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Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 17-0018

DA 17-0018

IN THE SUPREME COURT OF THE STATE OF MONTANA

2018 MT 150

STATE OF MONTANA,

Plaintiff and Appellee,

v.

MORRIS D. BUCKLES,

Defendant and Appellant.

APPEAL FROM: District Court of the Sixteenth Judicial District,
In and For the County of Custer, Cause No. DC 2015-71
Honorable Michael B. Hayworth, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Penelope S. Strong, Attorney at Law, Billings, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Ryan Aikin, Assistant Attorney General, Helena, Montana

Wyatt A. Glade, Custer County Attorney, Miles City, Montana

Submitted on Briefs: May 2, 2018

Decided: June 15, 2018

Filed:

Clerk

Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 Morris Buckles (Buckles) appeals from a jury verdict of the Sixteenth Judicial District Court, Custer County, finding him guilty of felony use or possession of property subject to criminal forfeiture, felony criminal possession of dangerous drugs, misdemeanor criminal possession of dangerous drugs, and misdemeanor criminal possession of drug paraphernalia. We reverse and remand for a new trial.

¶2 We restate the dispositive issue on appeal as follows:

Whether the District Court abused its discretion in admitting evidence of Buckles's Utah drug charges.

FACTUAL AND PROCEDURAL BACKGROUND

¶3 On May 10, 2015, Montana Highway Patrol Trooper Troy Muri (Trooper Muri) stopped Buckles for speeding. As Trooper Muri approached the vehicle he noticed an odor of marijuana coming from inside the vehicle. Trooper Muri asked Buckles for identification, registration, and insurance. Buckles acknowledged he did not have his driver's license at that time, but handed over registration and insurance. Trooper Muri questioned Buckles regarding the odor. Trooper Muri asked Buckles to step out of the vehicle and patted him down. The pat down did not reveal a weapon. Trooper Muri then asked Buckles to stand in front of his patrol car while he identified Buckles. As Trooper Muri and Buckles approached the patrol car, Trooper Muri saw Buckles throw something to the side of the road. Trooper Muri put Buckles in handcuffs and retrieved the item that was thrown. The item recovered was a small glass jar containing marijuana. Trooper Muri

then searched Buckles and discovered a methamphetamine pipe and $740 in cash bound with a rubber band.

¶4 Once Trooper Muri identified Buckles, he asked where Buckles was headed. Buckles stated he was headed to Billings. Buckles was then given his *Miranda* rights. Buckles admitted to Officer Muri he is an addict and uses drugs on a regular basis. Buckles refused to allow Trooper Muri to search his vehicle. Trooper Muri proceeded to impound the car to obtain a search warrant. Two days later a search of the car revealed a second methamphetamine pipe, two cell phones, a GPS, and a bank bag containing an additional $20,400 in cash, bound with rubber bands.

¶5 On October 8, 2015, Buckles was charged by Information with four counts: use or possession of property subject to criminal forfeiture, a felony; criminal possession of dangerous drugs, a felony; possession of dangerous drugs, a misdemeanor; and possession of drug paraphernalia, a misdemeanor. Prior to trial, the State indicated it intended to introduce Buckles's subsequent drug charges filed in Utah (Utah drug charges). These charges occurred in February 2016, nine months after Buckles was stopped for speeding by Officer Muri.

¶6 The District Court held a jury trial on September 27-28, 2016. At the conclusion of the first day of trial, the State brought forth the issue of having Drug Task Force Agent Jeffrey Faycosh (Agent Faycosh) testify regarding Buckles's Utah drug charges. The State

prepared a trial brief on the matter.[1] Defense counsel objected to the admittance of such evidence, arguing relevance and prejudice. The District Court took the matter under advisement and stated it would make a ruling the following morning. The following morning, the District Court ruled from the bench, allowing Agent Faycosh to testify as to Buckles's Utah drug charges to prove intent. The District Court found that the Utah drug charges were relevant to the State's theory that Buckles intended to use the cash on his person and in his vehicle to commit an illegal drug transaction. However, the District Court ordered such testimony be elicited on rebuttal, not in the State's case-in-chief, and that if elicited, a limiting instruction be provided to the jury.

¶7 During the State's case-in-chief, the State presented evidence regarding its theory that Buckles was traveling west to engage in a drug transaction with the $21,220.[2] Officer Muri testified Buckles stated he was traveling from Poplar to Billings. Officer Muri also testified regarding Scott Cole's, Buckles's son-in-law, statement that Buckles was traveling to Miles City then continuing on to Billings. Officer Muri testified he did not believe Buckles when he related he was traveling to Billings to get his heater in his truck fixed. Officer Muri based his belief on the fact it was May and he assumed Buckles would not need his heater and also on Buckles relating he was a mechanic such that Officer Muri

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[1] The trial brief was not filed and is not part of the record.

