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.

BRIEF OF APPELLEE

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

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Whether Temple's attorney was ineffective for not insisting upon a "Witness Legally Accountable" jury instruction.

Whether Temple is entitled to a new trial under the doctrine of cumulative error.

STATEMENT OF THE CASE

Gary Wayne Temple, Jr., was charged with felony distribution of dangerous drugs for distributing methamphetamine to multiple people over a several month period. (Docs. 1-3, 53-54.) The State presented testimony from a confidential informant who purchased methamphetamine directly from Temple, a person who obtained methamphetamine from Temple for the informant and others, and a person who sold Temple over ten pounds of methamphetamine over several months. (12/5/19 Tr.; 12/6/19 Tr.; Docs. 141, 146.)[1] During the trial, Temple

[1]Since the trial transcript is consecutively paginated, citations to the trial will be "Tr."

sought two mistrials; one after a witness for the State mentioned she and Temple were in jail and the other when the lead detective mentioned Temple's name had come up in prior investigations. (*Id*.) The district court denied both motions and gave a curative jury instruction concerning Temple's incarcerated status. (*Id*.)

The jury found Temple guilty. (Doc. 151.) The district court sentenced Temple to the Montana State Prison (MSP) for a term of 30 years with 10 years suspended and ordered his sentence to run consecutive to any other sentence Temple was serving. (2/24/20 Tr.; Doc. 166.)

STATEMENT OF THE FACTS

In November 2017, Derek Lohmeyer (Lohmeyer) contacted Detective Thomas Lynch with the Russell County Drug Task Force and told him Danielle Christine Schnick Wilson (Wilson) was selling methamphetamine in Great Falls. (Tr. at 142-70, 324-39.) Lohmeyer had recently been arrested/charged with distributing methamphetamine and law enforcement had approached him about offering information about drug distribution in the area. (*Id*.) Lohmeyer agreed to act as a confidential informant and wear a wire so officers could monitor his interactions with Wilson when he purchased drugs from her. (*Id*.)

Lohmeyer arranged to buy an ounce of methamphetamine from Wilson at Walmart. (Tr. at 142-70.) Based on Lohmeyer's information, Detective Lynch

arranged to electronically monitor the drug sale which took place in Cascade County on November 9, 2017. (*Id*. at 324-39.) An undercover narcotics officer with the Montana Department of Justice, Luke Smith, accompanied Lohmeyer during the controlled buy. (*Id*. at 146-49, 198-200, 324-39.)

Lohmeyer and Smith met with Wilson at Walmart, but she did not have the drugs with her, so she got into Smith's truck and directed them to Town Pump where Temple was waiting. (Tr. at 145-70, 172-98, 201-14.) When they arrived, Wilson called Temple who said he would meet her outside the casino. (*Id*.) Wilson walked with Temple to his gray Dodge Ram truck and they got inside. (*Id*.) Wilson gave Temple the $1,100 Lohmeyer had given her for the drugs and Temple gave Wilson approximately an ounce (29.4 grams) of methamphetamine. (*Id*., 329; Ex. 6.) Wilson was gone for only a few minutes and returned with the drugs which she gave to Lohmeyer. (*Id*.) Smith then drove Wilson to the Airway motel and dropped her off. (*Id*.)

Five days later, Lohmeyer arranged to purchase an ounce of methamphetamine from Wilson at the parking lot in front of Ross. (Tr. at 152-70; 206-14.) Detective Lynch arranged for Smith to again accompany Lohmeyer for this transaction, which now included both Wilson and Temple as suspects. (*Id*., 324-39.)

Just as the prior buy, when Lohmeyer and Smith met Wilson, she did not have the drugs with her. (Tr. at 152-70, 206-14.) Lohmeyer gave Wilson $1,100 and she drove to the nearby Super 8 motel and parked next to Temple's truck and went into his room. (*Id*., 174-98.) Temple did not have a full ounce to sell, so Wilson gave him money for a half an ounce (15.2 grams) of methamphetamine. (*Id*., 330; Ex. 7.) When she returned to the parking lot, Lohmeyer came up to her vehicle and she gave him the drugs and $300 inside a cigarette container. (*Id*.) Lohmeyer returned to Smith's truck and turned the drugs over to him. (*Id*.)

Detective Jack Hinchman with the Russell County Drug Task Force provided surveillance for this controlled buy and he observed Temple nearby in his truck right after the transaction was complete. (Tr. at 281-85.) Lab testing confirmed that the drugs Temple sold to Wilson/Lohmeyer on both occasions was methamphetamine. (Tr. at 214-25.)

Lohmeyer relapsed on methamphetamine and stopped communicating with Detective Lynch. (Tr. at 156-70, 325-39.) When Lohmeyer contacted his friend to obtain some methamphetamine, his friend led him to Temple. (*Id*.) Lohmeyer met Temple at the same Town Pump Wilson took him to for the first buy in early November 2017. (*Id*.) Lohmeyer met Temple there and bought a "ball" of methamphetamine (appx. 3.5 grams) from him for $200. (*Id*.)

Wilson was arrested on December 19, 2017, and charged with two counts of criminal distribution of dangerous drugs. (Tr. at 171-98, 332.) When she was arrested, Wilson informed Detective Lynch that she supplied methamphetamine to Temple. (*Id.*)[2] Lohmeyer, who was present at the house where Wilson was arrested, was arrested for violating the conditions of his release. (Tr. at 158-70, 331-39.) Lohmeyer reached out to Detective Lynch, asking for a second chance at being a confidential informant. (*Id.*) Lohmeyer told the detective he had purchased methamphetamine directly from Temple, and the State agreed to recommend Lohmeyer be given probation in his pending case if Lohmeyer testified against Temple. (*Id.*)

Through other investigations, Detective Lynch learned that in the summer of 2017, Donny Ferguson (Ferguson) sold methamphetamine to Temple, and Brian Osborn (Osborn) assisted Temple with transporting methamphetamine. (Tr. at 226-79, 324-39.)

