

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0301

STATE OF MONTANA,

Plaintiff and Appellee,

v.

WILLIAM G. ROSSBACH,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Twentieth Judicial District Court,
Lake County, The Honorable James A. Manley, Presiding

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STATEMENT OF THE ISSUE

1. After the second trial (following a mistrial) had been scheduled once, did the district court abuse its discretion when it denied the defendant's motion to continue the date of the second new trial setting?

2. Should this Court reject Rossbach's claim about having a constitutional right to have an incarcerated defense witness testify in civilian attire, when this record demonstrates the trial court balanced the possible prejudice to Rossbach against an un rebutted security interest, which Rossbach on appeal does not contest or even acknowledge?

3. Did the trial court correctly sentence Rossbach as a persistent felony offender (PFO)?

STATEMENT OF THE CASE

Appellant William G. Rossbach appeals his jury conviction of assault on a peace officer, entered in Lake County District Court, the Honorable James A. Manley, presiding. (D.C. Doc. 93.) This case began May 15, 2019, in St. Ignatius, when Tribal Officer T.J. Haynes, looking for a stolen bike, encountered Rossbach, who upon seeing Haynes, rode away on the bike. (2/5/20 Trial Tr. at 132.) The short chase that followed resulted in Rossbach physically resisting Haynes' multiple requests and orders to stop, with Rossbach thereafter resisting arrest by,

among other things, swinging his fists at Haynes and striking him on the right side of his head. (*Id.* 134-44.)

The State charged Rossbach with resisting arrest and assault on a peace officer, and Rossbach raised a justified use of force defense. (D.C. Docs. 4, 13, 22, 35.) The jury convicted Rossbach on resisting but hung on the assault charge. The court declared a mistrial on the assault charge and scheduled a new trial date. (12/2/19 Tr. 290; Docs. 64, 74 at 2.)

The day after the district court issued the scheduling order, Rossbach's counsel moved the court to postpone the trial by one month, explaining the new trial date conflicted with his attorneys' pre-booked, non-refundable travel plans to Morocco. (D.C. Doc. 65.) The district court denied the motion after a hearing, and Rossbach's attorneys, deciding to drop their representation of Rossbach, took their vacation and transferred representation to a new attorney, Ms. Alicia Backus. (D.C. Docs. 68, 70.)

At the second trial, held on February 5, 2020, the jury convicted Rossbach of assault, and the court later sentenced him as a PFO to 14 years at MSP, with no parole eligibility for the first 10 years. (D.C. Doc. 93.)

STATEMENT OF THE FACTS

On May 15, 2019, in St. Ignatius, Tribal Officer T.J. Haynes was in uniform in his marked police car patrolling near the area looking for a bike reported stolen about a week before. (*Trial Tr.* at 130.) The theft victim had just reported seeing someone riding his bike in town near the Silver Dollar Bar. Haynes drove that way. Near the Cenex station he saw a male with long hair sitting on the bike near the gas pumps. (*Id.* at 131-32.) The male would later be identified as Rossbach, whom Haynes did not recognize.

When Rossbach saw Haynes, he jumped on the bike and rode toward the front of the store. (*Id.* at 132.) Haynes drove after Rossbach and activated his top lights. (*Id.*) Rossbach looked back at Haynes and continued to flee; Haynes then turned on his sirens (*id.*), but Rossbach looked back at Haynes and rode away faster. (*Id.* at 134:2-3.)

Haynes then located Rossbach behind the Silver Dollar Bar, trying to hide behind a small bush. (*Id.* at 134.) Haynes got out of his car, pulled his taser out, and demanded Rossbach come out with his hands up. (*Id.* at 135:8-11.) Rossbach responded, "Fuck you, T.J. I'm not going to jail. (*Id.* at 135:15-16.) Haynes then tased Rossbach when Rossbach briefly turned his back. (*Id.* at 136.) Rossbach was unaffected by the tasing, and he pulled the taser probes out. (*Id.*)

Haynes holstered his taser, then noticed Rossbach had a large knife on his right hip. (*Id.* at 137.) Haynes drew his service weapon and told Rossbach, “Don’t pull that knife out or I’ll have to use deadly force if you use it on me.” (*Id.* at 137:4-5.) Rossbach reached down, drew his knife, threw it on the ground, started walking away, and told Haynes, “Fuck you. I ain’t going to jail.” (*Id.* at 137:23-24, 138:9-10.)

Haynes requested backup, but none was available. (*Id.* at 138-39.) Rossbach walked toward the malt shop next to the Silver Dollar Bar and kept using foul language toward Haynes and calling Haynes “bitch boy.” (*Id.* at 138-40.) Haynes decided to holster his weapon and try to “bum-rush” Rossbach, tackling him from behind to get him to the ground. (*Id.* at 141:4-7.) Haynes attempted this and did knock Rossbach to the ground, but Rossbach immediately jumped back up and, with a clenched fist, started bouncing around, yelling, “Come on, bitch boy. Come on, bitch boy. You think you’re fucking tough.” (*Id.* at 141.)

