NO. 18-0294

IN THE
SUPREME COURT OF IOWA

STATE OF IOWA,

Plaintiff-Appellee

vs.

EARNEST B. BYNUM,

Defendant-Appellant

APPEAL FROM THE LINN COUNTY DISTRICT COURT
No. SRCR116884

Hon. Nicholas Scott, Judge

APPELLANT'S BRIEF

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IV. ROUTING STATEMENT

The issues presented by this appeal involve existing legal principles. Iowa R. App. P. 6.1101(3)(a).

V. STATEMENT OF THE CASE

A. NATURE OF CASE

This is an appeal from a jury verdict finding Mr. Bynum, the Appellant, guilty of reporting the alleged occurrence of criminal activity knowing the act did not occur in violation of Iowa Code § 718.6(1). The penalty for this offense is a simple misdemeanor, "unless the alleged criminal act reported is a serious or aggravated misdemeanor of felony," in which case the person commits a serious misdemeanor. Mr. Bynum was convicted of the penalty enhanced version of Chapter 718.6(1), i.e. that he falsely reported the commission of an indictable offense. The jury verdict specified that the offense falsely reported was "Carrying Weapons." [Forms of Verdict, filed Jan. 11, 2018; Appendix p. 25].

B. COURSE OF PROCEEDINGS

On April 4, 2016, a Trial Information was filed charging Mr. Bynum with reporting a criminal act that did not occur in violation of Chapter 718.6(1). [Trial Information; Appendix p. 5]. The Information was amended on January 11, 2018,

to allege that the criminal act reported was Carrying Weapons, Burglary or Going Armed with Intent. [Amended Trial Information; Appendix p. 12].

The defense filed a motion in limine on about September 2, 2016. [Motion in Limine; Appendix p. 8]. There was a hearing on the motion on January 5, 2018. The trial commenced on January 8, 2018. The transcript of the trial consists of three volumes. The jury signed a verdict form dated January 10, 2018. [Form of Verdict; Appendix p. 25]. The Order accepting the verdict and setting the case for trial was filed on January 11, 2018. [Order re Verdict and Setting Sentencing Hearing; Appendix p. 28].

C. DISPOSITION

The sentencing hearing was held on February 16, 2018. The dispositional order filed the same day imposed a sentence of 365 days in jail, about but 14 suspended, with supervised probation for one year. [Judgment and Sentence; Appendix p. 30]. There was also a fine of $315.00 and a supervision fee of $300.00. Mr. Bynum filed a notice of appeal on February 19, 2018. [Notice of Appeal; Appendix p. 32].

VI. STATEMENT OF THE RELEVANT FACTS

The State's evidence was that Mr. Bynum had a dispute with Ms. Haskins, his girlfriend with whom he resided in Cedar Rapids, Iowa, on about March 9,

2016. [Tr. II, pp. 42:18-21; 43:7-14]. Mr. Bynum left the residence and Ms. Haskins called the police. [Tr. II, p. 44:20 – 45:8]. The next day a man, later identified as Mr. Bynum, called a non-emergency number to contact the Cedar Rapids police department. [Trial Exhibit 1, audio recording]. The caller said that he observed a Chevy Suburban pull up at a residence on E. Avenue NW, in Cedar Rapids, Iowa, and park in a manner that obstructed the sidewalk in front of the residence., and then the driver of the vehicle exited the Suburban with a gun. The caller suggested that another person exited the passenger side of the Suburban and that this person also had a gun. The caller reported that the two men went to the door of the residence, knocked on the door, and then entered. The caller said he did not know who lived at the residence or who the men with the guns were. The caller did not identify himself but he did provide a phone number. [Trial Exhibit 1].

Although the prosecution's law enforcement witness, Shannon Aguero, did not specifically indicate that the police responded by driving to the residence with lights and sirens blaring, that was suggested; and the officer did testify that she treated and by treating the situation as a "home invasion." [Tr. II, p. 6918 – 72:15]. Several officers arrived on the scene, some with assault rifles, and the occupants of the house were ordered to leave. [Tr. II, p. 77:15 – 78:5]. The police then

"cleared" the residence to make sure no one was inside. [Tr. II, p. 82:5-21]. Ms. Haskins was in the house and when questioned, she said she thought that Mr. Bynum was the person who made the call to the police. [Tr. II, p. 84:13-25].

