Montana Judicial Branch

Standards of Review Handbook

Criminal: Introduction

Updated: 8JAN2026

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Findings of Fact and Conclusions of Law

We review a trial court's underlying factual findings to determine if they are clearly erroneous. Findings of fact are clearly erroneous if they are not supported by substantial evidence, the court misapprehends the effect of the evidence, or appellate review of the record convinces the court that a mistake has been made. *State v. Warclub*, 2005 MT 149, ¶ 23, 327 Mont. 352, 114 P.3d 254

Harmless Error

In a review for harmless error, the burden is on the State, which committed the error over defendant's objection, to demonstrate a lack of prejudice for that error. *State v. Reichmand*, 2010 MT 228, ¶ 42, 358 Mont. 68, 243 P.3d 423.

The first step in the inquiry for harmless error issues is to determine whether the error was structural error or trial error. Structural error is that type of error that "affects the framework within which the trial proceeds, rather than simply an error in the trial process itself. Such error is typically of constitutional dimensions, precedes the trial, and undermines the fairness of the entire trial proceeding. Structural error is presumptively prejudicial and not subject to harmless error review. Trial error is the type of error that typically occurs during the presentation of a case to the jury. Trial error is not presumptively prejudicial and therefore not automatically reversible, and is subject to review under the harmless error statute, § 46-20-701(1), MCA. If the error is trial error, it must then be determined whether the error was harmless under the circumstances. *State v. Van Kirk*, 2001 MT 184, ¶¶ 38-41, 306 Mont. 215, 32 P.3d 735.

The test for prejudicial error is whether there is a reasonable possibility that the inadmissible evidence might have contributed to a conviction. *State v. Van Kirk*, 2001 MT 184, ¶ 42, 306 Mont. 215, 32 P.3d 735.

Plain Error

Under plain error, it is the defendant who permitted the error to occur by failing to object, not the State, thus the defendant bears the burden of demonstrating the need for review which overcomes that error. *State v. Reichmand*, 2010 MT 228, ¶ 42, 358 Mont. 68, 243 P.3d 423.

The Court may discretionarily review claimed errors that implicate a criminal defendant's fundamental rights, even if no contemporaneous objection is made and notwithstanding the inapplicability of the § 46-20-701(2), MCA, criteria, where failing to review the claimed error at issue may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial proceedings, or may compromise the integrity of the judicial

process. *State v. Finley*, 276 Mont. 126, 137-38, 915 P.2d 208, 215 (1996) (overruled on other grounds by *State v. Gallagher*, 2001 MT 39, 304 Mont. 215, 19 P.3d 817).

Exercise of common law plain error review, where the criteria of § 46-20-701(2), MCA, have not been met, must be used sparingly, on a case-by-case basis. It can only be invoked where failing to review the claimed error at issue may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial proceedings, or may compromise the integrity of the judicial process. *State v. Finley*, 276 Mont. 126, 137, 915 P.2d 208, 215 (1996) (overruled on other grounds by *State v. Gallagher*, 2001 MT 39, 304 Mont. 215, 19 P.3d 817).

Structural Error

Structural error is that type of error that "affects the framework within which the trial proceeds, rather than simply an error in the trial process itself. Such error is typically of constitutional dimensions, precedes the trial, and undermines the fairness of the entire trial proceeding. Structural error is presumptively prejudicial and not subject to harmless error review. *State v. Van Kirk*, 2001 MT 184, ¶¶ 38-39, 306 Mont. 215, 32 P.3d 735.

Montana Judicial Branch

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Criminal: Pretrial

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Bail

The amount of bail which the judge may fix is within his sound legal discretion and is always to be a reasonable amount. *State v. McLeod*, 131 Mont. 478, 490, 311 P.2d 400, 407 (1957).

That bail may not be excessive is a fundamental, constitutional principle. U.S. Const. Amend. VIII; Art. II, § 22, Mont. Const. To ensure that bail is not excessive, the Montana courts are constrained in setting bail by the [twelve] factors listed in § 46-9-301, MCA. Within these restrictions, the amount of bail is left to the sound discretion of the trial court and will be upheld if reasonable. *Billings v. Layzell*, 242 Mont. 145, 149, 789 P.2d 221, 223 (1990).

The appropriate standard of review when considering the denial of an application for bail pending appeal is whether the district court abused its discretion in denying the application. Absent such abuse, this Court will not interfere. *Moore v. McCormick*, 260 Mont. 305, 306, 858 P.2d 1254, 1255 (1993).

Brady Violations

We review a district court's denial of a motion for new trial based on a Brady violation for an abuse of discretion. *State v. Parrish*, 2010 MT 212, ¶¶ 14, 16, 357 Mont. 477, 241 P.3d 1041.

Brady claims not contained within the record below are reviewed under the plain error authority of § 46-20-701(2)(b), MCA. *State v. Ellison*, 2012 MT 50, ¶ 12, 364 Mont. 276, 272 P.3d 646.

A motion to dismiss charges based on the State's destruction or suppression of exculpatory evidence is a question of law: whether the District court erred in denying the motion to dismiss based on the destruction of evidence in state custody. We review a district court's decision to grant or deny a motion to dismiss to determine if the court applied the law correctly. *State v. Duncan*, 2008 MT 148, ¶ 17, 343 Mont. 220, 183 P.3d 111.

Competency to Stand Trial

When reviewing a district court's finding of competence, we inquire whether substantial evidence supports the district court's decision that the defendant was fit to proceed to trial. *State v. McCarthy*, 2004 MT 312, ¶ 20, 324 Mont. 1, 101 P.3d 288.

When sufficient doubt is raised as to an accused's competency to stand trial, the district court has a duty to sua sponte order a hearing on this issue. However, there can be no fixed or immutable signs which invariably indicate the need for further inquiry as inquiry into an accused's

competency is necessarily based on the individual circumstances presented. *State v. Garner*, 2001 MT 222, ¶¶ 21, 23, 306 Mont. 462, 36 P.3d 346.

Courts have a continuing duty to review the issue of competency in criminal proceedings. *State v. Bartlett*, 271 Mont. 429, 433, 898 P.2d 98, 100 (1995).

The question of whether a doubt as to an accused's sanity is raised in any given case addresses itself directly to the sound judicial discretion of the trial court. But like any matter thus committed to the discretion of a court or its judge this discretion may not be exercised arbitrarily. *State v. Kitchens*, 129 Mont. 331, 339, 286 P.2d 1079, 1083 (1955).

Fitness to proceed to trial is a matter largely within the discretion of the District Court. Therefore, we will not overturn a decision of the District Court in the absence of a clear abuse of discretion. The evidence may conflict, but it is substantial if any reasonable trier of fact could rely upon the evidence in support of its conclusion. *State v. Statczar*, 228 Mont. 446, 457, 743 P.2d 606, 613 (1987).

Confessions

We review a district court's findings of fact on a motion to suppress an admission or a confession to determine whether the findings are clearly erroneous. A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the district court misapprehended the effect of the evidence, or if this Court has a definite or firm conviction that the district court committed a mistake. *State v. Loh*, 275 Mont. 460, 475, 914 P.2d 592, 601 (1996).

Substantial evidence requires more than a mere scintilla of evidence, but may be less than a preponderance of the evidence. *State v. Scarborough*, 2000 MT 301, ¶ 30, 302 Mont. 350, 14 P.3d 1202.

The voluntariness of a confession or admission is a factual question which must take into account the totality of the circumstances. *State v. Loh*, 275 Mont. 460, 475, 914 P.2d 592, 601 (1996).

The issue of voluntariness is largely a factual question committed to the district court's discretion. We will not reverse that court if its order is supported by substantial credible evidence. *State v. Beach*, 217 Mont. 132, 151, 705 P.2d 94 (1985).

Where determination of voluntariness depends upon the credibility of witnesses, this Court must defer to the district court judge who is in a superior position to judge the credibility of those witnesses. *State v. Scarborough*, 2000 MT 301, ¶ 30, 302 Mont. 350, 14 P.3d 1202.

The burden of proof of voluntariness is upon the State, and it is required to prove voluntariness by a preponderance of the evidence but not beyond a reasonable doubt. *State v. Grimestad*, 183 Mont. 29, 36, 598 P.2d 198, 202 (1979).

Confidential Informants

Disclosure of an informant's identity requires "balancing the public interest in protecting the flow of information against the individual's right to prepare his defense." Disclosure "must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *State v. DuBray*, 2003 MT 255, ¶ 110, 317 Mont. 377, 77 P.3d 247 (quoting *Roviaro v. U.S.*, 353 U.S. 53, 62, 77 S. Ct. 623, 628-29 (1957)).

Under the balancing test, the defendant bears the burden of showing the need for disclosure, and the need must be sufficient to override the government's interest in protecting the name of the informant. *State v. DuBray*, 2003 MT 255, ¶ 112, 317 Mont. 377, 77 P.3d 247.

We review a district court's determination of whether or not to disclose the identity of a confidential informant for an abuse of discretion. *See State v. Ayers*, 2003 MT 114, ¶ 62, 315 Mont. 395, 68 P.3d 768; *State v. Seaman*, 236 Mont. 466, 474, 771 P.2d 950, 955 (1989); *State v. Coates*, 233 Mont. 303, 305, 759 P.2d 999, 1000-01 (1988), *overruled on other grounds by Porter v. State*, 2002 MT 319, ¶ 13, 313 Mont. 149, 60 P.3d 951.

Consolidation of Counts

In determining whether to grant a motion to sever, trial courts must balance the possibility of prejudice to the defendant against the judicial economy resulting from a joint trial. This balancing process is within the discretion of the trial court and, absent an abuse of discretion, we will not substitute our judgment for that of the trial court. *State v. Martin*, 279 Mont. 185, 190, 926 P.2d 1380, 1384 (1996).

The burden of showing prejudice rests on the defendant. In showing prejudice, it is not sufficient that the defendant prove some prejudice or that a better chance of acquittal exists if separate trials are held. Rather, the defendant must show the prejudice was so great as to prevent a fair trial. *State v. Richards*, 274 Mont. 180, 188, 906 P.2d 222, 227 (1995).

Continuances

The abuse of discretion standard applies to a trial court's ruling on a motion for continuance. A trial court decides continuance requests in light of the interests of justice and the due diligence of the moving party. If a request for a continuance is reasonable—given all the relevant factors

including a defendant's right to a fair trial and effective assistance of counsel—a court's refusal to grant the request amounts to an abuse of discretion. *State v. Strauss*, 2003 MT 195, ¶ 38, 317 Mont. 1, 74 P.3d 1052.

Section 46-13-202, MCA, governs continuances and provides that a court "may upon the motion of either party or upon the court's own motion order a continuance if the interests of justice so require." All motions for continuance are addressed to the discretion of the trial court and must be considered in the light of the diligence shown on the part of the movant. Accordingly, our standard of review is for an abuse of discretion. *State v. DaSilva*, 2011 MT 183, ¶ 24, 361 Mont. 288, 258 P.3d 419.

Motions for continuance are addressed to the discretion of the trial court and the granting of a continuance has never been a matter of right. The district court cannot be overturned on appeal in absence of a showing of prejudice to the movant. A defendant's claim of reversible error for failure to grant a continuance therefore must stand or fall on the issue of prejudice, for the district court can be said to have abused its discretion only if its ruling was prejudicial. *State v. Paulson*, 167 Mont. 310, 315, 538 P.2d 339, 342 (1975).

Defenses

In *State v. Awbery*, the Montana Supreme Court reviewed a pretrial decision of the trial court that a defendant was excluded from presenting certain evidence in his defense pursuant to Montana's Rape Shield Law. 2016 MT 48, ¶¶ 12–15, 382 Mont. 334, 367 P.3d 346. We reviewed the trial court's ruling "on the admission of evidence to determine whether there was an abuse of discretion." *Awbery*, ¶ 10. We reviewed the trial court's "application of [the] statute to determine whether it was correct." *Awbery*, ¶ 10.

When a defendant argues that a trial court erred in limiting an instruction on a defense, we review the instruction for abuse of discretion. *State v. Redlich*, 2014 MT 55, ¶¶ 26–27, 374 Mont. 135, 321 P.3d 82.

Discovery

Depositions

Section 46-15-201, MCA, is obviously a discretionary statute. Thus, a trial court's denial of a defendant's motion to depose a material witness is reviewed for an abuse of discretion. *State v. Tilly*, 227 Mont. 138, 144, 737 P.2d 484, 488 (1987).

Sanctions

Section 46-15-329, MCA, provides the mechanism for enforcement of discovery orders and possible sanctions. The standard of review for a court's decision regarding imposition of sanctions in such a case is whether the court has abused its discretion in allowing the material in controversy. *State v. Golder*, 2000 MT 239, ¶ 7, 301 Mont. 368, 9 P.3d 635.

We review a district court's imposition of sanctions pursuant to § 46-15-329, MCA, for an abuse of discretion. *State v. Dezeeuw*, 1999 MT 331, ¶ 9, 297 Mont. 379, 992 P.2d 1276.

Section 46-15-329, MCA, provides a means of enforcing discovery orders. It endows the district courts with the flexibility to impose sanctions commensurate with the failure to comply with discovery orders. This discretion allows the court to consider the reason why disclosure was not made, whether the noncompliance was willful, the amount of prejudice to the opposing party, and any other relevant circumstances. *State v. Dezeeuw*, 1999 MT 331, ¶ 13, 297 Mont. 379, 992 P.2d 1276 (citing *State v. Waters*, 228 Mont. 490, 495, 743 P.2d 617, 620 (1987)).

When considering the statutory sanctions provided in § 46-15-329, MCA, we must also keep in mind the guarantee in Article II, Section 24 of the Montana Constitution, "that in all criminal prosecutions, the accused shall have the right to . . . the attendance of witnesses in his behalf . . ." and exercise discretion accordingly. *State v. Dezeeuw*, 1999 MT 331, ¶ 15, 297 Mont. 379, 992 P.2d 1276.

