IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0098

STATE OF MONTANA,

Plaintiff and Appellee,

v.

LIVORIO LOERA,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, The Honorable Shane A. Vannatta, Presiding

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STATEMENT OF THE ISSUES

1. Whether the district court properly exercised its discretion when it prohibited Appellant from introducing evidence of the victim's seat belt use.

2. Whether the district court properly exercised its discretion when it allowed the State to introduce evidence that Appellant possessed unopened alcoholic beverages and self-help books related to alcoholism in the trunk of his car.

STATEMENT OF THE CASE

On April 22, 2021, the State charged Livorio Loera (Loera) with vehicular homicide while under the influence and three counts of criminal endangerment after he caused the death of Jerome Socheath (Socheath) and put three others at risk of serious bodily harm or death by driving the wrong way on Interstate 90 while under the influence of alcohol. (Doc. 4.) The State later amended the Information to clarify it was proceeding under a violation of Mont. Code Ann. § 61-8-401 as an element of vehicular homicide while under the influence. (Doc. 33.)

The State filed a motion in limine requesting an order to (1) "preclude [Loera] from introducing evidence at trial regarding whether the victims were wearing their seat belts during the vehicle crash;" and (2) preclude argument that

Socheath would have survived the crash if he had been wearing his seat belt. (Doc. 29.) The State argued that a proximate cause analysis was not appropriate given case law and that statute correctly related negligence and the causal relationship at issue. (*Id*.) Loera opposed the State's motion, arguing that the evidence was admissible based on the transaction rule and necessary to put forth a causation defense. (Doc. 44.) Loera stated he was not requesting a jury instruction on the proximate cause issue. (*Id*.)

The court concluded the State had to prove Loera was the "cause-in-fact" of the victim's death, holding that any mention of seat belt use by Socheath would be irrelevant to the determination of Loera's conduct. (Doc. 52, attached as App. A.) The court relied on the statutorily defined causal relationship between conduct and result in Mont. Code Ann. § 45-2-201.[1] (*Id.*) Additionally, the court found that seat belt use was not "explanatory of a fact in dispute" nor needed to "provide a comprehensive and complete issue" as to whether Loera negligently caused the death of Socheath. (*Id*.)

Loera later sought to prohibit the State from discussing unopened alcoholic beverages and "self-help for alcoholics" books located in the trunk of Loera's

[1] To reach this decision, the district court relied on *State v. Harris*, 2001 Mont. Dist. LEXIS 3488, decided by the Honorable Judge Salvagni, and adopted Judge Salvagni's findings and conclusion that the use of seat belts was irrelevant to Loera's conduct. *See* App. A.

vehicle at the time of the crash. (Doc. 49.) Loera argued that the items were not relevant because the items were not accessible to Loera while he was driving. (*Id.*)

The State countered that the items located in the trunk were probative of Loera's mental state. (Doc. 59.) The State argued the evidence would show that Loera knew his drinking patterns were problematic and that he was aware of the dangers of driving after consuming alcohol. (*Id.*) The State made clear that this evidence would be viewed in conjunction with evidence of Loera's driving behavior, alcoholic beverage containers in the passenger compartment of his vehicle, his flight from the crime scene, his blood alcohol concentration, and law enforcement's observations. (*Id.*)

The court concluded that the alcohol and self-help books were relevant to whether Loera consciously disregarded the risk of consuming alcohol and driving. (Doc. 60, attached as App. B). Although the court realized the evidence would be prejudicial, it determined it was not "*overly* prejudicial given its probative nature." (*Id.* at 8 (emphasis in original).)

Following a four-day jury trial in September 2022, a jury convicted Loera of all charges. (Docs. 71, 74, 77, 80, 82.)[2] The court sentenced Loera to a net sentence of 40 years at the Montana State Prison with 25 years suspended. (Doc. 92.)

[2] Loera is only appealing his conviction for vehicular homicide while under the influence. (Appellant's Br. at 8.)

STATEMENT OF THE FACTS

On April 13, 2021, four young men were victims of a fatal crash on Interstate 90 caused by Loera's negligent and impaired driving. Socheath was ejected due to the collision and ultimately died from his injuries in a Spokane hospital. (9/26/22 Tr. at 63; 9/27/22 Tr. at 253.) Pierre Luckett (Luckett) sustained a spinal fracture and bruised lungs, resulting in a two-day stay at the hospital. (9/28/22 Tr. at 65.) Alex Phoat (Phoat) suffered from a concussion. (*Id.* at 73.) Riley Schwieters (Schwieters) fractured both collarbones, his pelvis, and ribs. (*Id.* at 84.) He also suffered from a bruised lung and a neck injury that required him to wear a brace. (*Id.* at 84-85.) Schwieters was in the hospital for four or five days. (*Id.* at 84.)

Luckett, Phoat, Schwieters and Socheath had road-tripped from Minnesota to California to see Luckett's parents and celebrate his birthday. (9/28/22 Tr. at 60-61.) Late on April 13, 2021, while on their way back to Minnesota, the young men found themselves in the Rock Creek area near Missoula, Montana. (*Id.* at 63.) Luckett was driving, Phoat was in the front passenger seat, and Schwieters and Socheath were in the back seat of the vehicle. (*Id*.)