Ferguson, who was obtaining methamphetamine from out-of-state sources, sold ten pounds of methamphetamine to Temple out of her apartment in Great Falls between July and December 2017. (Tr. at 254-78.) Ferguson also sold Temple methamphetamine at the Super 8 motel and at a house where Temple and his

[2]At trial, Wilson stated she did not remember saying anything about Temple when she was arrested and agreed she was high at the time. (Tr. at 171.)

girlfriend, Whitney Bergan, lived as well. (*Id*. at 269-79.) Ferguson was later convicted in federal court with possession with intent to distribute and felon in possession of a firearm and was sentenced to a prison term of ten years, eight months. (*Id*. at 254-55.)

Temple approached Osborn in the summer of 2017 about working with him and Osborn accompanied Temple to a house in Vaughn were Temple obtained approximately a pound of methamphetamine. (Tr. at 226-53.) Osborn also described accompanying Temple to Market Place where Temple sold five separate quarter-pound baggies of methamphetamine to another person named Dana. (*Id*.) After Temple dropped the drugs off to Dana, he returned with a bag full of cash. (*Id*.) Osborn's role in these transactions was to be a lookout and hold the bag that contained methamphetamine so if Temple was stopped, Osborn could run away with the drugs. (*Id*.) Temple paid Osborn in cash and drugs for his assistance and provided Osborn with a firearm to protect him if necessary. (*Id*.)

In January 2018, Detective Lynch was conducting surveillance on Bergan's residence. (Tr. at 332-36.) The detective observed Temple's car at the residence and discovered several items in Bergan's trash indicating Temple was staying there. (*Id*.) The detective also discovered small plastic baggies that are commonly used to package methamphetamine in early February 2018. (*Id*.)

Temple was initially charged with two counts of criminal distribution of dangerous drugs on November 11, 2018. (Docs. 1-3.) On April 26, 2019, the State filed an Amended Information wherein it alleged continuing course of conduct—distribution of dangerous drugs—between July 1, 2017 and February 5, 2018. (Docs. 51-54, 84.)[3]

At trial, Wilson stated that she obtained methamphetamine from Temple almost daily during the months of October and December in 2017. (Tr. at 172-98.) Wilson explained that Temple would arrange to meet her in different locations throughout Great Falls, including Bergan's residence. (*Id*.; Exs. 1, 2.) In addition to describing the two transactions with Lohmeyer, Wilson explained that she agreed to sell methamphetamine to Lohmeyer as a favor to him and admitted she was using methamphetamine every day during the fall of 2017. (*Id*.) Wilson testified that in exchange for her truthful testimony about Temple, the State agreed to recommend a probationary sentence for one of her cases, but her other case remained pending without any plea agreement in place. (*Id*.)

Smith and Detective Lynch testified at trial about the protocols used with confidential informants, including Lohmeyer. (Tr. at 198-214, 285-87, 324-36.)

[3]Temple was represented by three different public defenders during his case; Sam Harris (September 2018 to January 2019), Victor Bunitsky (January 2019 to June 2019), and Paul Neal (July 2019 through sentencing). (Docs. 9, 11, 86, 107, 113.)

Smith explained that prior to each transaction, he searched Lohmeyer to make sure he did not have any contraband on his person, and he provided him with the money for the purchases. (*Id*.) After Lohmeyer met with Wilson and they were in a secure location, Smith collected the drugs and searched Lohmeyer again to confirm he did not retain any contraband. (*Id*.)

At trial, Ferguson explained that the large amounts of methamphetamine Temple purchased from her were not single "user quantities." (Tr. at 277-79.) Ferguson also testified that while she was in jail, she received a note from Temple that another inmate put on her cafeteria tray. (*Id*. at 261-65.) Temple did not object to admission of the note. (*Id*.; Ex. 5.) In his note, Temple asked Ferguson why she was testifying at his trial, asserted that everything being said about him was bullshit, and opined that "D.W. told me I was good." (*Id*.) When describing how she felt about the note, Ferguson mentioned that both she and Temple were in jail, which prompted Temple to move for a mistrial, which the court denied.[4] (*Id*. at 265.) The court also denied Temple's second motion for mistrial based on Detective Lynch's statement that he was familiar with Temple from "prior investigations." (Tr. at 286-303.)

[4]Additional facts relevant to Temple's motions for mistrial are set at Section II.B, *infra*.

Temple testified that he lost his job in the summer of 2017 and began using methamphetamine again. (Tr. at 339-59.) Temple claimed he and Wilson had an on-and-off sexual relationship and sometimes used methamphetamine together, but denied selling any drugs to Wilson. (*Id*.) Temple admitted that he bought methamphetamine from Ferguson, but denied it was in the quantities she described. (*Id*.) Temple denied ever selling methamphetamine to Lohmeyer and claimed that Osborn had never been in his vehicle. (*Id*.)

STANDARD OF REVIEW

Evidentiary rulings are reviewed for abuse of discretion, which occurs when a court "acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice." *State v. Smith*, 2021 MT 148, ¶ 14, 404 Mont. 245, 488 P.3d 531. However, when "no contemporaneous objection is made, [this Court] discretionarily may review claimed errors that implicate a criminal defendant's fundamental constitutional rights under plain error review." *State v. Oliver*, 2022 MT 104, ¶ 20, 408 Mont. 519, 510 P.3d 1218.

A district court's ruling on a motion for a mistrial is reviewed for abuse of discretion. *State v. Michelotti*, 2018 MT 158, ¶ 8, 392 Mont. 33, 420 P.3d 1020.

Ineffective assistance of counsel (IAC) claims present mixed questions of law and fact and are reviewed *de novo*. *Oliver*, ¶ 21.

SUMMARY OF THE ARGUMENT

This Court should decline to address Temple's claims related to alleged hearsay during Detective Lynch's testimony for three reasons. First, Temple did not raise a timely and specific objection to the alleged hearsay. Second, Temple's motion in limine did not preserve the challenges he raises to alleged hearsay, because unlike motions regarding specific prior bad acts, it did not detail what out-of-court statements he sought to preemptively exclude. Third, Temple did not assert on appeal that the alleged hearsay should be considered under the plain error doctrine and this Court is not required to develop legal arguments for appellants.

Nonetheless, should this Court consider Temple's hearsay claims, he has failed to establish that failing to review the claim would constitute a manifest miscarriage of justice or that failing because the detective's testimony about his discussion with Lohmeyer was not hearsay and his testimony about what Wilson said to him was admissible as a prior inconsistent statement because Wilson stated she did not recall telling him anything about Temple.

