IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 19-0471

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CARESSA JILL HARDY, aka
GLENN LEE DIBLEY,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, The Honorable James B. Wheelis, Presiding

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STATEMENT OF THE ISSUES

1. Whether inmates Anton Orth and Martin Hope became government agents, and therefore violated Hardy's right to counsel, by eliciting information, when they independently reported Hardy's statements to them to law enforcement and continued to gather information from Hardy after meeting with law enforcement, but were not offered leniency or asked to gather information.

2. Whether the court fully and fairly instructed the jury when it provided the general credibility instruction but rejected Hardy's instruction that directed the jury to carefully scrutinize the inmates' testimony.

3. Whether the court erred when it prohibited Hardy from arguing about the State's failure to call John Braunreiter as a witness, and if it did, whether that was harmless when Hardy argued the State's witnesses did not establish beyond a reasonable doubt that Hardy solicited Braunreiter, and Hardy referenced Braunreiter's failure to testify.

4. Whether Hardy has met his burden to demonstrate that his prosecutorial misconduct claim should be reviewed under the plain error doctrine.

STATEMENT OF THE CASE

In August 2017, the State charged Appellant Caressa Jill Hardy, aka Glenn Dibley, (Hardy) with two counts of deliberate homicide, alleging that he

killed Thomas Korjack and Robert Orozco between March 26 and April 1, 2013. (Doc. 3.) The State recounted the allegations of an eyewitness, later identified as Karen Jill Hardy (Karen), and law enforcement's corroboration of her claims through a search of Hardy's property. (Doc. 1.)

The State later added two counts of solicitation to commit deliberate homicide based on statements Hardy made to other inmates while incarcerated in the Missoula County Detention Facility (MCDF). (Doc. 41.) The State alleged that Hardy offered money to two inmates to kill Karen. (Doc. 36 at 16-18.)

Hardy moved to suppress evidence obtained from inmates in the MCDF. (Doc. 210; Tr. at 443.) The court denied the suppression motion. (Doc. 338, available at Appellant's App. B.)

At trial, three inmates testified about Hardy's statements to them. The court provided the jury the general credibility instruction, but refused to give Hardy's proposed instruction that would have directed jurors to "carefully scrutinize" the inmates' testimony. (Tr. at 766-67, 2412; Doc. 315, Def's Proposed Instr. No. 39.) The State did not call a fourth inmate, John Braunreiter, because he had indicated that he would not cooperate. The court prohibited Hardy from arguing about Braunreiter's absence because he was unwilling to be a witness. (Tr. at 2344-49.) After a nine-day trial, a jury convicted Hardy of two counts of deliberate homicide and two counts of solicitation to commit deliberate homicide. (Tr. at 2505.)

STATEMENT OF THE FACTS

I. Motion to suppress

After the State added two counts of solicitation to commit deliberate homicide, the court allowed Hardy to depose four inmates: Anton Orth, John Braunreiter, Bryan Palmer, and Martin Hope. (Docs. 96, 136.) Braunreiter wrote a letter declaring that he would not answer any questions or speak without an attorney. (Doc. 167.) Hardy attempted to depose Braunreiter, but he refused the oath and to answer most questions. (Doc. 211.1 at 4.) Braunreiter claimed his attorney had told him he would be released if he spoke to detectives, but instead he received the same sentence he had previously been offered. (*Id*. at 6-7, 10.) The other three inmates were deposed. (Docs. 149-50, 158.)

Hardy moved to suppress evidence obtained from search warrants that relied, in part, upon information from inmates. (Doc. 210.) Relevant to this appeal, Hardy challenged: 1) the January 23, 2018 search warrant authorizing seizure of a television; and 2) the April 2, 2018 search warrant authorizing a search of Hardy's residence. (Doc. 210; Tr. at 441-42; *see also* 3/1/19 Hr'g, Def.'s Exs. N, P, available at Appellee's App. A, B.) Hardy also requested suppression of his statements soliciting Karen's murder. (Doc. 210 at 2.) During a hearing, he expanded his argument to include any evidence obtained from the inmates. (Tr. at 443.) Hardy argued this evidence was inadmissible because: 1) it was obtained in

violation of Hardy's Sixth Amendment right to counsel; and 2) the statements were not voluntary. (Doc. 210.)

The State responded that the statements did not implicate Hardy's Sixth Amendment right to counsel because the State did not deliberately elicit the statements Hardy made to other inmates; Hardy's solicitations to kill a witness were not protected by his right to counsel because he had not been charged with those offenses; his solicitations were free from government influence; and Hardy's statements were all voluntary. (Doc. 227.)

At an evidentiary hearing, Detective Jared Cochran explained that the inmates provided information they had gained through conversations with Hardy. (Tr. at 331-32.) They also knew information from Hardy's legal documents because he showed them to the inmates. (Tr. at 332.) Cochran testified that the inmates were motivated by a desire to learn the truth. (Tr. at 333.) He stated they "were looking into the matter themselves and having conversations on their own free will with Mr. Hardy and—and providing that information to myself." (Tr. at 337.) Cochran did not make any promises to provide any benefit to the inmates. (Tr. at 334.) The only action he took on their behalf was to tell prosecutors they had provided information. (*Id*.)

Cochran did not direct any inmate except Palmer to take any action. Cochran asked Palmer to introduce an undercover agent, which never occurred.

(Tr. at 228.) Cochran also never influenced the inmates' placement in the facility. (Tr. at 237, 283.)

Cochran obtained a warrant on January 23, 2018, to search Hardy's property for a television the State believed may contain biological evidence. (Appellee's App. A.) In the application, Cochran relied on Karen's report that there was blood spatter on a large box-style television and on Hope's statement in his second interview indicating that Hardy had said the television with blood spatter was in his basement. (Appellee's App. A, Application at 5-6.) Two televisions were seized pursuant to the warrant. (Appellee's App. A, Return.)

Cochran obtained a warrant on April 2, 2018, to search Hardy's property again for human remains. (Tr. at 323-26; Appellee's App. B.) The application contained information from Karen and Hope, but it also explained that human bone fragments were discovered during the first search and more could likely be located. (Appellee's App. B, Application at 8.) The discovery of human remains during the first search motivated the second search. An anthropologist informed law enforcement they should use a smaller screen to locate teeth or small bone fragments. (Tr. at 323-27.) The State recovered additional human remains during the second search. (Tr. at 316-17.)

A. Inmates

1. Anton Orth

Cochran became aware that an inmate had information about the case when Orth sent a letter on September 25, 2017. (Tr. at 203-05.) Cochran interviewed Orth, who was Hardy's cellmate, on October 3, 2017 and on November 17, 2017. (Tr. at 204, 210, 216.) Cochran informed Orth he was not promising him anything. (Tr. at 205.) During the first interview, Orth told law enforcement about statements Hardy had made to him. Orth also stated he had made notes and sent letters that were in the mail. Cochran agreed to interview Orth again after receiving the notes. (Tr. at 208-10.)

After that interview, Orth sent numerous letters containing notes on his conversations with Hardy, which were admitted at the hearing. (Tr. at 211, 264-83; 3/1/19 Hr'g, Def.'s Exs. B-I.) But Cochran testified that he had not directed Orth to take any action. (Tr. at 213.) During that first meeting, Orth indicated he had snooped through Hardy's belongings and taken pages from Hardy's notebook, some of which Orth had mailed to his attorney. (Tr. at 210, 212, 256-59, 268, 418.) Cochran instructed Orth not to do so. He told Orth, "[i]f it is his property I would tell you to leave his property alone." (Tr. at 210, 276; 3/1/19 Hr'g State's Ex. 1 at 22, available at Appellant's App. D.) Orth mailed Cochran pages from Hardy's notebook on October 4, 2017. Detective Cochran

believed Orth had already taken those pages before his October 3, 2017 interview. (Tr. at 330-31.)

Orth decided to be a witness against Hardy because he read that Hardy had kept his child locked up, which Orth disapproved of. (Tr. at 354, 356, 416.) Orth also tried to get information from Hardy because the family of the people Hardy killed lacked closure. (Tr. at 356.) Orth "saw an opportunity to try to resolve the case[.]" (Tr. at 356-57, 417.)

Cochran acknowledged that Orth said he was trying to "bait" Hardy to get information. (Tr. at 251-55.) Hardy provided Orth more information about the case the longer they were housed together. (Tr. at 273, 282.) Orth also told Cochran that Hardy had solicited Braunreiter to kill a witness in the case. (Tr. at 213, 224.)

Orth acknowledged he had read through Hardy's paperwork, but claimed that almost all of the information he wrote down came from his conversations with Hardy. (Tr. at 360.) Orth said he looked at Hardy's legal paperwork, including attorney-client communications, after Hardy had reviewed it with him. (Tr. at 421-22.) Orth said detectives discouraged him from looking at Orth's paperwork. (Tr. at 426-27.)

Orth acknowledged his first letter to the county attorney stated he was interested in negotiations. But he said that term came from his counsel. Orth

testified he did not ask the detectives "for anything. They didn't promise me anything." (Tr. at 423.)

Hardy chose to be placed in a cell with Orth. (Tr. at 355.) Hardy was later moved out of his cell after an inmate placed a threatening note under his door as a joke. (Tr. at 352-53.) Orth denied that he gave information about Hardy's case to Palmer or Braunreiter. (Tr. at 430.)

2. Bryan Palmer

Hardy met Palmer when he was moved into a new pod. (Tr. at 216.) Palmer later requested to speak to law enforcement. (Tr. at 214, 218.) Cochran first interviewed Palmer on November 1, 2017. (Tr. at 215.) Palmer asked for leniency in exchange for information. (Tr. at 304.) Palmer said Hardy very quickly approached him when moved to his pod and wanted to see Palmer's legal documents. (Tr. at 215-17.)

Cochran did not ask Palmer to gather additional information during the first interview, but within a week Palmer sent a note indicating he had additional information. (*Id*.) During a second meeting, Palmer said that Hardy had solicited him to kill Karen. (Tr. at 219.) Based on that information, Cochran obtained a search warrant to place a recording device in Hardy's cell. (*Id*.; 3/1/19 Hr'g, Def.'s Ex. M.) Cochran intended to ask Palmer to introduce an undercover agent posing as someone who could kill Karen. Hardy was moved before that could

occur. Hardy also learned about the undercover operation, so the recording device did not yield any information. (*Id*. at 219-20.)

3. Martin Hope

Cochran interviewed Hope on December 21, 2017 and January 16, 2018. (*Id*. at 221, 288.) Hope shared a cell with Hardy for two months. (Tr. at 372.) They were friends at first, but Hope became frustrated with Hardy's complaints and determined that Hardy's statements "didn't match up." (Tr. at 407-08.) Hope began trying to get information from Hardy after he realized Hardy was lying to him. (Tr. at 411.) Hope told Cochran he wanted to get to the truth and wanted to get justice for the families. (Tr. at 294.) Hope also told Cochran that Hardy had a bad habit of telling everyone in the pod his life story. (Tr. at 223.) Hardy's first question to Hope was whether Hope knew anything about luminol, which is used to find blood evidence. (Tr. at 389, 405.)

