IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0637

STATE OF MONTANA,

Plaintiff and Appellee,

v.

WALTER JASON PURKHISER,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Nineteenth Judicial District Court,
Lincoln County, The Honorable Matthew J. Cuffe, Presiding

APPEARANCES:

AUSTIN KNUDSEN
Montana Attorney General
ROY BROWN
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
roy.brown2@mt.gov

MARCIA JEAN BORIS
Lincoln County Attorney
512 California Avenue
Libby, MT 59923

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

GREGORY E. PASKELL
Attorney at Law
21500 Cypress Way, Suite C
Lynnwood, WA 98036

ATTORNEY FOR DEFENDANT
AND APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF THE ISSUES

1. Whether Appellant raises a justiciable controversy when he challenges an exhibit replayed for the jury and a prospective juror's responses during voir dire, when both challenges relate to a Partner or Family Member Assault (PFMA) charge from which Appellant was never convicted.

2. Whether a 911 call occurring shortly after the alleged PFMA that was replayed for the jury during deliberations was "testimonial" for purposes of the common law rule. If so, whether the district court abused its discretion and placed undue emphasis on the exhibit. If so, whether the error was harmless.

3. Whether the district court abused its discretion in declining to dismiss a prospective juror for cause when the juror never expressed a fixed opinion or bias related to a common experience of physical abuse and repeatedly affirmed her ability to remain fair and impartial. If so, whether structural error occurred, or whether the error was harmless.

STATEMENT OF THE CASE

The State charged Appellant Walter Jason Purkhiser with one count of PFMA (3rd or subsequent offense) for his alleged physical assault against his girlfriend H.S., occurring January 22, 2022. The State also charged Purkhiser with one count of tampering with a witness or informant for his subsequent jail calls to

H.S., attempting to induce her to testify falsely in February 2022. (Doc. 32, 2nd Am. Inf.[1])

After a jury trial, the jury deadlocked on the PFMA charge but found Purkhiser guilty of tampering. (Doc. 42; Trial Tr. at 782-83.) The district court declared a mistrial for the PFMA, and later sentenced Purkhiser to the Montana State Prison for ten years for tampering. (Doc. 53; Trial Tr. at 783, 821.)

The State immediately expressed an intent to retry Purkhiser on the PFMA charge. Proceedings toward retrial were initiated. (Trial Tr. at 787; Doc. 58 (omnibus hearing); Doc. 59 (Pre-Omnibus Hearing Disclosure Statement).) But, two months later, the State moved to dismiss the PFMA charge in the interest of justice, which the district court granted. (Docs. 62, 63.)

Purkhiser appeals, raising a challenge to evidence replayed for the jury and further raising a for cause challenge, both related to the PFMA charge.

STATEMENT OF THE FACTS

I. The PFMA

A. The PFMA and the 911 call

H.S. met Purkhiser online and dated him for a couple months. (Trial Tr. at 197.) Purkhiser started living with her before the incident. (*Id*. at 197-98.)

[1] Other tampering charges were dismissed pretrial. (*See* Docs. 13, 25, 26.)

On January 22, 2022, they went to bed but H.S.'s phone "kept going off[.]" Purkhiser accused H.S. of cheating on him. (Trial Tr. at 199.) H.S. responded that it was "time for [Purkhiser] to go[]" but he did not want to leave and became upset. (*Id*. at 199-200.) H.S. went into the bathroom and believed that she had locked the door, but she had not actually done so. (*Id*. at 201.) Purkhiser came into the bathroom and attempted to take her phone. (*Id*.) He also grabbed H.S.'s wrist and twisted her arm behind her back, which hurt her. (*Id*. at 201-02.) H.S. texted her ex-husband Willliam Harrison (Will) "Help, please, now, now, now" explaining she was in the bathroom. (*Id*. at 203, 302-03.) Will responded he was coming and that he had called the police. (*Id*. at 203, 317.) H.S. was afraid. (*Id*. at 203.) Purkhiser was not successful in getting her phone. (*Id*. at 204.)

Will and his friend Tim Newton arrived at H.S.'s house. (Trial Tr. at 303-04.) Will brought his sidearm and tactical shotgun. (*Id*. at 305.) Will saw H.S. "hitting [Purkhiser]" and saying, "[W]hy would you do that?" (*Id*. at 307.) Will "grabbed [H.S.]" and "took her to the back of the house" and "calmed her down." (*Id*.) H.S. was incoherent, and she kept "grabbing her arm." (*Id*. at 308.)

Tim noted that Purkhiser was "excited" and "confused[,]" while H.S. was "really angry at [Purkhiser]." (Trial Tr. at 333.) Tim also helped to calm the situation. (*Id*.) Tim similarly noted that H.S. said Purkhiser "had grabbed onto her arm," and was asking him, "Why did you do this[?]" (*Id*. at 333-34.) Tim noted

that H.S. was "very upset," and she was "holding her arm" and he could tell that "she had been hurt." (*Id*. at 335.) Meanwhile, "[Purkhiser] acted like he didn't know what was going on[.]" (*Id*.) Tim and Will both focused on keeping the two apart, telling them, "Stay over there, the sheriffs are coming." (*Id*. at 341-42.)

