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STATE OF MONTANA
Case Number: DA 17-0347

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 17-0347

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ROBERT MATTHEW PAUL MITCHELL,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, The Honorable John A. Kutzman, Presiding

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STATEMENT OF THE ISSUES

1. Did the district court properly exercise its discretion when it excluded evidence of the teenaged victim's sexual orientation?

2. Did Appellant preserve his claim that the district court abused its discretion when it admitted into evidence the victim's writing concerning her victimization, when the victim identified the writing as hers, was available for cross-examination on her writing, and in lieu of reading her writing could have testified about the same things contained within the writing?

(a) If not, is plain error review warranted when Appellant has not argued plain error review is warranted?

(b) If so, does the claim result in reversible error?

3. Is the cumulative error doctrine applicable when Appellant has not established any error?

STATEMENT OF THE CASE

The State charged Appellant Robert Mitchell with three counts of Sexual Intercourse without Consent. Mitchell's cousin, K.S., is the victim. (D.C. Docs. 1-2, 111-12.) The State alleged digital penetration in Count I; vaginal penetration in Count II; and anal penetration in Count III. *Id.* The State asserted that K.S. was between the ages of about 8 and 12 when Mitchell committed the offenses. *Id.*

After the defense interviewed the victim shortly before trial, the State filed a motion in limine to prohibit Mitchell from introducing any evidence concerning K.S.'s sexual orientation. (D.C. Doc. 103, filed under seal in the district court.) The State relied upon this Court's decision in *City of Kalispell v. Miller*, 2010 MT 62, ¶ 14, 355 Mont. 379, 230 P.3d 792. Mitchell responded that K.S.'s father's discovery of her sexual orientation was admissible and relevant to show that K.S. had a motive to fabricate the allegations against Mitchell. (D.C. Doc. 105.) Neither the State nor defense counsel referenced Montana's Rape Shield Statute found at Mont. Code Ann. § 45-5-511(2).

After hearing the matter on the first day of trial the district court ruled that Mitchell could introduce evidence that K.S.'s father saw K.S.'s Facebook post, which was upsetting to him and made him angry, but could not disclose the specific nature of the post since it related to K.S.'s sexual orientation. (10/24/16-10/26/16 Transcript of Jury Trial [Tr. (1), Tr. (2), Tr. (3)] Tr. (1) at 18, 25.) After the jury verdict, Mitchell made an offer of proof on the merits of his motion. (Tr. (3) at 38-41.)

Mitchell also objected, on the grounds of foundation and best evidence, to the State's admission of a Facebook post that K.S. wrote concerning her disclosure of Mitchell's sexual abuse, why she did not disclose sooner, and her family members' reactions to her disclosure. (Tr. (2) at 77-84.) The district court

overruled the objection and admitted the written statement as State's Exhibit 11. (Tr. (2) at 84; State's Ex. 11, attached to Appellant's Br. as App. C.) Mitchell did not object to the exhibit on the grounds of hearsay.

The jury convicted Mitchell of Count II, and found Mitchell not guilty of Counts I and III. (Tr. (3) at 57; D.C. Doc. 129.) The district court sentenced Mitchell to 60 years in prison, with 20 years suspended. (D.C. Doc. 148, attached to Appellant's Br. As App. D.)

STATEMENT OF THE FACTS

I. Facts of the offense

At the time of trial, K.S. was a 15-year-old sophomore in high school living with her dad and stepmom in Great Falls. (Tr. (2) at 52-53.) Mitchell is K.S.'s older cousin. K.S. considered Mitchell to be one of her best friends. (Tr. (2) at 54.) Mitchell routinely babysat K.S. during her youth. (Tr. (2) at 54-55.)

K.S. did not move to Great Falls until she was in the sixth grade. Prior to that she lived in Box Elder on the Rocky Boy Reservation. *Id.* When K.S. was in the second or third grade, Mitchell started touching her vaginal area while he was also touching his penis. When he touched his penis, he would ejaculate. (Tr. (2) at 58-59.)

When K.S. was in the third or fourth grade, she was still living with her mother and was staying at the Townhouse Inn in Great Falls. Mitchell babysat her in the hotel room while the adults went out. K.S. recalled that while just the two of them were in the hotel room, Mitchell got up and latched the door. He came over to K.S. and said he wanted to try something new. K.S. was sitting on the bed. This was the first time that Mitchell penetrated K.S.'s vaginal area with his fingers. (Tr. (2) at 59.) K.S. repeatedly told Mitchell that he was hurting her. He told her to just wait. When Mitchell finally stopped, K.S. went to the bathroom. Her vaginal area stung. When K.S. wiped her vaginal area there was blood on the toilet paper. After this encounter, Mitchell penetrated K.S.'s vaginal area with his fingers too many times to count. (Tr. (2) at 60.)

In September and October 2012, K.S. was living at the Townhouse Inn in Great Falls with her mom. K.S. thought she was in the sixth grade then. Mitchell was staying with them in the hotel room. Once when the two of them were alone in the room, Mitchell told K.S. to get undressed because he wanted to do something. Mitchell came over to K.S., positioned himself, and penetrated her vagina with his penis. When Mitchell was done, they both got dressed. (Tr. (2) at 61.) After this incident, Mitchell penetrated K.S.'s vaginal area with his penis countless times. (Tr. (2) at 64.)

