DA 19-0584

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 11

STATE OF MONTANA,

Plaintiff and Appellee,

v.

NICK LENIER WILSON,

Defendant and Appellant.

APPEAL FROM: District Court of the Twenty-First Judicial District,
In and For the County of Ravalli, Cause No. DC 18-88
Honorable Jennifer B. Lint, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

L. Amelia Swanson, Attorney at Law, Helena, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Brad Fjeldheim, Assistant Attorney General, Helena, Montana

William E. Fulbright, Ravalli County Attorney, Hamilton, Montana

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Submitted on Briefs: November 17, 2021

Decided: January 18, 2022

Filed:

Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 A Ravalli County jury convicted Nick Lenier Wilson of Theft and Burglary for stealing merchandise from the Ravalli Services Corporation (RSC) donation intake center. He raises the following issues on appeal.

1. *Did the District Court abuse its discretion when it ruled that F.Z., a developmentally disabled witness, was not competent to testify without examining F.Z. at the competency hearing?*

2. *Did the District Court err when it excluded, as improper character evidence, testimony that Wilson applied for a job at a motel one year before committing the charged offenses?*

3. *Did the District Court abuse its discretion when it permitted the State to call a rebuttal witness in violation of the court's Rule 615 order?*

We affirm the District Court's rulings.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Unemployed for several years, Wilson performed odd jobs, such as snow removal and cleaning, in Hamilton, Montana. He often worked without the expectation of pay, hoping that someone would hire him. According to Wilson, he sometimes volunteered at RSC, a nonprofit corporation that provides services for individuals with developmental, intellectual, and physical disabilities. RSC operates a thrift store in Hamilton, where it sells donated merchandise to raise money for its clients. RSC accepts donations through its intake center. When RSC receives defective merchandise, it either repairs and sells it or discards it.

¶3 Wilson claims that on March 14, 2018, he helped F.Z., a developmentally disabled client and employee of RSC, discard some junk at the intake center. While he was there,

Wilson noticed water puddles inside the intake center due to heavy rainfall that week. He purportedly offered to clean the puddles but was told he could not clean during business hours. According to Wilson, he left the intake center between 3:30 p.m. and 4:00 p.m. Believing he had permission to clean the puddles after 5:00 p.m., Wilson returned to the intake center at about 1:00 a.m. on March 15 and entered through the back door, which he claims was left unlocked for him. While there alone, he stashed several donated items, including electronics, recreation equipment, and clothes, outside the intake center. Shortly after 3:30 a.m., he walked to the home of his girlfriend, Tiva Merson, and borrowed her van. Wilson returned to the intake center at around 4:00 a.m. and loaded the stashed items into Merson's van. The merchandise he took totaled less than $1,500 in value. He stored most of the stolen goods in Merson's garage and gifted many of the items to Merson and her children in the ensuing days.

¶4 The State charged Wilson with felony burglary under § 45-6-204, MCA, and with misdemeanor theft under § 45-6-301, MCA. Since the beginning of the investigation, Wilson has admitted to stealing the items from the intake center. His defense strategy was that, although he committed theft, he did not commit burglary because he was authorized to clean the intake center. To support this theory, Wilson planned to call F.Z. as a witness. The court, however, granted the State's motion in limine to exclude F.Z. from testifying on the ground that he lacked the capacity to serve as a witness.

¶5 The State's theory of the case was that Wilson was an unemployed drug user who undermined and took advantage of the developmentally disabled clients and employees of RSC. At trial, the State played surveillance camera footage that showed Wilson moving

items around the intake center and behaving erratically. The videos showed that Wilson never turned on any lights, even though he spent approximately three hours rummaging through donated merchandise. Officer Scoggins of the Hamilton Police Department testified that the video showed Wilson ducking and crouching, ostensibly to avoid being seen through the windows. Wilson testified that he was crouched down cleaning the water damage with rags he found in the intake center. Because of prior damage to the intake center's doors, the police could not determine whether Wilson's entry was forced, and the security footage was inconclusive. Jason Garrard, who oversees information technology and internal investigations for RSC, testified that the video footage showing the power with which Wilson opened the door suggested that he forced it open. The State also played a video of Wilson's interview with Detective Altschwager, in which Wilson admitted to stealing the merchandise and to using drugs that day.

