

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0543

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JUSTIN GUY ZENO SHAWN WOLF MASON,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Tenth Judicial District Court,
Fergus County, The Honorable Heather Perry, Presiding

APPEARANCES:

AUSTIN KNUDSEN
Montana Attorney General
MICHAEL P. DOUGHERTY
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
Michael.dougherty2@mt.gov

GREGORY D. BIRDSONG
Birdsong Law Office
P.O. Box 4051
Santa Fe, NM 87502-4051

ATTORNEY FOR DEFENDANT
AND APPELLANT

KENT SIPE
Fergus County Attorney
JEAN ADAMS
Deputy County Attorney
801 West Broadway
Lewistown, MT 59457

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 3

Underlying offenses and sentence3

New offenses and petition to revoke5

SUMMARY OF THE ARGUMENT16

ARGUMENT.....19

I. Standards of review19

II. The district court correctly determined the State proved, by a preponderance of the evidence, that Mason committed a new criminal offense and violated the conditions of his suspended sentence21

A. The district court correctly found the State presented sufficient evidence that Mason committed a new criminal offense and violated the conditions of his suspended sentence23

B. This district court applied the proper burden of proof and expressly found that the State proved that Mason committed a new criminal offense by a preponderance of the evidence.....26

C. The pretrial diversion agreement in Mason’s bail jumping case, and it’s supposed “banishment condition,” is completely irrelevant to whether he violated the conditions of his suspended sentence by committing a new criminal offense in Missoula28

III. Even if the district court erred by not admitting the body camera video during the revocation hearing, Mason fails to allege or show that he was prejudiced by the ruling30

IV. The district court did not commit plain error by revoking Mason’s
suspended sentence31

CONCLUSION33

CERTIFICATE OF COMPLIANCE.....34

TABLE OF AUTHORITIES

Cases

<i>City of Missoula v. Sadiku</i> , 2021 MT 295, 406 Mont. 271, 498 P.3d 765	22
<i>City of Missoula v. Williams</i> , 2017 MT 282, 389 Mont. 303, 406 P.3d 8	26
<i>In re B.H.</i> , 2018 MT 282, 393 Mont. 352, 430 P.3d 1006	28
<i>State v. Burke</i> , 2005 MT 250, 329 Mont. 1, 122 P.3d 427	20
<i>State v. Fetveit</i> , 2020 MT 264, 401 Mont. 538, 474 P.3d 811	22, 24
<i>State v. Finley</i> , 2003 MT 239, 317 Mont. 268, 77 P.3d 193	32
<i>State v. Haagenson</i> , 2010 MT 95, 356 Mont. 177, 232 P.3d 367	21
<i>State v. Howard</i> , 2020 MT 279, 402 Mont. 54, 475 P.3d 392	passim
<i>State v. Huerta</i> , 285 Mont. 245, 947 P.2d 483 (1997)	30
<i>State v. Muhammad</i> , 2002 MT 47, 309 Mont. 1, 43 P.3d 318	29
<i>State v. Oropeza</i> , 2020 MT 16, 398 Mont. 379, 456 P.3d 1023	20
<i>State v. Reim</i> , 2014 MT 108, 374 Mont. 487, 323 P.3d 880	32
<i>State v. Sebastian</i> , 2013 MT 347, 372 Mont. 522, 313 P.3d 198	21, 32
<i>State v. Souther</i> , 2022 MT 203, 410 Mont. 330, 519 P.3d 1	21

<i>State v. Trujillo</i> , 2020 MT 128, 400 Mont. 124, 464 P.3d 72	20, 31, 32
-----------------------------------------------------------------------------	------------

<i>United States v. Simmons</i> , 812 F.2d 561 (9th Cir. 1987)	24
-------------------------------------------------------------------------	----

Other Authorities

Montana Code Annotated

§ 45-5-201	9
§ 45-5-201(1)(c)	27
§ 45-5-201(1)(c) (2021)	23
§ 45-5-201(1)(d)	23, 27
§ 46-18-203(4)(b)	32
§ 46-18-203(6)(a)	23
§ 46-18-203(7)(a)(iii)	22
§ 46-18-203(7)-(12)	22
§ 46-18-203(11)(b)(i)-(v)	22
§ 46-20-104(2)	20
§ 46-20-701(1)	30
§ 46-23-1001(3)(a)	22

STATEMENT OF THE ISSUES

1. Whether the district court correctly determined that the State proved, by a preponderance of the evidence, that sufficient evidence supported that Mason violated the conditions of his suspended sentence by committing a new criminal offense?
2. Whether the district court committed reversible error by denying Mason's motion to introduce a video recorded on a security guard's body camera?
3. Whether the district court committed plain error by revoking Mason's suspended sentence?

STATEMENT OF THE CASE

In 2021, Fergus County convicted Appellant Justin Guy Zeno Shawn Wolf Mason (Mason) of multiple criminal offenses, including felony partner or family member assault (PFMA), misdemeanor unlawful restraint, and misdemeanor resisting arrest. (Doc. 66 at 1-2.) Per his plea agreement, the district court sentenced Mason to the Department of Corrections (DOC) for five years pursuant to the PFMA conviction and suspended the sentence. (Docs. 60.1, 66 at 2.) The court also sentenced Mason to the Fergus County Jail for six months for each of his misdemeanor convictions and ran all counts concurrently to one another. (Doc. 66 at 2.)

On April 6, 2022, the State petitioned to revoke Mason’s suspended sentence after he was arrested for assaulting a security guard at the Missoula Poverello Center and for failing to report to his probation officer when instructed, all in violation of the terms and conditions of his suspended sentence. (Docs. 83, 83.1 at 2-3; *see also* 6/22/22 Tr., State’s Ex. 1 (DC-21-32).) The district court, District Court Judge Jon A. Oldenburg presiding, held an adjudicatory hearing on June 27, 2022. (Doc. 94.) During the hearing Mason moved to admit a body camera video recorded by one of the security guards and the State objected to its admission. (6/22/22 Tr. at 27.) The district court sustained the objection and denied the admission of the video. (*See id.* at 28.) The district court found that the State had proved that Mason had violated the conditions of his suspended sentence by committing a new offense, a noncompliance violation, and revoked Mason’s sentence. (*See* 6/22/22 Tr. at 40-41; Doc. 95.)

