IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0013

STATE OF MONTANA,

Plaintiff and Appellee,

v.

MICHAEL ROSS TROMBLEY,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Twentieth Judicial District Court,
Lake County, The Honorable Deborah Kim Christopher, Presiding

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STATEMENT OF THE ISSUES

1. Whether Montana's bail-jumping statute, Mont. Code Ann. § 45-7-308(1), is unconstitutionally vague on its face and unconstitutionally vague as-applied to Trombley because the term "lawful excuse" is not defined in the Montana Code Annotated.

2. Whether the State established probable cause in its Information when it charged Trombley with bail-jumping.

STATEMENT OF THE CASE

After failing to appear at an adjudicatory hearing in Twentieth Judicial District Court Cause No. DC-14-113 on February 16, 2023, despite being ordered by the district court to do so as a condition of his release, the State charged Appellant Michael Ross Trombley (Trombley) by Information with bail-jumping, a felony, in violation of Mont. Code Ann. § 45-7-308. (Docs. 1, 3.)

Trombley subsequently moved to dismiss his bail-jumping charge. (Doc. 10.) First, Trombley argued that the Information was not supported by probable cause because the State had not alleged sufficient evidence that Trombley purposely failed without lawful excuse to appear on February 16, 2023. (Doc. 10 at 2-5.) Second, Trombley argued, in relevant part, that Mont. Code Ann. § 45-7-308 is unconstitutionally vague because it does not define the phrase "lawful excuse."

(Doc. 10 at 5-8.) Following a hearing, the district court denied Trombley's motion to dismiss.[1] (Doc. 24.)

After Trombley pled guilty to bail-jumping pursuant to a plea agreement, the district court sentenced Trombley to the Montana State Prison for a term of two years. (Docs. 25, 26, 29.) Trombley timely appeals the district court's denial of his motion to dismiss.

STATEMENT OF THE FACTS

On January 19, 2023, Trombley appeared on a revocation petition in Twentieth Judicial District Court, Lake County, Cause Number DC-14-113. (Doc. 1 at 2.) At that time, the district court released Trombley conditioned on him appearing for an adjudicatory hearing on February 16, 2023, at 9 a.m. (*Id.*) Trombley did not appear on February 16, 2023, and his whereabouts were unknown.[2] (*Id.*)

[1] The district court did not verbally state that it denied Trombley's motion to dismiss, but its reasoning, and the case proceeding as normal, support that it implicitly denied Trombley's motion to dismiss. The district court also did not address Trombley's arguments regarding the constitutionality of the bail-jumping statute, instead focusing on the sufficiency of the charging documents. (9/11/23 Tr. at 27-30.) The record does not contain a written order on Trombley's motion to dismiss.

[2] The record on appeal does not include any trial court documents or transcripts from Trombley's revocation proceeding, from which the bail-jumping charge is based out of.

Consequently, the State was granted leave to charge Trombley with felony bail-jumping, and a warrant was issued for Trombley's arrest on February 17, 2023. (Docs. 2-4.) Nearly three months later, Trombley was arrested pursuant to the warrant on May 4, 2023. (Doc. 5.) Trombley appeared before the district court on May 11, 2023, and entered a plea of not guilty. (Doc. 7.)

Trombley subsequently filed a motion to dismiss on July 25, 2023. (Doc. 10.) Trombley first argued that the State had not established probable cause to charge him with bail-jumping because the State had not alleged sufficient information to support that Trombley purposely failed to appear without lawful excuse. (Doc. 10 at 2.) Specifically, Trombley asserted that the affidavit in support of leave to file an Information did not account for the possibility that he "could have missed for a variety of legitimate reasons: he was sick, his car broke down, he was caught in traffic delays, he was at the hospital, sick, or in custody in another location, among many other reasons." (*Id.*) Trombley further asserted that the State simply alleging that he had notice that he was supposed to appear in court at a specific date and time and failed to appear is insufficient to establish probable cause that Trombley had committed the offense of bail-jumping. (*Id*. at 5.)

Trombley next argued that Montana's bail-jumping statute, Mont. Code Ann. § 45-7-308(1), is unconstitutionally vague both on its face and as-applied to Trombley. (*Id*. at 5-8.) Trombley asserted that because the Legislature "has not

clearly defined the phrase 'without lawful excuse,'" then "ordinary citizens like Mr. Trombley," are forced to "guess what it means." (*Id*. at 5.) As a result, Trombley argued that the bail-jumping statute's vague language violated due process. (*Id*.) Trombley also argued that the statute is unconstitutionally vague as applied to him because "[w]ithout clear guidance, Mr. Trombley cannot know what justifies missing court." (*Id*. at 8.) Finally, Trombley asserted that the bail-jumping statute "impermissibly shift[ed] the burden to the defendant to provide a lawful excuse for his non-appearance." (*Id*. at 8.)

