IN THE SUPREME COURT OF IOWA
Supreme Court No. 19-1509

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JAMEESHA RENAE ALLEN,
Defendant-Appellant.

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

APPELLEE'S BRIEF

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ROUTING STATEMENT

The Court should transfer this matter to the Court of Appeals. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

A jury convicted Jameesha Allen of assault while using or displaying a dangerous weapon, an aggravated misdemeanor. *See* Iowa Code §§ 708.1, 708.2(3) (2017). She contends the district court erred to allow an amendment to the trial information and erred to admit surveillance videos over her foundation objection. She asserts counsel was ineffective for allowing two of the victim's out-of-court statements. And she contends the prosecutor committed misconduct in rebuttal argument, a claim which she raises directly and through ineffective assistance.

The Honorable David M. Porter presided.

Course of Proceedings

The State charged Allen by trial information on April 2, 2019 with two offenses: third-degree criminal mischief and assault causing bodily injury. Trial Info. (filed Apr. 2, 2019); App. 10–11. Sometime between July 19 and July 24, the State filed an amended trial

information, but it awaited approval in the district court until the day of trial. Tr. Vol. I p. 4, l. 20–p. 5, l. 7. It sought to amend the charges to willful injury and assault while displaying or using a dangerous weapon. *Id.*

On July 29, 2019, the morning of Allen's two-day trial, the district court refused to allow the amended charge of willful injury. *Id.* p. 1, l. 9, p. 16, l. 5–p. 22, l. 12. But the court approved amending the assault charge from bodily injury to use or display of a dangerous weapon. The jury trial concluded the next day with Allen's conviction as charged. Tr. Vol. III p. 84, l. 25–p. 85, l. 4. The amended trial information was time-stamped that day. Amend. Trial Info. (filed July 30, 2019); App. 14.

The district court denied Allen's posttrial motions on August 16, 2019. Tr. (Aug. 16, 2019) p. 7, l. 16–p. 10, l. 22. It imposed a two-year sentence, granted her probation, and levied a $625 fine. Sent. Order; App. 23–27.

Allen filed a timely notice of appeal.

Facts

On February 3, 2019 at 11:15 a.m., a man—later identified as Desean Waldrip—called 9-1-1 saying he was at the Dollar General

Store on Martin Luther King Jr. Ave and being chased. Tr. Vol. II p. 15, ll. 6–24; St. Ex. 1. He said there were three people and two cars—one white, one blue (and one a Ford). St. Ex. 1 at 02:16–02:24, 05:03, 05:30. In the course of his 9-1-1 call, he moved from the Dollar General to Hy-Vee. *See*, *e.g.*, *id.* at 04:05, 04:50–04:56, 05:26–05:36. He said he had been run over by one of the cars and was injured. *See*, *e.g.*, *id.* at 04:05, 04:50–04:56, 05:26–05:36.

Hy-Vee Assistant Store Manager James Knapp—whose store was across Urbandale Avenue from the Dollar General Store—later testified that he encountered a man, bleeding. Tr. Vol. II p. 20, ll. 1–6, p. 21, ll. 7–11. A surveillance video at Hy-Vee showed a man running toward the store and around a blue car. St. Ex. 2 at 00:32–00:53. As the man passed the blue car, a woman exited from it and chased him. *Id.* Then, once inside, a white car passed in front of the store. *Id.*; Tr. Vol. II p. 31, ll. 1–15. (In the 9-1-1 recording, the caller described the vehicles circling the lot and asked others to take down the cars' license plates. St. Ex. 1 at 05:15–05:36.)

The man told Knapp, that he "just got ran over by his girlfriend's mom." Tr. Vol. II p. 27, l. 22–25. He said it occurred at the Subway across the street. *Id.* p. 28, ll. 1–4. Knapp recalled the

man mentioned a white car. *Id.* p. 28, ll. 5–29. Knapp did not remember him saying anything about a blue car. *Id.*

Earlier, Brianna Alexander saw a car chasing the man. *Id.* p. 35, ll. 2–13. She was dropping her husband off for work at the Subway across from Hy-Vee. *Id.* p. 34, ll. 5–16; Tr. Vol. III p. 4, l. 18–p. 5, l. 5. She was standing near the drive-through lane. Tr. Vol. II p. 34, ll. 5–16; Tr. Vol. III; *see* St. Ex. 3. She heard a customer exclaim, "Somebody got hit." Tr. Vol. III p. 5, ll. 21–22. She saw a white car chasing a man and later a blue car. Tr. Vol. II p. 38, ll. 3–22. She described the man as Black, wearing a white T-shirt, "maybe 200 pounds, medium height." Tr. Vol. III p. 5, ll. 11–13.

Although initially unaware the store had a surveillance system, Ms. Alexander subsequently watched a recording of the drive-through. *Id.* p. 40, l. 21–p. 41, l. 1. She confirmed the accuracy of the date, time, and store number stamp. *Id.* The video showed a blue car driving over a gravel median and a man running from it, then stumbling, then walking away. St. Ex. 5 at 00:02–00:07. Ms. Alexander confirmed the man in the video looked to be the one she saw at the time and the car looked similar to what she recalled. Tr. Vol. III p. 6, l. 15–p. 7, l. 1.

Des Moines Police Officer Mark Stuempfig met Waldrip at the Hy-Vee. *Id.* p. 13, ll. 5–16. Waldrip was wearing a white T-shirt and had blood dripping from his hand. *Id.* He was "excited, agitated, sweaty, short of breath." *Id.* ll. 21–24. He acknowledged he called 9-1-1 and he had been hit by a car but was otherwise uncooperative and refused medical treatment. *Id.* p. 13, l. 8–p. 15, l. 2. Officer Stuempfig learned a white and a blue car were involved. *Id.* p. 15, ll. 15–24. Officer Steumpfig's partner spotted a blue car registered to Jameesha Allen on Martin Luther King. *Id.* p. 17, ll. 2–16.

