

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0165

CITY OF BOZEMAN,

Plaintiff and Appellee,

v.

JACOB ANDREW HOWARD,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Eighteenth Judicial District Court,
Gallatin County, The Honorable Rienne McElyea, Presiding

APPEARANCES:

AUSTIN KNUDSEN
Montana Attorney General
TAMMY K PLUBELL
Bureau Chief
KATIE F. SCHULZ
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
kschulz@mt.gov

CAITLIN BOLAND AARAB
Attorney at Law
Boland Aarab PLLP
11 5th Street North, Ste 207
Great Falls, MT 59401

ATTORNEY FOR DEFENDANT
AND APPELLANT

GREGORY S. SULLIVAN
Bozeman City Attorney
ED HIRSCH
Assistant City Attorney
121 North Rouse Avenue
Bozeman, MT 59715

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

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STATEMENT OF THE ISSUES

Whether the municipal court abused its discretion when it denied Howard's motion for an *in camera* review of the arresting officer's personnel file to determine whether it contained information of prior instances of excessive use of force.

Whether the district court correctly determined that the City presented sufficient evidence to convict Howard of resisting arrest.

STATEMENT OF THE CASE

Jacob Andrew Howard was charged in Bozeman Municipal Court with the following misdemeanors: partner/family member assault (PFMA); stalking; obstructing a peace officer; and resisting arrest. (Docs. 1-5.)

Howard sought an order for an *in camera* review of the arresting officer's personnel file for incidents of excessive use of force, which the City opposed. (Docs. 16, 22, 27.) The municipal court orally denied the motion following a hearing. (5/13/19 Audio at 4:02 to 4:04.)

The jury convicted Howard of stalking, obstructing a peace officer, and resisting arrest, and he was sentenced on August 21, 2019. (7/30/19 Audio (hereinafter, "Aud."); 8/21/19 Audio; Docs. 50-52.)

Howard appealed to the district court and the City responded. (Docs. 61, 67, 69.) The district court affirmed Howard's convictions by concluding the municipal court's orders were correctly entered and that sufficient evidence supported his conviction for resisting arrest. (Doc. 70.)

STATEMENT OF THE FACTS

In November 2018, Jasmine Sands dated Howard for about four days before she ended the relationship. (Aud. at 10:28 to 10:35, 10:56 to 11:06.) Sands stated that Howard was verbally aggressive and controlling during their short relationship and had made threats about killing cops and her father. (*Id.*)

On November 20, 2018, Sands met with Bozeman Police Department (BPD) Officer Jeremy Tankink to get help recovering her belongings from Howard. (Aud. at 2:40 to 2:43.) While helping facilitate the return of Sands' belongings, Officer Tankink told Howard to stay away from Sands, and Howard agreed. (*Id.*)

Howard nonetheless continued to harass Sands, and on November 24, 2018, at around 9 p.m., while Sands was walking to the Warming Center in Bozeman, Howard began following her in his car and imploring her to talk to him. (Aud. at 10:35 to 10:56, 11:06 to 11:14, 11:32 to 11:35.) Howard ignored Sands' requests to leave her alone and kept telling her to get in his car. (*Id.*) Howard's relentless attention scared Sands so she called 911 for help and gave a description of Howard

and the vehicle he was driving. (*Id.*; Trial Ex. 1.) As heard on the 911 call, Sands repeatedly told Howard to leave her alone and was trying to get away from him.

(*Id.*)

BPD Officers Thomas Lloyd and Ryan Jeppson responded to the dispatch. (Aud. at 11:43 to 12:05, 1:45 to 2:05, 2:19 to 2:36; Trial Ex. 2.) Officer Lloyd was the first to encounter Howard near a bar on Rouse Avenue. (*Id.*) Officer Lloyd was in uniform and driving a marked patrol car. (*Id.*) Officer Lloyd pulled in behind Howard's vehicle with his overhead lights activated and a spotlight on Howard's vehicle. (*Id.*)

Before Officer Lloyd said anything to him, Howard got out of his car, making the officer think Howard would attack him or flee. (Aud. at 11:43 to 12:05, 1:45 to 2:05, 2:13 to 2:18; Trial Ex. 2.) Officer Lloyd immediately instructed Howard to place his hands up and, although he eventually complied after multiple commands, Howard then quickly placed his hands down and refused to follow the officer's directives. (*Id.*) Howard questioned the officer's commands, would not place his hands where the officer could see them, and moved them to his waist, which escalated Officer Lloyd's safety concerns, so he drew his handgun and again gave Howard verbal commands to raise his hands and kneel. (*Id.*) Howard's refusal to listen to the officer's initial commands resulted in the obstructing a peace officer charge. (*Id.* at 2:14)

