IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0280

STATE OF MONTANA,

Plaintiff and Appellee,

v.

VAUGHN JAMES,

Defendant and Appellant.

BRIEF OF APPELLANT

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

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ISSUES PRESENTED

1. Whether the district court erred when it denied James's motion to dismiss the criminal endangerment charge based on a violation of his statutory right to be free from double jeopardy.

2. Whether the district court erred when it denied James's challenge to the State's use of a peremptory challenge to remove a Native American juror from the panel when the State's proffered explanation for the strike was not credible in that the State allowed a similarly situated non-Native juror to serve.

3. In the alternative, whether counsel was ineffective by failing to raise the equal protection argument regarding the State's use of its peremptory challenge in a timely fashion.

4. Whether the district court erred when it denied James's motion for a new trial on the partner and family member assault charge based on the State's failure to disclose admittedly exculpatory photographic evidence of the victim.

STATEMENT OF THE CASE

James was charged by Information in Twentieth Judicial District Court in Lake County with criminal endangerment, a felony. The State later amended the Information to add a charge of partner or family member assault, a misdemeanor, which occurred on the same evening. He was convicted of both counts after a jury trial and committed to the Montana State Prison for a period of thirty years with

twenty-two years suspended. James filed a timely appeal of his conviction and judgment in this matter.

FACTUAL AND PROCEDURAL BACKGROUND

On June 29, 2007, James was charged in the Tribal Court of the Confederated Salish and Kootenai Tribes (Tribal Court) with one count of the offense of driving or in actual physical control of a motor vehicle while under the influence of alcohol or drugs and one count of the offense of fleeing from or eluding a peace officer. (D.C.Doc. 20 at Ex. A.) With respect to the latter charge, the criminal complaint alleged:

> That on or about June 28, 2007, at approximately 10:20 p.m., at or near milemarker 15 through 11, Highway 35, Montana, on the Flathead Indian Reservation, the above named Defendant committed the offense of FLEEING FROM OR ELUDING A PEACE OFFICER, by operating a white 1998 Chevrolet bearing Montana license plates AFL-847 and knowingly fleeing from an Officer who was attempting to stop the vehicle by traveling at a high rate of speed and/or making improper passes.

(D.C.Doc. 20 at Ex. A.)

On July 16, 2007, the State of Montana sought leave to file an information in the Twentieth Judicial District Court in and for Lake County charging James with criminal endangerment in violation of Mont. Code Ann. § 45-5-207. (D.C.Doc. 1.) The affidavit in support of the information alleged on June 28, 2007, an officer from the Lake County Sheriff's Office responded to a report of an assault near Woods Bay, Montana, and "was advised that the male suspect had fled the scene"

traveling south on Highway 35 in a white Chevy Malibu. The officer then passed a white passenger car speeding in the southbound lane, turned around, activated his emergency lights, and pursued the car. The officer later discovered James was the driver of that car. The officer observed James traveling at a high rate of speed and saw him pass two southbound cars in no passing zones and on corners. (D.C.Doc. 1.) Based on this information, the court granted the State leave to file its Information, in which it alleged:

> On or about June 28, 2007 in Lake County, Montana, the Defendant knowingly engaged in conduct that created a substantial risk of death or serious bodily injury to another by passing in no passing zones and driving his vehicle at speeds up to 100 mph on Highway 35.

(D.C.Doc. 2.)

On December 21, 2007, pursuant to a plea agreement, James entered a guilty plea to the Tribal Court charge of eluding a police officer and the Tribal Court dismissed the drunk driving charge. The Tribal Court sentenced James to serve 90 days with 78 days suspended for one year on the condition that he obey all laws. James was also given credit for twelve days served before the change of plea. (D.C.Doc. 20 at Ex. B.)

On July 25, 2007, James served discovery requests on the State, including the following request for production:

> REQUEST NO. 5: Please provide copies of all material or information that tends to mitigate or negate the Defendant's guilt as to

> the offense charged or that would tend to reduce the Defendant's potential sentence.

(D.C.Doc. 6.)

On December 27, 2007, James filed a motion to dismiss the criminal endangerment charge in this case based on Montana's double jeopardy statute, Mont. Code Ann. § 46-11-504(1). (D.C.Doc. 20.) The State opposed the motion on the ground that the two charges did not arise out of the same transaction. (D.C.Doc. 22.) The court denied James's motion to dismiss. (D.C.Doc. 24, attached as Exhibit A.)

The State later amended the Information to add a charge of partner or family member assault (PFMA), a misdemeanor, based on the events that led up to the high speed chase charged in the original Information. (D.C. Docs. 33, 38-39.) James proceeded to trial on both charges.

During voir dire, the prosecutor asked the panel if there was anyone present who had something going on in their lives that might prevent them from giving the trial their full attention. Prospective Juror Alexander Mackey (Mackey) indicated in the affirmative and the following exchange occurred:

> MACKEY: I have a class all next week for my career that I need to do. I should be doing homework on it right now actually, but Monday through Thursday.
>
> [PROSECUTOR]: Well, we'll be done well before that.
>
> MACKEY: By Monday?

[PROSECUTOR]: Well, I shouldn't have guaranteed.

MACKEY: I'm not coming Monday.

[PROSECUTOR]: The trial's not over until the jury returns a verdict. How long the jury takes to return a verdict is up to the jury. But 99 percent sure that we're not going to be here Monday.

MACKEY: All right.

(Trial Tr. at 71-72.)

Defense counsel also asked the panel whether anyone believed they had time constraints that might affect how they approached the case. Mackey again discussed his time constraints:

MACKEY: Well, I was assured that I got a 99 percent chance that it won't go over to next week, so if I get picked as a juror[,] I'm on board.

[DEFENSE COUNSEL]: The kicker is that one percent.

MACKEY: I would be pretty upset if it rolls over to that.

(Trial Tr. at 133-34.)

Prospective Juror Rogers also indicated she had time constraints.

ROGERS: I apologize. I'm in college and I've already missed one class today. And if it goes Thursday and Friday[,] I'm missing classes and mid terms, and this is my professional development. This is for my job. I will stay here and I will do my job. I will do my duty. But that is a time constraint on me.

. . . .

[DEFENSE COUNSEL]: You're willing to hang in there?

