IN THE SUPREME COURT OF IOWA

STATE OF IOWA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	S.CT. NO. 18-1142
	)	
MONTREAL SHORTER,	)	
	)	
Defendant-Appellant.	)	

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
HONORABLE CYNTHIA M. MOISAN, JUDGE (JURY TRIAL & SENTENCING)

APPELLANT'S APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED OCTOBER 9, 2019

VIDHYA K. REDDY
Assistant Appellate Defender
vreddy@spd.state.ia.us
appellatedefender@spd.state.ia.us

STATE APPELLATE DEFENDER
Fourth Floor Lucas Building
Des Moines, Iowa 50319
(515) 281-8841 / (515) 281-7281 FAX
ATTORNEYS FOR DEFENDANT-APPELLANT

CERTIFICATE OF SERVICE

On October 29, 2019, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Montreal Shorter, 3800 Martin Luther King Jr. Parkway, Apt. 14, Des Moines, IA 50310.

STATE APPELLATE DEFENDER

/s/ Vidhya K. Reddy

VIDHYA K. REDDY
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
vreddy@spd.state.ia.us
appellatedefender@spd.state.ia.us

VKR/sm/1/19
VKR/sm/4/19

QUESTIONS PRESENTED FOR REVIEW

I. Whether a new trial is required where the district court erroneously overruled Defendant's objection to instructions authorizing the jury to convict based on mere 'Possession' (as distinct from 'carrying') of the dangerous weapon?

A). The Instructions Were Erroneous

1. § 724.4C authorizes conviction only for "carrying", not mere possession

2. "Possession" is broader than "Carrying"

B). ***The Error was not Harmless***

II. Whether trial counsel rendered ineffective assistance in failing to object to Jury Instruction 18, which incorrectly instructs jurors that they could consider Defendant's out-of-court statements "just as if they had been made at this trial"?

TABLE OF CONTENTS

Page

Certificate of Service 2

Questions Presented for Review 3

Table of Authorities 5

Statement in Support of Further Review 10

Statement of the Case 14

Argument

I. The district court erred in overruling Defendant's objection to language in the jury instructions authorizing the jury to convict based 'Possession' (as distinct from 'carrying') of the dangerous weapon. 16

II. Trial counsel rendered ineffective assistance in failing to object to Jury Instruction 18, which incorrectly instructs jurors that they could consider Defendant's out-of-court statements "just as if they had been made at this trial" 29

Conclusion 39

Attorney's Cost Certificate 40

Certificate of Compliance 41

Opinion, Iowa Court of Appeals (10/9/19) 42

TABLE OF AUTHORITIES

Cases: Page:

Jewel v. CSX Transp., Inc., 135 F.3d 361 (6th Cir. 1998)..... 32

Lamasters v. State, 821 N.W.2d 856 (Iowa 2012)..... 30

Mascarello v. U.S., 118 S.Ct. 1911, 524 U.S. 125 (1998)..... 24

State v. Ambrose, 861 N.W.2d 550 (Iowa 2015) 29

State v. Anderson, 636 N.W.2d 26 (Iowa 2001) 12, 27

State v. Bayles, 55 N.W.2d 600 (Iowa 1996)..... 31

State v. Brothern, 832 N.W.2d 187 (Iowa 2013)..... 30

State v. Chenoweth, 284 N.W. 110 (1939) 20

State v. Harris, 891 N.W.2d 182 (Iowa 2017)..... 12, 28

State v. Kehoe, 804 N.W.2d 302 (Iowa Ct. App. 2011).... 20

State v. Mikesell, 479 N.W.2d 591 (Iowa 1991) 11, 26

State v. Payne, No. 16-1672, 2018 WL 1182624 (Iowa Ct. App. March 7, 2018) 36-37

State v. Robinson, 859 N.W.2d 464 (Iowa 2015) 37

State v. Schuler, 774 N.W.2d 294 (Iowa 2009) 11, 28

State v. Thompson, No. 12-2314, 2013 WL 6686624 (Iowa Ct. App. Dec. 18, 2013) 23-24

State v. Wilmer, 743 N.W.2d 872 (Iowa Ct. App. 2007) 12, 27

State v. Yenger, No. 17-0592, 2018 WL 3060251
(Iowa Ct. App. June 20, 2018) 36

United States v. DiDomenico, 78 F.3d 294
(7th Cir. 1996)..... 32

Constitutional Provisions:

U.S. Const. amend. VI 29

U.S. Const. amend. XIV..... 29

Iowa Const. art. 1, § 10 29

Statutes & Court Rules:

