IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. KARI LEE FOGG, Defendant-Appellant.	)	S.CT. NO. 18-0483

APPEAL FROM THE IOWA DISTRICT COURT
FOR BOONE COUNTY
HONORABLE PAUL G. CRAWFORD, JUDGE (SUPPRESSION)
HONORABLE STEPHEN OWEN, ASSOCIATE JUDGE (TRIAL)

APPELLANT'S BRIEF AND ARGUMENT

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CERTIFICATE OF SERVICE

On the 10th day of January, 2019, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Kari Lee Fogg, 1532 3rd Street, Boone, IA 50036.

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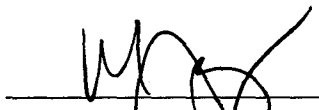

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page:

Constitutional Provisions:

Other Authority:

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. BY BLOCKING FOGG'S CAR IN THE ALLEY WITHOUT SUFFICIENT CAUSE, OFFICER FRAZIER VIOLATED FOGG'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS AGAINST UNREASONABLE SEIZURES, AND THE DISTRICT COURT ERRED IN DENYING FOGG'S MOTION TO SUPPRESS.

Authorities

State v. Wright, 441 N.W.2d 364, 366 (Iowa 1989)

State v. Tague, 676 N.W.2d 197, 201 (Iowa 2004)

State v. Turner, 630 N.W.2d 601, 606 (Iowa 2001)

U.S. Const. amend. IV

U.S. Const. amend. XIV

Iowa Const. Article I, Section 8

State v. Hoskins, 711 N.W.2d 720, 725-26 (Iowa 2006)

State v. Predka, 555 N.W.2d 202, 205 (Iowa 1996)

Whren v. United States, 517 U.S. 806, 810, 116 S.Ct. 1769, 1772, 135 L.Ed.2d 89, 95 (1996)

State v. Pals, 805 N.W.2d 767, 773–74 (Iowa 2011)

Terry v. Ohio, 392 U.S. 1, 23, 88 S.Ct. 1868, 1881, 20 L.Ed.2d 889, 907 (1968)

1. *Fogg was seized when Officer Frazier parked in front of her car, blocking her in the alley.*

State v. Tyler, 830 N.W.2d 288, 292 (Iowa 2013)

Florida v. Botstick, 501 U.S. 429, 437, 111 S.Ct. 2382, 2387 (1991)

U.S. v. Mendenhall, 446 U.S. 554, 554, 100 S.Ct. 1870, 1877 (1980)

State v. Kurth, 813 N.W.2d 270, 272 (Iowa 2012)

State v. Wilkes, 756 N.W.2d 838, 844 (Iowa 2008)

State v. Lowe, 812 N.W.2d 554, 570 (Iowa 2002)

2. *No reasonable suspicion of pending burglary.*

State v. Kreps, 650 N.W.2d 636, 641 (Iowa 2002)

State v. Heminover, 619 N.W.2d 353, 357 (Iowa 2000)

Illinois v. Wardlow, 528 U.S. 119, 123–24, 120 S.Ct. 673, 676, 145 L.Ed.2d 570, 576 (2000)

4 Wayne R. LaFave, Search and Seizure § 9.4(b), at 148 (3d ed. 1996)

3. *No reasonable suspicion of impaired driving.*

No Authorities

4. *Community caretaking does not apply.*

State v. Coffman, 914 N.W.2d 240, 245, 257 (Iowa 2018)

State v. Smith, 919 N.W.2d 1, 5 (Iowa 2018)

II. FOGG'S TRIAL ATTORNEY WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE STATE'S PROSECUTORIAL ERROR WHEN THE STATE DISPARAGED DEFENSE COUNSEL DURING CLOSING ARGUMENT.

Authorities

State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982)

State v. Bass, 385 N.W.2d 243, 245 (Iowa 1986)

State v. Goff, 342 N.W.2d 830, 838 (Iowa 1983)

State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004)

State v. Ondayog, 722 N.W.2d 778, 784 (Iowa 2006)

Gering v. State, 382 N.W.2d 151, 153-54 (Iowa 1986)

State v. Webb, 244 N.W.2d 332, 333 (Iowa 1976)

State v. Schlitter, 881 N.W.2d 380, 394 (Iowa 2016)

State v. Carey, 709 N.W.2d 547, 556 (Iowa 2006)

U.S. v. Sanchez, 176 F.3d 1214, 1224 (9th Cir. 1999)

Smith v. State, 771 P.2d 1374, 1379 (Alaska App. 1989)

Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983) (per curium), cert. denied, 469 U.S. 920 (1984)

State v. Graves, 668 N.W.2d 860, 879 (Iowa 2003)

State v. McGee, No. 15-1512, 2005 WL 2508416 (Iowa Ct. App. October 12, 2005)

State v. Gray, 1999 WL 1136476 (Iowa Ct. App. December 13, 1999)

ROUTING STATEMENT

This case should be transferred to the Court of Appeals because the issues raised involve the application of existing legal principles. Iowa R. App. P. 6.903(2)(d) and 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by Kari Lee Fogg from her conviction, judgment and sentence for operating while intoxicated, first offense, a serious misdemeanor in violation of Iowa Code Section 321J.2 (2017) following a jury trial in the Boone County District Court.

