

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0170

STATE OF MONTANA,

Plaintiff and Appellee,

v.

NED BRYANT GARDNER,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, The Honorable Jason T. Marks, Presiding

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STATEMENT OF THE ISSUE

Whether the district court correctly sentenced the Appellant as a persistent felony offender based on two undisputed prior felony offenses that the State specified more than four months prior to sentencing in its notice of intent to seek increased punishment.

STATEMENT OF THE CASE

On November 27, 2020, the State charged the Appellant, Ned Gardner (Gardner), with felony criminal endangerment, in violation of Mont. Code Ann. § 45-5-207, and felony partner family member assault (PFMA), third or subsequent offense, in violation of Mont. Code Ann. § 45-5-206. (District Court Documents (Docs.) 1-2.)

The district court held the omnibus hearing on January 12, 2021. (Docs. 7-8.) On September 29, 2021, the State filed under seal a notice of intent to seek increased punishment, pursuant to the persistent felony offender statutes. (Docs. 18-19.) On October 12, 2021, Gardner objected and argued the State's notice was untimely, it was without good cause, and the untimely filing prejudiced him. (Doc. 20.) On October 13, 2021, the district court held a hearing on the objection and took the matter under advisement. (Doc. 29.)

On October 18, 2021, a jury found Gardner guilty of felony PFMA and not guilty of criminal endangerment. (Doc. 35.) On February 3, 2022, the district court found the State showed that Gardner was a persistent felony offender and that Gardner provided nothing to show he had been prejudiced by the State's filing of its notice of intent to seek increased punishment under the persistent felony offender statutes. (Doc. 43.)

On February 4, 2022, the district court sentenced Gardner to 20 years in the Montana State Prison (MSP) pursuant to the persistent felony offender statutes. (Docs. 44, 48 at 2.)¹

STATEMENT OF THE FACTS

I. The offense

On the evening of November 16, 2020, a woman, D.J., called 911 and reported that her boyfriend had assaulted her. (10/15/21 Trial Transcript (Trial Tr.)² at 157-58, 160, 187-89; State's Ex. 1.) Law enforcement contacted the woman in a small truck outside a residence. (Trial. Tr. at 189, 233-35, 246-47.)

¹ Gardner attached the district court judgment (Doc. 48) to his brief as Appellant's Appendix A.

² The two-day jury trial occurred on Friday, October 15, 2021, and Monday, October 18, 2021. (Docs. 31-32.) The trial transcript is consecutively paginated, and the State cites to the transcripts for both days collectively as "Trial Tr." (Trial Tr. at 19-349.)

D.J. was crying and did not have any shoes on. (*Id.* at 235, 247.) It was November and snow was on the ground. (*Id.* at 247, 255.) D.J. lived in a nearby residence with Gardner. (*Id.* at 157-58, 235.)

Earlier that day, D.J. had traveled with Gardner to East Missoula to find a cheaper place to live. (*Id.* at 161-63.) Gardner had been drinking hard alcohol. (*Id.* at 164-65.) While they were driving, Gardner became upset. (*Id.* at 163-66.) He began driving erratically. (*Id.* at 166-69.) Gardner increased the vehicle speed, drove towards a building and slammed on the brakes right before they hit it. (*Id.*) He did this multiple times. (*Id.*) Gardner also made fast, hard turns and drove into oncoming traffic. (*Id.*) D.J. feared they would hit an oncoming vehicle. (*Id.*)

Eventually, they returned to their residence on the west side of Missoula. (*Id.* at 162, 169.) D.J. had a hard time remembering the exact details, but she remembered going into the house, and Gardner was sitting on the bed. (*Id.* at 170-72.) D.J. described:

We were talking or arguing. It was something—like his eyes went black. And he stood up over me and just—like I’ve been hit. I have been hit before. But this was—these were full force punches. And I fell onto the ground and on my knees. And I thought I was going to die. I covered my head with my arms but it was a lot of punches.

. . . .

It was like he didn't even know who I was. He just was like in this—like I've never seen it before, like monster mood. He just wanted to kill me. He was screaming like, I'm going to kill you.

(*Id.* at 172.) Gardner kept punching D.J. while she covered her head with her arms.

(*Id.* at 172-73.) Gardner hit D.J. on her arms, hands, and head. (*Id.* at 173.) D.J. said Gardner hit her around 20 times. (*Id.* at 174.)

