IN THE SUPREME COURT OF IOWA

No. 23-0964

Des Moines County No. OWIN 028293

STATE OF IOWA

Plaintiff-Appellee,

vs.

HOPE JENNIFER CLARK

Defendant-Appellant

APPEAL FROM THE DES MOINES COUNTY DISTRICT COURT

THE HONORABLE EMILY DEAN

APPELLANT'S BRIEF AND REQUEST FOR ORAL ARGUMENT

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1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

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/s/ Kent A. Simmons

KENT A. SIMMONS

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ROUTING STATEMENT

The issues raised in this appeal are based on well-established case law and statutes, and assignment to the Court of Appeals would be appropriate.

STATEMENT OF THE CASE

NATURE OF THE CASE: This is a direct appeal from the Des Moines County District Court after a jury found Hope Jennifer Clark guilty of a single count of Operating While Under the Influence.

The Assistant County Attorney filed a Trial Information on July 18, 2022, charging Ms. Clark with Operating While Intoxicated, in violation of Section 321J.2(1)(a) and (b) and 321J.2(2)(a) of the Iowa Criminal Code. The charging alternatives under subsections (1)(a) and (1)(b) presented either operating under the influence of an alcoholic beverage or other substance or " while having an alcohol concentration of 0.08 or more". (D0008, Trial Information, 7/18/22) The Honorable Emily Dean heard evidence on Ms. Clark's Motion to Suppress on February 2, 2023. That motion was overruled in the Ruling on Defendant's Motion to Suppress filed February 22, 2023. (D0019, Motion to Suppress, 10/3/22) (D0021, Resistance to Motion to Suppress, 10/6/22) (D0033, Ruling on Motion to Suppress, 2/22/23)

A jury trial proceeded on April 12 and 13, 2023. Judge Dean instructed the jury only on the question of whether the defendant was "under the influence of alcohol, drugs, or a combination of alcohol and drugs". (D0057, Jury Instructions, 4/13/23, No. 12, p. 8) There was no evidence of an alcohol B.A.C. offered at trial. Questions of whether the judge improperly admitted evidence alleging Ms. Clark refused alcohol testing were focus points in the suppression motion and the trial. Sheriff's deputies testified they detected an odor of alcohol "emanating" from her breath. There was no other evidence offered to show Ms. Clark actually consumed any alcohol or drugs on the night in question. The jury returned a verdict of guilty on April 13, and the case proceeded to sentencing on May 25, 2023. A timely Notice of Appeal was filed June 16, 2023. (D0055, Verdict Form, 4/13/23) (D0062, Sentencing Order, 5/25/23) (D0068, Notice of Appeal, 6/16/23)

Statement of the Facts

The Des Moines County Sheriff's Office investigation of the charge on the night of June 9, 2022, was highly defective for two reasons. First, the police officers chose to conduct the questioning and field tests literally in the middle of a very busy four-lane street and it became clear almost immediately that Ms. Clark

has a severe hearing deficit. The conversation and field testing were conducted in a turning lane with two lanes of two-way traffic in motion on each side of the turn lane. Hope was stopped in the center lane of five lanes of traffic. Secondly, the officers made no effort to obtain the services of an interpreter to aid in questioning and answers and testing procedures, and they considered no alternative location for conducting the investigation. (D0072, Suppression Hearing Transcript, 6/23/23, [hereafter "Supp. Tr."] pp. 26-31, L.23-24) (D0073, Trial Transcript, 7/19/23, [hereafter "Tr."] p. 101, L. 3-8)

Video evidence was submitted from before the time of the traffic stop up until the deputies concluded their Implied Consent procedures at the county jail, after Ms. Clark was arrested and booked. Video exhibits were submitted at the suppression hearing and in the jury trial by stipulation. In order to avoid confusion, Appellant will refer to portions of the videos in the real time that is stamped in the upper left corner in military time. (D0072, Supp.Hrg. Tr., 6/23/23, pp. 56-57, L. 7-16) (D0073, Tr., 7/19/23, pp. 38-39, L. 10-7, pp. 87-88, L. 9-2, pp. 120-121, L. 20-6) (D0046 Order for Maintenance - Trial Video Exhibits, 4/13/23)

For the submission of evidence on the suppression motion, the parties agreed that the defense could submit Suppression Motion Exhibit "A" by stipulation. The exhibit is a letter authored by Doctor of Audiology Jason Aird. Dr. Aird opened

the letter by saying Hope Clark had been a patient at the Iowa Audiology Clinic in Coralville for many years. The doctor emphasized that Hope's "hearing loss is unique", and he composed the letter to "give a better understanding of the degree of loss and expectations when communicating with someone with the limitations of this degree of hearing loss". (D0029, Suppression Motion Exhibit A, 2/2/23, p. 1, par. 1)

Dr. Aird reported that Hope last had a hearing test in 2017. She suffers from severe to profound hearing loss, and there are some areas in her hearing that cannot be tested for audition because "there is no remaining hearing in those areas". Hope is a candidate for cochlear implants. "Cochlear implants are reserved for severe hearing losses and when standard amplification is known to still limit the patient's ability to communicate effectively in daily situations." (D0029, Hrg. Ex. A, 2/2/23, p. 1. par. 2)

Dr. Aird also emphasized that environmental interference can add to Hope's inability to effectively communicate. "[I]t is always recommended that ambient noise be reduced or controlled. It is also recommended that there is adequate lighting and the person speaking uses clear, well articulated speech while looking at the individual with hearing loss at a distance from no more than approximately seven feet." The speaker must slow down the speech and use different words for

the same meaning when the person with hearing loss does not seem to understand what is being said. The doctor further explained that even with amplification Hope will not hear all the sounds that make up the language. She will only hear parts of words. She will hear part of a sentence, but not other parts. "This leads to miscommunication, misunderstanding, and a lack of cohesiveness with a conversation." Hope will try to find other ways to fully comprehend sentences. (D0029, Hrg. Ex A, 2/2/23, p.1. par. 3; App.)

In the instant case, one of Dr. Aird's conclusions is especially material:

> The individual with a hearing loss like Hope's will typically communicate better with people they are familiar with, and have a history with and have had a conversation with as to how best to communicate with them. When you add poor lighting, traffic noise, a new person talking to them for the first time and a potentially stressful situation, these factors will greatly decrease the already poor communication process. (D0029, Hrg. Ex A, 2/2/23, pp. 1-2)

Shortly before 11:00 p.m. on the night of June 9, 2022, county deputies were dispatched to locate a dark-colored vehicle entering the city of Burlington. There was no license plate number provided. The factual basis for the dispatch is discussed in detail in Argument III, below, the assignment of error for the admission of double-hearsay testimony. Deputy Phillips was training a new officer

at that time, Deputy Cheesman. The two were in the same squad car. Phillips was driving the squad. He began following a dark-colored convertible on Roosevelt Avenue. After seeing the vehicle "bump" a curb and an improper lane usage, Phillips activated his emergency lights and siren to make a traffic stop in a turning lane in the middle of Roosevelt Avenue. The turning lane is surrounded by four lanes of traffic, two-way traffic with two lanes heading in each direction. Phillips got out of the squad car. At first, the driver did not realize the squad car lights and siren were activated. The driver began making the left turn when Phillips "slapped" the car and shouted, "Hey !" The vehicle then immediately stopped. (D0073, Tr., 7/19/23, Tr. p. 35, L. 2-25) (Videos, 22:58:51 - 22:59:35)

Deputy Cheesman then initiated the questioning of the driver who immediately provided documentation identifying her car and her identity as Hope Jennifer Clark. Both officers would later testify that they smelled the odor of an alcoholic beverage emanating from her breath. Initially, Hope answered The question from Phillips as to whether she "had anything to drink" in the affirmative. When Cheesman asked if she "had been drinking tonight, Hope answered "No". (D0059-60, Videos, 22:59:35 - 23:01:23) The questions were similar, but they were asked by two different people.

