
STATE OF MONTANA,

Plaintiff and Appellee,

v.

KURTTIS WARREN COPYAK,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Second Judicial District Court,
Butte-Silver Bow County, the Honorable Kurt Krueger, Presiding

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STATEMENT OF THE ISSUES

Did the district court err in denying a for-cause challenge to a juror who spontaneously volunteered doubt regarding her ability to be impartial?

The offense of Impersonating a Public Servant requires that a person act with the purpose to cause someone to submit to that pretended authority or otherwise act in reliance upon that pretense to their detriment, but Yvette testified that Kurttis never asked her to do anything after showing her a toy commemorative U.S. Marshal's badge. Did the State present insufficient evidence of the charge?

Did the court impose an unlawful sentence when it banned Kurttis from the premise of 1000 Grizzly Trail as part of an active Department of Corrections commitment?

STATEMENT OF THE CASE

In December 2021, Kurttis Copyak was charged by Information in Butte-Silver Bow County with the offense of Impersonating a Public Servant. (D.C. Doc 4.) This offense requires that a person, "falsely pretend to hold a position in the public service" and do so "with the purpose to induce another individual to submit to the pretended official

authority” or otherwise “act in reliance upon that pretense to the individual's prejudice.” Mont. Code Ann. § 45-7-209.

The penalty for the offense was increased to a felony in 1995, increasing the jailable time from six months to five years. Mont. Laws 1995, ch. 351, § 2.

During jury selection, there was discussion about how the offense requires more than just pretending to be a public official, a person must do so with the purpose to “get somebody to follow your orders, basically.” (Tr. at 28.) A potential juror volunteered you would need to be trying to, “...spur a particular action out of a person.” (Tr. at 29.)

The State agreed, saying the offense requires something akin to if someone ate a banana, even though they hate bananas, because they thought someone who was law enforcement was ordering them to do so. (Tr. at 30.)

During trial, however, the prosecution's complaining witness, Yvette, testified that Kurttis had never demanded anything of her and did not ask her to do anything. (Tr. at 119–121.)

At the close of the State’s case, Kurttis moved to dismiss¹, arguing even if the State proved Kurttis showed a U.S. Marshal’s toy badge, the prosecution failed to offer sufficient evidence of a purpose to cause someone to submit to any pretended authority or act in reliance upon it to one’s detriment. (Tr. at 187–8.)

The district court denied the motion. (Tr. at 189; Attached as Appendix A.)

In its closing argument, the prosecutor argued the State did not have to prove Kurttis’s “motive.” They “...just have to prove the act itself occurred. That is it.” (Tr. at 204.)

The jury returned a guilty verdict. (D.C. Doc. 38.) Kurttis was sentenced to the Department of Corrections for the maximum term of five years. (D.C. Doc. 47; Attached as Appendix B.) The district court further ordered no contact with the victim and banned Kurttis from the

¹ At trial, Kurttis referred to his motion as one for a directed verdict. This Court has held that a motion for a directed verdict is properly deemed to be a motion to dismiss for insufficient evidence pursuant to Mont. Code Ann. § 46-16-403. *State v. McWilliams*, 2008 MT 59, ¶ 36, 341 Mont. 517, 178 P.3d 121.

premise of 1000 Grizzly Trail. (App. B.) He was awarded 76 days of credit for time already served. (App. B.)

STATEMENT OF THE FACTS

When Kurttis arrived at Sagebrush Sam's Gentleman's Club ("The Club"), where Yvette worked as a dancer, she was friendly at first, starting a conversation with him. (Tr. at 98.) He had arrived just before she took the stage and when she began her routine, she "directly paid her attention to him," "focusing and dancing" directly for him. (Tr. at 102.)

Yvette has worked as an exotic dancer for 20 years, and says it is common for men to catcall or make vulgar comments to her while she is onstage. (Tr. at 114.)

Kurttis began to flirt with Yvette, first telling her she was a "real pretty girl." (Tr. at 102.) Yvette leaned in closer to hear him better. (Tr. at 102.) What he said next didn't make a lot of sense to her: He said "you're a real pretty girl. I would be careful if I were you." (Tr. at 102.) Kurttis continued, saying he was going to put Yvette "in a trap house" and "keep her in a trap house." Yvette had never heard of a "trap house," but she guessed the idea was to "put her in something against

her will” or something along those lines. (Tr. at 102–3.) Yvette didn’t understand what Kurttis was getting at, but by this point she was uncomfortable with his attention. Yvette backed off and danced on the pole to finish her routine. (Tr. at 102.)

