IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0226

STATE OF MONTANA,

Plaintiff and Appellee,

v.

BRADLEY JAY HILLIOUS,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Eleventh Judicial District Court,
Flathead County, the Honorable Robert B. Allison, Presiding

APPEARANCES:

CHAD WRIGHT
Appellate Defender
JEFF N. WILSON
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147
JWilson@mt.gov
(406) 444-9505

ATTORNEYS FOR DEFENDANT
AND APPELLANT

AUSTIN KNUDSEN
Montana Attorney General
TAMMY K PLUBELL
Bureau Chief
Appellate Services Bureau
P.O. Box 201401
Helena, MT 59620-1401

TRAVIS R. AHNER
Flathead County Attorney
JOHN DONOVAN
Deputy County Attorney
820 South Main Street
Kalispell, MT 59901

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Laws and Regulations

Other Authorities

Maren Blanchard, *The Relationship between Socioeconomic Status and Literacy: How Literacy is Influenced by and Influences SES*, Mich. Journal of Economics (Jan. 5, 2023) https://sites.lsa.umich.edu/mje/2023/01/05/the-relationship-between-socioeconomic-status-and-literacy-how-literacy-is-influenced-by-and-influences-ses (accessed Feb. 27, 2024) 27

Richard D. Friedman, *The Confrontation Clause Re–Rooted and Transformed*, 2004 Cato Sup.Ct. Rev. 439 34

S.F. Reardon, et al., "Patterns of Literacy among U.S. Students," *The Future of Children*, (Fall 2012) http://www.jstor.org/stable/23317409 (accessed Feb. 27, 2024) 27

Scott Shindledecker, *Incoming sheriff assembles leadership team*, Daily Inter Lake (Nov. 22, 2018), https://dailyinterlake.com/news/2018/nov/22/incoming-sheriff-assembles-leadership-team-6 (accessed Feb. 28, 2024) 22

U.S. Dept. of Agriculture, Economic Research Svc. *Percent of total population in poverty, 2021: Montana,* https://data.ers.usda.gov/reports.aspx?ID=17826 (accessed Feb. 27, 2024) 26

STATEMENT OF THE ISSUES

When procuring jury pools, the clerk must mail notice to the persons selected and certify the non-responders to the sheriff who shall serve notice personally. A failure to substantially comply with these requirements is reversible without proof of prejudice because it undermines the jury selection process. Did the Flathead County Clerk and Sheriff substantially comply with these requirements when the Clerk failed to certify non-responders and the Sheriff failed to personally serve any non-responders?

Testimonial hearsay is inadmissible without confrontation. Non-testimonial hearsay is inadmissible absent a qualifying exception. Eight months before her death, Amanda claimed in an affidavit, text messages to a friend, and to her mother, that Brad assaulted her. Did the court err by admitting the testimonial affidavit, and similar accusations when all failed to fit a hearsay exception?

STATEMENT OF THE CASE

Bradley Jay Hillious (Brad) appeals his homicide conviction after a jury trial in Flathead County.

The State charged Brad with killing his wife, Amanda, in violation of Montana Code Annotated § 45-5-102 (2019). (Doc. 1.) Brad filed pretrial motions to exclude Amanda's statements accusing him of violence the prior April, which the court denied. (Doc. 91, Orders RE Testimonial Statements and Syndromes, attached as Appendix A.)

The court sentenced Brad to 100 years prison. (Doc. 194, Judgment and Sentence, attached as Appendix B.) Brad timely appealed. (Doc. 198.)

To form the venire for Brad's jury, the district court clerk mailed notices to the persons drawn as jurors in July of 2021. (Doc. 211, Ex. B at 2; 218, Ex. E at 14, 62.) At that time, the Clerk did not certify the individuals who failed to respond to the notice ("non-responders") to the sheriff for personal service. (Doc. 218, Ex. E at 68–69, 74–76.)

Brad discovered this irregular process about 17 months into his appeal and filed a Motion for New Trial and Request for Evidentiary Hearing in district court. (Doc. 211.) This Court stayed the appeal for the district court to rule on Brad's request. (Doc. 215.) The district court denied Brad's motion without a hearing. (Doc. 220, Order & Rationale on Motion for New Trial, attached as Appendix C.)

STATEMENT OF THE FACTS

Brad and Amanda lived in a two-level home with their kids: J.H., age eleven, A.H., age five, H.H., age three, and R.H., age one. (Doc. 1 at 3.) Amanda worked in healthcare; Brad was a wildland firefighter and frequently gone. (Trial Transcript (Tr.) at 317, 1205.) Scott, Brad's retired father, lived there too, often caring for the kids. (State Ex. 3 at 42:20–42:40.)

December 15

Brad laid in bed with H.H. as Amanda prepared for work. (State Ex. 28 at 9:20:00–9:20:30.) Scott and A.H. were downstairs. (Tr. at 347.) Amanda entered the bedroom to mention a bothersome comment Brad made on social media. (Tr. at 1762.) Brad told Amanda the kids were asleep, they could discuss it later, and laid back down. (Tr. at 1762–63.)

The exchange amounted to "stern whispering." (Tr. at 1765.) Text messages Amanda sent to a friend that morning gave no indication she was upset. (Tr. at 1782–83.) Days later, when Detective Foster from the Flathead County Sheriff's Office (FCSO) pressed Brad whether things became physical, suggesting Amanda hollered and pushed him, Brad maintained he never became physical. (Tr. at 1764, 1810.)

J.H. testified that Brad and Amanda argued while he ate breakfast; Brad hit Amanda, dragged her to the bedroom, and sent J.H. to his room. (Tr. at 357, 360.) J.H. heard Amanda go downstairs alone and Scott come out of his room. (Tr. at 378–79.) J.H. heard the metallic sound of a belt as Brad dressed upstairs, which confused J.H. because he thought he heard Brad downstairs. (Tr. at 379, 468.) J.H. heard Amanda say, "stop hitting me" and "call 911." (Tr. at 361–62.) He heard Amanda walking upstairs, then the sound of her falling. (Tr. at 362.) "[S]omething happened, and she fell." (Tr. at 358.)

Brad told FCSO he heard a yell, banging noise, and dogs barking; he quickly dressed, turned on a light, and saw Amanda lying at the base of the stairs. (State Ex. 28 at 9:21:00–9:22:40.) Brad put H.H. back in the bedroom and rushed downstairs. (State Ex. 28 at 9:21:00–9:22:40.) Amanda bled from her ear and her face was swelling. (State Ex. 28 at 9:26:45–9:27:05; 10:06:15–10:06:35.) She had a faint pulse and was breathing, but with snoring sounds. (Tr. at 1361–62.)

Brad pulled her a few feet into an open area and yelled for Scott. (Tr. at 1361; State Ex. 28 at 9:23:20–9:25:25.) A.H. appeared and saw Brad performing CPR. (State Ex. 28 at 9:25:50–9:26:10.) Amanda

remained unresponsive; Brad slapped the entertainment center in frustration. (State Ex. 28 at 9:29:50–9:30:45.)

A.H. did not see what happened but heard falling and Amanda say "stop." (Tr. at 346–48.) A.H. said Amanda fell down the stairs, then Brad came running down the stairs. (Tr. at 337.) A.H. recalled seeing four things: Amanda's "ear was gone[,]" blood on the floor, "[m]y dad and my other dad[.]" (Tr. at 337–38.) "[M]om said stop and dad said something[,]" and "mom said stop and stop and Papa said something." (Tr. at 589.)

