ELECTRONICALLY FILED JAN 11, 2021 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA
Supreme Court No. 19-0911

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANTHONY ALEXANDER MONG,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE WILLIAM P. KELLY, JUDGE

APPELLEE'S BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. The Defendant Failed to Establish the Jury Pool in his case Violated the Fair Cross-Section Requirements of the Federal and State Constitutions.

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Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded*, 59 DRAKe L. Rev., 761 (2011)

II. The District Court Did Not Err in Denying Mong's Motion to Compel Witness Testimony as Mong Was Asserting His Fifth Amendment Right against Self-Incrimination.

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III. There is Sufficient Evidence to Support Mong's Convictions for Attempted Murder, Intimidation with a Dangerous Weapon with Intent, Willful Injury Causing Bodily Injury, and Going Armed with Intent.

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ROUTING STATEMENT

This case can be decided based on existing legal principles. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

This is a direct appeal by the defendant Anthony Alexander Mong from his convictions for attempted murder, intimidation with a dangerous weapon, willfull injury causing bodily injury, and going armed with intent. Sentencing Order; Notice of Appeal; App. 84-88; 89.

Course of Proceedings

The State accepts the defendant's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

Madison Cobb had been dating Anthony Mong but broke off their relationship in May of 2018. Mong had been jealous of Madison's friendship with Ricco Martin and had made a number of threats against him, including a threat to kill him. On June 1, 2018, Mong drove to the home where Madison lived with her family while Ricco Martin was visiting. Mong drove past and looked at a group of people outside the house, then turned around, and drove back to the

house. Mong got out of the car and shot in the direction of Ricco Martin. Shane Woods was near Ricco at the time and was shot through the back.

Twenty-two-year-old Madison Cobb lived with her parents Heather and Todd Hines at their home at 8185 Franklin Avenue. Tr. II, 45:18-46:4. Ms. Cobb started dating Anthony Mong in early November of 2017 and had what Ms. Cobb thought was an exclusive relationship, although she eventually learned that Mong was also dating a woman she knew only as "Rachael." Tr. II, 46:16-47:13; 49:4-24. Madison and Mong's relationship was "very on and off all the time." She broke up with Mong for the last time no more than two weeks before the date of the shooting. Tr. II, 56:7-15; 58:10-20.

Todd and Heather Hines owned a semi-pro football team in Iowa and Ricco Martin played for their team. Madison met Ricco through football events she was involved in. He became friends with the whole family and would go to their home on occasion. Madison and Ricco were friends before she met the defendant. Tr. II, 47:21-49:3; 92:6-93:25. Madison considered Ricco to be a friend whom she had never dated. Tr. II, 48:9-25. Ricco considered he and Madison to be "friends with benefits." Tr. II, 94:3-7.

Ricco had met Mong, but they did not have much interaction. Ricco got "a bad vibe" from Mong and tried to avoid him. Tr. II, 94:8-22. The year before the shooting, Ricco had received thirty to forty intimidating text messages from Mong, one after the other. Ricco had texted Mong back to tell him that he was not afraid of Mong. Ricco then changed his phone number to avoid receiving further messages from Mong. Tr. II, 96:13-98:16.

Ricco would visit Madison's parents at their home and Madison would also be home when Ricco visited. The defendant was not happy about that and he voiced his displeasure to Madison. Tr. II, 49:25-50:17.

Just before June 1, Ricco and Mong had an argument during which Mong told Ricco that "he wasn't going to fight me; he was going to shoot me." That was the last time Ricco saw Mong before June 1. Tr. II, 94:23-95:5; 96:6-9. Madison was present when the defendant and Ricco had an argument. She, too, heard Mong tell Ricco that, "he was done arguing, he didn't want to fight anymore, that he was just going to shoot [Ricco]." Tr. II, 50:18-51:6.

On June 1, Ricco was at the Hines home. Sometime around 8:00 p.m., Ricco was outside the home with Todd Hines, David

Woods, and Shane Woods. The men were just standing there having a conversation when Mong drove by, made a U-turn in front of the elementary school right across the street from Hines' home, and came back. Tr. II, 99:7 -100:11. Todd Hines told Ricco to go inside, but he did not. Ricco saw Mong jump out of the car. He saw Mong run behind a tree. Then, he saw Mong's arm reach around the tree and shoot. Shane was hit. Tr. II, 100:12-101:21; 114:5-13.

Ricco ran to Shane's aid. Tr. II, 101:22-25. Ricco believed that Mong was trying to shoot him instead of Shane. Tr. II, 102:20-23.

Before Mong jumped behind the tree, Ricco had seen Todd Hines come out onto the deck with a gun. Ricco believed that Mong saw the gun, as well, and that was why Mong jumped behind a tree. Tr. II, 113:19-114:7. Ricco took the gun from Todd because he did not want Todd to get into trouble. Tr. II, 104:7-105:1. Someone then took the gun from Ricco and put it in the house. Tr. II, 106:24-107:5. Ricco did not fire a gun that day. Likewise, Todd Hines never pointed a gun or fired a gun that day. Tr. II, 117:9-17.

Todd Hines became friends with Ricco Martin when Ricco played football on the semi-pro football team Todd and Heather Hines owned. Todd Hines met Anthony Mong through some off the

other football players. Tr. II, 207;4- 208:2. Mong dated Todd's daughter Madison. Tr. II, 208:15-20.

Todd testified that Mong and Ricco Martin did not get along. Within two weeks of June 1, Todd was present when Mong threatened Ricco. Mong told Ricco that he would not fight him; he was just going to shoot him. Tr. II, 208:21-210:4.

Mong had taken a red Cadillac to Todd's house around Saturday, March 24. Todd was going to put a starter and some other parts on the car and then the car was going to be returned to Mong. Mong was at the house on Thursday, May 31 talking to Todd about the Cadillac. Todd told Mong that he would give him the title to the car and the car keys and told him to come back over the weekend to get the car. Tr. II, 223:24-225:4.

Todd recalled that around 8:00 p.m. on June 1, 2018, his nephew David Wood, David's father Shane Wood, and Ricco Martin were outside. His wife and children were inside the house. Tr. II, 210:5-25. Todd noticed Mong driving down the street in a Hyundai Sonata; the music in the car was blaring loudly. The vehicle belonged to "Rachel," he was not sure of her last name. Tr. II, 212:7-24.

Todd saw Mong drive past his house, go around the corner, turn around in the circle lot at the school and saw him making his way back to Todd's house. He thought, "Oh, boy, it's going to happen now." Tr. II, 212:25-213:18.

Todd ran inside to his bedroom, got his gun, and went back outside. He had the gun tucked into the back of his waistband. Tr. II, 214:2-24. When he first walked outside with his gun, Todd saw Mong walking into his driveway. He saw that Mong had a gun in his hand. Tr. II, 218:25-219:12. Todd thought Mong was going to shoot Ricco. Tr. II, 212:25-213:18. As Mong had driven past his house, Todd thought he had heard Mong rack the gun, chamber a bullet. Tr. II, 219:13-220:10; 223:16-23.

Todd saw Mong approaching his driveway and told him, "Don't do this." He said that twice. Then he ran into the house because the shooting started. He was inside the house but standing by the sliding door to his home and looking outside when he heard Mong fire two shots. Tr. II, 215:4-8; 218:17-24; 228:21-23. He turned around and told Shane to run because Mong was shooting. Shane said, "I'm hit." Todd told his wife to call 911, then he realized that his phone was in his pocket, so he called 911, too. Tr. II, 218:4-10; 220:14-221:1.

When the police arrived, they took Todd to the police station and questioned him. He told them he had a gun. Tr. 221:4-16.

Todd testified that he had been going to draw his gun and point it towards Mong, but Ricco grabbed his arm and reminded him that there were children playing outside in the neighbor's yard. Todd did not point the gun, then. He dropped it or it fell out of his waistband and Ricco took it. Todd did not shoot his gun. Tr. II, 215:9-5; 217:17-218:3; 228:23-229:4. Todd estimated there were at least eight teenaged girls outside jumping on a trampoline in the neighbor's yard. Tr. II, 215:9-216:9.

