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NO. 18-0294

IN THE
SUPREME COURT OF IOWA

STATE OF IOWA,
Plaintiff-Appellee
vs.

EARNEST BYNUM,
Defendant-Appellant

APPEAL FROM THE LINN COUNTY DISTRICT COURT
No. SRCR116884

Hon. Nicholas Scott, Judge

APPELLANT'S REPLY BRIEF

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A. BEING TRIED BY A JURY SELECTED FROM A POOL OF PROSPECTIVE JURORS FROM WHICH ALL AFRICAN-AMERICANS HAD BEEN REMOVED VIOLATED THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY

The salient facts are not in dispute – Mr. Bynum was tried by a jury selected from a venire in which there were no African-Americans. The State asserts that Mr. Bynum's fair-cross-section claim was procedurally defaulted by defense counsel, Appellee's Brief, at page 13. Contrary to the State's assertion, this issue was raised and ruled upon by the District Court, thus preserving the issue for review on appeal. Specifically, Mr. Bynum, who is African-American, objected to the composition of the jury pool and requested a new trial with a new panel. [Tr. II, p. 17:8-12]. When asked if the State had a response to the jury composition issue, the prosecutor said, "I don't." [Tr. II, p. 18:18-20]. The district court overruled Bynum's objection and denied his request but did affirm that none of the 21 potential jurors in Mr. Bynum's case was African-American. [Tr. II, p. 18:21 – 19:4].

Moreover, because the prosecutor did not assert at trial that the fair cross-section claim had been procedurally defaulted, and the State is precluded from

raising this claim for the first time on appeal. *See DeVoss v. State*, 648 N.W.2d 56, 63 (Iowa 2002). In *Devoss*, the court held that,

> Unquestionably, the State could have urged in the district court DeVoss' failure to raise in her direct appeal her ineffective-assistance-of-counsel claim regarding her trial counsel's failure to pursue the coaching issue at the original trial. The State's failure to do so waives DeVoss' failure to comply with section 822.8, allowing us to proceed to the merits of DeVoss' postconviction relief claims.

The State also asserts that there was no policy in place that led to the exclusion of African-Americans from the jury. Appellee's Brief, at page 17, to wit: "[t]he State submits Bynum would have to prove there was a policy in place of allowing civil juries to be picked before criminal juries, or that the court in his case was made aware of the racial composition of the jury pool prior to agreeing to let the civil case proceed first with jury selection." This argument relates to the third part of the three-part test for establishing a prima facie violation of the fair cross-section requirement.

The first two parts are (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. The State does not contest that these two parts of the test are met. The third part of this test is that this

underrepresentation is due to systematic exclusion of the group in the jury-selection process. *State v. Plain*, 898 N.W.2d 801, 821-22 (Iowa 2017).

This case therefore presents the following question. What good does it do to put a system in place to assure that the pool of potential jurors fairly reflect the racial composition of the community if that system can be tinkered with in a manner that, as in this case, unbalances the racial composition of the venire so that African-Americans accounted for 0% of the potential jurors available compared to 5.6% of the community? Mr. Bynum's answer is that tinkering with a system designed to yield a fair-cross section of the community in a manner that frustrates that goal is a form of systematic exclusion. The district associate judge had an opportunity to rectify the problem when it was presented to him, by declaring a mistrial, but failed to do so even when realizing that the fair cross-section goal had been thwarted. This essentially ratified the process that resulted in the exclusion of African-Americans from the venire.

Moreover, the fact that the civil trial conducted by a district court judge was given precedence in using the venire over the criminal trial before a district associate judge is evidence of a policy. There is no evidence that the judges got together and flipped a coin to decide which case could have access to the venire first, or that what occurred was otherwise a random occurrence. The evident

policy is that the district court judge's civil case was given priority over the criminal case, and as a result of application of that policy, the criminal trial was left with no African-Americans in the venire.

In conclusion, African-Americans were excluded from the venire in the Mr. Bynum's case as a result the deliberate decision to give the civil case precedence over the criminal case and the deliberate decision to proceed with a trial with a jury chosen from a panel with no African-Americans even when a motion for a mistrial was made to remedy the situation. This was not something caused by chance or random events and was thus systematic in nature.

B. THE TRIAL COURT ERRED BY ALLOWING THE STATE TO INTRODUCE PHOTOGRAPHS OF THE FIREARMS THAT THE POLICE POSSESSED TO ESTABLISH THE SEVERITY OF THE POLICE RESPONSE.