Course of Proceedings: The State charged Kari Lee Fogg with operating while intoxicated, first offense, a serious misdemeanor in violation of Iowa Code section 321J.2 (2017), alleging she operated a motor vehicle while under the influence of an alcoholic beverage or drugs or a combination of such substances. (Trial Information) (App. pp. 4-5).

Fogg filed a motion to suppress, asserting all evidence obtained after the stop of Fogg's vehicle should be suppressed because Officer Frazier had no probable cause or reasonable

suspicion to stop her car and the stop violated her federal and state constitutional rights against unreasonable seizures. (Motion to Suppress) (App. pp. 6-7). The State resisted, arguing the encounter between Officer Frazier and Fogg was consensual and not a seizure. In the alternative, the State asserted that if there was a seizure, it was supported by reasonable suspicion that Fogg was driving under the influence or was conducted pursuant to the community caretaking exception. (Resistance) (App. pp. 8-11).

At the suppression hearing, the State further asserted the stop was justified by Officer Frazier's concern that the vehicle's slow driving and pulling into an alley created a reasonable suspicion that the driver might be assisting with a burglary. (Supp. Tr. p. 38 L. 5-12). The court denied Fogg's motion, concluding it was "a close call" whether a seizure occurred, but that even if there was a seizure, Officer Frazier "suppl[ied] the sufficient reasonable and articulable suspicion that criminal activity may have been occurring," specifically his suspicion of a

potential burglary in progress. (Supp. Tr. p. 41 L. 12 – p. 42 L. 24).

The case proceeded to trial, and Fogg was convicted as charged. (Judgment & Sentence) (App. pp. 17-19). The court sentenced Fogg two days in jail and imposed a $1,250 fine, surcharges, and costs. The court also concluded Fogg was able to reimburse the State for court appointed attorney's fees. She was also required to obtain a substance abuse evaluation and complete any recommended treatment. (Judgment & Sentence) (App. pp. 17-19). Fogg filed a timely notice of appeal. (Notice of Appeal) (App. pp. 20-21).

Facts: Shortly before 10:00pm on October 10, 2017, Officer Michael Frazier was patrolling the east side of the city of Boone. According to his testimony at the suppression hearing, he observed a silver Hyundai driving slowly through a residential neighborhood. He estimated the car was travelling about ten miles per hour. He followed the car briefly and then circled the block. Because of his vantage point, he was unable to see who was in the car or to read the license plate. The

Hyundai turned down a narrow alley that was not often used but did have driveways and outbuildings along it. Officer Frazier was traveling parallel to the Hyundai on a city street and waited at a stop sign for the car to exit the alley. It did not, but instead stopped midway down the alley with its headlights still illuminate. (Supp. Tr. p. 5 L. 17 – p. 7 L. 15).

Officer Frazier decided to "see what was going on" and turned down the alley. (Supp. Tr. p. 7 L. 17-21). At the suppression hearing, when asked if there was a particular crime he was suspicious of when he approached the car in the alley, he said, "I wasn't sure. A lot of burglaries happen on that side of town, so I wasn't sure if someone was getting dropped off to do vehicle burglaries or garage burglaries in the area. It was just all around suspicious. Just wanted to make sure they were okay." (Supp. Tr. p. 10 L. 1-10). On cross examination, when asked if he pulled into the alley because he believed a crime was taking place or because he was concerned about the welfare of the driver, he said, "At that time I didn't really know until I made contact. I didn't know what was going on." Upon

further prompting, he said, "I had no idea, sir. I thought it was a possibility something was going on or it was somebody who was broken down in the alley. I didn't know. . . . I was suspicious of her driving behavior before then where she was parked at at that time or where she had stopped at." (Supp. Tr. p. 13 L. 15 – p. 14 L. 16).

At trial, Officer Frazier justified the stop solely on his suspicion of burglary. He explained that during the summer, he had been patrolling certain neighborhoods because of an increase in burglaries. On October he was patrolling "one of those types of neighborhoods." He explained that the area he was "on the east side. It would be east of the hospital and south of 8th Street South essentially. So east of Story and south of 8th Street." He saw the Hyundai driving slowly and observed it from nearby streets without actually following it. He saw it turn down a small alley running between residences and garages. (Trial Tr. vol I, p. 16 L. 21 – p. 17 L. 22). He had observed the car for a total of three or four minutes before it turned down the alley, and then he saw it stop about halfway

down the alley with its headlights still illuminated. He explained that the reason he approached the car in the alley was because

> I wasn't sure what this person was doing. I didn't know who – I hadn't run the license plate. I didn't know who it was. A male or female, young or old, if they lived in the neighborhood. I was concerned with burglaries over the summertime, that someone was maybe cruising the alleys casing some garages. I just – I didn't know what was going on. The behavior was strange.

