IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0732

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JAKE KENNETH LEE BURGHDUFF,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Seventh Judicial District Court,
Prairie County, the Honorable Olivia Rieger, Presiding

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STATEMENT OF THE ISSUE

The State charged Jake Burghduff with deliberate homicide under a felony-murder theory of accountability for alternative felonies: 1) assault with a weapon for the shooting of Isaac Carrier, or 2) aggravated assault for setting Isaac's apartment on fire. At trial, the State's case focused on the fire. After the State rested, the district court granted Jake's motion to dismiss for insufficient evidence for the underlying aggravated assault charge but denied it for the assault with a weapon charge. Did the district court err in only partially granting Jake's motion to dismiss for insufficient evidence?

STATEMENT OF THE CASE

Jake Burghduff voluntarily drove 100 miles to meet with detectives and told them that Sterling Brown murdered Isaac Carrier on January 23, 2023. (D.C Doc. 90.) Immediately after the interview, detectives arrested Jake and charged him with Count I: Arson, in violation of Mont. Code Ann. § 45-6-103, and Count II: Tampering with/or Fabricating Physical Evidence, in violation of Mont. Code Ann. § 45-7-207. (D.C. Doc. 3; 8.22.23 Trial Tr. at 469.)

Even though detectives told Jake that he would not be charged with homicide, the State filed an amended information adding Count I: Deliberate Homicide, in violation of Mont. Code Ann. § 45-5-102(1)(b). (D.C. Doc. 43 at 9; D.C. Doc. 26.) The State charged deliberate homicide via the felony-murder rule, alleging Jake was accountable for the commission of "aggravated assault and/or assault with a weapon," and during the commission of "that offense/those offenses, he or another person legally accountable for that offense, caused the death of Isaac Carrier." (D.C. Doc. 26.) Jake pleaded not guilty. (D.C. Doc. 32.1.)

Jake filed a Motion to Dismiss for Lack of Probable Cause. (D.C. Doc. 28.) Jake asked the court to dismiss all three counts. (D.C. Doc. 28.) After briefing, the court agreed with Jake that Count II: Arson and Count III: Tampering with/or Fabricating Physical Evidence, lacked probable cause. The Court dismissed those two counts "until the State provides facts sufficient to support probable cause." (D.C. Doc. 44.) The State never accepted the court's invitation to amend the affidavit and re-charge Counts II and III.

Jake also filed a Motion to Suppress Evidence. (D.C. Doc. 43.) Jake argued that detectives coerced his statements. (D.C. Doc. 43.) The

court held an evidentiary hearing. (D.C. Doc. 66.1.) The court partially granted Jake's motion, holding that evidence obtained from a portion of the interrogation be suppressed but that most of Jake's statements could come in at trial. (D.C. Doc. 90.)

On July 31, 2023, almost seven months after detectives arrested Jake and less than three weeks before trial, the State filed a Motion for Leave to File a Second Amended Affidavit in Support of Count I of the Amended Information. (D.C. Doc. 74.) The court granted the State's motion the following day. (D.C. Doc. 77.)

On August 18, 2023, the parties proceeded to trial. (D.C. Doc. 99.1.) The State called ten witnesses, four of whom the State included on its witness list, with the other six appearing somewhere in the 2,000 pages of discovery. (D.C. Doc. 26; 8.21.23 Trial Tr. at 21.) At the close of the State's case, Jake moved for a directed verdict.[1] (8.23.23 Trial Tr. at 500.) Jake provided a Memorandum in Support. (D.C. Doc. 103.) The court took a three-and-a-half-hour break to consider Jake's motion.

[1] A "motion for a directed verdict" is properly referred to as "motion to dismiss for insufficient evidence" made pursuant to Mont. Code Ann. § 46-16-403. As such, this Court deems a motion for a directed verdict as a motion to dismiss for insufficient evidence. *State v. McWilliams*, 2008 MT 59, ¶ 36, 341 Mont. 517, 525, 178 P.3d 121, 126.

(8.23.23 Trial Tr. at 531.) The court granted the motion for the underlying felony of aggravated assault and denied it for the alternate underlying felony charge of assault with a weapon. (8.23.23 Trial Tr. at 532.) The jury found Jake guilty of deliberate homicide. (D.C. Doc. 104.) Jake timely appealed. (D.C. Doc. 134.)

STATEMENT OF THE FACTS

Sterling Brown and Katie Bivens, recently married, resided in the small town of Camp Crook, South Dakota. (D.C. Doc. 74.) Katie and her ex-husband, Isaac Carrier, were engaged in a "high-conflict custody battle" over their son. (D.C. Doc. 74.) Katie and Sterling believed Isaac, who lived in Fallon, Montana, was abusing the boy. (D.C. Doc. 74.). The three were scheduled to appear in court for a custody hearing on January 25, 2023. (D.C. Doc. 74.) The stress and anxiety of the upcoming court date landed Katie in the emergency room. (D.C. Doc. 74.)

Early in the evening on January 23, 2023, Sterling texted his friend, Jake Burghduff. (State's Ex. 20, offered and admitted at 8.22.23 Trial Tr. at 419.) Jake was 20 years old at the time—ten years younger than Sterling. (8.22.23 Trial Tr. at 448.) Jake, a ranch kid, lived with

his father on his family's property. (8.22.23 Trial Tr. at 447.) Jake agreed to meet Sterling at the bar in Ludlow, South Dakota. (8.22.23 Trial Tr. at 403.) The next morning, Isaac was found dead. (D.C. Doc. 74.) He had a single gunshot wound through his head and his apartment had been set on fire. (D.C. Doc. 74.)

