IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0527

STATE OF MONTANA,

Plaintiff and Appellee,

v.

MARCIAL MEJIA JR,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, the Honorable Rod E. Souza, Presiding

APPEARANCES:

CHAD WRIGHT
Appellate Defender
MICHAEL MARCHESINI
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147
Michael.Marchesini@mt.gov
(406) 444-9505

ATTORNEYS FOR DEFENDANT
AND APPELLANT

TIMOTHY C. FOX
Montana Attorney General
TAMMY K PLUBELL
Interim Bureau Chief
Appellate Services Bureau
P.O. Box 201401
Helena, MT 59620-1401

SCOTT D. TWITO
Yellowstone County Attorney
MORGAN DAKE
Deputy County Attorney
P.O. Box 35025
Billings, MT 59101

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Montana Code Annotated

Montana Constitution

United States Constitution

Montana Rules of Appellate Procedure

Montana Rules of Evidence

Other Authorities

STATEMENT OF THE ISSUE

Whether the District Court wrongly deprived the jury of relevant impeachment evidence regarding the State's key witness's drug habit that admittedly impaired her perception and recall.

STATEMENT OF THE CASE

In 2012 and 2013, T.N.[1] was a habitual methamphetamine and bath salts user. (Defense Exhibit (Exh.) I at 9–10, 32–33.) She was using drugs "daily," and her drug use was causing mind-altering side effects, including hallucinations, impaired memory, confusion, and borderline schizophrenia. (Exh. I at 9–10, 32–33.)

In 2015, at age 17, T.N. found herself detained at the Riverside Youth Correctional Facility. (*See* 3/19–3/23/2018 Trial Transcript (Trial Tr.) at 305–18.) About a month into her detention, she told her case manager she had been subject to sexual intercourse without consent in the winter of 2012, several years earlier. (*See* District Court Document (Doc.) 31 at 2; Trial Tr. at 305, 308, 317.) T.N. alleged the assailant was Marcial Mejia, a Hispanic man and military veteran whom she met on

[1] This brief uses the alleged victim's initials out of respect for her privacy. Such redaction is not required by M. R. App. P. 10(6) ("Use of initials for parties in certain proceedings").

social media. (Trial Tr. at 430–31, 576–77.) Based on T.N.'s allegations, the police arrested Mr. Mejia while he was working at the Army Reserve Center and charged him on September 23, 2015, with sexual intercourse without consent. (Trial Tr. at 486; Doc. 5.)

T.N. testified at trial and described a sexual encounter Mr. Mejia categorically denied. (*See* Trial Tr. at 379–448, 575.) Through several pre-trial rulings and sustained objections at trial, the District Court barred Mr. Mejia from questioning T.N. about her daily drug habit, her use of bath salts[2] in addition to methamphetamine, or the mind-altering side effects she had experienced. (3/14/2018 Tr. at 35; Doc. 176 at 8–9; Trial Tr. at 9–11, 315–16, 419–20.) With the court limits in place, T.N. instead testified she was not a heavy drug user in 2012 and her drug use in no way affected her memory of the incident. (Trial Tr. at 389, 419–20, 436–37.)

---

[2] Bath salts, or "Synthetic Cathinones," are "unregulated psychoactive mind-altering substances with no legitimate medical use and are made to copy the effects of controlled substances" such as amphetamines and cocaine. Common side effects include paranoia, hallucinations, panic attacks, and excited delirium. *See Synthetic Cathinones ('Bath Salts') Drug Facts*, National Institute on Drug Abuse (NIDA), updated July 2020, accessed September 10, 2020, available at: https://www.drugabuse.gov/publications/drugfacts/synthetic-cathinones-bath-salts.

After three days of trial and nearly a dozen hours of deliberation that spanned two days, a Yellowstone County jury deadlocked on whether to find Mr. Mejia guilty. (Trial Tr. at 705, 721; Docs. 196, 199.) Only after the District Court issued a *Norquay* instruction did the jury return a guilty verdict. (Trial Tr. at 721–25.)

The District Court sentenced Mr. Mejia to 40 years to the Montana State Prison with 20 years suspended, designating him a level 2 sex offender. (Doc. 278.) Mr. Mejia filed a timely notice of appeal. (Doc. 280.)

STATEMENT OF THE FACTS

Marcial Mejia moved to Billings in August 2012, when the United States Army stationed him there to work as a supply sergeant at the Army Reserve Center. (Trial Tr. at 576, 579.) Mr. Mejia was 29 years old at the time, about to turn 30. (*See* Doc. 277 at 1.) Upon arriving in Billings, Mr. Mejia moved in with an old Army friend, Clark, with whom he had served in Iraq in 2007 and 2008. (Trial Tr. at 552, 576.) Mr. Mejia served two combat tours in Iraq and developed post-traumatic stress disorder (PTSD) as a result. (7/16/2019 Sentencing Transcript (Sentencing Tr. at 26.)

Whenever Mr. Mejia was reassigned to a new location, he would use social media, usually Facebook, to meet new people. (Trial Tr. at 576.) Mr. Mejia often reached out on Facebook to people with whom he thought he might have things in common. (Trial Tr. at 577.) He liked to meet other Hispanic people because he found he could "relate [ ] fairly quickly" to them. (Trial Tr. at 577.)[3]

T.N.'s Facebook page at the time publicly displayed a Hispanic last name and stated she was from Mexico. (Trial Tr. at 380–81, 578.) In truth, T.N. is from Billings, not Mexico. (Trial Tr. at 418.) T.N. was also 14 years old at the time, but she lied on her Facebook page that she was 16. (Trial Tr. at 417, 578–79.)

When Mr. Mejia noticed he and T.N. had Facebook friends in common, he sent her a friend request. (Trial Tr. at 580.) T.N. accepted the request, the two exchanged phone numbers, and Mr. Mejia said she should contact him if she ever wanted to hang out. (Trial Tr. at 385, 581.)

[3] Unlike Mr. Mejia, the overwhelming majority of Billings—85.1%—is non-Hispanic white. *See* https://www.census.gov/quickfacts/fact/table/billingscitymontana/INC110218, accessed September 10, 2020.

T.N. was engaged in heavy methamphetamine and bath salts use in 2012 and 2013. (Exh. I at 9–10, 32–33.) T.N. admitted the following in a May 2017 pre-trial interview with defense counsel:

> TNA [T.N.]: Um, I think I did use drugs earlier that day [of the alleged sexual assault].
>
> PS [Defense Counsel]: Okay, and what would that have been?
>
> TNA: Methamphetamine.
>
> PS: Okay. How much earlier that day?
>
> TNA: Um, I don't know, I want to say like sometime around the afternoon.
>
> PS: Okay, so you were still under the influence of that when [Mr. Mejia] picked you up?
>
> TNA: Probably.
>
> PS: Okay, were you a daily user at that time?
>
> TNA: *chuckles* Yes.
>
> . . .
>
> TNA: And after while like they [the people I was using methamphetamine with] would ask me if I wanted to get high more often.
>
> PS: Um hmm.
>
> TNA: . . . and then over the summer and then like towards the winter time [of 2012] is when it like I started doing it more and more and more. And they were giving me bath salts and they were shooting me up inside of my sleep so like there's a

lot that went on and happened that I don't really remember that good like in between those times but during like I think November and stuff I was trying to stop.

