IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0379

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CLAYTON LEE WELLKNOWN,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, The Honorable Donald L. Harris, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

OTHER AUTHORITIES

STATEMENT OF THE ISSUES

Whether the district court properly denied Wellknown's *Batson* challenge.

Whether the State's arguments during its closing remarks constituted plain error.

Whether the district court erred when it determined Wellknown's 2007 DUI conviction was constitutionally valid.

STATEMENT OF THE CASE

During *voir dire* for Clayton Lee Wellknown's felony DUI jury trial, Wellknown objected to one of the State's peremptory challenges because the selected juror was a "minority." (2/5/20 Tr. (Tr-1) at 92-93.) After hearing the State's neutral explanation behind its choice, the court overruled the objection. (*Id*.) Wellknown made no objections during the State's closing arguments. (2/6/20 Tr. (Tr-2) at 106-25.) Wellknown was convicted of DUI. (Doc. 49; Tr-2.)

At sentencing, Wellknown argued he should only be sentenced for a misdemeanor because his 2007 DUI conviction was constitutionally infirm. (Docs. 53-54, 57; 4/27/20 Tr. (Hr'g).) Following an evidentiary hearing, the district court determined that the State had established Wellknown's 2007 DUI was valid and sentenced Wellknown to the Department of Corrections (DOC) for

a period of 24 months for placement in an appropriate alcohol treatment program followed by a five-year suspended DOC sentence. (*Id*.; Doc. 69.)

STATEMENT OF THE FACTS

At about 9:15 p.m. on September 22, 2019, Billings Police Department (BPD) responded to several 911 calls concerning a silver Mitsubishi traveling westbound on 1st Avenue North, a one-way street. (Tr. at 174-66.) The Mitsubishi driver was later identified as Wellknown. (Tr. at 164-66.) Brianne Fanek noticed a black SUV speed by her that was immediately followed by Wellknown, who was also driving at a high rate of speed. (*Id*. at 110-220, 226-47.) Ryan Snyder was also driving on 1st Avenue North. (*Id*.) When Snyder looked in his rearview mirror, Wellknown was speeding towards Snyder at what he estimated was 60 to 70 miles per hour. (*Id*.) Snyder pulled over and braced for a collision. (*Id*.) But, Wellknown did not hit Snyder and instead swerved and then crashed into the sidewalk on the right side of the road, popping the front, passenger tire. (*Id*.)

Wellknown continued driving about 10 miles per hour on the tire rim. (Tr-1 at 110-220, 226-47.) Both Fanek and Snyder followed the damaged car and called 911. (*Id*.; Ex. 8.) At one point, a female jumped out of the passenger door of

Wellknown's car. (*Id*.) When Fanek stopped to check on her, the woman said she was fine and kept walking away, so Fanek continued following Snyder. (*Id*.)

Snyder and Fanek followed Wellknown for about 15 blocks until he stopped in front of the Double Tree hotel and got out, but quickly returned to grab a hat and a plastic convenience store bag. (Tr-1 at 110-220.) Snyder followed Wellknown into the hotel lobby and provided the dispatcher a physical description of him. (*Id*.) Snyder positioned himself so he could watch Wellknown and did not see him consume anything. (*Id*.)

BPD Officers Justin Robidoux and Daniel Shreeve responded and located Wellknown in the lobby. (Tr-1 at 161-220, 226-47.) Wellknown looked dazed/confused and refused to answer the officer's questions, but they identified him with an ID card and confirmed he was the registered owner of the Mitsubishi. (*Id*.) Officer Robidoux noted a strong odor of alcohol coming from Wellknown and noted his eyes were bloodshot and watery/glassy. (*Id*.) Officers did not notice any alcoholic containers near Wellknown when they found him in the lobby. (*Id*.) Officers observed an empty Tallboy of Steel Reserved, a malt liquor, on the driver's side floorboard of Wellknown's vehicle. (*Id*.)

Officer Robidoux read Wellknown the implied consent advisory and Wellknown did not respond, which was considered a refusal. (Tr-1 at 180-220; Ex. 11.) A search warrant was obtained to collect a blood sample. (*Id*.)

Wellknown did not cooperate with the blood draw process, but a nurse eventually obtained a blood sample around 10 p.m. (*Id.*; Tr-2 at 5-13.) Subsequent lab testing revealed that Wellknown's blood alcohol concentration (BAC) was 0.185. (Tr-2 at 5-57.) Wellknown's criminal history revealed three prior DUI convictions (2002, 2007, 2017), so he was charged with felony DUI. (Docs. 1-3, 33-35.)

Wellknown's jury trial began on February 5, 2020. (Tr-1.) The district court overruled Wellknown's objection to one of the State's peremptory challenges during jury selection. (Tr-1 at 92-93.)[1]

In addition to Snyder, Fanek, and the BPD officers, the State also presented evidence about Wellknown's blood test and BAC level. (Tr-1, Tr-2.) Wellknown cross-examined the forensic toxicologist about the amount of alcohol it takes to reach a 0.185 BAC, and whether Wellknown's BAC was increasing or decreasing. (Tr-2 at 5-57.) The toxicologist explained that generally a person who weighs 150 pounds would have to consume about 6 to 10 drinks (*e.g.*, shots of whisky or 12-ounce cans of beer) to reach a 0.185 BAC. (*Id.*) The toxicologist testified that he could not say if Wellknown's BAC was peaking or descending when his blood was drawn. (*Id.*)

Wellknown testified that he had been trying to get away from a SUV that was following him and said he did not drive faster than 45 miles per hour. (Tr-2 at

[1] Additional facts relevant to this issue are set forth below at Section I. A.

59-96.) Wellknown lost control of his car and hit the curb, but kept going and finally parked at the Double Tree. (*Id*.) According to Wellknown, he consumed alcohol after he went into the hotel and took two different types of anxiety pills. (*Id*.) Wellknown claimed he thew the bottle of liquor in the trash can when he saw the police officers come towards him in the hotel lobby. (*Id*.)

The jury convicted Wellknown of DUI. (Tr-2 at 129.) At sentencing, Wellknown argued that his 2007 DUI conviction was constitutionally infirm. (Hr'g.)[2] Following testimony and argument, the court concluded that Wellknown had not overcome the presumption that his conviction was valid and sentenced him for felony DUI. (*Id*.)

STANDARD OF REVIEW

When reviewing a district court's ruling on an allegedly discriminatory use of a peremptory challenge during jury selection, this Court "will defer to the trial court's findings of fact unless clearly erroneous, and will review the trial court's application of the law *de novo*." *State v. Warren*, 2019 MT 49, 395 Mont. 15, 439 P.3d 357.

