

IN THE SUPREME COURT OF IOWA
Supreme Court No. 18-0294

STATE OF IOWA,
Plaintiff-Appellee,

vs.

EARNEST B. BYNUM,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR LINN COUNTY
THE HONORABLE NICHOLAS L. SCOTT, JUDGE

APPELLEE'S BRIEF

THOMAS J. MILLER
Attorney General of Iowa

SHARON K. HALL
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
(515) 281-4902 (fax)
sharon.hall@ag.iowa.gov

JERRY VANDER SANDEN
Linn County Attorney

MONICA SLAUGHTER
Assistant Linn County Attorney

ATTORNEYS FOR PLAINTIFF-APPELLEE

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the District Court Correctly Denied the Defendant's Untimely Motion for Mistrial Based on the Racial Composition of the Jury Pool.

Authorities

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II. Whether the District Court Abused its Discretion in Overruling the Defendant's Motions for Mistrial Based on the Admission of Alleged Bad Acts Evidence.

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III. Whether the District Court Abused its Discretion in Overruling the Defendant’s Objection to the Admission of Two Photographs of Firearms Carried by Responding Officers.

Authorities

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IV. Whether the District Court Correctly Rejected the Defendant’s Proposed Jury Instruction Modification.

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(Iowa Ct. App. April 6, 2016)
Iowa Code § 718.6(1)
Iowa Code § 724.4(4)(i)

ROUTING STATEMENT

Because this case can be decided based on existing legal principles transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

The defendant, Earnest Bynum, appeals from judgment and sentence entered by the district court on a jury verdict finding him guilty of a false report alleging carrying weapons, a serious misdemeanor offense. *See* Iowa Code § 718.6(1). On appeal the defendant argues that the district court (1) erred in denying his motion for mistrial based on the racial composition of the jury pool, (2) abused its discretion in overruling his motions for mistrial based on the admission of alleged bad acts evidence, (3) abused its discretion in overruling his objection to the admission of two photographs of firearms carried by responding officers; and (4) erred in rejecting his proposed jury instruction modification.

Course of Proceedings

On April 26, 2016, the State charged Bynum with the crime of false reports committed in Cedar Rapids on March 9. Trial Information; App. 5-7. The State later amended the date to March 10.

Amended Trial Information (1/11/18); App. 12-14; Trial Tr.Vol.I, p.7, line 11-p.8, line 10. Bynum filed a motion in limine on September 2, 2016, and the court heard argument on January 5, 2018.¹ See *generally* Motion in Limine; Motion Tr.; App. 8-9.

A jury trial began on January 8 and ended with the return of a guilty verdict on January 10 finding Bynum had falsely reported the crime of carrying weapons. See Trial Tr. Vol.I-III; Verdict Form No.1; App. 25.

On February 16, 2018, the district court ordered Bynum to serve three-hundred sixty-five days in jail with all but fourteen days suspended and placed him on supervised probation for one year. Sent. Tr.p.9, line 16-p.11, line 5; Judgment and Sentence; App. 30-31.

Facts

In March of 2016, defendant Bynum was living with his long-time on again/off again girlfriend Pamela Haskins in Cedar Rapids. Trial Tr.Vol.II, p.42, line 14-p.43, line 20. Haskins and Bynum share a son, Tamir, who was around seventeen years old at the time; Haskins also has two older sons. Tr.Vol.II, p.42, lines 3-10,17-24, p.43, lines 21-25. On March 9, Haskins and Bynum had a

¹ The reason for the lengthy delay in proceedings is unclear.

disagreement ending with Bynum pushing her against a wall prior to leaving the home. Tr.Vol.II, p.44, lines 10-25. Haskins called police that day to report a domestic assault. Tr.Vol.II, p.44, lines 14-25.

The next evening, March 10, Haskins was at home with Tamir and a girlfriend when her older son, Bilal, stopped by with Haskins' young granddaughter. Tr.Vol.II, p.45, line 14-p.46, line 2, p.48, line 17-p.49, line 4. When a couple of them stepped out on the front porch to leave, they faced spotlights and police officers with guns drawn yelling at them to put their hands up. Tr.Vol.II, p.46, lines 3-24. Tamir was ordered to turn around, walk backwards, and get down on his knees. Tr.Vol.II, p.47, lines 2-10. Because Bilal was holding his daughter in his arms he was not ordered to the ground. Tr.Vol.II, p.47, lines 14-21. Haskins said they were scared and upset and that officers searched for guns but found none. Tr.Vol.II, p.46, line 25-p.47, line 1, p.48, lines 6-16.

