IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0221

STATE OF MONTANA,

Plaintiff and Appellee,

v.

GARY WAYNE TEMPLE,

Defendant and Appellant.

OPENING BRIEF OF APPELLANT

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, the Honorable Elizabeth Best, Presiding

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SUMMARY OF THE ISSUES

1. Did Temple receive ineffective assistance of counsel because his attorney did not insist upon a "witness legally accountable" instruction for the drug world witnesses who testified at his trial?
2. Did the district court err in admitting hearsay in the form of prior consistent statements and was the Defendant unfairly prejudiced by the prosecutor using them to comment improperly on the witnesses' credibility?
3. Did the district court err in denying Defendant's motions for a mistrial after the State elicited testimony from a detective that he knew Temple from "prior investigations" and after two witnesses referred to Temple being in jail?
4. Did the foregoing errors cumulatively compromise the trial's fairness?

STATEMENT OF THE CASE

On September 11, 2018, Gary Temple was charged with two counts of criminal distribution of dangerous drugs, based on controlled buys on November 9 and November 14, 2017. D.C. Doc. 1. On April 24, 2019, the State amended the charge to one count of criminal

distribution of dangerous drugs based on continuous conduct between July 1, 2017 and February 5, 2018. D.C. Docs. 51, 53.

On December 6, 2019, Temple was convicted at a jury trial of the amended single count of criminal distribution of dangerous drugs. D.C. Doc. 151.

On February 4, 2020, the district court sentenced Temple as a persistent felony offender to thirty years in Montana State Prison, with ten suspended, to run consecutive to a prior conviction. D.C. Doc. 166, Judgment, attached as App. A.

STATEMENT OF THE FACTS

The State charged Gary Temple with two counts of criminal distribution of dangerous drugs in September, 2018. D.C. Doc. 1. The original charges were based on two controlled transactions in November, 2017. In April, 2019, the State disclosed a confidential informant, added other witnesses, and amended the charges to one count of criminal distribution of dangerous drugs based on continuous conduct between July 2017 and February, 2018. D.C. Docs. 53, 54.

At trial in December, 2019, the State offered testimony from four witnesses who had been involved in distributing methamphetamine in

the Great Falls area. This testimony was the only direct evidence that Temple had distributed meth because law enforcement witnesses did not personally observe Temple distributing drugs.

Derek Lohmeyer had agreed to work as a confidential informant after he was arrested in the fall of 2017 for distributing drugs in a school zone. He arranged a buy from Danielle Wilson. She directed him to meet at a Town Pump, where he recognized Gary Temple's truck. He saw Wilson get into Temple's truck and return to him with meth. He also arranged another controlled buy from Wilson in which she directed him to a Super 8. He saw Temple's Dodge truck outside the hotel. Tr. at 144-150. Lohmeyer also testified that he privately purchased drugs from Temple on one occasion in December 2017 after he had gone AWOL from the informant program. Tr. at 158.

Danielle Wilson testified next, implicating Temple in the controlled buys of November 9 and 14. She said she met him in his truck and obtained the drugs that she then sold to Lohmeyer. Tr. at 173-79. She also told the jury that Temple sold drugs to her for her own use on a daily basis from October 2017 through December 2017. Tr. at 179-180.

Donny Ferguson, whom the prosecutor described as "the queen bee of methamphetamine dealing," testified that she distributed to Temple at least ten pounds of drugs during the period of summer 2017 through November 2017. Tr. at 260, 382. She said she had met Temple in June or July 2017 and had fronted meth to him so he could sell it and then repay her. Tr. at 256. Ferguson agreed that "as far as the [drug distribution] chain goes, Temple was below her." Tr. at 277. The prosecutor emphasized Ferguson's testimony heavily in closing, referring to it at least eight times and arguing that the large amounts of drugs Ferguson had sold Temple were powerful evidence that he had distributed drugs throughout this period. Tr. at 382-390, 396-403.

Ferguson had been pled guilty in federal court in March, 2019, for possession of dangerous drugs with intent to distribute and felony possession of a firearm. Tr. at 254. She had been sentenced to ten years eight months. Tr. at 255. The Cascade County prosecutor gave her immunity for testifying and did not charge her charged for her conduct related to distributing drugs to Temple. Tr. at 273. The prosecutor told the jury that Ferguson's only motive for testifying against Temple was that he should be held accountable just as she had been. Tr. at 273.

