SUPREME COURT NO. 19-1509
POLK COUNTY NO. AGCR325199

IN THE SUPREME COURT OF IOWA

STATE OF IOWA
Plaintiff-Appellee,

v.

JAMEESHA RENAE ALLEN
Defendant-Appellant.

ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
HONORABLE DAVID PORTER, DISTRICT COURT JUDGE

FINAL BRIEF FOR APPELLANT

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PROOF OF SERVICE & CERTIFICATE OF FILING

On September 2, 2020, I served this brief on the Appellant at her last known address in Des Moines and all other parties by EDMS to their respective counsel:

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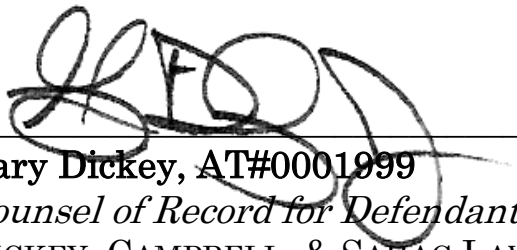
I further certify that I did file this proof brief with the Clerk of the Iowa Supreme Court by EDMS on September 2, 2020.



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ROUTING STATEMENT

Transfer to the court of appeals is appropriate.

STATEMENT OF THE CASE

Following a three-day trial, a jury convicted Jameesha Renae Allen of one count of Assault While Using or Displaying a Dangerous Weapon in violation of Iowa Code section 708.2(3). (App. at 14; 16). The district court imposed a two-year suspended sentence, a two-year term of probation, and a $625 fine. (App. at 23). Allen timely filed a notice of appeal. (App. at 28).

STATEMENT OF THE FACTS

On February 3, 2019, a person later identified as Desean Waldrip called 911 to report that somebody had just "busted [his] car windows" and "stabbed [him] on Welbeck Road" in Des Moines. (Ex. 1 at 0:02). Waldrip said that he was being chased by three guys and a girl who had "bats and all types of stuff." (Ex. 1 at 0:12). He gave his initial location as the Dollar General store near Welbeck Road. (Ex. 1 at 0:15). Waldrip told the dispatcher there were "five of them" and they were "still chasing [him]." (Ex. 1 at

1:55). According to Waldrip, the individuals chasing him were in two cars—a white Ford and a blue car. (Ex. 1 at 2:10).

While still on the phone with the 911 dispatch, Waldrip fled the Dollar General and reported that a female driver "just tried to run me over. . . . They're trying to kill me." (Ex. 1 at 3:20). Video from a nearby Subway restaurant captured footage of a blue car hopping over a curb in the drive-through and knocking Waldrip to the ground. (Ex. 5). When asked if he was injured, he told the dispatcher that he was "bleeding" and "damn near dying" with injuries to his "elbow, [his] hands—everything." (Ex. 1 at 4:50). Waldrip eventually made his way to a nearby Hy-Vee grocery store. (Ex. 1 at 5:10). He told the dispatcher that the people chasing him were still in the "parking lot sitting there circling." (Ex. 1 at 5:28). While waiting for the police to arrive, Waldrip explained to a Hy-Vee manager that "he just got ran over by his girlfriend's mom." (Vol. II Trial Tr. at 27). Des Moines Police Officer Mark Stuempfig subsequently arrived at the scene. (Vol. II Trial Tr. at 13). Waldrip refused medical attention and walked

away without cooperating with the investigation. (Vol. II Trial Tr. at 13-14).

On April 2, 2019, the State filed a trial information charging Allen with third-degree criminal mischief and assault causing bodily injury. (App. at 10). In the same trial information, the State charged Allen's mother, Sheila Thomas, with assault while displaying a dangerous weapon. (App. at 10). The State later dismissed the charge against Thomas and proceeded to trial against Allen. On the second day of trial, the State filed an amended Trial Information dismissing the original counts against Allen and substituting a single count of Assault Using or Displaying a Dangerous Weapon in violation of Iowa Code sections 708.1 and 708.2(3). (App. at 14). The jury found Allen guilty. (App. at 16). The district court imposed a two-year suspended sentence, a two-year term of probation, and a $625 fine. (App. at 23). This appeal followed. (App. at 28).