PS: Okay but it was affecting you.

TNA: Yeah.

PS: Your ability to remember stuff.

TNA: Yes.

. . .

TNA: [A]nd I was using drugs but I didn't get weird this time and stuff but still.

PS: What do you mean by getting weird?

TNA: Like, I don't know, I was coo-coo.

PS: Like out of control?

TNA: Yeah in 2013, 2012, hell yeah.

PS: And what does that mean out of control, you don't remember things, you used drugs a lot, you don't go to school?

TNA: I was like, hallucinating and stuff, like it was weird.

. . .

TNA: . . . I remember when I was in jail and I was like, you know going to treatment, they told me like you know you're not like no, and they said that you know like I was on the verge of being schizophrenic because of like getting shot up with bath salts and people smoking bath salts.

PS: And that's 2012 and 2013 yeah.

TNA: Yeah.

(Exh. I at 9–10, 32–33.)

In the midst of this heavy, mind-altering drug use, T.N. reached out to Mr. Mejia. The two offered different accounts of what happened the first time they met.

According to T.N., one late evening in November 2012, around 11:00 p.m. or midnight, she texted Mr. Mejia to ask for a ride home from a friend's house. (Trial Tr. at 386–88, 428.) T.N. testified this was probably on a Wednesday or Thursday. (Trial Tr. at 420.) Her friend's house was on the "South Side" of Billings. (Trial Tr. at 386.) T.N. lived with her older brother near the Sears department store about three or four miles away, and she "needed a ride home because it was getting late and it was snowing." (Trial Tr. at 386, 389–90.)

T.N. claimed she asked Mr. Mejia for a ride home because none of her friends had a car, and her brother was not allowed to use his mom's car. (Trial Tr. at 386, 426.) T.N. testified, "I called a taxi, but I wasn't waiting that long to get home." (Trial Tr. at 426.) So she opened her Facebook messages, found Mr. Mejia's number, and texted him. (Trial

Tr. at 386.) When defense counsel asked, "So you decided to call a complete stranger for a ride and then offer him $20 for gas money," T.N. testified, "Pretty much." (Trial Tr. at 426; *see also* Trial Tr. at 397–98.)

Despite it being 11:00 p.m. or midnight, T.N. claims that when she texted Mr. Mejia asking if he was busy, "a little time pas[sed]," and then he responded he "just got off work." (Trial Tr. at 386.) Mr. Mejia worked daily from 8:00 a.m. to 4:30 p.m. (Trial Tr. at 579.) T.N. said she asked Mr. Mejia for a ride, and he texted back saying he was "just going to take a shower or something like that" before picking her up. (Trial Tr. at 386.) So T.N. waited for Mr. Mejia to shower instead of waiting for a taxi. (Trial Tr. at 386, 426.)

T.N. had Mr. Mejia pick her up down the street from her friend's house. (Trial Tr. at 386.) When Mr. Mejia pulled up in his truck, T.N. claimed she was surprised to see he was a man. (Trial Tr. at 385.) She thought, based on their limited interactions on social media and by text, he was a woman. (Trial Tr. at 385.) Despite her surprise, she got in his truck. (Trial Tr. at 387.) T.N. texted her brother to let him know she would be home soon, and her brother texted back, "okay, see you soon, love you." (Trial Tr. at 388.)

T.N. testified Mr. Mejia was wearing his Army uniform when he picked her up and she assumed he was safe and trustworthy because he was in the military. (Trial Tr. at 394, 402.) Mr. Mejia had a locker at work and typically changed out of his uniform and into civilian clothes at the end of his workday at 4:30 p.m. (Trial Tr. at 579.)

According to T.N., Mr. Mejia said during the ride that he needed to stop by his apartment to change clothes and grab something. (Trial Tr. at 390.) When they got to Mr. Mejia's house, Mr. Mejia told T.N. he "might be a minute," so she decided to come inside and use the bathroom. (Trial Tr. at 394.)

T.N. claimed that after she used the bathroom, Mr. Mejia asked her if she wanted a drink, and she declined. (Trial Tr. at 396.) When she went to leave out the front door to go back to the truck, she claimed Mr. Mejia physically blocked her from opening the door. (Trial Tr. at 397.) She said Mr. Mejia insinuated he wanted her to have sex with him, became agitated when she refused, and then forcibly "wrestled" her to the couch. (Trial Tr. at 398–402, 426–27.) T.N. stated she told him to stop, and she screamed for help. (Trial Tr. at 403, 427.) She claimed Mr.

Mejia pinned her down with one arm, used his other arm to take off her pants, and proceeded to have sex with her. (Trial Tr. at 402–04.)

T.N. offered conflicting accounts of what happened next. When she first mentioned the incident two-and-a-half years later, she told the investigating officer, Detective Michael Robinson, Mr. Mejia gave her a ride home afterwards. (Trial Tr. at 428.) At trial, T.N. offered a more dramatic account: after the sexual intercourse, she "[w]aited for my opportunity to leave." (Trial Tr. at 405, 428.) When Mr. Mejia went to the bathroom, she fled his house and "ran down alleys and ran all the way home" in the cold winter weather to her brother's apartment—a distance of over a mile from Mr. Mejia's house. (Trial Tr. at 405–06, 428.)

When asked which of these conflicting stories was true, T.N. testified, "The one where I say I left the house" and ran home, asserting what she told Detective Robinson about getting a ride in Mr. Mejia's truck was "not true." (Trial Tr. at 428.) Upon arriving at her brother's home, after running over a mile through alleys in the snow in the middle of the night, T.N. did not mention the incident to any of her family members who were home and still awake at the time. (Trial Tr.

at 406–07.) T.N. did not tell her brother, even though he was the family member with whom she had the closest relationship. (Trial Tr. at 446.)

Mr. Mejia testified to a very different version of events. He told the jury that after they exchanged phone numbers on Facebook, T.N. called him one afternoon on December 3, 2012, saying she wanted to "meet up that evening to hang out." (Trial Tr. at 583.) Mr. Mejia produced a cell phone bill at trial showing a 3-minute-long incoming call from T.N. at 2:39 p.m. that day. (Trial Tr. at 583–84; Defendant's Exh. C at 10.)

According to Mr. Mejia, he and T.N. communicated by phone and text later that evening, around 9:30 p.m., and firmed up their plans to hang out. (Trial Tr. at 583–84.) Mr. Mejia's cell phone bill showed one outgoing and one incoming call from T.N. at that time. (Exh. C at 10.) T.N. asked Mr. Mejia to pick her up at a gas station, which he did. (Trial Tr. at 584.)

