IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0673

STATE OF MONTANA,

Plaintiff and Appellee,

v.

RENIE RAYMOND JOSEPH FILLION,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Eighteenth Judicial District Court,
Gallatin County, The Honorable John C. Brown, Presiding

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STATEMENT OF THE ISSUES

1. Did the district court properly deny Appellant's motion to dismiss the charges based upon his claim that the State failed to preserve exculpatory evidence when it photographed the stolen motorcycle before returning it to its owner who allowed defense counsel to personally examine the motorcycle?

2. Did the district court properly overrule Appellant's hearsay objection when the State did not offer the statement for the truth of the matter asserted?

3. After correctly instructing the jury, did the district court properly answer the jury's question about the charge of Altering an Identification Number by referring the jury back to the correctly provided jury instructions?

STATEMENT OF THE CASE

The State charged Appellant Renie Fillion with felony Theft; felony Altering an Identification Number; and misdemeanor Violation of a License Plate Requirement. (D.C. Doc. 3.) Fillion filed a motion to dismiss the charges, arguing that the State "failed to maintain a chain of custody concerning the primary piece of evidence, a Kawasaki motorbike." (D.C. Doc. 40 at 8.) Fillion argued that the State "gave away" the motorbike, prejudicing his right to properly defend against the charges. (*Id*. at 9.)

The State responded. (D.C. Doc. 48 at 9-11.) The State explained that the motorcycle was still available for Fillion to inspect. Also, officers photographed the motorcycle extensively prior to returning it to its owner. The State did not intend to introduce the motorcycle at trial. (*Id*.) Fillion replied. (D.C. Doc. 51.)

The district court held a hearing on April 7, 2017. (4/7/17 Transcript of Hearing [4/7/17 Tr.].) The court denied Fillion's motion to dismiss. (D.C. Doc. 64, attached to Appellant's Br. as App. A.) The court concluded:

> Here, the facts of the case are distinguished from *Halter*, *supra*. Unlike *Halter*, the Defendant here has made no claim as to how the evidence might be exculpatory. The Defendant makes conclusory statements that the evidence is exculpatory, but advances no actual theory or testing that the Defendant could rely on or perform if the motorcycle was still in the State's possession. The Defendant has not set forth any reasons why an inspection of the motorcycle in person would aid in his defense, as compared to a review of the extensive photographs of the motorcycle. Critically, the motorcycle is still available for inspection, in contrast to the slaughtered bull in *Halter*, *supra*. Haskell testified at the hearing that the VIN number is still in the exact same condition as when the motorcycle was returned to him. The Defendant can corroborate this by comparing the VIN's current condition to how it appears in the numerous photographs. Haskell also testified that he is amenable to allowing an inspection of the motorcycle by the Defendant. The Defendant has not advanced any theory why this would not be sufficient for the Defendant to prepare his defense. Therefore, the Defendant's Motion to Dismiss is denied.

(Appellant's App. A at 16.)

After receiving the district court's ruling, Fillion filed a motion in limine to prohibit the State from introducing photographs of the stolen motorcycle. (D.C. Doc. 74.) Although previously Fillion had argued that the State could not introduce

the motorcycle into evidence at trial because the State could not establish an unbroken chain of custody, in this motion Fillion argued that allowing photographs to be admitted into evidence in lieu of the motorcycle officers seized from Fillion's residence would violate the best evidence rule and would deny Fillion the right to a fair and impartial trial. (*Id*. at 3-5.)

Fillion renewed his argument that the State could not introduce the motorbike into evidence because the State failed to "preserve the condition" of the motorbike. (*Id*. at 5.) Fillion alternatively argued that if the court permitted the State to introduce photographs of the motorbike into evidence, then witnesses should be prevented from describing the photographs. (*Id*. at 7.) The State responded. (D.C. Doc. 75.) The district court denied the motion on the first day of trial, out of the presence of the jury. (D.C. Doc. 121; 6/25/18-6/26/18 Transcript of Jury Trial [Tr.] at 170-71.) Fillion did not appeal the district court's ruling.

During the investigative officer's testimony, Fillion made an objection on hearsay grounds that the officer could not reference what a witness had told him that resulted in him going to Fillion's house to investigate a possible theft. (Tr. at 284.) Initially the court sustained the objection. (*Id*.) Following a recess, the State filed a point brief on the hearsay objection. (D.C. Doc. 122.) After a lengthy discussion, the court overruled defense counsel's objection. (Tr. at 309-31)

Regarding the charge of Altering an Identification Number, the district court instructed the jury as follows:

> A person commits the offense of Altering an Identification Number if he willfully removes or falsifies an identification number of a motor vehicle, trailer, semitrailer, pole trailer, or motor vehicle engine.

(D.C. Doc. 127, Instruction 6, attached to Appellant's Br. as App. E.) The court additionally instructed the jury:

> To convict the Defendant, Renie Fillion, of the charge of Altering an Identification Number, the State must prove the following elements:
>
> 1. That the Defendant removed or falsified an identification number of a motor vehicle, trailer, semitrailer, pole trailer, or motor vehicle engine;
>
> AND
>
> 2. That the Defendant acted willfully.
>
> If you find from your consideration of the evidence that all of these elements have been proved beyond a reasonable doubt, then you should find the defendant guilty.
>
> If, on the other hand, you find from your consideration of the evidence that any of these elements has not been proved beyond a reasonable doubt then you should find the Defendant not guilty.

(D.C. Doc. 127, Instruction 7, attached to Appellant's Br. as App. E.) Fillion did not object to either instruction. (Tr. at 506-08.) When the jury submitted a question about Altering an Identification Number, the court referred the jury back to the jury instructions. (Tr. at 583.)

The jury convicted Fillion of all three offenses. (D.C. Doc. 129.) The court imposed concurrent five-year deferred-imposition sentences for both the Theft and Altering an Identification Number convictions, and a six-month suspended sentence for Violation of License Plate Requirements. (D.C. Doc. 138, attached to Appellant's Br. as App. F.)

STATEMENT OF THE FACTS

I. The offenses

Nicholas Haskell is a security officer at Bozeman Health, a community hospital. (Tr. at 205.) Haskell is interested in motorcycles and has owned hardtail custom choppers, dirt bikes, Supermotos, and older, antique dirt bikes. (Tr. at 206.) In May of 2016, Haskell owned a 2008 KLX450R Kawasaki. (*Id.*; State's Ex. 1.)

