IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0378

STATE OF MONTANA,

Plaintiff and Appellee,

v.

RALPH DEAVILA,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, The Honorable Rod Souza, Presiding

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STATEMENT OF THE ISSUES

Whether—for one comment in closing argument to which Appellant objected—Appellant has met his burden to show that the prosecutor's comment was improper and prejudiced Appellant's right to a fair and impartial trial.

Whether this Court should exercise its sparingly used plain error standard to review Appellant's other unpreserved prosecutorial misconduct claims. If so, whether the combined effect of the multiple alleged errors—in any combination—entitle Appellant to reversal of his convictions.

STATEMENT OF THE CASE

Appellant Ralph Deavila was charged with felony DUI, operating a motor vehicle without liability protection, unlawful possession of an open alcoholic beverage container in motor vehicle on highway, operating a vehicle without proper registration, and driving across the central dividing section of a controlled access highway.[1] (Doc. 4.) A jury convicted Deavila of all charges. (Docs. 59-64; Trial Tr. at 262-63.)

For felony DUI, the district court sentenced Deavila as a persistent felony offender to eight years at the Montana State Prison. For his misdemeanor offenses,

[1]Deavila was also charged with driving while suspended, which he pleaded guilty to prior to trial. (7/21/21 Tr. at 32-37.)

Deavila received concurrent fines and sentences. (Sentencing Tr. at 19; Doc. 90, *available at* Appellant's App. A.) Deavila appeals, raising one preserved claim and various unpreserved claims alleging prosecutorial misconduct.

STATEMENT OF THE FACTS

I. The offense

On November 3, 2020, at around 6 p.m., Trooper Jeremy Lundblad was driving his marked Montana Highway Patrol vehicle westbound on I-90 near Billings, heading home from his shift. (Trial Tr. at 130-31.) Trooper Lundblad observed a pickup truck in the fast lane, traveling at a slow speed, less than 35 miles per hour (mph). (*Id*.) He almost rear-ended the truck. (*Id*. at 131.) The speed limit is 65 mph on the interstate area surrounding Billings. (*Id*. at 121.)

Next, the truck turned into the "Authorized Vehicles Only" paved section between the eastbound and westbound lanes of traffic, a turnaround area designated for emergency or construction vehicle use only. (Trial Tr. at 132.) Trooper Lundblad initiated a traffic stop in the turnaround area. (*Id*. at 132-33.) He identified the driver as Ralph Deavila. (*Id*. at 133.) He told Deavila that the turnaround was for authorized personnel only. (*Id*.) Deavila responded that he was trying to turn around. (*Id*. at 133-34.) Trooper Lundblad did not smell any odors of alcohol, explaining that because he had just had COVID, he could not

smell anything for months. (*Id*. at 134.) He did notice Deavila's headlights were "dim" and hard to see. (*Id*. at 135-36.)

Trooper Lundblad did not ask for any documentation because he was already off-duty and just wanted to "give [Deavila] a lesson" to inform him about the turnaround's use. (Trial Tr. at 134.) He was "pretty much" giving Deavila a break. (*Id*.) He instructed Deavila that, when it was safe to do so, proceed to pull out back onto the highway. (Trial Tr. at 136.) Trooper Lundblad returned to his patrol vehicle. (*Id*. at 137.)

Around the same time, Benjamin Rush was driving eastbound on I-90 toward Billings, on his way home from Joliet. (Trial Tr. at 120, 123-24.) The road conditions were dry and clear and it was dark outside. (*Id*. at 121, 124.) Rush was driving the speed limit, 65 mph, in the right lane. (*Id*. at 124, 127.)

Rush observed a vehicle "slightly off the road" and apparently "without any lights on" on the centerline median. (Trial Tr. at 120, 125, 126-27.) Next, Rush "glanced down real quick to change a song[,]" and looked back up to realize the vehicle was right "in front" of him. (*Id*. at 120.) He "barely had time to brake," and started braking "as much as possible[,]" but still collided with the back of Deavila's truck. (*Id*.)

Rush's vehicle was totaled, and it remained in the lane of travel. (Trial Tr. at 121.) He called 911. (*Id*. at 122.) The crash occurred between the Zoo Drive and the King Avenue offramp exits. (*Id*. at 169.)

After returning to his vehicle, Trooper Lundblad heard a crash. (Trial Tr. at 136.) He saw that Deavila's truck had been rear-ended by another vehicle. (*Id*.) He reactivated his emergency lights and pulled into the eastbound side of the interstate behind both vehicles. (*Id*.) He checked on both drivers and confirmed their respective identities. (Trial Tr. at 137.) Deavila did not provide proof of insurance or registration. (*Id*. at 138.)

Trooper Jared Delaney was dispatched to the crash site and took over the investigation after receiving a briefing from Trooper Lundblad. Trooper Lundblad went home. (Trial Tr. at 138-39, 169, 172.) Trooper Delaney observed that the crash had occurred within 100 yards of the Authorized Vehicle Only area. (Trial Tr. at 171.) He saw a large fire engine parked in the driving lane behind the crashed vehicles. (Trial Tr. at 169; State's Ex. 2, offered and admitted at Trial Tr. at 170.) He contacted Rush, who relayed that Deavila's vehicle had been either "motionless in traffic or barely moving" and Rush "did not have time to stop in time to avoid the collision." (*Id*. at 173.)

Trooper Delaney's investigation was delayed for ten minutes when "chaos ensued[]" due to a U-Haul truck failing to see any of the flashing lights and

sideswiping and disabling the officers' vehicles. The U-Haul too was disabled when the axle broke from the vehicle. (Trial Tr. at 176-78.) More emergency vehicles responded. (*Id*.)

Trooper Delaney returned to his investigation and contacted Deavila. Deavila explained that he had utilized the centerline "Authorized Vehicle Only" Area because he had "missed the turn" at the King Avenue exit. Trooper Delaney noted that Deavila could have turned safely at the Zoo Drive exit, but Deavila explained he was not aware of that exit. He found Deavila's admission suspicious because Deavila had been living in Billings "for a very extended amount of time, if not nearly his whole life." (Trial Tr. at 179.) Trooper Delany reconstructed how the crash occurred based on the location of the Authorized Vehicle Area and the point of impact:

> Vehicle 1, the Defendant's, was in the Authorized Vehicles Only crossover, lead-in crossing, proceeded to exit, and rather than move into the passing lane, which is the one we usually use, the fastest one, cut across both lanes into the driving lane whereby the vehicle of Mr. Rush's wasn't able to stop in time and the two collided.

