IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0218

STATE OF MONTANA,

Plaintiff and Appellee,

v.

SHANE THOMAS PELLETIER,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, The Honorable Gregory G. Pinski, Presiding

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1. Did the district court properly exercise its discretion, when, after Appellant opened the door, it allowed the State to ask Appellant one question about a prior allegation of sexual intercourse without consent, and provided the jury with a limiting instruction?

2. Did the district court properly exercise its discretion when it prohibited Appellant from questioning the victim about using marijuana after the sexual intercourse without consent occurred, when Appellant did not provide any probative linkage between the victim's alleged use of marijuana and the offense?

3. Has Appellant met his heavy burden of proving that his trial counsel provided ineffective assistance of counsel for failing to present a defense of mental disease or defect when Appellant's mental health expert could not support such a defense?

STATEMENT OF THE CASE

On August 23, 2017, the State charged Appellant Shane Pelletier with one count of Sexual Intercourse Without Consent. (D.C. Doc. 3.) On the Omnibus Hearing Memorandum and Order, defense counsel listed the potential defense that, as a result of mental disease or defect, Pelletier did not have the mental state to commit the offense. (D.C. Doc. 19.) Pelletier did not rely upon this defense at trial.

The district court conducted a jury trial on January 2 through January 4, 2019. (1/2/19-1/4/19 Transcript of Jury Trial [Tr.].) The jury found Pelletier guilty of Sexual Intercourse Without Consent. (D.C. Doc. 63.)

The district court conducted a sentencing hearing on March 22, 2019. (3/22/19 Transcript of Sentencing Hearing [Sent. Tr.].) At the sentencing hearing, defense counsel called psychologist Laura Kirsch to provide expert testimony, based upon her evaluation of Pelletier. (Sent. Tr. at 814-850.) Kirsch testified that although Pelletier's mental illness did not prevent him from having the requisite state of mind to commit the criminal offense, or to appreciate the criminality of his conduct, the court should take Pelletier's mental illness into account when imposing sentence. (*Id*. at 817-18.) Kirsch advocated that the court not sentence Pelletier to prison, but instead impose a sentence that would allow him to remain in the community with safeguards in place. (*Id*. at 830-32.)

The district court sentenced Pelletier to 40 years in prison with 20 years suspended. The court designated Pelletier as a level two sexual offender and restricted his parole eligibility until he completed all phases of the prison's sexual offender treatment program. (*Id.* at 906; D.C. Doc. 76.)

STATEMENT OF THE FACTS

I. Facts related to the crime

At the time of trial, Marina was 21 years old. (Tr. at 201.) In July 2017, Marina live with her roommate and friend Brianna, and had a boyfriend named Austin. (Tr. at 204, 206.) On July 6, 2017, around 11 p.m., Marina, Austin, Marina's friend Haley, and Haley's cousin, Crystal, who was visiting from out of state, met up with Marina's dad, who purchased the group a bottle of Fireball whiskey. After procuring the whiskey, Marina suggested that she and her friends go hang out at Caras Park in downtown Missoula. (Tr. at 212-13, 286.) At Caras Park, the group took shots from the bottle of whiskey. Marina is uncertain how much she drank, but she was taking "giant swigs" from the bottle. Marina "thought she was fine," but then suddenly she was "gone." (Tr. at 214.)

Haley explained that she and Marina went to the river to put their feet in the water. But Marina, fully clothed, went further into the river until she was head to toe soaking wet. (Tr. at 293, 294.) When Marina got into the river, Haley realized she was pretty drunk. (Tr. at 288.) On a scale of 1 to 10, with 10 being passed out, Haley believed Marina was an 8 or 9. Haley reported that she herself was drunk but was not totally wasted. (Tr. at 289.) At this point, Crystal realized that Marina was too messed up, so Crystal dumped the rest of the whiskey in the river. (Tr. at

330.) Austin also estimated that on the 1 to 10 scale of intoxication, Marina was an 8 or 9. (Tr. at 375.)

After Marina got out of the river, while the group was walking back towards the tent area of the park, Marina suddenly sprinted off. Haley assumed she was simply running ahead, but when the rest of the group arrived at the tent area, Marina was gone. The group searched around for Marina without success. (Tr. at 296.) The group searched Caras Park, the parking garage across the street from the park, and the downtown area, but never found Marina. The group began searching for Marina between 3 and 4 a.m. Finally, the group gave up around 6 a.m. because Crystal had a flight to catch. (Tr. at 297.) At about 6 a.m., Haley messaged Marina's roommate Brianna asking if Marina was home. At 6:41 a.m., Brianna responded that Marina was not home. (Tr. at 299.)

Marina knew from her friends that events occurred of which she still has no recollections. For example, Marina knows that she went into the river at Caras Park, but has no recollection of doing so. Marina knows that she lost her shoes, but she has no idea what happened to them. (Tr. at 214.) Marina explained:

> The last thing I remember happening at Caras Park was—is they have, like of bunch of, like, green picnic tables down there and I was sitting at one.
>
> And the last thing I remember is, like, looking at one of my friends, like, coming towards me on the longboard and, like, taking another shot out of the bottle, and that's the last think I remember.