Haynes redrew his weapon and continued giving Rossbach orders; Rossbach turned around and started walking away again, saying, “You’re nothing but a bitch boy. You’re nothing but a fucking bitch boy.” (*Id.*) Haynes followed, holstered his gun, then approached Rossbach to go hands-on again; Rossbach spun around and hit Haynes on the side of his head, powerfully enough to hurt Haynes, who testified, “I had stars going through the eyes.” (*Id.* at 141:25.)

Rossbach continued resisting Haynes, and they fell to the ground, wrestling, with Rossbach trying to punch Haynes again. (*Id.* at 142.) Several bystanders came to aid Haynes and helped restrain Rossbach long enough for Haynes to put handcuffs on him. (*Id.* at 143.)

At trial, the State's eyewitness Mark Steele, one of the bystanders who helped Haynes, said he had previously known Haynes for a long time. (*Id.* at 201.) Steele did not observe Haynes getting out of hand. (*Id.* at 204:24.) Haynes testified he never choked Rossbach (*id.* at 178:12), as Rossbach would later insist had occurred. According to Steele, Haynes was simply trying to get control of Rossbach. (*See id.* at 205.)

When Rossbach testified, he admitted he knew Haynes had been in the patrol car that first approached him at the Cenex station. (*Id.* at 244:3-4.) Rossbach further admitted that: he ran from Haynes upon seeing him; he didn't stop when Haynes demanded he do so; he never showed his hands; he used tough talk, egging Haynes on (because, Rossbach claimed, he was afraid); and he specifically told Haynes "Come on, I thought you had more than that." (*Id.* at 244-49, 263, 267:5-6.) Rossbach claimed self-defense because he was familiar with Haynes, was scared of him, and supposedly several years before had had an affair with Haynes' wife (deceased at the time of trial). (*Id.* at 244.)

At trial, defense witness Chris Morigeau would explain he had been with Rossbach at the Cenex station when they both saw Haynes approaching. (*Id.* at 234-35.) After Morigeau identified Haynes to Rossbach (*id.* at 235:22), Rossbach took off running. (*Id.* at 236.)

Rossbach called Matthew Friedlander to testify about Haynes' excessive use of force. Friedlander spoke about getting arrested once by Haynes, who had roughly treated Friedlander while Friedlander was handcuffed. (*Id.* at 223.) But when Friedlander told Haynes to back off, Haynes stopped. (*Id.* at 223:13-15.) On another occasion, Haynes had arrested Friedlander at his house, in front of visitors who were present, thus embarrassing Friedlander; but Haynes had acted professionally. (*Id.* at 223-24.) The State will discuss additional record facts in the arguments that follow.

SUMMARY OF THE ARGUMENT

Continuance. Rossbach claims that the attorneys who represented him in the first trial (which resulted in a mistrial), and who were going to represent him in the second trial, were diligent but had a prescheduled vacation occurring during the time the second trial date was set, that the State would not have been prejudiced by a continuance, and that Rossbach was prejudiced by the denial of the motion to continue. Rossbach does not contest the trial court's findings about his attorneys'

lack of diligence. He therefore waives argument that the court acted arbitrarily or without conscientious judgment in applying those findings when deciding to deny his motion for a continuance. In any event, error, if any, was harmless and Rossbach fails to demonstrate any specific prejudice he suffered because of the denial of the motion.

Jail attire. Regarding Rossbach's second issue about having a defense witness appear in civilian attire, Rossbach fails to even once acknowledge the trial court's concerns about security. He therefore waives his argument for failing to brief it, and he should not be allowed to make up for the omission in a reply brief. This is especially so since the trial court gave Rossbach notice and an opportunity to establish a record that would rebut the security concerns.

PFO sentencing. A plain statutory interpretation of the PFO statutes shows that when Rossbach was released from his prison confinement some two months before he committed his assault on the victim in this case, he had been serving a "commitment;" that is, actually serving and completing a sentence of confinement, thus qualifying Rossbach for PFO sentencing.

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ARGUMENT

I. Because Rossbach presents no developed argument or discussion on the trial court’s findings about his attorneys’ lack of diligence, he has waived any argument that the trial court acted arbitrarily or without conscientious judgment in making those findings or applying those findings with respect to counsels’ request to move the February 3, 2020, trial date.