ARGUMENT

I. THE DISTRICT COURT ERRED IN ALLOWING THE STATE TO AMEND THE TRIAL INFORMATION DURING TRIAL TO INCLUDE THE NEW CHARGE OF ASSAULT WITH A WEAPON

Preservation of Error

Allen preserved error by contemporaneously objecting to the State's motion to amend. (Vol. I Trial Tr. at 4).

Standard of Review

The standard of review is for errors at law. *State v. Maghee*, 573 N.W.2d 1, 5 (Iowa 1997).

Merits

A. Applicable legal principles

Iowa Rule of Criminal Procedure 2.4(8) governs amendments to trial informations and provides in part:

> The court may, on motion of the state, either before or during the trial, order the indictment amended so as to correct errors or omissions in matters of form or substance. Amendment is not allowed if substantial rights of the defendant are prejudiced by the amendment, or if a wholly new and different offense is charged.

Iowa R. Crim. P. 2.4(8).[1] An amendment prejudices the substantial rights of the defendant if it creates such surprised that the defendant would have to change trial strategy to meet the

[1] The term "indictment" embraces the trial information, and all provisions of law applying to prosecutions on indictments apply also to informations. Iowa R. Crim. P. 2.5(5).

charge in the amended information." *Maghee*, 573 N.W.2d at 6. Likewise, an amendment adds a new and different offense if the new charge has different elements. *State v. Sharpe*, 304 N.W.2d 220, 223 (Iowa 1981).

The decision in *Sharpe* illustrates how Rule 2.4(8) operates. In *Sharpe*, the State originally charged the defendant by trial information with second-degree murder. *Id.* at 222. It later amended the trial information and substituted the crime of first-degree murder. *Id.* The Iowa Supreme Court held that the amendment was erroneous. *Id.* at 225. In particular, the court found relevant the fact that first-degree murder contains elements not found in second-degree. *Id.* at 223. Additionally, the court also noted that "there is a great disparity in punishment" between the two charges. *Id.* Accordingly, the court concluded that it would be "difficult to say that first-degree murder is not a 'wholly new and different offense' from second-degree murder." *Id.*

B. The State's amendment on the first day of trial charged a wholly new and different offense and prejudiced Allen's substantial rights

The original trial information, filed on April 2, 2019, charged Allen with two counts—third-degree criminal mischief and assault causing bodily injury. (App. at 10). On the morning of trial, the State sought to amend the trial information to substitute willful injury for criminal mischief in Count I and change the assault causing bodily injury to assault with a dangerous weapon in Count II. (Vol. I Trial Tr. at 3-22).[2] The trial court denied the proposed amendment to substitute willful injury for criminal mischief on the basis that it would constitute a new charge and prejudice Allen by exposing her to a felony rather than a serious misdemeanor. (Vol. I. Trial Tr. at 18-19). The court, however, allowed the amendment to Count II to charge Allen with assault while displaying a weapon:

> But for those almost exact same reasons, I will allow the amendment of the trial information as it relates to the assault while displaying a weapon, specifically the vehicle.
>
> That, then, takes us to *State v. Brisco*. In *State v. Brisco*, the Court noted, 'Here, as in *Maghee*, the amended trial information charged violations of the

[2] The prosecutor asserted at trial that he had filed an amended trial information six days before trial. (Vol. I. Trial Tr. at 4). The EDMS docket, however, does not reflect any such filing.

