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.

# REPLY BRIEF OF APPELLANT

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

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*Montana Code Annotated*

## I. The State on appeal obscures the fact that it offered in evidence William's hearsay statements for the truth of the matter asserted and also developed the idea that the jury could use that evidence for the same impermissible purpose.

On appeal, the State falsely claims that when it elicited these hearsay statements at trial, the only immediate inference it sought to draw was how Officer Couture's investigation progressed. (*See* Appellee's Br. at 3, 16, 18–19.) It tries to convince this Court that William's statements were only admitted and used solely to explain how its investigation progressed—that they were logically relevant for that permissible purpose. (*See* Appellee's Br. at 16, 18–19.)

The State hopes this detail goes unseen: It offered in evidence through Ishan Wylie, William's out-of-court statements for the truth of the matter asserted:

> **Q.** Did William indicate that he was present when the shooting occurred.
> **A.** Yes.
> **Q.** Did Ishan indicate to you who the shooter was?
> **A.** Yes.
> **[DEFENSE COUNSEL]:** Objection, hearsay.
> **THE COURT:** 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.

**BY [THE PROSECUTOR]:**

**Q.** And did William indicate to you who the shooter was?
**A.** Yes.
**Q.** Did they indicate the same individual?
**A.** Yes, they did.
**Q.** Who did they indicate?
**A.** Nathan Mahseelah.

(3/5/18 Tr. at 110–111.)

The State highlights it questioned Ishan:

**Q.** In fact, he was agreeing, wasn't he?
**A.** Yes.
**Q.** 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?
**[DEFENSE COUNSEL]:** Objection.
**THE COURT:** What's the objection?
**[DEFENSE COUNSEL]:** She is testifying to hearsay.
**[PROSECUTION]:** He opened the door.
**THE COURT:** She's an adverse witness. He can cross-examine with leading questions.
**[PROSECUTION]:**
**Q.** So isn't it true that that's what your brother said happened?
**A.** At the time, yes, he did say that.

(3/5/18 Tr. at 182.)

The State tries to re-frame facts but only manages to highlight the undeniable fact that it elicited William's statements for the truth of the matter asserted. (Appellee's Br. at 7–8).

The State does not deny that in its opening and closing arguments it told the jury it could use William's out-of-court statements for the truth of the matter asserted. (*See* 3/5/18 Tr. at 72–74; 3/6/18 Tr. at 8–12.) In closing, it told the jury: "it is pretty clear that the first story told Officer Couture by Ishan and William 'fits the facts' and that's how it happened." (3/6/18 Tr. at 12.)

Even if these statements were admitted for a permissible purpose, after the evidence was in, the State actively developed the idea that the jury could use it to prove the identity of the shooter. Supposedly, the evidence was admitted for a limited purpose—to explain how the investigation progressed. However, the State turned around and actively developed the idea that the jury could use it for the truth of the matter asserted. (*See* 3/5/18 Tr. at 72–74; 3/6/18 Tr. at 8–12; *see also*, Appellant's Br. at 22.) The State exploited William's hearsay evidence in impermissible ways— another gigantic detail it wishes would go unnoticed. (*See* 3/5/18 Tr. at 72–74; 3/6/18 Tr. at 8–12.)

### A. The State misreads *Laird* too narrowly to suggest the error is only in offering out-of-court statements for an impermissible purpose—for the truth of the matter asserted—and then leading the jury to believe it can use that evidence for the same impermissible purpose.

The State misreads this Court's controlling authority in *State v. Laird*, 2019 MT 198, 397 Mont. 29, 447 P.3d 416. According to the State, in *Laird*, this Court overturned the defendant's conviction after concluding that the out-of-court statements were admitted for the truth of the matter asserted, rather than to explain the investigation, and because the State later relied on the information provided for the truth of the matter asserted. (Appellee's Br. at 17.) It misreads *Laird*, to suggest a trial court can only err if it admits out-of-court statements for an *impermissible purpose*—for the truth of the matter asserted—and then actively seek to have the jury believe it can rely on that evidence for the same *impermissible purpose*. The jabberwocky reading seems calculated to mislead the Court.

