IN THE SUPREME COURT OF IOWA

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

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

APPELLANT'S REPLY BRIEF AND ARGUMENT

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

STATE APPELLATE DEFENDER'S OFFICE
Fourth Floor Lucas Building
Des Moines, Iowa 50319
(515) 281-8841 / (515) 281-7281 (FAX)

ATTORNEY FOR DEFENDANT-APPELLANT FINAL

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.

STATE APPELLATE DEFENDER

/s/ Vidhya K. Reddy

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

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Authorities

Not Harmless Error:

State v. Thornton, 498 N.W.2d 670, 673 (Iowa 1993)

State v. Morgan, 877 N.W.2d 133, 138 (Iowa Ct. App. 2016)

State v. Hanes, 790 N.W.2d 545, 550 (Iowa 2010)

State v. Harris, 891 N.W.2d 182, 188-89 (Iowa 2017)

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

This issue is not addressed in the reply brief.

STATEMENT OF THE CASE

COMES NOW the defendant-appellant, pursuant to Iowa R. App. P. 6.903(4), and hereby submits the following argument in reply to the State's brief filed on or about March 18, 2019. While the defendant's brief adequately addresses the issues presented for review, a short reply is necessary to address certain contentions raised by the State.

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.

Not Harmless Error:

The State argues the court's instructional error was not prejudicial. Specifically, the State argues that Shorter testified "he always keeps his pistol *in* the center console", but "Deputy Hook found the pistol *on top* of the center console"; the State concludes Shorter must thus have "moved [the pistol] from in his center console to on top of it." (State's Br. p.10). The State's claim of harmless error must be rejected.

To establish the offense herein, the State had to establish that Shorter had carried the weapon *after becoming intoxicated.* At trial, Shorter acknowledged that he had driven the car (with the weapon inside) prior to becoming intoxicated, but maintained that he had never touched the gun after becoming intoxicated. (Trial Vol.1 p.75 L.6-11). Shorter testified that the location where the weapon had been found "on" the center console is where he had left the weapon prior to becoming intoxicated. (Trial Vol.1 p.75 L.12-15). Although he subsequently exhibited some confusion on the phrasing of the State's cross-examination questions concerning whether he "normally" kept the gun "on" or "in" the center console (Trial Vol.1 p.80 L.19-p.81 L.6), Shorter insisted that on that night the location where the gun was found was the same location where he had left it prior to becoming intoxicated, and that he did not touch the gun after becoming intoxicated. (Trial Vol.1 p.83 L.5-20). See also (Trial Vol.2 p.42 L.25-p.43 L.1).

Note also there was no photograph or video of the center console at issue. The record herein does not establish whether this was a console with a lid or drawer that had to be opened, or whether instead it was topped with an inset tray or bin with no lid so that a gun located there could be described as both "on" and "in" the console.

Note further that there is no photograph of the precise location where the gun was found, and the squad video did not capture the location of the gun at the time of its discovery by law enforcement. Thus, even assuming the center console was such that there would be a distinction between being "on" and "in" the console, and even if Shorter's testimony could be interpreted to mean he would have kept the gun "in" and not "on" the console, the jury was still free to discredit the officer's testimony that the gun was discovered "on" rather than "in" that console. See (Trial Vol.1 p.36 L.24-p.37 L.3, p.38 L.1-5). State v. Thornton, 498 N.W.2d 670, 673 (Iowa 1993) ("The jury is free to believe or disbelieve any testimony as it chooses….");

State v. Morgan, 877 N.W.2d 133, 138 (Iowa Ct. App. 2016) (applying this principle to deputy's testimony).

The State acknowledges that error was preserved. (State's Br. p.7-8). The instructional error is therefore subject to harmless error analysis, wherein this Court must presume prejudice and reverse unless the record affirmatively establishes there was no prejudice. State v. Hanes, 790 N.W.2d 545, 550 (Iowa 2010). Note that the existence of "substantial evidence" which could support a finding of guilt under the correct law is not sufficient to establish harmlessness. Prejudice flows from the fact that the "flawed jury instruction did not require the jury to make a finding" on the carrying element of the crime, instead permitting it to return a guilty verdict based on mere constructive possession of the gun. State v. Harris, 891 N.W.2d 182, 188-89 (Iowa 2017) (finding prejudice under ineffective assistance of counsel framework).

Indeed, during closing argument, the State explicitly urged the jury that it could convict if Shorter was merely

"within immediate reach of that gun." The State argued that even if the jury didn't find Shorter "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).

This record does not affirmatively demonstrate the instructional error was harmless. Shorter is therefore entitled to 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".

This issue is not addressed in the reply brief.

CONCLUSION

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

ATTORNEY'S COST CERTIFICATE

I, the undersigned, hereby certify that the true cost of producing the necessary copies of the foregoing Reply Brief and Argument was $ 0 , and that amount has been paid in full by the State Appellate Defender.

VIDHYA K. REDDY
Assistant Appellate Defender

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS

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:

> [X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 914 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(f)(1).

/s/ Vidhya K. Reddy Dated: *4/8/19*

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