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Case Number: DA 20-0474

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0474

STATE OF MONTANA,

Plaintiff and Appellee,

v.

BENJAMIN PITKANEN III,

Defendant and Appellant.

# BRIEF OF APPELLANT

On Appeal from the Montana Eighth Judicial District Court, Cascade County, the Honorable John W. Parker, 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

AUSTIN KNUDSEN
Montana Attorney General
TAMMY K PLUBELL
Bureau Chief
Appellate Services Bureau
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

JOSHUA A. RACKI
Cascade County Attorney
AMANDA LOFINK
Deputy County Attorney
121 Fourth Street North Ste. 2A
Great Falls, MT 59401

ATTORNEYS FOR PLAINTIFF AND APPELLEE

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## STATEMENT OF THE ISSUES

1. Whether Karson Bird's video-recorded statement from the hospital that reinforced his nearly identical trial testimony that Ben Pitkanen stabbed him was a "prior inconsistent statement" under M. R. Evid. 801(d)(1)(A), or whether it was inadmissible hearsay.

2. Whether Detective Mahlum's uncertain recollection about a jail call he listened to between Ben and his girlfriend, Jenee—in which Jenee, but not Ben, referenced Ben having stabbed someone—was an "admission by party-opponent" under M. R. Evid. 801(d)(2), or whether it was inadmissible hearsay.

3. Whether Ben is entitled to credit for all 492 days he was incarcerated from his arrest through sentencing, rather than the mere 223 days he received.

## STATEMENT OF THE CASE

From a Great Falls hospital bed the night of March 24, 2019, Karson Bird told police he had been stabbed by a stranger in an alley during a mugging. (State's Exhibit (Ex.) 16.) He later changed his story to accuse Ben Pitkanen of stabbing him earlier that night at a mutual friend's house. (Exs. 17, 18.) Based on Karson's new story, the State

arrested Ben on March 27, 2019, and charged him with assault with a weapon under Mont. Code Ann. § 45-5-213(1)(a). (District Court Document (Doc.) 2.)

After Karson testified for the prosecution at trial, the State introduced a video recording of Karson's hospital statement accusing Ben. (Exs. 17, 18; 1/22/2020 Trial Transcript (1/22 Tr.) at 49.) This statement was materially identical to Karson's trial testimony in which he also claimed Ben had stabbed him. (1/21/2020 Trial Transcript (1/21 Tr.) at 220–30.) Over defense objection, the State introduced this video as a prior *in*consistent statement on the ground that Karson testified he could not remember every detail of what he told the police that night. (1/22 Tr. at 46–48.)

Later, the State asked one of its witnesses, Detective Mahlum, to paraphrase for the jury what Ben and his girlfriend, Jenee, said to each other during a March 27, 2019 phone call while Ben was in jail. (1/22 Tr. at 140–42.) Mahlum initially testified he did not remember hearing any "admissions" made during the call. (1/22 Tr. at 142.) On further prodding from the prosecutor, Mahlum testified he vaguely remembered Jenee telling Ben, "'It was my fault that you stabbed him,' something to

that effect." (1/22 Tr. at 142.) He claimed Ben then responded, "'No, baby. Don't worry about it. It wasn't your fault,' something to that effect." (1/22 Tr. at 142.) Mahlum admitted he could not "recall the exact verbatim" of this conversation he heard over nine months before trial. (1/22 Tr. at 142.)

Over objection, the District Court concluded this testimony was admissible as an admission by a party opponent under M. R. Evid. 801(d)(2). (1/22 Tr. at 141–45.) The court did not explain whether the "admission" was Ben's "own statement" under Rule 801(d)(2)(A), or whether it was Jenee's statement that Ben had adopted under Rule 801(d)(2)(B). (1/22 Tr. at 141–45.)

The jury found Ben guilty. (1/22 Tr. at 255; Doc. 76.) The District Court sentenced him to 40 years to the Montana State Prison with 20 suspended. (Doc. 99 at 2.)

Ben was incarcerated from the date of his March 27, 2019 arrest until the July 30, 2020 sentencing hearing—a total of 492 days. (Doc. 84 at 1, 7; 7/30/2020 Sentencing Hearing Transcript (Sentencing Tr.) at 17.) The District Court credited Ben with only 223 days for time served from his arrest until November 4, 2019—the date he was

sentenced to DOC custody in a separate, unrelated case. (Doc. 99 at 3; *see* Doc. 84 at 7.) The court and parties believed Ben was not eligible for any credit for the remaining 269 days he spent in custody from November 4, 2019, until his sentencing hearing. (Sentencing Tr. at 14–17.)

Ben filed a timely notice of appeal. (Doc. 105.)

## STATEMENT OF THE FACTS

Karson Bird and Ben Pitkanen got into a fistfight in their friend Erin's living room in Great Falls the evening of March 24, 2019. (1/21 Tr. at 220–22, 293–94.) The fight occurred right in front of Erin and Karson's friend Justin. (1/21 Tr. at 225.) Karson testified he was "buzzed" on five shots of vodka. (1/21 Tr. at 225–26.) At the end of the fight, Erin asked Karson if he was okay, and he said, "yes." (1/21 Tr. at 295, 298, 301.) He did not seem injured to her. (1/21 Tr. at 301.) Karson and Justin then left the house. (1/21 Tr. at 298.)

Around midnight that night, Karson and Justin showed up at the hospital. Karson had two stab wounds to his back. (1/21 Tr. at 214.) Officers Anthony Formell and Kristi Kinsey arrived at the hospital and asked Karson how he got his wounds. (1/22 Tr. at 36, 189.) Karson told

them what happened: he and Justin were walking down an alley when a stranger accosted them, demanded Karson's backpack, and when Karson refused, the stranger stabbed him. (1/21 Tr. at 218; Ex. 16.)

Officer Formell was a rookie-in-training who, according to his partner and training supervisor, was not really "getting" police work. (1/22 Tr. at 77, 93–96.) Officer Formell led the investigation while Officer Kinsey observed. (1/22 Tr. at 83, 187.) This was one of the last cases he investigated before quitting the force. (1/22 Tr. at 188.)

When Karson' mother showed up at the hospital, Officer Formell—who had doubts about what Karson had told him—decided to let Karson, his mother, and Justin talk alone in the hospital room. (1/21 Tr. at 219–20; 1/22 Tr. at 76–77, 193–94.) After 15 to 20 minutes, Karson and Justin emerged with a new story. This time, instead of saying he had been stabbed during a mugging, Karson said Ben stabbed him earlier during the fight at Erin's house. (1/21 Tr. at 220–22; 1/22 Tr. at 194–95; Exs. 17, 18.)

Karson took the stand as the State's key witness at Ben's trial.[1] The prosecutor asked Karson if he remembered what he *initially* told police about how he got his stab wounds that night. (1/21 Tr. at 217.) Karson answered, "Kind of. I mean, not really. I remember some stuff, but then the others I can't remember." (1/21 Tr. at 218.) The prosecutor asked him to say what he remembered telling the police, and Karson answered, "Telling them that I was walking down the alley, me and Justin, and some guy asked me for my bag, and I didn't give it to him, and he stabbed me." (1/21 Tr. at 218.)

