IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0372

STATE OF MONTANA,

Plaintiff and Appellee,

v.

MICKEY RODNEY PAYNE,

Defendant and Appellant.

ANDERS BRIEF OF APPELLANT

On Appeal from the Montana Thirteenth Judicial District Court, Yellowstone County, the Honorable Donald Harris, Presiding

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INTRODUCTION

Upon conscientious examination of the record below, counsel hereby advises this Court that the Appellant, Mickey Payne, has no non-frivolous basis for an appeal of his the district court's restitution order of $96,448.98, imposed as part of his conviction for misdemeanor assault. Undersigned counsel, therefore, moves this Court to allow her to withdraw from representing Mr. Payne 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 are issues that merit briefing, counsel requests this Court specify the issues to be briefed.

Pursuant to Mont. Code Ann. § 46-8-103(2), counsel has advised Mr. Payne of her decision regarding the merits of this appeal and informed him that he will have the right to file a response to this motion directly with the Court. Counsel also sent him a draft of this Anders brief in advance of filing.

STATEMENT OF THE ISSUE

Should the undersigned counsel and the Appellate Defender Division be permitted to withdraw from representing Mr. Payne in

accord with the criteria established by the United States Supreme Court in *Anders*?

STATEMENT OF THE CASE

On May 8, 2018, the State charged Mr. Payne with aggravated assault, misdemeanor assault, and criminal possession of dangerous drugs (misdemeanor). D.C. Doc. 1.

On January 30, 2019, the State amended the charge to misdemeanor assault. D.C. Doc. 41. Mr. Payne pled guilty to misdemeanor assault on the same day. D.C. Doc. 38.

On March 20, 2019, the district court sentenced Mr. Payne to six months in county jail, to run consecutive to his sentence in DC-16-0713 and DC-15-517. D.C. Doc. 47, Judgment, App. A. The court ordered Mr. Payne to pay $96,446.98 in restitution.

STATEMENT OF THE FACTS

On Thursday, February 4, 2016, Mr. Payne and a group of friends and acquaintances, including Pablo Hidalgo, Tiffaney Swackerd, Belva DeCoteau and Raina Stucker were socializing together near a bar in Billings, Montana. An argument between Payne and Swackerd started

over property. Payne struck Hidalgo in the face, injuring him. D.C. Doc. 1.

Over the weekend, Hidalgo did not seek medical treatment. March 19, 2019 Sentencing Hearing Tr. at 17. (Hereinafter, "Tr." refers to this transcript).

On Monday, February 8, 2016, Hidalgo was found unconscious in his bedroom by family members. He was taken to the hospital, where it was determined that he had severe bleeding in his brain secondary to a traumatic brain injury. He underwent multiple surgeries and remained in the ICU for weeks. D.C. Doc. 1.

On March 8, 2018, the State charged Mr. Payne with aggravated assault, misdemeanor assault, and criminal possession of dangerous drugs (misdemeanor). D.C. Doc. 1.

On June 11, 2018, the State gave notice of intent to designate Payne as a subsequent persistent felony offender. D.C. Doc. 10; *see also* D.C. Doc. 22.

On January 30, 2019, the State amended the charge to misdemeanor assault. D.C. Doc. 41. No plea agreement was offered on the misdemeanor and nothing was said about restitution.

Mr. Payne pled guilty to misdemeanor assault on the same day. D.C. Doc. 38. Specifically, he admitted that he knowingly "caused bodily injury to Pablo Hidalgo" and that he did that by "punching him in the face." January 30, 2019 Change of Plea Hearing Tr. at 4. The State later explained that it had decided to offer a misdemeanor because Mr. Hidalgo did not want to go through with trial "because of the trauma on him." Tr. at 14.

On February 10, 2019, the defense was provided with an Affidavit of Loss outlining a restitution claim for $96,446.98, based on Medicaid bills sustained by Hidalgo. D.C. Doc. 42.