At approximately the same time, John Sims (Sims) was also travelling eastbound on Interstate 90 near the Rock Creek exit when he observed a vehicle driving on the wrong side of the roadway. (9/26/22 Tr. at 35-38.) Sims flashed his

lights, attempting to get the driver's attention, then called 911 at 11:23 p.m. (*Id*. at 40, 53.) Less than 15 minutes later, at 11:37 p.m., Cody Hartley (Hartley) called 911 after observing what he thought was a cargo trailer on the north side of the median and a second vehicle facing the wrong way with its emergency flashers on. (*Id*. at 53, 58.)

Hartley turned around and observed a small sedan with damage to the front driver's side facing westbound in the left-hand lane. (*Id*. at 58-59.) Hartley observed a man walking near the passenger side of the sedan, later identified as Loera. (*Id*. at 59-60.) Loera told Hartley everyone was fine and repeatedly stated he needed a tow truck. (*Id*.) Loera did not appear to have any injuries. (*Id.* at 60.) Hartley then realized the vehicle in the median was a passenger vehicle. (*Id*. at 61; *see* State's Ex. 34-35, 39-47.)

Hartley approached the second vehicle, which was on its side. (9/26/22 Tr. at 61.) Two of the young men were out of the vehicle and a third was climbing out. (*Id.*) Hartley learned there was a fourth person missing. (*Id*.) Hartley, along with his wife and a co-worker, helped the third young man out of the vehicle and covered him with a blanket to keep him warm. (*Id*. at 62; 9/27/22 Tr. at 253.) Hartley then located Socheath. (9/26/22 Tr. at 62.)

Socheath was unconscious and bleeding from his head. (*Id.* at 63.) Hartley covered him with a blanket and waited for medical personnel to arrive. (*Id.*)

Hartley estimated it took approximately 20 minutes for emergency services to arrive. (*Id.*) During that time, he and the others moved around the scene, clearing a substantial amount of debris out of the road. (*Id.*) Hartley estimated he was on scene for approximately two hours and did not see Loera again. (*Id.* at 64.) Neither Luckett, Phoat, nor Schwieters observed Loera at the scene after the accident. (9/28/22 Tr. at 66, 74, 85-86.)

Missoula County Sheriff's Deputy Garrett Koppes was the first to arrive on scene. (*Id*. at 76.) He observed that Loera's car was unoccupied. (*Id.* at 75.) Soon, numerous other first responders arrived, including a helicopter to transport Socheath. (*Id.* at 92-93.)

At 1:37 a.m. on April 14, 2022, approximately two hours after the crash, Loera called 911 to report he was injured. (9/26/22 Tr. at 53; 9/27/22 Tr. at 46, 51.) Law enforcement, including Montana Highway Patrol (MHP) Trooper Jacob Ayers responded near the east-bound off-ramp of Exit 126. (9/27/22 Tr. at 47.) Loera was located on the embankment approximately a half-mile from his vehicle. (*Id.*) He was found in thick vegetation. (*Id.* at 115.)

Trooper Ayers observed several indicators of intoxication upon locating Loera. (*Id.* at 47-48.) Loera's eyes were red and glossy, he had vomit or blood around his mouth, his speech was slurred, and Trooper Ayers smelled the odor of an alcoholic beverage coming from him. (*Id*.) Loera was transported to the hospital

for a blood draw. (*Id*. at 111.) His blood alcohol content was .124 approximately four-and-a-half hours after the crash. (9/27/22 Tr. at 119-120; 9/28/22 Tr. at 35.)

MHP Trooper Phillip Smart, a Traffic Homicide Investigator, conducted the investigation. (9/27/22 Tr. at 179.) Trooper Smart determined that Loera's vehicle had traveled approximately 847 feet after striking the other vehicle. (*Id.* at 187.) Based on the evidence at the scene, Trooper Smart concluded that Loera had remained in control of his vehicle post-collision. (*Id*. at 198.) Trooper Smart also calculated that Loera was driving just under 80 miles per hour at the time of the crash. (*Id*. at 189.)

During the investigation, Trooper Smart searched Loera's vehicle. (*Id*. at 198.) Two open and empty wine cartons were found in the passenger compartment of Loera's vehicle, as well as other unopened alcohol containers. (*Id.* at 200-01.) In addition, Trooper Smart found two books about "controlling alcohol, and overcoming anxiety, depression and addiction" and other unopened alcohol in the trunk of Loera's vehicle. (*Id.* at 202-03.) In total, four pictures of the trunk were shown to the jury. (*Id.*; *see also* State's Exs. 85-88.) Only one of those photos showed images of the books. (*See* State's Ex. 88.) Trooper Smart testified at trial that the most common fatalities from car crashes involve people who are not wearing seat belts and are ejected. (9/27/22 Tr. at 219.)

During closing arguments, the State did not mention the unopened alcohol or the self-help books. (*See* 9/29/22 Tr. at 19-31, 45-47.)

STANDARD OF REVIEW

A district court has broad discretion to determine the admissibility of evidence and this Court reviews evidentiary rulings for an abuse of discretion. *State v. Walker*, 2018 MT 312, ¶ 11, 394 Mont. 1, 433 P.3d 202 (citing *State v. Madplume*, 2017 MT 40, ¶ 19, 386 Mont. 368, 390 P.3d 142). Abuse of discretion occurs if "a district court acts arbitrarily without conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice." *Madplume*, ¶ 19. While a district court has broad discretion when determining the relevancy and admissibility of evidence, it is bound by the Rules of Evidence and applicable statutes in exercising its discretion. *State v. Lake*, 2019 MT 172, ¶ 22, 396 Mont. 390, 445 P.3d 1211 (citations omitted). Where a district court's evidentiary ruling is based on its interpretation of a statute, this Court reviews the district court's ruling de novo for correctness. *Id.* ¶ 22.

