IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 17-0611

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

JOSEPH JOHN MARTINEZ,

Defendant and Appellant.

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# REPLY BRIEF OF APPELLANT

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*On Appeal from the Montana Eighth Judicial District Court, Cascade County, ADC 14-462, The Honorable Gregory G. Pinski, Presiding*

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... iii

ARGUMENT ..... 1

I. THE DISTRICT COURT'S DISALLOWANCE OF EVIDENCE REGARDING C.H.'S FACEBOOK MESSAGES DEPRIVED MARTINEZ OF HIS RIGHTS TO CONFRONTATION AND A FAIR TRIAL ..... 1

II. *MIRANDA* VIOLATIONS JUSTIFY A NEW TRIAL ..... 3

III. ALTERNATIVELY, CLAIMS OF IAC JUSTIFY A NEW TRIAL ..... 6

CONCLUSION ..... 7

CERTIFICATE OF COMPLIANCE ..... 8

## TABLE OF AUTHORITIES

### CASES

*City of Missoula v. Kroschel*, 2018 MT 142, 391 Mont. 457, 419 P.3d 1208.....5
*Park v. Sixth Jud. Dist. Court*, 1998 MT 164, 289 Mont. 367, 961 P.2d 1267.....4
*Rhode Island v. Innis*, 446 U.S. 291 (1980).....5, 6
*State v. Colburn*, 2016 MT 41, 382 Mont. 223, 366 P.3d 258 .....2
*State v. Howard*, 2002 MT 276, 312 Mont. 359, 59 P.3d 1075 .....4
*State v. Lenon*, 174 Mont. 264, 570 P.2d 901, 907-08 (1977),.....6
*State v. Tapson*, 2001 MT 292, 307 Mont. 428, 41 P.3d 305.....4
*State v. Van Pelt*, 247 Mont. 99, 805 P.2d 549 (1991) .....3

### STATUTES

§ 45-5-511(1), MCA .....2
§ 46-5-511(2), MCA .....1
§ 45-5-501(1), MCA .....1, 2

### OTHER AUTHORITIES

Comment, *The Need to Repeat Miranda Warnings at Subsequent Interrogations*, 12 Washburn L.J. 222 (1973) .....6

Appellant respectfully submits the following reply to the Response Brief of the Appellee.

## ARGUMENT

### I. THE DISTRICT COURT'S DISALLOWANCE OF EVIDENCE REGARDING C.H.'S FACEBOOK MESSAGES DEPRIVED MARTINEZ OF HIS RIGHTS TO CONFRONTATION AND A FAIR TRIAL.

The State admits that the day after the alleged offense was committed, C.H. authored a Facebook message where she "apologized to another person for being 'a slut'" the night before. (State's Response Brief at p. 22). Yet in the next breath, the State disclaims any relevance of such a statement, or similar statements, arguing that since she was intoxicated and less than sixteen years old, the issue of her consent was irrelevant to any issue to be determined by the jury. The State also maintains that Montana's Rape Shield Law, § 46-5-511(2), MCA, prohibits such statements, but fails to counter Martinez's argument that that statute's plain language does not apply to sexual conduct with him, especially when consent is a defense at issue. Last, the State argues, without any evidence, that such statements are consistent with other rape victims. All of these arguments must be rejected.

The statutory definition of "consent" includes "words or overt actions indicating a freely given agreement to have sexual intercourse or sexual contact." Section 45-5-501(1), MCA. Messages authored by the alleged victim indicating she was acting like a "slut" at the time of the alleged offense is certainly relevant to

whether she agreed to have sexual contact or intercourse with Martinez. The State was free to argue, pursuant to § 45-5-501(1)(b)(i) and (iv), MCA, that C.H. was incapable of consent, based on her age and her level of intoxication/incapacitation, which they did during trial. But Martinez should have been allowed to rebut the same and argue that he reasonably believed she was 16 years of age, a defense permitted by § 45-5-511(1), MCA ("[w]hen criminality depends on the victim being less than 16 years old, it is a defense for the offender to prove that the offender reasonably believed the child to be above that age. The belief may not be considered reasonable if the child is less than 14 years old").

The district court erred in concluding otherwise and "arbitrarily" and "mechanistically" excluded relevant evidence critical to Martinez's defense in violation of its "responsibility to strike a balance in each case between the defendant's right to present a defense and a victim's rights." *State v. Colburn*, 2016 MT 41, ¶ 25, 382 Mont. 223, 366 P.3d 258. Indeed, the State apparently concedes that no evidentiary hearsay rules barred admission of the messages, but still insists the Rape Shield law precluded their admission. However, even if somehow applicable to C.H.'s statements, the law does not "provide[] an impenetrable wall of protection" for the victim or prevent "her credibility" from being "questioned or attacked," especially when the evidence is probative and

critical to the defense of consent. *State v. Van Pelt*, 247 Mont. 99, 103, 805 P.2d 549, 552 (1991).

While Martinez's counsel was permitted to question C.H. during cross-examination, it was not permitted to question her regarding these statements. It was not permitted to attack or impeach her credibility, let alone support its defense of consent. The district court's erroneous ruling prohibiting evidence of these Facebook messages deprived Martinez of his right of confrontation and to a fair trial. Had the jury heard such evidence, there is a reasonable probability the outcome might have been different. Martinez is therefore entitled to a new trial.

