

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 17-0470

STATE OF MONTANA,

Plaintiff and Appellee,

v.

EMMANUEL F. GOMEZ,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, The Honorable Karen S. Townsend, Presiding

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STATEMENT OF ISSUES

1. Did the district court correctly rule Gomez did not prove he was prejudiced by the joinder of the homicide and partner or family member assault charges?
2. Did the district court properly exercise its discretion excluding evidence of the victim's meth use and denying Gomez's motions alleging it violated his right to present a defense?
3. Did the district court correctly admit the deceased victim's statements of state of mind?
4. Did the alleged errors cumulatively prejudice Gomez's right to a fair trial?

STATEMENT OF THE CASE

On January 13, 2016, the State charged Emmanuel F. Gomez with deliberate homicide, in violation of Mont. Code Ann. § 45-5-102(1), and misdemeanor PFMA, in violation of Mont. Code Ann. § 45-5-206. (D.C. Doc. (Doc.) 3.) The PFMA was charged as a continuing course of conduct occurring between January 1, 2015 through December 20, 2015. (*Id.*) A jury convicted Gomez of both counts. (Doc. 119.)

Gomez filed numerous pretrial motions. (Doc. 1.) Gomez moved to dismiss the PFMA charge or in the alternative to sever the two charges, and the district court denied it. (Docs. 36, 54, 59, 74.) Gomez objected to testimony of statements made by the victim, Charlie Wyrick. (Docs. 42, 48, 77.) The district court addressed some of the objections pretrial and ruled on the rest during trial. (Doc. 97.) Gomez moved to exclude Gomez's prior bad acts, including his drug use, which the State did not oppose. (Docs. 37, 49.) Gomez sought to introduce evidence of the victim's meth use. (Docs. 41, 56, 75.) The district court denied this motion along with Gomez's repeated requests during trial to reconsider based on his right to present a defense. (Doc. 103; Trial Transcript (Tr.) at 14-25, 452, 647-48, 844-45, 1166.)

After conviction, Gomez moved for a new trial, again arguing the exclusion of the victim's meth use violated his rights to present a defense and due process. (Docs. 124, 126.) The district court denied the motion noting, "[t]he Defendant offers no explanation of how being able to present evidence that she used meth during this relationship would lead to her acquiring a broken rib or account for bruising to her legs, torso, or face over the months that she resided with him before her violent death." (Doc. 139.)

STATEMENT OF FACTS

On December 27, 2015, Wyrick's frozen body was found in Pattee Canyon, outside of Missoula. (Tr. at 1326, 1486, 1753-59, 1780-81.) Prior to Wyrick's death, she lived with Gomez in a house just off Pattee Canyon Road. (Tr. at 951-53, 1044-46, 1053-54, 1058-59.) Gomez and Wyrick shared a bedroom above Chris Eckhoff. (Tr. at 950-60, 1044-45.) Eckhoff and the other roommates frequently heard Gomez and Wyrick fight inside their bedroom. (Tr. at 955-58, 1047-48, 1055-56, 1060, 1082-83, 1132-33.) There was yelling and swearing, Gomez would call Wyrick names, and you could hear loud thumps, like things were being thrown. (*Id.*) Gomez was louder than Wyrick, he seemed like the aggressor, and Wyrick would cry. (*Id.*) The fights were often followed by loud sex. (Tr. at 1047-48, 1082-83, 1141.)

At about 10:00 a.m. on December 21, 2015, Eckhoff and his girlfriend Hannah Kendall awoke to an argument between Gomez and Wyrick. (Tr. at 960-62, 985, 1085-89.) It was louder than usual, and it awoke another roommate. (Tr. at 962-63, 1060-62, 1087.) The argument escalated for 10 to 15 minutes until it ended with a loud thump, like a bowling ball hitting the ground, and "an immediate red-flag scream" from Wyrick, then it went quiet. (Tr. at 961-69, 1085-93.) Eckhoff was frustrated with the constant fighting, so he got out of bed to

confront Gomez. (*Id.*) Kendall was afraid and wanted to go with him, so Eckhoff waited for her to get dressed. (*Id.*)

As they came upstairs, Kendall saw Gomez run out the front door and slam it behind him. (Tr. at 964-74, 1009-13, 1091-96, 1128-42.) Gomez jumped into his black SUV, appeared to grab at something in the back seat, then sped out of the driveway. (*Id.*) Eckhoff knocked on Gomez's door and asked for Wyrick with no answer. (*Id.*) There were drops of blood down the hallway, on the front step, and in the snow where Gomez's vehicle had been parked. (*Id.*)

Eckhoff and Kendall were concerned for Wyrick. (Tr. at 969-78, 1095-97, 1129-34, 1817, 1820.) Eckhoff taped a note to Gomez's door: "Not sure what is going on, but I would like an explanation of what happened. Almost called the police. There's blood everywhere. This is not the first time I've woke to screaming and sounds of hitting and shoving. Please take a break." (*Id.*) Eckhoff sent Gomez a similar text message. (*Id.*)

Eckhoff and Kendall went to Pattee Creek Market to get food for breakfast and see if Wyrick was working. (*Id.*) She was not. (*Id.*) They returned to the house about 30 minutes later. (*Id.*) The note was no longer on Gomez's door and the blood in the hallway was gone. (*Id.*) Gomez never explained the argument to Eckhoff, but he replied to Eckhoff's text at 10:36 a.m.: "Okay, I will." (*Id.*)

On December 23, 2015, Dillon Moore, Wyrick's coworker, noticed she had not shown up for work the past two days. (Tr. at 922, 1041-43.) Moore was concerned, so he told his mother, Sherrie Harguess, who knew Wyrick from the store. (Tr. at 923, 1258, 1286.) Harguess became afraid Gomez may have hurt Wyrick. (*Id.*) The next morning Harguess and Moore drove to Gomez's house. (Tr. at 923-26, 1258-71.) Harguess pulled into the driveway and turned the car around in case they needed to leave quickly. (*Id.*) Gomez was in the garage. (*Id.*) When Harguess stepped out of her car, Gomez came outside. (*Id.*) Harguess said, "where's Charlie?" (*Id.*) Gomez replied, "who the fuck are you?" (*Id.*) Harguess took another step forward and said, "where's Charlie?" (*Id.*) Gomez tilted his head and said, "who the fuck are you?" (*Id.*) Harguess said she was a friend. (*Id.*) Gomez said they had an argument. (*Id.*) Harguess asked "where is she?" (*Id.*) Gomez stepped toward Harguess and said he did not know. (*Id.*) Harguess said "where is Charlie?" (*Id.*) Gomez took a drag of his cigarette and said, "she ain't comin' back." (*Id.*) Harguess left and called 911. (Tr. at 1265-71, 1625.)

The investigation began on December 24, 2015, as a welfare check for Wyrick, but quickly evolved into a missing person case. (Tr. at 1289, 1297-06, 1483-85, 1502-17, 1821-22.) Around 1:15 p.m., Officers stopped Gomez in his white Toyota Avalon. (*Id.*) Gomez agreed to accompany officers to execute search warrants for his house and vehicles. (*Id.*)

In the garage, officers found two large garbage bags filled with women's clothing. (Tr. at 1307.) In Gomez's bedroom, officers found: Eckhoff's note, the center console removed from Gomez's SUV, which had blood on it matching Wyrick's DNA, and gray rags piled in the shower with some matching Wyrick's blood DNA. (Tr. at 1305-06, 1390-1419, 1517, 1529-40, 1863.) In Gomez's SUV, officers found: Wyrick's wallet, which included her driver's license and other personal documents, blood on the door frame matching Wyrick's DNA, a letter to Gomez with Wyrick's blood DNA, a flashlight with Wyrick's blood DNA, and the carpet below the backseat had been removed. (Tr. at 1307, 1390-1419, 1547-55, 1562-64.) Officers took samples of the blood on the front steps and blood found on Gomez's right shoe, which both matched Wyrick's blood DNA. (Tr. at 1390-1419, 1518, 1528-29.)