A. Standard of review and applicable law

A district court’s ruling on a motion to continue is subject to the district court’s discretion, and this Court reviews the ruling to determine whether the district court abused its discretion. *State v. Morrison*, 2009 MT 397, ¶ 5, 353 Mont. 407, 220 P.3d 659 (citation omitted). Further, “[t]his 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, citing *State v. Ibarra-Salas*, 2007 MT 173, ¶ 13, 338 Mont. 191, 164 P.3d 898; see also *State v. Goff*, 2011 MT 6, ¶ 20, 359 Mont. 107, 247 P.3d 715 (“A district court abuses its discretion when it acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in a substantial injustice.”).

Montana Code Annotated § 46-13-202(3) provides that “[a]ll 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.” Any party requesting a continuance “must show that they have demonstrated sufficient diligence in preparing for the trial, and that the continuance is in ‘the interests of justice.’” *Duncan*, 2008 MT 148, ¶ 37, citing *State v. Borchert*, 281 Mont. 320, 324, 934 P.2d 170, 173-75 (1997); Mont. Code Ann. § 46-13-202(2).

In order to determine whether a district court abused its discretion in denying a motion to continue trial, this Court will consider the circumstances of the request, 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.” *State v. Molder*, 2007 MT 41, ¶ 23, 336 Mont. 91, 152 P.3d 722, citing *State v. Sotelo*, 209 Mont. 86, 91, 679 P.2d 779 (1984).

B. Rossbach, on appeal, fails to contest, and therefore waives objection to, the trial court’s multiple factual findings that Rossbach’s counsel were not diligent.

In his opening brief, Rossbach, argues the merits of his issue regarding his denied continuance motion based exclusively on the purported greater need to retain the same counsel for the second trial. (*See* Opening Br. at 21.) What

Rossbach never once argues against, or even acknowledges, are the copious factual findings by the trial court of his counsels' lack of diligence.

These findings included specific, detailed references to the acts of defense counsel that caused the delay that prompted the court to reset the second trial for February 3, 2020. (D.C. Doc. 68, Amended Order Denying Motion To Reset Jury Trial, at 1-4.) These findings included: counsel indicated they could be ready for the first trial set for December 2, 2019; for the first trial, counsels' notice of witnesses and exhibits was filed late, thus violating statutory and court-ordered requirements; counsel failed to make a showing of good cause for the delay when given the opportunity; the pre-trial conference on December 11 demonstrated a pattern of late and non-compliant defense filings; the first trial, which hung, was not a complicated case to try; while the State did not object to the continuance motion, defense counsel never informed the court that the county attorney had been consulted, nor did counsel file a brief supporting the motion for continuance; the two defense attorneys who made the travel arrangements knew they were co-counsel on this or other cases but chose to save money by buying non-refundable travel arrangements rather than pay for insurance or refundable arrangements. (*Id.*)

This Court will decline to consider arguments on appeal that are not adequately briefed and argued. *See State v. Cybulski*, 2009 MT 70, ¶¶ 13-15, 349 Mont. 429, 204 P.3d 7; Mont. R. App. P. 12(1)(g). Whether defense counsel was

diligent in preparation for trial is an important consideration to a judge considering whether a continuance request is meritorious. *See Molder*, ¶ 23; *Sotelo*, 209 Mont. at 91, 679 P.2d at 782. The State submits it has no obligation to discuss Rossbach's issue when it is not properly discussed or properly briefed in his opening brief. *See Chor v. Piper, Jaffray & Hopwood*, 261 Mont. 143, 149, 862 P.2d 26, 30 (1993) (concluding that since Chor did not address an issue in her brief to this Court, she effectively conceded); *see also Emery v. Federated Foods*, 262 Mont. 83, 87, 863 P.2d 426, 429 (1993) (failing to brief issue on appeal results in waiver).

The lack of specificity on any assertion regarding attorney diligence prejudices a respondent because the latter has to respond to indistinct claims at the peril that it may not have responded to what the petitioner implied. Neither this Court nor a respondent should be reduced to guesswork. *See State v. Austad*, 197 Mont. 70, 97, 641 P.2d 1373, 1388 (1982) (declaring it will decline to consider "bald assertions" of error); *cf. Whitefish v. Hansen*, 237 Mont. 105, 106, 771 P.2d 976, 976 (1989) (stating the Court should not dignify Hansen's indistinct, confusing, and incomprehensible contentions with anything beyond a curt reply). Rossbach is thus foreclosed from asserting he made an "implied argument" in his opening brief. Rossbach, in his opening brief, appears to purposely exclude any mention of attorney diligence as a consideration overborne by a greater right. He expressly mentions such considerations as busy trial schedules and speedy trial

matters, making his failure to mention attorney diligence significantly conspicuous by its absence. (See Opening Br. at 18, “Summary of Argument,” synopsis argument on issue 1 as focusing only on: 1) the request to accommodate a pre-paid vacation was reasonable; 2) lack of opposition by the State; and 3) the right to a fair trial with the advocacy of counsel trumps other considerations, “*such as crowded dockets and the speedy trial right.*”) (Emphasis supplied).

