SURVEY OF IOWA LAW
IOWA CRIMINAL LAW*

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* This Survey covers the period from September, 1973 to June, 1974.

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I. Substantive Law

A. *General Principles*

1. *Accomplice*

Iowa Code section 782.5 provides that a conviction may not result from the testimony of an accomplice unless such testimony is corroborated by other evidence. Operation of the statute first requires a determination of whether a witness was an accomplice. If it is concluded a witness was an accomplice, the existence and sufficiency of accomplice-corroboration must be determined. Whether a witness is in fact an accomplice must be shown by a preponderance of the evidence.[1]

Whether there is evidence which corroborates accomplice testimony is a question of law for the court. The sufficiency of such corroboration evidence is a question of fact for the jury.[2] "Corroborative evidence may be either direct or circumstantial. [citations] It need not be entirely inconsistent with innocence."[3]

Not every material fact of an accomplice's testimony need be corroborated,[4] but corroborative evidence must tend to connect defendant with the commission of the crime in some material way.[5] The defendant himself may supply the accomplice-corroboration evidence with his own "admissions, declarations, writings or other documentary evidence."[6] " '[I]t must be established by a preponderance of the evidence that a witness was in fact an accomplice.' "[7]

1. State v. Grindle, 215 N.W.2d 268, 270 (Iowa 1974).
2. Id.; State v. Bizzett, 212 N.W.2d 466, 468 (Iowa 1973); State v. Nepple, 211 N.W.2d 330, 331 (Iowa 1973).
3. State v. Nepple, 211 N.W.2d 330, 332 (Iowa 1973).
4. State v. Grindle, 215 N.W.2d 268, 270-71 (Iowa 1974); State v. Bizzett, 212 N.W.2d 466, 468 (Iowa 1973).
5. State v. Grindle, 215 N.W.2d 268, 270-71 (Iowa 1974); State v. Bizzett, 212 N.W. 2d 466, 468 (Iowa 1973).
6. State v. Bizzett, 212 N.W.2d 466, 468 (Iowa 1973). *See* State v. Nepple, 211 N.W.2d 330, 332 (Iowa 1973).
7. State v. Grindle, 215 N.W.2d 268, 270 (Iowa 1974), *quoting* State v. Jennings, 195 N.W.2d 351, 357 (Iowa 1972). *See* State v. Houston, 211 N.W.2d 598, 601 (Iowa 1973).

A person is an accomplice only if he "can be convicted of the crime for which the accused is on trial."[8] By that standard, the court determined four times that witnesses were not accomplices.

In *State v. Bizzett*,[9] Rucker stalked a group of people until one member of the group was attacked by the others pursuant to a premeditated plan. Rucker emerged from hiding to participate with the attackers in going through the pockets of the victim, who died as a result of injuries sustained in the attack. Rucker testified as a witness for the state in the murder prosecution of one of the attackers. Defendant asserted Rucker was an accomplice. In finding Rucker was not an accomplice to murder, the court noted that defendant was unaware of Rucker's presence until he emerged to rob the deceased. Until that time, the court said, Rucker was not connected with any of the events pertaining to the attack. In contrasting the role of an accomplice to that of Rucker, the court said: "Defendant received no aid, assistance, or encouragement from Rucker. In fact Rucker's conduct was in direct conflict with that of defendant. He was trying to deprive defendant of the fruits of his crime."[10]

In *State v. Grindle*,[11] a witness had helped arrange the sale of certain merchandise. The witness assumed that the merchandise had been stolen (and it had been) but he claimed to have had no knowledge of the theft. The court concluded that the witness was not an accomplice. It is clear that the witness could not have been charged with and convicted of the specific offense for which the accused was on trial. The court also concluded that two other witnesses, who had made purchases of the stolen merchandise, were not accomplices.[12] It should be noted that even if the witnesses had possessed knowledge of the theft, this alone would not make them accomplices. "[S]omething more than mere knowledge that a crime is contemplated, or mere personal presence at the time and place where committed, must be shown in order to make one an accomplice."[13]

In *State v. Johnson*,[14] the court declined to require corroboration of a witness merely because he was an addict-informer. In reaffirming the proposition that only the testimony of witnesses who are factually shown to be accomplices need be corroborated, the court said it was not disposed to follow the reasoning of Illinois decisions which hold that the mere witness-status of the addict-informer requires corroboration of testimony.[15]

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8. State v. Houston, 211 N.W.2d 598, 601 (Iowa 1973).
9. 212 N.W.2d 466 (Iowa 1973).
10. *Id.* at 470. Rucker was merely present at the time the crime was committed. "But something more than . . . mere personal presence at the time and place where [a crime is] committed, must be shown in order make one an accomplice." State v. Grindle, 215 N.W.2d 268, 270 (Iowa 1974), *quoting* State v. Jennings, 195 N.W.2d 351, 357 (Iowa 1972).
11. 215 N.W.2d 268 (Iowa 1974).
12. *Id.* at 271.
13. State v. Grindle, 215 N.W.2d 268, 270 (Iowa 1974), *quoting* State v. Jennings, 195 N.W.2d 351, 357 (Iowa 1972).
14. 219 N.W.2d 690 (Iowa 1974).
15. *See* People v. Dade, 109 Ill. App. 2d 337, 340, 248 N.E.2d 844, 846 (1969); People v. Watkins, 68 Ill. App. 2d 389, 392, 216 N.E.2d 494, 496 (1966).

In *State v. Houston*,[16] defendant was charged with receiving stolen property. The evidence showed that on January 26, 1971, a typewriter and a calculator had been stolen from certain business offices. On February 11, 1971, defendant sold the stolen machines to a tax accountant who had come to defendant's home for business purposes. At trial, the accountant testified concerning defendant's possession of the machines. His testimony was essential to defendant's conviction. Defendant urged the accountant was an accomplice and his testimony had to be corroborated. The court held that the accountant was not an accomplice because he could not have been charged with receiving stolen property as of January 26—the first day he had any connection with the stolen property was February 11. The court said even if the accountant could have been charged with receiving stolen property as of February 11, that would not make him an accomplice to defendant's earlier (January 26) crime.[17]

2. *Aiding and Abetting*

Code section 688.1 abrogates the distinction between an accessory before the fact and a principal. The section provides that persons who aid and abet in the commission of a crime must be tried as principals. In *State v. Young*,[18] Yoakum robbed a store. He emerged therefrom and hailed defendant, who was parked in a car about a block away. When police later approached the car, they found defendant and Yoakum therein along with evidence of the robbery. Evidence offered at trial showed that defendant and Yoakum roomed together and that they had spent several hours together just before the robbery visiting taverns and other establishments. Just before the robbery, Yoakum put on coveralls. Yoakum and defendant both asserted that defendant knew nothing about the robbery until after it was committed. The court said: "Knowledge or intent is usually inferred from the circumstances. Participation in a crime may be inferred from the presence, companionship and conduct before and after the crime is committed."[19] The court concluded there was substantial evidence that defendant knowingly aided and abetted Yoakum.

3. *Venue*

a. *In General.* Venue refers to the place where a case should be tried.[20] Jurisdiction refers to the power of the court to decide cases on the merits.[21] To sustain a criminal conviction, the state must show that a criminal offense was committed *and* " 'that it has been committed within the territorial jurisdiction of the court in which the criminal charge is filed.' "[22]

16. 211 N.W.2d 598 (Iowa 1973).
17. "A receiver of stolen goods is not an accessary to a prior receiving or possessing of the same goods." State v. Houston, 211 N.W.2d 598, 601 (Iowa 1973), *quoting* 76 C.J.S. *Receiving Stolen Goods* § 1 (1952).
18. 211 N.W.2d 352 (Iowa 1973).
19. *Id.* at 354.
20. Lueders v. Brewer, 218 N.W.2d 638, 640 (Iowa 1974).
21. *Id.*
22. State v. Warren, 212 N.W.2d 509, 512 (Iowa 1973), *quoting* State v. Hackett, 197 N.W.2d 569, 570 (Iowa 1972).

b. *Offenses Partly in County.* In *State v. Warren*,[23] defendant was charged in Black Hawk County for the crime of false pretenses. Defendant moved to dismiss the prosecution on grounds that venue could not be proved in that county. The court set out the elements of the crime of false pretenses and concluded that in order to sustain venue in Black Hawk County, the state had to prove "that at least one of the foregoing acts necessary to constitute the crime of obtaining money or other property by false pretenses was committed by defendant in that county."[24] In so holding, the court relied on *Code* section 753.4.[25] In conclusion, the court sustained venue in Black Hawk County because the victim of the crime had relied on the false representation and parted with her money there.[26]

c. *Timeliness of Venue Challenge.* "All objections to place of trial are waived by a defendant unless he objects thereto prior to trial."[27]

d. *Venue in Escape Cases.* In *Lueders v. Brewer*,[28] plaintiff was sentenced to the Men's Reformatory at Anamosa. He was later transferred to the penitentiary at Fort Madison. After this transfer, plaintiff was assigned to the University Hospital at Iowa City for medical treatment. He escaped from the hospital and was convicted therefore in Lee County (site of the penitentiary). On appeal he urged he could have been tried for the crime of escape only in Jones County (site of the Reformatory) or Johnson County (site of the hospital).

Code section 745.4 provides that jurisdiction of indictments for the crime of escape is in the county where a person charged with escape has been committed or in the county where such a person has been directed to go or has been allowed to be by the authorities of the prison wherefrom he is charged with escaping. Plaintiff argued venue should have been fixed in Jones County because that was the place of his original commitment. The court said plaintiff's transfer to the penitentiary placed him under the authority of the warden and other officers there. Further, the court said an escape from the hospital was an escape from the custody of the warden of the penitentiary. Therefore, venue was properly fixed in Lee County, site of the penitentiary.

B. *Specific Crimes*

1. *Assault with Intent to Inflict Great Bodily Injury*

In *State v. Petsche*,[29] defendant first stabbed deceased when deceased attempted to intervene in a fight between defendant and another. A scuffle ensued and defendant continued to stab at deceased, wounding him once more.

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23. 212 N.W.2d 509 (Iowa 1973).
24. *Id.* at 513.
25. *Iowa Code* Section 753.4 provides: "A conviction or acquittal of an offense in a court having jurisdiction thereof is a bar to a prosecution of the offense in another court." While the statute refers to *jurisdiction*, it is intended to fix venue. *Compare* Lueders v. Brewer, 218 N.W.2d 638, 640 (Iowa 1974) *with* State v. Warren, 212 N.W.2d 509, 513 (Iowa 1973).
26. State v. Warren, 212 N.W.2d 509, 513 (Iowa 1973).
27. IOWA CODE § 753.2 (1973).
28. 218 N.W.2d 638 (Iowa 1974).
29. 219 N.W.2d 716 (Iowa 1974).

Defendant was convicted of assault with intent to inflict great bodily injury. On appeal, he urged the evidence was insufficient to generate a jury question on his intent to inflict great bodily injury. Defendant urged that the first wound, apparently the fatal one, was the result of mere reflex, not intent. The court responded that intent is seldom capable of direct proof and ordinarily is disclosed by circumstantial evidence. The court also said that a person is presumed to intend the natural consequences of intentional acts.[30] In holding that there was sufficient evidence to submit the issue to the jury, the court said that the continued assault by defendant rendered "less than convincing" his contention that he did not intend to inflict great bodily injury.[31]

2. *Assault with Intent to Commit Rape*

The essentials of the crime of rape are carnal knowledge by force or against the victim's will.[32] In order to create a jury question as to assault with intent to commit rape, all elements of the crime of rape, except carnal knowledge, must be established.[33] In *State v. Banks*,[34] defendant physically assaulted the prosecutrix and partially disrobed her. The prosecutrix stated that she was at all times in fear of harm to herself and her infant daughter. The court found that defendant had used adequate force to accomplish his purpose and that prosecutrix had not consented to his advances. The court said that the element of actual fear was substantiated by the defendant's admission that he threatened to "bust" prosecutrix if she did not stop screaming.[35] Defendant asserted that the verdict of assault with intent to commit rape was erroneous in that intercourse unquestionably occurred. In response, the court noted that the jury was free to disbelieve evidence of intercourse and equally free to believe the evidence of assault.[36]

3. *Breaking and Entering with Intent to Commit any Public Offense*

"Breaking" occurs " 'when an intruder removes or puts aside some part of . . . [a] structure relied on as an obstruction to intrusion. Opening an entrance door is a breaking.' "[37] In *State v. Clay*,[38] defendant was charged with breaking and entering with intent to commit larceny. Defendant urged that the evidence was insufficient on the issue of intent. The court said: "An intent to steal may be inferred from the actual breaking and entering of a building which contains things of value or from an attempt to do so."[39] In this case,

30. *Id.* at 717.
31. *Id.*
32. State v. Gray, 216 N.W.2d 306, 307 (Iowa 1974); State v. Banks, 213 N.W.2d 483, 485 (Iowa 1973).
33. State v. Banks, 213 N.W.2d 483, 485 (Iowa 1973).
34. *Id.* at 483.
35. *Id.* at 485.
36. *Id.* at 486, *quoting* State v. Kramer, 252 Iowa 916, 920-921, 109 N.W.2d 18, 20 (1961). *See also* State v. Hall, 214 N.W.2d 205, 210 (Iowa 1974).
37. State v. Clay, 213 N.W.2d 473, 480 (Iowa 1973), *quoting* State v. Houghland, 197 N.W.2d 364, 365 (Iowa 1972).
38. 213 N.W.2d 473 (Iowa 1973).
39. *Id.* at 480.

the prosecution sought to prove that defendant broke and entered a hardware store. The court said that the hardware store was a building housing goods, merchandise, and other valuable things for use, sale, and deposit. Evidence that the defendant had broken and entered an adjacent lumber yard also was relevant to establish his intent in breaking and entering the hardware store. The court also said that substantial evidence that a window pane had been removed from the hardware store, that the rear door was open, and that defendant was the one who in fact had removed the window and opened the door, created a jury question on the issue of breaking.[40]

4. *Carrying a Concealed Weapon*

In *State v. Davidson*,[41] defendant was arrested while in the common hallway of the apartment building where he lived. At that time, police officers took from him a .22 caliber pistol which was concealed in his waist band. Defendant asserted that the hallway was part of his dwelling house and thus that it was legal for him to carry the pistol pursuant to the provisions of *Code* section 695.2.[42] The court rejected this argument as unrealistic. The court said that the legislature did not intend to permit a person armed with a concealed weapon to "wander about apartment buildings inhabited by hundreds of persons simply because his own living quarters were located somewhere in the recesses of that same building."[43]

The court also said that specific intent was not an element of the crime of carrying a concealed weapon.[44] Thus, the court rejected defendant's argument that the trial court erred in refusing to give an instruction that the state must prove that the defendant " 'consciously or intentionally carried the weapon in question from a place where one may lawfully carry a weapon, concealed or otherwise, to a place where one may not lawfully carry a concealed weapon.' "[45] The court said that the crime is one of general intent and that " 'such intent is presumed from the doing of the prohibited acts, without more.' "[46] Had defendant been unaware of the presence of the weapon on his person, he would have been entitled to the requested instruction. However, his own testimony established that he had armed himself before entering the hallway.[47]

5. *Concealing an Escapee*

In *State v. Walker*,[48] defendant was convicted of concealing a known es-

40. *Id.* at 480-81.
41. 217 N.W.2d 630 (Iowa 1974).
42. Section 695.2 provides that a person may carry a concealed weapon "in his own dwelling house or place of business or other land possessed by him."
43. 217 N.W.2d 630, 632 (Iowa 1974).
44. *Id.*
45. *Id.*
46. *Id.*, *quoting* State v. Baych, 169 N.W.2d 578, 585 (Iowa 1969).
47. 217 N.W.2d 630, 633 (Iowa 1974).
48. 218 N.W.2d 599 (Iowa 1974).

capee in violation of *Code* section 745.15. Defendant's husband escaped from the penitentiary and rented an apartment with his wife under a fictitious name. In order to convict defendant, the state had to prove her husband's escape, her knowledge of the escape, and an overt act by her to conceal him.[49] Defendant asserted an absence of evidence of an overt act of concealment. She insisted that mere failure to divulge her husband's whereabouts to authorities was not a violation of the statute. The court agreed that "the statute contemplates some affirmative act on the part of one accused of this crime."[50] The court said that to "conceal" meant to hide or withdraw; to keep out of or remove from sight; to prevent or avoid disclosure; or to shield from notice or to withdraw from being observed.[51] The court said that use of a fictitious name by defendant was not enough to constitute concealment of her husband pursuant to the above definitions. "The record is silent as to any act by which defendant hid her husband or kept him out of sight."[52] The court said a willingness to have her husband escape recapture and live with him, and consent to use of an assumed name did not amount to an overt or affirmative act of concealment.[53]

6. *Escape*

a. *Escape Under Code Section 745.1.* "The crime of escape is established by proof the accused was confined pursuant to conviction and escaped from such confinement or departed without due authority from a place to which he was duly assigned. Unauthorized departure is the gravaman of the offense."[54] Intent is not a factor.[55] Thus, unauthorized departure from a college where defendant had been duly assigned was an escape.[56]

In *Lueders v. Brewer,*[57] defendant was originally sentenced to the Men's Reformatory in Anamosa, Iowa. He was later transferred to the penitentiary at Fort Madison, Iowa. From there, he was assigned to a state hospital in Iowa City, Iowa for medical treatment. While at the hospital he escaped. The court said that escape from the hospital was an escape "from the custody of the warden of the penitentiary at Fort Madison."[58]

b. *Willful Escape—Code Section 247A.6.* In *State v. Gowins,*[59] defendant was convicted for willful failure to return to a half-way house. In distinguishing a prosecution under *Code* section 745.1, the court said that under *Code* section 247A.6, intent is a factor in that willful failure to return is the essence of the offense. In order to be convicted pursuant to *Code* section 247A.6, it must be

49. *Id.* at 601.
50. *Id.* at 600.
51. *Id.* at 601.
52. *Id.*
53. *Id.*
54. State v. Horstman, 218 N.W.2d 604, 605 (Iowa 1974). *See* State v. Gowins, 211 N.W.2d 302, 306 (Iowa 1973).
55. State v. Gowins, 211 N.W.2d 302, 306 (Iowa 1973).
56. State v. Horstman, 218 N.W.2d 604, 605 (Iowa 1974).
57. 218 N.W.2d 638 (Iowa 1974).
58. *Id.* at 641.
59. 211 N.W.2d 302 (Iowa 1973).

shown that defendant was convicted, given a work release, and willfully failed to return to a designated place at a specified time.[60]

7. *False Pretenses*

a. *Obtaining Money Under False Pretenses.* Defendant in *State v. Warren*[61] marketed an insurance plan whereby enrolled members were assessed a fee upon the death of other enrolled members. Such fees were assessed for the purpose of paying a death benefit to the deceased's designated beneficiary. Defendant was charged with obtaining money under false pretenses with intent to defraud for making enrolled member assessments upon the death of persons falsely represented by defendant to be members of the insurance plan. The material allegations of the charge of obtaining money under false pretenses are as follows:

> 1) the intent to defraud some particular person or people generally; 2) the false pretenses or representations regarding a past or existing material fact; 3) knowledge of the accused of the falsity of his representations at the time he made them; 4) the accomplishment of the fraud by employment of such false pretenses; and 5) reliance by the victim upon the false representations in parting with money or other property.[62]

After falsely assessing enrolled members, defendant issued checks to other persons for the amount of the assessments. The amount assessed and paid to these "would-be beneficiaries" exceeded by some $200 the amount that would have been paid to beneficiaries of legitimate members of the enrolled insurance plan. There was evidence that the total amount of the assessment was returned to defendant. Defendant sought to exclude testimony establishing the amount of the excess payments. The court held that the evidence had probative value on the issue of whether defendant knew the pretenses and representations employed by him were false at the time he made them.[63] Defendant's conviction was upheld.

b. *Uttering a False Check.* In *State v. Mathias*,[64] defendant was convicted of uttering a false check. On appeal, he urged that his motion for directed verdict made at trial should have been sustained because of insufficient evidence of his intent to defraud. The court responded that an intent to defraud could be shown by circumstantial evidence and that the jury could find from the evidence in the case that defendant knew at the time he gave the check which was the subject of the prosecution that he would have insufficient funds to pay it upon presentation.[65] Defendant first wrote a check for $70 on a bank where he had no account. He then opened an account at that same bank, depositing $71. Defendant thereafter wrote the $20 check which was the subject of the

60. *Id.* at 306.
61. 212 N.W.2d 509 (Iowa 1973).
62. *Id.* at 513.
63. *Id.* at 517.
64. 216 N.W.2d 319 (Iowa 1974).
65. *Id.* at 321.

prosecution against him. "A reasonable man could draw from this evidence an inference defendant intended to defraud the store on that occasion."[66]

Defendant sought to negate the existence of intent to defraud by showing that he had made restitution of some checks passed subsequent to the check involved in this case. The court acknowledged that evidence of restitution as to the check written for $20 would have been admissible on the issue of the drawer's intent to defraud. However, the court said that evidence of restitution on other checks later given to other persons was without probative value and properly excluded.[67]

8. *Flag Desecration*

Among other things, *Code* section 32.1 makes it a crime to "defile" or "cast contempt upon" the American flag. In *State v. Kool*,[68] while noting that the statute may be violated without specific intent, the court declined to resolve the question of whether the jury could have found that defendant's manner of displaying the American flag violated the statute. Defendant displayed the flag upside-down against a peace symbol backdrop in the window of his home. The parties to the case stipulated that defendant had displayed the American flag in the manner in which he did "as an expression, or to signify a signal of distress," and "defendant's actions were an expression of speech signaling a distress, and were intended as such."[69] The court found that the statute could not be constitutionally applied to prohibit such symbolic speech. The court said that it would "uphold incursions upon symbolic expression on the basis of probable violence only when we are convinced that violence really is probable."[70] The stipulation of the parties, which apparently was the record of the case, did not establish that violence was planned or probable and the court declined to say that the window display itself made violence likely. Defendant's conviction was reversed. While the court did not decide whether the statute had been violated, it indicated that the matter was open to serious question in view of the aforementioned stipulation.[71]

9. *Homicide*

a. *In General.* In *State v. Hall*,[72] the defendant was convicted of first degree murder. Defendant testified that he shot his traveling companion while the latter slept and then removed the body from the car. He said that he later returned to see if the deceased was still alive and at that time he took the deceased's billfold. The court said that the jury could find that defendant killed his traveling companion in the perpetration of a robbery. As well, since his

66. *Id.*
67. *Id.* at 322.
68. 212 N.W.2d 518 (Iowa 1973).
69. *Id.* at 519.
70. *Id.* at 521.
71. *Id.* at 520.
72. 214 N.W.2d 205 (Iowa 1974).

companion was asleep when defendant shot him, defendant had opportunity to deliberate the use of a deadly weapon. " '[T]he willful use of a deadly weapon or other instrument likely to cause death, with opportunity to deliberate before it is used, is evidence of malice, deliberation, premeditation and intent to kill.' "[73] If such evidence is believed by the jury, it is sufficient to sustain a verdict of first degree murder.

b. *Use of a Deadly Weapon.* In *State v. Bizzett*,[74] defendant was convicted of a homicide wherein deceased died from severe head injuries. The evidence showed defendant had stomped on deceased's head. The trial court instructed the jury that feet, if violently used, could be a deadly weapon. The instruction was approved on appeal.

10. *Larceny*

a. *Larceny of Property Exceeding $20 in Value.* In a prosecution for larceny of property exceeding $20 in value, defendant asserted that there was insufficient proof that the value of the goods as fixed by the evidence was the "general market value."[75] Defendant had stolen 31 records from a J.C. Penney store. On direct examination, the manager of the store was not allowed to testify as to the wholesale and retail prices of the records but was allowed to give his opinion as to the "fair market value or general market value" of the records; he testified that the records were worth $141.09.[76] On cross examination, he said that this was the retail value of the merchandise. *Code* section 709.2 refers only to the "value" of the property stolen. The value of stolen property is usually measured by its market value at the time and place of the theft.[77] Market value of newly stolen merchandise may be shown by evidence of both wholesale and retail values.[78] The court said a managing officer of a corporation may testify as to the value of property owned by the corporation if it is "shown he has knowledge of such value as qualifies him in fact."[79] If market value as established by either wholesale or retail prices in turn established grand larceny, "it is immaterial whether computation of market value is by reference to one or the other."[80] The determination of market value is not to be made on a subjective basis but on an objective basis.

b. *Larceny in the Nighttime.* Proof of ownership or greater possessory right of property by a person other than defendant is essential to a conviction of larceny in the nighttime.[81] In *State v. Grindle*,[82] defendant urged that the evi-

73. *Id.* at 210-11, *quoting* State v. Gilroy, 199 N.W.2d 63, 66 (Iowa 1972).
74. 212 N.W.2d 466 (Iowa 1973).
75. State v. Boyken, 217 N.W.2d 218, 220 (Iowa 1974).
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. State v. Grindle, 215 N.W.2d 268, 270 (Iowa 1974); IOWA CODE §§ 709.1, 709.4 (1973).
82. 215 N.W.2d 268 (Iowa 1974).

dence was insufficient in this regard. It was alleged that defendant stole and carried away property from the Mintle warehouse. The court conceded Mintle did not testify that he owned the property. However, the court said Mintle had possession of the property, as opposed to any such right of defendant. In this regard, the court noted that the property was stored in a warehouse owned by Mintle and that the police were informed of the serial numbers of the property from Mintle's invoices.[83] This was sufficient to support the conviction.

