IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0517

STATE OF MONTANA,

Plaintiff and Appellee,

v.

SHANE CLARK JOHNSON,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Twelfth Judicial District Court,
Hill County, the Honorable Matthew J. Cuffe, Presiding

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"The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies," which is a "fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 19 (1967). The jury was not allowed to hear critical relevant evidence supporting Shane's version of the facts and explanatory of his conduct on the night of his brother's tragic death because of the State's litigation tactics and defense counsel's failure to introduce that evidence because he incorrectly believed he already lost that battle and was not able "to get into all that" because of the court's prior rulings on the State's evidentiary motions and objections. (Appellant's Br. at 25-28, 35-38; App. G at 1228-29.) Unsatisfied with simply presenting a one-sided story, the prosecutor then unfairly and inaccurately suggested the jury should conclude Shane's "story" was untrue because "there was no evidence" to support it—even though there was, *i.e.*, the same evidence the State had worked methodically to keep the jury from hearing. (Appellant's Br. at 30-31; App. F at 1201-03, 1213, 1226.) And then, as the State concedes on appeal, *see* Appellee's Br. at 36, the prosecutor

"improper[ly]" invited the jury to consider facts not in evidence regarding prosecutors sometimes "charg[ing] too much," but assuring the jury it had not done so here because this case was "negligent homicide," a "lower standard than deliberate homicide"—even though it had charged deliberate homicide but could not do so again as it had failed to prove it the first time. (*See also* Appellant's Br. at 41-45; App. F at 1194-95, 1197.)

These errors, individually and collectively, resulted in a violation of Shane's rights to the effective assistance of counsel and to a fundamentally fair trial where the jury had the ability to determine where the truth lies based on the evidence presented by both sides, without being invited to make unfair and unwarranted inferences or to consider extraneous matters. (*See* Appellant's Br. at 45.) The resulting jury verdict is not worthy of confidence and cannot be allowed to stand.

Alternatively, because the persistent felony offender (PFO) statute supplants all other statutes setting forth the sentencing range for an offense, the court's imposition of both a PFO sentence and an additional penalty for the sentencing factor of use of a weapon in the commission of the offense was illegal and the latter penalty must be stricken.

I. The prosecutor's missing evidence argument was improper legal maneuvering that invited the jury to make an unfair and unwarranted inference under the circumstances.

A. The standard of review is *de novo*.

The State does not directly address Shane's argument that this Court must review the denial of his motion for mistrial for correctness and instead merely asserts the standard of review is for an abuse of discretion. (*Compare* Appellant's Br. at 19-20 *with* Appellee's Br. at 24.) But the first prong of the analysis, whether the prosecutor made an improper closing argument, is not a discretionary decision; it is a mixed question of law and fact reviewed for correctness. *See, e.g.*, *State v. Bazile*, 971 N.W.2d 884, 886 (N.D. 2022) (although a motion for mistrial is generally reviewed for abuse of discretion, "[w]hen the basis . . . is prosecutorial misconduct, this Court reviews a claim of prosecutorial misconduct under the *de novo* standard of review"); *Ayers v. State*, 251 A.3d 637 (Del. 2021) (de novo review for prosecutorial misconduct claim). Discretion enters the analysis, if at all, only during the second prong, *i.e.*, whether the error is curable or requires a mistrial. *See State v. Erickson*, 2021 MT 320, ¶¶ 25, 28, 406 Mont. 524, 500 P.3d 1243 (trial court is "given a latitude of discretion because it is in the best

position to observe the jurors and determine the effect" of a prosecutor's statements and whether it is reasonably possible they might affect the jury's verdict). Because the court incorrectly determined the prosecutor's argument was "appropriate" under the first prong, it never reached the second prong or exercised any discretion. Its ruling must be reviewed *de novo*.

