DA 16-0741

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 177N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DONNIE DORRELL NOLAN,

Defendant and Appellant.

APPEAL FROM: District Court of the Thirteenth Judicial District,
In and For the County of Yellowstone, Cause No. DC 15-0610
Honorable Ingrid Gustafson, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

William F. Hooks, Law Office of William F. Hooks, Helena, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Roy Brown, Assistant Attorney General, Helena, Montana

Scott D. Twito, Yellowstone County Attorney, Christopher A. Morris, Deputy County Attorney, Billings, Montana

Submitted on Briefs: May 1, 2019

Decided: July 30, 2019

Filed:

Justice Laurie McKinnon 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 A jury in the Thirteenth Judicial District Court, Yellowstone County, found Donnie Dorrell Nolan (Nolan) guilty of assault on a peace officer, obstructing a peace officer, and violation of a no contact order. As part of his sentence, the District Court ordered Nolan to pay a $10 information technology fee (IT fee) for each of the three counts. Nolan appeals his convictions and takes issue with the three IT fees. We affirm Nolan's convictions but conclude the District Court erred by imposing a separate IT fee for each count and accordingly remand to the District Court for amendment of the judgment.

¶3 Nolan had a 24-year on-and-off relationship with Linda. Nolan, Linda, and Linda's 20-year-old son Jarred lived at 225 Jackson Street in Billings. On May 4, 2015, a municipal court issued a no contact order pursuant to § 45-5-209, MCA, naming Linda as the protected person and prohibiting Nolan from contacting her or going near her residence or workplace. In May 2015, Linda and Jarred decided to move out of 225 Jackson. The two began to move and planned on being out of 225 Jackson by the end of June.

¶4 On June 23, 2015, at 2:00 a.m., Jarred was watching a movie at 225 Jackson when he heard a voice outside of the front door. Jarred looked out of a window and saw Nolan on the front steps. Jarred became concerned because he knew about the no contact order, so he called Linda, who was staying at her mother's house that night, to tell her Nolan was at 225 Jackson. Linda called the police and drove to 225 Jackson. By the time Linda and the police arrived, Nolan was no longer there.

¶5 Officer Vickery responded to Linda's call and spoke with Jarred and Linda. Jarred described Nolan to Officer Vickery. Officer Stovall arrived at the residence, and Officer Vickery directed him to find Nolan, who was presumably traveling on foot nearby. Officer Vickery provided Officer Stovall with Nolan's physical description. Officer Stovall eventually located a person who matched Nolan's description walking nearby. Officer Stovall pulled his car over, turned on his spotlight, exited his vehicle, and said, "Police, stop." The person, who was later identified as Nolan, replied, "What the fuck do you want? I don't have to stop. I have Fourth Amendment rights." Officer Stovall explained he was looking for a person matching Nolan's description and provided the description to Nolan. Nolan replied, "Fuck you." Officer Stovall asked Nolan for his name, Nolan responded, "I ain't going to tell you shit." Officer Stovall told Nolan that he needed to tell him his name, and Nolan again replied, "Fuck you." Officer Stovall told Nolan he was under arrest and that he needed to turn around and

place his hands behind his back. At that point, Officer Stovall activated his microphone,[1] which began an audio recording that captured the following exchange:

> **NOLAN:** Fuck you!
>
> **OFFICER STOVALL:** Turn around and face away from me now.
>
> **NOLAN:** What about my Fourth Amendment right, I ain't no bitch. [inaudible] You ain't gonna stop me. Fuck you! Fuck you!
>
> **OFFICER STOVALL:** Turn around and face away from me now.
>
> **NOLAN:** Fuck you! Do what you do then! Do what you do then! You got beef? Do what you do! [inaudible]
>
> **OFFICER STOVALL:** Turn around and face away from me now.
>
> **OFFICER STOVALL:** [Shuffling sound.] Stop where you are right now! I'll hit you with a taser right now!
>
> **NOLAN:** You hit me, you hit me, and I'm gonna hit your mothafuckin ass back.
>
> **OFFICER STOVALL:** Drop down on your knees right now.
>
> **NOLAN:** Fuck you! I have a Fourth Amendment right. Pop me! And I will [inaudible] your mothafuckin ass.
>
> **OFFICER STOVALL:** Drop down to your knees. Drop down on your knees now.

