IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0075

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ANTHONY WEIMER,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Eleventh Judicial District Court,
Flathead County, The Honorable Amy Eddy, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF THE ISSUES

1. Are Appellant's allegations of misconduct against the arresting officer, the justice of the peace, and the prosecutor properly before this Court on direct appeal?

2. Are Appellant's claims of ineffective assistance of counsel properly before this Court on direct appeal and, if so, has Appellant met his heavy burden of proving any of his claims?

3. Viewing the evidence in the light most favorable to the State, is there sufficient evidence to support Appellant's conviction for felony criminal mischief?

4. Did the district court properly exercise its discretion in denying Appellant's motion for a new trial?

5. Did the district court impose a legal sentence when it deferred imposition of Appellant's sentence for three years on a felony criminal mischief conviction?

STATEMENT OF THE CASE

By Amended Information, the State charged Appellant Anthony Weimer with felony criminal mischief, alleging that Weimer purposely or knowingly injured, damaged, or destroyed the property of another or public property without consent by damaging a Ten Commandments stone monument, causing a pecuniary

loss of greater than $1,500. (D.C. Docs. 15, 18.) State Public Defender Greg Rapkoch filed a notice of appearance on behalf of Weimer. (D.C. Doc. 5.1.)

The district court scheduled a jury trial. (D.C. Doc. 25.) On October 5, 2020, at Weimer's request, Rapkoch instructed the district court that Weimer elected to have a bench trial rather than a jury trial. (10/5/20 Hr'g Tr. at 5; D.C. Doc. 29.) The district court scheduled a one-day bench trial for October 28, 2020, and later rescheduled the bench trial for November 23, 2020. (D.C. Docs. 30, 43.)

On Weimer's behalf, Rapkoch filed a motion for an evidentiary hearing and a brief arguing that an evidentiary hearing was "necessary to determine the lawfulness of Flathead County's placement of the Ten Commandments monument at issue in this case." (D.C. Doc. 14 at 1.) Rapkoch argued that Montana law permits the remedy of self-help to abate a nuisance, citing Mont. Code Ann. §§ 27-30-204 and 27-30-302. Rapkoch asserted that Flathead County's display of the Ten Commandments monument conceivably violated the Establishment Clause in U.S. Const. amend. I. (*Id*. at 3.) Rapkoch urged that an evidentiary hearing was needed to determine whether Flathead County's placement of the Ten Commandments monument violated the Establishment Clause. (*Id*. at 4.)

The State responded, arguing that based on United States Supreme Court precedent, the Ten Commandments monument did not violate the Establishment Clause, nor did it meet the definition of a nuisance. (D.C. Doc. 26.) And, if

Weimer believed the Ten Commandments monument was a private or public nuisance, he had lawful remedies to pursue to attempt to address his grievance. (*Id*.)

The district court scheduled an evidentiary hearing for October 5, 2020. The court instructed the parties that at the hearing the court expected the parties to address:

> (1) Regardless of whether the Ten Commandments Monument breached the Establishment Clause, does the Ten Commandments Monument meet the definition of nuisance under Mont. Code Ann. § 27-30-101(1) or public nuisance under Mont. Code Ann. § 45-8-111?
>
> (2) Regardless of whether the Ten Commandments Monument breached the Establishment Clause, was the existence of the Ten Commandments Monument "specially injurious" to the Defendant under Mont. Code Ann. § 27-30-204?
>
> (3) Even if the Ten Commandments Monument meets the definition of "nuisance" and was "specially injurious" to the Defendant, why his conduct did not constitute "committing a breach of the peace or doing unnecessary injury" under Mont. Code Ann. § 27-30-204?
>
> (4) What circumstances existed such that the ordinary remedy afforded by legal proceedings would have been ineffectual in removing the Ten Commandments Monument, consistent with Mont. Code Ann. § [45-8-112], considering "[t]he statute recognizes the right here claimed, but only under those circumstances which necessity indulges in cases of extremity or great emergency wherein the ordinary remedy by legal proceedings is ineffectual." *Quong v. McEvoy*, 70 Mont. 99, 104, 224 P. 266, 268 (1924).

(D.C. Doc. 22.) (Footnote omitted.)

On October 2, 2020, Weimer attempted to file a pro se motion to disqualify Judge Eddy pursuant to Mont. Code Ann. § 3-1-805(1). (Affidavit for Disqualification attached to D.C. Doc. 31, attached hereto as App. A) In his affidavit, Weimer alleged:

> 1. Judge[']s disregard for violation of the first amendment establishment clause of the United States Constitution.
>
> 2. Violation of canons of judicial ethics adopted by the supreme court of the state of Montana and willful misconduct by a district court judge.
>
> 3. Personal bias and prejudice toward the defendant by the presiding district court judge.

