

DA 17-0346

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 231

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

GARY S. HAYES,

Defendant and Appellant.

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APPEAL FROM: District Court of the Fifth Judicial District,  
In and For the County of Jefferson, Cause No. DC-2016-13  
Honorable Luke Berger, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Deborah S. Smith, Assistant Appellate  
Defender, Helena, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Tammy K Plubell, Assistant  
Attorney General, Helena, Montana

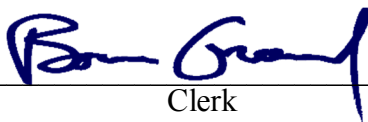
Steve Haddon, Jefferson County Attorney, Boulder, Montana

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Submitted on Briefs: June 5, 2019

Decided: October 1, 2019

Filed:

  
Clerk

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Justice Laurie McKinnon delivered the Opinion of the Court.

¶1 On February 5, 2017, a jury in the Fifth Judicial District Court, Jefferson County, found Gary S. Hayes (Hayes) guilty of incest, a felony in violation of § 45-5-507, MCA. Hayes appeals his conviction, raising three issues. We find the following issue dispositive:

*Did the District Court abuse its discretion by allowing the jury to hear during jury deliberations portions of a victim's taped forensic interview, after those portions of the interview had been played to the jury during trial?*

¶2 We reverse and remand for further proceedings consistent with this Opinion.

### **FACTUAL AND PROCEDURAL BACKGROUND**

¶3 The State charged Hayes with incest on March 1, 2016, based upon incidents which occurred between November 2015 and February 2016. On November 26, 2015, Hayes's soon-to-be ex-wife Karlina Robbennolt (Karlina) separated from him and moved out of the family home. Hayes and Karlina's two children remained with Hayes to maintain their schooling routine, spending time with Karlina on the weekends. In the middle of December 2015, Karlina moved the children to her home after being informed by her oldest daughter that Hayes was leaving each night around seven or eight and coming home inebriated at two or three in the morning. On January 31, 2016, Karlina called the Jefferson County Sheriff's Office to file a complaint that her ten-year old daughter, S.H., had told her Hayes had sexually touched her while taking showers with her.

¶4 Paula Samms (Samms) the director of Lewis and Clark County Child Advocacy Center, conducted a forensic interview of S.H. on February 8, 2016. During the interview with Samms, S.H. described touching Hayes's penis with her hand and what the penis felt like. S.H. also described Hayes masturbating and ejaculating; that Hayes had "oil" in his

penis; and that Hayes made a “deal” with her that she would not tell anybody about what occurred when they showered together.

¶5 Jefferson County Deputy Sheriff Tom Grimsrud interviewed Hayes on February 11, 2016. Deputy Grimsrud asked Hayes if he took showers with S.H. Hayes stated he did and that he showered with S.H. in order to wash her thoroughly and to examine her for eczema. Hayes stated he washed the victim’s hair, because she did not wash it thoroughly, but that he did not wash S.H.’s body. When Deputy Grimsrud asked Hayes whether he had ever gotten an erection while he was in the shower with S.H., he replied he had. In response to getting an erection, Hayes stated that he would immediately excuse himself from the shower.

¶6 The trial in this matter lasted two days. On the first day of trial, S.H. testified regarding what she told Samms in her forensic interview. The State questioned S.H. about specific areas of her interview with Samms. When asked about touching Hayes’s penis, S.H. claimed she could not remember what she told Samms. S.H. then denied both touching Hayes’s penis and telling Samms that she had touched Hayes’s penis. When asked about the “oil,” S.H. described Hayes ejaculating, but then claimed she forgot what happened. When questioned about Hayes’s “deal” with her, S.H. testified she could not remember the “deal” or telling Samms about the “deal.”

¶7 On the morning of the second day of trial, the State addressed the District Court, proposing that the entire forensic interview video be submitted into evidence so that he could play three segments of it to the jury. The State argued:

In substance, judge, [there] are three areas yesterday that [S.H.] did not recall. We view them as prior inconsistent statements because of her inability to remember. We believe we worked around it enough to try to ask questions different ways to see if she could have recall.

Accordingly, the State asserted the victim had testified inconsistently about (1) touching Hayes's penis; (2) what the victim said about "the oil in the penis;" and (3) whether the victim had a "deal" with Hayes, and the substance of the "deal."

¶8 Hayes objected to the State's proposal, as follows:

We would be objecting to . . . to playing the video mostly on the basis that I feel like [S.H.'s] testimony yesterday, it's – while there was some details missing, overall it is not inconsistent with what she said in this video. That the video itself would just be cumulative evidence at this point. She's managed to say on the stand, more or less, what was said in the video. And that you know, minor details left out and not being able to recall a few things doesn't change the fact that overall the video is going to be consistent with what she testified to yesterday.

