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CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 18-0074

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0074

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ROBERT GENE CLIFT,

Defendant and Appellant.

# BRIEF OF APPELLEE

On Appeal from the Montana Nineteenth Judicial District Court,
Lincoln County, The Honorable Matthew J. Cuffe, Presiding

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## STATEMENT OF THE ISSUE

Did the district court abuse its discretion when it denied Appellant's motion to sever the charge of Tampering with a Witness from his Aggravated Assault and Unlawful Restraint charges when the tampering charge resulted from the other charges?

## STATEMENT OF THE CASE

On September 28, 2016, the State charged Appellant Robert Clift with felony Aggravated Assault and misdemeanor Unlawful Restraint. (D.C. Doc. 3.) On January 4, 2017, the State filed an Amended Information charging Clift with an additional count of felony Tampering with a Witness based upon a telephone call Clift made to his father, a potential witness for the other two charges. (D.C. Doc. 37.) Clift gave notice of his intent to rely upon the defense of alibi. (D.C. Doc. 12 at 4.)

Clift filed a motion asking the district court to sever the charge of Tampering with a Witness from the other two charges. (D.C. Doc. 39.) The State responded and Clift replied. (D.C. Docs. 42-44.) The district court considered Clift's motion

at a hearing on January 23, 2017. (Tr. at 21.) [1] Clift offered no testimony at the hearing. (Tr. at 21-25.)

The district court entered a written order denying Clift's motion to sever. In the order the district court explained:

> A Defendant seeking to sever counts into separate trials has the burden of proving either the counts were mis-joined under Mont. Code Ann. § 46-11-404(1), or, if joinder was proper, that severing the counts under Mont. Code Ann. § 46-13-211(1), is necessary to prevent unfair prejudice. *State v. Southern*, 1999 MT 94, ¶ 14, 294 Mont. 225, ¶ 14. Defendant makes no argument that the above identified [counts] were mis-joined under Mont. Code Ann. § 46-11-404(1). Instead, his entire argument is based on unfair prejudice.
>
> It is not sufficient for a defendant to prove that he/she will face some prejudice as a result of a joint trial, or that he stands a better chance of acquittal if separate trials are held. Rather, a defendant must prove that prejudice is so great as to prevent a fair trial. *State v. Riggs*, 2005 MT 124, ¶ 34, 327 Mont. 196, 113 P.3d 281.
>
> In this case Defendant has failed to meet this showing. The Court finds *State v. Bingman* persuasive. In this case, that Defendant **"*may*"** want to testify as to one charge does not create unfair prejudice when there is a proper joinder. It is no different than any other defendant charged properly with multiple counts in the same Information. Defendant has not identified any prejudice that would prevent a fair trial. Moreover, the Montana Supreme Court has already held it appropriate for a later witness tampering charge to be tried with an assault charge. See *State v. Bingman*, 229 Mont. 101, 109-111, 745 P.2d 342, 346-49.

(D.C. Doc. 61, attached to Appellant's Br. as App. A, at 4-5.)

[1] All of the proceedings from the district court are compiled in one, sequentially numbered transcript that the State will refer to by Tr. followed by page number.

Clift's first jury trial resulted in a mistrial after defense counsel disclosed a potential conflict of interest and asked the court to appoint Clift new counsel. (Tr. at 264-72.) At the conclusion of the second jury trial, the jury found Clift guilty of all three offenses. (D.C. Doc. 124.) The district court sentenced Clift to prison for 15 years for the Aggravated Assault conviction, 10 years suspended and consecutive, for the Tampering with a Witness Conviction, and six months in jail, suspended and concurrent, for the Unlawful Restraint conviction. (D.C. Doc. 134.)

