

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0215

---

STATE OF MONTANA,

Plaintiff and Appellee,

v.

BRUCE ALAN GARAY,

Defendant and Appellant.

---

**BRIEF OF APPELLEE**

---

On Appeal from the Montana First Judicial District Court,  
Lewis and Clark County, The Honorable Michael McMahon, Presiding

---

APPEARANCES:

AUSTIN KNUDSEN  
Montana Attorney General  
BREE GEE  
Assistant Attorney General  
215 North Sanders  
P.O. Box 201401  
Helena, MT 59620-1401  
Phone: 406-444-2026  
Fax: 406-444-3549  
Bree.gee2@mt.gov

LAURA REED  
Attorney at Law  
P.O. Box 17437  
Missoula, MT 59808-7437

ATTORNEY FOR DEFENDANT  
AND APPELLANT

LEO GALLAGHER  
Lewis and Clark County Attorney  
STEPHANIE ROBLES  
Deputy County Attorney  
Courthouse – 228 Broadway  
Helena, MT 59601

ATTORNEYS FOR PLAINTIFF  
AND APPELLEE

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iii

STATEMENT OF THE ISSUE.....1

STATEMENT OF THE CASE.....1

STATEMENT OF THE FACTS .....2

    Expert witness testimony .....2

    Facts involving the commission of the crime .....5

    Law enforcement investigation of the crime .....10

    Garay’s first motion for mistrial .....12

    Garay’s second motion for mistrial .....14

    Officer Scavone’s interview with Garay .....17

    Garay’s third motion for mistrial.....19

SUMMARY OF THE ARGUMENT .....21

ARGUMENT .....21

I.    The district court properly and within its discretion denied Garay’s  
    motions for mistrial.....21

    A.    Standard of Review .....21

    B.    The alleged errors do not warrant reversal of Garay’s conviction.....22

        1.    Garay was not prejudiced by L.S.’s mention of Garay’s  
        past incarceration .....23

        2.    The district court properly exercised its discretion when it  
        allowed L.S. to testify about her own drug use under the  
        transaction rule .....24

        3.    Garay cannot establish his right to a fair trial was prejudiced,  
        so the cumulative error doctrine does not require reversal of  
        his conviction .....28

CONCLUSION .....32

CERTIFICATE OF COMPLIANCE .....33

## TABLE OF AUTHORITIES

### Cases

<i>Bircher v. BNSF Ry. Co.</i> , 2010 MT 121, 356 Mont. 357, 233 P.3d 348 .....	23
<i>State v. Brush</i> 228 Mont. 247, 741 P.2d 1333 (1987) .....	22
<i>State v. Denny</i> , 2021 MT 104, 404 Mont. 116, 485 P.3d 1227 .....	23, 31
<i>State v. Detonancour</i> , 2001 MT 213, 306 Mont. 389, 34 P.3d 487 .....	13, 26, 27
<i>State v. Erickson</i> , 2021 MT 320, 406 Mont. 524, 500 P.3d 1243 .....	22, 31
<i>State v. Favel</i> , 2015 MT 336, 381 Mont. 472, 362 P.3d 1126 .....	23
<i>State v. Gunderson</i> , 2010 MT 166, 357 Mont. 142, 237 P.3d 74 .....	23
<i>State v. Krause</i> , 2021 MT 24, 403 Mont. 105, 480 P.3d 222 .....	22
<i>State v. LaFournaise</i> , 2022 MT 36, 407 Mont. 399, 504 P.3d 486 .....	22-23
<i>State v. Long</i> , 2005 MT 130, 327 Mont. 238, 113 P.3d 290 .....	23
<i>State v. Partin</i> , 287 Mont. 12, 951 P.2d 1002 (1997) .....	20
<i>State v. Pulst</i> , 2015 MT 184, 379 Mont. 494, 351 P.3d 687 .....	27
<i>State v. Saylor</i> , 2016 MT 226, 384 Mont. 497, 380 P.3d 743 .....	13-14, 26

<i>State v. Smith</i> , 2020 MT 304, 402 Mont. 206, 476 P.3d 1178 .....	28-29
<i>State v. West</i> , 252 Mont. 83, 826 P.2d 940 (1992) .....	23
<i>State v. Wing</i> , 264 Mont. 215, 870 P.2d .....	26-27
<i>State v. Wood</i> , 2008 MT 298, 345 Mont. 487, 191 P.3d 463 .....	29
<i>State v. Zimmerman</i> , 2018 MT 94, 391 Mont. 210, 417 P.3d 289 .....	22

**Other Authorities**

Montana Code Annotated

§ 26-1-103 .....	13, 26
§ 45-5-215(1)(a) .....	1
§ 46-23-501 .....	1

Montana Constitution

Art. II, § 24 .....	22
---------------------	----

Montana Rules of Evidence

Rule 403 .....	14, 27
----------------	--------

United States Constitution

Amend. IV .....	22
-----------------	----

*5 Am. Jur. Appellate Review*

§ 624 (2007) .....	29
--------------------	----

## **STATEMENT OF THE ISSUE**

Did the district court properly exercise its discretion when it denied Appellant's motions for mistrial based upon his claim of multiple inadmissible witness statements?

## **STATEMENT OF THE CASE**

On September 23, 2019, the State charged the Appellant, Bruce Alan Garay (Garay), with: Count I, Strangulation of a Partner or Family Member (1st offense), a felony; and Count II, Strangulation of a Partner or Family Member (2nd offense), a felony, both in violation of Mont. Code Ann. § 45-5-215(1)(a), to have occurred on or about April 7, 2019. (Doc. 4.)

A jury trial was held October 30, 2020, through November 5, 2020. (Doc. 169; 10/30/20-11/05/20 Jury Trial Transcript [Tr].) The jury found Garay not guilty of Count I and guilty of Count II. (Doc. 169; Tr. at 808.)

