IN THE SUPREME COURT OF IOWA
Supreme Court No. 23-0964
Des Moines County No. OWIN028293

STATE OF IOWA,
Plaintiff–Appellee,

vs.

HOPE JENNIFER CLARK,
Defendant–Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR DES MOINES COUNTY
THE HONORABLE EMILY DEAN, JUDGE

APPELLEE'S AMENDED BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. **Whether Sufficient Evidence Exists to Prove Clark Guilty of Operating While Intoxicated.**

II. **Whether Clark's Rights Under Iowa Code Section 804.20 Were Violated, even though the Deputies Provided Her Cell Phone to Her at the Jail and Repeatedly Told Her She Was Free to Make Any Calls She Wanted.**

III. **Whether Clark's Double-Hearsay Claim Fails Given the Deputies' Testimony about the 911-Call and the Reasons They Were Dispatched was Admissible to Show Responsive Conduct.**

ROUTING STATEMENT

The State agrees that transfer to the court of appeals is appropriate. *See* Iowa R. App. P. 6.1101(3)(a).

NATURE OF THE CASE

Clark appeals after a jury found her guilty of one count of operating while intoxicated, a serious misdemeanor under Iowa Code section 321J.2. D0062, Sent. Order (5/25/23) at 1;D0055, Verdict (4/13/23); D0008, Trial Info. (7/18/22). She appeals her conviction, judgment, and the denial of her pretrial motion to suppress. *See* Def.'s Br. at 17–32, 34–43, 46–56.

The district court sentenced Clark to 30-days in jail with all but two-days suspended, placed her on probation for one year, and ordered her to fulfill other statutory obligations for her OWI conviction. *See* D0062 at 1–2. The Honorable Emily Dean presided.

STATEMENT OF THE FACTS

On the night of June 9, 2022, a 911-caller reported a "dark-colored convertible with a female driver" driving recklessly. Trial Tr. 30:14–32:2, 72:7–73:9, 75:23–76:4. In response, Des Moines County Sheriff's Deputies Sean Phillips and Blake Cheesman dispatched to investigate the incident. *Id.*

The Deputies quickly spotted a car matching the description provided by the caller. Trial Tr. 32:4–33:4. To catch up to it, they had to drive

"between 50 and 59 miles an hour" in a 40-mph zone. *Id.* at 33:12–34:5, 39:17–21. Once behind the car, they saw it strike a curb and "bounce[] off," swerve, brake at a green light, speed, and repeatedly fail to keep its lane. *Id.* at 34:8–13, 39:17–40:6, 74:12–75:22, 89:23–90:8. The Deputies then activated their patrol car's lights and sirens and initiated a traffic stop at a nearby intersection. *Id.* at 34:14–35:16, 74:12–76:8, 89:23–90:8.

After initiating the stop, the vehicle "began to accelerate" and attempted to drive away, prompting Deputy Phillips to "slap" the side of the vehicle and yell, "hey." Trial Tr. 35:2–6, 35:20–22, 51:3–7, 76:9–17. The driver, later identified as Clark, quickly stopped trying to drive away and acknowledged the Deputies' presence. Trial Tr. 35:23–36:19.

During their initial interaction, the Deputies noticed the smell of alcohol on Clark. Trial Tr. 36:20–23, 51:9–10, 76:23–77:1. When asked if she had been drinking that night, Clark said "yes." Trial Tr. 37:9–13. Deputy Cheesman observed Clark struggling to provide all the necessary documents for the stop. Trial Tr. 77:11–16. And despite being asked twice, Clark failed to provide her car registration. *Id.*

After noticing several signs of intoxication and Clark at first admitting to drinking, the Deputies asked Clark to exit her car. Trial Tr. 37:22–38:2, 75:10–13. Clark complied but "stumbled" and relied on "her car for

balance" while exiting. Trial Tr. 40:12–16, 51:3–7, 78:4–7. Deputy Cheesman also had to remind her to put the vehicle in park, as Clark had not done so. Trial Tr. 40:7–11, 77:11–19, 116:7–11.

Clark and the Deputies proceeded to the front of the patrol car to begin field sobriety testing. Trial Tr. 45:14–19, 78:12–18. Before commencing any tests, Clark disclosed to the Deputies that "she was hearing impaired." *Id.* at 41:6–12, 78:15–79:8. After learning this, Deputy Phillips "instructed Deputy Cheesman to enunciate everything he said," "speak loudly," and confirm Clark understood the directions "as he was giving them." *Id.* at 41:13–18. They maintained eye contact with Clark so "she could read [their] lips" and repeated any instructions until she confirmed comprehension. *Id.* at 42:21–43:1, 78:15–79:8. Deputy Phillips also intervened if it seemed Clark had trouble understanding to ensure clear communication. *Id.* at 79:9–21.

During the field sobriety tests, Clark showed multiple signs of impairment. Trial Tr. 50:18–21. During the horizontal gaze nystagmus (HGN) test, Clark repeatedly moved her whole head despite being instructed to follow with only her eyes. *Id.* at 80:19–81:22, 89:10–18. She acknowledged understanding the test's requirements, yet she still had to be reminded five times not to move her head. *Id.* at 82:1–3, 116:19–21.

Deputy Cheesman observed all six clues by the end of the test, confirming Clark was under the influence of alcohol. *Id.* at 82:4–18, 89:16–18.

