IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0581

STATE OF MONTANA,

Plaintiff and Appellee,

v.

STEVEN JOSEPH JOHNSON,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, The Honorable Kathy Seeley, Presiding

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STATEMENT OF THE ISSUE

Whether the district court erred by allowing a witness to testify via two-way video and, if so, whether the error was harmless.

STATEMENT OF THE CASE

On April 26, 2021, Appellant Steven Joseph Johnson crashed a reportedly stolen vehicle into the fence, shed, and swing set outside the Belcourts' residence, before fleeing the scene and hiding in the attached garage of Eugene Maw's house without permission. (1/09/2023—1/11/2023 Tr. (Trial Tr.) at 135-36, 150, 155, 171, 173, 178-80, 220, 231, 236, 259, 263, 293.)

The State ultimately proceeded to trial on the following charges against Johnson: Theft, a felony, in violation of Mont. Code Ann. § 45-6-301(1)(a), (7)(b)(ii); Criminal Possession of Drug Paraphernalia, a misdemeanor, in violation of Mont. Code Ann. § 45-10-103; Criminal Mischief, a felony, in violation of Mont. Code Ann. § 45-6-101(1)(a); Burglary, a felony, in violation of Mont. Code Ann. § 45-6-204(1)(b); and Bail Jumping, a felony, in violation of Mont. Code Ann. § 45-7-308. (Docs. 12, 34; 1/05/2023 Tr. at 15.)

Before trial, the district court, over Johnson's objection, granted the State's motion to allow Maw to testify at trial via two-way video. (Docs. 74, 79, 84; 1/05/2023 Tr. at 12-13.) After the jury convicted Johnson of Criminal Mischief,

Burglary, and Bail Jumping,[1] the district court committed Johnson to the Department of Corrections for a term of ten years with five suspended for his Criminal Mischief conviction; five years, none suspended, for his Burglary conviction;[2] and two years, all suspended, for his Bail Jumping conviction. (Docs. 89; 109 at 1-2.) The district court ran each sentence concurrently. (Doc. 109 at 2.) Johnson now appeals the district court's grant of the State's motion to allow Maw to testify by two-way video.

STATEMENT OF THE FACTS

I. Relevant facts of the offenses

Kim McWhiney entered into a contract for title of a 2013 White GMC Terrain with Jon Herrin on Friday, April 23, 2021. (Trial Tr. at 146, 162, 248, 250-52, 255-56.) On Sunday, April 25, 2021, McWhiney reported the vehicle stolen to law enforcement, alleging that Johnson, who had access to her apartment the day before, was the likely culprit. (*Id*. at 135-36, 150, 155, 259.)

On September 26, 2021, McWhiney's son, Travis Stewart, learned that the Terrain was parked at the Libation Station. (*Id*. at 165-66.) Stewart drove to that location, confirmed the vehicle was McWhiney's, and called law enforcement

[1] Before deliberations, the district court granted Johnson's motion to dismiss the Criminal Possession of Drug Paraphernalia charge. (Trial Tr. at 422.) The jury found Johnson not guilty of Theft. (*Id*. at 486.)

[2] Because Johnson is not challenging his bail jumping conviction on appeal, the State does not address the facts in support of that offense below.

while he sat parked across the road. (*Id*. at 166.) Stewart then attempted to park near Johnson to prevent him from pulling out of the parking lot until law enforcement arrived. (*Id*. at 170.)

Johnson, however, was able to leave the area. (*Id*. at 171.) Stewart followed him "[t]o keep an eye on the vehicle." (*Id*.) While on the phone with law enforcement, Stewart observed Johnson drive at a high rate of speed and then attempt "to hang a left," miss the turn, and then go through a fence. (*Id*. at 173, 196, 265.) Johnson also crashed into a children's swing set and clipped a storage shed. (*Id*. at 220, 263, 293.) Johnson fled to the east on foot while Stewart remained at the crash site. (*Id*. at 178-80, 209-10.)