Over defense counsel's objection, the District Court admitted the taped forensic interview of S.H., with the understanding that only specific portions of the interview were to be viewed by the jury.

¶9 The State called Samms on direct examination. Samms testified that she received a referral from Child Protective Services indicating S.H. may have been sexually abused. The State questioned Samms about the three areas the State believed S.H. had inconsistently testified. Based on Samms's responses, the State played portions of S.H.'s forensic interview for the jury. There is no record of what statements were played to the

jury, the duration of the segments, or in what portion of the interview the statements were contained.<sup>1</sup>

¶10 During jury deliberations, the jury sent a note to the judge stating “The Jury requests to watch the video clips . . . .” Defense counsel objected to playing the interview to the jury, arguing that to do so would emphasize S.H.’s testimony and unfairly prejudice Hayes. The District Court overruled Hayes’s objection and sent the court reporter to the jury room to play the videotaped interview.<sup>2</sup> The jury found Hayes guilty of incest.

¶11 The District Court designated Hayes a Tier II sexual offender and sentenced him to 100 years in prison, with all but thirty years suspended.

### STANDARD OF REVIEW

¶12 The decision to provide requested information to a jury is one of discretion. Section 46-16-503(2), MCA; *State v. Evans*, 261 Mont. 508, 511, 862 P.2d 417, 418 (1993). Accordingly, we review such a decision for an abuse of discretion. *State v. Greene*, 2015 MT 1, ¶ 12, 378 Mont. 1, 340 P.3d 551 (citing *State v. Crawford*, 2002 MT 117, ¶ 15, 310 Mont. 18, 48 P.3d 706.)

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<sup>1</sup> The practice of admitting a testimonial exhibit in place of a court reporter making a record of what the jury hears frequently presents numerous challenges for an appellant, who bears the burden of proof on appeal. Absent a record of what occurred, this Court is simply unable to assess the alleged error.

<sup>2</sup> Based upon our resolution of the instant issue, and finding it dispositive, we do not address the correctness of the District Court sending the court reporter to the jury room to play the video for the jury—unaccompanied by Hayes, his counsel, the prosecutor, or the presiding judge. The record does not support any objection having been made by Hayes and we decline to exercise plain error review when it is unnecessary.

## DISCUSSION

¶13 Hayes contends the District Court erred when it played portions of S.H.'s forensic interview two times to the jury – at trial and during jury deliberations. More particularly, Hayes argues that the court erred when it allowed the jury to hear portions of S.H.'s interview without first isolating the jury's difficulty concerning the evidence; weighing the danger of undue emphasis of the interview over other evidence; and failing to adopt a strictly controlled procedure for the jury's review. The State maintains that the District Court properly exercised its discretion when it allowed the jury to hear "three discreet portions" of S.H.'s interview.<sup>3</sup>

¶14 Montana statutory law permits a court to refresh the jury's recollection of trial testimony under certain limited circumstances. Section 46-16-503(2), MCA, provides:

After the jury has retired for deliberation, if there is any disagreement among the jurors as to the testimony or if the jurors desire to be informed on any point of law arising in the cause, they shall notify the officer appointed to keep them together, who shall then notify the court. The information requested may be given, in the discretion of the court, after consultation with the parties.

¶15 We have previously held that this statute does not completely displace the common law rule which prevents jury review of testimony in most cases. *Greene*, ¶ 22. Accordingly, we have held that § 46-16-503(2), MCA, allows, in limited circumstances, a judge to exercise discretion to supply information in response to juror questions. *Greene*, ¶ 22 (citing *Evans*, 261 Mont. at 512, 862 P.2d at 419; *State v. Harris*, 247 Mont. 405, 417-18, 808 P. 2d. 453, 460 (1991)).

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<sup>3</sup> Of course, no record exists regarding the portions of the interview that were played to the jury because the court reporter was in the jury room operating the video equipment.