Detective Brad Youngblut investigated the next day. *Id.* p. 23, l. 21–p. 24, l. 2. Familiar with the area, he obtained security footage from the Storage Mart, which is located on east side of Martin Luther King. *Id.* p. 27, ll. 1–23. The Storage Mart security camera looked across the road to the Dollar General Store. *Id.* p. 27, l. 23–p. 29, l. 16. The first video clip from the surveillance camera showed a man walking north on Martin Luther King from Wellbeck Road at 11:14. St. Ex. 8 clip 1 at 00:00–00:32. The figure stands or paces near the rear of the Dollar General store until 11:16 before walking south. *Id.* at 00:32–02:27. Moments later, the man in the white shirt runs back north through the Dollar General parking lot with two men in pursuit.

St. Ex. 8 clip 2 at 00:00–01:00. Two seconds later, a blue car turns in to the lot and drives over a berm in pursuit. *Id.* at 01:00–01:14. The balance of the clip shows people at the Storage Mart looking in the direction of that travel, running about, and moving in an apparent effort to follow events. *Id.* at 01:00–03:15.

The detective also obtained security footage from the Dollar General for the same time frame. Tr. Vol. III p. 31, l. 14–p. 32, l. 10. The camera pointed from the south corner of the building and points northeast. *Id.* p. 33, ll. 4–21. The first of its two clips show a man in a white shirt briefly pursued by two men to the north. St. Ex. 7 clip 1 at 00:00–00:42. The second clip shows the man overtaken by a blue car and two men following on foot. *Id.* clip 2 at 00:00–00:15. Detective Youngblut testified this was the same blue vehicle. Tr. Vol. III p. 34, ll. 3–11.

The detective spoke with Jameesha Allen later on the 4th. *Id.* p. 34, l. 18–p. 35, l. 9. When the detective described the blue car jumping the curb at the Dollar General, Allen said, "yeah, that's me. I was chasing him." St. Ex. 6 clip 1 at 00:00–00:11. "There was a whole bunch of people" chasing Waldrip, she said. *Id.* at 00:11–00:17, 00:39–00:41. Claiming not to know who was driving the white

car, she insisted the blue "Ford Fusion was me, for sure." *Id.* at 00:17–00:28. "I was driving." *Id.* at ~00:40. "You know who I am in this situation," she told the Detective. *Id.* at 00:40–00:45. "I was completely pissed off yesterday." *Id.* clip 2 at 00:20–00:28. "I was driving," she repeated. *Id.* Insisting the white car was not involved, she repeated that "it was the blue car," she was driving, but she did not think Waldrip "got hit." *Id.* at ~00:50–01:10.

On cross-examination, the Detective admitted he did not see Allen driving the car. Tr. Vol. III p. 43, l. 15–p. 44, l. 22. But he identified Allen in the video by, among other things, the distinctive bandage to her hand. *Id.* "[I]t matches her description to a 'T'." *Id.* p. 44, ll. 15–22.

Allen testified first, seemingly, that Waldrip cut her that morning. *Id.* p. 52, l. 24–p. 53, l. 3. Later she said she could not remember who cut her. *Id.* p. 53, l. 21–p. 54, l. 5. She recalled nothing special from the morning. *Id.* p. 53, ll. 18–20. She claimed she had been asleep that morning and her family had her car. *Id.* p. 54, ll. 13–18. She denied assaulting Waldrip with her car or even driving it. *Id.* p. 55, ll. 5–7, p. 55, ll. 19–21. Neither did she know if anyone did. *Id.* p. 54, ll. 8–9.

She claimed that she said otherwise to Detective Youngblut because "I was injured and I had family" and "just wanted him to get out of my mom's house, honestly." *Id.* p. 56, ll. 22–25, p. 57, ll. 1–6. She said, "it was a miscommunication because I really didn't understand what he was trying to get at." *Id.* p. 58, ll. 5–12.

ARGUMENT

I. The district court properly concluded the State did not charge a wholly new and different offense or substantially prejudice Allen when it allowed an amendment from one alternative of assault to another.

Preservation of Error

The State does not contest error preservation. Iowa R. App. P. 6.903(3).

Standard of Review

Because Rule 2.4(8)(a) provides that the district court "may" amend the trial information, that decision is generally reviewed for abuse of discretion. *State v. Maghee*, 573 N.W.2d 1, 5 (Iowa 1997). Review shifts to correction of errors at law for questions concerning prejudice to the defendant's substantial rights or charging a wholly new and different offense. *Id.*

Merits

The district court properly amended the trial information. The amendment alleged a different means of committing assault. The amendment did not impact Allen's denial defense, thus caused her no substantial prejudice.

Iowa Rule of Criminal Procedure 2.4(8) provides:

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

Iowa R. Crim. P. 2.4(8)(a); *see* Iowa R. Crim. P. 2.5(5) (making rules pertaining to indictment applicable to trial information). The Court has interpreted Rule 2.4(8) to require a "two part test." *Maghee*, 573 N.W.2d at 5. An information may be amended so long as it does not 1) prejudice the substantial rights of the defendant and 2) charge a "wholly new or different offense." *Id.*

A. "Wholly New and Different Offense" Analysis.

Relying principally on *State v. Sharpe*, 304 N.W.2d 220 (Iowa 1981), Allen argues the two offenses do not share identical elements or punishment and thus are "wholly new and different." Appellant's

Pr. Br. pp. 12-18. While *Sharpe* considered these distinctions, they do not govern here.

In *Sharpe*, the State sought to amend a charge from second-degree murder to first. 304 N.W.2d at 221. The court observed first-degree murder contained elements not present in second degree murder and the difference in punishment was great. *Id.* at 223; *compare* Iowa Code §§ 707.1, .2 [first-degree murder], and 902.1 [life imprisonment] *with* 707.3 [second-degree murder] and 902.9 [25 years' imprisonment]. *Sharpe* distinguished, however, instances in which a single crime may be committed by alternative means. 304 N.W.2d at 222. This is the principle that governs here.

In *State v. Fuhrmann*, 257 N.W.2d 619, 623–24 (Iowa 1977), the Court considered an amendment to add felony-murder to a charge of first-degree premeditated murder. Iowa Code section 707.2(1) contains several alternatives of murder, including premeditated murder, felony murder, killing during an escape, killing a police officer, and certain kinds of child endangerment resulting in death. Iowa Code § 707.2(1)(*a*)-(*f*). The Court concluded the amendment did not allege a wholly new and different offense. "There is but one crime called murder in Iowa. First-degree murder may be

committed in several ways. Therefore, the amendment alleging an alternative method by which defendant committed first-degree murder was authorized." *Fuhrmann*, 257 N.W.2d. at 624.

