

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0169

---

STATE OF MONTANA,

Plaintiff and Appellee,

v.

KAYLEA LYNN MULLENDORE,

Defendant and Appellant.

---

**BRIEF OF APPELLEE**

---

On Appeal from the Montana Thirteenth Judicial District Court,  
Yellowstone County, The Honorable Colette Davies, Presiding

---

APPEARANCES:

AUSTIN KNUDSEN  
Montana Attorney General  
CHRISTINE HUTCHISON  
Assistant Attorney General  
215 North Sanders  
P.O. Box 201401  
Helena, MT 59620-1401  
Phone: 406-444-2026  
chutchison@mt.gov

SCOTT D. TWITO  
Yellowstone County Attorney  
VICTORIA CALLENDER  
AMANDA TIERNAN  
Deputy County Attorneys  
P.O. Box 35025  
Billings, MT 59107-5025

ATTORNEYS FOR PLAINTIFF  
AND APPELLEE

TAMMY A. HINDERMAN  
Division Administrator  
CAROLYN GIBADLO  
Assistant Appellate Defender  
Office of State Public Defender  
Appellate Defender Division  
P.O. Box 200147  
Helena, MT 59620-0147

ATTORNEYS FOR DEFENDANT  
AND APPELLANT

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iii

STATEMENT OF THE ISSUES.....1

STATEMENT OF THE CASE.....2

STATEMENT OF THE FACTS .....4

I. The offenses.....4

II. Testimony related to Mullendore’s restricted parenting .....12

III. Testimony regarding the investigation .....14

SUMMARY OF THE ARGUMENT .....17

ARGUMENT .....19

I. Standard of review.....19

II. The State presented sufficient evidence that Mullendore’s negligent actions were the cause-in-fact of Spencer’s death.....20

A. Failure to comply with child safety restraint system requirements is admissible without a presumption of negligence. ....23

B. The jury’s verdicts do not equate with a finding that Mullendore did not ingest alcohol before driving .....24

C. Joyce was not an intervening superseding cause. ....25

III. Mullendore’s counsel was not deficient for failing to raise a statute and instructions that were inapplicable to her case. ....26

A. The lack of child safety restraints was admissible.....28

B. Mullendore’s counsel was not deficient for failing to request an intervening superseding cause instruction.....28

C.	Mullendore’s counsel was not ineffective for failing to request a specific instruction on the foreseeability of Spencer’s death.....	31
IV.	Officer Cook had the necessary training and experience to testify as an expert, Officer DeNio’s calculations were never admitted into evidence, and the defense opened the door to Officer DeNio’s expert testimony on redirect .....	33
A.	The district court properly overruled Mullendore’s objection to Officer Cook testifying to the result of his calculations because he had the necessary knowledge, skill, experience, and training.....	34
B.	The defense opened the door to Officer DeNio’s testimony regarding the science of speed calculations .....	36
V.	The district court properly denied Mullendore’s motion for a mistrial because no one told the jury Mullendore’s parental rights were terminated and she declined a curative instruction .....	38
VI.	The district court did not err in imposing restitution for the victim’s lost wages.....	40
	CONCLUSION.....	42
	CERTIFICATE OF COMPLIANCE.....	43

## TABLE OF AUTHORITIES

### Cases

<i>Baca v. State</i> , 2008 MT 371, 346 Mont. 474, 197 P.3d 948 .....	26
<i>Cusenbary v. Mortensen</i> , 1999 MT 221, 296 Mont. 25, 987 P.2d 351 .....	25
<i>Goodnough v. State</i> , 199 Mont. 9, 647 P.2d 364 (1982) .....	35
<i>Heddings v. State</i> , 2011 MT 228, 362 Mont. 90, 265 P.3d 600 .....	27
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984) .....	26
<i>S.W. v. State</i> , 2024 MT 55, 415 Mont. 437, ___ P.3d ___ .....	29
<i>State v. Ankeny</i> , 2018 MT 91, 391 Mont. 176, 417 P.3d 275 .....	38
<i>State v. Bier</i> , 181 Mont. 27, 591 P.2d 1115 (1979) .....	30
<i>State v. Bollman</i> , 2012 MT 49, 364 Mont. 265, 272 P.3d 650 .....	39
<i>State v. Borsberry</i> , 2006 MT 126, 332 Mont. 271, 136 P.3d 993 .....	19
<i>State v. Bowen</i> , 2015 MT 246, 380 Mont. 433, 356 P.3d 449 .....	21, 22
<i>State v. Clausell</i> , 2001 MT 62, 305 Mont. 1, 22 P.3d 1111 .....	34
<i>State v. Erickson</i> , 2021 MT 320, 406 Mont. 524, 500 P.3d 1243 .....	40

<i>State v. Fender</i> , 2007 MT 268, 339 Mont. 395, 170 P.3d 971 .....	27
<i>State v. Flores</i> , 1998 MT 328, 292 Mont. 255, 974 P.2d 124 .....	38
<i>State v. Guill</i> , 2010 MT 69, 355 Mont. 490, 228 P.3d 1152 .....	36, 37
<i>State v. Gunderson</i> , 2010 MT 166, 357 Mont. 142, 237 P.3d 74 .....	20
<i>State v. Himes</i> , 2015 MT 91, 378 Mont. 419, 345 P.3d 297 .....	21
<i>State v. Loera</i> , 2025 MT 84, 421 Mont. 390, ___ P.3d ___ .....	22
<i>State v. Marfuta</i> , 2024 MT 245, 418 Mont. 353, 557 P.3d 1260 .....	20
<i>State v. Maynard</i> , 2010 MT 115, 356 Mont. 333, 233 P.3d 331 .....	19
<i>State v. McMaster</i> , 2008 MT 268, 345 Mont. 172, 190 P.3d 302 .....	20
<i>State v. Passmore</i> , 2010 MT 34, 355 Mont. 187, 225 P.3d 1229 .....	20
<i>State v. Rovin</i> , 2009 MT 16, 349 Mont. 57, 201 P.3d 780 .....	27
<i>State v. Sartain</i> , 2010 MT 213, 357 Mont. 483, 241 P.3d 1032 .....	27
<i>State v. Veis</i> , 1998 MT 162, 289 Mont. 450, 962 P.2d 1153 .....	36
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	26
<i>Whiting v. State</i> , 248 Mont. 207, 810 P.2d 1177 (1991) .....	30

<i>Whitlow v. State</i> , 2008 MT 140, 343 Mont. 90, 183 P.3d 861 .....	26, 27
--	--------

**Other Authorities**

**Montana Code Annotated**

§ 27-1-323 .....	41
§ 45-2-101(43) .....	22
§ 45-5-104 .....	22
§ 46-18-241(1) .....	41
§ 46-18-243(1)(a) .....	41
§ 61-9-420 .....	24, 28
§ 61-9-422 .....	24, 28
§ 61-13-103 .....	23, 28
§ 61-13-106 .....	23, 28

**Montana Rules of Evidence**

Rule 702 .....	34, 35
----------------	--------

## **STATEMENT OF THE ISSUES**

1. Whether there was insufficient evidence that Mullendore negligently caused the death of Spencer when there was evidence that Mullendore consumed alcohol before driving, failed to put Spencer in a car seat, accelerated away from a minor accident at high speed, exited and reentered the roadway, drove into oncoming traffic, and crashed head-on into a Yukon without braking.

2. Whether Mullendore's counsel was ineffective for failing to raise a statute related to general seatbelt requirements, for failing to request an instruction on the foreseeability of Spencer's death, or for failing to request an instruction that Joyce was an intervening superseding cause.

3. Whether Officer Cook had the necessary training, experience, and education to testify to vehicle speed calculations and whether the district court abused its discretion in permitting Officer DeNio to testify about the science underlying accident reconstruction on redirect.