Officer Shannon Aguero explained to Haskins they were acting on a phone call and showed Haskins the phone number. Tr.Vol.II, p.84, lines 13-25. Haskins recognized the number as belonging to Bynum, and said "that was his MO" and "he was trying to do things to" hurt her "emotionally." Tr.Vol.II, p.50, lines 13-22, p.84, line 13-

p.85, line 13. Haskins further testified that the SUV Bilal was driving was in her name, Bynum was familiar with Bilal and the vehicle Bilal drove, and she denied that any males had entered her home carrying guns that evening. Tr.Vol.II, p.50, line 23-p.51, line 19.

Around 10:17 p.m. that evening, Bynum had called the police non-emergency number to report that two males in a Suburban had pulled up to 922 E. Ave. Northwest, parked over the sidewalk, and jumped out of the vehicle carrying a handgun and a rifle. State's Exh.1 (audio recording); App.----- . The men went up to the door, knocked, and entered the house. *Id.*; *see also* Tr.Vol.II, p.141, lines 4-8. Bynum provided his phone number but not his name. Exh.1; App.----. When asked, Bynum denied knowing who lived at that address and denied having previously seen that vehicle. *Id.*

Officer Aguero and others were dispatched to Haskins' home based on Bynum's report of two males with guns entering the home; the dispatch was a "code two" calling for lights and sirens based on the report of weapons. Tr.Vol.II, p.69, line 16-p.71, line 18, p.138, line 18-p.139, line 1. Officer Aguero believed the situation could be a burglary, robbery, intimidation, or going armed with intent. Tr.Vol.II, p.72, lines 9-21, p.143, lines 8-25. She did not recall if

dispatch had advised the males with guns had knocked before entering the house, and she did not know the call came in on the non-emergency number. Tr.Vol.II, p.139, line 24-p.140, line 2, p.141, lines 4-8.

Upon arrival, officers observed the Suburban parked as the caller had stated; they parked down the block and surrounded the house with weapons drawn. Tr.Vol.II, p.74, line 13-p.76, line 2. Officer Aguero carried her patrol rifle instead of her handgun explaining it was easier to use at longer distances. Tr.Vol.II, p.77, lines 15-22, p.78, lines 3-5, p.80, lines 1-10. Persons exiting the house were ordered to get down and other officers went inside to clear the house; no firearms were found. Tr.Vol.II, p.80, lines 11-20, p.81, line 16-p.82, line 20, p.83, lines 1-5.

Aguero was aware of the call for service to that address the previous day. Tr.Vol.II, p.84, lines 4-6. Aguero also testified that if she had heard the call herself she would have responded the same way. Tr.Vol.II, p.88, line 20-p.89, line 10. She admitted that it is not necessarily a crime to carry a firearm. Tr.Vol.II, p.141, lines 9-16, p.148, lines 1-9.

Officer Aguero made contact with Bynum on March 24. Tr.Vol.II, p.86, lines 22-25. Bynum initially denied any knowledge of the phone call but later admitted to making the report on the non-emergency line. Tr.Vol.II, p.90, lines 15-21, p.130, lines 14-20, p.139, lines 2-15. Bynum told Aguero that he was in the area of 1st Avenue and 10th Street West when he saw the Suburban drive by and observed a male waving a gun in his direction. Tr.Vol.II, p.131, line 15-p.132, line 12. Bynum said he knew where the vehicle was going so he reported that address and followed the vehicle to Haskins' home. Tr.Vol.II, p.132, line 13-p.134, line 1.

Bynum identified the person waving the gun as Haskins' son Bilal. Tr.Vol.II, p.133, line 20-p.134, line 1, p.140, lines 3-13. He did not provide his name because he did not want to get anyone in trouble and did not want to be a snitch. Tr.Vol.II, p.134, lines 10-18, p.135, lines 7-13.

Additional relevant facts will be discussed as part of the State's argument.