"Failure to contemporaneously object to alleged prosecutorial misconduct during opening or closing statements generally constitutes waiver of the right to

[2] Additional facts relevant to this issue are set forth below at Section III.

raise that issue on appeal." *State v. Polak*, 2021 MT 307, ¶ 9, ___ Mont. ___, ___ P.3d ___.[3] However, such issues may be considered under the plain error doctrine. *Id.* Plain error review is discretionary and exercised "sparingly, on a case-by-case basis, according to narrow circumstances, and by considering the totality of the circumstances." *State v. Haithcox*, 2019 MT 201, ¶ 23, 357 Mont. 103, 447 P.3d 45.

This Court reviews the question of law of whether a prior conviction may be used for sentence enhancement, *de novo*. *State v. Rasmussen*, 2017 MT 259, ¶ 10, 389 Mont. 139, 404 P.3d 719. However, the district court's findings of fact regarding that conviction based on testimony and documents "will not be disturbed unless they are clearly erroneous." *Id.*

SUMMARY OF THE ARGUMENT

The district court correctly denied Wellknown's objection to the State's peremptory challenge during jury selection. Wellknown's argument on appeal—that there was a "reasonable probability" that race or ethnicity was a factor in the State's use of its peremptory—is not the proper standard under *Batson v. Kentucky*,

[3] The State disagrees that *de novo* review is appropriate for Wellknown's prosecutorial misconduct allegations. (*See* Opening Brief (Br.) at 13.) Since Wellknown did not raise any objections to the State's arguments to the jury, his claims on appeal must be considered under plain error review.

476 U.S. 79, 89 (1986)). Rather, *Batson* sets forth a three-step process which was followed here. First, Wellknown had to make a prima facie showing that State's selection was based on race. Next, the State provided its neutral explanation for choosing the juror based on its prior interactions with that juror, who had been a victim in different case. Lastly, the court evaluated the State's response and correctly determined Wellknown had not met his burden to establish the State's selection was purposeful discrimination.

Wellknown was not prevented from offering rebuttal comment or argument to the State's specific neutral explanations even under a "reasonable probability" standard. While the district court did not issue detailed findings of fact and rationale, this Court may affirm the trial court's order denying Wellknown's *Batson* challenge because the record supports the district court's determination that the State's basis for striking Birdinground was not based on race in violation of Wellknown's constitutional rights.

Wellknown's request that this Court amend the criteria for evaluating a *Batson* challenge was not preserved and is improper to assert on direct appeal. Rather, and pursuant to Montana Code Annotated, there is a specific administrative procedure this Court employs to effectuate changes to court procedures that allows for collection of collateral evidence/information input from Montana's judiciary.

Since Wellknown did not raise any objections during the State's opening or closing remarks, the only way his four prosecutorial misconduct claims may be considered is if he firmly convinces this Court that plain error review is warranted. Wellknown cannot meet this burden because the State's arguments did not violate Wellknown's substantial rights, render his trial unfair, or compromise the integrity of the judicial process.

First, the State did not misstate the law during its rebuttal closing when, in response to Wellknown's examples, it offered its own argument on what "most important" of affairs means when evaluating reasonable doubt. The jury was provided the correct definition of reasonable doubt and was instructed that the attorneys' comments were not evidence or law. There is no reason to believe the jury did not adhere to these instructions.

Second, the State did not focus on Wellknown's refusal to perform FSTs or insinuate to the jury that Wellknown failed to "prove his innocence." Again, the jury was properly instructed that the State bore the burden of proof and that the presumption of innocence remained with Wellknown throughout the trial. The comments offered by the State about Wellknown's refusal to provide a blood/breath sample corresponded to the correct jury instructions concerning the inferences the jury may make from his refusal.

Third, the prosecutor did not assert his personal opinion on the credibility of its witnesses. The State's observations that Snyder and Fanek had no stake in the outcome of the case, but that Wellknown did, was not improper. These arguments were part and parcel with the jury instructions advising the jurors they are the sole judges of credibility and that in making that assessment they may consider if that witness has an interest in the outcome of the case, or any other motive for bias.

Finally, Wellknown's claim that the prosecutor made a personal comment on his guilt is incorrect and he presents the statement in insolation. Rather, when considered in the context it was given, the comment simply summarized the State's first closing argument: that it had proven Wellknown committed either DUI or DUI *per se*.

All of the State's closing remarks concerned what it believed the evidence had established and the inferences the jury could make from the evidence. When the record is reviewed as a whole, the State's alleged improper comments did not infect the trial with unfairness. Wellknown cannot firmly establish that the State's arguments to the jury constituted a manifest miscarriage of justice or compromised the integrity of the judicial process.

Lastly, the court correctly concluded that Wellknown did not overcome his burden to persuade the court that his 2007 DUI conviction was constitutionally infirm. Although the State respectfully disagrees that Wellknown presented

sufficient affirmative evidence to shift the burden to the State, the district court reached the correct conclusion when it determined the justice court record established Wellknown had notice of his 2007 trial but was voluntarily absent.

ARGUMENT

I. Wellknown's equal protection rights were not violated by the State's peremptory challenge selection.

A. Relevant facts

During *voir dire*, defense counsel questioned prospective jurors about their understanding of reasonable doubt. (Tr-1 at 72-81.) One juror replied he did not think it meant 100 percent, but maybe just slightly below that. (*Id.*) During further inquiry with the panel, three jurors, Jeff Allen, Shan Birdinground, and Jacob Roney, unequivocally stated that to find something beyond a reasonable doubt they believed you must be 100 percent certain. (*Id.* at 74, 79-81.) A fourth juror, Patsy Bentz, also discussed being 100 percent sure in her colloquy with defense counsel. (*Id.* at 81-82.)

The State selected Jeff Allen for its first peremptory challenge and its second selection was Shan Birdinground. (Tr-1 at 92.) Wellknown objected, stating that Birdinground was "the only minority" on the jury panel. (*Id.*) When the court asked the State for the basis of its peremptory selection, the prosecutor explained,

> Your Honor, Mr. Birdinground was the victim in DC-18-0336. He was stabbed multiple times by his partner, Sarah Deporto. He refused to cooperate. He would never return our phone calls and was hostile to our office. Because of that, we believe he would be a partial juror towards the State because he was so hostile to us when he was a victim a year and a half ago.
>
> We ended up amending that charge from assault with a weapon to criminal endangerment because of his lack of cooperation.

(*Id.* at 92.) The court then stated, "All right. So the objection is overruled." (*Id.*)

Although the objection was overruled, the State explained an additional reason for its choice was Birdinground's belief that he had to be 100 percent certain to convict someone. (Tr-1 at 93.) Wellknown interjected that there were other prospective jurors who made the same comment, and the State had not selected them. (*Id.*) The court pointed out that the State had not finished using its peremptory strikes. (*Id.*) The State used its remaining peremptory challenges to strike the following jurors: Morey Winchell, Vernon Davis, Charles Peterson, Jacob Roney, and Brian Schwartz. (*Id.* at 93-96.) Wellknown offered no further comment or objection to the State's use of peremptory challenges. (*Id.* at 93-98.)

