DA 19-0707

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 276

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JUSTIN PHILLIP HOOVER,

Defendant and Appellant.

APPEAL FROM: District Court of the Nineteenth Judicial District,
In and For the County of Lincoln, Cause No. DC 19-11
Honorable Matthew Cuffe, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Kristen L. Peterson, Assistant Appellate Defender, Helena, Montana

For Appellee:

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

Marcia Jean Borris, Lincoln County Attorney, Jeffrey Zwang, Deputy County Attorney, Libby, Montana

Submitted on Briefs: June 23, 2021

Decided: October 26, 2021

Filed:

Clerk

Justice Dirk Sandefur delivered the Opinion of the Court.

¶1 Justin Phillip Hoover (Hoover) appeals the September 13, 2019, judgment of the Montana Nineteenth Judicial District Court, Lincoln County, denying his motion for a new trial on the offense of partner or family member assault (PFMA), third or subsequent offense, a felony in violation of § 45-5-206, MCA. We address the following restated issue:

> *Whether the replay of video evidence of Hoover's incriminating statements to the deliberating jury without notice to the parties constituted reversible error?*

Reversed and remanded.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 On January 22, 2019, based on incriminating audio-video game camera footage that captured his belligerent verbal and physical interaction with his teenaged son (H.H.), and subsequent incriminating statements made in a post-arrest interrogation interview conducted by a sheriff's deputy, the State charged Hoover with third or subsequent offense PFMA. At trial, the State introduced the game camera footage exhibit through the foundation testimony of a game warden and the subsequent interrogation video through the foundation testimony of a sheriff's deputy who conducted the interview.

¶3 The game camera footage exhibit consisted of 25 short segments, each approximately 13 seconds in length, separated by unrecorded gaps of between eight seconds and eight minutes. The videos showed Hoover and H.H. stacking firewood in the back of a pickup truck on a snowy evening in a forested area where they were cutting wood. In pertinent part, the footage showed H.H. stacking wood in the pickup and Hoover telling

him to "get it fucking right" and then shoving him. The footage later showed H.H. pulling a tire from the pickup bed and saying to Hoover, "[n]ow you see what's up, dude?" Hoover responded by walking up to H.H. and twice slapping him on the side of his face. A subsequent segment showed Hoover grabbing H.H. by the front of his sweatshirt and pushing him onto the ground while calling him a "mother fucker." The clip then showed Hoover pull H.H. up from the ground while criticizing him for not "paying any fucking attention." The next clip showed Hoover kneeling down next to H.H. telling him how he had been incorrectly pushing logs "uphill against me, so I can't help you." A later clip showed Hoover approach H.H. and say that "not everything's gotta be a battle" because "I will fucking win." Subsequent clips showed Hoover continuing to berate H.H. with profanity while they were stacking logs and ultimately telling H.H. to clean up his bloody nose.

¶4 The State then presented excerpts, totaling approximately 21 minutes in duration, from the post-arrest interrogation video to the jury. Rather than providing a single video recording with the excluded segments redacted out, the State presented the admissible segments from the uncut video by manually stopping and skipping over the excluded segments during playback. During the interview, the sheriff's deputy did not initially disclose to Hoover that a remote game camera had captured the subject incident on video. With that omission, the deputy asked if Hoover had ever put his "hands on [H.H.] while you were cutting firewood." Hoover said "[p]robably not," but stated that he did not remember anything like that and then asked "who says I put my hands on [him]?" Upon

the deputy's disclosure that a game camera caught and recorded the subject incident, Hoover responded that he did not remember the incident, but insisted that H.H. "never had a bruise, never had nothing from me." The interrogation video showed the initially calm Hoover become increasingly agitated as the interview progressed and repeatedly referring to the deputy's allegation of misconduct as "fucking bullshit."

