

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0273

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ZACKARY MATTHEW MAAS,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Eleventh Judicial District Court,
Flathead County, The Honorable Dan Wilson, 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 4

I. The deliberate homicide.....4

II. Facts related to the issues Maas raises on appeal.....18

 A. Gabe’s statements to family members and law enforcement18

 B. Other acts evidence21

SUMMARY OF THE ARGUMENT23

ARGUMENT.....25

I. The standard of review.....25

II. The district court properly admitted Gabe’s nontestimonial statements.....26

 A. Introduction26

 B. Maas conceded below that Gabe’s statements to neighbors and law enforcement officers made at his residence right after Maas shot him were admissible28

 C. Gabe’s statements to Detective Webster34

 1. Logan Health34

 2. Statements Gabe made at Harborview.....37

 D. Gabe’s statements to family members were nontestimonial37

III. The district court properly exercised its discretion in allowing the State to rebut Maas’ self-serving testimony that he was a kind and peaceable person38

CONCLUSION41

CERTIFICATE OF COMPLIANCE.....42

TABLE OF AUTHORITIES

Cases

<i>Beach v. State</i> , 2015 MT 118, 379 Mont. 74, 348 P.3d 629	26
<i>Commonwealth v. Middlemiss</i> , 989 N.E.2d 871 (Mass. 2013)	33
<i>Crawford v. Washington</i> 541 U.S. 36 (2004)	26, 27, 29, 32
<i>Davis v. Washington</i> , 547 U.S. 813 (2006)	27, 28, 31, 32, 33
<i>Giles v. California</i> , 554 U.S. 353 (2008)	27, 29, 34
<i>Michigan v. Bryant</i> , 562 U.S. 344 (2011)	31, 32
<i>Ohio v. Clark</i> , 576 U.S. 237 (2015)	28
<i>State v. Austad</i> , 197 Mont. 70, 641 P.2d 1373 (1982)	39
<i>State v. Beasley</i> , 108 N.E.3d 1028 (Ohio 2018)	33
<i>State v. Blackstock</i> , 598 S.E.2d 412 (N.C. Ct. App. 2004)	38
<i>State v. Donahue</i> , 2025 MT 144, 423 Mont. 1, 571 P.3d 1068	25, 29
<i>State v. Gomez</i> , 2020 MT 73, 399 Mont. 376, 460 P.3d 926	3
<i>State v. Hicks</i> , 2013 MT 50, 369 Mont. 165, 296 P.3d 1149	40
<i>State v. Johnson</i> , 2024 MT 306, 419 Mont. 366, 560 P.3d 1219	36
<i>State v. Kutnyak</i> , 211 Mont. 155, 685 P.2d 901 (1984)	39

<i>State v. Madplume</i> , 2017 MT 40, 386 Mont. 368, 390 P.3d 142	39, 40
<i>State v. Martinez</i> 2023 MT 251, 414 Mont. 340, 545 P.3d 652	25, 28, 36
<i>State v. Mercier</i> , 2021 MT 12, 403 Mont. 34, 479 P.3d 967	28
<i>State v. Mizenko</i> , 2006 MT 11, 330 Mont. 299, 127 P.3d 458	26, 27
<i>State v. Myran</i> , 2012 MT 252, 366 Mont. 532, 289 P.3d 118	26
<i>State v. Reim</i> , 2014 MT 108, 374 Mont. 487, 323 P.3d 880	29
<i>State v. Sanchez</i> , 2008 MT 27, 341 Mont. 240, 177 P.3d 444	3, 34
<i>State v. Sanchez</i> , 2012 MT 191, 366 Mont. 132, 285 P.3d 540	34
<i>State v. Staudenmayer</i> , 2023 MT 3, 411 Mont. 167, 523 P.3d 29	26
<i>State v. Strizich</i> , 2021 MT 306, 406 Mont. 391, 406 P.3d 575	39
<i>Thomas v. State</i> , 668 S.E.2d 711 (Ga. 2008)	30, 31

Other Authorities

Montana Constitution

Art. II, § 24	25, 26
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Montana Rules of Evidence

Rule 403	22, 39, 40
Rule 404	22

United States Constitution

Amend. VI, Confrontation Clause	26, 27, 31
Amend. XIV	26

STATEMENT OF THE ISSUES

1. Whether the district court properly admitted the deceased victim's statements identifying his shooter when the statements were either nontestimonial or any error in admitting a testimonial statement was harmless.

2. Whether the district court properly exercised its discretion in allowing the State to question Appellant about a prior adjudicated act after Appellant testified he was nonviolent and kindhearted.

STATEMENT OF THE CASE

On April 15, 2022, the State charged Appellant Zackary Maas (Maas) with deliberate homicide for shooting Gabriel Wagoner (Gabe), resulting in his death. (Docs. 15, 19.) Maas filed notice of justifiable use of force. (Doc. 35.)

Maas filed a motion in limine to prohibit the State from introducing any evidence of prior bad acts, including Maas' juvenile record. (Doc. 45.) The State filed a response objecting to Maas' lack of specificity regarding the acts to which he was objecting and argued that depending on the course of the trial, otherwise objectionable evidence might become relevant and admissible. (Doc. 53.) Maas replied that his prior juvenile adjudications should not be admissible during the State's case-in-chief. (Doc. 55.)

Maas filed a motion in limine to prohibit the State from admitting Gabe's statements uttered after Maas shot him and before he died from the gunshot wound. (Doc. 47.) Maas argued that Gabe's statements were inadmissible under Montana's Rules of Evidence and the confrontation clauses of the United States and Montana constitutions. (Doc. 48.) Maas did not identify specific statements or offer any analysis of why a specific statement was inadmissible, making a blanket assertion that all Gabe's statements were inadmissible under the confrontation clauses. (*Id.*)

The State responded, identifying statements Gabe made to neighbors, medical providers, family members, and law enforcement officers, and analyzed why the statements were admissible, addressing both the confrontation clause and hearsay exceptions. (Doc. 53.)

Maas clarified that he agreed the statements Gabe made immediately after Maas shot him were admissible and he did not object to the statements Gabe made to "neighbors, responding law enforcement personnel and responding medical personnel." (Doc. 64, attached as App. A.) Maas maintained that all other statements Gabe made were testimonial and inadmissible, without providing any legal analysis. (*Id.*)

The district court held a hearing on Maas' motion to exclude prior acts. (9/7/22 Hr'g Tr. at 20.) The State informed the court it did not intend to offer such

evidence unless Maas opened the door. (*Id.* at 24.) The court granted the motion to exclude other acts evidence unless Maas opened the door thereby allowing the State to admit such evidence in rebuttal. (*Id.* at 27.)

The district court held a hearing on Maas’ motion to exclude any statements Gabe made after the shooting but prior to his death. (11/29/22 Hr’g Tr.) The district court concluded that Gabe’s statements were admissible under the confrontation clause because Maas’ criminal conduct caused Gabe’s unavailability.¹ (*Id.* at 24-25.) The court also concluded that it would consider any hearsay objection to Gabe’s statements at trial. (*Id.* at 25.) The court told the parties to be prepared to make such arguments during the trial. (3/13/23-3/16/23 Transcript of Jury Trial [Tr.])

