IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0500

STATE OF MONTANA,

Plaintiff and Appellee,

v.

WILLIE VELTKAMP,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana 8th Judicial District Court,
Cascade County, the Honorable John A. Kutzman, Presiding

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STATEMENT OF THE ISSUES

Issue I: Did the district court commit reversible error when it admitted a SANE exam that included a nurse's written statement of J.V., the alleged victim's, narrative accusing Willie Veltkamp of raping her and when the State relied heavily on the exam to fill-in gaps in J.V.'s sparce testimony at trial? Did the court then further err when it permitted the SANE exam, containing testimonial hearsay, to be sent to the jury room during deliberations?

Issue II: Did the district court commit reversible error when, over a hearsay objection, it admitted text messages J.V. sent her mother accusing Willie Veltkamp of raping her in the past and when the State relied heavily on the messages during both opening and closing argument?

STATEMENT OF THE CASE

Willie Veltkamp was charged in Montana's Eighth Judicial District Court, Cascade County, with three counts of incest against his daughter, J.V. (D.C. Doc. 1.) At his trial, defense counsel objected to two pieces of evidence that were central to the State's case. The first was a

SANE exam that included a nurse's statement of J.V.'s "patient narrative" alleging Willie raped her. It also included a page further recording the specific details of J.V.'s allegation of assault. (State's Ex. 9, admitted Trial Day 2[1], "Tr." Day 2 at 194, pg. 3-4.) This narrative differed significantly from J.V.'s trial testimony, so much so that the prosecution chose to impeach her testimony during trial with the SANE report as a prior inconsistent statement. (Tr. Day 3 at 92.)

The district court then sent the SANE exam to the jury room for the jury's review during deliberations, despite Willie's objection. (Tr. Day 4 at 77-78, attached as Appendix C.)

The second piece of evidence was a text message J.V. sent her mother, Glenda, claiming that Willie raped her. Willie argued this proposed exhibit was also hearsay. The court overruled the objections and admitted both exhibits. (State's Exhibit 9, admitted Tr. Day 2 at 92-94, 118-120, 139-141, attached as Appendix A; State's Exhibit 1, admitted Tr. Day 3 at 46-48, attached as Appendix B.)

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[1] The trial spanned four days: 2/3/2023 (Day 1), 2/6/2023 (Day 2), 2/7/2023 (Day 3), and 2/8/2023 (Day 4). The transcripts have been compiled by day, in four separate files, with page numbers starting over at Page 1 each day. Accordingly, Appellant's brief refers to both trial day and page number throughout.

The State relied heavily on the SANE report and text message throughout trial, revisiting both with multiple witnesses during its case in chief and quoting both during opening and closing arguments. (Tr. Day 1 at 21-24, Day 4 at 27-29.) The jury found Willie guilty of two counts of incest, and not guilty of one. (D.C. Doc. 132.)

The State sentenced Willie to 100 years on each count, running consecutively. (D.C. Doc. 147; attached as Appendix D.)

Willie timely appeals. (D.C. Doc 151.)

STATEMENT OF THE FACTS

Willie was shocked when he heard that his daughter, J.V., accused him of rape. He adamantly denied the allegations.

J.V.'s accusation came at a time of upheaval, in April 2020. About a month earlier, due to the onset of the COVID-19 pandemic, her school building closed overnight and students were sent home. All of a sudden life was on lockdown, and J.V.'s days were reduced to attending mandatory classes on a laptop, alone, from her basement. She was 14. J.V. wasn't able to socialize with her friend group, and the volleyball season—her favorite sport—was canceled. On top of this, her best friend

and her boyfriend were both about to move away. J.V. was isolated, and no one knew how long it would last. (Tr. Day 3 at 62.)

On April 16, 2020, Glenda, J.V.'s mom, was upstairs at home when she received a series of text messages from J.V., who was in the basement. Ultimately, J.V. sent a text that said, "Okay, I'll just put it that technically, I'm not a virgin because of my dad." Glenda went down to talk to her. (Tr. Day 3 at 127-8.) At that time, J.V. told Glenda Willie had raped her the previous night, April 15, 2020, while her mom was at work. She would later allege that Willie had been having sex with her consistently, several times per month, since she was nine. (Tr. Day 3 at 43.) Glenda had never suspected any abuse in her home. (Tr. Day 3 at 151.)

After speaking with J.V., Glenda took her to Benefis Hospital Emergency Room. She told J.V. to put everything she had been wearing the previous night in a plastic bag, grabbed the fitted sheet from J.V.'s bed, and brought both with them to the hospital. (Tr. Day 3 at 129.)

At Benefis, Nurse Brant, a Sexual Assault Nurse Examiner (SANE), began an investigation. (Tr. Day 2 at 89.) Brant met J.V. and administered a Montana Sexual Assault Evidence Collection Kit. (Tr.

Day 2 at 90-118.) Detective Guderian, who arrived to investigate the alleged sex crime for the Great Falls Police Department, also sat in on J.V.'s exam. (Tr. Day 3 at 89.)

As part of the exam, Brant completed a written report (SANE exam). The report includes J.V.'s "patient narrative," where Brant wrote down "everything [J.V.] told [him]." (Tr. Day 2 at 95.) At the time of the SANE exam, J.V. alleged a single incident of rape on April 15, 2020.

At Willie's incest trial, the State's opening argument began by emphasizing the text message sent from J.V. to her mother accusing Willie of rape:

> 'Okay, I'll just put it that technically, I'm not a virgin because of Dad.' That is what J.V. texted to her mom, Glenda Veltkamp, on April 16th, 2020. J.V. took the first step in stopping the abuse, stopping the sexual trauma and the rape that she endured at the hands of her father, the defendant, Willie Veltkamp. . . . [S]he told. She told her mother. She told her mother that the defendant had been sexually abusing her.
>
> (Tr. Day 2 at 21.)