David Woods is Shane Woods son. Tr. II, 173:15-22. He was at the Hines home on June 1. He, his dad, his uncle Todd Hines, and Ricco Martin were outside smoking a cigarette and talking about baseball when he saw Anthony Mong drive by in a dark blue or black Hyundai. He had seen Mong in that vehicle before. Mong gave the men "a little stare down" as he drove by. David saw Mong turn around at the school, then Mong "cranked his music and came back." Tr. II, 174:8-177:1.

David's instincts told him that something was going to happen, so he went to the garage and grabbed a ball bat. He could see in

Mong's face that something was going to happen. Tr. II, 177:3-11; 181:14-19. While David was in the garage, he heard a gunshot and heard his uncle say, "He's got a gun," then heard his dad yell, "I'm hit. I'm hit." Tr. II, 177:12-19. David immediately left the garage. He saw that his dad was bleeding and he chased after Mong with the baseball bat. Mong got back in his car really quickly and sped off. Tr. II, 177:14-179:1; 180:5-12.

On June 1, 2018, Madison was at home with her parents, her uncle Shane Woods, her cousin David Woods, and her younger siblings. Ricco Martin was also there. Tr. II, 46:5-15. That evening, Madison was inside her home and was just about to open the door to go outside when she heard a gunshot. Madison opened the door and saw what she recognized as defendant's back and then saw him open the door to Rachael's Hyundai Sonata, get in, and drive off. Madison was familiar with the car and had ridden in it with Mong "plenty of times." She knew it was Rachel's car. Tr. II, 51:7-55:9; 58:21-25; Exhs. 14, 15 (photographs of car); App. --.

Madison then noticed her uncle Shane Woods leaning up against the garage. She saw that there was blood pouring out of Shane's shirt. Tr. II, 55:10-17.

Heather Hines is married to Todd Hines and is the mother of Madison Hines. Tr. II, 158:14-159:2. She testified that Shane Woods was living with her family on June 1. Tr. II, 171:16-21. Heather was aware that there was a conflict between Mong and Ricco. A few weeks before the shooting, she had heard Mong threaten to beat up Ricco or just shoot him. Tr. II, 164:7-23; 165:6-10. She was not aware of any conflict between Mong and Todd Hines. Tr. II, 163:21-164:6.

Heather Hines was inside the house on June 1 and did not see Shane Woods get shot. Tr. II, 162:18-21. Her husband called her outside and she discovered that Shane had been shot. She called 911. Tr. II, 162:4-12. Ricco gave her a gun that night and asked her to put it upstairs in their room for Todd. She took the gun and put it under their mattress. Tr. II, 167:15-18; 170:19- 171:1.

Shane Woods lives with the Hines family. Tr. II, 239:21-240:9. On the evening of June 1, 2018, Shane was outside with his son David and Ricco Martin. Shane and David were smoking cigarettes and talking about baseball. Shane was playing for a semi-pro baseball team and David coached the team and they were talking about the game. Tr. II, 241:8-242:6. Shane saw Mong drive by and pull up on

front of the yard, but then drive on. Mong went around the corner by the school and turned around and came back. Tr. II, 242:10-243:25.

Mong stopped in front of the house, got out of the car, and walked to the back of the car. By that time, Todd had gone into the house and come back out. Shane heard Todd say, "Don't Tony, don't." Shane looked and saw that Mong was at the driveway with a gun pulled. Tr. II, 2444:1-20.

Shane did not have any ongoing conflict with Mong; he "had no problems with him at all." Tr. II, 243:4-13. When he saw that Mong had a gun, he did not run because he did not think he had a problem. Shane just turned around to walk back towards the house. He heard a shot and he was hit on the left side of his back. The bullet came out of his arm. Tr. II, 244:21-245:2. At the time he was shot, Shane was approximately six to eight feet from Ricco, who was standing by the front of the deck. Shane and Ricco were talking back and forth. Tr. III, 25:15-27:11; Exh. 10 (photograph); App. --.

Rachael Janousek is the fiancée of the defendant. By the time of trial, she had been in relationship with him for five years. Before June 2, 2018, she spent time with Mong at the home of her friend Rachel Kleiber. Rachel lived in a house at 913 62nd street with her

fiancé and the two sons. Janousek and Mong "pretty much" lived there full-time. Tr. II, 75:15-77:23.

On June 1, Mong and his friend Brandon, known as Griz, dropped Janousek off at work. Janousek worked 4:00 p.m. to either 8:00 or 9:00 p.m. that day. Mong was driving Rachael's Hyundai Sonata. The same car Madison Cobb had seen Mong leave in after the shooting. Tr. II, 78:4-80:22; 87:17-88:1; Exh. 15 (photograph of car); App. --.

Mong was supposed to pick up Janousek after she got off work, but he did not do so. She called him a few times and drank with her co-workers for about one and one-half hours while she waited for defendant, then got tired of waiting. She started walking home and then had another friend pick her up. The friend was going to take Janousek to her mother's house, but then Janousek got a call from a detective telling her that her car had been towed, so the friend took Janousek to the Clive Police Department. Tr. II, 80:23-82:8.

Janousek gave police permission to search her impounded car. Tr. II, 83:3-25. She testified that it was not her who put a shell casing in her car. Tr. II, 86:8-13. Ms. Janousek's boss verified that she clocked out of work at 9:47 p.m. on June 1. Tr. III, 77:8-21.

Willie Carl McClairen, Jr. is a general surgeon. Tr. III, 8:25-9:17. He was one of the attending trauma surgeons when Shane Woods was brought into the emergency room at about 9:10 p.m. Tr. III, 11:3-8; 14:20-15:4. He testified that Shane was shot in the back of his lower left chest and the bullet traveled through his chest cavity and exited through the front. The bullet passed close enough to Shane's lung to cause a wave to contuse the lung, but did not hit the lung. Dr. McClairen testified that there are vital organs throughout the chest – the heart, lungs, major blood vessels – and if the bullet had struck any of those Shane could have died. Tr. III, 12:3-13:7.

At the scene of the shooting, police found a 9-millimeter shell casing. There were also cigarette butts lying on the ground in the area by the deck, near where the casing was found. The casing was found against the west curb on Northwest 82nd Street. Tr. III, 60:8-18; 64:25-65:18; 67:8-15; Exh. 1 (aerial photograph); App. --.

Officers located Rachel Janousek's black Hyundai Sonata later on the night of the shooting. An officer looked into the car and saw a live round on the passenger seat. Tr. III, 32:3-8; 36:1-37:21; 38:9-24; 44:10-17. Ms. Janousak gave police permission to search her car and

they seized a 9-millimeter shell from the front passenger seat. Tr. III, 77:22-79:12.

Sgt. Richard Stoen spoke with Todd Hines at the scene and then took him to the police station to interview him. During the course of that interview at the station, Hines told the officer that when he had heard Mong rack a gun, Hines went into his house and got his gun. Tr. III, 107:16-108:16; 130:9-19.

Rachel Kleiber testified for the defense. She testified that Mong was living with her and her fiancé on June 1, 2018; he lived with them for three to five months. She never saw a firearm in Mong's portion of the house. Tr. III, 196:10-198:22; 216:14-23. Ms. Kleiber knew Mong for about five years. During that time, she never saw Mong with a firearm. Tr. III, 216:24-217:5.

Anthony Mong testified at his trial. He was thirty-one years old at the time of trial. Tr. IV, 11:16-12:7. He had a red Cadillac stored at the Hines residence. While Mong and Madison were still dating, they planned to fix the Cadillac as they needed a car. Todd Hines was going to help them. Tr. IV, 20:24-23:16. After Mong and Madison broke up, Mong wanted his car back. Tr. IV, 23:17-24. On May 31, 2018, Mong went to the Hines residence and spoke with Todd. Todd

told Mong to return over the weekend to get the car because Madison had the keys and title and she was not home at the time. Tr. IV, 24:3-17.