11. *Larceny of a Motor Vehicle*

Defendant in *State v. Walker*[84] was convicted of larceny of a motor vehicle. Although his conviction was reversed on grounds other than insufficiency of evidence, the court made slight note of the fact that conviction for this crime requires the intent by defendant to permanently appropriate the motor vehicle of another for his own use.[85]

12. *Manslaughter*

In *State v. Means*,[86] an automobile accident occurred which resulted in the death of Teresa Maeder. Defendant was charged with manslaughter. The state claimed that defendant operated his vehicle recklessly (count I) and while intoxicated (count II).

As to the charge of recklessness, the state urged that defendant failed to have his vehicle under control and that he failed to stop at a stop sign and yield to other vehicles. The testimony of Mark Boswell, the driver of the car in which Teresa Maeder was killed, was used by the state to establish defendant's presence on a dirt road which intersected with the main highway which was being travelled by Teresa and her companions. The state apparently attempted to show that defendant wrongfully proceeded onto the main highway, causing the collision and ensuing death. However, the court found the evidence insufficient in that it did not establish that defendant was on the dirt road. The state urged that this could be deduced from Boswell's testimony that he saw no other cars there. The court could not accept this deduction in view of Boswell's further testimony that his memory did not extend to the time of the collision. The court held that the issue of defendant's recklessness was improperly submitted to the jury. Because there was no way of knowing whether the jury reached its verdict relying on the improperly submitted count of recklessness, defendant's conviction was reversed. In its opinion, the court quoted the following: "This court has not regarded a mere violation of a so-called rule of the road as an unlawful or criminal act, within the law of manslaughter. . . . [W]e have required a showing of wanton and reckless indifference to the safety of others, in addition to such a violation, in manslaughter cases."[87]

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83. *Id.* at 270.
84. 218 N.W.2d 915 (Iowa 1974).
85. *Id.* at 919.
86. 211 N.W.2d 283 (Iowa 1973).
87. *Id.* at 286, *quoting* State v. Kellison, 233 Iowa 1274, 1277, 11 N.W.2d 371, 373 (1943).

Defendant asserted that there was insufficient evidence on the issue of whether he was driving the automobile which collided with Boswell's. The court said that this element of the crime could be proved by circumstantial and direct evidence. The court said that a jury question on this issue was created by evidence that subsequent to the collision, defendant was unconscious in the driver's position.[88]

13. *Possession of a Controlled Substance*

In *State v. Koch*,[89] defendant was convicted of possession of methamphetamine. On appeal, he urged the evidence was insufficient to create a jury question on the issue of possession. The evidence showed that a highway patrolman had stopped a car in which defendant was a passenger. Defendant occupied the passenger side of the front seat. After conversing with the driver of the stopped car, the patrolman returned to his own car to make out a "repair card."[90] When he did this, the patrolman observed an arm extend from an open car door. He also observed the arm as it was pulled back into the car. The door was thereupon closed. The patrolman had earlier observed defendant sitting by the car door which had been opened and closed. About a minute after the car door closed, defendant got out of the car, looked at the officer, and walked over to the shoulder of the road. Defendant then got back into the car.[91] The patrolman subsequently had occasion to search the car and, in doing so, he found substances which proved to be marijuana and methamphetamine. A search of a damp, grassy area by the passenger side of the car revealed a dry tin containing methamphetamine.

The court first noted that the tests regarding possession are set out in *State v. Reeves*.[92] The court also said that this was not a case in which the state had simply proved that defendant was a passenger in a car in which drugs were found. "The State proved circumstances here which tied defendant to the methamphetamine sufficiently to generate a jury question on joint possession."[93]

14. *Possession of a Controlled Substance with Intent to Deliver*

In *State v. Ampey*,[94] Meade had arranged for a controlled substance delivery transaction involving defendant and Clifford Friederich, an undercover agent. The evidence showed that Friederich offered to buy the substance and that defendant then secured it from his living quarters and placed it is Meade's pocket. Friederich then paid defendant a prearranged price and Meade made the actual delivery to Friederich in a washroom. On appeal, defendant challenged the sufficiency of the evidence to sustain the verdict but, on the basis

88. *Id.* at 288.
89. 214 N.W.2d 202 (Iowa 1974).
90. *Id.* at 203.
91. *Id.*
92. 209 N.W.2d 18 (Iowa 1973).
93. State v. Koch, 214 N.W.2d 202, 204 (Iowa 1974).
94. 210 N.W.2d 433 (Iowa 1973).

of the evidence related above, the court held the case was properly submitted to the jury.

15. *Rape*

a. *Forcible Rape.* The elements of the crime of rape are defendant's carnal knowledge of the victim by force and against her will.[95] In *State v. Gray*,[96] defendant asserted that "the evidence did not establish beyond a reasonable doubt the act of intercourse was by force, without complainant's consent and that she resisted to her utmost ability."[97] Complainant had testified that the act of intercourse occurred without her consent. The court said that she was competent to so testify and that there was no distinction between 1) her statement that she did not give her consent, and 2) her statement that she resisted to the best of her ability.[98] The court said that there is no consent when submission by the victim came as a result of threats of bodily harm from one with apparent power to execute such threats.[99]

i. *Corroboration. State v. Campbell*[100] reaffirmed that, under *Code* section 782.4, conviction for rape may not be sustained on the testimony of the prosecutrix alone. However, section 782.4, which required corroboration of a rape victim's testimony, was repealed by S.F. 1009, Acts of the 65th G.A. The testimony of a rape victim no longer need be corroborated in order to sustain a conviction.

b. *Statutory Rape.* In a prosecution for statutory rape, consent, force, and violence are not in issue. The only elements of the crime are the age of the defendant and the prosecutrix and the act of sexual intercourse.[101] Although force and violence are not in issue, evidence of the same is admissible; the state may show the circumstances surrounding the commission of a crime.[102]

16. *Receiving Gifts and Gratuities*

In *State v. Prybil*,[103] defendant, a member of the county board of supervisors, was alleged to have received meals, books, and expenses from contractors in connection with various county purchases. The state urged that this violated *Code* section 741.1 which makes it unlawful for any person acting "in behalf of a principal in any business transaction, to receive, for his own use, directly or indirectly, any gift, commission, discount, bonus, or gratuity connected with, relating to, or growing out of such business transaction . . . ."[104] In acquitting

95. State v. Gray, 216 N.W.2d 306, 307 (Iowa 1974); State v. Banks, 213 N.W.2d 483, 485 (Iowa 1973).
96. 216 N.W.2d 306 (Iowa 1974).
97. *Id.*
98. *Id.* at 307.
99. *Id.* at 307-308.
100. 217 N.W.2d 251 (Iowa 1974).
101. State v. Drake, 219 N.W.2d 492, 494 (Iowa 1974); IOWA CODE § 698.1 (1973).
102. State v. Drake, 219 N.W.2d 492, 494 (Iowa 1974).
103. 211 N.W.2d 308 (Iowa 1973).
104. IOWA CODE § 741.1 (1973).

defendant, the trial court limited the terms "gift[s] commission, discount, bonus or gratuity" to kickbacks. The court held that the gifts, etc., prohibited by the statute were not limited to kickbacks.[105] The trial court had also held that the state had to show that kickbacks were made in response to a particularly identified sale or purchase. The state introduced evidence of five separate transactions. On appeal, the court said that the statute bars gratuities related to multiple as well as single business transactions; the state does not have to single out one of what may be a series of business transactions where the jury could find that the gift was related to all transactions or any one of them.[106] The court said: "The statute does not require proof the transaction is corrupt, only that the transaction is the reason for the payment. If it is, the payment is corrupt but not necessarily the transaction."[107] The court held that a contractor's payment of luncheon expenses where past or future business transactions were discussed with a public officer was not a prohibited gift or gratuity. However, free dinner and drinks in celebration of a large county purchase of a gift of books, or payment of hotel expenses would not be in the same category. Such gratuities would ordinarily be no different "than an outright payment in cash to the public officer for his own use . . . ."[108]

17. *Receiving Stolen Property*

In *State v. Houston*[109] the information charged that defendant did " 'receive *and* aid in concealing stolen property.' "[110] On the basis of this conjunctive allegation, defendant filed a motion to dismiss the information. He also urged that the county attorney should be required to elect whether he would prosecute defendant for receiving stolen property *or* aiding in concealing stolen property. The court responded that, while the statute was disjunctive, "when the legislature states the acts constituting a crime disjunctively, the indictment may allege the acts conjunctively."[111] The court noted that since the statute in question involved only one crime (receiving stolen property) which could be committed by various means, and since the state "had a right to allege commission of that one crime by various means, the trial court properly refused to require it to elect among those means."[112]

In *Houston*, defendant asserted he could not be guilty of receiving stolen property if he was the only person involved in the larceny of the property.[113] Defendant therefore asserted that the evidence was insufficient in that there was no proof that another person had stolen the property or had stolen it with defendant. The court responded that unexplained possession of recently stolen

105. 211 N.W.2d at 312.
106. *Id.* at 312-13.
107. *Id.* at 312.
108. *Id.* at 314.
109. 211 N.W.2d 598 (Iowa 1973).
110. *Id.* at 599 (emphasis added); IOWA CODE § 712.1 (1973).
111. State v. Houston, 211 N.W.2d 598, 600 (Iowa 1973).
112. *Id.*
113. *Id.*

property justifies an inference that the possessing party illegally received it.[114] In this case, defendant's possession of the stolen property had not been explained and the court said that the jury could infer that defendant "received" the goods.

In a prosecution for receiving stolen property under *Code* section 712.1, the state must show that property exceeding twenty (20) dollars in value was stolen and that defendant bought, received or aided in concealing the same in the county of prosecution knowing it to be stolen. In *State v. O'Kelly*,[115] the court said "that unexplained possession of recently stolen property permits the jury to infer the property was received with guilty knowledge. [citations] The possession need not be for any particular period of time."[116]

18. *Robbery with Aggravation*

In *State v. Campbell*,[117] defendant was convicted of robbery with aggravation. On appeal, he urged that the evidence was insufficient to justify submission of the charge to the jury. The charge against defendant arose out of an incident where defendant seized a gun when it was apparently being used in an assault against him. The court said: "All definitions of robbery include the element of felonious taking. This animus furandi must exist at the time of the taking."[118] It was for the taking of the gun (whereupon defendant became armed) that defendant was charged with armed robbery. The court said defendant was justified in taking the gun in that he had been threatened with it. The court concluded that defendant acted without felonious intent in taking the weapon and that his conviction therefore could not stand.[119]

C. *Defenses*

1. *Entrapment*

In *State v. Mullen*,[120] the court abandoned the "subjective" test of entrapment and adopted the "objective" test. The "subjective" test focuses on the predisposition of the defendant to commit the crime charged. The "objective" test focuses on the conduct of government agents. The court defined entrapment as follows: " 'Entrapment occurs when a law enforcement agent induces the commission of an offense, using persuasion or other means likely to cause normally law-abiding persons to commit the offense.' "[121]

The court approved the comment that " '[t]he defense [of entrapment] is treated primarily as a curb upon improper law enforcement techniques, to

114. *Id.*
115. 211 N.W.2d 589 (Iowa 1973).
116. *Id.* at 596.
117. 214 N.W.2d 195 (Iowa 1974).
118. *Id.* at 198.
119. *Id.*
120. 216 N.W.2d 375 (Iowa 1974).
121. *Id.* at 382, *quoting* National Commission's Study Draft of a New Federal Criminal Code § 702 (1970).

which the predisposition of the particular defendant is irrelevant.' "[122] Improper law enforcement techniques might include emotional appeals based on illness, sympathy, pity, or friendship. Offers of inordinate sums of money are also disapproved.[123] All "transactional" conversation and conduct of government agents and defendants should be considered in determining what effect government conduct would have on normally law-abiding persons.[124]

As a consequence of *Mullen*, proof of defendant's prior offenses would not be admissible if offered only to prove predisposition to commit the crime charged. However, *Mullen* does not modify the rule which permits proof of other criminal acts as an inseparable part of a whole deed. And a defendant's right to place in issue his good character for the traits involved in an offense is not limited by *Mullen*.[125]

The new objective test is to be applied by the trial court where there is no factual dispute. Where the defense is properly raised, and there is a dispute as to facts and inferences, the question of entrapment should be submitted to the jury.[126]

That entrapment cannot result from inducements by a private individual or an accomplice was reaffirmed in *State v. Ostrand*.[127] However, law enforcement officers cannot disclaim the inducements of an individual in their employ. Therefore, should a defendant assert the defense of entrapment resulting from the inducements of one who is not a law enforcement officer, defendant must prove that the individual offering the inducements was acting for, or in the employ of, the state.[128] Defendant in *Ostrand* sought to do so. To show the relationship between the police and Hagen, the person who allegedly had induced him, defendant offered Hagen's statements of inducement. Defendant said that Hagen told defendant that he was working with the police in order to gain favor for himself. Defendant said that Hagen asked defendant to help him in this endeavor. The trial court excluded defendant's testimony of his conversations with Hagen on grounds that it was hearsay. On appeal, the court said that such statements were not hearsay because defendant did not offer the statements in order to prove the truth of them.[129]

2. *Insanity*

a. *Burden of Proof.* In *State v. Thomas*,[130] the court held that the state should bear the burden of proving the defendant's sanity beyond a reasonable doubt. In so holding, the court overturned its long standing rule which placed the bur-

122. State v. Mullen, 216 N.W.2d 375, 382 (Iowa 1974), *quoting* National Commission's Study Draft of a New Federal Code § 702, Comment (1970).
123. State v. Mullen, 216 N.W.2d 375, 383 (Iowa 1974).
124. *Id.* at 382.
125. *Id.* at 383.
126. *Id.* at 382.
127. 219 N.W.2d 509 (Iowa 1974).
128. *Id.* at 512.
129. *Id.*
130. 219 N.W.2d 3 (Iowa 1974).

den on the defendant to prove insanity. The court said: "We think the State must not only establish the *elements* of the crime but, when the defendant's *capacity* to commit the crime at all is drawn into question and substantial evidence appears in the record raising a fact issue under the M'Naghton test, the State must also establish the defendant's sanity."[131]

The defendant is still presumed to be sane. However, once his sanity is drawn into issue from any evidentiary source, the state must unite other evidence with the presumption to prove the defendant's sanity beyond a reasonable doubt.[132]

b. *Allegedly Caused by Drugs or Alcohol.* In *State v. Hall*,[133] defendant contended that drugs ingested by him caused a condition of temporary insanity which would constitute a complete defense. The court noted it had held "that a temporary mental condition caused by voluntary intoxication from alcohol does not constitute a complete defense."[134] The court concluded that no distinction should be made in this regard between voluntary alcoholic consumption and the voluntary ingestion of other drugs.

The court said that the trial court properly refused to instruct that defendant's drug intoxication required an acquittal. The court further found that a temporary mental condition resulting from voluntary ingestion of drugs or alcohol will not reduce a homicide from murder to manslaughter.[135]

3. *Self-Defense*

The court considered the matter of self-defense on only one occasion. In that case, defendant urged error in that the jury had not been given instructions on self-defense. In *State v. Campbell*,[136] an off-duty policeman (who did not so identify himself) pulled a pistol to enforce an order that he had given to defendant. Defendant and two others disarmed the man and proceeded to beat him about the face and head with the weapon. The court would not concede that this was done is self-defense. The court said that the parties should have gone their separate ways subsequent to the disarmament and concluded that there was no issue of self-defense because the off-duty police officer presented no threat to defendant after his pistol was taken from him.[137]

4. *Drug Addiction as a Defense*

In *State v. Smith*,[138] defendant was charged with possession of a controlled substance (heroin). By expert testimony, defendant sought to prove that her possession of heroin was not voluntary or willful in that she was an addict and

131. *Id.* at 5.
132. *Id.*
133. 214 N.W.2d 205 (Iowa 1974).
134. *Id.* at 207.
135. *Id.* at 208-10.
136. 214 N.W.2d 195 (Iowa 1974).
137. *Id.* at 197.
138. 219 N.W.2d 655 (Iowa 1974).

could not, without help, refrain from possessing it. Trial court ruled that such evidence was irrelevant. The court instructed the jury that the state must prove knowing or intentional possession. Defendant asserted that the instruction was inadequate as to intent. Defendant again urged that there also must be a voluntary and willful possession.

Without any discussion of the arguments for and against recognizing the defense of addiciton, the court concluded that the arguments against adopting the defense were "more persuasive."[139] The court also noted that the fact that other addicts voluntarily appear at treatment centers reflected the irrelevancy of defendant's proffered evidence that she could not, without help, control her conduct.

Defendant also urged Iowa's drug possession statute creates a crime of status (drug addiction) and therefore is unconstitutional. However, the court said that the statute did not proscribe the status of drug addiction, but that it proscribed the conduct of unauthorized drug possession and was thus a valid exercise of the police power of the legislature.[140] The court also noted that the "drug dependency defense" had been uniformly rejected in other jurisdictions.[141]

II. Procedural Law

A. *Pretrial*

1. *Arrest*

An arrest is not illegal merely because it is effected in part by out-of-state police officers. In *State v. O'Kelly*,[142] defendant was arrested by a posse of Iowa-Nebraska police officers. The court said that an Iowa deputy sheriff, who was a posse member, had authority to make the warrantless arrest in that a public offense was committed in his presence. As well, he had the right to call the Nebraska police officers to his aid. Being so called to aid, these officers acted with the full authority of the Iowa deputy sheriff. Even if the Iowa deputy sheriff had not been a member of the posse, the Nebraska officers, while outside their own jurisdiction, could have effected a valid warrantless arrest as private citizens in that a public offense was committed in their presence.

2. *Preliminary Hearing*

The only purpose of a preliminary hearing is to determine whether sufficient evidence exists to bind the defendant over the district court on a particular charge.[143] If there is not sufficient evidence to bind the defendant over to the grand jury, he shall be discharged unless it appears that he has committed an offense triable on information only. In that case, the magistrate shall order that

139. *Id.* at 656.
140. *Id.* at 657.
141. *Id.*
142. 211 N.W.2d 589 (Iowa 1973).
143. State v. Noble, 215 N.W.2d 219, 221 (Iowa 1974).

an information be filed against the defendant.[144]

Without comment, the court reaffirmed that one brought to trial upon the filing of a county attorney's information is not entitled to a preliminary hearing.[145]

In *State v. Noble*,[146] the state appeared at a preliminary hearing on felony charges and orally moved to reduce the charges to a misdemeanor. The motion was granted and defendant was forced to proceed immediately to a trial on the misdemeanor. In reversing defendant's conviction, the court said that the trial court should have ordered that new informations be filed against defendant pursuant to *Code* section 761.26.[147]

3. *Recordation of Preliminary Hearing at Request of Indigent Required*

In *State v. Lewis*,[148] a justice of the peace denied an indigent defendant's request to have his preliminary hearing reported by a shorthand reporter. On appeal, the court said: "Interposition of any financial obstacle between an indigent and his exercise of a state trial or appeal right is a denial of equal protection of the laws . . . ."[149] The court further noted that a defendant need not "articulate specific reasons for wanting a record made of preliminary hearing."[150] The court cited two factors to be considered in determining whether a verbatim record should be made of a pretrial proceeding. The factors are: "(1) the value of the record to the defendant in connection with the trial or appeal for which it is sought and (2) the availability of an alternate device that would fulfill the same function."[151]

The court said that the value of a transcript to a defendant as an impeachment tool or as a discovery device had been "consistently recognized."[152] Further, the court said that the burden shifted to the state to show the sufficiency of other alternatives when the value of a verbatim record "colorably appears." Alternative recording methods, to be acceptable, "would have to provide substantially equivalent utility as a device for discovery and impeachment. . . ."[153] Reversing defendant's conviction, the court said that the value of the verbatim transcript was self-evident and the state had not demonstrated that there was an equivalent alternative.

4. *Formal Charge*

a. *Legality of County Attorney Informations.* The use of the county attorney informations is not constitutionally objectionable. In this regard, the court in

144. Iowa Code § 761.26 (1973).
145. Furgison v. State, 217 N.W.2d 613, 616 (Iowa 1974).
146. 215 N.W.2d 219 (Iowa 1974).
147. *Id.* at 221-22.
148. 215 N.W.2d 293 (Iowa 1974).
149. *Id.* at 294-95.
150. *Id.* at 295.
151. *Id.*
152. *Id.*
153. *Id.* The court said that the proceedings could be recorded "by reporter, or electronically, or by equivalent method. . . ." *Id.* at 296.

Furgison v. State,[154] said that when one is charged by information rather than by indictment, the accused's rights are "amply protected" by the provisions of *Code* chapter 769. This includes the requirement that to be effective, a county attorney information must be approved by a district court judge.[155]

The filing of a county attorney information obviates the need for a grand jury indictment.[156] Also, one charged by a county attorney information is not entitled to a preliminary hearing.[157]

b. *Amendment of Charge.* An indictment or information which charges the wrong offense is not curable by amendment; indictments and informations cannot be amended to charge a different offense.[158] The court considered a related matter in *State v. Noble*.[159] In this case, defendant appeared for a preliminary hearing in municipal court. At this time, felony charges pending against him were reduced to the misdemeanor level on motion of the state. Over his objection, defendant was forced to an immediate trial on the new misdemeanor charge. On appeal, the court said that the reduction of charges in the above-described manner was error. The correct procedure would have been to file new misdemeanor informations.[160]

c. *Attack on Indictment.*

i. *In General.* The court has said that an attack on an indictment or information as to a matter of form or substance "which might be raised by demurrer"[161] must be timely or the claimed defect is waived.[162] Such an attack must be made before the jury is sworn.[163]

In *State v. Kobrock*,[164] defendant filed a motion to dismiss the information because it did not charge an offense. The court said that whether an indictment or information charges an offense must be determined on its face and that minutes of testimony attached thereto are not part of the indictment or information and do not need to be considered in determining its sufficiency to charge an offense. In *Kobrock*, the court said that a "claimed insufficiency of the minutes of testimony attached to the information raises the question of the sufficiency of the evidence not the sufficiency of the information."[165]

ii. *Motion to Set Aside the Indictment. Code* section 776.1(6) provides that a motion to quash an indictment can be made "[w]hen any person other than the grand jurors was present before the grand jury during the investigation

154. 217 N.W.2d 613 (Iowa 1974)
155. IOWA CODE § 769.8 (1973).
156. Furgison v. State, 217 N.W.2d 613, 616 (Iowa 1974).
157. *Id.*
158. State v. Gowins, 211 N.W.2d 302, 306 (Iowa 1973); IOWA CODE § 773.46 (1973).
159. 215 N.W.2d 219 (Iowa 1974).
160. *Iowa Code* section 761.26 mandates this procedure.
161. IOWA CODE § 777.3 (1973).
162. State v. Grindle, 215 N.W.2d 268, 269 (Iowa 1974).
163. IOWA CODE § 777.3 (1973).
164. 213 N.W.2d 481 (Iowa 1973).
165. *Id.* at 483.

of the charge, except as required or permitted by law." In *State v. Hansen*,[166] a sheriff and one of his deputies appeared together before the grand jury to vouch for the credibility of a person who had testified before that body. Defendant filed a motion to quash the indictment. He urged that the unauthorized joint appearance of the sheriff and the deputy violated the provisions of *Code* section 776.1(6). Defendant's motion was denied. On appeal, the court agreed with defendant's contention that the presence of the two men together before the grand jury was unauthorized. The court said that the mere fact of the violation required a reversal. It was not necessary that defendant show that prejudice resulted.[167] Quoting from *State v. Bower*,[168] the court expressed the position that the grand jury is a secret body and that to permit multiple witnesses to appear before it at the same time would eliminate all secrecy.