The district court's rulings on Temple's motions for mistrial were not reversible error. Temple mistakenly asserts that the motions were based on alleged

prosecutorial misconduct and, thus, the proper standard of review is abuse of discretion. The district court properly considered the prejudicial impact of the alleged improper evidence (*e.g.*, that Temple was in jail and that Temple's name had come up during prior investigations) along with the strength of the State's case. The court also correctly considered whether a cautionary jury instruction would be appropriate. Based on the overwhelming evidence that Temple had sold methamphetamine the court did not act arbitrarily or without judgment when it concluded that Temple was not prejudiced by Wilson's comment about Temple being in jail, especially when considering the court also gave a curative instruction on the issue. Nor did the court abuse its discretion when it found the detective's comment about prior investigations did not warrant a mistrial when considering the detective's restorative testimony which limited any prejudicial impact and the strength of the State's case against Temple.

Neal's conscious decision not to offer a "Witness Legally Accountable" jury instruction did not amount to ineffective assistance of counsel. First, Neal correctly concluded that such an instruction would not have been appropriate since his defense theory was that Temple had never sold drugs; not that Wilson shared the responsibility with him. Second, Temple cannot establish that he was prejudiced by the lack of instruction given Temple's defense and the strength of the State's case against him, which included testimony that corroborated Wilson's

and Lohmeyer's statements that they purchased methamphetamine from Temple (*e.g.*, type of truck he drove; places he sold the drug which were further corroborated by Smith and the detectives).

Finally, since Temple did not suffer any prejudicial errors, the cumulative error doctrine does not apply or require reversal of Temple's conviction.

ARGUMENT

I. Temple's motion in limine did not preserve challenges to alleged hearsay and admission of those statements was not plain error.

A. Temple's motion in limine was insufficient to preserve the hearsay challenges he raises on appeal.

"One 'must object to improper testimony when it is offered or abide the result.'" *State v. Gardner*, 2003 MT 338, ¶ 49, 318 Mont. 436, 80 P.3d 1262 (citation omitted). Montana Rules of Evidence state that:

> Error may not be predicated upon a ruling which admits . . . evidence unless . . . a timely objection or motion to strike appears of record stating the specific ground of objection, if the specific ground was not apparent from the context.

Mont. R. Evid. 103(a)(1). Similarly, Mont. Code Ann. § 46-20-104(2) provides:

> Upon appeal from a judgment, the court may review the verdict or decision and any alleged error objected to which involves the merits or necessarily affects the judgment. Failure to make a timely objection during trial constitutes a waiver of the objection except as provided in 46-20-701(2).

The reason for requiring specific contemporaneous objections is exemplified by Temple's brief on appeal: Temple argues that Mont. R. Evid. 801(d)(1)(B) did not apply (*see* Opening Brief (Br.) at 23-28)) and while the State agrees that particular exception did not apply, the alleged statements were admissible because they were not hearsay under Mont. R. Evid. 801(c) and 801(d)(1)(A).

By not lodging an objection at the time of the alleged evidentiary violation, Temple did not give the State the opportunity to establish why the alleged statements were admissible[5] or allow the court to exercise its discretion in allowing or prohibiting the testimony. *See In re M.C.*, 2017 MT 252, ¶ 14, 389 Mont. 78, 403 P.3d 1266 (fundamentally unfair to fault a trial court for failing to correctly consider an issue it was never given the opportunity to consider). Moreover, the legal theory Temple asserts on appeal was not the same as he raised in his pretrial motion (*e.g.*, constitutional right to confrontation). (Doc. 61.) "In a direct appeal, the defendant is 'limited to those issues that were properly preserved in the district court . . . .'" *State v. Davis*, 2003 MT 341, ¶ 18, 318 Mont. 459, 81 P.3d 484 (citation omitted); *Jacobson v. Bayview Loan Servicing, LLC*, 2016 MT 101, ¶ 24, 383 Mont. 257, 371 P.3d 397 (Court generally declines to '"address issues raised

[5]In its response to the motion in limine, the State correctly stated the admissibility of hearsay would depend on whether an exception applied. (Doc. 81.)

for the first time on appeal, or a party's change in legal theory' from that argued at the district court").

Despite his failure to raise contemporaneous objections, Temple asserts that his hearsay claims were nonetheless preserved by his motion in limine. (Br. at 24-25.) Temple's argument and reliance upon *State v. Crider*, 2014 MT 139, ¶¶ 20-23, 375 Mont. 187, 328 P.3d 612, are not compelling.

While this Court has determined a motion in limine may preserve an objection for appeal, it is only in limited circumstances where the motion clearly and particularly identifies the subject evidence and specifies the legal basis to exclude the proffered evidence. *Crider*, ¶ 20 (citing *State v. Vukasin*, 2003 MT 230, ¶ 29, 317 Mont. 204, 75 P.3d 1284); *State v. Byrne*, 2021 MT 238, ¶ 21, 405 Mont. 352, 495 P.3d 440; *State v. Lake*, 2022 MT 28, ¶ 34, 407 Mont. 350, 503 P.3d 274.

In *Crider*, the defendant's motion in limine—which sought to exclude inadmissible evidence of prior bad acts—referenced particular dates and allegations and specified the legal theory for excluding that evidence. *Crider*, ¶ 22. Following response briefing from the State, the district court issued an order delineating which specific prior bad act evidence was admissible. *Crider*, ¶ 22. On appeal, this Court held Crider's motion in limine was specific enough to preserve his challenges to admission of prior bad acts for appeal. *Crider*, ¶ 23.

See also Lake, ¶ 34 (defense not required to continually lodge objections when "motion and supporting briefing in limine, as supplemented by his oral argument at motions hearing, were sufficiently clear and specific to preserve his asserted Rule 404(b) and 403 objections").