In *Laird*, the district court ruled that Dr. Mueller's "troubling" neck-bruise statements were probative of what Agent Jackson did next in his investigation, specifically why a second autopsy occurred. *Laird*, ¶ 74. The district court allowed Agent Jackson to testify repeatedly:

"this is troubling" as he referred to the bruising around the deceased victim's neck. *Laird*, ¶ 74.

This Court concluded that Dr. Mueller's "troubling" statements were not hearsay if offered solely to explain the investigation. *Laird*, ¶ 75. However, the Court, after thoroughly reviewing the record was convinced that the State utilized Dr. Mueller's "troubling" statements to explain more than just the investigation. *Laird*, ¶ 75. Instead, the State clearly sought to have the jury believe Dr. Mueller found Kathryn's neck bruising "troubling"—that is, the State offered the statements for the truth of the matter they asserted and throughout the trial developed the idea that Dr. Mueller found Kathryn's neck bruising "troubling." *See Laird*, ¶ 75. The Court concluded that, based on the manner in which the State elicited testimony about Kathryn's bruising from its witnesses and the State's comments about Kathryn's bruising in opening and closing statements, Dr. Mueller's "troubling" statements were out-of-court statements offered in evidence to prove the truth of the matter asserted—they were hearsay. *Laird*, ¶ 80.

Contrary to the State's narrowed reading, *Laird* also stands for the proposition that once the district court permits the State to present

evidence for a limited *permissible* purpose—such as to explain the investigation—it cannot turn around and actively develop the idea that the jury can use that evidence for the truth of the matter asserted. Mahseelah maintains the State used William's statements for a different *impermissible* purpose.

### B. Even if *arguendo*, William's statements were admitted for a permissible purpose, once admitted, the State exploited them for a different impermissible purpose. The error was not harmless.

Even if *arguendo*, William's testimony was properly admitted for the purpose of explaining the investigation, there is no denying the State misused that evidence for an impermissible purpose—to prove the identity of the shooter. (Appellant's Br. at 22.)

When the inadmissible evidence goes to an essential element of the State's case, the State must identify "admissible evidence that proved the same facts as the tainted evidence," and show that the "quality of the tainted evidence" prohibits the possibility that it influenced the case's outcome. *State v. Van Kirk*, 2001 MT 184, ¶ 44, 306 Mont. 215, 32 P.3d 735.

An examination of the respective qualities of the inadmissible and admissible evidence confirms that there is a reasonable possibility that

the inadmissible evidence contributed to the verdict. Remember, the State does not deny that in its opening and closing arguments it told the jury it could use William's out-of-court statements for the truth of the matter asserted. (*See* 3/5/18 Tr. at 72–74; 3/6/18 Tr. at 8–12.)

The State insists that if William's out-of-court statements were erroneously admitted it constituted harmless error. However, the State cannot show with the necessary degree of certainty that the result of the trial would have remained the same had the trial court correctly excluded William's out-of-court hearsay statements.

The State cannot demonstrate, and has not demonstrated, that qualitatively, "there is no reasonable possibility that [the] inadmissible hearsay evidence might have contributed to the defendant's conviction." *Van Kirk*, ¶¶ 44, 47. Accordingly, the State cannot carry its burden to disprove the possibility that the tainted evidence affected the jury's verdict.

## II. Ishan's prior inconsistent statements are not corroborated by independent reliable evidence.

The State asserts that Ishan's prior statements and other circumstantial evidence on the record sufficiently prove the identity of the shooter. (Appellee's Br. at 20–27.) It suggests that it presented

substantial, circumstantial evidence to corroborate Ishan's prior statements. (*See* Appellee's Br. at 23–24.)

If the Court concludes that Ishan's prior inconsistent statements supplied substantive evidence on the identity of the shooter, the question reduces to whether "besides the prior statement" the remaining bits of evidence in the record constitute "independent, reliable evidence of guilt." *See City of Helena v. Strobel*, 2017 MT 55, ¶ 20, 387 Mont. 17, 390 P.3d 921 *citing State v. Torres*, 2013 MT 101, ¶ 27, 369 Mont. 516, 299 P.3d 804. Put differently, whether the record contained some independent, reliable evidence of guilt besides the prior statement. *See Strobel*, ¶ 20 *citing Torres*, ¶ 27.