The district court held a jury trial on March 13, 2023, through March 16, 2023. (Tr.) During deliberations the jury asked, “Did Maas lose his right to justifiable protection . . . when he first pulled his gun on Gabe?” (Doc. 136.) The district court responded in part, “The instructions are intended to provide the jury with all laws applicable to the evidence the jury heard during the trial to determine

¹The State presumes that when the district court referenced *Gomez* to support its conclusion, it was referencing *State v. Gomez*, 2020 MT 73, 399 Mont. 376, 460 P.3d 926. But *Gomez* did not address the confrontation clause. Consequently, the State believes the district court meant to reference *State v. Sanchez*, 2008 MT 27, 341 Mont. 240, 177 P.3d 444, in which this Court did adopt the forfeiture by wrongdoing exception to the defendant’s confrontation right. *Id.* ¶¶ 43-48 (*see* 3/13/23 Trial Tr. at 52).

these questions of fact.” The jury found Maas guilty of deliberate homicide. (Tr. at 137.)

The district court sentenced Maas to 80 years in prison with no time suspended. (Doc. 142.1, attached to Appellant’s Br. as App. A.)

STATEMENT OF THE FACTS

I. The deliberate homicide

On March 13, 2022, Richard Paulson (Richard) lived in Apartment B at 716 First Avenue West in Kalispell, Montana. Richard’s neighbor Jack Weis (Jack) lived in an apartment on the same level, and Gabe lived in the basement apartment. (Tr. at 259-60; *see also* State’s Exs. 1-2.) Richard was friendly with Gabe, who was a mechanic and had worked on both of Richard’s cars. (Tr. at 265-66.)

That evening, Richard had fallen asleep on his couch and he awakened to loud noises coming from the basement. Richard heard a loud bang. Startled, he went to his back door, where he heard Gabe crying out, “I’ve been shot, I’ve been shot.” (Tr. at 267-68.) Richard opened the door as he called 911 for help. (Tr. at 268-69; State’s Ex. 3.)

The landing leading to the basement stairs was just outside Richard’s door. (Tr. at 270; State’s Ex. 4.) Richard found Gabe lying with the upper part of his body on the landing and his head towards the door. The middle part of Gabe’s

body and his legs were on the stairs. (Tr. at 273.) There was an aluminum bat on his right side up by his head. (Tr. at 272.)

Jack also called 911 that night. (Tr. at 279.) He was awakened in the middle of the night by loud arguing coming from Gabe's apartment. Jack heard footsteps coming up the stairs from the basement, followed by a loud bang. He then heard Gabe yelling that he had been shot. (Tr. at 280-81.) He went to the door to look out. Gabe's body was against the door, with his upper body lying on the landing and his legs hanging down the stairs. (Tr. at 283-84.) Gabe shouted out that Zack Maas had shot him. (Tr. at 285)

Anna Kirchner (Anna) was engaged to Maas and had lived with him for several years. (Tr. at 492-93.) Maas had a six-year-old daughter named L.M., whose mother is Timberli Veyna (Timberli). (Tr. at 495-96.) Anna recalled that on March 12, 2022, Maas and L.M. had gone swimming at the Country Inn and Suites. (Tr. at 497.)

Jerum Auclair (Jerum) has known Maas since high school. For about 6 years Jerum and Maas were best friends. Jerum began using methamphetamine with Maas when he was about 20 years old. (Tr. at 614-15.) In late 2021 or early 2022, Jerum and Maas had a falling out because Maas accused him of stealing some property from his dad's place. Maas threatened Jerum, telling him that he

better have his new gun sighted in because Maas was going to shoot him. Jerum cut off contact with Maas. (Tr. at 620-21.)

At the time of trial, Jerum was dating Shayna Caldwell (Shayna). Jerum had a four-year-old son and Shayna had a child who was five years old. (Tr. at 579, 617.) On March 12, 2022, Jerum, Shayna, and both children traveled to Kalispell. They stayed at the Country Inn and Suites. Jerum and Maas conversed over Facebook Messenger. Maas asked if they could put everything behind them. Jerum invited Maas to bring his daughter to the hotel to swim. (Tr. at 618-19.) While the kids were swimming, the adults drank Twisted Teas. Maas told Jerum he now thought that Gabe had stolen the stuff missing from his dad's place. (Tr. at 622-23.)

Anna and Maas also exchanged texts that evening. (Tr. at 500.) Anna encouraged Maas to bring L.M. home so she would not be up too late. (Tr. at 501.) Maas responded that the people he was visiting at the hotel wanted to go out for a while and asked if Anna could watch L.M. Anna replied that Maas could bring L.M. home, put her to bed, and then go out with his friends. Instead, Maas came and got Anna and drove her to the hotel, where she then watched L.M. and some other children who were asleep. (Tr. at 502-03.)

Jerum explained that after swimming the kids all fell asleep, and Maas suggested they go out to the bars. He volunteered that his girlfriend Anna could

come over and watch the kids. Jerum and Shayna agreed to this plan, and Maas went to pick up Anna. (Tr. at 624.) Jerum explained that Anna did not like him because Maas always blamed him for “everything.” (*Id.*) Consequently, Maas told Jerum and Shayna to leave the hotel room before he arrived with Anna. (Tr. at 625.)

Maas, Jerum, and Shayna left the hotel at about 12:30 a.m. in Jerum’s truck and went to a bar in Whitefish until closing time. (Tr. at 592, 626-27.) On the way back to Kalispell, Maas again accused Jerum of stealing stuff from his dad’s property, upsetting Jerum. Maas then switched gears and said he thought Gabe had something to do with it. When Maas was younger, his mom had dated Gabe and briefly lived with him. Maas asked Jerum if he would go to Gabe’s house with him. Jerum eventually agreed because he thought Maas just wanted to talk with Gabe. Jerum told Maas that he would only go if Maas agreed not to bring a gun. (Tr. at 628-29, 850.)

Anna was unable to sleep at the hotel. She texted Maas and told him she was ready to go home. Maas texted back and told her he was going to get revenge first. She responded by telling Maas to get back to the hotel and take her home. (Tr. at 504-05; State’s Ex. 63.)

Maas did not respond. (Tr. at 506.) Anna eventually texted Maas, “How’s it going?” (Tr. at 509; State’s Ex. 64.) Maas responded, “Heading back that way.”

(*Id.*) Anna texted Maas that she really wanted to go home. She asked Maas if he was okay. Maas responded that he was good but he was just going to do one thing and then he would be back. Anna was angry and told him to get back to the hotel immediately. (Tr. at 509-10.)