A sentencing hearing was held on March 20, 2019. Payne's attorney argued that because Payne had only pled to a misdemeanor, the restitution imposed should reflect that charge, rather than the felony charge that was dropped. Tr. at 16-17. She argued that there was not enough information to prove that Payne's conduct caused the high medical costs. She pointed out that Hidalgo had continued to drink throughout the weekend and had not sought medical treatment until four days after the altercation with Payne. Tr. at 17. She did not offer any medical expert testimony regarding causation of Hidalgo's

traumatic brain injury, although she had previously mentioned consulting a medical expert regarding the causation issue. February 12, 2019 Hearing Tr. at 3.

The State called Hidalgo's mother, Carmen Salazar, to testify. Ms. Salazar told the Court that Hidalgo had been living with his grandmother at the time of the incident. Tr. at 18. She said that she had learned from the grandmother that Hidalgo had never left the home after returning home after Thursday night. Tr. at 19.

The judge asked defense counsel if she had any witnesses to establish that Hidalgo had gone out drinking after the Thursday incident or had gotten in other fights. She stated she did not. Tr. at 23. She relied on police reports in which bartenders had been interviewed and stated that they saw that Hidalgo at a casino during the weekend after February 4. Another witness reported he had taken Hidalgo out to do errands that weekend. App. B, excerpts from police reports used as exhibits at sentencing hearing. None of the witnesses stated that Hidalgo had gotten into a fight with anyone else. The reports did not contain any information that specifically confirmed Hidalgo had been drinking.

At the sentencing hearing, the State requested $96,446.98 in restitution, based on an invoice from Montana Medicaid. Ms. Carmen Salazar, mother of Pablo Hidalgo, testified regarding the medical costs.

The Court explained that it was imposing this restitution for the following reasons:

> More importantly, there's no medical evidence that has been presented to the Court about how drinking alcohol would have affected the traumatic brain injury in this case if at all, and when we don't know what, if anything, he had to drink, and we don't have any medical evidence that would show that that would have worsened the traumatic brain injury, and the Court simply has nothing upon which to determine that there should be a causal break, uh, between the assault and the traumatic brain injury for which these medical expenses were incurred.
>
> Tr. at 33.

The district court sentenced Payne to six months in jail, consecutive to his sentences in DC-16-713 and DC-15-513. The court ordered Payne to pay $96,446.98 in restitution. App. A.

STANDARD OF REVIEW

With a criminal sentence (such as Payne's six-month jail sentence) that is statutorily ineligible for review by the Sentence Review Division because it lacks at least one year of actual incarceration, this Court's review is two-tiered: this Court reviews the sentence for both legality

and abuse of discretion. *State v. Herd*, 2004 MT 85, ¶¶ 16-23, 320 Mont. 490, 87 P.3d 1017. This Court's review for legality is confined to determining whether the sentencing court had statutory authority to impose the sentence, whether the sentence falls within the parameters set by the applicable sentencing statutes, and whether the court adhered to the affirmative mandates of the applicable sentencing statutes. *State v. Stephenson*, 2008 MT 64, ¶ 15, 342 Mont. 60, 179 P.3d 502. This determination is a question of law and, as such, this Court's review is *de novo*. *Stephenson*, ¶ 15. A sentencing court abuses its discretion when it acts arbitrarily without employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice. *State v. Brotherton*, 2008 MT 119, ¶ 10, 342 Mont. 511, 182 P.3d 88.

In addition, this Court reviews for clear error a lower court's factual findings regarding the amount of restitution assessed against a defendant. *State v. Johnson*, 2011 MT 286, ¶ 8, 362 Mont. 473, 265 P.3d 638 (citing *State v. Essig*, 2009 MT 340, ¶ 12, 353 Mont. 99, 218 P.3d 838). A finding of fact is clearly erroneous if "it is not supported by substantial evidence, the court has misapprehended the effect of the

evidence, or this Court's review of the record convinces it that a mistake has been committed." *State v. Spina*, 1999 MT 113, ¶ 12, 294 Mont. 367, 982 P. 2d 421.

