

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0257

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

RICHARD LEE TOME,

Defendant and Appellant.

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OPENING BRIEF OF APPELLANT

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On Appeal from the Montana Eighth Judicial District Court,  
Cascade County, the Honorable Gregory G. Pinski, Presiding

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## **STATEMENT OF THE ISSUES**

1. Did the district court misinterpret the child hearsay statute by allowing the complaining witness's hearsay statements into evidence—without considering whether the child had sufficient memory to retain an independent recollection of the event, without considering whether the child had adequate mental capacity at the time of the event to create an accurate memory of it, and without analyzing the child's motivation to tell the truth in light of the fact that she could not distinguish between truth and falsity?

2. Did the admission of testimonial statements from the complaining witness violate Tome's right to confrontation given Appellant-Defendant was not allowed to interview nor cross-examine her?

## **STATEMENT OF THE CASE**

Appellant Richard Lee Tome appeals from the judgment of the Montana Eighth Judicial District Court, Cascade County, following a guilty verdict for felony sexual intercourse without consent (SIWC) against a 13-year old girl, T.C. (*See* 7/10/18 Tr. at 4.)

The State charged Tome with one count of SIWC in violation of Mont. Code Ann. § 45-5-503. (D.C. Doc. 1.) Incidentally, the State and the trial court acknowledged that T.C.'s Sexual Assault Nurse Examiner (SANE) rape kit and two items of clothing, her underwear and sweatpants, contained DNA profile from a male contributor—the DNA profile *did not belong* to Tome. (See Tr. at 552–53, 625–26, 632–33.) This DNA evidence suggested T.C. was sexually assaulted by someone else.

In preparation for trial, Tome filed a motion requesting to interview T.C. (See Tr. at 200–01.) The district court denied his request. (See Tr. at 200–01.) Tome's first trial ended in a mistrial because T.C., the primary witness, took the stand but was unable to understand the oath nor affirm her testimony would be the truth. (See Tr. at 137.) At his second trial, after a new jury was impaneled, the defense challenged the admissibility of T.C.'s out-of-court statements that the State intended to elicit through *five* adult witnesses. (See Tr. at 223–245.) Following a hearing where the *five* proposed witnesses testified, the district court allowed the State to elicit T.C.'s out-of-court statements through only *three* adult witnesses. (See Tr. at 245.)

Despite the trial court limiting the admission of T.C.'s out-of-court statements through only *three* witnesses, the State presented this contested evidence through *five* adult witnesses at trial. (*See* Tr. at 362–69, 377–83, 387–96.)

The jury convicted Tome. (Tr. at 642.) The district court sentenced Tome to *life* in prison and in addition, he was rendered *ineligible* for parole until he completed all three phases of the sexual offender treatment program. (D.C. Doc. 181 at 4.)

### **STATEMENT OF THE FACTS**

T.C. was 13 years old at the time, deaf, and developmentally disabled. (*See* Tr. at 225–26.) On November 2, 2016, T.C. became emotional in class. (Tr. at 228–29.) Her teacher took her to see the school psychologist. (Tr. at 228–29.) The State alleged that at the psychologist's office, T.C. said that a man named Ricky came and sat at the breakfast table, knocked her out of her chair onto the floor, pulled down her pants, and had sexual intercourse with her. (Tr. at 230.)

The next day on November 3, 2016, the Great Falls police went to T.C.'s mother's residence to investigate the alleged sexual assault. (*See* Tr. at 225–26). T.C.'s mother was interpreting for T.C. and told Officer

John Marshall that T.C. said through sign language that it was Tome<sup>1</sup> who had sexual intercourse with her. (*See* Tr. at 226, 389–91, 449.)

On November 4, 2016, the investigation progressed with T.C. being taken to the Benefis East Emergency Room for a SANE rape toolkit analysis. (*See* Tr. at 225–26.) T.C.’s entire body was swabbed for DNA using a SANE rape toolkit. This toolkit along with T.C.’s two items of clothing were later taken to the Montana State Crime Lab for DNA analysis. A SANE nurse documented vaginal lacerations, swelling, and tenderness. (Tr. at 420.) Next came the forensic interview at which T.C. alleged that while her mother was downstairs doing laundry, Tome showed her pornographic images on his phone, fondled her breasts, pulled her pants down, exposed his penis, laid her onto her back, and engaged her in sexual intercourse. (*See* Tr. at 391–392.) After the forensic interview, officers spoke with T.C.’s mother who said she remembered Tome had been at her residence on the evening of November 2, 2016, when she was doing her laundry downstairs. (*See* Tr. at 409, 410.)

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<sup>1</sup> Tome paid the landlord rent to park his camper van in the parking lot of the apartment complex—He came into the apartment complex as he needed to use the restroom and shower. (Tr. at 439.)

Police located Tome. Tome denied the sexual assault happened and denied showing T.C. pornographic images. (*See* Tr. at 553.)

**T.C. Was Unable to Distinguish Truth from Falsity**

At Tome's first trial, the State called T.C. to the stand and attempted several times to administer the oath to T.C.—asked her to affirm to speak the truth. (Tr. at 137.) She could not understand the oath and she could not understand the difference between truth and falsity. (*See* Tr. at 137.) T.C. was unable to affirm that she would testify truthfully. (*See* Tr. at 137.)

On the second day of trial, the district court held a hearing outside the presence of the jury on the issue of T.C.'s competence to testify. (Tr. at 188–218.) The State called other witnesses including T.C.'s mother, Dr. Nancy Maynard, the pediatrician the who treated T.C. at Benefis, the Great Falls Hospital, Kami Stone, who conducted a forensic interview on T.C., Chris Gutschenritter, the school psychologist at the Montana School for the Deaf and Blind (MSDB), Yvette Smail, the behavioral specialist at MSDB, and Officer Marshall to testify to T.C.'s hearsay statements. (Tr. at 143–53, 160–67, 168–174, 174–78.)

The defense challenged T.C.'s competence to testify and, additionally, urged the trial court to declare a mistrial on the ground that the State failed to put the defense on notice that T.C. was not competent to testify or that she would be otherwise unavailable to testify. (Tr. at 199, 200–01.) The defense explained that its trial strategy was “pure cross-examination” to contest T.C.'s credibility and to impeach her testimony. (See Tr. at 199–200, 210.) The defense prepared its case expecting an opportunity to cross-examine T.C. in accordance with *Crawford v. Washington*, to confront her, and to attempt to impeach her credibility in front of the jury. (See Tr. at 199–200, 206.)

The defense reminded the trial court it had denied access to T.C. to conduct an interview. (Tr. at 201; D.C. Doc 82.) That ruling prevented Tome from questioning T.C. at any time prior to trial. (See Tr. at 201.) The State countered insisting that T.C. was always able to tell the difference between a truth and falsity and it did not anticipate her inability to take the oath to testify truthfully. (Tr. at 204.) The State urged, in the alternative, that if the trial court was inclined to declare a mistrial after finding T.C. incompetent to testify, then that

ruling would serve as its required statutory notice to the defense that T.C.'s hearsay statements would be admissible at Tome's new trial.