The State had Brant testify first, before J.V. During his testimony, the State offered the SANE exam into evidence over Willie's hearsay objection. (Tr. Day 2 at 93.) After a sidebar, the district court admitted

the exam, reasoning that it qualified as a medical diagnosis exception to the hearsay rule. (State's Exhibit 9, admitted Tr. Day 2 at 94.) Throughout trial, the State focused heavily on J.V.'s account of what happened as recorded in the written report.

At the prosecutor's request, Brant read J.V.'s narrative to the jury, line by line. (Tr. Day 2 at 95.) He testified, reciting J.V.'s words:

> Probably about 2100, we were getting ready for bed. My dad, Willie Veltkamp, tucked my sister [] in first. He came down to tuck me in and was lying on the bed with me. He told me to go to the bathroom and take my tampon out. Then he pulled my pants down and he put his penis inside of me. He did that for a while. He pulled out and came in his hand and left. He acted like nothing ever happened and then I went to bed.
>
> (State's Exhibit 9, as read at Tr. Day 2 at 95.)

Still reading from the exam, Brant told the jury J.V.'s report "goes further into methods used by the assailant." (Tr. Day 2 at 97.) Brant told the jury he asked J.V. more questions about her allegation, and she separately responded "yes" to say that Willie's "penis penetrated her vulva, a finger had penetrated her vulva, and a tongue had penetrated her vulva." (Tr. Day 2 at 97.) Brant also testified that J.V. told him a second time that Willie had ejaculated into his hand. (Tr. Day 2 at 98.) He said J.V. told him when asked about the use of physical restraints,

that Willie had "pinned her hands down." Brant noted there was no bruising or injury to her hands, wrists, or arms to corroborate this, however. (Tr. Day 2 at 113.) Brant testified that at the time of the SANE exam, J.V. reported that she was not experiencing any injury, pain, or bleeding. (Tr. Day 2 at 110-111.)

Defense counsel renewed his objection to detailed use of J.V.'s statements contained in the SANE exam, arguing it served a law enforcement not medical purpose, and during a sidebar to discuss the objection elicited the following testimony from Brant:

> [Defense]: Why do you do a SANE examination? You are a SANE nurse. Why do we do it?
> [Nurse]: "Well, you are getting a history from the patient and that is, in a sense, painting a picture of where we need to look for evidence."
> Q. So, this is an evidence pursuit?
> A. Yes.
> Q. And part of what you are doing, you understand, is going to be used in the future in litigation?
> A. Yes.
> Q. And the intent and purpose of your evaluation is to obtain materials so that you can come to trial?
> A. Can you rephrase?
> Q. When you take a SANE examination, do you anticipate that that's an issue that could potentially go to court and be tried?
> A. Yes.
> Q. And do you generate these documents so that you know what you did in the evaluation?

A. I do.
Q. And is that so you can go back at a later time and review those records and understand what you did and what steps you took? A. Yes.
Q. And is that because you understand you might have to testify at a later date?
A. Yes.
Q. And is it because your recordings and recollections at the time you made the document are going to be better than your recollection could be months or years down the road when you testify?
A. Yes.

(Tr. Day 2 at 118-119.)

Following this response, defense counsel argued the exam was inadmissible hearsay, because Brant's responses showed the purpose of the SANE exam was an evidence pursuit rather than an examination for medical diagnosis purposes, meaning it did not qualify for admission under the medical diagnosis hearsay exception, as the State claimed. (Tr. Day 2 at 118-20, 139-141.)

The district court again denied the objection and let the SANE exam come into evidence, noting its finding that J.V.'s statements were made for purposes of obtaining a diagnosis or treatment. The court specifically further noted its ruling was based on the fact that J.V. would be later testifying. (Tr. Day 2 at 118-120, 139-141; Appendix A.)

As part of the exam, J.V.'s entire body was swabbed for DNA using the SANE rape toolkit. (Tr. Day 2 at 102-104.) This toolkit along with several items of clothing J.V. had been wearing and her purple bedsheet, which Glenda collected, were later taken to the Montana State Crime Lab for DNA analysis. (State's Exhibits 13-17; admitted Tr. Day 2 at 107.)

By this time, Willie, who was worried about his family when he arrived home and his wife and daughters were not there, had called the Great Falls police to report them missing. (Tr. Day 3 at 86.) He later went to the station and spoke with an officer, who eventually advised him that J.V. had accused him of raping her. He was shocked and cooperated in a suspect SANE exam and extended interview. (Tr. Day 3 at 188, State's Exhibit 26 admitted at Tr. Day 3 at 192.)

The crime lab testing showed that no DNA from Willie was found anywhere on J.V.'s body or clothing. (Tr. Day 3 at 176.) Vaginal cervical swabs tested negative for indications of male DNA. (Tr. Day 3 at 173.) There was no semen or other male DNA on the grey underwear J.V. had worn the previous night. (Tr. Day 3 at 176, 248.) There was also no seminal fluid on her overnight tampon. (Tr. Day 3 at 193.) And, even though Willie had genital herpes, J.V.'s STD test was negative. (State's

Ex. 9 at 9.) But, a semen stain was located on the purple bedsheet taken from her bed. (Tr. Day 3 at 176.) The bedsheet stain tested positive for Willie's DNA and was determined to likely be secretions from him. A trace of blood consistent with J.V.'s DNA was indicated from a swab of Willie's penis. (Tr. Day 3 at 173.)

J.V. testified after Brant, her testimony under oath did not include many of the details of the alleged assault that she initially reported during the SANE exam. (Tr. Day 3 at 30-50.) Instead, J.V. testified that on April 15, 2020, Willie came into her room to tuck her in for bed. She said he touched her legs and then asked her to take her tampon out, then proceeded to insert his penis into her vagina. She said Willie did not penetrate her with her fingers. When asked whether he ejaculated, she said "probably" but she didn't remember. (Tr. Day 3 at 40-41.)