Officer Lloyd holstered his gun, grabbed Howard's wrists, and held them behind Howard's back. (Aud. at 12:05 to 12:31, 1:45 to 2:05, 2:13 to 2:18; Trial Ex. 2.) When Officer Lloyd ordered Howard to kneel, Howard refused to comply and physically resisted. (*Id.*) Officer Lloyd used a leg sweep to bring Howard to the ground, but Howard continued to flail around and try to pull away. (*Id.*) Fearing Howard might access a hidden weapon, Officer Lloyd punched Howard in his face and was able to put one handcuff on him. (*Id.*) But Howard kept struggling to pull away and Officer Lloyd asked Officer Jeppson to get there as soon as possible. (*Id.*) When Officer Jeppson arrived, Howard was still refusing to move his hand away from his waist, so Officer Lloyd struck Howard again, which stunned Howard, but it still took both officers to secure and handcuff him. (*Id.*, 2:20 to 2:25.) Howard's continued physical resistance to Officer Lloyd attempting to handcuff him and arrest him for obstruction resulted in the resisting arrest charge. (*Id.*)

Officer Jeppson called an ambulance for Howard, but he refused treatment, so Jeppson transported Howard to the hospital to have him medically cleared for incarceration. (Aud. at 2:25 to 2:29; Ex. 5.) During his interactions with Officer Jeppson, Howard said Sands had run off with another guy named Nick and admitted that Officer Tankink had told him to stay away from Sands. (*Id.*)

Howard further admitted that he had kept following Sands that night even though she said to leave her alone. (*Id.*)

Officer Lloyd cited Howard with the following misdemeanors: PFMA; stalking; obstructing a peace officer; and resisting arrest. (Docs. 1-5.) The PFMA charge was later dismissed on the State's motion. (Aud. at 12:35; Doc. 44.) At his March 20, 2019 omnibus hearing, Howard indicated his intent to assert the affirmative defense of justifiable use of force. (03/20/19 Audio; Doc. 13.)

Howard filed a motion to compel the City to produce Officer Lloyd's personnel files for an *in camera* inspection based on Montana's "right to know" under article II, section 9 of Montana's Constitution. (Doc. 16.) Howard alleged that he and another witness would testify that Officer Lloyd was unjustified in using excessive force on Howard and that the officer had lied about Howard acting aggressively towards him. (*Id.*) Howard reasoned that, if Officer Lloyd had a history of using excessive force, it would support the officer's motive to lie about the events during Howard's arrest. (*Id.*) Thus, Howard claimed, he had a "substantial need" for the court to review the officer's personnel file *in camera* to determine if such evidence existed. (*Id.*) Howard also asked the court to review the files for evidence of the officer's untruthfulness. (*Id.*)

The City opposed Howard's motion as to the alleged incidents of excessive violence. (Doc. 22.) The City argued that, regardless of whether the officer's use

of force against Howard was “excessive,” his request was not supported by the principles of *Brady v. Maryland*, 373 U.S. 83 (1963), or Montana’s criminal discovery statute, as Howard failed to establish a substantial need for the alleged information because he offered only hypothetical theories. (*Id.*) The City argued Howard’s request was premised on the erroneous belief that it was relevant whether Officer Lloyd “was justified in using excessive force” against Howard because, pursuant to Mont. Code Ann. §§ 45-7-301(2) (resisting arrest), and -302(2) (obstructing a peace officer), an officer’s decision to use any force may not be used as a defense to either resisting arrest or obstruction of justice. (*Id.*)

In his reply, Howard amended his request for relief to rely upon Mont. Code Ann. § 46-15-322 and *Brady*. (Doc. 27.) Howard asserted he had a substantial need for Lloyd’s personnel file to support his claim that he was “trying to protect and defend himself against an unlawful assault.” (*Id.*)

In April and May 2019, Howard left voicemails for Officer Tankink at BPD. (Aud. at 2:40 to 3:00; Trial Exs. 6, 7, 8.) Howard called once on April 11, twice on April 16, once on May 3, and once on May 24. (*Id.*) On the messages, Howard talked about the events of November 24, 2018, and claimed Sands had asked him for directions to the Warming Center and was “playing games.” (*Id.*) Howard said Sands ran off with Nick and claimed Howard was the victim because Sands had told him she loved him but then called the police and caused a big problem. (*Id.*)

Howard admitted that when he saw Sands on her cell phone while she was walking, he figured she was calling the police. (Trial Ex. 7, second message, at 00:50 to 1:00.) Howard claimed he was calmly standing by his car and barely moved his arm when Officer Lloyd arrived. (*Id.*)

The City filed a motion in limine asking the court to preclude Howard from asserting illegal arguments at trial, namely that Howard had been defending himself against an unlawful attack by Officer Lloyd. (Doc. 32.) The City argued that in a prosecution for both resisting arrest and obstructing a peace officer, the defendant may not argue “that the arrest was unlawful, if the peace officer was acting under color of the officer’s authority.” Mont. Code Ann. §§ 45-7-301(2), -302(2). The City also cited Mont. Code Ann. § 45-3-108, which states that “[a] person is not authorized to use force to resist an arrest . . . even if the person believes that the arrest is unlawful and the arrest in fact is unlawful.” (*Id.*)