Before conducting the walk-and-turn (WAT) test, Clark agreed to remove her high-heeled shoes for better stability. Trial Tr. 46:24–47:13, 85:18–86:11, 117:7–20. But when Clark took off her shoes, Deputy Phillips had to provide support as Clark displayed imbalance and an unsteady gait: "Deputy Phillips had to grab her arm to prevent her from falling." Trial Tr. 47:14–48:5, 86:1–11, 117:21–118:3. During the test, Clark repeatedly failed to follow instructions. Trial Tr. 37:18–48:5, 82:18–84:22, 85:1–8. She did not allow the Deputies "to explain the rest of the instructions," resulting in the test being unable to be fully scored. *Id.* As a result, her performance on the WAT test was classified "as a refusal for failure to follow instructions." Trial Tr. 82:18–84:22.

Given her imbalance, the Deputies declined to conduct the one-legged stand (OLS) test for Clark's safety. Trial Tr. 50:10–17, 86:12–21, 90:9–12. Clark also declined to take a preliminary breath test. *Id.* at 86:22–87:1, 90:13–15. So she was arrested for OWI and taken to the Des Moines County jail. *Id.* at 90:16–19.

At the jail, Deputy Cheesman read Clark the *Miranda* warnings, the implied consent advisory, and Iowa Code section 804.20. Trial Tr. 91:23–

25, 93:16–25, 94:24–95:2, 96:1–19. The Deputies also placed Clark's cell phone in front of her on the small desk, which she acknowledged with a "thank you." Trial Tr. 53:4–7, 54:10–14, 66:11–13, 97:1–4. Despite being told multiple times that "she was free to call anyone she wanted," Clark never made any calls. Trial Tr. 53:14–23, 92:1–11, 93:8–25, 94:6–23. Just a short time after arriving at the jail, she refused to provide a breath sample for chemical testing. Trial Tr. 51:11–52:8, 94:1–16, 101:18–21.

The State then charged Clark with operating while intoxicated, first offense. *See* D0008, Trial Info. (7/18/22). Before trial, Clark moved to suppress "all evidence," contending, among other things, that the Deputies had infringed on her limited rights under Iowa Code section 804.20. *See* D0024, MTS (9/27/22) at 1–2. After a contested hearing, the district court rejected Clark's motion to suppress in its entirety. D0033, Order Denying MTS (2/2/23).

Ultimately, a jury found Clark guilty as charged. D0055, Guilty Verdict (4/13/23); *see* D0062, Sent. Order (5/25/23).

ARGUMENT

I. Sufficient Evidence Exists to Prove Clark Guilty of OWI.

Error Preservation

The State does not contest error preservation. *State v. Crawford*, 972 N.W.2d 189, 201 (Iowa 2022).

Standard of Review

The Court reviews sufficiency challenges for correction of errors at law. *Id.* at 202 (citation and quotations omitted). When doing so, it is "highly deferential to the jury's verdict. The jury's verdict binds th[e] court if the verdict is supported by substantial evidence." *State v. Mong*, 988 N.W.2d 305, 312 (Iowa 2023) (quoting *State v. Jones*, 967 N.W.2d 336, 339 (Iowa 2021)). "Substantial evidence is evidence sufficient to convince a rational trier of fact the defendant is guilty beyond a reasonable doubt." *Jones*, 967 N.W.2d at 339. "Evidence is not insubstantial merely because [appellate courts] may draw different conclusions from it." *Id.*

On review, the Court considers "all evidence, not just the evidence supporting the conviction[.]" *State v. Ernst*, 954 N.W.2d 50, 54 (Iowa 2021) (citation omitted). And it "view[s] the evidence in the light most favorable to the State, including all 'legitimate inferences and presumptions that may fairly and reasonably be deduced from the record evidence." *State v. Booker*, 989 N.W.2d 621, 626 (Iowa 2023) (citations omitted).

Merits

Clark contends the evidence is not enough to uphold her OWI conviction. Def.'s Br. at 17–32. Because sufficient evidence exists showing Clark drove while under the influence of alcohol, her claim fails.

As this appeal presents a sufficiency challenge, the Court gives a high level of deference to the jury's verdict. *Crawford*, 972 N.W.2d at 202; *State v. Tipton*, 897 N.W.2d 653, 692 (Iowa 2017). And because Iowa law does not differentiate between direct and circumstantial evidence, "the State need not discredit every other potential theory to be drawn from circumstantial evidence" to prevail. *Ernst*, 954 N.W.2d at 57; *see* D0057 at 7, Jury Instr. No. 10; *see also Tipton*, 897 N.W.2d at 692.

Here, to convict Clark, the State had to prove that on June 9, 2022, she "operated a motor vehicle" while "under the influence of alcohol[.]" D0057 at 8, Jury Instr. No. 12; Iowa Code § 321J.2(1)(a). A person is "under the influence" if one or more of the following is true:

(1) The person's reason or mental ability has been affected;
(2) The person's judgment is impaired;
(3) The person's emotions are visibly excited; or
(4) The person has, to any extent, lost control of bodily actions or motions.

D0057 at 9, Jury Instr. No. 13; *see also In re S.C.S.*, 454 N.W.2d 810, 814 (Iowa 1990).

Starting with the first element, it is evident Clark operated a vehicle. She drove her car and was en route to the casino. Trial Tr. 34:8–22, 36:20–37:21, 112:14–24. Two Des Moines County Deputies conducted a traffic stop of her vehicle. Trial Tr. 34:8–36:19, 75:10–76:8, 114:14–116:11.