[2] The parties, throughout trial and appellate review, refer to $740 found on Buckles's person and $20,400 discovered in the bank bag. The total of which would be $21,140. However, Agent Faycosh testified "that $740 was combined with the 20,400 and some odd dollars of currency that was in the bank bag itself. Then an official check for $21,220 was drafted and placed into evidence." It is unclear why there is a $80 discrepancy. Nevertheless, for purposes of this opinion, we will refer to the actual amount placed into evidence.

assumed Buckles could fix his own heater. Both Officer Muri and Agent Faycosh testified regarding the items seized during the search of Buckles's vehicle. Officer Muri and Agent Faycosh testified to the manner in which the cash was packaged. Specifically, Officer Muri and Agent Faycosh stated, in their experience, carrying a large amount of cash banded together by rubber bands is usually indicative of a drug transaction. Agent Faycosh further testified Buckles appeared to have created a "cockpit" by having a GPS and two cellphones in his front seat indicative of long drives. However, Buckles presented two witnesses who testified in contradiction to Officer Muri and Agent Faycosh's testimony offering a legitimate basis for possessing the money and a legitimate purpose for which it was intended to be used.

¶8 The State then recalled Agent Faycosh as a rebuttal witness to testify regarding Buckles's Utah drug charges. Agent Faycosh testified that in February 2016, nine months after the charges herein, Buckles was arrested in Utah with a co-defendant. Agent Faycosh testified Buckles was charged in Utah with possession with intent to distribute methamphetamine, possession of marijuana, and possession of paraphernalia. Agent Faycosh further testified where Buckles was arrested in Utah was southwest of Custer County. The jury returned a verdict of guilty on all four counts. Buckles timely appeals.

STANDARD OF REVIEW

¶9 District courts have broad discretion to determine the admissibility of evidence. *State v. Blaz*, 2017 MT 164, ¶ 10, 388 Mont. 105, 398 P.3d 247. 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. *Blaz*, ¶ 10 (citations omitted). Although a district court possesses broad discretion to determine the admissibility of evidence, judicial discretion must be guided by the Rules of Evidence, applicable statutes, and principles of law. *Maier v. Wilson*, 2017 MT 316, ¶ 17, 390 Mont. 43, 409 P.3d 878 (citing *State v. Price*, 2006 MT 79, ¶ 17, 331 Mont. 502, 134 P.3d 45). To the extent an evidentiary ruling is based on a district court's interpretation of the Montana Rules of Evidence, our review is de novo. *Blaz*, ¶ 10 (citations omitted). An erroneous evidentiary ruling constitutes reversible error when a substantial right of the party is affected. M. R. Evid. 103.

DISCUSSION

¶10 *Whether the District Court abused its discretion in admitting evidence of Buckles's Utah drug charges.*

¶11 On appeal, Buckles argues the District Court erred in admitting the Utah drug charges under M. R. Evid. 404(b) and M. R. Evid. 403. Buckles maintains his Utah drug charges were impermissibly admitted proving his propensity as a career drug dealer. Furthermore, Buckles contends admitting the Utah drug charges was highly prejudicial and outweighed any probative value. Accordingly, Buckles argues admitting his Utah drug charges impaired his right to a fair trial.

¶12 The State contends the District Court did not err in admitting the Utah drug charges. The State asserts the District Court properly admitted the Utah drug charges under M. R. Evid. 404(b) and M. R. Evid. 403. Further, the State maintains the District Court carefully

limited the scope of the evidence and provided a limiting instruction to mitigate any undue prejudice.

¶13 Even where Rule 404(b) evidence is relevant to an issue other than character or the defendant's propensity to commit the charged offense, the evidence is still subject to balancing under Rule 403. *State v. Stewart*, 2012 MT 317, ¶ 67, 367 Mont. 503, 291 P.3d 1187. Here, the District Court determined Buckles's Utah drug charges were relevant to intent under Rule 404(b). Even though the District Court concluded the Utah drug charges were admissible under Rule 404(b), the evidence was still subject to the balancing test under Rule 403. The record reflects the District Court failed to weigh the probative value of the evidence against the danger of unfair prejudice. For the reasons stated below, we determine admitting Buckles's Utah drug charges was highly prejudicial and subject to exclusion under Rule 403.

¶14 All relevant evidence is admissible except otherwise provided by constitution, statute, Rules of Evidence, or other rules applicable in the courts of this state. M. R. Evid. 402. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." M. R. Evid. 403. Rule 403 sets forth a balancing test whether the risk of unfair prejudice must substantially outweigh the evidence's probative value. Evidence rises to the level of being unfairly prejudicial only if it arouses the jury's hostility or sympathy for one side without regard to its probative cause, if it confuses or misleads the trier of fact, or

if it unduly distracts from the main issues. *State v. Madplume*, 2017 MT 40, ¶ 33, 386 Mont. 368, 390 P.3d 142 (citations omitted).