ROGERS: Yes.

(Trial Tr. at 134-35.)

Another prospective juror, Johnson, indicated he would rather not be on the jury. The court asked whether he was willing to serve anyway. The record does not show any response from Johnson. The State offered no opinion on the matter. However, the court denied counsel's challenge for cause. (Trial Tr. at 136.)

Defense counsel told the panel that James is Native American and asked if any of the panel members were enrolled or enrollable members of a tribe, or if they self-identified as Native American. Two panel members responded affirmatively: Michael Durglo (Durglo) and Mary Rogers (Rogers). (Trial Tr. at 126-27.) Durglo also indicated he might have a problem with the fact that this matter was not handled in Tribal Court and that the charge might have been inflated to a felony in order to keep it out of tribal court. (Trial Tr. at 127-32.)

The State used two of its peremptory strikes to remove Rogers and Durglo from the jury. The State apparently also struck Johnson, but did not remove Mackey. (Trial Tr. at 146-47, 159-60.) There apparently was a sidebar after the peremptory strikes were exercised at which defense counsel raised the issue of whether the State's peremptory strikes of Rogers and Durglo were based on the prospective jurors' race in violation of the Equal Protection Clause as described in

Batson v. Kentucky, 476 U.S. 79 (1986). The court, however, had the clerk read the names of the twelve jurors selected pursuant to this process and had them take their seats in the box. The court then asked counsel to stipulate that those jurors were "the jurors selected and that they are properly selected." Defense counsel stated, "With the pending matter we will so stipulate." The court then administered the jurors' oath to the selected jurors. The court took a break and asked that all of the panel members, including those who had been "excused," to return for selection of an alternate. (Trial Tr. at 144-46.)

Outside the presence of the panel, defense counsel made a motion for a mistrial and referenced *Batson*. Defense counsel argued he had made a *prima facie* case under *Batson* because both of the Native American jurors on the panel were stricken by the State. (Trial Tr. at 146-47.) The State did not challenge the sufficiency of James's *prima facie* case and instead proceeded to justify the strikes:

> Mr. Durglo I was uncomfortable with, with the discussion that happened about the jurisdictional issue with Tribal Court. And – well, quite frankly I was uncomfortable that he didn't have some concerns this was – that this matter shouldn't be tried in this court.
>
> As for Ms. Rogers, she expressed concerns about being here. She's missing class. She's in college. And she told the Court and us that she was missing classes today and that she was going to continue to miss classes tomorrow. I was concerned that her mind wasn't going to be focused on the trial.

(Trial Tr. at 147.)

The court then gave defense counsel the opportunity to respond. He argued:

> I think by [his] own statement Mr. Durglo was excluded on the basis of race. And his comments about Tribal Court jurisdiction simply was a reflection of his Native American ethnicity.
>
> With regard to Ms. Rogers, she expressed the same time constraints that several other jurors did in terms of other obligations and her willingness to sit through the process if she were selected. And I don't think that the State has overcome the issue. If there were four more jurors or even if he had only taken off one of the two jurors. But at this point it appears that the only two Native Americans were excluded and there's no other people on the panel of any Native American background.

(Trial Tr. at 147-48.)

The court then ruled as follows:

> Well, the court's ruling in this is, as I understand it there's a three-part test, and the first part is that the defendant has to show that he or she, the member of the jury is a member of a racial group. And certainly by having those people identify the fact that they are enrolled or enrollable, that factual step has been met.
>
> Secondly, then the defendant has to show that the prosecutor exercised a peremptory challenge to remove those members, and that in fact was the case.
>
> The third issue, which is the more difficult one for the Court, is that the Court must make a finding that such facts or any other relevant circumstances raised an inference that the prosecutor used that peremptory challenge based strictly on account of their race. And while I completely agree it is totally appropriate and responsible of [defense counsel] to make that challenge, the difference that I see is that the Court shares some of the concerns that were raised by Mr. Durglo, not on the basis of his race but on the basis of his concern about where these charges were filed and the confusion with regard to were they appropriately filed in this court or were they appropriately filed in another court.

> And if to eliminate that issue from the discussion of the jury, which the Court finds is not something the jury should be making a determination about, to have challenged Mr. Durglo, the Court doesn't find that that was done on the basis of race as much as it was on the basis of his expressed concern that these charges were inappropriately filed.
>
> And I carry with that the sense that somehow that was of disrespect to the Tribal Court, and I know of no way other than to utilize a peremptory challenge to address that issue and keep the case in the neutral position. [Defense counsel] is correct that there was one other juror that expressed concerns with regard to his circumstances that he had that were of time constraint, but the difference is is that [juror] in fact said that there wasn't a problem until next Monday and both counsel have assured me there is no reason to believe that we will do it next Monday.
>
> Furthermore, it is the Court's intention to appropriate an alternate jury, so in the event that came to pass I will excuse Mr. Mackey and allow him to go to the class that he needs to attend. And that was the specific and very forceful concern of Ms. Rogers, was that she was missing class today and would be missing three more.
>
> I do agree that, as I indicated, [defense counsel] has satisfied two of the three, but because of the specific statements that are germane to the record, the Court finds that the prosecutor's representation that he exercised his peremptory challenges for initially a neutral reason satisfy the Court. So we will proceed.
>
> We'll go ahead . . . [and] pick an alternate juror from the next three that remain. I'll allow each side a challenge to that and then we'll see. And the parties stand noticed that in the event that we go past Friday I will be replacing Mr. Mackey with that alternate juror unless of course we've run into illness problems prior to that time.

(Trial Tr. at 148-51, attached as Exhibit B.)

The parties proceeded to pick an alternate juror at that time. After the alternate was sworn, the court and the parties met in chambers, at which point the court further explained its *Batson* ruling:

> I was going to go back and check one of the other factors that the Court was considering in the course of the challenge that was made by the defendant, the additional person who was challenged, which was Mr. Johnson who did not want to be here. And that was one of the additional factors that the Court did consider, is the State challenged all of the people who represented on the record that they really didn't want to be present. So before I released the jury panel I wanted to make that finding so [defense counsel] was aware of it if you have any further argument or comments, or I wanted to make sure that you had opportunities before I released the jury.

