IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0367

STATE OF MONTANA,

Plaintiff and Appellee,

v.

EDWIN J. TUFFREE,

Defendant and Appellant.

ANDERS BRIEF OF APPELLANT

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, the Honorable Christopher D. Abbott,
Presiding

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INTRODUCTION

This memorandum accompanies undersigned counsel's motion to withdraw as counsel of record from this appeal.

Upon appellate counsel conscientiously examining the record without identifying any meritorious issues to appeal, counsel "shall file a motion with the court requesting permission to withdraw," and that motion "must be accompanied by a memorandum discussing any issues that arguably support an appeal." Mont. Code Ann. § 46-8-103(2). "The memorandum must include a summary of the procedural history of the case and any jurisdictional problems with the appeal, together with appropriate citations to the record and to the pertinent statutes, case law, and procedural rules bearing upon each issue discussed in the memorandum." Section 46-8-103(2). The memorandum, however, should not include "protracted argument" to support counsel's conclusion about the merits of the appeal. *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 440 (1988).

A defendant-appellant is "entitled to file a response" to counsel's motion to withdraw and memorandum. Section 46-8-103(2). Once a response is filed—or the time to file a response has elapsed—the

reviewing court must conduct "a full examination of all the proceedings" and "decide whether the case is wholly frivolous." *Anders v. California*, 386 U.S. 738, 744 (1967). If the court concludes the case is frivolous for appeal, the court "may grant counsel's request to withdraw and dismiss the appeal . . . . On the other hand, if [the court] finds any of the legal points arguable on their merits (and therefore not frivolous) it must . . . afford the indigent the assistance of counsel to argue the appeal." *Anders*, 386 U.S. at 744.

In accordance with the foregoing, undersigned counsel gives notice that he has conscientiously examined the record and has not identified any meritorious issues to appeal. On that basis, counsel requests to withdraw from the appeal. This brief summarizes this case's facts and discusses issues that might arguably support an appeal.

STATEMENT OF THE CASE

The State charged Edwin James Tuffree with threats and other improper influence in official and political matters ("improper influence") under Mont. Code Ann. § 45-7-102. (D.C. Doc. 4.) The First Judicial District Court, Lewis and Clark County, held a trial, and the jury returned a guilty verdict. (D.C. Doc. 17.) The District Court

imposed a three-year deferred sentence. (D.C. Doc. 25 (attached at App. A).) Tuffree filed a timely notice of appeal. (D.C. Doc. 28.)

STATEMENT OF THE FACTS

The defense did not file any pretrial motions. (*See* D.C. Docs.) The parties filed stipulated proposed jury instructions. (D.C. Doc. 14.) The day of trial, the defense did not challenge any prospective jurors for cause. (3/20 Tr. at 53–64.)

The State presented two witnesses at trial. The first witness was Corporal Lynette Flink of the Helena Police Department. Flink testified as follows. Flink received a report from an employee of Child Support Services in Lewis and Clark County. (3/20 Tr. at 71.) The employee, Marcie Sickles, "report[ed] some threats that she received over the phone." (3/20 Tr. at 71–72.) Sickles alleged Tuffree was the threatener. (3/20 Tr. at 72.) Flink called Tuffree to investigate the allegation. Tuffree told Flink "there was no complaint and that he was going to sue" Child Support Services. (3/20 Tr. at 73.) Tuffree disconnected the call. (3/20 Tr. at 73.)

The State's second witness was Marcie Sickles. Sickles testified as follows. She was employed as an investigator supervisor for

Montana Child Support Enforcement Services. (3/20 Tr. at 78.) At Sickles's direction, Child Support Enforcement Services executed a warrant of distraint on a bank account belonging to Tuffree, collecting $600. (3/20 Tr. at 86.) Sickles's office mailed Tuffree a notice of the action. Such a notice includes language specifying a person may, within ten business days, request a hearing on the matter before an administrative law judge. (3/20 Tr. At 86.) At Tuffree's request, an administrative law judge scheduled a hearing, but staff attorneys successfully moved to vacate the hearing because Tuffree had requested the hearing after the ten-day window had expired. (3/20 Tr. at 97.)

