IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0327

STATE OF MONTANA,

Plaintiff and Appellee,

v.

STEPHEN ERIC WALKS,

Defendant and Appellant.

REPLY BRIEF

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

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Walks respectfully replies to Appellee's brief as follows:

Argument

The State rightfully concedes Exhibits 20 and 24 (Appellant's Exs. C & D) were "testimonial," *i.e.*, "[t]hese two exhibits were presented as part of, or in lieu of, K.P.'s testimony." (Appellee's Br. at 23.) As will be argued *infra*, and the State's claim to the contrary, this Court should find the remaining drawings created by K.P. and K. that purported to illustrate Walks' alleged criminal conduct, and which the jurors had unfettered access to during deliberations, were likewise "testimonial" in nature.

Given the paucity of the evidence against Walks, including K.P.'s and K.'s less than compelling live testimony, this Court should find the State has not and cannot demonstrate there is "no reasonable possibility" the jurors' unsupervised review of the testimonial evidence at issue might have contributed to Walks' conviction.

I. All of K.P.'s and K.'s drawings purporting to illustrate Walks' alleged criminal conduct were "testimonial" in nature.

Again this Court, in *State v. Stout*, 2010 MT 137, ¶ 30, 356 Mont. 468, 237 P.3d 37, cited *Black's Law Dictionary* 640 (Bryan A. Garner

ed., 9th ed., 2009) definition of "testimonial evidence" as a "person's testimony offered to prove the truth of the matter asserted; esp., *evidence elicited from a witness*. Also termed *communicative evidence*; oral evidence." (Emphasis added.) Here, the district court did *not* conclude the drawings at issue (Exs. 18-21, 24, and 29) were not "testimonial" in nature. (2/2/23 Tr. at 6-7.)

The foregoing uncontested points notwithstanding, the State claims the drawings K. and K.P. created pursuant to their respective forensic interviews to illustrate Walks' alleged criminal conduct are not "testimonial;" rather, the drawings were only "relevant to show *how* the children communicated during their forensic interviews." (Appellee's Br. at 21 (emphasis in original); Exs. 18, 19, 21, & 29.) The State's argument in that regard is less than genuine. (Appellee's Br. at 21-22.)

Again, at trial, State's Exhibits 27 and 28 were admitted into evidence over Walks' objection and published to the jury. (2/1/23 Tr. at 104-04, 109-10.) State's Exhibit 27 consisted of clips from the video recording of K.'s forensic interview. (2/1/23 Tr. at 103-04.) State's Exhibit 28 consisted of clips from the video recording of K.P.'s forensic interview. (2/1/23 Tr. 109-10.) Walks respectfully submits Exhibits 27

and 28 were in reality the exhibits, "relevant to show *how* the children communicated during their forensic interviews," *i.e.*, the video clips allowed the jurors to observe the children's body language, demeanor, and hesitancy, in disclosing their respective allegations. Conversely, the drawings K.P. and K. created during their respective forensic interviews were clearly "communicative evidence," elicited pursuant to said interviews, and "offered to prove the truth the matter asserted," *i.e.*, Walks perpetrated the acts he was accused of. *Stout*, ¶ 30.

Again, regarding Exhibits 18 and 19, K.P., at Samms' request, composed the drawings to illustrate Walks' alleged criminal conduct. (Appellant's Exs. B & F.) As to Exhibit 29 K.P., at Samms' request, placed "Xs" on the anatomical drawing to specifically identify where Walks allegedly touched her. (Appellant's Ex. G.) The State also utilized the exact same anatomical drawing pursuant to K.P.'s direct examination wherein K.P. circled where Walks allegedly touched her (Ex. 20; Appellant's Ex. C). (1/31/23 Tr. 12-13.) Notably, although the State concedes Exhibit 20 is "testimonial," it makes no effort to distinguish the communicative and practical differences between Exhibits 20 and 29.

Again, regarding Exhibit 21, K., at Samms' request, composed a drawing to illustrate Walks' alleged criminal conduct. (Appellant's Ex. E.) Walks acknowledges Exhibit 21 has less "communitive content" than the exhibits attributed to K.P.; however, this Court should still find Exhibit 21 was "testimonial" in nature.

