ELECTRONICALLY FILED DEC 28, 2018 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA
Supreme Court No. 18-0483

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KARI LEE FOGG,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR BOONE COUNTY
THE HON. PAUL G. CRAWFORD (SUPPRESSION HEARING) AND
THE HON. STEPHEN OWEN (TRIAL), JUDGES

APPELLEE'S BRIEF

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FINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

State Statute

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. The District Court Correctly Determined that Defendant was Not Seized.

Authorities

United States v. Drayton, 536 U.S. 194 (2002)
United States v. Mendenhall, 446 U.S. 544 (1980)
People v. Cascio, 932 P.2d 1381 (Colo. 1997)
State v. Harlan, 301 N.W.2d 717 (Iowa 1981)
State v. Lane, 726 N.W.2d 371 (Iowa 2007)
State v. Naujoks, 637 N.W.2d 101 (Iowa 2001)
State v. Pals, 805 N.W.2d 767 (Iowa 2011)
State v. Reinders, 690 N.W.2d 78 (Iowa 2004)
State v. Roth, 305 N.W.2d 501 (Iowa 1981)
State v. Turner, 630 N.W.2d 601 (Iowa 2001)
State v. Wilkes, 756 N.W.2d 838 (Iowa 2008)

II. Defendant Cannot Establish She Was Prejudiced, so Her Claim of Ineffective Assistance of Counsel Must Fail.

Authorities

Strickland v. Washington, 466 U.S. 668 (1984)
Ledezma v. State, 626 N.W.2d 134 (Iowa 2001)
State v. Atley, 564 N.W.2d 817 (Iowa 1997)
State v. Begey, 672 N.W.2d 747 (Iowa 2003)
State v. Dominguez, 482 N.W.2d 390 (Iowa 1992)
State v. Graves, 668 N.W.2d 860 (Iowa 2003)
State v. Johnson, 784 N.W.2d 192 (Iowa 2010)
State v. Keller, 760 N.W.2d 451 (Iowa 2009)
State v. Musser, 721 N.W.2d 734 (Iowa 2006)
State v. Price, 692 N.W.2d 1 (Iowa 2005)
State v. Straw, 709 N.W.2d 128 (Iowa 2006)
Iowa Code § 321J.2(1)(a)

ROUTING STATEMENT

Because this case does not meet the criteria of Iowa Rule of Appellate Procedure 6.1101(2) for retention by the Supreme Court, transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(2).

STATEMENT OF THE CASE

Nature of the Case

Kari Lee Fogg ("Defendant") appeals her conviction following a jury trial in which she was found guilty of one count of Operating While Intoxicated, in violation of Iowa Code section 321J.2(1)(a), a serious misdemeanor. On appeal, Defendant argues that the district court erred by denying her motion to suppress because she was illegally seized. Defendant also argues that her trial counsel was ineffective for failing to object to certain statements made by the prosecutor during closing argument.

Course of Proceedings

The State accepts Defendant's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

On October 10, 2017, around 10:00 p.m., Officer Mike Frazier was patrolling the east side of the city of Boone when he observed a

slow-moving vehicle. 12-20-2017 Motion to Suppress Hearing Tr. 5:17–6:5. Officer Frazier stated the vehicle was driving only 10 miles per hour, even though the speed limit was 25 miles per hour. *Id.* at 5:17–6:15. Officer Frazier observed the vehicle turn into a narrow residential alley, which was not frequently used. *Id.* at 6:16–7:1, 14:17–20. There are houses and other outbuildings directly off the alley and some driveways abut the alley. *Id.* at 7:2–9. When the vehicle did not exit the alley, Officer Frazier turned into the alley to see what was going on because he thought it was odd that someone would park in that alley at that time of night. *Id.* at 7:10–21, 12:14–19.