ARGUMENT

I. **The District Court Correctly Denied the Defendant's Untimely Motion for Mistrial Based on the Racial Composition of the Jury Pool.**

Preservation of Error

Defendant Bynum waived error by failing to object to the jury pool prior to or during *voir dire*. See, e.g., Trial Tr.Vol.I, p.17, line 21-p.18, line 23, p.111, line 10-p.112, line 14; Tr.Vol.II, p.14, line 19-p.19, line 3. Bynum in fact did not move for a mistrial based on the composition of the jury pool until after thirteen jurors had been selected and prior to the commencement of evidence the next day. Tr.Vol.I, p.17, line 21-p.18, line 23, p.111, line 10-p.112, line 14; Tr.Vol.II, p.14, line 19-p.19, line 3. The district court overruled Bynum's motion and trial proceeded. Tr.Vol.II, p.18, line 21-p.19, line 3. Because Bynum does not assert a claim of ineffective assistance of counsel the Court need not consider this issue further.

Standards for Review

The Court reviews constitutional claims *de novo*. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001); accord *State v. Plain*, 898 N.W.2d 801, 810 (Iowa 2017). In order to establish a *prima facie* violation of the fair cross-section requirement, a defendant must show (1) that he or she is part of a "distinctive" group alleged to be

excluded; (2) that the representation of his/her group “in venires from which juries are selected is not fair and reasonable in relation to the number of persons in the community;” and (3) that such “underrepresentation is due to systematic exclusion of the group in the jury-selection process.” *Plain*, 898 N.W.2d at 822 (quoting *Duren v. Missouri*, 439 U.S. 357, 364 (1979)); see also *State v. Smith*, No.16-1881, 2017 WL 4315058, at *3 (Iowa Ct. App. Sept. 27, 2017). Because defendant Bynum is African-American he has met the first requirement. Yet, no presumption of bias may be drawn from the racial make-up of the jury pool. *State v. Fenton*, No.17-0154, 2018 WL 3057442, at *6 (Iowa Ct. App. June 20, 2018).

Generally, the Court’s review of rulings on motions for mistrial is for an abuse of discretion. *Plain*, 898 N.W.2d at 810-11; *State v. Huser*, 894 N.W.2d 472, 498 (Iowa 2017). Reversal is required only when “the trial court’s discretion ‘was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable.’” *State v. Webster*, 865 N.W.2d 865 N.W.2d 223, 231 (Iowa 2015) (citations omitted).

Merits

Bynum asserts a violation of his right to an impartial jury because there were no African-American persons in the available jury pool of twenty-one persons. Appellant's Brief pp.10-13. This Court should find defense counsel's motion for mistrial on this basis was untimely and unsupported.

The sparse record made by defense counsel prior to the beginning of trial on day two reflects that the original jury pool of thirty-five persons had included at least two African-American persons. Tr.Vol.II, p.14, line 19-p.15, line 15. The group of thirty-five was first sent "upstairs" where a jury was picked for a civil trial resulting in the subtraction of fourteen persons, including the two African-American persons, leaving twenty-one persons available for Bynum's jury. Tr.Vol.II, p.15, line 16-p.17, line 12.

Counsel moved for a mistrial asserting that the composition of the remaining jury pool violated his right to due process. Tr.Vol.II, p.17, lines 1-12. The district court agreed that there were no persons of African-American heritage among the twenty-one remaining persons, but overruled Bynum's due process objection. Tr.Vol.II, p.17, line 13-p.19, line 3.

On appeal Bynum concedes that the ratio of two out of thirty-five (5.7%) would be consistent with the overall percentage of the African-American population in Linn County (5.6%). Appellant's Brief pp.11-12. Bynum's complaint, however, is that the available jury pool "was tinkered with" and was not the result "of chance or a random occurrence." *Id.* at 12. While Bynum now claims that the "judge elected not to" retain the two African-Americans for his trial or to hold jury selection on another day with a different pool, there is no support in the record that any such requests or motions were timely made by either party. *Id.* Rather, the court simply stated that it was unaware of the races of persons before sending the large group up for the civil trial. Tr.Vol.II, p.18, line 21-p.19, line 3.

Bynum's argument falls far short of establishing a *prima facie* violation of the fair cross-section requirement. First, he admits the composition of the original jury pool of thirty-five was a fair and reasonable representation of the community. Second, the fact that the same group of thirty-five was the total number available for both a civil trial and a criminal trial in Linn County, and the fact that a jury was picked first for the civil case does not rise to the level of a "systematic exclusion" of African-Americans for Bynum's trial. *Plain,*

898 N.W.2d at 822-24. Nor is there any evidence in this record that “the system for selecting potential jurors was deliberately modified” to exclude persons of Bynum’s race. Appellant’s Brief p.12. Presumably, the two alleged African-Americans were selected as jurors by attorneys for their civil trial.

