

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0251

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

FRANKIE SAMUEL PRADO,

Defendant and Appellant.

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**BRIEF OF APPELLEE**

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

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE.....	1
STATEMENT OF THE FACTS .....	2
Relevant testimony.....	2
SUMMARY OF THE ARGUMENT .....	19
ARGUMENT .....	19
I. Standards of review .....	19
II. The district court did not abuse its discretion in allowing State’s Exhibit 60B into evidence, as Ruiz’s statements established foundation to admit the recording, gave context for Prado’s responses, and were not relevant to any of the convictions .....	20
A. Applicable law.....	20
B. Ruiz’s statements were not offered for the truth of the matter asserted .....	21
C. Alternatively, any error in the admission of Ruiz’s statements was harmless.....	22
III. This Court should decline to invoke plain error to review Prado’s unpreserved claim that LaQue vouched for C.G.’s credibility.....	25
A. Applicable law.....	25
B. LaQue did not vouch for C.G.’s credibility .....	25
C. Prado acquiesced to LaQue’s testimony as part of a strategy to attack C.G.’s credibility .....	26
CONCLUSION .....	28
CERTIFICATE OF COMPLIANCE.....	29

## **TABLE OF AUTHORITIES**

### **Cases**

<i>State v. Brasda</i> , 2021 MT 121, 404 Mont. 178, 486 P.3d 703 .....	21
<i>State v. Favel</i> , 2015 MT 336, 381 Mont. 472, 362 P.3d 1126 .....	20
<i>State v. George</i> , 2020 MT 56, 399 Mont. 173, 459 P.3d 854 .....	25
<i>State v. Gomez</i> , 2020 MT 73, 399 Mont. 376, 460 P.3d 926 .....	23
<i>State v. Kalina</i> , 2025 MT 70, 421 Mont. 305, 567 P.3d 270 .....	19
<i>State v. Laird</i> , 2019 MT 198, 397 Mont. 29, 447 P.3d 416 .....	21
<i>State v. Martinez</i> , 2003 MT 65, 314 Mont. 434, 67 P.3d 207 .....	25
<i>State v. Mercier</i> , 2021 MT 12, 403 Mont. 34, 479 P.3d 967 .....	22
<i>State v. Miller</i> , 2022 MT 92, 408 Mont. 316, 510 P.3d 17 .....	25
<i>State v. Mizenko</i> , 2006 MT 11, 330 Mont. 299, 127 P.3d 458 .....	23
<i>State v. Sanchez</i> , 2008 MT 27, 341 Mont. 240, 177 P.3d 444 .....	15, 23
<i>State v. Smith</i> , 2020 MT 304, 402 Mont. 206, 476 P.3d 1178 .....	21
<i>State v. Spottedbear</i> , 2016 MT 243, 385 Mont. 68, 380 P.3d 810 .....	19
<i>State v. Van Kirk</i> , 2001 MT 184, 306 Mont. 215, 32 P.3d 735 .....	23

<i>State v. Wells</i> , 2021 MT 103, 404 Mont. 105, 485 P.3d 1220 .....	20
<i>State v. Williams</i> , 2015 MT 247, 380 Mont. 445, 358 P.3d 127 .....	20
<i>State v. Zimmerman</i> , 2018 MT 94, 391 Mont. 210, 417 P.3d 289 .....	24

### **Other Authorities**

<b>Montana Code Annotated</b>	
§ 1-3-207 .....	25
§ 45-4-103 .....	1, 2
§ 45-5-102(1)(a) .....	1, 2
§ 45-5-209 .....	2
§ 45-5-215(1)(a) .....	2
§ 61-8-1002(1)(b) .....	2
<b>Montana Rules of Evidence</b>	
Rule 801(c) .....	20
Rule 801(d)(2)(A) .....	21
Rule 802 .....	20

## **STATEMENT OF THE ISSUES**

1. Whether the district court abused its discretion when it allowed the State to introduce a jail phone call into evidence which was made in violation of a no contact order and contained relevant admissions by the Appellant; alternatively, whether any error in allowing the call was harmless.

2. Whether Appellant has met his burden to establish plain error review of the victim's mother's testimony is warranted when he acquiesced to the testimony as part of a trial strategy to attack the victim's credibility with his mental health history.

## **STATEMENT OF THE CASE**

On February 27, 2023, the State charged Frankie Samuel Prado (Prado) via information with ten charges, including one count of attempted deliberate homicide, in violation of Mont. Code Ann. §§ 45-5-102(1)(a) and 45-4-103. (Doc. 3.)

Specifically, the State alleged that on February 12, 2023, Prado was with his “intimate partner,” Belen Ruiz (Ruiz), and two juvenile males (C.G. and G.V.), while they were drinking heavily. (Doc. 1 at 2.) Prado began assaulting and eventually strangling Ruiz and, when the juveniles attempted to intervene, Prado threatened that he was going to retrieve a gun and shoot them, so the juveniles fled the house. (Doc. 1 at 3.) C.G. attempted to leave the scene across a vacant field when Prado drove his car directly through the field at C.G. and hit him. (*Id.*)

Prior to trial, the State filed a second amended information, charging attempted deliberate homicide, in violation of Mont. Code Ann. §§ 45-5-102(1)(a) and 45-4-103; strangulation of a partner or family member, in violation of Mont. Code Ann. § 45-5-215(1)(a); operating a motor vehicle with an alcohol concentration of .08 or more, in violation of Mont. Code Ann. § 61-8-1002(1)(b); and violation of a no contact order pursuant to Mont. Code Ann. § 45-5-209 (Doc. 51.)