In *Byrne*, the defendant filed a motion in limine to preclude the State's experts from commenting on the victim's credibility and, following the State's assurance it did not intend to elicit such testimony, the court granted the motion. *Byrne*, ¶¶ 4-5. During the trial, the State questioned four of its witnesses about the victim's credibility, but Byrne did not raise objections to all the questions. *Byrne*, ¶¶ 5-9. This Court rejected the State's argument on appeal that Byrne failed to preserve the issue, noting that a motion in limine may preserve an issue when the "the district court is 'directly faced with the question' and has provided a 'definite ruling' on the issue." *Byrne*, ¶ 20 (held, motion in limine preserved issue for appeal because it specifically identified the evidence that should be excluded and the State agreed to the defense's request).

The situation presented here is not akin to *Crider*, *Lake*, or *Byrne*. Temple's motion in limine simply asserted hearsay should not be admitted because it violates his right to confrontation. He offered no examples or any specific out-of-court statement he believed was inadmissible. In contrast, the defendants' motions in *Crider*, *Lake*, and *Byrne*, were detailed and specific as to what exact evidence the

defendants' believed was improper and the issues were briefed and pointedly addressed in pretrial orders. And, unlike the three other cases, where the courts issued an order on the motions in limine, here no such order was issued concerning hearsay because it was too general, and Neal withdrew it. Notably, when Neal withdrew the motion in limine filed by Bunitsky, he described the hearsay issue as a "general motion" and stated his belief that a motion in limine should assert "a specific item and a specific rule." (Tr. at 8.)

Temple is incorrect that the motion in limine was sufficient to preserve the hearsay claims so his failure to contemporaneously object to the alleged hearsay at issue precludes this Court from considering this issue on appeal. Moreover, while the doctrine of plain error review may allow this Court to consider unpreserved issues, Temple did not assert that plain error should apply to this issue, and he is precluded from asserting a new legal theory in his reply brief. *See State v. Mathis*, 2022 MT 156, ¶ 31 n.6, 409 Mont. 348, ___ P.3d ___ ("[U]nder M. R. App. P. 12(1), this Court is not obligated to develop arguments on behalf of an appellant who fails to do so."); *State v. Sebastian*, 2013 MT 347, ¶ 26, 372 Mont. 522, 313 P.3d 198 ("Legal theories raised for the first time in an appellant's reply brief are outside the scope of such a brief . . . .").

Based upon the foregoing, this Court should decline to consider Temple's complaints about alleged hearsay on appeal. Nonetheless, should this Court still

consider Temple's arguments, the record establishes that admission of the alleged hearsay did not constitute plain error.

B. Admission of alleged hearsay during Detective Lynch's testimony was not plain error.

Plain error review applies "only in situations that implicate a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the proceedings, or compromise the integrity of the judicial process." *Mathis*, ¶ 23. The doctrine of plain error is applied "sparingly, on a case-by-case basis, considering "the totality of circumstances of each case." *Mathis*, ¶ 45. The appealing party must "firmly convince" this Court that failure to review the error clearly implicates a party's fundamental constitutional right. *State v. Norman*, 2010 MT 253, ¶ 17, 358 Mont. 252, 244 P.3d 737; *Mathis*, ¶ 43 (appellant asserting plain error bears a heavy burden; "[s]uccessful challenges utilizing plain error review remain rare").

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" and generally inadmissible at trial. Mont. R. Evid. 801(c), 802.

1. Statement about Lohmeyer

Temple claims that inadmissible hearsay from Lohmeyer was introduced during Detective Lynch's testimony. (Br. at 26.) However, Lynch's comments about Lohmeyer were not hearsay because he did not repeat or relay what

Lohmeyer said (not an out-of-court statement) and his comments about Lohmeyer were offered to explain his investigation progress, not for the truth of the matter.

First, when the detective testified about his interaction with Lohmeyer he did not repeat an out-of-court statement made by Lohmeyer. Rather, the detective only answered in the affirmative when asked the following questions: (1) "Was your first knowledge of the Defendant, Mr. Temple, in this investigation learned after speaking with Mr. Lohmeyer?"; (2) "By [December 19, 2017] had [Lohmeyer] already provided you information about the Defendant?; and (3) "Did [Lohmeyer] provide you information about his vehicle or vehicle he was driving?" (Tr. at 324, 331-32.)

Second, the context of the alleged hearsay about Lohmeyer demonstrates the testimony at issue was offered to clarify the progression of the detective's investigation. "[A] statement offered for the purpose of showing that the statement was made and the resulting state of mind is properly admitted." *City of Billings v. Nolan*, 2016 MT 266, ¶ 28, 385 Mont. 190, 383 P.3d 219 (no abuse of discretion to allow officer to state what he learned from dispatch about the registered owner of a vehicle because the information was relevant to demonstrate how the officer positively identified defendant); *Woolf v. Evans*, 264 Mont. 480, 487, 872 P.2d 777, 781 (1994) ("if the witness' state of mind resulted from the out-of-court statement, the statement is not hearsay and is admissible").

The detective's three affirmations to questions about Lohmeyer did not constitute hearsay and their admission did not result in a manifest miscarriage of justice, leave unsettled the question of fundamental fairness of the trial or proceedings, or compromise the integrity of the judicial process. *See Mathis*, ¶ 23.

2. Statement about Wilson

Temple also asserts that Detective Lynch repeated inadmissible hearsay from Wilson when he confirmed that when he arrested her in December 2017, she told him that "she was supplied by the defendant with methamphetamine." (Br. at 25 (citing Tr. at 332).)

An out-of-court statement is not hearsay when the declarant testifies at trial and is subject to cross examination and the out-of-court statement is "inconsistent with the declarant's testimony." Mont. R. Evid. 801(d)(1)(A). Claimed lapses of memory represents an inconsistency under Rule 801(d)(1)(A). *State v. Mederos*, 2013 MT 318, ¶ 17, 372 Mont. 325, 312 P.3d 438; *Oliver*, ¶ 26.

Wilson initially denied providing information about Temple to law enforcement prior to being charged. (Tr. at 171.) However, when asked if she remembered being arrested in December 2017, Wilson replied, "yes, and no," explaining she was high at the time. (*Id*.) Wilson was then asked if it was possible that she did not remember saying anything about Temple, and she replied, "I don't remember giving any information about him." (*Id*.)

