IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0717

STATE OF MONTANA,

Plaintiff and Appellee,

v.

LYNDSEY MAE LALICKER,

Defendant and Appellant.

# BRIEF OF APPELLANT

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

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## STATEMENT OF THE ISSUES

(1) Did the State present sufficient evidence to prove beyond a reasonable doubt that Lyndsey Mae Lalicker committed misdemeanor interference with parent-child contact on December 31, 2017, when she qualified for the first offense exception to the offense in Mont. Code Ann. § 45-5-633(2)?

(2) Did the State present sufficient evidence to prove beyond a reasonable doubt that Lyndsey Mae Lalicker committed misdemeanor interference with parent-child contact on January 7, 2018, when it did not prove that she knowingly and purposely prevented, obstructed, or frustrated Luke Olyer's contact with their minor-age child under an existing court order or that her actions lacked reasonable cause?

(3) Alternatively, did Lyndsey receive ineffective assistance of counsel when counsel failed to invoke the affirmative defenses set forth in Mont. Code Ann. § 45-5-633, which could have exonerated Lyndsey of both charges?

## STATEMENT OF THE CASE

The State charged Lyndsey Lalicker with two counts of interference with parent-child contact, a misdemeanor, pursuant to

Mont. Code Ann. § 45-5-631, for events that occurred on two different dates, December 31, 2017 (one count) and January 7, 2018 (one count). (D.C. Doc. 1.) The cases were joined and proceeded to a jury trial in Gallatin County Justice Court on January 22, 2019. (D.C. Docs. 58, 86.) The jury found Lyndsey guilty of both counts. (D.C. Doc. 88.) Sentencing occurred on February 6, 2019, at which Lyndsey received: Count 1, a six-month sentence with all time suspended but five days, plus a $250 fine, $1,400 in court and public defender costs, and $85 in surcharges and fees for a total financial obligation of $1,785; Count 2, a six-month sentence with all time suspended but five days, plus a $250 fine and $75 in surcharges and fees for a total financial obligation of $325.[1] (D.C. Docs. 93, 94, which are attached hereto as App. A.) Lyndsey filed a notice of appeal that same day and received a stay of sentence pending appeal in District Court. (D.C. Docs. 95 – 97.)

In District Court, Lyndsey received a trial de novo on the two charges. A jury found her guilty of both counts. (D.C. Doc. 142; Trial Tr. at 330.) At sentencing, the District Court imposed a five-day jail

[1] The sentencing orders do not indicate if the sentences are to run concurrent or consecutive. By statutory default, they run consecutively. Mont. Code Ann. § 46-18-401(4).

term with four days suspended plus a fine of $50 for Count 1, and a concurrent five-day jail term with four days suspended for Count 2, plus a $50 fine and $125 in fees and surcharges. (App. A at 14 – 15.) The total financial obligation imposed was $175.[2] (App. A at 15.) At Lyndsey's request, the District Court granted Lyndsey four months to pay the financial obligation in full. (App. A at 15.) The District Court also stayed execution of the sentences pending appeal. (App. A at 15 – 16; D.C. Doc. 147.) The written sentencing order conforms with the oral pronouncement. (App. B.)

Lyndsey timely appealed.

## STATEMENT OF THE FACTS

Lyndsey and Luke share a daughter together, LL, from their short-lived marriage, which was invalidated after eight months because Luke lacked the ability to consent to marry. *In re Parenting of L.G.L.*, 2018 MT 283N, ¶ 3.[3] (Trial Tr. at 248 – 49.) In September 2014, two

[2] Only one $50 fine was imposed for the two charges. (App. A at 14 – 15; App. B at 5.)

[3] Pursuant to Internal Operating Rule 3(I)(3)(c)(ii), the Court may take judicial notice of the memorandum disposition and Case Register Report in Lyndsey's parenting plan case, which started as the annulment proceeding.

months after his marriage was annulled, Luke filed a petition to voluntarily relinquish his parenting rights in Broadwater County district court, which was denied. *In re Parenting of L.G.L.*, ¶ 4. (Trial Tr. at 187 – 88, 192, 249 – 50.)

Luke filed a parenting plan action in Gallatin County in September 2015. *Parenting of L.G.L.*, ¶ 5. In a final parenting plan ordered on June 30, 2017, a standing master appointed by the District Court designated Lyndsey as LL's custodian and established a graduated parenting-time schedule for Luke. (Exh. 1[4] at 2, 4 – 7.) Luke's initial parenting time began in a supervised setting and then progressed on a graduated schedule. (Exh. 1 at 6 – 7, ¶ 5.)