Jake's Interrogation

Agent Bradley Tucker met Sterling Brown and Katie Bivens in Spearfish, South Dakota, to interview them about Isaac's death. (8.22.23 Trial Tr. at 380.) Sterling told Tucker he was with Jake the night of January 23, 2023, but denied any involvement in Isaac's murder. (8.22.23 Trial Tr. at 383.) After the interview, Tucker did not have enough to arrest Sterling or Katie, so he let them go. (D.C. Doc. 74.)

Agent Tucker then called Jake. (8.22.23 Trial Tr. at 397.) Jake agreed to drive 100 miles to meet Tucker in Spearfish, South Dakota, on February 7, 2023, for an interview. (8.22.23 Trial Tr. at 400.) During the first half of Jake's interrogation, Jake provided background information and "things that Sterling had omitted from his statement." (7.24.23 Suppression Hrg. Tr. at 43.) At one point, Jake showed Tucker

his phone, but Tucker proceeded to take the phone and scroll through Jake's messages, resulting in the district court's partial granting of Jake's Motion to Suppress. (7.24.23 Suppression Hrg. Tr. at 47; D.C. Doc. 90.)

Before the meeting with Jake, Tucker printed off four Montana statutes: Deliberate Homicide, When Accountability Exists, Mitigating Circumstances, and Aggravating Circumstances. (Def's Ex. D, Suppression Hrg., offered and admitted at 7.24.23 Suppression Hrg. Tr. at 115.) Of note, Tucker highlighted the words "Death Penalty" on the Aggravating Circumstances statute. (Def's Ex. D, Suppression Hrg.) Tucker also showed Jake a picture of Isaac's driver's license photo and a picture of his burned body. (Def's Ex. A and E, Suppression Hrg., offered and admitted at 7.24.23 Suppression Hrg. Tr. at 110 and 116.) Tucker then leaned in close to Jake, put a finger in his face and told him that this will "determine how long you spend in prison." (7.24.23 Suppression Hrg. Tr. At 119.)

Jake told Agent Tucker what happened that night. Over the course of the evening, he and Sterling drove from Ludlow, South Dakota, to Fallon, Montana, in Sterling's truck. (Def's Ex. B at 40-42,

offered and admitted at 8.22.23 Trial Tr. at 481.) On their way, they stopped at a gas station in Baker, Montana, to grab beer and gas. (State's Ex. 14AA at 42.) Sterling asked Jake to purchase a two-gallon gas jug and beer while he filled up his truck. (State's Ex. 14AA at 42-43.) Surveillance obtained from the gas station showed Jake buying the jug and beer and then filling the jug with gas. (State's Ex. 29, offered and admitted at 8.22.23 Trial Tr. at 437.)

Up until that night, Jake "didn't know this whole custody deal was going on with Isaac and them." (Def's Ex. B at 64.) It was not until they left the gas station in Baker that Jake realized they were heading to Isaac's place in Fallon. (State's Ex. 14BB at 79.) Sterling told Jake they were going to drive up there and "Just, when we get there, stay in the…stay in the pickup." (State's Ex. 14AA at 46.)

Once in Fallon, Sterling parked a few blocks away from Isaac's apartment. State's Ex. 14AA at 40-41.) He took the gas can, his .45 pistol, and left Jake in the passenger seat of the truck. (State's Ex. 14AA at 40-41; 46.) When Jake saw Sterling get out, he then "[t]hought he was gonna go kill Isaac." (State's Ex. 14AA at 52.) Sterling never told Jake what he planned to do "in specific terms. He said he was gonna

take care of him, the kid wasn't goin' back to him." (State's Ex. 14AA at 52.)

Sterling was gone for about 20 or 30 minutes. (State's Ex. 14AA at 53.) When he came back, he put the gas can in the back of the truck, got back in the driver's seat, and they left. (State's Ex. 14AA at 54.) Sterling was nervous, "huffin' and puffin," and they "didn't really say anything for a little while." (State's Ex. 14AA at 54.) When asked what Sterling told him after, Jake said, "I didn't ask him…anything. I didn't want to know. I saw the flames when we left, and that…I didn't wanna know." (State's Ex. 4B, Suppression Hrg. at 59, offered and admitted at 7.24.23 Suppression Hrg. at 32.)

Jake showed Agent Tucker the route they took, the gas station they stopped at, where exactly they parked in Fallon and consented to a search of his phone. (State's Ex. 4B, Suppression Hrg.) Tucker promised Jake he would act as his "biggest advocate" and was "in direct contact with the county attorney and this…the Prosecutorial Services Bureau that's gonna be handling this case." (State's Ex. 14AA at 41.) Tucker told Jake he would not be charged with homicide. (7.24.23 Suppression Hrg. Tr. at 134.) The interrogation lasted six and a half hours, and

Tucker arrested Jake for arson and tampering with evidence. (7.24.23 Suppression Hrg. Tr. at 135.)

State's Charging Decisions

The State, in its discretion, chose to add a count of deliberate homicide to Jake's charges. (D.C. Doc. 26.) After the district court dismissed the arson and tampering charges for lack of probable cause, the State never attempted to amend the affidavit to reinstate the charges. Rather, the State amended the affidavit in support of the one-count information. (D.C. Doc. 74.) After granting "leave to file a second amended affidavit", the court never discussed the additional factual allegations with Jake. In all, the 15-page affidavit detailed the detective's investigation but failed to clarify what facts the State believed met the essential elements of the charges. (D.C. Doc. 26.)

