
JEFFREY L. HARDMAN,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Twenty-Second Judicial District Court,
Stillwater County, The Honorable Matthew Wald, Presiding

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Hardman respectfully replies to Appellee's brief as follows:

Argument

The State correctly recognizes, “the only question here is whether Scott engaged in objectively reasonable professional assistance during *voir dire*.” (State's Br. at 30.) Its attempt to rationalize and justify Scott's failure to inquire of the venire regarding exposure to pretrial publicity, however, fails at every turn. As will be argued below, this Court should conclude the district court clearly erred in concluding Scott's failure to so inquire of the venire, *after* the presiding judge explicitly warned the case had been the subject of “considerable publicity,” was objectively reasonable.

I. Counsel's failure to inquire of the venire regarding exposure to pretrial publicity was not objectively reasonable.

Hardman had fundamental federal and state constitutional rights to an impartial jury. U.S. Const. amend. VI; Mont. Const. art. II, § 24; *e.g.*, *State v. Russell*, 2018 MT 26, ¶ 12, 390 Mont. 253, 411 P.3d 1260.

The State correctly asserts, and Hardman concurs (Appellant's Br. at 3), this Court has stated, “[t]here is no set number of questions that counsel is required to ask of the jurors.” (State's Br. at 30, *quoting*

State v. Kolberg, 241 Mont. 105, 108, 785 P.2d 702, 704 (1990).) Here as in every criminal case, however, Scott still had a “*clear duty* to ensure [Hardman’s] right to a fair trial by a panel of impartial jurors.” *State v. Chastain*, 285 Mont. 61, 65, 947 P.2d 57, 60 (1997) (emphasis added).

Although the State does not dispute that neither the prosecutor nor Scott posed a single question to the venire regarding exposure to pretrial publicity, it avers Scott asked “pointed questions on a variety of topics to weed out any potential bias[.]” (State’s Br. at 30-33.) It insists, “[a]ll of Scott’s actions were undertaken to ensure a fair and impartial jury.” (State’s Br. at 32.)

To be clear, Hardman does not take issue with Scott’s performance based on the questions actually posed to the prospective jurors. Rather, based on the “numerous articles and other news items concerning the shooting, law enforcement’s investigation thereof, and Hardman’s actions thereafter” (Ex. A at 5), Hardman argues counsel could not intelligently exercise his challenges without first probing the venire’s exposure to the same and, thus, it cannot be said the purpose of *voir dire* was fulfilled. The State’s claim to the contrary (State’s Br. at 29-30), Hardman’s argument in that regard is firmly grounded in long-

standing precedent of both the United States and Montana Supreme Court.

The United States Supreme Court has long and repeatedly recognized exposure to pretrial publicity may undermine a defendant's Sixth Amendment guarantee to trial by an impartial jury. *E.g.*, *Irvin v. Dowd*, 366 U.S. 717 (1961); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Murphy v. Florida*, 421 U.S. 794 (1975); *Patton v. Yount*, 467 U.S. 1025 (1984). It has thus directed, “[g]iven the pervasiveness of modern communications and the *difficulty of effacing prejudicial publicity from the minds of the jurors*, the trial courts *must* take strong measures to ensure that the balance is never weighed against the accused.” *Sheppard*, 384 U.S. at 362 (emphasis added).

This Court has likewise recognized, “[t]he amount and nature of pretrial publicity surrounding a case affect the defendant’s ability to obtain a fair trial by an impartial jury.” *State v. Nichols*, 225 Mont. 438, 444, 734 P.2d 170, 173 (1987). Moreover, “[a] defendant’s right to a fair trial by an impartial jury is jeopardized when the publicity surrounding the case is inflammatory in nature.” *Nichols*, 225 Mont. at

444, 734 P.2d at 173, *citing State v. Holmes*, 207 Mont. 176, 181, 674 P.2d 1071, 1073 (1983). “A trial judge *must* therefore consider the volume and nature of the pretrial publicity when determining *how best to conduct voir dire.*” *Nichols*, 225 Mont. at 444, 734 P.2d at 173 (emphasis added).