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Discriminatory (Selective) Prosecution

Our review of a district court's decision to grant or deny a motion to dismiss for selective prosecution is plenary. *State v. Stanko*, 1998 MT 323, ¶ 49, 292 Mont. 214, 974 P.2d 1139.

A person asserting that his or her constitutional rights have been violated by selective prosecution must allege and prove that the selection was deliberately based on an unjustifiable standard such as race religion, or other arbitrary classification. *State v. Harris*, 1999 MT 115, ¶ 23, 294 Mont. 397, 983 P.2d 881.

Dismissals

Cross-Reference: Indictments and Informations: Dismissals

We review the denial of a motion to dismiss for insufficient evidence (formerly a motion for directed verdict) de novo. *State v. Kirn*, 2012 MT 69, ¶ 8, 364 Mont. 356, 374 P.3d 746.

A ruling on a motion to dismiss in a criminal proceeding is a question of law, which we review de novo. *State v. Burns*, 2011 MT 167, ¶ 17, 361 Mont. 191, 256 P.3d 944.

A district court's conclusion as to whether sufficient evidence exists to convict is ultimately an analysis and application of the law to the facts, and as such is properly reviewed de novo. *State v. Swann*, 2007 MT 126, ¶ 19, 337 Mont. 326, 160 P.3d 511.

A motion to dismiss for insufficient evidence is appropriate only if, viewing the evidence in the light most favorable to the prosecution, there is not sufficient evidence upon which a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Rosling*, 2008 MT 62, ¶ 35, 342 Mont. 1, 180 P.3d 1102 (citing § 46-16-403, MCA).

Evidentiary Rulings

A trial court has broad discretion in determining the relevance and admissibility of evidence. Thus, we generally review evidentiary rulings for an abuse of discretion. A court abuses its discretion if it acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice. In exercising its discretion, however, the court is bound by the Rules of Evidence or applicable statutes. Thus, to the extent a trial court's ruling is based on an interpretation of an evidentiary rule or statute, our review is de novo. *State v. Passmore*, 2010 MT 34, ¶ 51, 355 Mont. 187, 225 P.3d 1229.

The determination of the adequacy of the foundation for the admission of evidence is within the discretion of the trial court, and will not be overturned absent a clear abuse of discretion. *State v. Weeks*, 270 Mont. 63, 75, 891 P.2d 477, 484 (1995).

Ex Post Facto

Our review of whether the ex post facto clauses of the Montana and United States Constitutions are implicated in a criminal case is plenary, meaning we simply determine whether the District Court's interpretation of the law is correct. *State v. Anderson*, 2008 MT 116, ¶ 18, 342 Mont. 485, 182 P.3d 80.

Whether the ex post facto clauses of the federal and Montana Constitutions are implicated in charging a criminal offense is a question of law. *State v. Brander*, 280 Mont. 148, 150, 930 P.2d 31, 33 (1996).

Extradition

The issuance of a warrant of rendition by the Governor of the asylum state raises a presumption that the accused is the fugitive wanted and it is sufficient to justify his arrest, detention and delivery to the demanding state. In order to rebut the presumption, the accused must prove beyond a reasonable doubt either that he was no present in the demanding state at the time of the alleged offense or that he was not the person named in the warrant. State ex rel. Hart v. Dist. Ct., 157 Mont. 287, 293-94, 485 P.2d 698, 702 (1971).

The question as to whether a defendant is a fugitive from justice is one of fact. The presumption raised by a governor's warrant in an asylum state in a habeas corpus proceeding may be overcome either by a petitioner showing that he was not within the demanding state at the time the crime was committed or that he has not since left the state. *State ex rel. Hart v. Dist. Ct.*, 157 Mont. 287, 291-92, 485 P.2d 698, 701 (1971).

A district court's power of inquiry with regard to extradition proceedings is limited. The court can determine whether the documents are in order on their face; whether the petitioner was charged with a crime in the demanding state; whether petitioner is the person named in the extradition request; and whether petitioner is a fugitive. Dismissal of the entire proceeding is improper since the authority to honor or reject an extradition demand lies solely with the Governor. *State v. Campbell*, 233 Mont. 502, 507, 761 P.2d 393, 396-97 (1988).

Franks Hearings

A defendant may challenge the truthfulness of factual statements made in a search warrant application if the defendant first makes a substantial preliminary showing that false information was included in the search warrant application. To make the required substantial preliminary showing, the defendant must provide more than mere conclusory statements. If the defendant makes the showing, then a hearing must be held at the defendant's request. *State v. Tucker*, 2008 MT 273, ¶ 35, 345 Mont. 237, 190 P.3d 1080 (citing *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674 (1978)).

The defendant must prove by a preponderance of the evidence that the statement was false. *State v. Clifford*, 2005 MT 219, ¶ 58, 328 Mont. 300, 121 P.3d 489.

Grand Juries

A district court's decision to empanel a grand jury is reviewed for an abuse of discretion. *State ex rel. Woodahl v. Dist. Ct.*, 166 Mont. 31, 39, 530 P.2d 780, 785 (1975).

Guilty Pleas

Voluntariness

When the voluntariness of the plea is at issue, we will review that ultimate mixed question of law and fact de novo, to determine if the trial court was correct in holding that the plea was voluntary. *State v. Warclub*, 2005 MT 149, ¶ 24, 327 Mont. 352, 114 P.3d 254.

The fundamental purpose of allowing the withdrawal of a guilty plea is to guard against the conviction of an innocent person. If there is any doubt that a plea was involuntary, the doubt should be resolved in favor of defendant. *State v. Boucher*, 2002 MT 114, ¶ 25, 309 Mont. 514, 48 P.3d 21 (overruled on "abuse of discretion" standard by *State v. Lone Elk*, 2005 MT 56, ¶ 19, 326 Mont. 214, 108 P.3d 500).

Withdrawal

NOTE: Cases identifying the standard of review for motion to withdraw a guilty plea as "abuse of discretion" were overruled by *State v. Lone Elk*, 2005 MT 56, ¶ 19, 326 Mont. 214, 108 P.3d 500, and as clarified in *State v. Warclub*, 2005 MT 149, ¶¶ 17-23, 327 Mont. 352, 114 P.3d 254. The majority of the "abuse of discretion" cases do not include a Shepard's signal indicating this.

Section 46-16-105(2), MCA, permits withdrawal of a plea of guilty if good cause is shown. The ultimate test of whether good cause is shown to withdraw a guilty plea is whether it was voluntary. However, numerous case-specific considerations may bear on the question of whether good cause is shown to withdraw a guilty plea including an inadequate colloquy, newly discovered evidence, intervening circumstances or any other reason for withdrawing a guilty plea that did not exist when the defendant pleaded guilty. *State v. Robinson*, 2009 MT 170, ¶ 11, 350 Mont. 493, 208 P.3d 851.

This Court reviews a denial of a motion to withdraw a guilty plea de novo because whether a plea was entered voluntarily is a mixed question of law and fact. *State v. Valdez-Mendoza*, 2011 MT 214, ¶ 12, 361 Mont. 503, 260 P.3d 151.

This Court reviews de novo a defendant's motion to withdraw a guilty plea. *State v. Andrews*, 2010 MT 154, ¶ 11, 357 Mont. 52, 236 P.3d 574.

To determine whether a defendant entered a plea voluntarily, and further, whether the district court erred in denying a defendant's motion to withdraw a plea, we may examine case specific considerations, including the adequacy of the district court's interrogation and whether there was a dismissal of another charge via plea bargain. *State v. Muhammad*, 2005 MT 234, ¶ 14, 328 Mont. 397, 121 P.3d 521.

In Camera Proceedings

The District Court has inherent discretionary power to control discovery based on its authority to control trial administration. We review a district court's rulings on discovery motions for an abuse of discretion. The party claiming error in the district court's discovery rulings must show prejudice. *Hendricksen v. State*, 2004 MT 20, ¶ 35, 319 Mont. 307, 84 P.3d 38.

The in camera procedure should be used to decide what information could be properly discovered. *State v. Burns*, 253 Mont. 37, 39, 830 P.2d 1318, 1320 (1992) (citing *In re Lacy*, 239 Mont. 321, 326, 780 P.2d 186, 189 (1989)).

An in camera review is often used at various stages throughout discovery and trial "to balance the privacy interests of the parties and the need to know. The in camera procedure can effectively offer protection to both parties by avoiding needless exposure of potentially harmful information." *Hendricksen v. State*, 2004 MT 20, ¶ 37, 319 Mont. 307, 84 P.3d 38 (quoting *State v. Burns*, 253 Mont. 37, 39, 830 P.2d 1318, 1319-20 (1992)).

We review a district court's decision to conduct an in camera inspection of evidence, and its decision whether or not to require disclosure of the reviewed evidence, for an abuse of

discretion. *State v. Burns*, 253 Mont. 37, 42, 830 P.2d 1318, 1322 (1992). *State v. Knowles*, 2010 MT 186, ¶ 53, 357 Mont. 272, 239 P.3d 129.

Indictments and Informations

Amendments

A district court's decision whether to allow amendment of an Information is reviewed for an abuse of discretion. An Information must reasonably apprise the accused of the charges against him, so that he may have the opportunity to prepare and present his defense. *State v. Wilson*, 2007 MT 327, ¶ 19, 340 Mont. 191, 172 P.3d 1264.

It is elementary that a defendant may waive objections to the filing of an amended information by failing to raise them even though the amendment goes to matter of substance. *State ex rel. Treat v. Dist. Ct.*, 122 Mont. 249, 253, 200 P.2d 248, 250 (1948). See also *Gransberry v. State*, 149 Mont. 158, 163, 423 P.2d 853, 856 (1967).

Dismissals

We review the denial of a motion to dismiss for insufficient evidence (formerly a motion for directed verdict) de novo. *State v. Kirn*, 2012 MT 69, ¶ 8, 364 Mont. 356, 374 P.3d 746.

A ruling on a motion to dismiss in a criminal proceeding is a question of law, which we review de novo. *State v. Burns*, 2011 MT 167, ¶ 17, 361 Mont. 191, 256 P.3d 944.

A district court's conclusion as to whether sufficient evidence exists to convict is ultimately an analysis and application of the law to the facts, and as such is properly reviewed de novo. *State v. Swann*, 2007 MT 126, ¶ 19, 337 Mont. 326, 160 P.3d 511.

A motion to dismiss for insufficient evidence is appropriate only if, viewing the evidence in the light most favorable to the prosecution, there is not sufficient evidence upon which a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Rosling*, 2008 MT 62, ¶ 35, 342 Mont. 1, 180 P.3d 1102 (citing § 46-16-403, MCA).

Misjoinder

A criminal defendant seeking to sever counts into separate trials has the burden of proving either that the counts were misjoined under § 46-11-404(1), MCA, or, if joinder was proper, that

severing the counts under § 46-13-211(1), MCA, is necessary to prevent unfair prejudice. *State v. Southern*, 1999 MT 94, ¶ 14, 294 Mont. 225, 980 P.2d 3.

We review whether counts were properly joined in an information de novo. Some factors used to consider whether counts in an information are of similar character include whether the charges are brought under the same statute; whether the charges involve similar victims, locations, or modes of operation; the time frame within which the charges occurred; and the geographical area within which the charges occurred. A defendant has the burden to prove that counts were misjoined under § 46-11-404(1), MCA. *State v. Freshment*, 2002 MT 61, ¶ 22, 309 Mont. 154, 43 P.3d 968.

Determining whether charges were properly joined in a charging document is a question of law which we review de novo. *State v. Southern*, 1999 MT 94, ¶ 17, 294 Mont. 225, 980 P.2d 3.

Prosecutorial Misconduct

Charging decisions are generally within the prosecutor's exclusive domain, and the separation of powers doctrine mandates judicial respect for the prosecutor's independence. An indictment will be dismissed only in flagrant cases of prosecutorial misconduct. Dismissal may be based either on constitutional grounds or on the court's exercise of its supervisory powers, and the appropriate analysis will differ accordingly. The purpose of dismissal may be to preserve fairness to the individual defendant, to deter prosecutorial misconduct, or to protect judicial integrity. But dismissal is permitted only if the misconduct was prejudicial to the defendant. *State v. Passmore*, 2010 MT 34, ¶ 46, 355 Mont. 187, 225 P.3d 1229 (citing §§ 46-1-103(3), 46-20-701(2), MCA).

This Court measures prosecutorial misconduct by reference to established norms of professional conduct. To establish that misconduct justifies reversal of a conviction, the defendant must show that the alleged prosecutorial misconduct violated his or her substantial rights. We will not presume prejudice from charges of prosecutorial misconduct. *State v. Martin*, 2001 MT 83, ¶ 63, 305 Mont. 123, 23 P.3d 216.

Sufficiency

We read the information, and the affidavit in support thereof, as a whole to determine the sufficiency of the charging documents. We apply the "common understanding" rule to determine if the charging language of a document allows a person to understand the charges against him. Under this standard, the test of the sufficiency of a charging document is whether the defendant is apprised of the charges and whether he will be surprised. *State v. Wilson*, 2007 MT 327, ¶ 25, 340 Mont. 191, 172 P.3d 1264.

An affidavit in support of a motion to file an information need not make out a prima facie case that a defendant committed an offense. A mere probability that he committed the offense is sufficient. Similarly, evidence to establish probable cause need not be as complete as the evidence necessary to establish guilt. The determination whether a motion to file an information is supported by probable cause is left to the sound discretion of the trial court. *State v. Kern*, 2003 MT 77, ¶17, 315 Mont. 22, 67 P.3d 272.

Montana follows the general rule that an information is sufficient if it properly charges an offense in the language of the statute describing the offense. *State v. Steffes*, 269 Mont. 214, 223, 887 P.2d 1196, 1201 (1994).