## II. *MIRANDA* VIOLATIONS JUSTIFY A NEW TRIAL.

The State argues that the totality of the circumstances show that Martinez's *Miranda* waiver was valid and that officers were not required to re-*Mirandize* him. As to his waiver, the State does not dispute that Martinez was intoxicated, but discounts it and maintains that it is only one factor of many to consider. While this is true, there is no hard-and-fast rule that intoxication, by itself, cannot invalidate a defendant's *Miranda* waiver. Indeed, as cited in Martinez's Opening Brief and acknowledged by the State, other jurisdictions have declared as much. Nevertheless, the State insists that despite his undisputed intoxication, his young age, his intellectual capacity and education level, and his diagnosed conditions of AHD and FAS, the record reveals that his waiver still the product of a free and

deliberate choice, made with full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it voluntarily, knowingly, and intelligently. The State's position is based on an overly generous interpretation of the record.

Merely because Martinez could track certain questions and Parks' believed he was competent to waive his rights, does not mean his level of intoxication did not interfere with his ability to effectuate a voluntary, knowing, and intelligent waiver. Indeed, the record shows that Martinez was extremely intoxicated. Coupled with the fact that he never completed high school and suffered from FAS and ADHD, this certainly gives great pause to his ability to waive his rights. The State speculates that Martinez's prior experience with law enforcement should have given him an appreciation of the rights he was waiving, however, when it comes the waiver of constitutional rights, this Court "will indulge in every reasonable presumption against waiver of fundamental constitutional rights," *State v. Howard*, 2002 MT 276, ¶ 14, 312 Mont. 359, 59 P.3d 1075, and "will not engage in presumptions of waiver." *State v. Tapson*, 2001 MT 292, ¶ 25, 307 Mont. 428, 41 P.3d 305 (citing *Park v. Sixth Judicial District Court*, 1998 MT 164, ¶ 36, 289 Mont. 367, 961 P.2d 1267).

Under the totality of the circumstances, this Court must conclude that Martinez's purported *Miranda* waiver of his rights was not given voluntarily,

knowingly, and intelligently, and on this basis declare that it was prejudicial error to permit the State to introduce the statements as evidence during trial. Even if the waiver was valid, however, exclusion of the recorded statements taken at the hospital is still justified as Martinez was entitled to re-administration of his *Miranda* rights. The States does not dispute the legal premise of the requirement for re-administration, per se, but instead argues that Martinez was not being interrogated and therefore his *Miranda* rights did not attach. The State argues that Martinez's statements to law enforcement were unprompted and that no questions were posed to him.

First, continuous questioning is not required. Martinez was in custody and had previously been subject to interrogation by law enforcement. He was transported to the hospital where further exchanges between himself and law enforcement took place. Such an interruption required re-administration of his rights regardless of whether the officers intended to pose additional questions to him. While no formal questioning took place, Martinez's statements were not spontaneous. A custodial interrogation does not require a formal interrogation or a police interrogation room setting; "implied questioning" is included. *City of Missoula v. Kroschel*, 2018 MT 142, ¶ 23, 391 Mont. 457, 419 P.3d 1208; *see also, Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980) ("the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or

actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect").

And despite the State's attempt to downplay its surreptitious recording of Martinez, the *Miranda* safeguards are "designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police." *Innis*, 446 U.S. at 301. The relevant inquiry here is whether Martinez's incriminating statements to law enforcement were given with a full understanding of his rights. *State v. Lenon*, 174 Mont. 264, 274, 570 P.2d 901, 907 (1977) (citing Comment, *The Need to Repeat Miranda Warnings at Subsequent Interrogations*, 12 Washburn L.J. 222 (1973)). They were not and he was entitled to be advised of them again.

Because Martinez's substantial rights designed to be protected by *Miranda* were prejudiced, and there is a reasonable probability the jury's verdict might have been different if it had not heard Martinez's recorded statements, the district court's prejudicial rulings admitting the same must be reversed and this matter remanded for a new trial.

## III. ALTERNATIVELY, CLAIMS OF IAC JUSTIFY A NEW TRIAL.

Should the Court decline to reverse and order a new trial on either of the above arguments, Martinez asserts that IAC demands a new trial. The State argues

that his IAC claims are nor proper for direct appeal, and regardless, are not actionable because he cannot establish prejudice by trial counsel's mere failure to file a pretrial motion to suppress. The legal merit to Martinez's arguments is established above. Martinez raised IAC to ensure the Court's reviews these errors, even if not properly preserved for appeal. Whether reviewed under substantive law, or IAC, Martinez's incriminating statements to law enforcement were inadmissible under *Miranda* and their admission at trial justifies a new trial.

## CONCLUSION

As established above, contrary to the State's arguments, Martinez did not receive a fair trial and was deprived of his constitutional rights securing the same, requiring reversal of his conviction. This Court should remand for a new trial, with the Facebook messages authored by C.H. declared admissible, and the statements of Martinez taken in violation of *Miranda*, excluded.

Respectfully submitted this 1st day of May, 2019.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply 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 5,000 words or less, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices

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## CERTIFICATE OF SERVICE

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