DA 19-0657

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 268

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ETHAN JOSEPH MURPHY,

Defendant and Appellant.

APPEAL FROM: District Court of the Eleventh Judicial District,
In and For the County of Flathead, Cause No. DC 17-610(D)
Honorable Dan Wilson, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, James Reavis, Assistant Appellate Defender, Billings, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Mardell Ployhar, Assistant Attorney General, Helena, Montana

Travis R. Ahner, Flathead County Attorney, Kalispell, Montana

Submitted on Briefs: June 16, 2021

Decided: October 19, 2021

Filed:

Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 Ethan Joseph Murphy pled guilty to Incest, § 45-5-507, MCA, reserving the right to appeal an order entered by the Eleventh Judicial District Court, Flathead County, denying his motion in limine to exclude admission of evidence of his other acts and statements involving Q.M., his half-sister and the victim. We affirm and state the issue as follows:

> *Did the District Court abuse its discretion by permitting admission of evidence regarding other acts and statements made by the Defendant?*

FACTUAL AND PROCEDURAL BACKGROUND

¶2 In December 2017, Murphy was charged by Information with Sexual Intercourse Without Consent upon Q.M., in violation of § 45-5-503, MCA. In June 2017, Q.M. was forensically interviewed after disclosing to a counselor that she "had been molested" by Murphy on January 1, 2017, during an outdoor game of hide-and-seek she was playing with her siblings. Q.M. reported that Murphy, an adult, followed Q.M., then age 14, behind a shed, began touching Q.M., made her perform oral sex on him, and then forced her against the shed and engaged in anal intercourse. The affidavit supporting the Information also described an incident that occurred in 2012 between then 13-year-old Murphy and 9-year-old Q.M., which resulted in Murphy entering an admission in Missoula County Youth Court to sexually assaulting Q.M. During the investigation of that event and the youth court proceeding, Murphy described "having sexual thoughts of Q.M." and admitted "touching Q.M.'s genitals" and that he "spread [her] vagina. . . . just [to] observe[]" while she was sleeping in a recliner.

¶3 Murphy entered a not guilty plea and moved in limine "to preclude the admission of evidence involving the occurrence of any other sexual acts or statements involving Q.M." Regarding such acts and statements occurring *before* the subject charge, Q.M. reported that, while she did not remember "a majority of the incidents," Murphy's sexual contact with her started before she was 9-years old. Murphy's mother learned of Murphy's inappropriate touching of Q.M. in 2010, two years before the incident leading to the youth court proceeding, when Murphy apparently disclosed to her that he had been, in her words, "exploring with his sister." Murphy admitted during a 2012 interview with a nurse interviewer that he was sexually inappropriate with Q.M., and when asked during the 2012 investigation if he had touched other persons in the same manner, Murphy answered "that he only thought about Q.M. 'in that way' and that when he was touching Q.M. he had no interest in touching anyone else." Murphy also sought to exclude reference to sexual actions he had taken with Q.M. approximately 30 minutes prior to the subject offense, during the same game of hide-and-seek. Q.M. reported that Murphy found her hiding in a vehicle, pulled down his and her clothing, and touched her "like down there" until Q.M.'s sister began to approach the vehicle. Q.M. stated that when Murphy began touching her, "I kinda just blanked out everything." Murphy has received counseling in the past for this behavior.

¶4 Regarding acts and statements *after* the subject charge, Murphy sought to exclude Q.M.'s disclosure to a forensic interviewer that Murphy used to threaten her not to disclose the sexual abuse, but as she grew older, Murphy stopped insisting on secrecy because he

knew she would not disclose. When Murphy was asked by detectives in the subject investigation whether he had inappropriately touched other siblings, he stated, "[n]o, not really." The affidavit supporting the Information also alleged that "a similar incident" to the charged conduct occurred between Murphy and Q.M. "in [Murphy's] car a few weeks later." In reply to the limine motion, the State argued that Murphy's "prior sexual acts . . . speak to [Murphy's] motive to sexually assault Q.M.," which it described as a "longstanding sexual fixation" with Q.M.

¶5 No party sought a hearing on the motion, and on October 16, 2018, the District Court denied it, holding that "evidence of Murphy's sexual conduct with Q.M., apart from the conduct alleged in the Information and its supporting affidavit, is relevant and admissible . . . under Rule 404(b) and 403," agreeing with the State in its reasoning:

> Murphy's identity as the alleged perpetrator, his intent, and his motive are primary issues in the case. One or more of Murphy's statements concerning the Missoula incident tend to show that Murphy experiences a desire to engage in sexual conduct with Q.M., which he does not experience with respect to other minor females. That Murphy has admitted subjecting Q.M. to sexual contact in the past tends to show . . . that he has a longstanding sexual fixation with Q.M. The evidence, if offered at trial, would be both relevant and offered for the permissible purpose of demonstrating Murphy's motive to commit a sexual offense against Q.M.