Prior to disposition, Mason moved to “disallow” the district court from considering the noncompliance violation and asserted that it was “only proper for the judge to consider the failure to keep in touch with probation . . . for sentencing purposes[.]” (*See* Doc. 104 at 1-2.) Mason asserted that the district court erred at the adjudicatory hearing when it “represented that all the [S]tate ha[d] to do was prove that there was a charge against defendant, without any evidence that he committed a crime.” (*See* Doc. 104 at 1.)

On July 26, 2024, the district court, District Court Judge Heather Perry presiding, held a dispositional hearing. (Doc. 111.) The district court orally denied Mason’s motion and found, after reviewing the transcript from the adjudicatory hearing and the order revoking Mason’s suspended sentence, that the State had proved the allegations by a preponderance of the evidence. (7/26/24 Tr. at 3-4.) The district court sentenced Mason to the Department of Corrections for 5 years, with no time suspended, and credited Mason for 370 days of time served. (*Id.*)

STATEMENT OF THE FACTS

Underlying offenses and sentence

Fergus County charged Mason with multiple criminal offenses after he assaulted his partner, N.J., caused her physical injury, and then “prevented N.J. from leaving a residence by physically holding her down.” (*See* Docs. 1 at 2-4 (“N.J. was bleeding from her hand and had swelling around her mouth and a cut on her upper lip.”), 3 at 1-2.) When responding officers attempted to place Mason into custody, he fought with them, “pulled away from [the] officers, and thrashed back and forth.” (Doc. 1 at 3.) Two of the officers eventually picked Mason up and carried him to a patrol vehicle. (*Id.*)

Mason ultimately negotiated a plea agreement with the State and agreed to plead guilty to felony PFMA,¹ unlawful restraint, and resisting arrest. (Doc. 60.1 at 7.) In exchange, the State agreed to dismiss one count of obstructing a peace officer or other public servant, and one count of disorderly conduct. (*Id.* at 2, 8.) The State further agreed to recommend a five-year suspended sentence pursuant to the PFMA count, and six months in the county jail for the counts of unlawful restraint and resisting arrest, both counts to be suspended and run concurrently. (*Id.* at 8.) Additionally, among other obligations,² the State agreed “[t]o enter a Pre-Trial Diversion Agreement in Fergus County Cause No. DC-2021-90 (Bail Jumping).” (*Id.*) Mason agreed as part of the pretrial diversion agreement in the bail-jumping case to leave Lewistown and Fergus County within a 14-day period. (6/22/22 Tr. at 14, 17, 40.)

At his sentencing hearing, the district court followed the plea agreement and sentenced Mason to a five-year suspended sentence and two six-month suspended sentences in the county jail, and ordered that the sentences would run concurrently. (*See* Doc. 66 at 2.) The district court ordered Mason to comply with numerous

¹ Mason was previously convicted of PFMA in May 2002 and 2021. (Doc. 60.1 at 7.)

² Pursuant to the plea agreement, the State also agreed: (1) to dismiss a petition to revoke a suspended sentence imposed in Mason’s 2021 PFMA conviction; and (2) not to file a petition to revoke a suspended sentence imposed following a 2021 “DUI” in Fergus County. (Doc. 60.1 at 8.)

conditions of his suspended sentence, including that he “must personally contact his supervising officer/designee at those individuals’ discretion.” (*Id.* at 4 (condition 5).)

Mason was also ordered to “comply with all municipal, county, state, and federal laws and ordinances and must conduct himself as a good citizen.” (*Id.* (condition 9).)

New offenses and petition to revoke

In 2022, the State petitioned to revoke Mason’s suspended sentence.

(Doc. 83.) The Petition stated that Mason violated the terms and conditions of his suspended sentence by: (1) failing to report to his probation officer as directed; and (2) because he was “charged with additional violent criminal offenses in Missoula City Court Cause TK-620-2022-298.” (Doc. 83 at 1.)

Count 1 of the report of violation (ROV) alleged that Mason was arrested in Missoula on January 25, 2022, after he assaulted a security guard at the Poverello Center. (*See* Doc. 83.1 at 2.) The ROV specifically stated that Mason “physically struck a security guard while they attempted to remove [him] off the property.”

(*Id.*) The ROV stated that Mason had violated the condition of his suspended sentence which required “[c]ompliance with all laws and ordinances.” (*Id.* (stating it was a “NON-COMPLIANCE Violation”).)

Count II of the ROV stated that Mason had contact with law enforcement in Lewistown on December 21, 2021. (Doc. 83.1 at 2.) Mason was instructed to report to the Lewistown probation office by noon, but “[h]e was a no show.” (*See id.*) The

ROV also alleged that on January 22, 2022, Mason was instructed to report to the Missoula probation office by Monday, January 24, before 9 a.m. (*Id.*) Again, Mason “was a no show.” (*Id.*) The ROV asserted that Mason violated the condition of his sentence requiring him to maintain contact with probation. (*See id.* (stating that Mason violated “Court/Parole Condition #4 Monthly Reports/Contact”).) At his initial appearance, Mason denied the allegations. (*See* 5/3/22 Tr. at 7-8; Doc. 90 at 1.)