(See Tr. at 205.)

After calling the adult witnesses to testify concerning what T.C. told them out of court, the State put her on the stand and the trial judge asked T.C.:

**Q:** [T.C.], I'm a judge. Is my robe black or white?

**A:** It's black.

**Q:** If I said my robe is white, would I be telling the truth?

**INTERPRETER:** She said I don't get the question.

(Tr. at 209.)

The State then asked T.C. a follow-up question to determine whether T.C. understood the difference between truth and falsity. (Tr. at 209.) At which point, the trial court interrupted that question and stopped the proceedings and then concluded: "I cannot find that this witness is competent to testify, despite *extensive questioning* by the Court and by Counsel." (Tr. at 209 (emphasis added).) In addition, it also concluded that T.C. was "unavailable." (Tr. at 209–210.) The trial court reasoned that T.C. was unable to differentiate between telling the truth or a lie. (Tr. at 210.) The defense renewed its motion for a mistrial on the grounds that T.C.'s inability to testify under oath

undermined his ability to mount a defense dependent on “pure cross-examination” of witnesses, especially the primary witness against him. (Tr. at 210, 218.) The State agreed that the sudden unavailability of its complaining witness undermined Tome’s ability to mount a defense. (See Tr. at 213.) The State did not oppose a mistrial to allow the defense to prepare to address T.C.’s hearsay evidence. (See Tr. at 213.) The State insisted that T.C.’s forensic interviews were the most probative evidence in the absence of her live testimony and the jury should be allowed to see the video of all her forensic interviews. (See Tr. at 214.) The defense, in opposition, argued that the unavailability of T.C. implicated his rights under the Confrontation Clause given the defense was precluded from interviewing T.C. (See Tr. at 215; *see also*, D.C. Doc. 82.) The trial court granted the defense’s motion for a mistrial and set a new trial date. (Tr. at 205, 218.)

### **Hearing on Admissibility of T.C.’s Hearsay**

On June 7, 2018, the trial court held an evidentiary hearing on the admissibility of T.C.’s out-of-court hearsay statements under the child hearsay statute. (Tr. at 223–245.) At this hearing, the State presented evidence from the same adult witnesses it presented before at

the competence hearing: Dr. Maynard, Gutschenritter, Smail, Officer Marshall, and Stone. (Tr. at 223–245.)

According to Dr. Maynard, T.C. communicated at a second or third grade level and did not always understand what was being communicated to her. (Tr. at 225–26.) Her physical examination of T.C. concluded she was the victim of sexual abuse. (Tr. at 226.)

Chris Gutschenritter, the school psychologist at MSDB, testified that T.C. became emotional in class and her teacher sent her to see him. (Tr. at 228–29.) Both Gutschenritter and Smail were together in the office when T.C. came in. (Tr. at 230.) They explained that they see children together as a safeguard. (Tr. at 233.) Gutschenritter acknowledged T.C. had difficulties communicating due to her mental disabilities and because she was deaf. (Tr. at 229.) T.C. talked about a man named Ricky coming to her as she sat at the breakfast table, knocking her out of her chair onto the floor. (Tr. at 230.) T.C. used the sign for sexual intercourse while claiming that Ricky had pulled her pants down, had sexual intercourse with her, and it bled, and it hurt. (Tr. at 230.) Gutschenritter explained T.C. was usually unable to tell stories in a linear way—She will kind of hop from topic to topic—but

this situation was unique as she maintained “eye-to-eye” contact, she was serious, and she told the story from start to finish. (Tr. at 230–31.)

“This time she wanted to get this out, and to make sure that we understood exactly what she was talking about.” (Tr. at 230–31.)

Gutschenritter claimed she had no difficulty whatsoever understanding what T.C. was trying to convey. (Tr. at 231.) Gutschenritter reported this matter to the Department of Health and Human Services. (Tr. at 231.)

Smail was in accord with Gutschenritter that T.C. can jump from topic to topic but sometimes she can be linear. (Tr. at 234.) Smail testified that T.C. spelled the name of a man “Rick.” (Tr. at 234.) Smail repeated the same allegation and claimed that T.C. used the sign for sexual intercourse six times and said “Hurt, hurt, hurt, bleed, bleed, bleed.” (Tr. at 234.) Smail explained that T.C. was in distress but was: “Easy to follow. There was no question what she was saying.” (Tr. at 234.)

Officer John Marshall testified that on the afternoon of November 3, 2016, he received a call from the child abuse hotline. (Tr. at 236.) His investigation led him to T.C.’s mother’s house. (Tr. at 236.) T.C.

made hand gestures, and she also communicated with Officer Marshall through writing on paper and, in addition, T.C.'s mother translated her sign language. (*See* Tr. at 236.) Officer Marshall repeated T.C.'s out-of-court statements:

She had stated that on the day before, on 11-2 of 2016, about 3:00 o'clock in the afternoon, that she was in her house on her bed, which was located in the living room. She had stated the roommate, or another individual who lived there, Richard Tome, had approached her on the bed, showed a pornographic picture of a man and woman having sex. He had then touched her left breast, grabbed her vagina, pulled her pants down, and then climbed on top of her, holding her down, and penetrated her vagina with his penis, having sex with her.

(Tr. at 236–37.)

Officer Marshall testified that through physical gestures and the motion of her hands, T.C. indicated that “Ricky” pulled down her pants, had sexual intercourse with her as she tried to push him off her. (Tr. 237.) Officer Marshall vouched that “[i]t was clear” what T.C. was trying to communicate to him. (Tr. at 237.) In an attempt to corroborate T.C.'s statements he collected some clothes and blood-stained beddings. (Tr. at 237.)

Kami Stone conducted a forensic interview of T.C. on November 4, 2016. (Tr. at 239–40.) The State introduced into evidence the video of

the 24-minute forensic interview. (Tr. at 240.) Stone explained that although T.C jumped from topic to topic in the interview, she would get animated and very clear when describing what happened to her. (Tr. at 241.) T.C. spelled out “Ricky.” (See Tr. at 241.) Although her gestures were not the standard sign language, they indicated sexual intercourse. (See Tr. at 241.)

The prosecution asserted: “I don’t believe there’s a question of whether the witness is available or not, as the Court has already ruled that she’s incompetent to testify.” (Tr. at 243.) The State urged the trial court to admit T.C.’s out-of-court statements into evidence on the ground that given the numerosity, timing, and content of these statements, they carried indicia of reliability. (See Tr. at 242–43.)

