IN THE SUPREME COURT OF THE STATE OF MONTANA

NO. DA 21-0564

STATE OF MONTANA,
Plaintiff and Appellee,

v.

KASEY N HUGS,
Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Fourth Judicial District Court, Missoula County, the Honorable Robert L. Deschamps III, Presiding.

Appearances:

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ISSUES PRESENTED

1. Did the State commit a Brady Violation by failing to disclose the items of jewelry that had been recovered thus depriving Ms. Hugs of an opportunity to fully challenge the restitution claims?

2. Whether Appellant's sentence is illegal due to the district court's failure to credit her for each day of incarceration from the date of arrest through the date of the court's imposition of sentence.

3. Whether Appellant's final judgment contains non-conforming fees.

STATEMENT OF THE CASE AND FACTS

This appeal arises from a February 9, 2019, report of a possible burglary that occurred at the Southgate Mall in Missoula. (D.C. Doc. 1.) The complainant, James Adair, claimed that their security camera system and approximately $250,000.00 worth of jewelry were stolen from his kiosk in the mall. (*Id.*) Police ultimately were able to locate the security system, based upon reports from another arrested suspect, and were able to view the recordings that showed Appellant Kasey Hugs attempting to access the kiosk prior to the system being disabled. (*Id.*)

As a result, on December 27, 2019, Ms. Hugs was charged in Cause Number DC 19-740 with one count of Burglary, a felony, in violation of Mont. Code Ann. § 45-6-204(1). (D.C. Doc. 3.) On July 14, 2020, an amended Information was filed

that dropped the Burglary charge and added a count for Theft – Over $5,000.00, a felony, in violation of Mont. Code Ann. § 45-6-301(1), and a count of Tampering with or Fabricating Physical Evidence, a felony, in violation of Mont. Code Ann. § 45-7-207(1)(a). (D.C. Doc. 24.)

On October 14, 2020, the parties entered into a global plea agreement, which resolved Cause Numbers: DC 19-740; DC 20-105; & DC 20-143. (D.C. Doc. 26.) Concerning DC 19-740, which is the current matter on appeal, the agreement provided that she would plead guilty to Count I in exchange for the dismissal of the Tampering with or Fabricating Physical Evidence count. (D.C. Doc. 26.) The plea agreement also provided that restitution was disputed and would be determined at a restitution hearing. (*Id.*) In exchange for the guilty plea, the parties recommended 5 years, with 2 suspended, to the Department of Corrections for Count I, pursuant to Mont. Code Ann. § 46-12-211(1)(b). (*Id.*)

On October 23, 2020, a change of plea hearing was held, where Ms. Hugs plead guilty to Count I. (D.C. Doc. 30.) A sentencing/restitution hearing was then set for December 8, 2020. (Tr. 10/23/20 Hr. at 24:16-17.) After several continuances, a restitution hearing was held on January 14, 2021. (D.C. Doc. 43.) At the hearing, the court heard testimony from James Adair, the owner of the kiosk that was stolen from, concerning the value of the items stolen. Despite his initial report to police that roughly $250,000.00 worth of jewelry had been stolen, Mr. Adair now testified

that only $47,000.00 worth of jewelry had been stolen in addition to the security system he testified was worth $5,000.00. (Tr. 1/14/21 Hr. at 35:21-36:1.) The State then introduced an exhibit listing the items that had allegedly been stolen from the kiosk, which had been submitted to Mr. Adair's insurance company for reimbursement in the amount of $48,534.23, which said amounts were being claimed by Mr. Adair's insurance company at the restitution hearing. (Tr. 1/14/21 Hr. at 36:21-37:25.) Mr. Adair then testified that he was shown photographs and a police report identifying a few pieces of jewelry that had been recovered, and he confirmed that these items were worth approximately $477.00. (Tr. 1/14/21 Hr. at 38:1-23.) Mr. Adair then testified that the security system cost $5,000.00 to replace, however he also admitted that he had not submitted any receipts to support this claim. (Tr. 1/14/21 Hr. at 39:25-42:7.)

Although an inventory of stolen items from Adair was provided, it appears that the State did not provide a list of the jewelry it had recovered. While Ms. Hugs confirms that there were a couple photos that were produced of the jewelry she returned, she also testified that additional items were either returned by, or recovered from, two other individuals. (Tr. 1/14/21 Hr. 60:15-24.)

On July 14, 2021, at the end of the hearing on Appellant's motion to withdraw her pleas in DC 20-105 & DC 20-14, defense counsel notified the district court that there was an amended claim concerning the cost of the surveillance system. (Tr.

