IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0166

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JONATHAN LOUIS KESSLER,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, the Honorable Elizabeth Best, Presiding

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STATEMENT OF THE ISSUE

The theft statute designates three levels of theft based on the value of the property stolen: misdemeanor theft of property worth less than $1,500, felony theft of property worth between $1,500 and $5,000, and felony theft of property worth over $5,000. The sentence for felony theft of property between $1,500 and $5,000 can be enhanced by prior convictions under that subsection. Can a prior misdemeanor theft conviction enhance the sentence for a conviction of felony theft of property worth between $1,500 and $5,000?

STATEMENT OF THE CASE

On June 1, 2023, the State charged Mr. Kessler with felony theft, third or subsequent offense, in violation of Mont. Code Ann. § 45-6-301(1)(a). (Information (District Court Document (Doc.) 3)). The State alleged that Mr. Kessler stole two generators worth a total of $2,400 from a camper trailer. (Motion for Leave to File Information Direct and Affidavit in Support (Doc. 1) at 2).

Mr. Kessler pled guilty on November 27, 2023. (November 27, 2023, Change of Plea Hearing Transcript (Plea Tr.) at 13). At sentencing, Mr. Kessler objected to the felony theft being designated a

third offense. (January 22, 2024, Sentencing Hearing Transcript (Sentencing Tr.) at 9). Mr. Kessler informed the court that he had only one prior felony theft conviction, not two. (Sentencing Tr. at 10). Mr. Kessler argued that the prior misdemeanor thefts on his record could not be used to enhance his felony theft sentence. (Sentencing Tr. at 9).

The district court nonetheless sentenced Mr. Kessler to a felony theft, third or subsequent offense. (Sentencing Tr. at 16; Sentencing Order and Judgment (Doc. 28), attached as Appendix A). He was sentenced to four years in Department of Corrections custody with two years suspended. (Doc. 28 at 1). Mr. Kessler timely appealed. (Notice of Appeal (Doc. 30)).

STATEMENT OF THE FACTS

At the time he was sentenced in this case, Mr. Kessler had one prior felony theft conviction and five prior misdemeanor theft convictions on his record. (Presentence Investigation Report (Doc. 25) at 2). Despite having only one prior felony theft on his record, the State charged Mr. Kessler with felony theft, third or subsequent offense, in violation of § 45-6-301(1)(a). (Doc. 3). He was also charged with criminal trespass to vehicles in violation of Mont. Code Ann. § 45-6-202 and

criminal mischief in violation of Mont. Code Ann. § 45-6-101(1)(a). (Doc. 3).

Mr. Kessler pled guilty to the theft charge. (Plea Tr. at 13). At the change of plea hearing, Mr. Kessler's counsel asked him if he had two prior felony theft convictions. (Plea Tr. at 12). Mr. Kessler incorrectly stated that he did. (Plea Tr. at 12). The district court accepted his guilty plea and found him guilty of theft, third or subsequent offense, a felony. (Plea Tr. at 13). The two remaining charges were dismissed by the State pursuant to the plea agreement. (Plea Tr. at 16).

Mr. Kessler's counsel asked Mr. Kessler about his understanding of the potential penalties in this case, warning him that a third felony theft conviction carried two years of mandatory prison time:

> Q. Okay. Do you also understand that, as the Judge maybe mentioned, there's a mandatory -- potential mandatory prison time on this conviction?
>
> A. Yes.
>
> …
>
> Q. Okay. Do you also understand that we might -- we'd be asking the Judge to potentially find one of the exceptions to the mandatory minimum, but that is entirely within Judge Best's discretion and we can't force her to agree with any of that?
>
> A. Yes.

Q. Do you understand if she does not agree with that her hands are tied and she's likely going to have to send you to the Department of Corrections or a prison sentence --

A. Yes.

Q. -- for those two years?

A. Yes

…

Q. Okay. Do you understand that because this is a third or subsequent theft offense, if you ever were charged or convicted in the future you'd also be facing the same mandatory prison time?