Hope told Cochran in the first interview that he "stroked" Hardy and was trying to get Hardy to acknowledge that he committed the homicides. (Tr. at 288, 292-93.) Hope explained that Hardy trusted him because he believed Hope was a gang member knowledgeable about crime. (Tr. at 385, 405-06.) Hope said he was trying to extract a confession, and Hardy confessed to him. (Tr. at 387.) Hope said Hardy's statements were inconsistent, but Hardy admitted that he shot Korjack and Orozco. (Tr. at 390, 409.)

Hope decided to be a witness against Hardy and took notes of their conversations. (Tr. at 372.) Hope wrote several letters to law enforcement, which were admitted at the hearing. (3/1/19 Hr'g, Def's Exs. J-L.)

Hope testified he told law enforcement in his first interview that he was trying to get information from Hardy and would let them know if he gained additional information. (Tr. at 412.) Hope explained that detectives returned for a second interview because he wrote them a note saying he needed to speak to them because Hardy had revealed more information. (Tr. at 391-92.) But Hope testified that the State never encouraged him to report on Hardy. (Tr. at 391-92, 410.)

Hope stated, "I'm doing what I did because he's remorseless for what he did." Hope explained, "I'm not doing this for gain, for a time off of my sentence, nothing. I'm doing this for the families because I know what he admitted to me." (Tr. at 392.)

Hope told detectives during his first interview that Hardy was worried blood spatter would be located on a television in his house and was worried about a bullet he could not locate after the shooting. (Tr. at 299, 329, 395, 406; 3/1/19 Hr'g, State's Ex. 4 at 16, 20, available at Appellant's App. G.) Cochran testified he applied for a search warrant to seize the television both because he knew from prior interviews there was likely blood spatter on a television, and because Hope described the television sufficiently for law enforcement to identify it. (Tr. at 226.)

It appears that information about the location of the television came from the second interview. (*See* Tr. at 226; Appellant's App. G at 16; Appellee's App. A at 6.)

Hope also told Cochran during the first interview that Hardy told him, "I walked in and shot the dude, two of them. One sitting on the couch and one was standing up." (Appellant's App. G at 4.) Hope later told officers that Hardy said he had burned a lot of things in a fire pit and that he was worried investigators would find bone fragments in the fire pit. When Hope asked Hardy what happened to the bodies, Hardy replied, "Poof. Up in smoke." (Tr. at 395.)

Hope said he did not read Hardy's paperwork when Hardy was absent, and Hardy always kept some of his confidential legal documents with him. (Tr. at 400-01.) Hardy eventually went through his legal documents with Hope. (Tr. at 401-02.) Hardy worked with Hope to try to fabricate a defense. (Tr. at 390, 403.)

4. John Braunreiter

Cochran testified that he interviewed John Braunreiter based on Orth's claim that Hardy had asked Braunreiter to kill a witness. (Tr. at 224.) Braunreiter told Cochran that Hardy had solicited him to kill a witness. (*Id.*; 3/1/19 Hr'g, State's Ex. 5 at 4-5.)

B. Arguments

The State argued that the inmates were not state agents because they were not acting at the direction of the State. (Tr. at 432, 438.) The State argued,

alternatively, that there was no ground to suppress statements Hardy made to any inmate before the inmate contacted law enforcement. (Tr. at 433-34.) The State argued that Orth and Hope did not become state agents between their first and second interviews because it did not have an affirmative duty to move the inmates away from Hardy after the inmates contacted law enforcement. (Tr. at 434-35.) The State also explained that Hardy's statements about his uncharged solicitation to commit homicide were not covered by the Sixth Amendment analysis that applied to his statements about his charged offenses. (Tr. at 437.)

Hardy argued evidence should be suppressed because the inmates informed law enforcement they were obtaining information from Hardy, and law enforcement allowed that to continue. (Tr. at 442-43, 450-51.) Hardy argued the inmates actively investigated him while he was represented by counsel. (Tr. at 444-45.) Hardy also argued that his statements were involuntary. (Tr. at 448.)

C. Order

The court issued a 36-page order denying Hardy's suppression. (Appellant's App. B.) The court found that Cochran, Orth, and Hope were truthful in their testimony. (*Id*. at 33.) The court also found that "Cochran did not suggest . . . that Orth and Hope were free to sift through [Hardy's] documents for further information. Cochran told the witnesses not to rifle through [Hardy's] documents." (*Id*. at 34.) The court further found that

> Cochran received information from Orth that Orth had obtained before meeting with Cochran. Orth was not motivated to inform on [Hardy] by anything other than his reaction to [Hardy's] parenting difficulties. Hope was motivated by a developed distaste for [Hardy.] These reactions do not disqualify testimony from informers who act on them to communicate information to the police, even if the speaker believed the discussion would remain confidential. *See*, *Hoffa v. United States*, 385 U.S. 293 (1966).

(Appellant's App. B at 34.)

Additionally, the court found the inmates did not search through Hardy's documents "in a way that resulted in sensitive information being transmitted to the detectives. Where important information was disclosed, [Hardy] either permitted it or endorsed the witness's reading it." (*Id*.)

Finally, the court concluded that the solicitations to commit homicide were "outside the scope of any possible abridgment of the right to counsel and may be admitted in evidence." (*Id*. at 35.)

II. The two homicides

A. Background

Karen and Hardy entered a relationship in California in the 1990's. (Tr. at 832-34). They later moved to Wyoming and lived together there for many years. (Tr. at 846, 853.) While Karen and Hardy were living together in Wyoming, they became friends with Thomas Korjack. (Tr. at 852-53.) Karen viewed Korjack as a father-figure. (Tr. at 860-61.)

Korjack had a Ph.D in engineering. (Tr. at 854-55, 1151.) Earlier in his life, he had a family and was well-employed in high-paying jobs. (Tr. at 1149-54.) Korjack became estranged from his family after he spent a year in prison for tax fraud. (Tr. at 1153-63.) He eventually started living with Hardy and Karen. (Tr. at 853.) During that time, Korjack earned significant money performing work in the petroleum industry. (Tr. at 855, 1472.)

Karen ended her relationship with Hardy and moved away when he transitioned to a woman and changed his name from Glenn Dibley to Caressa Jill Karen Hardy. (Tr. at 847-50, 982-83, 1468.) Hardy and Karen's child, Z.H., who was autistic and nonverbal, remained with Hardy. (Tr. at 851, 874, 946.)

Hardy convinced Karen to return to be with Z.H. (Tr. at 851, 983.) After Karen moved back in with Hardy and Korjack in Wyoming, she met Robert Orozco through Hardy. (Tr. at 861.) Karen viewed it as "love at first sight[.]" (Tr. at 862.) Orozco moved in within days, and they considered themselves married. (Tr. at 863.) Hardy became jealous of Orozco after he moved in with them. (Tr. at 865.)

B. Karen's report

In July 2016, Karen went to the police station in Sidney, Montana. She was trembling and crying, and she inquired about the witness protection program. She reported that she had seen Hardy commit a homicide in Missoula. (Tr. at

1375-77.) She believed she had seen Hardy in Sidney and was scared. (Tr. at 947, 1377.) She eventually provided the following information.

Around 2012, Korjack, Hardy, Karen, Orozco, and Z.H. moved to a home Korjack had purchased outside of Frenchtown, Montana. (Tr. at 873-77, 2218.) Korjack placed Hardy's name on the house deed. (Tr. at 875, 985.) Hardy, Karen, and Orozco all worked for Korjack and were financially dependent on him. (Tr. at 877, 881-82, 987.) Korjack ran a business doing home inspections, which Orozco helped with. (Tr. at 886-87, 990-91.) Hardy performed repairs when they located problems. (Tr. at 887.) They regularly traveled outside of Montana to perform inspections. (Tr. at 886.) Karen and Orozco also had a child named R.J. (Tr. at 870-71.)

Korjack's relationship with Hardy changed after Korjack discovered Hardy was in a homosexual relationship. Although Hardy had been dressing as a woman and had breast implants, Korjack was angry to discover Hardy in a homosexual relationship. (Tr. at 888-89.) Korjack began to treat Hardy differently and withdrew resources from Hardy, but Korjack still allowed Hardy to live there. (Tr. at 891-92.)

Korjack asked Hardy for the house deed because he wanted to remove Hardy's name. Hardy became stressed about Korjack wanting the deed and treating him differently. They began fighting often. (Tr. at 893-95.)

Around the same time, Korjack, Orozco, and Karen began looking for another home in a neighboring state where they were doing inspections. Hardy was afraid they were going to leave him. (Tr. at 894-95.)

One day in the spring of 2013, Korjack and Hardy argued upstairs about purchasing another home. (Tr. at 897.) Orozco, Karen, and Korjack went into a downstairs bedroom, where they discussed purchasing a new property and getting the deed from Hardy. (Tr. at 898, 902-03.)

Hardy entered the room and began arguing with Korjack. (Tr. at 903-04.) He then pulled out a gun and fired several shots toward Korjack and Orozco. (Tr. at 904.) Karen huddled in the corner with her infant, R.J., and begged Hardy not to kill her and the children. (Tr. at 904, 908.) Hardy kicked and hit Karen. (Tr. at 908.) Hardy's demeanor then changed, and he told Karen he would never hurt the children. (Tr. at 909.)

Korjack's body was lying near the door, and Orozco's body was on the bed. (Tr. at 910.) Karen noticed blood on the walls and a television and that the window had been broken. (Tr. at 906-07.)

Hardy led Karen upstairs. (Tr. at 909.) He pulled his bed into the living room and made Karen sleep on the couch. She remained terrified and shocked. (Tr. at 915-16.)

The next day, Hardy escorted Karen back downstairs, while armed, and let her get clothes and supplies. Both bodies were still in the room. (Tr. at 916-17.)

Hardy made Karen sleep in the living room for several days. He placed locks on doors so they could not be opened, and screwed windows shut. One morning, he placed a bullet or bullet casing on her pillow. Hardy repeatedly told Karen she would be better off if she killed herself. Hardy also took her phone. (Tr. at 918-920.)

Leading up to March 2013, Korjack had removed more than $200,000 from his bank accounts. He had placed significant cash and valuables in a safe in the basement. (Tr. at 883-85, 927-28.) After the homicides, Karen heard Hardy using power tools downstairs at night. When she saw the safe again, it had been cut open and was empty. (Tr. at 929.)

Shortly after the shootings, Hardy wanted Karen to go driving with the bodies during the night. Karen was scared and panicked, and it did not occur. Hardy began burning items in a fire pit outside of the house, including her bed. (Tr. at 920-21.) The fire burned day and night for days. Karen believed Hardy burned the bodies. (Tr. at 923.)

Hardy removed most of the things in the bedroom where the homicides occurred. He also replaced the broken window. (Tr. at 924-25.)

Karen did not think about seeking help when they went into town. She later explained that "after what he did and him having the gun, I wasn't going to make any waves[.] . . . I just didn't want him to kill me or hurt the kids or kill the kids." (Tr. at 926-27.)

Hardy relaxed his restrictions on Karen after an acquaintance named Lawrence came to the house. (Tr. at 925.) Lawrence later let Karen move in with him, and Hardy allowed her to do so. (Tr. at 932.) Karen took R.J. to live with Lawrence, but she knew Hardy would not let her take Z.H. (Tr. at 935.) Karen did not trust Lawrence enough to tell him what had happened. (Tr. at 933.) Lawrence later returned Karen to Hardy after Lawrence's home was burglarized. (Tr. at 934.) Karen was scared to return to Hardy, but she did so because she had nowhere else to go and needed to provide for her infant son. (Tr. at 936.)