7/14/21 Hr. 102:14-18.) To which the court replied "Yeah, that's part of the problem here. I didn't believe Adair at all. His credibility was awful." (Tr. 7/14/21 Hr. 102:19-21.) The State then stated that after Mr. Adair testified his system was worth $5,000.00, he went out and purchased a replacement system that was only $3,656.00. (Tr. 7/14/21 Hr. 105:1-17.)

A sentencing hearing was then held on August 10, 2021, where Ms. Hugs was sentenced to 10 years, with 5 years suspended, to the Department of Corrections. (D.C. Doc. 65.) The district court further ordered restitution paid in the amount of $4,656.00 to Adair Jewelers and $48,534.23 to Jewelers Mutual Insurance Group, while waiving her public defender and other discretionary fees. (D.C. Doc. 65 & Tr. 8/10/21 Hr. 116:13-15 & 133:10-134:3.)

Finally, when discussing whether Ms. Hugs should be granted credit for all of the time she had served, Ms. Hugs asserted that she should be entitled to 187 days of time served credit. (Tr. 8/10/21 Hr. at 137:9-12.) In response the State argued that Ms. Hugs should only get credit for time served related to the present matter and that should not receive credit for time served between March and May of 2020, on Cause Number DC 20-105. (Tr. 8/10/21 Hr. at 118:16-120:16 & 138:16-139:2.) Specifically, the State argued that Ms. Hugs would not be entitled to this time "as she was only being held in jail for that two-month period on a new offense, which is the one that she withdrew her plea on." (Tr. 8/10/21 Hr. at 118:16-120:16.) After

noting that the issue likely needed more clarification from this Court, the district court followed the State's recommendation and only gave Ms. Hugs credit for 100 days of time served. (Tr. 8/10/21 Hr. at 134:7-9 & 139:20-23.)

STANDARDS OF REVIEW

This Court's "review of constitutional violations, including alleged *Brady* violations, is plenary." *State v. Ilk*, 2018 MT 186, ¶15, 392 Mont. 201, 422 P.3d 1219A district court's sentence is reviewed for legality. *State v. Spagnolo*, 2022 MT 228, ¶ 4, 410 Mont. 457, 520 P.3d 330. The legality of a sentence is reviewed *de novo* as it presents a question of law. *Id.* "The law affords a sentencing court no discretion to grant credit for time served," and its calculations of time served credit are reviewed *de novo*. *Spagnolo*, ¶ 5.

SUMMARY OF THE ARGUMENT

Ms. Hugs's sentence must be overturned as her Due Process rights were violated when the county attorney failed to disclose exculpatory *Brady* evidence of which stolen items of jewelry had been recovered. While Ms. Hugs asserts that there were a couple photos that were produced of the jewelry she returned, she also testified at her restitution hearing that additional items were either returned by, or recovered from, two other individuals, one of whom was listed as a witness by the State. As such, it does not appear that there was an accurate and full disclosure of all

of the recovered jewelry. Further, this information was in the possession of the State as evidenced by their noticing one of the two individuals identified by Ms. Hugs. While there is no evidence to suggest that the county attorney intentionally suppressed this evidence, an inadvertent failure to disclose is sufficient to support a *Brady* violation. Further, there is a reasonable probability that this suppressed evidence would have changed the outcome of the restitution hearing as it is clearly favorable to Ms. Hugs to be able to claim further reductions to the restitution for recovered items, as well as help her further impeach the victim's credibility.

Finally, the district court's sentence was illegal as it disregarded the clear holding of *Killam v. Salmonsen*, in failing to credit Ms. Hugs with time served credit for each and every day she spent incarcerated prior to sentencing. Likewise, the written judgment does not conform to the oral pronouncement from the bench as it includes inaccurate restitution amounts and fees that were waived by the court, and as such, Ms. Hugs requests that this matter be remanded with instructions to strike the non-conforming fees from the written judgment.

ARGUMENT

I. The State committed a Brady Violation by failing to disclose the list of jewelry that had been recovered as this exculpatory evidence was required by Ms. Hugs to adequately challenge the restitution sought in this case.

By failing to disclose an accurate inventory of recovered jewelry, the State withheld exculpatory evidence that was material to the restitution amounts claimed,

and that would have helped Ms. Hugs to further impeach Mr. Adair. Further, this evidence was in the possession of the State as it noticed as a witness one of the individuals who Ms. Hugs identified as having returned items of jewelry. Because this evidence is clearly favorable to Ms. Hugs as it would allow her to not only further contest the claimed restitution to account for additional recovered jewelry, but it would also allow her to further impeach an already questionable witness, there is a reasonable probability that had this evidence been disclosed, Ms. Hugs would have obtained a different result at sentencing.