H.S. dialed 911, apparently around the time that Will and Tim arrived. (*See* Trial Tr. at 205.) The operator answered, "Lincoln County 911 what's the address for your emergency." (Ex. 1, "Second 911 call" at 0:05-0:10.)[2] H.S. never responded throughout the call but held the line open. Some yelling back and forth between H.S. and Purkhiser can be heard. H.S. told Purkhiser, "Get out! Get out!" (*Id*. at 0:20-0:25.) The operator narrated that she "got [H.S.] on the 911 just shouting in the background." (*Id*. at 0:08-0:15.) Will said, "[H.S.], I need you to step back and be quiet. We're gonna take care of it." (*Id*. at 0:21-0:27.)

The operator attempted to get H.S. to talk, saying "[H.S.], who is there with you." (*Id*. at 0:27-0:30.) Relaying information to the dispatched officer, the operator said, "It sounds like there are at least three people on the other end of the phone here." (*Id*. at 0:38-0:42.) H.S. continued a somewhat muffled conversation with Purkhiser, Will and Tim, frequently with all parties talking simultaneously. Purkhiser said he was "sleeping" and he "just woke up" and "I don't know what

[2] This call was admitted at trial without objection. (State's Ex. 1, *labeled on drive and identified at trial as* "Second 911 call," *offered, admitted, and published at* Trial Tr. at 205-06.)

the hell [inaudible] what the hell is going on." (*Id*. at 1:36-1:54.) Dispatch informed the responding officer: "5620, there's a male that's talking with them seems to be helping to calm the situation. Not sure who it is although I did hear somebody call the name "Will." The officer responded, "Copy, thank you." (*Id*. at 2:20-2:35.) Although H.S. never talked with the operator, the operator said, "[H.S.], I'm still here with you." (*Id*. at 3:00-3:03.)

Next, a third person (either Will or Tim) said to Purkhiser, "You're doing great . . . Let's just uh try to keep your [inaudible] up on top of the couch though." Purkhiser responded, "I don't have nothing to hide . . . we were just talking about you earlier." The third person said, "Well, I'm sure it was all good things." Purkhiser said, "This is bullshit." (*Id*. at 3:30-3:43.) The recording then ended.

Lincoln County Sheriff's Deputy James Derryberry was dispatched to H.S.'s residence. (Trial Tr. at 345.) He was communicating with the 911 operator, who "did an excellent job giving me the appropriate information" and he understood he was responding to a "domestic in progress." (*Id*. at 345-46.) He knew he was looking for Purkhiser because dispatch "gave [him] names" enroute. (*Id*. at 389.)

Deputy Derryberry contacted Tim and Purkhiser at the front door. (Trial Tr. at 346.) Purkhiser denied touching H.S., and further claimed he didn't really know what was going on. (*Id*. at 348-49.) Deputy Derryberry contacted H.S., who was clutching her shoulder. (*Id*. at 350.) He asked if she needed medical assistance

and she replied no. (*Id*.) H.S. relayed her story about the event. (State's Ex. 3, bodycam, offered at Trial Tr. at 351, admitted and published at 356 (first ten minutes).) Deputy Derryberry reapproached Purkhiser and asked him about the arm twisting behind H.S.'s back, and Purkhiser "said that he did not do that." (Trial Tr. at 357.) Purkhiser was arrested. (*Id*.)

Purkhiser testified at trial, admitting he was upset about the text messages from Will. (Trial Tr. at 487-88.) He affirmed that H.S. told him to leave. (*Id*. at 488.) He explained they got into a verbal argument while H.S. was in the bathroom and he was in the main room, but that he never went into the bathroom. (*Id*. at 494-97.) He denied grabbing H.S. and denied trying to take her phone. (*Id*. at 504.) According to Purkhiser, when Will and Tim came over, H.S. came out and said, "you twisted my arm, you did this" and continued yelling. (*Id*. at 499.) Purkhiser alleged that H.S. was lying in her recollection of the offense.[3] (*Id*. at 627, 629.)

B. The jury questions and the replaying of the 911 call

After deliberations began, the jury asked for a "[c]opy of second 911 call" to be brought into the jury room. (Trial Tr. at 756; Doc. 40.) Purkhiser argued it would result in "too much extra emphasis" on the 911 call compared to the other evidence. (Trial Tr. at 757.) The district court acknowledged this Court's

[3] However, in a jail phone call with H.S., Purkhiser claimed they were wrestling around when she got hurt. (*Id*. at 700.)

precedent that "testimonial evidence . . . cannot just be given to the jury for them to review over and over and over as it potentially puts undue weight on that testimony above that for the others[.]" (*Id*. at 758.) However, the court viewed the exhibit as an "open recording of conversations," which was more akin to a "picture of what was going on at that moment." (*Id*.) The court ruled that it was appropriate for the jury to hear the 911 call "one more time." (*Id*. at 758-59.) The jury came into the courtroom and the audio was replayed one time. (*Id*. at 759, 761-62.)