(App. A at 1.) Peg Allison, the Flathead County Clerk of the District Court, sent Weimer a letter that explained:

> The enclosed document entitled Affidavit submitted for filing on October 2 has been rejected by the court because you are currently represented by attorney Gregory Rapkoch of the Public Defender's Office. State law does not allow for the filing of documents both as a self-represented litigant and one represented by legal counsel.

(D.C. Doc. 31, attached as App. B.) At a hearing on October 21, 2020, defense counsel, in Weimer's presence, informed the court that he did not intend to refile the disqualification motion that Weimer had attempted to file pro se. (D.C. Doc. 40.)

On October 5, 2020, the district court held a hearing on Weimer's motion and brief arguing that the Ten Commandments monument violated the

Establishment Clause and constituted a nuisance that Weimer was statutorily authorized to abate. (10/5/20 Hr'g Tr.) The parties submitted stipulated facts prior to the hearing. (D.C. Doc. 28, attached as App. C.) Since Weimer did not testify at the hearing, the court offered:

> Well, this is what I might suggest if we're going to be having a bench trial on this issue, is that when we proceed to trial Ms. Boman will put on her evidence to meet her burden of proof in the criminal charge, and if at that point in time the Defendant chooses to testify, then I will take the matter under advisement as far as my bench ruling on the issue. I think that might be the best way to proceed with the most procedural safeguard for Mr. Weimer in determining whether or not he chooses to testify.

(10/5/20 Tr. at 8.)

The district court held a bench trial on November 23, 2020. (11/23/20 Transcript of Trial [Tr.].) At the conclusion of the bench trial, the district court found Weimer guilty of Criminal Mischief. (Tr. at 214-15.) The district court entered Findings of Fact, Conclusions of Law and Judgment. (D.C. Doc. 63, attached to Appellant's Br. as App. C.)

In addition to finding all the elements of felony criminal mischief beyond a reasonable doubt, the district court specifically found:

> (14) Prior to trial the Defendant alleged the Ten Commandments monument constituted a public nuisance that was especially injurious to him, and his conduct was justified to abate the nuisance. During closing argument defense counsel also argued the Ten Commandments could properly be designated a private nuisance.

> (15) Even assuming the Ten Commandments monument constituted a private nuisance, or a public nuisance that was especially injurious to the Defendant, the Defendant's conduct cannot be justified under an abatement argument.
>
> (16) The Defendant had taken no prior legal action or effort to have the Ten Commandments monument removed from Flathead County property, and there was no emergency or extenuating circumstance preventing him from doing so.

(Appellant's App. C at 3.)

Weimer filed a motion to proceed pro se and advised that he was exercising his right not to participate in the presentence investigation interview process. (D.C. Doc. 64.) The district court granted Weimer's motion to proceed pro se, but did appoint him standby counsel to attend the sentencing hearing and to answer any questions Weimer might have during the sentencing hearing. (D.C. Doc. 65.) Attorney William Managhan served as standby counsel. (D.C. Doc. 66.)

On December 18, 2020, Weimer filed a motion for a new trial. (D.C. Doc. 67.) In sum, Weimer argued that the district court's finding of guilt was legally incorrect. (*Id*.) The State responded, arguing that Weimer was merely rehashing the defense he fully presented at trial and a new trial was not in the interests of justice. (D.C. Doc. 68.) The district court denied Weimer's motion for a new trial. (D.C. Doc. 78.)

The district court sentenced Weimer to a three-year deferred imposition of sentence. (D.C. Doc. 79.)

STATEMENT OF THE FACTS

On June 27, 2020, Kevin Hunt and his wife were on their way to the grocery store. As Kevin was driving just west of the courthouse, southbound on Main Street, he saw a male, later identified as Weimer, get out of a truck, and throw a chain around the Ten Commandments monument displayed on the courthouse lawn. (Tr. at 12-13.) Weimer got back into the white dually Dodge truck and pulled the monument off the lawn and parked the monument in the middle of the street and stopped. Weimer got out of the truck, undid the chain from the monument, got back in the truck and drove away. (Tr. at 15.) Weimer left the monument partially in the lane of travel. (*Id*.) Hunt followed Weimer while he was on the phone with a dispatcher. (*Id*.) Hunt watched a police officer pull Weimer over in front of the Kalispell Police Department. Weimer was the only person in the truck. (*Id*. at 16.) About 45 seconds to one minute lapsed between the time Hunt saw Weimer pull out the monument and when the police officer pulled Weimer over. (*Id*. at 17.)