A. Yes.

(Plea Tr. at 9, 10). The district court did not comment on counsel's statements about mandatory prison time. (*See* Plea Tr. at 1-21).

A presentence investigation (PSI) was conducted. (Doc. 25). The PSI showed that Mr. Kessler had one prior conviction for felony theft and five prior convictions for misdemeanor theft. (Doc. 25).

At sentencing, Mr. Kessler objected to his prior misdemeanor theft convictions being used to enhance his felony theft sentence. (Sentencing Tr. at 9). His defense counsel caught the error that Mr. Kessler had only one prior felony theft conviction, not two, and lodged his objection prior to the oral pronouncement of sentence. (Sentencing Tr. at 9). Counsel

argued that the sentencing ranges for misdemeanor theft and felony theft are in separate sections of the theft statute and have separate provisions for sentence enhancement. (Sentencing Tr. at 10). He emphasized that a theft may be deemed a felony based only on the value of the items stolen, and that misdemeanor theft cannot ever become a felony based on prior convictions alone. (Sentencing Tr. at 10). The State did not respond to or contest these assertions. (*See* Sentencing Tr. at 1-24).

The district court sentenced Mr. Kessler to felony theft, third or subsequent offense. (Sentencing Tr. at 16; Doc. 28). The district court reasoned, "I just don't feel as though I have the law clearly before me to declare this a second offense, although I understand your argument." (Sentencing Tr. at 16). The district court acknowledged that Mr. Kessler only had one prior felony conviction. (Sentencing Tr. at 6). The district court asked the State, "You said other prior felonies. But I found one. Did I count wrong?" (Sentencing Tr. at 6). The State replied, "I believe you are correct, Your Honor. There is at least that other prior felony conviction." (Sentencing Tr. at 6). Additionally, the written judgment states that the sentence "considers that the Defendant has [one] prior

felony." (Doc. 28 at 2). In spite of this, the written judgment declares in bold letters that Mr. Kessler was sentenced for theft, third or subsequent offense, a felony. (Doc. 28 at 1).

STANDARD OF REVIEW

Whether prior convictions may be used for sentence enhancement purposes is generally a question of law that this Court reviews *de novo*. *State v. Chesterfield*, 2011 MT 256, ¶ 12, 362 Mont. 243, 262 P.3d 1109.

SUMMARY OF THE ARGUMENT

The theft statute designates three levels of theft based on the value of the property stolen: misdemeanor theft of property valued at less than $1,500; felony theft of property valued between $1,500 and $5,000; and felony theft of property valued over $5,000. The sentence for felony theft of property between $1,500 and $5,000 can be enhanced by prior convictions. The statute provide separate sentencing ranges for a first offense, a second offense, and a third or subsequent offense.

Here, Mr. Kessler undisputedly had only one prior felony theft conviction. Despite acknowledging this, the District Court still convicted Mr. Kessler of a third or subsequent offense. The plain language and structure of the statute make clear that a sentence for theft of property

between $1,500 and $5,000 can only be enhanced by prior convictions under that same subsection. Mr. Kessler should have been convicted of theft of property between $1,500 and $5,000, second offense. The district court's erroneous decision to designate Mr. Kessler a third-time felony theft offender materially influenced its sentencing decision, as evidenced by the court's imposition of two unsuspended years, which it erroneously believed was required for a third offense felony theft. Mr. Kessler should be resentenced based on the correct number of prior felony theft convictions.

ARGUMENT

I. Mr. Kessler's prior misdemeanor theft convictions cannot enhance his sentence for felony theft.

This Court will not look beyond the plain language of a statute if the language is clear and unambiguous. *State v. Jardee*, 2020 MT 81, ¶ 8, 399 Mont. 459, 461 P.3d 108. Statutory construction should not create absurd results if the statute can be reasonably interpreted to avoid it. *Jardee*, ¶ 8. The statute must be read and interpreted as a whole. *Jardee*, ¶ 8.