According to Sickles, she subsequently received a call in which Tuffree identified himself and said, "what do I have to do, you fucking bitch? Come down there and shoot up your building and everybody in it so I can get my fucking hearing? And I'm going to come out into the Valley and kill you." (3/20 Tr. at 90–92.) After the call, Sickles locked down the office, escorted employees to their cars at the end of the day, and called her husband warning him of the supposed threat. (3/20 Tr. at 94.) On cross examination, Sickles admitted that, when she previously contacted police to report the alleged incident, she did not

mention the "And I'm going to come out into the Valley and kill you" statement. (3/20 Tr. at 97–98.) She explained, "[T]here was a lot going on and I don't know that he - - at what point during the conversation that he said that, but at the time I was concerned about the office. I think he left a voice mail even a couple days after that, but I don't have that record. So I apologize, it all ran together." (3/20 Tr. at 97–98.) Sickles also testified that "hearings are not granted by my department," they "are granted by the office of the administrative law judge." (3/20 Tr. at 96.)

The State rested after Sickles testified. (3/20 Tr. at 98.) The defense moved to dismiss for insufficient evidence. (3/20 Tr. at 99.) The defense argued that the charged offense required a threat made "with the purpose to influence" a public servant's "decision, opinion, recommendation, vote or other exercise of discretion," and that requirement was not satisfied because Sickles testified she did not have discretion to order the hearing that Tuffree was allegedly talking to her about. (3/20 Tr. at 99–101.) The District Court initially reserved ruling on the issue to conduct additional research. (3/20 Tr. at 103.) Returning to the issue later, the District Court denied the motion, citing

§ 45-7-102(2)'s provision that "[i]t is no defense" to an improper influence prosecution "that a person whom the offender sought to influence was not qualified to act in the desired way, whether because the person had not yet assumed office or lacked jurisdiction or for any other reason." (3/20 Tr. at 110–11.)

Tuffree testified in his own defense as follows. Child Support Services took all of the money out of his bank account. (3/20 Tr. at 114, 117.) He promptly filled out the form requesting a hearing but did not receive a hearing. (3/20 Tr. at 114.) At some point, he went down to the Child Support Services building and spoke with an employee to try to get the situation rectified. Tuffree did not make any sort of threat about shooting people. (3/20 Tr. at 114–15.) Rather "what was stated was more or less to the point of what does a person have to do, blow something up? I didn't infer me blowing something up, I just said what would somebody have to do to get a fair hearing. Because by this point in time I'm getting so exasperated it's not even funny. I'm losing my mind trying to figure out how to get it into court." (3/20 Tr. at 115.) Tuffree did not intend to blow anything up, he was just voicing his

exasperation. (*See* 3/20 Tr. at 115–16.) Tuffree never threatened to shoot up the building or to go to "the Valley." (3/20 Tr. at 115–16.)

The defense rested after Tuffree testified. (3/20 Tr. at 117.)

In settling the jury instructions, the District Court noted the parties had submitted instructions giving a conduct-based definition of purpose. The court noted improper influence contains both (1) conduct-based purpose and knowing elements in relation to making a threat and (2) what appears to be a result-based "with the purpose" element in relation to influencing a public servant's decision. (3/20 Tr. at 105–06.) Both the State and the defense said they were fine with giving just the conduct-based definition of purpose without any result-based definition, and the court agreed to do that. (3/20 Tr. at 106–07.) No objections were raised regarding any other jury instructions. (3/20 Tr. at 104, 107–08.) The court instructed the jury on the elements of the offense and on the conduct-based definitions of knowingly and purposely. (3/20 Tr. at 129; D.C. Doc. 19, Instructs. 9–12). The "to convict" instruction specified that, in order to convict, the jury had to find Tuffree threatened harm to Sickles "with the purpose to influence" her discretion as a public servant. (D.C. Doc. 19, Instruct. 10.)

