IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 16-0741

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DONNIE DORRELL NOLAN,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, the Honorable Ingrid Gustafson, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

MONTANA CODE ANNOTATED

INTRODUCTION

The parties' arguments focus on three issues:

1. Did the state prove beyond a reasonable doubt that a house in which a protected person no longer lived was her "residence" for purposes of a no contact order? When the entirety of the protected person's testimony is considered, the answer is no.

2. Did the state prove beyond a reasonable doubt that Donnie Nolan obstructed an officer's investigation, and did so knowingly? Again, the answer is no.

3. Did a supplemental jury instruction have an impermissible coercive effect on a deadlocked jury? When the factual context and the circumstances in which the instruction was given are considered, it is clear the instruction placed undue pressure on the jury to reach a verdict on the charge of assault on a peace officer.

I. The State Failed to Prove that the Jackson Street House was the Protected Person's Residence, and thus the State Failed to Prove an Essential Element of the Offense of Violation of a No Contact Order.

Donnie Nolan defended the charge of violation of a no contact order on two fronts. First, he emphatically denied the allegation by Jared Ludwig, the sole occupant of the house, that Nolan had shown up at the house. Mr. Nolan testified "I had not been to 225 Jackson that night, period, at all." Tr., at 263, ll. 9-10. Nolan has not backed off that defense on appeal. His recognition of the standard of

review for appellate purposes does not reflect a change in his position, contrary to the state's argument. See Brief of Appellee at 14.

Mr. Nolan's defense took a second tack. He asserted that Linda Ludwig, the protected person named in the order, no longer lived in the Jackson Street house. Thus, the house was not her residence and Nolan could not be convicted of violating a no contact order that prohibited him from being within 1500 feet of Ms. Ludwig's residence.

Mr. Nolan asserts that the state failed to prove that the Jackson Street house was Ms. Ludwig's residence. Whether sufficient evidence exists is ultimately an analysis and application of the law to the facts. State v. Colburn, 2016 MT 246, ¶ 7, 385 Mont. 100, 386 P.2d 561.

The term "residence" is not defined in § 45-5-209, MCA, which sets out the offense of violation of a no contact order, nor was "residence" defined in the order Nolan was charged with violating. Neither party offered an instruction defining the term, and the trial court did not instruct the jury on the meaning of "residence." In the absence of a statutory definition, both parties here find support in dictionaries for a definition of "residence."[1] A definition of "residence" in common usage

[1] In Myers v. Dee, 2011 MT 244, ¶¶ 22-23, 362 Mont. 178, 261 P.3d 1054, which involved a condemnation action, the word "residence" as used in eminent domain statutes was not defined, so the Court relied on dictionary definitions to construe the term.

includes "the place where one actually lives[.]" See Appellant's Brief, at 19. Both parties focus on Ms. Ludwig's testimony as the factual basis on which to determine whether the house at 225 Jackson Street was her residence on the night in issue. As the state notes, the testimony of one witness, that the jury believes, is sufficient to prove any fact in a case. Brief of Appellee, at 15 (citing authority). Mr. Nolan's position is that the Court should consider the entirety of Ms. Ludwig's testimony regarding her residence. She established the basic facts of moving out of the house. She began moving her property, clothing and furniture out of the house and into a storage unit. As of June 23, her bed was in storage, and "all my other stuff was in storage." She was living with her mom at her mom's house. Tr., at 138; 141; 145; 146; Appellant's Brief, at 4-5.

The state does not mention or discuss Ms. Ludwig's testimony that her bed and "all my other stuff" were out of the house by the night in question. The state points to other statements: Ms. Ludwig testified the Jackson Street house was still her residence on June 23; she still had belonging there, and the rental was still in her name; and she did not consider her mother's house to be her residence. See Brief of Appellee, at 14-15.