On August 23, 2023, a jury convicted Prado of attempted deliberate homicide, operating a vehicle with an alcohol concentration of .08 or more, and violation of a no contact order. (Doc. 56.1.) The jury acquitted Prado of strangulation of a partner or family member. (*Id.*)

## **STATEMENT OF THE FACTS**

### **Relevant testimony**

Shannel Yocom (Yocom) was a 39-year-old nurse who had lived in Hamilton for about 7 months. (Trial Transcript [Tr.] at 194-95.) Yocom's first night at her duplex in Hamilton was on February 12, 2023. (*Id.* at 197.) That night, she was asleep in her bedroom when she heard some "banging and yelling" against her wall. (*Id.* at 198.)

Yocom grabbed her phone, and intended to inform whomever was making the noise that if they didn't "knock it off," she was going to call the police. (*Id.*) Outside her duplex, she encountered a woman who "seemed disheveled." (*Id.*) When Yocom said she intended to call 911, the woman responded, "[y]eah, you probably better." (*Id.* at 198-99.)

Yocom hit the call button on her phone, then two boys appeared and stated, "[h]e's got a gun. He's got a gun." (*Id.* at 201.) Yocom walked quickly back to her house to shut the door. (*Id.* at 203.) One of the boys begged Yocom to let them into her house, but she refused and asked them to leave. (*Id.*)

Yocom described what happened next:

And then a car turned on next door and backed out, and one of the boys went running, and the other one stayed right by me, the thinner set one. And then the car backed out and went towards the stop sign, which is under the large tree. It almost hit the stop sign. Accelerated around. Almost hit my Jeep, which I park kind of on the concrete but not all the way because I was still moving stuff, and almost hit my Jeep and then went speeding towards the field. And I didn't see him go from there.

And then the boys—One of the boys came like—The boy that had ran came back towards my house, and the other boy said he—

. . . .

The boy said he hit him. I didn't actually see anybody getting hit, but the boy came back running and he—I let them come in the house at that time because I saw the car coming around and parked, and then I shut the door and had the boys both laying on the ground . . . And we were scared, and I was still on the phone with 9-1-1.

(*Id.* at 203-04.)

While she was lying on her floor with the boys, Yocum was “begging [the police] to hurry.” (*Id.* at 210.) The “larger-set boy just sat there,” while the other one was yelling and screaming. (*Id.*) The State admitted the recording of Yocom’s 911 call into evidence as State’s Exhibit 58 and published it to the jury. (*Id.* at 215.)

David Schultz (Schultz) was a 37-year-old construction worker who had lived in the Hamilton area for about 30 years. (*Id.* at 231-32.) On February 12, 2023, he was at his parents’ home on Pine Street. (*Id.* at 232.)

That night, he heard “[n]oise and yelling,” which caught his attention. (*Id.* at 234.) Schultz was able to make out the words “I hate you. I hate you all.” (*Id.*) Schultz was standing outside his truck when he heard the yelling. (*Id.* at 235.) Schultz also heard “something shouted by someone who said, I want to kill you.” (*Id.* at 236.)

Next, Schultz observed a vehicle leaving from the area of the noise. (*Id.*) The vehicle began traveling west on Pine Street. (*Id.* at 238.) The vehicle “[t]urned around and came back,” then Schultz heard “some more crashing and then some more yelling.” (*Id.*)

Schultz heard a woman “shouting something along the lines of, ‘[y]ou hit him.’” (*Id.* at 240.) He described the tone of her voice as “[f]rantic.” (*Id.* at 241.) Schultz called 911. (*Id.*)



Cassandra LaQue (LaQue) lived in Hamilton with her husband and her two boys. (*Id.* at 247.) On February 12, 2023, her oldest son, C.G., was 15 years old. (*Id.* at 248.) LaQue testified that C.G. had been diagnosed as bipolar, type 1, and also with autism, level 2. (*Id.*) LaQue explained that C.G. “has high and low mood swings. He doesn’t communicate very well. Again, its better for him to show you. He also doesn’t process things as an average teenage individual.” (*Id.* at 249.) LaQue explained that C.G.’s brain processes at a slower level. (*Id.* at 250.)

LaQue testified that on February 12, 2023, C.G. went to the skate park without her permission. (*Id.* at 251.) LaQue found him at the park, but he refused to get into her car, and stated he was waiting for a friend. (*Id.* at 252-53.) LaQue told C.G. that she would run some errands and warned him, “[y]ou better be here when I get back.” (*Id.* at 253.) LaQue estimated this took place a little before 2 p.m. (*Id.*)

When LaQue returned to the skate park, she did not see C.G. (*Id.*) She contacted her husband and “went searching different areas throughout the town for him.” (*Id.* at 254.) She was unable to find him, and she called the Hamilton Police Department (HPD) for assistance. (*Id.* at 254-55.)