On February 9, 2021, the court sentenced Garay to the Department of Corrections (DOC) for five years with no time suspended. (Docs. 164, 169.) The court ordered Garay to register as a violent offender under Mont. Code Ann. § 46-23-501, *et. seq.*

## STATEMENT OF THE FACTS

The evidence presented at trial consisted of testimony from licensed clinical psychologist, Dr. Sheri Vanino (Dr. Vanino), a responding officer, Helena Police Officer Jacob Scavone (Officer Scavone), follow-up investigating officer, Helena Police Department Sergeant Adam Shanks (Sgt. Shanks), the victim, L.S., the victim's sister, Anna Snedeker (Anna), State Exs. 1 and 2, photographs of L.S.'s facial injuries taken on April 7, 2019, State's Exs. 3 and 3A, audiovisual recording and transcript of Officer Scavone's interview with Garay on November 9, 2019, State's Exs. 5 and 6, and photographs of L.S.'s facial injuries. (*See* Tr. Doc. 140, State's Exs. 1-6.)

Garay called no witnesses. (Tr. at 689.)

### **Expert witness testimony**

The State's first witness was Dr. Vanino, a licensed clinical psychologist who specializes in working with survivors of psychological trauma. (Tr. at 301.) Dr. Vanino testified that she provides training all over the country on "issues of understanding trauma victim behavior, especially sexual assault victim behavior." (*Id.* at 302.) Dr. Vanino explained that she has trained military judges, police officers, FBI agents, and other mental health providers "in understanding why victims behave the way they do." (*Id.* at 303.) Dr. Vanino clarified that she was a "blind expert," so the purpose of her testimony was to educate the jury, "and then

the jury can do what they need to do with the facts of the case that are presented.” (*Id.* at 307.) Dr. Vanino explained that she was not testifying about the credibility of any particular witness, had not met any of the witnesses, and did not know the facts of the case. (*Id.* at 306.)

Dr. Vanino testified that “domestic violence” occurs between two people who are in an intimate relationship, to include dating. (Tr. at 308.) She stated that the offender in a domestic violence situation “over time kind of micromanaging, manipulating, and controlling the victim as a way to have power over them.” (*Id.* at 309.) Dr. Vanino said, “from a psychological perspective, the violence is kind of the pinnacle of it, but usually there is . . . . all this abusive psychological behavior going on. (*Id.* at 318.) She testified that sometimes offenders tell their victim that if the victim reports them to the police, the offender will tell the police it was the victim who abused them and will get them in trouble. (*Id.* at 316.) When the State asked Dr. Vanino about a victim of domestic violence getting tattoos of the offender’s name, Dr. Vanino responded that victims often spend years trying to make sense of what happened with the offender and getting a tattoo of the offender’s name was a common response to that confusion. (*Id.* at 319.)

Dr. Vanino then described the effect of trauma on a victim’s memory. (Tr. at 323-30.) She explained that traumatic experiences cause a person’s brain to release chemicals, which often causes the person’s logical frontal lobe to shut

down. (*Id.* at 323.) The frontal lobe also controls a person’s sense of time. (*Id.* at 324.) Dr. Vanino testified that “what we end up seeing with traumatic memory is that people will often have instead of . . . whole memories where there is a start and an end to it, oftentimes people will have fragmented memories of trauma, and they might describe it like . . . flashes, images, sensations, and it is not as coherent.” (*Id.* at 325.) Dr. Vanino stated that it takes about two weeks for a traumatized person’s brain to “balance back out and function completely normally.” (*Id.* at 327.)

Dr. Vanino also explained that it is very common for victims of domestic violence and sexual assault to not tell their story immediately to law enforcement. (Tr. at 331.) She testified that sometimes it is difficult for female victims to disclose the abuse to male police officers, and that “it’s not uncommon for someone to leave out the most embarrassing part of the story.” (*Id.*) She said that if an event was particularly embarrassing or degrading, they may omit it from their report, partly because they do not want to admit it to themselves. (*Id.* at 332.)

Dr. Vanino clarified that “none of us ever tell the exact same story of something twice . . . [because] memory just doesn’t work like that.” (Tr. at 332-33.) She explained that a victim’s level of disclosure depends on “how much they come to terms with it themselves[,]” and many of her clients “come in and

don't tell me the most embarrassing details for six months into treatment, [even though] I'm their therapist." (*Id.* at 333.)

### **Facts involving the commission of the crime**

L.S. testified on direct examination that she first met Garay in 2011, then rekindled a long-distance relationship with him in December 2018. (Tr. at 395.)

L.S. reported that Garay visited her in March 2019, when they traveled to Bozeman to spend a weekend celebrating Garay's son's birthday. (*Id.* at 399-400.)

L.S. reported that though the visit started off well, Garay suddenly "took my cell phone and began questioning me about who I was talking to . . . and suspecting of me cheating . . . and, yes, kept me from my cell phone." (*Id.* at 400-01.) L.S.

testified that Garay's demeanor changed and "[i]t got very scary." (*Id.*) Although Garay was scheduled to return to California shortly after the weekend trip, "he stayed longer than planned." (*Id.* at 405.)

L.S. explained that Garay's jealousy escalated during that visit and he did not allow her to leave her apartment the following week. (*Id.* at 406.) She said that Garay would not allow her to go outside to smoke a cigarette and barely allowed her to leave her bedroom because he was questioning her about who she was talking to and who the men were on her phone. (*Id.*) L.S. then testified that Garay forced her to call a number in her phone belonging to a man to prove she had cheated on Garay with him. (*Id.* at 408-09.)

L.S. then shared that on Saturday, April 6, 2019, Garay put his arm around her neck, strangling her until she lost consciousness. (*Id.*) She said she hurt her foot on a table next to her bed while trying to kick her way out of Garay’s grasp. (*Id.* at 414.) She remembered regaining consciousness and then sitting with her son Ayden in his bedroom, trying to “make everything normal for Ayden.” (*Id.* at 416.)