¶5 Surprised that the deputy would consider his treatment of H.H. abusive, Hoover stated that "[y]ou can take it as 2019 fucking abuse" and repeatedly asserted it was "not a big deal." He further retorted, "[s]o I slapped my son upside the head, whoop-dee-do." Hoover asserted that his conduct was not abusive because H.H. was sixteen years old. He said that his own father had disciplined him "a lot worse than that." When asked whether he caused H.H.'s nose to bleed, Hoover responded "fuck no." When the deputy pointed out that the game camera footage showed him telling H.H. to clean blood off his face, Hoover replied, "whoop-dee-do," and insisted that his conduct was "a long fucking ways from abuse." Hoover later pointed out that blood was not "gushing" from H.H.'s nose and stated that his son frequently gets a bloody nose during competitive wrestling matches. When asked if H.H. deserved what happened, Hoover twice responded "[p]robably not," but then acknowledged that the interaction "maybe [constituted] some discipline, yeah."

¶6 Upon the close of the State's evidence, the District Court denied Hoover's motion for judgment as a matter of law. Hoover then testified on his own behalf. In stark contrast to his statements and demeanor in the interrogation video, he calmly asserted that he was only attempting to teach H.H. how to properly stack firewood so that it would not fall off

the truck and cause a safety hazard. He testified that he only slapped H.H. in order to get his attention so that he would properly stack the wood. He acknowledged that his conduct was "maybe a little drastic," but asserted that it was "definitely necessary." On cross-examination, however, he equivocated that it was "maybe not" necessary to hit H.H. and further acknowledged that he had similarly admitted in his post-arrest interview that H.H. "probably [did] not" deserve to be punished that day.

¶7 During the settlement of jury instructions outside the presence of the jury, Hoover requested an instruction on the affirmative defense of justifiable use of force by a parent. Over the State's objection that the evidence did not support that affirmative defense, the District Court granted Hoover's request and accordingly included the requested justifiable use of force instruction in the jury instruction set.

¶8 During closing arguments, defense counsel emphasized the broad discretion that parents have in disciplining their children and stressed that there is no "magical line between parenting and abuse." Counsel essentially asserted that Hoover did not have the requisite mental state for PFMA and was thus "absolutely dumbfounded" when confronted with the allegation that he was abusive to his son. In contrast, the State asserted and emphasized how the game camera footage and interrogation video were more than sufficient to prove Hoover's guilt on the elements of the offense of PFMA. *Inter alia*, the State pointed out and stressed the incriminating nature of Hoover's conduct and statements in the game camera footage. The State further attacked his asserted justifiable use of force defense by contending that shoving and slapping his son with the accompanying use of

profanity was not reasonably necessary under the circumstances to teach proper wood-stacking technique.

¶9 After the court submitted the case to the jurors and they retired to the jury room for deliberations, the bailiff delivered to the jury room the two video discs admitted into evidence during the trial. However, the jury room contained no equipment with which to replay those video exhibits. The record is devoid of any preceding conferral between court and counsel as to whether the video discs should even go into the jury room or, if so, how and under what circumstances the court and counsel contemplated that the jury should or would be able to review them if so inclined.

¶10 At some point in the course of their initial deliberations, the jury notified the bailiff that they wished to review the game camera footage. The bailiff informed the presiding judge of the request and, upon court authorization without notice to the parties, brought the jury back into the courtroom to review the video. With no one else present, the bailiff replayed game camera footage to the jury on a laptop computer in the courtroom and then returned the jury to the jury room with the video disc. The parties received no notice that the courtroom playback occurred. After almost 2½ hours of deliberations, the District Court sent the jury home for the night to return in the morning.

¶11 When the jurors reconvened for further deliberation the next day, the District Court gave them a so-called "dynamite instruction."[1] Sometime later that morning, the jurors

[1] *See State v. Norquay*, 2011 MT 34, ¶ 43, 359 Mont. 257, 248 P.3d 817. The purpose of a dynamite or *Allen*/*Norquay* instruction is to "encourage[] a deadlocked jury to continue deliberations" in furtherance of reaching a verdict. *State v. Santiago*, 2018 MT 13, ¶¶ 3 and 17, 390 Mont. 154, 415 P.3d 972.

notified the bailiff that they wished to again review the game camera footage, as well as Hoover's interrogation video.[2] As she did the night before, the bailiff advised the presiding judge of the request(s) and, upon court authorization without notice to the parties, returned the jurors to the courtroom with no one else present and replayed the game camera footage and interrogation videos to them on a laptop. As the State had when it first played the interrogation video during the trial, the bailiff manually redacted the excluded segments of the video, as specified by a pretrial court order, by stopping the playback and skipping forward to the admissible segments. After the video playbacks, the bailiff returned the jurors to the jury room with the video discs, again without any means to further view them there. As with the game footage playback the night before, the parties received no advance notice of the morning video playbacks to the jury.

