IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0571

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JEFFREY ALLEN WESTFALL,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Eleventh Judicial District Court,
Flathead County, the Honorable Heidi J. Ulbricht, Presiding

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II. Did the district court punish Jeffrey Allen Westfall twice for a singular act in violation of Montana's constitutional protection against double jeopardy when it sentenced him for aggravated assault because he fractured Francoise Chasse's jaw and additionally sentenced him for sexual assault with an enhanced penalty because he fractured Francoise Chasse's jaw?

III. Did the district court "scrupulously and meticulously" determine Jeffrey Allen Westfall's ability to pay prior to recommending $5,228.61 in jury costs, despite not inquiring with Westfall about his financial status? Similarly, did the district court correctly recommend the $50 PSI fee, despite the uncontested evidence that Westfall had no assets or income?

STATEMENT OF THE CASE

The State charged Jeffrey Allen Westfall (Westfall) with attempted sexual intercourse without consent and aggravated assault. (D.C. Doc. 3.) On the first day of the trial, Westfall yelled at the court, repeatedly interrupted the proceedings, and refused to be alone with his counsel. (Tr. at 23, 51 & 114.)[1] He admitted he could not control

[1] The citation (Tr.__) refers to the Combined Transcript of Hearings.pdf.

himself, asked for a continuance to seek mental health treatment, and both he and his counsel requested a fitness evaluation. (Tr. at 71–73.) The district court denied the motion, and the trial continued without Westfall receiving his mental health medication, an evaluation, or a competency hearing. (Tr. at 77.) Eventually, Westfall was so unruly the judge removed him from the courtroom, and he was only allowed to watch over video. (Tr. at 114.)

The next morning, after spending all night in his jail cell thinking someone was trying to kill him, Westfall decided to enter guilty pleas. (Tr. at 301 & 359.) The State amended count I to attempted sexual assault but enhanced it to a felony by alleging that Westfall assaulted Francoise Chasse (Francoise). (D.C. Doc. at 86.) The State also maintained the aggravated assault charge alleging again that Westfall assaulted Francoise. (*Id.*) Both the sexual assault enhancement and the assault charge relied on the allegation that Westfall fractured Francoise's jaw. (*Id.*)

At sentencing, Westfall argued he was being punished twice for fracturing Francoise's jaw in violation of Montana's Double Jeopardy Clause. (Tr. at 404 & 414.) The district court overruled his objection and

intentionally sentenced Westfall to count II first and then count I to abide by the terms of the plea agreement. (Tr. at 415; D.C. Doc. 92, at 2.) The parties believed it was necessary to avoid the 10-year mandatory minimum under Mont. Code Ann. § 46-18-502, the persistent felony offender (PFO) statute. (Tr. at 395.) The plea agreement allowed the State to argue for a maximum 50-year sentence but allowed Westfall to argue for any legal sentence. (*Id.*) The district court sentenced Westfall in count II, aggravated assault, to 20 years at Montana State Prison (MSP) with a 15-year parole restriction. (Tr. at 415.) Then, he was sentenced in count I, attempted sexual assault, to 50 years, concurrent with count II, and a 15-year parole restriction. (*Id.*) The district court deemed Westfall a PFO as to count I and a level II sex offender. (*Id.*) The district court recommended as conditions of parole that Westfall be required to pay $5,228.61 in jury costs for the abbreviated trial and a $50 PSI fee, despite never inquiring about his financial status. (Tr. at 416.) Westfall filed a timely Notice of Appeal.

STATEMENT OF THE FACTS

On the morning of the trial, Jeffrey Allen Westfall (Westfall) and his attorney had several topics they needed to discuss privately, because

Westfall's attorney had only been assigned to the case four business days prior. (Tr. at 39.) However, Westfall "absolutely [would] not" meet with his attorney unless the guards were there to watch; "[he] did not want to be accused of any[thing][.]" (Tr. at 23.) Additionally, Westfall believed his attorney violated confidentiality and so he felt no choice but to proceed *pro se*. The district court conducted a last-minute *Faretta*[2] hearing. (Tr. at 26–29, 33, 39 & 56.) However, when asked about his capacity to represent himself, Westfall repeatedly answered, "I don't know if I can answer that, Your Honor." (Tr. at 27–28.) Westfall wanted his counsel to continue to represent him, but he also believed his attorney wanted him convicted. (Tr. at 65 & 68.) The district court ordered counsel to continue to represent Westfall because he was not capable of representing himself and it was too unclear what he wanted. (Tr. at 29–30.)

During roll call, Westfall repeatedly interrupted, and the district court was forced to recess. It asked Westfall, "can we agree you're not in charge of the courtroom?" (Tr. at 70–71.) Westfall responded, "Your Honor, I don't even know if I'm in charge of myself at this point. You

[2] *Faretta v. California*, 422 U.S. 806 (1975).

know, Your Honor, I have mental difficulties[.]" (Tr. at 71.) Westfall was suffering from paranoia, unable to make decisions, and needed his mental health issues addressed because he had not been given his medications for months. (Tr. at 72.) His "anxiety level [wa]s through the roof" and he "[could] not process any of this." (Tr. at 74.)