Foremost, the parties both agree that the State must at the very least present substantial, *reliable* circumstantial evidence to sufficiently corroborate the prior statement. (*See* Appellee's Br. at 23.) However, the State misconstrues *Strobel*, ¶ 20, to suggest that the corroborating testimony does not have to be *independent*—it only needs to loosely "support" the elements of the offense established by the substantive evidence that the prior consistent statement supplies. (*See* Appellee's Br. at 22–23.) As a result of that misreading, the State mistakenly

contends that other evidence on this record sufficiently corroborates Ishan's prior statement. (*See* Appellee's Br. at 23–24.) The State seeks to rely on an *unreliable* prior inconsistent statement in conjunction with other *unreliable* anecdotal evidence to "support" an inference of guilt, contrary to the teaching of *State v. Giant*, 2001 MT 245, ¶ 39, 307 Mont. 74, 37 P.3d 49. Mahseelah maintains that the remaining bits of evidence are straws in the wind and do not weave a net of guilt around him.

The touchstone for corroboration is whether—besides the prior statements— each constituent part of the evidence is *independent* and *reliable* to weave a net of guilt around the defendant and him alone. The State must adduce other independent, reliable evidence of guilt besides the prior statement. *See Giant*, ¶ 39; *see Torres*, ¶ 27.

The Court wisely stated in *Torres* that "[a]s long as each element of the offense finds support in some independent, reliable evidence of guilt besides the prior statement . . . corroboration will be sufficient." *Torres*, ¶ 27. Admittedly, circumstantial evidence, if reliable, could supply the corroboration needed for a prior inconsistent statement. *See Strobel*, ¶¶ 18-19. All these cases make clear that corroborating

evidence must be reliable to positively implicate the defendant with the crime. *See Strobel*, ¶¶ 18–19. Moreover, this Court cautioned in *Giant* that to hold that "two forms of evidence, each unreliable in its own right, nonetheless, when taken together, are sufficient to prove guilt beyond a reasonable doubt, accords the sum of the evidence a characteristic trustworthiness that neither of its constituent parts possesses." *Giant*, ¶ 39.

The State mistakenly suggests the present case is like *Charlo*. (*See* Appellee's Br. at 23–24.) In *State v. Charlo*, 226 Mont. 213, 217–18, 735 P.2d 278, 280–81 (1987), this Court held that prior inconsistent statements identifying the defendant as the suspect in an aggravated assault case were adequately corroborated. (*See* Appellee's Br. at 23–24.) In that case, Charlo allegedly stabbed his daughter's boyfriend, Steele, in a parking lot. *Charlo*, 226 Mont. at 214. The daughter, Beth, and Steele both made statements to the police identifying Charlo as the assailant. *Charlo*, 226 Mont. at 214. At trial, they recanted their statements and asserted that they did not know who had stabbed Steele. *Charlo*, 226 Mont. at 215. Beth, Steele, and a third-party witness did, however, provide testimony that placed Charlo near the

victim immediately prior to the stabbing, and Beth testified that Charlo had a knife in his hand immediately after the stabbing. *Charlo*, 226 Mont. at 217. This Court held that other witness testimonies were sufficient corroboration of the prior inconsistent statements. *Charlo*, 226 Mont. at 218.

The Court reasoned that the prior statements in that case were corroborated by the testimony of the laundromat owner, who testified that Charlo, Beth, and Steele were the only people in the parking lot at the time of the stabbing. *Charlo*, 226 Mont. at 217. Also, in corroborating testimony, Beth stated that she saw Charlo and Steele standing together in front of the car, saw Steele fall down, and saw Charlo with a knife in his hand:

> **Q.** Where was the knife when you saw it?
> **A.** In his hand.
> **Q.** Pardon?
> **A.** In his hand.

