

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0640

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ROGER CRUZ,

Defendant and Appellant.

ANDERS BRIEF

On Appeal from the Montana Twelfth Judicial District Court,
Liberty County, DC17-06, The Honorable David Cybulski, Presiding

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INTRODUCTION

Upon conscientious examination of the record below, counsel hereby advises the Court that the Appellant Roger Cruz (Cruz) has no meritorious basis for an appeal of issues arising from his conviction for sexual assault. Cruz was acquitted of the offense of sexual intercourse without consent. Undersigned counsel, therefore, moves this Court to allow her to withdraw from representing Cruz in this appeal in accordance with *Anders v. California*, 386 U.S. 738 (1967), and Mont. Code Ann. § 46-8-103(2). If this Court deems there to be issues meriting briefing, counsel requests this Court to specify the issues to be briefed and to deny the motion without discharging undersigned counsel.

STATEMENT OF ISSUE

Should undersigned counsel be permitted to withdraw from this appeal in accord with the criteria established by the United States Supreme Court in *Anders*?

STATEMENT OF THE CASE

This is an appeal from a September 21, 2018, final order of the Twelfth Judicial District Court, Liberty County, The Honorable David Cybulski presiding, adjudging Cruz guilty of the offense of sexual assault, a felony in violation of Mont. Code Ann. § 45-5-502(3), after a May 24, 2018, jury verdict. (D.C. Doc. 79, attached as Appendix Ex. A). The jury acquitted Cruz of the offense of sexual intercourse without consent, Mont. Code Ann. § 45-5-503. His co-defendant,

David Jeffords, was tried in a separate trial, and convicted of sexual intercourse without consent (DC 17-07). His appeal is currently in the briefing stage before this Court (DA 18-0651).

COMBINED STATEMENT OF FACTS AND PROCEDURE

On September 22, 2017, Cruz was charged by Information with sexual intercourse without consent and, an alternative charge of sexual assault. (D.C. Doc. 3). These charges stemmed from his alleged actions on the evening of May 10, 2017, and early morning hours of May 11, 2017, where a 31-year-old woman, from Shelby, A.R., alleged she was raped by two men, Cruz and Jeffords, at a duplex in Chester, Montana, after a night of drinking alcohol.

Specifically, A.R. drove to Chester from Shelby after telephoning her longtime friend Leroy Sellers (“Mister”) who told her that he was hanging out with his son, but that she should talk to Cruz, his roommate whom she knew, and drive down and hang out with him. (5/21/18 Trial Tr. at 9-18). A.R. testified that she had been planting flowers while drinking a couple beers and felt like partying. She Facebook messaged Cruz who told her to come over. She felt comfortable with Cruz and the two had never been romantically involved. (Tr. at 19). A.R. drove from Shelby to Chester around 7:30 p.m., and when she arrived, she continued drinking beer with Cruz. (Tr. at 18-20).

Sam Derouche was also at the duplex. (Tr. at 20). He testified that he was sick from the night before and did not really party with Cruz and A.R. (Tr. at 19-20; 42-44). Cruz and A.R. drank a lot of beer continuously throughout the night. (Tr. at 20-22). She testified to lapses in her memory that night, but she recalls another male showing up whom she did not know at the time, but later found out was Jeffords. (Tr. at 25-26). She remembered going to a bonfire and then returning to the duplex and possibly playing strip poker with Cruz and Jeffords. (Tr. at 22-28, 57). She remembers sitting at the kitchen table with her pants and underwear off and going to the bedroom to lay down. (Tr. at 28).

A.R. testified that the next thing she remembered was Jeffords trying to force his penis into her mouth while Cruz forcibly performed oral sex on her. (Tr. at 29). She did not remember Cruz doing anything else to her. (Tr. at 62-63). She remembered telling Cruz to stop, but that he persisted and pried her legs apart. (Tr. at 29, 89-90). She remembers calling to Sam, who was in another room, for help with no response. (Tr. at 30). A.R. testified that she was panicked and scared and ran out of the room and outside to the neighboring duplex. (Tr. at 30-31). The woman who lived there, Kathy Ann Adams, testified that she heard arguing next door and a knock on her door around 2 or 2:30 a.m., but did not answer the door. (5/22/18 Trial Tr. at 3-4). A.R. got in her car and drove home, arriving in Shelby sometime before 4:30 a.m. (5/21/18 Trial Tr. at 31-32).