SUMMARY OF THE ARGUMENT

The district court properly excluded evidence of Socheath's seat belt use as the lack of a seat belt was not the cause-in-fact of Socheath's death. Evidence of

seat belt use was irrelevant to Loera's conduct and would have only served to confuse the jury about the issue of causation. Rather, the district court correctly determined that, but for Loera driving the wrong way on Interstate 90 while under the influence, the vehicle crash would not have occurred and Socheath would not have died.

This Court should reject Loera's claims as to foreseeability for two reasons. First, Loera's theory on appeal was not presented to the district court. Loera's argument during briefing was strictly related to Socheath's seat belt use and causation. Foreseeability is not mentioned in any of the motions in the trial court, nor in the district court's order. Loera's new theory may not be raised for the first time on appeal.

Second, Socheath not wearing a seat belt while in the backseat of a passenger vehicle was a foreseeable risk of Loera's conduct. Approximately 20 percent of passengers riding in a backseat do not wear their seat belts, meaning approximately 200,000 people in Montana do not wear their seat belts while in the backseat.

The district court properly exercised its discretion when it determined that whether Socheath was wearing his seat belt was inadmissible under the transaction rule. The transaction rule has historically been limited in its use. Whether Socheath

was wearing his seat belt is not explanatory of Loera's conduct and is easily divided from other aspects of the crime.

Finally, the district court properly exercised its discretion when it allowed testimony about the unopened alcoholic beverages and books related to alcoholism that officers found in Loera's trunk. Both were relevant to Loera's mental state, as he was aware of the risk drinking and driving could cause given his awareness of his own issues and him being impaired by alcohol at the time of the crash. Even if this Court finds that the evidence was improper, the error was harmless as the State introduced other evidence as to Loera's negligence and intoxication that the jury could rely on in deciding the verdict. Also, the State offered only minimal testimony about the trunk contents and did not rely on that evidence in closing arguments.

ARGUMENT

I. The district court properly exercised its discretion in excluding any evidence that Socheath was not wearing a seat belt after correctly concluding that evidence of proximate cause is irrelevant to criminal negligence.

A. Loera was the cause-in-fact of Socheath's death.

Cause-in-fact is required for a conviction of negligent homicide. *See State v. Schipman*, 2000 MT 102, 299 Mont. 273, 2 P.3d 223. Generally, where a crime is based on some form of negligence, the State must show that the defendant's

negligent conduct was the cause-in-fact of the victim's death. *State v. Bier*, 181 Mont. 27, 32, 591 P.2d 1115, 1118 (1979). Proximate cause is proven by establishing cause-in-fact, also known as the "but for" test or substantial factor test. *Estate of Strever v. Cline*, 278 Mont. 165, 175, 924 P.2d 666, 672 (1996). An individual's conduct is a cause-in-fact of an event if the event would not have occurred but for that conduct. *State ex rel. Kuntz v. Mont. Thirteenth Judicial Dist. Court*, 2000 MT 22, ¶ 37, 298 Mont. 146, 995 P.2d 951. The defendant's conduct is not a cause of the event if the event would have occurred without the conduct. *Id*.

The United States Supreme Court explored the issue of proximate cause as it relates to criminal matters in both *Paroline v. United States*, 572 U.S. 434 (2014), and *Burrage v. United States*, 571 U.S. 204 (2014). In *Paroline*, the Supreme Court discussed the limits of restitution. *Paroline*, 572 U.S. at 443. The Supreme Court relied on the cause-in-fact analysis central to Montana jurisprudence, finding that the concept of cause-in-fact "is not a metaphysical one, but an ordinary, matter-of-fact inquiry into the existence . . . of a causal relation as laypeople would view it." *Id*. at 444 (citing 4 F. Harper, F. James, O. Gray, Torts § 20.2, p. 100 (3d ed. 2007)).

Similarly, in *Burrage*, the Supreme Court found that such cause requires proof "'that the harm would not have occurred' in the absence of—that is, but

for—the defendant's conduct." *Burrage*, 571 U.S. at 211 (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 346-47 (2013); *Restatement of Torts* § 431, cmt. a (1934)). This premise is reflected in the Model Penal Code as well, which states, "Conduct is the cause of a result" if "it is an antecedent but for which the result in question would not have occurred." M.P.C. § 2.03(1)(a).

In *Burrage,* the Supreme Court gave the example of "where A shoots B, who is hit and dies, we can say that A [actually] caused B's death, since but for A's conduct B would not have died." *Burrage*, 571 U.S. at 211 (quoting 1 W. LaFave, *Substantive Criminal Law* § 6.4(a), pp. 467-68 (2d ed. 2003)). "The same conclusion follows if the predicate act combines with other factors to produce the result, so long as the other factors alone would not have done so—if, so to speak, it was the straw that broke the camel's back." *Burrage,* 571 U.S. at 211. In other words, even if the defendant's conduct combined with other factors to produce the result, the defendant is still subject to culpability.

The Commission Comments to Mont. Code Ann. § 45-2-201 mirror these concepts. The comments recognize that the offender's culpability cannot be based on the gravity of the offense if his conduct is not the cause of the harm. *Id.*, citing M.P.C. § 2.03 (1962). The comments point out that nothing in statute considers issues of intervening or concurrent causes. *Id*.