¶6 Wilson testified on his own behalf and called two witnesses: Merson and Deborah Dubois Porter (Dubois Porter). Merson testified to Wilson's tendency to work unpaid odd jobs in Hamilton and corroborated some parts of his testimony. Dubois Porter testified that Wilson applied for employment at the City Center Motel in 2017, but the court struck her testimony as improper character evidence.

¶7 The jury convicted Wilson of theft and burglary, and the court sentenced him to twenty years in prison, noting among other factors his extensive criminal history.

STANDARD OF REVIEW

¶8 We review evidentiary rulings for an abuse of discretion, "which occurs when a district court acts arbitrarily without conscientious judgment or exceeds the bounds of

reason, resulting in substantial injustice." *State v. Ellison*, 2018 MT 252, ¶ 8, 393 Mont. 90, 428 P.3d 826 (citations omitted). We review de novo a district court's interpretation of the Montana Rules of Evidence. *Ellison*, ¶ 8 (citations omitted).

DISCUSSION

¶9 *1. Did the District Court abuse its discretion when it determined that F.Z. was not competent to testify?*

¶10 Before trial, the State moved in limine to exclude F.Z. from testifying. The State attached to its motion an affidavit of Rebecca Merfeld, F.Z.'s targeted case manager, who attested that F.Z. was not a competent witness because he could not understand his duty to tell the truth. Wilson opposed the motion, and the District Court set a competency hearing for January 29, 2019. In the meantime, the State submitted a court-ordered report by Dr. Gerry D. Blasingame, titled "[F.Z.'s] competence to testify in Court." Dr. Blasingame based his report on an unrelated July 2018 evaluation of F.Z. and "approximately 200 pages of [F.Z.'s] case documentation" that he reviewed in preparing the report. Dr. Blasingame opined that F.Z. did not have the capacity to serve as a witness in court. Dr. Blasingame reported that F.Z. experiences "hallucinations and delusions"; "impaired reality contact, preservation, disorganized thinking, and loose associations"; and impaired long-term memory. Because of his mental illness, F.Z. believes many false things to be true, and his "ability to understand the abstract concept of 'duty' or moral responsibility to tell the truth is compromised[.]" Dr. Blasingame also estimated F.Z.'s mental age to be ten or eleven years old. Dr. Blasingame was not present at the competency hearing, however, and could not be examined by defense counsel. The State suggested that the court interview F.Z. to

determine F.Z.'s competency, and defense counsel did not object. The court declined, remarking:

> My comfort level with interviewing a 10-year-old and assessing their ability . . . is very different than interviewing somebody who has deficits and incapacity issues and functions as a 10-year-old. So I'm inclined to rely more on the doctor's report than substitute my own judgment . . . . I am also extremely sensitive to what the doctor says about [F.Z.] getting agitated or nervous or concerned, and I would try to make it as easy as I could, but I just don't need to get him agitated.

The court continued the competency hearing to give defense counsel an opportunity to confer with Dr. Blasingame. The court held a status hearing on March 14, 2019, after defense counsel had spoken to Dr. Blasingame. Wilson argued that Dr. Blasingame should interview F.Z. again, this time for the specific purpose of determining his ability to testify. The court stated that Dr. Blasingame's report was sufficient to support a finding that F.Z. was incompetent to testify:

> Asking Dr. Blasingame to review [F.Z.] more to me is equivalent of going and getting an expert to give you a different opinion. I'm looking at Dr. Blasingame's report, and he says, "This writer opines that [F.Z.'s] mental illness and cognitive impairments are such that they undermine his capacity to serve as a witness in a court of law." I think he answered the question.
>
> . . .
>
> [I]f you want him evaluated again more thoroughly by Dr. Blasingame or somebody else, you're welcome to do that, but it's not going to be on the state's dime.

