IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0584

STATE OF MONTANA,

Plaintiff and Appellee,

v.

NICK LENIER WILSON,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Twenty-First Judicial District Court,
Ravalli County, The Honorable Jennifer B. Lint, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

OTHER AUTHORITIES

STATEMENT OF THE ISSUES

1. Did the district court correctly rely on the expert's opinion that a prospective witness's mental illness and cognitive impairment rendered him incompetent to serve as a witness under Mont. R. Evid. 601?

2. Did the district court correctly exercise its discretion when it instructed the jury to disregard a defense witness's testimony as inadmissible character evidence?

3. Did the district court correctly exercise its discretion to allow the State to call a representative from the victim entity, who had observed the trial, as a rebuttal witness to the Appellant's false or inaccurate testimony?

STATEMENT OF THE CASE

On April 2, 2019, the Appellant, Nick Wilson (Wilson) was convicted of felony burglary, in violation of Mont. Code Ann. § 45-6-204, and misdemeanor theft, in violation of Mont. Code Ann. § 45-6-301. (D.C. Docs. (Doc.) 1, 4-5, 125.) At trial, Wilson conceded he was guilty of theft but contested the burglary charge. (4/1/19 and 4/2/19 Trial Tr. (Trial Tr.) at 100.).

Wilson challenges three evidentiary rulings on appeal and requests a new trial. Prior to trial, the district court excluded the testimony of one witness, F.Z.,[1] as incompetent to testify under Mont. R. Evid. 601. (3/14/19 Tr. at 3-7; 3/28/19 Tr. at 8.) During trial, the district court excluded the testimony of a defense witness as improper character evidence. (Trial Tr. at 211-16, 229-32.) The district court allowed the State to call a rebuttal witness who had been personally present during the testimony of other witnesses, which Wilson claims is at odds with a pretrial ruling under Mont. R. Evid. 615 that witnesses should be excluded from the courtroom. (Trial Tr. at 263-71, 287-89.)

STATEMENT OF THE FACTS

I. The Offense

On March 15, 2018, Officer Joshua Scoggins of the Hamilton Police Department (Officer Scoggins) was dispatched to Ravalli Services at approximately 10:05 p.m. pursuant to a burglary complaint. (Trial Tr. at 105-06, 108.) Ravalli Services helps individuals with developmental, intellectual and physicial disabilities. (*Id*. at 114.) Officer Scoggins met with Sheila Pegg (Pegg), who managed facilities for Ravalli Services. (*Id*. at 108, 114-15.)

[1] F.Z. is referred to by initials for consistency with Wilson's brief. (Appellant's Brief (Br.) at 1.)

Pegg managed three buildings, including a thrift store and an intake center for the store. (*Id*. at 115.) Items are donated at the intake center, sorted, and then moved to the thrift store if they are in good condition, to be resold or given away to people in need. (*Id*. at 118, 128, 130.) Trash or discarded items are placed in a roll-away dumpster in the rear of the building or sometimes in a horse trailer. (*Id*. at 123-24, 132, 149.) Customers do not come to the intake center, and it is closed at night. (*Id*. at 120, 130.) Most of the employees of the intake center are developmentally disabled clients of Ravalli Services, but they are supervised by direct support professionals. (*Id*. at 125.) The direct support professionals secure the facility, so the clients are not responsible for locking up in the evening. (*Id*. at 126-27.)

On the morning of March 15, 2018, Pegg was contacted by an employee to report things were missing from the intake center, which prompted the call to the police. (*Id*. at 120-21.) Pegg provided a list of the items missing to Officer Scoggins, which was later supplemented. (*Id*. at 109.) Officer Scoggins looked for any signs of forced entry, but all the exterior doors had previously existing damage, so he was unable to determine where the perpetrator entered. (*Id*. at 110.) Jason Garrard, who works in IT and internal investigations for Ravalli Services,

compiled surveillance video footage and provided that to the police. (*Id*. at 133-35, 140.)[2]

Officer Scoggins reviewed the video with Garrard on March 16, 2021. (*Id*. at 151-52.) Garrard described the videos:

> It depicts, to start with, somebody coming on camera out in front of that building looking through some bins and going around onto the north side of the building and accessing the building through a locked door and then being in the building for quite a few hours collecting items, making a pile, leaving, coming back later in a vehicle and loading up those items and leaving our premises.

(*Id*. at 138-39; *see also id*. at 152-68.) The individual first arrived at the intake center around 1:00 a.m., he left on foot around 3:30, he came back with a minivan around 4:00 a.m. and left with the stolen property just before 5:00 a.m. (Trial Tr. at 139, 154, 166-67.) The perpetrator used a flashlight, and at no point did the individual turn the lights on. (*Id*. at 140, 157, 164, 166, 173-74, 176.) Wilson did not take any trash out while he was in the intake center and no horse trailer is seen on the surveillance video. (*Id*. at 145, 165.)

A few days after the incident, Garrard saw a man that looked like the perpetrator walking on a street in Hamilton. (*Id*. at 141-43.) At trial, Garrard identified the man he saw walking as Wilson. (*Id*. at 144.) Garrard followed Wilson until he lost him near an apartment complex. (*Id*.) Garrard then saw a van

[2] The surveillance videos and a video key were admitted as exhibits 2A-2C. (Trial Tr. at 138, 151.)

that looked like the vehicle used by the perpetrator in the surveillance video. (*Id*. at 143-44.) Garrard followed the van until it parked at an apartment building in the same area where he last saw Wilson. (*Id*.) Garrard reported this information to the police. (*Id*. at 145.)

Law enforcement identified Wilson as the suspect and Tiva Merson (Merson) as the owner of the minivan registered at the apartment address. (*Id*. at 189-91.) Merson had dated Wilson at the time of the incident, but he did not live with her. (*Id*. at 181-82.) On March 21, 2018, the police executed a search warrant at Merson's home and recovered many of the stolen items. (Trial Tr. at 170, 182, 190-93.) Merson helped law enforcement search for the stolen property and found a variety of items, including speakers, surround sound systems, and electronics. (*Id*. at 180-81, 193-201.) Merson said Wilson had borrowed her van on March 14, 2018, but she did not know about the burglary. (*Id*. at 182, 184.)

