IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0714

STATE OF MONTANA,

Plaintiff and Appellee,

v.

HEATHER ROSE JOHNSON,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Twenty-First Judicial District Court,
Ravalli County, the Honorable Jennifer B. Lint, Presiding

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REPLY

Evidentiary rules for thee, not for me. Before the district court, the State succeeded in persuading the court to exclude evidence favorable to Heather Johnson based on her counsel's failure to provide notice of a foundational expert witness. (D.C. Docs. 53, 59.) But on appeal, the State asks this Court to forgive its failure to satisfy any legal basis for admissibility of prejudicial hearsay statements in contravention of Montana's Rules of Evidence and the Confrontation Clauses of the United States and Montana Constitutions. This Court should not countenance the State's double standard.

The State elected not to subpoena or call as a witness at trial, the local gas station employee who called 911 on Heather. (App. B at 7.) The decision not to call a particular witness ordinarily comes with consequences at trial. (*See, e.g.*, D.C. Docs. 53, 59 (requesting and receiving order prohibiting testimony regarding .000 preliminary breath test result based on failure to provide notice of expert witness).) But the district court exempted the State from those consequences by declaring the caller's statements "business records" and admitting them for their truth. (App. B at 8, 124.) The caller's opinions carried

unearned weight to the jury because Heather was denied her constitutional right to cross-examine him. (Appellant's Br. 27–28.) The State would have this Court endorse its corner-cutting outright, or in the alternative pretend this evidence was inconsequential beyond a reasonable doubt—even though the State gave this evidence primacy by presenting it first and asked the jury to focus on the caller's inadmissible statements, specifically, during closing arguments.

This Court should reverse the district court's judgment and remand for a new, and fair, trial. Alternatively, the parties agree that Heather's case should be remanded so that the district court can strike from the judgment the requirement that she appear at an "Audit Hearing." (Appellee's Br. 29–31.)

I. The district court erred in admitting the 911 caller's opinions that Heather was intoxicated and was about to drive under the influence.

The parties agree that the 911 call recording itself was hearsay (*see* Appellant's Br. 15, 19–20; Appellee's Br. 22–23), and *some* of the statements made on the call were admissible present sense impressions (Appellant's Br. 20–22; Appellee's Br. 25). The State does not dispute that the statements made on the call were not excited utterances.

(Appellant's Br. 20; Appellee's Br. 23–25 (arguing admissibility as business records and/or present sense impressions).) The parties' disagreement is narrow in scope but tremendous in impact: whether the district court should have admitted the 911 caller's statements that Heather and her companion were intoxicated and were about to commit the crime of driving under the influence.

The State appears to maintain that the business records exception, alone, sufficed to admit the entirety of the 911 call recording, including the caller's statements, for the truth of the matters the 911 caller asserted, arguing that "[t]he caller had no opportunity to deliberate or be influenced by others" when "conveying his observations in real time." (Appellee's Br. 23.) The State does not attempt to align this argument with the theoretical underpinning of the business records exception to the rule against hearsay, which is that the *employee* who *creates* a business record has economic incentives to record information regularly and truthfully. (*See* Appellant's Br. 17–19.) A third party lacks that incentive, so a third party's statements recorded *within* a business record cannot be presumed reliable and truthful. *Bean v. Mont. Bd. Of Labor Appeals*, 1998 MT 222, ¶¶ 20, 24, 290 Mont. 496,

965 P.2d 256; *see also* M.R. Evid. 805. The State has acknowledged as much in another recent case before this Court, in which a key piece of the State's evidence was an allegedly false report to 911. Brief of Appellee at 2, 8, 21, *State v. D. Wood*, No. DA 21-0260 (Mont. Sept. 19, 2023). The district court applied the wrong evidentiary rule by admitting the caller's statements for their truth under the business records exception, and legal error constitutes an abuse of discretion. *State v. Mizenko*, 2006 MT 11, ¶ 8, 330 Mont. 299, 127 P.3d 458.

