IN THE SUPREME COURT OF THE STATE OF MONTANA
DA 23-0416

STATE OF MONTANA,

Plaintiff and Appellee,

v.

SAMUEL WADE FRYDENLUND,

Defendant and Appellant.

OPENING BRIEF OF APPELLANT

On Appeal from the Montana Ninth Judicial District Court, Pondera County, DC-22-22, The Honorable Gregory L. Bonilla, Presiding

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STATEMENT OF ISSUE

Whether the district court erred in denying Appellant's post-trial motion to set aside the verdict based on an erroneous and prejudicial verdict form?

STATEMENT OF THE CASE

This is an appeal of July 19, 2023, decision of the Montana Ninth Judicial District, Pondera County, The Honorable Gregory L. Bonilla presiding, after a jury trial held June 12-14, 2023, denying Appellant's motion for dismissal notwithstanding the jury's guilty verdict to the lesser included offense of criminal trespass (after finding him not guilty of burglary), as incorporated in its final judgment and sentence. (D.C. Doc. 93, 7/19/23 Order Denying Motion to Set Aside the Verdict, attached as Appendix **Exhibit A**; D.C. Doc. 94, 7/19/23 Sentencing Order, attached as Appendix **Exhibit B**).

The basis for the motion is that by virtue of Montana law, Jury Instruction No. 34, and constitutional double jeopardy protections, the jury was precluded from deliberating on the lesser included offense of criminal trespass unless they could not agree on whether Mr. Frydenlund was guilty on the burglary charge. However, as permitted by the language of an erroneous jury verdict form, the jury unanimously found Mr. Frydenlund not guilty on the greater charge of burglary, but then proceeded to deliberate on the lesser included offense of criminal trespass. (*See* attached **Exhibit C**, J. Inst. No. 34; **Exhibit D**, Verdict Form).

Jury Instruction No. 34, which was provided to the jury in writing and read to the jurors before deliberations on June 14, 2023, stated:

> If you are unable after reasonable effort to reach a verdict on the greater offense, you may consider the lesser included offense of Criminal Trespass. You may find the Defendant guilty or not guilty of the lesser included offenses of Criminal Trespass.

(6/14/23 Trial Trans. at 33:12-34:05).

However, the jury verdict form differed from this instruction in that it allowed the jury to proceed to deliberate Mr. Frydenlund's guilt on the lesser included offense of criminal trespass under two theories of guilty: if it either first reached a "unanimous verdict" or if it "failed to agree." Specifically, the verdict form stated in relevant part:

> If you answered 'Guilty' or 'Not Guilty by Reason Of Mental Disease Or Disorder,' **STOP**. If you answered, 'Not Guilty,' OR if you are unable to after reasonable effort to reach a unanimous verdict on Count I, you may consider Count II on the next page. (Emphasis in original).[1]

The jury deliberated and returned a verdict that indicated that they had deliberated on Count I: Burglary and were unanimous in finding Mr. Frydenlund not guilty to that charge. The jury further indicated that they were unanimous in finding him guilty of the lesser included offense of Criminal Trespass. (6/14/23

[1]Jury Instruction No. 34 mirrors the language of MCJI 1-111 (2022) and § 46-16-702, MCA. It is also important to note that this instruction refers to a "Count II on the next page." There is no Count II. This jury was only charged with deliberating one count. These offenses were not charged in the alternative.

Trial Trans. at 37:10-37:23). After the verdict was read, the district court polled the jury who all indicated that the verdict was reflective of their respective vote. (6/14/23 Trial Trans. at 37:24-38:23).

The day after trial, on June 15, 2023, defense counsel became aware of the error in the jury's verdict and the problematic jury verdict form and immediately notified the State and the district court. The district court heard the issue on June 16, 2023, where defense counsel requested dismissal before sentencing. The district court requested briefing on the motion to dismiss. (6/16/23 Hrg. Trans. at 9:15-10:23). While the district court expressed concern during the hearing about waiver and the defense's failure to object to the language in the verdict form earlier, it should be noted that a motion under § 46-16-702(3)(c), MCA, is timely if made "within 30 days following a verdict or finding of guilty...".

