IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0405

STATE OF MONTANA,

Plaintiff and Appellee,

v.

NATHAN BRYCE HARDIN,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, The Honorable Shane Vannatta, Presiding

APPEARANCES:

AUSTIN KNUDSEN
Montana Attorney General
ROY BROWN
Assistant Attorney General
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
Fax: 406-444-3549
roy.brown2@mt.gov

KIRSTEN PABST
Missoula County Attorney
MEGHANN PADDOCK
Deputy County Attorney
200 West Broadway
Missoula, MT 59802

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

CHAD WRIGHT
Appellate Defender
ALEXANDER H. PYLE
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147

ATTORNEYS FOR DEFENDANT
AND APPELLANT

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STATEMENT OF THE ISSUES

Whether the district court abused its discretion when it denied Appellant's motion in limine seeking exclusion of evidence related to Appellant's sexual offender status.

Whether the district court imposed an illegal condition in ordering Appellant to pay pretrial supervision costs without considering Appellant's ability to pay.

STATEMENT OF THE CASE

The State charged Appellant Nathan Bryce Hardin with Count I: threats/improper influence in official and political matters under Mont. Code Ann. § 45-7-102(1)(a)(i); and Count II: misdemeanor DUI, second offense, under Mont. Code Ann. § 61-8-401(1)(a). (Doc. 19, Am. Info.)

Hardin filed a motion in limine to exclude reference to Hardin being a misdemeanor sex offender. (Doc. 59.) After briefing, the district court denied the motion. (Doc 70, State's Resp.; Doc. 76, Appellant's Reply; 3/1/21 Tr. at 11-13, Oral Order.)

Hardin pleaded guilty to DUI. (1/14/21 Tr. at 5.) The threats/improper influence charge proceeded to a jury trial. The jury found Hardin guilty. (Doc. 96.)

For the threats conviction, the district court sentenced Hardin to the Department of Corrections for five years with two years suspended upon

conditions. (Doc. 103 at 2-3.) For DUI, the court sentenced Hardin to six months at Missoula County Detention Facility, concurrent with the threats conviction, with no time suspended. (*Id*. at 3.) Over Hardin's objection, the district court imposed pretrial supervision costs. (*Id*. at 8.)

Hardin appeals, arguing the admission of the evidence was not transactional and violative of Mont. R. Evid. 404(b) and 403. Hardin also raises an ability to pay sentencing issue pertaining to the pretrial supervision costs, which the State concedes.

STATEMENT OF THE FACTS

I. The offense

Deputy Tyler Terrill contacted Hardin and began a DUI investigation on Nine Mile Road in Missoula County on the night of August 4, 2019. (3/22/21 Trial Tr. at 39, 44.) Upon his initial contact, he radioed dispatch and learned that Hardin was a sex offender. (3/22/21 Trial Tr. at 45.)

Hardin was talkative and "agitated" during the DUI investigation. (3/22/21 Trial Tr. at 44-45.) Deputy Terrill asked for a roadside breath sample and Hardin declined. (3/22/21 Trial Tr. at 45-46; State's Ex. 1, Terrill Roadside DUI Investigation Video at 1:00-2:30, offered, admitted, and published at 3/22/21 Trial Tr. at 47.) Hardin put his hands behind his back and asked to be arrested.

Deputy Terrill placed handcuffs on him. (3/22/21 Trial Tr. at 46; State's Ex. 1 at 2:00-2:30.)

Deputy Terrill placed Hardin in the back of the patrol car, where they waited for around 45 minutes for the tow truck to arrive. (3/22/21 Trial Tr. at 50.) He noted that Hardin was "up and down emotionally," becoming agitated at certain points. (*Id*.) Upon the tow truck's arrival, Deputy Terrill transported Hardin to the jail for DUI processing. (3/22/21 Trial Tr. at 51.)

At the DUI processing room, Deputy Terrill again asked Hardin for a breath sample, but Hardin did not respond. Deputy Terrill followed the Department's policy to treat the non-response as a refusal. (3/22/21 Trial Tr. at 52; State's Ex. 3, Terrill DUI Processing Video at 2:30-2:40 offered, admitted, and published at 3/22/21 Trial Tr. at 54.) Deputy Terrill informed Hardin that he would apply for a telephonic search warrant for a blood draw, and he would place Hardin back in the jail cell pending approval. (State's Ex. 3 at 4:30-4:45.) Hardin became agitated and told Deputy Terrill that "legally, you can't take my blood." While Deputy Terrill tried to explain the process, Hardin repeatedly interrupted him and said several times, "You can't." He continued, "It's against my right." (*Id*. at 4:45-5:10.) Deputy Terrill explained, "I'm just trying to keep you informed of this process." (*Id*. at 6:29-6:34.) Deputy Terrill escorted Hardin back to the holding cell and contacted the judge. (3/22/21 Trial Tr. at 55.)

The judge authorized the blood draw. (3/22/21 Trial Tr. at 57.) Deputy Terrill removed Hardin from the holding cell and told him that they were going to the hospital. (3/22/21 Trial Tr. at 61.)

While walking to the patrol vehicle in the sally port, Hardin asserted it was going to take the "force to hold me down and get my blood." (State's Ex. 5, Terrill Video Walking Out to Patrol Car at 5:05-5:15, offered, admitted, and published at 3/22/21 Trial Tr. at 63-64.) Hardin next said, "This is against the law." (State's Ex. 5 at 0:30-0:34.) As Deputy Terrill got into the driver's seat of the patrol car, Hardin became more agitated, asserting: " I know my rights . . . you can't force me to take my blood . . . I know the law . . . so literally . . . [unintelligible] . . . I'm gonna fight this shit . . . you are not sticking no needle in my fucking arm." (State's Ex. 5 at 1:33-2:00; *see* 3/22/21 Trial Tr. at 65.) Deputy Terrill radioed dispatch to inform hospital security about the situation, and also coordinated for other police officers to arrive and assist in case of Hardin's resistance. (3/22/21 Trial Tr. at 63.)

