DA 17-0273

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 237

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ROBERT JOSEPH FLEMING,

Defendant and Appellant.

APPEAL FROM: District Court of the Third Judicial District,
In and For the County of Anaconda-Deer Lodge, Cause No. DC-2016-11
Honorable Ray J. Dayton, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Gregory D. Birdsong, Birdsong Law Office, PC, Missoula, Montana

For Appellee:

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Decided: October 7, 2019

Filed:

Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 An Anaconda-Deer Lodge County jury found Robert Joseph Fleming guilty of criminal endangerment after he purchased a half-gallon of 80-proof whiskey for a teenager who drank it and suffered near-fatal consequences. Fleming raises the following issues on appeal:

> *1. Whether the District Court should have set aside the verdict and entered an acquittal because the State did not prove the risk requirement of § 45-5-207, MCA;*
>
> *2. Whether the District Court abused its discretion when it allowed evidence of Fleming's prior criminal endangerment conviction;*
>
> *3. Whether the criminal endangerment statute, § 45-5-207, MCA, is unconstitutionally vague as applied in Fleming's case.*

¶2 We reverse on Issue Two and remand for a new trial.

PROCEDURAL AND FACTUAL BACKGROUND

¶3 Sometime between January 5 and January 9, 2016, eighteen-year-old James J. Zenahlik, IV ("J.J.") contacted a man he knew as "Robby" on his cell phone to ask him to purchase a half-gallon of Northern Lights whiskey. Northern Lights whiskey is 80-proof, or 40% alcohol by volume. J.J. had Robby's cell phone number saved as "Robby B" in his contacts. J.J. did not know Robby's last name at the time, but he testified that the "B" meant Robby was someone who would buy alcohol for him. J.J. testified that he drove to Robby's house, picked Robby up, and drove him to the Anaconda Liquor Store. J.J. parked and gave Robby $20 for the whiskey. Robby returned with the liquor in a bag inside of his jacket. He put the bag down on the floorboard behind J.J.'s seat. J.J. gave Robby a couple of dollars and drove him home. As Robby exited the car, he told J.J. to "be safe" and

"have a good one." When J.J. got to the house that he shared with his father, James J. Zenahlik, III ("James"), he placed the bottle of whiskey in the trunk of his car so that no one would see it.

¶4 On January 10, J.J. began drinking the whiskey. James checked on J.J. the next morning and was unable to wake him. James called an ambulance, and J.J. was taken to the Anaconda hospital where he had an alcohol level of approximately .584. J.J. was intubated and flown to a Missoula hospital for treatment. When J.J. returned home after a few days in the hospital, he found the bottle of whiskey, empty, in the trunk of his car. After J.J. identified Fleming as the person who bought the whiskey for him, Fleming was charged with criminal endangerment in violation of § 45-5-207(1), MCA.

¶5 Prior to trial, the State gave notice of its intent to offer evidence of Fleming's 2001 conviction of criminal endangerment after he provided alcohol to two teenaged girls who drank it and were involved in a serious car crash. One of the girls did not survive. The State argued that the evidence was relevant and admissible to show Fleming's knowledge of the "very real potential consequences of underage drinking" and that he "understood the potential gravity of his actions." Fleming responded that the 2001 incident was too remote in time to be relevant for the purposes the State argued and that "[s]uch a grim set of facts is inherently prejudicial to the defendant." Fleming urged the court to keep the evidence out because it would distract the jury from the task of weighing the other evidence, and its prejudice could not be overcome by a curative instruction. Following a hearing in open court, the District Court overruled Fleming's objection.

¶6 The District Court read the following instruction to the jury panel prior to *voir dire*:

> Ladies and Gentlemen, the State has requested and the Court has permitted you, the jury, to hear information pertaining to a previous act committed by the Defendant. In 2001, Robert Joseph Fleming pled guilty to the offense of criminal endangerment. In that matter, the Defendant acknowledged purchasing and providing alcohol to two teen aged girls. The girls consumed the alcohol and became intoxicated. One of the girls subsequently drove a motorized vehicle and the second girl was the passenger. The teenagers crashed. One girl died and the second suffered significant physical injuries.
>
> This information of which the Court takes Judicial notice has been provided and may be only used to aid you, the jury, in determining whether Mr. Fleming had the requisite mental state of knowing regarding the possible severe consequences of his actions. The Defendant is not being tried and may not be convicted of any offense except for the one currently charged. The evidence cannot be used during your deliberations for any other purpose than to determine Mr. Fleming's mental state of knowing. It is important to remember this evidence is not admitted to prove the character of Mr. Fleming or his propensity to commit this offense and it cannot be used for either reason.
>
> The limited purpose for the admission of this evidence is to show Defendant's knowledge of the possible consequences of his actions to help you, the jury, to determine whether Mr. Fleming is guilty or not guilty of the offense of Criminal Endangerment. You may not use this evidence for any other purpose. And it is for you to decide what weight to give this evidence and whether or not it helps or does not help you in determining the, the [sic] knowing mental state.

