DA 20-0190

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 264

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CHERYL HREN and JEFFRY J. NELSON,

Defendants and Appellants.

APPEAL FROM: District Court of the Fifth Judicial District,
In and For the County of Beaverhead, Cause Nos. DC-17-3768 and DC-17-3769,
Honorable Luke Berger, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

Michael B. Grayson, Grayson Law Firm, Anaconda, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Roy Brown, Assistant Attorney General, Helena, Montana

David A. Buchler, Special Deputy County Attorney, Helena, Montana

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Submitted on Briefs: September 1, 2021

Decided: October 12, 2021

Filed:

Clerk

Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 After a combined jury trial, Defendant and Appellant Cheryl Hren (Hren) was convicted of felony criminal endangerment by accountability, misdemeanor stalking, and felony stalking, while Defendant and Appellant Jeffry J. Nelson (Nelson) was convicted of felony criminal endangerment, misdemeanor stalking, and felony stalking. Hren and Nelson appeal from the March 12, 2020 Judgment and Sentencing Order issued in each of their cases by the Fifth Judicial District Court, Beaverhead County, and their cases have again been consolidated on appeal.

¶2 We address the following restated issues on appeal:

> *1. Did the District Court err by not dismissing the stalking charges for insufficient evidence?*
>
> *2. Did the District Court err by admitting the railroad tie into evidence at the second trial after it had been exposed to the elements following the first trial and its condition deteriorated?*

¶3 We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶4 This criminal case arises from a long-simmering feud between property owners along the Small Horn Canyon Road, located approximately ten miles south of Dillon. The dispute regarding the road has been before us previously in the civil context multiple times, and a more complete background on the history of the road and its easements may be found in our decisions in *Meine v. Hren Ranches, Inc.*, 2015 MT 21, 378 Mont. 100, 342 P.3d 22

(*Meine I*) and *Meine v. Hren Ranches, Inc.*, 2020 MT 284, 402 Mont. 92, 475 P.3d 748 (*Meine II*).

¶5 Hren and Nelson own property and operate a ranch known as Hren Ranches[1] along the Small Horn Canyon Road, which they purchased in 1985. *Meine I*, ¶ 8. The Meine family owns property further up Small Horn Canyon Road, which has belonged to the family since they first homesteaded in the 1920s. *Meine I*, ¶ 6. Since the 1970s, there have been locked gates along Small Horn Canyon Road, placed there with the consent of neighboring landowners, who would receive a key. In 2007, the Hrens changed the locks on a gate across the road and did not provide keys to other landowners along Small Horn Canyon Road. *Meine I*, ¶ 13. The Meines, whose property is located beyond the locked gate, cut the Hrens' locks and chains and continued to use Small Horn Canyon Road. The Hrens made several complaints against both the Meines and Richard Blake, who maintains the property owned by the Mussard family along Small Horn Canyon Road, with the Beaverhead County Sheriff's Office (BCSO). *Meine I*, ¶ 14. The Meines filed suit in 2010, "seeking a determination that they hold a prescriptive easement over Small Horn Canyon Road where it crosses the Hrens' land and a permanent injunction prohibiting the Hrens from blocking or impeding the use of this easement." *Meine I*, ¶ 15. Ultimately, after the Meines were first granted a preliminary injunction which allowed them to use the road, the

[1] In previous litigation, Hren, Nelson, and Hren Ranches, Inc., are individually and collectively commonly referred to as "the Hrens." For consistency, we continue that practice in the factual background here.

Meines (and Mussard and the Blakes) were granted a prescriptive easement in 2014, which allowed them access to Small Horn Canyon Road and prevented the Hrens from blocking or impairing that access. *Meine I*, ¶ 19. The Hrens appealed, and we affirmed the Meines's prescriptive easement in 2015. *Meine I*, ¶ 49.