Fed. R. Evid. 801(d)(2) 32

Iowa Code 124.401(1)(e)-(f) (2017) 22-23

Iowa Code § 724.1B (2017)..... 21

Iowa Code § 724.1C (2017)..... 21

Iowa Code § 724.2(2) (2017) 21

Iowa Code § 724.3 (2017) 21

Iowa Code § 724.4(1) (2017) 21-22

Iowa Code § 724.4C (2017).....10, 19-22

Iowa Code § 724.26(1) (2017) 21

Iowa Code § 724.26(2)(a) 21

Iowa R. Evid. 5.801 (2017) 31

Jury Instructions:

Iowa State Bar Ass'n, Iowa Criminal Jury Instruction No. 200.16 (2017)..... 33

Iowa State Bar Ass'n, Iowa Criminal Jury Instruction No. 200.42 (2017)..... 33

Iowa State Bar Ass'n, Iowa Criminal Jury Instruction No. 200.43 (2017)..... 33

Iowa State Bar Ass'n, Iowa Criminal Jury Instruction No. 200.44 (2015).....13, 30-31

Iowa State Bar Ass'n, Iowa Criminal Jury Instruction No. 200.44 (Rev. 6/2018) 37

Iowa State Bar Ass'n, Iowa Criminal Jury Instruction No.200.47 (2017)..... 18

Iowa State Bar Ass'n, Iowa Criminal Jury Instruction No. 200.48 (2017)..... 17, 22

Iowa State Bar Ass'n, Iowa Criminal Jury Instruction No. 2400.6 (2017)..... 22

Other Authorities:

2 Oxford English Dictionary 919 (2nd ed. 1989)..... 24

Committee on Federal Criminal Jury Instructions for the Seventh Circuit, Pattern Criminal Jury Instructions of the Seventh Circuit (2012), http://www.ca7.uscourts.gov/pjury.pdf..... 34

Committee on Model Criminal Jury Instructions Third

Circuit, Model Criminal Jury Instructions (2017), http://www.ca3.uscourts.gov/model-jury-instructions . 34

Committee on Pattern Jury Instructions, District Judges Association, Fifth Circuit Pattern Jury Instructions (Criminal Cases) (2015), http://www.lb5.uscourts.gov/juryinstructions 34

Criminal Pattern Jury Instruction Committee of the United States Court of Appeals for the Tenth Circuit, Criminal Pattern Jury Instructions (2017), http://www.ca10. uscourts.gov/clerk/orders 35

Hon. Mark D. Cleve, Iowa Jury Instruction Committee Report to Board of Governors, found at https://cdn.ymaws.com/www.iowabar.org/resource/resmgr/ilw_resources/IJIC_Letter.pdf. 14, 37

Laurie Kratky Doré, 7 Iowa Practice Series, Evidence 5.801:9 (Nov. 2018) 31

Judicial Council of the Eleventh Circuit, Eleventh Circuit Pattern Jury Instructions (Criminal Cases) (2016), http://www.ca11.uscourts.gov/pattern-jury-instructions..... 35

Judicial Committee On Model Jury Instructions for the Eighth Circuit, Manual of Model Criminal Jury Instructions for the Eighth Circuit (2014), http://www.juryinstructions.ca8.uscourts.gov/criminal_instructions.htm 34

Ninth Circuit Jury Instructions Committee, Manual of Model Criminal Jury Instructions (2017), http://www3.ce9.uscourts.gov/jury-instructions/model-criminal 35

Sixth Circuit Committee on Pattern Jury Instructions, Pattern Criminal Jury Instructions (2017), http://www.ca6.uscourts. gov/pattern-jury-instructions..... 34

U.S. District Court District of Maine, Pattern Criminal Jury Instructions for the District Courts of the First Circuit (2017), http://www.med.uscourts.gov/pattern-jury-instructions 34

STATEMENT IN SUPPORT OF FURTHER REVIEW

I. *Instructional Error: Possession vs. Carrying (Preserved).*

The Supreme Court's guidance is needed concerning appropriate jury instruction language for Carrying a Dangerous Weapon (§ 724.4C), a crime for which no model instruction exists. The statutory language defining the offense requires "carrying" the weapon, not mere possession of it. But the district court, over a defense objection, amplified the statutory language and lessened the State's burden by instructing the jury to convict if it found *either* "***possession*** *or* carrying". The marshalling instruction thus explicitly misstated the elements of the offense, authorizing conviction on a lesser finding of mere *possession* rather than the more demanding element of *carrying* that's actually required by the statute.

Harmless-Error Analysis. The Supreme Court's guidance is also needed concerning the application of harmless error analysis to instructional errors that misstate

the elements of the offense to allow conviction on *less* than the statutorily required elements.

First, this Court should resolve the question left open in State v. Schuler, 774 N.W.2d 294, 299-300 (Iowa 2009) – whether harmless-error analysis is even applicable to such errors.

