IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0433

STATE OF MONTANA,

Plaintiff and Appellee,

v.

NATHAN MAHSEELAH,

Defendant and Appellant.

# BRIEF OF APPELLEE

On Appeal from the Montana Twentieth Judicial District Court,
Lake County, The Honorable James A. Manley, Presiding

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2. Whether there is sufficient evidence demonstrating that Mahseelah was the shooter to support Mahseelah's convictions.

3. Whether the court abused its discretion when it excluded a witness Mahseelah knew about weeks before trial but did not disclose until the morning of trial.

4. Whether Mahseelah's claim that the admission of William's statement violated the Confrontation Clause should be reviewed under the plain error doctrine.

## STATEMENT OF THE CASE

Appellant Nathan Mahseelah (Mahseelah) was charged with robbery, in violation of Mont. Code Ann. § 45-5-401; assault with a weapon, in violation of Mont. Code Ann. § 45-5-213; and criminal endangerment, in violation of Mont. Code Ann. § 45-5-207, after he fired three shots in a house, nearly hitting two children outside. (Docs. 2, 4, 21.) The charges were based on statements by two people in the house, Ishan Wylie (Ishan) and William Steele (William), identifying Mahseelah as the shooter. At trial, William did not testify, and Ishan

changed her story. Her prior inconstant statements identifying Mahseelah as the shooter were admitted. Mahseelah was convicted of all counts.

## STATEMENT OF THE FACTS

### I. The offense

Around 6 p.m., in August 2017, Mahseelah rode with Angelina Dempsey (Angelina) to Jay Sorrell's (Jay) house to obtain a cell phone. While Mahseelah was inside, three shots were fired. One of the shots went through a neighboring house and passed near a child who was in bed. (Tr. at 141-48.) Another shot passed near the head of a child who was being held by his mother on a porch. (*Id*. at 150-51.) Other children were playing in the area at the time. (*Id*. at 143-44.)

One of the neighbors, Jonathan Charlo (Jonathan) saw one female and three males get into a car. (*Id*. at 156.)[1] He identified one male as Benny Finley and the female as Angelina. (*Id*.) He did not see any weapons on any of them. (*Id*. at 156-57.) The three males were wearing shorts, and two of them were wearing jerseys while the other was not wearing a shirt. (*Id*. at 160.) Jonathan walked behind the car to get the license plate number. (*Id*. at 157.) The driver backed into

[1] Jonathan's testimony is inconsistent on the total number because he stated that three people got into the car, but he described them as one female and three males. (Tr. at 156.)

Jonathan slowly to get him out of the way so she could drive away. (*Id*. at 157-58.)

Based on information provided by Jonathan and another neighbor, law enforcement was able to identify the car and determine that it belonged to Angelina. (*Id*. at 105, 122, 158.) An officer located the car, and Confederated Salish and Kootenai police officer Casey Joe Couture (Officer Couture) responded to that location. He observed that the car was parked behind a motor home, rather than in the front of the home where cars usually parked, and that it was parked on top of a bike. (*Id*. at 108-09.) Angelina told law enforcement that she had been in the area where the shooting had occurred. (*Id*. at 123.)

Officers then went to Jay's house to speak to people who were there. (*Id*. at 110.) Officer Couture spoke to Ishan and William. (*Id*.) Both Ishan and William identified Mahseelah as the shooter. (*Id*. at 110-11.)

## II. Trial testimony

William did not testify at trial. While describing the investigation, Officer Couture testified about his conversation with William and Ishan shortly after the shooting. (*Id*. at 110-11.) When the prosecutor asked Officer Couture whether Ishan told him who the shooter was, defense counsel objected that it was hearsay. (*Id*.) The court stated, "Well, it's a little unclear but I think it's being

offered to prove why this officer did whatever he did next in his investigation rather than for the purpose of the truth of the matter asserted therein. So technically I don't think it's hearsay. I'll allow it." (*Id*. at 111.) Officer Couture then testified that Ishan and William identified Mahseelah as the shooter. (*Id*.) Officer Couture testified that William stated he was in one of the back bedrooms when the shots were fired. (*Id*.)

Officer Couture photographed three bullet holes in the wall of Jay's house, and those photographs were admitted at trial. (*Id*. at 112-14.) Officer Couture was allowed to testify over defense counsel's objection about where people outside of the house were when the shots were fired. (*Id*. at 116-18.) The court concluded that the testimony was admissible because it explained why the officer took the photographs he took. (*Id*. at 116.) Witnesses testified later in the trial about their location, and that testimony was consistent with Officer Couture's testimony. (*Id*. at 141-48, 150-51.)

Angelina testified that no one was in her car when she went to Jay's house, and that she did not get out of the car. (*Id*. at 126, 132.) She claimed that she was looking for her son and companion, so she stopped in front of the house and sent text messages. When she did not receive a response, she assumed "Benny" was

not there, and she left. (*Id*. at 127.)[2] Angelina testified that when she spoke to an officer, he mentioned that shots were fired, and she "kind of went along with him." (*Id*.) She denied that she directly told him she heard shots, and stated that she could not say how many shots were fired. (*Id*.) The prosecutor confronted Angelina with her statement to an officer indicating that she heard shots and started backing out, and that she told a guy standing behind her car to get out of her way because "I'm not trying to get shot." (*Id*. at 128.) Angelina stated that she did not remember saying all of that, but she did tell an officer that she yelled at a man behind her car to get out of the way. (*Id*.)

Officer Couture testified that Angelina did not just agree with him as she asserted. Instead, she gave him an affirmative statement about leaving in a hurry after hearing shots. (*Id*. at 191-92.)

Ishan testified that she was at her house with her ex-husband, Jay Sorrell, and her brother, William Steele, at the time of the shooting. (*Id*. at 162.) She testified that Angelina came over, but to her knowledge no one else came in the house. (*Id*. at 163.) She acknowledged that she and William talked to

[2] Mahseelah's counsel misrepresents Angelina's testimony in his brief, claiming that she testified that she drove Michael and Mahseelah to Jay's house and that she waited outside for them to come out. (Appellant's Br. at 11.) She testified directly to the contrary, stating specifically that she did not give Mahseelah a ride and that no one was in her car when she went to the house or when she left. (Tr. at 125-26, 132.)