¶12 After the morning dynamite instruction, and about an hour and twenty minutes of deliberation including the video playbacks, the jurors sent out a question regarding the relative definitions of "bodily injury" and "assault" as referenced in their PFMA instruction(s). Upon notice of the question, the court and counsel reconvened in the courtroom outside the presence of the jury to confer about the question. While what prompted the disclosure is not evident, the record manifests that, incident to discussion of the jury question, the District Court disclosed to the parties the occurrence of the jury playbacks of the game camera footage (twice) and interrogation video (once). Shortly after

[2] The record is unclear whether the requests came together or separately during deliberation that morning.

the court responded to the jury question, the jurors returned a verdict finding Hoover guilty of PFMA as charged.

¶13 Two weeks later, Hoover filed a motion for a new trial on the asserted ground that the court erroneously allowed the video playbacks to the jury without notice to the parties. Following a hearing, the District Court denied the motion on the stated ground that the un-noticed video playbacks were not prejudicial under the circumstances. Citing *State v. Hart*, 2009 MT 268, ¶ 35, 352 Mont. 92, 214 P.3d 1273, and *State v. Giddings*, 2009 MT 61, ¶ 97, 349 Mont. 347, 208 P.3d 363, the court reasoned that there was no danger of the jury placing undue emphasis on the videos over Hoover's trial testimony because: (1) the interrogation video was consistent with the both the game camera footage and Hoover's trial testimony except to the extent that he "contradicted himself within his own testimony"; (2) the interrogation video "ultimately was not crucial to the State's case"; and (3) both parties relied on the videos in support of their respective theories of the case. The District Court subsequently sentenced Hoover to a five-year commitment to the Montana State Prison, with two years suspended. Hoover timely appeals.

STANDARD OF REVIEW

¶14 We review district court denials of motions for new trial for an abuse of discretion. *State v. Clark*, 2005 MT 330, ¶ 18, 330 Mont. 8, 125 P.3d 1099 (citing *State v. McCarthy*, 2004 MT 312, ¶ 43, 324 Mont. 1, 101 P.3d 288). An abuse of discretion occurs if a court exercises granted discretion based on a clearly erroneous finding of fact, erroneous conclusion or application of law, or otherwise acts arbitrarily, without conscientious judgment or in excess of the bounds of reason, resulting in substantial injustice. *State v.*

Pelletier, 2020 MT 249, ¶ 12, 401 Mont. 454, 473 P.3d 991 (internal citations omitted); *State v. Derbyshire*, 2009 MT 27, ¶ 19, 349 Mont. 114, 201 P.3d 811. We review lower court conclusions and applications of law de novo for correctness. *State v. Christensen*, 265 Mont. 374, 375-76, 877 P.2d 468, 469 (1994).

DISCUSSION

¶15 *Whether the replay of video evidence of Hoover's incriminating statements to the deliberating jury without notice to the parties constituted reversible error?*

¶16 As a general rule, "[u]pon retiring for deliberation, the jurors may take with them the written jury instructions read by the court," their own notes taken during the trial, and "all exhibits that have been [admitted] as evidence" during the trial and which "in the opinion of the court will be necessary" to their deliberations. Section 46-16-504, MCA.[3] However, as a common law limitation not displaced by §§ 46-16-503(2) or -504, MCA, the court generally may not allow unsupervised or unrestricted jury review or replay of witness testimony or other evidence that is testimonial in nature. *State v. Nordholm*, 2019 MT 165, ¶ 14, 396 Mont. 384, 445 P.3d 799; *State v. Stout*, 2010 MT 137, ¶ 29, 356 Mont. 468, 237 P.3d 37 (common law rule applies to jury room submittals under both

