

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0605

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

JIM CASSADY,

Defendant and Appellant.

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**ANDERS BRIEF**

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On Appeal from the Montana Second Judicial District Court, Butte-Silverbow  
County, the Honorable Kurt Krueger Presiding.

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## **STATEMENT OF THE CASE**

Defendant and Appellant Jim Cassady was charged by Information with the offense of assault with a weapon, a felony, in violation of Mont. Code Ann. § 45-5-213(1)(a). (D.C. Doc 4). Mr. Cassady was arraigned on November 29, 2019 and entered his plea of not guilty to the offense. (D.C. Doc 8). The parties filed an Omnibus Hearing Memorandum on January 23, 2019. (D.C. Doc. 16). Defendant did not assert justifiable use of force as a defense to be raised at the trial in this matter. The court scheduled a final pretrial conference for June 11, 2019. (D.C. Doc 21). The defendant submitted one proposed jury instruction. (D.C. Doc. 31). A jury trial was held on June 24th and 25th of 2019. (D.C. Docs 32, 34). On June 25, 2019, the jury returned a verdict of guilty to the charge of assault with a weapon. (D.C. Doc 37).

A presentence investigation report was filed with the Court on August 15, 2019. (D.C. Doc 44). The court held a sentencing hearing on August 15, 2019. (D.C. Doc 45). The court sentenced Mr. Cassady to the Montana State Prison for a term of fifteen years, with seven years suspended, and included a list of conditions applicable to the suspended portion of the sentence in its judgment. (D.C. Doc 47).

Mr. Cassady timely appealed his conviction on October 21, 2019. The Court has granted nine extensions of time to file the opening brief and the brief is due by October 20, 2020.

### **STATEMENT OF THE FACTS**

On October 26, 2019 Mr. Bill Cuchine was at the Silver Bow Athletic Club with his ex-wife Stacey Cuchine in Butte, Montana. (06/24 Tr. Part 2 at 109). Bill had recently purchased a new car. (06/24 Tr. Part 2 at 112). When Bill and Stacey left the athletic club and walked outside toward Bill's vehicle, they noticed that the front window was shattered. (06/24 Tr. Part 2 at 111). Bill testified that he assumed Mr. Cassady had shattered his window and Bill was angry. (06/24 Tr. Part 2 at 112). Bill has known Mr. Cassady for many years. (06/24 Tr. Part 2 at 108). Mr. Cassady also had a relationship with Stacey Cuchine. *Id.*

Mr. Cassady does not own a car and was employed at Schnieders Wild Game, where he testified he was working all day on October 26, 2019. (06/25 Tr. at 246-47). Mr. Cassady testified that after work, he walked to Leo Stevens' house and never went to the athletic club. (06/25 Tr. at 247-48). Neither Bill nor Stacey testified that they saw Mr. Cassady on the athletic club premises.

Bill attempts to located Mr. Cassady to confront him about the window. (06/24 Tr. Part 2 at 113). Bill and Stacey first went to Mr. Cassady's sister's house, but he was not there. (06/24 Tr. Part 2 at 113-14). After Bill knocked on the door

at the sister's house, Mr. Ray Reynolds opened the door and indicated that he does not know where Mr. Cassady was and he testified that Bill stated that he was going to kill Jim. (06/25 Tr. at 242). Bill and Stacey then drove to Mr. Leo Stevens' house, but Mr. Cassady was not there either. (06/24 Tr. Part 2 at 115-16). However, shortly thereafter, a truck then pulls in to the driveway and parks behind Bill's car. (06/24 Tr. Part 2 at 116).

Leo Stevens was the driver of the truck and Mr. Cassady was the passenger. (06/24 Tr. Part 2 at 148). Bill was still very angry at this time and said to Leo that "if you see Jim Cassady, tell him he's a dead whatever, he said, for breaking my window at the bar." (06/24 Tr. Part 2 at 149). Mr. Cassady then rolls down the passenger windows and states "I'm right here." (06/24 Tr. Part 2 at 117).

Bill then proceeds to go over to the passenger door and Mr. Cassady attempts to open the door but Bill slams it shut. (06/25 Tr. at 250). Bill then proceeds to punch Mr. Cassady as hard as he could. (06/24 Tr. Part 2 at 118); (06/24 Tr. Part 2 at 135). Bill punched Mr. Cassady two times. (06/24 Tr. Part 2 at 150). Bill testified that he punched Mr. Cassady with his right hand even though he is left-handed. (06/24 Tr. Part 2 at 135). Stacey testified that she saw Bill punch Mr. Cassady while he was in the truck. (06/24 Tr. Part 2 at 176). Stacey testified that she saw Jim with what appeared to be a pocket knife. (06/24 Tr. Part 2 at 178). On cross examination, Stacey testified that she did not see a knife.



