

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0121

CITY OF WHITEFISH,

Plaintiff and Appellee,

vs.

WILLIAM PURDY KLINK III,

Defendant and Appellant.

OPENING BRIEF OF APPELLANT

On Appeal from the Montana Eleventh Judicial District,
Flathead County, the Honorable Amy Eddy, Presiding

APPEARANCES:

CODY ATKINS
Hendrickson Law Firm, P.C.
208 N. Broadway, Ste. 324
Billings, MT 59101
cody@hendricksonlawmt.com
(406) 245-6238

ATTORNEY FOR DEFENDANT
AND APPELLANT

TIMOTHY C. FOX
Montana Attorney General
2015 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

MARY LEFFERS BARRY
City of Whitefish Attorney
P.O. Box 158
Whitefish, MT 59937

ANGELA JACOBS
City of Whitefish Attorney
P.O. Box 158
Whitefish, MT 59937

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE ISSUES.	1
STATEMENT OF THE CASE.	1
STATEMENT OF THE FACTS.....	3
STANDARD OF REVIEW.....	5
SUMMARY OF ARGUMENT.....	5
ARGUMENT.....	6
I. The Municipal Court Abused its Discretion Because Good Cause Existed to Present Evidence of Mental Disease or Defect.....	6
II. William’s Sixth Amendment was Violated Because the Jury did not Comprise a Fair Cross-Section of the Community.....	8
CONCLUSION.	12
APPENDIX.	13
CERTIFICATE OF COMPLIANCE.....	14
CERTIFICATE OF SERVICE.	15

TABLE OF AUTHORITIES

Cases

<i>State v. Couture</i> , 2010 MT 201, 357 Mont. 398, 240 P.3d 987.	6, 7, 8
<i>State v. Daniels</i> , 2011 MT 278, 362 Mont. 426, 265 P.3d 623.	5
<i>State v. Gollehon</i> , 262 Mont. 1, 11, 864 P.2d 249, 255 (1993).....	9
<i>State v. Groom</i> , 49 Mont. 354, 359, 141 P. 858, 859 (1914).....	9
<i>State v. Hay</i> , 120 Mont. 573, 575, 194 P.2d 232, 233 (1948).	10, 11
<i>State v. LaMere</i> , 2000 MT 45, 298 Mont. 358, 2 P.3d 204.....	9, 10, 11
<i>State v. R.S.A.</i> , 2015 MT 202, 380 Mont. 118, 357 P.3d 899.	5
<i>State v. Root</i> 1999 MT 203, 296 Mont. 1, 987 P.2d 1140.....	7, 8
<i>State v. Stewart</i> , 175 Mont. 286, 293, 573 P.2d 1138, 1142 (1977).	9
<i>State v. Wells</i> , 202 Mont. 337, 344, 658 P.2d 381, 385 (1983).	6, 7, 8

Montana Code Annotated

§ 3-15-313, MCA.	10
§ 3-15-405, MCA.	10
§ 45-3-102, MCA.	2
§ 45-5-206, MCA.	1, 3
§ 45-5-206(1)(c), MCA.	2

Montana Constitution

Art. II, § 24.....	9
Art. II, § 26.....	9

United States Constitution

Amend. VI..	8, 9, 11
Amend. XIV.....	9

STATEMENT OF THE ISSUES

1. Did the Whitefish Municipal Court abuse its discretion by precluding Defendant from raising an affirmative defense of mental disease or defect during trial?
2. Did the Whitefish Municipal Court commit plain error by denying Defendant's oral motion for mistrial because the jury panel did not represent a sufficient cross-section of the community?

STATEMENT OF THE CASE

Appellant (hereinafter William) was arrested by a City of Whitefish, Montana police officer on February 25, 2018. The complaint alleged William committed the offense of Partner or Family Member Assault-1st Offense-misdemeanor, in violation of § 45-5-206, MCA. The complainant was William's Mother, Diane Klink, and the location of the offense took place at her residence within the city limits of Whitefish.

William first appeared at his Initial Appearance on February 26, 2018. A Notice of Appearance as William's counsel was entered by Emily Thomsen on March 1, 2018. A substitution of counsel was entered by William's primary attorney, Keenan Gallagher, on March 20, 2018.

The City sent a letter to William's legal counsel on March 14, 2018, regarding William's two previous stays at Pathways Treatment Center, a mental health provider in the community, that diagnosed William with drug induced schizophrenia. (D.C. Doc 6, Ex. A.) The City's letter recommended William receive a mental health and chemical dependency evaluation. *Id.*

The Record is unclear that William's counsel responded to the City's March 14, 2018 letter. The Record showed William being sent to Pathways for mental

health treatment on past occasions when police had been called. (D.C. Doc 7, p. 2.)