The district court was not "right for the wrong reasons." Under Rule 805 of the Montana Rules of Evidence, the 911 caller's statements contained within the recording must satisfy their own, independent hearsay exception before being admitted for their truth. *Compare, e.g.*, *State v. Martinez*, 188 Mont. 271, 284–85, 613 P.2d 974, 981 (1980) (applying Rule 805 to exclude officer's testimony about alleged victim's statement that he did not grant defendant permission to take property), *with* Appellee's Br. 24 (questioning "[i]f such a requirement exists in Montana"). As Heather fully—not "tepidly" (Appellee's Br. 25)—acknowledged in her opening brief, most of the statements on the call would have satisfied the present-sense impression exception to the rule

against hearsay *if* the district court had applied the correct standard. (Appellant's Br. 21.) But two statements—that the caller believed Heather and her companion were intoxicated and that they would drive under the influence—were not admissible under any exception to the rule against hearsay. (Appellant's Br. 21–24.) And those statements were precisely the same ones the State relied upon to prove its case. (Appellant's Br. 29–32.)

The State contends there is "no authority" imposing a *blanket* requirement for a court to parse individual statements "within a broader narrative" when considering whether to admit hearsay under the present sense impression exception. (Appellee's Br. 25–26.) However, in neither of the cases the State cites for that proposition did the defendant apparently object before or during trial to the admission of particular statements within the "broader narrative." *See United States v. Lovato*, 950 F.3d 1337, 1340, 1342–43 (10th Cir. 2020); *United States v. Allen*, 235 F.3d 482, 493 (10th Cir. 2000). Here, by contrast, Heather specifically objected to admission of the caller's "conclusions and opinions" without the opportunity to cross-examine the caller. (App. B at 123–24.) In so doing, she raised the "circumstances [that]

may require a court to conduct a more particularized analysis" that were missing from the State's Tenth Circuit cases. *Lovato*, 950 F.3d at 1342 (acknowledging tension between that court's "broader narrative" reasoning with Supreme Court interpretation of "statement" in hearsay rules, including present sense impression exception, as "limited to a single declaration or remark").

Moreover, this Court has previously rejected efforts by the State to smuggle inadmissible hearsay into evidence based on its proximity in the same narrative to admissible statements. *See State v. Castle*, 285 Mont. 363, 370–74, 948 P.2d 688, 692–94 (1997). The solution is simple: The inadmissible material must be removed. *Castle*, 285 Mont. at 373, 948 P.2d at 694 (requiring redaction); *see also State v. Smith*, 2021 MT 148, ¶ 30, 404 Mont. 245, 488 P.3d 531 (explaining that recorded admissible statements "could have been isolated and played for the jury without other portions of the interview being introduced"). The State clearly demonstrated its willingness and ability to edit the video exhibits to remove footage *the State* deemed irrelevant. (Trial Tr. at 138–39.) Or, in this case, the solution could have been even simpler: Subpoena the caller to testify at trial and avoid the hearsay fight

altogether. (*See* Appellant's Br. 22–23 (citing *State v. Berosik*, 1999 MT 238, ¶¶ 8, 37, 296 Mont. 165, 988 P.2d 775).) Rule 805 of the Montana Rules of Evidence prohibits the superficial analysis of an indivisible whole the district court conducted in this case.

The State avoids engaging with the critically important distinction between a declarant's factual observations and his opinions or speculation (Appellant's Br. 21–24), instead focusing on the timing of the 911 caller's statements and the fact that some of the caller's objective observations, like Heather purchasing a six-pack, were corroborated much later, at trial. (Appellee's Br. 24–25.) The intermediate appellate decision from Georgia on which the State relies at least paid lip service to the distinction between facts and opinions but made confounding logical leaps to avoid the obvious conclusion that opinions by definition are not present sense impressions; that court concluded that a 911 caller's statements that a driver was "drunk" were present sense impressions, not opinions or conclusions, even though the caller had no personal knowledge that the driver was drunk, because "any rational juror would understand that" the caller "was merely stating that [the defendant] appeared to be drunk based on his erratic

