DA 18-0233

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 52

STATE OF MONTANA,

Plaintiff and Appellee,

v.

LEONARD HIGGINS,

Defendant and Appellant.

APPEAL FROM: District Court of the Twelfth Judicial District,
In and For the County of Chouteau, Cause No. DC 16-18
Honorable Daniel A. Boucher, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Herman Austin Watson, IV, Attorney at Law, Bozeman, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Michael Patrick Dougherty, Assistant Attorney General, Helena, Montana

Stephen A. Gannon, Chouteau County Attorney, Fort Benton, Montana

Submitted on Briefs: January 29, 2020

Decided: March 3, 2020

Filed:

Clerk

Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 Defendant and Appellant Leonard Higgins (Higgins) appeals from the jury verdict and subsequent Judgment and Sentenc[e] issued on April 23, 2018, by the Twelfth Judicial District Court, Chouteau County. We affirm.

¶2 We restate the issues on appeal as follows:

> *1. Whether the District Court erred in denying Higgins's request to assert the common law defense of necessity and in refusing Higgins's jury instructions regarding the common law defense of necessity.*
>
> *2. Whether the District Court erred in denying Higgins's motions for directed verdict as to the criminal mischief charge and in ordering $3,755.47 in restitution.*

FACTUAL AND PROCEDURAL BACKGROUND

¶3 On October 19, 2016, Higgins was charged with misdemeanor criminal trespass and felony criminal mischief resulting from Higgins unlawfully entering a pipeline facility near Big Sandy and damaging the pipeline's property. Prior to trial, Higgins notified the District Court he intended to present the common law defense of necessity.

¶4 After raising a family and retiring, Higgins became increasingly concerned about climate change and the means and speed by which it was being combatted. As such, Higgins began lobbying legislators, organizing rallies, and engaging in various acts of civil disobedience which he believed were designed to educate the public about climate change. On October 11, 2016, after cutting a chain to gain access to the Spectra/Enbridge (the pipeline company) pipeline facility, Higgins cut two more chains to access the valve wheel and used manual controls to shut off the flow of oil. In doing this, Higgins also

inadvertently damaged the actuator cover. The pipeline company was provided advance notification of Higgins's plan to shut down the flow of tar sands oil through the company's pipeline.

¶5 Higgins characterized his conduct at issue here as another act of civil disobedience. He sought to use the common law necessity defense—presenting evidence and expert testimony to establish the imminence of climate change, the effectiveness of civil disobedience, and the absence of other lawful alternatives—at trial. The State filed a motion in limine to preclude Higgins from presenting a necessity defense, which the District Court granted.[1] At the conclusion of the State's case, Higgins made a motion for directed verdict on the felony criminal mischief offense asserting the State failed to prove a pecuniary loss in excess of $1,500, which the District Court denied. Following jury trial, the jury found there was sufficient evidence to establish damage in excess of $1,500 and found Higgins guilty of both offenses. Following a restitution and sentencing hearing, Higgins's sentence for the felony criminal mischief charge was deferred for a period of three years and a concurrent six-month suspended sentence was imposed on the misdemeanor criminal trespass charge. Higgins was also ordered to pay $3,755.47 in restitution. Additional facts will be discussed below as necessary.

[1] In addition to not permitting evidence at trial in support of his necessity defense, the District Court also refused the three jury instructions Higgins submitted in support of the necessity defense.