(*Id*. at 183.) This driving behavior was also suspicious because drifting across both lanes of travel from the Authorized Vehicle Only area "is a very unsafe maneuver." (*Id*.) Trooper Delaney explained that "[m]oving from an authorized crossover or a stopped position, across two lanes of traffic, is very risky." (*Id*.) Thus, the totality of the driving behavior, including "passing a well marked and

known exit, taking a crossover turn when the next exit is within eyesight, and then not matching highway speed, taking a wide curve out of there, not accelerating[,]" was concerning and suspicious. (Trial Tr. at 185.)

While visiting with the female passenger in Deavila's vehicle to ensure she had transportation, Trooper Delaney saw a Chelada Bud Light alcoholic drink in the vehicle. (*Id*. at 186.) Some of the can had been spilled on the center console and probably a tablespoon of liquid remained in the can. (*Id*. at 186, 202.) Deavila claimed ownership of the can. (*Id*. at 186-87.)

Initially, Deavila did not ask Trooper Delaney for medical assistance. But later, he told a first responder he wished to be transported for a medical evaluation. (Trial Tr. at 184.) Trooper Delaney contacted Deavila in the ambulance before it departed. He observed that Deavila had "red, watery, bloodshot eyes, kind of a dazed expression on his face" and his speech pattern was "slightly slurred." (*Id*.) Trooper Delaney asked Deavila if a blood test "would prove his innocence." Deavila responded that it would. (Trial Tr. at 209.) The ambulance took Deavila to the hospital. Trooper Delaney transported Deavila's passenger to a motel, then traveled to the hospital himself. (*Id*. at 189.)

Trooper Jason Fredenberg was called to the hospital to conduct the blood draw. (Trial Tr. at 152-53.) He read the Implied Consent Advisory in its entirety to Deavila. (*Id*. at 154, 159.) He explained that Deavila's "ability to give a blood

test is implied when you get [a] driver's license" and detailed the consequences for failing to provide a blood sample upon request. (Trial Tr. at 154; *see also* State's Ex 1, offered and admitted at 151, published at 161.) Deavila refused to provide a blood sample, and Trooper Fredenberg left him in the hospital's care and went to procure an application for a search warrant for a legal blood draw. (Trial Tr. at 155.)

Trooper Fredenberg and Trooper Delaney worked together to obtain the warrant. (*Id*. at 191.) After obtaining the warrant and arriving back to the hospital, hospital staff explained that "almost immediately upon Trooper Fredenberg's exit, [Deavila] denied additional medical care," despite the fact that he was "supposed to be going to get an x-ray," and he "left the hospital against medical advice." (*Id*. at 156, 191-92.)

Thus, the troopers were not able to obtain a blood sample. (Trial Tr. at 155.) To Trooper Delaney, this indicated that Deavila "was trying to flee the investigation and the wrongdoing he had committed." (*Id*. at 192.) Trooper Delaney noted it was typical for a defendant to change their mind about the blood draw to try to delay the investigation to diminish the amount of alcohol or other impairments in the body. (*Id*. at 190.)

While Trooper Delaney repeatedly tried to contact Deavila, he believed that Deavila's goal was to "avoid contact[.]" (*Id*. at 193.) And although Deavila's

vehicle had been towed, Deavila never attempted to retrieve it. (*Id*.) Deavila had also abandoned the contents of the vehicle. The vehicle was "nearly full" of cargo compartments in the interior. (*Id*. at 192-93.)

Finally, on November 10, 2020, Deavila agreed to speak with Trooper Delaney. (Trial Tr. at 193.) In response to Trooper Delaney's questions about why he left the hospital, Deavila responded that "he did not want to be UAed." (*Id*.)[2] Deavila also admitted "he had been drinking earlier in the day and then quit." (*Id*. at 194.) Deavila again confirmed that he was drinking the Chelada alcoholic drink found in his vehicle. (*Id*. at 194-95.)

II. Voir Dire

During voir dire, the State explained to the prospective jurors that "Montana law does not require a breath or blood test to convict a person of driving while

[2]The State played for the jury Trooper Delaney's conversation with Deavila. (State's Ex. 9, *offered, admitted, and published at* Trial Tr. at 196.) Deavila affirmed that as soon as Trooper Fredenberg stepped out of the room, Deavila left the hospital. He explained:

[DEAVILA]: Yeah I did [leave]. I didn't want to be bothered with that.

[TROOPER]: Bothered with which part?

[DEAVILA]: With the. . . the UA thing . . . or the blood draw or whatever.

(State's Ex. 9 at 5:45:36 – 5:45:44.)

under the influence." The State further explained that "[t]o prove that a person is under the influence, the State need only show that a person's ability to safely operate a motor vehicle" has been "diminished." (Trial Tr. at 34.) After discussing what driving behavior might constitute signs of diminishment, the State questioned the jurors on the refusal of a blood test:

> [**STATE**]: In this case, I anticipate you will hear that the Defendant refused to provide a blood or breath test. Let's go, Ms. Folkerts, why do you suppose someone might refuse a breath or blood test?
>
> [**PROSPECTIVE JUROR FOLKERTS**]: If they know that they have indeed been drinking and they don't want anybody to know, they'll probably refuse.
>
> [**STATE**]: Okay.
>
> * * *
>
> [**STATE**]: Does anyone have any other reason why someone might refuse a breath or blood test?

(*Id*. at 41.) Other reasons were brought up such as privacy, civil rights, and possible medical reasons. (*Id*. at 42-43.) After asking questions about the effect of lack of proof of a blood or breath test, the State continued:

> [**STATE**]: Anyone else who would have problems convicting if we didn't have a blood or breath test?
>
> (No response.)
>
> [**STATE**]: No? Seeing no hands. And does everyone here understand that the law does not require a number or a toxicology report, driving under the influence just means you're [sic] ability to operate a motor vehicle is impaired. Anyone have a problem with that?

(No response.)