An information need not be perfect. Technical errors (such as citing the wrong statute number when the correct name and language of the offense was used) are subject to harmless error review. *State v. Pearson*, 217 Mont. 363, 367, 704 P.2d 1056, 1059 (1985).

In Limine Orders

We review a lower court's evidentiary rulings, including rulings on motions in limine and expert witness qualifications and competency, for an abuse of discretion. *City of Missoula v. Paffhausen*, 2012 MT 265, ¶ 12, 367 Mont. 80, 289 P.3d 141.

We review a district court's denial of a motion in limine for an abuse of discretion. *State v. DuBray*, 2003 MT 255, ¶ 47, 317 Mont. 377, 77 P.3d 247.

The authority to grant or deny a motion in limine rests in the inherent power of the court to admit or exclude evidence and to take such precautions as are necessary to afford a fair trial for all parties. Therefore, we will not overturn a district court's grant or denial of a motion in limine absent an abuse of discretion. *State v. Ayers*, 2003 MT 114, ¶ 23, 315 Mont. 395, 68 P.3d 768.

Immunity Agreements

The District Court may compel testimony or production of evidence pursuant to § 46-15-331, MCA (requiring immunity if a witness is compelled by the court to produce any evidence that may incriminate him). Thus, an order pursuant to this statute is within the discretion of the District Court. *State v. Kills on Top*, 243 Mont. 56, 80, 793 P.2d 1273, 1289 (1990).

Fundamental fairness requires that a trial court compel testimony of a witness, with a corresponding grant of immunity, when defendant has requested the order and the testimony is

relevant and material to the defendant's defense of entrapment. *State v. Chapman*, 209 Mont. 57, 69, 679 P.2d 1210, 1217 (1984).

The trial court's finding that there was no immunity bargain is entitled to a presumption of correctness on appeal. In reviewing the evidence, all conflicts should be resolved in favor of the determination below. If there is any substantial evidence of record tending to support the determination below, this Court should affirm said determination upon appeal. *State v. Evans*, 178, Mont. 96, 100, 582 P.2d 1211, 1213 (1978).

Judicial Estoppel

In a case where the defendant claimed judicial estoppel applied, the Montana Supreme Court reviewed the district court's decision for correctness. *State v. Darrah*, 2009 MT 96, ¶ 8, 350 Mont. 70, 205 P.3d 792.

Judicial Notices

A trial court decision to take judicial notice of a fact is reviewed for abuse of discretion. *State v. Elison*, 2000 MT 288, ¶¶ 36–38, 302 Mont. 228, 14 P.3d 456. See also *State v. Anderson*, 211 Mont. 272, 287–88, 686 P.2d 193, 201–02 (Mont. 1984).

A defendant must request review by the trial court, either before or after the judicial notice is taken. *State v. Peterson*, 2002 MT 65, ¶ 21, 309 Mont. 199, 44 P.3d 499 (interpreting provisions of the Montana Code Annotated which have been renumbered but preserved in substance in M.R. Evid. 201 and M.R. Evid. 202). Failure to make objection at the trial court level will preclude review on appeal. *Peterson*, ¶ 21.

When a district court takes judicial notice of testimony and a defendant objects to that notice, the decision to take judicial notice of testimony is subject to harmless error review if "the State presented sufficient evidence at trial on which the finder of fact could conclude beyond a reasonable doubt that [the defendant] was guilty of the offenses charged." *State v. Loh*, 275 Mont. 460, 748–79, 914 P.2d 592, 603 (Mont. 1996).

Jurisdiction

A challenge to a district court's jurisdiction is an issue of law, which this Court reviews de novo. *State v. Martz*, 2008 MT 382, ¶ 16, 347 Mont. 47, 196 P.3d 1239.

The question of whether a motion to dismiss is properly granted or denied on the basis of a lack of subject matter jurisdiction is one of law which we review de novo. *State v. Spotted Blanket*, 1998 MT 59, ¶ 18, 288 Mont. 126, 955 P.2d 1347.

Jury Demand

The right to a jury trial is governed by Article II, Section 26 of the Montana Constitution. We review de novo a district court's conclusions of law and interpretations of the Constitution. Our review of questions involving constitutional law is plenary. *State v. Trier*, 2012 MT 99, ¶¶ 10-11, 365 Mont. 46, 277 P.3d 1230.

Jury Waiver

The constitutional and statutory provisions concerning jury trials must not be interpreted in such a manner as to permit a categorical rule of automatic waiver whenever a defendant fails to appear for a mandatory hearing, particularly where circumstances are present which call into question the defendant's ability to comply with the court's order requiring his appearance. Article II, Section 26 provides that, upon default of appearance, the court "may" be tried without a jury. This language grants the trial court discretion to manage the proceedings and to conduct the trial without a jury where the defendant has failed to appear for a mandatory hearing. *City of Missoula v. Girard*, 2013 MT 168, ¶ 19, 370 Mont. 443, 303 P.3d 1283.

Whether a defendant's failure to appear results in a waiver of the fundamental right to a jury trial is a conclusion of law based upon an interpretation of the Constitution. *City of Missoula v. Cox*, 2008 MT 364, ¶ 11, 346 Mont. 422, 196 P.3d 452. We review de novo a district court's conclusions of law and interpretations of the Constitution. Our review of questions involving constitutional law is plenary. *City of Missoula v. Cox*, 2008 MT 364, ¶ 5, 346 Mont. 422, 196 P.3d 452.

Whether the parties effectively waived the right to a jury trial pursuant to § 46-16-110(3), MCA, is a conclusion of law which we review for correctness. *State v. Dahlin*, 1998 MT 113, ¶¶ 10, 20, 289 Mont. 182, 961 P.2d 1247.

Juveniles

This court reviews a district court's decision for abuse of discretion regarding whether a juvenile should be prosecuted in youth court or district court. With regard to specific findings of fact relied on by the district court in transferring the case, the standard of review is whether such findings are clearly erroneous. We review a district court's conclusions of law to determine

whether its conclusions are correct. *State v. Whiteman*, 2005 MT 15, ¶ 10, 325 Mont. 358, 106 P.3d 543.

A youth court's interpretation and application of the Youth Court Act is reviewed for correctness. We review criminal sentences for legality, to determine whether they are within the parameters set by statutes as a matter of law. *In re T.M.L.*, 2012 MT 9, ¶ 8, 363 Mont. 304, 268 P.3d 1255.

Lack of Prosecution

When a defendant argues that "the State violated her fundamental right to a speedy trial as guaranteed by the Sixth Amendment to the United States Constitution and Article II, Section 24 of the Montana Constitution by failing to prosecute her case in a timely manner[,]" the Montana Supreme Court will review the trial court's determination whether the defendant has been denied the constitutional right to a speedy trial for correctness. *State v. Lewis*, 2007 MT 16, ¶¶ 7, 10, 335 Mont. 331, 151 P.3d 883.

Law of the Case

A district court's actions regarding law of the case issues is reviewed under an abuse of discretion standard. *Notti v. State*, 2008 MT 20, ¶ 66, 341 Mont. 183, 176 P.3d 1040 (overruled on other grounds by *Whitlow v. State*, 2008 MT 140, ¶ 18 n. 4, 343 Mont. 90, 183 P.3d 861).

Failure to properly apply the law of the case constitutes an abuse of discretion. *State v. Gilder*, 2001 MT 121, ¶ 18, 305 Mont. 362, 28 P.3d 488.

Lineups

A district court's denial of a motion to suppress testimony of a witness's identification of the defendant in a photographic lineup is reviewed to determine whether the court's findings of fact are clearly erroneous and whether those findings are correctly applied as a matter of law. *State v. DuBray*, 2003 MT 255, ¶¶ 56-57, 317 Mont. 377, 77 P.3d 247.

For a potentially tainted out-of-court photo lineup identification, unless the error is obvious and the prejudice clear, the defendant's remedy is an effective cross examination with the identification question then becoming one of weight to be determined by the jury and not one of admissibility. This standard is equally applicable to an in-court identification with no claim of taint or suggestiveness in the underlying out-of-court photo identification. *State v. Stokes*, 195 Mont. 321, 326, 637 P.2d 498, 500-01 (1981). We treat a motion to exclude an eyewitness identification as a motion to suppress. Our standard of review for a district court's denial of a motion to suppress is whether the court's findings of fact are clearly erroneous, and whether

those findings are correctly applied as a matter of law. *State v. Baldwin*, 2003 MT 346, ¶ 11, 318 Mont. 489, 81 P.3d 488.

A defendant's constitutional right to due process bars the admission of evidence deriving from suggestive identification procedures where there is a substantial likelihood of irreparable misidentification. *State v. Lally*, 2008 MT 452, ¶ 14, 348 Mont. 59, 199 P.3d 818

Miranda Rights

The Montana Supreme Court reviews a district court's determination that a defendant was not entitled to Miranda warnings for correctness. *State v. Elison*, 2000 MT 288, ¶¶ 12, 25, 34, 302 Mont. 228, 14 P.3d 456.

The Montana Supreme Court reviews a district court's determination that a defendant voluntarily, knowingly, and intelligently waived his Miranda rights to ensure its factual findings are supported by substantial credible evidence and its conclusions of law are correct. *State v. Nixon*, 2013 MT 81, ¶ 45, 369 Mont. 359, 298 P.3d 408.

Out-of-Court Identifications

When a defendant argues that evidence from a photographic lineup should be suppressed because it is unduly suggestive, the Montana Supreme Court reviews the district court's findings of fact to determine whether they are clearly erroneous, and reviews whether those findings are correctly applied as a matter of law. *State v. Dubray*, 2003 MT 255, ¶ 57, 317 Mont. 377, 77 P.3d 247.

A district court's decision to admit statistical evidence about witness identification of suspects from photo lineups is reviewed for abuse of discretion. *State v. Zlahn*, 2014 MT 224, ¶ 38, 376 Mont. 245, 332 P.3d 247.

Plea Agreement Breaches/Enforcement

Whether the State has breached a plea agreement is a question of law, which we review de novo. *State v. Lewis*, 2012 MT 157, ¶ 13, 365 Mont. 431, 282 P.3d 679.

A plea agreement is a contract and is subject to contract law standards. Based upon facts as determined by the fact-finder, the question of whether a contract was breached is a question of law which we review de novo. *State v. Shepard*, 2010 MT 20, ¶ 8, 355 Mont. 114, 225 P.3d 1217.

When the state has breached a plea agreement, the non-breaching defendant must be afforded the initial right to choose from available remedies. The State then bears the substantial burden, as the breaching party, of demonstrating with clear and convincing evidence that the defendant's choice of remedy would result in a miscarriage of justice. Only upon such a showing may a district court, in its discretion, disallow a defendant's choice of remedy. *State v. Munoz*, 2001 MT 85, ¶ 38, 305 Mont. 139, 23 P.3d 922.

Interpretation

A plea agreement is essentially a contract and is subject to contract law standards. We review the district court's interpretation of a contract for correctness. *State v. Lewis*, 2012 MT 157, ¶ 13, 365 Mont. 431, 282 P.3d 679.

Ambiguity in a plea agreement should be construed in favor of the defendant. *State v. Langley*, 2016 MT 67, ¶ 22, 383 Mont. 39, 369 P.3d 1005.

Preclusion of Proffered Defense

"In a criminal trial, the defendant bears the burden of proving an affirmative defense. A court may determine whether an affirmative defense exists as a matter of law. We review a district court's conclusions of law for correctness. However, if there are conflicting facts regarding the availability of an affirmative defense in a criminal trial, the issue is properly submitted to a jury." *State v. Leprowse*, 2009 MT 387, ¶ 11, 353 Mont. 312, 221 P.3d 648 (internal citations omitted).

Pre-indictment Delay

The issue of preaccusation (preindictment) delay presents a question of constitutional law. We review a trial court's resolution of such questions de novo, to determine whether the court's interpretation and application of the law are correct. *State v. Passmore*, 2010 MT 34, ¶ 23, 355 Mont. 187, 225 P.3d 1229.

Pretrial Detention and Release

The Montana Supreme Court reviews a defendant's claim that the district court incorrectly failed to give him credit for pretrial time served in violation of statute for correctness of the district court's decision. *State v. Hafner*, 2010 MT 233, ¶¶ 20–24, 358 Mont. 137, 243 P.3d 435.

Pretrial Hearings

"Whether the District Court violated [a defendant's] constitutional right to appear at all criminal proceedings against him when the court excluded him from a pre-trial meeting" is a question of constitutional law and therefore the review of the Montana Supreme Court is plenary. *State v. Mann*, 2006 MT 160, ¶¶ 10–11, 332 Mont. 476, 139 P.3d 159.

Pretrial Identifications

When a defendant challenges the admissibility of an in-court identification based upon a pretrial identification, this is an evidentiary ruling that the Montana Supreme Court reviews for an abuse of discretion. *State v. Bingman*, 2002 MT 350, ¶ 19, 313 Mont. 376, 61 P.3d 153.

"To determine the admissibility of an in-court identification based upon a pretrial identification, this Court applies a two-part test. First, we determine whether the pretrial identification procedure was impermissibly suggestive. If the identification procedure is deemed impermissibly suggestive, we then evaluate whether, under the totality of the circumstances, the procedure had such a tendency to give rise to a substantial likelihood of irreparable misidentification that to allow the witness to make an in-court identification would result in a violation of due process." *State v. Bingman*, 2002 MT 350, ¶ 21, 313 Mont. 376, 61 P.3d 153 (internal citations omitted).

Probable Cause

This Court's function as a reviewing court is to ultimately ensure that the magistrate or lower court had a "substantial basis" to determine that probable cause existed. It is critical in our review, however, that a magistrate's determination that probable cause exists be paid great deference and every reasonable inference possible be drawn to support that determination. *State v. Reesman*, 2000 MT 243, ¶ 19, 301 Mont. 408, 10 P.3d 83 (overruled on other grounds by *State v. Barnaby*, 2006 MT 203, ¶ 42, 333 Mont. 220, 142 P.3d 809).