B. The prosecutor's argument was improper.

Shane's defense during both trials was that he was not criminally responsible for Travis's death because Shane acted reasonably when he attempted to get his loaded gun back from his intoxicated brother, Travis because it was not like Travis to do something like that; he had never grabbed a gun during a fight before; Shane was afraid he might do something "stupid," like shoot himself or Shane; he thought "Travis could do something to himself;" and he wouldn't talk to Shane or put down the gun. (*See* Appellant's Brief at pages 5-8.) But the jury did not get to hear why Shane was worried that Travis might do something stupid or harm himself, or what he meant when he said he was not acting like himself. The State made sure of that by:

- successfully moving pretrial to exclude any evidence regarding Travis's behavior prior to their parents leaving the home and

objecting to Shane's every attempt to introduce it during Shane's first trial, Appellant's Br. at 4-5, 9-10;

- after Shane rested and lacked the ability to present additional evidence, convincing Judge Boucher to instruct the jury over Shane's objection on a negligent homicide charge that had never been on the table previously—and that was incompatible with the State's theory of the case at both trials that Shane was the one who brought the gun out, Appellant's Br. at 2 & 2014 Trial Vol. VIII at 3, 18-21; and

- then convincing Judge Cuffe to adopt the evidentiary rulings on retrial, arguing they constituted the "law of the case" and were "binding on the parties," Appellant's Br. at 10 & App. E at 15-17.

But the prosecution didn't stop there. The prosecutor turned around and "took advantage of [Shane's] inability to mention the evidence by implying that the evidence did not exist," *see Malcolm v. Evenflo Co., Inc.*, 2009 MT 285, ¶ 85, 352 Mont. 325, 217 P.3d 514, by encouraging the jury to determine Shane's "story" regarding Travis's death was not "true" and did not "actually happen[]" because "there was no evidence at all that Travis was ever suicidal" and "I don't think you'll find any evidence that Travis was ever suicidal," App. F. at 1202.

Without addressing *Malcolm* or the other cases cited in Appellant's Brief at pages 25-26, the State attempts to shift blame away from the prosecutor's conduct by suggesting Shane unfairly tricked the prosecutor into making this improper argument because the prosecutor

could not have realized that evidence regarding Travis's behavior—evidence Shane tried to introduce in his first trial but couldn't after it was deemed inadmissible at the State's request—might have supported Shane's defense. (*See* Appellee's Br. at 27-29, arguing it is unfair to fault the State for "failing to predict" Shane's defense.) That argument fails for several reasons. First, that argument misconstrues the fundamental problem with the argument: the unfairness of inviting the jury to draw unfavorable inferences that are not logically warranted by the circumstances. The practice of permitting counsel to comment on the failure of the opposing side to present evidence of certain facts "should be used with caution," and only where "an unfavorable inference may *fairly* be drawn from such omission," and "after obtaining an advance ruling from the trial court." 23A C.J.S. Criminal Procedure and Rights of Accused § 1763 (emphasis added). Caution is required because the inference is easily invoked while rarely warranted and can undermine both the defendant's presumption of innocence and right to present a defense.

Here, the unfavorable inference that no evidence existed—and thus Shane's "story" in toto was not believable—was untrue and unfair

because such evidence did exist, but it could not be introduced due to the State's litigation strategy. The prosecutor's suggestion to the contrary was unfair regardless of whether he recognized the evidentiary value of the evidence the State successfully got excluded.

What's more, the State did not make this argument below. Rather, the prosecutor argued the motion should be denied because he made a very limited closing argument to the jury regarding a lack of evidence that Travis had made any "comment . . . about killing himself," or to the effect that he was experiencing "suicidal thoughts or ideations," such statements did not exist, and they had never been excluded from evidence. (App. G at 1229-30.) Thus, it is the State—not Shane—that has changed its theory on appeal regarding the mistrial motion. (*See* Appellee's Br. at 29.)

In truth, the prosecutor's closing argument was far broader than he asserted below. Rather than limiting the argument to evidence that Travis had discussed killing himself, he argued "there was no evidence at all that Travis was ever suicidal" and "I don't think you'll find any evidence that Travis was ever suicidal." (App. F. at 1202.) *That* argument encompassed evidence beyond suicidal statements, including

evidence regarding Travis's behavior before his death. That is, the prosecutor's *actual* argument was *actually* responsive to Shane's *actual* testimony about Travis—that he was *not acting like himself*—not that he had expressed suicidal thoughts. As such, the State's suggestion now that it could not have possibly anticipated that Shane believed Travis's recent erratic and reckless behavior—evidence the State methodically excluded from both trials—was evidence that corroborated Shane's testimony is hard to swallow.

Undeterred, the State suggests 1) "the only thing supplying any connection at all between Travis's alleged pre-death conduct and the potential of suicidality is Johnson's citation" to National Institute of Mental Health's website on the warning signs of suicidality; and 2) Shane could not have introduced evidence regarding Travis's recent behavior absent expert witness testimony supplying such a connection. (Appellee's Br. at 29-30.) But Shane's almost-decade-old testimony, counsel's argument in support of the mistrial motion, and his closing argument provided the necessary connection between Shane's defense and the evidence regarding Travis's behavior in the weeks before his death. This argument was not made of whole cloth on appeal.

