

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0597

STATE OF MONTANA,

Plaintiff and Appellee,

v.

VAUGHN DAVID JAMES,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Twentieth Judicial District Court,
Lake County, The Honorable Deborah K. Christopher, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF THE ISSUES.....1

STATEMENT OF THE CASE.....1

STATEMENT OF THE FACTS3

I. The offense3

II. Procedural history5

 A. Pretrial ruling excluding evidence about Marilyn’s pending
 criminal charge5

 B. The first trial9

 C. The second trial12

SUMMARY OF THE ARGUMENT15

STANDARD OF REVIEW17

ARGUMENT17

I. The district court properly excluded evidence about Marilyn’s
pending DUI because the charge was irrelevant and also inadmissible
under Mont. R. Evid. 403 and 404(b).....17

 A. Clarification of the facts19

 B. Mont. R. Evid. 40121

 C. Mont. R. Evid. 40322

 D. Mont. R. Evid. 404(b)24

 E. Harmless error25

II. Exclusion of evidence about Marilyn’s DUI did not violate James’s
right to present a defense26

III. James waived his argument about the disqualification of the LCAO when he failed to move for disqualification, and he has failed to demonstrate cause for disqualification of the entire office30

A. Facts concerning the evidentiary hearing on remand.....30

B. James waived his argument that the entire LCAO should have been disqualified because he never filed a motion to disqualify38

C. The district court correctly concluded on remand that the LCAO should not have been disqualified from this case39

CONCLUSION42

CERTIFICATE OF COMPLIANCE.....42

TABLE OF AUTHORITIES

Cases

<i>Davis v. Alaska</i> , 415 U.S. 308 (1974)	28
<i>Delaware v. Van Arsdall</i> , 475 U.S. 673 (1986)	27, 29, 30
<i>In re Guardianship of Mower</i> , 1999 MT 73, 294 Mont. 35, 979 P.2d 156	38
<i>Holmes v. South Carolina</i> , 547 U.S. 319 (2006)	24, 27
<i>Montana v. Egelhoff</i> , 518 U.S. 37 (1996)	27
<i>Schuff v. A.T. Klemens & Son</i> , 2000 MT 357, 303 Mont. 274, 16 P.3d 1002	17, 38, 39, 40
<i>State v. Clifford</i> , 2005 MT 219, 328 Mont. 300, 121 P.3d 489	19, 22, 23, 24
<i>State v. Flowers</i> , 2018 MT 96, 391 Mont. 237, 416 P.3d 180	24
<i>State v. Garding</i> , 2013 MT 355, 373 Mont. 16, 315 P.3d 912	25
<i>State v. Giddings</i> , 2009 MT 61, 349 Mont. 347, 208 P.3d 363	19, 24
<i>State v. Gommenginger</i> , 242 Mont. 265, 790 P.2d 455	28, 29
<i>State v. Lotter</i> , 2013 MT 336, 372 Mont. 445, 313 P.3d 459	17
<i>State v. Madplume</i> , 2017 MT 40, 386 Mont. 368, 390 P.3d 142	6
<i>State v. Martinez</i> , 2003 MT 65, 314 Mont. 434, 67 P.3d 307	18, 38

<i>State v. Reams</i> , 2020 MT 326, 402 Mont. 366, 477 P.3d 1118	27
<i>Taylor v. Illinois</i> , 484 U.S. 400 (1988)	27
<i>Trust Corp. of Montana v. Piper Aircraft Corp.</i> , 701 F.2d 85 (9th Cir. 1983)	38
<i>United States v. Alayeto</i> , 628 F.3d 917 (7th Cir. 2010)	19, 23
<i>United States v. Scheffer</i> , 523 U.S. 303 (1998)	27

Other Authorities

Montana Code Annotated	
§ 46-20-104(2)	18, 38
Montana Rules of Evidence	
Rule 401	16, 17, 21
Rule 403	passim
Rule 404(b)	passim
Rule 608	7
Rule 609	7
Montana Rules of Professional Conduct	
Rule 1.11	41
Rule 1.9	32, 34, 40, 41
Rule 1.9(a)	40, 41
Rule 1.9(c)	40, 41
United States Constitution	
Amend. VI	27
Amend. XIV	27

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion when it excluded evidence of the victim's pending criminal charge under the rules of evidence?
2. Whether the district court's exclusion of evidence about the victim's pending criminal charge violated James's right to present a defense when James failed to establish a logical theory to support the admission of the evidence.
3. Whether James was entitled to have the entire Lake County Attorney's Office disqualified from prosecuting him when he never filed a motion to disqualify and was being prosecuted by a deputy county attorney, rather than the county attorney who had previously represented him.

STATEMENT OF THE CASE

Appellant Vaughn David James was charged in Lake County with sexual intercourse without consent and aggravated burglary. The State alleged that he entered a home and had sexual intercourse with his aunt, Marilyn, who had been sleeping and did not consent. (Docs. 2, 4; 7/11/17 Tr. at 167.)

Before trial, James moved to admit evidence that Marilyn had a pending charge for driving under the influence (DUI) in a neighboring county and that she had failed to comply with the conditions of her release on bond. (Doc. 44.) James argued that Marilyn's charge and the potential for her bond to be revoked gave her

a motive to fabricate the rape. (*Id.*) The court held a hearing at which James insisted that the rape was reported by Marilyn's friend, and Marilyn did not want to report it. (5/18/17 Tr. at 9-11.) The district court excluded evidence about Marilyn's DUI because James failed to present a logical connection between it and Marilyn's rape allegation, which she did not personally report to law enforcement. (*Id.* at 22-23.)

The jury failed to reach a verdict at the first trial, resulting in a mistrial. (6/14/17 Tr. at 527-28.) The jury in the second trial found James guilty of sexual intercourse without consent. (7/13/17 Tr. at 542.)

James filed an appeal in 2018. Pursuant to an unopposed motion filed by James, this Court remanded the case for an evidentiary hearing addressing whether the entire Lake County Attorney's Office (LCAO) should have been disqualified from prosecuting James because the County Attorney, Steve Eschenbacher, had represented James in a different case. (*State v. James*, DA 18-0597, Order issued 1/12/20.) The district court held a hearing and concluded that the LCAO did not need to be disqualified from prosecuting this case. (Doc. 158, available at Appellant's App. F.)

STATEMENT OF THE FACTS

I. The offense

In September 2016, James's aunt, Marilyn, spent two nights staying with her friend, Diana, who is James's mother. (7/11/17 Tr. at 168-70.) At the time, Marilyn did not have a residence, but she had people she could stay with. (*Id.* at 170, 191-92.) Diana had invited Marilyn to stay for a couple of nights. (*Id.* at 191.)

On the evening before the offense, James went to Diana's house. (*Id.* at 171.) Diana made James leave because he had been drinking. (*Id.* at 171-72.) Diana and Marilyn stayed up late talking. (*Id.* at 173.) Before going to bed, they locked the doors. (*Id.*) Marilyn went to sleep on a couch in the living room. (*Id.* at 174.)