Mong testified that on the evening of June 1, 2018, he and Rachel Janousek picked up Brndon Henlon, then dropped Janousek off at her job. Tr. IV, 25:21-28:2. Mong and Henlon then went to the home of Rachel Kleiber. Mong ran inside and "grabbed a couple items," then he and Henlon sat in the car and smoked marijuana for about forty-five minutes. Tr. IV, 28:3-14.

When they were done smoking, Mong testified, he and Henlon drove around for half an hour. Mong was driving, though he did not have a license. Mong decided he wanted to pick up the Cadillac since Henlon could drive one of the cars. Tr. IV, 28:3-34:1.

Mong testified that he drove to the Hines residence in Rachel's car. They had the music in the car blasting. When they got to the Hines residence, Mong saw Todd Hines, Ricco Martin, Shane Woods, and David Woods sitting outside. He testified that he started to pull into the driveway, but then realized that would block the Cadillac in, so he drove on, turned around in a nearby school area, returned to

Hines' house, and parked in front of a large tree in the Hines' yard. Tr. IV, 30:2-5; 31:25-33:16.

Mong testified that he told Henlon to stay in the car because Henlon was going to drive Rachel's car and Mong would drive the Cadillac. Mong testified that he got out of the car. He was holding his cell phone in his hand because he was still texting as he got out of the car and walked up the driveway. Tr. IV, 33:17-36:12. As he walked, Mong noticed that Todd Hines had a gun. Mong testified that he saw Ricco Martin "go for" Todd's gun and that is when Mong ducked behind the tree. Mong testified that, "I felt like I was going to get shot." Tr. IV, 33:17-34:1; 36:1–37:7.

Mong stated that he heard a shot fired from the direction of the group of people in Hines' yard. Then, he heard a second shot fired from behind him. Tr. IV, 37:8-38:9; 59:2-18; 63:13-64:14. He stated that the shot came "from the car" – the Hyndai Sonata that Mong drove to the scene. Tr. IV, 81:21-82:17. He testified, though, that Henlon never got out of the car. Tr. IV, 62:9-20. He also testified that he did not know that Henlon had a gun and had not seen it while the two were in the car together. Tr. IV, 90:13-91:10.

The group of people started to disperse and Mong ran to the car, got into the driver's seat, and sped away. Tr. IV, 38:2-25. He testified that when he got into the car he saw that Henlon had a gun in his hand. Tr. IV, 39:1-8. Mong testified that he did not see anyone get shot at the Hines residence. Tr. IV, 39:9-11.

Mong testified that they stopped a block away and Henlon got in the driver's seat because Henlon had a license. Then, they went to Rachel Kleiber's house and dropped off the car and went their separate ways. Tr. IV, 39:1-16; 60:7-61:15. Mong testified that he hid out in a hotel because he was afraid of someone coming after him or shooting him. The next morning, a friend drove him to Las Vegas. He went to Las Vegas because his mother lives there and his mother was sick so he "needed to see her anyway. Tr. IV, 39:19-41:5; 79:7-9.

Mong testified that he did not have a gun and did not intend to shoot or fight Ricco Martin, Shane Woods, or anyone else at the Hines residence. He testified that he had his black cell phone in his hand when he approached the Hines residence. Tr. IV, 41:8-22; 43:6-13. He testified that he had no problem with Shane Woods. Tr. IV, 50:18-20.

Mong testified that he did not learn that Shane Woods had been shot until a couple days after he got to Las Vegas. Mong was arrested in Las Vegas two months later. During the two months he was there, he did not try to contact authorities in Iowa to report that Henlon had shot Shane because Henlon was his best friend and Mong thought that Henlon had saved his life. Tr. IV, 42:15-43:5; 79:21-80:10; 81:13-20. Henlon died in February of 2019, before trial. Mong did not tell anyone before Henlon died that it was Henlon who shot Shane Woods or that Henlon had fired the second shot, though he did testify that he had told his lawyer. Tr. IV, 55:12-15; 85:20-90:6.

Additional facts will be discussed where relevant to the State's argument, below.

ARGUMENT

I. The Defendant Failed to Establish the Jury Pool in his case Violated the Fair Cross-Section Requirements of the Federal and State Constitutions.

Preservation of Error

The State does not challenge error preservation. On the first day of trial, before the start of voir dire, the defendant made an oral motion challenging the jury panel because of alleged deficient representation of African Americans in the jury pool. Specifically, the defense asserted that the jury pool violated both the Sixth

Amendment of the United States Constitution, and article I, section 10 of the Iowa Constitution for failure to represent a fair cross-section of the community. Tr. I, 62:19-71:21. In arguing his motion, defense counsel advised the district court that of the forty names drawn for Mong's jury panel, only one juror identified himself or herself as African-American. Tr. I, 63:4-24. Although Mong objected only to the composition of the jury *panel*, rather than to the jury *pool*, the State does not challenge preservation of Mong's appellate challenge to the pool. The authority cited by Mong in support of his motion, *State v. Plain*, 898 N.W.2d 801, was a case reviewing the composition of the jury pool, the prosecutor pointed out that *Plain* requires proof of systemic exclusion from the jury pool rather than the panel, and the district court ruled on Mong's motion as if it were a challenge to the jury pool. *See*, Tr. I, 63:5-71:21. The district court's ruling preserved error for Mong. *State v. Paredes*, 775 N.W.2d 554, 561 (Iowa 2009).[1]

[1] Generally, objections to evidence or other matters and proceedings must be made as soon as the grounds for doing so become apparent. *See State v. Johnson,* 476 N.W. 2d 330, 333 (Iowa 1991); *State v. Yaw,* 398 N.W. 2d 803, 805 (Iowa 1987). Normally, the State would argue that Mong waived his objection to the composition of the jury pool by waiting until the day of trial to raise his challenge rather than filing a written motion once the jury pool questionnaires were available. However, the prosecutor at trial did not object to the timeliness of Mong's motion and did not oppose

Mong raises an alternative claim that if his attorney failed to preserve error, his attorney was ineffective. Because the State is not challenging error preservation, the Court need not reach Mong's claim of ineffective assistance.[2]

Scope of Review

The Court reviews de novo Mong's claim that he was denied his right to a fair trial under the United States and Iowa constitutions. *See State v. Plain*, 898 N.W. 2d 801, 810 (Iowa 2017) (modified on other grounds by *State v. Lilly*, 930 N.W. 2d 293, 302 (Iowa 2019)). Because Mong does not urge a separate rule or analytical framework

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conducting an evidentiary hearing on the cross-section challenge. Tr. Vol. I, 21:23-29:8; Vol. II, 15:25-16:12; Vol. III, 7:3-11:7. Under these circumstances, the State agrees that the defendant's general claim under both the state and federal constitutions has been preserved. *See Lamasters v. State*, 821 N.W. 2d 856, 863 (Iowa 2012).

[2] A 2019 amendment to Iowa Code section 814.7 deprives the Court of jurisdiction over claims of ineffective assistance of counsel on direct appeal. The amendment to section 814.7 went into effect on July 1, 2019 and applies to those cases in which judgment and sentence is entered on or after July 1, 2019. *State v. Macke*, 933 N.W.2d 226, 228 (Iowa 2019); *see also State v. Trane*, 934 N.W.2d 447, 464-65 (Iowa 2019) (summarizing *Macke*, noting that SF589 does not apply "if the appeal was already pending on July 1, 2019," but does apply to later appeals); *State v. Draine,* 936 N.W.2d 205, 206 (Iowa 2019). Judgment and sentence in Mong's 's case was entered on May 23, 2019. Judgement & Sent.; App. 84-88. Thus, the amendment to section 814.7 does not apply to Mong's case.

under the state constitution, the same standards are applied under both constitutions. *See State v. Lowe*, 812 N.W. 2d 554, 566 (Iowa 2012).

Mong makes an alternative claim of ineffective assistance of counsel. As argued below, that claim has been waived. However, should the Court reach that claim, review would be *de novo*. *Taylor v. State*, 352 N.W.2d 683, 684 (Iowa 1984).

Merits

Anthony Mong challenges his convictions on the ground that he was denied his state and federal right to trial by a fair cross-section of the community. His claim should be rejected as he has not met his burden to establish that African Americans were underrepresented in the venire from which his jury was selected and has not met his burden to show that the alleged underrepresentation was due to systemic exclusion of African Americans in the jury selection process. His claim therefore fails.