After she left the stage, Yvette was talking to her coworker, the DJ at the club. She asked him if he knew what a “trap house” was, because a customer had said he wanted to put her in one, and he responded he thought it was a place where people go to do street drugs.² (Tr. 103–4.) The DJ told Yvette he thought the comment was an insinuation that Yvette does drugs and could be manipulated by being given drugs. (Tr. 103–104.) Kurttis did not, however, offer Yvette any drugs.

Offstage, Kurttis was hanging around over by the bathrooms. He was standing behind a five-foot dividing wall, separating the Club’s tables from the dancers’ offstage area. (Tr. at 118.) He waived Yvette over. Yvette did not relish the idea of talking to Kurttis again. She did,

² Dictionary.com defines “trap house” as a “place where illicit drugs are bought, sold, or used.” ([| Dictionary.com](https://www.dictionary.com) last visited 5/10/2024.)

though, because her boss motioned for her to go over to Kurttis after seeing him try to get Yvette's attention. (Tr. at 104.)

Yvette walked over to Kurttis, but she was finished being friendly. Now with a "standoffish" demeanor (Tr. at 118), Yvette said, over the wall, "What do you want, dude?", "I don't have nothing to say to you." (Tr. at 104.) She says Kurttis repeated, "yeah, I'd be real careful if I was you." (Tr. at 104.) Then, Yvette said he then "flipped" a challenge coin or a toy U.S. Marshal's badge that says "law enforcement supporter" and "memorial fund" on the back onto the five-foot dividing wall that stood between them.³ (Tr. at 176.) Kurttis didn't say anything to Yvette about either object or how he came to have them. Yvette admitted Kurttis did not then, or at any later point, ever ask or demand that she do anything

³ Both objects were admitted into evidence but it is not clear from Yvette's testimony which item she saw at the dividing wall. (State's Exhibit A and B admitted at 169.) Officer Bryce Foley explained in his testimony that the first, a "challenge coin," is a commemorative coin representing different "police departments, sheriff's departments, organizations, even events" that members of law enforcement use to trade amongst themselves during other "trainings or events." (Tr. at 170.) In addition to the "challenge coin," Kurttis was later found to possess a toy badge that said, "law enforcement supporter" on the back. (Tr. at 170.)

(Tr. at 119–21, 126–27), he just showed these objects to her and stayed on the other side of the wall from her.

Yvette says she threw the item back to Kurttis and told her boss about it so that Kurttis could be asked to leave the Club. (Tr. at 105, 126.)

It was around midnight when Kurttis left Sagebrush Sam's. (Tr. at 105.) He was not ready to call it a night so he hung around the area, but his options were limited. Grizzly Trail, the area where Sagebrush Sam's is located, is basically a truck stop. There are just a few other businesses nearby. (Tr. at 131.) Kurttis first went to get something to eat at McDonalds, then went to the nearby casino. (Tr. at 162.) After that, he went to Red Lion Inn to see how much it would cost to get a room. (Tr. at 162.) Then he parked his car out of the way, near the Town Pump gas station.

Yvette got off work at about 2:00 a.m. (Tr. at 106–7.) She went to the Red Lion to another dancer's motel room for a few hours where the two hung out and smoked marijuana together. (Tr. at 108, 127.) After getting high, she left and went home. Yvette herself lived in an RV, which she would park outside the Town Pump gas station. (Tr. at 106.)

She wasn't allowed to leave her rig there, so she kept it at Sagebrush Sam's until after work, then she would move it to the gas station and park for the night in the area where long-haul truckers parked. (Tr. at 106–7.) At 4:00 or 5:00 a.m., Yvette came back to her trailer and let her dog, Zach, out. Zach “t[ook] off running.” (Tr. at 109.) Five or ten minutes later, after she got her generator started, she called out for him to come back. (Tr. at 109.)

Meanwhile, Kurttis was putting stuff away in his car when Zach ran up to him. He heard someone hollering for her dog so Kurttis held the dog and approached the RV where Zach came from. (State's Exhibit C, “Ex. C”, Officer Foley's body camera recording admitted by stipulation, admitted at Tr. at 145; played at 171, 4:20–4:45).

Yvette, who was high, was very frightened when she realized there was a person outside her RV: She had not recognized Kurttis, “all she knew” was that “it's dark and there's somebody out there.” (Tr. at 110.) She ran inside to look for her bear spray, which she intended to use against whomever was out there. (Tr. at 109.)

It was only after she came back to the door that Yvette saw it was Kurttis standing there.

Kurttis said only, "I have your dog." (Tr. at 109, 131.)

Yvette responded, "[g]ive me back my f'ing dog." (Tr. at 110.) She then turned and ran to the Town Pump and told the man working there to call 9-1-1. (Tr. at 111.)