L.S. testified that the next day she, Garay, and Ayden were driving in her car to go fishing. (Tr. at 416.) During the drive, L.S. said that Garay started “being mean,” although she did not remember everything he said. (*Id.* at 416-17.) She “wanted him out of the car.” (*Id.* at 417.) L.S. testified that she “leaned over and opened the door and . . . made [Garay] get out, told him to get out, and he did.” (*Id.*) Thereafter, she and Ayden went fishing. (*Id.*)

On her way to the hotel, L.S. went to her bank and “cleaned out her checking account” because “I just had a feeling I needed to.” (Tr. at 417.) L.S. said she did so because a few days earlier she found Garay on her laptop looking at Google Maps, which showed all of her movements from that day, including the gas station, Ayden’s daycare, and her workplace. (*Id.* at 419-20.) Garay had taken her cell phone from her that evening because he did not believe she had been where she said she had been. (*Id.*) Garay had accessed her Google account and changed her passwords to her email and social media accounts. (*Id.*) Thus, she was concerned that Garay also had access to her bank accounts. (*Id.* at 420.)

L.S. testified she then booked a hotel room for herself and Ayden because she “didn’t want to be home” because “based on everything that had happened and his behavior . . . . I felt not safe.” (*Id.* at 418, 420.) Upon leaving the hotel the next day, L.S. testified that she “went to Bob Ward’s, and I bought a gun[.]” because she “did not feel safe anymore.” (*Id.* at 421.) L.S. then returned home to her apartment with Ayden, where she “saw there was incense burning on my dresser . . . . and Bruce was . . . . in my bedroom doorway.” (*Id.* at 422.) L.S. testified that she was “shocked,” and that his presence took her by surprise because she had never given him a key or left a key behind for him. (*Id.* at 424, 422-23.)

Garay told L.S. he believed she had taken Ayden to stay with someone else the night before so she could “go out and party or sleep with somebody[.]” (*Id.* at 424.) L.S. testified that Garay pushed her down and that she “remember[ed] seeing his eyes . . . .[t]hey were so angry.” (*Id.* at 425.) L.S. remembered hitting the floor and getting a rug burn on her elbow. (*Id.*) She tried to get up but Garay would not allow it. (*Id.*) She was finally able to go outside on the back porch and smoke a cigarette, but Garay stood at the bottom of the stairs and “it was very clear . . . . that I could not run or move[.]” (*Id.* at 427-28.)

Once inside, Garay put his arm around her neck as she walked toward Ayden’s room. (Tr. at 429.) L.S. testified that she felt she was about to die because she instantly could not breathe. (*Id.*) L.S. stated that “[A]ll I could do is put my feet up

again[st] the refrigerator and kick off of it.” (*Id.* at 430.) L.S. testified that she was unsure about what transpired between kicking off against the refrigerator and walking into Ayden’s room, but when she awoke, she had a cut above her right eye and “there was just blood dripping down my face like crazy.” (*Id.* at 431.) L.S. said that Garay then apologized to her. (*Id.* at 432.)

L.S. then testified that upon regaining consciousness while in Ayden’s room, Garay shoved a “rock of meth” in her mouth. (Tr. at 433.) She described it: “[Garay] was, like, behind me or next to me. He had his arm around me, like, kind of just holding me, and took it out of his pocket and put it in my mouth and made me—and moved my jaw so that I crunched it up.” (*Id.*) L.S. then stated Garay was apologetic and started caring for her face. (*Id.* at 435.) Garay then left the apartment while L.S. sat on the couch, crying and getting high from the “chunk” of meth he had forced her to ingest. (*Id.* at 436.)

L.S. then explained that she spoke with her mother on the phone, who told her that Anna, L.S.’s sister, was going to go get L.S. from her apartment. (Tr. at 457.) L.S. shared that Anna wanted her to go to the hospital, but L.S. “was scared, so [she] didn’t want to go right then.” (*Id.* at 457-58.) L.S. admitted she was under the influence of the methamphetamine, but that the drug did not affect her memory. (*Id.* at 458-59.) L.S. testified that she ate psychedelic mushrooms on the way to the

hospital because she was panicked. (*Id.* at 460-61.) She said that once she arrived at the hospital she asked to speak to a police officer. (*Id.* at 461.)

L.S. testified that she had the name, “Garay,” tattooed on her hip after the incident. (Tr. at 464-65.) She told the jury that she got the tattoo because after the incident she was very depressed. (*Id.* at 465.) She explained:

got it in my head that I would put the name on me to represent the—the very last man that I would every be with. And I was—it was an anger tattoo. It was a, like a, we were supposed to be together, and we were going to have a life together, and so—and that was all ruined. So . . . . I put his name on me.

(*Id.* at 465-66.)

L.S.’s sister, Anna, testified about her experiences with Garay and taking L.S. to the hospital on April 7, 2019. (Tr. at 528-549.) Anna stated that she went to L.S.’s apartment on April 7, 2019 to check on her after their mother contacted Anna and told her something was wrong with L.S. (*Id.* at 537-38.) Anna described L.S. as “scared, nervous, [and] very antsy[,]” and that L.S. had blood on her face. (*Id.* at 538.) Anna said L.S. seemed “to be high on something, [and] did not seem in her right state of mind.” (*Id.* at 539.) L.S. told Anna that Garay “put something in her mouth and forced her to swallow it.” (*Id.*)

Anna testified that L.S. was reluctant to go to the hospital or even leave her apartment. (*Id.* at 540.) After finally convincing L.S. to go with her to her home, Anna convinced L.S. to let Anna take her to the hospital. (*Id.* at 540-42.) Anna said

that during the drive to the hospital, L.S. “began digging through her bag and popped something in her mouth . . . and told [Anna] that it was mushrooms.” (*Id.* at 542.) The two women were at the hospital for approximately four to five hours. (*Id.* at 543.) Anna explained that she had been concerned because she witnessed L.S. receive calls and texts from Garay to an extent that interfered with L.S.’s ability to do her job. (*Id.* at 535.)

### **Law enforcement investigation of the crime**

On the night of April 7, 2019, Officer Scavone responded to a report that a female, L.S., was hurt and was being treated at St. Peter’s Hospital in Helena, Montana. (Tr. at 558-59.) Officer Scavone talked to L.S. in an exam room within the hospital’s emergency department. (*Id.* at 559.) He described her as “impaired” and “under the influence of dangerous drugs[]” and had a scattered train of thought that made it difficult for her to answer his questions. (*Id.* at 559-60.) He later learned that L.S. had ingested psychedelic mushrooms while her sister drove her to the hospital. (*Id.* at 587.)