The foregoing exhibits K.P. and K. created pursuant to their respective forensic interviews were clearly offered to prove the truth of the matters asserted, *i.e.*, that Walks perpetrated the crimes of which he was charged. *Stout*, ¶ 30. Moreover, the drawings were elicited pursuant K.P.'s and K.'s respective forensic interviews. *Stout*, ¶ 30. Finally, the drawings plainly communicated K.P.'s and K.'s allegations against Walks. *Stout*, ¶ 30. Thus, this Court should find the exhibits at issue were "testimonial" in nature and subject to the common law limitation generally disallowing unsupervised and unrestricted jury review of evidence that is "'testimonial in nature'" during deliberations. *State v. Green*, 2022 MT 218, ¶ 14, 410 Mont. 415, 519 P.3d 811, *quoting State v. Hoover*, 2022 MT 218, ¶ 16, 410 Mont. 415, 519 P.3d 811.

II. The court clearly abused its discretion by allowing the jurors unfettered and unmonitored access to K.P.'s and K.'s drawings during deliberations.

Again, here, the State must demonstrate there is "'no reasonable possibility'" that the unsupervised review of the testimonial evidence at issue might have contributed to Walks' conviction. *State v. Nordholm*, 2019 MT 165, ¶ 12, 396 Mont. 384, 445 P.3d 799, *quoting State v. Van Kirk*, 2001 MT 184, ¶ 47, 306 Mont. 215, 32 P.3d 735. As will be argued *infra*, this Court should find the State has failed to carry that burden.

First, the State argues the prosecutor's references to the testimonial evidence at issue in closing argument were "appropriate and necessary." (Appellee's Br. at 23-24.) To be sure, Walks does not suggest the prosecutor's remarks regarding the testimonial evidence constituted misconduct or were otherwise inappropriate. (2/2/23 Tr. at 27-28, 28-29, 30, 33, 44.) Rather, Walks argues that the prosecutor repeatedly and explicitly implored the jurors to consider the drawings at issue in deciding Walks' innocence and guilt is definitive proof the drawings were "testimonial." (*E.g.* 2/2/23 Tr. at 28-29 (["K.P.] also primarily used drawings to explain what happened . . . This is proof that it happened.").)

Perhaps more importantly, Walks argues because the record demonstrates the prosecutor repeatedly and explicitly implored the jurors to consider the drawings at issue, there is more than reasonable possibility that the jurors placed "'undue emphasis'" on this testimonial evidence "'to the exclusion of the evidence presented by other witnesses' for which the jury must rely upon its collective memory during deliberations." *Green*, ¶ 14, *quoting Nordholm*, ¶ 10. The foregoing should be obvious where immediately after the prosecutor's statements in closing, the jurors began their deliberations with unfettered and unmonitored access to K.P.'s and K.'s testimonial drawings.

Next, the State claims the jury's review of the testimonial evidence at issue in the present case was "harmless," citing *State v. Bales*, 1999 MT 334, 297 Mont. 402, 994 P.2d 17. (Appellee's Br. at 24-25.) *Bales* is readily distinguishable from the present case and in no way supports the State's claim there is no "reasonable possibility" the jury's review of the testimonial drawings did not contribute to Walks' conviction.

In *Bales*, ¶ 24, this Court held because the tape recording of a police interview with defendant had a testimonial character, the district

court abused its discretion in allowing the jury to hear the tape during deliberations.

Having listened to the tape the Court concluded, however, allowing the jury to hear the tape during deliberations did not unduly emphasize testimony to the exclusion of other witnesses. *Bales*, ¶ 25. It observed Bales did not claim, and the record did not show, the statements on the tape were inconsistent with those given by witnesses at trial. Moreover, the Court noted Bales did not claim the tape was critical to the State's case. *Bales*, ¶ 25.

Finally, the Court concluded the statements by Bales and the officer on the tape were "merely cumulative" of trial testimony. *Bales*, ¶ 29. Moreover, the other statements on the tape were, "'additional evidence of the same character [and] to the same point' as testimony by witnesses." *Bales*, ¶ 29 (alteration in original, citation omitted). Thus, in light of the totality of the circumstances, the Court concluded the tape was "merely cumulative of other evidence" and it did not prejudice Bales. *Bales*, ¶ 30.

