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STATE OF MONTANA
Case Number: DA 20-0562

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0562

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ROBERT EARL STAUDENMAYER,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Twentieth Judicial District Court,
Lake County, The Honorable Deborah Kim Christopher, Presiding

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STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion in admitting minute entries at a bail jumping trial.

2. Whether the district court abused its discretion in denying Appellant's motion to continue the trial.

STATEMENT OF THE CASE

In an earlier criminal proceeding (DC-18-379), the State charged Robert Staudenmayer in October 2018 with theft, money laundering, and robbery. (DC-18-379, Info., *available at* Doc. 40.) The district court advised Staudenmayer that he "shall make all court appearances in person" and if he failed to do so, his "bond, if any, and release shall be immediately revoked and a warrant shall be issued." (DC-18-379, Bond Order, *available at* State's Ex. 1.) On November 14, 2018, Staudenmayer was arraigned on the charges and pleaded not guilty. (DC-18-379, 11/14/18 min. ent., *available at* State's Ex. 2.) Staudenmayer affirmed he was "aware of his rights, the charges, and possible punishment." (*Id.*) The district court set an omnibus hearing for March 13, 2019 at 9 a.m. with a jury trial to follow on April 15, 2019. (*Id.*)

At the March 13, 2019 omnibus hearing, defense counsel, the court, and the State were all present, but Staudenmayer was not present. (DC-18-379, 3/3/19 min. ent., *available at* State's Ex. 3.) The minute entry detailed:

> [Defense counsel] has no information on the non-appearance of her client. The State moves for a warrant. The Court advises if the State prepares a warrant, the Court will sign it. The Court vacates the April 15, 2019 TSO.

(*Id.*)

Based on his non-appearance in DC-18-379, the State charged Staudenmayer with bail jumping in DC-19-17, the case that is subject to this appeal. (Doc. 3.) In pretrial proceedings, the district court denied Staudenmayer's motion in limine to exclude the minute entries offered by the State from DC-18-379, and further denied his motion to continue trial after the fourth trial setting. (Docs. 58, 64.)

The jury convicted Staudenmayer of bail jumping. (Doc. 66.) The district court sentenced Staudenmayer to ten years at the Montana State Prison with no time suspended, with his parole restricted for the sentence, to be served consecutively to his assault conviction in another proceeding, DC-20-97. (Doc. 75 at 2.)

Staudenmayer appeals his conviction for bail jumping, arguing that the district court abused its discretion and violated his constitutional right to confrontation by admitting minute entries in his trial. Staudenmayer further argues that the district court abused its discretion in denying his motion for a continuance.

STATEMENT OF THE FACTS

I. Facts related to bail jumping and the minute entries

A. The minute entries

In pretrial proceedings, the State gave notice of its witnesses and exhibits, attaching two minute entries and the Information from DC-18-379 as relevant to Staudenmayer's non-appearance at his prior omnibus hearing. (Doc. 40.) Both of the minute entries were certified as "true and correct" copies of the original documents on file "in the office of the Clerk of the District Court." (State's Exs. 2-3.)

Staudenmayer filed a motion in limine to preclude testimony about the minute entries, arguing that the State's proposed witness, Clerk of the Lake County District Court Lyn Fricker, did not generate the minute entries and had no personal knowledge to testify as to their contents. (Doc. 61 at 4.) Staudenmayer explained that Deputy Clerk Krisstyn Leiter actually wrote the minute entries in question, and the State had not listed her as a witness. (*Id.*) Staudenmayer further argued that the minute entries should be excluded because they violated his "constitutional right to confront the State's witnesses against him" at trial. (*Id.*)

The district court ruled that the "minute entries may be introduced if proper foundation is laid for their admission." (Doc. 64 at 2.) The court explained that

"[t]he court and counsel routinely rely on minute entries in the course of a case." (*Id.*)

Prior to trial testimony, the State repeated its intent to call District Court Clerk Lyn Fricker. (7/13/20 Tr. at 106.) The State recognized that Fricker was not the deputy clerk who drafted the minute entries but noted that "those records are kept in the normal and ordinary course of business." (*Id.*) The State explained that the minute entries were "official documents that have been certified[.]" (*Id.*) The State concluded that they fit into the "business rule exception," which is "applicable to court reports." (7/13/20 Tr. at 107.) Defense counsel objected, responding:

> **DEFENSE COUNSEL**: I do not think that it fits under the business record exception. We all know there are errors in minute entries all the time. We've all had to have one corrected. They're not self-authenticating documents and they're hearsay and they're testimonial. The woman that took these sitting there in the court that might have a personal memory of what happened that day is not here. Ms. Fricker was not there, she did not take these down. She did not even certify these records.

(7/13/20 Tr. at 107-08.) The district court reaffirmed its previous ruling allowing the minute entry admission, explaining:

> **COURT**: And I appreciate what the defense has to say about these particular documents. And while I will agree that there have been errors in minute entries, quite frankly in the Court's experience that doesn't happen often, and I don't think that because errors occur that somehow takes them out of the realm of a business record. These minute entries are made by the clerks for the purpose of making essentially a documentation of the Court's rulings at the time.

