IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0277

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JOSHUA DONALD BURLEY,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, The Honorable Donald L. Harris, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF THE ISSUES

1. Did the district court properly exercise its discretion in denying Appellant's motion in limine to exclude evidence of prior acts?

2. Did the district court impose a legal sentence?

STATEMENT OF THE CASE

The State charged Appellant Joshua Burley with: Count I, Incest, alleging that Burley had sexual contact with his stepdaughter F.L., who was under the age of 12; alternatively Count II, Solicitation of Incest, alleging that Burley commanded, encouraged, or facilitated the commission of Incest with F.L.; and Count III, Incest, alleging that Burley had sexual contact with his stepdaughter, A.T. (D.C. Doc. 37.) The day before Burley's jury trial, he filed a motion in limine asking the district court to rule that the State could not introduce any evidence of an incident where A.T. believed that Burley had used a cell phone to record her while she was showering or any reference to Burley's prior Partner or Family Member Assault convictions. (D.C. Doc. 56.)

The State responded, arguing that A.T. and other witnesses should be allowed to testify about the incident where she believed Burley had attempted to record her showering, but agreed it would not introduce evidence of Burley's prior PFMA convictions unless Burley opened the door to such testimony. (D.C. Doc.

58.) The district court considered Burley's motion prior to jury selection and denied the motion with respect to A.T.'s belief that Burley attempted to record her showering. (*Id.*)[1]

The jury convicted Burley of Solicitation of Incest and Incest. (D.C. Docs. 64-65.) Michael Sullivan completed a sexual offender evaluation, and Officer Stevenson completed a presentence investigation. (D.C. Docs. 79, 87.) Pursuant to Mont. Code Ann. § 45-5-507(5), the district court sentenced Burley to 100 years in prison with 40 years suspended for Solicitation of Incest. The court restricted Burley's parole eligibility for 25 years. (D.C. Doc. 88.) For Incest, the district court sentenced Burley to a concurrent sentence of 40 years with 20 years suspended. (*Id.)*

STATEMENT OF THE FACTS

I. Trial

Emery Starr met Burley in 2006 when they worked together at Old Chicago. They began dating and married on July 4, 2007. (2/12/17-2/14/17 Transcript of Jury Trial [Tr.] at 362-63.) Starr's four children, including A.T. and F.L. resided

[1] The district court did not issue a written order denying the motion, presumably because it did not have time to do so since Burley filed the motion the day before the jury trial started.

with Starr and Burley, although F.L. lived part-time with her natural father, Joe. (Tr. at 364-65.)

Prior to Starr's marriage to Burley, Starr and Joe had been married about three years. They separated in 2005. Starr and Joe had two children together—a son and F.L. Starr and Joe had an amicable divorce and negotiated a 50/50 parenting plan. (Tr. at 340-41.) After Starr married Burley, Joe and Burley interacted infrequently. Joe's feelings about Burley were neutral. (Tr. at 343.)

At trial, A.T. explained that while her mom was traveling for work, Burley instructed A.T. to take a shower. A.T. responded that she did not want to take a shower, but Burley insisted. A.T. was in the shower when she noticed there was some blue, metal object on top of the bathroom cabinet. A.T. got out of the shower, stood on top of the toilet, and found a blue Envy phone that was recording while she was in the shower. The phone had been propped up by cardboard from a toilet paper roll that had been squished. A.T. freaked out. She immediately wrapped herself in a towel and ran to find her older sister, S.D. (Tr. at 238-39.)

Starr had obtained legal guardianship of S.D. when S.D. was about 14 years old. S.D. did not have much of a relationship with Burley after Burley and Starr married. Burley did not talk to S.D. very often. (Tr. at 280.) S.D. had a good relationship with Starr, whom she considered to be her mom, and was also very

close to A.T., whom she considered her best friend. S.D. was always available to A.T. if A.T. needed anything. (Tr. at 281.)

S.D. recalled an evening when Starr was traveling for work. S.D. and A.T. where hanging out in their room listening to music when Burley came in and told A.T. she needed to take a shower. A.T. said she wanted to wait and take a shower before school the next morning. Burley got upset and told her she needed to go take her shower. A.T. complied. S.D. heard the bathroom fan come on because it was connected to the bathroom light. Shortly thereafter, A.T. returned to the room in tears. A.T. looked scared. She was shaking and crying. (Tr. at 284.)

A.T. tearfully told S.D. that she had found Burley's phone on top of the cabinet, directed toward the shower. She said the phone had been propped up with the cardboard from the end of a toilet paper roll. (Tr. at 283.) About 30 minutes later, S.D. and A.T. returned to the bathroom. When S.D. looked for the phone, she did not find it, but she did see the cardboard from a toilet paper roll. (*Id.)* They called their mom to tell her what happened. (Tr. at 285.)