Responding law enforcement officers conducted a "door-to-door search throughout the neighborhood" for Johnson. (*Id*. at 215.) When Maw arrived at his house, he was greeted by several law enforcement officers' vehicles parked outside. (*Id*. at 230.) Law enforcement informed Maw that they were looking for Johnson, who had run away after wrecking a vehicle. (*Id*.)

Upon going downstairs in his residence, Maw immediately noted "there was a gallon jar of distilled water that had been opened and a drink taken out of it." (*Id*.) And, in the laundry room, he noticed that "one of the windows was ajar and the door that leads up to the garage from there was partially open." (*Id*. at 230-31.) At that point, Maw "thought something was wrong." (*Id*. at 231.)

In the garage, Maw noticed that there was a large box by the freezer that had been moved out of place. (*Id*.) Maw "pushed the box back where it was supposed to be, and as soon as [he] did that" he saw Johnson crouched on the floor. (*Id*.) In response, Maw left the garage to inform law enforcement. (*Id*.) When law enforcement opened Maw's front door, they saw Johnson "running towards the living room." (*Id*. at 321.) Law enforcement ultimately apprehended Johnson in Maw's kitchen, which was located on the upstairs level of his home. (*Id*. at 232.)

Maw had not given Johnson permission to enter his home. (*Id*. at 236.) And, at trial, Johnson admitted that he entered Maw's garage without his permission. (*Id*. at 363-64, 381.) Johnson also admitted he knew law enforcement would come eventually because he had crashed a vehicle into a fence. (*Id*. at 383.) Johnson further admitted to hearing police outside Maw's house when he was in the garage. (*Id*. at 366, 368.)

II. Motion to allow two-way video testimony at trial

On December 16, 2022, the State moved for an order from the district court to allow Maw to appear by two-way video for Johnson's January 9, 2023 trial. (Doc. 74.) Maw wished to participate in the proceedings to hold Johnson accountable. (1/05/2023 Tr. at 11.) However, by the time of trial, Maw, then 86 years old, had moved from Helena to Burbank, Washington, which is 450 miles away. (Doc. 75 at

2.) In normal driving conditions, the drive from Burbank to Helena would take 7 hours one way. (*Id*.) And, by plane, it would require over half a day of travel through multiple airports. (*Id*.) Distance aside, it would also be difficult for Maw to testify in person in Helena because he is responsible for driving his wife, then 79 years old, to dialysis three times a week. (Doc. 75 at 2.) Maw also is often the primary caregiver for the couple's two adopted children, both under the age of 10, making it necessary for him to be in Burbank to help the children get ready for school by 6:45 a.m., and be home to care for them when school is done at 3:20 p.m. (Doc. 76 at 3.)

Thus, the State argued "that requiring Mr. Maw to travel this distance is both impractical and overly burdensome for Mr. Maw given the time of year (and winter driving conditions); his age and health; the age and health of his wife; as well as the needs of his young adopted children." (Doc. 75 at 3.) Johnson disagreed that Maw's appearance was impossible or impractical, arguing that Maw had moved to Washington in order to be closer to family, who Johnson "presumed [would] be able to provide for [Maw's] wife and adopted children." (Doc. 79 at 2.)

The district court conducted a hearing on the State's motion on January 5, 2023. (1/05/2023 Tr. at 3.) At the hearing, the State represented the facts from its motion, and further articulated the State's understanding that a storm would be

coming through the area where Maw resided in the few days between the motions hearing and Johnson's trial.[3] (*Id*. at 6-7.)

The State further argued that the reason for several months delay in proceeding to trial on an offense that occurred in April 2021 was because Johnson "was in the wind for a number of months." (*Id*. at 10.) Johnson failed to appear at a hearing on February 17, 2022, and was not arrested on the warrant until June 28, 2022. (Docs. 29, 35.) The State ultimately asserted that the public policy of "holding people accountable" supported allowing Maw, who wanted to participate in the trial, but could not physically appear because of his wife's health, his own age, and his caregiving of two young children, being able to testify by two-way video. (*Id*. at 10-11.) To the State, "forc[ing] Mr. Maw to travel that distance given his life circumstances [would] exclude[] him from participating in a criminal process" that he wanted to participate in to hold Johnson accountable. (*Id*. at 11.)