Sometime after this encounter, K.S. was living in a house in Great Falls behind Jimmy John's. Mitchell was babysitting K.S. and her younger sisters. Mitchell kept trying to get K.S. alone. K.S. decided to do some laundry. Mitchell followed her into the laundry room and told her to get undressed. Mitchell instructed K.S. to bend over the washer. Mitchell positioned himself behind K.S. and penetrated her anal area with his penis. Mitchell anally penetrated K.S. with his penis on about 10 other occasions. (Tr. (2) at 62-63.)

Every time Mitchell sexually molested K.S., he promised her that it would be the last time. For a while, K.S. believed him, but she slowly realized that Mitchell was not going to stop. K.S. hated what Mitchell was doing to her. K.S. began to struggle with depression and suicidal thoughts. K.S. hated her life. She frequently cut on her body. (Tr. (2) at 66.)

K.S. explained that her grandmother, Luella Swan, encouraged K.S. not to tell anyone about the things Mitchell had done to her. Ultimately, though, K.S. confided in her dad. (Tr. (2) at 67, 73.) Afterwards, Mitchell messaged K.S. on Facebook on several occasions. (Tr. (2) at 67; State's Ex. 10.) K.S. received the first message on January 16, 2015, about five days after K.S. confided in her dad. (Tr. (2) at 73.) Mitchell's message to K.S. stated: "I'm sitting. I don't know what's going on between us. All I know is you're my best friend, [K.S.], and I'll always love you." (Tr. (2) at 74.)

Mitchell's second message to K.S. stated: "Here talking to grandma. She told me what you told your dad. Call me later, please. I feel like dying. I'm crying right now. My heart dropped when I heard that. I'm sorry. I don't know what to say until we talk." (Tr. (2) at 74; State's Ex. 10.) In other messages, Mitchell implored K.S. to call him or text him. (Tr. (2) at 74-75; State's Ex. 10.) K.S. did not respond to any of the messages. (Tr. (2) at 76.)

At trial, the Stated admitted into evidence business records from the Townhouse Inn documenting instances where K.S.'s mother had stayed at the Townhouse Inn in Great Falls. (Tr. (1) at 334-38; State's Exs. 1-4.)

At the time of trial, defense witness Airianna, who is K.S.'s cousin, testified that she did not believe K.S. was trustworthy. Airianna did not want her cousin Mitchell to go to jail. (Tr. (1) at 345.) Airianna also testified that K.S. had multiple Facebook accounts using different names so she could keep "stuff" from her parents. (Tr. (1) at 350.) Airianna acknowledged that she was aware of an incident when Mitchell showed K.S. his penis. (Tr. (1) at 359.)

K.S.'s and Mitchell's grandmother, Luella, also testified on Mitchell's behalf. Luella gave her opinion that K.S. was not trustworthy. (Tr. (2) at 261-62.) Luella described K.S.'s and Mitchell's relationship to be that of best friends. (Tr. (2) at 264.) Luella explained that at the time K.S. disclosed Mitchell's sexual abuse to her dad, she was having issues with her dad. To Luella, K.S. seemed more

upset about the issues that caused her dad to be angry with her than Mitchell's sexual abuse of her. (Tr. (2) at 266.) After K.S.'s disclosure, Luella recalled thinking that she heard K.S. say something like "Robert didn't do it." (Tr. (2) at 267.) K.S. denied ever making such a statement. (Tr. (2) at 249.)

II. Facts related to the district court's evidentiary rulings

A. K.S.'s sexual orientation

On the first morning of trial, prior to jury selection, the district court addressed Mitchell's recently disclosed desire to introduce evidence of K.S.'s sexual orientation. Defense counsel explained that they had always known that K.S. disclosed the sexual abuse to her dad when her dad was angry with her over something he had learned from a Facebook post. But, when defense counsel interviewed K.S. a few days before trial, she explained that at the time she disclosed Mitchell's sexual abuse, her father was angry at her because:

> [H]e saw a particular message in her Facebook account from another girl saying that she loved the alleged victim. So, you've got a female here saying she loved the alleged victim.
>
> And the alleged victim said, well, at that time, I thought I loved her, too, and at least when my dad found this, I told my dad that I was in love with her, and that my orientation was bisexuality.
>
> Dad at that point, according to the alleged victim here, was livid, was very upset with her.

(Tr. (1) at 13-14.) Defense counsel elaborated:

> [I]t's really the theory of the case that the alleged victim had her back up against the wall and fabricated these allegations in order to get

cover for the topic she did not want to discuss, which was her bisexuality.

(Tr. (1) at 15-16.)