This Court has also stated, “[v]oir dire *must be used* to determine which potential jurors have been so affected by pretrial publicity, they would be unable to render a fair verdict.” *Nichols*, 225 Mont. at 444, 734 P.2d at 173 (emphasis added). Here, Hardman maintains, “[a] *probing voir dire examination* of prospective jurors [was] the judicial mechanism for determining this.” *Great Falls Tribune v. Eighth Judicial District*, 186 Mont. 433, 440, 608 P.2d 116, 120 (1980) (emphasis added). The State’s claim to the contrary, this should be obvious where this Court has recognized, “[t]he *voir dire* process, *especially in cases given a great amount of publicity, is essential* to ensure that defendant is adjudged by fair and impartial jurors.” *Nichols*, 225 Mont. at 445, 734 P.2d at 174 (emphasis added).

The State, as did the district court, misapprehends the effect of the pretrial publicity and strains mightily to downplay the significance

of this evidence. (State’s Br. at 33-36.) To support its inherently flawed assessment of the pretrial publicity at issue, and in ignoring the dispositive issue before this Court, the State cites: *State v. Kingman*, 2011 MT 269, 362 Mont. 330, 264 P.3d 1104; *State v. Kaarma*, 2017 MT 24, 386 Mont. 243, 390 P.3d 609; *State v. Pittman*, 2005 MT 70, 326 Mont. 324, 109 P.3d 237; and *State v. Bretz*, 185 Mont. 253, 605 P.2d 974 (1979). (State’s Br. at 33-36.)

Conspicuously absent from the State’s argument and analysis, however, is any recognition that three of the four foregoing cases contemplated appeals from failed motions to change venues. As will be demonstrated *infra*, the State’s authorities plainly support Hardman’s argument that Scott’s failure to inquire of the venire regarding exposure to pretrial publicity was not objectively reasonable.

In *Kingman*, ¶ 1, defendant argued his motion to change venue should have been granted on the basis of “presumed prejudice” resulting from pretrial publicity. This Court found the parties stipulated to a jury questionnaire, which was mailed to prospective jurors. *Kingman*, ¶ 11. Included in the questionnaire were several questions related to Kingman’s motion to change venue. The court also

attached a cover letter directing the prospective jurors, among other things, not to make any investigation or inquiries into the case on their own and not to watch or read any news accounts relating to the case.

Kingman, ¶ 11.

All 150 prospective jurors returned their questionnaires.

Kingman, ¶ 11. On the question whether the juror had seen, read, or heard anything about the case, 96 marked “yes,” 47 marked “no,” 3 left the question blank, and 4 indicated they were unsure whether they knew of the case. As to the question whether the juror had “formed an opinion that would affect your ability to serve as a juror,” 27 marked “yes,” 108 marked “no,” and 15 left the question blank. *Kingman*, ¶ 11.

The court and the parties agreed the court would decide the motion based on the responses received to the juror questionnaires and on the exhibits submitted by Kingman. *Kingman*, ¶ 12. It ultimately denied the motion, concluding, “the pretrial publicity had not been inflammatory and that Kingman had *failed to show that the prospective jurors could not set aside what they had heard or read in the media* and

decide his guilt impartially and based solely on the evidence admitted at trial.” *Kingman*, ¶ 13 (emphasis added).

Regarding the juror questionnaires, the court noted 27 of the 150 respondents had marked “‘yes’ to the question: ‘As a result of what you have seen, heard, read or discussed about this case, have you formed an opinion that would affect your ability to serve as a juror?’” *Kingman*, ¶ 45. The court found this percentage of affirmative responses to be insufficient to establish Kingman could not receive a fair and impartial trial in Gallatin County, particularly since the question provided no insight into what the juror’s opinion was, why the juror believed that opinion would affect his or her ability to serve, and whether the juror could lay that opinion aside and render a verdict based on the evidence presented. *Kingman*, ¶ 45.