¶7 The court reminded the jury in its final instructions at the close of trial that it had taken judicial notice of Fleming's prior crime solely for the purpose of showing knowledge and that the jury could not consider it for any other purpose.

¶8 The jury found Fleming guilty of criminal endangerment. Fleming moved the District Court to set aside the verdict and enter judgment for acquittal "based on the State's failure to prove." The court denied the motion.

STANDARDS OF REVIEW

¶9 We review de novo claims of insufficient evidence. *State v. Bekemans*, 2013 MT 11, ¶ 18, 368 Mont. 235, 293 P.3d 843. We review evidentiary rulings for an abuse of discretion. A trial court abuses its discretion if it acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice. *State v. Passmore*, 2010 MT 34, ¶ 51, 355 Mont. 187, 225 P.3d 1229.

DISCUSSION

¶10 *1. Whether the District Court should have set aside the verdict and entered an acquittal because the State did not prove the risk requirement of § 45-5-207, MCA.*

¶11 After the jury returned its verdict and was released, the District Court asked the parties if there were any post-trial motions. Fleming moved the court to set aside the verdict and rule an acquittal for Fleming "based on the State's failure to prove." Fleming offered no argument, and the State did not wish to be heard on the matter. The District Court denied the motion, holding that it was a triable case and "that the jury had plenty to work with to determine that all the elements of the crime of Criminal Endangerment were committed by [Fleming]."

¶12 We review a question on the sufficiency of the evidence to determine whether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Yuhas*, 2010 MT 223, ¶ 7, 358 Mont. 27, 243 P.3d. 409. It is within the province of the jury to weigh the evidence based on the credibility of the witnesses and to determine which version of events should prevail. *State v. Weigand*, 2005 MT 201, ¶ 7,

328 Mont. 198, 119 P.3d 74. We therefore review a jury's verdict to determine whether sufficient evidence exists to support the verdict, not whether the evidence could have supported a different result. *Weigand*, ¶ 7.

¶13 A person commits the offense of criminal endangerment when he "knowingly engages in conduct that creates a substantial risk of death or serious bodily injury to another." Section 45-5-207(1), MCA. The criminal endangerment statute does not require the victim to suffer actual physical injury. It requires only that the defendant engage in conduct that creates a substantial risk of death or serious bodily injury. *State v. Crisp*, 249 Mont. 199, 204, 814 P.2d 981, 984 (1991). A person acts knowingly for the purposes of criminal endangerment when the person is aware "of the high probability that the conduct in which he is engag[ed] . . . will cause a substantial risk of death or serious bodily injury to another." *State v. Lambert*, 280 Mont. 231, 237, 929 P.2d 846, 850 (1996); *see also* §§ 45-2-101(35) and 45-5-207(1), MCA. "[T]he term substantial risk [of death or serious bodily injury] warns a person of ordinary intelligence that if he engages in conduct that could result in a real possibility of loss or injury . . . he could be found guilty of the crime of criminal endangerment." *Crisp*, 249 Mont. at 204, 814 P.2d at 984.

¶14 We have held that the mental state required for criminal endangerment is the defendant's awareness of the high probability of substantial risk posed by his conduct. *See, e.g.*, *State v. Bekemans*, 2013 MT 11, ¶ 21, 368 Mont. 235, 293 P.3d 843 (holding that "[w]ith respect to the offense of criminal endangerment, a person acts knowingly when the person is aware that there exists a high probability that her conduct would create a substantial risk of death or serious bodily injury to another"); *State v. G'Stohl*, 2010 MT 7,

¶ 15, 355 Mont. 43, 223 P.3d 926 (holding "a person need not have a history of DUI convictions or admonishments from judges to understand that drinking to excess and then crashing one's pickup into an occupied vehicle with sufficient force to disable both vehicles 'creates a substantial risk of death or serious bodily injury to another'"); *State v. Cybulski*, 2009 MT 70, ¶ 38, 349 Mont. 429, 204 P.3d 7 (jury instructions allowed the defendant "to argue her defense theory that she was not aware that her conduct would cause substantial risk of death or serious bodily injury"); *State v. Hocevar*, 2000 MT 157, ¶ 25, 300 Mont. 167, 7 P.3d 329 (proving the criminal endangerment mental state required the State to prove the defendant "was aware that there was a high probability that making the Benadryl available to [her four-year-old son] created a specific result—a substantial **risk** of death or serious bodily injury" (emphasis in original)).

¶15 Fleming argues on appeal that the State failed to prove criminal endangerment because it could not establish beyond a reasonable doubt that Fleming "knew of a 'high probability' his actions would cause a substantial risk of death or serious bodily injury, unless it also shows the 'high probability' exists." Fleming maintains that the criminal endangerment statute requires the State to demonstrate a high probability that serious harm will occur and that the defendant have knowledge of that probability.[1]

[1] Fleming did not make this argument when he moved for judgment of acquittal before the trial court. Sufficiency of the evidence to support a conviction, however, may be raised for the first time on appeal, and we address the argument accordingly. *State v. Criswell*, 2013 MT 177, ¶ 13, 370 Mont. 511, 305 P.3d 760.