(Tr. at 215.) The next thing Marina remembered was waking up in a strange apartment with a man on top of her with his penis in her vagina. (Tr. at 215-16.) Marina recalls feeling confused. She knew there was a male on top of her, but she could not do anything about it. The next thing she knew she passed out. (Tr. at 216.)

Marina's next memory was of waking up in the morning. She was sitting on a bed. There was a male, later identified as Pelletier, standing in front of her, and he was trying to put his penis in her mouth. Marina explained:

> I was conscious at this point, and kind of knew what was going on around me and pushed him away and started asking him questions.

(Tr. at 218.) When Marina pushed Pelletier away, he seemed "panicked" and "flustered." (Tr. at 219.) Marina was wearing only her bra and underwear. She did not think Pelletier was wearing anything. (*Id*.)

Marina immediately started peppering Pelletier with questions about who he was, where she was, how she got there and about the location of her belongings. Pelletier told Marina that he had found her in the parking garage, passed out and covered in vomit. Pelletier said he walked Marina to his apartment. (Tr. at 220.) Pelletier handed Marina her clothes. Her pants were soaking wet, and her sweater was covered in vomit. Marina was very scared, confused, and uncomfortable. Marina had no idea how she got to Pelletier's apartment, and all she wanted to do

was leave. (*Id*.) Marina did not have her cell phone with her, which was unusual. Marina told Pelletier that she needed to leave so she could get to work. (Tr. at 222.)

Pelletier told Marina that he would walk her to the bus station. She was afraid to tell him no for fear that he might not let her leave. (Tr. at 224.) After finding her bus at the bus station, Pelletier gave Marina a hug. Marina did not want Pelletier touching her, but she politely used one arm to give him a hug. Before Marina got on the bus, Pelletier wrote his phone number on her arm. (Tr. at 225-26.) Marina did not want to give Pelletier a hug at all but explained:

> I was confused at the time, and I didn't know what I was going on. And so I thought what had happened, like, was my fault, and that I had wanted it to happen.

(Tr. at 226-27.) Marina just wanted to get home as soon as possible and kept repeating in her mind, "What the—just happened?" (Tr. at 228.) Marina was in shock. She recalled getting on the bus and feeling like she was "looking at a bad dream." (Tr. at 229.)

When Marina arrived at her apartment she tearfully told her roommate Briana, "I think I just got raped." (*Id*.) Brianna reported that Marina was wearing jeans, a very large T-shirt and had no shoes. Marina seemed very confused and tired. (Tr. at 393, 395.) Marina texted Haley asking her what happened because she could not remember much. Marina told Haley that she got raped. (Tr. at 230.) Marina sent this text at 8:33 a.m., after arriving home. (Tr. at 231, 298.)

Marina also quickly got into the shower because she wanted to "wash away what just happened." (*Id*.) Marina thought that by showering she could "make what just happened go away." (*Id*.) Marina scrubbed her arm raw where Pelletier had written his phone number. Marina wanted no trace of Pelletier on her body. (*Id*.)

Later that day, first Haley, followed by Austin, came to Marina's apartment. (Tr. at 233.) Marina told Haley everything she could remember, and Haley filled Marina on the details of the previous night, of which Marina had no recollections. (Tr. at 233.) According to Haley, Marina was shaken up and not doing very well. (Tr. at 301.)

When Marina told Austin about what happened, he insisted that she report it to the police. Marina was very sad, and initially did not want to report it to the police because she thought if she ignored it, it would go away. Marina agreed to report her rape to the police. (Tr. at 234.) Austin described Marina's mental state as one of disbelief and shock. (Tr. at 377.) Although Austin's first thought was to take matters into his own hands and seek "street justice," he quickly realized the best course of action would be to report the rape to the police. (Tr. at 379.) Austin took Marina to the police department. (Tr. at 235.)

Officer Kamerer of the Missoula Police Department was the first officer to speak with Marina. (Tr. at 459, 461.) This occurred at around 5 p.m. on July 7, 2017. (Tr. at 461, 466.) Marina told Officer Kamerer everything she could

remember and explained that she did not know her rapist, but that he had identified himself as Shane. Marina was very explicit about the things she could remember, but she admittedly had a lot of gaps between the things she could and could not remember. (Tr. at 466.)

Officer Kamerer took Marina in his patrol car to try and locate the apartment complex in which she woke up the morning of July 7, 2016. Through that process, Officer Kamerer deduced that the offense probably occurred at the Howard Apartments, which are directly across the street from the Main Street parking garage. (Tr. at 468.) Officer Kamerer later determined that Pelletier, whose first name is Shane, lived in the Howard Apartments. (Tr. at 479.)