The State brought up the lack of clarity in its charging document mid-trial, after jury selection. (8.18.23 Trial Tr. at 241.) The prosecutor explained to the court, "I did look at the charging document a moment ago, and I saw how wordy it was and it, it was somewhat confusing." (8.18.23 Trial Tr. at 241.) He added, "I don't think I did this charging

document, I think another prosecutor in my office did." (8.18.23 Trial Tr. at 241.)

The district court responded, "I'm going to tell you, I have been doing this for 20 years and I could barely make the connection with how the State chose to charge this. But that's your deal. That's, that's you." (8.18.23 Trial Tr. at 242.) The district court continued to express concern "that the jury is going to come back confused" because the State was "alleging accountability for two felony counts, and someone died via felony murder. And I just think that it's really messy." (8.18.23 Trial Tr. at 246.) "I think it's going to be, maybe, a little difficult for the connection to be made, sometimes, by people that don't understand all of these – I mean, look at how long we spend on felony murder when we're in law school." (8.18.23 Trial Tr. at 248.) Regardless, trial continued.

Trial

Over objection, the State called Issac's mom, Jackie Carrier, as the first witness. (8.21.23 Trial Tr. at 55.) The State asked her a stack of personal questions, starting with how far she traveled to testify. (8.21.23 Trial Tr. at 57.) The State asked her about her job at a church.

(8.21.23 Trial Tr. at 57.) The State asked about her three children, including Isaac. (8.21.23 Trial Tr. at 57.) Jackie told the jury about Isaac, Isaac's son, and Isaac's relationship with Katie. (8.21.23 Trial Tr. 61-63.) The State admitted three photos of Isaac and his family, all taken years prior to the incident. (8.21.23 Trial Tr. at 59 and 65.) Those photos were published to the jury. (8.21.23 Trial Tr. at 59 and 65.)

The State then called the three other residents from Isaac's four-unit apartment complex. (8.21.23 Trial Tr. at 96, 112 and 135.) Each testified to what they remembered the night of January 23, 2023. The first resident heard a loud bang before a smoke alarm went off. (8.21.23 Trial Tr. at 105.) Smoke filled the hallway as she felt her way down the hall and out the back door. (8.21.23 Trial Tr. at 107.) The second resident first woke up to a loud commotion and then heard one person running down the hall. (8.21.23 Trial Tr. at 122 and 126.) He then went back to sleep. (8.21.23 Trial Tr. at 123.) He woke up to his neighbor pounding on his window telling him the building was on fire and he got out. (8.21.23 Trial Tr. at 123.) The third neighbor heard a noise like "you tipped a bookshelf" or "something crashing into something else."

(8.21.23 Trial Tr. at 143.) When he went to check on it, he saw smoke in the hallway and escaped. (8.21.23 Trial Tr. at 145.)

The State then called the two deputy state fire marshals who investigated the fire. (8.21.23 Trial Tr. at 149-204.) George Lane meticulously detailed how he analyzed the scene. (8.21.23 Trial Tr. at 166.) Through him, the State introduced 35 photographs of the burned apartment building. (8.21.23 Trial Tr. at 168.) The second fire marshal, Michael Spini, reiterated much of Lane's testimony. He also discussed the lab report finding of weathered gasoline at the fire's point of origin. (8.21.23 Trial Tr. at 204.) The State admitted more pictures of burned debris. (8.21.23 Trial Tr. at 198.)

After Spini's testimony, the court gave the State an opportunity to make a record because "[t]he Court has already found that probable cause didn't exist that he [Jake] had anything to do with the fire." (8.22.23 Trial Tr. at 251.) "[A]nd now the State is trying to use the fire to suffice an element of the aggravated assault, after the Court has already dismissed the issue of the fire and this Defendant's accountability." (8.22.23 Trial Tr. at 253.) The State maintained that the fire was part of the crime. (8.22.23 Trial Tr. at 258-259.) Again, the

court noted that the State was asking a jury to find guilt beyond a reasonable doubt on the same facts that the "court previously didn't even find there was probable cause." (8.22.23 Trial Tr. at 261.)

The State called the chief medical examiner who conducted the autopsy. (8.22.23 Trial Tr. at 272.) He described the angle of the gunshot wound and lab testing done on Isaac's body. (8.22.23 Trial Tr. at 286-295.) He determined the cause of death was a gunshot wound to the head, contributory conditions included smoke inhalation and thermal injuries, and the manner of death was homicide. (8.22.23 Trial Tr. at 301.) The State also called a forensic analyst, Justin Ewing, as a foundational witness for the Cellebrite extraction of Jake's phone. (8.22.23 Trial Tr. at 312.)

Lastly, the State called Agent Bradley Tucker. (8.22.23 Trial Tr. at 339.) Tucker testified about what Jake told him during the interrogation. (8.22.23 Trial Tr. at 400.) The State admitted audio and transcript portions of Jake's interrogation, as well as the text messages sent between Jake and Sterling that night. (State's Ex. 14A, 14AA, 14B and 14BB, offered and admitted at 8.22.23 Trial Tr. at 406 and 429.)