(*Id*. at 46.) The State explained that under suspicion of a DUI, "if you refuse that blood or breath test, your driver's license could be suspended for six months to a year." (*Id*. at 46-47.) The State proceeded to ask how important driver's licenses were and whether the prospective jurors would give up their license to avoid the test:

> **[STATE]**: Who here would give up their driver's license from six months up to a year to avoid taking a blood or breath test if they were presumed to be under the influence?
>
> (No response.)
>
> **[STATE]**: Ms. Brailer.
>
> [**PROSPECTIVE JUROR BRAILER**]: I think it would depend on the penalty, if I knew I was going to lose my license permanently if I was impaired, then I might take that risk.
>
> [**STATE**] Okay. And would it also factor in if the law then presumes that you may be under the influence?
>
> [**PROSPECTIVE JUROR BRAILER**]: That would factor in, yeah.

(Trial Tr. at 48-49.)

Deavila's theme of voir dire was that the State's case was entirely based on "circumstantial evidence." (Trial Tr. at 71.) Defense counsel explained, "I think you are going to hear testimony that Mr. Deavila refused a blood test, and the State's going to ask you to make inferences based on that . . . ." (*Id*. at 73.) Defense counsel asked the prospective jurors about the concept of whether any

particular inference, standing alone, could support a conviction beyond a reasonable doubt. (*Id*. at 73-85.)

III. Closing argument

A. State's closing

While summarizing the State's evidence, the State explained in closing argument:

> You heard Trooper Delaney testify that upon making contact with the Defendant after the accident, he observed signs of impairment.
>
> You heard Trooper Delaney testify that the Defendant's decision to pull out of the Interstate and cross the lane of traffic was dangerous.
>
> Ladies and gentlemen, there is one person in this courtroom who knows how much the Defendant had to drink on October [sic] 3rd of 2020, think about who that is and why that is.
>
> In voir dire, [the other prosecutor] talked with you about the evidence you might like to see in a DUI trial as a juror, a blood alcohol concentration number or a toxicology number. But as you heard throughout this trial, we don't have that evidence. We don't have the evidence because the defendant refused to provide a blood sample, and he left the hospital before a blood sample could be obtained in service of the warrant that was granted.
>
> [The other prosecutor] also talked with you about how important a driver's license is to most of us here in Montana. And talked about how choosing to refuse to provide a breath or blood sample comes with the consequence of losing your driver's license for at least six months. Yet the defendant, the only person in this room who knows how much he had to drink on November 3rd, considered

the consequence while he was in the ambulance on his way to the hospital.

And you heard Trooper Fredenberg testify that, once at the hospital, the Defendant immediately refused to provide a blood sample. You heard Trooper Fredenberg and Trooper Delaney explain that they specifically requested a blood sample because the Defendant was already at the hospital where a blood sample could be easily obtained and where there was not an Intoxilyzer available to obtain a breath sample.

You then heard the Defendant say to Trooper Delaney that he abruptly terminated his medical treatment after being transported to the hospital in an ambulance because he did not want to provide a UA.

A refusal is important evidence, ladies and gentlemen. As Judge Souza instructed you, the law is that if a person refuses to submit to a physical test or a test of their breath or blood for alcohol concentration, such a refusal is admissible evidence, and you may infer from that refusal that the person was under the influence. He also instructed you that that inference is rebuttable, but has the Defendant done that?

Members of the jury, the State submits to you that there is no reasonable doubt that the Defendant was driving or in actual physical control of a motor vehicle upon ways of the state open to this public while under the influence of alcohol.

(Trial Tr. at 237-39.)

B. Defense's closing

In response, Deavila argued that "there is no direct evidence of intoxication" and the State failed to prove the intoxication element beyond a reasonable doubt. (Trial Tr. at 240.) Defense counsel explained that the beyond a reasonable doubt standard was greater than preponderance and clear and convincing evidence. (*Id.*

at 241.) Defense counsel argued that the State was merely attempting to convict Deavila because of his "bad driving[.]" (*Id*. at 249.)

After explaining perceived gaps in the State's case, defense counsel reminded the jury of Deavila's constitutional right to not testify:

> On that point, Mr. Deavila has a constitutional right not to testify, and that right is so sacred that you're not allowed to even consider it when you go back to deliberate. Nevertheless, I always get a little bit worried that in the backs of your minds, you are thinking, if Mr. Deavila was innocent, why wouldn't he testify?
>
> * * *
>
> Also, he didn't have to testify because you already heard what he had to say, because he told Trooper Delaney. He told Trooper Delaney that he had had alcohol, yes, much earlier in the day. Before he went to the hospital, he told Trooper Delaney that a blood test would show that he wasn't under the influence. That's a key point. Remember, that was before he went to the hospital.

(Trial Tr. at 246.)

Next, defense counsel urged the jury to not form any inference regarding Deavila's refusal to submit to a blood draw:

> [**DEFENSE COUNSEL**]: Now, this is the crown jewel of the State's case, the fact that Mr. Deavila declined to submit to a blood test once he got to the hospital. You may infer that Mr. Deavila's refusal of consent is evidence of being under the influence, you don't have to, but you may. But even if you do make that inference, does that convince you beyond a reasonable doubt that he was under the influence?
>
> Now, there are plenty of reasons why somebody might decline to submit to a blood draw. Remember also that Mr. Deavila was never offered a breath test. Something that could have been done in

> the field before he went to the hospital, he wasn't offered a breath test then, arguably he wasn't even offered a blood test then before he went to the hospital, but he was offered a blood test at the hospital.
>
> Now, Mr. Deavila, like many people, may—and I'm just going to throw some stuff out there, we don't know, but Mr. Deavila could have heard some bad legal advice in the past. Mr. Deavila could have heard the advice that if you get pulled over and investigated for DUI—
>
> [**STATE**]: Your Honor, objection, facts not in evidence.
>
> [**COURT**]: Sustained.
>
> [**DEFENSE COUNSEL**]: Regardless, I think the key fact here is that Mr. Deavila said, before he went to the hospital, that the blood test would prove that he was not under the influence, then he went to the hospital because he was injured in the accident, he was in pain, he was transported to hospital, and then approximately an hour and a half later, Trooper Fredenberg came down to the hospital and asked for consent for the blood draw. What happened in that intervening hour and a half? What sort of medical treatment did he get for his pain?

(Trial Tr. at 247-48.)

Finally, defense counsel wrapped up closing argument by criticizing the State for failing to present certain evidence, particularly the State's failure to call the passenger in Deavila's vehicle to testify:

> Then, ladies and gentlemen, there is the evidence that the State does not have, evidence the State did not present. There were other witnesses, he was transported to the hospital in an ambulance, ambulances have crews. Why weren't they here testifying to all the signs of intoxication. Medical staff, the folks treating him, they weren't here testifying.

