

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 BRIEF AND ARGUMENT
AND
CONDITIONAL REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE

On April 8, 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.

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TABLE OF CONTENTS

	<u>Page</u>
Certificate of Service	2
Table of Authorities.....	4
Statement of the Issues Presented for Review.....	10
Routing Statement	16
Statement of the Case	16
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.	27
Conclusion.....	44
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”.	44
Conclusion.....	57
Conditional Request for Oral Argument.....	57
Attorney's Cost Certificate.....	57
Certificate of Compliance	58

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page:</u>
Gering v. State, 382 N.W.2d 151 (Iowa 1986)	46
Jewel v. CSX Transp., Inc., 135 F.3d 361 (6th Cir. 1998)	49
Lamasters v. State, 821 N.W.2d 856 (Iowa 2012)	46
Mascarello v. U.S., 118 S.Ct. 1911, 524 U.S. 125 (1998)	39-41
State v. Allison, 576 N.W.2d 371 (Iowa 1998)	30
State v. Ambrose, 861 N.W.2d 550 (Iowa 2015)	45
State v. Bayles, 55 N.W.2d 600 (Iowa 1996)	48
State v. Brothern, 832 N.W.2d 187 (Iowa 2013)	45-46
State v. Chenoweth, 284 N.W. 110 (1939)	35
State v. Clay, 824 N.W.2d 488 (Iowa 2012)	45-46
State v. Fountain, 786 N.W.2d 260 (Iowa 2010)	29
State v. Goff, 342 N.W.2d 830 (Iowa 1983)	30
State v. Graves, 668 N.W.2d 860 (Iowa 2003)	31
State v. Hanes, 790 N.W.2d 545 (Iowa 2010)	29
State v. Hopkins, 576 N.W.2d 374 (Iowa 1998)	30, 46
State v. Hrbek, 336 N.W.2d 431 (Iowa 1983)	30, 46

State v. Kehoe, 804 N.W.2d 302 (Iowa Ct. App. 2011)	35
State v. Ondayog, 722 N.W.2d 778 (Iowa 2006).....	28, 45
State v. Payne, No. 16-1672, 2018 WL 1182624 (Iowa Ct. App. March 7, 2018).....	54-55
State v. Robinson, 859 N.W.2d 464 (Iowa 2015).....	54
State v. Thompson, No. 12-2314, 2013 WL 6686624 (Iowa Ct. App. Dec. 18, 2013).....	38-39
State v. Tobin, 333 N.W.2d 842 (Iowa 1983).....	28-29
State v. Yenger, No. 17-0592, 2018 WL 3060251 (Iowa Ct. App. June 20, 2018).....	53-54
Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	30, 46
Taylor v. State, 352 N.W.2d 683 (Iowa 1984).....	29-30, 45
United States v. DiDomenico, 78 F.3d 294 (7th Cir. 1996)	49
Washington v. Scurr, 304 N.W.2d 231 (Iowa 1981)	30, 46
<u>Constitutional Provisions:</u>	
U.S. Const. amend. VI.....	45
U.S. Const. amend. XIV	45
Iowa Const. art. 1, § 10.....	45

Statutes & Court Rules:

Iowa Code 124.401(1)(e)-(f) (2017)	38
Iowa Code § 724.1B (2017).....	36
Iowa Code § 724.1C (2017).....	36
Iowa Code § 724.2(2) (2017)	36
Iowa Code § 724.3 (2017).....	36
Iowa Code § 724.4(1) (2017)	37
Iowa Code § 724.4C (2017).....	34-35
Iowa Code § 724.26(1) (2017)	36
Iowa Code § 724.26(2)(a)	36
Iowa Code § 814.7(2)-(3) (2017).....	45
Iowa R. App. P. 6.907.....	29
Iowa R. Evid. 5.801 (2017)	48
Iowa R. Evid. 5.804(b)(3) (2017)	48

Jury Instructions:

Iowa Crim. Jury Instr. 200.44 (Rev. 6/2018).....	55
Iowa State Bar Ass'n, Iowa Criminal Jury Instruction No. 200.16 (2017)	50-51
Iowa State Bar Ass'n, Iowa Criminal Jury Instruction No. 200.42 (2017)	50

