IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0663

STATE OF MONTANA,

Plaintiff and Appellant,

v.

SKYLER L. GRIEBEL,

Defendant and Appellee.

APPELLANT'S REPLY BRIEF

On Appeal from the Montana Sixth Judicial District Court,
Park County, The Honorable Ray J. Dayton, Presiding

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Appellant, the State of Montana, maintains the arguments made in its Opening Brief (St.Br.) and offers the following arguments in reply to Griebel's Response Brief (Br.).

ARGUMENT

I. Alleged facts in Griebel's Response Brief that are erroneous and/or unsupported by citations to the record.

Briefs filed with this Court must include, among other things, a statement of the facts "with references to the pages or the parts of the record at which material facts appear." M. R. App. P. 12(1)(d). The argument section must contain the "contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes, and pages of the record relied on." M. R. App. P. 12(1)(g).

Griebel's statement of the case includes improper argument without citation to the record. (Br. at 5.) M. R. App. P. 12(1)(c). Similarly, many parts of the statement of the facts have no citation to the record. (*See, e.g.*, Br. at 11-14 (description of what the State "omitted" from the affidavit of probable cause); *Id*. at 15 (assertion that it was not until November 7, 2022 that he "learned" the presiding judge's son was a witness). This Court should disregard allegations of "fact" that lack any citation to the record or are "supported" by only counsel's

arguments in his pleadings that lack any citation to a hearing, exhibit, or other evidence. *State v. Whalen*, 2013 MT 26, ¶¶ 35-36, 368 Mont. 354, 295 P.3d 1055.

Additionally, throughout the Response Brief, Griebel cites only his pleadings, which in many cases do not contain any attached evidence (*e.g.*, interview transcripts, affidavits, copies of reports, etc.). Statements made by counsel in pleadings are not evidence. *State v. Stuart*, 2001 MT 178, ¶ 22, 306 Mont. 189, 31 P.3d 353 (citation omitted).

Finally, Griebel erroneously asserts the State requested five extensions to file its Opening Brief. (Br. at 6, 15.)[1] Regardless, events that occur after the district court entered its order granting Griebel's motion to dismiss are not relevant since this Court's review is limited to "the record made before the district court at the time of the speedy trial hearing." *State v. Velasquez*, 2016 MT 216, ¶ 42, 384 Mont. 447, 377 P.3d 1235.

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[1] The State filed two motions for extension of time to file its Opening Brief (4/23/24 and 5/22/24).

II. The district court erred when it granted Griebel's second speedy trial motion as it was based, in part, on clearly erroneous findings of fact.

A. Factor Two

1. The court erred by not attributing the Fourth Period of delay to Griebel once it found his motion to disqualify Judge Gilbert was untimely.

Griebel asserts that the district court's finding that the motion to disqualify Judge Gilbert was untimely was erroneous by claiming the court failed to recognize that "Griebel had only learned about [the judge's son's] involvement in November." (Br. at 20.) However, Griebel fails to cite to any evidence in the record establishing this alleged fact and instead references only his motion to disqualify the judge in support of this claim. Statements by counsel in pleadings are not evidence. *Stuart*, ¶ 22. In contrast, the court's finding that Griebel's motion to disqualify Judge Gilbert was supported in the record.

It is undisputed, and Griebel concedes, that as early as May 16, 2022, Griebel knew that Summer and Judge Gilbert were personally acquainted through their sons. (Br. at 19.) Yet, in Griebel's motion, he claimed that it was not until "*[a]fter interviewing* Ms. Overgauuw," that "*Mr. Greibel has discovered*" Judge Gilbert and Summer had been personally acquainted for many years as their sons grew up together. (Doc. 73 at 2 (emphasis added).) This obvious contradiction undercuts Griebel's argument that he was not dilatory in investigating possible judicial bias.