4. Whether the district court properly denied Mullendore's motion for a mistrial when Mullendore's mother inadvertently stated she had adopted A.R. and Mullendore declined a curative instruction.

5. Whether the district court imposed an illegal sentence by ordering restitution for Spencer Sr.'s loss of income for the documented days he missed work following Spencer's death.

## STATEMENT OF THE CASE

The State charged Appellant Kaylea Lynn Mullendore by Amended Information with vehicular homicide while under the influence or in the alternative negligent homicide, negligent vehicular assault or in the alternative criminal endangerment, four additional counts of criminal endangerment, and driving while the privilege to do so is suspended or revoked. (Doc. 86.) The Amended Information alleged that on November 23, 2019, after being rearended by a minivan, Mullendore, while under the influence of alcohol, attempted to flee by driving off the roadway at high speed, returned to the roadway and drove into oncoming traffic before crashing head-on into another vehicle with two teenage occupants. (*Id.* at 2-3; Doc. 84.) Mullendore's two children, Spencer, age 5, and A.R., age 6, were in the backseat without child safety restraints, and Mullendore's niece, T.K., age 5, was in a booster seat in the front passenger seat. (*Id.*) Spencer died, and A.R. was paralyzed due to injuries sustained in the crash. (*Id.*)

Prior to trial, the defense filed a motion in limine to exclude, among other things, any mention of Mullendore's involvement with Child Protective Services. (Doc. 62.) The State asserted that Mullendore's children had been in the State's legal custody, visitation was only allowed with specific supervisors, and none of those supervisors were present. (Doc. 76; 2/8/22 Tr. at 6.) The State said this went

to Mullendore's knowledge, intent, motive, and lack of mistake, and explained why Mullendore fled. (Doc. 76 at 8-12; 2/8/22 Tr. at 7.)

After an evidentiary hearing, the district court issued an order stating that “[a]s agreed by the parties,” the court would instruct the jury:

Pursuant to a Court Order, the Defendant was not authorized to have unsupervised contact with her children on November 23, 2019.

This evidence is not admitted to prove the character of the Defendant or to show she acted in conformity therewith. The only purpose of admitting this evidence is to show proof of motive, knowledge, and absence of mistake or accident. You may not use this evidence for any other purpose. . . .

(Doc. 147 at 11.)

The court further ordered the parties to “instruct their witnesses not to reference CPS or Child and Family Services specifically.” (*Id.* at 12.) The State could ask Spencer Budde Sr. (Spencer Sr.) about what transpired when Mullendore picked up Spencer, his understanding of who was in Mullendore's car, and that he told Mullendore Spencer could not spend the night with her because it was against the rules. (*Id.*) The court said other testimony regarding evidence of the visitation restriction shall be brought to the court's attention before introduction at trial. (*Id.*)

After a six-day trial, a jury convicted Mullendore of the alternative charges of negligent homicide for Spencer's death, and criminal endangerment as to A.R., as well as driving while suspended. (Doc. 155.) The jury did not reach a verdict on the remaining four counts of criminal endangerment. (*Id.*)

The district court sentenced Mullendore to 20 years at the Montana Women's Prison (MWP) with 5 suspended for negligent homicide, 10 years at MWP, all suspended, for criminal endangerment, and six months in jail for driving while suspended or revoked. (Doc. 186 at 1, attached to Appellant's Br. as App. A.)

## STATEMENT OF THE FACTS

### **I. The offenses**

On November 23, 2019, Mullendore and her friend Nicole Butler (Nicole) decided to go to the Reef to swim with Mullendore's children, Spencer and A.R., Mullendore's niece, T.K., Nicole's boyfriend, and Nicole's two children. (Tr.<sup>1</sup> at 1163-64.) Spencer and T.K. wanted to ride with Nicole but Mullendore said no. (*Id.* at 1163-64, 77.) Nicole's car only had five seats and four were already taken, "[s]o it wouldn't have been fair" if Spencer got to ride with Nicole and T.K. could not. (*Id.*)

Mullendore's sister Bryn Kojetin (Bryn) agreed to let Mullendore borrow her Acura. (*Id.* at 217-18.) At the time, Bryn used booster seats for both A.R. and T.K. and would not let the 45-pound girls sit in the front seat if they were in her car because of the airbag. (*Id.* at 223.) Bryn said she had extra car seats Mullendore

---

<sup>1</sup> Trial was held 4/25/22, 4/26/22, 4/27/22, 4/28/22, 4/29/22, and 5/2/22. The trial transcripts are consecutively paginated, and the State refers to them collectively as "Tr." unless otherwise noted.

could have borrowed that day, but she did not remember Mullendore asking to use any. (*Id.* at 222.) Mullendore put T.K. in the front seat in a booster seat and Spencer and A.R. in the backseat without any child safety restraints. (State's Ex. 18A at 11:37-12:04.) Spencer Sr. said Mullendore had called him that day and had asked to take Spencer swimming. (Tr. at 204.) Spencer Sr. saw Mullendore arrive in Bryn's car and thought Bryn was with her and that there were car seats in the vehicle. (*Id.* at 206-07.)

That same day, Quintin Abbey (Quinn) was driving home with his friends Triston Baker (Triston), Kade Ryan (Kade), and Kylar Broderius (Kylar). (*Id.* at 836-36, 866.) Quinn was speeding, going about 40 miles per hour, as they drove up the hill on 32nd Street South. (*Id.* at 839-40.) As they crested the hill, Quinn saw a line of traffic and a Mr. Rooter plumbing van. (*Id.* at 839, 872.) Quinn hit his brakes, but he still hit the back of the van. (*Id.* at 839, 870.) Don Summers (Don), the driver of the van, said his van moved "[a] couple of feet" after the impact, but not enough to hit the car in front of him that had begun to turn. (*Id.* at 1017.)

Not long after the accident between the Honda and the van, Joyce Duncan (Joyce) was driving home on 32nd Street in a Chevrolet Uplander minivan. (*Id.* at 790-91.) Joyce was looking around at all the people and cars when she suddenly saw Mullendore's Acura ahead. (*Id.* at 791.) Joyce's minivan ran into the Acura

and Joyce's airbag deployed. (*Id.* at 791.) When Joyce got out of the minivan, the Acura was gone. (*Id.* at 791-93.)

Triston said he heard the Acura "rev their engine really loud" and the "tires screeched" as it took off down the hill. (*Id.* at 873.) Triston told law enforcement that the Acura "[h]it rev limiter." (*Id.* at 910.) At trial, he explained that "[a]ll cars have a rev limiter." (*Id.*) The vehicle will "rev[] up all the way until it doesn't rev any more, I guess you could say. There's a point that it stops which is the limiter." (*Id.* at 910-11.) He also told law enforcement that the vehicle "straight pegged[,] meaning "[t]he pedal is as far as it can go down. As much gas as you can basically give a car." (*Id.* at 911.) Quinn did not hear the vehicle rev, but he said the circumstances still made him think the driver was "running." (*Id.* at 845.)

Kade saw the Acura "g[e]t pushed forward a little bit" but then it "accelerated at a rapid pace." (*Id.* at 946-47.) Kade explained that the Acura slowed then accelerated, as in there were two separate things that happened. (*Id.* at 968.) He said it seemed like the driver "want[ed] to get out of there." (*Id.* at 947.) Kade "heard the rev limiter and a bunch of dirt being kicked up, and just pretty much mashed the gas and launched down that hill." (*Id.*) Kade's girlfriend Cailey Redding saw the minivan hit the Acura and told law enforcement that Mullendore had slammed on her brakes and then slammed on the gas. (*Id.* at 977.) Kylar also watched as the Acura "started speeding down off of the side of the road

through the ditch on the right side, going south.” (*Id.* at 920.) Kylar thought the Acura’s acceleration “seemed aggressive.” (*Id.* at 924.)