Iowa State Bar Ass’n, Iowa Criminal Jury Instruction No. 200.43 (2017)	50
Iowa State Bar Ass’n, Iowa Criminal Jury Instruction No. 200.44 (2015)	47
Iowa State Bar Ass’n, Iowa Criminal Jury Instruction No.200.47 (2017)	32
Iowa State Bar Ass’n, Iowa Criminal Jury Instruction No. 200.48 (2017)	37
Iowa State Bar Ass’n, Iowa Criminal Jury Instruction No. 2400.6 (2017)	37
<u>Other Authorities:</u>	
2 Oxford English Dictionary 919 (2nd ed. 1989).....	40
The American Heritage Dictionary 243 (2nd College ed.1985).....	39
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	52
Committee on Model Criminal Jury Instructions Third Circuit, Model Criminal Jury Instructions (2017), http://www.ca3.uscourts.gov/model-jury-instructions..	51
Committee on Pattern Jury Instructions, District Judges Association, Fifth Circuit Pattern Jury Instructions (Criminal Cases) (2015), http://www.lb5.uscourts.gov/juryinstructions	51

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	52
Laurie Kratky Doré, 7 Iowa Practice Series, Evidence 5.801:9 (Nov. 2018).....	48
Fed. R. Evid. 801(d)(2).....	49
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	54
Judicial Council of the Eleventh Circuit, Eleventh Circuit Pattern Jury Instructions (Criminal Cases) (2016), http://www.ca11.uscourts.gov/pattern-jury-instructions	52
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	52
Ninth Circuit Jury Instructions Committee, Manual of Model Criminal Jury Instructions (2017), http://www3.ca9.uscourts.gov/jury-instructions/model-criminal	52
Random House Dictionary of the English Language Unabridged 319 (2nd ed. 1987).....	40
Sixth Circuit Committee on Pattern Jury Instructions, Pattern Criminal Jury Instructions (2017), http://www.ca6.uscourts.gov/pattern-jury-instructions	51-52

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](http://www.med.uscourts.gov/pattern-jury-instructions)51

Webster’s Third New International Dictionary 343
(1986)40

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether 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?

Authorities

State v. Ondayog, 722 N.W.2d 778, 785 (Iowa 2006)

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Iowa R. App. P. 6.907

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1. The Statutory Language is Phrased in Terms of ‘Carrying’ not ‘Possession’:

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

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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".

Authorities

State v. Ondayog, 722 N.W.2d 778, 784 (Iowa 2006)

Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984)

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State v. Clay, 824 N.W.2d 488, 494 (Iowa 2012)

U.S. Const. amend. VI

U.S. Const. amend. XIV

Iowa Const. art. 1, § 10

State v. Ambrose, 861 N.W.2d 550, 555 (Iowa 2015)

State v. Brothern, 832 N.W.2d 187, 192 (Iowa 2013)

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

Strickland v. Washington, 466 U.S. 668, 669, 104 S.Ct. 2052, 2055 (1984)

Gering v. State, 382 N.W.2d 151, 153-54 (Iowa 1986)

State v. Hopkins, 576 N.W.2d 374, 379-80 (Iowa 1998)

State v. Hrbek, 336 N.W.2d 431, 435-36 (Iowa 1983)

Washington v. Scurr, 304 N.W.2d 231, 235 (Iowa 1981)

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

Iowa R. Evid. 5.801 (2017)

Iowa R. Evid. 5.804(b)(3) (2017)

State v. Bayles, 55 N.W.2d 600, 606 (Iowa 1996)

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

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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)

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(Iowa Ct. App. March 7, 2018)

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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](https://cdn.ymaws.com/www.iowabar.org/resource/resmgr/ilw_resources/IJIC_Letter.pdf)

Iowa Crim. Jury Instr. 200.44 (Rev. 6/2018)

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because the issues raised involves substantial issues of first impression or of enunciating or changing legal principles in Iowa. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c) & (f).

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by Defendant-Appellant, Montreal Shorter, from his conviction, sentence, and judgment, following a jury trial for Carrying a Dangerous Weapon, a Serious Misdemeanor in violation of Iowa Code section 724.4C (2017).