Over Willie's objection, the district court allowed J.V. to read the jury text messages she sent to her mother the next day, on April 16, 2020. J.V. read aloud:

> [J.V.]. okay. So, there's this thing I need to tell you, but I'm scared to say it because it will ruin my life and mess up others' - other people's too but I can't let it keep happening to me."
> …

> [J.V.]:okay. So, I don't know how to say it because I don't want everything to change. And please don't come down and talk to me about it because it's hard as it is."
> …
> [J.V.] okay. So, I'll just put it that I'm technically not a virgin because of my dad.
>
> (Tr. Day 3 at 49.)

The State argued the text messages were admissible because "[i]t's her disclosure" and therefore not hearsay. The court ultimately admitted the messages, stating it was "part of the res gestae… litigated transaction." (State's Exhibit 1, admitted Tr. Day 3 at 47-48, attached as Appendix B.)

The State then returned to the SANE exam. Unsatisfied with J.V.'s testimony, the State attempted to use a leading question to prompt J.V. to say on April 15, 2020, Willie pulled out and ejaculated into his hand, aligning with Brant's transcription of her words in the SANE exam. The court sustained counsel's objection, stating:

> COURT: Yeah. Look, we all know what's going on here, right? The narrative doesn't match what she previously told the police. It doesn't match what's in your opening statement. It doesn't match what's in the SANE report. And, you know, I'm not going to let you lead her through it so that it matches up. You're going to have to find a better way to ask her. I'm not saying that you can't fix this, but I'm not going to let you lead her to do it.

> Prosecutor: Okay.
> Court: All right. Anything else?
> Defense: Not at this point.
> Court: All right. P.S., she's 17 and she's smart and she's articulate so. Look, I realize you've got a problem here and I think you can solve it, but I will not let you use leading questions to do it.
>
> (Tr. Day 3 at 41-42.)

During cross, defense counsel asked J.V. whether she told the truth during her SANE exam. J.V. said she did, except that she only reported a single rape, and would later allege she was raped several times monthly over the course of five years, starting at age 8 or 9. (Tr. Day 3 at 74.)

The State then returned to the SANE exam during J.V.'s rebuttal testimony, seeking to refresh J.V.'s recollection. The State asked J.V. to read the SANE report to herself in front of the jury and then confirm it was accurate, to which Willie objected. (Tr. Day 3 at 81.) The court allowed the State to use the SANE exam to refresh J.V.'s recollection, noting though that the rule indicates documents used to refresh recollection may not be received as an exhibit, but that here, the SANE exam was already in evidence. (Tr. Day 3 at 81.) With the court's permission, once J.V. finished reading the narrative in the report, the

prosecutor then asked her, "[i]s that your statement as you gave it …when you had your sexual assault exam?" to which J.V. responded that it was. (Tr. Day 3 at 83; State's Exhibit 9.)

During Detective Guderian's testimony, the prosecution revisited the SANE exam once again, this time seeking to impeach J.V.'s trial testimony with statements she made during the exam as a prior inconsistent statement. (Tr. Day 3 at 91.) The defense objected again. (Tr. Day 3 at 91.) The State argued this was proper impeachment evidence because J.V. didn't "disclose any finger penetration…. any oral licking…. or that Willie "ejaculated into his hand on the bed" during her trial testimony. (Tr. Day 3 at 91.) So, the State wished to have Guderian testify that she heard J.V. make statements as to all three during the SANE exam. The court responded:

> [Court]: I'm pretty confident I was taught in evidence class that nobody owns a witness anymore, and you can impeach your own witness. Am I wrong?
>
> [State]: No, Judge. You're right.
>
> …
>
> [State]: And I did specifically ask about digital penetration and ejaculation. She specifically said, "no," to the digital

> penetration, she didn't know about ejaculation. So, this is proper impeachment evidence based on that.
>
> [Court]: Interesting trial. I think that the prosecutors are right. I'm going to over-rule this objection. I'm going to allow this line of examination to continue.

(Tr. Day 3 at 91-92.)

In closing argument, the prosecutor returned to the SANE report, rather than J.V.'s trial testimony, to tell J.V.'s story. The prosecutor once again read J.V.'s narrative statement in the SANE report, line for line, describing her allegation that Willie raped her. (Tr. Day 4 at 30.) The State then revisited J.V.'s text message to her mother as well, accusing Willie of rape. The State pled to the jurors' emotions, arguing that they had the opportunity to right a wrong, for J.V. (Tr. Day 4 at 28.) In its emotional plea, the State referenced J.V.'s fear, expressed in her text messages to her mom, that their family's lives would be torn apart. (Tr. Day 4 at 30.)

The defense argued the DNA evidence from the Crime Lab did not support J.V.'s allegations. J.V.'s SANE kit did not contain any DNA material that belonged to Willie: J.V.'s vaginal swabs, her overnight tampon, and her underwear were all negative for any trace of Willie's

DNA. (Tr. Day 4 at 46.) And despite J.V.'s allegation that Willie pinned her down with his hand for a full half hour, there was none of J.V.'s DNA under Willie's fingernails. (Tr. Day 4 at 47.)

In choosing the exhibits that would be sent to the jury room, the district court allowed Exhibit 9, the SANE exam, to be sent back, over Willie's objection that it contained testimonial hearsay and therefore should not be included. (Tr. Day 4 at 77-78.)

The jury returned a mixed verdict, convicting Willie of Count I, the allegation of rape on April 15, 2020, and Count II, a continuing course of conduct. The jury acquitted Willie of Count II, an allegation of rape on April 10, 2020. (D.C. Doc. 147.)

STANDARDS OF REVIEW

A trial court's ruling on evidentiary matters is generally reviewed for an abuse of discretion; however, to the extent the trial court's ruling is based on an interpretation of an evidentiary rule or statute, the ruling is reviewed de novo. *State v. Stewart*, 2012 MT 317, ¶ 23, 367 Mont. 503, 291 P.3d 1187.