> There was a passenger, if anybody would be in a position to know whether Mr. Deavila was drinking, it would be that passenger. She didn't testify.
>
> The State has no direct evidence that Mr. Deavila was under the influence. They are asking you to convict him based entirely on inferences from circumstantial evidence.

(Trial Tr. at 248-49.) Defense counsel continued to explain how the State failed to obtain "breathalyzer tests and blood tests." (*Id*. at 249.) Defense counsel continued that the State's evidence was "not sufficient evidence beyond a reasonable doubt, ladies and gentlemen." (*Id*.)

C. State's rebuttal closing

In rebuttal closing, the State explained the progression of Deavila's actions and statements prior to fleeing from the hospital:

> So the defendant goes to the hospital. He was in so much pain he wanted to go to the hospital. And as Trooper Delaney told you in the back of that ambulance, before we went to the hospital, Trooper Delaney asked if a blood draw would prove his innocence, the Defendant says yes.
>
> And then he had that whole time, all the way up to the hospital to think about whether that blood draw would actually prove his innocence.
>
> And the moment Trooper Fredenberg, you heard him testify, first sentence, no.
>
> We talked in voir dire, why would someone refuse that. In Montana it's implied that you consent to that. Why? Because we only want safe drivers that aren't impaired on our roads.

So he says no. And then he just walks out of the hospital. Doesn't care about his elbow anymore and just walks out.

Trooper Delaney responds to the room, once he gets back up there, Defendant's gone. Then the Defendant takes off.

And Trooper Delaney testified to you that he tried to get in contact with the Defendant for a week. Defendant didn't know where his vehicle was, didn't know where all of his personal belongings were that were in the vehicle. He didn't care.

What he had just done is, gone to the hospital, avoided a blood test, he didn't want further contact with these troopers. Why? The State would submit to you because he knew he was under the influence and he knew he was going to get cited with a DUI. He did everything in his power to try and impede law enforcement's ability to investigate this properly and give you guys a toxicology report. But we don't have that.

(Trial Tr. at 254-56.) The State again addressed Deavila's failure to submit to a blood test:

The Defendant then tells you, and I think this is a very key piece of evidence, he tells you he didn't want to be UAed. In voir dire we talked about reasons why someone wouldn't submit to a breath test or a blood test. I believe one of your fellow jury panelists said, you know, diabetes, someone said they just may not want to.

Here, the Defendant in fact told you he did not want to get UAed, he did not want his blood to show what was in his system and how much was in his system.

(Trial Tr. at 256.) Finally, the State addressed Deavila's argument that the State should have called the passenger to testify:

[**STATE**]: Defense—the last thing I'll touch on here is, the Defense submitted to you a lot of what the State didn't bring to you.

[**COURT**]: And you are at five minutes.

[**STATE**]: Thank you, Your Honor.

The State would submit to you, we didn't need to. And as Defense pointed out, where is this passenger? The one person who could testify to whether the Defendant was drinking only earlier in the day is not here. The one person who could say, no, that was my beer. Although Trooper Delaney testified no one else claimed ownership in that vehicle of that open alcoholic container. Ask yourself, who should that witness testify on behalf?

[**DEFENSE COUNSEL**]: Your Honor, I would object an impermissible shift of burden of proof.

[**COURT**]: Overruled. *State v. Rodarte*, while it is improper for the prosecution to comment on the failure of a defendant to testify on his own behalf, the prosecution is permitted to point out facts at issue which could have been converted [sic, controverted][3] by persons other than the defendant but were not.

This was raised in Defense closing. You may proceed.

(Trial Tr. at 257-58.)

IV. Given jury instructions

A. Defendant's constitutional right not to testify

The district court advised the jury that, in deciding whether to testify, Deavila "may choose to rely on the state of the evidence and upon the failure, if any, of the State to prove beyond a reasonable doubt every essential element of the

[3] *See State v. Rodarte*, 2002 MT 317, ¶ 14, 313 Mont. 131, 60 P.3d 983.

charge against him." (Doc. 58, Given Instr. # 12.) The court further explained that Deavila "has a constitutional right not to testify." (Doc. 58, Given Instr. # 12; Trial Tr. at 22.) The court admonished the jury that they may not "draw any inference" from the defendant's failure to testify or discuss the fact in the deliberations "in any way." (Doc. 58, Given Instr. # 12; Trial Tr. at 22.)

B. State's burden and the presumption of innocence

The court instructed the jury on the definition of guilt "beyond a reasonable doubt" along with the presumption of innocence "throughout every stage of the trial and during your deliberations on the verdict." (Doc. 58, Given Instr. # 5; Trial Tr. at 22.) The court further instructed that Deavila was not "required to prove his innocence or present any evidence." (Doc. 58, Given Instr. # 5; Trial Tr. at 22.)

C. Effect of a blood test refusal

The district court specifically instructed the jury on the effect of the refusal of a blood test:

> If a person refuses to submit to a . . . test of their breath or blood for alcohol concentration, such a refusal is admissible evidence. You may infer from the refusal that the person was under the influence. The inference is rebuttable.

(Trial Tr. at 231; Doc. 58, Given Instr. # 19; *see also* Mont. Code Ann. § 61-8-1018(2), renumbered from Mont. Code Ann. § 61-8-404(3).)

SUMMARY OF THE ARGUMENT

Deavila fails to show that the prosecutor's isolated comment pertaining to the passenger in Deavila's vehicle was improper. As Deavila concedes on appeal (App. Br. at 16), the prosecutor was responding to defense counsel's closing argument questioning why the State did not call the passenger to testify and speculating what her testimony would have shown. In rebuttal closing, the prosecutor responded that it did not need to call the passenger considering Trooper Delaney's testimony affirming that Deavila admitted ownership of the beer can. Under the circumstances, it was not unreasonable for the prosecutor to infer that Deavila failed to call the passenger either to dispute the fact. As this Court has reasoned and as the district court properly concluded, pointing out facts at issue which could have been controverted by persons other than the defendant is not improper. And the comment could not reasonably be taken as implicating Deavila's failure to testify, but rather focused on the passenger.

In any event, Deavila fails to meet his burden to show prejudice from his speculative argument about the prosecutor's knowledge of the passenger's legal status. And Deavila did not suffer prejudice because: (1) the jury was properly instructed on the offense elements along with the instructions on the State's burden of proof, Deavila's constitutional right not to testify, and the presumption of innocence; (2) the State's case was compelling; and (3) the district court, defense

counsel, and the State repeatedly told the jury that the State carried the burden of proof beyond a reasonable doubt.