Marilyn woke up with James on top of her. (*Id.* at 175.) Her nightgown had been pulled up and her underwear removed. (*Id.*) James was fondling Marilyn's vagina and asking her if it felt good. (*Id.*) She did not respond because she was scared. (*Id.* at 176.) James kissed her face and neck. (*Id.* at 176.) Marilyn tried to push him away, but she was pinned down by his body and could not get him off her. (*Id.* at 176-77.) James penetrated her with his penis. (*Id.* at 176.) When Marilyn tried to yell, James covered her mouth with his hand. (*Id.* at 207.) Eventually Marilyn stated something about his mother, Diana, who was sleeping in

a nearby bedroom. (*Id.* at 177, 197, 210.) James got off of her, grabbed his clothes, and left the house. (*Id.* at 177, 211.) Afterward, Marilyn’s whole body hurt. (*Id.* at 178.)

Marilyn stayed on the couch in shock after James left. (*Id.* at 215-16.) When Diana woke up later that morning, Marilyn told her what had happened. (*Id.* at 214-15.) Marilyn later explained that it took her a minute to tell Diana because, “How do you explain to a mother that their son had raped you, especially my nephew.” (*Id.* at 215.) Diana contacted law enforcement. (*Id.* at 182, 215.)

Marilyn was interviewed by law enforcement. (7/12/17 Tr. at 233-53.) While crying, Marilyn reported that she woke up with James on top of her, and he penetrated her with his penis. (State’s Ex. 2 at 1:00-1:30, 3:00-4:20.) She said she kept trying to get him off of her, but could not do so. (*Id.*)

Afterward, Marilyn participated in a SANE examination, during which she was “rocking back and forth, crying and holding her head in her hands and saying, my whole body hurts, and I can’t believe he did this. She was just upset and distraught, anxious.” (7/12/17 Tr. at 320.) During the vaginal examination, the doctor observed an abrasion with a small amount of blood, which was consistent with a sexual assault. (*Id.* at 372-73.) The doctor swabbed secretions for later DNA testing. (*Id.* at 370.) The sperm cells obtained from that sample matched James’s DNA. (*Id.* at 400-01.)

At trial, James asserted that Marilyn had let him in the house that evening and had consensual sex with him. (*Id.* at 448-54.) A jury found him guilty of sexual intercourse without consent. (7/13/17 Tr. at 542.)

II. Procedural history

A. Pretrial ruling excluding evidence about Marilyn's pending criminal charge

Before trial, the State moved to exclude negative character evidence about Marilyn and evidence of her criminal behavior. (Doc. 18 at 2-3.) James did not object, and the court granted the State's motion excluding evidence regarding the victim's character. (Docs. 18.5 at 1-2; 28.)

After obtaining additional information, James moved to admit evidence that Marilyn had a charge in Sanders County for DUI that was pending when Marilyn alleged that James had raped her. (Doc. 44.) James alleged that Marilyn was in violation of the conditions of her release, which he argued gave her a motive to fabricate the allegation against James to prevent her bond from being revoked. (*Id.* at 2-3.)

The State argued in response that the evidence could not be admitted to establish that Marilyn had a motive to fabricate because there was no evidence indicating that Marilyn believed that her bond might be revoked or that she had fabricated the rape to avoid the consequences of violating the conditions of her

release. (Doc. 52 at 2-3.) Citing *State v. Madplume*, 2017 MT 40, 386 Mont. 368, 390 P.3d 142, the State noted that prior bad act evidence must be “clearly justified and carefully limited,” and the State argued James’s unsupported speculation was not clear justification. (*Id.* at 3-4.) The State also argued that the evidence was inadmissible under Mont. R. Evid. 403. (*Id.*)

James also moved to dismiss the charges against him arguing that the State delayed in providing him information, including information about charges against Marilyn. (Doc. 54.) In that motion, he stated that Marilyn failed to comply with the conditions of her release requiring her to participate in alcohol monitoring. James stated that Sanders County later moved to revoke her release, and her attorney argued that Marilyn should not be revoked because she missed her first blow due to “reportedly being violently sexually assaulted” the night before.” (*Id.* at 4.)

The court held a hearing on the admission of the evidence on May 18, 2017. James argued that Marilyn’s pending DUI and failure to comply with her bond conditions gave her a motive to fabricate the rape. (5/18/17 Tr. at 8.) James stated that Marilyn had been required to enroll in alcohol monitoring on September 15, 2016, but she did not provide the required breath tests. (*Id.* at 4.) James speculated that Marilyn fabricated the rape in Lake County on September 17, 2016 to avoid being punished for her failure to provide breath tests in the Sanders

County case. (*Id.* at 4.) James also alleged, without providing any evidence, that Marilyn had not been revoked by Sanders County because of her status as a victim in Lake County. (*Id.* at 5.) James asserted that when Sanders County moved to revoke Marilyn's release months later, Marilyn tried to "capitalize on her victim status" by saying that she had immediately missed her breath test because she had been violently sexually assaulted. (*Id.* at 12-13.)

The State argued that the evidence was inadmissible under Mont. R. Evid. 403, 404(b), 608, and 609. (5/18/17 Tr. at 18.) The State argued that the evidence about the victim's pending charges was highly prejudicial and that James's claim was based on mere speculation, which was insufficient to overcome the rules requiring exclusion of the evidence. (*Id.*)

The State explained that Marilyn had missed one breath test before she alleged that she was raped in this case, and anything that occurred after that was irrelevant to whether she had a motive to fabricate. (*Id.*) The State also insisted that it had not offered Marilyn anything in exchange for her testimony in this case. (*Id.*)

The State argued that there was no evidence to corroborate the speculation that Marilyn fabricated a rape in Lake County to obtain favorable treatment from Sanders County, and the later reliance on the rape by her defense counsel in the DUI case did not establish that Marilyn would have believed that fabricating a rape

in Lake County would be beneficial to her. (*Id.* at 17.) The State argued that it “defies total logic” to believe that Marilyn would have concocted a story against her own nephew to avoid getting in trouble for one missed breath test. (*Id.*)

The court expressed doubt about James’s theory because the court believed that Marilyn’s failure to comply with the conditions of her release would make her less likely, rather than more likely, to report a rape to law enforcement. (*Id.* at 6, 22.) In response, James repeatedly insisted that Marilyn did not want to involve law enforcement, and James’s mother called law enforcement. (*Id.* at 9-11.)

The court pointed out that Marilyn could not have fabricated this offense to obtain favorable treatment in Sanders County if she did not even choose to report this offense to law enforcement. (*Id.* at 13.) The court also explained that it did not think evidence about things that occurred after Marilyn reported the offense to law enforcement could demonstrate her motive to fabricate the offense. (*Id.* at 14.)