B. The district court correctly determined the State's use of a peremptory strike for Birdinground did not violate Wellknown's constitutional rights to equal protection under either the United States or Montana Constitutions.[4]

"The use of peremptory challenges to remove prospective jurors on the basis of race is unconstitutional under the Equal Protection Clause of the United States and Montana constitutions." *Warren*, ¶ 33 (citing U.S. Const. amend. XIV, § 1; Mont. Const. art. II, § 4; *Batson*, 476 U.S. at 89). *Batson* set out a three-part test to evaluate whether use of a peremptory challenge was discriminatory. *Batson*, 476 U.S. at 97-98; *Warren*, ¶ 34.

First, the person alleging a *Batson* violation must make a prima facie showing of purposeful discrimination (*e.g.*, that the reason for striking the juror was racially-motivated). *Warren*, ¶ 34. If such a showing is made, the burden shifts to the proponent of the strike to provide a neutral explanation for the strike. *Id*. In light of the explanation, the trial court must then "determine whether the opponent of the strike has established purposeful discrimination." *Warren*, ¶ 34 (citing *Batson*, 476 U.S. at 98; *Purkett v. Elem*, 514 U.S. 765, 768 (1995) ("It is not until the third step that the persuasiveness of the justification becomes relevant—the step in which the trial court determines whether the opponent of the strike has

[4] Wellknown improperly includes Birdinground in his appeal by arguing that this Court should determine the State's use of a peremptory challenge for Birdinground "violated *his and* [Wellknown's] rights to equal protection." (Br. at 23 (emphasis added).) Birdinground is not a party to this action.

carried his burden of proving purposeful discrimination.") (internal quotations omitted) (emphasis added)).

To make a prima facie case, Wellknown had to establish he belonged to a cognizable group; in this case, a racial group. *State v. Barnaby*, 2006 MT 203, ¶ 48, 333 Mont. 220, 142 P.3d 809. Wellknown was also required to show that the manner in which the State used its peremptory challenge raised an inference that it did so to purposely exclude a prospective juror from the petit jury on account of that person's race. *Id.*

The record does not indicate the race of either Wellknown or Birdinground and the district court did not explicitly rule on whether Wellknown met the first prong of *Batson*. However, it appears the parties and district court agreed both men were "minorities," and that Birdinground was the "only minority" in the jury venire. Moreover, by asking the State for its neutral explanation for selecting Birdinground, it appears the district court implicitly found the first prong of *Batson* was met.

The State explained it selected Birdinground based on prior interactions with him when he was uncooperative and hostile toward the State. This explanation reflected a rational basis to believe he would not be impartial towards the State. The State also referenced Birdinground's answers during *voir dire* about the meaning of reasonable doubt. Neither of these reasons were based on Birdinground's "minority" status. As this Court has explained, "[u]nless a

discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Warren*, ¶ 34 (citing *Hernandez v. New York*, 500 U.S. 352, 360 (1991); *Purkett*, 514 U.S. at 768 ("At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation.").)

Wellknown's argument on appeal—that the State's "subjective beliefs" were insufficient—is unavailing. (Br. at 20.) Wellknown's criticism that the State failed to probe into Birdinground's ability to be impartial conflates the two different types of juror-challenges: challenges for cause and peremptory challenges. *See* Mont. Code Ann. §§ 46-16-111 (criminal trial juries formed in same manner as civil trial juries); -115 (challenges for cause); -116 (number of peremptory challenges permitted); 25-7-224 ("Peremptory challenges shall be taken as provided in Rule 47(b), M.R.Civ.P.").

Challenges for cause occur during *voir dire* and may involve additional questioning aimed at determining if a juror can remain impartial, whereas peremptory challenges are used to strike those potential jurors a "party prefers not to have on the jury, usually because of a perceived bias on the part of the potential juror." *State v. Ford*, 2001 MT 230, ¶¶ 13-14, 306 Mont. 517, 319 P.3d 108 ("Peremptory strikes are often based primarily on instinct, and are cherished tools, guarded protectively by litigators."). As this Court explained, peremptory challenges are "essential to the fairness of trial by jury." *Ford*, ¶ 13.

Wellknown is incorrect that the State was required to "use *voir dire* to make a record" to support its reasoning for a peremptory challenge. (Br. at 21, 22.) First of all, when the parties are exercising their peremptory strikes, *voir dire* has been completed and both parties have passed the jury venire for cause. Mont. R. Civ. P. 47(b)(2)(A) (peremptory challenges are made "[w]hen the *voir dire* examination has been completed"). Second, but for a *Batson* challenge, a party does not have to express its reason for exercising a peremptory challenge. *Ford*, ¶ 14 ("Unlike strikes for cause, which are accompanied by an expressed reason for the strike, peremptory strikes may be exercised without having to explain the reason behind them."); (Doc. 46, Jury Instruction (JI) No. 1.).

Here, the State had to offer an explanation for its selection of Birdinground only because Wellknown made a timely objection and a prima facie showing that the basis for striking the juror could be racially-motivated. Under *Batson's* second prong, the State was then asked to provide its nondiscriminatory reasoning for not wanting Birdinground on the jury. The State was not required to elicit bias during *voir dire* for it to later exercise a peremptory challenge.

The State's explanation for selecting Birdinground was race neutral. *See Ford*, ¶ 16; *Barnaby*, ¶ 53. Just as in *Warren*, since the State's neutral explanation is "taken at face value," the State satisfied its burden by offering a "facially valid, non-discriminatory, basis" for using its peremptory challenge. *Warren*, ¶ 35.

Therefore, under the three-prong *Batson* test, the burden returned to Wellknown to demonstrate the State's proffered reason was pretextual and that discriminatory intent remained behind the peremptory challenge. *Batson*, 476 U.S. at 97-98; *Warren*, ¶ 35. Wellknown did not meet *Batson's* third prong.

Just as in *Warren*, Wellknown did not challenge the State's first explanation or demand further evidence. *See Warren*, ¶ 36 (noting defendant made no effort to undermine State's proffered explanation for the strike). The State provided details about its evaluation of Birdinground's likely bias and cited the Cause Number to further support the veracity of its account. The court was free to deem the State's explanation as credible. As this Court observed in *Warren*, the defendant's "failure to respond to the State's race-neutral explanation leaves the record devoid of any effort to demonstrate the explanation was pretextual." *Warren*, ¶ 39 (held, defendant failed to carry burden on *Batson* challenge).

Wellknown's claim that he was not "allowed" to respond to the State misconstrues the record. (Br. at 19.) The record shows that both the State and defense counsel interrupted the court's ruling. The court did not preclude or prevent Wellknown from making further argument. Moreover, Wellknown did try to undermine the State's second explanation by arguing there were other jurors who believed reasonable doubt meant 100 percent certainty who had not been challenged.