The jury also asked the following question: "Do we have to find the Defendant guilty or not guilty on both charges or can we be hung on one or the other?" The district court responded: "Each charge/count is separate and distinct. You should consider these separately. You can reach a decision of not guilty, or guilty, or be hopelessly deadlocked as to either or both." (Trial Tr. at 770-72; Doc. 40.)

The jury declared it was deadlocked on the PFMA and the court declared a mistrial on that count, but the jury convicted Purkhiser of tampering. (Trial Tr. at 783.)

II. Tampering conviction

At the time of his arrest, Purkhiser asked Deputy Derryberry if he could have H.S.'s phone number. Deputy Derryberry responded no and advised him not to contact H.S. (Trial Tr. at 358.)

Lincoln County City Court Judge Jay Sheffield conducted Purkhiser's initial appearance and went over his conditions in detail. (Trial Tr. at 654-55.) He went over the conditions "both times" he saw Purkhiser on January 24 and January 27, 2022, including the no association with the victim condition (condition # 18) and the no contact order (condition # 19). (*Id*. at 656-59; State's Ex. 18.)

However, Purkhiser called H.S. numerous times from jail, and engaged in around 15 hours of conversation with her. (Trial Tr. at 360-61.) Purkhiser knew that the calls were being recorded because of the advisory at the beginning of calls. (*Id*. at 360.) Deputy Derryberry noted that the calls were intended to "manipulat[e] the victim" and coach H.S. not to testify and to advise her what to do and say. (*Id*. at 361.)

Purkhiser began calling H.S. from jail on February 2, 2022. (Trial Tr. at 212.) He repeatedly said the "State of Montana could not make you do anything," including "testify or press charges." (*Id*. at 213-14.) He said the whole matter would be dropped if she did not testify. (*Id*. at 214.) He acknowledged he knew he was not supposed to tell her what to say. (*Id*.) He told H.S. to contact his attorney and the prosecutor and "say what you are going to say to them." (*Id*. at 214-15.) He said it was "against the law" for the "State to make a witness testify if they don't want to." (*Id*. at 215.)

Purkhiser encouraged her to "write the Judge" to get the charges dropped. (Trial Tr. at 216.) He also encouraged her to not "trust law enforcement." (*Id*.)

He said authorities were "real sneaky." (*Id*. at 217-18.) Purkhiser claimed that the State was "intimidating a witness" by asking her to testify. (*Id*. at 218.) He asked her to sign a "recantment statement." (*Id*. at 220.)

Purkhiser engaged in similar statements on February 4, 2022. (Trial Tr. at 220-21.) He urged her to say everything was a misunderstanding, she was not afraid, she voluntarily wanted to recant, and nobody was making her do so. (*Id*. at 224-25.)

He called H.S. again on February 5, 2022, telling her what to say at the upcoming February 14, 2022 arraignment. (Trial Tr. at 225-26.) He again urged her multiple times to contact the judge and prosecutor. (*Id*. at 227.) He said the prosecutor was "a piece of trash and a terrible person." (*Id*.) He encouraged her to send an email to all parties in this case, which she did. (*Id*. at 228.)

On February 8, 2022, Purkhiser told her to get the email notarized. (Trial Tr. at 229.) When the judge's clerk emailed H.S. back and said it was inappropriate to email the judge, Purkhiser got upset and told H.S. to send another email to the judge. (*Id*. at 230.) He again encouraged H.S. to vouch for him at the arraignment and said the prosecutor was playing "dirty." (*Id*. at 231-32.) Purkhiser instructed her to "raise [her] hand and speak to the Judge." (*Id*. at 232.) He said the State "has to have a witness" and she should "plead the 5th" so she would not have to testify. (*Id*. at 233-34.) He said the judge would be "angry if he

found out the State was harassing you," even though H.S. had not yet even talked with the prosecutor. (*Id*. at 234.)

Many more similar phone calls occurred on February 11, February 12, February 13, and February 14—with Purkhiser continuing to coach H.S. on what to say and how to act at the arraignment. (Trial Tr. at 234-56.)

H.S. testified at trial that she knew that Purkhiser was attempting to influence her not to testify. (Trial Tr. at 258.) She wanted to help Purkhiser, but she explained she would never have recanted. (*Id*. at 270.)

For his part, Purkhiser admitted he was immediately informed by the judge he was to have no contact with the victim, and that he was informed in writing of the no contact condition and violation was a criminal offense. (Trial Tr. at 509, 530-31.) He admitted calling H.S. anyway. (*Id*. at 510.) He understood he was violating the no contact order. (*Id*. at 516.) But he offered that his phone calls were intending to "help [H.S.]" and he wanted her to "tell the truth and nothing but the truth." (*Id*. at 520.)