As Cheesman started describing field sobriety tests that he wanted her to complete, Ms. Clark informed him that she was hearing impaired, and she showed him that she had hearing aids in both ears. Cheesman and Phillips testified that they both then began to "try" to look Hope directly in the face to allow her to read lips and also to "try" to speak loudly and to clearly enunciate their words. The attempts at field testing were fraught with Hope not being able to hear, or to understand, what the officers were saying in their directions. The officers repeated themselves numerous times. They admitted in their testimony that the traffic on Roosevelt Avenue at that time and location was very busy and noisy. The Court can see and hear that for itself. The officers never considered moving to a quieter, less hectic location for questioning and field tests or obtaining the services of an intrerpreter. (D0072, Supp. Hrg. Tr., 6/23/23, pp. 26-31, L. 23-24) (D0073, Tr., 7/19/23, p. 41, L. 6-18, pp. 78-79, L. 2-21) (Videos, 23:01:23 - 23:13:25)

After administering the Horizontal Gaze Nystagmus examination (HGN), and then deciding to abandon the other two field balance tests that are routinely used, Cheesman asked Hope if she would submit to a Preliminary Breath Test (PBT). At that point, Hope informed Cheesman she wanted to talk to her attorney.

Cheesman considered that request as a refusal to submit to the PBT and immediately placed Hope in handcuffs, telling her she was under arrest. (D0059-60, Videos, 23:11:00 - 23:13:25)

At the jail, the deputies immediately escorted Hope through the sallyport and in to the booking desk. They then began to prepare the "Intox Room" to read Hope's rights to her, and then to read the Implied Consent advisory statement to her. After Hope was seated in the Intox Room, Deputy Phillips then brought Hope's cell phone into the room and placed it on the desk where Cheesman and Hope were sitting. Cheesman then covered up the phone with a copy of the Implied Consent Advisory shortly after the phone's placement on the desk. After he read her the lengthy Implied Consent advisory, Cheesman asked Hope if she would submit to a breath test using the Datamaster Intoxilyzer. She hesitated. Both Cheesman and Phillips testified they told Hope she could call anybody she wanted to call before answering the question. Again, Hope stated that she wanted her attorney, four times. Again, Cheesman and Phillips considered that answer to be a test refusal. They both testified to the jury that she had refused both tests. (D0059-60, Videos 23:30:17 - 23:37:12)

The material facts will be developed in detail in the three arguments that follow below.

ARGUMENT

I.

THE STATE FAILED TO PROVIDE SUFFICIENT EVIDENCE IN THE TRIAL RECORD THAT WOULD REACH THE LEVEL OF SUBSTANTIAL EVIDENCE TO PROVE THAT THE DEFENDANT WAS OPERATING HER MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL

Preservation of Error: By the terms of this Court's holding in *State v.Crawford,* 972 N.W.2d 189 (Iowa 2022), a defendant is no longer required to raise a Motion for Acquittal in the district court during the trial. All findings of guilt returned by a jury are now subject to an appellate challenge on the sufficiency of the evidence to support the verdict, regardless of whether a motion is voiced or filed in the trial court. The Court held:

> We conclude a defendant whose conviction is not supported by sufficient evidence is entitled to relief when he raises the challenge on direct appeal without regard to whether the defendant filed a motion for judgment of acquittal. The government has no legitimate interest in imposing punishment on those not proven guilty of criminal conduct beyond a reasonable doubt. The continuing punishment of a defendant where the state has failed to prove the defendant committed a crime violates the defendant's federal and

> state constitutional rights and requires relief notwithstanding error preservation. *State v. Crawford,* 972 N.W.2d at 200 (Iowa 2022)

Standard of Review: The Court has also recently restated the standards applicable to the review of issues raised to challenge the sufficiency of the evidence:

> In conducting our analysis, we "consider all evidence, not just the evidence supporting the conviction, and view the evidence in the light most favorable to the State, 'including legitimate inferences and presumptions that may fairly and reasonably be deduced from the record evidence.' " *State v. Ernst*, 954 N.W.2d 50, 54 (Iowa 2021) (quoting *State v. Tipton*, 897 N.W.2d 653, 692 (Iowa 2017)). But, "[e]vidence which merely raises suspicion, speculation, or conjecture is insufficient." *State v. Casady*, 491 N.W.2d 782, 787 (Iowa 1992) (en banc). "Sufficient or substantial evidence is such evidence as could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt." *State v. Gay*, 526 N.W.2d 294, 295 (Iowa 1995).
>
> *State v. West Vangen,* 975 N.W.2d 344, 349 (Iowa 2022)

The Merits

Summary

The State's case against Ms. Clark was built fully upon circumstantial evidence. Each and every aspect of the evidence that the deputies used as indicators of the influence of alcohol is equivocal. Each aspect of the proof they relied upon to form their opinions of intoxication was just as consistent with a person who is not under the influence as it is with a person who is under the influence. The sum of the factors is not any stronger than the individual factors.

There is another consideration that is important to judging the strength of the State's case. The State's evidence is inherently defective because the deputies failed to take steps to ensure the reliability of Hope's performance on the field tests. The deputies were fully aware they needed to take special steps to ensure that Hope heard and understood the instructions they were giving her as to how she should go about performing the tests. They failed in that regard on all the instructions important to proper performance. Because of their lack of patience in this regard, Deputy Cheesman terminated the walk-and-turn balance test without even getting to the part that would show her ability to balance. The video evidence otherwise clearly showed that Hope was having no trouble maintaining her balance

while walking. Similarly, the deputies also chose to forego the third standard field test. That test would have allowed Hope the opportunity to show her balance capability, also. The reasoning for skipping that test was shown to be defective.

Finally, a defendant's refusal to submit to breath testing for alcohol can be considered as evidence as to the consciousness of guilt, but in this particular case it is not. On the requests for a breath sample on the PBT and the Datamaster, Hope did not actually refuse the tests. She requested that she to have the ability to consult with an attorney before making those decisions. By their standard procedure, the deputies were required to document that as a refusal. They never did provide her with an opportunity to consult with her attorney. Overall, the State's evidence is all diminished by the fact the deputies did not consider obtaining the services of an impaired hearing interpreter for the field tests or for the custodial interview and invocation of the Implied Consent procedures. All of the foregoing summarized facts are discussed in detail below.