On the car ride over, the following conversation occurred, captured by Deputy Terrill's onboard vehicle camera and additional bodycam:

> **HARDIN**: I'm not consenting to this at all. Can you show me the court order?
>
> **DEPUTY TERRILL**: [indecipherable.]

HARDIN: Show me the court order and you got it. I won't fight ya. But show me the court order.

DEPUTY TERRILL: It's right here.

HARDIN: I haven't seen it.

DEPUTY TERRILL: Okay. At this point man, I don't really care anymore.

HARDIN: I understand you say that, but I do care.

DEPUTY TERRILL: Okay.

HARDIN: Cause I think this is illegal.

DEPUTY TERRILL: Okay.

HARDIN: Which judge signed the order?

DEPUTY TERRILL: Judge Jenks.

HARDIN: Judge Jenks?

DEPUTY TERRILL: Yep.

HARDIN: The [sounds like "female"] judge?

(Def's Ex. A at 1:45-3:30 Onboard Video, offered, admitted, and published at 3/22/21 Trial Tr. at 90-91.)

DEPUTY TERRILL: Yep.

HARDIN: Based on what?

DEPUTY TERRILL: Based on everything that I told her. [13 second pause] I tried, we tried to do it the easy way, man.

HARDIN: It ain't my problem. You can tell her whatever. But you don't have proof. And when it comes to probable cause, they're looking at the video, it doesn't matter what a blood test shows.

DEPUTY TERRILL: Sure.

HARDIN: It really doesn't.

DEPUTY TERRILL: Okay.

HARDIN: Especially when I put my foot to foot.

DEPUTY TERRILL: Okay.

HARDIN: And I stood in that room with you. Didn't even move my feet and fall over.

DEPUTY TERRILL: Sure.

HARDIN: So I don't know what you fucking told her, but . . .

DEPUTY TERRILL: Okay.

HARDIN: You're trying way too hard, brother-man. For a so-called Christian.

DEPUTY TERRILL: Okay.

HARDIN: I'll see you at Zootown [church]. I'll follow you home one day.

DEPUTY TERRILL: I'm sorry, what was that?

HARDIN: Um, I don't know. Look, look back at your video.

DEPUTY TERRILL: Yeah, I would be very careful making threats like that. Cause you don't know where I live but. . .

HARDIN: I already do!

DEPUTY TERRILL: Okay.

HARDIN: I know your kids!

DEPUTY TERRILL: Okay.

HARDIN: I know what your wife looks like! I've been to church with you fucker!

DEPUTY TERRILL: Okay.

HARDIN: You're a fucking sinner and a liar!

DEPUTY TERRILL: Okay.

HARDIN: I'm just telling you dude. I mean, you want to roughhouse me because I tell you I know who the fuck you are?

DEPUTY TERRILL: I'm just telling you man, you don't want to go there.

HARDIN: Listen, were going to have a successful night. You're gonna get your little blood test. We're going to go back to the jail. If you choose to roughhouse me because [indecipherable] . . .

DEPUTY TERRILL: I don't want to roughhouse you, man. I really don't.

HARDIN: Then don't. But know that I know where you go to church, I know what your wife looks like, and I know you got a kid, not kids.

DEPUTY TERRILL: Okay.

HARDIN: Actually, I believe a little girl, if I remember correctly. But I've got a little girl too. So I wouldn't, it's not like I'm making any threats. I just know who the fuck you are, dude.

DEPUTY TERRILL: No, you're absolutely making threats, buddy.

HARDIN: Why? By saying I know who you are?

DEPUTY TERRILL: Telling me you're gonna follow me home, you know who my kid is. You're a sex offender, man. I'm telling you, I'm telling you right now, you do not want to go here.

HARDIN: Listen, [indecipherable], you don't know my offense.

DEPUTY TERRILL: I'm just telling you man.

HARDIN: You're making accusations.

DEPUTY TERRILL: I'm not making accusations.

HARDIN: [indecipherable] . . . fucking . . . [indecipherable].

DEPUTY TERRILL: Okay.

HARDIN: Listen, you don't know what happened to me. I'm charged with a misdemeanor. I have custody. I have an eleven-year-old daughter.

DEPUTY TERRILL: Okay.

HARDIN: Don't even assume shit or judge . . .

DEPUTY TERRILL: I'm just saying man . . .

HARDIN: . . . and call yourself a Christian.

DEPUTY TERRILL: I'm just saying you don't want to be threatening to be following me home.

HARDIN: I can follow you wherever I want!

DEPUTY TERRILL: Okay.

HARDIN: It's free rights!

DEPUTY TERRILL: Sure. That's fine.

HARDIN: I already know where you live!

DEPUTY TERRILL: Okay.

HARDIN: Like I know your church. What's wrong with me, I, I, I'll go out driving one night and see you driving and follow you home.

DEPUTY TERRILL: Okay. That's fine.

HARDIN: You can't pull me over for that.

DEPUTY TERRILL: That's fine.

HARDIN: Can you pull me over for that?

DEPUTY TERRILL: There's only one way to find out, bud.

HARDIN: Uh, I did it to other cops, they never pulled me over.

(State's Ex. 6 at 0:00-4:12, Drive to Hospital Bodycam, offered, admitted, and published at 3/22/21 Trial Tr. at 66-67.)

