IN THE SUPREME COURT OF IOWA

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

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

APPELLANT'S APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED MAY 1, 2019

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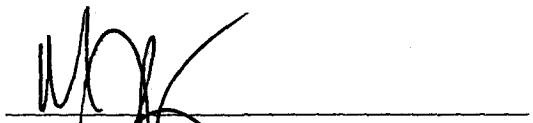
CERTIFICATE OF SERVICE

On May 20, 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.

APPELLATE DEFENDER'S OFFICE



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QUESTIONS PRESENTED FOR REVIEW

Is a person seized for federal and state constitutional purposes when a police officer blocks her car in a one-lane alley so that the only path of egress is to drive in reverse for 125 feet in the dark or to drive around the officer and through residential lawns?

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STATEMENT IN SUPPORT OF FURTHER REVIEW

Because this case presents an issue of broad public importance, Kari Lee Fogg respectfully requests this court accept further review to clarify that a person is seized for state and federal constitutional purposes when an officer blocks the person's route of egress in a single-lane alley, so that the only way to leave the encounter is to back out approximately 125 feet in the dark or to drive around the police car and through residential lawns. (Opinion, p. 3). Iowa R. App. 6.1103(b)(4).

In this case, Officer Frazier did not use sirens or flashing lights when he investigated a vehicle stopped in narrow alley at about 10:00pm on October 10, 2017. Thus, the determination of whether Fogg was seized depends on the location of Officer Frazier's car and the extent to which Fogg's ability to leave was impaired. Officer Frazier conceded at the suppression hearing that the only routes available to Fogg were to drive in reverse for half a block (estimated about 125 feet) or to drive around his car and through residential lawns.

The court of appeals also concluded Fogg could have turned around in a driveway. While driveways abutted the alley, there was no testimony below as to whether any of the driveways were unoccupied on the night in question. Further, turning around in one of them would have still required Fogg to drive in reverse down the alley for some distance and back into a driveway in the dark.

Under these circumstances Fogg was faced with either performing driving maneuvers that the average driver would not be comfortable or capable of performing or trespassing over residential lawns and providing the officer with justification to stop her, Fogg's ability to drive away was substantially impaired. Fogg was seized in a constitutional sense, and the court of appeals erred in holding otherwise. (Opinion, p. 8).

Accordingly, Fogg respectfully requests this court grant further review of the court of appeals' May 1, 2019, decision.

STATEMENT OF THE CASE

Nature of the Case: Kari Lee Fogg seeks further review of the court of appeals decision affirming 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. (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. (App. pp. 6-7). 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. (App. pp. 17-19). Fogg appealed, and the court of appeals affirmed her conviction and sentence. (App. pp. 20-21) (Opinion).

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) (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).

Fogg did not complete the field sobriety tests and declined to take a preliminary breath test. (Trial Tr. vol. I, p. 25 L. 24 – p. 26 L. 23; p. 27 L. 21-p. 28 L. 17; p. 30 L. 20 – p. 34 L. 17). Fogg was arrested and transported 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. 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) (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

FOGG WAS SEIZED WHEN OFFICER FRAZIER PARKED IN FRONT OF HER CAR, BLOCKING HER IN THE ALLEY.

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 court of appeals concluded Fogg was not seized under the federal or State constitution because her ability to drive away was not substantially impaired. (Opinion, p. 7). "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 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. Such actions could have constituted various crimes in Iowa, including trespass, criminal mischief, or harassment. See Iowa Code §§ 716.7 (2018) (trespass defined as entering upon property without permission of owner with intent to alter, damage, or harass); 716.1 (2018) (criminal mischief defined as any damage, defacing, alteration, or destruction of property when done intentionally by someone with no right to do so); 708.7 (2018) (a person commits harassment when the person purposefully and without legitimate purpose has personal contact with another person with the intent to threaten, intimidate, or alarm the other person). Even if Fogg lacked the requisite intent for those crimes, the act of driving through a stranger's lawn would have created reasonable suspicion of such an offense on the part of the officer. See State v. Moran, No. 15-2164, 2016 WL 6270126, at *2 (Iowa Ct. App. Oct. 26, 2016) (concluding a driver pulling into a residential lawn to turn around created a reasonable suspicion the driver was

threatening or harassing the occupant of the house sufficient to justify the stop of the car); State v. Kreps, 650 N.W.2d 636, 643 (Iowa 2002) (an investigatory stop is justified "if any reasonable inference of wrongful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn").