In response, the State argued that the bail-jumping charge was supported by probable cause: Trombley was set at liberty by the court, ordered to appear at a specific date and time, failed to do so, and has not offered any excuse for his non-appearance. (Doc. 12 at 2.) The State further asserted that Mont. Code Ann. § 45-7-308(1) is not facially unconstitutional or unconstitutional as-applied to Trombley. (*Id*. at 3-4.) As part of its argument, the State asserted that Trombley did not have standing to challenge the constitutionality of Mont. Code Ann. § 45-7-308(1) because Trombley "[f]ailing to appear is not constitutionally protected conduct" and Trombley's conduct fell within the statute's scope. (*Id*. at 4.) Moreover, as the State explained, a person with ordinary intelligence is able to discern which conduct is prohibited under the statute. (*Id*.)

On September 11, 2023, the district court conducted a hearing on several of Trombley's motions, including his motion to dismiss his bail-jumping charge. (9/11/23 Tr. 26-30.)[3] After hearing brief argument from Trombley and the State, the district court denied Trombley's motion. (*Id*. at 27-30.)

Trombley subsequently pled guilty pursuant to a plea agreement on September 21, 2023. (9/21/23 Tr. 12-13; Doc. 26.) At his change of plea hearing, Trombley admitted to the elements of bail-jumping, including that he did not have a lawful excuse for his non-appearance. (*Id*. at 12-13.)

Trombley also admitted that he had no excuse for not showing up to court in his Presentence Investigative Report (PSI). (Doc. 27 at 5.) At sentencing, the district court, in relevant part, imposed the parties' jointly recommended sentence of two years to the Montana State Prison, with none suspended. (11/9/23 Tr. at 3, 22.)

[3] The record includes two separate transcripts from hearings held in Trombley's various cases on September 11, 2023. Unless otherwise noted, citations to the 9/11/23 Tr. will be from the continuation of the hearing transcript from September 11, 2023.

SUMMARY OF THE ARGUMENT

Trombley lacks standing to challenge the bail jumping statute on its face because the bail-jumping statute does not proscribe any constitutionally protected conduct, and the statute clearly applies to his conduct of failing to appear.

However, even if Trombley had standing to challenge the facial validity of the bail-jumping statute, the statute is not unconstitutionally vague because it can be clearly applied in the vast majority of cases. Moreover, neither "lawful" nor "excuse" are arcane or unintelligible legalese; they are both commonly used and easily understood terms. Even so, any potential vagueness that is created by the phrase "without lawful excuse" is alleviated by the fact that the offense has to be committed purposely.

Nor is the statute unconstitutionally vague as applied to Trombley. Trombley admitted that he failed to appear without lawful excuse. Clearly, Trombley must know that failing to appear simply because you did not want to does not constitute a lawful excuse. But, even if Trombley had a reason for his non-appearance, he would not have been required to pick between his Fifth Amendment right against self-incrimination and his due process right to protect against burden shifting by providing the district court, the State, his counsel, or potentially a jury with the excuse for his failure to appear.

Next, the district court correctly denied Trombley's motion to dismiss for lack of probable cause. Trombley's motion prematurely asked the district court to weigh the evidence of whether he purposely failed without lawful excuse to appear on February 16, 2023, prior to trial and before the State had an opportunity to present its case.

However, even if the Court does not affirm on this basis, the district court correctly determined that the State alleged sufficient facts pretrial to survive a motion to dismiss. Importantly, the State's charging documents provided sufficient facts to allege the probability that Trombley committed the offense of bail-jumping. Trombley had been released by the district court at his hearing in January 2023 on the condition that he personally appear at the adjudicatory hearing on February 16, 2023, at 9 a.m. Trombley did not appear at 9 a.m. and no lawful excuse was provided for his failure to appear. In asserting that probable cause existed that Trombley failed to appear without lawful excuse, the State was not required to plead every possible excuse that Trombley could have had for his non-appearance. The State's asserted facts in support of its motion for leave to file an Information were sufficient to establish probable cause that Trombley circumstantially did not have a lawful excuse for his non-appearance.