Karson then testified this initial story to the police was a lie. (1/21 Tr. at 219.) He said he told them this because he did not want Ben "getting in trouble." (1/21 Tr. at 219.) Karson testified that after meeting privately with his mother and Justin, he changed his story and told the police what really happened. (1/21 Tr. at 220.)

[1] Before trial, Karson was reluctant to testify. Out of concern Karson would not show for trial, the prosecutor secured a court order for his arrest and deposition. (*See* Docs. 47, 53, 55.) On the morning of trial, the prosecutor was prepared to play Karson's deposition video in his stead. (1/21 Tr. at 207.) But Karson changed his mind at the last minute, showed up to court, and took the stand as a willing State witness. (1/21 Tr. at 212.)

The prosecutor asked, “What did you tell [the officers] really occurred?” (1/21 Tr. at 220.) Karson testified he told the police he was sitting on a chair in the living room at Erin’s house when Ben entered the house, went to the back room, grabbed his shoes, and then returned to the living room. (1/21 Tr. at 220–21.) Karson testified he told the officers Ben then said to him, “Get the fuck up. This is my chair. This is my spot.” (1/21 Tr. at 221.) Karson responded, “Fuck that. I ain’t gonna get up” and, “You ain’t gonna punk me out,” meaning, “[m]ake me do something I don’t want to do.” (1/21 Tr. at 221.)

Karson said he told the officers Ben then “threw his shoes and hit me in the face,” at which point Karson jumped up and “pushed” or “punched” him back. (1/21 Tr. at 222–23, 230.) Karson said Ben stabbed him during the ensuing fight. (1/21 Tr. at 222.) Karson testified the fight ended when Ben fell over onto a glass table and cut his hand, and then Erin and Justin “got between” him and Ben. (1/21 Tr. at 222–23.) He stated Justin and Erin were in the room for the whole incident. (1/21 Tr. at 225.)

Karson admitted he never saw a knife, nor did he notice the moment he had been stabbed. (1/21 Tr. at 222–23, 267.) After Ben cut

his hand, he went to the bathroom to wash it. (1/21 Tr. at 223.) Ben still had a cut on his hand days later when the police arrested him on March 27. (1/22 Tr. at 67–69; Exs. 11–15.) Karson testified that he and Justin left the house after the fight and walked several alleys down, at which point Justin arranged for someone Karson did not know to drive them to the hospital. (1/21 Tr. at 224.)

Karson testified he did nothing to provoke Ben that night "from the time [Ben] entered the house to the time that he attacked" Karson. (1/21 Tr. at 227.) He stated he was simply sitting in the recliner minding his own business when Ben aggressively confronted him. (1/21 Tr. at 227–28.) Karson testified he had been drinking that night, consuming about five shots of vodka a half hour before Ben arrived. (1/21 Tr. at 225–26.) Karson was feeling the effects by the time Ben showed up. (1/21 Tr. at 226.)

The prosecutor pressed Karson for details on how he reacted when Ben told him to get out of the chair. The prosecutor asked if Karson had been "trying to get out of the chair" at the beginning of the fight, and Karson initially answered, "No. It was just, he threw his shoes at me and I pushed him back, and then he came back at me and I pushed him

again.” (1/21 Tr. at 222.) The prosecutor asked if Karson remembered telling officers that “when [Ben] first told you to get out of the chair, you started gathering your stuff, and then he said, ‘Well, what are you doing?’ . . . And then, you responded, ‘What does it look like I’m doing?’ Do you remember that?” (1/21 Tr. at 222–23.) Karson answered, “Um,” and “Kind of.” (1/21 Tr. at 223.) The prosecutor asked if Karson remembered telling officers that Ben then punched him in the face, “and that’s when you punched him back,” and Karson answered yes. (1/21 Tr. at 223.)

After Karson gave more details about what he told the police, the prosecutor asked, “Do you remember all the details of what you told the officers had occurred?” (1/21 Tr. at 228.) Karson answered, “Not really.” (1/21 Tr. at 228.) The prosecutor again asked whether he remembered telling the officers he was gathering his stuff right before Ben attacked him. (1/21 Tr. at 228.) This time, Karson responded, “Kind of. I mean, I remember grabbing my stuff, and then I remember him asking me what I’m doing, but – like, I just told him, ‘I’m grabbing my stuff.’” (1/21 Tr. at 228–29.)

The prosecutor asked if Karson remembered "telling the officers what occurred after as you were trying to grab your stuff and move." Karson answered, "Yes," and recited again how Ben instigated the fight. (1/21 Tr. at 229.) The prosecutor asked if this narrative Karson told the officers was "the true story," and Karson said, "Yes." (1/21 Tr. at 229.)

Karson again reiterated that Ben punched him, threw his shoes at him, and stabbed him. (1/21 Tr. at 230–33.) He testified that the State's pictures of his wounds taken that night at the hospital were pictures of the "injuries [he] suffered from Ben that night." (1/21 Tr. at 240, 245; Exs. 1–4.) Karson concluded his direct examination by testifying he did not fabricate his statements to the police in which he incriminated Ben, and neither his mom nor Justin pressured him to falsely accuse Ben. (1/21 Tr. at 257.)

Karson testified on cross that he did not know he had been stabbed until he "asked them how I was bleeding, and they said, 'I think you got stabbed.'" (1/21 Tr. at 267.) He asserted the only time he lied was in his initial statement to police at the hospital in which he told them he had been mugged in an alley. (1/21 Tr. at 270.) Karson insisted that "every time since then"—from his second, video-recorded

statement to Officer Formell in the hospital to his trial testimony—he had told the truth. (1/21 Tr. at 270.)

Neither of the two people who witnessed the fight between Karson and Ben could verify Karson's story that Ben stabbed him. Justin saw the whole incident but did not testify. Erin took the stand and testified she was in the living room when the alleged stabbing occurred. (1/21 Tr. at 291–300.) She said Ben started the fight, and she watched the whole fight unfold. (1/21 Tr. at 291–300.) Erin never saw Ben holding a knife or other sharp object. (1/21 Tr. at 300.)

Erin said she ended the fight by yelling at Ben and Karson to stop. (1/21 Tr. at 297.) Erin acknowledged that she did not see Ben's hands the entire time, and that at one point Ben was facing Karson with his arms wrapped around Karson's back. (1/21 Tr. at 294–95, 304.) When the fight ended, Ben went into the bathroom. (1/21 Tr. at 295.) Erin asked Karson if he was okay, and he nodded yes. (1/21 Tr. at 295–96, 301.) She did not notice Karson bleeding. (1/21 Tr. at 301.)

Erin followed Ben into the bathroom, where he was tending to a cut on his hand. (1/21 Tr. at 296.) She did not see how Ben cut his hand. (1/21 Tr. at 297.) After checking on Ben in the bathroom, Erin came

back into the living room. Right before Karson and Justin left, Erin "asked Karson if he was okay again, and he said yes." (1/21 Tr. at 298.)