The next morning, A.R. testified that she called Mister and told him about what happened. (Tr. at 65). The same morning Jeffords contacted her and told her that the previous night's events were consensual. (Tr. at 33). Jeffords also called law enforcement that morning and reported that he had been sexually assaulted, but later admitted that did penetrate A.R. with his penis, but that such acts were consensual. (Tr. at 62, 64-65, 79-83). Mister told A.R. that Jeffords offered her \$200 if she would not report the incident to law enforcement. (Tr. at 37-38, 65). Cruz never contacted her or offered her money, and Sellers testified that Cruz believed it was consensual until she told him to stop, which he did. (5/23/18 Trial Tr. at 127-28). She testified that Cruz only performed oral sex on her and did not penetrate her with his penis. (5/21/18 Trial Tr. at 63).

Later that morning, A.R. told her parents, whom she lived with, what had happened and she ultimately went to the Shelby emergency room and reported the incident to law enforcement. (Tr. at 40-43). Deputy Dallas Garner met A.R. at the emergency room and transported her to Cut Bank, because there was no nurse certified to perform a SANE (Sexual Assault Nurse Exam) in Shelby. (Tr. at 44-45). SANE registered nurse Crystal Soker examined A.R. and obtained a rape kit and documented her injuries, which included a swollen lip, bruising and bite marks on her inner thighs, and a laceration to her perineum. (5/21/18 Trial Tr. at 43, 45,

5/22/18 Trial Tr. at 11, 16-19). A.R. also reported that her glasses were broken during the incident. (Tr. at 47-48).

After the SANE exam, Montana Department of Criminal Investigation (DCI) Agent Craig Baum interviewed A.R. (Tr. at 46-48, 82-85). The results from the rape kit were largely inconclusive and there was no biological evidence which incriminated Cruz. (Tr. at 38). Indeed, Soker testified that A.R. told her Jeffers was more of the aggressor. (Tr. at 39).

DCI Agent Baum also interviewed Cruz, who admitted to performing oral sex on A.R., but denied any penile penetration because he could not get an erection. (Tr. at 56-58). Liberty County law enforcement officials did not search the duplex or the bedroom after A.R.'s report, and by the time DCI Agent Baum became involved in the investigation, evidence at the duplex had been lost, so a search warrant to search it and the bedroom was never obtained. (Tr. at 62-63). Deputy Garner admitted that in hindsight, he should have collected more evidence and preserved the scene. (5/24/18 Trial Tr. at 10).

During trial, there were some notable jury issues where the judge instructed the jurors not to discuss the case until deliberations. (5/22/18 Trial Tr. at 57, 5/23/18 Trial Tr. at 2-5). The trial lasted four days, after which the jury acquitted Cruz of sexual intercourse without consent (SIWC), but issued a guilty verdict on the charge of sexual assault, with a specific and separate finding of bodily injury.

(5/24/18 Trial Tr. at 2-3; D.C. Docs. 48-49). Cruz's counsel had an issue with the bolding of a word and the title of a jury instruction, and objected during the State's closing argument on the basis of improper commentary by the prosecutor. (Tr. at 41-46, 66-70). A few days after the verdict, two jurors contacted an attorney in Missoula, and indicated they felt pressure to convict Cruz. Cruz's counsel raised the issue in her sentencing memorandum, realizing that Rule 606(b), M.R.Evid., precluded a motion for a new trial. (D.C. Doc. 66).

The State objected to the juror's statements, and the district court refused to consider the issue during the August 1, 2018, sentencing hearing. (8/1/18 Tr. at 3). Cruz's counsel argued for an exception to the minimum sentence required under Mont. Code Ann. § 45-5-502(3), if injuries were involved, and urged a deferred or suspended sentence. (Tr. at 42). The district court rejected this request and sentenced Cruz to 70 years at the Montana State Prison (MSP), with 63 suspended. (Tr. at 49).

The written order issued by the district court, however, imposed 60 years at MSP, with 53 suspended. (D.C. Doc. 79). The district court judge's written order contained that standard provision that "[i]n case of conflict with oral pronouncement, either party has 120 days to request modification." (D.C. Doc. 79). No modification was requested by either party. Cruz has indicated his intent to seek Sentence Review. (D.C. Docs. 78, 81). It is from the district court's final

judgment, conviction, and sentence, for sexual assault, that Cruz now seeks to appeal. (D.C. Docs. 79, 85).