Officer Couture after the shooting, and she told Officer Couture that Mahseelah was down the hall with William, and she saw Mahseelah fire a shot into the bedroom. (*Id*. at 163-64.) She acknowledged that she told Officer Couture that she ducked aside and heard two more shots. (*Id*. at 164.) She also acknowledged that she described where William was when the shots were fired, and based on that statement, the shots were fired within feet of William's head. (*Id*. at 166.)

But on the stand, she denied that she ever saw Mahseelah with a gun. (*Id*. at 164.) She stated that the police report was "backwards." (*Id*.) She testified, "I didn't see anyone in the hallway with a gun." (*Id*.) She then mentioned that afterwards a neighbor pulled up and pulled a rifle out of his car. (*Id*. at 164.) Ishan testified that she was providing a different story at the trial than she did after the shooting "[b]ecause at the time I was high off of methamphetamine." (*Id*. at 166-67.)

Ishan testified that the incident involved a phone. (*Id*. at 168.) She stated that Angelina came into the house and asked for Mahseelah's phone. (*Id*.) But she said she never saw Mahseelah come in the house, and that Angelina did not fire the shots. (*Id*. at 168-69.) The prosecutor questioned Ishan about the statements to law enforcement:

> "They found his phone" – this is you talking to him – "gave it back to him but Nathan [Mahseelah] did not think it was quick enough and he was trying to make them quicker (one shot)" in parentheses. "The

> phone was returned. William stood up and that is when Nathan fired two more shots." . . . . Did you say that?

(*Id*. at 169.) Ishan denied that she had said that. (*Id*.)

On cross-examination, Ishan testified that she and William were in the bedroom using methamphetamine when Angelina knocked on the door and asked for Mahseelah's phone. (*Id*. at 172-73.) She testified that she told Angelina that she needed to speak to Jay about the phone. (*Id*. at 173.) She said 10 to 15 minutes later, she heard a gunshot, and then she heard two more. (*Id*. at 174.) She testified that she then remembered that the phone was in the bedroom she was in, so she grabbed it, opened the door a crack, and threw the phone down the hallway. (*Id*. at 174.) She claimed that she, William, and Jay then left the rooms they had been in and questioned who had fired the shots. (*Id*. at 175.) She testified that they did not know, and they saw two people she did not recognize in her home. (*Id*.) She stated that everyone left the house, and she stayed on the porch. (*Id*. at 175-76.) She testified that a neighbor pulled up and pointed a gun toward her and asked who fired the shots, "[a]nd then I said it was Nathan Mahseelah because that's what everyone was telling me." (*Id*. at 176.)

The prosecutor questioned Ishan about William's agreement with her statements to Officer Couture after the shooting. Referring to William, the prosecutor asked, "He was saying 'Mr. Mahseelah is a shooter. I was sitting in my bedroom. He fired three shots close to my head.' He said that, didn't he?" (*Id*. at

182.) Defense counsel objected on hearsay grounds. (*Id*.) The court overruled the objection (*Id*.) Ishan then agreed that William had made those statements to law enforcement. (*Id*.) Ishan also agreed that she had told Officer Couture that she saw Mahseelah in her house with a gun and that he shot at William, and William was there while she said that and did not disagree. (*Id*. at 184-85.) She also acknowledged that William provided information to law enforcement consistent with her story at the time, and that she was providing a different story at trial. (*Id*. at 186.)

Officer Couture testified that when he spoke to Ishan and William after the shooting, they both told him that Mahseelah came into their house looking for a phone. (*Id*. at 194.) They both told Officer Couture that Mahseelah did not think they were responding quick enough, so he fired a shot at William. (*Id*.) Ishan told him that she was not in the room where the shots were fired, but she heard a shot and peeked down the hallway. (*Id*. at 194-95.) She said Mahseelah then pointed a gun at her, and she ducked back in the room. He then fired two more times. (*Id*. at 195.) Officer Couture testified that Ishan told him that William was sitting on the bed when the shots were fired, and then Officer Couture recreated the incident with William. (*Id*. at 197.) Officer Couture testified that Ishan appeared to be afraid from the gunshots. (*Id*. at 196.)

Former Lake County Deputy Sheriff Elmer Joel Diaz (Deputy Diaz) testified that he interviewed Mahseelah a week after the incident. (*Id*. at 212.) Mahseelah told Deputy Diaz that he rode with Angelina to Jay's house on the day of the shooting. (*Id*. at 212.) Mahseelah said another male was present, and that it was not Shawn Shourds, who law enforcement believed was with him. (*Id*. at 213.) But Mahseelah did not say who the other male was. (*Id*.) He stated that he was there to get his phone, but did not admit to taking any phone from William. (*Id*.) Mahseelah acknowledged that he made contact with Ishan and William. (*Id*. at 215.)

Mahseelah told Deputy Diaz that he was aware that shots were fired from a 9 mm gun, which was the caliber of bullets Deputy Diaz located near the neighbor's house. (*Id*. at 208-09, 213.) Mahseelah said he had been shown the shell casings by Jay Sorrell. When Deputy Diaz asked Mahseelah where the gun was, Mahseelah stated that it was "up north and safe," but then he stated that he was referring to a .32 caliber gun. (*Id*. at 214.)

Mahseelah's testimony contradicted Angelina's and Ishan's testimony. He testified that he rode to Jay's house with Angelina and Michael Steele (Michael) because he had learned that his cell phone was there. (*Id*. at 222-23.) He stated that Angelina went in before him because he "thought she was going to be able to handle the situation better because I was kind of upset about it." (*Id*. at 223.)

Mahseelah testified that Angelina came out and said she could not get his phone, so he went inside. (*Id*.) He claimed that he saw two people in the living room whom he did not recognize. (*Id*.) He stated that he saw Ishan and William in a room, and then he saw Jay in another room. (*Id*.) He testified that he started a casual conversation with Jay, and then he heard a shot go off. (*Id*.) Mahseelah testified that he "looked back at my cousin Jay and he shrugged his shoulders. I said, 'Okay.'" (*Id*. at 223-24.) He claimed that he continued talking to Jay, and then he heard two more shots. (*Id*. at 224.) Mahseelah stated, "I shook my head and I started to go out in the hallway. My phone rolled from the master bedroom down the hallway and so I picked it up and I went outside, wanting to get out of there." (*Id*.) He stated that he and Michael, who was on the porch, both got into Angelina's car, and she drove away. (*Id*.) Mahseelah testified that he was wearing basketball shorts and a jersey that day. (*Id*.)