STANDARD OF REVIEW

¶6 A district court may determine whether an affirmative defense exists as a matter of law. *State v. Leprowse*, 2009 MT 387, ¶ 11, 353 Mont. 312, 221 P.3d 648. We review a district court's denial of an affirmative defense for correctness. *State v. Lynch*, 2005 MT 337, ¶ 7, 330 Mont. 74, 125 P.3d 1148. We review a district court's refusal of a jury instruction regarding an affirmative defense for abuse of discretion. *State v. Nelson*, 2001 MT 236, ¶ 10, 307 Mont. 34, 36 P.3d 405. We review a district court's examination of a witness for abuse of discretion. *State v. Hibbs*, 239 Mont. 308, 311, 780 P.2d 182, 184 (1989). We review a district court's denial of a motion for directed verdict de novo. *State v. Swann*, 2007 MT 126, ¶ 17, 337 Mont. 326, 160 P.3d 511. Finally, we review a district court's award of restitution to determine if it is clearly erroneous. *State v. Cleveland*, 2018 MT 199, ¶ 7, 392 Mont. 338, 423 P.3d 1074.

DISCUSSION

¶7 *1. Whether the District Court erred in denying Higgins's request to assert the common law defense of necessity and in refusing Higgins's jury instructions regarding the common law defense of necessity.*

¶8 Higgins contends his action of accessing the pipeline and shutting off the flow of oil was an act of civil disobedience in protest of the fossil fuel industry to draw attention to climate change. He asserts he has a constitutional right to present a full defense and by denying him the ability to present the common law necessity defense, he was improperly precluded from testifying about his intent. The State counters that the common law necessity defense is not available to Higgins as the common law defense of necessity has

been merged into the statutory affirmative defense of compulsion codified at § 45-2-212, MCA, and the elements underlying the necessity defense are no longer applicable in Montana with one exception not applicable here.[2] *City of Helena v. Lewis*, 260 Mont. 421, 426, 860 P.2d 698, 701 (1993). The State asserts that when a particular defense is not available as a matter of law, evidence in support of that defense cannot be relevant and should be precluded. As such, excluding Higgins's testimony and exhibits regarding climate change and its imminent dangers was proper because it was irrelevant. The State also asserts Higgins did testify regarding his intent and motive in engaging in this act of civil disobedience. We agree with the State.

¶9 In *Lewis*, we explained application of the necessity defense in Montana:

> This Court recently clarified the applicability of the "necessity" defense in Montana and concluded that the defense has been codified in § 45-2-212, MCA. *State v. Ottwell* (1989), 240 Mont. 376, 379, 784 P.2d 402, 404. In *Ottwell*, we explained that the defenses of necessity, justification, compulsion, duress, and the "choice of two evils" have been merged statutorily and labeled "compulsion" under § 45-2-212, MCA. *Ottwell*, [240 Mont. at 379,] 784 P.2d at 404. Thus, the common law elements and distinctions between the aforementioned defenses are no longer applicable in Montana, with one exception which is inapplicable here. *Ottwell*, [240 Mont. at 379-80,] 784 P.2d at 404; *see also State v. Pease* (1988), 233 Mont. 65, 71, 758 P.2d 764, 768.

Lewis, 260 Mont. at 426, 860 P.2d at 701.

[2] The exception recognized by this Court occurs where necessity may excuse a prison escape when warranted by appropriate circumstances. Clearly, this exception does not apply to the facts of this case.

¶10 In *Nelson*, Nelson urged us to recognize the common law defense of necessity and follow the holding of the Supreme Court of Vermont in *State v. Shotton*, 458 A.2d 1105 (Vt. 1983).

> In *Shotton*, a state trooper noticed the defendant driving irregularly on a public highway. [*Shotton*, 458 A.2d] at 1105. After following her for a couple of miles, he pulled her over and asked her to exit the vehicle. [*Shotton*, 458 A.2d] at 1105-06. He then took her to the police station, where she told him and another officer that her husband had assaulted her and pushed her down a flight of stairs. [*Shotton*, 458 A.2d] at 1106. She also told them that the reason she had been driving was to get to the hospital. [*Shotton*, 458 A.2d at 1106]. The officers then took her to the emergency room, where they discovered that she had multiple rib fractures and would require a five-day hospital stay. [*Shotton*, 458 A.2d at 1106]. She later testified at trial that her husband was the only other person home that night and that he had been drinking heavily. [*Shotton*, 458 A.2d at 1106]. She did not have a working telephone in her house and, although the neighbors' homes were close by, she was unwilling to risk finding them empty. [*Shotton*, 458 A.2d at 1106]. The court held that this evidence raised legitimate factual issues relating to the defense of necessity. *See* [*Shotton*, 458 A.2d] at 1107. The court therefore reversed and remanded to the trial judge with directions to instruct the jury on the issue of necessity. [*Shotton*, 458 A.2d at 1107].