Recusal

"It appears we have never determined the appropriate standard of review for the question of whether a judge should have recused himself. In general, interpretation of laws such as constitutional and statutory provisions, are matters of law we review de novo. *Reichert v. State*, 2012 MT 111, ¶ 19, 365 Mont. 92, 278 P.3d 455. Since a judge's disqualification decision is directed by the Montana Code of Judicial Conduct, the decision relies on an accurate interpretation of the Code's provisions. Moreover, as other courts have recognized, an appellate court's inquiry into disqualification requires an objective examination of the circumstances surrounding a request for recusal. *See, e.g., Powell v. Anderson*, 660 N.W.2d 107, 116 (Minn. 2003) (adopting a de novo standard of review and noting that the objective inquiry required in disqualification claims 'displaces any deference that might otherwise be paid to the challenged judge's decision to not recuse'). For those reasons, we will review a judge's disqualification decision de novo, determining whether the lower court's decision not to recuse was correct under the Montana Code of Judicial Conduct." *State v. Dunsmore*, 2015 MT 108, ¶ 10, 378 Mont. 514, 347 P.3d 1220.

Representation

Conflict-Free Representation

We review the conflict of interest issue de novo. *Longjaw v. State*, 2012 MT 243, ¶ 11, 366 Mont. 472, 288 P.3d 210.

The Court reviews whether representation of co-defendants by the OPD creates a conflict of interest and violates a defendant's constitutional rights de novo. *State v. St. Dennis*, 2010 MT 229, ¶ 19, 358 Mont. 88, 244 P.3d 292.

Disqualification of Counsel

We review a district court's denial of a request for appointment of new counsel for an abuse of discretion. *State v. Happel*, 2010 MT 200, ¶ 11, 357 Mont. 390, 240 P.3d 1016.

Hybrid Representation

A court may appoint stand by counsel and allow the defendant to represent himself, but only if the court is satisfied that the defendant has knowingly and intelligently waived his counsel. The decision to remove appointed counsel and appoint standby counsel lies within the discretion of the trial court. *State v. Brown*, 228 Mont. 209, 213-14, 741 P.2d 428, 431 (1987).

Ineffective Representation

Claims of ineffective assistance of counsel present mixed issues of law and fact which we review de novo. *State v. Clary*, 2012 MT 26, ¶ 12, 364 Mont. 53, 270 P.3d 88.

ProSe Representation

A person charged with a crime has a constitutional right to proceed pro se. However, an accused who represents himself relinquishes many of the benefits associated with the right to counsel so a request to proceed pro se must be unequivocal, and made voluntarily, knowingly, and intelligently. Courts indulge in every reasonable presumption against waiver of the right to counsel. *State v. Swan*, 2000 MT 246, ¶¶ 16-17, 301 Mont. 439, 10 P.3d 102.

To determine whether a request for self-representation was unequivocal, we review the record as a whole. *State v. Swan*, 2000 MT 246, ¶ 20, 301 Mont. 439, 10 P.3d 102.

Substitution of Counsel

We review for abuse of discretion a district court's denial of a request for appointment of new counsel. *State v. Holm*, 2013 MT 58, ¶ 16, 369 Mont. 227, 304 P.3d 365.

Absent an abuse of discretion, this Court will not overrule a district court's ruling on a request for substitution of counsel, which is within the sound discretion of the district court. *State v. Edwards*, 2011 MT 210, ¶ 14, 361 Mont. 478, 260 P.3d 396.

It is within the discretion of the district court to consider requests to appoint new counsel and the court's determination will be sustained absent an abuse of discretion. *State v. Craig*, 274 Mont. 140, 149, 906 P.2d 683, 288 (1995).

Waiver of Representation

District Court judges are in the best position to determine whether the defendant has made a knowing and intelligent waiver of his or her right to counsel. This court will not disturb a district court's grant of a request for self-representation so long as substantial credible evidence exists to support a determination that the defendant acted voluntarily, knowingly, and intelligently in waiving his or her right to counsel. *State v. Hartsoe*, 2011 MT 188, ¶ 20, 361 Mont. 305, 258 P.3d 428.

Withdrawal of Counsel

The grant or denial of a lawyer's motion to withdraw is within the discretion of the district court. We review such discretionary matters to determine whether the court abused its discretion. *State v. Jones*, 278 Mont. 121, 125, 923 P.2d 560, 562 (1996).

Selective Prosecution

A reviewing court reviews allegations of prosecutorial error de novo, considering the prosecutor's conduct in the context of the entire proceeding. *State v. Roundstone*, 2011 MT 227, ¶ 13, 362 Mont. 74, 261 P.3d 1009.

Our review of a district court's decision to grant or deny a motion to dismiss for selective prosecution is plenary. *State v. Stanko*, 1998 MT 323, ¶ 49, 292 Mont. 214, 974 P.2d 1139.

A prosecutor has broad discretion in determining whether or not to prosecute. Thus, the conscious exercise of some selectivity in the enforcement of criminal laws, without more, does not constitute a violation of constitutional rights. A person asserting that his or her constitutional rights have been violated by selective prosecution must allege and prove that the selection was deliberately based on an unjustifiable standard such as race, religion or other arbitrary classification. *State v. Harris*, 1999 MT 115, ¶ 23, 294 Mont. 397, 983 P.2d 397.

There is a presumption of regularity supporting prosecutorial decisions. In the absence of clear evidence to the contrary, courts will presume that prosecutors have properly discharged their official duties. There must be a credible showing of different treatment of similarly situated persons in order to justify an order of selective prosecution discovery. *In re Himes*, No. OP 13-0244, 2013 Mont. LEXIS 299, at *7, 311 P.3d 443 (Mont. 2013).

Sixth Amendment Rights

De novo review is appropriate when applying a constitutional standard or concept, not capable of precise articulation, to the facts of a particular case. The appellate court reviews a district court's conclusions of law and interpretations of the Constitution or the rules of evidence, de novo. *State v. Mizenko*, 2006 MT 11, ¶ 8, 330 Mont. 299, 127 P.3d 458.

We review de novo a district court's interpretation of the Sixth Amendment. *State v. Sanchez*, 2008 MT 27, ¶ 15, 341 Mont. 240, 177 P.3d 444.

In determining whether the procedure followed at a defendant's trial complies with the Sixth Amendment, we address a question of constitutional law. We exercise plenary review of questions of constitutional law. *State v. Carter*, 2005 MT 87, ¶ 21, 326 Mont. 427, 114 P.3d 1001.

Speedy Trial

A criminal defendant's right to a speedy trial is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Mont. Const. art. II, § 24. *State v. Ariegwe*, 2007 MT 204, ¶ 20, 338 Mont. 442, 167 P.3d 815.

In order to address a speedy trial claim, a trial court must first make findings of fact. An appellate court reviews those factual findings to determine whether they are clearly erroneous. A trial court's factual findings are clearly erroneous if they are not supported by substantial credible evidence, if the trial court has misapprehended the effect of the evidence, or if a review of the record leaves the appellate court with the definite and firm conviction that a mistake has been made. While the factual findings are reviewed under the clearly erroneous standard, whether those facts amount to a violation of the defendant's right to a speedy trial is a question of constitutional law. An appellate court reviews a trial court's conclusions of law de novo to determine whether the trial court's interpretation and application of the law are correct. *State v. Houghton*, 2010 MT 145, ¶ 13, 357 Mont. 9, 234 P.3d 904.

Whether the right to speedy trial has been violated is a question of law, and we will review the district court's legal conclusions to determine whether the interpretation of law is correct. *State v. Bertolino*, 2003 MT 266, ¶ 10, 317 Mont. 453, 77 P.3d 543 (citing *State v. Chesarek*, 1998 MT 15, ¶ 9, 287 Mont. 215, 953 P.2d 698). We will review for clear error any of the district court's factual findings underlying the application of § 46-13-401(2), MCA. *City of Helena v. Roan*, 2010 MT 29, ¶ 7, 355 Mont. 172, 226 P.3d 601.

Statutes

This Court reviews de novo a district court's interpretation of a statute. In doing so we are guided by the long-held maxim that legislative intent must first be determined from the plain words used in the statute, and when that is possible no other means of interpretation are proper. Courts may not disregard the plain language of a statute. *State v. Cooksey*, 2012 MT 226, ¶ 32, 366 Mont. 346, 286 P.3d 1174.

We review a district court's application of a statute for correctness. *State v. Alden*, 282 Mont. 45, 49, 934 P.2d 210, 213 (1997).

Statutes of Limitation

Statutes of limitation in criminal matters are to be liberally interpreted in favor of repose. A particular offense should not be construed as continuing unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that the legislature must assuredly have intended that it be treated as a continuing one. *State v. Hamilton*, 252 Mont. 496, 502, 830 P.2d 1264, 1267 (1992).

An exception to a general statute of limitation cannot be enlarged beyond that which its plain language imports, and whenever the exception is invoked the case must unequivocally fall within it. *State v. Hamilton*, 252 Mont. 496, 500, 830 P.2d 1264, 1268 (1992).

Whether a specific statute of limitations applies retroactively to a defendant's alleged crime is a conclusion of law which we review for correctness. *State v. Duffy*, 2000 MT 186, ¶ 26, 300 Mont. 381, 6 P.3d 453.

A district court's determination that a criminal offense involves "continuous conduct" for the purposes of applying the statute of limitations is a conclusion of law which we review for correctness. *State v. Mullin*, 268 Mont. 214, 216, 886 P.2d 376 (1994).

Suppression

We review a district court's grant or denial of a motion to suppress to determine whether the court's findings are clearly erroneous and whether those findings were applied correctly as a matter of law. *State v. Gill*, 2012 MT 36, ¶ 10, 364 Mont. 182, 272 P.3d 60.

Venue

The grant or denial of a motion to dismiss for improper venue in a criminal case is a question of law which an appellate court reviews de novo. *State v. Galpin*, 2003 MT 324, ¶ 22, 318 Mont. 318, 80 P.3d 1207.

We review for abuse of discretion a trial court's ruling on a motion for change of venue under § 46-13-203(1), MCA. A court abuses its discretion if it acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice. Moreover, in exercising its discretion, the court is bound to uphold the defendant's constitutional right to a trial by an impartial jury. The burden to demonstrate an abuse of discretion is on the party seeking reversal of an unfavorable ruling. *State v. Devlin*, 2009 MT 18, ¶ 15, 349 Mont. 67, 201 P.3d 791.

Upon review of a denial of a motion for change of venue on the basis of prejudicial pretrial publicity, an appellate court looks not to the amount of publicity but rather to whether the publicity is of sufficient inflammatory nature to generate a widespread belief among the community of guilt. This inflammatory nature must be proven by the defendant who alleges denial of a fair trial. *State v. Miller*, 231 Mont. 497, 505, 757 P.2d 1275, 1280 (1988).

Vindictive Prosecution

A reviewing court reviews allegations of prosecutorial error de novo, considering the prosecutor's conduct in the context of the entire proceeding. *State v. Roundstone*, 2011 MT 227, ¶ 13, 362 Mont. 74, 261 P.3d 1009.

We review a district court's denial of a motion to dismiss based on prosecutorial vindictiveness de novo. *State v. Knowles*, 2010 MT 186, ¶¶ 23, 25, 357 Mont. 272, 239 P.3d 129.

The principle of prosecutorial vindictiveness originates from the idea that it is unconstitutional for the State or its agent to penalize a person for exercising his or her legal rights. To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort. Retaliatory action on the part of the prosecutor for the exercise of procedural rights by an accused has been held to violate constitutional due process requirements. *State v. Roundstone*, 2011 MT 227, ¶ 37, 362 Mont. 74, 261 P.3d 1009.

Voluntariness of Confession

The question of voluntariness largely depends upon the facts of each case, no single fact being dispositive. The determination of voluntariness, rather, depends upon the totality of the circumstances. The issue of voluntariness is a factual one addressed to the discretion of the trial court. We do not sit as triers of fact; nor do we lightly disturb the trial court's decision. *State v. Allies*, 186 Mont. 99, 111, 606 P.2d 1043, 1050 (1979).

When a defendant moves to suppress a confession on the basis that it was involuntarily given, the prosecution must prove by a preponderance of the evidence that the confession was voluntary. *State v. Campbell*, 278 Mont. 236, 240-41, 924 P.2d 1304, 1307 (1996) (citing § 46-13-301, MCA).

Waiver of Rights

Courts indulge in every reasonable presumption against waiver of fundamental constitutional rights and will not indulge in any presumption of waiver. Thus, for a waiver to be effective, a defendant must waive a known right knowingly, intelligently, and voluntarily. *State v. Walker*, 2008 MT 244, ¶ 18, 344 Mont. 477, 188 P.3d 1069.

A waiver of rights is only valid if the waiver has been made voluntarily, knowingly, and intelligently. Voluntariness depends on the totality of the circumstances, with no one fact being dispositive. We review a district court's determination that a defendant voluntarily, knowingly, and intelligently waived his rights under the clearly erroneous standard. *State v. Lawrence*, 285 Mont. 140, 148-49, 948 P.2d 186, 191 (1997).

Warrants

This Court has adopted the "totality of the circumstances" test set forth in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317 (1983), to address the issue of probable cause for a search warrant. The totality of the circumstances test is fact specific. If a magistrate issues a search warrant after subjecting the application to this test, a reviewing court must presume that the magistrate's decision is correct. *State v. Siegal*, 281 Mont. 250, 279, 934 P.2d 176, 193 (1997).

