CIVIL PRACTICE EVIDENCE OBJECTIONS

OBJECTIONS TO THE WITNESS

- Info will not help trier of fact
- Insufficient foundation to qualify expert
- Give basis of opinion before opinion
- Not beyond experience of layperson
- New scientific technique not qualified
- Opinion based on unreasonable material
- Incompetent Witness
- Inability to observe, remember & communicate
- Inability to understand duty to tell truth
- No personal knowledge
- Juror as Witness
- Judge as witness
- Lacks expert qualification

FORM OF QUESTION OBJECTIONS

- Ambiguous-unintelligible-vague
- Argumentative
- Assumes facts not in evidence
- Calls for narrative answer
- Calls for Speculation
- Compound or complex
- Asked and answered - cumulative
- Leading
- Misquotes testimony / misstates facts
- Too general / overly broad
- Adverse Witness
- Cross of Adverse Witness
- Refreshing Recollection
- Misleading
- Witness not allowed to finish answer
- Improper jypothetical
- Lack of Authentication

MOTION TO STRIKE

- Answer inadmissible
- Nonresponsive
- Evidence inadmissible
- No time to object
- Insufficient foundation
- Witness unavailable for Cross
- Improper rehabilitation

OBJECTIONS TO EXHIBITS

- Confuses the issues
- Cumulative - Needless Presentation
- Evidence Speaks for Itself
- Excluded by Pretrial Order
- Improper Foundation - Lack of Authentication
- Improper Character evidence
- Irrelevant (Immaterial)
- Insufficient foundation
- Hearsay

PRIVILEGES

- Self-incrimination
- Attorney - Client
- Work Product
- Marital Communication
- News Media Privilege
- Doctor - Patient
- Psychologist - Patient
- Trade Secrets
- Accountant - Client
- Therapist & Client
- Social Worker - Client
- Confessor - Confessant
- Counselor - Pupil
- Teacher - Pupil
- Waiver of Privilege

RESPONSES TO OBJECTIONS

- Relevant
- Coompetent to testify
- Exception to Hearsay
- State of Mind Exception
- Prior to trial statement by a witness
- Party Admission
- State of Mind Exception
- Business/Hospital/Public Records
- Present Sense Impression
- Excited Utterance
- Regularly Conducted Activity
- Waiver of Privilege

OBJECTIONS TO FORM OF ANSWER

- Argumentative
- Narrative
- Nonrespnsive
- Volunteered
- Assuming Facts Not in Evidence
- Speculation
- Insufficient foundation
- Inconsistent with Pleadings
- Involves Undue Delay
- Parol Evidence Rule Violated
- Best Evidence Rule Violated
- Privilege
- Stipulation Violated
- Unfairly Prejudicial
- Hearsay
- Not the best evidence
- Beyond the scope of direct
- Beyond the scope of cross
- Document speaks for itself
- Settlement Negotiations Are Inadmissible

Short List of Common Objections[1]

Objections to the Form of the Question

1. **Leading question** (611): question suggests its own answer
2. **Compound question**: contains 2 separate inquiries
3. **Vague question**: incomprehensible, incomplete, or answer will be ambiguous
4. **Argumentative question**: asks the witness to accept the examiner's summary, inference, or conclusion rather than a fact
5. **Narratives**: question calls for a narrative answer - answer does not allow opposing counsel to frame objections
6. **Asked and answered**: repeats the same question
7. **Assuming facts not in evidence**: contains as a predicate a statement of fact not proven
8. **Non-responsive answer**: answer does not respond to the question

Making an Objection

1. **Stand**
2. **State the Grounds**
   (No speaking objections)
3. **Wait for a Response from the Judge**

Responding to an Objection

1. **Requesting Argument**
   Politely let the judge know argument is necessary
2. **Limited Admissibility**
   What is the precise purpose for admission
3. **Conditional Offer**
   Production of additional evidence at a later point
4. **No Response**
   Rephrase the question

Substantive Objections

1. **Hearsay** (801(c)): statement, other than made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted
   Exceptions:
   Present sense impression (803(1))
   Excited utterance (802(2))
   State of mind (803(3))
   Past recollection recorded (803(5))
   Business records (803(6))
   Reputation as to Character (803(21), 404 & 405)
   Prior testimony (804(b)(1))
   Dying Declaration (804(b)(2))
   Statement against interest (804(b)(3))
2. **Relevance** (401 & 402): does not make any fact of consequence more or less probable
3. **Unfair Prejudice** (403): Probative value is outweighed by the danger of unfair prejudice
4. **Improper Character Evidence** (404(a)(1)) generally, (609) conviction, (608(b)) untruthfulness, (608(a)) reputation: character evidence can't be used to prove a person acted in conformity with his or her character
5. **Lack of Personal Knowledge** (602): Witnesses (other than experts) must testify from personal knowledge - sensory perception
6. **Improper Lay Opinion** (701): lay witnesses can't testify as to opinions, conclusions or inferences
7. **Speculation**: can't be asked to speculate or guess
8. **Authenticity** (901): exhibits must be authenticated before they may be admitted
9. **Lack of Foundation**: lack of the predicate foundation for admissibility
10. **Best Evidence** (1001-1003): copies, or secondary evidence of writings, can not be admitted into evidence unless the absence of the original can be explained (duplicates that accurately reproduce the original are acceptable)
11. **Privilege**: excludes otherwise admissible evidence because of special relationship (attorney/client, doctor/patient, marital, clergy, etc.)
12. **Liability Insurance** (411); **Subsequent Remedial Measures**(407) & **Settlement Offers** (408): All are not admissible as proof of negligence or liability

[1]Excerpted from Lubet, **Modern Trial Advocacy** (2nd Ed. 1997 NITA). *See, in particular*, Chapter 9.

Excerpts from the Federal Rules of Evidence

Rule 401 — Definition of Relevant Evidence
"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 403 — Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time
Although relevant, evidence my be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404 — Character Evidence not Admissible to Prove Conduct
(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion...

Rule 602 — Lack of Personal Knowledge
A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

Rule 701 — Opinion Testimony by Lay Witnesses
If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Rule 801 — Hearsay Defined
(c) Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
(d) Statements which are not hearsay (1) Prior statement by witness; (2) Admission by party-opponent.

Rule 803 — Hearsay Exceptions
(1) Present sense impression; (2) Excited utterance; (3) Then existing mental, emotional or physical condition; (4) Statements for medical diagnosis; (5) Recorded recollection; (6) Records of regularly conducted activity; (8) Public records; (9) Records of vital statistics; (11) Records of religious organizations; (14) Records or documents affecting an interest in property; (15) Statements in documents affecting an interest in property; (16) Statements in ancient documents; (17) Market reports; (18) Learned treatises; (19) Reputation concerning personal or family history; (20) Reputation concerning boundaries or general history; (21) Reputation as to character; (22) Judgment of previous conviction; (23) Judgment as to personal, family or general history.

Rule 804 — Hearsay Exceptions; Declarant Unavailable
(b) Hearsay exceptions: (1) Former testimony; (2) Statement under belief of impending death; (3) Statement against interest; (4) Statement of personal or family history.

Rule 1001 - Definitions of Writings Recordings and Photographs
(1) Writings and recordings consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or other form of data compilation.
(2) Photographs include still photographs, X-ray films, video tapes, or other motion pictures.
(3) An original of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by the person executing or issuing it. An original of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately is an original.
(4) A duplicate is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

Rule 1002 — Requirement of Original
To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

Rule 1003 — Admissibility of Duplicates
A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

TRIAL OBJECTIONS

Pretrial Motions And Notices

46-13-101. Pretrial motions and notices. (1) Except *for good cause* shown, any defense, objection, or request that is capable of determination without trial of the general issue must be raised at or before the omnibus hearing unless otherwise provided by Title 46.

(2) Failure of a party to raise defenses or objections or to make requests that must be made prior to trial, at the time set by the court, constitutes a waiver of the defense, objection, or request.

(3) The court, for cause shown, may grant relief from any waiver provided by this section. Lack of jurisdiction or the failure of a charging document to state an offense is a nonwaivable defect and must be noticed by the court at any time during the pendency of a proceeding.

(4) Unless the court provides otherwise, all pretrial motions must be in writing and must be supported by a statement of the relevant facts upon which the motion is being made. The motion must state with particularity the grounds for the motion and the order or relief sought.

Failure to make a timely objection during trial constitutes a waiver of the objection." Section 46-20-104(2), MCA. The Montana Supreme Court will not hold a district court in error when it has not been given an opportunity to correct itself. **State v. Weeks** (1995), 270 Mont. 63, 85, 891 P.2d 477, 490

Montana Rules of Evidence:

Rule 102. Purpose and construction.

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Rule 106. Remainder of or related acts, writings, or statements.

(a) When part of an act, declaration, conversation, writing or recorded statement or series thereof is introduced by a party:

(1) an adverse party may require the introduction at that time of any other part of such item or series thereof which ought in fairness to be considered at that time; or

(2) an adverse party may inquire into or introduce any other part of such item of evidence or series thereof.

(b) This rule does not limit the right of any party to cross-examine or further develop as part of the case matters covered by this rule

Rule 106--State v. Elliott, 2002 MT 26

Procedural Posture

The defendant was convicted in the Custer County District Court (Montana) of deliberate homicide. The defendant appealed.

Overview

On June 10, 1998, Cheri Johnson, a friend of Pamela Elliott (Elliott), was told that Elliott was sick and needed to go to the doctor, but she would not. Johnson went to Elliott's house to check on her and found Elliott on the living room couch, covered with a bloody comforter. After Elliott assured Johnson that her father was coming in a few hours to take her to the doctor, Johnson left. Johnson returned a few hours later and called an ambulance.

Elliott told the emergency medical technician (EMT) who responded to the call that she had been undergoing chemotherapy for Hodgkin's disease. When she arrived at the hospital, she also told the physician's assistant, Arley Irish, that she was undergoing chemotherapy. Elliott told Irish that she had been bleeding vaginally for three or four days. After examination revealed the presence of a placenta, Irish asked Elliott about a pregnancy and baby. Elliott denied being pregnant.

Dr. Randall Rauh next examined Elliott and found her cervix dilated and placental tissue in the upper cervix. Rauh diagnosed a condition called "placenta accreta" whereby the placenta had grown into the uterine wall. Because infection had set in, Rauh performed an emergency hysterectomy. Rauh concluded that Elliott had given birth within a week or so prior to her emergency admission to the hospital. Elliott continued to deny having had a baby. Because no child was accounted for, Rauh notified the Custer County Sheriff's office.

The Sheriff's office began an investigation into the matter. Elliott was interviewed on June 22, 1998. She again denied that she had been pregnant and denied having a baby. She admitted that she had made up the story about having cancer, and she attributed her water retention to taking weight loss pills.

A search warrant was issued for Elliott's home on December 16, 1998, and Elliott was again interviewed by law enforcement officers. After being informed of her Miranda rights, Elliott initially maintained that she had not given birth to a baby. Later in the interview, she admitted having a baby in the bathroom of her house. She stated that she glanced once at the baby, then went back to bed. She returned some time later and put the baby in a bath towel and a plastic garbage bag. She then put it in a cupboard in her basement. This information was relayed to the officers conducting the search of Elliott's home, and the baby was found in that location. The body was wrapped in plastic bags and a towel. Blood stains were found in three areas of the master bedroom and closet, on the living room couch and on the mattress in the master bedroom.

An autopsy of the baby was performed by Dr. Gary Dale, the State Medical Examiner. He found no placenta and a short umbilical stump that appeared to be cut. The soft tissues of the body had broken down and the body was partially decomposed. Dale also found fractures on both sides of the skull which he characterized as being the result of significant force and the most severe fractures he had seen in an infant or newborn. He stated that they were not the type of fractures suffered in the womb or during delivery. He further stated that if they had been inflicted on a newborn baby, they could cause death. Because of the decomposition and deterioration of the scalp, Dale could not determine whether there had been bleeding within the scalp or bruising of the scalp.

Based on the presence of ossification centers for the femurs and tibias, Dale concluded that the baby was approximately 40 weeks of gestational age and that

the baby was developmentally viable. But, because of the decomposition of the body, Dale was unable to determine whether the baby ever maintained life independent from its mother or whether the skull fractures were sustained life. He stated at trial that the baby's death was not accidental or natural.

Dr. Rauh reviewed Dr. Dale's report and testified at trial that the fractures documented in Dale's report were not consistent with fractures that, in his experience, occur during the vaginal delivery of a baby. He also testified that when a baby dies in the uterus, within twelve hours of death there is fluid accumulation in the brain, and the brain begins to liquify. If that occurs, the soft skull bones would move during delivery, but would not fracture.

Garry Kerr, an osteologist and forensic anthropologist who assists Dr. Dale, also testified at trial. Kerr examined the skull bones of the baby to determine whether the injuries occurred "in a normal fashion." Kerr found at least ten fractures of the skull bones, including fractures of both side (parietal) bones, the sphenoid at the base of the skull, and the left frontal bone.

Kerr concluded that the force that caused the fractures was not of the type that occurs during the normal birthing process and that the fractures appeared consistent with fractures from trauma at or about the time of death, rather than prior to or after death. Kerr also testified that he saw no evidence of nutritional deprivation nor genetic disorders that he is familiar with which could have caused the fractures. Kerr could not say whether the baby was born alive.

Dr.. John Patrick Sauer, a pediatrician who regularly attends the birth and delivery of infants and has knowledge regarding neonatal and delivery issues, also testified at trial. He examined an x-ray from the autopsy and testified regarding the gestational age of the baby. He also testified about procedures that can be followed after the birth of a baby to ensure that the baby stays alive.

Elliott relied on **Rule 106**, M.R.Evid., to support her argument that the tapes were inadmissible because they did not reflect a complete record of the conversation that Agent Hatfield had with Elliott. Elliott does not argue that only a portion of the tapes were played, but that the tapes themselves did not contain the entire interview. Elliott argues that "for a period of one hour and five minutes the interrogation of the defendant proceeded without the tape recorder being

employed." At trial, Agent Hatfield testified concerning what occurred during the time the tape recorder was not operating.

Rule 106, M.R.Evid., states that "when part of [a] . . . recorded statement or series thereof is introduced by a party: an adverse party may require the introduction at that time of any other part of such item or series thereof which ought in fairness to be considered at that time."

"The completeness doctrine stems from the principle restricting the scope of cross-examination to matters testified to on direct examination. It broadens this principle by allowing an immediate introduction of the balance of portions of the same document, correspondence or conversation, where fairness so dictates." **State v. Castle** (1997), 285 Mont. 363, 374, 948 P.2d 688, 694. **Rule 106** does not mandate inclusion of related evidence; it is allowed if it is needed to make the primary evidence understandable. **State v. Whitlow** (1997), 285 Mont. 430, 444, 949 P.2d 239, 248.

In this case, the completeness doctrine allowed Elliott to cross-examine Agent Hatfield concerning parts of his conversation with her that were not recorded. In fact, Agent Hatfield testified on direct examination by the State as to what occurred during the break. Elliott did not cross-examine him concerning that or other conversations, and again, she cannot now fault the State for her own failure to do so.

Elliott also objected to the playing of the tapes because of inadmissible matters contained within the recorded statements. She noted two of these statements on appeal: an offer to resolve the case through use of a specific criminal charge and reference to a statement by Elliott's mother that Elliott's condition on June 10, 1998, was the result of an abortion.

The State arguesd that these objections were not raised in the District Court and therefore should not be considered on appeal.

The Supreme Court declined to reverse.

Rule 401. Definition of relevant evidence.

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Relevant evidence may include evidence bearing upon the credibility of a witness or hearsay declarant.

Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

All relevant evidence is admissible, except as otherwise provided by constitution, statute, these rules, or other rules applicable in the courts of this state. Evidence which is not relevant is not admissible.

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404. Character evidence not admissible to prove conduct, exceptions; other crimes; character in issue.

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same.

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the

prosecution in a homicide case or in an assault case where the victim is incapable of testifying to rebut evidence that the victim was the first aggressor.

(3) Character of witness. Evidence of the character of a witness, as provided in Article VI.

(b) Other crimes, wrongs, acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(c) Character in issue. Evidence of a person's character or a trait of character is admissible in cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense.

Rules 401-404--State v. Lake, 2022 MT 28 (Included in Materials)

State v. Passmore, 2010 MT 34 Discussed Infra with Rule 704

Rule 405. Methods of proving character.

(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, or where the character of the victim relates to the reasonableness of force used by the accused in self defense, proof may also be made of specific instances of that person's conduct.

State v. Passmore, 2010 MT 34
Infra—Rule 704 Discussion

Rule 406. Habit; routine practice.

(a) Habit and routine practice defined. A habit is a person's regular response to a repeated specific situation. A routine practice is a regular course of conduct of a group of persons or an organization.

(b) Admissibility. Evidence of habit or of routine practice, whether corroborated or not, and regardless of the presence of eyewitnesses, is relevant to prove that conduct on a particular occasion was in conformity with the habit or routine practice.

(c) Method of proof. Habit or routine practice may be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine.

Rule 502. Identity of informer.

(a) Rule of privilege. The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law.

(b) Who may claim the privilege. The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished.

(c) Exceptions and limitations.

(1) Voluntary disclosure; informer a witness. No privilege exists under this rule if the identity of the informer or the informer's interest in the subject matter of the informer's communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the public entity.

(2) Testimony on relevant issue. If it appears in the case that an informer may be able to give testimony relevant to any issue in a criminal case or to a fair determination of a material issue on the merits in a civil case to which a public entity is a party, and the public entity invokes the privilege, the court shall give the public entity an opportunity to show facts relevant to determining whether the informer can, in fact, supply that testimony.

If the Court finds that the informer should be required to give the testimony, and the public entity elects not to disclose the informer's identity, the court on motion of the defendant in a criminal case shall dismiss the charges to which the testimony would relate, and the court may do so on its own motion. In civil cases, the court may make any order that justice requires

Rule 502 -- State v. Walston, 2020 MT 200 (Included in Materials)

Rule 505. Comment upon or inference from claim of privilege.

The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by the court or counsel. No inference may be drawn therefrom.

Savik v. Entech, 1995 Mont. Dist. LEXIS 830

Plaintiffs sought exclusion of any evidence or suggestion concerning, or any comment upon, private discussions between Plaintiffs and Alex George, Plaintiffs' attorney who represented them during the transactional negotiations. The Court found that Plaintiffs were correct that any private communications between them and their attorney Alex George was privileged and Defendants could not inquire into the substance of those communications. See Palmer v. Farmers Insurance Exchange, 261 Mont. 91, 861 P.2d 895 (1993). Likewise, Defendants may not comment upon, or draw inferences from, the claim of privilege. **Rule 505**, **M.R.Evid**. However, such privilege does not include any communications between Plaintiffs and their attorney, Alex George, which occurred in the presence of third parties. See Rule 503(a), **M.R.Evid**. Therefore, Defendants may inquire about any conversations between Plaintiffs and Mr. George in the presence of Defendants' employees or agents.

Rule 601. Competency in general; disqualification.

(a) General rule competency. Every person is competent to be a witness except as otherwise provided in these rules.

(b) Disqualification of witnesses. A person is disqualified to be a witness if the court finds that (1) the witness is incapable of expression concerning the matter so as to be understood by the judge and jury either directly or through interpretation by one who can understand the witness or (2) the witness is incapable of understanding the duty of a witness to tell the truth.

State v. Wilson, 2022 MT 11

The district court did not abuse its discretion when it determined that a developmentally-disabled individual was not competent to testify under Mont. R. Evid. 601(a) because the reports prepared by the professionals addressing the individual's ability to testify in court were sufficient. Further, there was no support for the contention that the district court improperly shifted the burden regarding competency to the defense; [2]-Because the district court made no error of law by allowing the vocational services director to testify in rebuttal despite his presence in the courtroom during trial, there was no need to conduct harmless-error review of its decision.

Rule 602. Lack of personal knowledge.

A witness may not testify as to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

State v. Butler, 2021 MT 124

1. *Whether the District Court properly admitted hearsay evidence from the alleged victim to the investigating officer to prove an element of negligent vehicular assault*.

Butler argued the District Court erred in overruling his hearsay objection to Trooper Cook's testimony about his follow-up investigation into Webster's injuries, as Trooper Cook's testimony relayed out-of-court statements Webster made to Trooper Cook. Butler points out the District Court admitted the statements without requiring the State to provide a reason for seeking the admission of the statements and the State used this testimony for the truth of the matter asserted—as substantive evidence of injury to Webster. Butler argues the District Court's comments during argument on his motion to dismiss demonstrate the District Court overruled the objection and admitted the testimony, not for the truth of the matter asserted, but to show the next steps in the officer's investigation. As such, the testimony was not substantive evidence and could not be used to prove Webster's injuries. Butler maintains an officer's next steps in the investigation should not be allowed to serve as a conduit for the admission of otherwise inadmissible hearsay.

The State countered Trooper Cook's testimony did not contain hearsay on its face, as it contained no statement by an out-of-court declarant, but rather Trooper Cook spoke about what investigative steps he took and what he later learned about Webster. The State argues to the extent Trooper Cook did not offer first-hand knowledge of Webster's injuries, Butler failed to make a foundational objection.

Hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted in the statement. **M. R. Evid**. 801(c). Hearsay is not admissible unless it falls under an exception to the general prohibition on such evidence. **M. R. Evid**. 802. By definition, out-of-court statements not entered to prove the truth of the matter asserted are not hearsay. Evidence admitted for use as non-hearsay, must be relevant under **M. R. Evid**. 402 for the non-hearsay purpose and the probative value of its non-hearsay use must not be substantially outweighed by danger of unfair prejudice, confusion of the issues, or misleading the jury under **M. R. Evid**. 403. Most importantly, if out-of-court statements are admissible only for a non-hearsay purpose, those statements cannot be used as substantive evidence, that is for the truth of the matter asserted. *See* **M. R. Evid**. 105. "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." **M. R. Evid**. 401.

We agree with Butler the record demonstrates the District Court admitted Trooper Cook's testimony as non-hearsay to explain the next steps in his investigation of the crash. The District Court explained it overruled the hearsay objection as Trooper Cook was entitled to testify about hearsay information he relied on to explain steps he took in his investigation. Thus, the theory for admission of the testimony was not for the truth of the matter asserted. Yet, this is precisely how the State used this evidence. The State relied on Trooper Cook's testimony as evidence of Webster's injury to support its arguments opposing dismissal of Count III for insufficient evidence and in its closing argument to the jury. It was error for the District Court to admit the testimony for the non-hearsay purpose of explaining the next stepsin Trooper Cook's investigation and then allow the State to rely on the evidence for the hearsay purpose of proving Webster was injured in the crash.

Testimony relaying out-of-court statements ostensibly to explain the next steps of law enforcement's investigation, but which go directly toward proving an element of the charged offense and the defendant's guilt, run a substantial risk of misuse and thus may run afoul of **M. R. Evid** 402 and 403. In many instances, this evidence has little or no probative value other than as substantive evidence in violation of the hearsay rule. *See* *State v. Laird*, 2019 MT 198, ¶ 75, 397 Mont. 29, 447 P.3d 416; *State v. Runs Above*, 2003 MT 181, ¶ 21, 316 Mont. 421, 73 P.3d 161; *In re D.W.L.*, 189 Mont. 267, 270-71, 615 P.2d 887, 889 (1980). This danger is

especially highlighted in this case, where it is not mere conjecture the jury may have misused the evidence, but the State explicitly and incorrectly relied on the evidence as substantive evidence to prove the essential elements of the charged offense.

We find the State's argument Butler should have made a foundational objection, rather than a hearsay objection unavailing. Witnesses can testify only to their personal knowledge and a "witness may not testify as to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." **M. R. Evid**. **602**. This **rule** and the prohibition on hearsay have considerable overlap: A witness must testify only to his or her personal knowledge, and not merely repeat the out-of-court statements of others as truth. *See* *State v. Crean*, 43 Mont. 47, 59, 114 P. 603, 607 (1911) ("The term 'hearsay,' as used in the law of evidence, signifies all evidence which is not founded upon the personal knowledge of the witness from whom it is elicited." (quoting H.C. Underhill, *A Treatise on the Law of Evidence*, 63 (1894))). As the District Court acknowledged, Trooper Cook had no basis for knowledge of Webster's injuries other than out-of-court statements made to him during his follow-up investigation. Butler's hearsay objection properly raised the issue of whether Trooper Cook testified from his personal knowledge or was merely repeating out-of-court statements made to him for their truth. The District Court erred in admitting the hearsay testimony from Trooper Cook as substantive evidence of Webster's injuries.

Rule 608. Evidence of character and conduct of witness.

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

State v. Smith, 2020 MT 304

Defendant did not receive a fair trial because at the outset, the State characterized the case as one of domestic violence and primed and exploited use of jurors' attitudes regarding partner assaults and domestic violence against him; despite dismissal of the partner or family member assault and stalking charges, throughout the entire evidentiary presentation the State used irrelevant, extrinsic evidence, revealing defendant as a probationer and portraying him as a stalking liar who had no regard for court orders or appreciation of his friends.

Rule 404(a) generally provides, "[e]vidence of a person's character or a trait of character is not admissible for purpose of proving action in conformity therewith on a particular occasion." **M. R. Evid**. 404(a). Further, Rule 404(b) provides "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." **M. R. Evid**. 404(b). While evidence of a person's character is not ordinarily admissible

to prove he acted in conformity with it, Rule 404 provides an exception under Article VI. **M. R. Evid**. 404(a)(3). Under Article VI, **Rule 608** provides direction for admission of character and specific conduct evidence: "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, may not be proved by extrinsic evidence." In the discretion of the court though, specific instances of conduct may "be inquired into on cross-examination" only. **M. R. Evid**. 608(b). This exception is narrowly drawn in recognition of the opportunities for its abuse. *In re Seizure of $ 23,691.00 in United States Currency*, 273 Mont. 474, 480-81, 905 P.2d 148, 152-53 (1995). Thus, **Rule 608** admits such evidence *only on cross-examination* and only if probative of a witness's truthfulness or untruthfulness. *In re Seizure of $ 23,691.00 in United States Currency*, 273 Mont. at 481, 905 P.2d at 153. In *State v. McClean*, 179 Mont. 178, 185, 587 P.2d 20, 24-25 (1978) (emphasis in original), this Court provided example of how to apply **Rule 608**:

Thus, on direct examination Witness A may not bolster his opinion concerning the truthfulness or untruthfulness of Witness B by making reference to specific instances of B's conduct. On cross-examination, however, Witness A may be questioned on his opinion by reference to such specific instances. This cross-examination, however, is further limited by the trial court's discretion in determining whether it is in fact relevant to the issue of B's credibility. The point of **Rule 608** . . . is that reference to specific instances of a witness' conduct for the purpose of proving his character for truthfulness or untruthfulness is *never* permitted on direct examination.

The District Court did not properly apply **Rules** 404 and **608** and erred in admitting the extrinsic evidence of Smith's other bad acts.

At the outset, the State characterized the case as one of domestic violence and primed and exploited use of jurors' attitudes regarding partner assaults and domestic violence against Smith. Then, despite dismissal of the PFMA and stalking charges, throughout the entire evidentiary presentation the State used irrelevant, extrinsic evidence, revealing Smith as a probationer and portraying him as a stalking liar who had no regard for court orders or appreciation of his friends. While perhaps no single one of the errors discussed above would warrant reversal, cumulatively they were prejudicial to the extent Smith did not receive a fair trial.

Rule 611. Mode and order of interrogation and presentation; re-examination and recall; confrontation.

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination.

(1) Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(2) Evidence developed on cross-examination may be considered by the trier of fact as proof of any fact in issue in the case.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

(d) Re-examination and recall. A witness may be re-examined as to the same matters to which the witness testified only in the discretion of the court, but without exception the witness may be re-examined as to any new matter brought out during cross-examination. After the examination of the witness has been concluded by all the parties to the action, that witness may be recalled only in the discretion of the court. This rule shall not limit the right of any party to recall a witness in rebuttal.

(e) Confrontation. Except as otherwise provided by constitution, statute, these rules, or other rules applicable to the courts of this state, at the trial of an action, a witness can be heard only in the presence and subject to the examination of all the parties to the action, if they choose to attend and examine.

State v. Hatfield, 2018 MT 229

Did the District Court abuse its discretion by allowing witnesses to testify multiple times on direct examination?

Defendant (Adam) argued that the District Court erred when it allowed the State to call two law enforcement officers multiple times on direct examination, over his counsel's objections.

During a pre-trial status hearing, Adam's counsel objected to the State's intention to call and later recall two law enforcement witnesses. He argued that allowing the witnesses to testify on multiple occasions would be prejudicial as well as inefficient and could frustrate effective cross-examination. He argued the format would give those witnesses "an aura of undue credibility as they filled a role like that of a narrator for the jury."

The State maintained this format would allow the jury to more easily understand the multi-year investigation. The State argued these two officers filled varying roles in the investigation over the course of six years, and it wanted the witnesses to testify chronologically. The State reasoned chronological order would allow a more cohesive narrative than having each witness testify about things that occurred across the span of the investigation. The District Court concluded such format was permissible under **M. R. Evid**. 611(d). The District Court reasoned that since the investigation spanned several years, the "ascertainment of the truth" was best served by allowing the State to call and later recall certain witnesses at different times during the presentation of its case-in-chief.

Adam acknowledges **Rule** **611**(d) allows a witness to be recalled in the court's discretion, but he asserts it does not contemplate the trial strategy the State proposed here. He notes this Court has rarely considered the scope of a district court's discretion in allowing the recall of witnesses, but argues in this instance, the District Court abused its discretion because the law enforcement officers "were allowed to 'clean up' anything they missed during the first round of questioning."

The State maintains the District Court acted within its discretion. It notes that although Adam alleges the court allowed the officers to "clean up" their earlier

testimony, he does not cite any specific testimony nor explain why it was improper.

M. R. Evid. 611(d) provides in relevant part:

A witness may be re-examined as to the same matters to which the witness testified only in the discretion of the court, but without exception the witness may be re-examined as to any new matter brought out during cross-examination. After the examination of the witness has been concluded by all the parties to the action, that witness may be recalled only in the discretion of the court.

Rule 611(d) has no counterpart in the Federal Rules, but its substance has a long history in Montana law. Its language, which was first enacted in § 3378, Montana Civil Code of 1895, was taken from § 93-1901-10, R.C.M. (1947) ("A witness once examined cannot be re-examined as to the same matter without leave of the court . . . . And after the examinations on both sides are once concluded, the witness cannot be recalled without leave of the court. Leave is granted or withheld, in the exercise of a sound discretion.").

In *Mumford*, 69 Mont. at 434, 222 P. at 450, this Court held that the district court did not abuse its discretion in denying the defendant's request to recall a witness for recross-examination where this Court determined the testimony would have been irrelevant to the issues in the case. However, in *Carns*, 136 Mont. at 137-38, 345 P.2d at 742, this Court held that a district court abused its discretion when it refused to allow the defense to recall an alleged assault victim after a later witness contradicted part of the victim's testimony where the only evidence connecting the defendant to the case was the victim's identification of him as the assailant, and the defense consisted primarily of attacking the victim's identification. In *Clark v. Wenger*, 147 Mont. 521, 415 P.2d 723 (1966), this Court also held that a district court abused its discretion when it refused to allow the plaintiff's recall after a juror informed the court that he had witnessed the plaintiff outside of court and her actions had influenced his opinion on the merits of her case.

Since the facts of those cases are distinct from the present case, they are of limited use in determining whether the District Court abused its discretion here. Recognizing this, the State offers *U.S. v. Puckett*, 147 F.3d 765 (8th Cir. 1998), which is factually on point. In *Puckett*, the defendant argued the lower court

erred by allowing the government to recall law enforcement officers so it could present evidence in chronological order. The U.S. Court of Appeals for the Eighth Circuit upheld the lower court, holding:

The witnesses testified about different subject matter each time they were called to the stand, the defendants were free to cross examine them about any of their testimony, and there is no indication that the government recalled the witnesses to bolster their credibility. While it may be preferable to have witnesses testify in a less interrupted manner, we cannot say the district court abused its discretion.

Puckett, 147 F.3d at 770 (citation omitted).

In Adam's case, the State also sought to recall law enforcement officers so it could present its case in chronological order. Here, the law enforcement officers also testified about different subject matter each time they were called to the stand, Adam was free to cross-examine them about any of their testimony, and we see no indication the State recalled its witnesses to bolster their credibility. While we agree it is preferable to have witnesses testify in a less interrupted manner, we find the Eighth Circuit's reasoning persuasive and consistent with our earlier interpretations of Montana law. Accordingly, we hold the District Court did not abuse its discretion when it allowed two of the State's law enforcement witnesses to testify multiple times on direct examination.

Rule 613. Prior statements of witnesses.

(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

State v. Passmore, 2010 MT 34

Defendant Passmore argued that Haefs' proffered testimony about what CR. told him is evidence of a prior inconsistent statement. **M. R. Evid**. 801(d)(1)(A) provides that a prior oral or written statement inconsistent with the declarant's trial testimony is admissible, and **M.R.Evid**. 613(b) provides that extrinsic evidence of a prior inconsistent statement is admissible so long as the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon. "The attack by prior inconsistent statement is not based on the theory that the present testimony is false and the former statement true. Rather, the attack rests on the notion that talking one way on the stand and another way previously is blowing hot and cold, raising a doubt as to the truthfulness of both statements." Broun, *McCormick on Evidence* § 34, at 151; *see also* *United States v. Winchenbach*, 197 F.3d 548, 558 (1st Cir. 1999) (explaining that **Rule 613**(b) permits extrinsic evidence of a prior inconsistent statement to show that a witness's statement at trial is irreconcilably at odds with the one made previously, thus calling the declarant's credibility into question, but Rule 608(b) bars extrinsic evidence of specific instances of a witness's conduct offered to impugn his character for truthfulness).

Of course, as just explained, the admissibility of such evidence is also subject to Rule 403, and that is where Passmore's claim fails. We agree with the State that the evidence in question (that CR. told Haefs she wished she could be bound with duct tape and tickled with a feather naked) was unfairly prejudicial. Indeed, it

effectively would have put CR. on trial, *cf.* *Detonancour*, P 24, and it easily could have caused the jury to attach undue importance to an extraneous and prejudicial matter. Moreover, this evidence would have been cumulative insofar as Passmore was able to present other evidence from which he then argued to the jury that CR. had "made up" the allegations against him. *See* P 34 n. 6, *supra*. And in terms of undermining C.R.'s credibility, the evidence had limited probative value in establishing the inference that because CR. erred or lied with respect to what she told Haefs, she erred or lied with respect to her testimony about Passmore's sexual acts with her. In short, the probative value of Haefs' proffered testimony was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and needless presentation of cumulative evidence.

A trial court has broad discretion to exclude evidence under **M. R. Evid**. 403. *See* *State v. McClean*, 179 Mont. 178, 186, 587 P.2d 20, 25 (1978); *State v. Grixti*, 2005 MT 296, P 22, 329 Mont. 330, 124 P.3d [**215] 177, *overruled in part on other grounds,* *Whitlow v. State*, 2008 MT 140, P 18 n. 4, 343 Mont. 90, 183 P.3d 861. Passmore has not shown that *the District Court abused that discretion*. We *accordingly affirm the court's ruling*.

Rule 701. Opinion testimony by lay witnesses.

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue

State v. Kaarma, 2017 MT 24

The district court has great latitude in ruling on the admissibility of expert testimony, and the ruling will not be disturbed without a showing of abuse of discretion. *State v. Stout*, 2010 MT 137, ¶ 59, 356 Mont. 468, 237 P.3d 37.

Kaarma argues Baker should not have been allowed to testify on blood spatter based on his common sense and training; rather he testified as an expert regarding the scientific and technical aspects of blood spatter. Kaarma argues that Baker should have been disclosed as an expert; had the disclosure been made, the defense would have secured a rebuttal witness. Kaarma asserts the District Court abused its discretion. The State counters that Baker was disclosed as a lay witness, Baker had the experience and training to testify based on his own perception as to the blood patterns he personally observed as a lay witness, and Kaarma had the opportunity to cross-examine him. Therefore, his testimony was appropriate under **M. R. Evid**. 701.

M. R. of Evid. 701 authorizes a lay witness to give an opinion, which is "based on the [witness's] perception," and is helpful for a clear understanding of the witness's testimony or a fact in issue. *State v. Nobach*, 2002 MT 91, ¶ 14, 309 Mont. 342, 46 P.3d 618. **M. R. Evid**. 702 governs expert testimony. Expert witnesses use their "scientific, technical, or other specialized knowledge" to assist the fact finder in understanding evidence or determining facts. **M. R. Evid**. 702. Expertise is based on "knowledge, skill, experience, training, or education." **M. R. Evid**. 702. Professional persons such as detectives, firefighters, paramedics, doctors, and dentists can testify under either **M. R. Evid**. 701 or 702; however, their testimony must comply with each rule accordingly.

Montana jurisprudence allows and this Court has condoned the practice of a police officer testifying as a lay witness under **M. R. Evid**. 701, to the officer's perceptions and conclusions based on extensive experience and training. *Dewitz*, ¶ 40; *State v. Zlahn*, 2014 MT 224, ¶ 33, 376 Mont. 245, 332 P.3d 247 (officer

testifying about inferences drawn from extensive experience dealing with criminals and administering gunshot residue testing); *State v. Frasure*, 2004 MT 305, ¶ 17, 323 Mont. 479, 100 P.3d 1013 (officer testimony as to whether a criminal defendant possessed drugs with an intent to sell, based on their training and experience as to the methods used in the illicit drug trade); *Hislop v. Cady*, 261 Mont. 243, 249, 862 P.2d 388, 392 (1993) (officer testimony regarding the cause of an accident based on the officer's experience in accident investigation). *See also* *State v. Henderson*, 2005 MT 333, ¶ 16, 330 Mont. 34, 125 P.3d 1132 (firefighter's testimony about "pour patterns" in analyzing cause of a fire).

However, if testimony crosses from lay to expert testimony the witness must be recognized as an expert by the court or error occurs. Testimony offered beyond the scope of **M. R. Evid**. 701 is expert testimony and should not be admitted as lay testimony. *See* *Massman v. Helena*, 237 Mont. 234, 242, 773 P.2d 1206, 1211 (1989) (holding that a firefighter's testimony based on "specialized, technical knowledge" was beyond the scope of **M. R. Evid**. 701); *Nobach*, ¶ 22 (holding a highway patrol officer's testimony about the effects of prescription drugs on the defendant's driving ability was expert opinion testimony under **M. R. Evid**. 702 and required the proper foundation); *Christofferson v. City of Great Falls*, 2003 MT 189, ¶ 49, 316 Mont. 469, 74 P.3d 1021 (holding paramedics' testimony "clearly extends beyond the men's observations at the scene or a description of their actions, and into the realm of expert medical opinion.").

Here, Baker's testimony was not proper under **M. R. Evid**. 701. While Baker's opinions were rationally related to his personal perceptions at the crime scene, they were based on his expertise and experience as a police detective. Baker's descriptions of high velocity versus low velocity blood spatter were expert testimony. As such Baker should have been noticed as an expert and the defense should have had the opportunity to challenge his qualifications as an expert. The District Court abused its discretion by allowing Baker to testify in this manner.

In order to determine if an alleged error prejudiced a criminal defendant's right to a fair trial, this Court has adopted a two-part test. *State v. Van Kirk*, 2001 MT 184, ¶ 37, 306 Mont. 215, 32 P.3d 735. The first step is to determine if the error was structural or trial error. *Van Kirk*, ¶ 37. Structural error usually affects the framework of the trial, precedes the actual trial, and is presumptively prejudicial. *Van Kirk*, ¶¶ 38-39. Trial error usually occurs during the trial's

presentation of evidence and is not presumptively_ prejudicial. *Van Kirk*, ¶ 40. This type of error is subject to review under the harmless error statute, § 46-20-701(1), MCA.