Brian Osborn also testified for the prosecution. He had served as a State's witness in three previous trials, including a February 2018 assault trial in which Temple had been acquitted. D.C. Docs. 61, 77; Tr. at 234. He originally had planned on testifying that Temple confessed to him in jail. D.C. Doc. 61. At trial, Osborn told the jury that on one occasion in the summer of 2017 he had served as a "lookout" and "protection" for Temple when Temple was dealing drugs. He said that he had witnessed Temple go into a home in Vaughn and emerge with a bag of drugs. Tr. at 228. He also saw Temple go into another house with a bag of drugs on a different occasion and emerge with a bag of money. Tr. at 230-32. He claimed he was not receiving any benefits for his testimony in this case. Tr. at 226.

In addition, three law enforcement witnesses testified regarding the controlled transactions on November 9 and November 14, 2017. Luke Smith was an undercover officer who drove Lohmeyer to the controlled transactions. He did not see Gary Temple at the scene, but saw a gray Dodge truck. Tr. at 212. Detective Tom Lynch monitored the wire on the informant and conducted surveillance. At the November 9 buy, he saw Temple and Wilson get into Temple's truck together. Tr. at

327-28. On November 14, he saw Temple's truck at the Super 8. Tr. at 328. Detective Hinchman saw Temple in his truck in the vicinity of the November 14 transaction, after the transaction had been completed. Tr. at 283.

The State offered four theories under which Temple could be convicted of distribution of drugs: 1) he sold drugs to Danielle Wilson on a daily basis from October through December 2017; 2) he sold drugs to Danielle who then sold them to Derek Lohmeyer in two controlled transactions on November 9 and November 14, 2017; 3) he sold drugs when Brian Osborn rode in his car and provided protection while Temple brought bag of meth into home and emerged with bag of cash; and 4) he sold drugs on one occasion to Lohmeyer after Lohmeyer went AWOL as a confidential informant. Tr. at 382-385, 387. The jury was told that a unanimous decision that one of these acts proved drug distribution was all that was required. Tr. at 387-88.

The defense theory was that Temple possessed meth during the time period in question, but only in personal use amounts. Tr. at 337, 393. Defense counsel also argued that the drug world witnesses against Temple had offered him up to law enforcement as a fake source for their

drugs so that they could protect their main suppliers. Tr. at 390-92. The defense argued that none of the law enforcement witnesses saw Temple dealing drugs. Tr. at 391.

When the Defendant testified, he admitted to buying personal use amounts of meth from Donny Ferguson during the summer and fall of 2017 period, but not in the large amounts necessary for drug distribution. Tr. at 344, 357. He admitted possessing and using meth in the presence of Danielle Wilson during the time period in question. He admitted seeing Danielle Wilson on a frequent basis during the time period in question, including in his truck. Tr. at 342-43. He denied ever selling drugs to her. With respect to the controlled transactions, he admitted that he might have been present at the Town Pump on one day during the period in question, and might have met Danielle Wilson in his truck there, but denied that he ever had sold her drugs in his truck at Town Pump. Tr. at 354. He flatly denied Osborn's entire testimony. Tr. at 344. He denied selling drugs on one occasion to Derek Lohmeyer or ever having met Lohmeyer. Tr. at 343.

After the jury found Temple guilty, the district court sentenced him to thirty years in prison, with ten suspended. Temple was eligible

for a PFO sentence based on his conviction for an aggravated assault committed at the age of 17, followed by several drug possession convictions.

His sentence was far harsher than those given to the State's witnesses, who also had prior convictions. Temple's codefendant for the controlled transactions, Danielle Wilson, was sentenced to four years of probation for two counts of drug distribution. Tr. at 182-83. Derek Lohmeyer, the confidential informant, received a probationary sentence for two counts of drug distribution in a school area. Tr. at 144, 159. Donny Ferguson, the high-level drug supplier who said she sold ten pounds of meth to Temple, had been sentenced to 128 months in federal prison for possession with intent to distribute and felon in possession of a weapon. Ferguson, "the queen bee of methamphetamine dealing," was given immunity from any state charges. Tr. at 273.

STANDARDS OF REVIEW

Claims of ineffective assistance of counsel present mixed questions of law and fact that this Court reviews *de novo*. *State v. St. Germain*, 2007 MT 28, ¶14, 336 Mont. 17, 153 P.3d 591.

This Court generally reviews a district court's evidentiary rulings for an abuse of discretion. *State v. Gomez*, 2007 MT 111, ¶18, 337 Mont. 219, 158 P.3d 442. A district court abuses its discretion if it acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice. *State v. Matz*, 2006 MT 348, ¶34, 335 Mont. 201, 150 P.3d 367. "Notwithstanding this deferential standard, however, judicial discretion must be guided by the rules and principles of law; thus, our standard of review is plenary to the extent that a discretionary ruling is based on a conclusion of law. In such circumstance, we must determine whether the court correctly interpreted the law." *State v. Price*, 2006 MT 79, ¶17, 331 Mont. 502, 134 P3d 45.