When Sterling texted Jake on January 23, 2023, he initially sent him a four-minute, twenty second video clip from the movie *The Town* with Ben Affleck. (8.22.23 Trial Tr. at 421.) In the clip, Ben Affleck goes with his bank-robbing accomplice to beat someone up. (State's Ex. 17, offered and admitted at 8.22.23 Trial Tr. at 419.) Less than a minute after receiving the message, Jake responded, "I'm confused lol." (State's Ex. 90A, offered and admitted at 8.22.23 Trial Tr. at 324.) Sterling told him to "[l]isten to it again let me know if I can come over." (State's Ex. 90A.) Again, Jake texts back, "I'm still confused, we gotta hurt someone or something? Lex [Jake's dad] and the chick that works for use are in the living room lol." (State's Ex. 90A.) The two agree to meet in at the bar in Ludlow "so lex don't ask who's pickin me up lol." (State's Ex. 90A.) Sterling also asked Jake to bring a .22 pistol so they could "duck some coins [SIC racoons] up," which Jake brought. (State's Ex. 90A and 8.22.23 Trial Tr. at 404.) Sterling told Jake he was on his way, and the last message Jake sent to Sterling was, "I forget you take that way lol definitely quicker." (State's Ex. 90A.)

Once the boys met up, they left their phones in Jake's truck and drove around the backroads of South Dakota. (Def's Ex. B at 48.) Jake

told Tucker that he thought Sterling may want to fight someone but also figured they were going to "shoot some coons [racoons] too, but I didn't know how…where we were goin'." (State's Ex. 14BB at 79.) In Baker, Montana, they stopped at the gas station. (State's Ex. 14AA at 42.) Jake was unsure exactly what time they stopped because "I was…I had been drinkin' a lot, s…at that point still." (State's Ex. 14AA at 42.) Surveillance from that night showed that they stopped around 9:45pm. (State's Ex. 24, offered and admitted at 8.22.23 Trial Tr. at 419.) Jake told Tucker that he went inside and purchased engine starting fluid, a plastic gas jug and an 18 pack of Coors. (State's Ex. 94, offered and admitted at 8.22.23 Trial Tr. at 443.) A receipt confirmed that purchase. (State's Ex. 94.) Jake needed the starting fluid at his house and still had it at the time of his interrogation. (State's Ex. 14AA at 43.) Sterling asked Jake to get the "two gallon can of gas" and said that "he'd [Sterling would] pay for the gas and everything." (State's Ex. 14AA at 42.) Jake grabbed the jug and filled it up at the pump. (State's Ex. 30, offered and admitted at 8.22.23 Trial Tr. at 437.) Tucker asked Jake if Sterling told Jake what the jug was for, and Jake said, "Not yet, I didn't

know." (State's Ex. 14AA at 43.) Sterling purchased the gas that went in the jug and his truck. (8.22.23 Trial Tr. at 436.)

Jake started to realize where they were heading about halfway between Baker and Fallon. (State's Ex. 14BB at 79.) Jake told Tucker, "Well I knew Isaac lived in Fallon, around there, I didn't know where he lived. And then after he'd been talkin' about the whole Isaac deal with the kid and everything, just kinda…just made sense." (State's Ex. 14BB at 79.) Tucker asked Jake more about what they talked about, and Jake said, "I'm kinda just bullshittin', kinda keepin' my mind off of the …what's about… what he's…what I know he's about to do." (State's Ex. 14BB at 81.)

Jake told Tucker that he kept drinking the whole night and "drank a lot after what happened." (State's Ex. 14BB at 81.) As Sterling drove them away from Fallon, Jake said he thought, "I'm an accessory to this shit. And I just wanted to get drunk." (State's Ex. 14BB at 81.) When Tucker asked Jake if he considered trying to talk Sterling out of it, Jake said, "I understood his reasoning. If that…if had been messin' with the kid or stuff. So. His mind was pretty well set and, not too easy

to change Sterling's mind if he…his mind is set, so. I just sat there and kept drinking." (State's Ex. 14BB at 81.)

After Agent Tucker testified, the State rested. (8.23.23 Trial Tr. at 500.)

Motion to Dismiss for Insufficient Evidence

Jake moved for a directed verdict and provided a memorandum in support. (8.23.23 Trial Tr. at 500; D.C. Doc. 103.) Jake's memo discussed the witnesses and exhibits the State presented at trial. (D.C. Doc. 103.) Jake pointed out the lack of testimony about Jake's involvement; instead, the testimony revolved around Isaac's death and the fire. (D.C. Doc. 103.) Of the 73 admitted exhibits, the only exhibits relevant to Jake were the text messages, gas station surveillance and Jake's own statement. (D.C. Doc. 103.)

Jake argued that knowledge that a crime is about to be committed, failure to disapprove the commission of a crime and mere presence at the scene all fail to establish criminal accountability. (D.C. Doc. 103.) Beyond that, the State failed to prove that Jake had "the mental state for the underlying felony for which they claim accountability." (D.C. Doc. 103.) Additionally, the State did not prove

that Jake had the mental state "to commit those offenses to the intended victim in this matter, Isaac Carrier." (D.C. Doc. 103.) Once Jake figured out where they were going, the State presented no evidence that Jake acted in furtherance of helping Sterling shoot Isaac. (D.C. Doc. 103.)

The State responded by first reminding the court that the court must view the evidence in the light most favorable to the State. (8.23.23 Trial Tr. at 507.) The court quickly interjected with questions. (8.23.23 Trial Tr. at 509.) The court asked how the State could prove, beyond a reasonable doubt, that Jake was legally accountable for Sterling setting a fire as an aggravated assault when the court found that probable cause did not exist to tie Jake to setting the fire in the apartment. (8.23.23 Trial Tr. at 510 and 516.)

The State responded, "I think, at the end of the day, the State understands the Court's ruling and has taken the Court's ruling and does not intend to, um, offer or argue—and in fact we're not asserting—that the fire was an instrument of either aggravated assault or an assault with a weapon." (8.23.23 Trial Tr. at 518.)