During the scheduled sentencing hearing on July 10, 2023, the district court denied the defense's motion for dismissal notwithstanding the jury's guilty verdict and sentenced Mr. Frydenlund to six months, with all but 20 days suspended, and a fine of $500, along with restitution. (D.C. Doc. No. 94; 7/1/23 Sent. Hrg. Trans. at 25:1-9). The district court's denial of Mr. Frydenlund's motion during the hearing was not based on principles of waiver or counsel's failure to contemporaneously object to the verdict form, but rather that the law did not support setting aside the jury's verdict. Specifically, the district court reasoned during the hearing:

> [T]he Court has before it, the Defense's motion, to set aside the verdict regarding the lesser included offense of criminal trespass. [T]he Court has reviewed, the briefing submitted by the parties, and while the Defense's motion certainly gave the Court something to chew on, at the end of the day, it's the Court's opinion that the *Scarborough Demontiney* line of case as relied upon by the Defense are distinguishable, in the sense that in – in those cases, the question was whether or not – essentially was whether or not a defendant could be acquitted of, deliberate homicide, yet be found guilty of mitigated deliberate homicide, and that's logically inconsistent for that to happen. However [] and I think that was the crux of the Supreme Court's reasoning – however, in this case, it is possible. It is not logically inconsistent for a defendant to be found guilty of criminal trespass, but not burglary. There's an added element to burglary, that is not – you have to be there, in order to do something else – that is not present for, or with the lesser included of criminal trespass. [T]he Court finds that there was no prejudice, [to] the Defendant, with respect to the jury instructions and the verdict form as issued to the jury. [A]gain, in *Scarborough*, it was the logical inconsistency, with the sentences – or with the – with the, offenses, which ultimately controlled, in that case, and I don't think we have that logical inconsistency here. And therefore, the Court is denying the Defense's motion, to set aside, the verdict.

(7/10/23 Sent. Hrg. Trans. at 04:18-06:06) (dysfluencies omitted).

In its written order issued July 19, 2023, the district court reiterated its position and declared Jury Instruction No. 34 and the verdict form not "inconsistent." (D.C. Doc. 93). The district court distinguished *Demontiney v. Twelfth Jud. Dist. Ct.*, 2002 MT 161, 310 Mont. 406, 51 P.3d 476, holding "[i]t is not logically inconsistent to find a defendant guilty of burglary but guilty of criminal trespass because criminal trespass requires proof of fewer elements than burglary. (D.C. Doc. 93). In its order, the district court faulted the defense for not objecting "until after the verdict had been reached." (D.C. Doc. 93).

In short, the district court declined to find any error, let alone any prejudicial error. It is from this erroneous decision from which Mr. Frydenlund now appeals to this Court.

STATEMENT OF FACTS

By an Information and Amended Information, the State charged Mr. Frydenlund with the offenses of burglary (Count I); partner-family member assault (Count II); and stalking (Count III), related to his actions towards his former girlfriend Ashley Johnson in October and November of 2023. (D.C. Docs. Nos. 1, 21, 29). Counts II and III were dismissed on June 12, 2013, just prior to trial. (6/12/23 Trial Trans. at 20:9-58:13). Specifically, the basis for the charges against Mr. Frydenlund was that he would show up at Ms. Johnson's place of employment and, on a couple of occasions, entered her house without permission in order to leave her gifts and in one instance doing her dishes for her. (6/12/23 Trial Trans. at 63:08-73:09).

Ms. Johnson testified during trial that Mr. Frydenlund never struck or hit her, never threatened her, but that she was scared and that her mental and emotional state was affected by his actions. (6/12/23 Trial Trans. at 118:01-119:25). It was ultimately discovered that Mr. Frydenlund, a petroleum engineer with a highly stressful job, suffered the onset of Bi-Polar or manic-depressive illness at the time of these events for which he ultimately received treatment.