Steele's corroborating testimony placed Charlo near Steele just prior to the stabbing:

> **Q.** Who was standing near you outside? Was anyone around you?
> **A.** Yeah, someone was.
> **Q.** Who?
> **A.** Him.

**Q.** Who is him?
**A.** Albert.

Steele's corroborating testimony also described Beth's reaction and comments to Charlo:

**Q.** Okay. Now, prior to you getting over to Beth, did you hear Beth say anything to her father?
**A.** Yeah, I did.
**Q.** What did you hear her say?
**A.** I heard her say, What are you going to do, stab me, too?

*Charlo*, 226 Mont. at 217–18.

This Court reasoned that the corroborating testimony of three witnesses placed Charlo near Steele immediately prior to the stabbing and confirmed that Steele was stabbed. *Charlo*, 226 Mont. at 217–18. The corroborating testimony of one witness placed a knife in Charlo's hand. *Charlo*, 226 Mont. at 217–18.

This Court concluded that the corroborating evidence in *Charlo* was sufficient because it placed the defendant near the victim with a knife at the time of the stabbing, even though there was no independent direct evidence that Charlo did the stabbing. *Charlo*, 226 Mont. at 217–18.

Contrary to the suggestion of the State, there is no corroboration whatsoever in the present case unlike *Charlo* and *Strobel*. Where is the

independent reliable evidence? The present case is starkly distinguishable from *Charlo*, which had *three independent witnesses* corroborating the prior statement. *See also*, *Strobel*,¶ 18 (At least one independent witness testified that he saw Strobel force his wife into a truck to corroborate his wife's prior inconsistent statement.). The State fails to distinguish the present case from *State v. White Water*, 194 Mont. 85, 634 P.2d 636 (1981) *and Giant*. (*See* Appellee's Br. at 26–27.)

In the present case, not a single witness corroborates Ishan's prior statement. None of the remaining bits of evidence—alone or cumulatively together—place a *9 mm gun* in Masheelah's hand immediately before or immediately after the shooting. Unlike *Charlo*, 226 Mont. at 217–18, not a single witness testified that Mahseelah was the only one who could have fired shots given there were nine other people at the scene of the shooting. Not one witness testified under oath they saw Mahseelah fire a gun.

The State suggests the following evidence on the record corroborates Ishan's prior inconsistent statements:

1. Mahseelah was present when the shots were fired—though eight other people were also present. (*See* Appellee's Br. at 27.)

2. William Steele could not have shot himself. (Appellee's Br. at 24.)

3. Mahseelah testified he was talking to Jay Sorrell when the shots were fired—which leads to the inescapable conclusion that Jay could not have been the shooter. (Appellees Br. at 24.)

4. There was never a suggestion that Ishan Wylie shot at William because Ishan was shaken up when Officer Couture interviewed her at home. (Appellee's Br. at 24.)

5. When Mahseelah entered the living room, two men were in the living room before he went to find Jay—The inescapable conclusion was that these men were so bonded to the living room they could not have travelled a few steps to the hallway to fire shots. (See Appellee's Br. at 24.)

6. Mahseelah testified Angelina was outside when shots were fired —therefore, Angelina could not have been the shooter. (*See* Appellee's Br. at 7, 24.)

7. Mahseelah came without his cellphone and left with it.

Here, the remaining bits of evidence must provide strong *independent* reliable evidence of the identity of the shooter. However, the bits of evidence have questionable trustworthiness. The sum of these bits of evidence is anecdotal at best. More importantly, the sum of such evidence could equally implicate any of the *other* eight persons at the disorderly house on the night of the shooting. There is no independent and reliable corroboration of Mahseelah's guilt.

Just like in *Giant*, ¶¶ 39, 41, Mahseelah was at Sorrell's disorderly house with eight *other* people. The fact that he was angry about his missing phone does not corroborate Ishan's prior inconsistent statements.