(06/24 Tr. Part 2 at 189). Mr. Cassady testifies that he was knocked unconscious by the punches and never exited the vehicle. (06/25 Tr. at 257).

After Bill punched Mr. Cassady, Bill realized the truck was slowly moving forward toward his car. (06/24 Tr. Part 2 at 119). Bill then goes to the front of the vehicle in an attempt to prevent the truck from rolling into his car. (06/24 Tr. Part 2 at 119). Mr. Leo Stevens exited the truck and went to the front of the truck as well to confront Bill for banging the side of his door. (06/24 Tr. Part 2 at 150). Mr. Cuchine testified that he saw Mr. Cassady approach and make a hooking motion with his arm and that Bill then felt pain in his side. (06/24 Tr. Part 2 at 120-21). Mr. Stevens testified that he heard an "oomph" from Bill and saw Mr. Cassady walking away from Bill. (06/24 Tr. Part 2 at 152). Mr. Stevens testified that he heard Bill say "I can't believe you stabbed me over this" and then he heard Mr. Cassady say "you are damn rights I did." (06/24 Tr. Part 2 at 152). Mr. Stevens testified that he did not see a knife. (06/24 Tr. Part 2 at 164). Mr. Stevens then testified that Mr. Cassady left on his bike and that Bill drove away and that he was left there in "awe." (06/24 Tr. Part 2 at 152-53).

Bill then noticed blood from the area where he was stabbed. (06/24 Tr. Part 2 at 123). Bill then entered his vehicle to drive to the hospital. (06/24 Tr. Part 2 at 123). Bill was unable to make it to the hospital because he crashed into a fence along the way and passed out. (06/24 Tr. Part 2 at 123). Officer Bryce Foley

arrived at the scene and observed Bill's injury and Bill was then transported to the hospital. (06/24 Tr. Part 2 at 200-01). Officer Foley viewed the coat and observed a hole in the left side. (06/24 Tr. Part 2 at 205-06). Officer Foley also testified as to the blood stains on the inside and outside of Bill's coat. (06/24 Tr. Part 2 at 210). Officer Christopher Snyder also testified that Stacey described the knife to him as "a folding pocket knife with a black handle." (06/24 Tr. Part 2 at 218).

Mr. Cassady testified that he was knocked unconscious by the punches. (06/25 Tr. at 250-51; 258). Mr. Cassady testified that he regained consciousness when he and Leo arrived back at Leo's house. (06/25 Tr. at 250-52). Mr. Cassady left Leo's property and Mr. Cassady was arrested later when he was near the Town Pump on Harrison Street. (06/24 Tr. Part 2 at 224). The police never obtained any knife from Mr. Cassady's possession that was linked to Bill's injuries. Mr. Cassady testified that he told the police he did not have a knife. (06/25 Tr. at 255). Mr. Cassady did not tell the booking officer at the detention center that he had been knocked unconscious. (06/25 Tr. at 261).

During closing argument, Prosecutor Fivey made the following statements:

MS. FIVEY:	So what do you know? You know that Bill was stabbed by somebody. You know that he had significant injuries. You got to see the clothing with the knife cut in both the jacket and the shirt. And you got to hear what the witnesses had to say. So where is the knife? We don't know. The only
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person that knows where that knife is Jim  
Cassady.

MR. SHEEHY: Your Honor, I object. I think that's improper.

THE COURT: You may proceed.

(06/25 Tr. at 274).

After the close of the presentation of the State's case, Mr. Sheehy made an oral motion for a directed verdict.

MR. SHEEHY: Your Honor, I do have a motion to make. I don't believe the State has met its burden of proof on the element that Mr. Cassady assaulted Mr. Cuchine with a weapon. I just don't think they've established proof beyond a reasonable doubt that it can go to the jury. I know that there are a lot of inconsistent statements, but he can't be convicted on the basis of inconsistent statements.

THE COURT: Mr. Clague.

MR. CLAGUE: Your Honor, the standard at this point is that the State make a prima facie case. We believe we have made a prima facie case simply on Mr. Leo Stevens' testimony on its own. So we would ask you to deny the motion.

THE COURT: The Court will deny

(06/24 Tr. Part 2 at 229).