A.H. called Scott both "papa" and "dad" and sometimes confused Scott's voice with Brad's. (Tr. at 338, 347, 478–79.) Amanda's ear was cut but fully attached. (State Ex. 84, 87.) A.H. also said "[J.H.] grabbed [Amanda's] neck and pushed her on the toy," and that Scott told him J.H. had his hands on mom's throat. (Tr. at 474, 2255.)

The boys had been with Michelle Wungluck, Amanda's mother, since the day after the incident. (Tr. at 344–45, 370–71, 460.) Before J.H.'s initial interview, Wungluck told J.H. that Brad was the one who killed his mother. (Tr. at 371.) While she had custody of the boys,

Wungluck frequently discussed Amanda's death and called Brad "a murderer[.]" (Tr. at 345.)

Cara Laney, an expert on memory and how it can go wrong, testified that authority figures are "very skilled" at changing children's memories because kids rely on those who know more than they do. (Tr. at 2178, 2185, 2187.) Wendy Dutton, the State's expert on child-forensic interviews, agreed children can often be influenced by authority figures. (Tr. at 440.) J.H. gave contradictory answers in one interview and had inconsistencies from one to the next. (Tr. at 469, 2214.) Over time, the boys' stories began to match. (Tr. at 2214.)

Scott brought towels and called 911. (State Ex. 28 at 9:25:10–9:25:40.) He said nobody saw what happened, but he heard Amanda fall down the stairs and hit the entertainment center. (Def. Ex. WW at 1:00–1:25.) Scott suggested she tripped on a toy. (Def. Ex. WW at 3:25–3:35.) FCSO Deputy McGauley arrived and took over CPR from an exhausted, distraught Brad. (Tr. at 506, 556.) Emergency responders arrived, inserted an artificial airway, and attached an automated chest compression machine. (Tr. at 1039, 1060.) Amanda had a faint pulse upon transport to the hospital. (Tr. at 1044.)

December 15–26

The swelling in Amanda's face and throat seemed unusual for a fall. (Tr. at 718.) She had "tremendous brain swelling" from lack of oxygen. (Tr. at 721–22.) Amanda's hyoid, a U-shaped bone under the jaw, was fractured, typically caused by hanging, strangulation, or forceful direct trauma. (Tr. at 825–26.) Amanda showed no external signs of strangulation like a ligature or handprint. (Tr. at 742.)

Amanda died December 19. (Tr. at 1090.) The medical examiner concluded it was lack of oxygen to her brain resulting from strangulation associated with blunt-force injuries. (Tr. at 1520–21.)

Rylie, Brad's coworker and on-again-off-again girlfriend, was at the house December 23. (Tr. at 1901, 1904, 1917.) Scott told Rylie he would never see his grandchildren again, was going to lose his home and son, but he would never go to jail. (Tr. at 1917.) Scott became aggressive and defensive when asked what this meant. (Tr. at 1917.) Scott told Rylie to stay at the house, do not leave Brad alone, and everything was Scott's fault. (Tr. at 1917–18.)

On December 24, Detective Schuster requested follow-up interviews from Brad and Scott. (Doc. 1 at 4.) Brad told Scott they

needed to do another interview. (Tr. at 1748.) Scott became solemn and replied, "I can't deal with this anymore. [T]his is bullshit, I'm not going to jail." (Tr. at 1748–49.) Scott told Brad he loved him, walked to their barn, and shot himself. (Tr. at 1749–50.)

FCSO had reason to seek another interview from Scott. Scott was "the one that found" Amanda at the bottom of the stairs. (Tr. at 1255.) Scott claimed he "hears everything" in the house, and "can't hear anything" when he is downstairs. (Def. Ex. M6 at 10:58:30–10:58:40; Tr. at 569.) Scott said he woke to an "ow" or "help" almost simultaneous to dogs barking. (Def. Ex. M6 at 11:09:20–11:10:35.) Later, Scott said he heard Amanda and J.H. walking around minutes before the barking, indicating he was already awake. (Def. Ex. M6 at 11:56:50–11:57:35.)

Deputy Foster questioned Brad about Scott's death just hours before, about the morning of Amanda's injuries, and about a dispute involving all three in April. (Tr. at 1744–45, 1754–55.) The interview ended with Brad's arrest for Amanda's death. (Doc. 3.)

Two days later, Brad told Rylie that before shooting himself, Scott confessed that he "did it[.]" (State Ex. 177 at 2:00:30–2:02:05.) Amanda told Scott she was leaving with the kids. (State Ex. 177 at 2:00:30–

2:02:05.) "[T]hat's what [Scott] told me. I haven't told anyone. I'm waiting to talk to Todd. . . . When you were on the phone . . . we were having a blank stare off, that's what [Scott] told me." (State Ex. 177 at 2:00:30–2:02:05.)

Scott revealed his potential for violence and animosity toward Amanda the previous April. (Def. Ex. YY at 3:50–7:10.) When FCSO served Scott a copy of the April 17 temporary order of protection (TOP) that Amanda obtained against him and Brad, Scott threatened Amanda, called her a "cunt," and begged deputies to shoot or tase him. (Def. Ex. YY at 5:55–6:50.) Scott was upset at being forced from his home, claimed he ate several bottles of medications, and had nothing to live for without his grandchildren. (Def. Ex. YY at 7:15–7:45, 8:10–8:35, 9:05–9:20, 24:25–25:05.) Scott always cared for the kids but Amanda offered no appreciation; "She's trying to take everything away." (Def. Ex. YY at 35:05–36:00.) "Now you're seeing the real me. . . . I have a tendency to blow up." (Def. Ex. YY at 26:35–26:52.) Deputies detained Scott on a mental health hold to end the situation. (Def. Ex. YY at 23:10–23:50.)

Amanda's hearsay statements

Brad sought to exclude Amanda's accusations that he became violent the previous April because they were testimonial, "unreliable, false and hearsay." (Doc. 66 at 2–3, 20.) Amanda made three accusatory statements: an affidavit requesting the TOP on April 17th, text messages to her friend and coworker Sara Prangley on April 12th and 16th, and to her mother on April 16th. (Doc. 66 at 20; State Ex. 33, 173–74.)

The State argued the statements were linked to and explanatory of what happened December 15, and admissible under various hearsay exceptions. (Doc. 39 at 5; 76.) It claimed the affidavit demonstrated that, when confronted about the affair and prospect of losing his children, Brad became enraged and violent, even putting his hand on Amanda's neck. (Doc. 39 at 5.)

In the affidavit, Amanda described confronting Brad about the affair in December, 2019. (State Ex. 33 at 3.) On April 12, she admitted recording Brad's comments from back then, and he broke her phone. (State Ex. 33 at 3–4.) Amanda contacted her father, who called 911 because Amanda, Brad, and Scott were "getting into it." (State Ex. 33 at

4; Tr. at 1077.) During the conflict, Scott asked for a gun because Amanda would not listen. (State Ex. 33 at 4.) Police arrived, Amanda told them what happened, and nobody got arrested. (State Ex. 33 at 4.)

On April 16, contemplating divorce, Amanda proposed taking the kids to visit Wungluck in Oregon. (State Ex. 33 at 4.) Scott got upset at this idea, began crying, and demanded Amanda "sign over" her rights to the kids. (State Ex. 33 at 4–5.) He knew three members of the Hell's Angels and would "put a hit on [Amanda's] head" if she took the kids. (State Ex. 33 at 6.) Brad changed his mind about Amanda leaving with the kids, got in her face, and demanded she sign divorce papers. (State Ex. 33 at 5.)

