IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0605

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CLAY BRADY RIPPLE,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Fourteenth Judicial District Court, Meagher County, the Honorable Randal I. Spaulding, Presiding

APPEARANCES:

CHAD WRIGHT
Appellate Defender
KRISTINA L. NEAL
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147
krneal@mt.gov
(406) 444-9505

ATTORNEYS FOR DEFENDANT AND APPELLANT

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

BURT HURWITZ
Meagher County Attorney
OLE OLSON
Special Deputy County Attorney
P.O. Box 309
White Sulphur Springs, MT 59645

ATTORNEYS FOR PLAINTIFF AND APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Authorities

I. The preclusion of the evidence regarding the sexual assault, and subsequent pregnancy, of J.Y.'s cousin necessitates reversal because the evidence was relevant and called into question the reliability of the state's key witness.

A. The evidence was admissible.

The State objected to Clay introducing evidence that J.Y.'s cousin had been sexually assaulted which resulted in a pregnancy. The State sought to justify the evidence's preclusion by claiming the evidence was not relevant. Defense counsel argued the importance of the testimony. The district court granted the state's objection and compromised the jury's function by keeping it ignorant about evidence relevant to assessing the State's key witness and her potential reasoning as to why she would make a second false accusation against Clay.

Despite that the State objected to the evidence, on appeal the State has argued it was Clay's objection that was not sufficient, and Clay cannot make a constitutional argument. However, before the district court could make a relevancy determination, the exclusion of the evidence must not be unconstitutional. "A district court's discretion in applying the Rules of Evidence and exercising control to exclude evidence is limited by the 'constitutional right to present a complete

defense and to confront his accusers, including to demonstrate the bias or motive of prosecution witnesses.'" *State v. Polak*, 2018 MT 174, ¶17, 392 Mont. 90, 422 P. 3d 112 *quoting State v. Gommenginger*, 242 Mont. 265, 274, 790 P. 2d 455, 461 (1990). "A defendant has a constitutional right to present a complete defense and to confront his accusers, including to "'demonstrate the bias or motive of prosecution witnesses.'" *Polak,* ¶17, *quoting Gommenginger*, 2242 Mont. at 272, 790 P. 2d at 460.

In *State v. Milton*, 280 Mont. 142, 144-145, 930 P. 2d 28, 29 (1996), the defendant sought to introduce evidence that the stabbing victim had a pending lawsuit against the bar in which the stabbing had occurred, as the defendant argued this gave the victim motive to testify falsely. The court denied the admission of the evidence as irrelevant. *Milton*, 280 Mont. at 145, 930 P. 2d at 29. This Court held the evidence should have been admitted and explained since bias or motive to testify falsely bears directly on a defendant's guilt, extrinsic evidence is admissible to prove that the witness has a motive to testify falsely. *Milton*, 280 Mont. at 146, 930 P. 2d at 30 *citing Gommenginger*, 242 Mont. at 272, 790 P. 2d at 460. This Court stressed an accused has a

Sixth Amendment right to demonstrate the bias or motive of a prosecution witness. *Milton*, 280 Mont. at 145-146, 930 P. 2d at 30 *citing Gommenginger*, 242 Mont. at 272, 790 P. 2d at 460. This Court held, "the trial court's discretion in exercising control and excluding evidence of a witness' bias or motive to testify falsely becomes operative only after the constitutionally required threshold level of inquiry has been afforded the defendant." *Milton*, 280 Mont. at 146, 930 P. 2d at 30 *citing Gommenginger*, 242 Mont. at 274, 790 P. 2d at 461.

Like the excluded evidence in *Milton*, here Clay wanted to introduce extrinsic evidence to explain why J.Y. would make false accusations against him. J.Y. had previously made false accusations when she wanted attention. J.Y.'s cousin's wedding was a time when the family focus would have been on her cousin. The cousin's previous sexual assault and pregnancy "was common knowledge in the family." (2/26/20 Tr. p. 136.) J.Y. would have again received attention, like her cousin, with a story about a pregnancy and relationship with Clay, and it was significant that J.Y.'s accusations came within one to two weeks of the family gathering for J.Y.'s cousin's wedding.