However, as correctly noted by the court, his claim was not persuasive since the State had not yet used all its challenges. The record shows that the State struck the three jurors who had stated unequivocally that a guilty verdict required 100 percent certainty. *See Warren*, ¶ 39 (how State used peremptory challenges on other jurors bolstered race-neutral explanation).

Notably, Wellknown did not offer any further challenge to the State's explanation about Birdinground, or any of its other peremptory selections. Contrary to Wellknown's claim on appeal, the court did not prevent him from making any *Batson* related arguments. Wellknown's attempts on appeal to undermine the State's neutral explanation with supposition and conjecture are untimely and inadequate. (Br. at 21-22.)

The record supports the district court's denial of Wellknown's *Batson's* challenge. *Ford,* ¶ 18 (record should include "all relevant facts and information" the court relied upon). Wellknown asserts that the district court did not, however, provide a "full explanation of [its] rationale." *See Ford*, ¶ 18; *Parrish*, ¶ 19 (when *Batson* issue is raised, "it is imperative that the trial court fully develop a record for review"); *Barnaby*, 54; *Warren*, ¶ 38.

While this Court has admonished trial courts to develop a record and make findings relevant to the *Batson* three-prong test, it has, nonetheless, been able to "conduct a review of the merits of a *Batson* challenge upon the assessment of the

record." *Warren*, ¶ 39 (affirmed ruling based on evidence in record despite fact court listed improper basis for denial; court reached right result, even if for wrong reason); *Barnaby*, ¶¶ 53-55 (affirmed denial of *Batson* challenge because record showed State provided race-neutral explanation); *State v. Parrish*, 2005 MT 112, ¶¶ 19-20, 327 Mont. 88, 111 P.3d 671 (affirmed court's denial of motion for new trial based on *Batson* because challenge was untimely; court reached right result, even if for wrong reason). Wellknown is incorrect that there is "nothing for this Court to review." (Br. at 19.)

Wellknown misapplies this Court's comment in *Parrish*, that omission of sufficient findings and rationale would be "fatal." (Br. at 18-19.) Parrish's defense counsel did not formally object to the State's peremptory challenges until after the jury was impaneled. *Parrish, supra*. Nonetheless, the State provided justification for its selections on the record prior to trial and after the guilty verdict. *Id*. This Court's statement that the district court's lack of findings was "not fatal," merely referenced the fact that this Court could affirm the lower court because Parrish's objection was untimely. *Id.* This Court has never held that it will be "fatal" to any district court ruling if a sufficient record and findings are not present. *See Warren*, ¶ 39; *Barnaby*, ¶¶ 53-55.

Wellknown also misapplies this Court's statements from *Barnaby* when he claims the only reason it affirmed the trial court's ruling was because *Parrish* had not

come out yet. (Br. at 18.) In addition to noting *Parrish*, this Court further explained that "record demonstrates that the State provided highly credible race-neutral explanations." *Barnaby*, ¶ 55. The same occurred in *Warren*, where this Court explained, "[a]s we did in *Barnaby*, we are here able to conduct a review of the merits of the *Batson* challenge upon an assessment of the record." *Warren*, ¶ 39.

The absence of particular findings and rationale on a *Batson* challenge is not "fatal to affirming" the district court. Rather, just as in *Barnaby* and *Warren*, despite lacking findings and rationale, when the record contained sufficient evidence to comport with the three *Batson* prongs, this Court can "conduct a review of the merits of a *Batson* challenge upon the assessment of the record" which confirms the State did not violate Wellknown's right to equal protection. *Warren*, ¶ 39.

C. Wellknown's argument that this Court should adopt new rules for jury selection is not properly before this Court.

When he objected to the State's second peremptory challenge, Wellknown did not assert that the *Batson* test was infirm or failed to account for "implicit or institutional forms of racial discrimination." (Br. at 26.) In fact, Wellknown did not even attempt to challenge the State's neutral explanation. Nor did Wellknown make any comment to the district court that his rights under the Montana Constitution should afford him greater protections. Thus, this Court should decline to consider Wellknown's new theory on appeal. *State v. Clawson*, 2018 MT 160,

392 Mont. 51, 421 P.3d 269 ("issues raised for the first time on appeal are not preserved for review").

Moreover, Wellknown's request that this Court inset additional screening procedures for *Batson* challenges is not appropriate for a direct appeal. The "authorities" Wellknown relies upon for his premise are rules of procedure from California, Arizona, and Washington State and a New Jersey Supreme Court opinion, *State v. Andujar*, 254 A.3d 606, 631-32 (N.J. Sup. Ct. 2021), that charged its "Director of the Administrative Office of the Courts to arrange for a Judicial Conference on Jury Selection" to "explore the nature of discrimination in the jury selection process," examine collateral resources, and make recommendations for proposed rule changes. (Br. at 26-29 (other citations omitted).)

Andujar is inapplicable here based on the divergent facts and procedural postures of the cases. In *Andujar*, the state challenged for cause a black, male juror based on his relationships with multiple persons who had committed crimes and that he lived in high crime area. *Andujar*, *supra*. The trial court found nothing in the juror's responses indicated he would not be impartial and denied the motion. *Id*. The state then ran a criminal background check on that juror and learned he had an outstanding warrant for his arrest and made plans to have him arrested, thus making him unavailable to serve. *Id*. The New Jersey Supreme Court held that under the specific facts presented, the prosecution's use of a criminal

background check mid-way through *voir dire* constituted "implicit or unconscious racial bias" in violation of the defendant's rights and also was an improper evasion of *Batson*. *Id*. at 627-29.

Here, the State's neutral explanation was not the result of a criminal background check on Birdinground, but rather was based on specific interactions the county attorney's office had with Birdinground as a victim. Unlike *Andujar*, the State did not try to evade application of *Batson* by essentially orchestrating challenge for cause by having Birdinground arrested. The State's neutral explanation for its choice during peremptory strikes did not constitute a pretext for discrimination. Moreover, Wellknown made no argument, nor does the record support, that the State acted under any "implicit bias" or that its actions were really pretextual discrimination as described in *Andujar*.

Just like the states mentioned by Wellknown, in Montana, selection of jurors is controlled by statutes and court rules. *See e.g.*, Mont. Code Ann. §§ 25-7-201, et al.; 46-16-111 through 118; Mont. R. Civ. P. 47. Relevant to this appeal, Mont. Code Ann. § 25-7-224(3) specifies that "[p]remptory challenges shall be taken as provided in Rule 47(b), M.R.Civ.P." Montana's Rules of Civil Procedure are promulgated by this Court. Mont. Code Ann. § 3-2-701.

New juridical procedural rules are enacted through a specific process that offers the appropriate mechanism to consider collateral resources and involves

public comment and input from other judges. *See* Mont. Code Ann. §§ 3-2-702 ("Before any rules are adopted, the supreme court shall appoint an advisory committee consisting of eight members of the bar of the state and at least three judges of the district court to assist the court in considering and preparing such rules as it may adopt."); -703 (requiring dissemination of proposed new rules and time for public comment).