Absent a developed argument, Rossbach waives such arguments entirely for failing to brief them in this Court. *Emery*, 262 Mont. at 87, 863 P.2d at 429. Because Rossbach presents no proper argument, he effectively concedes the trial court committed no abuse of discretion in denying the continuance motion. As such, the State need not address the merits of his claims further. He is prohibited from attempting to make up for his omissions in his reply brief. *Unified Indus. v. Easley*, 1998 MT 145, ¶ 28, 289 Mont. 255, 961 P.2d 100; see *Kinsey-Cartwright v. Brower*, 2000 MT 198, ¶ 9, 300 Mont. 450, 5 P.3d 1026 (granting Brower’s motion to strike portions of Kinsey-Cartwright’s reply brief where Kinsey-Cartwright improperly raised factual and legal arguments regarding assault and trespass in her reply brief that she did not raise in her opening brief).

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C. Even assuming for argument’s sake this Court decides to review the merits of Rossbach’s issue, the trial court correctly and conscientiously exercised its discretion in denying the continuance.

The State relies on the trial court’s uncontested findings that Rossbach’s counsel were not diligent. But, more than this, the non-diligence findings are more significant in light of Rossbach’s other preserved assertions, particularly his apparent dismissiveness of the speedy trial component of the judge’s order. (*See* Opening Br. at 22-23.) This record shows the trial court already knew about, and had previously accommodated, counsels’ vacation conflict. One day after the mistrial, December 3, 2019, when the district court’s order (D.C. Doc. 50) scheduled Rossbach’s first new trial date to December 16, 2019, the court had already acknowledged the attorneys had vacation plans. The day before, on the day of mistrial (December 2), and immediately following the court’s mistrial declaration, Judge Manley told defense counsel and the prosecutor that he intended to set a date

. . . for a new trial at the earliest possible date, which will probably be this month. So let me—I know you’re going to be out of town some of that time so let my office know what dates any of you are out of town and we’ll try it as soon as we can.

(12/2/19 Trial Tr. at 293:12-16.) (Emphasis supplied.) Defense counsel Liam Gallagher verbally assented to the court’s directive. (*Id.* at 293:18. Mr. Gallagher: “Okay.”) The Court entered its order on December 3. One may presume Mr.

Gallagher contacted the judge's chambers, as the first new trial setting of December 16 was not objected to by Mr. Gallagher. At the very least, Mr. Gallagher knew at that the court wanted Rossbach speedily re-tried.

Thus, even though the judge made clear he understood Mr. Gallagher had pre-scheduled vacation time, it was up to Mr. Gallagher to act reasonably in making sure the December 16 trial went forward, not only to preserve the known vacation plans, which the court had already accommodated, but, more reasonably, to fulfill the trial court's speedy trial concerns.

It makes no sense for Rossbach to try and magnify the importance of counsels' vacation by devaluing trial delay. This record does not show defense counsel advised Rossbach about the delays nor had him expressly waive any complaint of additional delay that accommodating the vacation would cause. The trial court noted this glaring omission. (D.C. Doc. 68 at 4: "There is no indication in the motion whether the Defendant was consulted or consented to these additional delays while he remains incarcerated.") Even ignoring this omission, the trial court's prior express admonition to Rossbach's counsel about avoiding delay created a far more preponderating principle in the balance of competing justifications Rossbach advances here and below; trial courts have a cardinal, independent duty to avoid unnecessary trial delays. *Cf. State v. Couture*, 2010 MT 201, ¶¶ 75-76, 357 Mont. 398, 240 P.3d 987 (suggesting in dicta that courts should

be more concerned with the fundamental right to a speedy trial in denying any continuance unsupported by a concrete showing of good cause for the delay above and beyond defense counsel's duty to conduct defense preparations diligently); *Sykes v. Virginia ex rel. Peyton*, 364 F.2d 314, 316 (4th Cir. 1966) (stating defendants are entitled to delay when delay is necessary to enable their attorneys to properly prepare themselves for trial, but when reasonable time has been provided for that purpose, "it becomes the Court's duty in the control of its docket to avoid unnecessary delay"); *United States v. Tigano*, 880 F.3d 602, 613 (2d Cir. 2018) (construing the test in *Wingo v. Barker*, 407 U.S. 514 (1972), and ruling that both the trial court and the government have affirmative duties to monitor the progress of a criminal case toward disposition and to take steps to avoid unnecessary delay where possible).

Rosbach has not only failed to demonstrate diligent defense preparations as a prerequisite to showing good cause, but he also fails to rebut the conclusion that counsels' inattention to following court rules and demonstrable indifference to the court's admonitions against delays were the cause of the second trial being set to February 3, which caused the conflict with counsels' vacation plans.