The questionnaire also asked those respondents who had read, heard, seen, or discussed the case to “‘please tell us everything you think you know about this case, in as much detail as possible.’” *Kingman*, ¶ 45. Some of the prospective jurors indicated they had heard a great deal about the case, and they described what they knew using terms that had been utilized in news reports. The court observed

that while 96 of the 150 prospective jurors indicated they had read, seen, or heard something about the case, 108 respondents indicated they had not formed an opinion that would affect their ability to serve.

Kingman, ¶ 45

At the outset this Court, in analyzing whether “actual prejudice” warranted a change of venue, stated “[*voir dire*, we have noted, is a *primary method of demonstrating that potential jurors have been so affected by pretrial publicity that they would be unable to render a fair and impartial verdict.*” *Kingman*, ¶ 31 (emphasis added), *citing State v. Devlin*, 2009 MT 18, ¶ 30, 349 Mont. 67, 201 P.3d 791; *State v. Bar-Jonah*, 2004 MT 344, ¶¶ 83-89, 324 Mont. 278, 102 P.3d 1229; and *State v. Hill*, 2000 MT 308, ¶¶ 54-55, 302 Mont. 415, 14 P.3d 1237 (additional citations omitted). The Court also stated where “actual prejudice” is alleged, “the *defendant must show through voir dire or other means*” the jury pool harbors actual partiality or hostility against the defendant that cannot be laid aside. *Kingman*, ¶ 32 (emphasis added).

This Court ultimately concluded the district court did not abuse its discretion in denying Kingman’s motion based on “presumed prejudice.” *Kingman*, ¶ 52. Relevant to the instant appeal, it found the

questionnaire responses did not show the jury pool was firmly predisposed to convict Kingman. *Kingman*, ¶ 51.

In *Karra*, ¶ 29, defendant argued the court abused its discretion when it denied his motions to change venue based on pretrial publicity. Kaarma moved to change the trial venue based on presumed prejudice in the community, arguing *voir dire* would not prevent juror bias.

Karra, ¶ 33. The court denied the motion, finding the publicity had been “‘by all accounts, factual in nature,’ and that *voir dire was the primary method for determining potential jurors’ pretrial biases.*”

Karra, ¶ 33 (emphasis added).

Kaarma thereafter filed a renewed request for change of venue, or alternatively suggested drawing the jury pool from another county or use a jointly-prepared jury questionnaire to determine the extent of actual prejudice in Missoula County. *Karra*, ¶ 35. The court denied the renewed motion, but granted Kaarma’s request for a jointly-prepared jury questionnaire to assess and remove jurors who, based on an already formed opinion, could not be impartial or fair at trial.

Karra, ¶ 35.

The jury questionnaires were mailed to 300 prospective jurors and 256 were returned. *Karrma*, ¶ 36. Based on the responses, 89 percent indicated they knew about Kaarma’s case, 56 percent noted they had formed an opinion of his guilt or innocence, 42 percent said they would find it difficult to be impartial, and 26 percent indicated they would be unable to render a fair and impartial verdict. *Karrma*, ¶ 36.

Kaarma later filed a second renewed request for venue change. *Karrma*, ¶ 37. The basis of this request was a recent media story. The court denied the renewed motion for change of venue. It informed the parties, “*it would be following the voir dire process closely* and would consider a venue change in the future if a fair and impartial jury could not be found.” *Karrma*, ¶ 37.

The parties stipulated to excuse 51 prospective jurors for cause and the court excluded 37 more. *Karrma*, ¶ 38. Kaarma requested, “*individual voir dire based on the publicity of the trial* after the questionnaires were received.” *Karrma*, ¶ 38 (emphasis added). The court denied individual *voir dire*, noting, “you can’t say an informed juror is not qualified,” but noting it was looking for jurors who could give

Kaarma a ‘clean slate’ and make a decision based only on the facts presented at trial.” *Karrma*, ¶ 38.