¶16 Paraphrasing the relevant statutes in *State v. Shegrud*, 2014 MT 63, 374 Mont. 192, 320 P.3d 455, we stated that "[a] person acts knowingly for the purposes of criminal endangerment when 'the person is aware that it is highly probable that the result [of death or serious bodily injury to another] will be caused by the person's conduct.'" *Shegrud*, ¶ 11 (quoting § 45-2-101(35), MCA, and citing *State v. Lambert*, 280 Mont. at 236, 929 P.2d at 849). But applying the statutory mental state later in the discussion, we explained that a "jury could reasonably find from the evidence that Shegrud was aware that it was highly probable that [his] conduct would create a substantial risk of death or serious bodily injury to [the victim]." *Shegrud*, ¶ 17. In *State v. Russell*, 2016 MT 268, ¶ 14, 385 Mont. 208, 383 P.3d 198, we parroted *Shegrud*'s paraphrasing of the mental state but again concluded that the evidence showed Russell knowingly "engag[ed] 'in conduct that create[d] a substantial risk of death or serious bodily injury to another.'" *Russell*, ¶ 25 (quoting § 45-5-207, MCA). Despite our imprecise statements in *Shegrud* and *Russell*, the plain language of the criminal endangerment statute does not require a high probability of death or serious bodily injury from the defendant's conduct, but a substantial risk to life or limb. The criminal endangerment mental state requires that the defendant be aware of a high probability that his conduct may cause a substantial risk of death or serious bodily injury to another. Sections 45-2-101(35) and 45-5-207(1), MCA.

¶17 Fleming next maintains that, because the State did not establish that he knew of a "high probability" that his actions would "cause a substantial risk of death or serious bodily injury to another," the District Court should have set aside the verdict. Fleming's argument in essence amounts to two separate arguments: the State did not argue the correct risk

standard for criminal endangerment, and the State did not present sufficient evidence to support the jury's verdict.

¶18 Fleming first contends that the State "repeatedly misstated the risk considered by" § 45-5-207(1), MCA, by arguing merely that Fleming knew of a "potential" of substantial risk and not that Fleming knew of a "high probability" of substantial risk. Fleming argues that the State weakened the language of the statute by arguing that Fleming "had to have known that what he was doing *could* cause serious bodily injury or death to another," or that Fleming "knew firsthand the *possible* severe consequences of providing someone who's under the age of [21] with a significant amount of alcohol." Fleming did not object to the statements made by the State, nor did he suggest in his opening statement or closing argument that the State misstated the risk requirement.

¶19 Jury Instruction No. 11 states, "A person commits the offense of *Criminal Endangerment* if the person knowingly engages in conduct that creates a substantial risk of death or serious bodily injury to another." Jury Instruction No. 14 states, "A person acts knowingly when the person is aware there exists the high probability that the person's conduct will cause a specific result." These instructions correctly stated the law. If a person engages in conduct that could result in a "real, true" possibility of loss of life or injury, he may be found guilty of criminal endangerment. *Crisp*, 249 Mont. at 204, 814 P.2d at 984 (internal citation omitted). The instruction fairly apprised the jury of the correct criminal endangerment risk requirement. Fleming did not preserve an argument that the State mischaracterized the standards, and we decline to disturb the verdict on this basis.

¶20 Fleming alternatively argues that the State did not offer evidence of a "high probability" that providing alcohol to minors creates a substantial risk of death or serious bodily injury. Absent other aggravating factors, Fleming maintains that the risk of providing alcohol to teenagers creates merely the "possibility" of a substantial risk of death or serious bodily injury. Fleming argues that no aggravating risk factors existed here. Viewing the evidence in the light most favorable to the State, however, we conclude that the prosecution presented sufficient evidence from which a rational jury could conclude that Fleming was aware of a high probability that buying an eighteen-year-old boy a half-gallon of 80-proof whiskey would create a substantial risk of death or serious bodily injury to another. "The existence of a mental state may be inferred from the acts of the accused and the facts and circumstances connected with the offense." Section 45-2-103(3), MCA. The jury could infer Fleming's knowledge from the evidence presented. Fleming purchased alcohol for J.J. more than once, and his contact information was in J.J.'s phone as someone who would buy alcohol for him. Fleming had no other relationship with J.J., but he texted him in December 2015 to ensure that he had his new phone number. J.J. picked Fleming up to drive him to the liquor store to purchase a large quantity of high-alcohol-content whiskey. After purchasing the 80-proof whiskey, Fleming left J.J. with the bottle and told him to "be safe" as J.J. drove away.

