IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0340

STATE OF MONTANA,

Plaintiff and Appellee,

v.

SHAWN THOMAS ANDERSEN,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Fifteenth Judicial District Court,
Sheridan County, the Honorable David Cybulski, Presiding

APPEARANCES:

TAMMY A. HINDERMAN
Division Administrator
CHARLOTTE LAWSON
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147
C.Lawson@mt.gov
(406) 444-9505

ATTORNEYS FOR DEFENDANT
AND APPELLANT

AUSTIN KNUDSEN
Montana Attorney General
TAMMY K PLUBELL
Bureau Chief
Appellate Services Bureau
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

BENJAMIN FOSLAND
Sheridan County Attorney
100 West Laurel Avenue
Plentywood, MT 59254

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

STATEMENT OF THE ISSUE 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 3

STANDARD OF REVIEW 12

SUMMARY OF THE ARGUMENT 12

ARGUMENT 13

I. The district court abused its discretion in denying Shawn's motion for a mistrial. 13

II. This Court should reverse and remand for a new trial because the legal assistant's comment was presumptively prejudicial, the presumption was not rebutted, and it could not have been rebutted on these facts. 15

A. The legal assistant's comment was presumptively prejudicial. 19

B. The presumption of prejudice was not rebutted. 28

1. The district court failed to conduct the inquiry of jurors necessary to find that the legal assistant's comment was harmless. 28

2. The district court took no remedial action to render the legal assistant's comment harmless. 29

C. This Court should reverse and remand for a new trial because the presumption of prejudice could not have been rebutted on these facts. 31

III. Alternatively, if this Court concludes the presumption of prejudice potentially could have been rebutted, the Court should reverse and remand for a *Remmer* hearing. 34

CONCLUSION 36

CERTIFICATE OF COMPLIANCE 37

TABLE OF AUTHORITIES

Cases

Caliendo v. Warden of Calif. Men's Colony,
365 F.3d 691 (9th Cir. 2004) 21, 26

Godoy v. Spearman,
861 F.3d 956 (9th Cir. 2017) 18, 22

Mattox v. United States,
146 U.S. 140 (1892) 18, 20, 26

Parker v. Gladden,
385 U.S. 363 (1966) 24, 27

Putro v. Baker,
147 Mont. 139, 410 P.2d 717 (1966) ..... passim

Remmer v. United States,
347 U.S. 227 (1954) 28, 31, 34, 35

Rogers v. United States,
422 U.S. 35 (1975) 26, 32

Sheppard v. Maxwell,
384 U.S. 333 (1966) 16

State v. Baugh,
174 Mont. 456, 571 P.2d 779 (1977) 30

State v. Criswell,
2013 MT 177, 370 Mont. 511, 305 P.3d 760 ..... 14, 15

State v. DeGraw,
235 Mont. 53, 764 P.2d 1290 (1988) ..... passim

State v. Eagan,
178 Mont. 67, 582 P.2d 1195 (1978) 29

State v. Gillham,
206 Mont. 169, 670 P.2d 544 (1983) 33, 34

State v. Herrman,
2003 MT 149, 316 Mont. 198, 70 P.3d 738 12

State v. Holmes,
207 Mont. 176, 674 P.2d 1071 (1983) ..... passim

State v. Hoover,
2021 MT 276, 406 Mont. 132, 497 P.3d 598 ..... 12, 14, 32

State v. Jackson,
9 Mont. 508, 24 P. 213 (1890) ..... passim

State v. MacGregor,
2013 MT 297, 372 Mont. 142, 311 P.3d 428 ..... 23, 24

State v. Miller,
2022 MT 92, 408 Mont. 316, 510 P.3d 17 16

State v. Weaver,
195 Mont. 481, 637 P.2d 23 (1981) 30

Turner v. Louisiana,
379 U.S. 466 (1965) 17, 26

United States v. Angulo,
4 F.3d 843 (9th Cir. 1993) 18

United States v. Dorsey,
122 F.4th 850 (9th Cir. 2024) 23

United States v. Pittman,
449 F.2d 1284 (9th Cir. 1971) 26

United States v. Stinson,
647 F.3d 1196 (9th Cir. 2011) 22

Constitutional Authorities

Montana Constitution

Art. II, § 24 ..... 15, 16
Art. II, § 26..... 15, 16

United States Constitution

Amend. XIV..... 15
Amend. VI..... 15

Rules

Fed. R. Evid. 606(b) 18

M.R. Evid. 606(b) 16

STATEMENT OF THE ISSUE

Did the district court commit reversible error when it denied Shawn's motion for a mistrial after the State's legal assistant audibly said "There it is" while critical video evidence was replayed for the jury during their deliberations?

STATEMENT OF THE CASE

The State charged Shawn Andersen with two counts of criminal possession of dangerous drugs and one count of criminal possession of drug paraphernalia. (D.C. Docs. 4, 13.) The case proceeded to a jury trial on March 9, 2023. (March 9, 2023 Transcript on Jury Trial ("Trial Tr.") at 1.)[1]

During the jury's deliberations, the jury asked to review surveillance footage of Shawn in a convenience store, which the State alleged showed Shawn dropping a baggie of methamphetamine. (Trial Tr. at 233–34, attached hereto as Appendix A.) The district court asked the State's legal assistant, who was seated at counsel table, to prepare to play the video for the jury. (App. A at 233–35; *see also, e.g.*, January

[1] An amended trial transcript was filed with the Court on October 7, 2024. All citations to the trial transcript refer to this amended transcript.

26, 2022 Minute Entry (identifying individual as County Attorney's legal assistant).)