It was no secret that Jay sold drugs at his home. (*See* 3/5/18 Tr. at 183.) The State readily acknowledges there was an outstanding warrant for Jay's arrest. (Appellee's Br. at 11.) After the shooting, Jay fled from his disorderly house. (*See* 3/5/18 Tr. at 232.) Ishan and William remained at the house to tell police the shooter was Mahseelah.

Ishan and Mahseelah in testimony insisted Jay Sorell was not the shooter. Anecdotally, Jay's Conweb profile indicates that in January 2018 he received a single five-year sentence for two charges: felony criminal possession of dangerous drugs with intent to distribute for a February 2017 offense, and a felony criminal possession of dangerous drugs from August 2017. (Sorrell's Conweb Profile, attached as App. A.) The State could have used the same web of circumstances and bits of evidence anecdotally to convict Jay for the present crimes.

All the witnesses were surprisingly reticent to mention that Ben Finley, Angelina's husband, was even at the disorderly house. (*See* Finley Conweb Profile, attached as App. B.)

The State assures the Court that the two ambulatory persons who Mahseelah saw in the living room remained so bonded to the living room furniture and could not have travelled a few steps to the hallway to shoot at William. (*See* Appellee's Br. at 24.)

The web of circumstances is equally hovering over the guilt of eight *other* persons who were hanging around Sorrell's disorderly house with Mahseelah on the evening of the shooting. The sum of this evidence does not supply strong positive proof that Mahseelah, and he alone, could have fired those shots. More importantly, the remaining bits of evidence equally inculpate any of the *other* eight meth-ingesting persons at Jay's disorderly house on the night of the shooting—Jay, Ishan, Benny Finley, Angelina, Michael, two males no one could describe, or even William.

In order to convict on circumstantial evidence alone, the facts and circumstances must be so closely interwoven and connected that the finger of guilt is pointed unerringly at the defendant and the defendant

alone. *See State v. Crawford*, 225 Tenn. 478, 484, 470 S.W.2d 610, 613 (1971). A web of guilt must be woven around the defendant from which he cannot escape and from which facts and circumstances the jury could draw an inference of the guilt of the defendant beyond a reasonable doubt. *See Crawford*, 225 Tenn. at 484, 470 S.W.2d at 613. Mere suspicion and straws in the wind are not enough. A defendant is clothed with a mantle of innocence and that presumption of innocence hovers over and protects him throughout the trial. *See Crawford*, 225 Tenn. at 484, 470 S.W.2d at 613. Until the mantle of innocence is overturned by strong proof of the accused's guilt beyond a reasonable doubt—not an imaginary or captious doubt but an honest doubt engendered after a consideration of all the evidence, so that the minds of the jurors cannot rest easy as to the certainty of guilt—he is entitled to an acquittal. *See Crawford*, 225 Tenn. at 484, 470 S.W.2d at 613.

The State acknowledged that Johnathan Charlo testified that after the shooting, three people—Mahseelah among them— got into Angelina's car and drove off. (Appellee's Br. at 35 *citing* 3/5/18 Tr. at 156–57.) Mahseelah was one of the men who was wearing basketball shorts and jerseys. None of these men had bulges of guns underneath

their shorts. (*See* Appellee's Br. at 35 *citing* 3/5/18 Tr. at 156–57.) Johnathan Charlo, who observed Mahseelah immediately after the shooting, provided circumstantial evidence that Mahseelah did not have a gun. So did Michael's proposed testimony. This conviction impermissibly dangles by a single thread: a prior inconsistent statement uncorroborated by any independent or reliable evidence.

## III. Incidentally, the evidence from all the witnesses fits Mahseelah's account that the real culprit was one of his relatives.

The State at trial and on appeal selectively cherry-picked bits and pieces of witness testimonies, anecdotally and out of context, to cobble together its narrative of guilt against Mahseelah. (*See* Appellee's Br. at 5–11.) The State desperately insists that Masheelah was the only person of the nine people present at Sorrell's disorderly house that could have done the shooting. (Appellee's Br. at 24.) The State took plain facts out of context, twisted and distorted them to give the meaning that Mahseelah was a criminal mastermind—a king pin—who shot at William and now was intimidating witnesses to testify falsely on his behalf. (*See* Appellee's Br. at 11 *citing* 3/5/18 Tr. at 227–39.) After assigning strikingly suggestive and luminous meaning to plain facts,

the State concreted a singular conclusion that Masheelah was guilty of these charges.

