In the Supreme Court for the State of Montana

Supreme Court No. DA 25-0237

STATE OF MONTANA,

Plaintiff and Appellee,

-vs-

DAVID JOSEPH RAMSBACHER,

Defendant and Appellant.

Appellant's Opening Brief

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, Hon. Brett Linnweber, Presiding

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Table of Contents

Table of Authorities

Cases:

Statutes:

Rules and Other Authority:

Statement of the Case

David Joseph Ramsbacher appeals his three convictions for Assault with a Weapon, and one conviction for misdemeanor Carrying a Concealed Weapon While Under the Influence. (Appendix A). David was convicted by a jury on October 23, 2024, after a three-day jury trial.

On March 6, 2025, the district court imposed ten-year consecutive prison sentences for each felony count. The court also imposed a six-month concurrent sentence to the Yellowstone County Jail for the misdemeanor conviction of Carrying a Concealed Weapon While Under the Influence. (Id.) David is currently housed at the Montana State Prison. He now appeals.

Statement of the Facts

On November 24, 2023, Black Friday, David and his wife set out to celebrate her birthday. (Trial Tr. at 467). His wife, Liliana, "really wanted to sing karaoke" and "dance." (Trial Tr. 533). David was much more excited about karaoke than he was about dancing. The evening began – and ended – in downtown Billings. Liliana's brother was also tagging along. (Trial Tr. 534).

Arriving by Uber, the group first went to Hooligan's, where David ordered "a hamburger and big stack of nachos." (Trial Tr. 534-535). He also had two "huckleberry craft beers." (Id.) After dinner, the group crossed the street to Doc Harper's, a local martini bar. (Trial Tr. 536). David had one martini. (Trial Tr. 537). Then, the group progressed north to the Crystal Lounge, where they sang karaoke. There, David had one beer and a bottled water. (Trial Tr. at 538). Next, the group went to Daisy Dukes. David is "not a fan" of that establishment, but Liliana wanted to dance. The group found a table, sat down and "were just laughing." (Trial Tr. 539 - 541).

David first left the table to order a beer for Liliana and "a Tito's Vodka lemonade drink mix thing" for his brother-in-law. (Trial Tr. 540). To David, nothing unusual happened either at the bar or on his return to the table despite the fact that it was a busy night and "the bar was packed." (Trial Tr. 611).

At some point, David paid the Daisy Dukes house DJ "ten bucks to play" Liliana's song, so she could dance. (Trial. Tr. 542).

After a bit, David got up and went to the restroom. En route, he

"noticed there was a fight occurring in the back." After using the restroom and returning to the table, David told his wife and brother-in-law he was ready to leave. (Trial Tr. 542). The other two did not want to leave. David, knowing Liliana was with her brother, left the bar intending to return home. (Trial Tr. 543). He made it about 25 feet out the door before his wife coaxed him back into the bar for "one more dance and one more drink." (Id.) David went "right back in." (Trial Tr. 544).

David and Liliana returned to the table, which was still occupied by Liliana's brother. David waited for them to decide what they wanted to drink and then he walked over to the bar. (Id.) As David was placing his order, the bartender blew smoke in his face.

Zoey Bittner, a bar tender at Daisy Dukes, tells a different story, however. By the time David ordered his second drink, Ms. Bittner considered David to be "kind of a jerk off" who was "drinking pretty fast" and "needs to slow down." (Trial Tr. 160). She communicated her opinion to other bartenders. (Id.). Ms. Bittner also testified about a hearsay statement conveyed to her by a cocktail server about someone's

behavior. "[S]he[1] was just not happy with how he talked to her. You could tell. Demanding a shot, you know, 'Go get me a freaking shot from the bar. That's your job.' Just not okay to talk to a cocktail like that." (Trial. Tr. 161). Regardless, Ms. Bittner attests the group "received their shots." (Id.)

Ms. Bittner continued to "keep an eye" on the group, especially David. Her subjective impression was "the aggression was progressing a little bit." (Id.) Apparently speaking for all staffers of Daisy Dukes, Ms. Bittner told the jury David's behavior "definitely rubbed us the wrong way, for sure." (Trial Tr. 163).

Ms. Bitter continued her surveillance and could tell "something [was] off" about David's relationship with "a Latina woman." As a bartender, Ms. Bitter was able to opine David and the Latina woman seemed a "more brand new" couple. (Trial Tr. at 163-164). The "Latina woman" was Liliana Wilkins, David's wife. At the time of the trial in 2024, David and Liliana had been dating since 2019. (Trial Tr. 493-

[1]Ms. Bittner seems to have presumed the "cocktail" was talking about David and relaying his statements, although the record is unclear as to the identity of the actual declarant.

494).

Ms. Bittner, who's "always watching," (Trial Tr. 164), saw David grab his wife and pull her into his face "and was sitting there, like, loud, loud enough for me to be like, 'whoa.'" (Trial Tr. 165). Upon seeing this, Ms. Bittner notified her bouncer, Hayden. (Trial Tr. at 165). Eventually, according to Ms. Bittner, "Hayden finally stepped in and was like 'you got to go, dude.'" (Trial Tr. at 166). Ms. Bittner would later affirm she told Hayden to tell David to leave. (Trial Tr. 177). Although she would later attribute the decision to bounce David to an "executive decision" Hayden made "after he saw what happened." (Trial Tr. 178). Consistent with that revised testimony was Ms. Bittner's statement, in fact, she did not tell Hayden to remove David. (Id.) She could not hear what Hayden "actually said or didn't say" to David. (Trial Tr. 180).

What happened next "happened so fast." Mr. Bittner remembers seeing Hayden "grab him."[2] From there, "it was just a brawl at that point like him trying to get out of the bouncer's [*sic*] reach and them

[2]Ms. Bittner's testimony is salted with pronouns and it is sometimes difficult to track on a cold record.

trying to get out the door of the building. It was just chaos at that point." (Trial Tr. at 187). According to her testimony, Ms. Bittner was "standing on top of the bar rail, you know, like 'Don't hurt him. Just wrestle him down and get him out. You know, like, that's our job." (Trial Tr. at 168).

Ms. Bittner believes David threw the first punch but she didn't know. She saw "a punch." (Trial Tr. 185).