The court explained that to admit prior bad act evidence, the proponent must “clearly articulate how that evidence fits into a chain of logical inferences. And the problem is that most of what it is that you’ve articulated happened post the event. The only thing that I’ve heard beforehand is that she failed to provide a breath test the day before. But then that chain gets broken because it’s not even reported by her.” (*Id.* at 22-23.) The court explained that it was denying James’s

motion because it could not “make the leaps that the defense is asking me to make to allow this evidence in.” (*Id.* at 23.)

The court ruled that James could ask Marilyn about her circumstances at the time of the offense, including her lack of housing, but could not ask about her recent release from jail or her criminal charges. (*Id.* at 27-29.)

The court revisited the admission of evidence about Marilyn’s pending charges before the first trial began. (6/12/17 Tr. at 113-24.) The court indicated that it would consider allowing James to present evidence that Marilyn had conditions that prohibited her from using alcohol or drugs, but not evidence that the requirement came from a court as a result of her pending charges. (*Id.* at 114-24.) The court also noted that it was “torn because I almost think that it goes more to the State’s benefit than it does to the defendant’s[.]” (*Id.* at 124.) James did not pursue the option of admitting the limited evidence about Marilyn’s conditions. (*Id.*)

B. The first trial

The first jury trial was held June 12-14, 2017, and it resulted in a hung jury. (6/12/17-6/14/17 Tr.) During the trial, James’s theory was that Marilyn fabricated the claim that she had been raped by James after they had consensual sexual intercourse because Marilyn did not have anywhere to live, and Marilyn was worried that Diana would make her leave if Diana knew she had sex with James in

Diana's home. (6/12/17 Tr. at 145-51; 6/14/17 Tr. at 499-500.) In closing, James argued that Marilyn concocted the story to gain sympathy with Diana, and Marilyn did not expect Diana to report the offense to law enforcement. (6/14/17 Tr. at 500.)

Before trial began on the third day, James's counsel, Amanda Gordon, informed the court that she was concerned that County Attorney Steve Eschenbacher was involved in the case. (*Id.* at 454.) She explained that she and Eschenbacher had previously represented James in a prior case. (*Id.*) Gordon stated that Eschenbacher had recently made a comment to her that she believed was inappropriate. (*Id.*) And she said that that morning she and her cocounsel overheard the State's paralegal ask the prosecutor, Brendan McQuillan, "did you run that by Steve?" (*Id.*) Gordon claimed that "Brendan said, well, it depends on what Vaughn testifies to." (*Id.*) She stated she was "extremely concerned that Steve has used any previous knowledge he has of this client to somehow assist in this case." (*Id.* at 454-55.)

In response, the court stated that it believed there needed to be a strict wall that prevented prior defense counsel from being involved in the case. (*Id.* at 455.) The court explained that it did not know whether that had been breached, but it invited counsel to investigate and make "complaints that would be necessary under the circumstances that may or may not result in post-trial motions[.]" (*Id.*) The

court stated that it could “take up this matter once you’ve had a chance to further investigate or . . . forward this to the Commission on Practice with regard to the actions. If it becomes the subject of any post-trial motion then the Court will review it once that’s reduced to writing.” (*Id.* at 455-56.) Gordon then thanked the court. (*Id.* at 456.)

Later that day, the court informed the parties that it was going to forward the transcript of the discussion “to the Commission on Practice for their investigation and review.” (*Id.* at 516.) The court directed Gordon to contact the Commission on Practice and provide her concerns. (*Id.*) The court explained that the matter should be investigated, and the Commission on Practice was the appropriate body to do that. (*Id.* at 517.) McQuillan noted that he objected to the assertions made by Gordon because he believed they were inaccurate. (*Id.*) The court noted that Eschenbacher had come into the courtroom during the case. (*Id.* at 518.) McQuillan informed the court that he had not received any confidential information from Eschenbacher about James. (*Id.*)

Later that day, the court declared a mistrial because the jury was unable to reach a verdict. (*Id.* at 527-28.) James’s trial counsel did not raise the issue about Eschenbacher again or move to disqualify McQuillan.

C. The second trial

James was convicted following the second trial held July 11-13, 2017. (7/11/17-7/13/17 Tr.) At that trial, James again relied on the theory that Marilyn fabricated the rape allegation after she had consensual sex with James because Marilyn needed a place to stay and thought the rape allegation would help her. (7/11/17 Tr. at 156; 7/13/17 Tr. at 514.) He argued that after she made the allegation, she obtained free housing and was “given the attention that she so badly wants.” (7/11/17 Tr. at 159-60.)

Marilyn cried profusely while testifying about how the rape changed her entire life. (*Id.* at 181.) She testified that she was scared at the time, and it was particularly difficult because James was her nephew. (*Id.* at 178, 180.) She said that James’s words to her, asking her whether it felt good, were “imbedded in my head and I can’t get them out. . . . Does that feel good. God, no. I would never become aroused.” (*Id.* at 178.) Afterward, she could not have a man near her and had difficulty leaving the house. (*Id.* at 181.) Marilyn also lost her friendship with Diana, who had been her best friend. (*Id.* at 185.)

When asked whether she would have concocted the allegations against James to help her obtain housing, Marilyn replied, “No, no. That is just ridiculous; no. I wasn’t homeless. I didn’t need—what would this do to make my life better.”

(*Id.* at 220.) Marilyn did not know how James had entered the house, but she noted that he might have had a key because he had lived there. (*Id.* at 202.)

Lake County Sheriff's Deputy Michelle Scott Lee testified that she responded when Diana reported the offense. (7/12/17 Tr. at 235.) She testified that Marilyn was rocking back and forth and sobbing during the interview. (*Id.* at 240-41.) Deputy Lee observed that Marilyn "seemed like she was disgusted and in disbelief that this was happening." (*Id.* at 242.) A video of Marilyn's interview with law enforcement was played for the jury. (State's Ex. 2.)

James's mother, Diana, testified that James came to her house around 2 a.m., and Marilyn greeted him enthusiastically. (7/12/17 Tr. at 416-18.) Diana made him leave because he had been drinking. (*Id.* at 416.) Diana testified that after breakfast the next morning Marilyn told her that James had raped her. (*Id.* at 421-22.) Diana decided to call law enforcement, and testified that she did not think that Marilyn expected her to report the offense. (*Id.* at 422.)

James testified that Marilyn was his aunt, and he had known her most of his life. (*Id.* at 436.) He said she had previously told him he was good looking, but he did not interpret it to be inappropriate. (*Id.* at 437.) He stated that as he got older, he believed that an attraction had built. (*Id.* at 437-38.) James stated that he had gone to Diana's house early in the morning because he was looking for his son, and he claimed that he was going to park his car at Diana's house and then walk to

meet up with friends. (*Id.* at 439-41.) James testified that while he was at Diana's house, Marilyn asked him if he could come back later because she had important matters to discuss with him. (*Id.* at 445.) James left the house because Diana told him he had to leave. (*Id.* at 444.)