The court granted the State's motion in limine. A week later, at defense counsel's request, Dr. Blasingame interviewed F.Z. again. He submitted a second report, again concluding that F.Z. was not competent to testify.

¶11 "We review a district court's ruling on witness competency for abuse of discretion." *State v. Longfellow*, 2008 MT 343, ¶ 9, 346 Mont. 286, 194 P.3d 694 (citation omitted). Generally, "[e]very person is competent to be a witness except as otherwise provided in these rules." M. R. Evid. 601(a). A witness may be disqualified, however, if the court finds that the person "is incapable of expression concerning the matter . . . [or] the witness is incapable of understanding the duty of a witness to tell the truth." M. R. Evid. 601(b). The Commission Comments make clear that the rule does not categorically exclude a person "of unsound mind" from testifying; the inquiry, rather, is whether the person is "capable of giving a correct account of the event and [of] appreciating the oath." Comm'n Comments to M. R. Evid. 601(b) (1976). "If a person meets this standard, the credibility of his testimony is left to the trier of fact." Comm'n Comments to M. R. Evid. 601(b) (1976). "A witness appreciates her duty to tell the truth if she understands the difference between the truth and a lie and understands that she has to tell the truth in court." *State v. Olson*, 286 Mont. 364, 370, 951 P.2d 571, 575 (1997).

¶12 Wilson argues that he should have been permitted to call F.Z. to testify. He contends that the District Court should have questioned F.Z. in addition to relying on Dr. Blasingame's report. He also asserts that the court shifted the burden to Wilson to prove that F.Z. was a competent witness by asking defense counsel to arrange a second evaluation of F.Z. by Dr. Blasingame. Wilson relies primarily on *State v. Stephens*, 198 Mont. 140, 645 P.2d 387 (1982), and *Olson*, 286 Mont. 364, 951 P.2d 571.

¶13 At issue in *Stephens* was the competency of a witness to a 1980 robbery. *Stephens*, 198 Mont. at 141, 645 P.2d at 388. The witness, "Bex," had been evaluated at

Warm Springs State Hospital between 1974 and 1976 after being charged with arson, and he was found unfit to stand trial. *Stephens*, 198 Mont. at 142, 645 P.2d at 388-89. The defense and the prosecution examined Bex in the presence of the trial judge. *Stephens*, 198 Mont. at 141-42, 645 P.2d at 388-89. The judge also reviewed materials related to Bex's old Warm Springs evaluations. *Stephens*, 198 Mont. at 142, 645 P.2d at 389. The records showed that, when he was evaluated in 1975 and 1976, Bex was diagnosed with some mental disorders but that his condition had improved. *Stephens*, 198 Mont. at 143-44, 645 P.2d at 389-90. The district court judge considered the Warm Springs reports and watched Bex answer the attorneys' questions in court, from which he concluded that Bex was capable of expressing himself and that Bex understood the duty to tell the truth. *Stephens*, 198 Mont. at 144, 645 P.2d at 390. Because neither the Warm Springs evaluations nor the attorneys' in-camera examination supported a finding of incompetency, we held that the district court did not abuse its discretion when it determined that Bex was competent to testify. *Stephens*, 198 Mont. at 143-44, 645 P.2d at 390.

¶14 Wilson cites *Stephens* for the proposition that reports alone cannot support a finding of incompetency. He claims *Stephens* demonstrates that a witness interview is always necessary before a court can determine a witness's competency or incompetency. We disagree. We held in *Stephens* that the trial court did not abuse its discretion by allowing Bex to testify because the "record disclose[d] facts upon which the District Court would properly reach" its conclusion: neither the five-year-old Warm Springs reports nor the in-court examination supported a finding that Bex was incompetent to testify.

Stephens, 198 Mont. at 143-44, 645 P.2d at 390. We did not comment on whether, under a different set of facts, the Warm Springs reports would or would not have been sufficient to support such a determination.