This Court reviews a district court's denial of a motion for a mistrial for abuse of discretion. *State v. Krause*, 2021 MT 24, ¶11, 403 Mont. 105, 480 P.3d 222. A district court abuses its discretion when it "acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice." *State v. Zimmerman*, 2018 MT 94, ¶13, 391 Mont. 210, 417 P.3d 289.

SUMMARY OF ARGUMENT

This Court should reverse because Temple received ineffective assistance of counsel and the district court made errors that undermined his trial with inadmissible hearsay and bad acts evidence.

Temple received ineffective assistance of counsel because his attorney did not insist upon the district court giving an accomplice instruction. The four witnesses who testified that they personally observed Temple distributing drugs were all involved in the same acts of drug distribution and/or possession that the State alleged Gary Temple performed and were legally accountable for those acts. The jury instruction was not inconsistent with Temple's theory of the case, which was not that he was "totally innocent," but rather that he possessed personal amounts of methamphetamine in the presence of one of the witnesses, and purchased meth from another one of the witnesses, but did not distribute it.

Temple was also deprived of his constitutional right to a fair trial because the district court erred in admitting hearsay in the form of prior consistent statements by the witnesses, which the prosecutor to used to bolster their trial testimony by arguing that their testimony

was consistent with these earlier statements. The hearsay exception for prior consistent statements did not apply because the prior consistent statements were made after the motive to lie arose. The State did not show that the motive to lie was not present at the time the witnesses were arrested. The error was not harmless because the prosecutor improperly used the prior consistent statements to vouch for the witnesses' credibility.

Temple also did not receive a constitutionally fair trial because the district court erred in denying the defense motion for a mistrial. The State violated Rule 404(b) by eliciting testimony from a detective regarding his familiarity with Temple from other previous investigations. In addition, two witnesses testified about Temple being in jail.

Alone or cumulatively, the erroneous mistrial and evidentiary rulings warrant a new trial. The four drug world witnesses were the only witnesses with direct evidence against Temple and had strong incentives to lie about Temple's involvement in drug distribution. But the jury was never instructed to view their testimony with distrust. At the same time, the prosecutor improperly bolstered the accomplices'

credibility by citing prior consistent statements that did not meet the requirements of the rules of evidence. Even as the State's witnesses were protected or bolstered, Temple's prior bad acts were presented to the jury, making the trial even more lopsided and unfair.

ARGUMENT

I. MR. TEMPLE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS LAWYER DID NOT INSIST UPON A "WITNESS LEGALLY ACCOUNTABLE" INSTRUCTION FOR THE DRUG WORLD WITNESSES AGAINST HIM.

A. Under Montana Law, Failure to Request A Witness Legally Accountable Instruction Can Constitute Ineffective Assistance of Counsel.

Both the Montana Constitution and the Sixth Amendment guarantee a person the right to effective assistance of counsel. *State v. Green*, 2009 MT 114, 350 Mont. 141, 205 P.3d 798. When reviewing ineffective assistance of counsel claims, this Court applies the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). The burden is on the defendant to show that defense counsel's performance "fell short of the range of competence required of attorneys in criminal cases and that his counsel's deficient performance was prejudicial to his case." *State v. Hendricks*, 2003 MT 223, ¶ 6, 317 Mont.

177, 75 P.3d 1268; *see also Whitlow v. State*, 2008 MT 140, 343 Mont. 90, 183 P.3d 861 (clarifying that the appropriate standard for ineffective assistance claims is not one of neglect or ignorance, but whether counsel's conduct fell below an objective standard of reasonableness).

Temple's ineffective assistance of counsel claim is based on § 26-1-303(4), MCA, which provides that a criminal defendant must receive an accomplice instruction on all proper occasions. The case law indicates that an occasion is proper when (1) an accomplice gives direct testimony, (2) the defendant requests such an instruction, and (3) the instruction is not inconsistent with the defendant's claim of innocence. *See State v. Allen*, 2010 MT 214, ¶ 68, 357 Mont. 495, 241 P.3d 1045. A person is an accomplice and legally accountable for the acts of another when, either before or during the commission of an offense with the purpose to promote or facilitate the commission, the person solicits, aids, abets, agrees, or attempts to aid the other person in the planning or commission of the offense. Mont. Code Ann. § 45-2-302(3). Whether a person is an accomplice is a question for the jury, unless it is undisputed. *State v. Rose*, 1998 Mont. 342, ¶13, 292 Mont. 350, 972 P. 2d 321. No caselaw states that the defendant is required to argue

directly that the witnesses are accomplices. The defendant need only present a theory of the case that is not inconsistent with the accomplice instruction, and may not claim "total innocence." *Allen*, ¶68.

