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STATE OF MONTANA
Case Number: DA 22-0280

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0280

STATE OF MONTANA,

Plaintiff and Appellee,

v.

MIKEL STETSON LETHERMAN,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, the Honorable Donald L. Harris, Presiding

APPEARANCES:

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
AlexPyle@mt.gov
(406) 444-9505

ATTORNEYS FOR DEFENDANT
AND APPELLANT

AUSTIN KNUDSEN
Montana Attorney General
CORY LOSING
Assistant Attorney General
P.O. Box 201401
Helena, MT 59620-1401

SCOTT D. TWITO
Yellowstone County Attorney
VICTORIA CALENDER
Deputy County Attorney
P.O. Box 35025
Billings, MT 59101

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

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REPLY BRIEF OF APPELLANT

Mikel's opening brief calls the State on repeatedly misdefining an element of bail jumping in its arguments to the jury. The appealed statements lowered the State's burden and may well have robbed Mikel of the jury's fair assessment of the charged offense. The unapologetic nature of the State's response indicates that, left unchecked, the State will continue this sort of misconduct in future cases. The system's integrity, and fairness to Mikel and other defendants, agitates for this Court to intercede.

I. The State's position and direction to the jury—that the lawful excuse element "requires" a judge to assess an excuse as valid—is legally false.

At trial, the prosecutor told Mikel's jury that a lawful excuse "means an order from a court," "means what a court says," is not present if a "lawful excuse ha[s] not been granted," and explained that what's "called a lawful excuse" is "an order" "by a court" granting a continuance. (11/29 Tr. at 176, 177, 184.) On appeal, the State's brief stands by the prosecutor's statements. The prosecutor's statements, says the State, were "not an incorrect statement of the law." (Appellee's Br. at 14.)

The State barely supports that contention. The State simply notes the Model Penal Code (MPC) comment that bail jumping "does not define the phrase [lawful excuse], leaving it to the courts to determine the validity of an excuse." (Appellee's Br. at 14 (citing 2 Model Penal Code and Commentaries (Official Draft and Revised Comments) § 242.8, p. 284 (Am. Law Inst. 1980)).) From there, the State simply reasons, "[a]ccordingly . . . a lawful excuse is what the judge says"—which, as the prosecutor said, is through "an order from a court." (Appellee's Br. at 14.)

Thus, the State's analysis equates, one-for-one, "the courts," referenced by the MPC comment, with *a court order*, issued before trial, prejudging the reasons for the defendant's absence. The State does not cite anything supporting that leap. (*See* Appellee's Br. at 14.) Indeed, the leap disregards that the court actor that our system charges with determining facts, applying them to elements of an offense, and assessing culpability is the jury, not the judge. *See* Mont. Code Ann. § 46-16-103(2) ("Questions of law must be decided by the court and question of fact by the jury.").

Of course, through statutory construction, judges may define the meaning of an offense and its elements. *McLaughlin v. Mont. State Legislature*, 2021 MT 178, ¶ 18, 405 Mont. 1, 493 P.3d 980 ("It is emphatically the province and the duty of the judicial department to say what the law is.") (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)). And judges may instruct juries according to that meaning. *See State v. Archambault*, 2007 MT 26, ¶ 25, 336 Mont. 6, 152 P.3d 698 (explaining the role of the court to "fully and fairly instruct the jury regarding the applicable law"). Bail jumping's "without lawful excuse" element is susceptible to such construction and instruction.

But here, there was no court instruction to the jury on the meaning of the "without lawful excuse" element. So, the prosecutor's comments cannot be interpreted to mean the "without lawful excuse" element means what "the judge says" via instruction. Rather, what the prosecutor told the jury was that the "without lawful excuse" element is necessarily satisfied by the lack of a court order prejudging the defendant and giving the defendant permission to miss or to have missed a hearing. (11/29 Tr. at 176, 177, 184.)

The bail jumping offense, however, contradicts that understanding. Statutes must be understood and construed "as a whole to avoid an absurd result and to give effect to a statute's purpose." *State v. Lodahl*, 2021 MT 156, ¶ 16, 404 Mont. 362, 491 P.3 661) (quoting *State v. Brendal*, 2009 MT 236, ¶ 18, 351 Mont. 395, 213 P.3d 448). The "[s]cope" and purpose of the MPC and Montana bail jumping offense is "to deter those who would obstruct justice by failure to appear for trial or service of sentence." 2 Model Penal Code and Commentaries § 242.8, p. 283. The statute exists to provide "a greater deterrent than any anticipated financial loss" to such would-be obstructionists. Mont. Crim. Law Comm'n Comments, § 45-7-308.

