

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 APPELLEE

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

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STATEMENT OF THE ISSUES

1. Whether Hillious preserved an objection to the victim's statements when the court did not definitively rule pretrial and Hillious did not object to their admission at trial.

2. If so, whether the statements' admission was harmless when other statements eliciting the same information were properly admitted at trial.

3. Whether Hillious's motion for new trial filed over a year after the judgment issued was untimely.

4. If the motion was timely, whether Hillious waived his challenge to the jury panel when he failed to timely raise the issue.

5. If not waived, whether the failure to personally serve individuals who did not respond and include nonresponders in the jury pool is a harmless technical violation that did not deprive Hillious of a jury randomly drawn from a fair cross-section of the community.

6. If the failures were a substantial violation, whether this Court should overrule *State v. LaMere*, 2000 MT 45, 298 Mont. 358, 2 P.3d 204, and find the error harmless.

STATEMENT OF THE CASE

Appellant Bradley Jay Hillious (Hillious) was charged with deliberate homicide for killing his wife, Amanda Hillious (Amanda). Before trial, Hillious opposed the admission of Amanda's prior statements. (Doc. 66.) At trial, however, Hillious stated he did not object to the admission of Amanda's Petition for a Temporary Order of Protection, and he failed to object to the admission of Amanda's statements to others, which the court had not definitively ruled on pretrial. (Trial Tr. at 1138, 1178, 1211-22.)¹ The jury convicted Hillious of deliberate homicide, and the court imposed a 100-year sentence. (Docs. 183, 194.)

After appealing, Hillious stayed his appeal to file a second motion for new trial in the district court based on the sheriff's failure to personally serve individuals who did not respond to their initial jury notice. (Doc. 211.) The court denied the motion concluding Hillious did not demonstrate prejudice. (Doc. 220, available at Appellant's App. C.)

STATEMENT OF THE FACTS

I. The homicide

On the morning of December 15, 2020, Amanda was home with Hillious, her four children, and Hillious's father, Scott Hillious (Scott). Amanda's

¹ The transcript of the trial, held January 3-14, 2022, is cited as "Trial Tr."

11-year-old son, J.H., was eating breakfast at the kitchen table. J.H. saw Hillious come out of his room and argue with Amanda. Hillious hit and dragged Amanda, and she told him to stop. Hillious ordered J.H. to his room. (Trial Tr. at 356-60.)

J.H. then heard Amanda go downstairs, followed by Hillious. J.H. heard Amanda say, “call 911” and “stop hitting me” from downstairs. J.H. heard Scott direct Hillious to stop hitting Amanda. J.H. heard Amanda on the stairs, and then heard a bang. (*Id.* at 360-63.) Hillious later told J.H. that Amanda had fallen on the stairs and not to tell the police that he did it. (*Id.* at 364, 368.)

Five-year-old A.H. heard banging on the stairs, which he believed was Amanda falling down the stairs, and Hillious running down the stairs. After that, Amanda repeatedly told Hillious to “stop,” and Hillious told her to “shut up.” A.H. saw Amanda telling Hillious to stop from his bedroom downstairs, but Hillious threw him on his bed. A.H. saw blood on the floor, and he believed Amanda’s ear was gone. (*Id.* at 337-39, 342, 348-49, 548; State’s Ex. 4 at 0:29-0:37, 0:43-1:00, admitted at Trial Tr. at 545.)

Scott called 911. (Trial Tr. at 1117.) When law enforcement arrived, Amanda was unresponsive on the basement floor, several feet from the bottom of the stairs, and did not appear to be breathing. (*Id.* at 505.) There appeared to be blood on an oak entertainment center across from the stairs and items on it had moved. (*Id.* at 564, 1775-76, 1784, 1935.)

After emergency personnel made considerable efforts to resuscitate Amanda at the house, she was transferred to the hospital. (*Id.* at 505-10, 606-25.) Lack of oxygen caused Amanda to become brain dead. (*Id.* at 721-22, 765-68, 962.) Amanda was kept alive for several days to harvest her organs. (*Id.* at 962-63.)

The autopsy showed that, in addition to swelling of her brain, Amanda's hyoid bone in her neck was fractured on both sides. (Trial Tr. at 1505-06, 1520.) A fractured hyoid bone is commonly caused by strangulation, hanging, or an accident causing a direct impact to the neck, but a bilateral fracture is generally caused from hanging or strangulation. (*Id.* at 725-27, 788, 826.) The hyoid bone is "very protected," and a bilateral fracture is "most common" with manual strangulation. (*Id.* at 1506.) Additionally, lack of oxygen to the brain can be caused by strangulation or asphyxiation. (*Id.* at 809.) Amanda had significant bruising all over her body, including her head, in addition to abrasions and lacerations, including a laceration behind her ear. (*Id.* at 1483-1506, 1523.)

The medical examiner determined Amanda died as a result of strangulation associated with blunt-force injuries. (*Id.* at 1521.) He opined that a fall down the stairs could not have caused Amanda's injuries. (*Id.*) Many of her bruises were in "protected regions," and he did not "see how falling down stairs could fracture her hyoid bone on both sides." (*Id.* at 1522.)

Hillious had bruising and some scrapes on his hands on December 15, which he said had come from performing CPR or from punching a coffee table in frustration. (*Id.* at 951, 981, 1939.)

II. Subsequent events

While Amanda was dying in the hospital, Hillious was in contact with Rylie Adams, with whom he had been having an affair. (Trial Tr. at 1656, 1823, 1834.) She began spending time at the house and driving Amanda's car. (*Id.* at 1264-65, 1840, 1942.)

On December 24, nine days after Amanda's lethal injuries, law enforcement called Hillious to ask him and Scott to come in to discuss the autopsy results. (*Id.* at 1946.) Shortly afterward, Hillious called 911 to report that Scott had shot himself. (*Id.* at 1274.) According to Hillious, when he told Scott about a detective's request to speak to them again, Scott said, "I can't deal with this anymore," and "this is bullshit, I'm not going to jail." (*Id.* at 1748.) Hillious said Scott went outside, and Hillious heard a gunshot. (*Id.* at 1749.) Scott was found in the barn with a lethal gunshot wound to the head. (*Id.* at 1275, 1280.)

When officers searched the home following Scott's death, they located Rylie's belongings in the master bedroom. (*Id.* at 1373-74, 1410, 1590-94; State's Exs. 119-20.) Evidence obtained from the home demonstrated that Rylie had

purchased a wedding dress and rings. (Trial Tr. at 1375-77, 1383, 1592-93; State's Exs. 122-26, 179, 195, 200, 206, 215.) Additionally, blank name tags had been placed over name tags with Amanda's name on them on wrapped Christmas presents. (Trial Tr. at 1387-88; State's Ex. at 133-36.)

Cell phone and social media records demonstrated that Rylie was making plans to move in with Hillious and get married before Amanda's death. (Trial Tr. at 1654; State's Ex. 206.) A week before Amanda's injury, Rylie sent a friend a message saying, "The only reason we aren't moving me into his house this week is because Amanda's claiming squatter's rights. He has to get her out before I can move in." (Trial Tr. at 1657-58; State's Ex. 206 at 6.) In one message, Hillious told Rylie, "You're mine, lover. I can't wait to marry you." (Trial Tr. at 1665.) In another message, Hillious told Rylie, "The wife" was "about to be fired." (*Id.* at 1666.)

III. Hillious's statements

A. Explanation of the incident

Hillious initially told law enforcement he had been asleep upstairs when he heard a scream and came out to find Amanda at the bottom of the stairs. (*Id.* at 530; Ex. 28, admitted and published at Trial Tr. at 999-1000.) He suggested she fell down the stairs and hit the side of the entertainment center. (State's Ex. 2 at

2:06-2:11.) Hillious denied having a conversation with Amanda that morning. (State's Ex. 28 at 9:31:24-9:31:34, 9:34:15-9:34:30.)