III. Facts related to for cause challenge

The prosecutor began voir dire by explaining that its purpose was to select a jury who "will be fair and impartial to both the Defendant and to the State, and who will be able to hear the case without bias or prejudice." (Trial Tr. at 90.)

The prosecutor continued, "What I'm really concerned about with this case is has anyone here ever served on a jury involving a charge of Assault, or Partner Family Member Assault, something along those lines? Okay. How about Tampering with a Witness?" There was no response. (*Id*. at 95.) The prosecutor continued to discuss the concept of "bodily injury" with prospective jurors. (*Id*. at 95-100.)

The prosecutor then asked if anyone had ever "been the victim of an assault." (Trial Tr. at 100.) B.H. responded yes and they went into chambers. (*Id*. at 101.) B.H. then explained that she was sexually abused as a child. (*Id*.) The district court inquired:

> **COURT**: Some strong emotions tied to those issues for you?
>
> **B.H.**: Yes.
>
> **COURT**: And that's fair. That's exactly what we want jurors to talk to us about and tell us. Now, if you were to learn that this case doesn't involve sexual abuse, or allegations of that, would that-would you still be somewhat triggered? Is that the word, triggered or impacted by that and have difficulty hearing the case?
>
> **B.H.**: No.
>
> **COURT**: Okay. But you have been the victim of more than just sexual assaults, is that right?
>
> **B.H.**: Yes.
>
> **COURT**: And so in perhaps an abusive relationship, or parent, or . . .
>
> **B.H.**: A stepfather.

COURT: A stepfather. Okay. This case does, I think ultimately will find, at least have allegations of those types of behaviors. Would that cause you-would you be able to put aside your personal experiences and look at the case independently . . .

B.H.: I think so. I have for a long time.

COURT: . . . without bias, and judging it solely on what the State alleges and whether the State has met their burden of proof.

B.H.: Yeah.

COURT: You can do that? You are comfortable doing that?

B.H.: Mm-mmm (positive).

COURT: Okay. Additional questions, [prosecutor?]

STATE: No, Your Honor.

COURT: [Defense counsel], you may ask her any questions that you might have.

DEFENSE COUNSEL: Yes. Is it fair to say that you say you've been a victim of several sorts of things, that it all didn't start at the most serious, it started at smaller things?

B.H.: In the beginning? Uhm, I don't-I don't remember it, I was young. I was in the first grade when I had to go live with my mother and she had already remarried so I had a stepfather. And so that abuse started within six months after I was there.

DEFENSE COUNSEL: Fair enough. I guess my question is leading to the first event was not a major horrible one but little things, controlling, manipulating?

B.H.: Well, I don't know, what do you call it if they double up their fist and punch you in the mouth? I mean, that's what it was. I mean . . .

DEFENSE COUNSEL: No, that's what I was exploring. That's fine. Thank you. Nothing further, Your Honor.

COURT: Motion, [prosecutor?]

STATE: No, Your Honor.

COURT: [Defense counsel,] motion?

DEFENSE COUNSEL: Your Honor, I would move that any-this was a family, a family event, and that the allegations here include a partner/family member. I would move that the-these things are likely very engrained and she was concerned enough to come back into here and I would move that she be dismissed.

COURT: So, the motion is a dismissal for cause. [Prosecutor], do you oppose the motion, [prosecutor]?

STATE: I do, Your Honor. This juror has indicated that she would be able to set aside those feelings and decide the case strictly based upon the evidence presented, which is the standard. So, yeah, we would oppose that.

COURT: So, here's what I am going to do, [defense counsel]. I am going to deny your motion without prejudice, which means you are free to inquire or remake your motion as we go through, if something comes up and [B.H.] indicates that something has caused her to feel differently. But she did say she could be fair and impartial and I appreciate that and that's all any of us can ask you to do. And so in the event that something changes or that there's some other issue or concern, you are free to make a motion again, okay, [defense counsel]?

DEFENSE COUNSEL: Thank you, Your Honor.

(Trial Tr. at 102-05.) After asking a variety of questions, the State passed the jury for cause. (*Id*. at 133.)

Defense counsel only discussed with B.H. her relationships with other jurors, which yielded no issues. (Trial Tr. at 143.) Nothing else came up with B.H. and defense counsel passed the panel for cause. (*Id*. at 170.)

Although both the State and defense counsel exercised seven peremptory strikes, defense counsel did not exercise a peremptory strike on B.H., and she served on the jury. (Doc. 40; Trial Tr. at 171.)

SUMMARY OF THE ARGUMENT

Purkhiser does not raise justiciable issues because both his challenges on appeal relate to a PFMA charge for which he was never convicted. This Court cannot grant Purkhiser any effective relief on the alleged PFMA because it cannot reverse a conviction that never happened. On the other hand, Purkhiser does not directly challenge his tampering conviction, the only valid conviction before this Court. This Court should accordingly affirm the tampering conviction.