The other option available to Fogg 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) (App. p. 12). An average driver of reasonable prudence is unlikely to feel comfortable or competent to back up in the dark for such a distance. Equally unlikely is that Fogg could have backed into a driveway to turn around, as suggested by the court of appeals. (Opinion, p. 8). This would have also required backing up in the dark and turning into a driveway that may or may not have been occupied by other vehicles or obstacles. Importantly, there was no testimony below about the accessibility of the driveways abutting the alley.

The court of appeals concluded the facts of this case were substantially similar to State v. Mathis, No. 14-0861, 2015 WL 1817111, at *1 (Iowa Ct. App. April 22, 2015). (Opinion, p. 7 fn. 1). However, the facts in Mathis were different in critical respects. The stop in Mathis appears to have occurred in the daytime, as the officers were able to see and identify the passengers in the car. Mathis, 2015 WL 1817111 at *1. Further, the officer testified "Mathis could have *easily* backed out down the alley. She could also have driven forward down the alley, although this would have required her to drive on the grass to get around his vehicle. . . . [I]t looked like other people had previously driven on the grass." Mathis, 2015 WL 1817111 at *1 (emphasis added). The evidence in this case did not show that Fogg could have easily backed out of the alley or that people regularly drove through the abutting yards.

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").

CONCLUSION

Because the court of appeals erred in affirming the district court's denial of Fogg's motion to suppress and subsequent conviction for OWI, Fogg respectfully requests this court accept further review, conclude Officer Frazier's stop violated Fogg's rights under the Fourth and Fourteenth Amendments to the United States Constitution and Article I, section 8 of the Iowa Constitution, vacate her conviction and remand her case.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was $3.56, and that amount has been paid in full by the Office of the Appellate Defender.

MELINDA J. NYE
Assistant Appellate Defender

CERTIFICATE OF COMPLIANCE WITH TYPEFACE *REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR* FURTHER REVIEWS

This application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

[X] this application has been prepared in a proportionally spaced typeface using Bookman Old Style, font 14 point and contains 2,819 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).

Dated: 5-17-19

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IN THE COURT OF APPEALS OF IOWA

No. 18-0483
Filed May 1, 2019

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KARI LEE FOGG,
Defendant-Appellant.

Appeal from the Iowa District Court for Boone County, Paul G. Crawford (motion to suppress) and Stephen A. Owen (trial), District Associate Judges.

Kari Fogg appeals her conviction of operating while intoxicated. **AFFIRMED.**

Mark C. Smith, State Appellate Defender (until withdrawal), and Melinda J. Nye, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, and Genevieve Reinkoester, Assistant Attorney General, for appellee.

Considered by Potterfield, P.J., and Doyle and Mullins, JJ.

MULLINS, Judge.

Kari Fogg appeals her conviction of operating while intoxicated (OWI), first offense. She contends the district court erred in denying her motion to suppress evidence on the basis of an allegedly unreasonable seizure. She also argues her counsel rendered ineffective assistance in failing to object to alleged prosecutorial error in the State's closing argument.

I. Background Facts and Proceedings

Shortly before 10:00 p.m. on Tuesday, October 10, 2017, Officer Michael Frazier of the Boone Police Department was on routine patrol when he observed a silver Hyundai "driving really slow" at "ten miles per hour" through a residential area. Frazier circled the block and observed the vehicle's movement for another three or four minutes. The vehicle then turned north into a narrow alley located between the main streets. According to Frazier's testimony, the alley is not used often. The alley is abutted by houses, outbuildings, and driveways. Frazier paralleled the vehicle on one of the side streets and then waited for the vehicle to exit the alley at the end of the block. After waiting at the end of the block for roughly one minute, Frazier noticed the car had stopped in the middle of the alley and parked. When asked during the suppression hearing whether he was suspicious a crime was being committed, Frazier testified:

> 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.
>
> . . . .
>
> I really don't know. I mean it was just odd that someone would be parked right there at that time of night.

On cross-examination, Frazier conceded he was not under any belief that a crime had been committed. He elaborated:

> I thought it was a possibility something was going on or it was somebody that was broken down in the alley. I didn't know.
>
> . . . .
>
> I was suspicious of her driving behavior before and then where she was parked at at the time or where she had stopped at.

