IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0341

STATE OF MONTANA,

Plaintiff and Appellee,

v.

SAMUEL RICHARD BONKO,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Twenty-Second Judicial District Court,
Big Horn County, the Honorable Matthew Wald, Presiding

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STATEMENT OF THE ISSUES

1. Whether the district erred in denying Samuel's motion for a directed verdict on the resisting arrest charge because no rational trier of fact could have found that the State proved beyond a reasonable doubt that Samuel used or threatened to use physical force or violence against the officer, or that he acted knowingly.

2. Whether the district court erred in admitting drug evidence without a proper foundation when the district court allowed the State to call previously undisclosed witnesses to testify at trial regarding the chain of custody and the State failed to show that the evidence allegedly seized was the same evidence admitted at trial.

3. Whether the district court erred in allowing the State's mid-trial amendment of the date on the information after Samuel relied on the date for his trial strategy in his opening statement and cross-examination of the first two witnesses.

STATEMENT OF THE CASE

On June 21, 2019, the State charged Samuel Bonko with Count I: Criminal Possession of Dangerous Drugs, in violation of Mont. Code Ann. § 45-9-102; Count II: Criminal Possession of Drug Paraphernalia, in violation of Mont. Code Ann. § 45-10-103; and Count III: Resisting Arrest, in violation of Mont. Code Ann. § 45-7-301 (D.C. Doc. 5.) The Motion for Leave to File an Information Direct and the Affidavit of

Probable Cause alleged the crimes occurred on or about June 21, 2019. [1] (D.C. Doc. 1-2, attached as Appendix E.) However, the filed Information indicated the incident date was June 18, 2019. (App. E.) The district court arraigned Samuel on July 9, 2019, and he entered not guilty pleas on all counts. (D.C. Doc. 8.)

A jury trial commenced on January 16, 2020. That afternoon, after defense counsel asked the State's first two witnesses about discrepancies concerning the date of the offense, the district court—over defense objection—allowed the State to amend the Information to change the offense date to June 17, 2019.

After the State rested, Samuel moved for a directed verdict on all three counts.[2] With respect to the resisting arrest charge, Samuel argued the officers never told Samuel he was under arrest and there was no evidence that Samuel used force or a threat of force. (1/17 Tr. at 255-256.) In regard to the possession charge, Samuel argued that the

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[1] In light of the alleged offense date, all references to the Montana Code Annotated in this brief are to the 2017 Code unless otherwise noted.

[2] A "motion for a directed verdict" is properly referred to as "motion to dismiss for insufficient evidence" made pursuant to Mont. Code Ann. § 46-16-403. As such, this Court deems a motion for a directed verdict as a motion to dismiss for insufficient evidence. *State v. McWilliams*, 2008 MT 59, ¶ 36, 341 Mont. 517, 525, 178 P.3d 121, 126.

drug evidence should not have been admitted, and without the evidence, there was insufficient evidence to convict Samuel. (1/17 Tr. at 258.) In response to Samuel's motion, the State conceded it presented inadequate evidence to support Count II, Criminal Possession of Drug Paraphernalia, and moved to dismiss that charge. (1/17 Tr. at 261.) The court granted the State's motion and denied Samuel's motion regarding Counts I and III. (1/17 Tr. at 262-263.) Samuel testified and the case went to the jury. The jury found Samuel guilty of the remaining two counts. (D.C. Doc. 30.)

The district court committed Samuel to the custody of the Department of Corrections for five years, none suspended, on Count I, and six months in jail on Count III, running concurrently. (D.C. Doc. 35, attached as Appendix A.) Samuel timely appealed. (D.C. Doc. 37.)

STATEMENT OF THE FACTS

I. Facts Related to Samuel's Arrest

An anonymous caller contacted the Department of Corrections and reported that Samuel Bonko had a warrant and was at Love's Truck Stop in Hardin. (1/16 Tr. at 123.) Barbara Yerger, who worked for probation and parole, took the call. Yerger testified she received the call

on June 18, 2019—the date listed on the information—and that she passed the information along to the Big Horn County Sheriff. (1/16 Tr. at 122.) Yerger never identified the caller or verified the warrant. (1/16 Tr. at 124.)

In response to the anonymous tip, Detective Ty Cruikshank drove to the truck stop. He also testified that he received the report on June 18, 2019. (1/6 Tr. at 126.) He thought dispatch verified the warrant, but the dispatch log did not show the warrant was ever verified. (1/6 Tr. at 143.)

When Cruikshank arrived at Love's, he saw an individual he recognized as Clayvin Herrera pumping gas into a pickup truck. (1/16 Tr. at 127.) He approached Clayvin and asked him if Samuel was inside the truck. (State's Ex. 5, video 1668 at 1:03, admitted and played for the jury, 1/16 Tr. at 138.)[3] Clayvin shook his head no. (State's Ex. 5, video 1668 at 1:16.) When asked again, Clayvin responded, "I don't know Samuel." (State's Ex. 5, video 1668 at 1:22.) Although Cruikshank testified that Clayvin told him Samuel was in the pickup truck, the

[3] State's Ex. 5, Det. Cruikshank's in-car video, was separated into four clips. Clayton cites to the particular clip using the last four digits in the file's name.

video does not include such a statement. An unidentified male then walked up to Cruikshank, and Cruikshank told him, "I'm just coming here to talk to my buddy, Clayvin, here." (State's Ex. 5, video 1668 at 1:39.)