But second, even assuming harmless-error analysis applies, the Court of Appeals erred in concluding that harmlessness was established here. The dispute at trial centered on whether Shorter picked up the gun after becoming intoxicated, with conflicting testimony being presented by the State's witnesses (two of whom claimed to see Defendant pick something up) and by Defendant (who denied ever picking up the gun after becoming intoxicated). The challenged instructional error thus implicated the very element that was contested at trial (carrying), and it rendered wholly irrelevant Defendant's only theory of defense (that he never picked up the weapon after becoming intoxicated). See State v. Mikesell, 479 N.W.2d 591, 592 (Iowa 1991) (instructional error not

harmless where "submission of [the] lesser-included offense was the only way to let the jury consider [Defendant's] primary theory of defense."). The Court of Appeals, relying upon the testimony of the State's witnesses, suggests there was "strong evidence" from which the jury could find actual carrying (holding or moving of the gun) as distinct from mere constructive possession of it – but any such finding would turn wholly on credibility determinations, which must be made by the jury and not by the court. State v. Wilmer, 743 N.W.2d 872 (Iowa Ct. App. 2007) ("If credibility… is key to the verdict, error is not harmless.") (citing, inter alia, State v. Anderson, 636 N.W.2d 26, 37-38 (Iowa 2001) in support). And by requiring a guilty verdict upon a mere finding of constructive possession, the instructional error wholly bypassed any jury finding on the more demanding (but statutorily required element) of "carrying." State v. Harris, 891 N.W.2d 182, 188-89 (Iowa 2017) (prejudice established even under more demanding ineffective-assistance framework, where the "flawed jury instruction did not require the jury to

make a finding" on a statutorily required element). Finally, the State used the instructional error to its advantage during closing argument by emphasizing that a guilty verdict must be returned even if some or all of the jurors concluded Shorter did not actually pick up or move the weapon (carrying) but was merely within reach of it (constructive possession). See (Trial Vol.2 p.24 L.12-17, p.29 L.5-13, p.31 L.5-6)

Where, as here, the instructional error (1) implicates a contested element, (2) in a he-said she-said case, (3) is used to the State's advantage during closing argument, and (4) allows the jury to convict on less than the statutorily required elements, it cannot be deemed harmless. A new trial is required.

II. *Instructional Error re: Defendant's Statements (Ineffective):* Under Division II, Shorter requests that this Court determine that the pre-revised version of Uniform Instruction 200.44, advising the jury it could consider Defendant's (unsworn) out-of-court statements "just as if they had been made at trial", misstates the law. At the request of

the Iowa Supreme Court, the Bar Association revised that uniform instruction in June 2018 to remove the language "just as if they had been made at this trial". Hon. Mark D. Cleve, Iowa Jury Instruction Committee Report to Board of Governors, found at https://cdn.ymaws.com/www.iowabar.org/resource/resmgr/ilw_resources/IJIC_Letter.pdf. Additionally, the majority of at least one Iowa Court of Appeals panel has reasoned that, even for a trial held prior to the June 2018 revision, counsel breaches an essential duty in failing to object to this instruction, though the defendant in that case had not been prejudiced by the breach. See State v. Garcia, No.17-0111, 2018 WL 3913668, at *5-6 (Iowa Ct. App. Aug. 15, 2018) (Tabor, J., concurring specially; joined by Potterfield, J.).

STATEMENT OF THE CASE

Background Facts: The State was here required to prove that Shorter had carried a dangerous weapon after becoming intoxicated. Shorter owned a gun which he kept in his car, and he had a license to carry the gun, but such license was

invalid during periods of intoxication. (Trial Vol.1 p.29 L.4-8). See also (Jury Instruction 11, first two unnumbered paragraphs) (App.15). On the night in question, Shorter had parked his car at the bar (leaving his gun inside the car) prior to drinking anything. He then left with friends, and consumed alcohol at a friend's apartment before returning, intoxicated, to the bar, at which time the incident at issue took place. (Trial Vol.1 p.69 L.6-20, p.70 L.14-p.74 L.3, p.77 L.10-15).

The factual dispute at trial centered on whether Shorter ever *touched or picked up* the weapon upon returning to the bar parking lot after becoming intoxicated. The State's witnesses (bouncers Weber and Carroll) testified they observed Shorter reach into the vehicle and pick up something (assumed to be the gun), before dropping it back in the vehicle when police arrived. (Trial Vol.1 p.47 L.8-p.48 L.1, p.49 L.16-p.51 L.8, p.53 L.13-18, p.58 L.10-p.61 L.4, p.62 L.22-p.63 L.5). Defendant Shorter, on the other hand, testified to the contrary, denying he ever touched the gun after becoming intoxicated, and stating that the location where the weapon

was found was where he always leaves it in his vehicle and where it would have been left by him when parking the car before becoming intoxicated. (Trial Vol.1 p.75 L.6-15, p.80 L.19-p.81 L.6, p.83 L.5-20).