Kurttis didn't go anywhere after Yvette ran into the gas station; he was still putting things away at his car when the police car arrived. (Tr. at 151.)

Finding an Offense to Detain Kurttis

Donald Lewis, a police officer with the Butte-Silver Bow Police Department, and Bryce Foley, another officer, responded to the call. (Tr. at 136–8.)

Both officers testified at trial.

Right off the bat, Lewis and Foley were operating under a mistaken understanding that they were arriving at a trespass or burglary situation. (Ex. C: 5:30–45.)

As they pieced the story together, though, they quickly realized Kurttis was never in Yvette's trailer. (Tr. at 165.) He had just approached her front door to bring back her dog. (Ex. C: 10:30–10:45.)

The officers weren't able to come up with a criminal statute that could provide a basis to detain Kurttis. (Ex. C: 19:50–20:08.) The body camera reflects them saying⁴:

“So we don't have criminal trespass.” (Ex. C: 21:00–7.)

“We don't? Why?”

“He was never in the camper.” (Ex. C: 21:00– 21:32.)

Silence.

“I don't know what else we have.” (Ex. C: 21:35–9.)

“Stalking?”

“No.”

Silence. (Ex C: 21:53–7.)

Foley finally said, “I am going to call the County Attorney. I just don't like this.” (Ex. C: 22:00–22:30.) Foley explained over the phone that “she wants to pursue something,” but it's not stalking, since they don't know each other. (Ex. C: 24:20–8.) Also, “...he didn't really threaten any harm to her” and, “...he never entered her camper...” (Ex. C: 25:35–26:40.)

He then explained that Yvette reported that five hours earlier at the Club, while she was onstage, Kurttis “said he'd put [Yvette] in a trap house but not keep her in a trap house...” Foley said, like Yvette,

⁴ The following is counsel's own transcription of the audio in Office Foley's body camera video, it may contain inadvertent minor errors, the original was admitted in the record as State's Exhibit C.

he was, “not really sure what that part means.” (Ex. C: 24:30–7.) A few minutes later, she said he showed her a U.S. Marshal’s badge.

The officers decided to arrest Kurttis for the offense of Impersonating a Public Servant five hours earlier at Sagebrush Sam’s, and brought him into the station to be booked. (Ex. C: 25:35–26:40.)

The Venire Panel

At Kurttis’s trial, the prosecutor introduced the case to the jury pool, telling them the charged offense would be Impersonating a Public Servant. (Tr. at 40–41.) Starting open-ended, the prosecutor asked the jurors, “Is there anyone that sits here today that says, you know, I’m a little uncomfortable with this, this just probably isn’t the case for me?”

Juror Fink raised her hand at this, to indicate, yes, she was uncomfortable with this, this was not the case for her.

Ms. Fink said, “My husband was a police officer, and so I hold them in a high regard. So I don’t know the whole case, so maybe he presented himself as that. I do hold them in a high regard.” (Tr. at 40–41.)

In response, the prosecutor did not inquire about Ms. Fink’s concern she may have a bias concerning the nature of the allegation,

instead switching her focus to the fact that two of the State's three witnesses would be police officers:

Prosecutor: Okay. So if we had two officers testify today, would you be, like, 100 percent that's where I'm going, because it was law enforcement?"

Ms. Fink: *I think I could do better, but I can't be –*

Not waiting for more, the prosecutor interrupted Ms. Fink with a series of pointed questions:

Prosecutor: Because would you agree with me that under that badge is a person?

Fink: Correct.

Prosecutor: And those people make mistakes?

Fink: Absolutely.

Prosecutor: And we've heard a lot of police mistakes in the media in the last couple years. So would you agree with me that the police definitely aren't perfect?

Fink: Yes.

Prosecutor: Okay. But that's probably more difficult for you because you have law enforcement family.

Fink: Correct.

Prosecutor: So what I'm trying to get at is, do you think, if you were chosen, that you could balance their testimony and anybody else's testimony along with all the evidence and consider it as a whole before you make your decision, or do you think you would just lean towards law enforcement and call it a day?

Fink: I think I could do both sides. (Tr. at 41–42.)

When the defense had the floor, counsel returned to the subject of whether anyone in the jury pool had family or friends in law enforcement. Juror Fink raised her hand again.

Counsel: Your husband was a law enforcement officer; is that correct?

Ms. Fink: Yes. He was in law enforcement in Anaconda for eight years.

Counsel: ...Okay. And do you feel that that would affect your perception of law enforcement, create any biases towards or against law enforcement?