D.J. thought, “This person that I loved was going to kill me.” (*Id.* at 173.) She was in a lot of pain at first, “A lot of pain like blows, like, would knock me almost cross eyed.” (*Id.*) Then she “just went numb.” (*Id.*) D.J. did not remember when it stopped. (*Id.*) “I just remember all of a sudden I'm outside and running towards the truck which fortunately was unlocked.” (*Id.* at 174.) D.J. locked herself in the pickup and called 9-1-1. (*Id.* at 186-87.) During the 9-1-1 call, D.J. was frightened for her life. (*Id.* at 188.) D.J. breathed erratically, sobbed, and told the dispatch operator that Gardner had punched her repeatedly in the head. (State's Ex. 1; Trial Tr. at 187-88.) During the call, D.J. told the operator that Gardner was throwing things at the pickup. (*Id.*)

At around 9 p.m., law enforcement officers arrived and spoke to D.J. while she sat in the pickup. (Trial Tr. at 189, 233-35, 246-48, 259.) D.J. said her arm hurt, and she was crying and upset. (*Id.* at 235, 247.) A coworker of Gardner's named Guy Johnson arrived about the same time as the officers. (*Id.* at 249-50.) He

told officers that Gardner had contacted him and told him to come. (*Id.* at 250, 272, 275-76.)

Missoula County Sheriff's Deputy Zachary Barber immediately observed visible injuries on D.J. (*Id.* at 247-48.) D.J. had redness on her head and a "deformity raised, goose egg," on her right forearm. (*Id.* at 247.) D.J. had a hard time explaining what happened because she was so upset, but she told Deputy Barber that Gardner had hit her multiple times over a period of a few hours prior to his arrival. (*Id.* at 248-49.) D.J. repeatedly said that Gardner hit her, and she said she was in pain. (*Id.* at 249.)

Missoula County Sheriff's Deputy David Swearingin contacted Gardner in the residence. (*Id.* at 233-35.) Gardner was calmly sitting on a bed "fidgeting with his phone." (*Id.* at 235.) Deputy Swearingin told Gardner he was responding to a report of a physical disturbance between him and D.J. (*Id.*) Gardner said he did not know what was going on. (*Id.*) Deputy Swearingin remained at the residence for 40 minutes, and Gardner repeatedly denied a physical altercation with D.J. and said he did not know why D.J. was upset with him. (*Id.* at 235-37, 241.) Gardner appeared to be intoxicated, and he acknowledged that he had been drinking a little. (*Id.* at 237-38.) Deputy Swearingin saw swelling, redness, and bruising on Gardner's right hand and knuckles. (*Id.* at 238.) Gardner initially said he did not know what caused the injuries, but he later said that he hit his hand while checking the oil in

the pickup. (*Id.* at 239-40.) The officers arrested Gardner and transported him to the jail. (*Id.* at 259-60.)

After the officers spoke with D.J. at the residence, an ambulance took her to the hospital. (*Id.* at 189-90.) The emergency room doctor who treated D.J. said she had large hematomas on her scalp and forearms. (*Id.* at 177-78.) Her forearms were “badly bruised and swollen.” (*Id.* at 178.) Due to the significant injuries, the doctor thought D.J. may have broken bones in her arms or skull, but subsequent testing showed nothing was broken. (*Id.* at 178-79.) The doctor said the scalp injuries could only be caused by “very tight, squeezing, direct blows.” (*Id.* at 179.) He compared D.J.’s injuries to those incurred during a bear attack. (*Id.* at 179-80.)

Think about when a bear attacks you, what are you going to do? You’re not really going to reach out. You’re going to go into this position. So that’s all I could imagine that she was being—how she was being assaulted, is probably similar to how you protect yourself from a bear.

(*Id.*)

D.J. described her injuries. (*Id.* at 173-74.) “Like a day and a half later I felt like I jumped off a six-story building, like, my whole body hurt. It was a week, my whole body hurt.” (*Id.* at 173.) She, along with the emergency medical responders, thought her arm was broken. (*Id.* at 174.) It had a large lump on it almost immediately. (*Id.*) D.J. said “Everything was swollen and bruised and black eye

and bruises and—nothing—no physical thing hurt as much as, you know, him doing the hurt.” (*Id.*)