Other relevant facts will be discussed below.

ARGUMENT

I. A new trial is required where the district court erroneously overruled Defendant's objection to language in the jury instructions authorizing the jury to convict based on mere 'Possession' (as distinct from 'carrying') of the dangerous weapon.

The District Court erroneously overruled defense counsel's objections to inclusion of the word 'possession' or 'possesses' in the marshalling instruction (Instruction 11), as well as to submission of Instructions 16 and 17 elaborating on possession concepts:

INSTRUCTION NO. 11

> The State must prove all of the following elements of Possession or Carrying of Dangerous Weapon While Intoxicated:
>
> On or about the 23rd day of December 2017, the Defendant was Intoxicated as defined in Jury Instruction No. 12; and the Defendant does any of the following:

a. ***Possesses or*** carries a dangerous weapon on or about his person as defined in instructions no. 13; or

b. ***Possesses or*** carries a dangerous weapon within the person's immediate access or reach while in a vehicle.

If the State has proved all of the elements, the defendant is guilty of Possession or Carrying a Dangerous Weapon While Intoxicated. If the State has failed to prove any one of the elements, the defendant is not guilty.

*** *** ***

INSTRUCTION NO. 16[1]

To have immediate access to a firearm means to have actual ***possession*** of the firearm on or around one's person. To have a dangerous weapon within one's immediate reach means to have the firearm in close proximity so that the person can reach for it or claim dominion or control over it. In order to prove that the defendant has ***possession or control*** of a firearm, the State must prove that the defendant had knowledge of its existence and its general location.

INSTRUCTION NO. 17[2]

[1] Jury Instruction 16 tracked, with limited modifications, Iowa State Bar Ass'n, Iowa Criminal Jury Instruction No. 200.48 (2017) ("Immediate Possession or Control of a Firearm or Offensive Weapon.").

> The law recognizes several kinds of possession. A person may have ***actual possession or constructive possession***. A person may have sole or joint possession.
>
> A person who has direct physical control over a thing on his person is in actual possession of it.
>
> A person who, although not in actual possession, has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is in constructive possession of it. A person's mere presence at a place where a thing is found or proximity to the thing is not enough to support a conclusion that the person possessed the thing.
>
> If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.
>
> Whenever the word "possession" has been used in these instructions, it includes actual as well as constructive possession and sole as well as joint possession.

(Jury Instructions 11, 16-17) (App. pp. 15, 17-18).

The District Court erred in overruling the defense objections, as the challenged instructions improperly allowed

---

[2] See Iowa State Bar Ass'n, Iowa Criminal Jury Instruction No.200.47 (2017) ("Possession").

the jury to convict upon a mere finding of 'possession' (including even constructive possession) rather than upon the statutorily required element of 'carrying' the weapon. The erroneous instruction lessened the State's burden of proof, allowing defendant to be convicted on less than the statutorily required elements.

A). The Instructions Were Erroneous:

1. § 724.4C authorizes conviction only for "carrying", not mere possession

Iowa Code section 724.4C, titled "Possession or carrying of dangerous weapons while under the influence", provides as follows:

> 1. Except as provided in subsection 2, a person commits a serious misdemeanor if the person is intoxicated as provided under the conditions set out in section 321J.2, subsection 1, paragraph "a", "b", or "c", and the person does any of the following:
>
> a. Carries a dangerous weapon on or about the person.
>
> b. Carries a dangerous weapon within the person's immediate access or reach while in a vehicle.
>
> 2. This section shall not apply to any of the following:

> a. A person who carries or possesses a dangerous weapon while in the person's own dwelling, place of business, or on land owned or lawfully possessed by the person.
>
> b. The transitory possession or use of a dangerous weapon during an act of justified self-defense or justified defense of another, provided that the possession lasts no longer than is immediately necessary to resolve the emergency.

Iowa Code § 724.4C (2017).

It is true the term "Possession" is contained in the title of the code section. However, "a headnote is 'no part of the statutory law of the State'". State v. Kehoe, 804 N.W.2d 302, 312 (Iowa Ct. App. 2011) (quoting State v. Chenoweth, 284 N.W. 110, 112 (1939)). Rather, the elements of the crime are properly determined pursuant to "the express language of the statute" itself, as distinct from its title. Kehoe, 804 N.W.2d at 313.