The prosecution is required to give a defendant "all requested exculpatory information material either to the defendant's guilt or to punishment," which includes "all evidence significant for impeachment purposes." *Kills on Top v. State*, 273 Mont. 32, 41-42, 901 P.2d 1368 (1995). As such, a defendant's due process rights are violated when the State fails to disclose exculpatory evidence. *Ilk*, ¶ 28 (citing Brady *v. Maryland,* 373 U.S. 83, 87 (1963)). In order to "prove a due process violation under Brady, a defendant must show: (1) the State possessed evidence, including impeachment evidence, favorable to the defense; (2) the prosecution suppressed the favorable evidence; and (3) had the evidence been disclosed, a reasonable probability exists that the outcome of the proceedings would have been different." *Ilk*, ¶ 28. Concerning the third element, the U.S. Supreme Court has stated that "[a] 'reasonable probability" of a different result is accordingly shown when the

Government's evidentiary suppression 'undermines confidence in the outcome of trial.'" *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (quoting *U.S. v. Bagley*, 473 U.S., 667, 678 (1985). Finally, "the effect of the suppressed *Brady* material must be considered collectively rather than on an item-by-item basis." *Id.*

In *Kills on Top*, the defendant had argued in his post-conviction relief petition that his conviction and sentence should be overturned due to alleged *Brady* violations. 273 Mont. 32, 41-42, 901 P.2d 1368 (1995). Specifically, the defendant argued that he should have been provided with discovery concerning a co-defendant's alleged rape by a jailer while incarcerated, as well as with the co-defendant's criminal record as the co-defendant had accepted a plea offer and testified against defendant at his trial. *Kills on Top*, 273 Mont. at 42-43. After determining that the information should have been produced, this Court then discussed whether the defendant's conviction and sentence should be reversed. *Kills on Top*, 273 Mont. at 44-45. While this Court held that there was not a reasonable probability that the sought after information would have changed the outcome of the conviction, as the co-defendant at issue was not the only witness to the crime, it also held that the results of the sentencing proceeding could have been different as the information directly related to defendant's contention that he had been manipulated by the co-defendant, which was a mitigating factor in sentencing. *Id.*

In *Gonzales v. Wong*, the defendant had been convicted of first-degree murder and received a death sentence after a finding of the special circumstance of killing a law enforcement officer engaged in the lawful pursuit of his duties and had brought a Federal post-conviction relief petition after his failed state petition. 667 F.3d 965, 971 (9th Cir. 2011). As an initial matter, the court noted that it "may only consider the record that was before the state court when it adjudicated the claim." *Gonzales*, 667 F.3d at 972. In evaluating the claims made to the California Supreme Court in his state post-conviction relief petition, the court noted that the defendant had argued that the prosecutor had failed to produce exculpatory material. *Id.* Specifically, during discovery in the Federal action, the State finally produced over six psychological reports concerning the State's main witness, William Acker, against the defendant which indicated that he "had a severe personality disorder, was mentally unstable, possibly schizophrenic, and had repeatedly lied and faked attempting suicide in order to obtain transfers to other facilities." *Gonzales*, 667 F.3d at 976. While the court concluded that the matter must be sent back to the state court to be fully adjudicated, it went on to discuss the withheld materials and why it concluded that the defendant had "a colorable or potentially meritorious *Brady* claim such that a reasonable state court could find a *Brady* violation. *Gonzales*, 667 F.3d at 980.

The *Gonzalez* court first noted that there was a colorable argument that the psychological reports could have been used to challenge Acker's credibility. *Gonzales*, 667 F.3d at 981. Next, the court noted that "*Brady* does not require a showing that the state willfully or intentionally suppressed the evidence; even inadvertent suppression will satisfy this prong of the test." *Id.* While it noted that the reports at issue were in the prosecutor's possession prior to trial, this did not matter as "a prosecutor has a duty under *Brady* to 'learn of any exculpatory evidence known to others acting on the government's behalf.'" *Gonzales*, 667 F.3d at 981-982 (quoting *Carriger v. Stewart*, 132 F.3d 463, 479-80 (9th Cir. 1997)). Finally, in discussing the materiality of the withheld evidence, the court noted that "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Gonzales*, 667 F.3d at 981-982.