Westfall and his counsel requested a fitness evaluation. (Tr. at 74 & 92.) His attorney understood that "typically, that's done by an evaluation, you know, long before the trial date. I think the fitness law due process is that if at any point in the proceedings the person becomes unfit, the proceedings must be ceased." (Tr. at 73.) A few days prior to trial, defense counsel told Westfall he was concerned about his mental health. (Tr. at 76.) Although he had not raised the issue in the three other business days he was assigned the case, at this point, counsel had to raise fitness, because Westfall was demonstrating "numerous symptoms" of his mental illness that were "contributing to his indecision of what to do in the moment." (Tr. at 73.) The State did not dispute that Westfall was mentally ill; it objected to more delay and argued Westfall understood the proceedings. (Tr. at 75.) The court denied the request for a fitness evaluation because it believed Westfall

was engaged, answered the charges against him, understood the penalties, and was familiar with the elements of the offenses. (Tr. at 77.) Westfall screamed, said he wanted to represent himself, told the court his anxiety was unbearable, and then refused to answer any more questions. (Tr. at 77–78.)

The district court tried a second time to understand whether Westfall wanted to proceed *pro se*. However, Westfall screamed, he was confused, and he did not understand the questions. (Tr. at 80.) Defense counsel requested a continuance on defense time, but that motion was denied too. (Tr. at 81.)

Roll call continued, but Westfall interrupted again. In front of the jury, he criticized the jury as being too old to judge him fairly. (Tr. at 82–83.) Again, he asked for "a continuance based on my mental health issues so that I can seek an evaluation." (Tr. at 84.) The district court took another recess. (Tr. at 85.)

During the second recess, Westfall explained again that his anxiety was "through the roof" and aggravating his mental health. (Tr. at 86.) The district court again denied his request for a continuance reasoning that the case had been pending almost eight months and

needed to continue to trial. (Tr. at 86.) It accused Westfall of acting out as a "delay tactic." (Tr. at 87–88.) Westfall responded, "I continue to tell you that I have mental health issues that I cannot make proper decisions right now… And I'm so stressed out because I'm here at trial with an attorney that has one day on my case." (Tr. at 89.) Frantically, he explained, "[t]here is nothing prepared. I am not prepared to do this. I don't have my medication." (Tr. at 90.) The district court warned Westfall that if he continued to have outbursts during trial he would be removed from the room and forced to view the proceedings over video. (Tr. at 91.) Westfall took the court's warning to mean that it was intentionally sabotaging him by forcing him to continue to trial without his medication and with an attorney that he did not know. (Tr. at 94–96 & 100.) He begged the court for a continuance; "If I had a chance to have my medication and be put on my medication, I might be stable enough to make rational decisions." (Tr. at 100.)

After lunch, voir dire started, and Westfall disrupted the proceedings again, this time yelling at the jury that his attorney only had one day to prepare for this trial. (Tr. 109–10.) He also exclaimed that everyone needed to wear masks. (Tr. at 111.) The district court

took a third recess. (Tr. at 113.) Westfall accused the court and his attorney of being "crooked," and, in his mind, he had no choice but to proceed *pro se*. (Tr. at 116.) But, the district court denied the motion because Westfall was inconsistent and unclear about what he wanted, plus he could not control himself in the courtroom. (Tr. at 100.) Westfall laughed maniacally and the district court decided to isolate him in a separate room. (Tr. at 118 & 120.) In the separate room, Westfall could only watch the trial and be seen, he could not talk to his lawyer. (Tr. at 121.) The parties proceeded and during voir dire Juror B. pointed out that Westfall had been "flipping [the jury] the bird." (Tr. at 262.)

The following morning the parties reconvened in chambers and the district court explained that Westfall would have another opportunity to be present in the courtroom. (Tr. at 297.) Westfall reiterated that he wanted more time because he never discussed trial strategy with his attorney. (Tr. at 299–301.) Additionally, "[he] spent all last night in a cell, thinking that somebody was gonna come in and kill [him]. You think that's fun? It's not fun." (Tr. at 301).

During opening statements, the State accused Westfall of attempting to commit sexual intercourse without consent and

aggravated assault against Francoise at the R.V. Resort and Motel in Lakeside, Montana. (Tr. at 317.) Francoise testified that she was 69 years old and worked at the motel with her husband, Richard Chasse (Richard). (Tr. at 328.) Around 9:00 p.m. on August 22, 2020, a woman and man checked into the hotel, but she only met the woman. (Tr. at 334–35.) Around 12:35 a.m., a man called asking her about a room. (Tr. at 337.) Shortly thereafter, a man knocked on the motel door and rang the doorbell. (Tr. at 338.) Francoise exited her bedroom, which was attached to the motel lobby, and answered the door believing it was the man who called. (Tr. at 338.) The man entered the motel and then followed Francoise around the counter, where he pushed her and then hit her in the jaw. (Tr. at 338.) Francoise fell to the floor. (Tr. at 338.) The man hit Francoise again and took her pants and underwear off. (Tr. at 339.) Francoise yelled for Richard, who entered, kicked the man from behind, and led him to the door. (Tr. at 339.) As a result of being hit, Francoise suffered a fractured jaw. (Tr. at 446.) The incident was captured on the motel's security cameras and played for the jury. (Tr. at 345). The entire interaction was less than a minute long. (St.'s Exhibit 5.) The man fled but police eventually spoke with the woman in the

rented room who said Westfall was her boyfriend and left her there unexpectedly. (Tr. at 318–19.) When police found Westfall, he had cuts all over his neck and wrists because he had tried to commit suicide immediately after the incident. (Tr. at 320 & 375.) As a result, he was treated in a psychiatric center. (Tr. at 375.)