The court also said that the subject of the testimony of the unauthorized persons was improper. As noted, they appeared to vouch for the credibility of another. The court said this is "a matter the grand jury must decide itself."[169]

The state urged that the statute was not violated because the two men were called back as witnesses. The court said that the record was unclear on this matter but that it made no difference to the conclusion. "If they were recalled as witnesses, it was error to hear them together; if not, it was error to hear them at all."[170] Defendant's conviction was reversed.

5. *Pleas*

a. *Entry of Plea.* In *State v. Koch*,[171] defendant asserted that his conviction was void because he had not entered a plea of not guilty. The court held that defendant's contention was without merit, citing *State v. Lynch*.[172] In regard to this same contention, the court in *State v. Lynch* said that a defendant is not prejudiced by the inadvertent omission to formally enter a not guilty plea. The court further noted that the jury was told that a plea had been entered; defendant's "position was precisely the same as if such a plea had been entered."[173]

b. *Guilty Pleas.*

i. *General Requirements.* Many cases involved examination of guilty pleas to determine whether the trial court had acted in "meaningful compliance" with the standards set forth in *State v. Sisco*[174] in accepting the plea. Pursuant to *Sisco*, the trial court must personally interrogate the defendant and determine that he understands the nature of the charge and inform him that by his plea

166. 215 N.W.2d 249 (Iowa 1974).
167. *Id.* at 252.
168. 191 Iowa 713. 183 N.W. 322 (1921).
169. State v. Hansen, 215 N.W.2d 249, 253 (Iowa 1974).
170. *Id.*
171. 214 N.W.2d 202 (Iowa 1974).
172. 197 N.W.2d 186 (Iowa 1972).
173. *Id.* at 188.
174. 169 N.W.2d 542 (Iowa 1969).

he waives the right to trial by jury. Further, the trial court must inform defendant of the maximum possible sentence and, if any, the mandatory minimum sentence on the charge. Also, the trial court must determine that the plea is voluntary.[175] Before entering judgment, the trial court should determine that there is a factual basis for the plea.[176]

When the record shows strong evidence of guilt, even though a defendant believes he is not guilty, he may plead guilty if he believes the plea is to his advantage.[177] Such a plea may be the result of plea bargaining and in this regard, the dismissal of other charges will not infer coercion.[178] Also, a "disappointed expectation of leniency is not sufficient cause to vitiate a guilty plea."[179]

If defendant understands the nature of the charge, a plea will not be invalidated because the trial court did not discuss each element of the crime charged.[180] However, a plea will be invalidated if defendant was not informed of the maximum penalty for the offense[181] or his several constitutional rights.[182] If there is an insufficient showing of a factual basis for the plea, the judgment, not the plea itself, will be set aside.[183] The acknowledgment by defendant that he did what he is charged with is not sufficient to show a factual basis for the plea.[184]

The trial court's interrogation of defendant upon tender of a guilty plea pursuant to the requirements of *Sisco* need not follow a ritualistic or rigid formula; meaningful compliance with *Sisco* guidelines is the requirement.[185] Further, it is not necessary that the trial court repeat the "*Sisco* interrogation" at the time of sentencing.[186]

ii. *Purpose of Sisco Standards.* The purpose of the *Sisco* standards is to complement the defendant's right to counsel[187] and to eliminate any need to resort to later factfinding to determine whether defendant's plea was voluntary.[188]

iii. *Effect of a Guilty Plea.* A guilty plea is a conviction of the highest order and it waives all defenses and procedural irregularities except that the indictment or information charges no offense and the right to challenge the plea itself.[189] The right to withdraw a guilty plea is a matter resting in the sound discretion of the trial court.[190]

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175. *Id.* at 547-48.
176. Ryan v. Iowa State Penitentiary, 218 N.W.2d 616, 620 (Iowa 1974).
177. State v. Heisdorffer, 217 N.W.2d 627, 629 (Iowa 1974).
178. State v. Dee, 218 N.W.2d 561, 564 (Iowa 1974).
179. *Id.* at 563-64.
180. Michels v. Brewer, 211 N.W.2d 293, 296 (Iowa 1973).
181. Allen v. State, 217 N.W.2d 528 (Iowa 1974); State v. Reppert, 215 N.W.2d 302 (Iowa 1974).
182. State v. Schroeder, 218 N.W.2d 591 (Iowa 1974).
183. Ryan v. Iowa State Penitentiary, 218 N.W.2d 616 (Iowa 1974).
184. *Id.* at 618.
185. State v. York, 210 N.W.2d 608 (Iowa 1973).
186. State v. Bell, 210 N.W.2d 423 (Iowa 1973).
187. State v. Sargent, 210 N.W.2d 656 (Iowa 1973).
188. State v. Bell, 210 N.W.2d 423 (Iowa 1973).
189. State v. Horstman, 218 N.W.2d 604 (Iowa 1974); State v. McGee, 211 N.W.2d 267 (Iowa 1973); State v. Burtlow, 210 N.W.2d 438 (Iowa 1973).
190. State v. Taylor, 211 N.W.2d 264 (Iowa 1973).

c. *Plea of Former Jeopardy.*

i. *Retrial on Different Offense.* In *State v. Gowins*,[191] a jury was empaneled to try defendant on a charge of escape. The prosecution was later dismissed by the trial court because it was " 'filed under the wrong section.' "[192] Defendant was thereafter charged with willful failure to return to a half-way house. Defendant entered a plea of former jeopardy in a motion to dismiss which was overruled. Defendant was convicted. On appeal defendant again urged the former jeopardy argument.

The court first noted that the right against twice being put in jeopardy "does not mean that every time an accused is placed on trial he must go free absent a final judgment."[193] The court quoted extensively from the United States Supreme Court case of *Illinois v. Somerville*.[194] In that case, the indictment did not charge a crime and a mistrial was directed. The Court held that this did not bar prosecution of the defendant on a subsequent valid indictment. In *Somerville*, the Court said trial courts have authority to discharge juries absent a verdict if "there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated."[195] A court may properly exercise its discretion to declare a mistrial if a valid conviction could not result due to procedural error.[196] It would not serve the ends of public justice to proceed with such a trial. In such a case, defendant may be retried and the double jeopardy proscription is not violated thereby.[197] In reference to the *Gowins* case, the court concluded that the trial court had "found an existent vitiating procedural defect which would preclude the return of a valid verdict. Thus trial court's decision implemented a legitimate state policy absent any manipulation prejudicial to Gowins."[198] The court further concluded that the "trial court's termination of the original action was proper as a matter of manifest necessity and warranted by the ends of public justice."[199] Therefore, the court held the trial of Gowins on the second charge (failure to return to a half-way house) did not violate his rights against double jeopardy.

ii. *Episodic Immunity.* Episodic immunity proposes that once a defendant is tried, he cannot be tried on another offense springing from the same episode.[200] The doctrine has not been adopted by the United States Supreme Court and the Iowa court has twice declined to apply it.[201]

iii. *Collateral Estoppel.* Collateral estoppel " 'means simply that when an issue of ultimate fact has once been determined by a valid and final judg-

191. 211 N.W.2d 302 (Iowa 1973).
192. *Id.* at 303.
193. *Id.* at 304.
194. 410 U.S. 458 (1973).
195. *Id.* at 461, *quoting* United States v. Perez, 22 U.S. (9 Wheat) 579, 580 (1824).
196. State v. Gowins, 211 N.W.2d 302, 306 (Iowa 1973).
197. *Id.* at 305.
198. *Id.* at 307.
199. *Id.* at 308.
200. State v. O'Kelly, 211 N.W.2d 589, 593 (Iowa 1973).
201. State v. Pospishel, 218 N.W.2d 602, 603-04 (Iowa 1974); State v. O'Kelly, 211 N.W.2d 589, 593 (Iowa 1973).

ment, that issue cannot again be litigated between the same parties in any future lawsuit.' "[202] In *State v. Young*,[203] defendant's co-indictee, Yoakum, was acquitted while defendant was subsequently tried and convicted. Because Yoakum had been charged with the same crime as defendant and had been acquitted, defendant invoked the doctrine of collateral estoppel. The United States Supreme Court recognized the doctrine in *Ashe v. Swenson*[204] as part of the Fifth Amendment guarantee against double jeopardy. Ashe had been acquitted of the robbery of one of six poker players because the state had not proved he participated in the robbery. Thereafter, the state attempted to prosecute Ashe for the robbery of one of the other poker players. The ultimate fact of Ashe's identity as a participant in the robbery had already been determined in his favor. Thus, the state was collaterally estopped from a second opportunity to prove the same fact. The court in *State v. Young*[205] said that defendant was not entitled to a dismissal under the doctrine of collateral estoppel because the trial "involved a different party" and "some different facts and different issues . . . than did the earlier trial of Yoakum."[206]

In *State v. Gowins*,[207] the court held that the doctrine of collateral estoppel would not apply where defendant's second charge involved a crime having entirely different elements than the first. Also, the issue of identity had not been resolved in defendant's favor as in *Ashe v. Swenson*.[208]

In *State v. O'Kelly*,[209] defendant was charged with burglary in Nebraska. The case was ultimately dismissed. Defendant was thereafter charged with receiving stolen property by Iowa authorities. Defendant urged that the Nebraska dismissal of the burglary charge "necessarily adjudicated in his favor an essential element of the charge of receiving stolen property in Iowa."[210] The court first noted that the dismissal of charges against defendant in Nebraska resulted because of a hung jury and therefore no facts had really been adjudicated in defendant's favor. However, the court said that even such an adjudication would not aid defendant. The court noted that the Nebraska and Iowa charges involved "two different times, places, and acts."[211] Even if Nebraska had ultimately failed to prove defendant's identity as a burglar, that would not mean defendant was not the person who received the fruits of the burglary in Iowa.

iv. *"Same Offense."* Defendant in *State v. O'Kelly*[212] also urged that he was being tried in Iowa for the "same offense" as in Nebraska. The court dismissed this contention by pointing out that one of the two offenses required

202. State v. Pospishel, 218 N.W.2d 602, 604 (Iowa 1974), *quoting* Ashe v Swenson, 397 U.S. 436, 443 (1970).
203. 211 N.W.2d 352 (Iowa 1973).
204. 397 U.S. 436 (1970).
205. 211 N.W.2d 352 (Iowa 1973).
206. *Id.* at 354.
207. 211 N.W.2d 302 (Iowa 1973).
208. 397 U.S. 436 (1970).
209. 211 N.W.2d 589 (Iowa 1973).
210. *Id.* at 593.
211. *Id.* at 594.
212. *Id.* at 589.

proof of an additional fact which the other one did not contain.[213]

6. *Plea Bargaining and Promises of Immunity*

A plea bargain agreement involves a promise by a prosecutor in exchange for a guilty plea to some charge.[214] There can be no doubt but that the state must keep its end of such a bargain. In *State v. Kuchenreuther*,[215] the court found that the defendant had performed according to the terms of an agreement with a prosecutor. The agreement provided that in exchange for such cooperation by defendant he would be permitted to enter a plea to a designated misdemeanor. The defendant was never afforded the opportunity to enter such a plea. Instead, he was charged with a felony and was convicted.

In reversing the conviction, the court noted that our system of justice would be unduly undermined if the defendant's conviction were allowed to stand. The court also said that breach of the agreement by the state was "nothing less than an intolerable violation of our time-honored fair play norm, and accepted professional standards."[216]

The package of promises contained in a plea bargain may represent the most attractive alternative for disposition of a defendant's case. In that regard, a guilty plea will not lose its "validity because it represents a voluntary and intelligent choice among alternative courses of action open to an indicted accused."[217] Thus, it appears that dismissal of other charges in exchange for a guilty plea to another charge does not reflect on the voluntariness of the plea.

Also involved in the plea bargaining in the *Kuchenreuther* case was a promise of immunity from further prosecution of defendant. This promise was given in exchange for defendant's cooperation in relating to the county attorney his knowledge concerning crimes which had been committed or which were to be committed. The court said that such a "promise of immunity from prosecution has no standing in this jurisdiction."[218]

7. *Demurrer*

a. *In General. Code* section 777.3 provides that "[a]ll objections to the indictment relating to matters of substance and form which might be raised by demurrer shall be deemed waived if not so raised by the defendant before the jury is sworn on the trial of the case."[210] In *State v. Grindle*,[220] defendant was

213. To determine whether one act constitutes a violation of two different statutory offenses, it must be determined " 'whether each provision requires proof of an additional fact which the other does not.' " State v. O'Kelly, 211 N.W.2d 589, 593 (Iowa 1973), *quoting* Blockburger v. United States, 284 U.S. 299, 304 (1932).

214. State v. Kuchenreuther, 218 N.W.2d 621, 624 (Iowa 1974); State v. O'Kelly, 211 N.W.2d 589, 595 (Iowa 1973).

215. 218 N.W.2d 621 (Iowa 1974).

216. *Id.* at 624.

217. State v. Dee, 218 N.W.2d 561, 563 (Iowa 1974); *See* text accompanying notes 174-90 *supra*.

218. State v. Kuchenreuther, 218 N.W.2d 621, 623 (Iowa 1974).

219. IOWA CODE § 777.3 (1973). *See* State v. Grindle, 215 N.W.2d 268, 269 (Iowa 1974).

220. 215 N.W.2d 268 (Iowa 1974).

convicted of larceny in the nighttime. On appeal, he urged that the information was insufficient in that it failed to allege that the allegedly stolen property belonged to someone other than the accused. The matter had not been timely raised by demurrer. "By his belated challenge as to content and sufficiency of the information Grindle waived the claimed defect."[221]

b. *Constitutional Challenges—Statutory Construction.* The constitutionality of a statute may be challenged by demurrer.[222] Failure to raise such constitutional issues at the trial level waives the right to raise alleged constitutional defects on appeal.[223]

Some cases did involve timely constitutional challenges by demurrer. This necessitated discussion concerning statutory construction. In *State v. Kueny*,[224] the trial court sustained defendant's demurrer to an information charging her with open and gross lewdness and indecent exposure. The trial court held that the statute under which defendant was charged was "unconstitutionally vague, duplicitous and discriminatory."[225] On appeal, the court first recognized a series of standard rules of statutory construction. The court said:

> It is well settled regularly enacted statutes are accorded a strong presumption of constitutionality. . . . Then too, where the constitutionality of a statute is merely doubtful, this court will not interfere. . . . And legislative enactments will not be held unconstitutional unless they are shown to clearly, palpably and without doubt infringe upon constitutional rights. . . . Finally, a party attacking any statutory enactment must negate every reasonable basis of support for such statute.[226]

In review of the *Kueny* challenge that *Code* section 725.1 was vague, the court approved the statement that: " 'It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.' "[227] If men of common intelligence must guess at the meaning of a statute and differ as to its application, the statute is void for vagueness.[228] A statute is not unconstitutionally vague if "its meaning is fairly ascertainable by reference to similar statutes, prior judicial determinations, reference to the dictionary, or if the questioned words have a common and generally accepted meaning."[229]

Code section 725.1 provides:

> If any man and woman not being married to each other, *lewdly*

221. *Id.* at 269. *See also* State v. Russell, 216 N.W.2d 355, 356 (Iowa 1974); State v. Johnson, 216 N.W.2d 337, 339 (Iowa 1974).
222. State v. Wedelstedt, 213 N.W.2d 652, 654 (Iowa 1973).
223. State v. Russell, 216 N.W.2d 355, 356 (Iowa 1974). State v. Johnson, 216 N.W.2d 337, 339 (Iowa 1974).
224. 215 N.W.2d 215 (Iowa 1974).
225. *Id.* at 216.
226. *Id.* at 216-17.
227. *Id.* at 217, *quoting* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). *See also* State v. Wedelstedt, 213 N.W.2d 652, 656 (Iowa 1973).
228. State v. Kueny, 215 N.W.2d 215, 217 (Iowa 1974); State v. Willis, 218 N.W.2d 921, 923 (Iowa 1974). *See also* State v. Kool, 212 N.W.2d 518 (Iowa 1973).
229. State v. Kueny, 215 N.W.2d 215, 217 (Iowa 1974); State v. Willis, 218 N.W.2d 921, 923 (Iowa 1974).

> and viciously associate and cohabit together, or if any man or woman, married or unmarried, is guilty of open and gross *lewdness*, and designedly makes an open and *indecent* or *obscene* exposure of his or her person, or of the person of another, every such person shall be imprisoned in the county jail not exceeding six months, or be fined not exceeding two hundred dollars.[230]

The court said that the italicized words standing alone were "without clear significance."[231] The court said that the terms had no generally accepted meaning, that prior judicial construction was of no help in defining them, and that reference to other statutory enactments was not useful. The court also said that the views adopted by other courts were of "little or no benefit."[232] The court found it impossible to discover the legislative intent in the passage of the statute. The court therefore declared *Code* section 725.1 unconstitutionally vague.

In *State v. Wedelstedt*,[233] the court reviewed defendant's convictions under Code section 725.3 which prohibited certain "obscene" activities. The court quoted extensively from *Miller v. California*,[234] a recent decision from the United States Supreme Court in the area of regulation of "obscene" matter, and the court concluded that the word "obscene" as used in *Code* section 725.3 was not "specifically defined."[235] "The statute fails to give fair notice to the average person of what is prohibited."[236] The court therefore held that *Code* section 725.3 was unconstitutionally vague. To avoid this conclusion, the state urged the court to construe the statute to include specific examples of "obscenity" stated in *Miller*. The court declined to do so. The court concluded that the incorporation of the *Miller* examples would violate well established rules of statutory construction. The court said: "No court under the guise of construction may extend, enlarge, or otherwise change the terms and meaning of a statute."[237] The court said that this was the function of the legislature. This was reaffirmed in *State v. Kueny*[238] and *State v. Lavin*.[239]

In *State v. Willis*,[240] the court distinguished between the terms vagueness and overbreadth. The defendant's challenge did not involve clarity of language and thus was not a challenge to the vagueness of the statute. Defendant urged that if the statute under which she was charged[241] were taken literally, all requested sexual intercourse, including marital sex, would be illegal. The court identified this as a challenge to the breadth of the statute. The court said: "A statute is overbroad if it attempts to achieve a governmental purpose to control or prevent activities constitutionally subject to state regulation by means which

230. Iowa Code § 725.1 (1973) (emphasis added).
231. State v. Kueny, 215 N.W.2d 215, 218 (Iowa 1974).
232. *Id.* at 219.
233. 213 N.W.2d 652 (Iowa 1973).
234. 413 U.S. 15 (1973).
235. State v. Wedelstedt, 213 N.W.2d 652, 656 (Iowa 1973).
236. *Id.*
237. *Id.*
238. 215 N.W.2d 215 (Iowa 1974).
239. 218 N.W.2d 925 (Iowa 1974).
240. 218 N.W.2d 921 (Iowa 1974).
241. Iowa Code § 724.2 (1973).

sweep unnecessarily broadly and thereby invade the area of protected freedoms."[242]

In *State v. Willis*,[243] a constitutional challenge to *Code* section 724.2 (soliciting) was considered by the court upon being raised at the trial level by a motion to dismiss. The court held: "Prior judicial determinations have . . . given the statute a fairly ascertainable meaning."[244]

Pursuant to standards already herein reiterated, the court reaffirmed that *Code* section 32.1 (flag desecration) is not unconstitutionally vague.[245] The court said that the statute " 'provides the requisite degree of certainty to provide men of ordinary intelligence with fair notice as to what conduct is proscribed.' "[246]

8. *Other Comments on Statutory Construction*

In addition to some of the rules of statutory construction discussed elsewhere herein,[247] the court made a few additional comments on the subject. In *State v. Kool*,[248] the court said that " '[s]tatutes defining crimes are to be strictly construed and not to be held to include charges plainly without the fair scope and intendment of the language of the statute, though within its reason and policy, and in the event of doubts they are to be resolved in favor of the accused.' "[249]

The court also re-announced other familiar principles of statutory construction. It said that the goal of statutory construction was to determine legislative intent;[250] words should be construed according to their ordinary meaning unless specially defined by the legislature;[251] the terms of the statute should not be changed through construction.[252] The court also said that a statute should be construed to best effect its purpose and to give effect to the entire statute.[253] Somewhat in this regard, the court once refused to continue construing one section of the *Code* in such a way as to render it a "useless restatement of the section that follows it."[254]

9. *Discovery/Disclosure*

a. *Depositions of State's Witnesses.* In a surprising move, the court overruled prior decisions and held that a defendant may take discovery depositions of

242. 218 N.W.2d 921, 923 (Iowa 1974).
243. *Id.* at 921.
244. *Id.* at 923.
245. State v. Kool, 212 N.W.2d 518 (Iowa 1973).
246. *Id.* at 519, *quoting* State v. Waterman, 190 N.W.2d 809, 813 (Iowa 1973).
247. *See* text accompanying notes 224-26 *supra.*
248. 212 N.W.2d 518 (Iowa 1973).
249. *Id.* at 520, *quoting* State v. Nelson, 178 N.W.2d 434, 437 (Iowa 1970).
250. State v. Prybil, 211 N.W.2d 308, 311 (Iowa 1973).
251. *Id.*
252. *Id.*
253. *Id.*
254. State v. Peterson, 219 N.W.2d 665, 668 (Iowa 1974).

state's witnesses.[255] The focal point of the rule was *Code* section 781.10 which provides: "A defendant in a criminal case, either after preliminary information, indictment, or information, may examine witnesses conditionally or on notice or commission, in the same manner and with like effect as in civil actions." Prior decisions[256] had construed the statute to be a mere procedural statement and held that the right to take criminal cases was not coextensive with the right to take depositions in civil actions. However, given the express application of section 781.10 to criminal defendants, the *Peterson* court removed its prior interpretative restrictions, and held that a defendant may take discovery depositions of state witnesses. Prior to *Peterson* the court had held that the section should be construed to allow depositions of state's witnesses by defendant only for the purpose of perpetuating testimony of witnesses who subsequently might be unavailable. The *Peterson* court said that this construction rendered the statute "a useless restatement of the section that follows it."[257] The court also concluded that the information sought by defendants pursuant to discovery depositions was not otherwise available to them on a satisfactory basis.[258] In allowing discovery depositions by defendants, the court said that any refinement of criminal discovery rules must await legislative action.

b. *Police Reports.* In *State v. Deanda*,[259] defendant sought to examine police reports during trial. An in camera hearing was held to determine whether the reports were discoverable. The trial court refused to allow discovery of the reports. On appeal, the state urged that availability of such reports should be discoverable only to the extent that they are inconsistent with a witness's testimony. The court rejected this argument saying that anything germane to the testimony of a witness should not be withheld from the defendant.[260]

One other case considered defendant's access to police reports. In *State v. Lyons*,[261] defendant sought police reports containing the victim's description of the person who had robbed her. The court noted that the victim made no signed statement nor did she sign one written by another but adopted by her.[262] The court also noted that there was no verbatim rendition of the victim's statements and they were not alleged to be exculpatory. For these reasons, the court held that the trial court did not err in refusing access to the reports by the defendant.

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255. State v. Peterson, 219 N.W.2d 665 (Iowa 1974).
256. State v. Rankin, 181 N.W.2d 169 (Iowa 1970); State v. District Court of Iowa in and for Delaware County, 253 Iowa 903, 114 N.W.2d 317 (1962).
257. State v. Peterson, 219 N.W.2d 665, 668 (Iowa 1974).
258. It might be argued that the minutes of testimony attached to an indictment or information give an indication of the testimony that an accused will be faced with at trial. However, the court said that limiting this defendant to the minutes of testimony was a "bitter irony" since a key prosecution witness exceeded the scope of the minutes on his testimony at trial.
259. 218 N.W.2d 649 (Iowa 1974).
260. *Id.* at 652. The court held that the police reports "were germane to the subject matter of the testimony of the witness" and should not have been withheld. *Id.*
261. 210 N.W.2d 543 (Iowa 1973).
262. *See* State v. Houston, 209 N.W.2d 42 (Iowa 1973).

c. *Promised Discovery Not Forthcoming—Waiver.* In *State v. Campbell*,[263] defendant requested that the county attorney furnish copies of a certain hospital report. The county attorney promised that the report would be available at trial. The report was not made available. However, defendant made no further request for its discovery and did not inform the trial court of the prior request. The court said that defendant's failure to renew the request for discovery preserved nothing for review on appeal.[264]

d. *Identity of Informant.* The burden is on defendant to show cause for the disclosure of the identity of an informant.[265] No cause for identity disclosure exists if defendant is acquainted with the informant.[266] Mere assertion of the defense of entrapment is not sufficient cause to require disclosure of the identity of an informant.[267] Disclosure is required if the informant "participated in or witnessed the crime charged."[268] However, even if it is shown that an informant participated in a crime, he is protected from identity disclosure if he has reasonable cause to believe such disclosure "could be used against him in a criminal prosecution or . . . could lead to other evidence which might be so used."[269]

Whether the identity of an informant should be disclosed requires a balancing of (1) the public interest in maintaining a free flow of information and (2) the defendant's right to "access to facts necessary for the preparation and presentation of his defense, and to a fair trial."[270] These interests must be balanced in light of such facts as the "(1) nature of the offense charged; (2) defenses raised; and (3) potential significance of an informer's testimony."[271]

e. *Exculpatory Statements.* In *State v. Peterson*,[272] defendant requested any exculpatory evidence in the hands of the state. The state answered that it had none. After conclusion of the trial, defendant became aware that the state had exculpatory evidence which it had suppressed, and defendant moved for a new trial on this ground and others. Defendant's motion for new trial was overruled. On appeal, the court said that the failure of the state to furnish the exculpatory evidence to defendant constituted grounds for a new trial. Defendant's conviction was reversed.