Rosbach misrelies on Washington State cases to shore up his assertion that lawyer vacations are critically important. (Opening Br. at 22-23, 30, citing *State v. Kelley*, 64 Wash. App. 755, 828 P.2d 1106 (1992); *State v. Grilley*, 67 Wash. App.

795, 840 P.2d 903 (1992); *State v. Heredia-Juarez*, 119 Wash. App. 150, 79 P.3d 987 (2003).) Doubtlessly, in the abstract, there is little to disagree with in Rossbach's assertion. But not one of Rossbach's Washington cases hold that prescheduled attorney vacations surmount the specific considerations of *avoidable* trial delay, especially where the attorney seeking the continuance was a necessary cause of the scheduling conflict. Rather, the requisite presence of diligent attorney preparations appear to be vital to those favorable Washington holdings. *See, e.g., Kelley*, 828 P.2d at 1107 (holding trial court did not abuse its discretion in granting to the State an extension for the trial period to permit the prosecutor to take a responsibly scheduled vacation where an unavoidable circumstance justified the extension); *Grilley*, 840 P.2d at 905 (holding trial court did not err in granting continuance based on investigating officer's vacation conflict where the State's prompt motion for a continuance was well within the speedy trial period and there was no indication in the record that the State failed to exercise appropriate case management responsibility, either in the original trial setting or in the timeliness of its motion for continuance).

Relevant case law in Montana is clear: "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*, 2008 MT 148, ¶ 40 (emphasis

added), citing *Borchert*, 281 Mont. at 326-27, 934 P.2d at 174 (1997) (citing Mont. Code Ann. § 46-13-202(3)).

Rossbach's additional grounds for the continuance, and his claim of prejudice, require little if any discussion. This record demonstrates that the need for counsel uniformity, consonant with public defender policy that Rossbach cites in his opening brief, is not a compelling claim in view of this record. Rossbach's successor counsel was very prepared, so much so that the trial court expressly complemented her preparation for trial. (2/5/20 Trial Tr. at 35:8.) Ultimately, there was simply no demonstrable prejudice to Rossbach's case. Rossbach's prejudice assertion falls flat.

Moreover, it is well known that while the right to assistance of counsel in a criminal case includes the right to retain counsel of one's own choosing, *State v. Garcia*, 2003 MT 211, ¶ 12, 317 Mont. 73, 75 P.3d 313 (citing *Chandler v. Fretag*, 348 U.S. 3, 9-10 (1954)), the right is not unlimited. It is not a license to delay proceedings and may not be manipulated so as to obstruct the orderly procedure of the courts or interfere with the fair administration of justice. *Foster v. State*, 704 So.2d 169, 172-73 (Fla. Ct. App. 1997). Where considerations of judicial administration supervene, the presumption in favor of counsel of choice is rebutted, and the right must give way. *Id.*, citing *Wheat v. United States*, 486 U.S. 153, 159 (1988), and *United States v. Voigt*, 89 F.3d 1050, 1074 (3rd Cir. 1996).

Without showing actual prejudice or substantial progress, Rossbach mainly relies upon the inconvenience to trial counsel. Again, the State points to the lengthy uncontested trial court findings of Mr. Gallagher's lack of diligence in preparing for the first trial and second trials. Rossbach ignores these findings, along with the trial judge's comments that Rossbach's successor counsel was far more prepared at the second trial than Mr. Gallagher was at the first trial. The district court was well within its discretion to deny the motion to continue.

II. The trial court appropriately rejected Rossbach's new trial claim about wanting an incarcerated defense witness to testify in civilian attire, as the court balanced the possible prejudice to Rossbach against an un rebutted security interest, which Rossbach on appeal does not contest or even acknowledge.

A. Standard of review and applicable law

The trial court has broad discretion to exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to effectively ascertain the truth, avoid any needless waste of time, and to protect witnesses from harassment or undue embarrassment. *State v. Gommenginger*, 242 Mont. 265, 274, 790 P.2d 455, 461 (1990). The standard of review of discretionary trial court rulings in criminal cases is whether the trial court abused its discretion.

State v. Flores, 1998 MT 328, ¶ 27, 292 Mont. 255, 974 P.2d 124 (citations omitted). The test for abuse of discretion is whether the trial court acted arbitrarily, without employment of conscientious judgment, or exceeded the bounds of reason resulting in substantial injustice. *See C. Haydon v. Mont. Mining Props.*, 286 Mont. 138, 146, 951 P.2d 46, 51 (1997).

Under Mont. Code Ann. § 46-16-702, a trial court may grant the defendant a new trial if required in the interest of justice. A defendant seeking a new trial must prove actual prejudice; there is no presumption of prejudice. *State v. Moore*, 268 Mont. 20, 885 P.2d 457 (1994).

B. Rossbach, abandoning any discussion of trial court security, essentially concedes courtroom security outweighed his interest in having his incarcerated defense witness not testify in jail attire.