Next, Deavila fails to show plain error from his multiple unpreserved claims alleging prosecutorial misconduct. For the first time on appeal, Deavila disputes the prosecution's characterization of Deavila's knowledge of how much he had to drink along with the prosecution's comments relating to conversations during the incident of Deavila proving his innocence by agreeing to take a blood draw. In context, the comments at issue bear on the reasonable and legal inference that the jury could make from Deavila's refusal to consent to a blood draw. The comments also reasonably addressed Deavila's consciousness of guilt from such refusal, in conjunction with his flight from the hospital shortly after the police left to obtain a warrant. This Court should further reject Deavila's unpreserved assertion that the prosecutor misstated the standard for the permissible inference for the refusal of a blood draw. Here, the prosecutor repeatedly properly referred to an "inference" rather than a "presumption" in closing argument, and the jury was otherwise given the proper instruction with the "inference" language intact. For similar reasons as his preserved claim, Deavila fails to show prejudice and fails to meet his heavy burden under plain error to reverse his convictions under any combination of claims raised.

ARGUMENT

I. As to his preserved claim, Deavila fails to show the prosecutor committed misconduct and resulting prejudice.

A. Standard of review

"In reviewing a preserved claim of prosecutorial misconduct," this Court "'consider[s] whether the prosecutor's comments were improper and whether they prejudiced the defendant's right to a fair trial.'" *State v. Ritesman*, 2018 MT 55, ¶ 21, 390 Mont. 399, 414 P.3d 261 (citing *State v. Stutzman*, 2017 MT 169, ¶ 16, 388 Mont. 133, 398 P.3d 265.) This Court considers the "alleged improper statements during closing argument in the context of the entire argument." *State v. Lawrence*, 2016 MT 346, ¶ 13, 386 Mont. 86, 385 P.3d 968. This Court "do[es] not presume prejudice from alleged prosecutorial misconduct; rather, the defendant bears the burden of showing that the argument violated his substantial rights." *Ritesman*, ¶ 21 (citing *Lawrence*, ¶ 13).

B. Discussion

Deavila first claims that the prosecutor's error was "commenting on the defense's failure to call" the passenger in Deavila's vehicle to testify. (Appellant's Br. at 6.) Bringing in facts outside the trial record, Deavila explains that the passenger's name was Tara Lovejoy and she had a felony warrant. (*Id*. at 2.) Further, without citation, Deavila claims that he suffered prejudice, alleging without evidentiary support that "[t]he prosecutor knew that the passenger had

been subject to a felony warrant at the time of the accident and thus likely had no desire to have any further involvement in the investigation and the trial."[4] (*Id*. at 14-15.) Accordingly, Deavila argues that the State was wrong for pointing out the missing witness because Deavila speculates that he could not control the witness. Deavila generally argues that the prosecutor's comment implicates the presumption of innocence, Deavila's Fifth Amendment right not to testify, and the State's burden of proof to meet the charges beyond a reasonable doubt. (*Id*. at 9.)

As an initial matter, Deavila mistakenly bases the majority of his argument on a concurrence by Justice Nelson in *State v. Newman*, 2005 MT 348, 330 Mont. 160, 127 P.3d 374.[5] As this Court explained in *Kolb*, the *Newman* concurrence is a "two member" concurrence of justices who "voted to reverse the criminal conviction based on a conclusion that prosecutorial comments during closing argument had deprived the defendant of a fair trial by referring to the defense's

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[4]There is no reference to the passenger's warrant status at the July 2021 trial. The only apparent reference in the record to the passenger's warrant status occurred in *post-trial* briefing pursuant to Deavila's motion for a new trial. The passenger's warrant reference was contained in an internal memorandum created by Trooper Lundblad shortly after the accident (Doc. 82, Exhibit), which the State explained in post-trial briefing it had "obtained a copy of" *after* trial on November 18, 2021. (Doc. 82 at 2.) Thus, Deavila's imputation of any maligned intent at trial based on prosecution's knowledge of the passenger's warrant status as relevant to the passenger possibly invoking her Fifth Amendment right to not incriminate herself is highly speculative.

[5](*See* Appellant's Br. at 9 (citing *Newman*, ¶ 28-30); Appellant's Br. at 10 (citing *Newman*, ¶¶ 23, 26); Appellant's Br. at 15-16 (citing *Newman*, ¶ 27).)

failure to present witnesses to support his theory of the case." *State v. Kolb*, 2009 MT 9, ¶ 26, 349 Mont. 10, 200 P.3d 504. Indeed, because the *Newman* concurrence "represents the view of just two members of the Court," it does "not constitute controlling authority." *Kolb*, ¶ 26 (citation omitted); *see also State v. Makarchuck*, 2009 MT 82, ¶ 25, 349 Mont. 507, 204 P.3d 1213 (affirming this reasoning in *Kolb* that *Newman* has "no precedential value for this issue[.]"). Even assuming the *Newman* concurrence could apply, it is distinguishable because the prosecutor in that case used its closing argument to "repeatedly criticize Newman for failing to present witnesses to corroborate her testimony[,]" *Newman*, ¶ 28, and "aggressively suggested that the jury disregard the presumption of innocence[.]" *Id*. ¶ 32. And in *Newman*, the prosecution also "made references to other matters not in evidence." *State v. Slade*, 2008 MT 341, ¶ 29, 346 Mont. 271, 194 P.3d 677 (citing *Newman*, ¶¶ 28-30, 32, Nelson, J., specially concurring).

This case is instead like *Kolb* and *Rodarte*. For example, in *Kolb*, the defense first brought up the notion of possible witnesses to the incident in question. *Kolb*, ¶ 28. And it was the defense that "pointed out" in "his closing argument" that the "prosecution had failed to call" any of the additional witnesses. *Id*. In closing, the prosecutor stated, "[T]hey keep talking about maybe these three witnesses that were there. Well, [defense counsel] has subpoena power also, did he bring those people in?" *Id*. ¶ 24. Defense counsel objected, explaining that the

defense had no obligation to prove anything. The district court responded that it had already "told the jurors about that." *Id*. And the prosecutor acknowledged the State's burden of proving the case beyond a reasonable doubt. *Id*. ¶ 27. On appeal, this Court held that "placed in context," the prosecutor's comments were not even improper because the State was merely responding to theories raised by the defense and the prosecutor had affirmed to the jury that it still carried the burden of proving the case beyond a reasonable doubt. *Kolb*, ¶¶ 27-29.