Regarding § 26-1-103, MCA, the "transaction rule," the District Court further reasoned:

> [t]he evidence Murphy seeks to exclude shows that he engaged in a pattern of escalating sexual conduct involving Q.M. properly characterized as 'grooming' . . . accompanied by threats to Q.M. that she should not disclose the abuse or they would both get into trouble. The sexual conduct continued and escalated until Murphy was satisfied that his conduct would go unreported, if not unprosecuted.

Regarding Rule 403's prejudice consideration, the District Court stated, "the charge may tend to arouse the jury's hostility or sympathy, but such hostility or sympathy may be inherent in the nature of the allegations against Murphy." The allegations of Murphy's past conduct with Q.M. were "not so much more abhorrent than the conduct alleged in the Information such that its admission is likely to arouse the jury's hostility or sympathy without regard for its probative value."

¶6 In April 2019, the Flathead County Attorney filed an Amended Information, charging Murphy instead with Incest, in violation of § 45-5-507, MCA. Pursuant to a plea agreement, Murphy entered an *Alford* Plea,[1] reserving the right to appeal the District Court's order denying his motion in limine. At the sentencing hearing the plea agreement was amended to include: "[i]n the event the Defendant's appeal results in reversal of the District Court, then the Defendant may move to vacate the sentence and conviction and withdraw his guilty plea without objection from the State." The District Court designated Murphy a Level II sex offender under § 46-23-509, MCA, and imposed a 10-year suspended sentence.

¶7 Murphy appeals, challenging the denial of his motion in limine.

STANDARD OF REVIEW

¶8 Trial courts are empowered with broad discretion to decide "all questions of law, including the admissibility of testimony . . . [,] other rules of evidence[,]" and "related

[1] *See generally North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160 (1970).

statutory and jurisprudential rules." Section 26-1-201, MCA; *State v. McGhee*, 2021 MT 193, ¶ 10, 405 Mont. 121, 492 P.3d 518 (citations omitted); *State v. Derbyshire*, 2009 MT 27, ¶ 19, 349 Mont. 114, 201 P.3d 811 (citing *State v. Hicks*, 2006 MT 71, ¶ 19, 331 Mont. 471, 133 P.3d 206). We review those decisions for an abuse of discretion, leaving them undisturbed unless made "arbitrarily without the employment of conscientious judgment or exceed[ing] the bounds of reason, resulting in substantial injustice. *Derbyshire*, ¶ 19 (citations omitted). Any rationale based upon a conclusion of law, we review *de novo*, "according no measure of deference to the district court." *State v. Guill*, 2010 MT 69, ¶ 21, 355 Mont. 490, 228 P.3d 1152 (citing *Derbyshire*, ¶ 19).

DISCUSSION

¶9 "All relevant evidence is admissible, except as otherwise provided by constitution, statute, these rules, or other rules applicable in the courts of this state." M. R. Evid. 402. To qualify as relevant, the evidence must have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." M. R. Evid. 401. "Rule 401's basic standard of relevance is a 'liberal' one." *State v. Stewart*, 2012 MT 317, ¶ 58, 367 Mont. 503, 291 P.3d 1187 (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 587, 113 S. Ct. 2786, 2794 (1993)). Here, the State alleged Murphy had non-consensual sex with 14-year-old Q.M., his half-sister. Facts demonstrating Murphy's individual attraction to Q.M., his admissions to sexually assaulting Q.M. in the past, and his statement that he does not act in this manner with anyone else have a "tendency" to make it more probable that

Murphy knowingly engaged in sexual intercourse without consent with Q.M. on the subject occasion. The evidence is clearly relevant and admissible, unless otherwise excluded by law.

Rule 404(b)

¶10 The District Court admitted the evidence under § 26-1-103, MCA, the "transaction rule" and M. R. Evid. 404(b), and the parties present extensive arguments regarding both theories of admission. We conclude the evidence was properly admitted as motive evidence under Rule 404(b) and therefore we do not address the parties' arguments regarding § 26-1-103, MCA. Despite the breadth of his motion in limine, which challenged a lengthy delineation of his other acts and statements, Murphy's appellate arguments address only the District Court's admission of evidence concerning his 2012 sexual assault of Q.M., while the State's arguments encompass all of Murphy's acts.