However, sometimes the pattern of human behavior in times of crisis is unpredictable. Sometimes an innocent man acts guilty. Rather than snitch[1] on his relative, Mahseelah chose to eat the charges, and to just do the time. (*See* 3/5/18 Tr. at 228.) When he was arrested, Mahseelah threw officers off the scent of his relative who fired the shots. At trial, Masheelah thought he was setting the record straight without snitching on that relative.

Contrary to the suggestion of the State, the evidence in the record fits Masheelah's account of events and puts serious doubt on the safety of these present convictions. At trial, both of the State's witnesses who were at the scene insisted they were high on meth and did not see Mahseelah fire a gun. Angelina first claimed she did not remember hearing any shots—even after the State threatened her with perjury

[1] *See United States v. Colhoff*, 833 F.3d 980, 982–83 (8th Cir. 2016) (This case is cited anecdotally to explain why Mahseelah would take responsibility for a crime he did not commit: "snitches get stiches" and "snitching" on a fellow Native American, and a relative, was not an option—better to eat the charge and just do the time.)

charges. Both Angelina's and Ishan's live testimonies supported Mahseelah's theory of innocence. Mahseelah, Angelina, and Ishan were all afraid to point a finger at the same relative—the real culprit. Masheelah testified he was covering for his relative but pointing the finger of blame at his kin was not an option. At trial, he tried to set the record straight. Out of a misguided sense of family loyalty or kinship, or perhaps out of sheer fear of a drug-dealing relative, Mahseelah ran interference and instructed Ishan and his good friend William to misdirect officers to point the finger at him. (*See* Appellee's Br. at 11 *citing* 3/5/18 Tr. at 239.) When officers went to find Mahseelah a week after the shooting, he told them he was at Jay's house with "Shawn Shroud," a fictitious person. Consistent with his live testimony, he stayed in jail and would not snitch on his relative.

The State at trial adopted a strategy of anecdotally twisting and distorting witness testimonies to provide support for its crumbling and implausible theory of guilt. (Appellee's Br. at 3–11.) Moreover, this record reveals that the State established Mahseelah's guilt by anecdotal evidence (proof by selected instances, or, more pejoratively, anecdata). On appeal, the State still cherry-picks which portions of each witness's

testimony to peddle as true and which part of the testimony to impugn as false just to secure a conviction.

Mahseelah maintains that his conviction is unsafe as it is based on anecdotal evidence of his guilt. The entire case is structured upon a misplaced and misconceived suspicion—an aspect that escaped notice in the district court below.

Instead of conducting an adequate investigation into the identity of the shooter, the prosecution pinned the shooting on Mahseelah and has been doubling down since.

## IV. The State downplays the importance of Michael's excluded evidence.

The State acknowledges that the case against Mahseelah reduced to the question of the identity of the shooter. (Appellee's Br. at 26.) However, it then downplays how crucial Michael's testimony was to this dispositive issue. (*See* Appellee's Br. at 34–35.) The State insists that Michael's testimony would not have been as helpful as Mahseelah asserts. (Appellee's Br. at 35.) The State mistakenly claims its witness, Johnathan Charlo, provided the same evidence as what Michael would have said. (Appellee's Br. at 35.) The State suggests Michael's

testimony would have been unnecessary or redundant after Johnathan Charlo's testimony.