About 2 or 3 a.m., S.D. and A.T. snuck into Burley's room while he was sleeping. (Tr. at 283.) They found the phone in a dresser but there was nothing on it—no photographs or videos. (Tr. at 240.) S.D. never discussed this incident with anyone again. It made her feel uncomfortable and scared, but she did not what to upset anything in the house. She did not want to make Burley upset. (Tr. at 286.)

Starr recalled the occasion when she had been traveling for work and A.T. had called her to say that she had found Burley's cell phone in the bathroom shower area recording while she was taking a shower. (Tr. at 370.) Starr had called a friend to go check on her children and then called Burley to ask what was going on. Starr told Burley what A.T. had reported to her. Burley responded that A.T. was hallucinating because there was no phone in the shower. When Starr returned from her trip, she checked Burley's phone but did not find any videos there. (Tr. at 370-71.) Starr did not know what to do. Since she did not have any proof, she let it go. In hindsight, Starr thinks she was scared. (Tr. at 372.)

A.T. recalled that sometime after the shower incident, the family was watching television together in the living room. A.T.'s mom was on the couch. A.T. was lying on the floor next to the couch, and Burley was lying on the floor next to the love seat. A.T. fell asleep. When she woke up, her pants were unbuttoned, and Burley's hand was down her pants. (Tr. at 241.) Burley's hand was underneath A.T.'s underwear touching her vaginal area. A.T. was scared and confused. (Tr. at 243-44.)

A.T. slowly moved Burley's hand and then rolled over to get up as quickly as she could. A.T. went to S.D.'s room. (Tr. at 241-44.) S.D. had gone to bed around midnight. A.T. came into her room around 2 or 3 a.m. She was crying and

told S.D. that she woke up and Burley's hand was down her pants. S.D. told A.T. to go tell their mom what happened. (Tr. at 241-44, 288.)

When A.T. awakened her mom, she was very confused. Burley also woke up and was upset by A.T.'s accusation. A.T.'s mom suggested that maybe A.T. had just had a bad dream. (Tr. at 242.) A.T. knew it was not a dream but during an interview she acknowledged that she told the detective it might have been a dream. She did so because she believed that was what the rest of her family wanted. A.T. did not feel that anyone believed her. She "wanted it to be a dream because nobody wants something like this to be real." (Tr. at 250.) A.T. elaborated:

> I know that I had a lot of people around me that did not want to believe anything that was going on, did not want to believe that he was the kind of man that would do those things, and I know that I felt very pressured to make it easier on everybody.

(Tr. at 259.)

Starr recalled the night that A.T. woke her up. A.T. had been panicked and told her that she woke up and Burley's hand was down her pants. Starr woke Burley up and was freaking out. She asked Burley if he had had his hand down A.T.'s pants. He responded, "No. That's sick. You must have been dreaming," as he looked at A.T. (Tr. at 374.) Burley then went into the bathroom saying he was going to throw up. (*Id.)* A.T. and Starr did not talk about it much after that late-night encounter. (Tr. at 375.)

S.D. explained that after the second incident between A.T. and Burley:

> [A.T.] steered clear of Josh, she avoided him for the most part. If she was going to be home and he was going to be home, she didn't stay in the room with him for more than five minutes by herself; if there were other people in the room, she kind of just acknowledged him, but didn't make an effort to talk to him.

(Tr. at 295.)

Starr's and Burley's relationship did not end after A.T.'s allegation but they did end their relationship in May 2010. (Tr. at 245, 377.) After Burley left the family home, A.T. reflected on other conduct between her and Burley that had been uncomfortable. For example, Burley would give A.T. piggyback rides, but when he did so, he would always hold her butt rather than her legs. (Tr. at 247.) A.T. acknowledged that when her mom and Burley initially got together, she had not been happy about it, but she had worked through those feelings. A.T. grew to trust Burley and started thinking about calling him dad. She grew to love Burley and thought of him as family. (Tr. at 247-48.)

On July 26, 2010, Joe was driving in his car with his son and F.L. when F.L. disclosed something to Joe, causing him to contact Starr. (Tr. at 344.) Joe took F.L. to Starr's house, and F.L. disclosed the same information to Starr. (Tr. at 349.) Starr and Joe called the police. (Tr. at 350.)[2]

[2] The gap between the initial report to law enforcement and when the State filed criminal charges is not relevant to any issues Burley raised on appeal.