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S.

Const. amend. VI. Likewise, article I, section 10 of the Iowa Constitution provides a right to trial before "an impartial jury." *State v. Lilly*, 930 N.W.2d 293, 300 (Iowa 2019). The right to an impartial jury entitles the criminally accused to a jury drawn from a fair cross-section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

When faced with a Sixth Amendment claim of unconstitutional underrepresentation of a racial group in a jury pool, Iowa follows the three-part test set forth in *Duren v. Missouri*, 439 U.S. 357 (1979). To establish a prima facie violation of the fair cross-section requirement of the Sixth Amendment, the defendant must establish the following:

> (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.

State v. Plain, 898 N.W.2d at 821–22 (quoting *Duren,* 439 U.S. at 364).

Our Court has explained that, under the second *Duren/Plain* prong, the percentage of the distinctive group in the population should be determined using the most recent available census data.

State v. Williams, 929 N.W.2d 621, 629–30 (Iowa 2019) (citing *Lilly*, 930 N.W.2d at 304; *State v. Veal*, 930 N.W.2d 319, 328 (Iowa 2019)). These data may be adjusted to account for those who are actually eligible to serve as jurors, for example, by eliminating the population that is under eighteen and the population (if any) that is incarcerated in a state prison located in the county. *Williams*, 929 N.W.2d at 630.

For Sixth Amendment purposes, the defendant must then show that the percentage of the group in the jury pool is less than this expected percentage by at least two standard deviations. *Lilly*, 930 N.W.2d at 303-305 (citing *Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977)); *Williams*, 929 N.W.2d at 630. Under the Iowa Constitution, the defendant must show only one standard deviation. *Lilly*, 930 N.W.2d at 304. Pools may be aggregated, so long as pools closer in time to the trial date are not omitted when earlier pools are included. *Williams*, 929 N.W.2d at 630; *Lilly*, 930 N.W.2d at 305. The aggregation of pools can help solve the problem with performing statistical analysis on small numbers. *Williams*, 929 N.W.2d at 630.

Under the third prong of the *Duren/Plain* analysis, the defendant must show that some practice or practices caused the

underrepresentation. *Duren*, 439 U.S. at 364; *Plain*, 898 N.W.2d at 822; *Williams*, 929 N.W.2d at 630.

A. Mong Has Satisfied the First Prong of the *Plain/Duran* Test.

Mong asserts the fair cross-section requirement was violated because African Americans constitute a distinctive group for purposes of the constitutional right to an impartial jury. The State agrees. *See, United States v. Weaver*, 267 F. 3d 231, 240 (3d Cir. 2001). Thus, Mong has satisfied the first prong of the *Duren* test.

B. Mong Has Not Satisfied the Second Prong of the *Plain/Duran Test*; He Has Not Established That African Americans Were Underrepresented in his Jury Pool.

The second prong of the *Plain/Duren* test is whether there is a fair and reasonable representation of the distinctive group in the jury pool. A challenger must establish that "the representation of the group in the jury venires" is not "fair and reasonable in relation to the number of such persons in the community." *See, Weaver*, 267 F. 3d at 240. Citing to *State v. Plain,* Mong asserts that there are three tests available to determine whether a distinctive group is underrepresented in the jury pool: absolute disparity, comparative disparity, and standard deviation. Appellant's Brief at 30. However,

in *Lilly* and *Veal*, our Court held that disparity is to be determined solely under the standard deviation method. *Lilly*, 930 N.W.2d at 302-305; *Veal*, 930 N.W.2d at 328. Those cases were decided on May 24, 2019. Mong filed his notice of appeal on May 30. Notice of Appeal[3]; App. --. Consequently, the decisions in *Lilly* and *Veal* apply to this case on appeal and review of Mong's challenge to his jury is limited to analysis under the standard deviation test. *See State v. Royer,* 436 N.W. 2d 637, 640 (Iowa 1989) (new appellate decision generally applicable to other similar cases then pending on direct appeal).

Mong has not shown that he has met the standard deviation test, or either of the other two tests discussed in *Plain*. In the district court, Mong failed to present any evidence to support his claim of unconstitutional underrepresentation of a racial group in his jury venire. Mong merely pointed out to the district court that in his jury panel of forty potential jurors, only one juror self-identified as Black and/or African American. Tr. I, 63:4-12. Defense counsel asserted that the most recent census records for Polk County showed that

[3] EDMS shows the notice of appeal as filed both May 30, 2019 and June 3, 2019. The certified notice of appeal was filed on June 3, 2019.

seven percent of the population is African American. Mong then attempted to calculate the absolute and comparative disparities using that asserted census data and the make-up of Mong's jury panel. He did not address the standard deviation test and did not address any disparity in his jury pool.

Mong did not present any evidence in support of his claim that African Americans were underrepresented. He did not make the juror questionnaires of his jury pool, or even his jury panel, part of the record and he did not present evidence establishing what percentage of the population in Polk County is African American. Counsel's argument will not substitute for evidence.

Mong failed to offer evidence to support his claim of underrepresentation even though the district court bent over backwards to give Mong an opportunity to do so. When defense counsel did not provide the court with the juror questionnaires during the hearing on Mong's challenge to his jury, the district court assisted Mong in gathering the necessary information. The court called the clerk of court and instructed the clerk to provide defense counsel with the "bios" of all of the 195 people who showed up for jury duty. The district court advised Mong's attorney that if he had

evidence of systemic exclusion based upon that jury pool information, he could raise the issue again. Tr. I, 69:20-71:21. Mong never raised the issue again.

Mong never provided evidence of a racial disparity in his jury pool. Thus, he failed to meet his burden of establishing the second part of the *Duren* test.

Moreover, Mong's argument in the district court was based upon the wrong data set. While Mong asserted that only one of the forty jurors who made up his jury panel was African American, Mong never discussed the racial composition of the jury pool from which his panel was chosen. He discussed only the racial make-up of those jurors who had been assigned to his trial.[4] "The *Plain/Duren* right applies to the jury pool." *State v. Wilson,* 941 N.W.2d 579, 593 (Iowa 2020) (citing *Plain*, 898 N.W.2d at 822 ("[A] defendant must establish the proportion of group members in the jury pool is under representative...."); and citing *Lilly*, 930 N.W.2d at 305 ("A defendant

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[4] "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. A jury 'panel' consists of 'those jurors drawn or assigned for service to a courtroom, judge, or trial.'" *State v. Gibson*, No. 19-0779, 2020 WL 3569566, at *1 (Iowa Ct. App. July 1, 2020) (quoting *Plain*, 898 N.W.2d at 821 n.5 (in turn citing Iowa Code § 607A.3 (2015)).

whose jury pool has a percentage of the distinctive group at least as large as the percentage of that group in the jury-eligible population has not had his or her right to a fair cross section infringed ….")).

Mong did not meet his burden to show that African Americans were underrepresented in his jury pool. Consequently, the district court properly denied Mong's fair-cross-section challenge. *Wilson,* 941 N.W.2d at 593 (holding that the district court properly denied Wilson's challenge to his jury as Wilson did not make a record as to the racial makeup of jurors in the entire jury pool that day— he showed underrepresentation only in the subset of jurors who had been assigned to his trial.).

C. Mong Has Not Established Systemic Exclusion.

The third requirement for a successful fair cross-section challenge is to establish that the alleged underrepresentation is due to systematic exclusion of the group in the jury-selection process. *Plain*, 898 N.W.2d at 821-22 (quoting *Duren*, 439 U.S. at 364). "[D]isproportionate exclusion of a distinctive group from the venire need not be intentional to be unconstitutional, but it must be systematic." *Randolph v. California*, 380 F. 3d 1133, 1141 (9th Cir. 2004). Exclusion must be "inherent in the particular jury-selection

process utilized.'" *Plain*, 898 N.W. 2d at 824 (quoting *Duren*, 439 U.S. at 366). Mong has failed to meet this requirement.