Clark herself even testified that she was behind the wheel when the Deputies pulled her over. Trial Tr. 112:14–24, 114:14–116:11. Given these facts, there is no serious dispute she was not "operating" a vehicle. *See* D0057 at 9, Jury Instr. No. 14.

As to the second element, sufficient evidence exists showing Clark was under the influence of alcohol. When Deputy Phillips first asked if she had been drinking that night, Clark said, "yes." Trial Tr. 37:9–13, 90:1–8; *see* State's Ex. 1 at MM 02:25–02:31 (10:59:56–11:00:03 p.m.). Both Deputies also smelled alcohol on Clark's breath emanating from her car. Trial Tr. 36:20–23, 51:9–10, 76:23–77:1. From this, the jury reasonably found alcohol played a role here. *See State v. Blake*, No. 15-1771, 2016 WL 4384253, at *2 (Iowa Ct. App. Aug. 17, 2016) ("The [factfinder] may also consider an officer's opinion regarding another person's sobriety.").

That leaves the four "under the influence" conditions. The trial court instructed the jury that "one or more" of those conditions was necessary to prove Clark was "under the influence." D0057 at 9, Jury Instr. No. 13. The State addresses each relevant condition in turn.

First, Clark's reason or mental ability was affected. Her driving behaviors were "reckless" and erratic. *See* Trial Tr. 13:7–14, 31:14–35:1, 50:22–51:2, 89:23–90:8. She drove "in the middle of the roadway not

keeping [her] lane." *Id.* at 34:8–13, 39:17–40:6. She struck a curb, hit her brakes while the light was green, and drove more than ten-miles-per-hour over the posted limit. *Id.* at 74:12–75:22, 89:23–90:8. At the start of the stop, Clark tried to drive away while the deputies were approaching. *Id.* at 76:9–17. When she exited her car during the stop, her "car was still in drive," and Deputy Cheesman had to tell her "to put it in park before exiting[.]" *Id.* at 77:11–19. She had issues following directions during the field sobriety tests, although she confirmed that she understood what was required. *Id.* at 42:21–43:1, 47:19–48:5, 79:22–84:22, 89:10–18, 116:19–21. Clark also never provided her registration, despite being asked for it twice. *Id.* at 77:11–16. And after repeatedly asking to call her attorney, Clark said that "she did not wish to call anybody" once her phone was in front of her. *Id.* at 51:11–54:14, 91:6–94:14, 96:1–19. These facts show Clark's reason or mental ability was impaired. *See State v. Zarwie*, No. 22-0770, 2023 WL 3335986, at *2 (Iowa Ct. App. May 10, 2023).

Second, Clark's judgment was also impaired. Clark's poor and erratic driving behaviors—including speeding, striking a curb, repeatedly failing to maintain her lane, braking at a green light—reflect impaired judgment. Trial Tr. 74:12–75:22, 89:23–90:8. The 911-call reporting her dangerous driving, coupled with her attempt to drive away during the stop,

underscores this impairment. Trial Tr. 76:9–17. Her performance on divided-attention tasks likewise indicates that she lacked the judgment to not get behind the wheel. Trial Tr. 77:11–19, 82:18–85:8. These facts collectively illustrate Clark's impaired judgment.

Third, Clark lost control of her bodily actions or motions. She drove erratically. Trial Tr. 74:12–75:22, 76:9–17, 77:11–19, 89:23–90:8. When exiting the car, she was unsteady on her feet and had to "use her car to sort of balance herself." *Id.* at 78:4–7, 90:1–8. During the HGN test, Clark's inability to track with just her eyes as she needed to, rather than moving her head, demonstrates her loss of control over her body's actions. *Id.* at 80:19–82:18, 89:10–18. And despite being told five times to "stop moving her head" during the HGN test and understanding the requirements, Clark was unable to perform it correctly, bolstering her impaired control over her motions. *Id.* at 82:1–3, 116:19–21.

During the WAT test, Clark "became unstable" while removing her shoes, requiring Deputy Phillips to intervene to prevent a fall. *Id.* at 86:1–11. Clark testified to feeling dizzy and imbalanced during the field sobriety tests, finding the HGN test was "very difficult." *Id.* at 116:22–118:3. She attributed these difficulties to her alleged vertigo and an ankle injury, yet failed to disclose these conditions to the Deputies. *Id.* at 46:3–11, 79:22–

86:21, 116:22–118:3. The State highlighted during its closing argument that Clark's supposed vertigo and ankle injury did not hinder her driving, wearing high-heeled shoes, or walking without a limp. *See id.* at 161:3–20. From these inconsistencies, the jury reasonably inferred that Clark's imbalance and test difficulties were not due to her undisclosed conditions, but a result of being under the influence of alcohol.

The Deputies did not ask Clark to perform the OLS test due to safety concerns and her unsteady gait. *Id.* at 50:10–17, 86:12–21, 90:9–12. "Unsteady balance" is a "common indic[ator] of intoxication." *State v. Quintero-Labrada*, No. 19-0544, 2020 WL 6482726, at *2 (Iowa Ct. App. Nov. 4, 2020) (citation omitted).

Clark also refused all chemical testing. Trial Tr. 51:11–21, 52:3–8, 86:22–87:1, 90:13–15, 94:1–16, 101:18–21. "And a refusal to submit to testing can be used by the factfinder as evidence of guilt." *Zarwie*, 2023 WL 3335986, at *2 (citing Iowa Code § 321J.16; *State v. Kilby*, 961 N.W.2d 374, 375 (Iowa 2021); *State v. Walter*, No. 21-0446, 2022 WL 610571, at *4 (Iowa Ct. App. Mar. 2, 2022)). From this, it is reasonable to infer Clark's refused because she knew she would not "pass." *State v. Young*, 232 N.W.2d 535, 538 (Iowa 1975); D0057 at 9, Jury Instr. No. 15.