The district court brought the jury into the courtroom to watch the video at 6:02 p.m., with all attorneys, the legal assistant, and Shawn present. (App. A at 233–34.) The court reporter documented the following: "While the jurors were watching the video, [the State's legal assistant] said out loud, 'There it is' when the item dropped out of Mr. Anders[e]n's pocket. The Jurors went back into the jury room at 6:09 p.m." (App. A at 234.)

Shawn immediately moved for a mistrial, arguing:

> In the last showing of the evidence at the jury's request, from the State counsel table there is an audible "That's it" and the jury then said that will be enough[,] and it is our position that the jury heard that audible utterance and that influenced their decision or will influence their decision.

(App. A at 234.) The district court responded: "I thought they were the ones making the comments, but." (App. A at 234.) The County Attorney corrected the court: "No, there was a comment from counsel table, 'That's it' that is accurate. However, I don't believe that has influenced the jury in a way that requires a mistrial. So, we could ask to continue on." (App. A at 234–35.)

The court denied the mistrial motion as follows: "Yep, I'm going to overrule it because, because I mean I thought it came from them, so. And the one guy was kind of telling us when he wanted to watch enough and so on." (App. A at 235.)

Immediately thereafter, the bailiff notified the district court that the jury had reached a verdict. (App. A at 235.) By 6:14 p.m., the jury was back in the courtroom for the reading of its verdict: guilty on all counts. (App. A at 235–37.)

Shawn timely appealed. (D.C. Doc. 64.)

STATEMENT OF THE FACTS

On September 27, 2021, Maria Bronson was working the overnight shift at the Kum and Go convenience store in Plentywood, Montana. (Trial Tr. at 126–27.) Multiple people had been inside the store during her shift, and she walked up and down the candy aisle "several times[.]" (Trial Tr. at 131.) One customer was Deputy Sheriff Remington Timothy, who visited around 1:00 a.m. (Trial Tr. at 137–38.) He testified that he noticed Shawn Andersen in the parking lot "looking through his pockets or on the ground[.]" (Trial Tr. at 138.)

Maria was cleaning the store in the early morning hours when she

noticed something on the floor in the candy aisle. (Trial Tr. at 127.) On closer look, she saw it was "a little bag." (Trial Tr. at 127.) She "placed a wet floor sign over it so nobody moved it or disturbed it" and called the police. (Trial Tr. at 127.)

Deputy Scott Nelson responded to Maria's call and arrived at the store around 4:30 a.m. (Trial Tr. at 101–02, 127.) Deputy Nelson looked at the baggie and suspected it contained methamphetamine. (Trial Tr. at 90.) He placed the baggie in an evidence bag. (Trial Tr. at 93.) Maria told him she thought a woman named Ashley had dropped the baggie "because [Ashley] had been in that vicinity when I noticed it." (Trial Tr. at 128–29.)

Deputy Nelson left the store and drove to a house where he knew one of Ashley's friends lived. (Trial Tr. at 95.) He approached the house to ask about Ashley and spoke to a resident, Lila Lord, but he did not inform Ms. Lord why he wanted to find Ashley. (Trial Tr. at 95.) Ms. Lord confirmed Ashley was friends with her daughter and gave Deputy Nelson "some better directions on how to get in touch with" Ashley. (Trial Tr. at 95.)

Ashley called Deputy Nelson about forty minutes after the baggie

was discovered. (Trial Tr. at 95, 113.) She "mentioned she didn't drop anything at the Kum and Go. She also made reference to it not being drugs." (Trial Tr. at 113.) Deputy Nelson thought her preemptive denials were "unusual[,]" especially given the fact he had not told Ms. Lord why he was looking for Ashley. (Trial Tr. at 113–14.) Although they set a time to speak later, someone cancelled—Deputy Nelson could not remember who—and he never followed up. (Trial Tr. at 94, 114–15.)

Deputy Nelson returned to the Kum and Go to watch surveillance camera footage. (Trial Tr. at 96.) He testified that he began reviewing the surveillance footage from around the time he had entered the store and worked backwards from there. (Trial Tr. at 96.) He watched himself collect the baggie and "noted where that position was." (Trial Tr. at 96–97.) On the video, he saw "a very small dark spot" where the baggie was, which no longer appeared after he had put the baggie into an evidence bag. (Trial Tr. at 97.) He rewound the recording to 1:00 a.m., when he noticed the dark spot was gone, and watched the video forward from there. (Trial Tr. at 97.) He testified at trial that he saw Shawn in the candy aisle around 1:15 a.m., and the dark spot appeared

after Shawn left that aisle. (Trial Tr. at 97–98.) He did not watch all of the footage between Shawn's appearance in the aisle and his own arrival. (Trial Tr. at 103–04.) Instead, he "spot check[ed]" the video, and he recalled seeing other people in the same candy aisle after Shawn was there, including Ashley. (Trial Tr. at 97–99.) He testified that the spot on the video did not move between Shawn's departure and his own arrival at the store. (Trial Tr. at 98–99.) Deputy Nelson offered his opinion that the video showed the baggie fell out of Shawn's pocket. (Trial Tr. at 102–03.) He testified that the video was the only evidence that shifted his focus from Ashley to Shawn. (Trial Tr. at 114–15.)

Later, Deputy Nelson reached Shawn by telephone. (Trial Tr. at 122.) During their first conversation, Shawn "didn't seem to have an understanding why [Deputy Nelson] was calling." (Trial Tr. at 122.) The following day, they communicated via text message, and Shawn denied dropping anything at the Kum and Go. (Trial Tr. at 105, 122–23.)