He stated that he did not have a gun or see anyone with a gun. (*Id*. at 225.) He said he looked down the hallway and saw a hand close the door to the room Ishan and William were in and saw the two people in the living room. (*Id*.) He later acknowledged that he saw the two people in the living room around the time the shots were fired and that the shots were not fired from the living room, indicating that they could not have fired the shots. (*Id*. at 237-38.) Instead, he

acknowledged that the shots were fired from the hallway into a bedroom. (*Id*. at 237.)

When Mahseelah was asked why Ishan might have testified falsely on his behalf, he testified, "Because I told her to." (*Id*. at 227.) He then clarified that he was referring to why she would have made false statements in her report to law enforcement. (*Id*.) He said he told her to lie to the police because he was trying to protect his family, specifically Jay, who had an outstanding warrant. (*Id*. at 228.) He acknowledged, however, that Jay was not the person who fired a gun in his house. (*Id*. at 232.) He claimed that although he did not know who was in the room and fired the shots, he told Ishan before leaving, "This is on me." (*Id*. at 239.)

Mahseelah testified that he was not serious when he talked about a .32 caliber gun up north. Instead, he stated he was referring to a gun that belonged to his friend, and that he referred to it as his because he thought it was cool. (*Id*. at 227.)

The jury found Mahseelah guilty of robbery, assault with a weapon, and criminal endangerment.

Facts concerning Mahseelah's excluded witness are addressed below.

## SUMMARY OF THE ARGUMENT

The State properly admitted Ishan's statements to Officer Couture because they were prior inconsistent statements. Although Officer Couture testified that Ishan identified Mahseelah as the shooter before she testified, that statement was not hearsay because it was offered to explain the progress of the investigation. Further, the admission of the statement was harmless because the same testimony was later admitted as prior inconsistent statements.

The statement of William's that Mahseelah challenges on appeal is not hearsay because it was admitted to explain the steps taken in the investigation. Further, it would be harmless because identical statements from Ishan were properly admitted.

The evidence was sufficient, when viewed in the light most favorable to the State, to support the convictions. Ishan's prior statements identifying Mahseelah as the shooter were properly admitted and relied on as substantive evidence. Those statements were sufficiently corroborated by other evidence, including Mahseelah's admission that he was present in the house when the shots were fired, that he went there to get his phone, which he was upset about, and that he got his phone when the shots were fired.

The court properly exercised its discretion when it excluded a witness whom Mahseelah was aware of weeks before the start of trial, but whom he did not alert

the State to until the morning of trial. Contrary to Mahseelah's assertions, the record indicates that the State was not aware of that witness before the first day of trial, and the State would have been significantly prejudiced if he had been allowed to testify.

Mahseelah's unpreserved Confrontation Clause claim challenging the admission of a statement from William should not be reviewed under the plain error doctrine.

## ARGUMENT

### I. Ishan's and William's prior statements were properly admitted. Further, if any statements were improperly admitted, they were harmless.

#### A. Standard of review

A district court has broad discretion to determine the relevancy and admissibility of evidence, and this Court will not overturn evidentiary rulings absent a showing of abuse of discretion. *State v. Pound*, 2014 MT 143, 375 Mont. 241, 326 P.3d 422. A court abuses its discretion if it acts arbitrarily without employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice. *Id.* This Court reviews a district court's application of a statue or rule of evidence de novo to determine whether it is correct. *Id.*

### B. Ishan's statements

Hearsay statements are not admissible unless an exception applies. Mont. R. Evid. 802. "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). But, a witness's prior statement is not hearsay if the witness testifies at trial and the prior statement is inconsistent with the witness's testimony. Mont. R. Evid. 801(d)(1)(A). "[T]estimony that is marked by 'evasion, denial, and inability to remember,' or is 'evasive and uncooperative' can be an inconsistent statement under" Rule 801(d)(1)(A). *State v. Pound*, 2014 MT 143, ¶ 33, 375 Mont. 241, 326 P.3d 422. To admit extrinsic evidence of a witness's prior inconsistent statement, the witness must be given an opportunity to explain or deny the statement, and the other party must have an opportunity to interrogate the witness. Mont. R. Evid. 613(b).

The statements Ishan made to law enforcement on the day of the shooting were properly admitted as prior inconsistent statements. During Ishan's testimony, she denied that she saw Mahseelah in her house with a gun, but she acknowledged that she told Officer Couture after the shooting that she saw Mahseelah shoot into the bedroom, and the shots were fired within feet of William's head. (Tr. at 163-64, 166, 184-85.) Because Ishan's statements at trial were inconsistent with the statements she made after the shooting, the court properly admitted testimony

about her prior inconsistent statements. Mont. R. Evid. 801(d)(1)(A). Further, Ishan was given an opportunity to explain her prior inconsistent statements, and Mahseelah was allowed to cross-examine her about them, as required by Mont. R. Evid. 613(b). Ishan denied having made one of the statements the prosecutor asked about, but she acknowledged having made statements identifying Mahseelah as the shooter. She claimed that the prior statements were incorrect because she was high on methamphetamine.

Because Ishan was given an opportunity to explain the statements, the court correctly allowed Officer Couture to testify after Ishan testified about her statements to him that were inconsistent with her trial testimony. Mont. R. Evid. 613(b). Officer Couture testified that Ishan told him Mahseelah came to her house looking for a phone, that Mahseelah shot at William when he did not think his phone was being provided quickly enough, that Mahseelah pointed the gun at her when she peeked into the hallway, and that Mahseelah then shot two more times. (Tr. at 194-95.)

Prior inconsistent statements may be admitted as substantive evidence. *City of Helena v. Strobel*, 2017 MT 55, ¶ 11, 387 Mont. 17, 390 P.3d 921. Ishan's prior inconsistent statements were properly admitted to demonstrate that she identified Mahseelah as the shooter.

Mahseelah points out that Officer Couture was allowed to testify one time before Ishan testified that she identified Mahseelah as the shooter. (Tr. at 111; Appellant's Br. at 23.) The court allowed Officer Couture to testify that Ishan and William identified Mahseelah as the shooter when Officer Couture was describing his investigation and explaining the pictures that he took of the crime scene. (Tr. at 110-12.) The court explained that the statement was offered to explain the steps the officer took in the investigation, not for the truth of the matter asserted. (*Id*. at 111.)