> same Code section and the same base prohibition and involved the same elements.'
>
> So while I don't find the elements of criminal mischief and willful injury to be sufficiently identical to allow an amendment, Ms. Siebrecht, I do find the amendment of assault causing bodily injury and assault while displaying a weapon to be substantially similar.
>
> Specifically, Iowa Code Section 708.1 defines assault. 708.2 defines the penalties for the assault. We're not transgressing over misdemeanor to felony level as we would have with the willful injury. Instead, we're going to a serious misdemeanor, effectively, to an aggravated misdemeanor.

(Vol. I Trial Tr. at 21-22).

The district court's ruling cannot be squared with *Sharpe*. There can be no meaningful doubt that assault causing bodily injury and assault with a dangerous weapon have different elements:

Assault Causing Bodily Injury	Assault with a Dangerous Weapon
Assaultive act	Assaultive act
Apparent ability	Apparent ability

Caused bodily injury	Display a dangerous weapon in a threatening manner

Compare Iowa Code § 708.2(2) *with* § 708.2(3). As explained in *Sharpe*, the Rule 2.4(8) provides "a relatively narrow view" of amendments to an indictment. *Sharpe*, 304 N.W.2d at 222-23 (noting the rule merely adopted the prior statutory law). Prior case law supports this view. *Id.* at 222. For example, the Iowa Supreme Court has previously held that the State could not amend a trial information charging escape to charge willful escape because the former did not require the element of intent. *Id.* (citing *State v. Gowins*, 211 N.W.2d 302, 306 (Iowa 1973)). Similarly, the court has held the State could not amend the charge in an information from forgery to uttering a forged instrument for the same reason. *Id.* (citing *State v. Hancock*, 164 N.W.2d 330, 336-37 (Iowa 1969)). From *Sharpe*, *Gowins*, and *Hancock*, it follows *a fortiori* that the State's amendment to the trial information ran afoul of Rule 2.4(8) because it substituted a new offense with different elements. *See State v. McLachlan*, 2014 Iowa App. LEXIS 941 at *7-9 (Iowa Ct. App. Oct. 1, 2014)

(explaining that offenses are different when the latter expands "criminal liability by charging a separate offense, with separate elements").

The State's proposed amendment also fails because Allen was substantially prejudiced in several ways. First, the amendment enhanced the penalty from a serious misdemeanor to an aggravated misdemeanor. Second, the amended charge materially changed the elements of the offense *on the first day of trial*. The prosecutor kept the amendment in his pocket for months as negotiation tool and waited until the very last moment to file it:

> THE COURT: Okay. As it relates to Count III, the assault while displaying a dangerous weapon, why are we now charging Ms. Allen with that effectively six days before trial when you had all those same facts on April 2?
>
> MR. STERBICK: I believe that we had a status conference only a matter of weeks ago. I believe we had the ability to conclude this without the need for trial. That did not proceed that way. The State didn't amend the trial information prior to that date in the belief that we could resolve this case.

(Vol. I Trial Tr. at 11). But, it was clear to both the State and Allen that the complaining witness, Desean Waldrip, was not

going to testify at trial. (Vol. I Trial Tr. at 27-28, 59-60). Indeed, the State did not even try to subpoena him for trial. (Vol. I Trial Tr. at 60). Thus, it was entirely reasonable for Allen to proceed to trial on the belief that the State would not be able to prove the bodily injury element in Waldrip's absence. A "defendant has a right to rely upon the acts alleged as constituting the offense with which he is charged and rest his defense upon a lack of proof by the State of the acts specified." *State v. Cooper*, 223 N.W.2d 177, 180 (Iowa 1974) (finding reversible error in allowing amendment at the close of evidence). Here, the State prejudiced Allen's right to rest her defense on a lack of proof of an assault involving a bodily injury. Accordingly, the court's error in allowing the amendment requires reversal.

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN ADMITTING SURVEILLANCE VIDEO EVIDENCE WITHOUT SUFFICIENT FOUNDATION

Preservation of Error

Allen preserved error by contemporaneously objecting to the State's admission of video evidence. (Vol. II Trial Tr. at 42; Vol. III Trial Tr. at 7, 28).