In *State v. Williams*, 305 N.W.2d 428, 430 (Iowa 1981), the Court considered an amendment to add conspiracy to deliver a controlled substance to two counts alleging delivery and possession with intent to deliver. *See* Iowa Code § 204.401(1) (1979) (now Iowa Code § 124.401(1)). The Court approved because "the effect of the amendment was not to add another offense but to merely add a new means of committing the same offense, drug trafficking . . ." The Court recognized that the "wholly new" language in Rule 2.4(8)(a) "preserve[s] the right to amend by charging a different means of committing an offense . . ." *Id.* at 430.

The rule governs even if the grade of offense changes with the amendment. In *Maghee*, the Court permitted an amendment to a possession with intent to deliver and conspiracy to deliver charge from a Class "C" offense to a Class "B" based on the amount of substance at issue. 573 N.W.2d at 4. Noting *Sharpe*, the Court still concluded there was but one controlled substance crime; the change of penalty did not make the amendment a wholly new or different

offense. *Id.* at 4–5; *see State v. Briscoe*, 816 N.W.2d 415, 417-19 (Iowa Ct. App. 2012) (holding same notwithstanding change of type of controlled substance).

In *State v. Schertz*, 330 N.W.2d 1, 2 (Iowa 1983), the Court considered an amendment to add first-degree kidnapping by intentionally subjecting the victim to torture to first-degree kidnapping by holding the victim as hostage or inflicting serious injury. *Id.* The defendant argued the newly charged alternative was "wholly new and different" because it required proof of different elements, but the Court rejected that elements-based test. *Id.* Instead, the Court noted, "[w]e have held that amending to add another means of committing a particular offense does not amount to alleging a new offense." *Id.* Because the defendant remained charged with the same offense—first-degree kidnapping—the addition of a new means of committing that offense did not violate the amendment rule.

Not to put too fine a point on it, but *State v. Abrahamson*—to say nothing of *Sharpe* and *Schertz*—forecloses a *Blockberger*-style elements comparison to determine whether offenses are different for anything other than lesser-included offense analysis. *State v.*

Abrahamson, 746 N.W.2d 270, 274 (Iowa 2008); *Schertz*, 330 N.W.2d at 2; *Sharpe*, 304 N.W.2d at 223. Thus, standing the elements and punishment of one offense up against those of another does not answer the issue here.

Here, the State originally charged Allen with assault causing bodily injury and sought to amend it to assault while displaying a dangerous weapon. There are three means of committing an assault:

> A person commits an assault when, without justification, the person does any of the following:
>
> *a*. Any act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act.
>
> *b*. Any act which is intended to place another in fear of immediate physical contact which will be painful, injurious, or offensive, coupled with the apparent ability to execute the act.
>
> *c*. Intentionally points any firearm toward another or displays in a threatening manner any dangerous weapon toward another.

Iowa Code § 708.1(2)(*a*)–(*c*); *see* Jury Instr. No. 11 (listing same alternative elements of assault); App. 31. At the risk of stating the obvious, the various alternatives—a harmful touch, an act intended

so, and display of a dangerous weapon—are all alternatives within a single Code section.

The following Code section governs penalties. Section 708.2(2) makes it a serious misdemeanor to cause bodily injury in an assault. Section 708.2(3) makes it an aggravated misdemeanor to "use or display a dangerous weapon" in an assault.

Thus, the district court correctly determined the amendment here did not charge a wholly new and different offense. The State may prove an assault by a variety of means. These include showing an act intended to result in offensive contact, an act intended to place the victim in fear of it, or an act of display of a dangerous weapon. *See* Iowa Code § 708.1(2)(*a*)–(*c*). The grade of offense may change depending on the alternative, but the offense itself has not changed. *Compare id. with* 708.2(2) and 708.2(3).

All the State did was allege an alternative means of committing assault. Cases from *Furhmann* to *Abrahamson* show the amendment did not charge a wholly new and different offense.

B. Substantial Prejudice Analysis.

Neither did the amendment cause Allen substantial prejudice. "An amendment prejudices the substantial rights of the defendant if it

creates such surprise that the defendant would have to change trial strategy to meet the charge in the amended information." *Maghee*, 573 N.W.2d at 6.

Allen claims she was prejudiced in two ways: first the amendment enhanced the penalty and second she believes she was entitled to rely on an absence of proof of bodily injury. Appellant's Pr. Br. pp. 17–18. Neither are availing.

The penalty did increase, but not substantially. The change here was one year, not the difference between life in prison and a 25-year sentence discussed in *Sharpe*. *Compare* Iowa Code §§ 708.2(2) and (3) *with* 903.1(1)(*b*) and 903.1(2). Certainly it is less than the change in penalty the defendant in *Maghee* faced, from a Class "C" offense to a Class "B" felony.

Allen's reliance interest requires a fuller discussion. It is not enough to state one may rely on the State's difficulty proving one alternative or grade of an offense. *See* Appellant's Pr. Br. p. 18 (citing *State v. Cooper*, 223 N.W.2d 177, 180 (Iowa 1974)). Rather, what is important is any indication of surprise or inability to follow through on her defense. The minutes of testimony here made plain the method of Allen's crime was driving and hitting Waldrip with her car.

Compare Maghee, 573 N.W.2d at 6 (noting minutes of testimony disclosed amount of controlled substance meeting threshold for amended grade of offense). Irrespective of amendment, the State could prove assault by display of a dangerous weapon (the car). *See* Iowa Code § 708.1(2)(*c*). And, the record implies Allen's counsel anticipated the amended charge; she filed proposed jury instructions based on the amended charges. *See* Tr. Vol. I p. 19, l. 12–p. 20, l. 12 (counsel stating she filed proposed instructions for amended charge of willful injury at the direction of court administration).

Further, supporting the absence of surprise, counsel did not ask for a continuance. *See Maghee*, 573 N.W.2d at 6 (noting counsel did not ask for a continuance, the "traditionally appropriate remedy for a defendant's claim of surprise"). Allen was not in custody and had waived speedy trial. Order Init. App. (filed Feb. 28, 2019); Waiver Speedy Tr. (filed May 2, 2019); App. 6-9, 13. If counsel were truly surprised, she would more likely have asked for a continuance. She did not.