Maas responded, “I’m just gonna get revenge and I’ll be back.” (Tr. at 511; State’s Ex. 64.) Anna told Maas he was taking advantage of her and she was tired of it. Maas replied, “It won’t happen after tonight I promise you.” (*Id.*) Anna texted back her displeasure with Maas. (*Id.*)

Maas directed Jerum to Gabe’s house. Jerum parked his truck a block away. He and Maas got out of the truck and approached Gabe’s residence. Maas knew where a spare key was hidden and used it to gain entry. He went down the stairs to Gabe’s apartment first. (Tr. at 630-32.) Jerum heard a gun cocking when Maas was halfway down the stairs and Jerum was still on the top landing. By the time Jerum got into Gabe’s apartment, Gabe was up out of his bed and Maas was holding him at gunpoint. (Tr. at 632-33.) Maas told Gabe that he knew he had something to do with stealing property from his dad’s place and demanded to know where the stuff was located. Gabe responded, “You have a gun pointed at me? Shoot me.” (Tr. at 634.)

Jerum grabbed Gabe around the arms because he was afraid Maas was going to shoot him and he did not want that to happen. Jerum physically restrained Gabe,

holding him from behind. Jerum thought Maas then hit Gabe because he felt the impact. Jerum let Gabe go. He did not intend to restrain Gabe to allow Maas to physically assault him. (Tr. at 635, 640, 689.) Maas was yelling at Gabe and accusing him of working with some guy named Luke to steal stuff from his dad's house. Gabe denied knowing anything about the theft but volunteered to take them to Luke's house. Jerum then turned around to head back up the stairs. (Tr. at 641.)

When Jerum got to the top of the stairs, he held open the screen door to exit the residence and saw that Gabe was about five feet behind him. Jerum could not see Maas. He then heard a gunshot and took off running.

Jerum had not seen a baseball bat, although he told detectives that Gabe had had a bat resting on his right shoulder. Jerum told detectives that he had not felt threatened and did not think Gabe was going to hit him with the bat. (Tr. at 643-45, 663.) Jerum later admitted lying to detectives about seeing a bat, explaining that the morning of the shooting Maas told him that Gabe had a bat. Jerum lied to cover for Maas. (Tr. at 680.)

Jerum and Maas returned to Jerum's truck without discussing what had happened. (Tr. at 665.) At 4:39, Maas texted Anna: "On my way." (Tr. at 513.) At the hotel, Jerum and Shayna stayed out of sight until Maas, Anna, and L.M. left. (Tr. at 668.) On the way home, Maas told Anna that he thought he had shot someone. He then elaborated that he had been at Gabe's house, and that when he

left, he knew that Gabe had “fallen over.” (Tr. at 521.) Maas said he just took off because he was scared. He related that Jerum had been with him and admitted he had pulled a gun out during his interaction with Gabe. (*Id.*)

Maas said that Jerum had grabbed Gabe and put him in a hold. Maas had wanted to talk to Gabe because he thought Gabe was involved in stealing property from his dad’s residence and he wanted the property returned. Maas admitted to Anna that he pulled out his gun during this interaction with Gabe. (Tr. at 521-22.) He had been upset about the stolen property. (Tr. at 525.) Maas told Anna that he shot Gabe to protect Jerum because Gabe had grabbed a baseball bat and swung it at Jerum’s head. (Tr. at 527.) Neither Maas nor Anna called law enforcement. (Tr. at 527-29.) Anna reluctantly admitted that she took photographs of text messages Maas authored threatening Gabe. (Tr. at 514-15; State’s Ex. 66.) Maas had threatened Gabe that he would take his life away. (Tr. at 516.)

At around 8 a.m. on March 13, 2022, Maas went to Jerum’s hotel room and said he needed to get something out of Jerum’s truck. Jerum saw him grab something from the back seat near where he had been sitting the previous evening. Maas also told Jerum that Gabe was about to swing a bat at him, so he shot him. (Tr. at 668-70.)

Deputy Matthews of the Flathead County Sheriff’s Office was dispatched to Gabe’s apartment building on March 13, 2022, at 4:45 a.m., for a possible

shooting. (Tr. at 294-95.) He was wearing his body camera when he arrived at the scene. Sergeant Haag and Officer Struble of the Kalispell Police Department were also at the scene. (Tr. at 296-97; *see* State's Ex. 5.) The shooting victim was on the landing to the downstairs. (Tr. at 298.) Deputy Matthews made certain the suspect was not in the basement apartment. (*Id.*)

Deputy Matthews assisted paramedics caring for the victim, later identified as Gabe, and observed that he had a bullet hole in the small of his back just to the right of his spine. (Tr. at 299.) Gabe was lying face down with his head towards the door and his legs hanging over the stairs. (Tr. at 301.) Deputy Matthews heard Gabe say Zackary Maas had shot him. Gabe was in and out of consciousness. (Tr. at 300.)

Officer Struble of the Kalispell Police Department also responded to the shooting. (Tr. at 310-311.) He also had his body camera on. (Tr. at 311, 319-20; State's Ex. 10.) As Officer Struble approached the residence, he heard a male yelling. He saw the male, later identified as Gabe, lying face down on the landing of the basement stairs. (Tr. at 314-15.) Officer Struble saw a bat partially sticking out of the doorway next to Gabe's right hand. Gabe said that his stepson had shot him in the back. Gabe said, "they busted into my house," and identified Maas as the person who shot him. (Tr. at 316-17.) The responding officers did not know the location of the shooter and whether he was still nearby. (Tr. at 317.) Officer

Struble rode to the hospital in the ambulance with Gabe. Gabe kept asking for help and screamed out in pain. He again identified Maas as his shooter. (Tr. at 326, 331.)

Jonathan Knuffke is a firefighter/paramedic with the Kalispell Fire Department. (Tr. at 346.) On March 13, 2022, at 4:39 a.m., Paramedic Knuffke responded to a reported gunshot wound at Gabe's residence. (Tr. at 350-52.) Paramedic Knuffke explained that emergency medical providers use a triage scale based on the colors green, yellow, red, and black. Green is the most minimal intervention and black means the person is dead or the situation is futile, and the person will die. Gabe was red on the triage scale and was designated as a full trauma. (Tr. at 354-55.)

When Paramedic Knuffke approached the house, he could hear Gabe screaming in pain. The paramedics quickly determined that Gabe had a penetrating injury to his back with no exit wound. (Tr. at 356.) In the ambulance on the way to the hospital, Gabe was sometimes awake and screaming in pain but also had periods where he appeared to have lost consciousness. (Tr. at 358.)

On Monday, March 14, 2022, Captain Bartholomew detained Anna and Maas and interviewed Anna. Initially, Anna told Captain Bartholomew that Maas was with her all weekend and nothing out of the ordinary occurred. They stayed

home, did laundry, watched some shows, and relaxed. (Tr. at 530-31.) Eventually, though, Anna told Captain Batholomew what she knew. (Tr. at 530.)

Detective Webster of the Kalispell Police Department interviewed Maas on March 14, 2022. (Tr. at 744-45; State's Ex. 71.) Maas reported that on March 12, 2022, he told Anna he was going to hang out with his friend Garrett. He claimed that later that evening he took his daughter home to Anna and then went out drinking with Jerum. (Tr. at 752.) He also claimed that Shayna remained back at the hotel with the other two children. (Tr. at 753.)