Nelson, ¶ 16. We declined to follow the Supreme Court of Vermont's holding in *Shotton*, finding the District Court did not abuse its discretion in refusing to give Nelson's instruction on the defense of necessity, as in opposition to *Shotton*, Nelson did not involve a medical emergency or any injury to Nelson and Nelson was not blameless in creating the emergency but had self-created his predicament which had multiple solutions.

¶11 In his pre-trial filings, Higgins asserted a common law necessity defense consistent with *United States v. Schoon*, 971 F.2d 193 (9th Cir. 1991). Under *Schoon*, to invoke the necessity defense, a defendant must show that: (1) he faced a choice of evils and chose the

lesser evil; (2) he acted to prevent imminent harm; (3) he reasonably anticipated a direct causal relationship between his action and the harm averted; and (4) he had no reasonable lawful alternatives to breaking the law. *Schoon*, 971 F.2d at 195 (citing *United States v. Aguilar*, 883 F.2d 662, 693 (9th Cir. 1989)). In *Schoon*, Schoon, Kennon, and Manning appealed their convictions for obstructing activities of the IRS and for failing to comply with an order of a federal police officer—both of which stemmed from their activities in protest of the United States's involvement in El Salvador. Thirty people, including Schoon, gained admittance to an IRS office where they splashed simulated blood on the counters, walls, and carpets, generally obstructed the office's operation, and shouted, "keep America's tax dollars out of El Salvador." At a bench trial, appellants proffered testimony about conditions in El Salvador as the motive for their protest actions, asserting such were necessary to avoid further violence in El Salvador. Despite finding the appellants' conduct was motivated by humanitarian concern, the district court precluded them from asserting the common law defense of necessity as the requisite immediacy was lacking, their actions would not abate the evil, and other legal alternatives existed. On review, the Ninth Circuit Court of Appeals found it could affirm on the grounds set forth by the lower court, but went further concluding the necessity defense to be inapplicable to cases involving indirect civil disobedience:

> As used in this opinion, "civil disobedience" is the wil[l]ful violation of a law, undertaken for the purpose of social or political protest. *Cf. Webster's Third New International Dictionary* 413 (unabridged, 1976) ("refusal to obey the demands or commands of the government" to force government concessions). Indirect civil disobedience involves violating a law or

> interfering with a government policy that is not, itself, the object of protest. Direct civil disobedience, on the other hand, involves protesting the existence of a law by breaking that law or by preventing the execution of that law in a specific instance in which a particularized harm would otherwise follow. *See* Note, *Applying the Necessity Defense to Civil Disobedience Cases*, 64 N.Y.U. L. Rev. 79, 79-80 & n.5 (1989). This case involves indirect civil disobedience because these protestors were not challenging the laws under which they were charged. In contrast, the civil rights lunch counter sit-ins, for example, constituted direct civil disobedience because the protestors were challenging the rule that prevented them from sitting at lunch counters. Similarly, if a city council passed an ordinance requiring immediate infusion of a suspected carcinogen into the drinking water, physically blocking the delivery of the substance would constitute direct civil disobedience: protestors would be preventing the execution of a law in a specific instance in which a particularized harm - contamination of the water supply - would otherwise follow.

Schoon, 971 F.2d at 195-96.