Finally, the amendment did not change Allen's defense. She claimed to have not been involved at all. *Id*. p. 53, l. 21–p. 54, l. 5. She recalled nothing special from the morning. *Id*. p. 53, ll. 18–20.

She claimed she had been asleep that morning and her family had her car. *Id.* p. 54, ll. 13–18. She denied assaulting Waldrip with her car or even driving it. *Id.* p. 55, ll. 5–7, p. 55, ll. 19–21. Neither did she know if anyone else did. *Id.* p. 54, ll. 8–9. Like the defendant in *Maghee*, Allen's defense was total denial. Whether the State asserted use of a dangerous weapon or bodily injury would have no impact on this defense.

The district court properly allowed the amendment.

II. The district court did not abuse its discretion to conclude there was adequate foundation for three surveillance videos.

Preservation of Error

The state does not contest error preservation. Iowa R. App. P. 6.903(3). Additionally, because this issue pertains to an evidentiary ruling, the Court may sustain it on any ground appearing in the record. *DeVoss v. State*, 648 N.W.2d 56, 63 (Iowa 2002).

Standard of Review

The Court reviews foundation rulings for abuse of discretion. *Hutchison v. American Family Mut. Ins. Co.*, 514 N.W.2d 882, 889–90 (Iowa 1994); *State v. Deering*, 291 N.W.2d 38, 41 (Iowa 1980). The Court will not disturb the ruling absent a clear abuse of that

discretion. *State v. Musser*, 721 N.W.2d 734, 750 (Iowa 2006). The appellant must demonstrate the lower court acted for "reasons clearly untenable or to an extent clearly unreasonable." *State v. Sayles*, 662 N.W.2d 1, 8 (Iowa 2003). "Even if an abuse of discretion is found, reversal is not required unless prejudice is shown." *State v. Buenaventura*, 660 N.W.2d 38, 50 (Iowa 2003).

Merits

Allen claims the district court abused its discretion to admit the surveillance videos from Subway, Dollar General, and Storage Mart over her foundation objection. Appellant's Pr. Br. pp. 19–26. She does not claim any falsification or misrepresentation occurred. Nor would that matter because her defense was that she was not present. She does argue that no testifying witness saw the events in the recordings. The circumstances, however, supply adequate foundation—some of which Allen herself provided.

Admission of a photograph or video generally requires that the picture is relevant to the controversy and that the picture fairly represents what it shows. *State v. Holderness*, 293 N.W.2d 226, 230 (Iowa 1980); *see* Iowa R. Evid. 5.901 (stating foundation requires "[t]estimony that a matter is what it is claimed to be"). The rule does

not require any "particular methodology." *Hutchison*, 514 N.W.2d at 890. There are some general approaches. One focuses on chain of custody. *Deering*, 291 N.W.2d at 40. Another focuses on the "photographic process employed and testi[mony] it produces accurate pictures." *Holderness*, 293 N.W.2d at 230. Yet another employs "testimony of a person who, although perhaps not connected with the photography, observed the scene and testifies that the picture fairly shows it." *Id.* But even without direct testimony, foundation can be established by the circumstances of the photo. *Id.*

A. Brianna Alexander confirmed the location the video showed. She said the man and the blue car were similar to those she saw at the time.

State's Exhibit 5 showed a blue car driving over a gravel median and a man running from it, then stumbling, then walking away. St. Ex. 5 at 00:02–00:07. Brianna Alexander had been standing near the drive-through lane. Tr. Vol. II p. 34, ll. 5–16; Tr. Vol. III; *see* St. Ex. 3, 5. She had seen a white car chasing a man and later a blue car. Tr. Vol. II p. 38, ll. 3–22. She described the man as Black, wearing a white T-shirt, "maybe 200 pounds, medium height." Tr. Vol. III p. 5, ll. 11–13.

Having viewed Exhibit 5, Alexander identified the surroundings and confirmed the video showed the correct store number, date, and time. Tr. Vol. II p. 40, l. 15–p. 41, l. 1. She also confirmed the video was a "fair and accurate of the depiction of the car and the young man" she had seen running. Tr. Vol. III p. 6, l. 15–p. 7, l. 1. Accordingly, the district court admitted the exhibit. *Id.* p. 7, ll. 6–7.

Allen contends the foundation was inadequate because Alexander had not known there was a surveillance system, did not know the people involved or see the specific portion in the video, and the collision she did see was with the white car. Appellant's Pr. Br. p. 25.

But, of course, an adequate foundation does not require identity of video and eyewitness recollection. *Holderness*, 293 N.W.2d at 230. Afterall, some videos are not recordings of a specific event at all, but rather a simulation of what a witness believes occurs in a particular circumstance. *Sayles*, 662 N.W.2d at 9. Without a claim the videos falsified or misrepresented what occurred, *Deering*, 291 N.W.2d at 41, a successful foundation challenge on appeal is difficult.

Here, the witness reported the video fairly depicted the man, the blue car, the time of events, and the location. The foundation was adequate.

Furthermore, the video caused Allen no unfair prejudice. First, Waldrip's 9-1-1 call and conversation with Mr. Knapp made clear he had been chased and struck by a blue car and a white car. Second, Allen admitted she and others chased Waldrip. Third, Allen admitted driving the blue car, going up and over a curb. Fourth, Ms. Alexander, was in place near site of the collision and saw parts of the chase after. Fifth, Allen has never questioned the fidelity of the video to the morning's events. Sixth, Allen claimed she was not there; so the video's fidelity would not matter to her defense. Taken together, admission of the evidence was also harmless.

B. The Storage Mart and Dollar General videos corroborate one another. They show what no one disputes: men and a blue car chasing another man.