(Trial Tr. at 159-60.)

Defense counsel made no further argument and rested on his prior argument. (Trial Tr. at 160.)

The alleged victim of the PFMA charge, Tracy Shaw (Shaw), did not testify. With respect to that charge, the State called two witnesses who testified they had been drinking at a bar across the street when they observed James punch the victim in the face at about 10:30 p.m. on the evening in question. (Trial Tr. at 177, 187, 197-200, 206.) The accounts of the witnesses, however, differed in some respects.

Brad Reedstrom (Reedstrom) testified James and Shaw were arguing loudly before the altercation. (Trial Tr. at 177, 187.) He testified Shaw fell on her rear and then on her back. (Trial Tr. at 178.) He explained he immediately ran across the street to check on her and observed that her face was "red and stuff" from the

punch. He did not observe any injuries "beyond that." (Trial Tr. at 179.) Reedstrom testified when the paramedics arrived, Shaw denied anything had happened and did not go in the ambulance. (Trial Tr. at 189-90.)

Bruce Bruck (Bruck) testified Shaw and James had exited the bar across the street from where he was located about ten to fifteen minutes prior to the altercation and "there was some words exchanged." (Trial Tr. at 199.) The couple returned to the bar. When they exited the second time, Shaw was "definitely after [James] about something," her lips were moving and her head was bobbing. (Trial Tr. at 198-99.) James then turned around and punched Shaw in the head with his left hand. Shaw "dropped straight down" to her knees. (Trial Tr. at 200.) Bruck told someone else in the bar to call 911 and went across the street himself. (Trial Tr. at 201.) When he arrived, Shaw was on her feet. Bruck did not see any marks, cuts or scrapes on Shaw. (Trial Tr. at 208.) While Bruck was present, Shaw denied a couple different times that James had hit her. (Trial Tr. at 209.)

During closing argument, the prosecutor reminded the jury that Reedstrom testified he saw Shaw lying on the ground and "noticed a red mark on her face." (Trial Tr. at 341.)

On November 14, 2008, the jury convicted James of both counts. (D.C.Doc. 83.) On December 11, 2008, James filed a motion for a new trial based on *Brady v. Maryland*, 373 U.S. 83 (1963), arguing that the State possessed potentially

exculpatory photographs showing the absence of injuries to the alleged victim of the assault taken shortly after it was supposed to have occurred and that the State had failed to provide the defense with copies of the photographs despite James's discovery request for all exculpatory materials. (D.C.Doc. 87.) The court held a hearing on the motion, but did not take evidence. The State conceded the Sheriff's Office took a booking photograph of Shaw on the evening of the alleged assault. The State further conceded the photograph "shows no injuries" to Shaw's face. (1/22/09 Hrg. Tr. at 6.) The State conceded it had not provided the defense with a copy of the photograph, and it failed to provide a copy to the defense or the court either before or during the hearing. (1/22/09 Hrg. Tr. at 4, 7.) However, the State argued the motion should be denied because the photograph "is consistent with the testimony at trial." (1/22/09 Hrg. Tr. at 6-7.) The court orally denied the motion and followed that ruling up with a written order. (1/22/09 Tr. at 6-7, attached as Exhibit C; D.C.Doc. 94, attached as Exhibit D.)

The court entered its amended written judgment on March 27, 2009, in which it committed James to the Montana State Prison for thirty years with twenty-two years suspended on the criminal endangerment charge and sentenced him to serve six months with all time suspended but the 116 days James served pretrial on the PFMA charge. (D.C.Doc. 104, attached as Exhibit E.) James filed a timely notice of appeal.

SUMMARY OF ARGUMENT

James was convicted of eluding a peace officer in tribal court based on his admission that he knowingly fled from an officer by traveling at high rates of speed and making improper passes. He was later charged in State court with criminal endangerment based on that same conduct, and ultimately was convicted of that charge. Both charges arose out of the same transaction in that the conduct was exactly the same, and it, therefore, was motivated by the same purpose: to avoid arrest and prosecution. The district court, therefore, erred when it failed to dismiss with prejudice the criminal endangerment charge pursuant to Montana's double jeopardy statute.

The prosecutor used his peremptory challenges to remove both Native American members of the venire from the jury. Although the prosecutor provided a race-neutral reason for removing Rogers from the panel, that proffered reason applied just as well if not with more force to an otherwise-similar non-Native panel member, Mackey, who was permitted to serve. The prosecutor failed to make any distinctions between the two panel members, and the court's own rationalizations are not evidence of the prosecutor's intent. The court never specifically found the prosecutor's stated reason was credible or sincere and instead provided its own justifications for the strike. Because the prosecutor's only reason for striking Rogers must fail as not uniformly applied to nonminority jurors, this Court must

conclude the only and actual reason for the strike was race. The court's failure to remedy this issue is structural error requiring this Court to reverse James's convictions.

Defense counsel timely raised the *Batson* issue. Although the jury had already been sworn in, the alternate had not yet been picked nor had the venire been released. To the extent the Court concludes the *Batson* issue was not timely raised, counsel's failure to do so constituted ineffective assistance of counsel that prejudiced James. Either way, he is entitled to a new trial on the charges.

The alleged victim of the PFMA charge was arrested by the Lake County Sheriff's Department on the night of the incident. The State concedes a booking photograph was taken of Shaw on that evening, that the booking photograph was in the State's possession, that the booking photograph would show that Shaw suffered no visible injuries from the alleged punch to her face, and that the State did not disclose that booking photograph to the defense before trial. Contrary to the district court's finding, one of the State's eyewitnesses testified directly that Shaw had a red mark on her face and the prosecutor emphasized this testimony during his closing argument. In other words, whether Shaw suffered visible injuries was certainly at issue during the trial, as was the broader issue of whether Shaw suffered bodily injury as a result of the contact. The evidence was not merely cumulative, it was exculpatory, and it tended to impeach the testimony of one of

only two witnesses to the event. In addition, contrary to the court's conclusion, defense counsel did not have a duty to use reasonable diligence to obtain the photograph from an independent source as neither defense counsel nor the defendant actually knew the photograph existed or that its exculpatory nature, and there was no independent source for this evidence which was created by and in the possession of the State. The district court, therefore, erred when it denied James's motion for a new trial on the PFMA charge.