(6/13/23 Trial Trans. at 26:01-46:20). Indeed, Mr. Frydenlund testified during trial that he did not really remember this period of time, that he was not sleeping or eating, and he was behaving in an "embarrassing" manner consistent with the manic phase of bi-polar disorder. (6/13/23 Trial Trans. at 128:16-129:13).

On June 13, 2013, after the second day of trial, the parties discussed jury instructions and agreed to submit the lesser included offense of criminal trespass. (6/12/23 Trial Trans. at 196:10-200:02). A discussion was held regarding the district court's proposed verdict form, with the court stating the following:

> Yeah, yeah. Well, but, but, but again, according to the verdict form as, as currently drafted, if, if they reach guilty on burglary, they're instructed to stop. If they reach not guilty by reason of mental disease or defect, they're instructed to stop. If they get to not guilty, then they can go on to, um, the, uh, lesser included. I, I think we're – I'm kind of falling off the track here, um, as the instruction says, if you are unable to, after reasonable effort, to reach a verdict on the greater offense. The verdict form doesn't contemplate that. Um, can – which is why I'm saying can we fix that last paragraph, um, can we agree to fix the last paragraph to comport with both the statute and the verdict form, uh, if, um, you. . . . Well, actually I'm inclined not to do that and just let the verdict form speak for itself because I don't want to confuse the jury.

(6/13/23 Trans. at 215:24-216:18).

Defense counsel indicated to the district court that the verdict form should instruct the jury that "if you're deliberating, then you're unable to come to a unanimous decision. You can start speaking about the lesser included offense." (6/13/23 Trial Trans. at 217:14-15). Defense counsel also cited the exact language of § 46-16-607(3), MCA, and specifically made the following request:

> I think what your proposal was we fix it on the form. "If you are unable to come to a unanimous decision on the charge of burglary, you may move on to consider the lesser included offense."

(6/13/23 Trial Trans. at 218:7-15; 219:15-19).

Ultimately, the district court instructed his law clerk to insert the statutory language into the verdict form, but the parties apparently did not review the specific language of the verdict form again before it was given to the jury. (6/13/23 Trial Trans. at 222:14-223:7).

Specifically, the district court represented on the record that he and his law clerk would "amend the Court's proposed verdict form [to] include the statutory language [§ 46-16-607(3), MCA] at the end of page one, insert language that says, however, if you are unable, after reasonable effort, to reach a [unanimous] verdict on count 1, you may consider – you may move on to page 2 and consider the lesser offense of criminal trespass." (6/13/23 Trial Trans. at 222:15-23).

STANDARD OF REVIEW

While technically a motion for judgment notwithstanding the jury's verdict is not specifically authorized by statute, § 46-16-702, MCA, permits a defendant to move "to modify or change the verdict by finding the defendant guilty of a lesser included offense or finding the defendant not guilty." *State v. McWilliams*, 2008 MT 59, ¶ 41, 341 Mont. 517, 178 P.3d 121. Such motions are reviewed for an abuse of discretion, *McWilliams*, ¶ 42, however, when a decision involves an error

of law, the review is *de novo*. *State v. Bell*, 277 Mont. 482, 486, 923 P.2d 524, 526 (1996) (citing *State v. Christensen*, 265 Mont. 374, 375, 877 P.2d 468, 468-69 (1994)). This is especially true when the error implicates a party's constitutional rights. *State v. Valenzuela*, 2021 MT 244, ¶ 7, 405 Mont. 409, 495 P.3d 1061.

Importantly, this Court's "*de novo*" standard of review "for correctness" is not one of deference and affords no discretion to the lower court's rationale or decision. *Planned Parenthood v. State*, 2015 MT 31, ¶ 25, 378 Mont. 151, 342 P.3d 684 ("review *de novo* [means] without deference to the trial court's decision"); *Siebken v. Voderberg*, 2012 MT 291, ¶ 20, 367 Mont. 344, 291 P.3d 572 ("[a] *de novo* review affords no deference to the district court's decision and we independently review the record…"). Rather, this Court reviews the applicable law and determines whether the district court erred.