After Gardner arrived at the jail, officers performed a breath test that showed Gardner’s blood alcohol content was 0.17. (*Id.*) At that point, Gardner admitted to officers that he had been drinking throughout the day. (*Id.*) A deputy read to Gardner a standard 72-hour no contact order for PFMA cases that precluded him from contacting D.J. (*Id.* at 260.) The officer placed a copy of the order with Gardner’s property at the jail. (*Id.*) Both the justice court on November 18, 2020, and the district court on December 8, 2020, ordered Gardner to have no contact with D.J. (*Id.* at 192.) Gardner and D.J. had numerous phone and text conversations in violation of the orders. (*Id.* at 192-210, 217-32; State’s Exs. 2, 6-9, 16.) Gardner also called three people from the jail on November 18, 2020. (Trial Tr. at 264-67; State’s Exs. 3-5.) In those three calls he acknowledged hitting D.J. (*Id.*)

II. Procedural history

On November 27, 2020, the State charged Gardner with felony criminal endangerment and felony PFMA, third or subsequent offense. (Docs. 1-2.) The district court held the omnibus hearing on January 12, 2021. (Docs. 7-8.) The omnibus memorandum specified:

X. PERSISTENT FELONY OFFENDER

Pursuant to MCA 46-13-108, the State will give notice, by separate pleading, if the State seeks to have the Defendant sentenced as a Persistent Felony Offender.

(Doc. 7 at 5 (emphasis in original).)

Pursuant to Gardner's unopposed motions, the district court twice continued the jury trial due to new counsel being assigned to Gardner's case. (Docs. 9-12, 14-15.) During a hearing on July 14, 2021, the district court rescheduled the jury trial to October 15, 2021, and set a final pretrial conference for September 28, 2021. (Doc. 15.) During the final pretrial conference, Gardner's counsel confirmed the jury trial date. (Doc. 16.)

The next day, September 29, 2021, the State filed under seal a notice of intent to seek increased punishment, pursuant to the persistent felony offender statutes, Mont. Code Ann. §§ 46-1-202(18), 46-13-108 and 46-18-502. (Docs. 18-19.) The State specified that Gardner had a prior felony conviction in 2012 for assault with a weapon and a prior felony conviction in 2016 for PFMA, third or subsequent offense. (Doc. 18.) The State explained that these offenses, combined with the offenses charged in the underlying matter, met the requirements of the persistent felony offender statutes and notified Gardner of the potential penalty. (Doc. 18.)

On October 12, 2021, Gardner objected to the notice. (Doc. 20.) Gardner argued the State did not have good cause to file the notice after the omnibus hearing and that the untimely filing prejudiced him by not providing him ample time to object to his prior convictions and hold a hearing with the court. (*Id.*) Gardner did not dispute his prior felony convictions. (*Id.*) In its response, the State argued its notice did not prejudice Gardner because he had ample time before sentencing to challenge his prior convictions. (Doc. 21 at 2.)

On October 13, 2021, the district court held a hearing on the objection. (Doc. 29; 10/31/21 Tr. at 4-11.) Gardner argued that he was prejudiced by the proximity of the State's notice—filed September 28, 2021—to the trial date—October 15, 2021. (10/31/21 Tr. at 6.) Gardner did not challenge his prior convictions during the hearing. (*Id.* at 4-11.) The State explained that it did not include any good cause analysis in its brief because the only reason it did not file the notice sooner was an oversight based on its belief that the case would settle. (*Id.* at 8-9.) The district court took the matter under advisement. (*Id.* at 10.)

The district court began the two-day jury trial on Friday, October 15, 2021, and it concluded on Monday, October 18, 2021. (Docs. 31-32.) During the second day of the trial, Gardner represented to his counsel that he was not satisfied with her representation. (Trial Tr. at 261-63.) After a conversation with the district court and a brief moment to consider his options, Gardner continued with his counsel.

(*Id.*) The jury found Gardner guilty of felony PFMA and not guilty of criminal endangerment. (Docs. 32, 35.) The district court ordered an updated Presentence Investigation Report (PSI). (Doc. 32 at 2.) The PSI, which the State filed on November 24, 2021, included in Gardner’s criminal history both prior felony convictions that the State asserted in its persistent felony offender notice. (Docs. 18, 36 at 2.)

On February 3, 2022, the district court issued its order on Gardner’s objection to the State’s notice of intent to seek increased punishment. (Doc. 43.) The district court found Gardner was a persistent felony offender and informed the parties that it would sentence him accordingly. (Doc. 43.) The district court explained:

The appropriate inquiry is whether the Defendant has “ample time” to object to his PFO designation (including a challenge as to whether the convictions in the notice qualify pursuant to the PFO statutes) and whether the Defendant was “prejudiced” by the timing of the filing.