Deputy Phillips was the first witness to testify for the State at trial. The prosecutor asked Phillips to summarize all the facts that led him to believe Hope was under the influence on the night in question:

Q. Based on the training and experience you've had, including 30 of your own OWI investigations, do you have an opinion about the defendant's state of sobriety?

A. I believed her to be under the influence.

Q. So could you list out the factors that made you believe -- besides standard field sobriety testing -- that she was -- that the defendant was under the influence.

A. Started with the reckless call, at which point we got behind her, and she bounced off the curb, and she failed to keep her lane, along with her speed.
Once we got behind her to stop her, she then tried to continue off once we stopped the vehicle, at which point we had to slap the side of the vehicle to get her to stop, along with her impaired balance getting out of the vehicle.

Q. And you also --

A. Also -- I'm sorry. Also, she had the odor of alcohol, of an alcoholic beverage on her person.

Q. Did you go to the jail after the defendant was

arrested?

A. Yes, ma'am.

Q. Were you in the room where the defendant is asked to submit to the DataMaster or chemical testing?

A. Yes, ma'am.

Q. Did you personally ask the defendant if she would submit to DataMaster test?

A. Yes, ma'am.

Q. And did the defendant refuse?

A. Yes, ma'am.

(D0073, Tr., 7/19/23, pp. 50-51, L. 18-21)

The prosecutor asked the same question of Deputy Cheesman later in the trial. His answer was virtually the same as Phillips:

Q. Up to that point can we just go over what observations you had made regarding the state of the defendant's sobriety?

A. So the initial reckless complaint, the striking the

curb, the speeding, the inappropriate braking, the inability to maintain her lane, her initial admission to drinking, the odor of an alcoholic beverage emanating from her breath, her not having the vehicle in park as we initially interacted, her inability to balance, and then what was observed during the standardized field sobriety tests.

(D0073, Tr. pp. 7/19/23, pp. 89-90, L. 23-8)

To the list Phillips gave, Cheesman added: "her initial admission to drinking"; "the inappropriate braking"; and "her not having the vehicle in park as we initially interacted". The inappropriate braking is apparently a reference to braking at a green light.

Operation of the Vehicle

Dispatch for Reckless Driving: As mentioned, the radio dispatch call to the deputies to locate a person for "reckless driving" is the subject of an assignment of error for the improper admission of double hearsay in

Argument III, below. Aside from that, however, the judge's ruling on that objection was that the evidence was only to be used by the factfinder as an explanation for the officers' responsive conduct. (D0073, Tr., 7/19/23, pp. 24-25, L. 16-1) The evidence cannot legally be a factor in reviewing the sufficiency of the evidence on the element of intoxication. Even if it were admitted for the truth of the matter asserted, however, the evidence is immaterial. There was no license plate number reported for the alleged reckless driver. There was no description of a make or model. The only identifier of the vehicle in question mentioned in the dispatch "was a dark-colored convertible with a female driver". The officers were also told a silver car was following the subject vehicle. Silver was the only identifier. It took the deputies about 15 minutes to get to the area of town that was identified. There was no description of any details as to how the vehicle in question had been operated, other than "reckless". There was clearly insufficient evidence to identify Hope Clark as someone who had been driving recklessly. (D0073, Tr., 7/19/23, pp. 31-33, L. 14-11)

How many silver cars and dark-colored convertibles can there be out there? Deputy Phillips testified that the officers did not see any reckless driving on Hope's part. (D0073, Tr., 7/19/23, pp. 58-59, L. 23-8)

Speed of the Vehicle: The deputies testified to their pacing of Hope's car. The totality of that testimony was that she was doing 50 m.p.h or less in a 40 m.p.h. zone on Roosevelt Avenue. That street is four-lane traffic. Cheesman testified about the pursuit when the squad car turned around to catch up to Hope: "The speed limit on Roosevelt Avenue is 40 miles per hour, and we were doing approximately 50 miles an hour and not gaining *much* ground on it." (D0073, Tr., 7/19/23, pp. 74-75, L. 23-2) Phillips testified: "We were traveling approximately 50. We were not catching the vehicle at that point, to which we accelerated to approximately 59 miles an hour." (D0073, Tr., 7/19/23, p. 34, L. 1-3) Neither deputy said they were falling behind at 50 m.p.h. Cheesman's observation that they were not gaining *much,* means they were gaining some. The speed of 50 in a 40 is not an unusual speed. Cheesman admitted that people who are speeding are not necessarily under the influence. (D0073, Tr., 7/19/23, p. 98, L. 14-20)

Braking for Green Light*:* Phillips testified Hope had "applied the brakes" when she was at a green light. There was no description of hard braking or anything else in particular about the braking. On cross-examination, Cheesman admitted that Hope had been trying to find her turn, and he did not deny that someone looking

for a driveway would apply their brakes. He just thought it was unusual to brake when a traffic light was green. One of the first things Hope said after the officers stopped her was that she had missed her turn. Common sense tells us that people who are not under the influence are likely to brake when trying to determine the right place to turn.(D0073, Tr., 7/19/23, p. 97, L. 2-19) (D0059-60, Videos, 22:59:25 - 23:00:05)

Bumping the Curb and Not Keeping Lane: Of course, this also plays in with Hope looking for her turn. There was no testimony saying her vehicle had violently struck the curb or anything like that. Cheesman agreed it was "bump" into the curb, and that kind of bump would not necessarily mean the driver was under the influence. (D0073, Tr., 7/19/23, p. 98, L. 21-23) Deputy Phillips had said it was not reckless driving. All he said was she "hit" the curb and "bounced off". "It was in the middle of the roadway not keeping its lane." (D0073, Tr., 7/19/23, p. 34, L. 6-13) Cheesman said she just crossed the center line "a little bit". (D0073, Tr., 7/19/23, pp. 102-103, L. 19-3) Again, these are simple violations consistent with a sober person looking for a turn on a busy street. There was no testimony that any vehicle was endangered.

Observations and Statements at Scene of Traffic Stop

All of these factors have to be evaluated in light of the testimony that Ms. Clark gave to the jury as to her profound hearing loss, and how it affects the way she tries to communicate with people. Those factors are set out, below, after all observations of the deputies are explained.

Beginning Turn after Officers Stopped: There is no reason to believe Hope would have heard the squad car's siren or noticed red flashing lights as she was looking for her turn and then starting into it. She did not hear Phillips shout "Hey" and did not stop her initiation of the turn until he "slapped" the side of her car. That slap she would have felt, as it was right next to where she was sitting in the car. Immediately after the slap, she stopped her car." (D0073, Tr., 7/19/23, p. 35, L. 2-25) (D0059-60, Videos, 22:59:18 - 22:59:36)

Admitting and Denying Drinking: As stated above, the questions along this line were slightly different and were asked at different points in time out on the noisy roadway. (D0059-60, Videos, 22:59:35 - 23:01:23) There is no reason to believe that Hope heard Phillips correctly when he asked if "she had been drinking".