Officers Kinsey and Formell and a couple other officers executed a search warrant at Erin's house the night of the incident. (1/22 Tr. at 61–62.) Officer Formell photographed the living room. (1/22 Tr. at 62–63; Exs. 9–10.) Officer Kinsey testified the home was "very dirty" and clearly had "a large number of people" coming and going from it. (1/22 Tr. at 102.) She testified it was cluttered, foul smelling, and strewn with garbage and filth. (1/22 Tr. at 114.)

The officers found blood on the recliner and on the living room floor. (1/22 Tr. at 66, 147.) Officer Formell collected samples of the blood, but the State never submitted them to the Crime Lab for testing. (1/22 Tr. at 67.) When asked why not, Officer Kinsey answered, "We knew that two people were bleeding. It wasn't a 'who done it' case. We had a suspect." (1/22 Tr. at 67.) When asked if she thought there would have been evidentiary value to determining whether Karson had in fact bled at Erin's house, as opposed to somewhere else that night, she answered, "[Karson] said he did, so we figured yes it was his blood." (1/22 Tr. at 89.) She agreed that the only reason she "knew" that Karson

had bled in the home was because she took his word for it, even though she agreed Karson had a tendency to be “dishonest” with the police. (1/22 Tr. at 93.)

Detective Mahlum agreed that absent testing of the blood, there was no way to know for sure it was Karson’s. (1/22 Tr. at 148.) Given that no one actually saw Ben stab Karson, and Karson had given shifting stories to the police about where and how the stabbing occurred, Mahlum agreed it could have been beneficial in hindsight to establish whether Karson had actually bled at Erin’s house. (1/22 Tr. at 155–56.)

At no point in the investigation, including in the search of Erin’s house and during Ben’s arrest, did police ever find a knife or other alleged weapon.

**Karson’s video-recorded statement**

During Officer Kinsey’s direct examination, the State introduced videos of Karson’s statements to Officer Formell at the hospital. (1/22 Tr. at 44–49; Exs. 16, 17, 18.) Defense counsel objected to Exhibits 17 and 18—the two videos containing Karson’s statement in which he first incriminated Ben—on hearsay grounds. (1/22 Tr. at 44.) Counsel

argued the State's effort to show the jury Karson's consistent hospital statement was simply an attempt at "bolstering" his trial testimony. (1/22 Tr. at 44–45.)

The State argued, "While this technically is hearsay, this is an exception under hearsay as a prior inconsistent statement. It is true that Mr. Bird did testify, but there was [sic] inconsistencies with his testimony, so this is for impeachment purposes of Mr. Bird's testimony." (1/22 Tr. at 46.) The State tried to justify admission by arguing that "Mr. Bird testified that he could not recall. He could recall bits and pieces of this. So this is not bolstering his testimony, this is impeaching his testimony." (1/22 Tr. at 47.)

The District Court ruled the videos would be admissible as a prior inconsistent statement. (1/22 Tr. at 48.) The State then published the videos to the jury. (1/22 Tr. at 49.)

The first video, Exhibit 17, was the longest and contained the bulk of Karson's statement to Officer Formell. The video began with Officer Formell telling Karson—after having spoken with Justin first—"So, here's what I know, Karson. I know that you were at Erin's house. I know that Ben wanted to take your stuff from you in Erin's house and

stabbed you. You want to tell me exactly how that went down, and why?"[2] (Ex. 17 at 0:00–0:16.)

In the video, Karson told Officer Formell Ben showed up at Erin's house and tried to "punk me out," meaning telling him to "get up, move." (Ex. 17 at 0:35–0:45). Karson said he started gathering his belongings to get ready to move, and Ben asked, "What are you doing?" to which Karson responded, "What does it look like I'm doing?" (Ex. 17 at 0:45–0:55.) Karson said Ben then punched him in the face. (Ex. 17 at 0:45–0:57.) Karson said, "I got up and punched him back, and he stabbed me." (Ex. 17 at 0:55–1:00.) Karson did not know why Ben attacked him, surmising, "I don't think he likes me, I guess." (Ex. 17 at 2:00–2:07.)

Officer Formell asked for more details, and Karson expounded that Ben wanted to change his shoes and sit in the chair where Karson was sitting. Ben told Karson to get up, Karson began gathering his stuff, Ben asked what he was doing, and Karson answered, "What does

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[2] Defense counsel asked Officer Kinsey whether, in her eight years of experience as a police officer, it was a "good idea to tell a witness what had happened and ask them to agree with you." (1/22 Tr. at 82.) She answered, "Not necessarily, no." (1/22 Tr. at 82.)

it look like I'm doing, I'm grabbing my shit." (Ex. 17 at 2:30–2:50.) Karson stated, "And that's when he punched me." (Ex. 17 at 2:48.) He reiterated he punched Ben back, and during the ensuing scuffle, Ben "stabbed me with a knife." (Ex. 17 at 2:50–2:53, 3:10–3:15.) Karson said he did not see a knife or other weapon, and he did not even know he had been stabbed until after the fight ended. (Ex. 17 at 3:15–3:45.)

Karson said Ben cut his hand during the fight, which Karson assumed happened when Ben fell on a "table" or "stand" with glass on it, "and it broke glass." (Ex. 17 at 1:00–1:23.) After the fight ended, Karson said he and Justin walked a few blocks down towards Longfellow school, and Justin arranged for ride to the hospital from someone Karson did not know. (Ex. 17 at 4:15–4:45.) Officer Formell asked why Karson thought Ben attacked him, and Karson answered, "I don't have a clue why it happened." (Ex. 18 at 0:00–0:08.)

**Detective Mahlum's recollection of the jail call**

Detective Mahlum testified he listened to three recorded jail phone calls between Ben and Jenee after Ben's March 27, 2019 arrest. (1/22 Tr. at 139–40.) The prosecutor asked, "During the second call, did the defendant make any admissions?" (1/22 Tr. at 142.) Detective

Mahlum answered, "Not that I can specifically recall." (1/22 Tr. at 142.)

The prosecutor pressed the issue: "Specifically towards the end of the second call, around 14 minutes, did the defendant make any statement that is an – you took as to be [sic] an admission in response to one of Jenee's statements?" (1/22 Tr. at 142.) Detective Mahlum then answered:

> During that second phone call, [Jenee] speaks with Mr. Pitkanen and indicates – her statement is something to the effect of: 'It's my fault that you stabbed,' – I don't recall if it was Karson or – but, 'It was my fault that you stabbed him,' something to that effect. Mr. Pitkanen then responds, 'No, baby. Don't worry about it. It wasn't your fault,' something to that effect. I don't recall the exact verbatim of the statement.

(1/22 Tr. at 142.) The State did not seek to introduce the actual audio recording of this call. (*See* 1/22 Tr. at 139–45.)

Defense counsel objected to Detective Mahlum's testimony, arguing, "None of that is a party admission." (1/22 Tr. at 142, 145.) The District Court overruled the objection and found the statement admissible as an admission by a party opponent. (1/22 Tr. at 144–45.) The District Court did not expound further or specify whether it believed Ben had personally made an admission or whether Jenee made an admission that Ben had adopted. (*See* 1/22 Tr. at 143–45.) The

District Court issued a jury instruction at the close of trial stating, "A statement made by a Defendant other than at this trial may be an admission," and defined the term "admission." (1/22 Tr. at 216.)