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT DENIED JAMES'S MOTION TO DISMISS THE CRIMINAL ENDANGERMENT CHARGE BASED ON A VIOLATION OF HIS STATUTORY RIGHT TO BE FREE FROM BEING PLACED IN DOUBLE JEOPARDY.

A. Standard of Review

A denial of a motion to dismiss based on double jeopardy presents a question of law that is reviewed for correctness. *State v. Neufeld*, 2009 MT 235, ¶ 10, 351 Mont. 389, 212 P.3d 1063.

B. Discussion

Montana Code Annotated § 46-11-504 provides, in part:

> When conduct constitutes an offense within the jurisdiction of any state or federal court, a prosecution in any jurisdiction is a bar to a subsequent prosecution in this state if:
>
> (1) the first prosecution resulted in an acquittal or in a conviction and the subsequent prosecution is based on an offense arising out of the same transaction. . . .

This Court has adopted a three-part test to determine whether a subsequent prosecution is barred under Mont. Code Ann. § 46-11-504(1):

> (1) a defendant's conduct constitutes an offense within the jurisdiction of the court where the first prosecution occurred and within the jurisdiction of the court where the subsequent prosecution is pursued;
>
> (2) the first prosecution resulted in an acquittal or conviction; and
>
> (3) the subsequent prosecution is based on an offense arising out of the same transaction.

Neufeld, ¶ 11 (internal citations omitted).

Only the third prong is at issue in this appeal as the State conceded below that James satisfied factors one and two. The State argued only that James failed to show the State charge of criminal endangerment arose out of the same transaction as the Tribal Court charge of eluding. (D.C.Doc. 22 at 2.)

For purposes of statutory double jeopardy claims, the term "same transaction" means the same as the statutory definition of that term found in Mont. Code. Ann. § 46-1-202(23):

> "Same transaction" means conduct consisting of a series of acts or omissions that are motivated by:
>
> (a) a purpose to accomplish a criminal objective and that are necessary or incidental to the accomplishment of that objective . . . .

See State v. Cech, 2007 MT 184, ¶ 19, 338 Mont. 330, 167 P.3d 389.

"Offenses arise from the same transaction when a defendant's underlying conduct of each prosecution is motivated by a purpose to accomplish the same criminal objective." *Cech*, ¶ 19 (internal quotation marks and citations omitted).

James was charged in Tribal Court with fleeing from or eluding a peace officer in Tribal Court. Specifically, James was charged with and later admitted "operating a . . . Chevrolet . . . and knowingly fleeing from an Officer who was attempting to stop the vehicle by traveling at a high rate of speed and/or making improper passes." (D.C.Doc. 20 at Ex. A.) The State of Montana later charged James with criminal endangerment, alleging he "created a substantial risk of death or serious bodily injury to another by passing in no passing zones and driving his vehicle at speeds up to 100 mph on Highway 35." (D.C.Doc. 3.) Both charges arose out of the same transaction: James made illegal passes and sped in order to achieve his criminal objective of avoiding being stopped by a police officer. James had no other criminal objective, nor did the State allege one. He was not purposefully trying to hurt anyone, and no one alleged he was an adrenaline junkie whose sole purpose was to create a risk of serious bodily injury or death to himself or others. In order to achieve his ultimate goal of avoiding prosecution, James had to drive fast and pass slow-moving cars in his path. These actions created a risk of harm to others; however, they were also "necessary or incidental to the accomplishment of [his criminal] objective," and he only created the risk in order

to meet his ultimate goal. Because the underlying conduct of each prosecution was the same and was motivated by the same purpose, *i.e.*, to accomplish his objective of eluding a peace officer and avoiding arrest, the charges arose from the same transaction and the third prong of the statutory double jeopardy test was satisfied. *See Cech*, ¶ 19.

This case is analogous to the facts presented in *Cech*. Cech was convicted of possession of a stolen vehicle in Washington. He was later charged with theft in Montana based on his control and possession of the same stolen vehicle. This Court concluded because "Cech's underlying conduct which served as a basis for both prosecutions sought to accomplish the same criminal objective--control of the stolen vehicle," and depriving the true owner of the property, the charges arose out of the same transaction for purposes of Mont. Code Ann. § 46-11-504(1). *Cech*, ¶ 22. Thus, the Montana prosecution was barred. The same reasoning applies in this case, as the underlying conduct in both prosecutions was the same and that conduct was aimed at the same criminal objective.

Similarly, in *State v. Sword*, 229 Mont. 370, 747 P.2d 206 (1987), the defendant pled guilty to violating the Endangered Species Act when he killed a bear in an area where bear hunting was not permitted. He was later charged in State court with making false statements on his application for a trophy license to transport the bear (*i.e.*, he misrepresented the location in which he killed the bear).

Even though the State charge involved different conduct than the conduct alleged in the federal prosecution, this Court, nonetheless, concluded the State charge arose out of the same transaction as the federal charge because "his false statements as well as his other acts were motivated and necessary or at least incidental to the accomplishment of the criminal objective of possessing carrying, and transporting of a grizzly bear taken unlawfully," which also prompted the federal charge. *Sword*, 229 Mont. at 374, 747 P.2d at 209; *see also*, *Neufeld*, ¶ 20 (where the defendant's criminal objective was to engage in sexual contact with a minor, he could not be convicted of both sexual intercourse without consent under state law and sexual exploitation under federal law based on his recording the same sexual contact). As a result, the State prosecution was barred.

Like the defendants in *Cech*, *Sword*, and *Neufeld*, James had but a single criminal objective: to elude the police officer and avoid prosecution. Although the trial court properly noted that a person may flee from an officer without creating a substantial risk of death or serious bodily injury, the underlying conduct that served as a basis for both prosecutions here was the same, and James's motivation behind that conduct was also the same. Under the facts of this case, the district court erred when it denied James's motion to dismiss the criminal endangerment charge based on Mont. Code Ann. § 46-11-504(1). The charge must be dismissed with prejudice.