(Trial Tr. vol. I, p. 17 L. 25 – p. 19 L. 16).

Officer Frazier turned down the one-lane alley from the other end. He parked his marked patrol car in front of the Hyundai, about twenty feet to the north, preventing it from proceeding down the alley. To leave, the Hyundai would have had to either drive around the police car by driving through residential lawns or by driving in reverse in the dark for about 125 feet down the narrow alley. (Supp. Tr. p. 21 L. 1 – p. 24 L. 3) (Supp. Ex. 1 (aerial map)) (App p. 12). He did not activate his lights or siren. Officer Frazier exited the police car and ran the license plate while he was walked to the Hyundai. As he approached the car, it was still running, and Kari Fogg, a

middle-aged woman who lived nearby, was sitting in the drivers' seat. (Supp. Tr. p. 7 L. 16 – p. 8 L. 25; p. 24 L. 8 - 24). She opened her door as Officer Frazier approached the car. He asked if everything was okay and she told him that she lived in the area and was checking to see if the alley was crooked because she was going to report it to the city. Frazier could "smell an strong odor of an alcoholic beverage coming from the vehicle after speaking with her for a short time," and he began an OWI investigation. (Supp. Tr. p. 9 L. 1-22). He asked Fogg how many drinks she'd had, and she first said none, then immediately corrected herself and said she'd had two glasses of wine. She also mentioned that she'd taken some prescription medication. (Trial Tr. vol. I, p. 28 L. 23 – p. p. 29 L. 21). Officer Frazier asked her to perform field sobriety tests. (Trial Tr. vol. I, p. 20 L. 12-22).

He detected six clues on the horizontal gaze nystagmus test and also detected the presence of vertical gaze nystagmus test. (Trial Tr. vol. I, p. 25 L. 24 – p. 26 L. 23; p. 27 L. 21-p. 28 L. 17). Fogg attempted the walk and turn, but never finished it

expressing concern that she'd fail, and she declined to perform the one-legged stand. (Trial Tr. vol. I, p. 30 L. 20 – p. 34 L. 17). He asked her to submit a preliminary breath test and she declined, and he arrested her and transported her to the Boone County Jail. (Trial Tr. vol. I, p. 35 L. 23 – p. 36 L. 10). At the station, Officer Frazier invoked implied consent and gave Fogg the opportunity to call an attorney. She left messages at several law officers, but was unable to speak with an attorney. She expressed confusion and frustration with the decision to submit to a breath test, wanting to talk to an attorney before she made a decision. She offered to submit a blood or urine sample for testing, but would not agree to the breath test. After about an hour and forty minutes, Officer Frazier concluded she would not consent and acknowledged such on the implied consent advisory form. Fogg refused to sign any of the paperwork. (Trial Tr. vol. I, p. 37 L. 4 – p. 44 L. 7) (State's Ex. 1) (App. pp. 15-16). Officer Frazier's interactions with Fogg in the alley and in the jail were captured on video. (State's Exs. 2, 3, 4, 5, 6).

ARGUMENT

I. BY BLOCKING FOGG'S CAR IN THE ALLEY WITHOUT SUFFICIENT CAUSE, OFFICER FRAZIER VIOLATED FOGG'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS AGAINST UNREASONABLE SEIZURES, AND THE DISTRICT COURT ERRED IN DENYING FOGG'S MOTION TO SUPPRESS.

A. Error Preservation. Error was preserved when Fogg moved to suppress the evidence obtained from the stop, arguing both her Fourth Amendment and article I, section 8 rights were violated. (Motion to Suppress) (App. pp. 6-7). After a hearing, the district court denied her motion. (Supp. Tr. p. 41 L. 11 – p. 43 L. 16; Order) (App. pp. 13-14). See State v. Wright, 441 N.W.2d 364, 366 (Iowa 1989).

B. Standard of Review. Appellate review of constitutional claims is de novo. State v. Tague, 676 N.W.2d 197, 201 (Iowa 2004). The appellate court will make an "independent evaluation of the totality of the circumstances as shown by the entire record." State v. Turner, 630 N.W.2d 601, 606 (Iowa 2001). In a motion to suppress, the State bears the burden of showing by a preponderance of the evidence that an officer's warrantless seizure was constitutional. Tague, 676

N.W.2d at 204.