**Credit for time served**

At the July 30, 2020 sentencing hearing, the State argued Ben was entitled to no credit for time served in this case. (Sentencing Tr. at 14.) Defense counsel asked for 223 days of credit from Ben's March 27, 2019 arrest until November 4, 2019, at which point he was sentenced to DOC custody in a separate case. (Sentencing Tr. at 17.) The PSI report similarly advised that Ben was not entitled to credit in this case after November 4, 2019. (Doc. 84 at 7.)

Ben was incarcerated in this case without interruption from March 27, 2019 through July 30, 2020—a period of 492 days. After his arrest, bail was set at $100,000. (Doc. 3.) Ben moved several times to reduce bail, but the District Court rebuffed his requests. (Docs. 7, 11, 34.) Ben never posted bail. (*See* Doc. 5 at 2 (stating bail had not been posted as of April 22, 2019); Docs. 9, 11, 14, 20, 26 (stating Ben appeared at various court hearings between May and October 2019 "from custody"); Doc. 84 at 1 (stating in the PSI that Ben was arrested

March 27, 2019, and had never been released).)

The District Court was hesitant to grant Ben credit even for the period from March 27 to November 4, 2019, saying at the sentencing hearing, "I think statutorily and under the law I don't have to do that, but I'm going to do that because it seems fair, even though your crime was severe." (Sentencing Tr. at 28.) Accordingly, the District Court awarded Ben 223 days of credit for time served from March 27 to November 4, 2019. (Doc. 99 at 3; Sentencing Tr. at 28.) It awarded him no credit for the 269 days from November 4, 2019, to July 30, 2020. (*See* Doc. 99; Sentencing Tr. at 28.)

## STANDARDS OF REVIEW

This Court reviews a district court's evidentiary rulings for an abuse of discretion. *State v. Smith*, 2021 MT 148, ¶ 14, 404 Mont. 245, 488 P.3d 531. However, evidentiary rulings must be supported by the "rules and principles of law." *Smith*, ¶ 14. Therefore, to the extent an evidentiary ruling is based on a conclusion of law, this Court determines whether the district court correctly interpreted the law. *Smith*, ¶ 14.

This Court reviews a district court's sentence de novo for legality. *State v. Mendoza*, 2021 MT 197, ¶ 8, 405 Mont. 154, 492 P.3d 509. "A sentence is legal if it falls within the parameters set by applicable sentencing statutes and if the sentencing court adheres to the affirmative mandates of those statutes." *Mendoza*, ¶ 8.

## SUMMARY OF THE ARGUMENT

The State relied heavily on hearsay evidence to convince the jury that Ben was the person who stabbed Karson. Karson was the State's key witness, but his story lacked corroboration. Aside from Karson himself, no other witness testified they (a) saw Ben stab Karson, (b) saw Ben with a knife or other weapon, or (c) saw Karson wounded and bleeding at Erin's house after his fistfight with Ben. The State did not even establish that any of the blood located in Erin's house was Karson's.

To shore up its case, the State bolstered Karson's trial testimony by showing the jury his nearly identical video-recorded statement from his hospital bed. Beyond a few negligible detail differences, the video statement was the same as Karson's testimony. This was not a prior inconsistent statement. It was an out-of-court statement offered to

prove the truth of the matter asserted therein—that Ben stabbed Karson—and buttress Karson's testimony. It was inadmissible hearsay.

The State again introduced hearsay in the form of Detective Mahlum's vague recollection about what he thought he heard over nine months earlier on a jail call between Ben and Jenee. Even according to Detective Mahlum's account—and he admitted he could not "recall the exact verbatim" of what Ben and Jenee said—Ben did not personally make any statements that could constitute an admission. Nor did the District Court expressly determine, as this Court's jurisprudence requires, that Jenee made an admission on Ben's behalf that Ben then adopted. The paraphrased contents of this conversation were not an admission by a party opponent; they were inadmissible hearsay.

Given the lack of direct evidence of Ben's guilt beyond Karson's testimony, the District Court's admission of these inadmissible hearsay statements might reasonably have impacted the verdict. Reversal and remand for a new trial is necessary to correct these errors.

If Ben's conviction is upheld, his judgment should at least be amended to reflect the full 492 days of credit for time served to which he

was statutory entitled under Mont. Code Ann. § 46-18-201(9) (2017), which is 269 days more than he received.

## ARGUMENT

### I. The District Court abused its discretion by twice admitting inadmissible hearsay evidence that unfairly bolstered the State's case.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. M. R. Evid. 801(c). Hearsay is generally prohibited at trial, absent an applicable exception. M. R. Evid. 802; *State v. Butler*, 2021 MT 124, ¶ 16, 404 Mont. 213, 487 P.3d 18. Karson's hospital statement and Detective Mahlum's testimony about the jail call were both inadmissible hearsay.

#### A. The video of Karson's hospital statement that mirrored his trial testimony was not a "prior inconsistent statement"; it was inadmissible hearsay that served only to bolster his testimony.

An out-of-court statement may be admissible as non-hearsay if the statement is "inconsistent with the declarant's testimony." M. R. Evid. 801(d)(1)(A). To be "inconsistent" within the meaning of this rule, there must be some "material variance" between the prior statement and the trial testimony. *See State v. Shearer*, 792 P.2d 1215, 1217 (Or. Ct. App.

1990). Inconsistencies that are "relatively immaterial" do not qualify. *Smith*, ¶ 30.

The reason prior inconsistent statements are classified as non-hearsay is because they are not offered for the truth of the matter asserted, but rather for impeachment purposes. *United States v. Hale*, 422 U.S. 171, 176 (1975); *accord Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 873 (9th Cir. 2001); *United States v. Bao*, 189 F.3d 860, 866 (9th Cir. 1999) ("[B]ecause a declarant's prior inconsistent statement is not offered for its truth, it is not hearsay."). It is the *fact* of the inconsistency that is relevant to call into question the declarant's credibility. *United States v. Winchenbach*, 197 F.3d 548, 558 (1st Cir. 1999) (stating the purpose of the prior inconsistent statement is "not to demonstrate which of the two [statements] is true but, rather, to show that the two do not jibe (thus calling the declarant's credibility into question")). "A prior inconsistent statement is admissible to raise the suggestion that if a witness makes inconsistent statements, then his entire testimony may not be credible." *Bao*, 189 F.3d at 866.

This was the State's express purpose for introducing Karson's video statement. The prosecutor argued, "[T]his is for impeachment

purposes of Mr. Bird's testimony," and, "[T]his is not bolstering his testimony, this is impeaching his testimony." (1/22 Tr. at 46–47.) The problem is Karson's video statement did not actually impeach his trial testimony; it reinforced it.

### 1. This Court's decisions make clear that a true prior inconsistent statement must substantively diverge from the declarant's trial testimony.