Since Wilson testified that she did not remember saying anything about Temple, the detective's testimony about what she told him when he arrested her was not hearsay. *Oliver*, ¶ 26; *Mederos*, ¶ 17. Temple cannot establish that Detective Lynch's statement about what Wilson said to him resulted in a manifest miscarriage of justice, leave unsettled the question of fundamental fairness of the trial or proceedings, or compromise the integrity of the judicial process. *See Mathis*, ¶ 23.

Even if this Court determines the jury should not have heard Detective Lynch's comment about Wilson's statement or his affirmation that Lohmeyer mentioned Temple's name, "[n]ot every error committed by a district court is reversible." *Oliver*, ¶ 28; Mont. Code Ann. § 46-20-701(1) ("A cause may not be reversed by reason of any error committed by the trial court against the convicted person unless the record shows that the error was prejudicial."). "When improperly admitted statements prove an element of the offense, their admission is harmless error when 'admissible evidence . . . proves the same facts as the tainted evidence' and 'the quality of the tainted evidence was such that there was no reasonable possibility that it might have contributed to the defendant's conviction.'" *Oliver*, ¶ 28 (citation omitted).

Detective Lynch's one comment about what Wilson had said was not significant enough to contribute to Temple's conviction since Wilson testified about buying methamphetamine from Temple on multiple occasions between

October and December 2017, in addition to the two times for Lohmeyer. The detective's vague comments about information he learned from Lohmeyer was also not significant enough to contribute to Temple's conviction given Lohmeyer's own testimony about being an informant and the evidence from law enforcement about the ongoing nature of the investigation into drug users in the area.

There was no reasonable possibility that the trial's outcome would have been different even if Temple had objected to the detective's comments about Wilson and Lohmeyer. *Oliver*, ¶ 28; *Smith*, ¶¶ 34-35.

II. The district court did not abuse its discretion when it denied Temple's motion for a mistrial.

A. Applicable mechanism of appellate review

On appeal, Temple asserts that the district court should have granted his motion(s) for mistrial because of prosecutorial misconduct. (Br. at 31-34.) However, that was not the legal basis Temple asserted during trial. Rather, both times Neal moved for a mistrial, he made it clear he was not accusing the State of purposely eliciting improper testimony.[6]

[6]*See* Tr. at 265 ("I do believe [prosecuting attorney], you know, really did try and walk around the issue; that I'm not saying that it was sort of like a direct question, obviously."); 288 ("I'm not saying this is sort of an intentional deal. I'm not making that out at all. These things happen. It comes up."); 303 ("[A]t no point have I alleged that this was a sort of intentional oversight . . . .").

Temple may not change his legal theory on appeal. *See Davis*, ¶ 18; *Jacobson*, ¶ 24; *M.C.*, ¶ 14. Nor has Temple asserted that this Court should consider alleged prosecutorial misconduct under the doctrine of plain error review, and he may not assert such an argument in his reply brief. *See Sebastian*, ¶ 26.

The proper standard of review for the district court's orders denying Temple's motions for a mistrial is abuse of discretion. *Michelotti*, ¶ 8.[7] "The trial judge is in the best position to gauge the effect that a challenged event will have on a jury" and the decision to grant or deny a motion for mistrial must be based on whether the defendant has been denied a fair and impartial trial. *State v. Ankeny*, 2018 MT 91, ¶ 36, 391 Mont. 176, 417 P.3d 275 (citing *State v. Criswell*, 2013 MT 177, ¶ 48, 370 Mont. 511, 305 P.3d 760; *State v. Bollman*, 2012 MT 49, ¶ 33, 364 Mont. 265, 272 P.3d 650).

When considering if a prohibited statement contributed to a conviction, this Court "consider[s] the strength of the evidence against the defendant, the prejudicial effect of the testimony, and whether a cautionary instruction could cure

[7]Since prosecutorial misconduct was not alleged below, the two-step appellate review process advanced by Temple is inapplicable. (Br. at 31 (citing *State v. Krause*, 2021 MT 24, ¶ 11, 403 Mont. 105, 480 P.3d 222) (first determine whether prosecutor's conduct was improper and, if so, did it prejudice defendant's right to fair trial).) As established below, since Temple was not denied a fair and impartial trial, he would not be able to meet his burden using this two-step review.

any prejudice." *Ankeny*, ¶ 36; *Michelotti*, ¶ 8 (mistrial warranted only when reasonable probability exists that inadmissible evidence contributed to conviction).

Here, the district court properly considered the strength of the evidence against Temple and the possible prejudicial effect of the alleged prejudicial comments when it considered both motions for mistrial.

B. First motion for mistrial

1. Additional facts

When the State asked Wilson if she had any contact with Temple since she last purchased methamphetamine from him, Wilson responded that she "tried to contact him through the fire door" which she clarified was a door in the jail (upon inquiry by the court). (Tr. at 183-84.) Temple did not raise any objection to this testimony. (*Id*.)

When the State asked Ferguson how she reacted to the note from Temple, she testified that it shocked her and explained that "Me and Gary, we don't associate, okay, from this. This is one of the things we don't associate. I'm in jail. He's in jail. We don't associate." (Tr. at 264.) Temple objected and, outside the presence of the jury, he argued for a mistrial because Ferguson had stated Temple was in jail; Temple did not refer to Wilson's comment about the fire wall. (*Id*. at 264-65.) The court denied the motion, noting that the comment did not amount to undue prejudice. (*Id*. at 265-66.) Temple then asked for a cautionary instruction

that the jury was not to draw any conclusions from the fact Temple was in jail. (*Id*. at 267-69.) Temple rejected the State's suggestion that the court give a 404(b) instruction upon reconvening. (*Id*.)

The court explained it would consider a proposed curative instruction if Temple presented one, but cautioned it may bring more attention to a fact the jury would not consider important when compared to the other evidence it had heard. (*Id*. at 267-69.) Temple specifically asked the court to give the curative instruction as part of the other instructions so as not to draw additional attention to the matter. (*Id*. at 297.)

Prior to closing statements, the court instructed the jury that "Incarceration is sometimes part of the legal process. You should not make any inference of guilt or any credibility determination of the Defendant based on solely the fact that the Defendant may have been incarcerated at some point during a legal proceeding." (Tr. at 378; JI No. 15.)