Haskell purchased the Kawasaki from someone in East Helena in 2015. (Tr. at 208, 215.) The KLX450R is a rare model because Kawasaki only manufactured it in the United States for three years, 2008 through 2010. (Tr. at 208.) There is a sticker underneath the seat that provides the model number. (Tr. at 223.) When Haskell purchased the motorcycle, some of the parts on the bike were custom rather than stock. After Haskell purchased the bike, he customized other parts on the motorcycle. (Tr. at 209.) For example, Haskell replaced the stock front fender with a Supermoto fender. (*Id.*)

Haskell also custom ordered the wheelset online. Haskell chose the color of the rim, the color of the spokes, and the color of the nipples that hold on the spokes and the hubs. The spokes were black, the hubs were green, the nipples were green, and the rim was black. (Tr. at 211.) And Haskell custom-ordered a Supermoto rotor, and purchased a FX Motorsports sticker set, a carry strap for the back, and a KX rear fender. (Tr. at 211-12.) During his trial testimony, Haskell pointed out all these items on State's Exhibit 1, a photograph of his motorcycle before it was stolen. (Tr. at 210-13.) Haskell explained that a Supermoto is a street legal dirt bike, so it has street tires. The tires that Haskell customed-ordered were Conti Attack SM tires. The tire ring was Warp 9 Elite. (Tr. at 212-13.) Also, the motorcycle usually comes with a cheap black chain, which Haskell replaced with a better quality, gold chain. (Tr. at 213.)

Haskell still had the receipt from Moto X Industries, dated March 20, 2016, for the wheelset. (Tr. at 214; State's Ex. 32.) Haskell spent $1,399.35 on the wheelset. (Tr. at 216.) Haskell explained that the exact wheels he purchased and placed on his motorcycle are extremely uncommon because you can choose any combination of colors. (*Id*.) Haskell had never seen another Kawasaki Supermoto motorcycle in Bozeman. (Tr. at 218.)

Although Haskell purchased the motorcycle in 2015, he did not receive the title to the bike until April 6, 2016, because he did not license the bike until he

purchased the new wheelset. (Tr. at 219-20; State's Ex. 2.) The title reflects that the bike is a 2008 model and has the VIN. (Tr. at 219.) The title lists the model number of the motorcycle as KL650A. This is not an accurate model number. (Tr. at 220.) Haskell explained:

> When you search KLX45OR, 20 other owners pop up and they say that they've run into the same issue and what they determined was that it was because they are an—off road motorcycles and when you go to get a license plate the system reads the KL650A which is an on-road street-legal motorcycle and it just generates that model number.

(Tr. at 222.)

Haskell drove his motorcycle to work on May 3, 2016. On a break, Haskell happened to walk by the parking lot and noticed his motorcycle was gone. Haskell called the Bozeman Police Department to report his motorcycle stolen. (Tr. at 223-24.) Officer Martin of the Bozeman Police Department went to the hospital to get Haskell's statement. On May 16, 2016, Haskell also posted an ad on Craigslist with a photograph of his missing motorcycle, offering a $1,500 reward for information leading to the return of Haskell's motorcycle. (Tr. at 225-26; 228, State's Ex. 3.)[1] No one ever contacted Haskell about the ad or attempted to collect the reward. (Tr. at 228.)

[1] The photograph of the motorcycle is the same photograph as State's Ex. 1. (Tr. at 227.)

Haskell also called all the motorcycle shops in the area to report that someone had stolen his motorcycle, and to provide a description so shop employees could be on the lookout. (Tr. at 225-26.) Haskell heard nothing about his stolen bike until Officer Engle of the Livingston Police Department called to tell him that officers might have found his motorcycle in Livingston. (Tr. at 229.)

After seeing Haskell's Craigslist ad, Officer Engle went to Fillion's residence where he observed, in the front yard, a motorcycle that looked similar to the stolen motorcycle in the Craigslist ad. (Tr. at 335-36.) Officer Engle was unable to get to the front door because of a pit bull. (Tr. at 336-37.) Officer Engle observed, though, that the motorcycle in Fillion's yard was the same make and model, with some similar colors, as the stolen motorcycle in the Craigslist ad. (Tr. at 337.) It appeared that some of the motorcycle in Fillion's yard, such as the fenders and headlight, had been painted a different color than the motorcycle in the Craigslist ad. (Tr. at 337-38.) Officer Engle saw a license plate on the rear of the motorcycle, so he ran it through the local system. (Tr. at 338.) The license number came back for a trailer, not a motorcycle. (Tr. at 339.) The trailer was registered to a Joseph Colvin. (Tr. at 340.)

Officer Engle applied for and obtained a search warrant. He returned to Fillion's residence and seized the motorcycle. (Tr. at 340-41.) After seizing the motorcycle, Officer Engle observed that it appeared the fenders of the motorcycle

were originally white but had been painted black. There were decals on the motorcycle different then the decals on the motorcycle in the Craigslist ad. Also, the VIN appeared to be altered and scuffed. (Tr. at 343.) It appeared that the original VIN had been scratched and stamped over. (Tr. at 344; State's Ex. 26.) The VIN that was stamped on the motorcycle came back to a 1981 Kawasaki. (Tr. at 377-78.)

Detective Harris of the Livingston Police Department, who executed the search warrant with Officer Engle, also examined the VIN on the motorcycle. The area of the VIN had scratches all over it, and the font of the VIN was not consistent from beginning to end. (Tr. at 384, 388-89.) The VIN did not look professional. It looked altered. (Tr. at 389.) On May 31, 2016, Detective Harris ran the VIN through a national database. The VIN he ran was J-K-A-K-Z-H-A-1-4-B-B-5-0-6-7-6-1. (390-92; State's Ex. 33.) There was no result for the VIN, meaning it had never been registered. (Tr. at 393.)

Detective Harris informed Fillion and his wife that if Fillion had proof of ownership of the motorcycle, such as a title or bill of sale, he needed to produce it. (Tr. at 394.) Fillion's wife dropped off a form bill of sale from the Department of Motor Vehicles. It indicated that Fillion had purchased a 2000 motorcycle dirt bike. (Tr. at 395-96; State's Ex. 34.) According to the document, Fillion purchased the bike from Andrew Pitcher for $800 on January 11, 2016. (Tr. at 398.) The

document had a driver's license number that purportedly belonged to Pitcher. (Tr. at 398.) The bill of sale was not notarized, as required. (Tr. at 399.) A notary is entrusted with the responsibility of verifying the identity of those involved in such business transactions. (Tr at 399.) No notary had signed to verify Pitcher's identity. (Tr. at 400.)