After the search, Gomez was arrested for PFMA. (Tr. at 1299-1300.) Gomez called his sister from jail and said "I did some shit" regarding his girlfriend, then restated it as allegedly did some shit. (Tr. at 1735-41.) Officers obtained evidence of Gomez's activity between December 21 and December 24, 2015, including receipts and pictures showing Gomez bought cleaning supplies, and multiple internet searches from Gomez's phone for Missoula stabbings, police scanner codes, and the DOJ missing persons website. (Tr. at 1488-1500, 1540, 1818-22, 1829-30).

Wyrick's friends and coworkers testified about the abuse Wyrick endured during her relationship with Gomez. About a year before her death, Wyrick moved from Helena to Missoula. (Tr. at 494-98.) Wyrick became close friends with Tearsa Rollins, a coworker at Safeway. (Tr. at 822-23.) Rollins described Wyrick as "fun, loving, passionate." (Tr. at 823.) Others described Wyrick as outgoing, silly, "a bubbly, happy-go-lucky person." (Tr. at 553, 1211, 1232.) Wyrick started dating Gomez, and for a few weeks early in their relationship they lived with Rollins. (Tr. at 823-26.) Rollins noticed Wyrick's behavior change after she started dating Gomez. (*Id.*) Others testified Wyrick was more withdrawn and stiff when Gomez was around. (Tr. at 534, 554, 681-83, 824-26, 1213-14.)

Rollins did not see Wyrick as much after she and Gomez moved out, but Rollins saw Wyrick with multiple injuries during her relationship with Gomez, including a broken nose, a black eye, fingerprints and hand marks around her neck, a cigarette burn on her face, and bruises on her arms. (Tr. at 826.) Others saw similar injuries. Wyrick's brother Max Straight, who also lived in Missoula, saw Wyrick with bruises on her face, wrists, arms and body, and lacerations around her neck. (Tr. at 1230-33.) Straight's girlfriend Maghan Radcliff said Wyrick started to wear baggy clothes to hide the bruises and said the injuries became more severe over time. (Tr. at 563-71.) Wyrick's grandmother saw bruises on Wyrick's arms

and a spot of Wyrick's hair missing about the size of a small orange. (Tr. at 1214-16.)

Multiple times during August of 2015, Wyrick talked to Kimberly Mulcare, a close friend from Helena. (Tr. at 498-510, 524-31.) Wyrick was scared. (*Id.*) Mulcare drove to Missoula to bring Wyrick back to Helena. (*Id.*) They met at a gas station. (*Id.*) Mulcare parked her car and quickly jumped into the back of the vehicle Wyrick was driving, so Gomez would not see her. (*Id.*) They stopped briefly at Straight's house to pick up some of Wyrick's things, then Mulcare drove them back to Helena. (*Id.*) During the trip, Wyrick told Mulcare she was afraid of Gomez and feared he may kill her. (*Id.*) Wyrick left Helena after less than a week, leaving most of her belongings at Mulcare's house. (*Id.*)

In September of 2015, Wyrick began working at Pattee Creek Market in Missoula. (Tr. at 540-41, 583-84, 602, 625, 667-68, 680, 703, 1016.) Wyrick's coworkers noticed various injuries: large bruises on Wyrick's hands or forearms, (Tr. at 670, 914-15), a black eye and bruising on her face, (Tr. at 549, 670, 683-84, 692, 718, 914-15, 1018), a bandaged nose, (Tr. at 629-30), a chunk of hair pulled out of her head on her hairline, (Tr. at 656-57, 718, 914, 1016-17), and bruises on both sides of her neck. (Tr. at 1017.) Harguess came into the store so frequently many of the employees called her mom. (Tr. at 1254-58.) Harguess saw scratches

on Wyrick's neck, throat, and chest, bruises on her arms and wrists, and a chunk of hair missing from the back of her head. (*Id.*)

On October 26, 2015, Wyrick went to the emergency room. (Tr. at 827, 1099-112.) Wyrick had a laceration over her nose, bruising in both eyes and a mild concussion. (*Id.*) Wyrick said she had fallen down the stairs the day before. (*Id.*) Wyrick offered the same explanation to Dr. Katherine Krebsbach during a visit a few days later. (Tr. at 894-906.) Dr. Krebsbach also treated Gomez for a broken hand on November 24, 2015, which Gomez said was caused by a car hood falling on it. (Tr. at 906-08.) Gomez had gone to the emergency room for the injury on October 25, 2015, where he was diagnosed with a boxer's fracture. (Tr. at 885-92). Dr. Krebsbach learned Wyrick and Gomez were in a relationship after she treated each of them separately, but in retrospect the timing and nature of the injuries gave her pause. (Tr. at 909-10.)

On December 16, 2015, Wyrick's coworkers noticed she was pale, holding her side in pain, and could not stand up straight. (Tr. at 633, 671, 1019.) Wyrick, crying, told coworkers Gomez kneed her in the ribs, and the store manager took Wyrick to the hospital. (Tr. at 587-90, 655-56, 1019-20.) Wyrick told the nurse "that her boyfriend had beat her approximately an hour before she showed up to the ER." (Tr. at 745-48, 761.) Wyrick "was in pain and she wanted to make sure that she was not physically so hurt that it was life threatening." (*Id.*) Wyrick had

ligature marks on her neck and contusions on her chest and ribs. (Tr. at 746, 762-63, 767.) Both the nurse and the doctor encouraged Wyrick to call the police, but Wyrick declined. (Tr. at 756-58, 762-65.) Wyrick indicated she planned to get out of the relationship. (Tr. at 751.) Wyrick called Straight and Radcliff to pick her up. (Tr. at 558-63, 1235-36.) Wyrick stayed with them that night and said she was going to leave Gomez and go back to Helena to spend Christmas with her six-year-old son, Harley. (Tr. at 558-63, 1209-10, 1236-37.) But she left the next morning with Gomez. (Tr. at 1237.)

Wyrick again stayed with Straight and Radcliff on the night of December 20, 2015. (Tr. at 566.) Gomez came to the house and talked with Wyrick. (Tr. at 566-69, 1237-40.) Straight told Gomez it seemed like Wyrick did not want to be with Gomez anymore. (*Id.*) Wyrick slept in Straight's living room and spent the night talking to her grandmother on the phone. (Tr. at 566-69, 1219-28, 1237-40.) The next morning, before Straight and Radcliff were awake, Gomez came and got Wyrick. (Tr. at 568-69, 1239-40, 1450-58.) Wyrick left her phone and other personal items. (*Id.*) That was the morning of her last fight with Gomez. (Tr. at 566, 1450-58, 960-77, 1085-97.)

The search for Wyrick began contemporaneous to Gomez's arrest. (Tr. at 1299-300, 1725-26.) An officer called Rollins who said Wyrick "was up Pattee Creek Canyon, and that she would not be coming back down." (Tr. at 835-36.)