Maria testified at trial that she later watched the surveillance footage with Deputy Nelson. (Trial Tr. at 129.) She provided her opinion that Ashley "just walked by" the baggie, "like she didn't even

know it was there." (Trial Tr. at 129.) But as to the footage of Shawn, she testified, "when he was going down the [a]isle, you could see something drop. Until we could zoom in on the video, that is when we noticed it. Or when I noticed it." (Trial Tr. at 129–30.) She described what she saw as "[l]ike a little white square just, boop, right onto the floor." (Trial Tr. at 130.)

Deputy Timothy arrested Shawn on January 13, 2022. (Trial Tr. at 139.) He went to a house in Plentywood where some cars Shawn was known to drive were parked outside. (Trial Tr. at 150–51.) A man named Brett answered the door, and Brett notified Shawn that Deputy Timothy was there. (Trial Tr. at 152.) Shawn came outside and was arrested without incident. (Trial Tr. at 139–40, 152.)

At the Sheridan County Jail, Detention Officer Patrick Gray removed some of Shawn's clothing. (Trial Tr. at 140–41.) Deputy Timothy "took some various items" out of Shawn's jean pockets, "like change, nuts and bolts or something like that[,]" a small wallet, and a tire gauge. (Trial Tr. at 141, 155.) He did not feel anything else in Shawn's pockets and believed he had removed everything. (Trial Tr. at 157.) Deputy Timothy began to leave, but Officer Gray called him back

to show him something: "in Shawn's . . . left front pocket there was a small little plastic baggy with white crystal-like substance inside." (Trial Tr. at 141.) Deputy Timothy suspected it was methamphetamine. (Trial Tr. at 142.) He seized the baggie, celebrated the discovery with the sheriff, and then placed it in his personal evidence locker. (Trial Tr. at 143, 159.) There were other items already present in the locker, and he did not label the baggie or seal it into an evidence bag until after field testing the substance thirty minutes later. (Trial Tr. at 160–61, 163.)

Each of the baggies later field tested presumptively positive for the presence of methamphetamine or ecstasy. (Trial Tr. at 106–10, 146.) Testing at the Montana State Crime Lab confirmed the presence of methamphetamine in each baggie: approximately one tenth of a gram in the first and a quarter of a gram in the second. (Trial Tr. at 193–95, 198–200.)

In addition to the testimony described above, the State presented several exhibits at trial, including the Kum and Go surveillance footage (State's Exhibit 1) and Deputy Timothy's body-worn camera footage from Shawn's arrest (State's Exhibit 11). (Trial Tr. at 100, 144–45.)

In closing arguments, the State repeatedly directed the jury's attention to the surveillance footage and Deputy Nelson's opinion that the video showed Shawn dropping the baggie on the floor. (Trial Tr. at 223–27.) The State also urged the jury to consider similarities between the Kum and Go allegations and the jail search allegations when determining whether Shawn had the requisite mental state for all three charged crimes:

> I asked you guys at the beginning; I was going to come back or I told you I was going to come back here and go what are the chances right? And that is what keeps coming up in my mind as I look at this case, you know the Defendant had his wallet in the same pocket as his meth on two different occasions. They are separate instances and do need to be judge[d] separately. But your wallet, I mean that is someplace where somebody is going to tuck something else from outside. I generally know what is in my pockets. And so, it will be your prerogative to determine if there is a reasonable explanation for that. But I think you can infer and the law allows you to infer that he had that mental state. That he had the knowledge that was in his pocket.

(Trial Tr. at 226–27.)

Defense counsel, by contrast, urged the jury to "[f]ocus on exactly what you heard and what you actually saw. Not what everyone is telling that they saw." (Trial Tr. at 228.) Counsel noted the inconsistent descriptions of what the video showed: "[Y]ou heard

testimony that somebody saw a black spot or heard somebody say they saw a white spot." (Trial Tr. at 228.) She asked the jury, "What did you see?" (Trial Tr. at 228.)

After the jury was sent to deliberate, they transmitted a note to the court stating that they "would like to review the footage of the Defendant in the candy [a]isle of the Kum and Go." (App. A at 233.) The district court directed the State's legal assistant to "[c]ue [the video] up right when he is coming down the candy [a]isle." (App. A at 233.) The jury was brought into the courtroom at 6:02 p.m. (App. A at 233.) The district court advised the jury, "Okay folks, if you're tired of watching it and we've gone past where you want yell." (App. A at 233–34.)

The court reporter summarized what happened next as follows: "While the jurors were watching the video, [the State's legal assistant] said out loud, 'There it is' when the item dropped out of Mr. Anders[e]n's pocket. The Jurors went back into the jury room at 6:09 p.m." (App. A at 234.)

Court resumed at 6:12, and defense counsel moved for a mistrial based on the State's legal assistant's comment, arguing "it is our

position that the jury heard that audible utterance and that influenced their decision or will influence their decision." (App. A at 234.) The State did not dispute that the outburst came from counsel table and was audible to the jury, but instead argued "I don't believe that has influenced the jury in a way that requires a mistrial." (App. A at 234–35.) The district court denied the motion: "Yep, I'm going to overrule it because, because I mean I thought it came from them, so. And the one guy was kind of telling us when he wanted to watch enough and so on." (App. A at 235.)

Within two minutes of the defense's mistrial motion, the jury was back in the courtroom with guilty verdicts on all counts. (App. A at 234–37.)

On April 26, 2023, the district court committed Shawn to the Department of Corrections for five years, three years suspended on count one and five years, all suspended on count two; and six months in the county jail, all suspended on count three. (D.C. Doc. 62 at 2, attached hereto as Appendix B.) The district court ordered that the sentences for counts one and two would run consecutively to each other, while count three would run concurrently with counts one and two.