Mr. Mejia asked T.N. what there was to do in Billings since he was new to town. (Trial Tr. at 585.) On T.N.'s suggestion, they went to the "Rims," to "Swords Park," and then got sodas at a gas station. (Trial Tr. at 585–86.) Then they "cruised towards the west end," and when

they were near Mr. Mejia's neighborhood, he asked T.N. if she wanted to see where he lived. (Trial Tr. at 586.) She said yes because she needed to use the restroom anyway. (Trial Tr. at 586.)

Mr. Mejia testified the two went in his house and remained there for about 10 minutes; she used the restroom, and Mr. Mejia waited for her in the kitchen. (Trial Tr. at 586.) Mr. Mejia testified his housemate, Clark, was at home and in his room. (Trial Tr. at 586.)

Clark himself confirmed he was most likely home when T.N. came to their house late at night. Clark got laid off from his job in late November and was usually at home. He testified sound carried well in the small two-bedroom house. And Clark said he never heard Mr. Mejia sexually assault anyone in their living room. (Trial Tr. at 552–55.)

After T.N. used the bathroom, Mr. Mejia drove her home to an apartment complex near the Sears. (Trial Tr. at 586–87.) He stated the two exchanged a few text messages and brief phone calls and hung out a couple more times in the following weeks, and then lost touch. (Trial Tr. at 587–92.) Mr. Mejia's phone bill shows the two exchanged brief phone calls on several occasions between December 4 and December 12. (Exh. C at 10–13.)

Mr. Mejia attempted to contact T.N. a couple years later, sending her what he acknowledged was a "flirtatious" email in October 2014 that said, "come back to me." (Trial Tr. at 592–94, 605, 615.) Mr. Mejia also looked T.N. up and "followed" her on Facebook around that time. (Trial Tr. at 594.)

When she was detained two-and-a-half years later, T.N. put down on her intake form at Riverside that she had never been raped. (Trial Tr. at 436.) She answered the question, "Have you ever been raped, or been in danger of getting raped?," with a "No." (Defendant's Exh. J.)

At Riverside, T.N. had to follow "a lot of rules." (Trial Tr. at 432.) She did not have access to a computer, cell phone, or social media. (Trial Tr. at 318, 433.) She had "very restricted access" to a telephone, and any numbers she wanted to call had to be pre-approved and dialed by her case manager. (Trial Tr. at 318.) There were rigid daily schedules, and T.N. wanted to get out of detention. (Trial Tr. at 325, 433.)

About a month after being detained at Riverside, on April 10, 2015, T.N. told her case manager and counselor, Kyle Johnson, that Mr.

Mejia had forced sex with her years earlier.[4] (Trial Tr. at 308, 317.) T.N. claimed she mentioned this to Ms. Johnson because Mr. Mejia had been contacting her little sister on social media, and she was worried he was going to sexually assault her too. (Trial Tr. at 413, 445.) Ms. Johnson testified that after T.N. told her about this past incident, she and the other staff at Riverside were more "lenient" with T.N. and gave her more "leeway." (Trial Tr. at 317, 325.)

The State asked Ms. Johnson at trial whether she had "any opinions about the overall truthfulness" of the March 2015 intake form on which T.N. denied having ever been raped. (Trial Tr. at 306.) Over Mr. Mejia's objection, the District Court allowed Ms. Johnson to opine, "it wouldn't be uncommon for them [the youth] not to be truthful on those." (Trial Tr. at 307.)

[4] T.N. alleged, apparently for the first time at trial, that she actually first discussed the incident with a counselor named Susan at "Rimrock," which is a treatment center in Billings T.N. apparently attended in 2014. (Trial Tr. at 412; *see* Exh. I at 33.) Despite mandatory reporting requirements, the State produced no evidence corroborating this earlier disclosure. All parties—the State, Mr. Mejia, and the District Court—consistently treated T.N.'s April 10, 2015 discussion with Kyle Johnson at Riverside as the first time she told anyone about the incident. (*See* Doc. 31 at 2; Doc. 69 at 2; Doc. 74 at 3; Trial Tr. at 659.)

Ms. Johnson added T.N. was "much more open and honest in an individual session with me than she would have been in group." (Trial Tr. at 307.) Mr. Mejia again objected to Ms. Johnson's opinions about T.N.'s truthfulness, and this time the District Court sustained the objection. (Trial Tr. at 307.)

Ms. Johnson reported T.N.'s allegation to a Child Abuse Hotline. (Trial Tr. at 308.) Detective Robinson interviewed T.N. twice while she was in detention; once by phone, and once in person. (Trial Tr. at 478–79, 513.) T.N. described Mr. Mejia to Detective Robinson as a 200-pound man in his 40s (Mr. Mejia was 160 pounds and in his early 30s). (Trial Tr. at 515, 585; *see* Doc. 277 at 1.)

Detective Robinson spoke with Mr. Mejia at the Army Reserve Center on September 2, 2015, although he claimed he did not tell Mr. Mejia what the investigation was about. (Trial Tr. at 485.) Two weeks later, on September 17, Detective Robinson arrested Mr. Mejia at his workplace, first notifying Mr. Mejia's commander of the arrest warrant and then arresting Mr. Mejia at his desk. (Trial Tr. at 485–86, 595.)

Detective Robinson seized Mr. Mejia's cell phone and later his laptop computer. (Trial Tr. at 490.) FBI agent Matt Salancinski

examined these items, which showed Mr. Mejia had browsed T.N.'s Facebook page on several occasions between 2013 and 2015, sent her several texts and emails in that time, and called her on September 3, 2015. (Trial Tr. at 455–72, State's Exhs. 16–26.) Mr. Mejia acknowledged his online searches and communications with T.N., and explained he placed the September 3 call because he had received a text message from that number—a number he did not recognize—and wanted to find out who it was. (Trial Tr. at 594, 607–08.)

About three weeks before trial, the State filed a motion in limine to ban any reference to T.N.'s drug habit. (Doc. 138.) Citing *State v. Sorenson*, 190 Mont. 155, 619 P.2d 1185 (1980), the State asserted this topic was inadmissible because "there is nothing to suggest she was under the influence at the time of this assault or during her disclosure." (Doc. 138 at 5.)

Mr. Mejia objected at a pre-trial hearing. Citing T.N.'s interview responses, defense counsel asked to cross-examine T.N. not only about her drug use the day of the alleged rape, but also about the fact "that she was a habitual addict to meth." (3/14 Tr. at 34.) The State objected to any reference to T.N.'s "overall addiction issues" or her "drug issues

before and even after" the incident. (3/14 Tr. at 35.) The District Court ruled:

> Pursuant to Sorenson and other case law on the issue, I will allow questions regarding her use at or near the time of the offense, to the extent she may have been under the influence and it impacted on her ability to perceive events. *I will exclude evidence of prior use and use subsequent.*

(3/14 Tr. at 35 (emphasis added).)

Defense counsel pressed the issue, noting T.N. had admitted that "because she was an ingrained meth addict . . . she didn't have the same type of recall that an ordinary person would." (3/14 Tr. at 36.) Counsel insisted this was "very critical impeachment evidence." (3/14 Tr. at 36.)