Here, the District Court's abuse of discretion was trial error as it occurred during the presentation of evidence. *Van Kirk*, ¶ 40. Therefore, under § 46-20-701(1), MCA, we must determine if the error was harmless or prejudicial thus necessitating reversal. This Court must determine if there is a reasonable possibility that the inadmissible evidence might have contributed to Kaarma's conviction. *Van Kirk*, ¶ 42. In order to determine this we use a "cumulative evidence" test. *Van Kirk*, ¶ 43. Inadmissible evidence will not be found prejudicial so long as the jury was presented with "admissible evidence that proved the same facts as the tainted evidence proved." *Van Kirk*, ¶ 43. This presented evidence must be admissible and of the same quality of the tainted evidence such that there was no reasonable possibility that it might have contributed to the defendant's conviction. *Van Kirk*, ¶ 44. This is particularly imperative where the inadmissible evidence goes to the proof of an element of the crime charged.

Here, Baker's testimony regarding the blood spatter was cumulative. The Montana State crime lab's expert witness, Spinder, testified as to where Kaarma was standing when he shot into the garage. Further, Spinder testified that Martini's (Kaarma's expert) report was consistent with his own determination of where Kaarma was standing. Baker also testified that Spinder's theory was consistent with his own theory. Baker, Spinder, and Martini all agreed with Kaarma's version of the story as to where he was standing when he shot. There was no reasonable possibility that the inadmissible evidence might have contributed to a conviction, as qualitatively similar admissible evidence was given. *Van Kirk*, ¶ 42. Moreover, the blood spatter and the location of Kaarma were not central points in the trial and under these circumstances were not germane to the specific elements of the crime of deliberate homicide. *See* § 45-5-102(1), MCA.

The record does not show that the error was prejudicial to Kaarma's defense. Section 46-20-701(1), MCA. The District Court [**266] abused its discretion when it allowed Baker to testify as an expert witness. However, we find that the error was harmless

Rule 702. Testimony by experts.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

State v. Clifford, 2005 MT 219

The jury found Cheryl Clifford (Cheryl) guilty of tampering with or fabricating physical evidence in violation of § 45-7-207, MCA (1995), and threats and other improper influence in official and political matters in violation of § 45-7-102(1)(a)(ii), MCA (1999).

I. Rule 702, M.R.Evid.

Cheryl argued that, since Blanco, in his deposition, could explain neither how nor why he concluded that Cheryl authored the documents, the District Court should have held a hearing pursuant to *Daubert* and *Kumho Tire Co. v. Carmichael* (1999), 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238.

Rule 702, **M.R.Evid**., provides as follows:

Testimony by experts.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

A. Daubert/Kumho Tire Co. Hearing

Questions concerning expert testimony's reliability are threefold under **Rule 702**, **M.R.Evid**.: (1) whether the expert field is reliable, (2) whether the expert is qualified, and (3) whether the qualified expert reliably applied the reliable field to the facts. First, the district court determines whether the expert

field is reliable. Second, the district court determines whether the witness is qualified as an expert in that reliable field. If the court deems the expert qualified, the testimony based on the results from that field is admissible-shaky as that evidence may be. Third, the question whether that qualified expert reliably applied the principles of that reliable field to the facts of the case is not a question for the trial court to resolve. Instead, "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are _ the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596, 113 S. Ct. at 2798, 125 L. Ed. 2d at 484; *contra* Fed. R. Evid. 702(3) (giving trial courts the decision whether the qualified expert witness reliably applied the reliable field to the facts).

The *Daubert* test helps determine the reliability of a field of expert methods. 509 U.S. at 592, 113 S. Ct. at 2796, 125 L. Ed. 2d at 482; *accord* *State v. Moore* (1994), 268 Mont. 20, 41, 885 P.2d 457, 470. In *Daubert*, the United States Supreme Court adopted a four-factor test, of which the factors are neither necessary nor sufficient to determine whether the field of scientific evidence that the expert is proposing is reliable. 509 U.S. at 592-95, 113 S. Ct. at 2796-98, 125 L. Ed. 2d at 482-84; *accord* *Moore*, 268 Mont. at 41, 885 P.2d at 470-71. The Supreme Court expanded this test to cover technical or other specialized expert testimony. *Kumho Tire Co.*, 526 U.S. at 141, 119 S. Ct. at 1171, 143 L. Ed. 2d at 246.

The *Daubert* test does not require a district court to determine whether the expert reliably applied expert methods to the facts. Rather, if the witness is a qualified expert in the field, he may testify. Under a *Daubert* analysis, the reliability of Blanco's application of his expert field to the facts is immaterial in determining the reliability of that expert field. **Rule** [**702**, **M.R.Evid**., did not require the District Court to hold a *Daubert* hearing.

B. Handwriting Expert's Opinion on an Ultimate Issue

Cheryl argues, under **Rule** **702**, **M.R.Evid**., that, although the District Court properly allowed Blanco to testify to similarities and dissimilarities between documents of unknown authorship and documents that Cheryl had written, it should not have allowed Blanco to testify to the ultimate conclusion that Cheryl authored the documents in question. Cheryl cites *United States v. Paul* (11th Cir. 1999), 175 F.3d 906, *United States v. Hines* (D. Mass. 1999), 55 F. Supp. 2d 62, and

two other federal district court cases for the proposition that, because the jury could have come to the ultimate conclusion without help from Blanco, Blanco need not have testified to that ultimate conclusion.

Rule 704, **M. R.Evid**., provides that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." This rule allows Blanco to testify to the ultimate conclusion of who wrote the letters.

C. Qualifying a Witness as an Expert

Cheryl argues that, because Blanco, in his deposition, could not state the basis for his conclusion that Cheryl authored the letters, he had no scientific, technical, or specialized knowledge under **Rule 702**, **M.R.Evid**. Cheryl misapprehends the force behind **Rule 702**, **M.R.Evid**. To restate this rule, *if* a reliable field helps the trier of fact, *and* the court deems the witness qualified as an expert, *then* he may testify. Whether the witness has scientific, technical, or specialized knowledge bears on the question whether the witness qualifies as an expert. Although the District Court did not specifically rule that Blanco qualified as an expert, Cheryl did not object to his testimony for lack of qualification. This Court does not address issues raised for the first time in this Court. *State v. White Bear*, 2005 MT 7, P 10, 325 Mont. 337, P 10, 106 P.3d 516, P 10. We decline to address this argument.

II. Adequate Probable Cause Upon Which to File an Information and

IV. The Legal Sufficiency of Blanco's Opinion Testimony

Cheryl asserts, without much coherent argument, that the affidavit in support of the information lacked probable cause. Cheryl fails to provide even the statute requiring probable cause to file an information. Rule 23(a)(4), M.R.App.P., requires an appellant, in her brief, to cite to the authorities, statutes, and pages of the record she relied upon in her arguments to this Court. Absent such citation, we decline to consider the argument. *In re Marriage of Hodge*, 2003 MT 146, P 10, 316 Mont. 194, P 10, 69 P.3d 1192, P 10.

Cheryl also argues that Blanco's testimony was the only concrete evidence against her, and it was insufficient as a matter of law to convict her. Cheryl did

nothing more in her brief than raise the argument. She fails even to cite a case. We decline to consider this argument, also. *In re Marriage of Hodge*, P 10.

III. Blanco's Reasoning

Cheryl argues the District Court erred in refusing to continue the trial because the State had not provided Blanco's subjective judgments upon which he relied to conclude Cheryl wrote the documents. She cites § 46-15-322(1)(c), MCA (2001), for the proposition that the State must produce the "results of physical examinations, scientific tests, experiments, or comparisons . . . ." Although the State provided Cheryl with Blanco's five reports in which he related his conclusions, Cheryl claims that Blanco did not reveal his "results."

During his deposition, Blanco made some comparisons for the benefit of the attorneys. He compared Cheryl's known writings to the unknown writings for similarities. He showed them how he compared Cheryl's voluntary statement to the Helena Police Department with the "LYkES" letter. For example, the writings both had distinctive k's. Further, Blanco provided almost twenty documents on which he had made notations next to specific characters. The notations indicated that those characters had similarities with characters from other documents.

In January 2002, shortly after the deposition, the prosecution provided Blanco's eighteen-page affidavit in which he reiterated many of his depositionstatements and reorganized many of those statements into a clear outline to show his methods. During trial, he testified in more detail.

Experts should explain their reasoning, so the opposing party can prepare for trial. *See* 46-15-322(1)(c) and 323(3) to (5), MCA (2001). With that information, the opposing party can attack the expert's reasoning as defective instead of merely attacking his conclusions as defective. At his deposition, Blanco provided fourteen of the documents of unknown origin on which he had made notations next to specific characters indicating those characters had similarities with characters from other documents that Cheryl had written. From the volume of similarities, he concluded that Cheryl had written the documents of unknown authorship. This explanation was sufficient for Cheryl's experts to understand Blanco's reasoning and methodology.

Cheryl also asserts that the District Court erred by denying a continuance so her handwriting expert, Lloyd Cunningham, could recover from an illness so he could testify in person rather than through video depositions. Cheryl did nothing more in her brief than raise the argument. She fails to develop the argument or cite any authority. Accordingly, we decline to address it. Rule 23(a)(4), M.R.App.P.; *In re Marriage of Hodge*, P 10.

V. Allowing Denbeaux to Testify

Mark Denbeaux is a law professor at Seton Hall Law School in Newark, New Jersey, who specializes in evidence law. He co-authored an article criticizing handwriting evidence. Denbeaux claims that, after many years of study, he has identified the defects and limitations of forensic handwriting witnesses' opinions and the reasons that handwriting analysis is unreliable. Cheryl argues that the District Court erred by refusing to recognize Denbeaux as a qualified expert and prohibiting him from testifying. She asserts that Denbeaux's testimony would have cast doubt on Blanco's testimony, the reliability of handwriting expert testimony in general, and the weight of that evidence. The Federal Circuit Courts have disagreed on whether to allow Denbeaux's testimony. *Compare United States v. Velasquez* (3d Cir. 1995), 33 V.I. 265, 64 F.3d 844, 852 (refusing to admit Denbeaux's testimony *was* an abuse of discretion), *with Paul*, 175 F.3d at 912 (refusing to admit Denbeaux's testimony *was not* an abuse of discretion).

First, arguably, Denbeaux is not an expert in the field of handwriting analysis; rather, he is an evidence professor who has, historically, criticized handwriting analysis evidence. It was within the District Court's discretion to conclude that Denbeaux did not qualify as an expert in handwriting analysis. *State v. Southern*, 1999 MT 94, P 48, 294 Mont. 225, P 48, 980 P.3d 3, P 48. Moreover, Cheryl presented the testimony of her own handwriting expert, and performed a thorough cross-examination of Blanco. Thus, even if Denbeaux's testimony might have cast doubt on Blanco's testimony, Cheryl was able to accomplish that task through the testimony of her expert and cross-examination. Under these circumstances, the District Court did not abuse its discretion in precluding Denbeaux's testimony

Rule 703. Basis of opinion testimony by experts.

The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence

State v. Brasda, 2021 MT 121

Because a forensic chemist testified only as an expert witness "regarding the testing and results of the chemical analysis of the evidence," his ultimate opinion required no reliance on a witness from the State Crime Lab; thus, the forensic chemist's personal knowledge about the witness, or lack thereof, was not a factor within his expert analysis and testimony, and was not admissible for that purpose, Mont. R. Evid. 703; [2]-While defendant correctly argued on appeal that questions concerning the State Crime Lab witness's involvement to demonstrate retesting of a sample were appropriate under the Rules of Evidence, nonetheless his trial request was premised upon speculation about contamination, and under these circumstances the District Court did not abuse its discretion in barring further inquiry.

The Montana Rules of Evidence require different foundations for admission of lay and expert witness testimony. Lay witnesses are prohibited from testifying "to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." **M. R. Evid**. 602. If a witness has personal knowledge, the witness may provide "opinions and inferences . . . rationally based on the perception of the witness" and "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." **M. R. Evid**. 701. Absent inadmissible hearsay, Doria lacked personal knowledge to testify about Thrush's drug use, investigation and termination, and its subsequent effect on the necessity to re-validate evidence, and therefore could not testify as a lay witness.

In contrast, "personal knowledge is not required for expert testimony." *State v. Wilmer*, 2011 MT 78, ¶ 21, 360 Mont. 101, 252 P.3d 178 (citing **M. R. Evid**. 602).

An expert witness may testify "in the form of an opinion or otherwise," to "scientific, technical, or other specialized knowledge" that assists the "trier of fact to understand the evidence or to determine a fact in issue," so long as the witness is qualified as "an expert by knowledge, skill, experience, training, or education." **M. R. Evid**. 702.

The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

M. R. Evid. **703**. "**Rule** **703** thus contemplates that a testifying expert may refer to otherwise inadmissible hearsay upon a foundational showing that the expert relied on the otherwise inadmissible evidence in forming the expert's opinion and the information is of a type reasonably relied upon by experts in the field of expertise." *In re C.K.*, 2017 MT 69, ¶ 18, 387 Mont. 127, 391 P.3d 735 (collecting cases).

Here, Doria could not rely on Thrush's circumstances to provide an expert opinion on the testing and analyzing of controlled substances. As a forensic chemist employed by the State Crime Lab, Doria's "responsibilities includ[ed] the analysis of suspected controlled substances and clandestine laboratories," for which his educational and professional background provided a foundation for expert testimony on the subject. permits an expert witness to rely on otherwise inadmissible evidence "[i]f of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon the subject." Thrush's drug use and termination was not evidence a chemist would reasonably rely on in reaching an expert opinion on chemical analysis of the material at issue. As differentiated by Doria in his testimony, he does not analyze concerns regarding the chain of custody: "[i]f there was an issue with the chain of custody, it would be addressed before analysis or whenever the issue was found. Without a proper chain of custody, there isn't a point of us working the evidence in the first place." Because Doria testified only as an expert witness "regarding the testing and results of the chemical analysis of the evidence," his ultimate opinion required no reliance on Thrush. Thus, Doria's personal knowledge about Thrush, or lack thereof, was not a factor within his expert analysis and testimony, and was not admissible for that purpose.

Second, Brasda argues "Doria's knowledge [****11] about Thrush's misdeeds was not hearsay because it would have been admitted to explain why he retested the sample." Brasda contends he wanted Doria "to explain why [he] had to retest the sample after the Crime Lab had already tested it once," not to prove that Thrush was a "drug user and thief," and that "the out-of-court statements about Thrush's misdeeds were admissible to explain why Doria took the action of retesting the sample."

We agree with Brasda that such an inquiry would have been permissible under the Rules of Evidence. "[O]ut-of-court statement[s] offered to prove something other than the truth of the matter asserted is not hearsay and is, accordingly, generally admissible." *State v. Laird*, 2019 MT 198, ¶ 73, 397 Mont. 29, 447 P.3d 416; *see also* **M. R. Evid**. 801(c) (defining hearsay). Brasda offers a non-hearsay purpose for admission of the testimony on Thrush's involvement, that being the reason the evidence was retested by Doria, not for the truth of Thrush's alleged acts. Doria was advised of Thrush's circumstances by his superiors to explain the need for re-testing of Thrush's work.

However, the thrust of Brasda's request in the District Court was to probe the witnesses for evidence of contamination of the sample. In that regard, Brasda offered merely a possibility of contamination, not proof of mishandling or tampering by ThrushFor chain of custody, the State is required to make a "prima facie showing of a continuous chain of possession and that there was no substantial change in the evidence while it was in its possession." *McCoy*, ¶ 13, (citing *Weeks*, 270 Mont. at 75, 891 P.2d at 484). "The burden then shifts to the defense to show that the evidence has been tampered with while in the State's custody." *Weeks*, 270 Mont. at 75, 891 P.2d at 484 (citing *State v. Armstrong*, 189 Mont. 407, 432, 616 P.2d 341, 355 (1980); *State v. Wells*, 202 Mont. 337, 356, 658 P.2d 381, 391 (1983)). Here, as the District Court reasoned:

[W]e don't know whether the sample has been tampered with, because the Defendant can't prove it. . . . [T]hose cases say that speculation and 'what if' isn't—about what might have happened to the sample isn't enough, that defense has got to have solid proof that somebody actually did tamper with the sample. You have proven that [Thrush] could have tampered with it. You haven't proven he did on a more likely basis or otherwise.

Rule 704. Opinions on ultimate issue.

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

State v. Passmore, 2010 MT 34

Issue 4. Did the District Court abuse its discretion in excluding testimony from a defense witness that Passmore lacked the character traits of a sex offender?

The standard of review here is the same as under Issue 3. *See* P 51, *supra*.

Prior to trial, Passmore disclosed his intention to call sex-offender evaluator Michael D. Sullivan, MSW, "to testify as an expert witness in the instant case, inasmuch as Mr. Sullivan conducted an evaluation of Mr. Passmore, which revealed that he does not have the characteristics of a sex offender as a result of an extensive assessment." The State responded with a motion in limine to exclude this proposed expert testimony based on **M. R. Evid**. 702 and *State v. Bailey*, 2004 MT 87, 320 Mont. 501, 87 P.3d 1032. The District Court held a hearing and thereafter granted the State's motion.

On appeal. Passmore notes that he did not offer this testimony for purposes of bolstering his own credibility. Rather, he offered Sullivan's testimony pursuant to **M. R. Evid**. 404(a), 405(a), 702, and **704**. In relevant part, these **rules** state as follows:

Rule 404(a): "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: (1) Character of accused. Evidence of a pertinent trait of character offered by an accused

Rule 405(a): "In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made … by testimony in the form of an opinion."

Rule 702: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness

qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."

Rule 704: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact"

Based on these provisions and several cases from other jurisdictions, Passmore maintains that expert testimony regarding whether a defendant possesses the character traits of a sex offender is admissible.

The chief case relied on by Passmore is *State v. Davis*, 2002 WI 75, 254 Wis. 2d 1, 645 N.W.2d 913 (Wis. 2002). Similar to the present case, the defendant in *Davis* sought to introduce evidence to show that he lacked the psychological characteristics of a sex offender and, therefore, was unlikely to have committed the charged crime. The court held that such evidence "may be admissible" under Wisconsin's rules of evidence governing character evidence and expert testimony (which are identical in pertinent respects to the Montana rules quoted above). *See Davis*, PP 2, 26. The court first observed that an accused may introduce evidence of a "pertinent" trait of his character, meaning the character evidence must relate to a fact or proposition that is of consequence to the determination of the action and have a tendency to establish that consequential proposition. Next, the court noted that a defendant may introduce such relevant character evidence through opinion testimony. Lastly, the court observed that expert testimony is permitted when specialized knowledge will assist the trier of fact to understand evidence or to determine a fact in issue. *See Davis*, PP 16-17. From this, the court reasoned on the facts presented:

Davis's expert will allegedly testify to the general character traits of sexual offenders, the tests used to determine whether an individual possesses such character traits, his findings on whether Davis possesses such character traits, and, based on these results, the likelihood that Davis committed the sexual assault. Such traits regarding the defendant's propensity to commit sexual assault are pertinent traits of his character. This evidence relates to a consequential fact, that is, whether the defendant committed sexual misconduct with a child. Further, this evidence has probative value in sexual assault cases, where there is often no neutral witness to the assault and there is seldom any physical evidence implicating the defendant. Such profile evidence may be extremely important to

the defense. Such testimony may also be useful to the trier of fact, helping it to determine a fact in issue, that is, whether the defendant committed the crime, by showing circumstantial evidence of the defendant's innocence.

Davis, P 18The court noted, however, that the trial court has "discretion in admitting such evidence" and is entrusted to act as a gatekeeper with the power to exclude "unduly prejudicial evidence." *See Davis*, P21; *see also State v. Walters*, 2004 WI 18, PP2, 24, 25, 28, 269 Wis. 2d 142, 675 N.W.2d 778 (Wis. 2004) (such evidence is subject to the rules of evidence, particularly rule 403's balancing test, and the decision to admit or exclude it is discretionary).

Passmore also cites *People v. Stoll*, 49 Cal. 3d 1136, 265 Cal. Rptr. 111, 783 P.2d 698 (Cal. 1989), and *Nolte v. State*, 854 S.W.2d 304 (Tex. App. 3d Dist. 1993). In *Stoll*, the court reversed the convictions because the trial court had erroneously excluded a defense psychologist's opinion testimony that the defendants displayed a "normal personality function" and showed no "indications of deviancy." 783 P.2d at 699-700, 707-08. The court observed that under California's rules of evidence, an accused may present expert opinion testimony to show his nondisposition to commit a charged sex offense. *Id*. at 708. In this regard, the court noted that "lack of deviance" is a relevant character trait in a lewd-and-lascivious-conduct case. *Id*. In contrast, the court in *Nolte* concluded that the proffered testimony, which would have compared the defendant's psychological profile with that of the typical sexual abuser, simply was not character evidence under Tex. R. Crim. Evid. 405(a) and, thus, should not have been excluded under this rule. 854 S.W.2d at 308-10.

The State counters that more courts have rejected "sex-offender profile testimony" than have allowed it. As support for this proposition, the State directs our attention to *People v. Dobek*, 274 Mich. App. 58, 732 N.W.2d 546, 575 (Mich. App. 2007) (listing courts that have rejected such testimony), and James Aaron George, Student Author, *Offender Profiling and Expert Testimony: Scientifically Valid or Glorified Results?* [61 Vand. L. Rev. 221, 240 n. 109 (2008) (listing jurisdictions that have rejected sex-offender profiling offered by the prosecution and jurisdictions that have rejected sex-offender profiling offered by the defendant). In *State v. Parkinson*, 128 Idaho 29, 909 P.2d 647 (Idaho App. 1996) (cited in *Dobek)*, the court noted that "[v]arious reasons have been given for rejection of this type of evidence, including that it has not gained general acceptance in the scientific community, that it invades the province of the jury

and unfairly prejudices the prosecution, and that it does not assist the trier of fact to understand the evidence or to determine a fact in issue." *Id*. at 651; *see also State v. Hughes*, 841 So. 2d 718, 721 (La. 2003). The *Dobek* court cited similar reasons in its decision. The court first concluded that evidence regarding the defendant's sex-offender profile did not meet the requirements of Mich. R. Evid. 702. Specifically, the court held that the proffered testimony was not sufficiently scientifically reliable and was not supported by sufficient scientific data. *Dobek*, 732 N.W.2d at 571-72. The court also concluded that the evidence would not assist the trier of fact in understanding the evidence or in determining a fact in issue, but rather would more likely confuse the Jury and distract it from focusing on the pertinent evidence. *Id*. at 572. Thus, the court held that even if the evidence were admissible under Mich. R. Evid. 702, any minimal probative value would be substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *Id*. In this regard, the court expressed concern that the evidence, purporting to answer the question of whether the defendant committed a sexual offense, could be given disproportionate weight by the jury and considered conclusive proof of guilt or innocence. *Id*.

These extrajurisdictional cases aside, the State also argues that under *State v. Spencer*, 2007 MT 245, 339 Mont. 227, 169 P.3d 384, the District Court did not abuse its discretion in excluding Sullivan's proposed testimony because its probative value was substantially outweighed by the danger of confusing the issues or misleading the jury. In *Spencer*, the defendant was accused of having sexual intercourse without consent with two young girls, and he sought to introduce testimony by a licensed clinical psychologist that he did not meet the diagnostic criteria of a pedophile. *Spencer*, PP6, 9-10. We affirmed the exclusion of this evidence, noting that it was "pertinent character evidence," *Spencer*, P 37, but concluding that "whatever relevance [the] testimony may have possessed, the dangers of confusing the issues or misleading the jury substantially outweighed its probative value, and thus it ran afoul of **M. R. Evid**. 403," *Spencer*, P 41.

Based on *Spencer* and the extrajurisdictional cases cited by Passmore and the State, we conclude that there is neither a per se rule requiring admission, nor a per se rule requiring exclusion, of evidence that a defendant does not possess (or does possess) the character traits of a sex offender. Rather, admissibility depends on a careful application of **M. *R*. Evid**. 403, 404(a)(1), 405(a), and 702. In the present case, Passmore forcefully argues that Sullivan's testimony was admissible under Rules 404(a)(1) and 405(a). However, he fails to provide any analysis, let

alone a complete record, on the question of whether Sullivan's testimony would meet the requirements of Rule 702. Insofar as Rule 702 is concerned, Passmore's argument is insufficient under M. R. App. P. 12(1)(f) Furthermore, we agree with the State that the District Court was well within its discretion in concluding that on the facts here, any probative value Sullivan's testimony may have had was substantially outweighed by the danger of confusing the issues or misleading the jury. **M. R. Evid**. 403; *cf Spencer, P* 41.

Passmore has not shown that the District Court abused its discretion in excluding testimony from Sullivan that Passmore lacked the character traits of a sex offender. We accordingly affirm the court's ruling.

Rule 705. Disclosure of facts or data underlying expert opinion.

The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

State v. McBride, 2003 ML 4406
Cascade County District Court

Used to challenge expert testimony and/or judicial notice of the expert testimony on the reliability and accuracy of the PBT/PAST test in a DUI matter where the District Court took judicial notice of a previous Court's ruling of accuracy of the test. Defendant objected at the Justice Court level to expert testimony on the topic without disclosure of the underlying data. Justice Court allowed the evidence. District Court reversed.

Rule 801. Definitions.

The following definitions apply under this article:

(a) Statement. A statement is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A declarant is a person who makes a statement.

(c) Hearsay. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if:

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of subsequent fabrication, improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of that relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Rule 802. Hearsay rule.

Hearsay is not admissible except as otherwise provided by statute, these rules, or other rules applicable in the courts of this state.

Rule 803. Hearsay exceptions: availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then-existing mental, emotional, or physical condition. A statement of the declarant's then-existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed.

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnosis, made at or near the time of the acts, events, conditions, opinions, or diagnosis, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. **However, written reports from the**

Montana state crime laboratory are within this exception to the hearsay rule when the state has notified the court and opposing parties in writing of its intention to offer such report or reports in evidence at trial in sufficient time for the party not offering the report or reports (1) to obtain the depositions before trial of the person or persons responsible for compiling such reports, or (2) to subpoena the attendance of said persons at trial. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports. To the extent not otherwise provided in this paragraph, records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule: (i) investigative reports by police and other law enforcement personnel; (ii) investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party; (iii) factual findings offered by the government in criminal cases; (iv) factual findings resulting from special investigation of a particular complaint, case, or incident; and (v) any matter as to which the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form

of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement or data compilation, or entry.

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a member of the clergy, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence twenty years or more, the authenticity of which is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject

of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce or dissolution of marriage, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) Reputation as to character. Reputation of a person's character among associates or in the community.

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the prosecution in a criminal prosecution, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family, or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.

State v. Baze, 2011 MT 52

*Issue: Did the District Court err when it admitted the faxed blood test results under **M. R. Evid**. 803(6), the business records hearsay exception?*

Prior to reaching the merits of this issue, we address the question of whether this issue was properly preserved for appeal. Both parties correctly note that this Court generally does not consider issues presented for the first time on appeal because it is "fundamentally unfair to fault the trial court for failing to rule on an issue it was never given the opportunity to consider." *State v. West*, 2008 MT 338, ¶ 16, 346 Mont. 244, 194 P.3d 683 (citing *Day v. Payne*, 280 Mont. 273, 276-77, 929 P.2d 864, 866 (1996)). However, the principal purpose of the timely-objection rule is judicial economy and "bringing alleged errors to the attention of each court involved, so that actual error can be prevented or corrected at the first opportunity." *West*, ¶ 17 (internal citations omitted). We have previously held we will not harshly apply the timely-objection rule for the sake of economy when its application is clearly at the expense of justice. *See State v. Montgomery*, 2010 MT 193, ¶ 13, 357 Mont. 348, 239 P.3d 929. Finally, "we have permitted parties to bolster their preserved issues with additional legal authority or to make further arguments within the scope of the legal theory articulated to the trial court." *Id.* at ¶ 12 (citations omitted).

Here, the State argues that Baze did not preserve his business record hearsay exception argument for appeal because he addressed, but did not adequately develop, that theory in the District Court. Baze concedes he did not fully develop this theory in the District Court, but asserts the reason was that the State provided notice it intended to introduce business records under **M. R. Evid**. 803(6), but did not indicate which documents it sought to admit. Moreover, Baze asserts that he objected to use of the business record hearsay exception in anticipation the State might try to use the exception to admit the faxed report. However, as both parties acknowledge in their briefs to this Court, neither party presented developed arguments regarding the business record hearsay exception. Nonetheless, the District Court developed its own theory and based its denial of Baze's motion to suppress the evidence in part upon a novel interpretation of the business records hearsay exception.

Fundamental unfairness to the District Court is not at stake here because it was the District Court, not the parties, which sua sponte resolved on the merits whether or not the faxed toxicology report was admissible via the business records hearsay exception. Baze and the State had the opportunity to address the question, the District Court had the opportunity to rule on it, and we have in front of us the benefit of the District Court's ruling. We conclude Baze's business record

hearsay exception argument is not barred on appeal, and therefore, we turn to its merits.

"Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." **M. R. Evid**. 801(c). "Hearsay is not admissible except as otherwise provided by statute, these rules, or other rules applicable in the courts of this state. **M. R. Evid**. 802. **M. R. Evid**. 803 identifies those statements that are not excluded by the hearsay rule, even though the declarant is an available witness. The relevant text of the business records exception states:

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnosis, made at or near the time of the acts, events, conditions, opinions, or diagnosis, if kept in the course of a regularly conducted business activity, *and if it was the regular practice of that business activity to make* the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

M. R. Evid. 803(6) (emphasis added). Business records are presumed reliable because: "1) employees *generating* these records are motivated to accurately prepare these records because *their employer's business depends on the records to conduct its business affairs*; and 2) the routine and habit of *creating* these records also lends reliability." *Bean v. Montana Bd. of Labor Appeals*, 1998 MT 222, ¶ 20, 290 Mont. 496, 965 P.2d 256 (emphasis added).

Our previous authority establishes that blood test results obtained by medical authorities for emergency treatment purposes may be admissible in a DUI prosecution when obtained through a valid subpoena, as medical records are generally considered constitutionally protected materials. *State v. Fregien*, 2006 MT 18, ¶ 11, 331 Mont. 18, 127 P.3d 1048 (citing *State v. Nelson*, 283 Mont. 231, 243-44, 941 P.2d, 441, 449 (1997)). In order to admit the blood test results into evidence during a DUI trial, the prosecution would also have to meet the admissibility requirements of § 61-8-404, MCA, *State v. Newill*, 285 Mont. 84, 88-89, 946 P.2d 134, 136-37 (1997), and the Montana Rules of Evidence. *State v. McDonald*, 215 Mont. 340, 343-44, 697 P.2d 1328, 1330 (1985).

he parties do not dispute that the toxicology report faxed from Billings Clinic to RHCC containing Baze's test results is hearsay under the Montana Rules of Evidence; the report was an out of court statement offered to prove that Baze's blood alcohol content was greater than the legal limit. Rather, the argument centers on whether the report is admissible under **M. R. Evid**. 803(6), the business records hearsay exception. Baze argues that the State did not establish any of the foundational elements of the business record exception because it did not produce testimony from personnel from Billings Clinic, the sending business that generated the report. The State concedes it did not produce testimony from anyone at Billings Clinic, but adopts the District Court's reasoning that this does not bar admission of the report because some federal courts have expanded the business records hearsay exception by allowing testimony from a *receiving* business if that business integrated the report into its records and relied upon it.

In its order denying Baze's motion to suppress the faxed report, the District Court stated:

Although it might be preferable that the State present evidence from the author of the report at Billings Clinic Lab, reports prepared by a third party may qualify as a business record under Rule 803(6) if the business integrated the document into its records and relied upon it, provided that circumstances support the trustworthiness of the document. *United States v. Adefehinti* [**417] , 510 F.3d 319, 326, 379 U.S. App. D.C. 91 (D.C. Cir. 2007). In this case, RHCC obtained and made the report a part of its business records and the testimony of RHCC employees is sufficient foundation under Rule 803(6), **M.R.Evid**. There is no reason to believe that the sample or report were [sic] somehow mishandled or misidentified or is otherwise untrustworthy.

The District Court's reliance on *Adefehinti*, a D.C. Circuit Court case, to resolve admissibility in a Montana state court under the Montana Rules of Evidence was erroneous. In *Adefehinti*, the issue was whether or not the trial court erred in admitting into evidence loan documents on the basis of certificates pursuant to F. R. Evid. 902(11). F. R. Evid. 902(11) permits authentication of certified domestic records of regularly conducted activity that would otherwise be admissible under F. R. Evid. 803(6) if the evidence is accompanied by a written declaration of its custodian or other qualified person. F. R. Evid. 902(11); *Adefehinti*, 510 F.3d at 324. F. R. Evid. 902(11) "extends [F. R. Evid. 803(6)] by allowing a written

foundation in lieu of an oral one." *Adefehinti*, 510 F.3d at 325. The D.C. Circuit Court went on to adopt the rule that "a record of which a firm takes custody is thereby 'made' by the firm within the meaning of [F. R. Evid. 902(11)] (and thus admissible if all the other requirements are satisfied)." *Id*. at 326. Montana has not adopted this expanded view of the business records hearsay exception and we decline to do so today.

F. R. Evid. 803(6) is similar—but not identical—to **M. R. Evid**. 803(6). F. R. Evid. 803(6) adds reference to F. R. Evid. 902(11):

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, *or by certification that complies with **Rule 902**(11), **Rule 902**(12), or a statute permitting certification*, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

F. R. Evid. 803(6) (emphasis added). F. R. Evid. 902 is entitled "self-authentication" and states that "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to" that evidence listed in the rule's subsections.

While the Montana Rules of Evidence identify evidence that is self-authenticating in **M. R. Evid**. **902**, the **rules** do not permit business records to be authenticated via a certificate of compliance. In short, Montana has no counterpart to F. R. Evid. 902(11). Therefore, reliance on *Adefehinti* is inapposite. We have held that hospital records and medical reports are "ordinarily not self-authenticating and are not admissible business records pursuant to **Rule 902**, **M.R.Evid**." *Pannoni v. Bd. of Trustees, Browning Sch. Dist. No. 9*, 2004 MT 130, ¶ 45, 321 Mont. 311, 90 P.3d 438 (citing *Palmer by Diacon v. Farmers Ins. Exch.*, 233 Mont. 515, 521, 761 P.2d 401, 405 (1998)).

For the records to be admissible, the following foundational facts must be established through the custodian of the records or another qualified witness: (1)

the records must have been made or transmitted by a person with knowledge at or near the time of the incident recorded; and (2) the record must have been kept in the course of a regularly conducted business activity.

United States v. Ray, 920 F.2d 562, 565 (9th Cir. 1990) (internal citation omitted).

Based on the record before us, the State failed to satisfy the foundational elements of **M. R. Evid**. 803(6), the business records hearsay exception. As noted above, this Rule requires the entity *creating* the business record—not the entity *receiving* it—to establish that the record was prepared in accordance with its regular and trustworthy business practices. Because no testimony to this effect was presented by personnel from the Billings Clinic where the record was generated, the District Court erred in admitting into evidence the faxed toxicology report based on testimony of personnel from the receiving entity, RHCC.

For the foregoing reasons, we hold that the District Court's interpretation of **M. R. Evid**. 803(6) was erroneous, and it was therefore an abuse of discretion for the District Court to admit the faxed toxicology report containing the results of Baze's blood tests under **M. R. Evid**. 803(6).

State v. Kindt 2021 Mont. 235 (included)

Rule 804. Hearsay exceptions: declarant unavailable.

(a) Definition of unavailability. Unavailability as a witness includes situations in which the declarant:

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, (A) in civil actions and proceedings, at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered; and (B) in criminal actions and proceedings, if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, and redirect examination.

(2) Statement under belief of impending death. A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstance of what the declarant believed to be impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended

to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history.

(A) A statement concerning the declarant's own birth, adoption, marriage, divorce or dissolution of marriage, legitimacy, relationship by blood, or family history, even though the declarant had no means of acquiring the personal knowledge of the matter stated; or

(B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.

Rule 806. Attacking and supporting the credibility of declarant.

When a hearsay statement, or a statement defined by Rule 801(d)(2)(C), (D), or (E) has been admitted in evidence, the credibility of the declarant may be attacked and, if attacked, may be supported by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Rule 901. Requirement of authentication or identification.

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion

concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Method provided by statute or rule. Any method of authentication or identification provided by statute, these rules, or other rules applicable in the courts of this state.

State v. Forsythe, 2017 MT 61

Did the District Court abuse its discretion by allowing a lay witness to testify regarding handwriting samples?

Forsythe alternatively asserts that the District Court erroneously admitted the subject correspondence based on foundational authentication testimony of Tucker in violation of **Rule 901**(b)(2) (permissible handwriting authentication through lay testimony based on non-litigation-related familiarity) and *State v. Dewitz*, 2009 MT 202, ¶¶ 42-43, 351 Mont. 182, 212 P.3d 1040 (admission of police officer's non-expert handwriting comparison testimony under **Rule 901**(b)(2) erroneous absent prior non-case-related familiarity). We agree.

Tucker's testimony regarding his handwriting comparison expertise and his resulting opinion testimony unquestionably constituted expert testimony beyond the scope of permissible lay opinion testimony. The State concedes that it failed to timely identify Tucker as an expert witness on its court-ordered pretrial witness list and thus purported to present his testimony as merely lay opinion testimony. As in *Dewitz*, Tucker had no prior non-case-related familiarity with Forsythe's handwriting. Therefore, the District Court abused its discretion in admitting the subject correspondence based on the foundational authentication testimony of Tucker under **Rule 901**(b)(2).

Rule 902. Self-authentication.

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic public documents not under seal. Except as otherwise provided by statute, a document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign public documents. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution of attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If a reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) or complying with any law of the United States or of this state.

(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.

(7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) Acknowledged documents. Documents accompanied by a certificate of acknowledgement executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgements.

(9) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) Presumptions created by law. Any signature, document, or other matter declared by any law of the United States or of this state to be presumptively or prima facie genuine or authentic.

City of Kalispell v. Omyer, 2016 MT 63

On June 20, 2010, Gloria Ferrari was cited by Kalispell Police Officer A.J. McDonnell for various traffic violations including driving with a suspended license. The Kalispell Municipal Court conducted a bench trial on May 30, 2013. Ferrari was represented by appointed counsel Rapkoch but was not in attendance. McDonnell presented Ferrari's "Certified Driver Record" generated by the State of Montana Department of Justice, Motor Vehicle Division (MVD), as well as six letters from MVD to Ferrari informing her that her license was suspended. Counse objected to the suspension letters as hearsay and in violation of Ferrari's United States and Montana constitutional rights to confrontation. The Municipal Court admitted the evidence over counsel's objection

Counsel argued that this language constituted testimony and was included in letters that were "prepared in anticipation of use at trial to prove historical facts relevant to prosecution." Counsel claimed that had the evidence been properly excluded, there would have been no evidence presented at trial establishing a

"knowing" culpable mental state and Appellants could not have been convicted under § 61-5-212, MCA.

The City of Kalispell responded that the MVD letters were properly admitted as self-authenticating business records under § 61-11-102, MCA, and **Rule 902**(4) of the Montana **Rules** of Evidence. The City further argued that the challenged letters did not constitute testimonial evidence triggering the Confrontation Clause and were admissible under Rule 803(8), **M. R. Evid**. Lastly, the City countered that under § 26-1-602(24), MCA, it is presumed that a correctly addressed and mailed letter is received by the intended recipient and none of the Appellants rebutted this presumption at trial.

The District Court determined that the stamped certificates of mailing included in each suspension letter did not constitute testimonial hearsay; rather, the letters were certified copies of public records and were admissible under **Rules 902**(4) and 803(8) of the Montana Rules of Evidence. The court also concluded that Appellants had not rebutted the statutory presumption that they had received the suspension letters; therefore, the court presumed receipt.

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*Did the District Court abuse its discretion by holding that the evidentiary "letters of suspension" were admissible as "certified copies of public records" under **M. R. Evid**. 902(4)*?

We next address the Appellants' assertion that the letters notifying them of their suspensions contained "testimonial hearsay" and should not have been admitted or used to support their convictions. As indicated above, the District Court affirmed the Municipal Court's admission of the suspension letters, finding them to be certified copies of public records under **Rule 902**(4). The court further determined they were not testimonial in nature and were appropriately admitted under the public records hearsay exception set forth in Rule 803.