Eventually, HPD called LaQue and told her that C.G. was in an ambulance. (*Id.* at 255.) LaQue found the ambulance and observed that C.G. “was shaking. He

was really pale. He had blood on his clothing, and he just looked very distraught.”  
(*Id.* at 256.)

When asked if she was able to communicate with C.G., LaQue responded, “[i]t was rough. He was still manic and up on a high, so he was still trying to process stuff. He was still scared and seemed like he was unaware of the surroundings at that time.” (*Id.* at 257.) LaQue estimated that this had taken place “around midnight.” (*Id.* at 258.)

The following day, C.G. was pale, not steady on his feet, and complained of dizziness and a headache. (*Id.* at 261.) LaQue felt two egg-shaped lumps on C.G.’s head, and C.G. told her that he felt like he had to vomit. (*Id.*)

On August 14, 2023, LaQue brought C.G. to the emergency room at Bitterroot Health. (*Id.* at 262-63.) She left the ER with discharge instructions for treating a concussion. (*Id.* at 263.)

Lisa Bone (Bone) had been a paramedic for about 17 years. (*Id.* at 300.) On February 12, 2023, she was dispatched to a vehicle hitting a pedestrian. (*Id.* at 302-03.) Upon arrival at the scene, she encountered C.G. “just right in front of the doorway.” (*Id.* at 303.)

Bone described that “[h]e was pretty anxious, hyperventilating, wasn’t responding well to questioning, just because he was very worked up.” (*Id.* at 304.) When asked to describe what C.G. eventually reported to her, Bone responded:

They had driven around. They went back to a residence. He stated that the driver of the vehicle and the woman got into an altercation and he attempted to break it up. And I think in my report he said he put him in a headlock or pinned him down until the gentleman said he'd calm down. He let him go. Then I believe I remember he said that the gentleman started to get agitated again and he was like, I'm just going home, left the residence and states the man got into a vehicle and hit him.

(*Id.* at 307-08.) Bone added that C.G. "said he jumped up on the hood, hit the windshield. It did shatter, and he rolled off." (*Id.* at 309.)

C.G. testified that on February 12, 2023, he had run away from his home and met up with his friend, G.V. (*Id.* at 315-16.) After LaQue had warned him that he needed to return home, he and G.V. "smoked and drank a little at the skate park." (*Id.* at 318.)

Later that evening, G.V. contacted Ruiz, who picked them up and took them to Prado's house. (*Id.* at 322-23) Prado was sleeping, and C.G. and G.V. attempted to wake him because "we were going to go for like a little drive with him." (*Id.* at 324.)

Prado woke up and they went for a drive. (*Id.* at 325-26.) During the drive, they were drinking alcoholic beverages. (*Id.* at 327.) Ruiz cut her hand on one of the beverages, and she began to fight with Prado. (*Id.*) When they got back to Prado's house, C.G. and G.V. had to help Ruiz because she was too drunk to stand. (*Id.* at 329.)

C.G. attempted to clean the blood from Ruiz’s car with paper towels. (*Id.* at 330.) He and G.V. helped her clean the blood from her hands and put her on the couch. (*Id.*) They started listening to music, and C.G. and G.V. began smoking and drinking alcohol. (*Id.* at 331.)

At some point, G.V. began “making out” with Ruiz. (*Id.*) Then, Ruiz and Prado began to fight. (*Id.* at 332.) C.G. described:

Then that’s when he got a little too physical and started—He was like physically pushing her over the couch onto the floor. And that’s when I was still by the table, and that’s when I rushed over and tackled him over the couch, when she—She had quickly got up and was coming towards him, but that’s when I tackled him over the couch and put him in a headlock.

(*Id.*)

C.G. released Prado after he agreed he would “stop trying to hurt [Ruiz].” (*Id.* at 333.) When Prado went after Ruiz again, another physical fight ensued between C.G. and Prado. (*Id.* at 333-34.) Prado grabbed a glass object and attempted to hit C.G., but G.V. was able to take the glass from Prado’s hands. (*Id.* at 336.)

C.G. and Prado went to the ground, and when they got back up, Prado went after Ruiz again. (*Id.*) C.G. explained, “[Prado] was on top of [Ruiz], and he was literally—His hands were wrapped around her throat, squeezing her throat really hard to the point her face started turning purple. That’s when I had to grab him again and slam him back on—backwards.” (*Id.* at 336-37.)

At this point, Prado threatened to “go grab his gun.” (*Id.* at 337.) Prado told C.G. to “Get out of my house.” (*Id.* at 338.) C.G. refused to leave unless Ruiz was going to be safe. (*Id.*) When Prado left the room, C.G. and G.V. grabbed the still bleeding Ruiz and exited the house. (*Id.* at 338, 343.)

Once they got outside, Ruiz fell into the grass in the front yard. (*Id.* at 343.) Prado came out of the house and threw a glass cup at C.G., which missed and shattered a couple of feet away from him. (*Id.* at 344.) C.G. and G.V. “went onto the front doorstep of the neighbor’s house to talk—try to get her to help us because the defendant was coming after us.” (*Id.* at 345.) C.G. described that he was “really scared and just drunk,” and started to head home when he noticed that Prado had “got into the car and backed out of the garage and came towards me with the car.” (*Id.*)

C.G. saw Prado driving the car. (*Id.* at 346.) C.G. described:

That’s when he had put it in drive and started coming at me with the car, and then that’s when I—Once I heard it and I saw the lights shining my way, I had turned around when I was in the field right next to the alleyway and the road. I turned around and saw that he was coming towards me, and I had [to] put my hands up trying to like signal him to stop, please stop. But I didn’t know that he was coming towards me exactly until he—until the car was not stopping. So he was coming straight towards me. That’s when I had jumped, and that’s when I landed on the car.

