IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0263

STATE OF MONTANA,

Plaintiff and Appellant,

v.

THOMAS JOSEPH BRENNAN,

Defendant and Appellee.

BRIEF OF APPELLEE

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, The Honorable Mike Menahan, Presiding

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STATEMENT OF THE ISSUE

Whether the district court correctly granted Thomas Joseph Brennan's ("Brennan") motion for a new trial and incorrectly dismissed his conviction for sexual abuse of children.

STATEMENT OF THE CASE

The State charged Brennan with one count of sexual abuse of children in violation of Mont. Code Ann. § 45-5-625(1)(a) and (2)(b), based on his conduct of entering the bedroom of his stepdaughter, A.H., after she showered and watched her get dressed. (Docs. 2, 3 at 2 (Count V).) The State also charged Brennan with four counts of sexual assault based on A.H.'s allegations that he touched her inappropriately. (Doc. 2 at 1, 3-4.) Brennan proceeded to trial, at which A.H., her mother Torrie Brennan, and Brennan himself testified; the jury found Brennan not guilty of the four counts of sexual assault but convicted him of the count of sexual abuse of children. (Doc. 53 at 1-3.)

Brennan then moved the district court for a new trial or, in the alternative, to overturn the jury's verdict and find him not guilty of the offense. (Docs. 59, 60 (citing Mont. Code Ann. § 46-16-702).) Brennan argued that "subsection (1)(a) [. . .] criminalizes "the employment or use of a child in an exhibition of sexual conduct, actual or simulated," but reminded the district court that this was simply not the conduct that Thomas is alleged to have engaged in. (*See* Docs. 59 at 1, 60 at 3-6.) Brennan described the history of Mont. Code Ann. § 45-5-625(1)(a) and the rest of the statute pointed out that this subsection was

specifically crafted to address child pornography. (Doc. 60 at 5.) The main point of Brennan's argument was that there is no construction of the statute, using its plain language, that would turn simply watching A.H. change clothes or get dressed after a shower into an "exhibition of sexual conduct." (*Id.*)

The State responded and argued that the statute went beyond the criminalization of child pornography. (Doc. 61 at 2 ("(1)(a) criminalizes exhibition of sexual conduct of a child, actual or simulated, without regard for medium").) Rather, it included "any [and] all conduct amounting to what the legislature has defined as sexually abusing children." (*Id.* at 3.) The State contended that it had presented testimony that Brennan "used a child (A.H.) in an exhibition of sexual conduct to arouse his own sexual response or desire." (*Id.*) Consequently, the State asked the district court to deny Brennan's motion. (*Id.*)

The district court granted Brennan's motion and dismissed his conviction for sexual abuse of children. (*See* Doc. 70 at 6 ("Count V of the State's Information is hereby DISMISSED with prejudice.").) The court found that A.H.'s testimony on the issue was largely uncontested but offered that "[t]his evidence, though alarming, does not demonstrate the Defendant employed, used, or permitted the employment or use of A.H. in an exhibition of sexual conduct, actual or simulated." (*Id.* at 5-6.) The court relied on the plain language of the statute. Mont. Code Ann. § 45-5-625(1)(a) states: "A person commits the offense of sexual abuse of children if the person knowingly employs, uses, or permits the employment or use of a child in an exhibition of sexual conduct, actual or

simulated." Mont. Code Ann. § 45-5-625(1)(a). The district court noted that "sexual conduct" was defined as the depiction of a child in the nude or in a state of partial undress. Mont. Code Ann. § 45-5-625(5)(b)(ii). (*Id.*)

However, the court concluded that "Brennan's account of the incident largely corroborated the testimony of A.H., neither of which established the elements constituting the crime of sexual abuse of children." (*Id.*) The court agreed with Brennan's argument that "the statute's plain language does not support the States's allegation—that simply watching A.H. change clothes or get dressed after a shower is a criminal act punishable by life imprisonment." (Doc. 70 at 4-5.)