After F.L. disclosed to Starr what Burley had done to her, Starr called A.T., who was visiting her father in Wyoming, and apologized for not listening to A.T.'s disclosures about Burley. (Tr. at 385.) A.T. began seeing a licensed counselor, Cherish Roberts. (Tr. at 434.)

Joe did not immediately put F.L. in counseling after her disclosure. But several years later, F.L. disclosed the same incident to her school counselor, Carly Coggins. (Tr. at 351-52.) Coggins is a school counselor at a Billings elementary school. F.L. was a student at Coggins' school in 2015. On October 9, 2015, Coggins gave personal safety presentations to the students geared to the students' grade levels. (Tr. at 448-49, 451.)

As part of the training, F.L. watched a video presentation that included a segment about a girl who discusses an unsafe touch from her cousin. (Tr. at 450.) Coggins instructed the students that if they had any questions or concerns to wait until after the video to speak with her privately. F.L. was the only student who stayed after the presentation to speak with Coggins. F.L. disclosed a prior incident of sexual abuse. F.L. was upset and crying. F.L. seemed almost confused, like she was trying to work things out in her head. (Tr. at 452.)

Coggins called both of F.L.'s parents, who both came to the school. Both parents reported that they knew about the prior sexual abuse. (Tr. at 452-54.) Joe informed Coggins that he was going to seek counseling for F.L. (Tr. at 454.)

At the time of trial, F.L. was 12 years old and residing exclusively with her father, Joe, in Billings. (Tr. at 308-09, 353.) F.L. testified that it was "kind of hard to say it out loud, but he [Burley] hurt my family and me." (Tr. at 315.) F.L. elaborated that when she was around three or four, she went downstairs to her mom's room to take a nap. (Tr. at 315.) F.L. awoke from her nap with Burley standing in front of her. Burley placed a birthday cake on the bed. Burley took his pants off, and F.L. could see his "private area" meaning his penis. (Tr. at 316-17.) Burley put frosting from the cake on his penis. He used his finger to take frosting off his penis and licked the frosting off his finger. Burley asked F.L. to take frosting from his penis too. F.L. could not remember what she did, explaining it was something she tried to forget. (Tr. at 317-18.) F.L. did remember that Burley took her hand and sat it on his "private area." (Tr. at 319.)

F.L. explained that even though she does not want to remember what happened, she "can remember a lot of things if I think about it. I remember the setting, I remember the time, I remember what color the curtains were . . . ." (Tr. at 320.)

F.L. explained that even though she forced herself to remember what happened for the trial, after the trial she could finally allow herself to forget. (*Id.)* F.L. elaborated that it was much easier to respond to questions about what Burley had done to her by saying that she did not remember. (Tr. at 324.) F.L. testified

that she told her mom what happened, but her mom "wasn't a very good believer." (Tr. at 321.) Eventually, F.L. confided in her dad. (*Id.)*

At trial, professional forensic interviewer and child sexual abuse specialist Wendy Dutton testified about the process of victimization and its aftermath. (Tr. at 125-33, 140.) Dutton had no personal knowledge of Burley's case. (Tr. at 136.) Rather, she testified about victim selection, engagement, grooming, assault, and concealment. (Tr. at 140.)

Dutton explained that victim selection refers to characteristics that can make some children more vulnerable to somebody who has a sexual interest in them than other children with whom the offender also has access. For example, young children, such as preschoolers, may be more vulnerable because they do not understand what is happening and do not have the verbal skills to tell anyone about the abuse. (Tr. at 141.) Children who are introverted or have low self-esteem are also more vulnerable to victimization. (Tr. at 142.) Research clearly demonstrates that it is more common for children to be abused by someone they know. (Tr. at 143.)

Grooming refers to how children report that perpetrators will engage in physical contact or introduce sexuality into their relationships. Often perpetrators will do things that children enjoy like wrestling, tickling, or snuggling. At some point this behavior becomes more intrusive and crosses over boundaries that

intimidate the children, like entering the bedroom or bathroom while the children are bathing or changing clothes. Other times, perpetrators might introduce sexuality into the relationship by telling sexual jokes or making comments about the children's developing bodies. (Tr. at 146.)

Dutton explained that even what some might characterize as "minor" offenses may have a significant impact on the victims. The most commonly reported forms of sexual abuse are perpetrators fondling or groping children's genitals or breasts. (Tr. at 149.) In addition to the physical part of assaults, other factors contribute to the degree of trauma children may experience. For example, children tend to be more traumatized when the abuser is a close or trusted adult, especially a parent. Also, children who receive negative reactions to disclosures, such as not being believed or being blamed for breaking apart the family, can suffer negative impacts. (Tr. at 150-51.)

