IN THE MONTANA SUPREME COURT

No. DA-19-0395

STATE OF MONTANA,
Plaintiff and Appellee,
vs.

GLEN JOHN GLENN,
Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, the Honorable Ashley Harada, Presiding

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ISSUES PRESENTED

1. Whether the trial court should have allowed the State to introduce extremely prejudicial rebuttal evidence, when the State possessed such evidence, at the latest, the afternoon before the jury trial commenced, but did not disclose the evidence to defense counsel until the noon hour on the second day of trial, after all the defense witnesses had testified and the defense had rested its case.

2. Whether the defendant received ineffective assistance of counsel when his lawyer mistook the critical time sequence relating to his client's alibi defense, leading to the State's obtaining recorded jail calls in which the defendant discussed this problem with his wife, and then playing portions of these calls for the jury during rebuttal, severely diminishing the credibility of the alibi testimony which had been presented by the defense.

STATEMENT OF THE CASE

On September 12, 2018, defendant Mr. Glenn was charged with

several felonies, and incarcerated pretrial on $15,000.00 bond. He was later tried on an Amended Information which charged one count of strangulation, 45-5-215 MCA, and two counts of PFMA, both felonies, 45-5-206 MCA. His jury trial took place on March 4 and 5, 2019 (he was still incarcerated at this time). Upon a verdict of guilty on all counts, he was subsequently sentenced to 5 years DOC on each of the three counts, no time suspended, all three sentences to run concurrently. This appeal followed.

Mr. Glenn was charged with strangling and beating up his former wife, Josie Rising Sun, in the early morning hours of Sunday, June 17, 2018. Mr. Glenn had been divorced from Ms. Rising Sun for more than a decade, and at the time of the alleged crimes was living with his wife, Fran Knows His Gun, and their five children. The State in its case presented Ms. Rising Sun, who testified Mr. Glenn entered her residence and assaulted her; Irving Rising Sun, her father, who testified she came to his residence afterward, beaten and distraught; and three Billings police officers who conducted the official investigation into the matter. The defense presented Lacey Doney, Mr.Glenn's sister, who testified she was drinking with Josie most of the day Saturday June l6, 2018, and

into the early morning hours of June l7, and had left Josie's residence shortly before the alleged assault. Lacey also testified that when she left Josie's residence, Josie's brother Chris Rising Sun, was passed out on the living room floor next to Josie (the investigating officers had testified that Chris had refused to speak with them the next morning about the incident; though subpoenaed, he did not attend the trial). The defense also presented Mr. Glenn's wife and 15-year old son, who testified he was with them at home on the evening of June 16 and into the early morning hours of June 17. The defendant did not testify.

At the noon recess, after the defense had rested and while the court was conferring with counsel to settle jury instructions, the State informed the court that it intended to play portions of three recorded jail calls between Mr. Glenn and his wife, in which they discussed the need to account in detail for Mr. Glenn's whereabouts on the evening of June 16, 2018. The defense objected to this, and there ensued a lengthy discussion between court and counsel as to the propriety of this rebuttal. The court expressed grave concern over the fact that the prosecution had possessed and reviewed these jail calls Sunday afternoon, March 3, but had not disclosed them to defense counsel until the noon hour the second

day of trial, March 5, 2018, after the defense had rested its case. In the course of this discussion, defense counsel explained that when he began to marshal the defense evidence of alibi by taking and recording the statements of Mr. Glenn's wife and son, he had neglected to elicit detailed information about the family's activities on the evening of June l6, 2018, mistakenly asking them about the evening of June 17, 2018, because the alleged assault had taken place on June 17 (but in the early morning hours, between 3-4 am). Defense counsel acknowledged that this was "a dumb mistake." After more discussion, the court took the matter under advisement for half an hour, then permitted the rebuttal. Tr. 359-372 (entire discussion of this matter).

Selected portions of the jail calls were then played for the jury, after which the State in its closing emphasized that these calls greatly diminished the credibility of the alibi testimony, and the Defense explained to the jury that defense counsel should be blamed for this, not defendant, because of defense counsel's deficient work. Tr. 394-95. Four hours into its deliberations, the jury sent a note to the court requesting to be provided with the tapes of the jail phone calls. Tr. 405. The court declined to do this. Shortly afterward, the jury returned a verdict of

guilty on all counts.