Accordingly, the court found that "a change in the verdict is justified by the weight of evidence and the Montana Code Annotated." (*Id*. at 6.) The State then appealed. (*See* Doc. 74.)

STATEMENT OF THE FACTS

The jury found Brennan not guilty of the four counts of sexual assault but convicted him of the count of sexual abuse of children; the State goes on at significant length to discuss the facts alleged surrounding these charges, of which the jury found him not guilty. (*See,* It also goes to considerable length to suggest guilt based on Brennan's knowledge of the allegations against him during his interview. However, the State knows perfectly well that Torrie spoke with Brennan about the allegations against him before that interview occurred. (Trial Vol. I at 349-51, 363-365.)

The facts that are relevant are summarized thusly: at trial, the evidence demonstrated that Brennan had entered A.H.'s bedroom and watched her change into clothing, making her feel uncomfortable. (Doc. 70 at 5.)

At trial, A.H. testified that Brennan would watch her change clothes in her bedroom after she showered. (Trial Vol. I at 224-26.) A.H. said it happened "[l]ike every other shower time." (*Id*. at 224.) The prosecutor asked A.H. to describe the last time it happened, and she said she had just taken a shower and walked to her bedroom. (*Id*.) She started to change, and Brennan walked in and sat on the bed. (*Id*.) She testified that Brennan just watched her as she turned her back to him and tried to hold her towel over her body as she changed into clothes. (*Id*. ("I had my back facing him as best as I could.").) She testified that Brennan would just sit on the bed, watch her, and "talk about himself and stuff." (Trial Vol. I at 224-25 (stating the last time it happened, Brennan was asking if she wanted to go to "a store" with him).) She stated that this made her feel "weird and uncomfortable." (*Id*. at 225.) When Brennan would talk to A.H. while she changed, she observed that his voice would become "slower and softer."

A.H. testified that she told Torrie about Brennan walking into her room and watching her change clothes. (Trial Vol. I at 229.) A.H. stated that she had gone to Torrie's room and told her about Brennan. (*Id*.; *see also id*. at 242 ("I told her that it makes me uncomfortable when Tom comes in my room and watches me change").) A.H. testified that Torrie told A.H. that she would talk to Brennan. (*Id*. at 229.) However, Torrie's account differs, and

Torrie testified that she had found the behavior innocuous. (*Id*. at 342-43.)

A.H. was also questioned about another incident she mentioned during her forensic interview, where she alleged that Brennan had walked into her room while another friend, H.H., and she were changing clothes. (*Id*. at 251-54.) This was during a "sleepover" when, at midnight, they were both changing clothes and were undressed (*See id*. at 251, 253.) A.H. testified that afterward, the friend told A.H. that it had made her uncomfortable and that A.H. "apologized because [she] did not know [t]hat he was going to walk in like that." (*Id*. at 252.) Torrie's testimony about this matter is at variance with A.H.'s. Torrie testified that Tom had gone upstairs to alert the girls that the noise they were making had woken Torrie, and they needed to keep the ruckus down. (*Id*. at 344-345.)

SUMMARY OF ARGUMENT

The district court was correct as a matter of law when it granted Brennan's motion for a new trial and dismissed his conviction for sexual abuse of children.

In the Information, the State charged Brennan for having violated Mont. Code Ann. § 45-5-625(1)(a) and (2)(b)[1]. The relevant statute reads as follows:

"Sexual abuse of children. A person commits the offense of sexual abuse of children if the person knowingly employs, uses, or permits the employment or use of a child in an exhibition of sexual conduct, actual or simulated[.]" Mont. Code Ann. § 45-5-

[1] Mont. Code Ann. § 45-5-625(2)(b) primarily concerns sentencing and does not form a significant part of the State's appeal.

625(1)(a).