If this Court continues to address Purkhiser's claims related to the PFMA, the district court did not abuse its discretion when it supervised the jury and allowed them to listen to the 911 call once during deliberations. The 911 call was not testimonial. The only non-testifying person on the call, the 911 operator, was not a critical non-testifying witness, nor did the operator offer facts for the truth of the matter asserted regarding the PFMA. Regardless, no danger of undue emphasis

exists because playing the call did not elevate one witness's testimony over any other witness's countervailing testimony. The call contained conversations of both the State's and defense's fact witnesses, and there were no disputes raised vis-à-vis the substance of the conversations and any alternative opposing witness's testimony that would carry the risk of undue influence. Even if Purkhiser could establish error, it would be harmless because the jury necessarily did not rely on the 911 call to convict him of anything, as he was not convicted of PFMA.

Nor did the district court abuse its direction when it denied Purkhiser's challenge for cause of juror B.H.—even though B.H. had a common experience with physical violence—because B.H. never expressed a fixed opinion or bias and affirmed she could remain impartial. Even if this Court somehow reached prejudice, structural error could not be established because Purkhiser did not use any of his seven peremptory strikes on B.H. Instead, any error would be harmless because neither B.H. nor the rest of the jury convicted Purkhiser of PFMA.

STANDARD OF REVIEW

Issues of justiciability are questions of law which this Court reviews de novo. *City of Missoula v. Fox*, 2019 MT 250, ¶ 7, 397 Mont. 388, 450 P.3d 898.

This Court reviews a district court's decision allowing exhibits to be taken into jury deliberations for an abuse of discretion. *State v. Green*, 2022 MT 218,

¶ 11, 410 Mont. 415, 519 P.3d 811. An abuse of discretion occurs when a court acts arbitrarily, unreasonably, or without the employment of conscientious judgment, resulting in substantial injustice. *State v. Nordholm*, 2019 MT 165, ¶ 8, 396 Mont. 384, 445 P.3d 799.

This Court reviews a district court's denial of a challenge to a prospective juror for cause for an abuse of discretion. *State v. Deveraux*, 2022 MT 130, ¶ 19, 409 Mont. 177, 512 P.3d 1198 (citations omitted). "A district court abuses its discretion if it denies a challenge for cause when a prospective juror's statements during voir dire raise serious doubts about the juror's ability to be fair and impartial or actual bias is discovered." *Deveraux*, ¶ 19.

ARGUMENT

I. Purkhiser does not raise a justiciable controversy.

"[T]he existence of a justiciable controversy is a threshold requirement to a court's adjudication of a dispute." *State v. Savage*, 2011 MT 23, ¶ 17, 359 Mont. 207, 248 P.3d 308 (citing *Clark v. Roosevelt Co.*, 2007 MT 44, ¶ 11, 336 Mont. 118, 154 P.3d 48). "A justiciable controversy is one upon which a court's judgment will effectively operate," as distinguished from purely academic questions. *Id*. (citing *Clark*, ¶ 44). This Court may not exercise its jurisdiction to

address a hypothetical controversy. *Shamrock Motors, Inc. v. Ford Motor Co.*, 1999 MT 21, ¶ 19, 293 Mont. 188, 974 P.2d 1150.

Here, there is no justiciable controversy and this Court cannot grant any effective relief for Purkhiser's claims. Purkhiser was not convicted of PFMA, but his claims directly attack the PFMA. For example, while Purkhiser argues that reversible error occurred because a 911 call pertaining to the PFMA was replayed for the jury during deliberations, the jury did not convict Purkhiser of PFMA. And while Purkhiser argues reversible error occurred because a prospective juror had a common experience with PFMA, neither the juror in question nor the rest of the jury convicted him of PFMA.

This Court cannot grant Purkhiser any effective relief on these claims—even if he had otherwise presented colorable arguments—because this Court cannot reverse a PFMA conviction that never occurred. And even if Purkhiser could prove his speculative claim that purported errors caused a hung jury rather than an acquittal, that still would not change the fact that there is no effective relief for Purkhiser on the PFMA count. The remedy after mistrial on the hung PFMA count was a new trial—which the county prosecutor ultimately decided not to pursue.[4] Thus, Purkhiser's tellingly ambiguous request to remand "[t]his case" for a "new

[4] Purkhiser does not ask this Court to review the district court's decision to declare a mistrial, which would be the only relevant inquiry in such a circumstance.

trial" cannot be accommodated for lack of a justiciable controversy. (*See* Appellant's Br. at 27.)

Purkhiser also has no right to appeal the hung PFMA count. "An appeal may be taken by the defendant only from a final judgment of conviction and orders after judgment which affect the substantial rights of the defendant." Mont. Code Ann. § 46-20-104(1). And, on appeal, this Court reviews "the verdict or decision and any alleged error objected to which involves the merits or necessarily affects the judgment." Mont. Code Ann. § 46-20-104(2). Here, Purkhiser has improperly expanded the scope of both his verdict and his final appealable judgment, which only shows a conviction for tampering, not PFMA. On the other hand, Purkhiser does not directly challenge his tampering conviction on appeal, which is the only valid conviction before this Court. Because Purkhiser raises no substantive claim challenging his actual tampering conviction, this Court should affirm that conviction and decline to address the substance of Purkhiser's arguments regarding the PFMA.