Ms. Fink: *I'd like to say no*, but I do hold them in high regard. So, I mean, I would do my best to be unbiased. (*Emphasis added, Tr. at 55–56.*)

Based on the prosecution's questions and his own, defense counsel challenged Ms. Fink for cause. (Tr. at 56.) The State objected.

The district court stepped in and, again focusing on the State's witnesses rather than the nature of the offense, asked, "What would your tendency be when you're listening to a police officer? Would you give their testimony more weight than someone else's?"

Fink: *I would like to say no*, but I can't -- I've never done this. I can't say for sure; right?

Court: And this is a difficult question because you've heard what somebody says. Do you think you have a natural bias towards the police department?

Fink: I'm sorry?

Court: Do you think you have a natural bias towards the police department?

Fink: No. I just hold officers in a high regard. (*Emphasis added*, Tr. at 56.)

The court denied Kurttis's for cause challenge. (Tr. at 56; Attached as Appendix C.)

Kurttis later removed Ms. Fink with his first preemptory challenge and used all his remaining preemptory challenges. (D.C. Doc. 35.)

Closing Arguments

At the close of trial, Kurttis argued the State failed to prove the elements of Impersonating a Public Servant, because even if Kurttis did show Yvette a badge, “[h]e was simply not trying to induce her to do anything.” (Tr. at 208.) Counsel suggested Kurttis had perhaps made a disastrous attempt at flirting with Yvette, but “[h]e never solicited anything from her. He never asked anything from her. He never was trying to induce her to do anything.” (Tr. at 206.) “He simply just didn't ask for anything in return for this alleged impersonation.” (Tr. at 208.)

The State earlier argued very generally that Kurttis's “intent was to induce [Yvette] into whatever his mind was set for that night. And we know it wasn't good.” (Tr. at 202.) The State told the jury that they

did not have to prove Kurttis’s “motive.” (Tr. at 204.) They said they only “...have to prove the act itself occurred. That is it.” (Tr. at 204.)

So instructed, the jury returned a guilty verdict.

SUMMARY OF THE ARGUMENT

The district court abused its discretion by denying Kurttis’s motion to strike Ms. Fink from the jury venire for cause.

Juror Fink was forthright about her views, stating she held law enforcement officers in a “high regard” and repeated no fewer than three times that because of this, she could not be sure that she could fairly judge a case about impersonating a law enforcement officer. The prosecutor used a series of yes or no questions to coax Ms. Fink into agreeing that she could “do both sides” when it came to listening to two law enforcement witnesses’ testimonies, but never rehabilitated her spontaneous and honest concern that she should sit on a jury asked to decide whether someone should be punished for posing as a law enforcement officer at a strip club when they were not one.

Next, the State’s evidence was insufficient to prove the necessary purpose element of the charged offense.

The prosecution told the jury in closing argument that it did not have to prove Kurttis's "motive," for flipping a U.S. Marshal's commemorative coin at Yvette, they "...just have to prove the act itself occurred. That is it." (Tr. at 204.) But that was not it.

It is not enough to meet the State's burden of proof to simply ask the jury to agree to convict Kurttis even if they don't know what his purpose was, but they "know it wasn't good." The State argued Kurttis was likely preparing to kidnap Yvette or preparing to force her to have sex with him, but the only "evidence" of this was his presence in the same Town Pump parking lot as where Yvette had parked her RV that night. Even if the jury believed Kurttis had a criminal purpose for hanging around near where Yvette's RV was parked, his behavior did not progress farther than mere preparation for it, at most, and it is pure speculation to say that he showed Yvette his U.S. Marshal's commemorative items hours earlier in the night so as to somehow enable a criminal purpose he never undertook.

Even in a light most favorable to the State, Yvette's testimony was insufficient to support an inference that Kurttis's "purpose" behind his actions at Sagebrush Sam's was to "induce [Yvette] to submit" to

Kurttis’s “pretended authority” as a U.S. Marshal or to “act in reliance upon a pretense” that he was a U.S. Marshal “to her prejudice.” Mont. Code Ann. § 45-7-209. The State substituted speculation for evidence and failed to prove the purpose element of the charged offense beyond a reasonable doubt.

Alternatively, the district court issued an illegal sentence by imposing a ban from the premise of 1000 Grizzly Trail on an active Department of Corrections commitment.

STANDARD OF REVIEW

This Court reviews for abuse of discretion a district court's denial of a challenge to a prospective juror for cause. *State v. Anderson*, 2019 MT 190, ¶ 11, 397 Mont. 1, 446 P.3d 1134. A lower court’s discretion is bound by the sound administration of justice and the accused’s right to a fair and impartial jury. *State v. Golie*, 2006 MT 91, ¶¶ 6, 29, 332 Mont. 69, 134 P. 3d 95.