B. An Accomplice Jury Instruction Was Appropriate for Temple's Case.

1. The Four Drug World Witnesses Were Legally Accountable For the Acts With Which Temple Was Charged.

At trial, the State offered four witnesses against Mr. Temple who were themselves involved in distributing and using methamphetamine and who were also charged or legally accountable based on the same continuing conduct or the specific transactions for which Mr. Temple was being charged with drug distribution. All of these witnesses met the definition of "accomplice" offered in MCA § 45-2-302:

> A person is legally accountable for the conduct of another when:
> (1) having a mental state described by the statute defining the offense, the person causes another to perform the conduct, regardless of the legal capacity or mental state of the other person;
> (2) the statute defining the offense makes the person accountable; or
> (3) either before or during the commission of an offense with the purpose to promote or facilitate the commission, the person solicits, aids, abets, agrees, or attempts to aid the other person in the planning or commission of the offense.

All four State's witnesses were legally accountable for the drug distribution conduct with which Mr. Temple was charged. Donny Ferguson testified that she provided drugs in large quantities to Temple for distribution. Danielle Wilson testified that she bought drugs from Temple (possession) during the months of October through December 2017. She also was a codefendant who was charged with drug distribution for the same controlled transactions as Mr. Temple, on November 9 and November 14, 2017. Derek Lohmeyer, the confidential informant in the controlled buys, also testified that he purchased drugs from Temple on his own during the period he went AWOL from the drug task force. He solicited the purchase and was legally accountable for drug possession for that purchase. Brian Osborn abetted Temple by serving as his lookout and "security" during drug distribution.

All of these witnesses were accomplices in the drug distribution business. All stood to benefit from testifying against Temple. Wilson and Lohmeyer received probationary sentences after testifying against Temple, despite having prior criminal convictions. Tr. at 182-83, 159. Osborn received several short, four-year probationary sentences and short four-year partial DOC commits despite being convicted of multiple

crimes around the time of Temple's trial. (*See* Montana DOC Inmate locator sentencing information, available at app.mt.gov/conweb.) Ferguson received immunity from the State and was not charged in state court for her drug distribution crimes. Tr. at 273.

2. The Instruction Was Consistent With Temple's Theory of Defense, In Which He Admitted To Possession of Dangerous Drugs and Did Not Claim "Total Innocence."

Before trial, Mr. Temple's first attorney, Mr. Bunitsky, had requested an accomplice jury instruction and proposed two possible jury instructions on this issue. D.C. Doc. 60. The State agreed in its Response brief on the Defendant's proposed jury instructions that the standard witness legally accountable instruction should be given. D.C. Doc. 82. But at trial, the State argued that no instruction on this issue should be given. Tr. at 364. Trial defense counsel Mr. Neal stated he had no objection to the instruction not being given. Tr. at 365. (Relevant portions of the transcript and relevant pretrial documents are attached in App. B.)

The State argued to the district court that because Mr. Temple denied selling drugs, the instruction should not be given. "The case law specifically in *State vs. Charlo-Whitworth* indicates that 'If the

defendant claims at trial that he did not commit the acts for which he is being tried, he cannot then ask the court to instruct the jury that testifying witnesses aided the defendant in the commission of those acts.'" Tr. at 364. *See State v. Charlo-Whitworth*, 2016 MT 157, ¶12, 384 Mont. 50, 373 P.3d 845. The prosecutor explained that because Temple was denying the allegations of drug dealing at trial, the instruction should not be given.

> And so I just -- I think it's very clear here that the Defendant has taken the position that he was not dealing drugs. And so because he has said that he's claiming -- or because he's claimed at trial that he didn't commit the act of distribution, that we don't need to give that Witness is Legally Accountable Instruction.

Tr. at 368.

The district court agreed with this reasoning. Tr. at 367.

If all courts followed this overbroad interpretation of the *Charlo-Whitworth* dicta, however, it is unclear when any defendant who went to trial would ever be entitled to the instruction in MCA § 26-1-303(4). All defendants at trial deny the State's allegations to some degree; if they did not, there would be no point in going to trial.

Defense counsel did not offer any plausible justification for not insisting on this instruction. He said his reasons for not asking for the instruction were "there was not a sort of accountability or an accomplice." Tr. at 363. This was not a plausible justification or tactical reason because the facts presented at trial were that the witnesses engaged in drug dealing and drug use. They met the legal definition of accomplices under MCA § 45-2-302. The defense agreed that Donny Ferguson had distributed drugs to Temple, that Danielle Wilson had distributed drugs to Lohmeyer, and that Wilson had possessed and used drugs with Temple.