STANDARDS OF REVIEW

This Court reviews the denial of a motion to dismiss in a criminal case de novo. *State v. Dugan*, 2013 MT 38, ¶ 13, 369 Mont. 39, 303 P.3d 755. This Court's review of constitutional questions is plenary. *Dugan*, ¶ 14. Because the constitutionality of a statute presents a question of law, this Court reviews for correctness a district court's legal conclusions. *Dugan*, ¶ 14.

This Court reviews de novo a district court's denial of a motion to dismiss for lack of probable cause. *State v. Flesch*, 2024 MT 160, ¶ 12, 417 Mont. 333, 553 P.3d at 357.

ARGUMENT

I. Montana Code Annotated § 45-7-308(1) is not unconstitutionally vague on its face or as-applied to Trombley.

"Legislative enactments are presumed to be constitutional." *In re S.M.*, 2017 MT 244, ¶ 10, 389 Mont. 28, 403 P.3d 324 (citation omitted). "[C]ourts should avoid constitutional issues whenever possible." *State v. Russell*, 2008 MT 417, ¶ 19, 347 Mont. 301, 198 P.3d 217 (internal quotations and citation omitted). "The party challenging the constitutionality of a statute has the burden of proving beyond a reasonable doubt that it is unconstitutional." *State v. Ber Lee Yang*, 2019 MT 266, ¶ 14, 397 Mont. 486, 452 P.3d 897 (citation omitted).

Vague criminal statutes violate a defendant's right to due process of law under the Fourteenth Amendment to the United States Constitution and article II, section 17 of the Montana Constitution. *State v. Knudson*, 2007 MT 324, ¶ 18, 340 Mont. 167, 174 P.3d 469. "The void for vagueness doctrine 'requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Knudson*, ¶ 18 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)).

A defendant may challenge a statute as unconstitutionally vague on two bases: (1) because the statute is so vague that it is rendered void on its face; or (2) because it is vague as-applied to the defendant's particular situation. *State v. Stanko*, 1998 MT 321, ¶ 17, 292 Mont. 192, 974 P.2d 1132. Trombley argues that the bail jumping statute is both unconstitutionally vague on its face and as-applied to his particular situation. (Appellant's Br. at 7-22.)

Because Trombley's admitted conduct falls within the scope of the bail-jumping statute, however, he does not have standing to challenge the bail-jumping statute as unconstitutionally vague on its face. Nor has Trombley proven that the bail-jumping statute is unconstitutionally vague as-applied to his conduct.

A. Trombley does not have standing to challenge Mont. Code Ann. § 45-7-308(1) as unconstitutionally vague on its face.

Trombley argues that the phrase "without lawful excuse" is so vague that it is unconstitutional on its face. (Appellant's Br. at 10.) Because the statute applies to Trombley's conduct, however, he lacks standing to challenge its constitutionality on its face.

A person challenging the constitutionality of a statute on vagueness grounds must have standing. *State v. Lancione*, 1998 MT 84, ¶ 28, 288 Mont. 228, 956 P.2d 1358. Unless a statute proscribes any constitutionally protected conduct, it may not be challenged on its face by a person to whom the statute clearly applies. *Lancione*, ¶ 28. As this Court and the United States Supreme Court have explained, "A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law." *State v. Dixon*, 2000 MT 82, ¶ 18, 299 Mont. 165, 998 P.2d 544 (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982)). "If the challenged statute is 'reasonably clear in its application to the conduct of the person bringing the challenge, it cannot be stricken for vagueness.'" *Dixon*, ¶ 20 (citing *Lancione*, ¶ 28).

"Bail-jumping consists of two elements: (1) being set at liberty by court order, upon condition of appearance at a specified time and place; and

(2) [purposely] failing without lawful excuse to appear at that time and place." *State v. Staudenmayer*, 2023 MT 3, ¶ 29, 411 Mont. 167, 523 P.3d 29 (citing Mont. Code Ann. § 45-7-308(1)). Accordingly, the bail-jumping statute does not proscribe any constitutionally protected conduct. The statute simply requires a person who has been released from incarceration to subsequently appear in court at a specified time and place. Mont. Code Ann. § 45-7-308.