After Scott's death, Hillious told detectives Amanda woke him up Tuesday morning and was upset about something he had written on social media. He said he told her he was not going to deal with it then and she needed to "back off." He said they argued, and then he went back to bed. (Trial Tr. at 1762-67.)

B. Other statements

Within hours of Amanda entering the hospital, Hillious told a nurse that Amanda did not want life saving measures to be taken and she wanted to be cremated. (*Id.* at 909.) Within days, he told Amanda's mother that the children would always know who Amanda was, but they needed to move on with their lives. (*Id.* at 1146.)

Hillious told a hospital social worker he was very excited to get a promotion at work. He said he needed to keep moving forward, and he needed to make sure he did not fall behind in life. He said he had not told his coworkers what had happened with Amanda because it was not their business. He discussed his marriage with the social worker and told her Amanda had obtained a restraining order against him earlier that year. (*Id.* at 980-81.)

During events that were held at the hospital for Amanda's organ donation, Hillious expressed frustration that Amanda's coworkers gave condolences and

money to Amanda's mother, but not him, and he confronted Amanda's supervisor about it. (*Id.* at 983, 1255.) The hospital social worker viewed his behavior as "very odd" because he "was very detached from the situation." (*Id.* at 984.)

IV. Amanda's prior statements

A. Motion to exclude Amanda's statements

Hillious moved to exclude statements Amanda had made in a Petition for a Temporary Order of Protection (Petition), her statements made in 911 calls, and her statements to coworkers and friends, arguing the statements were testimonial, inadmissible hearsay, and unreliable. (Doc. 66; *see also* 10/1/21 Tr. at 59-62.)

The State argued Amanda's statements in her Petition were not hearsay because they were circumstantial evidence of her state of mind and would not be offered for the truth of the matter asserted. (Doc. 76 at 7, 9.) The State argued the statements to 911 were not testimonial and were admissible as present sense impressions and then-existing sensations. (Doc. 76 at 7-8; 10/1/21 Tr. at 68-69, 75.) The State argued Amanda's statements to her mother, made shortly after Hillious smashed her phone and strangled her, were excited utterances. (Doc. 76 at 8.) The State argued other statements Amanda made explaining Hillious's abuse were either circumstantial evidence of her state of mind, excited utterances, or evidence of her then-existing mental, emotional, or physical condition. (*Id.*)

After a hearing, the court held that none of the statements Hillious challenged were testimonial. The court found statements in the Petition had indicia of reliability admissible under several hearsay exceptions, but deferred specific rulings until trial. (Doc. 91 at 3-5.) The court found Amanda's statements to 911 and law enforcement were nontestimonial and were admissible under hearsay exceptions. (*Id.* at 5.) The court found Hillious had not identified the statements to others he was challenging and stated if they were offered for the truth of the matter asserted, the court would consider their admissibility. (*Id.*)

B. Amanda's prior statements admitted by the State

Amanda's father, Christopher Maciel, testified Amanda called him late on April 12, 2020. She was crying and said Hillious and Scott were ganging up on her. (Trial Tr. at 1077, 1093.) Maciel called 911 and asked for a welfare check. (*Id.* at 1079-80.) When Maciel talked to Amanda the next day, she was worried it would be difficult to live as a single mother if she divorced Hillious. (*Id.* at 1082, 1105-06.)

The State played a 911 call Amanda made on April 16, 2020, without objection. (Trial Tr. at 1116; State's Ex. 29.) A 911 dispatcher called Amanda because Amanda had called 911 and hung up. (*Id.* at 1115-16.) Amanda indicated she was not safe to give her address. (Ex. 29 at 0:20-0:52; Trial Tr. at 1117.) Amanda told the dispatcher she was trying to visit her mom for a few days.

(State's Ex. 29 at 0:27-0:33.) During the call, Amanda yelled, "don't poke a hole in the tire." (*Id.* at 1:40-1:44.) Later, Amanda pleaded, "Please let me answer the door." (*Id.* at 2:20-2:23.) She then argued with a male, insisting she was, "coming right back," which the male denied she would do. (*Id.* at 2:23-2:29.) A different male, apparently Scott, yelled, "make her sign divorce papers, now," along with a statement about not going to jail. (*Id.* at 2:33-2:41.) She then said, "ow, please let me," before yelling "ow" more forcefully. (*Id.* at 2:40-2:44.) The conversation then ended.

After Hillious's counsel stated he did not object, the State admitted Amanda's Petition in which she explained that she and Hillious had an argument because she believed he was having an affair. (State's Ex. 33, admitted at Trial Tr. at 1178.) During the argument, Hillious smashed her phone. When she grabbed the house phone, Scott instructed her not to call 911 and told Hillious "to hand him a gun because [Amanda was] not listening to them." (*Id.* at 3-4.) She explained she later asked to visit her mother in Oregon with the kids. (*Id.* at 4.) Although Hillious initially agreed, Scott told her she could not take the kids and demanded she sign divorce papers and sign over her rights to the kids before leaving. (*Id.* at 5.)² Amanda stated Hillious pinned her against the sink with his forehead and

² Multiple pages are labeled with the same number, so counsel is citing the electronic page number.

demanded she sign the papers. (*Id.*) Scott threatened to put a “hit on [her] head” with the Hell’s Angels if she left with the kids. (*Id.* at 6.) Amanda explained that while she was talking to 911, Hillious gestured that he would stab her tire with a knife. (*Id.*) Hillious pulled Amanda from the car, smashed the house phone, and said, “take my kids now bitch.” (*Id.*) He then pushed her against the car, put his hands around her neck, and said, “I will end you B*t*h.” Amanda said when law enforcement arrived, she did not tell them everything Hillious and Scott had done because she still had to live with them. (*Id.* at 7.) Although the State admitted the Petition, it was not read by the State.

Amanda’s mother, Michelle Wungluck, testified Amanda was worried in early 2020 that Hillious was having an affair. (Trial Tr. at 1135.) Amanda called Wungluck in tears in April and told Wungluck she “had confronted [Hillious] about things she had found regarding this other woman, and, um, he had put hands on her, and I believe at that time he had thrown her phone and broken her phone so that she could not contact her loved ones or the police department. She was scared.” (*Id.* at 1135-36.) Amanda told Wungluck that Hillious had put his hands around her neck. (*Id.*) Wungluck could hear Hillious yelling in the background and heard him threaten Amanda with a gun. Hillious told Amanda the issue could be solved with a bullet between the eyes, and Scott agreed. (*Id.* at 1136-37.)

Wungluck explained Amanda locked herself in her car while waiting for officers to arrive because she was afraid. (*Id.* at 1137.)

Wungluck said Amanda planned to bring the kids to visit her. While Wungluck was on the phone with Amanda, Hillious started taking the kids out of the car, saying they could not leave. Scott told Hillious if he let Amanda leave with the kids she would never come back. Wungluck testified Amanda told officers Hillious had pushed her up against the car and was choking her. Wungluck testified Amanda would not tell officers Hillious had threatened her with a gun. (*Id.* at 1137-38.)

