
STATE OF MONTANA,

Plaintiff and Appellee,

v.

DONALD COLEN BRYANT,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Nineteenth Judicial District Court,
Lincoln County, the Honorable Matthew Cuffe, Presiding

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STATEMENT OF THE ISSUE

Whether the District Court should have granted Donald Bryant's motion to dismiss for insufficient evidence on the charge of Strangulation of a Partner or Family member, when Nels Strand testified that he was Mr. Bryant's foster father, which is not included in the definition of "family member" under Mont. Code Ann. § 45-5-206(2)(a).

STATEMENT OF THE CASE

Donald Bryant was charged in Lincoln County District Court with Strangulation of a Partner or Family Member (Felony), in violation of Mont. Code Ann. § 45-5-215, as well as several misdemeanor charges. (District Court Document (Doc.) 4.) Nels Strand was a complaining witness, alleged by the State to be the victim of the Strangulation charge. (Doc. 2, Exhibit A.) During trial, Mr. Strand identified himself as Mr. Bryant's "foster father." (5/5-5/6/2022 Trial Transcript (Tr.) at 192 ln. 8.) At the close of evidence, the defense moved the Court to dismiss the charge for insufficiency of the evidence. (Tr. at 441, lines 9-15.) The basis for the motion was that Nels Strand, as a foster father,

did not meet the definition of “family member” under Mont. Code Ann. § 45-5-206(2)(a). (Tr. at 441.) The Court denied the motion. (Tr. at 443.)

The jury then found Mr. Bryant guilty of all three counts. (Doc. 30.) Mr. Bryant filed a notice of appeal. (Doc. 40.)

STATEMENT OF THE FACTS

On November 22, 2021, an Information was filed in Cascade County District Court charging Donald Colen Bryant with Count I: Strangulation of a Partner or Family Member, First Offense, a felony, in violation of Mont. Code Ann. § 45-5-215; Count II: Partner or Family Member Assault, Second Offense, a misdemeanor, in violation of Mont. Code Ann. § 45-5-206; and Count III: Resisting Arrest, a misdemeanor, in violation of Mont. Code Ann. § 45-7-301. (Doc. 4.) The case proceeded to trial on May 5, 2022. (Tr. at 1.)

The alleged victim of the Strangulation charge (Count I) was Nels Strand. (Doc. 2, Exhibit A.) Mr. Strand was “going on 77” at the time of trial. (Tr. at 292.) Mr. Bryant was 54. (See Doc. 4.)

At trial, Mr. Strand testified as follows as to his relationship with Mr. Bryant:

Q. Mr. Strand, are you familiar with the Defendant in this case?

A. Yes, I am.

Q. How are you familiar with him?

A. He's a foster son.

Q. And how long has he resided with you?

A. Off and on, but this last time it has been six years.

Q. Beginning when?

A. Six years ago. Last time he came.

Q. Okay. Right. But when did he first begin to reside with you, Mr. Strand?

A. Back in the early '80's.

Q. Is the Defendant a member of your household?

A. Yes.

(Tr. at 192 lines 3-20.)

This was the entirety of Mr. Strand's testimony regarding his relationship with Mr. Bryant that was presented at trial. There was no further testimony about his position as a foster parent. It is unknown whether he was licensed and compensated for his work as a foster

parent, whether he fostered other children, how long Mr. Bryant lived with him as a child, or any other related information.

Mr. Strand went on to testify that the incident leading to Mr. Bryant's charges occurred in the home he shared with Mr. Bryant and Mr. Bryant's wife, Ivy Bryant. (Tr. at 193.) The altercation began in the early morning hours, around 4am, on November 9, 2021. (Tr. at 192-3.) All three individuals were at home. (Tr. at 193 lines 6-9.) Mr. Strand was lying on a couch, presumably sleeping, when Mr. Bryant began "dry heaving and spitting" repeatedly in the kitchen. (Tr. at 193.) This area adjoined the living room where Mr. Strand slept. The sound disturbed Mr. Strand, who got up to confront Mr. Bryant. (Tr. at 193.) After a verbal argument, they got in a "wrestling match standing up," with Mr. Bryant's hands around Mr. Strand's throat. (Tr. at 193.) It continued for a while, during which time both of them landed on the floor. (Tr. at 194.) The scuffle ended abruptly when Mr. Bryant left to go sit in a chair. (Tr. at 194.) Mr. Strand then went back to lay on the couch where he had been sleeping. (Tr. at 194.)