At the April 17, 2018, Omnibus Hearing, William gave proper notice of an affirmative defense for justifiable force under the authority of § 45-3-102, MCA. William also indicated he would not rely upon an affirmative defense of mental disease or disorder.

William filed a Motion to Continue the June 12, 2018, trial date to obtain a mental health and chemical dependency evaluation. William was unable to complete either evaluation before trial. The Record does not show why William was unable to complete the evaluations.

The jury trial took place on September 21, 2018. During *voir dire*, defense counsel made an oral motion for a mistrial on the basis that William's due process rights were being violated because the jury panel was made of only eleven jurors representing an inadequate cross-section of the community. (M.C. Trial at 40:30-43:10.) The City objected and the Court denied that motion. (43:15-43:45.) William did not appeal this issue to the District Court.

The jury found William guilty of Partner or Family Member Assault-1st offense-Misdemeanor, in violation of § 45-5-206(1)(c), MCA. (5:06:45-5:07:55; *Sentencing Order*, D.C. Doc 1, attached as App. A.) William timely filed a notice of appeal to District Court on the basis that the municipal court abused its discretion by denying the affirmative defense of mental disease or defect because good cause was shown for raising the defense at trial. (D.C. Doc 5, pp. 5-9.) The District Court did not find an abuse of discretion and affirmed the City of Whitefish Municipal Court. (*Order on Appeal*, D.C. Doc 7, pp. 5-7, attached as App. B.)

///

STATEMENT OF THE FACTS

On February 25, 2018, Diane Klink made a 911 call behind the locked door of her bathroom located on the second floor of her home. (1:32:35-1:33:10.) The purpose of the 911 call was because her son, William Klink, was having a mental health crisis and was talking about hurting himself and others. (1:55:55-1:56:30.) It took approximately ten minutes for police to arrive. (2:06:05-2:06:23.)

Diane testified on direct examination that William's eyes were black like he was not there and it was frightening. (2:09:30-2:10:03.) Diane testified she was in fear for William's safety as well as being in fear of what harm William might do to her. (2:08:00-2:08:50.) Diane remembered William making a statement about using methamphetamine and threatening suicide while mistaking Diane for another person. (2:14:30-2:15:25.)

Diane testified on cross examination that William's eyes appeared black because of possibly how dilated his pupils were. (2:19:40-2:19:54.) Diane testified William had been diagnosed with drug induced schizophrenia in the past. (2:19:55-2:20:00.) Diane testified she called 911 because she wanted William to get help. (2:20:10-2:20:25.) Her greatest concern was William might harm himself. (2:20:45-2:21:10.) Diane's worst fear was that William would leave the residence. (2:23:00-2:23:25.) Diane was more concerned for "Willy" than she was for herself. (2:28:20-2:28:30.)

While the jury was on recess, defense counsel proposed a jury instruction to the Court regarding an affirmative defense of mental disease or defect to be read as part of the jury instructions. (2:37:30-2:40:40.) The basis of the jury instruction was because the possible mental disease or defect defense was more clear and acute after Diane's testimony. (2:38:10-2:39:125.)

The Court denied the request for the jury instruction because the jury instruction was not timely. (2:39:00-2:40:45.) Additionally, there was no notice of an affirmative defense of mental disease or defect on the April 17, 2018, Omnibus Hearing Memorandum. (*Id.*; see also 2:42:00-2:42:30.)

Defense counsel reiterated the basis of the proposed jury instruction was because of new trial testimony from Diane that was not available before the trial. (2:46:40-2:48:10) Defense counsel also noted the City was submitting its own new jury instruction based on the same reason: new information unknown prior to trial testimony. *Id.* The Court reserved its final ruling on the proposed jury instructions until the other jury instructions would be addressed. (2:48:10-2:48:18.)

Three City of Whitefish Police Officers, Hunter Boll, Seth Stratton, and Chase Garner, testified before the City rested. (2:50:00-3:42:00.) Officer Garner was the officer that cited William with Partner or Family Member Assault and made the arrest. (3:44:40-3:45:08.)

William elected not to testify and the defense rested its case. (4:00:35-4:00:46.) The Court ruled that neither proposed jury instruction was timely and denied both proposed jury instructions. (4:01:30-4:01:55.) In addition, the jury instruction for the affirmative defense for mental disease or defect was denied because 1) an affirmative defense was not properly noticed on the Omnibus Memorandum; 2) a mental health evaluation was not completed after a May 30, 2018, trial continuance was granted for the purpose of completing the evaluation; and 3) the City's trial brief objecting to mental disease or defect as an affirmative defense was not addressed by the defense. (4:02:10-4:04:20.)

