NO. 18-0294

IN THE
SUPREME COURT OF IOWA

STATE OF IOWA,

Plaintiff-Appellee,

vs.

EARNEST BYNUM,

Defendant-Appellant.

APPEAL FROM THE LINN COUNTY DISTRICT COURT
No. SRCR116884

Hon. Nicholas Scott, Judge

APPLICATION FOR FURTHER REVIEW FROM A DECISION OF THE IOWA COURT OF APPEALS FILED MAY 1, 2019
I.R.APP.P. 6.1103(1)(b)(2)

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I. QUESTION PRESENTED FOR REVIEW

The text of Iowa's carry weapons statute, Iowa Code § 724.4, begins with the phrase, "Except as otherwise provided in this section," and then goes on to provide that a person who carries a firearm in a city violates the law. Should the jury be apprised of both the elements of the offense of carry weapons and the statutory exceptions when determining whether a defendant falsely reported that crime?

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IV. STATEMENT SUPPORTING FURTHER REVIEW

The statutory maximum sentence for the crime of making a false report in violation of Iowa Code 718(6) is increased if an offense other than a simple misdemeanor is falsely reported. In this case, the jury found that Mr. Bynum falsely reported the crime of carry weapons in violation of Iowa Code § 724.4, which is an aggravated misdemeanor. Chapter 724.4 is unusual in that there are several statutory exceptions to the general prohibition against carrying weapons. That the person has a permit to carry weapons is one of these exceptions, and many people have permits, so many people can legally carry weapons anywhere, including in towns and cities.

In this case, the jury was informed of the elements of the offense of carry weapons, but they were not informed of any of the exceptions, including the permit to carry exception. Without being apprised of the exceptions to the general prohibition, the jury was unable to evaluate whether the Defendant falsely reported the crime of carry weapons. Because the jury was not properly instructed, Mr. Bynum asserts that his conviction for the penalty enhanced version of the false report statute violated the guaranty of Due Process of Law and the right not to have a judge direct a guilty verdict. The constitutional right to have a jury determine every fact necessary to increase the maximum sentence for a crime is also implicated, as is the constitutional right to possess firearms.

Mr. Bynum therefore asserts that further review is appropriate because the Court of Appeals has erroneously decided a matter involving substantial questions of constitutional law. *See* I.R.App.P. 6.1103(1)(b)(2).[1]

V. BRIEF IN SUPPORT OF REQUEST FOR FURTHER REVIEW

A. PRIOR PROCEEDINGS

1. Nature of the case

Mr. Bynum was convicted of violating Iowa Code § 718.6(1), which makes it a crime to make a false report.

2. 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 crime falsely reported was Carrying Weapons, or Burglary, or Going Armed with Intent. [Amended Trial Information; Appendix p. 12].

[1] By focusing on this issue, Mr. Bynum does not waive or forego the other issues considered by the Court of Appeals.

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 verdict rejected the burglary and going armed with intent options for the crime falsely reported and checked only the box for the carry weapons offense. 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].

3. 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].

The appeal was decided in an opinion filed on May 1, 2019. The Court of Appeals ruled against Mr. Bynum on all issues he had presented to the Court including the failure to instruct the jury regarding the statutory exceptions to the general prohibition against carrying weapons.

4. Relevant facts, summarized

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 identifying what crime was falsely reported the jury checked only the option for the crime of carrying weapons contrary to Iowa Code § 724.4. [Form of Verdict, filed Jan. 11, 2018; Appendix p. 25].

B. ARGUMENT

1. Relevant statutes

As noted, Mr. Bynum was convicted of violating Iowa Code § 718.6(1), which makes it a crime to make a false report. This crime contains the following elements: (1) report of an alleged occurrence of a criminal act, (2) while knowing the act did not occur, and (3) the crime reported was a serious or aggravated misdemeanor or felony. The crime alleged falsely reported was carry weapon in violation of Iowa Code § 724.4.