The jury then deliberated and returned a verdict of guilty. (06/25 Tr. at 255).  
After the trial, Mr. Cassady sent a hand-written note to the Court stating that he had requested that his attorney Mr. Sheehy file a motion for a new trial and that

Mr. Sheehy would not do so. (D.C. Doc. 41). At sentencing Mr. Cassady testified that he called Mr. Sheehy after the trial and asked him to file the motion for a new trial and Mr. Sheehy said no. (Sent. Tr. at 5). Mr. Cassady testified that he wanted new counsel appointed. (Sent. Tr. at 5). Mr. Sheehy then obtained a "Gillam Order" and then testified that Mr. Cassady requested a motion for a new trial because counsel did not raised the defense of justifiable use of force. (Sent. Tr. at 6). Mr. Sheehy testified that the defense was not raised because Mr. Cassady testified that he did not stab Bill. (Sent. Tr. at 6). The Court then stated that having considered the oral motion, that it was denying the motion. (Sent. Tr. at 6).

## **ARGUMENTS**

### **I. COUNSEL FOR DEFENDANT SHOULD BE PERMITTED TO WITHDRAW FROM THIS CAUSE IN ACCORDANCE WITH *ANDERS V. CALIFORNIA* AND MONTANA CODE ANNOTATED § 46–8–103.**

An appellant is guaranteed the right to fair representation by the Sixth Amendment of the United States Constitution. *Anders v. California*, 386 U.S. 738, 744 (1967). When appellant’s counsel “finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw.” *Id.* To ensure protection of this right, counsel seeking to withdraw must accompany his motion to withdraw with a brief that references anything in the record that might arguably support an appeal. *Id.* A copy of the

brief should be provided to the appellant and the appellant must be afforded the time to respond to counsel's motion and brief. *Id.*

The State of Montana has codified the requirements of *Anders*. Mont. Code Ann. § 46–8–103(2). If counsel concludes that an appeal would be frivolous or wholly without merit after reviewing the entire record and researching the applicable law, counsel must file a motion with the Montana Supreme Court requesting permission to withdraw. *Id.* A memorandum discussing any issues that arguably support an appeal must accompany counsel's motion. *Id.* The memorandum must include a summary of the procedural history of the case and any jurisdictional problems with the appeal, along with appropriate citations to the record and the law bearing on each issue. *Id.* An Anders brief is intended to assist the appellate court in determining that counsel has conducted the required detailed review of the case and that the appeal is so frivolous that counsel's motion to withdraw should be granted. *Penson v. Ohio*, 488 U.S. 75, 81–82 (1988). The requirements of an Anders brief are not meant to force counsel to argue against her client. *Anders*, 386 U.S. at 745.

After conducting diligent research of the record and applicable law in this matter, counsel has not found any non-frivolous issues appropriate for appeal. Without arguing against his client, counsel for the Appellant is compelled by his

ethical duty of candor before this Court to provide the Court with this brief in accordance with the requirements of Anders.

## **II. THE RECORD MAY ARGUABLY SUPPORT DEFENDANT'S ASSERTION THAT THE DISTRICT COURT ERRED WHEN IT DENIED COUNSEL'S MOTION FOR A DIRECTED VERDICT.**

### **A. Standard of Review**

This Court has held that " the proper standard of review for denial of a motion for a directed verdict is *de novo*. *State v. Swann*, 2007 MT 126, ¶ 19, 337 Mont. 326, 330, 160 P.3d 511, 514; see also *State v. Cybulski*, 2009 MT 70, ¶ 42, 349 Mont. 429, 438, 204 P.3d 7, 15. A district court properly grants a motion for a directed verdict only when no evidence exists upon which a rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt, when viewing the evidence in a light most favorable to the prosecution. *State v. Marler*, 2008 MT 13, ¶ 20, 341 Mont. 120, 124, 176 P.3d 1010, 1013

### **B. Discussion.**

Mont. Code Ann. § 46-16-403 states the following:

When, at the close of the prosecution's evidence or at the close of all the evidence, the evidence is insufficient to support a finding or verdict of guilty, the court may, on its own motion or on the motion of the defendant, dismiss the action and discharge the defendant. However, prior to dismissal, the court may allow the case to be reopened for good cause shown.

"[A] motion to dismiss for insufficient evidence is appropriate only if, viewing the evidence in the light most favorable to the prosecution, there is not sufficient evidence upon which a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Cybulski*, 2009 MT 70, ¶ 42, 349 Mont. 429, 438, 204 P.3d 7, 15

The elements of the offense of assault with a weapon that the State needed to prove were as follows and were provide in Jury Instruction No. 12 that was given to the jury:

To convict the Defendant with assault with a weapon, the State must prove the following elements:

1. That on or about October 26, 2018 in Butte-Silver Bow County, State of Montana; and
2. That the Defendant acted purposely or knowingly and
3. That the Defendant caused bodily injury to William Cuchine with a weapon.

(D.C. Doc. 36)

Defendant may argue there was insufficient evidence to support a finding that he stabbed Mr. Cuchine with a knife and thus the State could not prove an essential element of the aggravated assault charge pursuant to Mont. Code Ann. § 45-5-213(1)(a).