Several minutes later, Mr. Bryant began spitting again, this time on the carpet in the living room. (Tr. at 194.) There was another

physical confrontation, during which time Mr. Strand says that Mr. Bryant put him in a chokehold with his arm around Mr. Strand's neck. (Tr. at 194.) At that point Mr. Strand started to feel lightheaded. (Tr. at 194.) Ivy Bryant came into the room and pulled Mr. Bryant off of Mr. Strand. (Tr. at 195.) They fell back and Mr. Bryant turned and hit her several times in the head. (Tr. at 303.) Ms. Bryant pushed Mr. Bryant off and went to call police. (Tr. at 196.)

Police arrived, and Mr. Bryant struggled when officers tried to put him in handcuffs. (Tr. at 341-2.)

At the conclusion of testimony, Mr. Bryant's attorneys moved the court to dismiss the Strangulation of a Partner or Family Member charge for insufficient evidence. (Tr. at 441 lines 9-13.) The basis for their argument was that a foster parent is not a "family member" for purposes of the statute, and the State had therefore failed to provide sufficient evidence that Mr. Bryant and Mr. Strand were family members. (Tr. at 441 lines 16-20.) Defense counsel argued that, "the statute specifies all the various relationships that can count for family member. The statute deliberately omits this type of relationship, a foster parent." (Tr. at 442 lines 14-16.) The judge then inquired, "but

they were living together, right? And for six years?” (Transcript, p. 442
ln. 25- p. 443 ln. 1.) Defense counsel responded,

Yeah, they were living together at the time...they said they had
lived together for some time in the past. But, you know, that
doesn't transform this foster relationship into a family
relationship absent some formal adoption process, which there
was no testimony to.

(Tr. at 443 lines 2-9.)

The District Court denied the motion. (See Tr. at 444-5.) In his
ruling, the judge cited *State v. Gregori*. (Tr. at 445.) See *State v.*
Gregori, 2014 MT 169, 375 Mont. 367, 328 P.3d 1128. He interpreted
the *Gregori* Court's finding to say that “nonblood relations can in fact,
and do in fact, pursuant to the statute, count as family members as long
as they are members of the same household.” (Tr. at 445 lines 16-20.)

He continued on to say,

I find for purposes of this case that foster parent since the 80's
where they've been living together for a significant period of time,
under the same household, is the same or similar enough to
stepparent, nonblood relationship members of the same household
where it meets the definition of family member.

(Tr. at 445-6.)

The jury returned a guilty verdict for all three counts: Strangulation of a Partner or Family Member against Mr. Strand; Partner or Family Member Assault against Ms. Bryant; and Resisting Arrest. (Doc. 30.)

Mr. Bryant's case proceeded to sentencing on June 27, 2022. (Doc. 34 (Judgment, Attached as Appendix B).) He received the following sentence: As to Count I, five years to the Department of Corrections with none of that time suspended and credit for time served of 231 days; as to Count II, 365 with all but 231 days suspended with credit for time served; and as to Count III, 180 days with credit for time served, with all three Counts to run concurrent. (Doc. 34 at 2.)

Mr. Bryant filed a notice of appeal. (Doc. 40.)

STANDARD OF REVIEW

“A District Court's conclusion as to whether sufficient evidence exists to convict is ultimately an analysis and application of the law to the facts, and as such is properly reviewed *de novo*.” *State v. Swann*, 2007 MT 126, ¶19, 337 Mont. at 330, 160 P.3d at 514.