///

STANDARD OF REVIEW

Evidentiary rulings are reviewed for an abuse of discretion. *State v. Daniels*, 2011 MT 278, ¶ 11, 362 Mont. 426, 265 P.3d 623. An abuse of discretion is completed when a district court “acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice.” *Id.*

The Montana Supreme Court applies common law plain error review when a defendant's fundamental rights are invoked, may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process. *State v. R.S.A.*, 2015 MT 202, ¶ 17, 380 Mont. 118, 357 P.3d 899. Plain error review is a discretionary application on a case-by-case basis. *Id.*

SUMMARY OF ARGUMENT

First, the municipal court abused its discretion by not finding good cause to allow William to present evidence of mental defect or disease because new information came to light.

William made prior representations to the City and the municipal court that the affirmative defense of mental disease or defect would not be relied upon. The testimony of William’s mother, Diane, changed the nature of those prior representations. Good cause arose out of Diane’s testimony supporting William’s request to raise the affirmative defense of mental disease or defect. Because good cause was present, the proper remedy was to recess or delay the proceedings to allow the City time to review.

The municipal court abused its discretion by not allowing the affirmative defense when good cause was shown. Therefore, William is entitled to a new trial.

Second, the municipal court committed plain error by not declaring a mistrial because the jury panel was so small that it did not represent a sufficient cross-section of the community. Recent case law has not addressed how large a jury panel should be to ensure the fundamental right of having a sufficient cross-section of the community.

The substantial compliance standard a municipal court must abide by when summoning a jury cannot be met when a material departure is shown in the way the jury was selected, drawn, or summoned.

The municipal court should have delayed proceedings until a larger jury panel could have been secured. The municipal court not delaying proceedings when the jury panel was so small violated William's fundamental right to a fair and impartial jury guaranteed by the Montana and United States Constitutions. Therefore, William is entitled to a new trial.

ARGUMENT

I. The Municipal Court Abused its Discretion Because Good Cause Existed to Present Evidence of Mental Disease or Defect.

The nub of this argument is William had good cause to raise an affirmative defense of mental disease or defect because trial testimony changed past representations that the affirmative defense was not at issue.

The Montana Supreme Court allows raising an affirmative defense, as late as during trial, when there is a showing of good cause. *State v. Wells*, 202 Mont. 337, 344, 658 P.2d 381, 385 (1983). “‘Good cause’ is a factual circumstance or event that occurs notwithstanding counsel's diligent efforts to prepare the defense for trial.” *State v. Couture*, 2010 MT 201, ¶ 76, 357 Mont. 398, 240 P.3d 987.

Wells is similar to the present case in that Defendant sought to raise an affirmative defense of alibi on the basis of good cause because the deadline for

raising the defense had passed (D.C. Doc. 7, pp. 4-5; see also 202 Mont. at 344, 658 P.2d at 385). *Wells* agrees with the *Couture* analysis that good cause is shown when there is “substantial reason that affords legal excuse.” *Wells*, 202 Mont. at 344, 658 P.2d at 385.

Defendant in *Wells* did not show good cause for the affirmative defense of alibi because no explanation was given for why his mother and friend could not be located to testify about a specific, thirty-five minute period. *Id.*

The strength of William’s argument is he did not request to introduce evidence of the affirmative defense of mental defect or disease until Diane’s testimony changed the nature of the case. (2:46:40-2:48:10.) William represented that the both the defense and the City interviewed Diane prior to trial, yet her representations at trial were different. *Id.* This is the factual circumstance required by the *Couture* analysis of good cause despite diligence in preparing for trial.

The weakness of William’s argument is representations were made to the Court and the City that he was not going to rely upon evidence of mental disease or defect. William made that representation at the Omnibus Hearing, he did not receive a mental health evaluation that was the basis for a trial continuance, and he did not respond to the City’s trial brief addressing that affirmative defense. (4:02:10-4:04:20.)

However, those representations do not change Diane’s testimony that raised the legal excuse for William to present an affirmative defense of mental disease or defect during trial.

In *State v. Root*, the trial court did not abuse its discretion in excluding testimony related to Defendant’s good character, even though Defendant changed counsel since the omnibus hearing that left little time for trial preparation. 1999

MT 203, ¶ 23, 296 Mont. 1, 987 P.2d 1140. Defendant was not allowed to present a neighbor as a witness for the affirmative defense of good character and reputation of nonviolence. *Id.* at ¶ 9.