The court's conclusion was not an abuse of its discretion. Officer Couture provided the statement while explaining the steps in his investigation, and Ishan's and William's identification of Mahseelah explained why law enforcement later interviewed him in connection with the shooting. Because the statement was not offered for the truth of the matter asserted, it was not hearsay and did not have to be excluded. "A statement is hearsay 'only when the immediate inference the proponent wants to draw is the truth of the assertion on the statement's face. If the proponent can demonstrate that the statement is logically relevant on any other theory, the statement is nonhearsay.'" *Siebken v. Voderberg*, 2015 MT 296, ¶ 22, 381 Mont. 256, 359 P.3d 1073 (quoting Edward J. Imwinkelried, *Evidentiary Foundations*, 153 (1980)).

Mahseelah also argues that the State improperly relied on Ishan's prior statements in its opening statement and closing argument. (Appellant's Br. at 22.) But as explained above, Ishan's prior inconsistent statements were properly introduced through her testimony, and they could be relied on as substantive evidence. That distinguishes this case from *State v. Laird*, 2019 MT 198, 397 Mont. 29, 447 P.3d 416, where this Court concluded that statements were admitted for the truth of the matter asserted, rather than to explain the investigation, because the State later relied on the information provided for the truth of the matter asserted. In this case, Ishan's prior statement identifying Mahseelah as the shooter later came in as substantive evidence that could be relied on. Further, the prosecutor's opening statement indicating that Ishan would identify Mahseelah as the shooter appears to have been based on the prosecutor's mistaken belief that Ishan's testimony would be consistent with her statements to law enforcement. Mahseelah has failed to demonstrate that the State improperly relied on hearsay statements from Ishan.

And, even if Officer Couture's initial statement indicating that Ishan identified Mahseelah as the shooter was hearsay that was improperly admitted, the statement was harmless. This Court has explained that

> [I]n order to prove that trial error was harmless, the State must demonstrate that there is no reasonable possibility that the inadmissible evidence might have contributed to the conviction. To do this, the State must demonstrate that the fact-finder was presented

> with admissible evidence that proved the same facts as the tainted evidence and, qualitatively, by comparison, the tainted evidence would not have contributed to the conviction.

*State v. Van Kirk*, 2001 MT 184, ¶ 47, 306 Mont. 215, 32 P.3d 735; *see also State v. Gomez*, 2020 MT 73, ¶ 56, 399 Mont. 376, __ P.3d __. There is no reasonable possibility that Officer Couture's initial statement that Ishan identified Mahseelah as the shooter contributed to the conviction because the State was later able to admit that same evidence after Ishan testified. Ishan testified that she told Officer Couture that Mahseelah was the shooter, and after her testimony, Officer Couture again testified that she identified Mahseelah as the shooter. (Tr. at 163-64, 194-95.) That admissible testimony demonstrated the same fact that the allegedly inadmissible testimony demonstrated. Officer Couture's initial statement was therefore harmless if it was hearsay.

### C. William's statements

Mahseelah argues that the State admitted hearsay statements from William. The only testimony he identifies in his argument, however, is Officer Couture's testimony indicating that Ishan and William identified Mahseelah as the shooter. (Appellant's Br. at 22 (citing the opening statement, closing argument, and Officer Couture's testimony at Tr. at 110-11).) As explained above, that testimony was provided while Officer Couture was explaining the steps he took in his

investigation. The district court correctly ruled that it was not hearsay because it was not offered for the truth of the matter asserted.

Even if this statement was improperly admitted, it was harmless. Although William did not testify, Ishan testified that she told Officer Couture that Mahseelah was the shooter. She also testified that William was present when she spoke to law enforcement, and he did not disagree with her. (Tr. at 186.) That evidence demonstrated the same fact as the allegedly improper evidence—that Mahseelah was the shooter. The allegedly improper evidence would not have had any impact on the verdict, and is therefore harmless. *See State v. Mizenko*, 2006 MT 11, ¶ 26, 330 Mont. 299, 127 P.3d 458 (holding admission of the victim's statements to law enforcement was harmless where the court properly admitted the victim's statements to other people containing the same information).

Further, Mahseelah acknowledged that the shooting occurred while he was in the house to get his phone, that he was upset about his phone, and that he left with his phone after the shooting. (Tr. at 222-24.) He also provided unbelievable testimony indicating that he told Ishan to falsely blame him for the shooting before he left the house. (*Id*. at 227.) And although Ishan denied that she saw Mahseelah in the house, she testified that the shooting involved Mahseelah's phone. (*Id*. at 168.) This evidence, along with Ishan's statement identifying Mahseelah, renders William's statement identifying Mahseelah harmless.

Because Mahseelah has failed to identify any other alleged hearsay statements involving William in his argument, this Court should not consider any statements by William admitted at trial that Mahseelah has not addressed. Further, if this Court does consider other statements made by William, the statements are harmless for the reasons discussed above.

## II. The convictions were supported by sufficient evidence.

### A. Standard of review

This Court reviews the sufficiency of the evidence in a criminal matter to determine whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *City of Helena v. Strobel*, 2017 MT 55, ¶ 8, 387 Mont. 17, 390 P.3d 921. Whether sufficient evidence exists to convict a defendant is an application of the law to the facts, which is reviewed de novo. *Id*. The trier of fact retains the function of determining the credibility of the witnesses and the weight to be given to their testimony. *Id*.

### B. Ishan's prior inconsistent statements identifying Mahseelah as the shooter were sufficiently corroborated by other evidence.

Mahseelah argues that his convictions for robbery, criminal endangerment, and assault with a weapon should be reversed because there is insufficient

evidence that he was the shooter. (Appellant's Br. at 25-29.) He first argues that there was not any evidence that could be relied on demonstrating that Mahseelah was the shooter because Officer Couture's testimony that Ishan and William identified Mahseelah could only be considered to explain the investigation, and Ishan's prior inconsistent statements could only be relied on to undermine her credibility. (Appellant's Br. at 25.) To support his claim about prior inconsistent statements, Mahseelah's counsel states that Mont. R. Evid. 801(c) means that "A statement is not hearsay if it is not being offered to prove the truth of the matter asserted but to undermine the credibility of a witness by showing inconsistencies in her statements." (Appellant's Br. at 25-26.) Contrary to his claim, Rule 801(c) provides the definition of hearsay and does not address prior inconsistent statements. Rule 801(d)(1)(A) creates an exclusion to the general hearsay rule for prior inconsistent statements. Nowhere do the rules indicate that a prior inconsistent statement may only be offered to undermine the credibility of a witness.