Don testified that he had noticed the Acura “slowing down in the southbound lane, stopping.” (*Id.* at 1003.) Don said the Acura “took off like a shot” after being hit by the minivan. (*Id.* at 1004.) Don explained that the “Accura appeared—it’s like someone had put their foot on the gas pedal, and it went flying down the road.” (*Id.*) Don analogized that it is like “when you strike on a pool table, you strike a cue ball, and the cue ball hits the other ball. The cue ball stays still, but the other ball goes flying across the table.” (*Id.* at 1008.) Don clarified that he did not see the minivan push the Acura any distance and said he does not play pool “at all.” (*Id.* at 1008-09, 1014.) Don said he did not see the Acura’s brake lights after the minivan hit it nor did he hear the Acura rev its engine. (*Id.* at 1016.)

Quinn’s father, Hans Abbey (Hans), was heading up the hill to get Quinn when he heard a crash and then saw the Acura coming over the top of the hill. (*Id.* at 1022-24, 1028.) The Acura went down the hill driving through “trees and bushes” in the shoulder area off the road. (*Id.* at 874-75, 1132.) As the Acura approached, Hans could see the driver’s face. (*Id.* at 1025.) Hans said he was looking at the driver of the Acura and she was looking at him. (*Id.* at 1025-26.) Hans did not see any blood on the driver, nor did he see an airbag. (*Id.*) Mullendore was headed “right at” Hans, so he “floored it and went up the hill.” (*Id.* at 1026.)

Hans said Mullendore’s vehicle curved around and had he not floored it, she would have” T-boned” him in “[his] lane.” (*Id.* at 1026-27.)

Using a demonstrative, Bryan Shulz (Bryan) testified that when he turned north onto 32nd Street, he “saw ahead some headlights that went off the road, down into a wooded area with trees and bushes” and then the vehicle “came back on to the road” and collided with the Yukon. (*Id.* at 1131-34.)

J.P. and her boyfriend C.N., who were in high school at the time, were driving to dinner before a school dance in J.P.’s father’s Yukon. (*Id.* at 1038-39, 1048-49.) As they drove up 32nd Street, C.N. saw the Acura driving on the “concrete slab” at the top of the hill. (*Id.* at 1109.) C.N. watched as the Acura came over the hill, into the ditch, “and then out of the ditch, and towards [them].” (*Id.* at 1109-110.)

J.P. testified that she saw the Acura “coming down the hill on 32nd in the ditch—half in the ditch and half in the road.” (*Id.* at 1049; State’s Exs. 25, 37.) J.P. watched as the Acura swerved into the northbound lane, and she braced for impact. (Tr. at 1050.) At the last second, C.N. turned the wheel slightly to the right to protect J.P. in the passenger seat. (*Id.* at 1113.) The Acura hit the Yukon head on. (*Id.* at 1050, 1113.) The impact caused the airbags in the Yukon to deploy. (*Id.* at 1056-57, 1113-14; State’s Exs. 15, 16.)

Bryan walked over to the Acura and saw Mullendore walking around with blood on her face. (*Id.* at 1136.) He looked into the backseat and saw Spencer with blood on his face and “extensive damage to his face, forehead area.” (*Id.* at 1137.) Spencer was “having a really hard time breathing. When he did try to breathe, [Bryan] could feel gurgling in [Spencer’s] . . . lungs.” (*Id.* at 1138.)

Kade testified that A.R. “had vomit all over herself and was convulsing really bad.” (*Id.* at 951-52.) Bryan remembered that a little later, he noticed A.R. was “just sitting there, very still. She wasn’t crying. She wasn’t talking.” (*Id.* at 1137) Bryan asked her if she was okay and A.R. said “she couldn’t feel her legs.” (*Id.*)

Spencer was initially treated at the hospital in Billings where they did a decompressive hemicrania surgery to cut open his skull and remove a portion of it and placed an EVD to drain any extra fluid off the brain tissue in an effort to relieve the brain pressure. (*Id.* at 177.) Spencer was flown to Primary Children’s in Salt Lake City where he arrived with a breathing tube in place. (*Id.*)

Dr. Lindsey Troy (Dr. Troy) treated Spencer after he arrived in Salt Lake City. (*Id.* at 178.) Spencer was “very critically ill[.] He had high pressure in his brain despite them taking that part of the skull off, which [was] very concerning[.]” (*Id.* at 179.) Exam findings indicated lack of brain function and issues with his lungs. (*Id.*) Spencer’s forehead bone and both eye sockets were broken. (*Id.*) “He had severe swelling of his brain tissue itself to the point where it was actually

swelling outside of his skull despite them taking that part of his skull off.” (*Id.*) Spencer “had bruising across the lower part of his abdomen,” which Dr. Troy said is colloquially referred to as “a seat belt sign.” (*Id.*)

Dr. Troy declared Spencer dead around 1 p.m. on November 24, 2019. (*Id.* at 181-82.) She determined the cause of Spencer’s death was blunt force injuries. (*Id.*) Dr. Troy explained that no autopsy was done because, “[w]hen there’s no questions about why a kid died, either from us or from the medical examiner’s standpoint, then the family can request one if they would like one, but it’s not needed.” (*Id.* at 183-84.) Dr. Troy said an autopsy would not have provided additional information on how Spencer obtained his injuries. (*Id.* at 193-94.)

Dr. Troy testified that part of her work involved keeping up with guidelines from the American Academy of Pediatrics (AAP), including their guidelines for the use of child safety restraints. (*Id.* at 184.) Spencer was five years old and weighed 35 pounds. (*Id.* at 177-78.) Dr. Troy said that the AAP recommends using “a five-point restraint” or “convertible car seat” for children “age 6 and under 60 pounds.” (*Id.* at 184-85.) She explained a five-point restraint “better restrains the children’s shoulders and hips.” (*Id.* at 187.)

Dr. Troy also explained what a “belt positioning car seat” is and the difference between that and a five-point restraint. (*Id.* at 189.) The belt positioning car seat “serves to raise the kid up a little bit so that the lap belt, that waist belt, sits on

the proper part of the kid's hips and not higher up on their abdomen." (*Id.*) The booster "relies on the shoulder belt from the car," so it does not have "the shoulder restraints on both sides," nor does it "have the groin restraint." (*Id.* at 189-90.) Dr. Troy said the shoulder restraints are important because "[l]ittle kids' shoulders are smaller and the—there's two problems with adult shoulder" straps. (*Id.* at 190.) "One is that, because they don't have the same muscle structure that [adults] do, they can easily slide out of a one-sided harness instead of having both sides of the harness pull them back." (*Id.*) The other problem "is where the harness lands on the kid's body, meaning you don't want it to end up in the neck, and you want it to be lower across the shoulder." (*Id.*) If a child is only wearing a lap belt, in an accident, "the forward momentum of the body doesn't stop." (*Id.*) Dr. Troy said that "[g]iven [Spencer's] weight and size, the AAP and [she] would recommend that he should have been in a five-point restraint[.]" (*Id.* at 189.)

Dr. Karen Breetz testified that A.R.'s injuries included damage to her pancreas and spleen, which required them to remove her spleen. (*Id.* at 711.) They also had to do a reconstructive surgery on one of her kidneys as well as her small intestine. (*Id.*) A.R. had a significant transection of the spinal cord resulting in no sensation below her belly button and no use or feeling in her lower extremities. (*Id.*) Dr. Breetz said the spinal injury is permanent and A.R. will never have normal bladder or bowel function. (*Id.* at 711-12.)