At this point, Deputy Terrill drove into the hospital bay. The threats ceased. Hardin became cooperative upon their arrival, in the presence of the hospital security team and police backup. (3/22/21 Trial Tr. at 75.) Hardin was wheeled into the exam room for the blood draw. Deputy Terrill's bodycam battery died shortly thereafter. (3/22/21 Trial Tr. at 76; State's Ex. 7 at 2:10-2:12, offered, admitted, and published at 3/22/21 Trial Tr. at 76.)

After the blood draw, Deputy Terrill declined to transport Hardin back to the jail, but left that job with his sergeant, explaining that he did not want to be around Hardin and was worried he might "say or do something that, uhm, I might regret,

something that might have an impact on my ability to maintain my career, protect my family." (3/22/21 Trial Tr. at 80-81.)

II. Facts related to other acts evidence

A. Briefing

Hardin filed a motion in limine to preclude mention of his misdemeanor sex offense, contending that the statements was 404(b) character evidence and more prejudicial than probative. (Doc. 59 at 5-7.)

The State responded that Deputy Terrill's knowledge of Hardin's sex offender status was an "important contextual piece of this case," and the evidence was not offered to prove character or conformity therewith. (Doc. 70 at 11.) Instead, the evidence would be offered to show "Defendant's intent in continuing to communicate to Deputy Terrill about Deputy Terrill's home, church, and family, as well as to show the effect on the listener." (*Id*. at 12.) Thus, it would provide a mental state inference of Hardin's conduct. (*Id*.) The State argued that the probative value was "not substantially outweighed by the risk of unfair prejudice" and that any concern for improper use of the evidence could be appropriately addressed via a cautionary instruction. (*Id*. at 13.) Correspondingly, the State asserted it did not seek to "introduce specific facts regarding Defendant's status as a sex offender beyond the fact that Deputy Terrill knew him to be one." (*Id*. at 14.)

In reply, Hardin argued that the only issue for trial was his own intent, and Deputy Terrill's mental state was irrelevant. (Doc. 76 at 2.)

B. The ruling

To fully understand the issue, the court reviewed the briefing and the "audio recording numerous times[.]" (3/19/21 Tr. at 8-9.) Ultimately, the court concluded the following:

> On the fourth [limine motion issue], that Hardin is a misdemeanor sex offender. This is a more difficult call. The court is very mindful of the effect that such a statement in open court may have to the jury and does address—or wants to ensure, of course, that Mr. Hardin gets a fair trial.
>
> That being said, again the Court, in reviewing the audio, heard not one warning, not two warnings, but three warnings by Mr. –or Officer Terrill, Deputy Terrill, that he was perceiving the discussion or statements that Hardin was making as threats, and, indeed, it was, I believe, during the third warning that Deputy Terrill said, I most assuredly—or "I most definitely feel you are threatening me. You have said you're going to follow me home, and that you know my wife, and that you know my daug—that you know I have a daughter." And then he says, "And you're a sex offender."
>
> Now, if the discussion had ended right there, I would be excluding that particular statement, and any reference to Hardin being a sex offender at all, and any discussion about it, whatsoever. But Mr. Hardin then clarifies the nature of the sex offense, which does not make it admissible, necessarily, and then proceeds to make additional threats.
>
> So, when confronted with the fact that Deputy Terrill was feeling threatened—and, yes, it was Deputy Terrill who inserted the sex offender information, at least in the audio recording, and that would be inappropriate, but it was followed on its heels by additional threats from Mr. Hardin.

And, so, therefore, Mr. Hardin was aware that specifically threatening his—Deputy Terrill's wife and daughter were a concern for him because of the, at least, sex offense, registered sex offender determination. And rather than retracting, reversing course, doing—doing something else, he, again, I think, at this point, doubles or triples down and says, "No, I am going—I can follow you home. I will wait for you, and I have followed other officers home."

And he has—he made, actually—I want to make sure I get it correct, "I can follow you whenever I want. I already know where you live. I'll go out and follow you." So having been presented with, again, this perceived threat from him, Mr. Hardin triples down.

So, given that, I'm happy to entertain a proposed instruction that would try to clarify that Mr. Hardin is not on trial for any violation of a registered sex offender or that —to clarify that it's a misdemeanor sex offense, although he says that in the audio already, uhm, but it has to come in as part of, again, the same transaction, and is proof of motive or intent.

And, frankly, preparation, knowledge, all of those. And truly does also sound in absence and [sic] mistake. Because if Mr. Hardin thought that he was not threatening Mr. Terrill, and then was confronted with exactly why Deputy Terrill had issues with it, again, Mr. Hardin tripled down or doubled down on the issue and continued the threatening process, rather than retracting or reversing course.

(3/19/21 Tr. at 11-13.)

C. Discussion pertaining to the cautionary instruction

Prior to trial, the court circled back on the issue of the cautionary instruction:

COURT: I do want to hear from [the defense]—if there is a specific instruction you want to frame the sex offense stuff to inform the jury more concretely about what that charge was, I'll give you that opportunity. Because it is coming in, and Mr. Hardin did explain it on the audio.

> But I want to give you the opportunity to either provide some cautionary language, or, otherwise, frame it in a way that helps minimize the fact that we—minimize any prejudicial effect.
>
> **DEFENSE COUNSEL**: Well, Your Honor, I thought about that, and, maybe, I'll let both the State's, mine, and yours sort of percolate a little bit. If it's coming in, that is an instance where I think I would like the jury to know that it was a misdemeanor, so that they understand better that we are not talking about someone who (shakes head negatively) went to prison, or needed to go to prison, or did something more heinous than whatever a misdemeanor might be in their minds.

(3/19/21 Tr. at 31-32.) The district court agreed that it wanted to "make certain that the jury is clear on the scope of that particular charge and conviction." (*Id*. at 32.) Defense counsel said he would "craft[] an instruction to address the sex offense" and "adapt the pattern instruction for 404(b) evidence." (*Id*. at 35.) Defense counsel offered a plan to consult the State and attempt to come to an agreement. (*Id*.)