In *Smith*, a child witness, E.G., gave a pre-trial forensic interview in which she recounted an incident of her stepfather's sexual abuse. *Smith*, ¶ 6. E.G. testified at trial, giving additional details about the incident that she did not mention in her forensic interview, and omitting other details that she had included in the interview. *Smith*, ¶ 26. And when asked whether she remembered *not* telling the forensic interviewer certain details that she did not in fact mention, E.G. stated she "did not remember." *Smith*, ¶ 26.

On appeal, this Court held these discrepancies did not make E.G.'s prior statement "inconsistent" from her testimony. *Smith*, ¶¶ 29–31. The Court rejected the State's position "that simply because E.G. mentioned certain facts in the forensic interview that she did not mention at trial, or vice-versa, her forensic interview statements are

therefore inconsistent with her trial testimony." *Smith*, ¶ 31. The Court classified many of these differences as "omissions," not "inconsistencies." *Smith*, ¶ 31.

Further, E.G.'s trial statements that she could not remember whether she said certain things in the forensic interview—which she did not in fact say—were not, in the Court's view, actual "lapses of memory" that would create an inconsistency. *Smith*, ¶ 29; *cf. State v. Lawrence*, 285 Mont. 140, 159, 948 P.2d 186, 198 (1997) (holding that a true lapse of memory is an inconsistency under M. R. Evid. 801(d)(1)(A)). Finally, the Court emphasized that E.G. "testified coherently and clearly," only occasionally answered that she could not remember things, and that, "[t]o the extent there were inconsistencies, they were relatively immaterial." *Smith*, ¶ 30.

In *Lawrence*, the witness's lapse of memory was far worse than E.G.'s or Karson's. The witness in that case, Mary, suffered from dementia and memory lapses that were "much more acute and frequent than the average person." *Lawrence*, 285 Mont. at 156, 948 P.2d at 196. Mary gave pre-trial interviews with police about a crime she witnessed, but then at trial, "most of her testimony was that she couldn't

remember" the incident or her pre-trial interviews. *Lawrence*, 285 Mont. at 157, 948 P.2d at 196. On cross-examination, "Mary often retracted her definitive answers that she made on direct by saying she could not remember." *Lawrence*, 285 Mont. at 157, 948 P.2d at 196. This Court concluded Mary's "lapses of memory" at trial were inconsistent with her pre-trial statements, making the latter admissible under M. R. Evid. 801(d)(1)(A). *Lawrence*, 285 Mont. at 160, 948 P.2d at 198.

In *State v. Mederos*, 2013 MT 318, ¶ 7, 372 Mont. 325, 312 P.3d 438, the young sexual assault victims gave pre-trial statements about the crime, but then at trial they "offered disjointed and, at times, contradictory testimony about what happened." When asked for details about the incident, the victims "often responded that they did not remember what happened." *Mederos*, ¶ 7. Due to the girls' "vague" testimony that was characterized by "repeated lapses in memory," this Court held the pre-trial statements were admissible as prior inconsistent statements. *Mederos*, ¶ 17.

Finally, in *State v. Maier*, 1999 MT 51, ¶ 26, 293 Mont. 403, 977 P.2d 298, the witness to a shooting contradicted himself on a critical fact: the identity of the shooter. The witness told police in a pre-trial

interview that Maier was the shooter. *Maier*, ¶ 14. But when asked at trial to identify the shooter, the witness responded, "I refuse to answer that" and suggested it was another man, Burwell. *Maier*, ¶ 26. This Court held the witness's trial testimony "was characterized by evasion, denial, and inability to remember," rendering his pre-trial statement admissible as a prior inconsistent statement. *Maier*, ¶¶ 26–27.

#### 2. Karson's statement in the hospital was not a prior inconsistent statement, because it was materially identical to his testimony.

As in *Smith*, and unlike in *Lawrence*, *Mederos*, and *Maier*, the minor factual discrepancies between Karson's hospital statement and his trial testimony 10 months later did not qualify as inconsistencies within the meaning of M. R. Evid. 801(d)(1)(A). Karson's two statements were remarkably similar on every material fact.

In both the hospital statement and his trial testimony, Karson testified he was sitting in the chair in Erin's living room, minding his own business, when Ben arrived and aggressively tried to "punk [him] out" by telling him to get out of the chair. (1/21 Tr. at 220–21, 227–28; Ex. 17 at 0:35–0:45, 2:30–2:50.)

In the hospital statement, Karson told Officer Formell he then started gathering his belongings, Ben asked what he was doing, and Karson responded, "What does it look like I'm doing, I'm grabbing my shit." (Ex. 17 at 0:45–0:55, 2:30–2:50.)

At trial, Karson initially testified he responded to Ben telling him to get up by saying, "Fuck that. I ain't gonna get up." (1/21 Tr. at 221.) The prosecutor asked if he was "trying to get out of the chair" before Ben punched him, and he said no. (1/21 Tr. at 222.) The prosecutor asked if he remembered gathering his stuff and Ben asking him what he was doing, and Karson said, "Kind of." (1/21 Tr. at 223.) When the prosecutor circled back and asked him the same question again, Karson clarified: "Kind of. I mean, *I remember grabbing my stuff, and then I remember him asking me what I'm doing, but – like, I just told him, 'I'm grabbing my stuff.'*" (1/21 Tr. at 228–29 (emphasis added).) This was consistent with what he said in the hospital. (Ex. 17 at 0:45–0:55, 2:30–2:50.)

In both statements, Karson said Ben responded to his failure to immediately get out of the chair by punching Karson in the face. (1/21 Tr. at 222–23, 229; Ex. 17 at 0:45–0:57, 2:48; Ex. 18 at 0:06–0:22.)

Karson added the additional detail at trial that Ben also threw his shoes at Karson. (1/21 Tr. at 222–23, 229.) In the hospital, Karson said he got up and "punched" Ben back. (Ex. 17 at 0:55–1:00, 2:50–2:53.) At trial, Karson initially testified that he "pushed" Ben, but when the prosecutor asked if he "punched" Ben, Karson said, "Yes." (1/21 Tr. at 222–23, 230.)

In both statements, Karson testified that at some point after he and Ben exchanged punches, Ben stabbed him. (1/21 Tr. at 222; Ex. 17 at 0:55–1:00, 2:30–3:15.) In both statements, Karson said he never saw Ben with a knife. (1/21 Tr. at 222; Ex. 17 at 0:55–1:00, 3:15–3:45.) Nor did he realize he had been stabbed until after the fight had ended. (1/21 Tr. at 222–23, 267; Ex. 17 at 3:15–3:45.) At the prosecutor's behest, Karson added in his trial testimony that he was drunk on five shots of vodka during the incident. (1/21 Tr. at 225–26.) Officer Formell never asked Karson if he had been drinking. (*See generally*, Exs. 16–18.)

Karson said in the hospital and at trial that Ben cut his hand during the fight, which Karson presumed occurred when Ben fell onto a glass table and cut himself on broken glass. (1/21 Tr. at 222–23; Ex. 17 at 1:00–1:23.) In both statements, he said Ben went to tend to the

wound on his hand while he and Justin left the house, walked a few blocks away, then got a ride to the hospital from someone Karson did not know. (1/21 Tr. at 223–24; Ex. 17 at 4:15–4:45.) In the hospital statement and on the witness stand, Karson said he did nothing to provoke Ben's attack. (1/21 Tr. at 227; Ex. 17 at 2:00–2:07; Ex. 18 at 0:00–0:08.)