Amanda called 911, hung up, and dispatch called back. (State Ex. 33 at 6.) Outside—with dispatch still on the line—Brad "gesture[d]" as if he may pop the car tire, broke the house phone, pushed Amanda against the car, "put his hands around [her] neck[,]" and said, "I will end you Bitch." (State Ex. 33 at 6.) Amanda called Wungluck as police arrived, but "did not tell the cops" what they did. (State Ex. 33 at 6–7.)

Instead of going to Oregon, Amanda left the house, contacted a lawyer, and went to Dairy Queen. (State Ex. 33 at 7–8.) Later, she

called Brad, texted Prangley, returned home to swap kids, and relaxed at a hotel for the night. (State Ex. 33 at 7–8; 174.) She spoke to a lawyer the next morning who recommended the TOP. (State Ex. 33 at 8.)

The text messages to Prangley similarly described these events. (State Ex. 173, 174.) On April 12, Amanda told Prangley Brad shattered her phone, and they were separating. (State Ex. 173.) On April 16, she told Prangley how Brad "was going to pop the tire[,]" smashed the phone, threatened her, and put "his hands around [her] neck and was going to choke" her, how she "didn't tell the cops he had his hands around [her] neck or threatened to shoot" her, and she was scared to be home. (State Ex. 174.) Roughly 30 minutes later, she returned home to swap the kids. (State Ex. 174 at 4.)

The State claimed Amanda told Wungluck on April 16, while officers were present, that Brad "hit and choked her[.]" (Doc. 76 at 3.) The State also claimed Amanda told Prangley he "strangled" her, and told Francine Roston that Brad "hit and choked her[,]" though Roston did not testify at trial. (Doc. 39 at 3; 76 at 3.)

Having already found Amanda's accusations admissible under the transaction rule and to prove Brad's motive, the court concluded the

affidavit was nontestimonial and Brad waived his opportunity for cross-examination "by deliberately avoiding a [TOP] hearing[.]" (Doc. 54 at 5; 91 at 4–5.) The court found the affidavit admissible under "hearsay exceptions: excited utterance, then-existing state of mind, recorded recollection, guarantees of trustworthiness, and/or impending death." (Doc. 91 at 4.) Amanda's statements to friends and family that portrayed Brad negatively would be considered under the "usual concerns – relevance, competency, [and] authenticity." (Doc. 91 at 5.)

At trial, the court admitted the affidavit, the text messages, and Prangley's testimony about their contents. (State Ex. 33, 173, 174; Tr. at 1212–19.) Wungluck testified that on April 16, she was on the phone with Amanda and heard Brad "threaten [Amanda] with a gun" and say he could put "a bullet between [her] eyes." (Tr. at 1136.) Wungluck also claimed to hear Amanda tell police Brad "pushed her up against the car and was choking her[.]" (Tr. at 1138.)

Venire issues

Unknown to Brad, the Clerk tasked with forming the venire mailed notices to those drawn as jurors for Brad's trial term, but did not

certify non-responders to the sheriff. (Doc. 211.) The State called it a "technical violation[.]" (Doc. 217 at 7.)

Peg Allison has been the Clerk and Jury Commissioner in Flathead, a geographically, racially, and economically diverse county, since 1993. (Doc. 218, Ex. E at 11, 39–40.) Since October of 2020, Allison has procured the annual venire by mailing 7,000 notices in January for trials between March 1 and August 31, and another 7,000 in July for trials between September 1 and February 28. (Doc. 211, Ex. B at 2; 218, Ex. E at 14, 62, 65.) Brad's trial began January 3, 2022, so Allison mailed notices for his venire in July of 2021. (Doc. 164.1.)

Allison ceased certifying non-responders during a prior sheriff's administration. (Doc. 218, Ex. E at 74–75.) Due to certifying being an "arduous task" and the prior sheriff's supposed inability to personally serve all non-responders, Allison stopped. (Doc. 218, Ex. E at 68, 75.) She resumed certifying in September of 2023, after questions arose regarding her jury procurement process. (Doc. 218, Ex. E at 76.)

Nic Salois, employed by FCSO since 2003, testified that "[n]ot once" has he served notice to a juror, and he "would have been one of the people to have" done so. (Doc. 218, Ex. E at 108.) Salois did not

recall his office ever receiving certified lists prior to Allison's recent about-face. (Doc. 218, Ex. E at 76, 108.)

In January of 2023, when Allison sent out 7,000 notices for the upcoming trial term, there were 2,742 non-responders. (Doc. 218, Ex. E at 27–28.) These individuals "probably" received the notice, ignored it, or could not respond. (Doc. 218, Ex. E at 28.) Only 2,507 individuals responded. (Doc. 218, Ex. E at 149.) About 1,000 notices came back as undeliverable; the rest received excusals. (Doc. 218, Ex. E at 15, 150.) For this particular term, Allison simply removed those 2,742 non-responders from the venire. (Doc. 218, Ex. E at 19, 40–41.) Allison never made any steps to certify the list of non-responders to the sheriff or assist in personally serving the non-responders in any manner.

Since Allison resumed certifying and the sheriff began personal service, Allison noticed "a significant improvement" in responses. (Doc. 218, Ex. E at 76–77.) She received "a huge response" from about 400 people by mailing a second notice. (Doc. 218, Ex. E at 77.) As the court described, the Clerk and Sheriff "made substantial efforts to remediate any concerns" regarding the "summoning [of] jury panelists." (Doc. 211, Ex. B.)

STANDARDS OF REVIEW

The denial of a motion for new trial concerning violations of the jury formation statutes is a conclusion of law, reviewed for correctness. *State v. LaMere*, 2000 MT 45, ¶ 14, 298 Mont. 358, 2 P.3d 204; *State v. Bearchild*, 2004 MT 355, ¶ 7, 324 Mont. 435, 103 P.3d 1006. A district court's findings are reviewed under the "clearly erroneous" standard. *Marble v. State*, 2015 MT 242, ¶ 13, 380 Mont. 366, 355 P.3d 742. Discretionary rulings, including rulings on whether to hold an evidentiary hearing, are reviewed for an abuse of discretion. *Marble*, ¶ 13. A court abuses its discretion if it acted arbitrarily without the employment of conscientious judgment or exceeded the bounds of reason, in view of all circumstances, ignoring recognized principles resulting in substantial injustice. *Clark v. Bell*, 2009 MT 390, ¶ 16, 353 Mont. 331, 220 P.3d 650.

This Court reviews a district court's evidentiary decisions for abuse of discretion and its conclusions of law and interpretations of the Constitution or the rules of evidence de novo. *State v. Mizenko*, 2006 MT 11, ¶ 8, 330 Mont. 299, 127 P.3d 458.

SUMMARY OF THE ARGUMENTS

The district court erred when it denied Brad's motion for new trial because the Clerk did not certify to the Sheriff those who did not respond to jury notices and the Sheriff did not serve the non-responders contrary to the plain, express language in § 3-15-405. The court denied Brad's motion for failing to show prejudice, in direct conflict with Montana law requiring reversal for failures to "substantially comply" with the statutes designed to ensure comprehensive venires.