driving." *Key v. State*, 289 Ga. App. 317, 321, 657 S.E.2d 273, 278 (Ga. Ct. App. 2008). Later in the very same decision, the court accurately described a police officer's testimony that the defendant was under the influence of alcohol as the officer's *opinion*. *Key*, 289 Ga. App. at 322, 657 S.E.2d at 278–79; *see also State v. Carter*, 285 Mont. 449, 456, 948 P.2d 1173, 1177 (1997). This Court should not rely on *Key*'s unpersuasive and internally inconsistent reasoning to conflate objective contemporaneous observations with subjective opinions and conclusions.

There is no "enforcing the rules of evidence would impose a minor inconvenience" exception to the rule against hearsay. The State should be held to the same evidentiary standards it sought to enforce against Heather before and during trial. (*See* D.C. Docs. 53, 59; Trial Tr. at 178–82.) The district court's erroneous admission of the State's prejudicial hearsay evidence warrants reversal and remand for a new trial.

II. The district court's erroneous admission of the 911 caller's opinions violated Heather's constitutional right to confront witnesses against her.

As explained in Heather's opening brief, it does not matter whether the 911 caller's opinions and speculation were testimonial or not; because those hearsay statements were not admissible under the rules of evidence, their admission violated the Confrontation Clause. (Appellant's Br. 16, 24–26.) Nontestimonial hearsay may be admitted against a criminal defendant without providing the defendant an opportunity to confront the declarant only if the nontestimonial hearsay has sufficient indicia of reliability, *i.e.*, complies with the rules of evidence. *State v. Tome*, 2021 MT 229, ¶¶ 33–34, 405 Mont. 292, 495 P.3d 54; *Mizenko*, ¶ 10.

The State contends that the 911 caller's statements were nontestimonial and their admission thus did not violate Heather's right to confront witnesses against her because their primary purpose was to enable police assistance in an ongoing emergency. (Appellee's Br. 18–22.) The State again primarily relies on *Key* to argue that the 911 caller's opinion statements that Heather was intoxicated and about to drive under the influence were nontestimonial. (Appellee's Br. 20–22.)

In *Key*, the Court of Appeals of Georgia concluded the 911 caller's primary purpose was "to prevent immediate harm to the public" based on the specific facts of that case, namely that the caller "repeatedly made clear that he believed that the driver of the SUV was 'going to cause an accident' or was 'going to hurt somebody[,]'" and his statements that the driver was drunk were thus intended to "convey to 911 dispatch the urgency of the situation and to emphasize the need for immediate police assistance." *Key*, 289 Ga. App. at 320, 657 S.E.2d at 277. The sixteen-minute-long call in that case was made as the caller followed the defendant and provided location updates on Interstate 85 North, at a point just outside Atlanta's perimeter where the highway's northbound side alone has six traffic lanes, and the caller reported that the driver was swerving "all over" and stopping in the middle of the gargantuan thoroughfare. *Key*, 289 Ga. App. at 318, 657 S.E.2d at 276. Here, by contrast, neither the 911 caller nor Sergeant Jessop observed or reported a single traffic violation or concerning driving maneuver, and Sergeant Jessop arrived at the comparatively quiet intersection almost immediately. (Trial Tr. at 132–33, 161–62.) Under the facts of this case, the 911 caller's statements that Heather and her companion

were drunk and *about to commit a crime* implicate *Mizenko*'s presumption that statements are testimonial when a declarant knowingly speaks to a governmental agent, rather than the presumption that statements are nontestimonial when they "serve only to avert or mitigate an imminent or immediate danger and the agent who received the statement had no intent to create evidence." *Mizenko*, ¶ 23; *see also State v. Laird*, 2019 MT 198, ¶¶ 98–106, 397 Mont. 29, 447 P.3d 416. But again, regardless whether the statements were testimonial or not, the district court's admission of the challenged statements violated Heather's federal and state constitutional right to confront witnesses against her because those statements were not admissible under the Rules of Evidence. (Appellant's Br. 16, 24–26.)