(Doc. 43 at 2.) The district court acknowledged that the State’s good cause explanation was “very questionable,” but it also explained that Gardner articulated “no prejudice whatsoever arising from the late filing.” (*Id.* at 1-2.) The district court found the State’s notice did not prejudice Gardner because he had “ample time” to challenge his prior convictions. (*Id.* at 1-4.)

The next day, the district court sentenced Gardner as a persistent felony offender to 20 years in MSP. (Docs. 44, 48 at 2; 2/4/22 Tr. at 394.) During the 4 months between the State's filing of its notice of intent to seek increased punishment and the sentencing hearing, Gardner never disputed that he qualified as a persistent felony offender. (*See* Docs. 20-43; 10/13/21 Tr. at 4-11; 2/4/22 Tr. at 352-95.)

SUMMARY OF THE ARGUMENT

The district court correctly sentenced Gardner as a persistent felony offender based on the State's pretrial notice that it filed more than four months before the sentencing hearing. Gardner has never challenged his prior felony convictions or his classification as a persistent felony offender. Gardner only challenged the State's notice, but he failed to make any showing that the timing of the State's filing caused him prejudice. Gardner does not dispute that the State provided the notice more than four months before sentencing or that the district court immediately held a hearing on his objection. Gardner failed to articulate any prejudice caused by the State's notice during the hearing or during the subsequent months prior to the district court's order confirming that it would sentence Gardner as a persistent felony offender. The district court correctly found the State's late filing of the notice did not prejudice Gardner and sentenced him accordingly.

Gardner has failed to support his request for this Court to overrule 25 years of precedent applying Mont. Code Ann. § 46-13-108(1). Gardner’s argument confuses this Court’s primary application of the notice statute, Mont. Code Ann. § 46-13-108(1), with the secondary application of the harmless error statute, Mont. Code Ann. § 46-20-701(1). This Court has never added a prejudice element to the notice statute. It has applied two different statutes to conclude that any error based on the notice provisions in Mont. Code Ann. § 46-13-108(1) may not require reversal of the sentence if the untimely notice did not cause the defendant prejudice under Mont. Code Ann. § 46-20-701(1). This is appropriate statutory analysis and does not render this Court’s precedent addressing Mont. Code Ann. § 46-13-108(1) manifestly wrong.

This Court should affirm Gardner’s sentence.

ARGUMENT

I. Standard of review

This Court reviews a criminal sentence beyond one year of incarceration de novo to ensure the sentence is legal. *State v. Martin*, 2019 MT 44, ¶ 12, 394 Mont. 351, 435 P.3d 73. “A sentence is legal if it falls within statutory parameters and is constitutional.” *Id.*

II. The district court correctly sentenced Gardner as a persistent felony offender when the State provided notice of the potential increased penalty more than four months before sentencing.

A persistent felony offender is subject to increased punishment. Mont. Code Ann. § 46-18-502 (2019).³ A persistent felony offender is an offender who has previously been convicted of two separate felonies and is currently being sentenced for a third felony. Mont. Code Ann. § 46-1-202(18). The third felony must have been committed on a different occasion than the prior felonies but within five years of the most recent prior conviction or the date of release from a sentence imposed for a prior conviction. *Id.* At least one of the felonies must be a sexual or violent offense. *Id.* For a defendant to be sentenced as a persistent felony offender, the State must provide notice that it is seeking the designation. Mont. Code Ann. § 46-13-108. “Except for good cause shown,” the notice “must be given at or before the omnibus hearing” and it “must specify the alleged prior convictions.” Mont. Code Ann. § 46-13-108(1)-(2).

This Court has explained that the purpose of the notice requirement “is to give the defendant an opportunity to file an objection to the criminal record relied upon in the notice and to hold a hearing should there be any such objection.”

State v. Ramsey, 2007 MT 31, ¶ 20, 336 Mont. 44, 152 P.3d 710; *accord State v.*

³ The applicable sentencing statutes at the time of Gardner’s offense were the 2019 versions.

Shults, 2006 MT 100, ¶ 22, 332 Mont. 130, 136 P.3d 507; *Martin*, ¶ 24. Relying on that purpose, this Court has held “that if a defendant had ample opportunity to object to PFO treatment and challenge the underlying criminal record, and if the defendant was not prejudiced by the timing of the filing, we will not overturn a court’s decision to impose a sentence with a PFO designation.” *Ramsey*, ¶ 20; *accord Shults*, ¶ 20; *Martin*, ¶ 24.