¶11 "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." M. R. Evid. 404(b). Rule 404(b) bars a "theory of admissibility"—evidence of other crimes, wrongs, or acts cannot be used to prove subjective character, disposition, or propensity "in order to show conduct in conformity with that character on a particular occasion." *State v. Blaz*, 2017 MT 164, ¶ 12, 388 Mont. 105, 398 P.3d 247 (quoting *State v. Dist. Court of the Eighteenth Judicial Dist.*, 2010 MT 263, ¶ 47, 358 Mont. 325, 246 P.3d 415 (*Salvagni*)) (internal quotation marks omitted). "Rule 404(b) prohibits admission of evidence to prove how a person *is*—fundamental character—for the purpose of implying conduct in accordance therewith, but

does not necessarily prohibit admission of evidence to prove how a person *acts*—patterns of behavior—in circumstances related to the charged conduct." *Blaz*, ¶ 12 (emphasis in original). Other crimes, wrongs, or acts may be admissible for purposes "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." M. R. Evid. 404(b); *McGhee*, ¶ 15 (stating Rule 404(b) is an "application of the doctrine of multiple admissibility"). Here, the District Court admitted the evidence on the bases of motive and identity.

¶12 Regarding motive, the District Court reasoned that the other act evidence establishes Murphy's motive, described as "a longstanding sexual fixation with Q.M.," to commit the current sexual offense. Murphy argues his 2012 juvenile case does not establish motive because "having sexual feelings does not, without more, establish a pattern to show the existence of a motive that moves beyond impermissible propensity evidence." The State answers that Murphy's other conduct "supports the inference that he has a desire to engage in sexual acts with her, even if she is not a willing participant."

¶13 Evidence of other crimes or acts can be admitted under Rule 404(b) if it serves to demonstrate that "separate acts can be explained by the same motive." *Blaz*, ¶ 14 (quoting *State v. Daffin*, 2017 MT 76, ¶ 19, 387 Mont. 154, 392 P.3d 150). In *Blaz*, we cautioned that the State's argument the defendant's prior act of domestic violence was admissible to demonstrate the motive of "general hostility or complete disregard for others, without more, would define motive very broadly and cast a wide net," potentially admitting

evidence for improper propensity purposes. *Blaz*, ¶ 15. We addressed the proper consideration of motive in *Salvagni*:

> In some cases, the uncharged act will indeed furnish the motive for the charged act. For instance, an uncharged theft may supply the motive to murder an eyewitness to the theft. In this situation, the uncharged act is cause, and the charged act is effect. In other cases, however, the uncharged act evidences the existence of a motive but does not supply the motive. Rather, *the motive is cause, and the charged and uncharged acts are effects; that is, both acts are explainable as a result of the same motive*. The prosecutor uses the uncharged act to show the existence of the motive, and the motive in turn strengthens the inference of the defendant's identity as the perpetrator of the charged act.

Salvagni, ¶ 59 (emphasis added, internal citations omitted).

¶14 Murphy analogizes from *Blaz*'s caution about "general hostility" motive evidence to argue that his "having sexual feelings" are not enough, but there is clearly more at issue here. The challenged evidence demonstrates his sexual feelings were directed only toward Q.M., resulting in his sexual pursuit of her alone over a period of years. His conduct and words do not merely demonstrate a general sexual desire, but a very particular one that led to a continuing course of conduct the District Court described as a "longstanding sexual fixation" with Q.M. The evidence demonstrates the utterly plausible motive that Murphy, despite therapy, struggled with incestual feelings towards Q.M. that he has repeatedly acted on. We conclude the District Court did not abuse its discretion by ruling this evidence was admissible for this purpose.

Rule 403

¶15 Rule 403 will exclude admissible evidence whose "probative value is substantially outweighed by the danger of unfair prejudice." M. R. Evid. 403. This is a "fact-specific

balancing test" favoring admission—"the risk of unfair prejudice must substantially outweigh the evidence's probative value." *State v. Haithcox*, 2019 MT 201, ¶ 16, 397 Mont. 103, 447 P.3d 452 (quoting *State v. Madplume*, 2017 MT 40, ¶ 33, 386 Mont. 368, 390 P.3d 142) (internal quotation marks omitted). Evidence is prejudicial "if it arouses the jury's hostility or sympathy for one side without regard to its probative value." *Blaz*, ¶ 20 (quoting *Hicks*, ¶ 24). Unfair prejudice may be minimized by "admitting evidence for a particular purpose and limiting the uses to which the jury may put the evidence," *Blaz*, ¶ 20 (quoting *State v. Pulst*, 2015 MT 184, ¶ 19, 379 Mont. 494, 351 P.3d 687) (internal quotation marks omitted), with a "limiting instruction generally cur[ing] any unfair prejudice," *Blaz*, ¶ 20 (quoting *State v. Hantz*, 2013 MT 311, ¶ 44, 372 Mont. 281, 311 P.3d 800) (internal quotation marks omitted).