## STATEMENT OF THE FACTS

Amber, who resides in Libby, Montana, briefly dated Clift beginning in April 2016 until sometime in June 2016. (Tr. at 610-11.) On September 11, 2016, Clift called Amber explaining that he had sold his car to a guy in Kalispell and needed a ride back to Libby. Amber agreed to pick Clift up in Kalispell. (Tr. at 612-13.) At about noon on September 12, 2016, Amber and Clift left Kalispell in Amber's car. Clift was driving since Amber had consumed quite a bit of tequila. (Tr. at 617.) Clift drove until they reached Happy's Inn, at which point they pulled over and switched drivers. The two next stopped at the Kicking Horse where they gambled for about 30 minutes. (Tr. at 618-19.)

Claude Edwards is a detention officer with the Flathead County Sheriff's Office. Edwards resides in Libby and commutes to work in Kalispell. (Tr. at

492-94.) On September 12, 2016, Edwards was traveling from Kalispell back to Libby. During his travels, he observed a blue KIA four times. The first time was when the blue KIA passed him about 25 miles out of Libby. There was a female and male in the vehicle, who appeared to be conversing or possible arguing. The female was driving. (Tr. at 494-95.)

The second time Edwards saw the blue KIA, the car was pulled over on a wide spot in the road about 20 miles out of Libby. (Tr. at 495.) The female and male were both seated inside the vehicle as Edwards passed by. (Tr. at 496.) About 10 miles outside of Libby, the same vehicle passed Edwards. The female was still driving. It appeared that she was attempting to push the passenger away from her. The male was turned in the passenger seat facing the female. The vehicle was a bit ahead of Edwards when he saw a cloud of dust. As he got closer he saw that the blue KIA was "kind of" pulled off on the Hammer Cutoff Road. Edwards saw skid marks as if the vehicle ran off the road. The car was a few feet from the stop sign just about ready to go over the edge of the bank. (Tr. at 497.)

The female and male were both standing behind the car and appeared to be arguing. The female's hands were flailing, and she appeared to by trying to push the male away. Edwards approached the vehicle, rolled down his window and asked if everything was okay. The female had already gotten back into the car. The male responded that everything was fine. Edwards never spoke with the female.

(498-99.) Edwards proceeded towards Libby but had misgivings. About a half a mile later, he called 911 to report what he had observed. (Tr. at 495.)

At about 1:45 p.m., on September 12, 2016, Captain Pitman of the Lincoln County Sheriff's Office was dispatched to Hammer Cutoff Road and Highway 2 based upon a reported altercation between a male and a female who were driving a blue KIA. When Captain Pitman got to Hammer Cutoff Road, the blue KIA was not there. Captain Pitman also had not seen the vehicle in route. (Tr. at 519.)

When Amber and Clift left the Kicking Horse, Amber was driving, and they were getting along fine. (Tr. at 619-20.) For reasons unknown to Amber, as the two were headed towards Libby, Clift became angry and back handed Amber. Amber responded by punching Clift. Clift then hit Amber in the face with a closed fist. Clift hit Amber hard enough that her head hit the window. It was very painful, and Amber slammed on the brakes as she was driving at about 70 miles per hour. They came to a stop at Hammer Cutoff Road. Amber yelled at Clift to get out of her car. Clift simply looked straight ahead. (Tr. at 622-23.)

Clift tried to grab Amber's head and hit it against the middle console. He then pulled Amber by her hair over to the passenger seat. Clift got out of the passenger door and got into the driver's seat. Amber was slouched down on the passenger seat crying. (Tr. at 624-25.) Clift drove the car while he continued to punch Amber. Amber used her arms to try to protect against Clift's blows. Clift

drove to his house, drug Amber out of the car by grabbing her neck and the back of her pants, took her inside and threw her onto his bed. Amber was afraid and was asking herself if this was really happening. (Tr. at 626-27.)

Clift got on top of Amber and pinned her down. He was yelling that he was going to kill her, fuck her and bury her in the back yard. Clift grabbed Amber's throat and squeezed long enough for her not to be able to breath for a second. Then Clift put his hand over Amber's mouth and plugged her nose so she could not breathe. (Tr. at 628.) Clift repeatedly threatened to kill Amber. Amber heard a vehicle outside and tried to scream. Clift again placed his hand over Amber's mouth. Amber could not protect herself because Clift had her arms pinned down. She pleaded with him to stop. (Tr. at 629.)