Additionally, Griebel provided no evidence establishing when the defense interviewed Summer and her son. Defense counsel's (Counsel's) affidavit simply averred, "I have learned" information. (Doc. 73.1 at 1.) Counsel used this same vague, passive language during the informal conference where she stated the information had "c[o]me to our attention." (11/7/22 Tr. at 39.) Although Griebel asserted that Linda Sanem (defense investigator hired in September 2022) interviewed Summer and her son (Doc. 338 at 4), Griebel omitted information about those interviews from Sanem's August 28, 2023 affidavit (Doc. 323, Ex. 2). Griebel thus failed to provide evidence that he had been diligent in seeking to disqualify Judge Gilbert.

Finally, even assuming Griebel did not interview Summer and her son until early November 2022, Griebel did not act diligently. It is undisputed that he was aware of the judge's connection to Summer well before November 2022. Griebel simply chose not to act. Griebel's alleged reliance on Judge Gilbert taking "no action" (Br. at 19) does not nullify his duty to diligently investigate possible bias, especially given Griebel's May 2022 letter. The district court's finding that Griebel's motion to disqualify Judge Gilbert was untimely was supported by substantial credible evidence.

Accordingly, the court misapprehended the effect of that evidence when it erroneously found the Fourth Period of delay was not attributable to Griebel.

"[D]elay caused by defense counsel is charged against the defendant." *State v. Morrisey*, 2009 MT 201, 351 Mont. 144, 214 P.3d 708.

2. Even if all periods of delay were attributable to the State, the delay was valid or institutional and weighed only slightly in favor of a speedy trial violation.

The State maintains that the final three periods of delay should have been attributed to Griebel, particularly the Fourth Period given his delay in seeking Judge Gilbert's recusal. However, even if the district court correctly attributed the entire 580 days of delay to the State, that delay was either valid (parties needed more time to prepare and secure witnesses) or institutional (realties of the court docket, delays inherent in the criminal justice system and with complex cases involving a significant amount of evidence). *State v. Ariegwe*, 2007 MT 204, ¶¶ 67-72, 108-109, 113, 338 Mont. 442, 167 P.3d 815.

The district court never found, nor does the record support, that the State acted negligently or in bad faith in meeting its discovery obligations. In its orders denying motions to compel and motions to dismiss for alleged discovery violations, the district court found that the State had not violated *Brady v. Maryland*, 373 U.S. 83 (1963), or the discovery statutes. When the court denied Griebel's first speedy trial motion in July 2023, the court reiterated that the State had complied with its discovery obligations and although the court attributed all the delay to the State, it found it was institutional delay based on inherent issues

related to complex criminal trials that were beyond the State's control. (St.Br., App. 1.) The court made this same determination when it granted Griebel's second speedy trial motion. (St.Br., App. 2.)

Despite the court's orders repeatedly rejecting Griebel's allegations of bad faith by the State and finding the State met its discovery obligations, Griebel continues to misconstrue and mischaracterize the record by asserting, without credible evidence, that all the delays were caused by the State acting in bad faith and withholding or denying him discovery. (Br.)

The State acknowledges that there was a five-month delay in providing copies of the March 2023 text messages from Ann Schilling to the Park County Attorney's Office paralegal, Kathy Foote. (Docs. 257, 319, 322, Ex. A; 8/23/23 Tr. (Hr'g) at 114-16.) The State further acknowledges that distribution of the text messages was delayed while DCI investigated Schilling's March 3rd message that claimed Walter Brandon had told someone that one of the prosecutors flirted with him during an interview. (*Id.*) In addition, Schilling's March 21st message alleged that Walter and his wife had been represented by Rebsom in prior cases and that Rebsom will "love him" because she will be able to get him to change his story or not remember. (*Id.*) While there was a delay in getting the DCI report and the hearsay-within-hearsay-within-hearsay text messages to Griebel, there is no

evidence the State acted in bad faith. Nor was Griebel prejudiced by this delay, given the lack of any evidentiary value of those texts.

In addition to accusing the State of purposely delaying discovery—despite the district court's orders repeatedly rejecting his arguments—Griebel asserts that State caused the final period of delay by not filing its brief before September 11, 2023. (Br. at 15-16, 23-24.) Griebel's argument fails to appreciate several factors and is not compelling.