¶16 Murphy argues admission of his 2012 juvenile sexual assault of Q.M. violated Rule 403 "because the probative value of [his] motive while a juvenile is substantially outweighed by the danger of unfair prejudice that a jury will use a prior act to convict [him] of the charged act." Murphy's sole focus on his 2012 assault ignores the continuum of his entire conduct, involving other acts and statements, and also ignores that the spliced ruling he now requests was never requested of the District Court, which considered the potential prejudice of all of Murphy's other acts, not just the 2012 assault. Acknowledging that some jury hostility or sympathy "may be inherent in the nature of the allegations against Murphy," the District Court reasoned that the other acts were not more abhorrent than the current charge, as they did not "necessarily involve allegations of penile insertion as the

Information alleges." We conclude the District Court did not abuse its discretion under Rule 403 because unfair prejudice did not substantially outweigh the probative value of Murphy's 2012 juvenile assault, as well as his other conduct.

¶17 Affirmed.

/S/ JIM RICE

We concur:

/S/ MIKE McGRATH
/S/ BETH BAKER
/S/ JAMES JEREMIAH SHEA

Justice Ingrid Gustafson, dissenting.

¶18 I would hold the District Court erred by denying Murphy's motion in limine and determining evidence of a juvenile Murphy's previous sexual contact with Q.M. was relevant and admissible under M. R. Evid. 404(b), separately determining such evidence was admissible under the transaction rule, § 26-1-103, MCA, and finally determining the probative value of the evidence did not outweigh the danger of unfair prejudice under M. R. Evid. 403 in either scenario. Here, the Court wrongly upholds the District Court by determining the evidence was admissible under Rules 403 and 404(b). I dissent.

¶19 At the outset, I note the incomplete record on which this matter was decided. In briefing before the District Court, Murphy set forth information gleaned from the charging documents in this case, the report of Deputy Thompson, Q.M.'s 2017 forensic interview, 2012 Missoula police records, Murphy's 2012 psychosexual evaluation, and Murphy's

2013 juvenile sexual assault case. With the exception of the 2017 charging documents, none of these sources of information appear in the record. The State's response brief to the motion in limine does not specify where its sources of information come from, though it appears to at least partially rely on a 2012 interview Murphy had with Missoula detectives and an interview Detective Cook had with Murphy about the present charges, presumably in 2017. Neither of these interviews are found in the record, though the State quotes from them. With this concern in mind, I turn now to addressing the issues on appeal and the facts as presented by the parties in their briefing.

¶20 Murphy and Q.M. are half-siblings who were raised in a physically and verbally abusive household, subjected to abuse by their stepfather and various boyfriends of their mother. In 2012, Murphy, then 14, and Q.M., then 9, were living in Missoula. They lived in their mother's home with one of the mother's boyfriends. This boyfriend had previously been investigated for downloading child pornography and tampering with evidence, and was convicted of evidence tampering for erasing files related to child pornography from his computer before a search warrant was executed. One night in April 2012, Q.M. was asleep in a chair in the living room. A neighbor was on his porch, and could see into Murphy's home because the windows were open. At around 10 p.m., the neighbor saw the boyfriend come into the living room and saw him kiss and fondle a sleeping Q.M. Later that night, the neighbor was again on his porch and looking into Murphy's home. At around 2 a.m., the neighbor saw Murphy enter the living room where he touched Q.M.'s privates with his hand.

¶21 The neighbor reported these incidents to the police, who began an investigation. Law enforcement interviewed Q.M., who told police she was asleep and did not know what happened, but stated "[the neighbor] told me [Murphy] touched me." Detectives also interviewed Murphy, who first denied touching Q.M., before later admitting he had touched Q.M. on the night in question. During the investigation, Murphy and Q.M.'s mother reported that Q.M.'s brother (not Murphy) and a male cousin had previously inappropriately touched Q.M.'s genital area. Murphy reported to a Sexual Assault Nurse Examiner that he had touched Q.M. because he wanted to leave the home and that he had previously been inappropriately touched. Ultimately, a criminal juvenile case was filed against Murphy in Missoula County Youth Court, alleging he committed sexual assault against Q.M. Murphy admitted to the allegation in Youth Court and was sentenced to probation. He also participated in sex offender therapy.

¶22 Murphy was kicked out of the family home once he turned 18. He stayed in contact with his family, however, and was invited to see them during the holiday season in December 2016 and January 2017. Approximately four months later, Q.M. reported to a counselor at her school that Murphy had molested her around New Years Eve. Approximately two months after this initial disclosure, Q.M. was forensically interviewed. Q.M. reported that, during a family game of hide-and-seek, Murphy found her in the back of her mother's vehicle and inappropriately touched her before stopping when her sister was approaching. Q.M. stated the game continued after this incident, and about 30 minutes later, Murphy found her behind a big shed, where Murphy had Q.M. perform oral sex on

him before having anal sex with her. Q.M. further reported that Murphy took her for a drive a couple of weeks later, where he again had anal sex with her. Q.M. also stated she had been told by others that Murphy had a long history of sexually abusing her, but she did not remember "the majority of it."