The parties’ pretrial motions were considered on May 13, 2019. (5/13/19 Audio.) The City did not oppose Howard’s request for an *in camera* review of Officer Lloyd’s personnel file for incidents of untruthfulness. (*Id.*) The City submitted an April 30, 2019 letter from BPD Deputy Chief Jim Veltkamp stating that he had reviewed Officer Lloyd’s personnel file and found “no *Brady/Giglio*¹

¹ *Giglio v. United States*, 405 U.S. 150 (1972).

information, such as instances of untruthfulness, [or] documentation describing any instances involving the use of excessive or unjustified force.” (*Id.*; State’s Ex. 1.)²

After hearing arguments, the municipal court ruled that it would conduct an *in camera* review of Officer Lloyd’s personnel file only for instances of untruthfulness, not instances of excessive force. (05/13/19 Audio at 4:02 to 4:04.) The court explained that Howard had not provided sufficient basis to overcome the officer’s right to privacy given the nature of the charges, lack of evidence Howard had any prior knowledge of Officer Lloyd’s alleged prior use of excessive force, and the absence of any compelling theory of admissibility, even if instances of prior excessive use of force did appear in the officer’s personnel file. (*Id.*)

At the next hearing, the court explained it had reviewed Officer Lloyd’s personnel records and found no instances of untrustworthiness. (5/30/19 Audio at 3:15:00 to 3:16:30.)

Howard left another voicemail for Officer Tankink on June 28, 2019, which was similar in tone and content to his prior calls. (Aud. 2:29 to 3:00; Trial Ex. 9.) On July 22, 2019, Howard left two voicemails for BPD that were forwarded to Officer Lloyd. (Aud. at 12:15 to 12:31; Trial Exs. 3, 4.) Like his prior messages, Howard belligerently rambled about being “pissed off” when Sands began seeing Nick and that he had been victimized by Sands. (Trial Ex. 3.) Howard admitted he

² This exhibit appears between Docs. 31 and 32 of the district court record.

was trying to get her away from Nick so she would be with him. (*Id.*) Later that day, Howard called back again, espousing the same hostile and profane narrative from his earlier messages. (Trial Ex. 4.) Howard's statements focused on how Sands had wronged him, and he claimed he did not resist arrest and had barely moved his arm. (*Id.*) Howard accused the officers of lying and stated he was going to call the President of the United States. (*Id.*)

At his July 30, 2019 jury trial, Howard's testimony mirrored the comments he made to the officers the night he was arrested and on his voicemails. (Aud. at 3:26 to 4:13.) Howard was convicted of stalking, obstructing a peace officer, and resisting arrest. (Aud.)

Howard called the BPD the day before his sentencing hearing, reiterating he had done nothing wrong and alleging the police had doctored the video. (8/21/19 Aud.) Like his other messages, Howard was agitated and volatile. (*Id.*) Howard was sentenced on August 21, 2019, as follows: for stalking, 12 months in jail with all but 5 days suspended; for resisting arrest, 6 months in jail with all but 10 days suspended; and for obstructing a peace officer, 6 months in jail with all but 1 day suspended. (*Id.*; Docs. 50-52.) Howard submitted a notice of appeal to the court and his sentence was stayed. (*Id.*)

The district court affirmed Howard’s convictions by concluding the municipal court’s orders were correctly entered and that sufficient evidence supported his conviction for resisting arrest. (Docs. 67, 70.)

STANDARD OF REVIEW

When a district court functions as an intermediate appellate court for an appeal from a lower court of record, this Court reviews the appeal *de novo*, as though it were originally filed in this Court. *See* Mont. Code Ann. §§ 3-5-303, 3-6-110; *City of Bozeman v. Lehrer*, 2020 MT 55, ¶ 6, 399 Mont. 166, 459 P.3d 850. “[The] ultimate determination is whether the district court, in its review of the trial court’s decision, reached the correct conclusions under the appropriate standards of review.” *State v. Davis*, 2016 MT 102, ¶ 31, 383 Mont. 281, 371 P.3d 979.

This Court reviews a trial court’s findings of fact for clear error and its legal conclusions for correctness. *State v. Meyer*, 2017 MT 124, ¶ 11, 387 Mont. 422, 396 P.3d 1265. Evidentiary rulings and rulings on discovery motions are reviewed for an abuse of discretion. *City of Bozeman v. McCarthy*, 2019 MT 209, ¶ 12, 397 Mont. 134, 447 P.3d 1048. A court “abuses its discretion if it exercises granted discretion based on a mistake of law, erroneous finding of material fact, or otherwise acts arbitrarily, without conscientious judgment or in excess of the bounds of reason, resulting in substantial injustice.” *Id.*

When considering whether sufficient evidence exists to support a jury's verdict, this Court views the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *State v. Sutton*, 2018 MT 143, ¶ 10, 391 Mont. 485, 419 P.3d 1201.