(*Id.* at 347.)

C.G. explained that he jumped so he “didn’t get [his] legs [taken] off by the car,” and he landed on the windshield. (*Id.* at 348.) After he hit the windshield, C.G. rolled off the driver’s side of the car and landed on all fours on the ground. (*Id.* at 349.) C.G. described that Prado drove into the alleyway, turned around, and began driving back towards C.G. (*Id.*) G.V. helped him up and they ran to Yocom’s house. (*Id.* at 350.)

The next day, C.G. “was just really sore and dizzy.” (*Id.* at 356.) He didn’t notice any other signs of injury until later on, when he found two “big bumps” on the right side of his head. (*Id.*) He opined that was from when his head hit off the roof of the car. (*Id.*)

Prado’s attorney asked C.G. about his commitment history at Shodair and Arcadia. (*Id.* at 416-17.) This led to the following exchange:

Q. Okay. And was there ever a time that your violent behavior led to your mom saying that she didn’t want you back in the home?

A. I don’t remember.

Q. She had concerns about your little brother; is that correct?

A. Yes.

Q. All right. And she had concerns about his safety; is that true?

A. Yes.

Q. And that was because of your outbursts and uncontrollable anger; is that also true?

A. Yes.

(*Id.* at 417.)

G.V. had turned 17 two weeks prior to the trial. (*Id.* at 424.) On February 12, 2023, G.V. met Prado for the first time. (*Id.* at 425.) His friend introduced them at about noon. (*Id.* at 426, 428.) Later, when G.V. was hanging out with C.G., they called Prado, whose girlfriend or fiancée picked them up. (*Id.* at 427-28.) G.V. explained that Prado had given him his phone number. (*Id.* at 428.)

Ruiz drove G.V. and C.G. to Prado's house. (*Id.* at 430.) There, Ruiz woke Prado up, and they began "taking dabs," which is "just a higher concentration of THC, basically." (*Id.* at 431.) G.V. thought that all of them were using the dabs and drinking alcohol. (*Id.* at 432.)

G.V. described that they went for a drive, and Ruiz began hitting Prado. (*Id.* at 433.) When they got back to Prado's house, Ruiz was "slapping [Prado] harder," and started screaming at him. (*Id.* at 434.) G.V. and C.G. pulled Ruiz and Prado "off of each other" and attempted to calm them down. (*Id.* at 436.) As a result, they began to fight with Prado, which "went on for a while." (*Id.*) When asked to describe how their fight ended, G.V. responded, "We had him on the ground. And then he got up, ran to his room, said something about a gun. So we got everyone out of the house." (*Id.* at 437-38.)

After leaving the house, they encountered Yocom, who was telling them to be quiet. (*Id.* at 439.) G.V. and C.G. told Yocom that Prado had a gun and they “kind of ran around the corner.” (*Id.*)

As he was standing in front of Yocom’s porch, G.V. saw Prado “pull his car out, turn, cut through the field, and then hit [C.G.] with his car.” (*Id.* at 442.) G.V. explained:

I heard his car start. He like backed out really quick and then came around the corner and then cut through the field where [C.G.] was running. And then all I heard after that was like him screaming, and then he dropped to the ground. And then, yeah, I started freaking out.

(*Id.* at 443.)

G.V. estimated that Prado was driving “like 10, 15 miles an hour, and hit him and then kept driving down through the next road and then turned around the block, parked his car back, and then, yeah, got out.” (*Id.* at 444-45.) After he helped C.G., G.V. began yelling at Prado until the police arrived. (*Id.* at 445-46.)

Pressly Chadwick (Deputy Chadwick) was a Deputy with the Ravalli County Sheriff’s Office (RCSO). (*Id.* at 458.) On February 12, 2023, she was working as an officer for HPD. (*Id.* at 459.) At 10:42 p.m., she responded to a call involving Prado. (*Id.*) Dispatch informed Deputy Chadwick that someone had possibly been hit with a car. (*Id.*)

When she arrived on scene, Deputy Chadwick observed “a bunch of people out on the front yard,” and “it looked like two males who seemed to be fighting or



yelling, arguing.” (*Id.* at 460.) Deputy Chadwick found C.G. laying on the front step of Yocum’s house. (*Id.* at 461.) C.G. couldn’t talk “because he was in obvious physical discomfort.” (*Id.*)

Deputy Chadwick took a series of pictures. (*Id.* at 463.) State’s Exhibits 3 and 4 were photographs that showed the broken windshield on Ruiz’s car, and scuff marks on the hood. (*Id.* at 464-65.) Officers located several chunks of glass from the mug that Prado had thrown at C.G. (*Id.* at 468.)