The State next called Officer Scavone as a witness. (Tr. at 550.) Officer Scavone testified that he received specialized training to investigate domestic violence and strangulation cases. (*Id.* at 553-57.) He explained that a strangulation victim may not have visible marks on their neck because it does not require a lot of pressure to

the throat or neck to restrict blood flow to the brain and cause loss of consciousness. (*Id.* at 555.)

Officer Scavone testified that L.S. “had some pretty obvious trauma to her face.” (Tr. at 560.) L.S. had a “large laceration over her right eye [and] another laceration over her left [eye].” (Tr. at 560; State’s Exs. 1-2.) Additionally, both of L.S.’s eyes and her upper lip were swollen. (*Id.*) Officer Scavone testified that L.S. did not provide him a chronology of events, but that he gathered information from her over a period of several hours at the hospital. (*Id.* at 561-62.) L.S. told him that she had been at her home with Garay, who accused her of infidelity. (*Id.*) L.S. said Garay drug her into her bedroom where she had consensual sex with him. (*Id.*) L.S. told Officer Scavone that Garay had then strangled her and her face hit the refrigerator, which caused the facial injury. (*Id.* at 561-62.) Officer Scavone explained that although L.S. initially agreed to have a Sexual Assault Nurse Examination (SANE), she ultimately left the hospital without undergoing the examination. (*Id.* at 563-65.)

Sgt. Shanks conducted a follow-up telephone call with L.S. on April 8, 2019, and set up an in-person meeting with her for the next day. (Tr. at 620-21.) L.S. told Sgt. Shanks that on Saturday, April 6, 2019, Garay strangled her in her bedroom after they participated in consensual sex, causing her to pass out. (*Id.* at 621, 626.) L.S. told Sgt. Shanks that she and Garay argued again regarding infidelity, and Garay strangled her from behind while they were in her kitchen. (*Id.* at 627.) L.S.

conveyed that she had hit her head on her refrigerator during the second attack, had passed out, and woken up on the floor. (*Id.* at 622.) L.S. reported that she remembered looking at knives in her kitchen while Garay was strangling her, “[didn’t] know if she grabbed one or not . . . [but] it would have been futile because he was so much more overpowering than she is and that she assumed he would take the knife and stab her.” (*Id.* at 636.)

### **Garay’s first motion for mistrial**

On direct examination, L.S. testified that she had kept in touch with Garay “on and off” since 2011 because “[h]e was incarcerated some of the times[.]” Defense counsel objected. (Tr. at 362.) The court sustained the objection and instructed the jury to disregard L.S.’s last statement. (*Id.*) The court explained, “[t]hat means you cannot consider her last statement when you deliberate this case. Is that understood?” (*Id.*) L.S. then resumed testifying and described being in an intimate relationship with Garay from November or December 2018 until March 2019. (*Id.* at 362-64.)

The State asked L.S. if she was a drug addict and asked her to explain how drug use played a role in her life. (Tr. at 364.) L.S. responded that she had struggled with opiates and sought treatment, then was sober from the end of 2014 until 2019. (*Id.*) The prosecutor asked, “[c]an you describe how drug use played into your relationship, if at all, with [Garay]?” L.S. began to answer “well, yes,”

defense counsel objected, and the court sustained the objection and excused the jury. (*Id.* at 365.)

Defense counsel argued that because the jury already knew L.S. was a drug addict “there could be an assumption by the jury that she’s a drug user and so is [sic] any of her associates.” (Tr. at 391.) The prosecutor argued that L.S.’s testimony was allowable under the transaction rule because the evidence would show that L.S. used drugs on her way to the hospital and because L.S. alleged Garay had shoved methamphetamine into her mouth after he strangled her. (*Id.* at 368.) The State pointed out that defense counsel had mentioned L.S.’s drug use on her way to the hospital in his opening statement. (*Id.*) The district court agreed that defense counsel had mentioned L.S.’s drug use.<sup>1</sup> (Tr. at 369.) The State added it asked L.S. to “simply provide a background to explain why either [L.S. or Garay] would have been in possession of methamphetamine at the time of this offense . . . [and why] he would have had the opportunity to shove some down her throat.” (*Id.*) Defense counsel responded that L.S. had already stated Garay was incarcerated and was now “getting into their possible drug habits together.” (*Id.*)

The district court cited to Mont. Code Ann. § 26-1-103, *State v. Detonancour*, 2001 MT 213, ¶ 29, 306 Mont. 389, 34 P.3d 487, and *State v. Saylor*, 2016 MT 226,

---

<sup>1</sup>The district court misspoke and stated that defense counsel had mentioned L.S.’s drug use during voir dire rather than during his opening statement. *Compare* Tr. at 283 with Tr. at 369.

¶¶ 14-15, 384 Mont. 497, 380 P.3d 743. (Tr. at 373-78.) The court reiterated that defense counsel’s position was that the evidence was inadmissible, even under the transaction rule, because it was substantially more prejudicial than probative under Mont. R. Evid. 403. (*Id.* at 373.) The court ruled that under the transaction rule, L.S. was allowed to testify about her methamphetamine use and addiction and that Garay put methamphetamine in her mouth. (*Id.* at 373-75.) However, the court prohibited L.S. from testifying about Garay’s use of drugs or his addiction to drugs. (*Id.* at 375-76.)

The court offered to give the jury a curative instruction about L.S.’s testimony regarding methamphetamine. (Tr. at 388.) Defense counsel responded that he was not sure “how much damage had been done[]” and that “giving the curative instruction is definitely going to alert the attention of the jury to this . . . question.” (*Id.*) After Garay and his attorney discussed the matter privately, defense counsel told the court, “Your Honor, there is already one curative instruction that’s going to be given to the jury. We are going to motion for a mistrial at this point.” (*Id.* at 389.)