Officer Kamerer arranged for Marina to have a physical examination at First Step. (Tr. at 466.) Adeline Wakeman, a registered nurse and trained sexual assault nurse examiner (SANE), completed Marina's physical examination at First Step. (Tr. at 433, 435, 437.) Marina was tearful but cooperative. (Tr. at 439.) Marina suffered from tenderness and visible redness to areas of her external vulva. (Tr. at 236, 441.) By using a dye on the areas Marina reported as tender, Wakeman found areas of potential abrasion. (Tr. at 442-43.) The observable redness and the pain Marina reported were consistent with forced penetration, although these injuries could also occur from consensual intercourse. (Tr. at 446.) Marina reported that she had never experienced soreness after consensual intercourse. (Tr. at 238.)

Wakeman swabbed Marina's cervix. (Tr. at 446.) The swabs were submitted to the State Crime Lab. (Tr. at 448.) The DNA recovered from the cervical swabs matched Pelletier's. (Tr. at 505.)

Detective Brueckner of the Missoula Police Department investigated Marina's rape report. (Tr. at 476, 478.) Detective Brueckner procured a video from the downtown Mountain Line bus transfer station, which captured Marina and Pelletier at the transfer station on the morning of July 7, 2017 (Tr. at 481-82.)

A police officer unfamiliar with Detective Brueckner's investigation completed a photographic lineup with Marina. Marina identified Pelletier as her assailant. (Tr. at 486-87.) Detective Brueckner called Pelletier's cell phone but he did not answer. Detective Brueckner then texted Pelletier. She identified herself and told him she needed to talk with him about a case she was investing. He responded, "Who is this?" (Tr. at 494.) Detective Brueckner replied with the same information. (Tr. at 495.) When Detective Brueckner's efforts to speak with Pelletier were not successful, she arranged for his arrest in Butte. (Tr. at 495.)

After his arrest, Pelletier agreed to speak with Detective Brueckner. Pelletier reported that on July 7, 2017, at about 2:30 a.m., he went outside to the parking garage near his apartment to smoke a cigarette. Pelletier heard someone throwing up in the stairwell of the parking garage. He found a young woman, Marina, who was throwing up and incoherent, so he assisted her. (Tr. at 496.) Pelletier said he

was concerned that Marina may have been suffering from alcohol poisoning. He thought about calling 911 but opted not to do so. Instead, he took Marina to his nearby apartment. (Tr. at 497.) Pelletier reported that after he got Marina to his apartment, she took a shower. Pelletier made Marina some food, but she continued to vomit. At about 3 a.m., Marina lay down on Pelletier's bed and fell asleep. (Tr. at 500.)

Pelletier stated that the next day he had consensual sex with Marina. Initially he said this happened at around noon, then he changed the time to 10 a.m., and then settled on 9:30 a.m. (Tr. at 500.) Pelletier stated that it was Marina who began kissing him, which then lead to intercourse. (Tr. at 501.) Pelletier maintained that he first asked permission to have sex with Marina and she consented. (Tr. at 501.) He said the consensual sex occurred after Pelletier and Marina had eaten the breakfast he had made for them. (Tr. at 501.) Towards the end of the interview, Pelletier changed his story and said that he had awakened from being "passed out" with Marina on top of him, having sex with him. (Tr. at 502-03.)

About an hour after the interview, Pelletier had a phone conversation with his father, Tom. Pelletier changed his story while talking to his father and reported that the person who had accused him of rape had wanted to date Pelletier, but he did not want to date her. (Tr. at 508.) Detective Brueckner later interviewed

Pelletier's father. Tom reported that Pelletier had told him about having consensual sex with Marina. The sex had occurred late at night. (Tr. at 510.)

At trial, Pelletier maintained that once he found Marina throwing up in the parking garage, he only tried to help her by taking her to his apartment. Pelletier testified that Marina wanted to come with him. (Tr. at 612.) After arriving at Pelletier's apartment, Marina took a shower while he made her some food. She only ate a couple of bites of food, but she drank a big glass of water. (Tr. at 615.)

Pelletier stated that Marina told him she just wanted to sober up a little bit and then find her friends, "but—and then she was kind of—in—in a way, she was, like, kind of, like, flirting with me a little bit." (Tr. at 615-16) Marina asked if she could just stay at his apartment. He said sure because he was just trying to help her sober up. (Tr. at 616.)

Marina got in his bed wearing her bra and panties. She was on top of his comforter, so he covered her with a small blanket and then lay down next to her. (Tr. at 616.) Pelletier said sex was not on his mind. (Tr. at 617.) According to Pelletier, he and Marina both "passed out." (Tr. at 618.) Pelletier was sure they woke up at 7 in the morning because he was wearing his watch with the alarm set. The alarm usually goes off at 7 a.m. (Tr. at 819.) When Marina opened her eyes, he said good morning and asked if she felt any better. According to Pelletier, Marina responded that she did feel better. Pelletier maintained that the two of them were

"small talking and then—which lead to kissing, which lead to sex." (Tr. at 620-21.) When Marina was ready to go, Pelletier walked her to the bus station "to be a gentleman." (Tr. at 629.) Pelletier wrote his phone number on Marina's arm at the bus station, but he never heard from her again. (Tr. at 632, 635.)

After the rape Marina initially stopped drinking alcohol and thought she would never drink again. Marina explained, though:

> But I couldn't—I couldn't really stop thinking about what happened. And so I just started drinking every day, like, as soon as I woke up and as soon as—and, like, put me to sleep.