After the search on March 21, 2018, law enforcement detained Wilson at his residence and brought him to the Hamilton Police Department. (*Id*. at 201-02.) Hamilton Police Detective Daniel Altschwager (Det. Altschwager) interviewed Wilson, who waived his *Miranda* rights. (*Id*. at 202-03, 208-210.)[3] Wilson admitted to taking various items from inside the intake center that were recovered

[3] A copy of the recorded interview was admitted as Ex. 1 and played for the jury during trial. (Trial Tr. at 151, 208.)

during the investigation. (Ex. 1 at 16:45-30:00, 37:15-38:00.) Wilson said he just pulled the doorknob and the door of the intake center opened. (*Id*. at 27:45-28:20.) Wilson was not sure how long he was inside the intake center. (*Id*.) He admitted he put the stolen items in Merson's minivan. (*Id*. 28:30-29:30.) He admitted he left some of the stolen items at Merson's house and gave other items to friends. (Ex. 1 at 25:15-25:50, 29:30-30:00, 31:00-32:00, 33:15-38:00.)

Wilson testified at trial. Wilson worked odd jobs but did not maintain steady employment. (Trial Tr. at 234-35.) Wilson testified that on the afternoon of March 15, 2018, he helped F.Z. load rejected donation items from the intake center into a horse trailer. (*Id*. at 236-38.) Wilson said water had puddled inside the intake center due to the rain, and he offered to clean it up. (*Id*. at 238-40, 245-46.) Wilson said he finished loading the horse trailer between 3:30 and 4:00 p.m., and he understood he had permission to come back after 5:00 p.m. to clean up the water. (*Id*. at 246, 280-81.) However, Wilson testified he did not go to the intake center at 5:00. (*Id*. at 246, 280-81.) Wilson had dinner with Merson, which resulted in an argument about Wilson not providing enough to live with her. (*Id*. at 236-37, 246.) Wilson left Merson's house around 7:00 p.m. or 8:00 p.m. and went to another friend's house until around midnight. (*Id*. at 237, 247.) Wilson then said he remembered that he needed to go to the intake center. (*Id*. at 237, 247-48.)

Wilson entered the intake center through the door on the north side, which was unlocked. (*Id*. at 249.) Wilson said he used a flashlight, as he did not have access to the light switches. (*Id*. at 249, 255.) Wilson said he cleaned up the water and staged various items to steal. (*Id*. at 249-54.) Wilson admitted he stole various items from Ravalli Services. (*Id*. at 252, 278.) Wilson said he threw out the materials used to clean up the water in the dumpster behind the intake center. (*Id*. at 259-60.) Wilson said he took some of the stolen items to Merson's house and gave other items to friends. (*Id*. at 260-61.)

To rebut Wilson's testimony, the State called Jon Cranston (Cranston), who was the director of day and vocational services at Ravalli Services. (*Id*. at 287.) Cranston testified Wilson could not have helped F.Z. or any staff at 3:30 or 4:00 p.m. on March 14, 2018. (*Id*. at 287-88.) Clients, like F.Z., get off work at 2:30 p.m. and are out of the building by 3:00 p.m. (*Id*. at 288.) All other staff is out of the building between 3:00 and 3:30 p.m. (*Id*.) Cranston said Wilson could have turned on the lights with multiple switches located near almost every doorway. (*Id*. at 289.) Cranston said the intake center did not have a flooding problem and Wilson could not have disposed of any cleaning materials in the dumpster because it was closed and padlocked at night. (*Id*. at 289.)

Pegg testified rain does not come in the intake center, she had never met Wilson, she did not give him permission to enter the intake center, and she did not

know of any employee giving Wilson permission to enter. (*Id*. at 121, 128-29, 131.)

II. Pretrial proceedings

On March 27, 2018, the State charged Wilson with felony burglary, in violation of Mont. Code Ann. § 45-6-204, and misdemeanor theft, in violation of Mont. Code Ann. § 45-6-301. (Docs. 1, 4-5.)

Wilson included F.Z. in its potential witness list, and he was issued a subpoena for the first trial setting. (Docs. 31.1, 34.) On December 10, 2018, the State moved the district court to find F.Z. incompetent to testify, pursuant to Mont. R. Evid. 601(d). (Doc. 52.) In support, the State filed an affidavit of Rebecca Merfeld, who was a targeted case manager for AWARE, a non-profit corporation in Missoula that provides services to people with mental, developmental, emotional, and physical disabilities. (Doc. 51 at 1.) Merfeld was F.Z.'s case manager. (*Id*.) Merfeld explained F.Z.'s mother had a full guardianship of him. (*Id*.) Merfeld, who was apprised of Mont. R. Evid. 601 by the State, said it was her opinion that F.Z. was not competent to testify as a witness. (*Id*. at 2.) Merfeld said F.Z. "lives with mental, developmental, emotional, and/or physical disabilities that make him incapable of fully understanding his duty to tell the truth." (*Id*.)

In response, Wilson argued the State's motion should be denied because Merfeld was not qualified to determine F.Z.'s competency. (Doc. 58.) During a hearing on December 13, 2018, the State explained it had known F.Z. was developmentally delayed but did not realize the extent of his issues until Merfeld contacted them. (12/13/18 Tr. at 3.) Merfeld identified two of Wilson's potential witnesses as developmentally delayed, but she believed only F.Z. was incompetent to testify. (*Id*.) The district court addressed the requirements to determine if F.Z. was competent to testify:

> I think the standard clearly is we have to have, at the very least, expert testimony or an evaluation of him, so I would like to see that happen. And then we'll set that for a hearing on whether or not he has the capacity to testify.

(*Id*. at 8-9.)