After hearing from the State and Johnson, the district court granted the State's motion, reasoning, in part:

> I think given that the witness is 86 years old, and that it is a seven-hour drive to Burbank, Washington, that his wife is having to be dialyzed three times a week, and that there are small children in the home, that there's a necessity to allow him to testify by Zoom where we can see and hear each other at the same time. I think there is a public policy here of getting this, being able to try this case. I do note I think the state is correct that the delay in this case has been caused

[3] By the time of the trial, Maw also had a family member pass away, which would have further prevented Maw from physically appearing. (Trial Tr. at 227.)

> by Mr. Johnson not being available for trial, which during that time Mr. Maw moved.

(*Id*. at 12.) The following day, the district court entered its written order granting the State's motion for leave to allow Maw to testify by two-way video. (Doc. 84.)

SUMMARY OF THE ARGUMENT

The district court properly allowed Maw to testify via two-way video from Burbank, Washington. During the delay in proceeding to trial, which was caused by Johnson, Maw had moved from Helena to Burbank, Washington. Maw is 86 years old, and cares for his 79-year-old wife, who attends dialysis 3 times a week, and his 2 children, both under the age of 10. To have Maw travel for trial, in winter, for more than 1 day would have posed a significant burden on him, his wife, and his 2 children. The district court did not err when it concluded that Maw's circumstances, along with Johnson causing the delay in his trial and holding Johnson accountable for his actions, constituted public policies that supported allowing Maw to testify by two-way video at trial.

However, even if the district court erred in allowing Johnson to testify by two-way video, any error was harmless. Maw's testimony was solicited only in support of the burglary charge against Johnson. And, specifically, Maw's testimony was used to establish that Johnson had entered Maw's attached garage without permission to do so. At trial, Johnson admitted he entered Maw's garage and that

Maw did not give him permission to do so. Moreover, circumstantial evidence also supported that Johnson did not have permission to be in Maw's home. The evidence presented supported that Johnson had fled the scene of the car accident and was apprehended inside a home in the neighborhood. Because the evidence presented at trial was either identical to Maw's testimony or provided compelling circumstantial testimony that was similar to Maw's testimony, even if Maw's testimony is disregarded, there was sufficient evidence for the jury to conclude that Johnson did not have permission to enter Maw's house and attached garage.

STANDARD OF REVIEW

This Court exercises plenary review of constitutional questions and applies de novo review to a district court's constitutional interpretation of the Sixth Amendment of the United States Constitution and article II, section 24, of the Montana Constitution. *State v. Strommen*, 2024 MT 87, ¶ 15, 416 Mont. 275, 547 P.3d 1227.

ARGUMENT

The district court did not violate Johnson's right to confrontation when it allowed Maw to testify via two-way video and, even if the district court did commit error, such error was harmless.

Relying on *Strommen*, Johnson argues that the district court violated his right to confrontation when it allowed Maw to testify by two-way video because

the record did not support that (1) Maw was unavailable for face-to-face cross-examination in the courtroom and (2) "denial of such personal face to face cross examination [was] necessary to further an important public policy with the reliability of the testimony otherwise assured." (Appellant's Br. at 12, 17 (citing *Strommen*, ¶ 19 (internal quotations omitted).) Johnson next argues the State cannot prove beyond a reasonable doubt that the error, if committed, was harmless. (Appellant's Br. at 17-21.) As set forth below, the district court correctly found, under *Mercier*, that Maw's video testimony was necessary to further important public policy. However, even if the district court erred, such error was harmless.

A. Maw's testimony via two-way video did not violate Johnson's rights under the Confrontation Clause.

The Confrontation Clause of the United States Constitution guarantees a criminal defendant the right to "be confronted with the witnesses against him." U.S. Const. amend. VI. Similarly, the Montana Constitution guarantees a criminal defendant the right "to meet the witnesses against him face to face . . . ." Mont. Const. art. II., § 24. The purpose of the Confrontation Clause is to ensure reliability of testimony by "subjecting it to rigorous testing in the context of an adversary proceeding . . . ." *State v. Mercier*, 2021 MT 12, ¶¶ 15, 17-21, 26-28, 403 Mont. 34, 479 P.3d 967 (quoting *Maryland v. Craig*, 497 U.S. 836, 844 (1990)). Both the United States Supreme Court and the Montana Supreme Court have recognized that "face-to-face" confrontation is not an absolute right, though it

should not "easily be dispensed with[.]" *Craig*, 497 U.S. at 850; *see also State v. Stock*, 2011 MT 131, ¶ 28, 361 Mont. 1, 256 P.3d 899.