¶12 The case before us, like *Schoon*, does not present a direct civil disobedience. Higgins was not protesting criminal mischief or criminal trespass laws but rather engaging in indirect civil disobedience involving violation of a law that is not, itself, the object of protest. Additionally, like *Schoon*, the lower court found lack of immediacy in the harm. Thus, even under application of *Schoon*, the common law defense of necessity is not available to Higgins.

¶13 Presumably recognizing application of *Schoon* would not result in the relief he seeks, on appeal Higgins now urges, similar to *Nelson*, application of an out-of-state authority—*State v. Klapstein*, No. A17-1649, 2018 Minn. App. Unpub. LEXIS 312 (Apr. 23, 2018), *review denied*, 2018 Minn. LEXIS 418 (July 17, 2018)—by which his necessity defense may be evaluated "obviating the need for a formalist analysis that would

look only to the statutory compulsion defense." Higgins asserts the Minnesota trial court permitted the necessity defense offered by fellow activists who had similarly turned pipeline valves upon a pre-trial proffer of evidence and expert testimony substantially similar to Higgins's proffer, and the trial court court's allowance of this defense was upheld by the Minnesota Supreme Court on review. We are not persuaded by this argument as it is raised for the first time on appeal and it urges us to consider an unpublished, non-precedential opinion of the Minnesota Court of Appeals.

¶14 Next, Higgins contends the questions posed of Higgins by the District Court at trial—most primarily, "So at no point did you feel your life was being directly threatened by [the pipeline company]; is that right?"—unfairly raised the necessity issue. Higgins asserts he was then prejudiced by not being able to present additional evidence supporting the defense and also by the implicit suggestion to jurors he had incorrectly argued an available legal theory. The State asserts Higgins, not the District Court, initially raised the issue and Higgins failed to timely object to any questions asked by the District Court. We agree with the State.

¶15 During Higgins's testimony, in response to his counsel's questioning, Higgins addressed his perception of the immediacy of climate change—"what will happen to, not so much me, but to my kids and grandkids if we do not do something about [climate change]." In its follow-up questions, the District Court merely sought clarification as to Higgins's perception of the immediacy of the climate problem. As Higgins raised the issue, it was not an abuse of discretion for the District Court to ask him follow up questions

regarding the issue. Further, Higgins did not contemporaneously object, thus depriving the District Court the opportunity to address the issue during trial. Under these circumstances, the District Court did not abuse its discretion in its examination of Higgins at trial.

¶16 Here, based on this record, the District Court was correct in concluding the common law defense of necessity was not available to Higgins. By extension, it cannot then be an abuse of discretion for the District Court to have refused Higgins's three proposed necessity defense jury instructions.

¶17 *2. Whether the District Court erred in denying Higgins's motions for directed verdict as to the criminal mischief charge and in ordering $3,755.47 in restitution.*

¶18 Upon the State resting, Higgins made a motion for a directed verdict as to the felony criminal mischief charge, arguing the State failed to present sufficient evidence of pecuniary loss of more than $1,500.[3] Higgins argued the State could only point to the damage to the chains and actuator, the replacement of which totaled only $937.69—less than the necessary $1,500 to establish the felony offense. Tied to this argument, Higgins also asserts the District Court later erred in imposing $3,755.47 in restitution, arguing only $937.69 was permitted by law and supported by the evidence.

¶19 Pecuniary loss includes economic loss to the victim including, "all special damages, but not general damages, substantiated by evidence in the record, that a person could

[3] Pursuant to § 45-6-101(1)(a), MCA, a person commits the offense of criminal mischief if the person purposely or knowingly injures, damages, or destroys another's property without consent. If a person commits a criminal mischief and causes pecuniary loss in excess of $1,500 the offender may be imprisoned for up to 10 years. Section 45-6-101(3), MCA. Basically, the offense of criminal mischief becomes a felony when the pecuniary loss caused is in excess of $1,500.

recover against the offender in a civil action arising out of the facts or events constituting the offender's criminal activities . . . ." Section 46-18-243(1)(a), MCA. Higgins contends the inconvenience of the incident to the pipeline company did not amount to economic damage as shutting down and starting up the pipeline were part of usual business operations and a "normal cost of doing business."