The evidence involved was testimonial and the state urged that it was not exculpatory because it was untrue and was hearsay. The court said: "It is no answer that the State does not believe the evidence to be true or believes it could object to it when offered."[273]

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263. 217 N.W.2d 251 (Iowa 1974).
264. *Id.* at 253.
265. State v. Lamar, 210 N.W.2d 600, 603 (Iowa 1973).
266. State v. Grady, 215 N.W.2d 213, 215 (Iowa 1974).
267. State v. Lamar, 210 N.W.2d 600, 603 (Iowa 1973).
268. *Id.*
269. *Id.* at 605.
270. *Id.* at 602.
271. *Id.* at 603.
272. 219 N.W.2d 665 (Iowa 1974).
273. *Id.* at 674.

10. *Competency to Stand Trial*

Code chapter 783 provides that the court shall order a hearing on defendant's competency to stand trial if circumstances exist which raise a reasonable doubt on the matter. In *Carstens v. Rans*,[274] defendant's attorney was asked whether he was claiming that defendant was not competent to stand trial. Counsel responded that he was not " 'making any statements at all about that question.' "[275] The court said that this would not preclude defendant from raising the issue at a later date because of the independent obligation of the trial court under *Code* chapter 783.

11. *Pretrial Return of Evidence*

Code section 751.36 provides that all property seized pursuant to a warrant shall be kept by the direction of the court as long as necessary for the purpose of being produced as evidence at trial. In *State v. Warren*,[276] the defendant, for purposes of preparing his defense, sought the return of evidence which had been seized pursuant to a lawful search warrant. The trial court ordered that copies of seized documents should be made available to defendant but authorized the state to retain control of the originals. Affirming, the supreme court held *Code* section 751.36 to be entirely dispositive of the issue.

Defendant also sought possession of certain documents held by the state which had not been seized pursuant to a warrant. However, these documents had been voluntarily surrendered to the state by the purchaser of defendant's business. Since the evidence had been lawfully obtained by the state, defendant had no right to its possession.[277]

12. *Adversary Hearing Prior to Seizure of Evidence*

In *State v. Wedelstedt*,[278] defendants complained that seizure of obscene material from them was illegal and unconstitutional because they were not afforded an adversary hearing prior to the seizure. The court held that there was no right to such a hearing where allegedly obscene material is seized pursuant to a warrant issued on probable cause for purposes of preserving the material as evidence in a criminal prosecution.[279]

13. *Motion To Suppress*

a. *Scope of the Motion.* In *State v. Weger*,[280] defendant filed a motion to suppress evidence of " 'the results of a chemical breath test allegedly performed on the defendant at the instance of patrolman Jerry Jones . . . .' "[281] This motion was sustained. Prior to the breath test administered by the patrolman, a deputy sheriff had administered a field alcohol intoxication test to defendant.

274. 210 N.W.2d 663 (Iowa 1973).
275. *Id.* at 665.
276. 212 N.W.2d 509 (Iowa 1973).
277. *Id.* at 514.
278. 213 N.W.2d 652 (Iowa 1973).
279. *Id.* at 653, *quoting* Heller v. New York, 413 U.S. 433 (1973).
280. 211 N.W.2d 322 (Iowa 1973).
281. *Id.*

At trial, defendant objected to evidence of the result of this test. Defendant urged that examination of the witness in this regard "would be improper 'in view of the previous rulings of the court.' "[282] This objection was overruled and defendant assigned such ruling as error on appeal. The court said that the test administered by the deputy sheriff was not within the scope of the motion to suppress or the ruling that followed. Therefore, the court concluded that defendant's objection was properly overruled. The court said: "Generally, the moving party is confined to the relief asked for in his motion . . . . Where there is some difficulty in construing an order, the primary rule is that an order will not ordinarily be construed as going beyond the motion in pursuance of which it is made."[283]

b. *Hearing—Order of Proof—Burden of Proof.* At the hearing on a motion to suppress an alleged involuntary confession, the trial court in *State v. Rank*[284] required defendant to present his evidence in advance of the state. The trial court apparently did so because it believed that defendant had " 'to make a prima facie case . . . and then the burden shifts to the State . . . .' "[285]

On appeal, the court said that upon challenge to the voluntariness of a confession by a defendant at a pretrial suppression hearing, the burden is on the state to prove the confession was voluntary by a preponderance of the evidence.[286] The court also said that the order of proof imposed on defendant was without prejudice because the ruling of the trial court on the motion to suppress indicated that the "burden of persuasion was never lifted from the State."[287]

c. *Necessity of Objection at Trial.* Error may not be predicated on the failure of trial court to sustain a motion to suppress. If a motion to suppress is overruled *prior to trial*,[288] error is preserved only by a proper objection to the evidence at trial.[289]

d. *Review of Ruling Sustaining a Motion to Suppress—Certiorari.* A trial court ruling sustaining a motion to suppress can be reviewed by certiorari. However, the review presents questions of law only; fact questions are reviewed only to ascertain whether the findings of fact made by the trial court have competent and substantial evidentiary support.[290]

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282. *Id.* at 323.
283. *Id.*
284. 214 N.W.2d 136 (Iowa 1974).
285. *Id.* at 138.
286. *Id.*; State v. Cullison, 215 N.W.2d 309 (Iowa 1974). "The voluntariness of a confession necessarily depends on the totality of the circumstances and cannot depend on any one factor for determination." *Id.* at 314.
287. State v. Rank, 214 N.W.2d 136, 139 (Iowa 1974). "Technical defects in procedure do not call for reversal unless it appears they have in some way prejudiced complaining party" *Id.* at 138.
288. In *State v. Evans*, 193 N.W.2d 515 (Iowa 1972), the jury was excused during the reception of evidence and defendant then made a motion to suppress evidence. The court held that he was not required to repeat the objection when the evidence was offered immediately after the jury returned.
289. *See* State v. Cage, 218 N.W.2d 582, 586 (Iowa 1974); State v. Salazar, 213 N.W.2d 490, 493 (Iowa 1973).
290. State v. District Court of Iowa, in and for Linn County, 218 N.W.2d 641, 643 (Iowa 1974); State v. Cullison, 215 N.W.2d 309, 313-14 (Iowa 1974).

14. *Motion in Limine*

The motion in limine is used as a pretrial "red flag" measure to alert the trial court to potential evidentiary problems which may arise at trial.[291] The purpose of the motion is to avoid disclosure of matters to the jury which may unduly prejudice the objecting party. To this end, evidence which is the subject of a motion in limine should not be disclosed at trial until the trial court, in the absence of the jury, has been presented with an offer of the evidence and an objection thereto.[292] If one has made a motion in limine, one should not be required to object to evidence in the presence of the jury.[293] If a party has made a motion in limine, he is in a stronger position to assert error if the evidence is "slipped in" apart from the procedure outlined above. " 'Excuses of good faith, use of opening statements, inadvertence or prompt admonition to the jury are harder to come by.' "[294]

In any event, no error may be predicated on the denial of a pretrial motion in limine. " 'It is only when the material is offered in the jury's presence that the harm or error, if any, has been done.' "[295] Therefore, error in the admission of testimony which is the subject of a motion in limine must be predicated on timely and sufficient objection made *at trial*.[296]

In *State v. Jensen*,[297] defendant was charged with and convicted of operating a motor vehicle while under the influence of an alcoholic beverage. He filed a pretrial motion in limine to avoid disclosure of all evidence relating to a breath test which he had taken.[298] At trial, evidence was admitted that defendant had taken a breath test. The court said that the "red flag" should have put the trial court on notice that a hearing at trial was required to avoid disclosure of possible prejudicial evidence. Since the trial court failed in this regard, a reversal was required.

15 *Motion for Continuance*

In *State v. Cowman*,[299] the court reaffirmed that a motion for continuance is addressed to the sound discretion of the trial court and the ruling of the trial

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291. State v. Jensen, 216 N.W.2d 369, 373 (Iowa 1974).
292. *Id.*
293. *Id.*
294. State v. Everett, 214 N.W.2d 214, 218 (Iowa 1974), *quoting* State v. Garrett, 183 N.W.2d 652, 655 (Iowa 1971).
295. State v. Bash, 214 N.W.2d 219, 221 (Iowa 1974), *quoting* State v. Garrett, 183 N.W.2d 652, 655 (Iowa 1971).
296. State v. Martin, 217 N.W.2d 536, 539 (Iowa 1974); State v. Jensen, 216 N.W.2d 369, 374 (Iowa 1974); State v. Hendren, 216 N.W.2d 302, 304 (Iowa 1974); State v. Bash, 214 N.W.2d 219, 221 (Iowa 1974). The reason that error must be predicated on objection made at trial is that the evidence may not be offered. If the jury is not exposed to the complained of evidence the objecting party is not prejudiced.
297. 216 N.W.2d 369 (Iowa 1974).
298. *Id.* at 372. The court said that it was difficult "to imagine how the State could ever have hoped to place the results of the breath test in evidence." *Id.* This was because there had been a "wholesale failure" to comply with the implied consent law. *See* text accompanying notes 368-78 *infra*.
299. 212 N.W.2d 420 (Iowa 1973).

court thereon will not be disturbed on appeal except upon abuse of that discretion. *Iowa Rule of Civil Procedure* 183 governs motions for continuance and is made applicable to criminal cases by *Code* section 780.2.[300] *Rule of Civil Procedure* 183(b) requires that motions for continuance based on absence of evidence must be supported by affidavit and must contain certain factual allegations.[301] In *Cowman*, defendant's motion for continuance based on absence of evidence was denied. On appeal, the court held that denial of the motion was not an abuse of discretion in that the motion was unsupported by affidavit and did not contain all of the factual allegations required by *Rule of Civil Procedure* 183.[302]

Rule 183 generally provides that a continuance based on absence of evidence, may be allowed if it "satisfies the court that substantial justice will be more nearly obtained. It shall be allowed if all parties so agree and the court approves."[303] In *State v. Myers*,[304] the state made application for a continuance on grounds that the court docket was filled with civil matters. The motion also asserted that defendant had not filed a motion for speedy trial. The motion was allowed, with no apparent notice to defendant. The court said: "It is difficult to discern how 'substantial justice' will be obtained for one incarcerated and charged with a felony by giving priority to civil matters or granting a continuance on the basis defendant has failed to file a speedy trial motion."[305] Although the court expressly disapproved the grounds of the motion and the fact that it was granted without notice to defendant, the court said that any resulting error was waived because defense counsel made no objection to the motion after he was informed that it had been granted.

16. *Speedy Trial*

Code section 795.2 provides that a defendant must be brought to trial within sixty days after indictment or the prosecution shall be dismissed unless good cause to the contrary is shown. Each essential part of the statute was in some way considered by the court.

a. *Counting the Sixty Days—What Days are Not Countable.* In *State v. Johnson*,[306] the sixtieth day fell on a Saturday. The following day was of course

300. *Iowa Code* section 780.2 provides: "The provisions of the Code of civil procedure relative to the continuances of the trial of civil causes shall apply to the continuance of criminal actions . . . ."

301. The motion must show:

> (1) The name and residence of the absent witness, or, if unknown, that affiant has used diligence to ascertain them; (2) what efforts, constituting due diligence, have been made to obtain such witness or his testimony, and facts showing reasonable grounds to believe the testimony will be procured by the next term; (3) what particular facts, distinct from legal conclusions, affiant believes the witness will prove, and that he believes them to be true and knows of no other witness by whom they can be fully proved.

IOWA R. CIV. P. 183(b).

302. How the motion was insufficient was not specified in the opinion.

303. IOWA R. CIV. P. 183(a).

304. 215 N.W.2d 262 (Iowa 1974).

305. *Id.* at 263.

306. 216 N.W.2d 335 (Iowa 1974).

Sunday and the following Monday was a legal holiday. Trial started on Tuesday, the sixty-third day after which trial should have started. The court held that this afforded no ground for dismissal because *Code* section 4.1(23) provides that if the last day for commencing any proceeding falls on a Saturday, Sunday, or any enumerated legal holiday, then the time for commencing the proceeding "shall be extended to include the next day which is not a Saturday, Sunday or such day hereinbefore enumerated." The particular Monday involved in the *Johnson* case was one of the enumerated holidays. The court held that defendant's trial was a "proceeding" under *Code* section 4.1(23) and that Saturday, Sunday, and Monday should be excluded in the computation of the sixty days within which defendant had to be brought to trial.

b. *The Dismissal—It is with Prejudice.* A dismissal pursuant to *Code* section 795.2 for failure to bring a defendant to trail within sixty days after indictment "shall be an absolute dismissal, a discharge with prejudice, prohibiting reinstatement or refiling of an information or indictment charging the same offense."[307] The court said that any other conclusion would render a defendant's right to speedy trial "largely meaningless."[308]

c. *Good Cause.* There is "good cause" for delay in bringing defendant to trial if the delay is directly attributable to defendant. In *State v. Shockey*,[309] defendant sought and obtained three continuances and two changes of counsel. The court found that all delay in connection with these procedures was attributable only to defendant and that defendant was not prejudiced thereby. Therefore, the court concluded defendant was not denied a speedy trial in violation of *Code* section 795.2.

In *State v. Meyers*,[310] defendant first asserted violation of his right to speedy trial in his motion for new trial. The court said that a defendant who is represented by counsel *or* admitted to bail waives his right to speedy trial by delaying his dismissal motion until after the verdict.

B. *Trial*

1. *Evidence*

a. *Relevancy.*

i. *In General.* "The basic test of relevancy is whether the evidence offered would render the desired inference more probable than it would be without the evidence."[311] In *State v. Warren*,[312] defendant was charged with the crime of false pretenses for fraudulently receiving money assessments from

307. State v. Johnson, 217 N.W.2d 609, 612 (Iowa 1974).
308. *Id.*
309. 214 N.W.2d 146 (Iowa 1974). See *State v. Hansen*, 215 N.W.2d 249 (Iowa 1974), where the court raked defense counsel for purposely delaying the case with some 135 filings while at the same time urging his right to a speedy trial.
310. 215 N.W.2d 262 (Iowa 1974).
311. State v. Mathias, 216 N.W.2d 319, 322 (Iowa 1974). *See* State v. Engeman, 217 N.W.2d 638 (Iowa 1974); State v. Warren, 212 N.W.2d 509, 517 (Iowa 1973).
312. 212 N.W.2d 509 (Iowa 1973).

members of an insurance plan. The assessments were supposed to be paid to the beneficiary of deceased members enrolled in the plan. Defendant fraudulently received the assessments and then issued checks to phony beneficiaries returned in amounts exceeding that which would have been received by a legitimate beneficiary. These checks were received in evidence over defendant's objection. On appeal, the court said that the checks "would render the desired inference Warren knew of the falsity of his representations more probable than it would have been without the evidence."[313] The court reached a like conclusion in *State v. Engeman*,[314] where defendant pled guilty to a charge of delivery of a controlled substance. In determining whether defendant was an accomodation offender,[315] the trial court considered certain address books (apparently defendant's) which contained narcotic related entries. Affirming trial court's finding of relevancy, the court said that the books could tend "to show defendant was . . . engaged in the business of selling illicit drugs."[316] This would of course negate defendant's claim that he delivered the controlled substance only as an accomodation.

Trial courts have much discretion in determining the question of relevancy.[317] Trial court rulings that evidence is irrelevant because it is speculative[318] or remote[319] will not be distrubed except for abuse of that discretion.

In *State v. Walker*,[320] defendant was convicted of larceny of a motor vehicle. Certain police car theft reports were admitted into evidence at trial. On appeal, the court said that these reports did not "prove or tend to prove defendant stole the . . . car or knew it had been stolen."[321] The court held that the reports were, among other things, irrelevant.

ii. *Res Gestae.* The court said that the fact that evidence "is not directly relevant to the elements of the crime charged should not, and does not, render it inadmissible, for if nothing more it is beneficial to accurately describe what actually happened at the time of the commission of the claimed offense."[322] This is the *res gestae*, the acts and circumstances surrounding a particular event. Thus in *State v. Lyons*,[323] statements defendant made during the commission of an offense were admissible against him as part of the *res gestae*. In *State*

313. *Id.* at 517. *See* State v. Clay, 213 N.W.2d 473, 475, 477-78 (Iowa 1973).
314. 217 N.W.2d 638 (Iowa 1974).
315. IOWA CODE § 204.410 (1973). *See* text accompanying notes 680-84 *infra.*
316. State v. Engeman, 217 N.W.2d 638, 639 (Iowa 1974). This conclusion was reached in spite of defendant's urging that the books were two to three years old and thus remote.
317. *Id.*; State v. Mathias, 216 N.W.2d 319, 322 (Iowa 1974).
318. State v. Mathias, 216 N.W.2d 319, 322 (Iowa 1974).
319. State v. Engeman, 217 N.W.2d 638, 639 (Iowa 1974). In *State v. Peterson*, 219 N.W.2d 665 (Iowa 1974), defendant was convicted of manslaughter involving the death of his fiance. Their love letters written during the previous year during which time they had an intimate relationship were admitted into evidence at trial over objection that they were remote. On appeal, the court declined to interfere with the discretion of the trial court in admitting the letters.
320. 218 N.W.2d 915 (Iowa 1974).
321. *Id.* at 919.
322. State v. Lyons, 210 N.W.2d 543, 546 (Iowa 1973).
323. *Id.* at 543.

v. Noble,[324] the trial court excluded statements of persons at the scene of the crime that was then the subject of prosecution. On appeal, the court said that this was error. The court said: "Such statements were quite relevant in shedding light on the circumstances under which the alleged offenses occurred. Defendant was entitled to show all the facts surrounding the altercation."[325]

In *State v. Drake*,[326] defendant was charged with statutory rape and the state introduced evidence of force and violence by defendant. Defendant assigned this as error on appeal because force and violence are not in issue in a statutory rape prosecution. However, the court approved of the evidence as showing the circumstances surrounding the commission of the offense. The court said: "The state is always entitled to show what actually happened at the time of the offense."[327]

b. *Like Offenses.* In *State v. Clay*,[328] defendant was convicted of breaking and entering a hardware store. At trial, a witness testified concerning the conditions at a nearby lumberyard which he observed soon after the breakin at the hardware store. The conditions there were reasonably similar to the conditions at the hardware store after it had been broken into. On appeal, defendant urged that the evidence of conditions at the lumberyard was without relevancy or materiality. The court recognized the general prohibition that evidence of crimes other than the one charged is inadmissible. However, the court noted an exception to the rule which allows proof of like offenses to establish " '(1) motive, (2) intent, (3) absence of mistake or accident, (4) common scheme embracing the commission of two or more crimes so related to each other that proof of one tends to prove the others, and (5) the identity of the person charged with the commission of the crime on trial.' "[329] The court found that the evidence of the like crime in this case was relevant to show defendant's flight from the scene of the crime and his intent in breaking and entering the hardware store.[330]

c. *Offenses Which Are an Inseparable Part of the Deed.* Statements and conduct of an accused which show the commission of offenses other than the one charged are also admissible if they are an inseparable part of the whole deed.[331] If the acts " 'form a continuous transaction, the whole transaction may be shown . . . .' "[332] Thus, in *State v. Lyons*,[333] the court said that defendant's request

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324. 215 N.W.2d 219 (Iowa 1974).
325. *Id.* at 222.
326. 219 N.W.2d 492 (Iowa 1974).
327. *Id.* at 494.
328. 213 N.W.2d 473 (Iowa 1973).
329. *Id.* at 478, *quoting* State v. Fetters, 202 N.W.2d 84, 91-92 (Iowa 1972).
330. 213 N.W.2d at 478.
331. State v. Lyons, 210 N.W.2d 543, 546 (Iowa 1973).
332. *Id., quoting* State v. Holoubek, 246 Iowa 109, 113, 66 N.W.2d 861, 863 (1954). *See* State v. Mullen, 216 N.W.2d 375, 383 (Iowa 1974). The court notes that this exception to proof of other crimes is similar to *res gestae*. *See* text accompanying notes 322-27 *supra*.
333. 210 N.W.2d 543 (Iowa 1973).

for sexual intercourse was admissible at trial on a charge of robbery with aggravation.

In *State v. Drake*,[334] defendant was charged with statutory rape. On the trial of this matter, evidence that he assaulted the companion prosecutrix was received. The court approved this evidence on the "inseparable part of the whole deed" rationale.

d. *Showing Prior Felony Conviction. Code* section 622.17 provides for the impeachment of a witness by showing prior felony convictions of that witness. Examination of witnesses concerning prior felony convictions was virtually unrestricted until the decision in *State v. Martin*.[335] In *Martin*, the court said that the "theory of impeachment . . . is that the moral qualities of a witness, including an accused, can throw some light on the probability of his truthfulness . . . . For this purpose only such instances as tend to show a lack of truthfulness or disposition—for example, forgery, cheating and the like—are relevant and material."[336] In this regard the court said that evidence that a witness has been previously convicted of a felony is admissible only if

> (1) the felony involved dishonesty or false statement, and (2) the judge determines any danger of unfair prejudice does not substantially outweigh the probative value of such prior felony conviction, taking into account such factors as (a) nature of the conviction, (b) its bearing on veracity, (c) its age, and (d) its propensity to improperly influence the minds of the jurors.[337]

The court said that the matter of admissibility of such evidence should be decided in a pretrial hearing or in a hearing outside the presence of the jury during trial.

Upon consideration of other authorities, other guidelines for determining admissibility of prior convictions were suggested by the court. By way of quotation from another case, it was suggested by the court that when prior convictions are for substantially the same conduct for which one stands charged, impeachment should be limited to proof of *one* of those convictions and only then if it relates to veracity.[338] In quoting from another case, the court established that the trial court should weigh the probative value of such evidence against its probability to cause undue prejudice. If a prior conviction was based on the same type of conduct for which one stands charged, the danger of undue prejudice is enhanced because the jury might be more likely to convict upon being informed that the accused has been convicted of the same act before.[339] Also, such evidence might encourage an accused not to testify in his own behalf. This would reflect on the probative value of the evidence, the court indicated.