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### **III. THE RECORD MAY ARGUABLY SUPPORT DEFENDANT'S ASSERTION THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING HIS MOTION FOR A NEW TRIAL BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL.**

#### **A. Standard of review**

This Court "review[a] a district court's denial of a motion for a new trial to determine whether the district court abused its discretion." *State v. Kelman*, 276 Mont. 253, 260, 915 P.2d 854, 859 (1996); *State v. Brogan*, 272 Mont. 156, 160, 900 P.2d 284, 286 (1995). "Absent an abuse of discretion, this Court will affirm a district court's decision to not grant a motion for a new trial." *State v. Lawlor*, 2002 MT 235, ¶ 8, 311 Mont. 493, 496, 56 P.3d 863, 865.

#### **B. Discussion**

"Abuse of discretion occurs if a district court acts arbitrarily without conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice." *State v. Strang*, 2017 MT 217, ¶ 14, 388 Mont. 428, 432, 401 P.3d 690, 694

Mr. Cassady requested that he be appointed new counsel to file a motion for a new trial based on Mr. Sheehy's refusal to file such a motion. The court heard from both Mr. Cassady and Mr. Sheehy on the issue. Mr. Cassady may argue that the District Court acted arbitrarily, without employment of conscientious



judgment, or exceeded the bounds of reason when it denied his motion for a new trial based on an assertion of ineffective assistance of counsel for failing to raise the defense of justifiable use of force.

#### **IV. THE RECORD MAY ARGUABLY SUPPORT DEFENDANT'S ASSERTION THAT HIS CONVICTION SHOULD BE REVERSED BASED ON PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT THAT DEPRIVED HIM OF A FAIR AND IMPARTIAL TRIAL.**

##### **A. Standard of review**

The Court reviews allegations of prosecutorial misconduct de novo, considering the prosecutor's conduct in the context of the entire proceeding. *State v. Dobrowski*, 2016 MT 261, ¶ 8, 385 Mont. 179, 382 P.3d 490. In general, this Court does not address issues of "prosecutorial misconduct pertaining to a prosecutor's statements not objected to at trial." *State v. Aker*, 2013 MT 253, ¶ 21, 371 Mont. 491, 310 P.3d 506 (quoting *State v. Longfellow*, 2008 MT 343, ¶ 24, 346 Mont. 286, 194 P.3d 694). However, the Court may exercise its discretion and review such issues under the plain error doctrine. *Aker*, ¶ 21 (citing *State v. Lacey*, 2012 MT 52, ¶ 14, 364 Mont. 291, 272 P.3d 1288).

##### **B. Discussion**

"Both the Sixth Amendment to the United States Constitution and Article II, Section 24 of the Montana Constitution guarantee criminal defendants 'the right to a fair trial by a jury.' " *State v. Aker*, 2013 MT 253, ¶ 24, 371 Mont. 491, 498, 310

P.3d 506, 511–12 (citing *State v. Hayden*, 2008 MT 274, ¶ 17, 345 Mont. 252, 190 P.3d 1091). "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.' " *Id.* (citing *State v. McDonald*, 2013 MT 97, ¶ 10, 369 Mont. 483, 299 P.3d 799). "We consider alleged improper statements during closing argument in the context of the entire argument." *State v. Makarchuk*, 2009 MT 82, ¶ 24, 349 Mont. 507, 204 P.3d 1213. "We do not presume prejudice from the alleged prosecutorial misconduct; rather, the 'defendant must show that the argument violated his substantial rights.' " *State v. Aker*, 2013 MT 253, ¶ 24, 371 Mont. 491, 498, 310 P.3d 506, 511–12.

Defendant may argue that the prosecutor's comments about Mr. Cassady knowing the location of the knife which was made during closing argument were prejudicial and in the context of the entire proceeding deprived him of a fair and impartial trial warranting reversal of his conviction.

### **CONCLUSION**

A thorough examination of the record and research of the applicable law seems to compel a conclusion that Appellant Cassady's appeal has no merit. This Court should grant the undersigned's motion to withdraw as counsel on direct appeal.

Respectfully submitted this 7th day of October, 2020.

FERGUSON LAW OFFICE.

By: /s/ John J. Ferguson

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JOHN J. FERGUSON  
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Appellant

### 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 3, 205, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/John J. Ferguson

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JOHN J. FERGUSON

APPENDIX

Judgment..... App. A

## **CERTIFICATE OF SERVICE**

I, John J. Ferguson, hereby certify that I have served true and accurate copies of the foregoing Brief - Anders to the following on 10-07-2020:

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