II. This Court should reject Purkhiser's challenge to the replaying of the 911 call.

A. Applicable law

Montana Code Annotated § 46-16-504 allows "all exhibits" the court deems "necessary" to be taken by the jury when retiring for deliberations. However, Mont. Code Ann. § 46-16-504 is limited by the "common law rule against

submission of testimonial materials to the jury for unsupervised and unrestricted review." *Nordholm*, ¶ 10 (citing *State v. Stout*, 2010 MT 137, ¶ 29, 356 Mont. 468, 237 P.3d 37).

B. The 911 call was not testimonial.

In assessing the district court's decision on exhibits allowable to go back to the jury under Mont. Code Ann. § 46-16-504, in conjunction with the common law rule, "the threshold question" is "whether the subject item is either testimony or testimonial in nature." *State v. Hoover*, 2021 MT 276, ¶ 18, 406 Mont. 132, 497 P.3d 598 (citations omitted). As this Court explained in *Stout*, in defining testimonial material in light of the common law rule and Mont. Code Ann. § 46-16-504:

> This Court has tended to identify "testimonial materials" for purposes of the common law rule by analogy. In *Bales*, ¶ 16, we quoted a definition of the phrase "testimonial evidence" from Black's Law Dictionary. The Current Ninth Edition of that work defines "testimonial evidence" as a "person's testimony offered to prove the truth of the matter asserted; esp., evidence elicited from a witness. Also termed communicative evidence; oral evidence." Black's Law Dictionary 640 (Bryan A. Garner ed., 9th ed., West 2009). Therefore for purposes of this rule, the terms "testimonial materials" and "testimonial evidence" have been treated as equivalents.

Stout, ¶ 30 (*see id.* ¶¶ 32, 35, holding that expert reports are not testimonial, and further observing the authors of the reports "testified and [were] cross-examined at trial."). Accordingly, in analyzing the common law rule, this Court has considered whether the jury was given access to material during deliberations from a "critical"

witness who "did not testify at trial, was not subject to cross-examination, and whose demeanor the jury was never able to observe." *State v. Parker*, 2006 MT 258, ¶ 21, 334 Mont. 129, 144 P.3d 831 (reversing when a critical non-testifying witness engaged in a recorded police interview, which was delivered to the jury room for deliberations).

Here, the only person on the 911 call who did not testify at trial was the 911 operator. While the 911 operator attempted to talk with H.S. to gather information to assist her, the operator never had a conversation with her. The operator shared no facts on the call for the truth of the matter asserted, nor was the recording intended to be used as a substitute for her live testimony at trial. The operator was not a critical witness for trial. On the other hand, all the witnesses who testified at trial—including Will, H.S., Tim, and Purkhiser—affirmed the corroborative background facts surrounding their statements at trial, as well as the statements in the 911 calls themselves. The call was not testimonial.

C. The district court did not place undue emphasis on the 911 call.

The purpose of the common law rule is to "prevent[] the jury from giving undue weight to one witness's statements to the exclusion of the evidence presented by other witnesses." *Nordholm*, ¶ 10 (citations omitted). Put another way, the "undue emphasis concern underlying the common law rule at issue is focused on the possibility that a jury 'may not accord adequate consideration to *controverting*

testimony received from live witnesses.'" *Green*, ¶ 16 (citing *State v. Christenson*, 250 Mont. 351, 361, 820 P.2d 1303, 1310 (1991) (emphasis in original).

Here, Purkhiser has not identified any countervailing fact nor has he identified an improper elevation of one witness's testimony over another witness's testimony. The conversation in the 911 call was not controverted by any live witness. All of the testifying witnesses concurred on the basic facts recorded on the call, including: (1) how Will and Tim arrived; (2) how H.S. and Purkhiser were initially in the midst of a heated argument; and (3) how Will and Tim separated the two and diffused the situation. The content of the conversations was not disputed either. The only fact controverted was Purkhiser's explanation that—contrary to what he said on the recording—he was not actually asleep prior to Tim and Will arriving. Instead, prior to his argument with H.S., he was in the *process* of falling asleep.[5] (Trial Tr. at 562.) But the concern of actual countervailing testimony involves sending "some, but not all, witness testimony into the jury room" which creates a "fundamental asymmetry between the testimony of some persons relative to others" in light of "contradictory facts." *Green*, ¶ 16. Purkhiser controverting himself at trial would not qualify as elevation of the countervailing testimony from another witness. Under these circumstances, it was impossible for the jury to place

[5] There was nonetheless no dispute, even from Purkhiser's testimony, that he was awake and engaged in an argument with H.S. prior to the alleged PFMA and prior to Will and Tim arriving. (Trial Tr. at 494-97.)

undue emphasis on the 911 call. *See, e.g., State v. Giddings*, 2009 MT 61, ¶ 97, 349 Mont. 347, 208 P.3d 363 (finding no prejudice when Giddings' statements on a police interview videotape did not "conflict[] with testimony given by other witnesses at trial[]" and where Giddings did not "claim[] that the tape was critical to the State's case[]" and the A/V quality of the tape was poor); *see also State v. Bales*, 1999 MT 334, ¶ 25, 297 Mont. 402, 994 P.2d 17 (Bales "has not claimed and the record does not show that the statements on the tape are inconsistent with those given by witnesses at trial."). There is no danger of undue emphasis.