About a two weeks later Officer Aguero contacted Mr. Bynum and arranged an interview. [Tr. II, p. 86:22-25]. Mr. Bynum initially denied making the call but eventually admitted that he had. [Tr. II, p. 89:18-25; 90:17-21]. Mr. Bynum explained that he had seen a gun during a confrontation with Ms. Haskins' son and that he followed the son and his companion to Haskins' residence, and then made the call to the police. [Tr. II, p. 131:7-24]. Bynum told Aguero that he did not want to get anyone in trouble, he just wanted to police to know what Haskins' son was up to, and that he didn't give his name when he called the police because he didn't want to be a snitch. [Tr. II, p. 134:13-13; 135:10-13].

On cross-examination, Aguero admitted that possession of firearms is not inherently illegal, and that there are hundreds of thousands of Iowans who possess licenses allowing them to carry firearms. [Tr. II, p. 141:9-16].

What the Judge and the attorneys said during the trial proceedings about various matters will be discussed in the Argument section of this brief.

VII. ARGUMENT

1. Being tried by a jury selected from a pool of prospective jurors from which all African-Americans had been removed violated the Defendant's Sixth Amendment right to an impartial jury.

a) How the Issue was Preserved for Review

The judge ruled on the merits of the issue after the defense moved for a mistrial. [Tr. II, p. 18:21 – 19:4].

b) Standard of Review

"Our review of constitutional questions is *de novo*." *State v. McKettrick*, 480 N.W.2d 52, 55 (Iowa 1992)

c) Argument

The first issue on appeal is whether the racial composition of the jury pool violated Earnest Bynum's Sixth Amendment right to an impartial jury. The record is not entirely clear, but it appears that there were two trials drawing on the same pool of prospective jurors – a civil trial in district court and Mr. Bynum's criminal case in associate district court. There were two African-Americans among 35 potential petit jurors called in for these two trials. [Tr. II, p. 16:12-13]. All of the 35 potential jurors were first made available to the district court. Then, 21 of the potential jurors not selected for the civil trial in district court became the pool of jurors for the criminal case. [Tr. II, p. 17:20 – 18:17]. Of the 21 potential jurors in Bynum's criminal case, none were African-American. [Tr. II, p. 16:21-25]. Both

had been removed from the list of prospective jurors before the jurors reported to the courtroom for the criminal case.

According to the U.S. Census Bureau, at last count African-Americans comprise 5.6% of Linn County's population overall,[1] but they represented 0 % of the potential jurors who were assigned to Bynum's trial. Bynum, who is African-American, objected to the composition of the jury pool and requested a new trial with a new panel. [Tr. II, p. 17:8-12]. The district court overruled his objection and denied his request but did affirm that none of the 21 potential jurors in Mr. Bynum's case was African-American. [Tr. II, p. 18:21 – 19:4].

In *State v. Plain*, 898 N.W.2d 801 (Iowa 2017), the Court discussed and applied *Duren v. Missouri*, 439 U.S. 357, 364 (1979), in which the United States Supreme Court defined a three-part test for establishing a violation of the fair cross-section requirement. Under this three-part test, a defendant can establish a prima facie violation of the fair cross-section requirement by showing (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that

[1] https://www.census.gov/quickfacts/fact/table/linncountyiowa/PST045217

this underrepresentation is due to systematic exclusion of the group in the jury-selection process. *Plain*, 898 N.W.2d at 821-22.

The problem in Mr. Bynum's case is that the although the system in place yielded a group of potential jurors that fairly reflect the racial composition of the community (2/35 =5.7%), that system was tinkered with in a manner that unbalanced the composition so that African-Americans accounted for 0% of the potential jurors available for Mr. Bynum's case compared to the 5.6% county-wide.