¶16 The touchstone for a district court in exercising its discretion under § 46-16-503(2), MCA, is whether complying with the jury's request would unduly emphasize the testimony of certain witnesses, relative to the probative value of that testimony. *Greene*, ¶ 24 (*see also Evans*, 261 Mont. at 512-13, 862 P.2d at 419-420). In *Harris*, 247 Mont. 405, 417, 808 P.2d. 453, 460 (1991), we adopted the reasoning of the Wyoming Supreme Court, interpreting a statute like § 46-16-503, MCA, to guide a trial court's inquiry when a jury requests testimonial material during deliberation:

[The statute] does not permit trial courts to repeat large amounts of testimony just because the jury makes such a request. On the contrary, it requires that the court discover the exact nature of the jury's difficulty, isolate the precise testimony which can solve it, and weigh the probative value of the testimony against the danger of undue emphasis. If, after this careful exercise of discretion, the court decides to repeat some testimony for the jury, it can do so in open court in the presence of the parties or their counsel or under other strictly controlled procedures of which the parties have been notified. (Footnote omitted.) The more testimony the court repeats, the greater the danger of undue emphasis. Even with the best of procedures, it would not be proper under the statute for the court to reread a transcript or replay a videotape of a witness's entire story just because the jury wants to review all of the testimonial matter that happens to be available or because the jury wants to review the general credibility of the witness. Undue emphasis and delay would be too likely.

*Harris*, 247 Mont. at 417, 808 at 460 (quoting *Chambers v. State*, 726 P.2d 1269, 1276 (Wyo. 1986)). We further explained that § 46-16-503 (2), MCA, is directed to a jury's inquiry concerning particular types of information; for example, "the width of a street, the height of an object, distance, time or some other limited request, but not the entire testimony of the witness." *Harris*, 247 Mont. at 417, 808 P.2d at 460.

¶17 Here, there was no inquiry made by the District Court to "discover the exact nature of the jury's difficulty, isolate the precise testimony which can solve it, and weigh the

probative value of the testimony against the danger of undue emphasis,” an effort we held in *Harris* the trial court was required to make. *Harris*, 247 Mont. at 417, 808 P.2d. at 460. In *Greene*, Greene—a previously convicted sex offender—was charged with failure to give notice of change of his address. A Missoula Detective attempted to contact Greene at his registered address, a hotel, and learned Greene had been checked out for approximately two months. *Greene*, ¶¶ 5-7. During deliberation, the jury sent a note to the judge requesting clarification of whether the detective checked Greene’s hotel room or merely inquired at the front desk. *Greene*, ¶ 9. In response, the District Court prepared a partial transcript of the Detective’s testimony, including the Detective’s answers to whether she had been to Greene’s room or been able to locate Greene. *Greene*, ¶ 9. This Court held the District Court did not abuse its discretion by providing the jury with a portion of the trial transcript during deliberation because the court “discovered the exact nature of the jury’s difficulty and isolated the particular testimony which could solve the difficulty.” *Greene*, ¶ 25.

¶18 Here, the District Court did not “discover the exact nature of the jury’s difficulty” when the jury made its broad request to watch portions of S.H.’s interview. *Greene*, ¶ 25. During its deliberations, the jury sent a note to the judge stating “The Jury requests to watch the video clips . . . .” At this point, pursuant to *Greene*, the District Court was required to inquire further and ask specifically about the jury’s difficulty. Following such an inquiry, the District Court would have been able to “isolate[] the particular testimony which could solve the difficulty” and “weigh the probative value of the testimony against the danger of undue emphasis.” *Harris*, 247 Mont. at 417, 808 P.2d. at 460. S.H.’s interview was



admitted as prior inconsistent statements. More particularly, S.H.'s statements made during the interview, which she would not clearly testify to at trial, corroborated the State's version of the offense. Statements that she, a child, had to touch Hayes's penis; that there was "oil in the penis;" and that Hayes made a deal with her not to tell, went to the heart of the offense. If the District Court, in its discretion, determined the testimony's probative value outweighed the danger of undue emphasis, the District Court was required to adopt a "strictly controlled procedure," like the court in *Greene*, and arrange to isolate the specific area giving the jury difficulty for review. *Greene*, ¶ 25.

¶19 We conclude that the appropriate procedures set forth in *Greene* and § 46-15-503(2), MCA, were not followed and, that as a result, Hayes was unfairly prejudiced "by placing undue emphasis on the statements of the alleged victim" to the exclusion of the other evidence presented at trial. *Harris*, 247 Mont. at 418, 808 P.2d at 460.

### CONCLUSION

¶20 The District Court abused its discretion by failing to isolate the jury's difficulty during deliberations before allowing it to watch unspecified portions of the video testimony in the jury room. The error resulted in prejudice to Hayes. We reverse Hayes's conviction and remand the case to the District Court for further proceedings consistent with this Opinion.

/S/ LAURIE McKINNON

We concur:

/S/ JAMES JEREMIAH SHEA

/S/ DIRK M. SANDEFUR

/S/ BETH BAKER

/S/ JIM RICE