SUMMARY OF THE ARGUMENT

The evidence in the record is that Nels Strand is Donald Bryant's foster parent. (Tr. at 192.) A foster parent is not a “family member” as

defined by statute. As a result, the District Court erred in denying Mr. Bryant's motion to dismiss his Strangulation charge for insufficient evidence.

Mont. Code Ann. § 45-5-206(2)(a), by its construction, contains an exhaustive list of those relationships that create "family members." All of those included in the statute are family relationships created by blood or legal ties. The list does not include foster parents or children.

The District Court's determination that a foster parent is a family member reads language into the statute and case law that is not present. The judge's ruling suggests that the mere fact of cohabitation can bring about a familial relationship. He also equates a foster parent-child relationship to that of a stepparent. This is not supported by the statute or case law.

Nels testified that Donald had lived with him "off and on since the 80's," when Donald would have been a teenager. (Tr. at 192.) There is no evidence that they are otherwise related by blood. There is no evidence that there was ever a formal adoption process. The lack of any legal or blood family relationship means that Nels Strand is not a "family member" for purposes of the statute.

ARGUMENT

- I. **The District Court erred in denying defense counsel’s motion to dismiss the charge of Strangulation of a Partner or Family Member for insufficient evidence.**
 - A. **The District Court judge must grant a motion for directed verdict where the law requires.**

If the evidence presented by the State is not enough on its face to support a finding of guilty, the charge should be dismissed.

Mont. Code Ann. § 46-16-403 provides:

When, at the close of the prosecution’s evidence or at the close of all the evidence, the evidence is insufficient to support a finding of guilty, the court may, on its own motion or on the motion of the defendant, dismiss the action and discharge the defendant.

A motion to dismiss for insufficient evidence,

...should only be granted if, viewing the evidence in the light most favorable to the prosecution, there is not sufficient evidence upon which a rational trier of fact could find the essential elements beyond a reasonable doubt.

State v. Gregori, 2014 MT 169, ¶ 5, 375 Mont. 367, 328 P.3d 1128, citing *State v. Criswell*, 2013 MT 177, ¶ 12, 370 Mont. 511, 305 P.3d 760.

A District Court cannot simply choose to deny a motion to dismiss for insufficient evidence where there is not enough evidence to support an element of the offense. The Court has found that, “ ‘may’...does not necessarily impart discretion when used in a statute.” *Swann*, ¶ 18. In

fact, “when the word ‘may’ is used to confer power upon the court, and the public has an interest in the exercise of power, ‘then the exercise of the power becomes imperative.” *Swann*, ¶ 18.

In ruling on a motion to dismiss for insufficiency of the evidence, the District Court must “appl[y]...the law to the facts.” *Swann*, ¶ 19. “There either is, or is not, sufficient evidence to convict, and the determination is not a matter of discretion.” *Swann*, ¶ 19.

As a result, where the law as applied to the facts clearly shows that the evidence is insufficient to support a conviction, the District Court must grant a motion to dismiss for insufficient evidence.

In this case, the evidence is undisputed as to Nels Strand’s relationship to Donald Bryant.

B. As a foster parent, Nels Strand did not meet the definition of “partner or family member” as required by statute.

All persons have a fundamental right to be protected from criminal convictions except upon proof beyond a reasonable doubt as to each element of a charged offense. *State v. Daniels*, 2011 MT 278 ¶ 33, 362 Mont. 426, 265 P.3d 623, citing *In re Winship*, 397 U.S. 358, 363-364 (1970). These standards of proof are “designed to exclude as nearly as

possible the likelihood of an erroneous judgment.” *State v. George*, 2020 MT 56, ¶ 11, 399 Mont. 173, 459 P.3d 854. Courts must carefully guard against dilution of the principle that guilt is only established by probative evidence and proven beyond a reasonable doubt. *State v. Favel*, 2015 MT 336, ¶ 25, 381 Mont. 472, 362 P.3d 1126. Due process makes it the State’s duty in a criminal prosecution to prove beyond a reasonable doubt every element of the crime charged. *State v. Clark*, 1998 MT 221, ¶ 29, 290 Mont. 479, 964 P.2d 766.