The court wrongly admitted Amanda's accusations of prior violence. The affidavit was testimonial, thus subject to confrontation. It, the text messages, and the statement heard by Wungluck were unreliable hearsay that did not fit an exception. Brad suffered prejudice from the erroneous admission of the statements because the State's common motive theory failed without them.

ARGUMENTS

I. The Clerk and Sheriff failed to substantially comply with § 3-15-405 when drawing Brad's jury panel.

Since statehood, Montana has maintained that a failure to substantially comply with the statutory procedures governing jury selection amounts to a denial of the fundamental constitutional right to

trial by a fair and impartial jury, which is automatically reversible without proof of individual prejudice. *LaMere*, ¶ 19; *see also State v. Landry*, 29 Mont. 218, 74 P. 418 (1903) (right to a "panel drawn in substantial conformity with the" statutory requirements "recognized since" *Dupont v. McAdow*, 6 Mont. 226, 9 P. 925 (1886)); *State v. Groom*, 49 Mont. 354, 141 P. 858 (1914) ("substantial compliance" with "the law in drawing" a jury "is required"); *State v. Miller*, 49 Mont. 360, 141 P. 860 (1914); *State v. Diedtman*, 58 Mont. 13, 190 P. 117 (1920) ("substantial departure from the statutory method" of selecting a jury would "nullify the statute itself"); *State v. Hay*, 120 Mont. 573, 194 P.2d 232 (1948) (defendant has right to an impartial jury drawn and summoned according to law); *State v. Porter*, 125 Mont. 503, 242 P.2d 984 (1952) (trial courts must "substantially comply with the statutes in procuring a jury"); *State v. Deeds*, 130 Mont. 503, 305 P.2d 321 (1957); *Dvorak v. Huntley Project Irrigation Dist.*, 196 Mont. 167, 639 P.2d 62 (1981) ("that no actual prejudice has been shown is irrelevant" when the court "went well beyond a mere technical departure from the jury selection statutes"); *Solberg v. County of Yellowstone*, 203 Mont. 79, 659 P.2d 290 (1983) (same basis for reversal as in *Dvorak*); *Robbins v. State*,

2002 MT 116, 310 Mont. 10, 50 P.3d 134 (*Robbins II*) (retroactive application of *LaMere* in return to "*per se* rule of reversal for a failure to substantially comply with Montana statutes governing procurement of a trial jury").

The sole, but brief aberration from this rule occurred in *State v. Robbins*, 1998 MT 297, 292 Mont. 23, 971 P.2d 359 (*Robbins I*). In *Robbins I*, the clerk notified jurors by telephone and did not serve by mail or serve personally. *Robbins I*, ¶ 51. This Court found the clerk failed to substantially comply with the statute, but departed from a century of precedent to hold that Robbins failed to demonstrate the error resulted in actual prejudice. *Robbins I*, ¶ 52. Fourteen months later, this Court overturned *Robbins I* and held prejudice need not be shown when there is a failure to substantially comply with the jury procurement statutes. *LaMere*, ¶ 61 *see also Robbins II*, (granting relief denied in *Robbins I*).

A. The Clerk's failure to certify and the subsequent lack of personal service constitute a substantial failure to comply with § 3-15-405.

> The clerk of court shall serve notice by mail on the persons drawn as jurors and require the persons to respond by mail as to their qualifications to serve as jurors. The clerk of court may attach to the notice a jury questionnaire and a form for

> an affidavit claiming an excuse from service provided for in 3-15-313. If a person fails to respond to the notice, the clerk shall certify the failure to the sheriff, who shall serve the notice personally on the person and make reasonable efforts to require the person to respond to the notice.

Mont. Code Ann. § 3-15-405.

"[C]ourts are bound by a statute's plain meaning." *Deschamps v. Mont. Twenty-First Jud. Dist. Ct.*, 2024 MT 15, ¶ 18, ___ Mont. ___, 542 P.3d 392 (citing Mont. Code Ann. § 1-2-101). "If the language is clear and unambiguous, no further interpretation is required." *Ravalli Co. v. Erickson*, 2004 MT 35, ¶ 11, 320 Mont. 31, 85 P.3d 772. The pertinent language here, "If the person fails to respond to the notice, the clerk shall certify the failure to the sheriff, who shall serve the notice personally[,]" is easily understood.

In *LaMere*, the jury notice statute required the clerk to serve notice by mail, certify non-responders to the sheriff, and the sheriff to personally serve the non-responders. *LaMere*, ¶¶ 9, 15. The clerk randomly selected 200 names but did not mail notice; instead, she used the telephone and did not request the sheriff personally serve the 70 individuals unsuccessfully contacted by phone. *LaMere*, ¶¶ 4, 9–10. The

trial court found the telephonic service was reasonable and caused no prejudice. *LaMere*, ¶ 11.

This Court found the failure to summon the entire panel or array "totally undermined" the purpose of juror notification to ensure a randomly drawn venire. *LaMere*, ¶¶ 71–72. "[O]ver one-third of the prospective jurors were excluded from possible jury service" under the phone-only notification method. *LaMere*, ¶ 70. The court "erred in concluding that the statutes on impaneling a trial jury do not require the mailing or personal service of a written jury summons to prospective jurors[,]" which they "plainly do[.]" *LaMere*, ¶ 17. This Court reversed, reasoning LaMere "demonstrated that the substantial failure to comply with the [jury notice statute] materially undermined the purpose of the [] statutes to provide for random selection of jurors" based on "objective criteria." *LaMere*, ¶ 75; *see also State v. Highpine*, 2000 MT 368, ¶¶ 39–41, 303 Mont. 422, 15 P.3d 938 (reversed because clerk used the same defective process from *Robbins II* and *LaMere*); *Dvorak*, 196 Mont. at 170, 639 P.2d at 64 (substantial failure to follow jury-formation statutes when clerk, acting without the judge present,

put juror names on paper slips, not capsules, and did not shake the box before drawing names).

The defective process used to form Brad's venire was similar to that in *LaMere*, *Highpine*, and *Robbins II*. Though Allison mailed notices, she did not certify non-responders to the sheriff, thus the sheriff did not attempt personal service on anyone. In each, the "certify and serve" requirements were not met.

Allison ceased certifying the list of non-responders sometime before the current sheriff's administration. Brian Heino became Sheriff in January, 2019.[1] Allison resumed certifying in September of 2023. Allison procured Brad's jury in July of 2021; his trial took place in January of 2022. Thus, Allison did not certify non-responders to the Sheriff and the Sheriff did not attempt personal service on anyone when Brad's jury was procured. The State conceded that Allison did not certify, but argued it was a "technical violation." The court clearly erred

[1] Scott Shindledecker, *Incoming sheriff assembles leadership team*, Daily Inter Lake (Nov. 22, 2018, 4:00 AM), https://dailyinterlake.com/news/2018/nov/22/incoming-sheriff-assembles-leadership-team-6/ (accessed Feb. 28, 2024). Mont. R. Evid. 201(f), 902(6).

by failing to find the Clerk did not comply with the statute, maintaining it was "alleged" noncompliance. (Doc. 220 at 1, 3.)

The failure to certify and serve is a failure to substantially comply with § 3-15-405. Section 3-15-405 imposes four duties: the clerk must (1) mail notice and (2) certify non-responders to the sheriff; the sheriff must (3) serve personally and (4) make reasonable efforts to require a response to the notice. Three of the four requirements were not met. That is plainly not substantial compliance.