Application of the definition of "residence" – the place where one actually lives - to the basic facts leads to the conclusion that the house on Jackson Street

was not Ms. Ludwig's residence. By June 23, Ms. Ludwig was not living in the house and items that make a house habitable, such as a bed, were in storage. While some belongings were still in the house, the state did not establish what those belongings were. The physical presence of personal items left behind in a rental as a person moves out does not make that rental unit a residence, "a place where one actually lives[.]" The fact that Ms. Ludwig's name was still on the rental agreement is insignificant to the resolution of the issue here. A lease defines a renter's obligations to her landlord. A lease does not require a tenant to live in the unit until the lease expires. A lease does not define a "residence" for purposes of § 45-5-209, MCA.

The state relies on statements of subjective belief or opinion. These statements are unavailing. Ms. Ludwig's belief or opinion that the Jackson Street house was still her residence on June 23 is undermined by her actions. She was not living there anymore and had all but moved out. Whether she considered her mom's house five miles away to be her new residence is immaterial.

The trial court erred by refusing to dismiss Count III at the end of the state's case-in-chief. This Court should reverse the conviction on Count III and remand with instructions to enter an order dismissing the charge.

II. The State Failed to Prove Beyond a Reasonable Doubt that Mr. Nolan Obstructed a Peace Officer.

A refusal to comply with an officer's command (1) must actually obstruct, impair or hinder an investigation, and (2) must be done with the knowledge that it is highly probable such non-compliance will obstruct or impair the officer's investigation. The state failed to prove each element in this case.

First, the state must prove actual obstruction. A person can ignore an officer's commands and swear at the officer, and if he does not actually obstruct, impair or hinder an investigation he has not committed obstructing under § 45-7-302, MCA. City of Kalispell v. Cameron, 2002 MT 78, ¶¶ 10, 12, 309 Mont. 248, 46 P.3d 46. Officer Stovall did not testify specifically that Nolan impaired any investigation. Stovall said that after a span of "probably 15, 20 seconds" during which Nolan refused to identify himself, he arrested Nolan for obstruction for not providing his name. Tr., at 200, 209. The state refers to developments after Nolan was arrested, which included Nolan refusing to give his name after being taken into custody. These events are not pertinent to the issue presented. The state, through Officer Stovall, defined the conduct and the 15-to-20 second time period in which it alleged Nolan obstructed the investigation.

Second, the state must prove the accused person was aware his or her conduct would hinder, obstruct or impair the officer. An obstruction charge cannot

be established, for example, merely by proving a person gave a dishonest answer in response to an officer's question. See State v. Johnston, 2010 MT 152, ¶¶ 12, 14, 357 Mont. 46, 237 P.3d 70. Mr. Nolan asserts that he had no knowledge he was impeding an investigation, as he had no reason to believe there was anything to investigate. See Brief of Appellant, at 23. Moments before Nolan was stopped by Officer Stovall, Ms. Ludwig had called Nolan and told him to come to the Jackson Street house to retrieve his things. He had no knowledge this was a ruse Ms. Ludwig set up with Officer Vickery. Nolan had no reason to believe his refusal to provide identification to Officer Stovall would impede any investigation.

The state asserts, incorrectly, that Nolan must have known he was obstructing an investigation because Officer Stovall told Nolan he matched the description *of a suspect*. See, Brief of Appellee, at 19-20: "Here, it was highly probable that Nolan would be aware that his conduct was impeding an investigation when Officer Stovall spotlighted Nolan, said, 'Police, stop[,]' told Nolan he matched the description *of a suspect*, provided Nolan with that description, and asked for Nolan's name." (emphasis added). This representation is contrary to the record. Stovall did not tell Nolan he matched the description of a suspect.

Officer Stovall had his report in front of him when he told the jury what he

said to Nolan when he stopped him: "I told him that I was looking for a male matching his description[.]" Tr., at 200, ll. 1-2. Stovall did not tell Nolan he matched the description of a suspect, as the state asserts. Stovall's actual statement to Nolan supports Nolan's contention that the state failed to prove he had actual knowledge that his conduct impeded an investigation.