Trombley's assertion that the lawful excuse portion of the element requires a defendant to incriminate themselves in violation of the Fifth Amendment of the United States Constitution and article II, section 25, of the Montana Constitution is not compelling. (*See* Appellant's Br. at 20-21.) However, in his proceedings before the district court, Trombley did not assert that the "without lawful excuse" requirement violated his right against self-incrimination. (*See* Doc. 10 at 8-9.) Instead, Trombley asserted that the bail-jumping statute "could be read in a way that shifts the burden to the defendant" to provide a lawful excuse. (Doc. 10 at 8.) This Court does not allow parties to assert a new legal theory on appeal. *State v. Ament*, 2025 MT 97, ¶ 9, 421 Mont. 502, 568 P.3d 535. Because Trombley argued that the bail-jumping statute impermissibly shifts the burden to the defendant, and not that the statute violates the constitutional protection against self-incrimination, this Court should decline to consider Trombley's arguments concerning the Fifth Amendment and article II, section 25, of the Montana Constitution.

Nevertheless, Trombley has not, and cannot, establish that the bail-jumping statute requiring the defendant purposely fail "without lawful excuse" to appear violates the right against self-incrimination. First, neither the district court nor the State are compelling a defendant accused of bail-jumping to incriminate themselves. Nor would, as Trombley suggests, the defendant providing an excuse for his non-appearance result in his self-incrimination. Even *if* a defendant seeks to explain his non-appearance to the trial court, the defendant at that point, regardless of his excuse, has already failed to appear. Providing a rationale for his failure to appear, even one the trial court does not find credible, does not incriminate a defendant who has already failed to appear without lawful excuse. If anything, the defendant has an interest in providing an excuse to the trial court as a means to avoid being charged with bail-jumping or having his bail-jumping charge dismissed.

Likewise, and despite Trombley's argument below, the "without lawful excuse" requirement does not impermissibly shift the burden on to the defendant. Although a defendant may have incentive to explain his failure to appear, the State must prove he acted purposely without lawful excuse. The State can satisfy that burden through admissions of a defendant or circumstantial evidence establishing lack of lawful excuse. Either way, the burden of proof remains with the State.

Because the statute does not interfere with any constitutionally protected conduct, Trombley cannot challenge it on its face if it clearly applies to his

conduct. *Lancione*, ¶¶ 28-30. Here, the bail-jumping statute clearly applies to Trombley because he was set at liberty by the district court and ordered to appear on February 16, 2023 at 9 a.m., and did not appear. The record contains no explanation, whether a lawful excuse or otherwise, for Trombley's failure to appear. As he admitted to, Trombley simply did not appear when he was ordered to do so. Thus, Trombley does not have standing to challenge the bail-jumping statute as unconstitutionally vague on its face.

B. Even if Trombley has standing, Mont. Code Ann. § 45-7-308(1) is not unconstitutionally vague.

A statute is void on its face "if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." *State v. Nye*, 283 Mont. 505, 513, 943 P.2d 96, 101 (1997) (internal quotations and citations omitted). A defendant raising a facial vagueness challenge must prove that the statute is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *State v. Watters*, 2009 MT 163, ¶ 25, 350 Mont. 465, 208 P.3d 408 (internal quotations and citations omitted). Thus, "[t]he fact that a statute is difficult to apply to some situations does not render it unconstitutionally vague." *Monroe v. State*, 265 Mont. 1, 3, 873 P.2d 230, 231 (1994) (citing *United States v. National Dairy Products Corp.*, 372 U.S. 29, 32 (1963)).

Here, the bail-jumping statute can easily be applied in most cases. A person who is unable to make it to a hearing through no fault of his own would have a lawful excuse. On the other hand, a person who simply fails to appear because he does not want to would clearly not have a lawful excuse. Because the phrase "without lawful excuse" can be clearly applied in most cases, it is not unconstitutionally vague on its face.

Nevertheless, Trombley contends the bail-jumping statute is facially vague because the Legislature did not define "'lawful excuse,' leaving it up to citizens to guess what the phrase may mean and giving discretion to the State, courts, and juries to determine what excuse is 'lawful.'" (Appellant's Br. at 10.) However, the Legislature "need not define every term it employs when constructing a statute," and this Court presumes that a reasonable person of average intelligence can comprehend terms that are "of common usage" and that are "readily understood" on their face. *Nye*, 283 Mont. at 513, 943 P.2d at 101-02. Thus, the "failure to include exhaustive definitions will not automatically render a statute overly vague, so long as the meaning of the statute is clear and provides a defendant with adequate notice of what conduct is proscribed." *Nye*, 283 Mont. at 513, 943 P.2d at 101-02.

