IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0

STATE OF MONTANA

Plaintiff and Appellee,

GARREN DOUGLAS SEAL,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Twenty-Second District Court,
Carbon County, the Honorable Matthew Wald, Presiding

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INTRODUCTION

Upon conscientious examination of the record below, counsel hereby advises this Court that the Appellant, Garren Seal, has no non-frivolous basis for an appeal of his convictions of 1) Aggravated Burglary); 2) Robbery); and 3) Theft. Undersigned counsel, therefore, moves this Court to allow him to withdraw from representing Garren Seal in this appeal in accordance with *Anders v. California*, 386 U.S. 738 (1967), and Mont. Code Ann. § 46-8-103(2). Counsel identifies and discusses issues and possible arguments that Mr. Seal might wish to argue on pages 14-21 of this document. If this Court deems any of the identified issues or any unidentified issues to merit briefing, counsel requests this Court to specify the issues to be briefed and to deny the motion without discharging undersigned counsel.

STATEMENT OF PRIMARY ISSUE

1. Should undersigned counsel be permitted to withdraw from representing Mr. Seal in accordance with the criteria established by the United States Supreme Court?

STATEMENT OF POTENTIAL ISSUES

2. Did the Jury reach an inconsistent verdict by finding that the Defendant was armed with a weapon in the course of committing a burglary, (thereby satisfying the elements of aggravated burglary), while also finding beyond a reasonable doubt that the Defendant did not display, brandish, or otherwise use a firearm in committing the offense of robbery?

3. If this was an inconsistent verdict, did the district court fail to properly resolve it?

4. Were the statements made by Jesse Watkins hearsay and should they have been excluded from the trial?

5. Did counsel for defendant provide ineffective assistance of counsel for failing to request a lesser included jury instruction?

STATEMENT OF THE CASE

On January 13, 2020, Garren Seal was charged in Carbon County, MT with Aggravated Burglary, Robbery, and Theft, all felonies. (D.C. Doc 4.) The State alleged that Garren Seal committed the offense of Aggravated Burglary, "in that the defendant purposely entered and remained unlawfully in an occupied structure with the purpose of

committing an offense, and committed the offense while armed with a weapon, to wit: defendant, while armed with a pistol, entered a bar after business hours to commit the offenses of robbery and theft." (D.C. Doc 4.) The State alleged that in committing the offense of robbery, "the Defendant, in the course of committing a theft, purposely and knowingly put another person in fear of immediate bodily injury; to wit: defendant used a firearm to cause another person fear of immediate bodily injury during the commission of burglary and theft." (D.C. Doc 4.) The State also included a penalty enhancement for the offense of robbery, stating that "The Defendant is alleged to have used a firearm in the commission of the above offense." (D.C. Doc 4.) Mr. Seal was arraigned on January 22, 2020, and pleaded not guilty to all offenses. (D.C. Doc 7.)

On February 4, 2022, counsel for the Defendant submitted a trial brief that argued, among other issues, that statements made by Matthew Knox and Jesse Watkins are hearsay and inadmissible. (D.C. Doc 64.) The State filed a response brief and argued that the statements are admissible either as prior inconsistent statements under Rule 801(d)(1)(A), or as an exception to the hearsay rule under Rule 804(b)(3)

if the witness is unavailable. (D.C. Doc 68.) During the jury trial held on February 7-9, 2022, (hereinafter referred to as "Tr."), the district court denied the Defendant's continued objections. (*See* Tr. at 15, 183, 202, and 320.) Defense counsel cross-examined Jesse Watkins and Matthew Knox at trial and elected not to recall either of them for further cross-examination later in the trial after their prior statements had been admitted. (*See* Tr. at 220, and 353.)

The State submitted its Amended Request for Jury Instructions during the trial. (D.C. Doc 70.) The Defense did not submit proposed jury instructions and no lesser included offense instructions were proposed by either party. The settled jury instructions provided to the jury included an instruction describing the elements of Aggravated Burglary. (D.C. Doc 73, Instructions No. 11-12, included as Appellant's App. A.) The aggravated burglary elements instruction read as follows:

> "To convict the Defendant of the charge of aggravated burglary, the State must prove the following elements:
>
> 1. That the Defendant knowingly entered or remained unlawfully in an occupied structure;

AND

2. That the Defendant did so with the purpose to commit the offense of THEFT in the occupied structure;

AND

3. That in the course of committing the offense, the Defendant was armed with a weapon."

(D.C. Doc 73, No. 11-12, App. A.) Robbery instructions were also included in the given instructions. (D.C. Doc 73, Instructions No. 16-18, included as Appellant's App. B.) Instruction No. 18 provided an enhanced penalty instruction for the offense of Robbery, and read as follows:

