

IN THE SUPREME COURT OF IOWA  
Supreme Court No. 18-1142

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STATE OF IOWA,  
Plaintiff-Appellee,

vs.

MONTREAL SHORTER,  
Defendant-Appellant.

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APPEAL FROM THE IOWA DISTRICT COURT  
FOR POLK COUNTY  
THE HONORABLE CYNTHIA M. MOISAN, JUDGE

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**APPELLEE'S BRIEF**

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FINAL

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## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

- I. Even if the district court provided an erroneous marshalling instruction, Shorter suffered no prejudice.**

### Authorities

*Boyle v. Alum-Line, Inc.*, 710 N.W.2d 741 (Iowa 2006)  
*Meier v. Senecaut*, 641 N.W.2d 532 (Iowa 2002)  
*State v. Hanes*, 790 N.W.2d 545 (Iowa 2010)  
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*State v. Predka*, 555 N.W.2d 202 (Iowa 1996)  
*State v. Spates*, 779 N.W.2d 770 (Iowa 2010)  
Iowa Code § 724.4C

- II. Instruction 18 correctly told the jury it could consider Shorter's out-of-court statements as if made at trial. His counsel had no duty to raise a challenge that has repeatedly been rejected.**

### Authorities

*Millam v. State*, 745 N.W.2d 719 (Iowa 2008)  
*State v. Clay*, 824 N.W.2d 488 (Iowa 2012)  
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(Iowa Ct. App. June, 20, 2018)  
Iowa Code § 814.7(2)

## **ROUTING STATEMENT**

None of the retention criteria in Iowa Rule of Appellate Procedure 6.1101(2) apply to the issues raised in this case, so transfer to the Court of Appeals is appropriate. Iowa R. App. P. 6.1101(1).

## **STATEMENT OF THE CASE**

### **Nature of the Case**

Defendant Montreal Shorter appeals his conviction following a jury trial for possessing or carrying a dangerous weapon while under the influence in violation of Iowa Code section 724.4C. He attacks two aspects of his jury instructions. This Court should affirm.

### **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**

At two in the morning, Shorter and his friend tried to enter the Minx Show Palace. Trial Tr., 73:1–19. Earlier that night they had gotten drunk. *Id.* at 72:13–17; *see id.* at 25:25 to 26:2. Minx's two bouncers, Anthony Weber and Matthew Carroll, asked Shorter if he had any knives or guns on him, and Shorter told them he "kept [his] shit in the car." *Id.* at; 48:5–11, 57:13–17. The bouncers denied Shorter and his friend entrance for violating the dress code. *Id.* at

73:17–19. Shorter’s friend squared up to fight Weber. *Id.* at 26:20 to 27:9, 47:21–22. Weber warned him to stop, then pepper sprayed him. *Id.* at 47:21–24.

Meanwhile, Carroll called the Polk County Sheriff to report the scuffle. *Id.* at 56:23 to 57:12. Shorter declared he was “going to get his gun,” then walked to his driver’s door, opened it, and reached for the center console. *Id.* at 48:20 to 49:21, 57:6 to 59:3. He reached for a specific object. *Id.* at 49:13–14. Both bouncers saw something in his hand but couldn’t tell what. *Id.* at 49:2–8, 57:6 to 59:3.

As Shorter leaned back out of his car, police approached the Minx parking lot with sirens blaring and lights flashing. *Id.* at 50:9–17, 58:14 to 59:3; Ex.1 (dash video) at 1:05 to 1:25. Shorter set whatever he had down and walked away from the car. *Id.* at 50:9–22, 58:18 to 59:9. Police spoke with Shorter, who repeatedly denied having had anything to drink even though he was slurring his words and staggering. Trial Tr., 25:9–14; Ex.1 (dash video) at 3:06 to 3:10, 9:24 to 9:27. Later he blew a 0.113 on a preliminary breath test (“PBT”). Trial Tr., 25:15 to 26:2.

While deputies spoke with Shorter, Deputy Hook looked in Shorter’s open driver’s door. Trial Tr., 36:24 to 37:3. He saw a pistol

on top of the center console. *Id.* at 38:1–5. When told he “can’t carry a gun while drunk,” Shorter insisted he was not drunk. *Id.* at 29:22 to 30:1; Ex.1 (dash video) at 12:30 to 12:40. He did not deny carrying his pistol. Trial Tr., 29:22 to 30:1; Ex.1 (dash video) at 12:30 to 12:40.