Research shows that it is not uncommon for perpetrators to engage in sexual contact with children while the children are sleeping. This is a common method perpetrators use to conceal the abuse. (Tr. at 157.) Dutton also explained that children's demeanors while they are discussing their victimization have no bearing on whether the disclosures are true. (Tr. at 196.)

Burley defended against the charges by positing a theory that Starr had implanted false memories in A.T. and F.L. (See, *e.g.* Tr. at 117-19, 123.) Burley

called his ex-wife, Christine Rauss, to support this theory. (Tr. at 462-77.) Starr denied ever asking Rauss to fabricate an allegation that Burley had sexually assaulted Rauss's and Burley's son. (Tr. at 407.)

II. Sentencing

Michael Sullivan, a licensed clinical social worker and a member of the Montana Sex Offender Treatment Association, completed a sexual offender evaluation of Burley. (03/06/18 Transcript of Sentencing Hearing [Sent. Tr.] at 546-47, 564.) Sullivan screens all sex offenders that have applied for acceptance into the prerelease center in Billings. (Sent. Tr. at 548.)

The purpose of a presentence psychosexual evaluation is narrowly focused to provide the sentencing court with a risk assessment of the offender, to recommend an offender tier level designation, and to recommend the least restrictive treatment alternative for the offender. (Sent. Tr. at 549.) The purpose of the evaluation does not include assessing punishment or victim impact. (*Id.* at 549-50.) Sullivan believes there is a role for punishment in treatment and rehabilitation of sex offenders. Punishment imparts upon the offender how serious his conduct was, how the community feels about the offender's conduct, and punishment holds the offender accountable for his actions. (*Id*. at 551.)

In evaluating risk level, psychosexual evaluators consider an offender's criminal history because offenders who engage in other nonsexual criminal acts have a higher probability of recidivism. (*Id*. at 557-58.)

Sullivan concluded that Burley is a situational regressed sex offender, meaning:

> an individual who is primarily attracted to people within their age group, but they are pretty inadequate, too, and they have significant intrapersonal deficits,
> self-esteem deficits, they don't do well in relationships, they don't solve problems well, that type of offender tends to offend an individual, usually female, with whom they have a significant relationship, and they commit their offenses during a period of time when that aren't coping well, their relationships aren't going well, things like that.

(*Id*. at 560.) A situational regressed sex offender is typical in incest cases. (Tr. at 569.) Sullivan explained that Burley's three prior convictions for Partner or Family Member Assault factor into Burley's risk to reoffend because "it would suggest an increased risk on his part in comparison to the typical incest offender." (*Id*. at 570.)

Burley attempts to portray himself in an overly favorable light and may have difficulty with anger and modulating its expression. (*Id*. at 570-71.) Burley's testing data suggests that he is "a little impulsive, he makes poor decisions, he's somewhat reactive, and that can cause some difficulties in a lesser restrictive placement." (*Id*. at 571-72.) The results of Burley's risk assessment scale suggest

that he is an individual who has "significant needs to deal with from a treatment standpoint." (*Id*. at 575.)

Burley emotionally identifies with children, which means that when he is troubled he tends to gravitate toward children to meet his needs. (*Id*. at 575-76.) Burley is likely to try to hang on to unhealthy relationships and react negatively to perceptions of rejection. At these times, he will be at a heightened risk to act out, either sexually or through domestic violence. (*Id*. at 581.)

Sullivan found it troubling that at the time of sentencing Burley had an intimate partner with a young child, and opined that it "would be ill advised to allow him to be in a situation where he could have access to a potential victim." (*Id*. at 582.) Sullivan explained that Burley is not very sophisticated, he is not very bright, and he operates with a "fairly unhealthy" level of denial and repression. (*Id*. at 585.)

Sullivan concluded that Burley has a "fairly extreme" level of denial about his sex offense convictions. Generally, Burley uses denial as a maladaptive coping mechanism in his life. (*Id*. at 577.) Burley's denial is likely to be a roadblock to successfully completing sexual offender treatment. (*Id*. at 578.) From Sullivan's decades of working with sex offenders, he has concluded that it is not possible to effectively treat a sex offender who is entrenched in denial. (*Id*. at 578-79.)

Sullivan concluded that the least restrictive placement option for Burley is a prerelease center. Sullivan did not, however, make a specific placement recommendation. Sullivan further added that, because of Burley's level of denial, the prerelease placement option would not likely be available to Burley. Sullivan indicated that if the court deemed incarceration to be appropriate, it should consider a Department of Corrections commitment because that allows for more flexibility in terms of placement and services. Such a commitment might also avoid the bottleneck in treatment for sex offenders sentenced to prison since there are a limited number of treatment spots available in prison. (*Id*. at 587.)