The fact that there were 0% African- Americans among his potential petit jurors did not occur because of chance or a random occurrence. There was an opportunity to either to retain African-Americans in the criminal jury pool or to select another jury in the criminal case on another day. The judge elected not to do either. Instead, the trial went on even though the system for selecting potential jurors was deliberately modified in a manner that resulted in there being no African-Americans among the potential petit jurors in Mr. Bynum's case. The absence of randomness or chance in creating a racially unrepresentative pool of prospective jurors, one with 0% African-Americans, is significant. Only random underrepresentation is tolerated. *See Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977) (articulating how to calculate the standard deviation and noting "if the

difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the jury drawing was random would be suspect to a social scientist").

According, Mr. Bynum's conviction should be set aside and the case remanded for a new trial.

2. Evidence of other bad acts was irrelevant and very prejudicial and should not have been admitted at trial

a) How Issue the was Preserved for Review

The defense objected to the State's evidence of other bad acts, as discussed in more detail, below.

b) Standard of Review

"When reviewing a trial court's rulings on admissibility of evidence, we use an abuse-of-discretion standard." *State v. Alvey*, 458 N.W.2d 850, 852 (Iowa 1990).

c) Argument

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." Iowa R. Evid. 5.404(b).

The defense filed a pretrial motion in limine to preclude the State from presenting evidence of prior bad acts by Mr. Bynum. [Motion in Limine, filed Sept. 2, 2016; Appendix p. 8]. The State argued that what allegedly happened with Ms. Haskins on March 9, 2016, provided a motive for Bynum to make a false report the next day. [Tr. Motions Hearing, p. 10:11-15]. The judge ruled prior to trial that the State could present evidence of what happened on March 8 (actually March 9), between Ms. Haskins and Mr. Bynum, that led her to call the police. [Tr. Motions Hearing, p. 22:11-18]. "I think that's close enough in time and I think it does go to the potential motivation, the lack of mistake and the – quite frankly, the defendant's intent of what was going on with this."

Then, during the trial, Ms. Haskins testified that there were "a couple of times I had to call." Specifically, Haskins testified on direct examination as follows:

> Q. And if in that police recording it says that it occurred on March 9th, would you have a reason to believe that recording wasn't correct?
> A. No. I guess I just don't know which incident you're talking about because unfortunately I did a couple of times. (emphasis added).
> [Tr. II p. 44:14-19].

The defense alleged this testimony violated the pretrial ruling, which authorized only evidence of what Haskins said occurred on March 9. [Tr. II, p. 58:10-12]. The judge agreed with the defense that the ruling on the motion in

limine was violated but that, "what she said, I would have hoped to keep that out of the record, but I find that it is not so prejudicial that we need to declare a mistrial in this matter. [Tr. II, p. 59:11-14].

The defense made another motion for mistrial after the State once again presented evidence in violation of the motion in limine. Specifically, the defense cited testimony that when the police were on their way to the residence, they received updated information referencing multiple previous incidents at the residence. [Tr, II, p. 151:25 – 152:5]. In addition, the defense cited testimony that Mr. Bynum's phone number was in the police department's system, thereby indicating prior involvement with law enforcement. [Tr. II, p. 18-22].

The judge denied the renewed motion in limine. The judge said he did not hear the statement about prior calls for service at the residence in question. [Tr. II, p. 158:19-22]. However, in fact, there was testimony by Officer Aguero regarding previous incidents at the residence, specifically:

> Well, we had -- once we had arrived on scene, we received an update that there had been previous incidents at this residence. That's one of the things that's customary of dispatch. They will look up prior calls for service in a situation like this. (emphasis added).
> [Tr. II, p. 88:23 – 89:6].

Alternatively, the judge said that references to prior calls for service were not specific enough to be prejudicial. [Tr. II, p. 159:3-5].

Mr. Bynum asserts that allowing the introduction of the prior bad acts evidence is reversible error because Mr. Bynum did not deny making the call to the police on March 10, 2016. Therefore, as argued by the defense at the pretrial motion in limine [Tr. Motions Hearing, p. 7:16-25], whether Mr. Bynum had a motive to make the call because of what happened on March 10 was irrelevant given the circumstances of this particular case. The evidence of prior bad acts had no probative value and was certainly prejudicial. The original motion in limine should have been granted, and the violations of the motion were grounds for a mistrial.