But defense counsel ultimately told the court and the State that it decided to address the issue through its questioning in voir dire, with an intent to "tell the jury that [the prior sex offense is] a misdemeanor." (3/22/21 Voir Dire Tr. at 57.) Defense counsel obtained consent from the State and permission from the district court in a sidebar before pursuing that strategy. (*Id*.)

Next, during the defense's voir dire, defense counsel told the jury that "Mr. Hardin was convicted in 2013 of a misdemeanor sex assault," and asked if anyone felt they were not the right person to be on the jury as a result. (3/22/21

Voir Dire Tr. at 73-74.) Each prospective juror who responded that they could not remain impartial or unbiased based on that issue was excused for cause—without any attempted rehabilitation or objection from the State. (*See* 3/22/21 Voir Dire Tr. at 76, Prospective Juror Hogue excused; 81, Prospective Juror Dwyer excused; 82-83, Prospective Juror Isely excused; 85, Prospective Juror Preston excused; 87, Prospective Juror Garramone excused; 89-90, Prospective Juror Johnson excused; 90-91 Prospective Juror Dexter excused.)

Meanwhile, the district court clarified to the prospective juror pool that Hardin was not on trial for any sex offense and "what we are inquiring about is your ability to assess his testimony fairly, to give him a fair opportunity." (3/22/21 Voir Dire Tr. at 85.) The court continued:

> What you've heard about the 2013 misdemeanor sex offense is likely the most you will hear the remainder of the day about that particular offense. Again, Mr. Hardin is not on trial for that particular offense, but it was referenced.

(*Id*.)

After voir dire and during a party conference, the court expressed an intent to read an other acts cautionary instruction prior to Deputy Terrill's testimony, and again prior to deliberations. (3/22/21 Trial Tr. 19.) Defense counsel responded that a modified other acts cautionary instruction—as contemplated earlier—was unnecessary "just based on we talked about it in voir dire, and I'll just advise them

during closing." (*Id*.) The district court agreed that they would "stick with the [pattern other acts] instruction." (3/22/21 Trial Tr. 20.)

Early on in Deputy Terrill's testimony the district court read the following instruction to the jury:

> So, Ladies and Gentlemen of the Jury, the State will now offer—or you have heard a discussion about evidence that the defendant at another time engaged in other crimes, wrongs, or acts. That evidence is not admitted to prove the character of the defendant or to show he acted in conformity therewith. The only purpose of admitting that evidence is to show knowledge, identity, or absence of mistake or accident. You may not use that evidence for any other purpose.
>
> The defendant is not being tried for that other crime, wrong, or act. He may not be convicted for any other offense . . . than that charged in this case. For the jury to convict the defendant of any other offense than that charged in this case may result in unjust double punishment of the defendant.
>
> You may publish State's Exhibit Number 1.

(3/22/21 Trial Tr. at 48; Doc. 93, Given Instr. # 7.)

During the settling of the instructions, the district court explained that it had recently "forwarded you the Court's version of the instructions[,]" which the court explained included cautionary instruction # 7, the instruction read during Deputy Terrill's testimony. As to the remaining instructions, including the duplicate cautionary other acts instruction to be read prior to deliberations (# 23), the court asked if there were any objections to the instructions. (3/22/21 Tr. at

121.) After review, Hardin told the court he had no objections "to the Court's final instructions." (*Id*.)

III. The trial

A. The State's case

Deputy Terrill testified that the threats were "specific" to him and took them seriously. (3/22/21 Trial Tr. at 74.) He explained that he does indeed have a wife and a little girl. (*Id*.) He also attended a church that does a lot of "outreach into the community." (*Id*. at 69.) He was a "prolific member" at the church, serving on the board of directors. (*Id*.) Thus, Deputy Terrill believed that Hardin had seen him and his family at church. (*Id*.) He felt "rage and fear[]" about the threats to his family. (*Id*. at 70.)

Deputy Terrill testified that even though he told Hardin, "You don't want to go there," he continued "doubling down on his threats." (3/22/21 Trial Tr. at 71-72.) Given the specificity of the threats, Deputy Terrill thought Hardin was "absolutely capable" of executing them. (*Id*. at 72.) When the threats continued, Deputy Terrill felt sick to his stomach, but continued on with the investigation, reasoning that he had signed up to be a police officer, but his "wife and my kids did not." (*Id*. at 72-73.)

He explained that he responded "Okay" and "That's fine" a lot because he considers himself a professional. (3/22/21 Trial Tr. at 67.) But he was angry in the moment and felt:

> . . . the same way that anybody would feel if, uh, somebody that was a sex offender said that they were going to follow him home, and commented about them having a beautiful[1] little girl, uhm, at home.

(*Id*.) Particularly, he explained that the threats regarding his daughter was "a game changer for me." (*Id*. at 73.)

He further explained that during his regular patrol on a "routine basis," people would swear at him, call him names, and some would threaten him. (3/22/21 Trial Tr. at 78-79.) While he would take precautions to make sure the threats weren't carried out, he wouldn't otherwise "take [the threats] super seriously." (*Id*. at 78-79.) But this situation was different because "never had somebody threatened my daughter before." (*Id*. at 79.)

He explained after the fourth instance of threats, he felt:

> That [Hardin] was absolutely serious. He was trying his best to either intimidate me into not fulfilling my obligations as a peace officer, or that he was going to follow me home. He told me that he had done it to other cops. He told me that, uhm—yeah, he just continued to double down as to say that he was going to follow me

[1]Despite the dashcam video apparently not capturing Hardin calling Deputy Terrill's daughter "beautiful," Hardin himself testified at trial: "I'm not threatening you by saying you've got a beautiful daughter, or you've got a beautiful wife, or, you know." (3/22/21 Trial Tr. at 108.)

