
CITY OF MISSOULA,

Plaintiff and Appellee,

v.

BRUCE ALLEN WINCHESTER,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, the Honorable Jason T. Marks, Presiding

APPEARANCES:

CHAD WRIGHT
Appellate Defender
HALEY CONNELL JACKSON
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147
HCJackson@mt.gov
(406) 444-9505

ATTORNEYS FOR DEFENDANT
AND APPELLANT

AUSTIN KNUDSEN
Montana Attorney General
TAMMY K PLUBELL
Bureau Chief
Appellate Services Bureau
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

JIM NUGENT
Missoula County Attorney
435 Ryman
Missoula, MT 59802

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

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STATEMENT OF THE ISSUES

Did the municipal court err when it stated at sentencing and in the written judgment that Bruce Winchester was convicted of violation of an order of protection when the record establishes it was *attempted* violation of an order of protection?

STATEMENT OF THE CASE

The City of Missoula charged Bruce with five counts of violation of an order of protection for attempting to sell some of his wife's, Wendy's, belongings while in the middle of a divorce. (D.C. Doc. 11, Notice to Appear and Complaint Nos. 1-5, Affidavit of Probable Cause.¹) The order of protection provided that Bruce "shall not take, hide, sell, damage or dispose of" Wendy's or her children's personal property that was temporarily residing in Bruce's storage unit and residence. (Ex. B at 2, admitted 11/21/10 Trial, Disc 3, Track 1 at 29:15.) At trial, the City did not present any evidence that Bruce sold any of the items. (11/21/19 Trial, Discs 3, Track 1, 4, Track 1.) At the close of the City's case-in-chief, Bruce made an oral motion for a directed verdict and asked the court to

¹ D.C. Doc. 11 contains several different documents. This brief will reference them by title.

dismiss all five charges due to insufficient evidence. (11/21/10 Trial, Disc 4, Track 1 at 24:20.) Bruce argued that because the City failed to prove that he sold any of Wendy's belongings, it failed to prove he violated the order of protection. (11/21/10 Trial, Disc 4, Track 1 at 24:30-26:00.)

The court granted the motion with respect to four of the five charges upon determining there was no evidence of a violation of an order of protection. (11/21/19 Trial, Disc 4, Track 1 at 49:05-51:15.) The court determined, however, that count four was in fact an attempted violation of an order of protection charge because the citation alleged Bruce "attempted to sell" Wendy's belongings. (11/21/19 Trial, Disc 4, Track 1 at 50:00-51:30; *see* D.C. Doc. 11, Notice to Appear and Complaint No. 4.) The court denied the motion with respect to count four and allowed the City to supplement the jury instructions with an attempt instruction and amend the verdict form to reflect the one attempt charge. (11/21/19 Trial, Discs 4, Track 1 at 50:00; *see* D.C. Doc. 5.)

The jury found Bruce guilty of one count of attempted violation of an order of protection. (11/21/19 Trial, Disc 6, Track 1 at 00:40; D.C. Doc. 5, attached as App. A.) The court sentenced Bruce to six months in jail with all but seven days suspended and imposed a \$200 fine and a \$85

surcharge. (11/21/19 Trial, Disc 6, Track 1 at 29:30; Sentencing Order, attached as App. B.) The court stated at sentencing and in the written judgment that the sentence was for violation of an order of protection rather than attempted violation of an order of protection. (11/21/19 Trial, Disc 6, Track 1 at 29:30; Sentencing Order.)

Bruce appealed to the district court the denial of his motion for a directed verdict. (Notice to Appeal and Motion to Stay Execution of Judgment; D.C. Docs. 3, 10.) The district court affirmed, and Bruce timely appealed to this Court. (D.C. Docs. 15, 18.)

STATEMENT OF THE FACTS

A statement of facts contains “facts relevant to the issues presented for review.” Mont. R. App. P. 12(1)(d). No additional facts beyond those recounted in the Statement of the Case are necessary.

SUMMARY OF THE ARGUMENT

A court always has the power to make the record speak the truth. Furthermore, this Court has the authority to modify a judgment from which an appeal is taken. The jury found Bruce guilty of one count of attempted violation of an order of protection. At sentencing and in its written judgment, the municipal court erroneously stated Bruce’s offense

was violation of an order of protection. The court should remand with instructions that the municipal court amend the written judgment to state the correct offense of which Bruce was convicted.