James claimed his friends had already left when he got to their house, so he went back to Diana's house planning to get a blanket from inside and sleep in his car. (*Id.* at 447-48.) James said he tapped on the window, and Marilyn let him in. (*Id.*) He said that after Marilyn let him in, they talked about problems she was having. (*Id.* at 450-51.) James said Marilyn then asked him if he would massage her calves and feet, which he did. (*Id.* at 452.)

James said he then "made the move to reach up and touch her on the inside of her thigh and she was like not telling me no, don't do that. And that's when I went ahead and made another move towards her vagina. And, again, there was no, stop, nothing like that. So I took that as the green light to go ahead further." (*Id.* at 452-53.) James testified that he believed Marilyn was receptive to his touch. (*Id.* at 453.) He stated that they then "engaged in sexual intercourse, which was really tough because that's not the ideal situation with my mom just in the next room over and the fact that it's wrong to be sleeping with your aunt. I mean, that's where the uncomfortable part comes in." (*Id.*) James testified that he believed, based on past encounters, that "it was an opportunity that I went ahead and moved

forward on. And, again, she was not saying no or we shouldn't do that[.]” (*Id.* at 454.) When asked whether Marilyn reciprocated, James replied, “Yeah. She wasn't—like I said, she wasn't like no, or—because actually that's what I anticipated that she would do, is like, you know—and that's—so it seemed like after we got over the weirdness of that then that's when just the flow of intercourse happened.” (*Id.*) He stated that it was “definitely uncomfortable,” and he believed “it was uncomfortable for both of us.” (*Id.*) But he claimed that “it wasn't sexual intercourse without consent.” (*Id.*)

The jury found James guilty of sexual intercourse without consent. (7/13/17 Tr. at 542.) The court sentenced him to 100 years in prison with no parole for 50 years and designated him a tier 3 sexual offender. (11/2/17 Tr. at 32; Doc. 119, available at Appellant's App. A.)

Facts that were developed after remand concerning the involvement of the LCAO are included below in the third issue.

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion when it excluded evidence about Marilyn's DUI because James did not present a logical theory that would have made the evidence relevant for a nonpropensity purpose. James's claim that Marilyn may have fabricated being raped in Lake County to obtain favorable

treatment from prosecutors in Sanders County, where she had a pending DUI and had failed to participate in alcohol monitoring, was inconsistent with his assertion that she did not want to report the rape to law enforcement. Because he failed to provide a logical theory for the admission of Marilyn's prior bad acts, the evidence was not admissible under Mont. R. Evid. 401, 403, and 404(b). Further, the exclusion of that evidence did not violate James's right to present a defense because the evidence rules under which the evidence was excluded are not arbitrary and disproportionate to the purposes they are designed to serve. Finally, even if the Court erred in excluding the evidence, it was harmless because there is not a reasonable possibility that it would have changed the outcome.

Additionally, when the district court addressed the challenge to the LCAO on remand, the court correctly concluded that disqualification of the LCAO and a new trial were not warranted. James waived his challenge to the prosecution by the LCAO when he failed to file a motion to disqualify any time before his conviction. He also failed to demonstrate that the office should have been disqualified because it was a different matter than the case Eschenbacher represented James in, Eschenbacher was not the prosecutor in this case and did not give the prosecutor information he learned from his representation of James, and James was not prejudiced by being prosecuted by an attorney in the LCAO.

STANDARD OF REVIEW

A district court has broad discretion when determining the relevance and admissibility of evidence. Accordingly, this Court generally reviews evidentiary rulings for abuse of discretion. *State v. Lotter*, 2013 MT 336, ¶ 13, 372 Mont. 445, 313 P.3d 459. To the extent the court's ruling is based on an interpretation of a rule of evidence, a statute, or a constitutional right, however, this Court's review is de novo. *Lotter*, ¶ 13.

Whether to disqualify counsel is within a district court's discretionary powers, so this Court reviews the denial of a motion to disqualify for an abuse of discretion. *Schuff v. A.T. Klemens & Son*, 2000 MT 357, 303 Mont. 274, 16 P.3d 1002.

ARGUMENT

I. The district court properly excluded evidence about Marilyn's pending DUI because the charge was irrelevant and also inadmissible under Mont. R. Evid. 403 and 404(b).

Evidence about Marilyn's DUI was inadmissible under Mont. R. Evid. 401 because it was irrelevant, and it was inadmissible under Rule 404(b) because it was not relevant to a nonpropensity purpose. Also, if there was some relevance, the marginal relevance was substantially outweighed by the danger of confusing the jury and wasting time on collateral issues, making the evidence inadmissible under Rule 403.

As an initial matter, the State notes that James argued in the district court that evidence concerning Marilyn’s DUI was admissible because her failure to comply with the conditions of her release on bond gave her a reason to fabricate the rape allegation to avoid a revocation of her bond. (Doc. 44.) On appeal, James has expanded his argument to argue that Marilyn had a motivation to testify falsely against James to appear sympathetic to the State. (Appellant’s Br. at 22.) Because James has waived any argument not raised in the district court, the State addresses only the argument he preserved. *See* Mont. Code Ann. § 46-20-104(2) (“Failure to make a timely objection during trial constitutes a waiver of the objection except as provided in 46-20-701(2).”); *State v. Martinez*, 2003 MT 65, ¶ 17, 314 Mont. 434, 67 P.3d 307 (noting that this Court “will not address an issue raised for the first time on appeal.”).

Rule 404(b) provides that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” To admit evidence of prior bad acts, “the proponent must clearly articulate how that evidence fits into a chain of logical inferences, no link of which may be the inference that the defendant has the propensity to commit the

crime charged.” *State v. Clifford*, 2005 MT 219, ¶ 48, 328 Mont. 300, 121 P.3d 489 (quotation marks and citations omitted).

A defendant may introduce evidence of another witness’s crimes or conduct, known as “reverse 404(b) evidence,” to support his defense if it tends to negate the defendant’s guilt of the crime charged against him. *United States v. Alayeto*, 628-F.3d 917, 921 (7th Cir. 2010). But a “defendant may not introduce reverse 404(b) evidence where it lacks connection with the crime, is speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant’s trial.” *State v. Giddings*, 2009 MT 61, ¶ 88, 349 Mont. 347, 208 P.3d 363. To be admissible, “the proffered reverse 404(b) evidence must be relevant, must not constitute inadmissible hearsay, and must survive the balancing of competing considerations under Rule 403.” *Alayeto*, 628 F.3d at 921 (internal citations omitted).