Course of Proceedings: On January 3, 2018, the State charged Shorter with Carrying a Dangerous Weapon While Intoxicated, a Serious Misdemeanor in violation of Iowa Code section 724.4C (2017). (1/31/18 Trial Information; 5/4/18 Mot. to Amend TI; 5/4/18 Order Granting Mot. Amend; 5/4/18 Amended TI) (App. pp. 4-5; 10; 11-12; 13-14). Shorter pled not guilty, and ultimately waived his 90-day right to

speedy trial. (2/5/18 Arraignment; 3/12/18 Waiver of Speedy) (App. pp. 6-8; 9).

A jury trial commenced on May 7, 2018. (Trial Vol.1 p.1 L.1-25). On May 8, the jury returned its verdict finding Shorter guilty of the offense as charged. (Trial Vol.2 p.1 L.1-25, p.62 L.10-p.63 L.3, p.67 L.6-7).

A sentencing hearing was held on May 31, 2018. At that time, the court entered judgment against Shorter for Carrying a Dangerous Weapon While Intoxicated, in violation of Iowa Code section 724.4C (2017). The court imposed but suspended a one-year sentence of incarceration, and placed Shorter on probation for one year. The court imposed a \$315 fine plus applicable surcharge. The court also ordered Shorter to attend a First-Time Offender Class, be tested for alcohol use, undergo a substance abuse evaluation, and cooperate with any treatment recommendations. (Sent. Tr. p.9 L.12-p.10 L.7); (5/31/18 Sentencing Order) (App. pp. 21-24).

Shorter filed a Notice of Appeal on June 27, 2018. (6/27/18 NOA) (App. p. 25).

Facts: During the early morning hours of December 23, 2017, Defendant Shorter and his friend (David) had been denied entry to the Minx Show Palace in Des Moines, owing to the club's dress code policy. Shorter's friend David grew confrontational, and was maced by one of the bouncers in the parking lot. Some of the overspray from the mace also hit Shorter. Club security called the police, who responded to the scene. (Trial Vol.1 p.26 L.20-p.27 L.7, p.35 L.23-p.36 L.6, p.56 L.5-p.57 L.6).

When law enforcement pulled into the Club parking lot, Deputy Jacob Murillo observed David in the middle of the parking lot and Shorter standing about ten to fifteen feet to the rear of a black Volkswagen Jetta (Shorter's vehicle). (Trial Vol.1 p.23 L.3-4, p.26 L.5-11, p.27 L.22-p.28 L.1, p.32 L.9-18).

Deputy Murillo testified that he asked Shorter if he had been drinking, and that Shorter responded he had not. (Trial Vol.1 p.28 L.2-6). However, Deputy Murillo testified Shorter exhibited signs of intoxication, including stumbling, slurred

speech, red bloodshot watery eyes, and demeanor going from extremely excited to calm. (Trial Vol.1 p.25 L.6-14). One of the club's security officers, Anthony Weber, also testified that Shorter had exhibited signs of intoxication, including slurred speech, odor of alcohol, glossy and wet eyes, and unstable standing. (Trial Vol.1 p.52 L.22-p.53 L.18). A preliminary breath test was administered on Shorter, indicating a blood alcohol content of 0.113. (Trial Vol.1 p.25 L.15-p.26 L.4, p.28 L.7-9).

Deputy Murillo testified one of the security guards told him that, after the mace incident, Shorter had gone back to his vehicle, and had been rummaging through the center console. (Trial Vol.1 p.27 L.8-17). Deputy Bradley Hook testified the security guards told him one of the males had made a statement to the effect of "I always carry. I got mine"; then walked over to his car, opened the door, and was reaching into the proximity of the driver's seat just before law enforcement arrived. (Trial Vol.1 p.36 L.17-23, p.43 L.13-20).

Deputy Hook decided to check Shorter's vehicle. He testified that he found the driver's side door of the vehicle already sitting open, and shined his flashlight in to observe a handgun in a soft holster sitting on the center console. (Trial Vol.1 p.36 L.24-p.38 L.5). Deputy Hook seized the handgun, which he testified had been in reach of the open door. (Trial Vol.1 p.38 L.6-7, p.43 L.20-22). The gun was found loaded with a magazine. The slide was not racked and there was no round in the chamber. (Trial Vol.1 p.39 L.1-12).