Sergeant Fetveit is a patrol sergeant with the Kalispell Police Department. On June 27, 2020, Sergeant Fetveit responded to a criminal mischief complaint at 800 South Main Street, where he saw a large granite tablet laying in the roadway. It was partially in the lane of traffic for southbound traffic. (Tr. at 21-22.) In the immediate area of the granite tablet, Sergeant Fetveit observed torn grass, tire

marks in the grass and scrape marks on the sidewalk. (Tr. at 23-25; State's Exs. 2-11, admitted without objection.)

According to Sergeant Fetveit, the stone face of the granite monument was about 30 feet from its monument base and was face down. The monument was damaged. (Tr. at 30.) The face of the monument was deeply marred with scratches and yellow paint was embedded into the face of it. (Tr. at 34; State's Exs. 14-17, admitted without objection.) Workers with a front-end bucket loader had to remove the monument from the roadway. (Tr. at 31-32.)

Officer Fusaro of the Kalispell Police Department initiated an investigative stop of Weimer near the Kalispell Police Department. Officer Fusaro approached Weimer, who was the only person in the truck, and told him the reason for the stop—that he had ripped down a "sign" on Courthouse Loop near South Main. (Tr. at 50.) Weimer volunteered, "Ten Commandments, sir." (*Id*.) Weimer stated that he was involved in a federal lawsuit. (Tr. at 51.) Officer Fusaro saw a chain in the bed of Weimer's truck. (Tr. at 54.) Officer Fusaro transported Weimer to the Kalispell Police Department where he read him his *Miranda* rights.[1] (Tr. at 57, 60.)

Donald Smith is a maintenance worker with Flathead County. He maintains the interiors and exteriors of county buildings, including monuments on the grounds of Flathead County buildings. (Tr. at 72-73.) Flathead County owns the

[1] *Miranda v. Ariz.*, 384 U.S. 436 (1966).

Ten Commandments monument and displays it on its property. (Tr. at 73.) Smith understood that the Lion's Club, or some other civic organization, had donated the Ten Commandments monument to Flathead County. (Tr. at 80, 82.) Smith knew that someone had torn down the Ten Commandments monument, and had done so without consent. (Tr. at 77.) Prior to this, Smith knew the monument was not damaged, because he helped take care of it. There were no gouges or scrapes on the face of the monument. (*Id*.)

David Covill is the building maintenance manager for Flathead County. Covill testified that the Ten Commandments monument belongs to Flathead County. (Tr. at 83-84.) The Fraternal Order of Eagles gifted the monument to Flathead County. (Tr. at 85-86; State's Ex. 17.) Covill explained that the monument was normally displayed on the southwest corner of the island next to the juvenile detention building. At the time of trial, it was not displayed because it had been damaged and was being repaired. Flathead County submitted an insurance claim for the damage to the monument. (Tr. at 86.) Prior to Weimer chaining the monument and pulling it into the street, it did not have any visible scratches or damage. (Tr. at 87.) Covill estimated the repair costs was $7,500 and Flathead County owed a $500 insurance deductible. (Tr. at 88-89.)

Mike Pence is the Flathead County Administrator. He confirmed that the Ten Commandments monument belonged to Flathead County, and the county had

displayed the monument on the grounds of county property since about 2012. (Tr. at 97-98.) Pence explained that the initial estimate to repair the monument was $14,975, but Flathead County sought a second estimate. Since the second estimate was much less, the county opted for that business to complete the repair. (Tr. at 102-04.) Pence explained that a Flathead County monument can only be removed with the permission of the Board of Commissioners. If an outside party requested the removal of a monument, Pence would research the request, forward it to the Board of Commissioners and make a recommendation to the Board concerning the request. (Tr. at 104-05.) Pence explained that no member of the public had made such a request. (Tr. at 106.) Weimer removed the Ten Commandments monument from the property of Flathead County without consent, and damaged the monument in the process. (Tr. at 107.)

Robert Jordan of Garden City Monument Services estimated the market value of the granite Ten Commandments monument, prior to its damage, to be between $14,000 and $20,000. (Tr. at 132-33, 135.) Garden City Monument Services contracted with Flathead County to repair the damaged Ten Commandments monument. (Tr. at 139; State's Ex. 31, admitted without objection.) Garden City Monument Services charged Flathead County $7,400 to repair the monument. (Tr. at 246-47.)