After Francoise testified, Westfall agreed to plead guilty to an amended charge of attempted sexual assault and aggravated assault. (Tr. at 360.) The Amended Information read:

COUNT I: ATTEMPTED SEXUAL ASSAULT, a felony

The Defendant, JEFFREY ALLEN WESTFALL, on or about August 23, 2020, in Flathead County, Montana, with the purpose to commit the offense of Sexual Assault, a felony, performed an act toward the commission of that offense by forcefully removing F.C.'s pants and underwear, contrary to the provisions of Sections 45-4-103(1) (Attempt), and § 45-5-502(1) (Sexual Assault). Because WESTFALL caused bodily injury to F.C. in the course of attempting the sexual assault this offense is punishable under § 45-5-502(3), MCA, by life imprisonment or imprisonment in the state prison for a term of not less than four years or more than one hundred years and by a maximum fine of $50,000.

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COUNT II: AGGRAVATED ASSAULT, a felony

The Defendant, JEFFREY ALLEN WESTFALL, on or about August 23, 2020, in Flathead County, Montana, knowingly, caused serious bodily injury to another, contrary to the provisions of § 45-5-202(1), M.C.A., and punishable under the provisions of § 45-5-202(2), M.C.A., by a term in the State Prison of not more than twenty (20) years and/or a maximum fine of $50,000.00..

(D.C. Doc. 86.) The parties reached a plea agreement whereby the State would recommend a combined sentence of 50 years at MSP with a 15-year parole restriction and Westfall would be designated a persistent felony offender. (Tr. at 371.) Westfall could argue for any legal sentence. (Tr. at 371.)

During his allocution, Westfall explained that he suffers from manic depression, suicidal ideation, and paranoia. (Tr. at 374.) He was prescribed antidepressants and medication to control his violent outbursts, although he had not been given them while incarcerated. (Tr. at 72.) Regardless, he wanted to change his plea and, despite being paranoid the day before, he believed he was more clear-headed now. (Tr. at 375.). He admitted to disrobing Francoise for his own sexual gratification and without her consent. He also acknowledged that he injured her jaw. As to the aggravated assault, he again admitted that he injured her jaw. (Tr. at 377–79.)

Prior to sentencing, Westfall participated in a psychosexual evaluation that did not consider or determine his competency to stand trial or enter a plea; however, Dr. Donna Zook, Ph.D. opined that Westfall "resembled other individuals who have significant antisocial

behavior by failing to conform to social norms and expectations. He has a history of problems with authority, impulsivity, aggression, and substance abuse that contributed to legal problems." (D.C. Doc. 84, at 4.) In 2019, Westfall was prescribed an antidepressant and an anti-convulsant, specifically to help him control his erratic behavior. (D.C. Doc. 84, at 4.) Dr. Zook also opined that there "was no indication of faking good, bad, or lying" in Westfall's behavior, rather he genuinely represented his mental health status. (D.C. Doc. 84, at 5.) Overall, he was in "severe emotional turmoil and cognitively, psychologically, and emotionally that contribute to deficits with dealing [with] everyday situations. He is easily agitated and escalates into self-destructive, risky, and violent behaviors." (D.C. Doc. 84, at 6.) She reasoned that his "ability to cognitively process information under stress is maladaptive" and he lacks the ability to regulate his emotions. (D.C. Doc. 84, at 10.) Overall, he has a significant risk of suicide necessitating both psychological and psychiatric interventions. (D.C. Doc. 84, at 10.) His ability to "regulate and express emotions [wa]s severely compromised." (D.C. Doc. 84, at 10.) He had an overall "inability to process information necessary to make appropriate pro-social decisions, address legal and

criminal issues." (D.C. Doc. 84, at 10.)

Westfall objected to the imposition of certain fines, fees, and surcharges prior to sentencing based on his inability to pay. (D.C. Doc. 82, at 4–6.) Westfall was incarcerated for 332 days prior to trial and has no assets or income. (D.C. Doc. 82, at 4; D.C. Doc. 92, at 10.) The district court waived or suspended some costs, like the $800 public defender cost, but it recommended $5,228.61 in jury trial costs, which included $3,000 to Dr. Joshua Blanton for being on-call to testify during the two-day trial and $2,228.61 in costs for postage, envelopes, thank you letters, jury fees and mileage. (D.C. Doc. 92, at 4–5.) The district court also recommended a $50 cost for the presentence investigation (PSI) and $8,123.47 in restitution. (*Id*.) The district court said it took Westfall's financial ability to pay into consideration, but it never stated how or why it determined Westfall had the ability to pay $13,402.08 in costs, a PSI fee, and restitution. (Tr. at 416.) The district court did not ask Westfall about his income, assets, employability, or other financial resources or debts. (Tr. at 395–418.) Instead, the only information regarding Westfall's financial status indicated he was poor. (D.C. Doc. 78, at 2; D.C. Doc. 82, at 4.)

STANDARD OF REVIEW

The issue of whether Jeffrey Allen Westfall had a right under Mont. Code Ann. § 46-14-202, to a fitness evaluation after he and his counsel requested one is a question of law. *See e.g., State v. Scarborough*, 2000 MT 301, ¶ 62, 302 Mont. 350, 14 P.3d 1202 (the question of whether the district court erred in ordering the defendant to participate in a mental health examination by the State's expert under Mont. Code Ann. § 46-14-204 is a question of law). It is an issue of statutory interpretation, which this Court reviews *de novo*. *Scarborough*, ¶ 62; *see also City of Missoula v. Fox*, 2019 MT 250, ¶ 8, 397 Mont. 388, 450 P.3d 898.

The issue of whether the district court violated Westfall's right to due process by refusing to order an evaluation is a question of constitutional law. Questions of constitutional law are reviewed *de novo*. *State v. Betterman*, 2015 MT 39, ¶ 11, 378 Mont. 182, 342 P.3d 971.