After the punch was thrown the "[c]rowd was going wild." (Trial Tr. 185). Several patrons had their cameras out, filming the melee. Ms. Bittner grabbed one woman's phone to prevent her from filming because "no one needs to have videos of stuff like that." (Trial Tr. 186).

Ms. Bittner did not see a gun at that time and she did not see David pull a gun despite being atop the bar and watching the scene unfold. (Trial Tr. 180 -181). Ms. Bittner still did not see the gun although David was facing her. (Trial Tr. 190). By the time she had climbed to the top of the bar, "[h]e had already been disarmed. And he was already facedown on the ground, with our bouncers, you know, trying to restrain him. Ms. Bittner was adamant "he drew a gun on

people. I just didn't see it get drawn." However, she did not actually see David pull a gun on anybody. (Trial Tr. 191). She did not see the disarming, either. (Trial Tr. 190). Afterwards the employees "absolutely" talked about what happened. (Trial Tr. 180).

The establishment had no video of the events, and Ms. Bittner did not inform law enforcement that patrons had been filming the hullabaloo. (Trial Tr. 187). Although there are cameras in the bar there was no footage obtained or shown at trial.

Ms. Bittner did acknowledge that the white substance that was blown into David's face was from her "vape," but that she did not "blow in his face . . . I was vaping." (Trial Tr. 196).

Hayden the bouncer with MMA and self-defense training, (Trial Tr. 212), recounted different perceptions of the evening. He recalled David being "loud" and about five feet away from Hayden. (Trial Tr. 216). Beyond his perception that David was "rude and loud," he did not see David do anything physical to his wife as Ms. Bittner described. Hayden was keeping his eyes open because "it is a rowdy bar." (Trial Tr. 217).

Contrary to Ms. Bittner's testimony, Hayden testified she told him "[h]e needs to go." (Trial Tr. 218 & 228). Hayden affirmed he took that to mean "he needs to be kicked out." (Id.) So that's what he did.

According to Hayden, he approached David, who was with his wife, at the bar (Trial Tr. 229), and "pretty much said, 'It's time to go. I'm going to walk you outside.' I put my hand on his back, just to kind of lead him, and that's where it started to get a little physical." (Trial Tr. at 219). "He turned around and shoved me and asked me to keep my hands off him so I did. I didn't react to that. And then I asked him to leave again. And at that point, I was shoved again, and a punch was about to be thrown, and that's where I grabbed the defendant to defend myself." (Trial Tr. 219).

David's punch was never thrown. "I restrained him before he was able to." (Id.) Hayden grabbed David's arm and the two ended up on the ground where David was restrained again. (Trial Tr. 220). David did not strike Hayden while they were on the ground and he calmed down. (Trial Tr. 236). Two other bouncers, Cory and Tiny, helped David up, and start escorting him outside. "[T]hat's where he grabbed

his concealed carry." (Trial Tr. 221). "He started to go towards the front door . . . he turned around and pulled out his concealed carry and pointed it at me." (Trial Tr. 222). In an interview with law enforcement after the incident, Hayden stated that David was disarmed before he was able to point it." (Trial Tr. 242). This would be consistent with Hayden's later testimony that he didn't notice any kind of panic from the crowd that was close to the entire incident. (Trial Tr. 247).

Shane Rieker, aka "Tiny," gave a different version of the events. Tiny had a been a bouncer at Daisy Dukes for over six years. (Trial Tr. 318). Tiny testified he initially became aware of Dave when the two other bouncers, Corey and Hayden, were back at the bar talking to him. (Trial Tr. 322). According to Tiny, it was "the owner" who told him to "get back there and help them out. . . ." (Trial Tr. 323). Prior to this, Tiny was not aware of David causing a disturbance. (Trial Tr. 332). He also doesn't know if the "defendant swung on my bouncers." (Trial Tr. 348).

When he got over to the bar Corey and David were "on the ground wrestling." (Id.) According to Tiny, both were on their backs. This was

occurring approximately five or six feet from the bar. (Trial Tr. 330). According to Tiny, Corey had David "in a hold at this point" but "the defendant was also on top of Corey." Corey was "kind of pinned down or held down by the defendant's weight. But, I mean [the defendant] couldn't have gone anywhere because Corey had a hold of him." (Trial Tr. 334-335). Corey had his right arm around David's neck in "a choke hold, but it wasn't choking him." (Trial Tr. 335).

Tiny helped Corey "get control of the guy" by placing a knee on David's chest. (Id.) David finally calmed down "and jumped up, and that's when he pulled the gun." (Trial Tr. 324). Although Tiny testified he saw David pull the firearm, the also testified he didn't see it. (Id.) Rather, the firearm "was kind of underneath everything on his right side. And when, I mean it came up – was this high up in the air when it first came out, and Corey's yelling 'Gun, gun.'" (Id.) The gun was drawn "pretty much [in a] fluid motion as [the bouncers] picked David off the ground." (Trial Tr. 342-343). David was "looking towards the bartenders." (Trial Tr. 338). The gun was "never actually pointed" at Tiny. He was "more concerned about his customers and stuff" than he

was about getting shot. (Trial Tr. 325). Tiny affirmed that "pretty much" everybody in the bar could have seen the gun when David raised it above his head. (Trial. Tr. 340). It was "100 percent in his mind" that "anybody who was watching would be able to see the gun." (Id.) Apparently, this did not apply to Ms. Bittner who was atop the bar less than 10 feet away. Tiny also denied that anyone, not Hayden, not Corey, and not David, were heading toward the door when the gun was pulled. (Trial Tr. 341).

Once the gun was pulled, Corey "Jackie Chan'd the clip and everything out and had a shell out of the barrel." (Id.) After Corey had disarmed David, Tiny went to get a pair of purple "gag handcuffs" and put them on David. (Trial Tr. 324). According to Tiny, David was conscious the whole time and was never knocked out. (Trial Tr. 346).

At the time of incident, Corey Cayko was a former United States Marine and had been accepted into the Billings Police Department. He had also been a bouncer at Daisy Dukes for "roughly three years." (Trial Tr. 407).

Corey recalls David entering with a lanyard around his neck

which contained "a military ID or a veteran's ID." (Trial tr. 412). Based on what he saw, Corey "recognized that the defendant was more than likely a Marine Corps veteran." (Id.) According to Corey, David was "chipping his teeth" at them, i.e., "making comments." (Trial Tr. 413). At some point in the evening, "Steve, the owner," waved Corey over. When that happens, Corey knows "somebody is going to be asked to leave." Steve gave Corey a "brief rundown," which consisted of hearsay. (Trial Tr. 414).

