IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0471

STATE OF MONTANA,

Plaintiff and Appellee,

v.

STEVEN LEE STRIKE, SR.,

Defendant and Appellant.

APPELLANT'S REPLY BRIEF

On Appeal from the Montana Twelfth Judicial District Court, Hill County, the Honorable Olivia Rieger, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Montana Code Annotated

Cases

Defendant and Appellant, Steven Lee Strike Sr. ("Strike"), respectfully replies to the State's Answer Brief as follows:

ARGUMENT

Strike received ineffective assistance of counsel because his counsel failed to move to dismiss Counts I (Aggravated Burglary) and II (Partner or Family Member Assault) for insufficient evidence of bodily injury, and to object to restitution amounts that were not substantiated by evidence in the record. The State has now conceded that at the very least this matter should be remanded for resentencing to address the objectionable restitution amounts. (Answer Br. at 21–24.) Strike therefore confines his Reply Brief to the sole remaining issue: sufficiency of the evidence of bodily injury.

I. Strike was prejudiced by his counsel's inexplicable failure to move to dismiss Counts I and II for insufficient evidence of bodily injury.

The eyewitness in this case, Valerie Moreni, testified at trial that she heard "banging and screaming," and she saw Strike hit Danae and pull her by the hair. (Tr. 6/18/20 Jury Trial at 20, 22.) Ms. Moreni was under the impression that Danae was in pain because "[s]he was crying and she was telling [Valerie and Valerie's mom] she was in pain and

how bad it hurt." (Tr. 6/18/20 Jury Trial at 21, 23.) Ms. Moreni also testified that Danae sustained "[a] couple of lumps on her head, her neck right around here (indicating) and where she got hurt when he was pulling her up or pulling her back. She got hurt in that area." (Tr. 6/18/20 Jury Trial at 22.) But on cross examination, Ms. Moreni admitted that she did not see the events that occurred in the house; she merely heard them. (Tr. 6/18/20 Jury Trial at 24.) Strike's counsel asked if it were true that "what you told dispatch is just hearing the fight and seeing [Strike] go down the alley." (Tr. 6/18/20 Jury Trial at 25.) Ms. Moreni was initially reluctant to agree that she had not told dispatch the details she had just testified to in court, but ultimately when Strike's counsel asked her, "So you did not give that story to the officer that day either, correct?" she replied, "I don't know. I'm not sure." (Tr. 6/18/20 Jury Trial at 25.)

Danae's testimony was similarly equivocal. On cross examination, she and Strike's attorney had this exchange:

Q. Did you indicate any pain?

A. No. I told the officers no.

Q. So you did not suffer any pain?

A. I don't know. No.

(Tr. 6/18/20 Jury Trial at 32–33.) But on redirect examination, the prosecutor and Danea had this exchange:

> Q. Mr. Harris inquired about whether you indicated to the officers that you were in physical pain. You said, no; is that right? Is that what you told him?
>
> A. Yes. Yes.
>
> Q. Were you actually in physical pain?
>
> A. Yes.

(Tr. 6/18/20 Jury Trial at 34.)

The State argues that sufficient evidence of bodily injury supported Strike's convictions for Aggravated Burglary and Partner or Family Member Assault because,

> [t]his Court has held that testimony that a defendant shoved a victim "hard enough to knock her backwards" and a victim's statement that it hurt are sufficient evidence of bodily injury. *State v. Bay*, 2003 MT 224, ¶ 14, 317 Mont. 181, 75 P.3d 1265. Additionally, testimony from the victim that they suffered physical pain "is not necessary" if other evidence "permits the trier of fact to make such inferences based on the evidence provided." *State v. Tuomala*, 2008 MT 330, ¶ 20, 346 Mont. 167, 194 P.3d 82.

(Answer Br. at 17.) The State is correct about this Court's holdings in *Bay* and *Tuomala*, but not about those holdings' applications to the case at bar.

In *Bay*, the unequivocal testimony from both the victim and an eye-witness was that the defendant had shoved the victim "hard enough to knock her backwards." *Bay*, ¶ 14. This Court held that the issue to be resolved by the jury was whom to believe: the victim who testified she was pushed, or the defendant who denied the pushing. If the jury believed the victim and the eye-witness about the fact of the pushing, then there was sufficient evidence to support the jury's finding of bodily injury to the victim. *Id*. (citing § 45-2-101(5), M.C.A.) In this case, the jury did not simply have to resolve a credibility issue between the victim and the defendant, but also among the victim's and the eye witness's different accounts of whether the victim suffered injury.