¶23 On December 6, 2017, after obtaining leave to file from the District Court, the State filed an Information charging Murphy with a single count of Sexual Intercourse Without Consent, a felony. The Information alleged Murphy had sexual intercourse without consent with Q.M. between the dates of December 1, 2016, and January 30, 2017. Before trial, Murphy filed a motion in limine, seeking an order from the District Court which prohibited the State and any of its witnesses from making any reference to the following:

> 1. That in Youth Court case DJ-13-52, Missoula County, Ethan Murphy admitted to Sexual Assault on Q.M., the related police reports, and [sexual offender evaluation] related to this incident;
>
> 2. Any alleged sexual contact between Ethan Murphy and Q.M. that allegedly occurred before December 1, 2016; and
>
> 3. Any alleged sexual contact not disclosed with specificity prior to the Omnibus Hearing. [Especially] allegations that Q.M. says are based upon what others told her rather than her own memory.

Murphy sought to prohibit the State from presenting such evidence pursuant to M. R. Evid. 403 and 404(b), arguing both that the evidence was only relevant for an improper propensity inference and that any non-propensity value the evidence might have is substantially outweighed by the danger of unfair prejudice. The State responded to Murphy's motion and argued the evidence was proper under the exception to Rule 404(b), separately admissible under the transaction rule of § 26-1-103, MCA, and that the probative

value was not outweighed by the danger of unfair prejudice under either scenario. Murphy did not file a reply brief and neither party asked for a hearing on the motion.

¶24 The District Court denied Murphy's motion in limine without holding a hearing. The court found the evidence of Murphy's previous sexual contact with Q.M. was admissible under the exception to Rule 404(b), separately admissible under the transaction rule, and its probative value was not outweighed by the danger of unfair prejudice under Rule 403 in either scenario. After the District Court denied his motion in limine, Murphy first moved for a bench trial, rather than a jury trial, before entering into a plea agreement in which Murphy entered an *Alford* plea[1] to an amended charge of Incest and reserved his right to appeal the District Court's denial of his motion in limine. The District Court sentenced Murphy to 10 years at the Montana State Prison, with 10 years suspended, except for 30 days, and gave Murphy credit for 273 days he had already served in custody. Murphy now appeals the denial of his motion in limine.

¶25 We review a district court's ruling regarding the admission of other crimes, wrongs, or acts for an abuse of discretion. *Haithcox*, ¶ 14 (citing *State v. Crider*, 2014 MT 139, ¶ 14, 375 Mont. 187, 328 P.3d 612). An abuse of discretion occurs when a district court acts arbitrarily without conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice. *Madplume*, ¶ 19 (citing *State v. Spottedbear*, 2016 MT 243, ¶ 9,

[1] An *Alford* plea arises from the United States Supreme Court's decision in *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160 (1970) and allows a defendant to plead guilty to an offense without acknowledging his guilt. *State v. Peterson*, 2013 MT 329, ¶ 8, 372 Mont. 382, 314 P.3d 227 (citing *State v. Locke*, 2008 MT 423, ¶ 18, 347 Mont. 387, 198 P.3d 316).

385 Mont. 68, 380 P.3d 810). To the extent a district court's evidentiary ruling is based upon an interpretation of a rule of evidence or a statute, however, our review is de novo. *Haithcox*, ¶ 14 (citing *State v. Lotter*, 2013 MT 336, ¶ 13, 372 Mont. 445, 313 P.3d 148).

¶26 In this case, the District Court denied Murphy's motion in limine to preclude the State from presenting evidence of (1) his juvenile sexual assault case against Q.M.; (2) any alleged sexual contact between Murphy and Q.M. from before the earliest date charged in this case, December 1, 2016; and (3) allegations of sexual contact between Murphy and Q.M. which Q.M. does not specifically remember, but says other people told her happened. The District Court flatly denied Murphy's motion in limine and ruled such evidence was relevant and admissible under both Rule 404(b) and the transaction rule, and did not run afoul of Rule 403's prohibition on the admission of evidence when its probative value is outweighed by the danger of unfair prejudice. The District Court's ruling was incorrect. Because the Court does not reach the transaction rule today, I address only Rule 404(b) and Rule 403.