Instead, as Mahseelah's counsel later acknowledges, this Court has stated that "[p]rior inconsistent statements may be admitted as substantive evidence and may be considered in determining whether the evidence is sufficient to sustain the conviction." *Strobel*, ¶ 11 (quotation marks and citation omitted); *see also State v.*

*Torres*, 2013 MT 101, ¶ 27, 369 Mont. 516, 299 P.3d 804 ("Montana law unquestionably permits such statements to be admitted as substantive evidence.").

While prior inconsistent statements "may be admitted as substantive evidence, [they are] insufficient, standing alone, to prove a necessary element of a criminal offense." *Strobel*, ¶ 11. "Instead, prior inconsistent statements must be corroborated by other evidence in order to sustain a conviction." *Id.* But "circumstantial evidence alone is sufficient to obtain a conviction." *State v. Spottedbear*, 2016 MT 243, ¶ 24, 385 Mont. 68, 380 P.3d 810 (internal quotation marks and citation omitted).

This Court recently clarified what is required to corroborate a prior inconsistent statement in *Strobel*. A bystander witnessed Strobel trying to force his wife into a truck and called 911. *Strobel*, ¶ 3. Strobel's wife was visibly upset and crying when an officer arrived. *Id*. She told the officer that Strobel tried to push her into the truck and punched her twice in the face. *Id.* The officer did not observe any injuries on the victim's face. *Id.* At trial, Strobel's wife denied that he struck her in the face and said she did not remember the incident well because she had been drunk. *Strobel*, ¶ 5.

Strobel argued that the evidence was insufficient to support his conviction for partner or family member assault because his wife's prior inconsistent statement was the only evidence establishing that he punched her. *Strobel*, ¶ 15.

This Court affirmed Strobel's conviction, explaining that "corroborating evidence must be *reliable*, but it need not be *direct* evidence of each element of the offense." *Strobel*, ¶ 18. This Court held that the victim's demeanor after the incident and testimony that a witness saw Strobel force his wife into a truck provided substantial, reliable circumstantial evidence sufficient to corroborate Strobel's wife's prior statement that Strobel assaulted her causing her pain. *Id.* This Court explained that, "The corroborating testimony does not have to be sufficient, standing alone, to prove guilt. It instead must 'support' the elements of the offense established by the substantive evidence that the prior inconsistent statement supplies." *Id.*

This case is similar to *State v. Charlo*, 226 Mont. 213, 735 P.2d 278 (1987), in which this Court concluded that witnesses' prior inconsistent statements were sufficiently corroborated by other evidence. In *Charlo*, a woman and her boyfriend initially identified the woman's father, the defendant, as the person who stabbed her boyfriend. At trial, the woman testified that she did not remember if the defendant stabbed her boyfriend, and her boyfriend declined to identify the defendant as the assailant. *Charlo*, 226 Mont. at 215-16, 735 P.2d at 279-80. This Court upheld the defendant's conviction for stabbing the boyfriend because there was corroborating testimony from three witnesses placing the defendant near the victim immediately prior to the stabling, testimony from one witness placing a

knife in the defendant's hand, and testimony suggesting that the defendant had stabbed the victim. *Charlo*, 226 Mont. at 217, 735 P.2d at 281.

This case is similar to *Charlo* because it is clear that an offense occurred, and the issue is the identity of the offender. And like *Charlo*, there were a limited number of people present at the crime scene, and the evidence points only to Mahseelah. Despite Ishan's testimony that she never saw Mahseelah in her home, Mahseelah admitted that he was there at the time of the shooting, that he was upset about his phone, and that he got his phone back after shots were fired. (*Id*. at 223-24.)

Mahseelah was the only person present who could have done the shooting. Ishan's prior statements indicated that William was the person who was shot at, so he could not have been the shooter. (*Id*. at 166.) Mahseelah also acknowledged that William did not shoot at himself. (*Id*. at 238.) Mahseelah stated that he was talking to Jay when the shots were fired and acknowledged that Jay did not fire a gun in his home. (*Id*. at 223-24, 232.) There was never any suggestion that Ishan shot at William, and Officer Couture's testimony demonstrated that she was shaken up by the shooting that had occurred in the home. (*Id*. at 196.) Further, Mahseelah testified that he saw both of them in a room before he saw Jay, and he did not mention anyone else being present. (*Id*. at 223.) Ishan also stated that she was in a room with William and did not mention anyone else. (*Id*. at 173.)

Mahseelah's testimony demonstrated that Angelina could not have been the shooter because she left the home before he went in and the shots were fired. (*Id*. at 223.)

In another section of Mahseelah's brief, he claims that "All testimony suggested someone else in the living room of Jay's house fired the gun." (Appellant's Br. at 35.) That is not accurate. Mahseelah testified that two people he did not know were in the living room at the time of the shooting, but he also acknowledged that the shots were not fired from where he saw those two people when the shooting was occurring. (Tr. at 223, 237-38.) Thus, even if two unidentified people were in the home, neither of them could have been the shooter.

Mahseelah's own testimony supports the conclusion that he was the shooter. And Ishan acknowledged that the shooting involved Mahseelah's phone, making it logical to believe he would have been the person shooting. (*Id*. at 168, 172-74.)

These facts all corroborate Ishan's prior statements identifying Mahseelah as the shooter. Further, Mahseelah's improbable testimony that he told Ishan to lie to law enforcement and blame him for shootings that he did not do likely led the jury to doubt Mahseelah's credibility. (Tr. at 227-28.) Mahseelah also told Deputy Diaz that the gun was up north and safe. (*Id*. at 214.) Although he then said he was talking about a different gun, the jury could conclude that he was talking about the gun used in the shooting. While many conflicting versions of

events were given at trial, the only version that made sense and was consistent with the evidence was the version Ishan gave to law enforcement shortly after the shooting. Those prior statements were sufficiently corroborated to support Mahseelah's convictions.