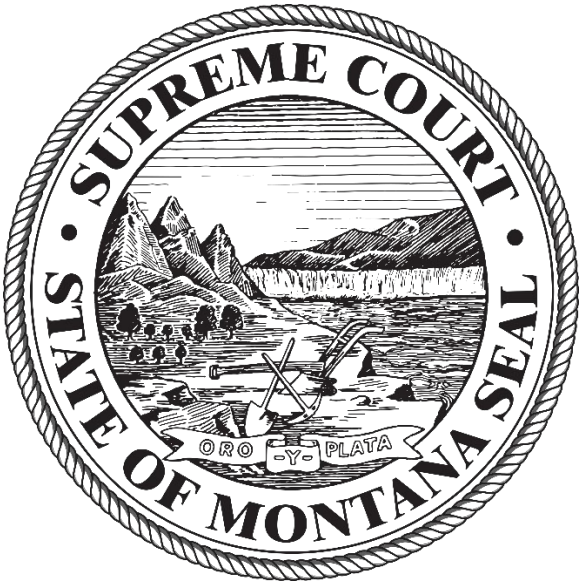
When a magistrate determines that probable cause exists to warrant the issuance of a search warrant, this Court should not only give great deference to that decision but we should also draw every reasonable inference possible to support that decision. Thus, the duty of a reviewing court is not to conduct a de novo review of the magistrate's determination, but to simply ensure that the magistrate or lower court had a substantial basis for concluding that probable cause to issue the search warrant existed. *State v. Siegal*, 281 Mont. 250, 279, 934 P.2d 176, 193 (1997) (modified in part by *State v. Kuneff*, 1998 MT 287, ¶ 19, 291 Mont. 474, 970 P.2d 556).

However, when the issuance of a search warrant is based in part on illegal information, the reviewing court shall excise the illegally obtained information from the application for search warrant and review the remaining information de novo to determine whether probable cause supported the issuance of a search warrant. *State v. Kuneff*, 1998 MT 287, ¶ 19, 291 Mont. 474, 970 P.2d 556

We review a district court's legal conclusion on whether or not a search warrant is overbroad de novo. *State v. Graham*, 2004 MT 385, ¶ 11, 325 Mont. 110, 103 P.3d 1073.

Wiretaps

We review a district court's denial of a motion to suppress wiretap evidence to determine whether the court's findings of fact are clearly erroneous and whether its interpretation and application of the law is correct. *State v. Allen*, 2010 MT 214, ¶ 32, 357 Mont. 495, 241 P.3d 1045.



Montana Judicial Branch

Standards of Review Handbook

Criminal Trial

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Acquittals

All denials of a directed verdict involve application of law (the applicable statute). We therefore review a trial court's decision on a motion for a directed verdict de novo. *State v. Swann*, 2007 MT 126, ¶ 17, 337 Mont. 326, 160 P.3d 511. An appellate court reviews the sufficiency of the evidence to determine whether, after 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. Granby*, 283 Mont. 193, 199, 939 P.2d 1006, 1009 (1997). An appellant need not challenge the sufficiency of the evidence at the district court level in order for this Court to review the "verdict or decision" on the basis of sufficiency of the evidence. *Granby*, 283 Mont. at 198, 939 P.2d at 1009.

Admission of Evidence

Evidentiary rulings are reviewed for an abuse of discretion. *State v. Hicks*, 2013 MT 50, ¶ 14, 369 Mont. 165, 296 P.3d 1149. A trial court abuses its discretion when it "acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice." *Hicks*, ¶ 14. To the extent that the court's ruling is based on an interpretation of an evidentiary rule or statute, our review is de novo. *State v. Derbyshire*, 2009 MT 27, ¶ 19, 349 Mont. 114, 201 P.3d 811.

Authenticity

The determination of the adequacy of foundation for the admission of evidence is within the discretion of the trial court and will not be overturned absent a clear abuse of discretion. *State v. Dubray*, 2003 MT 255, ¶ 74, 317 Mont. 377, 77 P.3d 247.

Batson Claims

When considering a Batson challenge, *i.e.*, a challenge that a litigant has exercised its use of preemptory strikes in a discriminating manner, an appellate court will defer to a trial court's findings of fact unless clearly erroneous, and will review the trial court's application of the law de novo. *State v. Ford*, 2001 MT 230, ¶ 7, 306 Mont. 517, 39 P.3d 108. We review a district court's application of the law regarding the timeliness of a Batson-type challenge de novo. *State v. Parrish*, 2005 MT 112, ¶ 9, 327 Mont. 88, 111 P.3d 671.

Best Evidence Rule

The best evidence rule provides that the original of a "writing, recording, or photograph" is required to prove the contents thereof. *M. R. Evid*. 1002.

We review evidentiary rulings for abuse of discretion, *see, e.g.*, *State v. Weeks*, 270 Mont. 63, 75, 891 P.2d 477, 484 (1995), but have never ruled on the standard for the Best Evidence Rule, specifically.

Bruton Violations

In *Bruton v. United States*, 391 U.S. 123, 126, 88 S. Ct. 1620, 1622, "the United States Supreme Court held that extrajudicial statements of a co-defendant who is not subject to cross-examination may violate the Confrontation Clause." *State v. Grimes*, 1999 MT 145, ¶ 27, 295 Mont. 22, 982 P.2d 1037. *Bruton* thus "bars the introduction of a co-defendant's post-arrest statements implicating other defendants when the co-defendant will not testify at trial." *Grimes*, ¶ 19 (citing *Bruton*, 391 U.S. at 126, 88 S. Ct. at 1622). The Montana Supreme Court adopted *Bruton* in *State v. Fitzpatrick*, 178 Mont. 530, 569 P.2d 383 (1977).

Although the Montana Supreme Court has not specifically cited a standard of review for *Bruton* violations, we have stated:

"We will review a district court's evidentiary decision to determine whether it abused its discretion. There is no discretion, however, in properly interpreting the Sixth Amendment. We review a district court's conclusions of law and interpretations of the Constitution or the rules of evidence, *de novo*." *State v. Mizenko*, 2006 MT 11, ¶ 8, 330 Mont. 299, 127 P.3d 458 (internal citations omitted). *See also State v. Spencer*, 2007 MT 245, ¶ 14, 339 Mont. 227, 169 P.3d 384 ("We review de novo a district court's interpretation of the Sixth Amendment. We review a district court's evidentiary rulings for abuse of discretion. A court abuses its discretion when it acts arbitrarily, without employing conscientious judgment, or exceeds the bounds of reason, resulting in substantial injustice.") (internal citations omitted).

Burden of Proof

The Montana Supreme Court has not yet specified a standard of review for whether a district court properly applied the correct burden of proof. However, in *State v. Anderson*, 2008 MT 116, ¶ 17, 342 Mont. 485, 182 P.3d 80, the Court explained that jury instructions which shift the burden of proof to the defendant may constitute a violation of due process. *State v. Anderson*,

2008 MT 116, ¶ 17, 342 Mont. 485, 182 P.3d 80. Because the issue of whether a defendant's due process rights were violated is a question of law, we review the district court's decision in instructing the jury to determine whether its interpretation of the law was correct. *Anderson*, ¶ 17. *See also State v. Raugust*, 2000 MT 146, ¶ 12, 300 Mont. 54, 3 P.3d 115 ("The standard of review for jury instructions in a criminal case is whether the instructions, as a whole, fully and fairly instruct the jury on the law applicable to the case.").

Chain of Custody

Generally, "[w]e review a district court's ruling on admissibility of evidence for abuse of discretion." *State v. Baze*, 2011 MT 52, ¶ 7, 359 Mont. 411, 251 P.3d 122. This includes rulings on chain of custody. *See Baze*, ¶ 20; *see also State v. McCoy*, 2012 MT 293, ¶¶ 11, 19, 367 Mont. 357, 291 P.3d 568 (holding that a district court did not abuse its discretion by finding a sufficient chain of custody for the admission of latent fingerprint evidence). However, in *Haffey v. State*, 2010 MT 97, ¶ 9, 356 Mont. 198, 233 P.3d 315, the Supreme Court stated:

This is our seminal decision regarding postconviction DNA testing under § 46-21-110, MCA. At issue on appeal are the District Court's determinations under § 46-21-110(5)(b), (c), (e), MCA, which involve, respectively, the chain of custody of the evidence to be tested, whether identity was or should have been an issue at trial, and whether the DNA testing would establish whether the petitioner was the perpetrator of the crime of which he was convicted. We conclude that these determinations are mixed questions of fact and law, subject to de novo review. *See United States v. Fasono*, 577 F.3d 572, 575 (5th Cir. 2009) (similar chain-of-custody and likelihood-of-innocence determinations under federal DNA testing statute, 18 U.S.C. § 3600(a)(4), (a)(8), subject to de novo review); *Illinois v. Urioste*, 316 Ill. App. 3d 307, 736 N.E.2d 706, 710, 249 Ill. Dec. 512 (Ill. App. 2000) (question of whether identity was an issue under similar statute subject to de novo review); *see also United States v. Jordan*, 594 F.3d 1265, 1269-70 (10th Cir. 2010) (Lucero, J., concurring) (explaining propriety of de novo review); *but see e.g. Washington v. Riofta*, 166 Wn.2d 358, 209 P.3d 467, 473 (Wash. 2009) (applying abuse of discretion standard of review).

Character Evidence

The Montana Supreme Court reviews a district court's evidentiary rulings for abuse of discretion. *State v. Huerta*, 285 Mont. 245, 254, 947 P.2d 483, 489 (1997). This includes the admissibility of character evidence. *Huerta*, 285 Mont. at 254, 947 P.2d at 489; accord *State v. MacGregor*, 2013 MT 297, ¶ 44, 372 Mont. 142, 311 P.3d 428.

Closing Arguments

The Montana Supreme Court reviews a district court's rulings on objections to closing argument content for abuse of discretion. *State v. Cooksey*, 2012 MT 226, ¶ 40, 366 Mont. 346, 286 P.3d 1174. "Closing argument statements are considered in the context of the entire argument. The defendant must make a timely objection to closing argument statements or the objection is deemed to be waived." *Cooksey*, ¶ 40 (internal citations omitted). However, the Supreme Court may undertake plain error review of closing argument objections not stated at trial if the Court is persuaded that the prosecutor's comments "resulted in a manifest miscarriage of justice, undermined the fundamental fairness of the trial, or compromised the integrity of the judicial process." *Cooksey*, ¶ 40; accord *State v. Awbery*, 2016 MT 48, ¶ 30, 382 Mont. 334, 367 P.3d 346; *State v. Chafee*, 2014 MT 226, ¶ 12, 376 Mont. 267, 332 P.3d 240. Plain error review is discretionary. *Awbery*, ¶ 30.

Coconspirator Statements

The Montana Supreme Court reviews a trial court's evidentiary rulings to determine whether the court abused its discretion. *State v. Smith*, 276 Mont. 434, 440, 916 P.2d 773, 776 (1996). This includes rulings on the admissibility of coconspirator statements. *See Smith*, 276 Mont. at 440, 916 P.2d at 776; *see also State v. Stever*, 225 Mont. 336, 342, 732 P.2d 853, 857 (1987).

Comments on Evidence

A district court's denial of a motion for a mistrial because of alleged improper comments a lawyer makes to a jury during closing argument, is reviewed for abuse of discretion. *State v. Criswell*, 2013 MT 177, ¶ 48. 370 Mont. 511, 305 P.3d 760.

Confrontation Clause

We review a district court's evidentiary ruling—which triggers a confrontation clause analysis—for abuse of discretion. *State v. Hall*, 1999 MT 297, ¶¶ 28, 37, 297 Mont. 111, 991 P.2d 929.

We exercise plenary review over claimed violations of a defendant's right to be present at a critical stage in the proceedings, including for confrontation clause purposes. *State v. Northcutt*,

2015 MT 267, ¶¶ 5, 6, 381 Mont. 81, 358 P.3d 179 (*citing State v. Charlie*, 2010 MT 195, ¶ 21, 357 Mont. 355, 239 P.3d 934).

Constitutionality of Statutes

Statutes are presumed to be constitutional. A party challenging a statute's constitutionality must establish, "beyond a reasonable doubt, that the statute is unconstitutional, and any doubt must be resolved in favor of the statute." *State v. Michaud*, 2008 MT 88, ¶ 15, 342 Mont. 244, 180 P.3d 636. The constitutionality of a statute is a question of law, which we review for correctness. *State v. Knudson*, 2007 MT 324, ¶ 12, 340 Mont. 167, 174 P.3d 469. When reviewing a question of constitutional law, including the issue of whether a defendant's due process rights were violated, this Court reviews the district court's conclusion to determine whether its interpretation of the law was correct. *State v. Spady*, 2015 MT 218, ¶ 12, 380 Mont. 179, 354 P.3d 590.

Contempt

We review a district court's decision regarding motions to hold people or entities in contempt by determining whether the district court acted within its jurisdiction and whether the evidence supports the court's order. *Sanders v. State*, 1998 MT 62, ¶ 9, 288 Mont. 143, 955 P.2d 1356.

We review a grant or denial of a motion to dismiss in a criminal case de novo. *State v. Letasky*, 2007 MT 51, ¶¶ 8–10, 336 Mont. 178, 152 P.3d 1288. This may occur when a district court held a defendant in contempt for violating § 45-7-309(1)(c), MCA and then denied the defendant's motion to dismiss the misdemeanor criminal contempt charges.

We review a district court's decision to restrain a criminal defendant during trial for an abuse of discretion. *State v. Hartsoe*, 2011 MT 188, ¶ 19, 361 Mont. 305, 258 P.3d 428 (citing *State v. Herrick*, 2004 MT 323, ¶ 15, 324 Mont. 76, 101 P.3d 755).

Continuances

The granting of a continuance by a district court is discretionary and not a matter of right with a defendant. Absent a clear abuse of discretion, an appellate court will not disturb a district court's denial of a continuance. *State v. Elliot*, 2002 MT 26, ¶ 45, 308 Mont. 227, 43 P.3d 279.