STATEMENT OF FACTS

By combining the testimony of the five State's witnesses and the first defense witness (Lacey Doney), one may piece together a narrative about Josie Rising Sun's assault, beginning about mid-day Saturday, June 16, 2018. Josie was moving into a new apartment, but her furniture hadn't arrived, so after setting up some mattresses and other bare domestic essentials, she spent the day visiting casinos and drinking with her brother Chris and her ex-sister in law, Lacey, Tr. 209-13; 235. The trio bought more to drink and spent the evening drinking at Josie's new residence. According to Lacey, they were all "pretty hammered by the end of the night," and everyone ended up passing out after midnight on the mattresses in the living room. Tr. 272-75. The last thing Josie remembered about the evening was seeing Chris and Lacey standing in her living room; then she passed out. Tr. 214-15. Lacey woke up at some point in the night and walked home; before this, she remembers Chris and Josie getting in a "fight" Tr. 275-77; 278. According to Lacey, none of them had seen defendant Mr. Glenn at any time during the time they

were together. Tr. 279.

According to Josie, she woke from her stupor to find herself being strangled and beaten by her former husband, Mr. Glenn. She asserts that someone else was beating up her brother Chris at this time; he, however, ran out of her apartment after the assault was over, even though she asked him to stay. Tr. 216-22. Josie then walked to her father's house, told him Mr. Glenn had assaulted her, and they called the police.

The police took statements from Josie and her father, and then located and attempted to take a statement from Chris; however, he "didn't want to talk to law enforcement at all" and "didn't want to give a statement about the assault on his sister" Tr. 181; 201. He also later absented himself from Billings in early March because "he didn't want to testify" at trial. Tr.122.

Fran Knows His Gun and Tasian Glenn (defendant's son) testified at some length on the second day of trial that Mr. Glenn was with them from mid-day Saturday through Sunday evening, engaging in various family activities and celebrating Father's Day. They testified that the whole family went to bed around midnight on June 16, and all woke up

for a routine household morning on June 17, Father's Day. Tr.299-331.

This was the state of the evidence when the Defense rested at noon on the second day of trial–an uncorroborated accusation of serious assault against Mr. Glenn, a strange set of evasions and disappearances by the only other eyewitness to the alleged assault, and a fairly detailed narrative of Mr. Glenn's continued presence with his family during the relevant time periods. At this point, the prosecutors, in chambers, informed the court that they intended to offer tape recordings of jail calls made by the defendant to his wife on February 13 and 15, 2019. Tr. 359-61. Defense counsel informed the court that he had only heard about and listened to portions of the calls during the noon hour, and objected to their admission as rebuttal evidence on the grounds of surprise. He also at this time explained to the court that when he first took the alibi witnesses' statements, he focused on June 17 (since that was the date of the assault), rather than the evening and night of June l6–the critical time period. He also explained "it was an honest mistake, so when I figured that out, I approached Mr. Glenn, and I approached the witness separately, and said, hey, actually, we are looking at June 16 and into

that early morning, not June 17, sorry, what did you guys do, what were you doing that day?" Tr.362-65.

The court, concerned about surprise, questioned the prosecutors about when they discovered and reviewed the three jail calls between Mr. Glenn and his wife. They claimed they first reviewed the calls the Sunday afternoon before trial, March 3, 2019. They acknowledged they had not provided notice of the calls to defense counsel until the noon hour, March 5, 2019. Tr. 365-66.

After further discussion, and after a recess to research the issue, the court permitted the State to play portions of the jail calls for the jury. Tr. 373-74.

In its closing, the State devoted a great deal of time to the jail calls arguing that they showed Mr. Glenn and his wife couldn't actually remember what they were doing on the evening of June 16. In particular, the State quoted Mr. Glenn (from the recorded call), arguing: "You've just heard the defense, ladies and gentlemen, 'I have no fucking idea what we did'–that is the alibi." Tr. 388.

The defense addressed the jail calls in its closing as follows: "What those calls show is that Mr. Glenn had an imperfect lawyer." Tr. 395.

STANDARD OF REVIEW

The court reviews rulings on the admissibility of rebuttal evidence for abuse of discretion, *State v. Weitzel,* 2000 MT 86, 299 Mont 192, 998 P2d 1154 (2000).

The standard of review for a claim of ineffective assistance of counsel is set out in *State v. Audet,* 2004 MT 224, 322 Mont 415, 96 P3d 1144 (2004) as follows (para. 9):

> "To assess a claim of ineffective assistance of counsel, both on direct appeal and in post-conviction proceedings, this Court applies the two-prong test from *Strickland v. Washington,* which requires the defendant to 'show that his counsel's performance was deficient and that the deficient performance prejudiced the defense and deprived the defendant of a fair trial'...Moreover, claims of ineffective assistance of counsel involve mixed questions of law and fact. Therefore, this Court reviews such claims *de novo.*"

SUMMARY OF ARGUMENT

The tape-recorded jail calls proposed for admission as rebuttal evidence contained so many elements of *unfair* prejudice, and the timing of their disclosure was so calculated to *unfairly* surprise the defense, that the court should have excluded them. The court's reliance on the *Dobrowski* case was misplaced–its facts made it readily distinguishable

from the circumstances apparent in this matter.