The court reviewed the transcript of T.N.'s pre-trial interview and then issued an order granting the State's motion in limine. (Doc. 176.) The court excluded:

> [M]ention of T.N.'s drug use with one exception. During the final pretrial conference, Mejia said that during a defense interview T.N. admitted being on meth when the alleged sexual assault occurred. Applying *Sorenson*, this is admissible. Mejia may additionally ask T.N. whether her long-term drug use affected her memory of this event.

(Doc. 176 at 8–9.)

On the first day of trial, defense counsel asked again whether she could cross-examine T.N. "not just that she was under the influence at

the time, that she had ingested meth, but that she had other drug issues that affected her memory, ability to recall and perceive." (Trial Tr. at 9.) When the District Court reiterated its order on the motion in limine, defense counsel asked, "So will that allow me to go into the specifics that she described? She described hallucinations due to being injected with bath salts, etcetera?" (Trial Tr. at 10.) The District Court responded it thought T.N.'s answer about how her drug use affected her memory "wasn't very clear." (Trial Tr. at 10.) The court stated Mr. Mejia could ask T.N. whether she had any drug-related impacts on her long-term memory, and "I will listen to the question and expect a potential objection if it's needed." (Trial Tr. at 10–11.)

Mr. Mejia attempted at trial to explore the true scope of T.N.'s drug habit. When Kyle Johnson testified she was an "addictions counselor" who worked with "substance abuse" and "gambling disorders," defense counsel asked whether T.N.'s counseling was "for gambling or for substance abuse." (Trial Tr. at 315.) The State objected, saying this was "excluded evidence." (Trial Tr. at 316.) The District Court ruled, "Pursuant to my previous ruling, sustained." (Trial Tr. at 316.)

On direct examination, T.N. claimed she had smoked methamphetamine "[e]arly that morning" of the alleged rape. (Trial Tr. at 389.) But she insisted she was sober by the time Mr. Mejia picked her up and had a clear memory of the incident. (Trial Tr. at 389.)

On cross-examination, Mr. Mejia sought to undercut T.N.'s claimed sobriety and clear memory by delving into her broader drug habit. But the District Court limited the inquiry:

> [Defense counsel]: And you also said that you were high on meth, that you had smoked meth earlier that day?
>
> [T.N.]: I was not high on meth during the time, but I had smoked meth earlier that day.
>
> Q: And when we talked earlier, you said you were a daily user, didn't you?
>
> A: No, at that point --
>
> [The State]: Objection --
>
> A: -- in time I was trying to stop.
>
> [The State]: Sorry. Your Honor, that is clearly excluded by court order.
>
> The Court: Sustained. I specifically said questioning could be related to impact on memory.

(Trial Tr. at 419–20.)

Defense counsel then compliantly asked T.N. whether her "drug use"—without being able to specify the nature or extent of that drug use—affected her long-term memory of the incident. (Trial Tr. at 420, 436–37.) T.N. answered no. (Trial Tr. at 420, 436–37.)

At the close of the State's case-in-chief, Mr. Mejia moved for a mistrial on several grounds, one of which was the District Court's prohibition on Mr. Mejia asking T.N. about her "serious drug habit" and her "hallucinating and being on the verge of schizophrenia in the 2012 and 2013 time period." (Trial Tr. at 527–28.) The court denied the mistrial motion. (Trial Tr. at 530.) The court ruled, "past drug use is irrelevant unless there's evidence individual [sic] is under the influence at the time." (Trial Tr. at 530.) The District Court stated it had allowed Mr. Mejia to "go further than that" because T.N. admitted she used drugs and there were references at trial to her having been in treatment. (Trial Tr. at 530.)

Mr. Mejia called two of T.N.'s peers, S.S. and B.B., to testify T.N. had a reputation in the community for dishonesty. (Trial Tr. at 535–38, 545–47.) Mr. Mejia then used closing argument to highlight the inconsistencies and irregularities in T.N.'s story. (Trial Tr. at 673–76,

689–90.) Defense counsel pointed to T.N.'s "unusual" behaviors during the trial—including her mid-trial mocking social media posts referring to one of the defense witnesses, B.B., as a "snitch"—as evidence T.N. viewed the trial as a "theater" or a "joke." (Trial Tr. at 672, 677; *see* Trial Tr. at 637; Defense Exhs. P, Q.) Mr. Mejia argued T.N. fabricated the allegations against him—possibly to gain favorable treatment at the correctional facility or to shield the identity of an older sex partner whom she wanted to protect from prosecution for statutory rape—and urged the jury to disregard her testimony. (Trial Tr. at 672–76, 689–90.)

Mr. Mejia also attempted to draw attention to T.N.'s drug use in closing argument. But given the limited testimony on the topic, he could do little more than ask the jury to speculate that T.N.'s occasional methamphetamine use may have impacted her memory of the incident. (Trial Tr. at 673, 676, 680–81.)

The State countered by citing T.N.'s assertion that any drug use in which she engaged "didn't affect her memory" of the alleged rape. (Trial Tr. at 665–66.) The State rested its case on the shoulders of T.N.'s testimony, telling the jury with regard to the evidence it needed to

return a guilty verdict: "[I]f you believe [T.N.], that's enough." (Trial Tr. at 668–69.)

About five hours after the jury retired for deliberations, at around 8:00 p.m., the foreperson submitted a note to the court: "We appear to be deadlocked. We have some people in the middle and people on both sides that feel they will not change. What are the next steps?" (Trial Tr. at 704–05.) The court recessed for the evening and resumed deliberations the next day, a Friday. (Trial Tr. at 707, 714–15.)

At around 1:00 p.m. the next day, about another five hours into deliberations, the jury again informed the court, "Judge, we continue to be deadlocked, 10 to 2. On both sides of the spectrum people have strong opinions and we do not anticipate further movement. Please advise." (Trial Tr. at 721.) The court then gave a *Norquay* instruction, and just over an hour later, the jury returned a guilty verdict. (Trial Tr. at 721–25; Doc. 199 at 3; Doc. 204.)

Mr. Mejia filed a motion for a new trial. (Doc. 206.) One of the grounds was the District Court's exclusion of evidence of T.N.'s drug habit and related mind-altering side effects. (Doc. 206 at 5.) Mr. Mejia argued this evidence was relevant to establish that T.N. "could not

remember events, and further, that she had a motive to lie in court to paint herself in a very positive light." (Doc. 206 at 8.) Mr. Mejia asserted the District Court had violated his Sixth Amendment constitutional right to confront the witnesses against him. (Doc. 206 at 8; Doc. 224 at 2.)

The District Court denied the motion for a new trial. (Doc. 238.) The court found it sufficient that Mr. Mejia was allowed to ask T.N. (1) whether she used methamphetamine the day of the alleged rape, (2) whether she was still high at the time of the alleged rape, and (3) "whether drug use affected her long-term memory." (Doc. 238 at 2.) The court insisted there was no improper limitation on Mr. Mejia's cross-examination of T.N. (Doc. 238 at 3.)