SUMMARY OF ARGUMENT

The district court's decision was in error and must be reversed. The verdict form incorrectly stated the law and mis-instructed the jury as to when the jurors were permitted to deliberate on the lesser included offense, which resulted in a constitutionally infirm conviction for criminal trespass. Mr. Frydenlund therefore respectfully requests this Court to declare the same and reverse the district court's denial of his motion to set aside the jury's guilty verdict for criminal trespass, while allowing the acquittal of burglary to remain.

ARGUMENT

I. UNDER § 46-16-702(3)(c), MCA, A DISTRICT COURT MAY VACATE A JURY'S GUILTY VERDICT AND ENTER A "NOT GUILTY" VERDICT.

Often labeled as a "motion for judgment notwithstanding the guilty verdict" by trial counsel, under § 46-16-702(3)(c), MCA, a defendant may move "to modify or change the verdict by finding the defendant guilty of a lesser included offense or finding the defendant not guilty." *McWilliams*, ¶ 41. Regardless of its denomination by counsel, however, such a motion will be treated as one for a new trial. *State v. Mackrill*, 2008 MT 297, ¶ 16, 345 Mont. 469, 191 P.3d 451 ("a 'motion for judgment notwithstanding the verdict' is properly referred to as a 'motion for a new trial' under § 46-16-702, MCA"): *Bell*, 277 Mont. at 485, 923 P.2d at 526; *State v. Mummey*, 264 Mont. 272, 276, 871 P.2d 868, 870 (1994).

While designated as a motion to set aside the verdict, the defense in this case effectively made a motion under § 46-16-702(3)(c), MCA, to the district court, which was erroneously denied. As argued below, the district court should have granted the motion and concluded the jury was prohibited from reaching the issue of Mr. Frydenlund's guilt on the lesser included offense of criminal trespass, when it had already unanimously declared him "not guilty" to the offense of burglary.

As argued below, the district court's failure to do so was unlawful and prejudicial, requiring reversal.

II. THE JURY'S GUILTY VERDICT ON THE LESSER INCLUDED OFFENSE DID NOT COMPORT WITH § 46-16-607(3), MCA.

Under § 46-16-607(3), MCA, "[u]pon request of the defendant at the settling of instructions, the court shall instruct the jury that it may consider the lesser included offense if it is unable after reasonable effort to reach a verdict on the greater offense." The Commission comments indicate that § 46-16-607(3), MCA, was drafted to comport with *United States v. Jackson*, 726 F.2d 1466, 1469, (9th Cir. 1984), which held that when a defendant makes a timely request for an instruction that the jury may consider the lesser offense if unable after reasonable effort to agree on a verdict for the greater offense, "it is error to reject the form timely requested by defendant" because it is a defendant's liberty at stake.

Montana, like a few other jurisdictions[2] utilizes the optional approach with regard to how a jury is instructed on a lesser included offense, with the "failure to agree" jury instruction preferred unless there is a tactical reason for requesting an "acquittal first" instruction. *State v. Rogers*, 2001 MT 165, ¶ 21, 306 Mont. 130, 32 P.3d 724 ("when sufficient facts exist to support a conviction for a lesser included offense, defense counsel shall offer the 'failure to agree' instruction unless she or he has a tactical reason for not doing so") (overruled in part, on other

[2] *See, e.g., Jones v. United States*, 620 A.2d 249, 252 (D.C. Cir. 1993); *Catches v. United States*, 582 F.2d 453, 459 (8th Cir. 1978); *United States v. Tsanas*, 572 F.2d 340, 346 (2d Cir. 1978).

grounds). Here, in Jury Instruction No. 34, the jury was instructed that it could not proceed to deliberate on the lesser included offense unless it was "unable to agree" on the greater charged offense.