> And so unless you can point me to where there's an actual error in this document that isn't accurate the Court's going to allow them under the business records.

(7/13/20 Tr. at 108.) The court continued that "based on the fact that we have the actual specific elected custodial of the records the Court's going to allow it to come in." (7/13/20 Tr. at 109.)

B. The trial testimony

1. Lyn Fricker

District Court Clerk Fricker has been employed at the Clerk's office for 29 years. (7/13/20 Tr. at 135.) She explained that deputy clerks transcribe the minute entries, which are part of the Clerk's records. (*Id.*) The "first thing" a deputy clerk does is to record who is present at a hearing and who is not present. And the "second thing" is to record the "dates and times." (7/13/20 Tr. at 151.) General recorded facts include what happens in a given hearing, including whether the defendant is present. (*Id.*) Part of the job is also recording the date of the next hearing on the minute entry. (*Id.*) Fricker testified that it is "not a practice" to "write down things we don't hear or don't see." (7/13/20 Tr. at 150.)

Fricker affirmed that the minute entries were true and correct copies of the minute entries kept in the ordinary course of the Clerk's business. (7/13/20 Tr. at 138, 142.) She also confirmed the facts relating to Staudenmayer's non-appearance

as specified in the minute entries. (7/13/20 Tr. at 138-42.) The court admitted both minute entries over Staudenmayer's objection. (7/13/20 Tr. at 139, 142.)

Fricker explained that part of the function of the Clerk's office is to reschedule hearing dates. (7/13/20 Tr. at 142.) She confirmed that Staudenmayer's trial was set for April 15, 2019, and it did not go forward that day, explaining, "[b]ecause there's no defendant, there's no trial." (7/13/20 Tr. at 143.) She also confirmed that a warrant was issued in DC-18-379. (*Id.*)

Fricker noted that judges do not typically cancel trials lightly. She did not believe that that trial was canceled in this case because the deputy clerk made a mistake and Staudenmayer had actually appeared. (*Id.*) She detailed that "everyone is provided a minute entry after the hearing, so the attorneys, the county attorney and the Judge would all be aware of this minute entry, and if it was wrong or there was a change to be made somebody would have brought it up." (7/13/20 Tr. at 145.) Fricker had no knowledge of any party requesting to amend the minute entries. (*Id.*)

2. Contessa Hines

Contessa Hines testified she spoke with Staudenmayer on the phone on July 8, 2020. (7/13/20 Tr. at 156.) She explained that Staudenmayer told her about "being on the run potentially from what he had told me before." (*Id.*) She detailed that Staudenmayer had told her that he "left" Montana "for a couple weeks." (*Id.*)

3. Joel Shearer

Joel Shearer, Jail Commander for the Lake County Sheriff's Office Detention Facility, testified that Staudenmayer was arrested pursuant to a warrant on June 13, 2019, and detained pending his next court hearing. (7/13/20 Tr. at 161; *see also* Doc. 6, return of warrant.)

II. Facts related to defense counsel's motion for a continuance

On March 18, 2019, Staudenmayer was charged with bail jumping. (Doc. 3.) The district court issued a warrant for his arrest and set bail at $50,000. (Doc. 4.) On June 13, 2019, he was served with the warrant and was held on the $50,000 bond. (Doc. 6.)

On June 17, 2019, Ashley Morigeau entered a notice of appearance and a discovery request on behalf of Staudenmayer. (Doc. 7.) Morigeau certified that she advised Staudenmayer of the single charge and his legal rights. (Doc. 8 at 5.) After the arraignment, the district court set an omnibus hearing for October 23, 2019, and a jury trial for December 2, 2019. (Docs. 9-10.)

But on September 20, 2019, the State moved to dismiss the bail jumping case without prejudice, reasoning that Staudenmayer had received a 20-year DOC sentence in DC-18-379. (Doc. 11.) On September 30, 2019, the district court dismissed the case without prejudice. (Doc. 12.)

However, on March 3, 2020, the State refiled the bail jumping charge. (Doc. 15.) The State moved to set aside dismissal, reasoning that Staudenmayer had withdrawn his plea in DC-18-379 and the district court had advised Staudenmayer that a consequence of withdrawing his plea was that his bail jumping charge would be reinstated. (Doc. 19.) The district court again issued a warrant for Staudenmayer's arrest and set bail at $25,000, served on the same day. (Doc. 17.)[1]

Lisa Kauffman was appointed to represent Staudenmayer and affirmed that she had advised him of the single charge and his legal rights. (Doc. 23.) After the second arraignment, the district court set an omnibus hearing for July 29, 2020, and a jury trial for August 31, 2020. (Docs. 24-25.)

Around the time the charge was re-instated, the COVID-19 shutdown ensued. In mid-March 2020, Chief Justice McGrath issued his first COVID-19 directive, encouraging continuations of trials and court video conferencing. (3/13/20 Directive.)[2] On March 27, 2020, the Chief Justice issued a shelter in place order, suspending all criminal jury trials until after April 10, 2020. (3/27/20

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[1]The warrant appears to have been served at the Lake County Jail. (Doc. 17.) Staudenmayer had multiple pending criminal proceedings so likely remained incarcerated even while the bail jumping charges were not pending. *See* n.6.