Officers used location data from Gomez's cell phone to find search coordinates, which led them to the Deer Creek drainage of Pattee Canyon. (Tr. at 1725-29, 1764-67.) It was cold, the snow was deep, and officers used snowmobiles to get to the coordinates, but they did not locate Wyrick. (Tr. at 1729-32, 1760-67, 1835-36.) Officers returned to the same area two days later and found Wyrick's body 15 to 20 feet down a steep embankment off Pattee Canyon Road. (Tr. at 1486-88, 1733-34, 1753-59, 1767-73, 1814-16.)

Wyrick was 5.4 miles from Gomez's house. (Tr. at 951-54, 1044-46, 1053, 1816.) She had a stab wound in her chest that cut her lung and airway, causing her to choke on her blood until she died. (Tr. at 1327-53.) She had a new fracture of a previously broken rib, a nasal fracture, and her spleen, which had previously been torn, was reinjured and bleeding near the time of her death. (Tr. at 1337-47.) She had contusions and abrasions on her head, face, torso, and extremities that occurred before she died. (Tr. at 1329-30, 1339-41, 1379-82.) The torso bruising was caused by blunt force trauma. (Tr. at 1340-43.)

SUMMARY OF ARGUMENT

Evidence of PFMA was correctly admitted, because the charges were properly joined, and Gomez failed to prove severance prejudice. Evidence of domestic abuse would be admissible on the homicide charge, Gomez does not

explain why he would have testified on a severed homicide charge, and he does not address judicial economy.

Evidence of Wyrick's meth use was correctly excluded, because it was not a pertinent character trait and it was irrelevant. It did not explain her physical injuries or stabbing death, and Gomez did not raise self-defense. Gomez's allegation that Wyrick was accidentally stabbed during their last fight was speculative, because no facts showed Wyrick was addicted to meth or that Wyrick's meth use caused her to become violent or aggressive. This evidence was properly excluded under Mont. R. Evid. 403, because the low probative value was substantially outweighed by the unfair prejudice of labeling Wyrick as a meth user. Gomez relied on these same grounds to support his unopposed motion to exclude his prior drug use.

Gomez's right to present a defense does not require a trial court to ignore standard rules of evidence. Gomez's right was not violated, because the district court's application of standard evidence rules was not arbitrary or disproportionate to their purpose. The district court repeatedly balanced any probative value of Wyrick's drug use against prejudice to Gomez, including the admission of Wyrick's statements showing her state of mind. Likewise, the district court correctly denied Gomez's motion for new trial. If this Court determines exclusion

of Wyrick's meth use was in error, it was harmless on evidentiary and federal constitutional grounds.

The district court correctly applied Mont. R. Evid. 803(3) and *State v. Losson* to admit Wyrick's state of mind statements, because they are relevant and were spontaneously made during conversations where Wyrick revealed her fear of Gomez, her physical and emotional pain, her stress, and her emotional conflict in deciding whether to leave him. The nontestimonial statements did not violate Gomez's confrontation rights and should not be excluded under Mont. R. Evid. 403. Wyrick's statements show the cycle of violence created by Gomez's consistent abuse, and any prejudice to Gomez, which is not unfair, does not substantially outweigh the probative value. The district court should have provided a limiting instruction for the circumstantial evidence admitted during one witness's testimony, but this, along with any error in admitting Wyrick's statements, is harmless.

Gomez does not satisfy cumulative error, because he has not demonstrated his right to a fair trial was prejudiced.

ARGUMENT

I. The district court correctly denied Gomez’s motion to sever.

A motion to sever requires a district court to determine joinder was proper and rule whether severance of the offenses is necessary to prevent prejudice to Gomez. *State v. Richards*, 274 Mont. 180, 906 P.2d 222, 226 (1995).

A. Standard of Review

This Court reviews “whether counts in a charging information were properly joined de novo.” *State v. Kirk*, 2011 MT 314, ¶ 10, 363 Mont. 102, 266 P.3d 1262. The denial of a motion to sever is reviewed for an abuse of discretion. *Id.* “The disposition of a severance motion is determined by the evidence presented at the time of the motion and not upon subsequent developments.” *State v. Redcrow*, 242 Mont. 254, 263, 790 P.2d 449, 455 (1990).

B. The charges were properly joined.

Joinder of multiple offenses is proper if they are “of the same or similar character or are based on the same transactions connected together or constituting parts of a common scheme or plan.” *Kirk*, ¶ 13 (quoting Mont. Code Ann. § 46-11-404(1)). The PFMA and homicide charges were of a similar character, because Wyrick was the victim of both charges and the offenses were committed in the same location, geographical area and time frame. *See Kirk*, ¶¶ 13-15.

The offenses were part of the same transactions connected together or a common scheme or plan, because Gomez caused an ongoing pattern of physical abuse to Wyrick and killed her during their final altercation. *See* Mont. Code Ann. § 46-11-404(1); *State v. Southern*, 1999 MT 94, ¶ 23, 294 Mont. 225, 980 P.2d 3; *Richards*, 274 Mont. at 187, 906 P.2d at 224-26. The PFMA charge precipitated the homicide charge, the charges are logically linked by Gomez’s motive to control Wyrick, and substantial overlapping evidence was necessary to prove both charges. *Id.*

C. Gomez failed to prove severance prejudice.

A district court has discretion to sever properly joined charges if the defendant proves prejudice. Mont. Code Ann. § 46-13-211. The defendant “must prove that the prejudice is so great as to prevent a fair trial.” *Kirk*, ¶ 10. The district court balances possible prejudice to a defendant against judicial economy, which weighs heavily in the process. *Id.* ¶ 11. Gomez does not address judicial efficiency and fails to prove prejudice. *See id.* ¶¶ 11, 17 (explaining the three ways a defendant can prove severance prejudice).

Gomez argues he was prejudiced by evidence of Gomez’s domestic violence against Wyrick, because it was inadmissible under Mont. R. Evid. 404(b) or unduly prejudicial under Mont. R. Evid. 403. Evidence of the injuries Gomez caused Wyrick would be admissible on the homicide charge to prove absence of

mistake or accident. *See* Mont. R. Evid. 404(b) (prior behavior evidence is admissible to show “absence of mistake or accident.”); *State v. Dist. Court of the Eighteenth Judicial Dist.*, 2010 MT 263, ¶¶ 61, 71, 358 Mont. 325, 246 P.3d 415 (evidence of prior mistreatment of the victim admissible to rebut accidental death). Gomez told authorities Wyrick’s death was an accident, and this was his defense when the district court denied his severance motion. (Docs. 40, 55, 62, 74, 85, 139 at 6-7; 4/12/2017 Tr. at 180-81.) Gomez’s abandonment of this defense is irrelevant, because it was a subsequent development unknown to the district court when it denied Gomez’s motion. *See Redcrow*, 242 Mont. at 263, 790 P.2d at 455.

The domestic violence evidence would also be admissible through the transaction rule. In *State v. Haithcox*, 2019 MT 201, ¶¶ 17-20, 397 Mont. 103, ___ P.3d ___, the defendant was charged with aggravated assault, and the State introduced evidence of prior assaultive behaviors against the victim. This Court rejected the defendant’s Rule 404(b) challenge. *Haithcox*, ¶ 19. The defendant’s prior assaultive behavior was “inextricably intertwined with the assault because it shed light on both the atmosphere of abuse and manipulation that had developed, and [the victim’s] resulting behavior.” *Id.* “Abuse within intimate relationships often follows a pattern known as the cycle of violence, ‘which consists of a tension building phase, followed by acute battering of the victim, and finally by a contrite phase where the batterer’s use of promises and gifts increases the battered

woman's hope that violence has occurred for the last time.'" *Id.* (quoting *Hernandez v. Ashcroft*, 345 F.3d 824, 836 (9th Cir. 2003)).