Regarding whether the prior bad acts evidence was relevant to prove intent. *see* Iowa Practice, Evidence, 2017-2018 Ed., § 5.404:6 at page 263, fn. 56, citing *United States v. Baker*, 432 F.3d 1189 (11th Cir. 2005). *Baker* stated that if intent is not disputed by the defendant, prior bad acts as evidence of intent has negligible value when compared to its unfair prejudice. *See also State v. Graham*, 856 N.W.2d 381 (Iowa Ct. App. 2014) (Table) (trial court should not have admitted evidence that that the defendant set an unoccupied golf center on file with a lighter eight days before he allegedly set hay in a barn on fire with a light – this was improper propensity evidence to prove intent); and *State v. Twigg*, 821 N.W.2d 779 (Iowa Ct. App. 2012) (Table) (finding trial court committed reversible error in

admitting to prior incidents involving defendant's former students to demonstrate that defendant's acts of pouring syrup over boy was sexually motivated – the prior incidents were not relevant to any issue other than propensity).

Regarding the question of admitting evidence of prior bad acts when motive is not in issue, *see State v. Putnam*, 848 N.W.2d 1, 14 (Iowa 2014). In *Putnam* the Court held that prior bad act evidence was testimony concerning child pornography found on the defendant's computer. Putnam was being prosecuted for sexual assault of a two-year old girl. The Court held that the other bad act evidence should not have been admitted to establish motive because Putnam's state of mind was not an element of the crime and was not otherwise put in issue. Therefore, "Putnam's motive for sexually abusing [the victim] was not a legitimate or disputed issue in the case."

It is far clearer in Bynum's case than Putnam's that motive was not a legitimate or disputed issue in the case. The theory of defense was that what Bynum said when he called the police was substantially true and that in any event it did not allege an indictable offense. [Tr. III, p. 43:13-21].

In conclusion, Mr. Bynum asks this court to find that the evidence of what happened on March 9, 2016, with Ms. Haskins; and that Haskins made more than one call to the police; and that the police had responded to prior incidents at the

residence; and that Bynum's phone was in the police data, demonstrate more about propensity and bad character than in it circumstantially demonstrates about intent or motive. This is because Mr. Bynum did not deny making the call and whether the call contained false information is the gist of the offense. Accordingly, the original motion in limine should have been granted, and the subsequent motions for mistrial should likewise have been granted. Admitting the various evidence regarding bad acts was reversible error.

3. The trial court erred by allowing the State to introduce photographs of the firearms that the police possessed to establish the severity of the police response.

a) How Issue the was Preserved for Review

The judge ruled that the State could publish photographs of two automatic rifles over the defendant's objection, as set forth in more detail below.

b) Standard of Review

"When reviewing a trial court's rulings on admissibility of evidence, we use an abuse-of-discretion standard." *Alvey*, 458 N.W.2d at 852.

c) Argument

"Evidence is relevant if: a. It has any tendency to make a fact more or less probable than it would be without the evidence; and b. The fact is of consequence in determining the action." Iowa R. Evid. 5.401.

The State argued that how the police responded determines whether the alleged criminal act reported is an indictable misdemeanor or felony. [Tr. I, p. 12:21 – 13:2]. The State's argument was, "I think that how things were reported and what officers believed going to a scene or to a call, or whatever we're going to reference it as, is sufficient to prove the severity or the extent or serious level of the offense that was reported in." [Tr. II, p. 99:16-21]. The State went so far as to claim that whether the crime falsely reported is an indictable misdemeanor should be decided by the Court, not the jury. [Tr. II, p. 100:1-7].

The judge reserved ruling on the State's theory. [Tr. I, p. 13:4-6]. But before the judge ruled on this theory, he allowed, over objection, the State to present photographs of two AR-15 assault rifles that the police possessed when they responded to the report. [Tr. II, p. 3:6 – 4:14]. The judge said that, "I think it's relevant to show the jury the chain of events as they occurred and actions that were initiated with that 911(sic) phone call." [Tr. II, p. 4:1-3].