There was a license number for Pitcher listed on the purported bill of sale. Detective Harris used that license number to attempt to find Pitcher. (Tr. at 400.) Detective Harris ran the listed license number through CJIN and NCIC but never got a hit on the listed license number. (Tr. at 401.) Later, Detective Harris realized that he had dropped the final digit from the number listed as Pitcher's license number, so he ran the license number again, but still was unable to connect the license number to an actual person. (Tr. at 404.)

The day after Officer Engle seized the motorcycle, Haskell came to Livingston to look at the bike and identified it as his. (Tr. at 347.) Haskell could identify 10 or 12 unique items on the motorcycle that either he had personally purchased and installed or the person he bought the bike from had added to the motorcycle. (Tr. at 229.) When he looked at the motorcycle the officers had seized, he identified the bike as his, based partly on the unique after-market items he or the owner before him had installed on the bike. (*Id*.) Officer Engle received a court order to release the motorcycle to the Bozeman Police Department. (Tr. at 376;

State's Ex. 43.) A few weeks later, Haskell and a Bozeman detective went to Livingston and collected his motorcycle. (Tr. at 230.)

During trial, Haskell identified State's Exhibits 4 through 26 as photographs of his motorcycle after it was stolen. (Tr. at 231; State's Exs. 4-26.) Haskell testified about what he saw in each photograph. (Tr. at 231-267) Upon seeing the motorcycle the Livingston police officers had seized, Haskell immediately noticed that someone had spray painted some parts on his bike and had put on new sticker decals. He quickly noticed the strap that he had added to the back of the seat and observed that the high-quality gold chain he had added had been spray painted green. At the top of the spray-painted chain, some of the original gold was still visible. (Tr. at 232.)

In the photographs, it was easy to see that the bike had been spray painted because of the overspray and in places the original color was still visible. (Tr. at 233; State's Exs. 5-6.) One photograph clearly captured the Warp 9 Elite tire ring that Haskell had special ordered. It also clearly showed the original white color of the motorcycle. (Tr. at 233-35; State's Ex. 7.) The frame of the bike had been polished and was very shiny. (Tr. at 234, 236; State's Ex. 10.) One of the photographs depicted the KX rear fender that the owner from East Helena had put on the bike in place of the stock KLX45OR fender. Also, the webbing strap that was bolted over the seat as a carrying handle was an add on that did not come with

the bike. (Tr. at 236; State's Ex. 9.) Another photograph clearly depicted the green anodized aluminum hubs that Haskell custom ordered. (Tr. at 236-37; State's Ex. 11.)

Haskell further identified a Baha Designs brake light switch, which he had installed, which was clearly visible in one of the photographs of the bike. (Tr. at 238; State's Ex. 11.) Another photograph depicted a Tusk gas cap the East Helena owner had installed on the bike. (Tr. at 240; State's Ex. 16.)

Haskell observed damage and misuse to his motorcycle. For example, one of the Warp 9 Elite rims was damaged. (Tr. at 242; State's Ex. 18.) There was also buildup of oil on the forks, showing that the bike had been abused. There should not be fork oil on the forks. This means that the fork seals have been destroyed. The bike was not in this condition when it was stolen from him in May. (Tr. at 243; State's Exs. 20-21.) Haskell explained that there was a motorcycle plate on the bike that did not belong to him, but the aluminum license plate bracket did belong to Haskell. (Tr. at 244; State's Ex. 23.) Haskell made the license plate bracket from scrap aluminum in his garage. (Tr. at 245.)

Haskell identified a photograph that depicted what the VIN on his motorcycle looked like when he got his bike back. (Tr. at 246-47; State's Ex. 24.)[2] The area of the VIN was very scratched up and the numbers were crooked. (Tr. at

[2] State's Exhibits 25 and 26 also depict the VIN. (Tr. at 252.)

253.) There is no reason that normal use of a motorcycle would result in this area being scratched. (Tr. at 254.) One photograph of the VIN shows that the H in the VIN was clearly altered. (Tr. at 254-55; State's Ex. 25.)

Before Haskell's bike was stolen, it had a permanent registration sticker with a number that linking the bike to Haskell. All the permanent registration numbers and letters were legible. (Tr. at 253.) When Haskell identified the bike in Livingston, the permanent sticker had been scratched out. (Tr. at 245.)

Officer Martin of the Bozeman Police Department investigated the VIN on the motorcycle Haskell reported as stolen and the VIN on the one officers seized from Fillion's yard. (Tr. at 432-33, 447.) Officer Martin used a web site called AnalogX, a VIN researching tool, and ran both VINs. (Tr. at 447.) The VIN Haskell provided for his stolen bike came back as a 2008 Kawasaki. (Tr. at 450; State's Ex. 37.) The VIN on the motorcycle officers recovered from Fillion's yard came back to a 1981 Kawasaki. (Tr. at 451; State's Ex. 38.) Officer Harris suspected that someone had altered the VIN on the vehicle because it clearly was not a 1981 Kawasaki. (Tr. at 452.)

Officer Martin also visited a local dealership to examine VINs on Kawasaki motorbikes for sale through the dealership. (Tr. at 452-457.) Officer Martin photographed the VIN from a 2005 Kawasaki. (Tr. at 453; State's Exs. 39-40.) Officer Martin observed that the numbers and letters in the VIN of the 2005

Kawasaki started at the bottom and worked up to the top of the stem. (Tr. at 554.) In comparison, on the motorcycle officers recovered from Fillion's yard the numbers and letters in the VIN started at the top of the stem and worked down to the bottom of the stem. (Tr. at 554-55.)

Officer Martin also photographed the VIN of a 2017 Kawasaki. (Tr. at 455; State's Exs. 41-42.) Again, the numbers and letters in the VIN started at the bottom and worked up to the top of the stem. Also, unlike the VIN on the motorcycle officers recovered from Fillion's yard, the numbers and letters were neatly stamped. (Tr. at 457.)

When Haskell got his stolen motorcycle back, he held on to it until the defense attorney came by and looked at it. (Tr. at 256.) Haskell cleaned off the spray paint, which had damaged the plastic. The Motor Vehicle Division had to rivet in a new VIN, matching the VIN on the title, before Haskell could sell the motorcycle because you cannot sell a motorcycle with an altered VIN. (Tr. at 256-57.)

Haskell sold the motorcycle for $3,000. He had paid $4,000 for the bike and spent another $1,500 to customize it before Fillion stole it. (Tr. at 268.)

II. The motion to dismiss

Officer Engle received a phone call from a citizen, Mr. Hames, reporting a possible stolen motorcycle. (4/7/17 Tr. at 4.) Hames informed Officer Engle that he had been at Fillion's house looking at a different item, when Fillion informed him that he had just gotten a new motorcycle and wanted to show it to him. Hames did not believe that Fillion had the means to purchase such a motorcycle, so he did some research. He found an ad on Craigslist listing a stolen motorcycle that resembled the motorcycle Hames had seen on Fillion's property. (*Id*. at 5.)