The State also admitted Amanda's statements to her coworker, Sara Prangley. (Trial Tr. at 1205.) In April, Amanda sent Prangley text messages saying she and Hillious were getting a divorce because of his relationship with his coworker, and Hillious had smashed her phone. (State's Ex. 173; Trial Tr. at 1213.) Amanda said Hillious had agreed she could visit her mother, but then locked her inside, stating she could not leave without signing divorce papers. (State's Ex. 174; Trial Tr. at 1217-19.) He cornered her with his forehead on hers and threatened her. (*Id.*) She said he threatened to pop the tire of her vehicle, and he pulled her from the vehicle and smashed her phone. (*Id.*) She said he threatened to put a "bullet into my fucking head" if he went to jail and put his hands around her neck. (*Id.*)

Prangle testified that in December 2020, Amanda was again worried that Hillious was talking to his coworker. (Trial Tr. at 1241.) Amanda did not want to get a divorce, and she was scared to raise the issue with Hillious. (*Id.*)

C. Amanda’s prior statements admitted by Hillious

On cross-examination, Hillious played Maciel’s call to 911 in which Maciel said it sounded like Hillious and his father were ganging up on Amanda. (Def.’s Ex. RR at 0:00-1:01.)

Hillious played a 911 call that Amanda placed on April 16 to ask whether a report had been filed. (Trial Tr. at 1120; Def.’s Exs. TT, UU at 1:50-2:00 (electronically labeled calls 3 and 4).) She said she did not know if Hillious would take her phone again and “smash it like he did last time” if she went back home. (Def.’s Ex. UU at 0:39-0:46.) She also told the dispatcher she did not know if she told law enforcement “how he had his hands on my . . .” Amanda was interrupted, but she appeared to say “throat” while the dispatcher was talking. (*Id.* at 2:16-2:23.)

Hillious also played Amanda’s 911 call she placed on April 17 to ask when her temporary restraining order would be served. (Def.’s Ex. VV.) She said Hillious and Scott had kicked her out of the house because she would not sign their custody agreement. (*Id.* at 0:39-0:44, 1:28-1:37.) She explained she told Hillious she was leaving for a night so she would not feel as scared to come home. (*Id.* at 2:05-2:13.)

Hillious elicited Wungluck's testimony that Amanda said Hillious "was hitting her, and she was going to leave, and he threatened her and told her, 'I'll shoot you before you take those kids away from me.'" (*Id.* at 1167.) Similarly, he elicited Amanda's supervisor's testimony that Amanda said she and Hillious "had domestic problems and that he had strangled her once." (*Id.* at 1256.) Hillious also elicited a neighbor's testimony that Amanda was fearful of both Hillious and Scott. (*Id.* at 1268.)

And Hillious himself said Amanda claimed that he "was physically abusing her" when she filed for a temporary order of protection. (Trial Tr. at 1797-98.) Hillious admitted the temporary order of protection. (Def.'s Ex. ZZ, admitted at *id.* at 1970.)

Hillious also admitted thousands of pages of text messages downloaded from Amanda's phone, and had a witness read many of them. (Trial Tr. at 1614-17, 1677-1701, 1708-09, 1715-16.) In one message, Amanda said Hillious threatened to "destroy" her when she would not sign his divorce papers. (*Id.* at 1701.) Amanda also said Scott ordered her to leave the house, and she "said I will because you guys scare me. I got a restraining order request in." (*Id.*)

The text messages Hillious admitted did not contain Amanda's text messages that the State admitted, but they contained similar statements. Amanda responded to a message that said, "I heard his dad put hands on you that true?,"

with, “No brad did.” (Def.’s Ex. DE5, April Message Nos. 399, 401.) In another message, Amanda’s mother told her she needed to tell her attorney “how controlling and angry Brad gets and that he threatened to put a bullet in your head if you took the kids away from him.” (*Id.*, No. 463.)

In another message, Amanda described fighting with Hillious about the divorce and said she told him she filed for a restraining order because “I don’t feel safe you both have threatened me and you put your hands on me[.]” Hillious smiled and repeatedly winked at her and said, “no I didn’t.” He also threatened to place a restraining order on her claiming she threatened to shoot him, winked, and said “two can play at this game bitch[.]” She also said he told her, “you didn’t tell the cops I did that[.]” and she replied, “yeah because I was terrified of you and knew if I told them you’d hold up to what you said[.] [H]e smiled winked and said no I wouldn’t.” (*Id.*, No. 614.)

Amanda also said her back hurt “from when he had me cornered into the kitchen sink.” (*Id.*, No. 621.) Another message said she told Hillious she did not tell law enforcement everything “because you guys threatened to shoot me.” (*Id.*, No. 695.) One message said A.T. asked “why daddy tried to kill [Amanda].” (*Id.*, No. 1079.)

V. Hillious's defense

At trial, Hillious's counsel argued he was not guilty because Amanda was injured by falling down the stairs, medical personnel performed deficiently, Scott may have harmed her, and Wungluck influenced the children's memories. (Trial Tr. at 2308-38.) Hillious theorized it was Scott, rather than Hillious, who Amanda feared. (*E.g., id.* at 1096-97, 1160, 1232-34, 1268, 1703, 2313-18, 2336-37.) Hillious played a body camera video demonstrating Scott became angry and suicidal when law enforcement served the order of protection. (Trial Tr. at 1180-83; Def.'s Ex. 77, admitted at Trial Tr. at 1189.)

Hillious called a medical expert who opined Amanda died from falling down the stairs. (*Id.* at 2123-24.) Hillious called a psychologist who opined inconsistencies in the children's statements showed their grandmother influenced their memories. (*Id.* at 2174-2219.)

SUMMARY OF THE ARGUMENT

Hillious did not preserve an objection to admitting Amanda's statements that he challenges on appeal. Although he objected to the admission of Amanda's Petition pretrial, at trial he stated he did not object to its admission. Hillious waived any objection. Hillious did not preserve an objection to the other

statements he challenges because the court did not issue a final ruling, and he failed to object at trial.

And even if the statements were erroneously admitted, any error would be harmless because the same information came in through other statements Hillious does not challenge. Hillious cannot demonstrate reversible error.

The district court correctly denied Hillious's second motion for new trial for several reasons. First, the motion was untimely. Second, Hillious waived the issue under Mont. Code Ann. § 46-16-112(1) by failing to raise the issue before trial. Third, the sheriff's failure to personally serve individuals who did not respond and the clerk's failure to include nonresponders in the trial jury pool was a technical violation of Mont. Code Ann. § 3-15-405 that did not affect the goals of random selection and objective disqualification. Instead, an impartial jury randomly selected from a fair cross-section of the community convicted Hillious. Because the clerk substantially complied with the statutory process, Hillious cannot prevail without demonstrating prejudice. The district court correctly concluded he failed to do so.

ARGUMENT

I. Standard of review

This Court reviews a district court's evidentiary rulings and the denial of a motion for a new trial for an abuse of discretion. *State v. Gomez*, 2020 MT 73, ¶ 40, 399 Mont. 376, 460 P.3d 926.

II. Amanda's statements in her Petition, to her mother, and to Prangley, were properly admitted without objection, or were all harmless because similar statements were properly admitted.

A. Hillious did not preserve an objection to Amanda's statements in the Petition or her statements to others.

1. The Petition

When the State moved to admit the Petition, defense counsel viewed the document and stated, "No objection." (Trial Tr. at 1177-78.) Although Hillious had previously moved to exclude the Petition, his contrary position at trial waived his prior objection to the document's admissibility.

A motion in limine is generally sufficient to preserve an objection, and a party does not need to make a contemporaneous objection if the objection would be redundant. *State v. Byrne*, 2021 MT 238, ¶ 20, 405 Mont. 352, 495 P.3d 440. But Hillious did not just remain silent or renew his previous position. Instead, he affirmatively stated he did not object to the admission of the Petition. This

statement expressed a change in his earlier position and constituted a waiver of any prior objection to the Petition's admission.

Hillious relied on the Petition to support his theory Amanda was afraid of Scott, not Hillious. (See Trial Tr. at 320-21, 1160-61, 1169, 1232-34, 1267-68, 2317.) It was Hillious, not the State, that read portions of the Petition during the trial and invited the jury to read the Petition. (*Id.* at 320-21, 1160-61, 1233-34, 2317.)