Later the Judge ruled against the State's theory that it is how the police respond to a report that determines whether the defendant is guilty of the penalty enhanced version of making a false report. The judge decided that the jury should be advised of a definition of the various offenses in order to determine if the falsely reported acts were indictable misdemeanors. [Tr. II, p. 123:22 – 124:8].

On the authority of Iowa R. Evid. 5.401, Mr. Bynum asserts that it was prejudicial error for the judge to allow the State to publish photos of the assault rifles the police possessed when they responded to the call. The photos of the assault rifles were not relevant to proving any fact in issue or element of the offense, which was whether Bynum's report to the police was false and alleged an indictable offense. The photos of the assault rifles were only relevant to the State's misguided theory that it is how the police respond to a report that determines whether the false report alleges the commission of an indictable offense. Because that premise is false, the photos served only to prejudice the defense. *Compare State v. Harris*, 589 N.W.2d 239 (Iowa 1999) (to prove defendant's access to a handgun, a police officer testified about a photograph depicting the defendant with a handgun that would produce rifling characteristics similar to those on the bullet recovered from the murder victim).

Accordingly, either on its own or in conjunction with the erroneous admission of other bad acts evidence, the ruling allowing the State to publish photographs of the assault rifles was reversible error.

4. The jury should have been instructed not to presume that a person who is seen in public in possession of a firearm is committing a crime.

a) How Issue the was Preserved for Review

Defense counsel proposed that the instructions advise the jury that a person who has a permit may carry a weapon. [Tr. III, p. 57:25 – 58:3]. The judge denied the request on the merits of the issue and not because the request was untimely. [Tr. III, p. 58:12-15].

b) Standard of Review

Although in general, a district court's refusal to give a requested jury instruction is reviewed for errors at law, constitutional issues are reviewed *de novo*. *Plain*, 898 N.W.2d at 810-11.

c) Argument

The court is required to instruct the jury on the law for all material issues raised by the evidence in a case. *State v. Guerrero Cordero*, 861 N.W.2d 253, 260 (Iowa 2015), *overruled in part by Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699, 708 n.3 (Iowa 2016). Where the defendant timely requests an instruction on a theory of defense, the theory is supported by the evidence, and the instruction is a correct statement of the law, the instruction must be given. *Guerrero Cordero*, 861 N.W.2d at 260. *See, e.g., State v. Cunningham*, 463 N.W.2d 887, 890 (Iowa Ct.

App. 1990) (trial court abused its discretion in refusing to instruct the jury on intervening and superseding cause).

The trial evidence established that Mr. Bynum reported to the police that he saw a man or perhaps two in possession of a firearm leave a car and approach and enter a house in Cedar Rapids. [Exhibit 1, audio of call to police]. The jury found that this report was false; and on the verdict form the jury checked only the option for the crime of carrying weapons when identifying what crime was falsely reported. [Form of Verdict, filed Jan. 11, 2018; Appendix p. 25].

Iowa's Carrying Weapons statute is Iowa Code § 724.4. The statute provides in relevant part that:

> 1. Except as otherwise provided in this section, a person … who, within the limits of any city, goes armed with a pistol or revolver, or any loaded firearm of any kind, whether concealed or not, or who knowingly carries or transports in a vehicle a pistol or revolver, commits an aggravated misdemeanor.

There are several circumstances set out in Chapter 724.4(4) exempting persons in possession of a firearm from the reach of Chapter 724.4(1). In particular, Chapter 724.4(1) does not apply when:

> (i) A person who has in the person's possession and who displays to a peace officer on demand a valid permit to carry weapons which has been issued to the person, and whose conduct is within the limits of that permit. A person

> shall not be convicted of a violation of this section if the person produces at the person's trial a permit to carry weapons which was valid at the time of the alleged offense and which would have brought the person's conduct within this exception if the permit had been produced at the time of the alleged offense.

Carrying Weapons was belatedly added to the Trial Information by an amendment requested after the State rested its case. [Tr. III, p. 22:9-13]. The defense acceded to this motion to amend even though it was untimely. The judge's instruction (No. 14) regarding what conduct constitutes Carrying Weapons was as follows:

> A person who goes armed with a firearm concealed on or about the person, or who, within the limits of any city, goes armed with a pistol or revolver, or any loaded firearm of any kind, whether concealed or not, or who knowingly carries or transports in a vehicle a pistol or revolver.