¶6 The conversation continues, with Nolan using foul language and Officer Stovall repeatedly telling Nolan to drop to his knees. Officer Stovall's dashcam video did not capture most of the exchange. Officer Stovall testified at trial that, after he told Nolan he

[1] When Officer Stovall activated his microphone, his dashcam system turned on and saved the previous minute of video. There is, accordingly, a one-minute soundless video, and then the audio activated. The patrol car was pointed straight ahead with a view of the street, and because the interaction between Officer Stovall and Nolan occurred primarily on the sidewalk, the video does not capture most of the interaction.

was under arrest and told him to turn around and put his hands behind his back, Nolan stood straight up, clenched both fists, and started to advance toward Officer Stovall. Officer Stovall called for backup. As Nolan advanced, Officer Stovall did not have time to get his taser out of its holster, so he kicked Nolan in the chest to make room between them. Nolan advanced again and Officer Stovall fired his taser at Nolan, but it was ineffective because one of the probes missed Nolan. Nolan began punching at Officer Stovall, striking him on the back portion of his head twice. Officer Stovall stepped back, struck Nolan, and Nolan went backwards. Officer Stovall unholstered his pepper spray and shot Nolan with the spray. Nolan ran down the street and onto a house's front porch; Officer Stovall ran after him. Eventually, Officer Stovall unholstered his firearm and ordered Nolan to lay on the ground. Nolan laid down. At that point, Officer Vickery arrived to assist, and the officers secured Nolan. Officer Vickery asked Nolan, "Are you Donnie Nolan?" Nolan did not respond. The officers transported Nolan to a patrol car and repeatedly asked him, "What is your name?" Nolan never replied, but the officers eventually obtained his identification and verified his identity.

¶7 The State charged Nolan with assault on a peace officer for punching Officer Stovall, obstructing a peace officer for not providing his name, and violation of a no contact order for being outside of 225 Jackson. Nolan's trial lasted a day and a half. During jury deliberations, the jury submitted three questions to the District Court, which the court refused to answer. The jury also requested to see Officer Stovall's dashcam video again. Neither party objected, and the District Court permitted the video to be played for the jury. After over three hours of deliberation, the jury informed the

District Court that it could not reach a unanimous verdict regarding the assault on a peace officer charge. Over Nolan's objection, the District Court read the *Norquay* instruction to the jury. The jury deliberated an additional two hours and ultimately returned a unanimous guilty verdict on all three counts. Later, the District Court sentenced Nolan. As part of his sentence, the court ordered Nolan to pay a $10 IT fee for each count. Nolan argues three issues on appeal, which we address in turn.

¶8 First, Nolan argues the State failed to prove, beyond a reasonable doubt, all elements of the offenses of violating a no contact order and obstructing a peace officer. The State must prove each factual element of a charged offense beyond a reasonable doubt. *State v. Mills*, 2018 MT 254, ¶ 24, 393 Mont. 121, 428 P.3d 834; *State v. Price*, 2002 MT 284, ¶ 33, 312 Mont. 458, 59 P.3d 1122 (citing *In re Winship*, 397 U.S. 358, 363-64, 90 S. Ct. 1068, 1072-73 (1970) ("[T]he 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.")). If a defendant believes the State failed to prove every element, he may request the court dismiss the case for insufficient evidence. When considering the defendant's motion, the court views the evidence in the light most favorable to the prosecution and will only dismiss the case if no rational trier of fact could find the essential elements of the charged offense beyond a reasonable doubt. *State v. McAlister*, 2016 MT 14, ¶ 6, 382 Mont. 129, 365 P.3d 1062; *State v. Trujillo*, 2008 MT 101, ¶ 8, 342 Mont. 319, 180 P.3d 1153.

¶9 This Court reviews a district court's decision regarding an insufficiency of the evidence motion to determine whether, after reviewing the evidence in the light most

favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Yuhas*, 2010 MT 223, ¶ 7, 358 Mont. 27, 243 P.3d 409. We inquire as to whether evidence exists to support the verdict, not whether the evidence could have supported a different result. *State v. Sheehan*, 2017 MT 185, ¶ 17, 388 Mont. 220, 399 P.3d 314. It is within the jury's exclusive province to weigh the witnesses' credibility and determine which version of events should prevail. *Sheehan*, ¶ 17.