¶15 "Rule 403 does not require the exclusion of relevant information simply because it is prejudicial. In a criminal prosecution[,] most of the evidence offered by the prosecution is prejudicial to the defendant." *State v. Lamarr*, 2014 MT 222, ¶ 19, 376 Mont. 232, 332 P.3d 258 (quoting *Stewart*, ¶ 68). Rule 403 allow district courts discretion to exclude relevant evidence that poses a danger of unfair prejudice, but only if the danger of unfair prejudice substantially outweighs the evidence's probative value. This occurs when the evidence will prompt the jury to decide the case on an improper basis. *Stewart*, ¶ 68 (citing *State v. Belanus*, 2010 MT 204, ¶ 14, 357 Mont. 463, 240 P.3d 1021).

¶16 Buckles argues the evidence of the Utah drug charges was unfairly prejudicial. "Evidence of a defendant's prior acts creates the risk that the jury will penalize the defendant simply for his past bad character." *State v. Croteau*, 248 Mont. 403, 407-08, 812 P.2d 1251, 1253 (1991). The evidence of Buckles's Utah drug charges created a substantial risk the jury would penalize Buckles for his character of bad behavior. The prejudicial nature was exacerbated by Agent Faycosh testifying regarding Buckles's multiple Utah drug charges—possession with the intent to distribute, possession of marijuana and possession of paraphernalia. Providing the jury with Buckles's possession of marijuana and possession of paraphernalia charges in Utah had no relevance other than to show Buckles's character and mislead the jury. The record reflects the State elected not to admit Buckles's prior charges—possession of marijuana, possession of drug

paraphernalia, and possession of methamphetamine—because it “risk[ed] confusing the issues and complicating this particular issue.” Therefore, the State recognized the risk of misleading the jury if it sought admitting any drug charges other than the Utah intent to distribute charge. Despite this statement, the State elicited testimony regarding Buckles’s similar drug charges from Agent Faycosh. Furthermore, during closing arguments, the prosecutor stated, “Ladies and gentlemen, the State of Montana is not here today to argue about whether the Defendant was a good drug dealer or a bad drug dealer.” The prosecution used the evidence to portray Buckles as a career drug dealer to mislead the jury. We determine Buckles’s Utah drug charges prejudicial nature substantially outweighed the probative value. Under these circumstances, it is not possible to conclude that the cautionary instruction given by the District Court was sufficient to mitigate the prejudicial impact of the Utah drug charges. Therefore, we conclude the District Court abused its discretion in admitting evidence of Buckles’s Utah drug charges because the probative value was outweighed by the unfairly prejudicial nature of the evidence.

¶17 We now turn to whether admitting the evidence of Buckles’s Utah drug charges was harmless error. We have adopted a two-step analysis to determine whether an error “prejudiced the criminal defendant’s right to a fair trial and is therefore reversible.” *State v. Van Kirk*, 2001 MT 184, ¶ 37, 306 Mont. 215, 32 P.3d 735. The first step in conducting harmless-error analysis is to determine whether the error is structural error or trial error. *Van Kirk*, ¶ 37. A structural error affects the framework within which the trial proceeds, while trial error typically occurs during the presentation of a case to the jury. *Van Kirk*,

¶¶ 38, 40. Trial error can be reviewed qualitatively for prejudice relative to other evidence introduced at trial; thus, the error is subject to harmless-error review. *Van Kirk*, ¶ 40. Here, the admission of the Rule 404(b) evidence was a trial error.

¶18 The second step in the analysis is to determine under the "cumulative evidence" test whether the trial error was harmless. *Van Kirk*, ¶¶ 43-44. If the tainted evidence was admitted to prove an element of the offense, then the State must direct us to admissible evidence that proves the same facts as the tainted evidence and demonstrate that the quality of the tainted evidence was such that there was no reasonable possibility it might have contributed to the conviction. *State v. Derbyshire*, 2009 MT 27, ¶ 47, 349 Mont. 114, 201 P.3d 811. Here, the evidence of the Utah drug charges was admitted to prove an element of the charge offense—the money was intended for use in the distribution of drugs. *See* § 45-9-206(3)(a), MCA. The State has failed to direct us to any admissible evidence proving the same facts as the tainted evidence that would demonstrate there was no reasonable possibility the tainted evidence might have contributed to Buckles's conviction. The record does not reflect any admissible evidence of intent other than Officer Muri's and Agent Faycosh's speculations the money was to be used for illegal drug activity. We have previously stated that we decline to "affirm a criminal forfeiture conviction based on what amounts to no more than a justifiable suspicion." *State v. Hegg*, 1998 MT 100, ¶ 14, 288 Mont. 254, 956 P.2d 754 (noting common items, such as cash, have lawful purposes). We therefore hold there is a reasonable probability the admission of Buckles's Utah drug

charges contributed to Buckles's conviction and the State has not demonstrated the error was harmless.