Unfortunately, the verdict form ultimately did not reflect what the parties and court agreed upon during the settlement of instruction, and contained language that was contradictory to Jury Instruction No. 34 and the plain language of § 46-16-607(3), MCA. Thus, Mr. Frydenlund's counsel could not object contemporaneously to the verdict form as the judge's clerk prepared it after their discussions. Regardless, however, a district court is "under a duty to correct the erroneous instruction." *State v. Robbins*, 1998 MT 297, ¶ 37, 292 Mont. 23, 971 P.2d 359 (citations omitted).

The deficiency in the verdict form provided to the jury failed to provide the jurors with a clear and unambiguous means to consider the lesser included offense of criminal trespass after being unable to unanimously determine the guilt or innocence of Mr. Frydenlund as to the greater offense of burglary. Indeed, such ambiguity was present as the jury returned a verdict finding him unanimously not guilty of burglary, yet guilty of criminal trespass.

Once the jury determined Mr. Frydenlund was not guilty of burglary, it was precluded from deliberating on the lesser included charge because the defense had elected an "unable to agree" instruction and indeed, the district court instructed

them as such in No. 34. While district courts have broad discretion in formulating jury instructions, they are "ultimately restricted by the overriding principle that jury instructions must fully and fairly instruct the jury regarding the applicable law." *City of Missoula v. Zerbst*, 2020 MT 108, ¶ 9, 400 Mont. 46, 462 P.3d 1219 (citing *State v. Miller*, 2008 MT 106, ¶ 11, 342 Mont. 355, 181 P.3d 625).

If a jury is not instructed properly on the law, resulting in prejudice to the defendant's substantial constitutional rights, the criminal conviction must be overturned by this Court. *Zerbst*, ¶ 9 (citations omitted); *see also, State v. Kaarma*, 2017 MT 24, ¶ 7, 386 Mont. 243, 390 P.3d 609 ("[t]o constitute reversible error, any mistake in instructing the jury must prejudicially affect the defendant's substantial rights").

In order to avoid the red herring conundrum created by comparing the current case to *Demontiney*, this appeal is simply focused on the statutory mandate provided in § 46-16-702(3), MCA. The defendant requested an "unable to agree" instruction and statutory law states the court shall instruct accordingly[3]. After the jury unanimously found Mr. Frydenlund not guilty of burglary, it was precluded from considering the lesser included offense.

Demontiney builds from a decision in *State v. Scarborough,* 2000 MT 301, 302 Mont. 350, 14 P.3d 1202, where this Court found error where a jury was mis-

[3] This fact was not at issue, or specifically addressed, in *Demontiney*.

instructed and rendered an illogical verdict on a lesser included offense. In *Demontiney*, similar to the current matter, at the settlement of instructions, a request was made for an instruction on the lesser included offense, but ultimately "the jury instructions and verdict form did not match those offered by either party" and the trial court instructed the jury that "if they reached a verdict of not guilty ***or*** were unable to reach a verdict on that charge, they were then to consider the charge of mitigated deliberate homicide. *Demontiney*, ¶ 7.

Also similar to the situation presented by this case, "[a]pparently neither party sufficiently reviewed the language of the court's instructions or verdict form before the court read the instructions and counsel made their closing arguments" and this Court found that the defendant was prejudiced by the lesser included offense verdict form instruction--"[w]e cannot imagine a much more prejudicial result to a defendant than a guilty verdict that is not logically possible." *Demontiney*, ¶ 21.

Unlike *Demontiney*, however, this appeal is not focused on the logical connection between the greater offense and the lesser included offense (deliberate homicide and mitigated homicide in *Demontiney* versus burglary and criminal trespass in the current matter). The guilty verdict to the offense of criminal trespass is not logically possible because the jury should not have considered the lesser included offense after unanimously finding Mr. Frydenlund not guilty of the

greater offense.

Because the jury was not properly instructed on the law, and rendered an impermissible verdict which, as argued below, violated Mr. Frydenlund's constitutional right against double jeopardy, the jury's acquittal should stand as to the charged offense, and the verdict on the lesser included offense should be set aside to adhere to the standards of Montana law.