Further, a motion in limine does not preserve an issue on appeal unless the district court provided a definitive ruling. *State v. Favel*, 2015 MT 336, ¶¶ 19-22, 381 Mont. 472, 362 P.3d 1126. Although the district court indicated the Petition was not testimonial and the statements would be admissible under hearsay rules, the court explicitly deferred specific rulings until trial. (Doc. 91 at 4.) This was not a definitive ruling. When Hillious stated he did not object, rather than requesting a definitive ruling, he waived an objection to the admission of the statements in the Petition.

2. Wungluck's testimony

Hillious did not preserve an objection to Wungluck's testimony that Amanda told law enforcement Hillious had pushed her against the car and choked her. (*Id.* at 1138.) For a motion in limine to preserve an issue on appeal, the district court must be "'directly faced with the question' and ha[ve] provided a 'definitive ruling' on the issue." *Byrne*, ¶ 20. Neither prong was satisfied here.

First, Hillious's motion did not mention the challenged testimony. Instead, he generally argued Amanda's statements to her family should be excluded, claiming her statements were unreliable. (Doc. 66.) That was not sufficiently specific to preserve an objection. *See State v. Vukasin*, 2003 MT 230, ¶ 33, 317 Mont. 204, 75 P.3d 1284.

Second, the court did not issue a definitive ruling. Instead, the court noted that Hillious had not identified the statements to others he was challenging and stated that it would consider the statements' admissibility at trial if they were offered for the truth of the matter asserted. (Doc. 91 at 5.) Because the court did not definitively rule, Hillious needed to object at trial to preserve the objection. He failed to do so (Trial Tr. at 1138), waiving his objection.

3. Amanda's messages to Prangley

Hillious similarly waived his challenge to the admission of Amanda's text messages. Hillious's motion did not specifically identify those statements he sought to exclude, and the court indicated it would consider the admissibility of Amanda's statements to others at trial. (Doc. 66; Doc. 91 at 5.) Hillious did not sufficiently raise an objection to the admission of the text messages, and the court never ruled on their admissibility.

To preserve an objection, Hillious needed to object to the admission of those messages at trial. He did not. Instead, he stated, “No objection,” to the admission of the text messages. (Trial Tr. at 1211-22.)

Hillious later admitted all the text messages contained on Amanda’s phone from 2020, further demonstrating he did not object to the admission of Amanda’s text messages. Hillious therefore waived an objection to Amanda’s messages.

B. Wungluck’s statement was admissible.

Additionally, Amanda’s statement to Wungluck uttered shortly after Hillious assaulted and strangled her was a nontestimonial excited utterance admissible under Mont. R. Evid. 803(2). *See State v. Mizenko*, 2006 MT 11, ¶ 33, 330 Mont. 299, 127 P.3d 458. Hillious argues that Wungluck’s testimony that Amanda told officers she was choked should have been excluded because it was inaccurate. The record does not conclusively demonstrate that Amanda did not make that statement to any officer. Further, it is the role of the jury, not the court, to determine the accuracy of the statement. *State v. Losson*, 262 Mont. 342, 350, 865 P.2d 255, 260 (1993) (citing Mont. R. Evid. 104(e)).

C. If any of the challenged statements were improperly admitted, their admission was harmless.

If erroneous, the admission of the Petition, Wungluck’s statement about what Amanda told law enforcement, and Amanda’s text messages to Prangley were harmless because other similar statements proving the same facts were

admitted at trial. And, given the strength of the evidence, the challenged statements did not have any effect on the verdict.

The admission of inadmissible evidence is harmless if the State demonstrates that the jury “was presented with admissible evidence that proved the same facts as the tainted evidence and, qualitatively, by comparison, the tainted evidence would not have contributed to the conviction.” *State v. Van Kirk*, 2001 MT 184, ¶ 47, 306 Mont. 215, 32 P.3d 735. This Court has found the admission of a victim’s prior statements to be harmless where other cumulative evidence proved the same facts and there was no reasonable possibility the statements might have contributed to the conviction. *Gomez*, ¶ 57; *State v. Sanchez*, 2008 MT 27, ¶¶ 25, 29, 341 Mont. 240, 177 P.3d 444; *Mizenko*, ¶ 26.

The challenged statements demonstrated Amanda said Hillious smashed her cell phone and the house phone, pinned her against a sink with his forehead, demanded she sign divorce papers, threatened to stab her tire with a knife, put his hands around her neck, and threatened to shoot her. (State’s Exs. 33, 173-76; Trial Tr. at 1138.) Those facts were established by other evidence the State admitted without objection or evidence Hillious admitted.

Several sources, including Hillious’s own statements, established that Amanda had obtained a restraining order against Hillious and reported he had physically abused her. (*E.g.*, Trial Tr. at 1138-39, 1797-98.) Significantly,

Hillious does not challenge the admission of Amanda's chilling 911 call from April 16 in which she stated she was not safe to give her address, explained she was trying to visit her mother, demanded that somebody not poke a hole in her tire, pleaded to be able to answer the door, insisted she would return from her trip, and then yelled "ow" repeatedly before the phone went dead. (State's Ex. 29.) He also does not challenge Maciel's testimony that he requested a welfare check on April 12 because Amanda felt Hillious and Scott were ganging up on her.

Hillious also does not challenge Wungluck's testimony that: Amanda called her in tears and was scared because she "had confronted [Hillious] about things she had found regarding [another] woman, and, um, he had put hands on her and . . . broken her phone"; Wungluck heard Hillious tell Amanda an issue could be solved with a bullet between her eyes; and Amanda locked herself in the car because she was afraid. (Trial Tr. at 1135-37.)

And Hillious's counsel elicited testimony stating that Hillious "was hitting her, and she was going to leave, and he threatened her and told her 'I'll shoot you before you take those kids away from me'"; Hillious "strangled her once"; and she was fearful of Hillious and Scott. (*Id.* at 1167, 1256, 1268.) Hillious also played 911 calls in which Amanda said Hillious had smashed her phone and had placed his hands on her throat, and she was scared to go home. (Def.'s Ex. UU at 0:39-0:46, 2:16-2:23; Def's Ex. VV at 2:05-2:13.)

Amanda's text messages, which Hillious's counsel admitted, provided similar evidence. They demonstrated Amanda had said Hillious put his hands on her, cornered her into the kitchen sink, and threatened to shoot her, and she was scared of him. (Def.'s Ex. DE5, April Messages 399, 463, 614, 621, 695.)

Even more significant than the cumulative evidence about the April events is compelling evidence about the homicide itself. Most importantly, the children in the home established Amanda did not fall down the stairs while Hillious was asleep, as he claimed. Instead, Hillious had been arguing with her and had hit and dragged her, while she was telling him to stop. (Trial Tr. at 357-60.) Although J.H. could not see what happened next, he heard Amanda and Hillious go downstairs, heard her say, "call 911" and "stop hitting me," and then heard a loud bang. (*Id.* at 361-62.) J.H. testified Hillious directed him not to tell law enforcement he did it. Similarly, A.H. said Amanda repeatedly told Hillious, "stop," and he told her to "shut up." (*Id.* at 337-39, 342, 348; Ex. 4 at 0:29-1:00.)

The medical evidence demonstrated Amanda had a bilateral broken hyoid, consistent with being strangled, and injuries all over her body. The medical examiner determined the cause of death was strangulation. (Trial Tr. at 1521.)

Although Hillious tried to suggest that Amanda may have been harmed by Scott, rather than him, his children identified him as the person who was fighting

with Amanda that morning, and J.H. heard Scott tell Hillious to stop hitting her. (*Id.* at 337-39, 342, 348, 357-63.)

Hillious also had a significant motive to kill Amanda because he had expressed his intentions to marry Rylie. Hillious's behavior, telling people he needed to move on before Amanda had even died, is also consistent with him having killed her.