After speaking with Steve, Corey approached David, who was talking to Hayden. Corey stood four or five feet behind David. (Trial. Tr. 415). Corey could not hear the words being said but, based off just facial features and mannerisms, [Corey] could tell it was . . . wasn't going real well." (Id.) At this point, Corey saw "the woman that the defendant had come in with . . . put her hand on his back." Corey then saw David "shove her to the side." (Trial Tr. 416). "[A]t that time, Hayden and the defendant started grabbing ahold of each other, and [Corey] saw the defendant punching Hayden." (Id.)

According to Corey, both David and Hayden "end up on the

ground. Hayden ends up on his back and the defendant is on top of him." (Id.) "He is continuing to punch Hayden . . . . "I get on the defendant's back, and I start to try to control his arms to stop him from punching. When that doesn't work, I put him in a rear neck restraint, and I pull him off and apply pressure. . . . I pull him straight back, and then I end up on my back. The defendant's on my chest and I have him controlled, and that's probably two feet away from where Hayden and the defendant were at . . . . I apply pressure and eventually [the defendant] taps my arm, which is an indication that he's succumbing to the pressure and to stop." (Trial Tr. 417-418).

Contrary to Hayden's testimony, Corey recalls David with his weight on top of Hayden and David punching down. (Trial Tr. 445). Hayden testified that "did not" happen. (Trial Tr. 236).

After a bit more thrashing by David and pressure by Corey, Corey "allow[s] the Defendant to stand up."

> He stands up, picks up his hat. I stand up, pick up my hat. There's probably a 20, 30 second moment . . . where the defendant is standing between all of the bouncers. And he's not fighting us, we're not touching him, he's not touching us, but he's being passive-aggressive saying, 'Yeah, yeah, I'll leave. You guys suck. Fuck you guys,' whatever.

(Trial Tr. 419). Then, "[t]he defendant turns to walk towards the door." (Trial Tr. 424). According to Corey, at this point David's back was turned toward him, and David was facing the door. "The defendant takes a few steps toward the door and then he turns and makes a motion, indicating that he is drawing a concealed firearm." (Trial Tr. at 425). Corey "jumped on his arm, grabbed ahold of the slide of the weapon, and did everything that [he'd] been trained to do to – on how to disarm somebody." (Trial Tr. 426). He "directed the weapon" toward his own thigh and took the gun from David. (Trial Tr. 427-428).

Contrary to his testimony, Corey had previously told law enforcement that David was "about halfway to a full draw before I grabbed him." However, at trial Corey testified David's hand was "either right at 90 [degrees] or slightly below 90." (Trial Tr. 443).

Corey would deny he put David in a sleep or choke hold (Trial Tr. 447) but acknowledged that David was "unconscious," "dead weight, wasn't moving," when they picked him up off the ground after Hayden and Tiny had placed the handcuffs on him. (Trial Tr. 448-449). Corey has no idea how David ended up unconscious. He is also the only

witness that testified David was unconscious. . .except David.

After Ms. Bittner blew smoke in his face, David approached "one of the individuals wearing a security T-shirt" and poked him in the chest a couple of times, and pointed over to my wife and said, 'Can you please help me get my wife and I out of the bar.'" (Trial Tr. 544-545). At this point, David was "immediately placed in a choke hold," although he did not know it at the time. (Trial Tr. 545). David "attempted to tap on his arm to signal that I, you know, didn't want to fight. But the choke hold remained, and I also started feeling a tugging at my waistband because I was hunched over." (Id.)[3]

Realizing that someone was fiddling with or trying to grab his firearm, David reached for it as he was starting to lose consciousness. Before he had the firearm above his thigh, he lost consciousness. (Trial Tr. 548). The next thing he remembered was waking up "belly down on the floor." David started screaming, "please get off me. Get off me now. Stop attacking me." Then, he got kicked in the right side of his face. (Trial Tr. 549). At the time he did not know who kicked him, but was

[3]David, who had a concealed-carry permit was aware he was not allowed to have a weapon in a bar. (Trial Tr. 546).

later able to identify Corey as the one who kicked him. (Id.) Again, David lost consciousness. (Trial Tr. 550).

David did not recall being dragged outside, being taken to the hospital, or being belligerent to medical staff. (Trial Tr. 551).

David was, in fact, transported to the Billings clinic by ambulance. There, at approximately 12:20 a.m., he was first seen by a nurse, Tatiana Rivera. (Trial Tr. 302-305). Nurse Rivera noted David had slurred speech, was exhibiting loose associations, and wasn't answering her questions. (Trial. Tr. 305). The hospital attempted to sedate him. (Id.)

Despite the sedatives, David was ultimately placed in six-point leather restraint straps because he "attempted to pull a taser off the [hospital] security guards." (Trial Tr. 307-308). Nurse Rivera acknowledged it was unusual for someone to be alert after given sedation. (Trial. Tr. 313). From that point on he was "still awake but fine." (Trial Tr. 308). Again, David had no memory of these events at the time of trial.

Dr. Natalie Wood Zemore treated David when David arrived at

the hospital. She also noted David was "very agitated, and confused, and basically kind of wouldn't answer any of the questions that [she] was asking." (Trial Tr. 360-361). "He kept repeating, like, military ID number and that was really the only information that was given to us." (Trial Tr. 361). Dr. Zemore ordered a CT scan of David's head because she saw bruising on his face and because of his behavior (Trial Tr. 361-362). "That CAT scan was normal," (Trial Tr. 362), although a concussion wouldn't show up on a CAT scan." (Trial Tr. 377). Additionally, Dr. Zemore examined David because it had been reported that he had been choked. (Trial Tr. 372).

Dr. Zemore also tested David's blood, which included a blood alcohol test. The report on David's blood was introduced over a hearsay objection. (Trial Tr. 364). Dr. Zemore testified that anything greater than 80 milligrams per deciliter is legal intoxication in Montana." (Trial. Tr. 365).