Dr. Breetz said the AAP recommends children under 60 pounds should be in a belt positioning booster seat and A.R. weighed about 47 pounds. (*Id.* at 714.) She said seatbelt shoulder straps do not properly restrain a child in an accident. (*Id.* at 714-15.) Dr. Breetz explained that restraining children properly in a booster seat with a chest strap would reduce the likelihood of spinal and abdominal injuries. (*Id.* at 715.)

On cross-examination, Dr. Breetz agreed that a child in a booster seat could still put a shoulder strap behind themselves. (*Id.* at 716.) Dr. Breetz said that if the child removes the shoulder strap, “it’s recommended that they would either be in a high back booster that has the belt positioning part of it so that makes it less possible for them to do it, or they should be kept even in a five-point harness.” (*Id.* at 717.)

## **II. Testimony related to Mullendore’s restricted parenting**

On cross-examination, the defense asked Bryn if she had been comfortable with Mullendore taking the children (*Id.* at 233.) On redirect, referencing the defense’s question, the prosecutor asked Bryn, “You weren’t under any kind of Court order that prevented you to have contact with these children; correct?” (*Id.* at 236.) Bryn said no. (*Id.*)

During a recess the court told the parties it had been clear that they were not to bring up the court order “absent approaching the bench and advising [the court]

first.” (*Id.* at 239.) However, the court “acknowledged that [it] would have allowed” the testimony “because the defense opened the door.” *Id.*

Mullendore’s Mother, Michelle Moore (Michelle), testified at trial. (*Id.* at 719.) The State asked her if she knew Spencer and who he was to her. (*Id.*) Michelle said yes, he was her grandson. (*Id.*) The State asked the same regarding A.R., and Michelle said she “adopted her. She was my granddaughter and now she’s—” (*Id.* at 720.) The court sustained Mullendore’s 404(b) objection and questioning resumed. (*Id.*) The State asked Michelle how she knew T.K., and Michelle said she was her granddaughter. (*Id.*)

The defense waited until the end of the day, after Michelle and another witness had testified, to bring up Michelle’s statement and request a mistrial. (*Id.* at 779.) The defense acknowledged that, “in some fairness to the State, [Michelle] just kind of blurted it out that she’s adopted A[R.]” (*Id.*) The prosecutor said she had expected Michelle would answer the same in regard to T.K. and A.R. as she had about Spencer. (*Id.*) The prosecutor said the jury had no information on why A.R. was adopted and that there are many ways adoptions happen. (*Id.*)

The court denied the motion for a mistrial and told the defense it could wait until the next morning to decide if Mullendore wanted a curative instruction. (*Id.* at 781.) The following day the defense declined the invitation for a curative instruction. (*Id.* at 862.) Counsel noted the statement “was brief” and indicated that

they preferred not to draw attention to it, especially because the court had sustained the defense's objection. (*Id.*)

### **III. Testimony regarding the investigation**

The State presented evidence that medical providers took Mullendore's blood for medical purposes once they began treating her. Nurse Perich testified that Mullendore told her Trazadone may be in her system. (Tr. at 562.) She said she would normally tell people taking Trazadone that they should not drink alcohol or drive while taking it. (*Id.*) Mullendore told Officer Cook the same thing. (Tr. at 334.) Nurse Perich said she would do a medical blood draw using an IV line she had flushed with saline if there was already an IV in place. (*Id.* at 563-64.) Nurse Perich said in her experience as a traveling nurse, the standard was to use a non-alcoholic wipe to prep the skin for an IV unless the patient has an allergy to chlorhexidine. (*Id.* at 578.) The defense's witness, Nurse Buer, also testified that the hospital uses chlorhexidine to prepare the skin unless patients have an allergy. (*Id.* at 1184.)

A blood draw taken for medical treatment purposes indicated that Mullendore's blood had an alcohol content of 61 milligrams per deciliter when it was taken at 6:02 p.m. (*Id.* at 565-67, 645.) The forensic scientist testified that "the elimination rate is really a range." (*Id.* at 679.) While it can be as low as 0.01

grams per 100 milliliters per hour, in alcoholics it can be as high as 0.025 to 0.035 grams per 100 milliliters per hour. (*Id.*) The administrative director of the laboratory for St. Vincent’s Healthcare testified that while they know everyone who handled the blood sample, they do not have “a paper signature.” (*Id.* at 653.)

Mullendore had gone to Salt Lake City the day after the crash and then to Texas. (*Id.* at 396, 514; State’s Ex. 18A at 14:40-14:49.) Officer Cook met with her when she returned. The parties stipulated to the admission of a recording of the interview in which Mullendore told Officer Cook she did not remember anything after being rear-ended. (State’s Ex. 18A at 3:15-3:30.) She said she knew Spencer should have been in a car seat, but she did not have any because someone had robbed her house and had taken her car seats. (*Id.* at 11:45-12:04.)

Sergeant Tony Jensen, the supervisor and manager of the crash investigations team, said he was only able to get crash data from the Yukon and the minivan, not the Acura, because the Acura was incompatible with the instrument he had to retrieve the data. (*Id.* at 302-05.) Based on crash data retrieved from the Uplander, Sergeant Jensen determined that Joyce was driving at 31 miles per hour one second prior to the crash with the Acura. (*Id.* at 313.)

At trial, Officer Cook used a demonstrative and explained the trajectory of the Acura:

[A]fter being rear ended, the Acura went off the right side of the road kind of into the—hit the reflector into kind of like the bramble, gravel

area. Went across the shoulder of the bridge on to this little dirt area just on the south side of the bridge and made a sharp left-hand maneuver and got back on to the road before crossing into the opposing lane.

(Tr. at 411.)

Officer Cook testified that based on his calculations, the Acura was traveling a little over 71 miles per hour when it hit the Yukon. (*Id.* at 418.) On cross-examination and rebuttal, Officer Cook explained that had he used curb weights instead of gross weights it only would have reduced Mullendore's speed by about 1-2 miles per hour. (*Id.* at 464-546.) Officer Cook maintained throughout his testimony that Mullendore hit the Yukon at less than a 10-degree angle from head-on. (*Id.* at 478-79.)

The defense called David Rochford who testified that he used a different formula to calculate the Acura's speed because he believed the angle of impact between the Acura and the Yukon was 40 degrees. (*Id.* at 1281.) He also used the curb weights plus passenger and cargo weights rather than gross weight. (*Id.* at 1288-1304.) Based on his calculations, Rochford believed Mullendore was traveling 56.1 miles per hour when she hit the Yukon. (*Id.* at 1291.) He also testified that other calculations indicated that the Acura could have reached 54.4 miles per hour just by coasting after being rearended. (*Id.* at 1300.) He did not see any evidence that the Acura braked. (*Id.* at 1324.)

Rochford testified that the evidence indicated that the minivan hit the Acura straight on directly from behind. (*Id.* at 1254-55.) Rochford also testified that he believed the Acura’s airbag went off when she drove off the concrete area onto the shoulder rather than when she hit the Yukon. (*Id.* at 1331.)

Officer Gabrielle DeNio used images produced by a FARO scanner to walk the jury through the crime scene. (*Id.* at 740-70; State’s Ex. 20.) She showed the jury the liquid pile and dirt debris in the southbound lane directly across from where the first accident between the Honda and the plumbing van happened. (Tr. at 747; State’s Ex. 20, Scan009.)

### **SUMMARY OF THE ARGUMENT**

As an initial matter, Mullendore’s claims are all fact-intensive and much of her recounting of what happened at trial is not born out by the record. For example, Mullendore states that A.R. “placed the shoulder strap under her arm and behind her back” and that Spencer “copied” her. (Appellant’s Br. at 3.) There is no evidence in the record establishing this fact and the exhibit she cites was a phlebotomy policy never admitted into the record. (Tr. at 197-98.) The problem with these inaccuracies and mischaracterizations compounds with fact-intensive claims such as Mullendore’s in which the facts determine the outcome.