After Deputy Hook saw the gun in the vehicle, he motioned to the other deputies to handcuff Shorter and his friend. (Trial Vol.1 p.38 L.11-25). Deputy Murillo testified that being intoxicated makes a license to possess a concealed weapon invalid. (Trial Vol.1 p.29 L.4-8). Shorter was arrested for intoxication while carrying a firearm. (Trial Vol.1 p.29 L.1-3). Deputy Murillo testified that he twice told Shorter, following his arrest, that "You can't carry a gun while drunk", and that Shorter did not ever deny possessing or carrying his

firearm, though he had denied being intoxicated. (Trial Vol.1 p.29 L.22-p.30 L.6).

Officer Murillo's vehicle was equipped with a dash cam and back seat video surveillance. The squad video was admitted into evidence as State's Exhibit 1, and was played for the jury at trial. (Trial Vol.1 p.23 L.15-p.24 L.16; Exhibit 1). The pertinent aspects of Deputy Hook's interaction with Shorter's vehicle, including whether the driver's door was already open and the particular location of the gun, are not visible from the perspective of the video. (Exhibit 1).

Deputy Murillo and Deputy Hook both acknowledged that, though club security indicated concerns about a gun after police had already arrived, there was no indication anything about a weapon had been mentioned by club security during the earlier phone call requesting police assistance. (Trial Vol.1 p.31 L.8-24, p.43 L.1-3).

Anthony Weber worked as a security officer at the Minx, and Matthew Carroll worked as the armed security guard there. (Trial Vol.1 p.44 L.17-22, p.45 L.14-25, p.46 L.13-21).

Weber testified that when somebody comes to the club, the first question club security asks is “Do you have any knives or weapons on you?” Weber testified he had asked that of Shorter, and that Shorter’s response was that he “kept his shit in the car.” (Trial Vol.1 p.48 L.5-15). Weber testified that later, after Shorter and his friend were denied access to the club because of dress code, they grew argumentative and Carroll called the police. While Carroll was on the phone with police, Shorter’s friend squared up like he was going to try to fight Weber, so Weber pepper sprayed the friend. Weber testified that Shorter then walked to the doorway of Shorter’s vehicle, saying he was going to get his gun. Weber testified Shorter started reaching for something inside the vehicle, and started to pull something out with his right hand. Weber testified Shorter was not rummaging but, rather, seemed like he was deliberately reaching for something. Weber testified he believed Shorter was reaching for a gun, but acknowledged he did not ever see a gun. Weber testified that, when Shorter saw the flashing lights and heard the sirens of the police vehicles

approaching, Shorter put down whatever he was grabbing and walked away from the car. (Trial Vol.1 p.47 L.8-p.48 L.1, p.49 L.16-p.51 L.8, p.53 L.13-18).

Armed security guard Matthew Carroll testified that, prior to the altercation, he had heard Shorter say “I left my shit in the car” which was something patrons often said in response to the club’s standard question of “Do you have any weapons or knives on you?”. Carroll took the statement by Shorter to mean that he had left his weapon in the vehicle. (Trial Vol.1 p.57 L.13-p.58 L.4). Carroll testified that, when Carroll was later on the phone with the Sheriff’s department, he observed Shorter heading back towards his vehicle. (Trial Vol.1 p.57 L.6-12). Carroll testified that Shorter did not get into the vehicle but reached in through the open door for something. Carroll testified that Shorter had something in his hand but that, as police were turning the corner into the parking lot, Shorter tossed it back into the car and started to walk back away from the car, leaving the door open. Carroll acknowledged he did not ever see whatever the item was that

he thought Shorter had in his hand. (Trial Vol.1 p.58 L.10-p.61 L.4, p.62 L.22-p.63 L.5).

Defendant Shorter also testified at trial. (Trial Vol.1 p.69 L.6-20). Shorter testified that he had driven his car to the Minx prior to drinking anything. He parked his car in the parking lot of the Minx and then left with his friend (David) and his friend's brother to hang out and drink at David's apartment. The gun remained inside Shorter's vehicle at the Minx while Shorter was at David's apartment. (Trial Vol.1 p.70 L.14-p.72 L.25).

David's brother drove Shorter and David back to the Minx at around 2:00 in the morning. (Trial Vol.1 p.72 L.1-p.73 L.13). Shorter acknowledged he was intoxicated at that point. (Trial Vol.1 p.77 L.10-15). Shorter and David then tried to enter the club, but they weren't allowed in because of the dress code. At that point, there was the incident where David got maced by the bouncer, and Shorter got some of the overspray. (Trial Vol.1 p73 L.14-p.74 L.3).