When Karen returned, Hardy's sister, Rhonda, visited. Karen tried to secretly confide in Rhonda by giving her a letter telling her what had happened. Rhonda reported the letter to Hardy. Hardy was angry and acted like Karen was crazy. (Tr. at 935-37.)

Karen was looking for somewhere to go. (Tr. at 938.) Eventually, a woman invited Karen to live with her in eastern Montana. (Tr. at 939-40.) Hardy drove Karen and R.J. there. (Tr. at 940-41.) She talked to Hardy on the phone a few times, but never lived with him again. (Tr. at 944-45.)

Karen did not report the homicides at that time because she was afraid somebody would be harmed. Karen feared that if law enforcement went to arrest Hardy, he would draw his gun and Z.H. would get shot. (Tr. at 940-41.)

C. Corroboration unrelated to the inmates

Law enforcement investigated Karen's report and found evidence corroborating her claims. (*E.g.*, Tr. at 1604.)

1. Hardy's and Karen's actions

In the winter of 2012, neighbors saw Hardy, two other men, a woman, and two children at the Frenchtown property. After the spring of 2013, neighbors only saw Hardy and Z.H. (Tr. at 1020, 1023-25, 1062-64.)

During the spring of 2013, neighbors noticed a horrible smell coming from a fire on Hardy's property, which lasted a week. (Tr. at 1025-27, 1026, 1030, 1058.) The smell was different than burning garbage. (Tr. at 1027, 1033.) Instead, it reminded one neighbor of the smell from a burning deer carcass. (Tr. at 1027.) Another person described it as "absolutely rank. Unlike anything I've ever smelled." (Tr. at 1090.)

Hardy was worried about people coming on the property. He secured the property with a locked electric gate and had surveillance cameras. (Tr. at 1037, 1039-40, 1654.) Inside the home, there were deadbolt locks outside of bedroom

doors and bars on the windows. (Tr. at 1041, 1654.) Hardy also did excavation on the property at night. (Tr. at 1042.)

Hardy went on a spending spree, purchasing cars, snowplow equipment, surveillance equipment, and night vision goggles. (Tr. at 1043-44.) A few years later that spending stopped, and Hardy complained to a neighbor that he did not have money. (Tr. at 1052.)

Hardy hired acquaintances to work on the property around the summer of 2013. (Tr. at 1210-11.) One person cleaned out paperwork in the house with names other than Hardy's on it, including Orozco's name. (Tr. at 1212.) In the basement, carpet and sheetrock that had been removed were piled up. (Tr. at 1213.) The acquaintance took items to a pile outside to be burned, but Hardy did not want him near his fire pit. (Tr. at 1212-13, 1220.)

Hardy hired people to pour a concrete pad outside of the house that summer. (Tr. at 1198, 1214-15.) They noticed the property was gated and had cameras all over. (Tr. at 1199, 1216.) He paid them in cash. (Tr. at 1203, 1218.) They saw a woman, who was likely Karen, on the property when they were there. (Tr. at 1201, 1216.)

Hardy also hired Marvin Taber to perform work in 2013. (Tr. at 1344, 1346.) Karen told him she did not want to stay there and was looking for a partner. (Tr. at 1350-51.) Hardy told Taber he had a friend who had stayed with him who had

taken over $100,000. (Tr. at 1355.) Hardy asked Taber if he would like to go to California to kill "the SOB[and t]ake the money back." (Tr. at 1357.) Hardy said he would give Taber half of the money. Taber did not take Hardy seriously. (*Id*.)

Lawrence James McKinley corroborated Karen's claim that she had lived with him. He met Karen when he was visiting Hardy at the property. Karen told him she wanted to leave, but had nowhere else to go. Lawrence told her she could come to live with him. Later that day, Hardy drove Karen to Lawrence's home, along with her infant son. (Tr. at 1238-40.) While they lived together, Karen talked about missing her partner, "Robert." (Tr. at 1243.) Lawrence noticed that Karen acted like a person with PTSD. (Tr. at 1250.) Karen lived with Lawrence for several months. (Tr. at 1242.) He had her leave after his home was burglarized because he felt that she was not safe there. (Tr. at 1249-50.)

Hardy's cousin Rhonda, who he refers to as a sister, previously gave him about $1,500 when he needed help. (Tr. at 1265-66, 1270-71.) In 2013, Hardy mailed Rhonda $1,500 to repay what she had given him. (Tr. at 1278-81.) He also flew Rhonda and her sister to Missoula to visit him. (Tr. at 1279-84.) Hardy gave Rhonda and her sister each a gold and silver coin when they were there. (Tr. at 1284.)

Hardy paid for Rhonda to visit a second time in September 2013. During that trip, Karen and R.J. were at the house. (Tr. at 1287-88.) Hardy told Rhonda

Karen was there because she did not have anywhere else to go. (Tr. at 1292.) Before Rhonda left, Karen placed a letter on Rhonda's luggage asking Rhonda to take Karen and her child home with her to Arizona. (Tr. at 1296.) The letter said Hardy was responsible for Orozco's absence. (Tr. at 1311.) Rhonda did not believe Karen's claims and was confused by the letter because nothing gave her any indication anything "so horrendous" had occurred. (Tr. at 1298, 1302.) Rhonda told Hardy about the letter. Hardy seemed shocked and was angry at Karen. (Tr. at 1301-02.)

In 2012, a woman in Wyoming had arranged to buy a trailer home from Korjack. (Tr. at 1110-18.) Hardy later called her and told her to make the payments to him instead of Korjack. (Tr. at 1114-15.)

2. Absence of Korjack and Orozco

Law enforcement did not find any evidence that Korjack or Orozco were alive after March 2013. (Tr. at 1407-1420, 1447-63.) A good friend of Korjack's was unable to contact him after December 2012. (Tr. at 1127-28.)

Although Orozco's family members heard from him periodically before 2013, they did not hear from him after that. (Tr. at 1451-52, 1611-13.) In 2012, Orozco had reconnected with his daughter, J.O., and became more involved in her life. (Tr. at 1318-24.) Orozco and Karen visited J.O., and J.O. spent a week with him. (Tr. at 1321-24.) J.O.'s mother, Suzanne Kew, believed that Orozco was also

trying to reestablish a relationship with his mother, who lived with her. (Tr. at 1322.) Kew never heard from Orozco again after January 2013. (Tr. at 1329.) J.O. and Orozco's mother became concerned because it was unusual for him to not contact his mother. (Tr. at 1337.)

Missoula detectives later arranged for Kew to call Hardy to ask if he knew where Orozco was. (Tr. at 1332.) Hardy said he did not know anyone named Robert or Karen. (*Id*.; State Ex. 49, admitted at Tr. at 1537.)

3. Records

Mail addressed to Orozco and Korjack went to a post office box Hardy was collecting mail from. (Tr. at 1411, 1418, 1434-35.) The box was renewed in August 2016 with two checks from Korjack's account. (Tr. at 1418, 1425.) Both checks were typed, and the signature was similar to a stamp later located at Hardy's house. (Tr. at 1425-32; State's Ex. 45, admitted at Tr. at 1426.) The key to the mailbox was also located in Hardy's house. (Tr. at 1435.)

Korjack had several bank accounts, which contained over $600,000 at the time of his death. (Tr. at 1460, 1547.) He did not access those accounts after March 2013. (Tr. at 1461.)

Korjack earned over $800,000 from January 2011 to February 2013 from Sinclair Refining. (Tr. at 1472.) Korjack's bank records demonstrated that the money for the purchase of the home came from Korjack's account. (Tr. at

1476-77.) The records also corroborated Karen's report that Korjack had been removing money from his accounts. (Tr. at 1482.) During the first few months of 2013, he removed nearly $270,000 in cash from his accounts. (*Id*.) He purchased $119,000 in gold and silver around that time. (Tr. at 1483.) On March 26, 2013, Korjack withdrew $123,000 in a cashier's check, which was never cashed and was located in Hardy's home. (Tr. at 1484-86.)

Korjack's bank account at First Security bank was dormant for years starting in 2013, and accrued monthly charges because it was not used. In July 2016, First Security Bank issued Korjack a new debit card and checks. (Tr. at 1420-21, 1424, 1433, 1445, 1625.) After that, the account was used again. (Tr. at 1436-37, 1621.) Checks from one of Korjack's other accounts were used to increase the balance in the First Security account. These checks were typed and had a signature that matched the stamp found in Hardy's home. (Tr. at 1438-39.)

After First Security Bank learned that the use of the debit card may be fraudulent, the bank deactivated the account and left a message at Korjack's phone number indicating that he needed to come in to update his information. (Tr. at 1441, 1621-22.) Instead, a person presented Korjack's passport to a teller in the drive through and said he was trying to update the account for his uncle. (Tr. at 1442, 1622-23). Korjack's passport was later located in a safe in Hardy's home. (Tr. at 1442-43.)

A debit card from one of Korjack's other accounts was located in Hardy's home. Approximately $16,000 was spent out of that account starting in April 2013. Hardy's access to that account was cut off when the bank required updated identification, and it was not provided. The bank mailed Korjack a cashier's check for over $71,000 when it closed the account. That check was located in Hardy's home. (Tr. at 1506-10.)

Surveillance video from Walmart captured Hardy using Korjack's debit card from another account. (Tr. at 1443-44, 1511.)

One of Hardy's bank accounts had only a dollar in it around the time of the homicides. (Tr. at 1518.) After March 2013, Hardy deposited large amounts of money into that account. (Tr. at 1519, 1640.) Hardy quickly spent the money and was running out of money in 2016. (Tr. at 1446, 1531-33.)

The last outgoing call from Korjack's phone was made on March 26, 2013. (Tr. at 1488.) Neither Hardy nor Orozco called Korjack's phone after that date. (Tr. at 1491.)

4. Additional items located in the home during the search

A receipt demonstrated that Hardy purchased a window on March 28, 2013. (Tr. at 1191.) Glass fragments outside of the bedroom window corroborated Karen's report that Hardy shot it and replaced it. (Tr. at 1494, 1674.)

Inside the bedroom, officers discovered a bullet behind the drywall. (Tr. at 1495, 1674.) Elsewhere, officers located a .45 caliber pistol that fired the bullet in the wall. (Tr. at 1681, 1694, 1741-46.) They also found a safe in the basement that appeared to have been cut open. (Tr. at 1502-04, 1679.)

Officers seized a typewriter that matched the typeface used on the checks and stamps of Korjack's signature. (Tr. at 1430, 1439, 1659, 1666, 1669, 1685-87.) They also located identification documents for Korjack and Orozco. (Tr. at 1669.) Additionally, they located uncashed checks addressed to Korjack, including a $70,000 check. (Tr. at 1671.)

Officers discovered human bone fragments and a shell casing in the fire pit. (Tr. at 1501, 1652, 1663, 1682-84.) A burned mattress and box springs were nearby. (Tr. at 1500-01, 1684-85.)

Two dogs trained to alert to human decomposition independently alerted in one area of the property. (Tr. at 1723-28.) One dog also expressed interest in a white truck on the property but did not give a final response. (Tr. at 1500, 1729-31.) Swabs taken from that truck tested positive for blood. (Tr. at 2103.)

Korjack's Jeep was located on Hardy's property. (Tr. at 1412, 1648, 1653.)