Sullivan did not believe that a 25-year parole restriction was necessary to adequately protect the community. There is, however, good support for the concept that some type of tangible, clear punishment is important and helpful in terms of victims' recoveries. (*Id*. at 598-99.) If Sullivan were to evaluate Burley for placement at the Billings Prerelease Center, he would not recommend his acceptance into that program. Sullivan also acknowledged that although he was recommending a Level 1 tier designation for Burley, an argument could be made that a Level 2 tier designation would also be appropriate. (*Id*. at 601.)

The State recommended that for Solicitation of Incest the court should sentence Burley to prison for 100 years with a 25-year parole restriction. The State recommended that for Incest the court should concurrently sentence Burley to 100

years with a 25-year parole restriction. The State recommended that the court designate Burley a Level 2 offender and order that Burley should complete phases one and two of sex offender treatment prior to a parole release. (*Id*. at 540.)

Defense counsel recommended that the court should commit Burley to the Department of Corrections for 30 years with 25 years suspended, arguing that the court should apply the exception to the mandatory minimum sentence found at Mont. Code Ann. § 46-18-222(6). Defense counsel recommended that the court designate Burley a Level 1 offender. (*Id*. at 541.)

Prior to pronouncing sentence, the court made it clear that it would not punish Burley for proceeding to trial. (*Id*. at 662.) The court further explained:

> There are two different sentencing provisions that apply in this case, the first one is what we call the Jessica's Law provision, and it requires a certain mandatory minimum sentence unless certain conditions are found—some certain exceptions are found.
>
> The other one also has a mandatory minimum requirement, the Incest charge, based on the age of the child, of four years. The Court, in assessing a sentence, is required to consider the nature and severity of the offense, whether the sentence is sufficient to hold the Defendant accountable, whether the sentence protects the public, whether the sentence provides opportunities for rehabilitation and reintegration into the community. I'm supposed to consider and follow, where appropriate, the recommendations of the Presentence Investigation Report, and in this case that would include Mr. Sullivan's psychosexual report.
>
> With respect to the offense of Count II, solicitation of Incest, Jessica's Law requires the mandatory minimum sentence of 100 years, with a parole eligibility restriction of 25 years, unless certain exceptions are found; and the exceptions say that if I determine, based upon the findings contained in the psychosexual evaluation report prepared by a qualified sexual offender evaluator pursuant to the

> statute, that the treatment of the offender while incarcerated, while in a residential treatment facility or while in the local community affords a better opportunity for rehabilitation and for the ultimate protection of the victim and society, then I can depart from the required mandatory minimum sentence.
>
> In this case, I listened to Mr. Sullivan's testimony, and I read his report closely. I wrote down—and there's no question in my mind—that Mr. Sullivan said that in his opinion—he's been doing this for 30-some years—his professional opinion is that denial of offending conduct for a sexual—a person accused of sexual abuse is a roadblock to treatment and that adequate treatment cannot be provided to deniers of sexual abuse. It is this Court's finding that his testimony means that the exceptions to Jessica's Law do not apply, and therefore the Court is bound to apply Jessica's Law.

(*Id*. at 668-69.)

SUMMARY OF THE ARGUMENT

The district court properly denied Burley's motion in limine to exclude other acts evidence, which Burley filed the day before trial. Although Burley argues that the evidence was inadmissible under Mont. R. Evid. 404(b), he offers no analysis of why it was inadmissible. Burley has therefore failed to prove error in this regard. Even so, the State had legitimate theories of admissibility, including motive and absence of mistake or accident. Also, the probative value of the evidence far outweighed the prejudicial impact. Burley failed to prove that the cell phone/shower evidence was unduly prejudicial. Under Mont. R. Evid. 403, the balance tips in favor of admissibility.

There is no merit to Burley's claim that the district court punished him for maintaining his innocence. Rather, the district court properly imposed the mandatory sentence adopted by the legislature because the psychosexual evaluator's testimony established that no exception to the mandatory sentence applied.