At this point, Samuel was asleep in the back seat of the pickup truck when a female who was also present in the truck, named Natasha, told him to "go." (1/17 Tr. at 293.) At first, Samuel tried to open the door, but it was locked, so he hopped into the front seat and started to slowly drive away. He saw a police car, but did not see an officer. (1/17 Tr. at 293.) After a few feet, the truck stopped and the engine was turned off. (State's Ex. 5, video 1947 at 0:27.) At this time, Samuel knew nothing about a warrant. (1/17 Tr. at 294.)

Cruikshank walked up to the truck and immediately opened the front door. He testified he identified Samuel "[b]ased on what Clayvin had stated earlier that Sam was in the vehicle." (1/16 Tr. at 129.) This was the identification also relied upon by the Sergeant Michael Atkinson, who then arrived on scene. (1/16 Tr. at 215.)

Cruikshank told Samuel to exit the vehicle. However, Cruikshank said that Samuel "appeared to be holding on." (1/16 Tr. at 129.) He

never told Samuel he was under arrest. (1/16 Tr. at 144.) Atkinson also did not tell Samuel he was under arrest because "I wasn't the primary deputy." (1/16 Tr. at 218.)

After less than one minute, Cruikshank tased Samuel. (State's Ex. 5, video 1947 at 1:15.) He then tased him again. (State's Ex. 5, video 1947 at 1:45.) And then again. (State's Ex. 5, video 1947 at 2:11.) Cruikshank testified policy prevents him from tasing someone more than three times, but he did not know why that was the policy. (1/16 Tr. at 153-154.) However, after being tased three times, Cruikshank said Samuel "had full lockup." (1/16 Tr. at 130.)

Clayvin then entered the passenger side of the vehicle and "began hitting [Samuel], and eventually that knocked him either unconscious or off balance enough for us to be able to pull him out the vehicle." (1/16 tr. at 216-217.) Clayvin is later seen "fist bumping" and "low-fiving" some other people on the scene. (1/16 Tr. at 150.)

The officers then pulled Samuel onto the ground and arrested him. Samuel asked to go to the hospital because he started "having chest pains," "couldn't breath[e]," and he thought he was dying. (1/17

Tr. at 281, 283.) Although Samuel pleaded with Cruikshank to go to the hospital, Cruikshank took him straight to the jail. (1/16 Tr. at 154-155.)

II. Facts and Objections Regarding Foundation for the Drug Evidence

When Samuel was pulled out of the truck and onto the ground, Clayvin then told Atkinson to check Samuel's pockets for his keys, so he did. (1/16 Tr. at 217.) When the State asked what Atkinson located in Samuel's pocket, he testified, "Paraphernalia. I don't remember exactly what. I believe a syringe and a baggie of methamphetamines, if I recall correctly." (1/16 Tr. at 217.) Atkinson testified that the baggie identified as State's Ex. 7 looked "similar to the bag that I pulled out of the pocket." (1/16 Tr. at 234.)

Atkinson stated he then "[t]urned [the alleged evidence] over to Detective Cruikshank." (1/16 Tr. at 217.) Contrary to Atkinson's recollection, Cruikshank said that Atkinson placed the evidence on "not the bed, but the back end of the pickup -- or the side end, I guess." (1/16 Tr. at 130.)

Multiple lay witnesses walked around the vehicle during the arrest, including one citizen who was attempting to help the officers and was standing right by the truck when, according to Atkinson, the

evidence was placed on the back end of the pickup. (State's Ex. 5, video 2226 at 0:10-2:11.) Cruikshank said he then seized the drugs. (1/6 Tr. at 131.)

Cruikshank said he later placed the baggie allegedly retrieved from Samuel's pocket in the evidence locker. (1/16 Tr. at 198.) Before placing it in the locker, Cruikshank weighed the evidence and wrote in his report that the "contents of the bag" weighted .039 grams. (1/16 Tr. at 159-160.) He testified at trial that he did not weigh the contents separately. (1/16 Tr. at 160.) Cruikshank testified he did not know what happened to the baggie after he put it in the evidence locker, but he believed it was the same baggie at trial. (1/16 Tr. at 162, 169.)

During Cruikshank's testimony, the State attempted to admit into evidence as State's Ex. 7, the baggie that allegedly was seized from Samuel's pocket, which had been placed in an evidence bag. (State's Ex. 7, attached as Appendix C, offered, Tr. at 172.) On the outside of the evidence bag, there was a sticker that described the evidence and said, "Officer: CRUICKSHANK." (State's Ex. 7.) No other officer's name was on the evidence bag. (State's Ex. 7.) The prosecutor referred to this as the "chain of custody property record" even though it did not contain

any other officer's name or describe each person who handled the evidence. (1/16 Tr. at 166.) Cruickshank testified that he did not know what happened to the evidence after he placed it in the evidence locker. (1/16 Tr. at 162.)

When the State attempted to admit the evidence, the district court initially sustained Samuel's objection that the evidence lacked proper foundation. (1/16 Tr. at 167, 172 and 176, attached as Appendix D.) As the district court explained to the prosecutor, "[t]he foundation for admission of drug evidence must show that the investigating officer obtained the evidence, sent it to the crime lab, received it back and identified it as the same." (1/16 Tr. at 179.)

