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.

REPLY BRIEF OF APPELLANT

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

APPEARANCES:

AUSTIN KNUDSEN
Montana Attorney General
MICHAEL P. DOUGHERTY
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
Michael.dougherty2@mt.gov

KEVIN DOWNS
Lewis and Clark County Attorney
JESSICA L. BEST
Deputy County Attorney
228 East Broadway
Helena, MT 59601

ATTORNEYS FOR PLAINTIFF
AND APPELLANT

BENJAMIN W. REED
Attorney at Law
34 West 6th Avenue, Suite 2E
Helena, MT 59601

ATTORNEY FOR DEFENDANT
AND APPELLEE

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OVERVIEW

The district court erred as a matter of law when it granted Brennan's motion for a new trial and dismissed the jury's guilty verdict. The district court misinterpreted Montana law to conclude that Brennan did not violate Mont. Code Ann. § 45-5-625(1)(a) after he repeatedly watched his 14-year-old stepdaughter dress after showering. This Court should reverse the district court's order and remand with instructions to reinstate the jury's unanimous verdict.

Brennan's response fails to overcome the State's contention on appeal that the district court erroneously applied a narrow definition of the term "depiction" to exclude conduct that includes the showing or presentation of a nude or partially clothed child for the sexual arousal or gratification of a person. This Court should vindicate the jury's decision, restore its guilty verdict, and reinstate Brennan's conviction for sexual abuse of children for conduct that is plainly prohibited under Montana law.

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ARGUMENT

This Court should reverse the district court's order granting Brennan's motion for a new trial and dismissing his conviction for sexual abuse of children.

A. Brennan does not dispute that the State presented evidence that he repeatedly watched his teenage stepdaughter get dressed after taking showers and, instead, erroneously asserts that this conduct does not violate Montana law.

The State first notes that Brennan does not dispute the core facts underlying his conviction. Specifically, that A.H. testified that Brennan would come into her bedroom after "every other shower time," and watch while she attempted to clothe her nude body. (*See* Trial Vol. I at 224-26.) Brennan also does not challenge that A.H. testified about the "last time" it happened, and recounted how he came into her room, sat on her bed, and watched as she tried to dress herself while holding a towel over her body, all while his voice became "slower and softer." (*Id*.) By implication, Brennan does not disagree that these facts allowed the jury to conclude that he watched A.H. get dressed to gratify his own sexual responses or desires. Mont. Code Ann. § 45-5-625(5)(b)(ii).

Instead, Brennan doubles down on his argument that his conduct did not satisfy the elements of Mont. Code Ann. § 45-5-625(1)(a) because he did not use A.H. in an exhibition of sexual conduct. (Br. at 8.) Brennan reaffirms his contention that the sexual abuse of children statute, "as charged, is pornography, not mere observation." (*Id*. at 9.) Brennan points to the definition of sexual conduct

provided in the jury instructions and asserts that "depiction of a child in the nude or in a state of partial undress with the purpose to . . . arouse or gratify the person's own sexual response," only includes forms of child pornography like photos or videos. (*Id*. at 12 (quoting Mont. Code Ann. § 45-5-625(5)(b)(ii)).)

Brennan acknowledges that "[t]he plain and ordinary meaning of 'depiction' includes 'the way that something is represented or shown, or something that represents or shows something.'" (Br. at 12 (citing State's Opening Brief at 28-29).) Thus, Brennan asserts, the "meaning of 'depiction' is a representation of a thing, and not the thing itself." (*Id*. at 12 (emphasis in original).) Brennan then posits that "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." (*Id*. (emphasis in original).)

However, while Brennan acknowledges that the plain and ordinary meaning of depiction may be limited to a representation of a thing, i.e., "something that represents or shows something," he downplays that the definition also includes "the way that something is . . . shown." (Br. at 12 (citing State's Opening Brief at 28-29).) Here, a live showing of A.H.'s nude and partially covered body. While Brennan would like to ignore the varied meaning of depiction, the reality is the

term may be broadly applied and includes the showing of something, such as a naked or partially dressed child.