After considering both parties' positions, the district court ruled:

> All right. I am not going to let you tell the jurors that the fight with her dad was about her disclosing, at age 14, that she thought she was bisexual.
>
> I will let you tell them that she was in the middle of a fight with her dad about a Facebook message from another kid, and that is all the detail I will let you put in.
>
> I gather that she told you in the interview that he was very angry. You used the word livid. Livid is good. You can use the word livid. You can cross-examine her until your heart's content about how angry he was. What you cannot do is go into what he was angry about, other than it was a Facebook message from another kid. That's the ruling.

(Tr. (1) at 18.) Neither defense counsel nor the court cited to Montana's Rape Shield Statute, *Id.*[1]

Before the start of jury selection, defense counsel made a second attempt at persuading the district court to allow in evidence of K.S.'s sexual orientation. (Tr. (1) at 20.) The following exchange occurred between the court and defense counsel:

> THE COURT: What you're arguing is, he was mad at her about something sexual, so she needed something sexual to distract from that? That's where you're going?

[1] The district court did discuss the rape shield statute in addressing other evidence defense counsel wanted to introduce about the victim, but Mitchell has not raised that issue on appeal. (*See* Tr. (1) at 24-31.)

MR. GALLAGHER: Sexual—yes, because the sexual stuff is weighty, and it's big-time stuff, and it corresponds roughly with the other. And if we just talk about, well, is this Facebook, she was on Facebook too much and maybe her grades were sinking, so he was mad, you don't make up sexual allegations in that context.

(Tr. (1) at 20-21.)

During his opening statement, defense counsel made the following remarks:

The evidence is going to show that [K.S.] was somewhat obsessed with Robert as a child, and it will show that after moving to Great Falls a few years ago, she was communicating on Facebook with others.

And the evidence is also going to show that at some point her father found out or discovered these communications, and he was pretty ticked off.

And it will show at this point, that's when all of these allegations came up, and that she had lied to cover up some pretty serious issues that were going on in her life and that she still hasn't come clean to her father.

. . . .

The evidence is going to show that shortly after making these allegations, she also spoke with her grandmother; and in fact, discussed these serious issues going on in her life and seemed more concerned with those than the allegations that she made up against Robert.

. . . .

The evidence is going to show that these allegations were fabricated by a troubled girl in an effort to control and manipulate the people closest to her in order to cover up some issues that were welling to the surface in her own life.

(Tr. (1) at 331-33.)

During cross-examination, the following exchange occurred between defense counsel and K.S.:

Q. And you were fighting with your father at the time you made these allegations, correct?
A. Yes.
Q. He was quite angry with you on that particular evening that you disclosed the allegations against Robert, wasn't he?
A. Yes.
Q. And he was—when I say angry, what if I used a stronger term like livid? Do you know what the means?
A. No.
Q. Was he kind of upset with you or was he extremely angry?
A. He wasn't extremely angry. He was just upset.
Q. And he was—he was upset with you because of—he had looked at your Facebook page, hadn't he?
A. Yes.
Q. Okay. And there was something on that page that disturbed him; is that right?
A. Yes.
Q. And that caused your father to believe something, didn't it?
A. What do you mean?
Q. Him having seen what he saw, it caused him to believe something, correct?
A. Yeah.
Q. And that something upset him quite a bit; is that correct?
A. Yes.
Q. You didn't talk extensively with your father about that particular matter, did you?
A. No.
Q. And to this day, you still have not discussed that matter fully with your father, have you?
A. No.
Q. Instead, you made these allegations, and the focus shifted to these allegations; is that correct?
A. Yeah.
Q. And it was actually your father that asked you, did someone sexually abuse you; is that correct?
A. Yes.

Q. And that is when you said yes?
A. Yes.
Q. One of the reasons he asked you is why you were miserable, didn't he?
A. yes.
Q. And you told him that the reason why you were miserable is because of—what you're alleging Robert did, correct?
A. Yes.

(Tr. (2) at 110-12.)

During closing argument, defense counsel made the following remarks:

> She had these [Facebook] accounts for role playing and would keep that information from her dad, and what was on those Facebook accounts? We don't know for sure. We don't know, but we do know a couple of things. We know that she initially stated that there was some stuff that was kind of sexual in nature.
>
> And then when asked about that, she said, well, yeah, there was some stuff of a sexual nature on the Facebook accounts that she used for rule playing. And again, this was confirmed by Airianna. And we know that dad discovered the accounts and messages, and he was pretty angry. And I want to point out, this wasn't some minor issue or matter of role playing. It was a serious issue. And she told you, if you remember on the stand, that they didn't discuss that issue extensively because that's when the allegations in the case were disclosed, and in her own words, that shifted the focus.
>
> . . . .
>
> And lastly, we heard from Luella who loves her grandkids. She's not taking sides. She raised both of these kids, but she told you, along with Airianna, [K.S. is] not trustworthy [. . .]. She confirmed that, in fact, there was a very serious issue taking place between [K.S.] and her father, a serious issue in her life. And it was causing a lot of friction, and she knows this because [K.S.] told her.

> And [Luella] told you that [K.S.] was much more concerned about the allegations—this issue with her dad, than the allegations she made against Robert.

(Tr. (3) at 25-28.)