> "The State has alleged that in committing the offense of Robbery, the Defendant knowingly displayed, brandished, or otherwise used a firearm. Whether the Defendant knowingly displayed, brandished, or otherwise used a firearm in the commission of the offense for which the Defendant is being tried, must be proved by the State by proof beyond a reasonable doubt. This is a separate

finding by you, independent of the issue of whether the Defendant is guilty of the offense of Robbery. Nevertheless, you cannot find the Defendant knowingly displayed, brandished, or otherwise used a firearm in the commission of the offense unless you first determine beyond a reasonable doubt that the Defendant committed the offense of Robbery."

(D.C. Doc 73, No. 16-18, App. B.)

Jury trial was held on February 7-9, 2022, in the Carbon County Courthouse. (See Jury Trial Transcript, "Tr.") The jury deliberated from 2:02pm to 11:12pm on February 8, 2022, without reaching a verdict. (D.C. Doc 75. and Tr. at 411-412.) On February 9, 2022, at 9:00am, they resumed deliberations and eventually reached a verdict at 1:28 pm. (D.C. Doc 75.) The jury found the Defendant guilty of Aggravated Burglary, Robbery, and Theft. (D.C. Doc 74, included as Appellant's App. C.) However, the jury found beyond a reasonable doubt that the defendant did not use a firearm in the commission of the Robbery. The jury verdict form for the weapon enhancement penalty read as follows:

> "To the allegation that in committing the above offense, the Defendant used a firearm in the commission of the offense of Robbery, we unanimously find, by proof beyond a reasonable doubt, that the Defendant: did not use a firearm in the commission of the Robbery."

(D.C. Doc 74, at pg.2, App. C, *also see* Tr. at 451-452)

Sentencing was held on April 20, 2022. (D.C. Doc. 80, included as Appellant's App. D.) Mr. Seal was sentenced to thirty years in prison with ten years suspended to the charge of Aggravated Burglary, thirty years in prison with ten years suspended to the charge of Robbery, and three years in prison with none suspended as to the charge of Theft. (D.C. Doc 80, App. D.) All charges were to run concurrently. The Defendant timely appealed.

STATEMENT OF THE FACTS

On the night of July 25-26, 2019, it is undisputed that two men broke into the Lost Village Road House Saloon, located in Roberts, MT, after the bar had closed and stole approximately $4,500. Slightly

different versions of the events were described by separate witnesses, as summarized below.

Prior to the robbery, Mary Doran, the swamper for the bar, observed a vehicle parked outside throwing trash in the bar's dumpster. (Tr. at 269.) Mary, the only employee working at the time, recalled that the two men who broke into the bar were wearing ski masks. (Tr. at 271.) One man wore a Carhartt jacket and was armed with a crowbar while the other man wore a blue hoodie and was armed with a handgun. (Tr. at 271-272.) The man with the gun told Mary to lay down on the ground as the men stole approximately $4,400 in cash from the register, a small safe behind the counter, a shake-a-day tip jar, and a memorial fund jar. The men then told Mary to count to one hundred as they left the scene. (Tr. at 273-274.)

Sometime after the robbery, Jesse Watkins ("Jesse") admitted and eventually pled guilty to being one of the individuals that burglarized the bar. (Tr. at 150, 153.) At Jesse's change of plea hearing, he stated "Somebody had a gun there, it was not me." (Tr. at 157.) During Garren Seal's trial, Jesse alleged that his memory of the events was unclear. Jesse testified that he was armed with a crowbar, and it was just him

and one other guy. (Tr. at 151.) However, Jesse did not remember a gun. He also only remembered encountering an employee of the bar as they were leaving when a woman came out of the restroom. (Tr. at 157.)

Matthew Knox ("Matthew"), a prison inmate who was a previous acquaintance of Jesse, gave a statement to Detective Thompson that Jesse had told Matthew about his involvement in the burglary. Matthew's statement indicated that Jesse told Matthew that Jesse and his friend "Gavin" had robbed the saloon. (Tr. at 185-187.) In this recollection, Jesse's friend was carrying a gun, but the name of the friend was unclear. (Tr. at 187.)

Dylan Newton was a jailhouse cellmate with Jesse Watkins after Jesse was arrested on the burglary charge. According to Dylan's version of events as told to him by Jesse, Garren Seal and Jesse Watkins robbed the bar while Garren's father, Ray Seal, waited in a car outside. (Tr. at 203-204.) However, Dylan's testimony included details of physical assault and restraint on Mary Doran, which conflicted with Mary Doran's testimony as well the version of the events described by the State at trial. (Tr. at 143, 214, 380.)