Mr. Kessler was sentenced under § 45-6-301(7)(b)(i), which provides:

> Except as provided in subsections (7)(c) and (7)(e), *a person convicted of the offense of theft of property that exceeds $1,500 in value and does not exceed $5,000 in value* shall be fined an amount not to exceed $1,500 or be imprisoned in the state prison for a term not to exceed 3 years, or both. A person convicted of a second offense shall be fined an amount not to exceed $1,500 or be imprisoned in the state prison for a term not to exceed 5 years, or both. *A person convicted of a third or subsequent offense* shall be imprisoned in the state prison for a term of not less than 2 years or more than 5 years and may be fined an amount not to exceed $5,000.
>
> (emphasis added).

This statutory subsection begins by making clear it pertains to "the offense of theft of property that exceeds $1,500 in value and does not exceed $5,000 in value." When this statute subsequently refers to a person convicted of a second or third or subsequent "offense," it is plainly referring to the aforementioned offense "of theft of property that exceeds $1,500 in value and does not exceed $5,000 in value." In a separate statute, Mont. Code Ann. § 45-6-345, the Legislature provided, "For the purpose of determining the number of convictions under 45-6-301, [. . .] a conviction means: (1) a conviction, as defined in 45-2-101, *under the same statute*; [or] (2) a conviction for a violation of a similar statute in another state…" (emphasis added).

The theft statute provides different sentencing subsections for each monetary range. *See* § 45-6-301(7)(a)–(b)(i). For purposes of determining a sentence under § 45-6-301, the only prior convictions that a court may use for sentencing enhancement, or "stacking", are convictions for theft "under the same statute," meaning within the same monetary range. § 45-6-345. A misdemeanor theft—theft of property not exceeding $1,500 in value—may only stack with previous misdemeanor thefts. § 45-6-301(7)(a). Likewise, a felony theft of property between $1,500 and $5,000 in value may only stack with previous felony thefts of property within that range. § 45-6-301(7)(b)(i).

This plain language interpretation is bolstered by the separate provision in § 45-6-345 that convictions from other jurisdictions may count for enhancement purposes if they were under a "similar statute." If the issue here were that Mr. Kessler's prior convictions were from another state, they would not be similar enough to stack. Subsection (7)(a) of § 45-6-301 (misdemeanor theft) is not "similar" to subsection (7)(b)(i) (felony theft). The former requires theft of property not exceeding $1,500 in value, while the latter requires the property to be worth more than $1,500.

The phrase, "a similar statute in another state," in § 45-6-345 mimics the language from the DUI stacking statute, which refers to "a violation of a similar statute or regulation in another state." Mont. Code Ann. § 61-8-1011(1)(a)(iii). The case law regarding this phrase has held that, to determine whether a DUI statute from another state is similar to one of Montana's DUI statutes, a court must compare the other state's statute with Montana's relevant statute for the same year. *State v. Polaski*, 2005 MT 13, ¶ 16, 325 Mont. 351, 106 P.3d 538. An out-of-state DUI statute or regulation is not similar and may not be used to enhance a DUI sentence if it allows for a DUI conviction under a lesser standard of culpability. *State v. McNally*, 2002 MT 160, ¶ 22, 310 Mont. 396, 50 P.3d 1080; *see also Polaski* at ¶ 22.

Misdemeanor theft, § 45-6-301(7)(a), allows for a conviction under a lesser standard of culpability than felony theft, § 45-6-301(7)(b)(i). To be convicted of misdemeanor theft, a person must have stolen items worth $1,500 or less. To be convicted of felony theft as charged here, a person must have stolen items worth more than $1,500 and less than $5,000. The value of the property stolen is an element of the offense and must be proven for a person to be convicted and sentenced under

§ 45-6-301(7)(b)(i). *State v. Daniels*, 2003 MT 30, ¶ 16, 314 Mont. 208, 64 P.3d 1045. Therefore, felony theft as charged here requires a different element of greater culpability—property with a value between $1,500 and $5,000—compared to misdemeanor theft.