As they were trying to enter the club, club security had asked Shorter if he had a weapon on him, and Shorter had told them it wasn't on him, it was in his vehicle. (Trial Vol.1 p.74 L.4-13). During trial, Shorter denied ever going back to his car that evening, or ever trying to open his car door. Rather, he testified he waited there in the parking lot for the police to arrive, as he knew they were on their way and he did not believe he had done anything wrong. (Trial Vol.1 p.74 L.14-p.75 L.5).

During trial, Shorter denied ever touching the gun after he'd become intoxicated. He denied entering his vehicle in any way after he became intoxicated. (Trial Vol.1 p.75 L.6-11). He testified that the center console where the weapon was found is where he always leaves his weapon. (Trial Vol.1 p.75 L.12-15, p.80 L.19-p.81 L.6, p.83 L.5-20). He denied ever opening his driver's side door, and disagreed with the claim that the door was open. (Trial Vol.1 p.75 L.25-p.76 L.11, p.79 L.19-p.80 L.6).

Shorter acknowledged he told the deputy multiple times on the night of the incident that he had not been drinking, and that those statements had been a lie. However, he insisted his trial testimony was truthful. (Trial Vol.1 p.77 L.10-23). On cross-examination by the State, Shorter acknowledged that he was twice told by the officer that he was being arrested “For possession or carrying a firearm while intoxicated”, and that he never denied to the officer that he possessed or was carrying the firearm though he had denied that he was drunk. Shorter explained he had been upset at the time, and that he had been drunk, though he did not feel he was “drunk-drunk” to the point that he couldn’t function. (Trial Vol.1 p.81 L.20-p.83 L.24).

Other relevant facts will be discussed below.

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.

A. Preservation of Error: During the jury instructions conference, trial counsel objected "to the inclusion of the word 'possesses' as used in subparts A and B" of the marshalling instruction (Instruction 11). Defense counsel urged that "possession is not an element of the offense" defined by statute, and "possession is much broader than carrying" thereby "amplifi[ying] the bullseye for the State and what they are required to prove" for conviction. Defense counsel "ask[ed] the word 'possesses' be removed from the [marshalling] instruction" as it is "not consistent with the statutory elements as laid out in section 724.4(c)." (Trial Vol.2 p.8 L.3-p9 L.12); (Instruction 11) (App. p. 15). Further, defense counsel also stated that "in as much as other instructions deal with the word 'possession', we object to those as well", including Jury

Instructions 16 and 17¹. (Trial Vol.2 p.10 L.17-22, p.11 L.14-p.12 L.2, p.14 L.19-20) (Instructions 16-17) (App. pp. 17-18). Defense counsel's objections were overruled by the district court. (Trial Vol.2 p.10 L.23-p.11 L.2). Error was therefore preserved by defense counsel's timely objection to the jury instructions' incorporation of 'possession', and the district court's overruling thereof. See State v. Ondayog, 722 N.W.2d 778, 785 (Iowa 2006) (“[T]imely objection to jury instructions in criminal proceedings is necessary to preserve alleged error for appellate review....”).

Alternatively, to the extent this Court concludes the issue raised herein was not properly preserved for any reason, Defendant respectfully requests that the issue be considered under the Court's familiar ineffective assistance of counsel framework. See State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983). Appellate review is not precluded if failure to preserve

¹ Those instructions were initially numbered 15 and 16 when objections were made during the instructions conference, but they were subsequently renumbered to 16 and 17 before submission to the jury. (Trial Vol.2 p.11 L.14-p.12 L.2, p.14 L.19-20); (Instructions 16-17) (App. pp. 17-18).

error results from a denial of the effective assistance of counsel required under the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, section 10 of the Iowa Constitution. Id.; State v. Fountain, 786 N.W.2d 260, 265 (Iowa 2010).

B. Standard of Review: Review of challenges to jury instructions is for correction of errors at law. State v. Hanes, 790 N.W.2d 545, 548 (Iowa 2010); Iowa R. App. P. 6.907. Where preserved, instructional error is subject to harmless error analysis. Hanes, 790 N.W.2d at 550. Our appellate courts “presume prejudice and reverse unless the record affirmatively establishes there was no prejudice.” Id. at 551.