The State submits Bynum would have to prove there was a policy in place of allowing civil juries to be picked before criminal juries, or that the court in his case was made aware of the racial composition of the jury pool prior to agreeing to let the civil case proceed first with jury selection. As noted, the record does not reflect that Bynum timely voiced any concern or objection over the order of jury selection or the composition of the available jury pool.

Accordingly, the district court’s denial of a mistrial and rejection of Bynum’s due process claim was appropriate and reasonable under the circumstances.

II. The District Court Reasonably Exercised its Discretion in Overruling the Defendant's Motions for Mistrial Based on the Admission of Alleged Bad Acts Evidence.

Preservation of Error

Bynum filed a motion in limine seeking to exclude evidence of an “unserved no-contact order” and other prior bad acts and related character evidence. Motion in Limine (9/02/16); App. 8-9. At the January 2018 motion hearing, the court agreed to exclude the “pending no-contact order.” Motion Tr.p.22, line 19-p.23, line 5; Motion in Limine Ruling (1/10/18); App. 10-11. The parties also argued over admissibility of evidence of the domestic assault incident the day prior to Bynum’s law enforcement report of men entering Haskins’ home with guns. *See generally* Motion Tr.p.10, line 1-p.11, line 11, p.13, lines 8-16. The court agreed the prior incident was admissible because it was close in time and relevant to Bynum’s motive, intent, or lack of mistake in making the phone call. Motion Tr.p.22, lines 8-18; Ruling; App. 10-11; *see also* Trial Tr.Vol.I, p.6, line 22-p.7, line 9.

Bynum, however, did not timely object when Pamela Haskins made the statements he asserts violated the court’s motion in limine ruling limiting the prior bad act evidence to the March 9 incident

between Haskins and Bynum. Tr.Vol.II, p.44, line 1-p.45, line 5. Nor did Bynum object when Officer Aguero mentioned prior incidents at that address. Tr.Vol.II, p.83, line 17-p.84, line 6.

Standards for Review

This Court reviews evidentiary rulings on the admission of evidence and rulings on motions for mistrial for an abuse of discretion. *State v. Huser*, 894 N.W.2d 472, 498 (Iowa 2017); *State v. Huston*, 825 N.W.2d 531, 536 (Iowa 2013); *State v. Reynolds*, 765 N.W.2d 283, 288 (Iowa 2009); *State v. Newell*, 710 N.W.2d 6, 32 (Iowa 2006).

Under Iowa Rule of Evidence 5.404(b) “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he [or she] acted in conformity therewith.” *State v. Henderson*, 696 N.W.2d 5, 11 (Iowa 2005) (citing Iowa Rule of Evidence 5.404(b)). Such evidence is, for example, “admissible as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Iowa R. Evid. 5.404(b); *see also State v. Nelson*, 791 N.W.2d 414, 424-25 (Iowa 2010); *Reynolds*, 765 N.W.2d at 289.

Yet, when prior bad acts evidence is offered to establish an inference of intent or motive, the State must “articulate a tenable noncharacter theory of logical relevance.” *Reynolds*, 765 N.W.2d at 290 (quotation omitted); *see also Nelson*, 791 N.W.2d at 425; *State v. Sullivan*, 679 N.W.2d 19, 28 (Iowa 2004); *State v. Twigg*, No.11-0733, 2012 WL 3590045, at *4-*5 (Iowa Ct. App. Aug. 22, 2012). In other words, such evidence must be “relevant and material to a *legitimate* issue in the case other than a general propensity to commit wrongful acts” *Reynolds*, 765 N.W.2d at 289 (citation omitted); *see also Nelson*, 791 N.W.2d at 425-26; *Sullivan*, 679 N.W.2d at 25. Further, there must be “clear proof” the accused committed the bad act or crime. *Reynolds*, 765 N.W.2d at 290; *Sullivan*, 679 N.W.2d at 25; *State v. Most*, 578 N.W.2d 250, 253 (Iowa Ct. App. 1988).