D. Any error would be harmless.

This Court utilizes the *Van Kirk* test in assessing harmless error for testimonial materials that go back with the jury. *Hoover*, ¶ 23 (citing *State v. Van Kirk*, 2001 MT 184, 306 Mont. 215, 32 P.3d 735.) The State must show that trial error is harmless by showing that there is "no reasonable possibility" that the subject trial error "might have contributed to the conviction." *Van Kirk*, ¶ 47.

Here, although no error exists, if any did, it was harmless. There is "no reasonable possibility" that the 911 call "contributed to [Purkhiser's] conviction" because he was not convicted of PFMA.

As to tampering—while Purkhiser speculates that the jury simply decided to convict Purkhiser of tampering to convict him of something—the evidence of Purkhiser's tampering was overwhelming (Trial Tr. at 212-56), and Purkhiser even

appeared to admit to the essential elements of tampering during his trial testimony. (*Id*. at 509-10, 516, 530-31.) Not only that, but the jury was specially instructed that "[e]ach charge/count" should be considered "separate and distinct" from each other. (Trial Tr. at 770-72; Doc. 40.) This Court "presume[s] that the jury upholds its duty and follows a district court's instructions." *State v. Erickson*, 2021 MT 320, ¶ 27, 406 Mont. 524, 500 P.3d 1243. Thus, this special unanimity instruction forecloses Purkhiser's undeveloped argument. Finally, there is no chance of juror confusion. The tampering conviction relied on entirely different events from the PFMA in February 2022, and involved Purkhiser's detailed pleas in jail phone conversations for H.S. to testify falsely, to not testify, and to recant her statements.

III. The district court did not abuse its discretion in declining to strike prospective juror B.H. for cause.

A. Applicable law

Criminal defendants have a fundamental right to a fair and impartial jury. U.S. Const. amend. VI; Mont. Const. art. II § 24. A juror must be dismissed if he has "a state of mind in reference to the case or to either of the parties that would prevent the juror from acting with entire impartiality and without prejudice to the substantial rights of either party." Mont. Code Ann. § 46-16-115(2)(j). A juror's "state of mind" may be ascertained from statements expressing fixed opinions, or statements that raise serious questions as to potential bias. *State v. Calahan*,

2023 MT 219, ¶ 22, 414 Mont. 71, 538 P.3d 1129 (citing *State v. Johnson*, 2014 MT 11, ¶ 10, 373 Mont. 330, 317 P.3d 164). The '"totality of the circumstances presented' is considered when making determinations about a juror's state of mind." *Id.* (citation omitted).

This Court focuses its inquiry on whether a juror has expressed a "fixed opinion" on their "spontaneous, and usually initial, statements or responses." *Calahan*, ¶ 22 (citation omitted). When assessing whether a juror's statements have raised "serious questions," this Court recognizes that jurors bring their life experiences with them to trial. *Calahan*, ¶ 22 (citing *State v. Rogers*, 2007 MT 227, ¶ 23, 339 Mont. 132, 168 P.3d 669). A juror "can remain impartial notwithstanding their personal views on or relevant experience with particular crimes." *Id.* (citation omitted). If a juror "expresses doubts but then unequivocally affirms that she can remain impartial, there is not a 'serious question' as to her state of mind." *Calahan*, ¶ 24 (citing *State v. Heath*, 2004 MT 58, ¶ 27, 320 Mont. 211, 89 P.3d 947).

B. Discussion

Purkhiser observes that B.H. explained that she has suffered physical abuse before. (Appellant's Br. at 23.) Despite not identifying any statements where B.H. expressed a bias, Purkhiser claims there was "a complete absence of any convincing statement affirming [B.H.'s] ability to set aside her bias." (*Id.*)

Purkhiser argues the district court provided "loaded" and "leading" questions to B.H., which prevented B.H. from expressing her true opinion. (*Id*.)