Rule 803(8), **M. R. Evid**. provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . .

(8) Public records and reports. To the extent not otherwise provided in this paragraph, records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule: (i) investigative reports by police and other law enforcement personnel; (ii) investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party; (iii) factual findings offered by the government in criminal cases; (iv) factual findings resulting from special investigation of a particular complaint, case, or incident; and (v) any matter as to which the sources of information or other circumstances indicate lack of trust worthiness.

Rule 902(4), **M. R. Evid**. provides:

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

. . .

(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) or complying with any law of the United States or of this state.

In *Billings v. Lindell*, 236 Mont. 519, 771 P.2d 134 (1989), we addressed the self-authenticating nature of the MVD's driving records. We explained that the MVD has the duty to maintain records of license convictions and that it would be unreasonable for a custodian of the department to be present in court each time a record was necessary for a trial. *Billings*, 236 Mont. at 521, 771 P.2d at 136. We discussed some of the various methods developed by the Legislature through which authenticity is taken as established for purposes of admissibility. Two such methods were **Rules** 803(8) and **902**(4), **M. R. Evid**. *Billings*, 236 Mont. at 521-22, 771 P.2d at 136. Based upon the plain language of these rules, the statutorily-mandated purpose of MVD's record-keeping, and our analysis in *Billings*, we

conclude the District Court did not abuse its discretion in holding that the suspension letters were admissible under **Rules** 803 and **902**(4).

Rule 1002. Requirement of original.

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided by statute, these rules, or other rules applicable in the courts of this state.

Rule 1003. Admissibility of duplicates, copies of certain entries.

A duplicate, or copy of an entry in the regular course of business as defined in Rule 1001(5), is admissible to the same extent as an original unless:

(1) a genuine question is raised as to the authenticity of the original; or

(2) in the circumstances it would be unfair to admit the duplicate or copy of an entry in the regular course of business in lieu of the original; or

(3) otherwise provided by statute.

State of Mt. v. Holmes, 1995 Mont. Dist. LEXIS 928
Ravalli County District Court

Rule 1002, **M.R.Evid**., provides that the original recording is required if the evidence is offered to prove the content of the recording. However, Rule 1003(1), **M.R.Evid**., allows admissibility of other evidence of the contents of a recording if all originals are lost or have been destroyed unless the proponent lost or destroyed them in bad faith. Before evidence in the form of a transcript may be admitted as other evidence of the contents of a lost recording, the State must strictly adhere to the following foundational requirements as set forth in Anno. Sound Recordings in Evidence, 58 A.L.R.2d 1024, to authenticate the recording and the transcript thereof:

. . . "(1) a showing that the recording device was capable of taking testimony, (2) a showing that the operator of the device was competent, (3) establishment of authenticity and correctness of the recording, (4) a showing that changes, additions, or deletions have not been made, (5) a showing of the manner of preservation of the recording; (6) identification of the speakers, (7) a showing that the testimony elicited was voluntarily made without any kind of inducement."

State v. Brodniak, 221 Mont. 212, 229, 718 P.2d 322, 333-34 (1986), citing State v. Warwick, 158 Mont. 531, 542-43, 494 P.2d 627, 633 (1972).

In Brodniak, the Court held that the district court had erred by allowing the defendant's audio taped statement to be read to the jury from a transcript

because the State had failed to strictly adhere to the Warwick foundation. Brodniak, 221 Mont. at 229-30, 718 P.2d at 334.

Rule 1004. Admissibility of other evidence of contents.

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or

(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

Gochanour v. Gochanour (In re Gochanour), 2000 MT 156

Under Montana's "best evidence rule," Rule 1002, **M.R.Evid**., "to prove the content of a writing . . . the original writing . . . is required, except as otherwise provided by statute, these rules, or other rules applicable in the courts of this state." *See* *Watkins v. Williams* (1994), 265 Mont. 306, 312, 877 P.2d 19, 22. Secondary evidence is admissible over a best evidence objection if one of the requirements set forth under **Rule 1004**, **M.R.Evid**., has been met and proper foundation is laid. *See* *Watkins*, 265 Mont. at 312, 877 P.2d at 22.

The relevant portion of **Rule 1004** pertains to the admissibility of "other evidence" that may, under certain circumstances, be offered to demonstrate the "contents of a writing, recording, or photograph," when the original has been "lost or destroyed." Typically, as Barbara points out, when the document is a contract, a photocopy of the enforceable agreement is admissible in the event the original is established as unavailable. *See generally* *Morris v. Langhausen* (1970), 155 Mont. 362, 365-66, 472 P.2d 860, 862 (distinguishing between "photostatic copies" and "carbon copies" under best evidence rule).

Virgil alleged he lost the agreement--or at least he could not find it--which established the foundation for the application of **Rule 1004**. Counsel for Barbara

did not dispute this assertion. Rather, the focus of her counsel's objection was that an unexecuted copy could not be admitted as a representation of an executed agreement.

Virgil then offered *other evidence* that a properly executed prenuptial agreement existed, one that would determine the rights of the parties. The court did not limit the introduction of such evidence, pursuant to **Rule 1004**, even though the **rule** pertains to the contents rather than the actual existence of the document. Virgil's copy of the alleged lost original--an *unsigned* copy no less--was perfectly admissible.

Virgil also provided documentation that he and Barbara each made a list of property they each owned and would subsequently bring into the marriage, indicating that a prenuptial agreement was contemplated by both parties. Barbara does not dispute that the lists admitted into evidence were genuine, and that she in fact drafted such a list prior to their marriage. Again, all such evidence was admissible as secondary evidence.

Virgil also testified that his attorney--his current counsel's father--drafted the agreement, a legal service for which he paid. Other than the unsigned copy, however, no other evidence beyond Virgil's testimony was offered to substantiate this claim. He testified that on June 1, 1989, he and Barbara went to the offices of Joseph Connors, Sr., and signed [****12] the agreement. Likewise, this allegation was not substantiated with further evidence. No record from Joseph Connors, Sr.'s files of this event were produced. Apparently, the agreement also would have been notarized. No evidence of this was offered. No other third-party corroboration testimony was offered.

The only evidence that the agreement was ever signed, therefore, was Virgil's testimony of his own recollections, which was rebutted by Barbara's recollection that no such event occurred. Therefore, the secondary evidence could not establish that an enforceable prenuptial contract--which, by definition, requires the signatures of both parties--ever existed. *See* § 40-2-604, MCA (providing that a premarital agreement must be in writing and signed by both parties).

Thus, Virgil's argument that he met an evidentiary burden imposed by **Rule 1004**, one that would magically transform circumstantial evidence of a signed agreement into a legally binding document, and that the court in turn ignored his

efforts, must fail. The evidentiary question here turns not on admissibility, but rather on the weight of the evidence admitted. **Rule 1004**, **M.R.Evid**., therefore, is entirely irrelevant to the District Court's determination that the evidence simply did not support Virgil's claim that a prenuptial agreement between the parties was ever executed.

Rule 1005. Public records.

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

Billings v. Lindell, 236 Mont. 519

Defendant appealed his conviction for speeding and driving while license suspended. On appeal, the court affirmed the judgment of the trial court. The court ruled that the abstract of driving was certified by a duly appointed custodian of the records, and therefore it was a self-authenticating document and the trial court correctly admitted it into evidence. Further, the court ruled that the letter sent to defendant informing him that the suspension of his license was extended was an official document authorized to be filed, and may have been proven by a copy certified as correct, thus the letter was properly admitted by the trial court. Moreover, the court held that the determination of receipt of the letter by defendant was properly made because defendant presented no evidence, apart from his own testimony, to prove the letter was not received. On the other hand, the letter contained a certificate of mailing, was dated and signed by an officer of the department, and was sent to defendant's home address. The court therefore found substantial evidence to support the trial court's finding of guilty.

The Division of Motor Vehicles has the duty of maintaining records of license convictions. Section 61-11-102(1), MCA; *Lancaster v. Department of Justice* (1985), 218 Mont. 97, 706 P.2d 126, 42 St.Rep. 1425. However, we recognize the inherent difficulty in requiring the custodian to be present in court each time the records become necessary in a trial. To meet practical concerns, the Legislature developed a number of instances in which authenticity is taken as established for purposes of admissibility without extrinsic evidence. Section 61-11-102(6), MCA, is one such instance:

"A reproduction of the information placed on a computer storage devise is *an original* of the record for all purposes and *is admissible in evidence without further foundation* in all courts or administrative agencies when the following certification by a custodian of the record appears on each page:

"The individual named below, being a duly designated custodian of the driverrecords of the department of justice, motor vehicle division, certifies this document as a true reproduction, in accordance with 61-11-102(6), of the information contained in a computer storage device of the department of justice, motor vehicle division.

"Signed: ___ (Print Full Name)

(Emphasis added)"

The statute is abundantly clear; once properly certified, the exhibit is admissible without additional foundation. In the instant case, the abstract of driving was certified by a duly appointed custodian of the records. We need not examine this point any further.

The copy of the suspension notification letter, dated February 18, 1987, likewise included a certificate from the custodian of the files and records of the motor vehicle division, certifying that the information was a true and correct copy of the original. As a public document kept in accordance with the statutory mandate, the letter falls within the class of self-authenticating documents. Rule 902(4), **M.R.Evid**. In addition, contents of an official document authorized to be filed may be proven by a copy "[c]ertified as correct in accordance with Rule 902 . . ." and meet the requirements of the best evidence **rule**. **Rule 1005**, **M.R.Evid**. Finally, the exhibit falls within Rule 803(8), the public document exception to the hearsay rule. We find the letter was properly admitted by the District Court.

Rule 1006. Summaries.

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

State v. Snyder, 2019 MT 90N

Defendant failed to object to the State's presentation of financial summary evidence under Mont. R. Evid. 1006, and there was no plain error in its admission because, inter alia, defendant acknowledged that the summarized information constituted voluminous records not subject to convenient examination in court and she did not demonstrate that the detective's testimony exceeded the bounds of permissible lay opinion testimony under Mont. R. Evid. 701.

Snyder further asserts that the District Court abused its discretion in contravention of **M. R. Evid**. 1006 by allowing the State to present the summary testimony and a summary exhibit through lead Missoula police detective (Detective Lear) regarding her review of Brown's financial records and the withdrawal and spending trends manifested therein. Snyder asserts that the admission of the summary testimony and exhibit contravened **M. R. Evid**. 1006 because the State did not present the testimony and summary through a qualified expert who was not a primary investigating officer and who did not provide other lay testimony in support of the State's case.

As a threshold matter, regardless of a general objection on an ancillary matter, Snyder made no similar contemporaneous objection in District Court. We generally "will not address issues raised for the first time on appeal." *State v. Hatfield*, 2018 MT 229, ¶ 52, 392 Mont. 509, 426 P.3d 569 (citing *State v. Taylor*, 2010 MT 94, ¶ 12, 356 Mont. 167, 231 P.3d 79). We will typically exercise plain error review of unpreserved issues only when necessary to avoid "a manifest miscarriage of justice" that would result from failure to review a question that implicates "the fundamental fairness" of lower court proceedings "or may compromise the integrity of the judicial process." *Taylor*, ¶ 12 (citing *State v. Jackson*, 2009 MT 427, ¶ 42, 354 Mont. 63, 221 P.3d 1213).

Here, Snyder tacitly acknowledges that the financial information summarized constituted the "contents of voluminous" records not subject to convenient examination in court as referenced in **M. R. Evid**. 1006. Snyder further acknowledges that the State timely disclosed and made the underlying financial records "available" to the defense prior to trial as required by **M. R. Evid**. 1006. Aside from foundational reference to the detective's training and experience and the cursory assertion that the detective testified as an expert "for all intents and purposes," Snyder has not demonstrated, and the record does not reflect, that the detective's testimony exceeded the bounds of permissible lay opinion testimony under **M. R. Evid**. 701.

Finally, despite reference to various dangers and precautions regarding summary evidence discussed in *United States v. Lemire*, 720 F.2d 1327, 232 U.S. App. D.C. 100 (D.C. Cir. 1983), Snyder has asserted no textual basis in **M. R. Evid**. 1006 or other authority supporting the blanket proposition that the State may never present **Rule 1006** summary evidence through a primary investigating law enforcement officer who may also provide other non-expert fact testimony in support of a prosecution. We hold that Snyder waived her assertion of error regarding the summary testimony and exhibit presented through Detective Lear and has further failed to adequately show that the issue is suitable for plain error review.

State v. Kindt

Supreme Court of Montana

August 18, 2021, Submitted on Briefs; September 14, 2021, Decided

DA 20-0152

Reporter
2021 MT 235N *; 2021 Mont. LEXIS 725 **; 405 Mont. 540; 494 P.3d 900; 2021 WL 4168091

STATE OF MONTANA, Plaintiff and Appellee, v. DAVID JON KINDT, Defendant and Appellant.

Notice: PUBLISHED IN TABLE FORMAT IN THE PACIFIC REPORTER.

PURSUANT TO THE APPLICABLE MONTANA CODE SECTION THIS OPINION IS NOT DESIGNATED FOR PUBLICATION.

PUBLISHED IN TABLE FORMAT IN THE MONTANA REPORTS.

Prior History: [1]** APPEAL FROM: District Court of the Seventh Judicial District, In and For the County of Richland, Cause No. DC 18-04. Honorable Katherine M. Bidegaray, Presiding Judge.

State v. Kindt, 2020 Mont. LEXIS 1796 (Mont., June 17, 2020)

Core Terms

interview, recording, assault, injuries, video recording, harmless, trial error, broken

Case Summary

Overview
HOLDINGS: [1]-The district court's error in admitting the video recording of the interview of defendant's girlfriend was harmless because given the cumulative effect of the girlfriend's in-court testimony, the photographs of the girlfriend's injuries, and the examining physician's testimony, no reasonable possibility existed that the video contributed to defendant's conviction for assaulting his girlfriend.

Outcome
Conviction affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion

Governments > Legislation > Interpretation

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

HN1[] **Standards of Review, Abuse of Discretion**

A trial court's ruling on evidentiary matters is generally reviewed for an abuse of discretion; however, to the extent the trial court's ruling is based on an interpretation of an evidentiary rule or statute, the ruling is reviewed de novo.

Criminal Law & Procedure > ... > Standards of

Review > Harmless & Invited Error > Evidence

Criminal Law & Procedure > Appeals > Reversible Error > Structural Errors

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Fair Trial

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Harmless Error

HN2[] **Harmless & Invited Error, Evidence**

The Montana Supreme Court implements a two-step analysis to assess whether an error prejudiced the criminal defendant's right to a fair trial and is therefore reversible. The first step determines whether the error is structural error or trial error. A structural error affects the framework within which the trial proceeds, while a trial error typically occurs during the presentation of a case to the jury. Trial error may be reviewed for prejudice relative to the other evidence introduced at trial and therefore is subject to harmless error review. The second step in the analysis determines whether the trial error was harmless under the cumulative evidence standard. To prove that an evidentiary error was harmless, the State must direct the Court to admissible evidence that proved the same facts as the tainted evidence and demonstrate that the quality of the tainted evidence was such that no reasonable possibility existed that it might have contributed to the conviction.

Counsel: For Appellant: Chad Wright, Appellate Defender, Haley Connell Jackson, Assistant Appellate Defender, Helena, Montana.

For Appellee: Austin Knudsen, Montana Attorney General, Mardell Ployhar, Assistant Attorney General, Helena, Montana; Janet Christoffersen, Richland County Attorney, Charity McLarty, Deputy County Attorney, Sidney, Montana.

Judges: Justice Laurie McKinnon delivered the Opinion of the Court. We Concur: MIKE McGRATH, JIM RICE, BETH BAKER, INGRID GUSTAFSON.

Opinion by: Laurie McKinnon

Opinion

Justice Laurie McKinnon delivered the Opinion of the Court.

[*P1] Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

[*P2] David Jon Kindt appeals a final judgment and sentencing order from the Seventh Judicial District Court, Richland County, convicting him of **[**2]** aggravated assault and partner or family member assault (PFMA). We affirm.

[*P3] On December 14, 2017, Kindt and his girlfriend, Pamella Johnson (Johnson), had an argument. As Johnson turned to leave, Kindt knocked her down and began kicking and stomping her. Johnson was finally able to leave and drove herself to the hospital. At the hospital, Dr. Dawn McCartney examined Johnson. Dr. McCartney's examination revealed that Johnson had sustained a fractured nasal bone and a broken ankle, and that Johnson had bruising and swelling on her face and abdomen. At the hospital, Johnson was also interviewed by Sidney Police Department Officer Timothy Case about her fight with Kindt. Johnson's interview with Officer Case was recorded on the body camera that Officer Case was wearing.

[*P4] Kindt was charged with the following crimes by Information: Count 1: Aggravated

Assault, a felony, in violation of *§ 45-5-202, MCA*; and Count 2: PFMA, a misdemeanor, in violation of *§ 45-5-206, MCA*. Trial was held on October 16, 2019. At trial, the State sought to introduce the body camera recording of Johnson's interview with Officer Case. Kindt objected, arguing that the body camera recording was hearsay. The State argued that the recording was not **[**3]** hearsay because Johnson was available for cross-examination. The State also argued that the recording was admissible under the following hearsay exceptions: M. R. Evid. 803(1) (present sense impression), M. R. Evid. 803(2) (excited utterance), M. R. Evid. 803(3) (then-existing mental, emotional, or physical condition), and M. R. Evid. 803(5) (recorded recollection). The District Court overruled Kindt's objection and admitted the video recording into evidence.

[*P5] The State also introduced testimony from Stacey Indergard, a registered nurse at Sidney Health Center. Indergard testified regarding the accuracy of several photographs she took of Johnson's injuries on December 14. The State provided testimony from Johnson regarding the events of December 14, and the severity of her injuries. Dr. McCartney testified that her examination of Johnson revealed a nasal fracture, a broken ankle, and some bruising and swelling on her face and abdomen. Dr. McCartney testified that the injuries were consistent with Johnson's report that she was assaulted but acknowledged on cross-examination that the injuries may have been caused by something else. Kindt offered no evidence in rebuttal of Johnson's testimony and acknowledged **[**4]** that he was guilty of PFMA. He denied beating Johnson in the manner she suggested and instead argued that Johnson's continued relationship with Kindt indicated that Johnson lacked credibility.[1]

[*P6] The jury found Kindt guilty of all counts. Kindt received a twenty-year sentence with all but ten years suspended for his aggravated assault conviction and a one-year sentence with all but twenty-four hours suspended for his PFMA conviction. The District Court also ordered restitution and imposed a fine of $500.

[*P7] Kindt appeals the District Court's admission into evidence of the recording of Johnson's interview with Officer Case. Kindt argues that the District Court committed reversible error when it admitted the recording into evidence. The State concedes that the District Court erred, but contends that, in light of the other evidence, such error was harmless.

[*P8] *HN1*[↑] A trial court's ruling on evidentiary matters is generally reviewed for an abuse of discretion; however, to the extent the trial court's ruling is based on an interpretation **[**5]** of an evidentiary rule or statute, the ruling is reviewed de novo. *State v. Stewart, 2012 MT 317, ¶ 23, 367 Mont. 503, 291 P.3d 1187*.

[*P9] Before we turn to Kindt's appeal, we must address two preliminary matters. First, Kindt conceded to the PFMA charge at trial, and he does not appeal that conviction. Second, the State correctly acknowledges that the video recording of Johnson's testimony constituted hearsay. We adopt this concession and focus our analysis on the effect of the District Court's error.

[*P10] *HN2*[↑] We implement a two-step analysis to assess whether an error "prejudiced the criminal defendant's right to a fair trial and is therefore reversible." *State v. Van Kirk, 2001 MT 184, ¶ 37, 306 Mont. 215, 32 P.3d 735*. The first step determines whether the error is structural error or trial error. *Van Kirk, ¶ 37*. A structural error

[1] We note that several obstacles can prevent an individual from leaving an abusive partner and that the "danger of violence, including the risk of death, escalates when a domestic violence survivor attempts to leave a batterer." John M. Burman, *Lawyers and Domestic Violence: Raising the Standard*, *9 Mich. J. Gender & L. 207, 221 (2003)*. *See generally* Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing their Experiences*, *167 U. Pa. L. Rev. 399 (2019)*.

affects the framework within which the trial proceeds, while a trial error typically occurs during the presentation of a case to the jury. *Van Kirk, ¶¶ 38, 40*. Trial error may be reviewed for prejudice relative to the other evidence introduced at trial and therefore is subject to harmless error review. *Van Kirk, ¶ 40*. Here, the admission of the video recording of Johnson's interview was trial error and thus subject to harmless error review.

[*P11] The second step in the analysis determines whether the trial error was harmless under the cumulative **[**6]** evidence standard. *Van Kirk, ¶¶ 43-44*. To prove that an evidentiary error was harmless, the State must direct us to admissible evidence that proved the same facts as the tainted evidence and demonstrate that the quality of the tainted evidence was such that no reasonable possibility existed that it might have contributed to the conviction. *State v. Buckles, 2018 MT 150, ¶ 18, 391 Mont. 511, 420 P.3d 511*.

[*P12] No reasonable possibility exists that the video recording of Johnson's interview contributed to Kindt's conviction. At trial, Johnson testified consistent with her recorded interview. She testified that Kindt knocked her down, kicked her in the face, and continued to kick her and stomp on her until she felt her leg break. She testified that Kindt continued assaulting her even after she begged him to stop because of her broken leg. Dr. McCartney's testimony corroborated Johnson's testimony. Dr. McCartney testified that Johnson's injuries included two broken bones in her lower leg and a broken nasal bone, which were consistent with Johnson's testimony that she had been assaulted. Dr. McCartney further testified that Johnson reported to her that her injuries came from being thrown to the ground and kicked and punched several times. The State also introduced photographs **[**7]** of Johnson's injuries through Indergard. The State's admissible evidence proved the same facts that the video recording contained. Our review of the admissible evidence makes clear that, qualitatively, no reasonable possibility exists that the tainted evidence contributed to Kindt's conviction.

[*P13] The District Court erred in admitting the video recording of Johnson's interview. However, given the cumulative effect of Johnson's in-court testimony, the photographs authenticated through Indergard, and Dr. McCartney's testimony, such error was harmless. Kindt's conviction for aggravated assault is affirmed.

[*P14] We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review.

/s/ Laurie Mckinnon

We Concur:

/s/ MIKE MCGRATH

/s/ JIM RICE

/s/ BETH BAKER

/s/ INGRID GUSTAFSON

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State v. Lake

Supreme Court of Montana

August 11, 2021, Submitted on Briefs; February 8, 2022, Decided; February 8, 2022, Filed

DA 19-0648

Reporter
2022 MT 28 *; 2022 Mont. LEXIS 120 **

STATE OF MONTANA, Plaintiff and Appellee, v. ANDREW PIERCE LAKE, Defendant and Appellant.

Subsequent History: Released for Publication February 10, 2022.

Prior History: [1]** APPEAL FROM: District Court of the First Judicial District, In and For the County of Lewis and Clark, Cause No. BDC 17-135. Honorable Michael F. McMahon, Presiding Judge.

State v. Lake, 2020 Mont. LEXIS 37 (Mont., Jan. 6, 2020)

Core Terms

skull, child sex abuse, references, comments, dream, joke, prejudicial, rape, child molester, motive, offended, stabbing, probative value, sex, district court, shocking, walking, propensity, Bartender, regulars, inter alia, cross-examination, nickname, trunk, kill, yell, general rule, non-propensity, deliberate, repetitive

Case Summary

Overview
HOLDINGS: [1]-Defendant's motion in limine was sufficiently specific to preserve his asserted objections to the subsequent multitude of explicit references at trial; [2]-The court erred under Mont. R. Evid. 403 by allowing the State to reference and elicit testimony regarding defendant's prior child sex abuse comments in an explicit and repetitive manner that was unfairly prejudicial because, even before opening statements, the trial started with a limiting instruction which, though generic in nature, brought the highly offensive and inherently prejudicial matter of the prior uncharged bad acts to the jury's attention; the State then exploited and emphasized that heightened focus at every available opportunity with multiple witnesses.

Outcome
The attempted deliberate homicide conviction was reversed and remanded for a new trial.

LexisNexis® Headnotes

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion

Evidence > Admissibility > Conduct
Evidence > Prior Acts, Crimes & Wrongs

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

Evidence > Rule Application & Interpretation

HN1[] **Standards of Review, Abuse of**

Discretion

District courts have broad discretion to determine the admissibility of evidence in accordance with the Montana Rules of Evidence and related statutory and jurisprudential rules. A trial court's decision on whether to admit evidence of other crimes, wrongs, or acts under Mont. R. Evid 404(b) is directed to the relevance and admissibility of such evidence, and thus reviewed for an abuse of discretion. In this context, an abuse of discretion occurs when a district court acts arbitrarily without conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice. To the extent an evidentiary ruling is based on an interpretation of an evidentiary rule or statute, review is de novo.

Evidence > Admissibility > Character Evidence

Evidence > Relevance > Relevant Evidence

HN2[] **Admissibility, Character Evidence**

All relevant evidence is admissible except as otherwise provided by law. Mont. R. Evid. 402. However, evidence is relevant only if tends to make the existence of a fact of consequence to the determination of the action more or less probable. Mont. R. Evid. 401. In conjunction with the general rule of admissibility under Rules 401-402, Mont. R. Evid. 404 more specifically governs the admission of character evidence. Character evidence is evidence regarding a person's general personality traits or propensities, whether of a praiseworthy or blameworthy nature including, inter alia, evidence of a person's moral standing in a community. The term character is generally synonymous with morality and includes the sum total of all of a person's moral traits, including honesty, fidelity, peacefulness, inter alia.

Evidence > Admissibility > Conduct
Evidence > Prior Acts, Crimes & Wrongs

HN3[] **Conduct Evidence, Prior Acts, Crimes & Wrongs**

As a particular application of the general rule of Mont. R. Evid. 404(a), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. Rule 404(b). The purpose of the general rule of Rule 404(b) is to prevent improper jury inference, based on evidence of other uncharged bad acts or allegations, that an accused is a person of bad character, and thus likely guilty of the charged offense based on common experience or belief that persons of bad character are predisposed or have a tendency or propensity to subsequently act in conformance therewith. The general prohibition of Rule 404(b) comes into play whenever the nature of the evidence might tempt the jury to decide the case against the defendant on an improper propensity basis and thus applies to any conduct, criminal or noncriminal, that effectively impugns or reflects negatively on the defendant's character.

Evidence > Inferences & Presumptions > Inferences

Evidence > Admissibility > Conduct
Evidence > Prior Acts, Crimes & Wrongs

HN4[] **Inferences & Presumptions, Inferences**

Mont. R. Evid. 404(b) authorizes admission of other acts evidence when relevant for other non-propensity purposes. This alternative or exception clause is a contrasting rule of inclusion for admission of other acts evidence that has independent relevance to a material matter at issue other than for proof of propensity conformance. It is a special application of the doctrine of multiple admissibility under which other acts evidence inadmissible for propensity purposes may yet be admissible for a relevant non-propensity purpose. Thus, Rule 404(b) does not categorically bar all

other acts evidence—it bars only a particular theory of admissibility of the subject evidence. Whether other acts evidence is admissible or inadmissible under Rule 404(b) depends on the particular purpose of the evidence rather than its substance. However, mere reference to a permissible purpose is insufficient—other acts evidence is admissible under the alternative clause of Rule 404(b) only if the proponent can clearly articulate how it fits into a chain of logical inferences, no link of which may be an inference that the defendant thus had the propensity or was predisposed to commit the charged offense.

Evidence > Admissibility > Conduct
Evidence > Prior Acts, Crimes & Wrongs

HN5 **Conduct Evidence, Prior Acts, Crimes & Wrongs**

One of the non-propensity other purpose exceptions expressly contemplated by Mont. R. Evid. 404(b) is admission of other acts evidence for the purpose of proving that an accused had a motive for committing a charged offense. A "motive" is a reason or rationale for doing or not doing something.

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

HN6 **Burdens of Proof, Prosecution**

Proof of motive is not necessary for proof of any requisite criminal mental state under current Montana law, *Mont. Code Ann. §§ 45-2-101(35)*, *(43)*, *(65)*, and *45-2-103(1)*, nor for any other essential element of a crime. However, it is the State's burden to prove every essential element, including the requisite mental state, of a charged offense a beyond a reasonable doubt. *Mont. Code Ann. §§ 26-1-402* and *26-1-403*. *Mont. Code Ann. § 45-2-103(1)*. Even though not an essential element of proof, the existence or non-existence of a motive to commit a charged offense is generally a relevant consideration in the assessment of whether an accused had the requisite criminal mental state and was in fact the person who committed the alleged offense. The existence of a motive, and the underlying nature and state of the prior relationship between the accused and an alleged victim, is likewise generally relevant to an accused's state of mind and intent.

Evidence > Relevance > Exclusion of Relevant
Evidence > Confusion, Prejudice & Waste of Time

Evidence > Admissibility > Conduct
Evidence > Prior Acts, Crimes & Wrongs

HN7 **Exclusion of Relevant Evidence, Confusion, Prejudice & Waste of Time**

Evidence that is relevant and admissible is nonetheless subject to exclusion if the danger of unfair prejudice substantially outweighs its relative probative value. Mont. R. Evid. 403. Because all evidence relevant to prove an adverse claim or assertion is somewhat prejudicial to the other party, Rule 403 applies only to evidence that poses a danger of unfair prejudice. Rule 403. Otherwise admissible evidence generally poses a danger of unfair prejudice only if of a type that tends or is likely to arouse or provoke jury disdain and hostility for the other party without regard to its probative value in the context of the other evidence in the case. Rule 403. The need and demand for careful consideration and application of Rule 403 is particularly critical in the case of other bad acts evidence because, even when otherwise validly admissible for a non-propensity purpose, such evidence is inherently prejudicial insofar that it impugns or has the tendency to impugn the character of the accused based on matters not directly at issue, thus arousing or provoking hostility against him or her without regard to its

probative value, thereby inviting or tempting the jury to find guilt on an improper basis. This is more acute when the other bad acts evidence pertains to child molestation.

Evidence > Admissibility > Character Evidence

Evidence > Admissibility > Conduct
Evidence > Prior Acts, Crimes & Wrongs

HN8 **Admissibility, Character Evidence**

Courts must exercise great caution when allowing use of potentially inflammatory propensity or character evidence of a sexual nature even when admitted for some other limited legitimate purpose such as under the transaction rule.

Criminal Law &
Procedure > ... > Reviewability > Preservation for Review > Failure to Object

Criminal Law &
Procedure > ... > Reviewability > Preservation for Review > Requirements

HN9 **Preservation for Review, Failure to Object**

A motion in limine that is sufficient to clearly and particularly identify the subject evidence and asserted basis for exclusion is sufficient to preserve the objection for appeal without need for continued or further contemporaneous objection at trial.

Criminal Law &
Procedure > Trials > Witnesses > Impeachment

Evidence > Admissibility > Character Evidence

Evidence > Admissibility > Procedural Matters > Curative Admissibility

Evidence > Admissibility > Conduct
Evidence > Prior Acts, Crimes & Wrongs

HN10 **Witnesses, Impeachment**

As an exception to the general rule of Mont. R. Evid. 404(a) barring propensity conformance evidence, an accused may present evidence that he or she has a pertinent good character trait inconsistent with the alleged offense. By doing so, however, the accused opens the door to otherwise inadmissible cross-examination and extrinsic evidence regarding specific instances of prior conduct that are relevant to impeach or rebut the subject good character testimony.

Criminal Law &
Procedure > Trials > Witnesses > Impeachment

Evidence > Admissibility > Character Evidence

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

Evidence > ... > Examination > Cross-Examinations > Scope

Evidence > Inferences & Presumptions > Inferences

HN11 **Witnesses, Impeachment**

Depending upon the circumstances at issue, Mont. R. Evid. 404(a)(1) impeachment and rebuttal evidence has two purposes. The first is to rebut and counter the good character propensity inference placed before the jury by the defendant with a basis for a contrary inference. In the case of a third-party good character witness, the second is to impeach the credibility of the good character testimony by challenging the sufficiency of the witness's basis of knowledge of the defendant. However, the scope of permissible Rule 404(a)(1) cross-examination or rebuttal evidence is not unlimited—it must be

relevant for the Rule 404(a)(1) purpose offered and not unfairly prejudicial.

Evidence > Relevance > Exclusion of Relevant
Evidence > Confusion, Prejudice & Waste of Time

Evidence > Admissibility > Conduct
Evidence > Prior Acts, Crimes & Wrongs

HN12[] **Exclusion of Relevant Evidence, Confusion, Prejudice & Waste of Time**

In assessing the relative probative value of particular evidence against the danger of unfair prejudice under Mont. R. Evid. 403, courts should consider not only the item in question but also any actually available substitutes as well. If an alternative is available with substantially the same or greater probative value but a lower danger of unfair prejudice, sound judicial discretion would discount the value of the item first offered and exclude it if its discounted probative value were substantially outweighed by unfairly prejudicial risk. While it must of course consider the proponent's need for evidentiary richness, narrative integrity, and prerogative in choosing what evidence to present in support of that party's burden of proof, the court should nonetheless reasonably apply some discount to the probative value of an item of evidence when less prejudicial but equally probative evidence is available. Consequently, what counts as the Rule 403 probative value of an item of evidence, as distinct from its Mont. R. Evid. 401 relevance, includes consideration, inter alia, of comparative evidentiary alternatives, particularly in the context of Mont. R. Evid. 404(b) other acts evidence that has both a legitimate purpose and an inherently illegitimate tendency or effect.

Criminal Law & Procedure > Trials > Jury Instructions > Limiting Instructions

Evidence > Relevance > Exclusion of Relevant
Evidence > Confusion, Prejudice & Waste of Time

Evidence > Admissibility > Conduct
Evidence > Prior Acts, Crimes & Wrongs

HN13[] **Jury Instructions, Limiting Instructions**

Adequate limiting instructions under Mont. R. Evid. 105 are often sufficient to eliminate, or at least reduce, the risk of unfair prejudice where prior bad acts evidence is both highly relevant and inherently prejudicial. Not so, however, when the relative probative value of the evidence is minimal or non-existent, and the relative danger of unfair prejudice is high.

Evidence > Relevance > Exclusion of Relevant
Evidence > Confusion, Prejudice & Waste of Time

Evidence > Admissibility > Conduct
Evidence > Prior Acts, Crimes & Wrongs

HN14[] **Exclusion of Relevant Evidence, Confusion, Prejudice & Waste of Time**

While district courts have broad discretion under Mont. Rs. Evid. 401-403 and 404(b) to determine and weigh the probative value of other acts evidence against the relative risk of unfair prejudice, confusion of the issues, or jury distraction, to prevent permissible uses from swallowing the general rule, trial courts must ensure that the use of prior bad acts evidence under Rule 404(b) is clearly justified and carefully limited.

Evidence > ... > Exemptions > Confessions > Corpus Delicti Doctrine

Evidence > ... > Exceptions > Spontaneous

Statements > Res Gestae

HN15[] **Confessions, Corpus Delicti Doctrine**

Pursuant to the transaction rule, evidence of a declaration, act, or omission that was inextricably linked or intertwined with the alleged criminal conduct of the accused may be admissible as proof of a pertinent element of a charged offense if explanatory of a fact in dispute and thus relevant to provide a comprehensive and complete picture of the alleged criminal conduct of the accused. While courts have discarded the common law concepts of res gestae and corpus delicti which, like magic incantations, had been invoked to admit evidence of questionable value without subjecting it to critical analysis, courts recognize the validity of the statutory transaction rule where applicable by its terms, and relevant in the context of a particular case.

Evidence > Admissibility > Conduct
Evidence > Prior Acts, Crimes & Wrongs

HN16[] **Conduct Evidence, Prior Acts, Crimes & Wrongs**

The transaction rule long predates modern Mont. R. Evid. 404(b) and, by its express terms, does not necessarily apply only to other acts of an accused. *Mont. Code Ann. § 26-1-103*. However, to the extent that it does and the evidence would otherwise be excluded as propensity evidence, the transaction rule may be an other purpose exception to the general exclusionary rule of Rule 404(b) to the extent the subject evidence is relevant in a particular case.

Evidence > Admissibility > Conduct
Evidence > Prior Acts, Crimes & Wrongs

HN17[] **Conduct Evidence, Prior Acts, Crimes & Wrongs**

Like any other purpose exception to Mont. R. Evid. 404(b) or, for that matter, any otherwise admissible evidence, evidence otherwise admissible under the transaction rule is nonetheless subject to exclusion under Mont. R. Evid. 403.

Counsel: For Appellant: Nick K. Brooke, Smith & Stephens, P.C., Missoula, Montana.

For Appellee: Austin Knudsen, Montana Attorney General, C. Mark Fowler, Assistant Attorney General, Helena, Montana; Leo Gallagher, Lewis and Clark County Attorney, Helena, Montana.

Judges: DIRK M. SANDEFUR. We concur: LAURIE McKINNON, BETH BAKER, INGRID GUSTAFSON, JIM RICE. Justice Dirk Sandefur delivered the Opinion of the Court.

Opinion by: DIRK M. SANDEFUR

Opinion

[*P1] Justice Dirk Sandefur delivered the Opinion of the Court. Andrew Pierce Lake (Lake) appeals his September 2019 judgment of conviction in the Montana First Judicial District Court, Lewis and Clark County, on the offense of attempted deliberate homicide. We address the following restated issue:

> *Whether the District Court erroneously allowed the State to reference and elicit testimony regarding Lake's prior child sex abuse comments and references in an explicit and repetitive manner that was unfairly prejudicial*?

Reversed and remanded.

FACTUAL AND PROCEDURAL BACKGROUND

[*P2] Late in the evening and into the early morning **[**2]** hours of March 15-16, 2017, Lake and Ryan Zitnik (Zitnik) were among a number of

regulars at The Jesters Bar (Jesters) in Helena, Montana. They had previously known each other from the bar for several years.

1. Stabbing Attack on Zitnik and Subsequent Arrest of Lake.

[*P3] At approximately 1:30 a.m., the two men became involved in a brief altercation near one end of the bar. Accounts differ as to who instigated it and the extent of their physical contact. Lake testified at trial that, while walking down the bar in anticipation of "last call," he passed behind Zitnik who was standing at the bar and who "stuck his butt out and bumped [him] really hard." He testified that he said "[e]xcuse me" to Zitnik and was walking away when he heard Zitnik "yell[] something at [him]." Lake said that, upon hearing someone else say, "he ain't worth it," he agreed and told Zitnik, "[y]ou hear that Ryan[,] [y]ou are not worth it," and then "walked out [of] the bar." Zitnik testified at trial that he could not remember the details of the "light confrontation in the bar" or how it started.

[*P4] Kevin Cravens (Cravens), another bar regular and an acquaintance of both men, testified that he saw Lake walk "through from **[**3]** the back side of the bar and start[] exchanging some words," i.e., "start[] the shit-talk," with Zitnik. He said he heard Zitnik respond that he "wasn't even to the bottom of his drink yet and that [Lake] wasn't worth his time." Cravens said that Lake replied that Zitnik was, however, "at the bottom of life," and that Lake then shoved Zitnik in the chest with the palm of his hand before leaving the bar, rambling about and pointing at Zitnik.

[*P5] Jesters bartender John Shook (Bartender) testified that he saw Lake do "something to [Zitnik] to get his attention as he walked by," which then set off a brief round of the "standard kind of shit-talking" that often occurred between the two of them. Lake's account at trial varied somewhat, but he testified that the Bartender's account was "[f]airly accurate." The Bartender testified that he "did not think anything would come of" the exchange in the bar. Cravens similarly testified that it was not the "sort of a scene" that appeared likely to result "in a fistfight." The Bartender testified that Zitnik left "a couple minutes" after Lake, and then Cravens left "a minute or so" later.