Rule 404(b)

¶27 "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." M. R. Evid. 404(b). Rule 404(b) bars admission of or reference to other acts for the purpose of supporting an inference of guilt based on conformance with prior bad character. *McGhee*, ¶ 14. "The aim of Rule

404(b) is to ensure jurors do not impermissibly infer that a defendant's prior bad acts make that person a bad person, and therefore, a guilty person." *Madplume*, ¶ 22 (citing *Salvagni*, ¶ 47). "Under Rule 404(b), the distinction between admissible and inadmissible other acts evidence thus depends on the particular purpose or effect of the evidence." *McGhee*, ¶ 15 (citing *Madplume*, ¶ 23). "To prevent the permissible uses from swallowing the general rule barring propensity evidence, the trial court must ensure that the use of Rule 404(b) evidence is 'clearly justified and carefully limited.'" *Madplume*, ¶ 23 (quoting *State v. Aakre*, 2002 MT 101, ¶ 12, 309 Mont. 403, 46 P.3d 648). "Rule 404(b) other acts evidence is admissible if the proponent can 'clearly articulate how that evidence fits into a chain of logical inferences, no link of which may be the inference that the defendant has the propensity to commit the crime charged.'" *Daffin*, ¶ 15 (quoting *State v. Clifford*, 2005 MT 219, ¶ 48, 328 Mont. 300, 121 P.3d 489). "The policy underlying Rule 404(b)'s general prohibition comes into play whenever the nature of the evidence might tempt the jury to decide the case against the defendant on an improper propensity basis." *Stewart*, ¶ 62 (citation omitted).

¶28 In ruling that evidence of Murphy's prior sexual touching of Q.M. when he was 14 was admissible pursuant to Rule 404(b), the District Court found that "Murphy's identity as the alleged perpetrator, his intent, and his motive are primary issues in the case." Under Rule 404(b), evidence of other crimes, wrongs, or acts may be admissible to prove motive, intent, or identity. M. R. Evid. 404(b). While those are enumerated exceptions to Rule 404(b), the proffered evidence must actually meet those exceptions to be admissible. In

this case, it does not. The State, in its briefing, appears to concede that the evidence would not be admissible for proof of Murphy's identity, as it writes that "Murphy's prior sexual abuse of Q.M. provided evidence that he had a motive and the intent to commit sexual intercourse without consent." As it appeared as a reason for the admission of the evidence in the District Court's order denying Murphy's motion in limine, I first briefly address the identity exception to Rule 404(b) before turning to motive and intent.

A. Identity

¶29 "Evidence is admissible to demonstrate that a defendant employs a particular grooming pattern or uses 'distinctive or idiosyncratic methods to lure victims into vulnerable positions that enable sexual assault.'" *Daffin*, ¶ 17 (quoting *Aakre*, ¶ 20). The identity exception to Rule 404(b) may be used to admit evidence of "'other like crimes by the accused so nearly identical in method as to earmark them as the handiwork of the accused.'" *Daffin*, ¶ 17 (quoting *Salvagni*, ¶ 60). We have found the similarity between prior crimes and the alleged crime on trial is sufficient for admissibility in sex crime cases. *Daffin*, ¶ 17 (citing *Aakre*, ¶ 22).

¶30 The District Court cited to *Daffin* when discussing why it was denying Murphy's motion in limine and admitting the evidence. In *Daffin*, we discussed Daffin's "criminal signature" for the common elements he used to select and groom victims, including: supplying them with alcohol and/or drugs; driving them around; partying with them; taking them mudding; and then assaulting them. *Daffin*, ¶ 18. We also discussed Daffin's "pattern" of sexual abuse, which "started with 'flirting'; escalated to sexual conversation

and touching that bordered on sexual; proceeded to sexual contact; and concluded by telling the victims they were at fault or complicit in the abuse, and swearing them to silence." *Daffin*, ¶ 18. Here, other than Murphy being the alleged perpetrator and Q.M. the victim, there are no similarities between the 2012 Missoula incident and the present charge. In the 2012 incident, a 14-year-old Murphy sexually touched a sleeping Q.M. with his hands and "observed her vagina." As alleged in the present case, an 18-year-old Murphy anally raped Q.M. twice, first behind a shed during a game of hide-and-seek and then later in his car. The alleged crimes are clearly not "so nearly identical in method as to earmark them as the handiwork of the accused," *Daffin*, ¶ 17, and to the extent the District Court held admission of the evidence of Murphy's prior crime was permissible due to the identity exception to Rule 404(b), its decision was an abuse of discretion.

B. Motive and Intent

¶31 I first note that, as Murphy denies the allegation he committed sexual intercourse without consent against Q.M. in 2016 and 2017, the admission of evidence of Murphy's prior crime to show his intent to commit the current offense cannot be a valid exception to Rule 404(b). "When a defendant denies participation in the act or acts which constitute the crime, intent is not a material issue for purposes of applying Rule 404(b)." *State v. Sweeney*, 2000 MT 74, ¶ 24, 299 Mont. 111, 999 P.2d 296 (quoting *United States v. Powell*, 587 F.2d 443, 448 (9th Cir. 1978)). To the extent the District Court held admission of the evidence of Murphy's prior crime was permissible due to the intent exception to Rule 404(b), its decision was an abuse of discretion.