Officer Frazier parked his patrol car about 20 feet away from Defendant's vehicle, with the patrol car facing Defendant's vehicle. *Id.* at 10:14–17, 12:5–13. He did not initiate his lights or sirens. *Id.* at 8:11–15. Defendant's car was not blocked from behind. *Id.* at 10:18–25. A map of the alley shows at least two driveways abut the alley. *Id.* at 34:18–36:10, Motion to Suppress Ex. 1; App. 12. Defendant's car "was parked right in front of one of those residential garages[.]" *Id.* Presumably, Defendant could have used this driveway to turn around and exit the alley.

Defendant was sitting in her car, with the engine running and her headlights on. *Id.* at 7:22–9:7. Officer Frazier approached Defendant's car on foot, asked if everything was okay, and inquired why Defendant was in the alley. *Id.* Defendant told him that "she lived in the area and she was checking to see if the alley was crooked or something to that effect, that she had to report to the city." *Id.* While Officer Frazier was speaking with Defendant, he "could smell a strong odor of an alcoholic beverage coming from the vehicle[.]" *Id.* at 9:15–19. After he smelled the odor of alcohol, Officer Frazier asked Defendant to exit her vehicle, so he could conduct field sobriety tests.

At the conclusion of the motion to suppress hearing, the district court stated that it was a "close call," but determined that Defendant had not been seized prior to Officer Frazier's observations of her intoxicated state. *Id.* at 41:12–43:16. The district court also determined that if Defendant had been seized, Officer Frazier had reasonable suspicion to do so. *Id.*

ARGUMENT

I. The District Court Correctly Determined that Defendant was Not Seized.

Preservation of Error

This issue was preserved by Defendant's motion to suppress, a hearing on the motion, and the district court's ruling on the issue. 12-04-2017 Motion to Suppress, 12-20-2017 Motion to Suppress Hearing, 12-20-2017 Order Denying Motion to Suppress; App. 6–7, 13–14.

Standard of Review

A challenge to the denial of a motion to suppress on federal or state constitutional grounds is reviewed de novo. *State v. Pals*, 805 N.W.2d 767, 771 (Iowa 2011). This review requires an independent evaluation of the totality of the circumstances as shown by the entire record. *Id.* (citing *State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001)). While this Court gives deference to the district court's factual findings, it is not bound by them. *Id.* (citing *State v. Lane*, 726 N.W.2d 371, 377 (Iowa 2007)).

Merits

"The Fourth Amendment to the United States Constitution and article I, section 8 of the Iowa Constitution protect persons from

unreasonable searches and seizures." *State v. Reinders*, 690 N.W.2d 78, 81 (Iowa 2004) (internal quotation marks and citation omitted). "Searches and seizures are unconstitutional if they are unreasonable and reasonableness depends on the facts of the particular case." *State v. Naujoks*, 637 N.W.2d 101, 107 (Iowa 2001) (citing *State v. Roth*, 305 N.W.2d 501, 504 (Iowa 1981)).

Not every interaction between police and citizens is involuntary, and well-established precedent has routinely upheld the ability of an officer to briefly ask an individual for identification or for their purpose for being in an area. *United States v. Drayton*, 536 U.S. 194, 200–01 (2002). An officer's simple approach to an individual to ask basic questions or initiate conversation is not a stop and does not, in and of itself, require reasonable suspicion. *See State v. Wilkes*, 756 N.W.2d 838, 843 (Iowa 2008); *see also Drayton*, 536 U.S. at 204.

"A seizure occurs when an officer by means of physical force or show of authority in some way restrains the liberty of a citizen." *Reinders*, 690 N.W.2d at 82 (internal quotation marks and citation omitted). Police are free to approach individuals in public places and ask them questions if the person is willing to listen. *See Drayton*, 536 U.S. at 200–01. "'Unless the circumstances of the encounter are so

intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment.'" *Reinders*, 690 N.W.2d at 82 (internal quotation marks and citation omitted). "Whether a 'seizure' occurred is determined by the totality of the circumstances." *Wilkes*, 756 N.W.2d at 842 (citing *Drayton*, 536 U.S. at 207).