Here, unlike *Bales*, ¶ 25, the record demonstrates the testimonial evidence at issue was not necessarily consistent with the K.P.'s and K.'s

testimony, at least with respect to the live testimony they provided from the witness stand. Again, the State argued the drawings K.P. created on the witness stand (Exs. 20 & 24) were "literally part of her testimony because she didn't use words" (2/1/23 Tr. at 162); conversely, the record demonstrates K.P.'s live testimony was less than certain and short on specifics (1/31/23 Tr. at 7-26). Similarly, K.'s live testimony was vague at best (1/31/23 Tr. at 27-40); indeed, the closest K. came to accusing Walks of sexual intercourse without consent came when she begrudgingly agreed "something" happened at Nancy's home (1/31/23 Tr. at 28-29).

Moreover here, unlike *Bales*, ¶25, Walks avers the testimonial drawings were in fact clearly "critical" to the State's case. Again, the State argued the drawings K.P. created on the witness stand (Exs. 20 & 24) were "literally part of her testimony because she didn't use words" (2/1/23 Tr. at 162). Additionally, as noted *supra*, the record demonstrates the prosecutor repeatedly and explicitly implored the jurors to consider the testimonial drawings at issue in deciding Walks' innocence or guilt. (2/2/23 Tr. at 27-28, 28-29, 30, 33, 44.) Walks submits if the testimonial drawings were not "critical" to the State's

case, then the prosecutor would not have referenced said drawings *ad nauseum* in closing.

Finally, here, it cannot be said the testimonial drawings were "merely cumulative" of trial testimony; especially, with respect to K.P.'s and K.'s live trial testimony. *Bales*, ¶ 29. Thus, and the State's claim to the contrary, *Bales* cannot be read to support its claim there is no "reasonable possibility" the jury's unfettered review of the testimonial drawings did not contribute to Walks' convictions.

Next, the State cites *State v. Hart*, 2009 MT 268, 352 Mont. 92, 214 P.3d 1273, to support its claim Walks was not prejudiced by the juror's unfettered review of the testimonial drawings at issue. (Appellee's Br. at 25.) *Hart* is not, however, remotely similar to the present case, factually or procedurally, and the State's reliance upon the decision is misplaced at best.

In *Hart*, ¶ 7, four DVDs were used at trial, including three patrol-car videos and a videotaped deposition of a material witness. The video deposition was played for the jury; however, it was not admitted as a trial exhibit. Prior to the parties' closing arguments, the court instructed the jurors they would be able to take into their deliberations,

"the instructions, the verdict form and all of the evidence that has been admitted, with the exception of the demonstrative evidence." *Hart*, ¶ 7.

After deliberating for approximately twenty minutes, the jury asked the bailiff for equipment to watch one of the DVDs. *Hart*, ¶ 29. The presiding judge had stepped out for a short walk, so the bailiff delivered video equipment to the jury room and cued up the video that the jury had selected—one of the patrol-car videos. According to the bailiff, the jury shut off the video player before the bailiff left the room. A few minutes later, the bailiff informed the court of his actions, whereupon the court told the bailiff to remove the equipment. The bailiff then re-entered the jury room and, finding the video player shut off, removed the video equipment. *Hart* ¶ 29.

The bailiff estimated the equipment had been in the jury room between five and ten minutes at the time the court had instructed him to remove it, and he estimated the equipment had been in the room for a total of ten minutes. *Hart*, ¶ 30. The bailiff explained the jury notified him that it had reached a verdict about twenty minutes after he had removed the equipment. *Hart*, ¶ 30. The parties concluded the

DVD cued up by the bailiff, displaying a daylight scene, would have been the patrol-car video of Officer Watson. *Hart*, ¶ 32.

Hart moved for a mistrial, contending the jury's access to the evidence placed an undue emphasis upon it, thus violating due process. *Hart*, ¶ 30. The court denied Hart's motion, explaining any potential undue emphasis or prejudice would be harmless based upon the "short" amount of time the jury had deliberated, and the total amount of evidence presented at trial. *Hart*, ¶ 30.