[*P6] Lake testified that, while walking across the street outside the **[**4]** bar, he heard the door open behind him and Zitnik angrily "yelling[,] . . . Andy come here." Lake asserted that he "kept on walking" down the street, but that Zitnik "kept . . . getting closer to [him]" and that, as he continued down the street, he told Zitnik, "leave me alone." He testified that Zitnik was undeterred, however, and kept saying, "[c]ome here," as he continued to get closer. Lake asserted that he kept walking away, but said, "I am warning you . . . [l]eave me alone." He said that Zitnik soon caught up with him, and that only then did he stop and turn to face him. He claimed that Zitnik was facing him in a threatening posture and that he feared Zitnik might attack him with a knife. He claimed that Zitnik then violently grabbed him by the shoulder in a manner that pulled his hooded sweatshirt and underlayers over his head, blinding him. Lake asserted that, while Zitnik "ha[d] ahold of him," he unsheathed his knife from his belt with his free arm and, in self-defense, began swinging blindly, "[r]oundhouse style," at Zitnik until he felt the "knife connect." He recalled swinging at Zitnik "until the last swing when my knife stopped" and Zitnik released him and pushed him **[**5]** to the ground. He asserted that he then "pull[ed] the rest of [his] hoodie" and "other shirts" off and, fearful of the still-standing Zitnik, "got up and . . . ran away," "down the hill," and "walked back home."

[*P7] Zitnik recalled that, after "let[ting] [Lake] leave first," he was walking across the street from the bar towards his car when he noticed Lake down the street, a "safe distance" ahead. He testified that he did not remember how they converged, but at some point sensed that he was hurt when he felt the sensation of a "thumbtack going down [his] neck" and realized that Lake was stabbing him. He said

that he then grabbed Lake, threw him to the ground, turned away, saw Cravens up the street, and ran towards him.

[*P8] Cravens testified that he was walking to his vehicle after leaving the bar when he heard grunting sounds down the street indicative of a scuffle. He said he continued in that direction until he saw Zitnik and Lake emerge from the darkness under a streetlight, with Lake "throwing hooks" at Zitnik, "the last one hit[ting] [him] in the neck." He said that, upon realizing that Zitnik was hurt, he called 911 and then helped Zitnik back to the bar where another regular applied **[**6]** towels to control his bleeding while they waited for an ambulance. An ambulance soon arrived and took Zitnik to the hospital emergency room. Due to the large arterial wound in his neck, attending medical personnel had Zitnik transported to a Great Falls hospital for surgical treatment of his multiple stab wounds.

[*P9] Police arrested Lake shortly after the stabbing and interrogated him in custody. On April 3, 2017, the State charged Lake with attempted deliberate homicide based on the stabbing of Zitnik, and evidence tampering based on his alleged concealment or disposal of the knife after the stabbing.[1]

2. Motion to Exclude Prior Child Sex Abuse Comments and References.

[*P10] Prior to trial, Lake gave notice of intent to assert the affirmative defense of justifiable use of force (JUOF). On the asserted grounds of relevance and prejudice, he also filed a motion for exclusion of any reference at trial to "an alleged rumor" that he was a "pervert" or "child molester." At the subsequent motions hearing, the parties and the court construed the motion to apply to any and all explicit references to Lake's self-given nickname, various other comments, and a particular dream, all of which referred to forms **[**7]** of child sexual abuse.

[*P11] The evidentiary dispute arose from Lake's initial post-arrest statements to police. He initially told detectives that, except for running away with his shirt off without knowing why, he had no memory of the altercation outside the bar. However, when police later followed up on his earlier written statement, Lake told them that an unidentified man, who had previously antagonized and slandered him to other bar regulars "about some" unspecified "things [he] said," followed him outside the bar the night of the stabbing.[2] He explained to police that he often made provocative statements to shock and repel others. For example, he said he was known by the nickname, "skull fucker," had once sang a song in the bar about "skull fucking" and "scallywags," and had told an offensive joke that referred to a "black and blue" "five-year-old boy" in the trunk of his car who "hates sex." After speaking with Lake, police questioned Zitnik in the hospital. He acknowledged that he was concerned about Lake's prior child sexual abuse comments, thereafter did not want to be around him, and had discussed his concerns about Lake with other bar regulars.

[*P12] At the subsequent motions hearing, **[**8]** defense counsel acknowledged that the generic facts that Zitnik was offended by Lake's prior child sex abuse comments and references, and had discussed his resulting concerns about Lake with others, were relevant as proof of Lake's alleged motive for attempting to kill Zitnik. Counsel asserted, however, that explicit reference to Lake's "skull fucker" nickname and comments, reference to him as a child molester, and other references to "child molestation" were unfairly prejudicial due to "the risk of . . . convict[ing] [him] for the wrong

[1] The State also charged Lake with misdemeanor possession of marijuana and drug paraphernalia after subsequently finding a small quantity of marijuana and a glass pipe incident to a warrant-authorized search of his apartment. He pled guilty to those charges before trial.

[2] Lake did not identify the referenced "man" in his statements to police, but later admitted at trial that he knew that the "man" was Zitnik, who he had known for years from the bar.

reasons." Counsel asserted that the State could more generically present evidence of the existence and nature of Lake's animosity toward Zitnik without such explicit child sex abuse references.[3]

[*P13] The State countered that verbatim references to Lake's sexually explicit nickname and corresponding child sex abuse comments were relevant to show the serious nature and degree of his animosity toward Zitnik, and thus his motive to attempt to kill him, to wit:

> [*T*]*here is something unique about somebody who himself says that he is a child molester*. . . . [H]e said that he was a skull fucker. He said that he had this bad joke about a dead five-year-old in his trunk **[**9]** who didn't like sex. *These statements* and ones like [them] were made to [Zitnik] and . . . other people in the bar . . . [and] *caused heightened concern by everybody* in the bar about whether [Lake] was violent, whether [he] was somebody who [they] should keep children away from . . . [a]nd just saying [it more generically will] not adequately explain why [Lake] would want to kill a man who had warned others *about his sexual abuse*. So I don't know how we . . . amp it down. . . . [It is] the only reason that anybody can understand why these men were engaged in a knife attack on the street. . . . [Lake] said it[,] . . . [Zitnik] heard it[,] [a]nd the *man who helped* . . . bring [Zitnik] back to the bar after the knife attack . . . will testify . . . that *he* was [thus] *concerned . . . that he was also in jeopardy* as he helped rescue [Zitnik] because there is nothing like somebody coming in and talking about dead children and molesting them.
>
> [I]t is prejudicial[,] . . . but it's not unfair because it goes to the heart of what this dispute was about. . . . The State does not intend to prove that he did, in fact, molest children. He just told people that he had this dream, that he was called **[**10]** "skull fucker[,]" . . . and that he had this notion of skull fucking a child's skull . . . [and] the victim warned other patrons in the bar, "[k]eep your children away from him." . . . [T]hat "slander" is . . . why this man may have followed him out of the bar and this altercation took place.

(Emphasis added.) Based on the State's asserted motive theory, the District Court denied Lake's motion in limine without qualification, except for ruling that references to his child sex abuse comments would be subject to a limiting instruction informing the jury of their limited purpose as proof of his alleged motive for attacking Zitnik.[4]

3. Trial References to Prior Child Sex Abuse Comments and References.

[*P14] Jury trial commenced on April 9, 2018. Before opening statements, the District Court instructed the jury, *inter alia*, that:

> You will hear evidence that the defendant made shocking statements about child sex abuse. The only purpose of admitting that evidence is to show proof of motive. That evidence will not be admitted to prove the defendant actually sexually abused a child or to establish his character or to show he acted in conformity therewith. You may not use that evidence for any other purpose **[**11]** other than to determine motive. The defendant is not being tried for making these shocking statements. You will not hear any evidence that the defendant actually sexually abused a child.

In its opening statement, the State previewed the disputed evidence to the jury:

> So at this point, you are probably wondering . .

[3] Lake's counsel suggested at hearing that the State and its witnesses could less prejudicially refer to his child sex abuse comments and references as "slurs."

[4] The State did not explain how Lake's alleged affinity for child sex abuse could reasonably cause Zitnik or other bar regulars to be concerned that he "was [potentially] violent" towards them. Ditto as to the "concern" of "everybody in the bar" as to whether Lake was "somebody who [they] should keep children away from," and the concern of the "man who helped" Zitnik that he, apart from Zitnik, "was also in jeopardy."

> . [w]hy did [Lake] attack [Zitnik]? . . . [Y]ou will hear . . . that . . . [Lake] made a remark to [Zitnik], making a joke or some sort of comment about child sex abuse. . . . [T]he judge read you the instruction . . . that this trial is not about whether . . . [Lake] actually sexually abused a child. There is no evidence to show that; that's not what this is about. But what you will hear is that he, for whatever reason, made provocative and shocking comments to people about child sex abuse and so when he made such a comment to . . . [Zitnik], who has children, [he] was offended[,] . . . did not like that and [was] concerned [about] him[,] . . . so he . . . tr[ied] to let people who had kids that hung out there or maybe worked there [know] that they should be careful of having their kids around [Lake].
>
> You will also hear that this was a pretty common thing for [Lake] to do. **[**12]** He also made a similar comment to . . . Cravens . . . [and also] told [Cravens] and another . . . about having a dream about raping a 14-year-old girl . . . [and that Cravens then] no longer wanted to be friends with him. . . . So again, this trial isn't about child sex abuse but you are going to hear evidence that the defendant liked to shock people by talking about it.

In its case-in-chief, and on cross-examination of defense witnesses, the State thereafter repeatedly referenced and elicited testimony from multiple witnesses that: (1) Lake referred to himself as "skull fucker"; (2) the name and term referred to "fucking" the skull of a child; (3) Lake's "skull fucker" nickname and references were well known to regulars at the bar; (4) Lake previously made a comment directly to Zitnik about "fucking" a child's skull which offended Zitnik and in regard to which he discussed his resulting concerns about Lake with others in the bar; (5) Lake sang a song in the bar about "skull fucking"; (6) Lake repeatedly yelled out "skull fucker" in the bar; (7) Lake told a joke at the bar about a child in the trunk of his car who didn't like sex; (8) Lake previously disclosed to Cravens and another **[**13]** that he had a dream about raping a 14-year-old girl which then offended Cravens and caused him to dislike Lake; and (9) Cravens discussed Lake's child rape dream with other regulars, including Zitnik, which then furthered poisoned Zitnik against Lake.

A. Cravens Testimony.

[*P15] Cravens was the only known eyewitness to what occurred outside the bar. During its case-in-chief, the State questioned him, *inter alia*, about his prior relationship with Lake in the months leading up to the stabbing.[5] He testified that, a few months before, Lake "came outside around the back [of the bar] and made a comment about having a dream about raping a 14-year-old girl." Cravens, whose "daughter was 14 at the time," found the story "hurt[ful]" and "offensive" and no longer "want[ed] to be [Lake's] friend."[6] The State asked whether Lake "demonstrate[d] anything to illustrate his dream." Cravens answered that he "made a motion as he was saying it." The State asked, "[a]s if he was engaged in intercourse?" Cravens replied, "[s]omething like that," and that he found it offensive and had thus discussed it with other bar regulars including Zitnik who also found it offensive. The following colloquy then occurred on defense **[**14]** cross-examination:

> [Defense]: [Y]ou never heard [Zitnik] say mean things to [Lake]?
>
> . . .
>
> [Cravens]: Directly to him, no.
>
> . . .
>
> [Defense]: "You are a pervert. You are a child

[5] Upon receipt of a State witness subpoena, Cravens initially refused to testify, purportedly due to safety concerns. On the State's motion on the first day of trial, the District Court issued a warrant for Cravens' arrest based on "civil contempt." Upon his arrest, the State deposed Cravens in open court after voir dire, outside the presence of the jury. The next morning, the State called Cravens to testify at trial, which he did without objection or incident.

[6] Cravens further stated that, while he and others were "concerned about" Lake, "the consensus" in the bar "was that [Lake] was harmless."

> molester." [D]id you hear [Zitnik say] any of those [to Lake]?
> [Cravens]: I had heard things like that but I never heard . . . that happen.
> [Defense]: Okay[,] . . . you had heard things[,] correct? There was quite a rumor going around the bar . . . [a]s to [Lake] . . . being a child molester or pervert?
> [Cravens]: Yes, for years.
> . . .
> [Defense]: Did you say things to [Lake] . . . like[,] "You are a child molester. You are a pervert." [T]hose kind of things?
> [Cravens]: There was an inciden[t] one night at the bar that [Lake] kept rubbing against me . . . [after] I had already told [him] to stay away from me and . . . [when] the same thing . . . [happened again] I pushed him off of me and I did say, "Get off of me you cho mo."[7]

After defense counsel asked whether Cravens had ever previously stated that Lake's description of the child rape dream included a sexual "motion," the State, on redirect, made and elicited additional explicit references to Lake's child sex abuse statements, to wit:

> [State]: And so you [previously stated **[**15]** to police], ". . . [Lake] admitted . . . he's known . . . [by the nickname] skull fucker . . . [and] has [also] made a comment about . . . skull fucking a young kid . . . [and said that] 'I had this dream last night [that] I was raping this fucking 14-year-old girl['] . . . and he is going like this[.]" . . . So when you said, "[Lake] is going like this," were you making the gyrating motion for the cop?
> [Cravens]: Yeah.
> . . .
> [State]: And now yesterday when you gave your [deposition] statement . . . you [said], ". . . [Lake] walked up and . . . said that . . . 'I had a dream last night that I was raping this . . . 14-year-old redhead.'["] . . . Then the question was, "You are demonstrating how he - ," and your answer was, "Made a humping motion."
> [Cravens]: Yes.

B. Bartender Testimony.

[*P16] On direct, the State questioned the Bartender, *inter alia*, about what happened before Lake and Zitnik left the bar and as to his knowledge of their prior relationship. He testified that he did not really know why, but that Lake and Zitnik did not like each other and that he had previously heard them speak "crassly" to each other and engage in "shit-talk." He initially testified that he had previously heard **[**16]** Cravens *and* Zitnik refer to Lake as a child molester, but later clarified on redirect that it was actually Cravens who had referred to him as a child molester, not Zitnik. The State asked the Bartender whether Cravens and Lake had been "friendly or unfriendly" before he heard Cravens refer to Lake as a child molester. He responded that they had been "pretty friendly up until the story." The State asked him to specify what "the story" was about. He replied that he recalled Cravens saying that it was "something about [Lake] having a dream about having sex with a 14-year-old." The State then asked again whether it was Cravens who "told [him] about the dream" and his "child molester concern." The Bartender affirmed his earlier testimony, said that he never heard Zitnik talk about it, and assumed he heard it from Cravens.

C. Detective Lawrence Testimony.

[*P17] The State presented the testimony of police detective Chad Lawrence regarding his follow-up post-arrest questioning of Lake regarding his earlier written statement to police. Detective Lawrence testified that he was trying to get Lake to clarify his written statement "about being slandered by" Zitnik, to wit:

> [State]: And so did you . . . **[**17]** [ask] him what he meant by the term "slandered"[?]
> [Detective]: Yeah. . . . [H]e said that [he and

[7] The record indicates that "cho mo" was a shorthand/slang for "child molester."

> Zitnik] . . . [knew] each other [as] semi-friends at one point and that he believed that Mr. Zitnik had told other people things that he had told him.
>
> [State]: And so did you get into specifics about the slander part?
>
> [Detective]: Yeah. . . . [H]e brought up that he likes to say things to shock other people . . . [and] he gave us an example of, "What's black and blue and hates sex?" [We] did not respond and he said, "[t]he five-year-old boy in my trunk." . . . He said he would say things like that that would cause shock in others . . . [a]nd . . . he said he was nicknamed "skull fucker."
>
> [State]: And did he tell you how that caused the other man . . . to react toward him?
>
> [Detective]: [Lake] said that *he was telling other people . . . about his sexual desires* or something to that effect *with children* and this man told the other people . . . about that stuff and there was some animosity between them. [(Emphasis added.)]

D. Zitnik Testimony.

[*P18] The State elicited testimony from Zitnik, *inter alia*, regarding his prior relationship with Lake. Zitnik testified that it was "pretty hard to narrow down" **[**18]** what led to their falling out approximately a year before the stabbing, but conceded there were "definitely some issues" and that he "didn't want to listen to [Lake] talk about some things." The State then pressed Zitnik for more:

> [State]: [I]f I could get a little bit more specific, . . . what things did you not want to hear him talk about?
>
> [Zitnik]: . . . I don't remember exactly word-for-word[.] . . . [He] called himself a skull fucker [and] . . . he was talking about skull fucking . . . children because their skulls are softer and more like rubber[.] . . . I told him that I'm not going to put up with it and stay away from me after that.

When asked on cross-examination how long he had been telling Lake, "I don't like you[,] [s]tay away from me," Zitnik responded, "Since he told me he likes to fuck children in the skull." In response to a follow-up question as to why he could not remember when Lake made such statement, Zitnik replied, "because it's . . . a flake of dust in the wind[,] [i]t means nothing to me." Contrary to Cravens' testimony, and the State's assertions at the pretrial motions hearing and in its opening statement, Zitnik did not testify that he had children or that Lake's **[**19]** child sex abuse comments and references offended him because he did.

E. Lake Testimony.

[*P19] After the State rested its case-in-chief, Lake testified as to his account of the stabbing and preceding events. He admitted stabbing Zitnik, but asserted that he was trying "to defend [him]self" rather than "try[ing] to kill him." Lake testified that Zitnik began "getting hostile" toward him in the last three months prior to the stabbing, called him "sick" and "disgusting," and threatened to "slice [his] throat." Lake stated that he stopped going into Jesters whenever he thought Zitnik was there.[8]

[*P20] On cross-examination by the State, Lake acknowledged that he told police that Zitnik had "blatantly slandered" him after becoming "upset about some of the things [he] said." The State then pressed for more detail:

> [State]: Did you tell somebody that your nickname in the military was "skull fucker"?
>
> [Lake]: No.
>
> [State]: [D]id you make comments that were shocking to people about children?
>
> [Lake]: Yes.
>
> [State]: So could you explain why you would tell people in a bar over the course of months or years shocking things about molesting children?

[8] Lake testified that he could tell if Zitnik was at the bar because he knew where Zitnik's "regular [parking] spot" was.

[Lake]: Sometimes it would make people laugh. Other times it would get **[**20]** people away from me.
[State]: . . . [D]id you tell [Cravens] shocking things about your attitude about children . . . about the dream that you had?
[Lake]: Yes, I [did].
[State]: And do you recall saying the age of the child involved in that dream?
[Lake]: Yes, I do.
. . .
[State]: Was there some precipitating event that caused [Cravens] to tell you to stay away from him . . . [and] [s]o why did he start referring to you in the presence of others as a child molester?
[Lake]: Because he didn't like me.
[State]: And you gave him no reason to believe that [the] apparition of being a child molester was something that would allow him to refer to you in that way?
[Lake]: I don't know. . . . I had made a joke like that around him before . . . and he didn't have a problem with it.
. . .
[State]: [S]o you are [saying] you did not tell [Cravens] about a dream that you had involving a 14-year-old being molested?
[Lake]: That was a nightmare first off.
[State]: Did you tell [Cravens] about it?
[Lake]: Yes, I did.
. . .
[State]: Did you ever say shocking things to people other than Mr. Cravens or Mr. Zitnik . . . [and] [w]hat did you tell them?

[Lake]: I would yell thinks like "skull fucking" . . . things . . . **[**21]** of that nature. Sometimes I would make a joke.
[State]: About the boy that was dead in the trunk of your car?
[Lake]: I didn't say [the] "boy was dead." I was merely repeating a joke my co-worker told me.
[State]: . . . What was the joke?
[Lake]: I'd rather not say.
[State]: Well, I'm asking you what was the joke?
[Lake]: My co-worker . . . asked me what was black and blue and hated sex. I said, "What?" He said, "The boy in the back of my truck."
[State]: And was that an offensive joke to some in the bar?
[Lake]: Yes.
[State]: Was it . . . offens[ive] . . . to Mr. Zitnik?
[Lake]: I believe so.
. . .
[State]: [W]hy would you . . . yell[] out "skull fucker," why — did you tell the cops something about a scallywag song? Remember that? . . . What's the scallywag song about?
[Lake]: [I]t was about skull fucking.
[State]: Skulling?
[Lake]: Skull fucking.
. . .
[State]: You talked [in the bar] about the nightmare you had involving a 14-year-old being hurt sexually?
[Lake]: Yes.
[State]: You sang a song about skull fucking that was heard by others . . . in the bar . . . [a]nd you used the term "skull fucker" more than once in that bar, didn't you?
[Lake]: Yes.
. . .

[State]: Why do you keep saying those things **[**22]** about children?
[Lake]: . . . Sometimes I make jokes and they are funny but sometimes I just want people, certain people, to get away from me.

F. Chadwick Testimony.

[*P21] Lake called Jesse Chadwick (Chadwick) to testify on his behalf. Chadwick was a childhood friend and Army buddy who served with Lake in Afghanistan. He testified that prior to the stabbing incident, Lake voiced concerns that "he would be jumped" due to bar regulars "persecuting him" for "open[ing] up about a dream that he had." He

testified that it was his "impression" that Lake was "looking for . . . a way to walk away . . . without having to fight" and that he sought Chadwick's advice on how to "peacefully" resolve the "conflict" with Zitnik. Defense counsel then asked Chadwick, "What's your opinion of . . . [Lake's] veracity for truth [and] . . . honesty[?]" to which he replied, "100 percent . . . [u]nequivocally." On cross-examination, non-sequitur to his prior testimony regarding Lake's character for truthfulness, the State extensively questioned Chadwick about his knowledge of Lake's comments to others about child sexual abuse, and whether *he thought* their adverse reactions were reasonable:

> [State]: So [Lake] told you **[**23]** that he was having problems with some people at Jesters, right? . . . And he had opened up about a dream that he had, correct?
> [Chadwick]: Correct.
> [State]: Did he tell you that when he related this dream to a couple of people at Jesters that he made the motion like that he was having sex with someone, with this 14-year-old that he had the dream about? Were you aware of that?
> [Chadwick]: No, he didn't.
> [State]: Were you aware that he would yell the term . . . "skull fucker" in the bar and just randomly yell that out?
> [Chadwick]: . . . We had talked about it at one point, yes, but that's the only exposure I have ever had to that.
> [State]: Did he tell you that he had a joke that he would tell about a five-year-old in the trunk of a car?
> [Chadwick]: I did not hear that, no.
> [State]: And so does it make sense to you that people might have concerns if somebody is sharing this information that's making light of and maybe even boasting about sexual abuse of children?
> [Chadwick]: I am kind of the king of off-color jokes myself and I mean I see the line a little clearer than he does is the . . . way that I see it.
> [State]: Okay. Let me tell you what the joke was, all right?
> [Chadwick]: Okay.
>
> [State]: And **[**24]** I guess the jury can decide whether they think it's off-color or something beyond that. The joke was — and he told this to the police after he was detained - "What's black and blue and doesn't like sex?" [A]nd the answer is, "The five-year-old in my trunk." That seems to be a little bit beyond off-color; wouldn't you agree with that?
> [Chadwick]: I have heard that [joke] from other people before.
> [State]: . . . So Mr. Lake's testimony yesterday was that some people thought it was funny and some people didn't. So do you know a lot of people who think that joke is funny?
> [Chadwick]: I know a lot of people who would laugh at that joke, yes, I do.
> . . .
> [State]: [D]o you think it's reasonable that people at Jesters were not just concerned about [Lake's child rape] dream . . . and the way he related it but also his comments about being a skull fucker and the jokes and that sort of thing?
> [Chadwick]: Probably was not being his best advocate, no.
> [State]: . . . Do you think it would be reasonable for a person that had a 14-year-old daughter to be offended about a person telling them about a dream that they had had—
> [Defense]: Objection. Speculation and not relevant. . . .
> [Court]: Overruled.
>
> [State]: **[**25]** Do you think it would be reasonable or unreasonable for somebody who had a 14-year-old daughter to be offended by that?
> [Chadwick]: I think it would be reasonable.

4. Final Limiting Instruction and Verdict.

[*P22] Based on its stated concern that "[t]here ha[d] been a lot of talk over [Lake's] perverse

statements, a lot of testimony about it," the District Court included in its final jury instruction set, *inter alia*, the preliminary jury instruction given earlier regarding the limited scope of admissibility of the multitude of trial references to Lake's child sex abuse comments and references. Upon deliberation, the jury returned a verdict finding Lake guilty of attempted deliberate homicide, but not guilty of tampering with evidence. The District Court later sentenced Lake to serve an 80-year prison term with no time suspended, *inter alia*. Lake timely appeals.

STANDARD OF REVIEW

[*P23] *HN1*[↑] "District courts have broad discretion to determine the admissibility of evidence in accordance with the Montana Rules of Evidence and related statutory and jurisprudential rules." *State v. McGhee, 2021 MT 193, ¶ 10, 405 Mont. 121, 492 P.3d 518*; *State v. Cesnik, 2005 MT 257, ¶ 12, 329 Mont. 63, 122 P.3d 456*; *State v. Aakre, 2002 MT 101, ¶ 8, 309 Mont. 403, 46 P.3d 648*. A trial court's decision on "whether to admit evidence of other crimes, wrongs[,] or acts under M. R. Evid 404(b)" is "directed to the relevance and **[**26]** admissibility of such evidence," and thus reviewed for an abuse of discretion. *State v. Ayers, 2003 MT 114, ¶ 25, 315 Mont. 395, 68 P.3d 768* (citing *Aakre, ¶ 8*); *State v. Crider, 2014 MT 139, ¶ 14, 375 Mont. 187, 328 P.3d 612*. In this context, an abuse of discretion occurs "when a district court acts arbitrarily without conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice." *State v. Madplume, 2017 MT 40, ¶ 19, 386 Mont. 368, 390 P.3d 142*. To the extent an evidentiary ruling "is based on an interpretation of an evidentiary rule or statute, our review is de novo." *State v. Lacey, 2010 MT 6, ¶ 12, 355 Mont. 31, 224 P.3d 1247* (citing *State v. Derbyshire, 2009 MT 27, ¶ 19, 349 Mont. 114, 201 P.3d 811*).

DISCUSSION

[*P24] *Whether the District Court erroneously allowed the State to reference and elicit testimony regarding Lake's prior child sex abuse comments and references in an explicit and repetitive manner that was unfairly prejudicial*?

[*P25] *HN2*[↑] "All relevant evidence is admissible" except as otherwise provided by law. M. R. Evid. 402. However, evidence is "relevant" only if "tend[s] to make the existence of [a] fact . . . of consequence to the determination of the action more . . . or less probable." M. R. Evid. 401. In conjunction with the general rule of admissibility under Rules 401-02, M. R. Evid. 404 more specifically governs the admission of character evidence. Character evidence is "evidence regarding a person's general personality traits or propensities, whether of a praiseworthy or blameworthy nature" including, *inter alia*, "evidence **[**27]** of a person's moral standing in a community." *State v. Pelletier, 2020 MT 249, ¶ 15, 401 Mont. 454, 473 P.3d 991* (quoting EVIDENCE, *Black's Law Dictionary* (11th ed. Westlaw 2019)—internal punctuation omitted). The term "character" is "generally synonymous with morality" and "includes the sum total of all of a person's moral traits, including honesty, fidelity, peacefulness," *inter alia*. *Pelletier, ¶ 15* (quoting *State v. Moorman, 133 Mont. 148, 155, 321 P.2d 236, 240 (1958)*—internal punctuation omitted).[9]

1. **Rule 404(b) Prohibition and Admission of Other Acts Evidence**.

[9] *Accord* 1A John H. Wigmore, *Evidence* §§ 52 and 55, at 1148 and 1159 (Tillers rev. 1983) (defining character as "the actual moral or psychical disposition or sum of traits," i.e., a "fixed trait or the sum of traits"); Christopher B. Mueller & Laird C. Kirkpatrick, *Evidence* § 4.11, at 182 (4th ed. 2009) ("character is not a unitary concept: . . . [e]veryone has multiple traits of character"); 1 J. Strong, *McCormick on Evidence* § 195, at 825 (4th ed. 1992) (character is "a generalized description of a person's disposition, or of a disposition in respect to a general trait, such as honesty, temperance[,] or peacefulness").

[*P26] Except as otherwise narrowly provided by an exception to the general rule,[10] evidence regarding the character (including but not limited to evidence of a particular character trait) of a party, witness, or hearsay declarant is not admissible for the purpose of proving that the person acted in "conform[ance] therewith on a particular occasion." M. R. Evid. 404(a). ***HN3***[↑] As a particular application of the general rule of Rule 404(a), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." M. R. Evid. 404(b). The purpose of the general rule of M. R. Evid. 404(b) is to prevent improper "jury inference, based on evidence of other uncharged bad acts or allegations, that an accused is a person of bad character, and thus **[**28]** likely guilty of the charged offense based on common experience or belief that persons of bad character are predisposed or have a tendency or propensity to subsequently act in conformance therewith." *McGhee, ¶ 14* (internal citations omitted).[11] *Accord State v. Mont. Eighteenth Jud. Dist. Ct. (Salvagni), 2010 MT 263, ¶ 47, 358 Mont. 325, 246 P.3d 415* (Rule 404(b) precludes admission of other acts evidence for a purpose that allows an "inference from bad act to bad person to guilty person"); *Aakre, ¶ 12* (the intent of the Rule "is to prevent convictions . . . based on a jury finding that [an accused] has a propensity to do certain things"). The "general prohibition" of Rule 404(b) "comes into play whenever the nature of the evidence might tempt the jury to decide the case against the defendant on an improper propensity basis" and thus "applies to any conduct, criminal or noncriminal, that effectively impugns or reflects negatively on the defendant's character." *State v. Stewart, 2012 MT 317, ¶ 62, 367 Mont. 503, 291 P.3d 1187* (internal citations omitted).

[*P27] ***HN4***[↑] In contrast, however, Rule 404(b) authorizes admission of other acts evidence when relevant for other non-propensity purposes. *McGhee, ¶ 15* (quoting M. R. Evid. 404(b) and noting its non-exclusive list of other potentially relevant non-propensity purposes). This "alternative or exception clause" of the Rule "is a contrasting rule of inclusion for admission of other acts **[**29]** evidence that has independent relevance to a material matter at issue other than for proof of propensity conformance." *McGhee, ¶ 15* (quoting *Pelletier, ¶ 18* (citing *Salvagni, ¶¶ 47 and 56*, and *United States v. Curtin, 489 F.3d 935, 944 (9th Cir. 2007)*), and *Salvagni, ¶¶ 47 and 62*—internal punctuation omitted). It is "a special application of the doctrine of multiple admissibility under which other acts evidence inadmissible for propensity purposes may yet be admissible for a relevant non-propensity purpose." *Pelletier, ¶ 18* (citing 22B Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice & Procedure: Evidence* § 5243, 132 (West 2017)).[12] Thus, "Rule 404(b) does not categorically bar all other acts evidence"—it bars "only a particular *theory of admissibility*" of the subject evidence. *McGhee, ¶ 15* (quoting *Salvagni, ¶ 47* (emphasis original)—internal punctuation omitted). Whether other acts evidence is admissible or inadmissible under Rule 404(b) depends on the particular purpose of the evidence rather than its substance. *Madplume, ¶ 23* (citing *Salvagni, ¶¶ 47*

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[10] *See Pelletier, ¶¶ 16-17* (discussing limited Rules 404(a)(1), (3), 608(a), and (b) propensity evidence exceptions to the general rule of Rule 404(a)).

[11] *Accord Pelletier, ¶ 15 n.6* (general rules of M. R. Evid. 404(a) and (b) are "based on recognition that persons of bad character are in fact more likely to commit crimes than persons of good character" and "the resulting need in our constitutional system to have criminal convictions based on evidence that the accused is in fact guilty of the particulars of the alleged crime without consideration of the unfairly corroborating inference that the person is more likely to be guilty based on his or her bad character traits"—quoting *State v. Gowan, 2000 MT 277, ¶¶ 19-20, 302 Mont. 127, 13 P.3d 376* (citing *Michelson v. United States, 335 U.S. 469, 475-76, 69 S. Ct. 213, 218-19, 93 L. Ed. 168 (1948)*), and noting various justifications for the general rule—internal punctuation omitted).

[12] *See also* M. R. Evid. 105 (in re limiting instructions for evidence admissible for one purpose but not for another).

and 62-63).[13] However, "[m]ere reference to a permissible purpose is insufficient"—other acts evidence is admissible under the alternative clause of Rule 404(b) "only if the proponent can clearly articulate how" it "fits into a chain of logical inferences, no link of which may be [an] inference that the defendant [thus] **[**30]** ha[d] the propensity" or was predisposed to commit the charged offense. *Madplume, ¶ 23* (quoting *State v. Clifford, 2005 MT 219, ¶ 48, 328 Mont. 300, 121 P.3d 489*—internal punctuation omitted). *Accord Stewart, ¶ 61* (citing *Salvagni, ¶ 47*, and quoting 22A Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice & Procedure: Evidence* § 5239, 260 (Thomson Reuters Supp. 2012), and 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 4:28, 746-47 (3d ed. 2007)).

[*P28] *HN5*[↑] One of the non-propensity "other purpose" exceptions expressly contemplated by Rule 404(b) is admission of other acts evidence for the purpose of proving that an accused had a motive for committing a charged offense.[14] A "motive" is a reason or rationale for doing or not doing something. *See* MOTIVE, *Webster's Third New International Dictionary* (Rev. ed. 2002) ("something within a person . . . that incites him to action"—"a prompting force or incitement working on a person to influence volition or action"). *See similarly State v. Blaz, 2017 MT 164, ¶ 14, 388 Mont. 105, 398 P.3d 247* (motive is a somewhat "nebulous concept" that includes "something . . . that leads someone to act" and is "evidential toward . . . doing or not doing the act"—quoting *Black's Law Dictionary* (Bryan A. Garner ed., 10th ed. 2014)—internal punctuation omitted).[15] *HN6*[↑] Proof of motive is not necessary for proof **[**31]** of any requisite criminal mental state under current Montana law, see *§§ 45-2-101(35)*, *(43)*, *(65)*, and *- 103(1), MCA*, nor for any other essential element of a crime. *See Title 45, chapters 4-10, MCA*. However, it is the State's burden to prove every essential element, including the requisite mental state, of a charged offense a beyond a reasonable doubt. *State v. Patton, 183 Mont. 417, 424, 600 P.2d 194, 198 (1979)*; *In re Winship, 397 U.S. 358, 359-64, 90 S. Ct. 1068, 1070-73, 25 L. Ed. 2d 368 (1970)*. *See also §§ 26-1-402* and *- 403, MCA* (in re evidentiary burdens of proof); *§ 45-2-103(1), MCA* (requiring proof of requisite mental state for all non-absolute liability offenses). Even though not an essential element of proof, the existence or non-existence of a motive to commit a charged offense is generally a relevant consideration in the assessment of whether an accused had the requisite criminal mental state and was in fact the person who committed the alleged offense. *State v. Enright, 2000 MT 372, ¶ 22, 303 Mont. 457, 16 P.3d 366*; *State v. Wells, 252 Mont. 121, 125, 827 P.2d 801, 803 (1992)* (internal citation omitted); *State v. Murdock, 160 Mont. 95, 103-04, 500 P.2d 387, 391-92 (1972)*; *State v. Simpson, 109 Mont. 198, 208-09, 95 P.2d 761, 764-65 (1939)*; *State v. Fine, 90 Mont. 311, 314, 2 P.2d 1016, 1017 (1931)*; *State v. Hollowell, 79 Mont. 343, 349, 256 P. 380, 382 (1927)*.[16] The existence of a motive, and the underlying nature and state of the prior relationship between the accused and an alleged victim, is

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[13] The related question of whether the predominant *effect* of the other acts evidence is to permit or invite an improper propensity inference is not a threshold "other purpose" issue under Rule 404(b), but rather, a distinct prejudice consideration under M. R. Evid. 403. *Salvagni, ¶ 62*.

[14] *See similarly State v. Hollowell, 79 Mont. 343, 349, 256 P. 380, 382-83 (1927)* (stating pre-Rules common law antecedent to Rule 404(b) in re admission of prior acts evidence to prove criminal motive or intent).

[15] In contrast to a motive for acting or not acting, "intent" is a desired aim, purpose, objective, or goal, i.e., "the mental resolution or determination to do" or not do something. *See* INTENT, *Black's Law Dictionary* (11th ed. 2019). *See also* INTENT, *Webster's Third New International Dictionary* (Rev. ed. 2002) ("directed with strained or eager attention"—"having the mind or attention closely or fixed directly on something").

[16] *See similarly State v. Mills, 2018 MT 254, ¶¶ 18-19, 393 Mont. 121, 428 P.3d 834* (noting 1973 Criminal Code displacement of prior common law-based offenses requiring proof of "specific and general intent" with Model Penal Code offenses requiring proof of purposely, knowingly, or negligently mental states).

likewise generally relevant to an accused's "state of mind and intent" when JUOF is at issue. *State v. Weinberger, 204 Mont. 278, 292, 665 P.2d 202, 210 (1983)*.

[*P29] Accordingly, here, the State had the initial burden of proving that Lake purposely committed **[**32]** an act toward purposely or knowingly causing Zitnik to die. *See §§ 45-4-103(1), 45-5-102(1)(a), 45-2-101(35), (65),* and *-103(1), MCA* (defining attempt, deliberate homicide, and requisite mental states). *See also State v. Sellner, 286 Mont. 397, 401, 951 P.2d 996, 998 (1997)* (attempted deliberate homicide "requires proof that the defendant had the *purpose* to cause the death of another . . . and *acted* toward purposely or knowingly causing" that person to die—emphasis added); *State v. Ilk, 2018 MT 186, ¶ 19, 392 Mont. 201, 422 P.3d 1219* (attempted deliberate homicide is "a result-based crime[]" requiring a specific, result-based mental state); *State v. St. Marks, 2020 MT 170, ¶¶ 20-22, 400 Mont. 334, 467 P.3d 550* (justifiable use of force assertion in attempted deliberate homicide case does not contest and thus effectively concedes State's proof that the accused "acted purposely or knowingly," but does not necessarily preclude an assertion that he or she did so without purpose to cause the victim to die—internal citations omitted). Also at issue here was Lake's asserted JUOF defense and thus, *inter alia*, his state of mind and the reason why he stabbed Zitnik—whether in self-defense or not.

[*P30] We have previously recognized at least two motive theories of non-propensity relevance of other acts evidence in a criminal case. *See Salvagni, ¶ 59*. Under the first, the State asserts the prior uncharged act as a reason why the accused committed the charged **[**33]** offense, i.e., that the uncharged act was the cause of the charged criminal act, rather than its effect. *Salvagni, ¶ 59* (citation omitted). *Accord State v. Sweeney, 2000 MT 74, ¶ 25, 299 Mont. 111, 999 P.2d 296* (internal citations omitted). *See also, e.g., State v. Ellison, 2018 MT 252, ¶ 13, 393 Mont. 90, 428 P.3d 826* (evidence of a law enforcement officer's involvement in prior conviction of the accused was relevant to show a "viable motive to retaliate" by "concocting a crime scene . . . to frame" him); *Simpson, 109 Mont. at 208-09, 95 P.2d at 764-65* (evidence of accused's prior commission of an undiscovered murder relevant to prove his motive to kill inquiring sheriff's deputy); *Hollowell, 79 Mont. at 348-49, 256 P. at 382* (evidence of accused's prior undiscovered crimes against victim probative of his subsequent motive to kill her).[17] Here, construed in the light most favorable to the State regardless of the errant portions of its stated rationale at the pretrial motions hearing, its asserted Rule 404(b) motive theory was that Lake's prior uncharged child sex abuse comments and references set off a chain of events that ultimately motivated him to attempt to kill Zitnik. More specifically but generically stated, Lake made various child sex abuse comments and references that offended and concerned Zitnik, which then caused him to dislike Lake and discuss with others his perception of Lake's apparent affinity for

[17] Under the second, the State asserts the uncharged act as additional proof, in conjunction with other proof of the charged offense, to show that the accused committed both acts in furtherance of a common purpose, thus "strengthen[ing] the inference" that he or she committed the charged offense. *Salvagni, ¶ 59* (citation omitted). In other words, the uncharged act "does not *supply* the motive" for the charged offense, but evinces "*the existence*" of a common motive as the common cause or reason for both, and that the charged and uncharged acts were thus "the effects" of that common motive or purpose. *Salvagni, ¶ 59* (citation omitted—emphasis original). *See also, e.g., State v. Daffin, 2017 MT 76, ¶¶ 19-22, 387 Mont. 154, 392 P.3d 150* (prior uncharged sexual abuse of multiple victims and charged SIWC explainable by common motive—accused's ongoing "sexual fixation with underage teen girls, particularly . . . in vulnerable family situations," and resulting desire to "pursue[]," groom, and "sexually assault" them); *Crider, ¶ 26* (prior uncharged PFMA and charged SIWC/PFMA of same victim explainable by common motive—desire to "exert power and control" over her); *Madplume, ¶¶ 26 and 30* (prior uncharged unwelcome sexual advance on alcohol-plied acquaintance and subsequent charged felony-murder of another predicated on similar conduct under similar circumstances in same location explainable by common motive to subject intoxicated subjects to non-consensual sexual contact in isolated intimate settings).

child **[**34]** sex abuse. Lake, in turn, viewed Zitnik's statements and warnings about him to others as "blatant[] slander[]," which then caused him to have particularized animosity towards Zitnik[18] and ultimately motivated him, i.e., gave him reason, to provoke the initial altercation with Zitnik in the bar, and to then lay in wait and repeatedly stab him outside.