The problem with the State's argument is that it dismisses, or at least downplays, the definition of "sexual conduct." Under Montana law, "'Sexual conduct' means:[. . .] depiction of a child in the nude or in a state of partial undress with the purpose to abuse, humiliate, harass, or degrade the child or to arouse or gratify the person's own sexual response or desire or the sexual response or desire of any person." Mont. Code Ann. § 45-5-625(5)(b)(ii). Under the express language of the statute, Brennan did not violate the law. The State goes to some length to explain that "exhibition" and "depiction" of a thing are in fact the thing itself. This is incorrect as a matter of plain language and of law.

Finally, Montana law is already equipped to deal with a case such as this; the State might have charged Brennan with violating Mont. Code Ann. § 45-5-223, which criminalizes surreptitious visual observation or recordation. The State did not. The facts of this case, even when viewed in the light most favorable to the prosecution, do not support the contention that Brennan committed sexual abuse of children.

ARGUMENT

I. Standards of review

Brennan agrees that the "standard of review of a trial court's ruling on a motion for a new trial depends on the basis of the motion." State v. Bomar, 2008 MT 91, ¶ 15, 342 Mont. 281, 182 P.3d 47. Generally, this Court reviews a ruling on "a motion for a new trial for abuse of discretion, while acknowledging the underlying assertion may involve a

different standard of review." Id. ¶ 15. Here, the underlying assertion does involve a different standard of review.

Brennan agrees that when a lower court changes a verdict based on its interpretation of a statute, this Court should review to determine whether the district court's interpretation of the law is correct. State v. Bell, 277 Mont. 482, 485-86, 923 P.2d 524, 526 (1996) (citing State v. Christensen, 265 Mont. 374, 375, 877 P.2d 468, 468-69 (1994)).

a. The district court's response to the motion for a new trial was correct when it concluded that the weight of the evidence did not support Brennan's conviction for sexual abuse of children.

Mont. Code Ann. §46-16-702 permits a defendant to move for a new trial and authorizes a trial court addressing such a motion to modify or change a verdict by finding a defendant not guilty of the offense charged. State v. Longhorn, 2002 MT 135, ¶1 (overruled on other grounds by Giambra v. Kelsey, 2007 MT 158, ¶24, fn2). Montana requires the trial court's decision to grant a new trial or modify or change a verdict is at the discretion of the court and "must be justified by the law and the weight of the evidence." Id. at ¶47.

Here, the trial court had lived through the testimony and was well acquainted with the evidence and the weight thereof. Brennan's motion for a new trial made it clear that Brennan's conviction could only have taken place if the statute made a crime out of simply observing A.H., change clothes or get dressed after a shower. There is, in fact, no

statute that criminalizes this conduct.

The district court understood the weight of the evidence presented at trial and understood that the State did, in fact, elicit testimony that Thomas had either observed A.H. change clothes or get dressed after a shower. However, it correctly ruled that the evidence as presented cannot logically lead to the conclusion that Thomas violated Mont. Code Ann. § 45-5-625, as there was simply no employment or use of A.H. in an exhibition of sexual conduct.

b. The district court correctly dismissed Brennan's conviction for sexual abuse of children.

This Court ought first to replicate the district court's efforts and look to the express language of Mont. Code Ann. § 45-5-625(1)(a). A court's function is to determine legislative intent, and where that can be determined from the plain meaning of the words used, the plain meaning controls, and the court need not go further or apply other means of interpretation. State v. Johnson, 2022 MT 216, ¶13.

The Court has previously said that its cardinal first step in statutory construction is clear: if the Court "can determine that intent from the plain meaning of the words used in a statute, [it] may not go further and apply any other means of interpretation." Gatts, 279 Mont. at 47, 928 P.2d at 117 (citing Clarke v. Massey, 271 Mont. 412, 416, 897 P.2d 1085, 1088 (1995)). "In the search for plain meaning, we must reasonably and logically interpret that language, giving words their usual and ordinary meaning." Id. (citing Werre v. David, 275 Mont. 376, 385, 913 P.2d 625, 631 (1996)). "Where the statutory language

is 'plain, unambiguous, direct and certain, the statute speaks for itself, and there is nothing left for the court to construe.'" State v. Wolf, 2020 MT 24, P15 (quoting Swearingen v. State, 2001 MT 10, ¶ 5, 304 Mont. 97, 18 P.3d 998; Curtis v. District Court, 266 Mont. 231, 235, 879 P.2d 1164, 1166 (1994)).