Without an actual chain of custody log, the State quickly realized it would need to call two additional fact witnesses: Detective Rick Krueger and Captain Michael Fuss. Samuel objected to the testimony of the witnesses, arguing the State failed to identify these witnesses prior to trial. (1/16 Tr. at 177.) The State did not endorse these witnesses on the Information. (D.C. Doc. 5.) In addition, the court's omnibus order in this case directed that all "fact witnesses shall be identified to the Defense no later than 45 days prior to trial." (D.C. Doc. 12 at 2.) The

State failed to identify either Krueger or Fuss by this deadline. In fact, the State failed to identify either witness in the information or in their list of possible witnesses filed just five days before trial. (D.C. Doc. 26.)

In response, the State did not contend that it had, in fact, timely disclosed these witnesses. Instead, the State argued that "this is an argument that should have been addressed in a prelim motion," and the report is "within this [Montana Rules of Evidence 803(6)] exception to the hearsay rule" and should therefore be admitted without witness testimony. (1/16 Tr. at 173, 176.) Over defense objection, the court allowed the witnesses to testify because "it's a foundational witness." (1/16 Tr. at 177.)

Defense counsel briefly spoke with the witnesses before they testified. (1/16 Tr. at 189.) Counsel discovered that "both have indicated they are in the chain of custody," but "in talking with them, they both talked about a computerized system. But that there isn't a document that says exactly what the chain is. I don't appear to have anything in terms of a document that shows how the chain was handled." (1/16 Tr. at 189.) Counsel noted that the "property record" he was provided contained Fuss's name, but it is unclear if he is referring to State's Ex.

7, which does not appear to contain to Fuss's name, or a different record provided during his hurried interview with the witnesses. (See 1/16 Tr. at 189-190.)

Detective Rick Krueger, the evidence technician, testified to the usual procedure when a deputy places evidence in a storage locker to send to the crime lab. (1/16 Tr. at 203.) He explained how evidence is labeled with a sticker, such as that attached to the outside of State's Ex. 7, that shows which deputy checked the item in and where it was stored. (1/16 Tr. at 203.) In this case, he said that State's Ex. 7 was checked in by Cruikshank. (1/16 Tr. at 204.) Because he knew the item was sent to the crime lab for testing, he testified that his usual practice was to check out the item to Captain Michael Fuss for transport. (1/16 Tr. at 204.) Krueger stated that he had "a slight memory of this case." (1/16 Tr. at 206.)

Captain Michael Fuss testified that he transports evidence. (1/16 Tr. at 209.) Fuss testified about his usual procedure for checking out evidence from Krueger and driving it to the crime lab in Billings. (1/16 Tr. at 210.) Fuss stated that he did not have a specific memory of this evidence. (1/16 Tr. at 212.)

After Krueger and Fuss testified, the State again moved to admit the baggie, State's Ex. 7. (1/16 Tr. at 234.) Samuel renewed his objection. (1/16 Tr. at 234.) The court overruled the objection and admitted the evidence. (1/16 Tr. at 234.)

The State then called Tanna Brown, a forensic scientist at the Montana State Crime Lab. (1/16 Tr. at 236.) She testified she received the baggie, State's Ex. 7, tested the contents of the item and identified methamphetamine. (1/16 Tr. at 243.) The State them moved to admit her lab report. (1/16 Tr. at 244.) Samuel objected to the report's admission because "this relies on the admission of State's Ex. 7, therefore, I will continue my objection as to foundation." (1/16 Tr. at 244.) The district court overruled the objection and admitted the lab report as State's Ex. 6. (1/16 Tr. at 244.) The report stated that the item's weight was .06 grams. (State's Ex. 6.)

III. Facts Regarding Jury Deliberations

During jury deliberations, the jury asked to look at the dash camera video again. (1/17 Tr. at 348.) Without objection, the district court allowed the viewing. (1/17 tr. at 348.) Later, the jury submitted to the court a two-part question: "How soon after Sam's arrest was he

appointed an attorney?" "What day of the week was June 17th?" (1/17 Tr. at 351.) The parties agreed that the court should decline to answer the questions and the district court told the jury to deliberate on the evidence presented. (1/17 Tr. at 352.) The jury later found Samuel guilty of both counts. (1/17 Tr. at 354.)

STANDARDS OF REVIEW

The Court reviews *de novo* a district court's denial of a motion to dismiss for insufficient evidence. *State v. Marler*, 2008 MT 13, ¶ 20, 341 Mont. 120, 124, 176 P.3d 1010, 101.

The Court reviews the adequacy of foundation to admit evidence for an abuse of discretion. *State v. McCoy*, 2012 MT 293, ¶ 11, 367 Mont. 357, 361, 291 P.3d 568, 571. Additionally, "[a] district court's ruling to allow testimony of witness is reviewed for abuse of discretion." *State v. Bowen*, 2015 MT 246, ¶ 20, 380 Mont. 433, 439, 356 P.3d 449, 453. "A lower 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." *City of Bozeman v. McCarthy,* 2019 MT 209, ¶ 12, 397 Mont. 134, 447 P.3d 1048.

The Court reviews a district court's decision to permit an amendment to a criminal complaint or information for an abuse of discretion. *State v. Hardground*, 2019 MT 14, ¶ 7, 394 Mont. 104, 107, 433 P.3d 711, 713.