STANDARDS OF REVIEW

This Court reviews a district court's exclusion of evidence for an abuse of discretion. Because a district court is bound by the Rules of Evidence and applicable statutes, this Court reviews "a district court's application of a statute or rule of evidence de novo." *State v. Polak*, 2018 MT 174, ¶ 12, 392 Mont. 90, 422 P.3d 112.

SUMMARY OF THE ARGUMENT

The jury struggled to determine whether T.N. was a reliable and credible witness. Mr. Mejia tried to explore the true scope and side effects of T.N.'s drug habit around the time of the alleged sexual intercourse without consent: her "daily" methamphetamine use "at that time"; her use of bath salts in addition to methamphetamine; and her admissions that her heavy drug use in 2012 and 2013 had far-reaching effects on her brain, including hallucinations, memory problems, and borderline schizophrenia.

The District Court barred Mr. Mejia from directly questioning T.N. about the true scope of her debilitating drug use. With the limitations in place, T.N. was able to paint herself in a favorable light to the jury by downplaying the severity of her drug habit at the time of the alleged incident and confidently asserting her drug use in no way interfered with her memory of the incident.

Preventing Mr. Mejia from questioning T.N. about the scope, severity, and side effects of her drug habit in 2012 and 2013 undercut his defense in three ways. First, Mr. Mejia could not show that T.N.'s constant drug use made it more likely she was high the night of the

alleged incident. Second, he could not point out how her severe drug use undermined her brain's capacity to accurately perceive and remember events from 2012 and 2013, including the alleged sexual assault in November 2012. Third, he could not impeach T.N.'s trial testimony downplaying her drug use and playing up her clear memory.

The jury deserved to hear this relevant impeachment evidence. The District Court misapplied this Court's jurisprudence and abused its discretion in excluding the true scope of T.N.'s contemporaneous drug use.

The District Court's evidentiary error was prejudicial. T.N.'s credibility was already shaky, and the jury's lengthy deadlock shows at least some jurors had reservations about the truth and accuracy of her testimony. Any additional evidence tending to undermine T.N.'s reliability or credibility could easily have tipped the scales and resulted in a different verdict.

ARGUMENT

I. The District Court abused its discretion by excluding relevant evidence bearing on T.N.'s reliability and credibility.

Under the Sixth Amendment to the United States Constitution and Article II, Section 24 of the Montana Constitution, Mr. Mejia was promised the right to squarely confront his accuser at trial. U.S. Const. Amend. VI; Mont. Const. art. II, § 24; *Davis v. Alaska*, 415 U.S. 308, 315 (1974); *State v. Zimmerman*, 2018 MT 94, ¶ 22, 391 Mont. 210, 417 P.3d 289. A robust cross-examination is the "primary interest secured by" this constitutional right. *Davis*, 415 U.S. at 315; *accord State v. Clark*, 1998 MT 221, ¶ 22, 290 Mont. 479, 964 P.2d 766 ("[F]ull cross-examination is a critical aspect of the right of confrontation.").

"Cross-examination is the principal means by which the believability of a witness and the truth of [her] testimony are tested." *Davis*, 415 U.S. at 316. A constitutionally compliant cross-examination should have allowed Mr. Mejia not only to "delve into the witness' story to test the witness' perceptions and memory," but also "to impeach, i.e., discredit, the witness." *Davis*, 415 U.S. at 316. Although the District Court had "broad discretion to determine the relevancy and

admissibility of evidence," this discretion was "limited by the 'constitutionally required threshold of inquiry . . . afforded [to] the [d]efendant.'" *Polak*, ¶¶ 15, 17 (quoting *State v. Gommenginger*, 242 Mont. 265, 274, 790 P.2d 455, 461 (1990)).

The District Court curtailed Mr. Mejia's exploration of the true nature of T.N.'s drug habit and *how*—not just "whether"—that habit might have interfered with her ability to competently testify to the alleged sexual assault more than five years later. In doing so, the court erroneously deprived the jury of relevant impeachment evidence and failed to afford Mr. Mejia a constitutionally adequate cross-examination of his accuser.

A. The scope, severity, and side effects of T.N.'s drug habit were relevant impeachment evidence.

Relevant evidence is "evidence having *any* tendency to make the existence of *any* fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." M. R. Evid. 401 (emphasis added). As a general rule, "[a]ll relevant evidence is admissible." M. R. Evid. 402. Evidence "bearing upon the credibility of a witness" is relevant for impeachment purposes. M. R. Evid. 401; *Zimmerman*, ¶ 23.

Because the jury is the "exclusive judge of a witness's credibility," it is "entitled to assess all evidence which might bear on the accuracy and truth of a witness's testimony." *Zimmerman*, ¶ 23 (citing Mont. Code Ann. § 26-1-302; *United States v. Abel*, 469 U.S. 45, 52 (1984)). Such evidence may include that the witness has a "motive to testify falsely," "the extent of the witness's capacity and opportunity to perceive or capacity to recollect or to communicate any matter about which the witness testifies," "inconsistent statements of the witness," and "other evidence contradicting the witness's testimony." § 26-1-302; *Zimmerman*, ¶ 23. Any of these "matters affecting the credibility of the witness" are generally fair game on cross-examination. M. R. Evid. 611(b)(1).

The central issue for the jury was whether T.N.'s account of the night Mr. Meija picked her up was accurate, reliable, and credible—a question the jury clearly grappled with during its deadlocked deliberations. T.N. admitted pre-trial she was a daily user of methamphetamine and bath salts when Mr. Mejia allegedly sexually assaulted her. Her constant and heavy use of these brain-altering drugs adversely impacted her memory, resulted in confusion and detachment

from reality, triggered borderline schizophrenia, and caused hallucinations. (Exh. I at 9–10, 32–33.)

T.N.'s story was riddled with irregularities. Her daily, mind-altering drug use in 2012 and 2013 would have given the jury an explanation for those irregularities and a reason to question the accuracy of her memory and the truthfulness of her testimony. This excluded evidence was relevant because it: (1) made it more likely T.N. was high at the time of the alleged incident and had not taken that night off from smoking methamphetamine or shooting up bath salts; (2) made it less likely T.N. could accurately perceive and recall an alleged sexual assault in 2012 that occurred in the midst of her drug-induced mental fog; and (3) contradicted her testimony downplaying her drug use and disavowing its mind-altering side effects, thus rendering her an untruthful witness.

1. The evidence of T.N.'s drug habit was relevant to whether she was high during the alleged incident.

The excluded evidence made it more likely T.N. was high during her interaction with Mr. Mejia, which undermined her capacity to accurately perceive and remember what happened that night. *See*

Sorenson, 190 Mont. at 166, 619 P.2d at 1191–92 ("Evidence that a witness was intoxicated is admissible on cross-examination to impeach the witness's ability to accurately perceive the events about which [s]he has testified."). T.N. claimed she was sober at the time of the alleged incident. (Trial Tr. at 389, 419–20.) Coming from an intermittent drug user whose modest use did not cause any notable side effects, that seemed credible.