¶15 The District Court here had a recent affidavit from F.Z.'s case manager and a recent report from F.Z.'s mental health care provider, both advising that F.Z. was not capable of testifying in a court of law. Dr. Blasingame specifically reported that F.Z.'s disability adversely affects his remote memory and hinders his ability to distinguish between truth and falsity. From these reports, the District Court reasonably could conclude that F.Z. did not "understand[ ] the difference between the truth and a lie" and did not understand "that [he] has to tell the truth in court." *See Olson*, 286 Mont. at 370, 951 P.2d at 575. It was within the trial court's discretion to forego its own evaluation in deference to Dr. Blasingame's report.

¶16 We considered in *Olson* whether a six-year-old witness was competent to testify. *Olson*, 286 Mont. at 371, 951 P.2d at 575. The defendant argued on appeal that the witness never expressed "on her own an appreciation of her duty to tell the truth." Brief of Appellant at 7, *State v. Olson*, 286 Mont. 364, 951 P.2d 571 (1997) (97-077). We observed, however, that the transcript showed the witness's ability to give correct answers to questions about the prosecutor's attire and the people present in the courtroom. *Olson*, 286 Mont. at 371, 951 P.2d at 575. Her answers showed she understood that giving false answers to questions would be lying. *Olson*, 286 Mont. at 371, 951 P.2d at 575. Noting that "[w]itness competency is within the discretion of the trial court," we concluded that the record reflected the witness was able to differentiate between a truth and a lie, and

"[s]he acknowledged it was a good thing to tell the truth and a bad thing to lie." *Olson*, 286 Mont. at 370-71, 951 P.2d at 575.

¶17 Wilson argues that, like the child witness in *Olson*, F.Z. should have been questioned in court about his ability to differentiate between a truth and a lie because F.Z. has the intellectual capacity of a minor. The *Olson* court, however, did not have any reports evaluating the witness. It instead correctly based its competency determination on the witness's answers in court. Here, the trial court had two reports from persons familiar with F.Z., including a qualified mental health expert, that specifically addressed F.Z.'s ability to testify in court. Though such reports are not necessary to determine a person's competency to testify, the District Court did not act arbitrarily by declining to question F.Z. directly because the reports prepared by the professionals were sufficient.

¶18 We find no support in the record for Wilson's second contention that the District Court improperly shifted the burden regarding F.Z.'s competency to the defense. At the March 14, 2019 hearing, the court made its ruling based on Dr. Blasingame's initial report. The court noted that the State had the burden to show F.Z. was not competent to testify but concluded that the State did not have the burden to pay for a second examination by Dr. Blasingame because the first report directly addressed the issue of competency. The court did not "shift the burden" of persuasion to Wilson by requiring him to pay for a further follow-up examination.

¶19 There being substantial evidence in the record to support its finding, the District Court did not abuse its discretion by excluding F.Z. as a witness on the ground that he was incompetent to testify.

¶20 *2. Did the District Court err when it excluded Dubois Porter's testimony that Wilson applied for a job at a motel in 2017?*

¶21 Before the start of Wilson's case-in-chief, the State objected in-chambers to Dubois Porter testifying because she had no knowledge of anything related to the charged offenses. Defense counsel argued that Dubois Porter's testimony would corroborate Wilson's claim that he frequently volunteered and performed odd jobs in search of employment. The court reluctantly allowed Dubois Porter to testify but warned defense counsel that her testimony might implicate M. R. Evid. Rule 404. Dubois Porter testified that in 2017 Wilson offered to remove snow for $2 at the City Center Motel, where she worked. Dubois Porter offered to pay Wilson $10 for his work, but he refused to accept anything greater than the $2 for which they had bargained. She testified that Wilson subsequently applied for a job at the motel but, because Wilson's phone number changed shortly thereafter, the motel management was not able to contact him. When defense counsel passed the witness, the State objected to the entirety of Dubois Porter's testimony on relevancy and character evidence grounds. The court agreed and instructed the jury to disregard Dubois Porter's testimony.

