IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0381

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CLAYTON DOUGLAS KIRN,

Defendant and Appellant.

OPENING BRIEF OF APPELLANT

On Appeal from the Montana Second Judicial District Court,
Silver Bow County, the Honorable Robert J. Whelan, Presiding

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2. Whether improper jury instructions warrant reversing Kirn's aggravated burglary conviction?

3. Whether the district court's use of erroneous information entitles Kirn to resentencing?

STATEMENT OF THE CASE & FACTS

Pre-Trial Timeline

9/17/2019: Kirn is arrested and charged by complaint with Count I, aggravated burglary under 45-6-204(2); and Count II, obstructing a police officer under 45-7-302. (D.C. Docs. 1-2.) Kirn's initial appearance is held, bail is set at $50,000, and a preliminary hearing is scheduled for 10/17/2019. (D.C. Doc. 2.)

10/17/2019: For reasons unclear from the record, Kirn's preliminary hearing was not held as scheduled.

10/31/2019: The State files its Information. For Count I, aggravated burglary, the State alleged Kirn "jumped on top of Melinda Laird attempt[ing] to assault her[]"; and for Count II, obstructing, the State alleged Kirn ran from police hindering their investigation. (D.C. Doc. 4.)

11/06/2019: Kirn enters not-guilty pleas at his arraignment. (D.C. Doc. 7.)

12/04/2019: Kirn's omnibus hearing is held and the court sets his trial for 4/20/2020. (D.C. Docs. 10-11.)

12/11/2019: Kirn files a motion to reduce bail—which the State opposes. (D.C. Doc. 13.)

4/2/2020: The court *sue sponte* vacates Kirn's 4/20/2020 trial and re-sets it for 8/17/2020. (D.C. Doc. 21.)

4/7/2020: Kirn writes Clerk of Court Tom Powers a letter requesting a writ of habeas corpus form. (D.C. Doc. 22.)

4/15/2020: Kirn sends Clerk Powers a second letter advising that his attorney was "very much ineffective" and again requests a habeas form. (D.C. Doc. 23.)

7/29/2020: During what was scheduled to be Kirn's pre-trial conference, the court determined there had been a breakdown in communication vis-à-vis Kirn and his attorney and agreed to assign substitute counsel. (7/29/20 Tr., 4-9.) Kirn also lamented his frustration with the court's lack of diligence, reminding the court he'd been in jail for 11 months and that his right to a speedy trial had already been violated. (Id. 9-10.) The court then vacated Kirn's August 17th trial because, according to the court, Kirn's new attorney wouldn't be ready. (Id. 10.)

8/11/2020: Kirn writes Clerk Powers' a third letter advising that

he "desperately need[s] to file writs + motions on my own behalf, seeings [*sic*] how I technically still don't have a lawyer!" (D.C. Doc. 25.)

8/14/2020: The court issues an order directing OPD to assign Kirn substitute counsel. (D.C. Doc. 25.)

8/19/2020: Victor Bunitsky files his NOA. (D.C. Doc. 28.)

11/10/2020: A hearing is held on the bond reduction motion Kirn filed 11 months before. (11/10/20 Tr., and D.C. Doc. 13.) The court denied Kirn's motion, opining *inter alia* that "I understand… [Kirn] can't afford these matters but that's not an issue for bail." (11/10/20 Tr., 5.) The then court re-set Kirn's case for trial on 1/25/2021. (Id., 8-9.)

12/29/2020: Kirn files a motion to dismiss for want of speedy trial. (D.C. Doc. 33.)

1/15/2021: The court vacates Kirn's 1/25/2021 trial and schedules a hearing for 2/10/2021. (D.C. Doc. 36.)

2/10/2021: Kirn's motion to dismiss hearing is held; neither side presented evidence or testimony, and the court re-set Kirn's trial for 4/12/2021. (See 2/10/21 Tr.)

2/16//2021: The court issues a written order denying Kirn's motion to dismiss based on *inter alia* a "clear lack of prejudice…" and

because Kirn's "responses to the challenged delay have not been consistent with his claim of a speedy trial violation." (D.C. Doc. 40, 10.)

4/12/2021: After 573-days of pre-trial incarceration, Kirn's trial begins. (D.C. Docs. 69-70.)

Trial

The State called the alleged victim Melinda Laird as its first witness. (Trial Tr., 88.) Ms. Laird testified that in the early morning hours of September 17, 2019, she and her husband (James Spencer) were asleep in the same bed in their home in Butte, Montana. (Id., 89-90.) Ms. Laird testified that she awoke to a man's voice saying "I love you"; the man then jumped on top of her, put his arms on her shoulders, and said "[d]on't say anything or I'll kill you." (Id., 90-91.) Ms. Laird yelled "Honey"—which woke her husband—who in turn yelled "[w]ho the fuck are you?" (Id., 91.) Ms. Laird testified that the man said his name was "Clayton." (Id.) Ms. Laird testified that she did not see or feel a weapon, and that while she was afraid, she did not suffer any physical injuries. (Id., 101, 104, 106.)

Ms. Laird said the individual then got off her and ran through the kitchen and into their living room. (Id., 91-93.) Ms. Laird said it

appeared the individual was trying to hide and seemed very confused. (Id., 93.) Ms. Laird testified that she and Mr. Spencer kept yelling at the man to leave—prompting him to respond, "I can't find the door"—but eventually her husband managed to escort him out the backdoor. (Id.) Ms. Laird said she then called 911, where she described the individual as being in his 20s, with a buzzcut, wearing a dark-colored T-shirt and a backpack. (Id., 93.) On re-cross Kirn's attorney, referring to Kirn, asked Ms. Laird "is this the gentleman who you saw that night?" (Id., 106.) Ms. Laird responded "Yes. Yep. That's exactly the face that was in my face." (Id., 106.)[1]

Following Ms. Laird and Mr. Spencer's testimony,[2] Butte Police Officer Bryan Ellison took the stand. (Id., 124.) Officer Ellison testified he was dispatched to the scene, and after conversing with Ms. Laird and Mr. Spencer, he transmitted via radio a description of the perpetrator to his fellow officers. (Id., 126-127.) Officer Ellison testified that he

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[1] During a closed session the following morning, the court expressed its desire to "make a quick record" concerning Ms. Laird's in-court identification. (Id., 182.) The court stated Kirn personally requested his attorney ask for the in-court identification; the record neither verifies nor dispels the accuracy of this assertion. (Id.)

[2] Mr. Spencer's testimony was substantially similar to his wife's. (*Compare* Trial Tr., 89-106 *with* 107-122.)

received a response from Officer Christopher Tierney advising him that he had found the suspect, prompting him (Officer Ellison) to respond to Officer Tierney's location to assist. (Id., 128-129.)

Officer Tierney's entire interaction with Kirn was captured on his bodycam, which was admitted and published to the jury as State's Exhibit 13. (Trial Tr., 157-158; and D.C. Doc. 72.) Officer Tierney testified he asked Kirn what his name was and he responded "Clayton Kirn." (Id., 145.) Officer Tierney testified Kirn told him he had not been inside any houses that night. (Id.) Officer Tierney also testified that Kirn emptied the contents of his pockets onto the sidewalk, and that one of the items was a pocketknife. (Id., 157; and D.C. Doc. 72, State's Ex. 13.)

Officer Tierney further testified that after Officer Ellison arrived to assist, he (Officer Ellison) told Kirn that the victim said the perpetrator identified himself as Clayton, and that immediately after hearing this Kirn took off running. (Id., 146.)[3] Officer Tierney said that Kirn ran towards some railroad tracks where he was quickly

[3] Officer Tierney's testimony is inaccurate as evidenced by his bodycam footage, which shows approximately 45 seconds elapsed between Officer Ellison's comment and Kirn's running. (*Compare* Trial Tr., 146 *with* D.C. Doc. 72, State's Ex. 13, at 4:10 – 5:00.)

apprehended, but that Kirn's running neverthless hindered his investigation. (Id., 146.)