This case is distinguishable from *State v. White Water*, 194 Mont. 85, 634 P.2d 636 (1981), and *State v. Giant*, 2001 MT 245, 307 Mont. 74, 37 P.3d 49, in which this Court held that prior inconsistent statements were not sufficiently corroborated. In *White Water*, the only evidence that the defendant penetrated the alleged victim came from a sheriff's report recounting the girl's statement. *White Water*, 194 Mont. at 88, 634 P.2d at 638. The alleged victim had a learning disability and was prone to agree with suggestions when she could not verbalize her thoughts. *Id.* At trial, she denied making the prior statement. *Id.* This Court held that the district court did not err when it dismissed the case because the prior statement was not corroborated by reliable evidence. *White Water*, 194 Mont. at 90, 634 P.2d at 639.

In contrast to *White Water,* it is clear in this case that an offense did occur, and the issue is only the identity of the offender. Unlike the victim in *White Water*, Ishan admitted that she made the prior statement identifying Mahseelah as the shooter. Ishan's prior statement is corroborated by other evidence, including

Mahseelah's admission that he was present when the shots were fired and was upset about his phone.

In *Giant*, a woman identified her husband as her attacker after the assault, but at trial, she testified that the attacker was actually her son. *Giant*, ¶¶ 3-4, 6. The only evidence supporting the conclusion that her husband had attacked her was that he fled the State after the incident. *Giant*, ¶ 14. This Court observed that evidence of flight does not demonstrate guilt. Because it was not reliable evidence, it was not sufficient to corroborate a prior inconsistent statement. *Giant*, ¶¶ 38-39.

In contrast to *Giant*, there was substantial evidence in this case corroborating Ishan's prior statement identifying Mahseelah as the shooter. That evidence, which is set out above, demonstrated that Mahseelah was present when shots were fired, he was upset about his phone, he got his phone after shots were fired, and he was the only person present who could have done the shooting. Further, Ishan's trial testimony was inconsistent not only with her statements to law enforcement, but also with Mahseelah's testimony in which he stated that he was in the house, and they saw each other. The evidence presented at trial was sufficient to corroborate Ishan's prior statements identifying Mahseelah as the shooter.

## III. The district court did not abuse its discretion when it excluded a witness Mahseelah was aware of weeks before the trial but did not disclose until the morning the trial began.

### A. Facts concerning the excluded witness

Mahseelah was arraigned on September 28, 2017. (Doc. 7.) The Omnibus Order informed the parties that they had to provide witness lists, as required by statute. (Doc. 18.) The Omnibus Order also stated that "No witness may be called nor exhibit introduced which has not been so provided without good cause having been first shown." (*Id*. at 2.) On February 22, 2018, Mahseelah filed a witness list that referred only to the "witnesses identified by the State" and "Additional Witnesses as they become known to the Defendant." (Doc. 23.)

The trial began on March 5, 2018. That morning, Mahseelah's counsel informed the court that he had learned about a witness the previous day who he wanted to add to his witness list. (Tr. at 60; Doc. 32.) Defense counsel explained that he did not have any prior notice of this witness until late Saturday, and he was not able to meet with the witness until midday Sunday. (Tr. at 60.) Counsel stated that the witness would demonstrate that his client was innocent of the charges. (*Id*.) Counsel told the court that the witness, Michael Steele, was incarcerated with Mahseelah, and had approached Mahseelah over the weekend and told Mahseelah that he was the person with Mahseelah when they went to Jay Sorrell's house. (*Id*.

at 61.) According to counsel, Michael would testify that Mahseelah did not have a gun when he went into or when he left Jay's house. (*Id*. at 62.)

The prosecutor stated that he was unaware of Michael Steele as a potential witness, and he opposed adding him as a witness because it was too late for him to be able to prepare. (*Id*. at 63.) The prosecutor also asserted that "whatever he's saying is a lie" because William Steele told officers that Mahseelah shot at him. (*Id*.) The prosecutor explained that even if he was able to interview Michael before the trial, adding him as a witness would prejudice the State because the State would not have an opportunity to do a proper investigation. (*Id*. at 63, 65, 67.)

The court informed the parties that it would give the State an opportunity to interview Michael before making a decision. The Court explained it was "going to let [the defense] call the witness in all likelihood" even though the late disclosure was prejudicial to the State because the witness had surfaced at the last minute. (*Id*. at 64-65.)

After the parties gave their opening statements, the court gave the jury a break and heard testimony from Michael. (*Id*. at 79-91.) Michael testified that on the day in question, he and Mahseelah rode to Pablo with Angelina. (*Id*. at 85.) Michael stated that Mahseelah wanted to stop by Jay's house to pick up his phone. (*Id*.) He stated that Angelina went inside to ask Jay for Mahseelah's phone. (*Id*.)

According to Michael, Angelina came out and said that Jay would not give her Mahseelah's phone and Mahseelah would have to go talk to him. (*Id*.) He testified that he and Mahseelah then walked into the house. (*Id*. at 86.) He stated that he saw William Steele and two other people in the living room, and Mahseelah walked into the back room to talk to "Jay and them." (*Id*. at 86-87.) According to Michael, he went back outside and waited on the porch. Five minutes later, he heard a boom. (*Id*. at 87.) Mahseelah walked out shortly after that, and they left. (*Id*.) Michael testified that Mahseelah was not carrying a gun with him, and he knew that because "[h]e had shorts and a t-shirt on. And I was with him when he was at Riverside and he didn't have one." (*Id*. at 88.)

Michael testified that he had been in jail in the same area as Mahseelah for 21 days. (*Id*. at 89.) He stated that he told Mahseelah shortly after he went to jail at the beginning of February that he could give a statement about the events because he rode with him. (*Id*. at 88-91.)

After hearing testimony from Michael, the court denied Mahseelah's request to add him as a witness because Mahseelah had known about Michael as a potential witness for three weeks and did not disclose it to his counsel until the weekend before the trial. (*Id*. at 92.)

### B. Standard of review

The court reviews a district court's decision to exclude a witness based on a discovery violation for an abuse of discretion. *State v. Strang*, 2017 MT 217, ¶¶ 14, 34, 388 Mont. 428, 401 P.3d 690; *State v. Pierce*, 2016 MT 308, ¶ 16, 385 Mont. 439, 384 P.3d 1042.