State's Exhibit 8 came from the Storage Mart and showed the Dollar General Store parking lot. St. Ex. 8; Tr. Vol. III p. 29, ll. 9–16. State's Exhibit 7 came from the Dollar General Store and pointed to the northeast of the Storage Mart. St. Ex. 7; Tr. Vol. III p. 33, ll. 4–23. Both videos show two men chasing a third on foot as well as a

blue car. Each has a time stamp of 11:17 to 11:19 in the morning of February 3. St. Ex. 7, 8. Detective Youngblut obtained the videos from each business. *See* Tr. Vol. III p. 31, ll. 14–16. He determined the images from the Dollar General Store corresponded to those of the Storage Mart. Tr. Vol. III p. 32, ll. 5–7. He also had reviewed the security camera at Hy-Vee. Tr. Vol. III p. 34, ll. 23–25; St. Ex. 2. And, Jameesha Allen told him several people chased Waldrip. Tr. Vol. III p. 35, ll. 3–5. "[Y]eah, that's me. I was chasing him." St. Ex. 6 clip 1 at 00:00–00:11. The "Ford Fusion was me, for sure." *Id.* at 00:17–00:28. "I was driving." *Id.* at ~00:40. "I was completely pissed off yesterday." *Id.* clip 2 at 00:20–00:28.

As the fuller picture of Youngblut's testimony shows, he could say the videos fairly depict the morning's events. *See* Tr. Vol. III p. 28, ll. 2–4, p. 32, ll. 8–10.

Just as with the Subway video, admission was harmless. Allen has never claimed the videos were inaccurate. Her defense at trial was she was not there. If the jury believed her, whether the videos fairly depicted events would not matter one way other the other.

Altogether, however, the record supplies an adequate foundation for all three videos. They show what was never seriously

questioned: that two cars (one white, one blue) and at least two men chased Waldrip. The videos corroborate one another as well as the 9-1-1 recording, eyewitness testimony, and Allen's admissions. The district court did not abuse its discretion to overrule the foundation objection.

III. The Court lacks authority to consider Allen's ineffective assistance of counsel claim based on the Confrontation Clause. In any case, Allen has not proven counsel was necessarily ineffective.

Preservation of Error

This case was tried on July 29 and 30, 2019. As such, Iowa Code section 814.7 governs. *State v. Macke*, 933 N.W.2d 226, 228, 230-36 (Iowa 2019). It provides,

> An ineffective assistance of counsel claim in a criminal case shall be determined by filing an application for postconviction relief pursuant to chapter 822. The claim need not be raised on direction appeal from the criminal proceedings in order to preserve the claim for postconviction relief purposes, and the claim shall not be decided on direct appeal from the criminal proceedings.

Recently, *State v. Damme* held section 814.7 precludes consideration of ineffective assistance of counsel claims on direct appeal. 944 N.W.2d 98, 109 (Iowa 2020). The Court explained,

> Section 814.7 became effective on July 1, 2019, and the judgment and sentence in Damme's case was entered on that date. Damme does not challenge the constitutionality of the 2019 amendment to section 814.7. The amendment applies, *see Macke*, 933 N.W.2d at 228, and we lack authority to consider her ineffective-assistance-of-counsel claims on direct appeal.

Id.

Allen does not distinguish or challenge the application of section 814.7.[1] The Court lacks authority to consider the matter on appeal.

The better forum for airing claims of ineffective assistance of counsel is a post-conviction relief action, especially where it is possible trial counsel made a tactical or strategic decision to abandon a claim after a complete investigation of the law. *State v. Fountain*, 786 N.W.2d 260, 266- 67 (Iowa 2010); *State v. DeCamp*, 622 N.W.2d 290, 296 (Iowa 2001).

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[1] Neither may Allen raise the question for the first-time in reply. *Young v. Gregg*, 480 N.W.2d 75, 78 (Iowa 1992); *Polk County v. Davis*, 525 N.W.2d 434, 435 (Iowa Ct. App. 1994). Unlike a discrete responsive argument as occurred in *State v. Carroll*, 767 N.W.2d 638, 644 (Iowa 2009), the State cannot anticipate and preemptively refute every conceivable distinguishing or constitutional argument an appellant in Allen's position might raise. The Court should deem a challenge to section 814.7 waived. Iowa R. App. P. 6.903(2)(g)(3).

Perhaps not often thought of, but the stakes for defense counsel are significant. A finding of ineffective assistance of counsel opens the door to a malpractice claim. *Trobaugh v. Sondag*, 668 N.W.2d 577, 582-83 (Iowa 2003). "Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned." *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978).

Standard of Review

Were the matter within the Court's authority to hear, the State would accept Allen's statement of the nature of review. Iowa R. App. P. 6.903(3).

Merits

Although the Court lacks authority to consider Allen's ineffective assistance of counsel challenge, the record shows it would not prevail anyway. Allen complains that trial counsel should not have allowed two hearsay statements by Desean Waldrip to reach the jury in violation of his right of confrontation. Counsel need not necessarily have objected. But even if she had, Allen has not proven a reasonable likelihood of a different outcome.

A. Ineffective assistance of counsel analysis sets a high bar for Allen's Confrontation Clause claim.

The constitutions of the United States and Iowa guarantee a criminal defendant the right to effective assistance of counsel. U.S. Const. amend. VI, XIV; Iowa Const. art. I, § 10.[2]

To establish ineffective assistance of counsel, a defendant must show that: (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom. *Wemark v. State*, 602 N.W.2d 810, 814 (Iowa 1999) (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)); *Ledezma v. State*, 626 N.W.2d 134, 141-42, 145 (Iowa 2001). However, both elements do not always need to be addressed.[3] *Strickland*, 466 U.S. at 697.

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[2] Allen does not cite either the Sixth Amendment or Article I, section 10. Neither does she argue or cite authority for a different result or analysis under one constitution or the other. As such, the Court should employ existing principles. Iowa R. App. P. 6.903(2)(*g*)(3) (stating failure to cite authority in support of an issue may be deemed a waiver of that issue); *State v. Piper*, 663 N.W.2d 894, 913-14 (Iowa 2003) (overruled on other grounds by *State v. Hanes*, 790 N.W.2d 545, 550 (Iowa 2010) and declining to undertake party's research and advocacy).

[3] Iowa courts have stated both these elements require proof by a "preponderance of the evidence." *See, e.g.*, *State v. Halverson*, 857 N.W.2d 632, 635 (Iowa 2015); *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001). Federal courts, however, have indicated that this is incorrect, at least with respect to proof of prejudice. *Paulson v. Newton Corr. Facility, Warden*, 703 F.3d 416, 420-21 (8th Cir. 2013);

There is a strong presumption that counsel performed within the "wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689; *Wemark*, 602 N.W.2d at 814. Counsel's actions are judged objectively, whether they were reasonable under prevailing professional norms. *Strickland*, 466 U.S. at 688. Tactical or strategic considerations, even if improvident, insulate the conviction from reversal. *State v. Johnson*, 604 N.W.2d 669, 673 (Iowa Ct. App. 1999). Given the strong presumption of competence, if counsel's conduct "'*might* be considered sound trial strategy,'" then it is deemed so. *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955) (emphasis added)).