In *Tuomala*, "multiple witnesses testified that they saw Tuomala strike [the victim]," and an officer "testified that he observed scratches and other injuries on [the victim's] face." *Tuomala*, ¶ 19. The State introduced photos of those injuries at trial. Tuomala argued that the State failed to prove the "bodily injury" element of a Partner or Family

Member Assault charge because the victim did not testify that he suffered physical pain. *Tuomala,* ¶¶ 16, 20. This Court was unpersuaded. This Court held that the victim's "testimony is not necessary. Section 26-1-501, MCA, permits the trier of fact to make such inferences based on the evidence provided." *Tuomala*, ¶ 20 (citing *State v. Heffner*, 1998 MT 181, ¶ 30, 290 Mont. 114, ¶ 30, 964 P.2d 736, ¶ 30). In this case, the jury did not simply have to infer the existence of pain from the evidence of physical contact, but rather had to decide whether to believe Danae's first statement to officers and her initial testimony that she did not suffer pain, or her later testimony on redirect examination that she was actually in physical pain even though she told the officers she was not. (Tr. 6/18/20 Jury Trial at 34.)

Under the circumstances, there can be no tactical or strategic explanation for Strike's counsel's failure to move under § 46-16-403, M.C.A., to dismiss the Aggravated Burglary and Partner or Family Member Assault charges at the close of the State's evidence. This mechanism exists to protect defendants from being convicted by a jury of a charge the prosecution has legally failed to prove. Such a motion would not have been frivolous or meritless. *See Heddings v. State*, 2011

MT 228, ¶ 33, 362 Mont. 90, 265 P.3d 600. When proof of an essential element of the two felony charges—infliction of bodily injury—was so clearly absent from the State's case, and counsel failed to move to dismiss the charges for insufficient evidence, counsel's performance was deficient, and this Court should find the first prong of the *Strickland* test to be satisfied, even in the absence of a record-based justification for counsel's inaction. *Strickland v. Washington*, 466 U.S. 668 (1984); *State v. Kougl*, 2004 MT 243, ¶¶ 11, 15, 323 Mont. 6, 97 P.3d 1095.

Had Strike's counsel moved to dismiss Counts I and II for insufficient evidence of bodily injury, the Court would have had the opportunity to weigh the scant and contradictory evidence on that element, and may have concluded that no reasonable jury could find that element to have been proven beyond a reasonable doubt. *City of Helena v. Strobel*, 2017 MT 55, ¶ 8, 387 Mont. 17, 390 P.3d 921. Therefore, there is a reasonable probability—that is, "a probability sufficient to undermine confidence in the outcome," *Kougl*, ¶ 25—that Strike may not have been convicted of Counts I and II had his counsel moved to dismiss them for insufficient evidence.

Because both elements of the *Strickland* test are met, Strike was deprived of his constitutional rights to effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and Article II, Section 24 of the Montana Constitution. The proper remedy is reversal of his convictions on Counts I and II. *Kougl*, ¶ 27.

CONCLUSION

Strike respectfully requests that his convictions for Aggravated Burglary and Partner or Family Member Assault be reversed because they were obtained in violation of his constitutional right to effective assistance of counsel. If this Court does not reverse those convictions, then Strike respectfully requests that this matter be remanded for resentencing because the restitution amounts were objectionable and imposed without the effective assistance of counsel. The State agrees that a remand for resentencing is in the interests of "justice and judicial economy." (Answer Br. at 24.)

Respectfully submitted this 15th day of December, 2022.

By: /s/ *Caitlin Boland Aarab*
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Reply Brief is printed with a proportionally-spaced roman text, Century Schoolbook, and a typeface of 14 points, and is double-spaced except for footnotes and quoted, indented material. This brief contains 1,397 words, as calculated by Microsoft Word for Windows, excluding the Cover, Table of Contents, Table of Authorities, Certificate of Compliance, Certificate of Service, and Appendix.

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I hereby certify that I caused a true and accurate copy of the foregoing Reply Brief to be mailed or electronically served to:

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