Flathead County's insurance carrier, PayneWest Insurance, agreed to reimburse Flathead County up to $15,000 for the damage Weimer caused to the Ten Commandments monument. (Tr. at 152-53, 157.)

After the State rested its case at the bench trial, Rapkoch moved to dismiss the charge because the State had presented insufficient evidence to support a conviction. (Tr. at 162.) Rapkoch argued that the State had failed to sufficiently prove that the monument either belonged to another person or to the government. (Tr. at 162-63.) Rapkoch additionally argued that the State had failed to prove that Weimer purposely or knowingly damaged the property of another or government property. (Tr. at 163.) Finally, Rapkoch argued that the State failed to prove that Weimer purposely or knowingly caused damage greater than $1,500. (Tr. at 164.) The district court denied the motion. (Tr. at 166.)

Weimer made it clear on the record that he wished to testify in his own defense. (Tr. at 167-68.) Weimer admitted that he put a chain around the Ten Commandments monument and pulled it off its base with his truck. (Tr. at 169.) He considered the monument to be public property. (*Id*.)

When defense counsel asked Weimer what led him to the monument, Weimer responded, "That would be a federal lawsuit." (Tr. at 170.) Weimer explained that the basis of his federal lawsuit was, "An Article 3 judge that violated certain federal laws and state laws." (*Id*.) Weimer elaborated:

> There are certain laws on obscenity, pornography, and those are primarily the ones that were involved. Distribution to minors.

(Tr. at 171-72.) Weimer agreed with defense counsel's assessment that Weimer had filed a lawsuit in federal court to hold Google and some other internet service providers liable for making pornography accessible to the public. Weimer believed that when the federal judge ruled against him, the judge violated the law, and explained:

> Well, if you look at the Judicial Code of Conduct based on what a judge can and cannot do that's kind of where it led me to where I was—where I am.

(Tr. at 172.) When defense counsel asked how that led Weimer to the Ten Commandments monument, Weimer explained:

> Because they both represent law, there's both law there. And the Ten Commandments for me personally is a law like any law, but for me, for a nation to claim God as somebody has—that this nation is under, and for that God to be the actual God that they've supposedly chosen, it just really contradicted itself.

(Tr. at 173.) Weimer concurred with defense counsel's assessment that he was "insulted by what [he] viewed as a hypocrisy, a claim to follow the Ten Commandments, and yet [he] thought Government officials were undermining it." (*Id*.)

The following dialogue occurred between the district court and Weimer:

> Q. Okay. So backing up a little bit, did you file an ethics complaint against one of the federal judges? Is that what you're referring to when you say you did this with the FBI and the Marshals, et cetera.

A. I don't know if you'd consider it to be an ethical complaint versus actual violations of law because the code of conduct—and I have them here, the canons that judges – federal judges have to follow, so it was more along those lines.

Q. All right, fair enough. And so you didn't get any response to those—

A. Correct.

Q. —ethical concerns that you had, would that be fair to say?

A. Correct.

Q. And that's what prompted you to then pull out the Ten Commandments monument?

A. That pushed me towards that direction, yes.

(Tr. at 177.)

On cross-examination, Weimer acknowledged that around 60 days before he uprooted the Ten Commandments monument, he wrote a letter to Congress threatening that if Congress did not act to presumably address his concerns about the federal judge and/or obscenity on the internet, then he intended to take matters into his own hands. (Tr. at 184-85.)

At the conclusion of the bench trial, the district court found Weimer guilty, explaining:

Based on the testimony provided during the trial here today and drawing all reasonable inferences therefrom, the Court finds the State

> has met its burden of proving beyond a reasonable doubt that the Defendant committed the offense of criminal mischief, a felony.
>
> Even assuming without deciding that the Ten Commandments monument constituted a private or public nuisance, and even assuming without deciding that the existence of the Ten Commandments monument located at 820 South Main was especially injurious to the Defendant, the Defendant was not justified in his conduct, as there was no great emergency whereby the ordinary remedy of legal proceedings to remove the Ten Commandments monument was not available to the Defendant.

(Tr. at 214-15.)