¶22 Though character evidence is generally inadmissible, "[e]vidence of a pertinent trait of character offered by an accused" is admissible. M. R. Evid. 404(a)(1). Montana Rule of Evidence 404(a)(1) is similar to its federal counterpart. *See* Comm'n Comments to M. R. Evid. 404(a) (1976); Fed. R. Evid. 404(a)(2). Rule 405 governs the methods by which admissible character evidence may be introduced. Comm'n Comments to M. R. Evid. 405 (1976). A party may offer evidence of a witness's character trait

through: (1) testimony as to reputation; (2) testimony in the form of an opinion; or (3) specific instances of conduct. M. R. Evid. 405; Comm'n Comments to M. R. Evid. 405 (1976). The first two, reputation testimony and opinion testimony, may be used "[i]n all cases" in which character evidence is admissible. M. R. Evid. 405(a). Use of the third method, specific instances of conduct, is limited to three circumstances: (1) cross-examination; (2) when "character or a trait of character of a person *is an essential element of a charge, claim, or defense*"; or (3) "where the character of the victim relates to the reasonableness of force used by the accused in self defense." M. R. Evid. 405 (emphasis added). The first two circumstances are identical to those in Fed. R. Evid. 405. Comm'n Comments to M. R. Evid. 405 (1976).

¶23 The parties agree that Dubois Porter's testimony regarding Wilson's snow removal and job application was character evidence. They agree also that her testimony introduced a "specific instance of conduct." Wilson argues that this evidence was admissible because his tendency to volunteer and work odd jobs in search of employment was a pertinent character trait that was essential to the determination of the case. He contends that Dubois Porter's testimony contradicted the State's suggestion in its opening statement that some people, like Wilson, see the disabled as "something less" while supporting his theory that he was volunteering at RSC in hopes of landing a job. The State counters that Dubois Porter's testimony was used merely to support Wilson's credibility as a witness and that it was an improper specific instance of conduct.

¶24 Assuming that Wilson's trait of volunteering and performing odd jobs is "pertinent" within the meaning of Rule 404(a)(1), he still must satisfy Rule 405 to demonstrate error

in the District Court's refusal to admit it. We look to the statutorily defined charges and defenses to determine whether a character trait is an "essential element." *See State v. Sattler*, 1998 MT 57, ¶ 45, 288 Mont. 79, 956 P.2d 54. To determine whether the character a party seeks to prove constitutes an "essential element," we consider whether "proof, or failure of proof, of the character trait by itself actually satisf[ies] an element of the charge, claim, or defense[.]" Robert T. Mosteller, *McCormick on Evidence* § 187 (8th ed. 2020); *see also United States v. Keiser*, 57 F.3d 847, 856 (9th Cir. 1995) (citation omitted).

¶25 The State here needed to prove that Wilson knowingly entered or remained unlawfully in an occupied structure and either had the purpose to commit an offense or purposely or knowingly committed an offense within the structure. *See* § 45-6-204, MCA. At issue in this trial was whether Wilson unlawfully entered or remained in the RSC intake center. The character trait that Wilson argues is pertinent to this element is that he frequently volunteered his services and worked odd jobs in search of more stable employment. Proof of this character trait, by itself, would not establish that Wilson had permission to enter the RSC intake center or whether he instead "entered or remained" unlawfully. Wilson's tendency to volunteer his manual labor in Hamilton does not, therefore, constitute "an essential element of a charge, claim, or defense" in this case. *See* M. R. Evid. 405(b). Because the character trait Wilson sought to prove through the admission of Dubois Porter's testimony was not an essential element, he was not permitted to introduce it using a specific instance of conduct.

¶26 The District Court did not err when it instructed the jury to disregard Dubois Porter's testimony.

