

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA-24-0462

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Eric Ramirez,  
APPELLANT,

v.

STATE OF MONTANA,  
APPEALEE.

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On Appeal from the District Court of the  
Second Judicial District of the State of Montana,  
Silver Bow County

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**OPENING BRIEF OF THE APPELLANT**

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## **ISSUES PRESENTED**

- I. DID THE DISTRICT COURT ERR FOR FAILING TO INSTRUCT THE JURY THAT MERE PRESENCE AT A CRIME WAS INSUFFICIENT EVIDENCE TO CONVICT?**
- II. DID THE DISTRICT COURT ERR FOR FAILING TO INSTRUCT THE JURY THAT THE TESTIMONY OF AN INDIVIDUAL LEGALLY CULPABLE SHOULD BE VIEWED WITH DISTRUST?**

### **STATEMENT OF THE CASE**

An information was filed charging Eric Ramirez with three counts of possession of dangerous drugs with intent to distribute. (Transcript of the trial, page 107-108, lines 21-2). The matter proceeded to trial on March 18, 2024. (Transcript of the trial, generally) and ended On March 20, 2024 with a verdict of guilty on counts One and Two and not guilty of Count Three.

Ramirez was sentenced on June 27, 2024 on Count One to 18 years with none suspended (Transcript of Sentencing, Page 8, lines 5-10) and on Count Two to fifteen years (Transcript of Sentencing, Page 8, Lines 11-15) with none suspended to run consecutive to each other with credit for time served in the amount of 44 days (Transcript of Sentencing, Page 8, lines 15-17). (Judgment and Order of Commitment, Appendix A). A timely notice of appeal was filed on August 8, 2024.

### **STATE OF THE FACTS**

Trevor Handy, an inmate at the time of trial on Conspiracy to Distribute dangerous drugs (Transcript of Trial, Page 116, lines 22-25) was living with his parents on January 10, 2023 in Butte (Transcript of Trial, Page 117, lines 22-25) and he was waiting for a package of fentanyl to be delivered at the

home. (Transcript of Trial, Page 118, lines 12-20). The drugs had been mailed to him from Martin Topete and after they arrived, he was raided by law enforcement. (Transcript of Trial, Page 119). Trevor identified Eric Ramirez as a man he knew as Rob. (Transcript of Trial, Page 121, lines 1-9). Trevor admitted he told the officers after his arrest "I will give you anything you want in order to avoid going to prison" (Transcript of Trial, page 132, lines 13-15). He hoped to have his sentence in federal court reduced due to his cooperation. (Transcript page 133, lines 2-4). He is facing a mandatory minimum of 20 years of incarceration in federal court. (Transcript of Trial, page 142, lines 14-25) and he hoped to receive 60 months of incarceration (Transcript of Trial, Page 141, lines 10-11). He had Eric's phone number in his phone (Transcript of Trial, page 133, lines 18-23). He provided law enforcement with access to his phone and all the contact information involved with the drug conspiracy (Transcript of Trial, Page 134, lines 6-25).

Eric first came to law enforcement's attention when interviewing Hardy but other individuals were being surveilled. (Transcript of Trial, Page 176, lines 19-10-25). There was no surveillance or anything on Eric prior to the interview with Handy. (Transcript of Trial, Page 177, lines 3-8).

Trevor went on one or two trips to Helena with Eric but wasn't sure if it was one or two trips because of the amount of drugs he was using distorted his

thinking and perceptions. (Transcript of Trial, Page 135, lines 11-35). While he testified there was a transaction occurring in Helena, he never saw any drugs or if it was a payoff. (Transcript of Trial, Page 136, lines 17-20). Trevor did drugs with Eric, but never saw him with any other drugs. (Transcript of Trial, Page 137, lines 21-23). He did not see Eric provide anyone with drugs. (Transcript of Trial, Page 138, lines 19-24). Based on the information that Hardy provided, law enforcement got a search warrant for 3545 Whiteway in Butte. (Transcript of Trial, Page 151, lines 22-25). There were three bedrooms in the house. (Transcript of Trial, Page 154, lines 14-16). Bedroom 1 was the one described by Handy as used by Eric. (Transcript of Trial, Page 155, lines 7-9). In the bedroom used and occupied by another individual other than Eric law enforcement found money, drugs, ammunition and other items involved in the drug trade. (Transcript of Trial, Page 158-159).