At trial, Frazier testified there was an increased rate of burglaries in the area over the summer months and Fogg's behavior on the night in question caused him concern "that someone was maybe cruising the alleys casing some garages."

Frazier turned east on the street north of the alley then "turned south into the alley and pulled in front of the vehicle to get out to see what was going on." Frazier observed the vehicle was still running, its headlights were illuminated, and it was occupied by a woman, later identified as Fogg. Frazier, without activating his emergency lights or siren or drawing his sidearm, parked his cruiser twenty to thirty feet in front of the Hyundai and approached. Because of the way the vehicles were situated, Fogg's only avenues for leaving would have been to back out of the alley or drive around Frazier's cruiser, the latter of which would have required Fogg to drive through yards along the alley. Fogg opened her car door, and Frazier questioned Fogg "whether everything was okay" and "what was going on," upon which Fogg advised "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." Frazier detected a strong odor of alcohol emanating from Fogg's vehicle. Fogg was ultimately arrested and charged with OWI.

Fogg filed a pretrial motion to suppress arguing she was seized absent reasonable suspicion or probable cause in violation of her constitutional rights

under the state and federal constitutions. Following a hearing, the district court denied the motion, concluding Fogg was not seized in the constitutional sense or, alternatively, the seizure was supported by reasonable suspicion. A jury ultimately found Fogg guilty as charged. Fogg appealed following the imposition of sentence.

II. Analysis

A. Motion to Suppress

Fogg challenges the district court's denial of her motion to suppress, contending the court erred in concluding her encounter with Frazier did not amount to a seizure or, alternatively, if the encounter did amount to a seizure, it was supported by reasonable suspicion. "When a defendant challenges a district court's denial of a motion to suppress based upon the deprivation of a state or federal constitutional right, our standard of review is de novo." *State v. Smith*, 919 N.W.2d 1, 4 (Iowa 2018) (quoting *State v. Coffman*, 914 N.W.2d 240, 244 (Iowa 2018)). "[W]e independently evaluate the totality of the circumstances as shown by the entire record." *Id.* (alteration in original) (quoting *State v. White*, 887 N.W.2d 172, 175 (Iowa 2016)). In evaluating the totality of the circumstances, we are entitled to consideration of evidence introduced at both the suppression hearing and trial. *See State v. Tyler*, 867 N.W.2d 136, 152 (Iowa 2015). "Each case must be evaluated in light of its unique circumstances." *Coffman*, 914 N.W.2d at 244 (quoting *State v. Kurth*, 813 N.W.2d 270, 272 (Iowa 2012)). We give deference to the district court's findings of fact, but we are not bound by them. *State v. Storm*, 898 N.W.2d 140, 144 (Iowa 2017).

"The Fourth Amendment of the United States Constitution," as applied to the states by the Fourteenth Amendment, "and article I, section 8 of the Iowa Constitution protect individuals against unreasonable searches and seizures." *State v. Naujoks*, 637 N.W.2d 101, 107 (Iowa 2001); *accord State v. McNeal*, 867 N.W.2d 91, 99 (Iowa 2015). Evidence obtained following a violation of these constitutional protections is generally inadmissible at trial. *See Wong Sun v. United States*, 371 U.S. 471, 484–85 (1963); *Mapp v. Ohio*, 367 U.S. 643, 654–55 (1961); *Naujoks*, 637 N.W.2d at 111.

Fogg argues that Frazier's placement of his police cruiser in the alley rendered the encounter a seizure. It is true that stopping an automobile and detaining its occupants unquestionably amounts to a seizure within the meaning of the state and federal constitutions. *See Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *State v. Coleman*, 890 N.W.2d 284, 288 (Iowa 2017); *State v. Tyler*, 830 N.W.2d 288, 292 (Iowa 2013). Fogg concedes this case does not involve a "textbook traffic stop" but argues "the circumstances of the encounter still demonstrate that [she] was seized for constitutional purposes."