> home. That he was going to come out driving around at night and find me and follow me.

(3/22/21 Trial Tr. at 73.) And as a result of Hardin's threats, Deputy Terrill changed several aspects of his life:

> Uhm, I resigned from the board at church. I no longer attend that church. I purchased a security system with cameras for my house. I provided Mr. Hardin's photograph to my kid's teachers at school, uhm, gave them a synopsis of what happened. Uhm, gave the picture to my wife. Uhm, I changed a lot of my life because of it.

(3/22/21 Trial Tr. at 79-80.)

B. The defense

Hardin elected to testify, admitting that he had recognized Deputy Terrill, possibly from church. (3/22/21 Trial Tr. at 100.) He affirmed he believed he knew where Deputy Terrill lived too. (*Id*. at 109; *see* 3/22/21 Trial Tr. at 100.) He offered that he had an "idea" of what Deputy Terrill's wife looked like. (*Id*. at 110.) Providing further context to his comment to Deputy Terrill that he had followed police before, Hardin testified that he had previously followed a patrol car in his own vehicle for 30 minutes as an "experiment." (*Id*. at 117.)

Hardin concurred that his voice sounded "very threatening." (3/22/21 Trial Tr. at 107.) But he explained that when he is excited his voice "gets really loud and I sound aggressive." (*Id*. at 106-07.) He detailed that he was trying to "get out what I got to say[,]" because he only had "so much time" between the "jail to the hospital[.]" (*Id*. at 116.)

Hardin conceded, "I can see how, with everything that's being said, it is a threat, and it's threatening." (3/22/21 Trial Tr. at 109.) He continued, "According to [Deputy Terrill], I can see how that was very threatening, and those are threats." (*Id*. at 118-19.) He concluded, "And that's how I was with Deputy Terrill. And, so, that, I guess, was very threatening to him. And, you know, I—I did say that." (*Id*. at 119.)

But Hardin also asserted that he didn't intend the threats because he immediately recognized that it "hit me, like, whoa, dude[,]" that Deputy Terrill based his fear of the threat on his sex offender status and his comment about his daughter, (3/22/21 Trial Tr. at 108-09), so he "figured I should shut my mouth[.]" (*Id*. at 115.) The State responded that he didn't actually shut his mouth when confronted by Deputy Terrill about his sex offender status and comments about his daughter, but rather continued his threats. Hardin responded, "I was drunk." (*Id*.) Hardin nonetheless conceded, "[Deputy Terrill] felt threatened because his mind was on the sex offender thing. And, yes, I guess the way he saw it, it would be threats. If I saw it that way, I would be very threatened. So, yes." (*Id*. at 113.)

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion when it denied Hardin's motion to exclude the introduction of Hardin's sex offender status because the evidence

was admissible for the permissible purposes of intent, knowledge, and absence of mistake. Indeed, Hardin's intent was the central issue at trial. The State's theory was not used for propensity but to support the inference that Hardin intended his words and continued the threats—despite Deputy Terrill putting Hardin on notice that he found Hardin's statements about his daughter threatening in light of his sex offender status.

The evidence was also admissible under the transaction rule because the context under which the threats were communicated were interspersed with a discussion of Hardin's sex offender status. The sex offender discussion occurred immediately after Hardin threatened to follow Deputy Terrill home and explained he knew what Deputy Terrill's daughter looked like. This was followed by Hardin repeating the threats, despite Deputy Terrill putting him on notice of his interpretation of the prior threats. It would have been difficult to subdivide the crime itself from the surrounding context and for Deputy Terrill to testify as to why he felt threatened if he could not explain his reasoning, including his specific words used to put Hardin on notice of how he viewed the threats. The district court properly admitted the evidence pursuant to the transaction rule.

Finally, the district court did not err in admitting the evidence because the danger of unfair prejudice did not substantially outweigh the probative value of the conduct under Mont. R. Evid. 403. The evidence was probative to Hardin's intent,

the context surrounding the threats, and Deputy Terrill's ascertainment of the threat of "harm" as defined in the jury instructions. And any potential for unfair prejudice was mitigated by the given cautionary instruction and the nature of Hardin's defense.

Regarding the sentencing issue, the State concedes that this court should remand Hardin's sentence to the district court for the limited purpose of factfinding regarding Hardin's ability to pay pretrial supervision costs.

ARGUMENT

I. The district court properly exercised its discretion in admitting the evidence, which did not violate Mont. R. Evid. 404(b) or 403.

A. Standard of review

"A district court has broad discretion when determining the relevance and admissibility of evidence," and this Court reviews a district court's evidentiary rulings for an abuse of discretion. *State v. Sayler,* 2016 MT 226, ¶ 11, 384 Mont. 497, 380 P.3d 743 (citation omitted). A district court "abuses its discretion if it acts arbitrarily or unreasonably, and a substantial injustice results." *Sayler,* ¶ 11 (citation omitted). To the extent that the trial court's ruling is based on an interpretation of a rule of evidence or a statute, this Court's review is de novo. *State v. Haithcox,* 2019 MT 201, ¶ 14, 397 Mont. 103, 447 P.3d 452 (citation omitted).

B. The district court did not abuse its discretion when it held that evidence of Hardin's prior sexual offense was admissible for a permissible purpose and was therefore not excluded by Mont. R. Evid. 404(b).

Hardin argues that the evidence was not admissible to establish motive or identity, but he also recognizes that the district court admitted the evidence for the other purposes of intent, knowledge, absence of mistake or accident. (Appellant's Br. at 26-27, 31.) Hardin does not substantively address or contest these bases for admission, but instead argues that to the extent these bases were relevant, the danger of unfair prejudice still substantially outweighed the probative value under Mont. R. Evid. 403. (*See* Appellant's Br. at 31.)