In the end, David was convicted of three counts of assault with a weapon and one count of carrying a concealed weapon while under the influence. He was acquitted of "purposely or knowingly causing bodily

injury to another." (Trial Tr. 648).[4]

Statement of the Issues

The district court committed instructional error by giving the Causal Relationship instruction. By doing so, the Court lowered the State's burden of proof to each of the individual charges.

There was insufficient Evidence of Reasonable Apprehension of Serious Bodily Injury to convict David on Counts I and III.

Hearsay and confrontation law prohibited the introduction of blood test results.

Summary of the Arguments

The district court erred by giving Instruction 32, (Appendix B)– "Causal Relationship Between Conduct and Result" – over David's objection, (Trial Tr. 582-583). The instruction addressed the causal relationship between David's conduct and the result of "reasonable apprehension of serious bodily injury." The commentary to the instruction indicates the instruction should be given in any case in which causation is at issue. Because causation was not at issue in this

[4]Additional facts will be set forth as necessary in the argument sections.

case, the instruction was inappropriate.

The was insufficient evidence to convict David on two of the three counts of assault with a weapon based on the State's failure to prove David caused a reasonable apprehension of *serious* bodily injury to Hayden Moore or Shane "Tiny" Rieker.

The district court's admission of hospital-obtained toxicology results was error in that it violated David's right under the Confrontation Clause and, under the circumstances, was inadmissible hearsay.

Standards of Review

This Court reviews a district court's decisions regarding jury instructions for an abuse of discretion. "The standard of review of jury instructions in criminal cases is whether the instructions, as a whole, fully and fairly instruct the jury on the law applicable to the case." *State v. King*, 2016 MT 323, ¶ 7, 385 Mont. 483, 385 P.3d 561.

A claim that there was insufficient evidence to sustain a conviction may be raised for the first time on appeal. *State v. Criswell*, 2013 MT 177, ¶ 13, 370 Mont. 511, 305 P.3d 760. Such claims are

reviewed to determine whether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Fleming*, 2019 MT 237, ¶ 12, 397 Mont. 345, 449 P.3d 1234. "We therefore review a jury's verdict to determine whether sufficient evidence exists to support the verdict, not whether the evidence could have supported a different result." *Id.*

This Court reviews a district court's evidentiary rulings for an abuse of discretion. *State v. Colburn*, 2018 MT 141, ¶ 7, 391 Mont. 449, 419 P.3d 1196. As to an argument a district court's ruling violated the Confrontation Clause, this Court exercises plenary review and applies *de novo* review. When analyzing constitutional deprivations of the confrontation right, the State bears the burden of proving the error was harmless beyond a reasonable doubt. *State v. Mercier*, 2021 MT 12, ¶¶ 11, 12 & 31, 403 Mont. 34, 479 P.3d 967.

Arguments

I. Under the Facts of the Case, the District Court Abused Its Discretion by Denying David's Objection to the Causal Relationship Instruction.

"[A]n accused is protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." *State v. Akers*, 2017 MT 311, ¶ 17, 389 Mont. 531, 408 P.3d 142 (internal quotations omitted). At the conclusion of the trial, the court instructed the jury as follows:

> If purposely or knowingly causing reasonable apprehension of serious bodily injury was not within the contemplation or purpose of the Defendant, either element can nevertheless be established if the result involves the same kind of harm or injury as contemplated but the precise harm or injury was different or occurred in a different way, unless the actual result is too remote or accidental to have a bearing on the Defendant's liability or on the gravity of the offense.

(Given Inst. 32; Trial Tr. 606-607). Defense counsel has objected to the instruction during the settlement of instructions. (Trial Tr. 582-583). The State's argued in support of the instruction.

> Your Honor, the State's position in considering giving this or offering this instruction is that there is testimony on the record that one of the bouncers [Corey Cayko], believed that it was the defendant's intention to shoot another bouncer by the name of Hayden Moore. However, the testimony on the record also reflects that all three of the bouncers who testified were either placed in reasonable apprehension of serious bodily injury by that firearm or reacted as if they were and there was enough information that they can infer, a jury can infer that.

> Because of that, the State's position is that even if it was the defendant's intention only to put Mr. Moore in fear, that intention transferring to the other bouncers who were standing near him provides a good faith basis to give this instruction.

(Trial Tr. 582-583). The Court gave the instruction. The jury was also instructed it could infer David's mental state from the circumstantial evidence, (Given Instruction 15), and that it could infer David's state of mind from his "acts and all other facts and circumstances in evidence which indicate his state of mind." (Given Instruction 21).

Giving the instruction when David was also charged individually with three separate crimes for which the State had to prove individual mental states lowered the State's burden to prove the mental state to each and every offense individually. Thus, in this instance, the causal relationship is inconsistent with *Mont. Code Ann. § 45-2-103(1)* (requiring proof of requisite mental state for all non-absolute liability offenses). By giving it, the court effectively turned the assault with a weapon offenses into strict liability offenses. Essentially, the State was allowed to prove and the jury was allowed to find that, because "knowingly or purposely" were elements of the offense, the jury could

assume the mental states existed if the result occurred.

The Commentary to the instruction, MCJI 2-111 (2022), provides courts on the origin and propriety of the instruction.

> The Montana Supreme Court decision in *Rothacher* indicates that this instructions should be given in any case in which causation is at issue as it was in *Rothacher*, a case in which the Defendant claimed, through other witnesses, that he did not intend to cause the death of the victim; instead he only hit and kicked him, and his resulting death was caused when his head struck the ground. The Court stated: ". . . that the requirement of purpose and knowing causation [for the defense of deliberate homicide] can occur without intending a specific result, so long as the same type of harm or injury was contemplated." *Rothacher*, 272 Mont. at 313, 901 P.2d at 88.
>
> The definition of the offense should also be given, as well as the elements instruction, the applicable mental states, and the voluntary act instruction, contained in this Chapter and defined in MCA § 45-2-202 (2021).

(Commentary: MCJI 2-111 (2022) (brackets in original)).

Rothacher dealt exclusively with a deliberate homicide. That is not the case with David. Further and unlike *Rothacher*, David did not present an argument either through himself or other witnesses that he did not intend the results of his actions.[5] No such evidence was

[5]In fact, David argued self-defense at trial.

presented at trial except from Corey's speculation and statement to the police on the scene "I believe I said, 'I thought he was going to kill Hayden.'" (Trial Tr. 441). If the State was going to use that statement in support of its argument for the Causal Relationship instruction, it also should have reminded the court of Corey's follow-up statement: "'I did not let him get that far.'" (Trial Tr. 442).