At first Hames wished to remain anonymous. He also stated that the Craigslist ad mentioned a possible reward. (*Id*.) Officer Engle reviewed the Craigslist ad. (*Id*. at 6.) Officer Engle followed up by going to Fillion's house. (*Id*. at 8.)

After Haskell identified the motorcycle officers seized from Fillion's yard as his motorcycle and officers returned it to him, he removed the spray paint, cleaned up the bike, and changed all the fluids. He did not make any changes to the VIN. (*Id*. at 90.) The bike was in Haskell's possession the entire time after the police returned it to him. (Tr. at 91.) Haskell was happy to allow defense counsel to come and inspect the motorcycle. (*Id*.)

At the conclusion of the hearing, defense counsel argued that "the exculpatory nature of the bike would be we can't, there aren't good enough pictures for us to say that the bike hasn't been subsequently altered." (*Id*. at 155.)

III. Trial issues

A. Hearsay objection

Officer Engle is employed by the Livingston Police Department. (Tr. at 282.) When the prosecutor asked how Officer Engle became involved in this case, he responded, "I received a call from a David [Hames] stating that he had possibly—" Defense counsel objected because the answer called for hearsay. (Tr. at 283.) The court sustained the objection. (Tr. at 284.) The prosecutor then asked, "What, if anything, did Mr. Hames show to you." (*Id*.) Defense counsel again objected on hearsay grounds. (*Id*.) The court initially sustained the objection, but then took a recess to consider the objection out of the jury's presence. (Tr. at 284.)

During this recess, the prosecutor explained:

> Your Honor, the act of, I asked Officer Engle what Mr. Hames showed him. The act of showing a picture or the fact that he viewed a Craigslist ad that Mr. Hames showed him, that's not hearsay. That's not a statement that Mr. [Hames] made, so it's not hearsay.

(Tr. at 285-86.) The prosecutor further explained that the photograph of the Craigslist ad was not being offered for the truth of the matter asserted but was being offered to show why Officer Engle went over to Fillion's house—a report of

a stolen vehicle. (Tr. at 286.) The court sustained the hearsay objection. (Tr. at 290.) Mr. Hames was not available to testify. (Tr. at 285.)

The prosecutor then asked the court to issue a material witness arrest warrant for Hames, "so that we can arrest him tonight and then there's going to be testimony on the stand why he's not here. I don't think that's going to go well for either Mr. Fillion or Ms. Mull Core." (Tr. at 295-96.) The court asked defense counsel whether she objected to the request for an arrest warrant for Hames. Defense counsel asked to speak with her client privately. (Tr. at 296.) After she did so, defense counsel told the court that she had previously spoken with Hames, explaining:

> We had a pleasant conversation. Then I got a phone call, I spoke with Mr. Boyer [the prosecutor], and Mr. Boyer said that Mr. Hames said that I essentially threatened him or at least that's what I took from the conversation. . . .

(Tr. at 296-97.) The court stated it would issue a material witness arrest warrant if the State requested it. (Tr. at 297.) The State asked for the opportunity to provide the court with some legal research on the hearsay objection. (Tr. at 297.)

The State also made the following offer of proof through Officer Engle:

Q. Officer Engle, you stated that you spoke to Mr. Hames on the phone?

A. Correct.

Q. After speaking to Mr. Hames on the phone, where did you go?

A. I went to 1-1-0 North O Street, Mr. Fillion's residence.

. . . .

Q. What did you observe there?

A. I observed a motorcycle matching the description of the Craigslist ad.

(Tr. at 300-01.) The prosecutor explained that he would then ask the officer about obtaining a search warrant. (Tr. at 301.) The prosecutor informed the court that he would contact Hames on the phone, tell him that the court was prepared to issue a material witness warrant, and ask him to come in voluntarily to testify. (Tr. at 302.) The court recessed the trial for the day. (Tr. at 304.)

During the evening recess, the State filed a point brief concerning the hearsay ruling. (D.C. Doc. 122.) The district court reversed its prior ruling on the hearsay objection, concluding that the State was not offering what Hames told Officer Engle for the truth of the matter asserted. (Tr. at 312, 331.) The prosecutor also explained that he chose not to request a material witness arrest warrant for Hames because Hames was intimidated by Fillion. Hames believed that if he testified Fillion would retaliate against him. (Tr. at 320.)

When the trial resumed, the following exchange occurred between the prosecutor and Officer Engle:

Q. Officer Engle, when we left off yesterday, you stated that you had received a call from a Mr. Hames; is that correct?

A. Correct.

. . . .

Q. And what, if anything, did he show you in relation to his report?

. . . .

A. He showed me a Craigslist ad for a stolen motorcycle.

. . . .

Q. This has been previously admitted as State's Exhibit 3. Officer Engle, do you recognize that?

A. I do.

Q. And what is that?

A. It is the Craigslist ad that I was shown.

Q. So, you observed that ad?

A. Correct.

Q. After viewing this ad and speaking with Mr. Hames, where did you go?

A. I went to 1-1-0 North O Street to try to locate the stolen motorcycle.

Q. And where is 1-1-0 North O Street?

A. It's in the City of Livingston.

Q. And who resides at that residence?

A. Mr. Fillion does.

Q. How do you know that Mr. Fillion resides at that residence?

A. Through previous professional dealings at that residence with him.

(Tr. at 334-335.)

During cross-examination defense counsel asked, "So Officer Engle, originally you received a call and the call was [from] an individual requesting a reward, correct?" (Tr. at 348.) Defense counsel identified the person who called Officer Engle as Hames. (*Id*.) Defense counsel then asked if Officer Engle knew Hames or did anything to verify his reliability. (*Id*.) After verifying that Hames had mentioned a reward, defense counsel asked, "And so you went over to Mr. Fillion's house. . . ." (*Id*. at 348-49.) During closing argument, defense counsel again brought up Officer Engle receiving a phone call from someone inquiring about a reward that resulted in Officer Engle going to Fillion's house. (Tr. at 555.)

B. Jury question

During jury deliberations, the court informed the parties that the jury had submitted a written question. (Tr. at 574; Court's Ex. 1.) The question referred to Instruction 6 and asked:

> [Does] falsifying a VIN number of a motor vehicle only apply to a stamped number on the actual vehicle or does altering a title or bill of sale fall under the same law?