[*P31] As referenced in the briefing and hearing on Lake's motion in limine, and even more particularly and explicitly at trial, Lake's prior child sex abuse comments and references were, by nature and frequency, likely to and likely did in fact seriously impugn his character in the eyes of the jury, thus implicating the general prohibition of Rule 404(b). However, at least as more generically stated here in the light most favorable to the State, no link in the chain of the State's theory of relevance of those other acts required or depended on an inference that Lake had a tendency, propensity, or predisposition to violently attack another *in conformity with his alleged affinity for child sex abuse*. Thus, as a preliminary matter of non-propensity relevance under M. R. Evid 401-02 and 404(b), we hold that the District Court did not abuse its discretion **[**35]** in denying Lake's motion in limine to *categorically* exclude any and all references to his prior child sex abuse comments and references. However, the relative probative value of the specific manner and frequency in which the State referenced and elicited witness references to them at trial is another matter under M. R. Evid. 403.

2. Rule 403 Limitation on Otherwise Admissible Rule 404(b) Evidence.

[*P32] *HN7*[↑] Evidence that is relevant and admissible under other rules of evidence is nonetheless subject to exclusion if the danger of unfair prejudice substantially outweighs its relative probative value. M. R. Evid. 403. Because all evidence relevant to prove an adverse claim or assertion is somewhat prejudicial to the other party, the Rule expressly applies, *inter alia*, only to evidence that poses a "danger of *unfair* prejudice." M. R. Evid. 403 (emphasis added). In turn, as pertinent here, otherwise admissible evidence generally poses a danger of unfair prejudice only if of a type that tends or is likely to arouse or provoke jury disdain and hostility for the other party without regard to its probative value in the context of the other evidence in the case. *See* *State v. Hicks, 2013 MT 50, ¶ 24, 369 Mont. 165, 296 P.3d 1149* (internal citation omitted); M. R. Evid. 403 (in re "danger of unfair prejudice, confusion of the issues, . . . misleading **[**36]** the jury," or "needless presentation of cumulative evidence"). The need and demand for careful consideration and application of Rule 403 is particularly critical in the case of other bad acts evidence because, even when otherwise validly admissible for a non-propensity purpose, such evidence is inherently prejudicial insofar that it impugns or has the tendency to impugn the character of the accused based on matters not directly at issue, thus arousing or provoking hostility against him or her without regard to its probative value, thereby inviting or tempting the jury to find guilt on an improper basis. *See* *State v. Pulst, 2015 MT 184, ¶ 19, 379 Mont. 494, 351 P.3d 687* (internal citations omitted); *State v. Franks, 2014 MT 273, ¶¶ 15-16, 376 Mont. 431, 335 P.3d 725* (internal citations omitted); *Salvagni, ¶ 48* (prior bad acts evidence has "potential to be highly prejudicial"); *Derbyshire, ¶ 51* (prior bad acts evidence carries danger "that the jury will penalize [the accused] simply for his past bad character . . . or prejudge him and deny him a fair opportunity to defend against the particular crime charged"—internal citations omitted); *State v. Thompson, 263 Mont. 17, 28-29, 865 P.2d 1125, 1132 (1993)* (citing 1 J. Strong, *McCormick on Evidence* § 185 (4th ed. 1992)); *Old Chief v. United States, 519 U.S. 172, 180-81, 117 S. Ct. 644, 650,*

[18] Compare *Blaz*, ¶¶ 13-19 ("general hostility" toward victim or "complete disregard for others" insufficient alone to be probative of motive to assault that person).

136 L. Ed. 2d 574 (1997)].[19] This inherent danger is even more acute when the other bad acts evidence pertains to child molestation. Franks, ¶ 17 (noting highly inflammatory nature of child **[**37]** molestation evidence). *Accord* Pulst, ¶ 19 (citing Franks). *See also* State v. Van Kirk, 2001 MT 184, ¶ 46, 306 Mont. 215, 32 P.3d 735 (noting "the highly inflammatory nature of child molestation evidence"); United States v. Ham, 998 F.2d 1247, 1252 (4th Cir. 1993) ("no evidence could be more inflammatory or more prejudicial than allegations of child molestation"). We have thus repeatedly warned districts courts, and the State, to exercise great caution in the use of prior acts evidence regarding child sexual abuse. *See* Pulst, ¶ 19; Franks, ¶ 17. *See also* State v. Sage, 2010 MT 156, ¶¶ 36-37, 357 Mont. 99, 235 P.3d 1284 (**HN8**[⬆] "courts must . . . exercise great caution when" allowing use of "potentially inflammatory propensity or character evidence" of a sexual nature even when admitted for some other limited legitimate purpose such as under the transaction rule).[20]

[*P33] Here, in a preliminary limiting instruction before opening statements, the District Court cautioned the jury that it would hear evidence that Lake "made shocking statements about child sex abuse." The State then likewise generically told them that they would hear evidence that Lake commonly "made provocative and shocking comments to people about child sex abuse," and "made such a comment" to Zitnik which "offended" and "concerned" him. Had the State thereafter referenced and elicited testimony regarding Lake's prior child **[**38]** sex abuse comments and references in a similarly generic manner, the Rule 403 balance would have easily tipped in its favor. But it did not.

[*P34] Rather, no sooner than making that generic statement, the State followed up by telling jurors that they would also hear that Lake "made a similar comment to" Cravens and told him and another "about having a dream about raping a 14-year-old girl." In its case-in-chief and on cross-examination of defense witnesses, the State then drove the proverbial truck through the crack in the door by repeatedly referencing and eliciting testimony from multiple witnesses that: (1) Lake referred to himself in the bar as "skull fucker"; (2) the name and term referred to "fucking" the skull of a child; (3) Lake's "skull fucker" nickname and references were well known to regulars at the bar; (4) he previously made a similar comment directly to Zitnik about "fucking" a child's skull which offended him and in regard to which he discussed his resulting concerns about Lake with others in the bar; (5) Lake sang a song in the bar about "skull fucking"; (6) he repeatedly yelled out "skull fucker" in the bar; (7) he told a joke at the bar about a child in the trunk of his car who **[**39]** didn't like sex; (8) he previously disclosed to Cravens and another that he had a dream about raping a 14-year-old girl which then offended Cravens and caused him to dislike Lake; and (9) Cravens discussed Lake's child rape dream with other regulars, including Zitnik, which then furthered poisoned Zitnik against Lake. While defense counsel also made and elicited a few similarly explicit child sex abuse references in cross-examination of Cravens, and on direct examination of Lake, the unqualified denial of Lake's motion in limine, and the State's resulting exploitation of the ruling, left counsel little choice under the circumstances. **HN9**[⬆] A motion in limine that is sufficient to clearly and particularly identify the subject evidence and asserted basis for exclusion is sufficient to preserve the objection for

[19] *See also* State v. Stout, 2010 MT 137, ¶ 84, 356 Mont. 468, 237 P.3d 37 (Nelson, J., dissenting) (bad "character evidence creates an unacceptable risk" that the jury "will be tempted, at least on a subconscious level, to penalize the defendant for . . . past misdeeds" or to "draw a deadly and decidedly improper . . . inference . . . from bad act to bad person to guilty person" or person in need of punishment regarding the uncharged conduct—citing various authorities and parenthetically quoting 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 4:28, 746 (3d ed. Thomson/West 2007)).

[20] *See also* State v. Murphy, 2021 MT 268, ¶¶ 39-40, 406 Mont. 42, 497 P.3d 263 (Gustafson, J., dissenting).

appeal without need for continued or further contemporaneous objection at trial. *Crider, ¶ 20* (internal citations omitted); *State v. Vukasin, 2003 MT 230, ¶ 29, 317 Mont. 204, 75 P.3d 1284* (internal citations omitted). Lake's motion and supporting briefing in limine, as supplemented by his oral argument at motions hearing, were sufficiently clear and specific to preserve his asserted Rule 404(b) and 403 objections to the subsequent multitude of explicit references at trial **[**40]** to his "skull fucker" nickname and references, child rape dream, and boy-in-the-trunk joke.

[*P35] The multitude of those explicit references not only portrayed Lake as a person of bad character with an affinity for child sex abuse, but also included direct characterizations of him as a child molester and a person who "likes to fuck children in the skull." Any of those statements and references would have alone seriously impugned his character and likely provoked jury disdain and hostility towards him. But the combination of the offensive nature, breadth, and multitude of those explicit references and characterizations was no doubt overwhelmingly prejudicial to his character regarding matters not directly at issue and without regard to probative value regarding the existence and extent of his animosity towards Zitnik. *See similarly, Derbyshire, ¶¶ 52-53* (noting that, in contrast to an isolated reference to prior bad conduct subject to an adequate limiting instruction, the "numerous" references to the subject prior bad conduct significantly amplified its inherently prejudicial nature simply by "virtue of . . . repetition"). The relevant essence of the State's articulated motive theory was that Lake tried to kill **[**41]** Zitnik because he disliked him for "slander[ing]" him to others in the bar after he took offense with Lake's various child sex abuse comments and references at the bar. Given the highly inflammatory nature of even that generic subject matter, the State's need for evidentiary richness and narrative integrity in "adequately explain[ing] why [Lake] would want to kill a man who had warned others" about such concern required no more, without need for more explicit and repetitive detail.

[*P36] Compounding matters, a number of the multitude of trial references to Lake's prior child sex abuse comments had little or no probative value even in that regard. For example, no witness testified during the State's case-in-chief that Zitnik in fact called or referred to Lake as a "child molester"—only that Zitnik did *not like* child molesters and thus did not like Lake based on his various child sex abuse comments. Similarly, though Cravens testified that Zitnik was further offended by Lake when *Cravens* told Zitnik about Lake's child rape dream, Zitnik never testified that he saw Lake "gyrate" when telling Cravens about it, or that he even heard about the dream at all, much less that it further fueled *Zitnik's* ***[**42]*** animosity toward Lake. The Bartender and Cravens both testified that it was Cravens, not Zitnik, who referred to Lake to others as a child molester or "cho mo."[21] The Bartender was unaware of Zitnik ever saying any "mean things to [Lake]," other than the crass and standard "shit-talking" that often took place between them. The facts that *Cravens and others* in the bar were or may reasonably have been offended by Lake's child sex abuse comments and references, and that *Cravens* thus called and referred to Lake as a child molester, had no direct or indirect probative value as to whether, why, and to what extent Lake disliked Zitnik, nor did the multiple trial references to the explicit nature, details, and manner of disclosure of Lake's child rape dream.

[*P37] Perhaps the farthest out of bounds was the State's cross-examination of Chadwick's opinion of Lake as an honest and truthful person.[22] ***HN10***[⬆]

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[21] Cravens similarly testified in his pretrial deposition that he never heard Zitnik call Lake a child molester and simply did not know whether Zitnik had ever referred to Lake as a child molester to others.

[22] Chadwick also testified, *inter alia*, to his specific observation of

As an exception to the general rule of Rule 404(a) barring propensity conformance evidence, an accused may "present evidence that he or she has a pertinent good character trait inconsistent with the alleged offense (e.g., that he or she is honest, trustworthy, has moral integrity, or is a peaceful, non-violent, loving, **[**43]** caring, or law-abiding person) for the purpose of supporting an inference that he or she is not guilty of the offense." *Pelletier, ¶ 16* (construing M. R. Evid. 404(a)(1)—internal citations omitted); *State v. Gowan, 2000 MT 277, ¶¶ 22-23, 302 Mont. 127, 13 P.3d 376*. By doing so, however, the accused "opens the door" to "otherwise inadmissible cross-examination [and] extrinsic evidence regarding specific instances of prior conduct [that are] *relevant* to impeach or rebut the subject good character testimony." *Pelletier, ¶ 16* (internal citations omitted—emphasis added).

[*P38] *HN11*[↑] Depending upon the circumstances at issue, Rule 404(a)(1) impeachment and rebuttal evidence has two purposes. The first is to rebut and counter the good character propensity inference placed before the jury by the defendant with a basis for a contrary inference. In the case of a third-party good character witness, the second is to impeach the credibility of the good character testimony by challenging the sufficiency of the witness's basis of knowledge of the defendant. *Pelletier, ¶ 16*. However, "the scope of permissible Rule 404(a)(1) cross-examination or rebuttal evidence is not unlimited—it must be relevant for the Rule 404(a)(1) purpose offered and not unfairly prejudicial." *Pelletier, ¶ 16* (internal citations omitted). *Accord State v. Clark, 209 Mont. 473, 488-91, 682 P.2d 1339, 1347-48 (1984)* (defendant "opened the door" to permissible cross-examination regarding **[**44]** specific instances of conduct directly related to pertinent character traits put at issue).

Lake's stated desire for a "peaceful resolution" of the ongoing animosity between him and Zitnik. He did not state any opinion or otherwise comment on Lake's general character for peacefulness.

[*P39] Here, Chadwick merely testified that he thought Lake was a "100 percent" honest and truthful person. However, without express or implied reference or regard to that opinion, the State then questioned him non-sequitur as to whether he was aware of Lake's child sex dream, that "he made the motion like . . . he was having sex with . . . th[e] 14-year-old" while describing the dream, would randomly "yell . . . 'skull fucker' in the bar," and had told "a joke . . about a five-year-old in the trunk of a car." Compounding matters further, the State then asked whether it made "sense *to* [*Chadwick*] that [*other*] *people* might have concerns if somebody is sharing this information," and "making light of and maybe even boasting about sexual abuse of children." The colloquy went on:

> [State]: Okay. Let me tell you what the joke was, all right?
>
> . . .
>
> [State]: And I guess the jury can decide whether they think it's off-color or something beyond that. The joke was — and he told this to the police after he was detained - "What's black and blue and doesn't like sex?" [A]nd the answer is, "The five-year-old in my trunk." **[**45]** That seems to be a little bit beyond off-color; wouldn't you agree with that?
>
> . . .
>
> [State]: So Mr. Lake's testimony yesterday was that some people thought it was funny and some people didn't. So do you know a lot of people who think that joke is funny?
>
> . . .
>
> [State]: [D]o you think it's reasonable that people at Jesters were not just concerned about [Lake's child rape] dream . . . and the way he related it but also his comments about being a skull fucker and the jokes and that sort of thing?
>
> . . .
>
> [State]: Do you think it would be reasonable for a person that had a 14-year-old daughter to be offended about a person telling them about a

> dream that they had had—
> [Defense]: Objection. Speculation and not relevant.
> . . .
> [Court]: Overruled.
> [State]: Do you think it would be reasonable or unreasonable for somebody who had a 14-year-old daughter to be offended by that?

[*P40] Whether Chadwick was aware of the occurrence and details of Lake's child sex dream, that "he made [a] motion like . . . he was having sex with . . . [a] 14-year-old" while disclosing it, that he would "yell . . . 'skull fucker' in the bar," and had told "a joke about a five-year-old in the trunk of a car," was wholly irrelevant to **[**46]** impeach or rebut his limited opinion regarding Lake's character for truthfulness and honesty. Even further afield, similarly irrelevant to Lake's character for honesty and truthfulness were *Chadwick's opinions* as to whether it made "sense" that "people might have concerns" about Lake's statements, whether his child sex abuse joke was "beyond off-color" or "funny," or whether "it [was] reasonable" that "people at Jesters" were concerned about Lake's child rape dream, "the way he related it," "his comments about being a skull fucker[,] and the jokes and that sort of thing." None of those matters had any probative value whatsoever as to whether Lake was in fact generally trustworthy and truthful, whether Chadwick had a sufficient knowledge base to conclude that he was, or whether and to what extent Lake had sufficient animosity against Zitnik to want to kill him.

[*P41] *HN12*[⬆] In assessing the relative probative value of particular evidence against the danger of unfair prejudice under Rule 403, courts should consider:

> not only . . . the item in question but [also] any actually available substitutes as well. If an alternative . . . [is available with] substantially the same or greater probative value but a lower **[**47]** danger of unfair prejudice, sound judicial discretion would discount the value of the item first offered and exclude it if its discounted probative value were substantially outweighed by unfairly prejudicial risk.

Old Chief, 519 U.S. at 182-83, 117 S. Ct. at 651 (construing *Fed. R. Evid. 403*). While it must of course consider the proponent's "need for evidentiary richness[,] . . . narrative integrity," and prerogative in choosing what evidence to present in support of that party's burden of proof, the court should nonetheless "reasonably apply some discount to the probative value of an item of evidence when . . . less prejudicial but equally probative evidence" is available. *Old Chief, 519 U.S. at 183-84, 117 S. Ct. at 651-52*. Consequently, "what counts as the *Rule 403* 'probative value' of an item of evidence, as distinct from its Rule 401 'relevance,'" includes consideration, *inter alia*, of "compar[ative] evidentiary alternatives," particularly in the context of Rule 404(b) other acts evidence that has both a "legitimate" purpose and an inherently "illegitimate" tendency or effect. *Old Chief, 519 U.S. at 184-85, 117 S. Ct. at 652*. *See also State v. Pendergrass, 179 Mont. 106, 111-13, 586 P.2d 691, 694-95 (1978)* ("[t]he foundation for admission of prejudicial evidence is a showing by the State to establish its *substantial necessity* or instructive value"—holding that admission of recording of victim's "emotional . . . outpourings"/call for help **[**48]** "in the immediate aftermath of a violent crime" was reversible error as unnecessary for proffered purpose of proving that rape had occurred and bolstering victim credibility in light of other "clear proof" of the alleged rape and absence of any issue as to her credibility).

[*P42] Here, as at least generally asserted by defense counsel at the pretrial motions hearing, the State could have readily accomplished its asserted non-propensity purpose by eliciting more generic testimony from Cravens, the Bartender, and Zitnik, as known to each, that Zitnik was offended by various child sex abuse comments and references previously made by Lake at the bar, he thus

disliked Lake, was concerned about him, and discussed those concerns with others in the bar, which then caused Lake to dislike and have animosity toward Zitnik as manifest in the altercation between them in the bar before the stabbing outside. The State could have further supported that theory with testimony from Detective Lawrence more generically stating the pertinent essence of Lake's post-arrest statements to police that an unidentified man had previously antagonized and slandered him to other bar regulars "about some of the things [he] **[**49]** said." Such limited and generic reference to Lake's prior child sex abuse comments and references would still have had the same or similar probative value as proof of the existence, nature, and extent of Lake's animosity towards Zitnik, and thus his motive to kill him, but without unnecessary and highly inflammatory explicit and repetitive reference to Lake's "skull fucker" nickname and references, child rape dream, and boy-in-the-trunk joke.

[*P43] *HN13*[↑] We have long recognized that adequate limiting instructions under M. R. Evid. 105 are often sufficient to eliminate, or at least reduce, the risk of unfair prejudice where prior bad acts evidence is both highly relevant and inherently prejudicial. *See* *Blaz, ¶ 20*; *State v. Hantz, 2013 MT 311, ¶ 44, 372 Mont. 281, 311 P.3d 800*. Not so, however, when the relative probative value of the evidence is minimal or non-existent, and the relative danger of unfair prejudice is high. *See* *Franks, ¶¶ 16-20*; *Sage, ¶ 42*. Here, even before opening statements, the trial started with a limiting instruction which, though generic in nature, brought the highly offensive and inherently prejudicial matter of Lake's prior uncharged bad acts front and center to the jury's attention and focus from the outset. The State then exploited and emphasized that heightened focus at every available **[**50]** opportunity with multiple witnesses, thereby permeating and polluting the trial with repetitive and unnecessarily explicit references to a highly offensive and prejudicial subject matter that, at best, had only ancillary relevance to the facts centrally at issue in the case. Under these circumstances, even the twice-given limiting instruction was simply not adequate to eliminate or fairly reduce the manifest danger of unfair prejudice posed by the explicit and repetitive manner in which those highly inflammatory prior bad acts were put before the jury in this case under the court's unqualified denial of Lake's motion in limine.

[*P44] *HN14*[↑] While district courts have broad discretion under M. R. Evid. 401-03 and 404(b) to determine and weigh the probative value of other acts evidence against the relative risk of unfair prejudice, confusion of the issues, or jury distraction, we have long recognized and cautioned that, to prevent permissible uses from swallowing the general rule, trial courts "*must ensure* that the use" of prior bad acts evidence under Rule 404(b) is "clearly justified and *carefully limited*." *Madplume, ¶ 23* (quoting *Aakre, ¶ 12*—emphasis added). *Accord* *State v. Crist, 253 Mont. 442, 444, 833 P.2d 1052, 1054 (1992)* ("general rule of Rule 404(b) . . . must be strictly enforced[] except where" an exception "is clearly **[**51]** justified and . . . carefully limited"—internal citations omitted); *State v. Just, 184 Mont. 262, 271-72, 602 P.2d 957, 962 (1979)* (pre-Rules citation omitted), *overruled on other grounds by* *Salvagni, ¶ 3*. Unfortunately, here, the otherwise valid use of the relevant essence of the subject prior bad acts evidence was not carefully limited to avoid its manifestly inherent risk of unfair prejudice. We hold that the District Court erroneously allowed the State to reference and elicit testimony regarding Lake's prior child sex abuse comments and references in an explicit and repetitive manner that was unfairly prejudicial under the circumstances in this case.

3. Transaction Rule - *§ 26-1-103, MCA*.

[*P45] As an alternative to admission under M. R. Evid. 404(b), the State asserts that Lake's prior child sex abuse comments and references were independently admissible under the transaction rule

codified in § 26-1-103, MCA ("[w]here [a] declaration, act, or omission forms part of a transaction which is itself the fact in dispute or evidence of that fact, such declaration, act, or omission is evidence as part of the transaction"). HN15[↑] Pursuant to the transaction rule, evidence of a declaration, act, or omission that was inextricably linked or intertwined with the alleged criminal conduct of the accused *may* be admissible as proof **[**52]** of a pertinent element of a charged offense if "explanatory of a fact in dispute" and thus relevant to "provide a comprehensive and complete picture" of the alleged criminal conduct of the accused. State v. Guill, 2010 MT 69, ¶ 36, 355 Mont. 490, 228 P.3d 1152 (citing State v. Bauer, 2002 MT 7, ¶ 23, 308 Mont. 99, 39 P.3d 689). *Accord* Ellison, ¶ 14 (citing Guill). *Compare* Sage, ¶¶ 39-41 (noting that all evidence that "provides some context for the charged conduct" and which "might 'help explain' the charged conduct" is not necessarily so "inextricably intertwined" with the accused's criminal conduct to be part and parcel of the crime); Derbyshire, ¶¶ 34-40 (similarly rejecting various State assertions of contextual need or relevance). While we have discarded the common law concepts of *res gestae* and *corpus delicti* "which, like magic incantations, had been invoked . . . [to] admit evidence of questionable value without subjecting it to critical analysis," we have continued to recognize the validity of the statutory transaction rule where applicable by its terms, and relevant in the context of a particular case. Guill, ¶¶ 26-27 (internal citations omitted).

[*P46] HN16[↑] The transaction rule long predates modern M. R. Evid. 404(b) and, by its express terms, does not necessarily apply only to other acts of an accused. *See* § 26-1-103, MCA (reenacted Code of Civil Procedure 1895 from prior 1877 enactment); *compare* M. R. Evid. 404(b) **[**53]** . However, to the extent that it does and the evidence would otherwise be excluded as propensity evidence, the transaction rule may be an "other purpose" exception to the general exclusionary rule of M. R. Evid. 404(b) to the extent the subject evidence is relevant in a particular case. *See, e.g.*, State v. Haithcox, 2019 MT 201, ¶ 17, 397 Mont. 103, 447 P.3d 452 (transaction rule is a statutory "other purpose" exception to general rule of M. R. Evid. 404(b) and thus is not a conduit for admission of evidence that "would otherwise be excluded by" Rules 404(b) and 403—internal citations omitted); Guill, ¶ 26 (noting that we have "endeavored to cabin application of the transaction rule to prevent it from" swallowing or marginalizing the general rule of M. R. Evid. 404(b)—internal citations omitted); State v. Berosik, 2009 MT 260, ¶ 45, 352 Mont. 16, 214 P.3d 776 (transaction rule evidence is relevant to inform finder of fact of "what happened prior to the alleged offense" thus allowing evaluation of "the evidence in the context in which the alleged criminal act occurred"—internal citations omitted); Derbyshire, ¶¶ 31-33 (noting that various articulated transaction rule "standards . . . evolved from" our "pre-Rule 404(b)" other acts "jurisprudence" and that we have since discarded common law *res gestae* and *corpus delicti* concepts in favor of application of particular rules of evidence specifically applicable to the factual situation at issue—internal citations omitted); State v. Gittens, 2008 MT 55, ¶ 37, 341 Mont. 450, 178 P.3d 91 (recognizing transaction rule is a codified "other purpose" exception to M. R. Evid. 404(b)).[23]

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[23] To the extent that it applies to other acts of an accused, some overlap exists between the transaction rule and "other purposes" exception to modern M. R. Evid. 404(b). *See* State v. Schlaps, 78 Mont. 560, 574-75, 254 P. 858, 861 (1927) (facts relevant to prove an element of a charged offense because they are probative of "identity, motive, intent[,] or of a system employed" are no less relevant and admissible because "they may prove or tend to prove the commission of an independent offense"—citing § 10511, RCM (1921) (now § 26-1-103, MCA)); *compare* M. R. Evid. 404(b) ("[e]vidence of other crimes, wrongs, or acts . . . may . . . be admissible for other purposes, such as proof of motive, . . . intent, . . . plan, . . . [or] identity"). *See also* Guill, ¶ 50 (Nelson, J., concurring—noting § 26-1-103, MCA, as "an historical artifact . . . straight out of" § 1683 of David Dudley Field's *The Code of Civil Procedure of the State of New-York*, Part IV (1850), and which should be discarded in the wake of the 1976 "adoption of the

[*P47] *HN17*[↑] Like any "other purpose" exception to Rule 404(b) or, for that matter, any otherwise admissible evidence, evidence otherwise admissible under the transaction rule is nonetheless subject to exclusion under M. R. Evid. 403. *Guill, ¶ 26*; *Berosik, ¶ 46*; *State v. Detonancour, 2001 MT 213, ¶¶ 29-31, 306 Mont. 389, 34 P.3d 487*. *See also Derbyshire, ¶¶ 28-40*; M. R. Evid. 403 (in re exclusion of otherwise relevant evidence). Consequently, alternative characterization of Lake's prior child sex abuse comments as relevant transaction rule evidence does not preclude or circumvent the foregoing application of M. R. Evid. 403 here.

CONCLUSION

[*P48] As a preliminary matter of non-propensity relevance under M. R. Evid 401-02 and the "other purpose" exception to Rule 404(b), we hold that the District Court did not abuse its discretion in denying Lake's motion in limine to *categorically* exclude any and all references to his prior child sex abuse comments and references. We further hold, however, that the court erroneously allowed the State to reference and elicit testimony regarding Lake's prior child **[**54]** sex abuse comments and references in an explicit and repetitive manner that was unfairly prejudicial under the circumstances in this case. We therefore hereby reverse Lake's 2019 attempted deliberate homicide conviction and remand for a new trial on that offense.

/s/ DIRK M. SANDEFUR

We concur:

/s/ LAURIE McKINNON

/s/ BETH BAKER

/s/ INGRID GUSTAFSON

/s/ JIM RICE

Montana Rules of Evidence" or at least construed within the Rule 404(b) framework).

End of Document

State v. Porter

Supreme Court of Montana

November 8, 2017, Submitted on Briefs; February 6, 2018, Decided

DA 15-0744

Reporter
2018 MT 16 *; 390 Mont. 174 **; 410 P.3d 955 ***; 2018 Mont. LEXIS 21 ****; 2018 WL 721621

STATE OF MONTANA, Plaintiff and Appellee, v. AARON ANTONIO PORTER, Defendant and Appellant.

Subsequent History: Released for Publication February 22, 2018.

Prior History: [**1]** APPEAL FROM: District Court of the Eighteenth Judicial District, In and For the County of Gallatin, Cause No. DC-14-243C. Honorable John C. Brown, Presiding Judge.

Core Terms

patient, injuries, assault, primary purpose, out-of-court, testimonial, hearsay, circumstances, strangulation, argues, medical provider, attacker, neck, medical treatment, declarant, diagnosis, bruises, decisions, questions, teachers, district court, medical care, strangled, Violence, purposes, Partner, assess, criminal prosecution, medical diagnosis, domestic partner

Case Summary

Overview

HOLDINGS: [1]-Defendant's conviction for felony aggravated assault under *Mont. Code Ann. § 45-5-202*, for strangling his domestic partner, was proper because a doctor's testimony concerning the victim's out-of-court statements did not violate defendant's Confrontation Clause rights under the *Sixth Amendment* and *Mont. Const. art. II, § 24*. The primary purpose of the conversation was not to create an out-of-court substitute for trial testimony; [2]-There was no abuse of discretion by admitting the doctor's testimony under Mont. R. Evid. 803(4) because statements identifying the victim's attacker and her state of mind were reasonably pertinent to diagnosis and treatment.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Constitutional Law

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Conclusions of Law

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

HN1[] **Constitutional Law**

A district court's conclusions of law and interpretations of the constitution are reviewed de novo. Whether evidence is relevant and admissible is left to the sound discretion of the district court and will not be overturned on appeal absent an abuse of discretion.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

Evidence > ... > Hearsay > Exceptions > Medical Diagnosis & Treatment

HN2[] Abuse of Discretion, Evidence

A determination that Mont. R. Evid. 803(4) allows certain hearsay testimony to be admitted is an evidentiary issue reviewed for abuse of discretion.

Criminal Law & Procedure > Appeals > Procedural Matters > Briefs

Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review

HN3[] Procedural Matters, Briefs

The Supreme Court of Montana will not entertain an argument first raised in a reply brief.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

HN4[] Criminal Process, Right to Confrontation

The *Sixth Amendment to the United States Constitution* guarantees that the accused shall enjoy the right to be confronted with the witnesses against him. *Mont. Const. art. II, § 24* guarantees that the accused shall have the right to meet the witnesses against him face to face. These rights are similar, but Montana's Confrontation Clause may provide greater protection than the *Sixth Amendment* in certain circumstances. The Supreme Court of Montana will not undertake a unique state constitutional analysis unless the defendant establishes sound and articulable reasons for the greater protection he seeks to invoke.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

HN5[] Criminal Process, Right to Confrontation

Under the Sixth Amendment Confrontation Clause, testimonial statements made out of court may not be admitted as evidence in a criminal trial against a defendant unless the declarant is unavailable to testify and the defendant had a previous opportunity to cross-examine the declarant. The United States Supreme Court has further defined what constitutes a testimonial statement. Statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. Whether an ongoing emergency exists is simply one factor, albeit an important factor, that informs the ultimate inquiry regarding the primary purpose of an interrogation. Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers.

Evidence > ... > Hearsay > Exceptions > Medical Diagnosis & Treatment

Evidence > ... > Statements as Evidence > Hearsay > Rule Components

HN6[] Exceptions, Medical Diagnosis & Treatment

Hearsay is an out-of-court statement offered to

prove the truth of the matter asserted. Mont. R. Evid. 801(c). Hearsay is not admissible as evidence in court unless it falls under an exception provided in statute or another rule. Mont. R. Evid. 802. Statements made for purposes of medical diagnosis or treatment, including statements describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof are excepted from the general hearsay prohibition, insofar as reasonably pertinent to diagnosis or treatment. Mont. R. Evid. 803(4).

Evidence > ... > Hearsay > Exceptions > Medical Diagnosis & Treatment

HN7[] **Exceptions, Medical Diagnosis & Treatment**

Courts are guided by two factors in determining admissibility under Mont. R. Evid. 803(4): (1) the statements must be made with an intention that is consistent with seeking medical treatment; and (2) the statements must be statements that would be relied upon by a doctor when making decisions regarding diagnosis or treatment. The first factor ensures the reliability of the out-of-court statements: The declarant who seeks medical treatment possesses a selfish motive in telling the truth because the declarant knows that the effectiveness of the treatment the declarant receives may depend largely upon the accuracy of the information the declarant provides. The trial court has discretion to determine whether testimony falls under the Mont. R. Evid. 803(4) exception.

Evidence > ... > Hearsay > Exceptions > Medical Diagnosis & Treatment

HN8[] **Exceptions, Medical Diagnosis & Treatment**

The Rules of Evidence allow providers to offer testimony about what informs their diagnosis and treatment decisions. Subjective impressions, such as the patient's state of mind during the attack, can inform a doctor's assessment of the future health risks a patient faces. Therefore, statements identifying Allen's attacker and her state of mind were reasonably pertinent to diagnosis and treatment.

Counsel: For Appellant: Chad Wright, Appellate Defender, Moses Okeyo, Assistant Appellate Defender, Helena, Montana.

For Appellee: Timothy C. Fox, Montana Attorney General, Jonathan M. Krauss, Assistant Attorney General, Helena, Montana; Marty Lambert, Gallatin County Attorney, Bozeman, Montana.

Judges: BETH BAKER. We Concur: MIKE McGRATH, JAMES JEREMIAH SHEA, JIM RICE. Justice Beth Baker delivered the Opinion of the Court. Justice Dirk Sandefur, specially concurring. Justice Laurie McKinnon joins the special concurrence Opinion of Justice Sandefur.

Opinion by: Beth Baker

Opinion

[*956] [**175]** Justice Beth Baker delivered the Opinion of the Court.

[*P1] A Gallatin County jury convicted Aaron Antonio Porter of felony aggravated assault under *§ 45-5-202, MCA*, for strangling his domestic partner, Michelle Allen, during a domestic dispute. Allen did not appear or testify at trial. Over Porter's objection, the District Court admitted testimony from an emergency room physician about Allen's statements during her examination. Porter argues on appeal that the doctor's testimony violated his *Confrontation Clause* rights and was **[****2]** not admissible under the hearsay exception for statements made for medical diagnosis or treatment. We affirm.

PROCEDURAL AND FACTUAL BACKGROUND

[*P2] One morning in August 2014, Michelle Allen arrived at work with a black eye and bruises on her neck, face, and arms. Her supervisor, Michael Bonander, called the police to report that Allen had been assaulted. Belgrade Police Officer Jesse Stovall responded and spoke to Allen. She identified Porter as her attacker. After the interview, Officer Stovall brought Allen to the emergency room. Allen signed a medical release form authorizing the hospital to release patient health information to the police. Dr. Tiffany Kuehl, an emergency room physician and the medical director of the Sexual Assault Nurse Examiner (SANE) team at the hospital, examined Allen. The exam revealed tenderness, bruises, and other markings on Allen's back, shoulders, neck, face, arms, and legs. Dr. Kuehl noted that Allen's injuries were consistent with strangulation. Following the medical examination, the police arrested Porter for assault. After his arrest, Porter waived his *Miranda* rights and gave an interview to the police. The State charged Porter with felony aggravated **[****3]** assault under *§ 45-2-202, MCA*.

[*P3] The case went to trial in September 2015. Allen did not testify, despite the District Court's issuance of a material witness arrest warrant compelling her to appear. Along with photographs of Allen's injuries and portions of Allen's medical records, the State called four other witnesses:

[*P4] Sharina Johnson, Allen's upstairs neighbor, testified that she heard "thuds" coming from the apartment the afternoon of the assault. **[**176]** She heard Allen tell Porter to stop hitting her and Porter reply, "No." Johnson also stated that she heard Allen "crying hysterically" and "gasping for air."

[*P5] Bonander testified that Allen was "really upset" when she came to work the next morning. He testified that she was covered in bruises on her face, neck, and arms, and that he called the police.

[*P6] Officer Stovall testified that when he first responded to the incident, he noticed that Allen had a black eye, a swollen cheek, **[***957]** and abrasions and bruises all over her body. He testified that he transported her to the hospital for examination. He stated that he was not present during the medical examination, but did talk to Dr. Kuehl afterwards pursuant to the release signed by Allen. Officer Stovall also testified **[****4]** to Porter's responses from his police interview. Porter told Office Stovall that he and Allen had gotten into a fight over the cable bill and began pushing and shoving each other. Porter stated that while pushing and shoving each other in the doorway of the bedroom they tripped and fell into the bedroom wall, cracking it. They then ended up struggling on the bed. Porter told the officers that he grabbed Allen's throat after she grabbed his. He reported that he held her throat for a period of "maybe" twenty to twenty-five seconds, "enough just to get her off of [him]." When the officers asked whether he squeezed Allen's neck hard enough for her to lose oxygen, Porter responded, "I probably did—I don't know like I said we were both heated and both arguing."

[*P7] Dr. Kuehl testified to her examination of Allen. She testified that Allen had bruises and abrasions all over her body, including on her shoulder, back, neck, face, arm, hand, knee, and hip. She stated that Allen "had a tender area across the entire anterior or front of her neck, and above the tender area and bruise there were petechia," which she described as "tiny purplish red spots that appear on the skin when very small capillary **[****5]** blood vessels are ruptured." Dr. Kuehl observed that the injuries on Allen's neck and face were indicative of strangulation.

[*P8] Over Porter's objection, Dr. Kuehl also testified about the "verbal history" of the incident she elicited from Allen. Dr. Kuehl testified that she takes verbal histories from patients because "[i]t is very important to understand what the injuries

might be, and also to assess their safety and need for further treatment." She stated that she relies on what patients tell her to diagnose and render treatment.

[*P9] Dr. Kuehl asked Allen about the identity of her attacker. Dr. Kuehl explained the importance of this question, stating,

> I attempt to obtain an identity, aiming at guaranteeing the safety of the patient, and where they will go home, so if they were **[**177]** attacked by someone in their apartment, I make sure that I have alternative arrangements for them to stay when I discharge them from the emergency department.

Dr. Kuehl explained further that, in apparent domestic violence cases, "It is my job to ensure the safety of all my patients, so it is my habit to ensure that they are living in safe circumstances." She acknowledged that her role was to "investigate" a victim's **[****6]** injuries related to what they report happened and to "make sure that there is an accurate representation of the injuries, their measurements and their level of seriousness so that the patient may be able to pursue a case in court and have appropriate justice." Dr. Kuehl reported that Allen told her she was thrown against the wall to the point of feeling dazed and strangled twice by her domestic partner, but that Allen did not identify him by name.

[*P10] Allen reported to Dr. Kuehl that during the first strangulation she was lifted off the ground by the throat. Allen told Dr. Kuehl that during the second strangulation she was strangled to the point of unconsciousness. Dr. Kuehl testified that it is also her "custom and habit" to ask patients involved in domestic assaults "what's going through their mind during the assault." She stated that Allen told her that, "at the moment that she lost consciousness, during the second strangulation, she felt that she was going to die." Dr. Kuehl testified that, in her many years of experience working with victims of strangulation, such feelings of impending death were commonly reported.

[*P11] Allen's verbal history gave Dr. Kuehl concern that Allen's carotid **[****7]** arteries may have been injured by excessive pressure, which could cause acute stroke or death in the days or weeks subsequent to an episode of strangulation. She ordered a CT scan of Allen's neck to evaluate this risk. The scans came back normal. Dr. Kuehl ultimately diagnosed Allen with strangulation and asphyxia, suspected posterior rib fracture, a concussion, and bruising. She said that the cause of Allen's injuries was "assault by her domestic partner with strangulation." Dr. Kuehl testified **[***958]** that in her opinion it was a near fatal strangulation.