"Improvident trial strategy or miscalculated tactics" do not typically constitute ineffective assistance of counsel. *State v. Polly*, 657 N.W.2d 462, 468 (Iowa 2003) (internal quotations omitted). If counsel's choice is reasonable, the fact it is unsuccessful does not mean counsel was ineffective. *State v. Losee*, 354 N.W.2d 239, 243 (Iowa 1984). "[W]hen reviewing counsel's effectiveness, we do not in

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Shelton v. Mapes, U.S. D.Ct. No. 4:12-cv-00076-JAJ (filed Sept. 9, 30, 2014) *aff'd on appeal* 821 F.3d 921 (8th Cir. 2016). The prejudice standard is simply whether there is a reasonable likelihood of a different outcome sufficient to undermine confidence in the verdict.

the light of 20–20 hindsight, assume the role of Monday morning quarterback." *Fryer v. State*, 325 N.W.2d 400, 414 (Iowa 1982).

A breach does not occur if counsel refrains from asserting a meritless issue. *State v. Hoskins*, 711 N.W.2d 720, 730-31 (Iowa 2006); *State v. Graves*, 668 N.W.2d 860, 881 (Iowa 2001). Nor must counsel assert an issue merely because it would not hurt. *See Knowles v. Mirzayance*, 129 S.Ct. 1411, 1419-20 (2009) ("This Court has never established anything akin to [a] 'nothing to lose' standard for evaluating *Strickland* claims.").

"The crux of the prejudice component rests on whether the defendant has shown 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* It must be a "substantial," not "just conceivable," likelihood of a different result. *State v. Madsen*, 813 N.W.2d 714, 727 (Iowa 2012). A failure to object to cumulative evidence does not establish ineffective assistance. *State v. McCurry*, 544 N.W.2d 444, 448 (Iowa 1996); *State v. Havemann*, 516 N.W.2d 26, 28 (Iowa Ct. App. 1994).

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right… to be confronted with the witnesses against him… ." A parallel provision of the Iowa Constitution provides: "In all criminal prosecutions… the accused shall have a right… to be confronted with the witnesses against him… ." Iowa Const. art. I, § 10.[4]

The Confrontation Clause prohibits admission of testimonial hearsay statements by a non-testifying witness if the person making the statement is unavailable and was not subject to prior cross-examination. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). Statements in the course of an ongoing emergency are non-testimonial. *See Davis v. Washington*, 547 U.S. 813, 822 (2006) (distinguishing between interrogations and statements made during ongoing emergencies). Unless the claim is ineffective assistance, the

[4] Allen does not ask for a different interpretation of these two materially identical provisions. The state provision should thus be interpreted consistent with the federal. *In re J.C.*, 877 N.W.2d 447, 452 (Iowa 2016) (addressing confrontation challenge and declining to interpret state constitution differently).

State has the burden to show compliance with the Confrontation Clause. *State v. Bentley*, 739 N.W.2d 296, 298 (Iowa 2007).

Determining whether a statement is testimonial, and thus inadmissible, requires considering all relevant circumstances. *Michigan v. Bryant,* 562 U.S. 344, 369 (2011).

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, 547 U.S. at 822. Not all persons are witnesses if police question them and not every police interrogation triggers Confrontation Clause concerns. *Bryant*, 562 U.S. at 355 (citing *Davis*, 547 U.S. at 826 and *Crawford*, 541 U.S. at 53).

B. Excluding Waldrip's statements to officers Stuempfig and Youngblut would not have changed the outcome.

In his 9-1-1 call, Waldrip reported he had been run over and described the car as a "blue Ford." St. Ex. 1 at 04:05, 04:50–:56, 05:03, 05:30. He told Hy-Vee manager James Knapp that his

girlfriend's mother had run him over at the Subway across the street in a white car. Tr. Vol. II p. 27, l. 22–p. 28, l. 29. Allen admitted to Detective Youngblut that she had been chasing Waldrip, was "pissed," and "for sure" had been driving the blue Ford. St. Ex. 6 clip 1 at 00:00–00:11–00:45; clip 2 at 00:20–01:10. (She simply thought Waldrip had not been hit. *Id*. clip 2 at ~01:10.).

Defense counsel did not object when officer Stuempfig reported that when he arrived at Hy-Vee, Waldrip "claimed he had just been hit." Tr. Vol. III p. 13, ll. 8–19. Two reasons support counsel's choice.

First, the testimony was admissible. The Court had earlier ruled some testimony by police of Waldrip's report would violate the Confrontation Clause. Tr. Vol. I p. 60, l. 16–p. 61, l. 8. But it is not clear the ruling pertains to on-the-scene hearsay as opposed to an interview the next day. This hearsay would likely have been admissible as an excited utterance.

Waldrip was "excited, agitated, sweaty, short of breath" and injured. Tr. Vo. III p. 15, l. 23. Mr. Knapp recalled Waldrip "running into" his store bleeding. Tr. Vol. II p. 21, ll. 1–12.

Granted, under *Davis's* test for ongoing emergency—"what is happening" versus "what happened"—Waldrip's statements could be viewed as establishing what happened. And while police may have been seeking to determine "what happened" as well as "what is happening," the backward-looking nature of the questioning is only one factor of the analysis. *Bryant*, 562 U.S. at 357. Police on the scene who have just separated parties in a suspected domestic-abuse situation are in "what's happening" mode at first. *Id.* at 365. That can shift to a "what happened" mode, as in *Hammon v. Indiana,* 547 U.S. 813, 820 (2006). But in the moment, where the suspects are still at large, this question and answer appeared to have a primary purpose of resolving whether the moment had passed or if Waldrip or others remained in danger from a group of people willing chase and run over.