Even relevant evidence, however, may be excluded if its probative value “is substantially outweighed by the danger of unfair prejudice.” *Reynolds*, 765 N.W.2d at 289-90 (citations omitted); *see Iowa R. Evid. 5.403*; *State v. Putman*, 848 N.W.2d 1, 14-15 (Iowa 2014); *Most*, 578 N.W.2d at 253. “Unfair prejudice” means use of evidence that “appeals to the jury’s sympathies, arouses its sense of

horror, [or] provokes its instincts to punish" *State v. Castaneda*, 621 N.W.2d 435, 440 (Iowa 2001) (citations omitted); *see also Most*, 578 N.W.2d at 253-54. While evidence presented by the prosecution is often prejudicial, the critical question is whether the challenged evidence is likely to prompt the fact finder to make a decision based on emotion rather than the factual record. *Compare Reynolds*, 765 N.W.2d at 292-93, *Castaneda*, 621 N.W.2d at 440-43, and *Most*, 578 N.W.2d at 254 with *Nelson*, 791 N.W.2d at 426.

The improper admission of evidence is subject to a harmless error analysis. *Sullivan*, 679 N.W.2d at 29-30 (discussing Iowa Rule of Evidence 5.103(a)); *Twigg*, 2012 WL 3590045, at *6-*8. The Court presumes prejudice "unless the record affirmatively establishes otherwise." *Id.* at 30. No prejudice will be found when the challenged evidence is cumulative or the properly admitted evidence is overwhelming. *Id.* at 30-31.

The Court has broad discretion in determining whether a mistrial is warranted because it is in the best position to judge the effect of the evidence at issue. *State v. Gully*, No.17-0727, 2018 WL 4621552, at *5 (Iowa Ct. App. Sept. 26, 2018). A mistrial should only be granted when an impartial verdict cannot be reached or an obvious

procedural error would require reversal on appeal. *State v. Frei*, 831 N.W.2d 70, 80 (Iowa 2013); *Newell*, 710 N.W.2d at 32.

Merits

Defendant Bynum challenges the district court's denial of two motions for mistrial concerning the admission of alleged bad acts evidence. Appellant's Brief pp.14-17. Bynum argues the challenged evidence was irrelevant and unfairly prejudicial warranting a new trial. This Court should find the denial of a mistrial on both grounds was reasonable under the circumstances.

A. Reference to Other Incidents.

Bynum first argues the court should have granted his motion for a mistrial concerning Pamela Haskins' reference to other incidents. Appellant's Brief pp.14-15. As noted above, the court had overruled Bynum's motion in limine ruling that the domestic abuse incident taking place on March 9, 2016, was relevant in determining Bynum's guilt on the false reports charge. Motion Tr.p.22, lines 8-17; Tr.Vol.I, p.6, line 22-p.7, line 9; Motion in Limine Ruling; App. 10-11. The court's ruling on that ground was appropriate—Bynum's motive was in fact relevant in determining why he might have wanted to make a false report involving Haskins and her family. *State v.*

Graham, No.13-1306, 2014 WL 4629585, at *2-*4 (Iowa Ct. App. Sept. 17, 2014) (evidence showing personal animus toward complaining witness was not propensity evidence); *cf. State v. Taylor*, 689 N.W.2d 116, 125, 128 (Iowa 2004).

When asked by the prosecutor about an incident with Haskins on March 9, Haskins responded that she did not “know which incident” the prosecutor was “talking about on the 9.” Tr.Vol.II, p.44, lines 1-9. The prosecutor attempted to clarify asking Haskins if she would disagree if the police recording shows she called on March 9—to which Haskins responded “I guess I just don’t know which incident you’re talking about because unfortunately I did a couple of times.” Tr.Vol.II, p.44, lines 10-19.

Next, the prosecutor asked Haskins if there was a time in March when Bynum had shoved her and she had called police; she answered “yeah” and that they had broken up. Tr.Vol.II, p.44, line 20-p.45, line 5. The prosecutor moved on to question Haskins about what had happened on March 10 after Bynum’s call to law enforcement. Tr.Vol.II, p.45, line 9-p.47, line 25.

Haskins later testified that she had recognized Bynum's phone number and said it "was his MO" in "trying to do things to, not physically hurt me, but to emotionally hurt me." Tr.Vol.II, p.50, lines 13-22. She further testified that Bynum knew her son Bilal and was familiar with the vehicle Bilal drove. Tr.Vol.II, p.50, line 23-p.51, line 19. Haskins added that at no time that evening had two males knocked on her door and entered the house carrying guns. Tr.Vol.II, p.51, lines 20-23.