Wyrick lived and died in this cycle of violence. *Haithcox*, ¶ 19. Gomez manipulated and abused Wyrick, which caused Wyrick to be afraid when Gomez beat her yet continue to stay in the relationship until her death. *Id.* Gomez's repeated assaults of Wyrick were "inextricably intertwined" with the homicide and admissible under the transaction rule. *Id.*

Evidence admitted under Rule 404(b) or the transaction rule are subject to Rule 403 balancing. *Haithcox*, ¶¶ 16-17. However, Gomez offers no basis for prejudice beyond arguing the evidence was inadmissible, which is insufficient to prove prejudice prevented a fair trial. *See Kirk*, ¶ 17. As the district court explained, Gomez also failed to prove bad person prejudice, because "the charges are few and the evidence is distinct." (Doc. 74 at 14-15 (quoting *State v. Freshment*, 2002 MT 61, ¶ 26, 309 Mont. 154, 43 P.3d 968).)

Gomez summarily asserts he "very likely would have testified in his defense as to the homicide charge, if not for the district court's adverse rulings." (Br. at 10.) However, a defendant's general assertion that his privilege against self-incrimination is compromised is insufficient to prove severance prejudice. *Kirk*, ¶ 21.

II. The district court properly exercised its discretion in excluding evidence of Wyrick's meth use and it did not violate Gomez's right to present a defense.

A. Standard of Review

"District courts are vested with broad discretion in controlling the admission of evidence at trial." *Seltzer v. Morton*, 2007 MT 62, ¶ 65, 336 Mont. 225, 154 P.3d 561. This Court will "not overturn a district court's evidentiary determinations absent a showing of abuse of discretion." *State v. Hardman*, 2012 MT 70, ¶ 8, 364 Mont. 361, 276 P.3d 839.

A district court's denial of a motion for new trial is reviewed for an abuse of discretion. *State v. Brummer*, 1998 MT 11, ¶ 49, 287 Mont. 168, 953 P.2d 250.

This Court exercises plenary review of whether a defendant's right to present a defense has been violated. *State v. Hauer*, 2012 MT 120, ¶ 23, 365 Mont. 184, 279 P.3d 149.

B. Evidence of Wyrick's meth use is not a pertinent character trait and its probative value is substantially outweighed by unfair prejudice.

Gomez moved to exclude his prior bad acts, including his drug use, as irrelevant, unfairly prejudicial and inadmissible character evidence, and the State did not oppose. (*See* Docs. 37 (citing Mont. R. Evid. 401, 403, 404), 49.) On the same grounds, the district court correctly excluded Wyrick's meth use. (*See* Doc. 103 at 3-4 (citing Mont. R. Evid. 401, 403, 404).)

Wyrick's meth use is irrelevant and not a pertinent character trait.

See Mont. R. Evid. 401, 404(a)(2). Wyrick's meth use did not explain her repeated physical injuries or stabbing death. (*See* Docs. 103 at 3-4, 139 at 9; 4/12/2017 Tr. at 181-82 (Gomez's trial counsel acknowledged the abundant evidence showing Gomez beat Wyrick).) To support his accident defense, Gomez speculated Wyrick was aggressive during the fight that led to her stabbing death, because meth users "may behave in a violent manner or respond irrationally to others." (Doc. 41 at 7-8.) However, the district court explained Gomez's speculation was not supported by the results of the toxicology screen at autopsy or her brother's statements. (Doc. 103 at 4 (distinguishing *State v. Colburn*, 2016 MT 41, 382 Mont. 223, 388 P.3d 258).)

Gomez's trial counsel acknowledged this speculation in an exchange omitted from Gomez's brief. (Br. at 11-13.)

[MS. KAUFFMAN]: Now, I think the Court was concerned that we were trying to say because of meth, she brought the knife to the fight and, you know, was aggressive. The Court doesn't want us to comment on the fact that she may have been volatile or violent because of the meth. We can certainly respect that, because we're probably—

THE COURT: You've got no evidence of that.

MS. KAUFFMAN: Right. I don't have anybody to say that, unless her brother says something like that. And, remember, her brother said she didn't change at all when

she was using meth, but I didn't get to the finish that interview. So—

THE COURT: But what he—I read his interview and he does not say anything—he doesn't even agree that she was addicted to meth.

MS. KAUFFMAN: Right.

THE COURT: Those are words that you were using. He doesn't agree with any of that stuff.

MS. KAUFFMAN: Right.

(Tr. at 18.)

Gomez's speculation does not make Wyrick's meth use a pertinent character trait. *See* Mont. R. Evid. 404(a)(2). Gomez later filed a written offer of proof, (Doc. 110; Tr. at 458-60), but it “simply recited what the proposed witnesses who had purported knowledge of the victim's meth use would testify to.” (Doc. 139 at 6.) Gomez also argued Wyrick's meth use was an alternative explanation for her weight loss, thinning hair, and other changes in her appearance. However, it was never the State's theory, and the State did not argue, that Wyrick's weight loss or change in appearance was due to domestic abuse. (*See* Tr. at 17, 1893-1926.)

In *Hardman*, ¶¶ 6-7, the defendant was charged with deliberate homicide, and he claimed it was an accident. The State introduced good character evidence of the victim. *Id.* ¶ 17. On cross-examination defense counsel sought to introduce evidence of the victim's drug use and criminal record. *Id.* The trial court excluded

the evidence under Rules 404 and 403, and this Court affirmed. *Id.* ¶¶ 17-22. This Court explained “[f]or a victim’s character trait to be ‘pertinent,’ it must relate to the defendant’s claim of self-defense—a claim not raised here.” *Id.* ¶ 20. Here, Gomez did not claim self-defense. *See id.*

Wyrick’s meth use is also barred by Rule 403. *Id.* Its probative value is low for the same reasons it is not relevant or pertinent. As the district court explained: “It doesn’t really go to a defense. It really is just a way to try and trash the victim.” (Tr. at 24.) Contrary to Gomez’s argument, the evidence was offered to show Wyrick used meth during her relationship with Gomez. (*See Br.* at 21-23.) Wyrick’s meth use is unfairly prejudicial, because it would portray her in the negative light of a meth user. Gomez caused Wyrick’s abuse and death, not Wyrick’s meth use. The evidence was properly excluded under Rule 403, because it would have caused unfair prejudice that substantially outweighed its probative value.

If this Court determines this evidence was excluded in error, it was harmless trial error. *See State v. Garding*, 2013 MT 355, ¶¶ 28-33, 373 Mont. 16, 315 P.3d 912 (improperly excluded evidence is harmless if there is no reasonable possibility the exclusion contributed to the conviction). Evidence at trial showed Wyrick endured months of physical injuries while in a relationship with Gomez. Roommates heard frequent arguments between Gomez and Wyrick in the bedroom

they shared and the last one ended with a loud thump and Wyrick's scream. Gomez ran out the door, reached at something in the backseat of his SUV, and sped out of the driveway. Blood was seen in the hallway, on the front step and in the snow near where Gomez's SUV was parked.