First, after advising the parties that it wanted supplemental briefing, the court explained that if the trial was vacated, "we can be at somewhat more of our leisure uh, to do really the kind of work you want to do in your briefs," but it would "still keep its foot on the gas on the speedy trial motion." (Hr'g at 227.) Second, the court did not issue a briefing schedule at the hearing or in its order vacating the trial the next day. (Hr'g; Doc. 315.) Third, Griebel's argument ignores that he filed a 40-page supplemental brief that advanced arguments well-beyond the alleged lost witness testimony issue the court had requested and included Sanem's post-hearing affidavit alleging new information. (Docs. 318-320, 322-323.) It was not reasonable to expect the State to respond to Griebel's overlength brief in less than two weeks. Finally, the State cannot be blamed for following the district court's successive orders rejecting Griebel's two attempts to expedite the State's deadline. (Docs. 324, 326-328.)

The State respectfully maintains that the court erred in not attributing at least some of the last two periods of delay to Griebel, or in the very least, finding that the parties shared in the final two periods of delay. *See, e.g., State v. Redlich*, 2014 MT 55, ¶ 47, 374 Mont. 135, 321 P.3d 82 (citations omitted). Since Griebel's lack of diligence was responsible for at least 77 days of the delay and he shared in at least part of the final two periods of delay, Factor Two should have weighed against finding a speedy trial violation.

Nonetheless, even if this court agrees the district court correctly attributed all the delay to the State as institutional, Factor Two would weigh only slightly in favor of finding a speedy trial violation given the complexity of the case. When delay is due to the complexity of the case, less weight is assigned to the State. *Ariegwe*, ¶¶ 70-71; *State v. Reynolds*, 2017 MT 25, 386 Mont. 267, 389 P.3d 243 (State's efforts to provide voluminous discovery was ample; complexity of proceedings and nature of investigation weighed against speedy trial violation).

B. Factor Three

The district court erred by finding Factor Three weighed in favor of a speedy trial violation, albeit only slightly. A court should consider a defendant's various responses to delays "based on the surrounding circumstances--such as the timeliness, persistence, and sincerity of the objections, [and] the reasons for [any]

acquiescence." *Ariegwe*, ¶¶ 80, 85, 110; *United States v. Loud Hawk*, 474 U.S. 302, 314-15 (1986).

In both its speedy trial orders, the district court found Griebel's responses to the delay were varied and concluded Factor Three weighed slightly in favor of finding a speedy trial violation. (Apps. 1, 2.) The State acknowledges that Griebel filed motions to compel and dismiss related to alleged lack of discovery. However, simply filing those motions does not absolve the defendant of his obligation to act diligently or preclude a finding he did not exhibit a sincere interest in a speedy trial when his actions are considered in total. As the United States Supreme Court explained, when the defendants filed speedy trial claims while simultaneously submitting "indisputably frivolous petitions for rehearing and for certiorari" as well as filling the trial court's docket with "repetitive and unsuccessful motions," it was appropriate to conclude the defendants did not establish a sincere interest in exercising their speedy trial right. *Loud Hawk*, 474 U.S. at 314-15.

Here, much of the "delayed" discovery at issue was additional material that the State did not possess or intend to use at trial, but Griebel wanted the State to obtain for him. (*See, e.g.*, 12/29/22 Tr. at 16-17, 59 (despite receiving DNA evidence reports "months ago" defense did not make requests for additional DNA testing for Walter and Summer until December 2022); Doc. 177 (Griebel did not request additional ATF records until March 1, 2023). Moreover, and despite the

court's directive, Griebel failed to demonstrate a substantial need for the material or establish that it would pose a hardship for him to obtain it himself in his requests. (*See, e.g.*, 2/17/23 Hr'g; Doc. 154 (Griebel's March 1 motion to compel ignored the court's order at the Omnibus hearing to demonstrate a substantial need or undue hardship; despite that omission, the court granted Griebel relief, which he then disingenuously used to argue that the State delayed discovery).