Additional evidence presented at the trial included a receipt from an O'Reilly Auto Parts store in nearby Billings that was found in the dumpster near the saloon. (Tr. at 299.) The receipt included the language: "Thank you for being an O' Rewards member". (State's Ex. 15.) Law enforcement contacted the O'Reilly Auto Parts store and determined that the rewards account belonged to Garren Seal. However, the auto parts store clerk testified that payment was made in cash, no video surveillance was available to identify the individual who made the purchase, and that it is possible for someone other than the rewards member to make the purchase. (Tr. at 361-362.)

Video surveillance was obtained from a camera on Darci Northwind's house, which was near the saloon. (State's Exhibits 1 and 2.) A still image from the video depicts what the officer believed to be the suspect vehicle leaving the scene, which the officers believed was a Subaru Impreza or WRX-type car. (Tr. at 309, and 311.) Later, Matthew Knox's statement to the police indicated that the getaway vehicle was located at Garren Seal's house, which Detective Thompson discovered to be a gold Nissan Maxima. This car was, however, not owned by Mr. Seal. (Tr. at 341.) After comparing the video still image and the car

parked in front of Garren's home, the officer could not say a hundred percent that this was the same vehicle. (Tr. at 327.)

Lastly, while in jail, Garren Seal made phone calls to his father, which were recorded and listened to by investigating officers. The call included a question by Garren's father regarding how much talking Jesse was doing. (Tr. at 407.) Also, the call referenced the term "SIG", which the officer believed to mean a SIG Sauer, a type of handgun. (Tr. at 335.)

STANDARDS OF REVIEW

The Montana Supreme Court reviews a trial court's conclusions of law and its interpretation of statutes *de novo* for correctness. *State v. Tam Thanh Le*, 2017 MT 82, ¶ 7, 387 Mont. 226, 392 P.3d 607. A district court abuses its discretion when it acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason resulting in substantial injustice. *State v. Hardground,* 2019 MT 14, ¶ 7, 394 Mont. 104, 433 P.3d 711.

The [Montana Supreme] court does not require consistency in criminal verdicts. *State v. Borsberry*, 2006 MT 126, ¶1, 332 Mont. 271, ¶1.

"A statement is not hearsay if … (T)he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony." *State v. Maier*, 1999 MT 51, ¶ 25, 293 Mont. 403, ¶ 25, (citing Rule 801(d)(1)(A), M.R.Evid.)

Claims of ineffective assistance of counsel are mixed questions of law and fact that this Court reviews de novo. *State v. Kougl*, 2004 MT 243, ¶ 12, 323 Mont. 6, 97 P.3d 1095.

PRIMARY ISSUE

I. The undersigned counsel should be permitted to withdraw from Mr. Seal's appeal in accord with *Anders*.

As set forth in *Anders*, if counsel on appeal "finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw." *Anders*, 386 U.S. at 744. The request to withdraw must be "accompanied by a brief referring to anything in the record that might arguably support the appeal." *Anders*, 386 U.S. at 744. The attorney must give a copy of the brief to the client, who must be afforded to raise any point he chooses. Mont. Code Ann. § 46-8-103(2) (codifying the *Anders* requirements).

"[T]he court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. *Anders*, 386 U.S. at 744.

Here, the undersigned is compelled by his duty of candor before the Court in accord with *Anders* to provide this Court with notice that, after a review of the entire record and diligent research of the applicable statutes, case law, and rules, there are no non-frivolous issues in this appeal. Without arguing against his client, counsel submits this brief which, in accordance with *Anders* and Mont. Code Ann. § 46-18-103(2), discusses any issues that might arguably support an appeal. If this Court deems there are issues that merit briefing, counsel requests this Court specify the issues to be briefed.

Pursuant to Mont. Code Ann. § 46-18-103(2), counsel has advised Mr. Seal of his decision regarding the merits of the appeal and informed him that he will have the right to file a response to this motion directly with the Court. Counsel also sent him a draft of this *Anders* brief in advance of filing.

POTENTIAL ISSUES

II. Mr. Seal could argue that the jury reached an inconsistent verdict when it determined beyond a reasonable doubt that Garren Seal did not use a firearm in robbing the saloon, yet also found that Seal was armed with a weapon in committing aggravated burglary.