SUMMARY OF THE ARGUMENT

The State presented overwhelming evidence at a bench trial that Weimer committed the felony offense of criminal mischief when he wrapped a chain around the Ten Commandments granite monument on the Flathead County Courthouse lawn and used his truck to pull the monument off its base and drag it into the street, causing thousands of dollars in damage and leaving the granite monument partially in a public roadway. Weimer admitted at trial that he acted out of frustration stemming from a federal lawsuit generally and particularly from a federal judge. Weimer unsuccessfully attempted to justify his criminal conduct by claiming that he was abating a public nuisance. When that did not work, he requested a new trial by rehashing the claims he had already presented to the district court. The district court properly exercised its discretion in denying this

motion. As a result, Weimer claimed the district court was biased and violated canons of ethics.

Since that was not successful, Weimer now makes unpreserved claims of misconduct against the arresting officer, the justice of the peace who conducted his initial appearance, and the prosecutor. These unpreserved claims lack merit at the outset and are not appropriate for plain error review.

Weimer also makes assorted allegations of ineffective assistance of counsel against his trial counsel. These claims are either inappropriate for direct appeal or cannot withstand the scrutiny that ineffective assistance of counsel claims require.

Here the district court deferred imposition of Weimer's sentence—a lenient punishment that gives Weimer the opportunity to remove the conviction from his record. Weimer insists that the district court's sentence is illegal, but offers no analysis of this claim. Like the rest of Weimer's claims, this claim too lacks merit.

This Court should affirm Weimer's conviction and sentence.

ARGUMENT

I. The standard of review

This Court generally does not address issues raised for the first time on appeal. *State v. George*, 2020 MT 56, ¶ 4, 399 Mont. 173, 459 P.3d 854. This

Court may exercise its discretion to review unpreserved issues alleging violations of a fundamental right under the plain error doctrine. *State v. Brandt*, 2020 MT 79, ¶ 10, 399 Mont. 415, 460 P.3d 427. This Court reviews record-based claims of ineffective assistance of counsel on direct appeal de novo. *Id*. The standard of review of the sufficiency of the evidence to sustain a conviction is whether, after reviewing the evidence in the 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. Baker*, 2013 MT 113, ¶ 34, 370 Mont. 43, 300 P.3d 686. This Court reviews a district court's denial of a motion for a new trial for an abuse of discretion. *State v. Ugalde*, 2013 MT 308, ¶ 26, 372 Mont. 234, 311 P.3d 772. This Court reviews a criminal sentence for legality. *State v. Simpson*, 2014 MT 175, ¶ 8, 375 Mont. 393, 328 P.3d 1144. A sentence that falls within the statutory parameters is a legal sentence. *State v. Clark*, 2008 MT 112, ¶ 8, 342 Mont. 461, 182 P.3d 62.

II. Weimer's allegations of misconduct against the arresting officer, the justice of the peace, and the prosecutor are not properly before this Court on direct appeal.

For the first time on appeal, Weimer makes assorted claims of wrongdoing against assorted members of the criminal justice system. Generally, "a reviewing court can consider only those issues that are properly preserved for its review."

State v. Akers, 2017 MT 311, ¶ 12, 389 Mont. 531, 408 P.3d 142, quoting *In re Transfer Terr. from Poplar Elem. Sch. Dist. No. 9 to Froid Elem. Sch. Dist. No. 65*, 2015 MT 278, ¶ 13, 381 Mont. 145, 364 P.3d 122. "In order to preserve a claim or objection for appeal, an appellant must first raise that specific claim or objection in the [lower court]." *In re T.E.*, 2002 MT 195, ¶ 20, 311 Mont. 148, 54 P.3d 38. This Court has repeatedly recognized that it is fundamentally unfair to fault the trial court for failing to rule on a matter it was never given the opportunity to consider. *Akers*, ¶ 12. Plain error review is an exception to this general rule. *Akers*, ¶ 10. This Court employs the plain error doctrine sparingly on a case-by-case basis after considering the totality of the circumstances of each case. *Akers*, ¶ 13.

It is Weimer's burden to establish that sparingly used plain error review is appropriate in his case because: (1) his unpreserved claims implicate a fundamental constitutional right; and (2) failing to review these claims may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may implicate the judicial integrity of the process. *State v. Evans*, 2012 MT 115, ¶ 25, 365 Mont. 163, 280 P.3d 871. "[A] mere assertion that constitutional rights are implicated or that failure to review the claimed error may result in a manifest miscarriage of justice is insufficient to implicate the plain error doctrine." *State v. Gunderson*, 2010 MT 166, ¶ 100, 357 Mont. 142, 237 P.3d 74. Weimer has failed to meet his burden of

demonstrating plain error review is appropriate for any of his unpreserved claims of wrongdoing by members of the criminal justice system.