The issue of whether Westfall's right against double jeopardy was violated when the district court sentenced him to felony sexual assault based on the bodily injury enhancement and aggravated assault based

on the same injury is a question of constitutional law that this Court reviews for correctness. *State v. Guillaume*, 1999 MT 29, ¶ 7, 293 Mont. 224, 975 P.2d 312.

The issue of whether the district court adhered to the sentencing statutes when recommending Westfall pay $5,228.61 in jury costs and a $50 PSI fee is reviewed *de novo*. *See State v. Oliver*, 2022 MT 104, ¶ 22, 408 Mont. 519, 510 P.3d 1218.

SUMMARY OF THE ARGUMENT

Jeffrey Allen Westfall had a constitutional and statutory right to be fit to proceed before standing trial. Once a defendant's competency has been called into question, the Due Process Clause and Mont. Code Ann. §§ 46-14-202 and 221 require a district court to pause proceedings, order an evaluation by a mental health professional, and make a finding based either on the professional's report or evidence presented during a hearing. The court must pause the proceedings if there is sufficient doubt about the defendant's competency. *State v. Santos*, 273 Mont. 125, 130, 902 P.2d 510, 513 (1995) (citing *State v. Austad*, 197 Mont. 70, 78, 641 P.2d 1373, 1378 (1982) (quoting *Dusky v. U.S.*, 362 U.S. 402, 402 (1960)).) Fundamental to a fair trial is the rule that a

defendant may not be tried if he lacks the capacity to rationally consult with his attorney, understand the proceedings, and aid in his defense. *Drope v. Missouri*, 420 U.S. 162, 171 (1975).

Westfall's behavior was so erratic and self-destructive that he was removed from trial and denied the ability to represent himself, yet the district court repeatedly denied his motion for a fitness evaluation. (Tr. at 114–117.) Under Mont. Code Ann. § 46-14-202, Westfall was entitled to an evaluation "as a matter of right." *State v. Bartlett*, 271 Mont. 429, 434, 898 P.2d 98, 101 (1995) (*Bartlett I*). Westfall was so paranoid he refused to meet alone with his attorney, he believed someone was going to kill him, and he was suffering from paralyzing anxiety. (Tr. at 23, 77, & 301,) He had an undisputed history of severe mental illness. (Tr. at 374.) These factors mean Westfall should have been evaluated for competency as soon as the issue was raised—even if the request came at the start of trial.

The district court violated Montana's Double Jeopardy protections when it sentenced Westfall to 20 years for aggravated assault and then 50 years for felony sexual assault based on the bodily injury enhancement. Both the assault charge and enhancement

necessarily relied on the same finding of bodily injury. *See* Mont. Code Ann. §§ 45-5-202(1) & 45-5-502(3). Montana's double jeopardy protections prohibit the court from punishing Westfall twice for a singular act. *Guillaume*, ¶ 17. Once is permissible—twice is double jeopardy.

The district court erroneously recommended $5,228.61 in trial costs and a $50 PSI fee after failing to inquire about Westfall's ability to pay. Under Mont. Code Ann. §§ 46-18-232(2) and 46-18-111(3), a district court must consider a defendant's ability to pay prior to imposing jury costs and the PSI fee. In particular, the court must "'scrupulously and meticulously determine the defendant's ability to pay jury costs to avoid undermining a defendant's right to a jury trial." *Oliver*, ¶ 52 (quoting *State v. Moore*, 2012 MT 95, ¶ 18, 365 Mont. 13, 277 P.3d 1212). Westfall had no income or assets. (D.C. Doc. 82, at 4–6.) The district court concluded Westfall could not afford other fees and costs, like the public defender fee and technology surcharge, yet confusingly it concluded he could afford the jury costs and PSI fee. (D.C. Doc. 92, at 4–6.) The district court did not seriously inquire about Westfall's ability to pay before recommending the jury costs and PSI fee. Westfall does not

have the ability to pay $5,27861. The costs and fee must be stricken from the Judgment.

ARGUMENT

I. The district court violated Jeffrey Allen Westfall's statutory and constitutional rights when, after Westfall and his attorney repeatedly moved the court for a fitness evaluation, it unilaterally determined he was fit to proceed.

"It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." *Drope*, 420 U.S. at 171; Mont. Code Ann. § 46-14-103. "The prohibition is fundamental to an adversary system of justice." *Drope*, 420 U.S. at 172. Therefore, when a defendant's fitness to proceed is at issue, the district court must determine if he has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *Santos*, 273 Mont. at 130, 902 P.2d at 513 (other citations omitted). The right to be competent to stand trial is protected under the

United States Constitution and "jealously guarded" under Montana law. *See Drope*, 420 U.S. at 173; *See also* Mont. Code Ann. § 46-14-221.

Westfall was paranoid, erratic, and self-defeating during the trial, which caused the district court to remove him. (Tr. at 8–359.) He has a history of mental illness dating back to 1989 and culminating just eight months before trial in a suicide attempt. (D.C. Doc. 78 at 6; Tr. at 375.) Given all the undisputed signs of mental illness, the district court should have been alarmed. Instead, the district court erroneously concluded the trial could not be delayed and unilaterally determined Westfall was fit. (Tr. at 77.) The district court violated Westfall's right under Mont. Code Ann. § 46-14-202, and his right to due process by refusing to grant Westfall's motions for a fitness evaluation and forcing him to stand trial despite obvious and undisputed signs that he was suffering from severe mental illness.

A. The district court violated Mont. Code Ann. § 46-14-202, when, after Westfall and his attorney moved for a fitness evaluation, the court unilaterally determined Westfall was fit to proceed without appointing a licensed professional.