The State attempted to distinguish that "the fire was action and conformity with this agreement, or in furtherance of this agreement." (8.23.23 Trial Tr. at 519.) The State acknowledged that the "State and Defense have very different theories in this case, have very different beliefs, and I think that's pretty normal in a case like this," but maintained there was sufficient evidence for the case to go to the jury. (8.23.23 Trial Tr. at 520.)

Jake replied, "This case has been all about the fire. The entire day, Monday, was about the fire. If he is not legally accountable for the fire because he did nothing to assist, how is the jury to parse that out?" (8.23.23 Trial Tr. at 522.) "This case is confusing" "because of the way the State charged it." (8.23.23 Trial Tr. at 522.)

Jake continued, "I'm confused as to how the jury is to know, your Honor, that if Mr. Burghduff is not legally accountable for the aggravated assault because of the fire, how they can then determine that he is alternatively accountable for the assault with a weapon for the gun." (8.23.23 Trial Tr. at 522.) Jake "getting off the couch and getting in the vehicle" is "not an act in furtherance" of assault with a weapon. (8.23.23 Trial Tr. at 522.) Rather, the State's "entire theory has

been that this gas can is what made him accountable. And that gas can goes towards that fire, your Honor, it doesn't go towards the death." (8.23.23 Trial Tr. at 523.) The State "now again changed their theory and instead of the fire causing death, the gunshot is what caused the death," and there is "no act that Mr. Burghduff assisted in the gunshot." (8.23.23 Trial Tr. at 523.) Therefore, Jake asked the court to find insufficient evidence to support the alternate charges.

The court took three-and-a-half hours to consider Jake's motion. (8.23.23 Trial Tr. at 531.) The court, acknowledging that the "aggravated assault was the fire," granted Jake's motion to dismiss the aggravated assault charge. (8.23.23 Trial Tr. at 532.) The court did not specify which, or all, of the elements were unsupported by sufficient evidence. In all, the court held it was "not going to allow the State to argue to the jury that Mr. Burghduff is accountable for Sterling Brown's commission of aggravated assault that resulted in the death of Isaac Carrier." (8.23.23 Trial Tr. at 532-533.)

The court denied Jake's motion for the alternate charge of assault with a weapon. However, the court added, "[F]or the record, this is by far the closest analysis that this Court has ever conducted. And this is

because the State chose to not charge deliberate homicide by accountability, but instead chose to charge felony murder by accountability for a forceable felony." (8.23.23 Trial. Tr. at 533.) "I'm not going to allow the State to argue that this Defendant is legally accountable for setting the fire because the State chose not to re-charge it. The State chose to charge an underlying forceable felony that led to the death of Isaac Carrier, and that this Defendant was legally accountable." (8.23.23 Trial Tr. at 545.)

While the court instructed the jury that "Arson by Accountability and Arson are not at issue in this case and may not enter in your deliberations," no one explained that the charges changed from the beginning of trial to when the jury deliberated. (D.C. Doc. 105.2, Instruction No. 26.) The jury found Jake guilty of deliberate homicide.[2] (D.C. Doc. 104.)

Prior to sentencing, Jake filed a sentencing memorandum along with 39 letters of support. (D.C. Doc. 126.) The court found, pursuant to Mont. Code. Ann. §46-18-222(4), an exception to the mandatory

[2] The verdict form did not specify the underlying felony supporting the conviction.

minimum sentence. (D.C. Doc. 130.) The judge explained that the "court did not enjoy this case at all. In fact, [defense counsel] is right. Very close—on the brink—of giving a directed verdict on this case. I'm troubled by the fact that the theory of this, the State's presentation changed during this case. And I believe your appellate motions will have merit." (10.17.23 Sent. Tr. at 82-83.) The court sentenced Jake to 15 years in the Department of Corrections, with 10 years suspended. (D.C. Doc. 130 (Judgment, attached as App. A).) The court ordered Jake pay $18,918.78 in restitution jointly and severally with Sterling Brown—if he is ever convicted at trial. (D.C. Doc. 130.)

STANDARD OF REVIEW

This Court reviews denials of a motion to dismiss for insufficient evidence de novo. *State v. Bennett,* 2022 MT 73, ¶ 7, 408 Mont. 209, 507 P.3d 1154. A directed verdict is appropriate when, viewing the evidence in a light most favorable to the prosecution, there is no evidence upon which a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Bennett*, ¶ 7.

SUMMARY OF THE ARGUMENT

The charges against Jake were confusing from the beginning. Detectives arrested Jake for arson and tampering with evidence after telling him he would not be charged with homicide. The State then added a charge of deliberate homicide under a felony-murder theory of accountability for alternative felonies. The district court dismissed the arson and tampering charges. The State, rather than amending the affidavit to reinstate the dismissed charges, chose to pursue the single count of deliberate homicide.

Going into trial, no one understood the State's theory, including the prosecutor. After voir dire, State told the court that the charging document was "confusing" and blamed the former prosecutor who wrote it. Without a clear trial strategy, the State presented what evidence it had, which centered around the fire. The district court then acquitted Jake of being accountable for that aggravated assault.

After the court dismissed that charge, it was too late for the State to go back and fix their case. The State failed to present evidence that Jake agreed to assist Sterling or took any steps that actually assisted Sterling in shooting Isaac. For this reason, no rational juror could find

the elements of deliberate homicide under a felony-murder theory of accountability for assault with a weapon. The district court erred in only partially granting Jake's motion to dismiss for insufficient evidence.

ARGUMENT

I. Because of how the State charged the crime and presented the evidence, no rational juror could have found the essential elements of deliberate homicide under a felony-murder theory of accountability for assault with a weapon.