5. Calls

Law enforcement arranged for Karen to conduct several recorded conversations with Hardy. (Tr. at 1539.) Karen confronted Hardy about killing

people, and Hardy repeatedly denied it. (State's Ex. 50, "6-27 1st actual contact incoming" at 3:45-4:10, "6-27 2nd actual contact" at 1:40-5:18, "6-27 3rd actual contact" at 0:00-1:00, admitted at Tr. at 1537.) When Karen accused him of taking all of the money, Hardy said that an out-of-state person had taken money from him. He asked her if she could help him to go get it, noting that he did not have anyone to watch Z.H. (State's Ex. 50, "6-28 call Dibley" at 8:25-11:40.) He expressed reluctance to talk over the phone, but told her he could probably give her $20,000 or $30,000 in cash if she helped him. (*Id*. at 11:00-11:40, 17:58-18:07.) He claimed that it was money he had earned doing construction. (*Id*. at 19:10-20.)

When Karen did not bring up the homicides during one of the calls, he thanked her for not bringing up "negative crap." (Tr. at 1547.) During one call, he stated that the "house was being threatened to be taken away from" them. (Tr. at 1543; State's Ex. 50, "6-28 call Dibley" at 2:55-3:40.) He then argued with Karen when she said Korjack would not have kicked Hardy out of the house. (State's Ex. 50, "6-28 call Dibley" at 3:40-5:25.)

III. Evidence gathered after homicide charges were filed

A. Subsequent search warrants

Anthropologist Dr. Kristen Green Mink identified some of the bones seized during the first search as human bones. (Tr. at 1764, 1769-71.) Dr. Mink and

several graduate students went back to the burn pit and rescreened the material with a smaller screen. They located additional human bone fragments. (Tr. at 1771-72, 1784.) Between the two searches, Dr. Mink identified three jaw bones, numerous teeth, and other bone fragments from a leg, vertebrae, fingers, and toes. Because there were two left jaw bones, she determined that the bones came from at least two different individuals. (Tr. at 1779-81.)

Officers also seized a television during a subsequent search. (Tr. at 1498-99, 1599, 1716.) Cochran obtained the television after an inmate, Hope, reported Hardy said a television with blood on it was still in the storeroom at the house. (Tr. at 2161-62.) The crime lab located blood on the television and determined, based on Korjack's son's DNA, that the DNA on the television had a high likelihood of being Korjack's. (Tr. at 2106, 2111-13, 2138.)

B. Evidence from the jail

Several inmates from the MCDF contacted law enforcement about their conversations with Hardy. Cochran testified that they were "witnesses," not "confidential informants," because he did not ask them to take any action on behalf of his office. (Tr. at 2203.) Cochran tells inmates when he speaks to them that he is not promising them anything in return for their statements. (Tr. at 2156.) Statements the inmates made to detectives were corroborated by statements from other inmates or by other means, such as the discovery of blood evidence on the

television. (Tr. at 2205.) Also, Hope provided information that was not public knowledge. (Tr. at 2160.) Inmates Orth, Palmer, and Hope were not housed together. (Tr. at 2206.)

Anton Orth testified that he took notes on Hardy's statements while they shared a cell. (Tr. at 1928-29.) Hardy made inconsistent statements to Orth about the homicide. (Tr. at 1934-35, 1937, 2007-08.) Hardy denied committing the homicides, but he also blamed Karen, whom he referred to as "the harlot," and said, "I shouldna never let her go." (Tr. at 1931-32, 1934, 1952.) Hardy claimed Orozco and Korjack were in a foreign country, but Hardy also asked Orth if he could figure out how to send a postcard from that country that appeared to be from them. (Tr. at 1939, 1961.) Orth recounted incriminating statements Hardy made, and testified that Hardy eventually explained why he had committed the offense. (Tr. at 1946-47, 1956-57.) Orth wrote law enforcement a note stating,

> He told me every thing happened so fast things were getting worse and worse for a few months with Tom and me—He was going to help . . . that harlot take my Z.H. Angel—Everything was fine till I let her back in my life—They were going to take my girl and I couldn't let that happen—Then I—then I heard them planning to move out so I stopped it—I almost killed her to but she had the baby.

(Tr. at 1957.)

Orth wrote another note saying Hardy broke down after watching a show that referred to the "smell of death." Orth said Hardy was "noticeably upset," and

> said that it had been 2 or 3 days after they were dead before he moved the bodies. When he picked up one of the—he said the bloat evacuated and said it had a stench that was so bad it gagged him intensely. That it was the most horrid stench you could ever imagine. He said that he put the bodies in a truck and moved it to the pit and that he'll never forget the smell of death.

(Tr. at 1959-60.)

Orth also said that Karen's contact information was in Hardy's discovery, and Hardy said he could pay Orth to make sure Karen did not testify. (Tr. at 1953.) Hardy then said he was kidding, but Orth did not believe he was. (*Id*.) Orth also testified that he heard Hardy offer Braunreiter $10,000 to kill Karen. (Tr. at 1954-56.)

Orth said Hardy complained that he had been betrayed by his best friend, Charles, who "got away with everything." (Tr. at 1951.) Orth also said Hardy talked to Braunreiter about Braunreiter getting the money back from Charles and keeping it as payment for killing Karen. (Tr. at 1959.)

Orth contacted law enforcement because he felt bad for the grieving family members. (Tr. at 1934, 1963.) Orth testified that Cochran did not promise him anything in exchange for his cooperation. Although he was sentenced to the Department of Corrections, rather than prison, Orth said he received a harsher sentence than he was originally offered. (Tr. at 1935-36.)

Palmer met Hardy after Hardy was housed with Orth. Palmer, who had a significant criminal history, allowed Hardy to review his legal paperwork when

they met. (Tr. at 2014-15, 2040.) Palmer testified that Hardy blamed his ex-girlfriend for his incarceration and offered Palmer about $10,000 to kill her. (Tr. at 2015-16, 2023.) Hardy told Palmer he wanted Karen to be shot in the head and unrecognizable. (Tr. at 2019.) Palmer believed Hardy was "very, very serious." (Tr. at 2020.) Palmer told law enforcement because he wanted to protect Karen. (Tr. at 2023-24.) Palmer also provided law enforcement with Hardy's Bible, which Hardy had left in Palmer's cell. In it, Hardy had written, "Death to the whore" and "Death to Karen." (Tr. at 2164, 2020; State's Ex. 102, admitted at Tr. at 2163.)

Hope shared a cell with Hardy after Hardy was housed in Palmer's pod. (Tr. at 2044.) Hardy seemed interested in talking to Hope because of his long criminal history. (Tr. at 2045-47.) Hardy asked Hope about luminol and told Hope he was worried about a television because it had blood all over it. (Tr. at 2048-49, 2070.)

Hope testified that Hardy eventually trusted him and told him what had happened, and Hope and Hardy discussed possible defenses. (Tr. at 2049, 2072.) Hardy told Hope he had been upset that Korjack, Orozco, and Karen were asking him for the house deed, and he heard them talking about moving away. Hardy also said he and Korjack bickered after Hardy disclosed his homosexuality. Hardy told Hope he decided he was done with it. Hardy said he went in the room and started arguing with the others about the deed. Hardy then asked if they wanted a war,

pulled out a gun, and began shooting. Hardy said he shot Korjack twice in the chest and then shot Orozco, who fell back on the bed. Hardy said he did not kill Karen because she was the mother of his child, but he beat her up and terrorized her. He told Hope he threatened to kill Karen if she told anyone and had screws mounted in the rooms to keep her in the house. Hardy also told Hope he left bullet casings next to Karen's pillow and would laugh when she woke up. Hardy told Hope he ground open the safe, which contained Korjack's money, gold, diamonds, and valuables. (Tr. at 2060-65.)

Hope testified that Hardy told him he moved the bodies in a white truck and then disposed of them. (Tr. at 2066.) Hope asked Hardy whether he had burned the bodies. Hope said Hardy smiled and said "Poof." (Tr. at 2067.) Hope testified that Hardy said he had committed the homicides using the .45 caliber handgun that law enforcement had seized. (Tr. at 2068-69.) Hope also said Hardy was worried he may have said something incriminating in his phone conversations with Karen. (Tr. at 2073.)

Hope reported Hardy's statements because Hardy lacked remorse, and Hope wanted to help the victims' families. Hope testified that he told his attorney he did not want anything in exchange for his statements. (Tr. at 2055-57.)

Officers also obtained four notes from jail staff that Hardy had attached to his cell wall. (Tr. at 2165-66.) They each had the names of Karen, Charles Beri,

inmate witnesses, or a prosecutor and investigators in the case. The notes contained stick-figure drawings and had several red X's over each drawing with "DOOMED!" written in red nearby. (Tr. at 2165-75; State's Exs. 103-1 to 103-8.)

Hardy also told a woman during a recorded call that her son, Charles Beri, had stolen a large amount of money from him. (Tr. at 2154.)

Hardy's counsel cross-examined Cochran about the inmates' credibility deficits. (Tr. at 2178-2200.) His counsel elicited testimony about the charges the inmates faced and any benefit they sought. (Tr. at 2184-85, 2191-95.) Palmer requested coffee and creamer and wanted Cochran to put in a good word for him. Cochran informed a prosecutor in Idaho that Palmer had cooperated with the State. Also, Orth stated that he was interested in "negotiations." (Tr. at 2191-92, 2194-95.) Hardy's counsel also asked about their cognitive and mental health problems, and Cochran acknowledged that Orth had memory problems. (Tr. at 2180, 2186.)

Hardy's counsel cross-examined Orth about the severity of the offense he was incarcerated on, his criminal history, his potential punishment, the sentence he received, and a prior case in which Orth had provided information to law enforcement. (Tr. at 1964-69, 2000-01.) Orth also acknowledged that he reviewed Hardy's legal documents and that he had a brain injury. (Tr. at 1976-77, 1985.)

Hardy's counsel elicited Palmer's recognition that he had lied to officers when he was arrested, he had memory problems and was schizophrenic, he had

served as an informant before, and he received coffee during his interview. (Tr. at 2027-31.) Palmer acknowledged that he asked for a deal in exchange for his testimony. (Tr. at 2037.) He also acknowledged that he had a DUI charge dismissed, but he said it was dismissed because he did not have drugs or alcohol in his blood. (*Id*.) Palmer testified that Cochran agreed to put in a good word with Palmer's probation officer. (Tr. at 2039.)

SUMMARY OF THE ARGUMENT

Orth and Hope properly testified, and the television containing blood spatter was properly admitted, because Orth and Hope were not government agents when Hardy spoke to them in jail. Significantly, neither inmate benefited from his testimony, entered into an agreement with law enforcement to gather information, or was directed by law enforcement to gather information. Instead, they were self-motivated witnesses to Hardy's statements. That did not change after either inmate spoke to law enforcement. Because neither Orth nor Hope became government agents, the admission of Hardy's statements to them, and the use of Hope's statements in a search warrant application, did not violate Hardy's Sixth Amendment right to counsel.

The court fully and fairly instructed the jury with the general credibility instructions. It did not err in refusing Hardy's instruction directing jurors to

carefully scrutinize the inmates' testimony. The instruction was unnecessary when the general credibility instruction was given and was improper because it treated all four inmates as informants without evidence that they benefited from their testimony.