### **Garay’s second motion for mistrial**

The State asked L.S. if anything occurred while her sister Anna was driving her to the hospital. (Tr. at 459.) L.S. testified that she had a gun in her purse and found some psychedelic mushrooms in her purse. (*Id.*) L.S. testified that she ate the mushrooms. (*Id.*) When the State asked her why she ate them, L.S. responded, “I

did not even realize they were in my purse, honestly. It was something that had been brought to me. Bruce had brought me the mushrooms.” (*Id.*) Defense counsel immediately objected. (*Id.*) The court sustained the objection, told L.S. to “hold on,” and advised that it “is going to strike the witness’[s] testimony with respect to her last statement. I am going to ask that [the prosecutor] ask a new question, and the jury is to disregard her last statement in its deliberations.” (*Id.* at 460.)

After the State asked L.S. about her conversations with law enforcement and about returning to her apartment after being at the hospital, the State asked L.S. if she talked to her landlord about changing the locks. (Tr. at 466-67.) L.S. responded that after getting her landlord’s permission, she had a locksmith change her apartment lock. (*Id.* at 467.) L.S. testified that her landlord also added a keypad lock to the apartment building’s foyer door, which had previously had no lock at all. (*Id.*) The State asked L.S., “[d]id you, at any point, attempt to obtain an order of protection against the defendant?” (*Id.*) L.S. said, “yes,” defense counsel objected, and the court sustained the objection. (*Id.*) The State asked L.S. more questions on several other topics and had her lay foundation for the photographs depicting her injuries. (*Id.* at 468-79.)

Garay asked the court to make a motion outside the presence of the jury (Tr. at 479.) Garay moved for a mistrial, arguing,

Your Honor, the defense is going to motion for a mistrial again with that statement that [Garay] provided her with [psychedelic]

mushrooms . . . I am afraid . . . at this point [Garay]’s not going to receive a fair trial[.]

(*Id.* at 480.) The prosecutor responded,

I repeatedly . . . met with this witness and instructed her not to mention anything having to do with drug dealing . . .

I think she’s incredibly nervous . . . [and] wants to tell as much of the truth as she can tell . . . [and] she let it slip. . . .

. . . .

[T]he defense did raise in their opening something having to do with her ingesting mushrooms on the way to the hospital. I didn’t ask her where she got the mushrooms . . . I think she just felt like it was a natural thing to share as to where she got them.”

(*Id.*) Defense counsel agreed that the State did not try to elicit the inadmissible statements, but reiterated that

[Considering L.S.’s] statement that [Garay] was an inmate and now with the fact that—the testimony that he was providing drugs to her, I just don’t know if this jury is going to give him a fair shot.

(*Id.* at 482.) The district court advised the parties that its “determination of whether to grant a motion for a mistrial must be based on whether the defendant has been denied a fair and impartial trial.” (*Id.* at 482.)

The court stated that the general rule was “whether there is a reasonable possibility that inadmissible evidence might have contributed to the conviction [and if so] a mistrial is appropriate.” (Tr. at 482.) The court advised it was going to reserve ruling on defense counsel’s motions for mistrial until the end of the State’s

case in chief. (*Id.* at 482-83.) The court recognized it had to consider the strength of the evidence against the defendant to determine the prejudicial effect of the testimony and whether a cautionary jury instruction could cure the prejudice. (*Id.* at 482.) The court emphasized “there is nothing that the State did to elicit the inadmissible testimony.” (*Id.* at 483.) The court advised it was “not going to hammer the prosecution[,] but I will follow the Supreme Court’s text, and we’re not there yet, all right?” (*Id.* at 484.)

On cross-examination, L.S. agreed that her sexual activity with Garay had been consensual, but added, “[t]here was an incident I have not yet discussed here, but there—yes, there was not.” (Tr. at 500.) Defense counsel interjected, “I am going to ask you to stop right there.” (*Id.*) L.S. responded, “Sure.” (*Id.*) Defense counsel then continued asking L.S. about a multitude of topics, including what she reported to law enforcement and when she reported it, details about her time at the hotel with her son, purchasing a gun, her sexual activity and arguments with Garay, and L.S.’s injuries. (*Id.* at 500-21.)

### **Officer Scavone’s interview with Garay**

Officer Scavone also testified that six months after his initial interview of L.S., he was dispatched to the Lewis and Clark County Detention Center to interview Garay. (Tr. at 573.) Garay told Officer Scavone that he wanted to submit a written statement and share that he had been sexually assaulted by L.S. (*Id.* at 574.)

Officer Scavone recorded the interview with his body-worn camera. (*Id.* at 575.)

With no objection from Garay, the State offered a recording and a transcript of the interview into evidence as State's Exs. 3 and 3A. (*Id.* at 579-80.) The jury watched the recording of the interview and read along with the transcript as they watched. (*Id.* 580.)

At the November 2019 interview, Garay told Officer Scavone that on April 6 or 7, 2019, he had been sleeping at L.S.'s residence before he returned to California. (State's Ex. 3A at 2.) Garay claimed he woke to pain as L.S. placed a massage stone in his rectum. (*Id.*) Garay said he yelled at L.S. and they began arguing because he was angry about what she had done. (*Id.*) Garay told Officer Scavone that L.S. was "wacked out of her [expletive] mind . . . really bad on drugs . . ." (*Id.*) Garay claimed he "jumped out" of the vehicle when they were driving to go fishing because he was so angry and called L.S.'s mom. (*Id.* at 3.) Garay told Officer Scavone that he had his own set of keys to L.S.'s apartment. (*Id.* at 4.) He returned to the apartment but said that L.S. did not return home that night. (*Id.*)

Garay then told Officer Scavone L.S. swung a butcher knife at him in the kitchen when he was trying to discuss her drug use. (*Id.*) Garay said he caught her arm as she swung the knife at him but let her go when she dropped the knife and he kicked it away from them. (*Id.*) Garay said it was then L.S. hit the refrigerator and Garay left the apartment through the back door. (*Id.*)

### **Garay's third motion for mistrial**

On redirect, the State asked Sgt. Shanks if L.S. told him she had invited Garay into her apartment on the Sunday she returned from the hotel. (Tr. at 676.) The prosecutor asked, "What was your sense as to his presence in the apartment? Was that a lawful presence or not?" (*Id.*) The court interrupted, "Hold on. Hold on." (*Id.*) Defense counsel objected, explaining that the questions "calls for him to comment on the testimony of another witness and evaluate it. I think that's up to the jury, a question for the jury. (*Id.* at 676-77.)