¶20 From our review of the record, substantial evidence supports the denial of Higgins's motion for directed verdict. Mike Graham (Graham), the pipeline company's operating manager, testified Higgins's actions caused the company to go from having a normal day to responding to an emergency. Graham testified that upon receiving the notification that Higgins intended to access pipeline property and close the pipeline valve, pursuant to company protocols, the entire pipeline had to be emergently shut down. This required he and another supervisor, Brian Barrett (Barrett), to each spend at least eight hours that day responding to the situation. Graham and Barrett are usually billed out for internal projects within the company at a rate of $100 per hour. Graham testified the replacement cost of the chains Higgins cut was $100 and the cost of replacing the actuator damaged by Higgins was $837.69. Graham further testified two pipeline technicians had to be diverted from their other usual work to travel 75 miles to the valve site to address the pipeline shutdown and the damage caused by Higgins to the chains and actuator. Once on site, these technicians each spent six and a half hours correcting the situation and inspecting the pipeline. These technicians were paid $43.12 per hour and reimbursed for travel at the rate of approximately $0.50 per mile. While Graham and Barrett usually perform operational

work for the pipeline, the work they performed in response to Higgins's actions would not have been performed in the usual course of their work but for the actions of Higgins and did not merely involve cooperation with or participation in the prosecution of the case. Likewise, while the two technicians usually performed pipeline maintenance and inspection, the work they were required to perform at the valve site was work that would not have had to be performed but for the actions of Higgins and did not merely involve cooperation with or participation in the prosecution of the case. Thus, these particular employee expenses were directly attributable to Higgins's actions and includable under § 46-18-243(1)(a), MCA. This testimony alone was sufficient to warrant the District Court's denial of Higgins's motion for directed verdict.

¶21 Following the jury's guilty verdicts, the District Court later conducted a restitution and sentencing hearing. At this hearing, Higgins asserted only $937.69 in restitution was permitted by law and the State urged the District Court to impose over $25,000 in restitution based on Graham's affidavit which was provided with Higgins's Pre-Sentence Investigative Report. At the hearing, probation officer, Marcy Inman (Inman), testified that approximately $20,000 of the restitution requested in Graham's affidavit included the cost of upgrading chains at every pump station owned by the pipeline company in the U.S. and Canada and were not expenses directly caused by Higgins's criminal conduct. She testified, without objection, to seeing an email from Graham outlining $2,817.78 in

employee wage expenses directly attributable to Higgins's criminal conduct.[4] This figure is substantially consistent with the employee wage expenses set forth in Graham's affidavit of $2,819.08. Inman also testified as to the $937.69, not contested by Higgins, for replacement of the chains and the actuator.

¶22 It is apparent the District Court accepted as credible the un-objected testimony of Inman as to the employee expenses directly attributable to Higgins's criminal conduct—$2,817.78—and added that amount to the $937.69 to obtain the restitution ordered of $3,755.47. Given Inman's testimony combined with Graham's trial testimony, the restitution ordered by the District Court was not clearly erroneous but rather based on substantial, credible evidence.

CONCLUSION

¶23 The District Court did not err in denying Higgins's request to assert the common law defense of necessity or in refusing Higgins's necessity defense jury instructions as the court correctly determined the common law defense of necessity was not available to Higgins under the circumstances of this case. Further, the District Court did not err in denying Higgins's motion for directed verdict as to the criminal mischief charge or in ordering restitution in the amount of $3,755.47.

¶24 Affirmed.

/S/ INGRID GUSTAFSON

[4] This email was not submitted and is not part of the record.

We concur:

/S/ DIRK M. SANDEFUR
/S/ LAURIE McKINNON
/S/ BETH BAKER
/S/ JIM RICE