There could hardly be a clearer example of deficient performance by defense counsel than mistaking the relevant time period involved in establishing an alibi defense. This may not have been a "dumb" mistake, as defense counsel himself characterized it, but it was an *inexcusable* one in a case where the State's case was less than overwhelming, and the sole defense was alibi. The prejudice resulting from this mistake was apparent: the prosecutor was enabled to argue in closing that Glenn's alibi was "I have no fucking idea what we did."

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN PERMITTING THE STATE TO INTRODUCE EXTREMELY PREJUDICIAL REBUTTAL EVIDENCE THAT HAD NOT BEEN DISCLOSED TO THE DEFENSE IN A TIMELY MANNER.

It was clearly established during the extended in-chambers conference concerning the proposed admission of the jail calls in rebuttal, that at least 48 hours elapsed between the prosecutors' reviewing these calls and their disclosing them to the defense. Tr. 360-62, 365. While ordinarily 48 hours might not be an unreasonable hiatus for disclosure, the timing in this case was not ordinary: the prosecutors knew about the

evidence the afternoon *before trial,* and disclosed the evidence to the defense *after the defense rested at trial*–in other words, after the defense could do nothing to counter them, *see,* Tr. 367. If they had been disclosed Sunday afternoon, as they should have been, the defense could have consulted with the defendant and his wife to alert them to the fact an explanation of the circumstances revealed by these calls would be called for in her testimony, and *perhaps* revisited what by that time must have been a nearly irrevocable decision to have the defendant remain silent in the defense case. As it was, the calls "spoke for themselves" to the jury–undoubtedly fueling the common skepticism with which family-centered alibi evidence is viewed by jurors.

After listening to argument and reviewing the *Dobrowski* case, the court allowed the State to play the jail calls in rebuttal, finding that the 48-hour delay in disclosure was not "prejudicial, dilatory" conduct on the prosecutors' part, Tr. 372-74. In deciding thus, the court failed to see that the hiatus in disclosure in this case was *gravely and unfairly* prejudicial (as it was not in *Dobrowski*), but also that what was involved was not *delay* but *surprise*–surprise expressly designed to be prevented

by the disclosure requirements of the discovery statutes, 46-l5-322, 327 MCA, *see, State v. Stewart,* 2000 MT 379, 303 Mont 507, 16 P3d 391 (2000); *see also* Tr. 365-374. The surprise was so great that the jail calls were allowed to resonate with the jury without response from the defense–and they resonated so strongly that the jurors wanted to hear them again during their deliberations, Tr. 405.

One central element of the prejudice involved in admitting these calls was, of course, the timing of the surprise itself–the defense had rested, the defendant had not testified, and so the defense was virtually helpless to do anything to counter or correct the diminution in credibility inevitably occasioned by this evidence.

But the calls were also gravely and unfairly prejudicial in another way: they allowed the jurors to hear the rough, unvarnished speech of the defendant himself, when his exercise of the constitutional right to silence at trial had protected him up until then from this exposure. The calls also revealed that he was in custody up to the time of trial–a fact courts always take pains to keep from jurors if possible. And by being able to utilize the automatically-recorded calls, the State was also enabled to take unfair advantage of the defendant's lack of financial

resources to post the modest bond at issue–had he been able to do so, the conversations he had with his wife concerning their activities on June 16, 2018, would have been private and forever inaccessible.

There is one other troubling aspect of the disclosure issue–namely an indication that the State may have been less than candid with the court concerning when they knew of the jail calls. The calls were made and recorded on February l3 and 15, 2019–two weeks before trial. Is it just a coincidence that the State filed a notice adding Det. John Tate, the individual who authenticated and published the calls at trial, as a State's witness on February 15, 2019? Doc. 30.

In any event, the court allowed the State to take advantage of a defendant's pretrial incarceration and decision to remain silent at trial to eviscerate what otherwise appears to be a good faith alibi defense. And in doing so, it permitted the State to benefit from a delay in disclosure expressly designed not only to surprise the defense, but also to ensure it could not effectively respond to the surprise.

II. THE DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS LAWYER MADE A CRITICAL MISTAKE IN MARSHALING ALIBI EVIDENCE, A MISTAKE EXPLICITLY ACKNOWLEDGED SEVERAL TIMES ON THE RECORD.