To the extent this issue is considered under an ineffective assistance of counsel framework rather than as preserved error, review is de novo. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984). A defendant claiming a violation of his constitutional right to the effective assistance of counsel must establish: (1) counsel’s performance fell below an objective standard of reasonableness and (2) counsel’s deficient

performance prejudiced the defense. Id. at 685. Trial counsel has a duty to know the applicable law, protect the defendant from conviction under a mistaken application of the law, and make sure the jury instructions correctly reflect the law. See State v. Goff, 342 N.W.2d 830, 837-38 (Iowa 1983); State v. Allison, 576 N.W.2d 371, 374 (Iowa 1998); State v. Hopkins, 576 N.W.2d 374, 379-80 (Iowa 1998). Further, the failure of counsel to preserve error on a meritorious issue may constitute a denial of effective assistance of counsel. State v. Hrbek, 336 N.W.2d 431, 435-436 (Iowa 1983); Washington v. Scurr, 304 N.W.2d 231, 235 (Iowa 1981). Once counsel's breach of duty is established, a defendant must further establish the prejudice prong of his ineffective assistance claim by showing "a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 669, 104 S.Ct. 2052, 2055, 80 L.Ed.2d 674 (1984). The prejudice prong "does not mean a defendant must establish that counsel's deficient conduct more likely than not altered

the outcome in the case. A defendant need only show that the probability of a different result is sufficient to undermine confidence in the outcome.” State v. Graves, 668 N.W.2d 860, 882 (Iowa 2003) (citation and internal quotation marks omitted).

C. Discussion: Defense counsel objected 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. 16²

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. 17³

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.

² 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.").

³ See Iowa State Bar Ass'n, Iowa Criminal Jury Instruction No.200.47 (2017) ("Possession").

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 Defendant's objections to these instructions, as the challenged language improperly authorized the jury to convict based 'Possession' – as distinct from 'carrying' – of the dangerous weapon. The pertinent statute, Iowa Code section 724.4C authorizes conviction only for *carrying*, not mere possession.

1. The Statutory Language is Phrased in Terms of ‘Carrying’ not ‘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).

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 (2017) (“A person shall not knowingly possess a firearm suppressor....”); Iowa Code § 724.1C (2017) (“A person shall not knowingly possess a short-barreled rifle or short-barreled shotgun....”); Iowa Code § 724.2(2) (2017) (“a person is not authorized to possess in this state a shotshell or cartridge” of the type specified); Iowa Code § 724.3 (2017) (“Any person... who knowingly *possesses* an offensive weapon commits a class ‘D’ felony.”); Iowa Code section 724.26(1) (2017) (a person convicted of a felony “who knowingly has under the person’s dominion and control or possession... a firearm or offensive weapon is guilty of a class ‘D’ felony”); Iowa Code section 724.26(2)(a) (“a person who is subject to a protective order... and who knowingly possesses... a firearm, offensive weapon, or ammunition is guilty of a class ‘D’ felony.”). 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 offense defined in Iowa Code section 724.4C. However, there is a model

instruction for the 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) (“1. On or about the _____ day of _____, 20____, the defendant knowingly [carried] [transported] a [pistol] [revolver] in a vehicle.”). There should likewise have been no mention of ‘possession’ in the marshalling instruction submitted in the present case for the section 724.4C offense.

Jury Instruction 16 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.”). Model Instruction 200.48 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) (applying to “A person in the immediate *possession* or control of” a firearm or offensive weapon while participating in a violation of this subsection) (emphasis added).

2. Meaning of “Carries”:

Defense counsel was correct that “possession is much broader than carrying” thereby “amplifi[ying] the bullseye for the State and what they are required to prove” for conviction. (Trial Vol.2 p.8 L.3-p9 L.12).

No statutory definition of “carries” is contained in Chapter 724. State v. Thompson, No. 12-2314, 2013 WL 6686624, *3 (Iowa Ct. App. Dec. 18, 2013). “In interpreting undefined statutory language, we... give words their common

and ordinary meaning.” Id. “As sources for the common and ordinary meaning of words, we consult prior judicial interpretations and dictionary definitions.” Id.

‘Possession’ is broader than ‘carrying’. One may ‘possess’ a firearm without ‘carrying’ it. Possession is necessary but not itself sufficient to prove carrying.

The first and primary meaning of the term ‘carrying’ requires not only possession but also *movement* of the item.

