DA 17-0297

IN THE SUPREME COURT OF THE STATE OF MONTANA

2018 MT 310N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

THOMAS EMIL SLIWINSKI,

Defendant and Appellant.

APPEAL FROM: District Court of the First Judicial District,
In and For the County of Lewis and Clark, Cause No. BDC 2016-53
Honorable Michael F. McMahon, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

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

For Appellee:

Timothy C. Fox, Montana Attorney General, Katie F. Schulz, Daniel Guzynski, Mary E. Cochenour, Assistant Attorneys General, Helena, Montana

Leo J. Gallagher, Lewis & Clark County Attorney, Helena, Montana

Submitted on Briefs: November 28, 2018

Decided: December 18, 2018

Filed:

Clerk

Justice Jim Rice 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 Appellant Thomas Emil Sliwinski (Sliwinski) appeals his conviction of bail jumping, in violation of § 45-7-308, MCA, following jury trial in the First Judicial District, Lewis and Clark County.

¶3 Sliwinski was charged with bail jumping on September 9, 2004, after failing to appear for probation revocation proceedings on September 2, 2004, related to two previous felony convictions. Shortly after failing to appear, Sliwinski fled to Mexico and was not apprehended until 2015. Sliwinski was extradited to the United States, and ultimately to Montana, in January 2016 and was placed in custody in the Lewis and Clark County Detention Center. Sliwinski pled not guilty, and trial was held January 23-25, 2017.

¶4 Sliwinski filed a pre-trial motion in limine to exclude reference to his previous convictions. Specifically, Sliwinski sought to exclude:

> [E]vidence of any other crimes, wrongs, or acts allegedly committed by Defendant, including but not limited to the following: any prior convictions, specifically his convictions in Lewis and Clark County . . . the details of the allegations underlying those convictions, any reference to the Defendant's participation in any sex offender treatment and/or counseling, any other charges, arrests, citations, complaints, or convictions . . . and any references

> to the Defendant (1) having multiple wives; (2) being classified as a sexual offender; (3) being arrested and extradited back to Montana in 2015.

The State agreed that the convictions and underlying details were inadmissible, but argued that Sliwinski's probation status in those cases was admissible as relevant to the fact that he had to be extradited back to Montana. The District Court granted the motion in part and denied in part.

¶5 At trial, the State called Robert Ryan (Ryan), a "bounty hunter" who worked for the company that provided Sliwinski bail in 2004, as a witness in its case-in-chief. Ryan testified about his attempts to locate Sliwinski. During questioning by the State about evidence that had been offered about Sliwinski's apprehension, the following exchange occurred:

> The State: Did you—but is this—the report is just what one of [Sliwinski's] sons says happened, right?
>
> Ryan: Yes. And given the fact that Mr. Sliwinski had more or less devoted his entire life to indoctrinating and brainwashing his family—
>
> The State: I'm going to interrupt you right there if I could. I think that's all the questions I have. Thank you, Your Honor.

The court took a break immediately following Ryan's testimony. The defense did not make an objection at that time.

¶6 At the close of testimony that day, Juror No. 11 sent a note to the District Court that read: "I think I know this defendant's story. Not sure that matters, but maybe I should talk to the Judge." Upon inquiry, Juror No. 11 explained that after Ryan mentioned Sliwinski's residence at Stickney Creek and "brainwashing," she recalled hearing something about

Sliwinski and she realized she knew one of his children. After discussion on the record and joint motion by the parties, the court replaced Juror No. 11 with an alternate. Sliwinski then moved for a mistrial based on Ryan's statement about Sliwinski "indoctrinating" and "brainwashing" his children, alleging that it violated the court's order in limine and prejudiced his right to a fair trial. At that time, the trial transcript read that Ryan used the word "indoctrinating," but not "brainwashing." The court denied the motion, and did not give a cautionary instruction about Ryan's comment, and one was not requested. The next day, the jury found Sliwinski guilty of bail jumping.

¶7 A few days later, the court issued an amended written order denying the mistrial, but clarified that the official transcript revealed that Ryan mentioned both Sliwinski's "indoctrinating" and "brainwashing" his children, the latter of which did not appear on the draft trial transcript due to transcription error. The court granted the defense leave to file a renewed motion for mistrial. Sliwinski filed a renewed motion, the State responded, and the court held a hearing on the motion on March 16, 2017. The next day, the court issued a written order denying the renewed motion for a mistrial, relying on both the strength of the evidence against Sliwinski and the absence of prejudice to Sliwinski from Ryan's comment.