This Court reviews a district court's decision allowing exhibits to be taken into jury deliberations for an abuse of discretion. *State v. Green*, 2022 MT 218, ¶ 11, 410 Mont. 415, 519 P.3d 811.

SUMMARY OF THE ARGUMENT

Jurors should never have seen two key pieces of evidence in Willie Veltkamp's incest trial—both of which were hearsay, containing the complaining witness—J.V.'s— out-of-court statements accusing Willie of rape. Instead, the State's case centered on them. First was a "patient narrative" in the SANE exam, and this was even sent to the jury room during their deliberations. The SANE exam contained detailed statements from J.V. that explained the State's other evidence, such as why a rape kit did not turn up any of Willie's DNA on J.V., or her clothing, even though she alleged he had raped her the previous evening. J.V.'s trial testimony did not contain the same detailed descriptions, and the evidence missing from her testimony was so significant that the State chose to impeach J.V.—their own complaining witness—with the exam, discrediting what she said under oath. The district court then sent the SANE exam, along with the testimonial hearsay it contained, to the jury room. This highlighted J.V.'s

statements alleging she was raped over other evidence it should have also considered, like that the DNA evidence did not fully support her story, and relieved jurors of the task of assessing the credibility her testimony under oath. The court also admitted J.V.'s text message accusing Willie of rape, under no valid hearsay exception, compounding the prejudice. Had the district court applied the rules of evidence correctly and fairly in this case, both the SANE exam and J.V.'s text message would have been excluded from Willie's trial.

The errors mandate a new trial because the State cannot demonstrate beyond a reasonable doubt the evidence might not have contributed to Willie's conviction for two counts of incest. A new trial is required.

ARGUMENT

I. The district court erred when it admitted the SANE exam that included J.V.'s "patient narrative" accusing Willie of rape and allowed this testimonial evidence to go to the jury room.

A. The SANE exam was inadmissible hearsay.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the

truth of the matter asserted." M. R. Evid. 801(c). Hearsay statements are inadmissible unless they meet a hearsay exception. M. R. Evid. 802.

The district court admitted the SANE exam under the hearsay exception for statements made "for purposes of medical diagnosis or treatment." M. R. Evid. 803(4). Rule 803(4), M.R.Evid., provides that "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment" are admissible even though the declarant is available as a witness.

To be admissible under this exception to the hearsay rule, the statements must be made with an intention that is, 1) consistent with seeking medical treatment and, 2) must be statements that would be relied upon by a doctor when making decisions regarding diagnosis or treatment. *State v. Whipple,* 2001 MT 16, ¶ 22, 304 Mont. 118, 19 P.3d 228, *citing State v. Huerta*, 285 Mont. 245, 258, 947 P.2d 483, 491, (1997). The rationale behind the medical treatment exception is that

the reliability of the out of court statements is assured by the first prong of the test. *Whipple*, ¶22. That is, a declarant seeking medical treatment "possesses a selfish motive in telling the truth" to effectuate appropriate care and therefore makes trustworthy statements. *State v. Harris*, 247 Mont. 405, 412-13, 808 P.2d 453, 457 (1991).

By contrast, statements obtained primarily to collect evidence of crimes for the purpose of future litigation, instead of a medical diagnosis, do not satisfy the hearsay exception under Rule 803(4). *State v. Martinez,* 2023 MT 251, ¶ 27, 414 Mont. 340, 545 P.3d 652.

In *Martinez*, this Court recognized that SANE exams are primarily an evidence pursuit, not conducted in order to receive medical care or treatment, and held that statements made by a declarant during a SANE exam were not admissible under Mont R. Evid. 803(4). There, Martinez was charged with incest and challenged the admission of separate statements made by the complaining witness to a SANE nurse and a family medicine physician under Rule 803(4). *Martinez,* ¶ 27. The prosecution introduced both statements through a Billings detective involved in the investigation. When the declarant—his daughter— did not testify at trial, Martinez challenged their admission under the

Confrontation Clause. *Martinez*, ¶ 13. The Court distinguished the statements made to the SANE nurse from those made to a family medicine physician, finding the latter fit the medical diagnosis hearsay exception while those made during the SANE exam did not. *Martinez,* ¶¶ 10-11, 25.

The distinction was in the purpose of the exam: The witnesses' statements to the doctor, who examined S.M. several days after her SANE exam, were admissible under M. R. Evid. 803(4), because following the exam, the physician rendered treatment and follow-up medical care. *Martinez*, ¶25. The Court contrasted the statements obtained in the SANE exam, which the Court agreed was conducted not to render treatment, but to collect evidence of sex-based crimes for purposes of future litigation. *Martinez*, ¶ 27. *See also State v. Tome*, 2021 MT 229, ¶ 35, 405 Mont. 292, 495 P.3d 54, (reaching the same conclusion).

The *Martinez* Court noted that the cover sheet to the SANE exam consent form had the patient attest to the fact that they "understand that this is not a routine medical checkup." *Martinez*, ¶ 27. The consent form also provided that the exam was done to "'[c]ollect

evidence,' take photographs 'to be used as evidence,' and '[r]elease evidence collected and information obtained to law enforcement." *Martinez*, ¶ 27. And, it specified that the examiner "'will not be held responsible for identifying, diagnosing, or treating any existing medical problems." *Martinez*, ¶ 27. The Court noted the SANE examiner saw the alleged victim on one occasion for the purpose of completing the exam and collecting evidence to provide to law enforcement. *Martinez*, ¶ 27.