The defense countered it was clear from the trial that T.C. was not competent to testify—she failed to understand the importance of telling the truth and this was a foundational requirement for the indicia of reliability determination. (Tr. at 243.) Although T.C.’s statements had some consistency, the question before the trial court was whether T.C. had the ability to understand the importance of saying the truth and the consequences of not saying the truth. (Tr. at 243–44.) If T.C. did

not understand the importance of telling the truth none of her statements should be allowed into evidence—meaning those statements were not reliable nor trustworthy. (*See Tr. at 243–44.*)

The trial court asked the prosecution to address the defense’s assertion that because T.C. was not competent to testify based on her inability to understand the oath, her out-of-court statements were also unreliable. (*See Tr. at 245.*)

The State asserted: “While that is one of the factors, it’s not the only factor” and the trial court was also required to consider the individual’s motivation to tell the truth, whether they are able to comprehend what others are saying to them. (*Tr. at 245.*) The State urged the court to base its indicia of reliability determination not only on the statements that the witness said, but also on whether her statements were corroborated through other statements made, and through other evidence. (*Tr. at 245.*) The State insisted that in this case, T.C.’s statements were corroborated. (*Tr. at 245.*)

The trial court concluded that the State met the admissibility standard under Mont. Code Ann. § 46-16-220 and -221. (*Tr. at 245.*)

The trial court reasoned: “And I think the other thing, too, is the ability

to tell the difference between truth and falsehood is one of, you know, the seven factors for the Court to weigh and balance.” (Tr. at 245.)

The trial court found T.C. was under the age of 16 at the time of the alleged offense. (Tr. at 220.) She was developmentally disabled and deaf. (Tr. at 220.) She was unable to understand the difference between the truth and a lie. (Tr. at 220.) She was unable to take the oath at trial on April 9 and April 10, 2018. (Tr. at 220.) The trial court concluded that due to the severity of T.C.’s developmental disability, T.C. was incompetent to testify at trial on April 10, 2018. (Findings of Fact, Conclusion of Law and Order on Child Hearsay, attached as App. A, at 2.) It also concluded that T.C. had sufficient mental capacity to provide an accurate memory of the incident to Gutschenritter, Smail, and Stone. (App. A, at 3.) The district court found that Gutschenritter, Smail, and Stone were the only witnesses relating T.C.’s out-of-court statements. (App. A at 4.) The trial court ruled that it would deem T.C. unavailable to testify as a witness. (Tr. at 220.) It reasoned that the time, content, and circumstances of T.C.’s statements to Gutschenritter, Smail, and Stone provided circumstantial guarantees of trustworthiness. (Tr. at 220; App. A at 6.) Moreover, it concluded that

T.C.'s statements to three witnesses—Gutschenritter, Smail, and Stone—were more probative than any other evidence. (Tr. at 220.)

Curiously, the State sent three items from the crime scene to the Montana State Crime Lab for a DNA analysis—T.C.'s grey Griz sweatpants, her pink underwear, and the SANE rape kit with evidence collected from all over T.C.'s body. (See Tr. at 543–44, 550.) The lab tests were *conclusive* and indicated a DNA profile donated by a male contributor. (Tr. at 552.) The State Crime Lab DNA test results excluded and eliminated Tome as a contributor of the male DNA profile found mostly on T.C.'s underwear and at the scene. (See Tr. at 552–53.) The State argued to the jury that T.C. had struggled with her attacker. (See Tr. at 99.) The State insinuated that the several rather large scabs and scrape marks on Tome's forearm were caused by T.C.'s fingernails.<sup>2</sup> (See Tr. 361, 418, 428, see also, Exhibit G–K, attached as App. C.)

However, the State had difficulty explaining why Tome's DNA profile did not appear from the lab tests—conducted on T.C.'s items of clothing

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<sup>2</sup> Incidentally, the State convinced the district court to exclude the expert witness testimony of Dr. John Sowers and his report which showed that T.C.'s nails could not have caused the scabs, superficial abrasions, and scrapes that were on Tome's forearm. (See D.C. Docs. 77, 86; see also, Tr. at 182, 632.)

and SANE swabs of T.C.'s person—given that the State asserted that T.C. scratched and bloodied him with her fingernails. Tome's DNA was conclusively not found on T.C., nor on her clothes, nor on the kitchen table, nor on the spatula that the prosecution alleged was used to threaten and menace T.C. to overcome her resistance, nor on T.C.'s sweatpants, nor on T.C.'s underwear. (*See Tr.* at 182.) The State did not bother to provide any explanation why the DNA profile from the sweatpants and underwear conclusively indicated a DNA profile from a male contributor but not Tome.

The trial court acknowledged the DNA evidence collected from T.C. and the crime scene did not belong to Tome. The trial court also acknowledged there were no witnesses to the alleged sexual intercourse and no physical evidence linked Tome to this crime. (*See Tr.* at 99.) However, the trial court concluded that T.C.'s out-of-court statements to Gutschenritter, Smail, and Stone would be offered as substantive evidence of material facts.

### **T.C.'s Out-of-Court Statements Admitted at Trial**

At the beginning of the second trial, the defense maintained its objection to T.C.'s child hearsay statements on the ground that it

violated his Sixth Amendment right to confront witnesses and his right to due process based on the Court's precedent in *State v. White Water*, 194 Mont. 85, 634 P.2d 636 (1981). (Tr. at 250.) The district court again rejected Tome's objection.

The State told the jury in its opening:

[T.C.] will not be here to tell her side of the story.

You will get to hear her story told by her to the people that she does trust, to the people who she trusted with this information, like her counselors, like the SANE nurse examiner, like Miss Stone who conducted the forensic interview, and Dr. Maynard who reviewed all the reports, from the nurses, the doctors and the detectives who investigated this case, and from the inmate who is going to be coming to testify about what the Defendant told him about this case, you will hear what happened to [T.C.] that night.

Despite [T.C.] not being here to talk to you, you are going to be here to listen to what she had to say, and to listen to what she told people happened to her.

(Tr. at 357–58.)

In its case-in-chief, the State called Gutschenritter, Smail, Kelli Willborn, the SANE nurse who conducted a rape kit examination of T.C., Stone, and Officer Marshall who all introduced T.C.'s out-of-court statements. (Tr. at 367, 380–81, 291–92, 492.)

Smail vouched that although T.C. appeared scared she was “very, very clear in her signs and in her communication” and “it was just very clear, quite frankly, the clearest that I believe I’ve had her talk with me.” (Tr. at 381.) Smail acknowledged T.C. sometimes mixed in what she saw in certain movies with what was happening in real life:

Sometimes with T.C., she might add in stuff about maybe a movie that she likes, or that maybe she -- you know, likes one certain movie, and that then might get mixed in with what is happening in real life. And then you just have to learn to sort, sort it out. Or she might think that something in a movie and real life is very connected or relative.

(Tr. at 381.) Smail explained that because T.C.’s disclosure did not appear rehearsed: “We didn’t have to ask if it was fake or real it was very concretely said.” (Tr. at 382.)

Over the renewed objections from the defense—under the hearsay rule and the Confrontation Clause—Officer Marshall repeated T.C.’s alleged out-of-court statements that Ricky showed her pornographic images on his phone<sup>3</sup>, grabbed her left breast, grabbed her vagina, pulled down her pants and inserted his penis into her vagina. (Tr. at

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<sup>3</sup> A forensic examination of Tome’s phone through cellbrite and a manual perusal by Officer Noah Scott of the Great Falls Police Department did not reveal a single pornographic image.