¶21 We agree that, without more, providing a modest amount of alcohol to a minor[2] likely could not sustain a felony criminal endangerment charge. But Fleming did not merely buy J.J. a beer or a six-pack to share with friends, which could have brought a less serious charge. He instead bought the eighteen-year-old a large bottle of strong, hard liquor and left it in the back of the car the teen was driving. J.J. proceeded to "chug" the entire bottle and required emergency medical treatment, including an ambulance response, intubation, and a life flight to Missoula. J.J.'s blood alcohol content was greater than seven times what would be the legal limit for an adult behind the wheel of a car. Given the amount and the circumstances involved, a rational jury could have concluded from the evidence presented that Fleming actually knew there was substantial risk associated with purchasing a half-gallon of whiskey for a teenager. Fleming is not entitled to dismissal of the charges. But because we reverse his conviction for admission of the unfairly prejudicial evidence regarding his prior crime, the case in any event will be remanded for a new trial.

¶22 *2. Whether the District Court abused its discretion when it allowed evidence of Fleming's prior criminal endangerment conviction.*

¶23 While contesting the sufficiency of evidence to prove his knowledge of the risk, Fleming argues that the District Court nonetheless should have rejected the State's pretrial request to take judicial notice of his prior criminal endangerment conviction because of its unfairly prejudicial impact. Fleming argued before trial that the conviction should be

[2] We use the term "minor" in this Opinion to refer to a person under age twenty-one, the legal age for consuming alcohol. *See* § 45-5-624(1), MCA. A person commits the misdemeanor offense of Unlawful Transactions With Children if the person "sells or gives an alcoholic beverage to a person under 21 years of age." Section 45-5-623(1)(c), MCA.

excluded for several reasons: first, it was irrelevant because his defense was that he did not purchase the alcohol that resulted in J.J's hospitalization; second, that the 2001 conviction was not relevant because it was remote in time and the facts were not similar; and third, that the probative value of the evidence was substantially outweighed by its "particularly prejudicial nature" to the Defendant. The District Court admitted the evidence of Fleming's 2001 criminal endangerment conviction after weighing the character of the evidence and concluding that it was highly probative of Fleming's knowledge.

¶24 Generally, "[a]ll relevant evidence is admissible" unless otherwise provided by law. M. R. Evid. 402. Evidence is relevant if it will have any value, as determined by logic and experience, in proving the proposition for which it is offered. M. R. Evid. 401. Rule 404(b), however, provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rule 404(b) is designed to ensure that jurors "do not impermissibly infer that a defendant's prior bad acts make that person a bad person, and therefore, a guilty person." *State v. Daffin*, 2017 MT 76, ¶ 15, 387 Mont. 154, 392 P.3d 150 (internal citation omitted). Evidence of other crimes or bad acts is admissible for other purposes, such "as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." M. R. Evid. 404(b).

¶25 When the District Court ruled the prior conviction admissible for the limited purpose of "knowledge," it relied on Rule 404(b)'s allowance of prior acts evidence for purposes other than proof of a defendant's propensity to commit an act of that nature. Fleming argued that the State would not have a case if it could not introduce evidence of

the 2001 conviction because it had no other evidence that he acted knowingly. The court held that argument "points up [sic] the importance of the issue . . . [and] means that . . . the probative character of the evidence weighs very heavily." The District Court agreed with the State that the 2001 incident demonstrated Fleming's understanding of the serious risk his conduct involved.

¶26 A person commits the offense of criminal endangerment if he "*knowingly* engages in conduct that creates a substantial risk of death or serious bodily injury to another . . . ." Section 45-5-207(1), MCA (emphasis supplied). In *Lambert* we defined "knowingly" as it applies to the offense of criminal endangerment. We explained that the criminal endangerment statute emphasizes result over conduct and that more is required of the accused's mental state than that he be aware only that his conduct is incorrect. Recognizing that at the heart of the offense is the avoidance of a singular result—the substantial risk of death or serious harm from the defendant's actions—we clarified that it is the "appreciation of the probable risks to others posed by one's conduct that creates culpability for criminal endangerment . . . ." *Lambert*, 280 Mont. at 236, 929 P.2d at 849. We recognized that were it otherwise, "where culpability could lie for mere appreciation of one's conduct, such as driving a car or shooting a hunting rifle, some very unfair results could follow." *Lambert*, 280 Mont. at 236, 929 P.2d at 849. We held that the mental state "knowingly" "applies without apparent distinction, to the elements (1) engage in conduct (2) that creates a substantial risk of death or serious bodily harm to another." *Lambert*, 280 Mont. at 237, 929 P.2d at 850. "Knowingly," therefore, applies both to the conduct and to the result of the conduct. "[T]o prove that a defendant was aware of his conduct was one thing; to prove

that he was aware of the high probability of the risks posed by his conduct is quite another." *Lambert*, 280 Mont. at 237, 929 P.2d at 850.