"[N]ot all personal intercourse between the police and citizens involve seizures." *State v. Wilkes*, 756 N.W.2d 838, 842 (Iowa 2008); *accord State v. Lowe*, 812 N.W.2d 554, 570 (Iowa 2012). "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Wilkes*, 756 N.W.2d at 842 (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968)). In order "to convert an encounter between police and citizens into a seizure," there must be "objective indices of police coercion," which "is not established by ordinary indicia of police

authority," such as merely flashing a badge, wearing a uniform, or being visibly armed. *See id.* at 843. Whether a seizure occurred depends on the totality of the circumstances, and 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.* at 842–843 (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). "The use of sirens, flashing lights or other signals . . . might also constitute a show of authority that is a seizure." *State v. Harlan*, 301 N.W.2d 717, 720 (Iowa 1981). None of the foregoing factors are present here; the only allegation of police coercion in this case is the placement of Frazier's patrol car in front of Fogg's vehicle. We agree that the location of the cruiser in relation to the subject vehicle is "a factor in determining whether a seizure occurred." *Wilkes*, 756 N.W.2d at 844. However, our supreme court has cited with approval the conclusion of another state high court "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." *Id.* (emphasis added) (citing *People v. Cascio*, 932 P.2d 1381, 1386–87 (Colo. 1997)). Here, the evidence is undisputed that Fogg's ability to leave was not "wholly" blocked; she could have backed out of the alleyway, and the evidence shows she was parked next to a driveway abutting the alley, which she could have turned around in; additionally, as conceded in her brief on appeal, she could have also driven forward, although that avenue would have required

her to drive through yards along the alley. *Cf. id.* ("Here, the ability of Wilkes to drive away was not substantially impaired. In fact, . . . there were at least two ways for him to turn his truck around and leave the quarry, had he chosen to do so."); *State v. Mathis*, No. 14-0861, 2015 WL1817111, at *2–3 (Iowa Ct. App. Apr. 22, 2015) (finding driver's ability to drive away was not "substantially impaired," as "[s]he had two means of egress. She could have backed out down the alley or she could have driven forward past the officers' vehicles."). Likewise, this is not a situation in which Fogg was in transit and Frazier's placement of his vehicle in her avenue of egress forced her to grind to a halt in the face of police authority; she was already stopped and parked in the alley. *See, e.g.*, *Harlan*, 301 N.W.2d at 720 (noting "[s]topping a car in transit is obviously a seizure," but indicating approaching a stationary vehicle is less akin to a seizure); *Mathis*, 2015 WL1817111, at *3 ("[W]hen an officer does not stop a vehicle, but merely walks up to a vehicle that is already stopped, as any citizen might do, there has generally not been a seizure."); *State v. Bakula*, No. 08-0629, 2008 WL 500196, at *2 (Iowa Ct. App. Nov. 26, 2008) (finding fact that subject vehicle was already stopped when officer initiated encounter militated against the existence of a seizure). The circumstances in this case are nearly identical to those in another matter in which this court affirmed a denial of a motion to suppress, concluding no seizure occurred. *See generally Mathis*, 2015 WL1817111, at *1–3.[1]

[1] In *Mathis*, two officers in separate vehicles saw the defendant drive her vehicle into an alley. 2015 WL1817111, at *1. Without activating their lights or sirens, both officers drove into the alley where the defendant's vehicle was parked with the motor running. *Id.* One officer parked parallel to the subject vehicle, but facing in the opposite direction, and the other officer parked about thirty feet behind the first officer, which would have placed him in the defendant's forward avenue of egress. *See id.* The evidence showed "Mathis could have easily backed out down the alley. She could also have driven

Here, Frazier was the sole officer involved in the initial encounter; he did not draw his sidearm; there was no physical touching between him and Fogg; his tone with Fogg was casual and non-aggressive; and he did not use sirens, flashing lights, or other signals of authority. Although Frazier's vehicle was situated in front of Fogg's, her ability to drive away was not substantially impaired. Simply stated, there were no objective indices of police coercion during this encounter; there was no show of authority here, which is a necessary prerequisite for a seizure. *See California v. Hodari D.*, 499 U.S. 621, 626–28 (1991). Consequently, upon our de novo review of the record and consideration of the totality of the circumstances, we agree with the district court that Fogg was not subjected to a seizure in the constitutional sense. We therefore affirm the district court's denial of her motion to suppress evidence.