Officer Tierney advised that following Kirn's apprehension, he began looking for and quickly discovered a backpack on the ground near the gate for a local business, Pioneer Concrete. (Id., 147-150.) Officer Ellison (who at the time was transporting Kirn to jail) was contacted by radio and requested to ask Kirn whether the backpack was his. (Id., 153.) Kirn said the backpack was not his, so Officer Tierney searched it, and found *inter alia* a credit card and prescription bottle that contained the name Clayton Kirn. (Id., 153-155.) Pictures of the backpack and its contents were admitted as State's Exhibits 4-12. (Id. 152-156; and D.C. Doc. 72.)

Detective Snyder testified that he obtained security footage from Pioneer Concrete, which showed Kirn dropping the backpack. (Trial Tr., 167-172.) The footage was admitted and published to the jury as State's Exhibits 14-22. (Trial Tr., 169-171; and D.C. Doc. 72.) Detective Snyder further advised that neither Ms. Laird nor Mr. Spencer were taken to the police station to identify Kirn because, according to

Detective Snyder, conducting eyewitness identifications is improper as its too "prejudicial" to the defendant. (Trial Tr., 172-173.)

Detective Snyder also advised that while he was the lead investigator on the case, he never spoke to the victim(s), never visited the scene, and never looked for physical evidence e.g., fingerprints. (Id., 174-176.) Detective Snyder explained that, given the backlog at the crime lab, it was not his practice to fingerprint a crime scene when officers already have a suspect identified. (Id., 176.)[4]

Kirn also took the stand and was adamant he never entered Ms. Laird's home. (Id., 186.) Kirn told jurors he had come to Butte from Billings and was abandoned by friends. (Id.) Kirn explained he dropped his backpack as he had been walking day and night and had blisters on his feet, pictures of which were admitted as Defense Exhibits A-C. (Id., 188-197; and D.C. Doc. 72.) When asked why he ran from police, Kirn said "I don't know. I just panicked. I can't explain it." (Id. 189.)

On cross-examination, Kirn admitted he had a pocketknife in his

[4] As an aside, during closing the prosecution characterized this as "excellent police work." (Trial Tr., 246.)

pocket that night. (Id., 203.) The prosecutor also asked Kirn "if someone jumped on you and pinned you down that could cause you to have pain and physical impairment because you're pinned down and you can't move; would you agree with that?" Kirn's response was "I guess. I…"—but the prosecutor cut him off and began a new line of questioning. (Id., 201.)

Following Kirn's testimony the parties settled the jury instructions. (Id., 205-229.) The instructions for Kirn's aggravated burglary charge (including the lesser-included burglary offense) were 15-25. (D.C. Doc. 73, Instructions 15-25.) Kirn's counsel did not object to a single jury instruction. (Trial Tr., 206-229.) After the court read jurors the instructions, the parties gave their respective closing arguments. (Id., 239-262.)

The prosecution reminded jurors that Kirn had a pocketknife in his possession that night, and that they could convict him of aggravated burglary for being "either" armed with a weapon "or" inflicting (or attempting to inflict) bodily injury. (Id., 243, 247.) The prosecution also told jurors Kirn admitted "if somebody jumped on me like that it would cause bodily injury or physical impairment." (Id., 247 & 263.) The jury

convicted Kirn on both counts. (Id., 270.)

Post-Trial

Kirn's sentencing was held on 6/2/2021. (D.C. Doc. 79.) At the outset, Kirn's attorney advised the court the defense had no corrections to the PSI. (6/2/2021 Tr., 5.) After the parties gave their respective recommendations, Kirn gave a brief statement protesting his innocence. (Id., 9.) The court then noted this was Kirn's "10th felony", and that Kirn was a registered violent offender. (Id.) Kirn immediately attempted to interject, "[c]an I say something your honor?"—but the court curtly rebuffed him—"No, Mr. Kirn. You're done." (Id., 10.) The court then sentenced Kirn to 40-years flat on the aggravated burglary charge, and 6-months on the obstructing offense (to run concurrent). (6/2/2021 Tr., 10; and D.C. Doc. 84 (attached as App. A).)

STANDARDS OF REVIEW

Speedy trial violations are questions of law reviewed de novo; although the court's factual findings are reviewed for clear error. *State v. Velasquez*, 2016 MT 216, ¶6, 384 Mont. 447, 377 P.3d 1235. That said, factual determinations based on documentary or recorded testimony—as opposed to live witnesses on the stand—receive no deference on appeal. *See Kills On Top v. State*, 2000 MT 340, ¶18, 303 Mont. 164, 15 P.3d 422.

Whether a defendant's due process rights were violated by incorrect jury instruction(s) is reviewed de novo. *State v. Anderson*, 2008 MT 116, ¶17, 342 Mont. 485, 182 P.3d 80. Similarly, while a district court's decision(s) regarding jury instructions are generally reviewed for an abuse of discretion, instructions must fully and fairly instruct the jury on the law, meaning to the extent a discretionary ruling is based on legal conclusions de novo review is warranted. *Kenser v. Premium Nail Concepts, Inc.*, 2014 MT 280, ¶22, 376 Mont. 482, 338 P.3d 37.

Record-based ineffective assistance of counsel claims receive de novo review. *State v. Chafee*, 2014 MT 226, ¶11, 376 Mont. 267, 332

P.3d 240. The Court may also exercise plain error review when failure to do so would result in a manifest miscarriage of justice, leave unsettled the fundamental fairness of the proceeding, or comprise the integrity of the judiciary. *State v. Akers*, 2017 MT 311, ¶¶13-17, 389 Mont. 531, 408 P.3d 142.

Whether a district court violated the defendant's constitutional rights at sentencing is reviewed de novo. *State v. Keefe*, 2021 MT 8, ¶11, 403 Mont. 1, 478 P.3d 830.

SUMMARY OF THE ARGUMENT

Judicial apathy and a dilatory prosecution were responsible for the bulk of Kirn's lengthy pre-trial delay. Dismissal for want of speedy trial is thus warranted. In the alternative, Kirn's aggravated burglary conviction must be vacated given the court's defective and highly prejudicial jury instructions—which Kirn's counsel failed to protest. In the final alternative, Kirn is entitled to resentencing owing to the court's use of erroneous information.

ARGUMENT

I. The State violated Kirn's constitutional right(s) to a speedy trial.

Criminal defendants in Montana have a constitutional right to a speedy trial under both the Sixth & Fourteenth Amendments of the United States Constitution, as well as Article II, § 24 of the Montana Constitution. *Barker v. Wingo*, 407 U.S. 514, 515 (1972); and *State v. Ariegwe*, 2007 MT 204, ¶20, 338 Mont. 442, 167 P.3d 815. Dismissal with prejudice is the only remedy for a speedy trial violation. *Strunk v. United States*, 412 U.S. 434, 439-440 (1973).

Once the 200-day "trigger point" is met, courts evaluate speedy trial claims by balancing four factors: (1) length of delay; (2) reasons for the delay; (3) accused's response; and (4) prejudice. *Barker*, 407 U.S. at 527; and *Ariegwe,* ¶20. None of the four factors are "indispensable or dispositive." *State v. Johnson*, 2000 MT 180, ¶14, 300 Mont. 367, 4 P.3d 654; citing *Barker*, 407 U.S. at 530.