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334. 219 N.W.2d 492, 494 (Iowa 1974).
335. 217 N.W.2d 536 (Iowa 1974).
336. *Id.* at 542.
337. *Id.*
338. *Id.* at 542-43, *quoting* Gordon v. United States, 383 F.2d 936, 940-41 (D.C. Cir. 1967).
339. State v. Martin, 217 N.W.2d 536, 543 (Iowa 1974), *quoting* People v. Delgado, 32 Cal. App. 3d 242, 248-49, 108 Cal. Rpt'r. 399, 404-05 (1973).

e. *Impeachment Generally.* In *State v. Peterson*,[340] the court gives a complete summary of methods of impeaching a witness. The court notes that impeachment is a technique for testing the veracity of a witness. The court says that this may be done by showing prior inconsistent statements of the witness, bias of the witness due to emotional influences (kinship, hostility) or pecuniary interest, bad character of the witness, a defect in the witnesses' power of observation or memory, and, lastly, that the "material facts are otherwise than as testified to by the witness under attack."[341]

i. *Impeachment by Evidence of Arraignment on Other Charges.* In *State v. Mullen*,[342] the trial court permitted defendant to be cross-examined concerning an arraignment on a separate charge. On appeal, the court summarily concluded that this was improper impeachment requiring a reversal.

f. *Rebuttal.* The court said that rebuttal evidence is " 'that which explains, repels, controverts, or disproves evidence produced by the other side.' "[343] In *State v. Walker*,[344] defendant was charged with larceny of a motor vehicle. The state introduced certain police reports on rebuttal. On appeal, the court said that the reports were impermissible rebuttal because they did not "prove or tend to prove defendant stole the . . . car or knew it had been stolen."[345]

In *State v. Clay*,[346] defense counsel inquired of at least two witnesses on cross-examination whether they had seen blood on defendant's face. Counsel may have been trying to establish the possibility of police misconduct at the time of his arrest, the court said. The prosecutor was apparently concerned about jury sympathy for defendant in this regard as he introduced, over objection, a picture of defendant taken the day after arrest which showed no evidence of physical abuse of defendant's face. On appeal, the court said that the picture of defendant was in the nature of rebuttal and properly admitted.[347]

g. *Expert Opinion Testimony.* The court said that trial courts have wide discretion in determining the admissibility of opinion evidence. The court reiterated standards for the admission of expert testimony in *State v. Peterson*[348] and *State v. Martin*.[349] In these cases, the court said that such evidence should be admissible only if it will aid the jury and is based on special training, experience or knowledge.[350] Expertise in an area is not a blanket qualification for the admission of testimony from an expert. "He must be qualified to answer the spe-

340. 219 N.W.2d 665 (Iowa 1974).
341. *Id.* at 671.
342. 216 N.W.2d 375 (Iowa 1974).
343. State v. Walker, 218 N.W.2d 915, 919 (Iowa 1974). *See* State v. Whitfield, 212 N.W.2d 402, 411 (Iowa 1973).
344. 218 N.W.2d 915 (Iowa 1974).
345. *Id.* at 919.
346. 213 N.W.2d 473 (Iowa 1973).
347. *Id.* at 479-80.
348. 219 N.W.2d 665 (Iowa 1974).
349. 217 N.W.2d 536 (Iowa 1974).
350. The testimony must be " ' beyond the ken of the average layman. . . .' " State v. Martin, 217 N.W.2d 536, 546 (Iowa 1974), *quoting* Hedges v. Conder, 166 N.W.2d 844, 857 (Iowa 1969).

cific question propounded."[351] Thus, in *Peterson*, the court affirmed the trial court's ruling that a doctor was qualified to testify concerning the time of death of the decedent even though the doctor had no training in forensic medicine and very limited training in pathology.

The court also affirmed the trial court ruling in *Martin* which excluded testimony of a claimed expert witness on grounds that he was not qualified. The court found that the background of the witness would qualify him as an expert in drug counseling but would not qualify him to answer questions of a medico-sociological nature.[352]

h. *Showing Specific Acts of Misconduct.* In *State v. Johnson*,[353] the trial court refused to let the defense cross-examine a state witness concerning specific acts of misconduct and criminal activity. On appeal, defendant urged that the trial court erred in this regard. The court said that the trial court had not abused its discretion in the matter. The court said: "The general moral character of a witness may be proven for the purpose of testing his credibility . . . . [S]uch proof must be confined to the general reputation of the individual and should not be directed to proof of specific vices or traits of character."[354]

i. *Reputation For Character Traits.* "A defendant may introduce evidence of his good character for the traits involved in an offense as bearing on the probability he did or did not commit the crime charged. This may be done by proof of his real character for such traits or his general reputation for them."[355] In *State v. Buckner*,[356] defendant was allowed to introduce evidence of his character for honesty but was not allowed to introduce reputation evidence because of the state's general objections of insufficient foundation.[357] The court held that this was an error requiring reversal.

On appeal, the state urged that defendant's foundation for offering reputation evidence was insufficient because "the witness derived his information from comments made by people who knew defendant only through his job."[358] The court acknowledged the rule that reputation evidence be based on "comments from a cross-section of the community as opposed to a narrow group or class . . . ."[359] The court said that the rule was "intended to assure the reliability of the opinion."[360]

In its discussion of the matter the court concluded that "the reputation of a person who lives in an urban center is often better known where he works than where he resides."[361] In the instant case, there was evidence that defend-

351. State v. Peterson, 219 N.W.2d 665, 673 (Iowa 1974). *See* State v. Martin, 217 N.W.2d 536, 545-46 (Iowa 1974).
352. State v. Martin, 217 N.W.2d 536, 546 (Iowa 1974).
353. 219 N.W.2d 690 (Iowa 1974).
354. *Id.* at 695.
355. State v. Buckner, 214 N.W.2d 164, 166-67 (Iowa 1974).
356. *Id.* at 164.
357. *See* text accompanying notes 496-500 *infra*.
358. State v. Buckner, 214 N.W.2d 164, 168-69 (Iowa 1974).
359. *Id.* at 169.
360. *Id.*
361. *Id.*

ant had developed a reputation for honesty where he worked. The offered opinion of defendant's reputation for honesty was based on comments from a "fairly representative number of persons who knew defendant's reputation for honesty through association with him in his work."[362] Therefore, the court concluded the trial court would have been well within its discretion in overruling at trial the state's objection urged on appeal that the reputation evidence offered at trial was properly excluded because it was based on "comments made by people who knew defendant only through his job."[363]

j. *Hearsay.* In *State v. Ampey*,[364] a witness for the state testified as to a conversation he had with defendant concerning a drug sale. The court said that the drug sale conversation followed by conduct showing acquiescence with the conversation was admissible as an admission. In *State v. Jackson*,[365] a state witness claimed that a since deceased person had identified defendant as the person he had seen near the room of a slain woman. The defense tried to introduce the court reporter's transcript of a sworn statement by the deceased wherein he allegedly denied having identified defendant. The court said that the trial court properly excluded the transcript because the statements of a person since deceased are inadmissible as hearsay. The court also said that the transcript in question was not admissible under the business record exception because that rule requires that the statement be supplied in the regular course of the declarant's business. Here, while the statement was taken in the regular course of the court reporter's business, it did not provide a basis for the presumptive veracity of the declarant.

In *State v. Ostrand*,[366] defendant attempted to show that he had been entrapped by offering statements of a police informer. The statements were excluded on the grounds that they were hearsay. On appeal, the court said that the hearsay rule was not involved because defendant was not offering the statements to prove the truth of their substance, but to prove that he was entrapped. "Indeed, the defendant normally tries to show the statements were lies."[367]

2. *Implied Consent*

Pursuant to *Code* section 321B.3, persons using the highways are subject to an implied contract to submit to chemical testing to determine the extent to which they are under the influence of an alcoholic beverage. The procedure outlined in the statute must be "explicitly followed and evidence flowing from its application can be received only as expressly provided."[368] The mandatory

362. *Id.*
363. *Id.*
364. 210 N.W.2d 433 (Iowa 1973).
365. 210 N.W.2d 537 (Iowa 1973).
366. 219 N.W.2d 509 (Iowa 1974).
367. *Id.* at 512.
368. State v. Jensen, 216 N.W.2d 369, 374 (Iowa 1974). However, if a blood sample is taken at defendant's request and "without a written request of a police officer there is substantial compliance. . . ." State v. Willer, 218 N.W.2d 605, 607 (Iowa 1974).

procedure under *Code* section 321B.3 is as follows: (1) The arresting officer must *first* make a *written* request of the arrested party for permission to take a blood test; (2) if this first request is refused, then the officer must make a written request for a breath or urine test; (3) the officer must be qualified to administer the test; and (4) the test must be administered by the use of approved devices and methods.[369] In *State v. Jensen*,[370] defendant refused a blood test before the officer had the opportunity to offer it to him, and took a breath test. However, since the arresting officer had not first offered a blood test, the refusal to submit by defendant was "clearly not a refusal sufficient to allow the officer's demand for either a breath or urine test."[371] Therefore, evidence of a defendant's refusal to take a blood test and his consent to a breath test was improperly submitted and required a reversal.

As noted, the statute requires that tests be administered according to approved methods and devices. In this regard *Code* section 321B.4 provides that withdrawal of body substances for the purpose of determining alcoholic content of the blood may be allowed only upon the written request of a police officer to a "licensed physician, or medical technologist or a registered nurse designated by a licensed physician as his representative. . . ." In *State v. Myers*,[372] a medical technologist withdrew blood from defendant pursuant to a blanket parol designation by a licensed physician directed to all qualified hospital staff. Defendant complained that such a general authorization was not sufficient to comply with *Code* section 321B.4. The court did not agree and said that the necessary authorization did not have to be in writing to be valid.[373]

Another requirement relating to the use of approved methods and devices is that the scientific reliability of the chemical testing procedure used to determine alcoholic content must be shown by expert testimony. The witness must also explain the particular test and vouch for its proper administration.[374] In this regard, the court said that evidence of the results of the tests on a first urine sample were not inadmissible because a test on a second sample would have been more reliable.[375]

In *State v. District Court of Iowa, in and for Linn County*,[376] defendant attempted to suppress the unfavorable results of a blood test by asserting the doctor-patient privilege.[377] The court found that defendant had been advised of the section 321B procedure and had consented to the test. The court said: "In doing so he necessarily consented (so long as the test was taken pursuant to the provisions of chapter 321B) to admission of the test results into evidence

369. State v. Jensen, 216 N.W.2d 369, 372 (Iowa 1974).
370. *Id.* at 369.
371. *Id.* at 372.
372. 215 N.W.2d 257 (Iowa 1974).
373. *Id.* at 258.
374. State v. Means, 211 N.W.2d 283, 288 (Iowa 1973).
375. State v. Prouty, 219 N.W.2d 675, 677 (Iowa 1974).
376. 218 N.W.2d 641 (Iowa 1974).
377. Blood was withdrawn by defendant's personal physician.

in any subsequent trial, and waived the privilege to the extent necessary to accomplish that limited purpose."[378]

3. *Identification Evidence*

In attempts to suppress identification evidence at trial, defendants on several occasions challenged pretrial identification procedures used by police. Constitutional challenges to such procedures can be avoided by an in-court identification which has an origin independent of the prior identification procedure.[379] It is the state's burden to show the independent origin of the in-court identification.[380] When that burden was not met in *State v. Salazar*,[381] the court examined the pretrial identification procedure to see if it was unnecessarily suggestive. In this regard, the court said that it did not aid defendant to merely urge that an identification procedure was "suggestive." The procedures must be so *unnecessarily*[382] or *"impermissibly . . .* suggestive as to create a very substantial likelihood of irreparable misidentification.' "[383] It is the burden of defendant to show "substantial likelihood of irreparable misidentification" by a witness due to improper pretrial identification procedures before the identification testimony of the witness will be excluded.[384] In *State v. Hendren*,[385] the court said that defendant had not met that burden even when a witness testified that his in-court identification recollection was a mixture of his observations at the time of the crime and of a picture he viewed the day before trial. The court said that "defendant failed to show the picture did or could mislead the witness."[386] The court further said: "It is not enough to show a possibility of suggestiveness. The requirement . . . is to show a very substantial likelihood of irreparable misidentification."[387]

In *State v. Canada*,[388] an identification witness, Marjorie Garner, viewed defendant for two hours while he held her captive in her apartment. Soon after defendant left the apartment, Garner went to the police station and identified defendant from a series of photographs. Defendant's name was on his picture and before Garner came to the police station, others had mentioned the name of defendant to Garner. The court said that Garner's in-court identification had an independent origin due to Garner's two-hour observance of defendant, and that her "identification of defendant from the photograph was not so

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378. State v. District Court of Iowa, in and for Linn County, 218 N.W.2d 641, 644 (Iowa 1974).
379. State v. Bash, 214 N.W.2d 219, 220 (Iowa 1974); State v. Salazar, 213 N.W.2d 490, 493 (Iowa 1973); State v. Canada, 212 N.W.2d 430, 433 (Iowa 1973).
380. State v. Bash, 214 N.W.2d 219, 220 (Iowa 1974); State v. Salazar, 213 N.W.2d 490, 493 (Iowa 1973).
381. 213 N.W.2d 490 (Iowa 1973).
382. *Id.* at 493-94.
383. State v. Canada, 212 N.W.2d 430, 433 (Iowa 1973), *quoting* Simmons v. United States, 390 U.S. 377, 384 (1968) (emphasis added).
384. State v. Hendren, 216 N.W.2d 302 (Iowa 1974).
385. *Id.*
386. *Id.* at 305.
387. *Id.* at 305-06.
388. 212 N.W.2d 430 (Iowa 1973).

tainted by prejudicial suggestiveness as to merit exclusion."[389]

In *State v. Salazar*,[390] defendant robbed a service station. He was apprehended some thirty minutes thereafter and brought back to the service station where he was positively identified by the station attendant. Defendant urged that the on-the-scene, one-on-one identification procedure was suggestive due to his close proximity to a police car while handcuffed and in the presence of several police officers. The court said that the procedure was not unnecessarily suggestive and held that defendant had not been denied due process.

In *State v. Lyons*,[391] defendant complained that a pretrial video-tape identification procedure was inducive of mistaken identity. The court said that the contention was without merit since the identification witness had made a positive identification of defendant before viewing the video-tape. She saw the tape twice and each time reaffirmed her prior identification.

4. *Self-Incrimination Evidence*

a. *Voluntary Waiver—Burden of State.* When the admissibility of in-custody confessions or incriminating statements of an accused is constitutionally challenged, it must be determined whether the statements were made voluntarily or were the consequence of coercion and an overborne will.[392] The voluntariness of statements depends on a totality of the circumstances.[393] Whether one was given his "constitutional rights is a circumstance relevant to a finding of voluntariness."[394] The court also said that deception as an inducement to secure statements from an accused was part of the totality of the circumstances to be considered in determining voluntariness.[395] When the question of voluntariness is raised, it is the burden of the state to prove a knowing and intelligent waiver of fifth amendment rights by a preponderance of the evidence.[396]

b. *Repetition of Miranda Warnings.* In *State v. Cooper*,[397] an assistant county attorney first interrogated defendant on May 29, 1972, after fully advising defendant of his rights.[398] Two days later, the assistant county attorney again interrogated defendant. Defendant urged that he should have been advised again of his constitutional rights. The court said that the record was "without dispute"[399] that proper warnings were given. However, the court volunteered that

389. *Id.* at 433.
390. 213 N.W.2d 490 (Iowa 1973).
391. 210 N.W.2d 543 (Iowa 1973).
392. State v. Cooper, 217 N.W.2d 589, 596 (Iowa 1974); State v. Cullison, 215 N.W.2d 309, 314 (Iowa 1974).
393. State v. Cooper, 217 N.W.2d 589, 595-96 (Iowa 1974); State v. Cullison, 215 N.W.2d 309, 314 (Iowa 1974).
394. State v. Cooper, 217 N.W.2d 589, 596 (Iowa 1974).
395. *Id.* at 597. The court said that "deception standing alone does not render a waiver of constitutional rights involuntary . . . unless the deceiving acts amount to a deprivation of due process." *Id.*
396. State v. Cullison, 215 N.W.2d 309, 314 (Iowa 1974).
397. 217 N.W.2d 589 (Iowa 1974).
398. *Id.* at 591, 592.
399. *Id.* at 597.

" '[a]n accused need not be advised of his constitutional rights more than once unless the time of warning and the time of subsequent interrogation are too remote in time from one another.' "[400]

In *State v. Cullison*,[401] defendant was advised of her constitutional rights on the way to take a polygraph examination. She was not advised that any voluntary statements she made to the polygraph examiner could be used against her.[402] Statements which she did make to the examiner were suppressed by the trial court. On review of the matter, the court said that the statements, in light of the totality of the circumstances, were properly suppressed. Part of the circumstances surrounding the incident included a statement to defendant by the county attorney that the polygraph test was for their " 'mutual benefit.' "[403] The trial court said that this implied that any statements she made could not be used against her. The trial court also made a finding of psychological intimidation and an implication that police authorities wanted to " 'help' " defendant prove her innocence.[404] The trial court also found that the polygraph examiner asked questions which extended beyond the scope of that about which defendant had been advised she would be questioned.[405] While defendant's statements were not made to a police officer, the court said that the " 'voluntariness requirement applies to statements made to private individuals as well as those made to police officers.' "[406]

c. *Conduct of Accused after Miranda Warnings.* In *State v. Canada*,[407] a state witness testified that defendant refused to make a statement after being advised of his *Miranda* rights. Because of this testimony, defendant moved for a mistrial. His motion was overruled. On appeal, the court said that the testimony did not deal with self-incrimination, but "dealt only with . . . observations of what was said and done by defendant at the time of his arrest."[408] The court said that the trial court did not err in denying defendant's motion for mistrial.

d. *Out-of-Custody Volunteered Statements.* In *State v. Rank*,[409] defendant entered a police station and immediately advised that he had broken a window in a downtown business building. At his trial, defendant attempted to suppress this statement because he had not been advised of his *Miranda* rights. On appeal, the court observed that defendant "was not in custody or detained when he volunteered the information sought to be suppressed."[410] The court held that defendant was not entitled to *Miranda* warnings under these circumstances.

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400. *Id.*, *quoting* State v. Davis, 261 Iowa 1351, 1354, 157 N.W.2d 907, 909 (1968).
401. 215 N.W.2d 309 (Iowa 1974).
402. *Id.* at 315.
403. *Id.* at 312.
404. *Id.* at 312-13.
405. *Id.* at 312.
406. *Id.* at 315, *quoting* C. McCormick, Law of Evidence § 162 (2d ed. Cleary 1972).
407. 212 N.W.2d 430 (Iowa 1973).
408. *Id.* at 435.
409. 214 N.W.2d 136 (Iowa 1974).
410. *Id.* at 138.

e. *Standing to Assert Right Against Self-Incrimination.* In *State v. Whitfield*,[411] a witness called by the state testified that he had seen defendant in possession of heroin. Counsel for the witness was present and asked the court to strike that testimony on fifth amendment grounds. The trial court refused and on appeal, *defendant* urged that this was error. The court said that the "objection . . . was not directed at the incrimination of the defendant [but] . . . only to the protection of the Fifth Amendment rights of the witness . . . ."[412] The court said that defendant lacked standing to assert error in regard to any violation of the witnesses' privilege against self-incrimination. The court pointed out that the privilege was a personal one and that " '[a] party is privileged from producing the evidence, but not from its production.' "[413]

f. *Failure to Give Complete Miranda Warnings.* In *Michigan v. Tucker*,[414] the United States Supreme Court held that failure to give the complete complement of *Miranda* warnings would not necessarily result in the suppression of the fruits of a custodial interrogation.

5. *Search and Seizure Evidence*

Evidence which is the result of a search and seizure by police officers is often the subject of objection at trial; the court had much opportunity to review the admissibility of such evidence.

a. *Necessity of a Search Warrant and Probable Cause.* With some exceptions, evidence which is the product of a search and seizure must have been seized pursuant to warrant lawfully issued on probable cause.[415]

The necessity of obtaining a search warrant was illustrated in *State v. Peterson*.[416] In this case, defendant, after assurance by law enforcement personnel that the procedure was legal, submitted to a request to take a sample of his blood. The purpose behind securing a sample of defendant's blood was to determine his blood type. The results of the tests of defendant's blood sample were admitted over the objection that the procedure whereby defendant's blood was taken was in violation of his fourth amendment rights against an unreasonable (warrantless) search and seizure. He urged the same argument on appeal and the court agreed. The court held that defendant's conviction had to be reversed because there was no justification for the failure to secure a search warrant to "seize" a sample of defendant's blood.[417]

The applicant for a search warrant must present the issuing magistrate with

411. 212 N.W.2d 402 (Iowa 1973).
412. *Id.* at 409.
413. *Id., quoting* Johnson v. United States, 228 U.S. 457, 458 (1913).
414. 94 S. Ct. 2357 (1974). A full discussion of *Michigan v. Tucker* is beyond the scope of this article and the reader is directed to the opinion for examination of various policy discussions.
415. State v. Shea, 218 N.W.2d 610 (Iowa 1974); State v. Jackson, 210 N.W.2d 537 (Iowa 1973).
416. 219 N.W.2d 665 (Iowa 1974).
417. The court found an absence of consent or exigent circumstances. *Id.* at 670. *See* text accompanying notes 434-46 *infra*.

enough information of facts and circumstances which "are sufficient in themselves to justify the belief of a man of reasonable caution that an offense has been or is being committed."[418] In this regard, the detail of the information presented to the issuing magistrate is important. Only the information brought to the attention of the magistrate may be considered to determine whether a search warrant was validly issued.[419] In *State v. Everett*,[420] police officers investigating a robbery were told by witnesses that one of the perpetrators wore a red plaid jacket while the other wore a blue jean jacket and jeans. Other witnesses related the flight of two men from the robbery site to a green car parked within a block and bearing a license number 98-6087. A car matching this description was later seen by police officers about two blocks from the robbery. It occupants were taken into custody. One of them, Graham, gave a statement to the police that defendant and another had committed the robbery while wearing the jackets described above. He also told police that these two had changed clothes and left the money from the robbery at defendant's home. All of this information was presented to the magistrate in an application for a search warrant to search defendant's home. The warrant issued, evidence was seized pursuant to search, and defendant objected to its admission at trial on grounds that the warrant "was issued without probable cause because based on hearsay which was neither reliable nor corroborated."[421] Defendant urged that Graham's statement was unreliable because he had been smoking marijuana and hallucinating on drugs. The court indicated that this had not been brought to the attention of the issuing magistrate and thus could not be considered in reviewing the validity of the warrant.[422] The court did say that a warrant may issue on hearsay if there is sufficient basis for crediting it. In this case, the court said, the hearsay was credible because it was against the penal interest of Graham and because its content was identical to the information gathered by independent police investigation. The court said that this was "sufficient to support the finding of probable cause."[432] The court also noted that the " '[o]bservations of fellow officers . . . engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number.' "[424]

b. *Searches Without a Warrant.* In certain situations, the admissibility of evidence seized without a warrant will not be affected. "No warrant is necessary when the search and seizure, within prescribed limits, are incident to a lawful arrest; the warrant requirement may be waived by an informed and voluntary consent and third, existence of exigent circumstances may relieve an officer from the obligation to obtain a warrant if it is impracticable to do so."[425]

i. *Search Incidental to a Lawful Arrest.* Reasonable searches incidental

418. State v. Everett, 214 N.W.2d 214, 217 (Iowa 1974).
419. *Id.*
420. *Id.* at 214.
421. *Id.* at 217.
422. *Id.*
423. *Id.* at 218.
424. *Id., quoting* United States v. Ventresca, 380 U.S. 102, 111 (1965).
425. State v. Jackson, 210 N.W.2d 537, 539 (Iowa 1973).

to a lawful arrest extend to the person of the individual[426] and to the area within his immediate control.[427] In *State v. Salazar*,[428] defendant was arrested on the highway and taken to the police station where formal arrest and booking procedures took place. During booking procedures, a cash register receipt was taken from defendant which was introduced against him in evidence at trial. The court merely concluded that the warrantless arrest of defendant was with probable cause and that the booking room procedure was therefore "reasonable as incidental to a lawful arrest."[429]

In *State v. Canada*,[430] police seized a gun stuffed between a box springs and mattress in the room where defendant was arrested. The court said that this was reasonable because the gun was in defendant's area of "immediate control." The court said that warrantless searches incidental to a lawful arrest extend to the person and his area of immediate control so that police officers might remove any weapons the person " 'might seek to use in order to resist arrest or effect his escape and to prevent the concealment or destruction of evidence.' "[431]

The standards set out above as to the extent of lawful search pursuant to a lawful arrest appear to have been loosened by the United States Supreme Court in *United States v. Robinson*.[432] In this case the Court said that a search incident to a lawful custodial arrest requires no more additional justification than the arrest itself. The limitation that searches incidental to a lawful arrest may be conducted only to the extent necessary to prevent harm to the officer, escape, and destruction of evidence is applicable only to the non-arrest, non-custodial "stop and frisk" situation.[433]

ii. *Exigent Circumstances and Probable Cause*. "Exigent circumstances sufficient to justify a search . . . without a warrant usually include danger of violence and injury to the officers or others; risk of the subject's escape; or the probability that, unless taken on the spot, evidence will be concealed or destroyed."[434] In *State v. Jackson*,[435] pursuant to an assault and battery investigation, police entered defendant's hotel room where they saw a bloody knife on the bed. Defendant was not there and the officers left. A murder in the hotel was subsequently discovered, and other officers who had been told about the knife made a second entry into defendant's room to secure the knife. The knife was used as evidence against defendant in a subsequent trial. Defendant claimed that the warrantless seizure of the knife violated his fourth amendment right to be secure against unreasonable searches and seizures. Since there was

426. State v. Salazar, 213 N.W.2d 490, 491-92 (Iowa 1973).
427. State v. Canada, 212 N.W.2d 430, 433-34 (Iowa 1973); State v. O'Kelly, 211 N.W.2d 589 (Iowa 1973).
428. 213 N.W.2d 490 (Iowa 1973).
429. *Id.* at 492.
430. 212 N.W.2d 430 (Iowa 1973).
431. *Id.* at 434, *quoting* State v. King, 191 N.W.2d 630, 634 (Iowa 1971).
432. 414 U.S. 218 (1973).
433. *Id.* at 234-35.
434. State v. Jackson, 210 N.W.2d 537, 540 (Iowa 1973).
435. *Id.* at 537.

no arrest and no consent to the search, the court on appeal considered whether exigent circumstances justified the warrantless search. The court concluded that exigent circumstances did not exist since there was no danger of violence, destruction of the evidence, or danger of escape.[436] The court said that knowledge of what was to be unearthed did not excuse failure to obtain the warrant and that the record "discloses beyond doubt that no warrant was obtained solely to suit the convenience of the officers."[437]

In *State v. Shea*,[438] the court dealt with the warrantless search of a car which was held to be reasonable in view of exigent circumstances and probable cause. The court said probable cause exists where facts and circumstances within officers' knowledge and of which they have " 'reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."[439] The court said that probable cause must "rise above mere suspicion"[440] and that "absent a warrant, the probable cause requirements are no less stringent [for an officer] than when he seeks the issuance of a warrant."[441] In *Shea*, the court concluded that opportunity to commit a crime (possession with intent to deliver a controlled substance in a high drug traffic area); likelihood (informant's tip that defendant was a pusher); knowledge that defendant had been in prior possession of hashish, LSD, and marijuana; the fact that defendant's automobile companion, Hines, talked with a known associate of drug pushers and users and that Hines was dealing in drugs with another who accompanied defendant and Hines to an establishment known for its drug traffic; and that defendant and Hines hurriedly left there in defendant's automobile, were such circumstances as would justify a conclusion of probable cause and exigent circumstances which were sufficient to justify a warrantless search.[442]

iii. *Consent.* The consent which will justify a warrantless search must involve the intentional relinquishment of a known right.[443] In *State v. Peterson*,[444] the court said that defendant did not consent but merely capitulated to authority.[445] Also, the court said that a hotel clerk could not give police officers consent to search a tenant's room.[446]

iv. *Plain Sight.* The "plain sight" doctrine permits an officer who is rightfully present to seize what is open and visible. The plain sight rule, however,

436. *Id.* at 540-41.
437. *Id.* at 541.
438. 218 N.W.2d 610 (Iowa 1974).
439. *Id.* at 614, *quoting* State v. King, 191 N.W.2d 650, 653 (Iowa 1971).
440. State v. Shea, 218 N.W.2d 610, 614 (Iowa 1974).
441. *Id.*
442. *Id.* at 612, 614, 615.
443. State v. Peterson, 219 N.W.2d 665, 670 (Iowa 1974), *citing* Johnson v. Zerbst, 304 U.S. 458 (1938). *See* State v. Smith, 217 N.W.2d 633 (Iowa 1974).
444. 219 N.W.2d 665, 670 (Iowa 1974).
445. Defendant expressed misgivings about submitting to a blood test but did so after being assured police had the right to take his blood and that if they did not, his lawyer could make sure that evidence flowing therefrom would not be used against him at trial.
446. State v. Jackson, 210 N.W.2d 537 (Iowa 1973).