[2] *Available at* https://courts.mt.gov/external/docs/COVID-19%203-13.pdf.

Directive.)[3] On April 27, 2020, the Chief Justice promulgated guidance for returning to courtroom trials, to begin "after May 4, 2020." (4/27/20 Directive.)[4]

Kauffman moved for Staudenmayer's release on his own recognizance, explaining he was diabetic and had COVID-19 risk factors. (Doc. 29.) The State opposed the motion because of Staudenmayer's criminal history and the diabetic menu he was receiving. (Doc. 26.) Kauffman later renewed the motion. (Doc. 33.) On April 16, 2020, the court held a bond hearing and denied O/R release. (Doc. 35.)

Kauffman next moved to substitute Judge James Manley. (Doc. 27.) On April 2, 2020, Judge Deborah Kim Christopher assumed jurisdiction and reset jury trial for June 29, 2020. (Doc. 30.) The court ordered jury instructions to be filed by June 9, 2020, and objections to instructions to be filed by June 19, 2020. (Doc. 31.)

Kauffman filed a discovery request. (Doc. 37.) The State obliged, indicating it would call as a witness Lyn Fricker, Clerk of Court, and would rely on two minute entries and the Information from DC-18-379. (Doc. 40.) The State attached the specified documents to its notice of witnesses and exhibits. (*Id.*)

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[3]*Available at* https://courts.mt.gov/external/virus/shelter.pdf.

[4]*Available at* https://courts.mt.gov/external/virus/COVID-19%20Revised%20Memo%20from%20Chief%20Justice%20McGrath%20042720.pdf?ver=2020-04-27-152609-250.

By May 14, 2020, Kauffman represented that she would rely on a general denial, and the parties agreed that trial should take one day. (Doc. 45.)

At a May 28, 2020 status hearing, Kaufmann did not appear, and the district court noted that no motion to withdraw existed in the record. (5/28/20 Tr. at 2-3.) Ms. Bear Don't Walk from the Public Defender's Office appeared and noted that since Kauffman had not moved to withdraw, she was "still on the hook" in the case. (5/28/20 Tr. at 3.)

At the hearing, the district court discussed trial administration in light of COVID-19 and the time needed to prepare for a jury trial. The court noted that "we're just beginning back into a world where we're going to have trials again." (5/28/20 Tr. at 6-7.) The court explained, "I want to make sure that . . . the trials are going and that we're not going to waste juror's time or put them in any situation that is not safe for them." (5/28/20 Tr. at 5.) The court expressed a preference to prioritize cases in which individuals had "been incarcerated the longest[.]" (*Id.*) The court urged the parties' cooperation. (5/28/20 Tr. at 6.) The court noted that Kauffman was not present and she hadn't "filed anything[,]" and thus noted the necessity to continue the status hearing. (5/28/20 Tr. at 5-6.)

That same day, Kauffman moved to withdraw, explaining she had a large caseload and was unable to serve Staudenmayer's right to a speedy trial, while additionally complaining about a purported lack of health and safety precautions

during COVID-19. (Doc. 46.) The district court granted the motion. (Doc. 47.) The court vacated the third trial setting and reset trial for July 13, 2020. (Doc. 48.) The court ordered jury instructions to be filed by June 24, 2020, and objections to jury instructions to be filed by July 3, 2020. (*Id.*)

On June 1, 2020, the State submitted proposed jury instructions. (Doc. 44.)

On June 15, 2020, Timothy Wenz and Amanda Gordon appeared as counsel for Staudenmayer, explaining in a later document that they were appointed as counsel on June 3, 2020. (Doc. 49; *see* Doc. 51.) They timely filed one additional proposed jury instruction about Staudenmayer's right not to testify and did not object to any of the State's proposed instructions. (Doc. 50.)

On June 23, 2020, Wenz and Gordon filed a motion to continue the July 13, 2020 trial, asking for a 30-day continuance and explaining:

> The reasons for the continuance are numerous. First, counsel for the Defendant were only appointed on June 3, 2020. Second, counsel for the Defendant has yet to receive the discovery in this matter and, is therefore unable to prepare for trial. Finally, due to the recent outbreaks of COVID-19 in Missoula and Flathead Counties, the Lake County Detention Center has denied counsel for the Defendant personal access to the Defendant. It is impossible for counsel to prepare for trial if they cannot speak to their client in person.

(Doc. 51.)

The State opposed the motion. First, the State explained that it had already provided the exhibits and noticed its proposed witnesses. (Doc. 52 at 1.) Next, the State explained that Lake County Jail "does not record conversations" so defense

counsel could contact Staudenmayer by phone, and defense counsel failed to explain why face-to-face conversations were necessary. (*Id*. at 1-2.)[5] The State observed that bail jumping was a simple charge that essentially turned on whether Staudenmayer was ordered to appear for a hearing and failed to appear. (*Id*. at 2.) The State argued that the request had "more to do with trial strategy amongst several cases"[6] than with actual preparation for trial for bail jumping. (*Id*.) Finally, the State noted its timing concerns, specifically that the July 13, 2020 trial setting was the "fourth trial setting in this matter." (*Id*. at 1.) Wenz and Gordon did not file a reply.