There was sufficient evidence that Mullendore negligently caused the death of Spencer. The State introduced evidence that Mullendore failed to put Spencer or A.R. in car seats, drank alcohol before driving, accelerated away from a minor accident in the shoulder area, reentered the roadway at a high rate of speed, and crashed into oncoming traffic without engaging her brakes.

Mullendore's counsel was not ineffective for failing to raise a statute addressing the admissibility of a failure to comply with standard seatbelt requirements, for failing to request an instruction on the foreseeability of Spencer's death, or for failing to request an instruction that Joyce was an intervening superseding cause. The statute does not address the admissibility of child safety restraint systems, the jury instructions as a whole properly instructed the jury, and Joyce could not be an intervening superseding cause when Mullendore's negligence continued after being rearended.

The district court did not abuse its discretion in permitting Officer Cook to testify as an expert because he had the necessary training, experience, and education. The district court did not abuse its discretion in permitting Officer DeNio to testify as an expert on redirect after the defense opened the door during cross-examination.

The district court properly denied Mullendore's motion for a mistrial based upon Michelle's isolated statement that she adopted A.R. because the statement

did not inform the jury that Mullendore’s parental rights were terminated and she declined a curative instruction.

The district court did not err in imposing restitution to Spencer Sr. for his loss of income based upon the documented days he missed work following Spencer’s death because he could have recovered those special damages in a civil case against Mullendore.

## **ARGUMENT**

### **I. Standard of review**

This Court reviews “a question on the sufficiency of the evidence to determine whether, in a light most favorable to the prosecution, any trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Borsberry*, 2006 MT 126, ¶ 11, 332 Mont. 271, 136 P.3d 993.

Claims for ineffective assistance of counsel (IAC) present mixed questions of law and fact, which this Court reviews de novo. *State v. Maynard*, 2010 MT 115, ¶ 11, 356 Mont. 333, 233 P.3d 331 (citation omitted).

A district court has broad discretion to formulate jury instructions. This Court reviews jury instructions for an abuse of discretion. A court abuses its discretion if the court acts arbitrarily, without employment of conscientious judgment, or exceeded the bounds of reason resulting in substantial injustice. “[A]

district court’s jury instructions must be reviewed ‘in their entirety in order to determine if they fully and fairly instruct the jury on the law applicable to the case.’” *State v. Marfuta*, 2024 MT 245, ¶ 20, 418 Mont. 353, 557 P.3d 1260 (citations omitted).

A trial court has broad discretion in determining the relevance and admissibility of evidence. Thus, this Court generally reviews evidentiary rulings for an abuse of discretion. However, to the extent a trial court’s ruling is based on an interpretation of an evidentiary rule or statute, this Court’s review is de novo. *State v. Passmore*, 2010 MT 34, ¶ 51, 355 Mont. 187, 225 P.3d 1229 (citations omitted).

This Court reviews the denial of a motion for a mistrial to determine whether the district court abused its discretion. *State v. Gunderson*, 2010 MT 166, ¶ 91, 357 Mont. 142, 237 P.3d 74.

This Court reviews de novo whether a district court had statutory authority to impose a sentence. *State v. McMaster*, 2008 MT 268, ¶ 20, 345 Mont. 172, 190 P.3d 302.

## **II. The State presented sufficient evidence that Mullendore’s negligent actions were the cause-in-fact of Spencer’s death.**

Mullendore asserts the district court erred when it denied Mullendore’s motion to dismiss the negligent homicide charge because there was insufficient

evidence that Mullendore was the cause-in-fact of Spencer's death. (Appellant's Br. at 22.)<sup>2</sup> Mullendore's entire argument presumes Mullendore's decision not to place Spencer or A.R. in any child safety restraint was her only negligent conduct. However, the State presented evidence that Mullendore greatly exasperated the risk that her children would suffer serious bodily injury or death by consuming alcohol before driving, exiting the roadway at a high rate of speed, reentering the roadway, driving the wrong way into oncoming traffic, and crashing into a Yukon without braking.

When considering whether there was sufficient evidence to support a conviction, this Court assumes every fact the jury could have deduced from the evidence and will not substitute its own judgement for that of the jury. *State v. Bowen*, 2015 MT 246, ¶ 30, 380 Mont. 433, 356 P.3d 449 (citations omitted). A conviction may be based entirely on circumstantial evidence and when circumstantial evidence is susceptible to two interpretations, one which supports guilt and the other innocence, the trier of fact determines which is more reasonable. *Id.* Conflicting testimony does not render evidence insufficient to support a

---

<sup>2</sup> At trial, Mullendore asserted there was insufficient evidence of some of the charges but not negligent homicide or criminal endangerment as to A.R. (Tr. at 1146-50.) The State is not raising a waiver argument. *See State v. Himes*, 2015 MT 91, ¶ 20, 378 Mont. 419, 345 P.3d 297. However, Mullendore's characterization of the nature of her sufficiency challenge, like much of her characterization of the trial, contradicts the record.

conviction and the testimony from one witness is sufficient to prove any fact in a case. *Id.* Determining the credibility of witnesses and the weight given to their testimony lies exclusively within the province of the jury. *Borsberry*, ¶ 20.

A person commits the offense of negligent homicide if the person negligently causes the death of a human being. Mont. Code Ann. § 45-5-104.

A person acts negligently . . . when the person consciously disregards a risk that the result will occur . . . or when the person disregards a risk of which the person should be aware that the result will occur . . . . The risk must be of a nature and degree that to disregard it involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor’s situation. “Gross deviation” means a deviation that is considerably greater than lack of ordinary care.

Mont. Code Ann. § 45-2-101(43).

To prove the defendant’s negligence caused the victim’s death in a negligent homicide case, the State must prove the defendant’s negligent conduct was the cause-in-fact of the victim’s death. *Bowen*, ¶ 33. A defendant’s conduct is the cause-in-fact of a victim’s death if the victim’s death would not have occurred but for that conduct. *Id.* Conversely, the defendant’s conduct is not a cause of the victim’s death if the victim’s death would have occurred without the defendant’s conduct. *Id.* Put another way, to find Mullendore not guilty of negligent homicide, the jury would have had to conclude that Spencer would have died without Mullendore’s negligent conduct. *See State v. Loera*, 2025 MT 84, ¶ 16, 421 Mont. 390, \_\_\_ P.3d \_\_\_.

It was undisputed that Mullendore failed to put Spencer in any child safety restraint, drove off the roadway at an angle into a grassy area after being rearended, continued over the crest of the hill in the shoulder, reentered the roadway at high speed, and collided into a Yukon without engaging her brakes. Additionally, the jury heard testimony that Mullendore floored the gas pedal after she was rearended and she had 61 mg/dL of alcohol in her blood.

Spencer's treating medical provider testified that Spencer should have been in a five-point restraint system given his age and weight. She said such a restraint is particularly important because it restrains the child's upper body and keeps it from sliding out of an adult sized seatbelt. She said Spencer had abdominal injuries that indicated he only had a lap belt on, and that he died from blunt force trauma to his head.

The State presented sufficient evidence to establish that but for Mullendore's negligent conduct, Spencer would not have died.

**A. Failure to comply with child safety restraint system requirements is admissible without a presumption of negligence.**

Mullendore's reliance on Mont. Code Ann. § 61-13-106 is misplaced. Montana Code Annotated § 61-13-106 addresses the admissibility of a person's compliance with Mont. Code Ann. § 61-13-103, the general seatbelt requirements. Montana Code Annotated § 61-13-106 does not address the admissibility of a

failure to comply with Mont. Code Ann. § 61-9-420, the child safety restraint system requirements.