1. The trial court expressed un rebutted security concerns about Friedlander appearing in civilian clothing.

Rossbach asserts he had a constitutional fair trial right to have his defense witness Matthew Friedlander not appear in jailhouse attire. (Opening Br. at 27-29.) Rossbach correctly distinguishes this alleged right from that of a defendant's own right to not appear at trial in jail clothing. (*See id.* at 27-29.) Moreover, he implicitly acknowledges this Court has never held such a right exists in Montana regarding non-defendant defense witnesses. (Opening Br. at 30.) The problem with Rossbach's claim on appeal is his omission, here and in the trial court, in

addressing the trial court's un rebutted security concerns about Friedlander appearing in civilian clothing.

Rossbach's counsel originally arranged for Friedlander to appear in non-jail clothing. (2/5/20 Trial Tr. at 21:1-4.) On the day of trial, however, the judge reported he had been informed in the courthouse hallway about a security concern from an unidentified source. (*See id.* at 20:3-9. Court: "[H]ere is what happened . . . I was stopped in the hall So I'm leaving that up to court security.") When the judge later, on the record, announced he would deny Rossbach's request, the court allowed Rossbach's counsel to make a record, but counsel did not address the security concern. (*See id.* at 22-23.) The prosecutor made a record for the State:

MR. ESCHENBACHER: . . . In speaking with the jail commander, Mr. Friedlander has a violent history. He has threatened to try to escape. It is the opinion of the jail commander that he not be allowed to dress out. He needs to be in cuffs when he testifies.

(*Id.* at 23:10-15.) The court then said the following to defense counsel

Alisha Backus:

THE COURT: And here is the problem I have, Alisha, is that Mr. Gallagher noticed this witness about two months ago as a new witness. And so the defense has had two months to ask for a hearing to determine—for the Court to determine his level of risk. To do that with the jury waiting outside for the first time is not acceptable and I'm not going to stop—I'm not going to hold all these jurors outside while we have a hearing to determine Mr. Friedlander's level of risk. And for that reason I'm leaving it up to the court security.

Furthermore, I don't think there is going to be much, if any, prejudice to the defendant because it's my understanding this

discovery by Mr. Rossbach of Mr. Friedlander's similar experiences with Officer Haynes was derived from jailhouse discussions when they were both in jail in Flathead County together. And so the fact that he was in jail or is in jail is going to come out anyway, I would assume, in the course of cross-examination as to how the story—and the State's position is it was concocted.

(*Id.* at 23:16-24:10.)

2. The record establishes that the court carefully balanced courtroom security against the potential prejudice to Rossbach.

The trial court did not, as the Rossbach's argument suggests, peremptorily prohibit Friedlander from appearing in civilian clothing. Rather, the court was forced to consider new exigencies involving Friedlander's level of risk, which necessitated the court deferring to the jail commander to decide whether Friedlander could appear in civilian clothing. The court acted well within its discretion in making this security determination. *Cf. State v. Herrick*, 2004 MT 323, ¶¶ 14-15, 324 Mont. 76, 101 P.3d 755 (reviewing a district court's decision granting a motion to restrain a defendant under the abuse of discretion standard, and stating a district court "has wide discretion to decide whether a defendant who has a propensity for violence poses a security risk and warrants increased security measures." (quoting *Morgan v. Bunnell*, 24 F.3d 49, 51 (9th Cir. 1994)).

Under the facts of this record, this Court should decline Rossbach's invitation to hold that a defendant has a constitutional right to clothe an incarcerated defense witness in civilian attire. This case is an inappropriate vehicle

to make such a ruling: Rossbach entirely ignores the implicit determination by the district court that courtroom security took precedence over Friedlander's appearance in civil clothing. The record shows the trial court was concerned about Friedlander's possibility of escape as might be facilitated by his appearance in non-jail clothing. The trial court balanced the possible prejudice to Rossbach with courtroom safety. (2/5/20 Trial Tr. at 23:16-25 to 24:1-10.) The court relied upon its own security's assessment (i.e., by deferring to the jail commander), the assessment of Friedlander's level of dangerousness, and the proper safety measures that needed to be taken.

3. Rossbach waives his issue for failing to address the security concern in his opening brief.

Rossbach's briefing omission is fatal to his appeal issue. Not one of his cited non-Montana cases establishes that courtroom security is not an overriding interest to a defendant's interest in having a defense witness not appear in jail clothing. In fact, at least three of Rossbach's cited cases indicate security was a necessary concern in weighing the defendant's fair trial interest. *See State v. Artwell*, 177 N.J. 526, 832 A.2d 295, 298 (2003); *People v. Garcia*, 2016 IL App 2d 140568-U, ¶ 12 (Ill. Ap. 2016); *State v. Rodriguez*, 45 P.3d 541, 543 (Wash. 2002).