¶27 Accordingly, the statutory definition of "knowingly" draws a distinction between (1) statutes that do nothing more than proscribe conduct (without regard to result), and (2) statutes that not only describe conduct, but also focus on the result of that conduct. This distinction is important in order to ensure that a person's behavior meets the singular focus of the criminal endangerment statute—the avoidance of death or serious bodily harm. Justice Leaphart, in his special concurrence in *Lambert*, gave the following example to illustrate the importance of this distinction:

> [A]ssume that three men are standing in a field and each has a rifle. Jones fires to the west where there is nothing but open field. Smith fires to the south in the direction of a grove of trees. Johnson fires to the north where, in plain view, there is a cluster of houses. Each of these men knowingly engaged in the same conduct, i.e., shooting a rifle. However, the legal consequence of any one man's conduct will vary depending upon his awareness. Jones' conduct did not create a risk of harm. Smith's conduct did create a risk of harm but he was unaware of that risk. Johnson's conduct resulted in a risk of harm of which he should have been aware.

Lambert, 280 Mont. at 242, 929 P.2d at 853 (Leaphart, J., concurring). In other words, it is of no consequence that either Jones or Smith had previously fired a rifle into a cluster of houses when assessing Jones's conduct of firing into an open field and Smith's conduct of firing into a grove of trees.

¶28 The State did not have to prove that Fleming's conduct actually resulted in bodily injury. But it did have to prove, under the facts of this case, that Fleming knew his conduct would result in placing J.J. at substantial risk of death or serious bodily injury. Therefore, to convict of criminal endangerment the State had to prove that Fleming was aware that it

was highly probable a result dictated by the circumstances of Fleming's conduct in this instance—that J.J. would binge-drink the entire bottle—could occur.

¶29 As discussed in Issue One, the jury had sufficient evidence to consider whether Fleming should have been aware that providing J.J. with 80-proof whiskey could result in alcohol poisoning—a risk of death or serious bodily harm. But the State relied heavily on evidence of the fourteen-year-old conviction to meet its burden. Although the proscribed conduct of providing alcohol to underaged persons was the same in both cases, the offense of criminal endangerment requires more than knowing something bad could happen from supplying alcohol to an underaged person.

¶30 The District Court emphasized that the prior incident was relevant to Fleming's knowledge that alcohol in the hands of a minor may cause harm. This is true to a degree: providing alcohol to minors creates risk because minors are more likely to lack the maturity to drink responsibly and the judgment to behave responsibly when they have been drinking. But the law sets the age of maturity at eighteen; at that age, J.J. was deemed to be mature enough to exercise judgment in all of his life endeavors other than the consumption of alcohol. The 2001 conviction was not as highly probative as the District Court determined; the results Fleming risked by supplying J.J. with alcohol are not directly comparable to the results he risked when he gave alcohol to the presumably less mature fifteen-year-olds. It is the appreciation of the risk posed by Fleming's conduct that creates culpability for criminal endangerment. Admitting the 2001 conviction to establish Fleming's result-based knowledge for the charged offense allowed the jury to find the mental state requirement by comparing Fleming's similar conduct in the past.

¶31 The State's position in this case could allow a conviction from proof of any result that may follow from the illegal conduct of supplying alcohol to any person under the age of twenty-one. The criminal endangerment statute does more than just proscribe conduct (without regard to result); it includes a requirement that a defendant knowingly understood that the risk (the endangerment) is the result of his conduct in the charged case. Evidence of the 2001 case brought significant risk that the jury would convict Fleming based on his prior conduct of supplying alcohol to a person under age.

¶32 Before the District Court, Fleming argued that the previous conviction was highly and unfairly prejudicial, "as there is an unavoidable danger of an improper character inference by the jury." Fleming maintained that "[n]o number of cautionary instructions can offset the insurmountable inference of guilt that will arise if the state is allowed to produce evidence of the prior offense." Even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." M. R. Evid. 403. We readily acknowledge that a trial judge is in the best position to evaluate the evidence's potentially prejudicial effect and has broad discretion in ruling on the admission of prejudicial evidence. *See Evans v. Scanson*, 2017 MT 157, ¶ 26, 388 Mont. 69, 396 P.3d 1284. But we agree with Fleming that, even if relevant to his knowledge of the risk, the conviction and its details were so prejudicial that the error requires reversal.

¶33 Evidence may be unfairly prejudicial "if it arouses the jury's hostility or sympathy for one side without regard to its probative value, if it confuses or misleads the trier of fact, or if it unduly distracts from the main issues." *State v. Madplume*, 2017 MT 40, ¶ 33,

386 Mont. 368, 390 P.3d 142 (internal citations omitted). "'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Old Chief v. United States*, 519 U.S. 172, 180, 117 S. Ct. 644, 650 (1997) (quoting Advisory Committee's Notes on Fed. Rule Evid. 403, 28 U.S.C. App., p. 860). Evidence of a prior conviction is thus analyzed under Rule 403 "for relative probative value and for prejudicial risk of misuse as propensity evidence." *Old Chief*, 519 U.S. at 182, 117 S. Ct. at 651.