¶6 The dispute between Hren and Nelson and the Meines regarding the locked gate and access to Small Horn Canyon Road did not stop after this Court affirmed the prescriptive easement in 2015, however, and the Hrens sued the Meines, Blakes, and Mussard in 2015. *Meine II*, ¶ 8. The Meines were granted summary judgment in that case in 2016. *Meine II*, ¶ 8.

¶7 On May 28, 2016, the Meines and Richard Blake traveled to the locked gate at the bottom of Small Horn Canyon Road (bottom gate). The Meines and Blake went to the bottom gate to reinstall a swinging metal gate which they had previously installed next to the bottom gate. The Hrens had removed the swinging gate and placed it in a creek before building a wooden fence where the swinging gate previously stood. The Meines and Blake removed the fence and then, after retrieving the gate from the creek and purchasing hinges in Dillon, as the gate no longer had any once it was retrieved from the creek, began to reinstall the gate. Hren and her sister, Renee Klakken, arrived to inform the Meines that they would tear down and take the gate and reinstall the fence. Nelson then arrived and again informed the Meines that they would take the gate away. Nelson and Jerry Meine got into a scuffle over the gate, which eventually calmed down before the Meines finished

putting up the gate. After the Meines left, the Hrens removed the gate and reassembled the wooden fence in its place.

¶8 On September 24, 2016, Richard Blake was leading cattle out from the Mussard land and down Small Horn Canyon Road. When he arrived at the bottom gate, which has a cattle guard across the bottom, he could not get the cattle out. Blake then cut down the wooden fence the Hrens had placed where the swinging gate previously stood with a chainsaw. Jerry Meine video-recorded Blake cutting down the fence. Part of the fence was created with an upright wooden railroad tie, which Blake cut with his chainsaw near the ground level. The Meines then removed several rocks from the road and placed them to the side of the road with the fencing Blake had cut down.

¶9 On September 26, 2016, two days after the fence had been cut down with a chainsaw, Hren and Nelson returned to the bottom gate to rebuild the fence. A portion of the fence was once again created with an upright wooden railroad tie which Hren and Nelson had brought from a pile of old ties on their ranch. Prior to putting the railroad tie into the ground, Nelson drilled an approximately seven-inch decking screw vertically into the tie. On October 15, 2016, the Meines and Blake were again at the bottom gate to remove the fence put up by Hren and Nelson. Jerry Meine cleared the area around the railroad tie and began cutting the tie near ground level with his chainsaw. As Jerry was chainsawing through the tie, he felt an obstruction and stopped. Jerry then backed off and attempted to cut through from the other side. Once again, he hit an obstruction with his chainsaw and backed off. Jerry then was able to wiggle the tie and break it off, where he

discovered the obstruction he hit with his chainsaw was the seven-inch decking screw placed in the tie by Nelson. Jerry's chainsaw was damaged in the incident. Jerry later reported the incident to the BCSO on November 2, 2016. BCSO Undersheriff William Knox responded to the bottom gate, where he took pictures and seized the chainsawed railroad ties as evidence. On June 1, 2017, Hren and Nelson were each charged with one count of conspiracy to commit criminal endangerment and one count of criminal endangerment, or in the alternative, accountability for criminal endangerment, for placing the decking screw into the railroad tie. As part of their conditions of release in the case, Hren and Nelson were ordered to avoid contact with the Meines and Blake and to not interfere with them.

¶10 A few days after Hren and Nelson were ordered to not have contact with or interfere with the Meines and Blake, Richard Blake and a friend were traveling up Small Horn Canyon Road to prepare for a Fourth of July party at the Meines's cabin. Past the bottom gate, there are two more gates along Small Horn Canyon Road which are relevant to this appeal. The first past the bottom gate is known as the corral gate, and the second is known as the gate at the top of the grade. When Richard and his friend got to the corral gate, they found it was closed with barbed wire. When they got to the gate at the top of the grade, they found a barricade and barbed wire on the cattleguard, along with rocks and some broken steel posts in the easement path, and discovered the cattleguard appeared to have been dug out at the end. They removed the barbed wire, rocks, and posts. After finishing work at the Meines's cabin, they returned to the gate at the top of the grade to find the