Rossbach's briefing omission is even more noteworthy given that the district court gave Rossbach's counsel a full opportunity to develop the record. (*See* 2/5/20 Trial Tr. at 20:18-21.) While the trial court specifically noted they did not have

time to have a full evidentiary hearing disproving those security concerns, this would not have prevented Rossbach's counsel *after trial*, in preparation for filing the motion for new trial, from at least presenting some minimal facts, or even an allegation, suggesting security was not a bona fide concern.

This Court should not hear Rossbach in a reply brief for the first time contest those security concerns. *See Schaubel v. Iversen*, 257 Mont. 164, 165, 848 P.2d 489, 490 (1993) (issue is deemed waived and the Court need not address it where party failed to raise the issue or argue it in their appellate brief); *Sands v. Nestegard*, 198 Mont. 421, 428, 646 P.2d 1189, 1193 (1982) (“This Court will not endeavor to review a matter when appellant has directed no argument toward it.”). Rossbach's new trial motion omits any mention of the earlier expressed security concerns by the court and omits even discussing security as an integral analytical component of his fair trial issue, as his own cited case law demonstrates. Now on appeal, Rossbach's opening brief fails to acknowledge, and he therefore concedes, that the security issue was a predominating and appropriately controlling component of the court's correct decision to disallow Friedlander from appearing in civilian clothing. Simply put, Rossbach has waived his issue. *See Emery*, 262 Mont. at 87, 863 P.2d at 429 (1993) (failing to brief issue on appeal results in waiver).

C. Rossbach cannot show prejudice; error, if any, was harmless.

Notwithstanding this waiver, the State submits for argument's sake that even if this Court were to decide to address this issue, Rossbach cannot show prejudice; further, error, if any, was harmless beyond a reasonable doubt.

Friedlander's testimony was weak and vague and conclusory. He did not establish excessive force, but in fact only reinforced the State's theory that Officer Haynes was professional. The trial court specifically found Friedlander's appearance in jail attire did not prejudice the defendant, as the jury would have known that he was an incarcerated individual. It would have been apparent to the jury that Friedlander and Rossbach were fellow inmates. (D.C. Doc. 99 at 4.)

Friedlander's testimony was better presented through the testimony of another defense witness, Christopher Morigeau, who more clearly stated that Haynes used excessive force in a prior arrest experience. (2/5/20 Trial Tr. at 231-40.) As a consequence, based on all of the foregoing, the trial court conscientiously exercised its discretion and denied Rossbach's new trial request based upon Friedlander's appearance at trial.

III. The sentencing court properly designated and sentenced Rossbach as a PFO.

The State may seek a “persistent felony offender” designation for a person who has previously been convicted of two separate felonies and who is presently being sentenced for a third felony committed on a different occasion than either of the first two felonies. Mont. Code Ann. § 46-1-202(18). An offender is considered to have “previously been convicted” of two separate felonies if:

- (a) the two previous felonies were for offenses that were committed in this state or any other jurisdiction for which a sentence of imprisonment in excess of 1 year could have been imposed;
- (b) less than 5 years have elapsed between the commission of the present offense and either:
 - (i) the most recent of the two felony convictions; or
 - (ii) the offender’s release on parole or otherwise from prison or other commitment imposed as a result of a previous felony conviction; and
- (c) the offender has not been pardoned on the ground of innocence and the conviction has not been set aside at a postconviction hearing.

Mont. Code Ann. § 46-1-202(18). If the offender qualifies as a PFO, he must be sentenced in accordance with Mont. Code Ann. § 46-18-502.

Here, the State sought a PFO designation for Rossbach based on his last felony conviction in May 2001 in Lake County, Montana, for robbery. (D.C. Doc. 39.) For that felony, Rossbach was sentenced to a prison term of fifteen years, with eleven years suspended. His suspended sentence was revoked in June 2006, however, and Rossbach returned to prison with seven years suspended. In May 2011, Rossbach’s robbery sentence was again revoked, and he was placed with the

Department of Corrections for seven years with four years suspended. In May 2015, Rossbach's robbery sentence was revoked a third time; he was given four years, and with credit for time served and was released directly from MSP on March 5, 2019, having finally finished his robbery sentence. (D.C. Doc. 85 at 4, 8.) The instant case began May 15, 2019, when Rossbach assaulted Officer Haynes in St. Ignatius.