This Court's role when interpreting a statute "is to implement the objectives the legislature sought to achieve." Holms v. Bretz, 2021 MT 200, ¶ 8, 405 Mont. 186, 492 P.3d 1210 (quoting Bullock v. Fox, 2019 MT 50, ¶ 52, 395 Mont. 35, 435 P.3d 1187). If the "plain language" of a statute "is clear and unambiguous," our interpretation ends there. Holms, ¶ 9 (quoting Mont. Sports Shooting Ass'n v. State, 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003). See also § 1-2-101, MCA ("the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted").

It is not always possible to follow the plain language of the statute, however, and where it is not, the Court must dig deeper. "Statutory construction is a 'holistic endeavor' and must account for the statute's text, language, structure, and object." S.L.H. v. State Compensation Mutual Insurance Fund, 2000 MT 362, P16, 303 Mont. 364, P16, 15 P.3d 948, P16 (citing W Bank v. Independent Ins. Agents of Am., 508 U.S. 439, 455, 113 S. Ct. 2173, 2182, 124 L. Ed. 2d 402, 418 (1993))."

i. Sexual abuse of children, as charged, is pornography, not mere observation.

Mont. Code Ann. § 45-5-625, originally codified in 1979, is the State of Montana's

statute describing the crime of sexual abuse of children. The statute reads as follows:

> 45-5-625. Sexual abuse of children. (1) A person commits the offense of sexual abuse of children if the person:
>
> (a) knowingly employs, uses, or permits the employment or use of a child in an exhibition of sexual conduct, actual or simulated;
>
> (b) knowingly photographs, films, videotapes, develops or duplicates the photographs, films, or videotapes, or records a child engaging in sexual conduct, actual or simulated;
>
> (c) knowingly, by any means of communication, including electronic communication or in person, persuades, entices, counsels, coerces, encourages, directs, or procures a child under 16 years of age or a person the offender believes to be a child under 16 years of age to engage in sexual conduct, actual or simulated, or to view sexually explicit material or acts for the purpose of inducing or persuading a child to participate in any sexual activity that is illegal;
>
> (d) knowingly processes, develops, prints, publishes, transports, distributes, sells, exhibits, or advertises any visual or print medium, including a medium by use of electronic communication in which a child is engaged in sexual conduct, actual or simulated;
>
> (e) knowingly possesses any visual or print medium, including a medium by use of electronic communication in which a child is engaged in sexual conduct, actual or simulated;
>
> (f) finances any of the activities described in subsections (1)(a) through (1)(d) and (1)(g), knowing that the activity is of the nature described in those subsections;
>
> (g) possesses with intent to sell any visual or print medium, including a medium by use of electronic communication in which a child is engaged in sexual conduct, actual or simulated;
>
> (h) knowingly travels within, from, or to this state with the intention of meeting a child under 16 years of age or a person the offender believes to be a child under 16 years of age in order to engage in sexual conduct, actual or simulated; or
>
> (i) knowingly coerces, entices, persuades, arranges for, or facilitates a child under 16 years of age or a person the offender believes to be a child under 16 years of age to travel within, from, or to this state with the intention of engaging in sexual conduct, actual or simulated.

Since its codification, this statute has been amended fourteen times for numerous

reasons, most of which are language deletions or additions and adding new conduct that constitutes sexual abuse of a child, mostly with an emphasis on visual or print medium content. In 1995, the statute was amended to expand the definition of the offense and increase the penalties attached to sexual abuse of children by deeming possession of visual or print media in which children are engaged in actual or simulated sexual conduct. 1995 Bill Text MT H.B. 161. The 2005 amendment was made to revise this offense by including luring children to engage in any sexual activity, and not just for purposes of child pornography. 2005 Bill Text MT D. 2112. In 2017, the statute was amended yet again to clarify that coercing a child in person to view sexually explicit material or acts constitutes sexual abuse of children. 2017 Bill Text MT H.B. 247. See also, Mont. Code Ann. § 45-5-625(1)(c). The most recent amendment in 2023 was to add a definition for the term "sexual intercourse" as well as adding an effective date. Mont. Code Ann. § 45-5-625.