¶8 On appeal, Sliwinski argues the District Court abused its discretion by denying his motion for mistrial because the absence of overwhelming evidence of his guilt, coupled with the prejudicial effect of Ryan's statement, denied Sliwinski's right to a fair trial.

¶9 "We review the denial of a motion for a mistrial to determine whether the district court abused its discretion." *State v. Gunderson*, 2010 MT 166, ¶ 91, 357 Mont. 142, 237 P.3d 74. When determining whether to grant or deny a mistrial, this Court considers "whether the defendant has been denied a fair and impartial trial. A mistrial is considered an extreme remedy, only to be granted for manifest necessity as required by the ends of justice." *State v. Flores*, 1998 MT 328, ¶ 11, 292 Mont. 255, 974 P.2d 124 (internal citations omitted). "A mistrial is appropriate when a reasonable possibility exists that inadmissable [sic] evidence may have contributed to the conviction." *State v. Long*, 2005 MT 130, ¶ 24, 327 Mont. 238, 113 P.3d 290 (citation omitted). In determining whether a prohibited statement contributed to the conviction, a court must review the strength of the evidence against the defendant, the prejudicial influence of the inadmissible evidence, and whether a cautionary jury instruction could cure any prejudice. *Long*, ¶ 24. "'A mistrial should be denied, however, for technical errors or defects that do not affect the substantial rights of the defendant and the record is sufficient to establish the defendant's guilt.'" *Long*, ¶ 24 (quoting *State v. Brady*, 2000 MT 282, ¶ 14, 302 Mont. 174, 13 P.3d 941).

¶10 Here, the evidence consisting of Ryan's statement was arguably inadmissible because mention of Sliwinski "indoctrinating and brainwashing his family" falls into the scope of the court's order in limine, which requested exclusion of evidence underlying his previous convictions and any other "crimes, wrongs, or acts" committed by him. However, the strength of the evidence against Sliwinski was substantial. At trial, the evidence presented to the jury included testimony from Judge Jeffrey M. Sherlock, the judge who

was to preside over Sliwinski's hearing, who testified that Sliwinski did not appear before the court on September 2, 2004, for his hearing as ordered. Additionally, Jeremy Gersovitz, the attorney assigned to Sliwinski for the hearing, testified that Sliwinski did not appear before him on September 2, 2004. The evidence also included testimony from Sliwinski himself, who testified that although he arrived at the court at approximately 3:30 p.m. on September 2, 2004, he was unable to locate either Judge Sherlock or Gersovitz—so he left.

¶11 Then, three trial exhibits demonstrated inconsistencies in Sliwinski's testimony. First, Sliwinski's letter to Judge Sherlock, dated September 14, 2004, which made no mention of his attempt to locate either Judge Sherlock or Gersovitz at the court on Septemeber 2, 2004, but stated he had arrived at the court an "hour and a half late" on September 2 and additionally stated, "But this time, I am not here, I will go, for the legal system is blind. It wishes no truth to be known. Perhaps, they will catch me, but till [sic] that day comes, if it be one day or 100 years. . . ." Second, an email from Sliwinski to his probation officer was introduced, dated September 2, 2004, informing his probation officer that he would turn himself in on the following Tuesday because he hated "long weekends in jail." And third, an answer to a question on a probation and parole form, written by Sliwinski in 2016, stated, "I did a stupid thing by jumping bail, not living up to my probations [sic] agreement, should of [sic] used better judgement [sic]." The testimony of Judge Sherlock, Gersovitz, and Sliwinski, plus the three trial exhibits, demonstrate substantial evidence that Sliwinski committed the crime of bail jumping.

¶12 Regarding prejudicial effect of Ryan's comment, we note, first, that it was unsolicited and nonresponsive. And, although it caused a juror to recall her encounter with Sliwinski's son, the juror was removed and there is no evidence in the record that the comment evoked similar responses in any other jurors. The comment did not go to an element of the bail jumping offense—"indoctrinating," "brainwashing," and "family" are not material elements to the crime of bail jumping—and as such, was not evidence the jury needed to consider in determining whether Sliwinski was guilty of bail jumping. Thus, we conclude that the prejudice resulting from Ryan's comment did not rise to the level necessary to justify a mistrial.

¶13 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.

¶14 Affirmed.

/S/ JIM RICE

We concur:

/S/ JAMES JEREMIAH SHEA
/S/ BETH BAKER
/S/ INGRID GUSTAFSON
/S/ LAURIE McKINNON