(Tr. at 574-75.) The court asked for the parties' input and the following exchange occurred:

MR. BOYER: I think, well, one, I think the answer is no, but I think, I mean I think the jury instructions pretty clearly cover that so I would just ask the Court to refer to the jury instructions.

THE COURT: Tell 'em to refer to the instruction. Ms. Mull Core.

MS. MULL CORE: I would agree.

THE COURT: All right. They love that answer. All right, Sandy, would you make a copy of this then, please, for me?

. . . .

THE COURT: Just one. So, the answer would be, please refer to instruction number 6.

MR. BOYER: I'd say 6, 7, —6, 7, 12 and 13.

(Tr. at 575.)

The court suggested answering by stating, please refer to the instructions, without referencing specific instructions. (Tr. at 576.) Defense counsel stated, "My concern would be that, I mean I think that the VIN specifically refers to the bike VIN, so." (*Id*.) The court responded that the instruction made that clear. (Tr. at 576-77.)

At one point the court stated:

> Well, or we could say that Mr. Fillion, —my gut instincts tell me is the safest way to go is you just tell 'em to refer to the instructions, but just for speculation, you could say, Mr. Fillion has not been charged with altering a certificate of ownership or certificate of title.

(Tr. at 578-79.) Defense counsel responded, "That's correct." (Tr. at 579.) The prosecutor responded that such an answer would ask the jury to speculate about other uncharged offenses. Defense counsel responded that such an answer would just be telling the jury what Fillion is "not charged with." (*Id*.)

The following dialogue then occurred:

> THE COURT: But, except for that, you know what, they know what he [is] not charged with because if they read the instructions as a whole it's got the three offenses that are listed.
>
> MR. BOYER: Right
>
> M[S]. MULL CORE: But they don't know that there's a separate code section.
>
> THE COURT: Yeah, but they, there's, but that could apply to any situation, just like they don't know that he's not charged with possession of a stolen motorcycle. They don't know and they may not know that that offense is out there but they—
>
> . . . .
>
> THE COURT: So, you just can't, but see I don't think you can inject another. The problem is if you start talking about other offenses then you're inserting other offenses into the case.
>
> MS. MULL CORE: Except for I agree with the Court's earlier statement that that would mean that he, he's not charged with that.
>
> MR. BOYER: I mean I think if you tell them about this other code section you'd have to define that other code section so they could distinguish between the two and I don't think that's proper. I think they just need to be referred back.

THE COURT: Well, and it would be giving them a whole another instruction.

MR. BOYER: Right. And I don't think, define—

THE COURT: And you can't do that.

MR. BOYER: Right. I mean he's not charged with that so I think just asking them to refer to the instructions is proper. It's exactly how, I mean the instruction is exactly what is said in the statute, so I think they just need to refer to that.

THE COURT: Ms. Mull Core, while I have, I have this temptation to go in and start adding stuff, I don't think I can do that.

(Tr. at 579-81.) Defense counsel proposed the court could read the jury the entire code section for altering a VIN, and also proposed adding the word defaced. (Tr. at 582.) The court responded that the statute does not say defaced. (Tr. at 582.)

After discussion, the court instructed the jury, "Please refer to the instructions." (Tr. at 583; Court's Ex. 2.) The jury reached a verdict shortly thereafter. Before the jury returned to the courtroom, defense counsel objected to the court not clarifying the instruction. (Tr. at 584.)

SUMMARY OF THE ARGUMENT

Fillion attempted to prove his *Brady* claim through mere speculation. Although the State returned stolen motorcycle to Haskell, it photographed the motorcycle, including the VIN, first. The State also provided Fillion the opportunity to personally inspect the motorcycle. Fillion has not offered a theory of

how the motorcycle was evidence favorable to him. Returning evidence to its owner, or even destroying evidence, does not presumptively make that evidence favorable to the defendant. Fillion cannot meet the first prong of proving a *Brady* violation, so his claim fails.

Fillion also cannot prove the remaining two prongs to prove a *Brady* violation. Here, the State did not suppress evidence because, although it returned the motorcycle to its rightful owner, that act did not change the evidentiary value of the motorcycle, and defense counsel did personally inspect the motorcycle before trial.

Also, Fillion cannot demonstrate that, but for the State releasing the motorcycle to Haskell, there was a reasonable probability of a different outcome, because Haskell's motorcycle was uniquely his. The model of Haskell's motorcycle was not common. And Haskell customized his motorcycle with numerous, identifiable parts, for which he produced receipts and identified right down to the color. Also, the bill of sale Fillion produced was of questionable legitimacy. It was not signed by a notary and the purported driver's license number of the purported seller came back to no one. Finally, the VIN on the motorcycle officers seized from Fillion's yard not only looked damaged and suspicious, but it came back for a 1981 Kawasaki motorcycle when the motorcycle was really a 2008 model.

The district court did not abuse its discretion when it overruled defense counsel's objection to Officer Engle's brief testimony concerning a conversation with a citizen referencing a Craigslist ad for a stolen motorcycle. The testimony was not hearsay because it was not offered for the truth of the matter asserted. Rather, it was offered to show what investigative steps Officer Engle had pursued. Also, it did not point the finger of guilt at Fillion. When Officer Engle went to Fillion's house he was not predisposed to a particular outcome.

The district court properly instructed the jury about the charge of Altering an Identification Number, and Fillion does not claim otherwise. When the jury posed a question about that charge, the court properly exercised its discretion in answering the question by instructing the jury to refer to the instructions the court had already provided.

ARGUMENT

I. The standard of review

This Court's review of constitutional questions, including alleged violations of *Brady v. Maryland*, 373 U.S. 83 (1963), is plenary. *State v. Ilk*, 2018 MT 186, ¶ 15, 392 Mont. 201, 422 P.3d 1219.

A district court is vested with broad discretion in controlling the admission of evidence at trial. *State v. Colburn*, 2018 MT 141, ¶ 7, 391 Mont. 449, 419 P.3d

1196. This Court reviews a district court's evidentiary ruling for an abuse of discretion. *Id*.

This Court reviews a district court's decision to provide or deny the jury's request for additional information pursuant to Mont. Code Ann. § 46-16-503 for an abuse of discretion. *State v. Bieber*, 2007 MT 262, ¶ 67, 339 Mont. 309, 170 P.3d 444.

II. The district court correctly denied Fillion's motion to dismiss based upon the State's alleged suppression of exculpatory evidence.

A. Introduction

Fillion alleges that the State suppressed exculpatory evidence by returning Haskell's stolen motorcycle to him after the State had photographed the condition of the motorcycle when officers seized it from Fillion's yard.