The forum to consider Wellknown's policy argument that a different procedure and standard for peremptory juror challenges is not a direct appeal. And certainly not on direct appeal when the issue was not preserved.

II. Plain error review is unwarranted to consider alleged improper comments during the State's closing comments to the jury.

When the defendant fails to raise claims of prosecutorial misconduct at trial, he may not assert them on appeal unless he convinces this Court the alleged error warrants invocation of the plain error review doctrine. *Polak*, ¶ 9. Plain error review is discretionary and exercised "sparingly, on a case-by-case basis, according to narrow circumstances, and by considering the totality of the circumstances." *Haithcox*, ¶ 23. Plain error review applies only "in situations that implicate a defendant's fundamental constitutional rights when failing to review the alleged error may result in a manifest miscarriage of justice, leave unsettled the question of

the fundamental fairness of the proceedings, or compromise the integrity of the judicial process." *State v. Aker*, 2013 MT 253, ¶ 21, 371 Mont. 791, 310 P.3d 506.

This Court "reviews alleged improper statements by the State during closing arguments 'in the context of the entire argument'" and measures prosecutorial misconduct by reference to established norms of professional conduct. *State v. Smith*, 2021 MT 148, ¶ 42, 404 Mont. 245, 488 P.3d 431; *Polak*, ¶ 23. "A prosecutor's misconduct may be grounds for reversing a conviction and granting a new trial if the conduct deprives the defendant of a fair and impartial trial." *Haithcox*, ¶ 24. "[I]t is not enough that the prosecutors' remarks were undesirable or even universally condemned [but rather] the relevant question is whether the comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Haithcox*, ¶ 24 (quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)).

While this Court may employ plain error review to reverse prosecutorial misconduct, the burden remains on the appealing party to convince this Court such review is necessary. *State v. McDonald*, 2013 MT 97, ¶¶ 10, 17, 369 Mont. 483, 299 P.3d 799; *Aker*, ¶ 24. This Court will not presume prejudice from charges of prosecutorial conduct; rather, the defendant must show that the alleged prosecutorial misconduct violated the defendant's substantial rights. *Haithcox*, ¶ 24.

Wellknown argues that the prosecutor violated his right to a fair trial by allegedly (a) misstating the law by "giving his own definition of beyond a reasonable doubt;" (b) giving his personal opinion that Wellknown was guilty; (c) "harping" on Wellknown's refusal to participate in field sobriety tests (FSTs), thus undermining his right to be presumed innocent; and (d) commenting on the credibility of the State's witnesses. (Br. at 34-40.) None of these comments constitute prosecutorial misconduct, let alone plain error.

A. Beyond a reasonable doubt

As noted above, Wellknown discussed the issue of reasonable doubt with the jury panel during *voir dire*, including his interpretation of what a person's "most serious affairs" or "serious decisions" means. (Tr-1 at 74-80.) Defense counsel suggested the level of certainty to convict someone of a crime is equivalent to deciding to amputate your child's or grandchild's leg or taking a loved one off of life support. (*Id.*) During the discussions, the jurors all described needing to gather information to make a rational, informed decision. (*Id.*)

In his opening and closing arguments to the jury, Wellknown focused on the State's burden to prove the case beyond a reasonable doubt and argued that "probably," "possibly," or "could be" guilty is insufficient to convict him of DUI. (Tr-1 at 106-109; Tr-2 at 114-22.) In his closing, Wellknown again analogized the

definition of beyond a reasonable doubt to deciding whether to amputate a loved one's limb or turn off life support. (*Id*. at 113.)

In its rebuttal closing, the State argued that the defense attorney's examples misconstrued the definition of beyond a reasonable doubt. (Tr-2 at 123.) The prosecutor argued that:

> The State proved this case beyond a reasonable doubt through all of the other witnesses. Defense also talked about proof beyond a reasonable doubt, the most important of your affairs.
>
> Hopefully none of you have had to make a decision to have a loved one limb removed. Pretty rare, isn't it? How about the decision to terminate someone's life? It happens. [Some] of us have made that. But, again, rare. Doesn't say that is the standard. What it says most important of your affairs.
>
> What big decision have you made in life? Depending on where you are in life, if you are 19 years old, it is possible which college to go to. That is a pretty big decision. If you are a little older, might be to get married. Who are you going to settle down with? Little older, it could be kids, jobs. Major decisions.
>
> All of you have made those decisions and you typically make them every year. This is not pulling off life support. It is most important of your affairs. What are the important things in your life? What decisions have you made? That's what you look at.

(Tr-2 at 123-24.)

The State was entitled to offer rebuttal argument to Wellknown's interpretation of what reasonable doubt means. The prosecutor's argument about what "most important of your affairs" means did not lessen the State's burden or

misstate the law. And, since Wellknown did not object to the State's comments, he must firmly convince this Court that those comments constituted plain error.

While both sides offered their opinions on reasonable doubt using different analogies for defining "reasonable doubt," the jury was instructed that the attorney's arguments were neither evidence nor law. (*See e.g.*, Doc. 46, Jury Instruction (JI) Nos. 2 (arguments intended to "assist in evaluating the evidence and understanding each party's view of the case"), 10 (attorneys "may comment and argue" on the law given).) The jury was correctly instructed on the meaning of reasonable doubt. (JI No. 7.) *See State v. Lucero*, 214 Mont. 334, 344 (1984) (approving use of a pattern jury instruction on reasonable doubt). "American jurisprudence depends on a jury's ability to follow instructions and juries are presumed to follow the law that courts provide." *State v. Favel*, 2015 MT 336, ¶ 28, 381 Mont. 472, 362 P.3d 1126 (citation omitted).

The State's argument that "most important" of affairs did not include rare or uncommon events in one's life did not misstate the law or reduce the State's burden of proof. *See State v. Labbe*, 2012 MT 76, ¶ 23, 364 Mont. 415, 276 P.3d 848 (attorneys "may comment on the burden of proof" as related to the facts presented, but "may not go outside the record or misrepresent the law as instructed by the judge"). Rather, the State's rebuttal arguments were just that: arguments. They did not "so infect" the trial with unfairness that Wellknown's due process

rights were violated. *Haithcox*, ¶ 24. Even if this Court does not approve of the use of "life examples" to explain reasonable doubt, the State's arguments did not constitute plain error.

Notably, under a *de novo* review, this Court has held that the State's closing arguments likening one of their "most important of affairs" to allowing the defendant to babysit their children did not prejudice defendant. *Labbe*, ¶¶ 27-29. Without concluding the use of life examples was a misstatement of the law, this Court considered whether it denied Labbe a fair trial "[t]o the extent [the] statement would be considered improper." *Labbe*, ¶ 27.