The court excused the jury and asked the prosecutor why she asked Sgt. Shanks that question because Garay was not charged with unlawful entry into L.S.'s apartment. (Tr. at 677.) The court explained it was unhappy with the State's question, so the court did not wait for an objection before interrupting Sgt. Shanks. (*Id.* at 677-78.) The prosecutor explained that her question was "exactly relevant to the issue of justifiable use of force," about which the court had instructed the jury. (Tr. at 678.) She argued that for Garay to be justified in his use of force, he needed to have been lawfully located in L.S.'s apartment before he could use force free of a duty to retreat. (*Id.*) The court disagreed, telling the State that L.S. had already testified she was surprised Garay was in her apartment and that the State had asked Sgt. Shanks a legal question, which was "not his realm." (*Id.* at 679.)

The court repeated that it was very concerned about a mistrial and the impact of inadmissible evidence because “we got credibility issues all over the place.” (*Id.* at 681.) When the jury returned, the court instructed the jury to “disregard the last question asked by the State to the witness and any possible answer he may have provided or any inference from that . . . .” (*Id.* at 683.) The State asked Sgt. Shanks a few additional questions and then the court excused him from the witness stand. (*Id.* at 684-85.)

Once the jury was excused Garay renewed his motion for a mistrial. (Tr. at 686.) Defense counsel argued that the court “stated the standard be that there’s a reasonable probability that inadmissible evidence . . . may lead to a conviction.” (*Id.*) The court interrupted, “The law is ‘might have contributed to the conviction[.]’ . . . [n]ot ‘may lead to a conviction.’” (*Id.*) The court reasoned that because Garay had not yet been convicted, it could not call a mistrial.<sup>2</sup> (*Id.*) After Sgt. Shanks finished testifying, Garay renewed his motion for a mistrial. (*Id.* at 686.) After Garay was convicted on Count II, the court again denied Garay’s motion for mistrial.

---

<sup>2</sup> The district court mistakenly interpreted the language of *State v. Partin*, 287 Mont. 12, 951 P.2d 1002 (1997), to mean that it could not grant a mistrial until and unless Garay was convicted. (Tr. at 686-87, “The law is ‘might have contributed to the conviction[,]’ [n]ot ‘may lead to a conviction.’”)

## **SUMMARY OF THE ARGUMENT**

The district court properly and within its discretion denied Garay's motions for mistrial. The inadmissible statements do not rise to a manifest necessity to exercise the extreme remedy of mistrial because the court cured any error by sustaining objections, providing the jury with curative instructions, and limiting the admission of testimony and other evidence whose prejudice outweighed its probative value.

Further, there was sufficient evidence to support Garay's conviction on one of two counts of felony Strangulation of a Partner or Family Member. Garay relied on his interview with law enforcement to advance a justifiable use of force affirmative defense. In doing so, Garay admitted to strangling L.S., which was the conduct upon which Count II was based. There was sufficient testimony from an expert witness, L.S., and law enforcement to support his conviction.

The Court should affirm Garay's conviction.

## **ARGUMENT**

### **I. The district court properly and within its discretion denied Garay's motions for mistrial.**

#### **A. Standard of review**

This Court "review[s] a district court's denial of a motion for a mistrial [sic] for abuse of discretion. This Court applies a deferential standard to the district

court because the trial judge is in the best position to decide on the motion.” *State v. Erickson*, 2021 MT 320, ¶ 17, 406 Mont. 524, 500 P.3d 1243 (quoting *State v. Krause*, 2021 MT 24, ¶ 11, 403 Mont. 105, 480 P.3d 222). A district court abuses its discretion when it “acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice.” *Erickson*, ¶ 17 (quoting *State v. Zimmerman*, 2018 MT 94, ¶ 13, 391 Mont. 210, 417 P.3d 289 (citation omitted)).

**B. The alleged errors do not warrant reversal of Garay’s conviction.**

“A defendant has a constitutional right to a fair trial by an impartial jury.” *Erickson*, ¶ 19 (citing U.S. Const. amend. IV and Mont. Const. art. II, § 24). The “standard for determining reversible error is whether there was a reasonable possibility that the inadmissible evidence might have contributed to the conviction.” *State v. Brush*, 228 Mont. 247, 252, 741 P.2d 1333 (1987). “[T]o grant a new trial, the defendant must have been deprived of a fair and impartial trial or it is clearly within the interest of justice. *Id.* at 252-53. “Because the trial court is in the best position to observe the jurors and determine the effect of questionable testimony it is given a latitude of discretion in its rulings on prejudicial evidence.” *Id.*

This Court has “long noted that juries are presumed to follow the law provided by courts.” *State v. LaFournaise*, 2022 MT 36, ¶ 41, 407 Mont. 399,

504 P.3d 486 (citing *State v. Favel*, 2015 MT 336, ¶ 28, 381 Mont. 472, 362 P.3d 1126). In *State v. West*, 252 Mont. 83, 91, 826 P.2d 940, 945 (1992), this Court reiterated “that when counsel opposes the admission of evidence and the District Court sustains counsel’s objection, strikes the evidence from the record, and instructs the jury to disregard the evidence, the error that is committed is presumed cured.” *West*, 252 Mont. at 91.