Mont. Code Ann. Mont. Code Ann. § 45-5-212 provides that:

A person commits the offense of strangulation of a partner or family member if the person purposely or knowingly impedes the normal breathing or circulation of blood of a partner or family member by applying pressure on the throat or neck of the partner or family member.

Jury Instruction 16 breaks out the elements of the offense as follows:

To convict the Defendant of strangulation of a partner or family member, the State must prove the following elements:

1. That the Defendant impeded the normal breathing or circulation of Nels Strand by applying pressure to his throat;
- AND**
2. That Nels Strand is a family member of the Defendant;
- AND**
3. That the Defendant acted purposely or knowingly.

(Doc. 29.)

The only element at issue for purposes of this brief is #2, that Nels Strand is a family member.

“Family member” is defined as:

...mothers, fathers, children, brothers, sisters, and other past or present family members of a household. These include relationships created by adoption and remarriage, including stepchildren, stepparents, in-laws, and adoptive children and parents. These relationships continue regardless of the ages of the parties and whether the parties reside in the same household.

Mont. Code Ann. § 45-5-206(2)(a).

The Court has found that,

In construing a statute, it is well-established that legislative intent must first be determined from the plain words used in the statute. If the meaning of a statute is clear on its face, we will not resort to the statute’s legislative history.

Gregori, ¶ 13, citing *State v. Johnson*, 2012 MT 101, ¶ 26, 365 Mont. 56, 277 P.3d 1232.

In the present case, the statute’s meaning is clear on its face.

§ 45-5-206(2)(a) specifically lists those relationships that create family members for purposes of the definition. The statute’s language is unambiguous. It lists the blood relations that count as “family members”- “mothers, fathers, children, brothers, sisters”- and then adds, “and other past or present family members of a household.” It

goes on: “**These include** relationships created by adoption and remarriage, **including** stepchildren, stepparents, in-laws, and adoptive children and parents” (emphasis added). Mont. Code Ann. § 45-5-206(2)(a). In essence, the statute is defining the “other past or present family members of a household” as exclusively including the specific relationships created by adoption and remarriage that are in the statutory language.

The Legislature carefully chose its language to narrow the statute’s applicability. Where a statute applies to broader situations than those explicitly listed, the language makes its broader applicability clear. One example is the Montana Criminal Endangerment statute, which reads:

A person who knowingly engages in conduct that creates a substantial risk of death or serious bodily injury to another commits the offense of criminal endangerment. This conduct **includes but is not limited to** knowingly placing in a tree, log, or any other wood any steel, iron, ceramic or other substance...” (emphasis added)

Mont. Code Ann. § 45-5-207(1).

Another example is in the Montana code’s definition of “value”, which states in part, “the value of an instrument constituting evidence of a debt, **such as** a check, draft, or promissory note, is considered the

amount due or collectible.” (emphasis added) Mont. Code Ann. § 45-2-101(77)(a)(i).

In the present instance, § 45-5-206(2)(a) uses the word “includes,” but never the qualifier “but not limited to.” If the Legislature’s intent was to include family members other than those listed, it would have used open-ended language as in the above examples.

The District Court in this case relied on the Montana Supreme Court’s decision in *State v. Gregori* to conclude that Nels Strand was Donald Bryant’s family member. (Transcript at 445.) The Court in *Gregori* determined that the statute’s definition of “family member” did not include a niece who had never resided with her uncle. *Gregori*, ¶ 18. The Court focuses its reasoning on the fact that Gregori and his niece never lived together. *Gregori*, ¶ 18. The Court cites domestic abuse statutes from Wyoming and Virginia in its decision, noting that “a common predicate of these and other domestic abuse statutes is that the victim lives or has lived under the same roof as the defendant.” *Gregori*, ¶ 16.