Montana routinely declines to address issues of proximate cause in criminal cases. *See State v. Magruder*, 234 Mont. 492, 765 P.2d 716 (1988); *State v. Dubois*, 2006 MT 89, 332 Mont. 44, 134 P.3d 82 (declining to give a proximate cause instruction upon plain error review); *State v. Christensen,* 2020 MT 237, 401 Mont. 247, 472 P.3d 662 (overturning convictions for negligent homicide because no evidence showed defendant was the "cause-in-fact" of the victims' deaths). In *Magruder*, defendant Magruder threatened the victim, stating he had better be "packing a piece" because Magruder would be packing and would be there later. *Magruder* at 493, 765 P.2d at 717. Witnesses testified they observed Magruder's truck outside the victim's residence and saw the victim walk to the driver's side of Magruder's truck. *Id*. at 494, 765 P.2d at 717. The witnesses heard a gunshot and observed Magruder driving away. *Id.* The victim died from his injuries. *Id*.

Magruder claimed that the victim approached his truck and a struggle over the gun ensued, resulting in the victim's gunshot wound. *Id*. A jury convicted Magruder of mitigated deliberate homicide. *Id*. At trial, Magruder offered four jury instructions on proximate causation, arguing that the victim's death was a result of the victim's own negligence. *Id*. at 497, 765 P.2d at 719. This Court held that "[p]roximate cause is not a term which is generally used in criminal jury instructions under Montana's Criminal Code of 1973." *Id.*

The Court adopted the Commission Comment to Mont. Code Ann. § 45-2-201 (1962), which states that issues created by concepts of proximate cause "should be faced as problems of the culpability required for conviction and not as problems of causation." *Id*. This Court definitively stated that it was "not able to envision a case under our present criminal code in which a proximate cause instruction would be appropriate." *Id.*

Similarly, in *Dubois*, Dubois attacked the victim with a bat. *Dubois*, ¶ 10. Dubois argued that a high dose of morphine was the actual cause of death for the victim, not his severe skull fracture and resulting brain injury—a true but for analysis, separate and distinct from Dubois' conduct. *Id.* ¶¶ 19-23. Dubois asked this Court to invoke plain error review and hold that a proximate cause instruction was necessary for a fair trial. *Id*. ¶ 41. This Court held that under the facts of the case, a proximate cause instruction was not warranted. *Id.*

Finally, other states have decided that a victim's failure to wear a seat belt is not sufficient to supersede a criminal defendant's conduct in causing the victim's injuries or death. *See State v. Hubka*, 480 N.W.2d 867 (Iowa 1992) (upheld the trial court's hearing on a state motion in limine to preclude the testimony of seat belts); *Panther v. State*, 780 P.2d 386 (Alaska Ct. App. 1989) (trial court did not err in refusing to instruct that the victim's failure to use seat belt could be considered); *Union v. State*, 642 So. 2d 91 (Fla. Dist. Ct. App. 1994) (victim's

failure to wear seat belt was not a defense); *People v. Clark*, 431 N.W.2d 88 (Mich. Ct. App. 1988) (trial court did not abuse its discretion in ruling that evidence of victim's failure to wear seat belt was inadmissible); *State v. Myers*, 536 P.2d 280 (N.M. Ct. App. 1975) (contributory negligence is not a factor in determining proximate cause in prosecution for vehicular homicide as a result of passenger not wearing a seat belt); *State v. Dodge*, 567 A.2d 1143 (Vt. 1989) (victim's failure to wear seat belt arguably a proximate cause of his death, but not an intervening cause); *State v. Nester*, 336 S.E.2d 187 (W. Va. 1985) (fact that victim did not wear seat belt was not intervening cause such as would break causal connection); *State v. Mitchell*, 586 N.E.2d 196 (Ohio Ct. App 1990) (did not allow testimony of seat belts into evidence based on statute prohibiting such testimony); *Whitener v. State*, 410 S.E.2nd 796 (Ga. Ct. App. 1991) (victim's failure to wear seat belt could play no role in determining whether defendant was guilty); *Allen v. Wyoming*, 43 P.3d 551 (Wy. 2002) (a victim's failure to wear a seat belt does not supersede a criminal defendant's causal responsibility); *Connecticut v. Stewart*, 759 A.2d 142 (Conn. Ct. App. 2000) (court properly excluded evidence that victim was not properly wearing seat belt); *People v. Sieck*, 351 P.3d 502 (Colo. Ct. App. 2014) (defendant's driving caused the accident, and passenger's failure to wear a seatbelt did not amount to an independent intervening cause); *State v. Hursh*, 890 P.2d 1066 (Wa. Ct. App. 1995) (evidence of victim's failure to wear seat belt

properly excluded because such failure did not cause accident, was not sole cause of victim's injuries, and did not relieve defendant of criminal liability); *Chapman v. Commonwealth*, 804 S.E.2d 326 (Va. Ct. App. 2017) (victim's failure to wear seat belt not a proximate cause of his death, leaving defendant's reckless driving as the "sole and proximate" cause of the accident and resulting death).