SUMMARY OF THE ARGUMENT

The district court erred in denying Samuel's motion to dismiss the resisting arrest charge for insufficient evidence. Although the district court denied the motion while referencing both prongs of the resisting arrest statute, the information included, and the jury was instructed, only on the first prong, that Samuel "knowingly attempted to prevent a peace officer from effecting an arrest by using or threatening to use physical force or violence against the peace officer." The State failed to produce any evidence of Samuel using force or threatening the use of force to prevent arrest.

Additionally, the State failed to prove that Samuel knowingly attempted to prevent an arrest. No one told Samuel he was under arrest and Samuel had no knowledge of a warrant. Therefore, no rational trier of fact could have found that the state proved the charge beyond a reasonable doubt. As a result, the district court erred in

denying Samuel's motion and the Court must acquit Samuel of that charge.

Next, although the main charge the State brought against Samuel was Criminal Possession of Dangerous Drugs, the State was ill-equipped to lay a foundation for its drug evidence. Due to a lack of preparation, the State provided no document nor had witnesses with adequate knowledge ready to establish the chain of custody for its evidence.

Instead, in response to Samuel's objection based on foundation, the State kept reiterating an exception to a hearsay rule, thus highlighting its misunderstanding of the foundation requirements. Once the court guided the State with what it needed to lay a proper foundation, the State realized it needed to scramble and call two additional witnesses whom it had not previously disclosed as required by statute and the court's omnibus order in this case.

The district court erred when it denied Samuel's motion to exclude these witnesses from testifying on the ground that they were foundational witnesses only. There is no blanket exception to the discovery rules for foundational witnesses, nor was there such an

exception in the district court's omnibus order. The State violated its duty of disclosure and the lower court's decision to allow the witnesses to testify, based on a misunderstanding of the law, was error.

Without these witnesses, the State could not establish a chain of custody. With the drug evidence excluded, the State would be unable to admit the lab report and testimony about the results. Without any drug evidence, there would be insufficient evidence to convict Samuel of Criminal Possession of Dangerous Drugs and an acquittal of that charge is therefore necessary. Alternatively, this Court should remand back to the district court to determine the proper discovery sanction.

Even with the testimony of the two undisclosed witnesses, the district court still erred in admitting the drug evidence over defense objection. The State failed to show that the evidence was in substantially the same condition as when it was first seized. The officer who seized the evidence lacked a clear memory of what he actually seized. Additionally, when asked at trial if the baggie was the same one that he seized, he responded that it looked "similar to the bag that I pulled out of the pocket." (1/16 Tr. at 234.)

Similar is not enough. The purpose of laying a foundation for fungible evidence ensures that the admitted item is the same item that was initially seized. The officer's vague testimony, combined with contradictory statements about where the evidence was initially placed after it was seized and how much it weighed, prevented the State from laying a sufficient foundation. For this reason, the district court erred in granting its admission. The Court should reverse and remand for a new trial.

Prior to trial, the State's Motion for Leave to File an Information Direct, Affidavit of Probable Cause and Information all contained varying, incorrect incident dates. None of the documents contained the correct date. Relying on this, Samuel's counsel told the jury during opening statements that the State would not be able to prove the crime occurred on June 18, 2019. Defense counsel's reliance on this date was further highlighted while cross-examining the State's first two witnesses.

Once defense counsel asked Cruikshank about the date on the dispatch log, the State realized its mistake and moved the district court to amend the information. The district court erred in allowing the State

to amend the information and modify the jury instructions with the correct date because it uprooted Samuel's trial strategy. The jury's question about the date during deliberations further shows that the amendment prejudiced Samuel. This error is grounds for reversal.

ARGUMENT

I. Samuel's conviction for resisting arrest cannot stand because viewing the evidence in the light most favorable to the State, no rational trier of fact could have found beyond a reasonable doubt that Samuel used or threatened to use physical force or violence, or acted knowingly.

In order to convict Samuel of resisting arrest as pled and presented to the jury in this case, the State was required to prove and the jury was required to find beyond a reasonable doubt that he "knowingly prevent[ed] or attempt[ed] 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." (D.C. Doc. 29, Instruction No. 16, attached as Appendix B; D.C. Doc. 5.)

Due process protects an 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 (1970); *see* U.S. Const. amend. XIV; Mont. Const. art. II, § 17. Thus, the

State must present "evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *Jackson v. Virginia*, 443 U.S. 307, 316 (1979). This standard requires proof from which a reasonable factfinder can "reach a subjective state of near certitude of the guilt of the accused." *Jackson*, 443 U.S. at 315.

Viewing the evidence in the light most favorable to the State, the State failed to meet its burden, and no rational trier of fact could have found the essential elements of the crime. The district court erred in denying Samuel's motion for a directed verdict on this charge.

A. No rational jury could have found beyond a reasonable doubt that Samuel used force or a threat of force against the officers

The State presented evidence that Samuel drove away from an officer a few feet at a slow speed, turned off the engine, refused to respond to requests to exit the vehicle or remove his hands from the steering wheel for less than a minute and then took a beating from a bystander. None of this constitutes a use of force or threat of force against Cruikshank.

The second prong of resisting arrest, under which Samuel was not charged and the jury not instructed, states that a person commits the offense by "using any other means that creates a risk of causing physical injury to the peace officer or another." Mont. Code Ann. § 45-7-301(1)(b). Creating a *risk* of physical injury includes a broader range of behaviors than the use or threat of physical force. Without a showing of force by the defendant, this Court has affirmed cases because the defendant's behavior satisfied the broader, alternate second prong of resisting arrest. *See e.g., State v. Tuomala*, 2008 MT 330, 346 Mont. 167, 194 P.3d 82.

