DA 20-0205

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 52N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

BRIAN BLISS,

Defendant and Appellant.

APPEAL FROM: District Court of the Eighteenth Judicial District,
In and For the County of Gallatin, Cause No. DC-19-50C
Honorable John C. Brown, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Paul Gallardo, Flaherty Gallardo Lawyers, Great Falls, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Jonathan M. Krauss, Assistant Attorney General, Helena, Montana

Marty Lambert, Gallatin County Attorney, Bradley Bowen, Deputy County Attorney, Bozeman, Montana

Submitted on Briefs: January 27, 2021

Decided: February 23, 2021

Filed:

Clerk

Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Defendant and Appellant Brian Bliss (Bliss) appeals the guilty verdict convicting Bliss of one count of Partner or Family Member Assault (PFMA) and the February 3, 2020 Order Re Defendant's Motion to Enter Not Guilty Finding, or Alternatively, to Order a New Trial as to Count II issued by the Eighteenth Judicial District Court, Gallatin County. We affirm.

¶3 This case involves an unfortunate incident in which it was alleged Bliss assaulted T.B., the asserted victim, on December 18, 2018, at the Element Hotel in Bozeman. T.B. alleged Bliss threw wine in her face and strangled her. Bliss asserted he had a verbal altercation with T.B. at the hotel but did not throw wine in her face or strangle her and that when he drove her home, she struck him in the face and broke his nose.

¶4 On September 23, 2019, Bliss was tried before a jury on two charges: Count I: Strangulation of a Partner or Family Member (Strangulation) and Count II: PFMA. On September 25, 2019, the jury found Bliss not guilty of the Strangulation charge and guilty of the PFMA charge. Post-trial, Bliss filed a motion with the District Court, pursuant to § 46-16-702, MCA, requesting the court enter a not guilty finding on the PFMA offense

or, alternatively, to order a new trial on that charge. Bliss contended, as he does now on appeal, he is entitled to a not guilty finding or, alternatively, a new trial as there was insufficient evidence to support his PFMA conviction. Alternatively, Bliss asserts if there was sufficient evidence to support the PFMA conviction, that use of the *Norquay/Allen* (*Norquay*) jury instruction[1] had an impermissibly coercive impact on the jury given the circumstances of this case—the jury had twice advised it was deadlocked and it was deliberating after normal working hours with no indication when it would end, or when they would eat—such that he should be entitled to a new trial. The District Court denied Bliss's motion to enter a not guilty finding or, alternately, to order him a new trial. The District Court, in essence, concluded there was ample evidence, when viewed in the light

[1] The *Norquay/Allen* instruction, also at times referred to as the "Dynamite" or "*Norquay*" instruction, is a supplemental jury instruction designed to be given when jurors are apparently deadlocked. It originated from *Allen v. U.S.*, 164 U.S. 492, 17 S. Ct. 154 (1896), in which the U.S. Supreme Court upheld an instruction given to a deadlocked jury instructing the jurors in the minority to reconsider their views in light of the contrary view held by the majority. This Court first considered an *Allen*-instruction in *State v. Randall*, 137 Mont. 534, 353 P.2d 1054 (1960). In *Randall*, we purposely took the opposite view of the U.S. Supreme Court when we concluded an instruction that singled out the minority jurors and asked them to reconsider their views in light of the contrary majority views constituted an objectionably coercive instruction. *Randall*, 137 Mont. at 540-42, 353 P.2d at 1057-58. Thereafter until 2011, this Court upheld *Allen*-instructions that did not instruct the minority jurors to surrender their opinions in light of the majority views—and the pattern jury instruction, Montana Pattern Jury Instruction Criminal (MPJIC) No. 1-121, removed language instructing minority jurors to reconsider their views. In 2011, in *State v. Norquay*, 2011 MT 34, 359 Mont. 257, 248 P.3d 817, we determined it appropriate to reconsider the "final test" language in MPJIC 1-121—which placed ultimate responsibility on the jury to render a verdict in the case and stating the final test of the quality of the jury's service was in returning a verdict to the court. *Norquay*, ¶ 38. After discussing the growing wariness toward *Allen*-instructions and the growing trend to eliminate "final test" language from such instructions, this Court adopted changes to MPJIC 1-121 to be used in future cases which eliminated the "final test" language and instead added language encouraging jurors to collaborate to reach a just and fair verdict. *Norquay*, ¶¶ 39-43.

most favorable to the prosecution, from which a jury could find all of the essential elements of the PFMA offense beyond a reasonable doubt. Further, the District Court determined the *Norquay* instruction had been properly given to the jury.

¶5 We review de novo whether sufficient evidence supports conviction—when viewed in the light most favorable to the prosecution, whether a rational trier of fact could find the essential elements of the charged offense beyond a reasonable doubt. *State v. Finley*, 2011 MT 89, ¶ 28, 360 Mont. 173, 252 P.3d 199 (citations omitted).

¶6 Bliss continues to assert there is insufficient evidence to support the PFMA conviction. The State contrarily asserts when viewed in the light most favorable to the prosecution, there is sufficient evidence to support the conviction. We agree with the State and the District Court.

¶7 Bliss primarily challenges the sufficiency of the evidence in regard to two points: 1) the photographs taken at the scene do not support T.B.'s testimony, and 2) the wine found in the hotel room and on T.B.'s sweater does not align with T.B.'s narrative of how Bliss threw the wine on her. Boiled down, Bliss takes issue with T.B.'s account of the event—her veracity and credibility—asserting the other evidence presented by the State was more consistent with his version of the event such that it "should virtually eliminate any consideration of T.B.'s story."