2. No abuse of discretion

The district court's comment that she did not believe the jury would assign "a great deal of import on [Ferguson's testimony that she and Temple were in jail] in comparison to the other evidence," demonstrates the court properly evaluating the potential prejudice in context of the testimony already presented. (Tr. at 268-69.) Moreover, the court gave a curative instruction as requested by Temple. *See*

Michelotti, ¶ 23 (jury must be presumed to have followed the court's limiting instruction).

The circumstances here are like *Michelotti* where this Court agreed with the district court that observed one unsolicited comment that the defendant had an outstanding warrant was less prejudicial than mentioning a defendant was on probation since it did not indicate he had been previously convicted of an offense. *Michelotti*, ¶ 24.

This Court's holding in *Bollman* is also instructive. In that case, this Court agreed that an officer's unsolicited comment about the defendant's prior DUI conviction did not contribute to the guilty verdict in light of the "ample evidence" against Bollman. *Bollman*, ¶ 34. This Court also found the officer's comment did not prejudice Bollman. *Bollman*, ¶ 35 ("The standard for establishing prejudice is whether a substantial right was denied."). This Court further observed that the officer's statement was "not drawn out by the county attorney nor was the information graphic or detailed." *Bollman*, ¶ 35 (citation omitted). The same occurred here; the State did not focus any attention on Temple's incarcerated status and there was strong, corroborated evidence establishing that Temple had distributed methamphetamine in the fall of 2017.

Temple cannot establish that the district court acted arbitrarily without conscious judgment or outside the bounds of reason causing him a substantial injustice when it denied his first mistrial motion. *Michelotti*, ¶ 8.

C. Second motion for mistrial

1. Additional facts

Temple's second motion for mistrial occurred after the following exchange took place between the State and Detective Lynch:

State: Are you familiar with the Defendant in this matter?

Lynch: I am.

State: And how is that?

Lynch: He had come up in previous investigations. His name had surfaced in previous investigations.

(Tr. at 286.) Temple objected and the court sustained the objection. (*Id*.) Temple then advised the court he had another motion, and the court excused the jury for the day. (*Id*.) Temple moved for a mistrial, arguing that the detective's answer, which immediately followed recitation of his role as investigating drug trafficking organizations, along with Ferguson's comment about Temple being in jail, were unduly prejudicial. (*Id*. at 288-89.)

The State asserted that Temple was charged with a continuing course of conduct that ranged from July 2017 to early 2018, and that Detective Lynch's reference to other investigations included what they had learned about Temple's

drug activity over the course of several months. (Tr. at 289-92.) The State further asserted that any prejudicial impact from the detective's comment could be limited by having the detective explain the ongoing nature of the investigations that involved interviews and information gathering. (*Id*.) Temple asserted that after-the-fact testimony could not undo the prejudice already suffered. (*Id*. at 293.)

The court denied Temple's motion, instructed the State to address the issue through pointed direct examination with the detective, and invited Temple to prepare a curative instruction if he desired. (Tr. at 293-95, 299-300.) The court explained that

> At this point, given the evidence that has come in so far, which is fairly hefty I would say on the issue of the pattern of distribution from the perspective that I'm viewing it at this point, I don't think that the answer of Detective Lynch has caused incurable, unfair prejudice or has inflamed the jury in a way that I think that he's not getting a fair trial. So I'm not going to grant the mistrial.

(*Id*. at 294.) Temple declined the court's offer to present a curative instruction for the detective's comment. (*Id*. Tr. at 296-97.)

When court reconvened the next day, the district court offered additional rationale for its decision,

> So I just want to flush out my ruling. A mistrial must be based on whether a Defendant has been denied a fair and impartial trial. When there's a reasonable possibility that inadmissible evidence might contribute to a conviction, a mistrial may be appropriate in determining whether a prohibited statement contributed to or may contribute to a conviction. The Court is required to consider the strength of the evidence against the Defendant, the prejudicial

> effect of the testimony, and whether a cautionary instruction would cure any prejudice.
>
> The standard is whether a substantial right was denied. In this case, I have reviewed the evidence, as I think it's part of the record fully at this point. I've recognized that a mistrial is an exceptional remedy, and a remedial action short of mistrial is preferred, unless the circumstances require otherwise.
>
> I have concluded that in this case, based upon what I consider to be the weight of the evidence and the strength of the evidence against the Defendant, and the potential prejudicial effect of the testimony, together with the curative instruction on the first Motion for Mistrial, as well as the intended cure through testimony of Detective Lynch this morning, that the prejudicial effect will be diluted and lessened, and that the likelihood of this evidence contributing to a conviction, as compared with all of the other evidence, is negligible. So for that reason, I am denying both Motions for Mistrial.

(Tr. at 298-99.)

The State offered to first present the detective's restorative testimony to just the court to ensure no further problems arose and suggested that the court give a Mont. R. Evid. 404(b) curative instruction out of an abundance of caution. (Tr. at 300-03.) Temple agreed with having the court hear the proposed restorative testimony outside the presence of the jury, but explained that for strategic reasons he did not want a curative instruction given on this issue. (*Id*.)

When it resumed its direct examination of Detective Lynch, the State confirmed that the detective first heard about Temple after speaking with

Lohmeyer in early October 2017, and that his investigation first shifted to Temple after the November 9, 2017 controlled buy. (Tr. at 324.)

2. No abuse of discretion

The record clearly demonstrates the district court engaged in a thoughtful and thorough evaluation of Temple's second motion for mistrial. First, it is important to note that the court sustained Temple's initial objection, so the jury was already on notice not to consider the comment. Second, the court ordered the State to narrowly tailor questions to clarify that the detective was not referring to prior investigations unrelated to the time period charged. Third, the district court offered to give a curative instruction, but Temple declined for strategic reasons (which the court concurred was the better course).

Again, *Bollman* is applicable here. In that case, this Court affirmed the trial court's denial of a motion for mistrial for inadvertent statement that offense was felony DUI, finding that there was "ample evidence" to support his conviction for DUI beyond the isolated comment and concluding the statement "cannot reasonably be seen as evidence of Bollman's criminal history or prior bad acts." *Bollman*, ¶¶ 34-35.