In *Tuomala*, the Court upheld the denial of the motion to dismiss a resisting arrest charge where the defendant slipped off one of her handcuffs, forcing the officers to unlock the cuffs, at which point she pulled away, fell to the ground and had to be carried to the patrol car. The Court concluded that the defendant's behavior created a risk of physical injury to the officers, thus satisfying the second prong of the offense. *Tuomala*, ¶ 25.

In reaching its decision in *Tuomala*, the Court cited *State v. Carter*, 285 Mont. 449, 454, 948 P.2d 1173, 1175 (1997). In *Carter*,

officers asked the defendant to come to the station for more testing after administering field sobriety tests. The officers then pried the defendant's hand off the car mirror in order to handcuff him and keep him from driving off. *Carter*, at 454. The Court found 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," thus finding the evidence sufficient to convict under the second prong. *Carter*, at 457.

Because the district court instructed the jury on the resisting arrest charge only under Mont. Code Ann. § 45-7-301(1)(a), the State needed to prove that Samuel used or threatened to use physical force. Refusing to move, like that in *Carter*, may be sufficient to prove that a risk existed that an officer might be injured, but it does not satisfy a showing of force or use of force against an officer.

There was no testimony that Samuel used physical force or violence. While Samuel's hands were on the steering wheel, he was not exerting or threatening force through the use of his hands or any weapon that could theoretically be around. There was no evidence that he was kicking or biting or spitting at the officers. The extent of the

officer's testimony was that Samuel "wouldn't let go of the steering wheel." (1/16 Tr. at 223.)

Because the State only charged Samuel under the first subsection and the State failed to prove that Samuel used force, the court erred in denying Samuel's motion to dismiss the resisting arrest charge.

B. The State failed to prove beyond a reasonable doubt that Samuel acted knowingly.

The court also erred in denying Samuel's motion to dismiss the resisting arrest charge because the State failed to prove that Samuel acted knowingly. In order for Samuel to act knowingly, he needed to first know that he was being arrested.

This Court has found that a defendant acted knowingly even when he was not told he was under arrest; however, the surrounding circumstances showed that the defendant knew he was being arrested. *City of Bozeman v. Howard*, 2021 MT 230, 405 Mont. 321, 495 P.3d 72.

In *Howard*, the defendant and his girlfriend recently ended their relationship. *Howard*, ¶ 3. While facilitating a return of her belongings, officers told Howard to stay away from his ex-girlfriend and he agreed. *Howard*, ¶ 3. Later, the ex-girlfriend called 911 after Howard started

following her in his car. *Howard*, ¶ 3. Officers responded to Howard's vehicle in uniform and a marked patrol car with overhead lights activated and shone a spotlight on Howard's vehicle. *Howard*, ¶ 3. Howard immediately exited his vehicle and walked towards the officers. *Howard*, ¶ 4.

After a lack of compliance, the officers eventually took Howard to the ground as he continued to "flail about" and struggle with the officers. *Howard*, ¶ 4. The Court found that "[t]he record provides substantial evidence to support the jury's finding that Howard could reasonably perceive that he was under arrest and therefore acted knowingly." *Howard*, ¶ 21.

However, what a reasonable person could perceive is akin to negligence, not knowledge. *See* Mont. Code Ann. § 45-2-101(43). In order to prove that Samuel acted knowingly, the State need to prove that Samuel was aware he was preventing an arrest. (Jury Instruction No. 19.) This is more than mere negligence or what a reasonable person in his shoes would have understood based on the circumstances.

Here, Samuel did not perceive he was under arrest under the circumstance because he was not aware of a warrant and was never told

he was under arrest. Further, Samuel was not armed or aggressive before he was tased three times and knocked "either unconscious or off balance enough" to be pulled from the vehicle. (1/16 Tr. at 217.)

Accordingly, the record does not provide sufficient evidence to support the jury's finding that Samuel knew he was under arrest and acting knowingly. For this and the above reason, this Court should enter a judgment of acquittal on the resisting arrest charge.

II. The district court erred in admitting the drug evidence because the State failed to adequately lay foundation for its admission.

A condition precedent to admissibility of evidence is the requirement of authentication or identification of evidence sufficient to support a finding that the evidence is what its proponent claims it is. Mont. R. Evid. 901(a). In other words, the introducing party must lay a proper foundation for the evidence.

Where the item is not readily identifiable because it is fungible, such as drug evidence, the object must be authenticated by a chain of custody. *State v. Zackuse*, 253 Mont. 305, 308, 833 P.2d 143, 145 (1992). "The chain of custody rule requires the State to establish a continuous chain of custody from the time law enforcement acquires evidence until

that evidence is used at trial." *State v. Burchill*, 2019 MT 285, ¶ 28, 398 Mont. 52, 61, 454 P.3d 633, 641. The State can authenticate drug evidence without testimony from every witness who possessed the item if "the State shows that the investigating officer obtained the evidence, sent it to the crime lab, received it back from the crime lab, and identified it as the same evidence sent to the lab." *Zackuse*, at 308.

A. The district court erred when it allowed additional witnesses that were not disclosed prior to trial to testify to establish a proper foundation for the drug evidence.