B. K.S.'s Facebook post about her disclosure and her family members' reactions to her disclosure

During K.S.'s trial testimony, she explained that when she disclosed Mitchell's sexual abuse of her, it created a divide in her extended family. Some family members posting things on Facebook and confronted K.S.'s stepmom. K.S. wrote about her own emotions, her disclosure and the consequences flowing from her disclosure and posted it on Facebook. (Tr. (2) at 76-77.) When the State showed K.S. a copy of the post she had written, defense counsel objected. The court considered the matter out of the jury's presence. (Tr. (2) at 77.)

Defense counsel initially argued that the State did not timely disclose its proposed exhibit. (Tr. (2) at 77-78.) Defense counsel later abandoned this basis for the objection. (Tr. (2) at 82.)

Defense counsel next argued:

> [W]hat they're saying this purports to be is the message that she posted on Facebook to family and friends in response to her being confronted by certain members of the family.
>
> What—they did not get it off Facebook, however. They actually got it from an email from her stepmom.
>
> . . . .

So for them to be saying this is a document that was posted on Facebook, I think that triggers the best evidence rule, because they are saying it's a writing on Facebook in response to other people. I think that actual writing on Facebook should be produced rather than a—just a text-formatted document that the [step] mother forwarded.

There's also foundational issue in the fact that if mother's forwarding this document, did mother alter it in any way? And I'd like the Court to note that mother—I keep saying mother but it's really her stepmother, is not going to be testifying. So I just think there's a number of evidentiary issues here, Your Honor.

Additionally, with the foundational issues, that really triggers confrontation issues because we should be able to confront and be prepared to confront all the individuals that had this document. We just didn't think that they were going to bring it up at trial because it seemed like a victim impact statement.

(Tr. (2) at 78-79.)

The court ruled:

Okay. Well, all right. Here's the thing. Either our witness over here wrote it or she didn't. She's got personal knowledge whether she wrote it or whether she didn't.

If she did and she says that that's her writing, it comes in under Rule 801(d)(1)(b).

(Tr. (2) at 82.) Defense counsel responded, "All right." (Tr. (2) at 83.)

When the State had K.S. identify the post, defense counsel objected on the grounds of relevance, best evidence and foundation. (Tr. (2) at 84.) K.S.'s post was admitted as State's Exhibit 11. (Tr. (2) at 84.) State's Exhibit 11 reads in part:

People keep asking me about my thoughts about my stealer of innocence. I prefer to call him that, because I hate the work rapist, because I don't know how that fits exactly. I didn't agree to what happened, but I also didn't fight it. I didn't do or say anything about it, honestly. I guess I was just too young to understand the whole meaning of rape and full meaning of wrong. I didn't know anything

for that matter. I guess it all happened when I was too young, too naïve, and too blinded.

I was easily lured into it at the time. It was only as I got older that I began to realize it was wrong, dirty, and molestation, as well as rape. It was, because I never consented to it, so it was my fault. I never told it was okay to touch me or penetrate me, but I also never told anyone because I was scared. I was terrified of the thought of losing everyone I loved. I'll be totally honest. I always thought of Robert as an older brother. I loved him as a sister would have loved their older brother.

I thought he would never hurt me. But he was. Every time we were alone, he would hurt me. As much as he hurt me, I believed him. I believed every time he said he would never do that to me again. I believed every time he would beg me that it would all be over after one last time. But it was sooner I realized he was also lying to me because after every time he promised it would never happen again, it did. And I soon became hopeless.

I guess I never thought it would come down to this. I became suicidal and depressed. Who wouldn't be?

. . . .

Most people would tell right away. Well not me. I acted as if nothing was happening. I treated him as any normal cousin would. I would hug him. I would call him names, and I would laugh with him. He knew me, and that was scary. He scares me because I also know him, so I kept my mouth shut.

. . . .

I mean, he was my babysitter, but it seemed like a good opportunity to finally tell someone. I had all attention on me, and my dad made it easy. As soon as I said no one would believe me, he asked if someone had sexually assaulted me, and I broke, admitting what Robert had done.

I honestly thought no one would believe me, but some did and others didn't. Others I thought would always be there, and that was hard. It was so hard not to break right now, but I'm trying. I'm trying not to give into the stress and agony, and so far, I'm good. But this is hard. No one said it would be easy, but I did lose a lot.

> I lost my grandma, the closest person to me. And now she doesn't care for me, and that hurts. All I can do is hurt, and it sucks. I have nightmares of him. Some are actually events. Some are just imagination, but still it scares me. It frightens me to think I have to fight him in front of people, knowing he has half of my so-called family on his side. I don't like thinking of him at all. I don't like knowing he had so much power over me, over my emotions and now he has my innocence as well. . . .

(Tr. (2) at 84-87; State's Ex. 11.)