The issue of a defendant's fitness may be raised by the defendant, his counsel, the State, or the court. Mont. Code Ann. § 46-14-221. Once

raised, the issue of whether the defendant is fit "must be determined by the court." Mont. Code Ann. § 46-14-221(1). To determine fitness, the court "shall appoint" a qualified mental health professional or ask the superintendent of the Montana state hospital to designate a qualified mental health professional to examine the defendant. Mont. Code Ann. § 46-14-202(1). "The word 'shall' is compulsory." *See Bartlett I*, 271 Mont. at 434, 898 P.2d at 101. A district court may not unilaterally determine that a defendant is fit to proceed because the defendant has a statutory right to a psychological examination by a qualified professional. *Bartlett I*, 271 Mont. at 432, 898 P.2d at 100.

The professional then provides a report that "must include" a description of the examination, a diagnosis of the defendant's condition, and, if the defendant suffers from a mental disease or disorder, an opinion as to the defendant's capacity to stand trial. Mont. Code Ann. § 46-14-206(1). Once the report is filed, if the findings are not contested, the district court may make a competency determination based on the report or, if the findings are contested, the court must conduct a hearing. Mont. Code Ann. § 46-14-221(1). If the defendant is found unfit, the proceedings must be suspended, and the defendant must

receive mental health treatment "for so long as the unfitness endures." Mont. Code Ann. § 46-14-221(2).

In *Bartlett I*, the defendant was *pro se,* but his standby counsel moved the district court for a fitness exam. *Bartlett I*, 271 Mont. at 431, 898 P.2d at 99. The defendant objected and reiterated that he fired his counsel. *Bartlett I*, 271 Mont. at 431, 898 P.2d at 99–100. The State objected because, although Bartlett was "difficult," it was "time to move this case toward some kind of disposition." *Bartlett I*, 271 Mont. at 431–32, 898 P.2d at 100. This Court reversed the conviction and held that a motion for a mental examination under Mont. Code Ann § 46-14-202, "must be granted as a matter of right." *Bartlett I*, 271 Mont. at 434, 898 P.2d at 101.

Westfall had a statutory right to a fitness evaluation by a qualified professional after both he and his counsel requested one. *Bartlett I*, 271 Mont. at 432, 898 P.2d at 100. The district court did not have the authority to unilaterally determine that he was fit to proceed. Rather, the use of "shall" in Mont. Code Ann. § 46-14-202, required the court to appoint a professional to evaluate Westfall's mental condition. The report needed to diagnosis Westfall's condition and, if found to be

mentally ill, opine as to his capacity to stand trial. Mont. Code Ann. § 46-14-206(1). Thereafter, the district court's findings needed to be rooted either in the professional's report or in evidence presented during a contested hearing. Mont. Code Ann. § 46-14-221(1).

A professional opinion would have allowed the district court to correctly assess whether Westfall had "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *Santos*, 273 Mont. at 130, 902 P.2d at 513 (other citations omitted). Instead, the district court erroneously concluded that Westfall was fit to proceed after it applied the wrong legal standard. It concluded, without expert assistance, that Westfall was fit to proceed because he "understood the – (Defendant continues to scream.)--charges against him, he was aware of the maximum penalty, and he was familiar with the exact legal elements." (Tr. at 77.) The district court never considered whether Westfall could reasonably and rationally consult with his counsel or assist in his defense. (*Id.*) Meanwhile, Westfall was afraid to meet with his counsel alone and believed his counsel wanted him convicted. (Tr. at 23 & 68.)

He constantly reiterated that he felt unable to make important decisions and begged for medication to control his behavior and anxiety. (Tr. at 70–71, 90 & 100.)

A professional report likely would have directly contradicted the district court's belief that Westfall was engaging in a delay tactic. Dr. Zook specifically opined that Westfall's erratic and self-destructive behavior was consistent with his illness. (D.C. Doc. 84, at 10.) Additionally, Dr. Zook opined that the display of his mental illness was genuine, not exaggerated. (D.C. Doc. 84, at 5.)

The district court's concerns that the case had been pending for eight months and the request was not until the morning of trial could not overcome Westfall's right to a fitness evaluation. The district court made the same erroneous conclusion that the district court made in *Bartlett I*; it was "time to move this case toward some kind of disposition." *Bartlett I*, 271 Mont. at 431–32, 898 P.2d at 100. However, the right to stand trial while competent is jealously guarded under Montana law and fundamental to a fair, adversarial system. Montana law explicitly requires the district court to pause the

proceedings "for so long as the unfitness endures[,]" without exception. Mont. Code Ann. § 46-14-221(2).

The district court erroneously relied on its own hunch to conclude Westfall was fit, rather than a professional opinion or evidence presented by the parties. Because the motion for a fitness evaluation "must be granted as a matter of right[,]" this court must reverse the conviction.

B. The district court violated Westfall's right to substantive due process when it failed to order an evaluation and competency hearing because there was "a sufficient doubt" that Westfall was fit to stand trial.

Criminally convicting a mentally incompetent person violates his right to substantive due process. *Drope*, 420 U.S. at 172. To protect a defendant's right to due process, a district court must order a hearing "whenever evidence raises a sufficient doubt about the mental competency of an accused to stand trial." *State v. Bartlett*, 282 Mont. 114, 120, 935 P.2d 1114, 1117 (1997) (*Bartlett II*) (other citations and footnote omitted). A psychiatric evaluation and competency hearing are compulsory and failure to conduct the procedural safeguards when

there is a doubt about the defendant's fitness violates his right to due process. *Bartlett II*, 282 Mont. at 120, 935 P.2d at 1117.