### C. The district court properly exercised its discretion to exclude a witness Mahseelah did not disclose in a timely manner.

A criminal defendant is required to provide the State with a list of witnesses he may call at trial "[w]ithin 30 days after the arraignment or at a later time as the court may for good cause permit." Mont. Code Ann. § 46-15-323(6)(a). If additional witnesses become known after that time, a party has a continuing duty to disclose under Mont. Code Ann. § 46-15-327. Montana Code Annotated § 46-15-327 requires a party who discovers a new witness after disclosure to "promptly notify all other parties of the existence of the additional information or material and make an appropriate disclosure." If a party fails to comply with its discovery obligations, "the court may impose any sanction that it finds just under the circumstances," including "precluding a party from calling a witness." Mont. Code Ann. §§ 46-15-329, -329(4).

The term "may" in Mont. Code Ann. § 46-15-329 gives district courts discretion to decide whether to impose sanctions for discovery violations. *Strang*,

¶ 34; *State v. Golder*, 2000 MT 239, ¶ 11, 301 Mont. 368, 9 P.3d 635. "Such discretion allows the court to consider the reason why disclosure was not made, whether noncompliance was willful, the amount of prejudice to the opposing party, and any other relevant circumstances." *Pierce*, ¶ 20. "Absent a clear abuse of discretion, the decision of the district court must be upheld." *Golder*, ¶ 11.

In *State v. DeMary*, 2003 MT 307, 318 Mont. 200, 79 P.3d 817, this Court held that a court did not abuse its discretion when it excluded an expert witness who the defense tried to add as a witness five days before trial. This Court noted that the defendant had been aware of the witness's involvement in the case for months, and never explained why he waited until five days before trial to attempt to add her as a witness. *DeMary*, ¶ 16. The defendant also failed to demonstrate that the State had sufficient time to prepare for the expert's testimony. *Id.* This Court concluded that the defendant's failure to notify the State of the expert sooner was not supported by good cause, as required by Mont. Code Ann. § 46-15-323(6). *Id*. This Court held that the district court did not abuse its discretion when it excluded the witness because the defendant did not explain the tardiness of his motion, did not demonstrate that the State was prepared to address the expert's testimony, and did not demonstrate that he was prejudiced by the exclusion of the witness. *DeMary*, ¶ 22.

Similar to *DeMary*, the court did not abuse its discretion in this case when it excluded Michael's testimony because Mahseelah did not provide notice to the State in a timely manner, Mahseelah did not explain why the delay occurred, the prejudice to the State would have been significant, and the prejudice to Mahseelah caused by excluding Michael's testimony is far less than he asserts.

Although Mahseelah's counsel was not aware that Michael might be a witness until two days before trial, Michael's testimony demonstrated that he told Mahseelah that he could be a witness for him approximately three weeks before the trial began. (Tr. at 60, 88-91.) Michael repeatedly testified that he told Mahseelah that he could be a witness for him in early February. (*Id*. at 88-91.) There was no explanation for why Mahseelah did not inform his attorney until the Saturday before trial that Michael would be a witness for him.

Further, if Michael really did ride to Jay's house with Mahseelah, Mahseelah would have been aware of Michael as a potential witness before Mahseelah and Michael were incarcerated together in February. Mahseelah prevented the State from knowing about Michael as a potential witness earlier because he refused to tell Officer Diaz who was riding in the car with him. (*Id*. at 213.) He then presented Michael as the person in the car on the morning of trial.

Allowing Mahseelah to add Michael as a witness that morning would have been highly prejudicial to the State. The State did not have notice that Michael

was a potential witness in the case until the morning trial began. (*Id*. at 89.) As the prosecutor explained, he would need to investigate Michael's claim that he was with Mahseelah around the time of the shooting. (*Id*. at 63, 64, 67.) And the prosecutor would not be able to do that when he did not know about the witness until trial was beginning. (*Id*.)

Mahseelah repeatedly speculates throughout his argument that the State should have been aware of Michael's testimony because he was in custody for a month leading up to trial, and that this incident must have been related to his arrest. (Appellant's Br. at 32, 39.) That speculation is unsupported by the record. Michael was not identified as a person who was related to this case until the first day of trial. (Tr. at 63.) Mahseelah asserts that the State had a duty to find and interview Michael to investigate the case. But there is no evidence that any witness identified Michael as a person related to the case. When Mahseelah was interviewed, he said Shawn Shrouds was not the person with him, as another witness had stated, but declined to say who was with him. (Tr. at 213.) Mahseelah also argues that Ishan and Angelina "must have brought it to the State's attention that Michael was one of the nine people who were at Jay's house on the night of the incident." (Appellant's Br. at 37.) There is no evidence to support that speculation, and the record actually indicates that law enforcement had been told that the other person in the car was Shawn Shrouds, not Michael. (Tr. at 213.)

Although the prosecutor initially told the court that Michael was listed in the filing affidavit, it was later clarified that the person in the filing affidavit was William Steele, not Michael Steele. (*Id*. at 61-63.)

Finally, Michael's testimony would not have been as helpful as Mahseelah asserts. In the offer of proof, Michael testified that Mahseelah was not carrying a gun, which he said he knew because Mahseelah was wearing a shirt and shorts, and Michael did not see a gun on him. (*Id*. at 88.) But the State's witness, Jonathan Charlo, also testified that he did not see any of the people getting into the car with a gun, and two of the men were wearing basketball shorts and jerseys. (*Id*. at 156-57.) The only difference with Michael's testimony and Jonathan's testimony is that Michael claimed to be with Mahseelah longer. But the jury may not have believed the testimony from Michael, who was a friend of Mahseelah's. More importantly, even if a jury would have believed Michael's testimony, it does not demonstrate that Mahseelah was not holding a handgun in the waistband of his shorts or did not have one concealed elsewhere under his clothing. Michael's testimony would not have demonstrated that Mahseelah was not the shooter.

Under these circumstances, the district court did not abuse its discretion when it excluded Michael's testimony on the ground that adding him as a witness at the last minute would be unfair to the State. (*See id*. at 92.)

### D. Mahseelah's right to present a defense was not infringed.

Mahseelah also argues that his constitutional right to present a defense was violated by the exclusion of the witness. This argument should not be considered because Mahseelah did not preserve this claim by making an argument to the district court about the right to present a defense and has not asked for plain error review.