The district court correctly described the State's obligation for establishing a chain of custody for drug evidence when sustaining Samuel's first objection. (1/16 Tr. at 170.) The State quickly realized that without the testimony of Det. Krueger and Capt. Fuss, it would not be able to meet this threshold. However, because the State failed to provide defense prior notice of these witnesses, the court erred in denying defense's motion to exclude the witnesses as a sanction for the State's discovery violation.

"Montana's discovery scheme is designed to enhance the search for truth and to avoid unnecessary delay and surprise at trial. The goal is

accomplished by providing full notification of each side's case-in-chief to avoid unnecessary delay and surprise at trial." *Bowen*, ¶ 23 (internal citations omitted).

The State must make available to defense "the names, addresses, and statements of all persons whom the prosecutor may call as witnesses in the case in chief." Mont. Code Ann. § 46-15-322(1)(a). Additionally, "[i]f the charge is by information or indictment, it must include endorsed on the information or indictment the names of the witnesses for the prosecution, if known." Mont. Code Ann. § 46-11-401(2).

Again, the State did not argue it timely disclosed Detective Krueger and Captain Fuss as potential witnesses or otherwise counter defense counsel's assertion that it had not done so. The State knew or should have known that it might need to call the evidence technician and the officer who allegedly transported the drug evidence to the State Crime Laboratory as witnesses in this case to establish the chain of custody when this drug possession case was filed. At a minimum, the State knew the identities of these witnesses and the potential need for their testimony by the omnibus deadline for disclosing prosecution

witnesses—45 days before trial. Properly laying the foundation for evidence is a basic skill in proving a drug possession case. The only explanation is sloppiness and lack of due diligence by the State. The State's failure to timely disclose these witnesses violated its statutory duty to disclose and the court's discovery order in this case.

To the extent the district court held otherwise, it erred. The district court claimed that the "foundational" aspect of the testimony justified its decision to allow the witnesses, but Montana law states that all witnesses for the State's case in chief must be disclosed prior to trial, regardless of the nature of the testimony. Mont. Code Ann. § 46-15-322. There is no exception for "foundational witnesses" in the disclosure statute, or the court's own discovery order. All potential witnesses must be disclosed. The State failed to do so. Therefore, the district court exercised its discretion based on a mistake of law, which constitutes an abuse of discretion. *McCarthy*, ¶ 12.

Montana law provides a means for district courts to enforce statutory discovery obligations and discovery orders of the court. Mont. Code Ann. § 46-16-329. Possible sanctions include precluding a party from not calling a witness who was not timely disclosed. Mont. Code

Ann. § 46-16-329(4). Generally, imposition of sanctions is left to the district court because the lower court can consider at the time why the disclosure was not made. *State v. Waters*, 228 Mont. 490, 495, 743 P.2d 617, 621 (1987). The court can "consider the reason the disclosure was not made, whether the noncompliance was willful, the amount of prejudice to the opposing party, and any other relevant circumstances." *Waters*, at 495.

In *State v. Licht*, 266 Mont. 123, 879 P.2d 670 (1994), this Court held that a lower court erred in denying the defendant's motion for a mistrial or a new trial when the defense discovered during trial that the State failed to reveal a prior electronically monitored meeting between a confidential informant and the defendant. The defendant moved for the mistrial after discovering the new information during trial testimony. *Licht*, at 126. After trial, Licht filed a motion for a new trial alleging that the new evidence established an entrapment defense. *Licht*, at 127. At a hearing on the motion, the State admitted that there was a written report about the prior meeting that was inadvertently not turned over to defense. *Licht*, at 127. The report was not admitted into

evidence during the hearing, leaving the report's contents outside of the record on appeal. *Licht*, at 127.

The Court held that the district court erred in denying Licht's motions, but without reviewing the actual report, the Court declined to determine if defense was prejudiced. *Licht*, at 130. Therefore, the Court reversed the denial of the motion for a new trial and remanded for a new hearing to determine prejudice and the appropriate sanction. *Licht*, at 130.

In contrast, in *Waters*, the Court held that the district court did not abuse its discretion in admitting a VCR into evidence when the prosecution only disclosed pictures of the VCR—and not the VCR itself—prior to trial. *Waters*, at 495. Because the charge stemmed from the theft of the VCR and the pictures were previously provided to defense, the district court properly concluded that Waters was not unduly surprised and not prejudiced by the introduction of the VCR. *Waters*, at 495.

Here, the district court told the parties that without the witnesses' testimony, the court would sustain Samuel's objection to the admission of the drug evidence. (Tr. 1/16 at 175-176.) Unlike *Licht*, the Court has

a record to evaluate if the State's discovery violation was willful, the amount of prejudice to Samuel and why the disclosure was not made. The only reason for the State's nondisclosure was a lack of preparation. Defense counsel's hurried talk with the two witnesses revealed that no actual chain of custody document existed. Therefore, the State was on notice from the beginning of the case that it would have to call the witnesses to establish the chain of custody.

Additionally, the unusual description of how the chain is tracked in a computerized system with no print-out indicates further investigation and possible pre-trial motions. Without disclosure of the witnesses pre-trial, the State prevented defense from conducting such an investigation. And, as described by the district court, the prejudice suffered by Samuel was the admission of the evidence required to convict him.