Iowa Code § 724.4 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. (emphasis added).

There are several circumstances set out in Chapter 724.4(4) that exempt 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.

The jury in Mr. Bynum's case was not apprised that carrying a gun within the city limits is a crime only if none of the statutory exceptions apply.

2. The Court of Appeals ruling

The Court of appeals ruled that,

> [t]he language requested by Bynum does not address the offense; rather, it addresses a statutory exception. See id. § 724.4(4) (listing exceptions) … The absence of a permit is not an element of the offense. *State v. Bowdry*, 337 N.W.2d 216, 218 (Iowa 1983) ("[W]e conclude that the General Assembly did not intend to make the absence of a permit an element of the offense."). The district court did not err in failing to give Bynum's requested instruction.
> Slip Opinion, pp. 14-15.

Mr. Bynum asserts that the Court of Appeals has erred. He asserts that simply listing the "elements" of the offense in the instruction defining the carry

weapons offense was inadequate because there are statutory exceptions to this offense. Because there are statutory exceptions, unlike most crimes, proving the "elements" is not necessarily sufficient to convict a person of the carry weapons offense.

By just listing the elements of the carry weapons offense, the jury was misled - they were instructed, in effect, that to carry a weapon in a public place is always a crime, without exception. But that is not accurate. In fact, because a significant proportion of the population can lawfully carry a weapon, the carry a weapon option either a – should not have been given as a choice of crimes that were falsely reported, or b – if listed as an option, then the jury should have been told that there are statutory exceptions to the offense. Because the jury was not so instructed, the jury was not given enough information to judge whether simply carrying a weapon is an offense.

3. It may not be presumed that to carry a weapon is a crime

The question of whether carrying 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 (RAS) of criminal activity. *Terry v. Ohio*, 392 U.S. 1, 21 (1968). This is relevant because if a report that a person is carrying a weapon is not even RAS of criminal activity,

then *a fortiori* such a report falls well short of alleging the commission of a crime.

One reason for the majority rule is that law enforcement cannot presume any possession of a firearm is unlawful is that 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). For instance, in *United States v. Jones*, 606 F.3d 964 (8th Cir. 2010), the Court relied in part on the Second Amendment and a state statute to find that merely carrying a weapon is not inherently illegal. Like 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.

Other cases finding that a report that a person is carrying a gun is not RAS of a crime include the following:[2]

N.B. - Not all these jurisdictions have the same statutes as Iowa.

• *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.")

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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.

• *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)

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).*

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, he did not receive a fair trial. 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.

4. Jury instruction No. 14 effectively directed a verdict on the penalty enhancement factor in violation of guaranty of Due Process of Law and the right to have the jury determine innocence or guilt.

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 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 this request. [Tr. III, p. 58:12-15]. The judge denied the request on the merits and not because the request was untimely. [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 simply 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 the statutory exceptions, including the exception for having a permit to carry,

effectively directed a verdict of guilty on the penalty enhancement factor in violation of Mr. Bynum's right to Due Process of Law and the right to trial by an impartial jury.

Regarding the latter, the Sixth Amendment provides that a criminal defendant shall have the right to a trial by an impartial jury. A fundamental principle implicit in this guarantee is that a trial court may never instruct a jury to convict. *United Brotherhood of Carpenters v. United States*, 330 U.S. 395, 408 (1947); *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920); *Sparf v. United States*, 156 U.S. 51, 105 (1895). No particular incantation by a judge is necessary to conclude that a verdict has been directed. *United States v. Hayward*, 136 U.S.App.D.C. 300, 302, 420 F.2d 142, 144 (1969):

> While the judge in this case did not direct a verdict of guilty in form, that is the substantive effect of the instruction given. The rule against directed verdicts of guilt includes perforce situations in which the judge's instructions fall short of directing a guilty verdict but which nevertheless have the effect of so doing by eliminating other relevant considerations if the jury finds one fact to be true….