> Factors that might suggest a seizure include the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

Id. (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

Police coercion "must be present to convert an encounter between police and citizens into a seizure." *Id.* at 843 (citing *Reinders*, 690 N.W.2d at 82). The Iowa Supreme Court has previously held that the "element of coercion is not established by ordinary indicia of police authority." *Id.* Thus, the showing of a badge, the fact that an officer is in uniform, or the fact that an officer is visibly armed "should have little weight in the analysis." *Id.* (internal quotation marks and citation omitted).

No such coercion or show of authority happened here. First, this is not a case where Officer Frazier initiated a traffic stop by turning on his emergency lights to signal Defendant to pull over. *See State v. Harlan*, 301 N.W.2d 717, 720 (Iowa 1981) ("Stopping a car in transit is obviously a seizure. In [defendant's] case, there is no evidence [the officer] stopped the car."). Instead, Defendant's car was already parked, and Officer Frazier parked nearly 20 feet from her car and never turned on his lights or sirens. Second, when Officer Frazier approached Defendant's vehicle, he did not issue any commands and did not tell her she was required to stay and speak with him. Finally, while the placement of Officer Frazier's car prevented Defendant from exiting the narrow alley in one direction, the alley had a second exit that was not blocked, and Defendant could have either reversed her car, or she could have used one of the garage driveways to turn her car around. Thus, Officer Frazier did not significantly restrain Defendant's movements. *See id.* ("[The officer] stood at the side of the car and did not restrain its movement."); *see also Wilkes*, 756 N.W.2d at 844 (citing *People v. Cascio*, 932 P.2d 1381, 1386–87 (Colo. 1997)) ("[T]he court concluded that if the police car wholly blocks the defendant's ability to leave, then an encounter cannot be considered

consensual, but where egress was only slightly restricted, with approximately ten to twenty feet between the two vehicles, the positioning of the vehicles does not create a detention.").

Officer Frazier approached Defendant in a public place to ask her a question and did not restrict Defendant's movements or use a show of authority or coercion. As such, Defendant was not seized, and the district court's order denying Defendant's motion to suppress was correct.

II. Defendant Cannot Establish She Was Prejudiced, so Her Claim of Ineffective Assistance of Counsel Must Fail.

Preservation of Error

Defendant challenges statements made by the prosecutor during closing argument and claims they are the product of prosecutorial error. Defendant did not object these statements at trial, so she did not preserve error on this claim. However, Defendant asks this Court to consider her argument under the rubric of ineffective assistance of counsel because such a claim is an exception to the normal error preservation rules. *State v. Begey*, 672 N.W.2d 747, 749 (Iowa 2003).

Standard of Review

Claims of ineffective assistance of counsel are reviewed de novo. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). Ineffective assistance claims are typically preserved for post-conviction relief actions to allow full development of the facts surrounding trial counsel's acts. *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). The Court may decide that the record is sufficient to rule on the merits, or it may choose to preserve the claim for post-conviction proceedings. If Defendant "wishes to have an ineffective-assistance claim resolved on direct appeal," she has the burden to "establish an adequate record to allow the appellate court to address the issue." *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010).

Merits

To establish ineffective assistance of counsel, "a defendant must typically show that (1) counsel failed to perform an essential duty and (2) prejudice resulted." *State v. Keller*, 760 N.W.2d 451, 452 (Iowa 2009) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Both elements must be proven, and failure to prove a single element is fatal to the claim. "If the claim lacks prejudice, it can be decided on that ground alone without deciding whether the attorney performed

deficiently." *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001) (internal string citation omitted). Here, Defendant's claim can be decided on the prejudice prong alone.

In her brief, Defendant reproduces the prosecutor's comments and claims these statements "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." App. Br. at 36–38, 41. Even if trial counsel breached a duty by failing to object to these statements, Defendant has failed to show she was prejudiced.