In looking to the express statutory language of section 724.4C, the term "possess[]" appears only in subsection (2), discussing exemptions from criminal liability. The term

"possess[]" does not appear anywhere in subsection (1), the portion of the statute which actually defines the elements of the crime. Rather, pursuant to subsection (1), criminal liability attaches only for *carrying* (and not merely for *possession of*) the dangerous weapon.

In contrast to section 724.4C, the statutory language contained in certain other sections of Chapter 724 explicitly define offenses in terms of 'possession' rather than carrying. See e.g., Iowa Code §§ 724.1B, 724.1C, 724.2(2), 724.3 724.26(1), 724.26(2)(a) (2017). It is thus meaningful that the statutory language of section 724.4C defines the offense only in terms of *carrying* and not in terms of *possession*.

There is no model instruction for the Iowa Code section 724.4C offense. However, there is a model instruction for the separate offense defined by Iowa Code section 724.4 ("Carrying weapons"). That separate statute provides, in pertinent part, that "a person… who knowingly *carries* or transports in a vehicle a pistol or revolver, commits an aggravated misdemeanor." Iowa Code section 724.4(1) (2017). The

section 724.4 statute is defined in terms of carrying or transporting, and makes no explicit mention of possession. Likewise, the model instruction for the section 724.4 offense is phrased in terms of 'carrying' or 'transporting' and makes no mention of 'possession'. See Iowa State Bar Ass'n, Iowa Criminal Jury Instruction No. 2400.6 (2017). There should likewise have been no mention of 'possession' in the marshalling instruction submitted in the present case for the section 724.4C offense.

But the marshalling instruction here (Jury Instruction 16) instead improperly tracked, with limited modifications, Model Instruction 200.48. Iowa State Bar Ass'n, Iowa Criminal Jury Instruction No. 200.48 (2017) ("Immediate Possession or Control of a Firearm or Offensive Weapon."). That particular model instruction, however, was created not for the section 724.4C offense at issue here, but instead for the section 124.401(e)-(f) firearm enhancement of the controlled substance statute which, again, specifically

references 'possession' rather than 'carrying'. See Iowa Code § 124.401(1)(e)-(f) (2017).

2. "Possession" is broader than "Carrying":

Trial counsel was correct that "possession is much broader than carrying" thereby "amplifi[ying] the bullseye for the State" by allowing conviction on less than the statutorily required elements. (Trial Vol.2 p.8 L.3-p9 L.12). Ultimately, the instructional error herein required the jury to convict upon a mere finding of constructive possession – falling far short of the 'carrying' element actually required under the statute.

In discussing the plain meaning of "carries"[3], caselaw references both a primary and a secondary meaning of the term. The primary meaning of 'carries' requires not only some degree of possession but also *movement* of the item. See Mascarello v. U.S., 118 S.Ct. 1911, 1914-20, 524 U.S. 125, 127-39 (1998); State v. Thompson, No. 12-2314, 2013 WL 6686624, *4 (Iowa Ct. App. Dec. 18, 2013); See also (Jury

[3] The term is not statutorily defined in Chapter 724. State v. Thompson, No. 12-2314, 2013 WL 6686624, *3 (Iowa Ct. App. Dec. 18, 2013).

Instruction 15) (App.16) ("As used in instruction no. 11, to carry a dangerous weapon means to support and move it from one place to another."). The secondary meaning of 'carries' does not require any movement, but does require *physically supporting* the item – that is holding the item up through actual possession of it on the person. Mascarello, 118 S.Ct. 1911, at 1915 (citing 2 Oxford English Dictionary, at 919, 921).

Thus, under its plain meaning, the term 'carrying' minimally requires either: (a) *physically supporting* the item - that is, *holding* the item up through actual possession of it on the person; or (b) *moving* the item while (actually *or constructively*) possessing it.

Possession, on the other hand, is a broader term that encompasses actual, constructive, sole, and joint possession. See (Jury Instructions 17) (App.18). Unlike carrying, Possession (a) does not require physically holding the item (mere constructive possession suffices); and (b) does not require any movement of the item.

B). ***The Error was not Harmless:***

Here, the dispute at trial centered on whether Shorter ever touched or picked up the weapon when returning to the parking lot after becoming intoxicated. The State's witnesses (bouncers Weber and Carroll) testified they observed Shorter reach into the vehicle and pick up something (assumed to be the gun), before dropping it back in the vehicle when police arrived. (Trial Vol.1 p.47 L.8-p.48 L.1, p.49 L.16-p.51 L.8, p.53 L.13-18, p.58 L.10-p.61 L.4, p.62 L.22-p.63 L.5). Defendant Shorter, on the other hand, testified to the contrary, denying that he ever touched the gun after becoming intoxicated, and stating that the location where the weapon was found was where he always leaves it in his vehicle and where it would have been left by him when parking the car before becoming intoxicated. (Trial Vol.1 p.75 L.6-15, p.80 L.19-p.81 L.6, p.83 L.5-20).