Further, this claim can be rejected on the merits. The right to present a defense "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.'" *Scheffer*, 523 U.S. at 308. Montana's discovery rules are designed to "provide notice and prevent surprise." *State v. Stewart*, 2000 MT 379, ¶ 22, 303 Mont. 507, 16 P.3d 391. By doing so, the rules promote fairness to both parties. Mahseelah's right to present a defense is not violated by rules that prevent him from prejudicing the State by presenting a witness on the morning of trial when he was aware of that witness for weeks.

## IV. Mahseelah has not met his burden to demonstrate that his Confrontation Clause claim should be reviewed under the plain error doctrine.

### A. Standard for plain error review

This Court has consistently held that it will not consider issues raised for the first time on appeal. *See, e.g.,* S*tate v. Reim,* 2014 MT 108, ¶ 38, 374 Mont. 487, 323 P.3d 880; *State v. Taylor*, 2010 MT 94, ¶ 12, 356 Mont. 167, 231 P.3d 79. But this Court may review an unpreserved claim alleging a violation of a fundamental constitutional right under the common law plain error doctrine where the defendant invokes the Court's inherent authority and establishes failing to review the claimed error may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process. *Taylor*, ¶¶ 12-13. An error is plain only if it leaves one "firmly convinced" that some aspect of the trial, if not addressed, would result in one of the consequences listed above. *Taylor*, ¶ 17. This Court invokes plain error review "sparingly, on a case-by-case basis, according to narrow circumstances and considering the totality of the circumstances." *State v. Williams*, 2015 MT 247, ¶ 16, 380 Mont. 445, 358 P.3d 127.

### B. Applicable law on the Confrontation Clause

The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. In *Crawford v. Washington*, 541 U.S. 36 (2004), the United States Supreme Court "limited the Confrontation Clause's reach to testimonial statements and held that in order for testimonial evidence to be admissible, the Sixth Amendment 'demands what the common law required: unavailability and a prior opportunity for cross-examination.'" *Michigan v. Bryant*, 562 U.S. 344, 354 (2011) (quoting *Crawford*, 541 U.S. at 68). Although *Crawford* declined to fully define "testimonial," it stated that the term includes prior testimony and police interrogations. *Crawford*, 541 U.S. at 68. The primary focus of the Confrontation Clause is to exclude "the introduction of out-of-court statements . . . in which state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial."

Not all statements to law enforcement, however, are testimonial. *Bryant*, 562 U.S. at 354 (discussing *Davis v. Washington* and *Hammon v. Indiana*, 547 U.S. 813 (2006)). In *Davis*, the Court held that statements made to a 911 operator during a domestic disturbance were not testimonial because the primary purpose of the statements was to respond to an ongoing emergency. 547 U.S. at 827-28. In contrast, the Court held in *Hammon* that statements made to law

enforcement shortly after a domestic disturbance, after the offender and victim had been separated, were testimonial because they were part of a criminal investigation into past conduct. 547 U.S. at 819-20, 829-30.

In *Bryant*, the Supreme Court concluded that statements made to law enforcement by a person dying of a gunshot wound were nontestimonial, even though the shooter left before the statements were made. 562 U.S. at 378. The Court explained that

> the existence of an 'ongoing emergency' at the time of an encounter between an individual and the police is among the most important circumstances informing the 'primary purpose' of an interrogation . . . . because an emergency focuses the participants on something other than 'prov[ing] past events potentially relevant to later criminal prosecution.' Rather, it focuses them on 'end[ing] a threatening situation.'

*Id.* at 361 (internal citations omitted). The *Bryant* Court also explained that the inquiry into whether the "primary purpose" of an interrogation is "to enable police assistance to meet an ongoing emergency" is objective. *Id.* at 359-60. Thus, "the relevant inquiry is not the subjective or actual purpose of the individuals involved in the particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." *Id.* at 360. The *Bryant* Court concluded that because the shooter was still at large and the statements were made in an informal setting, "the primary purpose of the interrogation was to enable

police assistance to meet an ongoing emergency." *Id.* at 377-78. Therefore, the statements were nontestimonial hearsay. *Id.* at 378.

### C. Mahseelah's claim about William's statement should not be reviewed.

Although Mahseelah does not cite to the statement, it appears that he is arguing that Officer Couture's testimony that William identified him as the shooter violates his right to confront witnesses. He has not met his burden to demonstrate that failing to review this claim would result in a manifest miscarriage of justice.

As explained above, Officer Couture was properly allowed to testify about William's identification of Mahseelah as the shooter because the information explained the steps that were taken in the investigation. (*See* Tr. at 111.) It was therefore not hearsay.

Further, because Mahseelah did not raise a Confrontation Clause claim, the State was not put on notice that it needed to develop a record about whether the primary purpose of the statement made by William after the shooting was to address an ongoing emergency. The record, however, supports that conclusion. Law enforcement responded to a call indicating that bullets shot from an unknown location passed near a child. (Tr. at 94.) After speaking to witnesses, law enforcement went to Jay's home, where an officer spoke to Ishan and William. (*Id.* at 110.) Like *Bryant*, law enforcement did not know who the shooter was, why the shooting occurred, or whether the shooter might return, when officers began

talking to Ishan and William. When Officer Couture was speaking to Ishan and William, Ishan's hands were shaking and she appeared to still be afraid from the shooting. (*Id.* at 196.) The evidence indicates that the primary purpose of the interrogation was to meet an ongoing emergency, rather than gathering evidence for a future court proceeding. Mahseelah has therefore failed to demonstrate that his right under the Confrontation Clause was violated.

Further, as explained above, any statements of William's that were admitted were harmless because Ishan's prior inconstant statements providing the same information were properly admitted. *See Mizenko*, ¶ 26 (holding admission of the victim's statements to officer was harmless where the victim's statements to other witnesses were properly admitted).

Mahseelah has failed to demonstrate that this is a rare case in which failing to review his claim under the plain error doctrine would result in a manifest miscarriage of justice. This claim should therefore not be reviewed.

## CONCLUSION

Mahseelah's convictions should be affirmed.

Respectfully submitted this 15th day of May, 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 9,712 words, excluding certificate of service and certificate of compliance.

*/s/ Mardell Ployhar*
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## CERTIFICATE OF SERVICE

I, Mardell Lynn Ployhar, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 05-15-2020:

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