During the adjudicatory hearing, the State called Mason’s probation and parole officer, Officer Gatlin Lamb (Officer Lamb). (6/22/22 Tr. at 2-3; Doc. 94.) Officer Lamb testified that Mason initially reported to probation after he was sentenced and signed his conditions of release. (*See* 6/22/22 Tr. at 5.) Officer Lamb stated that he understood that Mason had to leave Fergus County by a certain date, and he wanted “to make a game plan” with Mason to get the details about where he was going and how probation could contact him. (*Id.*) Officer Lamb explained that once probation had that information, he could create a travel permit for Mason so he could transfer supervision to that jurisdiction. (*See id.*) However, following Mason’s initial meeting at the probation office, he did not return to make a plan with Officer Lamb. (*Id.*)

After Mason failed to show, Officer Lamb did not hear from him and “couldn’t make any contact with him.” (6/22/22 Tr. at 5.) Officer Lamb stated that Mason “was kind of unreachable.” (*Id.*) Shortly thereafter, the Lewistown Police

Department called Officer Lamb and notified him that they had contact with Mason. (*See id* (stating that Mason “was a passenger in a vehicle in town and that they had him there”).) Officer Lamb told the Lewistown Police to tell Mason to report to his office by noon. (*Id.* at 5.) Mason failed to appear again. (*Id.*) Officer Lamb tried to call Mason “a couple times. There was no answer.” (*Id.* at 6.)

Officer Lamb ultimately called Mason’s aunt and she relayed that Mason had left town and was in Rocker. (6/22/22 Tr. at 6.) Mason’s aunt gave Officer Lamb a phone number that she had been using to get “a hold of him.” (*Id.*) This phone number was different than the number Mason provided to probation. (*Id.*)³ After Officer Lamb called the number multiple times, Mason eventually answered and said he was at a gas station in Rocker. (*Id.*) Mason told Officer Lamb that he was “held up” at the gas station. (*Id.* (stating that Mason said “he ran out of money and couldn’t travel anymore or didn’t have a ride from there”).)

Although Mason did not have a “travel permit” and probation did not know where Mason was going, Officer Lamb stated that he gave Mason “the benefit of the doubt,” and tried to “hammer out” the details about Mason’s destination. (6/22/22 Tr. at 7 (stating that Mason was not sure whether he was going to Missoula, Butte, or Helena).) Mason eventually told Officer Lamb that he was

³ Officer Lamb testified that Mason signed the standard conditions of supervision which required him to update his contact information with probation and parole, including his phone number. (*See* 6/22/22 Tr. at 6.)

going to Missoula and Officer Lamb affirmed that he told Mason to contact him when he arrived in Missoula (*See id.* at 7 (stating that he told Mason “[y]ou need to let me know when you get there”).) However, Mason failed to contact Officer Lamb upon his arrival. (*Id.* at 8.) Mason also did not contact the probation and parole office in Missoula. (*Id.*) Nevertheless, Officer Lamb called Mason and was able to briefly speak with him after he arrived in Missoula. (*See id.* at 12-13.) Officer Lamb described the conversation as “spotty,” because Mason was using Wi-Fi and kept losing service. (*Id.* (stating that “we were calling each other back and forth when he was losing it, losing service”).)

Following Mason’s arrival in Missoula, Officer Lamb affirmed that he received an email stating that Mason had been involved with law enforcement and was arrested. (6/22/22 Tr. at 9.) After Mason’s “contact” with law enforcement, Officer Lamb stated that he was “trespassed” from the Poverello Center. (*Id.*)⁴ Officer Lamb stated that a police officer instructed Mason to report to the Missoula probation office, but he never appeared. (*Id.* at 15 (“But the Missoula PD officer told him to report to Missoula office the next day at 9:00 o’clock so we could get that official transfer done and he didn’t show up for that.”).)

⁴ During his testimony, Mason disputed that he was trespassed from the Poverello Center and instead argued that he was given a “30 day out.” (6/22/22 Tr. at 37-38 (stating that, although he could not stay at the facility for 30 days, he was allowed to use the Poverello Center’s services).)

During Officer Lamb’s testimony, the State admitted, without objection, an exhibit with various documents from Mason’s misdemeanor assault case, Missoula City Court Cause TK-620-2022-298. (6/22/22 Tr. at 9-10 (“State’s Ex. 1”).)⁵ This exhibit contained Mason’s charging documents and various orders from the Missoula Municipal Court. (*See* State’s Ex. 1 at 56-61, 67-68.) Two of the documents were criminal complaints and notices to appear stating that on January 25, 2022, Mason violated Mont. Code Ann. § 45-5-201 when he committed assault. (*See id.* at 56, 58.)

The first complaint and notice to appear stated that at approximately 12:45 a.m., Mason committed assault by “causing apprehension of bodily injury after making physical contact with victim by punching victim in chest.” (State’s Ex. 1 at 56 (specifying that the offense occurred at “0045”).) The second complaint also alleged that Mason violated Mont. Code Ann. § 45-5-201 but included two counts of assault instead of one. (*Id.* at 58.) Count 1 asserted that Mason committed assault after “making physical contact of an insulting or provoking nature and/or causing reasonable apprehension of bodily injury in [RB] by threatening to knock him out while putting his hands on [RB] and attempting to push him.” (*Id.*) Count 2 stated that Mason was charged with assault after “causing reasonable

⁵ The documents in State’s Ex. 1 are identified with “Bates” numbering and the State will cite to that number for the pinpoint page citation.

apprehension of bodily injury in [ND] by swinging at him with a closed fist.” (*Id.*)

Like the first complaint, the second complaint alleged that the assault occurred at “1110 W Broadway.” (State’s Ex. 1 at 56, 58.) Additionally, both documents represent that “this complaint was presented to me and the officer under oath swore that the charges are true.” (*Id.* (capitalization omitted).)