But the instructional error at issue rendered Shorter's theory of defense wholly without consequence – requiring the jury convict upon a mere finding of constructive possession,

regardless of whether Shorter actually picked or touched the gun. See State v. Mikesell, 479 N.W.2d 591, 592 (Iowa 1991) (rejecting State's harmless error claim where "submission of [the] lesser-included offense was the only way to let the jury consider [Defendant's] primary theory of defense.").

Further, the State made use of the instructional error in its closing argument, telling the jury a guilty verdict was required even if Defendant never touched the gun but was merely within reach (constructive possession) of the weapon – though this would fall far short of satisfying the "carrying" element actually required under the statute. See (Trial Vol.2 p.29 L.5-13) (arguing that even if the jury didn't find Defendant "stepped in and leaned in" but instead only that "he just opened up that car door and [was] standing between an open car door and the center console and that gun's on the center console… anything that's on that center console is within immediate access in reach of an individual"); (Trial Vol.2 p.31 L.5-6) ("You don't even have to believe that he reached for it."); (Trial Vol.2 p.24 L.12-17) (emphasizing that

jurors don't have to agree on whether Shorter had actually handled the gun or, rather, was merely within reach of it).

The fact that evidence exists which, *if credited by the jury*, would support a finding of "carrying" does not render harmless the submission of instructions allowing the jury to convict upon the lesser finding of possession, thereby wholly bypassing the "carrying" element. State v. Wilmer, 743 N.W.2d 872 (Iowa Ct. App. 2007) ("If credibility… is key to the verdict, error is not harmless.") (citing, inter alia, State v. Anderson, 636 N.W.2d 26, 37-38 (Iowa 2001) in support). Error is not harmless where, as here, the "flawed jury instruction did not require the jury to make a finding" on the statutorily required element of 'carrying', instead permitting it to return a guilty verdict based on mere constructive possession of the gun. State v. Harris, 891 N.W.2d 182, 188-89 (Iowa 2017) (finding prejudice even under the more demanding standard applicable to unpreserved claims raised under ineffective-assistance framework).

Indeed, there is conflicting authority in Iowa (as well as in other jurisdictions) on the question of whether instructional errors misadvising the jury on the essential elements of the offense can ever be deemed harmless, or are even subject to harmless error review. See State v. Schuler, 774 N.W.2d 294, 299-300 (Iowa 2009) (discussing cases). That question, left open by Schuler, should now be taken up and resolved. Specifically, this Court should conclude that harmless error analysis is not applicable to instructional errors which misadvise the jury on the elements of the offense, allowing the jury to convict on *less* than the statutorily required elements. Such errors amount to a deprivation of the constitutional rights to a jury trial and due process. See State v. Schuler, 774 N.W.2d 294, 299-300 (Iowa 2009) (and authorities cited therein); Roger A. Fairfax, Jr., Harmless Constitutional Error and the Institutional Significance of the Jury, 76 Fordham L. Rev. 2027 (2008); Griffin v. U.S., 502 U.S. 46, 56 (1991) (due process requires reversal where general verdict is returned following submission of a legally flawed alternative); But see

Neder v. United States, 527 U.S. 1, 10 (1999) (holding, in divided opinion, that harmless error analysis applies to instructional errors omitting an element of the offense).

But even if this Court concludes harmless error analysis is generally applicable to such instructional errors, it should nevertheless conclude harmlessness is not established here for the various reasons outlined above. A new trial is required.

II. Trial counsel rendered ineffective assistance in failing to object to Jury Instruction 18, which incorrectly instructs jurors that they could consider Defendant's out-of-court statements "just as if they had been made at this trial".

The U.S. Constitution and the Iowa Constitution both guarantee defendants of criminal cases the right to effective assistance of counsel. U.S. Const. amends. VI, XIV; Iowa Const. art. 1, § 10; State v. Ambrose, 861 N.W.2d 550, 555 (Iowa 2015). To prevail on an ineffective-assistance-of-counsel claim, a defendant must establish (1) counsel failed to perform an essential duty and (2) the defense was prejudiced as a result. State v. Brothern, 832 N.W.2d 187, 192 (Iowa

2013)(quoting Lamasters v. State, 821 N.W.2d 856, 866 (Iowa 2012)).