The court did not violate Hardy's constitutional right by prohibiting him from arguing about Braunreiter's failure to testify when Braunreiter was not willing to cooperate to testify. Further, if the court erred in limiting Hardy's argument about Braunreiter, it was harmless because Hardy was allowed to argue the State's evidence did not satisfy its burden of proof and, regardless of the court's ruling, Hardy relied on Braunreiter's failure to testify to argue that the State did not prove beyond a reasonable doubt that Hardy solicited Braunreiter.

Finally, Hardy fails to demonstrate that his unpreserved prosecutorial misconduct claim should be reviewed under the plain error doctrine. Two of the witness statements he attributes to the State were made in response to general questions. Although a photograph of a gun was briefly and inadvertently shown, there was no reference to it at trial. Another document Hardy faults the State for admitting does not appear to have been shown to the jury. Hardy's arguments about the State's opening statement and closing argument raise issues that could have been corrected if he had objected, but he failed to do so. He fails to establish that he received an unfair trial.

If any error occurred, it is harmless beyond a reasonable doubt. Karen's eyewitness testimony describing the homicides was corroborated by irrefutable physical evidence, including the bone fragments of at least two people, a burned bed, a bullet in the wall, a safe that had been cut open, and blood on the truck. There was also no sign Korjack and Orozco had been alive in the last six years. Hardy obtained significant money after Karen said Korjack was killed, and Hardy spent money from Korjack's accounts. Karen's report of Hardy's motive was also corroborated by Hardy's recorded statement that he was going to lose the house. Even if Orth and Hope became government agents, their testimony about Hardy's solicitation of inmates to kill Karen was still admissible and provided support for all four counts. Further, the solicitation charges were corroborated by Hardy's writings in his Bible and notes on his cell wall. Thus, even if this Court finds an error, all of Hardy's convictions should be affirmed.

ARGUMENT

I. The court correctly denied Hardy's motion to suppress.

A. Standard of review

This Court reviews alleged violations of the constitutional right to counsel de novo. *State v. Zlahn*, 2014 MT 224, ¶ 13, 376 Mont. 245, 332 P.3d 247. This Court reviews the denial of a motion to suppress to determine whether the court's

factual findings are clearly erroneous and whether those findings were correctly applied as a matter of law. *State v. Conley*, 2018 MT 83, ¶ 9, 391 Mont. 164, 415 P.3d 473.

B. Hardy's right to counsel was not violated by conversations he had with inmates because they were not government agents.

The district court correctly concluded Hardy's statements were not deliberately elicited by government agents. A defendant's Sixth Amendment right to counsel is violated if a government agent deliberately elicits the defendant's statements without counsel present after his right to counsel has attached, which occurs when adversary proceedings commence. *Brewer v. Williams*, 430 U.S. 387, 400-01 (1977), citing *Massiah v. United States*, 377 U.S. 201, 206 (1964).

To demonstrate a Sixth Amendment violation, a defendant must demonstrate a government agent "took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." *Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986). "[T]he primary concern of the *Massiah* line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation." *Id*. The Sixth Amendment is thus "violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." *Maine v. Moulton*, 474 U.S. 159, 176 (1985). But a defendant does not make out a

Sixth Amendment violation "simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police." *Wilson*, 477 U.S. at 459 (internal citation omitted). The Sixth Amendment is not violated whenever the State obtains incriminating statements from the accused "by luck or happenstance." *Id*.

The Sixth Amendment was violated in *United States v. Henry*, 447 U.S. 264, 270-71 (1980), when a paid informant, who was paid only if he produced useful information, deliberately elicited Henry's statements while they were incarcerated together. Although an FBI agent instructed the informant to listen for information, but not to ask Henry questions, the Court concluded that the agent "must have known" that the paid informant was likely to elicit information. *Id*. at 271. The Court held that "[b]y intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel." *Id*. at 274. Conversely, a defendant's right to counsel was not violated in *Wilson* when law enforcement placed an informant into a defendant's cell and instructed the informant to report on the defendant's statements, and the informant reported the defendant's unsolicited statements that the informant had not deliberately elicited. 477 U.S. at 460.

For an informant to become a state agent, courts generally require either that the government have entered into an express or implied agreement to provide the

informant a benefit or provided direction to the informant. *See United States v. Johnson*, 338 F.3d 918, 921-23 (8th Cir. 2003) (holding that an informant becomes a government agent only when the informant has been instructed by the police to get information about a particular defendant); *United States v. Birbal*, 113 F.3d 342, 346 (2d Cir. 1997) (stating "Other circuits agree that an informant becomes a government agent . . . only when the informant has been instructed by the police to get information about the particular defendant."; holding a government informant in an unrelated case was not a government agent when he took Birbal's statements to police); *United States v. Taylor*, 800 F.2d 1012, 1016 (10th Cir. 1986) ("In the absence of any express or implied *quid pro quo* underlying the relationship between [the informant] and the Government, and in the absence of any instructions or directions by the Government, we hold that [the informant] was not a Government agent." (citation omitted)); *People v. Dement*, 264 P.3d 292, 319-20 (Cal. 2011) (held inmate who had agreed to provide information about prison gangs was not an informant even after he met with law enforcement about the defendant because he decided on his own to elicit information and was not promised any benefit); *Higuera-Hernandez v. State*, 714 S.E.2d 236, 239-40 (Ga. 2011) (placement of a prior informant into the defendant's cell without an agreement that he obtain information about the defendant did not render him a state agent, even if he hoped to obtain a benefit in exchange for the information he

provided to law enforcement); *Manns v. State*, 122 S.W.3d 171, 184 (Tex. Crim. App. 2003) (holding informant who had two meetings with law enforcement but was not promised any reward and was not asked to obtain information was not a government agent; stating all courts require that "the informant must at least have some sort of agreement with, or act under instructions from, a government official" to become a government agent); *Sincock v. State*, 76 P.3d 323, 333 (Wyo. 2003) ("[C]ase law from other jurisdictions overwhelmingly holds that an informant becomes a government agent so as to implicate the government in a right to counsel violation only when the government gives explicit directions or otherwise encourages the informant to obtain information.").

Several courts have held that an inmate does not become a government agent after the inmate informs law enforcement that the defendant has made incriminating statements if the inmate continues to gather additional statements from the defendant without being directed or encouraged by the government. *See Thomas v. Cox*, 708 F.2d 132 (4th Cir. 1983); *Taylor*, 800 F.2d at 1014-16; *Manns*, 122 S.W.3d at 176-89. In *Thomas*, the Fourth Circuit held that an inmate who obtained admissions from the defendant after meeting with law enforcement was not a government agent when the inmate was motivated by his curiosity and his conscience. Law enforcement told the inmate not to ask the defendant questions, to let the officer know if the defendant made additional statements, and that he was

not being promised anything. 708 F.2d at 133-37. The Court explained that *Henry* did not "establish the principle that any voluntary proffer of inmate informer assistance not met with silence or actually repudiated by state officials would make inadmissible any inculpatory disclosures arguably induced by the circumstances of confinement that are subsequently made by an accused in conversations with the inmate." *Thomas*, 708 F.2d at 137. Similarly, in *Taylor*, the Tenth Circuit held that an informant was not a government agent, even though he was placed in the defendant's cell after informing the FBI about the defendant's statements and then obtained additional admissions, because law enforcement did not make an agreement with him or promise him any benefit. 800 F.2d at 1014-16.

Courts have explained that an "inmate who elicits information on his own initiative with the hope of striking a deal with the government is an entrepreneur, not a state agent." *Manns*, 122 S.W.3d at 184 (citing cases in support); *see also Birbal*, 113 F.3d at 346 ("The Sixth Amendment rights of a talkative inmate are not violated when a jailmate acts in an entrepreneurial way to seek information of potential value, without having been deputized by the government to question that defendant.").

Consistent with those courts, the Ninth Circuit declined to disturb a state court finding that an inmate was not a government agent in *Brooks v. Kincheloe*, 848 F.2d 940, 942-45 (9th Cir. 1988), when the inmate asked the defendant

questions before and after meeting with law enforcement because he wanted to know why the defendant would commit the offense, and law enforcement did not promise him any benefit or ask him to elicit any information.

In contrast, the Ninth Circuit held in *Randolph v. California*, 380 F.3d 1133, 1139, 1143-47 (9th Cir. 2004), that Randolph's cellmate became a government agent after he sent prosecutors a letter asking for leniency, met with law enforcement, and then returned to the cell he shared with Randolph. The court concluded that the informant became a government agent because detectives knew or should have known that the informant believed he would receive lenience if he elicited incriminating statements from Randolph. *Id*. at 1147. The court relied on the informant's request for leniency to distinguish *Brooks*. *Id*.

The Sixth Circuit also concluded in *Ayers v. Hudson*, 623 F.3d 301, 315-16 (6th Cir. 2010), that under the circumstances of the case, an inmate became a government agent when he returned to a cell with the defendant and then elicited incriminating statements from the defendant. Unusual facts in *Ayers* led the court to conclude that law enforcement shared information with the informant during its meeting and may have directed the informant on questions to ask the defendant, which contributed to the court's conclusion that the informant became a government agent. *Id*. at 316.

Even if an informant becomes a government agent by meeting with law enforcement, statements the defendant made before the informant meets with law enforcement are not protected by the Sixth Amendment. *Randolph*, 380 F.3d at 1144. Further, because the Sixth Amendment right to counsel is "offense specific," it does not bar law enforcement from questioning a defendant about offenses that have not been charged, even if the defendant has been charged with other offenses. *Texas v. Cobb*, 532 U.S. 162 (2001). The right to counsel applies only to charged offenses or lesser-included offenses; it does not apply to other offenses that are factually related to the charged offenses. *Cobb*, 532 U.S. at 164-73.

The district court correctly concluded that none of the inmates were government agents. To begin with, none of the inmates could have been a government agent before speaking with law enforcement, so information inmates learned before speaking to law enforcement is admissible. *See Moulton*, 474 U.S. at 176; *Randolph*, 380 F.3d at 1144. And because the Sixth Amendment is implicated only after charges have been filed, Hardy's statements soliciting inmates to kill Karen were not protected by the Sixth Amendment. *See Cobb*, 532 U.S. at 172-73. Hardy appropriately does not challenge Palmer's testimony that Hardy solicited him to kill Karen. That testimony, along with Orth's testimony that Hardy solicited Braunreiter to kill Karen, was properly admitted.

The only issue is the admission of statements Hardy made to Orth and Hope after their first interview with law enforcement and evidence of the television, which was seized pursuant to a search warrant containing information Cochran learned from Hope during his second interview. The district court correctly admitted that evidence because Orth and Hope did not become state agents merely by meeting with law enforcement.

Significantly, Orth and Hope were not promised anything in exchange for information they provided. (Tr. at 205, 334; Appellant's App. D at 1; Appellant's App. G at 1.) Although Orth referred to "negotiations" in the first letter he sent to the county attorney (3/1/19 Hr'g Def.'s Ex. B, available at Appellant's App. C), he explained that he used that term because it came from his attorney. (Tr. at 423.) During his interview with law enforcement, he did not ask for leniency. (Appellant's App. D.) He testified that, "I wasn't asking for anything. They didn't promise me anything." (Tr. at 423.) He also testified that detectives discouraged him from doing what he had been doing. (Tr. at 427.) Detectives arranged to meet with Orth a second time to allow him to rely on notes that he had made but did not have access to during the first meeting, some of which were in the mail. (Tr. at 208-10; Appellant's App. D at 19-22.)