A. Officer Fusaro

Weimer initially claims that Officer Fusaro violated his rights under U.S. Const. amends. V and VI because he failed to read Weimer his *Mirada* rights before questioning. In *Miranda*, 384 U.S. at 444 (1966), the Supreme Court held that the government cannot use a defendant's statements from a custodial interrogation unless prior to questioning the investigating officer informed the defendant that he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney. This Court uses a two-step inquiry to determine whether a custodial interrogation, triggering *Miranda* warnings, has occurred: (1) was the defendant in custody, and (2) was the defendant subjected to an interrogation. *State v. Maile*, 2017 MT 154, ¶ 12, 388 Mont. 33, 396 P.3d 1270. While a criminal defendant's right to remain silent is a fundamental constitutional right, Weimer has cited nothing from the record to support his claim that Officer Fusaro conducted a *custodial interrogation* before reading Weimer his *Miranda* rights. Thus, Weimer cannot demonstrate that failing to review his claimed error would result in a manifest miscarriage of justice, leave unsettled the question of the fundamental

fairness of the trial or proceedings, or compromise the integrity of the judicial process.

Officer Fusaro's trial testimony establishes that when he initiated an investigative stop of Weimer, Officer Fusaro told Weimer that he had initiated the stop because a witness had reported that Weimer had ripped down a "sign" from the courthouse lawn. Weimer volunteered, "Ten Commandments, sir." (Tr. at 50.) When Weimer volunteered these comments, he was not in custody, and Officer Fusaro had not subjected Weimer to an interrogation. Thus, there was no need for Officer Fusaro to read Weimer his *Miranda* rights. Also, Officer Fusaro's testimony establishes that, when he arrived at the police department with Weimer, he read Weimer his *Miranda* rights *before* asking Weimer if he would submit to questioning. (Tr. at 57, 60.)

Weimer has failed to demonstrate that plain error review of this claim is warranted.

B. Judge Hummel

Weimer next accuses Judge Hummel of some sort of misconduct because at Weimer's initial appearance in justice court Judge Hummel asked Weimer if he had ever been arrest before. This is a legitimate question for purposes of setting bail. According to Weimer, when he responded, "Not that I am aware of," Judge Hummel replied, "The Court knows you've been arrested before." (Appellant's Br.

at 4.) Even assuming that this is an accurate representation of what transpired, Weimer has not identified a cognizable claim for appeal. And, even assuming Weimer could overcome that hurdle, he has failed to identify a fundamental constitutional right at play that would warrant plain error review of some unidentified constitutional claim. Weimer has failed to demonstrate that plain error review of this claim is warranted.

C. The prosecutor

Weimer claims that the criminal mischief charge resulted from a vindictive prosecution, but Weimer did not file a motion to dismiss the charge on this ground. Once again, Weimer did not preserve the issue for appeal. Also, the record before this Court does not lend itself to a vindictive prosecution claim. It appears that Weimer bases his claim of a vindictive prosecution upon the prosecutor's filing of an amended information in which the prosecutor amended the language of the criminal mischief charge to include public property. As this Court has explained, prosecutors have wide discretion to determine when a person should be charged with criminal conduct. *State v. Ridge*, 2014 MT 288, ¶ 11, 376 Mont. 534, 337 P.3d 80. The decision whether to prosecute and what charge to file is "particularly ill-suited for judicial review." *Id*. quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985). There is no evidence in the record that supports a claim of vindictive

prosecution based upon the prosecutor minimally amending the information with leave of the district court.

III. Weimer's ineffective assistance of counsel claims are either not record based or Weimer has failed to meet his burden of proving his claims.

A. Introduction

Sprinkled throughout his brief, Weimer makes accusations that his trial counsel was ineffective. A defendant's right to effective assistance of counsel is guaranteed by U.S. Const. amends. VI and XIV and by article II, section 24 of the Montana Constitution. To determine whether there was constitutionally ineffective assistance of counsel, this Court applies the two-prong test adopted by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *Whitlow v. State*, 2008 MT 140, ¶ 10, 343 Mont. 90, 183 P.3d 861. This test requires Weimer to prove (1) that defense counsel's performance was deficient, and (2) that counsel's deficient performance prejudiced the defense. *Id*.