Law enforcement found a large quantity of drugs and money in the other bedroom occupied by a different suspect. (Transcript of Trial, Page 183-184). As well as a large quantity of items inside a backpack behind the couch. (Transcript of Trial, Page 184, lines 16-24). When Eric was pulled over no drugs or substantial was found on him. (Transcript of Trial, Page 190, lines 15-19). Law enforcement went through Handy's phone looking for drug transactions. There were a number of clear drug transactions. (Transcript of



Trial, Page 191, lines 6-18). The government was aware of Eric's phone number and searched Handy's phone for all messages related to Eric.

(Transcript of Trial, Page 91, lines 19-24). The government did not find anything incriminating regarding Eric on Handy's phone. (Transcript of Trial, Page 192, lines 4-6). They also searched through the phones of the codefendants and found nothing incriminatory regarding Eric. (Transcript of Trial, Page 192-193). "We didn't find anything of evidentiary value..." (Transcript of Trial, Page 193, lines 1-7).

The government had been investigating the individuals involved from 2022 on. (Transcript of Trial, Page 194, lines 6-11). Eric first came to their attention in January of 2023 right before the search and after speaking with Handy. (Transcript of Trial, Page 195, lines 1-8). Searching the phones of the other suspects did not find any drug talk between Eric and them. (Transcript of Trial, Page 265, lines 17-22).

The defendant proposed a mere presence instruction (Defendant's proposed instruction 1, Transcript of the trial, Page 328, lines 2-24). The government objected, citing *State v. Ellerbee*. (Transcript of Trial, Page 329, lines 14-22).

Eric had never gone by the name of Rob. (Transcript of Trial, Page 336, lines 8-9). Eric testified he never transported drugs or money with Handy to

Helena. (Transcript of Trial, Page 342, lines 2-8). He did not do cocaine with him or anyone else. (Transcript of Trial, Page 342, lines 7-23). There were several bags in the house he stayed with friends he was visiting but didn't ever look into the bags because they were not his. (Transcript of Trial, Page 343, lines 4-10).

The court denied the admission of the mere presence instruction. (Transcript page 361, lines 11-13). The court also denied the instruction of the defense regarding the testimony of an individual legally culpable should be viewed with distrust as it pertains to Handy. (Transcript of the Trial, page 363, Lines 7-24).

### **SUMMARY OF THE ARGUMENT**

The District Court erred refused the instruction that mere presence at the scene of a crime was insufficient to find an individual guilty of a crime, the court also erred when it failed to instruct the jury that the testimony of an individual culpable of committing the alleged crime should be viewed with caution. The main evidence against Eric is the testimony of Trevor, an individual involved in the drug trade and facing a minimum of 20 years incarceration in federal court because of the incident involving Eric. Law enforcement had no information pertaining to Eric until after the search and

interview of Trevor, and he wasn't on their radar. Nor were there any messages between the suspects indicating that Eric was involved in the sale or distribution of drugs.

### **STANDARD OF REVIEW**

This Court reviews instructional errors in a criminal case to determine whether the jury instructions fully and fairly instruct the jury on the law applicable to the case. *State v. Daniels*, 2017 MT 163, ¶9, 388 Mont. 89, 397 P.3d 460, citing *State v. Shegrud*, 2014 MT 63, ¶ 7, 374 Mont. 192, 320 P.3d 455. A criminal defendant is entitled to jury instructions that cover every issue or theory having support in the evidence. *State v. Castle*, 285 Mont. 363, 366-367, 948 P. 2d 688, 690 (1997) citing *State v. Gopher* 194 Mont. 227, 229, 633 P.2d 1195, 1196 (1981). Reversible error occurs when the jury instructions prejudicially affect the defendant's substantial rights. *Daniels*, ¶.

When deciding to give or refuse jury instructions, the instructions must fully and fairly inform the jury of the applicable law. *Peterson v. St. Paul Fire and Marine Ins. Co.*, 2010 MT 187, ¶ 45, 357 Mont. 293, 239 P.3d 904. This is a legal determination made by the lower court, and legal determinations are reviewed either for correctness or de novo. *Peterson*, ¶ 45. A court either correctly applies the law or does not. *Peterson*, ¶ 45. Second, the court must decide if the requested instruction is warranted under the circumstances.