391–92.) Officer Marshall vouched that T.C. was “clear” and “very detailed,” and she actually used a finger and a motion commonly used to signal a male and female having intercourse. (Tr. at 392.) T.C. said that it hurt, and that afterwards her vagina was bleeding and wouldn’t stop. (Tr. at 393.)

Willborn testified for the State. (Tr. at 411–426.) The SANE examination was conducted 30 hours after T.C. was sexually abused and T.C. had showered and changed her clothes. (Tr. at 414, 418.) Wilborn observed the vaginal area was tender and presented with some redness. (Tr. at 415.) The State elicited from Wilborn T.C.’s out-of-court statements:

**Q:** And do you recall what narrative she gave you?

**A:** Basically she said, He hurt me. He was on top of me. Why would he do that? I’m just a little girl. Things to that effect.

**Q:** Did he also -- or did she also tell you he had sex with her?

**A:** Yes.

**Q:** Okay.

**A:** He pulled her pants down and had sex with her.

(Tr. at 416.)

T.C.’s mother testified that she picked her daughter up from school on November 3, 2016 and T.C. started saying that something happened with Ricky on November 2, 2016. (Tr. at 439.) Her mother

explained that T.C. was referring to Richard Tome, who lived in a camper on the parking lot behind the residence T.C.'s mother was renting. (Tr. at 439.) Tome's agreement with the owner of the residence allowed him to come into the residence to use the shower and the bathroom. (Tr. at 439.) On the day in question, she went downstairs to do laundry and did not suspect anything had happened to T.C. (See Tr. at 445–48.) The next day, the police called her to inform her of T.C.'s allegations of being sexually abused at home. (Tr. at 448.) When Officer Marshall came to question T.C., her mother claimed she tried not to ask her daughter leading questions and just let her talk and not put any words in her mouth. (Tr. at 449.) T.C.'s Mother interpreted for Officer Marshall's questions and vocalized her responses and interpreted the sign language her daughter was using. (Tr. at 449.) She interpreted for Officer Marshall the sign language T.C. used. (Tr. at 450.) She explained that T.C. learned a broken sign language, she signed one or two, or three words, "And then you kind of got to piece it together." (Tr. at 450.) When T.C. was asked what happened, she allegedly spelled out sex. (Tr. at 450.)

The State elicited T.C.'s out-of-court statements through Stone. (See Tr. at 492.) The State then admitted into evidence and played for the jury the video of Stone's forensic interview of T.C. (Tr. at 494–95.) The State asked Stone to vouch for T.C.'s disclosure:

**Q:** And we've seen a lot of these interviews over the years together. Do you see anything in that video that caused you concern about her fabricating any of this?

**A:** Absolutely not.

### **STANDARDS OF REVIEW**

The Montana Supreme Court reviews a trial court's conclusions of law and its interpretation of statutes *de novo* for correctness. *State v. Tam Thanh Le*, 2017 MT 82, ¶ 7, 387 Mont. 226, 392 P.3d 607. The Court's review of constitutional questions is plenary and therefore reviews *de novo* a district court's interpretation of the Sixth Amendment to the United States Constitution and Article II, Section 24 of the Montana Constitution. *State v. Stock*, 2011 MT 131, ¶ 16, 361 Mont. 1, 5, 256 P.3d 899, 902.

This Court reviews a district court's evidentiary rulings for an abuse of discretion. *State v. Colburn*, 2018 MT 141, ¶ 7, 391 Mont. 449, 419 P.3d 1196.

## **SUMMARY OF THE ARGUMENT**

In 2003, the Montana Legislature enacted a statute addressing the admission of child hearsay in criminal proceedings. The statute aimed to introduce out-of-court testimony from vulnerable child victims through other witnesses, while balancing the due process concerns of trustworthiness, reliability, and confrontation. Here, after T.C.'s accusation, Tome was precluded from interviewing her. The trial court ruled that T.C. was incompetent to testify but then allowed her unsworn out-of-court statements as substantive evidence under the child hearsay statute. However, the trial court neglected to make a finding that T.C. was mentally competent at the time of the alleged offense to create an accurate memory of the incident. The district court short-changed the inquiry of the child's motivation to tell the truth by failing to analyze whether the child understood her general obligation to speak truthfully and not to fabricate stories. Tome was prevented from challenging the accuracy of T.C.'s perceptions and memories of the incident. He was prevented from demonstrating that T.C. was an unreliable witness.

T.C. was incompetent to testify because she could not distinguish between fact and fiction. Several State witnesses readily acknowledged this fact. Nothing before trial made her statements any more trustworthy. The district court's ruling precluded Tome from testing the credibility and trustworthiness of T.C.'s out-of-court statements through the crucible of cross-examining her. The district court's conclusion that T.C.'s hearsay statements were inherently trustworthy was clearly erroneous. Thus, T.C.'s hearsay statements from Officer Marshall, Stone, and Willborn should have been excluded. Their inclusion warrants a new trial.

In addition to being inadmissible under Montana's unique child hearsay law, T.C.'s statements to Officer Marshall, forensic interviewer Stone, and SANE nurse Willborn were testimonial. The admission of T.C.'s hearsay statements violated the Confrontation Clause of the Sixth Amendment to the United States Constitution in light of the modern *Crawford v. Washington* jurisprudence. *Crawford* guarantees certain procedural protections—testing testimony in the crucible of cross-examination. T.C.'s testimonial hearsay statements were presented through these three government agents. The error was not

harmless. This was a case where other than T.C.'s out-of-court statements, no other evidence linked Tome to this crime. DNA evidence from the three items from the crime scene that were tested conclusively determine they contained DNA. (Tr. at 552, 625–26.) This DNA belonged to some other male and not Tome. The DNA evidence from T.C.'s underwear conclusively showed that this crime was committed by someone else and not Tome. The Court must reverse and grant Tome a new trial without out-of-court testimonial statements.

### **ARGUMENT**

#### **I. The district court erred by misinterpreting the child hearsay statute and abused its discretion by admitting T.C.'s hearsay statements.**

The admissibility of non-testimonial hearsay statements is governed by individual states' hearsay laws. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 1374.

At the outset, tracing the evolution to the United States Supreme Court jurisprudence to *Crawford* is instructive.

In 1980, the United States Supreme Court concluded in *Roberts* as follows:

In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally

requires a showing that he [or she] is unavailable. Even then, his [or her] statement is admissible only if it bears adequate “indicia of reliability.” Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

*Ohio v. Roberts*, 448 U.S. 56, 66, 100 S. Ct. 2531, 2539 (1980), *abrogated* by *Crawford*, 541 U.S. 36, 124 S. Ct. 1354.

