IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0028

STATE OF MONTANA,

Plaintiff and Appellee,

v.

TIMOTHY JOHN STRYKER,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Sixteenth Judicial District Court,
Rosebud County, the Honorable Nickolas C. Murnion, Presiding

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On appeal, the State contends the evidence of a later Wyoming crime did not dominate Tim's Montana trial. Yet in the first eight pages of the State's Statement of Facts, only two paragraphs reference any conduct in Montana. (Appellee 4-5). The remaining pages detail a Wyoming investigation, Wyoming allegations, and Tim's admissions to a Wyoming offense. (Appellee 1-8). The fact is, the vast majority of the evidence in this case was direct evidence of a crime in Wyoming, not Montana, one for which Tim was separately charged, convicted, and punished.

Of all the piecemeal Rule 404(b) reasons the State gives for why a Wyoming offense was the driver of Tim's trial in Montana, none stand up to scrutiny under Rule 403. In actuality, the Wyoming case figured so heavily because it provided everything the Montana prosecution lacked. In Wyoming, Tim was "caught in the act" and admitted he touched F.S. inappropriately. In the Montana case, the prosecution had to contend with three witnesses who all swore F.S. did not sleep in the bedroom with Tim at the April branding. So the prosecution pivoted to Wyoming to prove its case, and ultimately misused Rule 404(b) to import an eyewitness, an admission, and "apology" letters into Tim's

Montana trial. Never mind that this was all evidence of a crime in Wyoming, not the charged offense.

On appeal, the State's Rule 404(b) purposes pale in comparison to the actual effect the Wyoming evidence had on the jury. The prosecution repeatedly elicited testimony about Tim's admissions to inappropriately touching F.S. in Wyoming. Not, as the State says, because it showed a motive to abuse F.S. in Montana, but because it allowed the prosecution to blur the line and carry an admission over to Montana. Any admission, even a Wyoming one, could distract the jury from a story that otherwise didn't add up. Next, the State wanted the Montana jury to know exactly how the Wyoming charge came about. Not, as the State claims, because it explained the timing of F.S.'s disclosure but because it gave them what it lacked in its own case: an eyewitness to the abuse (Rachel). Finally, the prosecution couldn't resist an "apology" letter Tim wrote to F.S. in a Wyoming jail after admitting and being booked on a Wyoming offense, because what could conjure an air of general guilt more effectively than an apology to a young F.S.? The prosecution fought hard to front-load its case with evidence of an admitted Wyoming crime because there was very little investigation in Colstrip, which

turned up evidence contradictory to F.S.'s claims about what happened there. Tim could not fairly defend against the Montana charge because his jury was overwhelmed with his culpability for a Wyoming offense. Isolating out Tim's admitted acts of abuse in Wyoming, as Rule 403 should have done, there can be no certainty he really did what the State claims he did here in Montana.

I. To distract from the facts actually at issue in this case, the State takes a kitchen sink approach to Rule 404(b).

The State's arguments on appeal consistently neglect a critical touchpoint: there must be a fact at issue *in this case* to which Rule 404(b) evidence is relevant prior to admission. *State v. Aakre*, 2002 MT 101, ¶ 11, 309 Mont. 403, 46 P.3d 648. ("Before other crimes evidence can be admitted under Rule 404(b), M.R.Evid., the purpose justifying the admission of the evidence must be at issue in the current charge.") By articulating reasons that were not at issue in this case or are merely propensity theories thinly disguised, each in turn, the State stretches the motive, opportunity, plan, absence of mistake or accident, and transactional theories too far.

A. The State's motive claim is propensity disguised as motive.

On appeal, the State claims that it was the "similarity" of the two admitted subsequent acts in Wyoming that made them relevant to its motive theory. Thus, the State maintains it is not merely the fact of a subsequent allegation of abuse in Wyoming but the detailed descriptions of those subsequent Wyoming acts, and Tim's admissions to them, which were needed to argue Tim had an earlier-in-time motive to abuse F.S. in Montana. (Appellee 21-24.) The "similarity" of other acts does not show "pure" motive but rather modus operandi evidence, and because Tim's identity is not at issue, here it serves as nothing more than propensity evidence in disguise. *See* Britton Fraser, *You Can't Escape Your Past: State v. Blaz and The Future of 404(b) Evidence in Montana*, 80 Mont. L. Rev. 321 (2019).