[3] This statutory rule expressly contemplates that not all exhibits admitted into evidence should automatically go into the jury room for deliberations, but only those which "in the opinion of the court will be necessary" for deliberations. *See* § 46-16-504, MCA. In contrast to what occurred here, the express language of the rule thus manifestly contemplates an affirmative determination by the court, upon consultation with counsel, as to which exhibits admitted into evidence are necessary and proper to go into the jury room for deliberations. *See State v. Stout*, 2010 MT 137, ¶ 26, 356 Mont. 468, 237 P.3d 37 (noting post-submission court-counsel conferral in re jury room exhibits); *State v. Bales*, 1999 MT 334, ¶ 10, 297 Mont. 402, 994 P.2d 17 (noting threshold court determination "at the close" of trial admitting tape recording of a post-incident police interview of defendant into jury room).

§§ 46-16-503(2) and -504, MCA); *State v. Herman*, 2009 MT 101, ¶ 38, 350 Mont. 109, 204 P.3d 1245 (internal citation omitted); *State v. Bales*, 1999 MT 334, ¶¶ 19-24, 297 Mont. 402, 994 P.2d 17 (recognizing application of common law rule to § 46-16-504, MCA); *State v. Harris*, 247 Mont. 405, 416-18, 808 P.2d 453, 459-60 (1991) (citing *Chambers v. State*, 726 P.2d 1269 (Wyo. 1986)). The purpose of the common law rule is "to prevent a jury from placing undue emphasis" on the reheard or replayed testimonial evidence "to the exclusion of [the] other evidence" in the case. *Nordholm*, ¶ 14; *Harris*, 247 Mont. at 416, 808 P.2d at 459 (citing *Chambers*, 726 P.2d at 1275).

¶17 The jury must thus generally "rely on its collective memory" in assessing the nature, veracity, and credibility of all of the evidence as a whole, except in the discretion of the court based on an identified particularized need for review of a particular segment of testimonial evidence under controlled circumstances, thereby minimizing unnecessary amplification of, and the resulting danger of undue emphasis on, particular items of testimonial evidence over the other evidence. *See Nordholm*, ¶ 14. *See also State v. A.R.*, 65 A.3d 818, 820-21 (N.J. 2013); *Coleman v. State*, 610 So. 2d 1283, 1286 (Fla. 1992); *State v. Frazier*, 661 P.2d 126, 131-32 (Wash. 1983); *Richardson v. State*, 579 P.2d 1372, 1374 (Alaska 1978); *United States v. Criollo*, 962 F.2d 241, 243 (2d Cir. 1992). Section 46-16-503(2), MCA, strikes a balance between the purpose of § 46-16-504, MCA, to generally make all trial evidence available to the jury during deliberations and the common law limitation on jury review or replay of testimonial evidence. In pertinent part, it provides that if, during deliberations, "there is any disagreement among the jurors as to the

testimony" in evidence, the jurors "shall notify the officer appointed to keep them together, who shall then notify the court," which then may, "in [its] discretion . . . after consultation with the parties," provide the requested information to the jury. Section 46-16-503(2), MCA. Like § 46-16-504, MCA, § 46-16-503(2), MCA, did "not completely displace the common law rule" limiting review or replay of testimonial evidence. *State v. Greene*, 2015 MT 1, ¶ 22, 378 Mont. 1, 340 P.3d 551 (citing *Harris*). *See also Harris*, 247 Mont. at 417, 808 P.2d at 460 (applying § 46-16-503(2), MCA, in conjunction with common law rule and construction of similar Wyoming statute in *Chambers*, 726 P.2d at 1276). Rather, § 46-16-503(2), MCA, must be applied in conjunction with the common law rule, thereby imposing a similar limitation on requested reviews or replays of testimony and "testimonial materials" upon particularized consideration and proper balancing in the discretion of the court. *Greene*, ¶¶ 22-23 (quoting *Harris*); *Harris*, 247 Mont. at 417, 808 P.2d at 460.