SUMMARY OF ARGUMENT

The district court properly exercised its discretion when it refused Mitchell's request to focus Mitchell's trial on K.S.'s sexual orientation. The district court recognized that K.S.'s sexual orientation was not relevant, and that placing K.S.'s sexual orientation before the jury would unduly prejudice the State. The district court did, however, give Mitchell wide latitude to present evidence that K.S. disclosed the sexual abuse immediately after her father had read a Facebook post that contained information that made him very angry and upset with K.S. The district court's ruling did not undercut Mitchell's ability to present a defense. Rather, the ruling recognized that K.S.'s sexual orientation, which defense counsel described as "weighty stuff," had no relevance to her credibility. Mitchell was fully able to explore K.S.'s motive to fabricate without discussing her sexual orientation.

Mitchell did not preserve his claim that the district court erred when it admitted K.S.'s writing that discussed topics surrounding her sexual abuse into

evidence. Mitchell objected on the grounds of foundation, relevance and confrontation. For the first time on appeal, Mitchell argues that the writing was hearsay and inadmissible as a prior consistent statement. Mitchell has not argued that plain error review is appropriate. Even if this Court concludes that Mitchell did preserve this issue, and even if this Court excuses Mitchell from meeting his burden that plain error review is warranted, Mitchell still cannot prevail because, as this Court has held in a similar case, Mitchell cannot prove prejudice. The same evidence was admissible in a question and answer format, and Mitchell had the ability to cross examine K.S. about her writing.

The cumulative error doctrine does not apply because there is no error to cumulate.

ARGUMENT

I. The standard of review

A trial court has broad discretion in determining whether evidence is relevant and admissible. *State v. Kaarma*, 2017 MT 24, ¶ 11, 386 Mont. 243, 390 P.3d 609. This Court reviews preserved evidentiary determinations for abuse of discretion. *State v. Frey*, 2018 MT 238, ¶ 12, 393 Mont. 59, 427 P.3d 86. "This standard presumes that there may be more than one correct answer to an evidentiary issue. Otherwise, there would be no basis for discretion." *Id*., quoting

State v. Huerta, 285 Mont. 245, 254, 947 P.2d 483, 489 (1997). A district court abuses its discretion "if it acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice. *Id*., quoting *State v. Passmore*, 2010 MT 34, ¶ 51, 355 Mont. 187, 225 P.3d 1229.

This Court may discretionarily review claimed errors that implicate a violation of a criminal defendant's fundamental constitutional rights, even if no contemporaneous objection is made under plain error review. *State v. Lackman*, 2017 MT 127, ¶ 9, 387 Mont. 459, 395 P.3d 477. This Court exercises plain error review only where failing to review the claimed error may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial, or may compromise the integrity of the judicial process. *Id.* The Court uses its inherent power of common law plain error review sparingly, on a case-by-case basis, and only in this narrow class of cases. *Id.*

II. The district court properly exercised its discretion when it excluded irrelevant evidence of the young victim's sexual orientation.

The trial court gave Mitchell wide latitude in presenting evidence that K.S. disclosed Mitchell's sexual abuse to her father on the heels of her father finding a Facebook post concerning K.S. that made him very upset and angry. The trial court encouraged defense counsel to use descriptive adjectives about K.S.'s father's reaction to the post he discovered. But the court correctly concluded that defense

counsel could not disclose to the jury the content of the post—that K.S. believed she was bisexual and in love with a girl. The State did not attempt to exclude the evidence under Montana's Rape Shield Statute, and the defense did not invoke the statue either. Instead, the parties focused their arguments on the relevance of the evidence concerning K.S.'s sexual orientation and her father's discovery of such, as well as the prejudicial impact of the evidence. Even though the district court did not specifically discuss Montana's Rape Shield Statute, it balanced the probative value of such evidence against its prejudicial impact. Mitchell urges that the district court's ruling deprived him of due process because he could not present a complete defense.

Mitchell knew that K.S. disclosed Mitchell's sexual abuse on the heels of her argument with her father. Defense counsel went to some effort to make this point during K.S.'s cross-examination. But Mitchell claims that unless he was able to disclose that the argument centered on 14-year-old K.S.'s sexual orientation, his defense was simply unbelievable. Under Mitchell's analysis, he apparently thought he had a weak, unbelievable defense until a week before trial when K.S. disclosed, in a pretrial interview, that the Facebook post her father discovered discussed her sexual orientation.

The district court had great concern that if the jury heard evidence concerning young K.S.'s sexual orientation, the jury would be unable to consider

the State's evidence fairly. In *State v. Ford*, 278 Mont. 353, 363, 926 P.2d 245, 250 (1996), this Court recognized, "There will be, on virtually every jury, people who would find the lifestyle and sexual preferences of a homosexual or bisexual person offensive." More recently, in *Miller*, ¶¶ 15-16, the Court again cautioned about the prejudicial impact of presenting evidence of a defendant's sexual orientation. The same rationale holds true of a victim's sexual orientation.

Similar to the circumstances here, in *State v. Lindberg*, 2008 MT 389, 347 Mont. 76, 196 P.3d 1252, the State charged Lindberg with sexually abusing his girlfriend's daughters. *Id*. ¶ 2. Prior to trial, the State filed a motion in limine to exclude any evidence about one of the victim's sexual orientation. The defense theorized that the victim had been involved in a sexual relationship with another teenaged female. Lindberg intended to argue that he strenuously objected to the victim's relationship with the female, causing the victim to fabricate allegations against Lindberg in an attempt to have him removed from the home. Lindberg claimed that disclosing to the jury the nature of the victim's relationship with another female was imperative for him to present his defense theory. *Id.* ¶¶ 10-11.