In Bynum's case, the judge's instruction citing only the elements of the offense of carry weapons eliminated the relevant consideration of opening clause of the statute, the except-as-otherwise-provided clause that references the circumstances in which a firearm may be carried.

Regarding the Due Process issue, "the question is 'whether the ailing instruction . . . so infected the entire trial that the resulting conviction violates due process.'" *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). Mr. Bynum asserts that the failure to apprise the jury of the exceptions to the general prohibition against carrying weapons within a city limit affected the conviction for the penalty-enhanced version of false report statute. *See e.g. State v. Stallings*, 541 N.W.2d 855, 857 (Iowa 1995). In *Stallings* the Court reiterated that district court has a duty to instruct fully and fairly on the law regarding all issues raised by the evidence. An error in instructing the jury is presumed prejudicial unless the contrary appears beyond a reasonable doubt from a review of the whole case. *State v. Davis*, 228 N.W.2d 67, 73 (Iowa 1975).

5. Jury instruction No. 14 also denied Mr. Bynum the right to have the jury make findings of all facts required to increase the statutory maximum penalty for an offense

The finding that Bynum falsely reported the crime of carry weapons increased the category of offense from a simple misdemeanor (with a maximum sentence of 30 days in jail) to a serious misdemeanor (with a maximum of one year in jail). This is significant because in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond

the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The question that *Apprendi* forces the Court to answer is whether "the required finding expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict." *Apprendi*, 530 U.S. at 494.

In Bynum's case, the required finding that exposes him to greater punishment is that he falsely reported the indictable misdemeanor offense of carry weapons, a question the jury was unable to answer because they were erroneously instructed, in effect, that carrying a firearm is inherently illegal.

6. Remedy sought

The remedy is that Bynum's conviction for the penalty enhanced version of Iowa Code § 718.6(1), making false reports, should 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).

This error was not harmless. 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). Mr. Bynum, however, was sentenced to 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.

C. CONCLUSION

Appellant asserts that the Court of Appeals erred and requests that the Court take further review of this rather unusual issue. By just focusing on this issue, Appellant does not waive or forego his other claims as set forth in his briefings and as ruled upon by the Court of Appeals.

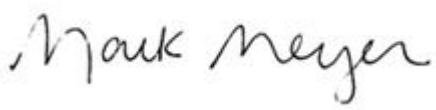
Respectfully submitted,

MARK C. MEYER

VI. CERTIFICATES

A. CERTIFICATE OF FILING

I hereby certify that on 5/19/2019, 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

I certify that on 5/20/2019 I served this document on the Appellant by mailing 1 copy of it to:

Earnest Bynum, latest address

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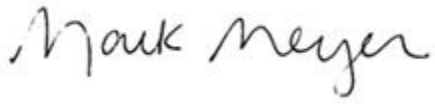
C. CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Iowa R. App. P. 6.1103(4) because:
[x] Based on a word count from Microsoft Word 2010 this brief contains approximately 3114 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.



5/19/2019

MARK C. MEYER DATE

VII. COURT OF APPEALS' DECISION

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IN THE COURT OF APPEALS OF IOWA

No. 18-0294
Filed May 1, 2019

STATE OF IOWA,
Plaintiff-Appellee,

vs.

EARNEST B. BYNUM,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Nicholas Scott, District Associate Judge.

Earnest Bynum appeals following his conviction for falsely reporting a criminal offense. **AFFIRMED.**

Mark C. Meyer, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, and Sharon K. Hall, Assistant Attorney General, for appellee.

Considered by Potterfield, P.J., and Tabor and Bower, JJ.

POTTERFIELD, Presiding Judge.