In 2003, the Montana legislature enacted a statutory provision allowing for child hearsay statements in criminal proceedings. Mont. Code Ann. § 46-16-220. This statutory provision codified prior case law established by *Roberts* and this Court in *State v. S.T.M.*, 2003 MT 221, ¶ 34, 317 Mont. 159, 75 P.3d 1257; *State v. J.C.E.*, 235 Mont. 264, 767 P.2d 309 (1988); and *State v. Osborne*, 1999 MT 149, ¶ 23-24, 295 Mont. 54, 982 P.2d 1045. However, since 2003, the Montana Legislature has not revised this child hearsay statute to keep pace with evolving Confrontation Clause jurisprudence.

Consistent with prior case law, Mont. Code Ann. § 46-16-220 guides lower courts on the admissibility of non-testimonial child hearsay statements through a series of requirements. Mont. Code Ann. § 46-16-220. Namely, the statute requires the prosecution of an alleged

violent crime, trustworthiness of the statement, unavailability of the child witness, probative material facts unavailable through other reasonable efforts, and notice to the opposing party. Mont. Code Ann. § 46-16-220(1)(a–e). The statute focuses heavily on how a court should weigh and balance the circumstances in the present case regarding truthfulness. The statute requires careful evaluation of the relationship and character of the witness offering the child’s statements. Mont. Code Ann. § 46-16- 220(2)(b). Furthermore, a trial court must evaluate the child’s statement in regard to age appropriate knowledge, spontaneity, suggestiveness by other persons, consistency, and corroborative evidence. Mont. Code Ann. § 46-16-220(2)(c–d).

Furthermore, the statute requires a trial court to determine, “if the child’s statement identifies a perpetrator, whether that identity can be corroborated.” Mont. Code Ann. § 46-16-220(2)(d)(ii). This multi-elemental statute puts an emphasis on determining whether hearsay statements are reliable and trustworthy evidence consistent with due process. *See* Mont. Code Ann. § 46-16-220.

Montana Code Annotated 46-16-220(3)(a) mandates that a district court *shall* consider the specific attributes of the child hearsay

declarant when deciding the admissibility of offered child hearsay testimony under subsections (1) and (2). The factors which a court must consider include:

- (i) the child's age;
- (ii) the child's ability to communicate verbally;
- (iii) the child's ability to comprehend the statements or questions of others;
- (iv) the child's ability to tell the difference between truth and falsehood;
- (v) the child's motivation to tell the truth, including whether the child understands the general obligation to speak truthfully and not fabricate stories;
- (vi) whether the child possessed sufficient mental capacity at the time of the alleged incident to create an accurate memory of the incident; and
- (vii) whether the child possesses sufficient memory to retain an independent recollection of the events at issue.

Additionally, Mont. Code Ann. 46-16-220(3)(d) requires a court to consider the availability of corroborative evidence—physical or circumstantial—establishing whether the alleged act can be corroborated and if the child's statements identify a perpetrator, whether that identity can be corroborated.

While absent from statutory language, the structure of the statute and similar prior case law suggests that the district court should review all of these functions of trustworthiness under the totality of the

circumstances. See Mont. Code Ann. 46-16-220; *Osborne*, ¶ 23; *S.T.M.*, ¶ 34.

Here, the State argued T.C.’s statements should be admitted on the ground that “numerous” statements were made spontaneously to other adult witnesses and their “timing” and content gave them “indicia of reliability.” (Tr. at 233–34.) The trial court agreed with the State without conducting the adequate statutory inquiry required.

Admittedly the next day after T.C. was sexually assaulted by someone, she, without being urged by anyone, gave her account to two school counsellors. Even if *arguendo*, T.C. made multiple statements in a relatively short period of time and they appeared consistent, nevertheless, these statements gave no insight about T.C.’s cognitive impairments, education or ability to tell the truth. The district court held an incomplete and flawed hearing— procedurally and substantively.

#### **A. Identity of the perpetrator**

The child hearsay statute requires that when the State seeks to introduce a child’s hearsay statement that identifies a perpetrator, the trial court must make a specific finding as to “whether that identity can

be corroborated.” Mont. Code Ann. § 46-16-220(2)(d)(ii). If a child’s statement identifies a perpetrator, the Court must make a finding that the identity has been corroborated by other evidence.

The district court did not find other evidence that corroborated T.C.’s out-of-court statements as to the identity of the perpetrator. (*See* Tr. at 220.) T.C.’s mother established that Tome lived in a camper near her house and shared common spaces in the building complex. This alone did not make Tome the perpetrator. This is especially true in light of the fact that DNA found on T.C.’s underwear conclusively tested positive for male DNA—only the DNA belonged to some other male who was not Tome. This DNA evidence conclusively belonged to a male perpetrator—it was not Tome. Without T.C.’s out-of-court statements identifying Tome, the State had no case. In its order permitting the child hearsay statements, the court made a rather vague blanket finding as follows: “. . . the Court feels the corroborating evidence consideration set forth in Mont. Code Ann. §§ 46-16-220 and 46-16-221 must be analyzed.” (App. A at 6.) This fails the statute. It is not a clear finding of corroboration. (*See* App. A at 6.)

## **B. Mental capacity to create an accurate memory**

Of course, the mental illness or emotional instability of a witness can be relevant on the issue of credibility, and a witness may be cross-examined on that subject if such illness or instability affects the witness's ability to perceive, recall or describe the events in question. *See State v. Polak*, 2018 MT 174, ¶¶ 22-23, 392 Mont. 90, 422 P.3d 112 (for the general proposition that a jury is entitled to consider facts bearing on the key witness's ability to perceive and accurately remember the incident); *State v. Howard*, 2011 MT 246, ¶ 27, 362 Mont. 196, 265 P.3d 606 (mental incapacity may inhibit a child's ability to accurately relate their experiences to a jury).

The district court did not inquire whether T.C. possessed sufficient mental capacity at the time of the alleged incident to create an accurate memory of the incident. *See* Mont. Code Ann. § 46-16-220 (3)(a)(vi). The statute mandates the district court to make such a determination. The district court failed to consider the question of whether T.C. had sufficient mental capacity at the time of the alleged incident to accurately perceive who had sexually assaulted her, instead concluding:

T.C. had sufficient mental capacity to provide an accurate memory of the incident to Gutschenritter, Smail, and Stone. She disclosed the incident the day after it occurred to Gutschenritter and Smail, then participated in a forensic interview two days after the incident with Stone.

(App. A at 3.)

This was a unique and unusual situation that hinged on T.C.'s ability to perceive and communicate about whether she was sexually assaulted and, if so, identifying the person responsible. Tome was precluded from inquiring through cross-examination whether at the time of the alleged incident T.C. possessed sufficient mental capacity to receive an accurate impression of it. *See S.T.M.*, ¶ 36. The district court failed to consider this question.