Substantial evidence supports all three of these theories, although "the jury only needed to find one" existed to conclude Clark was under the influence. *Zarwie*, 2023 WL 3335986, at *2. This Court should therefore affirm Clark's operating while intoxicated conviction.

Clark's other sufficiency arguments also fall short. For instance, Clark contends that the evidence is not enough to prove that she was under the influence because it was circumstantial. *See* Def.'s Br. at 17. Yet that argument misses the mark: the law does not distinguish between direct and circumstantial evidence. *Tipton*, 897 N.W.2d at 692. Even if the evidence could support a different conclusion—like Clark was not under the influence but impacted by her other conditions—substantial evidence can still exist to uphold a verdict. *State v. Weber*, No. 08-1613, 2009 WL 2525483, at *3 (Iowa Ct. App. Aug. 19, 2009) (citing *State v. Frake*, 450 N.W.2d 817, 818–19 (Iowa 1990)). And the State need not disprove all other alternative theories raised by Clark to prevail here. *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993) (citation omitted).

Clark also attacks the reliability of the Deputies' administration of the field sobriety tests. *See* Def.'s Br. at 17–18, 27–30. But "inconsistencies in administering the field sobriety tests affect the weight to be accorded to the results, rather than their admissibility." *Quintero-Labrada*, 2020 WL

6482726, at *2 (quoting *State v. Sitzmann*, No. 04-1212, 2005 WL 2477991, at *3 (Iowa Ct. App. Dec. 21, 2005)). "It is not [the Court's] place 'to resolve conflicts in the evidence, to pass upon the credibility of witnesses, to determine the plausibility of explanations, or to weight the evidence; such matters are for the jury.'" *State v. Brimmer*, 983 N.W.2d 247, 256 (Iowa 2022) (quoting *State v. Musser*, 721 N.W.2d 758, 761 (Iowa 2006)). It was within the jury's purview to weigh the evidentiary value of the tests and Clark's performance during them. *State v. Walker*, 499 N.W.2d 323, 325 (Iowa Ct. App. 1993) (quoting *State v. Vargason*, 462 N.W.2d 718, 720 (Iowa Ct. App. 1990; citing *Kaiser v. Stathas*, 263 N.W.2d 522, (Iowa 1978)). And the Court cannot reevaluate or reweigh the evidence on appeal, as Clark requests, but must respect the jury's decision on such matters. *Id.*

While the State acknowledges that Clark is hearing impaired, her testimony about the effects of her hearing impairment and other alleged conditions during the stop ultimately goes to her credibility. *See Thornton*, 498 N.W.2d at 673. The jury had the discretion to accept, reject, or assign whatever weight it saw fit to her claims and statements. *Walker*, 499 N.W.2d at 325 (citing *Kaiser*, 263 N.W.2d at 522). To be sure, juries "are free to accept part of a witness's testimony and reject other portions thereof." *Id.* (quoting *Vargason*, 462 N.W.2d at 720; citing *Kaiser*, 263

N.W.2d at 522). In this case, the jury believed Clark's unsteady gait, HGN test failure, refusal to provide a breath sample, and other signs of impairment were because she was under the influence of alcohol; it did not believe those facts were due to her hearing impairment, alleged vertigo, or ankle injury. Because the jury was free to dismiss Clark's explanations, the Court cannot reassess those determinations now.

At bottom, Clark drove her car while under the influence of alcohol. She displayed affected reason, impaired judgment, and loss of bodily control. This Court should therefore affirm Clark's conviction.

II. Clark's Rights Under Section 804.20 Were Not Violated.

Error Preservation

Clark's claim related to Iowa Code section 804.20 was raised before, and rejected by, the district court. D0033, Order Denying MTS (2/22/23) at 5–8; *see* D0024, MTS (9/27/22) at 1. That preserved error. *Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012).

Standard of Review

The Court reviews "a district court's interpretation of Iowa Code section 804.20 for errors at law." *State v. Davis*, 922 N.W.2d 326, 330 (Iowa 2019) (quoting *State v. Lamoreux*, 875 N.W.2d 172, 176 (Iowa 2016)). "If the district court applied the law correctly and substantial

evidence supports the court's findings of fact," the Court "will affirm the district court's ruling on a motion to suppress." *Id.* (citation omitted).

Merits

Clark claims that her limited statutory right to consult an attorney under Iowa Code section 804.20 was violated by the Deputies and, as such, the district court should have granted her motion to suppress. The State disagrees.

Iowa Code section 804.20 provides, in part:

> Any peace officer or other person having custody of any person arrested or restrained of the person's liberty for any reason whatever, shall permit that person, without unnecessary delay after arrival at the place of detention, to call, consult, and see a member of the person's family or an attorney of the person's choice, or both. Such person shall be permitted to make a reasonable number of telephone calls as may be required to secure an attorney.

Iowa Code § 804.20. This section provides defendants with only "a limited statutory right to counsel before making the important decision to take or refuse a chemical test under implied consent procedures." *Davis*, 922 N.W.2d at 330–31, 334 (citation omitted). At issue here is whether Clark's had a "reasonable opportunity" to call her attorney "without unnecessary delay." *See* Def.'s Br. at 38–43.