STANDARDS OF REVIEW

The Court reviews a sentence of less than one year of actual incarceration for both legality and abuse of discretion. *State v. Haldane*, 2013 MT 32, ¶ 17, 368 Mont. 396, 300 P.3d 657. In reviewing the legality of a sentence, the Court looks to whether the sentencing court had statutory authority to impose the sentence and whether the sentence falls within statutory parameters. *Haldane*, ¶ 17. This determination is a question of law reviewed de novo. *Haldane*, ¶ 17. A sentencing court abuses its discretion when it acts “arbitrarily without employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice.” *Haldane*, ¶ 17 (internal quotation marks omitted).

ARGUMENT

I. The court erred when it stated that Bruce was guilty of violation of an order of protection rather than attempted violation of an order of protection.

Montana Code Annotated § 46-20-703(1) authorizes this Court to “modify the judgment or order from which the appeal is taken.” Mont.

Code Ann. § 46-20-703(1). Moreover, Mont. Code Ann. § 46-18-116(3) provides that a court “may correct a factually erroneous sentence or judgment at any time.” Mont. Code Ann. § 46-18-116(3). A court always has “the power to make the record speak the truth.” *State v. Megard*, 2006 MT 84, ¶ 20, 332 Mont. 27, 134 P.3d 90. This Court will direct district courts to correct clerical errors in the record even when the error has “no bearing upon the integrity” of the conviction. *State v. Hancock*, 2016 MT 21, ¶ 16, 382 Mont. 141, 364 P.3d 1258; see *State v. Goff*, 2011 MT 6, ¶¶ 32-33, 359 Mont. 107, 247 P.3d 715. Correcting the error ensures the accuracy of the judgment and avoids confusion and future litigation. *Hancock*, ¶ 16; *Goff*, ¶ 33.

When a judgment states the incorrect offense, this Court will order the judgment be modified. In *Hancock*, the Court remanded to the district court to amend the judgment when it stated the incorrect offense of which Hancock was convicted. *Hancock*, ¶ 16. Hancock pled guilty to DUI per se; however, the court’s judgment stated that it convicted Hancock of DUI. *Hancock*, ¶¶ 15-16. Although the error had “no bearing upon the integrity” of the conviction, this Court instructed the district

court to amend the judgment to state the correct offense of which Hancock was convicted. *Hancock*, ¶ 16.

Similarly, in *State v. New*, 276 Mont. 529, 537-38, 917 P.2d 919, 924 (1996), the defendant pled guilty to counts I and III, and the court dismissed count II. The district court's judgment incorrectly stated that it sentenced the defendant for counts I, II, and III. *New*, 276 Mont. at 537, 917 P.2d at 924. On appeal, the Court noted the error and, pursuant to its authority under Mont. Code Ann. § 46-20-703(1), ordered the judgment modified so that it removed the reference to count II. *New*, 276 Mont. at 538, 917 P.2d at 924.

Although Bruce argued in district court that count 4 was charged as violation of an order of protection, the municipal court disagreed and determined the City had charged Bruce with *attempted* violation of an order of protection. (11/21/19 Trial, Disc 4, Track 1 at 50:00-51:30.) Accordingly, the court instructed the jury on attempt and amended the verdict form to include one count of attempted violation of an order of protection. (11/21/19 Trial, Discs 4, Track 1 at 50:00, 5, Track 1 at 26:50; D.C. Doc. 5.) The jury found Bruce guilty of one count of attempted violation of an order of protection. (11/21/19 Trial, Disc 6, Track 1 at

00:40; D.C. Doc. 5.) At sentencing and in the written judgment, however, the court mistakenly stated that Bruce was convicted of the charge of violation of an order of protection. (11/21/19 Trial, Disc 6, Track 1 at 29:30; Sentencing Order.)

As this Court did in *Hancock* and *New*, “to avoid any confusion and future litigation,” the Court should remand to the district court with instructions to amend the judgment so that it correctly states the offense that the jury found Bruce guilty of violating. *See Hancock*, ¶ 16; *New*, 276 Mont. at 538, 917 P.2d at 924.

CONCLUSION

Bruce requests the Court order the municipal court to amend his written judgment to state the correct offense of which he was convicted.

Respectfully submitted this 4th day of November, 2021.

OFFICE OF STATE PUBLIC DEFENDER
APPELLATE DEFENDER DIVISION
P.O. Box 200147
Helena, MT 59620-0147

By: /s/ Haley Connell Jackson
HALEY CONNELL JACKSON
Assistant Appellate Defender

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 1416, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Haley Connell Jackson
HALEY CONNELL JACKSON

APPENDIX

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CERTIFICATE OF SERVICE

I, Haley Connell Jackson, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 11-04-2021:

James P. Nugent (Attorney)
435 Ryman St
Missoula MT 59802
Representing: Missoula, City of
Service Method: eService

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: Missoula, City of
Service Method: eService

Electronically signed by Gerri Lamphier on behalf of Haley Connell Jackson
Dated: 11-04-2021