Wyrick disappeared. Officers discovered her body 5.4 miles from Gomez's house. She died of a stab wound to the chest. The blood on the front step matched Wyrick's DNA as well as blood found in various places in Gomez's SUV and on various items in Gomez's possession. There is no reasonable possibility the exclusion of Wyrick's meth use contributed to the conviction, because it did not change the independent evidence proving Gomez caused Wyrick's abuse and death. *See Garding*, ¶¶ 28-33.

C. The exclusion of Wyrick's meth use did not violate Gomez's right to present a defense.

Defendants have a constitutional right to present a defense. *Hauer*, ¶ 24. The right, however, "is subject to reasonable restrictions." *United States v. Scheffer*, 523 U.S. 303, 308 (1998). "[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Id.* In *Taylor v. Illinois*, 484 U.S. 400, 410 (1988), the Supreme Court explained "[t]he accused does not have an unfettered right to offer [evidence] that is

incompetent, privileged, or otherwise inadmissible under standard rules of evidence.”

The district court’s exclusion of Wyrick’s meth use under Rules 404(a)(2) and 403 was not “arbitrary” or “disproportionate” to their purpose. *See Scheffer*, 523 U.S. at 308; *Hauer*, ¶ 24. On multiple occasions the district court thoughtfully applied these rules and explained its rationale. In *Hauer*, ¶¶ 14-15, 20-35, this Court affirmed a district court’s exclusion of character evidence under Rule 404(a)(2) and held it did not violate the defendant’s right to present a defense. Similarly, Gomez’s speculative allegations were insufficient to tip the scales in favor of his right to present a defense. *See Hauer*, ¶ 25.

The Supreme Court has listed Fed. R. Evid. 403 and Mont. R. Evid. 403 as examples of “familiar and unquestionably constitutional evidentiary rules.” *Montana v. Egelhoff*, 518 U.S. 37, 42 (1996). The district court thoughtfully applied this “standard rule of evidence,” *see Taylor*, 484 U.S. at 410, and balanced the limited probative value of Wyrick’s meth use against the resulting unfair prejudice to Gomez, including any prejudice created by the admission of the statements Gomez challenges on appeal. (*See, e.g.*, Doc. 97 (excluding statements); Tr. at 809-16 (balancing statements against meth use evidence), 812-19 (limiting testimony of Wyrick’s statements), 831-33 (limiting testimony based on defense counsel voir dire), 1156-70 (noting the State’s domestic violence expert, who was

not called, could open the door to evidence of Wyrick's meth use); Appendix A (App. A.) Gomez's defense was limited by the substantial evidence showing he abused and killed Wyrick, but that does not allow him to introduce inadmissible, prejudicial evidence with the sole purpose of casting the victim in a negative light. *See Taylor*, 484 U.S. at 410.

The district court's ruling precluded evidence of Wyrick's meth use. It did not preclude Gomez from presenting a defense. *See Hauer*, ¶¶ 31-35. Gomez could have testified that Wyrick was accidentally stabbed during their last fight, and he took her body to Pattee Canyon in panic. (*See* Doc. 139 at 6-7; 4/12/2017 Tr. at 180-81.) Gomez's accident expert could have testified his reconstruction was consistent with Gomez's story, and Gomez's psychological expert could have testified his panic was consistent with his depressive tendencies. (*Id.*) Gomez asserts the limitation of his psychological expert's testimony "precluded" him from pursuing the accident defense. (Br. at 4.) The district court's ruling only "precluded" the expert from reciting Gomez's version of the facts and opining whether Gomez had the requisite intent to commit the charged offenses. (*See* Doc. 75.1.)

Gomez's assertion that "he couldn't exercise his right to testify if he couldn't talk about the meth," is a request for an unfettered right to present a defense that ignores standard rules of evidence. *See Taylor*, 484 U.S. at 410. The

right is not so extensive. *Id.* Moreover, this argument is not supported by the record. Gomez's counsel acknowledged during the new trial hearing that Gomez had started thinking he would not testify before the ruling excluding Wyrick's meth use. (*See* 4/12/2017 Tr. at 183.) Gomez cannot change the timing of his decision to fit his argument on appeal.

The district court's application of Rules 404(a)(2) and 403 did not violate Gomez's right to present a defense. However, if this Court determines the exclusion of Wyrick's meth use infringed this right, the error is harmless. A federal constitutional error is harmless if the court can declare a belief the error was harmless beyond a reasonable doubt. *Chapman v. Cal.*, 386 U.S. 18, 24 (1967). Given the strength of the independent evidence against Gomez and the lack of probative value of Wyrick's meth use, any infringement on Gomez's right to present a defense is harmless beyond a reasonable doubt. (*See* Section II(B).)

D. The district court correctly denied Gomez's motion for new trial.

The interests of justice did not require a new trial. *See* Mont. Code Ann. § 46-20-702. Gomez's reliance on *Brummer* is unpersuasive. The new trial order in *Brummer*, ¶¶ 26-29, 51-53, was supported by the State engaging in a variety of troubling practices, which are not present in this case. The State's theory was consistent while Gomez changed his theory on the eve of trial. (*See* Doc. 139 at 7-9.) Gomez's trial counsel undermines the argument Gomez was prejudiced by

the “last-minute” ruling. (*See* Br. at 25-26.) Two weeks before trial, Gomez’s counsel told the district court a ruling on the meth use evidence was “not, pressing necessarily.” (1/12/2017 Tr. at 49.) During the new trial hearing, Gomez’s counsel took the timing of the ruling “off the table.” (4/12/2017 Tr. at 182-84.)

III. The district court properly exercised its discretion by admitting Wyrick’s statements showing her state of mind.

The district court addressed Gomez’s objections to 116 of Wyrick’s statements in its pretrial order. A list of these statements, which was filed with the exhibits, is attached as App. A with notations of the statements refused, not offered, and admitted, including the grounds for admission.

A. Standard of Review

This Court “will not disturb the district court’s evidentiary rulings absent an abuse of discretion.” *State v. Losson*, 262 Mont. 342, 350, 865 P.2d 255, 260 (1993).

Conclusions of law and interpretations of the constitution are reviewed de novo. *State v. Porter*, 2018 MT 16, ¶ 14, 390 Mont. 174, 410 P.3d 955.

B. The State cannot respond to Gomez’s challenge of statements not cited in the record or on grounds not supported by authority.

Gomez specifically challenges numerous statements but also “challenges all of the statements cumulatively” without further citation, argument or authority.

(Br. at 27-28.) On appeal, an “argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes, and pages of the record relied on.” M. R. App. P. 12(1)(g). The State cannot respond to an error Gomez does not specifically identify or address.

Likewise, Gomez’s argument is limited to the statements admitted as circumstantial or direct evidence of Wyrick’s state of mind under *Losson* and Mont. R. Evid. 803(3). As this Court explained in *State v. English*, 2006 MT 177, ¶¶ 45-48, 333 Mont. 23, 140 P.3d 454, a district court does not abuse its discretion for admitting statements on grounds unchallenged on appeal. Four of the statements Gomez cites were admitted as excited utterances. (Br. at 28-29; Tr. at 628, 649-50, 655-57, 715-18.) One statement was admitted, with a limiting instruction, as non-hearsay because it showed dynamics of victim behavior. (Br. at 28-29; Tr. at 589-99.) Another statement was admitted as a present sense impression.¹ (Br. at 28; Tr. at 503-05.) Gomez does not argue or cite authority to show the district court erred on these grounds. (Br. at 26-37.)