First, This Court noted the jury was properly instructed that while attorneys were allowed to comment and argue on the law, the jury was to apply only the law as given from the court's instructions. *Labbe*, ¶ 28. Next, this Court concluded that Labbe had not overcome the presumption and "well recognized principle of law that juries are presumed to follow the law as given them," and concluded Labbe had not been prejudiced by the State's argument. *Labbe*, ¶ 29.

Here, the jury was presented with both attorneys' interpretations of what "most important" of affairs meant and, just as in *Labbe*, was instructed that such arguments are not evidence or law. (*See* JI No. 10.) Taken as a whole, the jury instructions directed that the jury's decision should be a product of a rational thought process applying the evidence to the law as given by the court; not as

argued by the attorneys. (*See e.g.*, JI Nos. 2, 5, 7, 8, 10 and 27.) The State's rebuttal comments about life examples did not create a "manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the proceedings, or compromise the integrity of the judicial process." *Aker*, ¶ 21.

B. FSTs and refusal to give breath/blood sample

Wellknown misconstrues the record when he claims the State "harped" on his refusal to perform FSTs. (Br. at 34.) The prosecutor mentioned Wellknown's refusal to do FSTs once. (Tr-2 at 109.) Next, the State discussed the inference the jury may make from Wellknown's refusal to provide a blood/breath sample based on the implied consent law and JI Nos. 20 and 21, not, as Wellknown asserts, his failure to "prove his innocence." (Tr-2 at 109-110.)

The State's closing arguments were appropriate comments on the evidence and in response to Wellknown's defense that he was not impaired when he arrived at the Double Tree and his lengthy discussions during *voir dire* about reasons why a person may refuse to submit to testing. The State's arguments about what could be inferred about Wellknown's behaviors/interactions were proper comments on what the jury could infer from the evidence. *See Smith*, ¶ 51 (State's arguments made in context of discussing evidence); *Polak*, ¶ 18.

The State properly relied on the language from JI Nos. 20, 21. It did not assert that the same inference occurs when FSTs are refused. Moreover, the State

explained to the jurors that "[y]ou get to make the determination" the effect his refusals have on whether he was under the influence. (Tr-2 at 110.)

The scope and nature of these comments by the State are not akin to *Favel*, where the State made multiple references to Favel's refusal to give a breath/blood sample as a failure to "prove her innocence." *Favel, supra*. Here, the prosecutor never used the term "innocence" in his closing. Nor did he argue Wellknown was guilty because he "could have proven" his innocence but did not, as occurred in *Favel*. The prosecutor's lone comment about the FSTs and his correct comments on the inference that the jury was allowed to make based on Wellknown's refusal under the implied consent law, did not shift the burden to Wellknown or undermine his presumption of innocence.

Notably, in *Favel*, where the State's comments specifically called out the defendant for not proving her innocence, thus "blurring the lines of burden of proof," this Court nonetheless concluded plain error was not warranted. *Favel*, ¶¶ 26-29. Here, the State's allegedly improper comments contained no "burden of proof language" that risked shifting the burden to the defendant.

Jury Instruction Nos. 7, 16, and 23, instructed the jury that the State bore the burden of proving Wellknown's guilt beyond a reasonable doubt. Jury Instruction No. 7 correctly defined the standard of proof required and instructed the jury that

Wellknown was presumed innocent throughout the trial and "is not required to prove his innocence or present any evidence."

Just as in *Favel*, the jury was instructed that the State bore the burden of proof and, during *voir dire* and both the opening and closing arguments, the State did not shirk that responsibility and acknowledged Wellknown was innocent until proven guilty. (*See* Tr-1 at 20-21, 45, 49; Tr-2 at 106-12, 122-25). Nor did the State suggest that to enjoy the presumption of innocence, Wellknown should have performed FSTs or submitted to testing. The State's lone comment about FSTs and Wellknown's refusal to voluntarily provide a blood/breath sample did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process" and was not plain error. *Haithcox*, ¶ 24.

C. Credibility of witnesses

During its closing remarks, the State pointed out that none of the State's witnesses had a motive to fabricate their testimony, but that Wellknown had such a motive. (Tr-2 at 112.) These observations did not constitute prosecutorial misconduct or plain error. (Tr-2 at 111-12.) Those observations were proper comments related to JI No. 5 which states:

> [y]ou are the sole judges of the credibility, that is, the believability, of all the witnesses testifying in this case, and of the weight, that is, the importance, to be given their testimony. . . . To do this, you should carefully consider all the testimony given, the circumstances under which each witness has testified, and every matter in evidence that tends to indicate whether a witness is worthy

> of belief. You may consider . . . [w]hether the witnesses have an interest in the outcome of the case or any motive, bias, or prejudice.

(JI No. 5.)

"While it is generally improper for the prosecution to offer *personal opinions* as to the credibility of the accused or the witnesses . . . it is proper for a prosecutor to comment on conflicts and contradictions in testimony, as well as to comment on the evidence presented and suggest to the jury inferences which may be drawn therefrom." *McDonald*, ¶ 14 (emphasis in original). Considering the challenged comments in the context of the trial and how they related to the jury instructions, Wellknown has not established how his substantial rights were violated or that the prosecutors acted beyond established norms of professional conduct or constituted plain error.

D. Alleged personal comment on defendant's guilt

Finally, Wellknown's complaint about the prosecutor's argument at the end of its first closing remarks is misplaced. (Br. at 38.) The statement must be taken in context. In explaining that Wellknown was charged in the alternative, the prosecutor stated,

> You can only find guilty on one or the other. You can't find guilt on one and not guilty on the other. Your verdict form is one document. It is very clearly telling you you can only enter guilt on one of them. And that [is] what he is.

(Tr-2 at 112.) When reviewed as part of the State's entire argument, this last sentence simply summarizes the State's closing remark that it met its burden to establish that Wellknown was guilty of either DUI or DUI *per se*. It was not a personal statement by the prosecutor that Wellknown was guilty.

The summation was an appropriate "comment on the gravity of the crime charged, the volume of evidence, credibility of witnesses, inferences to be drawn from various phases of evidence, and legal principles involved." *Smith*, ¶ 43; *Polak*, ¶ 18 (State's comments to jury will not constitute plain error "if made in the context of discussing the evidence presented and how it should be used to evaluate a witness's testimony under the principles set forth in the jury instructions").

None of the alleged improper comments denied Wellknown of a fair trial as was the case *State v. Lawrence*, 2016 MT 346, ¶ 4, 386 Mont. 86, 385 P.3d 968; *State v. Hayden*, 2008 MT 274, ¶ 33, 345 Mont. 252, 190 P.3d 1091; the only two cases where plain error has been invoked based on prosecutorial misconduct. Unlike *Lawrence*, where the State told the jury that "[t]he presumption of innocence that you came into this trial with no longer exists at this point" the State did not suggest Wellknown must prove his innocence or that he was no longer presumed innocent.