Ironically, Griebel did not comply with his reciprocal discovery obligations despite the State repeatedly bringing that issue to the court's attention. (*See, e.g.*, 12/29/22 Tr. at 20-21; Hr'g at 100-01, 127.) As late as the August 2023 evidentiary hearing, Counsel admitted the only discovery provided to the State were copies of the experts' reports they had received, and the video taken of the jail that was handed over that day. (Hr'g at 100-01, 127.) Griebel did not provide recordings or transcripts of defense witness interviews (including for witnesses he claimed were "vital" to his defense) and waited until 25 days before trial to file a "preliminary" witness list and three expert witness notices. (Docs. 278, 286-288.)

Griebel had also delayed filing the required notice of affirmative defense until February 10, 2023, and never complied with the court's directive to advise the court and State if he intended to rely upon that defense at trial. (*See* 12/29/22 Tr. at 72; 2/8/23 Tr. at 161; Doc. 148 (ordering Griebel to declare if he intended to rely on JUOF at trial). And, as late as the August 2023 evidentiary hearing, Griebel

refused to state on the record whether he was relying on that defense, despite his statement during cross-examination that he was 20 feet away from Tyler when he shot him. (Hr'g at 185-86, 191, 195-96.)

Griebel's lack of diligence is also apparent regarding the timing of the speedy trial hearing. Griebel did not request a hearing on his first speedy trial motion. Nor did Griebel supplement that motion after Birkeland passed away in early June 2023. Griebel did not request an evidentiary hearing when he filed his second motion to dismiss on July 7, 2023. Griebel finally requested a hearing on July 28, 2023, three days after the court denied his first speedy trial motion.[2]

Griebel was also dilatory when he waited 25 days to file a petition for a writ of supervisory control challenging the district court's February 15, 2023 order denying his motion for a probable cause hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). (Doc. 143; *Griebel v. Sixth Jud. Dist. Ct.*, No. OP 23-0158, 2023 Mont. LEXIS 324 (March 21, 2023) (holding, Griebel failed to meet threshold requirement for writs of supervisory control by offering "no argument as to why the normal appeal process would be inadequate"). Had this Court not denied Griebel's petition without requiring a response, the March 27 trial date would have had to be continued. Griebel was also dilatory when he waited until

[2] Given these dilatory actions, Griebel's suggestions that he was disadvantaged because the court did not hold a speedy trial hearing until August 23, 2023, are not persuasive. (Br. at 15, 23, 31.)

July 25, 2023, to challenge this Court's March 23, 2023 order denying his writ petition and June 13, 2023 order denying Griebel's motion to disqualify Judge Dayton, in the United States District Court. (St.Br., App. 3.)[3]

Furthermore, given that Griebel's petitions were both summarily denied without ordering responsive pleadings, the State respectfully disagrees with the district court's determination that Griebel did not file frivolous motions. Similarly, this Court found that Griebel's motion to disqualify Judge Dayton took the judge's comments out of context and otherwise mischaracterized the proceedings. (Doc. 232.)

Although Griebel had every right to appeal these rulings to this Court and the United States District Court, his decision to pursue such interlocutory claims could have delayed his trial and run counter to finding that Griebel sincerely wanted a speedy trial. As the district court aptly observed at the evidentiary hearing, a person's interest in exercising his right to a speedy trial often competes with other constitutional rights. (Hr'g at 225-30.)[4] Griebel had every right to

[3] Despite the federal district court summarily dismissing his petition, Griebel appealed to the Ninth Circuit which did not open its case until August 15, 2023; less than a month before the trial date. (App. 3.)

[4] When discussing the tension between Griebel's rights to speedy trial and effective assistance of counsel, the district court expressed concern that Griebel would have an ineffective assistance claim if the trial was not continued because of potential claims that defense experts had not been retained in a timely manner.

appeal rulings as he saw fit; but those choices may nonetheless be considered when evaluating the totality of his acts/omissions to determine his desire for a speedy trial. *See Loud Hawk*, 474 U.S. at 314-15.