(App. B at 2.)

STANDARD OF REVIEW

"A district court's determination of whether to grant a motion for a mistrial must be based on whether the defendant has been denied a fair and impartial trial." *State v. Herrman*, 2003 MT 149, ¶ 36, 316 Mont. 198, 70 P.3d 738. "This Court's standard of review of a grant or denial of a motion for mistrial is whether the court abused its discretion." *Herrman*, ¶ 36. "An abuse of discretion occurs if a court exercises granted discretion based on a clearly erroneous finding of fact, erroneous conclusion or application of law, or otherwise acts arbitrarily, without conscientious judgment or in excess of the bounds of reason, resulting in substantial injustice." *State v. Hoover*, 2021 MT 276, ¶ 14, 406 Mont. 132, 497 P.3d 598. This Court reviews a lower court's conclusions and applications of law de novo. *Hoover*, ¶ 14.

SUMMARY OF THE ARGUMENT

The district court abused its discretion when it denied Shawn's motion for a mistrial because it failed to correctly apply the law and offered incoherent and factually erroneous reasoning for its decision.

The legal assistant's comment was presumptively prejudicial. The district court failed to take any action to assess or mitigate the comment's impact on the jury, so the presumption was not rebutted. Under the circumstances, the misconduct was sufficiently prejudicial that the district court should have granted the mistrial motion outright. Accordingly, this Court should reverse and remand for a new trial.

Alternatively, even if this Court disagrees that the prejudice was insurmountable, the district court should have conducted a hearing to determine whether the State could rebut the presumption of prejudice. This Court should reverse and remand with instructions for such proceedings to occur.

ARGUMENT

I. The district court abused its discretion in denying Shawn's motion for a mistrial.

The district court incorrectly applied the law, relied on a clearly erroneous factual finding, and failed to employ conscientious judgment and exceeded the bounds of reason in denying Shawn's motion for a mistrial. As discussed in greater detail in Section II, *infra*, this is not an instance of a trial court reaching a correct decision that could have been more clearly explained. The district court failed to apply this

Court's precedent setting forth shifting burdens of proof when impropriety occurs with the jury. *See State v. Holmes*, 207 Mont. 176, 182–83, 674 P.2d 1071, 1074 (1983). The district court's failure to apply governing law constitutes an abuse of discretion. *Hoover*, ¶ 14.

The district court offered no coherent reasoning for its decision, instead stating: "Yep, I'm going to overrule it because, because I mean I thought it came from them, so. And the one guy was kind of telling us when he wanted to watch enough and so on." (App. A at 235.) To the extent the district court's statement is construed as a finding that a juror, rather than the State's legal assistant, made the offending comment, that finding was clearly erroneous because both parties agreed that the assistant was the speaker. (App. A at 234–35.) Accordingly, the district court appears to have based its decision on a clearly erroneous finding of fact, which also constitutes an abuse of discretion. *Hoover*, ¶ 14.

Indicators this Court has relied upon to demonstrate a district court's exercise of conscientious judgment, even absent thorough explanation of its reasoning, are not present here. The district court did not "g[i]ve careful consideration to the [defendant's] motion[.]" *State v.*

Criswell, 2013 MT 177, ¶¶ 46–47, 50, 370 Mont. 511, 305 P.3d 760 (noting court recessed to conduct research and applied proper legal test). Instead, it denied the motion out of hand based on the court's apparent misunderstanding of the facts. (App. A at 234–35.) And the district court articulated no finding of lack of prejudice to which this Court could defer. *See Criswell*, ¶¶ 50–51.

In sum, the district court abused its discretion in denying Shawn's mistrial motion because it failed to apply the law correctly, apparently rested its decision on a single clearly erroneous factual finding, and otherwise failed to demonstrate the exercise of conscientious judgment.

II. This Court should reverse and remand for a new trial because the legal assistant's comment was presumptively prejudicial, the presumption was not rebutted, and it could not have been rebutted on these facts.

Shawn was denied a fair trial before an impartial jury when the State's legal assistant audibly commented on critical evidence in the jury's presence during deliberations. The district court should have granted Shawn's mistrial motion.

"As applicable to the States as a matter of substantive due process implicit in the Fourteenth Amendment Due Process Clause, the Sixth Amendment to the United States Constitution, and Article II, Sections

24 and 26, of the Montana Constitution, similarly guarantee criminal defendants the right to a fair trial before an impartial jury." *State v. Miller*, 2022 MT 92, ¶ 21, 408 Mont. 316, 510 P.3d 17. "The guiding principle of our legal system is fairness. We must tenaciously adhere to the ideal that both sides of a lawsuit be guaranteed a fair trial." *Putro v. Baker*, 147 Mont. 139, 147–48, 410 P.2d 717, 722 (1966), *superseded on other grounds by* M.R. Evid. 606(b) (limiting permissible scope of testimony by jurors).

As part of protecting the constitutional right to a fair trial, this Court has recognized that "[r]estricting the source of the facts to be considered by the jury to the witness stand is important in all cases." *Putro*, 147 Mont. at 149, 410 P.2d at 722; *see also Sheppard v. Maxwell*, 384 U.S. 333, 351 (1966) ("Among these 'legal procedures' is the requirement that the jury's verdict be based on evidence received in open court, not from outside sources."). Parties' presentations to a jury "are made under the eye of a vigilant court, under the established rules of procedure, and with the ever-present opportunity of the defendant to put a telling shot under the armor of the state wherever a joint is left loose." *State v. Jackson*, 9 Mont. 508, 24 P. 213, 217 (1890); *see also*

Turner v. Louisiana, 379 U.S. 466, 472–73 (1965) ("In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel."). In addition to enforcing rules of criminal procedure and evidence, courts routinely insulate juries from commonplace improper influences with both preventative instructions and curative admonitions not to consider external sources of information or inadmissible evidence. *See Jackson*, 9 Mont. 508, 24 P. at 217.

