DA 19-0342

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 36N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

BRIAN ALAN ROBERTSON,

Defendant and Appellant.

APPEAL FROM: District Court of the Eighteenth Judicial District,
In and For the County of Gallatin, Cause No. DC 18-382-B
Honorable Rienne H. McElyea, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

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

For Appellee:

Austin Knudsen, Montana Attorney General, Tammy K Plubell, Assistant Attorney General, Helena, Montana

Marty Lambert, Gallatin County Attorney, Erin Murphy, Deputy County Attorney, Bozeman, Montana

Submitted on Briefs: January 20, 2021

Decided: February 9, 2021

Filed:

Clerk

Chief Justice Mike McGrath 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 Brian Allan Robertson (Robertson) appeals from his April 16, 2019 conviction by a jury of the offense of Criminal Possession of Dangerous Drugs pursuant to § 45-9-102, MCA. We affirm.

¶3 On October 17, 2018, Robertson reported as scheduled to his probation officer, Ashley Spragg (Spragg) and was given a urinalysis test. Spragg then decided to conduct a search of Robertson's residence with the assistance of another officer, Sean Daly (Daly). Spragg and Daly transported Robertson to his residence; however, upon arrival, Robertson informed the officers that he had forgotten his house key in his vehicle, which was parked at a Lowe's parking lot about half a mile from Spragg's office. Upon arriving at the Lowes parking lot, Spragg and Daly searched Robertson's car and found on the passenger seat two tubes containing a white crystalline substance taped together with black electrical tape. When asked about the tubing, Robertson replied that it was for a fish tank.

¶4 Believing the substance to be an illegal drug, Daly contacted law enforcement. After being notified that law enforcement was on its way, Robertson stated that the substance in the tubing was methamphetamine. Officer Ben Martin of the Bozeman Police

Department arrived. Officer Martin read Robertson his *Miranda* rights and Robertson agreed to speak with him. Robertson said that the tubing was a pipe but did not belong to him. Subsequent initial and confirmatory testing determined that the white substance was methamphetamine.

¶5 On October 30, 2018, the State charged Robertson with one count of felony Criminal Possession of Dangerous Drugs under § 45-9-102, MCA. Prior to trial, Robertson submitted a proposed jury instruction on the definition of not only the charged drug possession, but possession of paraphernalia, which was not charged. The State objected to the instruction on the ground that the jury would be confused by an instruction on an offense that had not been charged.

¶6 Throughout the April 16, 2019 jury trial, defense counsel presented a theory of the case to the jury that "this is a paraphernalia case charged as a drug case." Before closing arguments, the State renewed its objection to Robertson's proposed jury instruction. Defense counsel countered that she intended to argue to the jury that while Robertson may have knowingly possessed *paraphernalia*, the State had not proven that he had knowingly possessed *dangerous drugs*, the crime for which Robertson had been charged. Defense counsel maintained that providing the jury with the definition of the crime of possession of paraphernalia alongside with that of possession of dangerous drugs would highlight this argument. Defense counsel conceded that possession of drug paraphernalia was not a lesser included offense of criminal possession of dangerous drugs.

¶7 The District Court refused this instruction, citing concerns of potential jury confusion. During closing statements, defense counsel once again argued to the jury that

"this is a paraphernalia case that the State charged as a drug case. The State cannot prove that [Robertson] had any knowledge with regard to the possession of methamphetamine." The jury found Robertson guilty of Criminal Possession of Dangerous Drugs and the District Court sentenced Robertson to a three-year Department of Corrections commitment.

¶8 On appeal, Robertson argues that the District Court abused its discretion in denying Robertson's proposed jury instruction regarding criminal possession of drug paraphernalia. Robertson also argues that defense counsel's failure to move to suppress evidence stemming from his statements made to Spragg and Daly before being read his *Miranda* rights constituted ineffective assistance of counsel.

¶9 This Court reviews jury instruction decisions for abuse of discretion. *State v. Zhlan*, 2014 MT 224, ¶ 14, 376 Mont. 245, 332 P.3d 247 (citation omitted). We review claims of ineffective assistance of counsel de novo as mixed questions of law and fact. *State v. Chafee*, 2014 MT 226, ¶ 11, 376 Mont. 267, 332 P.3d 240 (citation omitted). However, we review such claims on direct appeal only to the extent that they are record-based. *Chafee*, ¶ 11 (citation omitted).

¶10 Robertson first argues that the District Court abused its discretion in refusing to instruct the jury on the definition of criminal possession of drug paraphernalia. A trial court operates with broad discretion when instructing a jury. *Zhlan*, ¶ 14 (citation omitted). A district court abuses its discretion if it acts arbitrarily without conscientious judgment or beyond the bounds of reason, resulting in substantial injustice. *State v. Kaarma*, 2017 MT 24, ¶ 6, 386 Mont. 243, 390 P.3d 609 (citation omitted). We consider jury

instructions as a whole and determine whether they fully and fairly instructed the jury on the applicable law. *Kaarma*, ¶ 7 (citation omitted). To be reversible, any error must have prejudicially affected the defendant's substantial rights. *Kaarma*, ¶ 7 (citation omitted).

¶11 Robertson claims that his entire defense was undercut by the District Court's refusal to instruct the jury on the paraphernalia elements. Defense counsel repeatedly argued to the jury that the State's efforts to obtain a conviction for possession of dangerous drugs, rather than mere paraphernalia, were unsupported by sufficient evidence. This amounts to simply another way of saying that the State had not born its burden of proving the elements of the charged crime beyond a reasonable doubt. In accordance with his constitutional rights, Robertson was able to repeatedly advance this position before the jury. The trial judge properly instructed the jury that in order to convict, it must find Robertson had knowingly possessed dangerous drugs. This instruction did not undercut Robertson's argument that the State had not born its burden of proving beyond a reasonable doubt that Robertson had knowingly possessed dangerous drugs, rather than mere paraphernalia.

¶12 We find no support for the contention that a court, after having fully and fairly instructed the jury regarding the applicable law, is required to further illustrate the law at hand by contrasting it to another crime that was not charged. Robertson had conceded the paraphernalia charge was not a lesser included offense of the charged crime and the District Court was well within its discretion.

¶13 Robertson also argues that he received ineffective assistance of counsel when his defense counsel failed to move to suppress evidence stemming from statements Robertson made to Spragg and Daly before receiving *Miranda* warnings. Criminal defendants are

constitutionally guaranteed the right to effective counsel. *State v. Weber*, 2016 MT 138, ¶ 21, 383 Mont. 506, 373 P.3d 26 (citation omitted). This Court examines ineffective assistance of counsel claims under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, under which a defendant must show that counsel's performance was deficient, and that the deficient performance prejudiced to defendant. *Weber*, ¶ 21 (citation omitted).

¶14 However, we will only review such claims brought on direct appeal based on the information available to us in the record. When the record provides insufficient evidence to determine why counsel took a particular course of action, the claim is better raised in a petition for postconviction relief. *State v. Larsen*, 2018 MT 211, ¶ 8, 392 Mont. 401, 425 P.3d 694 (citation omitted). Here, the record is silent as to why Robertson's defense did not move for suppression of evidence obtained because of Robertson's statements made before receiving *Miranda* warnings. Thus, this challenge is best suited to a petition for postconviction relief, where the record can be more fully developed. *See Larsen*, ¶ 8. As such, we do not address it on direct appeal here.

¶15 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.

¶16 Affirmed.

/S/ MIKE McGRATH

We Concur:

/S/ JAMES JEREMIAH SHEA
/S/ INGRID GUSTAFSON
/S/ BETH BAKER
/S/ JIM RICE