A. Clarification of the facts

James incorrectly claims in his brief that the State “readily acknowledged the bond violation evidence was relevant to [Marilyn’s] potential motive to fabricate[.]” (Appellant’s Br. at 14; *see also id.* at 2.) During the discussion about the admissibility of Marilyn’s charges, the prosecutor shifted from another topic to Marilyn’s potential bond revocation by stating the “bond issue . . . is the one that is the more interesting because it goes to motivation to fabricate.” (5/18/17 Tr. at 16.) When viewed in its context, that statement is not a concession that the bond issue

was relevant to Marilyn's motive to fabricate. Instead, the prosecutor appeared to be identifying the legal issue. The prosecutor repeatedly argued that Marilyn's release on bond was irrelevant because there was no evidence indicating that she would have believed that fabricating a rape allegation would have given her special treatment from a neighboring county for her DUI charge. (*Id.* at 5, 16-19.) The prosecutor stated that James's assertion that Marilyn's DUI and bond conditions gave her a motive to fabricate "defies total logic" and was too implausible and speculative to establish relevance. (*Id.* at 16-19.) The State clearly argued that the evidence of Marilyn's DUI charge was irrelevant in this case.

James also asserts that he proffered evidence demonstrating that Marilyn went to Lake County Deputy Attorney James Lopatka, who prosecuted Marilyn for drug possession, that Lopatka sent an email to the Sanders County prosecutor stating that Marilyn was a rape victim, and that Marilyn later successfully avoided having her bond revoked because she had been sexually assaulted. (Appellant's Br. at 21.) These assertions are incorrect for several reasons. First, James did not proffer any evidence about Marilyn's other charges except for the charging document and case register. (Doc. 44, Exs. A, B.)¹ In the trial court, James

¹On April 14, 2022, the State filed a motion to strike appendices and assertions of fact from Appellant's opening brief because he has attached documents from Marilyn's Sander's County case that are not part of the record in this case. This Court has not yet ruled on the State's motion.

referred to records that he may have had, but he did not provide them to the court. (5/18/17 Tr. at 4-5.) Second, many of the statements from James's counsel appear to be unsupported speculation that were not supported by any records. For example, James claimed that Marilyn was "at large, mainly because of her status as a rape [victim] now," but he failed to provide any support to that assertion. (5/18/17 Tr. at 4-5.) Furthermore, even the unsupported assertions of trial counsel do not support the claims made by James's appellate counsel. (*Compare* 5/18/17 Tr. at 4-5, *with* Appellant's Br. at 4.) Nothing James's trial counsel stated indicated that there was any evidence that Lopatka called Sanders County on Marilyn's behalf. (*See* 5/18/17 Tr. at 4-5.) James's factual assertions on page 21 of his brief are unsupported and should not be considered.

B. Mont. R. Evid. 401

The district court did not abuse its discretion when it excluded evidence that Marilyn had a pending DUI charge and violated bond conditions in a neighboring county because James failed to demonstrate that that evidence made it more likely that she would have fabricated the allegations against him. He therefore failed to establish the relevance of Marilyn's criminal case.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Mont. R. Evid. 401. James argued

Marilyn may have fabricated the rape allegation in order to be viewed as a victim and avoid having her bond revoked for failing to take a breath test the day before.

The idea that a person would fabricate being raped by her nephew, and report that rape to the nephew's mother, thinking that prosecutors in a neighboring county would then not revoke her bond for her failure to take a breath test the day before, is implausible. Further, that theory lost any potential merit when James insisted that Marilyn did not want the rape to be reported. (*See* 5/18/17 Tr. at 9.) Marilyn could not have fabricated a rape in Lake County in hopes that she would get favorable treatment from prosecutors in Sanders County if she did not want to or plan to report the rape. The district court correctly concluded that James failed to demonstrate that the evidence about Marilyn's pending DUI fit into a chain of logical inferences. (5/18/17 Tr. at 22-23.) The district court did not abuse its discretion when it excluded the evidence because the evidence did not have any tendency to make it more probable that Marilyn had fabricated the allegations.

C. Mont. R. Evid. 403

Rule 403 allows courts to exclude relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” “[U]nfair prejudice against the

government occurs when the evidence tends to make the jury more likely to find a defendant not guilty *despite* the proof beyond a reasonable doubt.” *Clifford*, ¶ 45. In *Clifford*, this Court held that reverse 404(b) evidence was properly excluded where the probative value was very low and was substantially outweighed by the waste of time and needless presentation of cumulative evidence. *Clifford*, ¶ 53. Similarly, the Seventh Circuit upheld the exclusion of reverse 404(b) evidence in *Alayeto*, where the relevance was minimal and it was substantially outweighed by the risk of confusion and the delay that would have been caused by bringing in additional witnesses. 628 F.3d at 921-23.

If this Court concludes there was any probative value to evidence about Marilyn’s DUI, the minimal probative value was substantially outweighed by the danger of confusing the issues and wasting time. Presenting evidence about Marilyn’s DUI would have required additional evidence about Marilyn’s charge pending in another county and about her compliance with the conditions of her bond. Because that charge was irrelevant to this case, it would likely have confused the jury. Although the district court did not explicitly rely on Rule 403, the court would not have abused its discretion in excluding the evidence under Rule 403 because the danger of confusing the issues and wasting time substantially outweighed any potential probative value, which was limited.

D. Mont. R. Evid. 404(b)

Evidence concerning Marilyn’s DUI and bond conditions was also inadmissible because James failed to demonstrate that it was admissible for a nonpropensity purpose. Evidence of another witness’s criminal acts is properly excluded where the defendant seeks to admit the evidence to show that another person had the propensity to commit the offense. *Giddings*, ¶¶ 87-89, 93; *Clifford*, ¶¶ 49-50. The evidence is also inadmissible where the defendant “fail[s] to create a chain of logical inferences between the evidence and [the offense.]” *Giddings*, ¶ 91 (quoting *Clifford*, ¶ 48, and *Holmes v. South Carolina*, 547 U.S. 319, 327 (2006); quotation marks omitted); *see also Giddings*, ¶ 93.

In contrast, *State v. Flowers*, 2018 MT 96, 391 Mont. 237, 416 P.3d 180, provides an example of admissible reverse 404(b) evidence. In *Flowers*’s trial for possessing drugs located in his vehicle, the court excluded evidence that the passenger, who pled guilty to possessing the drugs in *Flowers*’s vehicle, had other pending drug offenses that were resolved as part of a global plea agreement. *Flowers*, ¶¶ 2-9. That exclusion prevented *Flowers* from impeaching the passenger’s testimony indicating that she had not received favorable treatment. *Flowers*, ¶ 19. This Court held that the evidence about the passenger’s plea agreement was improperly excluded because it was relevant to impeach her credibility and to show her motive for testifying against *Flowers*. *Flowers*, ¶ 21.

Unlike Flowers, James failed to create a chain of logical inferences between Marilyn's DUI offense and her allegations against James, which James insisted she did not personally report and was reluctant to report. Marilyn's DUI charge in Sanders County was unrelated to her allegation against James in Lake County. James's argument that the evidence was admissible to show that Marilyn had a motive to fabricate her allegations was inconsistent with his claim that Marilyn did not personally report the offense and did not want it to be reported. (5/18/17 Tr. at 22-23.) Because he failed to connect his evidence to a nonpropensity purpose, the evidence would have improperly suggested that Marilyn should not be trusted because she had a pending criminal charge. The district court did not abuse its discretion when it excluded evidence that did not have a relevant nonpropensity purpose.