But more likely, counsel probably elected not to object because the testimony was cumulative. The jury had heard the 9-1-1 tape and Mr. Knapp's testimony. There was also the Subway video showing Waldrip being hit by the blue Ford and Ms. Alexander's testimony that "[s]omebody got hit." Tr. Vol. II. p. 34, ll. 5–16; Tr. Vol. III p. 4,

l. 18–p. 5, l. 22; St. Ex. 5 at 00:02-00:07. The officer's testimony of Waldrip's statement did not break new ground.

Neither does the record show the result of the proceeding would have been different had counsel objected. In addition to the above, the record also contains the surveillance videos from Dollar General and the Storage Mart, to say nothing of Allen's admission to chasing Waldrip with the blue Ford. The district court would later describe the evidence as "overwhelming." Tr. Aug. 16, 2019 p. 8, l. 22–p. 9, l. 13.

Much the same pertains to the argument that counsel should have objected to that portion of Detective Youngblut's body-camera video where he relates that Waldrip "told me it was mom … He says it was your mom. Desean says it was your mom in the white car chasing him." St. Ex. 6 clip 1 at ~00:30, clip 2 at ~00:28. Given the court lacks authority to consider this issue, it is not necessary to overlengthen this discussion. Suffice it to say, Waldrip told Knapp that his girlfriend's mother ran him over. Youngblut's testimony here was merely cumulative.

The Court lacks authority to consider this meritless claim.

IV. Counsel need not have objected to the State's rebuttal argument as prosecutorial misconduct.

Preservation of Error

In closing, the defense argued several times "where's the victim?" and "why isn't he here?" Tr. Vol. III p. 73, l. 25–p. 74, l. 2, p. 75, ll. 5–6, p. 76, ll. 1–3, p. 77, ll. 19–22. In rebuttal, the State argued the victim was not required to testify. *Id.* p. 78, ll. 8–10. The prosecutor also said,

> [l]et's think about this case. There's a man running down the street with people after him chasing him. Something occurred to make that happen. We don't know what. Do we know anything about street justice? What happens to snitches. What happens?

Id. ll. 11–15.

Counsel did not object at the time, leaving error unpreserved. *State v. Whitfield*, 212 N.W.2d 402, 406 (Iowa 1973). To this extent, the court lacks authority to consider Allen's argument that counsel was ineffective for failing to object. *Damme*, 944 N.W.2d at 109.

Counsel instead raised the issue in her motion for new trial, which the court considered and rejected. Tr. Aug. 16, 2019 p. 9, l. 14–p. 10, l. 22.

> Ordinarily where an aggrieved party does not object at trial to statements made by opposing

> counsel in his closing argument and does not move for a mistrial due to the alleged misconduct either at the time an improper argument is made or at the close of the argument before submission of the case to the jury in those instances where the arguments are reported and constituted a part of the record such conduct indicates a willingness of counsel to take his chances on a favorable verdict and constitutes a waiver of the misconduct.

State v. Phillips, 226 N.W.2d 16, 18–19 (Iowa 1975). The fact the court ruled on the untimely request suggests the Court may review it. *Lamasters v. State*, 821 N.W.2d 856, 862–63 (Iowa 2012); *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

Standard of Review

To the extent Allen pursues an ineffective counsel claim review would be *de novo* (if the Court had authority to hear it on direct appeal). *Ledezma*, 626 N.W.2d at 141. To the extent Allen pursues a preserved error claim, the ruling she must challenge is the court's denial of her motion for new trial based on prosecutorial misconduct.

"Trial courts have broad discretion in ruling on claims of prosecutorial misconduct," *State v. Jacobs*, 607 N.W.2d 679, 689 (Iowa 2000), and the court will review them for abuse of discretion, *State v. Leedom*, 938 N.W.2d 177, 185 (Iowa 2020). In this context,

presumably Allen asserts the district court should have granted her motion under Iowa Rule of Criminal Procedure 2.24(2)(b)(9) for "any other cause the defendant has not received a fair trial." If so, review remains for abuse of discretion. *State v. Coleman*, No. 09-0355, 2009 WL 2392718, *7 (Iowa Ct. App. Aug. 6, 2009). Trial courts enjoy a "great deal of leeway" in the "judgment call." *State v. Newell*, 710 N.W.2d 6, 20–21 (Iowa 2006).

The Court will reverse only if the lower court has acted "on grounds clearly untenable or to an extent clearly unreasonable." *State v. Coleman*, 907 N.W.2d 124, 134 (Iowa 2018). Prejudice, not misconduct itself, determines whether a defendant should have received a new trial. *State v. Wilkins*, 693 N.W.2d 348, 352 (Iowa 2005); *see State v. Boggs*, 741 N.W.2d 492, 508-09 (Iowa 2007) (discussing factors related a showing of prejudice).

Merits

Defense counsel made heavy weather of Desean Waldrip's absence. Tr. Vol. III p. 73, l. 25–p. 74, l. 2, p. 75, ll. 5–6, p. 76, ll. 1–3, p. 77, ll. 19–22. In rebuttal, the State argued the absence was immaterial under the instructions. *Id.* p. 78, ll. 8–10. Then, it asked the jury to consider his absence in the context of what the evidence

showed, an example of "street justice." *Id.* ll. 11–15. And, "[w]hat happens to snitches? What happens?" *Id.* In context, the response did not so much state Allen would retaliate, but rather the record showed Waldrip was afraid of several people.

Relying on *State v. Graves*, 668 N.W.2d 860, 868 (Iowa 2003), Allen contends that the prosecutor committed misconduct. Appellant's Pr. Br. pp. 35–38. There is a distinction to note at this juncture. "Prosecutorial error" is based on human error or poor judgment. *Coleman*, 907 N.W.2d at 138 (citing *State v. Schlitter*, 881 N.W.2d 380, 393 (Iowa 2016)). "Misconduct" is reckless disregard of a duty or intentional statements in violation of an obvious obligation, standard, or rule. *Id.* Allen claims the latter.

The district court concluded the defense had made a "constant refrain throughout" the case and in closing that there was a "nefarious" reason for Waldrip's absence. Tr. Aug. 16, 2019, p. 9, ll. 20–25. As such, the State could respond. *Id.* p. 10, ll. 1-12. Even if the State's argument were improper, it was not sufficiently prejudicial in light of the evidence. *Id.* ll. 8–22.