"presupposes a valid entry . . . ."[447] Since there was no valid entry in *State v. Jackson*,[448] the plain sight doctrine did not apply. It did apply, however, in *State v. Canada*,[449] where money in plain view was seized and used as evidence against defendant in trial.

6. *Sufficiency of Evidence*

a. *In General.* The cases in which defendants challenge the sufficiency of evidence to convict are legion. Upon such a challenge the evidence is construed in light most favorable to the state and if there is "substantial evidence reasonably supporting the charge, the trial court should not direct a verdict of acquittal and should submit the case to the jury."[450] In viewing the evidence in light most favorable to the state, only the supporting evidence need be considered, whether contradicted or not.[451] The jury is the sole trier of fact and witness credibility, and its finding of guilt is binding unless it is without substantial support in the record.[452] In this regard, the jury is not bound to believe all of the evidence presented to it.[453] The burden of the state is to prove all elements of a crime beyond a reasonable doubt. A conviction will not be allowed to stand absent sufficient proof of any essential element of the crime charged.[454] Accordingly, the conviction of defendant for robbery with aggravation in *State v. Campbell*[455] was reversed where the state failed to prove that defendant took a gun from another with intent to rob.[456]

The sufficiency of the evidence to convict must be challenged in a motion for directed verdict or motion for new trial or the right to raise the matter on appeal is waived.[457] Also, a motion for directed verdict made after the state rests but which is not renewed will result in a waiver of issues raised therein.[458]

b. *Circumstantial Evidence.* The court reaffirmed that each essential element of a crime may be proved by circumstantial evidence. The court said that circumstantial proof of each essential element of a crime is sufficient to sustain a conviction if it satisfies the jury beyond a reasonable doubt.[459] " 'Circumstan-

447. *Id.* at 540.
448. *Id.* at 537.
449. 212 N.W.2d 430 (Iowa 1973).
450. State v. Young, 211 N.W.2d 352, 354 (Iowa 1973). *See, e.g.*, State v. Meyers, 215 N.W.2d 262, 263 (Iowa 1974).
451. State v. Bizzett, 212 N.W.2d 466, 469 (Iowa 1973).
452. State v. Gray, 216 N.W.2d 306, 308 (Iowa 1974); State v. Clay, 213 N.W.2d 473, 476 (Iowa 1973).
453. State v. Hall, 214 N.W.2d 205, 210 (Iowa 1974). The jury " 'might believe all of the state's case, or none of it, or only part of it.' " State v. Banks, 213 N.W.2d 483, 486 (Iowa 1973), *quoting* State v. Kramer, 252 Iowa 916, 920-21, 109 N.W.2d 18, 20 (1961).
454. State v. Campbell, 214 N.W.2d 195 (Iowa 1974); State v. Grindle, 215 N.W.2d 268, 270 (Iowa 1974); State v. Banks, 213 N.W.2d 483 (Iowa 1973).
455. 214 N.W.2d 195 (Iowa 1974).
456. *See* text accompanying notes 117-19 *supra*.
457. State v. Cowman, 212 N.W.2d 420, 422 (Iowa 1973).
458. State v. Chalfant, 219 N.W.2d 2 (Iowa 1974); State v. Walker, 218 N.W.2d 915, 917 (Iowa 1974); State v. Warren, 212 N.W.2d 509, 516 (Iowa 1973).
459. State v. Sellers, 215 N.W.2d 231, 232 (Iowa 1974); State v. Ampey, 210 N.W.2d 433 (Iowa 1973).

tial evidence may be equal in value to and sometimes more reliable than direct evidence.' "[460] If proof of one or more of the essential elements of a crime is completely dependent upon circumstantial evidence, " 'the circumstance or circumstances must be entirely consistent with defendant's guilt and wholly inconsistent with any rational hypothesis of defendant's innocence and so convincing as to exclude a reasonable doubt that defendant was guilty of the offense charged.' "[461]

Operation of a motor vehicle may be proven by circumstantial evidence where it is an element of the offense.[462] Knowledge,[463] intent,[464] state of mind,[465] and intent to defraud[466] are usually inferred from circumstances. "Participation in a crime may be inferred from the presence, companionship and conduct before and after the crime is committed."[467] Circumstantial evidence may provide corroboration for accomplice testimony.[468]

In *State v. Sellers*,[469] the court noted that the circumstance of presence at the scene of a crime is in itself insufficient to prove that a defendant committed a crime. However, in *Sellers*, defendant's presence at the scene of the crime, established by his fingerprints on a window there, was only one circumstance supporting his conviction. Defendant's fingerprints were on a window in an enclosed porch at the rear of a house. There were pry marks on this window and a nearby door. Pry marks were also found on the front of the house. All pry marks were similar. The house was freshly painted, leading to the conclusion that the pry marks were recent. The time during which the pry marks and fingerprints could have been left there was limited. A mere passerby could not have left fingerprints on the inside of the porch. "The evidence clearly supports the inference defendant had placed his hand on the window during the unsuccessful attempt to enter the home from the porch."[470] Defendant's conviction for breaking and entering was affirmed.

7. *Objections to Evidence*

a. *Failure to Object.* It is axiomatic that failure to object to admission of evidence or failure to assert rights at trial, including constitutional questions, constitutes a waiver for purposes of assigning the matter as error on appeal. The court has so held many times.[471] In this regard, only known or existing rights

460. State v. Sellers, 215 N.W.2d 231, 232 (Iowa 1974).
461. *Id., quoting* State v. Jellema, 206 N.W.2d 679, 681 (Iowa 1973). *See* State v. Ampey, 210 N.W.2d 433, 434 (Iowa 1973).
462. State v. Means, 211 N.W.2d 283, 288 (Iowa 1973).
463. State v. Dandridge, 213 N.W.2d 903 (Iowa 1973); State v. Young, 211 N.W.2d 352, 354 (Iowa 1973).
464. State v. Stanton, 214 N.W.2d 125, 126 (Iowa 1974); State v. Young, 211 N.W.2d 352, 354 (Iowa 1973).
465. State v. Stanton, 214 N.W.2d 125, 126 (Iowa 1974).
466. State v. Mathias, 216 N.W.2d 319, 321 (Iowa 1974).
467. State v. Young, 211 N.W.2d 352, 354 (Iowa 1973).
468. State v. Grindle, 215 N.W.2d 268, 270 (Iowa 1974).
469. 215 N.W.2d 231, 232 (Iowa 1974).
470. *Id.*
471. State v. Kuchenreuther, 218 N.W.2d 621, 623 (Iowa 1974); State v. Pospishel, 218 N.W.2d 602, 603 (Iowa 1974); State v. York, 211 N.W.2d 314, 317 (Iowa 1973).

must be asserted to preserve error.[472] Matters may not be raised for the first time on appeal[473] and defendant is bound by the extent of his objection at trial.[474]

In *State v. Pardock*,[475] defendant failed to object to the testimony of two witnesses concerning the offer and refusal of a breath test. The court said that "failure of a party to object to evidence of a particular fact does not waive the right to object to similar evidence when offered at a later stage of the proceedings. . . ."[476]

b. *Timeliness of Objection.* To be timely, an objection "must be made at the earliest opportunity after grounds for objection became apparent."[477] If a tardy objection is offered absent an application to have the objection precede the answer, and no excuse is offered for the late objection which is overruled, no claim of error will be preserved.[478] Also, a party may not wait until making a motion for new trial to complain about error at trial. Sound law and logic dictate against this.[479]

In *State v. Canada*,[480] a witness testified without objection concerning the identification of defendant. Another witness took the stand and defendant then objected to the identification testimony of the prior witness. The court reiterated its position that objection should have been made when grounds therefore had first become apparent.[481] In *State v. Cooper*,[482] a motion to strike was not made until completion of cross-examination, redirect, and recross of the witness whose direct testimony was the subject of complaint. The court said that the facts which revealed the inadmissibility of the evidence were elicited for the first time by the opponent of the evidence on cross-examination. The court rejected the state's contention that the objection was not timely.[483]

c. *Sufficiency of Objection.* "Objections must be sufficiently specific to inform the court of the grounds upon which the evidence is thought inadmissible. If the court is not so informed by the objection there is no reversible error unless the grounds are obvious."[484] Upon making a specific objection to evidence, one is bound to the limits of the objection and may not expand the scope of the

472. State v. Wisher, 217 N.W.2d 618, 620 (Iowa 1974). *See* State v. Wisniewski, 171 N.W.2d 882 (Iowa 1969).
473. State v. Wisher, 217 N.W.2d 618, 620 (Iowa 1974); State v. Joss, 211 N.W.2d 320, 321 (Iowa 1973).
474. State v. Koch, 214 N.W.2d 202, 204 (Iowa 1974).
475. 215 N.W.2d 344 (Iowa 1974).
476. *Id.* at 349.
477. State v. Jewett, 219 N.W.2d 559, 560 (Iowa 1974). *See* State v. Whitfield, 212 N.W.2d 402, 410 (Iowa 1973).
478. State v. Hendren, 216 N.W.2d 302, 305 (Iowa 1974). *See* State v. Whitfield, 212 N.W.2d 402, 410 (Iowa 1973).
479. State v. Jewett, 219 N.W.2d 559, 560 (Iowa 1974). *See* State v. Whitfield, 212 N.W.2d 402, 406 (Iowa 1973).
480. 212 N.W.2d 430 (Iowa 1973).
481. *Id.* at 432.
482. 217 N.W.2d 589 (Iowa 1974).
483. *Id.* at 594.
484. State v. Hendren, 216 N.W.2d 302, 304 (Iowa 1974). *See* State v. Pardock, 215 N.W.2d 344, 348 (Iowa 1974); State v. Means, 211 N.W.2d 283, 288 (Iowa 1973).

objection on appeal.[485]

A general allegation that a line-up procedure violated an accused's rights under the fifth, sixth, and fourteenth amendments, without a more specific statement, was held insufficient.[486] Also, a general objection as to lack of foundation was held to be inadequate "without stating wherein the foundation is insufficient" and will preserve no error.[487] In *State v. Raue*,[488] defendant called into question the admissibility of evidence for noncompliance with the provisions of *Code* chapter 321B.[489] However, the objection was "insufficiently specific" for not pointing out the particular provision of chapter 321B not complied with.[490] The court also said that evidence is not inadmissible solely on the ground it calls for an opinion and conclusion of the witness. "Rather, some specific reason for its exclusion must be stated in the objection to the interrogatory put to the witness, and it is the duty of counsel to point out the particular defect or defects."[491]

In *State v. Clay*,[492] the court said that the objection "irrelevant" was sufficiently specific in that it advises the trial court of the contention that the evidence "does not logically tend to establish any material proposition."[493] Also, the court said that the objection "immaterial" was sufficient to advise the trial court of the contention that the evidence does not tend to prove a proposition at issue.[494] The objection "incompetent," the court said, means nothing more than "inadmissible" and does not state a ground of objection.[495]

If the trial court sustains a general objection, it will be affirmed even if the objection is put in a form which would be insufficient to preserve error for appeal.[496] However, preservation of error is not the full extent of the purpose of an objection to evidence. An objection is "in the first instance, a means of invoking a rule of evidence by which admission of proof at trial is regulated."[497] If a general objection is sustained, the offering party may rightfully inquire of the trial court concerning the specific grounds of its ruling. "[I]t is the court's duty to answer the inquiry. The court errs if it is unable or unwilling to specify the ground or grounds and nevertheless does not change its ruling."[498] The right of a party to know the specific ground upon which his evidence is excluded

485. State v. Koch, 214 N.W.2d 202, 204 (Iowa 1974); State v. Warren, 212 N.W.2d 509, 514-15 (Iowa 1973) ("I move for a mistrial on that ground alone."); State v. Weger, 211 N.W.2d 322, 323-24 (Iowa 1973); State v. Lyons, 210 N.W.2d 543, 547-48 (Iowa 1973).
486. State v. Hendren, 216 N.W.2d 302, 304-05 (Iowa 1974).
487. State v. Raue, 214 N.W.2d 162, 163 (Iowa 1974). *See* State v. Means, 211 N.W.2d 283, 287-88 (Iowa 1973).
488. 214 N.W.2d 162 (Iowa 1974).
489. *See* text accompanying notes 368-78 *supra.*
490. State v. Raue, 214 N.W.2d 162, 163 (Iowa 1974).
491. State v. Whitfield, 212 N.W.2d 402, 410 (Iowa 1973).
492. 213 N.W.2d 473 (Iowa 1973).
493. *Id.* at 477. *See* State v. Pardock, 215 N.W.2d 344, 349 (Iowa 1974).
494. State v. Clay, 213 N.W.2d 473, 477 (Iowa 1973). *See* State v. Raue, 214 N.W.2d 162, 163 (Iowa 1974).
495. State v. Clay, 213 N.W.2d 473, 477 (Iowa 1973).
496. State v. Means, 211 N.W.2d 283, 287 (Iowa 1973).
497. State v. Buckner, 214 N.W.2d 164, 167 (Iowa 1974).
498. *Id.* at 168.

is designed to give counsel an opportunity to correct defects.[499] The requirement that the court specify the basis of its ruling "does not cast the trial court in a partisan role. It simply requires the court to administer the law of evidence consonant with its purpose."[500]

d. *Excluding and Withdrawing Evidence from the Jury.* It is within the sound discretion of the trial court to exclude or withdraw evidence from jury consideration even in the absence of proper objection or no objection at all by the adverse parties.[501] If evidence which has gone to the jury is withdrawn due to proper objection and the trial court promptly admonishes the jury to disregard the evidence, the error, if any, is generally considered to be cured.[502] There are exceptions to this rule, however. In *State v. Jensen*,[503] the prosecutor presented evidence to the jury which was the subject of a motion in limine.[504] In describing the case as an "extreme instance," the court said: "To excuse the error here by an admonition to disregard would destroy any effectiveness of a motion in limine."[505] The court said that even with an admonition to disregard there would be a " 'remaining prejudicial effect' " of the evidence.[506]

8. *General Conduct and Procedure of Trial*

a. *Right of Defendant to Proceed Pro Se.* In *State v. Smith*,[507] defendant urged that trial courts have an "affirmative obligation to advise an accused of his right to proceed without an attorney."[508] The court did not agree.[509] While defendant urged he had made requests to represent himself, the court construed defendant's urgings as asserting the "right to ask his own questions of various witnesses . . . ."[510] The court said that this proposal was rightly refused for reasons "grounded in the obvious necessities of an orderly trial."[511] First, the court said that defendant waived the right to proceed pro se by failing to make an "unequivocal request to act as his own attorney."[512] Second, the court noted that the right to proceed pro se after trial has begun is "sharply curtailed."[513] The court indicated the potential of prejudice resulting from denial of such a

499. State v. Cooper, 217 N.W.2d 589, 594 (Iowa 1974); State v. Buckner, 214 N.W.2d 164, 168 (Iowa 1974). *See* State v. Clay, 213 N.W.2d 473, 477 (Iowa 1973).
500. State v. Buckner, 214 N.W.2d 164, 168 (Iowa 1974).
501. State v. York, 211 N.W.2d 314, 318 (Iowa 1973).
502. State v. Ampey, 210 N.W.2d 433, 435 (Iowa 1973).
503. 216 N.W.2d 369 (Iowa 1974).
504. The prosecutor should not have presented the evidence until the trial court was presented with an offer and objection outside the presence of the jury. *See* text accompanying notes 291-98 *supra*.
505. State v. Jensen, 216 N.W.2d 369, 374 (Iowa 1974).
506. *Id.*
507. 215 N.W.2d 225 (Iowa 1974).
508. *Id.* at 226.
509. "We find nothing to suggest a trial court is bound to inquire of the accused in order to determine whether, because of his dissatisfaction with the progress of the trial, he desires to have counsel withdraw so he can proceed without one." *Id.* at 227.
510. *Id.* at 226.
511. *Id.*
512. *Id.*
513. *Id.* at 227.

proposal as defendants must outweigh the potential disruption of the proceedings before one should be allowed to proceed pro se.[514]

b. *Presence of Armed Police Officer.* In *State v. Williams*,[515] defendant, at trial, objected to the effect of the presence of an armed deputy sheriff in the courtroom. Defendant urged that he was prejudiced in that the presence of the side arm carried " 'with it the suggestion of . . . suspected flight or danger or violence on the part of the defendant.' "[516] Trial court overruled a motion to prohibit the officer from wearing a gun but directed him to sit out of the view of the jury.

The supreme court said: " 'Courts are entitled to take all reasonably necessary precautions for the maintenance of order during the progress of the trial and for the detention and custody of the accused.' "[517] The court concluded that defendant had no ground for complaint.[518]

c. *Conduct of In Camera Hearing.* In *State v. Deanda*,[519] the trial court held an in camera hearing for examination of police reports to determine whether they should be made available to defendant. Defense counsel was not allowed to participate in the examination of the reports. On appeal, defendant urged that his counsel should have been allowed to participate in the examination. The court responded that the interests of all parties must be weighed in such a case. In some instances, the safety of an informant may be at stake. The conclusion of the matter appears to be that while counsel has a right to be at the hearing, he does not have the right to examine documents until the right of discovery has been determined by trial court.[520]

d. *Sequestration of Witness.* In *State v. Pardock*,[521] the testimony of a witness was interrupted by a recess. The defendant requested the trial court to segregate this witness. Trial court refused and defendant assigned the refusal as error on appeal. The court merely noted that this was a matter resting solely within the discretion of trial court and, in the absence of prejudice, no error was committed.[522]

e. *Standing Objections.* In very short fashion, the court stated that the deci-

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514. *See also* State v. Williams, 217 N.W.2d 573, 574 (Iowa 1974) (" 'Courts are entitled to take all reasonably necessary precautions for the maintenance of order during the progress of the trial. . . .' " *Id.*, *quoting* 21 AM. JUR. 2d *Criminal Law* § 240 (1965)).

515. 217 N.W.2d 573 (Iowa 1974).

516. *Id.* at 574.

517. *Id* at 574, *quoting* 21 AM. JUR. 2d, *Criminal Law* § 240 (1965).

518. The court compared this case to two others where it held that defendant was not denied a fair trial where he was handcuffed during trial, citing *State v. Brewer*, 218 Iowa 1287, 254 N.W. 834 (1934) and *State v. Evans*, 169 N.W.2d 200 (Iowa 1969). "There is considerably less ground to complain of the presence of officers with side arms than of defendants being restrained by handcuffs during a trial." State v. Williams, 217 N.W.2d 573, 574 (Iowa 1974).

519. 218 N.W.2d 649 (Iowa 1974).

520. "At hearings where the trial court declines to allow defense counsel to view the materials the presence of such counsel can nevertheless satisfy any defendant's fear as to the integrity of the record for any later appeal." *Id.* at 651.

521. 215 N.W.2d 344 (Iowa 1974).

522. The witness stated on cross-examination that he did not talk with any one during the recess. *Id.* at 347.

sion to refuse the request of a party to let objections "stand" is a matter resting well within the discretion of the trial court.[523]

f. *Scope of Cross-Examination.* The court also reaffirmed that "[t]he scope and extent of cross-examination is largely within trial court discretion."[524] Matters raised on direct examination are fairly within the range of cross-examination.[525]

g. *Reporting Final Arguments.* In *State v. Whitfield*,[526] defendant's request that final arguments to the jury be reported was denied. On appeal, the court found that *Code* section 624.11 governed the matter and interpreted that section to mean that "a record need not be made of arguments of counsel. Said section requires only rulings of the court not made in the presence of the jury to be reported."[527]

Defendant urged that trial court's refusal to have final arguments reported denied him equal protection of the laws. Defendant was indigent and, in essence, his argument to the court appears to have been that his indigency should not have precluded his access to that which could have been purchased by a non-indigent. While the court agreed, it relied on a statement by the United States Supreme Court to the effect that use of a bystanders bill of exceptions would have adequately preserved any error for review which may have occurred during final argument.[528]

h. *Trial Court Communication with a Juror.* In *State v. Cowman*,[529] a juror determined that defendant had given her husband an insufficient fund check. She had confirmed this by her own investigation. All of this took place after the close of evidence but before submission of the case to the jury. Trial court gave no opportunity to either counsel to challenge the juror. Trial court personally interrogated the juror and accepted her assurance that her knowledge concerning defendant would in no way prejudice her against him. On appeal, defendant urged that he was denied a fair trial because of the private communication between the judge and the juror.

The court agreed, stating that such communications are "universally condemned"[530] and holding that defendant was entitled to a new trial even apart from a showing of prejudice. The court reached this conclusion because of a strong persuasion that juries must remain above suspicion if the people are to retain faith in our courts and system of government.

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523. State v. Jensen, 216 N.W.2d 369, 375 (Iowa 1974).
524. State v. Everett, 214 N.W.2d 214, 219 (Iowa 1974).
525. *See* State v. Martin, 217 N.W.2d 536, 544 (Iowa 1974); IOWA CODE § 781.13 (1973).
526. 212 N.W.2d 402 (Iowa 1973).
527. *Id.* at 406.
528. "A statement of facts agreed to by both sides, a full narrative statement based perhaps on the trial judge's minutes taken during trial or on the court reporter's untranscribed notes, *or a bystander's bill of exceptions* might all be adequate substitutes, equally as good as a transcript." *Id.* at 406-07, *quoting* Mayer v. City of Chicago, 404 U.S. 189, 194 (1971) *and* Draper v. Washington, 372 U.S. 487, 495 (1963).
529. 212 N.W.2d 420 (Iowa 1973).
530. *Id.* at 424.