ARGUMENT

I. The standard of review

District courts have broad discretion to determine the admissibility of evidence. *State v. Daffin*, 2017 MT 76, ¶ 12, 387 Mont. 154, 392 P.3d 150. This Court reviews evidentiary rulings for an abuse of discretion, which only occurs when a district court acts arbitrarily, without conscientious judgment, or exceeds the bounds of reason, resulting in substantial injustice. *Id.* To the extent that an evidentiary ruling is based on a district court's interpretation of the Montana Rules of Evidence, this Court's review is de novo. *Id.*

This Court reviews a criminal sentence that includes at least one year of actual incarceration to determine whether it is legal. A sentence is legal when it is within the statutory parameters. The legality of a sentence is a question of law, which this Court reviews de novo. *State v. Hamilton*, 2018 MT 253, ¶ 14, 393 Mont. 102, 428 P.3d 849. This Court's review of a mandatory minimum

sentence exception requires it to analyze whether the district court correctly applied the statute. *Id*. ¶ 15. The district court's application of Mont. Code Ann. §§ 46-18-222 and -223 requires it to make findings of fact, which this Court reviews for clear error. *Id*. Findings of fact are clearly erroneous "if they are not supported by substantial evidence, the court has misapprehended the effect of the evidence," or this Court's review of the record convinces it that a mistake has been made. *State v. Warclub*, 2005 MT 149, ¶ 23, 327 Mont. 352, 114 P.3d 254.

II. The district court did not abuse its discretion when it denied Burley's motion in limine to exclude other acts evidence that was admissible for a legitimate purpose.

A. Rule 404(b)

Burley argues that the district court erred when it denied his motion in limine to exclude any evidence concerning A.T.'s report that she had found his cell phone in the bathroom recording her while she showered.

Montana Rule of Evidence 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." This rule does not bar evidence, "but rather prohibits a 'theory of admissibility'—using evidence of other crimes or wrongs to prove the defendant's subjected character 'in order to show conduct in conformity with that character on a particular occasion.'" *State v. Blaz*, 2017 MT 164, ¶ 12,

388 Mont. 105, 398 P.3d 247, quoting *State v. Eighteenth Jud. Dist.*, 2010 MT 263, ¶ 47, 358 Mont. 325, 246 P.3d 415 (*Salvagni*). Rule 404(b) permits admission of prior acts evidence for other purposes such as proof of motive, opportunity, intent, plan, knowledge, identity, or absence of mistake or accident. "This is a non-exclusive list of permissible purposes that are not precise; rather, the categories are amorphous, overlapping, and dependent upon the underlying facts." *Blaz*, ¶ 12.

A district court's decision is presumed correct. *State v. Gomez*, 2007 MT 111, ¶ 33, 337 Mont. 219, 158 P.3d 442. The Appellant has the burden to present legal authority that establishes error on the part of the district court. *State v. Giddings*, 2009 MT 61, ¶ 69, 349 Mont. 347, 208 P.3d 363. Burley fails to meet his burden of proving the district court erred in allowing testimony about A.T. finding a phone on the bathroom cabinet that was recording as she showered. Other than citing the rule and general law regarding Rule 404(b), Burley offers no analysis of how the district court erred in admitting this evidence. (*See* Appellant's Br. at 27.) This Court has consistently held that it is not its obligation to conduct legal research on behalf of a party or to develop legal analysis that might support a party's position. *State v. Gunderson*, 2010 MT 166, ¶ 12, 357 Mont. 142, 237 P.3d 74. Even though Burley has failed to brief this issue or meet his burden, the State had legitimate theories of admissibility for the evidence Burley sought to exclude.

At trial, Burley defended against the charges by arguing that A.T. and F.L. were simply mistaken in their reports of sexual misconduct, or that Starr fabricated the sexual abuse allegations and either implanted false memories into the minds of A.T. and F.L. or simply coached the two girls into making sexual abuse allegations against Burley in an apparent attempt to seek revenge upon Burley for some unknown reason. The cell phone/shower evidence was admissible to prove motive and to prove absence of mistake or accident. *See, e.g.,* S*tate v. Given,* 2015 MT 273, ¶¶ 29-30, 381 Mont. 115, 359 P.3d 90.

At trial, Burley presented evidence, through cross-examination, that A.T. was mistaken in her report that she awoke with her pants unbuttoned and Burley's hands touching her vaginal area. Burley theorized for the jury that A.T. had simply had a bad dream. The cell phone/shower evidence was admissible to establish Burley's sexual interest in A.T., making it more likely that A.T.'s recollections of Burley's hand fondling her vaginal area were accurate and not a realistic bad dream.

This Court has recognized that motive "can be a broad, nebulous concept." *Blaz*, ¶ 14. Also, this Court has stated that "[e]vidence is admissible to show motive when separate acts can be explained by the same motive." *Daffin*, ¶ 19. In *Salvagni*, this Court explained that

> the motive is cause, and the charged and uncharged acts are effects; that is, both acts are explainable as a result of the same motive. The

> prosecutor uses the uncharged act to show the existence of the motive, and the motive in turn strengthens the inference of the defendant's identity as the perpetrator of the charged act.