In *Hayden*, the State elicited testimony from one witness that bolstered the credibility of other witnesses and improperly vouched for its witnesses and made several improper comments vouching for the credulity of its witnesses during

closing. *Hayden*, *supra*. Here, the State did not elicit credibility testimony from other witnesses or personally attest to the believability of the witnesses and reliability of the police in its closing.

Wellknown has not established that his substantial rights were violated or that failing to review the four allegedly improper comments—either individually or collectively—would result in a "manifest miscarriage of justice, question of fundamental fairness, or compromise of the integrity of the judicial process." *Polak*, ¶ 20.

III. The district court correctly concluded Wellknown's 2007 DUI conviction could be used for sentence enhancement.

A. Relevant facts

Certified copies of Wellknown's driving record showed that he was charged with DUI, second offense, on February 5, 2007, and convicted of that offense on June 12, 2007. (Doc. 63, Exs. 1-2.) Certified copies of Yellowstone County Justice Court records show that on February 6, 2007, Wellknown appeared before the justice court and was advised his rights, including a right to counsel and jury trial. (*Id*., Ex. 3) Wellknown signed the acknowledgement of rights. (*Id*.)

In its Order Setting Conditions of Bond, Omnibus Hearing and Trial, the justice court further advised Wellknown that either he or his attorney must appear at his April 10, 2007 omnibus hearing, and at that time he may demand a jury trial.

(Doc. 63, Ex. 3.) The court explained that meanwhile, "trial without a jury is set for June 12, 2007 at 10:30 AM." And that the "[t]rial will be held in absence of defendant upon defendant's failure to appear for trial and will result in forfeiture of bail and a warrant issued for arrest of the defendant." (*Id*.)

Wellknown signed this document which contained the following acknowledgments:

> I acknowledge receipt of the above ORDER SETTING CONDITIONS OF BOND, OMNUBUS HEARING AND TRIAL and understand the terms of bail and release.
>
> I understand that my attendance at the omnibus hearing and trial is mandatory.
>
> I understand my right to a jury trial. I will make a timely demand for a jury trial. I understand that a demand for a jury trial within 10 days of the trial date is not timely and will be considered as a motion for a continuance and a waiver of my right to speedy trial.

(*Id*.)

Justice court documents dated June 12, 2007, show that Wellknown did not appear for his bench trial, but his Office of Public Defender (OPD) attorney, Frank Piocos, did attend. (Docs. 57, 63.) After explicitly finding that Wellknown "had knowledge of the trial date and time and [was] voluntarily absent" the court conducted the trial in abstentia, found Wellknown guilty, imposed sentence, and issued a bench warrant. (*Id*.) Wellknown was later arrested on the warrant. (Hr'g at 10.)

Wellknown did not appeal or challenge his 2007 conviction/trial for DUI, second offense. In 2017 he was charged and convicted of DUI, third offense, based on his prior two convictions in 2007 and 2002. Nonetheless, 17 years later, Wellknown argued that his 2007 conviction was unconstitutional.

At his sentencing hearing, Wellknown testified that he did not remember having any contact with the court after his arrest in 2007 but also claimed he did not receive paperwork showing he had a trial date set for June 12, 2007. (Hr'g at 5-15.) On cross-examination, Wellknown confirmed his signatures appeared on the certified copies of his justice court record that advised him that a bench trial was set for June 12, 2007, and, if he failed to appear, he would be tried in abstentia. (*Id*.; Hr'g Ex. 3.) Wellknown stated that he did not recall whether he contacted the OPD office when he was released from jail on February 6, 2007. (*Id*.) Wellknown stated that he was "pretty sure" he would have appeared for his trial had he been given a copy of the paperwork. (*Id*.)

The State presented a certified copy of Wellknown's driving record and met its burden of establishing the rebuttable presumption of regulatory and that his conviction was valid. (Hr'g at 24-26.) Next, after giving Wellknown the "benefit of the doubt" and, despite his extremely limited recollections, the court found that "with the barest of evidence" Wellknown demonstrated "some evidence" he did not have notice of his bench trial and shifted the burden to the State. (*Id*.) Lastly,

the court concluded the State met its burden based on the justice court document that found Wellknown's public defender was present for trial and Wellknown was voluntarily absent. (*Id*.)

B. Wellknown did not carry his burden and establish his 2007 conviction was constitutionally infirm.

"The Due Process Clause of Article II, Section 17 of the Montana Constitution protects a defendant from being sentenced based upon misinformation." *State v. Maine*, 2011 MT 90, ¶ 28, 360 Mont. 182, 255 P.3d 64. The State may not enhance punishment using a constitutionally infirm conviction since that would "constitutes 'misinformation of constitutional magnitude.'" *State v. Chaussee*, 2011 MT 203, ¶ 9, 361 Mont. 433, 259 P.3d 783.

This Court applies the following framework to evaluate collateral attacks on prior convictions offered for enhancement purposes:

> 1. A rebuttable presumption of regularity attaches to the prior conviction, and [this Court] presume[s] that the convicting court complied with the law in all respects;
>
> 2. The defendant has the burden to overcome the presumption of regularity by producing affirmative evidence and persuading the court, by a preponderance of the evidence, that the prior conviction is constitutionally infirm; and
>
> 3. Once the defendant has done so, the State has the burden to rebut the defendant's evidence. There is no burden of proof imposed on the State to show that the prior conviction is valid, however. The State's burden, rather, is only to rebut the defendant's showing of invalidity.

State v. Nixon, 2012 MT 316, ¶ 15, 367 Mont. 495, 291 P.3d 1154; *Maine*, ¶¶ 17, 33 (defendant has the "heavy burden" to present a preponderance of affirmative evidence establishing a prior conviction is invalid). As this Court explained,

> the ultimate burden of proof—which includes both the burden of production and the burden of persuasion—shall be on the defendant, who must prove by a preponderance of the evidence that the conviction is *invalid*. The burden is not on the State to prove by a preponderance of the evidence that the conviction is valid.

Maine, ¶ 34 (internal citations omitted) (emphasis in original). To carry this burden of proof, a

> defendant may not simply point to an ambiguous or silent record, but must come forward with affirmative evidence establishing that the prior conviction was obtained in violation of the Constitution. Self-serving statements by the defendant that his or her conviction is infirm are insufficient to overcome the presumption of regularity and bar the use of the conviction for enhancement.

Maine, ¶ 34.

This Court has defined "affirmative evidence" as evidence demonstrating "that certain facts actually exist or, in the context of a collateral challenge, that certain facts actually existed at some point in the past—*e.g.*, that an indigent defendant actually requested the appointment of counsel but counsel was actually refused." *Rasmussen*, ¶ 14.

1. Wellknown did not overcome the presumption of regularity by producing affirmative evidence that his 2007 conviction was constitutionally infirm.

Wellknown's 2007 conviction is presumed valid. The burden of both production and persuasion to rebut that presumption rested on Wellknown. *Chaussee*, ¶ 12. The State disagrees with the district court's determination that Wellknown met his initial burden because he did not produce *affirmative evidence* to show by a preponderance that his 2007 conviction was constitutionally infirm. *Chaussee*, ¶ 13.