The district court disagreed, concluding that the evidence in question was irrelevant and prohibited under Montana's Rape Shield Statute. *Id*. On appeal, this

Court concluded that the district court did not abuse its discretion in excluding the evidence:

> In this case, the District Court struck an appropriate balance between Lindberg's right to confront witnesses and develop his theory of the case, and H.B.'s rights under the rape shield law. The District Court provided Lindberg an opportunity to expose H.B.'s alleged motivation to fabricate the charges based on his disapproval of H.B.'s relationship with S.H., but also correctly reasoned that evidence of the sexual nature of that relationship was irrelevant, especially in light of the rape shield law.

Id. ¶ 56.

Here, the district court similarly struck an appropriate balance when it allowed Mitchell to present evidence that K.S. had a motive to fabricate allegations about Mitchell because she was fighting with her father over a Facebook post about her concerning a matter of a serious nature. The district court did not restrict defense counsel's cross examination of K.S. on this topic but rather appropriately prohibited defense counsel from informing the jury that the "matter of a serious nature" was K.S.'s sexual orientation. Even though the district court did not rely upon the rape shield statute to make its ruling, it balanced the competing interests that the rape shield statute requires. In so doing, the district court recognized that K.S.'s sexual orientation is irrelevant to her propensity for truthfulness. Although Mitchell discusses *Lindberg* in his brief, he fails to offer any meaningful distinction between the circumstances in *Lindberg* and those here. Instead,

Mitchell attempts to liken the circumstances of his case to those this Court considered in *State v. Colburn*, 2016 MT 41, 382 Mont. 223, 366 P.3d 258.

In *Colburn*, Colburn defended against the charge by arguing that someone had sexually abused the victim, but it was not him. Indeed, the young victim disclosed that her father had previously sexually abused her, and she had not previously disclosed the abuse. The district court disallowed evidence of the prior abuse even though the State's expert witness testified extensively that the young victim would not have the sexual knowledge she had without actually experiencing sexual acts. This Court concluded that the victim's prior sexual abuse by her father was relevant to her sexual knowledge. *Id*. ¶¶ 20, 26-29.

Unlike in *Colburn*, here the district court fully understood that defense counsel wanted to use K.S.'s sexual orientation in a manner prohibited by the rape shield statute, as illustrated by the following exchange:

> THE COURT: What you're arguing is, he was mad at her about something sexual, so she needed something sexual to distract from that? That's where you're going?
>
> MR. GALLAGHER: Sexual—yes, because the sexual stuff is weighty, and it's big-time stuff, and it corresponds roughly with the other. And if we just talk about, well, is this Facebook, she was on Facebook too much and maybe her grades were sinking, so he was mad, you don't make up sexual allegations in that context.

(Tr. (1) at 20-21.) In other words, defense counsel wanted the jury to believe that K.S.'s sexual orientation had a bearing on her propensity for truthfulness. Defense

counsel recognized that sexual orientation is "weighty," "big-time stuff" that, if presented to the jury, would allow the jury to focus on K.S.'s sexual orientation rather than focus on Mitchell's conduct.

Just as the district court did in *Lindberg*, the district court here properly exercised its discretion when it disallowed evidence about K.S.'s sexual orientation, while still allowing evidence about the circumstances of K.S.'s disclosure to her father. Mitchell argues that *Lindberg* is distinguishable because all that was relevant to Lindberg's defense was the existence of the relationship between the victim H.B. and S.H. Mitchell asserts that the bisexual nature of the relationship was unnecessary for Lindberg to argue that the victim fabricated sexual abuse allegations against him because of his disapproval of the relationship.

Mitchell argues that unlike in *Lindberg*, he could not sufficiently present K.S.'s motive to fabricate unless he disclosed K.S.'s father's discovery of her sexual orientation to the jury. Mitchell attempts to make a distinction where there is none. Just like Lindberg was able to present his theory that the victim fabricated allegations of sexual abuse against him to get him kicked out of the house because he objected to the victim's friendship with another young woman, Mitchell was able to argue that: (1) according to family members, K.S. did not have a reputation for truthfulness; (2) K.S. had secret Facebook accounts so she could hide information from her father; (3) K.S.'s father found a post on Facebook concerning

K.S. that was of a very serious nature and angered him; and (4) K.S. disclosed the sexual abuse in the midst of her father's anger about what he had learned on Facebook so she could deflect his anger from her onto Mitchell. During his closing argument, defense counsel even managed to state that the information was of a sexual nature.