Earnest Bynum appeals following his conviction for falsely reporting a criminal offense, in violation of Iowa Code section 718.6(1) (2016).[1] Bynum asserts he was denied an impartial jury of his peers; the court abused its discretion in allowing prior-bad-acts evidence and photographs of firearms used during the police response; and the court erred in denying Bynum's requested jury instruction, which stated carrying weapons is not a crime if the person has a permit. Finding no abuse of discretion in the trial court's denial of Bynum's motions for mistrial or its evidentiary and instructional rulings, we affirm.

I. Background Facts and Proceedings.

In March of 2016, Bynum was living with his girlfriend Pamela Haskins in Cedar Rapids. They had known each other for years and share a son, who was about seventeen years old at the time. Haskins also has two older sons, whom Bynum knew.

On March 9, Haskins and Bynum had a disagreement ending with Bynum pushing Haskins against a wall before he left the residence. That evening, Haskins called police to report a domestic assault.

On March 10, Haskins was at home with her youngest son and her friend, Judy, when Haskins's older son stopped by with his daughter. About an hour after the older son arrived, the younger son was going to drive Judy to her home. When

[1] Section 718.6(1) provides:

> A person who reports or causes to be reported false information to . . . 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 [and, if] the alleged criminal act reported is a serious or aggravated misdemeanor or felony, . . . the person commits a serious misdemeanor.

Haskins, Judy, and the teen stepped out on the front porch, spotlights were activated and police officers yelled at them to put their hands in the air. The teen was ordered to turn around, walk backwards, and get down on his knees. The older son came out of the house holding his daughter in his arms, and he too was ordered away from the house. Officers checked the house; no guns were found.[2]

Officer Shannon Aguero explained to Haskins they were acting on a phone call and showed Haskins the phone number. Haskins recognized the number as belonging to Bynum.

The call to which police responded came in at about 10:17 p.m. Bynum called the police nonemergency number to report that two males in a Suburban had pulled up to Haskins's address, parked over the sidewalk, and jumped out of the vehicle carrying a handgun and a rifle. He reported the men went up to the door, knocked, and entered the house. Bynum provided his phone number but not his name. Bynum denied knowing who lived at that address and denied having previously seen that vehicle.

Officer Aguero made contact with Bynum on March 24. Bynum initially denied any knowledge of a phone call to police but later admitted to making the report on the nonemergency line. Bynum told Officer Aguero that he was in the area near Haskins's home when he saw the Suburban drive by and observed a male waving a gun in his direction. Bynum said he knew where the vehicle was going so he reported that address and followed the vehicle to Haskins's home. Bynum identified the person waving the gun as Haskins's older son. Bynum said

[2] The officers "cleared" the house, which involves a room-to-room sweep to check for people or signs of danger.

he did not provide the man's name or his own name because he did not want to get anyone in trouble and he did not want to be a snitch.

Bynum was charged with making a false report to law enforcement. The State sought a preliminary ruling on whether the court would allow the guns used by officers in responding to the dispatch to be shown to the jury. Bynum objected on relevance grounds. The trial court ruled it would allow photographs of the guns used by officers but not the actual guns. The court determined the photos would be relevant "to show the jury the chain of events as they occurred and actions that were initiated with that 911 [sic] phone call."

Before trial started defense counsel made a record about the jury pool:

> And I understand that the case law—I think the most recent—one of the most recent cases to deal with it is *State v. Kelvin Plain, Sr.* case, which I did write down the citation for, 898 N.W.2d 801, discusses a criminal defendant's Sixth Amendment right to an impartial jury and to a jury drawn from a fair cross-section of the community, and that deals primarily with the pool as a whole.
>
> I believe that we had 35 members in the pool. There were at least two of those that were African-American. So I believe that the pool met the standard, because according to my quick research of, I believe it was the 2016 census information for Linn County, Iowa, the percentage of citizens claiming to be black or African-American was 5.2 percent. I believe we met that standard with the 2 out of 35. I did, however, want to make the record clear regarding the initial jury that did include someone who was African-American and then due to the circumstances we then did not have anyone up on the panel who was African-American. I understand we don't get to pick our jurors. We don't get to decide who comes into the box, but I did want to make that clear for the purposes of the record. And I understand that it was no fault of this court that led to that irregular procedure, but I would assert that the due to the low number of jurors that were called in, that led to the circumstances where we had to reshuffle everything and that then deprived Mr. Bynum the opportunity to have someone of his heritage in our petit jury. So I would allege that violates the due process and request a mistrial on that ground.