CONCLUSION

¶19 We hold the evidence of Buckles's Utah drug charges posed a substantial risk of unfair prejudice that outweighed the probative value of the evidence. Therefore, the District Court abused its discretion and incorrectly admitted the Utah drug charges under M. R. Evid. 403. Further, we conclude there is a reasonable probability the evidence contributed to Buckles's conviction, and therefore the admission of the evidence was not harmless.

¶20 Reversed and remanded for a new trial.

__/S/ INGRID GUSTAFSON

We concur:

/S/ MIKE McGRATH
/S/ DIRK M. SANDEFUR
/S/ LAURIE McKINNON

Justice Jim Rice, dissenting.

¶21 In my view, M. R. Evid. 403 was not violated because the subsequent drug charge evidence was relevant, probative, and not unfairly prejudicial. Because the probative value is not outweighed by the danger of unfair prejudice, I would affirm the jury conviction under § 45-9-206, MCA.

A. The subsequent drug charges were relevant to show intent on the criminal forfeiture charge.

¶22 "A person commits the offense of use or possession of property subject to criminal forfeiture if the person *knowingly possesses*, owns, uses, or *attempts to use* property that is subject to criminal forfeiture under this section." Section 45-9-206(1), MCA. (Emphasis added.) Property that is subject to criminal forfeiture includes "money . . . that is used or *intended for use* in . . . delivering, importing or exporting a dangerous drug[.]" Section 45-9-206(3)(a), MCA. (Emphasis added.) Therefore, the offense includes *forward-looking* elements that requires the State to show sufficient evidence that the money was intended for use in a drug transaction. The Court appears to agree that the evidence is relevant under M. R. Evid. 404(b) to show intent, but concludes the probative value was substantially outweighed by unfair prejudice under M. R. Evid 403. Opinion, ¶ 13.

B. The State was entitled to rebut the defense witnesses' assertions that the money seized from Buckles' vehicle originated from legitimate sources and was used for legitimate purposes.

¶23 Near the end of the first day of trial, the District Court held a conference with the parties outside the presence of the jury. The State indicated it intended to present evidence that while Buckles awaited trial in this case, he was arrested in Utah and charged with possession of methamphetamine with intent to distribute. The District Court observed that Buckles was "not required to present any proof," but inquired whether the defense intended to introduce evidence that he had legitimate sources and purposes for the $21,200 found in Buckles' vehicle, and defense counsel indicated they would account for the money. The

District Court concluded that "under relevance, under the State's use of this evidence for the purposes of intent . . . to use this money to purchase drugs" the Utah drug charges would be admissible to rebut the expected assertions by the defense that there was a "legitimate purpose" and "intent with regard to the $21,000." The District Court noted that "there is a relevance link" between the events charged but not proven in Utah and the events charged but not proven in Montana.[1] Thus, the District Court barred the State from discussing the subsequent charges during its case-in-chief, but ruled that if the defense presented evidence that there was legitimate purposes and sources for the money, the State

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[1] The Court states that "the record reflects the District Court failed to weigh the probative value of the evidence against the danger of unfair prejudice." Opinion, ¶ 13. However, the discussions between counsel and the District Court were concerning apparent violations of Rule 404(b), not Rule 403. Similarly, the arguments in the appellate briefs address Rule 404(b). This Court cannot fault the District Court for not considering issues that were not raised by the parties on the trial level, nor does this Court typically consider issues raised for the first time on appeal.

In his appellate arguments, within the context that the evidence proffered by the State is other crimes evidence under Rule 404(b), Buckles cites the Modified Just Rule, a Rule 404(b) analytical framework that incorporated Rule 403 considerations. *See e.g. State v. Green*, 2009 MT 114, ¶ 25, 350 Mont. 141, 205 P.3d 798. However, this Court overruled the Modified Just Rule in *Salvagni*, explaining that the rule was "no longer the correct analytical approach" and "rather, when presented with a claim that evidence is being offered for an impermissible propensity inference, the court should simply apply Rules 402 and 404 (and if requested, Rules 403 and 105)." *See State v. Dist. Court of the Eighteenth Judicial Dist.*, 2010 MT 263, ¶ 56, 358 Mont. 325, 246 P.3d 415 (hereinafter *Salvagni*). For these reasons, it is incorrect for the Court to state that Buckles argues the District Court erred in not considering Rule 403, because Buckles never expressly made a 403 argument, but, rather, erroneously made a discarded argument under Rule 404(b).