E. Harmless error

Finally, even if the court erred in excluding evidence about Marilyn's DUI case under the rules of evidence, the error was harmless because there is no reasonable possibility that the exclusion of the evidence contributed to the conviction. *See State v. Garding*, 2013 MT 355, ¶ 31, 373 Mont. 16, 315 P.3d 912 (citing standard). DNA evidence demonstrated that James had sexual intercourse with his Aunt Marilyn. When she reported the offense the next day, her distraught demeanor was consistent with her description of being raped by James. (*See State's*

Ex. 2; 7/12/17 Tr. at 240-42, 320.) James presented a theory that Marilyn had a motive to fabricate the rape to obtain a benefit with housing. The jury rejected that theory. The jury was not any more likely to have believed a theory that Marilyn fabricated being raped after having sex with her nephew to obtain favorable treatment from prosecutors in a neighboring county, particularly in light of Diana's testimony that she did not believe Marilyn thought she would report the rape. Therefore, the exclusion of that evidence is harmless beyond a reasonable doubt.

II. Exclusion of evidence about Marilyn's DUI did not violate James's right to present a defense.

As explained above, James preserved only the issue of whether evidence of Marilyn's DUI and failure to comply with bond conditions was admissible as evidence of a motive to fabricate her allegation against James. (*See* Doc. 44.) Without evidence, James suggested in the trial court that Marilyn had obtained favorable treatment in Sanders County and did not have her bond revoked because of her status as a victim. (5/18/17 Tr. at 4-5.) The Sanders County case was still pending, so the plea agreement that was subsequently reached in that case was not discussed. When reviewing whether the district court abused its discretion, this Court is limited to the arguments and information that were before the district court.

Exclusion of the evidence about Marilyn's pending DUI did not violate her right to present a defense. Defendants have a right to present a defense rooted in

the Due Process Clause of the Fourteenth Amendment and the Confrontation Clause of the Sixth Amendment to the United States Constitution. *State v. Reams*, 2020 MT 326, ¶ 18, 402 Mont. 366, 477 P.3d 1118. But the right to present a defense “is subject to reasonable restrictions.” *United States v. Scheffer*, 523 U.S. 303, 308 (1998). “[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused’s right to present a defense so long as they are not ‘arbitrary’ or ‘disproportionate to the purposes they are designed to serve.’” *Id.*; *see also Holmes*. Similarly, “trial judges retain wide latitude . . . to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.” *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).

“The accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.” *Taylor v. Illinois*, 484 U.S. 400, 410 (1988). Rule 403 is one of the “number of familiar and unquestionably constitutional evidentiary rules [that] authorize the exclusion of relevant evidence.” *Montana v. Egelhoff*, 518 U.S. 37, 42 (1996).

Evidence about Marilyn's DUI was appropriately excluded based on the lack of relevance, the danger of confusing the jury and wasting time with collateral litigation, and the lack of a nonpropensity purpose for the evidence. Exclusion on those grounds is well within a court's broad latitude to exclude evidence, and it does not violate James's right to present a defense because those rules are not arbitrary or disproportionate to the purposes those rules are designed to serve.

This case is distinguishable from both *Davis v. Alaska*, 415 U.S. 308 (1974), and *State v. Gommenginger*, 242 Mont. 265, 790 P.2d 455 (1990). The Supreme Court and this Court held in those cases that the defendant's right to present a defense or cross-examine witnesses was violated by the exclusion of a witness's bad acts. *Davis*, 415 U.S. at 315-20; *Gommenginger*, 242 Mont. at 272-75, 790 P.2d at 459-61. But in both cases, the defendants presented logical theories about why that evidence would give the witness a bias or motive to testify falsely. *Davis* was prevented from presenting evidence that the witness who asserted that *Davis* had been near a stolen safe was himself on probation for burglary and could have become a suspect in the burglary at issue, which may have given him a reason to testify falsely about *Davis*. *Davis*, 415 U.S. at 313-20. And in *Gommenginger*, a defendant charged with distributing drugs was prevented from presenting evidence that the paid informant, who claimed he had purchased drugs from *Gommenginger*, was a routine drug user. 242 Mont. at 269-70, 790 P.2d at 458. *Gommenginger*

argued that the informant's drug addiction may have given him a reason to falsely accuse Gommenginger to sustain the informant's drug habit, which was being supported by his undercover employment, and to avoid the risk of criminal prosecution. *Id.*

In this case, by contrast, James failed to present a comprehensible theory about why Marilyn's pending DUI charge would have given her a reason to fabricate that she was raped by her nephew after she had sex with him. James's claim that she may have fabricated the allegation to obtain favorable treatment from prosecutors in a neighboring county was illogical in light of James's assertion that she did not want to report the offense.

Further, contrary to James's claims, no evidence was presented demonstrating that Marilyn received favorable treatment as a defendant due to her involvement in this case. That distinguishes this case from *Van Arsdall*, 475 U.S. at 679, in which the Supreme Court held that a court erred when it excluded evidence that a witness had a charge dismissed in exchange for speaking to law enforcement.

Because James's assertion that Marilyn did not report the offense and did not want to report the offense was inconsistent with his argument about her motive to fabricate, the court's exclusion of the evidence did not violate his right to present a defense. As explained above, the court correctly excluded the evidence under the evidentiary rules. Those rules did not conflict with James's right to

present a defense because the evidence excluded did not support a coherent theory, and it would have resulted in time-consuming litigation about collateral matters that would have confused the jury.

Finally, even where a defendant's right to present a defense is violated, the error is harmless if the exclusion of the evidence was harmless beyond a reasonable doubt. *Van Arsdall*, 475 U.S. at 684. If the exclusion of evidence about Marilyn's DUI charge violated James's right to present a defense, it was harmless beyond a reasonable doubt because Marilyn's allegation was corroborated by DNA evidence and her demeanor after her report. Given the strength of the evidence, there is no reason to believe the jury would have reached a different outcome based on James's implausible theory about Marilyn's motive to fabricate, particularly in light of Diana's testimony that she did not think that Marilyn expected Diana to report the offense.

III. James waived his argument about the disqualification of the LCAO when he failed to move for disqualification, and he has failed to demonstrate cause for disqualification of the entire office.

A. Facts concerning the evidentiary hearing on remand

On appeal, James filed an Unopposed Motion to Stay Appeal and Remand, in which he asked for the case to be remanded to develop a record about whether the LCAO should have been disqualified from the prosecution. (*State v. James*,

DA 18-0597, Unopposed Motion to Stay Appeal and Remand, filed 1/17/20.) The State did not object to remanding for an evidentiary hearing, but it stated that it was not waiving the argument that the defense did not properly raise the disqualification issue or that disqualification was not required. (*Id.* at 3.)