"The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *State v. Davis*, 2012 MT 129, 365 Mont. 259, 279 P.3d 162. The granting of a motion to dismiss for insufficient evidence is the final due process safeguard before a case goes to the jury. *See* § 46-16-403, MCA.

Here, the State charged Jake with deliberate homicide for being legally accountable for the commission of alternative felonies, one of which—aggravated assault—was dismissed after the state rested.

Therefore, the State needed to prove that Jake was "legally accountable for the…commission of…assault with a weapon…and in the course of the forcible felony or flight thereafter…any person legally

accountable for the [assault with a weapon] causes the death of another human being." Montana Code Ann. § 45-5-102 (b) (defining deliberate homicide).

Further, as alleged, a person commits assault with a weapon "if the person purposely or knowingly causes: (a) bodily injury to another with a weapon." Mont. Code Ann. § 45-5-213(1).

Here, Jake would be legally accountable for Sterling committing assault with a weapon if "(3) either before or during the commission of an offense [i.e., causing bodily injury with a weapon] with the purpose to promote or facilitate the commission [of that offense], the person solicits, aids, abets, agrees, or attempts to aid the other person in the planning or commission of [causing assault with a weapon]." Mont. Code Ann. § 45-2-302.

In essence, the State charged Jake with deliberate homicide but twice removed. He did not commit homicide. He was not accountable for homicide. Rather, the State alleged he was accountable for an assault with a weapon that resulted in a death.

In all, as charged, the State needed to prove beyond a reasonable doubt that Jake agreed to assist Sterling to cause bodily harm to Isaac

through the use of a firearm or took any steps that actually assisted Sterling to cause bodily harm to Isaac through the use of a firearm with the purpose to facilitate the commission of that offense.

As detailed below, the State failed to meet its specific burden. The district court erred in only partially granting Jake's motion to dismiss for insufficient evidence.

A. Montana law requires far more than what the State presented to establish criminal accountability for deliberate homicide.

Cases involving motions to dismiss for insufficient evidence, especially those involving accountability, are nuanced and fact specific—even without the added wrinkle of confusing charges and half dismissals. These are cases where a defendant is involved and present at the scene of a crime. However, a defendant's "mere presence at the scene of a crime is, however, insufficient to establish criminal responsibility." *State v. Flatley*, 2000 MT 295, ¶ 12, 302 Mont. 314, 14 P.3d 1195. Instead, the defendant must take voluntary actions with the purpose of helping make the specific crime happen. *See* § 45-2-302(3), MCA.

For instance, in *Flatley*, the State charged the defendant with criminal distribution of dangerous drugs by accountability. *Flatley*, ¶ 1. In that case, Alan Real worked with agents from the Southwest Montana Drug Task Force to arrange a drug purchase from Flatley. *Flatley*, ¶ 4. Real drove the undercover agents to Boulder, Montana, where Real and the agents met up with Flatley and Lucas Janacaro. *Flatley*, ¶ 6. Flatley told Real that the drug dealer that was going to "hook" them up had "gone fishing," so the three of them drove to Jefferson City to buy from a different dealer. *Flatley*, ¶ 6. Real, Flatley and Janacaro discussed the drug deal on the way to Jefferson City. *Flatley*, ¶ 7. Flatley told Real it was "excellent bud." *Flatley*, ¶ 7. He added that he no longer keeps "bud on hand" because the "cops are watching him now," so he "only hooks people up." *Flatley*, ¶ 7.

When the three arrived in Jefferson City, Flatley and Janacaro got out to meet the drug dealer at his house. *Flatley*, ¶ 8. However, the dealer was not home. *Flatley*, ¶ 8. The dealer's mom said he was at the dredge ponds. *Flatley*, ¶ 8. Flatley and Janacaro got back in the car, and both of them directed the group to the dredge ponds in Jefferson City. *Flatley*, ¶ 8. There, they picked up the drug dealer and drove to Ting's

Bar. *Flatley*, ¶ 8. The dealer and Janacaro left the car for about 15 minutes. *Flatley*, ¶ 9. Janacaro came back with a bag of drugs. *Flatley*, ¶ 9.

Looking at the evidence, this Court found that the district court erred when it denied Flatley's motion to dismiss for insufficient evidence. *Flatley*, ¶ 17. While Flatley was present for the planning and execution of the crime, he waited in the car when Janacaro got the drugs and there was no evidence that Flatley discussed that specific drug transaction with the drug dealer. *Flatley*, ¶ 17. Flatley made statements revealing his involvement in drug dealing, but such knowledge "does not amount to a criminal offense," and the evidence was insufficient to criminal accountability. *Flatley*, ¶ 17.

Similarly, in *Murphy v. McKinnon*, this Court evaluated a writ of supervisory control and concluded that an amended affidavit failed to establish probable cause for granting leave to file an information charging Murphy with deliberate homicide. *State ex rel. Murphy v. McKinnon*, 171 Mont. 120, 556 P.2d 906 (1976).

Murphy and his two friends went to Roy Bar in Roy, Montana. *Murphy*, at 121. The three wanted to confront the owner of the bar, Ray

Hamann. *Murphy*, at 124-125. Hamann was scheduled to testify against the men at an upcoming assault trial. *Murphy*, at 121. Hamann was seated at the end of the bar when the three men walked in. *Murphy*, at 121.

Once in the bar, one of Murphy's friends attacked Hamann "three separate" times, resulting in his death. *Murphy*, at 122. Murphy's other friend fled during the attacks, but Murphy stayed. *Murphy*, at 122. After the last attack, Murphy turned Hamann over and told the bartender to call an ambulance while his friend took money from the cash register. *Murphy*, at 122. Murphy did not participate in the attacks but also did not stop them, rather stating that Hamman "had this coming." *Murphy*, at 125.