B. Ineffective Assistance of Counsel

Next, Fogg argues her "trial attorney was ineffective for failing to object to the State's prosecutorial error when the State disparaged defense counsel during closing argument." Ineffective-assistance-of-counsel claims are immune from error-preservation defects. *See State v. Fountain*, 786 N.W.2d 260, 263 (Iowa

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forward down the alley, although this would have required her to drive on the grass to get around" one of the officer's vehicles. *Id.* Ultimately, Mathis was charged with driving while barred, and she filed a motion to suppress, claiming she was improperly seized. On appeal, we affirmed the denial of the motion to suppress, concluding:

> The officers did not stop Mathis's vehicle. They did not have their lights and sirens on. The evidence showed Mathis's ability to drive away from the officers was not substantially impaired. She had two means of egress. She could have backed out down the alley or she could have driven forward past the officers' vehicles. There was no evidence the officers engaged in a display of force or used language that would have made Mathis believe she was compelled to comply with the request for her driver's license. The record in this case does not show there were objective indices of police coercion.

Id. at *3.

2010). We review such claims de novo. *State v. Albright*, ___ N.W.2d ___, ___, 2019 WL 1302384, at *4 (Iowa 2019). Fogg must establish by a preponderance of the evidence that (1) her trial counsel failed to perform an essential duty and (2) the failure resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Lopez*, 907 N.W.2d 112, 116 (Iowa 2018). We "may consider either the prejudice prong or breach of duty first, and failure to find either one will preclude relief." *State v. McNeal*, 897 N.W.2d 697, 703 (Iowa 2017) (quoting *State v. Lopez*, 872 N.W.2d 159, 169 (Iowa 2015)).

Specifically, Fogg complains of the prosecutor's statements during closing rebuttal argument that "her attorney was intentionally misrepresenting the evidence and making disingenuous arguments because that was his role in defending a client" and urging "the jury to consider the prosecutor more trustworthy and honest because he did not have a client to defend." Generally, Fogg believes the prosecutor improperly accused defense counsel of unethical conduct by trying to twist the evidence in his client's favor.

However, upon our de novo review of the record, we find no reasonable probability of a different outcome had counsel objected to the complained-of statements. *See Albright*, ___ N.W.2d at ___, 2019 WL 1302384, at *5 ("For the second prong—prejudice—the claimant must prove there is a reasonable probability that the outcome of the proceeding would have been different but for counsel's unprofessional errors."). The jury was specifically instructed it must base its verdict only upon the evidence presented and the court's instructions. The jury was also instructed statements, arguments, and comments by the lawyers are not evidence. Appellate courts presume juries follow the court's

instructions, *State v. Sanford*, 814 N.W.2d 611, 620 (Iowa 2012); *State v. Hanes*, 790 N.W.2d 545, 552 (Iowa 2010), and we are thus unconvinced that the complained-of statements had any effect on the jury's verdict.

Furthermore, we disagree with Fogg that "[t]he case was close." Although Fogg variously testified that she was not impaired on the night in question and attempted to explain away the State's evidence during her testimony, the State provided a mountain of evidence to rebuff her assertions. Fogg admitted to alcohol consumption, although initially denying the same, and the standard field sobriety tests she completed indicated she was impaired.[2] She also admitted to consuming several medications on the night in question, some of which cause dizziness and may impair one's ability to operate a motor vehicle. Video footage from Frazier's body camera showed Fogg to exhibit slurred speech and an inability to follow instructions during attempted field sobriety testing. Video footage of Fogg at the jail likewise showed Fogg, throughout the attempted exercise of her rights under Iowa Code section 804.20 (2017) and implied-consent-advisory procedures, to exhibit slurred speech; be in somewhat of a confused and emotional state; and have bloodshot, watery eyes. Frazier testified he continued to smell the odor of alcohol coming from Fogg's person throughout his more than two-hour encounter with her. She denied being impaired to Frazier, but refused to submit to both a preliminary breath test and chemical testing. The jury was instructed it could consider Fogg's refusal to submit to a breath test in reaching its verdict. Frazier testified he had "[n]o doubt" that Fogg

[2] Fogg was subjected to the horizontal- and vertical-nystagmus tests. She declined to perform the walk-and-turn and one-legged-stand tests because she knew she would fail those tests.

was operating a motor vehicle while intoxicated. Given the strong evidence of guilt, we find no reasonable probability of a different outcome had counsel objected to the complained-of statements. *See Albright*, ___ N.W.2d at ___, 2019 WL 1302384, at *5.

We find counsel's alleged failure did not result in prejudice to Fogg, and counsel therefore did not render ineffective assistance.

III. Conclusion

Having found the district court correctly denied Fogg's motion to suppress and counsel was not ineffective as alleged, we affirm Fogg's conviction of OWI, first offense.

AFFIRMED.

IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	**Case Title**
18-0483	State v. Fogg

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