(Tr. at 240.) Austin finally made her choose between him and alcohol. Marina chose alcohol. (*Id*.) Haley confirmed that after the rape Marina was depressed and began drinking more frequently. (Tr. at 396.)

Even though it was difficult for Marina to report the rape, to participate in the sexual assault examination, to repeat her story to numerous people, and to testify at trial, Marina did so:

> Cuz I feel, like, I'm not the one that should suffer for what happened because it wasn't my fault. I feel, like, if I have to go through this, then so should Shane.

(Tr. at 243.)

/ / /

II. Facts related to the evidentiary issues at trial

A. Other acts

During Pelletier's direct examination, defense counsel asked Pelletier questions about his initial interview with Detective Brueckner, and the following exchange occurred:

> Q. Okay. And does [Detective Brueckner] give you a lot of detail as to what Marina's story is?
>
> A. No.
>
> Q. Okay. And she asked you if you remember Marina, right?
>
> A. Right.
>
> Q. Okay. And what did you tell her?
>
> A. I told her that I did remember meeting a girl named Marina downtown Missoula and I gave her—I talked to her for a little while, but I was really rattled and discombobulated and stressed out during that interview. So—
>
> Q. Okay.
>
> A. —some of that.
>
> Q. Were you kind of frustrated?
>
> A. I was really frustrated, yeah.
>
> Q. Okay.
>
> A. Just because I didn't know who would accuse me of something like that because I'm—I'm a very kind, generous person

and I—I had—I've had a lot of different friends and stuff like that. So I was just kind of hurt by it.

(Tr. at 645-46.)

Later in the direct examination, the following exchange occurred:

Q. Did you get all your facts accurate during that interview with Detective Brueckner?

A. No.

Q. Okay. Were you 100 percent perfect with all of your details?

A. No, I wasn't.

Q. Okay. And why do you think?

A. I think—because of being surrounded at my house unexpectedly by the U.S. Marshals, I expect—I—I know it was because of being slandered and charged with this charge because it's—it's some—one of the worst things that a man can get charged with.

And I'm just not that kind of guy. I would never do that to a female. So it was kind of—

Q. Okay.

(Tr. at 647.)

Prior to cross-examination, and out of the presence of the jury, the State presented the following information to the court:

So Mr. Pelletier testified about the nature of the charge. Said he thought the charge was one of the worst in the world that a man could be accused of and that's not the kind of—type—type of person he is and he would never do anything like that.

> He was investigated in 2003 for committing sexual intercourse without consent against a peer. That investigation ultimately did not lead to charges.
>
> But my view is it's relevant to show that—to rebut his testimony that he is not that type of person and that he would never do anything like that.

(Tr. at 654.)

Defense counsel objected, arguing:

> Saying that this is the worst charge that—for someone to be accused of or that he wouldn't do this does not open the door that somebody else may have made an allegation—

(Tr. at 655.) The court remarked:

> But he didn't just say he wouldn't do it. He said he's not that type of person and he—he repeatedly held out his good character during his testimony. So how does that not open the door to it?

(*Id*.) Defense counsel responded that the evidence would be too prejudicial and that the State had no legitimate theory to admit the evidence. The State responded that Pelletier had put his character at issue by testifying that he was not the type of person who would ever engage in such criminal conduct. (*Id*.)

The Court explained:

> My concern is this. The defendant doesn't get to take the stand and go under oath and hold himself up as being a good guy and that this is out of character for him and then not allow some cross-examination into that.
>
> I mean, it's one thing if he says, *I didn't do it*, which is what he said. That doesn't open the door to—to it. That's not character evidence.
>
> But he held himself out as someone—that this is uncharacteristic of him. It's not something that he would do and I just

—I don't know how that doesn't open the door. It was his own testimony on direct examination, which you control.

(Tr. at 655-56.)

At the court's request, the State summarized the facts of the prior allegation:

It was a Missoula Police Department report. The peer was 14. She made a report of rape in April of 2003.

Essentially what she said is that Mr. Pelletier—that she was at Mr. Pelletier's house. Went to his bedroom. The started engaging in some foreplay.

He—she eventually told him that she did not want to engage in sexual intercourse and told him to stop. He did not stop. She said she cried throughout the incident—throughout the rape.

Eventually she reported it. It was not charged.

(Tr. at 656-57.)

After the State established that it had disclosed this information to the defense in discovery, the court took the matter under advisement. (Tr. at 659-60.) Ultimately, the court provided a lengthy rational for why the evidence was admissible on a very limited basis. (Tr. at 663-665.) The court ruled that the State could ask one succinct question about the prior allegation, before which the court would provide the jury with a limiting instruction. (Tr. at 665-67.)

Prior to the State asking Pelletier the one question about the prior allegation, the court instructed the jury:

Ladies and gentlemen, the State will now offer evidence that the Defendant at another time engaged in other acts. This evidence is not admitted to show that the defendant acted in conformity therewith in this case. The only purpose of admitting that evidence is to impeach

the Defendant's testimony concerning his good character. You may not use that evidence for any other purpose.