William's case is different from the issue in *Root* because Diane's trial testimony changed the completion of the case not contemplated until after the fact. Unlike *Root*, good cause has been met because Diane's testimony represented a factual circumstance or event that occurred notwithstanding counsel's diligent effort to prepare for trial. *Couture*, 2010 MT 201, ¶ 76.

The municipal court abused its discretion because it did not consider William's good cause for introducing the affirmative defense. "If such good cause is demonstrated, but the State will be surprised if the [affirmative] defense is allowed, the appropriate remedy would be to grant the prosecution a recess or a delay in the proceedings." *Wells*, 202 Mont. at 344, 658 P.2d at 385.

Prior representations by the City show it was aware of William's mental conditions (D.C. Doc 6, Ex. A.). Even though William made prior representations that he would not rely upon the affirmative defense the City was aware of, *Wells* requires that the appropriate remedy be a recess or delay in the proceedings because good cause was shown. The municipal court abused its discretion by not allowing William to present the affirmative defense of mental disease or defect. Therefore, substantial injustice occurred and William should be granted a new trial.

II. William's Sixth Amendment was Violated Because the Jury did not Comprise a Fair Cross-Section of the Community.

William did not get a sufficient cross-section of the community because only eleven jurors were present due to the Court's failure to have a sufficient jury panel.

A successful challenge to the jury panel can be founded upon a “material departure from the law” with respect to the manner in which the jury was selected, drawn, or summoned. *State v. LaMere*, 2000 MT 45, ¶ 59, 298 Mont. 358, 2 P.3d 204. A substantial failure is shown when there is a violation of either one of two basic principles: (1) random selection of jurors; or (2) determination of juror disqualification, excuses, exemptions, and exclusion on the basis of objective criteria. *Id.* at ¶ 57. This is known as the substantial compliance standard for the Montana statutes governing jury selection. *Id.* Those statutes cover the same two basic principles: random selection of prospective jurors and determining juror competency and excuses on the basis of objective criteria. *Id.*

“[T]he objective procedures established by the Montana Legislature for the random selection of jurors are intended to protect a criminal defendant's fundamental right to a fair and impartial jury, as guaranteed by Article II, Sections 24 and 26 of the Montana Constitution and by the Sixth and Fourteenth Amendments to the United States Constitution.” 2000 MT 46, ¶ 35.

“A fair cross section of the community must be represented on [a jury] panel to fulfill the Sixth Amendment's guaranty of an impartial jury in criminal prosecutions.” *Id.* at ¶ 37 (quoting *State v. Stewart*, 175 Mont. 286, 293, 573 P.2d 1138, 1142 (1977)). This Court acknowledges that “although a defendant has no right to have a particular juror sit on the case, a defendant is ‘entitled to a fair cross section of the jury panel’ from which the petit jury is chosen.” *Id.* (quoting *State v. Gollehon*, 262 Mont. 1, 11, 864 P.2d 249, 255 (1993)).

However, “not every deviation, however slight, from the strict letter of the law in drawing or returning a jury will furnish ground for challenge to the panel.” *Id.* at ¶ 59 (quoting *State v. Groom*, 49 Mont. 354, 359, 141 P. 858, 859 (1914)).

More than a technical irregularity must be shown to demonstrate that substantial compliance has not been achieved. *LaMere*, 2000 MT at ¶ 59.

The issue in *LaMere* was that the jury pool of prospective jurors that showed for jury selection was not representative of the community because the clerk utilized a telephone to summon prospective jurors. *Id.* at ¶ 72. The clerk's action violated the statutory requirement, since changed, that prospective jurors receive a jury summons by mail or personal service. *Id.* at ¶ 71.

The clerk's error caused over seventy of the 200 prospective jurors to be excluded. *Id.* at ¶ 70. The incorrect summoning of the jurors by the clerk "skewed the random nature and objectivity of the jury selection procedures..." *Id.* This was a substantial failure to comply with statutory requirements that violated Defendant's constitutional right for an impartial jury. *Id.* at ¶ 72.

William did not address this issue in his appeal to the District Court which is why plain error applies. The Record is unclear as to whether the municipal court properly noticed jurors under § 3-15-405, MCA. § 3-15-405, MCA states:

The clerk of court shall serve notice by mail on the persons drawn as jurors and require the persons to respond by mail as to their qualifications to serve as jurors. The clerk of court may attach to the notice a jury questionnaire and a form for an affidavit claiming an excuse from service provided for in 3-15-313. If a person fails to respond to the notice, the clerk shall certify the failure to the sheriff, who shall serve the notice personally on the person and make reasonable efforts to require the person to respond to the notice.