In the district court, Mong did not present either evidence or argument on systemic exclusion of African American jurors. In arguing that Mong was being denied his right to a fair cross-section, defense counsel stated,

> Moving to the third prong of the [*Duran*] test, systematic exclusion, we don't have the information available as to whether or not the – how the panel was selected, what the grounds are for picking jurors.
>
> We would indicate that the test, as it currently stands, makes it very difficult to establish the third prong. But given the results of the panel, the absolute disparity, the comparative disparity, the fact that there's only one African-American juror on this entire panel, we would urge that is proof of systemic exclusion and, therefore, we're raising a challenge to the panel.

Tr. I, 64:24-65:10.

Later, when specifically invited by the district court to present evidence of systemic exclusion of African Americans, defense counsel responded,

> I don't have evidence of that, Your Honor. The argument that I was making is that it's very difficult to fulfill that prong under the [*Duren*] test and , therefore, it is an unfair test.

Tr. I, 68:19-69:2. After a recess, the district court again advised the defense that it would take evidence on systemic exclusion. Defense

counsel simply responded that "I've already spoken to the evidence I have of that." Tr. I, 70:3-71:8.

On appeal, the defendant likewise fails to identify any systemic exclusion. He appears to argue that evidence of statistical disparity of representation of African Americans in his jury panel is alone sufficient to establish systematic exclusion in this case. Appellant's Brief at 26-32. The defendant is incorrect. As previously argued, he has not established any underrepresentation in violation of the fair-cross-section requirement. Furthermore, even if he had done so, there is still no showing of a causal link between any alleged underrepresentation and the procedures used to select Mong's jury pool.

Barring exceptional demonstrations of total exclusion over time, statistics alone cannot prove that underrepresentation is systematic. *See United States v. Rodriguez*, 581 F.3d 775, 790 (8th Cir. 2009) (quoting *United States v. Morin*, 338 F.3d 838, 844 (8th Cir. 2003)) ("[E]thnic and racial disparities between the general population and jury pools do not by themselves invalidate the use of [specific source] lists and cannot establish the systematic exclusion of allegedly under-represented groups."); *United States v. Hernandez-Estrada*, 749 F.3d

1154, 1166 (9th Cir. 2014) ("[W]hile Hernandez has introduced significant evidence regarding underrepresentation . . . , he has failed to provide evidence that this underrepresentation is due to the system employed . . . , and has therefore failed to establish a prima facie case under *Duren*."); *People v. Henriquez*, 406 P.3d 748, 763 (Cal. 2017).

The defendant never articulated any theory of systematic exclusion below and does not present such a theory on appeal, aside from his apparent claim that statistics alone may be sufficient. But that method of proof is specifically foreclosed by *Lilly*. Indeed, it was already foreclosed by the *Plain* decision in 2017, which *Lilly* took pains to point out:

> We said in *Plain*, "[T]he defendant must show evidence of a statistical disparity over time *that is attributable to the system for compiling jury pools*." 898 N.W.2d at 824 (emphasis added).
>
> We also quoted a law student note in *Plain* for the following point: "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." 898 N.W.2d at 824 (quoting David M. Coriell, Note, *An (Un)fair Cross Section: How the Application of* Duren *Undermines the Jury*, 100 CORNELL L. REV. 463, 481 (2015)). However, his quotation about what "stands to reason" should not be taken as a suggestion that we were eliminating the third prong of the prima facie case. To the contrary, we repeatedly noted that the defendant had the burden to establish systematic exclusion, not merely underrepresentation.

Lilly, 930 N.W.2d at 306 & n. 8. The district court issued its ruling in this case before *Lilly* was decided. However, even before *Lilly*, it was well-established that the defendant needs to prove causation, and that statistics alone are insufficient. *Plain*, 898 N.W.2d at 824.

Lilly elaborated on the manner of proof required to carry the burden of establishing systematic exclusion: a litigant must allege a causal link between jury management and underrepresentation, and then *prove* their causation theory with some kind of evidence:

> Litigants alleging a violation of the fair cross section requirement would still have to demonstrate that the underrepresentation was the result of the court's failure to practice effective jury system management. This would almost always require expert testimony concerning the precise point of the juror summoning and qualification process in which members of distinctive groups were excluded from the jury pool and a plausible explanation of how the operation of the jury system resulted in their exclusion. Mere speculation about the possible causes of underrepresentation will not substitute for a credible showing of evidence supporting those allegations.

Lilly, 930 N.W.2d at 307 (quoting Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded*, 59 DRAKE L. REV., 761, 790–91 (2011)). Mong did not even attempt to carry his burden to show systemic exclusion.

Mong has failed to show underrepresentation is "inherent in the particular jury-selection process utilized." *State v. Fetters*, 562 N.W.2d 770, 777 (Iowa Ct. App. 1997) (quoting *Duren*, 439 U.S. at 366). Both before and after *Lilly*, there has always been a requirement that a defendant raising a fair-cross-section challenge to a jury panel must "show causation, that is, that underrepresentation is produced by some aspect of the system.'" *See, Jones v. State*, No. 18–0134, 2019 WL 3330451, at *6 (Iowa Ct. App. July 24, 2019) (quoting *Lilly*, 930 N.W.2d at 306); *accord Williams*, 929 N.W.2d at 630 ("Once underrepresentation has been shown, the defendant must then show that some practice or practices caused the underrepresentation—i.e. the third *Duren*/*Plain* prong."); *Fetters*, 562 N.W.2d at 777 (quoting *Duren*, 439 U.S. at 366). Having failed to meet the requirement of causation, even assuming arguendo improper representation of African Americans, the district court rightly rejected the defendant's challenge to the jury.

D. Mong's Claim Should Be Rejected without Remanding to the District Court.

Finally, Mong notes that the record is inadequate to establish a fair-cross-section claim, places the blame for the lack of evidence on the district court, and seeks a remand to allow him to develop a

record. Following the recent decisions in *State v. Lilly*, *State v. Veal,* and *State v. Williams,* appellate courts have dealt with fair-cross-section challenges that were initially ruled on before those decisions by remanding them for consideration under the new standards for judging underrepresentation and systematic exclusion. *See, e.g.*, *State v. Shaw*, No. 18–0421, 2019 WL 5790884, at *4 (Iowa Ct. App. Nov. 6, 2019); *State v. Voigts*, No. 18–1927, 2019 WL 5424965, at *2 (Iowa Ct. App. Oct. 23, 2019). Although the defendant here requests a remand, such is not appropriate in this case for two reasons.

First, while the Court has remanded in cases in which the district court ruled prior to issuance of the Court's decisions in *Lilly*, *Veal*, and *Williams*, it has done so to permit analysis of the issue under its more recent decisions. It has not remanded to permit defendants to present additional evidence. Because Mong failed to present evidence on the second and third prongs of the *Duran* test, a remand would serve no purpose.

Second, Mong's apparent argument on appeal that he need not, and could not, prove causation for systematic exclusion was already wrong before *Lilly* was decided, as the Court explained in *Lilly*. *See Lilly*, 930 N.W.2d at 306 & n.8. A litigant should not be given a

second crack at carrying his burden on remand as a reward for arguing that his burdens do not exist. This claim was meritless when it was rejected, and nothing can save it.

Mong has failed to establish that he was denied a trial by a fair cross-section of the community. His challenge to his convictions must be rejected. Further, his request for a remand should be denied. A remand would serve no purpose as Mong failed to offer any evidence on the second and third prongs of the *Duran* test. Therefore, whether viewed under this Court's holding in *Plain* or its subsequent decisions in *Lilly*, *Veal*, and *Williams*, the lack of evidence would be fatal to Mong's claim.

Finally, Mong has raised an alternative claim of ineffective assistance of counsel. Mong has not, however, explained in what manner he believes that counsel was ineffective. His bare assertion that counsel was ineffective fails to state the specific ways in which counsel's performance was inadequate and identify how competent representation probably would have changed the outcome. *See State v. Astello*, 602 N.W.2d 190, 198 (Iowa Ct.App.1999). It also fails to comply with our rules of appellate procedure. See Iowa R. App. P. 6.14(1). The Court is not bound to consider claims that fail to comply

with our procedural rules, *Hanson v. Harveys Casino Hotel*, 652 N.W.2d 841, 842 (Iowa Ct.App.2002), or that require the Court to assume a partisan role and undertake a party's research and advocacy, *State v. Stoen*, 596 N.W.2d 504, 507 (Iowa 1999).