Montana Code Annotated § 61-9-420 outlines what child safety restraint systems must be used based on age and weight. Montana Code Annotated § 61-9-422 provides that evidence of compliance or failure to comply with the requirements of Mont. Code Ann. § 61-9-420 is admissible but without a presumption a negligence.

As Mullendore notes, the jury twice asked the court to instruct on the child safety restraint requirements. (Tr. at 1449-56.) The defense objected to the court instructing on the statutory requirements. (*Id.*) The district court believed it was up to the court's discretion, but the court opted not to instruct the jury on the child safety system requirements because it worried the jury could equate a violation of the statute with the negligence standard. (*Id.*) While no one raised Mont. Code Ann. §§ 61-9-420 and -422, the court's instinct in declining to give the instruction protected Mullendore from the jury deeming her failure to properly restrain Spencer negligence per se.

**B. The jury's verdicts do not equate with a finding that Mullendore did not ingest alcohol before driving.**

“An acquittal resulting from the State's failure to prove an element of a crime cannot be considered tantamount to an affirmative proposition that the defendant did or did not engage in any particular act.” *Borsberry*, ¶ 15.

Without challenging the district court's order on the admissibility of the medical blood draw, Mullendore challenges the evidence and asserts that the jury's verdicts establish that the jury rejected the evidence. The State presented evidence that Mullendore had 61 mg/dL of alcohol in her blood immediately after the accident, that alcohol dissipation rates vary, and that the hospital knew who had handled the blood sample. The verdicts do not equate with a finding that Mullendore did not consume alcohol before driving.

**C. Joyce was not an intervening superseding cause.**

Mullendore asserts that Joyce rearending the Acura was an intervening superseding cause, severing the causal connection between her negligence and Spencer's death. (Appellant's Br. at 30.) The State presented evidence that Mullendore continued to engage in negligent conduct after being rearended by exiting the roadway, fleeing at a high rate of speed, reentering the roadway driving into oncoming traffic, and crashing into a Yukon without braking. Moreover, Joyce rearending Mullendore could not constitute an intervening superseding cause even if the State had asserted that Mullendore's sole negligence was failing to properly secure the children because child safety restraint systems are specifically designed to prevent serious bodily injury or death in the event of an accident. *See Cusenbary v. Mortensen*, 1999 MT 221, ¶ 25, 296 Mont. 25, 987 P.2d 351 (not an intervening

superseding cause if defendant's actions constitute negligence because they create a greater risk of a particular harmful result and that harmful result occurs).

### **III. Mullendore's counsel was not deficient for failing to raise a statute and instructions that were inapplicable to her case.**

Mullendore alleges her counsel was ineffective for failing to object to the introduction of seatbelt evidence, for failing to request an instruction stating the State had to prove that Spencer's death was a foreseeable result of her conduct, and for failing to request an instruction on intervening superseding acts. (Appellant's Br. at 32-39.)

This Court reviews IAC claims applying the two-prong test set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on an IAC claim, a defendant must establish: (1) that counsel's performance was deficient; and (2) that the deficient performance prejudiced the defense. *Baca v. State*, 2008 MT 371, ¶ 16, 346 Mont. 474, 197 P.3d 948. There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance' and the defendant 'must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.'" *Whitlow v. State*, 2008 MT 140, ¶ 21, 343 Mont. 90, 183 P.3d 861 (quoting *Strickland*, 466 U.S. at 689). "Both prongs of the test

must be satisfied in order to prevail on an [IAC] claim; thus, an insufficient showing on one prong negates the need to address the other.” *Id.* ¶ 11.

Before reaching the merits of an IAC claim on direct appeal, this Court must first determine whether the claim is record or non-record based. *State v. Rovin*, 2009 MT 16, ¶ 34, 349 Mont. 57, 201 P.3d 780. This Court will review IAC claims on direct appeal if the claims are based solely on the record. *Rovin*, ¶ 24. “[A] silent record cannot rebut the strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Rovin*, ¶ 34. If the record does not explain “why” counsel did or did not take an action, the IAC claim is more suitable for a petition for postconviction relief. *State v. Sartain*, 2010 MT 213, ¶ 30, 357 Mont. 483, 241 P.3d 1032 (quotation marks and citation omitted). A non-record-based claim may be addressed on direct appeal, “in rare instances,” if there is no plausible justification for defense counsel’s actions or omission. *State v. Fender*, 2007 MT 268, ¶ 10, 339 Mont. 395, 170 P.3d 971.

This Court has repeatedly held that a defendant cannot prevail on an IAC claim that is premised on their counsel’s failure to object or make motions that would have been frivolous, without procedural or substantive merit, or otherwise would not have changed the outcome of the proceedings. *Heddings v. State*, 2011 MT 228, ¶ 33, 362 Mont. 90, 265 P.3d 600 (citations omitted).

The record does not explain why Mullendore’s counsel did not raise the challenges she asserts they should have and, thus, it would be inappropriate to find her attorneys ineffective without providing them with the opportunity to respond. However, regardless of why her attorneys did not raise the challenges, Mullendore’s counsel were not ineffective because the statutory seatbelt provision is inapplicable, Spencer’s death was a foreseeable result of Mullendore’s negligent conduct, the jury was properly instructed, and Joyce rearending Mullendore’s vehicle was not an intervening superseding cause.

**A. The lack of child safety restraints was admissible.**

As previously addressed, Mullendore’s reliance on Mont. Code Ann. §§ 61-13-103 and -106 is misplaced. Failure to comply with Mont. Code Ann. § 61-9-420 is admissible. Mont. Code Ann. § 61-9-422. Because the evidence was admissible, Mullendore’s attorneys were not deficient for failing to object.

**B. Mullendore’s counsel were not deficient for failing to request an intervening superseding cause instruction.**

Mullendore’s counsel were not constitutionally ineffective for failing to request an intervening superseding cause instruction because it would not have been applicable.

“An intervening cause is one in which the facts indicate that a force came into motion after the time of the defendant’s negligent act and combined with the negligent act to cause the injury to the [victim].” *S.W. v. State*, 2024 MT 55, ¶ 39,

415 Mont. 437, \_\_\_ P.3 \_\_\_\_\_. If an intervening cause is reasonably foreseeable, it does not break the chain of causation or relieve the defendant of liability. *Id.* “In other words, if one of the reasons that makes a defendant’s act negligent is a greater risk of a particular harmful result occurring, and that harmful result does occur, the defendant is generally liable.” *Cusenbary*, ¶ 25. A defendant need not foresee the specific injury in order for a third-party act to be foreseeable. *S.W.*, ¶ 39. While foreseeability is often a question of fact properly reserved for the jury, this Court has determined foreseeability as a matter of law on several occasions. *Id.* ¶¶ 41-42 (collecting cases).

This Court has found that a patron’s driving through a bar’s wall was not an intervening superseding cause because the driver’s actions of driving while intoxicated after being over-served in the bar were foreseeable as a matter of law. *Cusenbary*, ¶ 29. The consequences of serving alcohol to a person who is already visibly intoxicated are reasonably foreseeable precisely because of the causal relationship between serving alcohol and drunken conduct. *Id.* ¶ 30.

Similarly, a victim’s suicide attempt was foreseeable when the defendant gave his wife a loaded gun when she was heavily intoxicated and encouraged her to use the gun to stop him from leaving. *State v. Bier*, 181 Mont. 27, 29-30, 32-33, 591 P.2d 1115, 1116-18 (1979).