On appeal Hart argued, *inter alia*, the court abused its discretion by denying his motion for a mistrial after the bailiff delivered video equipment to the jury room without receiving approval from the court. *Hart*, ¶ 5. At the outset, the Court found the record indicated the video deposition was not in the jury room and therefore could not have been viewed by the jury. *Hart*, ¶ 32.

Next, the Court found the record indicated, "the jury would have had only a brief opportunity to watch a video, given the few minutes they had access to the viewing equipment." *Hart*, ¶ 33. Regarding Officer Watson's video, the Court found the video footage was taken while he first interviewed Hart at his home the day after the victim was

killed. *Hart*, ¶ 33. His patrol car camera remained motionless during the recording, showing a view of Hart's yard and a portion of Hart's vehicle parked at his residence. Neither Hart nor the officer were filmed on the video, although the officer's portable microphone recorded the audio portion of the interview. During this interview, Hart admitted to hitting something at the same time and location the victim in the case was struck. Hart also admitted to having been drinking prior to driving his vehicle. *Hart*, ¶ 33.

The Court concluded the DVDs could not have contributed to Hart's conviction, even if all three of them had been viewed by the jury. *Hart*, ¶ 36. Regarding the patrol-car video of the accident scene, the State introduced several photographs of the same scene portrayed on the video. Regarding the other DVDs containing audio recordings of Hart's interview, including his admissions, the Court found the State introduced blood tests matching the victim's blood to samples taken from Hart's vehicle, and witnesses testified about Hart's alcohol consumption and to his having admitted to hitting something or someone the night of the incident. *Hart*, ¶ 36.

Moreover, the Court found the DVDs supported both the State's and Hart's theories and were used by both sides. *Hart*, ¶ 36. Hart stipulated to the admission of all three patrol-car videos. Both Hart and the State used the remarks made by Hart during the interview to support their respective theories of the case. Defense counsel argued, "strenuously in his closing that Hart's responses and demeanor on the videos demonstrated his innocence." *Hart*, ¶ 36.

Based on these circumstances and application of the *Van Kirk* error analysis, the Court concluded any error committed by the bailiff in providing the jury with the video equipment without the court's permission did not contribute to Hart's conviction and was harmless. *Hart*, ¶ 37.

As noted *supra*, the present case is readily distinguishable from the facts and circumstances in *Hart*. First, there can be no doubt K.P.'s and K.'s testimonial drawings were in the jury room as the jurors deliberated. *Hart*, ¶ 32. Next, the jurors had more than a "brief opportunity" to review said drawings. *Hart*, ¶ 33. The record demonstrates the jury deliberated for just over an hour. (D.C. Doc. 72.)

Moreover, as argued *supra*, it cannot be said the testimonial drawings were necessarily cumulative of other evidence presented. *Hart*, ¶ 36.

Finally, and perhaps most importantly, K.P.'s and K.'s testimonial drawings did *not* support Walks' theory of defense. *Hart*, ¶ 36. Unlike defense counsel in *Hart*, Walks' counsel did *not* "strenuously" argue in closing the testimonial drawings demonstrated Walks' innocence. *Hart*, ¶ 36.

Based on the foregoing, this Court should find *Hart* in no way supports the State's claim there is no "reasonable possibility" the jury's unfettered review of the testimonial drawings did not contribute to Walks' convictions.

Finally, regarding Exhibits 20 and 24, the State argues to the effect the jury's unfettered access to the foregoing testimonial evidence was harmless because the drawings were cumulative of other, far more compelling evidence of Walks' guilt. (Appellee's Br. at 26-28.) In so arguing, however, the State finds itself in the same untenable position it unsuccessfully marshalled in *Nordholm*.

Again, in *Nordholm*, the State argued the evidence on the videos, "did not unduly contribute to [Nordholm's] conviction because other

evidence that was introduced at trial proved the same facts as in the videos." *Nordholm*, ¶ 13. This Court reiterated, however, the purpose of the common law prohibition on submission of testimonial material to a jury during its deliberations is to prevent the jury from "'giving undue weight'" to such testimonial evidence. *Nordholm*, ¶ 13, *quoting Hart*, ¶ 34. Unsupervised, the jury could repeatedly view the statements made by various witnesses on the videos. Conversely, the testimony given at trial was limited to what the jury remembered. *Nordholm*, ¶ 13.