Karson testified repeatedly at trial that everything he told Officer Formell in the hospital about Ben stabbing him was the truth. (1/21 Tr. at 229–30, 257, 270.) Although the prosecutor asked Karson if he remembered "all the details of what you told the officers," and he answered, "Not really," his detailed, accurate testimony about what he told Officer Formell belied his claimed lapse of memory. (1/21 Tr. at 228.) Moreover, most of Karson's assertions on the witness stand that he could not remember what he told the police were in relation to his *initial* statement about being mugged in an alley, not his subsequent statement accusing Ben. (1/21 Tr. at 218.)

As in *Smith*, to the extent Karson's trial testimony diverged from his hospital statement, the inconsistencies were "relatively immaterial." *Smith*, ¶ 30. Any witness would struggle to remember every innocuous

detail about what he told police 10 months earlier. Karson testified accurately down to nearly every detail about what he told Officer Formell the night of the incident. (*Compare* 1/21 Tr. at 213–73, *with* Exs. 17, 18.)

There were some minor discrepancies. Karson did not mention at the hospital—but did mention at trial—that he was drunk when Ben arrived, and that Ben not only punched him but also threw his shoes at him. And Karson initially struggled to remember—before ultimately remembering—that he told Officer Formell he was gathering his belongings right before Ben punched him. Karson added at trial that he told Ben in that moment, "Fuck that, I ain't gonna get up," whereas in the hospital he said only that he told Ben, "What does it look like I'm doing? I'm grabbing my shit." (1/21 Tr. at 221; Ex. 17 at 0:45–0:55, 2:30–2:50.) Finally, Karson said in the hospital that he "punched" Ben, but at trial he alternatively said he "pushed" and "punched" Ben.

Whether Karson punched Ben or pushed *and* punched him was immaterial. Karson's new details at trial about being drunk, Ben throwing his shoes, and Karson telling Ben he did not want to get up were not "inconsistencies"; they were simply minor details he had

omitted in his hospital statement. *See Smith*, ¶ 31. With regard to his intoxication specifically, Officer Formell did not ask him about this, but the prosecutor did. (*Compare* Exs. 17–18, *with* 1/22 Tr. at 225–26.) It is not surprising, then, that Karson failed to mention his intoxication to Formell but did mention it at trial. As in *Smith*, it was the different questions asked by the two interviewers, not Karson, that created the discrepancy. *Smith*, ¶ 31. None of these discrepancies rose to the level of an inconsistency within the meaning of M. R. Evid. 801(d)(1)(A).

Unlike the witness in *Lawrence*, Karson did not have debilitating, chronic memory problems, nor did he repeatedly testify that he could not remember the incident or what he said in the hospital. *Cf. Lawrence*, 285 Mont. at 156–57, 948 P.2d at 196. Unlike the witnesses in *Mederos*, Karson's testimony was not "vague," "disjointed," or "contradictory," nor did he "frequently" disavow his pre-trial statements. *Cf. Mederos*, ¶¶ 7, 17. His trial testimony was consistent—both internally and with what he told Officer Formell—and he explicitly vouched for the truthfulness and accuracy of his hospital statement. (1/21 Tr. at 229–30, 257, 270.) And unlike the witness in *Maier*, Karson's trial testimony strayed from his hospital statement on

inconsequential matters such as whether Ben threw his shoes and which swear words Karson used, not on crucial questions such as who committed the crime. *Cf. Maier*, ¶¶ 26–27.

Karson told materially the same story at trial that he told Officer Formell in the hospital. This was not a prior inconsistent statement under M. R. Evid. 801(d)(1)(A). The only purpose for introducing the video statement was to prove the truth of the matter asserted therein—that Ben stabbed Karson—and to thereby bolster Karson's trial testimony. This was inadmissible hearsay, *see* M. R. Evid. 801(c), 802, and the District Court wrongly admitted it.

**B. Detective Mahlum's vague recollection of a jail call between Ben and his girlfriend—in which only the girlfriend referenced a stabbing—was inadmissible hearsay, not an "admission by party-opponent."**

Montana Rule of Evidence 801(d)(2) exempts from the hearsay definition any statement that is "offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth." M. R. Evid. 801(d)(2).[3]

[3] Rule 801(d)(2) contains three additional subsections, none of which arguably apply here.

Detective Mahlum's testimony was not admissible under M. R. Evid. 801(d)(2)(A), because none of Ben's "own statement[s]," standing alone, could be considered an admission. The only statement Ben allegedly made was, "No, baby. Don't worry about it. It wasn't your fault." (1/22 Tr. at 142.) Even according to Mahlum's recollection, Ben never mentioned a stabbing, a fight, or Karson's name. (1/22 Tr. at 142.)

A "statement" within the meaning of this rule is defined as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." M. R. Evid. 801(a). "The key to the definition is that nothing is an assertion unless intended to be one." Fed. R. Evid. 801, Advisory Committee Note to Subdivision (a).[4] An "assertion" is, "A person's speaking . . . with the *intent of expressing a fact or opinion*." *Assertion, Black's Law Dictionary* (11th ed. 2019) (emphasis added).

Ben made no "assertion" that he had committed a stabbing; that was clearly not a fact or opinion he intended to express. The only intent

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[4] Because Fed. R. Evid. 801(a) is nearly identical to M. R. Evid. 801(a), this Court may view federal authority interpreting this rule as instructive. *See Jacobsen v. Allstate Ins. Co.*, 2013 MT 244, ¶ 28, 371 Mont. 393, 310 P.3d 452.

of Ben's statement was to calm Jenee, assuage her concerns, and encourage her not to blame herself for the fact he was sitting in jail on suspicion of a serious crime. Ben's "statement" was that Jenee should stop worrying and blaming herself. That statement was not an admission that he stabbed Karson.

The "admission" that the State really wanted the jury to hear was Jenee allegedly saying, "It was my fault that you stabbed him." (1/22 Tr. at 142.) Jenee was the only person in that conversation to mention a stabbing or even allude to Karson—although even she did not mention Karson by name. (1/22 Tr. at 142.) But Jenee did not testify, and she was not a party opponent. Her statement, standing alone, was hearsay. *See* M. R. Evid. 801(c).

The only way the State could admit Jenee's statement was under M. R. Evid. 801(d)(2)(B), on the theory that Jenee made an admission and Ben "manifested an adoption or belief in its truth." This Court has held unequivocally—in line with federal jurisprudence—that for a third-party statement to be admitted under Rule 801(d)(2)(B), the district court must first make an *explicit* finding the defendant adopted the statement.