Pursuant to the parenting plan, Luke would advance to the next phase of the graduated schedule based on "successful parenting" or "successful completion" of the existing phase for a specified number of weeks. (Exh. 1 at 4 – 6, ¶ 5.) Ultimately, "[f]ollowing the successful completion" of the graduated schedule, the plan provided that LL would reside primarily with Lyndsey and have contact with Luke between

[4] All exhibits cited herein are contained in the Record of Exhibits transmitted on appeal.

10 a.m. on Saturday until 5 p.m. on Sunday every other weekend. (Exh. 1 at 6, ¶ 6.) The plan did not define "successful parenting" or "successful completion". Nor did the plan provide a method or designate a person to determine Luke's success under the schedule.

In September 2017, at Luke's request, the standing master appointed a "Parenting Coordinator", KC McLaughlin, to perform scheduling duties for parenting time and resolve disputes between the parties for the parenting schedule. (Trial Tr. at 105, 193 – 94.) McLaughlin, who is not a licensed professional but does possess a Master of Social Work (Trial Tr. at 104, 132 – 34), referred to her parenting coordinator appointment as "a last train stop" (Trial Tr. at 106, 112), where "[t]hings are so incredibly bad that you have to bring in an expert to try to resolve and help the family work through the Parenting Plan." (Trial Tr. at 105.) The State did not attempt to qualify McLaughlin as an expert witness.

Lyndsey objected to McLaughlin's appointment and requested a different parenting coordinator because she believed that McLaughlin was biased against her and that her directives violated the schedule

established by the parenting plan.[5] (Trial Tr. at 254 – 57.) McLaughlin testified about Lyndsey, "Well, when you're at the last train stop, it's usually because one parent really is not working and not doing the process, not following through with what they say, not taking what I say to do as far as the schedule, my directives, not following directives, the list goes on and on as to why mothers or fathers don't cooperate." (Trial Tr. at 112.) Lyndsey denied that she was uncooperative with McLaughlin, providing numerous examples of how she sought to accommodate Luke's parenting time. (Trial Tr. at 257 – 69.)

On December 29, 2017, the District Court issued an order following a status report from McLaughlin. (Exh. 2.) The order states in-full:

> On December 13, 2017, K.C. McLaughlin, MSW, filed her *Status Report # 3* in which she details the steps taken toward implementing the Final Parenting Plan. She also reiterates from the Court's *Order Re Parenting Coordinator*, that in her role as Parenting Coordinator she is to

[5] Although not indicated in this record on appeal, the record in Lyndsey's companion appeal on the felony charge indicates that by the time of the District Court trial in the instant case in October 2019, McLaughlin had been replaced as the parenting coordinator. (*See State v. Lalicker*, DA 19-0683, 06/10/2019 Tr. at 21 (defense counsel explaining that "luckily" a new parenting coordinator had been appointed and friction should be abated).)

> decide parenting disputes that arise and that it is expected that the parties will comply with her directives.
>
> For good cause now appearing,
>
> IT IS HEREBY ORDERED that the December 13, 2017, Status Report # 3 is approved. The parties shall comply with Ms. McLaughlin's directives and scheduling of parenting time on time and as scheduled. Failure to do so may result in contempt of court.

(Exh. 2 (emphasis in original).) The order provides no clarification about the method for deciding Luke's parenting stages and does not delegate McLaughlin as the person to make those decisions.

The parties do not dispute that McLaughlin set parenting time for Luke on December 31, 2017, and on January 7, 2017, nor that Lyndsey was aware of the established time. (Exhs. 3, 4; Trial Tr. at 116 – 30; 265 – 70.) Lyndsey maintained, however, McLaughlin's directives violated the parenting plan and that she was advised to follow the parenting plan. (Trial Tr. at 257, 270 – 71.) Lyndsey testified that she was confused whether to follow the parenting plan or McLaughlin's directives. (Trial Tr. at 271.) McLaughlin conceded that Lyndsey may have believed her directives conflicted with the parenting plan. (Trial Tr. at 149 – 50.)

## STANDARDS OF REVIEW

The Court reviews *de novo* whether sufficient evidence supports a conviction. *State v. Polak*, 2018 MT 174, ¶ 14, 392 Mont. 90, 422 P.3d 112 (citations omitted).

Record-based ineffective assistance of counsel claims are reviewed on direct appeal under the *Strickland* standard. *State v. Weber*, 2016 MT 138, ¶ 11, 383 Mont. 506, 373 P.3d 26 (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)) (other citation omitted). Such claims present mixed questions of law and fact that the Court reviews de novo. *Weber*, ¶ 11 (citation omitted).