In *Drope*, the defendant was accused of sexually assaulting his wife with two of his friends. Prior to trial, defense counsel moved for a continuance to have Drope examined and attached a psychiatric evaluation to the motion that did not specifically opine whether Drope was fit to proceed, but it noted that Drope did not suffer from any delusions, illusions, or hallucinations, was orientated to "in all spheres," and he could answer questions testing his judgment without trouble. *Drope*, 420 U.S. at 175. The evaluation also stated Drope had episodic, irrational behavior and was diagnosed with borderline mental deficiencies, chronic anxiety, and depression. *Drope*, 420 U.S. at 175–76. The district court denied the request for a continuance. *Drope*, 420 U.S. at 165.

Drope's wife originally did not want him prosecuted, but shortly before trial he attacked her, and, as a result, she changed her mind. *Drope*, 420 U.S. at 166. On the second day of trial, Drope failed to appear because he shot himself in the stomach. *Drope*, 420 U.S. at 166.

The trial continued without Drope present, and he was convicted. *Drope*, 420 U.S. at 167.

The United States Supreme Court held that neither the trial court nor the appellate court gave appropriate weight to Drope's mental illness. *Drope*, 420 U.S. at 179. The trial court needed to consider "evidence of [the] defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence" to determine "whether further inquiry [wa]s required." *Drope*, 420 U.S. at 180. Furthermore, "one of these factors standing alone may, in some circumstances, be sufficient." *Drope*, 420 U.S. at 180. The trial court failed to see that Drope trying to kill his wife was self-defeating; she was advocating against him being prosecuted. *Drope*, 420 U.S. at 179. In addition, his suicide attempt was clearly an indication of mental illness, and it compounded the problem of trying to determine his fitness because his absence from trial meant neither the court nor his counsel could monitor his demeanor or ability to understand the proceedings. *Drope*, 420 U.S. at 180–81. Lastly, the lower courts failed to give proper weight to his documented history of mental illness. *Drope*, 420 U.S. at 179. The undisputed evidence should have triggered the district court to suspend

the trial and order a mental health evaluation. *Drope*, 420 U.S. at 181–82. Although delaying trial is a "hard reality," Drope's due process rights were violated when the district court failed to pause the proceedings and order a psychiatric evaluation and, as a result, the United States Supreme Court reversed the conviction. *Drope*, 420 U.S. at 183.

Here, like in *Drope*, the district court failed to give Westfall's mental illness sufficient consideration and the undisputed evidence should have triggered the district court to suspend the trial and order a mental health evaluation. Although a "hard reality" on the morning of trial, Westfall's right to an evaluation and corresponding right to be fit during trial must take precedence over the court's concern about trial delay.

Westfall, like *Drope*, acted irrationally and against his own self-interest leading up to the trial. Drope attacked his wife, despite her advocating against his prosecution. *Drope*, 420 U.S. at 166. Westfall refused to meet alone with his newly appointed attorney, despite needing to prepare for trial. (Tr. at 23 & 51.) Westfall believed his attorney would accuse him of wrongdoing and wanted him convicted.

(Tr. at 23 & 64.) Neither man could recognize who was trying to help them. Furthermore, Westfall repeatedly asked to proceed *pro se* but the district court implicitly recognized that he was incapable of making informed decisions prior to trial when it denied the request. The district court reasoned that Westfall was too irrational and unpredictable to represent himself but, contradictorily, concluded he was rational enough to stand trial.

Westfall's erratic and irrational behavior, like Drope's erratic behavior, continued throughout the trial. On the second morning of the trial, Drope shot himself. Westfall believed someone in the jail was trying to kill him. (Tr. at 301). Westfall also "flipp[ed] [the jury] the bird," told them they were too old to judge him fairly and yelled that his attorney was ill-prepared. (Tr. at 82–83, 89, & 262.) Westfall interrupted the proceedings, despite being told several times that he would be removed from the courtroom. (Tr. at 91.) As a result of both Drope's and Westfall's behavior, they had to be removed from the courtroom, which compounded the problem. Neither the court nor their attorneys could monitor their demeanor or ability to understand the proceedings. *See Drope*, 420 U.S. at 180–81; *see also* Tr. at 114.

Additionally, their removal eliminated their ability to participate in their trials. Westfall was unable to offer his opinions, observations, and concerns about jurors during voir dire.

Westfall, like Drope, had an undisputed history of severe mental illness. (Tr. at 374.) Westfall was first diagnosed with mental illness in 1989 and was recently treated in a psychiatric center. (D.C. Doc. 78 at 6; Tr. at 375.) During opening statements, the State described how he tried to kill himself only eight months prior. (Tr. at 320.) Additionally, Westfall repeatedly told the court that he was unable to control himself or make decisions, because he was not medicated, and he needed his mental health issues addressed. (Tr. at 71.) He explained his diagnoses, that his "anxiety level [wa]s through the roof" and that he "[could] not process any of this." (Tr. at 71–74.)

These factors meant Westfall should have been evaluated for competency as soon as the issue was raised—even if the request came at the start of trial. Instead, without a professional report, the court considered the wrong legal standard when it unilaterally decided he was fit to proceed. In *Drope*, the district court erroneously concluded that, because the defendant was not delusional, he was orientated to "in

all spheres," and he could answer questions testing his judgment without trouble, he was fit to proceed. *Drope*, 420 U.S. at 175. Here, the district court erroneously concluded that, because Westfall understood the elements, charges, and penalties, he was fit to proceed. (Tr. at 77.) In both cases, the district court failed to consider whether the defendant could rationally consult with his attorney, aid in his defense, and whether he understood the nature of the proceedings. *Drope*, 420 U.S. at 171.