On July 9, 2020, the district court denied the motion for a continuance, reasoning that the parties were already on their fourth trial setting and "any further delay prejudices the State." (Doc. 58.) The next day, in a limine order, the court elaborated that "[s]pecial arrangements were made for the two new Defense

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[5]Kauffman had also represented in an earlier filing that she was communicating with Staudenmayer via jail phone calls during COVID-19. (Doc. 33 at 1.)

[6]In addition to the robbery, theft, and money laundering case in DC-18-379 in front of Judge Manley, Staudenmayer was also charged in separate cases of robbery and assault in DC-20-97 and strangulation of a partner or family member in DC-19-40. (*See* Doc. 75 at 1; 9/17/20 Sentencing Tr. at 9.)

At his later combined sentencing hearing for this bail jumping case and DC-20-97 and DC-19-40, the State moved to dismiss DC-19-40 based on the victim's reported recantation, which the court granted. (9/17/20 Tr. at 7-9; Doc. 75 at 1.) Staudenmayer pled guilty to the lesser-included offense of assault in DC-20-97. (9/17/20 Tr. at 13-14.)

Counsel to meet with the defendant" the prior day. (Doc. 60.) The court further explained:

> This case has been pending since March 2020 [sic][7] and the Defendant has been incarcerated most if not all of that time. The nature of the case and the elements required for the State's case and the Defendant's defense are fairly straight forward. The Court expects and requires counsel to be prepared and ready to proceed on Monday. Given the inconvenience and the significant sacrifices being demanded of the jury during this time of COVID-19, this Court is unlikely to entertain any motions that would eliminate the trial as set.

(Doc. 60 at 2.)

The State had earlier filed a motion in limine to prevent Staudenmayer from testifying about a lawful excuse for non-appearance unless the defense provided notice of an affirmative defense. (Doc. 39.) The district court provisionally granted the motion on July 9, 2020, but allowed the defense to nonetheless file a late response. (Doc. 60.)

Pursuant to the court's accommodation, Gordon responded, arguing that a "lawful excuse" for non-appearance did not constitute an affirmative defense. (Doc. 62.) Gordon also filed a motion in limine to preclude: (1) discussion about whether the prior offense was a misdemeanor or felony; (2) admission of the

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[7]While the State refiled charges in March 2020, the court likely meant March 2019 when the charges were originally filed. The court corrected this error in a later order. (*See* Doc. 63 at 2, "This case has been pending since March 20~~20~~ 19 (notation "DKC") and the Defendant has been incarcerated a lot of all that time.")

minute entries and testimony about them; and (3) jail calls between Staudenmayer and Contessa Hines. (Doc. 61.)

After considering Gordon's argument, the court switched its position and denied the State's motion in limine. (Doc. 63.) And the court granted-in-part Gordon's motion in limine, precluding evidence regarding the charges for which Staudenmayer was out on bond, while denying the motion to exclude the minute entries, and reserving judgment on the State's proposed addition of the jail call. (Doc. 64.)

In explaining its limine rulings, the district court observed that "[a]ll parties are aware of the evidence in this case and have had access to review it." (Doc. 64 at 2.) The court noted that switching defense counsel several times had affected the "deadlines in the Omnibus order" for "both parties during all of the COVID-19 directives." (*Id.*) The court explained that it nonetheless intended to make accommodations for the parties given the simplicity of the single charge, explaining:

> [T]he Court is in no position to exclude evidence that develops during the case as long as both parties are aware and have had the information on Friday with the weekend to prepare. Both parties have had at a minimum at least 4 days to prepare for trial on a single charge with two elements and from what the Defense recites it appears that most if not all witnesses except one continue to work at the Courthouse so they should not be difficult to find.

(*Id.*)

On the eve of trial, the district court noted that the omnibus deadlines did not matter because the "omnibus hearing was so long ago so . . . I am not going to be as willing to follow deadlines in the omnibus hearing in this matter for either side. So, I mean, I've allowed the defense to file motions well after those motions should have been filed because of their circumstances, but that also compromises the State." (7/13/20 Tr. at 9.)

The court urged the parties to "share as much information as you can" to coordinate witness testimony. (*Id.*) The court provided further accommodations for late-noticed witnesses, explaining that the court was "functioning in an incredibly weird time doing things in a different way" and that "if somebody needs to have a few more witnesses with a witness that's being called, that they don't feel like they've actually seen whether it was the defense or the State, that I would take a break and the jury and I would wait on that." (7/13/20 Tr. at 11.) The court continued that "as long as there's the ability to have had a chance to talk with the witness I'm likely to let the witness testify unless some other complaint or issue about that." (*Id.*)

The court also circled back to its earlier denial of the defense's continuance motion, explaining "it was my understanding that Mr. Staudenmayer did want to go forward with the trial as soon as possible. I know that a motion to continue was filed." But the court explained, "I'm concerned, I want him to have his day in

court." Accordingly, the court urged the parties to reduce preliminary juror challenges to ensure 12 people were on the jury. (7/13/20 Tr. at 8.)