A failure by the State to disclose exculpatory evidence to a defendant is a violation of the defendant's Fourteenth Amendment guarantee of due process. *Ilk*, ¶ 29. In Montana, to assert a violation under *Brady*, a defendant "must establish: (1) the State possessed evidence, including impeachment evidence, favorable to the defense; (2) the prosecution suppressed the favorable evidence; and (3) had the evidence been disclosed a reasonable probability exists that the outcome of the proceedings would have been different." *State v. Weisbarth*, 2016 MT 214, ¶ 20,

384 Mont. 424, 378 P.3d 1195. The defendant bears the burden of proving all three prongs to establish a *Brady* violation. *Ilk*, ¶ 30.

On appeal, Fillion offers no independent analysis of the *Brady* prongs, but seemingly relies on *State v. Colvin*, 2016 MT 129, 383 Mont. 474, 372 P.3d 471, to argue that any time the State returns evidence to a victim, there is automatically a *Brady* violation. There are several flaws in this argument. For starters, there is no case that provides such a holding.

B. Fillion cannot meet his burden under *Brady*.

1. Fillion failed to prove the motorcycle was favorable evidence.

In the district court, Fillion failed to articulate how maintaining Haskell's stolen motorcycle in evidence would have been favorable to Fillion. The act of returning evidence, or even destroying evidence, does not automatically make the evidence favorable. Fillion must make a showing of more than mere speculation to demonstrate that the evidence the State had in its possession would have been favorable. *State v. Robertson*, 2019 MT 99, 395 Mont. 370, 440 P.3d 17, ¶ 33, *citing Ilk*, ¶ 31. Robertson alleged that the State suppressed favorable evidence because it allowed the detention center to overwrite the video related to his DUI arrest. But, like Fillion, Robertson offered nothing to indicate the video constituted favorable evidence. *Id*., ¶ 34.

Fillion merely conclusively states, "Because here, the State released the motorcycle to Haskell an entire month before charging Fillion, he will never have the ability, as the State did, to make his own judgment as to what photographs he would take to aid his defense." (Appellant's Br. at 28.) But if the motorcycle belonged to Fillion, as he claims it did, he should have been able to describe what he would have documented through photographs to demonstrate it was uniquely his, which was not captured by all the photographs officers did take of the motorcycle before releasing it to Haskell.

Fillion mistakenly relies heavily upon *Colvin* to argue that the motorcycle was evidence favorable to him. In *Colvin*, the State charged Colvin with attempted deliberate homicide based upon events that transpired in or around a Jeep. The alleged victim was sitting inside the Jeep when Colvin shot the victim with a pistol. The position of the pistol in relation to the victim at the time Colvin fired the pistol was a critical issue to both the State and to Colvin. *Colvin*, ¶ 3. The State theorized that Colvin shot the pistol from several feet outside the vehicle. Colvin theorized that the shot was fired from near or inside the vehicle. *Id*.

Colvin's motion for discovery, filed the same day that the State charged Colvin, established that the defense believed the vehicle contained essential evidence such as blood spatter and gunshot residue. *Id*. ¶ 4. The State's expert examined the Jeep and collected evidence, including photographs. The State's

expert concluded, based upon examination of the vehicle and other evidence, that Colvin was seven feet from the Jeep when he fired the shot that hit the victim. *Id*. ¶ 5.

Without notifying the defense or the district court, the State released the Jeep from evidence. Colvin did not have the opportunity to have an expert examine the Jeep and the evidence within the Jeep before the State returned the Jeep to the victim who then used the Jeep daily. *Id*. ¶¶ 5, 9. Colvin moved to dismiss his criminal charge based upon the State's failure to preserve the condition of the Jeep at the time of the alleged offense. The district court concluded that the State's negligent release of the impounded Jeep deprived Colvin of the opportunity to investigate and prove his theory of the case and violated Colvin's right to due process. *Id*. ¶¶ 8-9.

On appeal, this Court affirmed the district court's finding that Colvin made a sufficient showing that "the distance from which the shot was fired would be a critical issue" for proving or disproving intent. *Id*. ¶ 15. "A shot from a distance outside the vehicle would tend to support the State's charge that Colvin fired purposely or knowingly, while a shot fired adjacent to or inside the vehicle window would support Colvin's defense that the gun discharged accidently." *Id*. This Court also concurred with the district court's finding that the Jeep was the crime scene, and after returning the Jeep to the victim, the crime scene could not be

returned to the condition it was in when the State's expert examined it. *Id*. This Court concluded that both the blood spatter and gunshot residue within the Jeep were important evidence to the State and Colvin. After the State returned the Jeep to the victim without the defense expert's opportunity to examine the Jeep in the condition it was in at the time of the crime, favorable evidence was no longer available to Colvin. *Id*. ¶ 20.

Fillion also relies upon *State v. Halter*, 238 Mont. 408, 777 P.2d 1313 (1989), to support his theory that the motorcycle itself constituted favorable evidence. In *Halter*, as in *Colvin*, the defendant offered more than speculation to demonstrate that the destroyed evidence was favorable to him. The State charged Halter with stealing a bull and illegal branding. Halter moved the court to allow him to inspect the bull so his expert could physically inspect the brand. Upon learning that the bull had been sold and slaughtered, Halter moved to dismiss the charges based upon the State's failure to preserve exculpatory evidence. *Halter*, 238 Mont. at 409-10, 777 P.2d at 1314. In support of his motion, Halter explained that the slaughter of the bull prevented him from establishing that it was branded at a time when it was in the possession of others. Halter theorized that an inspection of the bull could have revealed the type of branding iron used, which could have been compared to those Halter used. Halter further argued that the State denied Halter the opportunity to compare the weight of the bull the State accused him of

stealing with the weight of the bulls he had previously owned. *Id*. at 411, 777 P.2d at 1315. On appeal, this Court affirmed the district court's order dismissing the charges against Halter. *Id*. at 413, 777 P.2d at 1317.

Here, unlike in *Halter*, the motorcycle was available for Fillion's personal inspection. The record establishes that defense counsel did personally inspect the motorcycle while it was in Haskell's possession. In the district court, Fillion offered no theory or evidence about why that personal inspection was insufficient. On appeal, Fillion seems to argue that, because Haskell had stripped off the black spray paint on parts of the motorcycle and removed and replaced the stickers, Haskell had destroyed evidence favorable to Fillion. But the spray paint and the stickers are captured in photographs.