In preparing Mr. Glenn's case, defense counsel took statements from Ms. Knows His Gun and Tavian Glenn on December 18, 2018, and provided these statements to the prosecution on January 2, 2019. Doc.18 Unfortunately, these statements concerned their recollections of the family's activities on the day and evening of June 17, 2018 (Father's Day), but omitted to address their recollections concerning family activities on the day and evening of June 16, 2018,and the early-morning hours of June 17, 2019–the crucial time period for the alibi. As counsel later said, "this was a dumb mistake" (Tr 362)–one which he tried to correct in mid-February by talking to his clients about it and directing their attention to recalling their activities on June 16. Tr.362. Since Mr. Glenn was in jail, however, his necessary consultation with Ms Knows His Gun about these crucial facts was recorded for all to hear. While the State contended that these calls demonstrated that the alibi was fabricated or imagined, defense counsel quite correctly told the jury in closing that what the calls demonstrated was that Mr. Glenn had "an imperfect lawyer" Tr. 395.

For an appellate court to make a finding of ineffective assistance of counsel on direct appeal, it must be apparent from the record that

defense counsel not only did something professionally questionable on its face, but that what he did "was not a reasonable defense strategy, thus overcoming the presumption that what he did fell within the range of reasonable professional conduct," *State v. Audet,* 2004 MT 224 (para. 11-12). In other words, the record must supply the reason for counsel's act or omission–which in this case, it amply does, *see,* Tr. 355; 362; 395.

Since we are left in no doubt from the record that defense counsel made an egregious mistake in marshaling the crucial defense evidence, we are left only to determine whether his mistake constitutes "objectively unreasonable professional conduct, *Whitlow v. State,* 2008 MT 140, 343 Mont 90, 183 P3d 861 (2008), and whether this conduct prejudiced the defense, that is, whether without the mistake the outcome of the trial might have been different, *Strickland v. Washington,* 466 U.S. 668 (1984). These determinations are easy to make on this record. No one would contend that a lawyer preparing an alibi defense, who mistakes the exact period of time for which he needs to provide testimony establishing the defendant was elsewhere, is acting in a reasonable professional manner. Everyone would surely agree this is the one mistake you *can't* make if you're a defense attorney with an alibi case. And in Mr.

Glenn's trial, the outcome surely might have been different if the jury hadn't listened to the jail calls–as the prosecution's emphasis on these calls in its closing, and as the jury's interest in these calls during its deliberations, clearly shows. And it is also clear that the outcome might have been different if the alibi evidence had been competently marshaled and presented, since the State's case was anything but overwhelming. Consider, in this regard: (1) the only eyewitness to the assault–Josie Rising Sun's brother–ran from her apartment after the assault, refused to talk to investigating officers the same day, and made himself unavailable for trial; (2) no one who was with Josie the day and evening of June 16 ever laid eyes on the defendant Mr. Glenn at all (in other words, Josie's identification of him as the perpetrator was wholly uncorroborated); (3) Josie and her companions were drunk to the point of passing out in the early morning hours of June 17; (4) Josie and her brother had "a fight" in the middle of the night June 17, and Josie and her brother could be physically violent with one another, Tr. 275-77; 289. (5)There was no evidence presented as to what could have motivated Mr. Glenn to attack his former wife on June 17, when they had been divorced for more than a decade, and when Mr.Glenn and his family had

not seen Josie but twice in the past six years, MotLimHrg Tr, 42. (6) Josie admitted during cross-examination that her initial statement to the police implicating Lacey Doney in the assault was inaccurate, Tr. 237, 239.

In short, because there were many elements of reasonable doubt infecting the State's case, a professionally competent presentation of alibi evidence would have had a reasonable probability of altering the result of the trial.

CONCLUSION

Because the district court committed reversible error in allowing the jail calls to be used in the State's rebuttal, Mr. Glenn's conviction should be vacated and the matter remanded for a new trial.

Alternatively, because the defendant received ineffective assistance of counsel, Mr. Glenn's conviction should be vacated, and the matter remanded for a new trial.

RESPECTFULLY SUBMITTED this 6th day of April, 2020.

/s/_____

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11, M.R.App.Proc., I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for quoted and indented material, and the word count calculated by Microsoft is 3,774, exclusive of words not to be counted under M.R.App.Pro.

/s/_____
William Boggs

APPENDIX

1. Judgment (dated May 15, 2019)

2. Order Appealed From (Trial Tr 359-372)

CERTIFICATE OF SERVICE

I, William Boggs, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 04-06-2020:

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