Despite this system of interlocking safeguards, jury misconduct[2] or interference may still occur, jeopardizing the defendant's right to a fair trial. *See Jackson*, 9 Mont. 508, 24 P. at 217. "[A] presumption of prejudice exists when something improper occurs with a jury," such as

[2] The phrase "jury misconduct" as used in this brief is not intended to apply only to wrongdoing committed *by* jurors or to cast aspersions; the phrase is often used in this Court's precedent as a shorthand for both misconduct *by* jurors, *e.g.*, *State v. DeGraw*, 235 Mont. 53, 56, 764 P.2d 1290, 1292 (1988) (describing jury foreman telling fellow jurors about prejudicial information he overheard outside courtroom), and misconduct *by others* that may *affect* jurors, *e.g.*, *Holmes*, 207 Mont. at 180, 182–83, 674 P.2d at 1073, 1074 (describing third party telling jurors he believed defendant was guilty).

tampering, communications with third parties, or exposure to prejudicial evidence not admitted at trial. *Holmes*, 207 Mont. at 182–83, 674 P.2d at 1074; *see also Mattox v. United States*, 146 U.S. 140, 150 (1892), *superseded on other grounds by* Fed. R. Evid. 606(b). "[T]he court can rebut the presumption by taking corrective steps and polling the jury as to whether they were influenced by anything other than the evidence introduced at trial[,]" although this will not be "sufficient in all cases to rebut the presumption." *Holmes*, 207 Mont. at 183, 674 P.2d at 1074. In short, "[t]he improper activity must be harmless or rendered harmless in order to provide the defendant a fair trial." *Holmes*, 207 Mont. at 183, 674 P.2d at 1074.

Shawn's motion for a mistrial triggered the district court's obligation to apply this clearly established legal framework, but it erroneously failed to do so. *Godoy v. Spearman*, 861 F.3d 956, 959–60 (9th Cir. 2017) (holding state court's failure to apply jury misconduct presumption of prejudice "was contrary to clearly established Supreme Court precedent"); *United States v. Angulo*, 4 F.3d 843, 848 (9th Cir. 1993) ("[I]t is clear from the case law that the only motion defendant need make to trigger the need for a hearing is a motion for new trial or

mistrial[.]"). The court should have applied the presumption of prejudice because, individually and collectively, the substance of the legal assistant's comment, the timing of the comment, and her role in the trial establish a "tend[ency] to injure the defendant." *DeGraw*, 235 Mont. at 55, 764 P.2d at 1291. The presumption was not rebutted because the district court conducted no inquiry of the jurors and took no corrective steps despite defense counsel's motion for a mistrial. *Holmes*, 207 Mont. at 183, 674 P.2d at 1074. Rather, the court denied the motion for a mistrial based on its already-debunked belief that one of the jurors made the comment. (App. A at 234–35.) And mere minutes later, the jury returned guilty verdicts. (App. A at 235–37.)

Shawn was denied a fair trial before an impartial jury because the legal assistant's comment was neither harmless nor rendered harmless. *Holmes*, 207 Mont. at 183, 674 P.2d at 1074. Accordingly, the district court should have granted Shawn's mistrial motion, and this Court should reverse and remand for a new trial.

A. The legal assistant's comment was presumptively prejudicial.

The presumption of prejudice in the event of jury misconduct was articulated by this Court and the Supreme Court of the United States

alike in the earliest days of Montana's statehood. *Mattox*, 146 U.S. at 150 ("Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear."); *Jackson*, 9 Mont. 508, 24 P. at 216 ("[I]f misconduct be shown tending to injure defendant, prejudice to the defendant is presumed, but not absolutely; the state may remove that presumption, and the burden is upon it to do so[.]"). The presumption derives from every litigant's constitutional right to a fair trial by an impartial jury: "We cannot be too strict in guarding trials by juries from improper influences. This strictness is necessary to give due confidence to parties in the results of their causes, and to enlighten the public who have recourse to our courts that any improper influence which has the natural tendency to prejudice the verdict is grounds for a mistrial." *Putro*, 147 Mont. at 148, 410 P.2d at 722.

The legal assistant's outburst in this case easily satisfies the low threshold necessary to trigger the presumption of prejudice: "misconduct tending to injure the defendant[.]" *DeGraw*, 235 Mont. at 55, 764 P.2d at 1291; *Putro*, 147 Mont. at 148, 410 P.2d at 722.

Together and individually, the comment's substance, timing, and source weigh in favor of applying the presumption in this case. *Cf. Caliendo v. Warden of Calif. Men's Colony*, 365 F.3d 691, 697–98 (9th Cir. 2004) (articulating factors to consider when deciding whether to apply presumption of prejudice: "[w]hether an unauthorized communication between a juror and a third party concerned the case[,]" "the length and nature of the contact, the identity and role at trial of the parties involved, evidence of actual impact on the juror, and the possibility of eliminating prejudice through a limiting instruction").

The Comment's Substance

Most significantly, the substance of the legal assistant's comment was directly relevant to the issue the jury was simultaneously deliberating and deciding: Shawn's guilt or innocence. Whether the comment is categorized as an improper communication with the jurors or as inadmissible extraneous evidence in the form of the legal assistant's lay opinion, this Court's ultimate conclusion should be the same: The presumption of prejudice should apply.