The State explained that it had updated its exhibit and witness lists based on a June 8, 2020 jail phone call between Staudenmayer and Contessa Hines in which Staudenmayer relayed inculpatory statements. (*See* Doc. 57, 7/9/20 List of Exhibits and Witnesses.) The State intended to simply have Hines testify, rather than play the jail call CD. (7/13/20 Tr. at 110.) Gordon confirmed that she was "given the CD's on [June] 9th" and "did object to it in [her] motion of limine for various reasons." (7/13/20 Tr. at 111.) After argument, the court allowed "the defendant to choose whether we use the CD or whether we use the individual who testified to it to prevent other prejudicial information to be presented[.]" (7/13/20 Tr. at 114.) Hines would ultimately testify at trial.

Prior to voir dire and outside the presence of the jury, the State also brought up a discussion revolving around admitting the Information against Staudenmayer in DC-18-379 with redactions, or, alternatively, admitting the Bond Order in DC-18-379, which did not require substantive redactions. (7/13/20 Tr. at 11-12.) Gordon objected, arguing that the Bond Order "was not listed on the witness and exhibit list." (7/13/20 Tr. at 5.) The court noted that the "bottom line is this is an opportunity to see it. We're not going to get to the actual introduction of evidence

until we're all back down at the courthouse."[8] (*Id.*) The court continued: "So this gives you a heads up, which was my intention, to make sure we're all on the same sheet of music, that everything is redacted properly and the documents you expect to see." (*Id.*)

The court urged the parties to "talk and determine which document is preferable from the defense, because obviously the information can come in. The [bond] order may be less prejudicial and if that's true then I think that would be a better direction to go. But push comes to if it has to be in the Information and that's the one the defense insists on I'm probably going to let the defense insist on it and that's where we will be." (7/13/20 Tr. at 12.) The court went into recess until jury selection. (7/13/20 Tr. at 13.)

After voir dire and jury selection occurred in the school gymnasium, trial was again paused to move the proceedings to the courthouse. (7/13/20 Tr. at 88-91.) Prior to opening statements and outside the jury's presence, the parties circled back to which document to use. (7/13/20 Tr. at 96-100.) Gordon argued that if "we're not bound to what we've listed in our witness and exhibit list why do we provide those and file those?" (7/13/20 Tr. at 99.) The State observed that "all

[8]The voir dire was held at a school gymnasium to maintain social distancing, while the trial was later held at the courthouse. (7/13/20 Tr. at 13, 89.)

of this material has been provided to the defendant." (7/13/20 Tr. at 97.) The court responded:

> **COURT**: Well, some of them were in the filing documents so I presume those are a matter of public record. You know, it's one thing if they're not a matter of public record, but if they're a matter of public record that's all information that's available to both parties. So I'm not getting into that battle. If there's discovery, actual discovery that hasn't been supplied, that's a different story. But this is a case where most of what it is that the parties are going to be talking about is a matter of public record. So I expect counsel to review and be ready for whatever it is that's going to come up.
>
> But I don't think that there's—anything that's in the Court file is there for anyone to see. That doesn't appear to me to be discovery. We do supply stuff back and forth but I think that can be considered a courtesy. But if it's a matter of public record I can't keep the State from relying on that nor can I keep the defense.
>
> In fact, like I said, if I was really relying on the rules of court then none of the motions filed by [the defense] could the Court consider because they were all well after the omnibus hearing and I have granted some of those motions tying the State's hands to some degree.

(7/13/20 Tr. at 100.)

After further discussions, Gordon explained that she "objected to the Information being admitted from 18-379 . . . because it's extremely prejudicial and the jury doesn't need to know what the underlying charges were." (7/13/20 Tr. at 103.) Having narrowed the issue to the Bond Order, the State proposed redactions to the "amount of bond granted" and references to the victim to eliminate potential prejudice. (7/13/20 Tr. at 104-05.) Gordon agreed that she knew "what was

redacted" and that the redactions were "appropriate," and clarified she would only object as to who would testify about the Bond Order. (7/13/20 Tr. at 106.)

Trial proceeded on schedule on July 13, 2020. (Doc. 65.) It was the first jury trial held in Lake County since the COVID-19 shutdown. (7/13/20 Tr. at 115-16.)

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion in admitting the minute entries at trial. Minute entries are generated pursuant to the clerk of the district court's duty to make an independent record of the events occurring at a court proceeding. They are not made in anticipation of future use in a criminal prosecution. Thus, the admission of the certified copies of minute entries in Staudenmayer's bail jumping trial made in the ordinary course of court administration were not testimonial and did not implicate his confrontation rights.

The district court properly exercised its discretion to deny defense counsel's motion to continue trial after the fourth trial setting. While the court denied the 30-day requested continuance for a single-charge trial, the court nonetheless made extraordinary accommodations to address defense counsel's concerns about the length of time to prepare for trial, while also considering the COVID-19 situation and Staudenmayer's speedy trial rights. The court allowed defense counsel to file

pretrial motions and responses late, pause trial if necessary to interview witnesses, and pick and choose the lesser prejudicial documents that the State was going to present. And, given the long delay in this case, the simple single charge, and Staudenmayer's lengthy incarceration, the district court reasonably considered speedy trial implications cautioning against any further delay. Finally, Staudenmayer fails to prove any specific prejudice from the denial of his motion.