As used in both MPC § 242.8 and Mont. Code Ann. § 45-7-308, the "without lawful excuse" element ensures the bail jumping offense applies only where its added measure of deterrence is called for. A defendant's refusal to face responsibility, intent to escape punishment, and intent to frustrate justice all are *not* lawful excuses for failing to appear, because all amount to purposeful obstruction, and crediting such excuses would defeat the bail jumping statute's reason for existence. *See Love v. Butler*, 952 F.2d 10, 12 n. 2 (1st Cir. 1991) (noting

a judge giving these examples of what is not a "sufficient excuse" under Massachusetts's bail jumping offense).

On the other hand, a lawful excuse "[o]bviously" includes and "exempt[s]" from the statute's reach "accident, illness, and the like" that "prevent[]" the defendant's appearance. 2 Model Penal Code and Commentaries § 242.8, p. 284. Why? Because these are reasons for absence that do not go to an intent to obstruct justice. A bail jumping conviction is harsh medicine—it is a potential felony carrying ten years in prison. Section 45-7-308(4). The law provides plenty of less crushing means (*e.g.*, contempt, revocation of release, forfeiture of bond, warning, or even understanding) to address defendants who are absent in circumstances that prevent the State from proving there was no "lawful excuse" for the absence. The Legislature intended the greater deterrent of a bail jumping conviction not to apply in such situations, and the "without lawful excuse" element, correctly interpreted, ensures that exemption. A court order has nothing to do with it.

Even looking beyond the offense's purpose, it is clear that a "lawful excuse" does not "mean[] an order from a court." (*Contra* 11/29 Tr. at 176.) The Legislature knows how to make an element of bail

jumping turn on a court order: The offense separately requires a defendant to have "been set at liberty by *court order* . . . upon condition that the person will subsequently appear at a specified time and place." Section 45-7-308(1) (emphasis supplied); *see also* Mont. Code Ann. § 46-5-631, -632, -633, -634 (explicitly using the term "court order" in offenses where the Legislature intends a court order requirement to apply). That variation has presumptive meaning and requires treating "lawful excuse" differently than "court order." "Because the enacting Legislature did not use identical language in the two provisions, it is proper . . . to assume that a different statutory meaning was intended." *Zinvest, LLC v. Gunnersfield Enters., Inc.*, 2017 MT 1270, ¶ 26, 389 Mont. 334, 405 P.3d 1270.

Two more things may be said about the State's construction, which effectively replaces bail jumping's "lawful excuse" element with a second "court order" element. First, the replacement plainly violates the rule not to "insert what has been omitted or omit what has been inserted." Mont. Code Ann. § 1-2-101. Second, the replacement leads to an absurdly "circular" construction of the statute (*see* Appellee's Br. at 14), as the opening brief explains. (*See* Appellant's Br. at 17–18.)

Caselaw from other jurisdictions also bespeaks the novelty of the State's construction. Several other jurisdictions have bail jumping offenses with elements similar to § 45-7-308's "without lawful excuse" element. *See* Ark. Code Ann. § 5-54-120; Ga. Code Ann. § 16-10-51; Idaho Code Ann. § 18-7401; Mass. Gen. Laws Ann. ch. 276, § 82A; N.J. Stat. Ann. 2c:29-7; 18 Pa. Cons. Stat. Ann. § 5124. But the State cites no jurisdiction—and Mikel can find none—that has interpreted a "lawful excuse" or equivalent element to mean and require a court order excusing the defendant's presence from a hearing. Rather, out-of-state authority contradicts such an interpretation. (*See* Appellant's Br. at 16 (discussing *New Jersey v. Emmons*, 936 A.2d 459, 463 (N.J. Super Ct. App. Div. 2007)).)

What the prosecutor told the jury—and what the State defends on appeal—is an incorrect interpretation of the law, made up by the prosecutor in closing arguments to lower the State's burden and secure Mikel's conviction, the law notwithstanding.

II. The prosecutor's misconduct was not "one statement," it was not divorced "from the entirety of the State's closing argument," and it was not supported by evidence.

The State asserts Mikel's appeal is based on "one statement" that is "divorce[d] . . . from the entirety of the State's closing argument" and "the evidence supported the State's comments." (Appellee's Br. at 9.) All these claims are false.

To start, Mikel's appeal is based on *several statements* comprising misconduct. (*See* Appellant's Br. at 13–14.) In three different passages, the prosecutor told Mikel's jury that a lawful excuse "means an order from a court," "means what a court says," is not present if a "lawful excuse ha[s] not been granted," and explained that what's "called a lawful excuse" is "an order" "by a court" granting a continuance. (11/29 Tr. at 176, 177, 184.) A single statement or instance of misconduct this was not.

The statements also were not "divorce[d] . . . from the entirety of the State's closing argument" claim. (*Contra* Appellee's Br. at 9.) The prosecutor's closing arguments in total fill less than ten pages of transcript. (*See* Trial at 173–178, 182–85.) The prosecutor's entire argument on the "without lawful excuse" element in those pages centers

on misdefining the element and requesting a conviction on that basis. (*See* Trial at 173–178, 182–85.) On an essential element that the State had to prove beyond a reasonable doubt, the State's repeated misstatements of the law were not separate from the State's closing argument; they *were* the State's closing argument.