Importantly, misdemeanor theft cannot become a felony based on prior convictions. The Legislature defined the severity of theft penalties based first on value of the item stolen. Then, within those value ranges, there are penalties for first, second, and third or subsequent convictions. § 45-6-301(7)(a)–(b)(i). Even if a person has an extensive history of misdemeanor theft convictions, a misdemeanor theft will never become a felony based on the number of prior convictions. § 45-6-301(7)(a) (providing for a misdemeanor sentence even for third "or subsequent" convictions under that subsection). It would be out of line with the plain language of the statute to sentence someone to up to five years under § 45-6-301(7)(b)(i), as a third-time felony theft offender, when the person's two priors were for misdemeanor theft. As Mr. Kessler's defense counsel put it, "it's contrary to legislative intent to have somebody who is charged with two counts of stealing cups of

[r]amen from the grocery store to suddenly find himself facing a third offense felony theft." (Sentencing Tr. at 10).

Although the subsections of the DUI statute stack on each other—for example, a previous DUI conviction under Mont. Code Ann. § 61-8-1002(1)(d) (a marijuana DUI) can still stack with a DUI under § 61-8-1002(1)(b) (an alcohol DUI) to make it a second offense—the subsections of theft are different. In the theft statute, the subsections specifically designate misdemeanor and felony status solely by the value of the property taken, not by the number of previous theft convictions. The severity of the present offense is what determines which subsection applies. A DUI, by contrast, can *only* become a felony if a person has at least three previous DUI convictions or a previous conviction for vehicular homicide. Mont. Code Ann. § 61-8-1008(1)(a). The language and organization of the theft statute makes it clear that, unlike with DUIs, prior misdemeanor theft convictions cannot be used to enhance the sentence of a felony theft conviction.

Here, the district court could not properly sentence Mr. Kessler to felony theft, third or subsequent offense. At the sentencing hearing, before the oral pronouncement, Mr. Kessler's counsel objected to him

being sentenced to a third or subsequent offense, correctly pointing out that he had only one prior felony conviction, not two. The PSI confirmed this. (Doc. 25). The district court even acknowledged this. (Sentencing Tr. at 6). The State did not disagree or make any argument as to why misdemeanor thefts should enhance a sentence for felony theft. *See State v. Krebs*, 2016 MT 288, ¶ 20, 385 Mont. 328, 384 P.3d 98 (holding that it is the State's burden to prove that a prior conviction can be used for sentence enhancement); *State v. Letherman*, 2023 MT 196, ¶ 12, 413 Mont. 459, 537 P.3d 862 (holding that when the defendant challenges the accuracy of his criminal record to be used for sentencing enhancement, the burden shifts to the State to provide competent proof of the defendant's prior convictions). The district court improperly sentenced Mr. Kessler to felony theft, third or subsequent offense, in light of the fact that this was only Mr. Kessler's second felony theft conviction.

II. Mr. Kessler is entitled to be resentenced based on a correct understanding of his criminal record.

A criminal defendant has a due process guarantee to not be sentenced based on misinformation. *State v. Simmons*, 2011 MT 264, ¶ 11, 362 Mont. 306, 264 P.3d 706. The due process inquiry turns on

whether the court premised the sentence on materially false information. *Simmons,* ¶ 11. The defendant must show the misinformation is materially inaccurate or prejudicial before a sentence will be overturned. *State v. Bar-Jonah*, 2004 MT 344, ¶ 120, 324 Mont. 278, 102 P.3d 1229. But "where the illegal portion of a sentence affects the entire sentence *or we are unable to determine what sentence the trial court would have imposed under a correct application of the law*," the Court will generally remand for resentencing. *State v. Hicks*, 2006 MT 71, ¶ 44, 331 Mont. 471, 133 P.3d 206 (emphasis added).