This Court held that a driver accidentally driving the wrong way on an exit ramp past a single set of “Wrong Way” signs was not an intervening or superseding cause of the State’s negligence in failing to post several warning signs at the end of the exit ramp. *Whiting v. State*, 248 Mont. 207, 217-18, 810 P.2d 1177, 1183-84 (1991). “The assumption that a motorist may become distracted long enough to miss a single set of warning signs, is reasonable.” *Id.* The very purpose of the redundant signage that the State’s specifications called for was to prevent someone from driving the wrong way onto an exit ramp. *Id.*

Mullendore’s IAC claim regarding the absence of an intervening superseding cause instruction requires an assumption that Mullendore’s only negligent conduct occurred prior to being rearended. Undisputed evidence at trial established that Mullendore engaged in additional negligent conduct after being rearended. Mullendore focuses on Rochford’s testimony that she could have coasted from the collision with the minivan to the collision with the Yukon. However, even assuming the jury concluded this was true, there was no dispute that Mullendore and the minivan were directly in line with each other when the minivan hit the Acura, yet Mullendore left the roadway at an angle. It was undisputed that she continued along in the shoulder and reentered the roadway at a high rate of speed significantly over the speed limit and there was no evidence that she engaged her brakes. In fact, the only way Mullendore could have reached the

speed her expert calculated without using the gas pedal is if she did not engage her brakes. Joyce could not be an intervening superseding cause of these negligent acts that occurred after Mullendore was rearended.

Moreover, Joyce rearending Mullendore did not break the causal connection between the isolated negligent conduct of failing to properly secure the children and Spencer's death. Child safety restraint systems are designed to properly secure children and prevent the risk of serious bodily injury or death in the event of an accident.

The reason Mullendore's failure to secure Spencer in any child safety restraint system constituted negligence is because it put Spencer at greater risk of serious bodily injury or death in the event of an accident. Spencer being injured in an automotive crash was a foreseeable consequence of Mullendore's negligence. Being rearended did not break the causal connection between Mullendore's negligence and Spencer's death. Mullendore's attorneys were not deficient in failing to request an intervening superseding cause instruction because it was not appropriate under the facts of this case.

**C. Mullendore's counsel were not ineffective for failing to request a specific instruction on the foreseeability of Spencer's death.**

Mullendore asserts the jury should have been instructed that the State needed to prove that Spencer "was foreseeably endangered in a manner and to a degree of

harm consistent with the actual or probable result.” (Appellant’s Br. at 37 (internal quotation marks omitted).)

The jury was instructed that a person commits the offense of negligent homicide if the person negligently causes the death of a human being. The jury was also instructed that “[a] person acts negligently when an act is done with a conscious disregard of the risk or when the person should be aware of the risk . . . .” Read together, these properly instructed the jury that to convict Mullendore, the State needed to prove that Mullendore either consciously disregarded the risk that she would cause Spencer’s death with her actions or that she should have been aware of the risk that her actions would cause Spencer’s death. The instructions were sufficient to fully and fairly instruct the jury on the relevant law. Notably, the pattern criminal jury instruction addressing negligently also does not include the words, “that the result will occur.” Although the pattern jury instruction, MCJI 2-105, instructs that the conduct at issue should be added to the instruction, Mullendore has not established any prejudice.

Child safety restraint systems are designed to prevent serious bodily injury or death in the event of an accident. As medical providers testified, child safety restraint systems prevent a child’s shoulders from slipping through in an accident. Spencer’s blunt force trauma to the head was a foreseeable risk of Mullendore’s failure to properly restrain him and the degree of risk was compounded by her

leaving the roadway after being rearended, proceeding through the shoulder area off the roadway at a high rate of speed, reentering the roadway at a high rate of speed, and colliding with oncoming traffic without any indication that she ever engaged her brakes.

Mullendore's counsel were not ineffective for failing to request an instruction that specifically stated that a person acts negligently when an act is done with a conscious disregard of the risk that the result will occur or when the person should be aware of the risk that the result will occur because the instructions as a whole sufficiently instructed the jury and Mullendore has not established any prejudice.

**IV. Officer Cook had the necessary training and experience to testify as an expert, Officer DeNio's calculations were never admitted into evidence, and the defense opened the door to Officer DeNio's expert testimony on redirect.**

Mullendore mischaracterizes Officer Cook's training and experience by omitting the education, training, or experience he received after November 23, 2019, she implies the State admitted calculations conducted by Officer DeNio into evidence when it never did, and she omits the defense's solicitation of expert testimony from Officer DeNio on cross-examination. (Appellant's Br. at 41-47.) The district court properly allowed Officer Cook to testify as an expert witness and the defense opened the door to Officer DeNio's testimony on rebuttal.

**A. The district court properly overruled Mullendore’s objection to Officer Cook testifying to the result of his calculations because he had the necessary knowledge, skill, experience, and training.**

At trial, Mullendore only objected on Mont. R. Evid. 702 grounds to Officer Cook stating the result of his speed calculation, not to any of his proceeding testimony regarding how calculations are done or other aspects of his crash investigation. The court properly overruled the objection because Officer Cook had the necessary training, experience, skill, and knowledge.

“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.” Mont. R. Evid. 702. “The determination of the qualification and competency of an expert witness rests within the sound discretion of the trial court and will not be disturbed absent a showing of abuse of discretion.” *State v. Clausell*, 2001 MT 62, ¶ 21, 305 Mont. 1, 22 P.3d 1111 (citation omitted). “Moreover, ‘the degree of a witness’ qualifications affects the weight of the expert’s testimony, not its admissibility.’” *Id.* (citation omitted).

In *Goodnough v. State*, 199 Mont. 9, 13-14, 647 P.2d 364, 369 (1982), this Court held that the district court properly permitted a highway patrolman to testify as to the speed of a vehicle. Goodnough claimed that “estimating speed in a complicated collision requires training in physics and mechanics” and that the

highway patrolman lacked the expertise to testify as to his calculations of vehicle speed based off skid marks. *Id.* This Court rejected the claim, noting prior precedent permitting a highway patrolman to testify as an expert as to the cause of an accident and vehicular speed. *Id.* The patrolman's experience investigating accidents and his training, including in how to estimate speed based on skid mark length and damage, met the requirements to testify as an expert witness. *Id.* This Court stated that "as long as the cross-examiner is given adequate opportunity to elicit any assumptions or facts underlying an expert's opinion, the weight to be given the expert's testimony is for the jury to determine." *Id.*

The district court did not err in overruling Mullendore's Mont. R. Evid. 702 objection. At the time he testified, Officer Cook had worked at the Billings Police Department for five and a half years, worked on the crash investigation team for several years, had completed the law enforcement academy training, had additional training in technical crash investigation, and had formal training and experience conducting calculations to determine the speed of vehicles.

Officer Cook was transparent about the difference between his knowledge, training, and experience at the time of the investigation versus at the time of trial. He also told the jury that his calculation of the Acura's speed had been his first time doing the calculation in a real-world case. Mullendore only acknowledges Officer Cook's training and experience at the time of the incident and offers no

authority that would support basing a witness's qualifications on a point in time other than at the time of trial.

To the extent Mullendore challenges Officer Cook's unobjected-to testimony, she waived her claims by failing to object in the district court. Officer Cook met the requirements to testify as to the result of his speed calculation and the court properly overruled Mullendore's objection.

**B. The defense opened the door to Officer DeNio's testimony regarding the science of speed calculations.**

"When one party opens the door, or broaches a certain topic that would otherwise be off limits, 'the opposing party has the right to offer evidence in rebuttal . . . .'" *State v. Guill*, 2010 MT 69, ¶ 39, 355 Mont. 490, 228 P.3d 1152 (quoting *State v. Veis*, 1998 MT 162, ¶ 18, 289 Mont. 450, 962 P.2d 1153).

"A district court has wide discretion in determining the scope and extent of reexamination regarding matters brought out on cross-examination." *Veis*, ¶ 19 (citations omitted).