9. *Mistrial Situations*

In some cases, actions of the trial court or the prosecuting attorney gave rise to a motion for mistrial by defendants. The following sections attempt to express the attitude of the court as it reviewed these instances.

a. *Alleged Misconduct by Prosecutor During Opening Argument.* In *State v. Everett*,[531] marijuana had been found in defendant's house. In ruling on defendant's motion in limine, trial court ordered the state not to refer to this matter "until its admissibility was determined at trial."[532] In opening argument, the prosecutor violated the order of the trial court and informed the jury that marijuana had been found in defendant's house. Defendant's motion for mistrial was overruled. On appeal, the court said that there was no reversible error because the marijuana was later received in evidence. "This made the county attorney's remark premature rather than prejudicial. Any error in trial court's ruling on the motion for mistrial is moot."[533]

In another case, after objections by defendant, "the trial court admonished the assistant county attorney to limit himself to what he expected his witnesses to testify to."[534] On appeal, the court recognized that trial courts have broad discretion in handling these matters and found nothing in the record which would warrant its interference.[535]

b. *Alleged Prejudicial Occurrences During a Trial.*

i. *Comment on Failure to Call an Available Witness.* In the closing argument in *State v. O'Kelley*,[536] the prosecutor made reference to the fact that defendant had not produced certain witnesses to testify. The prosecutor also apparently made some reference to the failure of defendant to subpoena certain other evidence (pictures, etc.). These comments spurred defense counsel to make a motion for mistrial. This was overruled and counsel renewed his complaints in a motion for new trial. In these motions and on appeal, counsel urged that the argument of the prosecutor placed the burden of proof on defendant. The court found that the prosecutor had not argued that defendant had the burden of proof. The court said: " 'Comment on failure of defendant to call witnesses available to him has been held fair argument.' "[537] The court acknowledged that the trial court was in a much better position to judge whether the prosecutor's comments were prejudicial and whether they denied defendant a fair trial.[538] Defendant's conviction was affirmed.

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531. 214 N.W.2d 214 (Iowa 1974).
532. *Id.* at 218. *See* text accompanying notes 291-98 *supra*.
533. State v. Everett, 214 N.W.2d 214, 218 (Iowa 1974).
534. State v. Ampey, 210 N.W.2d 433, 435 (Iowa 1973).
535. *Id.* at 435-36.
536. 211 N.W.2d 589 (Iowa 1973).
537. *Id.* at 597. *See* State v. Allison, 260 Iowa 176, 182, 147 N.W.2d 910, 913 (1967).
538. The court emphasized that the jury was clearly instructed that the defendant was presumed innocent and the burden of proof on the state was to prove him guilty beyond a reasonable doubt. State v. O'Kelley, 211 N.W.2d 589, 597 (Iowa 1973).

ii. *Conflict of Interest.* In *State v. Williams*,[539] defendant called as a witness a physician who had recently treated the person whom defendant was accused of murdering. Defense counsel began to delve into knowledge gained by the witness in his professional capacity. An objection of privilege was asserted by the county attorney in his capacity as personal attorney for the victim's family. Defendant urged this was a conflict of interest[540] and moved for a mistrial.

The court concluded that the situation of the county attorney "may have been inappropriate"[541] but found "no indication a conflict of interest on the part of the county attorney had any effect on the conduct or outcome of the trial."[542] The court reaffirmed the discretion of the trial court to determine whether prejudice results from such a situation.

iii. *Voluntary Statements of a Witness.* In *State v. Cage*,[543] the state called a witness who was asked if she had smoked marijuana with a group which included defendant. Part of her response in reference to defendant included the comment that "I knew he was a known heroin dealer."[544] Defendant objected and moved that the comment be stricken. The trial court sustained defendant's objection and directed the jury to disregard the statement. Defendant also moved for a mistrial. His motion was overruled. He assigned trial court's refusal to order a mistrial as error on appeal. The court cited the "considerable discretion"[545] of trial courts in ruling on motions for mistrial and noted their more favorable vantage point for determining the effect on the jury of such an occurrence as this. The court said that striking improper testimony ordinarily cures any error and declined to interfere with the exercise of trial court discretion.[546]

c. *Alleged Improper Rebuttal and Final Argument.* The court affirmed that "the county attorney is permitted wide latitude during closing arguments in drawing deductions from and inferences upon the evidence."[547] In *State v. Lyons*,[548] defense counsel, on cross-examination of a witness, asked her some questions concerning a ring she was wearing on her hand. The county attorney argued to the jury that the question by defense counsel was prompted by a whispered comment from defendant. The argument was as follows: "Just think of that. Just think of how it came out. It was never mentioned on direct examination. I didn't bring that out . . . . [A]fter the conversation from the Defendant to Mr. Critelli he asked about it. I didn't bring that out. The defense counsel, the defense did."[549] The court said that this was fair argument

539. 217 N.W.2d 573 (Iowa 1974).
540. *See* IOWA CODE § 336.5 (1973).
541. State v. Williams, 217 N.W.2d 573, 575 (Iowa 1974).
542. *Id.*
543. 218 N.W.2d 582 (Iowa 1974).
544. *Id.* at 585.
545. *Id.* at 586.
546. The court distinguished the instant case from one where the prosecution made repeated efforts to inject inflammatory evidence into the case. *See* State v. Wright, 203 N.W.2d 247, 251 (Iowa 1972).
547. State v. Whitfield, 212 N.W.2d 402, 406 (Iowa 1973).
548. 210 N.W.2d 543 (Iowa 1973).
549. *Id.* at 548.

in view of the fact that "counsel for the defendant introduced the subject of the cufflink-ring in cross-examination . . . ."[550] Also in *Lyons*, defendant objected on appeal to certain argument of the county attorney wherein he described what happened when a prosecution witness viewed a video tape of defendant. Defendant urged that his objection to that evidence had been sustained and the state's argument was therefore improper. The court found, however, that the evidence had not been the subject of an objection and that the state's argument was proper.

The court said that whether improper argument is cause for reversal is dependent upon whether the argument prejudiced the defendant to the extent of denying him a fair trial. The court again recognized the discretion of trial courts in such matters. Concerning this discretion, the court said: " 'That discretion is not, however, without limitations. It must be utilized fairly and impartially, not arbitrarily, by application of relevant, legal and equitable principles to all known or readily available facts of a given issue or cause to the end that justice may more nearly be effectuated.' "[551] In *State v. Whitfield*[552] the state called a rebuttal witness for the apparent purpose of impeaching defendant. The witness claimed the privilege against self-incrimination after a few questions. Defendant claimed that the prosecution knew the witness would claim his fifth amendment privileges and therefore acted in bad faith in calling him. Defendant urged that "it was the design of the prosecution to create an inference of criminal dealings between the witness and the defendant . . . ."[553] The court did not agree. The court observed that the questions asked of the witness were not " 'fact-laden' as to the crime defendant was charged with having committed, and did not even go to the substance of that offense."[554] The court also said that it had not been shown that the state called the witness merely to prejudice defendant. The court did not believe the prosecution called the witness with knowledge that he would invoke his fifth amendment rights.

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550. *Id.*

551. *Id., quoting* State v. Vickroy, 205 N.W.2d 748, 750-51 (Iowa 1973).

552. 212 N.W.2d 402 (Iowa 1973).

553. *Id.* at 407. Defendant also claimed that he was "effectively denied the right of cross-examination of [the witness]." *Id.*

554. *Id.* at 408. This would tend to negate the alleged improper "design" of the prosecutor to "create an inference of criminal dealings between the witness and the defendant." The court cited the following standards for determining whether reversible error results from calling a witness who asserts the fifth amendment:

> [I]t must appear directly or inferentially
> (1) that the witness appears to have been so closely implicated in the defendant's alleged criminal activities that the invocation by the witness of a claim of privilege when asked a relevant question tending to establish the offense charged will create an inference of the witness' complicity, which will, in turn, prejudice the defendant in the eyes of a jury;
> (2) that the prosecutor knew in advance or had reason to anticipate that the witness would claim his privilege, or had no reasonable basis for expecting him to waive it, and, therefore, called him in bad faith and for an improper purpose;
> (3) that the witness had a right to invoke his privilege;
> (4) that defense counsel made timely objection and took exception to the prosecutor's misconduct; and
> (5) that the trial court refused or failed to cure the error by an appropriate instruction or admonition to the jury.

Id., quoting Annot., 86 A.L.R.2d 1443, 1444-45 (1962).

In *State v. Warren*,[555] the county attorney commented upon the failure of defendant's spouse to testify. The trial court immediately and thoroughly instructed the jury to disregard that part of the argument.[556] The incident prompted defendant to move for a mistrial. The motion was overruled and defendant assigned this as error on appeal. The court conceded that the argument was prejudicial. However, the court, again giving sway to the discretion of the trial court,[557] found that defendant was not denied a fair trial in that the comment was made only once and, at that time, the court admonished the jury to disregard it.

d. *Alleged Misconduct by the Court.* In *State v. Noble*,[558] the trial court sat as the trier of fact in an assault and battery prosecution arising out of a dispute between defendant and a police officer. The trial court completely discounted defendant's version of the facts with the statement that he knew the police officer to be one man who would not do what defendant said he had done.[559] The supreme court said: "No lawyer would be willing to accept a juror with such a pre-conceived notion of the veracity of the complaining witness. Neither should he have a judge sitting as a trier of fact who takes as true the testimony of that witness by applying such a subjective standard based on his own out-of-court appraisal of his character."[560]

In *State v. O'Kelly*,[561] defendant complained that the trial court helped the prosecutor by prompting him concerning an evidentiary matter at trial. Trial court apparently told the prosecutor that he had not proved that a certain picture was a fair representation. The court concluded that defendant was not prejudiced since he had not objected to the picture on that ground. Further, the court said that trial courts may make remarks while ruling on the admissibility of evidence as long as the remarks " 'are not unfair and prejudicial to the accused.' "[562]

In *State v. Cowman*,[563] trial court had a private communication with a juror prior to the submission of the case. The conversation centered on the juror's ability to serve impartially after conducting her own investigation in the community as to whether defendant was the same person who had given her husband a $50 insufficient funds check. Counsel for either side were not made aware of the private communication nor the subject thereof. A motion for new trial urging error in this procedure was overruled and defendant assigned this as error on appeal. Reversing, the court said that the trial court should have informed counsel so as to allow them to make any record necessary on the matter. The court also condemned, in itself, the private communication.[564]

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555. 212 N.W.2d 509 (Iowa 1973).
556. *Id.* at 514.
557. *Id.* at 515.
558. 215 N.W.2d 219 (Iowa 1974).
559. "No way. It is not possible" said the judge. *Id.* at 222.
560. *Id.*
561. 211 N.W.2d 589 (Iowa 1973).
562. *Id.* at 597, *quoting* State v. McCarty, 179 N.W.2d 548, 553 (Iowa 1970).
563. 212 N.W.2d 420 (Iowa 1973).
564. *See* text accompanying notes 529-30 *supra.*

e. *Necessity of a Record of Alleged Misconduct.* In *State v. O'Kelly*,[565] defendant urged that trial court disparaged him by words and acts. Defendant set out his complaint in an affidavit but the trial court denied the truth thereof. No bill of exceptions was secured.[566] Therefore, the court could not review defendant's complaint.[567]

In *State v. Whitfield*,[568] the court said that failure to object to alleged improper comment at the time it is made waives the right to raise the matter in a motion for new trial or on appeal.[569] Although trial court refused defendant's request to record final arguments in *Whitfield*, the court said that defendant could have preserved error by use of a bill of exceptions.[570]

10. *Motion for Continuance*

In *State v. Johnson*,[571] defendant requested a continuance during trial on grounds of surprise. In a prosecution for possession of heroin with intent to deliver, defendant sought to establish that he was enroute to the city of Waterloo, Iowa, at the time he was supposed to have committed the crime there. To support his alibi defense, defendant introduced evidence of a telephone call made subsequent to the time of the crime and after his alleged arrival time in Waterloo. When a witness from the telephone company testified that the call had been made twenty-four (24) hours earlier than defendant claimed, defendant moved for a continuance based on surprise. Defendant urged that the testimony refuted his alibi and that he needed more time to evaluate the evidence. The trial court denied a continuance for several days but granted an extended lunch recess. The trial court found that defendant's witnesses "had already sufficiently established their reliance on the telephone billing in fixing the whereabouts of defendant on the date and at the time of the alleged crime."[572]

The charge of possession of heroin with intent to deliver grew out of a transaction occurring in a lounge in Waterloo. Witnesses for the state testified they saw defendant's car parked outside at the time the offense was alleged to have taken place. Again defendant moved for a continuance on grounds of surprise. Defendant urged that this testimony was not contained in the minutes of testimony attached to the information. This motion for continuance was also denied.

On cross-examination, one key prosecution witness testified that he had been convicted of " 'rape with consent' " in Michigan.[573] Defendant urged that

565. 211 N.W.2d 589 (Iowa 1973).
566. IOWA CODE § 786.6 (1973).
567. *See also* State v. Means, 211 N.W.2d 283 (Iowa 1973). In *Means*, defendant complained of final argument by the county attorney. "Defendant made or preserved no record of the remarks. Accordingly we have nothing to review." *Id.* at 288.
568. 212 N.W.2d 402 (Iowa 1973).
569. *Id.* at 406.
570. *Id.* at 405-07. *See* text accompanying note 528 *supra.*
571. 219 N.W.2d 690 (Iowa 1974).
572. *Id.* at 697.
573. *Id.*

there was no such crime in Michigan and urged the court to take judicial notice of this. In the alternative, defendant requested a continuance. The trial court would not take judicial notice of the Michigan statute and declined again to grant a continuance.

On appeal, the supreme court affirmed the trial court in its denial of defendant's motions for continuance. The court noted the discretionary function of the trial court in this regard and said that trial courts should grant a continuance "only on a ground which satisfies the court that substantial justice will be more nearly obtained."[574] The court found defendant was not unduly prejudiced by the trial court rulings.[575]

11. *Instructions*

a. *In General (Duty of Trial Court; Language of Instructions; etc.).* The trial court is required to instruct the jury on any issue which finds evidentiary support in the record.[576] "[T]he jury is presumed to follow clear instructions given by the trial court."[577] In *State v. Shea*,[578] the jury was allowed to take exhibits into the jury room. Defendant was charged with possession of certain controlled substances and some of the exhibits were specimens of substances which were not controlled substances under Iowa law. The jury was instructed to consider the "controlled substance exhibits" in making a determination of defendant's guilt. The supreme court said that allowing the jury to take the other exhibits into the jury room was error, albeit harmless error because the jury would be presumed to follow the clear instruction of trial court to consider only the marijuana and LSD exhibits.

While the trial court is required to instruct the jury on any issue which finds evidentiary support in the record, trial court is not required to give requested instructions which go beyond the holdings of the supreme court. In *State v. Stanton*,[579] defendant was convicted of the crime of malicious mischief. Defendant had pried open his cell door with bars he had removed from his bunk. In part, he requested that the jury be instructed that " '[i]n order to convict the defendant, the prosecution must prove, that the defendant knew the property in question belonged to the party as charged . . . .' "[580] The court held that the instruction was properly refused in that it went beyond the decisions of the court.

The trial court is not required to instruct in the precise language of requested instructions. It is sufficient if the requested instruction is substantially

574. *Id.*
575. The court found defendant was not prejudiced in the denial of his motion for continuance made when he was confronted with testimony outside the minutes of testimony. This is because the state "is not required to set out in the minutes all aspects of the testimony of a prospective witness." *Id.* at 696.
576. State v. Lamar, 210 N.W.2d 600, 606 (Iowa 1973).
577. State v. Shea, 218 N.W.2d 610, 616 (Iowa 1974).
578. *Id.* at 610.
579. 214 N.W.2d 125 (Iowa 1974).
580. *Id.* at 126.

covered in the courts' own instructions.[581] In this regard, instructions are not to be considered piecemeal but as a whole.[582] "If an instruction covers the legal principles involved, as they are raised by the facts in the case, the trial court has the right to choose its own language to best accomplish that purpose."[583] In *State v. Everett*,[584] trial court gave the standard accomplice instruction and defendant requested trial court to further instruct the jury that " '[t]he testimony of one accomplice cannot be corroborated by that of another accomplice.' "[585] Trial court did not make that precise addition but did instruct the jury that they could not convict defendant on the uncorroborated testimony of an " 'accomplice or accomplices.' "[586] The court held trial court was so entitled to instruct in its own language.

The trial court is not required to instruct as to the meaning of all words. In *State v. Davidson*,[587] defendant urged that trial court erred in not instructing the jury concerning the meaning of "dwelling house." The court held that trial court did not err and held that "dwelling house is a term of ordinary meaning which the jury could understand without explanation."[588]

b. *Objections to Instructions.* Failure to object to instructions at trial waives any error for appeal purposes;[589] a defendant may not "reserve" objections.[590] Further, objections must be specific; a general objection to all instructions " 'because the court erred in failing to sustain defendant's motion to direct' "[591] will not preserve error in regard to any particular instruction. Once a specific objection is made to an instruction defendant is bound by the objection, he may not expand on it in a motion for new trial.[592] It may be found that error in instructions or in failing to give instructions was expressly waived. If so, this will preclude raising any objections on appeal.[593] If trial court refuses to give requested instructions, then the requesting party must except to the refusal or no error is preserved for appeal.[594]

c. *Entrapment.* In *State v. Deanda*[595] defendant urged that trial court erred in giving Uniform Jury Instruction 501.21 of the Iowa State Bar Association on entrapment. The court agreed, finding that the jury was not told to "consider whether the police actions were so reprehensible that, as a matter of public pol-

581. State v. Everett, 214 N.W.2d 214, 219 (Iowa 1974). State v. Stanton, 214 N.W.2d 125, 126 (Iowa 1974).
582. State v. Robinette, 216 N.W.2d 317, 318 (Iowa 1974).
583. *Id.*
584. 214 N.W.2d 214 (Iowa 1974).
585. *Id.* at 219.
586. *Id.*
587. 217 N.W.2d 630 (Iowa 1974).
588. *Id.* at 633.
589. State v. Willer, 218 N.W.2d 605, 607 (Iowa 1974); State v. Buckner, 214 N.W.2d 164, 169 (Iowa 1974).
590. State v. Pardock, 215 N.W.2d 344, 346-47 (Iowa 1974).
591. State v. Willer, 218 N.W.2d 605, 607 (Iowa 1974).
592. State v. Hall, 214 N.W.2d 205, 210 (Iowa 1974).
593. State v. Smith, 215 N.W.2d 225, 227 (Iowa 1974); State v. Buckner, 214 N.W.2d 164, 169 (Iowa 1974).
594. State v. Shockey, 214 N.W.2d 146, 151 (Iowa 1974).
595. 218 N.W.2d 649 (Iowa 1974).

icy, a conviction should not be tolerated."[596] The stronger objection of the court to the instruction was that it failed "to focus on the crucial question of what is likely to cause normally law-abiding persons to commit the offense."[597]

The jury should be instructed on the law of entrapment if, upon consideration of the evidence, the jury could reasonably find that peace officers or their agents tricked, persuaded, or fraudulently induced an innocent person to commit the crime charged. In *State v. Lamar*,[598] defendant was persuaded to take part in a robbery by one who was not shown to be a government agent. Trial court had instructed that entrapment could result from the conduct of law enforcement officers. Defendant urged error in that trial court refused to instruct that entrapment could result from the conduct of law enforcement officers *or their agents*. The court found no error in trial court's refusal to instruct per defendant's request. Further, the court said that defendant enjoyed the benefit of an instruction to which he was not entitled in that there was no evidence of entrapment by law enforcement officers and the one person who did persuade defendant to take part in the robbery was acting *pro se*.

d. *Credibility Instruction.* In *State v. Nepple*,[599] the jury was instructed that defendant's testimony was to be considered "like that of any other witness."[600] The jury was also told not to discredit defendant's testimony because he was charged with a crime. The supreme court objected to the fact that defendant was singled out in a separate "credibility instruction." The court said that "instructions relating to the credibility of a witness should be general and apply equally to all of the witnesses . . . alike."[601]

e. *Insanity—M'Naghten Rule.* In *State v. Thomas*,[602] the court instructed the jury that it could acquit defendant by reason of insanity if it found that his act of homicide "was caused by mental disease or unsoundness which dethroned, overcame or swayed his reason and judgment with respect to that act to the extent that it destroyed his power to rationally comprehend the nature and consequences of his act, *that is, to know that the particular act was wrongful*."[603] On appeal, defendant urged that trial court's instruction was erroneous in that it equated two standards for determining insanity which should be connected by the disjunctive. The supreme court agreed and held that if the conditions stated above destroyed defendant's power to rationally comprehend the nature and consequences of his act *or* to know that the act was wrongful, then the jury could acquit him by reason of insanity.

f. *Jury Nullification.* In *State v. Willis*,[604] defendant was convicted of soliciting.[605] Defendant requested instructions which would have informed the jury

596. *Id.* at 651.
597. *Id.* *See* text accompanying notes 120-26 *supra.*
598. 210 N.W.2d 600 (Iowa 1973).
599. 211 N.W.2d 330 (Iowa 1973).
600. *Id.* at 332.
601. *Id.*
602. 219 N.W.2d 3 (Iowa 1974).
603. *Id.* at 5-6.
604. 218 N.W.2d 921 (Iowa 1974).
605. IOWA CODE § 724.2 (1973).

that it could acquit defendant even if it thought she was guilty as charged. The instructions would have advised that trial court instructions were only advisory and not binding, and that the jury could acquit defendant if it believed the solicitation law was contrary to the " 'conscience of the community.' "[606]

Defendant's requested instructions were an expression of what is called the doctrine of jury nullification. The court said that while the jury has the power to disregard trial court's instructions, it does not have the right to do so. The court pointed out that the matter is specifically controlled by statute[607] and that the doctrine of jury nullification has been rejected or sharply criticized in every jurisdiction which ever recognized it.