In all, the State's violation of its discovery obligations prevented Samuel from interviewing the witnesses pre-trial, discovering any pre-trial motions based on the witnesses or asking the jurors in voir dire about the witnesses. In a small town like Hardin, it is not unusual for

people to know each other, and such familiarities can be prejudicial. Discovery statutes are designed to prevent this kind of surprise.

Mid-trial disclosure was too late. The district court erred in denying Samuel's request for a sanction of excluding the witnesses. Absent the witnesses, the State would have been unable to establish the chain of custody for the drug evidence and no evidence would have been admitted proving that Samuel possessed a dangerous drug. With insufficient evidence that Samuel possessed a dangerous drug, the Court should acquit Samuel of the possession charge.

Alternatively, although Samuel believes the record allows this Court to fully address the prejudice suffered by Samuel by allowing the witnesses to testify and conclude that his request of exclusion is appropriate, at a minimum, the Court should remand to the district court for a hearing to determine the proper sanction for the discovery violation. *See State v. Pope*, 2017 MT 12, ¶ 27, 386 Mont. 194, 202, 387 P.3d 870, 876.

B. Even with the undisclosed witnesses, the State failed to meet its burden of showing a continuous chain of the evidence without any substantial change.

As part of laying a proper foundation for fungible evidence, the State bears the burden of showing a continuous chain of possession without any substantial change in the evidence while in its possession when identifying evidence by a chain of custody. *State v. Bowser,* 2005 MT 279, ¶ 30, 329 Mont. 218, 224, 123 P.3d 230, 236. To do so, the State must demonstrate "that no substantial change occurred in the evidence from the time that the State gathered it to the time that the State tested it or offered it into evidence." *Bowser*, ¶ 30. "The burden then shifts to the defendant to show that the evidence has been tampered with while in the State's custody." *Bowser*, ¶ 30. The State here failed to meet its initial burden.

In *Bowser*, the Court examined two items of evidence the State attempted to admit into evidence. First, the Court held that a marijuana pipe that the State attempted to admit into evidence was not in substantially the same condition. *Bowser*, ¶ 31. The seizing officer testified that the top of the pipe was attached when he locked it into evidence, but the top had broken off once it was received at the crime

lab. ¶ 31. The change in the pipe's condition prevented the State from laying a proper foundation. ¶ 31. Therefore, the district court properly excluded the evidence. *Bowser*, ¶ 31.

In contrast, the court properly admitted baggies seized from the defendant's home because no evidence suggested that the baggies changed prior to trial. *Bowser*, ¶ 32. An officer testified he seized the evidence, put it in a bag, placed the bag in an evidence locker and sent it to the crime lab. The lab technician testified the evidence was properly sealed when received and was again sealed after analysis. *Bowser*, ¶ 32. In essence, the evidence was in substantially the same condition when it was seized as when it was admitted into evidence. Therefore, the State met its burden of showing a sufficient chain of custody. *Bowser*, ¶ 33.

Unlike the baggies in *Bowser*, the State here failed to meet its threshold. Officer Atkinson, who allegedly seized State's Ex. 7, did not recall exactly what he seized: "I don't remember exactly what. I believe a syringe and a baggie of methamphetamines, if I recall correctly." (1/16 Tr. at 217.) When asked if the evidence was the same as what he seized,

he responded, "[I]t looks similar to the bag that I pulled out of the pocket." (1/16 Tr. at 234.)

Right after this testimony, the State moved to admit the drug evidence and defense counsel renewed his objection based on an inadequate foundation. (1/16 Tr. at 234.) The court confirmed that the objection was based on foundation, overruled the objection and told defense counsel he could "supplement the record later." (1/16 Tr. at 234.) Later, defense counsel "reiterate[d] the arguments that we've made to the Court and I'm not going into all of those in detail," including his earlier objection to the foundation of the drug evidence because he believed the evidence would show "that the chain has been compromised." (1/16 Tr. at 256 and 173.)

Indeed, the evidence did show that the chain was compromised. First, Atkinson, the seizing officer, could not testify that the baggie was the same one he seized at the scene. The entire purpose of laying a foundation for fungible evidence—evidence, such as a baggie, that because of its nature could be easily mistaken with an identical piece of evidence—is to show that the admitted item is the same as the seized item. *See State v. Weeks*, 270 Mont. 63, 75, 891 P.2d 477, 484 (1995) ("In

deciding whether to admit evidence concerning the blood tests results, the District Court had to determine whether a proper foundation had been laid. Specifically, the court had to determine if the blood samples used for the DNA and serological testing were the same blood taken from Weeks...")

Further, Atkinson testified that he handed the evidence to Cruikshank. However, Cruikshank testified that Atkinson put the evidence on the back of the pickup truck before he secured it. Multiple individuals, some of whom were never identified, are seen walking around the truck during this time. An anonymous caller reported Samuel, so it is not extraordinary to believe that Samuel was being set up in one way or another, especially when Clayvin—Cruikshank's "buddy"—was fist bumping and low-fiving people after knocking Samuel unconscious.

The record also contains varying reports about the item's weight, which calls into question whether it was the same baggie. Cruikshank testified that he wrote in his report that the contents of the baggie weighed .039 grams. (1/16 Tr. at 159-160.) He then testified that he did not weigh the contents of the baggie separately and that his report was

inaccurate. (1/16 Tr. at 160.) The lab report, on the other hand, State's Ex. 6, showed that the contents of the baggie weighed in at .06 grams.