¶27 *3. Did the District Court abuse its discretion when it permitted the State to call a rebuttal witness in violation of the court's Rule 615 order?*

¶28 At the beginning of Wilson's trial, the State moved for exclusion of witnesses under M. R. Evid. 615, and the court granted the unopposed motion:

> THE COURT: We're on the record on DC 18-88. Any last motions before we go through exhibits?
>
> MR. GEIST: Just a motion to exclude witnesses.
>
> THE COURT: Ms. Womack.
>
> MS. WOMACK: I thought that was already done.
>
> THE COURT: Well, I just always wait for people to ask, so that's fine. Yep, okay.

During a break in the middle of Wilson's testimony, the State notified the court that it would call Jon "A.J." Cranston, the RSC director of vocational services, as a rebuttal witness. The State had not disclosed Cranston as a witness until that moment. The court and counsel engaged in the following colloquy in chambers:

> THE COURT: And the rebuttal witness, any issue with that?
>
> MS. WOMACK: I'm not sure I know who he is, and I do object. If there was any opportunity that he would be called, then he should not have been in the courtroom. The witnesses were excluded at Mr. Geist's request, and he has sat through this entire testimony. I don't know what he's expected to testify to, but I would object to him being called at this point because he's been in violation of the Court's order excluding witnesses and he's not been identified to me.
>
> . . .
>
> MR. GEIST: Judge, the State is not required to identify rebuttal witnesses except in very narrow circumstances involving affirmative defenses. Again, we had no way of knowing what the defendant was going to testify to. I expect that the witness will get up and directly rebut the testimony of

> Mr. Wilson, the defendant, that he had contact with any individual at Ravalli Services. Basically, just to rebut false testimony, Judge.
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> MS. WOMACK: Who is A.J. Cranston?
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> MR. GEIST: He's the director of Ravalli Services.
>
> THE COURT: Okay. So the State is correct. They don't have any obligation to disclose rebuttal witnesses. Given what Mr. Geist has offered as his potential testimony, . . . I don't see that there's any damage or prejudice by having him sit through some of it, and I don't even know which one he is. But you certainly are welcome to cross-examine on that issue as to whether or not any of the evidence that he heard influenced his testimony.

¶29 Cranston proved to be a beneficial witness for the State because his testimony contradicted much of Wilson's story. Cranston testified that Wilson could not have been helping F.Z. until 3:30 or 4:00 in the afternoon on March 14, 2018, because the RSC client-employees are usually done working by 2:30 p.m. and out of the building by three o'clock. Cranston testified that Wilson was not an RSC volunteer because all RSC volunteers must apply and undergo a thorough volunteer interview and background check and, to his knowledge, RSC has not performed a background check on Wilson. Cranston also testified that the intake center has never had any problems with flooding and that Wilson could not have thrown away any cleaning supplies, as he claimed, on March 15, 2018, because the bins would have been locked.

¶30 Wilson argues that the District Court committed reversible error by allowing Cranston to testify in violation of its Rule 615 order. The State contends that Rule 615 does not prevent the State from calling a rebuttal witness to "contradict or disprove evidence of the defense." *See State v. Garding*, 2013 MT 355, ¶ 38, 373 Mont. 16, 315 P.3d 912 (citation omitted). The State argues that any error in the court's application

of Rule 615 was harmless in any event because Cranston was entitled to be in the courtroom.

¶31 Rule 615 states:

> At the request of a party, the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order on its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

M. R. Evid. 615. The Rule is identical to Fed. R. Evid. 615, with the exception that the federal Rule contemplates a fourth exception. *See* Comm'n Comments to M. R. Evid. 615 (1976); Fed. R. Evid. 615(d). The purpose of Rule 615 is "to prevent fabrication and to uncover fabrication that has already taken place." 1 Weinstein's Evidence Manual § 10.06 (2021).

¶32 Rule 615 "is not permissive" but "mandates that witnesses be excluded" absent a valid exception. *State v. Osborne*, 1999 MT 149, ¶ 28, 295 Mont. 54, 982 P.2d 1045. Because the Rule "makes the exclusion a matter of right," when a party requests an exclusion and no exception applies, the decision is not committed to the trial court's discretion. *United States v. Seschillie*, 310 F.3d 1208, 1213 n.3 (9th Cir. 2002) (citation omitted). But the decision "*whether* a Rule 615 exception applies is reviewed for abuse of discretion." *Seschillie*, 310 F.3d at 1213 n.3 (emphasis in original).