C. Discussion. The Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 8 of the Iowa Constitution protect individuals from unreasonable searches and seizures. State v. Hoskins, 711 N.W.2d 720, 725-26 (Iowa 2006). "When the police stop a car and temporarily detain an individual, the temporary detention is a 'seizure'" subject to the requirement of constitutional reasonableness. State v. Predka, 555 N.W.2d 202, 205 (Iowa 1996) (quoting Whren v. United States, 517 U.S. 806, 810, 116 S.Ct. 1769, 1772, 135 L.Ed.2d 89, 95 (1996)).

Warrantless searches and seizures are per se unreasonable unless an exception to the warrant requirement exists. Hoskins, 711 N.W.2d at 726. "As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." Whren, 517 U.S. at, 810, 116 S.Ct. at 1772, 135 L.Ed.2d at 95. Police may detain a person on less than probable cause when they suspect the person is about to

commit a crime or believe criminal activity is taking place. State v. Pals, 805 N.W.2d 767, 773–74 (Iowa 2011); Terry v. Ohio, 392 U.S. 1, 23, 88 S.Ct. 1868, 1881, 20 L.Ed.2d 889, 907 (1968).

The district court concluded that it was a "close call" whether a seizure occurred. (Supp. Tr. p. 41 L. 12-23). But the court reasoned that even if Fogg was seized, Officer Frazier "suppl[ied] sufficient reasonable and articulable suspicion that criminal activity may have been occurring," specifically noting Frazier's concern about a potential burglary. (Supp. Tr. p. 41 L. 24 – p. 42 L. 24).

1. *Fogg was seized when Officer Frazier parked in front of her car, blocking her in the alley.* "A traffic stop is unquestionably a seizure." State v. Tyler, 830 N.W.2d 288, 292 (Iowa 2013). Although this case does not involve a textbook traffic stop, the totality of the circumstances of the encounter still demonstrate that Fogg was seized for constitutional purposes. A seizure occurs if "the police conduct would have communicated to a reasonable person that

he was not at liberty to ignore the police presence and go about his business." Florida v. Botstick, 501 U.S. 429, 437, 111 S.Ct. 2382, 2387 (1991) (quotation marks and citation omitted). See also U.S. v. Mendenhall, 446 U.S. 554, 554, 100 S.Ct. 1870, 1877 (1980) (question is whether under all the circumstances surrounding the incident, "a reasonable person would have believed that he was not free to leave."). The court will make an independent evaluation [based on] the totality of the circumstances as shown by the entire record. State v. Kurth, 813 N.W.2d 270, 272 (Iowa 2012). "Each case must be evaluated in light of its unique circumstances." Id. "[T]he location of the patrol car(s) in relation to the parked vehicle [is] a factor in determining whether a seizure occurred under the Fourth Amendment." State v. Wilkes, 756 N.W.2d 838, 844 (Iowa 2008).

Officer Frazier did not activate the lights or sirens on his patrol car, but by parking his parking his patrol car in front of Fogg's car, blocking her egress from the alley, Officer Frazier's actions constituted a seizure. Officer Frazier testified that

Fogg could not have proceeded down the one-lane alley without driving through residential lawns to get around his patrol car. The only other option for Fogg to leave required her to back up down the narrow alley, in the dark, for half a block or about 125 feet. (Supp. Tr. p. 21 L. 1 – p. 24 L. 3) (Supp. Ex. 1 (aerial map)) (App. p. 12). Under these circumstances, a reasonable person would not "feel free to disregard the police and go about [her] business." State v. Lowe, 812 N.W.2d 554, 570 (Iowa 2002). Fogg's ability to drive away was substantially impaired. See Wilkes, 756 N.W.2d at 843–44 (Iowa 2008) (concluding Wilkes was not seized in large part because Wilkes' ability to drive away was not "substantially impaired").

2. *No reasonable suspicion of pending burglary.* One exception to the warrant requirement allows an officer to stop an individual or vehicle for investigatory purposes based on a reasonable suspicion that a criminal act has occurred or is occurring. State v. Kreps, 650 N.W.2d 636, 641 (Iowa 2002). The goal of an investigatory stop is to permit officers to confirm or dispel their suspicions of criminal activity. Id. However,

for such an investigatory stop to be justified, the officer must identify "specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant that intrusion." Id. (quoting State v. Heminover, 619 N.W.2d 353, 357 (Iowa 2000)). "Circumstances raising mere suspicion or curiosity are not enough." Id. The officer must be able to articulate more than an "inchoate and unparticularized suspicion or 'hunch' " of criminal activity. Id. (quoting Illinois v. Wardlow, 528 U.S. 119, 123–24, 120 S.Ct. 673, 676, 145 L.Ed.2d 570, 576 (2000)). The determination of whether reasonable suspicion exists will be made based on the totality of the circumstances known to the police officer at the time of the decision to make the stop. Id. "A good test of such a founded suspicion is that 'the possibility of criminal conduct was strong enough that, upon an objective appraisal of the situation, we would be critical of the officers had they let the event pass without investigation.' " Kreps, 650 N.W.2d at 642-3, (quoting 4 Wayne R. LaFave, Search and Seizure § 9.4(b), at 148 (3d ed. 1996)).