Amber pretended to pass out thinking maybe Clift would stop hitting her. Clift punched her. Clift briefly went into his bathroom. Amber thought about trying to run but knew she did not have enough time to get away. Clift returned, hit Amber between the legs and got back on top of her. Clift continued to hit Amber for a short time. Suddenly, as Clift was preparing to hit her again, he said, "What the hell, what did I do?" Clift uttered "Oh my God," and plopped over sideways. Amber waited until it sounded like Clift was snoring. She scooted of the bed and watched to make certain that Clift did not move. Amber grabbed the door knob,

and Clift still did not move. Amber opened up the bedroom door and ran out the front door. (Tr. at 631-32.)

Amber ran straight across a field to the closest neighbor. (Tr. at 632.) Amber was not wearing shoes and did not have her cell phone. (Tr. at 633.) Nobody answered the door. Amber ran to the next neighbor's house where she fell to the ground, unable to get up. (Tr. at 634.) Amber heard gravel crunching. She thought it was Clift and thought to herself that there was no way she could endure that again. Instead it was an older gentleman who owned the house. He took Amber inside and locked the door. (Tr. at 635.)

Shortly before 3 p.m., on September 12, 2016, Deputy Faulkner of the Lincoln County Sheriff's Office was dispatched to the home of Louis Fehrs on Falcon Trail, south of Libby. (Tr. at 390-92.) Captain Pitman also responded to the dispatch to Falcon Trail, where he and Deputy Faulkner both spoke with Amber. Amber explained how Clift had assaulted her while they were traveling in her blue KIA. (Tr. at 520-21.) Amber was obviously an assault victim. Her face was swollen, both eyes were blackened, and swollen, and she was bleeding from her mouth. Amber was obviously terrified. Amber identified her attacker as Clift, a person she had previously dated. (Tr. at 392-93.)

An ambulance transported Amber to the hospital in Libby. Amber was flown to the hospital in Kalispell where she was in intensive care for two days. (Tr. at

637.) Dr. Dykstra, a trauma surgeon, treated Amber in Kalispell. Amber was able to communicate with Dr. Dykstra. She described that her ex had repeatedly assaulted her. Amber was suffering from a subarachnoid hemorrhage. (Tr. at 547-48.) Amber's right eye was black and blue and swollen. She had bruising in her right ear. It looked like Amber might have blood behind the tympanic membrane of the left ear, bruising to both lips, red marks on her neck and a contusion on her chest. (Tr. at 548-49.) Amber's head injury is a serious bodily injury that could result in long term memory loss, chronic pain, chronic headaches and mood swings. If left untreated, Amber's head injury could have resulted in more serious injuries, including risk of death. (Tr. at 551-52.)

Deputy Faulkner attempted to locate Clift by speaking with his father, James, who lived near Fehrs' residence. Deputy Faulkner learned that Clift lived next door to his father, so he and Captain Pittman went to Clift's residence and knocked on the door. No one answered. The officers noticed, however, that there was a blue Kia, which belonged to Amber, parked at Clift's residence. The officers returned to James' home and enlisted his assistance in finding Clift. The three returned to Clift's residence. James went in the front door but asked the officers to remain outside. James was inside Clift's house for about three minutes. When James came back outside, he did not indicate whether Clift was inside the house. James' demeanor had changed, and he was no longer cooperative. (Tr. at 400-02.)

Deputy Faulkner returned to Clift's home the text day to arrest him. Clift did not respond to the initial knocks and the officers' loudly identifying themselves. The officers finally used a PA system from a patrol vehicle to urge Clift to come out. It took Clift about eight minutes to respond. (Tr. at 410.) While executing a search warrant of Clift's residence, officers found Amber's cell phone in Clift's bedroom, as well as an earring back and a broken candle and candle holder on the floor. (Tr. at 413, 530.) Although Clift's residence was very disorderly, officers found a set of freshly laundered sheets, which seemed oddly out of place since there were piles of dirty laundry inside the laundry room. (Tr. at 418, 530.) Officers also found a piece of paper on the floor which was labeled "Hate list." (Tr. at 530.) Amber's name was on the list. (*Id*.)