**C. The child's ability to tell the difference between the truth and falsity**

Several witnesses readily acknowledged T.C. was unable to distinguish between the truth and falsity—fact and fiction. Several witnesses acknowledged that T.C. can jump from topic to topic but sometimes she can be linear. (*See Tr.* at 234.) Smail acknowledged that T.C. had the tendency to “add in stuff” from movies she has seen and mix it in with what is happening in real life. (*See Tr.* at 381.) Tome had no way of independently ascertaining whether at the moment T.C.

spoke to the school psychologist and the school behavioral specialist she was not “adding in stuff”—fact mixed in with fiction. Smail acknowledged that T.C. sometimes might think that something in a movie and real life were “very connected” or relative. (*See Tr.* at 381.) But Smail claimed because T.C.’s disclosure did not appear rehearsed: “We didn’t have to ask if it was fake or real it was very concretely said.” (*Tr.* at 382.).

The child hearsay statute mandated the district court to make a determination whether T.C. had the ability to understand the importance of saying the truth and the consequences of not saying the truth. (*Tr.* at 243–44.) At trial, the district court categorically concluded that T.C. was unable to comprehend the difference between the truth and a lie. (*See Tr.* at 220.) Before trial, there is record establishing T.C. could not distinguish fact from fiction. How then did her pre-trial statements take on the quality of reliability? It was clear error to admit T.C.’s out-of-court statements for the truth of the matter asserted.

**D. The child's motivation to tell the truth including whether the child understands the general obligation to speak truthfully and not fabricate stories**

Under Mont. Code Ann. § 46-16-220 (3)(a)(v) the trial court must examine the child's motivation to tell the truth, including whether the child understands the general obligation to speak truthfully and not fabricate stories. The statute requires the trial court to make a factual finding whether the child understood her general obligation to speak truthfully and not to fabricate stories. The district court glossed over this determination when it concluded as follows:

T.C's motivation to tell the truth was appropriate, given the sincerity of her statements, the context surrounding them, and the usual pattern of conversation T.C. follows. Gutschenritter and Smail testified that T.C. was more direct, linear, and to-the-point than usual in her disclosure to them on November 3, 2016. They testified that T.C. usually jumps around from topic to topic in a conversation and often does not speak in a linear matter.

(App. A at 3.)

In its determination of T.C.'s motivation to tell the truth, the district court neglected the central inquiry. It failed to consider whether T.C. understood her general obligation to speak truthfully and not to fabricate stories. The trial court placed great weight on T.C. telling her account linearly. This, however, does not mean T.C. fulfilled

her obligation to speak truthfully. It was clear error to conclude T.C. had a motivation to tell the truth after concluding she did not understand the difference between the truth and falsity.

**E. Whether the child had sufficient memory to retain an independent recollection**

Admittedly, two days after the incident, T.C. disclosed to Gutschenritter, Smail, Officer Marshall, and Stone that she had been sexually assaulted. (*See Tr.* at 242–43.) The forensic interview and SANE examination revealed injuries consistent with sexual abuse. The only question at trial was whether Tome was the perpetrator. The district court leaned heavily on the “timing,” “numerosity,” and “spontaneity” of T.C.’s out-of-court statements thereby crediting that these statements were imbued with indicia of reliability. At Tome’s second trial, the district court ruled T.C. “unavailable” to testify because it had ruled in his first trial that resulted in mistrial that she could not understand the oath nor the difference between the truth and falsity. This fact is irreconcilably at odds with a conclusion that T.C. had independent recollection of who sexually assaulted her given several witnesses who readily acknowledged that T.C. frequently mixed in truth with fantasy. The district court erred because it failed to analyze

whether at the time of the incident, T.C. had sufficient memory to retain an independent recollection of the event at issue.

#### **F. Trustworthiness**

This court has said that when a trial court determines whether a hearsay statement is admissible, the witness's recitation of the declarant's alleged out-of-court statement must be evaluated for sufficient "guarantees of trustworthiness." *S.T.M.*, ¶ 14; *State v. LaPier*, 208 Mont. 106, 676 P.2d 210 (1984); *J.C.E.*, 235 Mont.at 264, 767 P.2d at 309. By statute evaluating the admissibility of child hearsay statements, a trial court must make a specific finding that "the time, content, and circumstances" of the child's statement "provide circumstantial guarantees of trustworthiness." Mont. Code Ann. § 46-16-220.

In *S.T.M.*, this Court adopted the reasoning of the United States Supreme Court in *Idaho v. Wright*, 497 U.S. 805, 823, 110 S.Ct. 3139, 3150 (1990) as follows:

In short, the use of corroborating evidence to support a hearsay statement's "particularized guarantees of trustworthiness" would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, a result we think at odds with the requirement that hearsay evidence

admitted under the Confrontation Clause be so trustworthy that cross-examination of the declarant would be of marginal utility.

*S.T.M.*, ¶ 32 citing *Wright*, 497 U.S. at 823, 110 S.Ct. at 3150.

The Court’s decision in *S.T.M.* adopted the reasoning of the United States Supreme Court embodied in *Wright*—that has since been abrogated by *Crawford*— which required a trial court to make a pre-trial determination that if the declarant was unavailable to testify and her out-of-court testimony bore adequate “indicia of reliability” to meet the requirements of the Confrontation Clause then this obviated the need for cross-examination. *See Wright*, 497 U.S. at 814–15, 110 S.Ct. at 3146. In essence, the *Wright* Court simplified the hearsay admissibility inquiry into two prongs. First, it required a showing of necessity—the prosecution was required to demonstrate the declarant was unavailable to testify. Second, the declarant’s hearsay statement would be deemed admissible “only if it bears adequate indicia of reliability.” *Wright*, 497 U.S. at 814-15, 110 S.Ct. at 3146. Moreover, when the hearsay statement does not fall within one of the firmly rooted exceptions to the rule against hearsay—and a residual exception is not among the firmly rooted exceptions—the indicia of reliability

requirement may be met only where the hearsay statement is supported by “a showing of particularized guarantees of trustworthiness.” *S.T.M.*, ¶¶ 28–29 *citing Wright*, 497 U.S. at 816, 110 S.Ct. at 3147. However, *Wright* has since been overturned by *Crawford*.

The district court categorically concluded that as a trial witness, T.C. was unable to comprehend the difference between the truth and a lie. (*See Tr.* at 220.) This conclusion of fact is irreconcilably at odds with the legal conclusion that T.C.’s out-of-court statements before trial had guarantees of reliability or were otherwise trustworthy. How can T.C.’s out-of-court statements not sworn under oath be deemed trustworthy? If T.C. could distinguish between fact and fiction before trial, the defense should have been allowed room to question her to ascertain whether her impression was accurate. The district court’s conclusion is at odds with the requirement that hearsay evidence admitted under the Confrontation Clause be so trustworthy that cross-examination of the declarant would be of marginal utility. *See S.T.M.*, ¶ 32. The reliance upon this child hearsay rule is permissible if the declarant’s truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal

utility. *See S.T.M.*, ¶ 31. It could not be said that the test of cross-examination would be of marginal utility to Tome.

To meet the substantial requirements for trustworthiness, Montana law requires a trial court evaluate specific features of possible testimony and make specific findings when evaluating child hearsay. Critically, the statute mandates if a child's statements identify a perpetrator, a court must consider whether the identity can be corroborated. This serves to balance the interests of child-provided information with the interests of reliability and due process. In this case, the district court failed to address, evaluate, or make a clear finding that the hearsay evidence was reliable. This error violated Tome's statutory due process rights.