To the extent that Mong's brief might be read to claim that counsel was ineffective in failing to provide the district court with evidence of underrepresentation of African Americans or of systemic exclusion, that claim, too, must be rejected in this direct appeal. To prevail on an ineffective assistance claim involving complaints of specific acts or omissions, the defendant must show that "(1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom." *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *State v. Miles*, 344 N.W.2d 231, 233-34 (Iowa 1984); *State v. Clay*, 824 N.W.2d 488, 495 (Iowa 2012). The existing record is not adequate to reach that issue.

II. The District Court Did Not Err in Denying Mong's Motion to Compel Witness Testimony as the Witness Was Asserting His Fifth Amendment Right against Self-Incrimination.

Preservation of Error

The State does not challenge preservation of Mong's claim that the district court erred in denying his motion to compel testimony.

Mong made a written motion and the district court denied his motion. That was adequate to preserve error.

However, to the extent that Mong may be arguing that trial counsel was ineffective in failing to make a record of the questions defense counsel intended to ask the witness, Mong has waived that claim by failing to argue it. His bare assertion that counsel was ineffective fails to state the specific ways in which counsel's performance was inadequate and identify how competent representation probably would have changed the outcome. *See Astello*, 602 N.W.2d at 198. It also fails to comply with our rules of appellate procedure. See Iowa R. App. P. 6.14(1). The Court is not bound to consider claims that fail to comply with our procedural rules, *Hanson*, 652 N.W.2d at 842, or that require the Court to assume a partisan role and undertake a party's research and advocacy, *Stoen*, 596 N.W.2d at 507.

Scope and Standard of Review

The Court reviews de novo Mong's constitutional claim that his right to compulsory process was violated. *State v. Heard*, 934 N.W.2d 433, 439 (Iowa 2019); *State v. Russell*, 897 N.W.2d 717, 724 (Iowa 2017). Should the Court reach Mong's alternative claim of

ineffective of trial counsel, that claim also would be reviewed de novo. *Taylor v. State*, 352 N.W.2d 683, 684 (Iowa 1984).

Merits

Next, Mong challenges his convictions on the ground that the district denied his motion to compel testimony from Tyrone Hughes, Jr. The district court properly denied Mong's motion as Hughes was asserting his Fifth Amendment right against self-incrimination. Mong's challenge should be rejected.

The Fifth Amendment to the United States Constitution provides, "No person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Fifth Amendment's protections extend to nonparty witnesses. *Heard*, 934 N.W.2d at 439–40 (citing *Ohio v. Reiner*, 532 U.S. 17 (2001) (per curiam)).

> "[W]hen a witness' privilege against self-incrimination under the Fifth Amendment collides with an accused's right to compulsory process under the Sixth Amendment, the latter must give way."

Heard, 934 N.W.2d at 439–40 (quoting *State v. McDowell*, 247 N.W.2d 499, 500–501 (Iowa 1976) (collecting cases)).

"The privilege against self-incrimination extends to answers that 'would furnish a link in the chain of evidence needed to prosecute

the claimant for a ... crime.'" *Heard*, 934 N.W.2d at 440 (quoting *Hoffman v. United States*, 341 U.S. 479, 486 (1951)). A witness cannot claim the privilege "unless he has reasonable cause to apprehend danger from a direct answer." *State v. Parham*, 220 N.W.2d 623, 627 (Iowa 1974). The federal standard set out in *Hoffman* applies in a prosecution by a state in determining whether the privilege is properly asserted. *Heard*, 934 N.W2d at 440. The trial court has the discretion to decide if the witness has grounds to assert the privilege against self-incrimination and may require the witness to answer if "it clearly appears to the court that he is mistaken." *Heard*, 934 N.W2d at 440 (cleaned up); *Parham,* 220 N.W.2d at 626.

In *Bedwell,* our Court reviewed the district court's refusal to permit Bedwell to call as a witness his companion at the scene of the crime. This determination was based on the fact that this witness had indicated, through counsel, an intention to claim his fifth amendment privilege against self-incrimination. Bedwell argued that restrictions against calling witnesses before the jury who have indicated an intention to invoke their fifth amendment privileges only preclude the State from calling such witnesses and that there is no similar

restriction against a defendant calling a witness who has predetermined to invoke the privilege. *State v. Bedwell*, 417 N.W.2d 66, 69 (Iowa 1987).

Our Supreme Court held that the district court properly refused to let Bedwell call the witness. It found that it is improper to permit a defendant to call a witness predetermined to invoke his fifth amendment privilege. It further found that the jury is not entitled to draw any inference from the decision of a witness to exercise his constitutional privilege, whether those inferences be favorable to the prosecution or the defense. *Bedwell*, 417 N.W.2d at 69.

Our court recently revisited *Bedwell* and reached the same conclusion. In *Heard*, the defense gave the trial judge the specific questions he intended to ask Brown to review before the judge exercised his discretion to allow Brown to invoke a blanket privilege against self-incrimination. The questions were aimed at impeaching Brown, which would be unnecessary without his trial testimony, or at implicating Brown in the murder by placing him in the group and at the scene of the murder, which would incriminate Brown and classically support his assertion of the Fifth Amendment privilege. The Court held that the district court correctly ruled Brown was

entitled to a blanket assertion of the privilege. *Heard*, 934 N.W.2d at 441.

Similarly here, Hughes made a blanket assertion of this Fifth Amendment right against self-incrimination. Hughes was relying on the advice of his attorney in making a blanket assertion. Tr. I, 9:22-10:23. If the district court had compelled Hughes to testify, Hughes would have been forced assert his Fifth Amendment privilege in front of the jury and would have created an inference of Hughes' guilt. Our Court has provided a "categorical prohibition" on calling a witness to the stand simply to have the jury hear him invoke the privilege in order to infer his guilt. *Heard*, 934 N.W.2d at 441 (citing *McDowell*, 247 N.W.2d 499 and *Bedwell*, 417 N.W.2d at 69).

In the district court, Mong attempted to distinguish *Heard* on the ground that the witness in *Heard* had testified in Heard's first trial and then invoked his Fifth Amendment rights in Heard's retrial. In *Heard*, the Court rejected that basis for distinction. The Court noted that "a waiver of a [F]ifth [A]mendment privilege is limited to the particular proceeding in which the waiver occurs." *Heard*, 934 N.W.2d at 442 (cleaned up). The Court concluded that the witness' waiver of his privilege in Heard's first trial did not preclude him from

invoking the privilege at the second trial because those trials were separate proceedings. *Heard*, 934 N.W.2d at 442–43.

On appeal, Mong argues that the district court made no inquiry into whether Hughes had grounds to assert the privilege against self-incrimination. Here, the district court was advised that the subject matter of the defense's questions to Hughes would revolve around a statement Hughes had given claiming that Brandon Henlon had been in the same prison pod with Hughes and had told Hughes that he had committed the crimes for which Mong was on trial. Henlon died sometime around the time Hughes wrote a statement implicating Henlon and prior to trial. Tr. I, 6:21-8:12.[5] If the statement Hughes wrote falsely claimed that Henlon had confessed to him, then Hughes would have committed perjury by testifying about it at trial. The record also shows that Hughes' attorney was advising him to invoke the Fifth Amendment. This was sufficient to permit the district court to find that Hughes could invoke the Fifth Amendment as to the

[5] At a scheduled deposition for Hughes, defense counsel submitted a list of the questions he wished to ask of Hughes. Hughes' attorney confirmed that Hughes would invoke his Fifth Amendment right as to all of those questions. Attachment to State's Resistance to Motion to Compel (transcript of Hughes' deposition); App. 21-23. However, those questions are not contained in the record.

whole subject matter of what he claimed to have learned from Henlon.