Deputy Chadwick observed that Ruiz was “somewhat physically aggressive,” and added that “it was apparent to me that she was very obviously highly intoxicated.” (*Id.* at 470.) Deputy Chadwick observed fresh looking injuries to Ruiz, including a split lip, a cut on her forehead, and “a pretty significant diagonal mark on her neck that was red and inflamed.” (*Id.* at 472.) Deputy Chadwick took photographs of Ruiz, which were introduced as State’s Exhibits 40 through 45. (*Id.* at 473-74.)

Deputy Chadwick spoke with Prado “several times” throughout the night. (*Id.* at 475.) Those conversations were recorded by her “in-car dash cam system.” (*Id.* at 476.) Prado initially told Deputy Chadwick that C.G. and G.V. had “jumped him in his own house,” and he denied that anyone had been hurt. (*Id.* at 477.)

The State published segments of Deputy Chadwick's conversations with Prado as State's Exhibit 56.<sup>1</sup> (*Id.* at 477-78.) Deputy Chadwick explained that the recording in State's Exhibit 56-3 was cut short because of interference with her conversations with Prado.<sup>2</sup> (*Id.* at 481-82.) Prado alleged that C.G. and G.V just "came up" to his house, saw him arguing with Ruiz, and assaulted him. (State's Ex. 56-3 at 00:25-42.) Additionally, Prado told Deputy Chadwick that "he wasn't even driving," and his car had been parked in his driveway "all night." (Tr. at 481.)

The State published State's Exhibit 56-4A, which showed Deputy Chadwick arresting Prado, and recorded the sound of Prado "banging his head against the [squad] window." (*Id.* at 482-83; *see also*, State's Ex. 56-4A at 03:59-04:11.)

Deputy Chadwick took Prado to the hospital and obtained a blood sample from him, which she had sent to the State Crime Lab. (*Id.* at 484.) Deputy Chadwick identified State's Exhibit 61 as the standing order of no contact that she had served on Prado that night. (*Id.* at 484-85.) The State then published State's Exhibit 56-5, which recorded Deputy Chadwick reading and serving the no contact order on Prado. (*Id.* at 486-87.)

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<sup>1</sup> State's Exhibit 56 contains five segments of audio/visual recordings from Deputy Chadwick's squad video, which were admitted in chronological order: 56-1, 56-2A, 56-3, 56-4A, and 56-5.

<sup>2</sup> At some point, Deputy Chadwick had placed Ruiz inside her squad car, and the interior recording of Ruiz's comments interfered with the ability to hear Prado. (Tr. at 480-81.)

Eric Miller (Miller) had worked as a forensic toxicologist at the State Crime Lab since 2014. (*Id.* at 540.) In February 2023, Miller tested the blood sample taken from Prado. (*Id.* at 543.) The State admitted Miller’s toxicology report from his testing into evidence as State’s Exhibit 62. (*Id.* at 549.) The report revealed that Prado’s blood alcohol level was determined to be 0.094, plus or minus 0.007 grams per 100 milliliters. (*Id.* at 550.)

Prior to the next witness, Prado’s attorney objected to the anticipated introduction of a jail call into evidence because the call contained “testimonial-type statements” from Ruiz. (*Id.* at 560.) Specifically, Prado’s attorney asked that the district court order the redaction of Ruiz’s statement to Prado that “[y]ou strangled me.” (*Id.*)

The State agreed to redact the statement “[y]ou strangled me,” from the recording. (*Id.* at 564.) After that redaction, Prado’s attorney objected to all statements made by Ruiz in the call. (*Id.* at 572.) After reviewing the exhibit, the district court cited *State v. Sanchez*, 2008 MT 27, 341 Mont. 240, 177 P.3d 444, and determined that Ruiz’s statements that “You hit the kid with the car,” needed to be redacted, and the remainder of the exhibit would be admissible. (*Id.* at 574-75.) The district court reasoned:

Clearly, the defendant’s statements can come in. I think what needs to come out is where Ms. Ruiz says, You hit the kid with the car. Then I think she says again, You hit the kid. And I think there’s only twice that that happens. Maybe there’s three times.

But the rest of her conversation and statements, you know, *I don't think that there's an issue with them and they are in the context of identifying who she is.*

(*Id.* (emphasis added).)

The district court added, “I don’t think that this case is going to hinge on this phone call one little bit, honestly.” (*Id.* at 582-83.)

Deputy Emily Hachenberger (Deputy Hachenberger) was a deputy at the RCSD, and had worked for the county attorney’s office as an investigator for over three years. (*Id.* at 587-88.) During her testimony, Prado’s attorney made four foundational objections to the State’s attempts to introduce the jail recording she had obtained into evidence.<sup>3</sup> (Tr. at 595, 596, 598, 600.) Eventually, the State admitted the jail call that Prado made to Ruiz on February 14, 2023, as State’s Exhibit 60B. (*Id.* at 601.) The State published it to the jury (*Id.*)

Prado first asked Ruiz to assist with obtaining a check to help with bail, and she informed him that her car had been impounded. (State’s Ex. 60B at 00:31-01:04.)