When the above-described dilatory acts are considered along with the fact Griebel's motion to disqualify Judge Gilbert was untimely, the district court's determination that Factor Three should weigh in Griebel's favor was erroneous. "[T]he overall accuracy of the balancing test is enhanced when the *totality* of the accused's responses to pretrial delays is considered." *Ariegwe*, ¶¶ 74-85, 110 (emphasis added); *State v. Stops*, 2013 MT 131, ¶ 40, 370 Mont. 226, 301 P.3d 811 ("Conduct that demonstrates a defendant's desire to avoid trial weighs against him in the overall balancing."). Factor Three weighs against finding a speedy trial violation.

C. Factor Four

1. Oppressive pretrial incarceration

"[P]reventing oppressive pretrial incarceration--reflects the 'core concern' of the speedy trial guarantee: 'impairment of liberty.'" *Ariegwe*, ¶ 89 (citation omitted). When evaluating the conditions of the detention facility, the inquiry is not one of "unpleasantness," but rather "oppressiveness." *Ariegwe*, ¶ 93.

The court concluded that Captain O'Neill "properly addressed all" of Griebel's complaints and found Griebel's pretrial incarceration was not oppressive.

(App. 2 at 7-8.) The court's findings were supported by substantial credible evidence and its conclusion was correctly entered.

2. Anxiety/concern

The speedy trial guarantee does not eliminate altogether the disruption to one's life caused by unresolved criminal charges, rather, it aims to shorten the disruption, since the criminal justice system will naturally involve some level of anxiety to those who have unresolved charges against them. *Ariegwe*, ¶¶ 97, 147. Thus, the critical inquiry is "whether the delay in bringing the accused to trial has *unduly* prolonged the disruption of his or her life or *aggravated* the anxiety and concern that are inherent in being accused of a crime." *Id.* (emphasis added).

Griebel did not present substantial, credible evidence that the delay bringing him to trial caused him either undue, prolonged disruptions or aggravated his anxiety or concern beyond that which is expected of any person charged with an offense. *See State v. Heath*, 2018 MT 318, ¶ 27, 394 Mont. 4, 432 P.3d 141. The court appropriately found that Griebel's claims of anxiety and depression were "more attributable to and consistent with the nature of his charges than the delay in commencing trial." (App. 2 at 7-8.) The court's findings were supported by substantial credible evidence and its conclusion was correctly entered.

3. Impairment of defense

Griebel offered no substantive or compelling rebuttal to the State's Opening Brief arguments that the district court's findings concerning his allegedly impaired defense were clearly erroneous. (Br. at 33-34.)

Griebel's response does not refute that other than Birkeland, he failed to establish the other witnesses were "unavailable as a result of the pretrial delay." *State v. Spang*, 2007 MT 54, ¶ 31, 336 Mont. 184, 153 P.3d 646. Griebel asserts he established causation for Glasson because she passed away before she could be *interviewed*. (Br. at 33.) This argument misses the mark. Causation turns on whether a witness becomes unavailable to testify *at trial*. Griebel also fails to apprehend that the issue of causation relative to Walter and Trooper Wager is whether the delay in getting to trial impacted their once clear recollections of material events relevant to Griebel's guilt or innocence.

Griebel did not present any evidence that the information known and expressed by Trooper Wager or Walter had faded since February 2023 when Walter was interviewed by Sanem and Trooper Wager testified at the evidentiary hearing. Griebel still offers only speculation that Walter's inconsistent statements were evidence of a faded memory. *State v. MacGregor*, 2013 MT 297A, ¶ 39, 372 Mont. 142, 311 P.3d 428 (no allegation of what favorable witness testimony was forgotten or how a clearer memory would aid defense). Moreover, Walter's

prior interviews could be used to either refresh his memory or impeach him. *State v. Jefferson*, 2003 MT 90, ¶ 37, 315 Mont. 146, 69 P.3d 641 (both witnesses to crime testified and earlier statements were preserved).