III. The State failed to prove the district court's error harmless beyond a reasonable doubt.

The State has not met its burden of proving there is no reasonable possibility the 911 caller's inadmissible statements might have contributed to Heather's convictions. Nor could it, when the State repeatedly reminded the jury of the caller's inadmissible and unreliable *opinion* that Heather was intoxicated to support its assertion that she

was under the influence of alcohol and therefore guilty of DUI—*and* more likely to have assaulted Sergeant Jessop—in its closing arguments. (Appellant's Br. 29–31.)

It is reasonably possible that the inadmissible opinion contributed to all of Heather's convictions by negatively impacting her credibility as a witness. (Appellant's Br. 31–32.) This Court recently concluded that a district court's erroneous admission of an expert witness's remote testimony in violation of the Confrontation Clause was not harmless "in a classic he-said/she-said sex offense case" because one primary purpose of the witness's testimony was "to aid the jury in favorably assessing the credibility of the central prosecution witness[.]" *State v. Strommen*, 2024 MT 87, ¶ 30, --- Mont. ----, 547 P.3d 1227. Although there are significant differences between expert and lay opinion testimony, *Strommen* illustrates the commonsense notion that the testimony of an apparently objective third party can tip the scales in a case that turns on witness credibility. *Strommen*, ¶ 30. And in *Strommen*, this Court held the Confrontation error was not harmless even though there *was* an opportunity for the defendant to cross-examine the witness, albeit not face-to-face, *Strommen*, ¶¶ 12, 30; Heather did not even have an

opportunity to conduct a constitutionally inadequate cross-examination of the 911 caller.

Heather's trial boiled down to just such a credibility fight. (Appellant's Br. 29–32.) The State resists this point by arguing that the video recordings played for the jury corroborate the officers' versions of events rather than Heather's (Appellee's Br. 27–29), but several key areas of Sergeant Jessop's testimony—the alleged kick, the alleged attempt to "fake" the PBT, and his side-angle perspective of Heather's field sobriety test performance—either were not visible in the footage or were not presented on video to the jury at all, so the recordings do not satisfy the State's harmless error burden. In particular, the State's assertion that the body camera footage, especially "the immediate reactions of Johnson and Sergeant Jessop[,]" "established beyond a reasonable doubt that she had kicked him" grossly understates the chaos and ambiguity of those moments. (*Compare* Appellee's Br. 27–29, *with* State's Ex. 2 at 07:58–08:20.) The jury was tasked with deciphering what happened, and the 911 caller's inadmissible opinion that Heather was intoxicated unfairly placed a thumb on the scale in favor of the State's version of events.

The State misrepresents the evidence presented to the jury when it states Heather "admit[ted] to Sergeant Jessop at the scene that she was aware her vehicle registration was expired." (Appellee's Br. 27 (citing State's Ex. 2 at 0:08–14).) Immediately after the six seconds of video to which the State cites, Heather states, "It's already been fixed," and begins to explain the paperwork problems she had with the State of Oregon. (State's Ex. 2 at 0:08–23.) The State presented no documentary evidence that Heather had an expired registration or suspended driver's license; it relied solely on Sergeant Jessop's testimony, which the jury had to weigh against Heather's testimony that she had been assured by the State of Oregon that the problems were resolved. (*See* Appellant's Br. 31–32.) There is a reasonable possibility that the State's ability to impugn Heather's credibility with untested hearsay evidence contributed to her convictions for driving with a suspended license and expired registration.

The State likewise attempts to conjure inconsistencies within Heather's testimony that do not exist. (Appellee's Br. 27.) Heather clearly and consistently testified she did not intentionally make any physical contact with Sergeant Jessop, she did not recall such contact

happening, and when *he said* she kicked him, she thought she must have accidentally done so when he pushed her back into the car. (Trial Tr. at 208–09, 218–20.) The testifying officers, by contrast, claimed she intentionally kicked him. (Trial Tr. at 156, 191.) Accordingly, when the State asked Heather on cross-examination, "So, did Sergeant Jessop make up getting kicked in the testicles?" Heather was entirely consistent with her prior testimony when she responded, "*The way he said it happened*, yeah." (Trial Tr. at 220 (emphasis added).)