Ineffective assistance of counsel claims present mixed issues of law and fact, which are reviewed de novo. *State v. Sartain*, 2010 MT 213, ¶ 11, 357 Mont. 483, 241 P.3d 1032.

I. MR. PAYNE MAY WISH TO ARGUE THAT THE DISTRICT COURT ERRED IN IMPOSING RESTITUTION OF OVER $96,000 BECAUSE THE STATE DID NOT PRESENT SUBSTANTIAL EVIDENCE THAT THESE MEDICAL COSTS WERE CAUSED BY THE MISDEMEANOR ASSAULT TO WHICH HE HAD PLED GUILTY.

A victim who sustains pecuniary loss from a defendant's criminal action is entitled to recover all special damages substantiated by evidence in the record that are recoverable in a civil action. MCA § 46-18-243(1)(a). Offenders are liable for restitution only for those offenses of which they have been found guilty or to which they have admitted or agreed to pay restitution. *State v. Breeding*, 2008 MT 162, ¶ 19, 343 Mont. 323, 184 P.3d 313. An offender may not be ordered to pay restitution in excess of the damages caused by his or her criminal conduct. "[A] causal relation between the offender's criminal conduct and the pecuniary loss is the touchstone for determining whether a

person or entity is a victim entitled to restitution. *Breeding*, ¶ 13 (noting 'causal standard')."

A claim for restitution must be supported by substantial evidence. "Substantial evidence is 'more than a mere scintilla of evidence but may be somewhat less than a preponderance…evidence presented in favor of restitution must be substantiated in the record such that a reasonable mind could conclude that the award of restitution was warranted." *State v. Patterson*, 2016 MT 289, ¶ 16, 385 Mont. 334, 384 P.3d 92 (citations and quotation marks omitted). Restitution amounts can be proved by a "victim's affidavit or testimony regarding the amount of pecuniary loss." *State v. Fenner*, 2014 MT 131, ¶ 13, 375 Mont. 131, 325 P.3d 691 (citing *State v. Kuykendall*, 2006 MT 110, 332 Mont. 180, 136 P.3d 983; *State v. Charley Johnson*, 2011 MT 286 362 Mont. 473, 265 P.3d 638).

A sentencing court accordingly may award restitution in reliance on victim testimony. *State v. Aragon*, 2014 MT 89, ¶ 14, 374 Mont. 391, 321 P.3d 841. A defendant has a due process right to " 'explain, argue, and rebut any information' presented at sentencing." *Aragon*, ¶ 12, quoting *State v. Roedel*, 2007 MT 291, ¶ 65, 339 Mont. 489, 171 P.3d

694). When a defendant does not present contradictory evidence, the District Court does not err in relying on a victim's estimates of loss. *State v. Simpson*, 2014 MT 175, ¶ 14, 375 Mont. 393, 328 P. 3d 1144, citing *State v. Dodson*, 2011 MT 302, ¶ 14, 363 Mont. 63, 265 P.3d 1254.

A. Mr. Payne may wish to argue that the restitution award was not supported by substantial evidence because he did not admit to causing serious bodily injury when he pled guilty to misdemeanor assault.

Mr. Payne pled guilty only to misdemeanor assault, but the restitution order reflected medical costs for an assault that caused serious bodily injury.

Mr. Payne's attorney objected that the State had not met its burden of proving that Mr. Payne caused Hidalgo's injuries because Mr. Payne had pled guilty only to misdemeanor assault. Tr. at 16-17. The State had the burden of proving causation for purposes of providing "substantial evidence" to support the restitution award.

At his change of plea, Mr. Payne admitted only to punching Hidalgo in the face. 1/30/19 Change of Plea Tr. at 4. He did not admit to causing "serious bodily injury," as it is defined in MCA § 45-2-101 (66).