Here, the district court did not decide an element of the offense for the jury as Loera claims. Loera's conduct was in fact the cause of Socheath's death. But for Loera driving the wrong way on Interstate 90 at highway speeds at night and crashing into the SUV with the four young men, Socheath would not have died. (9/26/22 Tr. at 35-38.) Put another way, Socheath would not have died from not wearing a seat belt without Loera's conduct. The analysis by the district court was correct in that it followed the causation standard in statute and in state and federal jurisprudence.[3] (App. A at 4-6.) Furthermore, the district court's decision is in accord with the numerous other jurisdictions that have held seat belt use is not admissible as to causation. The issue of causation was adequately addressed in the criminal pattern jury instructions defining negligence and the causal relationship

[3] Although the district court relied on non-binding authority in adopting the Honorable Judge Salvagni's reasoning in *State v. Harris*, 2001 Mont. Dist. LEXIS 3488, *Harris* was correctly decided as it followed established precedent in *Magruder*. *Harris*, ¶ 20.

between conduct and result that the district court provided to the jury. (*See* Doc. 81.)

B. Loera failed to raise an argument as to foreseeability in the district court.

"The rule is well established that this Court will not address an issue raised for the first time on appeal. A party may not raise new arguments or change its legal theory on appeal. The reason for the rule is that it is fundamentally unfair to fault the trial court for failing to rule on an issue it was never given the opportunity to consider." *State v. Martinez*, 2003 MT 65, ¶ 17, 314 Mont. 434, 67 P.3d 207 (citations omitted).

Loera fails to advise this Court that the issue of foreseeability as it relates to his negligence was not raised in the district court and, instead, provides numerous appendices that were not considered by the lower court. Loera's response in the trial court only articulated the issue of causation as it related to Socheath's seat belt use and the transaction rule. (Doc. 44.) Loera now seeks to shoehorn another theory for admission under the umbrella of "negligence." He argues that Socheath not wearing a seat belt was not a significant part of the risk involved in his conduct and it was unforeseeable that Socheath was unbelted in his vehicle. (Appellant's Br. at 19.) Loera is incorrect, as explained below.

This Court should not consider these arguments because Loera failed to raise them in the district court. The district court could not abuse its discretion by failing

to address these unvoiced concerns *sua sponte*. This Court should decline to review Loera's claim as to foreseeability on the merits. Even if this Court considers Loera's changed theory, he still cannot prove that the district court abused its discretion.

C. Lack of seat belt use is a foreseeable event.

It is a foreseeable risk that not every person travelling on a roadway will be wearing a seat belt. Criminal case law provides that a defendant must not only be the cause in fact, but that the victim must be foreseeably endangered, in a manner that is foreseeable, and to a degree of harm that is foreseeable. *Bier*, 181 Mont. at 32, 591 P.2d at 1118 (citing LaFave and Scott, *Criminal Law* § 78, p. 588). Culpability is limited when "the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity." *Paroline*, 572 U.S. at 445 (citing *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 838-39 (1996)). When dealing with Mont. Code Ann. § 45-2-201(3) regarding a defendant's negligence, the comments provide that the ultimate criterion is "whether the result was too accidental to have a bearing on the actor's liability or gravity of the offense." 45-5-201 (1962) Commission Comments, citing M.P.C., 1962, § 2.03. When addressing the issue of foreseeability in civil cases, this Court holds that "foreseeability is properly considered with respect to causation," "where there has been an allegation that the chain of causation is severed by an

independent intervening cause." *Estate of Strever*, 278 Mont. at 175, 924 P.2d at 672.

In *Bier*, the defendant and his wife had engaged in an argument after consuming alcohol. *Bier*, 181 Mont. at 29, 591 P.2d at 1116. Ms. Bier was in an intoxicated state when Bier pulled a gun from a holster, cocked it, and threw it on the bed while challenging Ms. Bier to shoot him. *Id*. Ms. Bier picked up the gun and pointed it at her head. *Id*. at 29, 591 P.2d at 1116-1117. Bier attempted to grab or slap the gun to avert its aim. *Id*. at 30, 591 P.2d at 1117. The gun discharged and Ms. Bier ultimately died from her injury. *Id*. Bier argued that his wife's suicide was not foreseeable. *Id.* at 32, 591 P.2d at 1118. With little analysis, this Court held that Bier's conduct created a foreseeable risk due to Ms. Bier's intoxicated state and the presence of a gun. *Id.* at 33, 591 P.2d at 1118.

This Court has also addressed the issue of negligence and foreseeability in a driving context:

> A driver who fails to exercise the level of care that an ordinary reasonable driver would use could easily foresee that other people on the highway might be hurt as a result of his negligence. The zone of risk created by a negligent driver necessarily includes other drivers and passengers in his immediate vicinity.

Fisher v. Swift Transp. Co., 2008 MT 105, ¶ 23, 342 Mont. 335, 181 P.3d 601. In a criminal context, this Court has recognized that "[d]runk driving presents a substantial and real risk to the public safety of Montanans,"

State v. Spady, 2015 MT 218, ¶ 29, 380 Mont. 179, 354 P.3d 590, and that "public safety is equally threatened by a person driving under the influence of alcohol as by a person illegally concealing a gun." *Hulse v. DOJ, Motor Vehicle Div.*, 1998 MT 108, ¶ 38, 289 Mont. 1, 961 P.2d 75.

The ultimate harm in this case—that someone might die while Loera drove down Interstate 90 at highway speeds, going the wrong way—was foreseeable, both under case law and Loera's analysis. Loera failed to exercise the ordinary, expected level of care of a typical driver on Montana's highways by going the wrong way in the dark at approximately 80 miles an hour while intoxicated. As such, it was foreseeable that a passenger in another vehicle on the same highway would be injured or killed. *Fisher*, ¶ 23.