STANDARD OF REVIEW

The standard of review for sufficiency of the evidence to support a jury verdict is “whether, after viewing the evidence in light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Colburn*, 2016 MT 246, ¶ 7, 385 Mont. 100, 386 P.3d 561 (citing *State v. Gardner*, 2003 MT 338, ¶ 29, 318 Mont. 436, 80 P.3d 1262). “Whether sufficient evidence exists to convict a defendant is ultimately an analysis and application of the law to the facts and, as such, is properly reviewed *de novo*.” *Colburn*, ¶ 7 (quoting *State v. Gunderson*, 2010 MT 166, ¶ 58, 357 Mont. 142, 237 P.3d 74).

De novo review also applies to a district court’s ruling “based on an interpretation of a rule of evidence or a statute.” *State v. Haithcox*, 2019 MT 201, ¶ 14, 397 Mont. 103, 447 P.3d 452 (citing *State v. Lotter*, 2013 MT 336, ¶ 13, 372 Mont. 445, 313 P.3d 148). Whether allegations of prosecutorial misconduct, objected to during trial, are sufficient to justify reversal or a new trial, are reviewed by this Court for an abuse of discretion. *State v. McDonald*, 2013 MT 97, ¶ 17, 369 Mont. 483, 299 P.3d 799.

Jury instructions in a criminal case are reviewed by this Court “to determine whether the instructions, as a whole, fully and fairly instruct the jury on the applicable law.” *State v. Sweet*, 2018 MT 263, ¶ 8, 393 Mont. 202, 429 P.3d 912. “A district court has broad discretion when instructing a jury and [this Court will] only reverse if the instructions prejudicially affect the defendant’s substantial rights.” *Sweet*, ¶ 8 (quoting *State v. Santiago*, 2018 MT 13, ¶ 7, 390 Mont. 154, 415 P.3d 972).

ARGUMENT

I. UNDERSIGNED COUNSEL SHOULD BE PERMITTED TO WITHDRAW FROM CRUZ’S APPEAL IN ACCORD WITH ANDERS.

In *Anders*, the United States Supreme Court concluded that when counsel on appeal finds the case to be lacking meritorious issues after a conscientious examination, counsel should advise the court and move to withdraw. *Anders*, 386 U.S. at 744; *see also*, Mont. Code Ann. § 46-8-103(2). The request to withdraw must be “accompanied by a brief referring to anything in the record that might arguably support the appeal.” *Anders*, 386 U.S. at 744; *see also*, Mont. Code Ann. § 46-8-103(2). This brief addresses those potential matters.

In the realm of appellate criminal defense practice, a dilemma arises between counsel’s duty of diligence to her client and the duty of candor before the court. The United States Supreme Court has addressed this dilemma as follows:

We interpret the discussion rule [of *Anders*] to require a statement of reasons why the appeal lacks merit which might include, for example, a brief summary of any case or statutory authority which appears to support the attorney's conclusions, or a synopsis of those facts in the record which might compel reaching that same result. We do not contemplate the discussion rule to require an attorney to engage in a protracted argument in favor of the conclusion reached; rather, we view the rule as an attempt to provide the court with 'notice' that there are facts on record or cases or statutes on point which would seem to compel a conclusion of no merit.

McCoy v. Court of Appeals of Wisconsin, District 1, 486 U.S. 429, 440 (1988).

Thus, the appellate defender, while dutifully reporting to the appellate Court that no merit exists in the appeal, cannot argue against her client's position. It is a tenuous balance. Here, undersigned is compelled by her duty of candor to the Court in accord with *Anders* to provide such notice to the Court that review of the entire transcripts and record, along with diligent research, has yielded just such a result. Undersigned counsel could find no non-frivolous issues to assert and argue in this appeal.

II. THE RECORD MIGHT ARGUABLY SUPPORT THE FOLLOWING ISSUES.

The jury found Cruz not guilty of the offense of SIWC. If not so acquitted, there would have been several legitimate issues to argue on appeal, including sufficiency of the evidence. Cruz may wish to argue that the same holds true for his conviction of sexual assault under Mont. Code Ann. § 45-5-502(3). *See State v. Fuller*, 266 Mont. 420, 880 P.2d 1340 (1994) (this Court reversed defendant's

conviction on three counts of sexual assault on grounds of insufficient evidence).

The criminal offense of sexual assault is codified at Mont. Code Ann. § 45-5-502(1) and provides that “[a] person who knowingly subjects another person to any sexual contact without consent commits the offense of sexual assault.”