The district court also briefly questioned Officer Lamb about the reported violations. (6/22/22 Tr. at 15-16.) The court stated that it understood that Officer Lamb attempted to reach Mason and asked if it was his duty to “run . . . down” people on his case load, or if it was their duty to contact him. (*Id.* at 15.) Officer Lamb responded that he “make[s] it very clear” to the people that he supervises that they need to communicate with him “if they want to do things right,” and it’s his job to try to track them down when they’re not communicating with him. (*Id.*) Lastly, the court noted that Mason had not yet gone to trial, and asked if it was a violation of his conditions because he was charged with a crime and the Missoula court found probable cause for charges. (*Id.* at 16 (“The fact that he was charged and the Court found probable cause to charge him is that a violation of his conditions?”).) Officer Lamb responded, “Yes.” (*Id.*)

Mason testified at the hearing and denied “hitting” the security guard. (6/22/22 Tr. at 28-29 ([Defense Counsel] Okay so Mr. Mason you deny ever hitting

the Officer?⁶ MR. MASON: I do.”.) However, Mason did not dispute he got into a “physical altercation” with the security guards. (*See id.* at 26.) Rather, Mason stated that a Poverello Center staff member was following him after he attempted to get some of his property from a locker in the building’s basement. (*Id.*) Mason testified that he told the staff member “that he didn’t have to breathe down my neck for me to grab my property and that I . . . was just gonna grab my property and go.” (*Id.*) Mason testified that after security got called, a physical altercation occurred when one of the security guards “grabbed” him and he put his “hand up:”

And then the security got called, they came in and there was a physical altercation there a little bit between, not between me, the only thing I was started about it because a guy grabbed me and when he grabbed me I kind of put my hand up, I didn’t try to strike or go rounds with the guy or anything like that.

(6/22/22 Tr. at 26.) Mason offered that he was “startled” after the security guard “jumped and grabbed” him, and he was just trying to tell them that all he wanted was his property. (*Id.* (“I was just trying to tell him that . . . all I wanted was my property before this even occurred that all I needed was the property, my dry socks and shoes so that I didn’t freeze to death.”).)

Mason moved to admit a video recorded on a body camera worn by one of the security guards during the altercation and the State objected to its admission

⁶ During the hearing, the participants often mistakenly referred to the security guards as “Officer[s].” (*E.g.*, 6/22/22 Tr. at 27-29.)

based on “relevance and incompleteness.” (*Id.* at 27-28.) The district court sustained the objection.⁷ (*Id.* at 28 (“MS. ADAMS: And Your Honor for purposes of the record I’m not objecting on hearsay grounds, I’m objecting on relevance and incompleteness. COURT: Sustained.”).) The district court added, “And the Court agrees that simply by being charged is a violation of Mr. Mason’s requirements and so.” (*Id.*)

Mason’s defense counsel argued that the video was relevant and submitted an offer of proof. (6/22/22 Tr. at 28-30.) Defense counsel offered that, if the district court was going to proceed to disposition, the video “definitely explains the situation that the individual [was] in and even if it isn’t totally complete it gives a much better idea of exactly what happened.” (6/22/22 Tr. at 28-29.) Mason also testified in support of the video and said that it would show that one of the security guards said that Mason “ma[de] contact with him.” (*Id.* at 29.) Specifically, Mason testified that the video showed that:

One Officer said that . . . I may have either hit him open handed or closed handed on the chest and the other Officer . . . did not say anything about me assaulting him. He said that he seen me maybe assault the other Officer, or the other security officer.

(6/22/22 Tr. at 29.)

⁷ The Court also stated that it would sustain the objection based on “authenticity.” (6/22/22 Tr. at 28 (“We’ll sustain the objection. Without the Officer being here to testify about the authenticity of the camera, when it was on, when it wasn’t, whether this was in fact the entire matter or not.”).)

Mason also stated that he was “tased” by one of the security guards for 45 seconds but claimed that they are only allowed to do it for 15 seconds. (6/22/22 Tr. at 29-30.) Mason asserted that his lawyer in Missoula stated he was only charged with assault to “cover” for the security guard:

And the security officer that I . . . allegedly assaulted had tased me for 45 seconds straight and from what I’ve, was able to ascertain from sheriff’s deputies and everybody is that they’re only allowed 15 seconds because after that it’s harmful to you and my lawyer in Missoula for this case that’s in question of the assault had stated that it was probably just cover charges is what the term is for it when they add other charges to you.

(*See id.* at 29-30.)⁸ Mason testified that the video would show that “nobody” wanted to “press” charges for assault. (6/22/22 Tr. at 30.) When defense counsel stated that the video would be “relevant for disposition[,]” Mason responded that he thought he “was able to admit any evidence on [his] behalf.” (*See id.* (“I thought I had . . . on my rights that I was able to admit any evidence on my behalf.”).)

On cross-examination, Mason stated that he went to the Poverello Center to retrieve some of his belongings and did not dispute that he was told by a staff member that he could not stay. (6/22/22 Tr. at 35 (“He said that I wasn’t allowed to stay and I said, okay I’m not allowed to stay.”).) However, Mason then contrarily claimed that he was told “that I could grab my property.” (*Id.* at 56.) Mason also

⁸ The district court sustained the State’s objection to this testimony as speculative. (6/22/22 Tr. at 30.)

denied that he had been using alcohol at the time. (*Id.*) When asked by the prosecutor if he denied whether he was “charged with new charges,” the following exchange took place:

MS. ADAMS: But you admit that you’re charged with new charges in Missoula City Court, Municipal Court, correct?

MR. MASON: Yes, and I do, but with saying that yes I do have evidence that refutes that. That I would like to enter in that you objected to.

MS. ADAMS: That refutes that you were charged?

MR. MASON: That refutes that I had committed a crime.

MS. ADAMS: That’s information that goes to your case in Missoula, not here, thank you.

(*Id.* at 36-37.)

The Court also questioned Mason and asked if he was told on January 22 to report to the Missoula probation officer the following Monday by 9 a.m. (6/22/22 Tr. at 39.) Mason responded that he did not remember being told to report on that date, and the court asked if he was denying he was told to report. (*Id.*) Mason responded that he did not have anybody to report to other than Officer Lamb, and asserted that Officer Lamb told him during their last conversation that Missoula probation would contact him. (*Id.*) Upon questioning by the court, Mason affirmed that he had previously been on parole and was familiar with the rules of probation and parole, which included “an obligation to check in independent of the officers

coming and finding [him].” (*Id.*) However, Mason offered that if he knew he had a probation officer to check in with, he “would’ve went straight in and seen them.” (*Id.*) When the court asked why Mason did not just go directly to the Missoula probation office and find out, Mason responded: “Because I was waiting for [Officer Lamb] to have his paperwork in and the transfer to be successful. Because when I left or before I left there was gonna be no transfer, I wouldn’t know, it was just kind of a wing it kind of thing.” (*Id.* at 40.)