The court recognized that the Clerk and Sheriff "made substantial efforts to remediate any concerns" regarding "the practices of summoning jury panelists." These recent efforts being "substantial" further shows the lack of substantial compliance prior to Allison's about-face.

Though the precise number of non-responders excluded from Brad's venire is absent from the record,[2] in an echo of *LaMere*, over one-third of the individuals, 2,742 of 7,000, who were mailed notice for the trial term 18 months later—still within the defective period—were

[2] This could have been established at the requested hearing on the motion for new trial that the court did not hold.

arbitrarily excluded from that pool by failing to respond. Allison's failure to certify non-responders meant none of that one-third were served personally. Instead, these potential jurors were removed from the venire.

Failing to certify and serve totally undermined the assurance of a randomly drawn venire because prospective jurors self-excused by ignoring the notice. Personal service may not succeed in notifying every non-responder, but certainly some, evidenced by Allison's testimony to a "significant improvement" once she and the Sheriff began following § 3-15-405.

B. The district court erred by requiring Brad show prejudice.

The court erred by requiring Brad to establish prejudice when *LaMere* "expressly overruled" this requirement from *Robbins I*, returning to 100 years of prior decisions. *LaMere*, ¶ 61. A failure to substantially comply with the jury selection statutes is "*per se* reversible without any proof of individual prejudice." *LaMere*, ¶ 19; *Robbins II*, ¶¶ 13–15 (substantial failure to comply with jury formation statutes cannot be harmless error).

The *LaMere* Court explained at length why the error is not amenable to harmless error analysis. *LaMere*, ¶¶ 39–54. To apply harmless error review to a violation of the jury formation statutes "merely invites abstract and unguided speculation about the possibility of prejudice in an individual case; it is pure conjecture as to whether a properly selected jury would have decided a case differently than an improperly selected jury[.]" *LaMere*, ¶ 26. A material failure to comply with these statutes cannot be treated as harmless error because the error precedes the trial process and presentation of any evidence, thus cannot be quantitatively assessed for prejudicial impact at trial; it is an error in the framework from which the trial proceeds; the impartiality of the jury goes to the very integrity of the justice system, which cannot be considered harmless error. *LaMere*, ¶ 50. Such a violation undermines the random nature or objectivity of the selection process. *LaMere*, ¶ 61. "The substantial compliance standard vindicates not only the rights of the individual defendant, but also the rights of the public in ensuring that the jury system remains inviolate." *LaMere*, ¶ 27.

Allison's defective process was subjective because it allowed individuals to arbitrarily disqualify themselves by choice, forgetfulness,

or personal whim, not by statutory criteria. *See* Mont. Code Ann. § 3-15-301. The faulty process allowed non-responders to shirk jury duty under § 3-15-301, just like the telephone summoning method in *LaMere* excluded prospective jurors who did not answer the phone. *See LaMere*, ¶ 74.

Though the *LaMere* Court did not base the reversal on the statistical data LaMere provided, there is similar evidence that the failure to certify and serve may have disproportionately excluded the illiterate, the poor, and minorities—implicating the fair cross-section principle.

Failing to personally serve any non-responders would exclude from the venire those who cannot read or understand the notice. About 13% of Montanans are functionally illiterate, about 12% live in poverty. *Literacy Rate by State*, Wisevoter, https://wisevoter.com/state-rankings/literacy-rate-by-state/ (accessed Feb. 9, 2024); U.S. Dept. of Agriculture, Economic Research Svc., *Percent of total population in poverty, 2021: Montana*, https://data.ers.usda.gov/reports.aspx?ID=17826 (accessed Feb. 27, 2024). Illiteracy and socio-economic status share a strong relationship,

each influencing the other. Maren Blanchard, *The Relationship between Socioeconomic Status and Literacy: How Literacy is Influenced by and Influences SES*, Mich. Journal of Economics, ¶ 10 (Jan. 5, 2023), https://sites.lsa.umich.edu/mje/2023/01/05/the-relationship-between-socioeconomic-status-and-literacy-how-literacy-is-influenced-by-and-influences-ses/ (accessed Feb. 27, 2024). Racial and ethnic minorities are impacted more by illiteracy as well. Reardon, S. F., Valentino, R. A., & Shores, K. A., "Patterns of Literacy among U.S. Students," *The Future of Children*, (Fall 2012) http://www.jstor.org/stable/23317409 (accessed Feb. 27, 2024).

Additionally, studies of the jury selection procedures in Massachusetts, Illinois, Florida, and California federal courts revealed a "mounting loss of minority jurors . . . due primarily to the disproportionate impact [of] undeliverable qualification questionnaires and non-response to jury forms." Jeffrey Abramson, *Jury Selection in the Weeds: Whither the Democratic Shore?,* 52 U. Mich. J.L. Reform 1, 10–11. This data highlights the need for personal service on non-responders to reduce the number of poor, illiterate, or minority persons excluded from the venire.

The clear mandate of *LaMere*, and a century of precedent before it remains: "Where the defendant shows that there has been a substantial or material deviation from statutory procedures . . . a presumption of prejudice obtains." *LaMere*, ¶ 61.

C. Brad never waived his right to a fair and impartial jury.

Brad never waived his ability to raise this claim. A defendant may waive a structural error by pleading guilty, but Brad went to trial. *See Class v. United States*, 583 U.S. 174, 181–82 (2018). A waiver of any constitutional right must be knowing and intelligent. Brad never waived his right to a properly drawn jury.

D. Brad's request was timely under the circumstances.

Timeliness regarding a motion for new trial based on violations of the jury selection statutes depends on the particular point in which knowledge of the violations is gained. *Solberg*, 203 Mont. at 84, 659 P.2d at 292. The plaintiff in *Solberg* requested, and ultimately received, a new trial in his initial brief on appeal, over one year after the trial, despite a "strenuous[]" argument it was untimely. *Solberg*, 203 Mont. at 83, 659 P.2d at 292. A party has "a right to rely on the judge and clerk to follow their statutory duties." *Solberg*, 203 Mont. at 84, 659 P.2d at

292 (citing *Dvorak*, 196 Mont. at 171–72, 639 P.2d at 64); *see also Gallego v. United States*, 276 F.2d 914, 917 (9th Cir. 1960) (courts presume public officers properly perform their duties). "[I]f counsel was without knowledge or means of knowledge during trial he may, upon gaining knowledge of selection irregularities, make his objection known in a motion for new trial. The rule does not limit the time period for making the objection, rather it defines a particular point as being timely." *Solberg*, 203 Mont. at 83–84, 659 P.2d at 292.

Shortly before September 1, 2023, the Flathead County District Court first found its Clerk and Sheriff failed to follow § 3-15-405. Brad learned about this failure on September 18, and requested a new trial 18 days later. Brad went a procedural step further than the *Solberg* plaintiff by obtaining a stay of this appeal so the district court could rule on the new trial motion before presenting it here. The period between the violation and Brad discovering it cannot count against him in evaluating timeliness based on the rule of when knowledge is gained under *Solberg*. Brad acted timely under the circumstances.