Salvagni, ¶ 59 (footnote omitted.)

Also, when Burley angrily insisted that A.T. immediately take a shower, even though she intended to take a shower the next morning before school, Starr was not in the home. Rather, she was traveling overnight for work. A.T. and S.D. were solely in Burley's care. Further, at this point neither A.T. nor F.L. had reported any inappropriate sexual conduct initiated by Burley and there is no evidence to suggest that Starr had any motivation to fabricate allegations against Burley. Divorce was not imminent, and in any event, Burley and Starr did not have any children together, so a custody dispute was impossible. A.T.'s finding the blue cell phone with the record light on, propped up on the medicine cabinet while she was showering, is admissible to prove absence of mistake or accident—that Starr did not fabricate the allegations or that A.T. did not "dream" that her stepfather was fondling her vaginal area while she was sleeping. Finally, when Burley denied A.T.'s allegation, Starr did not press Burley or A.T. on it any further. After Burley easily dodged this bullet, his sexual conduct towards A.T. escalated.

Burley's lack of legal analysis of this issue seemingly acknowledges these legitimate theories of admissibility. Rather than focusing attention on the claimed inadmissibility of the evidence under Rule 404(b), Burley spends the bulk of his

argument section for this issue on theorizing that the cell phone/shower evidence was unduly prejudicial under Montana Rule of Evidence 403.

B. Rule 403

Montana Rule of Evidence 403 allows relevant evidence to be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." This Court has recognized that probative evidence is generally prejudicial. *Id.* ¶ 20. But probative evidence is 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." *Blaz*, ¶ 20, quoting *State v. Hicks*, 2013 MT 50, ¶ 24, 369 Mont. 165, 296 P.3d 1149. "Even if evidence is potentially unfairly prejudicial, the Rule 403 balancing test favors admission—the risk of unfair prejudice must substantially outweigh the evidence's probative value." *State v. Madplume*, 2017 MT 40, ¶ 33, 386 Mont. 368, 390 P.3d 142.

Here, the probative value of the evidence was great, and the prejudicial impact of the evidence was not unfairly prejudicial. A.T. relayed her experience of finding the cell phone propped up on the medicine cabinet, recording as she was showering. Aspects of this evidence were more helpful than harmful to Burley. For

example, S.D. later looked for, but did not find, the cell phone in the bathroom, although she did see the cardboard from the toilet paper roll on top of the medicine cabinet. Further, A.T. and S.D. admitted to searching the cell phone after Burley went to sleep, and they found no recorded video on the cell phone.

If Burley was concerned that the jury would draw a prohibited inference from this testimony, he had the opportunity to request a limiting instruction. *State v. Stewart*, 2010 MT 317, ¶ 66, 367 Mont. 503, 291 P.3d 1187, citing *Salvagni*, ¶ 49; M. R. Evid. 105.

The evidence admitted over objection in this case is easily distinguishable from cases where this Court has concluded that admitted evidence was unduly prejudicial or used in a manner that was unduly prejudicial. For example, in *State v. Franks*, 2014 MT 273, 376 Mont. 431, 335 P.3d 725, a case which Burley heavily relies upon, this Court concluded that, while the State may have had a legitimate theory of admissibility for other acts evidence, the State did not limit itself to using the evidence for the legitimate theory of admissibility—the timing of the victim's disclosure of the sexual abuse. Instead, the State used the other acts evidence to argue that Franks had previously raped a little boy, even though Franks had been acquitted of that charge. *Id.* ¶ 19. Here, the State properly used the cell phone/shower evidence to establish Burley's sexual interest in A.T. and to demonstrate absence of mistake or accident.

III. The district court imposed a legal sentence and correctly found no exception to the mandatory minimum sentence.

A. Applicable statutes

The jury convicted Burley of Solicitation of Incest with J.L. At the time of the offense, J.L. was under the age of 12 and Burley was over the age of 18. Consequently, the sentencing provision applicable to the conviction of J.L. is Mont. Code Ann. § 45-5-507(5), which provides in relevant part:

> (5)(a) If the victim was 12 years of age or younger and the offender was 18 years of age or older at the time of the offense, the offender:
>
> (i) shall be punished by imprisonment in a state prison for a term of 100 years. The court may not suspend execution or defer imposition of the first 25 years of a sentence of imprisonment imposed under this subsection (5)(a)(i) except as provided in 46-18-222(1) through (5), and during the first 25 years of imprisonment, the offender is not eligible for parole.