Standard of Review

Admission of demonstrative evidence is reviewed for abuse of discretion. *Hutchison v. American Family Mut. Ins. Co.*, 514 N.W.2d 882, 889-90 (Iowa 1994).

Merits

A. Applicable legal principles

In order for surveillance video to be admissible, it "must be authenticated." *State v. Deering*, 291 N.W.2d 38, 39 (Iowa 1980). A "proper foundation for the admission into evidence of a motion picture film demands only that the fidelity of the film's portrayal be established." *Id.* at 40. This is satisfied when "a witness to the event purportedly depicted by the film testifies that the film accurately portrays the event." *Id.* The "requirement of preliminary proof that the picture projected from the film be an accurate reproduction of the event which it depicts" provides ample "film falsification or misrepresentation." *Id.* at 41. A "proper foundation laid for the accuracy of what the film portrays obviates the need to establish a chain of custody to demonstrate its authenticity." *Id.*

B. The State failed to offer adequate foundation to allow the admission of the surveillance evidence from the Subway restaurant

At trial, the State called the assistant manager of a Subway restaurant located across the parking lot from the Hy-Vee to which Waldrip fled. (Vol. II Trial Tr. at 33, 37). During her testimony, the State introduced into evidence a surveillance video from the Subway drive-thru showing a blue car jump a median and purportedly knock Waldrip to the ground. (Ex. 5). To lay foundation for the exhibit's admission, the State engaged in the following litany:

> Q. Where was the vehicle you saw chasing him?
> A. It was directly behind him.
>
> Q. What kind of vehicle was it?
> A. I don't know the type, but it was a white four-door car.
>
> Q. Okay. Did you see a blue vehicle at all?
> A. I did after he successfully entered Hy-Vee.
>
> * * *
>
> Q. Now, the driveway -- the drive-through area of Subway, is that equipped with any sort of surveillance cameras or anything like that?
> A. Yes. There is a camera on the outside of the building facing the drive-through window.

Q. Okay. And do you know if that camera equipment was working that day?

A. I didn't know that camera was even there until a detective arrived.

Q. Okay. And what alerted you to the camera being there? Just walk us through that process.

A. The detectives asked if we had any surveillance video, and I didn't know that there was a camera there. So I -- he asked to talk to the owner, and the owner said, "Yeah –

* * *

Q. So, ultimately, you know now that there's a camera there?

A. Yes, I looked.

Q. And have you seen any footage of the camera working that day?

A. No.

Q. If you were to see a recording that was time dated and stamped from that day capturing that day, would you have any reason to disagree with its validity?

A. No.

MR. STERBICK: Your Honor, may I approach the witness?

THE COURT: You may.

MR. STERBICK: Let the record reflect I'm showing the witness what's been marked for identification purpose as State's Exhibit 5.

THE COURT: Okay.

Q. Do you recognize what we're looking at here?
A. Yes.

Q. What is that?
A. That's my driveway.

Q. How do you recognize it?
A. The yellow pole that everybody hits.

Q. Okay. Now, up here on the right are some numbers. Do you know what those represent?
A. Our store number, day, and time.

Q. And does this fairly and accurately represent the recording of that time and date?
A. Yes.

MR. STERBICK: Your Honor, the State offers Exhibit 5.

* * *

MS. SIEBRECHT: Your Honor, I would object as to foundation.

MR. STERBICK: Your Honor --

THE COURT: Counsel, why don't you approach.

(A sidebar was held.)

* * *

Q. Okay. You also testified yesterday that you saw a white car. You also saw a blue car; is that right?

A. Yes.

Q. I have --

MR. STERBICK: Your Honor, may I approach the witness?

THE COURT: You may.

MR. STERBICK: I'm going to refer to what's been marked for identification purposes as State's Exhibit 5. I'm now showing that to the witness.

(Exhibit 5 was played.)