Officers also searched Amber's vehicle. Amber's purse was sitting on the seat. Deputy Faulkner immediately noticed that the interior of the vehicle looked like a bomb went off inside. There was a rearview mirror sitting on the floorboard, an overhead organizer was all tore up and the visor was hanging halfway tore off. (Tr. at 422-23.) Deputy Faulkner observed CDs strewn about the vehicle and a pair of broken sunglasses. Deputy Faulkner also noticed what appeared to be a blood smear on the center counsel. (Tr. at 424-25.) He took a swab from the blood smear and submitted it to the State Crime Lab. (Tr. at 426.) Joseph Pasternak, a DNA analyst for the State Crime Lab, tested the swabs from the blood smear in Amber's

vehicle. (Tr. at 673, 676, 679-80.) Pasternak concluded that the major DNA profile was consistent with the DNA profile of Amber. (Tr. at 682-84.)

Clift agreed to speak with Deputy Faulkner. Clift maintained that he was traveling in Amber's car when she kicked him out of the vehicle in the area of Happy's. Clift said he caught a ride into town. The blue KIA was parked at his house. (Tr. at 427-28.) Clift later provided details that conflicted with those he provided in his first interview. (Tr. at 428.)

In a second interview, Clift maintained that Amber kicked him out of the car, he caught a ride back to Happy's, went inside and made a phone call to a friend who picked him up. Clift claimed the two went to Troy without ever stopping in Libby. (*Id*.) Happy's was closed on September 12, 2016. (Tr. at 438.) The owner explained that Clift was not inside Happy's on this date and did not use the telephone at Happy's as he claimed. (Tr. at 508-11.)

Kenneth Kanzler testified at trial that sometime on September 12, 2016, Clift texted or called him needing a ride, explaining, "That's about it. That's all I remember." (Tr. at 571.) Kanzler identified a text message that he sent to Clift at 3:47 on September 12, 2016. (Tr. at 574-75; State's Ex. 75.) The message asked, "[Y]ou back in Libby yet?" (Tr. at 576.) The following exchange occurred between

the prosecutor and Kanzler:

> So, Mr. Kanzler, would it be safe to assume that if you sent a message to Bob Clift at 3:47 in the afternoon on September 12th that he had not, at that point, called you for a ride?
>
> That would be safe to assume, yes.

(Tr. at 576.) Kanzler explained that at some point on September 12, 2016, he picked Clift up somewhere around Happy's, stopped at Libby Creek and then went to Troy. (Tr. at 578-79.) Kanzler "vaguely" remembers Clift telling him that he had an argument or disagreement with Amber. (Tr. at 584.)

Clift and Richard Pefferman are friends. Pefferman lives in Troy. Sometime on September 12, 2016, Clift and Kanzler showed up at Peffereman's house in Troy. (Tr. at 588-89.) Pefferman told law enforcement that he thought the two arrived somewhere between 6 and 8 p.m. (Tr. at 590-91.) Around 10 or 11 p.m., Pefferman and Clift went to a casino in Bonners Ferry. They returned to Pefferman's house early the next morning. (Tr. at 592.) Between 9 and 10 a.m. on September 13, 2016, Pefferman gave Clift a ride back to his house in Libby. (Tr. at 593.)

On September 13, 2016, Clift contacted Tyler Wilkes, asking Wilkes to run an errand for him. Knowing that Clift had recently sold his vehicle, Wilkes agreed. (Tr. at 598-99.) When Wilkes went to Clift's house to get money for the errand, he saw that Amber's vehicle was parked there. (Tr. at 604.)

Wilkes also knows Amber. When he learned Amber was home from the hospital, he went to visit her. (Tr. at 603-04.) Amber looked "like she went nine rounds and didn't get one hit in. She looked really bad." (Tr. at 604.) Amber was "very scared." (Tr. at 605.) When Wilkes mentioned Clift's name Amber "would almost like curl up and be super scared just by saying his name." (*Id*.) Wilkes said "it was horrible. I've never seen somebody so scared of one person ever." (*Id*.) Wilkes bought Amber a can of bear mace and took it to her so she would "feel more protected." (*Id*.) Amber continues to have nightmares of Clift chasing her or of somebody sitting on top of her. In her nightmares she is paralyzed. (Tr. at 645.)