II. THE DISTRICT COURT ERRED WHEN IT DENIED JAMES'S *BATSON* CHALLENGE TO THE PROSECUTOR'S DECISION TO STRIKE ROGERS.

A. Standard of Review

When considering a challenge that a litigant has exercised its use of a peremptory strike in a discriminating manner, this Court reviews the trial court's application of the law *de novo* and will defer to the trial court's findings of fact unless they are clearly erroneous. *State v. Ford* (*Ford I*), 2001 MT 230, ¶ 7, 306 Mont. 517, 39 P.3d 108.

B. Discussion

1. Merits

In *Batson*, the U.S. Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the State from using its peremptory challenges to remove prospective jurors from the venire on the sole basis of race. *Batson*, 476 U.S. at 87. *Batson* set out a three-prong procedure to be used by a trial court when determining whether an Equal Protection violation had occurred. This Court has summarized these steps as follows:

> First, the defendant must make out a prima facie case of purposeful discrimination. To make a prima facie case, the defendant must show that he or she belongs to a cognizable racial group. The defendant may then rely on the fact that peremptory challenges constitute a jury selection practice that allows those to discriminate who are of a mind to discriminate. The defendant must then show that

> these facts, and any other relevant circumstances, raise an inference that the State used that practice to exclude members of the venire from the petit jury on account of their race.
>
> Once the defendant makes a prima facie case for discrimination, we proceed to the second step, where the State must provide a race-neutral explanation for its use of peremptory strikes. Finally, the trial court then will determine if the defendant has established purposeful discrimination.

State v. Barnaby, 2006 MT 203, ¶¶ 48-49, 333 Mont. 220, 142 P.3d 809.

It is unclear whether the district court concluded James failed to present sufficient evidence to raise an inference of purposeful discrimination in order to meet his initial burden to present a *prima facie* case or concluded James failed to rebut the race-neutral reasons for the strikes offered by the State and, therefore, failed to carry his burden to establish purposeful discrimination by a preponderance of the evidence. Neither decision is supported by the record.

When making a *prima facie* case, a defendant need not show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on race. *Johnson v. California*, 545 U.S. 162, 172-73 (2005). Only an inference of purposeful discrimination need arise from the facts presented. *Johnson*, 545 U.S. at 173. A prosecutor's decision to strike all members of a particular race from a venire (particularly where that race is the same as the defendant's race) is "suspicious" and is sufficient on its own to require the State to provide a case-specific, legitimate reason for the strike that is race-neutral. *See Batson*, 476 U.S.

at 78, 100 (prosecutor's decision to strike all four black members of the venire was sufficient in and of itself to raise an inference of discriminatory motive); *see also*, *Johnson*, 545 U.S. at 173 (prosecutor's decision to strike all three black members of the venire was sufficient to raise an inference of discrimination). Here, the prosecutor struck both of the Native American panel members, and James was Native American. These facts alone were sufficient to raise an inference of purposeful discrimination and to shift the burden of production to the prosecutor to provide race-neutral reasons for the strikes under the second step of the *Batson* test. The court erred as a matter of law when it concluded James failed to make a *prima facie* case of discrimination. In any event, contrary to the court's conclusion, there was ample evidence presented to raise an inference of purposeful discrimination, as will be discussed below with respect to the third *Batson* prong.

With respect to Rogers, the prosecutor stated he struck her because he was afraid her mind would not be on the trial because she was a college student and was missing classes to participate in the jury process. James concedes this is a race-neutral reason and that, therefore, pursuant to *Batson*, it was his duty to establish by a preponderance of the evidence that the prosecutor purposefully discriminated against Native Americans when he struck Rogers. *See e.g.*, *People v. Hutchins*, 147 Cal. App. 4th 992, 55 Cal.Rptr.3d 105 (2007) (remanding for hearing under preponderance standard).

The issue of discriminatory intent in the third *Batson* prong "largely will turn on evaluation of credibility." *Batson*, 476 U.S. at 98 n.21.

> In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge.

Miller-El v. Cockrell, 537 U.S. 322, 349 (2003).

In order to determine whether James met his burden to prove intentional discrimination, the district court was required to "conduct a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Batson*, 476 U.S. at 93. Thus, "it is imperative that the trial court fully develop a record for review--a record that includes all relevant facts and information relied upon by the trial court to render its decision, as well as a full explanation of the court's rationale." *Ford I*, ¶ 18.

"If a prosecutor's proffered reason for striking a [minority] panelist applies just as well to an otherwise-similar [nonminority] who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005). When a review of the record clearly and convincingly refutes each of the prosecutor's nonracial grounds, an appellate court is compelled to conclude that the actual and only reason for

striking the minority juror was, in fact, the juror's race. *Kesser v. Cambra*, 465 F.3d 351, 630 (9th Cir. 2006).

Although the prosecutor here properly noted that Rogers was missing class in order to be at the trial, Rogers was not the only juror who expressed such concerns. Both Mackey and Johnson indicated they would rather not serve on this jury and had other outside obligations.

Here, the court, not the prosecutor, attempted to distinguish between Rogers and these other jurors. Specifically, the court found that Mackey "said that there wasn't a problem until next Monday and both counsel have assured me there is no reason that we will do it next Monday." First, this factual finding is not supported by substantial evidence in the record and is, therefore, clearly erroneous. Although Mackey indicated his classes did not start until Monday, he did not say "there wasn't a problem until next Monday." In fact, he said the opposite. He indicated he should be studying for his classes right now, *i.e.*, during voir dire and the actual trial. Mackey never indicated he would be totally focused on the trial and not his other obligations before Monday rolled around.