During the next recess, defense counsel pointed to Haskins' mention of other incidents of calling police as a violation of the court's motion in limine ruling, and moved for a mistrial on that basis. Tr.Vol.II, p.57, line 14-p.58, line 12. The State resisted noting Haskins was having trouble remembering the date from two years earlier, and because no details were given it was not prejudicial. Tr.Vol.II, p.58, lines 14- p.59, line 7.

The court reasonably denied a mistrial finding "it is not so prejudicial that we need to declare a mistrial in this matter." Tr.Vol.II, p.59, lines 8-14. The court advised the prosecutor to make sure other witnesses were aware of the motion in limine rulings, and offered to instruct the jury to disregard if Bynum requested such an

instruction. Tr.Vol.II, p.59, lines 14-23. Defense counsel opted for the uniform bad acts instruction. Tr.Vol.II, p.59, line 24-p.60, line 22; Jury Instr. Nos.19-20; App. 20-21. The Court presumes juries follow the instructions given. *State v. Hanes*, 790 N.W.2d 545, 552 (Iowa 2010); *Gully*, 2018 WL 4621552, at *6.

Bynum claims that because his theory of defense was that his recorded statements were substantially true his intent or motive was not at issue. Appellant's Brief pp.17. The State disagrees. The record does not support the veracity of Bynum's police interview statements—Bilal was visiting Haskins with his young daughter and not driving past Bynum waving a gun, nor did he enter Haskins' house armed with another armed male. *Compare* Tr.Vol.II, p.48, line 17-p.49, line 13, p.51, lines 20-23 *with* Tr.Vol.II, p.89, lines 18-25, p.90, lines 15-21, p.131, line 2-p.134, line 7 *and* Exh.1. The only other male present was the younger son Haskins shared with Bynum and no firearms were found. Tr.Vol.II, p.45, line 14-p.46, line 2, p.48, lines 6-16. Bynum also lied about not knowing who lived at the address he reported and not knowing who owned the vehicle parked across the sidewalk. Tr.Vol.II, p.133, line 20-p.134, lines 1,10-18; Exh.1.

B. Reference to Prior Calls.

Bynum also argues that the court should have granted a mistrial based on Officer Aguero's reference to "prior calls for service" at that address. Appellant's Brief p.15. When asked if officers had received "any additional information regarding the address that would have heightened senses," Aguero recalled receiving an update after arrival "that there had been previous incidents at this residence," noting that dispatch customarily looks up "prior calls for service" in such situations. Tr.Vol.II, p.83, line 17-p.84, line 3. The prosecutor clarified asking if that would have been March 9th and Aguero said yes. Tr.Vol.II, p.84, lines 4-6. There were no other references to prior incidents.

The State points out that Bynum did not object to the above statements until after the State had rested its case. Tr.Vol.II, p.151, line 22-p.153, line 11. He then claimed it violated the court's motion in limine ruling and renewed his motion for a mistrial based on the admission of bad acts evidence. *Id.* The State resisted noting the only testimony was about a prior domestic incident. Tr.Vol.II, p.153, line 13-p.154, line 17. The court agreed noting no details were provided, and in any regard, the challenged statements were not sufficiently

prejudicial to warrant a mistrial. Tr.Vol.II, p.158, line 19-p.159, line 16.

Considering the nature of the challenged statements from both witnesses, the strength of the State's proof Bynum knowingly reported a crime (or potential crime) that did not occur, and the court's instructions on prior bad acts, this Court should find no abuse of discretion in the denials of a mistrial.

III. The District Court Reasonably Exercised its Discretion in Overruling the Defendant's Objection to the Admission of Two Photographs of Firearms Carried by Responding Officers.

Preservation of Error

Prior to jury selection, the prosecutor indicated that she wanted to present photographs of the firearms police carried in responding to Bynum's report of two armed males entering Haskins' residence asserting it was relevant to the question of the offense level. Tr.Vol.I, p.11, line 8-p.13, line 5. The court reserved ruling on that issue. Tr.Vol.I, p.13, lines 4-5. During trial the court ruled that the question of whether the State had proven Bynum had reported an indictable misdemeanor or felony would be submitted to the jury along with general definitions of the three alleged crimes. Tr.Vol.II, p.101, line 12-p.102, line 16; Jury Instr. Nos.1,13-18; App. 15, 19-20.