By its wording, section 804.20 allows for "appropriate" or necessary delays. That is, the statute recognizes that some delays are acceptable without resulting in a violation. *See State v. Caldwell*, No. 19-0894, 2021 WL 592747, at *5–6 (Iowa Ct. App. Jan. 21, 2021) (finding no unnecessary delay when the defendant "was allowed to make phone calls only five to six minutes after he asked to call his mother."); *State v. Smith*, No. 16-0749, 2017 WL 510957, at *2 (Iowa Ct. App. Feb. 8, 2017) (recognizing time for security measures and administrative tasks after arrest is not an unnecessary delay); *State v. Perry*, No. 11-1051, 2012 WL 1864568, at *3 (Iowa Ct. App. May 23, 2012) (finding no unnecessary delay when "Perry was given the opportunity to contact an attorney approximately seven minutes after arriving in the booking room"); *cf. Valadez v. City of Des Moines*, 324 N.W.2d 475, 478–79 (Iowa 1982). Therefore, contrary to Clark's claims, an officer is not obligated to "immediately address the attorney phone at the jail" upon arrival. *See* Def.'s Br. at 42–43.

Moreover, law enforcement may prioritize conducting "appropriate police activities" before allowing a defendant to make phone calls. *Caldwell*, 2021 WL 592747, at *6; *Smith*, 2017 WL 510957, at *2 ("Necessary security measures and administrative tasks first must be performed."). These "appropriate activities" include, for example,

handcuffing the defendant, reading the implied consent advisory, and leading the defendant "to the DataMaster room where the phone was located." *Caldwell*, 2021 WL 592747, at *6; *Perry*, 2012 WL1864568, at *3. The latter two activities are particularly relevant here. *Id.*

It is essentially undisputed that Clark was not entitled "to call, consult, and see a member of [her] family or [her] attorney" until arriving at the jail. *See* Def.'s Br. at 37–38; *Davis*, 922 N.W.2d at 332 (discussing *State v. Moorehead*, 699 N.W.2d 667, 669–72 (Iowa 2005)) (noting section 804.20 entitles a defendant "the opportunity to place a phone call 'without unnecessary delay' only after being arrested and brought … to the jail's intake room."). Thus, the fact Clark asked for her attorney before finishing field sobriety testing is immaterial, as her right to make calls under section 804.20 did not attach until she arrived at "the place of detention" (the jail).

The parties also agree that after arriving at the jail, Deputy Cheesman "immediately" informed Clark of her *Miranda* rights, the implied consent advisory, and read her section 804.20 before telling her "she could make calls." Def.'s Br. at 38–39; *see* D0033 at 8, ¶ 6. But Clark is incorrect that this process constituted an unnecessary delay. Def.'s Br. at 38–39; *see State v. Campbell-Scott*, No. 16-0472, 2017 WL 512590, at *4 (Iowa Ct. App. Feb. 8, 2017) (recognizing "without unnecessary delay" does not mean

"immediately" after arriving at the jail). "As a pragmatic matter, it is unrealistic to expect law enforcement to hand an accused a phone the minute he or she steps foot into the detention center. Necessary security measures and administrative tasks first must be performed." *Smith*, 2017 WL 510957, at *2; *Caldwell*, 2021 WL592747, at *6 (citing *Smith* for same). That is what occurred here.

Clark and the Deputies entered the jail at roughly 11:23:58 p.m. State's Ex. 1 (Dash Camera) at MM 26:28. Clark entered the DataMaster room around 11:30 p.m. after completing the necessary procedures to enter the jail. Def.'s Ex. A (Booking Room) at MM 02:30. The Deputies put her phone in front of her about 30-seconds later. *Id.* at MM 02:59. Deputy Cheesman finished reading the *Miranda* warnings at around 11:31:06 p.m. *Id.* at MM 03:35. He then provided Clark a physical copy of the implied consent advisory review as he read it aloud so she could read his lips. *Id.* at MM 03:43–6:50 (11:31:14–11:34:21 p.m.). And he informed her of the right to make calls by reading section 804.20 aloud and giving her a copy to review. *Id.* at MM 06:51–7:49 (11:34:22–11:35:20 p.m.).

At most, 11-minutes-and-22-seconds passed between entering the jail and Clark having the chance to make calls. State's Ex. 1 at MM 26:28 (11:23:58 p.m.); Def.'s Ex. A at MM 07:49 (11:35:20 p.m.). About 5-

minutes-and-20-seconds elapsed between Clark sitting down and Deputy Cheesman gesturing toward her phone and telling her that "[b]efore you answer that question [whether you would like to provide a breath sample], you can make an, um—a reasonable amount of phone calls." *Id.* at MM 07:50–7:55 (11:35:21–11:35:26 p.m.). Neither period is an "unnecessary delay." *Caldwell*, 2021 WL 592747, at *6; *Smith*, 2017 WL 510957, at *2.