¶10 Nolan argues the State failed to prove he violated the no contact order. Section 45-5-209(8)(a), MCA, provides: "A person commits the offense of violation of a no contact order if the person . . . purposely or knowingly violates any provision of any order issued under this section." The no-contact order named Linda as a protected person and mandated that Nolan "stay at least 1500 feet away from the residence, workplace, or other location of the protected person(s)." The District Court instructed the jury that, for it to find Nolan guilty, the State needed to prove: (1) Nolan violated the order of protection by coming within 1500 feet of Linda's residence; and (2) Nolan acted purposely or knowingly.

¶11 On appeal, Nolan faults the District Court for failing to instruct the jury about the definition of "residence," arguing that 225 Jackson, where Jarred testified he saw Nolan, was not Linda's "residence" on June 23, 2015. The District Court concluded the jury was responsible for resolving the factual question of where Linda resided, and we agree. *See State v. Larson*, 2004 MT 345, ¶ 59, 324 Mont. 310, 103 P.3d 524 ("[C]redibility of

witnesses and the weight to be given to their testimony are to be determined by the trier of fact . . . .").

¶12 We conclude the State presented enough evidence from which a rational trier of fact could have found that Linda resided at 225 Jackson on June 23, 2015, beyond a reasonable doubt. "The testimony from any one witness, that the jury believes, is sufficient to prove any fact in a case." *State v. Bowen*, 2015 MT 246, ¶ 30, 380 Mont. 433, 356 P.3d 449. At trial, Linda testified that 225 Jackson was still her place of residence on June 23, 2015, and that she planned to move out at the end of June. Jarred also testified that Linda lived at 225 Jackson on June 23, 2015. Nolan, on the other hand, testified that Linda did not reside at 225 Jackson because she was supposed to have moved out. Linda's and Jarred's testimonies were sufficient to prove 225 Jackson was Linda's place of residence on June 23, 2015. *See Larson*, ¶ 59 ("[D]isputed questions of fact and credibility will not be disturbed on appeal."). We conclude a rational trier of fact could have concluded Linda resided at 225 Jackson on June 23, 2015, beyond a reasonable doubt, and accordingly affirm the District Court's denial of Nolan's motion to dismiss for insufficient evidence.

¶13 Nolan further argues the State did not prove he obstructed a peace officer. Section 45-7-302(1), MCA, provides, "A person commits the offense of obstructing a peace officer . . . if the person knowingly obstructs, impairs, or hinders the enforcement of the criminal law, the preservation of the peace, or the performance of a governmental function . . . ." To establish the elements of obstructing a peace officer, the State must show the defendant engaged in conduct under circumstances that made him "aware that it

is highly probable that such conduct [would] impede the performance of a peace officer's lawful duty." *City of Kalispell v. Cameron*, 2002 MT 78, ¶ 11, 309 Mont. 248, 46 P.3d 46; *accord State v. Eisenzimer*, 2014 MT 208, ¶ 11, 376 Mont. 157, 330 P.3d 1166. The District Court instructed the jury that, for it to find Nolan guilty, the State needed to prove: (1) Nolan "obstructed, impaired, or hindered the enforcement of the criminal law, the preservation of the peace, or the performance of a governmental function"; and (2) Nolan acted knowingly.

¶14 We conclude that, based on the evidence presented at trial, a rational trier of fact could have found the essential elements of obstructing a peace officer beyond a reasonable doubt. Officer Stovall requested Nolan stop when he saw Nolan walking down the street. Officer Stovall told Nolan he was stopping him because he was looking for a male matching Nolan's description. Thereafter, Nolan refused to provide his name, used foul language, and became physically combative. Even after the officers arrested Nolan, Nolan continued to refuse to provide his name. The officers confirmed Nolan's identity only after obtaining his identification. Based on those facts, we conclude a rational trier of fact could have found Nolan was aware of a high probability that his conduct would impede the performance of Officer Stovall's lawful duty. *See Cameron*, ¶ 11. Because a rational trier of fact could have found all elements of the offense of obstructing a peace officer beyond a reasonable doubt, we affirm the District Court's denial of Nolan's motion to dismiss for insufficient evidence.