In sum, there is no reasonable possibility that Amanda's cumulative statements about the April incidents contributed to Hillious's conviction.

III. The district court correctly denied Hillious's motion for new trial.

A. Facts regarding the motion for new trial

The jury found Hillious guilty on January 14, 2022. (Doc. 183.) Thirty-one days later, Hillious filed a motion for new trial alleging the State's closing argument violated his right to a fair trial. (Doc. 184.) The court denied that motion. (Doc. 190.)

Hillious appealed his conviction in May 2022. Seventeen months later, he successfully moved to stay the appeal and remand so he could file another motion for new trial. (Motion to Stay Appeal and Remand, filed 10/12/23.) Hillious moved for a new trial, alleging the clerk had not certified to the sheriff the names

of potential jurors who did not respond to their jury notice, and the sheriff failed to personally serve those people, resulting in reversible error. (Doc. 211.)

The State responded that Hillious had not raised any issue concerning the jury panel, and he passed the jury for cause at the conclusion of voir dire.

(Doc. 217 at 1.) The State argued Hillious's motion was untimely under Mont. Code Ann. § 46-16-702; he waived his right to object to the formation of the jury panel under Mont. Code Ann. § 46-16-112 by failing to object; the process substantially complied with Mont. Code Ann. § 3-15-405; and Hillious failed to show he was prejudiced by any irregularities. (Doc. 217.)

The State attached an order from a Cascade County case, *State v. Hinkle*, in which a defendant challenged the formation of the jury panel before his trial.

(Doc. 217, Ex. 2.) The State also attached a 32-page order issued by the Honorable Dan Wilson denying a motion for new trial based on the notification of the jury in *State v. Shaw*. (Doc. 217, State's Ex. 1.) Hillious filed the transcript of the hearing on Shaw's motion for new trial. (Doc. 218, Ex. E.)

In the *Shaw* hearing, Flathead County Clerk and Jury Commissioner, Peg Allison, provided detailed testimony about the process of procuring juries. (*Id.*) She explained that she received a list of potential Flathead County jurors from the Office of the Court Administrator containing 142,472 names, which come from voter registration records and driver's license and Montana identification card

records. (*Id.* at 12, 59, 83.) From that list, she randomly draws 7,000 names two times a year, for a total of 14,000 individuals who are potential jurors for a 6-month term. (*Id.* at 8-14.) Allison draws 14,000 names each year to ensure there are sufficient jurors for every trial held. (*Id.* at 62.) Individuals drawn are sent a notice that they are required to submit a questionnaire, which can be done electronically or on paper. (*Id.* at 9-10, 25.) Some people obtain a paper form by contacting the clerk's office at the phone number or email address on the notice. (*Id.* at 50-51.)

The postal service generally returns approximately 1,000 of the 7,000 notices as undeliverable. (*Id.* at 15.) Only about 2 percent have forwarding addresses in Flathead County. (*Id.* at 18-19.) Allison sends new notices to people with a forwarding address in Flathead County and removes the other individuals from the jury pool. (*Id.* at 19.) Allison testified no area in Flathead County has more undeliverable notices than any other area. (*Id.* at 19-20.)

In the March 1 to August 31, 2023 jury term, 2,507 individuals returned their questionnaires and were available. (*Id.* at 148.) 2,742 individuals were designated "Available Without Questionnaire," which meant they did not respond or return a questionnaire, and their notices were not returned as undeliverable. (*Id.* at 27-28.) Questionnaires might not be returned for many reasons, including that the person may have died or moved. (*Id.* at 65-67.) 436 individuals were designated as deceased or permanently excused based on their obituary or

information they sent in. (*Id.* at 29-33.) 1,232 individuals were temporarily excused based on information they sent in. (*Id.* at 35-37.) Allison routinely receives questionnaires and notices returned as undeliverable throughout the jury term. (*Id.* at 64-65, 73.)

Allison had not certified the list of potential jurors who had not responded to the sheriff for several years. (*Id.* at 22-23, 68-69.) She had previously certified lists to sheriffs, but each time, the sheriff had told her there was no way they had the resources to personally serve potential jurors. (*Id.* at 68-69.) Because nothing was ever done with the list, Allison stopped the “arduous” task of certifying a list of nonresponders to the sheriff. (*Id.* at 71-76.)

Allison drew trial jurors from the group of people who were available with a questionnaire. (*Id.* at 42.) Those individuals were then summoned. (*Id.* at 14, 42.) Allison was “confident” that the distribution of individuals whose notice was undeliverable and who returned questionnaires was randomly distributed. (*Id.* at 54.)

Since issues had been raised concerning jury formation, Allison had seen “a significant improvement” in returns of questionnaires based on “the raised level of awareness among the communit[y.]” (*Id.* at 77.) She also received about 400 responses by sending a reminder, which she had not always done before. (*Id.*)

Allison was required to make the list of potential trial jurors publicly available and would have given the list to anyone upon request. (*Id.* at 63.) She

also would have told anyone her process for summoning jurors if anyone had asked. (*Id.* at 70.)

Flathead County Undersheriff Nic Salois testified his office had received a list of nonresponsive jurors in the previous months and had been attempting to personally serve the jurors. (*Id.* at 106-07.) Successful personal service was “very rare,” with only about ten percent of people being personally served. (*Id.* at 107.) Officers often learn that the person they are attempting to serve does not live at the listed address. (*Id.* at 111-12.) Salois did not know whether any of the people personally served subsequently filled out the questionnaire. (*Id.* at 109.) Salois was not aware of his office personally serving jurors in the previous 20 years until the issue had been recently raised. (*Id.* at 108.)

In the order denying Shaw’s motion for new trial, Judge Wilson found:

- [P]ersonal service “on ‘non-responders’ does little to nothing toward advancing the goal of ensuring the ‘random nature of the jury selection process,’ because there is no assurance that the FCSO can actually effect service on such persons.” (Doc. 217, Ex. 1 at 21.)
- “There is no evidence demonstrating [any identifiable group] is more likely than another person to fail to respond to a jury notice . . . and it cannot be said that personal service of a jury notice on a person who has *already* been lawfully served by mail will ensure the random nature of jury selection.” (*Id.* at 21-22.)
- “[N]othing about the apparent deficiencies in the statutorily described process for drawing and summoning jurors has been shown to have impacted the random nature of the jury selection process or the impartiality of the pool from whom the venire panel was selected or the trial jury ultimately selected.” (*Id.* at 22.)

- The Legislature “intended to provide a mechanism for ensuring responses to jury notices that was less than dictatorial and . . . more aspirational[.]” (*Id.* at 23.)
- The intent of the personal service requirement is to ensure a sufficient number of jurors, not to ensure that every person appears. Thus, a failure to “comply strictly” with the notice provision “does not undermine or materially affect the random nature or objectivity of the jury selection process, nor has anything been shown . . . to have had any impact on the formation of the trial jury selected from a fair cross-section of the community.” (*Id.* at 25.)

Judge Wilson also noted there were 142,472 names on the juror list in Flathead County, but there were only about 87,774 adults in the county. (*Id.* at 25-26.) The court thus concluded that the list from the Office of the Court Administrator was “substantially inaccurate because more than 1/3 (38%) of the ‘eligible potential jurors’ on the list are phantoms or figments who [do not live in] Flathead County.” (*Id.* at 26.) The court concluded that, given the “magnitude of the overcount,” requiring personal service would produce “not only an impossible task in trying to locate the non-responsive (and nonexistent) potential jurors, but, inevitably, both a fruitless and nonsensical one.” (*Id.* at 28.)