As in *Martinez* and *Tome*, J.V.'s SANE exam was administered to gather evidence to prosecute a child sex crime, not for the purpose of a medical diagnosis or treatment. The SANE exam here contained identical disclaimers as described in *Martinez*. J.V. did not arrive at the emergency room for medical treatment. Her mother brought her there along with a bag of belongings she gathered as evidence of a crime. J.V. was not experiencing any discomfort, pain, or injury when she went to the hospital, and did not have an STD or medical condition requiring care. In Brant's words, he conducted the exam to look for evidence and preserve a record so he could testify at a later prosecution. He agreed the SANE exam was an "evidence pursuit." Likewise, detective

Guderian sat in on the exam in order to conduct a criminal investigation into the report of child abuse. Just as this Court reflected in *Martinez* and *Tome*, here, as Brant told the district court, the SANE exam was an investigative tool used to gather and preserve evidence for future prosecution. The fact that J.V. later testified at trial does not change that, nor does it change the analysis under Rule 803(4).

This Court has previously held that SANE exams are criminal investigative pursuits and therefore do not contain the inherent indicators of trustworthiness that underlie the medical diagnosis or treatment hearsay exception, and do not justify the inclusion of J.V.'s detailed, out-of-court accusations of rape in Willie's trial under Mont. R. Evid. 803(4).

B. The SANE exam contained testimonial evidence that should not have gone to the jury room.

Generally, a trial court "may not allow unsupervised or unrestricted jury review or replay of witness testimony or other evidence that is testimonial in nature." *State v. Hoover*, 2021 MT 276, ¶ 16, 406 Mont. 132, 497 P.3d 598. The purpose of this common law rule is "to prevent a jury from placing undue emphasis" on the testimonial evidence "to the exclusion of [the] other evidence" in the case. *Hoover*, ¶

16 (internal quotation and citation omitted). Accordingly, in assessing what items of evidence may go into the jury room, "the threshold question" is whether the item is testimonial. *Hoover*, ¶ 18.

Evidence is testimonial when the "primary purpose" for eliciting the statement is to "establish or prove past events potentially relevant to later criminal prosecution" or "creat[e] an out-of-court substitute for trial testimony." *Martinez,* ¶ 21, *quoting Davis v. Washington*, 547 U.S. 813, 822 (2006) and *Ohio v. Clark*, 576 U.S. 237, 245, (2015). Whereas, a statement may be nontestimonial if "made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Martinez*, ¶ 21 (internal quotation and citation omitted).

The common law rule leaves trial courts with limited discretion under Mont. Code Ann. § 46-16-504 in determining what exhibits should go into the jury room. [2]*State v. Nordholm*, 2019 MT 165, ¶ 14,

[2] Montana Code Ann. § 46-16-504 says, "[u]pon retiring for deliberation, the jurors may take with them the written jury instructions read by the court," their own notes taken during the trial, and "all exhibits that have been [admitted] as evidence" during the trial and which "in the opinion of the court will be necessary" to their deliberations.

396 Mont. 384, 445 P.3d 799; *State v. Stout*, 2010 MT 137, ¶ 29, 356 Mont. 468, 237 P.3d 37 (common law rule applies to jury room submittals under both §§ 46-16-503(2) and -504, MCA); *State v. Bales*, 1999 MT 334, ¶¶ 19-24, 297 Mont. 402, 994 P.2d 17 (recognizing application of common law rule to § 46-16-504, MCA); *State v. Harris*, 247 Mont. 405, 416-18, 808 P.2d 453, 459-60 (1991). Instead, Mont. Code Ann. §46-16-504 "…contemplates an affirmative determination by the court, upon consultation with counsel, as to which exhibits admitted into evidence are necessary and proper to go into the jury room for deliberations." *Hoover*, ¶ 16, fn. 3.

This Court has previously held that an alleged victim's statements to a SANE nurse during the SANE exam are testimonial. *State v. Martinez*, 2023 MT 251, ¶ 27, 414 Mont. 340, 545 P.3d 652; *State v. Tome*, 2021 MT 229, ¶ 35, 405 Mont. 292, 495 P.3d 54. In *State v. Tome*, the Court further noted that the SANE exam occurred 24 to 48 hours after the alleged crime, which was "well after any potential ongoing emergency." *Tome*, ¶ 27.

Here, J.V.'s statements during her SANE exam were testimonial for the same reasons this Court found in *Martinez* and *Tome*. Brant testified that he conducted the SANE exam with J.V. in order to "get a picture of where we need to look for evidence" and agreed the exam's purpose is as an "evidence pursuit." J.V.'s statements were testimonial because as Brant said, the purpose of the exam was to make a record of evidence, including J.V.'s statements, to prepare for later prosecution. As an allegation of past rape, there was no need for police assistance other than to gather evidence of a crime.

This Court will reverse where testimonial evidence that was sent to the jury room placed undue emphasis on that evidence to the exclusion of other evidence. *State v. Nordholm,* 2019 MT 165, ¶ 14, 396 Mont. 384, 388, 445 P.3d 799.

In *State v. Nordholm*, this Court identified a "fundamental imbalance" inherent in allowing juries access to testimonial evidence during their deliberations. *Nordholm,* ¶ 14. The jury must generally "rely on its collective memory" in assessing the nature, veracity, and credibility of all of the evidence as a whole. *Hoover,* ¶¶ 16-17. The immediacy of testimonial evidence in front of the jury while they

deliberate may outweigh trial testimony. *State v. Bales*, 1999 MT 334, ¶ 20, 297 Mont. 402, 994 P.2d 17. The accused is unfairly prejudiced "by placing undue emphasis on the statements of the alleged victim" to the exclusion of trial testimony and other evidence presented at trial. *State v. Hayes,* 2019 MT 231, ¶ 19, 397 Mont. 304, 449 P.3d 826.

The error may be harmless where the State can show the trial testimony does not differ from the testimonial evidence erroneously allowed in the jury room. *Bales,* ¶ 25. In *Bales*, the district court allowed a tape-recorded police interview with the defendant to be admitted as an exhibit that the jury could review during deliberations. *Bales*, ¶ 10. This Court held the district court abused its discretion in allowing the jury to hear the tape from the outset of its deliberations. *Bales*, ¶¶ 23-24. But, the error was harmless because the recordings contained statements that were consistent with both Bales and the police officer's trial testimony. *Bales,* ¶ 16.