Hope did not ask for leniency and even told his attorney that he did not want anything in exchange for his information. (Tr. at 2057.)

Further, the court correctly found that Orth and Hope were both motivated by their dislike of Hardy. (Appellant's App. B at 34.) Orth became a witness against Hardy because Orth disapproved of the way Hardy had treated his child, and he wanted to locate the bodies to provide closure to the families of those killed. (Tr. at 353-56, 416-18, 1934.) Similarly, Hope testified that no investigator "encourage[d] me to act as an agent towards him. . . . I'm doing what I did because he's remorseless for what he did." (Tr. at 392.) Hope stated, "I'm not doing this for gain, for a time off of my sentence, nothing. I'm doing this for the families because I know what he admitted to me." (*Id*.)

The district court found that Cochran, Orth, and Hope were truthful when they testified at the suppression hearing, and Hardy has not demonstrated that that finding is clearly erroneous. (Appellant's App. B at 33.) This Court should not speculate that, despite their testimony to the contrary, Orth and Hope were motivated by a desire to obtain leniency. Further, even if they were, some courts have held that would not make them a state agent unless the State encouraged them to act on the State's behalf. *See Birbal*, 113 F.3d at 346; *Manns*, 122 S.W.3d at 184.

Because Orth and Hope were not promised any benefit in exchange for their testimony and were self-motivated by their dislike of Hardy and their desire to locate the bodies for the family members, their meeting with law enforcement did not transform them into state agents when they returned to the same location in the

jail and obtained additional information from Hardy. Indeed, this case is similar to cases in which courts held that inmates did not become government agents after they met with law enforcement and then gathered additional statements from the defendant. *See Thomas*, 708 F.2d at 133-37; *Taylor*, 800 F.2d at 1014-16; *Manns*, 122 S.W.3d at 176-89; *Brooks*, 848 F.2d at 942-45. These cases support the court's conclusion that Orth and Hope did not become government agents.

The cases Hardy relies on are not controlling and are distinguishable on their facts. Unlike Orth and Hope, the informant in *Randolph* specifically requested leniency from the prosecution from the beginning, which put law enforcement on notice that he was seeking to obtain information about the defendant in exchange for a benefit from the State. 380 F.3d at 1139. In *Ayers*, the court characterized the informant's testimony as inconsistent and unreliable and concluded that law enforcement either gave the informant information he used to obtain statements from the defendant or, even worse, specifically told the informant what questions to ask the defendant. 623 F.3d at 314-16. In *McBeath v. Commonwealth*, 244 S.W.3d 22, 28, 33 (Ky. 2007), law enforcement provided the informant a memorandum of understanding, which directed him to remember and report on the statements the defendant made, and they met with him seven more times. In *Depree v. Thomas*, 946 F.2d 784, 796 (11th Cir. 1991), the Court concluded that an

inmate might have become a state agent if a detective instructed him to gather information, which did not occur in this case.

Because Orth and Hope did not request a benefit, were not promised any benefit, and were not instructed to gather information, the district court correctly denied Hardy's motion to suppress evidence related to them, which includes their testimony at trial and the January 23, 2018 search warrant for the television.

C. Even if Orth and Hope became government agents, their testimony was harmless beyond a reasonable doubt.

A federal constitutional error that results in the improper admission of evidence does not require reversal of a conviction if the State demonstrates that the admission of the evidence is harmless beyond a reasonable doubt. *State v. Martell*, 2021 MT 318, ¶ 17, 406 Mont. 488, 500 P.3d 1233. In determining whether the admission of evidence was harmless, this Court considers "the importance of the witness'[s] testimony in the prosecution's case, whether the testimony was cumulative, and the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points." *Id.* (citation and quotation omitted). This Court looks "to whether the fact-finder was presented with admissible evidence that proved the same facts as the tainted evidence proved." *Id.*

Even if this Court concludes that Orth and Hope became government agents after their first interview with law enforcement and that their testimony and evidence about the television was improperly admitted, the eyewitness testimony

from Karen and the substantial evidence corroborating Karen's testimony demonstrates that the admission of Orth's and Hope's testimony was harmless beyond a reasonable doubt.

Karen's testimony alone was sufficient to establish Hardy's guilt for both homicide counts. Many compelling pieces of evidence corroborate her testimony, demonstrating that any testimony from inmates about the homicides was harmless. Most importantly, human bone fragments from at least two humans were located in Hardy's fire pit and the remains of a burned bed were nearby, corroborating Karen's belief that he had burned the bodies. Neighbors noticed a horrid smell resembling a burning carcass that lasted for days around the time Korjack and Orozco disappeared. Cadaver dogs also alerted to a location on the property. Karen's description of the homicide occurring in a basement bedroom was corroborated by the bullet located behind the drywall and evidence that the window had been replaced. And the damaged safe she said Hardy cut open was still in the house.

There was also no sign Korjack or Orozco were alive during the six years before the trial. They did not contact children or family members, use money in their bank accounts, or create any other record. Instead, there was evidence Hardy went on a spending spree after Korjack disappeared and was using Korjack's accounts.

Hardy's own recorded statement to Karen demonstrated his motive for the offense when he lamented that the "house was being threatened to be taken away from" them. (Tr. at 1543; State's Ex. 50, 6-28 call Dibley at 2:55-3:40.) And in a separate recording, Hardy suspiciously denied knowing Karen or Orozco. (Tr. at 1332.)

This evidence alone convincingly demonstrates that testimony from Orth and Hope was harmless beyond a reasonable doubt. But testimony demonstrating that Hardy solicited Braunreiter and Palmer to kill Karen was also properly admitted and supported the homicide counts, in addition to the two counts of soliciting homicide, by demonstrating consciousness of guilt. And even if Orth and Hope became government agents after meeting with law enforcement, they would be able to testify about statements Hardy made to them before they met with law enforcement. Orth's testimony that Hardy said, "I shouldna let her go," in reference to Karen was properly admitted. (Tr. at 1934; *see* Appellant's App. C.) Hardy also admitted to Hope before Hope's first law enforcement interview that he shot both men, and he told Hope he was worried about blood evidence on the television. (Appellant's App. G at 9-11, 16; *see also* Tr. at 2049, 2062-63.) Hardy's statements to Orth and Hope that were made before they met with law enforcement were properly admitted even if they later became state agents.

Further, while law enforcement relied on Hope's statements from the second interview to obtain the search warrant for the television, Hope's statements from the first interview, along with Karen's statement about the television, were sufficient to obtain a search warrant for the television. Given that Hope told law enforcement in the first interview that Hardy was worried about blood evidence on a television in the house, it is reasonable to assume that law enforcement would have obtained a search warrant for the televisions in the house.

Thus, if the court erred in admitting some of Orth's and Hope's testimony, the error was harmless.

II. The court fully and fairly instructed the jury.

A. Standard of review

This Court reviews jury instructions for abuse of discretion. *State v. Deveraux*, 2022 MT 130, ¶ 20, 409 Mont. 177, 512 P.3d 1198. This Court reviews instructions to determine whether, taken as a whole, the instructions fully and fairly instruct the jury as to the applicable law. *Id*. "If the instructions are erroneous in some aspect, the mistake must prejudicially affect the defendant's substantial rights in order to constitute reversible error." *State v. Gerstner*, 2009 MT 303, ¶ 15, 353 Mont. 86, 219 P.3d 866.

B. Facts concerning jury instructions

The court provided the model credibility instruction, which states, "You are the sole judges of the credibility, that is, the believability, of all the witnesses testifying in this case, and of the weight, that is, the importance, to be given their testimony." (Doc. 368, Instr. No. 3; Tr. at 766-67; MCJI No. 1-103.) That instruction further provided that,

> In determining what the facts are in the case, it may be necessary for you to determine what weight should be given to the testimony of each witness. To do this you should carefully consider all the testimony given, the circumstances under which each witness has testified, and every matter in evidence that tends to indicate whether a witness is worthy of belief. You may consider:
>
> 1. The appearance of the witnesses on the stand, their manner of testifying, their apparent candor, their apparent fairness, their apparent intelligence, their knowledge and means of knowledge on the subject upon which they have testified.
>
> 2. Whether the witnesses have an interest in the outcome of the case or any motive, bias or prejudice.
>
> 3. The extent to which the witnesses are either supported or contradicted by other evidence in the case.
>
> 4. The capacity of the witnesses to perceive and communicate information.
>
> 5. Proof that the witness has a bad character for truthfulness.

(*Id*.)

The instruction further stated that if a juror believed any witness had testified falsely, the juror could reject that testimony and view that witness's testimony with distrust. (*Id*.)

The court also instructed that

> The circumstances under which [a confession or admission] was made may be considered in determining its credibility or weight. You are the exclusive judges as to whether an admission or a confession was made by the Defendant, and if so, whether such statement is true in whole or in part.

(Doc. 368, Instr. No. 26; MCJI No. 1-119.)

Hardy offered a specific informant instruction, stating:

> [Testimony of Informants]
>
> You heard testimony from Anton Orth, Martin Hope, John Braunreiter, and/or Bryan Palmer. Their testimony was received in evidence and may be considered by you, but you should carefully scrutinize their testimony given and the circumstances under which each witness has testified, and ever matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness's intelligence, his motives, his access to secondary sources including the Defendant's paperwork, his state of mind, his demeanor and manner while on the witness stand. All evidence of a witness whose self-interest is shown from either benefits received, threats or promises made, or any attitude of the witness which might tend to prompt testimony either favorable or unfavorable to the accused should be considered with caution and weighed with care.

(Doc. 315, Def.'s Proposed Instr. No. 39.)

The State argued that the instruction improperly told the jury to distrust certain witnesses. (Tr. at 2412.) The court denied the instruction. (*Id*.)

C. The court's refusal of Hardy's informant instruction was not an abuse of discretion.

The court did not abuse its discretion when it provided the pattern instruction on credibility and refused Hardy's instruction directing jurors to view the inmates' testimony with caution. This Court has already held that a court is not required to instruct the jury to view testimony from an informant with caution. Instead, the general credibility instruction instructing jurors to consider "[w]hether the witness has an interest in the outcome of the case or any motive, bias, or prejudice[,]" fully and fairly instructs the jury on witness credibility. *State v. DuBray*, 2003 MT 255, ¶¶ 90-93, 317 Mont. 377, 77 P.3d 247. Thus, the court in *DuBray* did not abuse its discretion when it refused to give an instruction directing the jury to examine informant testimony "with greater care." *DuBray*, ¶¶ 89, 93.

DuBray reaffirmed this Court's holding in *State v. Long*, 274 Mont. 228, 907 P.2d 945, 947-49 (1995), that declining to give an instruction directing the jury to evaluate the testimony of a paid informant with caution is not an abuse of discretion when the general credibility instruction is given. This Court explained that "[d]istrict courts are given broad discretion in instructing the jury and while the defendant is entitled to have instructions on her theory of the case, she is not entitled to an instruction concerning every nuance of her argument." *Long*, 907 P.2d at 948. Because the general instruction adequately addresses motive, bias

and prejudice, it is not error for a court to refuse an instruction specific to informants. *Id.* at 949.