1. Kirn's pre-trial delay was 573-days.[5]

Pre-trial delay is measured from the date of arrest (or accusation)

[5] At no point during the pre-trial proceedings did either party put a witness(s) on the stand, meaning the court's factual determinations should receive no deference on appeal. *See Kills On Top*, ¶18.

to trial. *Ariegwe,* ¶42. Kirn was arrested on 9/17/2019 and his trial began on 4/12/2019, a delay of 573-days or nearly triple the 200-day mark. (D.C. Docs. 1 & 69.) Thus, the first factor weighs *strongly* in Kirn's favor.

2. The State failed to justify Kirn's prolonged pre-trial delay.

For the second factor, courts must identify each period of delay and assign responsibility. *State v. Zimmerman*, 2014 MT 173, ¶15, 375 Mont. 374, 328 P.3d 1132. "The prosecution bears the burden of explaining pretrial delays…" *Id.* Periods of delay are divided into four broad categories: (1) bad faith delays; (2) delays caused by negligence or lack of diligence (middle ground but still on wrong side of the divide); (3) institutional delays (inherent in the system out of the prosecutor's control); and (4) valid delays. *State v. Burnett*, 2022 MT 10, ¶¶22-23, 407 Mont. 189, 502 P.3d 703.

The complexity of the charge is an important consideration in determining the reasonableness of the pre-trial delay. *Zimmerman,* ¶21. Scheduling delays and court caused delays are attributed to the State. *See Johnson*, ¶19. Importantly, the longer the delay stretches beyond 200 days, the heavier the State's burden to justify the delay.

Zimmerman, ¶14.

9/17/2019 – 4/20/2020 = 217-days.

Kirn's counsel, the State, and the court labeled the initial period of delay from Kirn's arrest (9/17/2019) to his initial trial date (4/20/2020) as "institutional delay." (D.C. Docs. 33, at 3; 38, at 9; & 40, at 7.) This is not entirely accurate.

Curiously, it was Kirn (personally) who correctly recognized and advised the Court that the entirety of the initial period of delay was not institutional: "I've been in jail almost 11 months now. I mean, my speedy trial rights are way, way past the trigger point, which is 200 days… I was already in jail for 192 days when they canceled all the courts. How is that institutional delay? You guys could have… took me to trial a long time ago." (7/29/20 Tr., 9-10.) Kirn was absolutely correct.

There is simply no justification for the court's setting Kirn's initial trial 217-days after his arrest, or 17-days beyond the triggering of a speedy trial claim. As a brief comparison, consider the period from accusation to the first trial setting in *Velasquez* (113 days) and *Ariegwe* (115 days). *Velasquez* ¶17; and *Ariegwe* ¶125. The court has an

obligation to "keep control of its own docket…" *State v. Garcia*, 2003 MT 211, ¶32, 317 Mont. 73, 75 P.3d 313.

In addition to negligent calendaring by the court, much of the unnecessary initial delay stemmed from the State's waiting 44 days to file its Information—or 14 days *after* Kirn's scheduled preliminary hearing on 10/17/2019—almost certainly violating 46-10-105. (D.C. Docs. 2-4.)[6] The State presented no evidence justifying its dilatoriness—let alone sufficient evidence to meet its "heavy burden." *Zimmerman*, ¶14. Hence, at an *absolute minimum* 14 of the initial 217-days should be attributed to the State as negligent.

In sum, had Kirn's initial trial been set within a reasonable time of his arrest, say within 115-125 days, Kirn's trial would have been held long before COVID. Thus, even being incredibly generous to the State, at a minimum 14 of the initial 217 days must be attributed to the State as negligent (although 65+ is probably more accurate), with the remainder attributed to the State as institutional delay.

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[6] Had Kirn's counsel filed a motion to dismiss under 46-10-105, it almost certainly would have been granted. *See State v. Robison*, 2003 MT 198, ¶7, 317 Mont. 19, 75 P.3d 301. The State's dilatory prosecution is further evidenced by its failure to timely provide discovery. (See D.C. Docs. 15 & 33, at 7-8.) This is particularly egregious given the dearth of evidence. (See Trial Tr. 89-178, and D.C. Doc. 72.) Indeed, the discovery in a run-of-the-mill DUI would be more voluminous than here.

4/21/2020 – 7/29/2020 = 100-days.

The court characterized the period following Kirn's 1st trial setting (4/21/2020) to his 2nd scheduled pre-trial conference (7/29/2020) as institutional delay due to the "closing of the Courthouse." (D.C. Doc. 40, 7-8.) The court is wrong.

First, as Kirn correctly pointed out, the COVID restrictions "never included a ban on criminal trials for defendants in custody." (D.C. Doc. 33, 4.) It is true on March 27 the Montana Supreme Court ordered the cessation of criminal jury trials until April 10, and again ordered a cessation of criminal jury trials beginning April 22, yet it does not appear there was an order from the Montana Supreme Court prohibiting Kirn's trial on April 20 as originally scheduled. (See Chief Justice McGrath's April 22, 2020, Memorandum, at ¶3 (attached as App. B).)

Second, even if there was a *jury* trial prohibition on April 20, Chief Justice McGrath mandated that lower courts provide defendants the option of a *bench* trial:

> "[L]itigants scheduled for a jury trial through April 30th "***must be given the option***—and should be encouraged—to request a continuance or a ***bench trial***. Requests to continue criminal trials must

> include a waiver of speedy trial. Please notify your local parties scheduled for trial in the coming weeks of these options." (Chief Justice McGrath, March 13, 2020, Memorandum, at ¶3 (attached as App. C) (emphasis added).)

Yet rather than adhering to Chief Justice McGrath's mandate, the court decided instead—*sue sponte*—to vacate Kirn's April 20th jury trial without prior notice, without providing Kirn the opportunity for a bench trial, and without obtaining a speedy trial waiver. (*Compare* D.C. Doc. 21 *with* App. C, ¶3.) Put simply, the court either forgot or didn't care that "even in a pandemic[] the Constitution cannot be put away and forgotten." *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 68 (2020).

Third, even if jury trials were a no-go in April and May, the court could have and should have tried Kirn once the "the courthouse reopened on June 1, 2020…" (D.C. Doc. 40, 8.) The court blames Kirn for this for not "request[ing] an earlier trial setting as allowed by the Court's April 2, 2020 order." (D.C. Docs. 21; and 40, 8.) The court's scapegoating constitutes impermissible burden shifting; as it is the court and prosecutor that jointly bore the burden to timely bring Kirn to trial. *State v. Couture*, 2010 MT 201, ¶78, 357 Mont. 398, 240 P.3d 987.

In sum, even assuming *arguendo* the 41 days from 4/21/2020 –

5/31/2020 were correctly deemed institutional (or valid) delay attributed to the State, the 59 days from the courthouse re-opening on 6/1/2020 to Kirn's pre-trial conference on 7/29/2020 must be attributed to the State as negligent delay.

7/30/2020 – 1/25/2021 = 180-days.

The court characterized the period following Kirn's pre-trial conference (held 7/29/2020) to his 3rd trial setting (1/25/2021) as entirely attributable to Kirn owing to his "demand for new counsel." (D.C. Doc. 40, 5 & 8.) The court is incorrect.

First, at the July 29 hearing, it was the district court that *sue sponte* raised Kirn's issue with counsel, noting "I have a letter in my file, and I don't know if there's any – are there any issues between counsel and the defendant that the Court needs to be aware of at this time?" (7/29/20 Tr., 4-5.)[7]

Second, Kirn sent the letter, which the court characterized as a "pro se motion for substitution of his counsel" back on April 15—or 105 days before the hearing on July 29. (*Compare* D.C. Doc. 23 *with* D.C.

[7] Kirn's letter requested that Clerk Powers send him a "Writ of Habeas Corpus form" given that his attorney was "very much ineffective." (D.C. Doc. 23.)