But had the jury known T.N. was a daily methamphetamine user at the time of the alleged rape whose drug use was so constant and severe it caused hallucinations and borderline schizophrenia, it would have been less inclined to believe her claim of sobriety during the alleged rape. Her daily use of hard drugs—and the fact she had friends at that time with whom she used methamphetamine and who were "shooting [her] up" with bath salts—gave context to what she might have been doing stranded at a friend's house on the south side of Billings near midnight on a weeknight. (*See* Exh. I at 9–10, 32–33.) It raised the specter she was getting high right before Mr. Mejia picked her up.

In the context of T.N.'s otherwise heavy, near-constant drug use, her claim of sobriety precisely during the narrow, hours-long window of time she spent with Mr. Mejia may have come off as suspiciously convenient, unconvincing, and self-serving.

In *Polak*, the witness to a homicide had a methamphetamine pipe on top of a cleaning sponge inside her nearby trailer. *Polak*, ¶ 10. The witness claimed she was not high at the time of the homicide, and the district court precluded the defense from asking her about the methamphetamine pipe. *Polak*, ¶¶ 10, 21. On appeal, this Court held the pipe was relevant because it suggested the witness was in fact high at the time of the homicide, which in turn called into question her capacity to accurately perceive and remember the incident. *Polak*, ¶ 22.

As in *Polak*, the evidence of T.N.'s daily drug habit and tendency to shoot up with friends made it more likely she was high when Mr. Mejia picked her up late at night from a friend's house. It was thus relevant to her ability to accurately "perceive and remember" the events of that night accurately. *See Polak*, ¶ 22.

2. The evidence of T.N.'s drug habit was relevant to her capacity to recount events from 2012 and 2013 generally, including the alleged sexual assault from November 2012.

T.N.'s narrative about what happened the night Mr. Mejia picked her up included a host of improbable assertions. She claimed she waited for Mr. Mejia—a complete stranger she met on Facebook—to shower and then give her a ride home for $20 instead of simply waiting for a taxi. (Trial Tr. at 386, 426.) She said Mr. Mejia "just got off work" and was still wearing his work clothes when he picked her up around 11:00 p.m. or midnight, roughly seven hours after his shift ended. (Trial Tr. at 386, 402, 579.) She said she screamed for help in Mr. Mejia's living room, but his roommate did not hear any screams. (Trial Tr. at 399–403, 427, 552–55.) T.N. told the police Mr. Mejia drove her home afterwards, but then changed her story before trial to say she escaped and ran home in the cold, snowy weather. (Trial Tr. at 405–06, 428.) Upon arriving at her brother's apartment after running over a mile through alleys in the middle of the night, T.N. did not mention anything to her family members who were still up when she got there. (Trial Tr. at 406.) And even though T.N. was close to her brother and the two had been texting earlier about how she would be home soon, she said

nothing to him about the ordeal she had just endured. (Trial Tr. at 446.)

Something was off with T.N.'s testimony. Telling the jury about her heavy, chronic use of brain-altering drugs in 2012 and 2013 would have given the jury an explanation for her erratic story: that she was so impaired by her drug use at the time that her memory was unreliable.

The information about the true scope and effects of T.N.'s *habitual*, as opposed to occasional or intermittent drug use, bore on her capacity to perceive and remember events in 2012 and 2013 generally, and the November 2012 incident specifically. This is true regardless whether T.N. was high at the precise time the alleged rape occurred.

Daily, long-term methamphetamine use—of the type in which T.N. was engaged in the time period surrounding the alleged rape—causes structural brain damage and impairs the user's mental capacity in a way intermittent use does not. *See, e.g.*, Dr. Jane Carlisle Maxwell, *Methamphetamine: Epidemiological and Research Implications for the Legal Field*, 82 N.D.L. Rev. 1121, 1130 (2006) ("[C]hronic methamphetamine abuse causes a selective pattern of cerebral deterioration that contributes to impaired memory performance."); Dr. Mary Holley, *How Reversible Is Methamphetamine-Related Brain*

Damage?, 82 N.D.L. Rev. 1135, 1136–39 (2006) (stating habitual methamphetamine use adversely affects several brain structures, including "judgment and cognitive processes (frontal lobes)" and "memory (hippocampus)," and can contribute to dementia, schizophrenia, hallucinations, and psychosis).

According to the National Institute on Drug Abuse—a division of the U.S. Department of Health and Human Services' National Institutes of Health—the short-term side effects of occasional methamphetamine use are largely physiological in nature: increased wakefulness and physical activity; decreased appetite; faster breathing; rapid and/or irregular heartbeat; and increased blood pressure and body temperature.[5]

By contrast, the side effects of long-term, *habitual* methamphetamine use include: "changes in brain structure and function"; "confusion"; "memory loss"; "paranoia—extreme and unreasonable distrust of others"; and "hallucinations—sensations and

[5] *Methamphetamine Drug Facts*, National Institute on Drug Abuse (NIDA), updated May 2019, accessed September 10, 2020, available at: https://www.drugabuse.gov/publications/drugfacts/methamphetamine.

images that seem real though they aren't."[6] Even when daily methamphetamine users stop using, the withdrawal symptoms can be severe and include anxiety, depression, and psychosis.[7] Bath salts, a "psychoactive mind-altering substance" that T.N. also used heavily in 2012 and 2013, similarly may cause excited delirium, panic attacks, paranoia, and hallucinations.[8]

It was one thing for the jury to hear T.N. was an occasional methamphetamine user at the time of the alleged rape and tangential references to her going to "treatment" years later in 2015. (*See* Trial Tr. at 318, 321, 419–20, 436–37.) It would have been quite another to hear she was a daily user who consumed methamphetamine and bath salts with such frequency that she experienced severe, brain-altering, psychosis-like side effects in the time period surrounding the alleged rape. The latter narrative undermined T.N.'s mental capacity to accurately perceive and remember events from 2012 and 2013 generally, including the alleged rape in November 2012 specifically. This was relevant impeachment evidence. *See State v. Weisbarth*, 2016

[6] *Methamphetamine Drug Facts*, NIDA.
[7] *Methamphetamine Drug Facts*, NIDA.
[8] *Synthetic Cathinones ('Bath Salts') Drug Facts*, NIDA.

MT 214, ¶ 21, 384 Mont. 424, 378 P.3d 1195 (stating evidence that a witness cannot "credibly recall the alleged incident" or has an impaired "capacity to observe, remember, or narrate" constitutes "classic impeachment evidence").

a. The District Court misapplied *Sorenson* in concluding drug habit evidence was *per se* inadmissible.

The District Court repeatedly cited this Court's holding in *Sorenson* to justify cutting off any inquiry into the true extent of T.N.'s broader drug habit. (Doc. 176 at 8; Doc. 238 at 2; 3/14 Tr. at 35; Trial Tr. at 530.) The court reasoned *Sorenson* permitted inquiry only into whether the witness was intoxicated at the exact time of the incident. (Doc. 176 at 8; Doc. 238 at 2; 3/14 Tr. at 35; Trial Tr. at 530.) The court's interpretation of *Sorenson* was too narrow.