The Court of Appeals, in State v. Thompson, determined that “the dictionary’s first listing applies best to carrying weapons: ‘to bear or convey from one place to another, transport.’” State v. Thompson, No. 12-2314, 2013 WL 6686624, *4 (Iowa Ct. App. Dec. 18, 2013) (quoting The American Heritage Dictionary 243 (2nd College ed.1985)).

In Mascarello v. U.S., 118 S.Ct. 1911, 1914-20, 524 U.S. 125, 127-39 (1998), the United States Supreme Court discussed the plain meaning of the phrase “carries a firearm”. All of the dictionary definitions cited therein as to the primary meaning of the word “carries” involve some requirement of

movement, such as “convey”, “move”, take or support “from one place to another”. See Mascarello v. U.S., 118 S.Ct. 1911, 1914, 524 U.S. 125, 128 (1998) (quoting 2 Oxford English Dictionary 919 (2nd ed. 1989); Webster’s Third New International Dictionary 343 (1986); Random House Dictionary of the English Language Unabridged 319 (2nd ed. 1987)).

Mascarello also discussed how notions of possession distinguish the term “carries” from the separate and broader term “transports.” “Carries” is a narrower term *requiring possession* (in addition to movement) while ‘transport’ does not require possession (only movement, though often in bulk and over great distances). “‘Carry’ implies personal agency and some degree of *possession*, whereas ‘transport’ does not have such a limited connotation and, in addition, implies the movement of goods *in bulk over great distances.*” Mascarello, 118 S.Ct. at 1917, 524 U.S. at 134. “If Smith, for example, calls a parcel delivery service, which sends a truck to Smith’s house to pick up Smith’s package and take it to Los Angeles,

one might say that Smith has shipped the package and the parcel delivery service has *transported* the package. *But only the truck driver has ‘carried’ the package in the sense of ‘carry’ that we believe Congress intended.*” Id. 118 S.Ct. at 1917, 524 U.S. at 135 (emphasis added).

Thus, for purposes of this primary definition, carrying necessarily requires not only possession but also *movement* of the item. The requirement of movement was properly conveyed to the jury in the submitted instruction defining “carry”:

As used in instruction no. 11, to carry a dangerous weapon means to support *and move it from one place to another.*

(Jury Instruction 15) (App. p. 16) (emphasis added).

The Court in Mascarello also discussed “an important, but secondary, meaning of ‘carry’, a meaning that suggests *support rather than movement or transportation, as when, for example, a column ‘carries’ the weight of an arch.*” Mascarello, 118 S.Ct. 1911, at 1915 (citing 2 Oxford English Dictionary, at 919, 921) (emphasis added). This secondary meaning of

'carry' as 'support' would require *physically supporting* the item – that is holding the item up through actual possession of it on the person.

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

In the present case, the marshalling instruction erroneously instructed that one is guilty if he “Possesses or carries” the dangerous weapon. (Jury Instruction 11) (App. p. 15). Thus the marshalling instruction (in addition to instructions 16 and 17, elaborating on ‘possession’) improperly permitted the jury to convict based on a finding only of *possession* rather than carrying. See (Jury Instructions 11, 16-17) (App. pp. 15, 17-18). This was error as the jury could well have concluded that Shorter possessed but did not *carry* the gun after he became intoxicated. Specifically, the jury could have concluded that the gun was still owned by and

within reach of Shorter after he became intoxicated (constructive possession), even if the gun was never held or moved by Shorter after he became intoxicated (carrying).

Shorter was prejudiced by the error. During closing argument, the State explicitly argued that the jury could convict if Defendant was merely “within immediate reach of that gun.” The State argued 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” and the gun is “in the vehicle”, then “Sub B is... met.” (Trial Vol.2 p.29 L.5-13). The State explicitly argued “You don’t even have to believe that he reached for it.” (Trial Vol.2 p.31 L.5-6). The State also emphasized that the jury did not have to agree on the question of whether the defendant had actually handled the gun or, rather, was merely within reach (that is proximity)

of it. (Trial Vol.2 p.24 L.12-17). The instructional error was thus not harmless, and Shorter is entitled to a new trial.