ARGUMENT

I. The district court properly exercised its discretion when it admitted minute entries at trial.

A. Standard of review

This Court reviews a district court's evidentiary rulings for an abuse of discretion. *State v. Laird*, 2019 MT 198, ¶ 43, 397 Mont. 29, 447 P.3d 416. Abuse of discretion occurs if the district court acted arbitrarily and without the employment of conscientious judgment or in a manner that exceeds the bounds of reason, resulting in substantial injustice. *State v. Mercier*, 2021 MT 12, ¶ 12, 403 Mont. 34, 479 P.3d 967.

B. Applicable law

The Confrontation Clause of the Sixth Amendment of the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend VI.

The Montana Constitution provides that "[i]n all criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face[.]" Mont. Const. art. II, § 24. The essential purpose of the right to confront witnesses is to secure the opportunity to test witnesses' testimony through cross-examination. *State v. Tome*, 2021 MT 229, ¶ 23, 405 Mont. 292, 495 P.3d 54 (citing *State v. Baker*, 2013 MT 113, ¶ 18, 370 Mont. 43, 300 P.3d 696).

A confrontation clause violation does not occur unless the admitted hearsay evidence was "testimonial" and the accused did not have a prior opportunity to cross-examine the unavailable declarant. *See Crawford v. Washington*, 541 U.S. 36, 59, 68 (2004). Put another way, the confrontation clause "only applies to testimonial statements, leaving the remainder to regulation by state hearsay laws." *Tome*, ¶ 28 (citing *Crawford*, 541 U.S. at 68.) Thus, whether a hearsay statement's admission implicates a defendant's confrontation rights depends on whether the statement is testimonial or nontestimonial. *Michigan v. Bryant*, 562 U.S. 344, 357-58 (2011); *Crawford*, 541 U.S. at 68.

C. Discussion

In *Crawford*, the Supreme Court explained that certain statements "by their nature" are "not testimonial," which include, "for example, business records or statements in furtherance of a conspiracy." *Crawford*, 541 U.S. at 56. The

Supreme Court reaffirmed its statement from *Crawford* in *Melendez-Diaz*, explaining:

> Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial.

Melendez-Diaz v. Massachusetts, 557 U.S. 305, 324 (2009).

Here, the minute entries were not prepared for use in a criminal prosecution. Rather, they were created pursuant to the clerk's statutory duty to make an independent record of what was occurring in court. *See* Mont. Code Ann. § 3-5-501(1)(g) (duties of the district court clerk's office include keeping "a minute book, which must contain the daily proceedings of court, which may be signed by the clerk."). Thus, as the district court reasonably recognized, they are created for the court's administration. Since the records were not prepared for use in a criminal proceeding, they are not testimonial.

While this Court has not addressed this precise issue, persuasive authority from another jurisdiction has concluded that minute entries are not testimonial. For example, the Court of Appeals of Washington held that a clerk's minute entry made at a sentencing hearing pertaining to a prior conviction "is a certified record that was not prepared in anticipation of litigation" and was thus "not testimonial" for purposes of the confrontation clause. *State v. Hubbard*, 169 Wash. App. 182,

185, 279 P.3d 521, 523 (2012). The Court explained that such minute entries are not testimonial because "a certified public record such as a clerk's minute entry simply memorializes facts as they occurred in court, without reference to future litigation." *Hubbard*, 169 Wash. App. at 186, 279 P.3d at 523.

Another persuasive authority from the Washington Court of Appeals is almost exactly on point to this case. In *Phipps*, the defendant appealed his conviction for bail jumping. *State v. Phipps*, No. 75763-6-I, 2018 Wash. App. LEXIS 910, ¶ 1 (Ct. App. Apr. 23, 2018) (unpublished).[9] Phipps argued that the admission at his bail jumping trial of a minute entry showing he failed to appear for court violated his confrontation rights. *Id*. ¶ 2. At trial, the clerk who created the minute entry did not testify, but the judicial operations manager authenticated the documents. *Id*. ¶ 17. The operations manager did not prepare the documents or have personal knowledge of the information contained in the documents. *Id*. Phipps argued that the minute entry and order were "testimonial and therefore he must be allowed to confront the authors before their admission." *Id*. The

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[9]The State's citation is proper. This Court has reasoned that "[u]npublished decisions of other courts may be cited as legal authority to the extent the rules of the rendering court allow." *Greater Missoula Area Fedn. of Early Childhood Educators v. Child Start, Inc*. 2009 MT 362, ¶ 26 n.3, 353 Mont. 201, 219 P.3d 881 (approving citing of out-of-jurisdiction cases for "persuasive" value). Under Wash. Gen. R. 14.1(a), Washington Court of Appeals unpublished opinions are not precedential, but opinions issued after March 1, 2013, may be cited for "persuasive value[.]" https://www.courts.wa.gov/court_rules/pdf/GR/GA_GR_14_01_00.pdf.