According to the State, it was proper to expose the jury to detailed accounts, through the testimony of Tim's wife Rachel, the Wyoming investigator, Keeler, and through Tim's admissions, of Tim "rubbing [F.S.'s] buttocks, breast and vagina" in Wyoming, at times "when Stryker was alone with victim in the morning." (Appellee 23). In reality, only one of two subsequent Wyoming acts occurred in what the State

characterizes as the "same manner." Rachel's testimony was different, she said she saw Tim rub F.S.'s breast and right in front of Rachel, not while alone in the morning. And, the Rule 404(b) evidence of Wyoming abuse entailed actions that were not unique or unusual in a sexual abuse case, their generic nature could not establish a modus operandi even if motive in the form of identity were in question.

The State does not adequately account for the fact that the Wyoming acts occurred *after* the trip to Colstrip. A district court must analyze the motive evidence the State proposes to determine whether it supports the particular purpose asserted. *State v. Aakre*, 2002 MT 101, ¶ 11, 309 Mont. 403, 46 P.3d 648. While the State downplays the distinction, it could not point to a single case in which evidence of a *subsequent* crime was allowed for the Rule 404(b) purpose of showing a motive of sexual attraction to a particular victim. The State cites only cases where the identity of the perpetrator was at issue, *i.e., Salvagni* and *Blaz*, thus modus operandi, to support its argument that the similarity, hence the detailed testimony, of the subsequent Wyoming acts were relevant to show Tim's motive.

Mainly the State argues *State v. Murphy* supports its motive theory, a case where there was no similarity whatsoever between the charged conduct and the prior bad act admitted under Rule 404(b). *State v. Murphy*, 2021 MT 268, 406 Mont. 42, 497 P. 3d. 263. In this close 4-3 case, Murphy was accused of twice anally raping his younger half-sister. A years-earlier admission of his attraction to that relative was allowed to show he had a "longstanding" attraction specific to her. A prior instance of Murphy touching his half-sister's private parts was also admitted to show he had previously acted on that attraction. *Murphy*, ¶ 14. But the charged conduct was completely different (and much more egregious) than the prior bad act. In a case where Murphy was accused of rape, unlike here, there was no danger of the jury mistaking his years-prior comments as confessions to the charged offense, nor of a jury finding him guilty of the charged offense as punishment for a prior bad act. Additionally, Murphy's prior bad act is different because it established a longstanding sexual attraction to his victim. (*See* Appellant Opening 28-20.) By contrast here, the Rule 404(b) evidence occurred *after* the trip to Colstrip. The State has simply failed

to supply any case where *subsequent* acts were shown to establish a prior sexual attraction.

The State's claim that Rachel and Keeler's detailed testimony about Tim's Wyoming admissions shows motive rather than propensity falls flat. Hearing Tim admit he touched F.S. in Wyoming the "same way" that he was accused of doing in Montana does not identify a motive to touch her in Montana, rather, it supplies a propensity inference. Tim does not claim he touched F.S. in Colstrip but innocently, he denied touching F.S. in Montana at all. If any Wyoming evidence was relevant as to motive, it would be only the bare fact of a subsequent accusation of abuse, not a detailed, specific description. And while the State asserts the descriptions of abuse in Wyoming were not overly prejudicial because the alleged acts were "nearly identical", not worse, than the allegations in Montana, Appellee 17, this argument misses the point. The details of abuse in Wyoming are wrong because they allow the State to unfairly argue his propensity to abuse F.S. in the morning by rubbing her buttock and vagina, not that he should be punished for something worse. The State's use of the "similarity" of the admitted Wyoming acts to the allegations in Montana was unfairly prejudicial

because it painted a general air of culpability rather than articulating a motive. This unfairly distracted the jury from trial testimony that conflicted with F.S.'s version of the events in Colstrip, telling the jury instead that Tim must have abused F.S. in Montana because he did so later in their Wyoming home.