¶32 "Evidence is admissible to show motive when separate acts can be explained by the same motive." *Daffin*, ¶ 19 (citing *State v. Crider*, 2014 MT 139, ¶ 25, 375 Mont. 187, 328 P.3d 612). "In [*Salvagni*], ¶ 59, we explained that a prior bad act may evidence the existence of a motive without supplying the motive. In such cases, the motive is the cause and both the prior acts and the act at issue are effects." *Crider*, ¶ 25 (citing *Salvagni*, ¶ 59).

¶33 Once again comparing the present case to *Daffin*, the District Court found both that Murphy experiences a desire to engage in sexual contact with Q.M. that he does not experience with other minor females and that Murphy has a "longstanding sexual fixation with Q.M." Because of these findings, the District Court held the evidence would be relevant and admissible for "demonstrating Murphy's motive to commit a sexual offense against Q.M." The evidence we found to be permissible motive evidence under Rule 404(b) in *Daffin* is far different from that of the present case. In *Daffin*, we found the "testimony of former victims and witnesses demonstrated Daffin's longstanding sexual fixation with underage teen girls, particularly living in vulnerable family situations, and provided the motive for his crimes" and that Daffin "pursued a sexual interest in underage females for approximately 20 years." *Daffin*, ¶ 20.

¶34 Here, the District Court greatly overstated the evidence when it found Murphy had a "longstanding sexual fixation with Q.M." Unlike those of *Daffin*, the alleged offenses in this case are not similar, in that one involved a 14-year-old Murphy touching and "observing" his sleeping half-sister's vagina and the other involved an 18-year-old Murphy anally raping her behind a shed. They are also remote in time, separated by nearly five

years. The relevance of this remoteness is made even stronger when considering their relative ages—approximately a quarter of Murphy's life had passed since the previous incident, approximately a third of Q.M.'s.

¶35 In addition, the District Court misstates the evidence as presented in the State's response brief to Murphy's motion in limine, writing that when Murphy "was asked if he ever touched another minor female inappropriately, Murphy admitted that he only thought about Q.M. 'in that way' and that when he was touching Q.M. he had no interest in touching anyone else."[2] In the State's brief, it recounts Murphy being asked by Missoula detectives during the 2012 investigation about whether he "touch[ed] his other sister," not whether he had ever touched another minor female or whether he had feelings for any other minor females. Again, neither a transcript nor a recording of this interview is part of the record in this case, and Murphy was a minor at the time. The Court today continues to misstate this evidence, writing "[t]he challenged evidence demonstrates his sexual feelings were directed only toward Q.M., resulting in his sexual pursuit of her alone over a period of years." Opinion, ¶ 14. Murphy's denial of attraction towards his other sister in 2012 has somehow been twisted into a claim that he has only ever been attracted to Q.M., a claim which is not supported by the record of two sexual incidents five years apart. "[S]omething further is necessary to demonstrate a cause and effect relationship" if the State seeks to use Murphy's prior crime against him to prove motive. *Blaz*, ¶ 15. Unlike in *Blaz*, which, like

[2] The Court now appears to wrongly attribute this entire quote to Murphy himself. Opinion, ¶ 3.

Daffin, recounted a pattern of similar acts, there is nothing further here, and the District Court abused its discretion by admitting evidence pursuant to the motive exception to Rule 404(b).

¶36 The District Court abused its discretion by admitting evidence of Murphy's prior crime under Rule 404(b) in this case as the evidence was not admissible to prove any of: identity, motive, or intent. The evidence simply invites the fact finder to improperly consider Murphy's propensity to commit the crime due to his prior conviction as the 2012 incident and 2016-17 incidents share no similarities, and certainly no identical acts or criminal signature, beyond the identities of the alleged perpetrator and victim. The evidence of Murphy's prior crime should not have been admitted under Rule 404(b).

Rule 403 Balancing

¶37 I turn now to whether the probative value of the evidence is outweighed by the danger of unfair prejudice under Rule 403. The District Court found the probative value of a juvenile Murphy's prior sexual contact with Q.M. was not outweighed by the danger of unfair prejudice. I disagree.