Nonetheless, the record reveals that the District Court in fact weighed and considered Rule 403's effect of the state's intended evidence. The District Court believed that allowing the State to rebut the defense's evidence was not unduly prejudicial, and ruled that if the defense declined to offer evidence on admissible purposes for the money, the court would "evaluate at that point whether there is an undue prejudice" in allowing the State to present evidence as to the Utah drug charges. The District Court also considered the "similarity" and "remoteness" criteria, which are appropriate considerations under Rule 403, *see Salvagni*, ¶ 56, and concluded that the charges were "relevant because of the similarity of the conduct" and the "proximity in time."

was entitled to rebut the assertion with testimony pertaining to the charges. The District Court advised it would limit "the scope of what will be allowed by the Utah charges" and the court testimony to only the existence of the charges, and solicited proposed cautionary instructions from the parties. The District Court advised defense counsel it was "free to challenge the weight the jury is to give to that evidence. You are free to point out that these are unproven charges. That he is presumed innocent of the Utah charges . . . and that the weight of that evidence should not sway the jury from the presumption of innocence." *See Salvagni*, ¶ 55 (finding there is no "quantum of proof" to admit other-acts evidence and the credibility of witnesses "go to the weight of the evidence" and "evidence is not inadmissible just because [the defendant] believes the witnesses are not credible[,]" thus the defendant is free to cross-examine the witness to attempt to discredit their testimony).

¶24 The State began by eliciting testimony from Sergeant Troy Muri of the Montana Highway Patrol, who initiated the traffic stop for speeding. Muri testified that, during questioning, Buckles stated he was driving to Billings "to try to find a dealership to work on his pickup" because the "heater wasn't working correctly." Muri testified that the explanation was odd since it was "the middle of May" and because, earlier in their conversation, Buckles had stated he was a car mechanic, but Buckles contended he just "couldn't get it to work." Muri testified that, during the stop, Buckles' father-in-law Scott Cole saw Buckles being detained and pulled over to inquire. Muri testified that Cole stated he was headed to Miles City to get a Mother's Day present for his grandma, and that Buckles "was also going to Miles City and then he was going to continue on to Billings."

Muri testified that after Buckles' arrest, an inventory search revealed some cell phones, two meth pipes, and $21,200 in "thousand-dollar increments wrapped in rubber bands" in a "bank bag."

¶25 As planned, defense counsel then sought to establish Buckles' intended purpose for the cash. The Court credits Buckles' proffered story, stating his two witnesses offered a "*legitimate* basis for possessing the money and *legitimate* purpose for which it was intended to be used." Opinion, ¶ 7. (Emphasis added.) However, review of the record demonstrates a rational jury was fully entitled to reject the "legitimate" basis of the questionable testimony from Buckles' witnesses, the totality of which led to the District Court admonishing the defense for potentially suborning perjury.

¶26 Because Buckles was pulled over by police on May 10, 2015, defense counsel sought to incorporate all possible cash Buckles might have received prior to that date as an explanation for the $21,200 in cash found in the vehicle. To this end, Buckles called his niece, Adrianne Browning, to testify. Browning testified that, on May 9, 2015, she purchased Buckles' truck and paid him $10,000 in cash. Browning testified she didn't "remember what year" the truck was but she knew it was a "Chevy."[2] Browning stated that she believed there was a bill of sale that could verify the purchase, but she didn't know where it was, and it wasn't in her possession. Browning further testified that, the day after

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[2] Buckles made representations in pleadings filed to the District Court that the vehicle sold was a 1999 Chevrolet pickup truck.

she bought Buckles' truck, Buckles borrowed the same truck she had just purchased from him:

> **State**: [Buckles] didn't give you any reason for why he needed this vehicle?
> **Browning**: No.
> **State**: So you had owned the vehicle for all of — less than 24 hours?
> **Browning**: Uh-huh.
> **State**: And [Buckles] takes this vehicle and leaves?
> **Browning**: Uh-huh. Yes.

¶27 Defense counsel asked Browning about Buckles' plan to purchase a building to start a business. Browning believed that Buckles intended to start a business in Poplar, and asserted he was going to look at a building to purchase:

> **Defense**: Did you have any discussions with [Buckles] prior to his trip to Billings that resulted in the stop?
> **Browning**: He said he was going to look at a building or . . .
> **Defense**: And then you received the call that the car was impounded?
> **Browning**: Yes.

However, on cross-examination, Browning stated several times that she didn't know where Buckles was going:

> **State**: So [Buckles] didn't ask you or didn't tell you where he was going or why he needed your vehicle?
> **Browning**: No.
> **State**: But your testimony on direct was that he was going to Billings to look at a building.
> **Browning**: No, I didn't — no. He had talked about it but he didn't say that's where he was going. I didn't even ask.

¶28 The State asked Browning if, when discussing return of the impounded vehicle with police after Buckles' arrest, she had indicated the vehicle was stolen, and Browning said she had not. Browning testified several times that she was certain that the total price of the

vehicle was $10,000 and that she gave Buckles the money in "loose" bills that were not bound in any way. Browning also alleged that Buckles may have had additional cash from an insurance settlement earlier in 2015, because she was involved in the accident while driving Buckles' car. Browning stated that Buckles received a cash settlement of $3000 but she was not sure when it was paid out to him. As part of the settlement, Browning also received money in July 2015.