The State was wrong in characterizing Temple's defense as being that he was "totally innocent" and uninvolved in any illegal conduct related to methamphetamine. Part of the problem was that the State's argument against the instruction primarily focused on the two controlled transactions. At trial, however, the State offered at least four different sets of conduct as a basis for convicting Temple of distribution of dangerous drugs. These were: selling meth to Danielle Wilson on a daily basis during the fall of 2017; selling meth to Danielle Wilson during the two controlled transactions on November 9 and November

14; selling meth to Derek Lohmeyer personally on one occasion during the period when Lohmeyer absconded from the informant program; and distributing drugs with Brian Osborn present as a lookout. Tr. at 382. The State also offered as evidence of Temple's drug distribution the testimony of Donny Ferguson about the large amounts she sold to Temple during this period. Tr. at 382.

Contrary to the State's characterization of his defense, Temple did not claim "total innocence" with respect to drug crimes. Instead, Temple admitted to regularly purchasing and using methamphetamine from Donny Ferguson, but not in large amounts suitable for distribution. Tr. at 344, 357. This was an admission to a crime—possession of dangerous drugs. Temple's purchases of large amounts of meth from Ferguson were a key piece of evidence in the State's case that Temple was distributing drugs regularly throughout the period of July 2017 through February 2018.

Temple also admitted to using meth frequently with Wilson (possession) during the time period in question. Tr. at 343. He also admitted to being present at the Town Pump in his truck with Danielle Wilson during the period in question. Tr. at 355.

Both the prosecutor and defense counsel described Temple's defense as being that he possessed meth in personal use amounts rather than distributing meth. Tr. at 368, 393, 396.

At a minimum, Temple was entitled to the statutorily-required accomplice instruction with respect to Donny Ferguson and Danielle Wilson, because he admitted purchasing or possessing meth in their presence and did not claim "total innocence" with respect to the alleged drug crimes involving Ferguson and Wilson.

C. Temple's Legal Theory Resembles Those In Which This Court Held That It Was IAC Not to Request An Accomplice Instruction.

Temple's legal theory—that he possessed meth for personal use, but did not distribute it—is the kind of theory that requires a "witness legally accountable" instruction for the accomplices who testified against him. His theory was similar to those in cases in which this Court held that such an instruction should have been given.

In *State v. Kougl*, 2004 MT 243, 323 Mont. 6, 97 P.3d 1095, this Court held that defense counsel had been ineffective for failing to request a "witness legally accountable instruction." Defendant was convicted of operation of a clandestine lab after accomplices testified

against him. Defendant testified that he had been present in meth lab, but only for the purpose of learning how to make meth. The defendant only admitted to being present at the lab and knowing what the others were doing, but that was enough to justify the instruction in that case.

See also State v. Rose, 1998 MT 342, 292 Mont. 350, 972 P.2d 321 (counsel ineffective for failing to request witness legal accountability instruction in burglary case in which defendant testified that he was passed out in vehicle, unaware burglary conducted by accomplice was occurring). Again, the defendant only had to admit to being present at the scene of the crime. He did not even have to admit to knowledge of criminal activity. Similarly, in *State v. Allen*, the defendant was entitled to the witness legally accountable instruction for an accomplice who testified against him, when the defendant admitted that he was present for the assault, but argued that he did not use a weapon during the assault. *Allen*, ¶71. In *State v. Newman*, two justices on this Court voted to reverse a conviction in a drug distribution case because defense counsel had not asked for an accomplice instruction. *State v. Newman*, 2005 MT 348, ¶49, 330 Mont. 160, 127 P.3d 374.

These cases contrast with *State v. Johnson*, 257 Mont. 157, 163, 848 P.2d 496,499 (1993), in which the defendant claimed he was not at the scene of the crime.

They also differ from the case relied upon by the State at trial, *State v. Charlo-Whitworth*. The drug world witnesses in this case did not resemble the aunt and uncle in *Charlo-Whitworth*, the case cited by the State. Charlo-Whitworth was charged with aggravated assault and assault on a minor and argued at trial that the abuse had been committed by the child's aunt and uncle rather than himself. Neither the State nor the defendant offered evidence to support his allegation that aunt and uncle were accomplices. In *Charlo-Whitworth*, this Court rightly decided that a witness legally accountable instruction should not have been offered, primarily because no evidence was presented that the aunt and uncle met the definition of "accomplices." *Charlo-Whitworth*, ¶16.

Given Temple's admission that he purchased, possessed, and used meth in the presence of some of the drug world witnesses who testified against him, there was no plausible justification for his attorney not to insist upon the instruction. The reason given by his attorney for not

requesting this instruction—that none of these people were accomplices—was based on an incorrect assessment of the facts and was not consistent with the Defendant's own admissions that he bought personal use amounts from Ferguson and possessed drugs with Wilson. Tr. at 364. The witnesses stood to gain a great deal from testifying about him and the jury should have been instructed to view their testimony with distrust.