Doc. 26, 2.) Accordingly, if the court believed there was an issue, the court could have and should have immediately set the matter for a virtual hearing back in April. This is especially true given the court's assertion that the courthouse was closed in April—leaving plenty of time for virtual hearings.

Third, the court claims it "advised the Defendant that if new counsel was appointed, new counsel would not be ready to proceed to trial on August 17, 2020[] [and the] Defendant maintained his demand for new counsel." (D.C. Doc. 40, 8.) This is not accurate. After pausing the July 29 hearing, the court excused the prosecution and following a brief back-and-forth, determined there was a breakdown in communication vis-à-vis Kirn and his lawyer. (7/29/20 Tr., 4-9.) The court then asked Kirn if he wanted a new attorney and Kirn said, "I do", and the court responded, "[o]kay… I am going to grant new counsel[] [a]nd I will order OPD to assign subsequent counsel." (Id., 9.)

Kirn then began complaining that his speedy trial rights had already been violated, and only then did the court assert that Kirn's new attorney wouldn't be ready for trial on August 17. (Id., 9-10.) In other words, the record is crystal clear that the court advised Kirn it

would appoint substitute counsel *before* ever mentioning its intention to vacate his August 17th trial. Moreover, the court provided no evidence or explanation why Kirn's new attorney couldn't be prepared for trial on such a simple case in three weeks' time. (Id.)[8] Nor did the court seek or obtain a speedy trial waiver before vacating Kirn's August 17th trial. (Id.)

Fourth, even if *arguendo* it was necessary to vacate Kirn's August 17th trial, there is no justification for the court's waiting until November to re-set it. For starters, the court could have and should—during the July 29 hearing or later that same day—issued orders directing the OPD to assign substitute counsel and re-set the case for trial in perhaps 4-6 weeks. The court did neither. Instead, the court waited 16 days (until 8/14/2020) to issue a simple order directing OPD to appoint substitute counsel, and even then only *after* Kirn sent Clerk Powers yet another letter complaining he didn't have a lawyer. (D.C. Docs. 25-27.)

Even more troubling is that, after vacating his August 17th trial, Kirn's case remained off the trial calendar until November 10, when the

[8] As noted this was an incredibly simple case, with no physical evidence or expert testimony; just a handful of photographs and perhaps 15 minutes of video. (See Trial Tr., 89-178; and D.C. Doc. 72.)

court finally re-set it for trial on 1/25/2021. (*Compare* 7/29/20 Tr., 10, *with* 11/10/20 Tr., 7-9.) Once again Kirn was blamed because, according to the State, his new attorney failed "to advise the Court as to when he was ready [for trial]…" (*Compare* 2/10/21 Tr., 11-12 & D.C. Doc. 38, 3 *with* 11/10/20 Tr., 7-9.)

The State's contention is demonstrably false, as the court's August 14 order explicitly provided that the *court* would "[u]pon receipt of… [substitute counsel's notice of appearance] set further proceedings as required." (D.C. Doc. 26, 4.) Mr. Bunitsky filed his NOA just 5-days later, yet neither the court nor the State took any action to ensure Kirn's case was put back on the trial calendar. (D.C. Doc. 28.) It is essential a firm trial date be maintained from arraignment to trial. *Couture*, ¶74; and *Johnson*, ¶19 (Scheduling delays caused by the court are attributed to the State.) Additionally, as before, it is the court and State that bore the constitutional burden to bring Kirn to trial in a timely fashion. *Zimmerman*, ¶18.

Given the above, at *most* Kirn is responsible for the 5 days it took his attorney to file his NOA (8/14/2020 to 8/19/2020), and the 76-days after his trial was reset to his third trial setting (11/11/2020 to

1/25/2021). The State is therefore responsible for the 16 days (from 7/30/20 to 8/14/2020) and the 82 days (from 8/20/2020 to 11/10/2020)—which are properly characterized as negligent delay.

1/26/2021 – 4/12/2021 = 76-days

In its written order denying Kirn's motion to dismiss, the court failed to consider the 76-days from 1/26/2021 to 4/12/2021. (See D.C. Doc. 40.) During Kirn's 2/10/2021 hearing, however, the court advised it would consider this period of delay "institutional" / Covid related. (2/10/21 Tr., 11.) Kirn concedes the court's labeling this period as "institutional" delay was inaccurate. Kirn filed his motion to dismiss on 12/29/2020, which was less than 30-days from his trial, meaning the 76-days are attributed to Kirn. *Ariegwe*, ¶116.

In sum, Kirn's pre-trial delay was 573-days. At *most* Kirn is responsible for 158-days, meaning the State is responsible for 415-days. And of the 415-days, at a *minimum* 171 days must be characterized as negligent, with the remaining 244 institutional. Importantly, of the first 420-days of pre-trial delay—from 9/17/2019 to 11/10/2020—the State was responsible for all but 5-days. In other words, Kirn's right to a speedy trial had *already been violated* prior to Kirn's becoming

responsible for any substantive period of delay.

3. Kirn vociferously communicated his desire for a speedy trial.

The third factor is whether the defendant indicated a desire for a speedy trial, which courts evaluate by considering the "totality of the accused's response to the delay…" *Burnett*, ¶28. Here, the court found Kirn's "responses to the challenged delay have not been consistent with his claim of a speedy trial violation. The Defense did not file any other motions that could have reduced the delay at issue." (D.C. Doc. 40, 10.) The court is wrong.

For starters, Kirn's motion to dismiss by itself satisfies factor three. *State v. Chambers*, 2020 MT 271, ¶¶12-13, 402 Mont. 25, 474 P.3d 1268. Additionally, as before, the court's blaming Kirn for "not fil[ing] any motions that could have reduced the delay… " is impermissible burden shifting; "[a] defendant has no duty to bring himself to trial…" *Barker*, 407 U.S. at 527.

Moreover, the record is unequivocal that Kirn repeatedly expressed his desire for a prompt trial:

- **12/11/2019 (day 75):** Kirn files a bond reduction motion, which the State opposes and the court waits 11 months to hear. (D.C. Doc. 13; and 11/10/20 Tr.)

- **4/7/2020 (day 203):** Kirn writes Clerk Powers a letter requesting a writ of habeas corpus form. (D.C. Doc. 22.)

- **4/15/2020 (day 211):** Kirn writes Clerk Powers a second letter requesting a writ of habeas corpus form. (D.C. Doc. 23.)

- **7/29/2020 (day 316):** Kirn explicitly complains to the court that his speedy trial rights have and continue to be violated, "I've been in jail almost 11 months now. I mean, my speedy trial rights are way, way past the trigger point, which is 200 days… I was already in jail for 192 days when they canceled all the courts… you guys could have took me to trial a long time ago." (7/29/20 Tr., 9-10.)

- **8/11/2020 (day 329):** Kirn writes Clerk Powers a third letter expressing his desperate need for documents so he can "file writs + motions…" (D.C. Doc. 25.)

- **12/27/2020 (day 467):** Kirn's counsel files a motion to dismiss for want of speedy trial. (D.C. Doc. 33.)

- **2/10/2021 (day 512):** During Kirn's motion to dismiss hearing the court states "[o]bviously, Mr. Kirn would like to have a trial on this matter…" and "I know Mr. Kirn would like to move on and get this trial over with…" (2/10/21 Tr., 9-11.)

In sum, factor three weighs *strongly* in Kirn's favor.

4. Kirn suffered all three forms of prejudice.

The fourth factor is prejudice resulting from the pre-trial delay, which is assessed in light of the interests the right to a speedy trial was designed to protect: (i) preventing oppressive pretrial incarceration; (ii)

minimizing disruption and anxiety; and (iii) limiting harm to the accused's defense. *Ariegwe*, ¶111; and *Barker*, 407 U.S. at 532.