During *voir dire*, prospective jurors explained they had seen the media reports but would form their opinions based on the facts, were not concerned the defense tried to remove the case from Missoula County, and some even expressed criticism of the media’s reporting on the case. *Karrma*, ¶ 39. During the trial, a media outlet printed an article on the “‘castle doctrine,’” and the court conducted individual *voir dire* of each juror and determined none had read the article. *Karrma*, ¶ 40.

While publicity surrounding the case was “significant,” this Court found it was not so inflammatory or so prejudicial that a community member could not ignore it or that it invited prejudgment of Kaarma’s culpability significant enough to grant a change of venue. *Karrma*, ¶ 50.

Kaarma also argued, *inter alia*, the court erred in denying individual *voir dire* about the publicity of Kaarma’s criminal history. *Karrma*, ¶ 51. The Court found this argument was misplaced. On appeal, Kaarma asserted the court should have presumed prejudice

based on the extent and nature of the publicity alone. However, this Court noted individual *voir dire* is available to assess each potential juror for “actual prejudice;” by definition it does not address the issues raised regarding presumed prejudice. *Karrma*, ¶ 51 (citation omitted).

This Court observed there are “numerous protective tools” available to a trial court when issues regarding community prejudice are presented. *Karrma*, ¶ 54. To ensure Kaarma received a fair trial here, the court, *inter alia*, ordered an enhanced jointly-created jury questionnaire, ensured liberal excusals on stipulation of the parties, and allowed a full two-day *voir dire* process. Additionally, it conducted individual *voir dire* after the media published an article about the castle doctrine and excused a juror mid-trial whose spouse had been discussing the case. *Karrma*, ¶ 54. The court, in response to Kaarma’s assertions of prejudice, “used the tools available to it, *the questionnaire and voir dire.*” *Karrma*, ¶ 55 (emphasis added). This Court held, “[t]o ensure Kaarma received a fair trial the District Court’s *use of the questionnaire and voir dire was appropriate.*” *Karrma*, ¶ 55 (emphasis added).

In *Pittman*, ¶ 3, defendant argued the court abused its discretion in denying her motion for change of venue. Prior to her trial, Pittman accused a detention officer of having sexual intercourse with her while she was awaiting trial as an inmate in the detention center. *Pittman*, ¶ 14. The *Miles City Star* newspaper reported her allegations and described her previous criminal record. Pittman moved for a change of trial venue based on that single newspaper article. The court found there was no prejudicial publicity and denied Pittman's motion. *Pittman*, ¶ 14.

On appeal, Pittman argued the inclusion of her previous criminal record in the *Miles City Star* article, combined with the report of her allegations of a sexual relationship between herself and the detention officer, were of such an inflammatory nature she could not receive a fair trial in Miles City or Custer County. *Pittman*, ¶ 18. She argued the article presented her in such a bad light the jury would convict her based on the rumor of the relationship and her past criminal history, rather than on the evidence and testimony presented at trial. *Pittman*, ¶ 18.

This Court observed it has defined “inflammatory publicity” as editorializing on the part of the media or a calculated attempt to prejudice public opinion against the defendant or to destroy the fairness of the pool from which the defendant’s prospective jurors would be drawn. *Pittman*, ¶ 19.

The “newspaper *article*” concerning Pittman was not, however, inflammatory. *Pittman*, ¶ 19 (emphasis added). It summarized the charges against her, her allegations regarding the detention officer and her prior criminal record. The information in the article was based entirely on information contained in district court documents and testimony from an evidentiary hearing. Moreover, the newspaper article did not editorialize about Pittman’s guilt or innocence. *Pittman*, ¶ 19. Accordingly, this Court held the district court did not abuse its discretion in denying Pittman’s motion for change of venue. *Pittman*, ¶ 20.

In *Bretz*, defendant argued his right to trial by a fair and impartial jury under the Fifth and Fourteenth Amendments to the United States Constitution and Article II, Sections 4 and 24 of the 1972

Montana Constitution was denied by virtue of “extensive pretrial and trial publicity.” *Bretz*, 185 Mont. at 260, 605 P.2d at 979.