Initially, Maas stated that he and Jerum went to Gabe's house to get drugs. Maas stated that he had never had a problem with Gabe and had never fought with him. Maas repeatedly claimed that he went to Gabe's house to get high and that he had sent Gabe a text saying he and Jerum were headed to his home. (Tr. at 750-51.) Detective Webster did not find such a text on Maas' phone. (Tr. at 754.) Maas stated that he never broached the topic of his dad's stolen property with Gabe. (Tr. at 753.)

Maas' statements evolved throughout the interview. Later in the interview, Maas admitted that he took his gun to Gabe's house to talk to Gabe about the property stolen from his dad's house. (Tr. at 759.) Maas claimed that he went to Gabe's house to clear the air so they could be friends again. (Tr. at 762.) Later in the interview, Maas admitted that he immediately pointed his gun at Gabe. (Tr. at

761.) Maas claimed he did so to calm Gabe down. (Tr. at 766.) He stated that Jerum grabbed Gabe, so he put the gun away. (Tr. at 767.)

Maas told Detective Webster that he could not see Jerum as Jerum and Gabe were climbing the stairs because he was at the very bottom of the stairs. (Tr. at 763.) But, later in the interview, Maas claimed that Gabe was running after Jerum. (Tr. at 764.) Maas claimed this caused him to take the gun out again. (Tr. at 767.) Maas admitted that he shot Gabe with his Glock .48, after which he and Jerum left in Jerum's truck. Maas said that upon returning to the truck, he placed the gun under the back seat. (Tr. at 756.)

Jerum was arrested for his involvement in Gabe's shooting on March 17, 2022. (Tr. at 671.) At trial, Jerum testified that the State had not offered him any plea agreement or other favorable resolution in exchange for his trial testimony. (Tr. at 612.)

Gabe died on April 14, 2022. (Tr. at 228, 770-71.) Dr. Richard Harruff, the chief medical examiner in the King County Medical Examiner's Office in Seattle, Washington, performed an autopsy of Gabe. (Tr. at 362-63, 366; State's Ex. 46.) Dr. Harruff explained that Gabe died one month after sustaining a gunshot injury. Prior to Gabe's death, doctors surgically repaired his spine and his aorta. (Tr. at 367.) The bullet had entered Gabe's back, fractured his spine, damaged his spinal cord, and come to rest adjacent to his aorta. The bullet caused considerable damage

to Gabe's lower spinal cord, which controls the bladder and lower extremities, paralyzing Gabe's legs. (Tr. at 368-69.) Gabe developed a urinary tract infection, attributable to the damage to his spinal cord. The infection spread to his blood, producing sepsis. (Tr. at 368.)

During the autopsy, Dr. Harruff recovered a bullet from between the spine and the aorta. Dr. Harruff determined that Gabe was a normal male, consistent with his age of 41, with no apparent disease. He opined that Gabe died from complications of the gunshot wound to his back, and the manner of death was homicide. (Tr. at 377-78.)

Doug Lancon (Lancon) is a forensic scientist in the Firearm and Toolmark Section of the State Crime Lab. Lancon received for evaluation a variety of clothing from the victim. He completed chemical tests on the victim's clothing to determine the possibility of establishing the distance from the victim's clothing to the firearm used to shoot him. (Tr. at 469.) Lancon prepared a report detailing all his findings. (Tr. at 462, 468-69; State's Ex. 62.) On the victim's outermost garment, Lancon found residue consistent with the passage of the bullet through the garment but no other residue. Because there was only residue around the bullet hole, Lancon opined that the gun was generally four to five feet away from the victim. It could have been much further, but it was not any closer or he would have expected to see other residue in addition to around the bullet hole. (Tr. at 471.)

Maas discussed the shooting with Timberli, his daughter's mother. (Tr. at 723.) Maas told Timberli that his girlfriend Anna had been watching L.M. at home while Maas and Jerum went out to the bars. Maas said he had confronted Jerum about the theft of property from his dad's house, and Jerum told him he had nothing to do with it. The two of them decided to go to Gabe's house. They used a hidden key to gain entry. Maas claimed Gabe was awake and he confronted him about the theft. Maas reported that things got heated, so he pulled out his gun and set it on his lap to show Gabe that he had it, but later put the gun away. (Tr. at 723-24.)

Maas told Timberli that Gabe said he was not responsible for the theft of items stolen from his dad's house but agreed to take him to another guy's house because he thought that person, Luke, may have been involved. Maas claimed that as Jerum was about to go up the stairs, Gabe grabbed a bat and ran after Jerum. Maas took his gun out and shot Gabe. Maas said he panicked and ran. (Tr. at 725-26.) Timberli asked Maas if Gabe hit Jerum with the bat. Maas responded that he had not, but that he planned to claim self-defense. (Tr. at 726.) Maas told Timberli he had been mad at Gabe and that Gabe deserved it. (Tr. at 727.) Timberli testified that when she and Maas were together, he had a temper and would do things like punch holes in the walls. (*Id.*)

Law enforcement officers never found the firearm Maas used to shoot Gabe. (Tr. at 770.) Detective Webster did, however, find a photograph of a Glock from Maas' Facebook account. (Tr. at 806-07.)

Maas testified that in the early morning hours of March 13, 2022, he broke into Gabe's house because he just wanted to talk to him. Maas admitted that he had his gun out and cocked but only did so because he was nervous and did not know what was going to happen. (Tr. at 935-36.) Maas claimed that he never made threats that he would harm or kill Gabe. Rather, his threats were directed at someone named Luke. (Tr. at 937.) Maas pointed the gun at Gabe as Gabe was on his bed, but told Gabe, "I just want to talk." (Tr. at 936.) Maas claimed that Gabe got up and walked straight towards him, which was when Jerum grabbed him to hold him back. (*Id.*) Maas maintained he never hit Gabe. (Tr. at 938.)

Maas believed that someone named Luke also was involved in the theft. Gabe said that Luke lived two blocks away and volunteered to take him there. (Tr. at 939.) Jerum said "Let's go" and turned around to head up the stairs. (Tr. at 940.) Maas claimed that Gabe grabbed a baseball bat from his wall and immediately went after Jerum, who was heading up the stairs. Maas maintained that he knew Jerum was in trouble, so he yelled, "He's got a bat." (Tr. at 940-41.) Maas claimed that by the time he got to the stairway, Gabe was right behind Jerum and was about to swing the bat. Maas recalled that Jerum was on the landing and

Gabe was on the top two or three steps behind him with the bat over his head. Maas took out his gun, pointed it at Gabe and shot him. Jerum immediately took off running, and Maas followed him. (Tr. at 941-43.)

Maas said he did not have a good answer for why he did not call the police and wait there. He surmised that Jerum was always the leader between the two of them, so when Jerum ran, Maas followed him. (Tr. at 943.) Maas claimed that when he spoke with Detective Webster on March 14, 2022, for most of the interview he was not forthcoming because he was scared that he would get in trouble. (Tr. at 948.) Maas testified that if he had not shot Gabe, Jerum would not be alive. (Tr. at 949.) Maas admitted that the Glock handgun depicted in the photograph on his Facebook account was his and it was the gun he used to shoot Gabe. (Tr. at 957; State's Ex. 83.)