While the Court does identify that whether an individual is “a past or present member of a household” is key in determining whether

that individual qualifies as a “family member” (See *Gregori*, ¶ 16), it emphasizes the limits of the statute’s applicability. *Gregori*, ¶ 12. The District Court cited *State v. Gregori*, specifically ¶ 12, in making its determination that “nonblood relations...count as family members as long as they are members of the same household.” (Transcript at 442 lines 16-20.) The District Court’s interpretation would broaden the statute’s definition to apply to any person who shares a household with the accused. In actuality, ¶ 12 reads:

Because families can include distant and extended members, the Legislature chose to limit the relationships that would subject a defendant to criminal penalties for PFMA. It therefore defined family member to include persons of close consanguinity—parents, offspring, and siblings—as well as other close familial but non-consanguineous persons—such as stepparents, stepchildren, and in-laws who are members of the household.

Gregori, ¶ 12.

The case could be interpreted to imply that a niece *could* be a “family member” provided the uncle and niece lived together. However, the Court never makes an explicit finding as to that relationship. The Court in *Gregori* never suggests that the statute applies to any relationship beyond those explicitly listed.

The District Court also reasoned that a foster parent “is the same or similar enough to stepparent” to meet the definition of family member.

Even if the statute’s language could be viewed as having broader applicability than those relationships specifically listed, it would not apply to a foster parent-child relationship. All of the relationships listed in the statute are either close blood or legal relationships. A foster parent-child relationship is neither of these. A foster parent is defined in Black’s Law Dictionary as

An adult who, though without blood ties or legal ties, cares for and rears a child, especially an orphaned or neglected child who might otherwise be deprived of nurture, usually under the auspices and direction of an agency and for some compensation or benefit.

Blacks Law Dictionary 1145 (8th ed. 2004).

A foster father by definition has no legal ties to the child he has taken responsibility for rearing. He is usually compensated for his services by a contracting agency. A stepparent, on the other hand, is defined as “the spouse of one’s mother or father by a later marriage.” This means, of course, that a stepfather has a legal tie to his stepchild through marriage to the child’s mother. Likewise, an adoptive parent is “a parent by virtue of legal adoption.” *Blacks Law Dictionary* 1144 (8th

ed. 2004).

There is limited evidence in the record as to the exact nature of Mr. Strand's relationship with Mr. Bryant, none of it supporting that the two had a legal family relationship. It is unknown whether Mr. Strand was a foster parent compensated by the State to care for children, consistent with the generally accepted definition. If so, it is also unclear exactly when and how long they lived together during Mr. Bryant's childhood, and how many other foster children resided in the home at the same time. On the other hand, Mr. Strand could have used the term "foster father" informally, to mean, for example, that he was an older friend who took in Mr. Bryant as a teenager and later became his roommate. There is certainly no evidence as to an adoption or a marriage that would create a legal tie.

As there is no legal or blood tie between Mr. Strand and Mr. Bryant, they are not "family members" for purposes of the Mont. Code Ann. § 45-5-206(2)(a).

CONCLUSION

The evidence in the record is that Nels Strand is Donald Bryant's foster father. Foster father does not meet the definition of "family

member” found in Mont. Code Ann. § 45-5-206(2)(a). The District Court erred in denying Mr. Bryant’s motion to dismiss the charge of Strangulation of a Partner or Family Member for insufficient evidence.

This Court should reverse and remand to the District Court with instructions to dismiss the charge of Strangulation of a Partner or Family Member and vacate the June 27, 2022 Sentencing Order.

Respectfully submitted this 28th day of February, 2024.

By: /s/ Abigail Mathews
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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 1,437, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Abigail Mathews
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APPENDIX

Trial Transcript, pp. 441-6App. A

Judgment.....App. B

CERTIFICATE OF SERVICE

I, Abigail Davis Mathews, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 02-28-2024:

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