This Court is not obligated “to conduct legal research on behalf of a party, to guess at his or her precise position, or to develop legal analysis that may lend

¹ If this Court disagrees, it is admissible as direct evidence of Wyrick’s state of mind. *See* Section III(D)(3).

support to that position.” *Johnston v. Palmer*, 2007 MT 99, ¶ 30, 337 Mont. 101, 158 P.3d 988. The State limits its response to the statements specifically challenged and the bases argued on appeal.

C. The district court did not abuse its discretion by admitting Wyrick’s statements under Rule 803(3) or *Losson*.

“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.” Mont. R. Evid. 801(c). The hearsay exception in Rule 803(3) allows 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.”

The application of the hearsay rules to a homicide victim’s statements reflecting state of mind is addressed in *Losson*. A statement offered to circumstantially prove the declarant’s state of mind “is not offered to prove the truth of the matter asserted and the evidence is not hearsay.” *Losson*, 262 Mont. at 348, 865 P.2d at 259 (citing *United States v. Brown*, 490 F.2d 758, 762-63 (D.C. Cir. 1973)). A statement offered to directly prove the declarant’s state of mind must meet the exception in Rule 803(3), because it “is introduced to prove the truth of the matter asserted and is hearsay.” *Id.* at 349, 865 P.2d at 259.

In *Losson*, 262 Mont. at 345, 865 P.2d at 257, the defendant was charged with mitigated deliberate homicide for killing her husband. During trial, the district court allowed three witnesses to testify to statements the victim made before he died. *Id.* at 347, 865 P.2d at 258. The victim told a counselor his wife “threatened to kill him in the past.” *Id.* He told his boss “[his wife] would kill him if he ever moved out.” *Id.* He told a naval recruiter he wanted to go active duty because “[h]e was afraid of his wife and thought she was going to kill him.” *Id.* The district court admitted these statements under Rule 803(3) and instructed the jury the statements were not offered to prove the truth of the matter asserted and limited it to show the victim’s state of mind. *Id.*

On appeal, the defendant argued the statements were inadmissible hearsay, but this Court affirmed. *Losson*, 262 Mont. at 348-49, 865 P.2d at 259-60. The third statement was correctly admitted under Rule 803(3) as direct evidence of the victim’s state of mind. *Id.* This Court disagreed with the district court’s admission of the first two statements under Rule 803(3), but held they were correctly admitted as circumstantial evidence of the victim’s state of mind. *Id.* The statements were not hearsay and showed the victim’s fear of the defendant. *Id.* This Court noted it will affirm a trial court’s decision if the statements are correctly admitted regardless of its basis for admission. *Id.*

1. Wyrick's statements are relevant.

Statements of a homicide victim's state of mind must be relevant. *Losson*, 262 Mont. at 347-48, 865 P.2d at 258. In *Losson* the victim's statements were relevant to show the victim feared the defendant to rebut self-defense. This Court noted it had previously held, in *State v. Magruder*, 234 Mont. 492, 496, 765 P.2d 716, 719 (1988), that "a victim's state of mind is especially relevant in a homicide case where the defendant asserts the claim of self-defense." *Losson*, 262 Mont. at 347, 865 P.2d at 258.

However, Gomez incorrectly attempts to limit the relevancy of a homicide victim's state of mind to fear in self-defense cases. (Br. at 26-36.) Both *Losson* and *Magruder* cite *Brown*. The court in *Brown*, 490 F.2d at 767, explained "[w]hile there are undoubtedly a number of possible situations in which such statements may be relevant, the courts have developed three rather well-defined categories in which the need for such statements overcomes almost any possible prejudice." These three categories are defenses of self-defense, suicide or accident. *Id.*

Gomez actively pursued an accident defense from the outset of this case. (Docs. 22, 39-40, 55, 57, 60, 62, 75.1, 85, 139 at 6-7; 1/23/2017 Tr. at 105-16; Tr. at 330-31.) Although Gomez chose not to present a defense, the district court did not know how Gomez would proceed until the State rested. (Doc. 139 at 6-7; Tr. at 854-57, 1634-38, 1865-67; 4/12/2017 Tr. at 180-81.) The district court

should not be held in error for not knowing which defense Gomez would choose. During trial, Gomez reserved another theory, “that somebody else is involved,” which further supports the relevancy of these statements to prove the identity of Gomez as Wyrick’s killer. (*See* Tr. at 854-57.)

Gomez’s reliance on *State v. Hansen*, 1999 MT 253, ¶¶ 71-83, 296 Mont. 282, 989 P.2d 338, is misplaced. The statements in *Hansen*, ¶ 71, were improperly admitted under the theory of corpus delicti. The Court further explained the rules of evidence should be applied rather than the concept of res gestae, which “adds nothing but confusion to an already complex area of the law.” *Id.* ¶¶ 72-83. This Court did not apply Rule 803(3) or otherwise mention the applicable law in this case. *Id.* Gomez does not ask this Court to overrule *Losson*, which directly addresses the issue Gomez presents.

As the district court noted pretrial, Wyrick’s state of mind was relevant to the accident defense and to show Gomez and Wyrick “were in an abusive relationship in which he injured her on more than one occasion and his abuse escalated until he caused her death.” (Doc. 97 at 22.) This includes Wyrick’s fear of Gomez, her physical and emotional pain, her stress, and her emotional conflict in deciding whether to leave him. *See* Mont. R. Evid. 803(3).

2. Some of the challenged statements are admissible under Rule 803(3) without *Losson*.

During trial, Gomez conceded witnesses could testify to Wyrick's statements conveying her state of mind, like "I'm afraid," and narrowed his objections to testimony repeating Wyrick's statements explaining the reason for her fear. (Tr. at 878-79.)

Wyrick told Amy Finch "she was sad and scared." (Tr. at 540, 544-46.) Finch told Wyrick she had previously been in an abusive relationship. (Tr. at 546-48.) In response, Wyrick said she was afraid. (*Id.*) These statements convey Wyrick's state of mind and are admissible under Rule 803(3).

On December 16, 2015, Straight and Radcliff picked Wyrick up from the hospital. (Tr. at 558-63.) Wyrick stayed the night with them, and Radcliff talked to Wyrick about her plan. (*Id.*) Wyrick "seemed like she really wanted to leave and she was trying to make it happen." (*Id.*) Wyrick told Radcliff "she was going to try and make it to Helena." (*Id.*) This conveys Wyrick's plan and is admissible under Rule 803(3).

As Gomez conceded during trial, many of the statements below are also admissible under Rule 803(3) without further analysis of *Losson*. They are included below to provide context and foundation for Wyrick's statements explaining her fear.

3. The district court correctly admitted Wyrick's statements as direct evidence of her state of mind.

This Court has “previously concluded that state of mind statements are reliable.” *Losson*, 262 Mont. at 350, 865 P.2d at 260. As the district court noted, the guarantee of trustworthiness of statements admitted under Rule 803(3) is spontaneity. (Doc. 97 at 28 (citing Commission Comments to Mont. R. Evid. 803).) Like the statement admitted as direct evidence of state of mind in *Losson*, 262 Mont. at 350, 865 P.2d at 260, the challenged statements were spontaneously made during conversations where Wyrick revealed her state of mind, emotions, sensations, physical conditions, plan, mental feelings, pain and bodily health. *See* Mont. R. Evid. 803(3).