In holding that the trial court properly refused to give defendant's requested instructions, the court said:

> Jury nullification exalts the goal of particularized justice above the ideal of the rule of law. We are persuaded the rule should not be subverted. A central theme in our constitutional system is that no man is above the law and all are equally accountable to it. The people are sovereign, but they exercise their sovereignty through government rather than juries.[608]

g. *Lesser Included Offense.* "The fact that defendant may have committed two separate crimes and that he could have been prosecuted for either or both does not make one an included offense of the other."[609] A lesser included offense is established in a legal sense when the elements of that offense, coupled with one or more other elements, constitute the major offense charged. Before an instruction on the lesser included offense is required, however, it must be factually demonstrated that the major offense could not have been committed except for the commission of that which is asserted to be the lesser included offense.[610] There must be a "confluence" of the legal condition and the factual condition before one offense can be said to be a lesser included offense of another.[611]

In *State v. Grady*,[612] defendant was charged with and convicted of delivery of a controlled substance. On appeal, he urged that trial court erred in not submitting an instruction to the jury on the lesser included offenses of simple possession and possession with intent to deliver. The court determined that possession was not a necessary legal element of delivery. The court said: "It is conceivable a person might act as a broker in the drug trade, effecting delivery of a controlled substance by transfer of title or sale, without ever having possession of the material."[613] Such a " 'constructive transfer' " (delivery) would not involve possession. "Thus possession is not a legal element of delivery."[614]

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606. State v. Willis, 218 N.W.2d 921, 924 (Iowa 1974).
607. Iowa Code § 780.24 (1973).
608. State v. Willis, 218 N.W.2d 921, 925 (Iowa 1974).
609. State v. Arioso, 218 N.W.2d 920 (Iowa 1974). *See also* State v. Grady, 215 N.W.2d 213, 214 (Iowa 1974).
610. Everett v. Brewer, 215 N.W.2d 244, 246 (Iowa 1974).
611. State v. Grady, 215 N.W.2d 213, 214 (Iowa 1974).
612. *Id.* at 213.
613. *Id.* at 214.
614. *Id.*

In *State v. Arioso*,[615] defendant was convicted of going armed with intent. He urged that assault with intent to do great bodily injury is a lesser included offense thereof and that trial court erred in not submitting an instruction to that effect. The court concluded that while defendant may have committed two crimes, the one was not a lesser included offense of the other.[616]

In *Everett v. Brewer*,[617] the court set out two other rules concerning improper submission or omission of instructions on lesser included offenses. First, the court said that "[w]here a defendant has been convicted as charged of a major offense he cannot complain because a lesser offense was improperly submitted."[618] Second, the court said that after conviction of a major offense a defendant cannot "complain of the failure to submit an included offense if another included offense greater than the one omitted was submitted."[619]

h. *Multiple Admissibility of Evidence.* If evidence which is competent for one or more purposes is incompetent as to other inferences that might arise therefrom, then the party whose interest is to be protected should request an instruction that the jury should consider the evidence only for the allowed purpose.[620] In *State v. Jensen*,[621] a police officer gave defendant a breath test to determine whether he was intoxicated. The officer did not first offer a blood test as required by *Code* section 321B.3.[622] Consequently, the result of the breath test was inadmissible to show intoxication. On appeal, the state urged that the evidence was competent for another reason. The state contended that defendant's awkwardness in his attempt to take the breath test was indicative of his intoxication. The court rejected the state's "alternative relevancy" theory on the grounds that where the implied consent statute is not scrupulously followed, all evidence flowing from defendant's implied consent to be tested for intoxication must be excluded.[623] It is apparent that the court felt that the danger of misuse of the incompetent evidence by the jury was great and the value of the evidence according to its legitimate purpose was slight.[624] The trial court instructed the jury to disregard all evidence relating to blood or breath tests. However, on appeal, the court said that the instant situation was extreme and the prejudicial effect of the evidence would probably remain; the exclusionary instruction was insufficient to guarantee absence of prejudice.

i. *Presumption of Innocence.* In instructing concerning the presumption of innocence, the trial court in *State v. Robinette*[625] told the jury that the presumption followed defendant through the trial and " '*protects him from a conviction* until his guilt has been established . . . .' "[626] On appeal, defendant urged that

615. 218 N.W.2d 920 (Iowa 1974).
616. *Id.*
617. 215 N.W.2d 244 (Iowa 1974).
618. *Id.* at 248.
619. *Id.*
620. State v. Jensen, 216 N.W.2d 369 (Iowa 1974).
621. *Id.*
622. *See* text accompanying notes 368-78 *supra.*
623. *Id.*
624. State v. Jensen, 216 N.W.2d 369, 373 (Iowa 1974).
625. 216 N.W.2d 317 (Iowa 1974).
626. *Id.* at 318.

the italicized words suggested a burden of proof on his part. The court simply concluded that such an inference could not be deduced.

j. *Presumption of Intoxication.* In *State v. Prouty*,[627] the court instructed the jury that the presence of a given amount of alcohol in the blood of a person operating a motor vehicle on the public highways should be presumptive evidence that such person was under the influence of an alcoholic beverage. The court further instructed that the above rule allowed an inference that the person was under the influence if the jury should determine that the person, while driving an automobile on the public highways, had the given amount of alcohol in his blood. Also, the court instructed that the above inference was a rebuttable one. Defendant objected that the above described instructions took away his presumption of innocence. On appeal, the court agreed and defendant's conviction was reversed. The same instructions had required previous reversals.[628] The court said that the instruction was not helped by the fact that other instructions made it clear that the state must carry the burden of proving defendant's guilt.

k. *Reasonable Doubt.* In *State v. Boyken*,[629] the jury was instructed that " '[a] reasonable doubt may arise from the evidence in the case or it may arise from a lack or failure of evidence. . . .' "[630] On appeal, defendant urged error in that the instruction did not inform the jury that a reasonable doubt may arise only from the lack or failure of evidence *produced by the state.* Defendant argued that, in following the instruction, the jury "could have impermissibly considered lack of evidence on the part of defendant; and further, the instruction amounted to a prejudicial reference to defendant's failure to testify and present evidence in his own behalf."[631] The supreme court agreed that reference to a lack or failure of evidence should be limited to the lack or failure of the state's evidence. Defendant's conviction was reversed.

C. *Jury Deliberations*

1. *Recalling the Jury from Deliberations—No Record of Objection*

In *State v. Robinette*,[632] the trial court inquired as to the status of jury deliberations and defendant assigned this as error on appeal. The court found that defendant was precluded from raising the issue on appeal because the matter was not raised at trial.

2. *Separation of Jury During Deliberations*

In *State v. Johnson*,[633] defendant asserted that the jury separated during

627. 219 N.W.2d 675 (Iowa 1974).
628. State v. Hansen, 203 N.W.2d 216 (Iowa 1972); State v. Sloan, 203 N.W.2d 225 (Iowa 1972).
629. 217 N.W.2d 218 (Iowa 1974).
630. *Id.* at 219.
631. *Id.*
632. 216 N.W.2d 317 (Iowa 1974).
633. 216 N.W.2d 337 (Iowa 1974).

the deliberation period without the authorization of the trial court. The court said that the only thing in the record relating to defendant's contention was the trial court's determination that the jury should be provided with overnight lodging. The court said that this was a matter resting within the trial court's discretion. Also, the court said that there was no evidence of "untoward" conduct by any juror during their absence from the courthouse.

3. *Private Communication with a Juror by the Court*

The matter of *State v. Cowman*[634] has already been discussed herein and will not be further explored here.[635]

4. *Allowing the Jury to Take Exhibits to the Jury Room*

In *State v. Shea*,[636] trial court allowed certain exhibits to be taken to the jury room. The court said that this was an abuse of discretion because the exhibits "could not have aided the jurors in properly considering and weighing issues in the case."[637] The exhibits, some capsules, and other substances were not identifiable by the state chemist and were submitted along with some identified controlled substance exhibits. The court said that a reversal was not required because it did not appear that the defendant was prejudiced by their submission; the court said that it was apparent that the jury was not swayed by the presence of the exhibits. Further, the jury was told to consider only the identified marijuana and LSD exhibits as controlled substances (defendant was charged with possession of a controlled substance).

D. *Sentencing*

1. *Duty and Scope of Inquiry of Trial Court*

In fixing sentence, it is the duty of trial court to ascertain all facts, whether in or out of the record, that will assist it in the proper exercise of its sentencing discretion.[638] The sentence imposed should fit both the crime and the individual.[639] "To pass sentence intelligently, a trial court needs full information about the accused, whether that information derives from events prior or subsequent to the crime presently charged."[640] Matters which trial courts might consider in determining proper sentence include the nature of the offense, age of defendant, his character, and his potential for rehabilitation.[641] Accordingly, the court in *State v. Summers*[642] considered "defendant's prior difficulties with the

634. 212 N.W.2d 420 (Iowa 1973).
635. *See* text accompanying notes 529-30 *supra*.
636. 218 N.W.2d 610 (Iowa 1974).
637. *Id.* at 615.
638. State v. Stakenburg, 215 N.W.2d 265, 267 (Iowa 1974). State v. Banks, 213 N.W.2d 483, 485 (Iowa 1973).
639. State v. Banks, 213 N.W.2d 483, 487 (Iowa 1973).
640. State v. Stakenburg, 215 N.W.2d 265, 266 (Iowa 1974).
641. *Id.*
642. 219 N.W.2d 26 (Iowa 1974).

law."[643] In *State v. Banks*,[644] trial court properly considered defendant's juvenile record, his history of car theft involvement, and an attempted assault by defendant. A defendant's prior convictions may be considered by the trial court in its determination of proper sentence.[645] In *State v. Stakenburg*,[646] defendant urged that trial court should not have considered defendant's post-escape conviction for kidnapping in fixing his sentence for the crime of escape. Per the standards set out above, the court found defendant's assertion without merit.

2. *Length of Sentence*

a. *Sentence Claimed to be Excessive.* The general rule is that where a sentence does not exceed the statutory maximum, it will not be set aside except upon a showing of abuse of discretion by the sentencing judge.[647] Trial court's discretion should be exercised according to the guidelines contained in section one (1) of this division and the fact that a sentence appears harsh on its face is not determinative of abuse of discretion.[648]

b. *Sentence Claimed to be Cruel and Unusual.* In *State v. Waterman*,[649] the court reaffirmed the proposition that sentence within the range of penalties prescribed in a statute generally does not constitute cruel and unusual punishment. Also, the court rejected an argument that a sentence was cruel and unusual because it would result in defendant's imprisonment until he was ninety-six (96) years old.[650]

3. *Presentence Reports*

a. *Proper Use.* The proper use of presentence reports by the trial court is presumed. In the absence of evidence to the contrary it must be assumed that the trial court did not consider mere rumor, speculation, or conjecture in determining sentence.[651]

b. *Availability to Defendant.* "Presentence reports are documents which are not required to be made available to defendant as a matter of right."[652] The court noted that inspection of the presentence report by defendant was not presently constitutionally mandated.

4. *Indeterminate Sentencing*

Code section 789.13, commonly known as the Indeterminate Sentencing

643. *Id.* at 27.
644. 213 N.W.2d 483 (Iowa 1973).
645. State v. Waterman, 217 N.W.2d 621, 623 (Iowa 1974).
646. 215 N.W.2d 265 (Iowa 1974).
647. State v. Summers, 219 N.W.2d 26 (Iowa 1974); State v. Banks, 213 N.W.2d 483 (Iowa 1973).
648. State v. Banks, 213 N.W.2d 483, 486 (Iowa 1973).
649. 217 N.W.2d 621 (Iowa 1974).
650. State v. Russell, 216 N.W.2d 355, 356 (Iowa 1974).
651. State v. Waterman, 217 N.W.2d 621, 623 (Iowa 1974).
652. *Id.* at 624.

Statute, provides that when a person is convicted of a felony, the court shall not impose a fixed-term sentence. The statute further provides that the term of ordered imprisonment "shall not exceed the maximum term provided by law for the crime of which the prisoner was convicted."[653] By its terms, the statute does not apply to the crime of escape. This was reaffirmed in *State v. Stakenburg*.[654] Neither does the statute apply to the crime of rape.[655]

5. *Habitual Criminal*

Code section 747.5 provides that one who at the time of conviction has been twice previously sentenced and committed to prison for terms of not less than three years shall, upon the next subsequent conviction of a felony in this state, be deemed to be a habitual criminal and shall be sentenced according to the terms of the statute. *State v. Goodwin*[656] reaffirmed that the statute does not define a separate and distinct crime, and that "the allegation of prior convictions is made only for the purpose of determining the penalty to be imposed for the primary offense."[657] The occasion of the comment in *Goodwin* was defendant's allegation that trial court should have complied with the guidelines of *State v. Sisco*[658] in determining the applicability of *Code* section 747.5 to defendant. The court said *Sisco* "makes no requirement for interrogation of an accused regarding admissions of prior convictions as they bear on the penalty to be imposed after conviction of the crime charged."[659]

6. *Duty of Trial Court to Pronounce Sentence and Enter Judgment Consistent with Verdict*

In *State v. Sullivan*,[660] the trial court sentenced a defendant for a lesser crime than that for which he was convicted. The state sought review of the matter by writ of certiorari. The state urged that respondent acted illegally in failing to sentence defendant according to the crime for which he was found guilty. In effect, the state said, respondent "entered a judgment notwithstanding the verdict and thereby acted illegally."[661] The supreme court agreed. The court said that respondent's action was tantamount to an acquittal of the greater offense and that "[a]fter return of a guilty verdict in a criminal prosecution the trial court is without authority to enter an acquittal."[662] The court said respondent should have pronounced sentence and entered judgment consistent with the crime for which defendant was found guilty.

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653. Iowa Code § 789.13 (1973).
654. 215 N.W.2d 265 (Iowa 1974).
655. State v. Banks, 213 N.W.2d 483, 486 (Iowa 1973).
656. 212 N.W.2d 399, 401-02 (Iowa 1974).
657. *Id.* at 402.
658. 169 N.W.2d 542 (Iowa 1969). *See* text accompanying note 175 *supra.*
659. State v. Goodwin, 212 N.W.2d 399, 402 (Iowa 1974).
660. 215 N.W.2d 491 (Iowa 1974).
661. *Id.* at 493.
662. *Id.*

E. *Postconviction Developments*

1. *Postconviction Relief—Iowa Code*

a. *Scope and Limits of Postconviction Relief.* The limits of postconviction relief pursuant to *Code* chapter 663A are defined in *Code* section 663A.2. However the availability of relief pursuant to this provision is curtailed by the rule that the statute "is ordinarily not available to correct errors which should have been (but were not) raised at some previous stage of the proceedings."[663] In *Carstens v. Rans*,[664] petitioner urged that the trial court erred in failing to order a competency hearing before commencing her trial for murder. The court pointed out that petitioner had failed to urge this as error on the appeal from her conviction. The court said that petitioner was attempting to use the postconviction relief act as a substitute for direct appeal. To allow this, the court said, "would permit a defendant to submit multiple grievances piecemeal rather than by a single comprehensive appeal."[665] Since the matter should have been (but was not) raised on direct appeal, the court held that petitioner has not stated grounds upon which postconviction relief could be granted.

In *State v. Halsne*,[666] defendant's probation was revoked and he was ordered to serve previously imposed sentences. Defendant appealed, urging procedural error in the termination of his probation. He did not challenge the legality of his conviction. The court said that the notice of appeal would not permit a review of the procedure whereby defendant's probation was revoked. The court noted that the postconviction relief act, by its terms, was available to any person wishing to challenge an alleged unlawful revocation of probation, parole, or conditional release. The court held that defendant's exclusive remedy was through *Code* chapter 663A procedure.

The trial court in *Allen v. State*[667] disclaimed jurisdiction to review, via the postconviction relief act, prison disciplinary proceedings whereby petitioner's good and honor time was forfeited. On appeal, the trial court was upheld. The supreme court held that petitioner's remedy was not through the postconviction relief act, but by way of the writ of habeas corpus.[668]

b. *Implementation of the Statute.*

i. *Duty of State to Supply Record.* If an application for postconviction relief is not " 'accompanied by the record of the proceedings challenged therein, the respondent shall file with its answer the record or portions thereof that are material to the questions raised in the application.' "[669] In *Allen v. State*,[670]

663. Carstens v. Rans, 210 N.W.2d 663, 664 (Iowa 1973).
664. *Id.*
665. *Id.* at 665.
666. 219 N.W.2d 657 (Iowa 1974).
667. 217 N.W.2d 528 (Iowa 1974).
668. *Id.* at 531.
669. *Id.* at 530.
670. 217 N.W.2d 528 (Iowa 1974).

petitioner challenged trial court compliance with *State v. Sisco*[671] in accepting his guilty plea. Petitioner furnished scanty proof in this regard. However, the court said that the insufficiency stemmed directly from the state's failure to provide material portions of the record which had not accompanied petitioner's application.

ii. *Necessity of Evidentiary Hearing and Appointing Counsel for Indigents.* Whether an attorney should be appointed to represent an indigent postconviction applicant is a matter resting in the sound discretion of the trial court.[672] If construed in light most favorable to him, petitioner's application for postconviction relief presents the possibility of a substantial question of law or fact, then counsel should be appointed. In *Furgison v. State*,[673] petitioner requested appointment of counsel in connection with his application for postconviction relief. Counsel was not appointed and petitioner's application was dismissed without an evidentiary hearing upon trial court's determination that petitioner was not entitled to postconviction relief. On appeal, the court determined that most of petitioner's claimed errors had already been decided adversely to him in the appeal of his conviction. The court also determined that petitioner's remaining alleged error presented no substantial issue of law. Under these circumstances, failure to hold an evidentiary hearing and failure to appoint counsel for petitioner was not reversible error.

iii. *Default.* In *Furgison v. State*,[674] petitioner demanded an entry of default because the state did not make a timely response to his application for postconviction review. Petitioner's default demand was overruled. This action was affirmed on appeal. After some background discussion on default, the court concluded that "default procedures are inconsistent with and would serve no useful purpose in our postconviction review process."[675]

iv. *Duty of Court to Make Findings of Fact and Conclusions of Law.* A specific requirement of the postconviction relief act is that the trial court "make specific findings of fact, and state expressly its conclusions of law relating to each issue presented."[676] In *Allen v. State*,[677] the court held that this provision "should be complied with even where . . . the trial court believes the petitioner to be on unsound legal ground. The findings should nevertheless be made for a proper disposition on review."[678]

c. *Scope of Review.* The review of the supreme court is not de novo. The court is bound by the findings of the trial court which are supported by substantial evidence.[679]

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671. 169 N.W.2d 542 (Iowa 1969). *See* text accompanying note 175 *supra.*
672. Furgison v. State, 217 N.W.2d 613 (Iowa 1974).
673. *Id.*
674. *Id.*
675. *Id.* at 618.
676. IOWA CODE § 663A.7 (1973).
677. 217 N.W.2d 528 (Iowa 1974).
678. *Id.* at 531.
679. Furgison v. State, 217 N.W.2d 613, 615 (Iowa 1974); Michels v. Brewer, 211 N.W.2d 293, 294 (Iowa 1973).

2. *Accomodation Hearing*

Pursuant to *Code* section 204.410, any person convicted of delivery of a controlled substance or possession with intent to deliver a controlled substance (both crimes are felonies) is entitled to a postconviction hearing to determine whether the offense was committed only as an accomodation to another. If it is determined that defendant acted only in accomodation, he shall be sentenced as though he had been found guilty of mere possession of a controlled substance (a misdemeanor).[680] In an "accomodation hearing," there is no right to a jury determination of whether defendant's crime was committed as an accomodation; the court is the trier of fact and its findings have the effect of a jury verdict.[681] It is defendant's burden to show accomodation by clear and convincing evidence.[682] The trial court is not bound to accept evidence merely because it is not contradicted by other testimony.[683] The hearing procedure does not place any unconstitutional burdens on the accused.[684]

3. *Appeal*

a. *In General.* *Code* section 793.2 provides that appeal may be taken only from the final judgment and then only within sixty days thereafter. In a criminal case, the judgment is the sentence.[685] An appeal is taken and perfected by serving a notice of appeal on the adverse party or his attorney and by filing proof of service and the notice of appeal with the clerk of the district court.[686]

These requirements are jurisdictional and noncompliance requires a dismissal. In *State v. Clayton*,[687] two notices of appeal were filed on behalf of defendant. The first one was not served on the county attorney. The second one was not filed within the sixty day limit. The court said both attempts to appeal fell short of the requirements of *Code* section 793.4. Defendant's appeal was dismissed.

In *State v. Light*,[688] defendant was convicted of speeding in justice of the peace court. He appealed to the district court and made a demand for jury trial which was overruled. Defendant filed notice of appeal from that ruling. On appeal, the court dismissed defendant's appeal because no final judgment on defendant's case had been entered in the district court. The court said: "Interlocutory appeal is prohibited in criminal cases."[689]

b. *Appeal by the State.* In criminal cases, an appeal is permitted by the state only when the resolution of questions of law involved will be "beneficial to the

680. *Iowa Code* section 204.410 provides that an accommodation offender shall be sentenced "as if he had been convicted of a violation of section 204.401, subsection 3." *Iowa Code* section 204.401 provides for a misdemeanor sentence for its violation.
681. State v. Deanda, 218 N.W.2d 649 (Iowa 1974); State v. Engeman, 217 N.W.2d 638 (Iowa 1974).
682. Iowa Code § 204.410 (1973).
683. State v. Deanda, 218 N.W.2d 649, 652 (Iowa 1974).
684. State v. Vietor, 208 N.W.2d 894 (1974).
685. State v. Clayton, 217 N.W.2d 685, 687 (Iowa 1974).
686. Iowa Code § 793.4 (1973).
687. 217 N.W.2d 685 (Iowa 1974).
688. 218 N.W.2d 927 (Iowa 1974).
689. *Id.*

bench and bar as a guide in the future."[690] According to that standard, the court on three occasions dismissed appeals by the state. In one case, the question of law had been settled by the legislature, thus eliminating the need for an opinion by the court.[691] In another case, the court said a prior opinion of the court had settled all questions of law raised by the state's appeal.[692] In the last case, the court dismissed the appeal because it involved only a factual review.[693] The court said that one of the reasons for limiting the right to appeal by the state was because a judgment in favor of the defendant could not be affected by the outcome.[694]

c. *Delayed Appeal.* In *Horstman v. State*,[695] petitioner, applied to the court for permission to take a late appeal. He had not filed a notice of appeal from his conviction. In reviewing the circumstances, the court found that defendant had delivered communications to the district court clerk "clearly expressing his desire to appeal and asking that a lawyer be appointed to represent him."[696] These papers bore dates within the time allowed for taking and perfecting an appeal. The court concluded it was "perhaps asking too much"[697] to require a person proceeding pro se to observe statutory rules relating to appeal. The court noted that each application for delayed appeal must be considered on an individual basis according to the circumstances of each case. Under the circumstances presented to them in *Horstman*, the court granted petitioner's application for delayed appeal.

F. *Retroactivity of Decisions and Statutes*

1. *Statutes*

Code section 247.12 provides with certain exceptions, that persons whose parole is revoked shall receive credit on their sentence for time spent on parole. The statute was amended to so provide in 1971. In *Horstman v. State*,[698] petitioner's parole was revoked in 1971, but before the amendment to *Code* section 247.12 became effective. Petitioner urged that the statute should be retroactively applied so as to credit his sentence for the time he had spent on parole.

The amendment to *Code* section 247.12 contained no statement of legislative intent. The court therefore examined the application of the old rule to determine the extent to which it affected the " 'integrity of the fact-finding process,' " or the extent to which it produced a " 'clear danger of convicting the innocent.' "[699] The court concluded that there was no danger that petitioner

690. State v. Warren, 216 N.W.2d 326, 327 (Iowa 1974).
691. *Id.*
692. State v. Kessler, 213 N.W.2d 671, 672-73 (Iowa 1973).
693. State v. Deets, 217 N.W.2d 639, 640 (Iowa 1974).
694. State v. Warren, 216 N.W.2d 326 (Iowa 1974); IOWA CODE § 793.9 (1973).
695. 210 N.W.2d 427 (Iowa 1973).
696. *Id.* at 429.
697. *Id.*
698. *Id.*
699. *Id.* at 429.

was denied a fair trial according to either of the above standards since the application of the rule involves circumstances occurring *after* trial and conviction.[700] The court also said: "We are convinced the legislature did not mean to distrub the countless cases in which parole revocations had been processed by rules long established and relied on. If the legislative intent were otherwise, it should have been, and undoubtedly would have been, specifically expressed."[701]

2. *Decisions*

In *Morrissey v. Brewer*,[702] the United States Supreme Court held that a parole may not be revoked without notice or hearing. In *Horstman v. State*,[703] petitioner's parole was revoked without a hearing, but it was so revoked prior to the *Morrissey* decision. Petitioner urged that *Morrissey* should be retroactively applied. The court dismissed petitioner's argument with the observation that language in the *Morrissey* decision specifically limited it to future revocations.[704]

In two instances the court adopted new standards involving evidentiary matters.[705] In both cases, the application of the new standards was limited to 1) the particular case then under consideration; 2) to all cases then on appeal or appealable where a proper trial court record had been made; 3) and to all cases subsequently tried.[706]

In the original appeal of his conviction, petitioner in *Everett v. Brewer*[707] had urged the court to hold that trial court erred in refusing to submit the offense of operating a motor vehicle without consent[708] as included within the offense of larceny of a motor vehicle.[709] On that occasion, the court refused petitioner's contention and affirmed his conviction.[710] However, the court, in another case, subsequently approved the argument which had been previously urged by petitioner and overruled its decision filed in petitioner's original appeal. On application for postconviction relief, petitioner sought the retroactive application of the decision which adopted his previously urged position. The court said: " 'The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect

700. *Id.*
701. *Id.*
702. 408 U.S. 471 (1971).
703. 210 N.W.2d 427 (Iowa 1973).
704. *Id.* at 428.
705. State v. Martin, 217 N.W.2d 536 (Iowa 1974) (declaring a new policy concerning the extent of cross-examination as to prior felony convictions; *see* text accompanying note 337 *supra*); State v. Mullen, 216 N.W.2d 375 (Iowa 1974) (changing the entrapment test from the "subjective" test to the "objective" test; *see* text accompanying notes 120-126 *supra*).
706. State v. Martin, 217 N.W.2d 536, 542 (Iowa 1974); State v. Mullen, 216 N.W.2d 375, 382 (Iowa 1974).
707. 215 N.W.2d 244 (Iowa 1974).
708. IOWA CODE § 321.76 (1973).
709. IOWA CODE § 321.82 (1973).
710. State v. Everett, 157 N.W.2d 144 (Iowa 1968).

on the administration of justice of a retroactive application of the new standards.'"[711] In applying these tests, the court denied petitioner's request to retroactively apply the decision which had adopted his previously urged argument. The court noted especially that the subject of the changed rule was not a constitutional or a fundamental right.[712]

711. Everett v .Brewer, 215 N.W.2d 244, 248 (Iowa 1974).
712. *Id.*