Nor is Shane's defense dependent on someone testifying regarding the information contained on the NIMH's website. The State cites no legal authority indicating expert testimony would be necessary in a case like this. As such, this Court should not address this argument on appeal. *See Griffith v. Butte Sch. Dist. No. 1*, 2010 MT 246, ¶ 42, 358 Mont. 193, 244 P.3d 321 (this Court will not consider unsupported issues or arguments or conduct legal research on a party's behalf).

Regardless, the warning signs of suicide are just that: indicators that a person could be contemplating suicide and might need help. They are publicized widely specifically for the purpose of preventing suicide by instructing lay people regarding when they should intervene with a friend or family member struggling emotionally. Shane is admittedly no expert in mental health issues; but he knew his brother was not well and worried he might harm himself because he was drinking too much and doing drugs, threatening those he loved, engaging in aggressive and erratic behavior, and taking stupid risks with his own safety. Shane wasn't alone: his mother and his stepdad saw the signs, too. So, when, drunk and belligerent, Travis accessed lethal means, Shane did not sit back and do nothing: he tried to take

the loaded gun out of the equation, an act that is encouraged by law in Montana. *See* Aaron Bolton, Montana Public Radio, "Storing guns away from home could reduce suicides but there are legal hurdles," (Sept. 6, 2023), *available at* http://tinyurl.com/y3apk4wt (discussing 2023 legislation limiting legal liability for persons who store firearms for others and explaining the purpose was to "mak[e] it easier to help a friend get through a mental health crisis and alleviate the immediate risk of suicide until someone gets better").

Finally, the State—based on precedent regarding unpreserved errors—argues it would be "unseemly" to tell the court "it was wrong when it was never given "the opportunity to be right" regarding the admission of evidence of Travis's behavior. (Appellee's Br. at 27-28.) But Shane is not arguing that reversal is required because the court's evidentiary rulings were wrong. It is the court's denial of the mistrial motion, based on its determination that the prosecutor made an "appropriate" comment on Shane's failure to present any evidence that Travis was suicidal even though it was the State that obtained favorable rulings excluding that same evidence, that Shane challenges

on appeal.[1] (*See* App. G at 1231.) The State does not, and could not, contend that claim was not preserved below through counsel's motion. (*See* App. G at 1227-29.) In other words, Judge Cuffe had the opportunity to be "right" regarding the issue Shane has raised on appeal—he just wasn't.

II. The record shows Shane's counsel failed to provide objectively reasonable assistance.

When an ineffective assistance of counsel (IAC) claim is "based on facts of record in the underlying case," it "*must* be raised in the direct appeal," *State v. Brandt*, 2020 MT 79, ¶ 10, 399 Mont. 415, 460 P.3d 427 (emphasis added), and failure to do so will result in the claim being procedurally barred in a subsequent postconviction proceeding, § 46-21-105(2), MCA ("grounds for relief that were or could reasonably have been raised on direct appeal may not be raised, considered, or decided in" postconviction). The State contends Shane's IAC claim is not

[1] The State contends "[n]othing in the record establishes that the judge was unaware" of the pretrial rulings regarding Travis's behavior. (Appellee's Br. at 29 n.3.) However, the court explicitly inquired whether there was, in fact, an order or ruling from Judge Boucher "precluding that sort of a discussion." (App. G at 1230.) Had the judge been aware of the rulings at issue, he presumably would not have needed to ask if they existed or for "specifics" about them. (*Id.*)

reviewable on direct appeal because "the record does not explain why Johnson's counsel *chose* not to challenge" the court's evidentiary rulings, and "[t]here is no indication in the record that Johnson's counsel was unaware" he could do so. (Appellee's Br. at 34 (emphasis added).) But trial counsel explicitly stated he had "a lot of explanation" about Travis's behavior and how he was not acting like himself before his death, and he believed he might have been able to prove Travis was "suicidal," but, "[e]arly on" during the proceedings on remand,