The Defendant is not being tried for any other act. He may not be convicted for any other act or offense other than that charged in this case. For the jury to convict the Defendant of any other offense than that charged in this case may result in unjust double punishment of the Defendant.

(Tr. at 681.)

During cross-examination the following exchange then occurred:

Q. (By Mr. Lowney) So you indicated that you're not that type of person, meaning that you're not the type of person that would engage in a sexual offense like this; is that right?

A. That is right, yes.

Q. Isn't it true that, in 2003, you were investigated for sexual intercourse without consent against a peer. Is that right?

A. That is right, yes.

(Tr. at 682.)

B. Victim's marijuana use after the crime

During trial, the State brought it to the district court's attention that defense counsel planned to introduce evidence that Marina's toxicology screen taken during her sexual assault examination had detected some metabolites of THC in her system. The State believed the defense's proposed testimony would show that Marina may have used some marijuana sometime during the day after the rape. The State understood that Marina had taken a "dab," which is a concentrated tablet

that has THC in it, after the rape. The State argued that such evidence was irrelevant. (Tr. at 316.)

Defense counsel argued that the evidence of THC was relevant, whether Marina had taken it during the night before the events with Pelletier or if she had taken it after those events but before she made a report to law enforcement. (Tr. at 317.) Defense counsel argued:

> Either—I mean, if THC was there from the night before, then that goes to how, you know—again, her intoxication level, which is at issue in this case.
>
> Or if she smoked after and is under the influence of marijuana while she's reporting this event, that goes to her demeanor. It goes to her emotions. That goes to her recall.

(*Id*.)

The district court ruled that this evidence was irrelevant and might unnecessarily confuse the jury, and that the prejudicial effect outweighed the probative value. (Tr. at 318-19.) The court elaborated:

> There's so many issues that come into play when it comes to the effects of marijuana. There's not going to be any witnesses to that effect. Whether it did or did not cloud her judgment. Whether she did or didn't use it. There's no toxicologists that have been noted.
>
> There's so many issues related to the effects that marijuana could have on someone's brain. So when I talk about the prejudicial effect, I mean in that way.
>
> An in—in—in that sense, the—the jury's not going to hear any of that testimony to be able to draw those conclusions and it can become such a lightning rod with regard to—to marijuana and—and it's just not something that's relevant to the case at this point.

So even if it is, the 403 factors outweigh the—any probative value of it. So there's no—no testimony of marijuana.

(Tr. at 319-20.)

SUMMARY OF THE ARGUMENT

Pelletier has failed to meet his burden of establishing that the district court abused its discretion on either of the evidentiary rulings that Pelletier challenges on appeal. After Pelletier interjected his good character into the trial during his direct examination, the district court concluded that Pelletier had opened the door to the State asking him, in a very limited fashion, about a prior allegation of sexual intercourse without consent. The State abided by the court's limitation and asked Pelletier one question about the prior accusation against him. Even Pelletier acknowledges that this was legitimate rebuttal evidence. Pelletier's own testimony made the evidence probative, and the probative value of the evidence outweighed the prejudicial effect since the district court narrowed what the State could ask Pelletier and provided the jury with a limiting instruction.

The district court properly excluded any speculative evidence of the victim's minimal marijuana use after the rape since Pelletier failed to establish the relevance of the evidence, failed to provide how he would admit the evidence, and, in any event, the evidence was more prejudicial than probative.

Pelletier's claim that defense counsel was ineffective for failing to present a defense of mental disease or defect at trial fails at the outset because defense counsel provided notice of such a defense and retained a mental health expert, but despite the mental health expert concluding that Pelletier suffered from a mental illness, she could not provide an opinion that he could not have formed the requisite mental state at the time of the crime.

ARGUMENT

I. The standard of review

District courts have broad discretion in controlling the admissibility of evidence at trial. *State v. Reinert*, 2018 MT 111, ¶ 13, 391 Mont. 263, 419 P.3d 662. This Court reviews evidentiary rulings for abuse of discretion. *State v. Clemens*, 2018 MT 187, ¶ 4, 392 Mont. 214, 422 P.3d 1210. This Court reviews claims of ineffective assistance of counsel on direct appeal if the claims are based solely on the record. *State v. Cheetham*, 2016 MT 151, ¶ 14, 384 Mont. 1, 373 P.3d 54. It reviews record-based claims of ineffective assistance of counsel *de novo*. *Id.*

II. The district court properly exercised its discretion by admitting, in a limited manner, other acts evidence to which Pelletier had opened the door during his direct examination.

Pelletier argues that the district court abused its discretion when it allowed the State, on cross-examination, to ask Pelletier one question to rebut his assertion

of his good character. During direct examination, Pelletier offered that he is "a very kind, generous person" (Tr. at 646), and he was "being slandered" because he was "not that kind of guy" and "would never do that to a female." (Tr. at 647.) In the trial court, Pelletier argued that the evidence was inadmissible under Mont. R. Evid. 404(b), and that even if it was admissible under Rule 404(b) it was unduly prejudicial and inadmissible under Rule 403. (Tr. at 655, 657-58, 666.) On appeal, Pelletier also argues for the first time that the evidence was inadmissible under Rule 405(a). (Appellant's Br. at 13-14.)