[*P12] Porter had sought to exclude Dr. Kuehl's testimony, in part because Allen's statements during her exam constituted testimonial hearsay and were inadmissible. The District Court denied Porter's motion, reasoning that the statements were not testimonial in nature and therefore did not trigger the constitutional protections of the *Confrontation Clause*. The court held that the statements were admissible under the hearsay exception for information related to **[**178]** medical examinations under M. R. Evid. 803(4).

[*P13] A Gallatin County jury found Porter guilty of felony aggravated assault. The District Court sentenced Porter to fifteen years in prison. Porter appeals.

STANDARDS OF REVIEW

[*P14] ***HN1***[↑] We review **[****8]** a district court's conclusions of law and interpretations of the constitution de novo. *State v. Mizenko, 2006 MT 11, ¶ 8, 330 Mont. 299, 127 P.3d 458*. "Whether evidence is relevant and admissible is left to the sound discretion of the district court and will not be overturned on appeal absent an abuse of discretion." *State v. Whipple, 2001 MT 16, ¶ 17, 304 Mont. 118, 19 P.3d 228*. ***HN2***[↑] A

determination that M. R. Evid. 803(4) allows certain hearsay testimony to be admitted is an evidentiary issue reviewed for abuse of discretion. *State v. Huerta, 285 Mont. 245, 258, 947 P.2d 483, 491 (1997)*.

DISCUSSION

[*P15] *1. Did Dr. Kuehl's testimony concerning the victim's out-of-court statements violate Porter's Confrontation Clause rights?*

[*P16] Porter argues that Allen's statements to Dr. Kuehl were testimonial in nature. For that reason, he contends that the District Court violated his rights under both the federal and Montana constitutions when it admitted those statements because Porter did not have a prior opportunity to cross-examine Allen.[1]

[*P17] *HN4*[↑] The *Sixth Amendment to the United States Constitution* guarantees that "the accused shall enjoy the right . . . to be confronted with the witnesses against him." *Article II, Section 24 of the Montana Constitution* guarantees that "the accused shall have the right . . . to meet the witnesses against him face to face." These rights are similar, but we have acknowledged that Montana's *Confrontation Clause* may provide greater protection than the *Sixth Amendment to the United States Constitution* in certain circumstances. *State v. Clark, 1998 MT 221, ¶¶ 20-25, 290 Mont. 479, 964 P.2d 766* (holding that a written state crime lab **[****9]** report entered into evidence without requiring **[**179]** testimony from and cross-examination of the technician who wrote the report violated *Article II, Section 24*). Although Porter argues that *Article II, Section 24* provides greater protection of his right to face witnesses against him than the federal constitution provides, he fails to articulate how his claim implicates any enhanced right afforded under the Montana Constitution. Because Porter does not explain what additional protection the state constitution affords him for this particular claim, we analyze the state and federal constitutional claims together. *State v. Covington, 2012 MT 31, ¶¶ 20-21, 364 Mont. 118, 272 P.3d 43* (holding that we will not undertake a unique state constitutional analysis unless the defendant establishes sound and articulable reasons for the greater protection he seeks to invoke).

[*P18] *HN5*[↑] Under the *Sixth Amendment Confrontation Clause*, testimonial statements made out of court may not be admitted as evidence in a criminal trial against a defendant unless the declarant is unavailable to testify and the defendant had a previous opportunity to cross-examine the declarant. *See Crawford v. Washington, 541 U.S. 36, 59, 124 S. Ct. 1354, 1369, 158 L. Ed. 2d 177 (2004)*. Since *Crawford*, the United States Supreme **[***959]** Court has further defined what constitutes a testimonial statement. *See, e.g., Davis v. Washington, 547 U.S. 813, 822, 126 S. Ct. 2266, 2274-75, 165 L. Ed. 2d 224 (2006)* ("Without attempting to produce an exhaustive classification . . ., **[****10]** it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."); *Michigan v. Bryant, 562 U.S 344, 366, 131 S. Ct. 1143, 1160, 179 L. Ed. 2d 93 (2011)* ("[W]hether an ongoing emergency exists is simply one factor—

[1] Porter argues in his reply brief that the State did not demonstrate that Allen was unavailable to testify. The State moved to strike, arguing that Porter violated M. R. App. P. 12(3). We denied the motion pending our decision in the case. *HN3*[↑] This Court will not entertain an argument first raised in a reply brief. *State v. Sebastian, 2013 MT 347, ¶ 26, 372 Mont. 522, 313 P.3d 198*. But because we decide that Allen's statements were not testimonial, we need not consider the question.

albeit an important factor—that informs the ultimate inquiry regarding the 'primary purpose' of an interrogation.").

[*P19] Most recently, the Supreme Court explained that "the question is whether, in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony.'" *Ohio v. Clark, U.S. , 135 S. Ct. 2173, 2180, 192 L. Ed. 2d 306 (2015)* (quoting *Bryant, 562 U.S. at 358, 131 S. Ct. at 1155*). The Supreme Court declined to adopt a categorical rule that statements to non-law-enforcement individuals fall outside *Sixth Amendment* protection. *Clark, 135 S. Ct. at 2181*. It clarified that "statements made to someone who is not principally charged with **[**180]** uncovering and prosecuting **[****11]** criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers." *Clark, 135 S. Ct. at 2182*.

[*P20] *Clark* concerned the testimony of two preschool teachers who questioned a three-year-old boy about who had hurt him when he came to school with bruises on his face and body. *Clark, 135 S. Ct. at 2178*. The boy told them his mother's boyfriend had caused the injuries. *Clark, 135 S. Ct. at 2178*. The trial court determined that the boy was incompetent to testify under Ohio law, but admitted the teachers' testimony about the boy's out-of-court statements. *Clark, 135 S. Ct. at 2178*. The Supreme Court held that the boy's statements were nontestimonial. The Court explained that the teachers sought the identity of the abuser in order "to protect the victim from future attacks." *Clark, 135 S. Ct. at 2181*. The Court held that "whether the teachers thought that this would be done by apprehending the abuser or by some other means is irrelevant." *Clark, 135 S. Ct. at 2181*. The fact that the teachers' questions, along with their statutory duty to report suspected child abuse, "had the natural tendency to result in Clark's prosecution" was also irrelevant. *Clark, 135 S. Ct. at 2183*.

[*P21] Relying on this Court's interpretation of *Crawford* in *Mizenko, ¶ 23*, Porter maintains that Allen's statements were testimonial because she had a "clear **[****12]** reason" to believe that her statements would be used in court as substantive evidence against Porter. Porter highlights that Officer Stovall drove Allen to the hospital and that Allen signed a medical release so that the police could receive health information related to her medical examination from Dr. Kuehl. Additionally, Porter argues that Dr. Kuehl was not responding to an emergency or providing needed medical care because the attack had occurred the previous evening; rather, Porter contends, Dr. Kuehl's examination of Allen should be considered a forensic examination completed for the purpose of gathering evidence for the prosecution. Porter specifically challenges Dr. Kuehl's testimony that Allen identified her attacker as her domestic partner and that Allen stated she felt that she was going to die.

[*P22] The State counters that the statements to Dr. Kuehl were not testimonial. The State argues that the proper inquiry is whether "in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony.'" *Clark, 135 S. Ct. at 2180* (quoting *Bryant, 562 U.S. at 358, 131 S. Ct. at 1155*). The State argues the primary purpose of Allen's statements to Dr. Kuehl was to **[****13]** receive medical treatment for her **[**181]** injuries.

[*P23] We decided *Mizenko* only two years after the Supreme Court's decision in *Crawford*. **[***960]** More recently, we applied the "primary purpose" test to hold that driver's license suspension letters issued by the State Motor Vehicle Division are not testimonial for *Confrontation Clause* purposes. *City of Kalispell v. Omyer, 2016 MT 63, ¶¶ 23-24, 383 Mont. 19, 368 P.3d 1165* (citing *Davis, 547 U.S. at 822, 126 S. Ct. at 2273*). Given both this Court's and the Supreme Court's recent holdings articulating the primary

purpose test to determine whether a statement is testimonial, we agree with the State that *Clark, 135 S. Ct. at 2180*, provides the correct inquiry for our analysis in this case.

[*P24] Dr. Kuehl testified that that she takes verbal histories from patients to assess both their safety and their need for further treatment. Like the teachers in *Clark*, Dr. Kuehl testified that she asks about the attacker's identity to ensure the safety of her patients upon discharge from the emergency room, i.e., to prevent future harm. Beyond ensuring future safety, the verbal history provided Dr. Kuehl with the information she needed to decide what treatment to order for Allen. In fact, Dr. Kuehl ordered a CT scan to rule out injury to Allen's carotid arteries based on Allen's statements explaining the manner in which she was strangled—including **[****14]** being lifted off the ground, feeling like she was going to die, and losing consciousness.

[*P25] Porter argues that Dr. Kuehl acted as a SANE during her examination. Porter argues that SANEs can act essentially as government agents when they carry out their investigative duties as part of a formal law enforcement investigation. The record does not support Porter's contentions. Dr. Kuehl is a physician, not a nurse. She did not gather evidence primarily for possible future criminal prosecution; she examined Allen's injuries, evaluated her condition, and provided her with medical care. Although Dr. Kuehl stated that part of her role was to ensure that "there is an accurate representation of the injuries . . . so that the patient may be able to pursue a case in court," this does not automatically transform the examination's primary purpose into creating an out-of-court substitute for trial testimony. Dr. Kuehl had an obligation, beyond any potential use in future prosecution, to document Allen's injuries accurately and to treat her condition appropriately. Whether Dr. Kuehl's diagnosis of assault by domestic partner with strangulation "had a natural tendency to result in [Porter's] prosecution" **[****15]** is irrelevant. *See Clark, 135 S. Ct. at 2183*.

[*P26] The circumstances surrounding Dr. Kuehl's conversation with Allen lead us to conclude that the primary purpose of the conversation **[**182]** was not to create an out-of-court substitute for trial testimony. Officer Stovall drove Allen to the emergency room, had her sign a release, and waited for her; he did not, however, participate in the actual medical exam. Before going to the hospital, Allen already had identified her attacker and described the attack to Office Stovall. Further, Dr. Kuehl is not a law enforcement officer. The exam took place in the emergency room, not at the police station. Dr. Kuehl conducted tests to rule out internal injuries and provided Allen with treatment, including intravenous fluids and pain medication. Based on these circumstances, Allen's primary purpose in speaking with Dr. Kuehl was to receive medical care for her injuries, not to create an out-of-court substitute for trial testimony. Allen's statements to Dr. Kuehl were therefore nontestimonial and their admission did not violate Porter's *Confrontation Clause* rights under the *Sixth Amendment to the United States Constitution* or *Article II, Section 24 of the Montana Constitution*.

[*P27] *2. Did Dr. Kuehl's testimony meet the M. R. Evid. 803(4) hearsay exception as a statement made for purposes of medical diagnosis or treatment?*

[*P28] Porter **[****16]** argues that the District Court erred in admitting testimony under M. R. Evid. 803(4) from Dr. Kuehl relating to (1) the attacker's identity, and (2) Allen's mental state as she was strangled. Porter argues that the record does not demonstrate that these statements were reasonably pertinent to diagnose or treat Allen.

[*P29] The State counters that Allen's statements concerned the very reason she sought care from Dr. Kuehl and that Dr. Kuehl indeed relied on those statements in deciding to order a CT scan and chest

x-ray and to administer intravenous fluids and medications. **[***961]** Further, the State argues that the continuum of medical treatment logically extends beyond the initial hospital visit; in fact, Dr. Kuehl testified that asking about the identity of the attacker was important to assess Allen's safety and to make alternative arrangements upon discharge if needed.

[*P30] *HN6*[↑] Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. M. R. Evid. 801(c). Hearsay is not admissible as evidence in court unless it falls under an exception provided in statute or another rule. M. R. Evid. 802. Statements made "for purposes of medical diagnosis or treatment," including statements "describing medical history, or past or present symptoms, **[****17]** pain, or sensations, or the inception or general character of the cause or external source thereof" are excepted from the general hearsay prohibition, "insofar as reasonably pertinent to diagnosis or treatment." M. R. Evid. 803(4).

[*P31] *HN7*[↑] Courts are guided by two factors in determining admissibility **[**183]** under M. R. Evid. 803(4): (1) "the statements must be made with an intention that is consistent with seeking medical treatment"; and (2) the statements "must be statements that would be relied upon by a doctor when making decisions regarding diagnosis or treatment." *Whipple, ¶ 22*. The first factor ensures the reliability of the out-of-court statements: "The declarant who seeks medical treatment possesses a selfish motive in telling the truth because the declarant knows that 'the effectiveness of the treatment [the declarant] receives may depend largely upon the accuracy of the information [the declarant] provides.'" *Whipple, ¶ 22* (quoting *State v. Harris, 247 Mont. 405, 412-13, 808 P.2d 453, 457 (1991)*). The trial court has discretion to determine whether testimony falls under the M. R. Evid. 803(4) exception. *Huerta, 285 Mont. at 258, 947 P.2d at 491*.

[*P32] Porter challenges the second prong of the analysis, arguing that the statements were not "reasonably pertinent to diagnosis or treatment." *See* M. R. Evid. 803(4). But the record reflects, in accord with the District Court's **[****18]** ruling, that the identity of the perpetrator and circumstances surrounding Allen's injuries—including her state of mind—were statements related to the "inception or general character of the cause or external source" of Allen's injuries. M. R. Evid. 803(4). Dr. Kuehl sought specific information on how Allen was injured in part to assess the potential severity of any injuries that were not immediately apparent, such as damage to Allen's carotid arteries. Based on the verbal history from Allen, Dr. Kuehl "obtained a CT scan of the neck with angiography, which uses a type of highlighting intravenous dye to evaluate whether there was any injury to her carotid arteries, because [she] was so concerned that excessive pressure had been used in that area, especially with [Allen] reporting that she was held up by her neck." Thus, Dr. Kuehl used Allen's statements regarding the severity of the attack to make diagnosis and treatment decisions.

[*P33] Further, we agree with the State that Dr. Kuehl's role as a medical provider logically extended beyond treating cuts and bruises. Dr. Kuehl testified that she sought information about the identity and severity of the attack for discharge planning purposes. She explained that **[****19]** "It is my job to ensure the safety of all my patients, so it is my habit to ensure that they are living in safe circumstances."

[*P34] The medical community recognizes Intimate Partner Violence (IPV) as a public health problem. *See, e.g.*, Connie Mitchell & Lisa James, *Evolving Health Policy on Intimate Partner Violence, in Intimate Partner Violence: A Health-Based Perspective*, 1, 1 (Connie Mitchell ed., 2009); Frederick P. Rivara et al., *Healthcare Utilization **[**184]** and Costs for Women with a History of Intimate Partner Violence*, 32 Am. J. Preventative Med. 89, 89 (2007). Medical studies

have demonstrated the significant health consequences of IPV beyond the physical injuries immediately presenting to the medical provider. *See* Nancy Sugg, *Intimate Partner Violence: Prevalence, Health Consequences, and Intervention*, 99 Med. Clin. N. Am. 629, 633 (2015). Women who have experienced IPV have an increased risk of chronic pain, gastrointestinal disorders, and chronic disease, such as asthma, stroke, high blood pressure, high cholesterol, heart attack, heart disease, **[***962]** and cardiovascular disease. Sugg, *supra*, at 633-34. Nearly twenty percent of women who experienced IPV within the past year had a partner who prevented them from **[****20]** going to the doctor or interfered with their healthcare. Sugg, *supra*, at 634. Additionally, women who have experienced IPV are more likely to have mental health issues and are more likely to engage in other risky behaviors, such as smoking and substance abuse. Sugg, *supra*, at 635-36. Studies have shown increased healthcare utilization and medical care costs for individuals with a history of IPV, costing the healthcare system millions of dollars in additional healthcare costs each year. Rivara, *supra*, at 89, 94. One study showed that sixty-four percent of female victims of IPV had received care in an emergency department in the year before the assault. Sugg, *supra*, at 638. For this group of women, the median number of emergency room visits was four over the course of three years. Sugg, *supra*, at 638. Studies also show that utilization of mental health, substance abuse, and emergency department services decreased with cessation of IPV, and further decreased over time after IPV ceased. Rivara, *supra*, at 93. And some studies have shown that intervention from a medical provider reduces the recurrence of IPV. Sugg, *supra*, at 641; Rivara, *supra*, at 94 ("Routine screening can lead to increased identification of IPV, and interventions such as protection orders can reduce the risk of recurrent IPV by 50%"). Thus, intervention by a medical provider can help **[****21]** reduce the risk of additional violent attacks, the need for future medical care, and healthcare costs.

[*P35] Best practices for medical intervention "include acknowledging the problem, assessing safety, referring to appropriate resources, and documenting appropriately in the medical record." Sugg, *supra*, at 641. As part of the safety assessment, medical providers may ask questions to assess the future risk of severe injury or death their patient faces. Sugg, *supra*, at 642. One danger assessment tool that has been shown to be effective at predicting future risk of severe injury or death in **[**185]** clinical trials includes both objective questions ("Has he ever used a weapon or threatened you with a weapon?) and subjective questions ("Do you believe he is capable of killing you?"). Sugg, *supra*, at 642. Studies show that positive answers to such questions are predictive that the patient is at higher risk of severe injury or death. Sugg, *supra*, at 642. Such questions help medical providers determine the patient's health risks and potential next steps. *See* Sugg, *supra*, at 642. Ultimately, in addressing IPV "it is the patient's decision regarding the next steps to take, but *as with any health risk*, patients need to be fully informed when making their decisions." Sugg, *supra*, at 642 (emphasis added). Inquiring into **[****22]** the identify of their attacker and the severity of any IPV allows medical providers to help their patients make fully informed decisions.

[*P36] Dr. Kuehl testified that "it is very important to understand what the injuries might be, and also to assess [the patient's] safety and need for further treatment." Dr. Kuehl further testified that it was part of her "custom and habit" in making her assessment of patients to inquire into their state of mind during the assault. Answers to questions about the environmental factors of injury inform treatment decisions the medical provider makes. They also provide medical providers with a better understanding of the risk of future harm the patient faces. Health issues do not occur in a vacuum. Medical providers recognize the significance of IPV, its severity, and its impact on their patients' future health when gathering information from the patient to make medical decisions and to provide

medical advice and treatment. *HN8*[↑] The Rules of Evidence allow providers to offer testimony about what informs their diagnosis and treatment decisions. Subjective impressions, such as the patient's state of mind during the attack, can inform a doctor's assessment of the **[****23]** future health risks a patient faces. Therefore, statements identifying Allen's attacker and her state of mind were reasonably pertinent to diagnosis and treatment. The District Court did not abuse its discretion in admitting the testimony of Dr. Kuehl under M. R. Evid 803(4).

CONCLUSION

[*P37] The conviction is affirmed.

/s/ BETH BAKER

We Concur:

/s/ MIKE McGRATH

/s/ JAMES JEREMIAH SHEA

/s/ JIM RICE

Concur by: Dirk Sandefur

Concur

[*963]** Justice Dirk Sandefur, specially concurring.

[*P38] I concur with the Court's ultimate holdings that Dr. Kuehl's disputed testimony was admissible under M. R. Evid. 803(4) and did **[**186]** not violate Porter's right to confront adverse witnesses under the *Sixth* and *Fourteenth Amendments of the United States Constitution* and *Article II, Section 24 of the Montana Constitution*. However, regardless of the medical community's purported recognition of "Intimate Partner Violence (IPV) as a public health problem," I cannot join the Court's express or implicit justification of these holdings on the ground that the scope of Dr. Kuehl's medical treatment included identifying an abuser to facilitate the post-release safety of the patient and gathering evidence "so that the patient may be able to pursue a case in court and have appropriate justice." I certainly agree that those purposes are manifestly compelling public safety and social justice purposes. However, **[****24]** protecting an abused patient from her abuser after she leaves the hospital and gathering evidence to facilitate his criminal prosecution by the State do not constitute "medical treatment" within the plain meaning, and underlying circumstantial indicia of trustworthiness, of M. R. Evid. 803(4). Admission of Dr. Kuehl's testimony was independently correct without need for distortion of the plain meaning of "medical treatment."

[*P39] Narrowly at issue is Dr. Kuehl's testimony that Allen told her that Allen's unnamed domestic partner assaulted her and that "she felt that she was going to die" when he was strangling her. The State does not dispute that Dr. Kuehl's testimony was inadmissible hearsay within the general rule of M. R. Evid. 801(c) and 802. Qualifying out-of-court statements made for purposes of medical diagnosis or treatment are admissible as a narrow exception to the hearsay rule. M. R. Evid. 803(4). The circumstantial indicium of trustworthiness underlying this exception is that a person will generally make truthful statements to an attending physician in furtherance of the person's self-interest in effective medical treatment. *State v. Whipple, 2001 MT 16, ¶ 22, 304 Mont. 118, 19 P.3d 228*. Over the years, the Court has over-simplistically reduced M. R. Evid. 803(4) to a two-part test that does not give effect to **[****25]** all of the language of the rule. *See Whipple, ¶ 22* ("statements must be made with an intention that is consistent with seeking medical treatment and must be statements that would be relied upon by a doctor when making decisions regarding diagnosis or treatment").[1]

[1] In pertinent part, the actual text of M. R. Evid. 803(4) reads:

Giving effect to all of the language of the rule, M. R. Evid. 803(4) **[**187]** permits admission of otherwise inadmissible hearsay statements only if:

> (1) the declarant made the statement for the purpose of obtaining a "medical diagnosis or treatment;"
>
> (2) the statement "described:"
>
> (A) the declarant's "medical history;"
>
> (B) "past or present symptoms, pain, or sensations;" or
>
> (C) the "inception or general character of the cause or external source" of those symptoms, pains, or sensations; and
>
> (3) the statement was "reasonably pertinent to diagnosis or treatment" of the declarant's symptoms, pains, or sensations.

[*P40] Independent of M. R. Evid. 803(4), the *Sixth Amendment* prohibits admission of testimonial out-of-court statements unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. *Crawford v. Washington, 541 U.S. 36, 68, 124 S. Ct. 1354, 1374, 158 L. Ed. 2d 177 (2004)*. Regardless of knowledge or intent that the statements will facilitate a criminal **[***964]** prosecution, statements made to a private party are generally not testimonial if the primary purpose of the statements, and the person who heard them, was a purpose other than to facilitate a criminal prosecution. *See Ohio v. Clark, U.S. , , 135 S. Ct. 2173, 2181-83, 192 L. Ed. 2d 306 (2015)* (admission of out-of-court statements made by abused student to investigating teachers subject to mandatory reporting statute not testimonial where teachers were primarily acting in furtherance of child's welfare and child was unaware of potential prosecutorial use of the statements).

[*P41] Here, Allen did not seek medical care after the assault and there is no evidence that she intended to do so until an investigating law enforcement officer contacted her at work the next day and obtained her consent to take her to the hospital for an emergency room examination. At the hospital, Allen signed a release at the request of the law enforcement officer authorizing the attending **[****27]** physician to disclose her examination findings to the officer. However, regardless of the fact that it was not her idea to seek medical care and that she was well aware that her statements to Dr. Kuehl would likely facilitate a criminal prosecution, Allen had been violently beaten and strangled the night before. At the time she consented to the examination and **[**188]** spoke with Dr. Kuehl, Allen was suffering from a subsequently-diagnosed brain concussion and a possible rib fracture. The record clearly reflects that she made the statements at issue in the course of describing her condition at the time of examination and to what she attributed her injuries.

[*P42] Under these circumstances it is unreasonable to conclude that Allen's motive for consenting to the medical examination did not include the desire to obtain any necessary medical care or that such motive was not the primary motivation for consenting to the examination. Likewise, regardless of Dr. Kuehl's unquestionable ulterior prosecutorial motive as the medical director of the SANE program, her first and foremost purpose was to provide medical diagnosis and care to Allen. Without further elaboration, I would hold that Dr. Kuehl's testimony **[****28]** was admissible pursuant to M. R. Evid. 803(4) and that the hearsay statements to which she referred were not testimonial statements barred from admission by the *Sixth* and *Fourteenth Amendments of the United States Constitution* and *Article II, Section 24*

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . Statements made for purposes of medical diagnosis or treatment *and* describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof *insofar as* reasonably **[****26]** pertinent to diagnosis or treatment.

(Emphasis added.)

of the Montana Constitution.[2]

[*P43] For the foregoing reasons, I specially concur with the result reached by the Court.

/s/ DIRK M. SANDEFUR

Justice Laurie McKinnon joins the special concurrence Opinion of Justice Sandefur.

/s/ LAURIE McKINNON

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[2] Porter has put forth no compelling analysis or showing that the Framers of *Article II, Section 24 of the Montana Constitution* contemplated that the Montana Constitution would afford a confrontation right greater than guaranteed by the federal constitution.

State v. Walston

Supreme Court of Montana

June 24, 2020, Submitted on Briefs; August 11, 2020, Decided

DA 18-0501

Reporter
2020 MT 200 *; 401 Mont. 15 **; 469 P.3d 716 ***; 2020 Mont. LEXIS 2189 ****; 2020 WL 4593097

STATE OF MONTANA, Plaintiff and Appellee, v. SHAWN MARIE WALSTON, Defendant and Appellant.

Subsequent History: Released for Publication August 27, 2020.

Prior History: [**1]** APPEAL FROM: District Court of the Sixth Judicial District, In and For the County of Park, Cause No. DC 16-64. Honorable Brenda R. Gilbert, Presiding Judge.

State v. Walston, 2019 Mont. LEXIS 970 (Mont., Nov. 22, 2019)

Core Terms

informant, confidential informant, disclosure, disclose, informant's identity, informant's testimony, trailer, identity of the informant, primary role, district court, criminal activity, methamphetamine, played, alleged crime, confidential, drugs, substantial risk, controlled buy, conversation, conjecture, revealing

Case Summary

Overview

HOLDINGS: [1]-Defendant was improperly convicted of drug possession and distribution because the district court erred in denying her motion to disclose the identity of a confidential informant based on the State's privilege to refuse to disclose the name of an informant pursuant to the Roviaro balancing test, Mont. R. Evid. 502, and *Mont. Code Ann. § 46-15-324*; [2]-Although disclosure was not always warranted where the informant and the accused were the only two persons present during the drug exchange, disclosure was warranted here based on the fact that the informant in this case played a continuous, active, and primary role in the alleged crime and the fact that the informant would not be subjected to substantial risk since she was no longer working with law enforcement and had moved out of the area.

Outcome

Conviction vacated and case remanded.

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Conclusions of Law

HN1[] **Procedural Due Process, Scope of Protection**

The Supreme Court of Montana will review orders granting or denying discovery for an abuse of discretion. The question whether a defendant's right to due process has been violated is a constitutional question over which the supreme court exercises plenary review.

Criminal Law & Procedure > ... > Discovery by Defendant > Informants > Confidential Informant Privilege

Evidence > ... > Government Privileges > Official Information Privilege > Informer Privilege

Criminal Law & Procedure > ... > Discovery by Defendant > Informants > Scope

Criminal Law & Procedure > ... > Search Warrants > Confidential Informants > Identity of Informants

Evidence > ... > Government Privileges > Official Information Privilege > Investigative Files Privilege

HN2[] **Informants, Confidential Informant Privilege**

The State has the privilege to refuse to disclose the name of an informant under certain circumstances. The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation. The privilege has limits, however: Where the disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. Mont. R. Evid. 502 has incorporated this balancing test. Whether the State may rely on its privilege to keep the confidential informant's identity confidential requires balancing of the defendant's interest in preparing his defense and the government's interest in protecting the flow of informant information. The test requires the trial court to consider the circumstances of each case, the crime charged and any possible defenses, and the possible significance of the informant's testimony.

Criminal Law & Procedure > ... > Discovery by Defendant > Informants > Confidential Informant Privilege

Evidence > ... > Government Privileges > Official Information Privilege > Informer Privilege

Criminal Law & Procedure > ... > Discovery by Defendant > Informants > Scope

Criminal Law & Procedure > ... > Search Warrants > Confidential Informants > Identity of Informants

HN3[] **Informants, Confidential Informant Privilege**

Mont. R. Evid. 502 allows the State to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law. But if it appears in the case that an informer may be able to give testimony relevant to any issue in a criminal case and the public entity invokes the privilege, the court shall give the public entity an opportunity to show facts relevant to determining whether the informer can, in fact, supply that testimony. If the Court finds that the informer should be required to give the testimony, and the public entity elects not to disclose the informer's identity, the court shall dismiss the charges to which the testimony would relate. Rule 502(c)(2).

Criminal Law & Procedure > ... > Discovery by Defendant > Informants > Confidential Informant Privilege

Evidence > ... > Government Privileges > Official Information Privilege > Informer Privilege

Criminal Law & Procedure > ... > Discovery by Defendant > Informants > Scope

Criminal Law & Procedure > ... > Search Warrants > Confidential Informants > Credibility, Reliability & Veracity

Criminal Law & Procedure > ... > Search Warrants > Confidential Informants > Identity of Informants

HN4[] **Informants, Confidential Informant Privilege**

Mont. Code Ann. § 46-15-324(3) provides the State is not required to disclose the identity of an informant the State is not calling to testify if disclosure would result in substantial risk to the informant or the informant's operational effectiveness and the failure to disclose will not infringe the constitutional rights of the accused. *Section 46-15-324(3)*.

Criminal Law & Procedure > ... > Discovery by Defendant > Informants > Appellate Review & Judicial Discretion

Evidence > ... > Government Privileges > Official Information Privilege > Informer Privilege

Criminal Law & Procedure > ... > Discovery by Defendant > Informants > Scope

Criminal Law & Procedure > ... > Discovery by Defendant > Informants > Confidential Informant Privilege

Criminal Law & Procedure > ... > Search Warrants > Confidential Informants > Identity of Informants

HN5[] **Informants, Appellate Review & Judicial Discretion**

The balancing test articulated in U.S. Supreme Court precedent, Mont. R. Evid. 502, and *Mont. Code Ann. § 46-15-324(3)* together inform the analysis to determine when the State must disclose the identity of a confidential informant. Under this analysis, a defendant must provide evidence to the court supporting the possible relevance of the informant's testimony to her defense. The factors to consider include the circumstances of each case, the crime charged and any possible defenses, and the possible significance of the informant's testimony.

Criminal Law & Procedure > ... > Discovery by Defendant > Informants > Confidential Informant Privilege

Evidence > ... > Government Privileges > Official Information Privilege > Informer Privilege

Criminal Law & Procedure > ... > Discovery by Defendant > Informants > Scope

Criminal Law & Procedure > ... > Search Warrants > Confidential Informants > Identity of Informants

HN6[] **Informants, Confidential Informant Privilege**

The United States Supreme Court held that when, in the interests of fundamental fairness, disclosure of an informant's identity is relevant and helpful to the defendant's defense, or essential to a fair determination of the case, the privilege must fall. The Supreme Court of Montana has explained when the informant played a continuous, active and primary role in the alleged crime, an informant's

identity is relevant and potentially helpful to the defendant's defense and essential to a fair determination of the case.

Criminal Law & Procedure > ... > Discovery by Defendant > Informants > Confidential Informant Privilege

Evidence > ... > Government Privileges > Official Information Privilege > Informer Privilege

Criminal Law & Procedure > ... > Discovery by Defendant > Informants > Scope

Criminal Law & Procedure > ... > Search Warrants > Confidential Informants > Identity of Informants

HN7[] **Informants, Confidential Informant Privilege**

The Supreme Court of Montana has declined to compel the disclosure of an informant's identity in circumstances when the informant did not play a continuous, active, and primary role in the alleged crime.

Criminal Law & Procedure > ... > Discovery by Defendant > Informants > Confidential Informant Privilege

Evidence > ... > Government Privileges > Official Information Privilege > Informer Privilege

Criminal Law & Procedure > ... > Discovery by Defendant > Informants > Scope

HN8[] **Informants, Confidential Informant Privilege**

Mere conjecture or supposition about the possible relevancy of the informant's testimony is insufficient to warrant disclosure. The defendant must show the informant's testimony would significantly aid in establishing an asserted defense.

Criminal Law & Procedure > ... > Discovery by Defendant > Informants > Confidential Informant Privilege

Evidence > ... > Government Privileges > Official Information Privilege > Informer Privilege

Criminal Law & Procedure > ... > Discovery by Defendant > Informants > Scope

Criminal Law & Procedure > ... > Search Warrants > Confidential Informants > Identity of Informants

HN9[] **Informants, Confidential Informant Privilege**

The Eleventh Circuit has explained there are two primary factors in weighing whether the identity of an informant is necessary for a defendant to prepare his defense. The first is the extent to which the confidential informant participated in the criminal activity. When the informant plays a prominent part in the criminal activity, or a continuous, active and primary role in the alleged crime, the balance weighs heavily in favor of disclosure, In contrast, when an informant's level of involvement in the criminal activity is that of minimal participation, this factor by itself will not compel disclosure. The second factor is the directness of the relationship between the defendant's asserted defense and the probable testimony of the informant. Mere conjecture or supposition about the possible relevancy of the informant's testimony is insufficient to warrant disclosure.

Evidence > ... > Government Privileges > Official Information

Privilege > Informer Privilege

HN10[] **Official Information Privilege, Informer Privilege**

In Montana, the public's interest in protecting the flow of information includes considerations of continuing operational effectiveness of the informant and whether revealing the identity of the informant would subject her to substantial risk. *Mont. Code Ann. § 46-15-324(3)*.

Counsel: For Appellant: Chad Wright, Appellate Defender, James Reavis, Assistant Appellate Defender, Helena, Montana.

For Appellee: Timothy C. Fox, Montana Attorney General, Mardell L. Ployhar, Assistant Attorney General, Helena, Montana; Kendra K. Lassiter, Park County Attorney, Livingston, Montana.

Judges: INGRID GUSTAFSON. We concur: MIKE McGRATH, LAURIE McKINNON, BETH BAKER, JAMES JEREMIAH SHEA, DIRK M. SANDEFUR, JIM RICE. Justice Ingrid Gustafson delivered the Opinion of the Court.

Opinion by: Ingrid Gustafson

Opinion

[*P1] **[***717]** **[**18]** Shawn Marie Walston appeals from the August 7, 2017 Order Denying Motion for Disclosure of Confidential Informant and Alternative Motion to Dismiss issued by the **[***718]** Sixth Judicial District Court, Park County. After the District Court's denial of her pretrial motion, a Park County jury convicted Walston of criminal distribution of dangerous drugs, methamphetamine, in violation of *§ 45-9-101, MCA*, and criminal possession of dangerous drugs, methamphetamine, in violation of *§ 45-9-102, MCA*. We restate the issue on appeal as follows:

*Whether the District Court erred in denying Walston's **[****2]** motion to disclose the identity of a confidential informant.*

[*P2] We reverse and remand for further proceedings consistent with this Opinion.

PROCEDURAL AND FACTUAL BACKGROUND

[*P3] In March 2016, a confidential informant told Detective Tim Barnes of the Missouri River Drug Task Force that Walston was selling methamphetamine in the area. The informant had previously provided useful information to the Task Force. Detective Barnes corroborated the information from the confidential informant with other sources and applied for a search warrant to use a body wire to record a controlled buy between the confidential informant and Walston, which was granted.

[*P4] On March 10, 2016, Detective Barnes supervised a surveillance team of five officers to oversee the controlled buy. Before the buy, officers searched the confidential informant's person and vehicle to make sure she did not have access to money or drugs. After this preliminary search, Detective Barnes put a body wire on the confidential informant, which could record audio, and provided the confidential informant with $325 to purchase methamphetamine from Walston. Two detectives followed the informant in a separate car to the trailer park where Walston **[****3]** lived. Three other officers were already stationed in two vehicles at the trailer park. Only two of the five officers in the surveillance team could see Walston's trailer from their places in the vehicles, but all five officers could hear the transmission **[**19]** from the confidential informant's body wire over their radios.

[*P5] The confidential informant first met Walston outside her trailer. After a short conversation between the two women outside, the

women went inside the trailer. One officer witnessed them enter the trailer, but none of the officers could see inside the trailer. The transcript produced by the State during discovery, but not entered into evidence at trial, shows conversation relating to the weight and method of ingestion of methamphetamine.

[*P6] Upon leaving Walston's trailer, the confidential informant drove about eight miles to a predetermined meeting location. She provided officers with a small plastic bag containing a crystalline substance that field tested positive for methamphetamine. Officers again searched the informant's person and vehicle and did not recover any additional contraband or money.

[*P7] The State charged Walston with one count of criminal distribution of dangerous **[****4]** drugs, methamphetamine, in violation of *§ 45-9-101, MCA*, and criminal possession of dangerous drugs, methamphetamine, in violation of *§ 45-9-102, MCA*. In response to Walston's discovery requests, the State declined to reveal the identity of the confidential informant who participated in the controlled buy. Walston filed a motion asking the District Court to compel the State to disclose the informant's identity or to dismiss the case. After laying out the facts alleged by the State in its information that showed the informant was actively involved in the charged criminal activity, Walston argued:

> [T]here is no doubt that the [informant] is able to []give testimony relevant to the substance of the charges in this case (a material issue) based upon the facts set forth herein. Since the [informant's] testimony is material and may in fact provide exculpatory evidence, the State has a duty to disclose her identity pursuant to both *§ 46-15-322(2)(c)* and Rule 502.

The State responded it was relying on its privilege to decline to provide the identity of the informant. Because the informant was not going to testify at trial, the State maintained, the burden was on Walston to demonstrate a need for the disclosure beyond mere **[***719]** speculation the testimony **[****5]** of the informant would be relevant.

[*P8] At the hearing on the motion, Walston's argument focused on whether the officers would be able to identify her as the source of the drugs found on the confidential informant's person upon leaving the trailer court. The State provided testimony from Detective Barnes to counter this. Barnes explained officers had been given a photograph of Walston before the operation and the officers in view of the trailer could positively identify Walston as the woman who spoke with the **[**20]** confidential informant outside the trailer. Barnes answered affirmatively when asked whether disclosing the identity of the informant would "compromise the informant's safety." This was the only evidence regarding the informant's safety presented to the District Court. Walston maintained at the hearing the informant would be able to give testimony relevant to the substance of the charges, arguing she was entitled "to cross-examine and confront the confidential informant as to who exactly was present in the residence, what exactly occurred, and whether or not it was, in fact, Ms. Walston that participated in this deal." The District Court denied Walston's motion.

[*P9] The jury at Walston's **[****6]** first trial was unable to reach a verdict. Ten jurors voted to convict, while two voted to acquit. A second trial was held March 20, 2018.

[*P10] At the second trial, all five officers testified about their roles and observations during the controlled buy. Detective Barnes testified he heard conversation between the two women "consistent with a drug transaction." On cross-examination, Walston's counsel elicited testimony from the officers that the audio quality of the body wire's transmission was poor and scratchy and only parts of the conversation between the confidential informant and Walston were intelligible. The transcription shows over 120 portions of the audio

recording are unintelligible. Detective Barnes also testified the confidential informant had moved out of the area and no longer worked for the Task Force. The jury convicted Walston of both counts.

STANDARD OF REVIEW

[*P11] *HN1*[↑] We review orders granting or denying discovery for an abuse of discretion. *State v. DuBray, 2003 MT 255, ¶ 103, 317 Mont. 377, 77 P.3d 247*. The question whether a defendant's right to due process has been violated is a constitutional question over which this Court exercises plenary review. *State v. Hauer, 2012 MT 120, ¶ 23, 365 Mont. 184, 279 P.3d 149*.

DISCUSSION

[*P12] The District Court provided three grounds for its denial of Walston's motion **[****7]** to compel disclosure of the confidential informant. First, the court explained "[p]ursuant to Rule 502 of the Montana Rules of Evidence the State may refuse to disclose the identity of an informant if the informant is not going to testify." Second, the court determined disclosure was not required if disclosure would result in substantial risk to the informant and Detective Barnes testified affirmatively when asked whether the informant's safety would be **[**21]** compromised. Finally, the court explained mere speculation about the possible relevance of the informant's testimony is insufficient to warrant disclosure of the informant's identity. It determined Walston failed to provide anything concrete or substantive to establish "that disclosure is necessary to properly prepare for trial, that the informant might possess exculpatory information, or that the informant may have been involved in the crime."