BY MR. STERBICK:

Q. I'm pausing that at roughly two seconds. Do you see a man in that image?
A. Yes.

Q. Is that the same man that you saw running?
A. It looks to be.

Q. Okay. There's also what looks like a – correct me if I'm wrong, looks like a blue car in the video. Would you say that's the same car that you saw?
A. It looks similar, yes.

Q. Is this a fair and accurate depiction of both the car and the young man that you saw running?
A. Yes.

MR. STERBICK: The State offers Exhibit 5.

THE COURT: Objections?

MS. SIEBRECHT: Foundation, Your Honor, authentication.

THE COURT: Those objections are overruled. Exhibit 5 will be admitted.

(Exhibit 5 is received into evidence.)

* * *

Q. Okay. Do you know the young man in this picture?
A. No.

Q. Do you know the defendant sitting at defense counsel table?
A. No.

Q. We're just going off just your basic observations on February 3, 2019. *Did you see this event happen*?
A. No, I didn't.

(Vol. II Trial Tr. at 38-42; Vol. III Trial Tr. at 6-8)(emphasis added).

This colloquy was insufficient to establish foundation for the video. "A proper foundation for admission into evidence of a motion picture demands only that the fidelity of the film's portrayal be established." *Hutchison*, 514 N.W.2d at 890. Here, the witness's testimony failed to establish that the video was an

accurate portrayal. For starters, she did not know the camera even existed at the time of the events. Although she testified that she could authenticate the tape, she did not observe the event depicted in the video happen or know any of the people involved. (Vol. III Trial Tr. at 7-8). What she actually did observe—"a white four-door car" chasing "directly behind him"—is not depicted at all in the video. (Ex. 5; Vol. II Trial Tr. at 38). To the contrary, it is at odds with what she was asked to authenticate. Accordingly, the court abused its discretion in admitting the Subway video into evidence.

C. The State failed to offer adequate foundation to allow the admission of the surveillance evidence from Storage Mart

During trial, the State also introduced surveillance video from the Dollar General store and as well as the Storage Mart across the street during Detective Youngblut's testimony. (Vol. III Trial Tr. at 28, 32; Ex. 7, 8). With respect to both videos, Youngblut testified that they "fairly and accurately" depicted the events as they occurred on February 3rd. (Vol. III Trial Tr. at 28, 32). The problem, of course, is that Detective Youngblut was not

an eyewitness to any of the events on February 3rd. Indeed, he did not even become involved with the case until February 4th. (Vol. III Trial Tr. at 24). While he could properly testify about the chain of custody of the surveillance video, his testimony was not sufficient foundation to satisfy the standards of relevance and prejudice in Iowa Rules of Evidence 5.402 and 5.403. *Hutchison*, 514 N.W.2d at 890. Consequently, the trial court abused its discretion in admitting these videos as well.

III. ALLEN'S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE ADMSSION OF WALDRIP'S STATEMENTS TO LAW ENFORCEMENT ON THE BASIS THAT IT VIOLATED HER RIGHT TO CONFRONT HER ACCUSER

Preservation of Error

Allen's trial counsel initially objected to the admission of statements made by Desean Waldrip to law enforcement after his 911 call had concluded. (Vol. I Trial Tr. at 42-43). When the State sought to admit the statements during trial, however, she did not contemporaneously object. (Vol. II Trial Tr. at 13). Because Allen asserts this constitutes ineffective assistance of counsel, appellate

review is available notwithstanding trial counsel's failure to object. *State v. Ondayog*, 722 N.W.2d 778, 784 (Iowa 2006).

Standard of Review

Ineffective assistance of counsel claims are reviewed de novo. *Everett v. State*, 789 N.W.2d 151, 158 (Iowa 2010). Claims involving the Confrontation Clause are reviewed de novo. *State v. Shipley*, 757 N.W.2d 228, 231 (Iowa 2008).