The relevant portion of their conversation, as heard by the jury, went as follows:

PRADO: I didn’t fucking hit the kid, that’s the thing. No I didn’t. No one visually saw it, that’s their story they made because he broke my fucking windshield. Of course he’s gonna say I fucking hit him. But when I got arrested I didn’t have car keys on me I had nothing on me. There was no proof that I was fucking driving. It’s that kids’ story against mine. I legit did not fucking hit him, I chased him down. I

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<sup>3</sup> *C.f.*, Prado’s attorney conceding in closing argument: “He did. He made the phone call. He talked to her.” (Tr. at 686.)

wait—if I hit him with the fucking car why would I wait for the police then? Why?

RUIZ: Why is my car under investigation then?

PRADO: Because, that's what these fucking kids are saying, bro, I can't even press charges on 'em because they're kids. I don't even fucking know their names.

RUIZ: Yeah, well I don't know why you sit at a bar and give them your number.

PRADO: Dude, I don't even remember that. And I don't even fucking know who they are, and then they just show up at my house and I get mad, I tell them to get the fuck out, and then they start fighting me. You saw, they were trying to fight me I was defending myself, I got 'em out of my fucking house, dude—

RUIZ: I have a bruised lip, what are you talking about? I have a lump on my head, I look like shit right now, you fucked me up. You don't remember?

PRADO: You were the one who was going against me, dude, I was trying to get those kids out of the fucking house. You were the one who was being all drunk and crazy.

RUIZ: I have a bruised lip, I'm bleeding, I was bleeding, yuck.

PRADO: You were bleeding 'cause you cut your hand open on a fucking beer, dude, and now you're defending these kids.

RUIZ: I'm not defending anybody, Frankie. At all.

(State's Ex. 60B at 01:21-02:34.)

After discussing the consequences of Prado not making bail, they had the following exchange:

RUIZ: I know, its bad, you fucked up, dude.

PRADO: No I didn't. [inaudible—talkover]

RUIZ: CPS got called.

PRADO: I did nothing wrong. Fuck these kids. I was legit, minding my business, fucking defending myself, bro, they were doing this shit in front of my daughter, I was getting them out of my fucking house.

(*Id.* at 03:39-52.)<sup>4</sup>

After Deputy Hachenberger's testimony, the State rested. (*Id.* at 604.)

The defense rested without calling a substantive witness or presenting any evidence.<sup>5</sup> (*Id.* at 624.)

The jury convicted Prado of attempted deliberate homicide, operation of a vehicle by a person with an alcohol concentration of .08 or more, and violation of a no contact order. (*Id.* at 708; Doc. 56.1.) The jury acquitted Prado of strangulation of a partner or family member. (*Id.*) Additional relevant facts will be given in the Arguments section below.

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<sup>4</sup> Prado asked for and the district court gave a curative instruction that the reference to CPS was not evidence and not to be considered by the jury during deliberations. (Tr. at 654; Doc. 55, Instr. No. 25.)

<sup>5</sup> The defense recalled LaQue, to "impeach" her with an e-mail between her and C.G.'s probation officer from 2020, but the district court sustained the State's objection, and they withdrew her as a witness. (Tr. at 609-21.)

## **SUMMARY OF THE ARGUMENT**

The district court did not abuse its discretion when it allowed a jail call that was made in violation of a no contact order into evidence. The statements that were left on the redacted call were not hearsay as they were offered to provide foundation for the call and to give context for Prado's responses. Further, Prado was not convicted of assaulting Ruiz. Therefore, Ruiz's statement to Prado that he "fucked [Ruiz] up," was not relevant to the guilty verdicts, and any error in its admission was necessarily harmless.

Prado has failed to meet his burden to show why this Court should invoke plain error review of LaQue's testimony. First, the record demonstrates that LaQue did not ever vouch for C.G.'s credibility. Further, Prado's attorneys acquiesced to LaQue's testimony because their strategy was to attack C.G.'s character through his mother's knowledge of his past behavior and mental health history.

## **ARGUMENT**

### **I. Standards of review**

"A trial court has broad discretion in determining the admissibility of evidence, so we review a trial court's evidentiary rulings for an abuse of discretion." *State v. Kalina*, 2025 MT 70, ¶ 34, 421 Mont. 305, 567 P.3d 270 (citing *State v. Spottedbear*, 2016 MT 243, ¶ 9, 385 Mont. 68, 380 P.3d 810).

Generally, this Court does not address issues raised for the first time on appeal that were not objected to at trial. *State v. Favel*, 2015 MT 336, ¶ 13, 381 Mont. 472, 362 P.3d 1126. “However, we may choose to exercise discretionary plain error review where the alleged error may result in a manifest miscarriage of justice, leaves unsettled questions of fundamental fairness, or compromises the integrity of the judicial process.” *State v. Wells*, 2021 MT 103, ¶ 13, 404 Mont. 105, 485 P.3d 1220. This Court invokes plain error review “sparingly, on a case-by-case basis, according to narrow circumstances, and by considering the totality of the circumstances.” *State v. Williams*, 2015 MT 247, ¶ 16, 380 Mont. 445, 358 P.3d 127.