SUMMARY OF THE ARGUMENT

Howard did not present a due process claim or allege the City failed to disclose exculpatory material under Mont. Code Ann. § 46-15-322(1)(e). The only discovery issue properly before this Court is whether the municipal court abused its discretion when it found Howard had failed to present a "substantial need" for the court to conduct an *in camera* inspection of Officer Lloyd's personnel files for instances of excessive force.

Howard presented only speculation and hypothetical scenarios to support his request, misstates the record in his arguments on appeal, and mischaracterizes the facts from *McCarthy* in his allegation that Officer Lloyd had a history of using excessive force. Howard also failed to establish that he had any knowledge of Officer Lloyd's alleged history of excessive force to justify his attempt to assert self-defense.

Regardless, even if there had been an independent determination in other appropriate proceedings that Officer Lloyd had used “excessive force,” that fact was not germane to whether Howard was aware the officer was trying to effectuate an arrest and that his physical resistance was impeding the officer’s efforts. Moreover, even when subjected to an unlawful arrest, a person is not entitled to use physical force to prevent the arrest. Under the facts presented, the municipal court did not abuse its discretion when it concluded Howard had failed to demonstrate a “substantial need” for the court to examine Officer Lloyd’s personnel file for instances of excessive force.

When considering the evidence in the light most favorable to the prosecution, the record supports that a rational trier of fact could have found all the essential elements of resisting arrest beyond a reasonable doubt. Moreover, Howard’s recitation of the facts fundamentally mischaracterizes the evidence and testimony elicited at trial, including Howard’s own admissions and statements, and couches his arguments in subjective post-trial characterizations rather than objective retelling of the actual evidence.

Officer Lloyd was clearly acting within his authority as a BPD officer when he pulled up in a marked car with its overhead lights activated and ordered Howard to raise his hands and kneel. When Howard refused to follow the officer’s directions, he committed the offense of obstructing a peace officer, for which

Officer Lloyd then sought to arrest him. It was not necessary for the City to prove the officer had verbally advised Howard he was under arrest; the City only had to establish that Howard was aware the officer was trying to effectuate an arrest. Reviewing the evidence in the light most favorable to the City, the record supports the jury's verdict that Howard was aware he was being arrested and he fought back against both officers to prevent them from handcuffing him.

ARGUMENT

I. The municipal court did not abuse its discretion when it denied Howard's request for an *in camera* review of the arresting officer's personnel records to determine whether they contained information of prior instances of excessive use of force.

The trial court, without objection from the City, reviewed the officer's records for instances of untrustworthiness. Thus, Howard's argument to the district court and this Court are limited to his request for an *in camera* review of Officer Lloyd's records for instances of excessive force. Howard's request was not based on due process principles or Mont. Code Ann. § 46-15-322(1)(e), but, rather, on "extraordinary discovery," as provided for under Mont. Code Ann. § 46-15-322(5). *See McCarthy*, ¶ 15.

Pursuant to a criminal defendant's due process rights to a fundamentally fair trial, "prosecutors have an affirmative duty to disclose all information and materials known to the prosecutor that are favorable to the accused and

constitutionally material to the determination of his or her guilt or punishment.” *McCarthy*, ¶ 14; *Brady, supra*; *Giglio, supra*. An independent, but corollary, obligation appears at Mont. Code Ann. § 46-15-322(1)(e), which states that “[u]pon request, the prosecutor shall make available to the defendant for examination and reproduction [certain listed] material and information within the prosecutor’s possession or control [including] all material or information that tends to mitigate or negate the defendant’s guilt as to the offense charged or that would tend to reduce the defendant’s potential sentence.”

However, as this Court has explained, “the *Brady/Giglio* duty does not create a general constitutional discovery right entitling an accused to unfettered access to sift through all information available to the government that might be helpful at trial or sentencing.” *McCarthy*, ¶ 14. Therefore,

[t]he scope of required disclosure is limited to exculpatory evidence and any other constitutionally material evidence tending to show that a prosecution witness is unreliable, biased, has an interest or motive to testify falsely, or has a character for untruthfulness. Non-exculpatory information is constitutionally material only if nondisclosure would be reasonably likely to “undermine confidence” in the fairness of the trial or sentencing determination under the totality of the circumstances. Non-exculpatory impeachment evidence is thus constitutionally material only where the subject witness provides the key “evidence linking the defendant(s) to the crime, or where the likely impact on the witness’s credibility would . . . undermine[] a critical element of the prosecution’s case.” *In camera* review is the necessary and proper means to balance an accused’s due process rights with other compelling government interests including, e.g., privacy rights of government agents and third parties.