This Court has consistently applied the presumption of prejudice when third parties communicate with jurors about the issues the jury is

deciding. *DeGraw*, 235 Mont. at 56, 764 P.2d at 1292 (applying presumption where jury foreperson was third party to conversation in which person stated defendant "had a criminal record as long as your arm" and later told fellow jurors "he had reliable information from the sheriff's department" as jurors were discussing defendant's credibility); *Holmes*, 207 Mont. at 182–83, 674 P.2d at 1074 (applying presumption where at least two jurors overheard third party say "I don't care what you think, he's guilty"). Decisions by courts in other jurisdictions are in accord. *See, e.g.*, *Godoy*, 861 F.3d at 958–59, 962–68 (applying presumption where juror continuously communicated with "judge friend" "about the case" and passed judge's responses on to rest of jury); *United States v. Stinson*, 647 F.3d 1196, 1216 (9th Cir. 2011) (applying presumption where potential witness who was not called said "they're not guilty" in presence of two jurors).

In this case, the surveillance footage being replayed for the jury when the State's legal assistant said "There it is" was the State's key evidence purportedly implicating Shawn over the initial suspect. (*See* Trial Tr. at 115, 128–30, 233–34.) This Court should apply the presumption of prejudice because the comment effectively was an

improper communication with the jury about Shawn's guilt or innocence.

Even if this Court disagrees that the legal assistant's comment was a communication with the jury, however, the Court should apply the presumption of prejudice because the comment also could be characterized as the legal assistant's inadmissible lay opinion about what the video showed. This Court has consistently applied the presumption of prejudice in cases in which the jury was exposed to extraneous information that may have affected the verdict. "Restricting the source of the facts to be considered by the jury to the witness stand is important in all cases." *Putro*, 147 Mont. at 149, 410 P.2d at 722. Accordingly, "[w]here a juror is exposed to extraneous information," and that extraneous information "shows a natural tendency to prejudice[,]" " a rebuttable presumption of prejudice exists." *State v. MacGregor*, 2013 MT 297, ¶ 20, 372 Mont. 142, 311 P.3d 428.

Courts in other jurisdictions have concluded that testimony about what a video shows can be admissible as lay opinion evidence. *See United States v. Dorsey*, 122 F.4th 850, 855–56 (9th Cir. 2024). The legal assistant was not a sworn witness, so her opinion of what the

video showed was not given under an oath to tell the truth, nor was she "subjected to confrontation, cross-examination, or other safeguards guaranteed" as "fundamental requirements of a constitutionally fair trial." *Parker v. Gladden*, 385 U.S. 363, 364–65 (1966). There can be little dispute that the video was critical evidence for the State as the only evidence that steered the investigation away from the alternative suspect after she was implicated and made suspicious preemptive denials. (Trial Tr. at 94–99, 113–15, 128–29.) The legal assistant's opinion of what the video showed thus was extraneous information with "a natural tendency to prejudice[.]" *MacGregor*, ¶ 20.

Ultimately, regardless of whether this Court analyzes the legal assistant's comment through the lens of improper communication with the jury, extraneous information obtained by the jury, or another category of misconduct entirely, the presumption of prejudice should apply because the substance of the legal assistant's improper comment was directly relevant to Shawn's guilt or innocence. The tendency of such a comment to injure the defendant is obvious. *DeGraw*, 235 Mont. at 55, 764 P.2d at 1291; *Putro*, 147 Mont. at 148, 410 P.2d at 722.

The Comment's Timing

The timing of the legal assistant's comment—during the jury's deliberations—similarly weighs in favor of applying the presumption of prejudice. As this Court acknowledged in *Jackson* and reiterated in *Putro*, "the possibility of injury and prejudice would be more apparent" when jury misconduct occurs "after they retired for deliberation[.]" *Putro*, 147 Mont. at 147, 410 P.2d at 722 (quoting *Jackson*, 9 Mont. 508, 24 P. at 217). When misconduct occurs in advance of deliberations, the court has an opportunity to admonish the jury to disregard inadmissible information, instruct the jury to base its decision only on evidence presented in accordance with the rules of procedure, and allow the injured party to respond at trial. *See Jackson*, 9 Mont. 508, 24 P. at 217. By the time the jury begins deliberating, however, the court may have "never had opportunity to admonish the jury" about specific misconduct, or it may have "been too late for the jury to hear the defendant's evidence and the arguments of his counsel" before reaching a tainted verdict. *Jackson*, 9 Mont. 508, 24 P. at 217.

Such was the case here, illustrated no more plainly than by the fact that the jury returned guilty verdicts within *minutes* of the

outburst (App. A at 234–37). *See Rogers v. United States*, 422 U.S. 35, 40 (1975) (concluding that jury returning verdict within five minutes of judge responding to jury note "strongly suggests that the trial judge's response may have induced unanimity"). Accordingly, the timing of the misconduct supports applying the presumption of prejudice in this case.

The Comment's Source

The legal assistant's role in the proceedings contributed further to the comment's prejudicial nature. Courts have treated interactions between jurors and parties or witnesses with extraordinary caution, even when those interactions did not concern the issues the jurors were deciding. *Turner*, 379 U.S. at 472–74; *see also United States v. Pittman*, 449 F.2d 1284, 1285–86 (9th Cir. 1971) ("[A]ccess to the jury during its deliberative process by any adversary simply cannot be tolerated."). Indeed, the United States Court of Appeals for the Ninth Circuit and other federal courts of appeals "have held that *Mattox* established a bright-line rule: Any unauthorized communication between a juror and a witness or interested party is presumptively prejudicial[.]" *Caliendo*, 365 F.3d at 696 (collecting cases).