In all, the State did not show this piece of evidence was the same evidence or that it was in substantially the same condition when it was seized as when it was admitted. The baggie was left on the side of a truck while multiple people walked around the truck. The officer's report contained mistakes about the item's weight and how it was weighed. And the seizing officer could not testify that the baggie was the same one as the one seized. The State failed to meet the threshold burden of authenticating the drug evidence.

The district court therefore erred in admitting the baggie and the results of drug testing conducted on the contents of the baggie. The admission of this evidence is subject to harmless error analysis. *See State v. Van Kirk,* 2001 MT 184, ¶¶ 37-41, 306 Mont. 215, 32 P.3d 735. The State bears the burden to establish that this trial error was harmless by demonstrating "that the quality of the tainted evidence was such that there was no reasonable possibility that it might have contributed to the defendant's conviction." *Van Kirk*, ¶ 44. The State cannot meet that burden here. Without the drug evidence, there is no

other physical evidence or testimony to prove beyond a reasonable doubt that Samuel possessed a dangerous drug. Therefore, the Court must reverse his conviction. *Van Kirk*, ¶ 45.

III. The district court erred in allowing the State to amend the date on the information mid-trial because the amendment prejudiced Samuel.

A. Background

On the afternoon of the first day of trial and during the State's presentation of its case-in-chief, the State moved to amend the date of the offense listed in the Information "to make it clearer, because I notice the Information has one date and the affidavit of probable cause has another date." (1/16 Tr. at 182.) However, the State moved to amend the Information to June 17th, a date not included in either the Information or Affidavit of Probable Cause. Samuel objected. (1/16 Tr. at 183.) Samuel contended the change was to substance, which needed to be made at least five days before trial, and, alternatively, if the change was to form, the change should not be allowed because of the "detriment to the defendant." (1/16 Tr. at 183.)

The district court concluded the amendment was one as to form and overruled the objection without considering whether the amendment would cause any prejudice to the defense. (1/16 Tr. at 191.)

B. Discussion

Samuel's attorney relied on the date listed in the Information in his opening argument and cross-examination of the State's witnesses. Samuel's strategy was to show that the State could not prove the incident occurred on June 18th or June 21st, as Samuel was incarcerated on those days, and Samuel intended once again "to raise the issue at the close of the case." (1/16 Tr. at 187.) When the court allowed the State to amend the date on the Information and modify the jury instructions, this uprooted Samuel's trial strategy and prejudiced Samuel.

An amendment to the substance of an information must be made five days before trial. Mont. Code Ann. § 46-11-205(1). An amendment to form may be allowed before a verdict, but only "if no additional or different offense is charged and if the substantial rights of the defendant are not prejudiced." Mont. Code Ann. § 46-11-205(3).

Samuel concedes the amendment at issue is one as to form, not substance. *See State v. Yecovenko*, 2004 MT 196, ¶ 27, 322 Mont. 247,

252, 95 P.3d 145, 149 (Court concluded that the amendment of the date ranges for charges of sexual assault and sexual abuse of children, nineteen days before trial, was an amendment of form only). However, the district court here erred when it failed to take the next step and examine whether the amendment prejudiced Samuel's substantive rights.

The amendment prejudiced Samuel because his trial counsel relied on the date for his trial strategy. During opening statements, Samuel's counsel told the jury twice that the State would not be able to prove the events happened on June 18th. (1/16 Tr. at 117, 119.) Defense counsel told the jury that "the State is saying that they will prove that Mr. Bonko possessed methamphetamine and drug paraphernalia on June 18th of 2019. That is not true. They will not prove that." (1/16 Tr. at 117.) Again, defense counsel said that the State would not be able to show that Samuel "possessed drug paraphernalia and drugs on June 18th of 2019." (1/6 Tr. at 119.)

During cross-examination, Samuel focused on the date discrepancy when examining Detective Cruikshank. It was not until defense's strategy became clear that the State realized its mistake. And

not only was the date wrong on the information, but a totally different—and incorrect date—was included in the affidavit for probable cause. The jury was focused and confused by the date, as indicated by the question to the court during deliberations. Because the amendment prejudiced Samuel, the district court abused its discretion in allowing the amendment. The Court must reverse the conviction and remand for a new trial.

CONCLUSION

This Court should reverse Samuel's convictions and enter a judgment of acquittal on Count III because the State failed to present sufficient admissible evidence from which the jury could have found him guilty beyond a reasonable doubt.

This Court should find that the State violated its duty to disclose witnesses prior to trial and the district court erred in allowing the witnesses to testify based on a mistake of law. The Court should either find that the district court abused its discretion in denying Samuel's request for the sanction of exclusion of the witnesses and find insufficient evidence to support a conviction on Count I or remand to the district court to determine the proper sanction.

Instead, if the Court finds a lack of foundation because that the State failed to show the evidence seized was in substantially the same condition as when it was admitted, the court should reverse and remand for a new trial on Count I.

Alternatively, Samuel is entitled to a new trial because the State's mid-trial amendment of the Information prejudiced his defense and resulted in a fundamentally unfair trial.

Respectfully submitted this 10th day of February 2022.

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By: /s/ Jeavon C. Lang
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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 8,281, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Jeavon C. Lang
JEAVON C. LANG

APPENDIX

CERTIFICATE OF SERVICE

I, Jeavon C. Lang, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 02-10-2022:

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