Gomez challenges Radcliff's testimony of Wyrick's statements near the end of her life. Wyrick contacted Radcliff more frequently during the latter days, because Wyrick “was afraid to go home or they were fighting.” (Tr. at 564-68.) There were times Wyrick asked Radcliff and Straight to go to her house, because Wyrick “was afraid of what [Gomez] would do to her if we weren't.” (*Id.*) Sometimes Wyrick called Radcliff to pick her up from work, and Wyrick appeared “nervous and scared.” (*Id.*) Wyrick “made it very clear she was afraid to go home.” (*Id.*) “She wasn't sure what he would do to her.” (*Id.*) Radcliff testified on the last night she saw her, Wyrick “was definitely afraid for her life, and she wanted out.” (*Id.*)

These statements directly show Wyrick was afraid of Gomez and thought he was going to kill her. This parallels the statement admitted in *Losson*, 262 Mont. at 347-49, 865 P.2d at 258-59, as direct evidence of fear – “he was afraid of his wife and thought she was going to kill him.” This same direct evidence was admitted during Rollins’s testimony. Wyrick expressed her fear of Gomez when she told Rollins she had once tried to get out of the car while Gomez was driving. (Tr. at 827-29.) She said Gomez “grabbed her by the hair and pulled her back in, and he threatened her life.” (*Id.*) Gomez told her “[i]f you leave me, I’ll kill you.” (*Id.*) Like the statement in *Losson*, 262 Mont. at 347-49, 865 P.2d at 258-59, this shows Wyrick was afraid of Gomez and thought he was going to kill her.

Three of the challenged statements were correctly admitted as direct evidence of Wyrick’s state of mind and her then-existing physical condition. *See Losson*, 262 Mont. at 348-49, 865 P.2d at 259; Mont. R. Evid. 803(3). Karen Fairclough, the manager of Pattee Creek Market, testified she saw Wyrick at work sitting in pain on a stool holding her side. (Tr. at 587-89.) Wyrick told Fairclough “her boyfriend kneed her in the side.” (*Id.*) Wyrick told another coworker Gomez kicked her. (Tr. at 655-56.) The next day, Wyrick was still struggling with the pain. (Tr. at 915-16.) Wyrick told another coworker “she had gotten in an argument with [Gomez], and that he had kneed her in the chest.” (*Id.*) She told him “it did refracture a broken rib.” (*Id.*)

The reliability of these statements is further supported by testimony to which Gomez did not object. The nurse who treated Wyrick testified Wyrick said “her boyfriend had beat her,” and she “had been struck, choked, and punched, and kicked in the ribs.” (Tr. at 742-58.) Medical personnel also testified she had contusions to her chest and a pre-existing rib fracture. (Tr. at 767-75, 778-82.)

Substantial evidence shows Gomez repeatedly abused Wyrick. A coworker testified Wyrick came into work late one day distressed, with her hair messed up. (Tr. at 656-57.) Wyrick said Gomez had just pulled her hair during a fight in Gomez’s car. (*Id.*) This is direct evidence of Wyrick’s fear of Gomez, a fear that became persistent due to Gomez’s abuse. *See* Mont. R. Evid. 803(3); *Losson*, 262 Mont. at 347-50, 865 P.2d at 258-60. The remainder of the statements were correctly admitted as direct evidence of Wyrick’s state of mind, specifically her fear and concern for the consequences of her abusive relationship with Gomez. *See* Mont. R. Evid. 803(3); *Losson*, 262 Mont. at 348-49, 865 P.2d at 259.

During a drive to the store with Radcliff, Wyrick said she was afraid. (Tr. at 555-58.) Wyrick described a car following them and told Radcliff “[i]t wasn’t the first time she had been followed.” (*Id.*) This is direct evidence Wyrick was afraid of Gomez and she thought Gomez was following her. *See Losson*, 262 Mont. at 347-50, 865 P.2d at 258-60. Radcliff’s observations support Wyrick’s explanation of her fear. Radcliff observed a car behind them, pulled over, the car drove past,

and a short while later the car reappeared behind them. (Tr. at 555-58.) Radcliff identified the car as Gomez's white Toyota Avalon. (*Id.*) Radcliff zigzagged all over the place and dropped Wyrick off at her brother's house. (*Id.*)

Wyrick discussed her fear with her coworker Moore, on multiple occasions. (Tr. at 710-13.) Once Wyrick told Moore she could not speak with "any of the male employees because he would come in, the defendant would come in, and deal with any of the employees that she was still talking with; and that that is why she was afraid to talk to us, for our safety." (*Id.*) Wyrick "was very afraid when she told me that . . . she didn't even look at me when she said it." (*Id.*) Another male coworker testified he had a conversation with Wyrick where she appeared nervous and concerned. (Tr. at 604-07.) Wyrick told him "if it seemed like I was hitting on her or something . . . she would have 'consequences.'" (*Id.*) These are direct evidence Wyrick was afraid of Gomez and thought he may harm her or her coworkers. *See Losson*, 262 Mont. at 347-50, 865 P.2d at 258-60.

During the last conversation Moore had with Wyrick on December 19, 2015, Moore observed Wyrick to be "withdrawn" and in "a lot of fear and trepidation." (Tr. at 920-21.) Wyrick said she was sad and confused, and:

just within the last two or three days, recently, [Gomez] had been taking her up into the Pattee Canyon area and driving silently and showing her, slightly off-the-path areas and ditches and whatnot, and that he had been putting on his clothes and shoes with gloves on,

specifically, in the morning, and preparing himself with gloves on.

(*Id.*) Wyrick said, “she didn’t know what to do; that her will had been broken.”

(*Id.*) These statements are direct evidence of the fear, sadness and confusion Wyrick was experiencing near the end of her life. *See Losson*, 262 Mont. at 347-50, 865 P.2d at 258-60.

The district court properly exercised its discretion by admitting these statements under Rule 803(3) as direct evidence of Wyrick’s state of mind.

4. The district properly exercised its discretion by admitting Wyrick’s statements as circumstantial evidence of her state of mind.

The following statements were correctly admitted as circumstantial evidence of Wyrick’s fear of Gomez and concern for her life. *See Losson*, 262 Mont. at 347-50, 865 P.2d at 258-60.

Mulcare testified Wyrick was “very scared” and “in a very abusive relationship.” (Tr. at 498-501.) The district court admitted this and instructed the jury “the specific statement is not offered for the truth, but . . . it’s offered to show or demonstrate her fear.” (*Id.*) The district court correctly gave a limiting instruction. *See State v. Fuhrmann*, 278 Mont. 396, 404-07, 925 P.2d 1162, 1167-69 (1996) (a trial court must give a limiting instruction with statements admitted as circumstantial evidence of a deceased declarant’s state of mind because they are not offered for the truth of the matter asserted).

While Mulcare drove Wyrick back to Helena, Wyrick said she was afraid. (Tr. at 507-10.) Gomez objected to further questions. (*Id.*) The district court ruled further testimony was admissible as circumstantial evidence of Wyrick's fear and instructed the jury it was limited to show Wyrick's fear of Gomez. (*Id.*) Mulcare testified, Wyrick told her Gomez would continually take her to a wooded or forested area and "every time that he would take her there, [Wyrick] knew that he was taking her there with the intent to kill her." (*Id.*) Although some of Mulcare's statements may also be construed as direct evidence, the district court did not abuse its discretion by admitting them as circumstantial evidence with a limiting instruction. *See Losson*, 262 Mont. at 347-50, 865 P.2d at 258-60 (this Court will affirm correctly admitted statements regardless of the trial court's basis); *Fuhrmann*, 278 Mont. 396 at 404-07, 925 P.2d at 1167-69.