In reaching the conclusion that a reasonable state court could conclude that there was a reasonable probability of a different result had the withheld information been available to the defense and presented to the juries, the court undertook a two-step inquiry. *Gonzales*, 667 F.3d at 982. First the court asked, "whether a reasonable state court could conclude that there was a reasonable probability that the new evidence would have changed the way in which the jurors viewed Acker's

testimony." *Id.* Next, the court asked, "whether a reasonable state court could conclude that there was a reasonable probability that this change would have resulted in a different verdict during either or both phases." *Id.*

Concerning the juror's view of Acker, the court noted that "[t]here is a colorable argument that a factfinder would have found the information about Acker contained in these reports disturbing, and that it would have been difficult for anyone, let alone a reasonable factfinder, to trust the witness described in these reports." *Id.* While the state argued that the defendant was adequately able to impeach Acker at trial and therefore the new evidence was merely cumulative, the court noted that "withheld impeachment evidence does not become immaterial merely because there is some other impeachment of the witness at trial. *Id.* Where the withheld evidence opens new avenues for impeachment, it can be argued that it is still material." *Gonzales*, 667 F.3d at 984. Finally, the court noted that the defendant had:

> a colorable argument that the jury believed Acker despite the impeachment evidence presented to them. This argument could rest in part on the fact that Acker was an important witness for the government, especially during the penalty phase, and that '[i]n cases in which the witness is central to the prosecution's case, the defendant's conviction indicates that in all likelihood the impeachment evidence introduced at trial was insufficient to persuade a jury that the witness lacked credibility.'"

Gonzales, 667 F.3d at 985 (quoting *Benn v. Lambert*, 283 F.3d 1040, 1055, (9th Cir. 2002)).

The court then considered whether the new evidence would have led to a different outcome at either the guilt or penalty phase. *Gonzales*, 667 F.3d at 986. In concluding that a reasonable state court could conclude that further impeachment of Acker could have resulted in a different outcome, the court stated that "[w]hile there was other circumstantial evidence, Acker's testimony was the only direct evidence establishing that Gonzales had a premeditated plan to kill a police officer." *Gonzales*, 667 F.3d at 986. Ultimately, the court remanded the matter to the district court to stay proceedings pending review by the California Supreme Court, as it concluded that the defendant could make a potentially meritorious *Brady* claim. *Id.*

In the present matter, it appears that evidence concerning recovered items of jewelry were not disclosed to Ms. Hugs despite being in possession of the State or its agents. Specifically, Ms. Hugs testified that in addition to the jewelry recovered from her, the State had also recovered additional items from two other individuals. Notably, one of the individuals was listed as a witness on the State's Information, which evidences that the State was aware of these other recovered items of jewelry. Because each piece of recovered jewelry would allow Ms. Hugs to argue that the restitution owed should be lower to account for said recovered items, which is clearly favorable to the defense.

Further, even though it appears, at a minimum, that the State should have had knowledge of the items recovered from the identified witness, it does not matter as

the State has a duty to "learn of any exculpatory evidence known to others acting on the government's behalf." *Gonzales*, 667 F.3d at 981-982. As such, the State was clearly required to learn of any other items of jewelry recovered by police.

Finally, had the evidence been disclosed, there is a reasonable probability that the outcome would have been different. As detailed above, the withheld evidence is material not only to the amount of restitution owed, but it is also material to impeachment of Mr. Adair; a witness of doubtful credibility as noted by the district court. As such, there is a reasonable probability that Ms. Hugs would have been able to obtain a different, and likely more favorable outcome, had she been able to fully dispute both the amounts claimed as well as the veracity of Mr. Adair. Because the State violated Ms. Hugs's Due Process rights by withholding *Brady* evidence concerning the recovered items of jewelry, Ms. Hugs is entitled to have her sentence overturned.

II. The district court erred in failing to grant Ms. Hugs credit for all time she served during the pendency of this matter.

The sentence in this matter is illegal as Ms. Hugs was not given credit for every day she served prior to sentencing. Mont. Code Ann. § 46-18-201(9) provides that: "[w]hen imposing a sentence under this section that includes incarceration in a detention facility or the state prison, as defined in 53-30-101, the court shall provide credit for time served by the offender before trial or sentencing." In interpreting this statute, this Court stated that the statute "provides that upon sentencing, the court

shall provide credit for time served by the defendant before trial or sentencing *even if* the defendant would *not* have been released from custody pre-trial/sentencing had s/he been able to post bond." *Killam v. Salmonsen*, 2021 MT 196, ¶16, 405 Mont. 143, 492 P.3d 512 (emphasis original). Further, a defendant is entitled to time spent incarcerated pre-trial and pre-sentencing "even if the defendant is also being held on another matter." *State v. Spangnolo*, 2022 MT 228, ¶ 9, 410 Mont. 457, 520 P.3d 330.