This Court remanded the case to the district court “to hold an evidentiary hearing regarding screening of the Lake County Attorney and alleged disqualification of the [LCAO].” (Doc. 132.) This Court directed the district court to “make written findings of fact and conclusions of law and enter an order determining whether, based upon James’s disqualification claim, a new trial should be held.” (*Id.*)

James filed a brief arguing that the entire LCAO had a conflict of interest and should have recused themselves because Eschenbacher, the Lake County Attorney, had represented James in another case in 2011. (Doc. 139.) James asserted that Eschenbacher had learned a great deal about him. (*Id.*)

In response, the State argued that a new trial was not warranted for three reasons. (Doc. 140.) First, James had not filed a motion to disqualify or a motion for a new trial. (*Id.* at 3-5.) Second, no ethical rules had been broken because Eschenbacher was not involved in the prosecution of the case, this case is a different matter than the case Eschenbacher represented James in, and

Eschenbacher did not disclose any confidential information. (*Id.* at 4, 6-10.)

Third, James's rights were not prejudiced. (*Id.* at 10-11.)

The State attached affidavits from McQuillan and Eschenbacher. (*Id.*, Exs. C, D.) The State also attached a report from the Office of Disciplinary Counsel concluding that it did not have sufficient evidence to establish a violation of Mont. R. Prof. Cond. 1.9 and dismissing the grievance. (*Id.*, Ex. A.)

McQuillan, Eschenbacher, Lopatka, and Vera Johnson, the paralegal assigned to this case, all testified about the LCAO at evidentiary hearings held December 7, 2020 and March 29, 2021. Lopatka had previously prosecuted James for an unrelated sexual intercourse without consent charge in DC 11-85. (12/7/20 Tr. at 32.) Eschenbacher, who had been a defense attorney at that time, had represented James in that case. (*Id.*; 3/29/21 Tr. at 32-33.) The jury was unable to reach a verdict in DC 11-85, and the case was not retried after the victim committed suicide. (12/7/20 Tr. at 46.)

When this case was initiated, McQuillan was in a position funded by a grant that covered domestic violence and sexual offenses. (*Id.* at 8-9.) This case was automatically assigned to McQuillan because the offense was covered by his position. (*Id.* at 20, 33-34.)

Office software flagged the case as one Eschenbacher had a conflict on because he had previously represented James. (*Id.* at 10; 3/29/21 Tr. at 42.)

Eschenbacher told McQuillan that he did not want to be involved in the case and avoided it out of an abundance of caution. (12/7/20 Tr. at 10, 20.) Eschenbacher had been advised by counsel at the Montana State Bar that he could prosecute his former clients in a case unrelated to the case he had represented the client on. (*Id.* at 20; 3/29/21 Tr. at 51-52, 70.) But he avoided prosecuting his former clients as a “professional courtesy” to them. (3/29/21 Tr. at 43.)

McQuillan testified that he never had a direct conversation with Eschenbacher about the case, and Eschenbacher did not tell McQuillan anything about his prior representation of James. (12/7/20 Tr. at 14, 29.) McQuillan also noted that James’s counsel never moved to disqualify the LCAO from the case. (*Id.* at 29.)

Eschenbacher’s only involvement in the case occurred when the paralegal, Johnson, asked Eschenbacher a question on McQuillan’s behalf. (*Id.* at 55.) Johnson denied that she had ever asked McQuillan whether he had run something by Eschenbacher, as James’s counsel alleged. (*Id.* at 50-51.) Johnson explained that she would not have challenged McQuillan’s authority in that way. (*Id.*) But Johnson thought that she might have asked Eschenbacher whether the recording of the 911 call should be played at trial. (*Id.* at 52-54.) Johnson did not remember it very well, but she believed that McQuillan had already made up his mind to not play the recording before receiving the response from Eschenbacher. (*Id.* at 54.)

Eschenbacher testified that he did not remember specific details about the investigation in the 2011 case or specific things James had told him. (3/29/21 Tr. at 33-34, 36.) Eschenbacher did not believe he had received any sensitive attorney client information that could have been applicable in this case. (*Id.* at 35, 71.) He explained he liked James and believed James was innocent of the 2011 offense because he had an *Ambien* defense. (*Id.* at 35.) Eschenbacher explained that he “believed that the victim, at least to Vaughn, would have appeared to be fully compliant and consensual.” (*Id.* at 35.)

Eschenbacher believed that he could have prosecuted James in this case without violating Mont. R. Prof. Cond. 1.9 because this is not the same or substantially the same case as the 2011 case. (3/29/21 Tr. at 36.) Eschenbacher noted that the location, time, and victim were all different. (*Id.*)

Eschenbacher explained that he avoided James’s case in part because he liked James, and he did not want to interfere with the prosecutor doing what the prosecutor felt needed to be done. (*Id.* at 44.) He also felt like he should avoid the case to remove any questions about his involvement. (*Id.*) He stated, “I never, ever even looked at Vaughn James’ file. I never reviewed any of the information. I did not talk to anyone about it.” (*Id.*) He explained that when the case was discussed in the office, he stayed out of the conversation. (*Id.* at 44, 71.) Eschenbacher acknowledged that he might have gone into the courtroom during

the trial because he liked to observe his attorneys. (*Id.* at 55.) Eschenbacher did not believe he needed to stay out of the courtroom because he did not have any information from James's prior trial that could have been used against him in this case. (*Id.*)

Eschenbacher said he might have asked Gordon what was going on with the case, but he did not talk to the prosecutors about the case. (*Id.* at 68-69.) He did not believe that he had told Gordon that he could do whatever he wanted because he was the county attorney. (*Id.* at 69.)

Eschenbacher recalled one time when the paralegal, Johnson, had contacted him about this case. (*Id.* at 72-73.) Eschenbacher testified that Johnson told him that McQuillan asked her to get another attorney's opinion on whether he should play the recording of the 911 call. (*Id.* at 73.) Eschenbacher asked Johnson whether a witness had testified about the call, and she said yes. (*Id.*) Without listening to the recording, Eschenbacher told Johnson that it did not seem necessary to play it because it would be redundant. (*Id.*)

Eschenbacher also noted that the Office of Disciplinary Counsel did not find that he committed an ethical violation. (*Id.* at 75.)

Amanda Gordon testified that she assisted Eschenbacher in representing James in 2011. (*Id.* at 5-6.) That representation included having confidential conversations with him and preparing him to testify. (*Id.* at 6-8.) Gordon

acknowledged that she did not remember specific information about the meetings. (*Id.* at 28.)

Gordon represented James in this case until James filed a complaint about her before the sentencing hearing. (*Id.* at 10-11.) Gordon testified that she developed concerns that Eschenbacher had not sufficiently walled himself off from James's prosecution. (*Id.* at 12.) Gordon testified that Eschenbacher asked her in the courthouse whether James was going to trial. (*Id.*) Gordon said she told Eschenbacher he should not be asking about the case, and he stated that he could if he wanted to because he was the county attorney. (*Id.*) Gordon said she got upset during the trial because she overheard a conversation between McQuillan and Johnson, and she believed that one of them suggested that Eschenbacher could review something in the discovery. (*Id.* at 13.) Gordon explained that she then raised her concerns with the district court. (*Id.* at 15.)