## SUMMARY OF ARGUMENT

The State presented no evidence that Lyndsey knowingly or purposely prevented, obstructed, or frustrated Luke's contact with LL on the two days in question. Lyndsey believed she was following the court-ordered parenting plan and that McLaughlin's directives violated the plan. No court order gave McLaughlin authority to decide Luke's success under the parenting plan or when he would progress to a new phase. The evidence only established that the parenting coordinator believed she had authority to determine when Luke entered a new

parenting phase and acted like she possessed such authority. The December 29, 2017 order merely granted the parenting coordinator authority to set scheduling and resolve scheduling conflicts.

Even viewing the evidence in the light most favorable to the State, no rational juror could find that the State proved beyond a reasonable doubt that Lyndsey committed the essential elements of interference with parent-child contact, as set forth in Mont. Code Ann. § 45-5-631(1), on either date in question.

Mont. Code Ann. § 45-5-633(2) provides an absolute defense to the first charged offense because Lyndsey "returned the child" to Luke before arrest. Indeed, Lyndsey was never arrested for either of the two offenses. Concerning the second offense, Lyndsey believed her actions were taken under an existing court order, i.e., the parenting plan, or were taken with reasonable cause given the confusion between McLaughlin's directives with the parenting plan. Accordingly, the State did not prove beyond a reasonable doubt that Lyndsey committed the second charged offense of interference with parent-child contact pursuant to Mont. Code Ann. § 45-5-633(1)(b), (c).

Should the Court determine the defenses provided in § 45-5-633 were not presented to the jury, the Court should find Lyndsey received ineffective assistance of counsel for not raising them.

## ARGUMENT

### I. The State failed to provide sufficient evidence to prove beyond a reasonable doubt that Lyndsey committed interference with parent-child contact on December 31, 2017, pursuant to Mont. Code Ann. § 45-5-631(1), because she clearly qualifies for the first-time offense exception set forth in Mont. Code Ann. § 45-5-633(2).

Evidence is insufficient to support a finding or verdict of guilty when, after reviewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Polak*, ¶ 34 (citations omitted). "A new trial cannot be granted where the evidence adduced at the first trial proves insufficient to support a conviction. . . . Once a reviewing court has found the evidence legally insufficient, the proper remedy is a judgment of acquittal." *Polak*, ¶ 35 (citations omitted).

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S.

358, 364, 90 S. Ct. 1068, 1073, 25 L. Ed. 2d 368 (1970). "The question whether a defendant has been convicted upon inadequate evidence is central to the basic question of guilt or innocence. The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless." *Jackson v. Virginia*, 443 U.S. 307, 323, 99 S. Ct. 2781, 2791, 61 L. Ed. 2d 560 (1979). *Accord State v. Akers*, 2017 MT 311, ¶ 14, 389 Mont. 531, 408 P.3d 142 (recognizing that due process requires the State to prove beyond a reasonable doubt every element of a crime charged in a criminal prosecution, and reflects "a profound judgment about the way in which law should be enforced and justice administered") (citations omitted).

To convict Lyndsey of interference with parent-child contact on December 31, 2017, the State had to prove beyond a reasonable doubt that she knowingly or purposely prevented, obstructed, or frustrated Luke's right to parent-child contact under an existing court order. Mont. Code Ann. § 45-5-631. *Accord* Jury Instructions 4 – 7. The State failed to meet its burden for two reasons.

First and foremost, Lyndsey qualifies for the first-offense exception in Mont. Code Ann. § 45-5-633(2), which provides in relevant

part: "Return of the child before arrest is a defense only with respect to the first commission of interference with parent-child contact[.]" Lyndsey was not arrested for this offense and it is undisputed that she delivered LL to Luke for parenting time on January 3, 2018. (Trial Tr. at 174, 265.) Though this defense was not asserted at trial, and no jury instruction addressed it, § 45-5-633(2) specifies that the offense is not committed if the child is returned to the parent entitled to contact before the offending parent is arrested. Thus, as a matter of law, the first charge must be dismissed.

Second, even if the first time exception did not apply – which it does – the State's evidence did not prove beyond a reasonable doubt that McLaughlin possessed authority to decide the phases of Luke's parenting under either the parenting plan or the December 29, 2017 order. The evidence only established that the parties must follow McLaughlin's directives about scheduling parenting time. No evidence established that McLaughlin could decide Luke's parenting phases. If the District Court had wanted to give McLaughlin that authority it needed to say so in an order. Without a clear order to that effect, the State could not meet its burden of proof.

Concerning the December 31, 2017 charge, no rational juror could have found the State proved the essential elements of interference with parent-child contact beyond a reasonable doubt, even when considering the evidence in the light most favorable to the State. *Polak*, ¶ 34.

## II. The State failed to provide sufficient evidence to prove beyond a reasonable doubt that Lyndsey committed interference with parent-child contact on January 7, 2018, pursuant to Mont. Code Ann. § 45-5-631(1), because Lyndsey acted with reasonable cause pursuant to the court-ordered parenting plan and thus qualifies for the defense in Mont. Code Ann. § 45-5-633(1)(b), (c).