In this case, the district court concluded Officer Frazier had a reasonable suspicion to investigate whether Fogg was involved in burglary or a potential burglary. (Supp. Tr. p. 41 L. 24 – p. 42 L. 24). However, a de novo review of the record demonstrates that Officer Frazier had no more than a hunch regarding an ongoing burglary, and the district court erred in denying Fogg's motion to suppress.

Officer Frazier observed Fogg's small silver Hyundai driving slowly for three or four minutes through a residential neighborhood just before 10:00pm on a weeknight in October. The car turned down a narrow alley. The alley was not commonly used, but it did have access to access to several driveways and outbuildings. At least one portion of the alley was lit by a streetlight. (Trial Tr. p. 120 L. 16-24). The car stopped about midway down the alley with its headlights still illuminated. Officer Frazier waited a minute or two for the car to continue through the alley before he pulled in from the other end and blocked the car. Officer Frazier testified that "a lot of

burglaries happen on that side of town." (Supp. Tr. p. 10 L. 6-7). He explained the specifics:

> Q: Now, you've indicated that there had been some burglaries in that area. What was the last burglary in that area prior to October 10th?
> A: I don't know. I said that there are usually burglaries in that area and I mean when they happen, the residential area on that side is quite frequent.
>
> Q: Well, how many burglaries were there in that area during the first ten months of 2017?
> A: When I was on days over the summer, which would be June through September, on one shift alone – now this wasn't all in that area – but I had taken 17 burglary reports myself.
>
> Q: In the city of Boone?
> A: Yes. And then I would say probably half a dozen or so would be considered east of Benton Street, in that area.
>
> Q: East of Benton Street covers, what, a third of the city of Boone?
> A: Benton Street is the 1200 block. If you count all the way out to Court Avenue, that's the 600 block so that's about 14 blocks right there.
>
> Q: Would that be what percentage of those burglaries happened then east of Benton? Six out of 17 I guess but –
> A: Not quite 50 percent there.
>
> Q: Okay. And what part of the city of Boone is east of Benton?

A: Like a fraction of it?

Q: If you can tell me.
A: Say a quarter maybe.

Q: Okay. Okay. There's nothing particular about this area between Second and Third and Jackson and Clinton that makes it a high crime area?
A: No. I wouldn't consider anything in Boone a high crime area. It's just there's areas where we patrol a little extra.

Q: And there hadn't been any recent reports of burglaries specifically in that area around Ms. Fogg's house?
A: No.

Q: And you hadn't received any reports that evening of any burglaries or attempted burglaries within ten blocks of Ms. Fogg's home, had you?
A: No.

Q: And these other burglaries that you talked about, the 17 in the time period you talked about, Officer, were those daytime or nighttime burglaries?
A: They would have been overnight burglaries.

Q: All right. Had there been any special directives come down from your supervisors in the police department to keep special watch on any part of the city on the evening of October 10th concerning burglaries?
A: That specific area, I can't say. We have a house watch list that changes every two or three weeks either for an area or for a specific residence?

Q: And you can't tell me specifically when the last burglary in that specific area took place prior to October 10th?

A: Not off the top of my head, no.

(Supp. Tr. p. 31 L. 9 – p. 33 L. 12).

Officer Frazier's testimony does not establish a reasonable suspicion of pending criminal activity. His estimation that six out of seventeen burglaries, or about thirty-five percent, occurring over the summer months happened an area comprising between a quarter and a third of the city of Boone does not warrant the investigation of any slowly-travelling car on that side of town. And Fogg's conduct did not otherwise invite suspicion of being involved in a burglary. Fogg's car was unremarkable—a small passenger car—not a vehicle suited to transport the sort of larger items one would expect from a burglary of a garage or outbuilding. She turned down an alley and came to a stop midway, but left her headlights turned on, making her presence visible to anyone in the neighborhood. Driving slowly through a residential neighborhood at ten o'clock at a night is behavior that is expected and appreciated, not a cause for suspicion.

Officer Frazier himself expressed the unreasonableness of any suspicion when he was asked if he really thought the car was involved in criminal activity such as a burglary: "I had no reason to believe that. I just – I didn't know why the vehicle was back there." (Supp. Tr. p. 30 L. 18-22). A hunch or general curiosity in insufficient to support the seizure of a vehicle, and Officer Frazier's stop of Fogg's car violated her rights under the Iowa and federal constitutions. Consequently, any evidence flowing from the stop should have been suppressed.