The Iowa State Bar Association model jury instruction 200.44 addresses the jury's consideration of evidence of a criminal defendant's out-of-court statements. Iowa State Bar Ass'n, Iowa Criminal Jury Instruction No. 200.44 (2015). Jury Instruction 18, given in this case, is a reproduction of the model instruction:

> Evidence has been offered to show that the defendant made statements at an earlier time and place.
>
> If you find any of the statements were made, then you may consider them as part of the evidence, *just as if they had been made at this trial*.
>
> You may also use these statements to help you decide if you believe the defendant. You may disregard all or any part of the defendant's testimony if you find the statements were made and were inconsistent with the defendant's testimony given at trial, but you are not required to do so. Do not disregard the defendant's testimony if other evidence you believe supports it or you believe it for any other reason.

(Jury Instruction 18) (App. p. 19).

The comment to the model instruction provides no specific authority for the last phrase of the instruction, but instead refers to Iowa Rule of Evidence 5.801(d)(2) – Admission by a Party Opponent. Comment, Iowa State Bar Ass'n, Iowa Criminal Jury Instructions No. 200.44 (2015). Rule 5.801(d)(2) provides that certain statements are not hearsay, including any statements by a party-opponent. Iowa R. Evid. 5.801 (2017). According to case law, statements of a party opponent constitute substantive evidence of the facts asserted but are not conclusive evidence of those facts. See State v. Bayles, 55 N.W.2d 600, 606 (Iowa 1996). See also Dore, Laurie Kratky, 7 Iowa Practice Series, Evidence 5.801:9 (Nov. 2016).

The hearsay exception for the statements of a party-opponent in Iowa's rules of evidence is modeled on the same exception found in Federal Rule of Evidence 801(d)(2).

> Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule. No guarantee of trustworthiness is required in the case of an

> admission. The freedom which admissions have enjoyed from technical demands of searching for an assurance of trustworthiness in some against-interest circumstance, and from the restrictive influences of the opinion rule and the rule requiring firsthand knowledge, when taken with the apparently prevalent satisfaction with the results, calls for generous treatment of this avenue to admissibility.

Fed. R. Evid. 801(d)(2) advisory committee note (internal citations omitted). The rationale for the hearsay exception is not based on the inherent reliability or trustworthiness of the statements themselves, but rather is rooted in an estoppel argument that a party to a lawsuit should be able to rely on the words of her opposing party. Jewel v. CSX Transp., Inc., 135 F.3d 361, 365 (6th Cir. 1998); United States v. DiDomenico, 78 F.3d 294, 303 (7th Cir. 1996).

Accordingly, the authority for the directive that the jury consider the defendant's statements just as if they had been made at trial is unclear. The directive is unsupported by both the text of the rule and the rationale and history of the hearsay exception. Notably, the Iowa model jury instructions addressing other hearsay exceptions do not include similar

language unless the exception applies to previous statements that were made under oath. Compare Iowa State Bar Ass'n, Iowa Criminal Jury Instruction No. 200.42 (2017) with Iowa State Bar Ass'n, Iowa Criminal Jury Instruction No. 200.43 (2017).

Moreover, the model instruction addressing "confessions" by a defendant does not include a directive for the jury to consider the statements just as if they had been made at trial. See Iowa State Bar Ass'n, Iowa Criminal Jury Instruction No. 200.16 (2017). Instead a jury is told to consider various circumstances under which the confession is made when deciding how much weight to give it. See Id.

Although the federal rules provide for the same exception to hearsay for a party-opponent's out of court statements, the model jury instructions in the various circuits do not provide a model instruction for the consideration of the statements, and certainly not one instructing the jury it may consider the statements the same as sworn testimony by the defendant. See U.S. District Court District of Maine, Pattern Criminal

Jury Instructions for the District Courts of the First Circuit (2017), http://www.med.uscourts.gov/pattern-jury-instructions; Committee on Model Criminal Jury Instructions Third Circuit, Model Criminal Jury Instructions (2017), http://www.ca3.uscourts.gov/model-jury-instructions; Committee on Pattern Jury Instructions, District Judges Association, Fifth Circuit Pattern Jury Instructions (Criminal Cases) (2015), http://www.lb5.uscourts.gov/juryinstructions; Sixth Circuit Committee on Pattern Jury Instructions, Pattern Criminal Jury Instructions (2017), http://www.ca6.uscourts.gov/pattern-jury-instructions; Committee on Federal Criminal Jury Instructions for the Seventh Circuit, Pattern Criminal Jury Instructions of the Seventh Circuit (2012), http://www.ca7.uscourts.gov/pjury.pdf; Judicial Committee On Model Jury Instructions for the Eighth Circuit, Manual of Model Criminal Jury Instructions for the Eighth Circuit (2014), http://www.juryinstructions.ca8.uscourts.gov/criminal_instructions.htm; Ninth Circuit Jury Instructions Committee, Manual of Model Criminal Jury Instructions

(2017), http://www3.ce9.uscourts.gov/jury-instructions/model-criminal; Criminal Pattern Jury Instruction Committee of the United States Court of Appeals for the Tenth Circuit, Criminal Pattern Jury Instructions (2017), http://www.ca10.uscourts.gov/clerk/orders; Judicial Council of the Eleventh Circuit, Eleventh Circuit Pattern Jury Instructions (Criminal Cases) (2016), http://www.ca11.uscourts.gov/pattern-jury-instructions.