**1. Garay was not prejudiced by L.S.’s mention of Garay’s past incarceration.**

It cannot be said that L.S.’s mention of Garay being “incarcerated some of the time,” in the totality of evidence against Garay presented to the jury at trial, “so infected the jury’s deliberations that it influenced every question propounded to the jury.” *Bircher v. BNSF Ry. Co.*, 2010 MT 121, ¶ 22, 356 Mont. 357, 233 P.3d 348 (citing *State v. Long*, 2005 MT 130, ¶ 27, 327 Mont. 238, 113 P.3d 290). As this Court has recognized “most prospective jurors are aware that a defendant charged with a crime may have spent some time in jail.” *State v. Denny*, 2021 MT 104, ¶ 25, 404 Mont. 116, 485 P.3d 1227 (citing *State v. Gunderson*, 2010 MT 166, ¶ 94, 357 Mont. 142, 237 P.3d 74.). The only time the State introduced evidence of Garay’s incarceration was through the admission of State’s Ex. 3, to which Garay did not object, and which he used to support his justifiable use of force affirmative defense.

Garay not only did **not** object to admission of a video clearly showing him in jail orange clothing but relied almost exclusively on that video for evidence to support his affirmative defense of justifiable use of force. (*See* Tr. at 592, 707-08.) Defense counsel told the court it intended to rely on Garay’s statements from his interview with Officer Scavone “while [Garay] was in jail on November 9[.]” (Tr. at 708.) Garay cannot reasonably cite L.S.’s mention of Garay being an inmate years earlier as preventing a fair trial after he welcomed and relied on more recent and clear evidence of incarceration. Any prejudice created by L.S.’s reference to Garay’s past incarceration was not only cured by the district court’s curative instruction but was made obsolete by the video of Garay meeting with Officer Scavone while Garay was clearly incarcerated (wearing orange jail clothes).

**2. The district court properly exercised its discretion when it allowed L.S. to testify about her own drug use under the transaction rule.**

Garay is mistaken that L.S. testified that Garay used drugs with her and forced her to use drugs aside from the methamphetamine he forced her to eat. (*See* Appellant’s Br. at 12.) Rather, the State asked L.S. if she was a drug addict and asked her to explain how drug use played a role in her life. (Tr. at 364.) L.S. responded that she had struggled with opiates and sought treatment, then was sober from the end of 2014 until 2019. (*Id.*) The prosecutor asked, “[c]an you describe how drug use played into your relationship, if at all, with [Garay]?” L.S. began to

answer “well, yes” before defense counsel objected, but the court sustained the objection and excused the jury.

First, L.S. did not testify to anything that was inadmissible when she talked about her own drug use and started to answer that drug use played a role in her relationship with Garay. Secondly, the district court carefully and properly allowed L.S. to testify about Garay forcing her to ingest methamphetamine. At trial, defense counsel argued that “there could be an assumption by the jury that she’s a drug user and so is [sic] any of her associates.” (Tr. at 391.) The prosecutor argued that L.S.’s testimony was allowable under the transaction rule because the evidence would show that L.S. used drugs on her way to the hospital and because L.S. alleged Garay had shoved methamphetamine into her mouth after he strangled her. (*Id.* at 368.)

The State pointed out that defense counsel had mentioned L.S.’s drug use on her way to the hospital in his opening statement. (Tr. at 368.) The district court agreed that defense counsel had mentioned L.S.’s drug use.<sup>3</sup> (*Id.* at 369.) The State added it asked L.S. to “simply provide a background to explain why either [L.S. or Garay] would have been in possession of methamphetamine at the time of this offense . . . [and why] he would have had the opportunity to shove some down her

---

<sup>3</sup>The district court misspoke and stated that defense counsel had mentioned L.S.’s drug use during voir dire rather than during his opening statement. *Compare* Tr. at 283 with Tr. at 369.

throat.” (*Id.* at 368) Defense counsel responded that L.S. had already stated Garay was incarcerated and was now “getting into their possible drug habits together.”

(*Id.*)

The district court carefully analyzed L.S.’s testimony and the anticipated evidence about the methamphetamine pursuant to the transaction rule set forth by Mont. Code Ann. § 26-1-103. (Tr. at 373-78.) The district court also relied upon *Detonancour*, ¶ 29, and *Sayler*, ¶¶ 14-15. The court ruled that under the transaction rule, L.S. was allowed to testify about her methamphetamine use and addiction and that Garay put methamphetamine in her mouth. (Tr. at 373-74.) However, the court prohibited L.S. from testifying about Garay’s use of drugs or his addiction to drugs.

(*Id.*)

The court properly exercised its discretion when it allowed L.S.’s testimony about her drug use. The transaction rule provides that “[w]here the declaration, act, or omission forms part of a transaction which is itself the fact in dispute or evidence of that fact, such declaration, act, or omission is evidence as part of the transaction.” Mont. Code Ann. § 26-1-103. “Admissibility under the transaction rule is ‘predicated on the jury’s right to hear what transgressed immediately prior and subsequent to the commission of the offense charged, so that they may evaluate the evidence in the context in which the criminal act occurred.’”

*Detonancour*, ¶ 29 (citing *State v. Wing*, 264 Mont. 215, 225, 870 P.2d 1368,

1374). The district court properly limited L.S.’s testimony and ordered that “[s]he will be allowed to testify in her testimony that he shoved meth down her throat” because it was an event that occurred immediately subsequent to the commission of strangulation, the offense with which Garay was charged. (Tr. at 374.)

The district court’s ruling to limit testimony under the transaction rule excluded some of the testimony the State wished to elicit from L.S. The State argued L.S. should be allowed to testify “there was meth use, consensual meth use by both of them, leading up to the first offense that’s been charged . . . it just seems a little imbalanced that the jury gets to hear all about what she’s using and not what he’s using.” (Tr. at 375-76.) The court responded that Garay was “not on trial for meth possession[,] [so the] transaction rule will only apply to the charged offense. (*Id.* at 376.) The court’s ruling was in line with Mont. R. Evid. 403, which “does not require exclusion of relevant evidence simply because it is prejudicial[;] [i]ndeed, most evidence offered by the prosecution in a criminal trial will be prejudicial to the defendant.” *State v. Pulst*, 2015 MT 184, ¶ 18, 379 Mont. 494, 351 P.3d 687. Here, the court properly allowed evidence limited to the “[a]cts of a defendant subsequent to the alleged commission of the crime, and intertwined therewith, [because they] are highly probative.” *Detonancour*, ¶ 29.

After further discussion, the court advised the parties it planned to give a curative instruction regarding L.S.’s testimony about drug use. (Tr. at 387-88.)