In *State v. Widenhofer*, 286 Mont. 341, 349–50, 950 P.2d 1383, 1388 (1997), this Court held an out-of-court statement by a non-testifying declarant, Rothschiller, identifying Widenhofer as the intoxicated driver of a crashed vehicle, was not admissible under M. R. Evid. 801(d)(2)(B). The State introduced Rothschiller's statement—and Widenhofer's supposed failure to disavow it—through the testimony of a police officer. This Court held the statement was not admissible as an admission by a party opponent in part because "the District Court did not make an *express determination* that Widenhofer adopted the statement of Rothschiller *as is required*." *Widenhofer*, 286 Mont. at 349, 950 P.2d at 1388 (citing *United States v. Schaff*, 948 F.2d 501, 505 (9th Cir.1991) (emphasis added)).

Likewise, in *State v. Francis*, 2001 MT 233, ¶ 10, 307 Mont. 12, 36 P.3d 390, the non-testifying declarant, Steilman, had told his girlfriend, Dinius, that he and Francis murdered someone. The State introduced this statement through Dinius at trial, who also testified Francis "sat there and agreed with the whole thing." *Francis*, ¶ 13. The State argued on appeal that Francis had effectively adopted Steilman's incriminating

statement by failing to disavow it, and thus it was admissible as an admission by a party opponent under Rule 801(d)(2)(B). *Francis*, ¶ 15.

This Court reversed on appeal, holding in part that Steilman's statements were inadmissible because "the District Court failed to make an express determination that Francis adopted Steilman's statements as required." *Francis*, ¶ 15. The Court explained that because "the District Court made no findings on this matter, we cannot conclude that the court properly admitted Dinius' testimony as statements made by Steilman and then adopted by Francis." *Francis*, ¶ 15.

The rule is clear: without an explicit judicial finding that an out-of-court statement by a non-testifying declarant was actually adopted by a party opponent, the statement is not admissible under M. R. Evid. 801(d)(2)(B). *Francis*, ¶ 15; *Widenhofer*, 286 Mont. at 349, 950 P.2d at 1388; *Schaff*, 948 F.2d at 505.

The District Court here made no such finding. (1/22 Tr. at 141–45.) The District Court said of Detective Mahlum's testimony, "I find conclusively this constitutes an admission of a party opponent for rule purposes." (1/22 Tr. at 145.) The District Court did not cite a

particular subsection of M. R. Evid. 801(d)(2). It did not say who exactly made the "admission," Ben or Jenee. Nor did it determine that Ben had manifested an adoption or belief in the truth of an admission Jenee made. Because the District Court made no "express determination" that Jenee made an admission and Ben adopted its truth, "as is required," that statement was not admissible under Rule 801(d)(2)(B). *See Francis*, ¶ 15; *Widenhofer*, 286 Mont. at 349, 950 P.2d at 1388.

Nor was there sufficient evidence to support a hypothetical District Court finding that Ben's effort to comfort his girlfriend meant he adopted the truth of everything she said. The standard for assessing whether a defendant made an adoptive admission of a third-party statement is: first, whether an innocent person normally would be induced to respond; and second, whether the defendant demonstrated his acquiescence in the statement. *State v. McCollom*, 2009 MT 257, ¶ 19, 352 Mont. 10, 214 P.3d 1230.

The first criterion governs when a defendant is silent in response to an accusatory statement. *McCollom*, ¶ 19. If the defendant was not silent and did respond to the statement, then the second factor

governs—whether the nature of the defendant's response constituted an acquiescence in the truth of the statement. *McCollom*, ¶ 21.

Jenee's alleged statement—or at least Detective Mahlum's paraphrasing of it, because he could not recall the "exact verbatim" of what she or Ben said—was "something to [the] effect" of, "It was my fault that you stabbed him." (1/22 Tr. at 142.) This statement contains two clauses: (1) "It was my fault," and (2) "that you stabbed him." The primary clause was the first; the thrust of what Jenee was saying was that Ben's current predicament was somehow her fault. Her statement was not an accusation against Ben; it was an acceptance of her own blame.

Ben's alleged response of, "No, baby. Don't worry about it. It wasn't your fault" was clearly in response to the main point Jenee was making; that she blamed herself for the trouble Ben was in. The thrust of what Ben was saying was that he did not want Jenee to worry or blame herself. Ben did not directly respond to Jenee's secondary statement that he had "stabbed" someone—in effect, he was silent in response to that statement.

Jenee's statement did not necessarily call for an immediate disavowal. If Ben's goal was to calm Jenee down and get her to not blame herself, it was reasonable that he would simply tell her to not worry or blame herself, rather than argue with her about whether he was in fact guilty. Not every innocent person in Ben's shoes would necessarily proclaim his innocence in response to what Jenee said. *Cf. McCollum*, ¶ 19.

At most, Ben's silence was ambiguous in its meaning, not a conclusive adoption of Jenee's statement. "Silence may be motivated by many factors other than a sense of guilt or lack of an exculpatory story." 2 McCormick on Evidence, § 262 (8th ed. 2020) (citing *Doyle v. Ohio*, 426 U.S. 610 (1976); *Hale*, 422 U.S. at 176). "In criminal cases, [ ] troublesome questions have been raised by decisions holding that failure to deny is an admission: the inference is a fairly weak one, to begin with." *United States v. Hoosier*, 542 F.2d 687, 688 (6th Cir. 1976). Due to the "inherently ambiguous and unreliable nature of attributing meaning to silence," Ben's failure to argue with Jenee about her tangential statement that he had stabbed someone was not proof he

adopted the truth of that statement. *See Ragland v. Commonwealth*, 476 S.W.3d 236, 252 (Ky. 2015).

Jenee's main point was that it was somehow her fault Ben was in jail. Ben's main point was it was not her fault. Ben's decision to try and assuage Jenee, rather than debate his factual innocence with her on a recorded jail line, did not demonstrate he acquiesced in her comment that he had stabbed someone. Even if the District Court had expressly determined that Ben adopted Jenee's statements—a requirement the court did not fulfill—Detective Mahlum's testimony did not show Ben made an adoptive admission under M. R. Evid. 801(d)(2)(B).

The District Court should have excluded Mahlum's admittedly imprecise "she said/he said" testimony as inadmissible hearsay.

### C. Given Karson's shifting stories and the lack of eyewitness testimony or physical evidence directly implicating Ben, the State cannot prove the inadmissible hearsay evidence was harmless.

Once an evidentiary ruling is deemed erroneous, it is "incumbent on the State to demonstrate that the error at issue was not prejudicial." *State v. Van Kirk*, 2001 MT 184, ¶ 42, 306 Mont. 215, 32 P.3d 735. To do this, the State must not only point to other admissible evidence proving the same facts as the tainted evidence, but also "demonstrate that the

*quality* of the tainted evidence was such that there was no reasonable possibility that it might have contributed to the defendant's conviction." *Van Kirk*, ¶ 44 (emphasis in original); *accord State v. Kaarma*, 2017 MT 24, ¶ 89, 386 Mont. 243, 390 P.3d 609 (stating the other admissible evidence must be "of the same quality" as the tainted evidence).

The State did not present the jury with any evidence of the "same quality" as video footage of a wounded Karson accusing Ben of a serious crime from his hospital bed. Nor did it present qualitatively similar evidence as Detective Mahlum saying he overheard Ben's girlfriend saying that Ben stabbed someone.