The prosecutor acknowledged the events occurred as the defense asserted. The court ruled:

> At this point I'm going to overrule the due process objection. Certainly you've made your record for appeal. And I would note on the 21 that we called up for the petit jury I did not see anybody of African-American heritage. There were two in the pool that you noted, but at no time did they ever make it to the petit jury so that record has been made.

At trial, Haskins testified she and Bynum had a long-term, on-and-off relationship. When an officer showed her the phone number of the instigating call, she knew immediately it was made by Bynum "because at that time that was his MO and he was trying to do things to, not physically hurt me, but to emotionally hurt me."

Officer Aguero testified that she and other officers were dispatched to Haskins's home based on Bynum's report of two males entering the home, one with a handgun and one with a long gun; the dispatch was a "code two" calling for lights and sirens due to a reported threat to the life of individuals. When officers arrived at the scene, dispatch provided an update that there had been a call to the same address the day before. Officer Aguero was not aware the initial call came in on the nonemergency number. She testified she believed a home invasion had occurred because the report was of individuals with guns entering the residence.

Upon arrival, as the caller had stated, Officer Aguero observed a Suburban parked at an angle in the driveway and across the sidewalk. So she and several other officers parked down the block and surrounded the house with weapons drawn. Officer Aguero carried her patrol rifle instead of her handgun, explaining it was easier to use at longer distances. As people came out of the house, they were

ordered to get down and other officers went inside to clear the house. No firearms were found.

On cross-examination, Officer Aguero acknowledged the initial call to dispatch did not claim anyone was in danger. She also acknowledged it was not necessarily illegal for someone to possess a handgun or rifle and that many people possess licenses to carry firearms.

After closing arguments, the defense sought a modification to a jury instruction:

> Instruction Number 14, which is the definitional instruction for carrying weapons, I failed to realize earlier that it does not include any exceptions basically. That it essentially says that anyone within city limits that has a firearm is committing carrying weapons. And obviously we all know that is not accurate in that there are exceptions, primarily there's an exception for anyone who possesses a legally-issued permit to carry such firearms. So I would request the court amend that instruction if that's even possible.

The State resisted, noting the instruction was accurate and arguing the requested modification related to a defense to the criminal charge—not to the definition of the offense. The court denied the proposed change.

A jury found Bynum guilty as charged, specifying the crime he reported was that of carrying weapons.

Bynum appeals. He contends the court erred in denying his motion for mistrial based on the makeup of the jury. He also asserts the court abused its discretion in allowing prior-bad-acts evidence and photographs of firearms used during the police response. Further, Bynum argues the court erred in denying Bynum's requested jury instruction.

II. Scope and Standard of Review.

We review constitutional issues de novo. *State v. Plain*, 898 N.W.2d 801, 810 (Iowa 2017).

We review the denial of a motion for mistrial for an abuse of discretion. *Id.*

When assessing a district court's decision for an abuse of discretion, we only reverse if the district court's decision rested on grounds or reasoning that were clearly untenable or clearly unreasonable. *State v. Dudley*, 856 N.W.2d 668, 675 (Iowa 2014). "When a ground or reason is based on an erroneous application of the law or not supported by substantial evidence, it is untenable." *Id.*

A district court's refusal to give a requested jury instruction is generally reviewed for errors at law; however, if the jury instruction is not required but discretionary, we review for an abuse of discretion. *Id.* (citing *Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699, 707–08 (Iowa 2016)).