[*P13] Walston appeals, arguing she had the right to know the identity of the informant because the informant played a continuous, active, and primary role in the alleged crime. The State counters Walston failed to meet her burden of showing her need for disclosure was sufficient to override the government's interest in protecting the identity **[****8]** of the informant, but rather provided only speculation and conjecture the informant would provide relevant testimony.

[*P14] The State has the privilege to refuse to disclose the name of an informant under certain circumstances. *HN2*[↑] "The purpose of the privilege is the furtherance and protection of the public interest in effective law **[***720]** enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation." *Roviaro v. United States, 353 U.S. 53, 59, 77 S. Ct. 623, 627, 1 L. Ed. 2d 639 (1957)*. The privilege has limits, however: "Where the disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." *Roviaro, 353 U.S. at 60-61, 77 S. Ct. at 628*.

[*P15] The enactment of M. R. Evid. 502 in 1977 codified this privilege in Montana. Rule 502 incorporated the balancing test from *Roviaro* this Court had previously adopted in *State ex rel. Offerdahl v. District Court of the Eighth Judicial District, 156 Mont. 432, 481 P.2d 338 (1971)*. *See* M. R. Evid. 502, cmt. c. Whether the State may rely on its privilege to keep the confidential informant's identity confidential requires "balancing of the defendant's interest in preparing his defense[] and the government's interest in protecting **[****9]** the flow of informant information. The test requires the trial court to consider the circumstances of each case, the crime charged and any possible defenses, and the possible significance of the informant's testimony." *State v. Chapman, 209 Mont. 57, 66, 679 P.2d 1210, 1215 (1984)*.

[*P16] *HN3*[↑] Rule 502 allows the State "to

refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law." But

> [i]f it appears in the case that an informer may be able to give **[**22]** testimony *relevant to any issue in a criminal case* . . . and the public entity invokes the privilege, the court shall give the public entity an opportunity to show facts relevant to determining whether the informer can, in fact, supply that testimony. If the Court finds that the informer should be required to give the testimony, and the public entity elects not to disclose the informer's identity, the court . . . shall dismiss the charges to which the testimony would relate."

Rule 502(c)(2) (emphasis added).

[*P17] The Montana Legislature provided further guidance about when the State can withhold the identity of an informer with its 1985 enactment of *§ 46-15-324(3), MCA*. ***HN4***[↑] That statute provides the State is not required to disclose the identity of an informant the State **[****10]** is not calling to testify if "disclosure would result in substantial risk to the informant or the informant's operational effectiveness" and "the failure to disclose will not infringe the constitutional rights of the accused." *Section 46-15-324(3), MCA*.

[*P18] ***HN5***[↑] The balancing test articulated in *Roviaro*, Rule 502, and *§ 46-15-324(3), MCA*, together inform the analysis to determine when the State must disclose the identity of a confidential informant. Under this analysis, a defendant must provide evidence to the court supporting the possible relevance of the informant's testimony to her defense. *See State v. Babella, 237 Mont. 311, 316, 772 P.2d 875, 878 (1989)*. The factors to consider include "the circumstances of each case, the crime charged and any possible defenses, and the possible significance of the informant's testimony." *Chapman, 209 Mont. at 66, 679 P.2d at 1215*.

[*P19] In *Roviaro*, four law enforcement officers arranged a controlled buy between a confidential informant and the defendant. One officer was in the trunk of the informant's vehicle and could hear the conversation inside the vehicle. The other officers tailed the informant's vehicle. The confidential informant picked up the defendant and the defendant directed him to drive to a specific location. Once there, the officers witnessed the defendant get out of the vehicle, pick up a small **[****11]** package, place it in the informant's car and then walk away. An officer immediately went to the informant's vehicle and retrieved a small package containing three envelopes of heroin. The officer in the trunk testified at trial he heard the defendant give the informant directions to the spot where the package was picked up and heard the defendant say he brought the informant "three pieces this time." *Roviaro, 353 U.S. at 57, 77 S. Ct. at 626*. The government refused **[***721]** to disclose the identity of the informant and the informant did not testify at trial. The United States Supreme Court reversed the **[**23]** defendant's conviction. After laying out the balancing test to determine when an informant's identity must be disclosed, the Supreme Court explained the informant's testimony

> was highly relevant and might have been helpful to the defense. So far as [the defendant] knew, he and [the informant] were alone and unobserved during the crucial occurrence for which he was indicted. Unless [the defendant] waived his constitutional right not to take the stand in his own defense, [the informant] was his one material witness.

Roviaro, 353 U.S. at 63-64, 77 S. Ct. at 629. The Court went on to explain the opportunity to cross-examine the officers "was hardly a substitute for an opportunity to **[****12]** examine the man who had been nearest to him and took part in the transaction." *Roviaro, 353 U.S. at 64, 77 S. Ct. at 629*.

[*P20] ***HN6***[↑] In *Chapman*, this Court applied *Roviaro* and summarized its holding: "The United

States Supreme Court held that when, in the interests of fundamental fairness, disclosure of an informant's identity is relevant and helpful to the defendant's defense, or essential to a fair determination of the case, the privilege must fall." *Chapman, 209 Mont. at 66, 679 P.2d at 1215*. We explained when "the informant played a continuous, active and primary role in the alleged crime," an informant's identity is relevant and potentially helpful to the defendant's defense and essential to a fair determination of the case. *Chapman, 209 Mont. at 66-67, 679 P.2d at 1215*. We held the informant in *Chapman* played such a primary role through his extensive and repeated involvement in setting up the sale and his presence and involvement at the time of the sale of drugs to an undercover agent, and the district court erred in not compelling the State to disclose the informant's identity.

[*P21] ***HN7***[↑] On the other hand, this Court has declined to compel the disclosure of an informant's identity in circumstances when the informant did not play a continuous, active, and primary role in the alleged crime. In *State v. McLeod*, the defendant **[****13]** sought the identity of an informant who arranged a drug sale between the defendant and an undercover agent. While present at the sale, the record did not show the informant played an active or primary role in the transaction. The defendant argued he needed the testimony of the informant to support an entrapment defense. ***HN8***[↑] We held "[m]ere conjecture or supposition about the possible relevancy of the informant's testimony is insufficient to warrant disclosure. . . . The defendant must show the informant's testimony would significantly aid in establishing an asserted defense." *State v. McLeod, 227 Mont. 482, 487, 740 P.2d 672, 675 (1987)* (quoting **[**24]** *United States v. Kerris, 748 F.2d 610, 614 (11th Cir. 1984))* (alterations in original). This Court held the defendant did not meet his burden of showing the informant would be a material witness in supporting an entrapment defense and failure to disclose the identity of the informant did not infringe on the defendant's constitutional rights. *McLeod, 227 Mont. at 488, 740 P.2d at 675*.

[*P22] ***HN9***[↑] In the *Kerris* decision we relied on in *McLeod*, the Eleventh Circuit explained there are two primary factors in weighing whether the identity of an informant is necessary for a defendant to prepare his defense. The first is "the extent to which the confidential informant participated in the criminal activity." *Kerris, 748 F.2d at 613-14*. When the informant **[****14]** plays a "prominent part" in the criminal activity, *Roviaro, 353 U.S. at 64, 77 S. Ct. at 629*, or "a continuous, active and primary role in the alleged crime," *Chapman, 209 Mont. at 67, 679 P.2d at 1215*, the balance weighs heavily in favor of disclosure, *Chapman, 209 Mont. at 67, 679 P.2d at 1216*. In contrast, "[w]hen an informant's level of involvement in the criminal activity is that of minimal participation, this factor by itself will not compel disclosure." *Kerris, 748 F.2d at 614* (internal quotation omitted). The second factor "is the directness of the relationship between the defendant's asserted defense and the probable testimony of the informant. Mere conjecture or supposition about the possible relevancy of the informant's testimony is insufficient to warrant disclosure." *Kerris, 748 F.2d at 614*. *McLeod* **[***722]** and its progeny relied on this second factor to hold defendants had failed to meet their burdens to demonstrate the informants' testimonies were relevant to their asserted defenses. *See, e.g., DuBray, ¶ 113*; *State v. Ayers, 2003 MT 114, ¶¶ 55, 59, 315 Mont. 395, 68 P.3d 768*; *State v. Coates, 233 Mont. 303, 306-07, 759 P.2d 999, 1002 (1988)*; *Babella, 237 Mont. at 315-16, 772 P.2d at 878*.

[*P23] The State rightly does not attempt to defend the District Court's determination Walston's due process rights were not violated because the State was not going call the informant to testify. Rather, it rests its argument on *McLeod* and its progeny, where the informant either simply provided information or was present at the criminal

transaction **[****15]** but did not play a primary role in the criminal activity. Unlike the informant in those cases, the informant in this case played a continuous, active, and primary role in the alleged crime. "[I]t was evident from the face of the" information the confidential informant "was a participant in and material witness to the sale." *Roviaro, 353 U.S. at 65 n.15, 77 S. Ct. at 630 n.15*. The testimony of the informant, thus, is relevant to a material issue in the case. Apart from Walston, the confidential informant was the only eyewitness to and an active **[**25]** participant in the drug sale itself. While the officers who testified could hear some of the interaction between the confidential informant and Walston, they could not see what was happening and cross-examination of the officers was "hardly a substitute for an opportunity to examine the [woman] who had been nearest to [her] and took part in the transaction." *Roviaro, 353 U.S. at 64, 77 S. Ct. at 629*.

[*P24] Despite the informant's active, continuous, and primary role in the alleged crime, the State argues Walston has provided only mere conjecture or supposition about the possible relevancy of the informant's testimony and failed to show the informant's testimony would significantly aid in establishing an asserted defense. But Walston has established **[****16]** the relevancy of the informant's testimony by virtue of the fact the informant played a continuous, active, and primary role in the crime with which Walston was charged. The parties were never in dispute the informant was a continuous, active, and primary participant in the criminal activity. Thus, the informant's role in the criminal activity and ability to provide testimony relevant to a material issue in the case was not mere speculation or conjecture.

[*P25] Balanced against this is the public's interest in protecting the flow of information. ***HN10***[⬆] In Montana, this includes considerations of continuing operational effectiveness of the informant and whether revealing the identity of the informant would subject her to "substantial risk." *See § 46-15-324(3), MCA*. By the time of Walston's second trial, Detective Barnes admitted the confidential informant was no longer working with law enforcement and had moved out of the area. Therefore, revealing the identity of the informant would not affect her continuing operational effectiveness. The State also failed to provide sufficient evidence to demonstrate that revealing the identity of the informant would create a *substantial* risk to the informant. The only evidence **[****17]** provided was a single question posed to Detective Barnes whether revealing the informant's identity would "compromise" her safety. There was no testimony or evidence presented, however, to support this conclusion.[1] The State offered no evidence Walston had engaged in, encouraged, or threatened violence in the past; any of Walston's known associates engaged in violence; or even general **[**26]** evidence regarding the violent nature of the drug trade in Park County. *See Babella, 237 Mont. at 314-15, 772 P.2d at 877-78*. This single question with an affirmative response is wholly insufficient to demonstrate revealing the informant's identity would place her at substantial risk as required under *§ 46-15-324(3), MCA*, especially when balanced against the relevance of **[***723]** the testimony the informant could provide as an eye witness to and a participant in the alleged criminal activity. *Compare McLeod, 227 Mont. at 487-88, 740 P.2d at 675* (noting that the deputy sheriff had "explained how disclosure of the identity of the informant would interfere with the informant's continued operational effectiveness"); *Babella, 237 Mont. at 314-15, 772 P.2d at 877-78* (reciting testimony from law enforcement officers that informants' safety was at risk because the defendant

[1] Further undermining this argument, the State posited in its briefing before this Court that Walston may have known the identity of the confidential informant by the time of the second trial based on her attorney's detailed cross-examination of the officers. The State, thus, takes the incongruous position on appeal that Walston knew the identity of the confidential informant and yet the informant's safety may be jeopardized if the State revealed the identity of the informant to Walston.

had made threats against the informants, nine guns had been found in her residence, and the defendant's **[****18]** boyfriend was "in the habit of using violence for enforcement").

[*P26] This is not to say that any time an informant and the accused are the only two persons present during an alleged drug exchange, the informant's identity must be revealed. But here, considering all "the particular circumstances" of the case, *Roviaro, 353 U.S. at 62, 77 S. Ct. at 629*, including the relevance of the testimony from the confidential informant as an eye witness to and participant in the alleged criminal activity—in fact, the only eye witness and participant other than Walston—balanced against the meager record provided of the public's interest in withholding the confidential informant's identity, the District Court erred in denying Walston's motion to compel disclosure of the informant's identity. We reverse and remand the case.

CONCLUSION

[*P27] The District Court's order denying Walston's petition to disclose the identity of the confidential informant is reversed. Walston's conviction is vacated and the case is remanded for further proceedings consistent with this Opinion. If the State declines to disclose the identity of the confidential informant to Walston, the District Court must dismiss the charges against her.

/s/ INGRID GUSTAFSON

We concur:

/s/ MIKE **[****19]** McGRATH

/s/ LAURIE McKINNON

/s/ BETH BAKER

/s/ JAMES JEREMIAH SHEA

/s/ DIRK M. SANDEFUR

/s/ JIM RICE

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State v. Kaarma

Supreme Court of Montana

October 19, 2016, Submitted on Briefs; February 8, 2017, Decided

DA 15-0214

Reporter
2017 MT 24 *; 386 Mont. 243 **; 390 P.3d 609 ***; 2017 Mont. LEXIS 40 ****; 2017 WL 511880

STATE OF MONTANA, Plaintiff and Appellee, v. MARKUS HENDRIK KAARMA, Defendant and Appellant.

Subsequent History: Released for Publication March 22, 2017.

Rehearing denied by *State v. Kaarma, 2017 Mont. LEXIS 125 (Mont., Mar. 22, 2017)*

US Supreme Court certiorari denied by *Kaarma v. Montana, 138 S. Ct. 167, 199 L. Ed. 2d 40, 2017 U.S. LEXIS 5701 (U.S., Oct. 2, 2017)*

Writ denied by *Kaarma v. Mont. Fourth Judicial Dist. Court, 395 Mont. 520, 437 P.3d 108, 2019 Mont. LEXIS 24 (Mont., Jan. 8, 2019)*

Post-conviction proceeding at, Motion granted by *Kaarma v. State, 2019 Mont. LEXIS 394 (Mont., Aug. 23, 2019)*

Prior History: [****1] APPEAL FROM: District Court of the Fourth Judicial District, In and For the County of Missoula, Cause No. DC-2014-252. Honorable Ed McLean, Presiding Judge.

State v. Kaarma, 2016 Mont. LEXIS 109 (Mont., Feb. 18, 2016)

Core Terms

district court, juror, garage, use of force, voir dire, presumed, impartial, media, jury instructions, blood, prejudicial, occupied, training, argues, prospective juror, door, blood spatter, fair trial, questionnaire, inflammatory, abused, expert testimony, change of venue, instruct a jury, elicited, spatter, articles, shooting, velocity, assault

Case Summary

Overview

HOLDINGS: [1]-The district court did not err by instructing the jury on justifiable use of force in defense of a person under *Mont. Code Ann. § 45-3-102* because defendant had proposed jury instructions for defense of self, he elicited expert testimony on his state of mind and "imminent fear" he felt standing at the garage, and elicited testimony regarding when it might be reasonable to use deadly force in defense of self; [2]-While publicity surrounding the case was significant, it was not so inflammatory or so prejudicial that a community member could not ignore it or that it invited prejudgment of defendant's culpability significant enough to grant a change of venue; [3]-The district court did not err in declining to remove a prospective juror for cause based on her marriage to a former police officer; the juror was very clear that she would render her decision impartially.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion

HN1[] **Standards of Review, Abuse of Discretion**

A district court abuses its discretion if it acts arbitrarily without conscientious judgment or exceeds the bounds of reason resulting in substantial injustice.

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion

Criminal Law & Procedure > Trials > Judicial Discretion

Criminal Law & Procedure > Trials > Jury Instructions

Criminal Law & Procedure > Appeals > Reversible Error > Jury Instructions

HN2[] **Standards of Review, Abuse of Discretion**

The Montana Supreme Court reviews a district court's decisions regarding jury instructions for an abuse of discretion. The standard of review of jury instructions in criminal cases is whether the instructions, as a whole, fully and fairly instruct the jury on the law applicable to the case. A 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.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Jury Trial

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Venue

HN3[] **Criminal Process, Right to Jury Trial**

The Montana Supreme Court reviews for abuse of discretion a trial court's ruling on a motion for change of venue. *Mont. Code Ann. § 46-13-203(1)*. 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.

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

HN4[] **Jurisdiction & Venue, Pretrial Publicity**

For a court to presume that a defendant was prejudiced by pretrial publicity, the defendant must demonstrate that an irrepressibly hostile attitude pervades the jury pool or that the complained-of publicity has effectively displaced the judicial process and dictated the community's opinion as to the defendant's guilt or innocence. A court can only find presumed prejudice in extreme circumstances amounting to a circus atmosphere or lynch mob mentality. The bar is very high to prove this assertion.

Criminal Law & Procedure > ... > Challenges for Cause > Appellate Review > Standards of Review

HN5[] **Appellate Review, Standards of Review**

The Montana Supreme Court reviews for abuse of discretion a district court's denial of a challenge for cause of a prospective juror. When reviewing challenges for cause, a court abuses its discretion if it fails to excuse a prospective juror whose actual bias is discovered during voir dire or whose

statements raise serious doubts about the juror's ability to be fair and impartial. Errors in the jury selection process are structural; therefore, reversal is required if the district court abused its discretion by denying the defendant's challenge for cause, the defendant uses a preemptory challenge to remove the juror, and the defendant used all of his preemptory challenges.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

Evidence > Admissibility > Character Evidence

HN6[] **Abuse of Discretion, Evidence**

The Montana Supreme Court reviews a district court's evidentiary rulings for abuse of discretion. This includes the admissibility of character evidence.

Criminal Law & Procedure > Trials > Judicial Discretion

Evidence > Relevance > Relevant Evidence

HN7[] **Trials, Judicial Discretion**

A district court has broad discretion to determine whether evidence is relevant and admissible.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Witnesses

Evidence > Admissibility > Expert Witnesses

HN8[] **Abuse of Discretion, Witnesses**

A district court has great latitude in ruling on the admissibility of expert testimony, and the ruling will not be disturbed without a showing of abuse of discretion.

Criminal Law & Procedure > Defenses > Self-Defense

HN9[] **Defenses, Self-Defense**

Mont. Code Ann. § 45-3-102 justifies a person to use force against another when the person reasonably believes that the conduct is necessary for self-defense against another's imminent use of unlawful force. That person is only justified to use force likely to cause death or serious bodily harm if the person reasonably believes it is necessary to prevent imminent death or serious bodily harm or to prevent a forcible felony.

Criminal Law & Procedure > Defenses > Defense of Others

Criminal Law & Procedure > Defenses > Self-Defense

HN10[] **Defenses, Defense of Others**

Mont. Code Ann. § 45-3-103 justifies a person to use force against another when the person reasonably believes it is necessary to prevent or terminate the other person's unlawful entry into or attack upon an occupied structure. That person may be justified to use force likely to cause death or serious bodily injury if, after entry is made or attempted into the occupied structure, the person reasonably believes force is necessary to prevent an assault upon himself or another in the structure, or the person reasonably believes that the force is necessary to prevent the commission of a forcible felony in the occupied structure.

Criminal Law & Procedure > Defenses > Justification

HN11[] **Defenses, Justification**

Justifiable use of force, where a defendant admits to the act but seeks to justify, excuse, or mitigate it,

is an affirmative defense. The initial burden is on the defendant to produce evidence of justifiable use of force.

Criminal Law & Procedure > Defenses > Burdens of Proof

Evidence > Burdens of Proof > Proof Beyond Reasonable Doubt

Criminal Law & Procedure > Defenses > Justification

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

HN12[] **Defenses, Burdens of Proof**

Once a defendant offers justifiable use of force evidence, the State has the burden to prove beyond a reasonable doubt the defendant's actions were not justified. *Mont. Code Ann. § 46-16-131*. In order to meet the initial burden of production, a defendant must do more than give notice of intention to use the defense. *Mont. Code Ann. § 46-16-131*.

Criminal Law & Procedure > Defenses > Burdens of Proof

Criminal Law & Procedure > Defenses > Justification

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Theory of Defense

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Use of Particular Evidence

HN13[] **Defenses, Burdens of Proof**

A defendant is not bound to rely on his or her affirmative defense proposals at trial. If the defense fails to present sufficient evidence regarding justifiable use of force, the defense fails. However, a district court must instruct the jury on theories and issues that are supported by evidence presented at trial.

Criminal Law & Procedure > Defenses > Justification

HN14[] **Defenses, Justification**

Once a defendant offers justifiable use of force evidence, the State's burden is to prove his actions were not justified. *Mont. Code Ann. § 46-16-131*.

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Use of Particular Evidence

HN15[] **Standards of Review, Abuse of Discretion**

A district court must instruct a jury on theories and issues that are supported by evidence presented at trial; therefore, when conflicting evidence is presented, the district court must provide jury instructions on both theories supported by the evidence. A district court does not abuse its discretion in giving an instruction if it is supported by either direct evidence or some logical inference from the evidence presented.

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Use of Particular Evidence

HN16[] **Particular Instructions, Use of Particular Evidence**

A trial judge is under a duty to instruct the jury on every issue or theory finding support in the evidence, and the duty is discharged by giving instructions which accurately and correctly state the law applicable in a case.

Criminal Law & Procedure > Trials > Judicial Discretion

Criminal Law & Procedure > Trials > Jury Instructions

HN17[] **Trials, Judicial Discretion**

A district court is entitled to broad discretion formulating and approving jury instructions.

Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review

Criminal Law & Procedure > Appeals > Reviewability > Waiver

HN18[] **Reviewability, Preservation for Review**

The Montana Supreme Court will not address either an issue raised for the first time on appeal or a party's change in legal theory.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Jury Trial

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

Criminal Law & Procedure > Jurisdiction & Venue > Venue

HN19[] **Criminal Process, Right to Jury Trial**

A prosecutor must file criminal charges in the county where the defendant committed the offense, and the trial must take place in the same county unless otherwise provided by law. *Mont. Code Ann. § 46-3-111(1)*. The Montana and United States Constitutions guarantee a defendant a right to a fair trial by an impartial jury. *Mont. Const. art. II, §§ 17, 24*; *U.S. Const. amend. VI*. Accordingly, Montana law provides that if in the county in which prosecution is pending the district court finds there exists such prejudice that a fair trial cannot be had in the county, then the court is required to transfer the case to another county, direct that a jury be selected from another county, or take any other action designed to ensure that a fair trial may be had. *Mont. Code Ann. § 46-13-203(1), (2)*. Extensive publicity alone is not sufficient. Informed jurors are not biased jurors.

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

HN20[] **Jurisdiction & Venue, Pretrial Publicity**

Presumed prejudice is found where pretrial publicity is so pervasive and prejudicial that a court cannot expect to find an unbiased jury pool in the community. In order to establish presumptive prejudice, a defendant must show that an irrepressibly hostile attitude pervades the community and that the publicity dictates the community's opinion as to guilt or innocence. Stated otherwise, the defendant must show that the publicity is inflammatory and the publicity actually did inflame the prejudice of the community so that no unbiased jury could be found.

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

HN21[] **Jurisdiction & Venue, Pretrial Publicity**

Inflammatory publicity is that which community members cannot ignore and invites prejudgment of a defendant's culpability.

Criminal Law & Procedure > Juries & Jurors > Voir Dire > Individual Voir Dire

Criminal Law & Procedure > Jurisdiction & Venue > Pretrial Publicity

HN22[] **Voir Dire, Individual Voir Dire**

Individual voir dire is available to assess each potential juror for actual prejudice; by definition, it does not address the issues raised regarding presumed prejudice. The bar facing a defendant seeking to prove presumed prejudice is extremely high. The principle of presumed prejudice is rarely applicable and as such is reserved for extreme situations.

Criminal Law & Procedure > ... > Challenges for Cause > Bias & Impartiality > Actual & Implied Bias

Criminal Law & Procedure > Juries & Jurors > Challenges for Cause > Determinations

HN23[] **Bias & Impartiality, Actual & Implied Bias**

In a criminal trial, a party may challenge a prospective juror based on the juror's inability to be impartial or act without prejudice. *Mont. Code Ann. § 46-16-115(2)(j)*. In reality, few people are entirely impartial regarding criminal matters. Therefore, a district court must make a determination, based on the totality of the circumstance, whether a juror can convincingly affirm her ability to lay aside any misgivings and fairly weigh the evidence. If the juror cannot, the district court must remove the juror for cause.

Criminal Law & Procedure > Juries & Jurors > Challenges for Cause > Bias & Impartiality

HN24[] **Challenges for Cause, Bias & Impartiality**

The mere fact that a prospective juror is connected with law enforcement does not, without more, necessitate a finding that he or she would not be an impartial juror.

Criminal Law & Procedure > Juries & Jurors > Voir Dire

HN25[] **Juries & Jurors, Voir Dire**

A district court is in the best position to judge the credibility of potential jurors.

Evidence > Admissibility > Character Evidence

HN26[] **Admissibility, Character Evidence**

Generally, evidence of a person's character is not admissible for the purpose of proving action in conformity therewith on a particular occasion. Mont. R. Evid. 404(a). However, the character of an accused may be rebutted by the prosecution when the accused offers evidence of a pertinent trait. Mont. R. Evid. 404(a)(1). It is axiomatic that when a defendant first offers evidence of good character, the State may then present rebuttal evidence of bad character.

Criminal Law & Procedure > Trials > Examination of Witnesses > Cross-Examination

Evidence > ... > Examination > Cross-Examinations > Scope

HN27[] **Examination of Witnesses, Cross-**

Examination

If a defendant raises an issue when cross-examining a witness, the prosecution may re-examine the witness to elaborate and explain what is already in evidence.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Witnesses

Evidence > Admissibility > Expert Witnesses

HN28[] **Abuse of Discretion, Witnesses**

A district court has great latitude in ruling on the admissibility of expert testimony, and the ruling will not be disturbed without a showing of abuse of discretion.

Evidence > ... > Lay Witnesses > Opinion Testimony > Helpfulness

Evidence > ... > Lay Witnesses > Opinion Testimony > Personal Perceptions

Evidence > ... > Testimony > Expert Witnesses > Qualifications

Evidence > Admissibility > Expert Witnesses > Helpfulness

HN29[] **Opinion Testimony, Helpfulness**

Mont. R. Evid. 701 authorizes a lay witness to give an opinion, which is based on the witness's perception, and is helpful for a clear understanding of the witness's testimony or a fact in issue. Mont. R. Evid. 702 governs expert testimony. Expert witnesses use their scientific, technical, or other specialized knowledge to assist the fact finder in understanding evidence or determining facts. Expertise is based on knowledge, skill, experience, training, or education. Professional persons, such as detectives, firefighters, paramedics, doctors, and dentists, can testify under either Rule 701 or 702; however, their testimony must comply with each rule accordingly.

Evidence > ... > Lay Witnesses > Opinion Testimony > Personal Perceptions

HN30[] **Opinion Testimony, Personal Perceptions**

Montana jurisprudence allows and the Montana Supreme Court condones the practice of a police officer testifying as a lay witness under Mont. R. Evid. 701, to the officer's perceptions and conclusions based on extensive experience and training. However, if testimony crosses from lay to expert testimony, the witness must be recognized as an expert by the court or error occurs. Testimony offered beyond the scope of Rule 701 is expert testimony and should not be admitted as lay testimony.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Definition of Harmless & Invited Error

Criminal Law & Procedure > Appeals > Reversible Error > Structural Errors

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Evidence

HN31[] **Harmless & Invited Error, Definition of Harmless & Invited Error**

In order to determine if an alleged error prejudiced a criminal defendant's right to a fair trial, the Montana Supreme Court has adopted a two-part test. The first step is to determine if the error was structural or trial error. Structural error usually affects the framework of the trial, precedes the actual trial, and is presumptively prejudicial. Trial error usually occurs during the trial's presentation

of evidence and is not presumptively prejudicial. This type of error is subject to review under the harmless error statute, *Mont. Code Ann. § 46-20-701(1)*.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Evidence

HN32[] **Harmless & Invited Error, Evidence**

Trial error occurs during the presentation of evidence. Under *Mont. Code Ann. § 46-20-701(1)*, a reviewing court must determine if the error was harmless or prejudicial thus necessitating reversal. The reviewing court must determine if there is a reasonable possibility that the inadmissible evidence might have contributed to the defendant's conviction. In order to determine this, the court uses a "cumulative evidence" test. Inadmissible evidence will not be found prejudicial so long as the jury was presented with admissible evidence that proved the same facts as the tainted evidence proved. This presented evidence must be admissible and of the same quality of the tainted evidence such that there was no reasonable possibility that it might have contributed to the defendant's conviction. This is particularly imperative where the inadmissible evidence goes to the proof of an element of the crime charged.

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For Appellee: Timothy C. Fox, Montana Attorney General, Jonathan M. Krauss, Assistant Attorney General, Helena, Montana; Kirsten H. Pabst, Missoula County Attorney, Andrew Paul, Jennifer Clark, Karla Painter, Deputy County Attorneys, Missoula, Montana.

Judges: MIKE McGRATH. We Concur: MICHAEL E WHEAT, LAURIE McKINNON, BETH BAKER, JIM RICE. Chief Justice Mike McGrath delivered the Opinion of the Court.

Opinion by: Mike McGrath

Opinion

[*614] [**245]** Chief Justice Mike McGrath delivered the Opinion of the Court.

[*P1] Markus Hendrik Kaarma (Kaarma) appeals from his December 17, 2014 deliberate homicide conviction by a jury. We affirm.

[*P2] We restate the issues on appeal as follows:

Issue One: Did the District Court abuse its discretion by instructing the jury on justifiable use of force in defense of a person?

Issue Two: Did the District Court abuse its discretion when it denied Kaarma's motions to change venue based on pretrial publicity?

*Issue Three: Did the District Court abuse its discretion when **[****2]** it declined to remove a prospective juror for cause based on her marriage to a former police officer?*

Issue Four: Did the District Court abuse its discretion when it admitted evidence of Kaarma's prior assault on Pflager?

Issue Five: Did the District Court abuse its discretion when it allowed lay opinion testimony regarding blood spatter evidence?

FACTUAL AND PROCEDURAL BACKGROUND

[*P3] In April 2014, the Missoula, Montana, home Kaarma and his partner Janelle Pflager (Pflager) shared with their infant son was burglarized two times. Each time the burglar entered the garage through the partially open garage door. Concerned about safety, Kaarma and Pflager installed security cameras in and around their garage, changed how they parked their cars, started locking the doors to the house, created a

perimeter to discourage entrance into the garage, encouraged their neighbors to do the same, and placed a purse with identifying information in the garage. Kaarma was vocal about **[**246]** his anger regarding the burglaries and his perception that the police were not "dealing with the situation." Several witness testified that Kaarma told them he was "up the last three nights with a shotgun wanting to kill some kids," **[****3]** that "he was going to shoot [the burglars]," and "he was not kidding, [the witnesses] were going to see this on the news." Witnesses testified that Pflager knew the burglars would come back because "we are going to bait them," and that their guns were loaded. Kaarma and Pflager testified to "living in fear" about the burglaries and decided to be "a little proactive."

[*P4] In the early morning hours of April 27, 2014, Kaarma and Pflager were at home. Pflager left the garage door partially open to air out after smoking a cigarette. While inside the home, Kaarma and Pflager saw on the security camera an intruder enter their attached garage. The intruder was well into the garage and "jiggling" the car handles. Kaarma took his shotgun, walked out the front door of the home, turned and stood in front of the partially open garage door. Kaarma testified that he shouted into the garage and a voice or "metal on metal" sound came from inside the garage. He testified he thought he was "going to die," then "aimed high," fumbled with the shotgun, and discharged four shots into his garage in a sweeping motion from right to left. Shotgun pellets sprayed the inside garage wall, and several penetrated the **[****4]** home causing damage. The intruder was shot twice, once in the arm and once in the head. The intruder, later **[***615]** identified as Diren Dede, died as a result of his injuries.

[*P5] Kaarma was charged with deliberate homicide. A trial was conducted in Missoula County beginning on December 1, 2014. The jury found Kaarma guilty of deliberate homicide. On February 12, 2015, the District Court sentenced Kaarma to seventy years in the Montana State Prison. Kaarma appeals. Additional facts specific to Kaarma's arguments are included below.

STANDARDS OF REVIEW

[*P6] All of the issues raised by Kaarma invoke an application of the abuse of discretion standard. *HN1*[↑] "A district court abuses its discretion if it acts arbitrarily without conscientious judgment or exceeds the bounds of reason resulting in substantial injustice." *Ammondson v. Northwestern Corp., 2009 MT 331, ¶ 30, 353 Mont. 28, 220 P.3d 1*.

[*P7] *HN2*[↑] We review a district court's decisions regarding jury instructions for an abuse of discretion. *Ammondson, ¶ 30*. 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*. **[**247]** The district court has broad discretion in formulating jury instructions. *State v. Spotted Eagle, 2010 MT 222, ¶ 6, 358 Mont. 22, 243 P.3d 402*. To constitute reversible error, any **[****5]** mistake in instructing the jury must prejudicially affect the defendant's substantial rights. *Spotted Eagle, ¶ 6*.

[*P8] *HN3*[↑] We review for abuse of discretion a trial court's ruling on a motion for change of venue. *Section 46-13-203(1), MCA*; *State v. Devlin, 2009 MT 18, ¶ 15, 349 Mont. 67, 201 P.3d 791*. In exercising its discretion, the court is bound to uphold the defendant's constitutional right to a trial by an impartial jury. *State v. Kingman, 2011 MT 269, ¶ 40, 362 Mont. 330, 264 P.3d 1104*. The burden to demonstrate an abuse of discretion is on the party seeking reversal of an unfavorable ruling. *Devlin, ¶ 15*.

[*P9] *HN4*[↑] For a court to presume the defendant was prejudiced by pretrial publicity, a defendant must demonstrate that "an irrepressibly

hostile attitude pervades the jury pool or that the complained-of publicity has effectively displaced the judicial process and dictated the community's opinion as to the defendant's guilt or innocence." *Kingman, ¶ 32*. A court can only find presumed prejudice in extreme circumstances amounting to "a circus atmosphere or lynch mob mentality." *Kingman, ¶ 32*. The bar is very high to prove this assertion. *Kingman, ¶ 32*.

[*P10] *HN5*[↑] We review for abuse of discretion a district court's denial of a challenge for cause of a prospective juror. *State v. Allen, 2010 MT 214, ¶ 20, 357 Mont. 495, 241 P.3d 1045*. When reviewing challenges for cause, a court abuses its discretion if it fails to **[****6]** excuse a prospective juror whose actual bias is discovered during voir dire or whose statements raise serious doubts about the juror's ability to be fair and impartial. *State v. Heath, 2004 MT 58, ¶ 7, 320 Mont. 211, 89 P.3d 947*; *Allen, ¶ 25*. Errors in the jury selection process are structural; therefore, reversal is required if the district court abused its discretion by denying the defendant's challenge for cause, the defendant uses a preemptory challenge to remove the juror, and the defendant used all of his preemptory challenges. *Heath, ¶ 7*.

[*P11] *HN6*[↑] 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 254-55, 947 P.2d at 489-90*; *accord State v. MacGregor, 2013 MT 297, ¶ 44, 372 Mont. 142, 311 P.3d 428*. *HN7*[↑] A district court has broad discretion to determine whether evidence is relevant and admissible. *State v. Duffy, 2000 MT 186, ¶ 43, 300 Mont. 381, 6 P.3d 453*.

[*P12] *HN8*[↑] The district court has great latitude in ruling on the admissibility **[**248]** of expert testimony, and the ruling will not be disturbed without a showing of abuse of discretion. *State v. Stout, 2010 MT 137, ¶ 59, 356 Mont. 468, 237 P.3d 37*.

[***616] DISCUSSION

[*P13] *Issue One: Did the District Court abuse its discretion by instructing the jury on justifiable use of force in defense of a person?*

[*P14] Prior to trial Kaarma notified the court and State he planned to rely on the affirmative defenses of "justifiable use of force in defense **[****7]** of self, others, [and] home," and proposed jury instructions regarding the same. Kaarma claimed self-defense to the officers responding to the shooting. During his opening statement, Kaarma's attorney argued Kaarma shot because "in his mind he's going to get attacked." Kaarma testified he "believed his life was threatened and he was going to get attacked," and that he was "fearful, concerned, and angry." The defense provided expert testimony regarding his state of mind and the "imminent fear that was occurring." Kaarma elicited testimony that a person may, depending on the circumstances, protect against a forcible felony in the home, as well as when the person feels his or her life is in danger. He elicited testimony from witnesses regarding the reasonableness of defending oneself.

[*P15] At the jury instruction settlement conference, Kaarma argued the only affirmative defense raised at trial was use of force in defense of an occupied structure and objected to the justifiable use of force in defense of a person and the use of force by aggressor jury instructions. He argued that *§ 45-3-102, MCA*, defense of person, requires a commensurate response to the nature of the threat, where defense of an occupied **[****8]** structure only requires the actor's reasonable belief that the use of force was necessary to terminate the unlawful entry. Counsel asserted the defendant "gets to pick which justifiable use of force [theory, he] wants to proceed under." The State objected, arguing Kaarma was not inside the occupied

structure when he used deadly force and therefore the defense of an occupied structure instruction does not apply.

[*P16] The District Court determined the State "has the right to have the justifiable use of force in defense of self" instruction given based on Kaarma's arguments that he was in fear he was about to be assaulted or killed outside of his home. Both defense of an occupied structure and defense of person jury instructions were given. The District Court directed jurors to look at the two types of defenses separately and determine which applied based on the elements of each.

[249] Discussion**

[*P17] Under Montana law a person is justified in the use of force in three primary situations: *§ 45-3-102, MCA* (defense of person), *-103* (defense of occupied structure), and *-104* (defense of other property—not applicable here).

[*P18] *HN9*[↑] *Section 45-3-102, MCA*, justifies a person to use force against another when the person reasonably believes that the conduct **[****9]** is necessary for self-defense against another's imminent use of unlawful force. That person is only justified to use force likely to cause death or serious bodily harm if the person reasonably believes it is necessary to prevent imminent death or serious bodily harm or to prevent a forcible felony.

[*P19] *HN10*[↑] *Section 45-3-103, MCA*, justifies a person to use force against another when the person reasonably believes it is necessary to prevent or terminate the other person's unlawful entry into or attack upon an occupied structure. That person may be justified to use force likely to cause death or serious bodily injury if, after entry is made or attempted into the occupied structure, the person reasonably believes force is necessary to prevent an assault upon himself or another in the structure, or the person reasonably believes that the force is necessary to prevent the commission of a forcible felony in the occupied structure.

[*P20] *HN11*[↑] Justifiable use of force, where a defendant admits to the act but seeks to justify, excuse, or mitigate it, is an affirmative defense. *State v. Erickson, 2014 MT 304, ¶ 25, 377 Mont. 84, 338 P.3d 598*. The initial burden is on the defendant to produce evidence of justifiable use of force. *Erickson, ¶ 25*.

[*P21] *HN12*[↑] Once a defendant offers justifiable use of force evidence, **[****10]** the State has the burden to prove beyond a reasonable doubt **[***617]** the defendant's actions were not justified. *Section 46-16-131, MCA*. In order to meet the initial burden of production, a defendant must do more than give notice of intention to use the defense. *State v. Daniels, 2011 MT 278, ¶¶ 15-16, 362 Mont. 426, 265 P.3d 623*; *State v. R.S.A., 2015 MT 202, ¶¶ 35-37, 380 Mont. 118, 357 P.3d 899*; *§ 46-16-131, MCA*.