At trial, Corey testified "I thought I was going to get shot." This testimony does not justify giving the instruction and extending an alleged mental state as to Corey to two other alleged victims who are also the subject of separate counts. Giving the instruction may have been justified had the State charged David with one count of Assault With a Weapon, i.e., purposely or knowingly causing reasonable apprehension of serious bodily injury to Corey while attempting to try and kill Hayden. But, that would also be dependent on David presenting a defense that it was not his intent to cause that result in Corey but to Hayden.

This Causal Relationship instruction is based on *Mont. Code Ann. § 45-2-201,* which reads in relevant part:

(1) Conduct is the cause of a result if:

(a) without the conduct the result would not have occurred; **and**

(b) any additional causal requirements imposed by the specific statute defining the offense are satisfied.

(2) If purposely or knowingly causing a result is an element of an offense **and** the result is not within the contemplation or purpose of the offender, either element can be nevertheless be established **if**:

(a) the result differs from that contemplated only in respect that a different person or different property is affected or that the injury or harm caused is less than contemplated; **or**

(b) the result involves the same kind of harm or injury as contemplated **but** the precise harm or injury was different or occurred in a different way, unless the actual result is too remote or accidental to have a bearing on the offender's liability or on the gravity of the offense.

Mont. Code Ann. § 45-2-201 (emphasis added).

The Commission comments to the statute note the "section is concerned with offenses that are so defined that causing a particular result is a material element of the offense." *See also State v. Luchau*, 1999 MT 336, ¶ 21, 297 Mont. 415, 992 P.2d 840 (*Mont. Code Ann. § 45-2-201* is a "definitional statute setting forth the causal relationship

between conduct and result for those offenses, which as statutorily defined, require a specific result.)

Based on this commentary, the propriety of the causal relationship instruction is tied, in part, to the elements of the offenses for which David was charged.

As to the definition of "purposely," in the context of assault with a weapon, the court instructed "a person acts purposely when it is the person's conscious object to cause such a result." (Instruction 17[6]). For the crime of carrying a concealed weapon while under the influence, the court instructed "a person acts purposely when it is his conscious object to engage in conduct of that nature." (Instruction 18).

These definitions track those the court gave for "knowingly." "For the offense of Assault with a Weapon and Assault, a person acts knowingly when the person is aware there exists the high probability that the person's conduct will cause the specific result." (Instruction 19). "For the offense of Carrying a Concealed Weapon While Under the Influence, a person acts knowingly when the person is aware of his or

[6]The given instructions are found at Dkt. 85 of the district court's record.

her conduct." (Instruction 20).

These instructions are the correct mental state instructions as applied to the respective offenses. The offense of Assault with a Weapon requires the State prove David was aware that it was highly probable that his conduct would result in serious bodily injury to another by the use of a weapon or what reasonably appears to be a weapon.[7] Because Assault with a Weapon is a result-based offense, the causal relationship instruction could be appropriate. The problem with the instruction in David's case arose at the practical level due to the State's charging decision.

The State levied three separate counts of Assault with a Weapon alleging he committed the offense against three separate individuals. The jury was also instructed that "[e]ach count charges a distinct offense. You must decide each count separately. The Defendant may be found guilty or not guilty of any or all of the offenses charged. Your

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[7]It could reasonably be argued that the offense also requires a respective "circumstance" instruction, e.g., proof that David was aware of the circumstance the implement was a weapon or reasonably appeared to be a weapon. For obvious reasons, this issue was not raised in the lower court.

finding as to each out must be stated in a separate verdict." (Instruction 12).

The error in providing the causal relationship instruction in a case where the State charged three distinct acts and three distinct victims is that it lowers the State's burden of proof. With each count, the State was required to prove beyond a reasonable doubt that David was aware that it was highly probable his conduct would cause a specific result ("knowingly") to that particular intended victim referenced in that particular count. Alternatively it was required to prove that it was David's conscious object to cause a specific result to that particular intended victim ("purposely"). With this charging decision, the State accepted the burden that it could prove David's actions were the factual cause of the intended result in three separate instances.

It has long been a principle of criminal law that crimes must include both an *actus reas* and a *mens rea*. It is not enough that the defendant caused the prohibited result, but it must also be shown that at the time of his conduct causing that result the defendant had a culpable state of mind or intent to cause that result. By charging David

with three separate counts corresponding to three separate individuals, the State accepted the burden that it could prove both intent and act as to each offense and each individual victim. (Trial Tr. 615 ("So for each of these counts, we have to prove that the defendant, this guy, caused reasonable apprehension of serious bodily in each of these victims.")) Inclusion of the causal relationship instruction lowered that burden especially as it relates to the mental state elements.

To see just how the instruction lowered the burden, one need only look to the instruction. "If purposely or knowing causing reasonable apprehension of serious bodily injury was not within the contemplation or purpose of the Defendant, *either element* can nevertheless be established . . . ." (Instruction 32) (emphasis added). That instruction itself is confusing. Does it explain that either the mental state element **and** the result element (reasonable apprehension of serious bodily injury" can be established or, is it saying that either "knowingly or purposely" can nevertheless be established? The originating statute, *Mont. Code Ann. § 45-2-201*, clarifies the answer is the latter: "If purposely or knowingly causing a result is an element as contemplated

but the precise harm or injury was different. . . ." In other words, both *Mont. Code Ann. § 45-2-201* and Instruction 32 broaden the scope of culpability of either a person's "conscious object" to cause a specific result, or what results are highly probable to occur from a person's conduct. Because Instruction 32 does not adopt the statutory language verbatim, the Instruction does not clarify that the "elements" referenced are "purposely or knowingly" and not the element of "reasonable apprehension of serious bodily injury."

Instruction 32 then goes on to instruct that, even if reasonable apprehension of serious bodily injury to each respective victim was not within the contemplation or purpose of David, "knowingly" or "purposely" could still be satisfied "if the result involves the same kind of harm or injury as contemplated but the precise harm or injury was different or occurred in a different way[.]" Again, because the State charged three precise acts that harmed three distinct individuals, Instruction 32, when read in conjunction with Instruction, the "harm or injury as contemplated" applies individually as to each individual separately.