Here, J.V.'s narrative in the SANE exam contained key differences to her trial testimony, so much so that the prosecution took the unusual step of impeaching J.V.—their own complaining witness— with the exam. This shows how heavily invested the State was in putting J.V.'s

statements from the SANE exam at the forefront of their prosecution, and how badly the State wanted the jury to focus on the exam over J.V.'s trial testimony.

One reason the State was so laser-focused on the SANE exam throughout trial was because it provided a piece of evidence key to the prosecution that J.V.'s testimony lacked: a statement that Willie, on April 15, had ejaculated into his hand. This piece of evidence was critical to J.V.'s credibility, and by extension Willie's conviction, because so much of the DNA analysis did not otherwise support J.V.'s allegations of a rape the previous evening. There was no trace of Willie's DNA, through semen or any other source on J.V.; not on the vaginal swabs, not on the overnight tampon, not on her underwear, and not on her wrists or hands. The only place Willie's DNA was found was on a stain on the purple bedsheet. Therefore, the Crime Lab results only supported J.V.'s accusation of rape if the State could argue Willie ejaculated on his hand, onto the purple bedsheet, and not in J.V.'s body. J.V.'s trial testimony lacked this key information, and without it, the DNA analysis did not corroborate J.V.'s allegation. The State was concerned the remaining evidence, like the trace of J.V.'s blood found on

Willie's pubic hair, could be explained by alternative causes. So the prosecution took a significant risk by discrediting their own alleged victim, by impeaching her testimony, as well as asking her to read the SANE exam in front of the jury to confirm it was accurate. All of this was designed to get the jury to defer to the SANE exam rather than J.V.'s testimony when deciding Willie's guilt.

With the prominence the State put on the SANE exam during trial, already greatly outweighing J.V.'s trial testimony, the prejudice to Willie's defense grew exponentially when the district court then sent the exam into the jury room for the entirety of jury deliberations. The State had returned to J.V.'s statements in the exhibit over and over throughout trial, when it should never have been allowed into evidence in the first place. The district court then placed undue emphasis on that evidence to the exclusion of the ZDNZA evidence and J.V.'s testimony at trial by then sending the SANE exam into the jury room during the jury's deliberation.

The error warrants reversal.

II. The district court erred when it admitted a text message sent from J.V. to her mother accusing Willie of rape.

The district court overruled Willie's objection to the text message J.V. sent her mother on the grounds that it was part of the "res gestae" of the State's allegation that Willie raped J.V. the previous day. The State put these messages front and center to its case against Willie, starting its opening argument by reading the written accusation—verbatim—to the jury. But these messages were hearsay meeting no exception and should never have come before the jury.

This Court has discarded the common law concepts of *res gestae* and *corpus delicti* "which, like magic incantations, had been invoked ... [to] admit evidence of questionable value without subjecting it to critical analysis." *State v. Lake,* 2022 MT 28, ¶ 45, 407 Mont. 350, 503 P.3d 274 (internal citations omitted). *See also*, *Evert v. Swick*, 8 P. 3d 773, 300 Mont. 427 (2000). ("The phrase "res gestae" adds nothing but confusion to an already complex area of the law; thus, the better practice is to abandon the use of the phrase altogether and to, instead, use the specific rule of evidence or statute that applies to the particular factual situation presented.")

The phrase *res gestae* generally refers to spontaneous declarations that are so closely connected to an occurrence that they are considered part of the occurrence. *State v. Hansen*, 1999 MT 253, ¶¶ 73-75, 296 Mont. 282, 989 P.2d 338. Under the modern rules of evidence, the phrase may encompass present sense impressions, excited utterances, and evidence admitted pursuant to the transaction rule, among others. *Hansen*, ¶¶ 73-75; M.R.Evid.803. Whichever modern rule the party seeking admission argues applies, the basic theory which supports this common law exception to the hearsay rule is that the circumstances under which a *res gestae* statement is made stand as a guaranty of the statement's truthfulness. *Hansen*, ¶¶ 73-75, citing Wharton's Criminal Evidence § 288 (Charles E. Torcia ed., 14th ed.1986).

J.V.'s text messages to her mother, alleging that she was "technically not a virgin anymore because of []dad," and saying she didn't want her or her or anyone else's lives to change, do not fit any of these modern hearsay exceptions.

Pursuant to the transaction rule, codified in Mont. Code Ann. § 26-1-103, evidence of a declaration, act, or omission that was inextricably linked or intertwined with the alleged criminal conduct of

the accused may be admissible as proof of a pertinent element of a charged offense if "explanatory of a fact in dispute" and thus relevant to "provide a comprehensive and complete picture" of the alleged criminal conduct of the accused. *Lake,* ¶ 45, *citing State v. Guill*, 2010 MT 69, ¶ 36, 355 Mont. 490, 228 P.3d 1152. But not all evidence that helps explain and or provides fuller context surrounding an offense qualifies as so "intrinsic to" or "inextricably intertwined" with an alleged offense as to permit the evidence's admission under the transaction rule. *State v. Sage*, 2010 MT 156, ¶¶ 39-41; 357 Mont. 99, 235 P.3d 1284; *accord Lake*, ¶ 45.

In *State v. Sage*, the defendant was charged with SIWC after an allegation that he forcibly raped a guest at his house. *Sage*, ¶13. At trial, the State sought to introduce sexually explicit photographs that Sage, who was 50 years old, showed the victim, who was 19, alleging he used them to groom her and encourage her to have sex with him leading up to the assault. *Sage*, ¶13. The State also sought to introduce evidence that Sage provided marijuana to his house guests, to explain why numerous 19-year-olds spent time in his home. The district court allowed both the evidence of a drug culture in Sage's home and the

introduction of the elicit photographs, reasoning they both gave the jury context for the allegations. The court determined the photographs were part of the "conduct, communications, and relationship" between Sage and the witness, which the jury was entitled to hear. *Sage*, ¶¶13-16. This Court disagreed and reversed the conviction, holding the pornographic photographs were not necessary to "help explain" allegations of forceable rape, and were not so "intrinsic to" or "inextricably intertwined" with the SIWC charge to bring them under the ambit of the transaction rule. *Sage*, ¶¶ 38-39.