"Serious bodily injury" is defined as "bodily injury that: (i) creates a substantial risk of death; (ii) causes serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ; or (iii) at the time of injury, can reasonably be expected to result in serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ."

The State had amended the charge of aggravated assault—which which does require proof of serious bodily injury—to misdemeanor assault, which does not. This amendment suggested that Mr. Payne was pleading guilty to conduct that did not amount to an assault that caused serious bodily injury. On the other hand, the statutory definition of misdemeanor assault does not exclude the possibility of serious bodily injury, because it refers only to "bodily injury." MCA § 45-5-201 provides: "(1) A person commits the offense of assault if the person: (a) purposely or knowingly causes bodily injury to another."

In addition, Mr. Payne could argue that there was no plea agreement in this case, and that he therefore did not agree to pay for a restitution total suggested by the State. He did not waive his right to contest the amount of restitution imposed. The State did not present his

attorney with an Affidavit of Loss until after the change of plea hearing. D.C. Doc. 42.

This Court has determined, however, that "restitution is not to be limited by the definition of the offense or to only those injuries arising as a "direct" result of the offense." *See State v. Jent*, 2013 MT 93, P 12, 369 Mont. 468, 299 P.3d 332 (restitution imposed for medical costs related to victim's suicide attempt after defendant pled guilty to aggravated assault). *See State v. LaTray*, 2000 MT 262, PP 12-14, 302 Mont. 11, 11 P. 3d 116. The plain language of the restitution statutes "does not limit restitution to victims defined in terms of the offense for which the defendant was convicted or to losses arising directly from the defendant's criminal conduct." *LaTray*, ¶ 12 ; *see also State v. Ness,* 2009 MT 300, ¶ 20, 352 Mont. 317, 216 P. 3d 773.

Here, the district court noted that Mr. Hidalgo's traumatic brain injury could have resulted from the assault on Thursday: "It could be a situation where the criminal offense is pushing somebody down, they hit their head, and then four days later they have a brain bleed that builds up enough pressure so finally there's some real, real issues." Tr. at 22.

This Court could find, however, that the district court's factual finding—that Hidalgo's medical costs were caused by the Thursday misdemeanor assault—were clearly erroneous.

B. Mr. Payne may wish to argue that the court failed to consider Mr. Hidalgo's comparative negligence or other intervening causes of Hidalgo's injuries and medical costs.

A defendant has a right to raise any defense to restitution that could be raised in a civil case. One such defense is comparative negligence. Comparative negligence "compares the conduct of the parties 'based on evidence and contributory negligence, as established by reasonable and prudent person standards.'" *Giambra v. Kelsey*, 2007 MT 158, ¶ 44, 338 Mont. 19, 162 P.3d 134 (quoting *Faulconbridge v. State*, 2006 MT 198, P 99, 333 Mont. 186, 142 P. 3d 777). Montana's comparative negligence scheme employs a "greater than" version of comparative negligence. MCA § 27-1-702. In other words, a plaintiff may not recover if the plaintiff is found to be greater than fifty percent negligent.

Another affirmative defense plaintiffs may raise is intervening cause. A defendant may argue that another person or event caused the final damage for which he is being held liable. *Estate of Strever v.*

Cline, 278 Mont. 165, 175, 924 P. 2d 666 (1996). If the defendant could not reasonably foresee the intervening acts that caused the harm, then the defendant is not liable as a matter of law. *Covey v. Brishka*, 2019 MT 164, ¶¶ 60-61, 369 Mont. 362, 445 P. 3d 785. The defendant has the burden of proof on both of these affirmative defenses.

At sentencing, Mr. Payne's defense attorney argued that the restitution amount should take into account Hidalgo's contributory or comparative negligence in going out drinking after being injured possibly getting into other fights, and refusing medical treatment. Tr. at 25.