Even to the extent the issue is instead considered under ineffective assistance of counsel framework, Shorter is still entitled to relief. For the reasons argued above, these jury instruction challenges were meritorious, and counsel breached an essential duty in failing to properly assert them. Prejudice resulted in that there is at least a reasonable probability that, absent the instructional error, the jury would have found that Shorter did not *carry* the gun after becoming intoxicated. Confidence is undermined, and a new trial is required.

D. Conclusion: Shorter respectfully requests that this Court reverse his conviction and judgment and remand this matter to the district court for a new trial.

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".

A. Preservation of Error: The traditional rules of preservation of error do not apply to claims of ineffective

assistance of counsel. State v. Ondayog, 722 N.W.2d 778, 784 (Iowa 2006)(citation omitted).

B. Standard of Review: Because they involve a constitutional right, the Court reviews claims of ineffective assistance of counsel de novo. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984). While the Court usually considers claims alleging ineffective assistance of counsel in post-conviction relief proceedings, the Court will address ineffective-assistance-of-counsel claims on direct appeal when the record is sufficient. Iowa Code § 814.7(2)–(3) (2017); State v. Clay, 824 N.W.2d 488, 494 (Iowa 2012).

C. Discussion: 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. Brothorn, 832 N.W.2d 187,

192 (Iowa 2013)(quoting Lamasters v. State, 821 N.W.2d 856, 866 (Iowa 2012)). Prejudice is established by showing “a reasonable probability that, but for counsel’s unprofessional errors, the results of the proceeding would have been different.” Strickland v. Washington, 466 U.S. 668, 669, 104 S.Ct. 2052, 2055 (1984). A reasonable probability is one sufficient to undermine confidence in the outcome. Gering v. State, 382 N.W.2d 151, 153-54 (Iowa 1986).

“Competent representation requires counsel to be familiar with the current state of the law.” Clay, 824 N.W.2d at 496 (citing State v. Hopkins, 576 N.W.2d 374, 379–80 (Iowa 1998)). The Iowa Supreme Court has stated “that ‘failure to preserve error may be so egregious that it denies a defendant the constitutional right to effective assistance of counsel.’” State v. Hrbek, 336 N.W.2d 431, 435–36 (Iowa 1983)(quoting Washington v. Scurr, 304 N.W.2d 231, 235 (Iowa 1981)).

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:

d. *Statements that are not hearsay.* A statement that meets the following conditions is not hearsay:

...

(2) *An opposing party's statement.* The statement is offered against an opposing party and:

(A) Was made by the party in an individual or representative capacity.

Iowa R. Evid. 5.801 (2017).

This exception is broadly applied. Statements admitted under this exception may or may not be against the party's interest; that is, they need not be "confessions" or "admissions" in order to be admissible for the truth of the matter asserted.⁴ The admitted statements constitute "substantive evidence of the facts asserted but are not conclusive evidence of those facts" State v. Bayles, 55 N.W.2d 600, 606 (Iowa 1996). See also Laurie Kratky Doré, 7 Iowa Practice Series, Evidence 5.801:9 (Nov. 2018).

⁴ Rule 5.804(b)(3) provides a separate exception to the hearsay rule for declarations against interest. See Iowa R. Evid. 5.804(b)(3) (2017).

The 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).

Thus, 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) (Contradictory Statements -Non-Party-Witness Not Under Oath) with Iowa State Bar Ass'n, Iowa Criminal Jury Instruction No. 200.43 (2017) (Contradictory Statements -Non-Party-Witness Under Oath).

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 to 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 require the jury to consider the 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 free to assign whatever weight and reliability to the statements as it saw fit. Particularly, the jury should have been free 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).

“The clear implication of the challenged instruction was that [the defendant’s] extrajudicial admissions 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. Yenger, No. 17-0592, 2018 WL 3060251, at *6–7 (Tabor, J., dissenting).

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”). Note, however, that at the request of the Supreme Court, the Bar Association revised Iowa Criminal Jury Instruction 200.44 in June 2018. 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. Current Instruction 200.44 provides: “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.” 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.

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

D. Conclusion: Defendant-Appellant Montreal Shorter respectfully requests that his conviction be reversed and remanded for a new trial.

CONDITIONAL REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument if this Court believes oral argument would assist in resolution of this case.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was \$ 4.65, and that amount has been paid in full by the Office of the Appellate Defender.

**CERTIFICATE OF COMPLIANCE WITH TYPEFACE
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This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(f)(1) because:

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