Accordingly, the district court erred in instructing the jury that they could consider Wilson's out of court statements "just as if they had been made at this trial." While the rules of evidence provide that statements of party opponents are admissible, the rule of evidence and the rationale underlying the hearsay exception provides no authority to instruct the jury it may consider the defendant's unsworn out-of-court statements as bearing the same weight as testimony received at trial, made under oath and under penalty of perjury. Instead the jury should have been left to assign whatever weight and reliability to the statements as it saw fit.

Particularly, the jury should have been left to consider reliability of the statements from within the context in which they were made.

> Critically, substantive evidence is not the same as sworn testimony. [The defendant's statements] were not made under oath and, therefore, did not have the same binding effect on the declarant. . . . In the absence of the oath, any ability to observe the declarant's demeanor, and cross examination to aid in determining credibility, the probative force of out-of-court statements differs from the probative force of testimony. It was a mistake to instruct the jury on a false equivalency.

State v. Yenger, No. 17-0592, 2018 WL 3060251, at *6 (Iowa Ct. App. June 20, 2018) (Tabor, J., dissenting)(footnote omitted). See also State v. Payne, No. 16-1672, 2018 WL 1182624, at *11-12 (Iowa Ct. App. March 7, 2018) (Tabor, J. dissenting).

Though the language at issue was in the uniform instructions as they existed at the time of trial herein, uniform instructions are not preapproved by the Iowa Supreme Court. See State v. Robinson, 859 N.W.2d 464, 490 (Iowa 2015) (Wiggins, J., dissenting) (asserting "we can never delegate the

formulation of the law to the instruction committee"). Moreover, at the request of the Supreme Court, the Bar Association subsequently revised Iowa Criminal Jury Instruction 200.44 in June 2018 to remove the language "just as if they had been made at this trial". See Hon. Mark D. Cleve, Iowa Jury Instruction Committee Report to Board of Governors, found at https://cdn.ymaws.com/www.iowabar.org/resource/resmgr/ilw_resources/IJIC_Letter.pdf; Iowa Crim. Jury Instr. 200.44 (Rev. 6/2018).

Because the jury instruction misstates the law, his trial counsel was ineffective for failing to object to the instruction.

Shorter was prejudiced by his attorney's failure. The clear implication of Instruction 18 was that Shorter's out-of-court statements "were to be given the same force and effect as if he had uttered the words from the witness stand under the penalty of perjury." Payne, 2018 WL 1182624, at *12 (Tabor, J., dissenting). Additionally, the State explicitly referenced and emphasized Instruction 18 and the Defendant's out-of-court statements in urging the jury during closing argument to

return a guilty verdict. (Trial Vol.2 p.34 L.13-18). The state argued that Defendant's statements from the night of the incident, which could be considered just as if they were made at trial, were inconsistent with his trial testimony, and Defendant should therefore not be credited or believed. Specifically, the State pointed to Defendant's statements from the night of the incident stating he wasn't drunk as contrasted with Defendant's trial testimony acknowledging that he was intoxicated. (Trial Vol.2 p.20 L.18-22, p.34 L.13-p.35 L.16, p.53 L.2-14, p.58 L.17-22, p.59 L.5-7). The State also argued that Defendant's statements from the night of the incident amounted to "an admission by omission", in that his statements to the officer had explicitly denied intoxication but had not explicitly denied possession or carrying of the gun. (Trial Vol.2 p.35 L.4-10). Defendant's trial testimony was crucial to his defense that he'd never carried the gun *after* becoming intoxicated. Defendant's purportedly inconsistent or incriminating statements from the night of the incident, if artificially inflated to the level of sworn testimony given at trial

under oath, would be much more suspect and more powerful as a potential indication of non-credibility or guilt than the same statements properly understood in the context in which they were made. A new trial is required.

CONCLUSION

Shorter's conviction should be vacated and his case remanded for a new trial.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was $__0__, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR FURTHER REVIEWS

This application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

[X] this application has been prepared in a proportionally spaced typeface using Bookman Old Style, font 14 point and contains 4,962 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).

/s/ Vidhya K. Reddy Dated: *10/29/19*

VIDHYA K. REDDY
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
vreddy@spd.state.ia.us
appellatedefender@spd.state.ia.us