Sorenson held that evidence of a witness's drug use is inadmissible *if there is no evidentiary link* between the drug use and the witness's capacity to testify accurately. In that case, the witnesses who saw the defendant commit a shooting had smoked marijuana 12 hours earlier. *Sorenson*, 190 Mont. at 165, 619 P.2d at 1191. The defendant argued the witnesses' marijuana use "could have colored their

perception" of the shooting and was thus relevant and admissible. *Sorenson*, 190 Mont. at 165, 619 P.2d at 1191. But the defendant "merely assume[d]" the witnesses' drug use impaired their perception and did not proffer any evidence supporting that assumption. *Sorenson*, 190 Mont. at 165, 619 P.2d at 1191.

This Court explained, "evidence of drug usage is not permitted 'unless it can also be proved that the use of narcotics has impaired the sensory, retentive, or communicative faculties of the witness.'" *Sorenson*, 190 Mont. at 166, 619 P.2d at 1192. The Court then held, "Given defendant's failure to lay a proper foundation that the witnesses were under the influence of drugs at the time of the material events in this case, exclusion of the evidence was justified." *Sorenson*, 190 Mont. at 167, 619 P.2d at 1192; *accord State v. Matz*, 2006 MT 348, ¶ 38, 335 Mont. 201, 150 P.3d 367 (barring evidence the witness had a marijuana pipe in his pocket at the time of the incident because "Matz laid no foundation tending to show [the witness] was under the influence of drugs at the time of the events in question").

The *Sorenson* decision relied on this Court's holding in *State v. Gleim*, 17 Mont. 17, 41 P. 998 (1895). *See Sorenson*, 190 Mont. at 165–

67, 619 P.2d at 1191–92. *Gleim* states:

> We see no error in refusing to permit a witness to be asked, on cross-examination, for the purpose of affecting her credibility, whether or not she is addicted to the morphine habit, *unless it is proposed to show* that the witness was under the influence of the drug at the time the events happened about which she testified . . . *or unless it is made to appear that her powers of recollection are impaired by the habitual or excessive use of the drug*.

Gleim, 17 Mont. at 17, 41 P. at 1001 (emphasis added). *Gleim* explicitly allowed introduction of a witness's drug *habit*—not just her intoxication at the time of the witnessed event—so long as there was an evidentiary link between her drug habit and her diminished "powers of recollection."

In *Polak*, this Court cited *Sorenson* for the proposition that when it comes to evidence of a witness's drug use, "a defendant must, as with any other piece of evidence proffered, *present a coherent theory of relevance*." *Polak*, ¶ 18 (emphasis added). In other words, there is no *presumption* of relevance; the proponent of evidence of a witness's drug use must articulate why it is relevant. *See Polak*, ¶ 18. One way—but not the only way—to do that is to show the witness was high at the time of the event witnessed. *Gleim*, 17 Mont. at 17, 41 P. at 1001; *see Sorenson*, 190 Mont. at 167, 619 P.2d at 1192; *Matz*, ¶ 38. Another way

is to show the witness has such a severe drug habit that her "powers of recollection are impaired." *Gleim*, 17 Mont. at 17, 41 P. at 1001.

Read together, *Gleim*, *Sorenson*, and *Polak* make clear there is no blanket, categorical prohibition on evidence of a witness's drug habit. These cases simply require more than mere speculation that the witness's drug habit has interfered with her ability to competently testify. They require an evidentiary foundation and a coherent theory of relevance tying the witness's drug habit to her impaired powers of recollection.

Mr. Mejia provided that evidentiary foundation when he proffered T.N.'s pre-trial interview responses. She admitted her severe drug habit affected her "ability to remember stuff," caused her to hallucinate, and put her "on the verge of being schizophrenic," particularly in 2012 and 2013, the time period surrounding the alleged rape. (Exh. I at 9–10, 32–33.) Mr. Mejia's "coherent theory of relevance" was that T.N. herself had explicitly linked the severity of her drug use to the impairment of her mental capacity. The District Court misapplied *Sorenson* in categorically excluding any evidence of T.N.'s broader drug habit.

3. The evidence of T.N.'s drug habit contradicted her trial testimony and was relevant to her truthfulness as a witness.

The excluded evidence about the true scope and side effects of T.N.'s drug habit flew in the face of her trial testimony. T.N. swore to the jury she was sober at the time of the alleged incident and her drug use in no way impacted her memory of that event. (Trial Tr. at 389, 419–20, 436–37.) A proper inquiry into the full scope of her mentally debilitating drug habit in 2012 and 2013 would have contradicted those assertions and impugned her truthfulness as a witness.

T.N. was a *daily* methamphetamine user at the time of the alleged sexual assault, and she regularly used bath salts with her friends. Those facts undermined her testimony that she did not do drugs the night Mr. Mejia picked her up from a friend's house late at night and she was sober during the window of time she spent with him. (*See* Trial Tr. at 389.) Her admittedly heavy drug use in 2012 and 2013 contradicted her testimony in which she disavowed that she was a heavy user around the time of the alleged incident. (*See* Trial Tr. at 419–20, 436.) And the debilitating side effects she experienced in that time period—including impaired memory, borderline schizophrenia,

confusion, and hallucinations—undermined her testimony that her drug use in no way interfered with her memory of the alleged sexual assault. (*See* Trial Tr. at 419–20, 436–37.)

In *Polak*, this Court agreed the presence of the methamphetamine pipe in the witness's trailer the night of the homicide was relevant because it contradicted her claim that she was not high that night, thus rendering her an "untrustworthy witness." *Polak*, ¶ 21. Likewise, because the excluded evidence of T.N.'s daily, mind-impairing drug habit in 2012 and 2013 conflicted with her trial testimony downplaying her drug use and its side effects, it was relevant impeachment evidence that undermined her truthfulness as a witness. *See* M. R. Evid. 401; § 26-1-302; *Zimmerman*, ¶ 23; *Polak*, ¶ 23.

B. The cross-examination the District Court did allow was inadequate.

The District Court allowed Mr. Mejia to ask T.N. conclusory questions such as "whether" she was high at the time of the alleged rape and "whether" her drug use impaired her memory of the incident. (*See* Doc. 176 at 8–9.) But it barred Mr. Mejia from establishing any facts about her drug use from which he could argue—and from which the jury could consider for itself—that her drug use impacted her mind

in ways that rendered her an unreliable witness.

The limited cross-examination the District Court allowed is akin to what occurred in the United States Supreme Court case of *Davis v. Alaska*. There, the prosecution's key witness in a burglary case had a possible motive to misidentify the defendant as the suspect. The witness, Green, had a juvenile criminal record and was currently on probation, and the stolen property—a safe—was located near Green's house. *Davis*, 415 U.S. at 309–11. At the prosecutor's behest, the trial court excluded evidence of Green's juvenile record and probation status. *Davis*, 415 U.S. at 311–12.