The Supreme Court in *Wright* held that "particularized guarantees of trustworthiness' must be shown from the totality of the circumstances," but cautioned that the "relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief." *Wright*, 497 U.S. at 819, 110 S.Ct. at 3148. Specifically, evidence at trial that corroborates the truth of the statement is not to be considered. *S.T.M.*, ¶ 30. The Court

cautioned that it should be clear that in child sexual abuse cases, a court may not consider corroborating evidence when making a determination about the trustworthiness of hearsay statements under the Confrontation Clause. *S.T.M.*, ¶ 34. Here, T.C.'s statements to the out-of-court witnesses were not trustworthy nor reliable because she has no ability to tell the difference between truth and falsity.

**II. The trial court violated Tome's right to confront the State's complaining witness when it admitted testimonial hearsay declared to several government agents over trial counsel's objections.**

The district court incorrectly ruled that T.C.'s out-of-court statements to the forensic interviewer Kami Stone were non-testimonial and therefore admissible under Montana law. Additionally, the district court incorrectly permitted the State to elicit T.C.'s out-of-court statements through Officer Marshall and Sane nurse Kelli Willborn. The district court concluded that the State could elicit T.C.'s out-of-court statements from only three adult witnesses—Gutschenritter, Smail, and Stone. The ruling of the trial court did not allow the State to elicit T.C.'s out-of-court statements from Officer Marshall nor Willborn. T.C.'s testimony was the only link establishing Tome's guilt in the eyes of the jury. The admission of this evidence rendered Tome's

ability to defend against the State's case exceedingly difficult given he was not allowed access to interview T.C. at any time prior to trial.

Article II, Section 24 of the Montana Constitution and the Sixth Amendment of the United States Constitution guarantee a criminal defendant the right to confront or face the witnesses against him. *State v. Baker*, 2013 MT 113, ¶ 18, 370 Mont. 43, 300 P.3d 696 (citations omitted). The essential purpose of the right to confront witnesses is to secure the opportunity to test witnesses' testimony through cross-examination. *Baker*, ¶ 18 (citations omitted).

However in 2004, the United States Supreme Court in *Crawford*, 541 U.S. at 68, 124 S.Ct. at 1374, held that testimonial hearsay statements of witnesses absent from trial are inadmissible under the Confrontation Clause unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination. *See Howard*, ¶ 33.

The Supreme Court's rulings in *Crawford* and *Davis* have clarified the Confrontation Clause only applies to testimonial statements. As argued above, a hearsay statement that fails to implicate the Confrontation Clause may nevertheless be inadmissible hearsay. *Davis*

*v. Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 2274–75 (2006); *State v. Spencer*, 2007 MT 245, ¶ 33, 339 Mont. 227, 169 P.3d 384.

To determine whether a statement is testimonial, “[i]n the end, the question is whether, in light of all the circumstances, viewed objectively, the ‘primary purpose’ of the conversation was to ‘creat[e] an out-of-court substitute for trial testimony.’” *Ohio v. Clark*, 576 U.S. 237, 135 S. Ct. 2173, 2180 (2015) quoting *Michigan v. Bryant*, 562 U.S. 344, 358, 131 S. Ct. 1143, 1155 (2011).

Fourteen years after *Roberts*, the United States Supreme Court departed from pre-trial judicial determinations of trustworthiness to a jurisprudence that allows jurors to evaluate the reliability of evidence after all witnesses have been thoroughly cross-examined. See *Crawford*, 541 U.S. at 51, 124 S. Ct. at 1364. “[The Confrontation Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.” *Crawford*, 541 U.S. at 61, 124 S. Ct. at 1370. To determine which declarants must be tested by cross-examination, the *Crawford* Court concentrated on who exactly was a witness within the meaning of the Clause. The Court opined that a “witness” against the

accused was one “who ‘bear[s] testimony.” *Crawford*, 541 U.S at 51, 124 S. Ct. at 1364. Therefore, the Clause was primarily concerned with “testimonial hearsay.” The Confrontation Clause applies to witnesses against the accused who bear testimony. *Crawford*, 541 U.S. at 51, 124 S. Ct. at 1364. Testimony is “a solemn declaration of affirmation made for the purpose of establishing or proving some fact.” *Crawford*, 541 U.S. at 51 (internal citations omitted). This definition of testimony includes out-of-court hearsay statements. *Crawford*, 541 U.S. at 50–51 (“Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.”).

The Confrontation Clause prohibits the admission of a testimonial hearsay statement unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. *State v. Laird*, 2019 MT 198, ¶ 107, 397 Mont. 29, 447 P.3d 416; *Spencer*, ¶ 16; *Melandaz-Diaz v. Massachusetts*, 557 U.S. 305, 309, 129 S. Ct. 2527, 2531 (2009). The Confrontation Clause requires this testimony to be tested by “the crucible of cross-examination.” *Crawford*, 541 U.S at 61; *see also*, *State v. Mizenko*, 2006 MT 11, ¶ 14, 330 Mont.

299, 127 P.3d 458. This Court recognizes the cross-examination process as “essential to the adversarial system” and as “the most rigorous, demanding, and exacting test.” *Mizenko*, ¶ 13. Therefore, if a declarant’s statement is testimonial, the defendant must have had the opportunity to cross-examine that declarant before she became unavailable for trial.

Out-of-court statements are testimonial, however, “when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” *Laird*, ¶ 85 citing *Davis*, 547 U.S. at 822, 126 S. Ct. at 2273-74.

Admittedly, T.C.’s statements to the school psychologist, Gutschenritter and the behavioral specialist, Smail, were non-testimonial because they were not government agents at the time T.C. disclosed to them she had been allegedly abused. Admittedly, T.C.’s out-of-court statements to Dr. Maynard were nontestimonial. Nevertheless, T.C.’s out-of-court statements to Officer Marshall, to the

SANE nurse, and to the forensic interviewer were undoubtedly testimonial.

Here, the State sought to introduce T.C.'s statements through five separate witnesses: Dr. Maynard, Officer Marshall, Stone, Gutschenritter, and Smail. (Tr. at 496,503–304, 510.) The trial court ruled T.C.'s out-of-court statements were admissible through only Gutschenritter, Smail, and Stone. Nevertheless, the State admitted T.C.'s out-of-court statements through two additional adult witnesses, Kelli Willborn and Officer Marshall. The State played for the jury the video recording of the forensic interview Stone conducted with T.C. Each of these broken, fragmented statements from the adult witnesses served to identify an alleged perpetrator as a man named Ricky.

Here, based on all of the circumstances, the “primary purpose” in speaking with Officer Marshall, Kami Stone, and Kelli Willborn was to create an out-of-court substitute for trial testimony. *See Laird*, ¶97; *see also, State v. Porter*, 2018 MT 16, ¶ 26, 390 Mont. 174, 410 P.3d 955.