The court also found, after she had already made her ruling and the alternate juror was chosen, that "the State challenged all of the people who represented on the record that they really didn't want to be present." This factual finding is also clearly erroneous as it is not supported by the record. The State did not challenge

Mackey, who was the only juror who said directly that he was unwilling to do his duty and serve as a juror. Mackey stated he would not appear in court on the following Monday, even if chosen to serve on the jury. Rogers, whom the State did challenge, never expressed such a strong opposition to serving, and, indeed, spontaneously and without prompting by counsel or the court indicated that she would do her duty and was willing to serve as a juror. Similarly, in *Turner v. Marshall*, 121 F.3d 1248, 1252 (9th Cir. 1997), the prosecutor explained that she struck an African-American juror because he expressed a concern about viewing gruesome photographs. She offered no other explanation for the strike. That minority juror, however, also affirmed that he would do his duty as a juror and look at the photographs. A white juror who was questioned similarly expressed an even greater reluctance to the view the photographs than the stricken minority juror because she provided an ambiguous "I guess" response when asked if she would do her duty as a juror, yet she was not stricken. The Ninth Circuit concluded this failure to challenge the similarly situated white juror was fatal to the prosecutor's alleged explanation of the strike of the minority juror, even though the prosecutor allowed four African-Americans to sit as jurors, and reversed the district court's finding of no purposeful discrimination as clearly erroneous. Similarly, the prosecutor's decision here not to strike the non-Native juror, Mackey, who expressed an even greater reluctance to serve due to outside obligations than the

Native American juror, Rogers, who was stricken undermines the prosecutor's alleged explanation for the strike and renders it pretextual. Because the prosecutor offered no other explanation for the strike, to the extent the district court concluded no purposeful discrimination was shown must be reversed.

In addition, the prosecutor here never expressed that his decision to strike Rogers was based on these subtle distinctions between her testimony and the testimony of Mackey and Johnson. The mere fact that someone *might* have made these distinctions or that the judge was able to come up with these post-hoc rationalizations is not evidence of the credibility or sincerity of the prosecutor's claimed explanation. Unless the prosecutor indicated he personally made those distinctions, which he did not do here, these distinctions are simply not evidence regarding his intent. It is important to note the court did not find the prosecutor's race-neutral reasons believable or credible; instead, the court provided its own *possible* race-neutral distinctions and said that those non-reasons were "sufficient." In doing so, the court erred as a matter of law because it denied James's *Batson* challenge based not on the credibility and sincerity of the prosecutor's given reasons but instead on evidence not proffered by the State.

Notably, the State did not concede that Rogers could be excused for cause when defense counsel raised the issue of her outside obligations during voir dire. Nor did the State concede Johnson could be excused for cause when defense

counsel asked the court to excuse him because he expressed his desire not to participate in the jury process. In other words, the alleged defect in these jurors did not cause the prosecutor concern until he was called upon to justify his striking of the only two Native Americans on the panel. This, too, supports the conclusion that Rogers's statements regarding missing class were not the true motivation for her removal. Moreover, the prosecutor did not explain his rationale for removing Johnson. Again, the fact that the prosecutor *might* have stricken Johnson due to his inability to focus on the task at hand is not evidence tending to prove that the prosecutor had a race-neutral reason for striking Rogers. That justification was provided only by the court, and only after the court had already made its ruling on the *Batson* challenge.

The trial court also based its decision to deny the challenge on the fact that the case would likely be concluded before Mackey's classes began and, in the event the case did not finish before then, it was the court's intention to excuse him from service. Of course, even the court acknowledged that would not be possible if the alternate had already been used to replace another juror due to illness or some other reason. More importantly, this fact has no bearing on the prosecutor's motives for striking Rogers and not striking Mackey. The prosecutor did not indicate he decided not to strike Mackey because he could always be excused later and replaced with the alternate. Indeed, when the prosecutor exercised his

challenges, the court had not yet indicated whether it even intended to pick an alternate. Thus, this fact could have played no role in the prosecutor's thinking.

The court's proffered distinction between the testimony of Mackey and Rogers is not convincing. If the prosecutor was truly concerned about having jurors who could focus on the evidence presented, the prosecutor would have removed both jurors and, undoubtedly, would have been inclined to first remove the juror who expressed his intention not to appear as required by law and to do his duty rather than the juror who steadfastly and spontaneously stated she was willing to serve. The trial court never specifically found the prosecutor's stated reason for dismissing Rogers was, in fact, credible or sincere. The judge did not make any findings regarding the prosecutor's demeanor or believability. The court instead seemed to conclude the prosecutor's reason was plausible, based on her own interpretation of what prompted the Rogers challenge. This decision was based not on facts in the record, but instead on mere conjecture. The discrepancy between the treatment of the white juror, Mackey, and the Native American juror, Rogers, which was not justified by the prosecutor himself in any way, in combination with the inference of racial discrimination that arose because all members of James's minority group were struck by the prosecutor, establishes the prosecutor's purported race-neutral reasons were not, in fact, credible. *See e.g.*, *Turner*, 121 F.3d at 1255 n. 4 ("The striking of a single black juror for racial reasons violates

the equal protection clause . . . even when there are valid reasons for the striking of some black jurors.") To the extent the court concluded otherwise, its conclusion was based on an erroneous conclusion of law and clearly erroneous factual findings not supported by substantial evidence in the record.

The exclusion of a juror on the basis of race is a structural error that cannot be harmless and that warrants automatic reversal. *See e.g., Tankleff v. Senkowski*, 135 F.3d 235, 240 (2nd Cir. 1998). *See also, State v. Good*, 2002 MT 59, ¶ 59, 309 Mont. 113, 43 P.3d 948 (describing typical structural error as an error of constitutional dimensions that precedes the trial, undermines the fairness of the entire trial, and that cannot be qualitatively or quantitatively weighed against the admissible evidence introduced at trial.) As a result, this Court should reverse James's convictions based on the *Batson* violation.

2. Timeliness of Motion

An untimely *Batson* challenge results in waiver of the error. *State v. Parrish*, 2005 MT 112, ¶¶ 12-13, 327 Mont. 88, 111 P.3d 671. This Court has previously held that "counsel must raise a *Batson* challenge before the district court swears the jury and dismisses the venire." *Parrish*, ¶ 12. In order to adequately raise the issue, counsel must at least argue facts in support of a *prima facie* case of purposeful discrimination at a time when the trial court still has an

opportunity to correct the error and cure the defect. *Parrish*, ¶¶ 13-14. The Court has explained an untimely objection results in waiver for the following reasons:

> First, it delays justice because *once the court dismisses the venire*, the jury selection process must start anew with no readily available venire from which to finish the selection process. Moreover, *once the court dismisses the venire*, the challenged counsel's duty to explain his or her peremptory challenges 'becomes very difficult once the persons to whom the peremptories were directed have disappeared from sight[.]' Finally a substantive Batson challenge raised after the court has sworn the jury *and dismissed the venire* deprives the court of its opportunity to first correct any error and cure the alleged defect.