Importantly, "[p]rejudice may be established based on '***any or all***' of these considerations." *Ariegwe*, ¶88 (emphasis added). And "once the 200-day threshold is triggered, ***a presumption of prejudice arises***… [and] [t]he further the delay stretches beyond the trigger date[] the stronger the presumption . . . that the accused has been prejudiced by the delay." *Chambers*, ¶8 (internal citations omitted, emphasis added.).)

(i) Kirn's 573-days of pre-trial incarceration was oppressive.

Preventing oppressive pretrial incarceration "reflects the core concern" of the speedy trial guarantee; namely, the "impairment of liberty." *Ariegwe*, ¶89, citing *United States v. Loud Hawk*, 474 U.S. 302, 312 (1985). To that end, the most important consideration in determining whether pre-trial incarceration is oppressive is the duration, meaning "the longer the pretrial incarceration, the more likely it has been oppressive and the more likely the accused has been prejudiced..." *Ariegwe*, ¶90. Other factors include the complexity of the charge, the defendant's pre-trial conduct, detention conditions, and

whether the defendant sought to be released on bail. *Couture*, ¶¶56-60.

Concerning detention conditions, the court opined Kirn presented no evidence of overcrowding etc., leading the court to conclude that "[t]he record… demonstrates that the Silver Bow County Detention Officers have attended to the Defendant's needs." (D.C. Doc. 40, 9.) The court is wrong. It is true Kirn presented no evidence of poor detention conditions, but neither did the State proffer evidence that conditions were acceptable, meaning at best the record is silent.

That said, by the court's own admission COVID-19 was a "health crisis", which in turn prompted Chief Justice McGrath to *mandate* that judges evaluate "every pre-trial detention under your order[]" given "the potential danger of congregate care…" (D.C. Doc. 21; and Chief Justice McGrath, March 17, 2020, Memorandum, at ¶3 (attached as App. D).) It requires little imagination, therefore, to conclude Kirn's protracted pre-trial incarceration during a "health crisis" involving a deadly communicable disease was oppressive.

The record does reveal, however, that Kirn sent Clerk Powers three separate letters requesting habeas forms—potent evidence Kirn perceived his pre-trial detention as oppressive. (D.C. Docs., 22, 23, 25.)

Kirn also filed a motion to reduce bond, which the State actively opposed and the court waited 11 months to hear, violating this Court's March 27 Emergency Order: "Courts shall hear motions for pretrial release on an expedited basis…" (D.C. Doc. 13; and COVID-19 Public Health Emergency Order, March 27, 2020, at ¶12(a) (attached as App. E).)

Adding insult to injury, when the court finally heard Kirn's bond reduction motion after sitting on it for 11 months, the court denied it on legal erroneous grounds. Specifically, the Court asserted Kirn's inability to post $50,000 was "not an issue for bail" because "[t]he issue with regards to bail is whether or not it's appropriate given the offenses…" (11/10/20 Tr., 5.) This is incorrect. Section 46-9-301 is explicit that bail must be *reasonable* based on 12 factors, including *inter alia* "the financial ability of the accused[.]" § 46-9-301(6), MCA; *see also* *Bryan v. Slaughter*, 2021 Mont. LEXIS 1004, at 9 ("A defendant's wealth or financial circumstances should not be the determining factor in whether the defendant secures conditional pretrial release[]"; *see also* Comments to § 46-9-301, MCA ("The purpose of this section is to ***eliminate the practice of automatically setting bail entirely on***

the basis of the crime involved." (Emphasis added.)

Finally, all parties agreed this was a simple case. (D.C. Docs. 33, at 9; and 38, at 15.) And because the case was exceedingly simple, and because at 573-days the delay was exceptionally long, a strong presumption arose that Kirn *was prejudiced*—which the State proffered no evidence to rebut. *See State v. Blair*, 2004 MT 356, ¶28, 324 Mont. 444, 103 P.3d 538 (Holding that without rebuttal from the State, 342 days of pre-trial detention suffices as oppressive.) The court completely ignored the strong presumption that Kirn was prejudiced by the 573-day delay; nor did the court consider the State's failure to present even a scintilla of rebuttal evidence.

(ii) Kirn's 573-days of pre-trial incarceration caused anxiety and unduly pronged the disruption to his life.

The purpose of the speedy trial right is to "to shorten the disruption of life caused by arrest..." *United States v. MacDonald*, 456 U.S. 1, 8 (1982). "[T]ime spent in jail awaiting trial has a detrimental impact on the individual… time spent in jail is simply dead time." *Barker*, 407 U.S. at 532-533. The crucial question, therefore, is whether the pre-trial delay unduly prolonged the disruption to the defendant's

life? *Ariegwe* ¶97.

In determining whether the disruption to the defendant's life was unduly prolonged, courts should consider *inter alia* the length of delay, deprivation of the freedom to associate, and the disruption of employment opportunities. *Ariegwe*, ¶¶96-97. Anxiety and disruption are subjective and difficult to prove, however, meaning "court[s] may infer from evidence of such disruption that the accused has suffered anxiety…" *Ariegwe*, ¶¶95-97.

Here, the court determined Kirn "experienced a significant disruption to his freedom of movement and association." (D.C. Doc. 40, 9.) The record supports the court's conclusion given that Kirn was incarcerated from the moment of his arrest to trial; moreover, Kirn sought pre-trial release to be closer to his family in Billings and sent three separate letters to Clerk Powers requesting habeas forms. (11/10/20 Tr., 4; and D.C. Docs, 13, 22, 23, 25.)

The court also concluded, wrongly, that Kirn failed to show his pre-trial incarceration caused economic hardship, opining that Kirn made "no allegations concerning any lost employment opportunities…" (D.C. Doc. 40, 9.) The record says otherwise, as Kirn repeatedly

expressed his desire for pre-trial release to "seek employment…" and "try to find a job so he can earn some money." (D.C. Doc. 13; and 11/10/20 Tr., 4.)

Additionally, given the length of Kirn's pre-trial delay—573-days—the State was required to "make a highly persuasive showing that [Kirn] ***was not prejudiced***..." *Ariegwe*, ¶123 (emphasis added).) The State not only failed to present evidence that Kirn *did not* suffer prejudice; the State actively opposed Kirn's pre-trial release, further exasperating his anxiety and the disruption to his life. (D.C. Doc. 13; and 11/10/20 Tr.)

(iii) Kirn's defense was prejudiced.

The third and final type of prejudice "considers issues of evidence, witness reliability, and the accused's ability to present an effective defense." *Burnett*, ¶40. Prejudice to the accused's defense occurs when witnesses are unable to recall distant events accurately due to the passage of time. *Barker*, 407 U.S. at 532.

Here, in justifying its denial of Kirn's motion to dismiss, the court opined that "[t]he Defendant has not alleged his ability to prepare and present a defense has been diminished" nor has Kirn "identified a single

piece of evidence that is no longer available to him as the result of the challenged delay." (D.C. Doc. 40, 9.) Once again the court is wrong.

(a) Kirn's defense on the *aggravated burglary* charge was prejudiced.

As it pertains to the aggravated burglary charge,[9] the State's case was based primarily on the memory of two eyewitness, Ms. Laird and Mr. Spencer. (Trial Tr., 89-122.) Accordingly, by definition Kirn's defense was prejudiced as it does not take a PhD to know "[t]he more time that elapses between an initial observation and a later identification procedure… the less reliable the later recollection will be." *State v. Lawson*, 352 Ore. 724, 778 (2012); *see also State v. Oppelt*, 176 Mont. 499, 504, 580 P.2d 110 (1978) (Holding that the length of time between the crime and the victim's identifying the perpetrator is a factor to consider in a due process challenge to a pre-trial lineup.)[10]

(b) Even if Kirn failed to affirmatively show prejudice to his defense—

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[9] Kirn concedes he cannot show prejudice on the obstructing charge as the event was captured on Officer Tierney's bodycam. (D.C. Doc. 72, State's Ex. 13; see also *Zimmerman*, ¶37.)