This Court found statewide publicity, especially concentrated in Great Falls, accompanied the prosecution of the case at each stage. *Bretz*, 185 Mont. at 271, 605 P.2d at 985. Defendant moved the court to dismiss the charges or, in the alternative, continue the date for trial due to extensive pretrial publicity. The court denied the motion. Defendant again moved for dismissal at a later date, and the court denied that motion as well. *Bretz*, 185 Mont. at 271, 605 P.2d at 985.

Defendant again raised the issue of pretrial publicity after the swearing of the jury at his trial. *Bretz*, 185 Mont. at 271, 605 P.2d at 985. By that time defendant had become the object of heavy statewide publicity because of a trial in which he had been charged with and acquitted of soliciting persons to assassinate the Attorney General. Also, a statewide general election was imminent in which the Attorney General was a gubernatorial candidate. *Bretz*, 185 Mont. at 271, 605 P.2d at 985.

The publicity continued during the trial of the case. *Bretz*, 185 Mont. at 271-72, 605 P.2d at 985. It culminated in the door-to-door

distribution of a political newsletter entitled the “*Montana Gazette*” in which defendant’s name was mentioned. Defendant thereafter filed a motion for a mistrial because of the publicity. *Bretz*, 185 Mont. at 272, 605 P.2d at 985.

On appeal, defendant argued this Court should presume, under the facts of the case, the mid-trial publicity reached the non-sequestered jury. *Bretz*, 185 Mont. at 272, 605 P.2d at 985. He further argued the court should have, “examined the jury concerning (1) their contact with the material and (2) its prejudicial effect upon them.” *Bretz*, 185 Mont. at 272, 605 P.2d at 986.

At the outset this Court observed, “we have a sword that cuts both ways.” *Bretz*, 185 Mont. at 272, 605 P.2d at 986. The record was clear and evidence substantial regarding defendant’s own attempt to use the media to his advantage, “as well as his failure to move for change of venue on the basis of the publicity.” Indeed, this Court observed, “[t]he theatrics reflected in the record by defendant is not indicative of conduct tending to show genuine concern over the amount of pretrial and trial publicity and when reported cannot be condemned.” *Bretz*, 185 Mont. at 272, 605 P.2d at 986.

This Court concluded defendant's argument the court should have conducted a poll of the jury to determine whether the members had seen a copy of the "*Montana Gazette*" was not properly before the Court inasmuch as defendant made no motion for the poll in the trial court and raised the issue for the first time on appeal. *Bretz*, 185 Mont. at 272, 605 P.2d at 986.

This Court also observed this case did not, "spawn editorials crying for defendant's conviction." *Bretz*, 185 Mont. at 273, 605 P.2d at 986. Rather, defendant simply provided his statement of inferences and conclusions, "and these are not enough." *Bretz*, 185 Mont. at 273, 605 P.2d at 986.

Ultimately, this Court concluded defendant failed to meet his burden of showing the nature of the publicity, the effect of the publicity, and the necessity of such a drastic remedy. *Bretz*, 185 Mont. at 274, 605 P.2d at 987. He also failed to meet the procedural requirements of moving for a change of venue and submitting an affidavit containing specific allegations as to the prejudicial nature of the publicity. *Bretz*, 185 Mont. at 274, 605 P.2d at 987.

Here, unlike *Kingman*, *Kaarma*, and *Pittman*, Hardman does not argue the pretrial publicity was so pervasive and so inflammatory it warranted a change of venue. Moreover, unlike *Bretz*, Hardman does not argue the pretrial publicity was so pervasive and so inflammatory it should be presumed his right to a fair and impartial jury was violated. Rather, as argued *passim*, Hardman maintains the pretrial publicity was so pervasive, and detailed inflammatory and prejudicial information, that Scott had a clear and obvious duty to inquire of the venire regarding exposure to the same to ensure Hardman's right to a fair and impartial jury.

Moreover, unlike *Kingman* and *Kaarma*, here the prospective jurors did not fill out special questionnaires regarding the pretrial publicity at issue. Unlike, *Pittman*, the pretrial publicity at issue in the present case was not limited to a single newspaper article. Unlike *Bretz*, it cannot be said Hardman sought to use the media to his benefit at trial.