Further, federal law does not require the informant instruction. Although the United States Supreme Court approved of an instruction with similar language in *Hoffa v. United States*, 385 U.S. 293, 312 n.14 (1966), that instruction differs significantly. The *Hoffa* instruction directed jurors to carefully scrutinize the "circumstances under which *each witness* has testified," and "[c]onsider *each witness*' . . . motives[.]" *Id*. (emphasis added). It then directed jurors to consider testimony of a witness who is self-interested with caution. *Id.* The instruction left it to the jury to determine which witnesses were self-interested, similar to the general credibility instruction given in this case.

Conversely, Hardy's instruction directed jurors to carefully scrutinize each inmates' testimony. The instruction improperly suggested they were less credible merely because they were inmates, without evidence they had each obtained, or even sought, a benefit. While many federal courts have model jury instructions applicable to informant witnesses, a witness must be an informant for the instructions to be given. *See* 1A O'Malley, et. al., Federal Jury Practice and Instructions, Criminal, § 15.02 (6th Ed., 2008). The Ninth Circuit has stated that "[t]o be an informer the individual supplying information generally is either paid for his services, or, having been a participant in the unlawful transaction, is granted

immunity in exchange for his testimony." *United States v. Hoyos*, 573 F.2d 1111, 1116 (9th Cir. 1978). The *Hoyos* court held it was not error to refuse to give an informant instruction for a witness who was not a paid informant or an accomplice with a promise of immunity. *Id*. Other definitions of informant contemplate an agreement to obtain a benefit in exchange for information. The model instructions from the First, Sixth, Seventh, and Ninth Circuits all state that the jury has heard testimony that the informant received payment, immunity, or some other benefit in exchange for information. 1st Cir. Model Criminal Jury Instr. 2.08, available at https://www.ca1.uscourts.gov/sites/ca1/files/citations/Pattern%20Jury%20Instructions.pdf; 6th Cir. Model Criminal Jury Instr. 7.06A, available at https://www.ca6.uscourts.gov/sites/ca6/files/pattern_criminal_jury_full-22.pdf; 7th Cir. Model Criminal Jury Instr. 3.05, available at https://www.ca7.uscourts.gov/pattern-jury-instructions/pattern_criminal_jury_instructions_2020edition.pdf; 9th Cir. Model Criminal Jury Instr. 3.9, available at https://www.ce9.uscourts.gov/jury-instructions/node/839; *see also* O'Malley, § 15.02 at 364, 368, 370. The instructions do not apply to a witness who has not received such benefit.

The court did not abuse its discretion in refusing Hardy's informant instruction, in part, because it labeled all of the inmates as informants despite a lack of evidence that they provided evidence in exchange for any benefit. None

were promised leniency, and they gathered information without any direction from law enforcement. (Tr. at 334, 2156, 2203.) Indeed, Hope testified he did not want any benefit and wanted to help the victims' families. (Tr. at 2057.) Although Orth used the word "negotiations," (Appellant's App. C), he never sought any benefit. (Appellant's App. C; Tr. at 423.) Orth provided information because he sympathized with grieving family members. (Tr. at 1934, 1963.) While Hardy speculates that Orth received a benefit to his sentence, Orth refuted that, and there is no evidence he received leniency. (Tr. at 1935-36.) The only benefit any inmate received was Palmer, who received a cup of coffee and a statement to a prosecutor in another jurisdiction that he had cooperated. (Tr. at 2031, 2039, 2195.) That minimal benefit did not entitle Hardy to his proposed instruction stating that each inmates' testimony should be viewed with caution.

Further, even if the inmates were informants, federal law does not mandate the jury be instructed on Hardy's proposed instruction. The United States Supreme Court has directed that where the use of informers or "false friends . . . raise[s] serious questions of credibility[,]" defendants should have "broad latitude to probe credibility by cross-examination and to have the issues submitted to the jury with careful instructions." *On Lee v. United States*, 343 U.S. 747, 757 (1952); *see also Banks v. Dretke*, 540 U.S. 668, 701-02 (2004). But the Court has not specified

what instructions are required or held that the language in Montana's general credibility instruction is inadequate.

Significantly, the Ninth Circuit held in *United States v. Holmes*, 229 F.3d 782, 787-88 (9th Cir. 2000), that denying a specific informant instruction was not an abuse of discretion where a separate instruction directed jurors to consider whether a witness received money or benefits for his testimony. The court noted the informant was not the only strong evidence of the defendant's guilt and the jury was aware of the benefit the informant received. *Id*. Similarly, in *Hoyos*, the Ninth Circuit held that even if the witness was an informant, there was no prejudice in refusing to give the specific informant instruction because evidence of the witness's bias or prejudice was presented, and a general credibility instruction was given. 573 F.2d at 1116.

Even if the inmates were informants, the court did not abuse its discretion in denying the specific informant instruction. Hardy was able to thoroughly probe into any credibility concerns, including the punishment the inmates faced and any benefit they received. (Tr. at 1964-69, 2000-02, 2025-31, 2076-79, 2184-85, 2191-95.) He argued in his closing that the inmates should not be believed because they were criminals who had memory problems, had lied, and had targeted Hardy to obtain a benefit for themselves. (Tr. at 2471-2480.) He argued, "These informants are not fair or intelligent individuals. They wanted to get out of jail.

They certainly have bias and motive to lie. They both had criminal convictions for lying to the police." (Tr. at 2478.) The jury was well aware the inmates were incarcerated and had pending charges.

The general credibility instruction directed jurors to consider those circumstances when it judged the witnesses' credibility. Specifically, it instructed jurors to consider "the circumstances under which each witness has testified," "their knowledge and means of knowledge on the subject," and "[w]hether the witnesses have an interest in the outcome of the case or any motive, bias or prejudice." (Doc. 368, Instr. No. 3.) Because the general credibility instruction sufficiently instructed the jury, the court did not abuse its discretion when it declined to give the specific informant instruction.

Finally, even if the district court should have given Hardy's informant instruction, Hardy's convictions should be affirmed because he was not prejudiced by the refusal to give that instruction. Hardy was able to cross-examine witnesses about their credibility deficits, and the jury was adequately instructed to consider witnesses' self-interest. A specific instruction regarding informants would not have impacted the jury's verdict.

III. Hardy's right to present a defense and to counsel was not violated by the court's prohibition on arguing about Braunreiter's absence.

A. Facts concerning Braunreiter

Before trial began, the State informed the court that it planned to call Braunreiter to testify, but Braunreiter had indicated he would be disruptive if called. (Tr. at 503-04.) The State requested that the court admonish Braunreiter about the proper procedure outside the presence of the jury before his testimony. (Tr. 504.) The court indicated it was willing to do so but warned that the witness would likely ignore that. (Tr. at 504-05.) During the State's opening statement, it stated that Braunreiter told law enforcement Hardy told him he would pay him to kill Karen. (Tr. at 807-08.) The State did not subsequently call Braunreiter to testify.

Hardy's counsel later asked Cochran on cross-examination why Braunreiter was not called by the State. The court sustained the State's objection to the question. (Tr. at 2182.) When outside the presence of the jury, the State argued that Mont. Code Ann. § 46-15-325 prohibits a party from commenting on the other party's failure to call a witness. (Tr. at 2213.) Hardy argued that a jury instruction directs the jury to consider whether the State has offered the strongest testimony. (*Id*.)

When the issue was raised again, Hardy's counsel argued that he should be able to argue in closing that the State did not meet its burden of proof because it did not call Braunreiter to testify. (Tr. at 2343.) Hardy's counsel argued that under Mont. Code Ann. § 26-1-303, he could argue that the jury should view the evidence with mistrust because the State had the power to offer stronger and more satisfactory evidence. (Tr. at 2346-47.)

The court explained that if Braunreiter was not willing to take the oath and instead wanted to make an outburst, he could not be a witness. (Tr. at 2344, 2347-49.) The court believed that was why the State had not called Braunreiter. (Tr. at 2345.) The State confirmed that "that was part of it, yes, Your Honor." (*Id*.) The State later explained that Braunreiter's testimony would have been favorable to the State, but Braunreiter was not willing to cooperate and testify. (Tr. at 2348.) The State argued that if Hardy was allowed to comment on Braunreiter's absence, the State should be allowed to explain why he was not called. (Tr. at 2350.)

The court concluded that under Mont. Code Ann. § 46-15-325, a party cannot comment on the other party's failure to call a witness unless the court makes findings. The court concluded that the standard had not been met for Hardy to comment on Braunreiter's failure to testify. The court explained that Hardy could not use Braunreiter's absence to argue the State did not call him because his testimony would conflict with their charge when he would not cooperate and

therefore could not become a witness. (Tr. at 2345.) The court concluded that Hardy could not attribute the failure to produce Braunreiter to the State because the State wanted to call Braunreiter to testify but could not do so. (Tr. at 2350-51.)

Hardy personally insisted that Braunreiter be called to testify, but his counsel declined to call Braunreiter, noting that Braunreiter had previously said Hardy had solicited him. (Tr. at 2356-60.)

Despite the court's ruling, Hardy's counsel stated in his closing argument that "Count three is based on John Braunreiter. I drove to the prison to take Mr. Braunreiter's deposition. He refused to participate. He wouldn't even go under oath and talk to me." (Tr. at 2477.) The court sustained the State's objection to that statement. Hardy's counsel then asked, "Where is Mr. Braunreiter in this trial?" (Tr. at 2477-78.) The State again objected, and the court instructed the jury to disregard that argument. (*Id*.)

Hardy again referenced Braunreiter's absence when arguing the State had not met its burden of proof. Hardy argued the State "completely failed" to meet its burden of proof on the solicitation charges "based on these jailhouse informants with their serious character flaws, one of whom didn't even participate." (Tr. at 2480.)

B. Standard of review

This Court reviews a trial court's interpretation of a statute or a constitutional right de novo. *State v. James*, 2022 MT 177, ¶ 9, 410 Mont. 55, ___ P.3d ___.

C. Hardy waived this claim.

Although Hardy argued he should be able to argue about Braunreiter's absence, he did not raise a constitutional claim. (Tr. at 2213, 2346-51.) "[T]his Court will not address an issue raised for the first time on appeal. A party may not raise new arguments or change its legal theory on appeal. . . . [I]t is fundamentally unfair to fault the trial court for failing to rule on an issue it was never given the opportunity to consider." *State v. Martinez*, 2003 MT 65, ¶ 17, 314 Mont. 434, 67 P.3d 307 (citations omitted); *see also* Mont. Code Ann. § 46-20-104(2). Hardy also did not argue he should be able to argue about Braunreiter's absence because the State said he would testify during its opening statement. Hardy waived the arguments he makes on appeal about Braunreiter's absence, so this claim should not be considered.

D. Hardy's rights were not infringed.

If this Court considers this claim, it should conclude that prohibiting Hardy from arguing about Braunreiter's absence did not violate Hardy's right to present a defense or his right to counsel. The complete denial of a closing argument violates a defendant's right to counsel. *Herring v. New York*, 422 U.S. 853, 862 (1975). But a defendant's right to make a closing argument is not "uncontrolled or even unrestrained." *Id*.

> The presiding judge must be and is given great latitude in controlling the duration and limiting the scope of closing summations. He may

> limit counsel to a reasonable time and may terminate argument when continuation would be repetitive or redundant. He may ensure that argument does not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial.

Id.

Similarly, the right to present a defense "is subject to reasonable restrictions." *United States v. Scheffer*, 523 U.S. 303, 308 (1998). "[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Id*.