McCarthy, ¶ 14 (internal quotations and citations omitted).

Just as he did in the municipal court and in his appeal to the district court, Howard does not now articulate a specific due process violation related to *Brady/Giglio* or Mont. Code Ann. § 46-15-322(1)(e), for failing to disclose “material or information that tends to mitigate or negate the defendant’s guilt as to the offense charged or that would tend to reduce the defendant’s potential sentence.”

Howard argued to the district court that his constitutional right to know and “substantial need” supported his request to have the officer’s records reviewed. (Doc. 61 at 8-10.) In its response, the City correctly pointed out that Howard had failed to assert a *Brady/Giglio* argument. (Doc. 67.) The City argued that Howard had failed to establish a substantial need as required under Mont. Code Ann. § 46-15-322(5). (Doc. 67 at 6-8.) In his reply, Howard did not assert he was entitled to the records under elements of due process and focused only on his claim he had established “substantial need.” (Doc. 69 at 5-6.) Thus, Howard did not preserve a due process argument or claim the City failed to disclose exculpatory material pursuant to Mont. Code Ann. § 46-15-322(1)(e) in his appeal to the district court.

Moreover, Howard’s passing reference to being “potentially deprived of constitutionally material information” (*see* Opening Brief (Br.) at 31) fails to meet his obligation on appeal to establish the City failed to disclose exculpatory material

under *Brady* or Mont. Code Ann. § 46-15-322(1)(e). See *McCarthy*, ¶ 15. This Court is not obligated to “develop legal arguments” for appellants or guess what position they may want to take and seek out supporting legal authority that may support that position. *State v. Gomez*, 2020 MT 73, ¶ 29 n.2, 399 Mont. 376, 460 P.3d 926.

Accordingly, the only issue on appeal is whether the municipal court abused its discretion when it found, pursuant to Mont. Code Ann. § 46-15-322(5), that Howard had not put forth sufficient evidence of a “substantial need” to justify an *in camera* review of Officer Lloyd’s personnel files for instances of excessive force.

In addition to the *Brady* material the State is required to disclose, Montana’s criminal discovery statute also provides that:

Upon motion showing that the defendant has substantial need in the preparation of the case for additional material or information not otherwise provided for and that the defendant is unable, without undue hardship, to obtain the substantial equivalent by other means, the court, in its discretion, may order any person to make it available to the defendant. The court may, upon the request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive. The prosecutor may not be required to prepare or disclose summaries of witnesses’ testimony.

Mont. Code Ann. § 46-15-322(5).

Like in *McCarthy*, Howard offered nothing more than “mere cursory” and “naked” assertions of his alleged “substantial need” to see Officer Lloyd’s records. *McCarthy*, ¶¶ 15, 21. Howard misstates the record when he alleges that the

officer's records "were likely to contain evidence" of past instances of excessive force. (Br. at 24.) To support this premise, Howard cites to this Court's *McCarthy* opinion, which happened to also involve Officer Lloyd. (Br. at 29, 30.) Howard misrepresents the facts from that case. Nowhere in the *McCarthy* opinion does this Court state that Officer Lloyd used "excessive force." Nor do the facts of that case support the existence of evidence that Office Lloyd had used excessive force in the past. Howard may be correct that an "incident-specific use-of-force report" related to McCarthy's arrest may appear in Officer Lloyd's personnel records, but there is no evidence that there was an administrative or judicial determination Officer Lloyd used *excessive force* when apprehending McCarthy.

For this same reason, Howard's suggestions that the BPD Deputy Chief's April 30, 2019 letter was "not the whole truth" is unsupported. (Br. at 30, 32.) Moreover, and contrary to Howard's claim on appeal, it does not appear that the municipal court relied upon that letter when it concluded it would conduct an *in camera* review of the records of evidence of untruthfulness/untrustworthiness but not instances of excessive use of force. Howard is incorrect that his alleged deprivation of "constitutionally material information" was the "direct result of the State's [sic] representations to the municipal court about the contents of Officer Lloyd's personnel file." (Br. at 31-32.)

In addition to Howard's mere speculation, even if there were examples of excessive use of force in Officer Lloyd's personnel file, there was no basis upon which that information would have been admissible during Howard's trial. The municipal court did not abuse its discretion when it determined Howard had failed to present a sufficient basis or need to justify an *in camera* review of the records. *See McCarthy*, ¶ 16 (McCarthy failed to meet his burden of demonstrating abuse of discretion when he "has yet to particularly articulate or show what legitimate 'substantial need' he had").