On December 21, 2018, the district court ordered F.Z. be evaluated by his mental health care provider. (Doc. 68.) The order specified any costs of the evaluation would be paid by the State. (*Id*.) During a hearing on January 3, 2019, Wilson's counsel protested any obligation to produce F.Z. for the evaluation. (1/3/19 Tr. at 7.) The district court clarified the State needed to coordinate the evaluation and Wilson's only obligation under the order was to inform F.Z. he needed to comply. (*Id*. at 9-10.) The district court noted it was important to be sensitive to F.Z. and not be too "heavy-handed." (*Id*. at 10.) On January 25, 2019,

the district court issued an amended order for competency evaluation changing the name of the mental health care provider. (Doc. 77.)

On January 29, 2019, the State filed a report of Gerry D. Blasingame, Psy.D., who evaluated F.Z. in July 2018. (Doc. 79.) Dr. Blasingame reviewed approximately 200 pages of F.Z.'s case documentation and provided a history of F.Z.'s mental illness:

> [F.Z.] is diagnosed with schizoaffective disorder, bipolar type and mild intellectual disability. This condition involves psychotic disorder and bipolar disorder symptoms including experiencing hallucinations and delusions. [F.Z.] has times of paranoid ideation and can easily feel threatened. There have been times in the past when [F.Z.] identified himself as a military officer and as a sheriff from Denver. In those moments he believed he was telling the truth.
>
> [F.Z.] can exhibit impaired reality contact, perseveration, disorganized thinking and loose associations. His speech can be tangential. His short-term memory is fair; his remote memory is impaired. There are times when [F.Z.] is highly distractible and engages in excessive talking. [F.Z.] experiences a significant amount of anxiety.
>
> Past cognitive functioning assessments have placed [F.Z.] at or below the 1st percentile in the domains of mental processing speed and freedom from distractibility. His verbal comprehension is within the borderline intellectual functioning range, at the 21st percentile. These discrepancies suggests [sic] some form of brain impairment different than what is expected in persons with intellectual disability.

(*Id*.)

Dr. Blasingame addressed three questions to explain F.Z.'s incompetency to serve as a witness:

> 1. Does [F.Z] have the ability to know his role as a witness?

[F.Z.] can learn pieces of information by rote and facts regarding topics of interest to him. He can read at about the 3rd grade level. [F.Z.] probably can learn "rules" for a witness to follow if they are taught at the early elementary age level. [F.Z.] requires extra time to process information and questions. If [F.Z.] is not in a lucid state, none of this applies.

2. Can [F.Z.] communicate with the court?

[F.Z.] is a person who can become highly anxious. He had many traumatic experiences in the past. [F.Z.] reported he has flashbacks about the hard things in his life. He can easily feel threatened. When [F.Z.] is anxious and threatened, he can become irritable, agitated or disruptive. Also, [F.Z.]'s mental age is estimated at the 10 to 11-year-old level. This suggests his social maturity is at that level as well, e.g. his social sophistication is at about the 5th grade. [F.Z.] is susceptible to leading questions. [F.Z.] has a tendency to present information in ways that make him look more normal and more socially desirable, even if the question is not about him.

Anyone interacting with [F.Z.] should approach him with a non-threatening, nondemanding tone of voice and posture. intimidation tactics or efforts to discredit him such as during cross examinations could have significant, detrimental effects on [F.Z.].

3. Can [F.Z.] appreciate his duty to tell the truth?

[F.Z.] will tell you that he will tell you the truth. He can likely give a basic reason why it is important to tell the truth. This writer opines that [F.Z.]'s ability to understand the abstract concept of "duty" or moral responsibility to tell the truth is compromised by his mental illness and cognitive impairments.

[F.Z.] has confabulated and espoused many delusional statements. On the other hand, [F.Z.] has times of lucidity and good contact with reality. [F.Z.] can and does shift into delusional thinking despite taking psychotropic medication.

> In summary, this writer opines that [F.Z.]'s mental illness and cognitive impairments are such that they undermine his capacity to serve as a witness in a court of law. This writer is not trying to imply that [F.Z.] would be purposely untruthful. [F.Z.] will tell the truth as he believes it to be. Sadly, he has believed many things to be true that were not.

(*Id*. at 2.)

During a hearing on January 29, 2019, Wilson's counsel noted she had received Dr. Blasingame's report that morning. (1/29/19 Tr. at 3, 7.) She was feeling ill and not ready to proceed to a hearing that day. (*Id*. at 3.) The State had F.Z. available to testify at the hearing, but the district court said:

> So I'm inclined to rely more on the doctor's report, rather than substitute my own judgment for it.
>
> I also am extremely sensitive to what the doctor says about [F.Z.] getting agitated or nervous or concerned, and I would try to make it as easy as I could, but I just don't need to get him agitated.

(*Id*. at 8.) The district court acknowledged questions Wilson had for Dr. Blasingame and said Wilson should have an opportunity to question him. (*Id*. at 11.) The district court told Wilson he could request a hearing if necessary. (*Id*.)

The district court held a status hearing on February 14, 2019.[4] (Doc. 86.) On March 12, 2019, Wilson requested a status hearing to address, in part, F.Z.'s competency to testify. (Doc. 98.) At the outset of the hearing, the district court explained:

[4] Wilson did not provide a transcript of this hearing.

> So, Ms. Womack, I saw your filing regarding having [F.Z.] meet personally with Dr. Blasingame. I don't have any problem with that. That's entirely up to you. At this point [F.Z.] has been determined to be not competent to testify, so that's your standard, because we've already had the report. I reviewed it. I made the determination. If you have additional information, that's great, but I don't want it moving the trial.

(3/14/19 Tr. at 3.) Wilson's counsel said she understood the district court's order, explained the reasons she wanted [F.Z.] to meet with Dr. Blasingame, and asked the district court to address the costs of the meeting Wilson arranged. (*Id*. at 3-5.)

The State opposed paying additional costs. (*Id*. at 5.)

> From the state's perspective on the billing issue, the Court has already ruled that he's not competent. The Court gave the defense — I think we were here a month ago and gave them the opportunity to have a hearing. No hearing was ever requested. I certainly think the defense can request a follow-up investigation. But, at this point, the matter has been ruled upon. I don't think the state should have to pay for anything more.