A verdict is inconsistent when there is no rational, non-speculative way to reconcile two essential jury findings. *Reider v. Philip Morris USA*, Inc. (11th Cir. 2015), 793 F.3d 1254, 1256.[1]

In order to convict Mr. Seal of aggravated burglary, the State had to prove that Mr. Seal was "armed with a weapon." (See D.C. Doc 73, App. A.) Since there was never any suggestion made by any party that Mr. Seal was in possession of any weapon other than a handgun, this verdict demonstrates that the jury believed Mr. Seal was armed with a gun when he robbed the saloon. However, the jury also reached a unanimous verdict that Seal was not using a firearm when he committed robbery, stating "we unanimously find by proof beyond a reasonable doubt that the defendant did not use a firearm in the commission of the offense of robbery." (Tr. at 452, App. C.) The

[1] Cases from outside jurisdictions may be used for "their persuasive value". *Greater Missoula Area Fed'n of Early Childhood Educators v. Child Start, Inc.*, 2009 MT 362, ¶ 24, 353 Mont. 201, ¶ 24.

definition of *using a firearm* was described in the State's jury instruction, which read "in committing the offense of Robbery, the Defendant knowingly displayed, brandished, or otherwise used a firearm." (D.C. Doc 73, App. B.)

It is impossible to reconcile these two findings made by the jury. Either he had a gun, or he did not have a gun. It is unclear why the jury found the way it did and nothing in the record is available to explain the juror's rationale. These two findings of the jury are clearly inconsistent and there is no rational non-speculative way to reconcile the two findings.

III. Mr. Seal might argue that the district court should have directed the jury to reconcile this inconsistency.

Guidance from outside jurisdictions suggests that courts should attempt to resolve inconsistent jury verdicts. The United States Eleventh Circuit Court has stated that a district court "must make all reasonable efforts to reconcile an inconsistent jury verdict and if there is a view of the case which makes the jury's answers consistent, the court must adopt that view and enter judgment accordingly." *Burger King Corp. v. Mason*, 710 F.2d 1480, 1489 (11th Cir. 1983).

However, this Court has maintained that consistency is not required. *State v. Borsberry*, 2006 MT 126, ¶15, 332 Mont. 271, ¶15. When juries reach inconsistent verdicts, "[t]he most that can be said . . . is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt." *Borsberry*, at ¶15.

The United States Supreme Court addressed the issue by stating that inconsistent verdicts could be viewed as demonstration of the jury's leniency. *Dunn v. United States* (1932), 284 U.S. 390, 393, 52 S. Ct. 189, 190. In *United States v. Powell*, the Court stated that an inconsistent verdict suggests an "error" was made but that it is unclear "whose ox has been gored." *United States v. Powell* (1984), 469 U.S. 57, 65, 105 S. Ct. 471, 477. The possibility that such a result could favor either the criminal defendant or the government militates against reviewing such a conviction at the defendant's behest. *Powell*, at 65. Nevertheless, the Court acknowledged that an inconsistent verdict shows an assumption by the jury of "a power which they had no right to exercise." *Dunn*, at 393.

Mr. Seal may make an argument that although the district court was not required to ensure the jury's verdict was consistent, it nevertheless should have exercised its discretion to do so. The jury deliberated for over thirteen hours and the court contemplated giving a *Norquay* instruction. (D.C. Doc. 75, Tr. at 384.) This demonstrates that the jury had some trouble reaching a unanimous verdict. The discord may have been over whether Mr. Seal did or did not have a gun. Despite the United States Supreme Court's rule that consistency is not required, the Court also acknowledged that an inconsistent verdict is indeed an "error." *Powell*, at 65. Mr. Seal may argue that such an error should have demanded resolution at the district court level, either by directing the jury to reconcile its inconsistency, or by declaring a mistrial.

IV. Mr. Seal could argue that Jesse Watkin's previous statements, as well as Matthew Knox's previous statements regarding what Jesse Watkins told Matthew, were inadmissible hearsay.

"A statement is not hearsay if … (T)he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony." *State v. Maier*, 1999 MT 51, ¶ 25, 293 Mont. 403, ¶ 25, (citing Rule 801(d)(1)(A), M.R.Evid.)