Before sentencing, the district court received Dr. Zook's report that directly contradicted its perception that Westfall was disingenuous in the depiction of his mental illness. Dr. Zook confirmed that Westfall suffered from severe mental illness and likely lacked the ability to control his own behavior during trial. (D.C. Doc. 84, at 10.) In 2019, Westfall was prescribed medication specifically to help him control his erratic, irrational behavior. Dr. Zook called Westfall's ability to control his impulsive behavior "severely compromised." (D.C. Doc. 84, at 4.) Unlike the district court's belief that Westfall's behavior was a "delay tactic," Dr. Zook opined that there "was no indication of faking good,

bad, or lying" in Westfall's behavior, rather he genuinely represented his mental health status. (D.C. Doc. 84, at 5.)

The district court violated Westfall's due process rights because the undisputed evidence should have caused the district court to doubt Westfall's competency and it should have appointed a professional to examine Westfall. As a result of the district court's failure to give the obvious signs of Westfall's mental illness sufficient weight, this Court must reverse the conviction.

II. The district court punished Westfall twice for a singular act when it sentenced him to 20 years MSP for aggravated assault for fracturing Francoise's jaw and then enhanced his sexual assault sentence to 50 years because he fractured Francoise's jaw.

Both the United States Constitution and the Montana Constitution protect defendants from being punished multiple times for the same offense. The United States Constitution proclaims, "No person shall…be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amnd. V. The Fifth Amendment's Double Jeopardy Clause prohibits a court from imposing cumulative sentences. *Missouri v. Hunter* 459 U.S. 359, 366 (1983).

The Montana Constitution states, "No person shall be again put in jeopardy for the same offense previously tried in any jurisdiction." Mont. Const. art. II, § 25. The Montana Constitution provides greater protections against double punishment than the Fifth Amendment. *Guillaume*, ¶ 16. In finding that the Montana Constitution offers greater protections, this Court explained, "[s]imply put, double jeopardy exemplifies the legal and moral concept that no person should suffer twice for a single act." *Guillaume*, ¶ 17.

Aggravated assault provides, "[a] person commits the offense of aggravated assault if the person purposely or knowingly causes serious bodily injury to another[.]" Mont. Code Ann. § 45-5-202(1) (2019). Subsection (3) of the sexual assault statute allows a court to enhance a defendant's penalty if, during the commission of the offense, the defendant "inflicted bodily injury." Mont. Code Ann. § 45-5-502(3). Both statutes punish a defendant for inflicting bodily injury.

Westfall cannot be sentenced to 20 years MSP for fracturing Francoise's jaw in violation of the aggravated assault statute and then also sentenced to an additional 49 years and six months at MSP for causing the same injury. Westfall was punished twice for a singular act

in violation of Montana's heightened double jeopardy protections and as a result the sentence is illegal.

A. Westfall was punished twice for causing bodily injury in violation of his right to be free from double jeopardy.

In *Guillaume*, this Court held that the defendant's right against double jeopardy was violated when he was sentenced for aggravated assault, which was elevated to a felony because he used a weapon during the offense, and then the same sentence was enhanced under Mont. Code Ann. § 46-18-221, the weapon enhancement statute. *Guillaume*, ¶ 16. Elevating the assault charge from a misdemeanor to a felony because Guillaume used a weapon was the "legislature's way of punishing a criminal defendant for use of a weapon in committing an assault." *Guillaume*, ¶ 18. When the sentencing court also applied a separate statutory enhancement, Guillaume was punished twice for a singular act in contravention to Montana's constitutional protections against double jeopardy and the legislature's intent. *Guillaume*, ¶ 18. Importantly, this Court noted that under Montana law the inquiry relevant to double jeopardy is whether the defendant was punished

twice for one singular conduct, use of a weapon, not whether he committed two offenses. *Guillaume*, ¶ 21.

The Montana Constitution prohibits Westfall from being punished twice for causing bodily injury to Francoise. The vital double jeopardy question before the court is whether it was constitutionally permissible to punish Westfall multiple times for causing bodily injury to Francoise. The aggravated assault statute punishes Westfall for causing "bodily injury to another[.]" Mont. Code Ann. §45-5-202. Subsection (3) of the sexual assault statute enhances Westfall's sentence because he "inflict[ed] bodily injury." Mont. Code Ann. § 45-5-502(1). Under either statute, Westfall is punished for the same singular act—causing bodily injury.

To sentence Westfall for aggravated assault the judge necessarily needed to find that Westfall injured Francoise. Because a finding of bodily injury was essential to the conviction of Count II, aggravated assault, it could not be used again a second time to increase the sentence of the sexual assault. Once is permissible—twice is double jeopardy.

The State could have charged Westfall for felony sexual assault or, alternatively, it could have charged misdemeanor sexual assault and aggravated assault, but it cannot charge and punish him for both. In *Guillaume,* this Court recognized that elevating the charge of aggravated assault to a felony when the defendant used a weapon was the "legislature's way of punishing a criminal defendant" for using the weapon. However, the State could not also then enhance the sentence a second time based on the same fact. Similarly, the legislature gave the State a clear path under subsection (3) to increase Westfall's punishment for physically assaulting Francoise. The State could have enhanced the penalty under the sexual assault statute. The State cannot rely on a separate statute to penalize Westfall for the same conduct a second time. The intent of the legislature was to provide a path for a higher penalty if Westfall injured Francois during a sexual assault, not to allow the State to punish Westfall twice for the assault.