(*Id*.) The district court agreed. (*Id*. at 5-6.)

> So I'm in complete agreement. Asking Dr. Blasingame to review [F.Z.] more to me is equivalent of going and getting an expert to give you a different opinion. I'm looking at Dr. Blasingame's report, and he says, This [sic] writer opines that [F.Z]'s mental illness and cognitive impairments are such that they undermine his capacity to serve as a witness in a court of law. I think he answered the question.
>
> Whether it's Dr. Blasingame or somebody within OPD's stable of approved experts that you want to review him, that's up to you, but I don't think it's the state's burden to pay for it at this point. They did what they were supposed to do.

(*Id*.)

Wilson's counsel again argued it was the State's burden to prove F.Z. was incompetent. (*Id*. at 6-7.) The district court explained it was the State's burden and they met that burden by providing Dr. Blasingame's report. (*Id*. at 7.) The district court reiterated that Dr. Blasingame found in his report that F.Z. did not have the ability to know his role as a witness, he could not communicate with the court, and he could not reliably understand his duty to tell the truth. (*Id*.) The district court reiterated that Wilson was free to have Dr. Blasingame reevaluate F.Z. but the State was not obligated to pay for it. (*Id*.)

On March 28, 2019, Wilson filed a second report by Dr. Blasingame assessing F.Z.'s competency. (Doc. 117.) Dr. Blasingame described in detail his meeting with F.Z. on March 20, 2019. (*Id*.) Dr. Blasingame evaluated F.Z. with special consideration of Mont. R. Evid. 601 and concluded, "[t]his writer remains of the opinion that [F.Z.]'s mental illness and cognitive impairments are such that they undermine his capacity to serve as a witness in a court of law." (*Id*. at 3.) Dr. Blasingame also reported that F.Z. did not know Wilson and did not remember a conversation with Wilson on the night the offenses were alleged to occur. (*Id*. at 2.)

During a hearing on March 28, 2019, Wilson argued the State should be obligated to pay for delays they alleged the State caused. (3/28/19 Tr. at 4-5, 9.) The State disputed any obligation to coordinate Wilson's second evaluation after

the district court's order on March 14, 2019. (*Id*. at 7.) The district court reiterated its prior rulings, explained it was Wilson's obligation to coordinate the second evaluation, and rejected Wilson's attempt to push any costs on to the State. (*Id*. at 8.)

III. District court rulings challenged during trial

On April 2, 2019, the jury convicted Wilson of both felony burglary and misdemeanor theft after a two-day jury trial. (Docs. 118, 125.) At the outset of the trial, the State moved to exclude witnesses from the courtroom. (Trial Tr. at 5-6.) The district court granted that motion and twice during trial asked observers to leave if they were witnesses. (*Id*. at 104-05, 189.)

A. Deborah Porter's testimony

Wilson called Deborah Porter (Porter) as a defense witness. (Trial Tr. at 229-32.) Prior to her testimony, the State informed the district court it was going to object to Porter's testimony as irrelevant and improper character evidence. (*Id*. at 211-16.) The State explained Porter's testimony was limited to her prior employment of Wilson, which was entirely unrelated to the charged offense. (*Id*. at 211-13.) The district court agreed any testimony unrelated to the factual allegations would be inappropriate character evidence. (*Id*. at 213-15.) The district court explained, its only purpose would be to support an inference that Wilson's

intention was to help clean up the intake center because he had helped other people in the past. (*Id*. at 213-15.) The district court reserved ruling until Porter testified but explained character testimony would not be admissible and any factual testimony would be subject to a relevance objection. (*Id*. at 213-16.)

At the time of Porter's testimony, the district court overruled the State's first relevance objection to allow Wilson an opportunity to elicit admissible testimony. (*Id*. at 229-31.) Porter testified she worked for a motel and had one interaction with Wilson during the winter of 2017. (*Id*. at 229-30.) Porter testified:

> A. He was offering to remove snow for $2. He was going around the neighborhood trying to make some money, and so I went ahead and had him do it, and he did a very good job. He did beyond that. He cleaned everything on the ground and went around the entire motel. And so I just had about $10 in my wallet, so I offered that to him. And he said, No. I just asked for two. I'm going to honor that. And I said, I couldn't live with myself. You did too much work, and I'll pay you more. He was very nice. And he came for an interview, got an application to come for an interview for a job.
>
> Q. Okay. And was he interviewed for a job?
>
> A. Yes, he was. And my employer, the owner of the business, asked me to contact him to have him come in for work. He was going to hire him. And the contact phone number we had no longer was his contact number, and I didn't know how to reach him.
>
> Q. And that's the last time that you saw or had any involvement with Mr. Wilson?
>
> A. That's correct.

(*Id*. at 231.) The State objected as irrelevant and improper character evidence. (*Id*. at 232.) The district court sustained the objection based on improper character evidence and instructed the jury to disregard the testimony. (*Id*.)

B. Jon Cranston's testimony

During a break in Wilson's testimony, the State informed the district court they were going to call Cranston as a rebuttal witness. (*Id*. at 263.) The State acknowledged Cranston, who was the director of Ravalli Services, had been in the court room during the proceedings despite the pretrial order to exclude witnesses from the courtroom. (*Id*. at 263, 270.) The State explained, "we had no way of knowing what the defendant was going to say until he actually said it." (*Id*. at 263) The State asked Cranston to leave until he was to be called. (*Id*.)

Wilson objected because Cranston had been in the courtroom during the trial and calling him as a rebuttal witness was in violation of the exclusion order. (*Id*. at 269.) The district court allowed Cranston to testify in rebuttal to Wilson's testimony. (*Id*. at 271.) The district court explained the State was not required to disclose rebuttal witnesses, there was no obvious prejudice to Wilson by having Cranston sit through some of Wilson's testimony, and Wilson was free to cross examine Cranston including issues of prejudice. (*Id*. at 270-71.)

