MAINE SUPREME JUDICIAL COURT

SITTING AS THE LAW COURT

LAW COURT DOCKET NO.: Cum-24-301

GABRIEL MCKUSICK
Appellant

v.

STATE OF MAINE
Appellee

ON APPEAL FROM THE

CUMBERLAND COUNTY UNIFIED CRIMINAL DOCKET

BRIEF FOR THE APPELLANT

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TABLE OF CONTENTS

TABLE OF CASES AND OTHER AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF THE CASE

Gabriel McKusick ("Mr. McKusick") was charged with criminal threatening with a dangerous weapon, creating a police standoff, and refusing to submit in CUMCD-CR-2023-02495. After a one-day jury trial on May 29, 2024, Mr. McKusick was found guilty of creating a police standoff and acquitted of the other two charges.

During the trial, the State introduced [redacted], the Burger King worker who served Mr. McKusick at the drive-thru. She testified that when serving Mr. McKusick, he showed her a gun and flicked the back of it. She further testified that he said, "I'll get you later." On cross-examination, [redacted] testified that the incident was scarier in light of the Lewiston shooting despite the event happening in June 2023.

Officer Christopher Walles ("Officer Walles") testified he arrived at the Burger King parking lot at approximately 7:00pm, and ordered Mr. McKusick to get out of the vehicle. Mr. McKusick did not leave his vehicle but did comply with law enforcement's demands – he put his vehicle in park, threw his keys out of the window, and left his hands out of his window. At some point during the incident, a negotiator from Westbrook Police Department arrived at the scene. Walles explained that she was trying to establish a rapport and told Mr. McKusick that she was there to ensure his safety. Walles denied that Mr. McKusick did anything to create a barrier

between himself and police officers. He testified that the simple act of being in a car was a barricade. Mr. McKusick was arrested at approximately 9:30pm.

Officer Jacob Webster ("Officer Webster") testified that the entire incident last about 1.5 to 2 hours. When asked, during cross-examination, at what point he saw Mr. McKusick barricade himself in the vehicle, Webster testified "I didn't see him barricade himself into his vehicle at all."

Officer Zachary Theriault ("Officer Theriault") testified that he responded to the scene as part of the Special Reaction Team. He was the officer who shot multiple rounds of tear gas into Mr. McKusick's vehicle. During cross-examination, Theriault admitted that Mr. McKusick was heard on camera stating "several times" that his hands were out of the window and out of the vehicle. Theriault also testified that Mr. McKusick was heard on the body camera that his car doors were unlocked. Theriault also testified that nothing was put up by Mr. McKusick to barricade himself between the officers. At his vantage point on top of the SWAT vehicle, he was able to see the arrest and testified that it only took seconds for Mr. McKusick to be apprehended.

The last witness introduced by the State was John Nelson ("Officer Nelson"), who was the evidence technician. When he searched and photographed Mr. McKusick's vehicle after the arrest, he had to move a construction vest in order to see an AR-15. He denied being able to see a firearm when he approached the vehicle.

Defense counsel argued a Motion for Acquittal under Rule 29 of the Maine Rules of Criminal Procedure. 30. Justice O'Neil denied the motion. 19.

A Renewed Motion for Acquittal was filed by defense counsel within 14 days of the verdict, and a hearing was held on November 21, 2024. 25. Justice O'Neil denied the motion in a written order on November 25, 2024. 13.

ISSUES PRESENTED FOR REVIEW

I. Preservation and standard of review

At the conclusion of the State's case, defense counsel moved for a judgment of acquittal pursuant to M.R.U.Crim.P. 29, and a renewed motion for acquittal. Even if counsel had not done so, however, "the trial court has an independent duty pursuant to M.R.U. Crim. P. 29(a) to assess the sufficiency of the evidence at the close of both the State's case-in-chief and the accused's case.*" State v. Kendall*, 2016 ME 147, ¶ 12, 148 A.3d 1230. This Court will review "the evidence in the light most favorable to the State to determine whether the trier of fact rationally could have found beyond a reasonable doubt every element of the offense charged." *State v. Lowden*, 2014 ME 29, ¶ 13, 87 A.3d 694 (quotation marks and citation omitted). Where identification of statutory elements is necessary, this Court retains plenary authority. *Ibid*.

II. The Trial Court erred in interpreting the word "barricade" in 17-A M.R.S. § 517.

The Court reviews a trial court's legal conclusions, including its interpretation of a statutory provision, de novo. *State v. Conroy*, 2020 ME 22, ¶¶ 10, 19, 225 A.3d 1011;*see, e.g.*,*State v. Chittim*, 2001 ME 125, ¶ 5, 775 A.2d 381 ("The interpretation of a statute is a question of law."). In interpreting statutes, this Court "look[s] first to the plain language of the statute to determine its meaning if we can do so while avoiding absurd, illogical, or inconsistent results." *Conroy*, 2020 ME 22, ¶ 19, 225 A.3d 1011. "Unless the statute itself discloses a contrary intent, words in a statute must be given their plain, common and ordinary meaning, such as [the average person] would usually ascribe to them." *State v. Vainio*, 466 A.2d 471, 474 (Me. 1983).