B. Opportunity was not at issue.

Next, the State claims the detailed evidence of subsequent Wyoming acts was admissible to prove that Tim and F.S.'s trip to Colstrip provided Tim with an "opportunity" to abuse F.S. (Appellee 26-28.) While the State devotes several pages of its brief to argue subsequent Wyoming bad acts were properly admitted to prove Tim had the opportunity to abuse F.S. in Colstrip, *See* Appellee 26-28, the issue was not in dispute in this case.

The State argues the evidence was proper because it supports a theory that between April and June, Tim "would often" abuse F.S. "when he had the opportunity to do so." (Appellee 27). It stands to reason why the State does not offer a single case from any jurisdiction to support its opportunity argument: Evidence admitted to show a

defendant abused a victim "whenever he had the opportunity" (Appellee 27), is not how the Rule 404(b) exception for opportunity works.

The State articulates a propensity purpose, nothing more. There is no Rule 404(b) evidence that could be properly admitted to show Tim had an "opportunity" to abuse F.S. in Colstrip because no one disputes that Tim and F.S. were both at the Lee Ranch for the April branding. The State cannot use other crimes evidence to prove a point not at issue in the case. *See State v. Sweeney*, 2000 MT 74, ¶ 19, 299 Mont. 111, 999 P.2d 296. That Tim had the opportunity to abuse F.S. in Colstrip merely states the obvious: Tim and F.S. were both at the Lee Ranch on the night F.S. alleged Tim abused her. While three witnesses did testify that F.S. was never in the bedroom with Tim that weekend, there is simply no evidence of subsequent acts in Wyoming that could possibly be relevant to show that she was. What the State really wanted was to highlight the fact that Tim touched F.S. inappropriately in her bedroom in Wyoming soon after the branding event in Colstrip. The State's improper purpose is to show he was more likely to have done so earlier in Colstrip too. This propensity purpose is not valid under Rule 404(b).

The State's articulated "opportunity" argument merely reveals its misunderstanding about what could potentially comprise Rule 404(b) opportunity evidence. Hypothetically, if a defendant claimed he could not have committed the charged crime because he was in Helena that day, the prosecution could produce evidence that he was in fact in Colstrip, even if it showed that he was committing a crime, e.g., a time-stamped surveillance video showing the defendant stealing a candy bar at a Colstrip gas station. More generally, uncharged crimes can be admissible to establish opportunity by demonstrating that defendant had access to or was present at the scene of the crime or that the defendant possessed certain distinctive or unusual skills or abilities employed in the commission of the crime charged. 1 McCormick On Evid. § 190.6 (8th ed.) No such "opportunity" question arose in this case.

C. Mistake or Accident was not at issue.

The Wyoming offense was not admissible to show an "absence of mistake or accident" because Tim denied touching F.S. in Colstrip at all- mistakenly, accidentally or otherwise. Fundamental to the premise that other acts be admitted to show "absence of mistake or accident," is that the defendant claims he made a mistake. *See* Christopher B.

Mueller & Laird C. Kirkpatrick, Federal Evidence vol. 1, § 4:34, 824 (4th ed., Thomson Reuters 2013). On appeal, the State misleads the Court by claiming Tim raised a defense of mistake or accident on the Montana charge. (Appellee 29.) The State refers to Tim's response to a Wyoming investigator that he inadvertently touched F.S.'s nipple while giving her a back massage in their Wyoming home. (Appellee 29.) Tim never put mistake or accident at issue in his Montana trial. From the very start, Tim unequivocally denied ever touching F.S. in Montana. He always maintained he did not touch F.S. in Colstrip, thus, absence of mistake or accident simply was not a live issue in this case.