SUMMARY OF THE ARGUMENT

The district court properly exercised its discretion to find F.Z. incompetent to testify under Mont. R. Evid. 601(b). The district court reasonably relied on a report filed by F.Z.'s mental health provider, which addressed the requirements of Mont. R. Evid. 601(b). The doctor opined F.Z. did not have the ability to know his role as a witness, F.Z. could not communicate with the court, and F.Z. could not reliably understand his duty to tell the truth. If this Court deems the district court erred, it was harmless trial error. Wilson maintained F.Z. was essential to his defense because F.Z. gave him permission to enter the intake center. However, F.Z.'s pretrial statements were that he did not give Wilson this permission or otherwise know Wilson. Wilson was not prejudiced by the exclusion of F.Z's testimony.

The district court correctly instructed the jury to disregard Porter's testimony as inadmissible character evidence. Porter testified to a specific instance of Wilson's prior conduct while no character trait was the element of the charge or defense. The district court correctly found this inadmissible under Mont. R. Evid. 404(a) and 405. Further, Porter's testimony was inadmissible under Mont. R. Evid. 401-03. Wilson's past efforts to do odd jobs for a small amount of money have little to do with his presence at the intake center at midnight when he admittedly entered the building and spent hours gathering items to steal. The low probative

value of this testimony was substantially outweighed by the effects of improperly bolstering Wilson's character based on unrelated prior acts.

The district court correctly allowed its rebuttal witness to address Wilson's false or inaccurate testimony. The order to exclude witnesses was made under Mont. R. Evid. 615, which in no case is to apply in a way that forecloses a party's ability to expose inaccurate or false testimony. Although Cranston observed the trial, his limited testimony addressed only Wilson's false or inaccurate testimony. Further, any error was harmless trial error, because Wilson fails to show any prejudice to his substantial rights. This Court has held exclusion orders under Mont. R. Evid. 615 do not apply to a victim who will testify and a validly designated representative of a party. Cranston was the director of day services for the victim entity. Although the State did not designate Cranston under Mont. R. Evid. 615, an exception for his presence and testimony would have been properly granted.

Wilson's convictions should be affirmed.

///

ARGUMENT

I. Standard of review

"This Court 'review[s] evidentiary rulings for an abuse of discretion, which occurs when a district court acts arbitrarily without conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice.'" *State v. Ellison*, 2018 MT 252, ¶ 8, 393 Mont. 90, 428 P.3d 826 (quoting *State v. Blaz*, 2017 MT 164, ¶ 10, 388 Mont. 105, 398 P.3d 247; *State v. Madplume*, 2017 MT 40, ¶ 19, 386 Mont. 368, 390 P.3d 142). A district court's ruling on witness competency is an evidentiary ruling reviewed for abuse of discretion. *State v. Longfellow*, 2008 MT 343, ¶ 9, 346 Mont. 286, 194 P.3d 694. This Court "will affirm the district court when it reaches the right result, even if it reaches the right result for the wrong reason." *Ellison*, ¶ 8.

II. The district court correctly relied on Dr. Blasingame's opinion that F.Z.'s mental illness and cognitive impairment rendered him incompetent to serve as a witness under Mont. R. Evid. 601.

"Every person is competent to be a witness except as otherwise provided in" the rules of evidence. Mont. R. Evid. 601(a).

> A person is disqualified to be a witness if the court finds that (1) the witness is incapable of expression concerning the matter so as to be understood by the judge and jury either directly or through interpretation by one who can understand the witness or (2) the witness is incapable of understanding the duty of a witness to tell the truth.

Mont. R. Evid. 601(b). The party asserting a prospective witness is incompetent bears the burden of proof. *State v. Coleman*, 177 Mont. 1, 27, 579 P.2d 732, 748 (1978). "It is within the discretion of the trial judge to determine competency and his findings will not be overturned absent an abuse of discretion." *State v. Stephens*, 198 Mont. 140, 144, 645 P.2d 387, 390 (1982).

The district court had discretion to make the competency determination under Mont. R. Evid. 601, *Stephens*, 198 Mont. at 144, 645 P.2d at 390, and Wilson cannot show the district court abused that discretion. The district court primarily relied on a report filed by a mental health provider for F.Z., Dr. Blasingame, who found F.Z. did not have the ability to know his role as a witness, F.Z. could not communicate with the court, and F.Z. could not reliably understand his duty to tell the truth. (Doc. 79; 3/14/19 Tr. at 7.) Dr. Blasingame applied the requirements of Mont. R. Evid. 601(b) to F.Z.'s circumstances and determined F.Z. did not meet the competency requirements.

The district court's decision to rely on Dr. Blasingame's report was well reasoned and made with conscientious judgment. *See Ellison*, ¶ 8. As the district court explained, it was inclined to rely on a qualified expert opinion of Dr. Blasingame, who addressed the requirements of Mont. R. Evid. 601 in his report and opined F.Z. did not meet the requirements of a competent witness. Moreover, the district court's decision is supported by the affidavit of F.Z.'s case

manager with AWARE expressing her concern with F.Z.'s ability to understand his duty to tell the truth and Dr. Blasingame's second report. After the district court found F.Z. incompetent, Wilson asked Dr. Blasingame to evaluate F.Z. again and issue a second report. In that report, Dr. Blasingame reaffirmed, "[t]his writer remains of the opinion that [F.Z.]'s mental illness and cognitive impairments are such that they undermine his capacity to serve as a witness in a court of law." (Doc. 117 at 3.) All of this supports the district court's discretionary decision to find F.Z. incompetent under Mont. R. Evid. 601.

Wilson argues the district court abused its discretion by not holding an evidentiary hearing. (Appellant's Brief (Br.) at 19-23.) However, Wilson did not request a hearing, he does not cite any authority that a hearing is required, and he points to nothing in the record to show it was necessary to further develop the facts with a hearing. Wilson did not challenge Dr. Blasingame's qualifications, he relied on Dr. Blasingame for a second report, and nothing was offered to dispute Dr. Blasingame's opinion that F.Z. was not competent to testify. The district court did not abuse its discretion for not holding an unnecessary evidentiary hearing that was not requested by either side.