Although Shawn respectfully submits this bright-line rule is correct, this Court need not adopt it to apply the presumption of prejudice to these facts. The State's legal assistant had a prominent role in the proceedings, seated at counsel table as a representative of one of the parties. (*See, e.g.*, App. A at 233 (court asking legal assistant to manage video replay for jury), 235.) As previously noted, the defense could not confront her because she was not a sworn witness. *See Parker*, 385 U.S. at 364. She also was not an attorney, so the impact of her comment would not be mitigated by routine jury admonitions that attorneys' arguments are not evidence. (Trial Tr. at 62.) As a non-attorney representative of a party, her words carried weight, and as a non-witness, the defense was powerless to call her opinion into question through cross-examination. *See Parker*, 385 U.S. at 364–65 (rejecting state's argument that bailiff's comments that defendant was guilty were not prejudicial because it "overlooks the fact that the official character of the bailiff—as an officer of the court as well as the State—beyond question carries great weight with a jury"). The presumption of prejudice should apply.

B. The presumption of prejudice was not rebutted.

Once jury misconduct triggers the presumption of prejudice, "the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." *Remmer v. United States*, 347 U.S. 227, 229 (1954). The State may argue that it met that burden in this case. Such argument should be rejected because the district court did not engage in any inquiry or analysis necessary to find the presumption rebutted. *See Holmes*, 207 Mont. at 183, 674 P.2d at 1074.

1. The district court failed to conduct the inquiry of jurors necessary to find that the legal assistant's comment was harmless.

The district court denied Shawn's motion for a mistrial without conducting any inquiry of the jury, instead stating, "I mean I thought it came from them, so." (App. A at 235.)

"[W]hile a presumption of prejudice exists when something improper occurs with a jury, the court can rebut the presumption by taking corrective steps and polling the jury as to whether they were influenced by anything other than the evidence introduced at trial." *Holmes*, 207 Mont. at 183, 674 P.2d at 1074. Ideally, this inquiry occurs

before the verdict is announced. *See Holmes*, 207 Mont. at 183, 674 P.2d at 1074. Such action by the court is not "sufficient in all cases to rebut the presumption[,]" but this Court's case law suggests it is necessary whenever the presumption of prejudice is triggered. *Holmes*, 207 Mont. at 183, 674 P.2d at 1074.

Once the court becomes aware of potentially prejudicial misconduct, it cannot simply assume that "the jury panel had been safeguarded from contamination in the absence of some interrogation addressed to those jurors[,]" as the trial court apparently assumed in this case. *State v. Eagan*, 178 Mont. 67, 78, 582 P.2d 1195, 1201 (1978). Accordingly, without conducting an inquiry of the jury, the district court could not have concluded that the legal assistant's comment in this case was harmless. *Eagan*, 178 Mont. at 79, 582 P.2d at 1202 ("In this case, the members of the jury were not so interrogated, and therefore the presumption of prejudice remains.").

2. The district court took no remedial action to render the legal assistant's comment harmless.

In addition to polling the jury, the court can "tak[e] corrective steps[.]" *Holmes*, 207 Mont. at 183, 674 P.2d at 1074. These steps may include a cautionary instruction, admonishment to disregard

inadmissible evidence, or dismissal of a juror. *E.g.*, *Jackson*, 9 Mont. 508, 24 P. at 217; *State v. Baugh*, 174 Mont. 456, 463–65, 571 P.2d 779, 783–84 (1977). For example, in *State v. Weaver*, the district court learned on the second day of trial, before deliberations, that the *Billings Gazette* had published an article containing potentially prejudicial information about the defendant. *State v. Weaver*, 195 Mont. 481, 487–88, 637 P.2d 23, 26–27 (1981). The defendant moved for a mistrial, but the district court instead admonished the jury to refrain from reading the *Billings Gazette* and listening to television broadcasts so they would not "be influenced by news accounts or anything else[.]" *Weaver*, 195 Mont. at 489, 637 P.2d at 27. This Court concluded that the court's admonition "was sufficient to correct any damaging influence one news article might have had under the circumstances." *Weaver*, 195 Mont. at 493, 637 P. 2d at 29.

The district court in this case issued no admonition and took no other corrective action after the legal assistant's comment. Instead, almost immediately after denying the mistrial motion, the court brought the jury back into the courtroom to read the verdict. (App. A at 235–36.) Because the district court failed to conduct an inquiry or take

corrective action, the presumption of prejudice was not rebutted. *Holmes*, 207 Mont. at 183, 674 P.2d at 1074.

C. This Court should reverse and remand for a new trial because the presumption of prejudice could not have been rebutted on these facts.

Once the presumption of prejudice applies, "the burden rests heavily upon the Government to establish" that any impropriety with the jury "was harmless to the defendant." *Remmer*, 347 U.S. at 229. Typically, the prosecution is given an opportunity to meet that burden "after notice to and hearing of the defendant[.]" *Remmer*, 347 U.S. at 229. But even if such a hearing had occurred here, the legal assistant's comment "creates a situation of such inherent unfairness that a mistrial should [have] be[en] ordered to prevent a possible miscarriage of justice." *Putro*, 147 Mont. at 148, 410 P.2d at 722.