Gardner has never disputed that he qualified to be sentenced as a persistent felony offender or challenged the content of the State’s notice. The State’s notice provided that Gardner was convicted on January 10, 2012, of felony assault with a weapon, in violation of Mont. Code Ann. § 45-5-213, and convicted on October 18, 2016, of felony PFMA, third or subsequent offense, in violation of Mont. Code Ann. § 45-5-206. Both are prior violent felony offenses. *See* Mont. Code Ann. §§ 46-1-202(18), 46-23-502(13). Less than five years had elapsed between the most recent prior conviction and the commission of the offense of conviction in this case, which is also a violent felony. *Id.* None of his convictions had been set aside. *See* Mont. Code Ann. § 46-1-202(18)(c).

Gardner never challenged the substance of the State’s notice because he plainly qualified as a persistent felony offender. As this Court has repeatedly explained, the purpose of the notice requirement is to give the defendant an opportunity to object and hold a hearing to contest the persistent felony offender

sentence. *Ramsey*, ¶ 20; *Shults*, ¶ 22; *Martin*, ¶ 24. Gardner had ample time to file an objection, which the State responded to. The district court had ample time to hold a hearing, which it promptly did the day after Gardner filed his objection. After the hearing, where Gardner offered no substantive challenge, the district court reserved ruling on the dispute for more than three months. During that time, Gardner did nothing to challenge his prior convictions or the content of the State’s notice because he had no basis to do so.

Gardner acknowledges that he had no substantive basis to dispute his persistent felony offender status or sentence. Instead, he argues the entire line of cases considering the persistent felony offender notice statute—Mont. Code Ann. § 46-13-108—should be overruled. (Br. at 11-14.) Gardner argues this Court’s consideration of prejudice in its analysis of Mont. Code Ann. § 46-13-108 renders its precedent during the past 25 years manifestly wrong. *See Formicove, Inc. v. Burlington N.*, 207 Mont. 189, 194-95, 673 P.2d 469, 472 (1983) (stare decisis requires this Court to follow its precedent unless the statutory interpretation supporting the holding was manifestly wrong).

But Gardner’s argument ignores that this Court’s prejudice analysis is based on Mont. Code Ann. § 46-20-701(1), not Mont. Code Ann. § 46-13-108. Montana Code Annotated § 46-20-701(1) prohibits this Court from reversing a case “unless the record shows that the error was prejudicial.” In *State v. McQuiston*, 277 Mont.

397, 409, 922 P.2d 519, 527 (1996), this Court applied this prejudice analysis to affirm a persistent felony offender sentence despite untimely notice under Mont. Code Ann. § 46-13-108(1). This Court has continued to consider prejudice in this analysis, but it has never interpreted Mont. Code Ann. § 46-13-108(1) to include a prejudice requirement. *See, e.g., Ramsey*, ¶ 20; *Shults*, ¶ 20; *Martin*, ¶ 24. Rather, this Court has consistently applied the good cause standard in Mont. Code Ann. § 46-13-108(1), and only affirmed sentences imposed after untimely notices if a defendant was not prejudiced by it, as required by Mont. Code Ann. § 46-20-701(1). *Id.* Gardner has provided no authority to undermine this Court’s consideration of Mont. Code Ann. § 46-20-701(1), and it does not render this Court’s interpretation of Mont. Code Ann. § 46-13-108(1) manifestly wrong.

Despite arguing prejudice should have no bearing on the Mont. Code Ann. § 46-13-108(1) analysis, Gardner argues the State “prejudicially taxed” him for invoking his right to a jury trial. (Br. at 14.) Gardner, however, provides no facts to support this conclusion beyond the timing of the State’s notice, which the district court correctly found did not prejudice Gardner. Neither the State nor the district court punished Gardner for going to trial. The district court “punished” Gardner for his felony PFMA conviction, which was Gardner’s third violent felony conviction within seven years and undisputably qualified him to be sentenced as a persistent felony offender.

Consistent with this Court’s correct application of Mont. Code Ann. §§ 46-13-108(1) and 46-20-701(1), this Court should affirm Gardner’s sentence because the State’s notice did not prejudice his ability to object to his classification or sentence as a persistent felony offender. *See Ramsey*, ¶ 20; *Shults*, ¶ 22; *Martin*, ¶ 24.

CONCLUSION

The State respectfully requests this Court affirm Gardner’s sentence.

Respectfully submitted this 8th day of April, 2024.

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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 3,827 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Brad Fjeldheim

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CERTIFICATE OF SERVICE

I, Brad Fjeldheim, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 04-08-2024:

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