Brennan's argument is almost identical to the argument made by the defendant in *Zambrana v. State*, 118 A.3d 773, 777 (Del. 2015). Similar to this case, Zambrana did not contest that he engaged in the alleged conduct and solicited a minor "to remove her clothing for his own sexual gratification." *Zambrana*, 118 A.3d at 777. But Zambrana argued that his conviction must be reversed because he never "intend[ed] to or [took] a picture, video recording, or create[d] any other 'depiction' of [the child's] nudity." *Id*.[1]

However, the Delaware Supreme Court closely examined the meaning and application of the term "depiction," and concluded that the term was broadly defined, and "include[d] the presentation of a live performance" or "live conduct." *Zambrana*. 118 A.3d at 777-78, 780. The Delaware Supreme Court grounded its reasoning to the United States Supreme Court's decision in *New York v. Ferber*, which also recognized that "a depiction" may include a live performance of nudity. *Id*. at 777-78 (citing *New York v. Ferber*, 458 U.S. 747, 764-65 (1982)). Brennan ignores the persuasive value of *Zambrana* and *Ferber* to this case. Accordingly,

[1] Zambrana was convicted pursuant to a statute that prohibited soliciting or causing a child to engage in certain sexual acts, such as "[n]udity, if such nudity is to be depicted for the purpose of the sexual stimulation or the sexual gratification of any individual who may view such depiction." *Zambrana*, 118 A.3d at 777.

like these decisions, this Court should recognize that "depiction" under the definition of sexual conduct includes the showing or live performance of a child, not just a representation of that child.

Brennan also downplays that in *Marshall* this Court recognized that the live presentation or showing of a nude child is prohibited under Mont. Code Ann. § 45-5-625(1)(a). *See State v. Marshall*, 2007 MT 198, ¶¶ 6, 25-29, 338 Mont. 395, 165 P.3d 1129. Brennan contends that *Marshall* is inapposite to his case because the attempted conduct involved the "lewd exhibition" of the child's intimate parts (Br. at 12-13), which is another definition of sexual conduct under the child sexual abuse statute. Mont. Code Ann. § 45-5-625(5)(b)(i)(F) ('"Sexual conduct' means: actual or simulated . . . lewd exhibition of the genitals, breasts, pubic or rectal area, or other intimate parts of any person.").

However, just because these two definitions of sexual conduct overlap and are similar, that does not mean they are exclusive of one another. Instead, like many of the definitions of sexual conduct under the child sexual abuse statute, the two subsections can intersect and often apply to the same conduct. For example, sexual conduct under the statute can include "sexual intercourse," as well as "penetration of the vagina or rectum by any object" and "sadomasochistic abuse." Mont. Code Ann. § 45-5-625(5)(b)(i)(A)-(B), (E). Thus, the circumstances of a

particular offense can include conduct, or a series of acts, where multiple definitions of sexual conduct are applicable to the situation.

Likewise, here, sexual conduct that includes "lewd exhibition" of the child may also include conduct and situations that could be considered a "depiction of the child" for purposes of sexual arousal or gratification. The obvious example includes the situation identified in *Zambrana* and *Ferber*, specifically, the live performance or presentation of a nude child. *See Zambrana*, 118 A.3d at 777-78; *Ferber*, 458 U.S. at 762-65.

Here, Brennan's jury, like the one in *Marshall*, could have been given a jury instruction that included the definition under (5)(b)(i)(F), i.e., "lewd exhibition" of the child, instead of only being instructed pursuant to the definition at (5)(b)(ii), i.e., "depiction of the child." Mont. Code Ann. § 45-5-625(5)(b)(i)(F), (5)(b)(ii). However, because the evidence presented at trial established that Brennan's conduct overlapped with both definitions, the jury was appropriately instructed. Consequently, the district court erred when it determined that the State did not allege or present evidence that "established the elements constituting the crime of sexual abuse of children." (Doc. 70 at 6.)

B. The State did not mischarge the crime as A.H. was aware Brennan was in her bedroom and conspicuously watching as she tried to dress herself after taking a shower.

Brennan suggests that the State erred when charging him with sexual abuse of children and states that Montana law "has already criminalized this behavior by enacting Mont. Code Ann. § 45-5-223." (Br. at 13.) This crime, which is a misdemeanor for the first conviction,[2] provides:

> A person commits the offense of surreptitious visual observation or recordation in a place of residence if the person 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:
>
> (a) watching, gazing at, or looking upon any occupant in the residence in a *surreptitious manner without the occupant's knowledge*; or
>
> (b) by means of an electronic device, surreptitiously observing or recording the visual image of any occupant in the residence without the occupant's knowledge.[3]

Mont. Code Ann. § 45-5-223(1) (2015) (emphasis added).

However, contrary to Brennan's argument, the plain language of the statute precludes application to his conduct. Namely, Brennan did not watch A.H. in a

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[2] *See* Mont. Code Ann. § 45-5-223(4) (providing that upon the "third or subsequent conviction, a person shall be fined an amount not to exceed $10,000 or be incarcerated for a term not to exceed 5 years, or both").