Washington Court of Appeals disagreed, citing *Hubbard* and explaining that the minute entry was not testimonial because it was not made "for the purpose of proving some fact in anticipation of criminal prosecution[,]" but was rather meant to create "an independent record of what is occurring in court." *Id*. ¶ 18.

Here, the district court offered several justifications as to why the minute entries were admissible. The court noted that the minute entries were made with the "purpose of making essentially a documentation of the Court's rulings at the time." The court noted that the minute entries were reliable and the actual custodian of the records, the district court clerk, would authenticate the documents. Because the materials were not testimonial, the district court committed no error whatsoever. The district court did not abuse its discretion by acting arbitrarily and without the employment of conscientious judgment nor exceed the bounds of reason but, rather, carefully considered the issue after briefing and argument.

As a final note, on appeal, Staudenmayer exclusively raises a constitutional confrontation claim. (Appellant's Br. at 11 (summary), 12-17 (body of argument).) He does not—in any manner—alternatively argue that the minute entries were otherwise precluded under the Montana Rules of Evidence. However, if this Court considers the issue, the minute entries were admissible as either business records or self-authenticating public records. Mont. R. Evid. 803(6) (business records

exception); Mont. R. Evid. 803(8) (public records exception); Mont. R. Evid. 902(4) (self-authentication rule for certified copies of public records).

II. The district court properly exercised its discretion when it denied Staudenmayer's pretrial motion for a continuance.

A. Standard of review

This Court reviews matters of trial administration for an abuse of discretion. *State v. Rossbach*, 2022 MT 2, ¶ 9, 407 Mont. 55, 501 P.3d 914. Ruling on a motion to continue a trial "is left to the discretion of the trial court." *State v. Molder*, 2007 MT 41, ¶ 23, 336 Mont. 91, 152 P.3d 722. "This Court will not overturn a district court's decision to deny a continuance 'unless the district court abused its discretion and the ruling prejudices the defendant.'" *State v. Duncan*, 2008 MT 148, ¶ 37, 343 Mont. 220, 183 P.3d 111 (quoting *State v. Ibarra-Salas*, 2007 MT 173, ¶ 13, 338 Mont. 191, 164 P.3d 898). Abuse of discretion occurs if the district court acted arbitrarily and without the employment of conscientious judgment or in a manner that exceeds the bounds of reason, resulting in substantial injustice. *Mercier*, ¶ 12.

B. Applicable law

Montana Code Annotated § 46-13-202 provides:

> (1) The defendant or the prosecutor may move for a continuance. If the motion is made more than 30 days after

> arraignment or at any time after trial has begun, the court may require that it be supported by affidavit.
>
> (2) The court may upon the motion of either party or upon the court's own motion order a continuance if the interests of justice so require.
>
> (3) All motions for continuance are addressed to the discretion of the trial court and must be considered in the light of the diligence shown on the part of the movant. This section must be construed to the end that criminal cases are tried with due diligence consonant with the rights of the defendant and the prosecution to a speedy trial.

When reviewing a district court's denial of a motion for a continuance, this Court considers factors such as:

> the length of the requested delay, whether there was a showing that the State's case would be prejudiced, the reasons for the requested continuance, whether defense counsel was diligent in preparation for trial, whether the defendant's right to a speedy trial would be violated, and the defendant's right to effective assistance of counsel.

Molder, ¶ 23 (citing *State v. Sotelo*, 209 Mont. 86, 91, 679 P.2d 779, 782 (1984)). "Demonstrating that a continuance is in the interests of justice is not enough; the defendant must also make an affirmative showing of his due diligence." *Duncan*, ¶ 40 (citing *State v. Borchert*, 218 Mont. 320, 326-27, 934 P.2d 170, 174-75 (1997); Mont. Code Ann. § 46-13-202(3)).

C. Discussion

The district court did not abuse its discretion in denying defense counsel's motion for a continuance. While the district court denied the motion, it mitigated

any potential prejudice by making concerted efforts to accommodate the defense's preparation for trial, even in light of the relatively straightforward single charge with two elements. Notwithstanding the State's salient observations that defense counsel's purported reasons in the motion for the requested continuance fell flat, the court addressed each of defense counsel's concerns regarding (1) the ability to communicate with Staudenmayer; (2) the ability to respond and prepare for trial; and (3) the time between when counsel was appointed and trial.

First, the district court made "special arrangements" for defense counsel to meet with Staudenmayer during the COVID-19 shutdown. Next, the court allowed defense counsel to respond to the State's motion in limine late, as well as permitted the defense to file their own motion in limine. The court gave defense counsel an opportunity to pause trial to interview witnesses if necessary. The court even allowed defense counsel to choose the less prejudicial evidence for their client that *the State* would present. The extension denial was not prejudicial as the court gave defense counsel both reasonable time and accommodations to prepare for a short trial with a single charge.

No aspect of the court's decision was an arbitrary exercise of judgment exceeding the bounds of reason and resulting in substantial injustice. Indeed, the court reasonably decided that, given the single charge, the expected one-day trial, the two elements at issue, and the readily available witnesses, the trial could go

forward with a full month of pretrial preparation for the two "competent counsel" and several days prior to trial to resolve late evidentiary issues. (7/13/20 Tr. at 11.)