In evaluating whether counsel's performance was deficient under *Strickland*, this Court indulges "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Whitlow*, ¶ 15, quoting *Strickland*, 466 U.S. at 689. To overcome this presumption, the defendant must "identify the acts or omissions of counsel that are alleged not to have been the

result of reasonable professional judgment." *Whitlow*, ¶ 16, quoting *Strickland*, 466 U.S. at 690. This Court "must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Whitlow*, ¶ 16, quoting *Strickland*, 466 U.S. at 690. The Court makes every effort "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Whitlow*, ¶ 15, quoting *Strickland*, 466 U.S. at 689.

The focus of this Court's analysis under the prejudice prong of *Strickland* is whether counsel's deficient performance renders the trial result unreliable or the proceedings fundamentally unfair. *State v. Miner*, 2012 MT 20, ¶ 12, 364 Mont. 1, 271 P.3d 56. To establish prejudice, the defendant must show that, but for counsel's errors, a reasonable probability exists that the result of the proceeding would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceedings. *Id.*

Because Weimer must prove both prongs of *Strickland*, if he fails to prove either prong this Court need not consider the other. *Whitlow*, ¶ 11.

B. The non-record-based claims are not appropriate for direct appeal.

Before this Court will reach the merits of an ineffective assistance of counsel claim in a direct appeal, it first considers whether the claim is properly before it on

appeal or whether the appellant should raise the claim in a postconviction petition. *Ugalde*, 2013 MT 308, ¶ 65. If the claim is based on matters outside of the record, this Court will refuse to address the issue on direct appeal. *Id*. Claims involving omissions of trial counsel are often ill-suited for direct appeal. *State v*. *Russell*, 2008 MT 417, ¶ 33, 347 Mont. 301, 198 P.3d 271. As set forth below, many of Weimer's ineffective assistance of counsel claims are not record based and are claims that are instead suited for a postconviction proceeding. A silent record cannot rebut the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance under *Strickland*. *State v. White*, 2001 MT 149, ¶ 11, 306 Mont. 58, 30 P.3d 340.

Weimer first argues that his counsel was ineffective for failing to challenge the probable cause affidavit in support of his arrest. This is not a record-based claim of ineffective assistance of counsel because the record does not and cannot establish why defense counsel did not file a motion to dismiss for lack of probable cause. Rapkoch could have had sound strategic reasons for not filing such a motion.

Weimer next seems to argue that defense counsel was ineffective for failing to renew Weimer's pro se motion to disqualify Judge Eddy from his case. (Appellant's Br. at 5.) Again, this is not a record-based claim. It is not possible to

discern from the record before the Court if defense counsel had sound reasons for not moving to disqualify Judge Eddy for cause.

Weimer also seems to assert that Rapkoch was ineffective for waiving his right to a jury trial. Weimer waived his right to a jury trial at a pretrial hearing. (10/5/21 Hr'g Tr. at 5.) If he now claims this was based upon defective advice from Rapkoch, such a claim is not record-based because Rapkoch legitimately could have advised that a bench trial was in Weimer's best interest, or Weimer could have insisted on a bench trial.

Weimer argues that defense counsel should have relied upon a justified use of force defense. (Appellant's Br. at 17-18.) This is not a record-based claim because defense counsel no doubt had sound reasons for not presenting such a defense. Arguably, such a defense was not even available to Weimer under the circumstances of his case.

C. Weimer fails to meet his heavy burden of proving any record-based ineffective assistance of counsel claim.

Weimer's claim that defense counsel should have used the defense of "abatement" of a public nuisance fails on the merits because Rapkoch did make such an argument before the district court. The district court concluded, however that this defense was not credible since Weimer had resorted to criminal conduct first before ever pursuing a non-criminal solution to the possible removal of the Ten Commandments monument. (*See* Appellant's App. C at 3, ¶¶ 14-16.) Based

upon the record before this Court, Weimer's ineffective assistance of counsel claim fails on the merits.

Weimer also criticizes defense counsel for not arguing that the State failed to prove ownership of the Ten Commandments monument. (Appellant's Br. at 18-19.) The trial record, however, clearly contradicts Weimer's assessment of defense counsel's alleged failure. (*See*, *e.g.*, Tr. at 162-63.) Based on the record before the Court, Weimer's ineffective assistance of counsel claim fails on the merits.

IV. Viewing the evidence in the light most favorable to the State, the State presented sufficient evidence to sustain the criminal mischief conviction against Weimer.

To the extent that any of Weimer's arguments can be characterized as a challenge to the sufficiency of the evidence the State presented to support the district court's finding of guilt for felony criminal mischief, this argument is without merit. The State presented testimony from an eyewitness to Weimer's criminal conduct. Hunt, who did not know Weimer, happened upon Weimer, and watched Weimer get out of his truck, throw a chain around the Ten Commandments monument displayed on the courthouse lawn, get back in the truck, and pull the monument off the lawn. Hunt watched Weimer stop in the middle of the street, get out of the truck, undo the chain from the monument, get

back in the truck, and drive away, leaving the monument partially in a lane of travel.