The State argued that Rossbach clearly qualified for the PFO designation. (4/1/20 Sent. Hr'g Tr. at 5:22.) The district court sentenced Rossbach under the PFO designation. In view of Mont. Code Ann. § 46-1-202(18)(b), less than five years had elapsed between the commission of the present offense and Rossbach's completion in 2019 of his robbery sentence and release from prison. This event, term completion and prison release, qualified as both "the offender's release . . . otherwise from prison [**and**] other commitment imposed as a result of a previous felony conviction." Mont. Code Ann. § 46-1-202(18)(b)(ii) (substitution of conjunction "or" with conjunction "and" supplied; emphasis supplied). Rossbach's counsel argued she "disagree[d] that Mr. Rossbach is a candidate for persistent felony offender," but she provided no argument at the sentencing hearing in support of this view. (4/1/20 Sent. Hr'g Tr. at 7:15-17.)

Now, on appeal, Rossbach argues for the first time that when he was released in 2019, he was not subject to a "commitment" as that term is

contemplated in Mont. Code Ann. §§ 46-18-502, 46-1-202(18), and as previously interpreted under the same statutory language 33 years ago by this Court in *State v. Smith*, 232 Mont. 156, 755 P.2d 569 (1988). (Opening Br. at 36.)

In *Smith*, this Court considered whether probationary conditions constituted a “commitment” within the meaning of Mont. Code Ann. § 46-1-202(18)(b). *Smith*, who was under consideration for a PFO designation for an offense committed in 1986, had been previously sentenced in 1979 to a three-year suspended sentence upon certain conditions. This Court held that none of *Smith*’s probationary conditions constituted a “commitment” under Mont. Code Ann. § 46-1-202(18)(b). *Smith*, 232 Mont. at 161, 755 P.2d at 572. The Court relied on the following definition of “commitment” from Black’s Law Dictionary, 248 (5th ed. 1979) to reach its conclusion:

[T]he act of taking or sending to the prison, mental facility, or the like. A person is committed when he is actually sentenced to confinement by a court as contrasted with a suspended sentence or probation.

Smith, 232 Mont. at 161, 755 P.2d at 572.

Unlike *Smith*, who discharged his suspended sentence prior to the commission of his subsequent offense without incident, *Rossbach* thrice violated the terms of his suspended sentence, the sentence was thrice revoked, and *Rossbach* was sent back to prison or committed to the Department of Corrections. He started actual confinement in 2001, with four unsuspended years in prison and

was only released from actual confinement in 2019 when he had completely discharged his sentence.

Rossbach was held on inmate status at MSP until he completed his sentence on March 5, 2019. Even though Rossbach theoretically may not have been eligible for a PFO designation, under *Smith*, had he successfully discharged his suspended sentence, his subsequent prison time and re-commitments to the Department of Corrections and release from his prison sentence in 2019 rendered him a PFO under Mont. Code Ann. § 46-1-202(18)(b).

This conclusion is confirmed by the language in *Smith*, where the Court stated:

[T]he plain meaning of the word “commitment” reveals that the period of commitment begins when the defendant is handed over to law enforcement personnel for confinement, and our analysis need not proceed further because the plain meaning of the word controls its interpretation. However, our resolution of this issue is also supported by the apparent purpose of employing the term “other commitment” for initiating the period of time between convictions. That intent, as demonstrated by the other event which initiates the five year period in this subsection; *release from prison, is to have the time start to run when the habitual offender is once again free, if he or she chooses, to victimize society.*

Smith, 232 Mont. at 161-62, 755 P.2d at 572 (emphasis added) (citation omitted).

The district court properly designated Rossbach a PFO and sentenced him in accordance with Mont. Code Ann. § 46-18-502.

Rossbach’s appellate arguments weave multiple skeins of statutory misconstruction and choplogic. As much as the State can reasonably discern, Rossbach’s arguments may be reduced to the assertion that a revocation (of suspended sentence) is not a punishment, therefore not a “commitment” under §§ 46-18-502, 46-1-202(18), and therefore his 2019 release from confinement cannot qualify Rossbach for PFO sentencing. Rossbach uses this assertion to propound various complicated and abstruse arguments, including a flawed attempt to distinguish clearly established, controlling, post-*Smith* authority such as *State v. Montoya*, 1999 MT 180, 295 Mont. 288, 983 P.2d 937 (holding release on parole or otherwise from prison or other commitment triggers the commencement of the five-year period under preceding (statute re-numbered now as Mont. Code Ann. § 46-18-502), irrespective of whether the prior felony conviction occurred more than five years in the past).

This Court, however, should decline to delve into Rossbach’s briar patch because it is beyond the analysis required for a plain statutory interpretation that Rossbach expressly concedes control of his issue. (Opening Br. at 33-37.) This Court in *Smith* looked to the plain meaning of “commitment” and stated that it means when a person is actually sentenced to confinement, as Rossbach was until 2019, even if he served his confinement serially due to his chronic inability to follow the law.

CONCLUSION

The State respectfully requests this Court affirm Rossbach's conviction and sentence.

Respectfully submitted this 2nd day of August, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 6,923 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, and any appendices.

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CERTIFICATE OF SERVICE

I, C. Mark Fowler, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 08-02-2021:

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