For the first time on appeal, Loera provides statistics to illustrate how common seat belt usage is. Loera states that over 90 percent of front-seat passengers use a seat belt. (Appellant's Br. at 18.) Statistically speaking, if approximately 90 percent of people wear a seat belt, it also means that approximately 10 percent of people *do not* wear a seat belt. Montana's 2020 Census population totaled 1,084,225 people. *See* U.S. Census Bureau, *Montana*, retrieved from https://data.census.gov/profile/Montana?g=040XX00US30. Ten percent of 1,000,000 is 100,000, meaning approximately 100,000 people in Montana are not wearing a seat belt at any given time. To frame the issue another

way, Loera had a one in ten chance of encountering a passenger not wearing a seat belt in the front seat.

Because this issue was not raised below, the State was unable to provide contrary evidence to the district court. Studies show that passengers in the back seat are even less likely to wear a seat belt. Only 81.7 percent of passengers wear seat belts in back seats according to the National Highway Traffic Safety Administration (NHTSA). *See* Boyle, L., *Occupant restraint use in 2022: Results from the NOPUS Controlled Intersection Study* (Report No. DOT HS 813 523), retrieved from: https://crashstats.nhtsa.dot.gov (Nov. 2023). Statistically, Loera's chances of encountering a passenger without a seat belt were nearly doubled when the passenger was in the back seat. To be unforeseeable, the event must be in the realm of "mere fortuity," accident, or the unexpected. Socheath traveling without wearing a seat belt was a foreseeable risk to Loera's conduct, just as Ms. Bier's death was a foreseeable risk when a loaded firearm and alcohol were combined.

Finally, that the collision resulted in Socheath's death, rather than survivable injuries, was foreseeable. In another study conducted by NHTSA, half of passengers killed in fatal traffic crashes were unrestrained, while the other half were restrained. *See* National Center for Statistics and Analysis, *Occupant protection in passenger vehicles: 2022 data* (Traffic Safety Facts, Report No. DOT HS 813 573) retrieved from: https://crashstats.nhtsa.dot.gov (May 2024). Applying

those statistics to this case, Luckett, Phoat and Schwieters each could have died with the same odds.

In this case, the district court correctly concluded that Loera's conduct was the cause-in-fact of Socheath's death. Socheath would not have perished if his lack of seat belt were the only circumstance; rather, Loera's negligent actions caused the crash and Socheath's resulting death. Allowing argument about Socheath's unworn seat belt to the jury would have only confused the issue of Loera's negligence. Additionally, there is a 20 percent chance of encountering an unrestrained passenger in a moving vehicle on Montana's roadways. That was a foreseeable event within the zone of risk created by Loera based on his grossly negligent conduct. The district court correctly suppressed evidence of Socheath's lack of restraint, and the jury was adequately instructed as to the elements of vehicular homicide while under the influence.

II. The transaction rule is inapplicable to Socheath's conduct.

The transaction rule, codified at Mont. Code Ann. § 26-1-103, allows evidence of acts that are "inextricably linked" with and "explanatory of" the charged allegations. *State v. Guill*, 2010 MT 69, ¶¶ 25, 30, 355 Mont. 490, 228 P.3d 1152. The rationale for admitting evidence of the transaction is two-fold. To be admissible, the evidence must be "theoretically difficult to subdivide a

course of conduct into discrete criminal acts and 'other' conduct" and "difficult for a witness to testify coherently to an event if the witness is only permitted to reference the minutely defined elements of the crime." *Guill*, ¶ 27 (citing Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* vol. 22, § 5239, 446 (West 1988)). Evidence offered under the transaction rule is subject to balancing under Mont. R. Evid. 403, which allows the court to exclude relevant material when its prejudicial effect substantially outweighs its probative value. *State v. Hardman*, 2012 MT 70, ¶ 16, 364 Mont. 361, 276 P.3d 839**.**

This Court is careful to limit the transaction rule's application. *State v. Stout*, 2010 MT 137, ¶¶ 38-39, 356 Mont. 468, 237 P.3d 37. "Where the declaration, act, or omission forms part of a transaction which is itself the fact in dispute or evidence of that fact, such declaration, act, or omission is evidence as part of the transaction." Mont. Code Ann. § 26-1-103. The fact in dispute in a criminal case would be whether the defendant committed all the elements of the charged offense. *State v. Derbyshire*, 2009 MT 27, ¶ 29, 349 Mont. 114, 201 P.3d 811.

Loera quotes *State v. Lake*, 2022 MT 28, ¶ 46, 407 Mont. 350, 503 P.3d 274, to say that the transaction rule "by its express terms, does not necessarily apply

only to other acts of an accused."[4] However, *Lake* does not analyze what other acts might apply. *Id.* To support his position third party conduct is admissible, Loera cites to *State v. Beavers*, 1999 MT 260, 296 Mont. 340, 987 P.2d 371, and *State v. Baker*, 2004 MT 393, 325 Mont. 229, 104 P.3d 491. Loera fails to recognize that both *Beavers* and *Baker* were decided on the now "discarded" common law concept of *res gestae. Beavers*, ¶¶ 48-49; *Baker*, ¶¶ 26-27; *see also Guill*, ¶¶ 26-27; *State v. Hansen*, 1999 MT 253, ¶ 96, 296 Mont. 282, 989 P.2d 338.