Gordon testified that she did not file a motion to disqualify the county attorney's office and had not done anything else to officially raise her concerns because it felt futile. (*Id.* at 16, 22, 29.) She had been told that the LCAO had consulted with someone who had validated the opinion of the office that there was not an ethical problem. (*Id.*) Gordon stated that it "never sat right with" her to have the office prosecuting serious felonies when the client's former defense attorney was part of that office. (*Id.* at 26.)

James testified that he had many conversations with Eschenbacher when Eschenbacher represented him. James stated that he had discussed personal information with Eschenbacher, and Eschenbacher had practiced cross-examining him. (*Id.* at 78.) James stated that Eschenbacher learned from James that James had been a victim of child sexual abuse. (*Id.* at 79.) James stated that he was surprised and concerned that Eschenbacher led the office that was prosecuting him in 2016. (*Id.* at 80.) James also testified that he was not present when his counsel had the conversation with Judge Christopher about their concerns about Eschenbacher. (*Id.* at 84-85.) James also complained that he believed that Marilyn had fabricated the allegation against him to gain favorable treatment in her DUI case. (*Id.* at 94.)

The district court issued an order concluding that James's disqualification claim was "without merit," and that "a new trial is not warranted." (Appellant's App. F.) After setting out detailed findings of fact and conclusions of law, the court explained that the "2016 case is not a matter in which Eschenbacher had personally and materially participated as a public defender. In addition, Eschenbacher did not participate in any material way in the 2016 case. Finally, the court was provided with no evidence that Eschenbacher communicated to anyone in the LCAO office any confidential information he received from Defendant during his representation of Defendant in the 2011 case." (*Id.* at 12.)

B. James waived his argument that the entire LCAO should have been disqualified because he never filed a motion to disqualify.

James waited until the third day of trial before raising any concern about the LCAO prosecuting James, and even then, he did not move to disqualify McQuillan. (*Id.* at 8.) Because he never moved to disqualify McQuillan or other members of the LCAO before filing his appeal, he waived the argument that McQuillan should have been disqualified. *See* Mont. Code Ann. § 46-20-104(2); *Martinez*, ¶ 17. James’s remand does not remedy his failure to raise the issue in the district court because he did not make a timely objection.

Indeed, motions to disqualify counsel must be raised “as early as possible so that a determination may be made that does not unduly prejudice any party.” *Schuff*, ¶ 46 (citation and quotation marks omitted). This Court and the Ninth Circuit have held that failure to object to opposing counsel’s alleged conflict of interest in a reasonable time may waive the objection even if a motion is made. *Schuff*, ¶¶ 46-47 (citing *In re Guardianship of Mower*, 1999 MT 73, ¶ 23, 294 Mont. 35, 979 P.2d 156; *Trust Corp. of Montana v. Piper Aircraft Corp.*, 701 F.2d 85, 87 (9th Cir. 1983)).

Although the defendant in *Schuff* filed a timely motion to disqualify opposing counsel, this Court faulted the defendant for failing to take additional actions that would have allowed this Court to review the denial in a timely manner.

Schuff, ¶¶ 49-51. Because the defendant did not challenge the court's denial of their motion to disqualify for six years, this Court concluded under the theory of laches that it would be inequitable to permit the party to assert its right on appeal. *Schuff*, ¶ 52. The court also affirmed the denial of the motion to disqualify because the remedy the defendant originally sought, which was for the plaintiff to obtain new counsel, was no longer available, and the remedy the defendant sought on appeal, which was a new trial, was not the remedy requested in the original motion. *Schuff*, ¶ 53.

This case is far more egregious. James failed to take any action to put the State or court on notice that he had concerns about the LCAO until the third day of trial, when he still did not move to disqualify the LCAO. If he had moved to disqualify the LCAO when he was first charged and he had a meritorious request, a prosecutor from outside the office could have handled the case. Instead, he waited until midtrial to raise any issue, and still did not move to disqualify the LCAO, even when the second trial was held. James cannot wait until after he is convicted and then argue that his prosecutor should have been disqualified. He therefore waived this argument.

C. The district court correctly concluded on remand that the LCAO should not have been disqualified from this case.

Even if this Court considers James's untimely argument that the LCAO should have been disqualified, his claim should be rejected because he has failed to

establish: (1) that Eschenbacher’s duty to James was violated by the LCAO’s prosecution of James; or (2) that he was prejudiced by being prosecuted by the LCAO, rather than another prosecutor.

The “gravamen of a motion to disqualify is not that an attorney or firm violated one of the conflict of interest rules under our Rules of Professional conduct . . . ; rather, a motion to disqualify must offer sufficient proof that the continued representation of one party by the attorney or firm will prejudice or adversely impact the rights of another party in the matter pending before the court.” *Schuff*, ¶ 36. A violation of a professional conduct rule is relevant evidence, but it does not establish that a party is entitled to have opposing counsel disqualified without a showing of prejudice. *Schuff*, ¶ 37.

Eschenbacher’s duty to James, his former client, is governed by Mont. R. Prof. Cond. 1.9. Montana Rule of Professional Conduct 1.9(a) prohibits a lawyer who has a former client from “represent[ing] another person *in the same or a substantially related matter* in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.” (Emphasis added.) Additionally, Mont. R. Prof. Cond. 1.9(c) prohibits a lawyer who has a former client from (1) using “information relating to the representation to the disadvantage of the former client” or (2) revealing “information relating to the representation[.]”

James failed to demonstrate that Eschenbacher violated Rule 1.9. Because the two cases were not “the same or a substantially related matter,” Eschenbacher was not prohibited from prosecuting James under Rule 1.9(a). Further, Eschenbacher did not prosecute James—McQuillan did. As the district court found, “Eschenbacher did not participate in any material way in the 2016 case.” (Appellant’s App. F. at 12.) The court also found that there was “no evidence that Eschenbacher communicated to anyone in the LCAO office any confidential information he received from Defendant during his representation of Defendant in the 2011 case.” Thus, there is no evidence that Eschenbacher used or revealed information in violation of Rule 1.9(c). Additionally, none of the special conflict of interest rules applicable to government attorneys in Mont. R. Prof. Cond. 1.11 apply.

James also failed to establish that he was prejudiced by being prosecuted by McQuillan, rather than a prosecutor from another office. Without that showing, James was not entitled to disqualify McQuillan.

For all of these reasons, the district court correctly concluded on remand that James had not demonstrated that the LCAO should have been disqualified, and he was not entitled to a new trial.

CONCLUSION

James's conviction for sexual intercourse without consent should be affirmed.

Respectfully submitted this 5th day of May, 2022.

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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 9,861 words, excluding certificate of service and certificate of compliance.

/s/ Mardell Ployhar
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CERTIFICATE OF SERVICE

I, Mardell Lynn Ployhar, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 05-05-2022:

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