[3] Similarly, subsection (2) of the statute applies to public places and prohibits "visual observation or recordation in public if the person purposely or knowingly observes or records a visual image of the sexual or intimate parts of another person in a public place without the other person's knowledge when the victim has a reasonable expectation of privacy." Mont. Code Ann. § 45-5-223(2).

surreptitious manner without her knowledge or surreptitiously observe or record her visual image by means of an electronic device. Mont. Code Ann. § 45-5-223(1)(a)-(b). Instead, as reflected in A.H.'s testimony at trial, Brennan did not try to conceal that he was watching her, but blatantly sat on her bed and leered as she tried to cover herself while getting dressed. There was nothing inconspicuous or surreptitious about Brennan's actions. Consequently, this Court should reject his argument that the State charged him with the wrong offense.

C. The conclusion that Brennan's conduct was not prohibited under the sexual abuse of children statute would lead to an absurd interpretation of Montana law.

The district court erred as a matter of law when it determined that Brennan's conduct was not prohibited under subsection (1)(a) of the sexual abuse of children statute. (*See* Doc. 70 at 5-6 ("This 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.").) Although Brennan cites to Mont. Code Ann. § 45-5-223 and claims that he was mischarged by the State, the plain language of the statute precludes its application to the facts of this case.

Therefore, to affirm the dismissal of the conviction, this Court would need to agree with the district court's conclusion that when Brennan watched his 14-year-old stepdaughter get dressed after taking a shower, he did not violate

Mont. Code Ann. § 45-5-625 because he only observed her live, instead of making a recording or some other physical representation of the event. This reasoning would lead to an absurd interpretation of the statute. *See Mont. Sports Shooting Ass'n v. State*, 2008 MT 190, ¶¶ 11, 20, 344 Mont. 1, 185 P.3d 1003 (courts must construe statutes in a manner that avoids an absurd result).

Indeed, Brennan's response acknowledges that the Legislature has amended Mont. Code Ann. § 45-5-625 repeatedly, and that its amendments reflect the criminalization of all sorts of offenses against children, including: "persuading children to engage in viewing sexual conduct or material, child pornography, trafficking, and financing those activities." (Br. at 11 (citing Mont. Code Ann. § 45-5-625(1)(a)-(i)).) Brennan also does not dispute that this Court has acknowledged the "statute's broad purpose," which is to protect against the victimization of children by proscribing "multiple variants of conduct by which a person engages in sexual abuse of children by exploiting them for child pornography." *State v. Felde*, 2021 MT 1, ¶¶ 17, 20, 402 Mont. 391, 478 P.3d 825.

Consequently, given the broad range of crimes the Legislature sought to prohibit pursuant to the sexual abuse of children statute, it would be unreasonable to conclude that the Legislature would seek to prohibit a crime against a child, but only if the perpetrator recorded it or made some physical representation of the event. That is nonsensical and antithetical to the legislative purpose of Mont. Code

Ann. § 45-5-625. *See Felde*, ¶¶ 17, 20. This Court should reject such an absurd interpretation of the statute and reinstate Brennan's conviction for sexual abuse of children.

CONCLUSION

This Court should reverse the district court's grant of Brennan's motion for a new trial (Doc. 70), and remand with instructions for the lower court to reinstate his conviction under Mont. Code Ann. § 45-5-625(1)(a) and proceed to sentencing.

Respectfully submitted this 11th day of October, 2024.

AUSTIN KNUDSEN
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: */s/ Michael P. Dougherty*
MICHAEL P. DOUGHERTY
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman 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 2,205 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Michael P. Dougherty
MICHAEL P. DOUGHERTY

CERTIFICATE OF SERVICE

I, Michael Patrick Dougherty, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 10-11-2024:

Benjamin W. Reed (Attorney)
30 W 6th Ave.
Ste. 2E
Helena MT 59601
Representing: Thomas Joseph Brennan
Service Method: eService

Tammy K Plubell (Govt Attorney)
215 N. Sanders
Helena MT 59601
Representing: State of Montana
Service Method: eService

Jessica L. Best (Govt Attorney)
228 Broadway
Helena MT 59601
Representing: State of Montana
Service Method: eService

Kevin Downs (Govt Attorney)
228 E. Broadway
Helena, MT MT 59601
Representing: State of Montana
Service Method: eService

Electronically signed by LaRay Jenks on behalf of Michael Patrick Dougherty
Dated: 10-11-2024