The court did not instruct the jury under *Mont. Code Ann. § 45-2-201(2)(b)* to the effect that knowingly or purposely could be satisfied if the result of reasonable apprehension of serious bodily injury occurred but to a different victim than the one intended. In this case an example would be that David pulled his weapon on Tiny, who did not experience reasonable apprehension of serious bodily injury but Cory did experience that result. In a trial for assault with a weapon on Cory, *Mont. Code Ann. § 45-2-201(2)(a)* would prohibit David from being acquitted under the defense that he did not have the mental state to cause Cory that result. Again, that is not the theory under which the jury was instructed but it was how the State justified and used the instruction to lower its burden of proof. (See e.g., Trial Tr. 582).

The burden is lowered because Instruction 32 imputes culpability (*mens rea*) if the result is achieved (reasonable apprehension of bodily injury) unless and only unless the actual result is too remote or accidental. In essence, as long as the State was able to establish the result occurred in any victim, "knowingly" or "purposely" were established for the other two victims. This type of transferred intent

argument is inconsistent with the charges against David. The only exception to the transferred intent or imputation of *mens rea* would be if each victim's own reasonable apprehension of serious bodily injury was either accidental or too remote.

"A strict, or absolute, liability offense is one which does not require proof of a mental state as an element of the offense." *State v. Himes*, 2015 MT 91, ¶ 44, 378 Mont. 419, 345 P.3d 297 (citing Black's Law Dictionary 453 (Bryan A. Garner ed., 10th ed. 2014)). At minimum, Instruction 32 converted two of the three offenses against David into strict liability offenses and lowered the State's burden of proof to establish David acted "knowingly" or "purposely," and that the prohibited result occurred as to each count and each individual referenced in that count.

Because Instruction 32 offered the State an alternative way to impute the mental state based solely on the fact that a result occurred, the Instruction lowered the State's burden. It was error for the court to give the instruction.

II. Sufficiency of the Evidence on Reasonable Apprehension of Serious Bodily Injury on Counts I & III.

Montana law defines "serious bodily injury" as a bodily injury that (i) creates a substantial risk of death; (ii) creates serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ; or (iii) at the time of the injury, can be expected to result in serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ. The term can also include a serious mental illness or impairment. *Mont. Code Ann. § 45-2-101(66).*

On direct, Hayden Moore testified that when he saw the gun he felt "scared." (Trial Tr. 222). He also testified that "its definitely still bothers me and still kind of freaks me out. And if I'm 100 percent honest, I still have nightmares. I mean, just - - it was traumatic. (Trial Tr. 224). However, Hayden and David were in a physical fight before the firearm was produced. Even viewing the testimony in a light most favorable to the State, it cannot be ascertained what, precisely, still freaks Hayden out: the fight or seeing the gun. Further, no evidence

produced by the State suggests that being "scared," "freaked out," or having nightmares constitutes a serious bodily injury as defined by statute.

Shane Rieker, aka "Tiny," may or may not have seen the gun. (Trial Tr. 324). Under certain circumstances, this Court has held that reasonable apprehension can occur even if a victim does not see the gun. *State v. Swann*, 2007 MT 126, ¶ 27, 337 Mont. 326, 160 P.3d 511. No such circumstances exist in this case. Tiny testified he was "kind of scared" but, even when prompted, he did not testify that he was concerned he might get shot. (Trial Tr. 325). Rather, he was more concerned for "his customers and stuff." (Id.)

Finally, Cory Cayko testified about the effect of seeing the firearm David had on him. "I jumped on [the defendant's] arm, grabbed ahold of the slide of the weapon, and did everything I've ever been trained to do to - - on how to disarm somebody." (Trial Tr. 426). He directed the weapon toward his thigh so "at the very least if it was going to fire, I wanted it to fire toward the ground or into my thigh." (Trial. Tr. 427). It was only on cross-examination that he testified that he thought he

was going to get shot. (Trial Tr. 442). This testimony may be sufficient to sustain a conviction for Court II. For Counts I and III, however, there is insufficient evidence to sustain the convictions.

The standard for this Court in reviewing whether there was sufficient evidence to convict David of the offense of Assault with a Weapon is whether, upon viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Boyd*, 2012 MT 323, ¶ 12, 407 Mont. 1, 501 P.3d 409.

This Court has held the "requirements of" the Assault with a Weapon statute "are satisfied merely by the existence of circumstances which lead *the victim* to reasonably apprehend that he or she will be injured by a weapon." *Swann*, ¶ 27 (emphasis added). When compared to the standard, the analysis of the issue can become complicated. What matters, however, is whether there is objectively reasonable evidence when viewed in a light most favorable to the State that the victim's testimony objectively but reasonably apprehended that he would be injured by a weapon. The analysis is not whether a

reasonable person in the victims shoes, after hearing all of the evidence, would conclude the victim *should* have had that reasonable belief.

In light of this victim-centric analysis, the evidence at trial is not sufficient to support a conviction. Neither the testimony of Hayden nor Tiny is sufficient to establish the existence of circumstances that they reasonably believed they would be subject to serious bodily injury as a result of David's actions. Even when viewed in a light most favorable, fear for another or nightmares is insufficient to meet the element absent further evidence. That an individual juror may have been justified in feeling a reasonable apprehension had they been in either Hayden's or Tiny's shoes is insufficient to sustain the conviction. In light of the paucity of evidence, this Court should reverse David's convictions on Counts I and III.

III. The District Court Erred by Admitting David's Blood/Toxicology Results.

At trial, David objected to the introduction of State's Exhibit B, which was a hospital lab report for David's blood alcohol level. (Trial Tr. 364). The report was introduced through the testimony of Dr. Natalie Wood, who gave testimony befitting both her role as a medical

doctor under *Mont. R. Evid. 702* and as David's treating physician at the Billings Clinic, *Mont. R. Evid. 701*. At trial, defense counsel objected to the introduction of the report as "hearsay," but did not levy an objection on confrontation grounds. The court's ruling admitting the Exhibit violated both the hearsay rule and the Confrontation Clause.