In closing arguments, both parties argued in the vein of the State having to prove Tuffree had the purpose to influence Sickles. (*See* 3/20 Tr. at 120–21 ("The second thing you have to find is that that threat has to be made with the purpose to influence a decision . . . by a public servant. . . . He threatened her in order to change the course of the administrative proceeding . . . ."), 124 (stating the State had to prove "the defendant did so with the purpose to influence . . . "), 126 (arguing Tuffree's words "were a threat to change her attitude, her discretion, cause her to take action"). The defense additionally noted Sickles did not have discretion to grant a hearing and argued that, because Tuffree didn't mean any harm through his alleged words, he lacked the mental state necessary to commit improper influence. (3/20 Tr. at 124–25.)

Mid-deliberations, the jury sent out two questions. The first question was, "Does the threat have to be against an individual or a business?" The second question was, "Is the threat charged focused on Sickle[s] or the business?" (D.C. Doc. 16.) The court convened the parties. The parties and the court agreed to answer the questions by stating "the statute requires that the threat be made to a public servant" and by referring the jury to Instruction 10, which stated the

elements of the offense. (3/20 Tr. at 129–31; D.C. Doc. 16.) The jury subsequently returned a guilty verdict. (3/20 Tr. at 132–33; D.C. Doc. 17.)

The defense did not raise any objections at the sentencing hearing. (*See* 4/6 Tr.) Both the State and the defense recommended a two-year deferred sentence to the Department of Corrections. (4/6 Tr. at 4–5.) The State additionally recommended a condition that Tuffree engage, within sixty days of the judgment, "in mental health counseling and follow through [with] any treatment recommendations." (4/6 Tr. at 3–4.)

The District Court imposed a three-year deferred sentence to the Department of Corrections. (4/6 Tr. at 11.) The court imposed "all the standard conditions of probation and parole as set forth in the administrative rule." (4/6 Tr. at 12.) Additional conditions were that Tuffree had to obtain a mental health evaluation within sixty days and comply with any of that evaluation's recommendations; that Tuffree had to complete fifty hours of community service; and that Tuffree could not have any non-written communications with Child Support Services. (4/6 Tr. at 11–12.) At the defense's request, the court waived the cost of

counsel but imposed other standard fees for a total of $80. (4/6 Tr. at 12.) The written judgment appears to reflect the oral pronouncement of the sentence. (D.C. Doc. 25.)

DISCUSSION OF ISSUES THAT MIGHT BE APPEALED

I. Insufficient evidence

Tuffree might appeal whether there was sufficient evidence for the jury to find him guilty and/or whether the District Court erred by denying his motion to dismiss for insufficient evidence.

This Court reviews "de novo whether sufficient evidence supports a conviction." *State v. Polak*, 2018 MT 174, ¶ 14, 392 Mont. 90, 422 P.3d 112. The issue requires determining "whether, after reviewing 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." *Polak*, ¶ 34.

To convict Tuffree of improper influence as charged by the State, the jury had to find Tuffree (1) "purposely or knowingly . . . threaten[ed] harm to any person, the person's spouse, child, parent or sibling, or the person's property" and (2) did so "with the purpose to influence the person's decision, opinion, recommendation, vote or other exercise of

discretion as a public servant, party official, or voter." Section 45-7-102(1)(a)(i).

The sufficiency of the evidence assessment would mostly be based on the testimony of Sickles (3/20 Tr. at 78–98) and Tuffree (3/20 Tr. at 112–17.) In assessing the sufficiency of the evidence for the elements of the offense, a jury may infer the existence of a mental state "from the acts of the accused and the facts and circumstances connected with the offense." *State v. Fleming*, 2019 MT 237, ¶ 20, 397 Mont. 345, 449 P.3d 1234 (quoting Mont. Code Ann. § 45-2-103(3)). Additionally, the jury is the sole judge of credibility of witnesses, and the jury gets to resolve conflicts in the evidence. *State v. Daniels*, 2019 MT 214, ¶ 42, 397 Mont. 204, 448 P.3d 511.

