IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA-21-0361

STATE OF MONTANA

Plaintiff and Appellee,

v.

MAUREEN THERESE DOUBEK

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, The Honorable Christopher Abbott, Presiding

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ISSUE PRESENTED

Whether Doubek's Sixth Amendment right to effective assistance of counsel was violated when her attorneys failed to offer a "mere presence" instruction during her trial for accountability for arson.

STATEMENT OF THE CASE

The State of Montana charged Doubek with Count I: Conspiracy to Commit Arson, in violation of sections 45-4-102(1), and 45-6-103(1)(b) MCA, and Count II: Accountability for Arson, in violation of sections 45-2-302(3) and 45-6-103(1)(b) MCA. Docs. 2-4.

Doubek proceeded to trial. The jury delivered a mixed verdict, acquitting on the conspiracy count but convicting on the accountability count. Doc. 125.

The district court sentenced Doubek to six years deferred imposition of sentence, with assorted conditions and restitution. Doc. 158.

Doubek timely filed her notice of appeal, Doc. 165, and now appeals.

STATEMENT OF FACTS

Doubek owned the Red Roof Cafe on the west end of Helena. On the night of October 19, 2018 a fire occurred causing substantial damage to the interior of the Red Roof Cafe. Docs. 2-4.

The State alleged that Doubek had worked in concert with an acquaintance, Brad Richardson, to burn down the Red Roof Cafe and collect on its insurance policy: "Brad Richardson will testify that Maureen tells him to do it, tells him to burn it all the way down to the ground and that she leaves the back door unlocked." State's Opening, Jury Trial at 209:3-6. In text and Facebook messenger exchanges, Richardson offered to burn down the Red Roof, which Doubek declined. Jury Trial at 218:8-11. In spite of these messages, the State argued that Richardson and Doubek had agreed in secret to burn down the Red Roof.

But in closing, the State's argument began to point towards Doubek's apparent negligence in associating with Richardson. The State explicitly argued that Doubek was accountable because she knew of Brad's prior offer, kept him near her business, and left the door unlocked on the night he committed the arson:

> Accountability is defined in the instructions that the Judge gave you. It's broken into things like, did the person solicit? Did they aid? Did they abet? Did they attempt to aid or abet? I would submit to you that by Maureen Doubek's own admission, she announced on Facebook that she's having all these problems with the property and got all these people to respond, and some of them from as far away as California, she said, and that she requested meetings with some of these people that offered to help her and ultimately invited one of those, Brad Richardson, to live in the trailer on the property. Does she aid in that? Yes. She brought Brad into the building. She left him behind there. She let him scope it out and she left the back door unlocked.
>
> Then what about abet, what is that abet word? I had to look it up. Abet is sort of like, it's kind of like bringing help in, trying to get people to help her do this. So did she announce to the world, did she

> tell people she was so depressed over the fire – or the sale falling through, rather? She mentions that she has a million in insurance. You don't think that's going to tip off the guy who's living out of his car? She provides housing, access for this admitted arsonist to get in there.

Jury Trial 992:23-993:22.

> Again, she asks you to think of her as a diligent, responsible businessperson and property owner. You know, oh, and then she's got these small businesses in Helena. She was having a heck of a time with all the meth users in town. It was just awful. Well, she invited them onto her property. Brad and Makayla, she invited on. Would you guys let the fox watch the henhouse? That's why she's accountable.

Jury Trial 1000:18-25.

The Defense countered that Richardson was a serial criminal who stood to benefit by accusing Doubek. Jury Trial at 241:11-243:17. Doubek later obtained an order of protection against Richardson for harassment. Jury Trial at 219:5-11. Richardson tried to demand money from Doubek's brother, attorney John Doubek, threatening to turn her in for burning down the Red Roof. 219:14-18. The Defense theory was that Doubek did not participate in the criminal act, directly told Richardson not to burn down the Red Roof Cafe, and was involved only to the extent that she allowed Richardson to remain in her orbit.

The Defense and State both offered jury instructions. Docs. 87-88. Neither offered an instruction on accountability based on "mere presence and knowledge that a crime is being committed."

The Jury returned a mixed verdict, acquitting on the conspiracy count but convicting on the accountability count. Doc. 125.