The same is true here. The detective's comment was not the equivalent to stating Temple had been charged with, let alone convicted of, prior offenses. Moreover, as the State asserted, Temple was charged with a continuing course of

conduct from July 2017 to February 2018, and any risk of prejudice was mitigated by the State's subsequent narrowly-tailored direct examination. Finally, like *Bollman*, and as Neal explained, a curative instruction for this issue would have only reinforced problematic testimony. *Bollman*, ¶ 36 (Court will not fault trial court for decision not to give cautionary instruction when defense did not want one given).

Temple has not demonstrated how the two passing comments about Temple being in jail and the detective's comment that his name came up in another investigation entitle him to a new trial. *See State v. Giddings*, 2009 MT 61, ¶¶ 82-84, 349 Mont. 347, 208 P.3d 363 (overwhelming evidence against defendant along with little prejudicial effect of alleged improper statements were insufficient to grant mistrial; in finding no prejudice, Court noted "the disputed [statements] constituted small parts of a complex three-week trial" and neither "individually or collectively" denied the defendant a fair trial).

Trial courts are given "wide latitude of discretion" when ruling on motions for mistrial since trial courts are '"in the best position to observe the jurors and determine the effect of questionable statements . . . ."' *Criswell*, ¶ 51 (citation omitted). Granting a motion for a mistrial is an "exceptional remedy," that is appropriate only "when a reasonable probability exists that inadmissible evidence might have contributed to the defendant's conviction." *State v. Miner*, 2012 MT 20, ¶ 13, 364 Mont. 1, 271 P.3d 56.

Temple was not entitled to the exceptional remedy of a mistrial and he has not demonstrated how the trial court "acted arbitrarily without the employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice" when it denied his motions for a mistrial. *Michelotti*, ¶ 8.

III. Temple's attorney was not ineffective for not insisting upon a "Witness Legally Accountable" jury instruction.

A. Relevant additional facts

Bunitsky included an accomplice instruction in his proposed jury instructions. (Doc. 60.) The State opposed that instruction in its written response. (Doc. 82.) Prior to closing arguments, the State brought up the issue of the appropriateness of a "Witness Legally Accountable" jury instruction, explaining that while Neal had not offered the instruction, the State did not believe it was appropriate in this instance. (Tr. at 363-64.) In response, Neal stated he believed it was a "nonissue" and explained that "[w]e've considered it. It's not applicable to this case, so it's not a sort of oversight." (*Id*. at 365.) Following further discussion with the court, Neal confirmed that this case was "not a sort of accountability of accomplice" situation. (*Id*. at 367.)

B. Neal was not ineffective

Temple alleges Neal was ineffective for not insisting the court give an accomplice jury instruction. (Br. at 12-23.)

The Sixth and Fourteenth Amendments to the United States Constitution, and Article II, section 24 of the Montana Constitution, guarantee criminal defendants the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984); *Whitlow v. State*, 2008 MT 140, ¶ 10, 343 Mont. 90, 183 P.3d 861. This Court applies the two-pronged *Strickland* test to address ineffective assistance of counsel (IAC) claims to determine whether counsel's performance was deficient and, if so, whether the defendant suffered prejudice as a result. *Whitlow*, ¶ 10.

To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The prejudice analysis considers "the likelihood of success of the actions counsel failed to take." *State v. Henderson*, 2004 MT 173, ¶ 9, 322 Mont. 69, 93 P.3d 1231. This Court need not address the two prongs in any particular order. *Whitlow*, ¶ 10; *Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.")

1. Neal did not perform deficiently.

Since Neal's performance is presumed constitutionally effective, Temple bears the heavy burden of overcoming the strong presumption that Neal's decisions

fell within the wide range of reasonable professional conduct. *Whitlow*, ¶¶ 20-21; *Strickland*, 466 U.S. at 689. When considering whether Temple met this burden, "every effort must be made 'to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."' *Whitlow*, ¶ 15 (citing *Strickland*, 466 U.S. at 689).

"A defendant must do more than just show that the alleged errors of a trial counsel 'had some conceivable effect on the outcome of the proceeding.'" *State v. Dineen*, 2020 MT 193, ¶ 25, 400 Mont. 461, 469 P.3d 122; *Strickland*, 466 U.S. at 689 ("There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.").

Temple cannot establish that Neal's purposeful decision not to seek an accomplice instruction was outside the realm of acceptable professional judgment. "Counsel is not ineffective for failing to pursue a meritless strategy or one with an unlikely chance of success based upon the exercise of reasonable judgment." *State v. Payne*, 2021 MT 256, ¶ 32, 405 Mont. 511, 496 P.3d 546.

Pursuant to Mont. Code Ann. § 26-1-303(4), a district court should instruct the jury "on all proper occasions" that "testimony of a person legally accountable for the acts of the accused ought to be viewed with distrust." An accomplice jury

instruction should be given if all of the following factors are present: "(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." *State v. Allen*, 2010 MT 214, ¶ 22, 68, 357 Mont. 495, 241 P.3d 1045 (citing *State v. Hall*, 2003 MT 253, ¶ 30, 317 Mont. 356, 77 P.3d 239; *State v. Johnson*, 257 Mont 157, 163, 848 P.2d 496, 499 (1993), *overruled in part on other grounds by City of Helena v. Frankforter*, 2018 MT 193, 392 Mont. 277, 423 P.3d 581).

As this Court has explained, "the propriety of [an accomplice] instruction presupposes the existence of an accomplice." *State v. Charlo-Whitworth*, 2016 MT 157, ¶ 12, 384 Mont. 50, 373 P.3d 845. Thus,

> 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 a testifying witness aided the defendant in the commission of those acts. In other words, a person cannot be an accomplice to a person who did not commit the crime.

Charlo-Whitworth, ¶ 12. *See also State v. Flowers*, 2018 MT 96, ¶ 29, 391 Mont. 237, 416 P.3d 180; *Johnson, supra*.

This Court has held that when the defense theory is innocence, defense counsel's performance was not deficient when an accomplice instruction was not offered. *Flowers*, ¶ 29 (accomplice instruction not consistent with defense of complete innocence; counsel acted within the range of reasonable professional assistance in not requesting the instruction and his performance did not fall below

an objective standard of reasonableness); *Johnson*, 257 Mont at 163, 848 P.2d at 499 (same).