The Court concluded the hearing by finding that, based on the evidence before it, the State proved both allegations in the ROV by “a preponderance of the evidence.” (6/22/22 Tr. at 40-41.) In concluding that the State proved Count I of the ROV, the Court expressly highlighted State’s Exhibit 1, i.e., the documents from Mason’s Missoula assault case. (*Id.*) The court stated that it was clear that Mason was charged, and although he may have some defenses at trial, the State satisfied its burden to prove Count I of the ROV at the hearing. (*Id.* (“He may have some defenses and that may in fact weigh in on the dispositional hearing in this matter, but as far as adjudicatory the Court finds that Count I has been proven.”).)

Following the adjudicatory hearing, Mason filed a motion to preclude the district court from considering the assault charges at his dispositional hearing. (Doc. 104 at 1 (“The defendant asks this honorable court not to have his assault charges considered at the disposition hearing.”).) Mason argued the district court

“[mis]represented that all the [S]tate ha[d] to do was prove that here was a charge against defendant, without any evidence that he committed a crime.” (*See* Doc. 104 at 1; *see also* 7/26/22 Tr. at 3-4 (arguing that the State had proved that Mason was charged, but not that he engaged in the “conduct,” i.e., committed assault).) Consequently, Mason asked the district court to only consider the violation concerning his failure to maintain contact with probation at disposition. (Doc. 104 at 2 (“Therefore, it is only proper for the judge to consider the failure to keep in touch with probation . . . for sentencing purposes[.]”).)

At the July 26, 2022, dispositional hearing, the district court orally denied Mason’s motion. (7/26/22 Tr. at 3-4.) Judge Perry recognized that although she did not preside over Mason’s adjudicatory hearing, she had reviewed the transcript from the adjudicatory hearing and the order revoking Mason’s suspended sentence. (*Id.*) Upon review of these documents, she noted Judge Oldenburg’s rulings concluding that the State had proved the allegations in the ROV by a preponderance of the evidence. (*Id.* at 3.) Consequently, based on the district court’s prior rulings, Mason’s motion was denied. (*Id.*)

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion when it revoked Mason’s suspended sentence because the State presented sufficient evidence that he

committed a new offense and violated the condition of his sentence requiring compliance with all laws. In support of the allegations in the Petition, the State submitted Officer Lamb's ROV and the charging documents from Mason's Missoula assault case, in addition to providing Officer Lamb's testimony at the hearing. This evidence was sufficient to show that Mason committed a new offense by a preponderance of the evidence.

Specifically, the unchallenged evidence showed that Mason made physical contact with RB after being told that he could not stay the night at the Poverello Center. Mason's charging documents detail the assault, including that Mason threatened to "knock . . . out" RB, and swung his "closed fist" at ND. Mason himself did not deny that a physical altercation occurred, but argued that it only happened because he was "grabbed" and he became "startled." Montana law provides that a person commits assault if they make physical contact of an insulting or provoking nature, or if they purposely or knowingly cause reasonable apprehension of bodily injury in another. Under the circumstances, the State provided sufficient evidence to show that Mason committed assault.

The district court also applied the proper burden of proof at the adjudicatory hearing and found the State proved the violations by a preponderance of the evidence. Mason cites statements by the district court where it stated that "simply being charged" violates the conditions of Mason's suspended sentence and argues

that the court committed error. (Br. at 32 (citing 6/22/22 Tr. at 28).) However, despite Mason's implicit suggestion that the district court applied the wrong standard of proof at the hearing, the district court correctly applied the proper standard and expressly held that the State had proved the violation by a preponderance of evidence. Additionally, the district court did not simply rely on the allegations in the Petition, but instead found that the State proved the violation after Officer Lamb submitted his ROV and testified, and the court reviewed the charging documents from Mason's criminal case. Mason fails to show that the district court committed error.

Next, even if the district court erred by precluding the admission of the security guard's body camera video, Mason fails to show that he was prejudiced by the ruling. Mason himself testified that the video would show that a physical altercation occurred, including that one of the security guards stated that Mason hit him on the chest, and that the other officer witnessed it. Mason fails to show how this evidence would undercut the State's allegations, or otherwise support the contention that the assault did not take place. Because a matter should only be reversed on appeal for prejudicial error, and Mason fails to allege or show that he was prejudiced by the ruling, the Court should not reverse Mason's revocation, even if the district court erred by not admitting the video.

Mason also argues that this Court should exercise plain error and reverse his revocation. In support, Mason cites the pretrial diversion agreement in his Fergus County bail jumping case, and its so-called banishment condition, and contends that it was the proximate cause of his violations. The Court should deny Mason's invitation to apply plain error review. Importantly, even if the pretrial diversion agreement contained an illegal provision, that is not the reason for his revocation. Instead, Mason was revoked because he failed to comply with the law when he committed assault and failed to report to probation on two specific instances. Mason's pretrial diversion agreement is simply irrelevant to the dispositive issues before the Court. Mason also fails to allege that his revocation implicates a constitutional or fundamental right, and that failure to review the alleged error would result in a miscarriage of justice. Accordingly, Mason does not meet his burden for the Court to invoke plain error review and the request should be denied.

ARGUMENT

I. Standards of review

This Court "review[s] a district court's decision to revoke a suspended sentence to determine whether a district court's 'decision was supported by a preponderance of the evidence in favor of the State, and if so, whether the court

abused its discretion.” *State v. Howard*, 2020 MT 279, ¶ 9, 402 Mont. 54, 475 P.3d 392 (citing *State v. Oropeza*, 2020 MT 16, ¶ 14, 398 Mont. 379, 456 P.3d 1023).

“A district court abuses its discretion when it ‘acts arbitrarily without employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice.’” *Howard*, ¶ 9 (citing *State v. Burke*, 2005 MT 250, ¶ 11, 329 Mont. 1, 122 P.3d 427).