II. Facts related to the issues Maas raises on appeal

A. Gabe's statements to family members and law enforcement

Wade Wagoner (Wade), Gabe's older brother, testified at trial that on March 13, 2022, he received a phone call from a trauma surgeon at Harborview Medical Center in Seattle, Washington, informing him that Gabe was in critical condition and needed surgery. (Tr. at 552-53.) It was questionable whether Gabe would survive. (Tr. at 554.) Following Gabe's surgery, Wade traveled to

Harborview to visit him. (Tr. at 555.) Gabe was withdrawn and in considerable pain. He was afraid that Maas and Jerum were going to come to his room and kill him and asked that guards be placed at his door. (Tr. at 556-57.)

Gabe told Wade that he had woken up and someone was choking him and another person was beating him. He said there had been some dispute about a car title and the two men, Maas and Jerum, made Gabe go with them. As the three of them were headed up the stairs to leave Gabe's apartment, Gabe grabbed a bat so he could defend himself since they were going somewhere. Jerum was in front, headed up the stairs, Gabe was behind Jerum, and Maas was behind Gabe. Gabe said that when he got to the top of the stairs, he heard a "crack," and then it felt like a hot poker. (Tr. at 559-60.)

Braidy Yargus (Braidy), another of Gabe's brothers, spoke with Gabe on the phone on March 14, 2022, and visited Gabe at the Seattle hospital on March 17, 2022. (Tr. at 572.) Gabe was in rough shape. (Tr. at 573.) Gabe tried to explain to Braidy what happened. He reported that people came into his home at about 4 a.m. and roughed him up. At some point he had a gun pointed at him. There was discussion about some kind of transaction and the two people wanted Gabe to go with them. Gabe had grabbed a baseball bat. One of the men walked up the stairs to exit Gabe's apartment in front of him, and the other man was behind him. Gabe said that as he was walking up the stairs, he heard a loud crack, and that was when

he got shot. (Tr. at 574-75.) Braidy explained that Gabe had previously dated Maas' mother. Gabe told Braidy that it was Maas who shot him. (Tr. at 576-77.)

Detective Webster briefly spoke with Gabe at the Logan Health Emergency Room about an hour after Maas shot him. (Tr. at 736-37.) Law enforcement did not yet know the shooter's full name and the shooter had not been apprehended. (Tr. at 738.) Detective Webster only spoke with Gabe for a few minutes because he was in considerable pain and it was hard to understand him. Gabe told her that Maas and someone named Jerum had stormed his house, pointed a gun at him, and wanted him to go to "Luke's" house to get information about stolen property. Maas had accused Gabe of stealing the property. Gabe also said that Maas had punched him. (Tr. at 739.)

Detective Webster spoke with Gabe over the phone on March 14, 2022, after he had been transported to Harborview Medical Center in Seattle. (Tr. at 740-41.) Gabe was very emotional during the phone call. He told Detective Webster that Maas and Jerum had come into his house. Gabe had been on his bed. Maas pointed a gun at his head and Jerum put him in a choke hold while Maas punched him. (Tr. at 741.) Gabe volunteered to take them to Luke's house to prove he did not steal items from Maas' dad's property. Gabe said he grabbed a bat for protection at Luke's house. (Tr. at 742.)

B. Other acts evidence

During the prosecutor's cross-examination of Maas, he asked why Maas told Anna he was going to get revenge and whether he was simply trying to talk tough.

Maas responded:

No, not exactly. I mean, maybe a little bit.

But she knows, more than anybody, how not tough I really am. She knows, more than anybody, that I'm not a fighter, I'm a pretty kindhearted person.

(Tr. at 956-57.)

The prosecutor asked Maas, "Did you shoot a woman in the head with a BB gun?" (Tr. at 975.) Defense counsel objected that the question was beyond the scope of the direct examination. (*Id.*)

The district court considered the objection during a recess. The court defined the issue to be whether Maas' testimony—that he is a kind and peaceable person, and is not a fighter—opened the door to the State questioning him about his juvenile adjudication resulting from shooting a woman in the head with a BB gun. Defense counsel agreed with the court's assessment. (Tr. at 977.)

The prosecutor argued he had asked Maas a yes or no question about whether he was talking tough in front of Anna when he was discussing getting revenge. Maas could have simply answered yes or no. Instead, he provided a self-serving statement about his peaceful and kindhearted nature. The prosecutor

argued that under Mont. R. Evid. 404, he was allowed to rebut Maas' testimony about his character trait by referencing specific instances of conduct. (Tr. at 984-85.) The district court carefully and thoroughly considered Maas' objection.

The district court concluded that the prosecutor did not improperly question Maas in a manner designed to lead him into opening the door to prior acts evidence. Maas gave a non-responsive answer to the prosecutor's questioning that was self-serving. (Tr. at 986-98.) The district court next concluded that Maas' non-responsive, gratuitous, and self-serving answer opened the door for the prosecutor to ask about past instances of conduct that could rebut his assertion that he is not a fighter but is kindhearted. (Tr. at 990.)

The court addressed whether allowing the State to briefly question Maas about his prior youth court adjudication was more prejudicial than probative under Mont. R. Evid. 403. (*Id.*) Defense counsel argued that the prejudicial impact of the evidence clearly outweighed the probative value since the conduct in question and its adjudication occurred while Maas was a juvenile. (Tr. at 998-99.)

After considering numerous factors, including that the prior conduct resulted in an adjudication and was not based merely on an allegation, the district court overruled the objection. (Tr. at 999-1004.)

Maas acknowledged that he did shoot a woman in the head with a BB gun when he was a juvenile, and the BB had imbedded in the woman's scalp. (Tr. at

1005.) Maas further acknowledged that this was not a kindhearted action. The prosecutor then asked Maas if that experience had taught him that all firearms are dangerous and not to be handled recklessly. Maas responded that he had taken hunter education classes and knew that firearms are dangerous. Maas understood that you should never point a weapon at somebody unless you are willing to kill them. (Tr. at 1006-07.)

The district court provided the jury with the following cautionary instruction:

Ladies and gentlemen, Mr. Ahner has been permitted to ask Mr. Maas questions about the incident that occurred about a dozen years ago for the purpose of—the State’s purpose of seeking to contradict Mr. Maas’s testimony that he is either not a fighter and a pretty kindhearted person, or both.

You may not convict Mr. Maas of the offense in this matter solely or primarily on the basis of these questions and this prior incident. He is not on trial for that prior incident.

And for the purposes that I’ve just instructed you are the appropriate purposes for you to consider this evidence, if at all, if you determine that it’s entitled to any weight whatsoever.

(Tr. at 1007.)

SUMMARY OF THE ARGUMENT

For purposes of the confrontation clause, Gabe’s statements immediately after Maas shot him in the back, which identified Maas as the shooter, were

nontestimonial statements that occurred during an ongoing emergency and were made under Gabe's belief that he was dying. Maas acknowledged these statements were admissible. Gabe's statements to his brothers were also nontestimonial statements made in private while Gabe was still processing what had transpired. Even if this Court concludes that some of Gabe's statements were testimonial, any error in admitting them was harmless because Gabe's initial excited utterances were nontestimonial and admissible and Maas admitted he shot Gabe in the back.