Temple asserts his defense was not total innocence "with respect to drug crimes." (Br. at 19.) However, Temple was not charged with possessing methamphetamine. He was charged with distributing methamphetamine. While Temple agreed he had purchased methamphetamine and used the drug, he denied ever selling methamphetamine to anyone. Thus, to the pending charge of distributing dangerous drugs, Temple's defense was complete innocence.

Even if Wilson was an accomplice or legally accountable, Temple was not entitled to the instruction because it was inconsistent with his "total innocence" theory of the case. Temple asserted that while he possessed personal amounts of methamphetamine in the presence of Wilson and purchased methamphetamine from Ferguson, he denied selling methamphetamine to anyone. This defense was actual innocence, not that Wilson was legally accountable for his conduct or that she acted in concert with him. *Flowers* and *Johnson* support Neal's decision not to offer an accomplice instruction and his performance was not deficient.

The facts of this case are not like *State v. Rose*, 1998 MT 342, 292 Mont. 350, 972 P.2d 321, or *State v. Kougl*, 2004 MT 243, 323 Mont. 6, 97 P.3d 1095, where this Court concluded defense counsel was ineffective for not seeking an accomplice instruction. (Br. at 20-21.) Unlike here, in *Rose*, the State

acknowledged that an accomplice instruction would have been appropriate. *Rose*, ¶ 18. Moreover, Rose did not present a complete innocence defense as Temple did here. *Rose, supra*. The same is true for *Kougl*.

Kougl was charged with operating an unlawful clandestine laboratory after he was arrested at another person's home where a lab was discovered in the garage. *Kougl*, ¶¶ 5-9. Kougl was found sleeping in one of the rooms where ingredients to make meth was discovered. *Id*. Kougl told the officers he was there to learn how to cook meth from other individuals who testified against him at trial as part of their plea agreements. *Id*. Other than his presence in the home in proximity to ingredients, the only evidence connecting Kougl to the lab came from those witnesses. *Id*. Kougl's counsel did not request an accomplice instruction or an instruction that such testimony must be corroborated. *Kougl,* ¶¶ 9, 21.

In reversing Kougl's conviction, this Court noted that the parties agreed that the witnesses were accomplices, and their testimony should be viewed with suspicion. *Kougl*, ¶¶ 9, 20. Noting that the State's case against defendant was largely based on the credibility of the three accomplices, this Court noted there was little corroborating evidence to the accomplices' testimony. *Kougl*, ¶ 21. This Court concluded there was no plausible justification for Kougl's counsel not to ask for the accomplice and corroboration instructions and determined that constituted deficient performance. *Kougl*, ¶¶ 21-24.

Here, unlike *Kougl*, Neal expressed a thoughtful and rational reason for not offering an accomplice instruction; it was not supported in law. Also, unlike *Kougl*, there was direct corroborating evidence of Temple's involvement in selling methamphetamine to Wilson from a law enforcement officer (*e.g.*, Smith observed Wilson get into Temple's truck at the Town Pump and return with methamphetamine and Detective Hinchman saw Temple's truck near the Super 8).

Since an accomplice instruction is not appropriate when a "defendant claims at trial that he did not commit the acts for which he is being tried," *Charlo-Whitworth*, ¶ 12, it would have been meritless for Neal to seek an accomplice instruction. *Flowers*, ¶ 29; *Johnson*, 257 Mont. at 163, 848 P.2d at 499. It would also have been contrary to Neal's trial strategy. *Payne*, ¶ 32.

Since Temple failed to establish how Neal's performance was deficient, this Court need not even consider the second *Strickland* prong. *Whitlow*, ¶ 10; *Strickland*, 466 U.S. at 697. Nonetheless, Temple has failed to establish that he was prejudiced by Neal's decision.

2. Temple was not prejudiced

Temple also fails to establish the second *Strickland* prong by demonstrating there is a reasonable probability that the outcome would have been different but for Neal's alleged deficient performance. *Strickland*, 466 U.S. at 687. When addressing the prejudice prong, a court must consider the strength of the case against

the defendant and the likelihood of success of the actions counsel failed to take. *State v. Haldane*, 2013 MT 32, ¶ 37, 368 Mont. 396, 300 P.3d 657 (IAC claim cannot succeed when predicated on counsel's failure to take an action which, under the circumstances, would likely not have changed the outcome of the proceeding).

Neal thoroughly cross-examined the State's witnesses about their plea agreements and ensured the jury was fully aware of the multiple reasons to question their credibility. Notably, Ferguson, who testified to supplying Temple with pounds of methamphetamine, had already been convicted on federal charges. Additionally, Wilson's and Lohmeyer's testimonies about the two controlled buys in early November 2017, were consistent and the State also produced testimony from two law enforcement officers who corroborated those events.

Temple has not demonstrated how the outcome of his trial would have been any different had Neal insisted on the court giving an accomplice jury instruction. *See, e.g.*, *In re Gillham*, 218 Mont. 187, 707 P.2d 1100 (1985) (even when accomplice instruction should have been given, the outcome was not undermined by such failure); *Haldane*, ¶ 37.

IV. No cumulative error

"The cumulative error doctrine mandates reversal of a conviction where numerous errors, when taken together, have prejudiced a defendant's rights to a

fair trial." *Oliver*, ¶ 47. "Mere allegations of error without proof of prejudice are inadequate to satisfy the doctrine [of cumulative error]." *Giddings*, ¶ 100 (Court declined to consider cumulative error when it considered each claim separately and determined no prejudice).

Since Temple has failed to establish any prejudicial errors occurred during his trial, the cumulative error doctrine is inapplicable. *See State v. Hardman*, 2012 MT 70, ¶ 35, 364 Mont. 361, 276 P.3d 839 ("Having found no abuse of discretion in all but one of the District Court's evidentiary rulings, cumulative error does not require reversal of Hardman's conviction.").

CONCLUSION

Temple's conviction for criminal distribution of dangerous drugs should be affirmed.

Respectfully submitted this >> day of August, 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 8,890 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

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CERTIFICATE OF SERVICE

I, Kathryn Fey Schulz, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 08-29-2022:

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