[10] It is noteworthy, however, that the State could have mitigated the inherent risk of dimming memories by buttressing Ms. Laird and Mr. Spencer's memories with evidence immune (or nearly immune) from the erosion of time. This did not happen, as evidenced by detective Snyder's decision not to fingerprint the crime scene nor conduct a lineup. (Id., 172-176.)

prejudice must be *presumed*.

"Loss of memory… is not always reflected in the record because what has been forgotten can rarely be shown." *Barker*, 407 U.S. at 514; and *Zimmerman*, ¶35 ("[T]ime's erosion of exculpatory evidence and testimony can rarely be shown… [accordingly] the accused's failure to make an affirmative showing that the delay weakened his ability to raise specific defenses… does not preclude a finding that the defense has been impaired.")

Accordingly, "***prejudice may fairly be presumed simply because everyone knows that memories fade***…" *Dickey v. Florida*, 398 U.S. at 54 (1970) (J. Harlan Concur., (emphasis added).) And the further the delay stretches beyond 200-days, the stronger the presumption of prejudice grows. *Chambers*, ¶14. For example, in *Burnett* this Court advised that a pre-trial delay of 466-days "***substantially increased***" the State's burden to prove the delay was *not prejudicial*—while simultaneously substantially decreasing the defendant's burden to show the delay was prejudicial. *Burnett* ¶20 (emphasis added).) The State presented no evidence whatsoever to rebut the *heavy burden* that Kirn *was prejudiced* by the delay.

(c) Presumed or otherwise, Kirn was *not* required to show his defense was prejudiced.

This Court has opined that "[i]mpairment of the defense from a speedy trial violation constitutes the most important interest in our ***prejudice analysis***." *Burnett*, ¶40 (emphasis added).) But this Court has also been crystal clear that a defendant can satisfy the prejudice factor based on "***any or all***" of the three types of prejudice. *Ariegwe*, ¶88 (emphasis added).) Moreover, prejudice is but one of four factors—none of which are "indispensable or dispositive." *Johnson*, ¶14. In other words, impairment to one's defense is but ***one type of prejudice*** out of three—and ***prejudice*** is but one factor out of four—each of which must be considered and weighed given that none are dispositive or indispensable.

Moreover, the United States Supreme Court has repeatedly held that prejudice to one's defense ***is not the most important factor*** in a speedy trial analysis:

> [T]he major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense… *United States v. Marion*, 404 U.S. 307, 320 (1971).

The Sixth Amendment right to a speedy trial is thus

> not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the Due Process Clause and by statutes of limitations. *Macdonald*, 456 U.S. at 8.

Indeed the plain language of the right to a ***speedy*** trial under Article II, § 24 of the Montana Constitution and the Sixth Amendment to the United States Constitution would be rendered meaningless if a speedy trial claim hinged on whether a defendant's pre-trial delay impugned his right to a *fair* trial. Put simply, the Founders guaranteed the accused more than a fair trial—they explicitly guaranteed a ***speedy*** trial.[11]

5. Properly balanced and apportioned, the *Ariegwe* / *Barker* factors require dismissal.

Kirn's 573-day delay easily satisfies the first factor (duration of pre-trial delay). Under the second factor, the State is responsibility for the vast majority of the delay (at least 415 days), and of those *at a minimum* 171 days were caused by negligence. The second factor therefore also weighs heavily in Kirn's favor. Kirn vociferously communicated his desire for a speedy trial, so the third factor *strongly*

[11] Additionally, the speedy trial guarantee addresses concerns beyond individual defendants, as "society has a particular interest in bringing swift prosecutions, and society's representatives are the ones who should protect that interest." *Barker*, 407 U.S. at 527.

supports dismissal. Lastly, factor four supports dismissal as well given that Kirn suffered all three forms prejudice; and equally importantly, the State presented no evidence to rebut the heavy presumption that Kirn was *not prejudiced* from the prolonged pre-trial delay.

In sum, after properly weighing and apportioning the four *Ariegwe* / *Barker* factors, Kirn easily established that the State violated his right to a speedy trial under both Article II, § 24 of the Montana Constitution and the Sixth and Fourteenth Amendments to the United States Constitution.

II. In the alternative, erroneous jury instructions render Kirn's aggravated burglary conviction constitutionally infirm.

Claims of instructional error are reviewed to determine whether, as a whole, the instructions fully and fairly instructed the jury on the applicable law. *State v. Dasen*, 2007 MT 87, ¶63, 337 Mont. 74, 155 P.3d 1282. Generally, a defendant must object at trial to preserve an issue for appeal. *Akers*, ¶10; and 46-20-104(2). Reversal without a contemporaneous objection is proper under the plain error doctrine, however, if the defendant can show the claimed error violated a fundamental right, and that failing to remedy the wrong will result in a

miscarriage of justice, question the fundamental fairness of the trial, or compromise the integrity of the judicial process. *Akers*, ¶¶13-17. Under the related doctrine of cumulative error, reversal is warranted when multiple errors, taken together, prejudice a defendant's right to a fair trial. *State v. Smith*, 2020 MT 304, ¶16, 402 Mont. 206, 476 P.3d 1178.

Criminal defendants also have a constitutional right to the effective assistance of counsel. U.S. Const. amend. VI, XIV; Mont. Const. art II, § 24. IAC claims are analyzed under the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Chafee*, ¶19. To mount a successful IAC claim, the defendant must show his attorney's performance was deficient and that he suffered prejudice as a result. *Chafee*, ¶¶19 & 23. To satisfy the prejudice prong the defendant need only show there is a reasonable probability that but for counsel's deficient performance, the outcome would have been different. *Chafee*, ¶24.

A. Individually and in the aggregate, Instructions 15, 18, 19, 23, & 24 prejudiced Kirn by misstating the elements of aggravated burglary and substantially lowering the State's burden of proof—reversal for plain / cumulative error or IAC is thus warranted.

Aggravated burglary is a combination crime meaning in addition

to proving the underlying elements for simple burglary (unlawful entry + intent to commit / commission of a crime therein), the State must also satisfy an additional enhancement element. *See* § 45-6-204(2)(b)(i)-(ii), MCA. The additional enhancement element divides aggravated burglary into two separate and distinct offenses; the first for committing the underlying burglary while being "armed with a weapon", and the second for inflicting (or attempting to inflict) bodily injury during the commission of the underlying burglary. (*Compare* 45-6-204(2)(b)(i) *with* 45-6-204(2)(b)(ii).)

As pled in the Information, the State charged Kirn with the bodily injury offense owing to his purportedly "jump[ing] on top of Melinda Laird attempt[ing] to assault her." (D.C. Doc. 4.) The State also used "assault" as the predicate offense for the underlying burglary. (D.C. Doc. 4; and D.C. Doc. 73, Instructions 19 & 20-A.)

The instructions for Kirn's aggravated burglary charge (including the lesser included burglary offense) were 15-25, with the most problematic being 15, 18, 19, 23, & 24. Kirn's counsel did not object to a single jury instruction. (See Trial Tr., 206-229.) That said, "[i]t is the duty of the court to instruct the jury on the law… [which] cannot be

delegated to counsel…" *State v. Kougl*, 2004 MT 243, ¶26, 323 Mont. 6, 97 P.3d 1095 (internal citations and quotations omitted). Indeed, the court explicitly admonished the jury "it is my duty as judge to instruct you on the applicable law in this case, and it is your duty to follow the law as I shall state it to you." (Trial Tr., 229-30.)