As in *Sage*, the text messages J.V.'s sent to her mother accusing Willie of raping her the previous day provided "context" of how she came forward with her accusation, after five years, but the exact content of the messages was not necessary, intrinsic to, or inextricably linked with the alleged crime. The State claims the messages were necessary to show her "disclosure" but the content of these messages were not needed to prove that J.V. told her mother Willie had raped her. The State used them instead to insert emotion into J.V.'s story that her testimony lacked.

The text messages were neither a present sense impression nor an excited utterance, either.

The present sense impression exception applies to statements that describe or explain an event or condition "made while the declarant was perceiving the event or condition, or immediately thereafter." M. R. Evid. 803(1). The statements must be "spontaneous and contemporaneous." *State v. Newman*, 162 Mont. 450, 457, 513 P.2d 258, 262 (1973). "The timing element assures the trustworthiness of present sense impressions in two ways: it reduces the likelihood of faulty recollection and precludes time for reflection." *State v. Hocevar*, 2000 MT 157, ¶ 47, 300 Mont. 167, 7 P.3d 329. "Absent contemporaneous or near-contemporaneous of event and statement, the inherent trustworthiness of a present sense impression is negated." *Hocevar*, ¶ 47.

This Court has upheld the admission of hearsay statements under the present sense impression exception when the declarant made the statement while perceiving an event and before there was any time to reflect. In *In re S.M.*, the Court upheld the application of the present sense impression exception when the statement was made while the

declarant was perceiving the event. *In re S.M.*, 2001 MT 11, ¶ 24, 304 Mont. 102, 19 P.3d 213. There, while in the custody of DPHHS, S.M. saw her abuser and became frightened. *In re S.M.*, ¶ 19. A social worker with S.M. testified that she knew S.M. was frightened "[b]ecause she stated she was." *In re S.M.*, ¶ 19. Because S.M.'s statement to the social worker was made while S.M. was perceiving the event and "before S.M. had time to reflect," the Court concluded the statement was admissible as a present sense impression. *In re S.M.*, ¶¶ 22, 24.

This Court has repeatedly rejected application of the present sense impression exception when the statement was made the previous evening, after the declarant had time to reflect upon the event. In *State v. Newman*, the Court reversed a conviction when the district court incorrectly admitted hearsay under the present sense impression exception. *Newman*, 162 Mont. 450, 458, 513 P.2d 258, 263. There, the statements were made several hours after the event at issue and, thus, were not "spontaneous and contemporaneous." *Newman*, 162 Mont. at 457-58, 513 P.2d at 263. The statements "were not declarations of present sense impressions," "but rather in reference to something that

had happened the previous evening." *Newman*, 162 Mont. at 457, 513 P.2d at 262. Emphasizing that the passage of time "indicate[s] that [the witness] did have time to reflect, plan and, if it suited her purpose, fabricate," the Court held the statements were not present sense impressions and were inadmissible. *Newman*, 162 Mont. at 458, 513 P.2d at 263; *see also State v. Sanchez*, 2008 MT 27, 341 Mont. 240, ¶ 21, 177 P.3d 444 (holding that a statement made regarding an event from the prior evening was not a present sense impression because the statement "described an event [the witness] perceived the prior evening, rather than a present sense impression").

The text messages also do not meet the excited utterance hearsay exception. An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." M. R. Evid. 803(2). An excited utterance is "spontaneous and contemporaneous." *Newman*, 162 Mont. at 457, 513 P.2d at 262. "[T]he excited utterance exception relies on the spontaneity of the statement caused by the excitement of the event." *State v. Hamby*, 1999 MT 319, ¶ 26, 297 Mont. 274, 992 P.2d 1266. "The guarantee of trustworthiness is provided by the spontaneity

of the statement, caused by the excitement . . . which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication." Commission Comments to M. R. Evid. 803(2) (internal quotation marks and citation omitted).

When evaluating whether a statement is an excited utterance, the Court looks at whether a lapse of time between the event and the statement dissipated the stress or excitement caused by the event. In *Hamby*, the Court concluded the declarant's statements to her mother were excited utterances when they were made immediately following a sexual assault and when the declarant's distress from the assault never subsided. *Hamby*, ¶ 29. There, when D.S.'s mother walked in on Hamby sexually assaulting D.S., she immediately took D.S. to the bathroom where D.S. grabbed her crotch, performed licking motions, and told her mother that Hamby had licked her vagina. *Hamby*, ¶¶ 7-8. The district court admitted D.S.'s statements through her mother's testimony under the excited utterance hearsay exception. *Hamby*, ¶ 29. This Court affirmed, highlighting that D.S.'s "immediate signs of distress" from the assault never subsided prior to talking to her mother. *Hamby*, ¶ 29. The Court concluded that "D.S.'s reactions were

spontaneous and, therefore, admissible" under the excited utterance exception. *Hamby*, ¶ 29.

When a lapse of time between the event and the statement results in a diminished emotional state, the excited utterance exception does not apply. In *Newman*, the Court held that hearsay statements made several hours after an alleged assault were not excited utterances. *Newman*, 162 Mont. at 457, 513 P.2d at 262. Although the declarant had been crying just minutes before giving the statements, because her emotions subsided and she appeared "relatively calm" when she made the statements, the Court determined the statements were not excited utterances. *Newman*, 162 Mont. at 457, 513 P.2d at 262. *See In re Estate of Harmon*, 2011 MT 84, ¶¶ 29-30, 360 Mont. 150, 253 P.3d 821 (holding that statements made several hours after an event were not excited utterances when it was unclear whether the declarant was under stress when she made the statement).