Mr. Payne's attorney stated that the injuries on Hidalgo's face after the fight with Payne were on the left side of his face only, while "the injuries he had four days later included black eyes on the right side and behind his ears and other things that were not documented by the Sheriff on Thursday." Tr. at 17. She added that there was "speculative information" in the hospital records that Hidalgo had been in additional bar fights over the weekend after the altercation with Payne. Tr. at 17.

She noted that the police reports "are pretty clear that he was out drinking quite a bit." Tr. at 17. The physician she had consulted told

her that "the time that elapsed caused most of the damage and also the very thin blood because Mr. Hidalgo was significantly intoxicated possibly for that whole time." *Id.* It was undisputed that Mr. Hidalgo did not seek medical treatment until Monday. Mr. Payne's attorney did not present a report from the physician, however.

The State presented Carmen Salazar's testimony in response. Tr. at 18. Ms. Salazar stated that Hidalgo never left his grandmother's house that weekend. She did not have personal knowledge of this information. Her testimony was not borne out by interviews with witnesses that were in the police reports. *See* App. B. excerpts at 1-3, 11-12.

The district court asked the defense attorney whether she had any witnesses to establish that Hidalgo went out drinking, and that he was involved in additional fights. She stated she did not. Tr. at 23. The police reports contained statements from witnesses saying that Hidalgo went out that weekend. The witnesses did not state that Hidalgo had been drinking or had gotten into fights during the times that he went out after the Thursday assault and before the Monday hospitalization. App. B.

When the defendant does not present contradictory evidence "the District Court does not err in relying on a victim's estimates of loss." *State v. Simpson*, 2014 MT 175, ¶ 14, 375 Mont. 393, 328 P. 3d 1144.

This Court has remanded a restitution case for resentencing when the district court failed to take into account the contributory negligence of the police officer whose car damage the victim was ordered to pay for as part of a restitution award. *City of Whitefish v. Jentile,* 2012 MT 185, ¶ 41, 366 Mont. 94, 285 P.3d 515. In *Jentile*, this Court held that the district court erred by failing to consider any possible negligence on the part of the police officer who rear-ended another police officer in the pursuit of Jentile. *Jentile*, ¶ 34.

Mr. Payne's case can be distinguished from *Jentile*, because in *Jentile*, unlike in this case, the defense presented evidence of the officer's negligence, including Jentile's insurance company's determination that the police officer was negligent, and the Montana Highway Patrol's determination that the police officer was negligent. *Jentile*, ¶¶ 16, 39.

Here, by contrast, the defense did not present evidence such as testimony or report from the physician the defense consulted, or

testimony from the witnesses in the police reports regarding Hidalgo drinking or getting into fights over the weekend. Mr. Payne could argue, however, that it was undisputed that Mr. Hidalgo did not seek treatment for four days and that the physician whom his attorney consulted had stated that was a cause of the brain damage. The defense had the burden of proof on the affirmative defenses of comparative negligence or intervening cause.

II. MR. PAYNE MAY WISH TO ARGUE THAT HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT AND ARTICLE II, SECTION 24 OF THE MONTANA CONSTITUTION WAS VIOLATED WHEN HIS ATTORNEY FAILED TO CALL WITNESSES ON THE CAUSATION ISSUE.

The Sixth and Fourteenth Amendments of the United States Constitution and Article II, §24 of the Montana Constitution guarantee the right to effective assistance of counsel. That right is violated when counsel provides unreasonable assistance that prejudices a defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Additionally, the Montana Constitution provides a more expansive right to counsel than the federal constitution. "Despite the Sixth Amendment's extensive protections, we have held that the right to counsel afforded by Article II, Section 24 of the Montana Constitution

is broader than the rights afforded by the United States Constitution." *State v. Garcia*, 2003 MT 211, ¶37, 317 Mont. 73, 75 P. 3d 313 (citations omitted.)