III. Discussion.

A. Right to an impartial jury. Bynum asserts the racial composition of the jury violated his Sixth Amendment right. While Bynum concedes the jury "pool" fairly reflected the composition of the community, he asserts the jury "panel" did not.[3] The State argues Bynum's complaint about the jury composition came too late.

[3] As explained in *Plain*, 898 N.W.2d at 821 n.5,

> Under Iowa's jury-selection statutes, a jury "pool" (i.e., venire) consists of all persons who are summoned for jury service and who report. Iowa Code § 607A.3(9). A jury "panel" consists of "those jurors drawn or assigned for service to a courtroom, judge, or trial." *Id.* § 607A.3(7). And a "petit" jury (i.e., grand jury) consists of the jurors who are actually called upon to attend court proceedings. *See id.* § 607A.3(3).

As a general rule, objections must be raised at the earliest opportunity after the grounds for objection become apparent." *State v. Johnson*, 476 N.W.2d 330, 333 (Iowa 1991). The jury panel's racial composition would have been immediately apparent upon the commencement of voir dire, yet defense counsel waited until after voir dire to make the objection. Nonetheless, the district court ruled on Bynum's objection to the jury panel, and we will to address the merits of the claim. *See State v. Taylor*, 596 N.W.2d 55, 56 (Iowa 1999) ("We choose to pass [the defendant's] serious preservation-of-error problems and affirm on the merits.").

There is a three-part test for determining whether the constitutional right to an impartial jury has been violated by not having the jury drawn from a fair cross-section of the community. *See Duren v. Missouri*, 439 U.S. 357, 364 (1979); *see also Plain*, 898 N.W.2d at 822.

> [T]he defendant must show (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 this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren, 439 U.S. at 364.

There is no question in this case regarding the first element; there were no African-Americans in the panel. But Bynum has not established the other two elements of a prima facie showing. Bynum acknowledges "the system in place yielded a group of potential jurors that fairly reflect the racial composition of the community." However, he argues the jurors available for selection at his trial "did

not occur because of chance or a random occurrence." Bynum argues that he has established the underrepresentation was systematic in nature because

> African-Americans were excluded from the venire in [his] case as a result [of] the deliberate decision to give the civil case precedence over the criminal case and the deliberate decision to proceed with a trial with a jury chosen from a panel with no African-Americans even when a motion for a mistrial was made to remedy the situation.

This assertion is not sufficient to establish the third prong of the *Duren* test.

> The third prong "distinguishes between situations where a particular jury venire is nonrepresentative and those situations where the jury venires in a district are continuously nonrepresentative of the community." To establish systematic exclusion, a defendant must establish the exclusion is "inherent in the particular jury-selection process utilized" but need not show intent. In other words, the defendant must show evidence of a statistical disparity over time that is attributable to the system for compiling jury pools. "If there is a pattern of underrepresentation of certain groups on jury venires, it stands to reason that some aspect of the jury-selection procedure is causing that underrepresentation."

Plain, 898 N.W.2d at 824 (citation omitted). Bynum failed to show a "statistical disparity over time that is attributable to the system for compiling jury pools." *Id.* We affirm the trial court's denial of his motion for mistrial based on the composition of the jury panel.

B. Prior-bad-acts evidence. Bynum contends the trial court abused its discretion in allowing evidence of the March 9 domestic disturbance between Haskins and him and any reference to prior calls to their residence.

Under Iowa Rule of Evidence 5.404(b), "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character" though it may be admissible "for another purpose such as proving motive, opportunity,

intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."

Rule 5.404(b) excludes evidence of other crimes not on grounds of relevance but "based on the premise that a jury will tend to give other crimes, wrongs, or acts evidence excessive weight and the belief that a jury should not convict a person based on his or her previous misdeeds." *State v. Nelson*, 791 N.W.2d 414, 425 (Iowa 2010). But, the rule expressly permits evidence of other crimes, wrongs, or acts for "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Iowa R. Evid. 5.404(b)(2).