Here, like in *Kolb*, there was no issue with the prosecutor's comments in rebuttal closing, comments which were entirely responsive to Deavila's closing argument alleging that the prosecution failed to call the passenger to testify and that the passenger would have "be[en] in a position to know whether Mr. Deavila was drinking." (Trial Tr. at 248-49.) As the district court specifically ruled, the prosecutor's comment was merely based on what was "raised in Defense's closing." In a Hail-Mary attempt, defense counsel raised an issue from the State's failure to call the passenger to contradict Deavila's own admission to Trooper Delaney that the beer can was Deavila's. Thus, like in *Kolb*, it was the defense that first accused the State of failing to call a witness and the prosecutor's statement was merely responsive. And like in *Kolb*, the State explained its burden to prove the case "beyond a reasonable doubt[,]" and explained the pattern instruction. (Trial Tr. at 30.) Even in defense counsel's voir dire, defense counsel recognized

that "I've mentioned several times, and [the prosecutor] mentioned several times, the standard of beyond a reasonable doubt," and further affirmed that the entire panel understood that standard. (Trial Tr. at 85-86.) Finally, the district court instructed the jury on the prosecution's burden. (Doc. 58, Given Instr. # 12.)

Part of the prosecutor's comments also touch on the issue in *Rodarte*, where the prosecutor made comments on "the defense's failure to put on evidence which contradicted testimony of witnesses for the prosecution[.]" *Rodarte*, ¶ 14. This Court explained that "[w]hile it is improper for the prosecution to comment on the failure of a defendant to testify on his own behalf, the prosecution is permitted to point out facts at issue which could have been controverted by persons other than the defendant, but were not." *Id*. (*citing Lockett v. Ohio*, 438 U.S. 586 (1978)). Here, like in *Rodarte*, it was not improper here for the prosecutor to say "we didn't need to" call the passenger to testify because Deavila claimed ownership of the can when speaking with Trooper Delaney, which carried the inference that Deavila failed to contradict Trooper Delaney's testimony by calling the passenger himself. Again, the State was merely responding to Deavila's counsel's criticisms for failing to call the passenger.[6] Far from being improper, this is a reasonable reply to the invited issue raised by defense counsel's closing argument speculating what the

[6]Here, even the charging documents explain that Trooper Delaney had asked the passenger about the beverage and "she denied it was hers." (Doc. 1 at 2; *see also* Doc. 13 at 2-3.)

passenger could have testified to when the State declined to call her. This is not like the situation where the State argued that the evidence at issue could have *only* come from the defendant. *Cf. Town of Columbus v. Harrington*, 2001 MT 258, ¶¶ 19-20, 307 Mont. 215, 36 P.3d 937. And the prosecutor's comment here neither overtly nor implicitly referred to Deavila's own failure to testify. *See United States v. Bagley*, 772 F.2d 482, 494 (9th Cir. 1985) (noting that "[a] prosecutor may properly reply to arguments made by defense counsel, so long as the comment is not manifestly intended to call attention to the defendant's failure to testify.").

But even if Deavila could show that the comment was improper, "such prosecutorial misconduct is not remediable by reversal of conviction absent an affirmative record-based showing by the defendant that the violation actually prejudiced his or her right to a fair trial under the totality of the circumstances." *State v. Miller*, 2022 MT 92, ¶ 36, 408 Mont. 316, 510 P.3d 17 (collecting cases).

Deavila's sole prejudice argument appears to be equating this circumstance with a prosecutor's comment on a coconspirator or codefendant's failure to testify. (*See* Appellant's Br. at 16-17; citing *United States v. Williams*, 2004 U.S. Dist. LEXIS 30842, and *United States v. Viera*, 839 F.2d 1113 (5th Cir. 1988).) That is not the circumstance here, and Deavila's speculation about the prosecutor's possible knowledge of the passenger's warrant status based on the passenger's "likely" reluctance to testify fails for lack of any evidentiary support in the record.

Deavila cannot meet his burden to show prejudice here from the prosecutor's comment. Even assuming the comment could tangentially be viewed as referencing Deavila's right not to testify, ownership of the can (already admittedly belonging to Deavila) would do little to negate the State's compelling evidence of guilt such as: (1) Deavila's admission to drinking that day; (2) Deavila's erratic driving behavior such as driving slowly on the highway, turning into a restricted area while claiming a lack of knowledge of Billings interstate exits when he lived in Billings, and pulling from the restricted area across two lanes into oncoming traffic; (3) Deavila's signs of impairment including slurred speech, watery eyes, and a dazed expression; and (4) Deavila's flight from the hospital when the officers went to obtain a warrant, along with his later admission he did not want to be "UAed."

Here too, there is little chance of prejudice because the jury was properly instructed as to the State's burden of proving the charges beyond a reasonable doubt, the presumption of innocence, and Deavila's constitutional right to not testify. This Court has explained that "jurors are presumed to have followed the repeated instructions given to them regarding the State's burden of proof." *State v. Hardy*, 2023 MT 110, ¶ 70, 412 Mont. 383, 530 P.3d 814 (citation omitted). Indeed, the Supreme Court has correspondingly recognized that "arguments of

counsel generally carry less weight with a jury than do instructions from the court." *Boyde v. California*, 494 U.S. 370, 384 (1990).

Deavila has failed to rebut the presumption that the jury followed the court's instructions. Deavila has further failed to demonstrate he was prejudiced by the prosecutor's comment. *See State v. Sanchez*, 2008 MT 27, ¶¶ 57-58, 341 Mont. 240, 177 P.3d 444. To the extent that the prosecutor's statement was "a very brief deviation" from the overall approach, it certainly does not go so far as to create a "clear danger that the jurors adopted the prosecutor's views instead of exercising their own independent judgment." *State v. Wells*, 2021 MT 103, ¶ 28, 404 Mont. 105, 485 P.3d 1220 (citations omitted).

II. Deavila fails to show a manifest miscarriage of justice entitling him to plain error reversal for his unpreserved claims of prosecutorial misconduct.