SUMMARY OF THE ARGUMENT

Other than the testimony of Richardson, the State's case lacked any evidence of positive action or participation by Doubek in burning the Red Roof Cafe. The State leaned heavily on Doubek's otherwise legal behavior, such as renting Richardson a double wide on the same property, employing him with small tasks, and leaving the building unlocked.

The Defense theory insisted that Doubek took no positive action to commit, act in furtherance of, or assist in the crime. Richardson's accusations against Doubek were motivated by favorable plea offers from the State and investigating agents. Although Richardson had directly offered to burn down the building in a message to Doubek, she declined the offer. The Defense argued that Doubek's only fault was that she continued to provide Richardson with work and housing.

In light of those competing theories, offering a "mere presence" instruction was obviously beneficial to the Defendant. That instruction would have cautioned the jury that Doubek's association with Richardson and knowledge of his possible criminal activities was insufficient to convict her of accountability. Such an

instruction could have no disadvantage to Doubek's case, so no tactical or strategic reasons can justify defense counsels' omission here. Reversal is required.

STANDARD OF REVIEW

Claims of ineffective assistance of counsel present mixed issues of law and fact which this Court reviews *de novo*. *State v. Clary*, 2012 MT 26, ¶ 12, 364 Mont. 53, 270 P.3d 88.

ARGUMENT

I. Doubek's Sixth Amendment Right to effective assistance of counsel was violated by counsels' failure to offer a "mere presence" instruction.

"[T]he right to counsel is the right to effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Ineffective assistance of counsel claims are governed by the two-part test established in *Strickland*. *State v. Kougl*, 2004 MT 243, ¶ 11, 323 Mont. 6, 97 P.3d 1095. The defendant must (1) show that "'counsel's performance was deficient or fell below an objective standard of reasonableness'" and (2) "'establish prejudice by demonstrating that there was a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.'" *Kougl*, ¶ 11 (citation omitted).

Prong one of the *Strickland* test asks whether counsel's conduct, "regardless of its characterization as 'strategic' or 'tactical,' proved reasonable under the

circumstances." *Rosling v. State*, 2012 MT 179, ¶ 24. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," but "strategic choices made after less than complete investigation" are reasonable only to the extent it was reasonable to limit counsel's investigation. *Strickland*, 466 U.S. at 690-691. "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Hinton v. Alabama*, 134 S. Ct. 1081, 1089 (2014).

A. Counsel's performance was deficient.

"Choosing, proposing, and objecting to jury instructions are the most important things counsel can do at trial, aside from delivering the closing argument." David M. Axelrad, et. al., *Appellate Practice in Federal and State Courts*, § 2.03[2] (6th ed. 2017). The importance of jury instructions cannot be underestimated because they guide the court, the parties, and the fact-finder in the determination of the ultimate facts of the case. Hon. Ruggero J. Aldisert, *Winning on Appeal*, § 5.4.2 (2d ed. 2003). Prevailing professional norms clearly require an attorney to actively litigate instructions on his client's behalf.

This Court has approved the following instruction in cases where accountability is the State's theory of liability:

> Mere presence at the scene of the crime and knowledge that a crime is being committed are not sufficient to establish that the defendant was involved in the crime. To be responsible, you must find beyond reasonable doubt that the defendant was a participant and not merely a knowing spectator.

State v. Chafee, 2014 MT 226, ¶ 15, 376 Mont. 267, 271, 332 P.3d 240, 244 (*citing State v. Kills on Top*, 243 Mont. 56, 92, 793 P.2d 1273, 1298 (1990)).

In *Chafee*, this Court found that failure to offer this instruction was ineffective assistance of counsel. Key to this Court's determination was the fact that the instruction was a "potentially beneficial instruction," had no disadvantage to Chafee, and thus, no tactical reason could justify failing to offer the instruction. *Id.* ¶ 21.

The *Chafee* Court also gave heavy consideration to the defense theory in that case: defense counsel had repeatedly argued that his client was simply sitting there while another committed a crime, and that she did nothing to aid the commission of the crime. *Id.*, ¶ 22. "Because the mainstay of the defense was that Chafee's presence at the scene was not sufficient to convict, there can be no plausible reason for failing to submit the very jury instruction that would have lent the force of law to counsel's argument." *Id.*

In this case, neither party argued that Doubek was actually present when Richardson set the Red Roof ablaze. But the State's theory leaned heavily on facts suggesting that Doubek should have known about Richardson's criminal intent,

kept him around despite this knowledge, and that she enabled him to commit the crime through her earlier presence at the scene:

> Accountability is defined in the instructions that the Judge gave you. It's broken into things like, did the person solicit? Did they aid? Did they abet? Did they attempt to aid or abet? I would submit to you that by Maureen Doubek's own admission, she announced on Facebook that she's having all these problems with the property and got all these people to respond, and some of them from as far away as California, she said, and that she requested meetings with some of these people that offered to help her and ultimately invited one of those, Brad Richardson, to live in the trailer on the property. Does she aid in that? Yes. She brought Brad into the building. She left him behind there. She let him scope it out and she left the back door unlocked.
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Jury Trial 1000:18-25 (Emphasis added). This latter characterization reveals that the State's theory rested in part on Doubek's knowledge that a crime might be committed.

The Defense repeatedly argued that Doubek was only guilty of associating with deplorables and directly refused to have Richardson start a fire:

> Yeah, she consorted with some people that are unsavory. Yeah, she consorted with some people that perhaps most of us wouldn't. She took people under her wing and tried to help them out. She tried to help out people here and there. And Brad Ray Richardson comes along and they have a friendship and he says, ah-hah. I have an idea. I have an idea. What if we go ahead --what if I go ahead and burn down the Red Roof . . . .
>
> She said, no. No, thank you. She did entertain some things like what could people do? I would like to get her out of there, but at no time did she go ahead and -- there's no texts that say, go ahead. I want you to burn this place down. There's nothing to that effect.

Jury Trial 1007:12-1008:2.

In the context of these competing theories, Doubek would have benefitted immensely from a *Chafee* instruction. The State's claim that accountability was established by "letting the fox watch the henhouse" was legally incorrect. The instruction would have told jurors that the State's theory lacked legal grounding: that *even if* Doubek thought Richardson would burn down the Red Roof, such knowledge alone was not sufficient to establish accountability. Further, the instruction would have told jurors that *even if* Doubek was present and unlocked the doors directly before Richardson started the fire, that was not sufficient to establish accountability. Failure to offer this instruction was clearly deficient performance.

B. Doubek's trial was prejudiced by the lack of instruction.

"[P]rong two of the *Strickland* test requires that the defendant establish prejudice by demonstrating that there was a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *State v. Turnsplenty*, 2003 MT 159, ¶ 14, 322 Mont. 310, 95 P.3d 708. "A reasonable probability is a probability sufficient to undermine confidence in the outcome, but it does not require that a defendant demonstrate that he would have been acquitted." *Kougl*, ¶ 25 (internal citations and quotations omitted).

The most obvious evidence of prejudice to Doubek was the jury's verdict itself. The jury acquitted Doubek of conspiracy, which would have required a finding that Doubek "agrees with another to the commission of the offense of arson, and an act in furtherance of the agreement is performed by any party to the agreement." Doc. 124, Instruction 11. That result shows the jury rejected the State's primary theory that Doubek asked Richardson to burn it down. The only remaining theory of liability was the State's legally incorrect formulation of accountability as "letting the fox watch the henhouse;" that renting a space to a known firebug was "abetting" his commission of the crime; that leaving a door unlocked on the night of the fire was sufficient to convict on accountability.

Since the jury was clearly willing to reject the State's theory in part, the lack of a legally correct jury instruction casts substantial doubt over the outcome of this

trial. The jury was already willing to find that the State had presented insufficient evidence that Doubek "agreed" to the crime. But when turning to the question of whether Doubek had "the purpose to promote or facilitate" the arson, the State gave the jury a direct misstatement of the law. A *Chafee* instruction would have contradicted that blatant misstatement of law by telling the jury that mere presence and knowledge is insufficient for accountability.

CONCLUSION

Doubek's counsel rendered ineffective assistance when they failed to offer a "mere presence" instruction. This Court should reverse and remand for new trial.

Respectfully submitted this 5th day of August, 2022.

/s/ Nick K. Brooke
Nick K. Brooke
Attorney for Doubek

CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that the Appellant's Opening Brief is printed with proportionately-spaced Times New Roman typeface of 14 points; is double spaced except for lengthy quotations or footnotes; and does not exceed 10,000 words. The exact words count is 3168 words

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Dated this 29th day of January, 2021.

/s/ Nick K. Brooke
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CERTIFICATE OF SERVICE

I, Nick Kirby Brooke, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 08-05-2022:

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