A court may admit evidence of other crimes, wrongs, or acts if there is a non-character theory of relevance and the evidence is material to a legitimate issue other than the defendant's general criminal disposition. *Nelson*, 791 N.W.2d at 425. Even if there is a non-character theory of relevance, "the probative value of the evidence [must] not [be] substantially outweighed by the danger of unfair prejudice to the defendant." *State v. Cox*, 781 N.W.2d 757, 761 (Iowa 2010).

In ruling on Bynum's motion in limine to exclude any reference to the March 9 domestic assault call, the court found 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 March 10 phone call. We find no abuse of discretion in this ruling as it could be argued the interpersonal conflict was "logically relevant" to the reason for making a false report. *See State v. Graham*, No. 13-1306, 2014 WL 4629585, at *2 (Iowa Ct. App. Sep. 17, 2014) ("'Logical relevancy' may be defined as the existence of such a relationship in logic between the fact of which evidence is

offered and a fact in issue that the existence of the former renders probable or improbable the existence of the latter." (quoting *State v. Knox*, 18 N.W.2d 716, 723 (Iowa 1945)).

Bynum argues the admission of prior-acts evidence were unfairly prejudicial. Bynum references Haskins's statement that she had made "prior calls" to police and Officer Aguero's statements (1) that dispatch provided an update "that there had been previous incidents at the residence" and (2) that Bynum's number was in law enforcement's system.

A fundamental problem is that Bynum did not object to those statements in a timely manner. *See State v. Yaw*, 398 N.W.2d 803, 805 (Iowa 1987) ("It is well settled in Iowa that objections to evidence must be raised at the earliest opportunity after the grounds for objection become apparent."). When he did object to Haskins's statement, Bynum rejected the court's offer to provide a contemporaneous cautionary instruction, opting instead for a uniform instruction on prior bad acts.[4] As for Officer Aguero's statements, Bynum did not challenge them until he made a motion for mistrial after the State rested.

[4] The court did instruct the jury

> Evidence has been received concerning other wrongful acts alleged to have been committed by the defendant. The defendant is not on trial for those acts. This evidence must be shown by clear proof to show motive or intent and for no other purpose. If you find other wrongful acts occurred then and only then may such other wrongful acts be considered for the purpose of establishing motive, intent, or absence of mistake, or lack of accident.
>
> You may consider the evidence in deciding how much weight and effect to give the evidence.

We presume juries follow the court's instructions. *State v. Hanes*, 790 N.W.2d 545, 552 (Iowa 2010).

"Generally, a district court's decision not to grant a mistrial but to offer a cautionary instruction instead is entitled to broad deference," and "[c]autionary instructions are sufficient to mitigate the prejudicial impact of inadmissible evidence 'in all but the most extreme cases.'" *Plain*, 898 N.W.2d at 815 (citations omitted). We find the cautionary instruction here was sufficient in that this was not one of the extreme cases. *See*, *e.g.*, *State v. Garrison*, No. 04-0141, 2006 WL 138280, at *13 (Iowa Ct. App. Jan. 19, 2006) (noting several reasons a cautionary instruction in a double murder case was not sufficient to remove the unfairly prejudicial effect of irrelevant evidence suggesting the defendant was a drug dealer). We find no abuse of discretion in the court's denial of Bynum's motion for mistrial.

C. Photos of service weapons. Prior to jury selection, the prosecutor indicated that she intended to put on evidence "establishing the severity or seriousness of the response to this false report" and asked if the court preferred photographs of the weapons officers used or if the court would permit Officer Aguero to bring in the firearm. The State argued that it was required to show the false report was of an offense greater than a misdemeanor and the response of officers was relevant to that issue. Bynum objected to any evidence of the types of weapons used in response, arguing it was not relevant to whether the report was false or not. The court reserved ruling.