Clark also had the opportunity to call whoever she wanted before she refused testing. The Deputies retrieved her phone and put it right in front of her. Def.'s Ex. A at MM 02:59 (11:30:30 p.m.). Clark thanked the Deputies and intermittently glanced at her phone for at least the next several seconds. *Id.* at MM 02:59–03:43 (11:30:30–11:31:14 p.m.). During that time, her phone was visibly unobstructed on the desk before her. *Id.*

The Deputies then repeatedly informed Clark that she could make any calls she wanted. *Id.* at MM 08:01–08:25 (11:35:33–11:35:56 p.m.). Deputy Cheesman, for instance, gestured directly toward her phone on the desk while telling Clark she could make "a reasonable number of calls." *Id.* at MM 07:50–07:55 (11:35:21–11:35:26 p.m.). Deputy Phillips reiterated this to her. *Id.* at MM 08:11–08:25 (11:35:42–11:35:56 p.m.). Yet, despite having her phone, Clark never tried to find or call an attorney before refusing to provide a breath sample for testing. *Id.*

> DEPUTY PHILLIPS: So, you're more than welcome to start making those phone calls to try to talk to your attorney, okay?
>
> CLARK: Mhm.
>
> DEPUTY PHILLIPS: And once you're done making those phone calls, we're going to ask if you want to consent or refuse our breath test, okay?
>
> CLARK: I'm going to refuse it.
>
> DEPUTY PHILLIPS: You're going to refuse it?
>
> CLARK: [nodding in the affirmative]
>
> DEPUTY PHILLIPS: Okay.

Def.'s Ex. A at MM 08:11–08:25 (11:35:42–11:35:56 p.m.).

Again, section 804.20 confers "a limited statutory right to counsel before making the important decision to take or refuse a chemical test under implied consent procedures." *Davis*, 922 N.W.2d at 334 (quoting *State v. Hellstern*, 856 N.W.2d 355, 361 (Iowa 2014)). In this case, Clark had the *opportunity* to call whoever she wanted before deciding whether to submit to testing, but she refused all testing before making any calls. Def.'s Ex. A at MM 08:11–08:25 (11:35:42–11:35:56 p.m.); *see id.* at MM 09:03–09:35 (11:36:34–11:37:06 p.m.) (reflecting Clark's confirmation two more times that she was "going to say no to everything" and was "refusing everything"). She never asked for a lawyer's contact information or attempted to use her phone to call anyone before refusing testing. *See id.*

The Deputies were not obligated to inform Clark of her rights under section 804.20 or "shape the nature of the communication" with her attorney. *State v. Lyon*, 862 N.W.2d 391, 400 (Iowa 2015). In other words, they were not required to choose a lawyer for Clark and contact them on her behalf. *See State v. Markley*, 884 N.W.2d 218, 218–21 (Iowa Ct. App. 2016) (citation omitted) (finding no violation when the officer told the defendant, "you can use your cell phone" and "you can call anyone you want" "without restriction"). This is especially true because Iowa Code section 804.20 is not "self-enforcing: Something does not have to be *provided* just because the statute says it must be 'permitted.'" *Id.* at 221 (emphasis in original) (quoting *Lamoreux*, 875 N.W.2d at 178–79). Because of this, the district court correctly declined Clark's motion to suppress after aptly applying the law to the facts:

> Clark was allowed to use her cell phone while at the jail. It was in fact retrieved for her by the arresting deputies. Clark was read the implied consent advisory and the 804.20 advisory. She was allowed to make phone calls to anyone from the jail, and was instructed on multiple occasions that [she] could call her attorney and that she could do so prior to making a decision. She was allowed to read the advisory on paper and on [the] computer. There were no restrictions placed on who Clark could call or how many calls she could make.

D0033 at 8, ¶ 6 (referencing State's Ex. 1).

In short, the Deputies honored Clark's right to call her lawyer by providing her cell phone and repeatedly informing her that she could place calls without restriction. That was enough to satisfy section 804.20's requirements. Since no violation occurred here, the Court should affirm.

III. Clark's Hearsay Claim Fails; the Deputies' Testimony about the 911-Call and Why They Were Dispatched was Admissible to Show Responsive Conduct.

Error Preservation

Clark raised this objection at trial in a motion in limine. *See* Trial Tr. 22:15–23:8. The trial court ruled on it. *See id.* at 24:16–25:1. That ruling preserved error. *Lamasters*, 821 N.W.2d at 864.

Standard of Review

"Rulings on the admissibility of hearsay evidence are reviewed for correction of errors at law." *State v. Juste*, 939 N.w.2d 664, 674 (Iowa Ct. App. 2019) (quoting *State v. Thompson*, 836 N.W.2d 470, 476 (Iowa 2013)); *see State v. Dessinger*, 958 N.W.2d 590, 597 (Iowa 2021).

Merits

Clark argues that the trial court erred by allowing the Deputies to testify to the reasons for being dispatched to locate Clark's vehicle following a 911-call reporting her dangerous driving. *See* Def.'s Br. at 46–56. The Deputies' testimony, however, was admissible to show their responsive conduct. So Clark's claim should fail.

Hearsay is a statement that "(1) The declarant does not make while testifying at the current trial or hearing; and (2) A party offers into evidence to prove the truth of the matter asserted in the statement." Iowa R. Evid. 5.801(c). Such statements are generally inadmissible. And in cases "[w]here a hearsay statement includes a further hearsay statement, both statements must conform to a hearsay exception to be admissible." *State v. Puffinbarger*, 540 N.W.2d 452, 455 (Iowa Ct. App. 1995) (citing *State v. Williams*, 427 N.W.2d 469 (Iowa 1988) (citation omitted)).