Finally, *Kingman* and *Karma* make clear *voir dire* is the "primary method" of demonstrating potential jurors have been so affected by pretrial publicity that they would be unable to render a fair and

impartial verdict. Of course, counsel must inquire of the venire regarding exposure to pretrial publicity in the first place, and thereafter follow-up with content questioning to give legal depth to a trial court's finding of impartiality.

Again, the State's skewed assessment of the pretrial publicity at issue notwithstanding, the record demonstrates the media coverage detailed inflammatory and prejudicial evidence, without context or explanation, purported to incriminate Hardman:

Court records state that investigators found a threatening voice message on Blattie's cell phone that had been left the day of the shooting. The message originated from Hardman's nearby residence, and Hardman allegedly admitted leaving a similar message on Blattie's phone.

(Ex. J.)

The charging documents also say that Blattie received a threatening voice message on his cell phone the day of his death that originated from Hardman's nearby residence.

(Ex. S.)

Hardman is also accused of leaving a threatening telephone message for Blattie the day of the shooting.

(Ex. K.)

Court documents say Blattie received a threatening voice message on his cell phone the same day that came from Hardman's nearby residence.

(Ex. T.)

The record demonstrates the pretrial media coverage also detailed, without context or explanation, prejudicial, inflammatory, and purportedly incriminating, evidence surrounding Hardman's "confession":

Murder charges filed in Molt slaying; defendant's note asked forgiveness.

A Molt man accused of shooting his neighbor left a note for police before his arrest, according to charging documents filed Thursday.

“I can’t take the guilt,” Jeffrey Lynn Hardman allegedly wrote in a note found by investigators. “God save me and Mike please. I hope Mike’s family can forgive me.”

After obtaining a search warrant for Hardman’s house, investigators said they found a note signed by Hardman.

Investigators also spoke to a witness, according to court records, who said Hardman stated that he was involved in the shooting of Blattie and “had been lying to authorities about what actually happened.”

The witness also said Hardman admitted that he “was in possession of a firearm when the victim was shot,” court records state, and only Hardman and Blattie were present at the time of the shooting.

(Ex. J.)

It appears the man who is accused in the shooting death of a Molt man left a note for investigators apologizing for his alleged actions.

In charging documents filed Thursday by the Stillwater County attorney, it shows that police found a note at Jeffrey Hardman’s residence signed by him that stated, “I can’t take the guilt . . . god save me and Mike please” and went on to say, “I hope Mike’s family can forgive me.”

(Ex. S.)

Hardman was arrested about two weeks later after investigators said they found a written confession during a search of his house.

“I can’t take the guilt,” Hardman is alleged to have written in the signed note.

Investigators also allege that Hardman admitted to another person that he was armed with a firearm when Blattie was shot.

(Ex. K.)

Investigators say they discovered a note at Hardman’s house signed by the 48-year-old apologizing for the shooting and asking Blattie’s family for forgiveness.

(Ex. T.)

A District Court judge in Montana has ruled that a pastor can testify about what a man told him about a shooting death because the pastor warned the defendant he would not keep confidential anything to do with illegal activity.

Hardman had argued that anything he may have said to Pastor Robert Griggs of Billings about the death of Michael Blattie last October should be kept confidential.

Jones ruled on May 20 that Griggs could testify because he told Hardman he would not keep secrets about illegal activity, and Hardman went ahead with the conversation.

(Ex. L.)

Finally, the record demonstrates the pretrial media coverage detailed highly prejudicial and otherwise inadmissible evidence regarding Hardman's criminal history:

Stillwater County Attorney John Petak asked for the [\$2 million bond,] saying the charge against Hardman is the most serious offense that can be filed. Petak also said Hardman has a criminal history that includes several firearms offenses, a drug offense and a domestic-violence offense in West Virginia.

(Ex. H.)