Since this Court abandoned the terms *res gestae* and *corpus delicti*, it has focused on a defendant's conduct surrounding a criminal act. *State v. Haithcox*, 2019 MT 201, ¶ 18, 397 Mont. 103, 447 P.3d 452 (evidence concerning Haithcox's contemporaneous relationships, use of a false name and repeated lies about past employment, and consumption of alcohol were important to establish the source of tension building up to the assault); *State v. Sayler*, 2016 MT 226, ¶ 15, 384 Mont. 497, 380 P.3d 743 (evidence of a prior altercation between defendant and victim was inextricably linked to and explained the dynamic of their relationship); *State v. Lamarr*, 2014 MT 222, ¶ 18, 376 Mont. 232, 332 P.3d 258 (testimony regarding threats and an assault committed by defendant against victim's friend prior to charged assault by defendant against the victim gave the jury context as to the

[4] Loera incorrectly attributes this quote to *Derbyshire*, ¶ 29, and *State v. Detonancour*, 2001 MT 213, ¶ 29, 306 Mont. 289, 34 P.3d 487. *See* Appellant's Br. at 21.

interaction); *Guill*, ¶ 45 (prior violence against wife and son was evidence of a fact in dispute: whether defendant's sexual intercourse with his daughter was consensual); *Stout*, ¶ 49 (defendant's attempts to falsely implicate a woman who had an affair with her husband were admissible); *State v. Berosik*, 2009 MT 260, ¶ 47, 352 Mont. 16, 214 P.3d 776 (defendant's prior bad acts in grooming child victims was admissible as it was closely linked to and explanatory of the charges).

Even after deciding *Lake*, this Court continues to focus on the conduct of a defendant in its consideration of the transaction rule. *State v. Palmer*, 2024 MT 25, ¶ 18, 415 Mont. 150, 543 P.3d 566 (evidence of cycle of domestic violence provided context for understanding the pattern defendant engaged in, and reasons for victim's reactions to it); *State v. Hardin*, 2023 MT 132, ¶¶ 19-24, 413 Mont. 26, 532 P.3d 466 (defendant's status as a sex offender was relevant to the victim's interpretation of the threats). Furthermore, this Court has not allowed conduct of a victim to be introduced under the transaction rule because the victim's conduct is not inextricably linked to, and explanatory of, the charged offense committed by a defendant. *See State v. Henson*, 2010 MT 136, ¶¶ 26-27, 356 Mont. 458, 235 P.3d 1274.

The district court properly concluded that testimony related to seat belt usage was not explanatory of Loera's conduct and, thus, was not admissible under the transaction rule. Moreover, this Court has previously ruled that conduct of a

victim that was not linked to a defendant's conduct was inadmissible. *Id.* This Court should affirm the district court's decision regarding the transaction rule.

III. The district court properly exercised its discretion by allowing the State to present evidence of the unopened alcohol and self-help books in Loera's trunk; alternatively, the admission was harmless error.

A. The evidence was relevant.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Mont. R. Evid. 401. Generally, all relevant evidence is admissible, unless provided by law. Mont. R. Evid. 402. To determine relevance, a district court looks to

> whether an item of evidence will have any value, as determined by logic and experience, in proving the proposition for which it is offered. The standard used to measure this acceptable probative value is "any tendency to make the existence of any fact . . . more probable or less probable than it would be without the evidence". This standard rejects more stringent ones which call for evidence to make the fact or proposition for which it is offered more probable than any other. It is meant to allow wide admissibility of circumstantial evidence limited only by Rule 403 or other special relevancy rules in Article IV.

Mont. R. Evid. 401, Commission Comments.

In *Ingraham*, prosecutors overstepped by introducing evidence of drugs that would not have had an intoxicating effect on the driver. *State v. Ingraham*, 1998 MT 156, ¶ 63, 290 Mont. 18, 996 P.2d 103. Testimony established that the

lithium and Buspar in Ingraham's system had no effect on his driving. *Id*. ¶ 42. This Court held that "evidence of the use of drugs is, by its very nature, prejudicial." *Id.* ¶ 47 (citing *Simonson v. White*, 220 Mont. 14, 23, 713 P.2d 983, 988 (1986). This would be amplified if there is no tangible connection to the fact at issue. *Ingraham*, ¶ 47 (citing *Simonson*, 220 Mont. at 23-24).

Contrary to the facts in *Ingraham,* alcohol did impair Loera's driving and related evidence of alcohol use was probative of several facts at issue. In this case, Loera was under the influence of alcohol, with .124 BAC hours after the crash. Regardless of whether the alcohol in his trunk was open or consumed, the presence of it and the self-help books related to alcoholism led to a tangible connection between his consumption, the presence of alcohol, and his mental state. The presence of the self-help books suggested that Loera was aware he was addicted to alcohol, and thus aware of the risk of drinking and driving—a risk he then consciously disregarded by getting behind the wheel and crashing into four young men while intoxicated.

B. The evidence was not unduly prejudicial.

This Court has readily acknowledged that "a trial judge is in the best position to evaluate the evidence's potentially prejudicial effect and has broad discretion in ruling on the admission of prejudicial evidence." *State v. Fleming*, 2019 MT 237, ¶ 32, 397 Mont. 345, 449 P.3d 1234. Relevant evidence may be

excluded "if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Mont. R. Evid. 403. "A key element of this rule is the discretion of the judge in deciding whether otherwise relevant evidence is to be excluded because of the factors listed in the rule." Mont. R. Evid. 403, Commission Comments.