Beyond that point, Hope steadfastly maintained she had not been drinking alcohol that night.

Odor of Alcohol "Emanating from Her Breath": The deputies agreed that the so-called odor of alcohol is just the odor from the flavorings in the beverage, not the alcohol itself. Hope maintained she had not been drinking, and the officers must have been smelling something else. Regardless of whether or not she drank any alcohol, Cheesman agreed it was not illegal to have an odor about the person, and it is not illegal to drink and drive. It is illegal to drink too much and drive. (D0073, Tr., 7/19/23, p. 104, L. 9-17) Of particular importance, is the fact that the well-known intoxication symptom of bloodshot, watery eyes was not present. Also, the deputies dropped the notion of slurred speech once they learned Hope's hearing was severely impaired.

The HGN Examination: Hope was very often moving her head when following Cheesman's finger. She was not looking at him when he was telling her to move her eyes only, and not her head. The test was not administered correctly due to poor delivery of the key instruction. (D0059-60, Videos, 23:04:15 - 23:07:05) The reported results are wholly unreliable.

Balance and Field Tests: These are the factors that probably bear the most significance as they are related to Hope's severe hearing loss. Both officers testified that once they became aware of her impairment shortly after they stopped Hope, they then tried to speak slowly and loudly with an emphasis on enunciating their words clearly. Also, they tried to look directly at her to allow her to read lips. (D0073, Tr., 7/19/23, p. 41, L. 6-18, pp. 78-79, L. 2-21) The Court must closely examine the video evidence to see that the officers were not practicing their techniques with any consistency.

First, the Court must take note that the video shows Hope had no trouble walking and did not exhibit any problem with balance while walking. Cheesman's opinion that she showed imbalance when getting out of her vehicle is just very plainly incorrect. Hope gets out of her car without any problem. She starts walking back toward the squad car as requested, and very briefly and lightly touches the side of her own car. There is no hint of any imbalance at that point. The touch to the car is just a natural reflex for a person walking next to a large object. She then walks directly back to Deputy Phillips, as requested. She takes ten fairly long strides to Phillips without any sign of imbalance. (D0059-60, Videos, 23:01:45 - 23:12:10)

Upon the deputies' suggestion, Hope does take her wedge-styled heeled shoes off in order to proceed to the walk and turn test. It is not at all unusual that a person would use something or someone for balance when taking off shoes while standing up in a busy roadway. People generally take off and put on shoes while sitting down. She does have a little problem with balance on that difficult maneuver, but that is not necessarily a sign of intoxication. (D0059-60, Videos, 23:08:19 - 23:09:05) That removal of the shoes provided no justification for the deputies to skip the One-Leg-Stand. There were three deputies on the scene to assure safety.

After that, Hope does not correctly hear the instructions on the walk-and-turn test, but she does take 21 total steps up and back, placing each step on a straight line the officers told her to follow. She shows no signs of imbalance. (D0059-60, Videos, 23:10:00 - 23:10:23) Phillips admitted that during the instructions to begin the test, Hope was not looking at the deputies, but was looking at the line straight out ahead of her or down at the ground at the line she was supposed to walk. (D0073, Tr., 7/19/23, pp. 49-50, L. 6-9)

Deputy Cheesman terminated the walk-and-turn test because Hope was not understanding that the deputy wanted her to stand on the line in a heel-to-toe stance for a sustained amount of time before she started walking, and while he gave her

the full instructions as to exactly how he wanted her to do the walking. Watching the video, the Court will see that this was a particularly poor performance area for the deputies in trying to practice their adopted technique of looking directly into Hope's eyes when speaking, speaking loudly and enunciating clearly. It was not happening that way. (D0059-60, Videos, 23:09:10:05 - 23:10:55)

A particularly instructive segment on that point is when Phillips steps up to Hope to try to give her the important instruction of not starting to walk until Cheesman has given all instructions. He asks Hope to look at his face when he is talking, but then they both immediately look down at the line when he starts talking. At 23:10:02, when he tells her not to start walking, Phillips is not looking at her. He has turned away from her, and she is already walking down the line. Before that, at 23:09:23, Phillips had told Cheesman to look at Hope when talking to her. (D0059-60, Videos, 23:09:05 - 23:10:55)

Overall Communication

In addition to all of the communication problems with the specific field tests, it is clear that Hope was even having trouble hearing and understanding Deputy Cheesman when she was looking directly at him. His voice is not loud, he is usually talking fast, and he is not concentrating on enunciating. Out on the street,

she is unable to understand him when he asks if she will perform the field sobriety tests. This happens again when he asks if she will submit to the PBT. Both times it is clear she thinks he wants to touch her body. (Video, 23:02:35 - 23:03:45) (D0059-60, Videos, 23:11:00 - 23:11:35)

At the jail, she seems to understand Cheesman's reading of her Miranda rights from a small card, as he is speaking slowly in easily understood sentences. It appears he is looking at her while reading the card. Then, however, he reads the Implied Consent advisory and Section 804.20, the Code, as those provisions sit on the desk. It is clear he cannot be looking at her as he is reading, and both readings are fraught with long sentences in legalese. Again it appears Hope believes the deputies are preparing to touch her when they start using the words "breath" and "test". She is shaking her head "no" and covering her breasts. This entire episode illustrates the deputies' poor communication with Hope, and the procedures carry no weight in an assessment of whether Hope has consciousness of guilt, or if she is under the influence. It is clear she does not understand Cheesman a vast majority of the time and that she gives up on trying to read his lips. (D0059-60, Videos, 23:30:17 - 23:36:47)

Hope Clark's Trial Testimony

Hope explained to the jury the nature of her severe hearing impairment and her difficulty in understanding what people are saying, even when she is wearing her hearing aids. She has had the profound hearing loss since she was three years old after experiencing a very high fever from the measles when she was a baby. She was first fitted with hearing aids when she was three. She needed speech therapists to learn how to speak. She learned sign language, and attended deaf hearing education classes throughout her school years, including college. To understand people who are talking, she uses visual clues and reads lips if a person is talking slowly. She uses contextual clues in trying to understand sentences. For her professional work, she always uses an interpreter. (D0073, Tr., 7/19/23, pp. 109-112, L. 7-5)

When the Court reviews the entire record it will be clear that there is insufficient evidence to show that a reasonable juror could find proof beyond a reasonable doubt on the element of intoxication. The failure of the evidence is largely a result of the deputies' failure to take steps to facilitate effective communication with Ms. Clark. The Court must reverse the conviction and order a remand for entry of a judgment of acquittal.

II.

THE JUDGE BASED THE DECISION ON ERRORS OF LAW IN RULING ON THE MOTION TO SUPPRESS EVIDENCE FOR VIOLATION OF THE RIGHT TO CONSULT WITH AN ATTORNEY AS IT IS PROTECTED UNDER SECTION 804.20, THE CODE OF IOWA, AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION.