**II. The district court did not abuse its discretion in allowing State’s Exhibit 60B into evidence, as Ruiz’s statements established foundation to admit the recording, gave context for Prado’s responses, and were not relevant to any of the convictions.**

**A. Applicable law**

“Hearsay is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted.” Mont. R. Evid. 801(c). Hearsay testimony is generally not admissible. Mont. R. Evid. 802. “[O]ut-of-court statement[s] offered to prove something other than the truth of the matter asserted is not hearsay and is, accordingly, generally



admissible.” *State v. Brasda*, 2021 MT 121, ¶ 18, 404 Mont. 178, 486 P.3d 703 (quoting *State v. Laird*, 2019 MT 198, ¶ 73, 397 Mont. 29, 447 P.3d 416).

A statement that is offered against a party and is the party’s own statement is not hearsay. Mont. R. Evid. 801(d)(2)(A); *State v. Smith*, 2020 MT 304, ¶ 25, 402 Mont. 206, 476 P.3d 1178 (citations omitted).

**B. Ruiz’s statements were not offered for the truth of the matter asserted.**

The State had to prove beyond a reasonable doubt that Prado had violated a no contact order. Since the relevant order precluded Prado from contacting Ruiz specifically, the district court recognized that some of her statements, at least enough to identify her, were necessary for foundation and to show that Prado was violating the no contact order. (*See* Tr. at 575: “But the rest of her conversation and statements, you know, I don’t think that there’s an issue with them *and they are in the context of identifying who she is.*” (emphasis added).)

Prado contends that the entire jail call was inadmissible but does not identify a legal basis to preclude any of the statements that he made during the call. Further, in the context of arguing that he “could not cross examine a recording,” Prado identifies only two of Ruiz’s specific statements: When she told Prado that “You fucked me up,” and when she stated, “You fucked up dude.” (Appellant’s Br. at 33-34 (citing State’s Ex. 60 B).)

However, whether Prado “fucked [Ruiz] up,” or whether he “fucked up” in some vague, general sense was not the reason the district court allowed those statements into evidence. It was Prado’s responses to Ruiz’s comments, including his admission that “*I chased him down*,” which were relevant. (State’s Ex. 60B at 01:39 (emphasis added).)

Ruiz’s comments merely provided context for Prado’s responses and helped establish what was a highly, if not overly contested foundation to prove that Prado was in fact speaking with Ruiz. (*See* Tr. at 593-601.) Because Ruiz’s statements established foundation for the call and gave context to Prado’s responses, they were not offered for the truth of the matter asserted, and by definition, are not hearsay.

**C. Alternatively, any error in the admission of Ruiz’s statements was harmless.**

“A constitutional deprivation of the defendant’s confrontation right is a trial error and is subject to harmless error review.” *State v. Mercier*, 2021 MT 12, ¶ 31, 403 Mont. 34, 479 P.3d 967. The Court considers “the importance of the witness’[s] testimony in the prosecution’s case, whether the testimony was cumulative, [and] the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points.” *Mercier*, ¶ 31.

The admission of inadmissible evidence is harmless if the State demonstrates that the jury “was presented with admissible evidence that proved the

same facts as the tainted evidence and, qualitatively, by comparison, the tainted evidence would not have contributed to the conviction.” *State v. Van Kirk*, 2001 MT 184, ¶ 47, 306 Mont. 215, 32 P.3d 735. This Court has found the admission of a victim’s prior statements to be harmless where other cumulative evidence proved the same facts and there was no reasonable possibility the statements might have contributed to the conviction. *State v. Gomez*, 2020 MT 73, ¶ 57, 399 Mont. 376, 460 P.3d 926; *Sanchez, infra*, ¶¶ 25, 29; *State v. Mizenko*, 2006 MT 11, ¶ 26, 330 Mont. 299, 127 P.3d 458.

Ultimately, the jury acquitted Prado on the charge of strangulation. (Doc. 56.1.) Prado has not shown a reasonable possibility that Ruiz’s statement to Prado that he “fucked [her] up,” was relevant to any of the convictions: attempted deliberate homicide—for intentionally hitting C.G. with a car; DUI—for driving the car with an alcohol concentration of .094 percent; or violation of a no contact order, *other than establishing that it was, in fact, Ruiz* that Prado was calling.

The jury here was already aware that Ruiz had made a “frantic” exclamation, which was “something along the lines of, ‘You hit him,’” after Prado returned to their residence in their car.<sup>6</sup> (Tr. at 240-41.) C.G. and G.V. testified that Prado

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<sup>6</sup> As the State explained during its closing argument, the “frantic” female that Schultz heard shouting something like, “You hit him,” could not have been Yocum, who was on the phone with 911 and being recorded at the time. (Tr. at 662-63.)

accelerated at and hit C.G. with his car and the jury necessarily found their testimony on this issue credible. “The weight of the evidence and the credibility of witnesses are exclusively within the province of the trier of fact, and we will not reweigh the evidence or the credibility of witnesses.” *State v. Zimmerman*, 2018 MT 94, ¶ 20, 391 Mont. 210, 417 P.3d 289 (citation omitted).

The jury observed Prado’s demeanor immediately after the assault, demonstrating that he was inebriated and belligerent. (*See* State’s Exs. 56-1 through 5.) Testing revealed his blood alcohol concentration to be .094 percent. (Tr. at 550; State’s Ex. 2.)