1. The district court correctly applied the *Craig* test as adopted by this Court in *Mercier*.

As an initial matter, the State requests, based on Johnson's recitation of the law in his brief and this Court's cases following its decision in *Mercier*, that this Court clarify that the applicable test to Johnson's confrontation claim is the *Craig* test as adopted by this Court in *Mercier*. In his argument, Johnson correctly provides that this Court in *Strommen* stated that:

> [T]he trial testimony of a prosecution witnesses is admissible via two-way video conferencing under the *Craig* exception upon an affirmative case-specific prosecutorial showing, and corresponding trial court findings, that (1) the witness is "unavailable" for personal face-to-face cross-examination in the courtroom, and (2) denial of such personal face-to-face cross-examination is "necessary to further an important public policy" with "the reliability of the testimony . . . otherwise assured."

Strommen, ¶ 19 (citing *Mercier*, ¶¶ 15, 17-21, 26-28; *City of Missoula v. Duane*, 2015 MT 232, ¶¶ 14-16, 20-21, 380 Mont. 290, 355 P.3d 729; *Craig*, 497 U.S. at 847-50, 855-59).

However, this Court's recitation of the *Craig* test in *Strommen*, which added an "unavailability" factor, does not comport with the test set forth in *Craig*, itself, as adopted by this Court in *Mercier*. In *Craig*, the issue before the United States Supreme Court was whether the Sixth Amendment's Confrontation Clause

"categorically prohibit[ed] a child witness in a child abuse case from testifying against a defendant at trial, outside the defendant's physical presence, by one-way closed circuit television." *Craig*, 497 U.S. at 840. The Court answered in the negative, concluding that "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Craig*, 497 U.S. at 850.

Approximately three decades after the Court's decision in *Craig*, this Court, in *Mercier*, was faced with whether a defendant's right to confront witnesses against him, under the United States and Montana Constitutions was violated when the State presented a foundational witness's testimony via two-way video. *Mercier*, ¶ 1. To answer the issue presented in *Mercier*, this Court adopted verbatim *Craig*'s two-pronged test. *Mercier*, ¶ 19. And, since *Mercier*, but before its decision in *Strommen*, this Court has notably applied, as written, *Craig*'s two-pronged test in *State v. Bailey*, 2021 MT 157, ¶ 42, 404 Mont. 384, 489 P.3d 889, *State v. Walsh*, 2023 MT 33, ¶ 10, 411 Mont. 244, 525 P.3d 343, and *State v. Mountain Chief*, 2023 MT 147, ¶ 29, 413 Mont. 131, 533 P.3d 663.

However, in *Strommen*, this Court, without explanation, added an "unavailability" prong into the *Craig* test that had never existed before. Then, after applying the *Craig* test as adopted in *Mercier* in *State v. Whitaker*, 2024 MT 255,

¶ 21, 418 Mont. 501, 558 P.3d 741, this Court reverted back to the *Strommen* version of *Craig* in *State v. Hogues*, 2024 MT 304, ¶ 28, 419 Mont. 322, 561 P.3d 1. Notably, neither *Strommen* nor *Hogues* concerned a witness who was "unavailable" for trial. *See Strommen*, ¶¶ 5-6; *Hogues*, ¶ 7.

Indeed, the *Strommen* Court seemingly derived the unavailability prong addition to *Craig* from the United States Supreme Court decision in *Ohio v. Roberts*, 448 U.S. 56 (1980) (*overruled in part by Crawford v. Washington*, 541 U.S. 36 (2004)). *See Strommen*, ¶ 19. The discussions of witness "unavailability" in *Roberts* and in *Crawford*, however, are not akin to whether a witness testifying via two-way video at trial violates the Confrontation Clause.