II. THE DISTRICT COURT ERRED IN ADMITTING HEARSAY IN THE FORM OF PRIOR CONSISTENT STATEMENTS BY THE DRUG WORLD WITNESSES.

A. Hearsay in the Form of Prior Consistent Statements Is Inadmissible At Trial.

"Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." M. R. Evid. 801(c). As a general rule, hearsay statements are not admissible. M. R. Evid. 802. However, under M. R. Evid. 801(d)(1)(B):

> A statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of

> *subsequent* fabrication, improper influence, or motive….

State v. McOmber, 2007 MT 340, ¶13, 340 Mont. 262, 173 P.3d 690 (emphasis added). Under the rule, there are four requirements that must be met for a statement to be admissible as a prior consistent statement: "(1) the declarant must testify at trial and (2) be subject to cross-examination concerning her statement, and (3) the statements to which the witness testifies must be consistent with the declarant's testimony, and (4) the statement must rebut an express or implied charge of subsequent fabrication, improper influence or motive." *State v. Teters,* 2004 MT 137, ¶25, 321 Mont. 379, 91 P.3d. 559.

Prior to trial, defense counsel Mr. Bunitsky had filed a motion in limine to prohibit hearsay. D.C. Doc. 61, attached as App. C. He argued that admission of hearsay violates Confrontation Clause requirements. Trial defense counsel Mr. Neal stated before trial started that he was withdrawing the motions in limine, but asserted that he maintained an objection to hearsay. The district court granted the motion and stated that she would enforce the rules of evidence. Tr. at 8-9. The State agreed in its *Response* to the motions in limine that hearsay should be

prohibited at trial. D.C. Doc. 81. App. C. includes the relevant district court documents and relevant portions of the transcript.

This Court has stated that motions in limine are an appropriate method for raising evidentiary objection prior to trial. *State v. Byrne*, 2021 MT 238, P 20, 405 Mont. 352, 495 P.3d 440. This Court has permitted a motion in limine to preserve an issue on appeal when the district court is "directly faced with the question" and has provided a "definitive ruling" on the issue. *See, e.g. State v. Crider,* 2014 MT 139, 375 Mon. 187, 328 P.3d 612*; State v. Vukasin,* 2003 MT 230, 317 Mont. 204, 75 P.3d 1284.

B. The Prosecutor Introduced Inadmissible Hearsay to Bolster the Credibility of the Drug World Witnesses.

At Temple's trial, the prosecutor improperly bolstered the credibility of the drug world witnesses by introducing hearsay in the form of Wilson's and Lohmeyers' prior consistent statements to law enforcement. Detective Lynch testified that when he arrested Danielle Wilson, she informed him that Temple had supplied her with methamphetamine. Tr. at 332. On direct examination, however, Danielle Wilson had denied ever having made a prior consistent statement at the time of her arrest. Tr. at 171.

The State also asked Lohmeyer to testify about a prior consistent statement he had made after his re-arrest in December 2017. Lohmeyer agreed that he had made a statement about Temple when he was re-arrested in December 2017 after going AWOL from the confidential informant program. Tr. at 159. Detective Lynch also told the jury that Lohmeyer had provided information about Temple when he was first arrested in October 2017. Tr. at 324, 331-32. Lohmeyer was never asked to testify about what he had said about Temple in October 2017 and was never cross-examined about it. *See* Tr. at 141-50, 152-60.

The State then used all of these prior consistent statements to suggest that the Lohmeyer and Wilson had made allegations identical to their trial testimony against Temple *before* they had received any deals or promises from the State, and that therefore they must be telling the truth in their trial testimony.

> So let's talk for a minute about some of these witnesses' motivation for testifying. Derek Lohmeyer was arrested and charged with criminal distribution of danger [sic] drugs. After he was arrested, he provided a statement to law enforcement, which Detective Lynch told you where he first mentioned Temple. And at that point, Derek had been offered no deals by the State. He provided that information for Detective Lynch hoping that maybe it would be taken into

> consideration in his underlying case, but he didn't know for sure. There was no promise at that point.[1]
> And then Danielle Wilson when she was arrested, she also -- and that was in December of 2017 -- she also provided a statement about Temple. So why that's important is these people have already provided information about Gary. It's not like they're just coming in here, getting up on the stand, crossing their fingers hoping for a lighter sentence and then making stuff up about Temple. They've already provided this information to law enforcement long before they knew that they were going to get any sort of benefit.

Tr. at 388-89.