Structural error requiring automatic reversal occurs if: (1) a district court abuses its discretion by denying a challenge for cause to a prospective juror; (2) the defendant uses one of his or her peremptory challenges to remove the disputed juror; and (3) the defendant exhausts

all of his or her peremptory challenges. *State v. Good*, 2002 MT 59, ¶ 62, 309 Mont. 113, 43 P.3d 948.

The Court reviews de novo a district court's denial of a motion to dismiss for insufficient evidence. *State v. Boyd*, 2021 MT 323, ¶12, 407 Mont. 1, 5, 501 P. 3d 409, 412. This Court also reviews de novo whether sufficient evidence supports a conviction. *State v. Stillsmoking*, 2020 MT 154, ¶9, 400 Mont. 256, 470 P. 3d 183. "The standard of review of sufficiency of the evidence on appeal is whether, upon viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Boyd*, ¶ 12 (internal citations omitted).

This Court reviews the legality of a criminal sentence by determining whether the sentence falls within the parameters set by the applicable sentencing statutes. *State v. Erickson*, 2008 MT 50, ¶ 10, 341 Mont. 426, 177 P.3d 1043. This Court may review claims of an illegal sentence absent an objection below. *State v. Lenihan*, 184 Mont. 338, 343, 602 P.2d 997, 1000 (1979).

ARGUMENT

- I. **Kurttis didn't receive a fair trial from the start, after the district court denied his for-cause challenge of a potential juror who raised concern that her high regard for law enforcement would interfere with her ability to be fair.**

The accused have a fundamental right under both state and federal constitutions to be tried by an impartial jury. U.S. Const. amend. VI; Mont. Const. art. II, § 24. Accordingly, a person may challenge and the trial court must dismiss a potential juror with a “state of mind” that would prevent her from serving “with entire impartiality.” Mont. Code Ann. § 46-16-115(2)(j). “A district court abuses its discretion if it denies a challenge for cause when a prospective juror's statements during *voir dire* raise serious doubts about her ability to be fair and impartial or actual bias is discovered.” *State v. Anderson*, 2019 MT 190, ¶ 11, 397 Mont. 1, 446 P.3d 1134.

Here, the prosecutor asked the venire panel if anyone was uncomfortable with being on a jury tasked with judging someone accused of impersonating a public servant, and Juror Fink raised her hand, indicating yes. She was forthright and honest about her bias, saying that she would *like* to be impartial, but in a case involving

falsely claiming to be a law enforcement officer, she wasn't sure she could be.

Her concern merited thorough examination. As this Court has recognized, it is a “fundamental fact of human character” that “people are prone to favor that side of a cause with which they identify themselves.” *State v. Golie*, 2006 MT 91, ¶ 10, 332 Mont. 69, 134 P.3d 95 (quotations omitted).

If a prospective juror makes a suspect statement during *voir dire*, counsel or the court may ask open-ended questions to decide whether a serious question exists about the juror's bias. *State v. Morales*, 2020 MT 188, ¶¶ 11–12, 400 Mont. 442, 468 P.3d 355. It is not a district court's role, however, to attempt to rehabilitate jurors by asking leading questions; this merely results in “wheedled” and “coaxed recantations” that fail to demonstrate impartiality. *State v. Freshment*, 2002 MT 61, ¶ 12, 309 Mont. 154, 43 P.3d 968. A prospective juror's spontaneous and unprompted statements are the most meaningful, reliable, and honest. *State v. Braunreiter*, 2008 MT 197, ¶¶ 9, 11, 344 Mont. 59, 185 P. 3d 1024; *State v. Russell*, 2018 MT 26, ¶ 14, 390 Mont. 253, 411 P.3d 1260.

Trial courts “must resolve any doubt or ambiguity about a juror’s ability to be fair and impartial in favor of disqualification.” *State v. Johnson*, 2019 MT 68, ¶ 11, 395 Mont. 169, 437 P.3d 147; *Freshment*, ¶ 11.