In deciding whether a mistrial or new trial is warranted in the case of impropriety with the jury, "[t]he important question that the trial judge face[s] [is] whether the complaining party was probably prejudiced by the misconduct." *Putro*, 147 Mont. at 149, 410 P.2d at 723. For the same reasons explained in Section II.A., *supra*, the legal assistant's comment did not merely have a *tendency* to injure Shawn, as

required for the presumption of prejudice to apply—he probably was, in fact, prejudiced.

In particular, the timing and surrounding circumstances of the legal assistant's comment strongly suggest influence upon the verdict. The jury's request to review evidence indicates that the verdict was not yet certain. (*See* App. A at 233.) The video they reviewed was the State's key evidence to link Shawn, rather than Ashley, to the baggie in the Kum and Go. (Trial Tr. at 94–99, 113–115, 128–29.) And after reviewing the video—with the legal assistant's commentary—the jury returned guilty verdicts within five minutes. (App. A at 234–35.) The circumstances of the jury's decision arriving mere minutes after the impropriety occurred "strongly suggest[]" that the comment "may have induced unanimity[.]" *Rogers*, 422 U.S. at 40 (concluding verdict returned "within five minutes" of judge's response to jury question indicated jury may have been influenced by response); *cf. Hoover*, ¶ 29 (holding State failed to show error of replaying testimonial videos for jury was harmless to "the guilty verdict that did not come until shortly thereafter").

The State may argue that the legal assistant's comment could not

have affected the verdicts on counts two and three, which related to conduct alleged to have occurred months after the events documented in the surveillance footage. (*See* D.C. Doc. 13.) But the State expressly tied these events together in its closing argument and asked the jury to infer Shawn's knowledge, an essential element of all counts, from the incidents' similarities. (Trial Tr. at 226–27.) The State thereby wove all three charges together; it should not be permitted to tear them asunder when their connection becomes inconvenient on appeal.

Under the circumstances of this case, it is not feasible that the State could have overcome the presumption of prejudice and proven the comment was harmless, even if the district court had held a hearing. *See Holmes*, 207 Mont. at 183, 674 P.2d at 1074. It is well established that, upon inquiry, "a juror could not purge himself" of the presumption of prejudice "by merely declaring that such information did not affect his judgment in forming the verdict." *State v. Gillham*, 206 Mont. 169, 180, 670 P.2d 544, 550 (1983). Rather, there must be other facts—elicited through juror testimony or otherwise—"which prove that prejudice or injury did not or could not occur." *Gillham*, 206 Mont. at 180, 670 P.2d at 550 (quoting *Putro*, 147 Mont. at 147, 410 P.2d at 721).

In *Gillham*, that burden was met with proof that an outside article a juror had read was "an accurate and factual report" about the testimony already before the jury. *Gillham*, 206 Mont. at 181, 670 P.2d at 551. But there was no such mitigating fact in this case. As discussed in Sections II.A.–B, *supra*, the substance, timing, and source of the improper comment on the evidence amplified its prejudicial impact, and the district court did nothing to mitigate it. It "was bound to have prejudicial effect." *Putro*, 147 Mont. at 149, 410 P.2d at 723. Accordingly, this Court should reverse the district court's judgment and remand for a new trial. *Putro*, 147 Mont. at 149–50, 410 P.2d at 723.

III. Alternatively, if this Court concludes the presumption of prejudice potentially could have been rebutted, the Court should reverse and remand for a *Remmer* hearing.

If this Court concludes the State potentially could overcome the presumption of prejudice, this Court should remand for a hearing to allow the district court to make that determination in the first instance. *See Remmer*, 347 U.S. at 230. In *Remmer*, the United States Supreme Court reversed a trial court's denial of a motion for a new trial based on allegations that a juror was told "he could profit by bringing in a verdict favorable to the [defendant,]" which was investigated by the FBI after

the juror reported the attempted bribery to the judge. 347 U.S. at 228. The FBI prepared a report, which the judge and prosecutors reviewed *ex parte* and never disclosed to the defense; the trial court concluded that the suggested bribery was a joke, and "nothing further was done[.]" *Remmer*, 347 U.S. at 228. The Supreme Court concluded that "[t]he trial court should not decide and take final action ex parte on information such as was received in this case, but should determine the circumstances, the impact thereof on the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." *Remmer*, 347 U.S. at 229–30. The Court directed the trial court "to hold a hearing to determine whether the incident complained of was harmful to the petitioner, and if after hearing it is found to have been harmful, to grant a new trial." *Remmer*, 347 U.S. at 230. If this Court concludes that additional record development is needed to determine whether the legal assistant's comment probably prejudiced Shawn, it should remand for further proceedings in accordance with *Remmer*.

CONCLUSION

The district court abused its discretion when it denied Shawn's motion for a mistrial. This Court should reverse and remand for a new trial, or, in the alternative, for proceedings to determine whether the State can overcome the presumption of prejudice triggered by the legal assistant's improper comment on the evidence.

Respectfully submitted this 28th day of February, 2025.

OFFICE OF STATE PUBLIC DEFENDER
APPELLATE DEFENDER DIVISION
P.O. Box 200147
Helena, MT 59620-0147

By: /s/ Charlotte Lawson
CHARLOTTE LAWSON
Assistant Appellate Defender

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook 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 7,406, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Charlotte Lawson
Charlotte Lawson

APPENDIX

Trial Transcript Excerpts .....App. A

Judgment.....App. B

CERTIFICATE OF SERVICE

I, Charlotte Lawson, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 02-28-2025:

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

Benjamin Jordan Fosland (Attorney)
100 W. Laurel
Plentywood MT 59254
Representing: State of Montana
Service Method: E-mail Delivery

Electronically signed by Kat J. Hahm on behalf of Charlotte Lawson
Dated: 02-28-2025