The State did not attempt to offer evidence of the prior allegation of sexual intercourse without consent against Pelletier in its case-in-chief. The State alerted the court to its intention to introduce this evidence only after Pelletier raised his good character during direct examination. This Court has explained that the Montana Rules of Evidence generally prohibit evidence of a person's character, including evidence of other bad acts, to prove the person's actions at issue in the case. *Clemans*, ¶ 10. But, "[w]hen one party opens the door, or broaches a certain topic that would otherwise be off limits, 'the opposing party has the right to offer evidence in rebuttal, including evidence of other acts.'" *Clemans*, ¶ 10, quoting *State v. Guill*, 2010 MT 69, P 39, 355 Mont. 490, 228 P.3d 1152 (quoting *State v. Veis*, 1998 MT 162, P 18, 289 Mont. 450, 962 P.2d 1153.) District courts have

broad discretion to determine the extent to which a party may respond once the party has opened the door. *Veis*, ¶ 19.

It is the intended purpose of the evidence, not the substance, that differentiates admissible evidence from inadmissible evidence. *Clemens*, ¶ 11. For example, in *Clemens*, the trial court properly allowed evidence on redirect examination of a State's witness that Clemens had previously assaulted another member of the family in the victim's presence to rebut the defense's assertion that the victim was not afraid of Clemens. *Id*. ¶¶ 12-15.

Evidence of a person's character is not admissible for the purpose of proving he acted in conformity therewith on a particular occasion. *State v. Kaarma*, 2017 MT 24, ¶ 74, 386 Mont. 243, 390 P.3d 609. But "if probative of truthfulness and for the purpose of attacking or supporting the witness's credibility, specific instances of the conduct of a witness may be inquired into on cross-examination of the witness concerning the witness's character of truthfulness." *Reinert*, ¶ 26, citing Mont. R. Evid. 608(b)(i).

Here, it was not the State but Pelletier who interjected the issue of his upstanding character into the trial. Once he did so, the district court properly allowed the State to question Pelletier, in a very limited fashion, about a prior accusation against him of sexual intercourse without consent. The State abided by the district court's limitation about what it could ask. And the State never

referenced the question or answer in its closing argument. The State asked its question to rebut Pelletier's assertion that he was of such character that he would never subject another person to sexual intercourse without that person's consent. Once Pelletier open the door to his good character, it was appropriate for the State to offer limited evidence to rebut Pelletier's self-serving claim of good character.

Also, the Court provided the jury with a limiting instruction before the State asked its question.

Pelletier next argues that the 2003 sexual intercourse without consent allegation was too remote to have relevance. But the cases upon which Pelletier relies are cases in which the State introduced other acts evidence under Mont. R. Evid. 404(b) to establish a continuing course of conduct in child sexual abuse cases, applying the Modified Just Rule, which this Court overruled in *State v. Eighteenth Judicial District,* 2010 MT 163, 358 Mont. 325, 246 P.3d 415. (*See* Appellant's Br. at 13, citing *State v. Tecca*, 220 Mont. 168, 172, 714 P.2d 136, 139 (1986), and *State v. Ray*, 267 Mont. 128, 130, 882 P.2d 1013, 1016 (1994).)

In Pelletier's case the State *did not* attempt to offer the evidence in its case-in-chief under the theory that it would establish a continuing course of conduct. Rather, it offered the limited evidence to rebut Pelletier's claim of good character. Also, the State neither misrepresented the limited evidence, nor did it attempt to use the limited evidence for a purpose other than to rebut Pelletier's

claim that he would never have sexual intercourse without explicit consent of his partner. The State did not even reference the evidence in its closing argument. In his brief, Pelletier admits that "the evidence was introduced to rebut Mr. Pelletier's testimony regarding his 'good character[.]'" (Appellants Br. at 12.)

For the first time on appeal, Pelletier argues that the State's one question regarding the prior allegation of sexual intercourse without consent was not proper character evidence under Mont. R. Evid. 405(a). It is well established that this Court will not address an issued raised for the first time on appeal. Allowing a party to raise new arguments or change its legal theory on appeal is fundamentally unfair to the district court, which failed to rule on an issue it was never given the opportunity to consider. *State v. Marinez*, 2003 MT 659, ¶ 17, 314 Mont. 434, 67 P.3d 207. A party must state grounds for an objection that are sufficiently specific to preserve the appeal. *State v. Claasen*, 2012 MT 13, ¶ 19, 367 Mont. 478, 291 P.3d 1176.

Even so, the argument Pelletier makes for the first time on appeal has no merit. As this Court has explained, when "the accused presents evidence not of a pertinent character trait, but of his good character in general, he opens the door to all legitimate cross-examination and must, therefore, accept the consequences which result." *State v. Reinert*, 2018 MT 111, ¶ 28, 391 Mont. 263, 419 P.3d 662.