Further, Deputy Chadwick’s photographs demonstrated that Ruiz’s vehicle had struck something large enough to leave scuff marks on the hood and then shatter his windshield, both on the driver’s side, which was consistent with C.G.’s description of what had occurred. (*See* State’s Exs. 3, 4.) None of Ruiz’s statements in the jail call affected the analysis of any of this evidence or other substantial evidence that supported the jury’s guilty verdicts. (*See, e.g.,* State’s Ex. 58.)

As the district court observed, “I don’t think that this case is going to hinge on this phone call one little bit, honestly.”<sup>7</sup> (*Id.* at 582-83.) The evidence shows

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<sup>7</sup> During her closing, Prado’s attorney emphasized, “But I think what’s clear at the end of the day is that all of this case rests on the credibility of [C.G.]” (Tr. at 679.)

that it did not and, therefore, any error in allowing the State's Exhibit 60B into evidence was harmless.

**III. This Court should decline to invoke plain error to review Prado's unpreserved claim that LaQue vouched for C.G.'s credibility.**

**A. Applicable law**

The rule is well established that this Court will not address an issue raised for the first time on appeal. *State v. Martinez*, 2003 MT 65, ¶ 17, 314 Mont. 434, 67 P.3d 207. Allowing a party to raise new arguments or change its legal theory on appeal "is fundamentally unfair to fault the district court for failing to rule on an issue it was never given the opportunity to consider." *Martinez*, ¶ 17. "Acquiescence in error takes away the right of objecting to it." Mont. Code Ann. § 1-3-207.

The party requesting reversal because of plain error bears the burden of firmly convincing this Court that the claimed error implicates a fundamental right and that such review is necessary to prevent a manifest miscarriage of justice or that failure to review the claim may leave unsettled the question of the fundamental fairness of the proceedings or may compromise the integrity of the judicial process. *State v. George*, 2020 MT 56, ¶ 5, 399 Mont. 173, 459 P.3d 854.

**B. LaQue did not vouch for C.G.'s credibility.**

Prado cites *State v. Miller*, 2022 MT 92, ¶ 24, 408 Mont. 316, 510 P.3d 17, for the proposition that prosecutors generally "may not elicit a witness's direct

personal opinion or belief as to whether another witness or the accused, or his or her testimony, was credible, believable, reliable, or truthful.” (Appellants Br. at 36.) Prado contends that LaQue provided “vouching testimony,” but does not cite to an example of her testifying that she had an opinion or belief that C.G. or his testimony was “credible, believable, reliable, or truthful.”

The record shows that LaQue did not state nor imply that C.G. or his testimony, which hadn’t taken place, were any of these things. (*See* Tr. at 247-70.) Importantly, there is nothing in the record to indicate that any of the potential communication issues that LaQue described actually manifested themselves during C.G.’s testimony.

**C. Prado acquiesced to LaQue’s testimony as part of a strategy to attack C.G.’s credibility.**

Prado’s attorneys did not object to LaQue’s testimony. (Tr. at 15-16.) Further, they did not voice a single objection to her providing “vouching” during her testimony. Prado’s attorneys made it abundantly clear that part of their trial strategy was to attack C.G.’s credibility through LaQue’s knowledge of his past behavior and mental health history:

So if Mom is going to talk about why he can’t process or potentially maybe why his story has changed over the course of months, then I think I certainly should be able to explore what’s going on with him cognitively. So we would just ask that Your Honor

reserve any kind of ruling on that until the testimony is offered and—  
But I certainly intend to ask about those diagnoses.

(*Id.* at 16.)

First, Prado's attorney attempted to ask LaQue how many times she had called the police to help locate C.G. (Tr. at 265.) She asserted that "[LaQue] opened the door to [C.G.'s] temperament and his past history. We'd argue that its allowed." (Tr. at 266.)

After the district court sustained the State's objection, Prado's attorney asked LaQue about C.G.'s commitment history and mental health diagnoses. (*Id.* at 266-69.) When asked if C.G. ever got "overstimulated or overaroused," LaQue responded, "It's depending on the situation." (*Id.* at 269.)

Not only did Prado's attorneys acquiesce to LaQue's testimony during the State's case, they attempted to recall her, purportedly to "impeach" her with an e-mail between her and C.G.'s probation officer from 2020, about whether C.G. should "stay in detention, return home, those sorts of things." (*Id.* at 610.)

Because Prado chose not to object as part of an obvious strategy to allow his attorneys to present evidence of C.G.'s past behavior and mental health history, he should not be allowed to invoke plain error to obtain appellate review of his new legal theory.

Prado has not identified any alleged errors in LaQue's testimony that would result in a manifest miscarriage of justice, nor has he shown that failure to review

her testimony would leave unsettled the question of the fundamental fairness of the trial or compromise the integrity of the judicial process. Therefore, this Court should decline to conduct plain error review.

### **CONCLUSION**

The district court properly allowed Prado's jail call into evidence, and any alleged errors in allowing the call were harmless. This Court should decline to conduct plain error review of testimony his attorneys acquiesced to and wanted presented as part of their strategy. The convictions should be affirmed.

Respectfully submitted this 11th day of July, 2025.

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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 6,766 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

*/s/ Thad Tudor*

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THAD TUDOR

## **CERTIFICATE OF SERVICE**

I, Thad Nathan Tudor, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 07-11-2025:

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