Merits

A. Applicable legal principles

Both the United States Constitution and the Iowa Constitution preserve an accused's right "to be confronted with the witnesses against him." U.S. Const. amend. VI Iowa Const. art. I, § 10. The right to confrontation "prohibits the introduction of testimonial statements by a nontestifying witness, unless the witness is unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Ohio v. Clark*, ___ U.S. ___, 135 S. Ct. 2173, 2179 (2015). Under the Sixth Amendment, therefore, the fundamental question is whether the out-of-court statements were testimonial in nature. *See State v. Bentley*, 739

N.W.2d 296, 298 (Iowa 2007). "If the statements are testimonial, they are inadmissible against [the defendant] at trial; but if they are nontestimonial, the Confrontation Clause does not prevent their admission." *Id.* The burden is on the State to prove by a preponderance of the evidence that a challenged statement is nontestimonial. *State v. Schaer*, 757 N.W.2d 630, 635 (Iowa 2008).

Relying upon the decision in *Crawford v. Washington*, 541 U.S. 36 (2004), the Iowa Supreme Court has identified, at a minimum, four types of evidence that meet the definition of being testimonial: grand jury testimony, preliminary hearing testimony, former trial testimony, and statements resulting from police interrogations. *In re J.C.* , 877 N.W.2d 447, 452 (Iowa 2016). With respect to the last category, the United States Supreme Court has adopted the "primary purpose test." *Clark*, ___ U.S. at ___, 135 S. Ct. at 2179. Under the test:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such

> ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at ___, 135 S. Ct. at 2179-80. Under this test, statements made to a 911 operator during and shortly after a violent attack are not testimonial if the "primary purpose was to enable police assistance to meet an ongoing emergency." *Davis v. Washington*, 547 U.S. 813, 820, 828 (2006). But, statements made by a victim after being isolated from an attacker are testimonial. *Hammon v. Indiana*, 547 U.S. 813, 829-30 (2006). "The existence *vel non* of an ongoing emergency is not the touchstone of the testimonial inquiry." *Clark*, ___ U.S. at ___, 135 S. Ct. at 2180. "Instead, whether an ongoing emergency exists is simply one factor . . . that informs the ultimate inquiry regarding the 'primary purpose' of an interrogation." *Id.*

B. Admission of the accuser's statements to the police after they arrived at the scene violated Allen's right of confrontation

At trial, the prosecution introduced statements made by Waldrip to Officer Stuempfig upon his arrival to Hy-Vee:

> Q. So you arrive at Hy-Vee. I'm assuming you eventually arrive there.

A. Yes.

Q. What happened then?

A. As we arrived, I pulled up to the front doors of the Hy-Vee, which face east, and made contact right out front on the walkway by the front doors with an individual who was wearing a white T-shirt and had blood dripping from one of his hands. I got out and made contact with him. He claimed that he was the one that had contacted dispatch and claimed that he had just been hit by a car.

Q. You described his appearance briefly there. Were you able to identify who he was? Did you know who he was?

A. We were able to identify him as Desean Waldrip.

(Vol. II Trial Tr. at 13). Waldrip did not testify at trial, but Allen's trial counsel did not object to their admission during trial. This error was compounded by trial counsel's failure to object to Detective Youngblut's recitation of his conversations with Waldrip, which happened at least a day after the actual event:

> [Waldrip] told me its mom. . . . He says it was your mom. Desean said it was your mom in the white car chasing him. And you pulled up and talked to the woman. And the witnesses saw you talk to the woman. And the witnesses saw the white car hit him in front of Subway.

(Ex. 6-1 at 0:00:30; Ex. 6-2 at 0:00:28).

There is no meaningful dispute that introduction of these statements violated Allen's right of confrontation. In fact, the trial court previously ruled these statements were inadmissible because they were testimonial. (Vol. I Trial Tr. at 60). Accordingly, Allen's trial counsel owed her a duty to object. *See State v. Reynolds*, 746 N.W.2d 837, 845 (Iowa 2008) (finding counsel ineffective for failing to object to inadmissible evidence); ABA Standards for Criminal Justice for the Defense Function 4-1.5 Preserving the Record & 4-7.6 Presentation of Evidence (4th ed) (imposing a duty to object in ordered to challenge inadmissible evidence and preserve the record).