Additionally, nothing in the record suggests that Trooper Wager had witnessed any event or heard any statement that would have helped the jury determine Griebel's guilt or innocence. Griebel claimed that Trooper Wager's video "would have captured Det. Hopkin's communications and actions, including an investigation into a suspicious vehicle nearby." (Br. at 33.) Griebel not only fails to cite any evidence for this claim, *see Stuart*, ¶ 22, he references Griebel's *hearsay* testimony about a *rumor* Casey Anderson relayed to him as "proof" there had been other vehicles present. (*Id*., n.8 (emphasis added).)

Griebel also misrepresented the record when he asserted that Griebel's hearsay statement about what Anderson heard from "those guys" having a .22 was corroborated by Schilling's texts to Foote. (Br. at 34.) Schilling's text messages had no evidentiary value given they constituted multiple layers of hearsay and could not be used to impeach Walter let alone confirm a rumor Anderson allegedly had heard and repeated to Griebel. Guesswork based on inadmissible hearsay does not support Griebel's claim of impaired defense. The court's findings to that effect were clearly erroneous.

Griebel again improperly focuses on the failure to preserve Trooper Wager's video and the lack of videos from other patrol cars. (Br. at 33.) Griebel offers no response to the court's inconsistent findings concerning the value of Trooper Wager's allegedly "lost" testimony. In its order denying Griebel's *Brady* claims the court found that: there was no evidence that trooper's recording would have been material, of substantial use, or exculpatory; Griebel had other comparable evidence to draw from; and the impact of "losing" Trooper Wager's testimony was negligible. (Doc. 170.) Yet, in its order granting Griebel's speedy trial motion, the court found the trooper's allegedly faded memory prejudiced Griebel. By ignoring its prior determination, the court misapprehended the effect of the evidence and its findings relative to the trooper's alleged faded memories were not supported by substantial evidence. *See MacGregor*, ¶ 39 (no showing alleged surveillance video existed or would have been exculpatory).

While Griebel criticizes the State for referring to Sanem's conversation with Glasson over the phone as an "interview" (Br. at 34), he fails to address the salient issue: that Glasson's comment that she "knew stuff" does not constitute substantial credible evidence relevant to Griebel's guilt or innocence. The "loss" of this irrelevant, vague, and inadmissible evidence did not impair Griebel's ability to present a defense.

Griebel misrepresents the State's argument when he asserts that the "State acknowledged that Griebel established that the loss of Ms. Birkland [sic] was prejudicial." (Br. at 33 (citing St.Br. at 36).) The State acknowledged only that the record supported a causal connection between the delay and unavailability of Birkeland. The State did not agree her death impaired Griebel's ability to present a defense.

Griebel misunderstands the State's arguments about Griebel's and Summer's consistent representations about what allegedly occurred at Birkeland's. (Br. at 33.) Since Summer and Griebel would have been available to testify about those events and Summer could have testified about Griebel's demeanor, Birkeland's alleged testimony would have been cumulative at best and certainly not "vital" to the defense. Griebel's assertion that Birkeland could have testified about Tyler's propensity for violence ignores that such testimony would have been inadmissible character evidence, and depending on the source of her information, also hearsay.

Significantly, in his response, Griebel chose not to address his failure to call Walter and Trooper Wager to testify about how the delay in getting to trial impacted their once clear recollections of material events relevant to Griebel's guilt or innocence. Griebel also failed to counter the State's argument the record was devoid of any credible, direct or first-hand evidence (*i.e.*, recordings, transcripts, written statements) of the allegedly "lost" testimony of three deceased witnesses.

Instead, Griebel cites only to his own opinion testimony during the hearing as evidence that the three deceased witnesses were "vital" to his defense. (Br. at 33.) The lack of any direct, competent, reliable evidence about what was actually lost undermines Griebel's claim of prejudice. *See State v. Taylor*, 1998 MT 121, ¶ 24, 289 Mont. 63, 960 P.2d 773 (when claiming prejudice in pre-accusation delay, "bare speculation that a lost witness's testimony would have been exculpatory is insufficient to prove actual prejudice"); *State v. Laird*, 2019 MT 198, ¶ 54, 397 Mont. 29, 447 P.3d 416.