The question is whether the trial court erred by allowing the prosecutor to publish to the jury two photographs of AR-15 assault rifles that the police carried in response to the false report.

Evidence is relevant if: "a. It has any tendency to make a fact more or less probable than it would be without the evidence; and b. The fact is of consequence in determining the action." Iowa R. Evid. 5.401. Photographs of the AR-15 rifles might arguably be relevant in the trial of a false report charge if and only if, as the prosecutor incorrectly asserted, the police response to the

false report determines whether the offense reported was an indictable misdemeanor. As explained below, the case was not tried on this theory and so the photographs were clearly irrelevant and highly prejudicial.

Early on during the trial, the State was allowed to introduce photographs of two AR-15 assault rifles that the police brought with them when responding to the false report. At that time, the judge said that, "I think it's relevant to show the jury the chain of events as they occurred and actions that were initiated with that 911 (sic) phone call." [Tr. II, p. 4:1-3]. The judge reasoned that "we see guns all the time on TV and photographs." [Tr. III, p.4:4-14].

Later on during the trial, the judge ruled that how the police respond to a report does not determine whether the defendant is guilty of the penalty enhanced version of making a false report. The judge ruled that it is what is reported by the defendant, not how the police respond to the report, that is determinative. The judge concluded that the jury should therefore be advised of the definition of the various offenses the State alleged had been falsely reported in order to determine if the falsely reported acts were indictable misdemeanors. [Tr. II, p. 123:22 – 124:8].

The corollary to this ruling that how the police responded to the report does not determine if the report is an indictable offense is that the photographs

of the AR-15's did not make any fact in issue more or less likely. The photographs of the AR-15's are therefore totally irrelevant. *Compare State v. Harris*, 589 N.W.2d 239 (Iowa 1999) (to prove defendant's access to a handgun, a police officer testified about a photograph depicting the defendant with a handgun that would produce rifling characteristics similar to those on the bullet recovered from the murder victim). In contrast to the circumstances that made the photograph of a gun relevant in the *Harris* case, that the police were armed with military-style assault rifles had nothing to do with the nature or elements of the offense of false report.

The State's fallback argument is that publication of the photographs of the AR-15 assault rifles was harmless error. Appellee's Brief, page 30. Mr. Bynum disagrees. Other than bringing the rifles into the courtroom, publication of photos of the assault rifles is the most prejudicial irrelevant evidence the State could have presented. This is because visual evidence of the assault rifles that the police brought to the scene is bound to elicit a strong emotional response given, among other things, their use to commit mass murders and the fact that they are designed for use in military combat.

Accordingly, Mr. Bynum asserts that because the photographs depict assault rifles combined with the fact that the photos of the guns are totally

irrelevant, publishing those photographs to the jury was reversible error, either on its own or in conjunction with the erroneous admission of other bad acts evidence, as set forth Division VII(2) of Appellant's brief, beginning at page 13.

C. THE JURY SHOULD HAVE BEEN INSTRUCTED NOT TO PRESUME THAT A PERSON WHO IS SEEN IN PUBLIC IN POSSESSION OF A FIREARM IS COMMITTING A CRIME.

The trial evidence established that Mr. Bynum reported to the police that he saw a man or perhaps two in possession of a firearm leave a car and approach and enter a house in Cedar Rapids. [Exhibit 1, audio of call to police]. Mr. Bynum was charged with and found to be guilty of reporting the alleged occurrence of criminal activity knowing the act did not occur in violation of Iowa Code § 718.6(1). The penalty for this offense is a simple misdemeanor, "unless the alleged criminal act reported is a serious or aggravated misdemeanor of felony," in which case the person commits a serious misdemeanor.

Mr. Bynum was convicted of the penalty-enhanced version of Chapter 718.6(1), i.e. that he falsely reported the commission of an indictable offense. The jury verdict specified that the offense falsely reported was "Carrying Weapons." [Forms of Verdict, filed Jan. 11, 2018; Appendix p. 225]. The jury

was given the option to find other offenses but checked only the box for the Carry Weapon offense.