Here, the phrase "lawful excuse" is comprised of two terms of common usage, that are readily understood by a person of ordinary intelligence. "Lawful" is defined as (a) "being in harmony with the law" or (b) as "constituted, authorized,

or established by law." *Lawful*, Merriam-Webster Dictionary Online, https://www.merriam-webster.com/dictionary/lawful. "Excuse" is defined as (a) "to make [an] apology for," (b) "to try to remove blame from," (c) "to forgive entirely or disregard as of trivial import," (d) "to grant exemption or release to," (e) "to allow to leave," (f) "something offered as justification or as grounds for being excused," (g) "an expression of regret for failure to do something, or (h) "a note of explanation of an absence." *Excuse*, Merriam-Webster Dictionary Online, https://www.merriam-webster.com/dictionary/excuse.

When combined, it is clear that the ordinary meaning of the phrase "lawful excuse" is that a person's reason for absence is authorized by the law. In the context of the bail-jumping statute, this phrase is readily understood. In order to not be charged with bail-jumping, a defendant, who has been set at liberty and ordered to appear in court, could only legally not appear if the court—the very entity that ordered his appearance—voided its previous order, either prospectively or retroactively, based on the defendant's reason or justification for not being able to appear at the specific time and place he was ordered to do so.

The ordinary meaning of "lawful excuse" is further supported by the commentary to the Model Penal Code (MPC) § 242.8, which the Legislature modeled Mont. Code Ann. § 45-7-308(1) after. MPC § 242.8 states, "A person set at liberty by court order, with or without bail, upon the condition that he will

subsequently appear at a specified time and place commits [bail jumping] if, without lawful excuse, he fails to appear at that time and place." MPC § 242.8. Accordingly, both Mont. Code Ann. § 45-7-308(1) and MPC § 242.8 require the defendant to fail to appear "without lawful excuse."

When an offense is sourced from another jurisdiction or model legislation, this Court looks to that other jurisdiction or model legislation for guidance on the offense's meeting. *See, e.g.*, *State v. Mills*, 2018 MT 254, ¶ 22, 393 Mont. 121, 428 P.3d 834. The commentary to MPC § 242.8 regarding the "without lawful excuse" element provides:

> Section 242.8 also conditions liability on the absence of "lawful excuse for failure to appear. The statute does not define the phrase [lawful excuse], leaving it to the courts to determine the validity of an excuse. Obviously, this provision would exempt from liability persons prevented from appearance by accident, illness, and the like. However, the full range of excuses that might be judged valid in one or another circumstance is impossible to identify in advance.

Model Penal Code and Commentaries, Part II, vol. 3, at 282. This commentary demonstrates that excuses legitimately preventing a person from appearing, such as illness or accident, constitute lawful excuses. However, it was impossible for the

drafters of the Model Penal Code to provide every excuse that would constitute a lawful excuse, just as it would be impossible for the legislature to do so.[4]

Moreover, cases from other jurisdictions support the conclusion that "without lawful excuse" is not impermissibly vague. In *State v. Emmons*, 936 A.2d 459 (N.J. Super. Ct. App. Div. 2007), the Superior Court of New Jersey, Appellate Division concluded that the language "without lawful excuse" in New Jersey's bail jumping statute was not unconstitutionally vague. The court noted that the basic prohibition of New Jersey's bail-jumping statute, which was nearly identical to Montana's statute, is perfectly clear. *Emmons*, 936 A.2d at 467. The statute requires a criminal defendant to appear as directed at a specified time and place. *Id.* Further, the court explained that:

> the requirement that a failure to appear must be 'without lawful excuse' does not render the basic prohibition of this section unclear in most circumstances. A defendant who simply fails to appear for a trial after receiving the [required warnings], or who absconds during the middle of trial to avoid prosecution, could not possibly believe that this is a lawful excuse for a failure to appear. The mere fact that some unusual circumstances can be hypothesized—such as a sudden death or illness of a family member—in which a defendant could have genuine uncertainty regarding the obligation to appear, does not make the [bail jumping statute] unclear in the far more common

[4] Trombley seemingly suggests that a defendant would have to "identify in advance" what could constitute a lawful excuse of the defendant's non-appearance. (Appellant's Br. at 14-15, 18.) However, the plain reading of the commentary supports that the commenters were stating that a list of excuses should be non-exhaustive because the myriad of available excuses is impossible to identify in advance sufficient enough to create a concrete list of excuses.

> circumstance where a defendant's sole reason for failing to appear is to avoid prosecution or incarceration.

Emmons, 936 A.2d at 468.

Similarly, the Appeals Court of Massachusetts held that a bail jumping statute that prohibited a defendant from failing to appear "without sufficient excuse" was not unconstitutionally vague, concluding that the defendant "could apprehend within rough bounds where his duty lay." *Commonwealth v. Love*, 530 N.E.2d 176, 180 (Mass. App. Ct. 1988); *see also Love v. Butler*, 952 F.2d 10, 13-14 (1st Cir. 1991) (holding that Love could not challenge the Massachusetts bail-jumping statute on its face because it clearly applied to him).