The State charged Murphy with deliberate homicide under the theory that he either caused Hamman's death as an accessory or principal, or, in the alternative, during the course of the felonies of either tampering with a witness or robbery, Murphy was an accessory or principal during one of those felonies that caused Hamman's death. *Murphy*, at 122.

This Court found that the allegations failed to establish probable cause. While the affidavit claimed that Murphy "encouraged by words" his friend while he attacked Hamman, and Murphy "planned the initial contact" with Hamman, the Court found that "such statements are not facts but only conclusions, conclusions not supported by other facts in the amended affidavit." *Murphy*, at 125. The definitions of "deliberate homicide and criminal accountability contemplate a more active role before a person can be charged as a principal or accessory to murder." *Murphy*, at 125. Without sufficient probable cause, this Court directed the district court to dismiss the charge with prejudice. *Murphy*, at 127.

On the other hand, in *State v. Miller*, 231 Mont. 497, 757 P.2d 1275 (1988), this Court found sufficient evidence to warrant denial of motions to dismiss two counts of deliberate homicide under the felony-murder rule. After an evening of drinking and hunting, Miller and his friend, Sean Wentz, left Ting's Bar in Jefferson City and proceeded to get lost trying to find Boulder Hot Springs. *Miller*, at 501. During the drive, Wentz fired his shotgun four or five times out the window of Miller's white 1968 Volkswagen. *Miller*, at 501. The two detoured to the Lounge bar in Boulder, Montana. *Miller*, at 501. They drank tequila

while the bartender gave them directions to the hot springs. *Miller*, at 501. They left and headed south. *Miller*, at 501.

After getting lost again, the two returned to the Lounge Bar. *Miller*, at 502. Miller walked in first, and Wentz followed behind with the shotgun. *Miller*, at 502. The bartender came out from behind the bar and a struggle ensured. Miller, at 502. The shotgun discharged, killing the bartender. *Miller*, at 502. The bartender's wife then walked in, and she was shot and murdered as well. *Miller*, at 502.

At trial, Wentz and Miller gave conflicting testimony as to who shot the victims at the bar. *Miller*, at 502-503. Wentz claimed they returned to the bar to rob it. *Miller*, at 502. At first, he said Miller encouraged him to shoot the bartender. *Miller*, at 502. Later, he testified that Miller grabbed the gun and shot the bartender and the bartender's wife. *Miller*, at 502. Contrarily, Miller testified that Wentz shot both the victims, forced him to grab money from the register, and threatened to shoot him if he did not comply. *Miller*, at 503. The jury found Miller not guilty of deliberate homicide but found him guilty of two counts of deliberate homicide under the felony-murder rule—one for robbery and one for felony assault by accountability. *Miller*, at 501.

This Court evaluated Miller's motion to dismiss for insufficient evidence. *Miller*, at 511. While presence at the scene of a crime is not enough to establish accountability, the Court found sufficient evidence that Miller was not just present but acted in concert. *Miller*, at 511. Acknowledging that the case rested on a lot of circumstantial evidence, "the facts and circumstances must not only be entirely consistent with the theory of guilt, but must be inconsistent with any other rational (reasonable) conclusion." *Miller*, at 512 (internal citation omitted). Regardless of the conflicting stories, the jury heard from 31 separate witnesses and chose which story to believe. *Miller*, at 512. As the Court explained, "We will not invade the province of the jury when they are presented with varying stories.' *Miller*, at 515. Therefore, sufficient evidence supported the district court's denial of the motion to dismiss. *Miller*, at 513.

B. The State presented no evidence that Jake knew about Sterling's plan to shoot Isaac until after they had already purchased the gas in Baker and Sterling was driving to Fallon.

Here, the State's entire theory of accomplice liability centered around an "agreement" between Jake and Sterling. However, unlike *Miller*, this case was not about co-defendants with conflicting testimony.

There was no testimony from Sterling, the only other person there that night. The State planned on calling Sterling as a witness but decided against it at the last minute. (8.21.23 Trial Tr. at 12.) No one testified about Jake and Sterling's relationship—if they were close or how long they knew each other. This was not a case of the jury weighing the credibility of witnesses against each other. Rather, this was a case of scant evidence with the defendant present during the crime, like in *Flatley* and *Murphy*.

Indeed, it was not until the State's tenth and final witness that the State presented any substantive evidence alleging Jake's involvement that night. Much of Agent Tucker's testimony focused on the messages between Sterling and Jake. However, none of the texts Sterling sent Jake mentioned Fallon or Montana. None of the texts mentioned Isaac or any custody battle.

Rather, the State argued that Jake simply getting "off the couch" after watching the video clip proved some sort of agreement between Jake and Sterling. (8.21.23 Trial Tr. at 41.) However, the evidence showed that Jake responded to Sterling's text with the video clip 60 seconds after receiving it, which was not even enough time to watch the

clip. (State's Ex. 90A.) Jake told Tucker that he had not seen the whole movie and could not remember the name of the actors. (8.23.23 Trial Tr. at 571.) Nevertheless, the State alleged that because Jake saw the movie before, he must have known that Sterling wanted to hurt someone, and that was enough. But that is not enough. In *Flatley*, the defendant also got off the couch—after agreeing to facilitate a drug deal. But when that specific drug deal fell through, there was insufficient evidence to prove accomplice liability for the next drug deal, even though he was present for it. The evidence must specifically support the underlying felony charged.