¶15 Second, Nolan argues the District Court prejudicially affected his substantial rights when it provided a *Norquay* instruction to the deadlocked jury. We review jury

instructions in a criminal case to determine whether the instructions, as a whole, fully and fairly instruct the jury on the applicable law. *State v. Santiago*, 2018 MT 13, ¶ 7, 390 Mont. 154, 415 P.3d 972. A district court has broad discretion when it instructs a jury and we will only reverse if the instructions prejudicially affected the defendant's substantial rights. *Santiago*, ¶ 7.

¶16 A district court may provide a supplemental jury instruction—an "*Allen*" or "*Norquay*" instruction—to a deadlocked jury. *Santiago*, ¶ 10; *State v. Norquay*, 2011 MT 34, ¶ 33, 359 Mont. 257, 248 P.3d 817. "The instruction is meant to remind the jury of its responsibilities to consider the facts of the case, deliberate with one another, and attempt to reach a unanimous verdict." *Santiago*, ¶ 10. However, defendants are constitutionally entitled to an uncoerced jury verdict and, accordingly, the instruction may not "place undue pressure upon the jury to reach a verdict." *Norquay*, ¶ 32; *accord Santiago*, ¶ 9. We have already repeatedly determined the text of the *Norquay* instruction "appropriately encourages a deadlocked jury to continue deliberations while still protecting a defendant's right to an uncoerced jury verdict by encouraging jurors to stay true to their strongly held convictions." *See, e.g.*, *Santiago*, ¶ 17.

¶17 Here, Nolan does not challenge the *Norquay* instruction's text; instead, he argues the instruction had an impermissibly coercive impact on the deadlocked jury in the circumstances of this case. After approximately three hours of deliberation, the jury notified the District Court it was deadlocked regarding the assault on a peace officer charge. At trial, Officer Stovall testified Nolan punched him in the head. Nolan testified he did not punch Officer Stovall in the head. Officer Stovall's dashcam video did not

show Nolan punch Officer Stovall, but most of the interaction was out of the camera's view. During their deliberations, the jury asked to view the dashcam video again. Neither party objected, and the District Court permitted the jury to watch the video.

¶18 Nolan argues the *Norquay* instruction was impermissibly coercive because no physical evidence corroborated Officer Stovall's testimony that Nolan punched him in the head, the jury was clearly dealing with uncertainty based on its request to view the dashcam video during deliberations, and the jury was still at an impasse after viewing the video. Nolan reasons the District Court had other options besides providing the *Norquay* instruction: it could have accepted that the jury was deadlocked on that count or simply asked the jurors to "Please continue your deliberations."

¶19 The District Court had broad discretion in instructing the jury, and we conclude the *Norquay* instruction did not prejudicially affect Nolan's substantial rights. *See Santiago*, ¶ 7. The jury deliberated three hours, re-watched the dashcam video, and was deadlocked regarding the assault on a peace officer charge. While Nolan is correct in his reasoning that the District Court had other options besides the *Norquay* instruction, we cannot find it abused its discretion by giving it. The instruction appropriately encouraged the deadlocked jury to continue its deliberations while still protecting Nolan's right to an uncoerced jury verdict by telling jurors to stay true to their strongly held convictions. *See Santiago*, ¶ 17. We accordingly affirm Nolan's conviction for assaulting a peace officer.

¶20 Finally, the State concedes Nolan's third issue, regarding the District Court's imposition of the IT fee. The District Court cited § 3-1-317, MCA, and ordered Nolan to

pay "$10.00 per count for court information technology fee." However, § 3-1-317(1)(a), MCA, provides, "[A]ll courts of original jurisdiction shall impose . . . a $10 user surcharge [for court information technology] upon conviction for any conduct made criminal by state statute . . . ." The statute requires a "user surcharge," which implies a surcharge "per user upon conviction, and not per conviction of that user." *State v. Ellison*, 2017 MT 88, ¶ 24, 387 Mont. 243, 393 P.3d 192. The District Court erred when it assessed a $10 per-count IT fee. We remand to the District Court with instructions to strike the $10 per-count IT fee and, pursuant to § 3-1-317(1)(a), MCA, impose only one $10 user surcharge for court information technology.

¶21 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent.

¶22 Nolan's convictions are affirmed but we remand to the District Court for amendment of the judgment consistent with this Opinion.

/S/ LAURIE McKINNON

We concur:

/S/ MIKE McGRATH
/S/ DIRK M. SANDEFUR
/S/ BETH BAKER
/S/ JAMES JEREMIAH SHEA