During trial, the court ruled that the question of whether the State had proved Bynum had reported an indictable misdemeanor or felony would be submitted to the jury along with general definitions of the three alleged crimes. During Officer Aguero's testimony, the court allowed the prosecution to publish two

photographs of weapons used by the responding officer: one photo of an AR-15 the officer used during the response and one of the standard issue handgun. The trial court overruled Bynum's argument concerning prejudice stating:

> The photos of the guns, I don't think that that's going to be as prejudicial because we see guns all the time on TV and photographs and I don't think that's going to have the same sort of emotional appeal that having an officer walking around in here with an AR-15 would certainly be jarring and could be—overly excite the jury and arouse passions that are not necessary and would not necessarily be greater than the probative value of that sort of evidence.

Even though we find the photos were of little relevance, we are not convinced Bynum has been deprived of a fair trial by their viewing by the jury. The two photos were used as demonstratives only. They were not admitted into evidence and were not sent in to the jury deliberations. Moreover, Officer Aguero testified about the "code two" response to the call and described the use of different response weapons when a report of guns is made without objection. *See State v. Putman*, 848 N.W.2d 1, 7 (Iowa 2014) ("Even if a trial court has abused its discretion [in an evidentiary ruling], prejudice must be shown before we will reverse."). Where evidence was merely cumulative, a defendant cannot establish the court's erroneous evidentiary error affected substantive rights. *State v. Elliott*, 806 N.W.2d 660, 669 (Iowa 2011).

D. Jury instruction regarding defense to carrying weapons. Bynum was charged with making a false report alleging the crime of carrying weapons, burglary, or going armed with intent. Iowa Code section 718.6 applies to "persons who take affirmative steps to convey false information to law enforcement authorities." *State v. Ahitow*, 544 N.W.2d 270, 274 (Iowa 1996). The severity of the offense that is falsely reported is related to the severity of the punishment, i.e.,

reporting a criminal act that constitutes a simple misdemeanor is a simple misdemeanor, reporting a serious or aggravated misdemeanor or felony is a serious misdemeanor. Iowa Code § 718.6(1). *But see id.* § 712.7 ("A person who, knowing the information to be false, conveys or causes to be conveyed to any person any false information concerning the placement of any incendiary or explosive device or material or other destructive substance or device in any place where persons or property would be endangered commits a class 'D' felony.").

Here, the jury was instructed:

> The State must prove [all] of the following elements of False Reports:
>
> (1) On or about the March 10, 2016, the defendant reported information to law enforcement authority concerning the alleged occurrence of a criminal act.
>
> (2) When reporting the alleged criminal act the defendant knew, as, defined in Instruction 18, the information was false.
>
> (3) The defendant reported the crime of carrying weapons, burglary, or going armed with intent.

With respect to the offense of carrying weapons, the jury was instructed:

> Carrying weapons is defined as: 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.

This definition is almost verbatim section 724.4(1), which defines the offense of carrying weapons.[5] The language requested by Bynum does not address the

[5] Section 724.4(1) provides:

> Except as otherwise provided in this section, a person who goes armed with a dangerous weapon 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, commits an aggravated misdemeanor.

offense; rather, it addresses a statutory exception. *See id.* § 724.4(4) (listing exceptions).

Bynum asserts the trial court erred in denying his requested modification to the jury instruction defining the offense of carrying weapons to include the absence of a permit. The absence of a permit is not an element of the offense. *State v. Bowdry*, 337 N.W.2d 216, 218 (Iowa 1983) ("[W]e conclude that the General Assembly did not intend to make the absence of a permit an element of the offense."). The district court did not err in failing to give Bynum's requested instruction.

Finding no abuse of discretion in the trial court's denial of Bynum's motions for mistrial or its evidentiary and instructional rulings, we affirm.

AFFIRMED.

IOWA APPELLATE COURTS

State of Iowa Courts

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