D. The State's new reference to "plan" really means propensity.

Next, the State says that when the prosecutor told the jury Tim engaged in a "pattern" of abuse, she really meant he was acting on a "plan" to abuse her. The State then proceeds to argue why the evidence was admissible to show a plan or common scheme. (Appellee 25-26.) What the State glosses over also disposes of its argument: In the State's own words, the prosecution "often referred to Stryker's actions as a 'pattern' during trial." (Appellee 24.) The State can't now rewind the clock and tell the jury something different than it did at trial. At trial,

the prosecution used Rule 404(b) evidence to argue to the jury that Tim had a habit of abusing F.S., this was a propensity theory that prejudiced Tim's defense. In any case, the State's theory on appeal that acts of subsequent Wyoming abuse could establish Tim's "plan" was to abuse F.S. first while at a busy branding event in Colstrip, in a house crowded with other guests, before doing so in the privacy of their own Wyoming home does not withstand scrutiny. If such a broad theory could establish a "plan," then almost anything could. The State's theory was really just the exact propensity theory the prosecution told the jury: that Tim showed a "pattern," that is habit, of abusing F.S.

E. Transaction evidence was not necessary.

Transaction evidence is subject to the same Rule 403 analysis as Rule 404(b) evidence. On appeal, the State makes much ado about the difficulty of telling the full story of what was alleged in Montana without also telling the full story of what later transpired in Wyoming. (Appellee 30-31.) In reality, it was not difficult for F.S. to keep the two stories separate. F.S. responded to questions about Colstrip concisely at trial, she only elaborated on Wyoming when the prosecution specifically asked her to. The jury did not need to know much about "how and why

the victim came forward when she did", (7/24/2020 Tr. at 18.), because this case does not present a situation where a victim delayed disclosing abuse for any significant period of time. When the State says it would be too hard to tell the story of Colstrip while restricting the evidence of the Wyoming crime, (Appellee 31), it means it would be much harder to prove its case without showcasing the much stronger Wyoming one. This does not satisfy the transaction rule.

In sum, none of the State's non-propensity theories for admitting evidence of the subsequent Wyoming acts satisfied Rule 404(b). The evidence was not probative of these theories, the theories did not pertain to issues in dispute in this case, and they required forbidden propensity inferences. In actuality, the State used this evidence to persuade the jury since Tim was guilty in Wyoming, he must be guilty in Montana too, and it all was admitted in error under Rule 404(b).

II. The State agrees Tim's statements about a Wyoming offense were Rule 404(b) evidence of other bad acts, but still defends the prosecution's use of this evidence to argue Tim admitted the charged offense.

Even though the State agrees on appeal that Tim's admissions to a Wyoming offense were only permitted in his Montana trial as Rule 404(b) other bad acts evidence, it still defends the prosecution's use of

this evidence to argue Tim admitted the charged offense. (Appellee 39.) The State's position is untenable.

The State was not permitted to use Tim's Wyoming admissions to argue he admitted the charged conduct in Montana but that is precisely what it did. The district court's order allowed the jury to hear Tim's Wyoming admissions as evidence whose "only purpose" was to show "motive, opportunity, plan or absence of mistake or accident." (Appendix B; D.C. Doc. 91, Pg. 7.; Limiting Instruction, given at transcript pages 414, 420, 453, 464.) Yet on appeal, the State defends the prosecution's decision to use this supposed Rule 404(b) evidence to characterize Tim's statements as "general admissions." (Appellee 38.) In closing, the prosecutor told the jury Tim "admitted he felt F.S.'s pubic hair," then claimed this admission had to be in reference to Colstrip because that was the only place he had been accused of touching her there. The argument plainly used Tim's statements out of context as direct evidence Tim admitted to the abuse charged in Colstrip. On appeal, the State counters the prosecution's statements only "highlighted the similarities of F.S.'s Colstrip allegation to Stryker's generalized admissions." (Appellee 38.) Even if this is what the prosecutor did, the

distinction is an empty one. These "highlighted similarities" are still inappropriate use of Rule 404(b) evidence as direct evidence Tim admitted the charged offense, not evidence to show proof of motive, opportunity, plan, or absence of mistake or accident.