Haskell testified at the evidentiary hearing that he had not in any way altered the condition of the VIN after the State returned the motorcycle to him. Although Fillion theorizes on appeal that Haskell's ability to drive the motorcycle for a month could have damaged the VIN, this theory is based on speculation. Haskell testified that driving the motorcycle would not damage the VIN. Also, Fillion's assertion that the motorcycle was designed to be driven off road, ignores Haskell's testimony that he converted the motorcycle to a street-legal bike and used it in that manner. And officers testified about the condition of the VIN when they seized the motorcycle from Fillion.

Fillion has made no showing of why the motorcycle itself, and its condition at the time officers seized it, rather than photographs depicting the motorcycle and its condition when officers seized it, were favorable evidence. He only speculates that the motorcycle itself, rather than photographs depicting the motorcycle, was favorable evidence.

Fillion claimed that he owned the motorcycle after purchasing it legitimately. He offers no explanation of why the State needed to keep the motorcycle in evidence for him to prove his ownership A legitimate title for the motorcycle listing the VIN on the motorcycle when officers seized it would have proved ownership and proved that the VIN had not been altered. Fillion did not meet his burden to prove the first prong of his alleged due process violation.

2. Fillion failed to prove the State suppressed the evidence.

Even if this Court concludes that Fillion established that the motorcycle was evidence favorable to Fillion, Fillion cannot prove that the State suppressed the evidence because the State arranged for defense counsel to personally inspect the motorcycle. Presumably, that inspection could have included any photographs Fillion wished to take of the motorcycle. At trial, Haskell testified that defense counsel did personally inspect the motorcycle. Fillion has not presented a theory, or evidence, of how the personal inspection did not provide him with what he needed.

Fillion claims that the photographs officers took of the VIN after seizing the motorcycle from Fillion, along with Haskell's testimony that he did nothing to the VIN after the police returned the motorcycle to him, did not sufficiently allow him to defend against the charge of altering a VIN. Missing from Fillion's analysis is how the personal inspection and photographs were deficient. Fillion's claim is based on speculation.

3. Fillion failed to prove that had the State not returned the stolen motorcycle to its owner there was a reasonable probability of a different outcome.

Fillion offers no meaningful analysis of how, if the State had maintained the motorcycle in evidence until Fillion personally examined it, there was a reasonable probability of a different outcome. This Court has explained that, when considering whether a defendant has met his burden of proving a reasonable probability of a different outcome, "the question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Ilk*, ¶ 37, quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995); accord *Weisbarth*, 2016 MT 214, ¶ 26.

The State presented overwhelming evidence that the motorcycle officers seized from Fillion's yard was the motorcycle stolen from Haskell, and the VIN on the stolen motorcycle had been altered. Haskell testified that his motorcycle had many customized, unique features, most of which Haskell had added to the bike.

All those features were on the motorcycle in Fillion's yard and were immediately observable to Haskell. Haskell explained in detail why his motorcycle was rare, both because of the limited time Kawasaki manufactured this model in the United States and the customized parts. Haskell painstakingly documented all of those details in a photograph of his motorcycle before it was stolen and in photographs officers took of the motorcycle seized from Fillion's yard.

And the VIN on Haskell's motorcycle came back for a 2008 Kawasaki motorcycle. The VIN from the motorcycle officers seized from Fillion's yard came back for a 1981 Kawasaki motorcycle. The motorcycle Fillion possessed was clearly not a 1981 motorcycle. Additionally, the VIN on the motorcycle officers seized from Fillion's yard looked as if it had been altered when compared to VINs on other Kawasaki motorcycles available for purchase at a dealership.

Also, rather than producing a title for the motorcycle, Fillion produced a bill of sale and indicated that he had purchased the motorcycle from Andrew Pitcher. The bill of sale was not notarized, as required. Additionally, the police were never able to connect the driver's license number listed on the bill of sale, purportedly belonging to Pitcher, to any actual person.

Fillion has failed to meet his burden of proving that if he had been able to take his own photographs of the motorcycle police officers seized from his yard

before the officers returned the motorcycle to Haskell there is a reasonable probability of a different outcome in his case.

The district court correctly denied Fillion's motion to dismiss the charges.

III. The district court properly exercised its discretion when it admitted a non-hearsay statement.

Fillion argues that the district court erred by allowing the State to present hearsay when Officer Engle referenced a statement that a citizen, Hames, made to him about a possible stolen motorcycle. "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). Hearsay is generally not admissible. *Id*. R. 802. "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. Vonderberg*, 2015 MT 296, ¶ 22, 381 Mont. 256, 359 P.3d 1073, citing Edward J. Imwinkelried, *Evidentiary Foundations*, 153 (1980); *State v. Sanchez*, 2008 MT 27, ¶ 19, 341 Mont. 240, 177 P.3d 444. "[A] statement offered for the purpose of showing that the statement was made and the resulting state of mind is properly admitted." *City of Billings v. Nolan*, 2016 MT 266, ¶ 28, 385 Mont. 190, 383 P.3d 219; quoting *Vonderberg*, ¶ 22. Investigatory explanations are not hearsay if they are

not offered for the truth of the matter asserted. *State v. Lawrence*, 285 Mont. 140, 167, 948 P.2d 202 (1997). In *Lawrence*, the Court cautioned, though, that an officer's testimony is not admissible when it "effectively points the finger of accusation at [the] defendant." *Id*. at 167, 948 P.2d at 202, quoting *Fontenot v. State*, 881 P.2d 69, 82 (Okla. Crim. App. 1994). The Sixth Amendment's Confrontation Clause applies only to testimonial hearsay. *Sanchez*, ¶ 32, citing *Davis v. Washington*, 541 U.S. 813, 823 (2006).

Officer Engle's initial contact with Hames was offered to explain why he went to Fillion's house in the first place. Officer Engle's reference to his contact with Hames did not point the finger of accusation at Fillion. Rather, it informed the next steps Officer Engle took into the possible investigation of a stolen vehicle. The State did not offer this brief testimony for the truth of the matter asserted—that Fillion possessed a stolen motorcycle. Rather, the State offered the brief testimony concerning Hames for the jury to understand why Officer Engle went to Fillion's house in the first place. Officer Engle did not go to Fillion's house expecting the particular outcome of finding a stolen motorcycle matching the description in the Craigslist ad. It was equally plausible that Officer Engle would: not find a motorcycle at all; find a motorcycle with a title properly issued to Fillion; or find a motorcycle that matched the motorcycle in the Craigslist ad for

which Fillion could offer a legitimate bill of sale demonstrating that he had purchased the motorcycle from an identifiable third party.

The district court correctly concluded that Officer Engle's brief reference to his discussion with Hames was not hearsay. Rather, the brief testimony was offered to show that Hames showed Officer Engle a Craigslist ad and Officer Engle's resulting action—going to Fillion's house.