Specifically, with the assault with the weapon charge, the State did not allege reasonable apprehension of bodily injury. The State alleged actual bodily injury. (D.C. Doc. 105.2, Instruction No. 19.) Therefore, the State needed to prove Jake knew Sterling was going to shoot Isaac—not just threaten or scare him.

Jake told Agent Tucker that after receiving the video, he thought that "it just involved someone, yes," but he also "figured we might shoot some coons too, but I didn't know how…where we were goin', or." (State's Ex. 14BB at 79.) And the two did shoot at animals while

drinking and driving on the rural country roads. (State's Ex. 14AA at 47.) Jake said he "did not" think the trip involved "actually murdering somebody." (State's Ex. 14BB at 79.) Rather, because he knew "Sterling smokes weed and stuff, and that clip with him dealin' with the drugs I kinda figured it had s…might have somethin' to do with that." (State's Ex. 14BB at 79.)

It was not until "[a]bout halfway between Baker and Fallon" that Jake thought it might be more than that. (State's Ex. 14BB at 79.) When Sterling got out of his truck in Fallon, he took the "can of gas and a pistol" (State's Ex. 14AA at 41.) Jake told Tucker that it was a .45 ACP. (State's Ex. 14AA at 41.) Jake saw Sterling bring the .45 out for the first time "sometime after Baker and stuff, cause he had it down by his feet." (State's Ex. 14BB at 79.) It was at that point, "somewhere between Baker and the turnoff to north" when Sterling checked the chamber of his .45, and Jake realized where they were going and what Sterling might want to do. (State's Ex. 14BB at 80.) While one would urge someone in Jake's position to try and stop Sterling, that is not what the law requires. There was no agreement between the two. Like in *Murphy*, Jake's presence, absent evidence of an agreement, falls

below what Montana law requires to prove accountability for deliberate homicide.

C. The State presented no evidence that Jake facilitated, agreed, or was in any way involved with Sterling's decision to shoot Isaac.

Not only did the State fail to show evidence of an agreement between Jake and Sterling, but the State also failed to present evidence of a voluntary act by Jake in furtherance of that agreement. At trial, the State argued that Jake filling up the gas jug at the station in Baker was such an act. However, nothing about Jake filling a gas can while Sterling went inside to pay constitutes an act in furtherance of Jake helping Sterling shoot Isaac.

Again, the State provided no evidence that Jake knew why Sterling wanted the gas can when Jake filled it for him. It is not unusual to keep extra gas while driving in rural areas. In fact, Jake picked up starter fluid at that time to use at his house, which he still had when he spoke with Agent Tucker.

Further, the court acquitted Jake of any accountability for the aggravated assault. Therefore, the jury could not have found Jake guilty based on the theory that Jake was an accomplice to the arson.

The gas and fire were not the weapons at issue in the assault with a weapon charge—it was solely a gun. Nothing Jake did facilitated causing bodily injury to Isaac through the use of a firearm.

The State also claimed that Jake telling Tucker that as Sterling drove them away from Fallon, he was "an accessory to this shit" and just wanted to get drunk, was evidence of guilt. But a 20-year-old ranch kid saying that he was an "accessory," absent knowing the definition, does not make him criminally liable. Tucker never clarified what Jake meant with this statement. To be an actual admission of the essential elements of how the State charged Jake, Jake would have to understand those elements. And he did not. After Sterling left the truck, there was nothing Jake could have done to assist Sterling. He could not see the apartment building from where Sterling parked the truck. He could not have acted as a lookout. He did not have a phone to text or call Sterling. He did not have the keys to the truck. He never drove.

Instead, the most the State proved was that Jake was along for the ride. Like in *Murphy*, "criminal accountability contemplate[s] a more active role" before a person can be charged—let alone convicted—

as an accessory to murder. *Murphy*, at 125. Jake, at most, was an unwilling passenger stuck hundreds of miles from home, in a different state, with a drunk man who had a vendetta against his wife's ex. The evidence the State presented showed Sterling took all the necessary steps to commit the assault with a weapon on his own. Indeed, the evidence showed Sterling committed deliberate homicide by purposely shooting Isaac in the head with a .45. Sterling drove his own vehicle. He brought his own gun. He took his loaded pistol and walked into the apartment. He shot Isaac and started the fire. And then he drove away from the scene.

This was a tragedy, and Isaac never should have lost his life. Unfortunately, the State highlighted the emotional weight of the case rather than proving the necessary elements. The jury heard from Isaac's mom. They looked at pictures of Isaac and his family. The jury listened to the residents of the apartment complex describe their escapes from the burning building. Additionally, the State told the jury that "life is sacred, Isaac's life was sacred," and that "[A]nybody that had a part in the taking of a life should be held responsible." (8.23.23. Trial Tr. at 628-629.) But that is not the law. Again, the evidence

presented failed to address the elements the State needed to prove. And while a motion to dismiss for insufficient evidence is used sparingly, a judge must grant the motion when the evidence falls short to protect a jury from making a decision based on emotions rather than the evidence.

Overall, looking at the State's case in a most favorable light, the evidence falls short of what a rational juror could find to support the essential elements of accountability for an assault with a weapon resulting in Isaac's death. And in this case, the district court erred in allowing this case to go the jury and only partially granting Jake's motion to dismiss for insufficient evidence.

CONCLUSION

The State failed to present sufficient evidence to convict Jake of deliberate homicide. This Court must reverse his conviction and remand to the district court to dismiss the charge with prejudice. *See State v. Boyd*, 2021 MT 323, ¶ 24.

Respectfully submitted this 18th day of August, 2025.

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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 8,087, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Jeavon C. Lang
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APPENDIX

Judgment..App. A

CERTIFICATE OF SERVICE

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