“The failure to preserve an assertion of error by contemporaneous objection generally waives the right to subsequent appellate review.” *State v. Trujillo*, 2020 MT 128, ¶ 6, 400 Mont. 124, 464 P.3d 72 (citing Mont. Code Ann. § 46-20-104(2)). At the Court’s discretion, it may apply “a narrow exception to the waiver rule [and] review an unpreserved objection if it implicates a fundamental constitutional right and plain error review is necessary to avoid a manifest miscarriage of justice, leaving an unsettled question regarding the fundamental fairness of the proceeding, or otherwise compromising the integrity of the judicial process.” *Trujillo*, ¶ 6. “Whether an asserted error implicates a fundamental constitutional right is a question of law subject to plenary review.” *Trujillo*, ¶ 6.

II. The district court correctly determined the State proved, by a preponderance of the evidence, that Mason committed a new criminal offense and violated the conditions of his suspended sentence.

“Revocation proceedings are civil matters and fundamentally differ from underlying criminal conviction statutes.” *State v. Souther*, 2022 MT 203, ¶ 9, 410 Mont. 330, 519 P.3d 1 (citing *Howard*, ¶ 13 (“A probation violation proceeding is civil and is based upon later conduct that constitutes a violation of the conditions of a suspended sentence.”) (citation and internal punctuation marks omitted)). A “revocation hearing is not subject to the Montana Rules of Evidence, although it must be fundamentally fair.” *State v. Sebastian*, 2013 MT 347, ¶ 19, 372 Mont. 522, 313 P.3d 198.

“A revocation proceeding, in turn, is a purely administrative action designed to determine whether a parolee or probationer has violated the conditions of his parole or probation, not a proceeding designed to punish a criminal defendant for violation of a criminal law.” *State v. Haagen*, 2010 MT 95, ¶ 15, 356 Mont. 177, 232 P.3d 367. Thus, “[r]evocation of a suspended sentence indicates a determination by the court that the purposes of rehabilitation are not being served by the suspension.” *Howard*, ¶ 13 (citation and internal punctuation marks omitted).

The Montana Incentives and Interventions Grid for Adult Probation & Parole (MIIG) “provides guidelines for probation and parole officers that create

consistency with incentives and interventions for offenders.” *State v. Fetveit*, 2020 MT 264, ¶ 17, 401 Mont. 538, 474 P.3d 811. The MIIG separates violations of probation or parole into two categories: compliance and noncompliance violations. *Fetveit*, ¶ 17 (citing Mont. Code Ann. § 46-18-203(7)-(12)).

“Compliance violations are defined in the negative to mean violations that are not absconding or other serious violations such as a new criminal offense.” *Fetveit*, ¶ 18 (citing Mont. Code Ann. § 46-18-203(11)(b)(i)-(v)); *City of Missoula v. Sadiku*, 2021 MT 295, ¶ 16, 406 Mont. 271, 498 P.3d 765 (stating that “[a] non-compliance violation includes ‘a new criminal offense’”); *see also* Mont. Code Ann. § 46-23-1001(3)(a) (“‘Compliance violation’ means a violation of the conditions of supervision that is not . . . a new criminal offense.”).

“Non-compliance violations . . . can result in a direct revocation and are not subject to the MIIG procedures.” *Fetveit*, ¶ 17 (citing Mont. Code Ann. § 46-18-203(7)(a)(iii)). “Thus, conduct by the respondent that supports a new criminal charge or offense can also form the basis of the revocation petition, which must be proven by a preponderance of the evidence to establish a violation, but which may be demonstrated even if the criminal charges are dismissed.” *Howard*, ¶ 13. “This is not the same proof necessary to obtain a conviction of the offense.” *Howard*, ¶ 13; *see also Howard*, ¶ 11 (“At the hearing, the prosecution shall

prove, by a preponderance of the evidence, that there has been a violation’ of a term or condition of the sentence.”) (quoting Mont. Code Ann. § 46-18-203(6)(a)).

A. The district court correctly found the State presented sufficient evidence that Mason committed a new criminal offense and violated the conditions of his suspended sentence.

As a threshold issue, the district court did not abuse its discretion when it revoked Mason’s suspended sentence. Critically, the State presented sufficient evidence, supported by a preponderance of the evidence, that Mason violated the conditions of his suspended sentence by engaging in conduct constituting a new criminal offense.

As discussed, the Petition and ROV alleged that when Mason was arrested and charged with misdemeanor assault, he violated the condition of his suspended sentence that required compliance with all laws. (Docs. 83 at 1, 83.1 at 2.) Pursuant to Montana law, “[a] person commits the offense of assault if the person . . . purposely or knowingly makes physical contact of an insulting or provoking nature with any individual.” Mont. Code Ann. § 45-5-201(1)(c) (2021). A person also commits assault if that person “purposely or knowingly causes reasonable apprehension of bodily injury in another.” Mont. Code Ann. § 45-5-201(1)(d).

Officer Lamb testified during the adjudicatory hearing that he was notified by email that Mason was “trespassed” from the Poverello Center in Missoula and arrested. (6/22/22 Tr. at 9, 15.) This was in addition to Officer Lamb’s ROV that

specified that Mason had been arrested for assault. In support of the ROV and Officer Lamb's testimony, the State admitted Mason's charging documents from his Missoula assault case as an exhibit. The criminal complaints within this exhibit, which the district court stated it "especially" relied upon, established the factual circumstances underlying the assault. (*Id.* at 40-41.) Namely, that Mason made physical contact of an insulting or provoking nature when he threatened to knock RB out while his hands were on RB's body, and Mason was attempting to push RB. This documentary evidence was also sufficient to independently establish that Mason's physical contact caused RB reasonable apprehension of bodily injury.