Mitchell's defense was neither incomplete nor undercut by the district court's ruling. Mitchell, recognizing what this Court has repeatedly recognized—that evidence related to sexual orientation can cause some jurors to be unable to judge a case fairly, wanted to present evidence concerning K.S.'s sexual orientation to inflame the jury rather than to present a complete defense. As this Court recognized in *State v. Walker*, 2018 MT 312, 394 Mont. 1, __ P.3d __, "District courts have the power and responsibility to manage the defendant's evidence to prevent 'sordid probes into a victim's past sexual conduct.'" *Id*. ¶ 59, quoting *Colburn*, ¶ 28. The district court properly exercised its discretion and fulfilled its responsibility to both Mitchell and the State.

Finally, since Mitchell, as the Appellant, failed to meet his burden of proving that the district court abused its discretion in making its thoughtful evidentiary ruling, the State has no burden to prove harmlessness as Mitchell suggests.

III. Should this Court invoke plain error review to determine whether the district court properly exercised its discretion when it admitted into evidence the victim's writing about her sexual victimization?

Defense counsel objected to the admission of K.S.'s written statement on the grounds of unfairness due to allegedly untimely disclosure, foundation, best evidence, relevance and confrontation. (Tr. (2) at 77-82, 84.) Defense counsel did not object that the evidence was hearsay. Montana Rule of Evidence 103(a)(1) requires a timely objection to the admission of evidence along with the specific ground for the objection if the specific ground was not apparent from the context. For the first time on appeal, Mitchell argues that K.S.'s writing about her thoughts and experiences concerning Mitchell's sexual abuse of her was inadmissible hearsay. As set forth below, Mitchell did not properly preserve his objection on hearsay grounds.

A. Mitchell did not preserve this issue and the claim does not warrant plain error review since Mitchell acquiesced in any error.

After the district court overruled Mitchell's untimely disclosure objection, defense counsel stated:

> The second is, what they're saying this purports to be is the message that she posted on Facebook to family and friends in response to her being confronted by certain members of the family.
>
> What—they did not get it off Facebook, however. They actually got it from an email from her stepmom.
>
> . . . .

> So for them to be saying this is a document that was posted on Facebook, I think that triggers the best evidence rule, because they are saying it's a writing on Facebook in response to other people. I think that actual writing on Facebook should be produced rather than a—just a text-formatted document that the [step] mother forwarded.
>
> There's also foundational issue in the fact that if mother's forwarding this document, did mother alter it in any way? And I'd like the Court to note that mother – I keep saying mother but it's really her stepmother, is not going to be testifying. So I just think there's a number of evidentiary issues here, Your Honor.
>
> Additionally, with the foundational issues, that really triggers confrontation issues because we should be able to confront and be prepared to confront all the individuals that had this document. We just didn't think that they were going to bring it up at trial because it seemed like a victim impact statement.

(Tr. (2) at 78-79.)

In direct response to defense counsel's reasoning, the district court stated:

> Okay. Well, all right. Here's the thing. Either our witness over here wrote it or she didn't. She's got personal knowledge whether she wrote it or whether she didn't.
>
> If she did and she says that that's her writing, it comes in under Rule 801(d)(1)(b).

(Tr. (2) at 82.) Defense counsel responded, "All right." (Tr. (2) at 83.)

Mitchell argues on appeal that this Court should deem his objection preserved on hearsay grounds because the district court referenced Mont. R. Evid. 801(d)(1)(b) as a basis for admissibility so this case falls within this Court's holding in *State v. Baze*, 2011 MT 52, 359 Mont. 411, 251 P.3d 122.

In *Baze*, Baze appealed a lower court order denying his motion to suppress the results of a blood test during his DUI trial. This Court framed the dispositive

issue to be whether the lower court erred when it admitted a faxed report containing Baze's blood test results under Mont. R. Evid. 803(6). *Id*. ¶¶ 1-2. Baze was involved in a single car rollover accident. The officer investigating the accident suspected Baze of DUI. While Baze was receiving medical care at the local hospital, the investigating officer asked him to submit to a breath test. Baze refused. Medical providers drew Baze's blood in the course of providing medical treatment. Baze's blood samples were sent to the Billings Clinic, a larger hospital, for testing. According to the notice on the bottom of a faxed toxicology report from the Billings Clinic, Baze's BAC was 0.328. *Id*. ¶¶ 3-5.

At a suppression hearing, Baze argued that the faxed report was inadmissible unless the State established a chain of custody from the person at the local hospital who drew his blood until the technician at the Billings Clinic tested it. The State responded that a chain of custody was not required because the blood was drawn for medical purposes rather than at the behest of law enforcement. The State also briefly argued that the blood test result was admissible under the business records hearsay exception. The State called witnesses to support this theory of admissibility. *Id*. ¶ 5. The district court concluded that chain of custody requirements for a blood sample taken for medical purposes are not as strict as for a blood test taken at the request of law enforcement. The court further concluded

that the report was admissible under Mont. R. Evid. 803(6), the business records hearsay exception. *Id*. ¶ 6.

On appeal, Baze argued that the district court erred when it admitted the faxed blood test result under the business record hearsay exception. The State argued that Baze did not preserve this argument for appeal because he addressed, but did not adequately develop, that theory in the district court. In the parties' appeal briefs, both parties acknowledged that neither party presented developed arguments on the business records hearsay exception. *Id*. ¶¶ 9-10. This Court considered Baze's issue on the merits because:

> 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.