Defense counsel responded:

my only fear is that by giving the curative instruction at this point—I don’t know how much damage has been done. But giving the curative instruction is definitely going to alert the attention of the jury to this fact—or, this—not a fact, but question.

(*Id.* at 388.) The court recessed to allow Garay to speak with his counsel, then asked if Garay wanted the court to “give a curative instruction with regard to the witness’[s] testimony relative to Mr. Garay’s meth use—or, the parties’ meth use?”

(*Id.* at 388-89.) Defense counsel responded that there was “already one curative instruction that’s going to be given to the jury . . . [so] [w]e are going to motion for a mistrial at this point.” (*Id.* at 389.) The court declined to give the jury a curative instruction and reserved ruling on Garay’s renewed motion for mistrial. (*Id.* at 394.) Given the court’s treatment of the evidence, there was little opportunity for the jury to decide the case on an improper basis.

**3. Garay cannot establish his right to a fair trial was prejudiced, so the cumulative error doctrine does not require reversal of his conviction.**

Garay is mistaken that he was prejudiced or that the State “used every opportunity to introduce evidence of other bad acts[.]” (*See* Appellant’s Br. at 12.) The cumulative doctrine requires reversal of a conviction where numerous errors, taken together, have prejudiced a defendant’s right to a fair trial. *State v. Smith*,

2020 MT 304, ¶ 16, 402 Mont. 206, 476 P.3d 1178. “The defendant must establish prejudice; a mere allegation of error without proof of prejudice is inadequate to satisfy the doctrine.” *Id.* “[P]rejudice may result from the cumulative effect of errors, and . . . the cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error.” *Id.* (quoting 5 Am. Jur. *Appellate Review* § 624 (2007) (footnotes omitted)). However, a defendant is “entitled to a fair trial, not to a trial free from errors.” *Id.*

Garay argues that the State insinuated Garay’s re-entry into L.S.’s life caused her to relapse into drug use, and that he was prevented from countering any assumptions the jury may have made because it could not introduce evidence that L.S. was incarcerated prior to trial or had her child removed by Child Protective Services. (*See* Appellant’s Br. at 12.) The inference that Garay influenced L.S.’s drug relapse is a reasonable inference based upon her admissible testimony that he shoved methamphetamine into her mouth. Further, the credibility and weight of testimony are within the exclusive province of the jury, and conflicting testimony does not render evidence insufficient to support a conviction. *See State v. Wood*, 2008 MT 298, ¶ 43, 345 Mont. 487, 191 P.3d 463.

Additionally, the fact that L.S. was incarcerated immediately prior to and during trial does not counter an inference the jury may have made about Garay’s influence on L.S.; L.S.’s charges after Garay was arrested for strangulation have no

bearing on the facts of this matter. Further, the only evidence in the record that Child Protective Services (CPS) removed L.S.'s son is a subpoena for him directed to CPS. (Doc. 70.) There is no evidence that CPS was involved during a time relevant to this case.

Garay submits that he did not receive a fair trial because the State presented a weak case. (*See* Appellant's Br. at 17-20.) As previously discussed, credibility of witnesses and evidence is within the province of the jury. Further, Garay admitted to putting his arm around L.S.'s neck (State's Ex. 3A at 4) and relied on that statement to offer an affirmative defense of justifiable use of force. (Tr. at 737-38, 783, 787.) The jury was entitled to believe L.S.'s version of events and disbelieve what Garay told Sgt. Shanks in his recorded interview. The jury had the benefit of an expert witness to learn about domestic violence dynamics and the effects of trauma on the brain. The jury was allowed to apply that education when it considered the facts of the case and found Garay guilty of Count II.

As the district court noted, the jury found Garay guilty on only one of the two felonies charged. (Tr. at 810-11.) The court noted that it "believed the jury followed the Court's instructions and disregarded what I consider the inadmissible evidence." (*Id.* at 811.) The court also stated that the "jury worked hard[,] [a]nd I can't find that there is prejudicial effect of that testimony based upon this verdict." (*Id.*)

Garay was not prejudiced because the court properly addressed inadmissible testimony. “When determining whether a prohibited statement contributed to a conviction, a court must review the prejudicial influence of the inadmissible evidence together with the strength of the evidence against the defendant and whether a cautionary jury instruction could cure any prejudice.” *State v. Denny*, 2021 MT 104, ¶ 24, 404 Mont. 116, 485 P.3d 1227. The court sustained Garay’s objections and often excused the jury to discuss the objection with counsel. The court repeatedly commented that it was concerned about a mistrial, which shows that its ruling to deny Garay’s motions for mistrial was carefully made. Finally, the court did exclude evidence it determined more prejudicial than probative. It is unreasonable to conclude that the district court “act[ed] arbitrarily without the employment of conscientious judgment . . . resulting in substantial injustice.” *Erickson*, ¶ 17.

///

**CONCLUSION**

This Court should affirm the district court's denial of Garay's motion for mistrial.

Respectfully submitted this 24th day of October, 2022.

AUSTIN KNUDSEN  
Montana Attorney General  
215 North Sanders  
P.O. Box 201401  
Helena, MT 59620-1401

By:  /s/ Bree Gee  
BREE GEE  
Assistant Attorney General

**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 7,922 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

*/s/ Bree Gee* \_\_\_\_\_  
BREE GEE

## CERTIFICATE OF SERVICE

I, Bree Williamson Gee, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 10-24-2022:

Chad M. Wright (Attorney)  
P.O. Box 200147  
Helena MT 59620-0147  
Representing: Bruce Alan Garay  
Service Method: eService

Leo John Gallagher (Govt Attorney)  
Lewis & Clark County Attorney Office  
Courthouse - 228 E. Broadway  
Helena MT 59601  
Representing: State of Montana  
Service Method: eService

Laura Marie Reed (Attorney)  
P.O. Box 17437  
Missoula MT 59808  
Representing: Bruce Alan Garay  
Service Method: eService

Electronically signed by Wendi Waterman on behalf of Bree Williamson Gee  
Dated: 10-24-2022