Finally, the evidence did not support the State's misstatements of the law. (*Contra* Appellee's Br. at 9.) In asserting a lawful excuse "means an order from a court," the prosecutor did say this was the meaning of the element "in the legal world, as you heard from witnesses." (11/29 Tr. at 176.) But, tellingly, the State's brief points to no witness testimony supporting the prosecutor. (*See* Appellee's Br.) No lawyers or judges from "the legal world" testified regarding what a "lawful excuse" means, and a prosecutor's statements to that effect "are not evidence." *State v. Stuart*, 2001 MT 178, ¶ 22, 306 Mont. 189, 31 P.3d 353. While there was testimony that Mikel moved for a continuance and the court did not act upon the motion before the hearing, the prosecutor's assertion that a lawful excuse "means an order from the court" was a legal conclusion from "the legal world"—not a factual statement—off of which the prosecutor argued for conviction.

Closing arguments are not the Wild West, and anything does not go. If the prosecutor wanted to convict Mikel based on her misinterpretation of the law, that needed to have been litigated (and rejected) in settling jury instructions, not fabricated and asserted to the jury in closing arguments.

III. The prosecutor fostered the possibility of wrongful conviction.

Having been misdirected by the prosecutor on what a lawful excuse requires, Mikel's jury received no instruction correctly defining that element, and the jury heard no response from defense counsel or the court explaining that the prosecutor was mistaken. (*See* Appellant's Br. at 23.)

Nonetheless, the State seems to believe a prosecutor's misstatements of law, no matter how wrong, cannot cause prejudice so long as the jury receives the standard instruction, given at the beginning of every trial, that the jury "should not accept anyone else's version as to what the law is in this case." (*See* Appellee's Br. at 12–13 (citing 11/29 Tr. at 16); *see* also Mont. Crim. Jury Instruct. 1-102.) Yet, in *State v. Lawrence*, 2016 MT 346, 386 Mont. 86, 385 P.3d 968, the jury received that same standard instruction, *see Lawrence,* ¶ 36 (McGrath,

C.J., dissenting, with Rice, J., joining), and the jury was even at one point instructed contrarily to the State's statements, *see Lawrence*, ¶ 19. Nonetheless, this Court rightfully reversed based on the prosecutor's misstatement of key legal principle. *Lawrence*, ¶¶ 21–22. Likewise, determining a defendant's guilt for an offense based on what the offense actually means is a key legal principle. (*See* Appellant's Br. at 19–20 (*citing, e.g.*, *State v. Lambert*, 280 Mont. 231, 237, 929 P.2d 846, 850 (1996)).) And here, at no point did the jury receive an instruction correctly defining "without lawful excuse"—the sort of instruction that could immunize a jury from the prosecutor misleading them on an element.

Under the facts, the prosecutor's misstatements of the law were "apt to carry much weight" when they should have "properly carr[ied] none." *Lawrence*, ¶ 20 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). The evidence supported excuses for Mikel missing the hearing that were not about an intent to obstruct justice and thus were lawful: he was representing himself with no training, he repeatedly attended all prior hearings, he tried to continue this hearing, he didn't figure out this hearing's exact time and that it was going forward until

immediately before it began, he could not wrangle his children into the car in time to get to the hearing, and when he arrived at the courthouse late, he called and was told there was no use coming in. (*See* Appellant's Br. at 20–21.) Through the "without lawful excuse" element, these excuses plausibly "exempt[ed]" Mikel from bail jumping's harsh punishment. 2 Model Penal Code and Commentaries § 242.8, p. 284. But the prosecutor's erroneous definition of "without lawful excuse," repeatedly asserted in closing arguments, had the natural effect of rendering these excuses meaningless to Mikel's jury, the law notwithstanding.

CONCLUSION

This Court should use plain error review to reverse the bail jumping felony that the prosecutor obtained upon misleading the jury on the meaning of an essential element.

Respectfully submitted this 28th day of July, 2023.

OFFICE OF STATE PUBLIC DEFENDER
APPELLATE DEFENDER DIVISION
P.O. Box 200147
Helena, MT 59620-0147

By: /s/ Alexander H. Pyle
ALEXANDER H. PYLE
Assistant Appellate Defender

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply 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 2,360, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Alexander H. Pyle
ALEXANDER H. PYLE

CERTIFICATE OF SERVICE

I, Alexander H. Pyle, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 07-28-2023:

Scott D. Twito (Govt Attorney)
PO Box 35025
Billings MT 59107
Representing: State of Montana
Service Method: eService

Cori Danielle Losing (Govt Attorney)
215 North Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Electronically signed by Pamela S. Rossi on behalf of Alexander H. Pyle
Dated: 07-28-2023