"It is axiomatic that when a defendant first offers evidence of good character the State may then present rebuttal evidence of bad character." *Id*. citing *Kaarma*, ¶ 76.

Even if this Court considers Pelletier's unpreserved Mont. R. Evid. 405(a) argument, under the facts of this case, his claim has no merit.

Pelletier next argues that even if the evidence was admissible under other Rules of Evidence, the district court should have refused to admit the evidence under Rule 403 because the prejudicial impact of the evidence outweighed any probative value.

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. *State v. Blaz*, 2017 MT 164, ¶ 20, 388 Mont. 105, 398 P.3d 247. 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.

Again, Pelletier's argument that the limited rebuttal evidence was unduly prejudicial lacks merit for several reasons. First, it was Pelletier who interjected his self-proclaimed good character into the trial during his own direct examination. Thus, it was Pelletier's own testimony on direct examination that gave the evidence of which he now complains its probative value. As the district court aptly stated, the defendant "doesn't get to take the stand and go under oath and hold himself up as being a good guy and that this is out of character for him and then not allow some cross-examination into that." (Tr. at 655-56.)

Second, the district court set strict parameters for the State to follow, and the State followed those parameters. Not only did the district court limit the State to asking Pelletier one question, it framed the wording of the question.

Third, the district court not only gave a limiting instruction, it provided Pelletier the opportunity for input into the wording of the instruction. (Tr. at 665-66.) And, fourth, the State did not unduly emphasize the evidence.

The manner in which the district court allowed the State to narrowly present rebuttal evidence, and the State's own conduct, assured that the probative value of the evidence outweighed its prejudicial effect.

The district court did not abuse its discretion when it allowed the State, in a limited manner, to rebut Pelletier's claim of good character.

III. The district court properly exercised its discretion when it refused to admit evidence that the victim used marijuana after she arrived home from Pelletier's apartment and before she reported the rape to law enforcement.

Pelletier argues that the district court abused its discretion when it did not allow him to offer evidence that the victim used marijuana at some unidentified time because her toxicology screen detected THC in her system. It is not clear from the record specifically what evidence Pelletier proposed to introduce. Pelletier attached a copy of the toxicology report to his brief, but Pelletier did not subpoena an expert witness to introduce toxicology results or any expert witness to testify what those results might or might not have meant.

The State, on the other hand, candidly informed the court that Marina and her boyfriend had a "dab" of marijuana after she returned home from Pelletier's apartment and confided in him about the rape, but before she went to the police department to report the rape.

This Court has recognized that "evidence of the use of drugs is, by its very nature, prejudicial." *State v. Ingraham*, 1998 MT 156, ¶ 47, 290 Mont. 18, 966 P.2d 103, quoting *Simonson v. White*, 220 Mont. 14, 23, 713 P.2d 983, 988 (1986); *see also State v. Sage*, 2019 MT 156, ¶ 29, 357 Mont. 99, 235 P.3d 1284.

More recently, this Court has explained that the "mere use of narcotics, or other intoxicants, is not admissible to impeach a witness's credibility." *State v. Polak*, 2018 MT 174, ¶18, 392 Mont. 90, 422 P.3d 112.

But evidence of a witness's intoxication "is admissible on cross-examination to impeach the witness's ability to accurately perceive the events about which [she] testified." *Polak*, ¶ 18, quoting *State v. Sorenson*, 190 Mont. 155, 166, 619 P.2d 1185, 1191-92 (1980) (internal citations omitted.) For the evidence to be admissible, the defendant "must lay a foundation that tends to show a witness was under the influence of intoxicants at the time of the events in question." *Id*. citing *State v. Matz*, 2006 Mt 348, ¶¶ 37-38, 355 Mont. 201, 150 P.3d 367. "In other words, a defendant must, as with any other piece of evidence proffered, present a coherent theory of relevance." *Polak*, ¶ 18, citing Mont. Rule Evid. 401, 402. Pelletier failed to present a coherent theory of relevance.

Pelletier argues that Marina ingesting any amount of marijuana near in time to the rape is directly relevant to her state of mind, the time of the incident, and when she reported it to law enforcement. (Appellant's Br. at 18.) There is nothing in the record to support Pelletier's claim that Marina used marijuana near in time to the rape. Rather, this theory is merely speculative. The only thing defense counsel suggested was "anticipating someone testifying that he and Marina smoked marijuana at least after the incident." (Tr. at 318.) And Marina freely admitted that

as a result of alcohol consumption she was wasted and had no idea how she got to Pelletier's apartment or what precisely occurred once she got there. For example, Marina has no memory of taking a shower or passing out on Pelletier's bed. Marina clearly remembered waking up with Pelletier on top of her with his penis in her vagina. Marina then passed out. She woke up the next morning with Pelletier attempting to put his penis in her mouth.

If Pelletier's claim is that he and Marina smoked marijuana together at his apartment, this evidence would not have been favorable to him. Pelletier admitted that Marina was very drunk and vomiting when he found her. Pelletier was concerned she may have been suffering from alcohol poisoning. If Pelletier had presented evidence that he smoked marijuana with Marina under these circumstances, this would have only portrayed Pelletier in a negative light.