As noted above, the State's argument at sentencing was that Ms. Hugs was not eligible for time served credit from March to May of 2020 as she was being held on another matter. However, as this Court noted in *Spangnolo*, Ms. Hugs was entitled to credit for all time served "even if the [she] is also being held on another matter." *Id.* As such, Ms. Hugs's sentence in this matter is illegal as she was not given credit for each day of incarceration from the date of arrest through the date of the court's imposition of sentence.

III. The inaccurate restitution amounts and discretionary fees that were waived by the court should be stricken from Ms. Hugs's sentence.

As detailed above, the oral pronouncement of judgment included restitution in the amount of $4,656.00 to Adair Jewelers and $48,534.23 to Adair's insurance carrier, for a total restitution amount of $53,190.23. Although the total restitution total is accurate, the breakdown of payments shows that Adair Jewelers is entitled to $6,656.00, which is contrary to the oral pronouncement of $4,656.00. When the

amount in the written judgment is added to the amounts owed to Adair's insurance carrier, the total is $55,190.23, which also demonstrates an internal inconsistency. Further, given the amount of restitution in this case, the district court waived the public defender fee, as well as the other discretionary fees. However, these fees were also included in the written judgment.

"It is well-established that the oral sentence pronounced from the bench in defendant's presence is the 'legally effective sentence and valid, final judgment.'" *State v. Andress*, 2013 MT 12, ¶ 33, 368 Mont. 248, 299 P.3d 316 (quoting *State v. Lane*, 1998 MT 76, ¶40, 288 Mont. 286, 957 P.2d 9). In evaluating whether any portion of a written judgment is unlawful, this Court first determines whether the defendant was afforded the opportunity to respond to its inclusion upon sufficient notice at sentencing, and whether that portion of the written judgment substantively increases either the defendant's loss of liberty or the sacrifice of defendant's property. *Andress*, ¶ 34. This Court will accept jurisdiction of a timely appeal alleging an illegal sentence or one that exceeds statutory authority even if a defendant fails to object at sentencing. *Andress*, ¶ 36. Likewise, a failure to seek a sentence modification pursuant to Mont. Code Ann. § 46-18-116(2) does not bar review of defendant's written judgment on appeal. *Andress*, ¶ 39.

While the amount of $53,190.23 was awarded during the sentencing hearing hearing was accurate, the breakdown of amounts owed to Adair Jewelers is incorrect.

Likewise, the written judgment also contains a PSI report and Public Defender fees, both of which were waived during the oral sentencing. Ms. Hugs had no opportunity to object at the sentencing hearing as these errors did not occur until after the hearing. Further, the inclusion of inaccurate restitution details, as well as the inclusion of the PSI report and Public Defender fees substantively increases the defendant's sacrifice of property. As such, the award of $6,656.00 in restitution to Adair Jewelers should be corrected to $4,656.00 in order to conform to the district court's oral pronouncement. Likewise, the PSI report and Public Defender fees contained in the written judgment in this matter must be stricken to conform with the oral pronouncement of the court.

CONCLUSION

Ms. Hugs's Due Process rights were violated when the State committed a *Brady* violation by withholding evidence of additional recovered items of jewelry, necessitating that her sentence be overturned. Ms. Hugs's sentence was also illegal as she was not given time served credit for each day she served prior to sentencing in this matter. Likewise, her written judgment contains non-conforming fees and restitution that must be stricken from her sentence.

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Respectfully submitted this 30th day of June, 2023.

ELLIS LAW, PLLC

/s/ Nathan D. Ellis
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Opening Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for footnotes and quoted, indented material; and the word count calculated by Microsoft Word is 3,961, excluding the Cover Page, Table of Contents, Table of Authorities, Certificate of Compliance, Certificate of Service, and Appendices.

DATED this 30th day of June, 2023.

/s/ Nathan D. Ellis
Nathan D. Ellis
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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of June, 2023, I caused a true and accurate copy of the foregoing **OPENING BRIEF** to be electronically served to:

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APPENDIX

CERTIFICATE OF SERVICE

I, Nathan Daniel Ellis, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 06-30-2023:

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