The district court properly allowed the State to question Maas about his prior act of shooting a woman with a BB gun after Maas testified that he was kindhearted and not a fighter. The probative value outweighed the prejudicial impact, and, even if this Court disagrees, the error was harmless. The State presented overwhelming evidence of Maas' guilt and proved that Maas' justifiable use of force defense was meritless. Other admissible evidence was more prejudicial than Maas' prior act, including Maas' repeated threats of violence and his talk of revenge. Maas broke into Gabe's house at 4:30 in the morning and shot him in the back—those admissible facts were prejudicial.

///

ARGUMENT

I. The standard of review

This Court's review of constitutional questions is plenary, and it reviews de novo a district court's interpretation of the Sixth Amendment of the United States Constitution and article II, section 24, of the Montana Constitution. *State v. Martinez*, 2023 MT 251, ¶ 18, 414 Mont. 340, 545 P.3d 652. Whether evidence is relevant and admissible is left to the sound discretion of the district court and the district court will not be overturned on appeal absent an abuse of discretion. *Id.* To the extent that the district court's ruling is based on its interpretation of an evidentiary rule, this Court's review is de novo. *State v. Donahue*, 2025 MT 144, ¶ 9, 423 Mont. 1, 571 P.3d 1068. An erroneous evidentiary ruling constitutes reversible error only when a party's substantial rights are affected. *Id.*

///

II. The district court properly admitted Gabe’s nontestimonial statements.

A. Introduction²

Maas makes a sweeping and generalized claim on appeal that all Gabe’s statements he uttered after he was shot and until his death about a month later were inadmissible under the confrontation clauses of the federal and state constitutions. The Sixth Amendment’s Confrontation Clause of the United States Constitution, applicable to state prosecutions through the Fourteenth Amendment, guarantees a criminal defendant’s right “to be confronted with the witnesses against him.” U.S. Const. amends. VI, XIV; *State v. Staudenmayer*, 2023 MT 3, ¶ 17, 411 Mont. 167, 523 P.3d 29. The Montana Constitution also provides, “[T]he accused shall have the right . . . to meet the witnesses against him face to face.” Mont. Const. art. II, § 24.

As this Court explained in *State v. Mizenko*, 2006 MT 11, 330 Mont. 299, 127 P.3d 458, in *Crawford v. Washington*, 541 U.S. 36 (2004), the United States

²Maas did not object to any of Gabe’s statements at trial on hearsay grounds, so that issue is not preserved for appeal. *State v. Myran*, 2012 MT 252, ¶ 19, 366 Mont. 532, 289 P.3d 118. Also, Maas has made no argument or offered any analysis on appeal that some or all of Gabe’s statements were improperly admitted on hearsay grounds. This Court is not obligated to develop legal analysis that may lend support to an appellant’s arguments. *Beach v. State*, 2015 MT 118, ¶ 26, 379 Mont. 74, 348 P.3d 629. Because Maas did not object at trial on hearsay grounds, and does not raise and analyze hearsay grounds on appeal, the State only addresses Maas’ claim concerning his confrontation rights.

Supreme Court “dramatically bifurcated hearsay law from the Confrontation Clause.” *Id.* ¶ 10. Under *Crawford*, the Sixth Amendment Confrontation Clause allows courts to admit hearsay against criminal defendants only in two instances. First, if the hearsay is testimonial, the defendant must have an opportunity to cross-examine the declarant, and the prosecution must establish that the declarant is unavailable to testify at the trial. *Mizenko*, ¶ 10, citing *Crawford*, 541 U.S. at 59. Second, if the hearsay is nontestimonial, the hearsay must bear adequate indicia of reliability or particularized guarantees of trustworthiness to be admissible. *Id.*, citing *Crawford*, 541 U.S. at 68. In *Crawford*, the Supreme Court also explained that a statement by a speaker who was near death and aware that he was dying was admissible even though it was testimonial and unconfuted. *Crawford*, 541 U.S. at 56, n.6, 62; *see also Giles v. California*, 554 U.S. 353, 358 (2008).

In *Davis v. Washington*, 547 U.S. 813 (2006), the Supreme Court adopted the “primary purpose” test to differentiate between a hearsay statement being testimonial and nontestimonial. *Id.* at 822. The Supreme Court determined that statements are nontestimonial if they are “made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.” *Id.* Conversely, statements are testimonial when “the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of

the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” *Id.* When determining a statement’s primary purpose, “the question is whether, in light of all the circumstances, viewed objectively, the ‘primary purpose’ of the conversation was to ‘creat[e] an out-of-court substitute for trial testimony.’” *Ohio v. Clark*, 576 U.S. 237, 245 (2018), quoting *Davis* at 822.

When considering whether statements made outside of court are testimonial, all circumstances must be considered, with no specific circumstance controlling. *Martinez*, ¶ 22. And this Court has determined that a “constitutional deprivation of the defendant’s confrontation right is a trial error and is subject to harmless error review.” *Id.* ¶ 19, quoting *State v. Mercier*, 2021 MT 12, ¶ 31, 403 Mont. 34, 479 P.3d 967.

B. Maas conceded below that Gabe’s statements to neighbors and law enforcement officers made at his residence right after Maas shot him were admissible.

Maas does not mention in his opening brief that he informed the district court in writing that he did not object to the admissibility of any of the statements Gabe made after the shooting and before he was transported to the hospital. (*See* App. A.) Maas not only did not object to the admission of Gabe’s statements that he uttered as he lay face down, partially paralyzed in stairwell with a bullet lodged between his spinal cord and his aorta, Maas affirmatively conceded that those statements were admissible. (App. A.) Even if Maas now believes the statements

were inadmissible, he acquiesced in any error that occurred. This Court will not put “a district court in error for an action in which the appealing party acquiesced or actively participated.” *Donahue*, ¶ 31, quoting *State v. Reim*, 2014 MT 108, ¶ 28, 374 Mont. 487, 323 P.3d 880.

Even if this Court overlooks Maas’ acquiescence in the error he now alleges on appeal, Maas has not conducted any specific legal analysis for each specific statement and only generally argues that admission of all the statements violated his confrontation rights. Importantly, the statements Gabe made in the stairwell and in the ambulance were made when he was near death and aware that he was near dying. A dying declaration is an exception to the confrontation clause. *Crawford*, 541 U.S. at 56, n.6, 62; *see also Giles*, 554 U.S. at 358. Even though the local medical professionals were able to save Gabe’s life and transfer him to a trauma center in Seattle for a life-threatening surgery, this does not change the direness of the situation Gabe faced while he was lying face down in the stairwell in excruciating pain, bleeding, unable to move his legs, and begging for medical intervention, or in the ambulance while in and out of consciousness and struggling to breath.

Additionally, the statement Gabe made right after Maas shot him, which his neighbor Jack heard, that Zack Maas shot him, is nontestimonial. Jack is not a government agent, and as a resident of the building where the shooting occurred, it

was reasonable for Gabe's neighbors to be concerned for their own safety and to share with law enforcement anything they saw or heard during an ongoing emergency. The Georgia Supreme Court considered a very similar issue in *Thomas v. State*, 668 S.E.2d 711 (Ga. 2008), and reached the conclusion that the hearsay statements admitted at trial were nontestimonial.