3. *No reasonable suspicion of impaired driving.* Although Officer Frazier did not justify the stop with suspicion of impaired driving, relying primarily on the potential for an ongoing burglary or just general curiosity, the State also argued Fogg's slow driving could have provided reasonable suspicion that she was impaired. (Supp. Tr. p. 38 L. 5-12). However, although Fogg was driving slowly, she was not violating any speed ordinance in the city. She was not impeding the travel of any other vehicles on the road or creating a hazard with her slow driving. (Supp. Tr. p. 17 L. 19 – p. 19 L. 4). Officer Frazier

observed no other traffic violation such as swerving or weaving. He thought it was odd that she turned down the alley. However, while the alley is not commonly used, it did have access to garages and outbuildings belonging to the residences on the neighboring streets. Accordingly, Officer Frazier's actions were not justified by a reasonable suspicion of impaired driving.

4. *Community caretaking does not apply.* The State also argued that Officer Frazier's stop was justified as community caretaking. The community caretaking exception involves a three step analysis under both the federal and the Iowa constitution: (1) was there a seizure?; (2) if so, was the police conduct bona fide community caretaker activity?; and (3) if so, did the public need and interest outweigh the intrusion upon the privacy of the citizen? State v. Coffman, 914 N.W.2d 240, 245, 257 (Iowa 2018). Under article I, section 8 of the Iowa Constitution, "it is incumbent on the state to prove both that the objective facts satisfy the standards for community

caretaking and that the officer subjectively intended to engage in community caretaking." Coffman, 914 N.W.2d at 257.

As discussed above, Fogg was seized when Officer Frazier blocked her in the narrow alley. However, Officer Frazier was not engaging in bona fide community caretaking activity. As he testified at the suppression hearing:

> Q: Did you have concern for the well-being of the car or just the general intrigue as to what it was doing?
>
> A: I really didn't know. I mean it was just odd that someone would be parked there at that time of night.

(Supp. Tr. p. 12 L. 14-19). Further, when Officer Frazier testified at trial, he only justified his stop of Fogg with his suspicion she was participating in a burglary. (Trial Tr. vol I, p. 16 L. 21 – p. 19 L. 16).

Further, the objective facts do not support a conclusion that was bona fide community caretaking. There was no indication Fogg's car was broken down—the car was running and the headlights were on. She had been traveling slowly down the residential roads, but there was no outward sign of distress such a flat tire or activated hazard lights. And Officer

Frazier himself acknowledged that he didn't have any real concern about the driver's well-being—he just found it odd that she stopped in the alley.

Under these circumstances, Officer Frazier's actions are not subjectively nor objectively justified as bona fide community caretaking. See State v. Smith, 919 N.W.2d 1, 5 (Iowa 2018).

D. Conclusion. Because Officer Frazier seized Fogg when he blocked her in the alley and because the stop was not supported by reasonable suspicion nor was justified by community caretaking, the stop therefore violated Fogg's rights under the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 8 of the Iowa Constitution.

II. FOGG'S TRIAL ATTORNEY WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE STATE'S PROSECUTORIAL ERROR WHEN THE STATE DISPARAGED DEFENSE COUNSEL DURING CLOSING ARGUMENT.

A. Error Preservation. Fogg's trial attorney objected once, during the State's rebuttal closing statement, on the grounds that the State was vouching for the truthfulness of its witness. (Trial Tr. vol. II, p. 50 L. 23 – p. 51 L. 6). Her

attorney did not argue the State was inappropriately disparaging defense counsel. Accordingly, error was not preserved on the specific arguments being raised on appeal.

Because an attorney will not realistically make a claim of ineffective assistance of counsel against his or her own actions during trial, these claims are rarely raised in the trial court. State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982). Although it is preferred to resolve claims of ineffective assistance of counsel by post-conviction relief, State v. Bass, 385 N.W.2d 243, 245 (Iowa 1986), such claims may be resolved on direct appeal when the trial attorney's acts, or lack thereof, cannot be explained by plausible strategic and tactical considerations. State v. Goff, 342 N.W.2d 830, 838 (Iowa 1983). In such instances the normal rules of preservation of error are waived and the defendant is permitted to raise the issue of ineffective assistance of counsel on appeal. Id. The record is adequate in this case for the issues to be reached on appeal.

B. Standard of Review. Claims of ineffective assistance of counsel are reviewed de novo. State v. Truesdell,

679 N.W.2d 611, 616 (Iowa 2004). Criminal defendants are guaranteed the effective assistance of counsel by the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, section 10 of the Iowa Constitution. State v. Ondayog, 722 N.W.2d 778, 784 (Iowa 2006). To prevail on a claim of ineffective assistance of counsel, a defendant must establish, by a preponderance of evidence, that trial counsel failed to perform an essential duty and that the defendant was prejudiced by counsel's failure. Id. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. Gering v. State, 382 N.W.2d 151, 153-54 (Iowa 1986). A *reasonable probability* is a probability sufficient to undermine confidence in the outcome. Id.