III. MR. FRYDENLUND'S SUBSTANTIAL RIGHTS WERE PREJUDICED BY THE JURY'S GUILTY VERDICT.

To constitute reversible error, a mistake in instructing the jury must prejudicially affect the defendant's substantial rights. *Zerbst*, ¶ 27; *see also*, *State v. Courville*, 2002 MT 330, ¶ 15, 313 Mont. 218, 61 P.3d 749) ("[i]f the district court has rendered instructions that are erroneous in some aspect, the mistake must prejudicially affect the defendant's substantial rights in order to constitute a reversible error"). Obviously, a criminal conviction in itself is prejudicial. But additionally, by convicting Mr. Frydenlund of criminal trespass when he was unanimously acquitted of burglary, his right against double jeopardy is implicated.

The double jeopardy clause of the U.S. Constitution, the Montana Constitution, and § 46-11-410, MCA, safeguard a criminal defendant and ensure protection against multiple prosecutions and punishments for the same offense. U.S. Const. Amend. V ("[n]or shall any person be subject for the same offence to be twice put in jeopardy . . . ."); Mont. Const. Art. II, § 25 ("[n]o person shall be

again put in jeopardy for the same offense previously tried in any jurisdiction"). Double jeopardy protects against: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980). Of relevance here is the first protection.

The jury declared Mr. Frydenlund not guilty of the offense of burglary and thereby unanimously determined that he did not enter or remain unlawfully in Ms. Johnson's home. To convict and punish him for criminal trespass necessarily puts him in jeopardy for the same behavior and the same occurrence which the jury already declared him innocent of. To allow the guilty verdict to stand violates his constitutional right against being placed twice in jeopardy. *See United States v. James*, 556 F.3d 1062 (9th Cir. 2009).

Indeed, because Montana law precludes convicting a criminal defendant of more than one criminal offense if "one offense is included in the other," § 46-11-410(2)(a), MCA, it stands to reasons that once acquitted of the greater criminal offense, double jeopardy protections apply to a prosecution and conviction of any lesser offense, especially when it is inconsistent and illogical with the jury's acquittal.

Indeed, this Court's decision in *Demontiney* is instructive on the issue raised by Mr. Frydenlund on appeal, where this Court reversed and refused to order a new

trial on the basis that the State could not retry the defendant, even on the lesser included charge of mitigated deliberate homicide, because it would violate his right against double jeopardy:

> The jury found Demontiney not guilty of deliberate homicide. Therefore, the State cannot retry Demontiney on that same charge.
>
> Second, we concluded above that a conviction of mitigated deliberate homicide is not possible if a jury finds a defendant not guilty of deliberate homicide. Because the jury found Demontiney not guilty of deliberate homicide, it cannot logically convict Demontiney of mitigated deliberate homicide. The State thus cannot retry Demontiney on that charge.

Demontiney, ¶¶ 23-24.

Accordingly, the appropriate remedy on appeal is for this Court to reverse and vacate Mr. Frydenlund's conviction of the lesser included offense of criminal trespass, but leave intact his acquittal for the offense of burglary. *C.f. State v. Williams*, 2010 MT 58, ¶ 30, 355 Mont. 354, 228 P.3d 1127. He respectfully requests this relief from the Court.

CONCLUSION

As established by the above arguments and authorities, the district court erred in instructing the jury that it could reach the lesser included offense even after it had already acquitted Mr. Frydenlund of the greater offense, to the prejudice of his substantial rights. He therefore requests reversal of his conviction of criminal trespass, while allowing his acquittal of burglary to stand.

Respectfully submitted this 23rd day of October, 2023.

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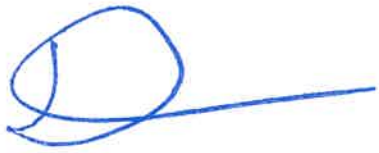
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman 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 less than 10,000 (3,971) words, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices



APPENDIX

CERTIFICATE OF SERVICE

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