Had Birkeland been such a key witness to the defense, as indicated by Griebel listing her as a witness in his notice of JUOF, then Griebel should have interviewed her. Griebel's failure to memorialize Birkeland's statements completely undermines his claim that her testimony was "vital" to the defense. Additionally, Griebel could present text messages that Tyler sent to Birkeland and Summer about his desire to harm Griebel. (*See, e.g.*, Doc. 103, Ex. A (screen shot of Summer's cell phone showing a message from Tyler to Summer on 2/7/22 that he was going to kill Griebel and himself); Doc. 342, Ex. D (copies of texts Tyler sent to Summer and Summer's son on February 6 and 7, 2022, about wanting to beat up Griebel; copies of texts Tyler sent on February 4, 2022, to obtain brass knuckles).)

The court's finding that the loss of Birkeland prejudiced Griebel's ability to present a defense was clearly erroneous because there was no direct, affirmative, or

credible evidence that Birkeland would have testified to anything beyond that which Summer and Griebel would say or what appeared in text messages from Tyler. The court also misapprehended the effect of "losing" Birkeland's testimony by failing to appreciate that Griebel had two experts prepared to testify in support of his JUOF defense, just as it had done in its order denying Griebel's first speedy trial motion when it found that "the experts and hundreds of pieces of evidence in this case ensure the [c]ourt that the duration of time will not impair [Griebel's] defense." (App. 1 at 10.)

"Though a lengthy delay requires less from the accused to demonstrate prejudice, 'it would be virtually impossible for the State to rebut presumed prejudice from an allegedly impaired defense without some *showing* by the defendant of *actual* impairment resulting in prejudice.'" *State v. Daly*, 2023 MT 142, ¶ 34, 413 Mont. 100, 533 P.3d 326 (citation omitted) (emphasis added). The record does not contain credible, substantial evidence demonstrating how the "loss" of three witnesses or allegedly faded memories of two others actually impaired Griebel's ability to bring a defense.

Of the alleged testimony that Griebel asserted he "lost," Walter was the only person who had been present at the crime scene. The alleged loss of the other "witnesses" was negligible at best, especially since Griebel's defense was JUOF, which hinges on what *Griebel* allegedly experienced in the minutes leading up to

shooting Tyler. And, as established, Griebel offered only speculation that Walter's memory of the events had faded.

The court's clearly erroneous findings concerning impairment of Griebel's defense led the court to err in concluding Griebel was prejudiced. This error was exacerbated when the court engaged in balancing the four factors.

D. Balancing the four factors

"[N]one of the . . . four factors is either a necessary or a sufficient condition to the legal conclusion that the accused has been deprived of the right to a speedy trial. Rather, the factors must be considered together with such other circumstances as may be relevant." *Ariegwe*, ¶ 102. "Determining whether there has been a speedy trial depends upon weighing the conduct of the prosecution *and the defendant* . . . so that evaluation of speedy trial claims is necessarily relative and depends upon the circumstances of each case." *State v. Llamas*, 2017 MT 155, ¶ 13, 388 Mont. 53, 402 P.3d 611 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972) (emphasis added)).

None of the four factors weighed in favor of finding a speedy trial violation. Factor Two weighs against a violation because any delay attributable to the State was institutional while Griebel was responsible for at least 77 days of delay due to lack of diligence. Factor Three weighs against a speedy trial violation because, when reviewed as a whole, Griebel's acts/omissions did not demonstrate a sincere

desire for a speedy trial. Factor Four weighs against a speedy trial violation because Griebel was not prejudiced by the delay.

CONCLUSION

The State requests that this Court reverse the district court's order granting Griebel's second speedy trial motion to dismiss and remand this case to the district court to set the matter for trial.

Respectfully submitted this 12th day of August, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced 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 4,946 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Katie F. Schulz
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