C. Discussion. In its rebuttal closing argument, the State's argued that Fogg's attorney was intentionally misrepresenting the evidence and making disingenuous arguments because that was his role in defending a client. He

urged the jury to consider the prosecutor more trustworthy and honest because he did not have a client to defend.

> MR. SPEERS: Thank you, Your Honor. Ladies and gentlemen, I'm certainly not going to be as long as he just was, but he's worried about what I'm about to say. Certainly. And he should be. *I want to point something out. This is a courtroom; right? This is the defendant. And this is where Steve sits. He works for her. Who is at my table? I represent the State. Yeah, I have the burden, but I don't have a client. I'm not trying to pull the wool over your eyes. I'm not trying to misrepresent the evidence. But I think some -- many of what Steve just told you -- Mr. Nalean just told you were misrepresentations of the evidence. That's just not fair to you. That's not the fair trial process. He picked almost every piece of intoxication, and he said things like, I think, my opinion.* Well, his opinion doesn't count. Neither does mine. Yours does.
>
> I only want you to look at the evidence. Because I know what the evidence is. *The evidence all points to guilt. But him representing his client zealously, of course he picked every piece of evidence that looks bad for him, for his client, and he turned it around and tried to give a logical explanation. Piece by piece, evidence, little piece of evidence, and he wanted to give you some explanation, any other explanation that pointed away from intoxication. I was trying to keep count. Maybe around 12 things he had to explain away.*

(Trial vol. II, p. 48 L. 22 – p. 49 L. 23).

> Mr. Nalean pointed to that manual and said, well, you can't wear glasses. Officer Frazier was making

things as he goes. No, he was not. He said the reason a person is to remove their glasses is for the officer's observation of the eyes. Well, he didn't want to bring the manual out for where it says that. Officer Frazier didn't have a manual with him, but that was his testimony. He wasn't making anything up. He's a good cop. He's not going to make anything up. Okay?

MR. NALEAN: Your Honor, I object to that. The county attorney is personally vouching for a State's witness. I believe it's improper, and I ask that that be stricken.

THE COURT: Sustained.

MR. NALEAN: I'd ask the jury be instructed that they not consider that statement by Mr. Speers -- that the officer is a good cop and he can be believed.

THE COURT: Ladies and gentlemen, it is improper for counsel to vouch for the credibility of any witness you heard. I'm going to instruct you to not take that argument into consideration at this point.

Mr. Speers.

MR. SPEERS: Thank you, Your Honor. You get to decide if Officer Frazier is a good cop, but what you know is that Mr. Nalean attacked him for forty-five minutes and then at the end under his breath just turned the other cheek, oh, but I really respect him. You get to make the decision, and that was the last thing that Mr. Nalean wanted to talk about was credibility. The defendant is not credible. You can't believe both Officer Frazier and the defendant. It's just not possible. So certainly Mr. Nalean wanted to lean into that.

> The other thing that Mr. Nalean wanted to lean into was this issue of the defendant wanted to go to the hospital to get a test. He said Ms. Fogg did not know that the State would not have the results of an independent test. Right. When you're drunk and you're impaired, you don't want the State to have the evidence. That's the whole idea of why she was not taking the test, not -- and waiting for an attorney.
>
> I want you to see something. The credibility issue, it really does boil down just to that. The State presented one witness. The defense presented one witness. And you can't believe both of them. You simply can't. If you believe Officer Frazier, you must return a guilty verdict based on his testimony. If you believe the defendant, then I guess you have to return a not guilty verdict. But you have to believe her. And I want to show you what the judge gives you as your tools to decide whether or not to believe somebody.
>
> I'm not going to sit up here and talk and talk and talk and try to explain away every fact.
>
> . . .
>
> *I'm not going to stand up here and try and twist the evidence. Because I don't need to because she's guilty of OWI.*

(Trial Tr. vol. II, p. 50 L. 15 – p. 54 L. 5).

A prosecutor owes a duty to the defendant as well as to the public. Graves, 668 N.W.2d at 870. "[W]hile a prosecutor is properly an advocate for the State within the bounds of the law, the prosecutor's primary interest should be to see that justice is done, not to obtain a conviction." Id. A prosecutor's actions

may constitute misconduct regardless of whether he acted in good faith. Id. at 869. "Lawyers should avoid making statements before a jury which tend to prejudice a defendant's right to a fair trial. This is particularly true when one lawyer undertakes to accuse another of unethical conduct." State v. Webb, 244 N.W.2d 332, 333 (Iowa 1976).

To succeed on a claim of prosecutorial error, the defendant must prove: 1) that the prosecutor actually committed an error or engaged in misconduct, and 2) that the defendant suffered prejudice as a result. Id. The key inquiry is whether "the misconduct resulted in prejudice to such an extent that the defendant was denied a fair trial." Id. See State v. Schlitter, 881 N.W.2d 380, 394 (Iowa 2016) (stating preference for use of term "prosecutorial error" rather than "prosecutorial misconduct" and holding that the multifactor test found in Graves applies to allegations of prosecutorial error).