But "testimony of out-of-court statements" are generally admissible when offered to explain law enforcement's responsive actions in a case, rather than establish the truth of the statement itself. *State v. Kamerick*, No. 11-1078, 2012 WL1453984, at *3 (Iowa Ct. App. Apr. 25, 2012) (citing *State v. Mitchell*, 450 N.W.2d 828, 832 (Iowa 1990)). "An out-of-court statement offered only to explain responsive conduct that is relevant to an aspect of the state's case is not offered to prove the truth of the matter asserted and is therefore not hearsay. But 'if the evidence is admitted, the court must limit its scope to that needed to achieve its purpose.'" *State v. Plain*, 898 N.W.2d 801, 812 (Iowa 2017) (quoting *McElroy v. State*, 637 N.W.2d 488, 502 (Iowa 2001)). Thus, "[f]or a statement to be admissible as showing responsive conduct," "it must not only tend to explain the

responsive conduct but the conduct itself must be relevant to some aspect of the State's case." *Mitchell*, 450 N.W.2d at 832 (citing *State v. Hollins*, 397 N.W.2d 701, 705–06 (Iowa 1986)).

Here, it is undisputed that neither the unidentified caller's statements during the 911-call nor the call itself were admitted as evidence at trial. When testifying, the Deputies did not include or quote the caller's specific statements into the record. *State v. Church*, No. 15-1904, 2017 WL 2461429, at *4 (Iowa Ct. App. June 7, 2017); *see State v. Sowder*, 394 N.W.2d 368, 371 (Iowa 1986). In his testimony, Deputy Phillips never mentioned any of the 911-caller's specific statements. Instead, he stated that he was dispatched "for a reckless driver complaint" to locate a "dark-colored convertible with a female driver," which he successfully found and followed for roughly "700 yards, 800 yards." *See* Trial Tr. 31:14–32:17. Deputy Cheesman also never mentioned the specifics of the 911-caller's statements, except for mentioning an "initial reckless complaint" while he listed Clark's other traffic infractions that he observed. *See id.* at 89:23–90:8. These passing references are not enough to qualify as inadmissible hearsay; they instead constitute responsive conduct.

This holds true because investigating officers are generally permitted to "explain his or her actions by testifying as to what information he or she

had, including its source, regarding the crime and the criminal." *State v. Elliott*, 806 N.W.2d 660, 667 (Iowa 2011). That is what happened here: the Deputies' references to the 911-call and the unidentified caller were relevant to explain their responsive conduct for three key reasons. First, their references were relevant to show why they were searching for Clark's car. Second, their references were relevant to show why they tailed Clark after spotting her vehicle that matched the caller's description. Third, their references were pertinent to outline the information they possessed about the alleged crime and criminal (Clark).

So any references to the caller and 911-call were not offered for the truth of the matter asserted. *See Plain*, 898 N.W.2d at 812. The Deputies did not cite the call as evidence that Clark was driving recklessly to justify the traffic stop. Indeed, Deputy Phillips explicitly said he did not "observe any reckless driving" by Clark. *See* Trial Tr. 64:7–21. Deputy Cheesman also confirmed Clark was never cited for reckless driving after her attorney asked him directly during trial. *Id.* at 102:19–103:3.

Even if the references to the dispatch and 911-call could be considered inadmissible hearsay, Clark was not prejudiced by the admission of those statements as they were merely cumulative. *See State v. Brown*, 656 N.W.2d 355, 361 (Iowa 2003). The record contains "substantially the same

evidence" derived from Clark's own testimony and her attorney's many inquiries into the reckless driving call that spurred the investigation. *See id.*; *see also* Trial Tr. 58:23–59:14, 102:19–25, 113:7–114:13, 125:12–17. For instance, Clark testified that her poor driving stemmed from her distraction and looking elsewhere, not her reckless driving behaviors. *See* Trial Tr. 113:7–114:13, 125:12–17. During direct-examination, Clark testified that she "was swerving because [she] was looking at [her] GPS trying to get to the casino." *Id.* at 113:7–21.

During cross-examination, when questioned about her poor driving and the 911-call, Clark attributed the 911-call itself and her erratic driving to her distraction from her phone or GPS. *Id.* at 125:12–17. Thus, even Clark acknowledged the content of the alleged hearsay call and related statements while providing alternative explanations for her poor driving conduct that led to the stop.[1] This underscores that the alleged hearsay statements were, at most, cumulative. As a result, the admission of any such statements does not warrant reversal here.

Clark's attorney also had the chance to cross-examine the Deputies about the reasons for their dispatch. *See State v. Mercy*, No. 14-1785, 2016

[1] Clark does not claim the alleged hearsay statements are somehow untrustworthy. *See* Def.'s Br. at 46–56.

WL 4384430, at *3 (Iowa Ct. App. Aug. 17, 2016) (noting that the defendant's lack of contemporaneous objection to the testimony and their "opportunity to cross-examine" weighed against finding prejudice resulted from the admission of hearsay testimony). During cross-examination, Clark's attorney specifically asked Deputy Phillips about the 911- call:

> JOHNSTON: So we have to talk about your other observations, and most of that would be the driving of this vehicle. There was—as I understand it, dispatch told you there was some concern that this vehicle described may have been driving, I think you used the word, reckless; correct?
>
> PHILLIPS: Yes, sir.
>
> JOHNSTON: And you got behind this vehicle and followed it, and we can see it there, and none of those things that you observed constitute reckless driving under Iowa law; would you agree?
>
> PHILLIPS: I would agree.
>
> JOHNSTON: So we don't have any of the three tests; we don't have any reckless driving; the jury can look at that—that video and determine what comes from that . . . .

Trial Tr. 58:23–59:11. Clark's counsel, during cross-examination, also asked Deputy Cheesman about whether Clark was cited for reckless driving:

> JOHNSTON: And, again, the only citation you issued only was for on OWI, not for speeding or reckless driving; correct?
>
> CHEESMAN: I believe she was also issued a citation for improper lane change.