Officer Marshall went to T.C.'s mother's residence to investigate. At the residence, T.C. gave out-of-court statements to Officer Marshall alleging that her attacker was a man named Ricky. Those out-of-court

statements T.C. made to Officer Marshall are unquestionably testimonial. Those statements were made to Officer Marshall when he came to investigate the allegations of sexual abuse at T.C.'s home.

Officer Marshall's investigation progressed by taking T.C. to get a SANE rape kit examination and then to get a forensic interview. T.C.'s out-of-court statements to SANE nurse Kelli Wilborn were clearly made with intent to create evidence. Kelli Willborn conducted T.C.'s SANE examination.

The district court erred when it concluded that T.C.'s statements to forensic interviewer Stone were nontestimonial because they were made in her capacity as a forensic interviewer. (App. A at 7.) After the SANE evaluation, Officer Marshall took T.C. to the forensic interviewer, Stone. T.C.'s out-of-court statements to Stone were testimonial—they were clearly made with intent to create evidence. Stone conducted her forensic interview of T.C. and recorded it in video in preparation for the prosecution. Stone's whole purpose was to create a videotaped statement for use by law enforcement. Forensic interview videos are often played at trial to show consistency with a child's testimony. Indubitably, the forensic interview was developed to

facilitate a criminal prosecution. *See Baker*, ¶ 18. These statements were clearly testimonial.

Under certain circumstances, this Court allows prior out-of-court statements of a witness to be admitted into evidence. For example, Mont. R. Evid. 801(d)(1)(A) allows admission of prior statements by a witness that are inconsistent with the witness's testimony at trial. *State v. Pound*, 2014 MT 143, ¶ 33, 375 Mont. 241, 326 P.3d 422. This Court has ruled that a "claimed lapse of memory," as well as testimony marked by "evasion, denial, and inability to remember," are inconsistencies within the meaning of Rule 801(d)(1)(A), when the prior statements have been "sufficiently inconsistent" with testimony at trial. *Baker*, ¶ 30; *Pound*, ¶¶ 33, 37 (citations and internal quotation marks omitted). In *Baker*, the Court upheld the admission of a taped forensic interview of a 6- or 7-year old victim of sexual assault whose testimony was "sufficiently inconsistent" with her interview statements, in which some areas were consistent and others were not. *Baker*, ¶ 30. In contrast here, there was no basis for admitting any portion of the forensic interview as prior inconsistent statements. The admission of this video runs counter to Rule 801(d)(1)(A)'s purpose to favor trial

testimony over prior, out-of-court statements. Tome had a right to confront this complaining witness in open court for cross-examination.

The primary purpose of T.C.'s out-of-court statements to each of these three adults was to create an out-of-court substitute for trial. MSDB called Officer Marshall to investigate T.C.'s allegations of abuse. Before Willborn attempted to conduct her SANE rape kit analysis<sup>4</sup>, T.C. made out-of-court statements identifying her attacker as Ricky. T.C. made out-of-court statements identifying her attacker as Ricky during her forensic interview with Stone. The only purpose of these interactions with these three adults was to create evidence against Tome. Clearly, all these statements were testimonial.

Moreover, the trial court refused to allow Tome to interview T.C. at any time before trial. At his first trial, T.C. could not take the oath to testify truthfully. The trial court declared a mistrial. At the second trial, the State took a different tact. The State moved to declare T.C. an unavailable witness even though Tome had not been given a prior opportunity to cross-examine her. The trial court concluded that T.C.

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<sup>4</sup> Unlike in *Porter*, the SANE nurse in the present case did not provide any treatment. (Tr. at 493–99.) T.C. was only treated by Dr. Maynard, her pediatrician.

was unavailable to testify. It then allowed the State to admit her out-of-court testimonial statements to be elicited from only three adult witnesses.

The testimonial hearsay came into evidence and Tome had no prior opportunity to cross-examine T.C. “That alone is sufficient to make out a violation of the Sixth Amendment.... Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.” *Laird*, ¶ 107; *see also*, *Crawford*, 541 U.S. at 68-69, 124 S. Ct. at 1374.

### **III. The error was not harmless.**

Within the harmless error analysis, the question is whether the State can show there is no reasonable possibility that the erroneous exclusion of evidence might have contributed to the conviction. *See State v. Reichmand*, 2010 MT 228, ¶ 23, 358 Mont. 68, 243 P.3d 423; *see also*, *State v. Van Kirk*, 2001 MT 184, ¶¶ 42-44, 306 Mont. 215, 32 P.3d 735. The Court reemphasized that “this is a very high bar.” *Reichmand*, ¶ 23.

The State bears the harmless error burden to demonstrate that there is no reasonable possibility that this erroneous admission of this evidence “might have contributed” to Tome’s conviction. *Van Kirk*, ¶ 42. The State will be unable to meet this “very high bar.” *Reichmand*, ¶ 23.

Even if the Court considers T.C.’s out-of-court statements to the school psychologist, the behavioral specialist and the pediatrician were non-testimonial and could be admitted as substantive evidence, nevertheless, T.C.’s out-of-court statements to Officer Marshall, to the SANE nurse, and to the forensic interviewer were undoubtedly testimonial. The erroneous admission of this evidence was not harmless. The psychologist and the behavioral therapist verbally described T.C.’s statements in their live testimony.

However, the forensic interview was played as a video for the jury. Stone’s forensic video evidence was the most devastating piece of evidence. The video highlighted Stone’s testimony for the jury because it was qualitatively superior to the verbal description of the school psychologist and the behavioral therapist. The jury observed T.C.’s out-of-court testimony from her own mouth through the medium of video. As the trial court itself reasoned at sentencing “When watching [T.C.’s]

interview with DFS it is evident just how much the Defendant's actions effected [T.C.] physically and mentally. Numerous times the victim stated how it hurt and how wrong it was what the Defendant did.”  
(D.C. Doc. 175 at 8.)

Moreover, Officer Marshall also provided additional out-of-court statements. He testified that T.C. told him that a man named Rick showed him pornographic images on his phone and then pushed her from her chair, pulled down her pants and had sex with her. Qualitatively, this evidence was superior to other evidence and its addition supplied this additional hearsay. The State, by presenting the forensic interview video and the testimonies of the SANE nurse and Officer Marshall, ostensibly recognized such evidence was qualitatively superior to the verbal descriptions given by the psychologist and the behavioral specialist from MSDB.

### **CONCLUSION**

Tome respectfully requests this Court reverse and remand for a new trial.

Respectfully submitted this 18<sup>th</sup> day of August, 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 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 9,958, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Moses Okeyo  
MOSES OKEYO

APPENDIX

Findings of Fact, Conclusions of Law, and Order on Admission of Child  
Hearsay Testimony .....App. A

Order Denying Motion for Deposition .....App. B

Exhibits G through K .....App. C

## CERTIFICATE OF SERVICE

I, Moses Ouma Okeyo, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 08-18-2020:

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