The Court found the State's harmless error arguments regarding the "qualitative effect" of the videos likewise did not reach the true issue in the case—the unsupervised review of the videos. *Nordholm*, ¶ 13. Although other evidence presented at trial may have proved at least some of the same facts as those in the videos, the Court concluded the qualitative effect of the jury's review of the videos was both unknown and unknowable because they were given unsupervised access to view the videos as many times as they wished. *Nordholm*, ¶ 13.

The Court concluded the State could not prove that there was "'no reasonable possibility'" the jury's review of the testimonial videos

contributed to Nordholm's conviction because the jury had unsupervised access to them. *Nordholm*, ¶ 14, *quoting Van Kirk*, ¶ 47. It reasoned the jury could repeatedly play the videos and therefore give them "'undue emphasis.'" *Nordholm*, ¶ 14, *quoting Hart*, ¶ 34.

As noted *supra*, the State concedes Exhibits 20 and 24 (Appellants Exs. C & D) were "testimonial" in nature. (Appellee's Br. at 19.) As in *Nordholm*, ¶ 11, the jury in the present case made no requests to view the testimonial drawings; rather, said drawings were simply given to the jury for unsupervised and unrestricted review at the start of their deliberations.

As argued *supra* and pursuant to Walks' opening brief, the evidence of Walks' guilt was anything but overwhelming. K.P.'s live testimony from the witness stand was less than certain and short on specifics. (1/31/23 Tr. at 7-26.) K.'s live testimony from the witness stand was even less than certain and vague at best. (1/31/23 Tr. at 27-40.) Conversely, Walks adamantly and repeatedly denied the allegations of his accusers. (2/1/23 Tr. at 147, 149-50, 152-53, 155.) Thus, the undue emphasis concern underlying the common law rule is clearly implicated in the present case.

Here, unsupervised, the jury could repeatedly view the drawings at issue. Conversely, the live testimony given at trial such as it was, and the clips from the forensic interviews, was limited to what the jury could remember. *Nordholm*, ¶ 13. Although it may be true other evidence presented at trial may have proved at least some of the same facts as those depicted in the drawings, the qualitative effect of the jurors' review of the drawings is both unknow and unknowable because they were given unsupervised and unfettered access to view the drawings as many times as they wished. *Nordholm*, ¶ 13. As in *Nordholm*, ¶ 13, it can never be known if the jury would have even asked to view the drawings during deliberations as the court simply gave them to the jury without being asked. *Nordholm*, ¶ 13.

This Court should conclude the State cannot prove there is "'no reasonable possibility'" the jury's review of the testimonial drawings contributed to Walks' conviction because the jury had unsupervised and unfettered access to them. *Nordholm*, ¶ 14, *quoting Van Kirk*, ¶ 47. Here, the jury could repeatedly view the drawings and thus give them "'undue emphasis.'" *Nordholm*, ¶ 14, *quoting Hart*, ¶ 34. Again, this danger should be obvious where the State repeatedly highlighted the

drawings in closing, urged the jurors to consider the same as evidence of Walks' guilt, and reminded the jurors the drawings would be available for review in deliberations. (2/2/23 Tr. at 27-28, 28-29, 30, 33, 44.)

Here, as in *Nordholm*, the court's decision to allow the jurors to have unsupervised and unfettered access to the testimonial drawings created a "fundamental imbalance" between the other evidence presented at trial. *Nordholm*, ¶ 14.

Conclusion

This Court should find the district court abused its discretion by allowing the jurors unsupervised and unfettered access to K.P.'s and K.'s testimonial drawings. Moreover, the State has not established there is "'no reasonable possibility'" the jury's review of the testimonial drawings contributed to Walks' conviction.

Based on the foregoing, this Court should remand the case for a new trial consistent with *Nordholm*.

Respectfully submitted this 3rd day of March 2025.

/s/ *Joseph P. Howard*
Joseph P. Howard
Joseph P. Howard, P.C.

Certificate of compliance

Pursuant to Mont. R. App. P. 11(4)(e) 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 3,467 words, not averaging more than 280 words per page, excluding the certificate of compliance.

/s/ *Joseph P. Howard*
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CERTIFICATE OF SERVICE

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