When evaluating a claim of ineffective assistance of counsel, this Court uses the two-part test enunciated in *Strickland*. *State v. Colburn*, 2018 MT 141, ¶21, 391 Mont. 449, 419 P.3d 1196 *citing Whitlow v. State*, 2008 MT 140, ¶ 10, 343 Mont. 90, 183 P.3d 861. Under the first prong of the *Strickland* test, the defendant must show "counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." *Colburn*, ¶21 *quoting Golie v. State*, 2017 MT 191, ¶ 7, 388 Mont. 252, 399 P.3d 892 (*citing Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064). Under the second prong of *Strickland*, the defendant must show that counsel's performance prejudiced the defense. *Colburn*, ¶21 *citing Whitlow*, ¶ 10. Under this prong the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Colburn*, ¶21 *citing Dawson v. State*, 2000 MT 219, ¶ 147, 301 Mont. 135, 10 P.3d 49; and *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.

Mr. Payne's counsel could have subpoenaed some of the witnesses cited in the police report who saw Mr. Hidalgo out at casinos and at other locations outside his home during the weekend after the Thursday assault. Three bartenders at the Grand Casino reported seeing Mr. Hidalgo there on Saturday and Sunday, but did not specifically say whether or not they observed him drinking. *See* App. B at 11-12. Mr. Payne's counsel could have subpoenaed them and asked them whether they saw Hidalgo drinking.

She could have subpoenaed Mr. Hidalgo's relative, Edward, who told police that he transported Mr. Hidalgo to various locations over the weekend, and could have asked him whether he observed Mr. Hidalgo get into other fights, or consume alcohol. *See* App. B at 1-3.

Mr. Payne's attorney also reported to the district court that the pathologist she consulted had attributed part of the brain damage to the four-day delay in seeking medical treatment. Tr. at 17. She could have called the pathologist to explain whether the delay and the consumption of alcohol contributed to the traumatic brain injury that only became apparent on Monday.

These witnesses could have helped Mr. Payne establish the affirmative defenses of comparative negligence and/or intervening cause. This Court has held that a defendant's attorney was ineffective for failing to introduce evidence that might counter evidence offered by the State in a restitution hearing. *State v. Weber*, 2016 MT 138, ¶ 26, 383 MT 506, 373 P.3d 26.

III. MR. PAYNE MAY WISH TO ARGUE THAT HIS ATTORNEY WAS INEFFECTIVE WHEN SHE FAILED TO INFORM HIM ABOUT THE RESTITUTION COSTS PRIOR TO HIS CHANGE OF PLEA

Mr. Payne pled guilty without a plea agreement. D.C. Doc. 38. His attorney apparently did not receive information regarding the high restitution costs until after he had pled guilty. D.C. Doc. 42. He was not informed of these costs at the time he pled guilty. During the plea colloquy, the district court did not inform him that he might have to pay a large amount of restitution. January 30, 2019 change of plea hearing transcript.

When Mr. Payne pled guilty to misdemeanor assault, he avoided a potential 100-year sentence for being a subsequent persistent felony offender convicted of aggravated assault. Nevertheless, he may wish to argue that his attorney was ineffective in failing to inform him of the

possibility of a high amount of restitution. He may also wish to argue that he has a right to withdraw his guilty plea because it was not fully knowing and informed. *See State v. Enoch*, 269 Mont. 8, 18, 887 P. 2d 175, 181 (1994) (error not to advise defendant of the possibility that the court could order restitution).

CONCLUSION

Counsel has not identified any non-frivolous issues for direct appeal. Counsel requests this court allow counsel to withdraw. If this Court determines there are issues warranting an appeal brief, counsel requests the Court set them out in its Order.

Respectfully submitted this 30th day of July, 2020.

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By: /s/ Laura Reed
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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 Century Schoolbook 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 4118, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Laura Reed
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APPENDIX

CERTIFICATE OF SERVICE

I, Laura Marie Reed, hereby certify that I have served true and accurate copies of the foregoing Brief - Anders to the following on 07-30-2020:

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