Wilson's reliance on *Stephens*, 198 Mont. 140, 645 P.2d 387, to argue a trial court is required to personally question a prospective witness before making a competency determination is misplaced. (*See* Br. at 22-23.) In that case, the

defendant challenged a witness's competency with two evaluations from Warm Springs that were at least four- and five-years old respectively. *Stephens*, 198 Mont. at 142-44, 645 P.2d 389-90. At the time of the evaluations, the challenged witness (Bex) was deemed to have an impaired ability to understand the criminality of his conduct when he committed an offense and an impaired ability to assist in his defense. *Id.*, 198 Mont. at 142, 645 P.2d 389. The evaluations did not address Mont. R. Evid. 601. *Stephens,* 198 Mont. at 142-44, 645 P.2d 389-90 The trial court examined Bex in camera, which was the only analysis of Mont. R. Evid. 601, and found he was competent to testify. *Stephens*, 198 Mont. at 142, 645 P.2d 389.

This Court affirmed, noting the defendant relied solely on the reports from years before and introduced no recent evidence to support Bex's competency at the time of trial. *Id*., 198 Mont. at 144, 645 P.2d 389-90. This Court explained:

> While these reports show 1976 diagnoses of mental disorders, the reports also indicate that he was very much improved. In and of themselves, these reports are not sufficient to require a conclusion that the witness was incompetent, incapable of expressing himself concerning the matter, or incapable of understanding the duty to tell the truth. After considering such reports and after watching Bex answer questions, the District Court concluded that Bex was capable of expressing himself in a manner so as to be understood and was capable of understanding the duty of a witness to tell the truth. The record discloses facts upon which the District Court would properly reach such a conclusion.

Id.

Here, the difference is that Dr. Blasingame evaluated F.Z.'s competence to be a witness under the standards in Mont. R. Evid. 601 a few months before trial. In *Stephens*, 198 Mont. at 144, 645 P.2d 389-90, this Court appropriately relied on the district court's decision to examine Bex in camera because it was the only current evaluation of Bex and the only evidence that addressed his competency under Mont. R. Evid. 601. However, the holding does not require a trial court to do so in every case, especially when the challenging party provides an expert report specifically addressing the standards in Mont. R. Evid. 601. *See Stephens*, 198 Mont. at 144, 645 P.2d 389-90. As the district court explained, Dr. Blasingame addressed every requirement under Mont. R. Evid. 601 and opined F.Z. was not competent to testify. (3/14/19 Tr. at 5-7.)

Wilson challenged the report because Dr. Blasingame had personally evaluated F.Z. for a different purpose. However, Dr. Blasingame had met with F.Z. less than six months before and he reviewed approximately 200 pages of F.Z.'s case documentation in preparation for his report. The purpose of the meeting did nothing to undermine Dr. Blasingame's opinion or his qualifications to provide it, which were not challenged. The district court was within its discretion to rely on Dr. Blasingame's expert opinion. This conclusion is supported by Dr. Blasingame's opinion in his second report, which included a second in-person

meeting with F.Z. and reiterated F.Z.'s inability to meet the competency standards in Mont. R. Evid. 601.

Wilson also fails to support his argument that the district court shifted the burden of proof. The State's motion included an affidavit from F.Z.'s case manager with AWARE, which analyzed Mont. R. Evid. 601 and concluded F.Z. was incapable of understanding the difference between a truth and a lie. The district court ordered the State to produce a report from F.Z.'s mental health provider. The State provided that report from Dr. Blasingame, which included his opinion that F.Z. was not competent to testify under the standards in Mont. R. Evid. 601.

The district court correctly denied Wilson's request that the State be required to do more and pay for further evaluations.

> Asking Dr. Blasingame to review [F.Z.] more to me is equivalent of going and getting an expert to give you a different opinion. I'm looking at Dr. Blasingame's report, and he says, This [sic] writer opines that Frank's mental illness and cognitive impairments are such that they undermine his capacity to serve as a witness in a court of law. I think he answered the question.
>
> Whether it's Dr. Blasingame or somebody within OPD's stable of approved experts that you want to review him, that's up to you, but I don't think it's the state's burden to pay for it at this point. They did what they were supposed to do.

(3/14/19 Tr. at 5-6.)

> I agree it was the state's motion, which is why I made it their burden in the first place. I'm also going to trust that Dr. Blasingame would not have given this letter if he were not confident in his medical and psychological assessment. He notes that he had a prior

> evaluation that wasn't related to this, but he specifically answers the questions.
>
> Does Frank have the ability to know his role as a witness? He says no; if Frank is not in a lucid state, he can't do it.
>
> Can Frank communicate with the Court? No.
>
> Can Frank appreciate his duty to tell the truth? He specifically says Frank will tell the truth as he believes it to be.
>
> So, again, if you want him evaluated again more thoroughly by Dr. Blasingame or somebody else, you're welcome to do that, but it's not going to be on the state's dime.

(3/14/19 Tr. at 7.)

There was no burden shifting here. The district court required the State to provide an expert's report to address F.Z.'s competency at the State's expense. The State followed that directive, and Dr. Blasingame provided an opinion directly addressing the considerations of Mont. R. Evid. 601. Based on this information, the district court found F.Z. was not competent to testify. The State had met its burden. The district court did not abuse its discretion or otherwise infringe on Wilson's fair trial rights by ruling he had to pay for any further efforts to rebut the proof offered by the State.

Further, Wilson's argument that the district court's ruling substantially prejudiced his right to a fair trial ignores the purported substance of F.Z.'s testimony. The record does not support Wilson's statement that "F.Z. was a critical witness with exculpatory information and without his testimony, Wilson was

bootstrapped as to how he could testify and present his case." (Br. at 23.) Although Wilson consistently pursued this as a theory of his defense, nothing in the record shows F.Z.'s testimony would support it.