Mont. Code Ann. § 45-5-633(1), provides in relevant part: "A person does not commit the offense of interference with parent-child contact . . . if the person acts . . . (b) under an existing court order; or (c) with reasonable cause." The State introduced no evidence that Lyndsey violated the court-ordered parenting plan. The State did introduce evidence that Lyndsey violated McLaughlin's directives – there is no dispute about that. But not even the December 29, 2017 order telling the parties to follow McLaughlin's directives gave McLaughlin authority to resolve Lyndsey's confusion about what stage of parenting applied on January 7, 2018. The evidence at trial established Lyndsey

believed she was following the parenting plan and McLaughlin's directives conflicted with the court-ordered plan.

Lyndsey's belief was reasonable under the confusing circumstances that existed. That confusion created reasonable doubt, as argued by counsel below. (Trial Tr. at 306.) And it also qualified Lyndsey for the exceptions to committing the offense contained in Mont. Code Ann. § 45-5-633(1)(b), (c).

Concerning the January 7, 2018 charge, no rational juror could have found the State proved the essential elements of interference with parent-child contact beyond a reasonable doubt, even when considering the evidence in the light most favorable to the State. *Polak*, ¶ 34.

## III. Alternatively, if the Court determines that the defenses available to Lyndsey in Mont. Code Ann. § 45-5-633 were not asserted at trial or presented to the jury, the Court should find that Lyndsey received ineffective assistance of counsel by waiving plainly applicable defenses.

"The United States and Montana Constitutions guarantee criminal defendants the right to effective assistance of counsel. U.S. Const. amend. VI; Mont. Const. art. II, § 24[.]" *Weber*, ¶ 21 (citations omitted). This Court has adopted a two-pronged test set out in *Strickland* to assess ineffective assistance of counsel claims. *Weber*,

¶ 21 (citation omitted). Under *Strickland*, a defendant must prove first that counsel's performance was deficient, and second that counsel's deficient performance prejudiced the defense. *Weber*, ¶ 21 (citation omitted). Under the prejudice prong of *Strickland*, a defendant must establish that but for counsel's unprofessional errors, a reasonable probability exists that the result of the proceeding would have been different. *Weber*, ¶ 29 (citations omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Weber*, ¶ 29 (citations and internal quotation marks omitted).

Ineffective assistance of counsel claims for which there is no plausible justification for counsel's acts or omissions may be considered on direct appeal. *Weber*, ¶ 22; *State v. Chafee*, 2014 MT 226, ¶ 17, 376 Mont. 267, 332 P.3d 240 (observing that "it is unnecessary to ask "why performed as he [or she] did when there is 'no plausible justification' for defense counsel's action or inaction"), *citing State v. Kougl*, 2004 MT 243, ¶15, 323 Mont. 6, 97 P.3d 1095 (ruling that when counsel is faced with an obligatory, non-tactical action, the question is not "why" but rather "whether" counsel acted, and if so, whether counsel acted adequately).

If the Court determines that it cannot grant relief to Lyndsey for insufficient evidence because the defenses in Mont. Code Ann. § 45-5-633 were waived below, it should find that Lyndsey received ineffective assistance of counsel because trial counsel failed to assert defenses that could have resulted in Lyndsey's acquittal at trial or even dismissal before trial. There is no plausible justification for not raising plainly applicable statutory defenses to the charged offenses. Not asserting an applicable defense qualifies as deficient performance that obviously prejudiced Lyndsey by resulting in her conviction for two crimes that arguably should never have been charged. As the December 29, 2017 order admonished, the parties could be subject to contempt of court for violating McLaughlin's directives. Any confusion about whether her directives were violating the parenting plan could, and should, have been resolved in contempt proceedings, not in a criminal case.

Lyndsey respectfully requests the Court to find she received ineffective assistance of counsel and remand for a new trial, if it determines her defenses to the charges were waived below by trial counsel.

## CONCLUSION

For the foregoing reasons, Lyndsey Mae Lalicker respectfully requests the Court to vacate her two convictions for interference with parent-child contact because the State failed to provide sufficient evidence to prove her guilt beyond a reasonable doubt for either offense. The Court should vacate the sentences related thereto and remand with instructions to enter judgments of acquittal for both charges. Alternatively, Lyndsey requests the Court to find she received ineffective assistance of counsel by waiving plainly applicable statutory defenses below and to remand for a new trial.

Respectfully submitted this 27th day of July, 2021.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary 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 3,306, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Deborah S. Smith
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# APPENDIX

## CERTIFICATE OF SERVICE

I, Deborah Susan Smith, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 07-27-2021:

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