*Peterson*, ¶ 45. This determination is discretionary in nature because the court must address considerations such as the sufficiency of the evidence presented, relevance in light of the theory in the case, and whether the jury will be unduly confused. *Peterson*, ¶ 45. A district court that acts within its discretion can nonetheless still err when the instructions are not correct or incomplete on the applicable law to the case. *Peterson*, ¶ 45. Here when the district court failed to instruct the jury regarding “mere presence,” the court erred by failing to fully and fairly instruct the jury on the law.

## ARGUMENT

### **I. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO GIVE THE JURY THE MERE PRESENCE INSTRUCTION.**

This Court has approved the following instruction in similar cases: Mere presence at the scene of the crime and knowledge that a crime is being committed are not sufficient to establish that the defendant was involved in the crime. To be responsible, you must find beyond reasonable doubt that the defendant was a participant and not merely a knowing spectator. *State v. Chafee*, 2014 MT 226, ¶ 15, 376 Mont. 267, 271, 332 P.3d 240, 244 (citing *State v. Killson*, 243 Mont. 56, 92, 793 P.2d 1273, 1298 (1990))

In *Chafee*, this Court found that the instruction was a “potentially beneficial instruction,” that had no disadvantage to Chafee, and thus, no

tactical reason could justify failing to offer the instruction. Id. ¶ 21. This court in *Chafee* also gave heavy consideration to the defense theory in that case: defense counsel had repeatedly argued that his client was simply sitting there while another committed a crime, and that she did nothing to aid the commission of the crime. Id., ¶ 22. “Because the mainstay of the defense was that *Chafee's* presence at the scene was not sufficient to convict, there can be no plausible reason for failing to submit the very jury instruction that would have lent the force of law to counsel's argument.”

Similarly, Eric’s defense was that he was visiting friends, that he had driven up to Butte to visit them and was about to leave when the search and arrest occurred.

“The existence of a mental state may be inferred from the acts of the accused and the facts and circumstances connected with the offense.” Mont. Code Ann. § 45-2-103(3). Knowledge “cannot be inferred from mere possession alone, knowledge may be proved by evidence of acts, declarations or conduct of the accused from which an inference of knowledge may be drawn.” *State v. Krum*, 238 Mont. 359, 362, 777 P.2d 889 (1989), citing *State v. Anderson*, 159 Mont. 344, 351, 498 P.2d 295, 299, (1972). “Complicity in the crime cannot be guessed but must be based upon substantial evidence sufficient to convince an unbiased mind to a moral certainty.” *People v. Hill*,

175 P. 2d 45, 48 (Calif. 1946) citing *Dodson v. United States*, 23 F. 2d 401, 402 (4th Cir. 1928.)

In *State v. Hood*, 89 Mont. 432, 298 P. 354, 356 (1931), this Court held that the defendant was entitled to a directed verdict regarding the allegation he criminally possessed dangerous drugs. The defendant was in a home when it was raided, and agents found cocaine in various locations in the front room. *Hood*, 298 P. at 355. Agents found cocaine in a book with the words “Property of Samuel C. Hood [the defendant].” *Hood*, 298 P. at 355. This Court held that no evidence existed that the defendant had any control of the premises or any personal possessions in the building. *Hood*, 298 P. at 355. The Court reiterated “suspicions however justified are not sufficient to sustain a conviction.” *Hood*, 298 P. at 355.

In *State v. Gorder*, 248 Mont. 336, 338, 811 P. 2d 1291, 1293 (1991) this Court found the State had failed to establish sufficient evidence of actual or constructive possession of cocaine by the defendant which was found in the defendant’s travel trailer when another individual was admittedly more culpable than the defendant. “Other than the fact that the drug was found in appellant’s trailer, no evidence was produced to tie appellant to the drug.” *Gorder* at 338.

The facts are clear in this case, there was no evidence between the various individuals that were actually culpable of the possession and distribution of drugs in Montana that Eric was involved. The house was occupied by several individuals that were under the surveillance of law enforcement. The individual that was pointing to Eric as involved was arrested, afraid of being sent to prison, and had just been busted for receiving controlled substances in the mail.

The evidence tying Eric to any of the drugs, let alone the distribution of the same is weaker than the evidence in *Hood*, *Gorder*, or *Chafee*. Just as in *Chafee*, the defense theory and argument was that Eric was visiting friends at the time the bust occurred and was not involved in the criminal activity of the other people involved that were indicted by the federal government.