Credibility Determinations

A jury's verdict is reviewed by determining if substantial evidence supports the verdict. With respect to the crucial matter of witness credibility, "[t]he jury is the sole judge . . . . [I]nconsistencies [in witness testimony] do not make [the] testimony inherently incredible. 'Only in those rare cases where the story told is so inherently improbable or so nullified by internal self-contradictions that no fair-minded person could believe it may we say that no firm foundation exists for the verdict based on it.'" *State v. Anderson*, 211 Mont. 272, 294–95, 686 P.2d 193, 205 (1984).

Cross-Examination

"We apply the abuse of discretion standard when reviewing a district court's evidentiary rulings. With respect to evidentiary rulings, we afford the district courts 'broad discretion . . . to limit the scope of cross-examination to those issues it determines are relevant to trial.'" *State v. Wilson*, 2007 MT 327, ¶ 19, 340 Mont. 191, 172 P.3d 1264 (citing *State v. Beavers*, 1999 MT 260, ¶ 20, 296 Mont. 340, 987 P.2d 371).

"We review a district court's evidentiary rulings for an abuse of discretion. If evidence has been improperly admitted, however, we will find reversible error based on prejudice to the defendant where there is a reasonable probability that the inadmissible evidence might have contributed to the conviction." *State v. Gowan*, 2000 MT 277, ¶ 9, 302 Mont. 127, 13 P.3d 376 (holding the District Court did abuse its discretion when it allowed a prosecutor to open the door to character evidence when crossing a defense witness). *See also State v. Nelson*, 2002 MT 122, ¶¶ 9, 11, 310 Mont. 71, 48 P.3d 736.

Double Jeopardy

"A district court's denial of a motion to dismiss criminal charges on double jeopardy grounds presents a question of law which we review for correctness." *State v. Cates*, 2009 MT 94, ¶ 22, 350 Mont. 38, 204 P.3d 1224 (citing *State v. Maki*, 2008 MT 379, ¶ 9, 347 Mont. 24, 196 P.3d 1281).

Entrapment

We have held that "in reviewing a district court's denial of a motion to dismiss based on entrapment, we will review the evidence and inferences in a light most favorable to the State." *State v. Reynolds*, 2004 MT 364, ¶ 8, 324 Mont. 495, 104 P.3d 1056 (citing *State v. Kim*, 239 Mont. 189, 194, 779 P.2d 512, 515 (1989)). "The defendant bears the burden of proving entrapment." *Reynolds*, ¶ 9. However, a district court "may determine that entrapment exists as a matter of law." *Reynolds*, ¶ 9. "If there are conflicting facts, the issue is properly submitted to a jury." *Reynolds*, ¶ 9.

Evidentiary Rulings

"District courts are vested with broad discretion in controlling the admission of evidence at trial." *Seltzer v. Morton*, 2007 MT 62, ¶ 65, 336 Mont. 225, 154 P.3d 561. We review the district court to determine whether the "court abused its discretion." *Seltzer*, ¶ 65.

Expert Testimony

The determination of the qualification and competency of expert witnesses rests largely within the trial judge, and without a showing of an abuse of discretion, such determination will not be disturbed. *State v. Dubray*, 2003 MT 255, ¶ 38, 317 Mont. 377, 77 P.3d 247.

Extrinsic Evidence

"[W]hether extrinsic evidence is admissible is a question of law that we review for correctness." *Kruer v. Three Creeks Ranch of Wyo., L.L.C.*, 2008 MT 315, ¶ 37, 346 Mont. 66, 194 P.3d 634.

Fifth Amendment Rights

"This Court's review of constitutional questions is plenary." *State v. Dugan*, 2013 MT 38, ¶ 14, 369 Mont. 39, 303 P.3d 755. We "review for correctness a district court's interpretation of constitutional law." *Nichols v. Dept. of Just.*, 2011 MT 33, ¶ 8, 359 Mont. 251, 248 P.3d 813.

Griffin Violations

Prosecutors are forbidden from commenting on a defendant's decision not to testify under the Fifth Amendment to the United States Constitution. *Griffin v. California*, 380 U.S. 609, 615, 85 S. Ct. 1229, 1232 (1965); *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824 (1967); *Town of Columbus v. Harrington*, 2001 MT 258, ¶ 18, 307 Mont. 215, 36 P.3d 937. "The holdings in *Griffin* and *Chapman* form the foundation for the Montana cases which have considered the same issue." *State v. Johnson*, 233 Mont. 473, 476, 760 P.2d 760, 761 (1988). We "review for correctness a district court's interpretation of constitutional law." *Nichols v. Dept. of Just.*, 2011 MT 33, ¶ 8, 359 Mont. 251, 248 P.3d 813. When there is no objection to the prosecutor's comments, review is for plain error. *State v. Upshaw*, 2006 MT 341, ¶ 15, 335 Mont. 162, 153 P.3d 579.

Hearsay

We review a district court's evidentiary decision to determine whether it abused its discretion. *State v. Mizenko*, 2006 MT 11, ¶ 8, 330 Mont. 299, 127 P.3d 458.

Impeachment Evidence

"We review evidentiary rulings for an abuse of discretion. *State v. Derbyshire*, 2009 MT 27, ¶ 19, 349 Mont. 114, 201 P.3d 811. "A court abuses its discretion if it acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice." *Derbyshire*, ¶ 19." *State v. Hardman*, 2012 MT 70, ¶ 8, 364 Mont. 361, 276 P.3d 839.

In Abstentia Proceedings

"We review findings of fact under the clearly erroneous standard. *State v. Burt*, 2000 MT 115, P 6, 299 Mont. 412, P 6, 3 P.3d 597, P 6; *see also United States v. Houtchens*, 926 F.2d 824, 826 (9th Cir. 1991) ("The judge's factual finding that a defendant has knowingly and voluntarily failed to appear at trial is reviewable for clear error.")." *State v. Weaver*, 2008 MT 86, ¶ 9, 342 Mont. 196, 179 P.3d 534.

In-Court Identification

"We apply a two-part test to determine whether an in-court identification based on a pretrial identification is admissible. We first determine whether the pretrial identification procedure was impermissibly suggestive. If it was, we then determine, based on the totality of the circumstances, whether the suggestive procedure created a substantial likelihood of irreparable misidentification." *State v. Lally*, 2008 MT 452, ¶ 15, 348 Mont. 59, 199 P.3d 818.

Ineffective Assistance of Counsel

"Because ineffective assistance of counsel claims constitute mixed questions of law and fact, our review is de novo." *Deschon v. State*, 2008 MT 380, ¶ 16, 347 Mont. 30, 197 P.3d 476 (internal citation omitted).

"Where ineffective assistance of counsel claims are based on facts of record in the underlying case, they must be raised in the direct appeal and, conversely, where the allegations of ineffective assistance of counsel cannot be documented from the record in the underlying case, those claims must be raised by petition for post-conviction relief." *State v. White*, 2001 MT 149, ¶ 12, 306 Mont. 58, 30 P.3d 340.

"When evaluating a claim of ineffective assistance of trial counsel, we use the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Whitlow v. State*, 2008 MT 140, ¶ 10, 343 Mont. 90, 183 P.3d 861. Under the first prong of the Strickland test, 'the defendant must show that counsel's representation fell below an objective standard of reasonableness.' *Whitlow*, ¶ 14 (quoting *Strickland*, 466 U.S. at 687–88, 104 S. Ct. at 2064). Under the second prong of *Strickland*, the defendant must show that counsel's performance prejudiced the defense. *Whitlow*, ¶ 10 (citing *State v. Racz*, 2007 MT 244, ¶ 22, 339 Mont. 218, 168 P.3d 685). 'The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. In short, the defendant must prove (1) that counsel's performance was deficient and (2) that counsel's deficient performance prejudiced the defense. *Whitlow*, ¶ 10 (citation omitted). Because a defendant must prove both prongs, an insufficient showing under one prong eliminates the need to address the other. *Whitlow*, ¶ 11 (citing *Adams v. State*, 2007 MT 35, ¶ 22, 336 Mont. 63, 153 P.3d 601)." *Sartain v. State*, 2012 MT 164, ¶ 11, 365 Mont. 483, 285 P.3d 407.

Judge Conduct

A communication between a judge and a deliberating jury in the jury room holds the potential to substantially prejudice a defendant, but will not always result in reversible error. *Compare State v. Northcutt*, 2015 MT 267, ¶ 16, 381 Mont. 81, 358 P.3d 179, *with State v. Tapson*, 2001 MT 292, ¶ 32, 307 Mont. 428, 41 P.3d 305.

Article VII, section 11(3) of the Montana Constitution and § 3-1-1107, MCA, allow this Court, upon recommendation of the Judicial Standards Commission, to impose discipline upon any Montana judge for violation of the Code of Judicial Conduct. *Judicial Stds. Comm'n of Mont. v. Baugh*, 2014 MT 149, ¶ 12, 375 Mont. 257, 334 P.3d 352.

Juror Misconduct

"This Court reviews motions for new trial based on juror misconduct for abuse of discretion, and a district court will not be overturned unless a defendant demonstrates he was deprived of a fair and impartial trial." *State v. MacGregor*, 2013 MT 297, ¶ 15, 372 Mont. 142, 311 P.3d 428.

"The trial court is in the best position to observe the jurors and to decide the potential for prejudice when allegations of juror misconduct are raised; therefore, the trial court has significant latitude when ruling on these matters, and its determination is given considerable weight by this Court. This Court will defer to that determination absent a showing of prejudice." *State v. Rennaker*, 2007 MT 10, ¶ 29, 335 Mont. 274, 150 P.3d 906 (internal citations omitted).

Jury Inquiries
District Court's Response

The decision to provide requested information to a jury is one of discretion. Section 46-16-503(2), MCA. Accordingly, we review such a decision for abuse of discretion. *State v. Greene*, 2015 MT 1, ¶ 12, 378 Mont. 1, 340 P.3d 551.

If the judge is of the opinion the instructions already given are adequate, correctly state the law, and fully advise the jury on the procedures it is to follow in its deliberation, his refusal to answer a question already answered in the instruction is not error. *State v. Dunfee*, 2005 MT 147, ¶ 23, 327 Mont. 335, 114 P.3d 217.

Supplemental Instructions

The giving of jury instructions is reviewed for an abuse of discretion. The district court has broad discretion in formulating jury instructions. We review jury instructions to determine whether the instructions, as a whole, fully and fairly instruct the jury on the law applicable to the case. To constitute reversible error, any mistake in instructing the jury must prejudicially affect the defendant's substantial rights. *State v. Spotted Eagle*, 2010 MT 222, ¶ 6, 358 Mont. 22, 243 P.3d 402.

Jury Instructions

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. Dunfee*, 2005 MT 147, ¶ 20, 327 Mont. 335, 114 P.3d 217.

Adequacy of Instructions

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. Dunfee*, 2005 MT 147, ¶ 20, 327 Mont. 335, 114 P.3d 217.

The party assigning error to a district court's instruction must show prejudice in order to prevail. *Murphy Homes, Inc. v. Muller*, 2007 MT 140, ¶ 74, 337 Mont. 411, 162 P.3d 106.

The error must be "so significant as to affect the substantial rights of the party asserting error," and any error that does not affect substantial rights must be disregarded. *Clark v. Bell*, 2009 MT 390, ¶ 18, 353 Mont. 331, 220 P.3d 650.

Allen Charges

In analyzing a potential *Allen* Charge, this Court has concluded that a district court's instruction was not "objectionably coercive." *State v. Cline*, 170 Mont. 520, 540, 555 P.2d 724, 736 (1976). In *State v. Bieber*, 2007 MT 262, ¶ 65, 339 Mont. 309, 170 P.3d 444, this Court addressed whether a district court abused its discretion in "providing an *Allen*-type instruction after the jury was deadlocked." This Court cited *Cline* and concluded "that the instruction given here was not objectionably coercive." *Bieber*, ¶ 70.

Denial of Requested Instruction

We review a district court's decisions regarding jury instructions for an abuse of discretion. *Ammondson v. Northwestern Corp.*, 2009 MT 331, ¶ 30, 353 Mont. 28, 220 P.3d 1.

Two criteria must be met before a defendant is entitled to a lesser included offense instruction. First, the offense must actually constitute a lesser included offense of the offense charged and second, there must be sufficient evidence to support the included offense instruction. *See State v. Martinez*, 1998 MT 265, ¶ 10, 291 Mont. 265, 968 P.2d 705. In regard to the second criterion, we have stated that a lesser included offense instruction is not supported by the evidence where the defendant's evidence or theory, if believed, would require an acquittal. *State v. Hamby*, 1999 MT 319, ¶ 17, 297 Mont. 274, 992 P.2d 1266.

Due Process Challenges

Jury instructions that impermissibly shift the burden of proof to the defendant may constitute a violation of due process. *State v. McCaslin*, 2004 MT 212, ¶ 24, 322 Mont. 350, 96 P.3d 722. Because the issue of whether a defendant's due process rights were violated is a question of law, we review the district court's conclusion to determine whether its interpretation of the law was correct. *McCaslin*, ¶ 14.

Formulation of Instructions

The district court has broad discretion in formulating jury instructions. To constitute reversible error, any mistake in instructing the jury must prejudicially affect the defendant's substantial rights. *State v. Spotted Eagle*, 2010 MT 222, ¶ 6, 358 Mont. 22, 243 P.3d 402.