Contrary to the State's claim that the prosecutor's statement was an "isolated remark," this was not the only time the prosecution intentionally omitted critical context that Tim only admitted he touched F.S. in Wyoming, not Montana. Keeler and Rachel's testimony at trial also "generalized" Tim's admissions. Rachel testified that after she accused Tim of touching F.S.'s nipples, he replied "that it happened and I really regret it." (Tr. at 434.) Keeler also omitted the Wyoming context saying, "…Tim did admit over the ph – um that he had touched um F.S.'s nipples um on uh two occasions I believe." (Tr. at 464.) The State insists Keeler did clarify on direct examination that Tim denied ever touching F.S. in Montana. But the prosecution muddied Keeler's testimony on this point too, in the same breath asking Keeler whether he "admitted to going to Colstrip" as well as "admitted to touching her

vagina." (Tr. at 468-469.)[1] The prosecutor's impropriate use of Tim's admissions to Wyoming conduct unduly distracted the jury from considering a very different situation in Montana. Here, Tim adamantly denied he ever touched F.S. in Colstrip and three adult witnesses at the Lee Ranch each testified it was not possible. To distract from this, the prosecution unfairly capitalized on Tim's admissions to Wyoming acts. They were admissible as Rule 404(b) evidence only, that is, as evidence of an *other* bad act, separate from the charged offense. (Appendix B; D.C. Doc. 91, pg. 7.) Instead, they became the main attraction of his Montana trial.

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[1] Q: So, did Timothy Stryker make any admissions to the alleged conduct?
A. Um he had – he had provided initially uh a denial um and kind of a reason behind um th – his um statements about touching her um nipples from the night before and kinda [sic] giving the reason why he had um and e – as the interview progressed he did eventually admit to touching um [F.S.]'s vagina as well.
Q. And um did he admit to going to Colstrip?
A. He…
Q. With [F.S.] and touching her there?
A. He did not admit to touching her in Colstrip no.
Q. Did he ever admit to touching um [F.S.]'s vagina?
A. He did. (Tr. at 468-469.)

Rule 403 operates to prevent confusion, misleading evidence and distraction that would deny a fair opportunity to defend against a particular charge. *State v. Franks,* 2014 MT 273, ¶ 16, 376 Mont. 431, 436, 335 P.3d 725. Bypassing Rule 403, the prosecution created unacceptable confusion here. The State capitalized the on the confusion about Rule 404(b) evidence to convert Tim's Wyoming admissions into substantive proof that he admitted guilt to the Montana allegation. It was not necessary as the State suggests for Tim to object again when the objection would be futile. *See State v. Crider,* 2014 MT 139, ¶ 40, 375 Mont. 187, 328 P.3d 612. Tim's motion *in limine* challenged the admissibility of this evidence, both under Rule 404(b) and Rule 403, which the district court ruled on.

Then, in a footnote, the State asks this Court to exclude the Wyoming "apology" letters from the district court's Rule 404(b) and Rule 403 motion because it supposedly wasn't one of the "areas of evidence" specifically addressed in the court's order. (*See* Appellee at 20.) The State conveniently omits that the cause of any lack of specificity in the order was the prosecution's own failure to precisely identify the Rule 404(b) evidence it planned to introduce at trial. The district court noted

that it had to rely on the 'procedural background" the State set forth in its March 26, 2020, response to Tim's motion *in limine* as its representation of the evidence of "other bad acts" it intended to introduce at trial. (Appendix B; D.C. Doc. 91, Pg. 4.) Tim's motion *in limine* asserted similarly that, "[b]ecause the State has not yet provided specific notice of any other acts evidence upon which it intends to rely at trial, defendant begins by asserting that absent such notice a detailed accounting of the evidence objected to is not required." (D.C. Doc 35.) It is the State's responsibility to adequately advise the defendant of Rule 404(b) evidence it plans to use. *C.f. Eighteenth Judicial District Court*, 2010 MT 263 ¶ 46, 358 Mont, 325, 246 P. 3d 415. On appeal, the State tries to leverage its own misstep and wrongly faults the district court for what was the prosecution's failure to identify the specific Wyoming evidence it intended to introduce as "other bad acts." In any event, the State's assertion that the "apology" letters were anything other than Rule 404(b) evidence doesn't pass the sniff test. Tim wrote these letters in the moment he was booked in a Wyoming jail. Minutes earlier he had admitted to inappropriately touching F.S. in Wyoming and denied the same in Montana. He had just been arrested by a Wyoming officer on a