At trial, Shorter told the jury he never opened his car door after being pepper sprayed at Minx. Trial Tr., 74:18–21, 75:25 to 76:4. He denied touching his pistol when intoxicated, though he admitted being drunk and having his pistol in his car. *Id.* at 74:4–8, 75:6–8, 77:16–20. Shorter told the jury he always kept his pistol in the center console. *Id.* at 80:24 to 81:5. He did not know how it got on top of the center console. *Id.* at 74:18–21, 81:6–15. The jury convicted him, and he timely appealed. Verdict (5/8/2018) at 1; App.20; Not. of Appeal (6/27/2018); App.25.

## ARGUMENT

### I. **Even if the district court provided an erroneous marshalling instruction, Shorter suffered no prejudice.**

#### **Preservation of Error**

Shorter objected to instruction 11 as incorrectly including the word “possesses” because it improperly expanded the statutory definition of the crime. Closing Tr., 8:6 to 9:12. He extended that objection to the other possession instructions. *Id.* at 10:17–22, 11:14–

24. The district court overruled his objections, preserving error. *Id.* at 10:23 to 11:4; *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

### **Standard of Review**

“This court reviews challenges to jury instructions for correction of errors at law.” *State v. Hanes*, 790 N.W.2d 545, 548 (Iowa 2010) (citing *Boyle v. Alum-Line, Inc.*, 710 N.W.2d 741, 748 (Iowa 2006)). It decides “whether the challenged instruction accurately states the law and is supported by substantial evidence.” *Id.* (citing *State v. Predka*, 555 N.W.2d 202, 204 (Iowa 1996)). “Error in a particular instruction does not require reversal unless the error was prejudicial to the complaining party.” *Id.* (citing *State v. Spates*, 779 N.W.2d 770, 775 (Iowa 2010)).

### **Merits**

As instructed, to convict Shorter the State had to prove that he “was Intoxicated ... and ... a. Possesse[d] or carrie[d] a dangerous weapon on or about his person ...; or b. Possesse[d] or carrie[d] a dangerous weapon within [his] immediate access or reach while in a vehicle.” Jury Instr. No.11; App.15. The court defined “to carry a dangerous weapon” as “to support or move it from one place to another.” Jury Instr. No.15; App.16. Shorter complains that including



“possesses” in the marshalling instruction improperly exceeded the crime’s statutory definition. Shorter Br. at 27, 38, 42–43; *see also* Jury Instr. No. 11 App.15. Specifically, it allowed the jury to convict him for constructively possessing his pistol when the legislature limited the crime to carrying. Shorter Br. at 27, 38–43; Jury Instr. Nos.11, 16, 17; App.15, 17, 18; Iowa Code § 724.4C. Even if Shorter is correct, any error must have prejudiced him to warrant reversing. *Hanes*, 790 N.W.2d at 550–51. Because the record “affirmatively establishes” Shorter suffered no prejudice, this Court should affirm. *Id.* at 551.

Had “possesses” not been included in the marshalling instruction, the State still proved that Shorter carried his pistol “on or about his body” by moving it with his hand when he reached in his car. Jury Instr. Nos.11, 15; App.15, 16. When asked whether he had a knife or gun, Shorter told both Minx bouncers that he left “[his] shit in the car.” Trial Tr., 57:13–17. After Shorter’s friend was pepper sprayed, Shorter told the bouncers “he was going to get his gun.” *Id.* at 49:15–21. He then walked to the driver’s side door of his car, opened it, and deliberately reached toward the center console for something. *Id.* at 48:20 to 49:21, 57:6 to 59:3. Both bouncers saw that

Shorter had something in his hand but could not tell what. *Id.* at 49:2–8, 57:6 to 59:3. And they both saw him return the item as police approached with sirens and lights on. *Id.* at 50:9–22, 58:18 to 59:9. Shorter then walked away from his car. *Id.* As officers spoke with Shorter, Deputy Hook looked through the open driver’s door of Shorter’s car and saw a pistol sitting on the center console “right where [Shorter] was reaching for” it. *Id.* at 36:24 to 37:3, 38:1–25, 50:9–22. In response to being told he “can’t carry a gun while drunk,” Shorter denied that he was drunk but not that he had handled his pistol. *Id.* at 29:22 to 30:1; Ex.1 (dash video) at 3:06 to 3:10, 9:24 to 9:27, 12:30 to 12:40. At trial, he said that he always keeps his pistol *in* the center console of his car. Trial Tr., 80:24 to 81:5. But Deputy Hook found the pistol *on top* of the center console, “indicat[ing] that the firearm was moved.” *Id.* at 81:6–15. Plus, Shorter admitted that he lied to police about being drunk. *Id.* at 77:10–20.