During the testimony of Jesse Watkins, the State introduced a prior statement taken from the transcript of Jesse's change of plea hearing, which said: "Somebody had a gun there, it was not me." (Tr. at 157.) During Matthew Knox's testimony and Detective Thompson's testimony, the State introduced multiple statements made by Matthew Knox to Detective Thomspon about statements Jesse had made to Matthew. (Tr. at 182-183, and 320-322.) These statements indicated that Jesse and man named "Gavin" had robbed the saloon. Lastly, during Dylan Newton's testimony, Dylan relayed information that he received through statements Jesse made to Dylan while they were cellmates. (Tr. at 201.) These statements also placed Jesse and Garren at the scene of the crime with Jesse holding a crowbar and Garren carrying a gun. Mr. Seal could argue that all of these statements were hearsay and inadmissible. Defendant, through counsel, objected to the admission of these statements and was overruled by the district court. (Tr. at 15, 182, 202, 320.) The defense argued that statements Jesse made to Matthew Knox or Dylan Newton do not qualify as statements by the witness because they were not recorded nor made to law enforcement. (Tr. at 13.) The district court accepted the State's

argument that the statements, both Jesse's and Matthew's, qualify as prior inconsistent statements under Rule 801(d)(1)(a). (Tr. at 15.) However, the district court did not address the Defendant's argument that Jesse's comments to Matthew and Dylan should not qualify as statements due to them not being recorded.

In addition to the hearsay argument mentioned above, Mr. Seal could argue the related issue that while a prior inconsistent statement may be admitted as substantive evidence, it must be corroborated by other evidence in order to sustain a conviction. *City of Helena v. Strobel*, 2017 MT 55, ¶1, 387 Mont. 17, ¶1. While other evidence was offered by the State, such evidence was weak. The detective initially thought the video surveillance showed a Subaru Impreza, despite later believing it was a match for the gold Nissan Maxima that was located at the defendant's house. The Nissan Maxima, however, did not actually belong to Garren. The auto parts store receipt was also inconclusive. Although the rewards number on the receipt belonged to Garren, it could have been used by a friend of Garren's rather than Garren himself, and there was no proof that Garren personally made the purchase. Furthermore, the phone call between Garren and his father

only proved that there was some discussion about Jesse talking to the police. It would not be illogical for Garren's father to be worried that Jesse had accused Jesse of committing a crime, since the fact that Garren was arrested suggested that someone had already implicated him. Simply worrying that Jesse had accused Garren of committing a crime does not necessarily suggest that Garren is guilty. Finally, the conclusion that the term "SIG" meant SIG Sauer is speculative. It could have easily been a reference to something else.

V. Mr. Seal could argue that he received ineffective assistance of counsel due to the fact that no lesser included offense instruction was offered to the jury

In considering ineffective assistance of counsel claims on direct appeal or in postconviction proceedings, we apply the two-pronged standard of review set forth by the United States Supreme Court in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. *See State v. Hagen,* 1999 MT 8, ¶10, 293 Mont. 60, ¶10, 973 P.2d 233, ¶10. Under the *Strickland* test, the petitioner must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Hagen,* ¶ 10.

A lesser-included offense is defined in part as an offense that is established by proof of the same or less than all the facts required to establish the commission of the offense charged. Mont. Code Ann. § 46-1-202(9)(a). *State v. Freiburg*, 2018 MT 145, ¶1, 391 Mont. 502, ¶1. In the present case, the charge of burglary could have been proposed as a lesser-included offense to the charge of aggravated burglary. All elements of burglary are included in aggravated burglary, except for the requirement that the person is armed with a weapon. Mont. Code Ann. § 45-6-204(2)(b)(i).

The fact that the jury found beyond a reasonable doubt that Mr. Seal did not use a firearm in the commission of the robbery combined with the length of time the jury deliberated suggests that the jury were convinced that Garren Seal was at the scene of the crime but were unsure whether he held a handgun or not. Therefore, if the court had offered a lesser included instruction that allowed the Defendant to be convicted of burglary, but not aggravated burglary, the jury may have chosen this option. The record shows that defense counsel did not propose nor discuss the possibility of offering such an instruction. Mr.

Seal may argue that the failure to do so is evidence that he received ineffective assistance of counsel.

CONCLUSION

Counsel requests this Court grant counsel's motion to withdraw as counsel on direct appeal. The issues identified above are possible arguments to demonstrate that Mr. Seal's trial was fundamentally unfair. However, persuasive legal authority exists to rebut such assumptions. Therefore, Counsel has not identified any non-frivolous issues that Mr. Seal should pursue. If this Court disagrees and deems there are issues to be briefed, either from the ones suggested by counsel or other issues so far unidentified, counsel respectfully request this Court specify the issue(s) to be briefed.

Respectfully submitted this 26th day of March, 2024.

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By: */s/ Karl Pitcher*
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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 expect for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word is 4,184, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Karl Pitcher
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APPENDIX

CERTIFICATE OF SERVICE

I, Karl Pitcher, hereby certify that I have served true and accurate copies of the foregoing Brief - Anders to the following on 03-26-2024:

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