The record suggests that Mr. Kessler's incorrect designation as a third-time felony theft offender caused the district court to impose a harsher sentence than it might have imposed had he been correctly sentenced to a second felony theft. Specifically, the record suggests the court likely believed it was required to impose a minimum of two years of unsuspended prison time for a felony theft, third or subsequent offense.

A person convicted of felony theft, third or subsequent offense, as charged in this case, "shall be imprisoned in the state prison for a term of not less than 2 years or more than 5 years and may be fined an

amount not to exceed $5,000." § 45-6-301(7)(b)(i). By contrast, a person convicted of felony theft, second offense—the correct charge in this case—"shall be fined an amount not to exceed $1,500 or be imprisoned in the state prison for a term not to exceed 5 years, or both." § 45-6-301(7)(b)(i). Mr. Kessler was sentenced to four years in Department of Corrections custody, with just two years suspended. (Doc. 28). At the sentencing hearing, the district court told Mr. Kessler, "I just don't feel as though I have the law clearly before me to declare this a second offense, although I understand your argument." (Sentencing Tr. at 16).

The record suggests that the parties, including the court, believed that the district court was unable to suspend Mr. Kessler's entire sentence because he was being sentenced for a third felony theft.[1] The parties seemed to believe that the language "shall be imprisoned in the state prison for a term of not less than 2 years" meant that the district

[1] This belief was apparently incorrect. "Whenever a person has been found guilty of an offense upon a verdict of guilty or a plea of guilty or nolo contendere, a sentencing judge may suspend execution of sentence, except… as otherwise specifically provided by statute…" Mont. Code Ann. § 46-18-201(2)(a). Some statutes specifically provide that the mandatory minimum term of imprisonment may not be suspended. *See, e.g.*, Mont. Code Ann. § 46-18-219. The theft statute has no such provision. *See* § 45-6-301.

court could not suspend two years of Mr. Kessler's sentence. § 45-6-301(7)(b)(i).

At the change of plea hearing, Mr. Kessler's counsel asked him on the stand if he understood that there was "potential mandatory prison time" and that if the court did not agree to an exception, "her hands are tied and she's likely going to have to send you to the Department of Corrections" or prison for two years. (Plea Tr. at 9). The district court did not correct counsel's statements that for a felony theft, third offense, the court would be legally bound to impose at least two years of unsuspended prison time. This suggests that the district court itself also believed that the two years could not be suspended; if it did not believe so, it presumably would have corrected Mr. Kessler's counsel and ensured that Mr. Kessler was properly advised on the potential penalties he faced.

Additionally, defense counsel argued at sentencing that a felony theft, second offense—unlike a third offense—would allow the district court "to suspend all the sentence, if it desires." (Sentencing Tr. at 11). Again, the district court did not correct this misunderstanding of the law or give any indication it believed it had the power to fully suspend

Mr. Kessler's sentence even for a third felony offense. (*See* Sentencing Tr. at 1-24).

The district court sentenced Mr. Kessler as a third-time felony theft offender and imposed a sentence that tracked its apparent belief of what the mandatory minimum sentence was for a third-time offender: two years of unsuspended incarceration. There is a high likelihood the district court imposed two years of unsuspended time in this case based on its belief that it could not suspend the entire sentence for a third-time felony offender. This shows that the incorrect designation of Mr. Kessler as a third-time felony theft offender may have affected his sentence.

It is not clear from the record what Mr. Kessler's sentence would have been if the district court had sentenced him as a second-time offender, and had it not felt statutorily bound to impose at least two years of actual incarceration. As such, Mr. Kessler is entitled to resentencing. *See Hicks*, ¶ 44.

CONCLUSION

Mr. Kessler was improperly sentenced as a third-time felony theft offender, despite this being only his second felony theft. His sentence should be vacated, and the case remanded for resentencing.

Respectfully submitted this 3rd day of February, 2025.

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By: /s/ Emma N. Sauve
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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 3,543, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Emma N. Sauve
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APPENDIX

CERTIFICATE OF SERVICE

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