Furthermore, in support of the second count of assault, the evidence established that Mason caused ND reasonable apprehension of bodily injury after Mason attempted to punch "him with a closed fist." (State's Ex. 1 at 58.) This evidence was sufficient to establish a separate criminal offense, and was an additional noncompliance violation. Although the Povorello staff and the security guards did not testify at the hearing, the district court was permitted to rely on Mason's charging documents as evidence that he engaged in conduct constituting assault. *See Fetveit*, ¶ 14 (stating that "Reports of Violation" may be used as evidence in revocation proceedings, and that a court may utilize documentary evidence in its decision, even if the evidence does not meet usual evidentiary requirements) (citing *United States v. Simmons*, 812 F.2d 561, 564 (9th Cir.

1987)). Consequently, the above evidence was sufficient to establish by a preponderance that Mason committed a new offense and violated a condition of his suspended sentence.

Importantly, Mason did not object to the admission of the charging documents, nor directly dispute that he engaged in the conduct alleged in this evidence. During his testimony Mason agreed that he was told by staff that he was not permitted to stay at the Poverello Center and did not deny that he became involved in a physical altercation after security was called. Mason also did not explicitly deny that he placed his hands on RB, pushed him, and threatened to knock him out. Further, although Mason asserted that he was not trying to “strike” anyone, Mason testified that he put his hand up when he was “grabbed.” (6/22/22 Tr. at 26.) Mason thus does not even contest that he made contact during the altercation. Under the circumstances, it would not be unreasonable to think this contact would be of an insulting or provoking nature, or that it would have caused reasonable apprehension of bodily injury.

Accordingly, based upon the unchallenged documentary evidence admitted in support of Officer Lamb’s testimony, in addition to Mason’s own testimony, sufficient evidence was presented for the district court to determine the State had proved by a preponderance of the evidence that Mason had committed assault.

B. This district court applied the proper burden of proof and expressly found that the State proved that Mason committed a new criminal offense by a preponderance of the evidence.

Mason contends that the district court erred at the adjudicatory hearing when it remarked that “simply by being charged is a violation of Mr. Mason’s requirements. . . .” (6/22/22 Tr. at 28; *see also* Br. at 31-34.) Mason thus impliedly suggests that the district court applied the incorrect burden of proof at his hearing and this Court should vacate his revocation as a result. Mason’s suggestion is incorrect.

Indeed, the State does not dispute that probable cause was only required to arrest Mason for assault, while a slightly higher standard, a preponderance of the evidence, was necessary to revoke his suspended sentence because he committed a new offense. *See City of Missoula v. Williams*, 2017 MT 282, ¶ 18 n.2, 389 Mont. 303, 406 P.3d 8 (discussing, generally, that preponderance of the evidence is a higher standard of proof than probable cause); *see also Howard*, ¶ 13. However, contrary to Mason’s argument, the district court correctly applied the preponderance standard of proof at his hearing. (6/22/22 Tr. at 40-41 (“Count I of this reported violation has been proven to a preponderance of the evidence.”).)

Additionally, Mason failed to raise this issue at the time of his adjudicatory hearing. Instead, he raised the issue prior to disposition and after a new judge, Judge Perry, had been assigned to his revocation proceeding. (*See* 7/26/22 Tr. at

3-4.) Judge Oldenburg, the previous judge, was thus deprived of an opportunity to explain his statement. Instead of somehow lowering the State's burden of proof, Judge Oldenburg could have simply been clarifying that a conviction was not required to revoke Mason's sentence. *See Howard*, ¶ 13 (rejecting the idea that a conviction was necessary before a probationer's suspended sentence could be revoked for committing a new offense). Because Mason failed to promptly raise the issue, and deprived the sitting judge of the opportunity to appropriately address it, the question is now left unanswered.

Although Mason belatedly argued that the district court's statements somehow undercut the propriety of his revocation, the State presented sufficient evidence to establish Mason's violation and his failure to comply with the law—not simply an unsupported and vague accusation that Mason had committed a new crime. In addition to the Petition, the State established Mason's violation through Officer Lamb's testimony in conjunction with the admission of the unchallenged documentary evidence, including the ROV and the charging documents. Further, Mason's testimony, and his recognition that he was involved in a physical altercation, provided further evidence that Mason engaged in conduct that constituted assault under Mont. Code Ann. §§ 45-5-201(1)(c) or (1)(d).

Consequently, this Court should not reverse the revocation of Mason’s suspended sentence based on the district court’s statements, particularly because Mason failed to promptly lodge an objection during the hearing. A timely objection would have allowed the court to properly respond and rule on the issue. Because Mason failed to do so, and deprived the district court of the opportunity to appropriately address the issue, this Court should affirm the revocation of his suspended sentence. *See In re B.H.*, 2018 MT 282, ¶ 22, 393 Mont. 352, 430 P.3d 1006 (stating that “[f]ailure to make contemporaneous objection deprives the court from opportunity to correct the error” and noting that “a simple objection or even suggestion by counsel that a statutory requirement had not been satisfied would have alerted the District Court to the problem, which it then could have easily remedied”).

C. The pretrial diversion agreement in Mason’s bail jumping case, and it’s supposed “banishment condition,” is completely irrelevant to whether he violated the conditions of his suspended sentence by committing a new criminal offense in Missoula.

At the adjudicatory hearing, Officer Lamb was questioned about the pretrial diversion agreement Mason signed with Fergus County. (*See* 6/22/22 Tr. at 10-11, 14.) Officer Lamb stated that this agreement was for a different case and affirmed that, as part of the agreement, Mason agreed to leave Lewistown and Fergus County within 14 days. (*Id.* at 14.) However, Officer Lamb stated that Mason did not leave within the 14-day period. (*Id.*)

On appeal, Mason argues that this agreement constituted an illegal banishment provision. (Br. at 26-29 (citing *State v. Muhammad*, 2002 MT 47, 309 Mont. 1, 43 P.3d 318).) Furthermore, Mason argues that this Court should reverse his revocation because the pretrial agreement's requirement that he leave the jurisdiction was the "actual and proximate cause" of his violations. (Br. at 30-31.) Disregarding the propriety of the pretrial diversion agreement's stipulation that Mason leave Fergus County, it is simply incorrect to contend that Mason committed assault because of the agreement. Rather, Mason committed assault because he knowingly made physical contact with RB and swung his fist at ND, not because he signed a document in a different county where he voluntarily agreed to leave said county.