Montana Code Annotated § 45-2-101(67) defines “sexual contact” as “touching of the sexual or other intimate parts of the person of another, directly or through clothing, in order to knowingly or purposely: (a) cause bodily injury to or humiliate, harass, or degrade another; or (b) arouse or gratify the sexual response or desire of either party.” Under Mont. Code Ann. § 45-5-502(3), “if the offender inflicts bodily injury upon anyone in the course of committing sexual assault, the offender shall be punished by life imprisonment or by imprisonment in the state prison for a term of not less than 4 years, unless the judge makes a written finding that there is good cause to impose a term of less than 4 years and imposes a term of less than 4 years, or more than 100 years and may be fined not more than \$50,000.” “Bodily injury” is defined at Mont. Code Ann. § 45-2-101(5) as “physical pain, illness, or an impairment of physical condition and includes mental illness or impairment.”

Cruz may wish to argue on appeal that the testimony and evidence introduced during trial was not sufficient to support a conviction for sexual assault and/or sufficient to prove the requisite bodily injuries suffered by A.R. to support

his conviction and corresponding sentence for felony sexual assault under Mont. Code Ann. § 45-5-502(3). He may wish to challenge the jury instructions, as a whole, did not fully and fairly instructing the jury on the applicable law.

Despite the district court judge's admonition and instructions to the jury and the constraints of Rule 606(b), M.R.Evid., Cruz may wish to argue that juror issues (talking amongst themselves before verdict and two jurors' post-verdict regret) justify a new trial and/or a new sentencing hearing. Rule 606(b), M.R.Evid. provides

Inquiry into validity of verdict or indictment.

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

This Court has determined that this Rule precludes evidence of internal influence to undermine a guilty verdict, such as pressure from other jurors, however, it is inapplicable to preclude evidence of external influences on the jury. *Horn v. Bull River Country Store Props.*, 2012 MT 245, ¶ 46, 366 Mont. 491, 288 P.3d 218 ("a juror is permitted to submit an affidavit calling into question the validity of a verdict if the affidavit concerns 'extraneous prejudicial information'

improperly brought to the jury's attention or 'outside influence' brought to bear upon any juror").

This Court has "consistently held that under Rule 606(b), M.R.Evid., the use of juror affidavits to impeach a jury verdict is limited to showing external influences on the jury." *Horn*, ¶ 46 (quoting *Spicher v. Miller*, 260 Mont. 504, 507, 861 P.2d 183, 185 (1993)); *see also*, *State v. Kelman*, 276 Mont. 253, 262, 915 P.2d 854, 860 (1996). "In other words, 'juror affidavits may not be used to impeach the verdict based upon internal influences on the jury,' in part because 'jurors are expected to bring to the courtroom their own knowledge and experience to aid in their resolution of the case.'" *Horn*, ¶ 46 (quoting *Stebner v. Associated Materials, Inc.*, 2010 MT 138, ¶ 16, 356 Mont. 520, 234 P.3d 94). Unfortunately for Cruz, this Court has determined that "[p]ressure by other jurors also does not qualify as an exception to Rule 606(b), M.R.Evid." and "knowledge and information shared from one juror to another or others is not an extraneous influence." *State v. Hage*, 258 Mont. 498, 508-09, 853 P.2d 1251, 1257 (1993). Cruz may wish to distinguish these case authorities and argue that the jury issues in this case justify a new trial.

Cruz may also wish to argue on appeal that instances of prosecutorial misconduct which occurred during the State's closing argument, even if the comments related to the SIWC charge, were sufficiently prejudicial to justify

reversal and a new trial. “A prosecutor’s misconduct may be grounds for reversing a conviction and granting a new trial if the conduct deprives the defendant of a fair and impartial trial.” *Haithcox*, ¶ 24 (citing *McDonald*, ¶ 10). However, “this Court will not presume prejudice from the alleged prosecutorial misconduct” and a “defendant must show that the argument violated his substantial rights.” *Haithcox*, ¶ 24 (citing *McDonald*, ¶ 10).

CONCLUSION

Undersigned counsel has concluded that this appeal presents no meritorious issues for appellate review by the Court and therefore requests the Court to grant her motion to withdraw as counsel. If the Court determines there are issues warranting an appeal brief, counsel requests the Court set them out in its Order and allow undersigned counsel to remain on the case and to proceed with briefing.

Respectfully submitted this 4th day of March, 2020.

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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 less than 10,000 words, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices

/s/ Robin A. Meguire
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APPENDIX

Judgment and Sentence (September 21, 2018)..... App. A

CERTIFICATE OF SERVICE

I, Robin Amber Meguire, hereby certify that I have served true and accurate copies of the foregoing Brief - Anders-Withdrawal of Counsel to the following on 03-04-2020:

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