Preservation of Error: On October 3, 2022, the defense filed its Motion to Suppress. The motion was based on Iowa Rule of Criminal Procedure 2.11(2)(c) and Section 804.20, the Code. Ms. Clark asserted the arresting officers failed to accommodate her repeated requests for consultation with counsel. The error was asserted as a violation of state and federal constitutional rights, as well as a violation of statutory rights. After the State filed its Resistance on October 6, 2022, the motion went to an evidentiary hearing on February 2, 2023, and Judge Dean filed her Ruling on February 22. (D0019, Motion to Suppress, 10/3/22) (D0021, Resistance to Motion to Suppress, 10/6/22) (D0033, Ruling on Motion to Suppress, 2/22/23)

Standard of Review: The judge's interpretation of the statute is reviewed for error of law. The Court will affirm the suppression ruling where the trial court "correctly

applied the law and substantial evidence supports the court's fact-finding." "Prejudice is presumed upon a violation of section 804.20." *State v. Walker*, 804 NW 2d 284, 289, 296 (Iowa 2011) On an assignment for violation of constitutional rights, the Court engages a *de novo* review. *Ledezma v. State*, 626 N.W. 2d 134, 141 (Iowa 2000) When police continue solicitation of responses from a defendant in custody who has requested the assistance of counsel, they violate the Fifth and Fourteenth Amendments to the federal constitution. In reviewing the ruling on a Motion to Suppress, the Court will consider evidence presented at trial in addition to evidence presented with the submission of the motion. *State v. Naujoks,* 637 N.W.2d 101, 106 (Iowa 2001)

The Merits

"The Fifth Amendment to the federal constitution provides that no person 'shall be compelled in any criminal case to be a witness against himself'. The Due Process Clause of the Fourteenth Amendment to the federal constitution makes this right against self-incrimination binding on the states." Once a defendant in police custody has requested the assistance of an attorney, the defendant "is not subject to further interrogation by the authorities until counsel has been made available". "Statements obtained in contravention of this bright-line rule violate the accused's

Fifth and Fourteenth Amendment rights to have counsel present during custodial interrogation and for that reason are inadmissible." *State v. Peterson,* 663 N.W.2d 417, 423-425 (Iowa 2003), quoting *Edwards v. Arizona*, 451 U.S. 477, 484, 101 S.Ct. 1880, 1885 (1981)

The pertinent statute under the Code of Iowa is the longstanding Section 804.20, first enacted in 1978 and remaining exactly the same to this day:

804.20. Communications by arrested persons

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. If a call is made, it shall be made in the presence of the person having custody of the one arrested or restrained. If such person is intoxicated, or a person under eighteen years of age, the call may be made by the person having custody. An attorney shall be permitted to see and consult confidentially with such person alone and in private at the jail or other place of custody without unreasonable delay. A violation of this section shall constitute a simple misdemeanor.

The straightforward approach to the Section 804.20 issue is that the breath test refusal is always suppressed after a violation of the statute. "The exclusionary rule extends to the exclusion of breath tests, breath test refusals, and non-spontaneous statements obtained after unnecessary delay in allowing the person the statutory right to consult with an attorney or family member." *State v. Garrity*, 765 N.W. 2d 592, 597 (Iowa 2009). In *State v. Walker*, 804 N.W. 2d 284, 296 (Iowa 2011), the Court said, "The district court applied the remedy mandated by more than a generation of our precedent -- suppression of the breath test results." The statutory right to full suppression of evidence when counsel is not made available to the defendant is perfectly aligned with the Fifth Amendment constitutional privilege against coerced self-incrimination.

Custody and Detention

In the instant case, there is no doubt that Ms. Clark was in police custody when her request for her attorney was made. The deputy sheriff had completed his chosen administration of the field sobriety tests. Hope's request for counsel and the initiation of custody were simultaneous. In fact, her request for her attorney was the reason she was taken into custody. The deputies had completed the HGN and walk-and-turn portions of the field tests. Deputy Cheesman was then attempting to

talk Hope into submitting a PBT sample, when she requested counsel. With that, the deputy hand-cuffed her, placed her under arrest, and put her in the back of the squad car. (D0059-60, Videos, 23:10:54 - 23:12:25)

In *State v. Davis*, 922 N.W.2d 326 (Iowa 2019), the Court's description of the events in *State v. Moorehead,* 699 N.W.2d 667 (Iowa 2005) is instructive here:

> On the other hand, in *State v. Moorehead*, we held a defendant had effectively invoked his Iowa Code section 804.20 right to contact his mother at the scene of a traffic stop. 699 N.W.2d 667, 671 (Iowa 2005). There, the officer observed the defendant speeding and swerving over the centerline before eventually coming to a stop on the wrong side of an adjacent street. *Id.* at 669. The defendant smelled of alcohol, his speech was slurred, and his eyes were glazed. *Id.* The defendant failed three field sobriety tests and a preliminary breath test. *Id.* at 669, 671. The deputy placed the defendant in the back of his patrol car, telling him that he was definitely over the legal limit and that he was taking him to the police station for one more test. *Id.* at 699. The deputy later testified he considered the defendant "technically" under arrest once he had failed the field sobriety tests. *Id.* at 671.
>
> *Davis,* 922 N.W. 2d at 331-332

The *Walker* court agreed with the *Moorehead* decision in that the police were not required to accommodate the phone call for the defendant out at the scene of the arrest, but they were required by the statute to accommodate the call immediately upon arriving at the place of detention, i.e., the police station:

> While in the patrol car, the defendant asked if he could speak to his mother on the phone. *Id*. at 669. The defendant, however, was not given the opportunity to call her after he arrived at the police station and before taking the chemical breath test, on which he recorded a .182 blood alcohol concentration. *Id*. at 669–70. We found that under these circumstances, the defendant's request to speak to his mother was a proper invocation of Iowa Code section 804.20 and should have been honored when he arrived at the police station. *Id*. at 671.
>
> It is worth reading *Moorehead* with care. We emphasized that when the defendant was being put in the patrol car, "[t]he investigatory stage of the stop had ended." *Id*. The defendant had failed the field tests and, as we have already noted, in the view of the deputy, he was " 'technically' under arrest." *Id*. As a consequence, the police were obligated to honor Moorehead's request 'without unnecessary delay after arrival at the place of detention,' in this case the police station. Because the police did not do so, they violated Moorehead's statutory right to contact a family member**.**