Howard continues to erroneously assert that his "substantial need" was met because "if [examples of prior instances of excessive force] existed," they would support his claim that he was not resisting arrest, but rather was responding to the officer's excessive use of force, and would discredit the officer's claim that force was needed because Howard was resisting. (Br. at 27 (emphasis added).) Howard's argument is still not compelling.

First, whether Officer Lloyd had used excessive force in the past was not relevant to whether Howard was aware that the officer was trying to effectuate an arrest the night of November 24, 2018, and that his conduct was preventing the officer from arresting him. *See* Mont. R. Evid. 401 ("Relevant evidence means evidence having any tendency to make the existence of any fact that is of

consequence to the determination of the action more probable or less probable than it would be without the evidence.”).

Second, Howard’s attempt to justify his physical resistance to Officer Lloyd’s attempts to handcuff and arrest him based on the officer’s alleged use of excessive force is statutorily prohibited. *See* Mont. Code Ann. §§ 45-3-108 (person not entitled to use force to resist an arrest, even if person believes the arrest is unlawful or the arrest is in fact unlawful) and 45-7-301(2) (in resisting arrest prosecution, it is no defense that arrest was unlawful if officer acting under official authority). As the City explained, whether an officer used excessive force is considered during wholly separate proceedings. *See State v. Laughlin*, 281 Mont. 179, 182, 933 P.2d 813, 815 (1997) (“If the arrest is illegal (a determination which few citizens can make while being arrested), the arrestee should pursue civil and criminal remedies rather than resort to self-help . . .”).

Finally, even if a person could assert the affirmative defense of justifiable use of force in a resisting arrest prosecution, Howard offered nothing but speculation and hypotheticals and no evidence that he knew Officer Lloyd had a history of using excessive force. *See State v. Mont. Ninth Judicial Dist. Court*, 2014 MT 188, ¶ 8, 375 Mont. 488, 329 P.3d 603 (when defendant claiming justifiable use of force, evidence that the person using force against defendant had character for violence “is limited to what the defendant knew at the time [he] used force”). The district court

correctly concluded that the trial court did not abuse its discretion when it determined that, even if Officer Lloyd had used excessive force in prior circumstances, that information would have been irrelevant, prejudicial to the State, and inadmissible.

The district court also correctly noted that “in balancing [Howard’s] right to know against Officer Lloyd’s right of privacy, [Howard’s] right/need to know carried little to no weight when he had no practical use for the private information he sought. As such, even Officer Lloyd’s limited expectation of privacy outweighed [Howard’s] right/need to know.” (Doc. 70 at 9.)

Howard failed to demonstrate a substantial need as required under Mont. Code Ann. § 46-15-322(5). The municipal court’s denial of Howard’s motion to compel an *in camera* inspection of Officer Lloyd’s personnel file for instances of excessive force was not “based on a mistake of law, erroneous finding of material fact, or otherwise [arbitrarily act], without conscientious judgment or in excess of the bounds of reason, resulting in substantial injustice.” *McCarthy*, ¶ 12. The district court correctly affirmed the trial court’s order.

II. Sufficiency of the evidence

Since it is the jury’s sole province to weigh the evidence based on the credibility of the witnesses and determine which version of events should prevail,

when reviewing a jury verdict, this Court determines whether sufficient evidence existed to support the verdict, not whether the evidence could have supported a different result. *Sutton*, ¶ 10; *State v. Jackson*, 2009 MT 427, ¶ 23, 354 Mont. 63, 221 P.3d 1213 (Court will not substitute its judgment for that of the jury and “will assume every fact which the jury could have deduced from the evidence”).

Under Mont. Code Ann. § 45-7-301(1)(a), “A person commits the offense of resisting arrest if the person knowingly prevents or attempts to prevent a peace officer from effecting an arrest by using or threatening to use physical force or violence against the peace officer or another.” “It is no defense to [the charge of resisting arrest] that the arrest was unlawful, if the peace officer was acting under color of the officer’s official authority.” Mont. Code Ann. § 45-7-301(2). “A person is not authorized to use force to resist an arrest that the person knows is being made either by a peace officer or by a private person summoned and directed by a peace officer to make the arrest, even if the person believes that the arrest is unlawful and the arrest in fact is unlawful.” Mont. Code Ann. § 45-3-108; *Laughlin*, 281 Mont. at 182, 933 P.2d at 815 (1997). The jury was correctly instructed on the applicable law. (*See* Doc. 46, JI Nos. 19-22.) Based on the evidence presented at trial, a rational trier of fact could have found the essential elements of resisting arrest beyond a reasonable doubt.

Howard admitted he knew Sands was calling the police and that they would want to talk to him. Howard ignored the officer's instructions, thereby committing the offense of obstructing a peace officer. Officers Lloyd and Jeppson testified, and the video confirmed, Howard physically fought back against Officer Lloyd's attempts to secure and handcuff him. Officer Lloyd had to use a leg maneuver to get Howard to the ground and, even then, Howard continued to pull his hands away and tuck them against his waist. Even after lifting Howard off the ground and striking him in the face to stun him, it still took two BPD officers to finally handcuff Howard and secure him.