¶34 In this case, the overwhelming effect of admitting Fleming's 2001 conviction was to show that Fleming must be guilty because he had committed a similar offense before. Evidence of Fleming's 2001 conviction aroused sympathy among the potential jurors without regard for the evidence's probative value. The District Court revealed the catastrophic details of the 2001 incident at the trial's outset, announcing that Fleming's prior actions resulted in one teenager's death and another's significant physical injuries. During *voir dire*, the State discussed the deceased teenager's funeral with a potential juror. The court excused another potential juror because, after learning of the prior incident and hearing the State discuss the funeral, the woman felt as though she could not be fair to Fleming. Also during *voir dire*, the State elicited sympathy by reiterating that it wanted to ensure no one related to either of the two girls involved in the 2001 incident served on the jury because the State would "hate to . . . put a family member through that if they're here."

¶35 Thus, from the outset, with very little reference to the facts of the crime for which Fleming stood trial, the jury knew that, because of Fleming, "One girl died and the second suffered significant physical injuries." That evidence packed an incredibly powerful

punch, one that we conclude was simply too prejudicial to be overcome by a cautionary instruction. With each reference by the trial court, by the prosecutor, and by defense counsel, those tragic details would be brought to mind. We agree with Fleming that a limiting instruction could not erase the searing image of the tragic fatal crash, making it more likely the jury would convict because he had done this before and had not learned his lesson.

¶36 Though the District Court apparently intended to blunt the evidence's prejudicial impact by presenting it at the forefront of Fleming's trial, by doing so the court emphasized the impact and distracted from the main issue. The *first* piece of information the jurors learned about Fleming was that, in 2001, Fleming's actions caused one teenaged girl to die and another to suffer significant injuries. They learned that information from a judge, whom jurors view as impartial. During *voir dire*, the State repeatedly asked the potential jurors if they could keep the cautionary instruction in mind, emphasizing Fleming's prior conviction by drawing it to the forefront of the potential jurors' minds. By emphasizing the prior conviction, both the District Court and the State distracted from the main issue. The jury's task was to decide whether Fleming was guilty of criminal endangerment based on his alleged provision of alcohol to J.J., not whether Fleming was guilty of criminal endangerment based on his admitted prior provision of alcohol to two underaged girls. On balance, the unfair prejudice outweighed the evidence's probative value.

¶37 We conclude that the District Court erred when it allowed evidence of Fleming's prior conviction for criminal endangerment, and that Fleming is entitled to a new trial.

¶38 *3. Whether the criminal endangerment statute, § 45-5-207, MCA, is unconstitutionally vague as applied in Fleming's case.*

¶39 Fleming argues that the criminal endangerment statute is unconstitutionally vague as applied to the facts of his case because a person of ordinary intelligence would not know that the charged conduct would constitute anything other than the misdemeanor offenses of providing or selling alcohol to a person under the age of twenty-one as defined in §§ 16-6-305 and 45-5-623, MCA. Fleming did not raise the constitutional challenge in the District Court. Fleming first requests plain error review in his appellate reply brief and argues that there was no unfair surprise because the underlying issue was presented in the opening appellate brief.

¶40 "It is perhaps our most fundamental rule of appellate review that, with rare exception, we will not consider an issue or claim that was not properly preserved for appeal." *State v. Norman*, 2010 MT 253, ¶ 16, 358 Mont. 252, 244 P.3d 737. An as-applied vagueness challenge to a statute defining the elements of an offense is a question of law capable of determination by a trial court prior to trial and must be raised at or before the omnibus hearing or it will be waived for purposes of appeal pursuant to § 46-13-101, MCA. *State v. Hamilton*, 2018 MT 253, ¶ 23, 393 Mont. 102, 428 P.3d 849. We previously have refused to invoke the common-law doctrine of plain error review when a party raises such request for the first time in his reply brief. *See*, *e.g.*, *State v. Johnson*, 2010 MT 288, ¶ 13, 359 Mont. 15, 245 P.3d 1113; *State v. Raugust*, 2000 MT 146, ¶ 19, 300 Mont. 54, 3 P.3d 115; *State v. Hagen*, 283 Mont. 156, 159, 939 P.2d 994, 996 (1997). We decline to apply plain error review here.

CONCLUSION

¶41 The State presented sufficient evidence to support the jury's guilty verdict. But the District Court abused its discretion by admitting evidence of Fleming's prior criminal endangerment conviction. Fleming's as-applied constitutional challenge to § 45-5-207, MCA, is not preserved for appeal. We reverse the conviction and remand for a new trial.

/S/ BETH BAKER

We Concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ INGRID GUSTAFSON
/S/ LAURIE McKINNON
/S/ DIRK M. SANDEFUR

Justice Jim Rice, dissenting.