Only if a statute is ambiguous "will we look beyond the words of the statute to examine other potential indicia of the Legislature's intent, such as the legislative history." *Conroy*, 2020 ME 22, ¶ 19, 225 A.3d 1011. "A statute is ambiguous if it is reasonably susceptible to different interpretations." *State v. Legassie*, 2017 ME 202, ¶ 13, 171 A.3d 589 (quotation marks omitted). The rules of lenity and of strict construction also guide the Court's interpretation of criminal statutes. *Id*. "Pursuant to each of these rules, any ambiguity left unresolved by a strict construction of the statute must be resolved in the defendant's favor." *Id.*

To convict a person of creating a police standoff, the State needs to prove that the person:

> (A) Is in fact barricaded as a result of the person's own actions;
> (B) Is or claims to be armed with a dangerous weapon;
> (C) Is instructed by a law enforcement officer or law enforcement agency, either personally, electronically or in writing, to leave the barricaded location; and
> (D) Fails to leave the barricaded location within 1/2 hour of receiving the instruction . . . by a law enforcement officer . . . ."

17-A M.R.S. § 517

The word "barricade" can be a noun or a verb, depending on usage. Barricade, as a noun, is defined as "an obstruction hastily erected across a path or street to stop an enemy's advance." *Barricade*, *Oxford English Dictionary*, 2024. If used as a verb, a person must "block (a passage) with a barricade." *Id*.

17-A M.R.S. § 517(1)(A) reads that a person is guilty of creating a police standoff, if a person "[i]s in fact *barricaded* as a result of the person's own actions." (Emphasis added.) The term "barricaded," as used in the statute, suggests that an action was required. Therefore, it functions as a verb. Mr. McKusick must have *acted* in a way to block a passage between police officers and himself.

Because the word "barricade" is not defined within the statute, the Court should look to the plain meaning of the word. As it is read, the word is used as a verb in the statute which means Mr. McKusick had to use something to block a passageway between law enforcement and himself.

Should the Court find the statute to be ambiguous, it would then look at the Legislative intent. The legislative history is silent as to what it means to have a barricade. The statute in question was enacted in 2017 and is current.

III. The State did not prove each and every element of 17-A M.R.S. § 517 beyond a reasonable doubt.

The Court reviews for clear error a finding that the State has proved an element of a crime, viewing "the evidence admitted at trial in the light most favorable to the State to determine whether the fact-finder could rationally have reached its finding[] beyond a reasonable doubt." *Wilson*, 2015 ME 148, ¶ 13, 127 A.3d 1234 (quotation marks omitted); *see* Alexander, *Maine Appellate Practice* § 416 at 258 (6th ed. 2022). Factual findings are the result of clear error only when the record contains no competent evidence supporting them *Greenleaf*, 2004 ME 149, ¶ 13, 863 A.2d 877; *see Conroy*, 2020 ME 22, ¶ 26, 225 A.3d 1011.

The Court reviews the sufficiency of the evidence "in the light most favorable to the State to determine whether a trier of fact rationally could find beyond a reasonable doubt every element of the offense charged." *State v. Chad B.*, 1998 ME 150 at ¶ 11, 715 A.2d at 147–48 (quotations omitted). The Court "defers credibility determinations and reasonable inferences drawn by the fact-finder, even if those inferences are contradicted by parts of the direct evidence." *State v. Marquis*, 2023

ME 16, ¶ 22, 290 A.3d 96, 103. Citing *State v. Cummings*, 2017 ME 143, ¶ 12, 166 A.3d 996.

a. Gabriel McKusick did not "barricade" himself in his vehicle.

In the present case, the evidence presented at trial shows that Mr. McKusick did not place anything between him and police officers to block access to him. They all testified that he did not roll up his window, that he did not put anything over the window, that he did not move further into the vehicle or away from the window, and that he kept his hands out of the window during the duration of the event. Officer Webster testified that there was no barricade. Another officer – Officer Walles – testified that the simple act of sitting in a vehicle was enough for a barricade. The officers' testimony is insufficient to prove Mr. McKusick created a barricade.

Should the Court adopt the view that Mr. McKusick created a barricade by simply sitting in his vehicle as Officer Walles suggests in his testimony, then it will create a dangerous precedent that anyone who is simply *being* can be considered to be creating a barricade and thus, a police standoff.