The remedy is to remand the case and sentence Westfall under the misdemeanor sexual assault statute. The State sentenced Westfall to aggravated assault first, then it violated Westfall's right against double jeopardy by adding an additional punishment for causing the same

bodily injury under felony sexual assault. Therefore, the aggravated assault sentence of 20 years with a 15-year parole restriction is legal, but the portion of the sexual assault sentence that relies on the enhancement is illegal. [3] This Court must reverse the felony sexual assault conviction and remand the case for resentencing on the sexual assault charge and order the district court not to apply the enhancement. The sexual assault sentence may not exceed 6 months, a $500 fine, or both.[4] Because the felony sexual assault conviction is also the predicate offense for the PFO conviction, Westfall's PFO conviction must be stricken from the Judgment.

III. The district court suggested an illegal sentence when it recommended as a parole condition that Westfall pay $5,228.61 in trial costs and a $50 PSI fee, despite him not having any income, assets, or other means to pay.

[3] The State never alleged that Westfall was previously convicted of a sexual assault that would be grounds for enhancing the penalty under 45-5-502(2)(b) or (c). Similarly, the State does not allege nor do the facts support enhancing the sentence under 45-5-502(3) on the grounds that the victim is less than 16 years old, and the offender is 3 or more years older.

[4] Although sexual assault was count I, the district court intentionally sentenced Westfall to count I second. Therefore, the imposition of the sentence for count II was legal, whereas the imposition of the sentence for count I violated double jeopardy because a punishment had already been imposed.

A district court may not impose the cost of trial, "unless the defendant is or will be able to pay them." Mont. Code Ann. § 46-18-232(2) (2019); *see also* § 25-10-201. Prior to imposing jury costs, the sentencing 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." Mont. Code Ann. § 46-18-232(2). "[T]rial courts must 'scrupulously and meticulously determine the defendant's ability to pay' jury costs to avoid undermining a defendant's right to a jury trial." *Oliver*, ¶ 52, (quoting *Moore*, ¶ 18).

Similarly, the court may waive the PSI fee if it "determines the defendant is not able to pay the fee within a reasonable time." Mont Code Ann. § 46-18-111(3). Although the standards of assessing the defendant's ability to pay are slightly different depending on what cost is being imposed, the district court's inquiry regarding jury costs under Mont. Code Ann. § 46-18-232(2), "will necessarily inform its decision to impose the other costs and fees under the other statutes." *Oliver*, ¶ 53. The inquiry into a defendant's ability to pay requires more than noting a defendant's assets, debts, and income. *State v. McLeod*, 2002 MT 348,

¶¶ 34–35, 313 Mont. 358, 61 P.3d 126. It demands a "serious inquiry" separate from the financial information provided in the PSI. *McLeod*, ¶¶ 34–35.

Here, the district court failed to make any inquiry into Westfall's ability to pay prior to imposing $5,228.61 in trial costs and a $50 PSI fee. Although the district court said that it took Westfall's financial status into consideration, the only information provided to the district did not support imposition of the costs and fee. Both the PSI and defense's presentence memorandum stated Westfall had no assets and was unemployed due to incarceration. (D.C. Doc. 78, at 2; D.C. Doc. 82, at 4–6.) The State never presented any evidence rebutting Westfall's financial status and the district court never asked Westfall about his assets or debts. Therefore, there was no evidence presented that supported the district court's conclusion that Westfall had the ability to pay $5,228.61 in trial costs and a $50 PSI fee.

The district court's imposition of jury costs and the PSI fee is also inconsistent with its decision to waive other costs, and the imposition of jury costs undermines Westfall's right to a jury trial. The court was obligated to waive the public defender free (which it waived) and the

jury costs (which it did not waive) if, under the same inquiry, Westfall was not able to pay. The district court's logic is contradictory. Additionally, according to the district court, Westfall was so indigent that it waived the $10 technology fee—despite waiver being discretionary. Yet, despite the jury costs being the most expensive and the cost that demands the most scrutiny to protect his right to trial, the court concluded Westfall could afford them. If Westfall had the ability to pay anything the district court should have recommended the discretionary technology fee and the public defender fee, not the jury costs that also runs the risk of undermining his right to a jury trial.

Additionally, the State never provided the district court with any documentation that it or any other agency actually paid Dr. Blanton-Dickens $3,000. The district court recommended $3,000 in costs be awarded to Dr. Joshua Blanton-Dickens in lost wages because he was an on-call witness for two days. As defense counsel explained, general costs "must be limited to expenses specifically incurred by the prosecution or other agency[.]" (D.C. Doc. 82, at 5 (citing Mont. Code Ann. § 46-18-232(1).) Although Dr. Blanton-Dickens provided a letter stating he cleared his schedule for two days and earns $1,500 per day,

his assertions do not meet the requirements of Mont. Code Ann. § 46-18-232(1). The State additionally needed to indicate that it or some other State agency incurred that cost as a result. Therefore, the imposition of a $3,000 jury cost is illegal on its face.

CONCLUSION

Jeffrey Allen Westfall respectfully requests this Court vacate his conviction and remand the case with an order for the district court to order a fitness evaluation and subsequently follow the procedures outlined in Montana Code Annotated § 46-14-202, et. seq. Additionally, Westfall requests that this Court order he cannot be punished, if convicted on a re-trial, of both aggravated assault and felony sexual assault. Lastly, Westfall requests this Court order the district court to strike the parole recommendation that he pay the cost of the jury trial and PSI fee from the Judgment because Westfall lacks any ability to pay.

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Respectfully submitted this 19th day of June, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately 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 8,082, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Carolyn Gibadlo
CAROLYN GIBADLO

APPENDIX

CERTIFICATE OF SERVICE

I, Carolyn Marlar Gibadlo, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 06-19-2023:

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