

DA 16-0138

IN THE SUPREME COURT OF THE STATE OF MONTANA

2018 MT 107N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

WILLIAM MICHAEL WINDSOR,

Defendant and Appellant.

APPEAL FROM: District Court of the Fourth Judicial District,
In and For the County of Missoula, Cause No. DC-14-509
Honorable James A. Haynes, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Colin M. Stephens, Smith & Stephens, P.C., Missoula, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Ryan W. Aikin, Assistant
Attorney General, Helena, Montana

Kirsten H. Pabst, Missoula County Attorney, Missoula, Montana

Submitted on Briefs: April 11, 2018

Decided: May 1, 2018

Filed:



Clerk

Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 William Michael Windsor (Windsor) appeals the jury verdict finding him guilty of two misdemeanor counts of violating an order of protection pursuant to § 45-5-626, MCA. We affirm.

¶3 This case involves a dispute between Windsor and Sean Boushie (Boushie), an employee of the University of Montana. In 2011, Boushie discovered a website which was objectionable to him as his name "started popping up" on it. This website was evidently operated by Windsor and owned by Windsor's wife, Barbara. Boushie sent the Windsors a letter demanding they stop referring to him in the website. Windsor then came to Montana where he engaged in odd behaviors including showing up at Boushie's work, filing police reports, and creating the website SeanBoushie.com where he posted false and derogatory statements about Boushie and Boushie's wife. In August 2013, Boushie obtained an order of protection prohibiting Windsor from communicating, directly or indirectly, with Boushie, Boushie's wife, or the University of Montana staff. The order of protection further required Windsor to release the objectionable website to Boushie. We affirmed the order of protection in *Boushie v. Windsor*, 2014 MT 153, 375 Mont. 301, 318 P.3d 631.

¶4 On October 3, 2014, Windsor was charged with two felony counts and three misdemeanor counts of violating an order of protection pursuant to § 45-5-626, MCA. On October 29, 2015, the District Court dismissed three of the counts, ultimately leaving two misdemeanor charges. During the two-day trial beginning on January 5, 2016, Windsor admitted to sending 44 legal documents to University of Montana staff attorney Claudia Denker-Eccles and to other University of Montana staff members over a period of a year and a half after issuance of the original order of protection. Windsor also admitted at trial that he had not released the SeanBoushie.com website to Boushie. The jury found Windsor guilty of both charges. Windsor was sentenced to two consecutive six-month sentences to the Missoula County Detention Facility, with all but the time he had served—134 days—suspended, and ordered to pay restitution and various fees. This appeal followed.

¶5 On appeal, Windsor now asserts he was wrongly convicted because he did not purposely or knowingly violate the order of protection as he did not believe sending an email to Denker-Eccles, a University of Montana staff member, or failing to release the website were violations of the order of protection. He further asserts (1) the District Court erred by not giving jury instructions defining “purposely” and “knowingly,” (2) the State committed a *Brady* violation when it did not produce evidence that Detective Shermer, the lead investigator in Windsor’s case, was previously disciplined for past misconduct, and (3) the State’s references to dismissed charges constitute plain error.

¶6 In criminal cases, we review jury instructions to determine if, as a whole, they fully and fairly instruct the jury on the applicable law. *State v. Kaarma*, 2017 MT 24, ¶ 7, 386

Mont. 243, 390 P.3d 609. When not raised below, we review *Brady* claims for plain error. *State v. Weisbarth*, 2016 MT 214, ¶ 18, 384 Mont. 424, 378 P.3d 1195. This Court may discretionarily review claimed errors that implicate a criminal defendant’s fundamental constitutional rights, even if no contemporaneous objection is made, under plain error review. *State v. Lackman*, 2017 MT 127, ¶ 9, 387 Mont. 459, 395 P.3d 477 (citing *State v. Godfrey*, 2004 MT 197, ¶ 22, 322 Mont. 254, 95 P.3d 166).

¶7 Section 45-5-626(1), MCA, criminalizes conduct or lack of conduct. In this case, that is the conduct prohibited or required by the order of protection. Although Windsor claimed to have some confusion as to what the order prohibited and required, the order of protection prohibited Windsor from contacting University of Montana staff and required him to release the website. The order of protection did not require his conduct produce any result. The District Court instructed the jury that to convict Windsor of violating an order of protection the State was required to prove Windsor had knowledge of the order of protection, he violated a provision of the order of protection, and he acted purposely or knowingly. The District Court also instructed the jury it could find Windsor not guilty if it found the order of protection was “vague” or “overbroad.” We find the District Court did not err in instructing the jury. The jury instructions on a whole fully and fairly instructed the jury on the applicable law.

¶8 Windsor asserts for the first time on appeal that the State failed to disclose evidence that Detective Shermer, who investigated the case, had been disciplined in 2010 for using illegal means to locate an offender in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963). To establish a *Brady* violation Windsor must show that: (1) the State

possessed evidence or information favorable to Windsor's defense, (2) Windsor did not possess the evidence and could not have obtained it with reasonable diligence, (3) the prosecution suppressed the favorable evidence, and (4) had the evidence been disclosed, a reasonable probability exists that the outcome of the trial would have been different. *State v. Ellenburg*, 2000 MT 232, ¶ 52, 301 Mont. 289, 8 P.3d 801 (citing *Gollehon v. State*, 1999 MT 210, ¶ 15, 296 Mont. 6, 986 P.2d 395).

¶9 Windsor has failed to meet his burden to establish a *Brady* violation. Even assuming Detective Shermer's disciplinary history was known to the State, could not reasonably be obtained by Windsor, and was not disclosed by the State, Windsor has failed to establish a reasonable probability that the outcome of his trial would have been different. Windsor's allegation has nothing to do with establishing his guilt or punishment. Although Detective Shermer was present at trial, the State established its proof without his testimony. The State established, through Windsor's own admissions, that: (1) Windsor had knowledge of the order of protection; (2) Windsor engaged in conduct that violated the provisions of the order of protection; and (3) Windsor acted purposely or knowingly. Windsor's defense was that he did not believe his conduct or lack of conduct was illegal as he believed the order of protection to be confusing or vague in its requirements. The jury found otherwise. Windsor has failed to establish any theory as to how Detective Shermer's disciplinary history has any relevance with Windsor's action or inaction, or with Windsor's beliefs as to what was or was not criminal conduct. Windsor has failed to establish a reasonable probability that production of Detective Shermer's disciplinary history would have affected the outcome of the trial.

¶10 Finally, although not raised below, Windsor now asserts the State violated his right to a fair trial and violated M. R. Evid. 410 when it referenced dismissed charges and plea negotiations when cross-examining him at trial. A review of the trial transcript indicates Windsor opened the door for the inquiry regarding dismissal of other charges and plea negotiations upon his direct testimony. Windsor further failed to object to the inquiry on cross-examination. Windsor's argument is not persuasive because it is clear from the record Windsor was able to object and did so numerous times during the State's cross-examination. Windsor cannot claim prejudice where he brought up the other charges during his own direct examination. Neither the State nor the District Court violated Windsor's right to a fair trial.

¶11 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review.

¶12 Affirmed.

/S/ INGRID GUSTAFSON

We concur:

/S/ DIRK M. SANDEFUR
/S/ BETH BAKER
/S/ JAMES JEREMIAH SHEA
/S/ JIM RICE