With all of this having been said, clearly, this statute criminalizes persuading children to engage in viewing sexual conduct or material[2], child pornography[3], trafficking[4], and financing those activities[5].

ii. Brennan's conduct is mere observation and not sexual abuse of children.

[2] Mont. Code Ann. § 45-5-625(1)(c).
[3] Mont. Code Ann. §§ 45-5-625(1)(a), -(b), -(d), -(e), and -(g).
[4] Mont. Code Ann. §§ 45-5-625(1)(h) and -(i).
[5] Mont. Code Ann. § 45-5-625(1)(f).

Montana law defines sexual conduct as the "depiction of a child in the nude or in a state of partial undress with the purpose to abuse, humiliate, harass, or degrade the child or to arouse or gratify the person's own sexual response or desire or the sexual response or desire of any person." Mont. Code Ann. § 45-5-625(5)(b)(ii). This, in essence, defines the prohibited conduct as child pornography. But that is simply not the conduct that Thomas is alleged to have engaged in.

The State notes that "The plain and ordinary meaning of "depiction" includes "the way that something is represented or shown, or something that represents or shows something." (Appellant's Brief 28-29) (citation omitted). In other words, the plain and ordinary meaning of "depiction" is a representation of a thing, and not the thing itself. In other words, watching a movie or a picture of a naked 14-year-old girl dress after showering would constitute a depiction of a child in the nude; seeing the girl herself in person would not constitute a depiction of a child in the nude, and therefore would not be a violation of Mont. Code Ann. § 45-5-625.

iii. The cases the State cites are inapposite.

The State cites to State v. Marshall, 2007 MT 198, for the principle that a defendant's conduct under Mont. Code Ann. § 45-5-625 need not include any photos or videos of the child nor any attempts by the defendant to record the child. (Appellant's Brf. 34-35.) But in Marshall, the defendant had been engaging in humping a table in front of the victim and sought to employ the victim in sexual conduct, namely a lewd exhibition of

her intimate parts. State v. Marshall, 2007 MT 198, ¶¶7, 29. No such behavior–no sexual re-enactment or solicitation–exists here.

The State then cites to a Delaware case in which a man surreptitiously spied on a child victim changing clothes while he hid behind a shower curtain under a law "intended to punish predators who solicit children to take off their clothes for their own sexual gratification." (Appellant's Brf. 29, 31.) The State engages in the same contortions set out above to show that any observation is equivalent to experiencing a performance. But Montana law is simply different and has already criminalized this behavior by enacting Mont. Code Ann. § 45-5-223.

Mont. Code Ann. § 45-5-223 criminalizes surreptitious visual observation or recordation by anyone who "purposely or knowingly hides, waits, or otherwise loiters in person or by means of a remote electronic device within or in the vicinity of a private dwelling house, apartment, or other place of residence for the purpose of […] watching, gazing at, or looking upon any occupant in the residence in a surreptitious manner without the occupant's knowledge[.] Mont. Code Ann. § 45-5-223(1). The State concedes that the Delaware Supreme Court had to adopt a "more expansive definition of depiction" in order to fit the facts of the underlying case. (*See* Appellant Brf. 30.) But to do so in Montana is unnecessary–a prosecutor would only have to charge appropriately.

CONCLUSION

For the forgoing reasons, Brennan respectfully requests that the Court affirm the

district court and find that the district court appropriately granted his motion and dismissed the case against him with prejudice.

Respectfully submitted this 27th day of September 2024.

By: */s/ Benjamin Reed*

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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 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 3,583 words, excluding Table of Contents, Table of Authorities, Certificate of Service, and Certificate of Compliance.

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CERTIFICATE OF SERVICE

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