The record indicates the State believed Braunreiter's information would have been favorable to the State, but it did not call Braunreiter because he would not cooperate and testify. (Tr. at 2345, 2348.) Under those unusual circumstances, the court did not violate Hardy's constitutional rights by barring him from arguing the State had failed to produce Braunreiter. The court's ruling was within its latitude to limit a closing argument to ensure the fair and orderly conduct of the trial. The court reasonably agreed that Hardy should not be able to fault the State for failing to call Braunreiter when Braunreiter would not cooperate as a witness. Thus, the court did not err when it sustained the State's objection to Hardy's question, "Where is Mr. Braunreiter in this trial?" (Tr. at 2477-78.)

Significantly, the court did not limit Hardy's argument that the State's evidence on count three was insufficient to prove count three beyond a reasonable doubt. Indeed, Hardy made that argument, and even argued about Braunreiter's absence. Hardy's counsel argued, without objection, that the State "completely failed" to meet its burden of proof on count three because the "jailhouse informants" had "serious character flaws, one of whom didn't even participate." (Tr. at 2480.) Because he was able to argue the State's evidence was insufficient, his right to present a defense was not violated.

The court also correctly sustained an objection when Hardy's counsel told the jury that Braunreiter would not cooperate with his attempt to depose him. That statement violated the court's prior order and improperly told the jury information that was not in evidence.

Even if the court improperly prohibited Hardy from arguing about Braunreiter's absence, the error would be trial error and is harmless beyond a reasonable doubt. Automatic reversal is required only for structural error, which is a "rare type of error . . . that infect[s] the entire trial process and necessarily render[s] [it] fundamentally unfair." *Glebe v. Frost*, 574 U.S. 21, 23 (2014) (internal citations and quotation marks omitted); *see also State v. Van Kirk*, 2001 MT 184, ¶¶ 38-40, 306 Mont. 215, 32 P.3d 735. In contrast, an error in the presentation of the case to the jury is trial error, which may be harmless. *Van Kirk*,

¶ 40. "[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis." *Neder v. United States*, 527 U.S. 1, 8 (1999). A violation of the right to present a defense involving the improper exclusion of evidence is trial error subject to the harmless error analysis. *See Crane v. Kentucky*, 476 U.S. 683, 691 (1986); *State v. Mercier*, 2021 MT 12, 403 Mont. 34, 479 P.3d 967 (holding violation of the Confrontation Clause was harmless). This is similar, and harmless error should apply.

Herring does not stand for the proposition that a limitation on a closing argument is structural error. In reversing a grant of habeas relief from the Ninth Circuit, the Supreme Court pointed out in *Frost* that "even assuming that *Herring* established that *complete denial* of summation amounts to structural error, it did not clearly establish that the *restriction* of summation also amounts to structural error." *Frost*, 574 U.S. at 23-24 (*reversing Frost v. Van Boening*, 757 F.3d 910 (9th Cir. 2014)).

The Ninth Circuit concluded in *United States v. Brown*, 859 F.3d 730, 734-37 (9th Cir. 2017), that preventing a defendant from presenting a theory of defense is structural error, but that is distinguishable because Brown was prevented from arguing that the government did not prove an element of its case. That did not occur here. Further, the Ninth Circuit relied on its decision in *Frost v. Van Boening*,

757 F.3d at 916, which the Supreme Court severely criticized on related grounds in *Glebe v. Frost*, 574 U.S. at 23-25. That raises doubt about the validity of the Ninth Circuit's analysis.

And, the Ninth Circuit's holding in *Conde v. Henry*, 198 F.3d 734, 739 (9th Cir. 1999), is not as broad as Hardy claims. Instead, that Ninth Circuit held that a combination of errors, including preventing the defendant from arguing that an offense did not occur and that he lacked the intent to do it, deprived the petitioner of a fair trial and was structural error. *Id*. at 739, 741. *Conde* is distinguishable from this case where the defendant was allowed to, and did, argue that the State had not met its burden to prove he committed the offenses.

Instead, precedent from this Court and the Supreme Court demonstrates that the alleged error is subject to harmless error analysis. *See Crane*, 476 U.S. at 691; *Frost*, 574 U.S. at 23; *Van Kirk*, ¶ 40. A federal constitutional error does not require reversal if it is harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967); *see also Mercier*, ¶ 31.

The limitation on Hardy's closing was harmless because he was able to argue the State's evidence did not satisfy its burden of proof. Further, Hardy even pointed out that one of the inmates did not "participate" at trial, clearly referring to Braunreiter. The difference between what he was prohibited from arguing and was able to argue is minimal, and it did not prevent him from mounting his defense.

The alleged error is thus harmless beyond a reasonable doubt. Finally, even if the court erred and it was not harmless regarding count three, the alleged error should not impact the other three convictions that were not related to Braunreiter.

IV. Hardy has not met his burden to demonstrate that his prosecutorial misconduct claim should be reviewed under the plain error doctrine.

This court reviews unpreserved prosecutorial misconduct claims only if the claim implicates the defendant's fundamental rights and the defendant demonstrates that failing to review the claim may result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the proceedings, or compromise the integrity of the judicial process. *State v. Haithcox*, 2019 MT 201, ¶ 23, 397 Mont. 103, 447 P.3d 452. This court invokes plain error review "sparingly, on a case-by-case basis, according to narrow circumstances, and by considering the totality of the circumstances." *Id*. (quotation marks and citation omitted).

"A prosecutor's 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." *Haithcox*, ¶ 24 (quotation marks and citation omitted). But this Court will not reverse a conviction for prosecutorial misconduct unless the defendant shows that the prosecutor's conduct violated his substantial rights. *Id*. "'[I]t is not enough that the prosecutors' remarks were undesirable or even universally

condemned.'" *Id*., quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). "[T]he relevant question is whether the comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Haithcox*, ¶ 24. A few imperfect statements or questions asked over the course of a nine-day trial do not meet that standard.

Hardy has not demonstrated that his complaints should be reviewed under the plain error standard. To begin with, two witness statements Hardy faults the prosecutors for were not directly elicited by the prosecutors. First, a serologist responding to the prosecutor's request to summarize what he had done mentioned a sexual assault kit in a list of things that he analyzed. (Tr. at 2105.) There was no testimony directly relating the sexual assault kit to Hardy or his daughter. Without that context, it was a brief and harmless reference.

Second, a prosecutor asked the officer who interviewed Karen in Sidney about her demeanor. The officer responded that she

> was obviously very emotional, very upset, and [was] showing indications of fear just based—like the visible trembling that she was showing and her voice was shaky at times, especially when she was going into intimate details about the homicides.
>
> But throughout the entire account of the interview, she seemed very specific and detailed to the point where she was believable to us.

(Tr. at 1381.)

While the statement that Karen was believable was improper, the question the prosecutor asked, and most of the officer's answer, properly addressed the fear Karen demonstrated.

Two other photographs Hardy challenges were never discussed at trial. A photo of an assault rifle appeared "for a few seconds" during the State's presentation of crime scene photographs. (*See* Tr. at 1688.) The prosecutor explained it was "inadvertent certainly," and he had believed it had been removed from the disk. (Tr. 1689.) No comment was made about it to the jury. (*Id*.)

Hardy argues that the State erroneously admitted a letter denying Hardy's passport application based on an arrest warrant. But only a photograph of that letter is in the record, and it was one of 208 documents contained on a disk admitted at the same time as ten other disks. (State's Ex. 53; Tr. at 1423.) There is no indication the letter was ever displayed to the jury or that the jury had the ability to view photographs contained on the disk that were not displayed in the courtroom.

While there may have been two inadvertent statements made by a witness or a photograph inadvertently shown during the nine-day trial, there is no indication the prosecutors intentionally violated an order or that these incidents rendered the trial unfair.

Hardy's other criticisms also fail to establish prosecutorial misconduct. Each party may provide an opening statement outlining the evidence it intends to

present if the "statements are made in good faith and with reasonable ground to believe the evidence is admissible." *State ex rel. Fitzgerald v. District Court*, 217 Mont. 106, 122-23, 703 P.2d 148, 158 (1985). In the opening statement, the prosecutor summarized the evidence, including statements that had been made. While it would have been better for the prosecutor to frame the evidence as testimony the State believed would be presented, Hardy did not object. Had he done so, the prosecutor could easily have reframed her statements. Regardless, statements from the prosecutor were plainly the summary of the evidence the State expected to give, rather than evidence for the jury to consider. That did not deprive Hardy of a fair trial.

While Braunreiter did not subsequently testify, the State's request for the court to admonish Braunreiter before his testimony indicates the State planned to call him. Its later failure to do so does not establish the State acted in bad faith.

Similarly, the State's presentation of Karen's prior statements does not constitute prosecutorial misconduct. While prior consistent statements are not admissible for the truth of the matter asserted, they may be admissible to explain how and why an investigation proceeded. *City of Billings v. Nolan*, 2016 MT 266, ¶ 28, 385 Mont. 190, 383 P.3d 219. The statements elicited by the prosecutor explained the reason for the search of the property and why evidence was seized that corroborated Karen's story. (*See* Tr. at 1379-80.) The prosecutor stated that

the statements were not offered for the truth of the matter asserted. (Tr. at 1378.) Even if the questions were broader than necessary, they did not result in an unfair trial. Karen provided the same testimony at trial, and her prior statements, if erroneously admitted, were harmless. *See State v. Mensing*, 1999 MT 303, ¶ 18, 297 Mont. 172, 991 P.2d 950 (stating that prior consistent statements are harmless where the declarant testifies at trial).

Finally, the prosecutor's closing argument appropriately emphasized the many sources of evidence corroborating Karen's story, both witness testimony and physical evidence. (*See* Tr. at 2440-61.) As part of that discussion, the prosecutor stated that "it's not just Karen that has to be making this up for the defendant's story to be true." (Tr. at 2460.) The prosecutor then stated that the witnesses who provided testimony about Hardy's actions after the homicides "would have to be lying," along with the inmates. (*Id*.) He also pointed out the physical and financial evidence that supported Karen's story. (Tr. at 2461.)

The prosecutor's statement that each witness had to be lying for Hardy's story to be true was an exaggeration, but it was an argument about the amount of evidence corroborating Karen's testimony. The prosecutor never suggested that the jury should ignore the State's burden of proof or that the jury had to find that anybody lied to acquit Hardy. The jurors were repeatedly instructed that they had to find Hardy guilty beyond a reasonable doubt to convict. (Doc. 368, Instr. Nos.

4, 21-22, 24-25.) Jurors are presumed to follow the law, and the prosecutor's argument did not rebut that presumption.

Hardy has not met his burden to demonstrate failing to review the claim may result in a manifest miscarriage of justice. If reviewed, the claim should be denied. If some imperfections occurred during the nine-day trial, they did not impact the outcome or result in a fundamentally unfair trial. Hardy has thus failed to establish prosecutorial misconduct.

CONCLUSION

Hardy's convictions for homicide and solicitation to commit homicide should be affirmed. If this Court concludes that any error occurred, the convictions for homicide, at a minimum, should be affirmed because any error would be harmless as to those convictions given the overwhelming evidence of Hardy's guilt.

Respectfully submitted this 6th 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 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 16,937 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, Mardell Lynn Ployhar, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 10-05-2022:

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