District courts are generally granted great deference in their evidentiary rulings, and this Court generally reviews such rulings for an abuse of discretion. *State v. Passmore*, 2010 MT 34, ¶ 51, 355 Mont. 187, 225 P.3d 1229. A district court abuses its discretion if it acts arbitrarily without the employment of conscious judgment. *Id.* Additionally, if the court's ruling is based on an interpretation of an evidentiary rule, this Court's review is *de novo*. From the record, it is impossible to determine what authority the district court used in overruling David's hearsay objection. It was simply overruled without argument by the state or explanation by the Court. (Trial Tr. 364). Thus, both the parties on appeal, and this Court, are left to speculate upon what authority the court based its otherwise discretionary decision. Because the objection before the court was on "hearsay"

grounds, it will be addressed first.

The document and the Doctor's testimony based on the report are hearsay. The report is a written assertion made by someone other than the doctor[8] and it was offered for the truth of the matter it asserted, i.e., David's blood results. Absent an exception, the report was inadmissible. *Mont. R. Evid. 802*. Establishing the foundation for admitting hearsay evidence requires the proponent to establish that the evidence meets not just the standards for a hearsay exception, but that the evidence meets the requirements under other rules of evidence, including relevancy and authentication. *See United States v. Bellucci*, 995 F.2d 157, 160 (9th Cir. 1993) (the proponent of a writing at trial must overcome authentication, best evidence *and* hearsay objections).

In David's case, the district court did not require the State to respond to the hearsay objection to provide any explanation as to the relevancy, authentication, or even an exception to the hearsay exclusionary rule. Consequently, the State – as the proponent of the evidence – was relieved of those burdens and David and the Court are

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[8]There is no evidence in either the Exhibit or the record that Dr. Wood was the one who performed the tests.

now left to guess what exception applied and what foundation/authentication supported the admission of the State's Ex. 4.

In the fog of this speculation, it is critical to note that the State made no representation or argument that the individual who performed or conducted the toxicology test was unavailable either for hearsay or confrontation purposes. In the absence of such a showing, none of the hearsay exceptions set forth in *Mont. R. Evid. 804* should apply.

We are thus left with the litany of hearsay exceptions in *Rule 803* and the expert hearsay exception in *Mont. R. Evid. 703*. Of the *Rule 803* exception a great many can be excluded based solely on the nature of the evidence. This would likely include *Rule 803* sections (1) - (3), (7) - (23). Remaining are sections (4) (statements made for purposes of medical diagnosis or treatment); (5) (recorded recollection); and (6) (records of regularly conducted activity).

Rule 803(4) excepts statements made for purposes of medical diagnosis or treatment. While a report as a "written assertion," can qualify as a "statement," nothing in State's Exhibit 4 or the record gives any indication who the author or "declarant" of the statement is. Even

if the report did indicate such, it would not fulfill the policy underpinning *Rule 803(4)*. *See e.g., White v. Illinois*, 502 U.S. 346, 355-56 (1992). Further, the exception is almost universally restricted to only apply to statements made by the individual seeking medical attention and not to statements made by the medical professional to the patient or statements between other medical professionals. *Bulthuis v. Rexall Corp.*, 789 F.2d 1315, 1316 (9th Cir. 1985) ("Rule 803(4) applies only statements made by the patient to the doctor, not the reverse."); *Field v. Trigg County Hosp., Inc.*, 386 F.3d 729, 735-36 (6th Cir. 2004). Here, a "statement" in the form of a laboratory report entered into the record as substantive evidence and testified to by a medical provider does not meet the exception in *803(4)*. If this was the court's basis for admitting the report, it was both a erroneous interpretation of the Rule and an abuse of discretion.

Rule 803(5) exempts recorded recollections from hearsay exclusion. This exception is unlikely to save the district court's ruling in David's case, especially since the report got admitted into evidence, which patently violates the plain text of the Rule. Further, because it is

unlikely Dr. Wood wrote the report, it does not meet the criteria that the report was a statement "made or adopted by the witness when the matter was fresh in the witness's memory."

The only other conceivable hearsay exception could be *Rule 803(6)*, records of regularly conducted activity. While the exception in *Rule 803(6)* applies to "diagnosis [] made at or near the time of the acts, events, conditions, opinions, or diagnosis," the requires the "testimony of the custodian or other qualified witness." At trial, the State made no effort to qualify Dr. Wood as either the custodian or as a "qualified witness" to establish that the report or tests were "kept in the course of a regularly conducted business activity" and that it was "regular practice of that business activity to keep the memorandum," etc. *See e.g., United States v. Chu Kong Yin*, 935 F.2d 990, 994-1000 (9th Cir. 1991) (discussing separate authentication and hearsay requirements for the admission of foreign public documents). Finally, argument can be made that the results from the blood tests fall short of an actual "diagnosis" or that Dr. Wood possessed the requisite expertise to support the conclusions, i.e., whether she could provide foundation or

authentication for the results contained in the report.

If it was the State's intention to invoke *Rule 803(6)* as grounds to admit either the report or Dr. Woods' testimony on the report, it failed to fulfill the requirements of the rule and the court's admission of either was an abuse of discretion. If the court's ruling was, in fact, predicated on *Rule 806(6)* the ruling cannot survive *de novo* review in the face of the evidence – or lack thereof – to support the report as a business record.

The other evidentiary rule that could be argued to support the admission of State's Ex. 4 is *Mont. R. Evid. 703*, the basis of testimony by experts. Invocation of this Rule presents the State with a particularly sticky wicket given the dual nature of Dr. Woods' testimony. "Rule 703 thus contemplates that a testifying expert may refer to otherwise inadmissible hearsay upon a foundational showing that the expert relied on the otherwise inadmissible evidence in forming *the expert's opinion* and the information is of a type reasonably relied upon by experts in the field of expertise." *In re C.K.*, 2017 MT 69, ¶ 18, 387 Mont. 127, 391 P.3d 735. (emphasis added). The problem for the

State is that the lion's share of Dr. Woods' testimony was of the lay variety contemplated by *Mont. R. Evid. 701*. *Rule 703* only applies to expert opinions, not the "opinions or inferences" permitted to lay witnesses.