B. The exclusion of the relevant evidence warrants reversal.

This error is reversible. Under the harmless error test, the State carries the burden to demonstrate there is no reasonable possibility the error might have contributed to the jury's verdict. *State v. Van Kirk*, 2001 MT 184, ¶¶ 44, 47, 306 Mont. 215, 32 P.3d 735. The State has "a very high bar." *State v. Reichmand*, 2010 MT 228, ¶ 23, 358 Mont. 68, 243 P.3d 423. Here, the State has not met its heavy burden to prove the error did not contribute to the verdict.

This was a trial with no physical evidence to support the State's charges. Instead, the State's case relied almost exclusively on J.Y.'s credibility. "Impeachment evidence is especially likely to be material when it impugns the testimony of a witness who is critical to the prosecution's case." *State v. Weisbarth*, 2016 MT 214, ¶ 26, 384 Mont. 424, 378 P.3d 1195. Undoubtedly, the overreaching question on the jurors' minds centered around why J.Y. would create such an elaborate tale for a second time. If the jury knew of the excluded evidence bearing on a potential explanation of the timing of J.Y. seeking attention again, a reasonable possibility at least one juror, if not all, might have

harbored reasonable doubt. A new trial is necessary for a jury that is fully informed of the relevant evidence to resolve this case.

II. Jo.Y.'s statement as to what E.R. told him was hearsay.

J.Y.'s younger brother (Jo.Y.) told the jury that Clay's younger brother (E.R.) told Jo.Y. that E.R. told him Clay and J.Y. were having sexual intercourse:

> Q: Okay, Jo.Y., did you ever hear that J.Y. and Clay were having a sexual relationship?
> A: Yeah.
> Q: How did you learn that?
> A: E.R.?
> Q: Who is E.R.?
> A: My cousin.
> Q: He's your cousin?
> Y: (Nod's head.)
> **Q: What did E.R. tell you?**
> Defense counsel: I am going to object to the hearsay, Your Honor.
> Prosecutor: Not offered for the truth of the effect on the listener, Your Honor.
> Court: Overruled. You may answer.
> Q: Go ahead.
> A: **He told me Clay and J.Y. were having sexual intercourse.** [1]

(Tr. 2/25/20 p. 197.) (Emphasis added.)

---

[1] Appellant Counsel concedes that she erroneously included in Jo.Y.'s response that E.R.'s statement was that the sexual intercourse was *in the living room*. (Appellant Br. pp. 16, 19.) However, this error does not impact the hearsay analysis.

Contrary to the State's assertions at trial and on appeal, if the State had merely intended to elicit testimony from Jo.Y. of what Jo.Y. did after he supposedly learned about Clay and J.Y.'s relationship, Jo.Y. had already answered that he had heard that Clay and J.Y. were in a relationship. If the State's intent was to explain "what Jo.Y. did next" (Appellee Br. p. 29), there was no need for the State to follow up with direct hearsay of "What did E.R. tell you?" (Tr. 2/25/20 p. 197.) The question of "What did E.R. tell you?" (Tr. 2/25/20 p. 197.) was inadmissible hearsay.

Contrary to the State's arguments on appeal, (Appellee Brief pp. 31-32), Clay has not argued that the prosecutor's use of the hearsay statements was impermissible. Rather, Clay established that the prosecutor's closing arguments demonstrated that the State did not use the hearsay just to explain Jo.Y.'s next step, but rather used Jo.Y's statement to prove the truth of the matter asserted.

CONCLUSION

Clay Ripple requests the Court vacate his conviction and remand this matter for a new trial.

Respectfully submitted this 11th day of January 2023.

OFFICE OF STATE PUBLIC DEFENDER
APPELLATE DEFENDER DIVISION
P.O. Box 200147
Helena, MT 59620-0147

By: /s/ Kristina L. Neal
KRISTINA L. NEAL
Assistant Appellate Defender

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 1,231, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Kristina L. Neal
KRISTINA L. NEAL

CERTIFICATE OF SERVICE

I, Kristina L. Neal, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 01-11-2023:

Burt Norman Hurwitz (Attorney)
PO Box 309
15 West Main Street
White Sulphur Springs MT 59645
Representing: State of Montana
Service Method: eService

Michael Patrick Dougherty (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Electronically signed by Kim Harrison on behalf of Kristina L. Neal
Dated: 01-11-2023