> the Court had ruled that the prior evidentiary -- *or at least I took it that way, the prior evidentiary rulings of Judge Boucher were in place*. And one of those things were about evidence in regard to Travis Johnson. Travis Johnson – and this was well known to the family members at the time – was really, really out of sorts and he threatened to kill Donna Biem. He threatened to burn his ex-girlfriend, Bonnies' house down right around this time. He received a death threat thereafter, just days before this by text from Bonnie's phone which had actually came from Bonnie's current boyfriend.
>
> And it was clear that Travis was under some type of stress and was acting very abnormally, and Shane had every right to be concerned about what was going on with Travis. The whole family was. *But we have not been able to get into that*.
>
> And so I believe *they're the ones that . . . closed the door to the evidence here because of a successful ruling. . . . And*

> *then they attack us in closing for the very thing that they've closed the door on with us. . . and we stayed away from . . . .*

(App. G at 1228-30 (emphases added).)

Defense counsel unequivocally stated he "had not been able to get into" evidence regarding Travis's behavior because the door had been closed on that evidence due to Judge Cuffe's adoption of Judge Boucher's prior evidentiary rulings at the State's request. Thus, it is evident from the record that defense counsel believed he was precluded from introducing evidence regarding Travis's behavior by those rulings and did not "cho[o]se not to challenge the evidentiary rulings," as the State contends. (Appellee's Br. at 34.)

Nor was this a "strategic" decision of some sort, as the State suggests. (*See* Appellee's Br. at 29-30, discussing Shane's alleged "untimely change in trial strategy" after the State's closing argument.) Even if it had been, a strategic decision is not automatically immune from attack through an IAC claim because counsel's decisions must be made pursuant to an objectively reasonable strategy. *Golie v. State*, 2017 MT 191, ¶ 8, 388 Mont. 252, 399 P.3d 892. And where there could be "no plausible justification" or "legitimate reason" for counsel's strategic "choice," an IAC claim may be raised on direct appeal.

State v. Kougl, 2004 MT 243, ¶ 15, 323 Mont. 6, 97 P.3d 1095. Here, counsel failed to introduce evidence critical to Shane's defense, as was made abundantly clear in both parties' closing arguments. There can be no plausible justification for choosing not to introduce available, relevant evidence explanatory of and inextricably linked to the defense presented at trial where that evidence could be introduced through and corroborated by third parties like Donna and Robert, and then to turn around and ask the jury in closing argument to consider the possibility that there might be some evidence out there that would support the defense, but "you are not ever going to know," *see* 2021 Trial VI at 1232, 1248, 1251. *See, e.g., State v. Santoro*, 2019 MT 192, ¶¶ 18-21, 397 Mont. 19, 446 P.3d 1141 (failure to present evidence that would lend support to the defense presented at trial while discounting the State's trial theory was deficient performance that prejudiced the defense). The State has identified no reasonable strategy or legitimate reason for counsel's conduct because there is none.

A more developed record regarding the evidence not admitted is not necessary given the information in the record here. (*See* Appellee's Br. at 34.) The evidence is set forth in detail on pages 17-19 of

Appellant's Brief, and it is clear from the description that Shane, who lived across the hall from his brother in his parents' home, was physically present for many of the incidents described therein. (*See* D.C. Doc. 341, Second PSI, Ltr. from Donna Biem (discussing Travis's accident and the afternoon and evening of Travis's death).) In addition, when discussing the evidence of Travis's behavior in support of the motion for mistrial, defense counsel asserted Shane had every right to be concerned about Travis because it was "well known" to Travis's family, including Shane, that he had threatened to kill his mother and to burn down Bonnie's house, that Bonnie had obtained a protective order against him, and that her new boyfriend had threatened to blow off Travis's head. (App. G at 1228.) That is sufficient detail to determine counsel's performance was deficient and that deficiency undermined confidence in the jury's verdict. *See Santoro*, ¶¶ 18-21. Again, as discussed above, the State's argument that expert testimony regarding the warning signs of suicide was required before testimony regarding Travis's behavior could be admitted is both unsupported by any legal authority and wrong.

To the extent this Court concludes this claim must be raised in postconviction, Shane requests this Court order the appointment of counsel. Because Shane has set forth a substantial IAC claim that, the State contends, requires evidentiary development and, perhaps, even expert testimony, the interests of justice would be served by the appointment counsel to assist Shane in pursuing that claim. *See* § 46-21-201(2), MCA.

III. Because the errors individually and collectively rendered Shane's trial fundamentally unfair and have undermined confidence in the jury's verdict, reversal is required.