This Court has yet to fully address whether treating physicians or other treating medical providers are lay witnesses or expert witnesses. This Court is not alone. The United States Court of Appeals for the Second Circuit has referred to the distinction as an "increasingly thinning line." *United States v. Mejia*, 545 F.3d 179, 190 (2d Cir. 2008) *See also:* D. Beane & T. Karatinos*, Catching the Chamaeleon: When is the Treating Physician an Expert?*, Fed. Law., May 2004, at 26. As a fact witness, a treating physician can testify as "first-hand participants in the diagnosis and treatment of the plaintiff," yet "diagnosis and treatment are almost always certainly informed by the physician's specialized training and knowledge." Eric S. Dreiband*, Recent Developments in Disabilities and Discrimination and Litigation: Use of Expert Witnesses,* Employment Discrimination Law and Litigation, 2010, 291 (PLI Lit. & Admin. Practice Course Handbook).

Common sense would dictate that any treating medical provider can testify as a lay witness assuming otherwise necessary qualifications for her testimony. For example, a treating physical could testify she witnessed a skinned knee, bruising, a gaping torso wound, etc. The question gets more problematic when the medical provider is then allowed to testify about diagnosis, prognosis, and treatment of what she observed. "[A] treating doctor (or similarly situated witness) is providing expert testimony if the testimony consists of opinions based on 'scientific, technical, or otherwise specialized knowledge' regardless of whether those opinions are formed during the scope of the interaction with a party prior to litigation." *Musser v. Genitiva Health Services*, 356 F.3d 751, 757 n.2 (7th Cir. 2003). A treating medical professional's opinions regarding diagnosis of a medical condition are almost always expert testimony because diagnosis requires judgment based on scientific, technical, or other specialized knowledge in almost every case. *See James River Ins., Co. v. Rapid Funding, L.L.C.*, 658 F.3df 1207, 1214 (10th Cir. 2011).

The distinction between the type of testimony being given by the

expert provider is critical because it informs the admissibility of otherwise inadmissible facts or data under *Rule 703* when those facts or data are used by the medical professional as a basis for an "opinion or inference." If a doctor's testimony does not implicate her scientific, technical, or otherwise specialized knowledge, it is not the type of opinion or inference contemplated by *Rule 703*. David's case presents an excellent example of the distinct testimony, the confusion that arises from such testimony, and the potential for misuse of *Rule 703*.

Dr. Wood's testimony begins on page 356 of the transcripts and ends on page 379. The State began its direct by asking Dr. Wood to describe her "career path," including an undergraduate degree from the University of Kentucky and a medical degree from Virginia Commonwealth University in Richmond, Virginia, into her medical residency. (Trial. Tr. 357-358). The State then moved further into the expert arena by asking "what are some of the typical kinds of orders, I guess, like routine practice, [when] somebody comes in in an ambulance." (Trial Tr. 359). Dr. Woods noted that part of her practice is to order "laboratory studies," which included "blood work." (Id). This

blood work, which includes tests for alcohol or other drugs, can tell Dr. Woods "lots of different things." (Trial Tr. 359-360).

The State then steered Dr. Woods toward traditionally lay-testimony, by asking her about the "early morning hours of November 25th, 2023." Dr. Woods described David as "very agitated, and confused," and that he would not "answer any of the questions" she asked. (Trial Tr. at 360-361).

The testimony then shifted back to the expert variety when Dr. Woods explained she ordered "toxicology labs, which is a blood alcohol level," tested "[i]n the laboratory at the Billings Clinic." The doctor affirmed she bases "medical decisions" "off the information" received from the lab work. (Trial Tr. at 362-363). The testimony suggested the entire basis of her expert decision-making is predicated on the assumption the "lab work is accurate[.]" (Trial Tr. 363). This area of testimony is exclusively subject to *Mont. R. Evid. 703*.

If *703* served as the basis for the court's ruling, it was still error for the court to allow Dr. Woods to act as a conduit for the admission of the report itself. Certainly, she can rely on it or use the results to guide

her testimony, but the report's out-right admission into evidence under these circumstance is not supported by any rule of evidence and, in fact, is prohibited by the Confrontation Clauses to both the United States and Montana Constitutions. *See e.g. Melendez-Diaz v. Mass.*, 557 U.S. 305 (2009); *State v. Laird*, 2019 MT 198, 397 Mont. 29, 447 P.3d 416. This is especially true since the report was introduced as evidence and used for the truth of the matter its conclusion asserted. *See e.g., Williams v. Illinois*, 567 U.S. 50, 57-59 (2012) (distinguishing between confrontation clause issues when a DNA lab report was not admitted for the truth of the matter it asserted).

Although the Court may be inclined to conclude the introduction of the report (Appendix C) is non-testimonial and not subject to a Confrontation Clause analysis, such an inclination is belied by the "interpretative data" conclusions of the report. In *Melendez-Diaz,* the United States Supreme Court found affidavits to be testimonial and subject to the Confrontation Clause because they were "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

Melendez-Diaz, 557 U.S. at 311 (citing and quoting *Crawford v. Washington*, 541 U.S. 36, 52 (2004)).

For example, if the sole purpose of the blood alcohol report is to apprise the physician of the patient's blood-alcohol level for future treatment purposes, they why does the Interpretative Data section of the report contain a notation that "[l]evels greater than 80 mg/dl = Legal intoxication in Montana"? That notation is clearly an indication that medical providers, laboratory technicians, and other reasonable individuals believe that the report "would be available for use at a later trial." *Id.*

The impact of the introduction of this report in the absence of an articulated hearsay basis or reference to the Confrontation Clause is especially prejudicial to David's conviction on Count V, Carrying a Concealed Weapon While Under the Influence. But, the court instructed and the State argued that David was intoxicated and was responsible for his actions despite his intoxicated condition. The admission of the report was not supported by the Rules of Evidence or the respective constitutions and was, ultimately, error.

Conclusion

Given the number and impact of the errors that occurred in David's trial, he respectfully requests this Court reverse his conviction and grant him a new trial. Even if the Court concludes the legal errors do not warrant reversal on all counts, the insufficiency of the evidence presented at trial as to Counts I and III warrant, at minimum, reversal of those two serious felonies that resulted in consecutive sentences for each.

Respectfully submitted this 20th day of February, 2026.

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CERTIFICATE OF COMPLIANCE

Pursuant to M.R.App.P., Rule 11(4)(e), I certify that this principal brief is printed with a proportionately spaced Century text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by WordPerfect is 9,704 words, excluding captions, tables, and certificates.

DATED this 20th day of February 2026.

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CERTIFICATE OF SERVICE

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