¶38 Generally, relevant evidence is admissible. M. R. Evid. 402. Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." M. R. Evid. 401. In addition, "[r]elevant evidence may include evidence bearing upon the credibility of a witness or hearsay declarant." M. R. Evid. 401. "M. R. Evid. 403 provides that, although 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." *State v. Colburn*, 2018 MT 141, ¶ 16, 391 Mont. 449, 419 P.3d 1196 (*Colburn II*) (citing *State v. Ankeny*, 2018 MT 91, ¶ 33, 391 Mont. 176, 417 P.3d 275). While probative evidence is generally prejudicial to one side or the other, evidence is unfairly prejudicial if it arouses the jury's hostility or sympathy for one side without regard to its probative value, confuses or misleads the trier of fact, or unduly distracts from the main issues. *Madplume*, ¶ 33 (citations omitted).

¶39 We have found that "[t]he 'highly inflammatory' nature of child molestation evidence . . . require[s] the District Court and the State to tread with caution." *State v. Franks*, 2014 MT 273, ¶ 17, 376 Mont. 431, 335 P.3d 725 (quoting *State v. Van Kirk*, 2001 MT 184, ¶ 46, 306 Mont. 215, 32 P.3d 735). "Further, while generally going only to the weight of evidence rather than its admissibility, remoteness in time may nonetheless, depending on the nature of the evidence and purpose offered, diminish the probative value of other acts evidence on Rule 403 balancing." *State v. Pelletier*, 2020 MT 249, ¶ 25, 401 Mont. 454, 473 P.3d 991 (collecting cases).

¶40 The District Court, rather than properly treading with caution regarding the admission of Murphy's prior conviction of molesting Q.M. when he was 14, stated "the evidence of Murphy's past conduct will tend to focus the jury's attention on the main issues of fact" when ruling the probative value did not outweigh the danger of unfair prejudice. Such a statement is remarkable on its face, as the evidence was both "highly inflammatory"

and remote in time. While the District Court claimed this evidence would "focus the jury's attention" on the present charges, it seems patently obvious that the admission of Murphy's previous molestation conviction would arouse the jury's hostility towards him and provoke their sympathy for Q.M. The District Court abused its discretion in its Rule 403 balancing test by not treading with caution regarding Murphy's prior molestation conviction and instead asserting its admission would somehow focus the jury rather than provoke their hostility. The Court today compounds this mistake by not even addressing our previous caselaw noting the "highly inflammatory" nature of child molestation evidence and its potential for unfair prejudice in this case, instead choosing to recount the District Court's stated reasons for admitting the evidence before flatly declaring "unfair prejudice did not substantially outweigh the probative value of Murphy's 2012 juvenile assault, as well as his other conduct" in this case, with no further analysis provided. Opinion, ¶ 16. The "highly inflammatory" nature of the evidence involved here clearly requires both the District Court and this Court to treat it with more "caution" than they have. *Franks*, ¶ 17.

¶41 While I believe a proper application of Rule 403 in this case—presuming the evidence was admissible, which, as I have explained above, it was not—would show the evidence of Murphy's prior sexual touching of Q.M. as a minor would lead to the exclusion of that evidence as unfairly prejudicial, we have previously found that in certain cases, when addressing an allegation of child molestation at the motion in limine stage, given the "overwhelmingly prejudicial nature of child molestation evidence," the "wiser course" of action for a district court is to "withhold ruling on its admissibility." *Franks*, ¶ 21. Here,

not even that happened. The District Court instead gave the State carte blanche to admit the evidence Murphy sought to be excluded and declared "the evidence may be confronted and challenged adequately by traditional evidentiary methods available to the defense." As Murphy succinctly argued before the District Court, one cannot "un-ring" the bell of child molestation accusations. It is for precisely this reason we have held that a court must "tread with caution" regarding the admission of such evidence. *Franks*, ¶ 17. The District Court did not do so here.

¶42 For the reasons set forth above, I would hold the District Court abused its discretion in denying Murphy's motion in limine. In this case, there was a plea agreement whereby Murphy pled guilty via *Alford* plea to the amended charge of Incest and reserved his right to appeal the District Court's determination on his motion in limine in accordance with § 46-12-204(3), MCA. Pursuant to that statute, "[i]f the defendant prevails on appeal, the defendant must be allowed to withdraw the plea." Section 46-12-204(3), MCA. As I have set forth why Murphy should have prevailed on appeal in this case, I would have remanded the matter to the District Court where Murphy "must be allowed to withdraw his plea" pursuant to § 46-12-204(3), MCA. *In re Z.M.*, 2007 MT 122, ¶ 49, 337 Mont. 278, 160 P.3d 490.

¶43 The District Court erred by denying Murphy's motion in limine. I would reverse the denial of Murphy's motion in limine and remand to the District Court, where Murphy must be allowed to withdraw his *Alford* plea. I respectfully dissent from the Court concluding otherwise.

/S/ INGRID GUSTAFSON

Justices Dirk Sandefur and Laurie McKinnon join in the dissenting Opinion of Justice Gustafson.

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