"The testimony from any one witness, that the jury believes, is sufficient to prove any fact in a case." *State v. Bowen*, 2015 MT 246, ¶ 30, 380 Mont. 433, 356 P.3d 449. Mahseelah wanted to put on evidence that he did not have a gun immediately before entering, during his stay at, and immediately after leaving the Sorrell home. If the jury would have heard Johnathan Charlo's testimony in conjunction with Michael's testimony, he could have established reasonable doubt that he was not the shooter. (*See* Appellant's Br. at 34–35.) Additionally, Johnathan Charlo's testimony tended to prove that immediately after the shooting, Mahseelah left without a gun. Michael's testimony tended to prove that immediately before the shooting, Mahseelah did not come with a gun to Sorrell's house. Ishan testified under oath she did not see Masheelah with a gun while he was inside Sorrell's home. (3/5/18 Tr. at 164–66.) The State acknowledges that Johnathan Charlo's testimony was circumstantial evidence that Mahseelah did not have a gun underneath his basketball shorts as he left the home. Now three witnesses in unison was crucial to

Mahseelah's theory of innocence—that he did not have a gun immediately before, during, and immediately after the shooting.

As previously discussed, Mahseelah stands convicted by anecdotal evidence. It became imperative for the State to do everything in its power to exclude Michael's testimony at trial. Michael's testimony did not fit with the State's theory of the case. If the jury believed Michael, then it would acquit Mahseelah.

Incredibly, the State suggests that after investigating nine people who were at Sorrell's disorderly house, it did not ever discover that Michael was present on the night of the shooting. (Appellee's Br. at 34–35.) This clearly defies belief.

It equally defies belief that the State was not prepared to cross-examine Michael if it had prepared its case-in-chief to prove beyond a reasonable doubt that it was Masheelah who fired the three shots.

"The policy behind §46-15-322, MCA, is to provide notice and prevent surprise." *State v. Pope*, 2017 MT 12, ¶ 22, 386 Mont. 194, 387 P.3d 870 (internal citation omitted). Where was the surprise to the State? Michael's testimony was fairly predictable—a point the State does not contest. (Appellant's Br. at 37–41.) The State informed the

trial court that it had witnesses who could controvert his account and prove him to be a "liar"—another point the State does not contest. (Appellant's Br. at 39.)

The State's pseudo investigation wanted to pin these charges on Mahseelah despite evidence to the contrary. The State implicitly concedes after it focused its investigation on Masheelah, it became less important to locate and to question most of the nine persons who were present at Sorrell's disorderly house. (*See* Appellee's Br. at 33–34.) The State does not deny that Michael was present at the Sorrell's house on the evening of the shooting. It highlighted Michael's presence in its closing statements. (*See* 3/6/18 Tr. at 13.)

The State insists it would have been patently unfair to the prosecution and its case against Mahseelah would have been "prejudiced" if the district court allowed Michael to testify on the second day of trial. (*See* Appellee's Br. at 29, 33–35.) The State would like this Court to presume such prejudice without any argument or analysis although Michael's testimony was fairly predictable. It is significant to note that the State does not dispute that Michael's testimony was fairly predictable. (*See* Appellee's Br. at 29, 37–38.) It does not contest that it

told the trial court it had witnesses ready to controvert Michael's testimony. (*See* Appellee's Br. at 29, 37–38.) Again, where is the prejudice to the State?

The State reaped big dividends by precluding a critical eyewitness account and then exploiting hearsay evidence for an impermissible purpose. In district court, the State gained this windfall by heaping blame on Mahseelah—a 22-year old, penniless, high-school drop-out who was not trained in the intricacies of the law— for failing to appreciate the importance of promptly communicating with his attorney about a favorable witness in preparation for trial. (*See* Appellee's Br. at 34–35.) If Mahseelah's unsafe conviction stands, he will remain incarcerated until his two-year old daughter will be thirteen, and until his five-year old son will be sixteen. (D.C. Doc. 35 at 1.)

The State urges the Court to affirm and conclude that a 21-day delay in communicating with counsel about a favorable witness under these circumstances is an adequate ground for denial of Mahseelah's Sixth Amendment Constitutional right to present a complete defense.

## CONCLUSION

Mahseelah respectfully requests the Court to reverse his conviction and remand for further proceedings.

Respectfully submitted this 29th 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 reply brief is printed with a proportionately spaced Century Schoolbook 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 4,998, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Moses Okeyo
MOSES OKEYO

## APPENDIX

## CERTIFICATE OF SERVICE

I, Moses Ouma Okeyo, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 05-29-2020:

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