Ms. Fink’s spontaneous concern for her ability to fairly judge Kurttis’s case raised a serious question of bias and was left unexamined. Ms. Fink spoke up because she felt her high regard for law enforcement would interfere with her ability to be impartial in hearing the evidence in Kurttis’s case. This self-identified bias goes right to the core of the charged offense: In enacting the offense of Impersonating a Public Servant, the Legislature desired to protect respect for law enforcement officers. Criminal Law Commission Comments M.P.C. 1962, § 241.9; Mont. Code Ann. § 45-7-209. Ms. Fink’s own concern about her ability to be fair to Kurttis on this topic signaled a serious question of juror bias. Ms. Fink’s husband served as law enforcement for eight years, her self-proclaimed “high regard” for law enforcement signaled she would be especially offended by the notion of someone flashing a badge to get attention at a strip club. This would have been a direct affront to the hard work, danger, and risk her husband undertook

when he chose to join the profession and would overly distract her from objectively assessing the evidence at Kurttis's trial.

But the prosecutor and the district court both veered off topic, asking Ms. Fink questions instead about her ability to judge the testimonies of two police officers, not, as she had signaled, to examine her ability to fairly judge a person accused of pretending to be a law enforcement officer.

The prosecutor's leading questions did nothing to dispel Ms. Fink's flagged concern. Ms. Fink's bias raises a concern that she may want to punish Kurttis simply because she didn't like the idea of a person using commemorative U.S. Marshal's gear if they were not a U.S. Marshal, or the idea of a person bringing these objects into a strip club. Whereas the prosecutor asked Ms. Fink to agree or disagree with her leading statement about law enforcement witnesses instead, asking Ms. Fink to agree that "under the badge is a person," and the people underneath their badges "make mistakes." Ms. Fink did agree with this statement, but her willingness to agree that police officers are people too does not dispel the concern she herself raised: Rather, Ms. Fink was concerned about her ability to fairly judge a person accused of dishonoring law

enforcement by pretending to be an officer when he was not, not her ability to judge the credibility of two of the State's witnesses. The court's questions were only a distraction, Ms. Fink's serious concern about her ability to be fair was left unexamined and thus must be resolved in favor of disqualification.

Second, the prosecutor and the court's cross-examination style yes-no questions were of no help, as they were designed only to coax Ms. Fink into agreeing, not to understand the degree and her ability to set aside her bias. This Court has held that such coaxed recantations, to the extent they were even relevant to the concern Ms. Fink raised, are "inherently unreliable" because they put "ordinary citizens, who are already in 'an unfamiliar and imposing courtroom' setting under scrutiny of the judge, peers, lawyers, and the community, in the untenable position of having to publicly disagree with the court or counsel on generally accepted legal principles in order to reiterate an earlier spontaneous statement of bias." *Johnson*, ¶ 12, quoting *State v. Brown*, 1999 MT 339, ¶ 27, 297 Mont. 427, 993 P.2d 672 (Nelson, J., specially concurring). Ms. Fink said three times that she'd "like to say" she could listen and judge the case fairly, but she couldn't say for sure

that she could do that. Under the gaze of the judge, and the rest of the jury pool, Ms. Fink never dispelled her concerns over her ability to be fair as a juror in Kurttis’s case.

Finally, Ms. Fink’s halfhearted agreement she could “do both sides” should not sway this Court. Like the juror in *State v. Anderson*, Ms. Fink never relinquished her view that she would have difficulty being fair. In *Anderson*, after *voir dire* had concluded, a juror selected for the panel voluntarily stated to the bailiff that he was “pretty sure the Defendant is guilty.” *Anderson*, ¶ 5. The district court questioned the juror in chambers, where he stated that he would “100 percent try” to weigh the evidence and follow jury instructions, but he would be troubled if Anderson chose not to testify. *Anderson*, ¶¶ 6–7. When asked later whether he could “give Mr. Anderson a fair shot,” the juror responded, “I believe I could[,]” but then added, “There just is a slight bit of preconception stepping in, forward now. And that’s, that’s why I told the Bailiff why, what I wanted you to be aware of.” *Anderson*, ¶ 19. The district court explained the law and asked the juror if he could keep an open mind, to which the juror responded, “I can absolutely keep an open mind[.]” *Anderson*, ¶ 8. This Court still reversed, concluding that

despite the juror’s eventual promise to keep an open mind, the prospective juror did not relinquish his opinion of Anderson's guilt. *Anderson*, ¶ 20. The same is true here, Ms. Fink may have agreed – after being cross examined about her views– that she could listen to the two police officer’s testimonies and weigh them on their merits, but she persisted, three times, in saying that while she *would like* to judge *the case itself* fairly, she wasn’t sure she could. This refusal to relinquish her views should have caused the district court to grant Kurttis’s motion to strike Ms. Fink from the jury pool for cause. Its failure to do so was an abuse of discretion requiring reversal.

II. The State was required to prove Kurttis’s specific purpose, it was insufficient to convict based on the assertion that even if the jury didn’t know why he showed Yvette a toy badge hours earlier, whatever his reason, “we know it wasn't good.”