¶42 The Court explains at length the uniquely high, and difficult to prove, mental state element necessary to establish felony Criminal Endangerment. To act knowingly, a defendant must be aware of the "high probability" that his conduct "will cause" substantial risk of death or serious bodily injury. *See* Opinion, ¶ 13 (citing *State v. Lambert*, 280 Mont. 231, 929 P.2d 846 (1996)). The Court cites our case law holding "more is required" than merely proving awareness of one's conduct, and that criminal culpability for this offense arises from "*the appreciation of the probable risks* to others posed by one's conduct." Opinion, ¶ 26 (citing *Lambert*, 280 Mont. at 236, 929 P.2d at 849) (emphasis added). The statute's elements are numerous. It requires a defendant to have acted: *knowing* . . . the

high probability . . . his conduct . . . *will* cause . . . a *substantial* risk . . . of *death or serious* bodily injury.[1] By legislative design, Criminal Endangerment is a legally complex felony, justified under particular circumstances.

¶43 The Court recognizes the typical case of providing alcohol to a minor "likely could not" support a charge of Criminal Endangerment. Opinion, ¶ 21. That is because, under the elements of the crime discussed above, something beyond the typical scenario is necessary. To prove this crime, prosecutors must show a particular defendant had a particular understanding or awareness of the high probability that his actions would *assuredly* cause a substantial risk of serious injury—"will cause." ("[T]o prove that a defendant was aware of his conduct [is] one thing; to prove that he was aware of the high probability of the risks imposed by his conduct is quite another." *Lambert*, 280 Mont. at 236, 929 P.2d at 849.) In short, a heightened level of knowledge about the risks of the conduct is required. Without evidence that a defendant possessed such heightened knowledge, the felony cannot be proven because the requisite mental state cannot be demonstrated. The Court repeatedly notes Fleming's arguments that made up his central defense: that he lacked sufficient knowledge to support the charge. *See* Opinion, ¶¶ 15, 17, 25 (Fleming maintains "the State did not establish that he knew of a 'high probability' that his actions would 'cause a substantial risk of death or serious bodily injury to another'").

[1] The Court alternatively uses "may cause," Opinion, ¶ 16, but the statute states, "will cause." Section 45-2-101(35), MCA. *See also State v. Lambert*, 280 Mont. 231, 237, 929 P.2d 846, 850 (1996).

¶44 The facts of this case presented prosecutors with evidence that satisfied this heightened burden: Fleming had a unique reason to possess particular understanding of the high probability his actions would assuredly cause such a substantial risk of harm—he had previously provided alcohol to teenagers, which had led to death or serious injury. Prosecutors thus validly exercised their discretion and brought a Criminal Endangerment charge against Fleming.

¶45 The District Court concluded that Fleming's prior experience was "very, very probative" to his knowledge of the dangerousness of his conduct. However, in stark contrast, the Court concludes this evidence is not probative because it is "not directly comparable to the results he risked" in supplying the alcohol here, and is so lacking in probative value that the District Court abused its discretion by admitting it. Opinion, ¶ 30. Why is this? Because, as the Court offers, Fleming provided alcohol in the earlier incident to fifteen-year-old underage drinkers who were "presumably less mature" than the underage drinker who drank himself to a .584 alcohol level in this case. Opinion, ¶ 30. Beyond the problem of basing its holding on complete speculation about the maturity levels of the underage drinkers in these incidents, the Court's conclusion that this distinction reduces the probative value of the evidence is unquestionably incorrect, evident by the lack of cited supporting authority. "Evidence is probative if it has *any tendency* to make the existence of a fact that is consequential to the determination of the action more or less probable than without it. M. R. Evid. 401." *State v. Meyer*, 2017 MT 124, ¶ 23, 387 Mont. 422, 396 P.3d 1265 (emphasis added); *State v. Wilmer*, 2011 MT 78, ¶ 14, 360 Mont. 101, 252 P.3d 178. Far more than bearing a mere "tendency," Fleming's experience bore

directly upon his knowledge and understanding of the risks involved with his conduct. Indeed, the evidence is particularly probative when viewed, as this Court has done previously, in light of the defense to the charge raised by the Defendant—here, that he lacked sufficient knowledge to satisfy the statute's heightened knowledge requirement. *See State v. Berosik*, 2009 MT 260, ¶ 42, 352 Mont. 16, 214 P.3d 776 ("*In the face of this defense*, a jury could conclude the evidence is probative" in deciding proof beyond a reasonable doubt) (emphasis added).[2] Under the Court's reasoning, Fleming's prior experience would only be probative if he had here supplied alcohol to fifteen-year-olds, and apparently, not to sixteen or seventeen-year-olds. This conclusion is untenable. The District Court was correct to see Fleming's past experience as very probative to his current knowledge.

¶46 The Court is obviously concerned that the use of a prior experience could go too far, precipitating a conviction upon "*any* result that may follow" from illegally supplying alcohol to underage drinkers. Opinion, ¶ 31. This is a legitimate concern, but is not the case before us. There is no "bridge too far" here. The circumstances of these incidents, of Fleming's actions and the results that followed, are virtually identical, thus requiring the

[2] Fleming defended by contesting mental state, in addition to contesting identity. Fleming's pre-trial motion in limine sought exclusion of his prior conviction, arguing "[k]nowledge of the risk of serious bodily injury or death posed by providing alcohol to minors is common knowledge," which he argued rendered the evidence of his prior conviction unnecessary and prejudicial. Accordingly, the State was put on further notice of the need to meet its burden by proving mental state. *See State v. Brown*, 355 P.3d 216, 221 (Or. 2015) (finding no prejudice in admitting defendant's prior conviction where defendant argued he lacked the requisite mental state, the prior conviction was relevant to show defendant had not made a mistake or otherwise lacked knowledge, and the probative value was "substantial" because "of the difficulty in proving knowledge").