This evidence overwhelmingly proved that Shorter carried his pistol “on or about his person” when he moved it from in his center console to on top of it. *See* Jury Instr. Nos. 11, 15; App.15, 16. Because the State proved he carried the gun on or about his person, it also proved that he “carrie[d it] within [his] immediate access or reach

while in a vehicle.” Jury Instr. 11; App.15. After all, he moved the gun within his car. And because the State proved both methods of carrying the pistol, no general verdict problem arises. *See State v. Lukins*, 846 N.W.2d 902, 911–12 (Iowa 2014).<sup>1</sup>

Because the record “affirmatively establishes” that Shorter carried his pistol while intoxicated, he suffered no prejudice from instructional error. This Court should reject his claim.

**II. Instruction 18 correctly told the jury it could consider Shorter’s out-of-court statements as if made at trial. His counsel had no duty to raise a challenge that has repeatedly been rejected.**

**Preservation of Error**

Ineffective assistance is an exception to error preservation; if the record is adequate, the court may address it on appeal. *State v. Thorndike*, 860 N.W.2d 316, 319 (Iowa 2015) (citing Iowa Code § 814.7(2)).

**Standard of Review**

Review is de novo. *Id.* (citing *State v. Clay*, 824 N.W.2d 488, 494 (Iowa 2012)).

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<sup>1</sup> Shorter admitted both that he had a gun in the car and that he was intoxicated when at Minx. Trial Tr., 74:4–8, 75:6–8, 77:16–20.; *see also id.* at 25:15 to 26:2, 38:1–5, 81:10–12; Jury Instr. Nos. 11, 15; App.15, 16.

“To prove ineffective assistance, the defendant must demonstrate by a preponderance of evidence that ‘(1) his trial counsel failed to perform an essential duty, and (2) this failure resulted in prejudice.’” *State v. Ortiz*, 789 N.W.2d 761, 764 (Iowa 2010) (quoting *State v. Straw*, 709 N.W.2d 128, 133(Iowa 2006)).

### **Merits**

Shorter argues his counsel performed ineffectively by failing to object to the party-opponent jury-instruction. Shorter Br. at 44–57. That instruction told the jury: “Evidence has been offered to show that [Shorter] 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.*” Jury Instr. 18; App.19 (emphasis added). Shorter complains that the italicized language misstated the law. Shorter Br. at 44–55. His claim fails because he proved neither breach nor prejudice.

Shorter cannot prove breach of duty because his claim lacks merit. The Court of Appeals has repeatedly rejected challenges identical to Shorter’s. *E.g.*, *State v. Yenger*, No. 17–0592, 2018 WL 3060251, at \*4–5 (Iowa Ct. App. June, 20, 2018); *State v. Hayes*, No. 17–0563, 2018 WL 2722782, at \*5 (Iowa Ct. App. June 6, 2018); *State*

*v. Payne*, No. 16–1672, 2018 WL 1182624, at \*9 (Iowa Ct. App. Mar. 7, 2018); see also *State v. Tucker*, No. 13–1790, 2015 WL 405970, at \*3 & n.4 (Iowa Ct. App. Jan. 28, 2015) (approving an instruction with the exact wording Shorter challenges). Because objecting was futile, his counsel breached no duty by declining to object. *Millam v. State*, 745 N.W.2d 719, 721–22 (Iowa 2008) (quoting *State v. Graves*, 668 N.W.2d 860, 881 (Iowa 2003)).

Nor did he prove prejudice. It is difficult to see how Shorter could show an acquittal likely had he objected to this instruction. Even if the instruction omitted the language he balks at, the jury would have considered all his statements as substantive evidence against him. Shorter Br. at 52–53. There is no reason to think that the as-if-made-at-trial language made any difference. See Jury Instr. 18; App.19. Indeed, as previously explained, the evidence overwhelmingly proved that Shorter carried a gun while under the influence. He simply cannot prove a different outcome likely.

### **CONCLUSION**

For the foregoing reasons, the State respectfully requests that this Court affirm Shorter’s conviction.

## REQUEST FOR NONORAL SUBMISSION

This case is appropriate for nonoral submission.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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Dated: April 11, 2019



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