[*P22] Kaarma contends he raised only justifiable use of force in defense of an occupied structure at trial and based on the evidence presented at trial only a justifiable use of force in defense of an occupied structure jury instruction should have been given. Kaarma concedes he did put the District Court and State on notice of his intent to use justifiable use of force in defense of a person, but asserts that is not enough to instruct the jury on that defense. Kaarma argues this was an abuse of discretion by the District Court, if not a violation of his right to control his defense pursuant to the *Sixth Amendment of the United States Constitution*. **[**250]** We disagree.

[*P23] *HN13*[↑] A defendant is not bound to rely on his or her affirmative defense proposals at trial. *Daniels, ¶ 16* (citing *City of Red Lodge v. Nelson, 1999 MT 246, ¶ 13, 296 Mont. 190, 989 P.2d 300*; *State v. Logan, 156 Mont. 48, 65, 473 P.2d 833, 842 (1970)*). If the defense fails to present sufficient evidence regarding justifiable use of force, the defense fails. *Daniels, ¶ 15*. However, the

district court must instruct the jury on theories and issues that are supported by evidence presented **[****11]** at trial. *State v. King, 2013 MT 139, ¶ 25, 370 Mont. 277, 304 P.3d 1*.

[*P24] The record is clear. During trial Kaarma argued that he shot into the garage, killing Dede, because of the "metal on metal" sound coming from the garage and that sound made him fear for his own life. Without any other evidence, Kaarma's own words gave rise to his justifiable use of force in defense of self-argument and the eventual jury instruction. Moreover, Kaarma proposed jury instructions for defense of self; he elicited expert testimony on his state of mind and "imminent fear" he felt standing at the garage, and elicited testimony regarding when it may be reasonable to use deadly force in defense of self. Kaarma gave notice that he planned to invoke both the affirmative defenses of justifiable use of force in defense of a person and defense of an occupied structure, and at trial he provided evidence to support both theories. *HN14*[↑] Once Kaarma offered justifiable use of force evidence, the State's burden was to prove his actions were not justified. *Section 46-16-131, MCA*.

[*P25] *HN15*[↑] The district court must instruct the jury on theories and issues that are supported by evidence presented at trial; therefore, when conflicting evidence is presented, the district court must provide jury instructions on both **[****12]** theories supported by the evidence. *King, ¶¶ 23-25*. A trial court does not abuse its discretion in giving an instruction if it is "supported by either direct evidence or some logical inference from the evidence presented." *Erickson, ¶ 35*; *State v. Hudson, 2005 MT 142, ¶ 17, 327 Mont. 286, 114 P.3d 210*.

[*P26] Kaarma argues upholding the jury instructions as given will override legislative intent. We are not convinced. Kaarma cites no Montana authority for his argument. Montana jurisprudence clearly holds that *HN16*[↑] "the trial judge is under a duty to instruct the jury on every issue or theory finding support in the evidence, and this duty is discharged by giving instructions which accurately and correctly state the law applicable in a case." *Erickson, ¶ 35*; *King, ¶ 25*. By instructing the jury based on the evidence, the District Court was upholding its duty.

[*P27] The instructions given were a full and fair instruction on the **[**251]** applicable law of the case. *HN17*[↑] The district court is entitled to broad discretion formulating and approving jury instructions. *Spotted Eagle, ¶ 6*. Here, the District Court provided jury instructions, which were supported by either direct evidence or some logical inference from the evidence presented at trial. *Erickson, ¶ 35*; *Hudson, ¶ 17*. As such, **[****13]** we find no error in the jury instructions. The District Court did not abuse its discretion.

[*P28] Kaarma also argues the District Court erred by declining to instruct the jury that, as a matter of law, burglary is a forcible felony. *HN18*[↑] This Court will not address either an issue raised for the first time on appeal or a **[***618]** party's change in legal theory. *State v. Weaselboy, 1999 MT 274, ¶ 16, 296 Mont. 503, 989 P.2d 836*. Kaarma clearly and unequivocally withdrew his proposed instruction that burglary is a forcible felony without objection. This issue, raised for the first time on appeal, is not properly before this Court.

[*P29] *Issue Two: Did the District Court abuse its discretion when it denied Kaarma's motions to change venue based on pretrial publicity?*

[*P30] Missoula County has a population of approximately 110,000 individuals with six major media outlets, including television, newspaper, and radio. It is asserted the local media published some 500 articles or stories on the Kaarma case. The media reported on the affidavit of probable cause, citing it was amended from the original three pages to a twenty-page affidavit and motion for leave to

file information. The media reported the new affidavit noted Kaarma's previous bad acts including road rage, his statements that **[****14]** he was "baiting these kids" and "that he would be glad to shoot a cop," suggested he had premeditated the murder, and that he was under the influence when the shooting occurred.

[*P31] A Deputy Missoula County Attorney was quoted as stating Kaarma "essentially trapped [Dede] in the garage." Other articles commented on Kaarma's alleged drug use, his "luring" of the victim into his garage, and compared him to a Minnesota man who committed unnerving homicides after luring two burglars into his basement. Local politicians publicly commented on the case, discussing the "castle doctrine" and that it would not protect Kaarma's actions. A former Montana Governor publicly stated that Kaarma intended to "entrap them" and that "the laws of Montana are not going to protect this guy." Offensive epithets were spray painted on his defense attorney's business, online comments were critical of Kaarma, some even called for his death, and threats against their persons were reported by Kaarma and Pflager.

[*P32] Articles regarding the case commonly referred to Dede as a victim, **[**252]** portrayed as beloved, and labeled the intrusion into Kaarma's garage as benign as opposed to a forcible felony. Dede's funeral and parents **[****15]** were covered in the media, and some fund drives were established to support his family.

[*P33] On July 18, 2014, Kaarma moved to change the trial venue based on presumed prejudice in the community, arguing voir dire would not prevent juror bias. The State argued that Kaarma failed to meet the burden required to presume prejudice in that the publicity surrounding the case was not so inflammatory or so prejudicial that an unbiased jury could not be found in Missoula County. The District Court denied the motion, finding Kaarma failed to meet the burden required for change of venue based on presumed prejudice. The District Court found the publicity had been "by all accounts, factual in nature," and that voir dire was the primary method for determining potential jurors' pretrial biases.

[*P34] On August 8, 2014, Kaarma moved to seal and close the pretrial proceedings on the admissibility of his prior bad acts pursuant to M. R. Evid. 404(b). The motion was unopposed. The District Court granted the motion and sealed the pretrial proceedings.

[*P35] On September 4, 2014, Kaarma filed a renewed request for change of venue, or alternatively suggested drawing the jury pool from Mineral County or use a jointly prepared jury questionnaire **[****16]** to determine the extent of actual prejudice in Missoula County. The motion was unopposed. The District Court denied the renewed motion holding the motion contained no new compelling legal basis to set aside its earlier order. However, the District Court granted Kaarma's request for a jointly prepared jury questionnaire to assess and remove jurors who, based on an already formed opinion, could not be impartial or fair at trial. The District Court indicated it was cognizant of its "prerogative and legal duty to protect Kaarma's right to a fair trial and impartial jury."

[*P36] On or about September 30, 2014, the jury questionnaires were mailed to 300 prospective jurors and 256 were returned. Based on the responses, 89 percent indicated they knew about Kaarma's case, 56 percent noted they had formed an opinion of his guilt or innocence, 42 percent said they would find it **[***619]** difficult to be impartial, and 26 percent indicated they would be unable to render a fair and impartial verdict.

[*P37] On November 19, 2014, Kaarma filed a second renewed request for venue change. The basis of this request was a recent media story regarding Kaarma's violent past of child and partner abuse, which most local media outlets **[****17]** ran. The District Court scheduled a hearing the

same day. The District Court denied the renewed motion for **[**253]** change of venue, granted Kaarma's motion for a protective order of the 911 tapes, and essentially put a gag order into effect. The District Court informed the parties it would be following the voir dire process closely and would consider a venue change in the future if a fair and impartial jury could not be found.

[*P38] The parties stipulated to excuse 51 prospective jurors for cause and the District Court excluded 37 more. Kaarma requested individual voir dire based on the publicity of the trial after the questionnaires were received. The District Court denied individual voir dire noting, "you can't say an informed juror is not qualified," but noting it was looking for jurors who could give Kaarma a "clean slate" and make a decision based only on the facts presented at trial.

[*P39] During voir dire, prospective jurors explained they had seen the media reports but would form their opinions based on the facts, were not concerned the defense tried to remove the case from Missoula County, and some even expressed criticism of the media's reporting on the case. The jury was selected and sworn **[****18]** in on December 2, 2014.

[*P40] During the trial, a media outlet printed an article on the "castle doctrine," which is a commonly used term for legislation that allows a homeowner to use self-defense and sometimes deadly force in defense of the owner's home or "castle." The District Court conducted individual voir dire of each juror and determined that none had read the article. One juror was excused based on public comments his wife had made regarding Kaarma's guilt. Additionally, a media outlet published a photo of a witness, which included several of the jurors. The District Court denied Kaarma's motion for a mistrial based on the photo.

Discussion

[*P41] *HN19*[↑] A prosecutor must file criminal charges in the county where the defendant committed the offense, and the trial must take place in the same county unless otherwise provided by law. *Section 46-3-111(1), MCA*; *State v. Adams, 190 Mont. 233, 235, 620 P.2d 856, 857 (1980)*. The Montana and United States Constitutions guarantee a defendant a right to a fair trial by an impartial jury. *Mont. Const. art. II, §§ 17*, *24*; *U.S. Const. amend. VI*. Accordingly, Montana law provides if in the county in which prosecution is pending the district court finds there exists "such prejudice that a fair trial cannot be had in the county," then the court is required to transfer the case to another county, **[****19]** direct that a jury be selected from another county, or take any other action designed to ensure that a fair trial may be had. *Section 46-13-203(1), (2), MCA*.

[*P42] Kaarma argues the District Court should have granted his motion **[**254]** for change of venue; that under Montana and federal law, the facts show prejudice should have been presumed (as opposed to actual prejudice) based on the significant publicity the case attracted in Missoula County. He argues Missoula's size and community characteristics alone prove presumed prejudice. Without support, he argues prejudice should be presumed within a smaller community because with a smaller jury pool no unbiased jury could be pulled. He argues Missoula County is a small community with around 111,800 individuals (citing *Skilling v. United States, 561 U.S. 358, 382, 130 S. Ct. 2896, 2915, 177 L. Ed. 2d 619 (2010)* (a community of 150,000 people was small)). Kaarma recites the news media circulation specifics and that some 500 news articles (from television, to print, to radio) were published covering his case. He asserts this number was exponentially larger than in some cases where presumed prejudice was found. *See Callahan v. Lash, 381 F. Supp. 827 (N.D. Ind. 1974)*.

[*P43] However, extensive publicity alone is not sufficient. Informed jurors are not biased jurors.

HN20[↑] Presumed prejudice is **[***620]** found where "pretrial publicity is so pervasive **[****20]** and prejudicial that we cannot expect to find an unbiased jury pool in the community." *Kingman, ¶ 21*. In order to establish presumptive prejudice the defendant must show that "an irrepressibly hostile attitude pervades the community" and that the publicity "dictates the community's opinion as to guilt or innocence." *Kingman, ¶ 24* (citing *United States v. Abello-Silva, 948 F.2d 1168, 1176 (10th Cir. 1991)*. Stated otherwise, the defendant must show that the publicity is inflammatory and the publicity actually did inflame the prejudice of the community so that no unbiased jury could be found. *Devlin, ¶ 17*.

[*P44] The seminal United States Supreme Court case on presumed prejudice, *Rideau v. Louisiana, 373 U.S. 723, 83 S. Ct. 1417, 10 L. Ed. 2d 663 (1963)*, found the district court abused its discretion by failing to grant a change of venue. *Rideau, 373 U.S. at 726, 83 S. Ct. at 1419*. There the defendant confessed to murder in police custody and his videotaped confession was broadcast three times over the local television station two weeks before trial. *Rideau, 373 U.S. at 724-25, 83 S. Ct. at 1418-19*. The Supreme Court reasoned that the confession was a "spectacle," had derailed due process, and "in a very real sense was his trial." *Rideau, 373 U.S. at 726, 83 S. Ct. at 1419*.

[*P45] In *Rideau*, "the people of Calcasieu Parish had been exposed repeatedly and in depth to the spectacle of Rideau personally confessing in detail to the crimes with which **[****21]** he was later to be charged." *Rideau, 373 U.S. at 726, 83 S. Ct. at 1419*. While it is true Kaarma experienced significant media coverage of his case, we do not **[**255]** agree that the media coverage was as significant and pervasive as the televised confession in *Rideau*. Although Kaarma acknowledged some of the alleged acts, he never confessed to committing the crime, nor was a confession released by the police and broadcast throughout the community.

[*P46] The nature of the media coverage was not so inflammatory or sensational that community sentiment was against him to the extent an unbiased jury could not be found. *HN21*[↑] Inflammatory publicity is that which community members could not ignore and "invites prejudgment of the defendant's culpability." *Kingman, ¶ 42*. Kaarma cites a long list of actions that inflamed the community and prejudiced it against him: the published prosecutor's comments about Kaarma's luring and trapping Dede in his garage; the charging affidavit's accusations; the articles published during the trial regarding his child abuse and domestic violence; the articles published indicating Kaarma was violent and a drug user; the jury pool questionnaire responses; community sympathy for Dede; and the sheer volume of articles regarding **[****22]** the case. However, none of these are so inflammatory as to invite prejudgment of Kaarma's guilt.

[*P47] Kaarma argues the publication of statements made by the prosecutors and law enforcement officers were inflammatory, citing *State ex rel. Coburn v. Bennett, 202 Mont. 20, 655 P.2d 502 (1982)*, in support. In *Coburn*, this Court held that a change of venue should have been granted based on inherent prejudice. *Coburn, 202 Mont. at 34, 655 P.2d at 509*. Coburn was charged with aggravated kidnapping and sexual intercourse without consent; bail was set at $100,000, then reduced to $15,000, which was posted and Coburn was released. *Coburn, 202 Mont. at 22, 655 P.2d at 503*.

[*P48] The media coverage in *Colburn* was sensational. The outrage in the community was clear: angry citizens marched on the courthouse; public meetings were held; community organizations were established; significant and widespread vandalism occurred; and threats were made against the Judge and Coburn. *Coburn, 202 Mont. at 22-30, 655 P.2d at 503-06*. Local news articles quoted some of the statements made by the sheriff, the county attorney, and a deputy county

attorney that were inflammatory and prejudicial to the defendant. *Coburn, 202 Mont. at 23-30, 655 P.2d at 503-07*. The statements included "he picked the wrong little girl," as well as citing that the Sheriff's reaction to the reduction in bail was "unprintable." *Coburn, 202 Mont. at 23, 31, 655 P.2d at 503, 507*. This Court determined the newspaper went beyond objective **[****23]** dissemination of information; instead it "inflamed an already angry **[***621]** populace." *Coburn, 202 Mont. at 30-31, 655 P.2d at 507*.

[*P49] **[**256]** While comments made by the county attorney and sheriff in *Coburn* did stoke the inflammatory nature of the media coverage, the situation here is dramatically different. Most of the comments cited by local media came directly from the charging affidavit or court proceedings. A deputy county attorney commented, in a telephone interview with a local newspaper, that "[Kaarma] actually sought Dede out by essentially trapping him in the garage," adding that every gun instructor tells students to identify the target before firing. However, no one marched on the courthouse calling for judges to resign, no community organizations developed, nor were public meetings held. The public statements were not inflammatory.

[*P50] While publicity surrounding the case was significant, we do not agree that it was so inflammatory or so prejudicial that a community member could not ignore it or that it invited prejudgment of Kaarma's culpability significant enough to grant a change of venue. *Kingman, ¶ 42*. The District Court did not find community sentiment to be enraged against Kaarma like the community in *Coburn*. Montana case law **[****24]** does not require a finding of presumed prejudice based on the facts in this case.

[*P51] Kaarma raises two additional errors: the District Court's order sealing and closing the M. R. Evid. 404(b) proceedings and its denial of individual voir dire about the publicity of Kaarma's criminal history. The M. R. Evid. 404(b) proceedings were sealed in response to Kaarma's own unopposed motion and therefore he cannot now assert error. *See State v. Dewitz, 2009 MT 202, ¶ 53, 351 Mont. 182, 212 P.3d 1040*; *State v. Smith, 2005 MT 18, ¶ 10, 325 Mont. 374, 106 P.3d 553*; *State v. Harris, 1999 MT 115, ¶ 32, 294 Mont. 397, 983 P.2d 881* ("We will not put a district court in error for an action in which the appealing party acquiesced or actively participated."); *McDonald v. McNinch, 63 Mont. 308, 316, 206 P. 1096, 1098 (1922)* ("A party who participates in or contributes to an error cannot complain of it.").

[*P52] Significantly, Kaarma's argument regarding individual voir dire is misplaced. On appeal, Kaarma is asserting the District Court should have presumed prejudice based on the extent and nature of the publicity alone. However, *HN22*[↑] individual voir dire is available to assess each potential juror for actual prejudice; by definition it does not address the issues raised regarding presumed prejudice. *State v. Griego, 2016 MT 207, ¶ 25, 384 Mont. 392, 377 P.3d 1217*.

[*P53] The bar facing the defendant seeking to prove presumed prejudice is "extremely high." *Kingman, ¶ 24*; *Griego, ¶ 25*. The principle of presumed prejudice is "rarely applicable" and as such is reserved **[****25]** for "extreme situations." *Kingman, ¶ 24*.

[*P54] **[**257]** There are numerous protective tools available to a trial court when issues regarding community prejudice are presented. To ensure Kaarma received a fair trial here the District Court sealed and closed the M. R. Evid. 404(b) proceedings, ordered an enhanced jointly created jury questionnaire, issued a "gag" order and protective order, ensured liberal excusals on stipulation of the parties, and allowed a full two-day voir dire process. Additionally, the District Court conducted individual voir dire after the media published an article about the castle doctrine and excused a juror mid-trial whose spouse had been discussing the case.

[*P55] Kaarma has not proven the pretrial publicity was so pervasive and prejudicial that the District Court was required to change the venue. Publicity may be wide spread, but communities are rarely listening closely. The questionnaire tally showed almost 90% of polled potential jurors indicated they had heard of the criminal charges against Kaarma, and 26% had heard enough to be unable to render a neutral verdict. Obviously, these jurors were excused prior to the commencement of the trial. Here, the District Court, in response to Kaarma's **[****26]** assertions of prejudice, used the tools available to it, the questionnaire and voir dire. To ensure Kaarma received a fair trial the District Court's use of the questionnaire and voir dire was appropriate.

[*P56] This Court has noted:

> **[***622]** Living, as we do, in a society which is continuously inundated with news coverage by the print and broadcast media, it is doubtful that most members of the community will not share some knowledge of, or about, a locally high-profile crime, and the various persons allegedly involved in its commission or in its investigation. Given the inevitable conflict with the media's constitutional right of free speech, the public's constitutional right to know, and the accused's constitutional right to a fair trial, it remains the task of the district court, in such cases, to scrupulously examine the evidence supporting a motion for change of venue to insure that the jurors who will ultimately decide the guilt or innocence of the accused are fair minded and uninfluenced by what they may have seen, heard or read. That conclusion must necessarily be based upon not only the jurors' responses in voir dire, but also on a careful analysis of the quantity and content of the pretrial **[****27]** publicity. Each case is unique and must be decided on its own merits.

Devlin, ¶ 35.

[*P57] Kaarma failed to establish facts sufficient for the District Court to have found presumed prejudice. The publicity surrounding Kaarma's **[**258]** trial did not rise to the level of an extreme circumstance, amounting to a "circus atmosphere or lynch mob mentality." *Kingman, ¶ 24*. Kaarma has not reached the very high bar required to convince this Court that we should presume the community was so prejudiced against the defendant that a fair trial could not have been conducted.

[*P58] The District Court is entitled to great deference; it was in the best position possible to determine the nature and extent of prejudice against Kaarma in both the community and potential jurors. *Kingman ¶ 40*; *Stevenson v. Felco Indus. 2009 MT 299, ¶ 32, 352 Mont. 303, 216 P.3d 763*. The District Court, in considering the issue multiple times, did not act arbitrarily without the employment of conscientious judgment or exceed the bounds of reason. Accordingly, we hold that the District Court did not abuse its discretion when it denied Kaarma's motions for change of venue.

[*P59] *Issue Three: Did the District Court abuse its discretion when it declined to remove a prospective juror for cause based on her marriage to a former **[****28]** police officer?*

[*P60] Prior to trial the District Court ordered that "any prospective juror who is in law enforcement, or related to anyone in law enforcement in the following manner: spouse, child, or parent, will be automatically excused from the jury panel." Juror Kathryn Hughes' (Hughes) husband was both the former chief of police for Hamilton, Montana, and assistant chief of police for Missoula, Montana. She also knew a state witness and lead investigator on the case, Detective Guy Baker (Baker) as a young child. During the two days of voir dire Hughes affirmed that irrespective of her associations, her ability to be impartial was absolute, stating, "I think I have a fair mind and I can make up my own mind."

[*P61] Kaarma sought to remove Hughes for

cause, arguing the court order excusing jurors related to law enforcement clearly should have removed Hughes. Kaarma argued Hughes was too close to law enforcement, as even the District Court judge acknowledged that he personally knew Hughes and noted that her husband had been retired for twenty plus years.

[*P62] The State objected to the removal. It argued the purpose of automatically excusing jurors related to law enforcement personnel was because **[****29]** that juror might know officers or others working on the case and because of that relationship, they could not be impartial. The District Court did not excuse her stating, "let's see what you shake up on voir dire."

[*P63] During voir dire, Hughes stated "[Kaarma's] fighting for his life and we're—on the police investigation, I just believe it's going to be **[**259]** more accurate, true. Whereas the defendant, you know, he's going to fight for his life, so he's going to say something that's maybe not quite true because, you know, he's fighting for his life." Kaarma's attorney asked her "so you would treat him differently?" To which Hughes' responded "well, no, oh no, I wouldn't treat it differently. I'm just telling you that I think he's going to be—he would be more apt, maybe, to stretch the **[***623]** truth a little bit, maybe that's what I want to say. I would not treat it any differently, I'm just looking at his point of view." Kaarma again sought to remove Hughes for cause.

[*P64] The State again objected to the removal, arguing Hughes clearly stated she would not treat police and Kaarma differently. Further, she was allowed to consider the defendant's motivation to lie when determining Kaarma's credibility. The **[****30]** District Court declined to remove her for cause. Kaarma continued questioning Hughes, eliciting statements that she would "listen to both sides," "be very honest," and that "my mind is my mind." Kaarma did not renew his challenge for cause. Kaarma used a preemptory challenge to remove Hughes from the jury. Kaarma used all six of his preemptory challenges.

Discussion

[*P65] Kaarma argues the District Court abused its discretion by failing to remove Hughes for cause. He argues both that Hughes should have been removed based on her substantial ties to law enforcement and her expressed bias against Kaarma. *HN23*[↑] In a criminal trial, a party may challenge a prospective juror based on the juror's inability to be impartial or act without prejudice. *State v. Allen, 2010 MT 214, ¶ 25, 357 Mont. 495, 241 P.3d 1045*; *§ 46-16-115(2)(j), MCA*. This Court has noted, however, that "in reality, few people are entirely impartial regarding criminal matters." *Allen, ¶ 26*. Therefore, the District Court must make a determination, based on the totality of the circumstance, whether a juror can "convincingly affirm [her] ability to lay aside any misgivings and fairly weigh the evidence." *Allen, ¶ 26*. If the juror cannot, the District Court must remove the juror for cause.

[*P66] Kaarma relies on *Allen* to support **[****31]** removing Hughes for cause. In *Allen*, this Court determined that the District Court abused its discretion for failing to remove a juror for cause after the juror stated he would be partial to testimony by police officers involved in the case, whom he knew professionally and personally. *Allen, ¶¶ 27, 30*.

[*P67] The cases are distinguishable; the juror in *Allen* is not in a similar relationship to Hughes, the juror here. The prospective juror in *Allen* was very clear that he did not care if the defendant was guilty or not, wouldn't listen to all of the evidence, and if the trial went beyond two days all bets were off on how he would choose to decide the case. *Allen, [**260] ¶¶ 28-29*. Despite the juror's repeated refusal to uphold the law or his duty as a juror the District Court refused to remove him for cause. *Allen, ¶ 30*.

[*P68] This Court has repeatedly held that *HN24*[↑] "the mere fact that a prospective juror is connected with law enforcement does not, without more, necessitate a finding that he or she would not be an impartial juror." *State v. Lamere, 2005 MT 118, ¶ 17, 327 Mont. 115, 112 P.3d 1005* (citing *State v. Deschon, 2004 MT 32, ¶ 41, 320 Mont. 1, 85 P.3d 756*.) Here, Hughes was very clear, through her questionnaire and voir dire, that she would render her decision impartially, that she would listen to all of the evidence before **[****32]** deciding, and that she did not associate with any current law enforcement employees. While Hughes knew Baker as a child, she was not currently associated with him.

[*P69] The pretrial District Court order did not apply to Hughes. Her marriage to a former policeman was not specifically listed. Voir dire did not establish Hughes harbored actual bias nor did her statements raise serious doubts about her ability to be fair and impartial. *Heath, ¶ 7*; *Allen, ¶ 25*. *HN25*[↑] The district court is in the best position to judge credibility. *See State v. Ring, 2014 MT 49, ¶ 14, 374 Mont. 109, 321 P.3d 800*. The District Court did not abuse its discretion when it denied Kaarma's motion to remove juror Hughes for cause.

[*P70] *Issue Four: Did the District Court abuse its discretion when it admitted evidence of Kaarma's prior assault on Pflager?*

[*P71] In the State's case-in-chief, Pflager testified that she was afraid the burglars were going to harm her and her family; her primary concern was her child. When asked by the prosecutor why she left the garage door open considering her fear, she stated she assumed Kaarma would smoke a cigarette after her and close the garage door. Without prompting, Pflager further explained **[***624]** that Kaarma was "our protector," and he took that job very seriously. **[****33]** The State made no comment nor asked any questions regarding the statement.

[*P72] On cross-examination, the defense specifically elicited additional testimony from Pflager regarding Kaarma's character as it related to him being the "protector of the family." Pflager testified that Kaarma was "old school" and "very traditional." She elaborated stating "he understands . . . family is very traditional values, meaning that he's supposed to be able to protect me from any danger and from any threat, any bad thing."

[*P73] The State argued that this inquiry by the defense opened the door to Kaarma's character. Specifically, a prior assault by Kaarma on Pflager, which had been excluded by stipulation, could now be used to impeach Pflager's portrait of Kaarma as a protector. Kaarma objected **[**261]** based on remoteness, the high likelihood of prejudice under M. R. Evid. 403, and that in the two years since the assault, the family's circumstances had changed. The District Court determined the "door had been opened" but that the fact Kaarma had been charged with assault was too prejudicial, thus outweighing the probative value based on M. R. Evid. 403. The District Court allowed a limited inquiry into the act. On redirect, the State asked Pflager **[****34]** about Kaarma physically assaulting her, which Pflager confirmed.

Discussion

[*P74] *HN26*[↑] Generally, evidence of a person's character is not admissible for the purpose of proving action in conformity therewith on a particular occasion. M. R. Evid. 404(a); *State v. Dist. Court of the Eighteenth Judicial Dist., 2010 MT 263, ¶ 64, 358 Mont. 325, 246 P.3d 415*. However, the character of the accused may be rebutted by the prosecution when the defendant offers evidence of a pertinent trait. M. R. Evid. 404(a)(1). It is axiomatic that when a defendant first offers evidence of good character, the State may then present rebuttal evidence of bad character. *State v. Hayden, 2008 MT 274, ¶ 22, 345 Mont. 252, 190 P.3d 1091*; *State v. Gowan, 2000*

MT 277, ¶ 23, 302 Mont. 127, 13 P.3d 376; M. R. Evid. 404(a)(1).

[*P75] Here the State asked Pflager a question about leaving her garage door open, Pflager answered the question and stated Kaarma was the family's protector. It was Kaarma who then brought forth Pflager's testimony on cross-examination, encouraging her to expand on her statement that he was a protector and specifically asked her to expand on "what his role was in your family." *HN27*[↑] "If a defendant raises an issue when cross-examining a witness, the prosecution may re-examine the witness to elaborate and explain what is already in evidence." *Hayden, ¶ 22*; *Duffy, ¶ 43*.

[*P76] Kaarma elicited specific testimony from Pflager about his good character; he was the family's protector. The State then had the right **[****35]** to present other character evidence to rebut it. The District Court did not abuse its discretion.

[*P77] *Issue Five: Did the District Court abuse its discretion when it allowed lay opinion testimony regarding blood spatter evidence?*

[*P78] Detective Baker testified at trial regarding his personal observations of the blood patterns in Kaarma's garage and his interpretation about where Kaarma was standing when the shooting occurred. Baker testified that Dede's injured arm transferred blood to a vehicle in the garage when Dede crouched behind it. He inferred that Dede then stood up and Kaarma shot, hitting Dede, resulting in a blood spray pattern on the garage wall behind him. Specifically, Baker **[**262]** testified:

> [Baker:] I see a vent of blood transfer that's on the rear bumper of the Buick that was parked in the garage. It's on the driver's side.
>
> [Prosecutor:] When you say "blood transfer," what are you saying?
>
> [Baker:] There was a blood source that came in contact with the vehicle and left the blood in that position.
>
> [Prosecutor:] Go ahead and continue.
>
> [Baker:] There was also an event of high-speed spatter that's over this transfer. So blood acts consistent with physics, and force acting upon blood is consistent. **[****36]** So if **[***625]** you have low-speed spatter, for example, that would be spatter that's about 4 millimeters in size or greater and it would be caused by something that's traveling about up to 5 feet per second, like a punch.
>
> Medium velocity spatter would be a little smaller because as the velocity increases the size of spatter decreases. That would be an object traveling up to 20 feet per second, approximately. That would be something with a fulcrum, like say a hammer or baseball bat, that gives that added velocity at the end, and that blood spatter would be about 1 to 4 millimeters in size.
>
> Then you have high-speed spatter, which is greater than a hundred feet per second, so an object traveling greater than a hundred feet per second could be high-speed trauma, like a machinery accident. It could be bullets. It could be explosions. So the greater the velocity, the smaller the [spatter]. With a bomb, sometimes the spatter is mis[t]ed because of the greater velocity.
>
> Blood acts in connection with the velocity that acts upon it, and there's high-speed spatter on . . . [the back] of this Buick that would be consistent with a shotgun wound to the head being sustained by Diren at the back of this vehicle.

The testimony **[****37]** was elicited when the State sought to provide the jury with the location of Dede and Kaarma during the shooting.

[*P79] Baker, the Montana State Crime Lab firearm and tool mark examiner, Travis Spinder (Spinder), and an expert for the defense, Lance Martini (Martini) all provided consistent reports regarding where Kaarma was standing when the shooting occurred. Each agreed that Kaarma's

version of where he stood was irrefutable. Martini was disclosed as a defense expert and prepared an expert report, which Baker and Spinder both read prior to their testimony. However, Martini did not testify at trial.

[*P80] At trial, the State argued Baker based his opinions on his experience with crime scenes, training, and "common sense" perception based on his years as a police officer. Baker had been with the **[**263]** Missoula police department for almost 25 years, the last 14 as a police detective. He had participated in over 120 hours of homicide investigation training and 40 hours of shooting reconstruction training including blood spatter. He attended basic police training at the Montana Law Enforcement Academy, almost 2,300 hours of post-academy certified training, and obtained significant in-service training and **[****38]** experience through over 750 career cases.

[*P81] Kaarma objected multiple times during the testimony, asserting Baker was offering expert testimony as a lay witness and the defense did not secure a rebuttal witness, resulting in prejudice. The District Court heard arguments outside the presence of the jury on the issue and held Baker was offered as a lay witness, the State was not required to disclose him as an expert, and that he has "established his qualification to render an opinion on the blood spatter." Kaarma vigorously cross-examined Baker on his lack of education and training, elicited testimony that Baker was not sure what certain technical terms meant or what procedures and practices there were for testing blood at the crime scene, and blood samples in general.

Discussion

[*P82] *HN28*[↑] The district court has great latitude in ruling on the admissibility of expert testimony, and the ruling will not be disturbed without a showing of abuse of discretion. *State v. Stout, 2010 MT 137, ¶ 59, 356 Mont. 468, 237 P.3d 37*.

[*P83] Kaarma argues Baker should not have been allowed to testify on blood spatter based on his common sense and training; rather he testified as an expert regarding the scientific and technical aspects of blood spatter. Kaarma argues that Baker should **[****39]** have been disclosed as an expert; had the disclosure been made, the defense would have secured a rebuttal witness. Kaarma asserts the District Court abused its discretion. The State counters that Baker was disclosed as a lay witness, Baker had the experience and training to testify based on his own perception as to the blood patterns he personally observed as a lay witness, and Kaarma had the opportunity to cross-examine him. Therefore, his testimony was appropriate under M. R. Evid. 701.

[*P84] **[***626]** *HN29*[↑] M. R. of Evid. 701 authorizes a lay witness to give an opinion, which is "based on the [witness's] perception," and is helpful for a clear understanding of the witness's testimony or a fact in issue. *State v. Nobach, 2002 MT 91, ¶ 14, 309 Mont. 342, 46 P.3d 618*. M. R. Evid. 702 governs expert testimony. Expert witnesses use their "scientific, technical, or other specialized knowledge" to assist the fact finder in understanding evidence or determining facts. M. R. Evid. 702. Expertise is based on "knowledge, skill, experience, training, or **[**264]** education." M. R. Evid. 702. Professional persons such as detectives, firefighters, paramedics, doctors, and dentists can testify under either M. R. Evid. 701 or 702; however, their testimony must comply with each rule accordingly.

[*P85] *HN30*[↑] Montana jurisprudence allows and this Court has condoned the practice of a police officer **[****40]** testifying as a lay witness under M. R. Evid. 701, to the officer's perceptions and conclusions based on extensive experience and training. *Dewitz, ¶ 40*; *State v. Zlahn, 2014 MT 224, ¶ 33, 376 Mont. 245, 332 P.3d 247* (officer testifying about inferences drawn from extensive

experience dealing with criminals and administering gunshot residue testing); *State v. Frasure, 2004 MT 305, ¶ 17, 323 Mont. 479, 100 P.3d 1013* (officer testimony as to whether a criminal defendant possessed drugs with an intent to sell, based on their training and experience as to the methods used in the illicit drug trade); *Hislop v. Cady, 261 Mont. 243, 249, 862 P.2d 388, 392 (1993)* (officer testimony regarding the cause of an accident based on the officer's experience in accident investigation). *See also State v. Henderson, 2005 MT 333, ¶ 16, 330 Mont. 34, 125 P.3d 1132* (firefighter's testimony about "pour patterns" in analyzing cause of a fire).

[*P86] However, if testimony crosses from lay to expert testimony the witness must be recognized as an expert by the court or error occurs. Testimony offered beyond the scope of M. R. Evid. 701 is expert testimony and should not be admitted as lay testimony. *See Massman v. Helena, 237 Mont. 234, 242, 773 P.2d 1206, 1211 (1989)* (holding that a firefighter's testimony based on "specialized, technical knowledge" was beyond the scope of M. R. Evid. 701); *Nobach, ¶ 22* (holding a highway patrol officer's testimony about the effects of prescription drugs on the defendant's driving ability was expert opinion testimony under M. R. Evid. 702 and required **[****41]** the proper foundation); *Christofferson v. City of Great Falls, 2003 MT 189, ¶ 49, 316 Mont. 469, 74 P.3d 1021* (holding paramedics' testimony "clearly extends beyond the men's observations at the scene or a description of their actions, and into the realm of expert medical opinion.").

[*P87] Here, Baker's testimony was not proper under M. R. Evid. 701. While Baker's opinions were rationally related to his personal perceptions at the crime scene, they were based on his expertise and experience as a police detective. Baker's descriptions of high velocity versus low velocity blood spatter were expert testimony. As such Baker should have been noticed as an expert and the defense should have had the opportunity to challenge his qualifications as an expert. The District Court abused its discretion by allowing Baker to testify in this **[**265]** manner.

[*P88] *HN31*[↑] In order to determine if an alleged error prejudiced a criminal defendant's right to a fair trial, this Court has adopted a two-part test. *State v. Van Kirk, 2001 MT 184, ¶ 37, 306 Mont. 215, 32 P.3d 735*. The first step is to determine if the error was structural or trial error. *Van Kirk, ¶ 37*. Structural error usually affects the framework of the trial, precedes the actual trial, and is presumptively prejudicial. *Van Kirk, ¶¶ 38-39*. Trial error usually occurs during the trial's presentation of evidence and is not presumptively **[****42]** prejudicial. *Van Kirk, ¶ 40*. This type of error is subject to review under the harmless error statute, *§ 46-20-701(1), MCA*.

[*P89] Here, the District Court's abuse of discretion was *HN32*[↑] trial error as it occurred during the presentation of evidence. *Van Kirk, ¶ 40*. Therefore, under *§ 46-20-701(1), MCA*, we must determine if the error was harmless or prejudicial thus necessitating reversal. This Court must determine if there is a reasonable possibility that the inadmissible evidence might have contributed to Kaarma's conviction. *Van Kirk, ¶ 42*. In **[***627]** order to determine this we use a "cumulative evidence" test. *Van Kirk, ¶ 43*. Inadmissible evidence will not be found prejudicial so long as the jury was presented with "admissible evidence that proved the same facts as the tainted evidence proved." *Van Kirk, ¶ 43*. This presented evidence must be admissible and of the same quality of the tainted evidence such that there was no reasonable possibility that it might have contributed to the defendant's conviction. *Van Kirk, ¶ 44*. This is particularly imperative where the inadmissible evidence goes to the proof of an element of the crime charged.

[*P90] Here, Baker's testimony regarding the blood spatter was cumulative. The Montana State crime lab's expert **[****43]** witness, Spinder,

testified as to where Kaarma was standing when he shot into the garage. Further, Spinder testified that Martini's (Kaarma's expert) report was consistent with his own determination of where Kaarma was standing. Baker also testified that Spinder's theory was consistent with his own theory. Baker, Spinder, and Martini all agreed with Kaarma's version of the story as to where he was standing when he shot. There was no reasonable possibility that the inadmissible evidence might have contributed to a conviction, as qualitatively similar admissible evidence was given. *Van Kirk, ¶ 42*. Moreover, the blood spatter and the location of Kaarma were not central points in the trial and under these circumstances were not germane to the specific elements of the crime of deliberate homicide. *See § 45-5-102(1), MCA*.

[*P91] The record does not show that the error was prejudicial to Kaarma's defense. *Section 46-20-701(1), MCA*. The District Court **[**266]** abused its discretion when it allowed Baker to testify as an expert witness. However, we find that the error was harmless.

CONCLUSION

[*P92] The District Court did not abuse its discretion. The jury instructions given were a full and fair instruction on the applicable law of the case. The District Court **[****44]** was in the best position possible to determine the nature and extent of prejudice against Kaarma in both the community and potential jurors. We are satisfied that the District Court, in considering pretrial publicity, did not act arbitrarily without the employment of conscientious judgment or exceed the bounds of reason. Kaarma was unable to establish that the District Court should have presumed prejudice.

[*P93] The District Court's pretrial order removing jurors based on direct relationships with police employees did not apply to Hughes. Voir dire did not establish Hughes harbored actual bias nor did her statements raise serious doubts about her ability to be fair and impartial. The District Court was in the best position to judge her credibility.

[*P94] Kaarma opened the door to his good character; the State then had the right to present bad character evidence to rebut it.

[*P95] The District Court abused its discretion when it allowed Baker to testify as an expert witness. However, Kaarma's right to a fair trial was not prejudiced. We find that the error was harmless.

[*P96] In conducting this trial, the District Court did not act arbitrarily without conscientious judgment or exceed the bounds of reason resulting **[****45]** in substantial injustice. The District Court did not abuse its discretion.

[*P97] Affirmed.

/s/ MIKE McGRATH

We Concur:

/s/ MICHAEL E WHEAT

/s/ LAURIE McKINNON

/s/ BETH BAKER

/s/ JIM RICE

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