Following jury selection, the court ruled that it would allow the State to introduce two photographs, one of an assault rifle and the other a Glock handgun. Tr.Vol.II, p.3, line 2-p.4, line 14. The court believed it was “the natural consequences of calling in a false report involving guns by suspects” that the law enforcement response would also involve firearms. *Id.* The court added that it was “relevant to show the jury the chain of events as they occurred and actions that were initiated with that 911 phone call.” Tr.Vol.II, p.3, line 22-p.4, line 3. The court found photos of guns would not be prejudicial “because we see guns all the time on TV and photographs” so they do not have the same emotional appeal or arouse passions. Tr.Vol.II, p.4, lines 4-14.

Standards for Review

The standards applicable to review of evidentiary rulings are detailed in division II above.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Iowa R. Evid. 5.401; *see, e.g., State v. Plaster*, 424 N.W.2d 226, 229 (Iowa 1988); Iowa R. Evid. 5.402.

Merits

Bynum urges that “it was prejudicial error” for the court to allow publication of the two firearms photographs to show the weapons police possessed in responding to his phone call.² Appellant’s Brief p.20. He urges the photos 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.” *Id.* With respect to that issue, it is clear that all three of the offenses the State alleged Bynum had falsely reported were indictable misdemeanor or felony offenses. Tr.Vol.II, p.122, line 1-p.123, line 11. What the jury had to decide was whether defendant Bynum knowingly made a false report of one of the alleged crimes. Jury Instr. Nos.13-18; App. 19-20. In any regard, no relief is warranted on this claim.

Evidence of the level of law enforcement response was relevant to show why the legislature has found it appropriate to punish the false reporting of a fire or other emergency that poses a danger to the safety of all persons. Notably, the defense did not object to any of Officer Aguero’s testimony explaining why they treated the dispatch

² Because the photographs are not listed as exhibits on the district court docket, it appears the jury did not have them for deliberation.

as a “code two” involving weapons, sent more than one unit of officers, and brought along rifles. Tr.Vol.II, p.69, line 11-p.72, line 8. The calls details were somewhat vague making it difficult for law enforcement to determine what level of response was warranted. Exh.1; App.-----.

Even assuming, for the sake of argument, the court abused its discretion in finding the two photographs were relevant to show the circumstances as they unfolded following Bynum’s call, such evidence was not prejudicial considering the record as a whole. Only one officer testified about the police response and it is clear that no shots were fired, and the encounter with Haskins and others was peaceful. Moreover, as discussed in division II above, the strength of the State’s proof Bynum knowingly made a false report makes it unlikely a brief viewing of the two photographs during trial would have prompted jurors to decide the case on emotions rather than record facts.

Accordingly, defendant Bynum is not entitled to a new trial based on this ground or his claims concerning the admission of bad acts evidence, separately or cumulatively—such evidence was harmless.

IV. The District Court Correctly Rejected the Defendant's Proposed Jury Instruction Modification.

Preservation of Error

The State agrees that defense counsel asked the court to include in the carrying weapons definitional instruction (No.14) the exception for having a valid permit to carry a firearm within the city limits.

Trial Tr.Vol.III, p.56, line 8-p.57, lines 1-6,19-25, p.58, lines 1-11. The State objected noting that the exceptions listed under Iowa Code section 724.4(4) are defenses to a carrying weapons charge and not relevant to the false reports charge against Bynum. Tr.Vol.III, p.57, lines 8-18. The court agreed with the prosecutor and denied the requested modification to instruction 14. Tr.Vol.III, p.58, lines 12-24.

However, defendant Bynum has not preserved a due process or other constitutional claim. Appellant's Brief pp.24-28. The Court need not address Bynum's Second Amendment argument. *Id.*

Standards for Review

The Court reviews jury instruction claims for correction of errors at law. *State v. Johnson*, 604 N.W.2d 669, 671 (Iowa Ct. App. 1999). "Ordinarily, the district court must instruct on a defendant's theory of defense provided the defendant makes a timely request, the theory underlying the requested instruction is supported by the

evidence, and the requested instruction is a correct statement of the law.” *Id.* (citation omitted).