¶33 Though the parties did not cite it, we find one case in which this Court addressed directly whether rebuttal witnesses are within the scope of Rule 615. In *State v. Close*, we held that "[r]ebuttal witnesses are not within the rule governing exclusion of sworn

witnesses from the courtroom during taking of testimony." 191 Mont. 229, 244, 623 P.2d 940, 948 (1981) (citation omitted). The parties cite various other authorities on whether the Rule does or should extend to rebuttal witnesses, but we find it unnecessary to analyze the question further. Not only is *Close* on point, but we agree with the State that Cranston was entitled under other provisions of law to remain in the courtroom throughout the trial.

¶34 We may affirm a trial court on any ground supported by the record, regardless of its reasoning. *See Johnson Farms, Inc. v. Halland*, 2012 MT 215, ¶ 11, 366 Mont. 299, 291 P.3d 1096 (citation omitted); *Rooney v. City of Cut Bank*, 2012 MT 149, ¶ 25, 365 Mont. 375, 286 P.3d 241 (citation omitted); *Conagra, Inc. v. Nierenberg*, 2000 MT 213, ¶ 33, 301 Mont. 55, 7 P.3d 369 (citation omitted). We will not reverse a conviction for an error that does not violate a defendant's substantial rights. Section 46-20-701(1), MCA. The court here reached the correct result, albeit on a different rationale. Despite the exclusion of witnesses under Rule 615,

> the victim of a crime has the right to be present during trial[ ] and may not be excluded from the trial solely because he or she will also be called as a witness. . . . A victim may be excluded only if the trial court finds specific facts supporting exclusion, for disruptive conduct, or from portions of a trial or hearing dealing with sensitive matters personal to a youth.

State v. Braulick, 2015 MT 147, ¶ 24, 379 Mont. 302, 349 P.3d 508 (citing § 46-24-106, MCA). As a director of RSC, the victim in this case, Cranston was entitled to be present in the courtroom during trial, including during the presentation of Wilson's

testimony.[1] The District Court's failure to recognize Cranston as a representative of RSC did not render its ruling in error.

¶35 We agree with Wilson that admission of Cranston's testimony would not be considered harmless as a matter of substance. But because Cranston was not subject to the witness-exclusion rule, harmless-error review does not apply. As the District Court made no error of law by allowing Cranston to testify in rebuttal despite his presence in the courtroom during trial, there is no need to conduct harmless-error review of its decision. The court did not abuse its discretion in allowing him to testify as a rebuttal witness. We will not hold the District Court in error when it, as a matter of law, did not err. Cranston would have been entitled to be present in the courtroom throughout trial, and Wilson's substantial rights were not violated by the District Court's decision to allow him to testify.

CONCLUSION

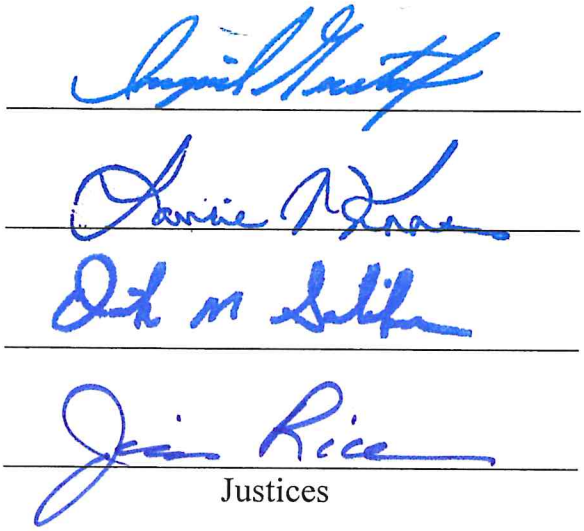
¶36 We affirm Wilson's conviction.