The Due Process Clause of the Fourteenth Amendment “protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364 (1970); *see also* U.S. Const. amend. XIV; Mont. Const. art II, §17. Therefore, the State must present “evidence necessary to convince a trier of fact beyond a reasonable

doubt of the existence of every element of the offense.” *Jackson v. Virginia*, 443 U.S. 307, 316 (1979). This standard requires proof from which a reasonable factfinder can “reach a subjective state of near certitude of the guilt of the accused.” *Jackson*, 443 U.S. at 315.

Here, the prosecution asked the jury to convict Kurttis if they believed he “flipped” an object commemorating the U.S. Marshal service over a five-foot dividing wall toward Yvette while she was at work at Sagebrush Sam’s, even if they don’t know why, because whatever his reason, “we know it wasn't good.”

This might have been enough reason to detain Kurttis that night, so as to investigate further, but it is not enough to convict him of the felony offense of Impersonating a Public Servant.

That is because, even in a light most favorable to the prosecution, neither Yvette’s testimony nor Kurttis’s words or actions were sufficient to prove the required element that Kurttis intended to “induce [Yvette] to submit to his pretended official authority” or “otherwise to act in reliance upon a pretense” that he was a U.S. Marshal, to her prejudice. It is not enough, although the State asked the jury to convict on this

basis, for the jury to believe that later in the night, Kurttis was waiting around the Town Pump parking lot hoping to see Yvette again.

Other prosecutions of the offense of Impersonating a Public Servant make clear how the State's evidence here came up short. In *State v. Taylor*, four members of the group known as the Freemen entered the Garfield County courthouse and demanded the clerk file and record a document entitled "Writ of Habeas Corpus," which they stated would allow them to establish their own supreme court.⁵ *State v. Taylor*, 2000 MT 202, ¶ 9, 300 Mont. 499, 5 P.3d 1019, overruled by *State v. Brister*, 2002 MT 13, ¶ 9, 308 Mont. 154, 41 P.3d 314. Following the clerk's refusal to file the document without a proper filing fee, the four men informed the clerk that they were going to conduct their own supreme court in the Garfield County courtroom that day. *Taylor*, ¶ 9. Taylor then responded to a loan officer who had previously filed an action to collect on a debt of one of the Freemen members by serving an affidavit signed by Taylor, declaring himself a "Justice of the Peace."

⁵ The increase in penalty for the offense of Impersonating a Public Servant from a misdemeanor to a felony was in response to the Freedmen. (See Mont. Laws 1995, ch. 351, § 2.)

The document was captioned so as to indicate that Taylor’s signature bore the authority of the State of Montana, essentially an attempt to prevent collection on the debt. *Taylor*, ¶¶ 14–15. Taylor’s various actions to present himself as a justice of the peace were an attempt to convince others he had the power to establish his own “supreme court,” to persuade the Garfield County clerk to file a writ without a filing fee, and to dissuade a loan officer from collecting on an owed debt.

In *State v. Ellison*, Ellison was convicted of impersonating a public servant after he made phone calls to two employers in which he falsely identified himself as a police detective whom he had tried to frame for an arson, maintaining the employers should not hire Ellison. *State v. Ellison*, 2018 MT 252, ¶ 3, 393 Mont. 90, 428 P.3d 826. Ellison’s motive for claiming to be a detective was to cause the employers not to hire him, which they might otherwise have done, thereby trying to establish false animus as a motive for the detective to have burned down his home.

In both *Taylor* and *Ellison*, the defendant clearly presented themselves as a public servant, and made specific demands based on that pretended authority: in *Taylor* the demand was to not collect on a

debt otherwise owed, and in *Ellison* the demand was to not hire Ellison for prospective employment.

Here, that specific demand is missing. Yvette herself testified Kurttis never asked her to do anything, and said he left the club when she told him she had nothing more to say to him.

In its rebuttal, the State took its “whatever Kurttis’s mind was set for that night,” “we know it wasn’t good” argument to an extreme, to suggest to the jury that because Kurttis was present in the same parking lot as where Yvette had parked her RV that night, Kurttis was perhaps preparing to kidnap Yvette or planned to make her have sex with him. (Tr. at 216–7.) The State’s suggestion that Kurttis may have been contemplating kidnapping Yvette is pure speculation, it is not evidence. Doubly so, to argue that Kurttis was going to somehow use the fact that he showed Yvette a U.S. Marshal’s commemorative item hours earlier in the night to his advantage in this speculative, unsupported plan to kidnap or have sex with her. Kurttis did not even have his commemorative items with him when he brought Yvette’s dog back to her RV, they were put away in his car.