Hunt immediately called 911 and followed Weimer until Officer Fusaro stopped Weimer's truck. When Officer Fusaro explained that he had stopped Weimer based on a report that he had ripped down a sign, Weimer volunteered "Ten Commandments, sir." (Tr. at 50.) The State proved that prior to Weimer's actions the Ten Commandments granite monument was undamaged. As a result of Weimer's actions, the Ten Commandments monument sustained significant damage, resulting in $7,400 in repairs to restore it.

Viewing the evidence in the light most favorable to the State, the State proved all elements of felony criminal mischief beyond a reasonable doubt. To the extent that Weimer argues that Judge Eddy was biased against him, and this impacted her verdict, Weimer has cited nothing from the record to support such a claim. Judge Eddy was patient and courteous with Weimer. She made certain that he wished to exercise his right to testify at trial. Judge Eddy earnestly listened to Weimer and asked appropriate questions to clarify Weimer's position.

Finally, to the extent Weimer argues that, based upon his "defense" of abating a public nuisance, it was impossible for the State to prove the criminal mischief charge against him, Weimer is mistaken. Weimer argues that his criminal conduct was justified pursuant to Mont. Code Ann. § 27-30-204, which provides:

> A public nuisance may be abated by any public body or officer authorized by law. A person may abate a public nuisance that is specially injurious to that person by removing or, if necessary, destroying the thing that constitutes the nuisance without committing a breach of the peace or doing unnecessary injury.

A "nuisance" is defined as:

> Anything that is injurious to health, indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or that unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, river, bay, stream, canal, or basin or any public park, square, street, or highway is a nuisance.

Mont. Code Ann. § 27-30-101(1). A "public nuisance" is:

> one which affects, at the same time, an entire community or neighborhood or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.

Id. § 27-30-102(1).

In the district court, Weimer never established that the Ten Commandments monument was a public nuisance. Even assuming Weimer could have done so, he failed to demonstrate that the monument was specially injurious to him. Indeed, his testimony established that he engaged in his criminal conduct because he was frustrated with the federal government, particularly a federal judge, and had threatened to take matters into his own hands if the federal government did not respond within a given time. Weimer's own testimony discounts his claim that he

was abating a public nuisance. Weimer's actions may well have been considered a breach of the peace or at least his actions caused unnecessary injury.

V. Weimer has failed to prove that the district court abused its discretion in denying Weimer's motion for a new trial.

Following a finding of guilty, a district court may grant a defendant a new trial "if required in the interest of justice." Mont. Code Ann. § 46-16-702(1). Here, in support of his request for a new trial, Weimer merely rehashed all the arguments that he had previously made to the district court concerning abatement of a public nuisance. Weimer did not identify, for example, newly discovered evidence that was relevant to the criminal mischief conviction, or some newly discovered issue, such as juror misconduct. Here, the district court properly exercised its discretion when it denied Weimer's motion for a new trial because a new trial was not required in the interest of justice.

VI. The district court imposed a legal sentence.

The district court deferred imposition of Weimer's sentence for three years. This sentence was within statutory parameters and is a legal sentence. Mont. Code Ann. §§ 45-6-101(1), (3). Weimer has offered no analysis of his claim that the district court imposed an illegal sentence. As this Court has explained, it is not its job "to conduct legal research on [a party's] behalf, to guess as to [the party's]

precise position, or to develop legal analysis that may lend support to that position." *State v. Whalen*, 2013 MT 26, ¶ 32, 368 Mont. 354, 295 P.3d 1055, quoting *Johansen v. Dep't of Nat'l Res. & Conserv.*, 1998 MT 51, ¶ 24, 288 Mont. 39, 955 P.2d 653 (internal citations omitted). Weimer has failed to offer any analysis of the claim he raises, and the record clearly establishes that the court imposed a lawful sentence.

CONCLUSION

The State respectfully requests that this Court affirm Weimer's conviction for felony criminal mischief based on overwhelming evidence of Weimer's guilt.

Respectfully submitted this 9th 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 6,686 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, and any appendices.

/s/ Tammy K Plubell
TAMMY K PLUBELL

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0075

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ANTHONY WEIMER,

Defendant and Appellant.

Appendices

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 08-09-2021:

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