The court concluded the failure to personally serve did “not undermine or materially affect the random nature or the objectivity of the jury selection process” and was “immaterial to any thoughtful analysis of whether the Defendant was denied a fair trial or a jury composed of a fair cross-section of the community.” (*Id.* at 30-31.) As a result, there was not a structural error. (*Id.* at 30.)

Here, the district court denied Hillious's motion, concluding he failed to show he was prejudiced because no evidence suggested that any person of any identifiable group was "more likely than another person to fail to respond to a jury notice lawfully served by mail," and there was no indication that service on a person who had already been lawfully served would ensure the random nature of jury selection. (Appellant's App. C at 3.) Because there was no evidence that a technical departure from the jury selection statutes affected the randomness of Hillious's jury, the court found there was not a substantial failure to comply with the statutes. (*Id.*)

B. Hillious's motion for a new trial was untimely.

Montana Code Annotated § 46-16-702(1) provides trial courts the authority to "grant the defendant a new trial if required in the interest of justice." The court may order a new trial "without a motion or . . . after motion and hearing." Mont. Code Ann. § 46-16-702(1). A "motion must be filed by the defendant within 30 days following a verdict or finding of guilty" Mont. Code Ann. § 46-16-702(2).

Although Mont. Code Ann. § 46-16-702(2) requires a defendant to file a motion for new trial within 30 days following the verdict, this Court has held a court can grant a new trial under Mont. Code Ann. § 46-16-702(1) based on information learned through an untimely motion if the interest of justice requires. *State v. Morse*, 2015 MT 51, 378 Mont. 249, 343 P.3d 1196. In *Morse*, this Court held a trial court erred in denying an untimely motion for new trial where the

victim recanted before sentencing and the new evidence satisfied the test for a new trial because the court had the authority to grant a new trial sua sponte under Mont. Code Ann. § 46-16-702(1). *Morse*, ¶¶ 30-36.

Hillious's second motion for new trial was untimely because he filed it on October 6, 2023, 630 days after the jury issued its verdict and after the judgment had issued. Although a court may grant an untimely motion for new trial where the interest of justice requires, that was not required here because the irregularity in forming the jury did not prevent Hillious from having a randomly drawn jury made up of a fair cross-section of his community.

Further, the motion for new trial was not appropriate because Hillious filed it after his judgment of conviction had been issued, and his appeal had been pending for more than a year. While a motion for new trial can be granted after the 30-day deadline, the time to file is not infinite. Because other postconviction remedies exist and differing standards apply to different postconviction remedies, a motion for new trial should be limited to issues raised before a judgment of conviction is issued.

Shortly after deciding *Morse*, this Court stated in *Marble v. State*, 2015 MT 242, ¶ 26, 380 Mont. 366, 355 P.3d 742, that the “window of time” for filing a motion for new trial “invariably closes before the imposition of a judgment of conviction[.]” *See also Marble*, ¶ 28. And this Court recently stated that “[a] new trial motion must be filed within 30 days following a verdict or finding of guilt[.]”

Worthan v. State, 2023 MT 151, ¶ 30 n.5, 413 Mont. 155, 533 P.3d 1033. This Court explained a motion for new trial was not available to Worthan, whose conviction was 16 years old, so he was limited to pursuing postconviction relief. *Id.*

Because Hillious did not file his motion until his appeal was already pending, it was untimely and was correctly denied.

The civil cases of *Dvorak v. Huntley Project Irrigation Dist.*, 196 Mont. 167, 639 P.2d 62 (1981), and *Solberg v. County of Yellowstone*, 203 Mont. 79, 659 P.2d 290 (1983), in which this Court reversed verdicts because the jury was not properly drawn, do not apply because those cases do not address the time bar for filing a motion for new trial in a criminal case. Montana Code Annotated § 46-16-701 establishes a time bar for filing a motion for new trial in a criminal case, and it bars Hillious's untimely motion.

C. Hillious waived any challenge to his jury by failing to raise the issue before trial.

A criminal defendant must challenge the formation of the jury panel before trial. Montana Code Annotated § 46-16-112(1) provides:

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. Except for good cause shown, the motion *must be made at least 5 days prior to the term for which the jury is drawn.*

(Emphasis added). A motion to discharge the jury panel “must be in writing supported by affidavit and must state facts that show that the jury panel was

improperly selected or drawn.” Mont. Code Ann. § 46-16-112(2). If the motion provides evidence showing the jury panel has been improperly selected or drawn, the court must hold a hearing. Mont. Code Ann. § 46-16-112(3). The burden of proof is on the movant. Mont. Code Ann. § 46-16-112(3).

Montana Code Annotated § 46-16-112 demonstrates the Legislature’s intent to require defendants to raise challenges to the jury panel at least five days before the trial begins so that any procedural irregularities can be remedied before trial. This serves the important purpose of avoiding the needless reversal of convictions after a trial has been held.

There is a strong public policy supporting the time bar in Mont. Code Ann. § 46-16-112(1), and many jurisdictions have a similar time bar. Generally,

a challenge to the array must be supported as specified by statute or rule, and interposed in a timely fashion. . . . Rules typically provide that absent a showing of good cause for later filing, the challenge must be made before trial or before commencement of the voir dire examination.

6 Wayne R. LaFave et al., *Criminal Procedure* § 22.2(f), 70-71 (3d ed., West 2007).

In federal courts, challenges to compliance with the jury selection procedures must be raised “before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, *whichever is earlier*[.]” 28 U.S.C. § 1867(a) (emphasis added). This time limit “is to be strictly construed, and failure to comply precisely with its

terms forecloses a challenge under the Act.” *United States v. Bearden*, 659 F.2d 590, 595 (5th Cir. 1981); *see also United States v. Young*, 570 F.2d 152 (6th Cir. 1978).

Similarly, a constitutional claim arguing the jury does not represent a fair cross-section has to be raised before trial in federal court under Fed. R. Crim. P. 12(b)(3), formerly Rule 12(b)(2). The Supreme Court has explained the important interest served by the pretrial objection requirement:

the possible avoidance of an unnecessary trial or of a retrial, the difficulty of making factual determinations concerning grand juries long after the indictment has been handed down and the grand jury disbanded, and the potential disruption to numerous convictions of finding a defect in a grand jury only after the jury has handed down indictments in many cases.

Coleman v. Thompson, 501 U.S. 722, 745 (1991); *see also Davis v. United States*, 411 U.S. 233, 241 (1973) (explaining that absent the rule, “[s]trong tactical considerations would militate in favor of delaying the raising of the claim”).

The source of Mont. Code Ann. § 46-16-112 is the Illinois Code of Criminal Procedure, Chapter 38, section 114-3. Comm’n Comments to Mont. Code Ann. § 46-16-112. The Illinois Supreme Court has held section 114-3 bars a challenge after voir dire begins. *People v. Gill*, 297 N.E.2d 135, 139 (Ill. 1973) (citing Ill. Rev. Stat. 1965, ch. 38, par. 114-3(a)).

Other state courts have barred challenges made after voir dire has begun based on a statutory time bar. *State v. Dangcil*, 256 A.3d 1016, 1027 (N.J. 2021)

(time bar is “strictly enforced” and is relaxed only where there is a showing of actual prejudice to the defendant’s right to a fair and impartial jury because to do otherwise “would impede the orderly administration of [the] criminal justice system.” (quotation marks and citation omitted, alteration in original)); *State v. Johnson*, 476 N.W.2d 330, 333 (Iowa 1991); *People v. Green*, 759 P.2d 814, 816 (Colo. App. 1988).