Pure speculation about what a person may be considering cannot form the basis for the State to prove a necessary element of the charged offense. In *State v. Boyd*, an attempted homicide conviction, this Court reversed a conviction for insufficient evidence when a needed element was supported by mere speculation of what actions the defendant planned to later take. There, Boyd had had an argument with a bartender, went one block home, and came back outside with a knife. *State v. Boyd*, 2021 MT 323, ¶¶ 21-22, 407 Mont. 1, 501 P.3d 409. This Court held that his actions did not reach far enough toward the accomplishment of homicide to support an attempted deliberate homicide conviction. This Court said, “to murder [the bartender], Boyd would have had to come down the stairs, go across the street, find [the bartender] (who was nearly a foot taller and over 100 pounds heavier than Boyd), get the knife out of his pants, and stab him in the heart.” *Boyd*, ¶ 21–22. The evidence was insufficient because Boyd did none of those things, and could easily have decided not to do any of them.

Similarly here, the State’s assertion doesn’t add up: there is no evidence to support an idea that Kurttis, by standing in the parking lot where Yvette’s RV was parked, was planning to somehow leverage the

fact that he had hours earlier shown her a U.S. Marshal's commemorative item to help him now kidnap or have sex with her. Like in *Boyd*, this theory requires far too much speculation about Kurttis's future, potential actions to support conviction. Kurttis had no reason to believe that Yvette ever even believed he was a U.S. Marshal. Yvette handled Kurttis as she would any obnoxious customer of the strip club where she was employed: In the State's words, at "[Yvette's] [f]irst contact [with Kurttis], she walks away and ignores him. Second contact, she has him kicked out of the club." (Tr. at 215.) So it strains credulity, and is pure speculation, to say he was planning to persist in pretending to be a U.S. Marshal hours later to now convince Yvette to submit to his pretended authority when there was no indication from before that he would have any success with this. Indeed, when Yvette saw Kurttis, she ran to the Town Pump and called 9-1-1, at which point he did not leave, he simply returned to his car and continued to put his things away until the police arrived.

The State presented insufficient evidence to prove Kurttis's purpose, beyond a reasonable doubt, in showing Yvette U.S. Marshal's items was to cause her to submit to his pretended authority or

otherwise act in reliance to her detriment, when she herself said he asked nothing of her. As the responding officers indicated in their conversation at the scene, they may have arrived at a situation that made Yvette fearful but nonetheless, one in which Kurttis has committed no crime.

III. Alternatively, the district court issued an illegal sentence by imposing conditions on Kurttis’s active Department of Corrections commitment.

The district court lacked authority to impose the condition on Kurttis’s active Department of Corrections (“DOC”) sentence banning him from the premise of 1000 Grizzly Trail.

A district court's authority to sentence a defendant is defined and constrained by statute. *State v. Burch*, 2008 MT 118, ¶12, 342 Mont. 499, 182 P.3d 66. A sentence not based on statutory authority is an illegal sentence. *Burch*, ¶ 12.

Per Montana Code Ann. § 46-18- 201(3)(a)(iv)(A), upon a verdict of guilty, a sentencing judge may impose a DOC commitment. *State v. Day*, 2018 MT 51, ¶ 9, 390 Mont. 388, 414 P.3d 267. But there is no statutory authority for a sentencing court to impose conditions on an unsuspended DOC sentence. Montana Code Annotated § 46-18-202 does

not apply. A sentencing court's authority is constrained and defined by Mont., Code Ann. § 46–18–201; *Burch*, ¶ 23. According to the plain language of Mont. Code Ann. § 46–18–202(1), this statute does not provide any greater sentencing authority than is provided for in Mont. Code Ann. § 46-18-201; *Burch*, ¶ 26. Therefore, the district court imposing a ban from the premise of 1000 Grizzly Trail when it had already ordered a five-year DOC commitment, with no time suspended, is an illegal sentence and must be stricken from the judgment.

CONCLUSION

Kurttis's conviction must be reversed and dismissed because he was not guaranteed an impartial jury and speculation not evidence supported his conviction. In the alternative, the ban from the premise of 1000 Grizzly Trail is an illegal sentence and should be struck from his judgment.

Respectfully submitted this 20th day of May, 2024.

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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 6,872, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Kathryn Gear Hutchison
KATHRYN GREAR HUTCHISON

APPENDIX

District Court denial of motion to dismiss.....App. A

Judgment.....App. B

District Court denial of motion to strike juror for-cause.....App. C

CERTIFICATE OF SERVICE

I, Kathryn Grear Hutchison, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 05-20-2024:

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