IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0187

STATE OF MONTANA,

Plaintiff and Appellee,

v.

WESLEY SMITH,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, the Honorable Leslie Halligan, Presiding

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Mr. Smith maintains the arguments in his opening brief and respectfully replies to the State's argument as follows:

ARGUMENT

I. The State's new argument on appeal that E.G.'s forensic interview video was admissible because the Defense failed to prove the video was inadmissible as a prior inconsistent statement lacks merit and should be rejected by the Court.

The State asserts that because the forensic interview video contains both inconsistent and consistent statements as compared to E.G.'s trial testimony, it is admissible under Mont. R. Evid. 801(d)(1)(A) as mixed inconsistent and consistent statements. (Appellee's Br. at 24 – 27.) There are several problems with this assertion. First, the Prosecutor did not offer the video as a prior inconsistent statement under Rule 801(d)(1)(A) during trial. This is a new argument the State advances on appeal. During trial, the Prosecutor explained she wanted to play the video for the jury as "demeanor" evidence to bolster E.G.'s credibility after E.G. testified during cross-examination that she had told two different versions of the pole-dancing story to a friend and the school nurse before telling the story she gave in her forensic interview and during trial. To get the video admitted, the Prosecutor tried to

shoehorn it into Rule 801(d)(1)(B) as a prior consistent statement. (D.C. Doc. 65; Tr. at 486 – 90, 497 – 500, 506 – 510; App. A at 4 – 6.)

The District Court accepted the State's argument, ruling, "Therefore, pursuant to Rule 801(d)(1)(B), the Video is not hearsay and thus is not considered hearsay and is admissible." (App. A at 6.) In support of its decision, the District Court string-cited cases holding that prior, out-of-court statements by a child were admissible as prior inconsistent statements under Rule 801(d)(1)(A), where the inconsistent statements were mixed with consistent statements as compared to trial testimony. (App. A at 6, *citing without discussion State v. Howard*, 2011 MT 246, 362 Mont. 196, 265 P.3d 606; *State v. Lawrence*, 285 Mont. 140, 948 P.2d 186 (1997); *State v. Baker*, 2013 MT 113, 370 Mont. 43, 300 P.3d 696; *State v. Mederos*, 2013 MT 318, 372 Mont. 325, 312 P.3d 438.)

These cases, however, are inapposite to the issue presented in this case. As argued by the party moving to admit the video, i.e., the State, E.G.'s video statements were consistent with her trial testimony. Contrary to the State's position now on appeal, the Prosecutor recognized that the video did not contain a mix of consistent and

inconsistent statements. (Appellee's Br. at 17 – 18.) Moreover, the District Court expressly admitted the video as a prior consistent statement under Rule 801(d)(1)(B), ruling that the State's argument for admissibility was "similar enough" to the rule's language of "improper influence or motive" for the District Court's satisfaction. (App. A at 6.)

In an attempt to find mixed statements, the State points to facts testified to by E.G. at trial that were not mentioned during her forensic interview, and conversely to facts stated by E.G. at her interview that were not testified to at trial. (Appellee's Br. at 17 – 18.) But Rule 801(d) does not provide an exemption against hearsay to supplement a witness's testimony. Instead, Rule 801(d) excludes out-of-court statements from hearsay if they are used to impeach in-court testimony as an inconsistent statement or as a consistent statement offered to rebut a charge of subsequent fabrication, improper influence or motive. E.G.'s forensic interview fell within neither of these exemptions.

Retreating from its position in District Court, the State does not argue that the video was admissible as a prior consistent statement, but rather contends that even if the video is inadmissible hearsay, the District Court's error in admitting it was harmless. (Appellee's Br. at

26 – 27, *citing Mederos*, ¶ 24, and *State v. Van Kirk*, 2001 MT 184, ¶¶ 43 – 44, 47, 306 Mont. 215, 32 P.3d 735.) Apparently, the State agrees with Mr. Smith that E.G.'s forensic interview video should not have been admitted on the very ground argued by the Prosecutor and allowed by the District Court. The State is incorrect, however, to contend that the video was simply cumulative of other, unobjected-to testimony and did not prejudice Mr. Smith because, in the State's view, exclusion of the video would not have changed the outcome of the proceeding. (Appellee's Br. at 27.)

Clearly, the Prosecutor believed she needed the video to bolster E.G.'s credibility, because she said so to the judge: "It [the video] is primarily offered to rebut the defense's attack on the victim's credibility, by showing relevant proof of her demeanor, articulation, eye contact, advanced maturity for a then 9-year-old, her emotional reactions to the content and fear." (D.C. Doc. 65 at 1.) The Prosecutor further purported to shift the burden to the Defense to exclude the video under the applicable hearsay exemption, asserting the Defense "cannot have it both ways". (D.C. Doc. 65 at 1 – 2.) The Defense did not have the burden to find a way to keep out the video, even though there

was no dispute the video was relevant under Rule 402. (App. A at 3.) The video was an out-of-court statement offered for the proof of the matter asserted. (App. A at 4.) It was not admissible unless the State, as the party moving its admission as an exhibit, could prove it was either a prior inconsistent or consistent statement under Rule 801(d)(1). The Defense's arguments simply responded to the Prosecutor's explicit, primary reason to introduce the video to bolster E.G.'s credibility after the Defense "attacked" it during cross-examination. (D.C. Doc. 65 at 1 – 2.)