Prosecutors said [Hardman] has previous convictions for assault, drug charges and weapons charges, some from West Virginia.

(Ex. R.)

County Attorney John Petak asked for the higher bond amount to remain, saying Hardman has a criminal record in Kansas and California that includes several misdemeanors and at least one felony.

(Ex. K.)

Clearly, both the State and the court misapprehended the effect of the pretrial publicity at issue relative to Scott's clear duty to ensure Hardman's fate was determined by twelve fair and impartial jurors. This should be obvious where the prejudice from such reporting "may indeed be greater" than when it is part of the prosecution's evidence,

“for it is then not tempered by protective procedures.” *Marshall v. United States*, 360 U.S. 310, 313 (1959).

Finally, the State insists, “even assuming *arguendo* that some prospective juror remembered some old generalized news coverage about the incident, that does not mean they were impartial [sic].”

(State’s Br. at 37.) The State cites the following to support this claim:

It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror’s impartiality would be to establish an impossible standard. *It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.*

(State’s Br. at 38, quoting *Bretz*, 185 Mont. at 273-74, 605 P.2d 974

(emphasis added).) Of course, it *cannot* be known whether a juror is capable of laying aside his or her impression or opinion of the case based upon what he or she has read or heard if counsel does not pose questions regarding exposure to pretrial publicity in the first place.

II. Errors in the jury selection process are structural and prejudice is presumed.

The State's claim to the contrary, this Court has repeatedly held errors in the jury selection process are structural errors. *E.g.*, *State v. Lamere*, 2005 MT 118, ¶ 26, 327 Mont. 115, 112 P.3d 1005. Having determined a structural error exists, courts need not engage in speculation or refer to evidence of record in order to support a determination of prejudice. *Lamere*, ¶ 29. Indeed, this Court has concluded the presence on the jury of even one juror who could not fairly assess the credibility of the witnesses must be presumed prejudicial and will result in the reversal of the conviction. *Chastain*, 285 Mont. at 65, 947 P.2d at 60; *State v. Herrman*, 2003 MT 149, ¶ 22, 316 Mont. 198, 70 P.3d 738.

Moreover, in *Lamere*, this Court concluded because a structural error existed at the outset of his trial, “we must presume prejudice *regardless of the evidence against Lamere.*” *Lamere*, ¶ 29 (emphasis added). “The strength and magnitude of the evidence against Lamere ha[d] no bearing on the determination of whether structural error existed, nor [did] it invalidate the presumption of prejudice that accompanies structural error.” *Lamere*, ¶ 29.

The State's claim, "*Lemere* [sic] has been overruled by the Supreme Court in *Weaver* regarding the applicable procedural posture here," is less than genuine. (State's Br. at 41, *citing Weaver v. Massachusetts*, 582 U.S. 286, 293 (2017).) The *Weaver* Court explicitly stated the opinion was *limited* to, "counsel's failure to object to the closure of the courtroom during jury selection." *Weaver*, 582 U.S. at 294.

This Court should conclude Scott's failure to pose a single question to the venire to determine whether any of the prospective jurors had been exposed to the pretrial coverage of the case and, if so, whether said jurors could nevertheless fairly and impartially render a verdict based solely on the evidence presented and instructions given, constituted structural error. *Lamere*, ¶ 28. Prejudice must be presumed. *Lamere*, ¶ 29. This Court should conclude Hardman has satisfied the *Strickland* test.

Conclusion

"*Voir dire must be used to determine which potential jurors have been so affected by pretrial publicity, they would be unable to render a fair verdict.*" (Ex. A at 24 (emphasis added), *quoting Nichols*, 225

Mont. at 444, 734 P.2d at 173.) Here, as a direct result of Scott's ineffective assistance, it was not.

Based on the forgoing, this Court should reverse the district court's denial of Hardman's amended petition and remand with instructions to vacate and overturn his convictions.

Respectfully submitted this 17th day of June 2024.

/s/ Joseph P. Howard
Joseph P. Howard
Joseph P. Howard, P.C.

Certificate of compliance

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