Harmless Error Plain Error

Jury instructions constitute trial error. *State v. LaMere*, 2000 MT 45, ¶¶ 44-45, 298 Mont. 358, 2 P.3d 204. Trial error is that type of error that typically occurs during the presentation of a case to the jury. Such error is amenable to qualitative assessment by a reviewing court for prejudicial impact relative to the other evidence introduced at trial. Trial error is not presumptively prejudicial and therefore not automatically reversible, and is subject to review under our harmless error statute, § 46-20-701(1), MCA. *State v. Van Kirk*, 306 Mont. 215, 225, 32 P.3d 735, 744 (2001). To constitute harmless error, this Court must be able to assent as a court that the offensive instruction could not reasonably have contributed to the jury verdict. This Court determines the impact of the error upon a reasonable jury. If the impact of the instruction could not have reasonably contributed to the verdict, then the error is harmless. *State v. Hamilton*, 185

Mont. 522, 541-42, 605 P.2d 1121, 1132 (1980). A court must view all the evidence in determining whether the instruction had an impact on the jury. *State v. Martinez*, 188 Mont. 271, 281, 613 P.2d 974, 979 (1980).

Plain Error

Where the defendant raises the plain error doctrine to request our review of issues that were not objected to at the district court level, our review is discretionary. *State v. Daniels*, 2003 MT 247, ¶ 20, 317 Mont. 331, 77 P.3d 224. This Court's inherent power of common law plain error review is used sparingly, on a case-by-case basis. Plain error review is undertaken only in those cases that implicate a criminal defendant's fundamental constitutional rights, where failing to review the claimed error at issue may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process. *State v. Dubois*, 2006 MT 89, ¶ 31, 322 Mont. 44, 134 P.3d 82.

Procedure for Reviewing Instructions

In reviewing jury instructions, we consider the instructions as a whole to determine whether they fully inform the jury of the law of the case, and we will not overturn a trial court's decisions in instructing a jury unless the court has abused its discretion. *Kenser v. Premium Nail Concepts, Inc.*, 2014 MT 280, ¶ 35, 376 Mont. 482, 338 P.3d 37.

Special Verdict Forms

We review the trial court's usage of a special verdict form for an abuse of discretion. *Hern v. Safeco Ins. Co. of Ill.*, 2005 MT 301, ¶ 20, 329 Mont. 347, 354, 125 P.3d 597. Our ordinary standard of review of a discretionary trial court ruling, including the use of a special verdict form, is whether the court abused its discretion. *Hern*, ¶ 20 (citation and internal quotation marks omitted).

Jury Selection

Challenges for Cause

We review whether a court, in granting or denying a challenge for cause, has abused its discretion. *State v. Falls Down*, 2003 MT 300, ¶ 17, 318 Mont. 219, 79 P.3d 797. If a court has abused its discretion in granting or denying a challenge for cause, we then determine whether a conviction should be set aside as a result of that error. *Falls Down*, ¶ 17. We will reverse the judgment and order a new trial if a court abuses its discretion by denying a defendant's challenge for cause, the defendant removes the challenged prospective juror with a peremptory challenge, and the defendant exhausts his peremptory challenges. *State v. Kebble*, 2015 MT 195, ¶ 15, 380 Mont. 69, 353 P.3d 1175.

Voir Dire/Peremptory Challenges

The District Court's decision to permit the State to challenge a juror for cause prior to a voir dire examination involves a conclusion of law. We review a district court's conclusion of law to determine if it is correct. *State v. Bearchild*, 2004 MT 355, ¶ 7, 324 Mont. 435, 103 P.3d 1006.

A district judge has great latitude in controlling voir dire. We review a court's control of voir dire for abuse of discretion. *State v. Grant*, 2011 MT 81, ¶ 8, 360 Mont. 127, 252 P.3d 193.

We review whether a court's findings of fact regarding a peremptory challenge are clearly erroneous. We apply de novo review to a court's application of the law. *State v. Falls Down*, 2003 MT 300, ¶ 37, 318 Mont. 219, 79 P.3d 797.

Jury Misconduct

The standard of review for reversing a lower court's ruling on a motion for mistrial requires clear and convincing evidence that the trial court's ruling was erroneous. Because the trial court is in the best position to observe the jurors and determine the potential for prejudice when allegations of jury misconduct are raised, the court has significant latitude when ruling on these matters, and its determination is given considerable weight by this court. *State v. McNatt*, 257 Mont. 468, 471, 849 P.2d 1050, 1052 (1993). In Montana, if jury misconduct is shown tending to injure the defendant, prejudice to the defendant is presumed. However, this presumption is not absolute and may be rebutted by testimony of the juror showing facts which prove that prejudice or injury did not occur. *State v. Murray*, 228 Mont. 125, 130, 741 P.2d 759, 762 (1987).

Jury Composition

It is well established that when considering a *Batson* challenge, *i.e.*, a challenge that a litigant has exercised its use of peremptory strikes in a discriminating manner, an appellate court will defer to the trial court's findings of fact unless clearly erroneous, and will review the trial court's application of the law de novo. *State v. Ford*, 2001 MT 230, ¶ 7, 306 Mont. 517, 39 P.3d 108. In *Ford*, this Court reviewed the history and progression of the *Batson* analysis concerning jury composition. *Ford*, ¶¶ 8-20. The standard of review to be applied by an appellate court to a *Batson* challenge depends upon the issue being appealed. If the issue on appeal is a matter of law, such as the timeliness in which a *Batson* challenge is made, the appellate court will review the trial court's application of the law de novo. If the issue is a factual one, however, *e.g.*, whether a party has established a prima facie case for discrimination, an appellate court will defer to the trial court's findings of fact unless clearly erroneous. Therefore, 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*, ¶ 18.

Opinion Evidence

Regarding a district courts evidentiary rulings, including rulings on the admissibility of expert testimony, we review for abuse of discretion. Reese v. Stanton, 2015 MT 293, ¶ 17, 381 Mont. 241, 358 P.3d 208 (*citing* Beehler v. Eastern Radiological Associates, P.C., 2012 MT 260, ¶ 17, 367 Mont. 21, 289 P.3d 131).

Lay Opinion Evidence

We review a district court's evidentiary rulings to determine whether the court abused its discretion. *State v. Nobach*, 2002 MT 91, ¶ 13, 309 Mont. 342, 46 P.3d 618. Lay opinion testimony is an evidentiary ruling that is reviewed for abuse of discretion. *See Nobach*, ¶¶ 13–14.

Prior Crimes, Wrongs, or Acts
M. R. Evid. 404(3)(b)

Trial courts have broad discretion in determine whether evidence is relevant and admissible. A district court's evidentiary ruling is reviewed for abuse of discretion. *State v. Rogers*, 1999 MT 305, ¶ 11, 297 Mont. 188, 992 P.2d 229. A district court abuses its discretion if it acts arbitrarily

or exceeds the bounds of reason resulting in substantial injustice. *State v. Doyle*, 2007 MT 125, ¶ 43, 337 Mont. 308, 160 P.3d 515.

M. R. Evid. 608

A district court has broad discretion to determine whether evidence is relevant and admissible. *State v. MacKinnon*, 1998 MT 78, ¶ 12, 288 Mont. 329, 957 P.2d 23. A district court's evidentiary ruling is reviewed for abuse of discretion. *State v. Maier*, 1999 MT 51, ¶ 13, 293 Mont. 403, 977 P.2d 298. A district court abuses its discretion if it acts arbitrarily or exceeds the bounds of reason resulting in substantial injustice. *State v. Doyle*, 2007 MT 125, ¶ 43, 337 Mont. 308, 160 P.3d 515.

M. R. Evid. 609

A district court has broad discretion to limit the scope of cross examination. *State v. Doyle*, 2007 MT 125, ¶ 43, 337 Mont. 308, 160 P.3d 515. District courts' evidentiary rulings are reviewed for abuses of discretion. *State v. Bingman*, 2002 MT 350, ¶ 31, 313 Mont. 376, 61 P.3d 153. A district court abuses its discretion if it acts arbitrarily or exceeds the bounds of reason resulting in substantial injustice. *Doyle*, ¶ 43.

Presence of Defendant

At Trial: The presence of a defendant in a criminal trial is guaranteed by the United States and Montana Constitutions. ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." U.S. Const. amend. VI. "In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel . . ." Mont. Const. art. II, § 24.). Whether a criminal defendant's right to be present at a crucial stage of trial has been violated is a question of constitutional law, and review of constitutional law by the Montana Supreme Court is plenary. *State v. St. Germain*, 2007 MT 28, ¶ 14, 336 Mont. 17, 153 P.3d 591.

Other proceedings: The presence of a defendant in non-trial stages of criminal proceedings may be regulated by statute. *See* Title 46, MCA. A district court's interpretation and application of a statute is reviewed for correctness. *State v. Clark*, 2006 MT 313, ¶ 7, 335 Mont. 39, 149 P.3d 551.

Privileges

Attorney-Client Privilege

"An attorney cannot, without the consent of his client, be examined as to any communication made by his client to him or his advice given thereon in the course of his professional employment." Section 26-1-803(1), MCA. "A client cannot, except voluntarily, be examined as to any communication made by the client to the client's attorney or the advice given to the client by the attorney in the course of the attorney's professional employment." Section 26-1-803(2), MCA. Waiver is the "intentional or voluntary relinquishment of a known right or conduct which implies relinquishment of a known right." *State v. Statczar*, 228 Mont. 446, 453, 743 P.2d 606, 610 (1987). The burden of establishing waiver of privilege is on the party seeking to overcome the privilege. *Statczar*, 228 Mont. at 452, 743 P.2d at 610. The party must provide the Court with evidence of words or conduct to support waiver. *Statczar*, 228 Mont at 453, 743 P.2d at 611.

Note: Motions made in district court based on an alleged violation of the attorney-client privilege are reviewed under the standards of review related to the underlying motion. *See State v. Tadewalt*, 2010 MT 177, 357 Mont. 208, 237 P.3d 1273, and *State v. Usrey*, 2009 MT 227, 351 Mont. 341, 212 P.3d 279.

Doctor-Patient Privilege

The Court has not defined a standard of review applicable to this section. However, evidentiary rulings are generally reviewed by the Court for an abuse of discretion. *State v. Cameron*, 2005 MT 32, ¶ 14, 326 Mont. 51, 106 P.3d 1189. A district court abuses its discretion if it acts arbitrarily or exceeds the bounds of reason resulting in substantial injustice. *State v. Doyle*, 2007 MT 125, ¶ 43, 337 Mont. 308, 160 P.3d 515.

Note: State v. Campbell, 146 Mont. 251, 405 P.2d 978 (1965) held doctor-patient privilege is not available to a defendant during a criminal prosecution as described by § 26-1-805, MCA. *Campbell*, 146 Mont. at 260, 405 P.2d at 984. (Section 46-16-201, MCA, states "[t]he Montana Rules of Evidence and the statutory rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided." Section 26-1-805, MCA, states: "Except as provided in Rule 35, M. R. Civ. P., a licensed physician, surgeon, or dentist may not, without the consent of the patient, be examined in a civil action as to any information acquired in attending the patient that was necessary to enable the physician, surgeon, or dentist to prescribe or act for the patient. A communication described in § 45-9-104(7)[, MCA,] is not a privileged communication.").

Marital Privilege

Two statutes apply to marital privilege. Section 26-1-802, MCA, states: "Neither spouse may, without the consent of the other, testify during or after the marriage concerning any communication made by one to the other during their marriage. The privilege is restricted to communications made during the existence of the marriage relationship and does not extend to communications made prior to the marriage or to communications made after the marriage is dissolved. The privilege does not apply to a civil action or proceeding by one spouse against the other or to a criminal action or proceeding for a crime committed by one spouse against the other or against a child of either spouse." Section 46-16-212, MCA, states in part: "Neither spouse may testify to the communications or conversations between spouses that occur during their marriage unless: (a) consent of the defendant-spouse is obtained; (b) the defendant-spouse has been charged with an act of criminal violence against the other; or (c) the defendant-spouse has been charged with abuse, abandonment, or neglect of the other spouse or either spouse's children."

If a district court's ruling is based on an interpretation of a statute, the Court reviews the interpretation de novo and the application of the statute for an abuse of discretion. *State v. Edwards*, 2011 MT 210, ¶ 12, 361 Mont. 478, 260 P.3d 396. A district court abuses its discretion if it acts arbitrarily or exceeds the bounds of reason resulting in substantial injustice. *State v. Doyle*, 2007 MT 125, ¶ 43, 337 Mont. 308, 160 P.3d 515.

M. R. Evid. 403

The Court reviews a district court's ruling on whether to exclude evidence due to a danger of unfair prejudice for an abuse of discretion. *State v. Belanus*, 2010 MT 204, ¶ 15, 357 Mont. 463, 240 P.3d 1021. A district court abuses its discretion if it acts arbitrarily or exceeds the bounds of reason resulting in substantial injustice. *State v. Doyle*, 2007 MT 125, ¶ 43, 337 Mont. 308, 160 P.3d 515.

Privilege against Self-Incrimination under the Fifth Amendment of the U.S. Constitution and Article II, Section 25 of the Montana Constitution

Whether or not a defendant's privilege against self-incrimination is violated is a conclusion of law, of which the Court's review is plenary and conclusions of law are reviewed for correctness. *State v. Fuller*, 276 Mont. 155, 159, 915 P.2d 809, 811 (1996).

Witnesses

District Court Decisions

A district court "has wide discretion to decide whether a [witness] who has a propensity for violence poses a security risk and warrants increased security measures." We therefore review for an abuse of discretion a district court's decision to require a witness to testify shackled, in handcuffs, or appear in jail clothing." *State v. Rossbach*, 2022 MT 2, ¶ 20, 407 Mont. 55, 501 P.3d 914 (quoting *State v. Herrick*, 2004 MT 323, ¶¶ 14-15, 324 Mont. 76, 101 P.3d 755, citing *State v. Hartson*, 2011 MT 188, ¶¶ 22-23, 361 Mont. 305, 258 P.3d 428).