Relying on the State's attempt to shift the burden to the Defense, the District Court misinterpreted the law. (App. A at 3 (asserting that the non-moving party, i.e., Mr. Smith, possessed the burden to prove the video was not admissible).) The District Court found that the defense "waffled" in court on whether E.G.'s statements were consistent or inconsistent with her trial testimony, and "equivocated on whether they implied the alleged victim had an improper influence or motive, or subsequently fabricated any or all of her statement." (App. A at 5 – 6; Appellee's Br. at 26.) But the burden was on the State, not the Defense, to articulate a theory of admissibility for E.G.'s video statements that

excluded them from the bar against hearsay. And, as the District Court recognized, the State's theory was the video was admissible to show E.G.'s candor and reliability and as a prior consistent statement under Rule 801(d)(1). (App. A at 4.)

E.G. already had testified about the alleged incident. The video reiterated the story E.G. told in her testimony. Of course E.G.'s story was relevant to the State's prosecution. But the pertinent issue is not relevance. It is whether E.G.'s out-of-court statements were admissible to bolster her testimony. And the party moving to admit the video shouldered the burden to establish admissibility under the rules of evidence.

The District Court's error was not harmless. The video was evidence of E.G.'s demeanor, played for the jury immediately prior to Mr. Smith's testimony and after the Defense had effectively undermined E.G.'s credibility during cross-examination. The State was allowed to rehabilitate E.G.'s direct testimony, unchallenged by cross-examination, by playing the video for the jury after E.G. had been excused as a witness.

Based on the sequence of events at trial, and on the prosecutor's emphasis on the video during closing argument, this Court cannot find that Mr. Smith would have been convicted anyway, even if the video had been excluded. (See Appellee's Br. at 27.) The video was not merely cumulative of other testimony. It bolstered E.G.'s story told during direct examination and denied the Defense its confrontation right to cross-examine E.G. after the video was played. The video was inadmissible under either prong of Rule 801(d)(1) and playing it for jury prejudiced Mr. Smith's right to a fair trial by an impartial jury.

II. Plain error review is appropriate to rectify prosecutorial misconduct during closing argument that violated Mr. Smith's fundamental right to a fair trial.

Mr. Smith rests on the arguments set forth in his opening brief concerning prosecutorial misconduct. (Appellant's Br. at 28 – 34.) Notwithstanding the State's arguments against plain error review, declining review of the Prosecutor's misleading and impermissible comments would tacitly encourage prosecutors to cross over the edge of permissible advocacy during closing argument, as there would be little or no risk of a conviction being reversed because of improper remarks. (*See* Appellee's Br. at 29 – 35.) The District Court's jury instructions

did not eliminate the harm to Mr. Smith of the Prosecutor relying on the video to try to prove E.G. was telling the truth, misstating or misrepresenting witness testimony, misstating the law, or vouching for E.G.'s credibility.

III. Mont. Code Ann. § 45-5-625(4)(b) is facially unconstitutional because it requires mandates lifetime monitoring of people by satellite without regard to individual circumstances, even after a former defendant's term-of-years sentence has been fully discharged.

The State argues that Mr. Smith's challenge to the facial constitutionality of Mont. Code Ann. § 45-5-625(4)(b) is a "thinly veiled 'as-applied' challenge" to his own sentence. (Appellee's Br. at 40.) The State quarrels that Mr. Smith has failed to demonstrate no set of circumstances exist under which the statute would be valid or that it lacks a plainly legitimate sweep. (Appellee's Br. at 39.) Noting that the Defense did not object below to the lifetime monitoring condition at sentencing, the State observes that Mr. Smith waived an as-applied challenge to his own sentence. (Appellee's Br. at 39 – 41.)

To be clear, Mr. Smith maintains that the statute is facially unconstitutional because it mandates lifetime satellite monitoring of people whose sentences have been fully discharged. The statute is not

discretionary. Mr. Smith has not disputed that the State is authorized to monitor Level 3, "sexually violent predators" during any period of community supervision, pursuant to Mont. Code Ann. §§ 46-23-509, -1010.

Here, the sentencing judge recognized she must impose the condition, even though her oral pronouncement otherwise conveyed that lifetime GPS monitoring was inappropriate for Mr. Smith, whom she designated Level 1, at low risk for a repeat sexual offense. (App. B at 679 – 80, 687.) The statute's reach is unconstitutionally overbroad under any circumstances because it requires the State to monitor people for the rest of their lives after their fundamental liberties have been fully restored following discharge of their sentences. That Mr. Smith is among the people who would be subject to ongoing government supervision by satellite after his rights are restored – and further notwithstanding that he has been determined at low risk to commit a sexual offense – does not transform his facial challenge into an as-applied challenge. Rather, the potential infringement of his own rights provides him standing in this appeal to facially challenge the statute, even though he did not object below to the sentencing condition.

Applying the Court's analysis from *State v. Yang*, 2019 MT 266, 397 Mont. 486, 452 P.3d 897 (*en banc*), to Mont. Code Ann. § 45-5-624(4)(b) is a straightforward endeavor. This statute requires a sentencing judge to impose a mandatory lifetime satellite monitoring condition without permitting the judge to consider whether the condition is excessive. There is no set of circumstances under which a judge may determine that satellite monitoring for the rest of a defendant's life is grossly disproportionate to the offense committed. *Yang*, ¶ 23.

Mont. Code Ann. § 45-5-625(4)(b) is facially unconstitutional, pursuant the Court's reasoning in *Yang*. As the State acknowledges, it is illegal to be sentenced pursuant to an unconstitutional statute. *Yang*, ¶ 11. (Appellee's Br. at 40.)

CONCLUSION

For the reasons above and those set forth in his opening brief, Mr. Smith respectfully requests the Court to reverse his conviction and remand for a new trial. Mr. Smith also requests the Court to declare Mont. Code Ann. § 45-5-624(4)(b) facially unconstitutional and strike Condition 39 in his sentence.

Respectfully submitted this 18th day of November, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 2,007, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Deborah S. Smith
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CERTIFICATE OF SERVICE

I, Deborah Susan Smith, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 11-18-2020:

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