¶29 Marilee Buckles (Marilee), Buckles' sister, testified that she had a power of attorney for Buckles and shared a bank account with him. Marilee testified she would give Buckles money whenever he asked for it, and that she knew "for sure" she gave him $3,000, and she may have given him up to $6,000 sometime in April or May of 2015. Marilee testified that Buckles intended to start a "garage business" in Poplar. In addition to money drawn from their shared bank account, Marilee testified she personally saw their mother give Buckles $12,000 in cash in December 2014.

¶30 Immediately after Marilee's testimony, the District Court dismissed the jury to the jury room and held a conference with counsel. The District Court indicated that the case was "very close to mistrial" and that it had "real concerns that [defense] witnesses have committed perjury" and hoped that defense counsel had "talked to [defense] witnesses about the importance of being candid, the whole truth, and nothing but the truth[.]" The District Court recalled that, at a September 6, 2016 Pretrial Motions Hearing, Marilee testified that her mother and her had only discussed that money was given to Buckles, not

that she *witnessed* the mother giving Buckles the money, and that Buckles himself testified that Browning paid him $8,500 for the truck, not $10,000:

> [I]t is concerning to see the amount of the truck went from $8,500 to $10,000. The—when we were at the prior hearing, the $12,000 was—I believe it was Marilee saying that this—the witness with the dialysis had told her that she gave Morris $12,000. Not that she had witnessed it, but then today she testified she witnessed it.

¶31 After this conference, testimony continued. On rebuttal, the State called Muri. The prosecutor asked Muri under what circumstances Browning retrieved her vehicle after it was impounded:

> **State**: And did [Browning] claim ownership of the 1999 pickup truck?
> **Muri**: She said she had bought it, and then she said that Mr. Buckles had stole it.
> **State**: Did she relay to you the circumstances under which he stole it from her?
> **Muri**: She had said on Saturday that he had stole[n] the vehicle from her.
> **State**: Did she tell you what she was doing when he stole it from her?
> **Muri**: She said she had been passed out on the floor when he stole it.

¶32 The State called Agent Jeffrey Faycosh. Faycosh read Buckles' testimony from the prior hearing that Browning "purchased the truck and paid me $8,500 in cash for the truck." The State then informed the District Court it was about to elicit testimony about the subsequent charges, and the Court read aloud a cautionary jury instruction. The State then inquired:

> **State**: What happened after the Defendant was released from custody?
> **Faycosh**: In February of 2016, two months after his release or thereabouts, then the arrest in Weber County, Utah, of him and a co-defendant.
> **State**: And what was the result of that arrest?

> **Faycosh**: Charges were filed in Weber County, Utah, for Possession with Intent to Distribute Methamphetamine, Possession of Marijuana and Possession of Paraphernalia.
> **State**: And where exactly is Weber County, Utah, in relation to Custer County?
> **Faycosh**: It would be southwest of Custer County
> **State**: You stated that he was charged with two crimes. What exactly did that mean, sir?
> **Faycosh**: It means he's not been convicted. It means there was at least probable cause to commence legal proceeding, but it has not been proven beyond a reasonable doubt that he committed those crimes, and a co-defendant, as well.

¶33 The State ended its questioning. Before closing arguments, the District Court gave another cautionary instruction about proper use of the evidence concerning the Utah charges.

¶34 The District Court did not err by admitting testimony to rebut the defense's witnesses. Defense witness testimony was inconsistent and largely unverified by the documentary evidence, and, despite it being, in the District Court's view, perjury, provided a story about the purpose of the cash. As to the forfeiture charge, questions existed regarding the amount of money Browning stated she paid Buckles and Buckles stated that he received—putting into question the amount of money involved in the car transaction—or whether Buckles may have stolen the vehicle from Browning. Browning's testimony also offered the possibility that Buckles had money from an insurance settlement, but did not establish the timing of when Buckles received the settlement. Finally, Marilee could not recall the exact amount of money she gave Buckles, somewhere between $3000-$6,000, and sometime in April or May of 2015. Marilee changed her story about whether

she witnessed or merely discussed that her mother gave money to Buckles. Therefore, the existence, amount and timing all the sources of cash, and its intended purpose, were all put into question by the defense's testimony.

C. Any prejudice resulting from the drug charges does not substantially outweigh the probative value. The District Court carefully limited testimony and provided multiple limiting instructions to cure any prejudice.

¶35 Probative evidence is usually prejudicial, but rises to the level of being 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. Blaz*, 2017 MT 164, ¶ 20, 388 Mont. 105, 398 P.3d 247 (citation omitted). "Even if evidence is potentially unfairly prejudicial, the Rule 403 balancing test favors admission—the risk of unfair prejudice must substantially outweigh the evidence's probative value." *State v. Madplume*, 2017 MT 40, ¶ 33, 386 Mont. 368, 390 P.3d 142. The risk of unfair prejudice "substantially outweigh[ing]" the evidence's probative value "occurs when the evidence will prompt the jury to decide the case on an improper basis." *State v. Stewart*, 2012 MT 317, ¶ 67, 367 Mont. 503, 291 P.3d 1187 (citation omitted).