Davis, 922 N.W. 2d at 332

In the instant case, Officer Cheesman verified Ms. Clark's request to speak with her attorney *after* he completed all of the field testing that he cared to attempt. Upon arrival at the jail, he took her straight to booking. After she was formally booked, he immediately interviewed and directed her through the Implied Consent procedure. She was not asked if she would like to call someone until the Implied Consent procedures were fully completed, and she was not told how she could go about making a call. In fact, Officer Cheesman believed the officer working in

booking would have told Hope that she would not be allowed to use her cell phone to make a call. The officers placed the cart before the horse. Assisting Ms. Clark in making phone calls was required to be the deputies' first order of business at the jail, not their last. (D0072, Supp. Hrg. Tr., 6/23/23, pp. 19-22, L. 13 -16, pp. 31-36, L. 25-2, pp. 51-55, 20–2) (D0059-60, Videos, 23:30:17 - 23:36:47)

Judge Dean discussed *Moorehead* at length in her ruling, but failed to acknowledge and declined to follow its holding. In her Findings of Fact, at paragraph 11, on the ruling, the judge pointed out the chronology inside the jail correctly to the extent Cheesman read her Miranda rights advisory and then the Implied Consent Advisory before she was told she could make calls. Section 804.20 was read after those two advisory warnings, however. (D0033, Ruling on Motion to Suppress, 2/22/23, pp. 3-4) The judge then stated her conclusion as to accommodation for a phone in this simple statement: "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." (D0033, Ruling on Motion to Suppress, 2/22/23, p. 8) The part of the *Moorehead* holding that the judge omitted is this:

> Moorehead's request was sufficient to invoke the statute. As a consequence, the police were obligated to honor Moorehead's request "*without unnecessary delay* after arrival at the place of detention," in this case the police station. Iowa Code Section 804.20. Because the police did not do so, they violated Moorehead's statutory right to contact a family member."
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> *Moorehead,* 699 N.W.2d at 672 (emphasis added)

As in *Moorehead,* the police did not accommodate Ms. Clark's request to call her attorney "without unnecessary delay". As in *Moorehead,* the deputies proceeded through the *Miranda* warnings, reading the 804.20 rights, and invoking the Implied Consent before telling Hope she could call anyone she wanted. The deputies violated her Section 804.20 rights.

Reasonable Opportunity to Make Call

"Our cases addressing the right to a telephone consultation with an attorney make clear that section 804.20 is to be applied in a pragmatic manner, balancing the rights of the arrestee and the goals of the chemical-testing statutes.'" *Walker,* 804 N.W. 2d at 290-291.

The State and the district court assumed the deputies complied with 804.20 by placing Hope's cell phone on the desk where Cheesman was reading her rights under the statute and then reading the lengthy Implied Consent Advisory to her.

Both deputies admitted that they did not tell Hope she could call anyone she liked until after Cheesman had read the Implied Consent Advisory and asked her if she would submit to providing a breath sample for the Datamaster. (D0072, Supp. Hrg. Tr., 6/23/23, 19-22, L. 13 -16, pp. 33-35, L. 22-23) (23:30:17 - 23:36:47)

Deputy Cheesman's admissions on cross-examination are a testament to the conclusion that placing the cell phone on the desk was not providing Hope a reasonable opportunity to make a phone call. The deputy admitted he covered up Hope's phone with a copy of the Implied Consent Advisory sheet. He admitted Hope was in *his* control and custody, and she could only do what he told her she could do. Both deputies admitted they did not instruct Hope at any time as to what method they would allow her to use to make a phone call. Both deputies admitted they did not do anything to attempt to assist her in making a phone call. They believed that placing the phone within her reach, out of sight, under the advisory sheet was in compliance. Cheesman testified the booking officer would have told Hope she could not use her cell phone to make a call. (D0072, Supp. Hrg. Tr., 6/23/23, pp. 39- 40, L. 17-22) (D0073, Tr., 7/19/23, pp. 52-54, L. 1-20)

The deputies did not comply with Section 804.20 in the way their obligation was explained in *State v. Hicks,* 791 N.W.2d 89, 96 (Iowa 2010):

> The district court concluded "that the record indicates Hicks was permitted numerous opportunities to exercise his rights under section 804.20." We disagree. The district court noted that a telephone was located within reach of Hicks on the table where [the police officer] and Hicks were sitting, and that [the police officer] did nothing to deny Hicks the right to call his mother. First, from reviewing the tape of the processing room, no telephone is *visible* in the room. A small portion of the four-person table where [the police officer] and Hicks sat, the corner farthest diagonally from where Hicks was seated, was not shown on camera. If a telephone was located in that corner, it clearly was not within the reach or control of Hicks. Second, even if a phone was in reach, we do not think that alone suffices to provide a detainee a "reasonable opportunity" to contact family. (emphasis added)

Judge Dean's ruling is on all fours with the deputies' flawed opinion herein and the district court's erroneous opinion in *Hicks*. Even though Judge Dean discussed the *Hicks* decision at length, she again failed to acknowledge and declined to follow the case's holding. Without explicitly saying so, the judge concluded that the presence of Hope's phone under the advisory sheet complied with this Court's explanation of the accommodations the peace officers must provide. The judge simply concluded:

> 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. (Ruling on Suppression, pp. 7-8; App.)

Judge Dean's conclusion that "Clark was allowed to use her cell phone while at the jail" pays no heed to this Court's rule of "reasonable opportunity" explained in *Hicks*. The deputies' strategy of hiding Hope's phone and then not telling her how she could make a call violated her Section 804.20 rights.

Because the deputies violated Section 804.20, the Code, by failing to immediately address the attorney phone call at the jail, and by failing to accommodate a reasonable opportunity to call her attorney after processing, all evidence as to everything that was said and that occurred in the processing at the jail was required to be suppressed.

III.

THE JUDGE ABUSED DISCRETION BY FAILING TO EXCLUDE DOUBLE HEARSAY ORIGINATING FROM AN UNKNOWN CALLER WHO ALLEGEDLY REPORTED SEEING MS. CLARK ENGAGED IN RECKLESS DRIVING

Preservation of Error: In her opening statement, the prosecutor said this to the jury:

> We will have Deputy Cheesman and Deputy Phillips testifying today. They -- I expect them to testify that they received information about a driver who had almost went off the road into a ditch; that they received a little bit of information about the vehicle they were looking for; that they identified that vehicle and observed with their own two eyes the kind of driving behaviors that were concerning to law enforcement. (Tr. p. 13, L. 7-14)

After counsel for both parties had completed opening statements and the jury was dismissed for noon recess, the trial court entertained an oral Motion in Limine made by the defense attorney. In pertinent part, defense counsel asserted:

> I would like to make a Motion in Limine in regard to any testimony about the person who made the telephone call. The -- it's hearsay, and there's no proper foundation. That person is not listed as a witness, and I don't believe the officers have any personal knowledge that they should be able to indicate that what that call was, who it was from, that it was anything that's admissible. They didn't -- once they got behind the vehicle, they can talk about what observations they have, but anything prior to that, it's -- it's hearsay. Again, there's no proper foundation, and it's prejudicial to my client, and there's no way for me to cross-examine that information. (D0073, Tr., 7/19/23, 22-23, L. 15-2)

In response to the motion and argument, the prosecutor said she was intending to have police officers testify as to all the information they received from the radio dispatcher, but not to relate exactly what the unknown caller had said to the dispatcher. (Tr. p. 23, L. 9-24) Judge Dean ruled in this way:

> **THE COURT:** All right. The first issue regarding the statements made by the caller, those are hearsay; those are not coming in.
>
> The context of what dispatch provided to the deputies as far as the description of the vehicle and *what type of a crime they were investigating*, I -- I don't see any evidentiary problem that would block that from coming in. I don't believe that's hearsay because it's nothing that's being offered for the truth of the matter asserted; it simply is what the officers -- why they were stopping the defendant with that vehicle description.
> (Tr. pp. 24-25, L. 16-1) (emphasis added)

A trial judge makes a conclusive ruling denying a Motion in Limine when the ruling declares the evidence in question is admissible. Where the ruling bears no contingencies or conditions that might affect the ruling, no further objections during trial are necessary to preserve error for appeal. *State v. Thoren,* 970 N.W.2d 611, 620-621 (Iowa 2022)

Standard of Review: This Court's standard of review for hearsay questions differs from the common standard for assignments of error on improper admission of evidence: "We review hearsay rulings for correction of errors at law 'because admission of hearsay evidence is prejudicial to the nonoffering party unless the contrary is shown.' *State v. Ross*, 573 N.W.2d 906, 910 (Iowa 1998). We review other evidentiary rulings for an abuse of discretion. *State v. Jordan*, 663 N.W.2d 877, 879 (Iowa 2003); *State v. Elliott,* 806 N.W.2d 660, 667 (Iowa 2011) "'[A]dmission of hearsay evidence over a proper objection is presumed to be prejudicial error unless the contrary is affirmatively established.' *State v. Nims*, 357 N.W.2d 608, 609 (Iowa 1984)." *Elliott,* 806 N.W.2d at 669

The Merits

The Mechanics of the Rulings: The first step the trial judge must take in ruling on an objection or motion to exclude hearsay evidence is to determine whether testimony would actually be defined as hearsay, as defined by Rule 801, Iowa Rules of Evidence. If it is determined the offered statement is not hearsay, the judge must then decide whether the statement is relevant. *Elliott,* 806 N.W.2d at 667-668. If deemed relevant, then the judge must take the third step and rule as to

whether the scope of the out-of-court statement must be limited in trial testimony to avoid the improper purpose of asserting the truth of the matter asserted:

> Evidence is not hearsay if it is not offered to show the truth of the matter asserted. *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. *Id.* But "if the evidence is admitted, the court must limit its scope to that needed to achieve its purpose." *McElroy v. State,* 637 N.W.2d 488, 502 (Iowa 2001).
>
> *State v. Plain,* 898 N.W.2d 801, 811 (Iowa 2017)

In the instant case, Judge Dean completed these first three steps, but erred on all of them.

Definition of Hearsay

The basic error in this first step is that the judge did not address the statements in question as double hearsay, often referred to as hearsay within hearsay. The testimony is double hearsay at best. Because the dispatcher did not testify, it is not known if the dispatcher is even the person who took the statement from the caller. Because the police officers would be relating the statement they received from the radio dispatcher, there are at least two levels of hearsay. There is no exception for double hearsay in Rules 802 or 803, I. R. Evid. Double hearsay

can only be admitted in evidence if each of the two levels in the statements is shown to be offered for a legitimate purpose other than for the truth of the matter asserted. *State v. Sowder,* 394 N.W.2d 368, 370-372 (Iowa 1986); *Phan v. Trinity Regional Hospital,* 3 F.Supp.2d 1014, 1018 (N.D. Iowa 1998)

In *Sowder,* a witness offered statements she had heard from a person who allegedly heard a conversation between Sowder and a co-defendant of Sowder's named Loeffler. If true, Sowder's statements would have him admitting to participation in the robbery on trial. The State claimed it was not introducing the double hearsay for the truth of the matter asserted, but only to impeach Leffler's testimony denying that he had ever spoken to Sowder about the crime. This Court concluded:

> Thus, to be admissible, each statement or level of hearsay must be deemed non-hearsay or fall within an exception to the hearsay rule. Iowa R. Evid. 805. The State justifies the trial court's ruling by saying that the testimony was admissible for another purpose which was to impeach Leffler. It is correct that a prior, inconsistent, out-of-court statement offered for impeachment purposes falls outside the definition of hearsay. *State v. Hill,* 243 N.W.2d 567, 570 (Iowa 1976). *Hill* does not, however, hold that what would otherwise be double hearsay can be similarly stripped of its hearsay nature by being offered for impeachment purposes. *Sowder,* 394 N.W.2d at 371

In the instant case, the prosecutor's argument to the judge for the introduction of the hearsay was:

> I am not asking them to say what the witness who called dispatch said or what dispatch said exactly to them. I'm just asking them for the information they had as far as what they were looking for based on the complaint -- or the complaint they received in order to start their investigation, information they relied on in order to continue their investigation. (D0073, Tr., 7/19/23, p. 23, L. 18-24)

The judge ruled statements made by the unknown caller would not be admissible, but the statements from the dispatch operator to the deputies would be admitted. She concluded: "I don't believe that's hearsay because it's nothing that's being offered for the truth of the matter asserted; it simply is what the officers -- why they were stopping the defendant with that vehicle description." (D0073, Tr., 7/19/23, pp. 24-25, L. 23-1) That reasoning takes no account of the crux of the matter that was pointed out by defense counsel in his motion. Counsel explained that the evidence was simply unnecessary to the State's case. There was no need to disclose the content of the dispatch, or even the fact that Cheesman and Phillips were dispatched. The deputies would testify to their own observations of traffic

violations to explain why they stopped Ms. Clark's vehicle. Defense counsel told the judge: "Once they got behind the vehicle, they can talk about what observations they have, but anything prior to that, it's -- it's hearsay. Again, there's no proper foundation, prejudicial to my client, and there's no way for me to cross-examine that information." (D0073, Tr., 7/19/23, pp. 22-23, L. 22-2)

"In deciding whether an out-of-court statement is offered to explain responsive conduct, the court considers 'whether the statement is truly relevant to the purpose for which it is being offered, or whether the statement is merely an attempt to put before the fact finder inadmissible evidence.;" *State v. Plain*, 898 N.W.2d at 812, quoting *State v. Mitchell,* 806 N.W.2d 660, 668 (Iowa 2011). In analyzing the double hearsay, the trial judge is required to determine "the real purpose for the offered testimony, not just the purposes urged by the prosecutor." *Sowder*, 394 N.W.2d at 371. Judge Dean failed in her duty to consider the real purpose for the State's intent in introducing the dispatcher's report of "reckless driving". The prosecutor said she did not intend to disclose the statements the unknown caller had made, but that is exactly what she was doing. In her opening statement to the jury, the prosecutor offered facts that the deputies did not even know. She told the jury: "We will have Deputy Cheesman and Deputy Phillips

testifying today. They -- I expect them to testify that they received information about a driver who had almost went off the road into a ditch." (D0073, Tr., 7/19/23, p. 13, L. 7-9) That opening statement to the jury led to the defense then making the motion in limine in chambers.