At trial, defense counsel "did his best to expose Green's state of mind at the time Green discovered that a stolen safe had been discovered near his home." *Davis*, 415 U.S. at 312. The defense asked Green if he was "upset" or "uncomfortable" about this and whether he was worried the police might suspect him of the crime; Green defiantly answered "no." *Davis*, 415 U.S. at 312. Then, in discussing Green's conversations with the investigators, defense counsel asked, "Have you ever been questioned like that before by any law enforcement officers?" Green answered, "No." The prosecutor immediately objected as Green

answered, and the trial court sustained the objection, cutting off any further inquiry. *Davis*, 415 U.S. at 313.

The Supreme Court noted Green's last "No" answer was "highly suspect," given his prior arrest and prosecution. *Davis*, 415 U.S. at 314. And it noted that "under protection of the trial court's ruling" excluding his probation status, Green was able to confidently assert he had no reason for concern about the police investigating him for the stolen safe; i.e., that he had no motive or bias when he identified the defendant as the suspect. *Davis*, 415 U.S. at 314. The Court then held:

> While counsel was permitted to ask Green *whether* he was biased, counsel was unable to make a record from which to argue *why* Green might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial. On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a *speculative and baseless* line of attack on the credibility of an apparently blameless witness . . . [D]efense counsel should have been permitted to expose to the jury *the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences* relating to the reliability of the witness.

Davis, 415 U.S. at 318 (emphasis added).

As in *Davis*, T.N. asserted "under protection of the trial court's ruling" that she did not have a serious, mind-altering drug problem at or around the time of the alleged rape. (Trial Tr. at 419–20, 436–37.) As

in *Davis*, she interjected a "highly suspect" answer that "No," she was not a "daily" user at the time of the alleged rape, just as the State objected and the District Court cut off Mr. Mejia's inquiry into the topic. (Trial Tr. at 419–20.) And as in *Davis*, Mr. Mejia's counsel was allowed to ask T.N. "whether" her drug use impaired her memory of this incident but was "unable to make a record from which to argue why" that might be so. (Doc. 176 at 9.)

The District Court blocked Mr. Mejia from putting any facts in evidence from which to argue T.N.'s drug use impacted her perception or memory of the alleged rape. When Mr. Mejia attempted to argue in closing that T.N.'s occasional methamphetamine use made her an unreliable witness, the jury likely "thought that defense counsel was engaged in a speculative and baseless line of attack" against her. (*See* Trial Tr. at 673, 676, 680–81.)

As in *Davis*, "defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." *See Davis*, 415 U.S. at 318. Instead, the jury was shielded from the facts about T.N.'s daily, brain-altering drug habit

in the time period immediately surrounding the alleged rape.

The excluded evidence of the scope, severity, and side effects of T.N.'s drug habit was relevant to the reliability and credibility of her story. The jury was "entitled to assess all evidence which might bear on the accuracy and truth" of T.N.'s testimony. *Zimmerman*, ¶ 23; *accord Polak*, ¶ 22. The District Court abused its discretion by depriving the jury of this relevant impeachment evidence.

II. In a close case that hinged on T.N.'s credibility, the District Court's evidentiary error prejudiced the defense.

Because the District Court erred in excluding relevant impeachment evidence, "the State must demonstrate there was *no reasonable possibility* that the exclusion contributed to the conviction." *State v. Slavin*, 2004 MT 76, ¶ 22, 320 Mont. 425, 87 P.3d 495 (emphasis added). The State cannot meet that heavy burden.

"[I]mpeachment evidence is especially likely to be material when it impugns the testimony of a witness who is critical to the prosecution's case." *Weisbarth*, ¶ 26. T.N. was the State's star witness, and she provided the only direct, testimonial evidence of Mr. Mejia's guilt. (*See* Trial Tr. at 379–448.) The State's case flowed through her testimony.

T.N.'s reliability and credibility were already shaky, and the jury had reason to question her story. Elements of her account strained credulity: her using Mr. Mejia as an expensive and time-consuming de facto taxi service; that he was still in his work clothes late at night; that his home-bodied roommate was either gone for the night or somehow did not hear T.N.'s screams; and that T.N. ran home over a mile in the snow at midnight but did not mention anything to her brother or other family members when she got there. (Trial Tr. at 386, 399–403, 426–27, 552–55, 579.)

T.N.'s credibility took another hit when she admitted she changed her story about what happened after the alleged assault, first telling Detective Robinson Mr. Mejia drove her home but then claiming she escaped from Mr. Mejia's house and ran home. (Trial Tr. at 405–06, 428.) And upon her detention at Riverside, T.N. denied on her intake form she had ever been raped, but then told her case manager a month later she had. (Trial Tr. at 308, 436; Exh. J.)

The jury clearly grappled with whether T.N.'s memory was reliable, whether she was being truthful on the witness stand, or both. It deadlocked five hours into deliberations and remained deadlocked for

another five hours the next day. (Trial Tr. at 704–07, 721.) The jury needed a *Norquay* instruction to break the logjam. (Trial Tr. at 721–25.)

Given T.N.'s fragile credibility and the jury's labored guilty verdict, *any* additional evidence tending to undermine T.N.'s testimony might reasonably have changed the outcome. Had the jury heard the truth about T.N.'s brain-altering drug addiction at and around the time of the alleged rape, that would have called into question the accuracy of her memory and the truthfulness of her testimony. That might have swayed the verdict.

CONCLUSION

The jury strained to unanimously conclude T.N.'s story was true. Some jurors were clearly on the fence whether her testimony was accurate and believable enough to justify a guilty verdict. As the sole trier of fact, the jury was entitled to hear *all* the facts bearing on the lynchpin issue of T.N.'s credibility.

The District Court erroneously deprived the jury of relevant impeachment evidence concerning the true extent and mind-impairing effects of T.N.'s chronic drug habit. In a close case that turned on the believability of T.N.'s testimony, this error was prejudicial.

Mr. Mejia respectfully asks this Court to reverse his conviction and remand for a new trial.

Respectfully submitted this 21st day of September, 2020.

OFFICE OF STATE PUBLIC DEFENDER
APPELLATE DEFENDER DIVISION
P.O. Box 200147
Helena, MT 59620-0147

By: /s/ Michael Marchesini
MICHAEL MARCHESINI
Assistant Appellate Defender

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary 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 9,836, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Michael Marchesini
MICHAEL MARCHESINI

APPENDIX

CERTIFICATE OF SERVICE

I, Michael Marchesini, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 09-19-2020:

Scott D. Twito (Prosecutor)
Yellowstone County Attorney's Office
PO Box 35025
Billings MT 59107
Representing: State of Montana
Service Method: eService

Timothy Charles Fox (Prosecutor)
Montana Attorney General
215 North Sanders
PO Box 201401
Helena MT 59620
Representing: State of Montana
Service Method: eService

Electronically signed by Pamela S. Rossi on behalf of Michael Marchesini
Dated: 09-19-2020