Trombley correctly asserts that the Washington Supreme Court found a bail-jumping statute nearly identical to Montana's to be unconstitutionally vague on its face in *State v. Hilt*, 662 P.2d 52 (Wash. 1983). (Appellant's Br. at 17.) The *Hilt* court based its decision on its ruling in prior cases that the phrases "lawful order" and "lawful excuse" were vague. *Hilt*, 662 P.2d at 53. As the Appeals Court of Massachusetts noted, however, the *Hilt* court failed to examine the phrase "without lawful excuse" in its context. *Love*, 530 N.E.2d at 180. Furthermore, recent cases from the Washington Supreme Court have rejected the notion that the term "lawful" is inherently vague. *State v. Washington, 822 P.2d* 1245, 1247 (Wash. App. 1992) (citing cases). The *Hilt* decision is poorly reasoned and should not be followed by this Court.

Although the cases from other jurisdictions are merely persuasive authority, this Court should follow the *Emmons* court in concluding that the phrase "without lawful excuse" is not unconstitutionally vague. As the court held in *Emmons*, in the vast majority of cases, it is clear whether the defendant's excuse is a "lawful excuse." Clearly, a defendant who fails to provide any excuse, or fails to appear because he wants to avoid the consequences of the court proceeding, does not have a lawful excuse. The fact that some close cases may exist does not render Mont. Code Ann. § 45-7-308 impermissibly vague.

Furthermore, any potential vagueness issues associated with Mont. Code Ann. § 45-7-308 are mitigated by the statute's mental state requirement that provides that a person commits the offense if he purposely fails to appear without lawful excuse. The Supreme Court has made it clear that a mental state requirement mitigates vagueness concerns. *Village of Hoffman Estates*, 455 U.S. at 499; *Gonzales v. Carhart*, 550 U.S. 124, 149 (2007). Because the statute contains the "purposely" mental state requirement, the statute does not punish anybody who makes a reasonable effort to attend their hearing, but is unable to do so due to uncontrollable circumstances. Therefore, the mental state requirement provides further evidence that the statute is not impermissibly vague.

Finally, and despite Trombley's assertion to the contrary, just because, across the state, some prosecutors, judges, and juries would find a specific factual

scenario constituted "without lawful excuse," while other prosecutors, judges, and juries would reach the opposite conclusion when presented with the same excuse does not equate to "arbitrary application" of the phrase "without lawful excuse." (*See* Appellant's Br. at 18.)

First, prosecutors have sole discretion in bringing any criminal charge, including bail-jumping, so long as the prosecutors allege sufficient facts to support probable cause for charging the defendant with the crime. However, because it is *discretionary*, even when sufficient facts support probable cause, prosecutors can decline to file charges for any or no reason at all. If that, itself, rendered the bail-jumping statute unconstitutionally vague then it would render every criminal statute unconstitutionally vague.

Similarly, a trial court or a jury not finding a defendant's reason for his non-appearance credible when a different trial court or jury finds the same reason credible from a different defendant does not result in the bail-jumping statute being impermissibly arbitrary. Credibility determinations may be influenced by a myriad of factors.

Moreover, trial courts across the state routinely sentence defendants to different lengths of sentences based on similar crimes without rendering sentencing laws impermissibly arbitrary. The same is true for motions and evidentiary rulings that are at the discretion of each court. The same is true for juries. One jury could

convict a defendant on the same facts of a crime that another jury acquits another defendant on. The phrase "without lawful excuse" is not unconstitutionally vague.

C. The bail-jumping statute is not unconstitutionally vague as-applied to Trombley

Trombley argues that the bail-jumping statute is unconstitutional as-applied to him because he "had no way of knowing if his conduct was prohibited, because he had no way of knowing what would constitute a 'lawful excuse.'" (Appellant's Br. at 19.) When a defendant raises an as-applied vagueness challenge to a statute, this Court determines "whether the statute in question provides a person with actual notice and whether it provides minimal guidelines to law enforcement." *Dugan*, ¶ 67 (internal quotations and citation omitted). "To determine whether the challenged statute provides actual notice, courts examine the statute in light of the defendant's conduct to determine if the defendant reasonably could have understood that the statute prohibited such conduct." *Dugan*, ¶ 67 (internal quotations and citation omitted).