suspicion of committing the Wyoming offense of abuse of a minor. The State's position that these letters were not specific to the Wyoming offense, thus not Rule 404(b) evidence in this case, lacks merit. Like Tim's admissions, his apology letters should have been excluded as unduly prejudicial, confusing, and misleading for the jury.

This Court will reverse when, as here, "the manner in which a jury is exposed to prior bad acts exacerbate its prejudicial nature" regardless of the purpose for which the evidence is nominally admitted. *State v. Fleming*, 2019 MT 237, ¶ 36, 397 Mont. 345, 449 P.3d 1234. In *Fleming*, this Court applied Rule 403 to reverse even when holding the defendant's prior conviction for providing alcohol to minors was admissible to show that he knew the risk of providing alcohol to minors. *Fleming*, ¶ 36. But because the details underlying that conviction, specifically that it resulted in the minors' death, were overly prejudicial and the State capitalized on that advantage repeatedly to convict Fleming, the Court reversed. *Fleming*, ¶ 36. In *Franks*, an allegation of past child molestation was probative and admissible under an exception to Mont. R. Evid. 404(b). The State offered evidence of a newspaper report that Franks had been charged with abusing a young boy in order

to explain the victim's disclosure four years after her alleged abuse. *Franks,* ¶ 4. This Court reversed again when the State did not in fact limit its use of the testimony to explaining the timing of the victim's disclosure but instead maligned the defendant throughout trial by reminding the jury he was "accused of raping a little boy." *Franks, ¶ 19.* Here, the prosecution's improper use of Tim's admissions to subsequent abuse in Wyoming, beyond the use authorized by the district court's rulings on Tim's motions *in limine*, denied him a fair and impartial trial. He requires a new trial limited to only the offense charged in Montana.

III. The State makes no claim the Wyoming evidence admitted in error was harmless.

Once an evidentiary ruling is deemed erroneous, it is "incumbent on the State to demonstrate that the error at issue was not prejudicial." *State v. Van Kirk*, 2001 MT 184, ¶ 42, 306 Mont. 215, 32 P.3d 735. To do this, the State must not only point to other admissible evidence proving the same facts as the tainted evidence, but also "demonstrate that the quality of the tainted evidence was such that there was no reasonable possibility that it might have contributed to the defendant's conviction." *Van Kirk*, ¶ 44 (emphasis in original); *accord State v. Kaarma*, 2017 MT

24, ¶ 89, 386 Mont. 243, 390 P.3d 609 (stating the other admissible evidence must be "of the same quality" as the tainted evidence).

The State makes no claim on appeal that the Wyoming evidence admitted in error was harmless. Nor could it. Without the Wyoming evidence, the prosecution is left with only F.S.'s testimony, contradicted by every other witness to the April branding event. Qualitatively, there is no comparison to the value for the prosecution of the jury hearing the details of the admitted Wyoming evidence. The Montana conviction was not inevitable. It was only assured because the State was allowed to use Tim's admitted conduct from Wyoming without limitation. The State doubles down on Rule 404(b), but makes no argument Tim's conviction could stand had the Wyoming acts been carefully controlled and used for their limited purpose. Tim requires a new trial because in this one, he was denied a fair opportunity to challenge the specific single incident alleged in Montana.

Respectfully submitted this 3rd day of October, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply 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 4424, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Kathryn Hutchison
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CERTIFICATE OF SERVICE

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