¶36 The Court concludes that the evidence of Buckles' drug charges "had no relevance other than to show Buckles' character and mislead the jury" and would only penalize the defendant for "his character of bad behavior[.]" Opinion, ¶ 16. The Opinion notes that "[t]he record reflects the State elected not to admit Buckles' prior charges—possession of marijuana, possession of drug paraphernalia, and possession of methamphetamine—

because it 'risk[ed] confusing the issues and complicating this particular issue.'" The Court thus offers that because the State "recognized the risk" of the jury being able to draw the inference of bad character from prior acts, the State should have also recognized the risk of subsequent acts impinging character. Opinion, ¶ 16.

¶37 However, the record shows both that the defense put prior acts at issue, and, substantively, that prior acts have a different effect on the issue of a defendant's character than subsequent acts. During pre-trial, the State indicated it would not present any evidence of Buckles' past convictions, but defense counsel—not the State—discussed prior drug charges during opening statement, noting that "one of the things that is unfortunate about the Defendant is he has been convicted in the past for drug charges" but "it isn't as though he's actively in the habit of buying and selling large quantities of drugs."[3] Further, although the opinion notes that prior convictions may pose a risk the jury will impinge character references on the defendant, at the time of trial, Buckles had not been convicted of the drug charges in Utah, only charged, unlike the prior drug offenses. Therefore, the State, likely out of caution, omitted reference to prior convictions which likely *would* have the danger of impinging his character, with the improper reference that he was in fact dealing drugs to conform with past behavior from past convictions. We apply the rule

[3] The Court states that a highly prejudicial statement by the State occurred during closing statements, where the State observed "the State of Montana is not here today to argue about whether the Defendant was a good drug dealer or a bad drug dealer." Opinion, ¶ 16. This statement was in response to the defense, again, putting drug dealing at issue during its closing argument, where it observed, "If he was a really good drug dealer, he would have a lot of [scales and packaging] in his truck."

barring proof of other crimes to ensure a that a defendant is not convicted "*because he committed a crime in the past*, he has a defect of character that makes him more likely than people generally to have committed the charged offense." *State v. Rogers*, 2013 MT 221, ¶ 32, 371 Mont. 239, 306 P.3d 348 (Emphasis added.)[4]

¶38 Even assuming that unfair prejudice resulted from the introduction of the Utah drug charges, "[a] district court may minimize unfair prejudice by admitting evidence for a particular purpose and limiting the uses to which the jury may put the evidence." *State v. Pulst*, 2015 MT 184, ¶ 19, 379 Mont. 494, 351 P.3d 687. "A limiting instruction generally cures any unfair prejudice." *Blaz*, ¶ 20. The District Court carefully limited the scope of the evidence presented, and gave appropriate limiting instructions to mitigate any prejudice. The District Court discussed at length with counsel how the testimony should be presented, how the cautionary instruction should be crafted, how Buckles would be mentioned to the jury as only a co-defendant in the Utah charges, and that his guilt was not to be presumed. Before Faycosh's testimony the District Court gave a limiting instruction, as well as provided the following instruction for the jury to aid its deliberations:

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[4] This Court has approved the admission of subsequent bad acts when offered for a non-propensity purpose. *See e.g. State v. Gray*, 197 Mont. 348, 643 P.2d 233 (1982); *State v. Berger*, 1998 MT 170, ¶¶ 36-40, 290 Mont. 78, 964 P.2d 725. The Ninth Circuit has concluded that, "Acts both prior and subsequent to the indictment period may be probative of the defendant's state of mind." *United States v. Voorhies*, 658 F.2d 710, 715 (9th Cir. 1981). "[E]vidence of subsequent crimes or acts of misconduct is admissible if it is relevant to an issue at trial." *United States v. Ayers*, 924 F.2d 1468, 1473 (9th Cir. 1991); *United States v. Mehrmanesh*, 689 F.2d 822 (9th Cir. 1982) (evidence that defendant continued to sell drugs after his arrest was admitted to show that he intended something more than mere personal use of heroin); *United States v. Young*, 572 F.2d 1137 (9th Cir. 1978) (testimony regarding defendant's subsequent narcotics transactions admitted in trial for conspiracy to possess cocaine with intent to distribute).

> Morris Buckles is on trial only for the offenses charged in this case. Evidence of other acts alleged to have been committed in Utah (and other locations) by Mr. Buckles that have not been charged in this case may not be considered in your deliberations, except as I authorize you to do so. In other words, you may not infer that because the Defendant may have engaged in other acts, that he is guilty of any of the offenses charged in this case. Along with all other evidence in this case, evidence of other actions attributed to the Defendant may be considered only for the limited purpose of aiding the jury to discern motive or intent as to the acts charged in this case. You, the jury, are instructed to determine the credibility and weight, if any, to assign to any evidence of any other criminal charge or alleged act. Mr. Buckles is not being tried for that other charge. He may not be convicted for any other actions except those charged in this case. For the jury to convict Mr. Buckles of any other offense than that charged in this case may result in unjust double punishment.