In *Roberts*, the State subpoenaed the victim's daughter, Anita, five times to appear at Roberts's trial. *Roberts*, 448 U.S. at 59. None of Anita's family knew where she was located. *Roberts*, 448 U.S. at 59-60. Because Anita could not be produced for trial, the trial court allowed the State to admit the transcript of Anita's testimony from a preliminary hearing. *Roberts*, 448 U.S. at 58-60. The United States Supreme Court held that the admission of out-of-court statements of an unavailable witness do not violate the Confrontation Clause so long as the statement "bears adequate indicia of reliability." *Roberts*, 448 U.S. at 66 (internal quotations omitted).

In *Crawford*, Crawford's wife, Sylvia, submitted to a recorded interrogation in relation to Crawford's criminal charges. *Crawford*, 541 U.S. at 38-41. At trial,

Sylvia could not be compelled to testify due to spousal privilege. *Crawford*, 541 U.S. at 40. The trial court ultimately allowed the State to admit Sylvia's statements to law enforcement at trial. *Crawford*, 541 U.S. at 40-41. In reversing Crawford's conviction, the United States Supreme Court overruled *Roberts*, holding that "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford*, 541 U.S. at 60, 68-69.

In sum, *Roberts* and *Crawford* both dealt with whether the Confrontation Clause precluded out-of-court statements being admitted when a witness was either physically or legally unavailable to testify. In stark contrast, the issues raised in *Craig*, *Mercier*, and subsequent cases did not revolve around whether the witnesses were unavailable. In fact, all of the witnesses were available to testify at trial, the witnesses simply were not able to be personally present in the courtroom for their testimony for various reasons. Because "unavailability" does not factor into whether remote testimony by two-way video violates the Confrontation Clause, the State requests this Court discontinue adding the "unavailability" prong to the *Craig* test as this Court did in *Strommen* and *Hogues*.

Likewise, the State requests this Court clarify that the State does not have to satisfy the "good faith requirement" to ensure a witness is unavailable for trial when requesting a trial court allow the witness to testify by two-way video

pursuant to *Mercier*. Because the *Strommen* Court introduced the "unavailability" prong into *Craig*, the *Strommen* Court stated that "[i]mplicit in the required showing under the first *Craig* exception element is an affirmative showing of a good faith prosecutorial effort to obtain the witness's presence at trial." *Strommen*, ¶ 19 (internal quotations, citation, and emphasis omitted). Again, the "good faith requirement" relied upon by the *Strommen* Court is derived from *Roberts* and is tethered to a truly unavailable witness, and not to a witness who is requesting permission to testify via two-way video. As such, the State should not be required to show that it has made a good faith effort to obtain a witness's physical presence at trial.

In sum, this Court's simultaneous departure from the *Craig* test in *Strommen* and *Hogues*, while relying on the United States Supreme Court's *Craig* test in several other cases, has created unnecessary confusion that the State requests this Court resolve by clarifying that, for purposes of two-way video challenges under the Confrontation Clause, it is relying on the *Craig* test as adopted by this Court in *Mercier*. That said, because *Strommen* and *Hogues* appear to be outliers, the State responds below to Johnson's confrontation claim under *Mercier*.

2. Maw's testimony via two-way video satisfied the *Craig* test as articulated in *Mercier*.

"[A] defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial 'only where denial of such

confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.'" *Mercier*, ¶ 17 (quoting *Craig*, 497 U.S. at 850).

The *Craig* test sets forth a two-pronged analysis. *Mercier*, ¶ 18. First, the prosecutor proposing video testimony must show the "denial of physical face-to-face confrontation is necessary to further an important public policy." *Mercier*, ¶ 18. Second, the prosecutor must show the "reliability of the testimony is otherwise assured." *Mercier*, ¶ 18. This Court has adopted the rationale set forth in *Craig* as it applies to witnesses appearing via two-way video technology. *Mercier*, ¶ 22 (*see also Duane*, ¶ 21; *Stock*, ¶ 30). Here, Johnson only challenges the district court's analysis under *Craig*'s public policy prong. (*See* Appellant's Br. at 11-17.)