These prior statements to law enforcement were inadmissible hearsay because they were prior consistent statements offered to prove the truth of the matter asserted—that Temple distributed drugs. In addition, the statements did not qualify for the hearsay exception rule under M.R. Evid. 801(d)(1)(B) because they were made after Wilson and Lohmeyer were arrested, when they had a motive to lie. The State failed to show that the prior consistent statements were made before

[1] This statement is misleading not only because Lohmeyer had already been arrested and had a strong motive to lie, but also because Lohmeyer's statement in October 2017 did not and could not include his key allegation that Temple directly distributed drugs to Lohmeyer in December 2017. That statement was only made after Lohmeyer had been re-arrested after going AWOL from the confidential informant program. Tr. at 158.

the alleged motive to fabricate arose. *Cf. McOmber*, ¶18. The State misled the jury by suggesting repeatedly that because "no deals had yet been offered at the time of the statement," the witnesses had no motive to lie. Tr. at 388.

Moreover, because Danielle Wilson never admitted that she had made a prior consistent statement, her prior consistent statement (described by Detective Lynch) did not meet the requirement of M.R. Evid. 801(d)(1)(B), which requires that the declarant testify to the statement in court and be subject to cross-examination about it. Similarly, Derek Lohmeyer was never asked to testify about his October 2017 statement to Detective Lynch, which was different from his post-December 2017 statement, about which he did testify. The requirements of confrontation with the declarant under M.R.Evid. 801(d)(1)(B), and under Montana's Confrontation Clause, Article II, section 24, were therefore not met.

The State's use of hearsay in the form of prior consistent statements for the purpose of bolstering its witnesses' testimony resembles the prosecutor's tactics in *State v. McOmber*, where this Court described such tactics as error. *McOmber,* ¶18.

C. The Error Was Not Harmless Because the Prosecutor Used the Inadmissible Hearsay to Vouch Improperly on the Witnesses' Credibility.

Here, the State's use of inadmissible hearsay was not harmless error because the prosecutor used it in her closing argument to convince the jury that the witnesses were telling the truth when they testified at trial. Because the requirements for admission of a prior consistent statement were not met, the prosecutor's comments amounted to her personal opinion that the witnesses were credible. The prosecutor improperly injected her personal opinion that the witnesses were not lying when she stated "It's not like they're just coming in here, getting up on the stand, crossing their fingers hoping for a lighter sentence and then making stuff up about Temple." Tr. at 389.

This Court has held that a prosecutor improperly bolstering the credibility of State witnesses by expressing her opinion about their credibility can constitute reversible error. *State v. Hayden*, 2008 MT 274, ¶¶31-32, 345 Mont. 252, 190 P.3d 1091. Here, the prosecutor's comments were just a different way of saying "the witnesses had no reason to lie," a comment which this Court has described as improper vouching for witness credibility. *See State v. Byrne*, 2021 MT 238, ¶23,

405 Mont. 352, 495 P.3d 440, citing *State v. Thorp*, 2010 MT 92, ¶26, 356 Mont 150, 231 P.3d 1096 (prosecutor told the jury that the victim was "a very credible witness" who had "*no reason to lie*" and that the jury should believe the victim); *State v. Racz*, 2007 MT 244, ¶ 36, 339 Mont. 218, 168 P3d (prosecutor stated that the State's witness had "*no reason to lie*, was "honest," and "told the truth").

The prosecutor's comments were also misleading because the witnesses did have a reason to lie at the time they made their prior consistent statements, because they had been arrested. In addition, it was just plain wrong to say that Lohmeyer had made the same statements about Temple in October, 2017, because his key allegation about Temple—that Temple sold drugs personally to him in December 2017—could not have been part of his October 2017 prior statement.

Most importantly, the huge disparity in the sentences these witnesses received as compared to Temple reveals that the witnesses had strong incentives to lie. The prosecutor's closing remarks about the prior consistent statements were prejudicial because they countered and minimized the evidence that the witnesses had benefited

significantly from testifying against Temple. The jury was therefore misled when making their assessment of the witnesses' credibility.

III. THE DISTRICT COURT ERRED IN DENYING THE DEFENSE MOTION FOR A MISTRIAL.

A. When a Prosecutor Deliberately Elicits Inadmissible 404(b) Evidence from a State's Witness, the Defendant Is Denied His Constitutional Right to a Fair Trial.

A defendant has a constitutional right to a fair trial by an impartial jury. U.S. Const. amend. VI; Mont. Const. art. II, § 24. Prosecutorial misconduct " 'may be grounds for reversing a conviction and granting a new trial if the conduct deprives the defendant of a fair and impartial trial.' " *State v. Lawrence*, 2016 MT 346, ¶13, 386 Mont. 86, 385 P.3d 968 (quoting *State v. Hayden*, 2008 MT 274, ¶27, 345 Mon. 252, 190 P.3d 1091). When considering a prosecutor's conduct, this Court employs a two-step process to evaluate whether a district court abused its discretion in denying a defendant's motion for a mistrial: "First, the Court considers whether the prosecutor's conduct was improper; if so, we consider whether the improper conduct prejudiced the defendant's right to a fair trial." *Krause*, ¶25 (citation omitted).