In denying Tuffree's motion to dismiss after the State rested its case, the District Court ruled the State did not have to prove Sickles had discretion to provide Tuffree a hearing, as Sickles testified she did not have such discretion. (3/20 Tr. at 110–11; *see* 3/20 Tr. at 96.) Section 45-7-102(2) states "[i]t is no defense" to an improper influence prosecution "that a person whom the offender sought to influence was not qualified to act in the desired way, whether because the person had

not yet assumed office or lacked jurisdiction or for any other reason." (3/20 Tr. at 110–11.) The Annotator's Note to this subsection suggests the provision "establishes that it is not a defense to charges brought under this provision that the person sought to be influenced could not have acted. Thus, the offender will not benefit from a mistaken belief that an official could have acted so as to bring about the offender's desired result." Annotator's Note, § 45-7-102.

II. Purpose mental state definition instruction

Tuffree might appeal whether the jury should have received an instruction on the result-based definition of purpose.

This Court generally does not review issues raised for the first time on appeal. *State v. Taylor*, 2010 MT 94, ¶ 12, 356 Mont. 167, 231 P.3d 79. While the District Court raised the issue of whether the jury should receive a result-based instruction on purpose, the parties agreed conduct-based mental state instructions would suffice. (3/20 Tr. at 105–07.) Because the defense at trial did not object to the instruction given, the paths for raising an issue of instructional error on appeal would be through plain error review or ineffective assistance of counsel.

Under plain error review, this Court may review an unpreserved error that implicates fundamental rights where failure to review the error "may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process." *State v. Finley*, 276 Mont. 126, 137, 915 P.2d 208, 215 (1996).

When raising an ineffective assistance of counsel claim, the appellant must show counsel's performance fell below an objective standard of reasonable representation and, but-for the unreasonable performance, there was a reasonable probability that the trial's outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984); *State v. Weber*, 2016 MT 138, ¶ 21, 383 Mont. 506, 37 P.3d 26. To be reviewable on direct appeal, the record must either establish the reasons defense counsel had for performing in a particular manner, or there must be no plausible justification for defense counsel's performance. *Weber*, ¶ 22.

Improper influence under § 45-7-102(1)(a)(i) seemingly contains two types of purposeful mental states. The first purposeful mental state is conduct-based, in that the defendant must purposely (or

knowingly) "threaten harm" to another. Section 45-7-102(1)(a)(i). As the District Court instructed the jury seemingly based on this first purposeful mental state, "a person acts purposely when it is the person's conscious object to engage in conduct of that nature." (D.C. Doc. 19, Instruct. 12; *accord* Mont. Code Ann. § 45-2-101(65) ("A person acts purposely with respect to . . . conduct described by a statute defining an offense if it is the person's conscious object to engage in that conduct."). Improper influence's second purposeful mental state, by contrast, is arguably result-based, in that the defendant must make a threat "with the purpose to influence the person's . . . exercise of discretion as a public servant." Section 45-7-102(1)(a)(i). *Cf. State v. Tellegen*, 2013 MT 337, ¶ 21, 372 Mont. 454, 314 P.3d 902 ("Applying a result-based mental state" to an accountability offense where a person must act "with the purpose to promote or facilitate the commission of an offense."). "A person acts purposely with respect to a result . . . described by a statute defining an offense if it is the person's conscious object . . . to cause that result." Section 45-2-101(65). In this context, "with the purpose'[] ha[s] the same meaning" as "purposely." Section 45-2-101(65). The District Court did not give a result-based

instruction for the offense's "with the purpose" element. (*See* D.C. Doc. 19.)