In *State v. Hassan*, 2013 ME 98, 82 A.3d 86, the defendant was convicted of creating a police standoff, among other charges. In that case, the defendant was at a house party and was one of a group of people who taunted, physically assaulted, and held a victim captive. *Id*. at 89. Police officers responded to the house and established a perimeter. They knocked on the door but received no response; they

were unable to see into the house because the blinds and curtains were drawn, so they could not see inside. *Id*. The defendant's refusal to leave the residence lasted for approximately seven hours from the time officers arrived until the defendant was taken into custody. *Id*. at 89-90.

In *State v. Leonard*, 2002 ME 125, 802 A.2d 991, the defendant was convicted of creating a police standoff, among other charges. In that case, the defendant was upset with his house contractor and went to the contractor's home, physically assaulted him, and demanded the contractor write him a $15,000 check. *Id*. at 92. After police responded to the defendant's house, the defendant refused to leave his house, although he did leave it on two occasions – the first time, he retreated, the second time, he was arrested. *Id*. During the standoff, the defendant shot at police officers. *Id*.

In both *Hassan* and *Leonard*, both defendants retreated to their homes. Those places have multiple rooms. Houses are potentially multi-level homes that afford a defendant the ability to hide in various places. The homes have storage spaces, cabinets, nooks, etc. Essentially, houses are full of opportunities for a person to barricade himself behind or in.[1]

[1]. The layout of the homes in Hassan or Leonard is unclear. Defense counsel does not suggest that either of the houses in the mentioned cases have any particular feature.

This is much different than the present case. Mr. McKusick was sitting in a vehicle that had four windows that were see-through. He did not move from his seat. He did not place anything over the windows that prevented anyone from seeing inside the vehicle. He did not retreat into the vehicle by moving to a different seat or from the front to the back seat.

b. Gabriel McKusick left his vehicle within 30 minutes after knowing he was being charged with creating a police standoff.

Should the Court determine Mr. McKusick was, in fact, barricaded in his vehicle, defense counsel argues that the State did not prove the fourth element of 17-A M.R.S. § 517. Specifically, that Mr. McKusick failed to leave the barricaded location within half an hour of receiving the instruction [to leave the vehicle]. 17-A M.R.S. § 517(1)(D).

When law enforcement arrived at Burger King, they arrived because of a report of a man in a vehicle who allegedly threatened a worker with a gun. Police officers did not arrive *because* Mr. McKusick was creating a police standoff but because of a report of criminal threatening with a dangerous weapon. At some point during the duration of the evening, officers decided to charge Mr. McKusick with creating a police standoff. It is unclear when that decision was made but the body camera from Officer Theriault made clear the timeline just before Mr. McKusick's arrest.

During Officer Theriault's body camera recording presented by the State, Mr. McKusick is notified by a female negotiator at the 6:19 mark that he would be facing a new charge of creating a police standoff. It is at this point that defense counsel suggests the "running of the clock" should begin. Mr. McKusick has been told multiple times by police officers that they were there because of the supposed threat. He is never notified that if he fails to comply, he will face a new criminal charge and that that charge comes with a countdown. After being told he's creating a police standoff, Mr. McKusick is out of his vehicle at the 36:36 mark. This means he is out of his vehicle in 30 minutes and 16 seconds.

There is no requirement in the statute that a person be notified of what potential charge or charges he may be facing. However, an exception should be made to the "no notification" requirement for this charge due to its time-sensitive nature. Unlike other crimes in Title 17-A, this offense imposes a specific time limit for compliance with law enforcement commands. If a person fails to comply within that time frame, they can be charged with a crime. As currently written, the law could allow someone to be charged with creating a police standoff simply for refusing to exit a vehicle during a routine traffic stop, even if only one officer is present.

After being told that the only reason for the police presence in the Burger King parking lot was because of a threat Mr. McKusick supposedly made to a drive-thru worker, police officers changed their minds and arrested Mr. McKusick for creating

a police standoff. After being notified of the change in circumstances, Mr. McKusick is out of the vehicle within 30 minutes, and is not in violation of the statute.

CONCLUSION

The trial court applied an incorrect interpretation of 17-A M.R.S. § 517 when it did not interpret the statute according to the plain meaning of "barricade." There was also insufficient evidence to convict Mr. McKusick of creating a police standoff because he did not take any act to barricade himself in a vehicle, and because he was out of the vehicle within 30 minutes after learning that he would be charged with a new crime. Therefore, the Court should vacate the conviction for creating a police standoff.

Dated: December 18, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kayla M. Alves, attorney for the Appellant, hereby certify that the Appellant's Brief and Appendix have been served upon Appellee by emailing them to Assistant District Attorney Deb Chmielewski at chmielewski@cumberlandcounty.org on December 18, 2024.

Dated: December 18, 2024

Respectfully submitted,

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