Importantly, the district court was particularly sensitive to the length of Staudenmayer's incarceration and his speedy trial rights for a simple charge in declining to stretch the trial further. Staudenmayer minimizes this concern, arguing that a delay of "less than four months" was "hardly a lengthy delay" thus his speedy trial rights could never have been implicated by his requested continuance. (Appellant's Br. at 24.) But Staudenmayer ignores the full amount of the delay in this case. In assessing the length of delay for speedy trial purposes, this Court includes the time spanning from when the charge was first filed to the dismissal, and then further considers the time from which charges are refiled to trial. *State v. Butterfly*, 2016 MT 195, ¶ 25, 384 Mont. 287, 377 P.3d 1191. Thus, the total delay in this case was 328 days, encompassing March 18, 2019, to September 30, 2019, and March 3, 2020, to July 13, 2020. Given the straightforward charge and Staudenmayer's lengthy incarceration, the district court had compelling reasons to decline to stretch the trial date out further—to protect both the defendant's right to a speedy trial and the State's interest to avoid dismissal of the case. Mitigating against further delay was also an obvious concern in light of the uncertainty of trial administration during COVID-19 and the preceding shutdown of the Montana court system.

Staudenmayer further complains about a lack of discovery and that "there was no indication that the new attorney had yet received the discovery." (Appellant's Br. at 25.) But the State had provided the minute entries and the Information as early as May 8, 2020. (Doc. 40.) And, while the State swapped out the Information for the Bond Order prior to trial, defense counsel had agreed to the redactions in the less prejudicial Bond Order, and only maintained her objection insofar as who would testify about the document. On the other hand, defense counsel reasonably objected to admission of the Information because it could not be adequately redacted and contained more prejudicial information. And, while defense counsel generally complained about lack of notice from the State's lists of witnesses and exhibits, she never argued that she had not been provided the two-page Bond Order or had insufficient time to review it. As the district court reasoned, counsel should diligently prepare with public records that are pertinent to the bail jumping trial. In any event, the court provided additional accommodations for Gordon to review the document, confer with the State, and renew the issue prior to the trial.

None of Staudenmayer's post-hoc complaints impacted his ability to prepare to defend against the single charge. Staudenmayer offers no instances of specific prejudice resulting from, for example, the loss of a material witness, pretrial publicity, or a circumstance that fundamentally changed the defense's trial

strategy. *See* Commission Comments to Mont. Code Ann. § 46-13-202; *see also State v. Fields*, 2002 MT 84, 309 Mont. 300, 46 P.3d 612 (abuse of discretion in denying continuance motion to secure expert testimony that went directly to the defense of mitigated deliberate homicide); *State v. Borchert*, 281 Mont. 320, 934 P.3d 170 (1997) (abuse of discretion in denying continuance motion when a codefendant gave a last-minute confession obliterating defendant's trial strategy). Even as early as the omnibus memorandum, Staudenmayer represented that he would rely on a general denial in a one-day trial. He did not present any witnesses or evidence disputing the State's evidence and was apprised of the two elements the State intended to prove.

Showing no clear prejudice from the denial of his motion, Staudenmayer speculates that, had defense counsel been given more time, she could have raised different arguments. For example, Staudenmayer points to alleged "failures" of defense counsel, including (1) the failure to obtain a transcript of the prior hearings; (2) the failure to interview witnesses; and (3) the failure to object to a non-public trial. But Staudenmayer cannot show prejudice from speculation about potential arguments that he could have made, nor can Staudenmayer explain how defense counsel had insufficient time to raise any of the arguments or simply object when such issues would have become readily apparent. In other words, while Gordon appeared to raise colorable arguments prior to and during trial,

Staudenmayer fails to explain how any further delay would have provided trial counsel with a basis to raise different arguments.

Regarding the non-public trial argument, Staudenmayer's speculation for the first time on appeal that the public was excluded from trial is not supported by the record. After jury selection, the district court told the non-selected people from the jury pool that they were "certainly welcome to join us at the courtroom" but, to maintain social distancing, "there aren't going to be a lot of seats for the public." (7/13/20 Tr. at 88.) Thus, the public was invited, but subject to reasonable COVID-19 restrictions. And, given the extraordinary circumstances during COVID-19, defense counsel might have reasonably concluded that objecting to safety precautions taken in response to the pandemic would not have been meritorious either. Next, regarding the failure to interview witnesses argument, the district court noted several days before trial that witnesses could readily be interviewed because they were at the courthouse, and even gave defense counsel an express opportunity to pause trial to interview witnesses should the need arise. Finally, regarding Staudenmayer's new argument that defense counsel should have requested a transcript from his prior hearings, defense counsel might have reasonably concluded that a transcript would not have changed the otherwise undisputed facts as recorded by the deputy clerk or changed the outcome of the bail jumping trial.

CONCLUSION

The State respectfully requests that this Court affirm Staudenmayer's conviction for bail jumping.

Respectfully submitted this 18th day of July, 2022.

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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 7,546 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

*_/s/ Roy Brown_*
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CERTIFICATE OF SERVICE

I, Roy Lindsay Brown, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 07-18-2022:

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