Defense counsel did ultimately propose that this instruction include language to advise the jury that a person who has a permit may carry a weapon. [Tr. III, p. 57:25 – 58:3]. The Judge denied this request. [Tr. III, p. 58:12-15].

The problem with the judge's denial of this request is that the facts clearly establish that Bynum reported that one or two men possessed weapons in Cedar Rapids. The jury was not given any basis to know that for this man or men to possess a firearm is not inherently a crime. Leaving out this information effectively directed a verdict of guilty on the penalty enhancement factor.

Accordingly, Mr. Bynum asserts that the failure to properly instruct the jury that possession of a firearm in a city with a permit is not illegal violated his right to a fair trial and due process of law under the State and Federal Constitutions., specifically, Iowa Const. art. I §§ 9 and 10 and U.S. Const. amend. XIV.

The question of whether possession of a firearm is inherently illegal most often arises in the context of whether a stop and frisk based on firearm possession alone meets the requirements for a *Terry* stop. The requirement for a *Terry* stop is a reasonable and articulable suspicion of criminal activity. *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

There are many cases, set forth below, holding that a report or observation of a person with a gun does not create a reasonable and articulable suspicion (RAS) of criminal activity. RAS would presumably be the minimum threshold for finding that what a person reported was a crime for purposes of Chapter 718.6(1), the false reporting statute. In other words, if a report that a person has a gun is not even RAS to stop a person to conduct a frisk, it would not be sufficient to constitute a report of a crime under Chapter 718.6(1).

An increasing number of courts are finding that law enforcement cannot presume any possession of a firearm is unlawful – meaning that someone does not have a valid permit.[2] These include:

• *Northrup v. City of Toledo Police Dep't*, 785 F.3d 1128 (6th Cir. 2015) (6th 2015)

• *United States v. Black*, 707 F.3d 531, 540 (4th Cir. 2013)

• *United States v. King*, 990 F.2d 1552, 1559 (10th Cir. 1993) ("In a state such as New Mexico, which permits persons to lawfully carry firearms, [allowing a seizure] would effectively eliminate Fourth Amendment protections for lawfully armed persons.")

• *State v. Williamson*, 368 S.W.3d 468, 480 (Tenn. 2012)

• *Commonwealth v. Hawkins*, 692 A.2d 1068 (Pa. 1997)

• *Commonwealth v. Couture*, 552 N.E.2d 538, 540 (Mass. 1990)

• *Regalado v. State*, 25 So. 3d 600, 604 (Fla. Dist. Ct. App. 2009)

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[2] Counsel acknowledges the significant contribution by Assistant Federal Public Defender Heather Quick to the argument presented in this brief point. Ms. Quick prepared a Power Point presentation regarding pretrial motions pursuant to Rule 12 of the Federal Rules of Criminal procedure for a legal education seminar sponsored by the Northern District of Iowa's Federal Defender's office. The seminar was on June 8, 2018.

Not all of these jurisdictions have the same statutes as Iowa.

A minority of courts have held that law enforcement can presume that possession of a firearm is illegal in states where possession can be unlawful. These include:

• *United States v. Gatlin*, 613 F.3d 374 (3d Cir. 2010)

• *Schubert v. City of Springfield*, 589 F.3d 496, 501 (1st Cir. 2009)

• *United States v. Montague*, 437 F. App'x 833, 835 (11th Cir. 2011).

The right to possess guns is fundamental under U.S. Const. amend. II, as interpreted in *District of Columbia v. Heller*, 554 U.S. 570 (2008). This is a one reason that the majority rule is that law enforcement cannot presume any possession of a firearm is unlawful is that. And of course, to so presume would be contrary to Iowa's Carrying Weapons statute, which allows many people to carry guns, including anyone with a permit to carry weapons.