Parrish, ¶ 13 (emphasis added).

The State may argue that the *Batson* challenge here was untimely. Here, counsel apparently first raised the *Batson* issue immediately after the parties exercised their peremptory challenges during a sidebar that was not recorded. The motion was not heard until *after* the twelve jurors were seated and sworn in. The motion, however, was heard *before* the court released the remaining members of the panel. In fact, voir dire was not yet complete when the motion was decided as the alternate juror had not yet been chosen. The panel was released only after the parties selected an alternate.

In other words, James's *Batson* challenge was made at a time when the reasons for the prosecutor's strike were still very fresh in his mind and at a time when the court still had the opportunity to cure the defect. Despite the court's language regarding the swearing of the jury, it seems the operative time when a

challenge becomes untimely is when the venire is released and the error is no longer correctable. Because James's challenge was made at such a time, it was not untimely, and he has not waived the error.

III. IN THE ALTERNATIVE, DEFENSE COUNSEL WAS INEFFECTIVE WHEN HE MADE AN UNTIMELY BATSON CHALLENGE.

A. Standard of Review

When analyzing claims of ineffective assistance of counsel on direct appeal, this Court applies the two-part test adopted by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). In order to succeed, a criminal defendant must establish: 1) counsel's performance fell below an objective standard of reasonableness; and 2) a reasonable probability exists that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687; *State v. Racz*, 2007 MT 244, ¶ 22, 339 Mont. 218, 168 P.3d 685.

Under Montana law, this Court has held that a threshold question when analyzing ineffective assistance claims is whether a direct appeal or a postconviction hearing is the more appropriate forum. *Racz*, ¶¶ 23, 27. Where an attorney's reasons for performing or not performing an act are not laid out in the record but are, instead, a "matter of internal thought processes" only, the matter is usually more appropriately addressed in a postconviction hearing unless there is no

plausible justification or legitimate reason for what defense counsel did or failed to do. *Racz*, ¶ 29; *State v. Kougl*, 2004 MT 243, ¶ 15, 323 Mont. 6, 97 P.3d 1095.

B. Discussion

This Court has previously held that trial counsel's failure to raise a timely objection to the State's discriminatory use of its peremptory challenges cannot be considered a trial strategy or tactical decision, and there could be no plausible justification for failing to raise such an argument in a timely fashion as such a decision could only prejudice the defendant and not aid him in any way. *Ford v. State* (*Ford II*), 2005 MT 151, ¶ 17, 327 Mont. 378, 114 P.3d 244. Thus, the issue of counsel's effectiveness in this regard is one that must be raised on direct appeal or waived. *Ford II*, ¶ 17. The Court so held even though the underlying question of when a *Batson* challenge must be made in order to be timely was a matter of first impression raised by the Court *sua sponte* in the underlying appeal of that case. *See Ford I*, ¶¶ 21-22. Thus, to the extent the Court concludes a *Batson* challenge made after the jury is sworn but before the venire is released is untimely, there can be no plausible justification for James's trial attorney's failure to raise a timely challenge and the issue is ripe for direct appeal.

This Court has repeatedly stated a *Batson* challenge must be made and a *prima facie* showing of discriminatory motive established "before the district court swears the jury and dismisses the venire." *Parrish*, ¶ 14; *see also*, *Ford I*, ¶ 28;

Cassiano v. Greenway Enterprises, Inc., 2002 MT 93, ¶¶ 27-28, 309 Mont. 358, 47 P.3d 432, *overruled on other grounds by Giambra v. Kelsey*, 2007 MT 158, 338 Mont. 19, 162 P.3d 134. Although it appears trial counsel here made a timely objection during a sidebar, the *Batson* hearing was not held until after the twelve jurors were sworn in. To the extent the Court concludes such a challenge must be made prior to seating and swearing in the jury, counsel's failure to do so was unreasonable conduct based on the Court's prior statements in this regard.

As explained above, James's *Batson* challenge regarding Rogers should have been granted. Therefore, there is more than a reasonable possibility that had his challenge been timely made, the result would have been different. As a result, James is entitled to a new trial.

IV. THE COURT ERRED WHEN IT DENIED JAMES'S MOTION FOR A NEW TRIAL BASED ON THE STATE'S VIOLATION OF JAMES'S DUE PROCESS RIGHTS UNDER *BRADY*.

A. Standard of Review

A district court's determination that the State did not violate *Brady* is reviewed *de novo*. *See e.g.*, *United States v. Mincoff*, 574 F.3d 1186, 1192 (9th Cir. 2009).

B. Discussion

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or

to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87; *see also, State v. Giddings*, 2009 MT 61, ¶ 47, 349 Mont. 347, 208 P.3d 363. The State violates its obligations under *Brady* when: (1) the evidence in question was favorable to the defendant, meaning that it had either exculpatory or impeachment value; (2) the State suppressed the evidence; and (3) the defendant was prejudiced by the suppression. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)); *see also Mincoff*, 574 F.3d at 1199; *State v. Kills on Top*, 2000 MT 340, ¶ 23, 330 Mont. 164, 15 P.3d 422. A defendant is prejudiced by the suppression if "there [was] a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433 (1995); *Mincoff*, 574 F.3d at 1199; *Kills on Top*, ¶ 24. A "reasonable probability" of a different result is shown when the government's suppression "undermines confidence in the outcome of the trial." *Kyles*, 514 U.S. at 434; *see also, State v. Buckles*, 1999 MT 79, ¶ 11, 294 Mont. 95, 979 P.2d 177.

Here, the State conceded Shaw's booking photograph was favorable to the defense, it was in the possession of the State, and the State failed to disclose the information to the defense before trial. The State, however, argued James suffered no prejudice and no *Brady* violation occurred because the photograph was merely cumulative of the evidence offered at trial. The district court denied James's

motion, in part, because "the photo was consistent with the testimony of the independent witnesses and what was depicted in the photo was not contested." (Ex. D.) This conclusion was based on the court's finding of fact that "witnesses at trial did not testify Ms. Shaw had visible physical injuries," "everybody agreed . . . that they didn't see any injuries," and "the issue of whether Ms. Shaw had visible physical injuries was not contested at trial by the State." (Exs. C-D.)