Additionally, there is no evidence that prospective jurors were improperly noticed to ensure random selection. What is clear is that a mere eleven jurors were available to meet the requirement that William's jury represents a sufficient cross-section of the community. (40:30-43:10.)

Recent case law is limited on the number of potential jurors needed to properly represent a sufficient cross-section of the community. In *State v. Hay*,

the District Court did not abuse its discretion for supplementing a final jury panel of nineteen jurors that originally summoned seventy. 120 Mont. 573, 575, 194 P.2d 232, 233 (1948). The District Court ordered a special venire of an additional twenty names to serve as special jurors of the civil trial. *Id.* at 234, 576.

The basis for ordering the additional names was because the nineteen jurors in attendance were insufficient to complete the jury for the cause now on trial. *Id.* at 234, 577. A challenge to the jury panel was denied. *Id.* at 234, 575.

The Supreme Court could not say an abuse of discretion took place just because the District Court did not draw more than seventy jurors. *Id.* at 235, 579. “The most that can be said here is that, perhaps, the trial judge lent too sympathetic an ear to recited woes of his jurors from the agricultural districts.” *Id.* at 236, 580.

William’s case is similar to *Hay* in that very few jurors showed up for the jury panel. *Hay* is unlike this case in that the municipal court proceeded without supplementing the jury panel, but still made a similar ruling as in *Hay* by denying William’s motion for a mistrial. The municipal court action of not supplementing the jury panel is a material departure from the law with respect to the manner in which the jury was selected, drawn, or summoned. *LaMere*, 2000 MT at ¶ 59. The municipal court action went beyond a technical irregularity under the *LaMere* analysis.

Because of the municipal court’s action, or lack thereof, William’s Sixth Amendment right to have a fair, impartial jury represent a sufficient cross-section of the community was violated under the analysis of *LaMere*.

The municipal court’s action violated William’s fundamental right to a fair and impartial jury. Therefore, the municipal court’s plain error entitles William to receive a new trial.

CONCLUSION

The Court should reverse and remand for a new trial because an abuse of discretion took place when William had good cause to present the affirmative defense of mental disease or defect. Alternatively, the Court should reverse and remand for a new trial because plain error occurred when the municipal court did not provide a sufficient cross-section of the community to represent an impartial jury.

Respectfully submitted this 27th day of February, 2020.

HENDRICKSON LAW FIRM, P.C.
P. O. Box 2502
Billings, MT 59103-2502

By: /S/ CODY ATKINS
CODY ATKINS
Attorney for Defendant/Appellant

APPENDIX

Sentencing Order.....	App. A.
Order on Appeal.	App. B.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except footnotes and for quoted and indented material; and the word count calculated by Word Perfect is 3,227, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/S/ CODY ATKINS
CODY ATKINS

CERTIFICATE OF SERVICE

I hereby certify that on I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on February 27, 2020:

Mary Leffers Barry (Prosecutor)
PO Box 158
Whitefish, MT 59937
Service Method: eService

Timothy Charles Fox (Prosecutor)
Montana Attorney General
215 North Sanders
PO Box 201401
Helena, MT 59620
Representing: State of Montana
Service Method: eService

Angela Jacobs (Attorney)
City of Whitefish
P.O. Box 158
Whitefish, MT 59937
Representing: State of Montana
Service Method: Email Delivery

HENDRICKSON LAW FIRM, P.C.
P. O. Box 2502
Billings, MMT 59103-2502

By: /S/ CODY ATKINS
CODY ATKINS
Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

I, Cody Oliver Atkins, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 02-27-2020:

Chad M. Wright (Attorney)
P.O. Box 200147
Helena MT 59620-0147
Representing: William Purdy Klink III
Service Method: eService

Mary Leffers Barry (Prosecutor)
PO Box 158
Whitefish MT 59937
Representing: State of Montana
Service Method: eService

Timothy Charles Fox (Prosecutor)
Montana Attorney General
215 North Sanders
PO Box 201401
Helena MT 59620
Representing: State of Montana
Service Method: eService

Angela Jacobs (Attorney)
City of Whitefish
P.O. Box 158
Whitefish MT 59937
Representing: State of Montana
Service Method: E-mail Delivery

Electronically Signed By: Cody Oliver Atkins
Dated: 02-27-2020