In *Thomas*, two months after the victim had divorced Thomas, the victim's neighbor found the victim's car parked at an angle, with the rear of the vehicle against the side of the house. The neighbor stopped to investigate and found the victim sitting up in the driver's seat. The neighbor asked what had happened and the victim replied that her ex-husband, Thomas, had shot her. The neighbor immediately called 911 to report that his neighbor had been shot. He also called other neighbors, who arrived within minutes to assist. The neighbors asked the victim several questions, such as what kind of vehicle Thomas was driving, and relayed the victim's answers to the 911 dispatcher. *Id.* at 713.

A deputy sheriff arrived at the scene and observed the victim sitting in the car, bleeding profusely, with a large hole in her left eye socket. The victim was fading in and out of consciousness. The deputy sheriff asked the victim the identity of her shooter several times, and she eventually replied that Thomas, her ex-husband, had shot her. *Id.* The victim also identified Thomas as the shooter

when the life-flight paramedic asked her what had happened. The victim later died of complications from two gunshot wounds. *Id.* at 714.

On appeal, Thomas argued that his Sixth Amendment right of confrontation was violated when the victim's hearsay statements identifying him as the shooter were admitted through several witnesses including neighbors, paramedics, and police officers. The Georgia Supreme Court concluded that the lower court had properly applied the principles of *Davis* by concluding the statements were not testimonial. The court noted that the victim was speaking about events that had just occurred. And the questioning from all the witnesses was primarily to assist the police in an ongoing emergency. *Id.* at 715. In this case, Gabe's neighbor did not ask Gabe any questions. Rather, Gabe spontaneously called out that Zack Maas had shot him. Gabe was no doubt in shock from what had just happened.

Here, Officer Struble was one of the first officers to arrive at the crime scene. Gabe told him that his stepson had shot him in the back and then later identified his stepson as Maas. Officer Struble had no idea why someone had shot Gabe in the back, where the shooter was located, or whether the shooter might shoot someone else. In *Michigan v. Bryant*, 562 U.S. 344 (2011), the Supreme Court reaffirmed that "the basic objective of the Confrontation Clause . . . is to prevent the accused from being deprived of the opportunity to cross-examine the declarant about statements taken for use at trial." *Id.* at 358. The Court also

revisited the primary purpose test it had announced in *Crawford* and the “ongoing emergency” circumstance addressed in *Davis*. *Id.* at 359.

In *Bryant*, police responded to a 911 call reporting that a man had been shot. When police arrived at the scene, they found the victim with a gunshot wound in his abdomen, in great pain, and speaking with great difficulty. The police asked the victim what happened, who had shot him, and where the shooting occurred. The victim responded by identifying the shooter and stating the shooting occurred at another location. The victim’s conversation with the police lasted between five and ten minutes before the victim was transported to a hospital, where he later died. *Id.* at 349.

In considering whether the statements at issue in *Bryant* were testimonial, the Supreme Court reaffirmed its holding in *Davis* that the existence of an ongoing emergency is an important factor that informs the ultimate inquiry about the primary purpose of an interrogation. *Id.* at 366. The Court further explained that determining the existence of an ongoing emergency is an “objective,” context-dependent inquiry. *Id.* at 359-60, 364. The Court also elaborated that the “existence and duration of an emergency depend on the type and scope of danger posed to the victim, the police, and the public.” *Id.* at 370-71.

The statements Gabe made to the initial responding officers, identifying Maas as the shooter and informing the officers that Maas broke into his house and

shot him in the back, were “made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation [was] to enable police assistance to meet an ongoing emergency.” *Davis*, 547 U.S. at 822. Law enforcement officers had little information about what had transpired other than that an armed person broke into Gabe’s home and shot him in the back and that Gabe was in critical condition. There was an ongoing concern for Gabe’s wellbeing, and an ongoing risk to law enforcement officers, medical providers, and/or other members of the public until the shooter was properly identified and detained. *See Commonwealth v. Middlemiss*, 989 N.E.2d 871, 878-79 (Mass. 2013) (victim’s statements nontestimonial when primary purpose of questioning victim was to address an ongoing emergency where responders had reason to believe perpetrator possessed a gun and could inflict further injury to victim, responding officers, and others).

Gabe’s spontaneous declaration that Maas shot him, which for hearsay purposes meets the definition of an excited utterance under M. R. Evid. 803(2), and his responses to questions the initial responders asked at the crime scene were non-testimonial and admissible. *See State v. Beasley*, 108 N.E.3d 1028, 1064 (Ohio 2018) (A truly excited utterance is unlikely ever to meet the standard to be testimonial.).

C. Gabe's statements to Detective Webster

1. Logan Health

Detective Webster spoke with Maas at the Logan Health Emergency Room for about five minutes around an hour after the shooting. At that time, law enforcement officers did not know the shooter's full name and had not apprehended the shooter. Gabe stated that Maas and Jerum stormed his house, pointed a gun at him, and wanted him to go to Luke's house to get information about stolen property. Gabe also said that Maas had punched him.

The district court, relying on this Court's decision in *Sanchez*, 2008 MT 27, *supra*, admitted the statements under the forfeiture by wrongdoing doctrine. This Court adopted the forfeiture by wrongdoing doctrine in *State v. Sanchez*, 2012 MT 191, 366 Mont. 132, 285 P.3d 540, and concluded that, to the extent the defendant's deliberate acts resulted in the victim's death, the applicability of the forfeiture by wrongdoing doctrine did not hinge on whether the defendant intended to prevent the witness from testifying at a trial. *Id.* ¶¶ 39-47.

After it did so, the United States Supreme Court decided *Giles*, in which it held that the forfeiture by wrongdoing exception to a defendant's Sixth Amendment confrontation right "applie[s] only when the defendant engaged in conduct *designed* to prevent the witness from testifying." *Giles*, 554 U.S. at 359 (emphasis in original). Here, the parties did not argue that Maas killed Gabe to

silence him, and the district court did not conclude that Maas did so. As such, the district court applied the wrong reasoning to conclude that Gabe's statements to Detective Webster were admissible.

Even so, the district court reached the right result because Gabe's statements were nontestimonial. There was still an ongoing emergency to which law enforcement officers were responding. This was when officers learned there was a second person at Gabe's house at the time of the shooting.

Even if this Court were to disagree and conclude that the emergency had subsided, and Gabe's statements were testimonial, any error in admitting these statements was harmless for several reasons. First, Maas admitted to Detective Webster that he shot Gabe in the back, although claiming he did so to protect Jerum from Gabe's baseball bat. Maas' admission to Detective Webster was admissible at trial as an admission by a party opponent under M. R. Evid. 801(2). Regardless of whether Maas testified at his trial, his admission would be before the jury through Detective Webster's testimony.