Nonetheless, the district court properly exercised its discretion in holding that Hardin and Deputy Terrill's discussion about Hardin's sex offender status in the midst of Hardin's threats was not barred by Mont. R. Evid. 404(b). Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Rule 404(b) does not bar evidence. Rather, it prohibits a "*theory of admissibility*: using evidence of other crimes, wrongs, or acts to prove the defendant's subjective character, disposition, or propensity . . . in order to show conduct in conformity with that character on a particular occasion." *State v. Dist.*

Court of the Eighteenth Judicial Dist., 2010 MT 263, ¶ 47, 358 Mont. 325, 246 P.3d 415 (emphasis in original). The list of permissible purposes for the admission of prior acts evidence in Rule 404(b) is "a non-exclusive list of permissible purposes that are not precise; rather, the categories are amorphous, overlapping, and dependent upon the underlying facts." *State v. Blaz*, 2017 MT 164, ¶ 12, 388 Mont. 105, 398 P.3d 247. And "the distinction between admissible and inadmissible Rule 404(b) evidence turns on the intended purpose of the evidence, not its substance." *Blaz*, ¶ 12 (internal quotation marks and citation omitted).

Here, the district court ruled the evidence was permissible for the purposes of establishing intent, knowledge, and absence of mistake or accident. Indeed, the theory was offered by the State to strengthen the inference that Hardin intended his threats[2] and rebutted Hardin's theory that his threat was accidental or that his threats ceased after he realized Deputy Terrill's reaction in light of the sex offender information. (*See* Doc. 70, State's Resp. to Limine Motion at 11-12.) The district court reasoned that the theory was an admissible purpose accordingly, especially because Hardin doubled down and continued the threats. As Hardin implicitly concedes, the evidence was admissible for these purposes.

[2]As the conversation was recorded and played for the jury, intent was the only issue at trial and Hardin's only defense. (*See, e.g.*, Doc. 76, Hardin's Reply Br. on 404(b) Limine Motion at 2: "The only issue properly before the jury is Hardin's intent.")

C. The district court did not abuse its discretion when it held that evidence of Hardin's prior sexual offense was also admissible under the transaction rule.

Even assuming for argument's sake the evidence does not meet one of the permissible purposes listed under Rule 404(b), it was nevertheless admissible under Mont. Code Ann. § 26-1-103, the transaction rule. The district court did not abuse its discretion when it also held that the evidence was properly part of "the same transaction." (3/19/21 Tr. at 12-13.)

The rule provides, "Where the declaration, act, or omission forms part of a transaction which is itself the fact in dispute or evidence of that fact, such declaration, act, or omission is evidence as part of the transaction." Mont. Code Ann. § 26-1-103. "[T]he rule recognizes the legitimacy of admitting properly limited evidence that is 'intrinsic to' or 'inextricably intertwined with' a charged crime in order to provide 'a comprehensive and complete picture of the commission of the crime.'" *Haithcox*, ¶ 17 (quoting *State v. Guill*, 2010 MT 69, ¶¶ 28, 36, 355 Mont. 490, 228 P.3d 1152; some quotation marks omitted).

"Admissibility under the transaction rule is predicated on the jury's right to hear what transgressed immediately prior and subsequent to the commission of the offense charged, so that they may evaluate the evidence in the context in which the criminal act occurred." *State v. Michelotti*, 2018 MT 158, ¶ 13, 392 Mont. 33, 420 P.3d 1020 (internal quotations and citation omitted). Transaction evidence is

also admissible because "it is theoretically difficult to subdivide a course of conduct into discrete criminal acts and 'other' conduct and . . . it is difficult for a witness to testify coherently to an event if the witness is only permitted to reference the minutely defined elements of the crime." *Guill*, ¶ 27. This Court explained that "courts must be cognizant of each party's need to present the 'evidentiary richness' and 'narrative integrity' of its case." *Guill*, ¶ 36 (*quoting Old Chief v. United States*, 519 U.S. 172 (1997)).

Here, the district court properly exercised its discretion in ruling that the discussion revolving around Hardin's prior sex offense in the midst of Hardin's threats was part of the transaction. Hardin linked his threats to his knowledge about Deputy Terrill's daughter. Immediately following the comment, Deputy Terrill clarified that Hardin was "absolutely making threats" because he knew that Hardin was a sex offender and because Hardin knew who his daughter was. But Hardin nonetheless continued the threats, interspersed with explaining his prior misdemeanor offense. Thus, the information was part of the transaction because it occurred both subsequent to a prior threat and immediately prior to additional threats, and it provided context to the offense itself. *See Michelotti*, ¶ 13. It would have been difficult to subdivide the crime itself from the surrounding context and for Deputy Terrill to testify as to why he felt threatened by this particular comment if he could not explain his reasoning. As Deputy Terrill testified, he had been threatened

by other arrestees before, but because of the nature of the previous generic threats, he did not take them seriously. But because this was a specific threat against his daughter and he knew Hardin was a sex offender, he did take the threat seriously.[3]

Hardin nonetheless argues the State could have proven its case without the evidence. (Appellant's Br. at 31.) Hardin's theory on appeal is that—despite Deputy Terrill's *actual words communicated* to Hardin explaining how he regarded the threat in light of his knowledge of Hardin's sex offender status and Hardin's comments about his daughter—the State could have excised chunks of the conversation and reframed what Deputy Terrill regarded as a general threat against his family. (Appellant's Br. at 33, 35.) Necessarily, such excision of the context of the discussion would have deprived the jury of Deputy Terrill's specific concern about the threat. Hardin's response to Deputy Terrill would also have had to be excised, which, in turn, gave context to Hardin's later doubling down of the threats. With these gaps in information, combined with Hardin's only defense going toward his intent, the jury would have an incomplete picture of the offense. The district court properly exercised its discretion to admit the theory under the transaction rule.