In *Fleming*, the State introduced evidence of Fleming's previous conviction. *Fleming*, ¶ 6. This Court has held that, regardless of the purpose for which it is admitted, evidence of prior crimes may unduly prejudice a jury against the defendant. *State v. Zimmerman*, 2018 MT 94, ¶ 31, 391 Mont. 210, 417 P.3d 289 (citing *State v. Franks*, 2014 MT 273, ¶ 15, 376 Mont. 431, 335 P.3d 725). The introduction of four photos of unopened alcoholic beverages and two self-help books, as compared to a previous conviction of negligent homicide, do not rise to the same level of prejudice proclaimed by Loera. Unlike in *Fleming*, where the evidence of his prior conviction was "an incredibly powerful punch," more prejudicial than the underlying evidence in the case, the evidence in this case had no such effect. *See Fleming*, ¶ 35. *Fleming* should be distinguished here.

C. Any error in admitting the evidence was harmless.

In order to determine if an alleged error prejudiced a criminal defendant's right to a fair trial, this Court has adopted a two-part test. *State v. Van Kirk*, 2001 MT 184, ¶ 37, 306 Mont. 215, 32 P.3d 735. The first step is to determine if

the error was structural or trial error. *Id*. Structural error usually affects the framework of the trial, precedes the actual trial, and is presumptively prejudicial. *Id.* ¶¶ 38-39. Trial error usually occurs during the trial's presentation of evidence and is not presumptively prejudicial. *Id.* ¶ 40. This type of error is subject to review under the harmless error statute, Mont. Code Ann. § 46-20-701(1).

If the inadmissible evidence was offered to prove an element of an offense, the State must demonstrate that there is no reasonable possibility the inadmissible evidence might have contributed to the conviction. *Van Kirk*, ¶ 47. This Court has explained that "[t]o do this, the State must demonstrate that the fact-finder was presented with admissible evidence that proved the same facts as the tainted evidence and, qualitatively, by comparison, the tainted evidence would not have contributed to the conviction." *Id*. In *Van Kirk*, this Court applied the term "same fact" broadly, holding that the improper admission of the HGN test was harmless because it was offered to prove the defendant was under the influence (an element of driving under the influence), and there was cumulative evidence of the fact that Van Kirk was under the influence. *Id.* ¶ 49.

Here, the jury heard extensive evidence to prove the elements of Loera's negligence and intoxication. The jury heard that Loera was driving the wrong way on Interstate 90 at nearly 80 miles per hour when he crashed into the other vehicle. (9/27/22 Tr. at 189.) After the collision, Loera stated that no one was hurt and

asked for a tow truck. (9/26/22 Tr. at 59-60.) He then left the scene of the accident where the four occupants of the other vehicle were being treated for significant or fatal injuries. (*Id*. at 93-94.) Loera called 911 more than two hours after the crash to report he was injured. (*Id*. at 53; 9/27/22 Tr. at 46, 51.) Law enforcement located Loera on the embankment approximately a half-mile from his vehicle, near the east bound off-ramp of the nearby exit. (9/27/22 Tr. at 47.) He was found in thick vegetation. (*Id.* at 115.)

Trooper Ayers observed several indicators of intoxication upon locating Loera. (*Id.* at 47-48.) Loera's eyes were red and glossy, he had vomit or blood around his mouth, his speech was slurred, and Trooper Ayers smelled the odor of an alcoholic beverage coming from Loera. (*Id*.) Loera was transported to the hospital for a blood draw. (*Id*. at 111.) A blood test established that his blood alcohol content was .124 approximately four-and-a-half hours after the crash. (9/27/22 Tr. at 119-20; 9/28/22 Tr. at 35.)

Upon searching Loera's vehicle, two open and empty wine cartons were found in the passenger compartment, as well as other unopened alcohol. (9/27/22 Tr. at 200-01.) Three photographs of the unopened alcohol in Loera's trunk were shown to the jury. (*Id.* at 202-03; *see also* State's Exs. 85-87.) The State only mentioned the books related to alcoholism once, and only showed 1 photograph of the books to the jury out of the 113 exhibits admitted by the district court. (9/27/22

Tr. at 203; State's Ex. 88.) Although the State argued the evidence was relevant to Loera's mental state in its briefing, the State did not refer to the contents of the trunk in either its closing argument or summation. (*See* 9/29/22 Tr. at 19-31, 45-47.)

Finally, Loera reduced any potential impact as to the effect of the unopened alcohol containers with his cross-examination of Trooper Smart. (*Id.* at 231-236.) Trooper Smart acknowledged that Loera had not consumed, nor had access to, the alcohol in the trunk. (*Id*. at 235.) Evidence discussing the presence of alcohol in Loera's passenger compartment, indicators of impairment, and his blood alcohol concentration after the crash qualitatively and quantitatively exceeded the evidence of alcohol and the books found in Loera's trunk. Just as in *Van Kirk*, this Court should find that the admission was harmless error.

/ / /

CONCLUSION

The district court correctly suppressed evidence of Socheath's seat belt use, and correctly denied Loera's motion *in limine*. This Court should affirm Loera's conviction for vehicular homicide while under the influence.

Respectfully submitted this 31st day of December, 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 7,566 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

/s/ Selene Koepke
SELENE KOEPKE

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0098

STATE OF MONTANA,

Plaintiff and Appellee,

v.

LIVORIO LOERA,

Defendant and Appellant.

APPENDICES

CERTIFICATE OF SERVICE

I, Selene Marie Koepke, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 12-31-2024:

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