Court to wrench a distinction from the ages of the respective underage drinkers in order to conclude the evidence is not sufficiently probative.

¶47 Perhaps an indication that its probative value conclusion is suspect, the Court goes on to also conclude that admission of Fleming's prior experience is too prejudicial for this case. Opinion, ¶ 32. To the contrary, Fleming's prior experience *is* the case, that is, it is part-and-parcel to the crime. Fleming's prior similar conduct establishes probable cause of the requisite heightened mental state element and justifies the charge of felony criminal endangerment. Of course, the evidence is prejudicial to Fleming. In the same way that evidence of a weapon prejudices a defendant charged with assault with a weapon, Fleming's prior experience prejudices him as charged with endangering another with heightened knowledge.

¶48 "Probative evidence is generally prejudicial" and "rises to the level of being unfairly prejudicial only 'if it arouses the jury's hostility or sympathy for one side without regard to its probative value, if it confuses or misleads the trier of fact, or if it unduly distracts from the main issues.'" *State v. Madplume*, 2017 MT 40, ¶ 33, 386 Mont. 368, 390 P.3d 142 (internal citation omitted). "[Trial] courts have broad discretion to weigh the relative probative value of evidence against the risk of unfair prejudice." *City of Bozeman v. McCarthy*, 2019 MT 209, ¶ 24, ___ Mont. ___, ___ P.3d ___ (citing *Madplume*, ¶ 32). Citing nothing whatsoever from the record, the Court leaps to the conclusion that the evidence of Fleming's experience "aroused sympathy among the potential jurors without regard for the evidence's probative value." The Court describes the evidence as a "searing image of [a] tragic fatal crash" that was "an incredibly powerful punch" that was "simply

too prejudicial to be overcome by a cautionary instruction." Opinion, ¶¶ 34, 35. However, there is no record indication that the jury's sympathies were improperly aroused. Preventing that from occurring and providing a fair trial was the cumulative purpose of voir dire, the Rules of Evidence and the instructions—to insure the evidence is presented circumspectly, not used inappropriately, and not permitted to inflame. The record is clear the District Court thought deeply about the issue and acted carefully and conscientiously throughout the trial process. The jury was clearly and repeatedly cautioned numerous times not to use Fleming's prior conviction inappropriately. I believe the District Court and the jurors undertook their duties with utmost solemnness. As a matter of law, we are to presume the jury followed the court's cautionary instructions. *State v. Michelotti*, 2018 MT 158, ¶ 23, 392 Mont. 33, 420 P.3d 1020. I completely disagree with the Court's supposition that the jury convicted Fleming for the wrong reason, or that the District Court abused its discretion in handling the evidence.

¶49 In my view, rather than the jury's sympathies, it is the Court's sympathies that have been aroused. In its Opinion, the Court is aghast at the reference to the death and serious injuries that followed Fleming's actions in the prior case, but utterly misses the salient point: that death or serious injury was likewise the risk Fleming created in this case. Fleming's actions here almost led, again, to a young person's death. The evidence in these cases is difficult because the subject is difficult—placing young people in situations that risk their death.

¶50 The Court strips away the foundation for the felony charge by undermining the proof of the required heightened mental state, and thus permits Fleming to argue that he had no

"appreciation of the probable risks to others posed by [his] conduct," *Lambert*, 280 Mont. at 236, 929 P.2d at 849, or, in other words, that he no reason to know or realize his actions of simply buying alcohol for a teenager could place the teenager at risk of such a serious outcome—death or serious injury. Which, of course, is not the truth. This felony charge is viable only when the State can demonstrate such commonly raised defenses are not reasonable, but, unfortunately, the Court here has taken the truth out of the search for truth, and has undermined the Legislature's purpose in creating the crime.[3]

¶51 I dissent, and would affirm.

/S/ JIM RICE

[3] The Court takes comfort in its theory that, even without evidence of Fleming's prior conviction, sufficient evidence remains for a rational jury to convict Fleming of Criminal Endangerment. Opinion, ¶ 21. Beyond the problems of this statement being dicta and speculation, given that the Court is reversing the conviction, and the jury here was provided the evidence of Fleming's experience, I think otherwise: without the context of Fleming's experience, and in view of an "I didn't realize" defense, the evidence here would make it difficult for a rational jury to find the requisite components of the heightened mental state element. I invite the reader to look closely at the Court's discussion of the sufficiency of the evidence in Paragraph 21. Without Fleming's prior conviction, it is a slim reed.