Clift left Amber a message before he was arrested during which he apologized. (Tr. at 637-38.)

On December 22, 2016, while Clift was incarcerated, he had a recorded telephone call with his father, James. (Tr. at 465; State's Ex. 72.) The only witness Clift called at trial was his first attorney, Alisha Backus. Clift called Backus to address this telephone conversation forming the grounds for the allegation that Clift tampered with a witness – his father, James. (Tr. at 705.)

Backus had a telephone conversation with James on December 13, 2016. (Tr. at 705.) Backus maintained that James never told her that Clift was at home when James went in to look for him at the request of law enforcement. (Tr. at 707-

08.) Backus explained her discussion with Clift about his phone call to his father as follows:

> So when I asked him about the call what he had told me was that he had an interaction with his father and he knew that it was at another time. And so he was trying to talk to his father because his father is forgetful. He told me that his father doesn't always remember things, and he wanted him to remember the truth, which is when he saw him at a different time from what Robert was telling me.

(Tr. at 709.) Backus stated that Clift was telling her that he only called his dad so his dad would call Backus and tell her the truth about what happened. (Tr. at 710.)

During Clift's telephone conversation with his dad, Clift accused that his father told Clift's attorney that he was at his house the day of the crimes. Clift then stated that he was not there and insisted his father was mistaken. (State's Ex. 72 at 11:52, 13:24.) Throughout the phone call Clift repeatedly told his father he was not there followed by questions like, "you hear me?" or "understand?" (*Id*. at 13:10, 13:57-58.) After Clift instructed his father to call his attorney to tell her he was not there, he emphasized to him, "I wasn't there no matter what." (*Id*. at 13:29.)

## SUMMARY OF THE ARGUMENT

The district court properly exercised its discretion when it denied Clift's motion to sever the witness tampering charge from the other two charges. But for the other two charges, there would be no witness tampering charge. This Court has previously held that a witness tampering charge is properly joined with the charges

from which it flowed. The burden was on Clift to prove that he would be denied the right to a fair trial if the court did not sever the witness tampering charge. Clift relies solely upon a claim that his right against self-incrimination was implicated by the court's denial of severance. But the State did not exploit Clift's right against self-incrimination because Clift did not testify at trial. Further, Clift's claim to the contrary, he did have other witnesses besides himself to defend against the tampering charge – his prior attorney and his father who was the subject of the tampering charge. Clift called his prior attorney at trial and could have called his father to support his defense but chose not to do so. And, the State admitted a recording of the phone call forming the basis for the witness tampering charge into evidence. Clift was free to argue that the phone call did not constitute tampering with a witness. Clift failed to meet his burden of establishing substantial prejudice.

## ARGUMENT

### I. The standard of review

This Court reviews the district court's denial of a motion to sever charges based on unfair prejudice for an abuse of discretion. *State v. Kirk*, 2011 MT 314, ¶ 10, 363 Mont. 102, 266 P.3d 1262.

## II. The district court did not abuse its discretion when it denied Clift's motion to sever the Tampering with a Witness charge from the other two charges.

Clift argues that the district court abused its discretion in denying his motion to sever the witness tampering charge from the other two charges. It is Clift's burden to show either that the counts were improperly joined under Mont. Code Ann. § 46-11-404(1), or, if joinder was proper, that severing the counts under Mont. Code Ann. § 46-13-211(1) is necessary to prevent unfair prejudice. In the district court, Clift seems to concede that the charges were properly joined. Thus, in the district court it was Clift's burden to prove that failing to sever the charges would result in unfair prejudice to him. Clift's burden was substantial. *Kirk*, ¶ 10. As this Court has explained:

> It is not sufficient for a criminal defendant to prove that he will face some prejudice as a result of a joint trial, or that he stands a better chance of acquittal if separate trials are held. Rather, a criminal defendant must prove that the prejudice is so great as to prevent a fair trial.