Here, Trombley admitted that he had no lawful excuse for his non-appearance at the adjudicatory hearing at which he was previously ordered to appear. Indeed, the record supports the fact that not one single excuse was offered as to why Trombley failed to appear when he was ordered to do so. Simply, the evidence was that Trombley was ordered to appear, did not appear, was arrested

three months later, and at his change of plea hearing admitted he had no lawful excuse for his non-appearance.

Clearly, a defendant would understand that he is failing to appear without lawful excuse if he fails to appear without any excuse or reasoning to support his non-appearance. Thus, Trombley had actual notice that he was committing the offense of bail-jumping. Trombley's conduct, likewise, clearly falls within the proscriptions of the charge.

Nevertheless, Trombley asserts that he would be violating his right against self-incrimination if he proffered a reason for missing court because he would have no way to know if his "excuse would exonerate him or incriminate him" because the phrase "without lawful excuse" is too vague. (Appellant's Br. at 20.) Again, as argued above, Trombley did not argue that providing an excuse would violate his right against self-incrimination as guaranteed by the Fifth Amendment and article II, section 25, of the Montana Constitution. *See Ament*, ¶ 9.

However, even if this Court entertains Trombley's unpreserved constitutional argument, Trombley has not established that providing an excuse for not complying with a court order requires him to invoke the Fifth Amendment or incriminate himself. (*See* Appellant's Br. at 20.) For instance, Trombley hypothetically informing the district court that he missed his February 16, 2023 court date for any myriad of reasons—he was in the hospital, he tested positive for

COVID-19, he was caring for a sick family member, he was in a vehicle accident, etc.—does not result in him incriminating himself.

Indeed, at the point in time that Trombley would have appeared before the district court to inform it of his possible reason for his non-appearance, the State had already charged Trombley with bail-jumping, which the State had sufficient, circumstantial evidence to prove. Trombley was set at liberty by the district court conditioned on his appearance at the February 16, 2023 hearing. Trombley did not appear, his whereabouts were unknown, and his counsel reportedly had no information about his non-appearance. (*See* Doc. 10 at 1.) Furthermore, Trombley was in the wind for nearly three months following his non-appearance.

Trombley, therefore, providing an excuse would not have resulted in his incrimination when there was already evidence to support that he had no lawful excuse. Instead, if he had presented an excuse, it would have had higher chances of leading to the State dismissing its bail-jumping charge against him or, at the very least, would have created a dispute of fact for the jury to resolve based on the ordinary meaning of "lawful excuse."

Nor would Trombley providing an excuse for his non-appearance result in him having to decide between exercising his Fifth Amendment right or his due process right that protects against burden shifting. (*See* Appellant's Br. at 20.) Again, as argued above, the State is still required to prove the element of "without

lawful excuse." Trombley providing evidence that he had a lawful excuse for his non-appearance does not equate to him having the burden of proving lawful excuse. Instead, it would simply be Trombley defending the charge by providing evidence that attacked the State's burden of proof on that specific portion of the element.

Because Trombley had actual notice that he was committing the offense of bail-jumping and his conduct clearly violated the offense, the bail-jumping statute is not unconstitutionally vague as applied to Trombley.

II. The district court correctly denied Trombley's motion to dismiss because there was probable cause to charge Trombley with bail-jumping.

On appeal, Trombley contends that the district court erred by denying his motion to dismiss because the State did not allege any facts supporting why Trombley did not appear at his adjudicatory hearing. (Appellant's Br. at 22.) However, although the district court correctly denied Trombley's motion to dismiss for other reasons, this Court should affirm the lower court's decision because the request was premature. *See State v. Wilson*, 2022 MT 11, ¶ 34, 407 Mont. 225, 502 P.3d 679

A. Trombley's motion to dismiss was premature.

This Court has held that a pretrial motion to dismiss based on insufficient evidence is "premature because such a challenge can only be made after the State

has had an opportunity to present its evidence to the trier of fact." *State v. Nichols*, 1998 MT 271, ¶ 4, 291 Mont. 367, 970 P.2d 79; *see also State v. Tichenor*, 2002 MT 311, ¶ 21, 313 Mont. 95, 60 P.3d 454 (question of whether defendant was unlawfully in victim's apartment "was a question of fact for the jury and it would have been improper for the judge to step into the jury's place and resolve these issues pretrial"); *see also* Mont. Code Ann. § 46-16-403.