Witness Sequestration

"Rule 615 'is not permissive' but 'mandates that witnesses be excluded' absent a valid exception." *State v. Wilson*, 2022 MT 11, ¶ 32, 407 Mont. 225, 502 P.3d 679 (quoting *State v. Osborne*, 1999 MT 149, ¶ 28, 295 Mont. 54, 982 P.2d 1045). "[W]hen a party requests an exclusion, and no exception applies, the decision is not committed to the trial court's discretion." *Wilson*, ¶ 32 (citation omitted). "But the decision whether a Rule 615 exception applies is reviewed for abuse of discretion." *Wilson*, ¶ 32 (emphasis in original).

Montana Judicial Branch

Standards of Review Handbook

Criminal: Post-Trial Decisions

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Sentencing

Constitutionality

The constitutionality of a sentence is a question of constitutional law. Questions of constitutional law are subject to plenary review by this Court and the district court's interpretation of the law is reviewed for correctness. *State v. Webb*, 2005 MT 5, ¶ 8, 325 Mont. 317, 106 P.3d 521 (analyzing whether a mandatory minimum sentence violated a defendant's procedural and substantive due process rights under the United States and Montana Constitutions); *State v. LaFreniere*, 2008 MT 99, ¶ 7, 324 Mont. 309, 180 P.3d 1161 (analyzing whether a condition added to defendant's probation violated the ex post facto clauses of the United States and Montana Constitutions).

A district court's resolution of an issue involving a question of constitutional law during sentencing is a conclusion of law which we review to determine whether the court's conclusion is correct. *State v. Killam*, 2005 MT 255, ¶ 7, 329 Mont. 50, 122 P.3d 439.

Continuances

The general standard of review of a district court's denial of a motion for continuance is whether the district court abused its discretion. *State v. Gleed*, 2014 MT 151, ¶ 10, 375 Mont. 286, 326 P.3d 1095.

Death Penalty

This Court automatically reviews every death sentence imposed under Montana law. *State v. Sattler*, 1998 MT 57, ¶ 91, 288 Mont. 79, 956 P.2d 54; § 46-18-307.

This Court must comply with the provisions of § 46-18-310, MCA, in reviewing a death sentence. *State v. Keith*, 231 Mont. 214, 222, 754 P.2d 474 (1988). We therefore adhere to the standards of review provided for in § 46-18-310, MCA. *State v. Smith*, 280 Mont. 158, 170, 931 P.2d 1272, 1279 (1996). Our review, conducted from a statewide perspective rather than from the individualized perspective the sentencing court must apply, serves as a check against arbitrary imposition of the death penalty. *State v. Sattler*, 1998 MT 57, ¶ 91, 288 Mont. 79, 956 P.2d 54.

Section 46-18-310, MCA, provides that this Court "shall uphold the sentencing court's findings of fact issued pursuant to 46-18-306 unless those findings are clearly erroneous. The supreme court may not substitute its judgment for that of the sentencing court in: (a) assessing the credibility of witnesses; drawing inferences from testimonial, physical, documentary, or other

evidence; or (c) resolving conflicts in the evidence presented at the sentencing hearing or considered by the sentencing court." Section 46-18-310(2), MCA. *See also State v. Sattler*, 1998 MT 57, ¶ 110, 288 Mont. 79, 956 P.2d 54 (citing § 46-18-310(2), MCA, and concluding that this Court's automatic review of death sentences includes "whether the evidence supports the sentencing court's findings regarding aggravating and mitigating circumstances").

When the death penalty has been imposed, the Legislature has directed this Court, because of the nature of the penalty involved, to expeditiously review the record and determine if any errors have been committed resulting in the imposition of an illegal sentence and to determine if a legal sentence is appropriate in the circumstances.

This Court is compelled to determine whether the punishment of death is disproportionate in relation to the crime for which it is imposed. In undertaking such a consideration, we are directed by statute to consider whether the sentence was imposed as a result of passion, prejudice, or other arbitrary factors; whether evidence supports the sentencing court's findings regarding aggravating and mitigating circumstances; and whether the sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and defendant. We make such an assessment based upon our independent review of the trial record and transcript, and of the record and transcript of the sentencing hearing. In so doing, we are not usurping the position of the district court as the primary sentencing entity in Montana's system of criminal jurisprudence; rather we mean to ensure that a penalty as unique in its severity and as irrevocable as the death penalty is not wantonly and freakishly, or arbitrarily and capriciously imposed. *State v. Coleman*, 185 Mont. 299, 306, 329-30, 605 P.2d 1000, 1006, 1018 (1979).

Disproportionate Sentences

While neither the Eighth Amendment to the United States Constitution, nor Article II, Section 22 of the Montana Constitution, contains explicit prohibitions against disproportionate sentences, the United States Supreme Court has held that the cruel and unusual punishment clause of the Eight Amendment bans sentences that are grossly disproportionate to the crime for which the defendant is convicted. The general rule in Montana is that a sentence that is within the statutory maximum guidelines does not violate the prohibition against cruel and unusual punishment. This Court has recognized an exception to the general rule when a sentence is so disproportionate to the crime that it shocks the conscience and outrages the moral sense of the community or of justice. The defendant bears the burden of proving his sentence falls within this exception. *State v. Rickman*, 2008 MT 142, ¶ 15, 343 Mont. 120, 183 P.3d 49.

Factual Findings

This Court reviews the district court's findings on which its sentence is based to determine whether they are clearly erroneous. *State v. Shults*, 2006 MT 100, ¶ 34, 322 Mont. 130, 136 P.3d 507.

Fines

This Court reviews fines as sentencing conditions. In reviewing a sentencing condition, we first review the condition for legality, to determine whether it falls within statutory parameters. A sentence outside the statutory parameters is illegal. Our standard of review of that question of law is de novo. If the condition is legal, we then review its reasonableness to determine whether the district court abused its discretion. *State v. Dennison*, 2008 MT 344, ¶ 10, 346 Mont. 295, 194 P.3d 704.

We review the sentence imposed by the court and, more specifically, the fine imposed for legality only, confining our review to determining whether the court had the statutory authority to impose the sentence, whether the sentence falls within the parameters set by the applicable sentencing statutes, and whether the court adhered to the affirmative mandates of the applicable sentencing statutes. This determination is a question of law and, as such, our review is de novo. *State v. Stephenson*, 2008 MT 64, ¶ 15, 342 Mont. 60, 179 P.3d 502.

Legality

Trial judges are granted broad discretion to determine the appropriate punishment for offenses. On appeal we will not review a sentence for mere inequity or disparity. Rather, this Court will only review a criminal sentence for its legality; that is, whether the sentence is within statutory parameters. A trial court's statutory interpretation is a question of law, which we review to determine whether it is correct. *State v. Webb*, 2005 MT 5, ¶ 8, 325 Mont. 317, 106 P.3d 521.

We review criminal sentences that include at least one year of actual incarceration for legality only. The term "legality" in this context signifies that we will not review a sentence for mere inequity or disparity. Rather, our review is confined to determining whether the sentencing court had statutory authority to impose the sentence, whether the sentence falls within the parameters set by the applicable sentencing statutes, and whether the court adhered to the affirmative mandates of the applicable sentencing statutes. We have characterized this "legality" standard more generally as reviewing for correctness. The question is one of law and the determination is whether the district court interpreted the law correctly. This determination is a question of law and, as such, our review is de novo. *State v. Ariegwe*, 2007 MT 204, ¶ 174, 338 Mont. 442, 167 P.3d 815.

With two narrow exceptions, our review of criminal sentences is for legality only. Under the first exception, if a defendant is sentenced to serve less than one year of actual incarceration, we review the sentence both for legality and for abuse of discretion. Under the second exception, if a defendant challenges a sentencing condition, we first review the condition's legality, and then

review for an abuse of discretion the condition's reasonableness under the particular facts of the case. *City of Bozeman v. Cantu*, 2013 MT 40, ¶ 10, 369 Mont. 81, 296 P.3d 461.

Persistent Felony Offender

A court's designation of a defendant as a persistent felony offender involves a question of statutory interpretation. We review a trial court's interpretation of the law, including questions of statutory interpretation, to determine whether the court's interpretation is correct. *State v. Montoya*, 1999 MT 180, ¶ 11, 295 Mont. 288, 983 P.2d 937; *State v. Damon*, 2005 MT 218, ¶ 12, 328 Mont. 276, 119 P.3d 1194.

Restitution

We review de novo whether a district court had statutory authority to impose a sentence, whether the sentence falls within the applicable sentencing parameters, and whether the court adhered to mandates of the applicable sentencing statutes. The appropriate measure of restitution is a question of law, which we review for correctness. In reviewing a district court's findings of fact as to the amount of restitution, our standard of review is whether those findings are clearly erroneous. *State v. Johnson*, 2011 MT 116, ¶¶ 12-13, 360 Mont. 443, 254 P.3d 578; *State v. Aragon*, 2014 MT 89, ¶ 9, 374 Mont. 391, 321 P.3d 841.

Restrictions/Conditions on Sentence

We will first review a sentencing condition for legality. Then, because sentencing statutes authorize sentencing judges to impose conditions on deferred or suspended sentences that constitute "reasonable restrictions or conditions considered necessary for rehabilitation or for the protection of the victim or society," the "reasonableness" of such conditions will be reviewed for an abuse of discretion. *State v. Ashby*, 2008 MT 83, ¶ 9, 342 Mont. 187, 179 P.3d 1164; *State v. Stiles*, 2008 MT 390, ¶ 13, 347 Mont. 95, 197 P.3d 966.

Revocation of Suspended/Deferred Sentence

The standard for revocation of a suspended or deferred sentence is whether the trial judge is reasonably satisfied that the conduct of the probationer has not been what the probationer agreed it would be if the probationer were given liberty. We review a district court's decision to revoke a deferred or suspended sentence to determine whether the court's decision was supported by a preponderance of the evidence in favor of the State and, if it was, whether the court abused its discretion. *State v. Goff*, 2011 MT 6, ¶ 13, 359 Mont. 107, 247 P.3d 715.

Sentence Review Division

We apply a two-tiered standard of review to a criminal sentence that does not qualify under statute for review by the Sentence Review Division because the sentence does not impose at least one year of actual incarceration. We review de novo whether the court had statutory authority to impose the sentence, whether the sentence falls within the applicable sentencing parameters, and whether the court adhered to the mandates of the applicable sentencing statutes. We next review the district court's sentence for an abuse of discretion. *State v. McMaster*, 2008 MT 268, ¶ 20, 345 Mont. 172, 190 P.3d 302.

The proper basis by which this Court may review a challenge to a decision of the Sentence Review Division is through a petition for extraordinary relief. Because the Sentence Review Division functions as an arm of this Court, this Court has the supervisory authority to ensure that it complies with statutes and rules governing its operations as well as the Montana Constitution and the United States Constitution. Pursuant to M. R. App. P. 14(1), this Court has the power to hear and determine such original and remedial writs as may be necessary or proper to the complete exercise of its jurisdiction. *Driver v. Sentence Review Div. in the Supreme Court of Mont.*, 2010 MT 43, ¶ 9, 355 Mont. 273, 227 P.3d 1018.

We review a criminal sentence for legality only. We consider whether the sentence falls within the parameters set by the applicable sentencing statutes. We leave equitable claims to the Sentence Review Division. *State v. Habets*, 2011 MT 275, ¶ 12, 362 Mont. 406, 264 P.3d 1139.

Sufficiency of the Evidence

Whether sufficient evidence exists to convict a defendant is ultimately an analysis and application of the law to the facts and, as such, is properly reviewed de novo. The standard of review of sufficiency of the evidence on appeal 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. Gunderson*, 2010 MT 166, ¶ 58, 357 Mont. 142, 237 P.3d 74.

We review the record for sufficient evidence in the light most favorable to the prosecution. There is sufficient evidence to support a conviction if any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. It is the jury's role as factfinder to evaluate the credibility of witnesses, weigh the evidence, and ultimately determine which version of events should prevail. Thus, it is immaterial to our review whether the evidence could have also supported a different result. *State v. Bekermans*, 2013 MT 11, ¶ 20, 368 Mont. 235, 293 P.3d 843.

Supervised Release

"We review restrictions or conditions on a criminal sentence for both legality and abuse of discretion. *State v. Hafner*, 2010 MT 233, ¶ 13, 358 Mont. 137, 243 P.3d 435; *State v. Ashby*, 2008 MT 83, ¶ 9, 342 Mont. 187, 179 P.3d 1164." *State v. Melton*, 2012 MT 84, ¶ 16, 364 Mont. 482, 276 P.3d 900.

"A court does not have the power to impose a sentence unless authorized by a specific grant of statutory authority. *State v. Burch*, 2008 MT 118, ¶ 23, 342 Mont. 499, 182 P.3d 66. A sentencing judge is specifically authorized to impose on a suspended sentence various restrictions or conditions that the judge considered necessary to obtain the objectives of rehabilitation and the protection of the victim and society. Section 46-18-202(1), MCA. These include restrictions on the offender's freedom of association and freedom of movement, plus 'any other limitation reasonably related to the objectives of rehabilitation and the protection of the victim and society.' Section 46-18-202(1)(c), (d), (f), MCA." *State v. Melton*, 2012 MT 84, ¶ 17, 364 Mont. 482, 276 P.3d 900.

A sentencing judge's discretion under § 46-18-202(1), MCA, is broad, and our review is correspondingly deferential. As a general rule, we will affirm a restriction or condition imposed pursuant to this statutory authority so long as the restriction or condition has some correlation or connections-i.e., nexus-to the underlying offense or to the offender himself. At the same time, however, we have explained that a sentencing judge's discretion "is not without limit" and that deferential review does not mean "no review at all." If the restriction or condition at issue is "overly broad or unduly punitive," or if the required nexus is "absent or exceedingly tenuous," we will reverse. *State v. Melton*, 2012 MT 84, ¶¶ 16-18, 364 Mont. 482, 276 P.3d 900 (citations omitted).