A prosecutor acts improperly by bringing to the jury's attention matters the prosecutor "knows to be inadmissible." *Krause*, ¶26.

Montana Rule of Evidence 404(b), states ("[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"); *see State v. Derbyshire,* 2009 MT 27, P 21, 349 Mont. 114, 201 P.3d 811 *(quoting State v. Tiedemann,* 139 Mont. 237, 242, 362 P. 2d 529, 531 (1961) (proof of prior crimes may not "'be offered if it only tends to create a prejudice against the accused in the minds of the jury' ").

B. The State Violated Rule 404(b) When the Prosecutor Elicited Inadmissible Testimony Regarding a Detective's Familiarity with Temple from Other Drug Distribution Investigations.

Here, the State violated Rule 404(b) when the prosecutor elicited testimony from Detective Lynch that he was familiar with Temple from "previous investigations." This testimony informed the jury that Temple had been investigated for drug dealing on other occasions, even beyond the broad period of "continuous conduct" alleged by the State for this case.

> Q. Are you familiar with the Defendant in this matter?
> A. I am.
> Q. And how is that?
> A. He had come up in previous investigations. His name had surfaced in previous investigations.
> MR. NEAL: Objection, Your Honor.

THE COURT: Sustained.
Q. And with just this investigation --

Tr. at 286.

The district court correctly interpreted the exchange as follows: "the way that the answer came out, it sounded as though Mr. Temple has been the subject of unrelated and other investigations other than the one we're talking about here today." The court further noted that the prosecutor's question was unnecessary for the State's case: "no one really cares how Mr. -- how Detective Lynch knows the Defendant. I think everyone knows." Tr. at 303.

The State's efforts to correct this intentional violation were inadequate to address the constitutional violation. The prosecutor said that he could pretend to the jury that he had been asking about, and the detective had been referring to, multiple investigations "within" this investigation. This "fix" did not make up for the clear references to "previous investigations" in contrast to the reference to "just this investigation" in the first exchange. Here is the attempted fix:

> Q. Was your first knowledge of the Defendant, Mr. Temple, *in this investigation* learned after speaking with Mr. Lohmeyer?
> A. It was.
> Q. And do you recall the date?

A. It was early October.
Q. Would October 9th sound familiar?
A. Yes, it would.
Q. 2017?

Tr. at 324.

The phrase "in this investigation" still implied that the detective was familiar with Temple from other investigations, with the inference that he was a well-known drug dealer that law enforcement had so far been unable to convict.

In addition, the State violated Rule 404(b) by eliciting testimony from Ms. Ferguson that she had received a message from Temple while he was in jail and she was in jail. Defense counsel again moved for a mistrial. Tr. at 263-64. Danielle Wilson also testified that she tried to contact Temple through the fire door at the jail. Tr. at 183-84, 195.

Temple was denied a fair trial because the jury was permitted to hear inadmissible evidence about other bad acts and about his status in jail.

IV. THE ERRORS WERE INDIVIDUALLY AND CUMULATIVELY PREJUDICIAL.

"The cumulative error doctrine mandates reversal of a conviction where numerous errors, when taken together, have prejudiced the

defendant's right to a fair trial." *State v. Cunningham*, 2018 MT 56, ¶ 32, 390 Mont. 408, 414 P.3d 289 (citation omitted). Here, a series of errors were mutually exacerbating.

First, the denial of the accomplice instruction, required by statute, permitted the State's witnesses to testify without the jury being warned that their testimony should be viewed with mistrust. The Defendant was further prejudiced when the State was allowed to improperly bolster the credibility of these witnesses by claiming incorrectly that they had made prior consistent statements and that therefore they were not "just making stuff up." Finally, the detective's testimony about Temple's prior bad acts—that he was familiar with Temple from prior investigations, prior to the eight-month-long period alleged at trial—encouraged Temple's jury to convict him because of the inference that he had gotten away with drug dealing for a long time. Because these errors compromised Temple's right to a fair trial, when either the errors are taken together or viewed separately, this Court should reverse and remand for a new trial.

CONCLUSION

For all of the above reasons, the conviction in this case should be reversed and remanded for a new trial.

Respectfully submitted this 13th day of May, 2022.

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By: /s/ Laura Reed
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this 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 7059, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

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APPENDIX

CERTIFICATE OF SERVICE

I, Laura Marie Reed, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 05-13-2022:

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