Unlike in *Smith*, where this Court held the introduction of E.G.'s forensic interview video was harmless, Karson's trial testimony was not meaningfully corroborated by other witness testimony. In *Smith*, this Court acknowledged that the cumulative video evidence "bolstered and lent credibility to" E.G.'s testimony. *Smith*, ¶ 35. But it held this bolstering was harmless because there were several other witnesses who gave "admissible testimony tending to lend the same credibility to E.G.'s trial testimony." *Smith*, ¶ 35.

There was no compelling "admissible testimony tending to lend the same credibility to [Karson's] trial testimony" as the video of Karson's hospital statement or Jenee's hearsay statement mentioning Ben had "stabbed him." *Cf. Smith*, ¶ 35.

Karson was the only witness to testify Ben stabbed him. His friend Justin, who supposedly saw the whole incident, noticed Karson bleeding afterwards, and took Karson to the hospital, did not testify. Erin, who also saw the whole fight play out right in front of her eyes, testified she never saw Ben wield a knife or stab Karson. She also testified that after the fight ended, Karson seemed fine, and she did not notice him bleeding.

The State never introduced evidence of any weapon that Ben supposedly wielded. Ben had a cut on his hand that the State argued was consistent with him having wielded a knife, but Karson consistently said in the hospital and at trial that Ben got this cut when he fell on a table and injured himself on broken glass.

There was blood on the floor and on the recliner in Erin's house, but the State never tested it to confirm that Karson had indeed bled in the house as he alleged. Beyond taking Karson's word for it, the State

never established through any other evidence that Karson was stabbed at Erin's house, as opposed to somewhere else that night.

The State's case came down to convincing the jury to simply take Karson at his word that Ben was the one who stabbed him. One of the most compelling things the State did to accomplish this was to show the jury a video of a wounded Karson, lying in his hospital bed seemingly half-conscious, and pointing the finger at Ben for putting him there. The video no doubt triggered the jury's sympathy for Karson. It also corroborated his trial testimony and was arguably even more persuasive, given its close proximity in time to the stabbing.

Apart from Karson, Jenee was the only other person to directly suggest Ben was responsible for the stabbing. But she did not testify, and her statement came in only through Detective Mahlum saying he heard her say this. No other witness besides Karson clearly tied Ben to the stabbing. Through Mahlum's hearsay testimony about what Jenee allegedly said, the jury heard an out-of-court statement that it could interpret as directly corroborating Karson's account that Ben was the person who stabbed him. No other witness corroborated Karson's allegation the way Jenee's hearsay statement did.

Against this backdrop, the State cannot "demonstrate that the *quality* of the tainted evidence was such that there was no reasonable possibility that it might have contributed to" Ben's conviction. *See Van Kirk*, ¶ 44. The District Court wrongly admitted Karson's bolstering hospital statement and Detective Mahlum's hearsay testimony about what he vaguely remembered hearing Jenee say. Reversal and remand for a new trial is necessary to correct these errors.

## II. Ben is statutorily entitled to an additional 269 days of credit for time served.

This Court may review claims of an illegal sentence even in the absence of an objection. *State v. Lenihan*, 184 Mont. 338, 343, 602 P.2d 997, 1000 (1979). A sentence that fails to award the proper amount of credit for time served violates statutory mandates, is illegal, and is thus subject to appellate review under *Lenihan*. *State v. McCaslin*, 2011 MT 221, ¶ 8, 362 Mont. 47, 260 P.3d 403; *State v. Erickson*, 2005 MT 276, ¶ 27, 329 Mont. 192, 124 P.3d 119.

Ben was incarcerated from the date of his March 27, 2019 arrest through the date of his July 30, 2020 sentencing hearing—a total of 492 days. He was awarded credit for only the first 223 of these days, up

through November 4, 2019—the date he was sentenced in a separate case to DOC custody.

Montana Code Annotated § 46-18-201(9) (2017) provides: "When imposing a sentence under this section that includes incarceration in a detention facility or the state prison, as defined in 53-30-101, the court shall provide credit for time served by the offender before trial or sentencing." This statute binds a sentencing court to award the defendant credit for *all* time served from the date of arrest to the date of sentencing, without regard to any other sentences the defendant may be serving simultaneously. *Killam v. Salmonsen*, 2021 MT 196, ¶¶ 16–18, 405 Mont. 143, 492 P.3d 512.

In *Killam*, this Court explained that the determination of credit for time served under § 46-18-201(9) is "straight-forward." *Killam*, ¶ 16. It is "based solely on the record of the offense for which the defendant is being sentenced and does not require determination by the court as to whether [the] defendant is also being held on another matter and, if so, which hold is primary." *Killam*, ¶ 16. The statute demands the offender "*shall*" receive credit for all time served before trial or sentencing "*even if* the defendant would *not* have been released from custody pre-

trial/sentencing had s/he been able to post bond." *Killam*, ¶ 16 (emphasis in original). A sentencing court must determine credit for time served in the case before it "without considering other criminal proceedings or DOC incarcerations." *Killam*, ¶ 16; *accord Mendoza*, ¶ 12 (awarding the defendant full credit for time served "regardless of whether he was also being held in connection with another matter").

The only reason Ben did not receive credit for the full 492 days he spent in custody from arrest to sentencing was because the District Court and parties incorrectly relied on his "other criminal proceeding[ ] or DOC incarceration[ ]." *Killam*, ¶ 16. The fact that Ben was sentenced on November 4, 2019, to DOC custody in a separate case was completely irrelevant to his eligibility for credit for time served in this case. *Killam*, ¶ 16. Under § 46-18-201(9), Ben was plainly entitled to "credit for time served from the date of his arrest . . . to sentencing," a total of 492 days. *Killam*, ¶ 18. That is 269 days more credit than the District Court awarded him.

The District Court had a "legal mandate" to credit Ben for these additional 269 days. *State v. Hornstein*, 2010 MT 75, ¶ 12, 356 Mont.

14, 229 P.3d 1206. Remand is necessary to correct the judgment and revise Ben's credit for time served upwards from 223 to 492 days.

## CONCLUSION

The District Court twice admitted inadmissible hearsay evidence that unfairly bolstered Karson's trial testimony. In a case that hinged on Karson's otherwise largely uncorroborated testimony, the State cannot prove the erroneous admission of these bolstering statements was harmless. Ben respectfully asks this Court to reverse his conviction and remand for a new trial.

In the event his conviction is affirmed, Ben requests that this Court order his judgment be amended to reflect the full 492 days of credit for time served to which he was statutorily entitled.

Respectfully submitted this 27th day of January, 2022.

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 10,000, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Michael Marchesini
MICHAEL MARCHESINI

## APPENDIX

Judgment ......................................................................................App. A

Admission of Karson's pre-trial video statement ............................App. B

Admission of Detective Mahlum's testimony .................................App. C

## 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 01-27-2022:

Joshua A. Racki (Govt Attorney)
121 4th Street North
Suite 2A
Great Falls MT 59401
Representing: State of Montana
Service Method: eService

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Electronically signed by Pamela S. Rossi on behalf of Michael Marchesini
Dated: 01-27-2022