> In closing arguments, counsel is allowed some latitude. Counsel may draw conclusions and argue permissible inferences which reasonably

> flow from the evidence presented. However, counsel has no right to create evidence or to misstate the facts. A prosecutor is not required to sit mute and let the defendant's interpretation of evidence go unchallenged. A prosecutor is entitled to make a fair response, or "invited and fair comment," on a new argument defendant presents during closing. The prosecutor is allowed this additional leeway because it was the defendant's own new argument that prompted the prosecutor's response.

State v. Thornton, 498 N.W.2d 670, 676-77 (Iowa 1993).

Argument in closing may not always be "logical and just, but that is something the court cannot assume to control." *State v. Burns*, 119 Iowa 663, 94 N.W. 238, 241 (1903).

> Within reasonable limits, the language of counsel in argument is privileged, and he is permitted to express his own ideas in his own way, so long as they may fairly be considered relevant to the case which has been made. No lawyer has the right to misrepresent or misstate the testimony. On the other hand, he is not required to forego all the embellishments of oratory, or to leave uncultivated the fertile field of fancy. It is his time-honored privilege to--
>
> "Drown the stage in tears, Make mad the guilty and appall the free, Confound the ignorant, and amaze, indeed, The very faculties of eyes and ears."
>
> Stored away in the property room of the profession are moving pictures in infinite

> variety, from which every lawyer is expected to freely draw on all proper occasions. They give zest and point to the declamation, relieve the tediousness of the juror's duties, and please the audience, but are not often effective in securing unjust verdicts. The sorrowing, "gray-haired parents," upon the one hand, and the broken-hearted "victim of man's duplicity," upon the other, have adorned the climax and peroration of legal oratory from a time "whence the memory of man runneth not to the contrary," and for us at this late day to brand their use as misconduct would expose us to just censure for interference with ancient landmarks.

Id. at 665, 94 N.W. at 241; *see State v. Blanks*, 479 N.W.2d 601, 604 (Iowa Ct. App. 1991) (quoting *Burns*).

Counsel enjoy some latitude in closing arguments to draw inferences from the evidence, but they may not create or misstate the record. *State v. Carey*, 709 N.W.2d 547, 554 (Iowa 2006). There are various ways a prosecutor might engage in misconduct, primarily by inflaming the passions or fears of the jury. *See State v. Shanahan*, 712 N.W.2d 121, 140 (Iowa 2006) (listing examples). But so long as the prosecutor draws reasonable inferences from the evidence, no misconduct occurs. *Id.*

In evaluating a district court's ruling on claims of misconduct, an abuse of discretion occurs only where (1) there is misconduct and (2) the defendant was so prejudiced by the misconduct as to deprive

him of a fair trial. *State v. Greene*, 592 N.W.2d 24, 31 (Iowa 1999). "[I]t is the prejudice resulting from misconduct, not the misconduct itself, that entitles a defendant to a new trial." *Wilkins*, 693 N.W.2d at 352; *State v. Bowers*, 656 N.W.2d 349, 355 (Iowa 2002).

The party claiming prejudice has the burden of establishing it. *State v. Anderson*, 448 N.W.2d 32, 33 (Iowa 1989).

There are several factors to consider in assessing prejudice, to borrow from the combined ineffective assistance of counsel/due process claim of misconduct:

> (1) the severity and pervasiveness of misconduct; (2) the significance of the misconduct to the central issues in the case; (3) the strength of the State's evidence; (4) the use of cautionary instructions or other curative measures; (5) the extent to which the defense invited the misconduct.
>
> The most important factor is the strength of the State's case against the defendant.

Boggs, 741 N.W.2d at 508-09 (citations omitted).

Here, the reference was short, making it less severe. Though not central to the State's case, Waldrip's absence was important to Allen as a diversion. The State's case was strong. There was no cautionary instruction, perhaps because counsel elected not to object at the time. And the defense invited the issue.

Even if a prosecutor's arguments cross the line, defense counsel does not necessarily have to object. Counsel has no duty to object at every conceivable opportunity. *See State v. Keesey*, 519 N.W.2d 836, 838 (Iowa Ct. App. 1994) (citing *State v. Carberry*, 501 N.W.2d 473, 477 (Iowa 1993) and stating "With respect to evidentiary objections, counsel need not take advantage of every opportunity to object in order to satisfy the standard of normal competency."); *State v. Blackford*, 335 N.W.2d 173, 178 (Iowa 1983) (counsel need not take advantage of every opportunity to object to jury instructions to satisfy the standard for normal competency).

Counsel might have refrained from objecting at the time, confident that her arguments about Waldrip took hold. An objection, she could have surmised, might trigger a belief that the statement about "snitches" had some meaning related to Allen. The facts show several people were upset with Waldrip: Allen, her mother, and at least two other people. Waldrip could have been afraid of any or all of them. An objection might have led the jury to believe that Allen would harm Waldrip, as opposed to any of the others. *See State v. Good*, No. 19-0056, 2020 WL 3264320, *7 (Iowa Ct. App. June 17, 2020) ("insinuation" Good and another were accessories to an

unknown felony was insufficiently prejudicial on its own and in context of the entire case).

In any event, the jury likely already surmised that Waldrip was unwilling to participate in the prosecution out of fear of all of them. He declined medical attention. He walked away. Implying that people who cooperate with the police may suffer did not likely tell the jury anything it did not already know. Allen was running from at least five people angry at him. Testifying against one would not improve his standing with the others. The State, moreover, was not necessarily implying Allen alone was the reason Waldrip did not testify.

In any case, the district court stood on solid footing to deny the motion. Allen did not suffer sufficient prejudice to warrant a new trial. The record contained her admission to driving; her motive in that she was "pissed;" her problematic testimony in her own defense; the surveillance videos at Hy-Vee, Subway, the Dollar General store, and the Storage Mart; the 9-1-1 recording; and the testimony of Mr. Knapp and Ms. Alexander. Given the overwhelming evidence of guilt, the court could reasonably exercise its discretion to deny the motion for new trial based on prosecutorial error.

CONCLUSION

The district court ruling should be affirmed.

REQUEST FOR NONORAL SUBMISSION

The State agrees this matter does not require oral argument.

Respectfully submitted,

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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)(f)(1) or (2) because:

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