Id. ¶ 11.

The circumstances of Mitchell's case are very different from those in *Baze.* In *Baze*, the district court made its determination after Baze filed a pretrial motion to suppress, the State responded, and the court held a hearing. The evidentiary ruling here occurred at trial. In *Baze*, the parties both referenced the business records hearsay exception. Here, Mitchell did not ever object on the grounds of hearsay. On appeal, Mitchell is not bolstering an argument he made below, but is

now arguing a new theory on inadmissibility that he never raised or even hinted about.

Further, in this case the district court addressed the concerns that Mitchell raised by explaining that either K.S. could identify the writing as hers or she could not. If she could, Mitchell's lack of foundation objection lacked merit. Obviously, K.S. was available for cross-examination to alleviate any confrontation concerns. The district court's comment that the writing was then admissible as a prior consistent statement was more of an observation then a ruling. It is not as if the district court had the benefit of briefing, a hearing, argument or analysis before it on prior consistent statements. The district court's observation did not preclude Mitchell from arguing that K.S.'s writing was not admissible as a prior consistent statement. Rather than addressing the prior consistent statement theory of admissibility, defense counsel simply acquiesced in the court's observation.

If Mitchell had objected on the grounds of hearsay, the State would have had an opportunity to respond within its own theory of admissibility under the rules of evidence. Because Mitchell did not do so, there was neither reason nor opportunity for the State to offer theories of admissibility. Thus, fundamental fairness to the State is at stake.

Moreover, since Mitchell did not preserve this issue for appeal, it was incumbent upon him, in his opening brief, to establish that plain error review of

this evidentiary issue is warranted. Mitchell has offered no argument why this Court should invoke the sparingly-used doctrine of plain error review.

Mitchell has placed all of his eggs in the *Baze* basket and has failed to raise a plain error argument, let alone prove that plain error review is warranted. Thus, this Court should decline to address Mitchell's claimed error under the plain error doctrine. *State v. Beaudet*, 2014 MT 152, ¶ 18, 375 Mont. 295, 326 P.3d 1101. ("We will not invoke plain error review where a party has requested it for the first time in the reply brief.")

Further, even if this Court could liken the circumstances of this case to those in *Baze*, Mitchell still cannot prevail for the reasons set forth below.

B. Alternatively, the claim lacks merit because it did not result in prejudice to Mitchell's substantial rights.

On appeal Mitchell asserts that K.S.'s writing was not admissible as a prior consistent statement because K.S. authored the writing after, rather than before, her alleged motive to fabricate sexual abuse allegations against him. Even assuming this Court were to consider and agree with Mitchell's analysis, this Court will not reverse a district court for committing error that did not prejudice the defendant. Mont. Code Ann. § 46-21-701(1). This Court has previously held that where the declarant testifies at trial and the defendant is given an opportunity to

cross-examine regarding the statements at issue, the improper admission of the declarant's out-of-court statements is considered harmless. *State v. Mensing*, 1999 MT 303, ¶ 18, 291 Mont. 172, 991 P.2d 950.

This case demonstrates the reasonableness of this Court's rationale in *Mensing*. K.S. testified from her writing about the same topics she could have testified about in a question and answer format. Her writing talked about: her delay and struggle in disclosing her abuse; how she trusted Mitchell and viewed him as a big brother; how she tried to act like everything was normal; her own self-blame and embarrassment; and the consequences of her disclosure, including losing her grandma, a person of great importance in her life. The prosecutor could have properly addressed all of these topics with K.S. through questions and answers. Presumably the question and answer format would have been more emotionally difficult for K.S. and could have had greater impact on the jury. Mitchell had the opportunity to question K.S. about the content of her writing just as he would have had the opportunity to cross-examine K.S. if the prosecutor had broached the same topics in a question and answer format.

Even if this Court concludes that Mitchell preserved this issue for appeal and the district court erred, it should apply its holding in *Mensing* and conclude that any error is harmless.

III. The cumulative error doctrine is inapplicable.

"The doctrine of cumulative error requires reversal of a conviction where a number of errors, taken together, prejudiced a defendant's right to a fair trial." *State v. Ferguson*, 2005 MT 343, ¶ 126, 330 Mont. 103, 126 P.3d 463. Mitchell has claimed that the district court erred twice when making evidentiary rulings. But, as set forth above, the district court did not abuse its discretion when it refused to allow Mitchell to present evidence of the victim's sexual orientation.

Further, Mitchell did not preserve his claim that the district court erroneously admitted K.S.'s writing. Even if this Court disagrees and concludes that the issue is preserved, based on precedent, the error is harmless. Either way, there is no error to cumulate so the doctrine of cumulative error does not apply.

CONCLUSION

The State respectfully requests that this Court affirm Mitchell's conviction for Sexual Intercourse without Consent.

Respectfully submitted this 4th day of February, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 8425 words, excluding certificate of service and certificate of compliance.

/s/ Tammy K Plubell
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CERTIFICATE OF SERVICE

I, Tammy Plubell, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 02-04-2019:

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