barbed wire again across the cattleguard and more steel posts in the path. On July 3, Richard again traveled up the Small Horn Canyon Road. At the gate at the top of the grade, he again discovered a barricade on the cattleguard, rocks in the road, and that the cattleguard had been dug out. On July 4, the Meines and some friends were headed to their cabin for the Fourth of July party. Nelson arrived and watched them pass through the bottom gate. When the Meines got to the corral gate, they found the gate was hung on the wrong side and had been shut with tightly twisted barbed wire. The gate at the top of the grade was also shut with tightly twisted barbed wire. At trial, Richard Blake testified that from June 26, 2017, to July 4, 2017, he encountered barbed wire, barricades, and rocks in the road every time he went up Small Horn Canyon Road. He testified he never saw rocks in front of the Hren gates, but always along the Meine easement.

¶11 On July 26, 2017, the Meines again traveled the Small Horn Canyon Road to their property. Along the way, they discovered the cattleguard gate at the corral gate had been shut with barbed wire. At the gate at the top of the grade, they discovered a new gate had been placed over the cattleguard and shut with barbed wire. Jerry Meine could not untwist this barbed wire, so he had to cut it. The same day, Richard Blake also went up the road. He found the gate at the top of the grade shut with barbed wire, more of the cattleguard dug out, and rocks in the roadway. After finishing up work at the Meine cabin, Richard found the gates were once again closed with barbed wire on his way out. On August 29, 2017, Richard found more gravel gone from the front of the cattleguard, the gate at the top of the grade tied with barbed wire, and rocks in the easement. On November 5, 2017,

Richard and a friend went up the road. They discovered the Meine gates closed with barbed wire, but the Hren gates open. They then cut through the barbed wire and traveled through the Meine easement.

¶12 As relevant to this appeal, on January 9, 2018, both Hren and Nelson were each charged via Amended Information with criminal endangerment, or, in the alternative, criminal endangerment by accountability; misdemeanor stalking, or, in the alternative, misdemeanor stalking by accountability; and felony stalking, or, in the alternative, felony stalking by accountability.[2] Hren and Nelson's cases were combined and first went to trial from September 10-14, 2018. One of the exhibits shown at trial was the railroad tie with the decking screw. At the time of trial, the dirt line showing where the screw was in relation to the ground was still clearly visible. The first trial resulted in a hung jury. A few months after the hung jury, the State notified the parties it intended to retry the matter.

¶13 The second trial was held just over a year after the first trial, on September 23-27, 2019. In the time between the first and second trials, the railroad ties had been stored by the BCSO outside under a tarp. At some point before the second trial, the tarp blew off and the railroad ties were exposed to the elements. By the time of the second trial, the dirt line was not as clearly visible on the railroad tie with the decking screw inside. Hren and Nelson's counsel objected to the admission of the railroad tie at the second trial because it

[2] An additional charge of criminal contempt was dismissed by the District Court before trial and is not at issue here.

was not in the same condition as the first trial. Noting there were numerous pictures which showed the dirt line, the District Court overruled Hren and Nelson's objection and admitted the railroad tie. At the close of the State's case, Hren and Nelson moved to dismiss the charges for insufficient evidence, asserting the State did not present sufficient evidence to convict them on any of the charges. The District Court ruled the State had presented enough evidence to go to the jury on all charges and denied the motion.

¶14 The jury convicted Hren of criminal endangerment by accountability, misdemeanor stalking, and felony stalking. The jury convicted Nelson of criminal endangerment, misdemeanor stalking, and felony stalking. The District Court held a sentencing hearing on February 13, 2020, at which time it issued its oral pronouncement of sentence for both cases. The court gave both Hren and Nelson identical sentences—six years, deferred, for criminal endangerment; 180 days in the county jail, all suspended, for misdemeanor stalking, to be served concurrently with the criminal endangerment sentence; and six years, deferred, for felony stalking, to be served consecutively to the criminal endangerment sentence.