1. The district court did not abuse its discretion in declining to grant Purkhiser's for cause challenge.

Purkhiser conflates the concept of whether a juror shares a common experience with the concept of whether a juror has expressed a fixed opinion or bias. But they are not the same thing. The record does not show that B.H. ever expressed a fixed opinion or bias, or that her responses raised "serious questions" about her ability to remain fair and impartial. A juror "can remain impartial notwithstanding their personal views on or relevant experience with particular crimes." *Calahan*, ¶ 22. Here, B.H. unequivocally answered "no" when the court initially asked her if she would be "triggered or impacted by that and have difficulty hearing the case[.]" (Trial Tr. at 102.) When the court asked her more about her personal history and subsequently inquired if she would be able to "put aside your personal experiences and look at the case independently," B.H. responded, "I think so. *I have for a long time*." *Id*. at 103 (emphasis added). While the first statement might suggest some equivocation, the second statement affirms that she has not had difficulty putting aside her personal experiences historically. Nonetheless, the district court was exceedingly careful and followed up two more times, asking B.H. if she could "judg[e] [the case] solely on what the

State alleges and whether the State has met their burden of proof." *Id*. B.H. replied affirmatively twice.

Purkhiser has failed to identify B.H. expressing any bias or partiality whatsoever in this record. And defense counsel's objection was only tailored to the mere fact that B.H. had had a common experience in the past, which, again, does not show bias or prejudice standing alone.

Purkhiser's suggestion that the district court erred in asking leading or loaded questions misses the mark too. While it is improper for a court to "attempt to rehabilitate" a prospective juror by asking leading or loaded questions, *State v. Morales*, 2020 MT 188, ¶ 12, 400 Mont. 442, 468 P.3d 355, the district court was not attempting to do so because there was nothing to rehabilitate. Rather, the court's questions were carefully tailored to explore whether any possible bias or prejudice existed, and none was discovered.

Purkhiser fails to show an abuse of discretion. The district court carefully framed its questions, listened to B.H.'s answers, and determined that prospective juror B.H. did not express a fixed opinion or bias and she could remain impartial. The court nonetheless thoughtfully and cautiously denied Purkhiser's motion without prejudice to allow Purkhiser to reraise it if anything else came up with B.H., which did not happen. Purkhiser fails to show that the district court's careful consideration of the issue was an arbitrary decision that was unreasonable or

without the employment of conscientious judgment, nor does Purkhiser show a resulting substantial injustice.

2. Structural error cannot be established here.

Even if Purkhiser could establish error, he would not be able to show that he is entitled to automatic reversal based on structural error. Purkhiser alleges that he has satisfied the structural error test because he has "use[d] all of his allotted p[er]emptory challenges." (Appellant's Br. at 24.) Purkhiser summarily alleges he had to pick the "lesser of two evils" when he exercised his seven peremptory challenges on other people and B.H. ended up on the jury. (*Id*. at 11.)

"[I]n the context of jury selection, 'structural error occurs if: (1) a district court abuses its discretion by denying a challenge for cause to a prospective juror; (2) the defendant uses one of his or her peremptory challenges to remove the disputed juror; and (3) the defendant exhausts all of his or her peremptory challenges.'" *Deveraux*, ¶ 25 (citing *State v. Good*, 2002 MT 59, ¶ 62, 309 Mont. 113, 43 P.3d 948).

Here, as in *Deveraux*, Purkhiser "did not use a peremptory challenge to remove [B.H.] from the jury pool, and thus he cannot satisfy part two of the analysis." *See Deveraux*, ¶ 26. The *Deveraux* Court further rejected a structural error claim when Deveraux claimed he "was compelled to use peremptory challenges on other less desirable individuals[.]" This Court explained that, on

appeal, Deveraux "provide[d] reasoning for only four of the six individuals he removed[.]" *Deveraux*, ¶ 28. Accordingly, this Court reasoned, "there is no demonstration that Deveraux could not have elected to remove [the prospective juror in question][.]" *Id.* Here, Purkhiser has given no explanation for any of his seven peremptory strikes, thus he has not established a compulsion to seat B.H. on the jury.

3. Any error, if error exists, would be harmless.

Because structural error cannot be established, any possible error would be under a trial error analysis, which would be subject to review under the harmless error statute, Mont. Code Ann. § 46-20-701(1). *Good,* ¶ 61. The record does not show any error "was prejudicial" here because the jury selected, including B.H. did not convict Purkhiser of PFMA. Mont. Code Ann. § 46-20-701(1).

CONCLUSION

This Court should affirm Purkhiser's conviction for tampering.

Respectfully submitted this 21st day of March, 2025.

AUSTIN KNUDSEN
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: */s/ Roy Brown*
ROY BROWN
Assistant Attorney General

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 6,773 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Roy Brown
ROY BROWN

CERTIFICATE OF SERVICE

I, Roy Lindsay Brown, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 03-21-2025:

Gregory E. Paskell (Attorney)
20500 Cypress Way
ste c
Lynnwood WA 98036
Representing: Walter Jason Purkhiser
Service Method: eService

Tammy Ann Hinderman (Attorney)
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena MT 59620
Representing: Walter Jason Purkhiser
Service Method: eService

Marcia Jean Boris (Govt Attorney)
512 California Avenue
Libby - MT MT 59923
Service Method: eService
E-mail Address: mboris@libby.org

Electronically signed by LaRay Jenks on behalf of Roy Lindsay Brown
Dated: 03-21-2025