Further, Pelletier's own statement to the police and his trial testimony did not leave time for Pelletier and Marina to have smoked marijuana together in the morning when Pelletier claimed they had consensual sex. Again, Pelletier did not offer a clear theory of admissibility.

To the extent that Pelletier claims that Marina's ingestion of a "dab" of marijuana sometime before she reported the rape to law enforcement inhibited her ability to accurate report the rape and the events leading up to the rape, then Pelletier should have at least established that those who observed Marina—her

boyfriend, Officer Kamerer, and/or the SANE nurse, had reason to believe she was under the influence of drugs or alcohol. Pelletier failed to do so. As this Court has recognized, "Absent other evidence establishing probative linkage between the crime and the [drug] use and showing the effect of such use on the defendant, evidence of [drug] use may well be admissible." *State v. Buck*, 2006 MT 81, ¶ 81, 331 Mont. 517, 134 P.3d 53. Pelletier did not provide other evidence establishing that linkage to the district court. As such, the district court properly excluded speculative evidence concerning Marina's use of marijuana.

IV. Pelletier has failed to meet his burden of proving the ineffective assistance of counsel claim.

Pelletier finally argues that defense counsel was ineffective because she failed to present evidence of mental disease or defect at trial to establish that as a result of his mental disease or defect Pelletier could not form the required mental state to commit sexual intercourse without consent.

"The United States and Montana Constitutions guarantee criminal defendants the right to effective counsel." *State v. Weber*, 2016 MT 138, ¶ 21, 383 P.3d 506, 373 P.3d 26. This Court analyzes claims of ineffective assistance of counsel under the two-part test the United States Supreme Court announced in *Strickland v. Washington*, 466 U.S. 668 (1984). *McGarvey v. State*, 2014 MT 189, ¶ 24, 375 Mont. 495, 329 P.3d 576. In order to prove ineffective assistance of

counsel, a defendant must show: (1) that counsel's performance was deficient, and (2) that counsel's deficient performance prejudiced the defendant. *McGarvey*, ¶ 24.

In order to prove the deficient performance prong, the defendant must demonstrate that counsel's performance "fell below an objective standard of reasonableness considering prevailing professional norms, and in the context of all circumstances." *McGarvey*, ¶ 25. The defendant must overcome a strong presumption that "counsel's defense strategies and trial tactics fall within a wide range of reasonable and sound professional decisions." *State v. Turnsplenty*, 2003 MT 159, ¶ 14, 316 Mont. 275, 70 P.3d 1234. Under the second prong of the *Strickland* test, a defendant must establish that, but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *Id*. Because a defendant must prove both prongs of *Strickland*, if a defendant fails to prove either prong, this Court need not consider the other. *Rose v. State*, 2013 MT 161, ¶ 22, 370 Mont. 398, 304 P.3d 387.

Pursuant to Mont. Code Ann. § 46-14-102, during trial, evidence of a defendant's mental disease or defect is admissible when relevant to prove, at the time of the offense charged, the defendant did not have the state of mind that is an element of the offense. *State v. Korell*, 213 Mont. 316, 323, 690 P.2d 992, 996 (1984). There is no dispute that Pelletier suffers from a mental illness. This explains why defense counsel gave notice of a possible mental disease or defect

defense and arranged for Dr. Kirsch to evaluate him. But the record before this Court establishes that despite Dr. Kirsch's conclusion that Pelletier suffered from a mental illness, she could not conclude that the mental illness prevented Pelletier from forming the requisite mental state. (Sent. Tr. at 816-17.) Thus, Pelletier's ineffective assistance of counsel claim is record-based and fails at the outset.

Pelletier cannot meet his burden of proving that defense counsel performed deficiently because, despite defense counsel procuring a mental health expert to evaluate Pelletier, that mental health expert's evaluation did not support the defense of mental disease or defect. Pelletier fails to meet the prejudice prong of *Strickland* for the same reason.

Because Dr. Kirsch's testimony could not support a mental disease or defect defense at trial, defense counsel instead called Dr. Kirsch at the sentencing hearing. Even then, Dr. Kirsch could not provide an opinion that would prevent the court from imposing a prison sentence. Instead, Dr. Kirsch provided testimony to support her recommendation that, because of Pelletier's mental illness, it was in his best interest for the court to impose a sentence that would allow him to receive treatment in a community setting with many safeguards. After considering that testimony, the district court still sentenced Pelletier to prison for 40 years with 20 years suspended.

Pelletier has failed to meet his burden of proving that his trial counsel was ineffective for not relying upon the defense of mental disease or defect at trial because the expert witness who evaluated Pelletier could not provide expert testimony to support such a defense.

CONCLUSION

This Court should affirm Pelletier's conviction for sexual intercourse without consent because Pelletier has failed to meet his burden of proving that the district court abused its discretion in making two evidentiary rulings at trial. Also, Pelletier failed to meet his burden of proving his ineffective assistance of counsel claim because his expert witness could not support a mental disease or defect defense.

Respectfully submitted this 30th day of March, 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 7,969 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, and appendices.

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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 03-30-2020:

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