The State acknowledges reversal is required unless there is no reasonable possibility that the prosecutor's improper legal maneuvering affected the jury's verdict. (Appellee's Br. at 30.) As Shane argued on page 30 of his opening brief, because the State committed the offending conduct and benefitted from it, it must bear the burden of showing it is not reasonably possible that its error affected the jury's verdict. Conversely, Shane bears the burden of showing the other errors individually, or all three errors collectively, undermined confidence in the jury's guilty verdict. *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *State v. Smith*, 2020 MT 304, ¶ 16, 402 Mont. 206, 476 P.3d

1178 (multiple errors of varying types require reversal when, taken together, they have prejudiced the defendant's right to a fair trial).

The State contends the evidence it presented at trial "overwhelmingly indicated that [Shane] introduced the gun," and, thus, the errors in this case could not reasonably have contributed to the jury's determination that Shane's "story" was not true, and the admission of any evidence supporting Shane's "story" would have been "inconsequential." (Appellee's Br. at 31-32.) Admittedly, the State presented numerous pieces of circumstantial evidence, arguing they collectively "engulf[ed]" Shane in guilt. (App. F at 1198.) But zero plus zero still equals zero, no matter how many zeroes you stack up.

The State's case relied heavily on the testimony of a crime scene reconstruction expert who was eager to give his "opinion" regarding what he "believe[d]" happened on the night of Travis's death, *see, e.g.*, 2021 Trial V at 1103, 1106, but was just as willing to admit he was "not saying" Shane's version of the facts "couldn't have happened," *id.* at 1104-05. Indeed, as discussed in Appellant's Brief at pages 31-34, he admitted being unaware the telltale bloody plastic bag was found not at the foot of Shane's bed where he testified he kept his gun, Shane's Test.

at 88, 96, but at the head of the bed, *see* State's Ex. 65. Although the State seems to suggest he could have simply disregarded Shane's "self-serving" testimony on this point because it was the only evidence indicating the gun was kept under the foot of the bed, *see* Appellee's Br. at 31-32, that is neither what the expert testified to, nor is it factually true, as the gun case was later found lying on Shane's mattress near the foot of the bed, as though that is where it had been retrieved from; it was not located at the head of the bed or anywhere near the bloody bag. (*See* State's Ex. 55, discussed in Appellant's Br. at 31-32.)

The State also points to Shane's blood being found on the gun case, the envelope, and the gun barrel as showing that Shane was the one who got the gun out because "there was no evidence in the record" that Shane bled on these items "*at a previous time*." (Appellee's Br. at 31 (emphasis added).) But that isn't Shane's argument; Shane contended he may have bled on these items *after Travis's death when he returned to his bedroom*, and there is no evidence indicating that could not have happened. Plus, Shane's blood was found exactly where you would expect if he had tried to grab the gun away from his brother with his bloodied hand, as Shane testified: it was on the gun barrel. And it

was not found where you would expect if he had unzipped the case, grabbed the gun, walked across the hall, and purposely shot his brother, as the State alleged: no blood was found on the zipper pull, the trigger, or the grip. (*See* Appellant's Br. at 32-33.)

The State also points to the fact that Travis was wearing only one shoe when he was found unconscious in the hallway as evidence that Travis was in the middle of putting on his shoes and preparing to leave the house when Shane entered his bedroom and "attacked him." (Appellee's Br. at 38-39.) But had Travis been in the process of putting on his shoes, why was his missing shoe—with the laces tied in a bow—found by his doorway, where the State acknowledges a struggle over the gun took place, and not next to his bed, where he likely would have been sitting if he was in the process of putting that shoe on when Shane entered? (*See* State's Exs. 81, 88, offered and admitted, 2021 Trial II at 497; published, *id*. at 528, 536.) The State's argument about the evidentiary value of Travis's missing shoe, like its arguments about much of the circumstantial evidence, is nothing more than guesswork.

The State also relies on Shane's statements to law enforcement on the night of Travis's death, arguing Shane's "story" changed

dramatically when he testified. But Shane's initial claim of self-defense and his statements to the effect that Travis threw him down the stairs, and the gun "went off" are not necessarily inconsistent with his testimony at trial. (*Compare* State's Ex. 343 *with* Shane's Test. at 94-99.) He never told anyone that the gun went off *because or when* Travis threw him down the stairs.