Merits

On this ground, Bynum argues that the definitional instruction for carrying weapons, instruction 14, should have included the exception for having a valid permit to carry because “law enforcement cannot presume any possession of a firearm is unlawful—meaning that someone does not have a valid permit.” Appellant’s Brief p.25. He urges the absence of the requested information “effectively directed a verdict of guilty on the penalty enhancement factor.” *Id.* at 23. The Court should find Bynum’s argument without merit. Tr.Vol.III, p.56, line 19-p.58, line 24.

Bynum was charged with the crime of “False Reports alleging the crime of Carrying Weapons, Burglary, or Going Armed with Intent occurred, in violation of Iowa Code section 718.6(1).” Jury Instr. No.1; App. 15. Section 718.6(1) provides:

A person who reports or causes to be reported false information to a fire department, a law enforcement authority, or other public safety entity, knowing that the information is false, or who reports the alleged occurrence of a criminal act knowing the act did not occur, commits a simple misdemeanor, unless the alleged criminal act

reported is a serious or aggravated misdemeanor or felony, in which case the person commits a serious misdemeanor.

Iowa Code § 718.6(1); *see also State v. Wilson*, No.15-1141, 2016 WL 1359051, at *1-*2 (Iowa Ct. App. April 6, 2016) (false reporting is a crime against the government; the defendant must know the reported crime did not occur); *State v. Vikel*, No.08-0525, 2009 WL 779803, at *2 (Iowa Ct. App. March 26, 2009) (explaining offense levels for false reports).

The court instructed the State was required to prove that on March 10, 2016, Bynum “reported information to law enforcement authority concerning the alleged occurrence of a criminal act,” at the time of reporting Bynum “knew, as defined in Instruction 18, the information was false,” and that he “reported the crime of Carrying Weapons, Burglary, or Going Armed with Intent.” Jury Instr. No.13; App. 19. Instruction 18 defined “to know” as having “a conscious awareness that the information was false.” Jury Instr. No.18; App. 20. The court further instructed on the general definitions of the three alleged crimes. Jury Instr. Nos.14-16; App. 19-20.

The crime of carrying weapons was defined as follows:

A person who goes armed with a firearm concealed on or about the person, or who, within the city 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.

Jury Instr. No.14; App. 19; *see, e.g., State v. Fuller*, No.17-1231, 2018 WL 3471096, at *3 (Iowa Ct. App. July 18, 2018). Exceptions listed under section 724.4(4), including having a valid permit, were not included. The jury completed verdict form No.1 marking carrying weapons as the crime Bynum had falsely reported. Verdict Form No.1; App. 25.

Bynum's argument is irrelevant to the question of his guilt in knowingly reporting a crime that did not exist or occur because having a valid permit to carry a firearm is a defense to a charge of carrying weapons not at issue in his case. Iowa Code § 724.4(4)(i); *see, e.g., Fuller*, 2018 WL 3471096, at *3-*4 (permit exception); *State v. McCoy*, 618 N.W.2d 324, 325-26 (Iowa 2000) (closed container exception). Nor is the question of law enforcement's authority to perform a *Terry* stop of a person suspected of carrying a firearm before the Court here. Appellant's Brief pp.23-28.

In short, the State did not have to prove the crime of carrying weapons actually occurred—rather, the State established Bynum’s report was in fact false and he knew it. Jury Instr. Nos.13, 18; Verdict Form No.1; App. 19-20, 25. Bynum’s challenge to the enhanced offense level is unclear—carrying weapons is an aggravated misdemeanor, which raises the false reports to a serious misdemeanor. Appellant’s Brief pp.23-24; see Iowa Code § 718.6(1). Bynum did not ask for and does not suggest an alternative simple misdemeanor that should have been submitted.

Because Bynum’s proposed modification to the carrying weapons definition was not a correct statement of the law the district court correctly rejected his request.

CONCLUSION

For all of the reasons stated above, the State respectfully requests that this Court affirm the conviction and sentence of defendant-appellant Earnest Bynum.

REQUEST FOR NONORAL SUBMISSION

Appellant has requested oral submission of this appeal primarily raising evidentiary challenges. The State, however, believes that oral argument would neither be of material assistance nor advance the routine issues raised, which may be resolved by the parties' briefs and established case law. Iowa R. App. P. 6.903(2)(i), 6.908(2). Should the Court order oral argument, the State would request to also be heard.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa



SHARON K. HALL
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
sharon.hall@ag.iowa.gov

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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SHARON K. HALL

Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
sharon.hall@ag.iowa.gov