¶39 The subsequent drug charge was not unfairly prejudicial because the testimony was limited to the charge itself to avoid confusing or misleading the jury, was not evocative or admitted in a way that would produce hostility to the defendant, and, because it was only admitted on rebuttal, did not distract from the main issues. *Blaz*, ¶ 20. If there was any prejudice, the multiple instructions successfully cured any unfair prejudice that might have occurred, and the District Court did so conscientiously and reasonably. Therefore, in my view, the District Court did not abuse its broad discretion in admitting the Utah drug charges.[5]

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[5] The District Court also gave Instruction Number 3, which instructed the jury that they were the "sole judges of the credibility" of the witnesses and the weight given to their testimony. The District Court instructed that the jury was entitled to consider "the extent to which the witnesses are either supported or contracted by other evidence in the case" and whether a witness may be motivated by "bias or prejudice." The District Court instructed that if the jury believed a witness has testified falsely, it "must reject" such testimony.

D. The State presented sufficient evidence for a rational jury to convict on the criminal forfeiture charge.

¶40 It is well-established that "circumstantial evidence alone may be sufficient to support a criminal conviction." *State v. Chaussee*, 2011 MT 203, ¶ 16, 361 Mont. 433, 259 P.3d 783 (citation omitted). However, it is also well-established that the State bears the burden of proving each element of the offense beyond a reasonable doubt. *State v. Hegg*, 1998 MT 100, ¶ 13, 288 Mont. 254, 956 P.2d 754 (citation omitted).

¶41 In *Hegg*, police seized quantities of marijuana, methamphetamine, hashish, $7,897 in cash, numerous loaded guns, a coin collection, a safe, and three scales from Hegg's home. *Hegg*, ¶ 4. The State charged Hegg with drug possession charges as well as a criminal forfeiture charge for the cash, coins, scales, safe, and guns. *Hegg*, ¶ 5. The jury convicted on all counts and found that each item should be forfeited. *Hegg*, ¶ 7. On appeal, the State contended that the "mere proximity of the guns, cash, and scales to Hegg's illegal drugs" was sufficient to prove any element of an offense and/or to sustain a conviction. *Hegg*, ¶ 12. We noted that the criminal forfeiture offense had a mental state, thus the State had to prove that Hegg "knowingly possessed" those items to facilitate illegal drug activity. *Hegg*, ¶ 14. Thus, we declined to "affirm a criminal forfeiture conviction based on what amounts to no more than a justifiable suspicion." We reasoned that the presence of cash in a home, with nothing more, was not sufficient circumstantial evidence from which a jury could conclude beyond a reasonable doubt that the property was subject to criminal

forfeiture, and that the State had failed to show that "the cash that was confiscated . . . was traceable to illegal drug sales," therefore the evidence was insufficient. *Hegg*, ¶ 15.

¶42 Here, equally, while it might be tempting to make the inference that $21,200 in cash bound in rubber bands in a bank bag along with the other circumstantial evidence of the gps, burner phones, and drugs could be sufficient evidence from which a jury could convict on the forfeiture charge, the State recognized that it still needed to prove intent to use the money for illegal activity, i.e. that Buckles possessed cash that could be "traceable" to "illegal drug sales." *Hegg*, ¶ 15. To that end, the State offered probative evidence to supplement the circumstantial evidence that the cash was intended to be used for a drug transaction. Now that the State has presented evidence sufficient for a reasonable jury to convict by providing a logical nexus from the traceability of the cash to an illegal drug transaction, this Court reasons that the evidence violates Rule 403. To the contrary, the evidence is clearly consequential to a determination of an element of the crime, whether Buckles possessed the intent for the crime charged. A thorough review of the record does not demonstrate that the State's theory of admissibility was in any way tied to the inference of bad character, and indeed, the character reference based on past crimes was from Buckles' own counsel.

¶43 The Utah drug charges were highly probative of intent as well as to rebut the defense witnesses' assertions of legitimate sources of the money. District courts are vested with broad discretion in controlling the admission of evidence at trial. *Seltzer v. Morton*, 2007 MT 62, ¶ 65, 336 Mont. 225, 154 P.3d 561. We review the district court to determine

whether the court abused its discretion. *Seltzer*, ¶ 65. To establish that a court abused its discretion, the appellant must demonstrate that the district court acted arbitrarily without conscientious judgment or exceeded the bounds of reason. *Seltzer*, ¶ 65. The District Court did not abuse its discretion in admitting the subsequent drug charges.

¶44 I would affirm.

/S/ JIM RICE