Second, Jerum testified at trial that they broke into Gabe's house, Maas pulled a gun at Gabe, Jerum took Gabe in a hold, and Maas punched him. Jerum testified to everything Gabe had disclosed to Detective Webster. And, finally, Maas relied upon the affirmative defense of justifiable use of force at trial and admitted that he broke into Gabe's apartment at around 4:30 a.m. on March 13,

2022, and shot him in the back. He claimed he did so to defend Jerum because Gabe was about to hit him with a baseball bat.

When considering whether a confrontation clause error is harmless, this Court considers the importance of the witness' 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. *State v. Johnson*, 2024 MT 306, ¶ 24, 419 Mont. 366, 560 P.3d 1219; *see also State v. Martinez*, 2023 MT 251, ¶ 31, 414 Mont. 340, 545 P.3d 652 (error in admitting testimony of victim's statements through SANE nurse harmless because same testimony properly admitted through other witnesses). The statements Gabe made to Detective Webster, which she repeated at trial, were not important to the State's case because it already had properly admitted statements as to what Gabe reported at the crime scene soon after Maas shot him and fled. And, as set forth above, Jerum testified about what actions he and Maas took during the early morning hours of March 13, 2022. Finally, Maas admitted at trial that he broke into Gabe's apartment and shot him in the back with the gun he brought. Maas claimed he did so to protect Jerum, but the jury did not find Maas' claim credible. There was ample admissible evidence for the jury to reject Maas' assertion that he shot Gabe in the back in defense of Jerum, and the admission of the statements Gabe made to Detective Webster were repetitive of Jerum's testimony.

2. Statements Gabe made at Harborview

Detective Webster interviewed Gabe a second time on March 14, 2022, after he had been emergently transferred to Harborview Medical Center in Seattle. Assuming for the sake of argument that Gabe's statements to Detective Webster were testimonial, admission of the statements was harmless for the same reasons set forth above. Additionally, in his statement to Detective Webster, Gabe admitted that he grabbed a baseball bat, which was helpful, not harmful, to Maas' affirmative defense.

D. Gabe's statements to family members were nontestimonial.

As Gabe was fighting for his life in a hospital far away from his home, two of his brothers went to visit him. Gabe's statements to his brothers were personal conversations with family members concerning what he had endured. Gabe was still processing being shot by Maas, who he thought of as a stepson, contemplating whether he would survive, and, if he did survive, what his life would look like since he was partially paralyzed. There is nothing in the record to remotely suggest these personal conversations with family members were made with the purpose of using them in a pending criminal case.

Gabe's brothers did not visit him at the behest of law enforcement officers or the prosecution. Gabe's brothers visited him to provide him comfort and encouragement. It is not surprising that Gabe would discuss with his brothers what

had occurred since there was probably little else on Gabe's mind. The primary purpose of these conversations was not to create an out-of-court substitute for trial testimony. Gabe's statements to his brothers were nontestimonial. *See, e.g., State v. Blackstock*, 598 S.E.2d 412, 420 (N.C. Ct. App. 2004) (statements victim made to his wife and daughter while in hospital were nontestimonial, personal conversations made when victim's condition was improving).

Even if this Court were to conclude that Gabe's statements to his brothers were testimonial, any error in admitting the statements was harmless for the reasons already articulated above. Gabe's statements to his brothers were, for the most part, consistent with what he had initially told responding officers and Detective Webster.

The district court properly admitted Gabe's statements at trial.

III. The district court properly exercised its discretion in allowing the State to rebut Maas' self-serving testimony that he was a kind and peaceable person.

Maas next argues that the district court abused its discretion when it allowed the State to question him about his juvenile adjudication for shooting a woman in the head with a BB gun after Maas testified that he was kindhearted and not a fighter. Maas volunteered this description of himself during cross-examination when he provided a nonresponsive, self-serving answer.

Evidence of a person’s character or a trait of character is generally not admissible for proving the person acted in conformity therewith on a certain occasion. M. R. Evid. 404(a). But an accused may offer a pertinent character trait, and, if he does so, the prosecution may rebut the same. M. R. Evid. 404(a)(1). As this Court has long held, “The rules of evidence were not intended to muzzle the State against the defendant’s deliberate attempts to mislead the jury” *State v. Kutnyak*, 211 Mont. 155, 168, 685 P.2d 901, 908 (1984), quoting *State v. Austad*, 197 Mont. 70, 641 P.2d 1373 (1982). After Maas volunteered that he was kindhearted and not a fighter, the State was permitted to ask about his prior adjudication for shooting a woman in the head with a BB gun.

Maas seemingly concedes that he did open the door to the prosecutor’s question concerning his prior adjudication but argues that allowing the prosecutor to ask him about the prior adjudication, was unduly prejudicial under M. R. Evid. 403. (Appellant’s Br. at 21.) Under Rule 403, district courts have broad discretion to weigh the probative value of evidence against the risk of unfair prejudice. *State v. Madplume*, 2017 MT 40, ¶ 32, 386 Mont. 368, 390 P.3d 142. The balancing is fact-specific, and the district court is in the best position to determine whether the evidence is unfairly prejudicial. *State v. Strizich*, 2021 MT 306, ¶ 34, 406 Mont. 391, 406 P.3d 575. Probative evidence is always prejudicial to some degree. *Madplume*, ¶ 33. Evidence is unfairly prejudicial only “if it arouses the jury’s

hostility or sympathy for one side without regard to its probative value, if it confuses or misleads the trier of fact, or if it unduly distracts from the main issues.” *State v. Hicks*, 2013 MT 50, ¶ 24, 369 Mont. 165, 296 P.3d 1149. The balancing test under Rule 403 favors admission. *Madplume*, ¶ 33.

Maas argues that the questions concerning his prior act of shooting a woman in the head with a BB gun were unduly prejudicial because they weakened his justifiable use of force defense by suggesting he had a propensity for violence. But the State’s clear purpose in questioning Maas about his prior act was to rebut his claim that he was kindhearted and not a fighter. Also, there was other evidence admitted without objection that showed Maas had threatened both Gabe and his good friend Jerum with physical violence through text messages, he had a temper, he intended to seek revenge, and he thought Gabe got what he deserved. Even if this Court were to conclude that referencing Maas’ prior adjudication was more prejudicial than probative, the other admissible evidence was far more damaging to Maas’ defense that he shot Gabe in the back to protect his friend, whom he had previously threatened with harm.

The district court provided the jury with a cautionary instruction about the purpose of the evidence and how the jury could completely disregard it. The evidence against Maas was overwhelming and his claim of justifiable use of force

lacked credibility. There was no prejudicial error resulting from the State's questioning of Maas about his prior act of shooting a woman with a BB gun.

CONCLUSION

The State respectfully requests that this Court affirm the trial court's evidentiary rulings and affirm Maas' conviction and sentence.

Respectfully submitted this 18th day of September, 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 9,865 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

/s/ Tammy K Plubell

TAMMY K PLUBELL

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0273

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ZACKARY MATTHEW MAAS,

Defendant and Appellant.

APPENDIX

Notice re: Defendant's Motion in Limine No. 3 (Doc. 64)..... Appendix A

CERTIFICATE OF SERVICE

I, Tammy K Plubell, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 09-18-2025:

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