Here, J.V.'s text messages to her mother were sent the day after the last alleged assault and do not describe any specific occurrence or event. J.V. later alleged she was raped around 9:00 p.m. the previous night and then went to sleep. She texted her mother between 12:30 or

1:00 pm, after she had been attending classes online for school all morning. The emotion displayed relates to her reluctance to cause her life to change if she told, not stress or agitation from being assaulted. This delayed timeline, along with the general contents of the messages, do not record then-occurring events and thus do not fit either the present sense impression or excited utterance hearsay exceptions.

J.V.'s text messages to her mother were hearsay meeting no modern evidentiary exception allowing admission, they were not so closely entwined with the facts of the offense to allow admission under the transaction rule, and they were neither present sense impressions nor excited utterances. The district court admitted the messages as *res gestae*, by which the court could have meant any of the above three possible rules, but none of them apply to J.V.'s general allegation of rape contained in her text message to her mother. This evidence should have been kept out.

III. Collectively, these errors prejudiced Willie's right to a fair trial.

The trial court erred by admitting two pieces of hearsay evidence into Willie Veltkamp's trial: the SANE exam and text messages J.V. sent her mother accusing Willie of rape. The error was exasperated

when the court allowed the jury to reference J.V.'s testimonial statements during its deliberations. These errors mandate a new trial because the erroneously admitted evidence was critical to the prosecution's case, and the State cannot demonstrate their admission was harmless. *State v. Van Kirk*, 2001 MT 184, ¶ 37, 306 Mont. 215, 32 P.3d 735.

In order to prove that trial error was harmless, the State must demonstrate that there is no reasonable possibility that the inadmissible evidence might have contributed to the conviction. *State v. Van Kirk*, 2001 MT 184, ¶ 47, 306 Mont. 215, 32 P.3d 735. To do this the State must demonstrate that the fact-finder 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. *Van Kirk*, ¶ 47.

Any harmless error argument on appeal will necessarily contradict the central importance the State placed on both the SANE report and J.V.'s text messages to her mother at trial. The State's case fixated on J.V.'s accusation of rape contained in the SANE exam and her text messages to her mom. This evidence was front and center at

trial and effectively replaced J.V.'s trial testimony. The very first line of the prosecution's opening argument was the quoted content of J.V.'s text message to her mom, which the State used to commend her courage to the jury. The State then chose to have nurse Brant testify first, before J.V., to be able to use the detailed SANE exam as the jury's first impression of J.V.'s rape allegation instead of the testimony of J.V. herself, who wouldn't testify until the next day.

The State wanted the contents of the SANE exam firmly in the jury's mind: returning to J.V.'s statements in the exhibit on five separate occasions, with three separate witnesses, and in opening and closing argument. Following nurse Brant's detailed, line by line recitation of J.V. hearsay statements, the State argued, and the district court permitted, the prosecution to use the SANE exam during J.V.'s testimony as a recorded recollection under M.R. Evid. 803(5).

The State initially attempted to use leading questions to prompt J.V. to change her trial testimony to resemble the SANE report. The Court stopped the prosecution's line of questioning, saying it recognized that the State "had a problem" when J.V.'s trial testimony "[didn't] match" what was in the SANE report. The State then fixed their

"problem" over Willie's objection, first by asking J.V. to read her statement in the SANE report in front of the jury, and confirm that it was in fact what she told Brant when she had her sexual assault exam, which J.V. confirmed. Then, the State took the unusual step of impeaching their own complaining witness with the contents of the SANE exam, further notifying the jury to take a close look at the report in the jury room.

The use of the SANE report as a recorded recollection was not harmless either. By its terms, Rule 803(5), M.R.Evid., requires the declarant to be a witness and requires that the witness "has insufficient recollection to enable the witness to testify fully and accurately." The recorded recollection hearsay exception includes clear limitations for a jury's subsequent access. The rule states, "If admitted, the memorandum or record may be read into evidence but *may not itself be received as an exhibit unless offered by an adverse party.* (Emphasis added.) This limitation is imposed to "prevent a jury from giving too much weight to a written statement that cannot be effectively cross-examined." Commentary to Rule 803(5). Here, these limitations were not recognized because it was already admitted, erroneously, under

Mont. R. Evid. 803(4). J.V. was allowed to vouch that her statement in the exam was accurate *and* it was sent to the jury room as an exhibit.

Qualitatively, the inadmissible hearsay added missing depth to the State's case. J.V.'s text messages to her mother added an emotional component to her story that the prosecution anticipated her testimony would lack. At trial, the prosecutor, likely familiar with J.V.'s presentation, pre-emptively asked J.V. to tell the jury if she might have any unexpected reactions during her testimony. J.V. testified that she might laugh sometimes. But J.V.'s text messages by contrast, expressed J.V.'s heartfelt sadness and fear, that by disclosing years of abuse, she was afraid of disrupting the lives of people she loved, her own and her family's. Likewise, Detective Guderian testified about J.V.'s demeanor during the SANE exam, recalling she was "crying, upset, and very emotional" at the time. Guderian was allowed to testify about J.V.'s hearsay statements made during the SANE exam ostensibly to impeach her trial testimony, where J.V. had denied that Willie pinned her down or that he ejaculated into onto his hand, but she was also able to add this emotional component to J.V.'s story as well.

The State put both J.V.'s narrative from the SANE exam and her text messages to her mother accusing Willie of rape at the center of its case against Willie. The prosecution's choice to showcase this evidence over J.V.'s trial testimony shows it was the State's most compelling evidence, most certainly contributed to Willie's conviction on Count I and II, and was not harmless.

CONCLUSION

This Court should reverse Willie Veltkamp's conviction and remand for a new trial.

Respectfully submitted this 29th day of May, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 8,823, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Kathryn Grear Hutchison
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APPENDICES

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