During the hearing on January 29, 2019, Wilson told the district court F.Z. was important to his defense because F.Z. gave him permission to enter the facility that he burgled. (1/29/19 Tr. at 9.) The State informed the district court it was confused because F.Z. had previously said he did not give Wilson permission to enter in an interview with Wilson's investigator. (*Id*. at 9-10.) F.Z. reconfirmed this position in his second evaluation with Dr. Blasingame. (Doc. 117 at 2.) Dr. Blasingame reported:

> [F.Z.] stated he does not remember a conversation with the guy (Nick W.). [F.Z.] said he does not know him. He said he doesn't remember what he looks like. [F.Z.] said the guy said that he knows [F.Z.], but [F.Z.] disclaims this.

(*Id*.) Wilson cannot show he was prejudiced by the exclusion of F.Z.'s testimony because the only facts in the record show his testimony would have undermined Wilson's defense. *See Ellison*, ¶ 8.

Similarly, even if this Court determined the district court erred in finding F.Z. incompetent, it was harmless trial error. *See State v. Garding*, 2013 MT 355, ¶¶ 28-33, 373 Mont. 16, 315 P.3d 912 (improperly excluded evidence is harmless if there is no reasonable possibility the exclusion contributed to the conviction). There is no reasonable possibility the exclusion of F.Z.'s testimony would have

contributed to his conviction because F.Z. stated he did not know Wilson or give him permission to enter the intake center. At trial, Wilson had the opportunity to forward his theory that he had permission to enter the intake center. F.Z.'s testimony would have undermined that defense. Considering this and the strength of the evidence against Wilson, including the surveillance video and Wilson's admissions that he entered the intake center and stole various items, the exclusion of F.Z.'s testimony was harmless. *See Garding*, ¶¶ 28-33.

III. The district court correctly exercised its discretion when it instructed the jury to disregard Porter's testimony as inadmissible character evidence.

The admission of character evidence is governed by Mont. R. Evid. 404.

State v. Pelletier, 2020 MT 249, ¶ 15, 401 Mont. 454, 473 P.3d 991.

> Except as otherwise narrowly provided by an enumerated exception to the rule, evidence of the character, or a character trait, of a party, witness, or hearsay declarant is not admissible for the purpose of proving that the person acted in "conform[ance] therewith on a particular occasion." M. R. Evid. 404(a).

Pelletier, ¶ 15 (footnote omitted).

Under the applicable exception in Mont. R. Evid. 404(a)(1), Wilson was allowed to offer "[e]vidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same." However, "[e]ven when admissible under an enumerated exception to Rule 404(a), character evidence is admissible only in

the form specified by M. R. Evid. 405 and 608(b) (in re reputation/opinion evidence and prior acts evidence)." *Pelletier*, ¶ 15. Both of these rules divide character evidence into two categories: (1) reputation or opinion and (2) specific instances of conduct. Mont. R. Evid. 405, 608.

When character evidence is allowed, it is generally acceptable to offer reputation or opinion evidence, but specific instances of conduct are limited to self-defense cases or "cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense." Mont. R. Evid. 405; *see also* Commission Comments to Mont. R. Evid. 405(b) (1976) (specific instances of conduct evidence "is generally restricted to situations where character is in issue, when such proof is central to the outcome of the case"). The admission of specific instances of conduct is limited because that "method of proof is the most persuasive . . . and is also the most likely 'to arouse undue prejudice, to confuse and distract, to engender time-consuming side issues and to create risk of unfair surprise.'" Commission Comments to Mont. R. Evid. 405(b) (1976) (quoting McCormick, *Handbook of the Law of Evidence* 443 (2d ed. 1972)).

The district court correctly exercised its discretion to exclude Porter's testimony because it provided a specific instance of conduct that was not central to the outcome of the case. *See* Commission Comments to Mont. R. Evid. 405(b) (1976). Porter's testimony, which was provided in total before the district court

found it was inadmissible, was based entirely on a specific interaction Porter had with Wilson on a prior occasion. As the district court explained, the purpose of the evidence was to show "[Wilson] behaved this way before so that's certainly what he must be doing now." (Trial Tr. at 215.) This is improper character evidence, and the district court properly excluded it under Mont. R. Evid. 404(a) and 405.

Moreover, Porter's testimony had little probative value beyond bolstering Wilson's character and it was properly excluded under Mont. R. Evid. 401-403.[5] *See Ellison*, ¶ 8 (evidentiary rulings may be affirmed if the district court reaches the correct result for the wrong reason). As Wilson explains in his opening brief, the purpose of the testimony was "verification of his past behavior — how he looked for work." (Br. at 24.) Wilson's past efforts to do an odd job for a small amount of money does little to explain his presence at the intake center at midnight when he admittedly entered the building while no one was there and spent hours gathering items to steal with the lights off. The minimal probative value of Porter's testimony was substantially outweighed by the risk of confusing the issues and

[5] Wilson overstates his allegation that the State prejudicially reframed the character of this case. (*See* Br. at 24.) The State cannot locate the uncited quotation "exploitation of persons with developmental disabilities," which Wilson impliedly attributes to the State in his opening brief. (*See* Br. at 24; Trial Tr. at 1-341.) Wilson cannot blame the State for his admitted theft from Ravalli Services, which is a community organization that serves the developmentally disabled.

distracting the jury from the events that resulted in the charged offenses. *See* Mont. R. Evid. 401-403.

The district court correctly exercised its discretion to instruct the jury to disregard Porter's testimony. However, even this Court determines the district court abused its discretion, it was harmless trial error. *See Garding*, ¶¶ 28-33 (improperly excluded evidence is harmless if there is no reasonable possibility the exclusion contributed to the conviction). There is no reasonable possibility the exclusion of Porter's testimony contributed to Wilson's conviction because he remained in the intake center for hours gathering items to steal. As the State argued in closing, Wilson committed burglary if he knowingly entered or remained in the intake center with the purpose to commit an offense therein. (*See* Trial Tr. at 316-18; Doc. 123 at Instr. 17; Mont. Code Ann. § 45-6-204.) Wilson admitted to deciding to steal items while inside the intake center and the surveillance video showed Wilson remained in the intake center for hours gathering items to steal. Due to the strength of the evidence showing Wilson committed burglary, any error in the exclusion of Porter's testimony was harmless trial error. *See Garding*, ¶¶ 28-33.