Based on those facts, a rational trier of fact could have found Howard was aware of his conduct and the existing circumstances of his arrest. Since a rational trier of fact could have found all the elements of the offense of resisting arrest beyond a reasonable doubt, the district court correctly affirmed Howard's conviction for the same.

As he did at trial, on appeal, Howard alleges he did not know he was under arrest, so he could not be guilty of resisting arrest. (Br. at 17-23). Howard's claims ring hollow for many reasons.

First, Howard did not challenge that sufficient evidence supported his conviction for obstructing a peace officer. Thus, Howard does not challenge the evidence at trial that he was aware Officer Lloyd was a police officer acting within

his official authority when the officer pulled in behind him with overhead lights activated and a spotlight trained on his car. Nor does he dispute that Officer Lloyd was acting within his authority when he instructed Howard to raise his hands and kneel, and that he chose to ignore those commands. Thus, Howard committed the offense of obstructing a peace officer, for which Officer Lloyd was authorized to arrest Howard. Howard's allegation that Officer Lloyd did not seek to arrest him until he resisted arrest (*see* Br. at 17, 22) is refuted by the evidence presented at trial. The officer's testimony and video of the struggle clearly show that Officer Lloyd did not seek to effectuate an arrest until Howard committed the offense of obstructing a peace officer.

Second, Howard mischaracterizes the facts presented at trial. For instance, Howard alleges he did not know Sands had called law enforcement. (Br. at 19.) However, at trial, Howard testified that when he saw Sands on her phone, he figured she was calling the cops anyway and he would have to talk to the police, so he followed her to the bar. (Aud. at 3:58:50.) Howard made a similar admission during one of his April 16 messages to Officer Tankink. (Trial Ex. 7.)

Howard's allegation that, since he raised his hand for a moment when he first got out of the car, he was "visibly unarmed," is incorrect. (Br. at 21.) As Officer Lloyd explained, he did not know whether Howard had a weapon concealed on his person, and when Howard put his hands down and at his waist,

the officer could not tell if he was obtaining a weapon. Finally, and directly related to Howard's argument he did not know he was under arrest, as the district court noted, Howard admitted at his trial that "he was struggling with Officer Lloyd because he did not think he should be arrested." (Doc. 70 (citing Aud. at 4:09:00 to 4:09:30).)

Third, Howard's reliance on *Sutton* and *State v. Carter*, 285 Mont. 449, 948 P.2d 1173, 1178 (1997) is not compelling. (Br. at 19-20.) Howard is correct that in *Sutton* and *Carter* the officers advised the suspects they were being arrested, but that fact was not dispositive or relevant to the decisions. Neither of those cases held that before a person can be convicted of resisting arrest, the State must prove the arresting officer verbally advised the person he was under arrest.

In *Carter*, the issue on appeal was whether Carter's actions constituted "resisting" since he did not fight back against the officer. *Carter, supra*. When the officer asked Carter to submit to a breath test, Carter told the officer he intended to drive home, and when the officer tried to prevent him from leaving, Carter grabbed on to the side mirror. *Carter*, 285 Mont. at 454, 948 P.2d at 1176. The officer had to pry Carter's hands loose and wrestle him to the ground and into handcuffs to effectuate the arrest. *Id.* This Court rejected Carter's argument that, since he did not use or threaten to use physical force or violence against the officer, he could not be found guilty. *Carter*, 285 Mont. at 456-57, 948 P.2d at 1177 (citing Mont.

Code Ann. § 45-7-301(1)(b), Court agreed that “once an officer has to engage in a physical struggle with an arrestee in order to prevent him from driving away, a risk that the officer or another might be physically injured is created,” which constituted resisting arrest). Carter’s knowledge about whether he was being arrested was not at issue.

In *Sutton*, this Court examined whether the defendant’s actions constituted “physical force or violence” as opposed to Sutton’s claim that she was merely being “insufficiently cooperative.” *Sutton*, ¶¶ 24-26. This Court affirmed the jury’s guilty verdict, noting that the evidence showed Sutton “forcefully and actively” pulled her body and hands away from the officers to prevent them from handcuffing her. *Id.* This Court’s recitation of the facts concerning the officer’s statement that Sutton was under arrest was included merely to refute Sutton’s version of events. *Id.* Like *Carter*, nothing in *Sutton* established that to convict someone of resisting arrest, the State must prove the officer warned the person he or she was about to be arrested. Nor does Montana law require an officer to always advise a person if they are about to be arrested.