Mullendore's objection to Officer DeNio's testimony based on improper notice came at the end of the day on April 27 and was specific as to any speed calculations she may have conducted. (Tr. at 774-77.) The court sustained the objection "as to the calculations," and the following day the State only questioned Officer DeNio on evidence gathering procedures and indicators of impairment before concluding direct examination. (*Id.* at 777-78, 809-11.)

On redirect, when Officer DeNio began testifying about Newton's laws and the angle the Acura left the roadway to explain why she did not believe the Acura rolled down the hill, Mullendore objected, asserting it called for expert testimony. Mullendore omits that it was the defense that asked Officer DeNio about ACTAR certifications, asked whether Officer Cook received ACTAR certification before the 2019 investigation, proposed hypotheticals about ten-pound bowling balls, asked how various things would affect a bowling ball's speed, asked whether the Yukon would go to the right if it was a less than ten degree angle of impact, asked whether a vehicle going down the hill would gain momentum without acceleration, and asked whether someone who had been rearended would have control of their vehicle. (*Id.* at 811-21.)

The district court did not abuse its discretion in permitting Officer DeNio to testify on redirect as to the science underlying her cross-examination testimony because the defense opened the door. While the district court did not state why it overruled Mullendore's objection during redirect, this Court will not reverse if a court reaches the right result, even if for the wrong reason. *Veis*, ¶ 16. To the extent Mullendore challenges other unobjected-to testimony from Officer DeNio, she has waived the challenge by failing to object in the district court.

**V. The district court properly denied Mullendore’s motion for a mistrial because no one told the jury Mullendore’s parental rights were terminated and she declined a curative instruction.**

Mullendore asserts the district court abused its discretion in denying her motion for a mistrial that she requested after the State “told the jury her right to parent A[.R.] was terminated.” (Appellant’s Br. at 48.) No one told the jury Mullendore’s parental rights were terminated.

When determining whether to grant or deny a mistrial, a district court must consider whether the defendant has been denied a fair and impartial trial. *State v. Flores*, 1998 MT 328, ¶ 11, 292 Mont. 255, 974 P.2d 124 (citation omitted).

“Generally, a mistrial is appropriate when there is a reasonable possibility that inadmissible evidence contributed to the conviction.” *State v. Ankeny*, 2018 MT 91, ¶ 36, 391 Mont. 176, 417 P.3d 275. To determine whether a prohibited statement contributed to a conviction, this Court considers the strength of the evidence against the defendant, the prejudicial effect of the testimony, and whether a cautionary instruction could cure any prejudice. *Ankeny*, ¶ 36. A mistrial is “an extreme remedy, only to be granted for manifest necessity as required by the ends of justice.” *Flores*, ¶ 11.

In *State v. Bollman*, 2012 MT 49, ¶¶ 31-37, 364 Mont. 265, 272 P.3d 650, this Court held that an officer’s isolated statement about felony DUIs did not warrant a mistrial. This Court noted the statement appeared to be an inadvertent

remark unsolicited by the State. *Id.* ¶ 34. The statement was not the only link between the defendant and the offense and there was ample evidence against Bollman. *Id.* Contrary to Bollman’s assertions, this Court found that the “statement could not reasonably be seen as evidence of Bollman’s criminal history or prior bad acts.” *Id.* ¶ 35. The statement was not drawn out by the prosecution, nor was the information graphic or detailed. *Id.* Further, Bollman did not seek a curative instruction. *Id.* ¶ 36.

Here, Mullendore only asked for a mistrial based on Michelle’s statement that she adopted A.R., not based on the question posed to Bryn which Mullendore challenges for the first time on appeal. As the district court noted, Mullendore opened the door to the question to Bryn. Regarding Michelle’s statement, the defense admitted she “just kind of blurted it out” that she adopted A.R. and that it appeared the State had not intended that response. Contrary to Mullendore’s assertions, Michelle’s unanticipated response did not tell the jury that the State had terminated Mullendore’s parental rights. As the State noted below, adoptions can happen in multiple contexts. *See, e.g.,* Mont. Code Ann. § 42-4-302(2).

As in *Bollman*, Mullendore declined the court’s invitation to give a curative instruction, and this Court will not fault a district court for failing to give a curative instruction when the defense acquiesced in its omission. *Bollman*, ¶ 36. Moreover, the court told the jury that Mullendore’s restricted parenting could only be

considered for motive, knowledge, or absence of mistake or accident and we presume a jury upholds its duty and follows a court's instructions. *State v. Erickson*, 2021 MT 320, ¶ 27, 406 Mont. 524, 500 P.3d 1243. There was also ample evidence of Mullendore's guilt. It was undisputed she failed to restrain either A.R. or Spencer in a safety seat, she exited the roadway at an angle, traveled down the hill in the shoulder area at a high rate of speed, reentered the roadway at a high rate of speed, and did not engage her brakes before colliding with the Yukon. There was also evidence she consumed alcohol before driving and hit the gas pedal.

The district court did not abuse its discretion in denying the motion for a mistrial. The statement was brief, inadvertent, and it did not mention Mullendore's parental rights, termination, or any State involvement. Mullendore was not prejudiced by the statement, and she declined any curative instruction beyond the stipulated language already included in the court's instruction.

**VI. The district court did not err in imposing restitution for the victim's lost wages.**

Mullendore asserts that Spencer Sr.'s lost wages are not recoverable as restitution because they are not expenses involved in a cash payment or outlay. (Appellant's Br. at 52.)

“[A] sentencing court shall, as part of the sentence, require an offender to make full restitution to any victim who has sustained a pecuniary loss[.]” Mont. Code Ann. § 46-18-241(1). Pecuniary loss includes “all special damages, but not general damages, substantiated by evidence in the record, that a person could recover against the offender in a civil action arising out of the facts or events constituting the offender’s criminal activities, including. . . loss of income[.]” Mont. Code Ann. § 46-18-243(1)(a). In a wrongful death action, “such damages may be given as under all the circumstances of the case may be just.” Mont. Code Ann. § 27-1-323.

The district court awarded Spencer Sr. \$9,458.19 for 191.5 hours of missed work at his pay rate of \$49.39 per hour. (2/28/22 Tr. at 142.) Spencer Sr. testified that after the accident, he missed work to go to Salt Lake City, for court hearings, and due to his grief. (*Id.* at 46-54.) Spencer Sr. provided documentation of those lost wages prior to sentencing. (Doc. 159 at 22-40.) The damages Spencer Sr. received restitution for are special damages that are concrete and easily quantifiable, unlike general damages, such as pain and suffering, which are intangible. Spencer Sr. would have been able to recover for his lost wages in a civil action against Mullendore. The district court did not err in awarding Spencer Sr. restitution for his documented loss of income.

**CONCLUSION**

This Court should affirm Mullendore's conviction and her sentence.

Respectfully submitted this 4th day of June, 2025.

AUSTIN KNUDSEN  
Montana Attorney General  
215 North Sanders  
P.O. Box 201401  
Helena, MT 59620-1401

By: /s/ Christine Hutchison  
CHRISTINE HUTCHISON  
Assistant Attorney General

## **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 9,976 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

*/s/ Christine Hutchison*

---

CHRISTINE HUTCHISON

## **CERTIFICATE OF SERVICE**

I, Christine M. Hutchison, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 06-04-2025:

Scott D. Twito (Govt Attorney)  
PO Box 35025  
Billings MT 59107  
Representing: State of Montana  
Service Method: eService

Carolyn (Carrie) Marlar Gibadlo (Attorney)  
501 S. Russell Street  
Missoula MT 59801  
Representing: Kaylea L. Mullendore  
Service Method: eService

Electronically signed by Wendi Waterman on behalf of Christine M. Hutchison  
Dated: 06-04-2025