Though the district court did not address whether Brad's motion was timely, the State argued it was not, relying on the 30-day deadline

from § 46-16-702. But § 46-16-702(1), as discussed in *State v. Morse*, 2015 MT 51, ¶¶ 25–29, 378 Mont. 249, 343 P.3d 1196, provides courts "the authority to consider granting a new trial and [be] guided in its decision only by the interest of justice." *Morse*, ¶ 26. "The Legislature did not insert a time limitation on the court's authority to act under subsection (1), nor did it restrict the manner in which the issue may first be raised." *Morse*, ¶ 26. The provisions of § 46-16-702(1) allow courts to grant a new trial when required by the interests of justice under its "inherent authority," notwithstanding the 30-day deadline under § 46-16-702(2). *Morse*, ¶ 29. The interests of justice have no timeline. *Morse*, ¶¶ 27–29.

Under the statutory scheme for jury formation in civil trials, a challenge to the panel may be made and the whole panel set aside when the jury was not notified as prescribed by law. Mont. Code Ann. § 25-7-222. Section 25-7-222 contains no deadline. Criminal trial juries are formed in the same manner as those in civil cases. Mont. Code Ann. § 46-16-111. It is unreasonable to require a strict deadline for challenges to the panel in criminal trials, where fundamental rights,

namely liberty, are at stake, but maintain no such deadline regarding civil matters. Brad's motion should be considered timely.

Brad's post-trial discovery of the defective jury panel constituted good cause to challenge the panel beyond the deadline in Montana Code Annotated § 46-16-112. Section 46-16-112 states that, except for good cause shown, any objection to the manner in which a jury panel has been selected or drawn must be raised by a motion to discharge the jury panel at least five days prior to the term for which the jury is drawn. This deadline would require Brad to have had knowledge of the defective jury panel five days before it was drawn in July of 2021. But the Flathead County District Court did not discover its jury formation irregularities until shortly before September 1, 2023. Brad had no reason to know his venire was defective before then. Brad's post-trial discovery of his defective panel met the good cause exception under § 46-16-112.

Brad did not lack diligence in moving for a new trial 18 days after discovering the potential error. Allison's testimony shortly after, on October 25, 2023, confirmed the defect. (Doc. 218, Ex. E.) Under these

unique circumstances and the fundamental rights at stake, Brad acted timely, and the court's inherent power allowed it to grant a new trial.

II. Amanda's accusations from April were inadmissible hearsay, plus the Confrontation Clause and Rule 804(b)(1) barred admission of the affidavit.

Amanda accused Brad of acting violently in April, which the court wrongly admitted through three statements—Amanda's TOP affidavit, text messages to Prangley, and to her mother, Wungluck. Admission of the affidavit violated Brad's confrontation right and the associated testimony rule under Montana Rule of Evidence 804(b)(1). All three statements lacked guarantees of trustworthiness and failed to fit a hearsay exception.

A. Amanda's TOP affidavit was inadmissible.

1. Admission of the affidavit violated the Confrontation Clause.

The Sixth Amendment, applicable to the States via the Fourteenth, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." *Crawford v. Washington,* 541 U.S. 36, 42 (2004); *Pointer v. Texas,* 380 U.S. 400, 403 (1965)). Using language stronger than its federal counterpart, the Montana Constitution provides that the

accused have the right to meet the witnesses against them "face to face." Mont. Const. art. II, § 24; *State v. Pingree*, 2015 MT 187, ¶ 13, 379 Mont. 521, 352 P.3d 1086. "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." *Crawford*, 541 U.S. at 62.

The Confrontation Clause allows courts to admit hearsay against criminal defendants in two instances: (1) if the hearsay is testimonial, the defendant must have had an opportunity to cross-examine the declarant and the declarant must be unavailable; (2) if the hearsay is nontestimonial, it must bear adequate indicia of reliability or particularized guarantees of trustworthiness. *Mizenko*, ¶ 10 (citing *Crawford,* 541 U.S. at 59, 68). Though the Supreme Court gave numerous examples in *Crawford*, it specifically declined to define "testimonial" evidence. *Mizenko*, ¶ 10.

Testimony is "[a] solemn declaration or affirmation *made for the purpose* of establishing or proving some fact." *Mizenko*, ¶ 11 (citing *Crawford,* 541 U.S. at 51, 71; emphasis in *Mizenko*); *State v. Tome*, 2021 MT 229, ¶ 23, 405 Mont. 292, 495 P.3d 54. Testimonial

statements include the "functional equivalent" of "*ex parte* in-court testimony[,]" such as "affidavits[.]" *Crawford*, 541 U.S. at 51. When a declarant signs an affidavit, the declarant expects the state will seek to make use of those statements, even if the state may not be directly involved in obtaining the sworn testimony. *Mizenko*, ¶ 19. "[I]f just before trial a person shoved a written statement under the courthouse door, asserting that the accused did in fact commit the crime, that would plainly be testimonial even though no government official played a role in preparing the statement." *Mizenko*, ¶ 19 (quoting Richard D. Friedman, *The Confrontation Clause Re–Rooted and Transformed*, 2004 Cato Sup.Ct. Rev. 439, 458).

Testimonial evidence requires a more demanding test of reliability than nontestimonial evidence because the framers intended to protect defendants from the evils inherent in testimonial evidence. *Mizenko*, ¶ 15. "[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Mizenko*, ¶ 15 (quoting *Crawford*, 541 U.S. at 50). Written evidence is

almost useless, is frequently taken *ex parte*, and seldom leads to the proper discovery of truth. *Crawford,* 541 U.S. at 49.

Here, Amanda's affidavit was plainly testimonial and inadmissible without a prior opportunity for cross-examination. It was the functional equivalent of *ex parte* in-court testimony for the TOP. The statement served as a solemn affirmation made to establish a dispute between Amanda, Brad, and Scott. The first page indicates it is under oath and the signature page indicates it is sworn.[3] By signing it, Amanda expected the State would seek to make use of the statement, despite it not being directly involved.

The State's use of the affidavit at trial amounted to an *ex parte* examination as evidence against Brad who was accused of a crime—the "principal evil at which the Confrontation Clause was directed[.]" *Mizenko*, ¶ 15. The court erred by admitting the affidavit when Amanda was unavailable, and Brad had no prior opportunity for confrontation.

---

[3] The affidavit is unnotarized, however, should still be treated as a sworn statement. *See Bullcoming v. New Mexico*, 564 U.S. 647, 664 (2011) ("implausible" to read Confrontation Clause to allow admission of formal, unsworn statement but not sworn *ex parte* affidavits).

The court erred in finding Brad waived his opportunity for cross-examination. Waiver of a fundamental right must be informed and intelligent. *State v. Matt*, 2008 MT 444, ¶ 24, 347 Mont. 530, 199 P.3d 244 (overruled on other grounds). The court referenced no written or oral waiver and cited no authority to support its conclusion that Brad waived his confrontation right at a future criminal trial through the process in which he resolved the TOP. (Doc. 91 at 5.) Brad could not waive a fundamental constitutional right that had not yet been implicated. The district court clearly erred in this regard. The affidavit was testimonial and inadmissible without an opportunity for cross-examination.

2. Rule 804(b) barred admission of Amanda's affidavit.

Montana Rule of Evidence 804(b)(1) states that unavailable witness testimony from another hearing in a different proceeding may be admitted in a criminal proceeding if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by cross-examination. *Pingree*, ¶ 15. This rule barred admission of Amanda's affidavit because Brad never had an opportunity for cross-examination about it, and his motive to develop

the testimony at a TOP hearing would vastly differ from his motive at a criminal trial.