IV. The district court correctly exercised its discretion to allow Cranston to testify in rebuttal to Wilson's false or inaccurate testimony.

At the outset of the trial, the district court granted the State's motion to exclude witnesses from the courtroom under Mont. R. Evid. 615. The rule provides:

> At the request of a party, the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

Mont. R. Evid. 615. In the 1976 commission comments to Mont. R. Evid. 615 the rule is described to be "a powerful weapon against perjury." It was further noted that "no rule should ever be allowed which does not permit a party to expose inaccurate testimony or even perjury." Commission Comments to Mont. R. Evid. 615 (1976) (citing 6 Wigmore, *Evidence*, Section 1838 (3d ed. 1940)).

Cranston was the director of day and vocational services at Ravalli Services, the victim organization. The State did not intend to call Cranston as a witness, so he was present in the courtroom during the trial until midway through Wilson's testimony. After Wilson gave inaccurate or false testimony, the State decided it was necessary to call Cranston in rebuttal, notified the district court, and asked Cranston to leave for the remainder of Wilson's testimony. As the State explained,

"[o]bviously we had no way of knowing what the defendant was going to say until he actually said it." (Trial Tr. at 263.)

The State had a right to call Cranston as a rebuttal witness. "Rebuttal evidence offered by the State is admissible if it has a tendency to contradict or disprove evidence of the defense." *Garding*, ¶ 38 (quoting *State v. Gardner*, 2003 MT 338, ¶ 36, 318 Mont. 436, 80 P.3d 1262) (internal quotations omitted). The district court's discretionary decision to allow the State to call Cranston was consistent with the purpose of Mont. R. Evid. 615. As noted in the commission comments, the rule should never be used to foreclose a party's ability to "expose inaccurate testimony or even perjury." Commission Comments to Mont. R. Evid. 615 (1976) (citing 6 Wigmore, *Evidence*, Section 1838 (3d ed. 1940)).

Cranston's brief testimony was limited to rebutting specific statements Wilson made during his testimony that were either inaccurate or false. Wilson testified he helped load a horse trailer with F.Z. on March 14, 2018, and left around 3:30 or 4:00. (Trial Tr. at 246.) Cranston testified this could not be true because clients, like F.Z., got off work at 2:30 p.m. and all other staff leaves the building between 3:00 and 3:30. (*Id*. at 287-88.) Wilson testified he did not turn the lights on in the intake center while he was admittedly stealing items in the middle of the night because the only light switches were in a locked room. (*Id*. at 249, 255.) Cranston testified there were multiple light switches located near almost every

doorway. (*Id*. at 289.) Wilson testified he was there to clean up water from flooding he had noticed that afternoon. (*Id*. at 238-40, 245-46.) Cranston testified the intake center did not have a flooding problem. (*Id*. at 289.) Wilson testified he disposed of items used to clean up water in the dumpster behind the intake center. (*Id*. at 259-60.) Cranston testified this would not be possible because the dumpster was closed and padlocked at night. (*Id*. at 289.)

Wilson argues the district court's decision to allow Cranston to testify caused him substantial harm. (Br. at 29.) However, the only harm Cranston's testimony caused Wilson was to expose his inaccurate and false testimony. That is the purpose of rebuttal evidence, *Garding*, ¶ 38, and Wilson cannot rely on Mont. R. Evid. 615 to foreclose the State's ability to expose his inaccurate or false testimony. *See* Commission Comments to Mont. R. Evid. 615 (1976). Wilson's attempt to use Mont. R. Evid. 615 as a perjury shield is contrary to the rule's design as "a powerful weapon against perjury." Commission Comments to Mont. R. Evid. 615 (1976).

Further, any error alleged by Wilson is harmless trial error, because he cannot show the district court's allowance of Cranston's testimony prejudiced his substantial rights. *See* Mont. Code Ann. § 46-20-701(1); *State v. Van Kirk*, 2001 MT 184, ¶¶ 38-42, 306 Mont. 215, 32 P.3d 735; *State v. Flowers*, 2004 MT 37, ¶ 27, 320 Mont. 49, 86 P.3d 3 (overruled on other grounds) (erroneous rulings

under Mont. R. Evid. 615 are trial error). This Court has held that a validly designated representative under Mont. R. Evid. 615(2) may both remain in the courtroom and testify. *Faulconbridge v. State*, 2006 MT 198, ¶ 53, 333 Mont. 186, 142 P.3d 777 (2006). Further, "the victim of a crime has the right to be present during trial, and may not be excluded from the trial solely because he or she will also be called as a witness." *State v. Braulick*, 2015 MT 147, ¶¶ 24-25, 379 Mont. 302, 349 P.3d 508 (applying Mont. Code Ann. § 46-24-106(1) and Mont. R. Evid. 615). Although the State did not formally designate Cranston under Mont. R. Evid. 615(2), an exception for Cranston's presence and testimony would have been properly granted under the rules of evidence and Montana law. *See Faulconbridge*, ¶ 53; *Braulick*, ¶¶ 24-25.

Moreover, Cranston's testimony merely rebutted Wilson's false or inaccurate testimony about collateral factual issues. Cranston's rebuttal testimony was not admitted to prove an element of the offense and it was harmless because there is no reasonable possibility it might have contributed to the conviction. *See Van Kirk*, ¶ 46; *State v. Stewart*, 2012 MT 317, ¶ 46, 367 Mont. 503, 291 P.3d 1187 (citing appropriate harmless error test). Pointing out Wilson's inaccurate and false testimony is proper rebuttal testimony, *see Garding*, ¶ 38, and any error in admitting it should be deemed harmless trial error based on the high quality of Wilson's admissions and the surveillance video. *See Van Kirk*, ¶ 46; *Stewart*, ¶ 46.

CONCLUSION

The State respectfully requests this Court affirm Wilson's conviction.

Respectfully submitted this 22nd day of September, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 8,650 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature and any appendices.

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