[3]Hardin also argues that the evidence was not part of the transaction or even probative because Deputy Terrill's mental state did not matter to the elements of the offense. The State addresses that claim in the Rule 403 analysis below.

D. Evidence of Hardin's prior sexual offense was not excludable under Mont. R. Evid. 403.

As this Court has noted, "Rule 403 does not require the exclusion of relevant evidence simply because it is prejudicial." *State v. Stewart*, 2012 MT 317, ¶ 68, 367 Mont. 503, 291 P.3d 1187. Indeed, "[E]vidence the State offers in a criminal case is generally prejudicial to the defendant." *Michelotti*, ¶ 14. Rule 403 gives trial courts the discretion to exclude relevant evidence that poses a "danger of unfair prejudice" only if the prejudice "substantially outweigh[s]" the probative value. Mont. R. Evid. 403. Otherwise probative evidence rises to the level of being unfairly prejudicial only "if it arouses the jury's hostility or sympathy for one side without regard to its probative value, if it confuses or misleads the trier of fact, or if it unduly distracts from the main issues." *Blaz*, ¶ 20. A trial court may exercise its discretion to exclude evidence under Rule 403 where the evidence will prompt the jury to decide the case on such an improper basis. *Stewart*, ¶ 68.

Hardin contends that the evidence was not probative because—even if Deputy Terrill took the threats seriously because of Hardin's sex offender status and Hardin's comments about his daughter—the evidence was not relevant to "an element of the offense" of threats/intimidation, which Hardin contends is instead based exclusively on his own mental state. (Appellant's Br. at 30.) But the jury was instructed that to convict Hardin of the charge of threats or improper influence, the State must prove the following elements:

1. That the Defendant threatened harm to Missoula County Sheriff's Deputy Tyler Terrill or Deputy Tyler Terrill's wife or child;

AND

2. That the Defendant did so with the purpose to influence the decision of [Deputy Terrill] as a public servant;

AND

3. That the Defendant acted purposely or knowingly.

(Doc. 93, Given Instr. # 10.) The threat of "harm" was further defined to the jury as "loss, disadvantage, or injury or anything *so regarded by the person affected*, including loss, disadvantage, or injury to a person or entity in whose welfare the affected person is interested." (Doc. 93, Given Instr. # 14 (emphasis added); *see also* Mont. Code Ann. § 45-2-101(76)(a).) Here, Deputy Terrill regarded a threat of *harm* in a person whose welfare Deputy Terrill was interested—specifically his daughter in light of Hardin's sex offender status. Thus, contrary to Hardin's argument, Deputy Terrill's fear was probative to the elements of the offense.

Moreover, the information was probative to establish the inference of Hardin's intent, a central issue. The jury was further instructed, as to Hardin's mental state, that circumstantial evidence may be used to determine the "existence of a particular mental state" and the jury could "infer mental state from what the Defendant does and says and from all the facts and circumstances involved." (Doc. 93, Given Instr. # 20.) Finally, as explained above, the evidence also

provided context around the offense pursuant to the transaction rule. Because the evidence was central to the issues the jury would have to decide, the danger of unfair prejudice does not substantially outweigh the probative value.

Hardin nonetheless contends that the probative value of the information was limited because the State didn't belabor the point of his sex offender status in closing argument. (Appellant's Br. at 33-34.) It didn't need to. Hardin himself conceded at trial, "[Deputy Terrill] felt threatened because his mind was on the sex offender thing. And, yes, I guess the way he saw it, it would be threats. If I saw it that way, I would be very threatened. So, yes." (3/22/21 Trial Tr. at 113.)

The danger of unfair prejudice does not substantially outweigh the probative value here because the district court limited the evidence to Deputy Terrill's knowledge that Hardin was a sex offender. From the beginning, the State cabined its proposed case to not "introduce specific facts regarding Defendant's status as a sex offender beyond the fact that Deputy Terrill knew him to be one." (Doc 70. at 14.) While Hardin was allowed to clarify that his prior offense was a *misdemeanor* sex offense, the jury heard no other details from the State regarding the details of that prior offense. The district court met its duty to ensure that the use of the evidence was "clearly justified and carefully limited." *State v. Madplume*, 2017 MT 40, ¶ 23, 386 Mont. 368, 390 P.3d 142 (quotation omitted). Further, the danger of unfair prejudice was mitigated through voir dire when the parties weeded

out any potential jurors who might have a bias as related to Hardin's prior misdemeanor sexual offense.

E. Any potential prejudice was cured by the cautionary instruction and the nature of Hardin's defense.

A criminal case "may not be reversed by reason of any error committed by the trial court against the convicted person unless the record shows that the error was prejudicial." Mont. Code Ann. § 46-20-701(1). As this Court has explained, "[a] limiting instruction generally cures any unfair prejudice." *Haithcox*, ¶ 21 (citing *Blaz*, ¶ 20).

Here, not only did the district court advise the jury pool during voir dire that "Mr. Hardin is not on trial for that particular [prior sex] offense" that was "referenced [in the recording]," but the court twice gave a cautionary instruction that identified the permissible purposes of "knowledge" and "absence of mistake or accident" and relayed the critical information that "defendant is not being tried for that other crime, wrong, or act" and the jury "may not" convict Hardin on that basis. (Doc. 93, Given Instr. # 7, 23.) This Court presumes that juries follow the instructions provided by the district court. *State v. Sinz*, 2021 MT 163, ¶ 31, 404 Mont. 498, 490 P.3d 97 (citation omitted).