In *Pingree*, the State accused Pingree of pointing a gun at his wife and firing it near her head. *Pingree*, ¶ 3. The wife testified about the incident at a civil order-of-protection hearing, which the court allowed to be read into evidence at Pingree's criminal trial when the wife failed to appear. *Pingree*, ¶¶ 2–6. Pingree attended the civil hearing without counsel and did not cross-examine his wife. *Pingree*, ¶ 4.

This Court reversed, reasoning that Pingree must have had an opportunity to examine the declarant, and a similar motive to develop the declarant's testimony under Rule 804(b)(1)(B) when the testimony was given. *Pingree*, ¶ 15. Though Pingree had an opportunity to cross-examine, the "similar motive" requirement was not met because an order-of-protection served to prevent further conflict between Pingree and his wife, whereas a criminal case could result in fines and imprisonment. *Pingree*, ¶¶ 17–19. Pingree's motive to develop the testimony in either case was "vastly different." *Pingree*, ¶ 17.

Amanda's affidavit is just like Pingree's wife's testimony. Both here and in *Pingree* the State used these accusatory statements from a

civil proceeding against a defendant in a later criminal trial. Unlike Pingree, Brad never had an opportunity to cross-examine Amanda about the affidavit. Like Pingree, Brad had a "vastly different" motive to develop the testimony at a TOP hearing versus his criminal trial. Rule 804(b)(1) barred admission of the affidavit because Brad had no opportunity to cross-examine Amanda about it, plus his motive to develop such testimony at a TOP hearing would vastly differ from that at a criminal trial.

B. Amanda's statement "heard" by Wungluck was inadmissible.

Wungluck's testimony to what Amanda told police on April 16 was demonstrably false. Wungluck testified that, while on the phone, she heard Amanda tell police Brad "pushed her up against the car and was choking her." Amanda said no such thing to law enforcement that day, a fact provided to the court before trial. (Doc. 76 at 3.) Both Amanda's affidavit and texts to Prangley expressly stated she did not mention this to the police. No FCSO deputy testified to hearing it, nor did FCSO ever charge Brad with any crimes that April. Wungluck testified falsely. No hearsay exception could render her false statement reliable.

C. Amanda's messages to Prangley were inadmissible.

The court erred by admitting the text messages to Prangley. Though the court did not apply a specific hearsay exception to these messages, it did cite excited utterance, then-existing state of mind, recorded recollection, guarantees of trustworthiness, and the statement of impending death exception for the affidavit and other statements made about the same events, and around the same time, as the text messages. But none of these exceptions rendered the text messages admissible.[4]

The "**Excited utterance**" exception is defined as a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. Mont. R. Evid. 803(2). The spontaneity of the statement provides the guarantee of trustworthiness; an exciting event temporarily stills the capacity of reflection and produces utterances free of conscious fabrication. Commission Comments to 803(2); *see In re Estate of Harmon*, 2011 MT 84, ¶ 30, 360 Mont. 150, 253 P.3d 821 (no evidence

[4] The analysis applied to the text messages here also applies to the affidavit, should the Court find it nontestimonial.

that testator's statement she was "hoodwinked" was a startling event, dispute remained whether testator appeared to be under undue stress at time of signing, and "numerous hours" had passed between event and statement); *see also Mizenko*, ¶ 34 (excited utterance when victim told neighbor that defendant was drinking and trying to hurt her because it was made a short time after the assault, while out of breath, visibly upset, and a fresh wound on her face); *State v. Cameron*, 2005 MT 32, ¶¶ 33–34, 326 Mont. 51, 106 P.3d 1189 (sex assault victim's statement to sister admissible when made shortly after victim arrived home, within two hours of the incident, victim cried from time she left crime scene until after making statement, and firmly held sister while she cried); *State v. Sanchez*, 2008 MT 27, ¶ 21, 341 Mont. 240, 177 P.3d 444 (victim's statement about receiving a threat was not an excited utterance because she was unconcerned by it and surrounding comments indicated she lacked the "stress of excitement").

Nothing about Amanda's texts to Prangley indicate they were excited utterances. The April 12 text described Amanda confronting Brad about infidelity, Brad breaking the phone, and threats she received. (State Ex. 173.) Amanda's purpose was to ask Prangley to

notify their employer that she lacked a phone and to explain why she was getting divorced. She voiced concern about the separation, kids, and finances, but gave no indication she remained under the excitement of a startling event.

The same applies to Amanda's April 16 text. (State Ex. 174.) Amanda described Brad's and Scott's past actions in a linear manner. She was an emotional "mess[,]" but conveyed no sense of urgency or excitement. By comparing this text with the affidavit, it appears Amanda sent it to Prangley around the time she had left home, went to Dairy Queen, got a hotel, "and relax[ed] in the hotel while [] talking to friends and family." Amanda was relaxed and calm enough to reflect on past events and tell Prangley what she did not tell police. She mentioned being "scared" to go home, and being "worried" Brad may smash a new phone. Despite these concerns, Amanda returned home 30 minutes later. These circumstances show the texts were not excited utterances.

"**Then-existing mental condition**" is defined as a "statement of the declarant's then-existing state of mind," "but not including a statement of memory or belief to prove the fact remembered or

believed." Mont. R. Evid. 803(3). This exception allows hearsay statements to prove state of mind from which future actions of the declarant may be inferred, but is not allowed to be used to infer past actions; the guarantee of trustworthiness is the statement's spontaneity. Commission Comments to 803(3). To prevent this exception from swallowing the rule, 803(3) allows statements that directly reveal the declarant's state of mind, but excludes the parts that explain the external circumstances causing the state of mind. *State v. Gomez*, 2020 MT 73, ¶ 52, 399 Mont. 376, 460 P.3d 926.

The text messages recount the external circumstances—Brad's conduct— causing Amanda to be in a state of marital strife and an emotional mess in response to Prangley asking if she was okay. Amanda did not send the messages spontaneously. Allegations that Brad broke two phones, got in Amanda's face, threatened her, and put his hands around her neck were memories to prove past facts. Even if Amanda was in fear at the time, Rule 803(3) allows only the statements that directly reveal the state of mind, not the circumstances causing it.

Amanda's mental state eight months before her death was not probative of the charge. The State used these statements to prove the

truth of the matter asserted in furtherance of its theory of the case: Brad reacted violently when confronted about infidelity. Whether Amanda feared Brad in April did not explain her death. If Amanda's fear was probative of the charge, it had to be based on the truth of the matter asserted—that Brad had been violent. Rule 803(3) did not provide a basis to admit the text messages.

The "**Recorded recollection**" exception is defined as a:

> memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

Mont. R. Evid. 803(5); *State v. Hocevar*, 2000 MT 157, ¶ 49, 300 Mont. 167, 7 P.3d 329; *Spurgeon v. Imperial Elevator Co.*, 99 Mont. 432, 436, 43 P.2d 891, 893 (1935).

Rule 803(5) did not provide a basis to admit Amanda's texts because Amanda was not a trial witness. Rule 803(5) applies to a declarant-witness needing to be refreshed on a prior statement. The court incorrectly admitted the statements as exhibits when the rule

only permits reading them into evidence—and only upon insufficient recollection of the declarant-witness. Amanda's messages to Prangley could not be read into evidence by Prangley because she did not "ma[k]e or adopt[]" them. The court erred by relying on 803(5).

The "**residual hearsay exception**" is a "statement not specifically covered by any other exception but having comparable circumstantial guarantees of trustworthiness." Mont. R. Evid. 803(24). This exception should be used sparingly, and only in exceptional circumstances; it is not a broad license to admit hearsay. *State v. Brown*, 231 Mont. 334, 338, 752 P.2d 204, 207 (1988).