The government cited *State v. Ellerbee*, 394 Mont. 289434 P.3d 910, 2019 MT 37 for the proposition that a mere presence instruction was not warranted in this case. *Ellerbee* is distinguishable under the facts. First, in *Ellerbee*, the drugs were found in the back seat of the car where the Defendant was sleeping, second there were text messages between the defendant and another individual arranging the purchase of drugs including a money gram with the drugs that matched a reference number in the defendant's text messages. *Ellerbee* at ¶8.

In this case, there were no text messages, no drugs found on Eric, and the majority of the drugs and related materials were in a bedroom occupied by another suspect. None of the drugs were out in the open and there was nothing tying Eric to the distribution of dangerous drugs other than the testimony of Handy.

*Fleming v. State*, 373 Md. 426, 818 A.2d 1117 (2003), which this court references in *Ellerbee* is a much closer to the facts in this case than *Ellerbee*. The Maryland Court of Appeals determined that the trial court failed to explain to the jury that “along with the requirement of the ability to exercise dominion and control, *knowledge* is an element of the offense of possession of a controlled dangerous substance.” *Fleming*, 818 A.2d at 1125 “The purpose of a mere presence instruction ... is to inform the jury that simply because the defendant was in close proximity to the drugs in question, [the jury] may not infer knowledge and intent to exercise dominion and control from that fact alone.” *Fleming*, 818 A.2d at 1125. *Ellerbee* at ¶31.



**II. THE DISTRICT COURT ERRED FOR FAILING TO INSTRUCT THE JURY THAT THE TESTIMONY OF AN INDIVIDUAL LEGALLY CULPABLE SHOULD BE VIEWED WITH DISTRUST**

A person cannot be convicted of a crime solely on the uncorroborated testimony of witnesses who are legally accountable for the same offense M.C.A. 46-16-213. When proper, the district court must instruct the jury that “the testimony of a person legally accountable for the acts of the accused ought to be viewed with distrust.” M.C.A. 36-1-303(4).

The instruction should be given if the defendant requests the instruction and the record contains “significant accomplice testimony.” *State v. Johnson*, 257 Mont. 157, 163, 848 P.2d 496, 499 (1993). It is normally a question of fact reserved for the jury whether a party is or is not legally accountable for the conduct of the defendant. *State v. Blackcrow*, 1999 MT 44, ¶ 21, 293 Mont. 374, 975 P.2d 1253.

The “testimony of a personal legally accountable for the acts of the accused ought to be viewed with distrust.” See *State v. Allen*, 2010 MT 214, ¶ 68, 357 Mont. 495, 519, 241 P.3d 1045, 1061–62; *State v. Kline*, 2016 MT 177, ¶ 16, 384 Mont. 157, 162, 376 P.3d 132, 136 (“if a person legally accountable for the acts of the accused testifies, the jury must be instructed that the person’s testimony ought to be viewed with distrust.”). As such, a

criminal defendant is entitled to such an instruction on all proper occasions.  
*Allen*, ¶ 68.

“Requesting an accomplice instruction in fact supports a defendant’s position of innocence by directing the jury to view with distrust the accusations of a witness” when there is evidence that that witness acted in concert with the defendant. *State v. Newman*, 2005 MT 348, ¶ 56, 330 Mont. 160, 176, 127 P.3d 374, 384.

The primary testimony against Eric, was the statements of Trevor, an individual actively involved in the distribution of drugs in the Butte community and culpable for the alleged crimes against Eric. It was improper for the court to deny the Defendant the instruction to view his testimony with caution.

### **CONCLUSION**

The Court failed to properly instruct the jury on the defendant’s theory of the case and the failure to do so prejudiced the defendant. The convictions should be reversed and remanded for a new trial.

DATED this 16<sup>th</sup> day of December, 2024.

RESPECTFULLY SUBMITTED

/s/ Carl B. Jensen, Jr.  
Carl B. Jensen, Jr.  
Attorney at Law

## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a courier typeface have no more than ten characters per inch; is double spaced; pages are 8.5 x 11 inches with margins of no less than 1" from the top, bottom and right side and 1.5" from the left margin. The brief does not exceed twenty-one pages, excluding the table of contents, table of authorities, certificate of service and addendum.

DATED this 16<sup>th</sup> day of December, 2023

/s/ Carl B. Jensen, Jr.  
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**CERTIFICATE OF SERVICE**

I, Carl Jensen, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on December 16, 2024:

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