The State cannot prove beyond a reasonable doubt that the error was harmless. *State v. Griffin*, 576 N.W.2d 594, 597 (Iowa 1998). Although Allen admitted to Detective Youngblut that she was driving the blue car, Waldrip told the Hy-Vee manager that it was her mother that hit him in a white car. (Vol. II Trial Tr. at 28, 30, 38). The State's other eyewitness, the Subway manager, said that she saw a white car chasing Waldrip. (Vol. III Trial Tr. at 5-6). The only evidence showing Allen as the driver of the blue

car is when she was in the Hy-Vee parking lot, and her conduct in the video does not constitute an assault while displaying a dangerous weapon. (Ex. 3 at 0:00:30-0:01:12). Waldrip's inadmissible testimony, therefore, could have been viewed by the jury as evidence resolving conflicts in the video and testimonial evidence presented at trial. *State v. Paulson*, 2011 Iowa App. LEXIS 903 at *27 (Iowa Ct. App. Sept. 8, 2011) (explaining how inadmissible testimony may cause "jury to place inappropriate weight on [accuser's] version of the events"). At a minimum, the introduction of the inadmissible evidence is sufficient to undermine confidence in the outcome of the trial. *Id.* (finding trial counsel's errors in sex abuse trial prejudicial where the case "hinged on the relative truthfulness of the witnesses"). For this reason, Allen's trial counsel was ineffective for failing to object to the Confrontation Clause violation. Accordingly, her conviction must be reversed on this ground as well.

IV. THE PROSECUTOR'S UNSUPPORTED INSINUATION IN CLOSING ARGUMENT THAT WALDRIP DID NOT TESTIFY BECAUSE ALLEN PHYSICALLY THREATENED HIM VIOLATED HER DUE PROCESS RIGHT TO A FAIR TRIAL

Preservation of Error

Allen's trial counsel did not contemporaneously object to the prosecutor's insinuation in closing argument that Waldrip did not testify out of fear of physical retribution. (Vol. III Trial Tr. at 78). She did, however, raise the issue in her post-trial motion for a new trial. (App. at 18). Similarly, Allen filed a pro se motion for a new trial raising the issue. (App. at 19-20). The trial court considered the issue at the time of sentencing denied the motions. (08/16/19 Sentencing Hr'g Tr. at 9-10). Thus, the issue has been preserved for appellate review. *Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012) ("If the court's ruling indicates that the court *considered* the issue and necessarily ruled on it, even if the court's reasoning is 'incomplete or sparse,' the issue has been preserved"). To the extent that error was not preserved adequately, Allen asserts that her trial counsel committed ineffective assistance of counsel in which case appellate review is available notwithstanding trial counsel's failure to contemporaneously object. *Ondayog*, 722 N.W.2d at 784.

Standard of Review

The standard of review for Allen's ineffective assistance and due process claims is de novo. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001).

Merits

A. Applicable legal principles

In *State v. Graves*, 668 N.W.2d 860 (Iowa 2003), the Iowa Supreme Court explained that prosecutors have a special role in the criminal justice system. *Id.* at 869-70. A prosecutor is not an ordinary advocate because he or she owes "a duty to the defendant as well as the public" to see "that justice is done, not to obtain a conviction." *Id.* at 870; *see also State v. Plain*, 898 N.W.2d 801, 818 (Iowa 2017). A defendant's constitutional right to a fair trial is violated if a prosecutor fails to act in accordance with the special rule with which he or she is entrusted. *Plain*, 898 N.W.2d at 818. To establish a due process violation based prosecutorial behavior, a defendant must prove reckless misconduct resulting in prejudice. *Id.* at 818-19. In determining prejudice, we consider

> (1) the severity and pervasiveness of the misconduct; (2) the significance of the misconduct to the central issues in the case; (3) the strength of the State's evidence; (4) the use of cautionary instructions or other

> curative measures; and (5) the extent to which the defense invited the misconduct.