*State v. Riggs*, 2005 MT 124, ¶ 34, 327 Mont. 196, 113 P.3d 281.

When considering a motion to sever, the district court must balance possible prejudice to a defendant against the judicial economy resulting from holding a joint trial. *Kirk*, ¶ 11. Judicial economy weighs heavily in the balancing process. *Id*. Because the balancing is discretionary, this Court will not substitute its judgment for that of the district court unless there is an abuse of discretion. *Id*.

This Court has previously stated that three types of prejudice may result from consolidating charges:

> First, a jury may consider the criminal defendant facing multiple charges a "bad man" and accumulate evidence until it finds the defendant guilty of something. Second, a jury may use proof of guilt on one count to convict the defendant of a second count even though that proof would be inadmissible at a separate trial on the second count. Third, the defendant may be prejudiced if he or she wishes to testify on one charge but not the other.

*State v. Southern*, 1999 MT 94, ¶ 30, 294 Mont. 225, 980 P.2d 3. Clift's appeal is confined to the third type of prejudice. Clift maintains that the district court erred by not severing the charges because this foreclosed his option of testifying only on the tampering charge. (Appellant's Br. at 7-8.) Clift also erroneously maintains that his testimony was the only viable defense for the tampering charge. (Appellant's Br. at 9.)

This Court has previously recognized that a witness tampering charge is properly joined with a felony assault charge from which the witness tampering charge flowed. *State v. Bingman*, 229 Mont. 101, 110, 745 P.2d 342, 348 (1987). Clift argues that the district court erroneously relied upon *Bingman* because defendant Bingman did not rely upon the third type of prejudice as Clift does. But, Clift misses the significance of the district court's reliance upon *Bingman* – that the charges were appropriately joined.

In the district court Clift claimed that he was the only possible witness who could defend himself against the tampering charge. (D.C. Doc. 43 at 3.) At trial, Clift called his former attorney to defend against the tampering charge. The former attorney maintained that Clift's father never told her that Clift was at his house the day the other offenses occurred and law enforcement was looking for him. Thus, by implication, the recorded telephone call between Clift and his father was merely Clift trying to provide his father's ailing memory with clarity. Clift also could have called his father as a witness at trial but forwent the opportunity. Finally, the jury listened to the recorded telephone conversation between Clift and his father. Clift was free to argue to the jury his view of the appropriate interpretation of that phone call.

Also, Clift chose not to testify at his trial. A defendant cannot claim that his right against self-incrimination has been prejudiced where the State has not exploited the defendant's right to testify by cross-examining him on the matters on which the defendant wished to avoid testifying. *State v. Duncan*, 2008 MT 148, ¶ 34, 343 Mont. 220, 183 P.3d 111. The State did not exploit Clift's right against self-incrimination because Clift did not attempt to testify. *Kirk*, ¶ 21. In the briefing below, Clift made only a general assertion that his right against self-incrimination would be implicated unless the charges were severed. As such, the district court did not abuse its discretion in denying Clift's motion to sever. *Id.*

As this Court recognized in *Kirk*, had Clift testified at trial, the district court could have limited the scope of the State's cross-examination to the tampering charge. *Id.* The strength of the State's evidence against Clift on the other charges was overwhelming. There would have been little for the State to gain from cross-examining Clift on those charges.

Clift has failed to meet his substantial burden of proving prejudice and, thus, cannot establish that the district court abused its discretion.

## CONCLUSION

This Court should affirm the order of the district court denying Clift's motion to sever the Tampering with a Witness charge from the other two charges because Clift failed to meet his burden of establishing that since the district court did not sever the tampering charge he was denied his right to a fair trial.

Respectfully submitted this 8th day of July, 2019.

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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 4,540 words, excluding certificate of service and certificate of compliance.

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## CERTIFICATE OF SERVICE

I, Tammy Plubell, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 07-08-2019:

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