In *Nichols*, the defendant sought to have his drug charges dismissed via a pretrial motion and argued that the State would be unable to prove at trial that the substance in question was marijuana. *Nichol*s, ¶¶ 1, 8. This Court affirmed the district court's denial of the motion to dismiss because Nichols "requested that the trial court resolve an issue of fact before the State was given an opportunity to present its proof to the trier of fact—the jury." *Nichols*, ¶ 8.

Below, Trombley asserted that the State would be unable to prove that he purposely failed to appear without lawful excuse because the State did not assert various excuses that Trombley could have had for his non-appearance at the adjudicatory hearing. Although the district court, here, correctly denied the motion because the facts alleged by the State were sufficient to meet the elements of bail-jumping, this Court should instead affirm the district court because Trombley's request was premature. Specifically, Trombley was asking the district court to make a factual determination—whether Trombley purposely failed without

lawful excuse to appear on February 16, 2023—that would be more appropriately addressed at trial, after the State had an opportunity to present its evidence. *See Nichols*, ¶¶ 8, 10.

B. The charging documents established probable cause to charge Trombley with bail-jumping.

In determining the sufficiency of charging documents, a trial court reads "the information together with the affidavit in support of the motion for leave to file the information." *Flesch*, ¶ 22 (quotations and citation omitted). "The affidavit need not make out a prima facie case that a defendant committed the charged offense; it need only present a mere probability that the defendant committed the offense." *Flesch*, ¶ 22.

Indeed, "evidence to establish probable cause need not be as complete as the evidence necessary to establish guilt." *State v. Giffin*, 2021 MT 190, ¶ 15, 405 Mont. 78, 491 P.3d 1288 (quoting *State v. Arrington*, 260 Mont. 1, 6, 858 P.2d 343, 346 (1993)). That said, "the Information must reasonably apprise the accused of the charges again him to enable him the opportunity to prepare a defense." *Giffin*, ¶ 15. This Court "appl[ies] the common understanding rule to determine if the charging language of a document allows a person to understand the charges against him." *Giffin*, ¶ 15 (internal quotations and citations omitted). "Under this standard, the test of the sufficiency of a charging document is whether the defendant is apprised of the

charges and whether he will be surprised." *Giffin*, ¶ 15 (quotations and citations omitted).

The district court properly denied Trombley's motion to dismiss the Information for lack of probable cause. A person commits the offense of bail-jumping if "having been set at liberty by court order, with or without security, upon condition that the person will subsequently appear at a specified time and place, the person purposely fails without lawful excuse to appear at that time and place." Mont. Code Ann. § 45-7-308(1).

In its affidavit in support of leave to file an Information, the State alleged that: (1) on January 19, 2023, the district court released Trombley on the condition that he appear for an adjudicatory hearing on February 16, 2023, at 9 a.m.; (2) Trombley then purposely failed to appear on February 16, 2023, at 9 a.m., as ordered; and (3) as of the date of the State's motion for leave, Trombley "ha[d] not appeared and given any lawful excuse for his failure to appear." (Doc. 1 at 2.)

Despite Trombley's assertion below to the contrary, the State need not provide direct evidence of Trombley purposely failing without lawful excuse to appear at a specific time and place. Rather, a defendant's mental state is rarely proven by direct evidence and can be inferred from his actions and the facts and circumstances connected with the offense charged. *State v. Bay*, 2003 MT 224,

¶ 16, 317 Mont. 181, 75 P.3d 1265. Further, whether a defendant had the requisite intent is a question of fact for the jury. *Tichenor*, ¶ 21.

Although the State has the burden of proving that Trombley purposely failed without lawful excuse to appear, Trombley has a significant interest in presenting evidence that he had a lawful excuse. To that extent, although an element of the crime, the "lawful excuse" requirement is akin to an affirmative defense in that the defendant admits to not appearing, but explains he was justified in doing so based on his excuse. In doing so, Trombley is merely defending himself against the bail-jumping charge and is not being required to prove an element of the offense asserted against him.

Based on the information alleged, probable cause exists to believe that Trombley, who was released with the explicit condition to personally appear for a scheduled court appearance and who failed to appear as directed, has "purposely" failed to appear "without lawful excuse." However, even if the Information and supporting affidavit in this case could have included more detail, the charging documents still met the minimum requirements. As a matter of law, the charging documents apprised Trombley of being charged with bail-jumping and the alleged facts in support of that offense were sufficient to enable him the opportunity to prepare a defense. Thus, the district court correctly denied Trombley's motion to dismiss for lack of probable cause.

CONCLUSION

This Court should affirm Trombley's conviction.

Respectfully submitted this 3rd day of September, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 6,567 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

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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 09-03-2025:

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