United States v. Jones, 606 F.3d 964 (8th Cir. 2010) is an example of a case relying on the Second Amendment and a state statute to find that merely carrying a weapon is not inherently illegal. Similar to Iowa's carrying weapons statute, the Nebraska statute provides that:

> (1)(a) Except as otherwise provided in this section, any person who carries a weapon … concealed on or about his or her person such as a revolver . . . commits the offense of carrying a concealed weapon.
> …
> (2) This section does not apply to a person who is the holder of a valid permit issued under the Concealed Handgun Permit Act . . .

In his concurring opinion in *Jones*, Judge Loken found that even if law enforcement had reasonable suspicion to believe that Jones possessed a firearm, the stop was unlawful because the Nebraska statute "makes clear that a significant portion of the general public may lawfully carry a concealed weapon." Judge Loken pointed to the exceptions in the statute and held that in order to stop a person with a gun (which requires only a reasonable suspicion of criminal activity) police must have a reasonable and articulable suspicion that the suspect does not have a valid permit. Judge Loken also found that allowing officers "unfettered discretion to stop and frisk anyone suspected of carrying a concealed weapon without particularized suspicion of unlawful carrying conflicts with the spirit of" Nebraska's constitutional guarantee of the right to bear arms. *Jones*, 606 F.3d at 968-69.

Mr. Bynum, consistent with the majority rule, asserts that because possession of a firearm is not inherently illegal and because a significant portion of general public may legally carry a firearm in Iowa, and because the jury was not so instructed, his right to due process and a fair trial was violated. The jury could not

properly decide if Mr. Bynum falsely reported the crime of carrying weapons because they were not apprised that carrying a weapon in a city is not inherently illegal. The remedy is that Bynum's conviction for the penalty enhanced version of Iowa Code § 718.6(1), making false reports, be set aside and a new trial granted. *See* Iowa R. Crim. P. 2.24(2)(b)(7) (new trial may be granted when the "the court has refused to properly instruct the jury." *See Brown v. Lyon*, 258 Iowa 1216, 1222, 142 N.W.2d 536, 539 (1966) (trial court does not have discretion to deny motion for new trial when misstatement of law appears in instructions), cited with approval in *State v. Lindsey*, 302 N.W.2d 98, 102 (Iowa 1981).

Mr. Bynum notes that this error was not harmless because the sentence imposed for the penalty enhanced offense was 365 days in jail, all but 14 suspended. [Order of disposition, filed Feb. 16, 2008; Appendix p. 30]. This 365 day sentence exceeded the statutory maximum for a violation for the offense that does not involve the false reporting of an indictable misdemeanor. Falsely reporting a non-indictable misdemeanor is a simple misdemeanor under Chapter 718.6(1) and is punishable by no more 30 days in jail. *See* Iowa Code § 903.1(1)(a) (maximum sentence for misdemeanants).

VIII. CONCLUSION

For the reasons and upon the authority cited above, Mr. Bynum requests that the Court grant set aside his conviction and grant him a new trial, or in the alternative, that the Court set aside his conviction and sentence for the penalty enhanced offense of making a false report.

Respectfully submitted,

MARK C. MEYER, Attorney for Appellant

IX. REQUEST FOR ORAL ARGUMENT

Appellant requests that the case be submitted for oral argument.

X. CERTIFICATES

A. CERTIFICATE OF FILING

12/11/2018

I hereby certify that on ~~11/12/2018~~, I electronically filed the foregoing with the Iowa Supreme Court Clerk by using the ECF system. I certify that all participants in the case are registered ECF users and that service will be accomplished by the ECF system.

_____

MARK C. MEYER

B. PROOF OF SERVICE

12/11/2018

I certify that on ~~11/12/2018~~ I served this document on the Applicant by mailing 1 copy of it to:

Earnest B. Bynum

_____

MARK C. MEYER

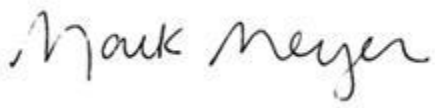
C. CERTIFICATE OF COMPLIANCE

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

   [x] Based on a word count from Microsoft Word 2010 this brief contains approximately 5204 words *excluding* the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because:

   [x] this brief uses a proportionally spaced, 14-point Times New Roman font.



12/11/2018

~~11/12/2018~~

MARK C. MEYER — DATE