Critically, the pretrial diversion agreement is completely irrelevant to whether Mason violated his suspended sentence. The State did not move to revoke his suspended sentence because he failed to leave Fergus County within the stipulated 14-day period. Additionally, although it is equally irrelevant to the issue before the Court, there is also no evidence that the State has even sought to rescind the pretrial diversion agreement in Mason's unconnected bail jumping case because he failed to leave the county within 14 days. Rather, the State petitioned to revoke Mason's sentence because he committed a new offense and failed to report to probation on two separate occasions after being explicitly directed to do so.

Thus, even if the pretrial diversion agreement constituted an illegal banishment provision, it has no bearing on the legal issues before the Court. The Court should reject Mason's red herring argument and conclude that the district court did not abuse its discretion when it revoked Mason's suspended sentence.

III. Even if the district court erred by not admitting the body camera video during the revocation hearing, Mason fails to allege or show that he was prejudiced by the ruling.

Mason contends that the district court erred when it denied his request to admit a video of the incident that was recorded on the security guard's body camera. (Br. at 32-33.) However, even if the district court abused its discretion by denying the admission of the video, namely due to its relevance, Mason fails to show that he was prejudiced by the court's ruling. Per well-established statutory and case law: "A cause may not be reversed by reason of any error committed by the trial court against the convicted person unless the record shows that the error was prejudicial." Mont. Code Ann. § 46-20-701(1); *see also State v. Huerta*, 285 Mont. 245, 252, 947 P.2d 483, 487 (1997).

During the defense's offer of proof, far from exonerating Mason, he testified that the video would show that one of the security guards stated that Mason made physical contact with him, and another guard stated that he witnessed the assault. (*See* 6/22/22 Tr. at 29 ("One Officer [sic] said that . . . I may have either hit him

open handed or closed handed on the chest.”.) Mason fails to show how this evidence would have undermined the State’s contentions that he committed assault by making contact of an insulting or provoking nature. Thus, because Mason neither shows nor argues that he was prejudiced by the district court’s decision to deny the admission of the video, this Court should decline to reverse Mason’s revocation.

IV. The district court did not commit plain error by revoking Mason’s suspended sentence.

The Court may “exercise plain error review only under extraordinary circumstances.” *Trujillo*, ¶ 6. “Mere assertion that an asserted error implicates a constitutional right or that a manifest miscarriage of justice will result absent review is insufficient—the appellant must affirmatively demonstrate the criteria for plain error review.” *Trujillo*, ¶ 6.

Here, Mason contends that the Court should exercise plain error review, vacate his revocation, and remand “to district court with such orders as the Court deems appropriate.” (Br. at 34-35.) In support of his request for plain error review, Mason raises the pretrial diversion agreement’s purported banishment condition, in addition to his challenging personal circumstances at the time of the violation, and asserts that it was simply unfair to revoke his suspended sentence under the circumstances. However, although the State understands that his situation was not without its complications and challenges, Mason fails to carry his burden, and

show that the district court's decision to revoke his suspended sentence implicated a constitutional or fundamental right, and that failure to review the alleged error is necessary to avoid a manifest miscarriage of justice. *Trujillo*, ¶ 6. The Court should thus decline to exercise plain error review and reverse Mason's revocation.

Lastly, although Mason failed to raise a constitutional objection below, and has forfeited the issue on appellate review,⁹ the State notes that an offender retains certain statutory and constitutional rights during a revocation proceeding, including the minimum requirements of due process. *Sebastian*, ¶ 18 (“The minimum requirements of due process are extended to sentence revocation hearings.”). This includes the opportunity to be heard in person and present testimonial and documentary evidence. *State v. Finley*, 2003 MT 239, ¶ 31, 317 Mont. 268, 77 P.3d 193 (citations omitted); *see also* Mont. Code Ann. § 46-18-203(4)(b) (providing that during a revocation hearing an offender must be advised of the “opportunity to appear and to present evidence in the offender’s own behalf”).

Again, although Mason does not argue on appeal that his right to due process was violated when the district court precluded the admission of the body camera video during the hearing, even if he did raise a constitutional argument and

⁹ “The general rule is that an objection concerning constitutional matters must be raised before the trial court, and if the objection is not made, it will not be reviewed on appeal.” *State v. Reim*, 2014 MT 108, ¶ 38, 374 Mont. 487, 323 P.3d 880.

request the Court exercise plain error review under these grounds, as discussed above, Mason cannot show that he was prejudiced by the court's ruling. Instead, as Mason's testimony confirmed during the hearing, playing the video for the court would have simply strengthened the State's case and provided further evidence that Mason's physical contact was of an insulting or provoking nature, in addition to causing reasonable apprehension of bodily injury. Accordingly, even if the Court finds that the district court erred when it denied the admission of the video, it should conclude that Mason's due process rights were not violated because he fails to show that he was prejudiced.

CONCLUSION

This Court should affirm the district court's revocation of Mason's suspended sentence.

Respectfully submitted this 18th day of March, 2024.

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

By: /s/ Michael P. Dougherty
MICHAEL P. DOUGHERTY
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 7,925 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Michael P. Dougherty
MICHAEL P. DOUGHERTY

CERTIFICATE OF SERVICE

I, Michael Patrick Dougherty, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 03-18-2024:

Chad M. Wright (Attorney)
P.O. Box 200147
Helena MT 59620-0147
Representing: Justin Guy Zeno Shawn Wolf Mason
Service Method: eService

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Kent M. Sipe (Govt Attorney)
801 W. Broadway
Lewistown MT 59457
Representing: State of Montana
Service Method: eService

Gregory Dee Birdsong (Attorney)
P.O. Box 4051
Santa Fe NM 87502
Representing: Justin Guy Zeno Shawn Wolf Mason
Service Method: eService

Electronically signed by Janet Sanderson on behalf of Michael Patrick Dougherty
Dated: 03-18-2024