The concern addressed by Graves is the possibility that a jury might convict the defendant for reasons other than those found in the evidence. "[M]isconduct [or error] occurs when

the prosecutor seeks [a conviction] through unnecessary and overinflammatory means that go outside the record or threaten to improperly incite the passions of the jury. State v. Carey, 709 N.W.2d 547, 556 (Iowa 2006). "Iowa follows the rule that it is improper for a prosecutor to call the defendant a liar, to state the defendant is lying, or to make similar disparaging comments." Graves, 668 N.W.2d at 876. Iowa courts strongly disfavor accusations of attorney unethical conduct. See State v. Webb, 244 N.W.2d 332, 333 (Iowa 1976) ("Lawyers should avoid making statements before a jury which tend to prejudice a defendant's right to a fair trial. This is particularly true when one lawyer undertakes to accuse another of unethical conduct.").

It is improper for the prosecution to disparage the accused's defense as a "sham" or a "scam." U.S. v. Sanchez, 176 F.3d 1214, 1224 (9th Cir. 1999). "[I]t is . . . virtually always improper for [the prosecutor] to suggest that defense counsel corroborated perjury." Smith v. State, 771 P.2d 1374, 1379 (Alaska App. 1989). Suggestions by the State that defense

counsel manufactured a false defense for trial are impermissible. See, e.g., Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983) (per curium), cert. denied, 469 U.S. 920 (1984) (accusing defense counsel of acting in "underhanded and unethical ways" undermined Bruno's right to a fair trial and required reversal for new trial); State v. Graves, 668 N.W.2d 860, 879 (Iowa 2003) (improper for State to refer to the defense counsel's argument as a "smoke screen"); State v. McGee, No. 15-1512, 2005 WL 2508416 (Iowa Ct. App. October 12, 2005) (improper for the State to shame defense counsel for "blaming the victim"); State v. Gray, 1999 WL 1136476 (Iowa Ct. App. December 13, 1999) (concluding State engaged in prosecutorial misconduct in part by disparaging defense counsel in front the jury and reversing for new trial).

The statements by the State in this case cross the line by accusing defense counsel of unethical "twisting" the facts and making untrue and disingenuous arguments because he had to represent his client.

To show a denial of due process, the defendant must establish the prosecutor's misconduct deprived the defendant of a fair trial. The court will 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 876–77. In this case, Fogg's right to have her guilt or innocence determined solely on the basis of the evidence introduced at trial was threatened. There is a reasonable probability the State's error prejudiced, inflamed or misled the jurors so as to prompt them to convict Fogg for reasons other than the evidence introduced at trial and the law as contained in the court's instructions.

Fogg did not invite the error and no curative instructions were given. The prosecution's comments came during rebuttal—defense counsel had no chance to respond or dispute the characterization of his role. The case was close. The jury had to decide whether Fogg had operated her vehicle while

under the influence of drugs or alcohol. While Officer Frazier testified he smelled alcohol, Fogg testified she hadn't had anything to drink for four to five hours before she was stopped. (Trial Tr. vol. I, p. 101 L. 7 – p. 103 L. 9). The jury was able to view the videos of Fogg on the night of the stop, but her behavior is inconclusive—Fogg is not obviously intoxicated on the video. (State's Exs. 2, 3, 4, 5, 6). Her initial statement to Officer Frazier about the crooked alley, which at first blush sounds odd, was rationally explained by small-town politics and her concern that a neighbor's new driveway was encroaching into the alley. (Trial Tr. vol. I, p. 104 L. 2 – p. 106 L. 2). Accordingly, accusing Fogg's attorney of intentionally and necessarily mispresenting evidence created a significant risk that the jury would decide the case on improper considerations.

Had defense counsel objected to the State's inflammatory statements on the ground that it was improper or moved for a new trial on the same basis, the motion would have been granted, and trial counsel was ineffective for failing to do so.

Under these circumstances, there is no reasonable strategic reason not to object to the impermissible statements. See Graves, 668 N.W.2d at 882 (finding defense counsel's failure to object to prosecutorial misconduct could not have been strategic because it was pervasive and related to a critical issue in the case).

D. Conclusion. Because trial counsel was ineffective for failing to object to the State's prosecutorial error, Fogg's conviction should be vacated and her case remanded for a new trial.

REQUEST FOR NONORAL ARGUMENT

Counsel does not request to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $4.63, and that amount has been paid in full by the Office of the Appellate Defender.

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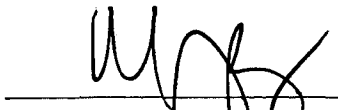

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