This Court should similarly interpret Mont. Code Ann. § 46-16-112(1) to bar an untimely challenge to a failure to personally serve notice on potential jurors. The State acknowledges this Court narrowly construed Mont. Code Ann. § 46-16-112(1) in *State v. Robbins*, 1998 MT 297, 292 Mont. 23, 971 P.2d 359, *overruled on other grounds in State v. LaMere*, 2000 MT 45, 298 Mont. 358, 2 P.3d 204. This Court applied Mont. Code Ann. § 46-16-112(1) to bar an untimely challenge to “drawing” the jury, but did not apply the time bar to a challenge to the manner by which the jury was summoned under Mont. Code Ann. § 3-15-505 (1997), *repealed by* 1999 Mont. Laws, ch. 241, § 9, *replaced by* Mont. Code Ann. § 3-15-405 (1999). *Robbins*, ¶¶ 47-51.

Here, Hillious challenges the failure to personally serve, which occurs after the drawing of “regular” jurors, who serve for a year, and before the drawing of trial jurors, who are later summoned. Personal service is part of the process of drawing and selecting, and a challenge to the failure to personally serve is a

challenge to the “manner in which a jury panel has been selected or drawn”³ as that term is used in Mont. Code Ann. § 46-16-112(1). Similarly, the failure to include nonresponsive potential jurors in the jury pool is part of drawing jurors, so a timely challenge must be raised. Further, *Robbins* erroneously parses out summoning from drawing and selecting. Montana Code Annotated § 46-16-112 demonstrates the Legislature’s intent to bar challenges to the jury pool that are not timely raised, consistent with general practice in other jurisdictions.

Significantly, *Dvorak* and *Solberg* do not apply and cannot override the Legislative mandate that a criminal defendant must raise a challenge to the formation of the jury pool. *Dvorak* and *Solberg* were civil cases in which this Court reversed verdicts based on the clerk’s failure to properly draw trial jurors. Because they were civil cases, the time bar in Mont. Code Ann. § 46-16-112(1) did not apply. Because Mont. Code Ann. § 46-16-112(1) conflicts with the analysis in *Dvorak* and *Solberg*, that analysis cannot be applied in criminal cases.

Further, *Dvorak* and *Solberg* both misquote *Ledger v. McKenzie*, 107 Mont. 335, 85 P.2d 352 (1938), and rely on the misstatement to conclude an irregularity in the drawing of a jury may be raised for the first time on a motion for new trial if counsel does not have the knowledge or means of knowledge of the irregularity.

³ The terms “draw” and “select” are used interchangeably throughout Title 3, chapter 15, parts 4 and 5 and do not appear to have separate meanings.

Dvorak, 196 Mont. at 171, 639 P.2d at 64; *Solberg*, 203 Mont. at 83, 659 P.2d at 292. *Ledger* actually stated that the plaintiff urged the Court to adopt the above rule, which was contrary to the general rule. This Court concluded it did not matter which rule applied because the court minutes gave the plaintiff the means of knowledge of the irregularity. *Ledger*, 107 Mont. at 340, 85 P.2d at 353. *Dvorak* and *Solberg* are flawed and should not be followed.

Hillious should not be able to avoid the consequences of Mont. Code Ann. § 46-16-112 by claiming he did not know what process was followed. The time bar places defendants on notice they must inquire about the jury selection process and raise any claim before trial, or they waive their objection. Unlike the defendant in *Hinkle*, who raised an objection to this issue before trial, Hillious failed to object before trial despite having a similar means of knowledge. Allison would have provided that information if Hillious had inquired before trial, but he failed to do so and waived his claim.

Further, Allison was present in the courtroom before the jurors were brought in, and she informed the court of the number of jurors who had been pulled, the number she had excused, and the number who had failed to show up. (Trial Tr. at 50.) Hillious could have raised a concern about the process. Instead, Hillious passed the jury for cause at the conclusion of voir dire. (*Id.* at 251.) Hillious's failure to raise any challenge to the formation of the jury waives his untimely

challenge. Given his failure to inquire into the jury procedures, his later discovery of irregularities does not provide good cause for him to challenge the jury long after his conviction.

D. If the formation of the jury is reviewed, the Clerk substantially complied with the jury procurement statutes.

The clerk must select people, “known as regular jurors,” to serve for a one-year term pursuant to Mont. Code Ann. §§ 3-15-404 and -411(1). Montana Code Annotated § 3-15-405 requires the clerk to “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[.]” “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. Trial jurors must be drawn from the pool of people selected, excluding those who are excused. Mont. Code Ann. §§ 3-15-411(1), -501(1).

The State acknowledges the clerk did not certify a list of nonresponders to the sheriff, and the sheriff did not personally serve nonresponders. The clerk also did not include nonresponders in the jury pool when drawing trial jurors.

The court nevertheless correctly denied Hillious’s motion for new trial because the clerk substantially complied with the jury statutes by randomly

selecting potential jurors from a fair cross-section of the community. The failure to personally serve nonresponsive jurors was not a material deviation from the statutes and was harmless.

This Court has held that a substantial failure to comply with the jury statutes requires reversal of a conviction, but a technical violation that does not threaten the goals of random selection and objective disqualification is subject to the harmless error standard. *State v. Bearchild*, 2004 MT 355, ¶ 16, 324 Mont. 435, 103 P.3d 1006.

In *LaMere*, this Court held that summoning potential jurors by telephone, rather than by mail, materially undermined the purpose of the jury selection statutes to provide for random selection of jurors on the basis of objective criteria, requiring reversal. *LaMere*, ¶¶ 17, 75-76. *LaMere* moved to strike the jury panel before trial and presented statistics demonstrating a significant percentage of residents in Cascade County were Native American and a significant percentage of Native Americans lacked a telephone. *LaMere*, ¶¶ 5-8. The trial court denied the motion.

On appeal, this Court held that telephone summoning failed to substantially comply with Mont. Code Ann. § 3-15-505 (1997). This Court overruled *Robbins*, which had held that summoning jurors by telephone was harmless error, holding a substantial failure to comply with the statutory process of forming a jury required reversal. *LaMere*, ¶¶ 25, 55-61.

“A substantial failure to comply encompasses a statutory violation that affects the random nature or objectivity of the selection process.” *LaMere*, ¶ 57 (citation and quotation marks omitted). “[T]echnical violations—even numerous such violations—that do not frustrate these goals or result in discrimination and arbitrariness do not constitute a substantial failure to comply.” *LaMere*, ¶ 58. This Court noted that the Commission Comments to Mont. Code Ann. § 46-16-112 provide that “a successful challenge to the jury panel can be founded only upon a ‘*material departure* from the law’ with respect to the manner in which the jury was selected, drawn, or summoned.” *LaMere*, ¶ 59 (emphasis in original).

Thus, if a “statutory violation is ‘substantial’ or ‘material’—viewed in terms of the underlying principles of ensuring that jury venires are selected randomly and on the basis of objective criteria—then it cannot be considered non-prejudicial to the defendant. A departure from the statutory scheme that directly or materially affects the random nature or objectivity of the jury selection process establishes a substantial violation independently of the departure’s consequences in an individual case.” *LaMere*, ¶ 60. “Conversely, a mere ‘technical’ or ‘immaterial’ violation—one that does not undermine the objective procedures designed to produce a jury venire consisting of a fair cross-section of the community—constitutes non-prejudicial error under the substantial compliance standard.” *Id.*

Because LaMere demonstrated the error undermined the random selection of jurors and the removal of jurors based on objective criteria, this Court reversed his conviction. *LaMere*, ¶ 75.

Similarly, this Court reversed the defendant's conviction in *State v. Highpine*, 2000 MT 368, 303 Mont. 422, 15 P.3d 938, because the clerk served notice on potential jurors by telephone. Highpine, like LaMere, presented statistical analysis demonstrating the clerk's method excluded economically disadvantaged people from the jury. *Highpine*, ¶ 40.