Burley is challenging the district court's imposition of the mandatory sentence for this conviction.

/ / /

Montana Code Annotated § 46-18-222(6)[3] provides the mandatory minimum sentence and parole restriction does not apply if:

> the judge determines, based on the findings contained in a psychosexual evaluation report prepared by a qualified sexual offender evaluator pursuant to the provisions of 46-23-509, that treatment of the offender while incarcerated, while in a residential treatment facility, or while in a local community affords a better a better opportunity for rehabilitation of the offender and for the ultimate protection of the victim and society, in which case the judge shall include in its judgment a statement of the reasons for its determination.

At the conclusion of the sentencing hearing, the district court correctly found that the facts did not support application of the exception to the mandatory minimum sentence.

B. After finding that Mont. Code Ann. § 46-18-222(6) does not apply, the district court correctly sentenced Burley to the mandatory sentence.

Burley's argument that the district court imposed an illegal sentence is based upon the faulty premise that the district court punished Burley for maintaining his innocence. Thus, Burley's reliance on cases like *State v. Shreves*, 2002 MT 333,

[3] This Court has consistently held that exceptions set forth in Mont. Code Ann. § 46-18-222 do not apply in cases in which the district court sentences the offender to more than the minimum sentence. *State v. Novak*, 2008 MT 157, ¶ 8, 343 Mont. 292, 183 P.3d 887. Here, the district court could have suspended all but 25 years of Burley's sentence. Instead, it sentenced Burley to 100 years with 40 years suspended. The court sentenced Burley to more than the mandatory minimum sentence.

¶ 22, 313 Mont. 252, 60 P.3d 991, *State v. Morris*, 2010 MT 259, ¶ 22, 358 Mont. 307, 245 P.3d 512, and *State v. Cesnik*, 2005 MT 257, ¶ 10, 329 Mont. 63, 122 P.3d 456, is misplaced. The State does not disagree with the underlying premise of those cases—that the sentencing court may not punish a defendant for failing to accept responsibility for a crime when the defendant has maintained his innocence and has a right to appeal his conviction. The State disagrees that, here, the district court based its sentence on Burley's failure to admit his guilt. Rather, based upon the testimony of Sullivan, the district court correctly concluded that the exception to the mandatory minimum sentence found at Mont. Code Ann. § 46-18-222(6) did not apply. Thus, the district court was required to impose the mandatory sentence set forth in Mont. Code Ann. § 45-5-507(5).

While Burley wants to highlight small portions of Sullivan's testimony, the district court properly considered Sullivan's testimony in total. The court made it clear that it had no intention of punishing Burley for proceeding to trial. But the court was also bound to impose the mandatory minimum sentence unless an exception applied. Sullivan testified that the least restrictive placement option for Burley was a prerelease center. Sullivan clarified that he was not making such a placement recommendation, and also testified that he screens all candidates for the Billings Prerelease Center, and that if he were screening Burley for the Billings Prerelease Center, he would not recommend his placement there. Burley speculates

that perhaps another prerelease center would have accepted him. Burley presented no evidence to support his speculation.

Also, while Burley has a right to maintain his innocence, his exercise of that right does not somehow qualify him for the exception to the mandatory minimum sentence. Sullivan clearly testified that, based upon his years of experience working with sex offenders, he did not believe it was possible to provide effective treatment to an offender who is entrenched in denial. A sex offender's level of denial is relevant to both community safety and rehabilitation. The sentencing court was not at liberty to simply ignore this reality. And Burley did not offer any evidence to contradict Sullivan's opinion.

Even assuming that Sullivan's testimony could be interpreted to mean that an alternative sentence would have provided Burley with a better opportunity for rehabilitation, the district court also heard testimony from the victims in this case and rightfully could have concluded that an alternative sentence would not provide for a better opportunity for the ultimate protection of the victims and society. *See Hamilton*, ¶ 42.

The district court thoughtfully and carefully considered whether an exception to the mandatory sentence applied. There is ample support in the record to support the court's conclusion that it did not. Consequently, the district court correctly imposed the sentence that the Montana Legislature mandated.

CONCLUSION

The State requests that this Court affirm the district court's decision to admit evidence for a legitimate purpose under Rule 404(b) when the probative value of the evidence outweighed the prejudicial impact under Rule 403. The State further requests that this Court affirm the district court's lawfully imposed sentence, which complies with legislative mandates.

Respectfully submitted this 20th day of February, 2020.

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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 6,984 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, and appendices.

/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 02-20-2020:

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