The district court properly found that Hughes could invoke the protections of the Fifth Amendment and that he could do so in a blanket invocation outside the presence of the jury. *See, Heard*, 934 N.W.2d at 441 (Given that there was no element of the witness' testimony that would not be incriminating, we concluded the blanket assertion of privilege was appropriate.); *Bedwell*, 417 N.W.2d at 69 (Holding that it is improper for a prosecutor to require a witness to claim his privilege against self-incrimination in the presence of the jury when, as in this case, the prosecutor knows or has reason to anticipate the witness will assert it.); *McDowell,* 247 N.W.2d at 501 (witness could assert blanket privilege).

Mong makes an alternative argument of ineffective assistance of counsel. As noted above, that bare assertion is not sufficient to obtain review. To establish that his attorney was ineffective, Mong must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom. *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *State v. Miles*, 344 N.W.2d 231, 233-34 (Iowa 1984); *State v.*

Clay, 824 N.W.2d 488, 495 (Iowa 2012). Mong has not satisfied either requirement. The Court should reject this alternative claim.

III. There is Sufficient Evidence to Support Mong's Convictions for Attempted Murder, Intimidation with a Dangerous Weapon with Intent, and Willful Injury Causing Bodily Injury.

Preservation of Error

A defendant must preserve error by making a motion for judgment of acquittal. *State v. Grosvenor*, 402 N.W.2d 402, 406 (Iowa 1987); *State v. Dickerson*, 313 N.W.2d 526, 528 (Iowa 1981). If the motion for judgment of acquittal is limited to specific grounds, then the challenge on appeal should be limited to those same grounds. *State v. Schertz*, 328 N.W.2d 320, 321 (Iowa 1982). Mong's motions for judgment of acquittal made at the close of the State's case and at the close of all the evidence were adequate to preserve error. See, Tr. III, 175:6-185:23; Tr. IV, 101:23-104:7.

Scope and Standard of Review

The Court reviews a challenge to the sufficiency of the evidence for correction of errors of law. If the verdict is supported by substantial evidence, the Court will uphold a finding of guilt. "Substantial evidence" is that upon which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *State v.*

Henderson, 696 N.W.2d 5, 7 (Iowa 2005); *State v. Hagedorn*, 679 N.W.2d 666, 668-69 (Iowa 2004).

Merits

Mong challenges the sufficiency of the evidence to support his convictions for attempted murder, intimidation with a dangerous weapon, and willful injury causing bodily injury. He does not challenge the sufficiency of the evidence to support his conviction for going armed with intent. He challenges the sufficiency of the evidence to prove that he shot a gun and also challenges the sufficiency of the evidence to prove the specific intent elements of his crimes. His challenge to his convictions should be rejected as there is sufficient evidence to establish the challenged elements.

The test for whether the evidence is sufficient to withstand appellate scrutiny and support a verdict is whether the evidence is "substantial." *State v. Aldape*, 307 N.W.2d 32, 39 (Iowa 1981). In making that determination, the Court reviews the record in the light most favorable to the State. *Henderson*, 696 N.W.2d at 7. In reviewing the evidence in this "favorable light," the Court makes any legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record. *State v. Bass*,

349 N.W.2d 498 (Iowa 1984). The findings of the factfinder are to be broadly and liberally construed, rather than narrowly or technically, and in cases of ambiguity they will be construed to uphold, rather than defeat, the verdict. *State v. Price*, 365 N.W.2d 632, 633 (Iowa Ct. App. 1985). Evidence meets the threshold criterion of substantiality if it would convince a rational factfinder that the defendant is guilty beyond a reasonable doubt. *State v. LeGear*, 346 N.W.2d 21, 23 (Iowa 1984).

The jury members is free to give each witness' testimony such weight as it thinks it thought it should receive. *State v. Shanahan*, 712 N.W.2d 121, 135 (Iowa 2006) (citing *State v. Schrier*, 300 N.W.2d 305, 309 (Iowa 1981)). The jury is free to accept or reject any of a witness' testimony. *Shanahan*, 712 N.W.2d at 135 (*citing State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993)). The function of the jury is to weigh the evidence and "place credibility where it belongs." *Shanahan*, 712 N.W.2d at 135 (citing *State v. Blair*, 347 N.W.2d 416, 420 (Iowa 1984)).

Mong challenges the sufficiency of the evidence to prove that he shot a firearm and to prove the intent elements of his crimes. The evidence amply establishes those elements. Mong's jury was

instructed that, for the purposes of the charges of attempted murder and willful injury, the State was required to prove that Mong shot, or shot at, Shane Woods with a firearm. Jury Instruction Nos. 17, 25 (marshalling instructions); App. 40, 46. His jury was instructed that for the purposes of the charge of intimidation with a dangerous weapon, the State was required to prove that Mong shot a dangerous weapon. Jury Instruction No. 23 (marshalling instruction); App. 44. The dangerous weapon was a firearm. Instruction No. 34 (defining dangerous weapon); App. 52. There was sufficient evidence to prove that Mong fired a firearm.

Mong also challenges the sufficiency of the evidence to prove the intent elements of the charges against him. Each of Mong's charges contained a specific intent element. For the purposes of the charge of attempted murder, the State was required to prove that Mong specifically intended to cause the death of Shane Woods. Jury Instr. No. 17; App. 40. For the purposes of the charge of intimidation with a dangerous weapon, the State was required to prove that Mong had the specific intent to injure or cause fear or anger in Shane Woods. Jury Instr. No. 23; App. 44. To prove that Mong committed willful injury, the State was required to show that Mong specifically

intended to cause a serious injury to Shane Woods. Instruction No. 25; App. 46.

Mong's challenge to the evidence to support his convictions is based the language of the jury instructions that required the State to prove that Mong intended to act upon Shane Woods. He contends that the evidence was insufficient because to the evidence showed that Mong wanted to kill, injure or cause fear or anger in Ricco Martin rather than Shane Woods. The flaw in Mong's argument is that his jury was also instructed on transferred intent, as follows.

> Under the doctrine of transferred intent, once the intent to inflict harm on one victim is established, the criminal intent transfers to any other victim who is actually assaulted. A party is liable for a wrongful act, where there exists a criminal intent, although the act done, is not that which was intended. The wrongful intent to do one act, is transposed to the other, and constitutes the same offense.

Jury Instruction No. 16; App. 39.

Under the doctrine of transferred intent, Mong was properly convicted of attempted murder of Shane Woods, intimidation of Wood with a dangerous weapon, and willful injury of Woods based upon his act of shooting at Ricco Martin and his intent to kill, seriously injury, and injure or cause fear and anger in Martin. The evidence at trial showed that Mong's intended target was Ricco

Martin. Mong was nursing a deep grudge against Ricco because both men had been involved with Madison Cobb. Mong and had made numerous threats to shoot Ricco. The evidence shows that Mong shot at Ricco Martin but hit Shane Woods who was near Ricco at the time. That evidence is summarized as follows.

Anthony Mong and Madison Cobb had an on-and-of-again dating relationship from November of 2107 until just before the shooting on June 1, 2018. During that time, Ricco Martin and Madison Cobb were "friends with benefits." Tr. II, 46:16-47:13; 49:4-24; 94:3-7. Mong was not happy that Ricco would visit Madison at the family home and that Ricco would be there when he visited. Tr. II, 49:25-50:17.

The year before the shooting, Ricco had received thirty to forty intimidating text messages from Mong, one after the other. Ricco changed his phone number to avoid receiving further messages from Mong. Tr. II, 96:13-98:16.

Just before June 1, 2018, Ricco and Mong had an argument during which Mong told Ricco that "he wasn't going to fight me; he was going to shoot me." That was the last time Ricco saw Mong before June 1. Tr. II, 94:23-95:5; 96:6-9. Madison was present

during that argument and she heard Mong tell Ricco that, "he was done arguing, he didn't want to fight anymore, that he was just going to shoot [Ricco]." Tr. II, 50:18-51:6.

Todd Hines also testified that Mong and Ricco Martin did not get along. Within two weeks of June 1, Todd was present when Mong threatened Ricco. Mong told Ricco that he would not fight him; he was just going to shoot him. Tr. II, 208:21-210:4.