But this Court has found violations that did not impact the random nature or objectivity of the jury selection process to be technical violations, which are not reversible absent a showing of prejudice. This Court found that a judge's improper dismissal of a juror before trial was not a material failure to substantially comply and was harmless because the potential juror would not have served, and her dismissal did not affect the defendant's right to an impartial jury. *Bearchild*, ¶¶ 19-23. Similarly, this Court held an error was harmless when the wrong alternate juror deliberated on the case. *State v. Oschmann*, 2019 MT 33, ¶ 19, 394 Mont. 237, 434 P.3d 280.

Here, the Clerk's failure to certify the list of nonresponsive jurors to the sheriff, the sheriff's failure to personally serve, and the clerk's failure to include nonresponders when drawing the trial jury did not undermine the goals of

producing a randomly drawn jury composed of a fair cross-section of the community with excuses based only on objective criteria. The clerk used the jury program to randomly pull 7,000 names from the list of potential jurors in Flathead County. Although the data from Hillious's jury term is not in the record, it should be similar to the data in *Shaw*, which demonstrated that 2,507 people returned their questionnaires, 2,742 people did not return their questionnaires, and many others were excused or deceased. (Doc. 218, Ex. E at 26-37, 148.)⁴ In addition, around 1,000 people generally have their questionnaires returned as undeliverable. (*Id.* at 15.)

This data demonstrates that approximately 2,500 individuals likely returned their questionnaires in Hillious's jury term. From that pool, 200 potential trial jurors were randomly drawn. (Trial Tr. at 50.) 65 of those potential jurors were excused and 30 failed to show up, leaving 105 potential trial jurors.

Unlike *LaMere* and *Highpine*, where potential jurors were never notified of jury service if they did not have a phone number, there is no indication any identifiable group was excluded by the failure to personally serve individuals who did not return their questionnaires. Every person with a valid address was notified they had been drawn and had an opportunity to respond.

⁴ Hillious does not request remand to hold a hearing and relies on the data from *Shaw*, which he admitted.

Significantly, Allison testified that the percentage of people who return questionnaires is evenly spread throughout the county. There is no evidence the failure to return a questionnaire is related to race or poverty. Instead, as Judge Wilson demonstrated in *Shaw*, many people fail to respond because they no longer live in Flathead County. That is confirmed by law enforcement's recent experience with personal service, which is successful only about ten percent of the time. Recent efforts to increase responses did improve the response rate, but there is no indication that increasing responses has impacted the rate at which any group is represented in a jury pool.

And there is no guarantee that personal service will lead a person to complete a questionnaire or appear for jury duty. As Wilson concluded, the requirement of personal service is "aspirational" and appears to be intended to produce a sufficient number of potential jurors, rather than to ensure that every person drawn appears for jury duty. (Doc. 217, Ex. 1 at 23.)

Federal law demonstrates that personal service is not required to produce an impartial jury. The personal service requirement was removed from federal statutes in 1970 and, federal statutes have allowed potential jurors to be served by first-class mail since 1983. Pub. L. No. 91-543, 84 Stat. 1408 (codified at 28 U.S.C. § 1866 (1970)); Pub. L. No. 97-463, § 2, 96 Stat. 2531 (codified at 28 U.S.C. § 1866 (1983)). Further, federal clerks are not required to follow up with individuals who

do not respond to their jury summons. *United States v. Gometz*, 730 F.2d 475 (7th Cir. 1984); *United States v. Santos*, 588 F.2d 1300, 1303 (9th Cir. 1979).

Hillious's reliance on literacy statistics to suggest that illiterate jurors may have been excluded should be rejected for many reasons. (Appellant's Br. at 26.) First, that data was not cited in the district court. Second, a person who qualifies as "illiterate" under the standard used in that data may understand the notice. (See <https://nces.ed.gov/surveys/piaac/measure.asp#:~:text=For%20PIAAC%2C%20literacy%20was%20defined,this%20definition%20are%20explained%20below>. (defining literacy).) Third, a person who does not understand the notice can ask anyone to help them read the notice or can call the number on the notice. There is no evidence the failure to personally serve potential jurors resulted in the type of error that occurred in *LaMere*, where potential jurors without a phone did not have any opportunity to be served.⁵

The record demonstrates personal service would be largely futile, and failing to personally serve does not undermine the goals of the jury statutes to produce an impartial jury randomly selected from a fair cross-section of the community. Because a substantial violation is defined as one that undermines the principles of ensuring that jury venires are selected randomly and on the basis of objective

⁵ It is doubtful Hillious would have wanted an illiterate juror given that he admitted thousands of pages of written evidence.

criteria, and failing to personally serve and include nonresponders in the pool did not undermine those principles, the violation is a technical violation subject to harmless error analysis.

There is no evidence Hillious was harmed by the failure to personally serve individuals who failed to respond. 105 potential jurors appeared for jury duty after twice being randomly selected—first, for the pool of regular jurors, and second, for the trial jury. Hillious had the opportunity to question all jurors during voir dire, and he passed the jury for cause. (Trial Tr. at 251.) There is no indication that the 105 who appeared for jury duty were not a representative group of Flathead County citizens. Nor is there evidence that representation of any identifiable group in the jury pool would have been different if officers had undertaken the arduous task of attempting to personally serve every nonresponsive individual. Because this failure did not have any effect on the fairness of Hillious’s trial, the failure to comply is harmless.

E. Alternatively, this Court should overruled *LaMere* and find harmless error.

This Court’s analysis in *LaMere* is internally inconsistent and is manifestly wrong. *LaMere* incorrectly stated the issue was “whether a transgression of the Sixth Amendment’s fair cross-section guarantee is amenable to harmless error review.” *LaMere*, ¶ 39. But, *LaMere* did not involve a violation of the Sixth Amendment’s fair cross-section guarantee. Instead, it involved a statutory

violation. *LaMere* relied on caselaw involving violations of the Sixth Amendment right to a jury trial to determine that a statutory violation could not be considered harmless. *LaMere*, ¶¶ 39-49. This Court then determined that it did not matter that LaMere did not demonstrate a violation of his constitutional right to an impartial jury under *Duren v. Missouri*, 439 U.S. 357 (1979), because he was only alleging a statutory violation. *LaMere*, ¶¶ 62-64. This Court improperly applied the structural error standard applicable to a constitutional violation to a statutory violation.

Structural error “is typically of constitutional dimensions, precedes the trial, and undermines the fairness of the entire trial proceeding.” *Van Kirk*, ¶ 38. The failure to comply with a statute, which is not required to produce an impartial jury, should not be treated the same as a violation of the constitutional right to an impartial jury. Significantly, personal service is not required by federal courts nor the federal Constitution.

While it may be appropriate to find structural error in cases like *LaMere*, where a defendant demonstrates that a significant percentage of Native Americans in the community were never given the opportunity to receive notice of jury duty, structural error is not appropriate in this case. Here, there is no showing the failure to personally serve impacted Hillious’s right to an impartial jury. Hillious and other defendants are attempting to have their convictions reversed without any

showing their jury was not impartial. When a statutory violation has no impact on the impartiality of the jury, harmless error should apply.

The Legislature’s mandate that no conviction be reversed based on an “irregularity” that “does not affect the substantial rights of the accused,” or any “error . . . unless the record shows that the error was prejudicial[,]” Mont. Code Ann. §§ 46-1-103(3), 46-20-701(1), supports that conclusion. Because the failure to personally serve nonresponsive individuals did not affect Hillious’s substantial rights, the violation is not a basis to reverse his conviction.

CONCLUSION

The district court did not err in admitting Amanda’s prior statements, and if it did, the error was harmless. Additionally, irregularities in serving and drawing potential jurors were not reversible error. Accordingly, Hillious’s deliberate homicide conviction should be affirmed.

Respectfully submitted this 21st 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 principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 11,374 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

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CERTIFICATE OF SERVICE

I, Mardell Lynn Ployhar, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 06-21-2024:

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