Because Defendant raises this as an ineffective assistance of counsel claim, in order to establish prejudice, Defendant must show that "there is a reasonable probability the outcome of the trial would have been different had trial counsel performed competently." *State v. Graves*, 668 N.W.2d 860, 870 (Iowa 2003). In her brief, Defendant focuses solely on the prejudice component of her prosecutorial error claim. *See State v. Musser*, 721 N.W.2d 734, 755–56 (Iowa 2006) ("[P]rosecutorial misconduct is not, standing alone, a due process violation… There must be proof the misconduct resulted in prejudice to the extent the defendant was denied a fair trial."). While the

prejudice component of the prosecutorial error claim is relevant to whether her trial counsel breached a duty in failing to object to the comments, it does not help establish whether there is a reasonable possibility of a different result at trial.

And here, this reasonable possibility does not exist. Defendant was charged under Iowa Code section 321J.2(1)(a) under the theory that she was operating a motor vehicle "[w]hile under the influence of an alcoholic beverage or other drug or a combination of such substances." Iowa Code § 321J.2(1)(a). This charge has two elements: 1) Defendant must have operated a motor vehicle; and 2) Defendant must have done so while under the influence of alcohol or another drug. *Id.* Defendant does not contest that she operated a motor vehicle. The only question for the jury was whether Defendant was under the influence of alcohol at the time.

A person is "under the influence" when at least one of the following is true because of alcohol consumption: 1) the person's reasoning or mental ability is affected; 2) the person's judgment is impaired; 3) the person's emotions are visibly excited; or 4) the person, to any extent, loses control of bodily actions or motions. *State v. Dominguez*, 482 N.W.2d 390, 392 (Iowa 1992). Conduct and

demeanor are important considerations in evaluating whether a person is under the influence. *State v. Price*, 692 N.W.2d 1, 3 (Iowa 2005). A person's manner of driving also pertains to whether he or she is under the influence. *Dominguez*, 482 N.W.2d at 392. Any one of these factors on its own can suffice to support an inference that a person is under the influence. *Id.*

Returning from a late evening trip to Subway, Defendant drove home significantly under the speed limit. Trial Tr. I 17:7–18:12, 103:14–104:4. Although it was dark, she decided to stop in an alley to evaluate a neighbor's construction project. *Id.* at 103:14–106:2. In addition, when Officer Frazier spoke with Defendant, she smelled strongly of alcohol, had red, watery eyes, and was slurring her words. *Id.* at 18:16–20:22. Defendant initially denied drinking any alcohol before admitting that she had two glasses of wine earlier in the evening. *Id.* at 28:23–29:13, 101:17–102:9. Defendant also failed the horizontal and vertical gaze nystagmus tests before refusing to participate in the remaining field sobriety tests. *Id.* at 25:20–34:21. The videos of Defendant at the jail show that she was confused, emotional, had difficulty speaking, and ultimately refused to take the

DataMaster test. State's Exs. 3–6.[1] These facts establish that Defendant's judgment was impaired, and that she had lost some control over her bodily actions, as well as her emotions, and her claim of ineffective assistance of counsel fails.

CONCLUSION

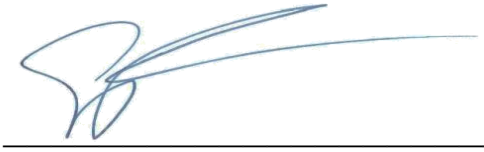
For all the reasons stated above, the State respectfully requests that this Court affirm Defendant's conviction and sentence and deny all claims on the merits.

REQUEST FOR NONORAL SUBMISSION

The State requests that this case be submitted without oral argument.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa



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[1] These exhibits are police videos and cannot be reproduced in the appendix.

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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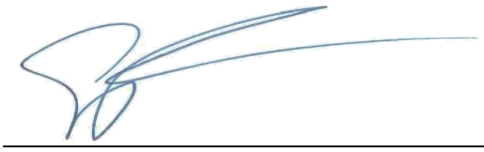
Dated: December 28, 2018



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