But Hardin argues for the first time on appeal that the purpose of "identity" was erroneously included in the cautionary instruction. (Appellant's Br. at 24, 27.) Hardin cannot complain on appeal about a cautionary instruction that he had no

objection to and acquiesced in. While the district court repeatedly asked Hardin about a specifically tailored cautionary instruction, Hardin ultimately declined to offer one and said it wasn't needed, and instead pursued a plan to tell the jury pool upfront during voir dire about the prior misdemeanor sex offense. And Hardin had no objection at all to the court's cautionary instructions. Hardin "cannot create error for his own benefit on appeal." *Cline v. Durden*, 246 Mont. 154, 162, 803 P.2d 1088, 1082 (1990). And "acquiescence in error takes away the right of objecting to it." *State v. Dethman*, 2010 MT 268, ¶ 32, 358 Mont. 384, 245 P.3d 30.

Additionally, the nature of Hardin's defense curtailed the possibility that the jury would decide the case based on an improper basis. Hardin only contested the mental state element of the offense, but he also testified that his statements were threatening, and he understood how Deputy Terrill would regard them as threats. (3/22/21 Trial Tr. at 109, 113, 118-19.) He even conceded his only mental state argument that he shut his mouth once he realized Deputy Terrill's interpretation of his comments. (3/22/21 Trial Tr. at 115.) Under the circumstances and given the overwhelming strength of the State's case, there is little chance the jury convicted Hardin based on an improper basis. Hardin's admissions and concessions are also relevant to a harmless error analysis, assuming that the evidence was otherwise inadmissible. *See State v. Van Kirk*, 2001 MT 184, ¶¶ 37, 40, 43-44, 306 Mont. 215, 32 P.3d 735; *State v. Derbyshire*, 2009 MT 27, ¶ 46, 349 Mont. 114, 201 P.3d 811.

II. The State concedes that this matter should be remanded for the limited purpose of determining Hardin's ability to pay his pretrial supervision costs.

A. Standard of review

This Court reviews sentencing conditions, fines, and fees "first for legality, then for abuse of discretion as to the condition's reasonableness under the facts of the case." *State v. Steger*, 2021 MT 321, ¶ 7, 406 Mont. 536, 501 P.3d 394 (citing *State v. Ingram*, 2020 MT 327, ¶ 8, 402 Mont. 374, 478 P.3d 799). This Court determines legality by considering only "whether the sentence falls within the statutory parameters, whether the district court had statutory authority to impose the sentence, and whether the district court followed the affirmative mandates of the applicable sentencing statutes." *Steger*, ¶ 7 (citations omitted).

B. Background

At sentencing, the Court ordered Hardin to pay pretrial supervision costs:

> The pretrial supervision, the Court is going to impose the $9,428. Those fees, according to the PSI, were related to lost GPS monitors; broken, damaged equipment; missing chargers, and the like. Our pretrial supervision program only succeeds if people are careful with the equipment that is placed on them, and the Court is going to impose that fee.

(6/11/21 Tr. at 14.) Defense counsel objected to a portion of the pretrial supervision fees, explaining: "Mr. Hardin doesn't have the ability to pay the . . . the costs of the—I think the cost of the monitors might be appropriate, but the

remaining costs for supervision he just doesn't have the ability to pay." (6/11/21 Tr. at 15.) The court responded:

> I heard you say that you are on social security. The Court will waive, then, the cost of the jury fee. But, again, the equipment cost is far different. That's an actual hard cost born by the pretrial supervision program, and I'm not going to waive that $9,428.

(6/11/21 Tr. at 15.)

The judgment specified that Hardin was required to pay the $9,428 cost of pretrial supervision, including the cost of each piece of GPS equipment that Hardin lost or damaged, which totaled $153. (Doc. 103, J. at 8; *see* Doc 86, Pretrial Supervision Report at 4 (specifying damaged equipment and cost).

C. Discussion

Pursuant to Mont. Code Ann. §§ 46-18-232(1) and (2), while a court may impose costs when sentencing a defendant, including pretrial supervision costs, such costs may not be imposed "unless the defendant is or will be able to pay them," and in making such a determination, the court "shall take into account the financial resources of the defendant, the future ability of the defendant to pay costs, and the nature of the burden that payment of costs will impose."

The State concedes that the district court failed to consider Hardin's ability to pay, and this matter should be remanded to the district court for a specific determination of Hardin's ability to pay pretrial supervision costs by evaluating Hardin's financial resources, his future ability to work and pay costs, and the

nature of the burden that payment of the pretrial supervision costs will impose. *See State v. Moore*, 2012 MT 95, ¶ 10, 365 Mont. 13, 277 P.3d 1212.

CONCLUSION

This Court should affirm Hardin's convictions and remand Hardin's sentence for the sole purpose of factfinding relating to Hardin's ability to pay pretrial supervision costs.

Respectfully submitted this 16th day of February, 2023.

AUSTIN KNUDSEN
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: */s/ Roy Brown*
ROY BROWN
Assistant Attorney General

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 7,967 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

/s/ Roy Brown
ROY BROWN

CERTIFICATE OF SERVICE

I, Roy Lindsay Brown, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 02-16-2023:

Kirsten H. Pabst (Govt Attorney)
200 W. Broadway
Missoula MT 59802
Representing: State of Montana
Service Method: eService

Alexander H. Pyle (Attorney)
Office of the State Appellate Defender
139 N. Last Chance Gulch
P.O. Box 200145
Helena MT 59601-0145
Representing: Nathan Bryce Hardin
Service Method: eService

Electronically signed by LaRay Jenks on behalf of Roy Lindsay Brown
Dated: 02-16-2023