1. Instruction 19.

Instruction 19 provided jurors the elements for aggravated burglary, and in doing so, specifically listed both enhancement offenses i.e., "armed with a weapon" or "inflicting bodily injury" as alternative means to convict. (D.C. Doc. 73, Instruction 19.)[12]

(a) Plain / Cumulative Error.

The court plainly errored in instructing jurors they could convict Kirn for *either* "being armed with a weapon" *or* "inflicting or attempting to inflict bodily injury." (Id.)[13]

First, Kirn was never charged with the offense of aggravated burglary for being "armed with a weapon"; rather, as pled in the

[12] Instruction 18 likewise impermissibly listed the separate enhancement offenses as alternative means to convict. (D.C. Doc. 73, Instruction 18.)

[13] The Source and Comment section to the aggravated burglary instructions explicitly provides that the enhancement offenses are "alternatives" meaning "[o]nly one should be used." (MCJI 6-105(a), 2018 Supp. (attached as App. F).)

Information, the State alleged Kirn "jumped on top of Melinda Laird attempt[ing] to assault her." (D.C. Doc. 4.) The Information does not contain the terms "armed", "weapon", or "pocketknife." (Id.) The Information must apprise the defendant of the charges; it is impermissible for jurors to be permitted to convict for a charge not specifically pled in the Information. *State v. Spotted Eagle*, 2010 MT 222, ¶¶9-15, 358 Mont. 22, 243 P.3d 402; *see also* 46-11-205(1); and *State v. Hill*, 2005 MT 216, ¶24, 328 Mont. 253, 119 P.3d 1210 ("Proper notice of the accusation is a fundamental constitutional right… [warranting] consideration for exercising plain error review…")

Second, courts may only instruct on theories supported by evidence, and there was insufficient evidence to instruct on the armed with a weapon offense. *Spotted Eagle*, ¶6. It is true Kirn possessed a pocketknife—but the term "weapon" is so broad as to include even a tennis shoe—meaning Kirn's mere possession of a pocketknife wasn't enough. (Trial Tr., 157, 203; *see also State v Ray*, 2003 MT 171, ¶40, 316 Mont. 354, 71 P.3d 124.) Rather, the State was required to present evidence that Kirn *intended to use* the pocketknife. *See Ray*, ¶52. The State presented no evidence that Kirn intended to use the folded

pocketknife, as illustrated by Ms. Laird testifying that the perpetrator "had his arms on [her] shoulders" and that she neither saw nor felt a weapon of any kind. (Trial Tr., 91, 101.)[14] Instructions relieving the State of its burden to prove every element beyond a reasonable doubt "invade the truth-finding task assigned solely to juries in criminal cases." *Carella v. California*, 491 U.S. 263, 265 (1989).

Third, by combining the "armed with a weapon" and "infliction of bodily injury" offenses, Instruction 19 violated Kirn's fundamental right to a unanimous verdict. *Dasen*, ¶39; *see also* Mont. Const. art. II, § 26. Thus, it would be a miscarriage of justice to allow the verdict to stand.

(b) Counsel's Deficient Performance.

There is no plausible justification for counsel's failure to object to Instruction 19, which directed jurors to convict Kirn of an offense he was never charged with, for which there was insufficient evidence, and that greenlighted a non-unanimous verdict. *Spotted Eagle*, ¶¶9-15; *Carella*, 491 U.S. at 265; and *Dasen*, ¶39.

Counsel's failure to object to Instruction 19 was particularly

[14] Jurors were also not provided the required definition for the term "weapon." (See Source and Comment to MCJI 6-105, 2018 Supp. (attached as App. G).)

egregious given that counsel specifically articulated in Kirn's Trial Brief that aggravated burglary had "many permutations" and that the State was "specific" in charging Kirn with aggravated burglary (inflicting bodily injury) for attempting to assault Ms. Laird. (D.C. Doc. 34, 2.) Yet at trial defense counsel not only failed to object, but referred to Instruction 19 as "an accurate statement of the law." (Trial Tr., 215.)

(c) Prejudice.

Instruction 19 prejudiced Kirn as there is a high likelihood at least one juror (if not all) voted to convict Kirn for being "armed with a weapon" under 45-6 204(2)(b)(i)—a crime he was never charged with. (D.C. Doc. 4.) Especially given Ms. Laird's testimony that she suffered *no* physical injuries; coupled with the prosecutor's admonishing jurors in closing that Kirn had a pocketknife and that they could convict him for "either" being armed with a weapon "or" inflicting bodily injury. (Trial Tr., 104, 105, 243, 247.)

2. Instructions 23-24.

Instruction 23 defined the crime of assault as *inter alia* "mak[ing] physical contact of an insulting nature" or "caus[ing] reasonable apprehension." (D.C. Doc. 73, Instruction 23.)

Instruction 24 was the State's "attempt" instruction, which read verbatim as follows: "A person commits the offense of attempt when, with the purpose to commit the offense of assault, the person commits any act toward the commission of the offense of assault." (D.C. Doc. 73, Instruction 24.)

(a) Plain / Cumulative Error.

As it pertains to the enhancement for inflicting bodily injury, Instruction 19 correctly advised jurors that the State had to prove Kirn inflicted or *attempted* to inflict bodily injury on Ms. Laird. (D.C. Doc. 73, Instruction 19.) But jury instructions must be read "as a whole"—which is where the trouble arises. *See Dasen*, ¶63. Because Instruction 24 defined "attempt" as attempting to commit the crime of *assault*—not an attempt to *inflict bodily injury* as required. (*Compare* D.C. Doc. 73, Instruction 24 *with* 45-6 204(2)(b)(ii).) And Instruction 23 defined "assault" as *inter alia* "mak[ing] physical contact of an insulting nature" or "caus[ing] reasonable apprehension."[15] And to make matters worse,

[15] Even a "causing bodily injury" definition would be improper as *causing bodily injury* is different than *inflicting bodily injury*. (*Compare* 45-5-201(1)(a) *with* 45-6-204(2)(b)(ii).) "To personally inflict an injury is to directly cause an injury, not just to proximately cause it." *People v. Bland*, 28 Cal. 4th 313, 337 (2002) (internal citations and quotations omitted).)

the State used "assault" as the predicate offense for the underlying burglary as well. (D.C. Doc. 4; and D.C. Doc. 73, Instruction 19.)

Thus, when read in conjunction with Instruction 19, Instructions 23-24 completely eliminated the State's burden of proving the enhancement element i.e. that Kirn inflicted (or attempted to inflict) bodily injury. Because if the jury determined Kirn "assaulted" Ms. Laird as required for the underlying burglary charge, by definition the jury had to also conclude he *attempted to assault* Ms. Laird. Moreover, Instruction 24 defined assault as *inter alia* "mak[ing] physical contact of an insulting nature" or "caus[ing] reasonable apprehension"—a substantially lower burden than *inflicting bodily injury*.

A defendant's fundamental rights are implicated when jury instructions do not fully and fairly instruct on the applicable law and relieve the State of its burden to prove every element of the offense. *Akers*, ¶16. Accordingly, it would be fundamentally unfair to allow Kirn's verdict to stand.

(b) Counsel's Deficient Performance.

Because Instructions 23-24 substantially lowered the State's burden of proof, there is no plausible justification for counsel's failure to

object. *State v. Secrease*, 2021 MT 212, ¶15, 405 Mont. 229, 493 P.3d 335.

(c) Prejudice.

Instruction 23-24 prejudiced Kirn because, when read in conjunction with Instruction 19, Instructions 23-24 directed jurors that the enhancement element was satisfied if they concluded Kirn *attempted* to cause Ms. Laird "reasonable apprehension" or "make physical contact of an insulting nature." This substantially lowered the State's burden of proof and was particularly prejudicial given Ms. Laird's testimony that she suffered *no* physical injuries—but was "afraid" and that the perpetrator "put his hand on her shoulders." (Trial Tr., 91, 104, 105.) Thus, there is strong possibility that but for Instructions 23-24, the outcome would have been different.