Justice

We Concur:

Chief Justice

[1] A "victim," under § 46-24-106(5), MCA, includes a "person who suffers loss of property[.]" The criminal code generally defines a "person" to include "an individual, business association, partnership, corporation, government, or other legal entity[.]" Section 45-2-101(57), MCA.



Justices

Justice Laurie McKinnon, concurring.

¶37 I agree with the Court's resolution of Issues Two and Three. Regarding Issue One, I am troubled by the District Court's statement that it would not substitute its judgment for that of a doctor who opined that F.Z.'s mental illness and cognitive impairments would "undermine his capacity to serve as a witness in a court of law." In my view, it was the court's role to decide whether F.Z.'s mental impairments prevented him from giving an account of the event and from appreciating the oath. A witness suffering from mental illness and cognitive impairments is not necessarily rendered incapable of expression concerning an event or incapable of understanding the duty to tell the truth. It would seem that few witnesses should be disqualified on this ground and that discretion should be regularly exercised in favor of allowing such testimony, for the question of witness credibility and truthfulness is particularly suited for the jury as one of weight and credibility. The determination of a witness's credibility is within the province of the jury, not a mental health evaluator, and a witness's potential testimony may be kept from a jury only if that witness is disqualified by a judge.

¶38 Our standard of review commits the inquiry to the trial court's discretion. *Ellison*, ¶ 8 . While it appears the District Court declined to exercise its own discretion and instead opted to adopt the opinion of a doctor urging that F.Z.'s ability to testify as a witness was "undermine[d]," I nonetheless believe the record lacks sufficient evidence to show an abuse of discretion. I remain troubled, however, that answering the simple question of whether a person is capable of expression and of understanding an oath should become so

complicated as it has here. Trial courts do not need to become entangled in unnecessary and protracted proceedings involving experts, mental health evaluations, and additional hearings to determine whether the presumption *in favor* of witness qualification has been rebutted. It is a question easily committed to the expertise of judges, who routinely hear and assess communications and understand oaths. Moreover, challenging the mental health of an opponent's witness to prevent that witness from testifying can be an abusive trial strategy. Most of all, I am troubled by the notion that someone who suffers from a mental illness may—by virtue of that illness—have basic functions, like their abilities to communicate and tell the truth, questioned and scrutinized in the depth that was exhibited here.

¶39 I cannot, however, conclude that the District Court acted arbitrarily without conscientious judgment. The District Court deliberated on the issue and considered the evidence before it. I therefore concur with the Court's resolution of Issue One with the aforesaid reservations.

Justice

Justice Ingrid Gustafson, concurring.

¶40 I concur with the Opinion in regard to issues two and three and concur in Justice McKinnon's Concurrence.

¶41 I write to note that the defendant's most compelling issue is more appropriate for sentence review than for appeal. Wilson was charged with entering a thrift store and taking merchandise totaling less than $1,500 in value. At trial, the evidence was less than compelling that Wilson's entry into the intake area of the thrift store was made by force rather than merely through an unlocked door. Wilson has been unemployed for years and clearly has difficulty in decision-making. He appears to be the very type of person RSC's thrift store was designed to assist. It is likely Wilson could have obtained the items he removed at little to no cost by merely requesting assistance directly from the thrift store. Wilson was sentenced to 20 years at MSP for the burglary, with the District Court citing an extensive criminal history as a primary factor in the sentence. In my opinion, the nature and circumstances of the burglary offense here (no use of a weapon or other use of harm or threat and no evidence of forced or damaging entry into the unoccupied sorting bay of the thrift store) do not warrant such a harsh sentence, despite Wilson's criminal history. Wilson clearly experiences challenges in obtaining and maintaining employment, which no doubt has resulted in significant financial insecurity, likely contributing heavily to his poor decision-making. Rehabilitative efforts designed to assist Wilson in acquiring work skills or in assisting him in obtaining a sheltered work situation, if indicated, appears more

appropriate and desirable for both Wilson and Montana taxpayers than a lengthy prison sentence.

Justice