¶8 As Bliss points out in his briefing, there was conflicting testimony from witnesses—responding officers, T.B., and himself—as well as inconsistencies in T.B.'s testimony. Also admitted into evidence were photographs of the scene showing where wine was found

in various places in the hotel room. While Bliss may be accurate that there was evidence supporting acquittal, this does not equate to a conclusion that there was insufficient evidence from which a jury could find he committed each element of the offense beyond a reasonable doubt. Through cross-examination, Bliss had full opportunity to expose inconsistencies between T.B.'s testimony and other testimony and evidence and Bliss had full opportunity to walk the jury through those inconsistencies on closing to emphasize any lack of credibility on T.B.'s part. Despite this, as delineated by the District Court, the jury could have reasonably concluded from the photographs (State's exhibits 21, 22, 23, 33, and 34) that where the wine was found was consistent with T.B.'s account of the event and could have reasonably determined T.B.'s account of the event to be generally credible.

¶9 Conflicting evidence does not render evidence insufficient to support a conviction; instead, a jury determines which version of events prevails. *State v. McAlister*, 2016 MT 14, ¶ 12, 382 Mont. 129, 365 P.3d 1062 (citing *State v. Dewitz*, 2009 MT 202, ¶ 85, 351 Mont. 182, 212 P.3d 1040). The jury has the exclusive responsibility to determine the credibility and weight to be given conflicting evidence. *McAlister*, ¶ 12. Here, the jury was free to accept the testimony of T.B. it considered to be credible and to disregard the testimony of T.B. it did not find credible. The jury was also free to accept the testimony of other witnesses, including Bliss, it considered to be credible and disregard the testimony of other witnesses, including Bliss, it did not find credible.

¶10 In sum, Bliss seeks that we adjudge T.B.'s credibility as he does and then substitute our judgment for that of the jury and the District Court. We decline to do so. Our task is

not to substitute our judgment of each witness's credibility for that of the jury, but rather to determine, when viewed in the light most favorable to the State, whether there was sufficient evidence to establish the PFMA. *State v. Ritesman,* 2018 MT 55, ¶ 11, 390 Mont. 399, 414 P.3d 261. When viewed in the light most favorable to the State, we conclude there was sufficient evidence to support conviction of Bliss for the PFMA against T.B.

¶11 Having concluded there was sufficient evidence to support Bliss's conviction for PFMA, we consider whether giving the *Norquay* instruction constituted reversible error. Defendants are constitutionally entitled to an uncoerced jury verdict and, accordingly, jury instructions may not place undue pressure on a jury to reach a verdict. *Norquay*, ¶ 32. We review jury instructions to determine whether, as a whole, they fully and fairly provide instruction on the applicable law. *State v. Johnson*, 2010 MT 288, ¶ 6, 359 Mont. 15, 245 P.3d 1113; *Norquay*, ¶ 14; *State v. Swann*, 2007 MT 126, ¶ 32, 337 Mont. 326, 160 P.3d 511. A district court's discretion in formulating instructions is reversible only if the instructions prejudicially affect a defendant's substantial rights. *State v. Schaeffer*, 2014 MT 47, ¶ 12, 374 Mont. 93, 321 P.3d 809 (citing *State v. Hovey*, 2011 MT 3, ¶ 10, 359 Mont. 100, 248 P.3d 303); *Norquay*, ¶ 14; *Swann*, ¶ 32.

¶12 Following hours of deliberation, the jury submitted two notes to the District Court: one seeking a definition for the words impedes, knowingly, and purposely; and another asking if it could come to a consensus on one count and not the other. The District Court instructed the jury with regard to these separate inquiries to "Please refer to the instructions." Later, the jury notified the District Court it was deadlocked on both counts.

Following discussion with the parties, and over Bliss's objection, the court gave the pattern *Norquay* instruction and returned the jury to further deliberate. Thereafter, the jury returned a not guilty verdict on the strangulation charge and a guilty verdict on the PFMA charge.

¶13 Bliss concedes he does not take issue with the text of the *Norquay* instruction given, "but rather submits that the instruction had an impermissibly coercive impact on the deadlocked jury in the circumstances of this case." By reference to the jury's lack of knowledge as to when it would eat and to ABA Jury Principle 15(C)(2)—which recommends a jury not be required to deliberate after normal working hours unless the court, after consultation with the parties and the jurors, determines such would not impose an undue hardship on the jurors—Bliss appears to assert that giving the *Norquay* instruction to the jury when it was deadlocked and deliberating after normal business hours not knowing when the jury would receive dinner had an impermissibly coercive impact on the jury. We are not persuaded by this argument. The jury, obviously skilled at submitting notes to the court, had not indicated any concern regarding deliberating after hours or any concern or desire for dinner arrangements. Bliss provides nothing more than mere speculation the *Norquay* instruction given had a coercive impact. We find no error on the District Court's part in giving the instruction in the manner it did.

¶14 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the

Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review.

¶15 Affirmed.

/S/ INGRID GUSTAFSON

We concur:

/S/ MIKE McGRATH
/S/ LAURIE McKINNON
/S/ BETH BAKER
/S/ JIM RICE