The final statement admitted as circumstantial evidence of Wyrick's state of mind was made to her coworker, Mary Kotula. Wyrick appeared eerily calm and collected, like she was nervous but not scared. (Tr. at 636-37.) In a forewarning way, Wyrick said "[i]f I ever go missing, look for my body in Pattee Canyon." (Tr. at 656.) Prior to this testimony, the district court ruled Kotula's testimony was circumstantial evidence of Wyrick's state of mind and said a limiting instruction would be given. (Tr. at 647.) However, no instruction was given, or requested, during the testimony. (Tr. at 656-57.)

The district court should have given a limiting instruction for this testimony. *See Fuhrmann*, 278 Mont. at 404-07, 925 P.2d at 1167-69. This error, however, is harmless, because there is no reasonable possibility the failure to give a limiting instruction for this statement contributed to the conviction. *See Garding*, ¶ 31; *Fuhrmann*, 278 Mont. at 404-08, 925 P.2d at 1167-69 (holding harmless error, under prior test, when limiting instruction was not provided).

5. The district court correctly ruled Wyrick’s hearsay statements were nontestimonial and did not implicate Gomez’s confrontation rights.

A defendant’s Sixth Amendment confrontation rights are not implicated by hearsay statements admitted into evidence if they are nontestimonial. *State v. Laird*, 2019 MT 198, ¶ 83-84, 397 Mont. 29, 447 P.3d 416. This Court applies the primary purpose test to determine if a statement is testimonial. *Id.* ¶¶ 92-108. This Court examines “in light of all the circumstances, viewed objectively, the statements’ primary purpose was to create an out-of-court substitute for trial testimony.” *Id.* ¶ 99. “[L]ess formal questioning is less likely to reflect a primary purpose aimed at obtaining testimonial evidence against the accused.” *Id.* ¶ 94 (quoting *Ohio v. Clark*, 576 U.S. ___, 135 S. Ct. 2173, 2180 (2015)).

Wyrick’s statements were made in conversation with her friends and coworkers. Wyrick disappeared before law enforcement could interview her. An objective review of the circumstances shows Wyrick did not make these comments

to create an out-of-court substitute for trial testimony. *See Laird*, ¶ 99. As the district court noted, some of Wyrick's comments indicate the opposite to be true. (*See* Doc. 97 at 33.) Wyrick did not want to report her abuse, because she was afraid it might make it worse. (*Id.*)

D. Any prejudice of the challenged statements does not substantially outweigh the probative value of Wyrick's state of mind.

The State addresses Gomez's challenge to the admission of statements under Rule 403 collectively but does not concede Gomez preserved these grounds for all the challenged statements.²

Wyrick's statements are probative and necessary to explain Wyrick's fear, conflict, pain, and the emotional stress caused by Gomez's escalating physical abuse and his continued threats to harm or kill her. They provide context to Wyrick's decisions not to report Gomez's abuse and not to follow through with her plan to leave him. They illustrate Gomez's efforts to control Wyrick and inform the cycle of violence underlying both the PFMA and homicide charges. *See Haithcox*, ¶ 19. If the jury were denied an explanation for Wyrick's state of mind, it would receive an incomplete, and potentially misleading, picture. *Id.*

² Based on its review of the record, the State finds Gomez only objected under Rule 403 to these cited statements. (Tr. at 507-10, 564-68, 604-07, 710-13, 827-29; *see also* 1/12/2017 Tr. at 43-48.)

The district court acknowledged some of the statements were prejudicial, but explained it is necessary to admit prejudicial evidence to prove homicide and PFMA. (Doc. 97 at 23.) “The critical issue here is whether there is a danger of **unfair prejudice.**” (*Id.*) This Court has recognized “[p]robative evidence is usually prejudicial, but rises to the level of being unfairly prejudicial only ‘if it arouses the jury’s hostility or sympathy for one side without regard to its probative value, if it confuses or misleads the trier of fact, or if it unduly distracts from the main issues.’” *State v. Blaz*, 2017 MT 164, ¶ 20, 388 Mont. 105, 398 P.3d 247 (quoting *State v. Hicks*, 2013 MT 50, ¶ 24, 269 Mont. 165, 296 P.3d 1149). Wyrick’s statements inform the main issues, which are whether Gomez beat Wyrick during their relationship and killed her. *See id.* They do not distract, confuse or mislead the jury. *Id.*

Throughout the proceedings the district court thoughtfully balanced the probative value of Wyrick’s statements against Gomez’s competing interests. *Id.* In its pretrial order, the district court excluded some of the statements under Rule 403 that dealt with Gomez wanting to engage in a threesome, forcing Wyrick to sign a sex contract, and Gomez’s desire to prostitute Wyrick. (Doc. 97 at 23-24.) The district court excluded other statements as unfairly prejudicial during trial and many were not offered pursuant to these rulings. (*See App A.*)

The district court properly exercised its discretion by determining the probative value of the challenged statements was not substantially outweighed by unfair prejudice under Rule 403.

E. If the district court erred in admitting any of the challenged statements, it is harmless trial error.

Gomez decided to put the State to proof, which required the jury to decide whether it was Gomez who caused Wyrick's repeated abuse and death. This identity defense was reserved by Gomez during trial. (Tr. at 854-57 (reserving theory "that somebody else is involved.")) Wyrick's statements of state of mind prove Gomez was her abuser and killer, an element of the offense, because he was the source of her fear, pain, concern, and plans to leave.

"The cumulative evidence test asks whether the fact finder was presented with admissible evidence providing the same facts as the tainted evidence." *State v. Larson*, 2015 MT 271, ¶ 33, 381 Mont. 94, 356 P.3d 488. An abundance of other admissible evidence was offered to prove Gomez abused and killed Wyrick. (See Section II(B).) This cumulative evidence alone supports Gomez's conviction, so the quality of Wyrick's statements "was such that there was no reasonable possibility that it might have contributed to the defendant's conviction." *State v. Van Kirk*, 2001 MT 184, ¶ 44, 306 Mont. 215, 32 P.3d 735. If this Court determines any of Wyrick's statements were admitted in error, it was harmless. *See id.*

IV. Cumulative error does not support reversal.

Gomez has not demonstrated any error that has prejudiced his right to a fair trial. *See Hardman*, ¶ 35. The district court applied standard evidence rules and thoughtfully balanced the evidence, admitted or excluded, with Gomez's rights. This proper exercise of judicial discretion does not justify reversal on any of the grounds raised by Gomez, including cumulative error. Gomez's general challenge to all the statements cumulatively and the litany of other unsupported issues are mere allegations that do not satisfy cumulative error. *State v. Flowers*, 2004 MT 37, ¶¶ 46-47, 320 Mont. 49, 86 P.3d 3.

CONCLUSION

The State respectfully requests this Court affirm Gomez's convictions.

Respectfully submitted this 8th day of October, 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 9,996 words, excluding certificate of service and certificate of compliance.

/s/ *Brad Fjeldheim*

BRAD FJELDHEIM

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 17-0470

STATE OF MONTANA,

Plaintiff and Appellee,

v.

EMMANUEL F. GOMEZ,

Defendant and Appellant.

APPENDIX

Modified list of Wyrick’s statements addressed by the district court,
as filed with the exhibitsApp. A

CERTIFICATE OF SERVICE

I, Brad Fjeldheim, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 10-08-2019:

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