In *State v. Spottedbear*, 2016 MT 243, 385 Mon. 68, 380 P.3d 810, this Court addressed an ineffective assistance of counsel claim regarding counsel's failure to request a result-based purpose definition instruction at an improper influence trial. *Spottedbear*, ¶ 48. The Court determined that, regardless of whether counsel's performance in that regard was reasonable or unreasonable, the performance was not prejudicial. *Spottedbear*, ¶ 50. The Court reasoned that, even without a result-based instruction on purpose, the trial court's "to convict" instruction made it clear the jury had to find the defendant had "the purpose to influence" a public servant. *Spottedbear*, ¶ 50.

III. Hearsay

Tuffree might appeal whether inadmissible hearsay was admitted through the testimony of Flink that Sickles had "report[ed] some threats that she received over the phone" from Tuffree. (3/20 Tr. at 71–72.) Because the defense at trial did not object to this testimony, the paths for raising this issue on appeal would be through plain error review or ineffective assistance of counsel.

Under plain error review, this Court may review an unpreserved error that implicates fundamental rights where failure to review the claim "may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process." *Finley*, 276 Mont. at 137, 915 P.2d at 215.

When raising an ineffective assistance of counsel claim, the appellant must show counsel's performance fell below an objective standard of reasonable representation and, but-for the unreasonable performance, there was a reasonable probability that the trial's outcome would have been different. *Strickland*, 466 U.S. at 688, 694; *Weber*, ¶ 21. To be reviewable on direct appeal, the record must either establish the reasons defense counsel had for performing in a particular manner, or there must be no plausible justification for defense counsel's performance. *Weber*, ¶ 22.

Hearsay is an out-of-court statement, other than one made by a party-opponent, "offered in evidence to prove the truth of the matter asserted." Mont. R. Evid. 801(c), (d). Hearsay is generally inadmissible. Mont. R. Evid. 802. This Court has approved of

admitting out-of-court statements not offered for the truth of the matter asserted but rather to "explain" how an officer proceeded in an investigation. *City of Billings v. Nolan*, 2016 MT 266, ¶ 28, 385 Mont. 190, 382 P.3d 219.

IV. Unintroduced evidence

Tuffree might appeal whether his counsel was ineffective in failing to introduce additional witnesses or evidence that might have contradicted Sickles's allegations and supported the defense.

"[T]he manner in which evidence is presented and witnesses are called are matters of trial tactics and strategy that are exclusively within the province of defense counsel." *State v. Reams*, 2020 MT 326, ¶ 19, 402 Mont. 366 477 P.3d 1188. This Court finds ineffective assistance of counsel on direct appeal regarding such matters only if the record demonstrates both that counsel's decisions regarding the presentation of evidence were unreasonable and that the unintroduced evidence carried a reasonable probability of changing the trial's outcome. *See State v. Santoro*, 2019 MT 192, ¶¶ 15–21, 397 Mont. 19, 446 P.3d 1141 (finding ineffective assistance on direct appeal where the record established (1) why counsel didn't introduce certain evidence and

(2) what the omitted evidence was and its importance to the defense). In a claim raised on direct appeal, "[r]eview is limited to the existing record which cannot be supplemented or supplanted." *State v. Tiedemann*, 178 Mont. 394, 397, 584 P.2d 1284, 1287 (1978).

CONCLUSION

Undersigned counsel requests to withdraw because he has not identified any meritorious issues to appeal. Should this Court review the record and identify any meritorious issues to appeal, undersigned counsel requests this Court issue an order that (1) denies the request to withdraw, (2) identifies the issue(s) the Court has determined are meritorious, and (3) directs counsel to file a brief on the merits.

Respectfully submitted this 6th day of August, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this *Anders* 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 3,582, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

By: /s/ Alexander H. Pyle
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APPENDIX

CERTIFICATE OF SERVICE

I, Alexander H. Pyle, hereby certify that I have served true and accurate copies of the foregoing Brief - Anders to the following on 08-06-2024:

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