Graves, 668 N.W.2d at 869.

B. The prosecutor's invocation of "snitches get stitches or wind up in ditches" to explain Waldrip's failure to testify violated Allen's right to fair trial

The State's best eyewitness to the events on February 3rd, Desean Waldrip, refused to cooperate with law enforcement and the prosecution. Sensing the need to explain Waldrip's absence from trial, the prosecutor told the jury on rebuttal:

> I hold in my hands the jury instructions. Looking through them, there's not a single instruction that says you need to see or hear from the victim.
>
> Let's think about this case. There's a man running down the street with people after him chasing him. Something occurred to make that happen. We don't know what. Do we know anything about street justice? What happens to snitches? What happens?

(Vol. III Trial Tr. at 78). While the prosecutor did not say it completely, his rebuttal argument was intended to evoke the familiar adages that "snitches get stitches" or "snitches wind up in ditches." The clear implication from this statement was that Waldrip did not testify because Allen threatened him. Of course,

there is no factual basis in the record to support the insinuation that Allen threatened Waldrip if he cooperated with either law enforcement or the prosecution.

"The prosecutor's duty to the accused is to assure the defendant a fair trial by complying with the requirements of due process throughout the trial." *Graves*, 668 N.W.2d at 870. A prosecutor is entitled to some latitude during closing arguments in analyzing the evidence admitted in the trial . . . but may not suggest that the jury decide the case on "any ground other than the weight of the evidence" introduced at trial. *Id.* at 874. In short, a prosecutor "has no right to create evidence or to misstate the facts" in closing argument. *State v. Thornton*, 498 N.W.2d 670, 676 (Iowa 1993).

The prosecutor's rebuttal remarks were highly prejudicial on several levels. First, Allen's theory of defense at trial was that the State lacked evidence to meet its burden of proof—namely that Waldrip did not testify at trial. (App. at 30) ("A reasonable doubt is one that fairly and naturally arises from the evidence in the case, or *from the lack or failure of evidence produced by the*

State")(emphasis added). The prosecutor's response was to suggest that Allen was the reason that he did not testify, which has absolutely no support in the record. Second, the rebuttal argument implies that Allen has a propensity for committing threatening acts. As the Iowa Supreme Court has noted, this type of evidence "creates an acute risk they jury will resort to propensity or assume [an accused's] guilt based upon recent bad character as a way to resolve the irreconcilable, uncorroborated evidentiary dispute." *State v. Redmond*, 803 N.W.2d 112, 127 (Iowa 2011); *see also Old Chief v. United States*, 519 U.S. 172, 182 (1997) ("There is, accordingly, no question that propensity would be an 'improper basis' for conviction . . ."). Consequently, Allen is entitled to a new trial.[3]

CONCLUSION

For the reason set forth above, Jameesha Allen requests this Court reverse her convictions.

REQUEST FOR ORAL ARGUMENT

Counsel for Appellant requests to be heard in oral argument.

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[3] Alternatively, counsel was ineffective for failing to object to the prosecutorial misconduct. *Graves*, 668 N.W.2d at 882-84.

COST CERTIFICATE

I hereby certify that the costs of printing the Appellant's proof brief was $15.00, and that that amount has been paid in full by me.

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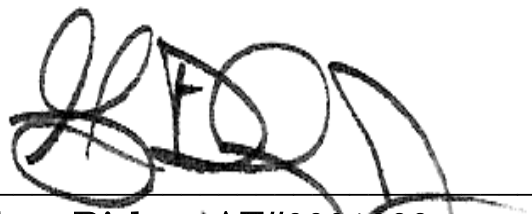

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