Under the first prong, the district court must make "'more than generalized findings' of policy concerns." *Mercier*, ¶ 19 (quoting *Coy v. Iowa*, 487 U.S. 1012 (1988)). A witness may testify via video if the prosecution makes an "adequate showing" that the "personal presence of the witness is impossible or impracticable to secure due to considerations of distance or expense." *Bailey*, ¶ 42 (citing *Duane*, ¶ 25).

However, showing that procuring the witness at trial is "impossible" or "impracticable" does not obviate the State's burden to also demonstrate that dispensing with face-to-face confrontation will be "necessary to further an

important public policy." *Bailey*, ¶ 42. "[J]udicial economy, added expense, or inconvenience alone are not important public policies sufficient to preclude the constitutional right of a defendant to face-to-face confrontation at trial." *State v. Martell*, 2021 MT 318, ¶ 12, 406 Mont. 488, 500 P.3d 1233 (citing *Mercier*, ¶ 26; *Bailey*, ¶ 45). Although judicial economy, the expense of the witness attending in-person, and inconvenience to the witness, standing alone, cannot justify video testimony, all three remain important factors in determining whether video testimony violates the confrontation clause. *See Mercier*, ¶ 20 (affirming the holding in *Duane*).

In *Duane*, the defendant was one of three individuals that the State prosecuted for cruelty to animals. *Duane*, ¶ 5. Each of the defendants requested a separate trial in the Missoula Municipal Court, which would have required one of the witnesses to travel from California to the three separate trials. *Duane*, ¶ 6. The *Duane* Court focused primarily on the reliability prong of the *Craig* test but also found that requiring the witness to travel from California to Montana for three trials would "impose a prohibitive expense on the City and a significant burden on" the witness. *Duane*, ¶ 21.

Although the *Duane* Court did not specifically reference the necessity prong of the *Craig* test, the two-member plurality opinion in *Mercier* clarified that the holding in *Duane* left the necessity prong of *Craig* "unaltered." *Mercier*, ¶ 20;

see also Bailey, ¶ 42 n.5. In reference to the *Duane* holding, the *Mercier* Court stated that "[t[he substantial impracticality of the out-of-state witness's physical appearance in three misdemeanor trials satisfied the requirement of *Craig* that use of video was necessary to further an important public policy." *Mercier*, ¶ 20.

In sum, *Mercier*, *Bailey*, and *Martell* make it clear that expense and inconvenience alone do not constitute "important public policy." *Mercier*, ¶ 26; *Bailey*, ¶ 45; *Martell*, ¶ 12. However, *Duane* and *Mercier* distinguish that proposition and hold that causing a witness a "significant burden" and avoiding "extraordinary expense" do constitute "important public policy." *Duane*, ¶ 21; *Mercier*, ¶ 20.

Here, the district court did not err when it found that several public policies supported allowing Maw to testify via two-way video at Johnson's trial. During the time between Johnson being charged and his trial occurring, Maw had moved from Helena to Burbank, Washington. The cause of the delay in trial was largely due to Johnson's conduct. Burbank, Washington, is a day of travel by car one way or more then a half day of travel by plane one way to Helena. Maw could not be away from his family because he is needed to help get his young children ready for school early in the morning and to be there when they get home in the late afternoon. In addition, Maw transports his wife to dialysis three times a week and is needed to contribute more to chores at home when she is feeling ill. (Doc. 76 at

3.) Finally, the distance becomes more complicated for Maw, an 86-year-old man, to travel, particularly in the winter when a storm was expected to hit his area in the few days between the motions hearing and Johnson's trial.

The district court accordingly did not err when it concluded that Johnson's actions in delaying his trial had contributed to the need for the State to present testimony via video instead of in person by delaying his trial. Nor did the district court err when it concluded that public policy supported allowing Maw to testify by two-way video due to his age, the health and age of his wife, and his role as a primary caregiver to their two young children.