Even if this Court were to disagree with the district court's ruling, admission of Officer Engle's brief reference to his phone call with a concerned citizen is harmless. Trial error is not presumptively prejudicial and, therefore, not automatically reversible. *State v. Van Kirk*, 2001 MT 184, ¶ 40, 306 Mont. 215, 32 P.3d 735. Rather, it is subject to review under Montana's harmless error statute, Mont. Code Ann. § 46-20-701(1), which provides: "A cause may not be reversed by reason of any error committed by the trial court against the convicted person unless the record shows the error was prejudicial." *Id*.

Officer Engle's brief reference to his conversation with Hames was not prejudicial because: (1) Officer Engle did not directly repeat all that Hames had told him; (2) Officer Engle only referenced his conversation with Hames to explain why he went to Fillion's house; (3) Fillion used Engle's conversation to his advantage by asking Officer Engle a question the answer to which relied on hearsay—that Hames was motivated to call Officer Engle by the reward listed in

the Craigslist ad; (4) the testimony admitted at trial did nothing to establish any of the elements of the offense; and (5) the State presented overwhelming admissible evidence of Fillion's guilt.

If this Court concludes the district court erred in allowing Officer Engle's brief testimony about his conversation with Hames, the error was harmless.

IV. The district court properly answered the jury's question by referring the jury back to the jury instructions, which were correct and admitted without objection.

Fillion finally argues that the district court abused its discretion when it answered the question from the jury about the offense of Altering an Identification Number by referring the jury back to the jury instructions.

Montana Code Annotated § 46-16-503(2) provides:

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

"When a court fully and correctly instructs the jury as to a defendant's legal duties at issue, it was not an abuse of discretion to refuse to further instruct the jury." *Bieber*, ¶ 67, citing *State v. Crawford*, 2002 MT 117, ¶ 15, 310 Mont. 18, 48 P.3d 706.

The district court fully and correctly instructed the jury on the charge of Altering a VIN. Fillion conceded as much by not objecting to the court's instructions concerning this offense. Montana Code Annotated § 61-3-604(1) provides that a person commits the offense of Altering an Identification Number if he "willfully removes or falsifies an identification number of a motor vehicle . . . ." The district court's instructions to the jury for this offense repeat the language of the statute. (Appellant's App. E.) The record establishes that the district court carefully considered the jury's question and, after considerable discussion, kept returning to the same answer—to refer to the instructions the court had already provided.

When the court initially asked defense counsel her opinion on how to respond to the jury's question, she agreed with the prosecutor that the court should refer the jury to the instructions it had already provided. Later, defense counsel suggested that the court should instruct the jury that Fillion *was not* charged with forgery for a certificate of ownership or certificate of title pursuant to Mont. Code Ann. § 61-3-603. The district court correctly identified the confusion that might result by offering a supplemental instruction informing the jury of offenses the State had not charged Fillion with committing.

Fillion asserts that the district court should have provided the jury with a supplemental jury instruction as defense counsel urged or, alternatively, replied to

the jury's question by stating that altering a title or bill of sale does not fall under the same law. (Appellant's Br. at 40.) As the lower court recognized, either of these answers would likely have resulted in confusing the jury.

Fillion attempts to show that the district court abused its discretion by primarily relying upon *United States v. Warren*, 984 F.2d 325 (9th Cir. 1993) and *United States v. Southwell*, 432 F.3d 1050 (9th Cir. 2005). Both cases are distinguishable.

In *Warren*, during deliberations, the jury posed the following question, "Is premeditated to 'hurt' the same has premeditated to 'kill'?" Defendant Warren urged the court to answer "no" because premeditation to hurt would not support a first-degree murder conviction. The court instead referred the jury back to a specific instruction, adding, "and in particular, the third element of the offense" as defined in that instruction. *Warren* at 329-30.

Later, the jury asked, "If the jury disagrees on Murder in the First Degree, does it automatically make it Second Degree?" *Warren*, at 330. Warren asked the court to refer the jury back to another instruction relevant to the question. The court refused and instead responded:

> Please see Instruction 32 and the Verdict form itself. There is no obligation upon the jury to automatically reach any verdict in this case. It is your obligation to deliberate until you reach a verdict on each of the counts. Whatever verdict you reach must be unanimous.

Id.

Regarding the first question, the Ninth Circuit concluded that the trial court should have provided a supplemental instruction to clear up the uncertainty that the jury had about premeditation to hurt versus premeditation to kill. *Id*. Regarding the second question, the Ninth Circuit concluded that the trial court should have informed the jury it could consider a lesser included offense if it disagreed on the charge of murder in the first degree, or should have referred the jury back to an instruction already provided that would have made that equally clear. *Id*. at 331.

In Fillion's case, the instruction the court provided for the charge of Altering a Vehicle Number was verbatim from the statute. The instruction was correct and was not confusing.

In *Southwell*, defendant Southwell pled not guilty to his criminal charge, and in the alternative, not guilty by reason of insanity. The trial court instructed the jury that it was Southwell's burden to prove insanity at the time of the offense by clear and convincing evidence. *Southwell* at 1051. The jury asked if it could find Southwell guilty if the jurors unanimously concluded that Southwell committed all of the elements of the offense but did not unanimously agree whether Southwell was sane or insane. *Id* at 1052. Defense counsel proposed that either the court instruct the jury that it could not find the defendant guilty if the jurors were not unanimous on the issue of insanity, or that the jury had to be unanimous on the insanity issue before it could return a verdict. Instead, the court referred the jury

back to the instructions it had already given. *Id*. The next day the jury found Southwell guilty. The court rejected Southwell's request for additional polling to determine whether the jurors had unanimously rejected the insanity defense. *Id*.

The Ninth Circuit concluded that, although the trial court's instructions did not misstate the law, the instructions were unclear as to what the jury should do in the very situation outlined in the jury's question. Thus, the trial court abused its discretion when it failed to provide a clarifying instruction when the jury identified a legitimate ambiguity. The court's error was particularly serious because Southwell had a constitutional right to a unanimous jury verdict. *Id*. at 1053.

Again, here, the instruction was clear and correct. Any time the trial court discussed other possible answers, they only led to less clarity and more confusion. The district court did not abuse its discretion when it referred the jury back to the correctly provided jury instructions.

/ / /

CONCLUSION

Since the district court did not err in any manner Fillion alleges on appeal, the State requests this Court affirm his convictions.

Respectfully submitted this 26th 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 9,981 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, 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 05-26-2020:

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