A. Standard of review

For unpreserved claims, this Court generally does "not address issues of prosecutorial misconduct pertaining to a prosecutor's statements not objected to at trial." *Wells*, ¶ 13 (citing *State v. Ugalde*, 2013 MT 308, ¶ 27, 372 Mont. 234, 311 P.3d 772); *see also Lawrence*, ¶ 12. When the argument is made for the first time on appeal, this Court may discretionarily review the prosecutorial misconduct claim under the plain error doctrine. *Lawrence*, ¶¶ 6, 9. This Court uses its

inherent power of common law plain error sparingly, on a case-by-case basis, and only in a narrow class of cases. *State v. Lackman*, 2017 MT 127, ¶ 9, 387 Mont. 459, 395 P.3d 477.

In analyzing a claim under plain error, this Court "first determine[s] whether the defendant's fundamental constitutional rights have been implicated." *Ritesman*, ¶ 21 (citing *Lawrence*, ¶ 9). "Even then, [this Court] will not invoke the plain error doctrine to reverse a conviction when 'the alleged error did not result in a miscarriage of justice, raise a question as to the fundamental fairness of the proceedings, or compromise the integrity of the judicial process.'" *Ritesman*, ¶ 21 (citing *Lawrence*, ¶ 11).

This Court will not undertake a full analysis of the alleged error each time a party requests plain error review. *State v. Griffin*, 2016 MT 231, ¶ 7, 385 Mont. 1, 386 P.3d 559. Conducting a full analysis to determine whether to find plain error would "defeat the underlying rule that a party must object to error at trial, because errors should be brought to the attention of the trial court where they can be initially addressed." *Ritesman*, ¶ 12 (citing *Griffin*, ¶ 7).

B. Discussion

Deavila presents three points of error for comments to which he never objected at trial, thus, the district court was never given an opportunity to consider. Deavila urges this Court to exercise plain error review to reverse his convictions

based on a purported combination of errors. This Court should deny Deavila's request.

1. Comments on defendant's consciousness of guilt

Deavila first presents an unpreserved claim arguing that the prosecutor erred in saying "the defendant knows" how much he had to drink because such a comment "indirectly" referenced his decision not to testify. (Appellant's Br. at 17.)

This Court "do[es] not isolate the challenged comments on review[,]" but rather considers "the challenged comments in the context of the trial and the closing argument as a whole." *State v. Palafox*, 2023 MT 26, ¶ 27, 411 Mont. 233, 524 P.3d 461 (citation omitted). Put into their proper context, the prosecutor's statements do not constitute an implicit or indirect comment on Deavila's failure to testify. Rather, the comments are pertaining to the State's theory of Deavila's consciousness of guilt based on his refusal to consent to the blood test and his flight immediately after the troopers left to obtain a blood draw warrant, and the legal inference that could be properly made by the jury therefrom.

The comments are also responsive to Deavila's trial theme that the State failed to obtain physical evidence of intoxication such as a blood sample, thus, the State could not meet its burden of proof to show Deavila was impaired beyond a reasonable doubt. As the State explained in closing immediately after saying a reason existed that only Deavila "knows how much [he] had to drink," the reason

was that "we don't have [blood sample] evidence. We don't have that evidence because the defendant refused to provide a blood sample, and he left the hospital before a blood sample could be obtained in service of the warrant granted." (Trial Tr. at 237.) Other persuasive authority has held that when a comment like "only the defendant knows" is made "to explain the State's inability to introduce evidence" rather than focusing on the defendant's failure to testify, such a comment is not improper and the "jurors are not likely to receive the words of the prosecutor as an invitation to draw an admission of guilt from the defendant's failure to testify, but rather as a reason for why the jury should not penalize the State for its failure to introduce certain evidence." *State v. Loston*, 874 So. 2d 197, 208 (La. Ct. App. 1 Feb. 23, 2004). That is the situation here.

Moreover, the prosecutor never stated that Deavila's decision not to testify could be relied upon by the jury as evidence of guilt. Prosecutorial comments only "deny the accused [the Fifth Amendment] privilege when the language used is manifestly intended or is of such character that the jury would naturally and necessarily take it as a comment on the failure of the accused to testify." *Harrington*, ¶ 18 (citations omitted). Here, as this Court has explained, a recitation of the conduct combined with a mere assertion of prejudice "is insufficient to implicate the plain error doctrine." *Palafox*, ¶ 28 (citation omitted). Deavila fails

to show a manifest miscarriage of justice from the comments and this Court should decline to exercise plain error review.

2. "Prove his innocence" comments

Deavila next presents an unpreserved claim arguing that the prosecutor was wrong to restate in closing argument Trooper Delaney's question to Deavila in the ambulance as to whether a blood draw would "prove his innocence." (Appellant's Br. at 20.) Deavila argues that the comments misconstrue the jury instruction regarding refusal of a blood test, as well as the jury instructions on the presumption of innocence and the State's burden of proof. (*Id*. at 20-21.)

Initially, while the State acknowledges that this Court held that similar comments were improper in *Favel* (*see* ¶ 25), the multiple comments at issue in *Favel* constituted positive assertions from the prosecutor that misled the jury to imply the law *required* a defendant to prove his innocence upon refusal of a breath test. *See State v. Favel*, 2015 MT 336, ¶ 11, 381 Mont. 472, 362 P.3d 1126.[7] In that scenario, a danger could exist that a permissive inference from the blood draw could be misconstrued by the jury as a mandate. But here, in context, the prosecutor was

[7]("[The breathalyzer] is an instrument that could prove how much alcohol is in her system, could exonerate her, could *prove her innocence*."); ("You can double-check our work. She refused again an instrument which could *prove her innocence* and she refused."); ("She's fiercely protective of a blood sample that can *prove her innocence*? It's completely illogical, it makes no sense.") *Favel*, ¶ 11 (emphasis added.)

simply recalling a conversation between Trooper Delaney and Deavila. The point of the prosecutor's closing here was that Trooper Delaney asked Deavila if a blood test could prove his innocence, and Deavila agreed it would. Then, considering Deavila's own words that it would prove his innocence, Deavila realized he needed to avoid the blood draw, and did so by rejecting the blood draw and fleeing the hospital shortly after the officers left to obtain the warrant.[8] Thus, the totality of the prosecutor's comments point out Deavila's consciousness of guilt considering his actions and considering his flight. This Court has "concluded that evidence of a defendant's refusal to take a sobriety test is probative evidence under the [inference of intoxication] statute and may be used by the State to argue the defendant's consciousness of guilt." *Favel*, ¶ 24 (citing *State v. Machaud*, 2008 MT 88, ¶ 55, 342 Mont. 244, 180 P.3d 636).