The court's factual findings are not supported by the record. Reedstrom testified Shaw's cheek was "red and stuff" when he first approached her, and that he saw no physical injuries "beyond that." (Trial Tr. at 179.) The State actually emphasized this testimony during its closing argument, repeating that Reedstrom testified he saw Shaw lying on the ground and "noticed a red mark on her face." (Trial Tr. at 341.) Whether there were any visible physical injuries was most certainly contested by the State and the court's finding to the contrary was not supported by the evidence. The photograph, therefore, was not merely cumulative of all of the evidence presented at trial, nor was the issue uncontested. The photograph was strong evidence that directly controverted the testimony at trial and the State's argument to the jury during closing.

The photograph was evidence from which the jury could have concluded that the State failed to prove beyond a reasonable doubt one of the elements of the State's case-in-chief. The State was not required to show only that James struck

Shaw. It was required to show that in doing so, he caused bodily injury to her. Mont. Code Ann. § 45-5-206(1)(a). Bodily injury means "physical pain, illness, or an impairment of physical condition." Mont. Code Ann. § 45-2-101(5). The photograph of Shaw tended to prove that she did not actually suffer physical pain or impairment of her physical condition as a result of anything that James did that night. As the adage goes, a picture is worth a thousand words. Unlike the testimony of an eyewitness, a photograph's memory does not fade nor is it apt to fabricate or embellish reality. As such, a photograph is highly persuasive evidence. Indeed, the whole reason this issue came to light in this case was a juror's statement after the trial was concluded that it would have been helpful if there had been photographs of Shaw. (D.C.Doc. 92.) The only evidence tending to show that Shaw suffered bodily injury was the testimony of two men who witnessed the event from across the street at 10:30 at night after they had been drinking. Given the nature of the testimony and the highly persuasive nature of photographs, there was more than a reasonable probability that had the photograph been disclosed to James pretrial and shown to the jury during the trial, James would not have been convicted of PFMA. The court erred when it concluded otherwise.

The Court also denied James's motion because although James did not possess a copy of the booking photograph, he "could have obtained it with

reasonable diligence given his opportunity to interview Ms. Shaw and his counsel's familiarity with booking procedures." (Ex. D.) This Court has occasionally but not consistently required defendants claiming a *Brady* violation to also show the evidence could not have been obtained by the defense with "reasonable diligence." *See e.g.*, *Gollehon v. State*, 1999 MT 210, ¶ 15, 296 Mont. 6, 986 P.2d 395 (*citing Mills v. Singletary*, 63 F.3d 999, 1014 (11th. Cir. 1995), *cert. denied*, 517 U.S. 1214 (1996)); *cf. State v. Fish*, 2009 MT 47, ¶ 20, 3419 Mont. 286, 204 P.3d 681. The United States Supreme Court has never explicitly required a defendant to show "reasonable diligence" in order to make out a *Brady* claim, but has stated that no *Brady* violation occurs unless the suppressed information "had been known to the prosecution but unknown to the defense." *United States v. Agurs*, 427 U.S. 97, 103 (1976). From this statement, some courts have concluded that a defendant cannot cry foul if he or his counsel knew of the existence of apparently exculpatory evidence and he could have obtained it from a source other than the prosecution through the use of due diligence. *See* Wayne R. LaFave, *Criminal Procedure*, § 24.3(b) at 362 (3d ed. 2007) (discussing cases where no *Brady* violation was found because the defense actually knew of the evidence, knew it was potentially exculpatory, and could have obtained it from a source other than the prosecution). To the contrary, a defendant has no duty to use reasonable diligence to obtain a document that the defendant either does not

actually know exists, or does not know is exculpatory in nature. Even if a defendant has a duty to use reasonable diligence to obtain known exculpatory evidence from independent sources, the State cannot withhold exculpatory evidence in its possession simply because the defendant "should have known" that it might exist and "should have known" that it might be favorable to the defendant, when the defendant asked the State to disclose all such information to no avail. Here, there was no evidence James or his counsel knew the booking photograph actually existed prior to the verdict in this case or that such a photograph would have been favorable to his case, and the court did not find as much.

In addition, a defendant cannot be faulted for not obtaining a document from an "independent source" when there is no independent source of the information available. The Sheriff's Department created and held the booking photograph of Shaw. Shaw did not have a copy of the photograph; indeed, in her initial discussions with defense counsel after the trial regarding the existence of photographs, she did not even remember a booking photograph having been taken. (D.C.Doc. 92.) James's attorney did not represent Shaw in the matter that resulted in her arrest that evening. James could have obtained the photograph, if at all, only through the State. There was no source of this information beyond the State itself.

In addition, pursuant to Mont. Code Ann. § 44-5-103(3)(c), photographs are confidential criminal justice information that generally can be disseminated only to

criminal justice agencies, those "authorized by law to receive" them, and those authorized by court order to receive them because the demands of individual privacy do not clearly outweigh the merits of public disclosure. Mont. Code Ann. § 44-5-303(1). None of these categories applied to defense counsel in an unrelated criminal case in which Shaw, the arrested party, was an alleged victim. Had counsel actually known about the photograph and had counsel actually known it was favorable to James's case even though the prosecution failed to disclose it, he still would not have been able to obtain it from an independent source through reasonable diligence.

As a result, the district court erred when it concluded James's due process rights were not violated by the prosecution's failure to disclose the photograph of Shaw. James did not receive a fundamentally fair trial on the PFMA charge and his conviction, therefore, must be reversed.

CONCLUSION

James's criminal endangerment conviction must be reversed and the charge must be dismissed with prejudice because the State was statutorily barred from prosecuting him for conduct that arose out of the same transaction that resulted in his Tribal Court conviction. Should the Court disagree, James's convictions on both charges must be reversed because the State used a peremptory challenge to remove a Native American juror from the panel based on her race, or, in the

alternative, his counsel was ineffective for failing to raise that argument in a timely manner. In any event, James's PFMA conviction must be reversed because the State suppressed evidence favorable to him and that suppression undermines confidence in the outcome.

Respectfully submitted this ____ day of October, 2009.

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Pursuant to Rule 27 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 not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

_____

TAMMY A. HINDERMAN

APPENDIX