This case is readily distinguishable from State v. Eisenzimer, 2014 MT 208, 376 Mont 157, 330 P.3d 1166, on which the state relies. Brief of Appellee, at 18. There, the defendant approached a police officer who was "obviously in the middle of a traffic stop" with the red and blue flashing top lights activated, at 2:00 a.m. The man, visibly intoxicated, repeatedly asked the officer for a ride. The officer repeatedly told the man to keep walking and advised him he would be arrested if he did not do so. This Court concluded that on these facts, a rational trier of fact could find that the defendant was aware it was highly probable his conduct would impede the officer's performance of his lawful duties. 2014 MT 208, ¶¶ 3, 11.

In contrast, the facts here were substantially different. Nolan was on his way to the house at Ms. Ludwig's invitation. He did not step into the midst of a "flashing lights" police investigation. The mental state element of the obstruction statute imposes a high probability standard, and Eisenzimer illustrates a circumstance in which that high standard was met. It was not met in this case.

This Court should reverse the conviction on Count II and remand with instructions to enter an order dismissing the charge.

III. The Supplemental Jury Instruction was Impermissibly Coercive on the Deadlocked Jury in Light of the Circumstances.

This Court in other cases has approved the use of the supplemental jury instruction set out in State v. Norquay, 2011 MT 34, 359 Mont. 257, 248 P.3d 817. This does not mean that the instruction should be given in every trial in which a jury is deadlocked. Each case is unique. The issue presented is whether the Norquay instruction was impermissibly coercive in this case and on these facts. Nolan cited several factors which frame the supplemental instruction in context and under the circumstances, as the Supreme Court suggested. Appellant's Brief, at 24-26. See Lowenfield v. Phelps, 484 U.S. 231, 237 (1988) (citing Jenkins v. United States, 380 U.S. 445, 446 (1965) (*per curiam*)).

The state separates these circumstances into individual factors and argues each factor is not coercive. Brief of Appellee, at 22-24. This approach impermissibly minimizes the overall context of the instruction. The circumstances should be considered as considered together to assess whether, collectively, the instruction was coercive.

When assessed in context, the supplemental instruction was both coercive and unnecessary. Officer Stovall claimed that Donnie Nolan hit him in the back of

the head; Nolan denied it. There was no physical evidence to support the officer's claim. During trial, the jury viewed the video, which included an audio recording of the confrontation during which Stovall claims Nolan struck him. This did not convince the jury beyond a reasonable doubt. During deliberations the jury asked the court to watch and listen to the exhibit again. The video/audio exhibit was clearly important to the jury. The court earlier denied the jury's request for information relating to other counts, so the fact the jury persisted in asking to see and hear the exhibit again highlights its importance on Count I. So, the jury could not reach a verdict on the assault charge based on the trial testimony, and it could not reach a verdict after reconsidering the video/audio exhibit of the incident involving Stovall and Nolan. It remained deadlocked on Count I. The jury reached a verdict only after it received the supplemental Norquay instruction.

The use of a Norquay instruction has been upheld in other cases, based on the circumstances presented. That does not mean the instruction can be given in every case. In Mr. Nolan's case, in the context in which the trial court decided to give the jury the supplemental instruction, and in light of all the circumstances, the instruction was impermissibly coercive. It led the jury to conclude it had to reach a verdict on the assault charge. Mr. Nolan's rights were violated.

The conviction on Count I should be reversed.

CONCLUSION

Mr. Nolan respectfully requests this Court to dismiss the violation of a no contact order count (III) and the obstructing a peace officer count (Count II), and to reverse and remand for a new trial as to the count alleging assault on a peace officer charge (Count I).

Respectfully submitted this 29th day of March, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 2,306, excluding Table of Contents, Table of Authorities, Certificate of Service, and Certificate of Compliance.

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