A statement's reliability can be found upon showing it has "particularized guarantees of trustworthiness." *Idaho v. Wright*, 497 U.S. 805, 817 (1990); *State v. S.T.M.*, 2003 MT 221, ¶ 29, 317 Mont. 159, 75 P.3d 1257. The particularized guarantee of trustworthiness must be shown from the totality of the circumstances, including "only those that surround the making of the statement and that render the declarant particularly worthy of belief." *S.T.M.*, ¶ 30. Everything bearing on the credibility of the speaker and the accuracy of the statement may be considered, including its spontaneity and the declarant's motive to

fabricate. *Hocevar*, ¶ 50; *see also S.T.M.*, ¶ 31. The presence of corroborating evidence is not a basis for presuming the declarant is trustworthy. *S.T.M.*, ¶ 33 (citing *Wright*, 497 U.S. at 819, 823). The declarant's truthfulness must be so clear from the surrounding circumstances that cross-examination would be of marginal utility. *S.T.M.*, ¶ 31.

Amanda's text messages were inadmissible under 803(24). As argued above, the messages lacked spontaneity. Plus, Amanda had motive to fabricate Brad's conduct to garner sympathy and gain leverage in a potential dissolution.

The specifics of Amanda's accusations vary from one statement to the next, calling the reliability of all into further question. Pretrial, the State claimed Amanda told Prangley "Brad strangled her." Prangley never testified to this at trial. The affidavit said Brad pushed Amanda against the car, and "put his hands around [her] neck[,]" and said, "I will end you." The April 16 text said Brad put "his hands around [Amanda's] neck and was going to choke" her. In Amanda's statement to Roston, which was not admitted at trial, but included in the court's findings of fact, Amanda said Brad "hit and choked her."

When reconciling all of Amanda's statements, it remains unclear what happened. In one version, Brad strangled Amanda; in another, he hit and strangled her, in a third, he placed his hands as if he might strangle her. For the police at the scene, no violence was mentioned. The trustworthiness of the accusations was far from guaranteed. This Court should not rely on the residual exception as a "broad license" to find Amanda's text messages admissible.

The last exception cited by the district court was a "**Statement under belief of impending death**" defined as a "statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstance of what the declarant believed to be impending death." Mont. R. Evid. 804(b)(2); *see also Sanchez*, ¶ 21 (declarant's statement not made while believing her death to be imminent, nor was she concerned by any threat to kill, stating, "He ain't got the balls to do nothing"). There must be a settled hopeless expectation that death is near at hand, and what is said must have been spoken in the hush of its impending presence. *Shepard v. United States*, 290 U.S. 96, 99–100 (1933). The declarant's state of mind must

be exhibited in the evidence, and not left to conjecture. *Shepard*, 290 U.S. at 99–100.

The "impending death" exception is plainly inapplicable to Amanda's text messages. Amanda never stated, nor suggested, she thought she may die. The messages began with a request to notify her employer about her lack of a phone, indicating Amanda believed she would live because she needed to maintain contact with work. The April 16 text claimed Brad threatened to put a bullet in Amanda's head if he went to jail and that her reaction was, "are you serious[,] I don't want you in jail[,]" not that she genuinely believed a bullet was coming her way. The statement specifically alleging Brad "puts his hand around [Amanda's] neck and was going to choke [her]" did not indicate Amanda thought she was going to die. The impending death exception did not serve as a basis to admit the hearsay.

D. The State cannot show admission of Amanda's statements was harmless.

A defendant must have suffered prejudice from erroneously admitted hearsay to have his conviction reversed. *State v. Veis*, 1998 MT 162, ¶ 25, 289 Mont. 450, 962 P.2d 1153. Prejudice exists when there is a reasonable possibility the inadmissible evidence might have

contributed to a conviction by examining whether the factfinder was presented with admissible evidence proving the same facts that the tainted evidence proved. *State v. Van Kirk*, 2001 MT 184, ¶¶ 42–43, 306 Mont. 215, 32 P.3d 735. Factors to consider include the importance of the testimony in the prosecution's case, whether the testimony was cumulative, and the presence or absence of evidence corroborating or contradicting the testimony on material points. *State v. Martell*, 2021 MT 318, ¶ 17, 406 Mont. 488, 500 P.3d 1233.

It is the State's obligation to demonstrate the error at issue was not prejudicial. *Van Kirk*, ¶ 42. The State must also demonstrate that the *quality* of the tainted evidence is such that there is no reasonable possibility it might have contributed to the conviction. *Van Kirk*, ¶ 44 (italics in original).

Without Amanda's hearsay reports of violence, there was no evidence showing a common motive between the April incident and Amanda's death. Without evidence of a motive, it was less likely the jury would believe Brad killed Amanda, particularly in light of the evidence pointing to Scott and the inconsistencies in the boys' testimonies.

Even without Scott's confession and suicide, he could not be ruled out as Amanda's killer, and had motive to harm her. He was present that morning, his bedroom a few feet from where Amanda landed. His statements about what transpired were inconsistent. In April, he raged at the idea of Amanda taking his grandchildren away.

As cumulative evidence, the State may point to Mary Neuharth's testimony, "in April [Amanda] said that she had left Brad, and she said that—something to the effect that they have had domestic problems and that he had strangled her once." (Tr. at 1256.) Mary knew little of Amanda's family life and did not interact with her outside of work gatherings. (Tr. at 1250–51.) Mary threw this remark in at the end of her testimony, and qualified it with, "something to the effect . . .," showing a murky memory as to precisely what Amanda said. Amanda never used the term "strangled" in any of her statements. Mary offered this vague memory in contrast to not knowing much about Amanda otherwise. Whether Mary meant Brad strangled Amanda in April or, in April, Amanda said Brad strangled her sometime earlier, remained unclear.

Assuming Mary meant Brad strangled Amanda in April, this differed from the text message, "was going to choke" her, and the affidavit, "put his hands around [her] neck." Amanda's accusation through Mary was no more reliable than the other hearsay statements.

Mary's testimony did not prove the same facts as the tainted hearsay and lacked the detailed quality of the affidavit and texts. Mary did not testify that Amanda confronted Brad about infidelity, thus she did not provide the shared motive between the prior and charged act to further the State's theory. The State never mentioned Mary's testimony in closing argument, but did highlight the tainted statements.

The court clearly erred in admitting unreliable hearsay, which was not harmless. The State painted Brad as Amanda's killer by portraying him as a repeat abuser when reasonable questions remained about the April dispute. Given the lack of direct evidence against Brad, and the evidence pointing to Scott, admission of the hearsay unfairly led to Brad's conviction.

CONCLUSION

Based on either error argued above, Brad requests this matter be remanded for a new trial.

Respectfully submitted this 8th day of March, 2024.

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

By: /s/ Jeff N. Wilson
JEFF N. WILSON
Assistant Appellate Defender

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary 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 9,962, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Jeff N. Wilson
JEFF N. WILSON

APPENDIX

CERTIFICATE OF SERVICE

I, Jeff N. Wilson, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 03-08-2024:

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Travis R. Ahner (Govt Attorney)
820 South Main Street
Kalispell MT 59901
Representing: State of Montana
Service Method: eService

Electronically signed by Pamela S. Rossi on behalf of Jeff N. Wilson
Dated: 03-08-2024