Id. at 102:19–22. Clark's opportunity to cross-examine the witnesses through counsel diminishes the argument for prejudice resulting from the mention of the 911-call and initial reckless driving report by the unidentified caller. This is bolstered even more because Clark's counsel addressed the reckless driving complaint and the testimony surrounding it during closing arguments. *See* Trial Tr. 155:9–56:17.

Further, by questioning Deputy Phillips on the definition of reckless driving under Iowa law and Deputy Cheesman about the absence of a reckless driving ticket, Clark effectively prompted a discussion about the 911-caller's complaint and report. By delving into the specifics of what "constitute[s] reckless driving under Iowa law" and whether the Deputies observed such driving behavior by Clark, the door was opened "to at least a limited receipt" and discussion "of that evidence." *Church*, 2017 WL 2461429, at *4 (quoting *State v. Brockman*, 725 N.W.2d 653, 656 (Iowa Ct. App. 2006)). "Defense tactics 'are most likely to be found to have opened the door if they involved a calculated effort to create a high degree of confusion based upon knowledge that any adequate explanation would require some reference to evidence previously suppressed'" or excluded. *Brockman*, 725 N.W.2d at 656 (quoting 6 Wayne R. LaFave, *Search & Seizure* § 11.6 at 412 (4th ed. 2004)). This holds here: Clark's counsel

strategically invited additional discussion and argument over what constitutes "reckless driving" and Clark's related driving conduct by mentioning those issues at trial. *See Jasper v. State*, 477 N.W.2d 852, 856 (Iowa 1991); *McCracken v. Edward D. Jones & Co.*, 445 N.W.2d 375, 378 (Iowa Ct. App. 1989). And because she opened the door to these issues, Clark cannot complain doing so was prejudicial.

Separately, Clark contends that the prosecutor's mention of the 911-call during her opening statement aligns with her hearsay claim. The State disagrees. Clark did not object during the State's opening statement, and she only sought to disallow references to the 911-call after opening statements wrapped up. *See* Trial Tr. 13:7–14, 22:15–23:2. Clark also never moved to strike the statement, and she did not request that the trial court admonish the jury "to disregard the objectionable statement." *See State v. Tompkins*, 859 N.W.2d 631, 643 (Iowa 2015) (citation and quotations omitted). Nor does Clark bring a claim of prosecutorial misconduct. In any case, opening statements and closing arguments are not evidence—a fact the district court expressly communicated to the jury. *See* D0057 at 5, Jury Instr. No. 8. This instruction mitigated any prejudice in this regard, especially given that Clark's counsel made such references at trial, including during closing arguments.

And overall, the State's case was strong, so the prejudicial impact of any inadmissible references to the 911-call or caller is sufficiently stymied, and reversal is unnecessary. *See State v. Ross*, 986 N.W.2d 581, 589 (Iowa 2023) (quoting *State v. Kraai*, 969 N.W.2d 487, 497 (Iowa 2022)) ("The presumption of prejudice may also be 'overcome when the jury received "strong evidence" of a defendant's guilt.'"); *State v. Johnson*, 19-0579, 2020 WL 5650731, at *2–3 (Iowa Ct. App. Sept. 23, 2020) (citation omitted). Here, like in *State v. Johnson*, the Deputies' body camera footage was played to the jury, which corroborated their testimony that Clark showed signs of being under the influence and impaired. *Johnson*, 2020 WL 5650731, at *2–3. The jury asked to view video evidence again during their deliberations, which "suggests they relied on observations of [Clark]'s level of intoxication as opposed to any" statements related to the 911-call or her reportedly reckless driving. *See Johnson*, 2020 WL 5650731, at *3 n.2. From the evidence, as discussed above, the jury could reasonably find Clark was impaired based on her erratic driving, the fact she smelled like alcohol, her field sobriety test performance, and her refusal to provide a breath sample for testing. *See id.* at *3 (citation omitted). Nothing in the record suggests that the jury "actually rested its verdict" on the allegedly inadmissible hearsay statements. *See Ross*, 986 N.W.2d at 589 (quoting

State v. Kennedy, 846 N.W.2d 517, 527 (Iowa 2014)). As such, "the guilty verdict actually rendered in *this* trial was surely unattributable to the [alleged] error." *Id.* (quoting *State v. Shorter*, 945 N.W.2d 1, 9 (Iowa 2020)). The record affirmatively establishes Clark was not prejudiced by the admission of the alleged hearsay statements. *Id.* (citation omitted).

The Deputies testimony about the 911-call and the reasons for being dispatched was not inadmissible double-hearsay; instead, their testimony was admissible to show their responsive actions. Even if their statements were objectionable hearsay, any error in admitting those statements was harmless and not prejudicial given the strength of the State's case. So the Court should reject Clark's hearsay claim.

CONCLUSION

Clark fails to prove that the trial court improperly denied her motion to suppress. She cannot prove that the court erred by allowing the Deputies to testify to their responsive conduct after being dispatched to investigate Clark's reportedly reckless driving. And because sufficient evidence supports her OWI conviction, the Court should affirm.

REQUEST FOR NONORAL SUBMISSION

Oral argument is unnecessary for this case.

Respectfully submitted,

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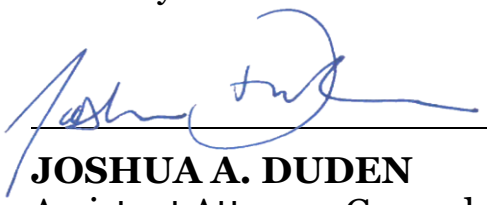

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