¶15 Hren and Nelson appeal. Additional facts will be discussed as necessary below.

STANDARD OF REVIEW

¶16 We review a district court's denial of a motion to dismiss a criminal charge for insufficient evidence de novo. *State v. McAlister*, 2016 MT 14, ¶ 6, 382 Mont. 129, 365 P.3d 1062 (citing *State v. Swann*, 2007 MT 126, ¶¶ 18-19, 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." *McAlister*, ¶ 6 (citations omitted).

¶17 We exercise plenary review over constitutional questions, including *Brady*[3] violations. *State v. Fillion*, 2020 MT 283, ¶ 8, 402 Mont. 84, 475 P.3d 725 (citing *State v. Ilk*, 2018 MT 186, ¶ 15, 392 Mont. 201, 422 P.3d 1219). A district court has broad discretion in controlling the admission of evidence at trial and we review a district court's evidentiary ruling for an abuse of discretion. *Fillion*, ¶ 8 (citing *State v. Colburn*, 2018 MT 141, ¶ 7, 391 Mont. 449, 419 P.3d 1196 (*Colburn II*)).

DISCUSSION

¶18 *1. Did the District Court err by not dismissing the Stalking charges for insufficient evidence?*

¶19 At the outset, we note that Hren and Nelson, in their briefing on appeal, declare they "are not challenging the constitutionality of the Stalking statute," but are "challenging the District Court's overbroad interpretation of the Stalking statute, which led to the District Court's failure to dismiss the Stalking charges pretrial, and at the end of the case in chief in each trial, for lack of sufficient evidence." Though the State argues Hren and Nelson have forfeited their constitutional challenge to the statute, the record is clear no constitutional challenge is made to the stalking statute in this appeal. What remains then,

[3] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963).

is Hren and Nelson's assertion there is insufficient evidence to convict them of stalking. Hren and Nelson essentially make two arguments in this regard: first, that a stalking charge must involve a "communication," while the actions alleged in this case did not involve any communications; and second, that the facts as presented were insufficient to constitute stalking in any case.

¶20 At the close of the State's case in the second trial, Hren and Nelson moved to dismiss the charges on the basis of insufficient evidence. Montana law provides for a dismissal of charges based on insufficient evidence. Section 46-16-403, MCA ("When, at the close of the prosecution's evidence or at the close of all the evidence, the evidence is insufficient to support a finding or verdict of guilty, the court may, on its own motion or on the motion of the defendant, dismiss the action and discharge the defendant."). The District Court could only grant such a motion "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." *McAlister*, ¶ 6. Here, the District Court denied Hren and Nelson's motion.

¶21 First, we address Hren and Nelson's argument regarding the stalking statute and whether it requires a "communication." The applicable version of Montana's stalking statute provides:

> A person commits the offense of stalking if the person purposely or knowingly causes another person substantial emotional distress or reasonable apprehension of bodily injury or death by repeatedly:
>
> (a) following the stalked person; or

> (b) harassing, threatening, or intimidating the stalked person, in person or by mail, electronic communication, as defined in 45-8-213, or any other action, device, or method.

Section 45-5-220(1), MCA (2017). The stalking statute "does not apply to a constitutionally protected activity." Section 45-5-220(2), MCA (2017). Hren and Nelson were charged with stalking under § 45-5-220(1)(b), MCA (2017), for causing substantial emotional distress to the Meine family by repeatedly harassing them through the use of barbed wire, fencing, rocks, and other obstructions to the use of the Meines's easement.