When arresting someone without a warrant, an officer must give notice of his authority, intent, and justification to arrest that person, “*except when the person to be arrested is actually engaged in the commission of or in an attempt to commit an offense or is pursued immediately after its commission, after an escape, or when*

the giving of the information will imperil the arrest.” Mont. Code Ann. § 46-6-312 (emphasis added). Here, Howard had committed the offense of obstructing a peace officer and, under the circumstances presented, his failure to comply with the officer’s commands to keep his hands raised and his furtive actions also demonstrated that telling him he was under arrest could have endangered the officer further.

To establish the elements of resisting arrest, the City had to establish that Howard knowingly prevented or attempted to prevent Officer Lloyd from effectuating his arrest by using, or threatening to use, force or violence against Officer Lloyd. (Doc. 46, JI No. 20.) To establish Howard acted knowingly with respect to resisting arrest, the City had to establish Howard was “aware of [his] own conduct . . . and that the circumstances exist[ed].” (*Id.* at JI No. 21.) That is, as the district court correctly explained, “the question was not whether [Howard] knew he was under arrest . . . but rather, whether [Howard] was aware Officer Lloyd was attempting to effectuate an arrest.” (Doc. 70 at 10.)

The term “arrest” means “taking a person into custody in the manner authorized by law.” Mont. Code Ann. § 46-1-202(3). “An arrest is made by an actual restraint of the person to be arrested or by the person’s submission to the custody of the person making the arrest.” Mont. Code Ann. § 46-6-104(1). *See also State v. May*, 2004 MT 45, ¶ 13, 320 Mont. 116, 86 P.3d 42 (elements of an

“arrest” include authority to arrest, assertion of the authority with intent to arrest, and restraint of the person).

As this Court has explained, the purpose of Mont. Code Ann. § 45-3-108

on use of force in resisting arrest is to change the common-law rule that an illegal arrest could be resisted lawfully. That rule encouraged resistance and breaches of the peace. This section requires submission to arrest. If the arrest is illegal (a determination which few citizens can make while being arrested), the arrestee should pursue civil and criminal remedies rather than resort to self-help

Laughlin, 281 Mont. at 182, 933 P.2d at 815.

In *Laughlin*, the issue on appeal was whether the arresting officer had a duty to inform Laughlin that a bond had been set for his offense prior to effectuating the arrest. *Laughlin, supra*. However, this Court did not determine that particular issue since, “[a]n individual is not entitled to resist [arrest] regardless of the legality of an arrest.” *Laughlin*, 281 Mont. at 182, 933 P.2d at 815 (held, even assuming failure to advise about bond rendered arrest illegal, “Laughlin was still statutorily prohibited from resisting the arrest”).

The record demonstrates that, after ignoring commands from a BPD officer (who was in uniform and driving a marked police car with its overhead light activated and clearly acting within his authority) to raise his hands, Howard actively struggled against Officer Lloyd to prevent the officer from taking him into custody by handcuffing him. Just as the City and potential jurors discussed during *voir dire*, when given instructions by an officer, a reasonable person will comply.

Whether the person agrees with the officer's actions, or even if the arrest is later deemed illegal, a person is not allowed to physically resist. The jury was presented with sufficient evidence to infer from Howard's "acts and all other facts and circumstances" that he was acting knowingly in trying to prevent Officer Lloyd from arresting him. (*See* Doc. 46, JI No. 23.)

Viewing the evidence in the light most favorable to the City, the record supports that a rational trier of fact could have found all the essential elements of resisting arrest beyond a reasonable doubt. *Sutton*, ¶ 10. The district court correctly concluded that sufficient evidence existed to support the jury's verdict.

CONCLUSION

This Court should affirm the municipal court's order denying Howard's motion for *in camera* review of the arresting officer's personnel files and the district court's determination that sufficient evidence supported Howard's conviction for resisting arrest.

Respectfully submitted this 21st day of May, 2021.

AUSTIN KNUDSEN
Montana Attorney General
215 North Sanders
Helena, MT 59620-1401

By: /s/ Katie F. Schulz
KATIE F. SCHULZ
Assistant Attorney General

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 6,669 words, excluding certificate of service and certificate of compliance.

/s/ *Katie F. Schulz*
KATIE F. SCHULZ

CERTIFICATE OF SERVICE

I, Kathryn Fey Schulz, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 05-21-2021:

Chad M. Wright (Attorney)
P.O. Box 200147
Helena MT 59620-0147
Representing: Jacob Andrew Howard
Service Method: eService

Caitlin Boland Aarab (Attorney)
11 5th Street North, Suite 207
Great Falls MT 59401
Representing: Jacob Andrew Howard
Service Method: eService

Gregory S. Sullivan (Attorney)
121 North Rouse Ave.
P.O. Box 1230
Bozeman MT 59771-1230
Representing: City of Bozeman
Service Method: Conventional

Electronically signed by Wendi Waterman on behalf of Kathryn Fey Schulz
Dated: 05-21-2021