3. Instructions 15 & 18.

Instruction 18 advised jurors that to satisfy the infliction of bodily injury element, the State was required to prove Kirn "purposefully", "*knowingly*", or "*negligently*" inflicted or *attempted* to inflict bodily. (D.C. Doc. 73, Instruction 18 (emphasis added).)

Instruction 15 provided jurors the *conduct-based* definition of

"purposefully" i.e., "[a] person acts purposefully when it is the person's conscious object to engage in conduct of that nature." (D.C. Doc. 73, Instruction 15; and 45-2-101(65).)

(a) Plain / Cumulative Error.

Instruction 18 was improper as it directed jurors to convict if they determined Kirn "*knowingly*… or … *negligently*… *attempt[ed]* to inflict bodily injury upon [Ms. Laird]." (D.C. Doc. 73, Instruction 18 (emphasis added).)[16] This was improper because "attempt" requires the jury to conclude the defendant acted *purposefully*. *See* § 45-4-103, MCA. In other words, the jury was required to find that Kirn *purposefully attempted* to inflict bodily injury—not that Kirn acted knowingly and certainly not negligently. "Attempt requires purpose to commit a specific offense… It is impossible to show one purposely was negligent." *State v. Hembd*, 197 Mont. 438, 440, 643 P.2d 567 (1982) (internal quotations omitted).

Additionally, Instruction 15 erroneously provided jurors the "conduct-based" definition of purposefully rather than the "result-

[16] Jurors were also not provided the definition of "negligently" as required. (App. G; and MCJI 2-105, 2009, (attached as App. H).)

based" definition. This was improper because unlike the armed with a weapon enhancement, aggravated burglary for inflicting (or attempting to inflict) bodily injury is a result-based offense as it seeks to avoid a singular result i.e., the infliction of bodily injury. (*Compare* 46-6-204(2)(b)(i) *with* 46-6 204(2)(b)(ii).) Accordingly, Instruction 15 should have provided the result-based version of purposefully, "a person acts purposefully with respect to a result if it is the person's conscious object to cause that result." (See MCJI 2-106, 2009, Source and Comment (attached as App. I).)[17]

Thus, Instructions 15 & 18 violated Kirn's fundamental rights by substantially lowering the State's burden of proof. *See State v. Lambert*, 280 Mont. 231, 237, 929 P.2d 846 (1996). Accordingly, it would be fundamentally unfair to affirm Kirn's conviction.

(b) Counsel's Deficient Performance.

There is no plausible justification for counsel's failure to seek the correct "purposeful" instruction when the incorrect version lowered the State's burden of proof. *Secrease*, ¶15. Nor is there any plausible

[17] Curiously, Instruction 16 provided jurors the result-based version of "knowingly." (D.C. Doc. 73, Instruction 16; see also 45-2-101(35).)

justification for inviting jurors to convict Kirn of the non-existent crime of aggravated burglary for *negligently attempting* to inflict bodily injury. *See Hembd*, 197 Mont. at 440.

(c) Prejudice.

Instructions 15 & 18 were highly prejudicial as they substantially lowered the State's burden of proof, likely resulting in Kirn's wrongful conviction. Because to prove Kirn purposefully engaged in *conduct* (jumping on the bed) is one thing, to prove Kirn's *purpose* was to inflict bodily injury is quite another. *See Lambert*, 280 Mont. at 237.

The prejudicial effects of Instructions 15 & 18 were particularly acute given Ms. Laird's testifying that she suffered *no* physical injuries and that the perpetrator seemed "very confused." (Trial Tr., 93, 104, 105.) Kirn's prejudice was further exasperated by the prosecution's falsely admonishing jurors during closing that Kirn admitted "if somebody jumped on me… it would cause bodily injury..." (Id., 263.)[18] This was highly prejudicial as it focused the jury on Kirn's purported

[18] Kirn's verbatim response was "I guess. I…" and the prosecutor cut him off—hardly an "admission." (Trial Tr., 201.) Additionally, the prosecutor's question to Kirn was "if someone jumped on you… that ***could cause*** you to have pain…[?]" (Id. (emphasis added).) Yet the prosecutor claimed Kirn admitted "if somebody jumped on me… it ***would cause*** bodily injury…" (Id., 263 (emphasis added).)

conduct (jumping on the bed) rather than the intended result; as in "Kirn's conscious objective was to inflict bodily injury… [so he jumped on the bed]." *See* § 45-2-101(65), MCA.

III. In the final alternative, Kirn is entitled to resentencing.

A criminal defendant has a due process right to be sentenced on correct information. *State v. Edmundson*, 2014 MT 12, ¶20, 373 Mont. 338, 317 P.3d 169. When a defendant's sentence is predicated on substantially incorrect information, he has a right to be resentenced. *State v. Van Haele*, 207 Mont. 162, 169, 675 P.2d 79 (1983). Appellate review of due process violations at sentencing are proper even when no contemporaneous objection was made. *State v. Winter*, 2014 MT 235, ¶27, 376 Mont. 284, 333 P.3d 222.

At the outset of Kirn's sentencing hearing, his attorney advised the court the defense had no corrections to the PSI, which *inter alia* provided that Kirn had 4 juveniles "felonies" and 5 adult felonies. (6/2/21 Tr., 5; and D.C. Doc. 80, at 2, 3, 6.) The attorneys then gave their respective recommendations; Kirn also gave a brief statement protesting his innocence. (6/2/21 Tr., 9.)

The court then opined that Kirn's PSI indicated this was his "10th

felony" and that he was a "registered violent offender." (Id.) In a clear attempt to correct the judge, Kirn said "[c]an I say something your honor?"—which the court curtly refused—"No, Mr. Kirn. You're done." (Id., 10.) The court then, based among other things on Kirn's "history", sentenced Kirn to 40-years flat on the aggravated burglary and 6-months on the obstructing offense (to run concurrent). (6/2/21 Tr., 10; see also Add., A, at 3.)

Kirn's sentenced was based on inaccurate information because, as the PSI indicates, he only had 5 (adult) felonies. (D.C. Doc. 80, at 2, 3, 6.) The other 4 "felonies" were part of his juvenile record, and youth adjudications "may not be deemed [] criminal conviction[s]…" § 41-5-106, MCA. Kirn was also not—as a matter of law—a registered violent offender. Kirn was convicted of assaulting a police officer on 5/24/1999; yet as the record indicates, Kirn did not commit a subsequent felony in the proceeding 10 years. (D.C. Doc. 80, at 3.) Accordingly, Kirn was automatically removed (or should have been) from the registry on 5/25/2009. *See State v. Sedler*, 2020 MT 248, ¶¶14-19, 401 Mont. 437, 473 P.3d 406.

CONCLUSION

Much has changed since Montana's Territory days, yet one thing remains the same: "The government… cannot cast a man into prison and then fold its arms and refuse to prosecute." *United States v. Fox*, 3 Mont. 512, 520 (Mont. 1880). Thus, both counts should be dismissed for want of speedy trial. In the alternative, Kirn's aggravated burglary conviction must be vacated given the prejudice he suffered from the court's erroneous jury instructions. In the final alternative, Kirn is entitled to resentencing.

Respectfully submitted this 16th day of October, 2022.

By /s/ Pete Wood
Pete Wood, Attorney for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionally spaced Century Schoolbook 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 9,999 (including footnotes), but excluding Title Page, Table of Contents, Table of Authorities, Certificate of Compliance, Appendix, and Certificate of Service.

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APPENDIX

CERTIFICATE OF SERVICE

I, Peter Allan Wood, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 10-16-2022:

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