¶22 Hren and Nelson assert we should interpret subsection (1)(b) of the stalking statute according to the *ejusdem generis* canon of construction. *Ejusdem generis* is "[a] canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed." *Ejusdem generis*, *Black's Law Dictionary* (11th ed. 2019). Hren and Nelson argue applying this canon of construction to § 45-5-220(1)(b), MCA (2017), which prohibits "harassing, threatening, or intimidating the stalked person, in person or by mail, electronic communication, as defined in 45-8-213, or any other action, device, or method" would lead to the conclusion that stalking must involve a "communication." We disagree.

¶23 The conduct which the relevant portion of the stalking statute prohibits is a person "harassing, threatening, or intimidating" the stalked person. Section 45-5-220(1)(b), MCA (2017). The statute goes on to list the ways in which a person may not harass, threaten, or intimidate a stalked person: "in person or by mail, electronic communication, as defined in

45-8-213, or any other action, device, or method." Section 45-5-220(1)(b), MCA (2017). Hren and Nelson assert that, because the statute lists forms of communication—in person, by mail, or by electronic communication—prior to listing "any other action, device, or method," we must interpret the statute's "any other action, device, or method" language to only include forms of communication such as letters, text-messages, phone calls, and e-mails. We reject Hren and Nelson's argument as the stalking statute prohibits *conduct* which harasses, threatens, or intimidates a stalked person, not simply *communications* which do such. In addition, it is entirely possible to harass, threaten, or intimidate someone in person without ever speaking or writing, so the application of *ejusdem generis* would still not lead to the conclusion that all stalking under subsection (1)(b) must be from a verbal or written form of communication. As such, the District Court correctly rejected Hren and Nelson's pretrial motion to dismiss the charges as alleged in the Amended Information.

¶24 Hren and Nelson also argue the District Court erred by not granting their motion to dismiss for insufficient evidence at the close of the State's case. While we review the denial of a motion to dismiss for insufficient evidence de novo, we view the evidence presented in the light most favorable to the prosecution to determine whether there is sufficient evidence upon which a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *McAlister*, ¶ 6. In considering the denial of a motion to dismiss for insufficient evidence, "we only consider the trial testimony and the evidence properly before the jury. We cannot consider potential evidence that was not introduced,

offers of proof discussed during arguments on motions if the evidence is not eventually offered and accepted, discussions in chambers or during sidebars, or evidence not admitted at trial but admitted during the sentencing hearing." *State v. Giant*, 2001 MT 245, ¶ 10, 307 Mont. 74, 37 P.3d 49, *overruled, in part, on other grounds by Swann*, ¶¶ 16-19. Reviewing the evidence presented at trial in the light most favorable to the prosecution, we determine a rational trier of fact could find Hren and Nelson committed the crime of stalking beyond a reasonable doubt.

¶25 At trial, the District Court, in Instruction No. 18, instructed the jury that:

> A person commits the offense of stalking if the person purposely or knowingly causes another person substantial emotional distress by repeatedly:
>
> 1. following the stalked person,
>
> OR
>
> 2. harassing the stalked person, in person or by any other action, device or method.

For purposes of the stalking charge, the District Court, in Instruction No. 24, instructed the jury that "'[h]arass' means to annoy repeatedly."

¶26 The testimony at trial supports the District Court's denial of Hren and Nelson's motion to dismiss for insufficient evidence, as the State presented sufficient evidence to show they committed the offense of stalking. The other landowners who use Small Horn Canyon Road testified they were not the ones who placed barbed wire, barriers, rocks, and obstructions in the Meines's easement. Some of the landowners replaced the barbed wire

on the gates with smooth chains, which would then disappear and be replaced, once again, with barbed wire. The other landowners both testified they did not put up the obstructions in the Meines's easement and also that those obstructions would not be there from normal ranching operations. "It is well-established that circumstantial evidence is sufficient to prove any element of an offense and/or to sustain a conviction." *State v. Hegg*, 1998 MT 100, ¶ 13, 288 Mont. 254, 956 P.2d 754 (citations omitted).