Finally, the district court correctly found that public policy favors criminal prosecutions. Although this is undoubtedly an important public policy, standing alone it cannot justify dispensing with face-to-face confrontation. Using this public policy alone as justification for video testimony would render the *Craig* analysis meaningless as the policy exists in all criminal cases. Therefore, the policy of adjudicating criminal cases must be coupled with other important public policies to satisfy the necessity prong. Here, as articulated above, the district court did not exclusively rely on the public policy of the State adjudicating criminal cases.

Finally, although the district court's finding that Maw's two-way video appearance "is supported by the important public policy of allowing the State to prepare its case where the defense has been silent," is not supported by the record

that does not undermine that the district court correctly allowed Maw to testify by two-way video. (*See* Doc. 84; Appellant's Br. at 16.) This Court "will affirm the district court when it reaches the right result, even if it reaches the right result for the wrong reason." *State v. Fredericks*, 2024 MT 226, ¶ 16, 418 Mont. 220, 557 P.3d 32 (internal quotations and citation omitted). Accordingly, this Court should affirm the district court's order granting the State's motion to allow Maw to testify at trial via two-way video because the district court correctly applied *Craig* as adopted by this Court in *Mercier* to correctly conclude that the denial of personal face-to-face cross-examination of Maw was necessary to further several important public policies.

B. Any error caused by Maw testifying by two-way video was harmless because at trial Johnson admitted that he was in Maw's garage without his permission.

"A constitutional deprivation of the defendant's confrontation right is a trial error and is subject to harmless error review." *Mercier*, ¶ 31. The State bears the burden to show, beyond a reasonable doubt, that the error was harmless. *Mercier*, ¶ 31.

To determine whether the error was harmless, the Court must apply the "cumulative evidence" test. *Mercier*, ¶ 31 (citing *State v. Van Kirk*, 2001 MT 184, ¶ 43, 306 Mont. 215, 32 P.3d 735). The "cumulative evidence" test "looks not to the quantitative effect of other admissible evidence, but rather to whether the

fact-finder was presented with admissible evidence that proved *the same facts as the tainted evidence proved*." *Van Kirk*, ¶ 43 (emphasis in original). "If the tainted evidence goes to an element of the crime charged and is the only evidence tending to prove that element," then the Court will be "compelled to reverse." *Martell*, ¶ 17 (citing *Van Kirk*, ¶ 45). However, "[i]f there is admissible evidence on the same element, the State must demonstrate 'that the quality of the tainted evidence was such that there was no reasonable possibility that it might have contributed to the defendant's conviction.'" *Martell*, ¶ 17 (quoting *Van Kirk*, ¶ 44) (emphasis omitted). To meet its burden, the State must "direct [the Court] to admissible evidence that proved the same facts as the tainted evidence." *Van Kirk*, ¶ 44.

The State solicited Maw's testimony only in support of the Burglary charge against Johnson. "A person commits the offense of burglary if the person knowingly enters or remains unlawfully in an occupied structure and: (a) the person has the purpose to commit to an offense in the occupied structure; or (b) the person knowingly or purposely commits any other offense within that structure." Mont. Code Ann. § 45-6-204(1).

Maw's testimony regarding the burglary charge went only to the element of whether Johnson entered Maw's attached garage unlawfully. Johnson, himself, testified that he entered Maw's home and garage without permission to do so. Moreover, significant circumstantial evidence supported that Johnson had entered

Maw's house without permission to do so. Stewart observed Johnson driving at a high rate of speed before crashing into the fence, shed, and swing set at a residence. Johnson then fled the scene of a car accident on foot and was subsequently seen and apprehended inside of a home that did not belong to him. Because evidence other than Maw's testimony established that Johnson was inside Maw's house and garage without permission, any Confrontation Clause violation was harmless.

CONCLUSION

This Court should affirm Johnson's convictions and sentence.

Respectfully submitted this 19th day of August, 2025.

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

I, Cori Danielle Losing, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 08-19-2025:

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Lynnwood WA 98036
Representing: Stephen Joseph Johnson
Service Method: eService

Electronically signed by LaRay Jenks on behalf of Cori Danielle Losing
Dated: 08-19-2025