Wellknown offered no affirmative evidence of what *actually* occurred in 2007. Wellknown only asserted he could not recall if he received copies of the paperwork he had signed or whether he contacted OPD. *See State v. Chesterfield*, 2011 MT 256, ¶ 27, 362 Mont. 243, 262 P.3d 1109 (held, district court did not err by not holding hearing on prior DUI conviction validity when defendant did not make prima facie showing because he had no recollection of waiving his rights and his statements did not "constitute affirmative evidence").

Wellknown's "self-serving and conclusory inferences" were insufficient to "forc[e] the State to prove the validity of the prior conviction, when such validity is already presumed." *Rasmussen*, ¶ 14. In *Rasmussen*, this Court explained that his argument "that he did not sign a waiver of his right to counsel was '*not proof of anything. It is absence of proof.*'" *Rasmussen*, ¶ 18 (emphasis added). Similarly,

Wellknown's claim that he did not recall getting the paperwork from the justice court is not affirmative "proof of anything" and was insufficient to meet his initial burden. The State respectfully disagrees with the district court's determination that Wellknown met his initial burden of proof to then shift the burden to the State.

Nonetheless, the district court reached the right result when it concluded that the State sufficiently rebutted Wellknown's allegations that his right to appear and have a jury trial were violated. A district court decision may be affirmed if it reached the right result, but for the wrong reasons. *See State v. Betterman*, 2015 MT 39, ¶ 11, 378 Mont. 182, 342 P.3d 971.

2. The State produced affirmative, credible evidence to rebut Wellknown's vague claims.

The certified copies of the 2007 justice court records constituted credible, affirmative evidence that rebutted Wellknown's claims. *See e.g.*, *Nixon*, ¶¶ 20-21 (probative value of Nixon's affidavit was undermined by evidence presented at the hearing); *State v. Couture*, 1998 MT 137, 289 Mont. 215, 959 P.2d 948 (affirmed court determination that State met burden to establish validity of conviction based on court documents showing defendant waived right to counsel); *State v. Walker*, 2008 MT 244, 344 Mont. 477, 188 P.3d 1069 (affirmed court's reliance on court records from prior conviction to rebut defendant's claim right to counsel was violated).

The initial appearance records established Wellknown was advised that: he had a right to counsel and to demand a jury trial; he would be assigned a public defender; a bench trial was set for June 12, 2007; and, if he failed to appear at his trial, he would be tried in abstentia. The trial and sentencing records established that: Wellknown's public defender was present for the June 12, 2007 bench trial; Wellknown failed to appear for his bench trial; and his absence was voluntary.

The district court correctly relied upon *State v. Weaver*, 2008 MT 86, ¶ 9, 342 Mont. 196, 179 P.3d 534, when making its ruling. (Hr'g at 19-26.) In *Weaver*, this Court affirmed the trial court's determination that Weaver's 1996 DUI conviction was valid and could be used to support his felony DUI in 2005. *Weaver*, *supra*. In 1996, Weaver was assigned a public defender who continued his DUI trial because of Weaver's health. *Weaver*, ¶¶ 4-5. When Weaver did not appear for his trial, but his counsel did, the court tried him in abstentia, and he was convicted. *Id*. In 2005, Weaver argued his 1996 conviction was not constitutionally valid because he did not have notice of the trial. *Id*. The district court disagreed, concluding that his failure to maintain contact with his attorney made his absence from trial voluntary. *Weaver*, ¶ 6.

This Court affirmed the district court, relying upon Mont. Code Ann. § 46-16-122(2)(d), to conclude the court correctly determined Weaver effectively waived his right to be present at his trial because he had knowledge of his trial and

was voluntarily absent. *Weaver*, ¶ 20. This Court concluded that substantial evidence established Weaver either knew of the trial date and failed to appear, or maintained deliberate ignorance of the trial date. *Weaver*, ¶ 22. This Court agreed that the district court's determination that Weaver's account was not credible was not clearly erroneous. *Weaver*, ¶¶ 23-24. The facts establishing that Wellknown was voluntarily absent from his 2007 trial are even more compelling than in *Weaver*.

Wellknown was advised a public defender would be appointed for him and he confirmed his address listed in the court records was correct. Moreover, the justice court directly informed Wellknown of the dates of his omnibus hearing and bench trial. Significantly, Wellknown was further informed that if he failed to appear for trial, it would be held in abstentia. Just as in *Weaver*, when Wellknown did not appear for his trial, the justice court made a finding that he was voluntarily absent and properly proceeded to trial.

Pursuant to Mont. Code Ann. § 46-16-122(1), if a defendant in a misdemeanor case fails to appear for trial, and his counsel is authorized to act on his behalf, "the court shall proceed with the trial unless good cause for continuance exists." If a misdemeanor defendant fails to appear and his counsel is not authorized to act on his behalf, the trial court has several options, including continuing the trial, forfeiting bail, issuing an arrest warrant, or "proceed[ing] with the trial after finding that the

defendant had knowledge of the trial date and is voluntarily absent." Mont. Code Ann. § 46-16-122(2).

Nothing in the record suggests that Wellknown's public defender was not authorized to proceed in his absence or that there was "good cause" to continue the trial. Nor did he allege such an argument below. Nonetheless, the justice court chose to make an explicit finding that Wellknown had notice of the trial date and was voluntarily absent. Just as in *Weaver*, the district court properly relied on the justice court's findings.

The district court, as the factfinder, was responsible for weighing the evidence and determining the credibility of the testimony presented and it is not this Court's role to reweigh the evidence. *See Nixon*, ¶ 21. Like the district court did here, in *Nixon*, this Court concluded that despite Nixon's allegedly "affirmative evidence" (*e.g.*, statements in his affidavit and during the hearing), he did not satisfy his ultimate burden of proof "which includes *both* the burden of production and the burden of persuasion . . ." *Nixon*, ¶ 19 (emphasis added); *Weaver*, ¶ 23 (even if defendant presents sufficient evidence to shift burden to State, it does not preclude the State from attempting later to undermine the credibility of that evidence).

Even if Wellknown's claims about not having notice were taken at face value, the State presented credible, affirmative evidence to rebut his assertions and

demonstrate his constitutional rights were not violated and his 2007 DUI conviction was not infirm. The district court did not misapprehend the effect of the State's evidence and its findings were "supported by substantial evidence." *Weaver*, ¶ 9. The district court correctly denied Wellknown's motion to reduce his felony DUI to a misdemeanor.

CONCLUSION

This Court should affirm Wellknown's conviction for DUI and the judgment and sentence that imposed a felony DUI sentence based on his three prior DUI convictions.

Respectfully submitted this 23rd day of December, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,951 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Katie F. Schulz
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CERTIFICATE OF SERVICE

I, Kathryn Fey Schulz, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 12-23-2021:

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