The prosecutor had no reason to believe either of the deputies would testify "that they received information about a driver who had almost went off the road into a ditch". Both deputies testified in the previous suppression hearing that the dispatcher had given them no details about the driver's actions other than there was a report of a reckless driver. (D0072, Supp.Hrg. Tr., 6/23/23, p. 6, L. 11-18, pp. 42-43, L. 24-11) At trial, Phillips specifically testified that the violations he observed did not constitute reckless driving. The prosecutor then had Deputy Phillips explain that the definition of reckless driving for the jury. He testified: "Reckless driving is a wanton disregard for the safety of others." The deputies would both testify in the trial that they were not told the details of the driving, just that it was reported as reckless. It is unknown as to whether the caller used the term "reckless driver" or that was just an interpretation the dispatcher passed along to the deputies. (D0073, Tr., 7/19/23, pp. 58-59. L. 23-8, p. 64, L. 7-21, pp. 89-90, L. 23-8)

In addition to her opening statement, the prosecutor's real purpose in introducing testimony about a reckless driver and the identification of the vehicle is to be gleaned from the absence of necessity for the testimony:

> Generally, an investigating officer may 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. Reynolds*, 250 N.W.2d 434, 440 (Iowa 1977). Yet, this option is not without restraint. "If [an] investigating officer specifically repeats a victim's complaint of a particular crime, it is likely that the testimony will be construed by the jury as evidence of the facts asserted." *Elliott,* 806 N.W.2d at 667-668

If the deputies simply testified they were dispatched to Roosevelt Road without saying why, the real purpose for introducing that testimony would not be in question, even though there was no need for introducing it. When the prosecutor prompts the report of a reckless driver, however, the real purpose becomes clear and the testimony is improper hearsay.

> "In criminal cases, the arresting or investigating officer will often explain his going to the scene of the crime or his interview with the defendant, or a search or seizure, by stating that he did so upon information received and this of course will not be objectionable as hearsay, but if he becomes more specific by repeating definite complaints of a particular crime by the accused, this is so likely to be misused by the jury as evidence of the fact asserted that it should be excluded as hearsay."
>
> *State v. Mitchell,* 806 N.W.2d 660, 668 (Iowa 2011)

That is the simple distinction that Judge Dean failed to make in the instant case, and that is why the testimony the deputies delivered to the jury was double hearsay. The trial court erred in failing to exclude the testimony as to what the dispatcher told the deputies.

Prejudice

"Admission of hearsay evidence over a proper objection is presumed to be prejudicial error unless the contrary is affirmatively established." *State v. Nims*, 357 N.W.2d 608, 609 (Iowa 1984). The contrary is affirmatively established if the record shows the hearsay evidence did not affect the jury's finding of guilt. *Id.* One way to show the tainted evidence did not have an impact on the jury's verdict is to show the tainted evidence was merely cumulative to other evidence. *Elliott,* 806 N.W.2d at 669 "In assessing prejudice, we place the burden on the state to affirmatively establish that the admission of hearsay evidence over proper objection was not prejudicial." *Plain,* 898 N.W.2d at 813.

The statement admitted in the testimony to the jury from Deputies Cheesman and Phillips regarding the dispatch identifying Ms. Clark as a "reckless driver" originated from some unknown person. Other evidence alleging reckless driving

does not appear anywhere does not appear anywhere else in the record. In fact, Phillips testified the driving they observed was not reckless. (Tr. p. 64, L. 7-21) The hearsay was not cumulative to other testimony. The only thing that was cumulative to the hearsay was the prosecutor's even more damaging improper description of the reckless driving as the driver almost going off the road into a ditch.

The testimony was not in passing, either. The prosecutor asked both deputies on direct examination to tell the jury what the dispatcher said. Both deputies referred at length specifically to a "reckless driving complaint" and the report of the vehicle identification linking the complaint to Ms. Clark. Both officers testified that the reckless driving complaint was a factor in developing their opinions that Hope was under the influence of alcohol. (Tr. pp. 31-33, L. 14-21, pp. 50-51, L. 18-2, pp. 89-90, L. 23-8) On top of that, the prosecutor specifically elicited testimony from Deputy Phillips as to how Reckless Driving is defined:

> **Q.** [The Prosecutor]: Deputy, you testified that -- during your questioning with Mr. Johnston that you didn't observe any

reckless driving, is that right?

A. By Iowa Code, no, ma'am.

Q. Okay. Did you observe any violations of the law?

A. Yes, ma'am.

Q. And could you go over those.

A. Yes, ma'am. That would have been we believed to be the speed, the improper use of lane -- or failure to maintain, I apologize.

Q. What are you looking for for reckless driving? [sic] What does the Code say -- what are you looking to see when there's a complaint of reckless driving?

A. Reckless driving is a wanton disregard for the safety of others. (Tr. p. 64, L. 7-21)

The definition was clearly elicited to tell the jury that Hope had been seen driving with "a wanton disregard for the safety of others".

The judge clearly did not understand that the jury was not going to limit the use of the reckless driving complaint as simply an explanation as to why the officers began to look for her vehicle. In fact, the judge did not understand that limited purpose herself. Judge Dean herself used the fact of the complaint as evidence she believed would lead a rational juror to conclude Ms. Clark was under the influence. In ruling on the Motion for Acquittal at the close of the State's case, Judge Dean concluded:

> Well, in this case ultimately the jury is going to be instructed that the state would have to prove two elements as to this offense, the first of which, whether the defendant was operating a motor vehicle on the date in question in Des Moines County, and I do feel that sufficient evidence has been put forth to support that element, and the second element the state would have to prove is that the defendant was under the influence of alcohol, drugs, or a combination of alcohol and drugs. With that the court looks at the following: The testimony of Officer Phillips outlines his basis, *including the reckless*

> *driving call*, the defendant hitting a curb, failure
> to maintain lane, and speeding, her impaired balance,
> and the odor of alcoholic beverage coming from her person,
> and Officer Deputy Cheesman I believe noting the same.
> (Tr. p. 107, L. 1-16) (emphasis added)

The judge believed the reckless driving hearsay was a basis for a finding of the influence of alcohol. The jury would be certain to conclude the same. As pointed out in Argument I, above, the other proof of intoxication was made up entirely of equivocal and poorly developed evidence. A conclusion that Ms. Clark had engaged in driving with wanton disregard for the safety of others was evidence of mindset, and would certainly be used by the jury as evidence of intoxication. The State cannot affirmatively prove that other evidence in regard to intoxication was overwhelming, making the error harmless.

CONCLUSION

The Court must reverse the conviction and order a judgment of acquittal due to the State's failure to provide sufficient evidence on the element of intoxication.

Failing that, the Court must reverse the action for a new trial due to the trial court's errors in ruling on the Motion to Suppress or on the trial court's improper admission of double hearsay evidence, or for both reasons.

REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 6.908(1), Appellant requests to be heard in oral argument.

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