If Appellant correctly understands the State's argument, it appears that the State's position is that it was sufficient that Bynum made a false report to uphold his conviction for the penalty-enhanced version of the false-reports statute. Specifically, the State asserts that, "Bynum's argument is irrelevant to the question of his guilt in knowingly reporting a crime that did not exist or occur because having a valid permit to carry a firearm is a defense to a charge of carrying weapons not at issue in his case." [Appellee's Brief, page 34].

Mr. Bynum respectfully disagrees. Whether having a valid permit is a defense to a charge of carrying weapons is at issue in this case because the jury determined that he reported that offense, which in turn subjected him to an enhanced penalty. Although simply carrying a weapon within the city limits is not a crime unless the person carrying the weapon does not have a permit, the jury in Mr. Bynum's case was instructed that carrying a weapon within the city limits is always a crime. Specifically, the judge's instruction (No. 14, Appendix p. 19) was that a person commits the crime of Carrying Weapons when:

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

The jury was not told of the several circumstances, as set out in Chapter 724.4(4), that exempt persons in possession of a firearm from the reach of Chapter 724.4(1). In particular, Chapter 724.4(1) does not apply when:

> (i) A person who has in the person's possession and who displays to a peace officer on demand a valid permit to carry weapons which has been issued to the person, and whose conduct is within the limits of that permit. A person shall not be convicted of a violation of this section if the person produces at the person's trial a permit to carry weapons which was valid at the time of the alleged offense and which would have brought the person's conduct within this exception if the permit had been produced at the time of the alleged offense.

The jury could not do its job because it was not given the tools to do so – which in this case is knowledge that carrying a weapon in Iowa is not inherently illegal. One of the state's witnesses, Officer Aguero, on cross-examination, admitted that possession of firearms is not inherently illegal, and that there are hundreds of thousands of Iowans who possess licenses allowing them to carry firearms. [Tr. II, p. 141:9-16]. However, the jury instructions failed to so advise the jury during their deliberation of whether Bynum falsely reported the crime of Carrying Weapons.

In *State v. Gordon*, 732 N.W.2d 41, 44 (Iowa 2007) the Court discussed penalty enhancements. *Gordon* cited *State v. Brady*, 442 N.W.2d 57, 58 (Iowa 1989) as authority that, "habitual offender statutes do not charge a separate offense," but simply "provide for enhanced punishment on the current offense." Consequently, if the habitual-offender statute does not apply, an enhanced sentence based on habitual-offender status is "not permitted by statute" and is, therefore, illegal. Likewise, in Mr. Bynum's case, because what he reported was not an indictable offense, then his penalty-enhanced sentence is not permitted by statute, and is illegal.

Furthermore, when the defendant timely requests an instruction on a theory of defense, the theory is supported by the evidence, and the instruction is a correct statement of the law, the instruction must be given. *State v. Guerrero Cordero*, 861 N.W.2d 253, 260 (Iowa 2015), *overruled in part by Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699, 708 n.3 (Iowa 2016); Iowa R. Crim. P. 2.24(2)(b)(7) (new trial may be granted when the "the court has refused to properly instruct the jury.")

In conclusion, the failure to properly instruct the jury prejudiced Mr. Bynum because the jury found that he falsely reported an indictable misdemeanor, Carrying Weapons, and this finding enhanced the offense from a

simple misdemeanor to a serious misdemeanor. The penalty imposed upon Mr. Bynum was 365 days in jail, all but 14 suspended, which far exceeds the maximum sentence for a simple misdemeanor. Moreover, imposition of a penalty-enhanced sentence not supported by evidence is illegal. *Gordon*, 732 N.W.2d at 44.

D. CONCLUSION

For the reasons and upon the authority cited herein, Earnest Bynum requests that the Court set aside his conviction and remand the case to the district court for a new trial.

Respectfully submitted,

MARK C. MEYER, Attorney for Appellant

IV. CERTIFICATES

A. CERTIFICATE OF FILING

I hereby certify that on 11/13/2018, I electronically filed the foregoing with the Iowa Supreme Court Clerk by using the ECF system. I certify that all participants in the case are registered ECF users and that service will be accomplished by the ECF system.

MARK C. MEYER

B. PROOF OF SERVICE

I certify that on 11/13/2018 I served this document on the Applicant by mailing

1 copy of it to the last known address of:

Earnest Bynum

C. CERTIFICATE OF COMPLIANCE

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

   [x] Based on a word count from Microsoft Word 2010 this brief contains approximately 2438 words excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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

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

11/13/2018

MARK C. MEYER DATE