Finally, the State argues Shane's conduct after Travis was shot was indicative of consciousness of his guilt and not the reaction of a concerned brother. How a concerned brother, drunk and in shock after having just been in what turned out to be a fight for his life over a loaded gun that resulted in what he—correctly—believed was his brother's death is not something most people would know. As Shane testified, he did not know what to do. But he didn't run or hide the gun because he knew he was justified in what happened. And he assumed the government would understand that and do the right thing. But his faith in the system was misplaced.

In short, the State's case—that Shane grabbed the gun from under his bed and purposely or knowingly "fired the gun" at Travis, see Appellee's Br. at 4-5, was not "strong," id. at 38-39, let alone

"overwhelming," *id*. at 23, 32. The State was unable to convince the jury in Shane's first trial that he did so. (D.C. Docs. 1, 3, 107.) Nor was it able to convince Travis and Shane's immediate family—the people who knew best what was going in Travis's life and his relationship with Shane and who could have testified in Shane's defense—that Travis's death was anything more than a tragic accident, even after two attempts to do so. (*See* D.C. Doc. 137, First PSI at 9 ("victim" impact statements from Donna and Robert Biem); D.C. Doc. 137, First PSI, Ltrs. From Donna Biem and Robert Biem; D.C. Doc. 341, Second PSI, Add'l Ltr. From Donna Biem; *see also id.*, July 19, 2021 Ltr. from Travis's younger sister.) That the jury on retrial took only an hour to convict Shane after hearing a one-sided presentation of the evidence free of even Donna's statement that Travis had been "drunk and belligerent" the afternoon of his death, *see* App. D 145-66, only shows the prejudicial effect of the combined errors in this case—not that Shane's trial was fair. This Court should conclude Shane did not receive what he is constitutionally entitled to: a fundamentally fair trial where the jury, after hearing the relevant admissible evidence supporting each party's version of the facts decided where the truth lies

based solely on the evidence presented at trial and proper inferences warranted by that evidence, and not based on unfair and unwarranted inferences, falsehoods, and extraneous information about the prosecutor's charging decision and greater offenses allegedly not charged in this case. The resulting verdict is not worthy of confidence, and Shane's conviction, thus, should be reversed.

IV. The court illegally stacked a weapon enhancement onto a PFO sentence.

Because "[t]his Court has repeatedly held that Montana's weapon enhancement statute is a sentencing factor, and does not create a separate crime or element of a crime," the penalty or punishment it requires is directly related to and part and parcel of the penalty for the underlying offense. *State v. Guillaume*, 1999 MT 29, ¶¶ 10, 22, 293 Mont. 224, 975 P.2d 312. That is, a weapon enhancement is nothing more than a sentencing factor that increases the possible penalty range for the underlying offense set forth in the statute defining that offense by requiring a mandatory minimum sentence and increasing the maximum possible sentence. (*See* Appellant's Br. at 47.) When applicable, both statutes operate together to determine the appropriate sentencing range for an offense.

The State concedes, "[t]his Court has determined that when a court sentences an individual as a PFO, the 'sentencing parameters of § 46-18-502, MCA, replace the maximum sentence prescribed for the offense.'" (Appellee's Br. at 39, quoting *State v. Fitzpatrick*, 247 Mont. 206, 206, 805 P.2d 584, 586 (1991)). Shane agrees. Because use of a weapon in the commission of an offense is just that—a sentencing factor that increases the sentencing range applicable to the underlying offense—when a court sentences an individual as a PFO, that PFO sentence replaces any sentence imposed pursuant to that enhanced sentencing range. That conclusion is consistent with this Court's statement in *State v. Damon*, 2005 MT 218, ¶ 39, 328 Mont. 276, 119 P.3d 1194, that the PFO statute "conflicts with all specific sentencing provisions," by imposing more severe penalties that replace those other sentencing provisions. Both the sentencing provision in § 45-5-104(3), MCA, and the sentence enhancement in § 46-18-221(2), MCA, constitute "specific sentencing provisions" with which the PFO statute conflicts and which must be replaced by a PFO sentence. Accordingly, the court erred when it stacked a weapons enhancement penalty onto Shane's PFO sentence.

CONCLUSION

Shane's conviction should be reversed and vacated. Alternatively, the additional five-year penalty for use of a weapon in the commission of the offense should be stricken.

Respectfully submitted this 26th day of February, 2024.

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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 4,998, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Tammy A. Hinderman
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CERTIFICATE OF SERVICE

I, Tammy Ann Hinderman, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 02-26-2024:

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