Heather Hines, too, was aware that there was a conflict between Mong and Ricco. A few weeks before the shooting, she had heard Mong threaten to beat up Ricco or just shoot him. Tr. II, 163:21-23; 165:6-10.

Around 8:00 p.m. on June 1, 2018, Todd Hines was outside in his yard with his nephew David Wood, David's father Shane Wood, and Ricco Martin. Tr. II, 210:5-25. Todd noticed Mong driving down the street in a Hyundai Sonata; the music in the car was blaring loudly. Tr. II, 212:7-24. Todd saw Mong drive past his house, go around the corner, turn around in the circle lot at the school and saw him making his way back to Todd's house. Todd thought, "Oh, boy, it's going to happen now." Tr. II, 212:25-213:18.

Todd ran inside to his bedroom, got his gun, and went back outside. He had the gun tucked into the back of his waistband. Tr. II, 214:2-24. When he first walked outside with his gun, Todd saw Mong walking into his driveway. He saw that Mong had a gun in his hand. Tr. II, 218:25-219:12. Todd thought Mong was going to shoot Ricco. Tr. II, 212:25-213:18. When Mong drove past his house the first time, Todd had heard Mong rack the gun, chamber a bullet. Tr. II, 219:13-220:10; 223:16-23.

Todd told Mong, "Don't do this." He repeated the warning twice. Then Todd ran into the house. He was inside the house but standing by the sliding door to his home and looking outside when he heard Mong fire two shots. Tr. II, 215:4-8; 218:17-24; 228:21-23. He turned around and told Shane to run because Mong was shooting. Shane said, "I'm hit." Tr. II, 218:4-10; 220:14-221:1.

Shane corroborated Todd Hines' account of events. Shane saw Mong drive by, pull up in front of the yard, but then drive on. He watched as Mong went around the corner, turned around, and came back. Tr. II, 242:10-243:25. This time, Mong stopped in front of the house, got out of the car, and walked to the back of the car. By that time, Todd had gone into the house and come back out. Shane heard

Todd say, "Don't Tony, don't." Shane looked and saw that Mong was at the driveway with a gun pulled. Tr. II, 244:1-20.

Shane did not have any ongoing conflict with Mong; he "had no problems with him at all." Tr. II, 243:4-13. When he saw that Mong had a gun, he did not run because he did not think he had a problem. Shane just turned around to walk back towards the house. He heard a shot and he was hit on the left side of his back. The bullet came out of his arm. Tr. I, 244:21-245:2. At the time he was shot, Shane was approximately six to eight feet from Ricco, who was standing by the front of the deck. Tr. III, 25:15-27:11; Exh. 10 (photograph); App. --.

Ricco Martin was outside with Todd Hines, David Woods, and Shane Woods when Mong arrived. He, too, saw Mong drive by, make a U-turn, and come back. Tr. II, 99:7-100:11. Todd Hines told Ricco to go inside, but he did not. Ricco saw Mong jump out of the car. He saw Mong run behind a tree and shoot. Shane was hit. Tr. II, 100:12-101:21. Ricco believed that Mong was trying to shoot him instead of Shane. Tr. II, 102:20-23.

David Woods saw Anthony Mong drive by the Hines house. Mong gave the men "a little stare down" as he drove by. David saw

Mong turn around at the school, then Mong "cranked his music and came back." Tr. II, 174:8-177:1.

David's instincts told him that something was going to happen, so he went to the garage and grabbed a ball bat. He could see in Mong's face that something was going to happen. Tr. II, 177:3-11; 181:14-19. While David was in the garage, he heard a gunshot and heard his uncle say, "He's got a gun," then heard his dad yell, "I'm hit. I'm hit." Tr. II, 177:12-19. David immediately left the garage. He saw that his dad was bleeding and he chased after Mong with the baseball bat. Mong got back in his car really quickly and sped off. Tr. II, 177:14-179:1; 180:5-12.

In his trial testimony, Mong denied that he had a gun with him and denied that he intended to shoot anyone at the Hines residence or that he intended to fight anyone there and denied that he shot at anyone at the Hines residence. Tr. IV, 41:8-22. He testified that he was storing a red Cadillac at the Hines residence. Todd Hines had planned to help Mong and Madison fix up the car. After Mong and Madison broke up, Mong wanted his car back. Tr. IV, 20:16-23:24. Mong testified that he went to Hines' house on May 31, 2018 and talked to Todd Hines about getting the car back. Todd told him to

come back on the weekend because Madison had the title and keys to the car and she was not home. Tr. IV, 23:25-24:17.

Mong testified that after he got off work on June 1, 2018, he and Brandon Henlon were riding around and Mong decided to go get his Cadillac. Tr. IV, 24:21-29-30:1. Mong testified that when he got to the Hines residence, he saw Todd Hines, Ricco Martin, and Shane and David Woods all sitting outside. He pulled up in front of the house and parked behind a big tree in the yard. He told Henlon to stay in the car and then he got out with his cell phone in his hand. Mong testified that he saw that Todd had a gun. He saw Ricco grab the gun, so Mong ducked behind the tree. Tr. IV, 32:16-36:12; 43:6-13.

While he was behind the tree, Mong testified, he heard one shot fired from the direction of the men in the Hines' yard. Then, he heard a second shot. That shot was fired from behind Mong, from his car. Mong ran back to the car and drove off. Tr. IV, 37:8-38:25; 82:9-17. Mong saw that Henlon had a gun in his hand. Tr. IV, 39:1-8. No other witness at the scene reported seeing a passenger in the car Mong drove that night.

Mong was afraid that someone would come after him or shoot him, so he stayed in a hotel until morning, then a friend drove him to Las Vegas, where his mother lived. He testified that he was afraid and also that his mother was sick and he wanted to visit her. Tr. IV, 39:19-40:25. He claimed that he did not know that Shane Woods was shot; he did not learn that Shane Woods had been injured until a day or two after he arrived in Las Vegas. He testified that he did not try to contact the police in Iowa because Henlon was his best friend and had saved his life and he did not want to get him in trouble. Tr. IV, 42:15-43:5; 73:15-22; 81:13-20; 82:22-25.

Mong was arrested in Las Vegas two months after Shane Woods was shot. Tr. IV, 79:21-23. Henlon died before Mong's trial. Tr. IV, 55:12-15. Mong never told the police that Henlon shot the second shot until after Henlon had died. Tr. IV, 89:9-90:6

The jury was free to disbelieve Mong's testimony that the shot that hit Shane Woods was fired by Brandon Henlon. *Shanahan*, 712 N.W.2d at 135. By its verdict the jury showed that it did so.

The evidence overwhelmingly proved that it was Anthony Mong who shot Shane Woods. It also overwhelmingly proved the necessary intent elements. The evidence showed that Mong was angry with

Ricco Martin and threatened to shoot him. About two weeks later Mong found Ricco at Todd Hines' home and tried to carry out that threat, though his aim was off. Mong's specific intent was shown by his earlier threats and by the fact that Mong first drove by the house and glared at the men outside, then turned around, parked, and got out with a gun. Mong ignored the entreaties from Todd Hines not to shoot, stayed at the scene even when he saw Todd also had a gun, and shot his weapon in the direction of Ricco Martin and Shane Woods. Thus, even though Mong's intent to kill, his intent to seriously injure, and his intent to injure or cause fear or anger was directed at Ricco Martin, Mong was properly convicted of attempting to murder Woods of intimidation of Woods with a dangerous weapon, and willful injury of Woods causing bodily injury. *State v. Harlow*, 886 N.W.2d 106 (Iowa Ct. App. 2016) (Affirming Harlow's conviction for assault where the evidence showed Harlow inadvertently struck the baby in the face and gave the baby a black eye while assaulting the baby's mother, who was holding the baby at the time of the assault.). Mong's challenge to the sufficiency of the evidence should be rejected.

CONCLUSION

The Court should affirm Anthony Alexander Mong's convictions.

REQUEST FOR NONORAL SUBMISSION

Oral argument is unlikely to assist the Court in deciding the issue raised on appeal. Therefore, the State waives oral argument. However, if appellant is granted oral argument, counsel for appellee desires to be heard in oral argument, as well.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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