¶27 The Meine family testified to the emotional distress they suffered due to Hren and Nelson's harassment, including not wanting to travel the road alone, the nerve-wracking drive, sleepless nights, and stress and concern for the safety of themselves and others. Viewing the evidence in the light most favorable to the prosecution, a rational juror could find the Meines suffered "substantial emotional distress." By the time the State closed its case-in-chief, there was sufficient evidence for a rational juror to determine Hren and Nelson had engaged in stalking by harassing the Meine family through the use of barbed wire, rocks, and other obstructions in the Meines's easement.

¶28 After the District Court denied their motion to dismiss for insufficient evidence, Hren and Nelson put on their defense. Hren and Nelson testified to closing gates with barbed wire, changing the hinges on the corral gate to swing in the opposite direction, placing a new gate at the gate at the top of the grade, and to putting rocks in the roadway where the Meines believed their easement to be. Both Hren and Nelson denied digging out the cattleguards. "[D]epending upon the nature, timing, context and frequency of the [constitutionally protected activity, such activity] . . . may or may not be a constitutionally

protected activity under § 45-5-220(2), MCA." *State v. Adgerson*, 2003 MT 284, ¶ 28, 318 Mont. 22, 78 P.3d 850 (quoting *State v. Helfrich*, 277 Mont. 452, 459, 922 P.2d 1159, 1163 (1996)). Hren and Nelson repeatedly argued the actions charged as stalking in this case were simply their normal day-to-day operations of the ranch. They were free to make this argument, and the jury was free to reject it.

¶29 The District Court correctly denied Hren and Nelson's motion to dismiss the charges for insufficient evidence because there was sufficient evidence upon which a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *McAlister*, ¶ 6. As the District Court correctly denied the motion to dismiss for insufficient evidence, there was also sufficient evidence to support the jury's guilty verdict in this case. *State v. Otten*, 2011 MT 83, ¶ 20, 360 Mont. 144, 253 P.3d 834. The District Court's denial of Hren and Nelson's motion to dismiss for insufficient evidence is affirmed.

¶30 *2. Did the District Court err by admitting the railroad tie into evidence at the second trial after it had been exposed to the elements following the first trial and its condition deteriorated?*

¶31 Hren and Nelson assert they are entitled to dismissal of the criminal endangerment charges, or, in the alternative, a new trial due to the deterioration of the railroad tie when it was exposed to the elements while it was stored outside between the first and second trials. Hren and Nelson assert the State's negligence in properly storing the evidence and the ensuing loss of exculpatory evidence amounts to a *Brady* violation. The State responds that Hren and Nelson's *Brady* violation claim is forfeited because their trial counsel did not mention *Brady* when arguing the railroad ties should be excluded.

¶32 We first briefly address the State's claim Hren and Nelson's *Brady* claim is forfeited. The State correctly notes objections must be specific to preserve the issue for appeal. *State v. LaFreniere*, 2008 MT 99, ¶ 12, 342 Mont. 309, 180 P.3d 1161. "[W]e generally require an appellant to 'show that an objection was made at trial on the same basis as the error asserted on appeal.'" *State v. Thompson*, 2017 MT 107, ¶ 17, 387 Mont. 339, 394 P.3d 197 (quoting *State v. Nolan*, 2003 MT 13, ¶ 16, 314 Mont. 47, 62 P.3d 1118). Here, it is undisputed counsel for Hren and Nelson did not specifically mention *Brady* when he made his objection to the admission of the railroad tie during the second trial. Counsel's objection to the admission of the railroad tie at the second trial stated, in full:

> As sort of a preliminary matter, I'm going to object to the admission of these exhibits. My concern is they've effectively already been published to the jury. I feel like we've lost some exculpatory evidence here. I, last year when we tried this matter, remember pointing out a fairly clear line on the stumps, particularly on this one, where you could see about where the dirt was that shows the cut. It's very, very faint now. And this is going to be an important part of our defense was to be able to show that -- and I mean, the ruler shows it to some degree -- that an inch and three quarters of the stump was still above ground. And then down where the head of the screw was, an inch of that screw was still above ground. Now, you can't really see where the dirt line was like you could when we tried this matter previously.
>
> I think even in the transcript from last year you can see that I pointed that out during my examination of Undersheriff Knox. So, I'm just concerned about that, and that the state of the evidence has been altered. Not by anybody on purpose, don't get me wrong. I know that's not the case. But I'm just concerned that we've lost some of the evidentiary value. And so, along with that, I think that's exculpatory evidence that's been lost due to the delay and getting this thing tried. One of the main reasons Your Honor had denied my speedy trial motion this summer was we didn't have any prejudice to the Defendants. And now, I think we have some prejudice that's due to the delay. Not purposeful conduct on behalf of the State. Just, I guess, it's

> still -- I think we've lost something here. And I think the deputy -- I'm sorry, undersheriff's testimony supports that.

¶33 "A *Brady* violation of due process occurs when the defendant establishes that the State possessed evidence that had exculpatory or impeachment value to the defense; the evidence was willfully or inadvertently suppressed; and that suppression prejudiced the defense." *State v. Colvin*, 2016 MT 129, ¶ 13, 383 Mont. 474, 372 P.3d 471 (citing *State v. Root*, 2015 MT 310, ¶ 19, 381 Mont. 314, 359 P.3d 1088). While Hren and Nelson's counsel did not specifically cite to *Brady* during his objection, he did argue the State possessed the ties which had exculpatory value to the defense, the evidence had been inadvertently altered by being exposed to the elements, and Hren and Nelson would be prejudiced by the admission of the tie in its altered state. Hren and Nelson's counsel articulated the very issues we have held could constitute a *Brady* violation, so we determine Hren and Nelson have not forfeited appellate review of their *Brady* claim by failing to properly object, and will review their claim on the merits.

¶34 Turning to the merits of the claim, we again note *Brady* is violated "when the defendant establishes that the State possessed evidence that had exculpatory or impeachment value to the defense; the evidence was willfully or inadvertently suppressed; and that suppression prejudiced the defense." *Colvin*, ¶ 13. A defendant "bears the burden of proving all three prongs to establish a *Brady* violation." *Ilk*, ¶ 30. We conclude Hren and Nelson have not met their burden of demonstrating prejudice in this case, so we need not address the other prongs of the test.

¶35 Hren and Nelson argue the prejudice they suffered due to the altered state of the railroad tie is clear in this case, because at the first trial, when the dirt line was more visible on the tie, there was a hung jury, while at the second trial they were convicted. We are not persuaded by this argument. Under the third prong of our *Brady* violation test, "the question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Ilk*, ¶ 37 (quoting *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S. Ct. 1555, 1566 (1995)). Here, though the actual tie had lost its clear dirt line, there were still numerous photographs showing the railroad tie in its unaltered state, with the dirt line visible. Undersheriff Knox testified to where the tie was buried. Hren and Nelson had full opportunity to argue to the jury that the screw was visible before Jerry Meine took his chainsaw to the railroad tie. It was simply up to the jury to determine whether their story was credible. We do not find that the dirt line becoming less visible between the first and second trials puts the whole case in such a different light as to undermine confidence in the verdict.

¶36 Because there was no *Brady* violation in this case and a "district court has broad discretion in controlling the admission of evidence at trial," *Fillion*, ¶ 8, the District Court did not err or abuse its discretion regarding the admission of the railroad tie into evidence during the second trial.

CONCLUSION

¶37 The District Court did not err when it denied Hren and Nelson's motion to dismiss the charges on the basis of insufficient evidence. In addition, the District Court did not err by admitting the railroad tie into evidence at the second trial.

¶38 Affirmed.

/S/ INGRID GUSTAFSON

We concur:

/S/ MIKE McGRATH
/S/ BETH BAKER
/S/ DIRK M. SANDEFUR
/S/ JIM RICE