And, to the extent the prosecutor's recitation of Trooper Delaney's and Deavila's conversation could be correlated to the permissive inference instruction, the error was minimal, particularly under plain error. "A prosecutor's argument is not plain error if made in the context of discussing the evidence presented and how

[8]Deavila did not object. Rather, in Deavila's closing, defense counsel also affirmed that Deavila told Trooper Delaney a "blood test would prove that he was not under the influence," but argued that there could have been intervening events at the hospital that led Deavila to walk out instead of because of a consciousness of guilt. (Trial Tr. at 247-48.)

it should be used to evaluate a witness's testimony under the principles set forth in the jury instructions." *State v. Polak*, 2021 MT 307, ¶ 18, 406 Mont. 421, 499 P.3d 565 (citation omitted). Underlying the permissible inference under the statute is "an assumption that the person who believes that he or she is not intoxicated would likely be willing to provide a breath test to *demonstrate, show*, or *otherwise prove* that he or she is, in fact, not intoxicated." *Favel*, ¶ 26. "Because the rebuttable presumption is constitutional and did not shift the burden of proof to [Deavila], it was not improper for the prosecutor to comment upon it." *See Slade*, ¶ 29.

Finally, Deavila fails to show he suffered prejudice from the comments. Particularly under plain error, Deavila fails to show the error resulted in a "miscarriage of justice, raise a question as to the fundamental fairness of the proceedings, or compromise the integrity of the judicial process.'" *Ritesman*, ¶ 21 (citing *Lawrence*, ¶ 11). For example, in *Favel*, this Court held that despite multiple comments about the defendant being required to "prove" her innocence, the defendant was not entitled to plain error reversal because: (1) "the court properly instructed the jury on the State's burden of proof regarding each element of [DUI] and on the presumption of Favel's innocence[;]" (2) the prosecutor "reminded the jury" that the "State carried the burden of proof[;]" and (3) the State otherwise had compelling evidence of Favel's intoxication. *Favel*, ¶ 28. As explained above, the jury was properly instructed, the prosecutor acknowledged its

burden of proof and the defense and the court reminded the jury of that burden, and the evidence of Deavila's guilt was compelling. Here too, the prosecutor avoided any confusion by summarizing the correct language of the inference statute to the jury in closing argument. (Trial Tr. at 279 ("As Judge Souza instructed you, the law is that if a person refuses to submit to a physical test or a test of their breath or blood for alcohol concentration, such a refusal is admissible evidence, and you may infer from that refusal that the person was under the influence. He also instructed you that that inference is rebuttable. . . .")

3. Inference vs. presumption

Finally, in his last unpreserved claim, Deavila argues that the prosecutor committed misconduct when—during voir dire—the prosecutor twice used the word "presume" rather than "infer" when quizzing the jury. (Appellant's Br. at 21-22.)

This argument readily fails. Here, while the prosecutor did initially reference a presumption in voir dire, the prosecutor only referenced that word amid asking hypothetical questions to prospective jurors. (*See* Trial Tr. at 48-49, "Okay. And would it also factor in if the law then presumes that you may be under the influence?") The prosecutor did not instruct the jury that the permissible inference statute relating to blood draws and the corresponding jury instruction actually was a presumption rather than an inference. Under the circumstances, there is little

danger that during deliberations, the selected jurors would extrapolate back to questions about hypothetical situations during voir dire, conclude that the prosecutor must have been talking about the permissible inference blood draw given jury instruction, and then decide to reject the given jury instruction's inference language in favor of the prosecutor's brief unmoored reference of a presumption during voir dire.

The argument further fails because whenever the prosecutor would thereafter talk about the blood draw permissible inference jury instruction—particularly during closing argument—it was properly mentioned as an inference, not a presumption. *See* Trial Tr. at 238 ("As Judge Souza instructed you, the law is that if a person refuses to submit to a physical test or a test of their breath or blood for alcohol concentration, such a refusal is admissible evidence, and you may *infer* from that refusal that the person was under the influence."; Trial Tr. at 257 ("In addition, you may *infer* that the Defendant was under the influence."). Defense counsel too properly referred to an inference, referencing the given instruction in closing. ("You may *infer* that Mr. Deavila's refusal of consent is evidence of being under the influence, you don't have to, but you may. But even if you do make that *inference*, does that convince you beyond a reasonable doubt that he was under the influence?") (Trial Tr. at 247.) Finally, the court gave the jury the correct instruction, with the proper inference language included.

III. Deavila has not proven cumulative error.

Deavila concedes that none of the identified alleged errors alone rise to reversible error but appears to argue that the cumulative effect of multiple errors merits reversal. (*See* Headnote I-C, the comments "taken together," prejudiced Deavila's right to a fair trial.) While Deavila does not particularly plead cumulative error as a claim, he does attempt to impose the prejudice analysis for *preserved* claims for all of his claims, while the latter three claims should be properly interpreted under the more stringent plain error standard. (*See* Appellant's Br. at 25.) This Court should only analyze the cumulative effect of Deavila's unpreserved claims assuming it finds plain error prejudice individually for multiple unpreserved claims.

Deavila cannot not show cumulative error in any event. "[T]he cumulative effect of errors will rarely merit reversal[.]" *State v. Cunningham*, 2018 MT 56, ¶ 33, 390 Mont. 408, 414 P.3d 289. For cumulative errors to warrant reversal, the defendant must establish actual prejudice from the aggregation of more than one otherwise harmless error: "a mere allegation of error without proof of prejudice is inadequate to satisfy the doctrine." *Cunningham*, ¶ 32 (citing *McGarvey v. State*, 2014 MT 189, ¶ 36, 375 Mont. 495, 329 P.3d 576). This Court will reverse a conviction under the cumulative error doctrine only if accumulated errors,

considered together, prejudiced the defendant's right to a fair trial. *State v. Haithcox*, 2019 MT 201, ¶ 38, 397 Mont. 103, 447 P.3d 452.

Application of the cumulative error doctrine is not appropriate where the alleged errors are considered separately and found to be without merit. *State v. Novak*, 2005 MT 294, ¶ 36, 329 Mont. 309, 124 P.3d 182. Deavila fails to show actual prejudice from any individual claim, much less from any combination of his claims under cumulative error.

CONCLUSION

This Court should affirm Deavila's convictions.

Respectfully submitted this 16th day of November, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,299 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Roy Brown
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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 11-16-2023:

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