The State next asserts that Heather "[e]xplain[ed]" to Sergeant Jessop "why she *intentionally* kicked Sergeant Jessop between the legs" in one portion of State's Exhibit 2. (Appellee's Br. 28.) In notable contrast to the State's repeated emphasis at trial on the 911 caller's inadmissible opinions, the State did *not* call any attention to this snippet of video as evidence of Heather's mental state at trial. (Trial Tr. at 158–60, 230–31, 251–53.) When this so-called "explanation" occurred in the video footage, Sergeant Jessop offered to remove Heather's handcuffs if she "cooperate[d]" with him. (State's Ex. 2 at 12:51–13:33.) Heather asked when she had not cooperated with him, and she had barely gotten the words out before Sergeant Jessop quietly

replied, "When you kicked me between the legs," and that is when she gave the response cited by the State: "That's because you were putting me in the back of a cop car . . . ." (State's Ex. 2 at 13:33–45.) Contrary to the State's characterization, this was not necessarily an admission of intentional violence, nor was it inconsistent with accidentally kicking Sergeant Jessop in the chaos of being shoved into his car. This ambiguity is likely why the State did not remark on this exchange at all at trial, let alone cite it as evidence that Heather intentionally kicked Sergeant Jessop. This evidence does not demonstrate that the 911 caller's inadmissible statements that Heather was intoxicated and about to commit a crime were harmless.

The State would have had a fundamentally different case if it opened the trial with Sergeant Jessop pulling Heather over for expired registration. The State intentionally began its case with the 911 caller's unimpeachable opinion that Heather was intoxicated, priming the jury to view Heather's subsequent actions through the lens of that assumption, just as Sergeant Jessop did that night. (Appellant's Br. 28–29.) This was not a blink-and-you-miss-it blip in the middle of otherwise unobjectionable mid-trial testimony, such as a witness

accidentally mentioning a defendant's probation status; the 911 call was the State's opening salvo, and the State repeatedly asked the jury in closing arguments to rely in part on the caller's opinions that Heather was intoxicated and about to commit the crime of DUI to find her guilty as charged and to disbelieve her contrary assertions of innocence (*see* Appellant's Br. 28–32). *Compare State v. Long*, 2005 MT 130, ¶¶ 22–27, 327 Mont. 238, 113 P.3d 290 (concluding prejudice caused by single impermissible reference to defendant's prior bad acts was eliminated by curative jury instruction), *with State v. Derbyshire*, 2009 MT 27, ¶¶ 50–53, 349 Mont. 114, 201 P.3d 811 (holding error was not harmless, even with curative instructions, where State witnesses repeatedly referred to defendant's status as probationer). This Court need not credit the State's post-hoc claim that evidence it chose to emphasize to the jury was inconsequential. *See Strommen*, ¶ 30.

CONCLUSION

The 911 caller's inadmissible statements directly accused Heather of guilt for DUI, supported the State's theory of Heather's guilt as to assault on a peace officer, and undermined her credibility to the benefit of the State's version of events as to all charges. The district court's

evidentiary error denied Heather her constitutional right to confront this witness and challenge *his* credibility. And the State has not proven that there is no reasonable possibility that evidence it expressly relied upon in its arguments to the jury had no impact on the outcome of this case. This Court should reverse and remand for a new trial.

Alternatively, the parties agree that remand is appropriate to strike from Heather's judgment the requirement that she appear at an "Audit Hearing" because that requirement was not orally pronounced.

Respectfully submitted this 12th day of June, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 3,507, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Charlotte Lawson
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CERTIFICATE OF SERVICE

I, Charlotte Lawson, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 06-12-2024:

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