¶18 Accordingly, in assessing what items of evidence may initially go into the jury room, or may be subsequently reviewed or replayed upon request, under §§ 46-16-503(2) and -504, MCA, and the related common law rule, the threshold question for advance consideration by the court in consultation with the parties is whether the subject item is either testimony or testimonial in nature. *See* §§ 46-16-503(2) and -504, MCA; *Greene*, ¶¶ 22-23 (stating common law rule—citing *Harris*, 247 Mont. at 417, 808 P.2d at 460); *Stout*, ¶¶ 29-32 (stating common law rule and discussing nature of testimonial materials); *Herman*, ¶¶ 38-39; *Bales*, ¶ 16. *See also Nordholm*, ¶¶ 6 and 10-11 (*inter alia* noting State

concession that body camera videos that captured conversations between the police officer and the defendant and other witnesses were testimonial in nature). If not, the common law rule and § 46-16-503(2), MCA, do not apply. *See* § 46-16-503(2), MCA (in re "disagreement . . . as to the testimony"); *Nordholm*, ¶ 14; *Greene*, ¶¶ 22-23; *Stout*, ¶¶ 29-32; *Herman*, ¶ 38; *Bales*, ¶¶ 16-24; *Harris*, 247 Mont. at 416-18, 808 P.2d at 459-60. In that regard, the testimony of a party or witness, whether provided to the jury by written transcript, replay of an electronic recording, or from a transcript, are obviously subject to the common law rule under §§ 46-16-503(2) and -504, MCA. *See Greene*, ¶¶ 9, 21, and 25 (cover page and partial transcript of witness testimony); *State v. Evans*, 261 Mont. 508, 510-11, 862 P.2d 417, 418 (1993) (reading/replay of a witness's direct testimony); *State v. Mayes*, 251 Mont. 358, 825 P.2d 1196 (1992) (replay of tape-recorded witness testimony); *Harris*, 247 Mont. at 416-18, 808 P.2d at 459-60 (courtroom rereading witness testimony). Moreover, while we have not fully defined the term *testimonial* for purposes of the common law rule and §§ 46-16-503(2) and -504, MCA, we have recognized that other types of testimonial materials (*i.e.* materials that are testimonial in nature) subject to the common law rule under those statutes include, *inter alia*, relevant written and electronic recordings of out-of-court statements of individuals. *See Nordholm*, ¶¶ 6 and 10-11 (police body camera videos that captured conversations between an officer and the defendant and other witnesses); *Herman*, ¶¶ 36-39 (prior inconsistent written statement of a witness); *Bales*, ¶¶ 9 and 16 (taped post-fatality traffic accident interview of injured defendant by investigating officer at the hospital).

¶19 Upon a jury request for review or replay of testimony or testimonial materials or exhibits under § 46-16-503(2), MCA, the court must next consider and determine upon consultation with the parties: (1) the particular testimony or portion of a testimonial exhibit the jury seeks; (2) the "exact" purpose of the request or the "exact nature of the . . . difficulty" which prompted the request; and (3) the "precise testimony" or portion of the subject testimonial exhibit that would be responsive thereto. *See Harris*, 247 Mont. at 417, 808 P.2d at 460 (quoting with approval *Chambers*, 726 P.2d at 1276). *Accord Greene*, ¶ 23 (citing *Harris* (quoting *Chambers*)); *Evans*, 261 Mont. at 512, 862 P.2d at 419; *Mayes*, 251 Mont. at 374, 825 P.2d at 1206. The court must then "weigh the probative value" of the particular testimony or portion of the testimonial exhibit at issue "against the danger of undue emphasis" and make a discretionary decision as to whether, and to what extent, to repeat or replay the "precise testimony" or portion of the subject testimonial exhibit that would be responsive to the assessed purpose or "difficulty" which prompted the request. *See Harris*, 247 Mont. at 417, 808 P.2d at 460 (quoting with approval *Chambers*, 726 P.2d at 1276). *Accord Greene*, ¶¶ 23-24 (citing *Harris* (quoting *Chambers*)); *Evans*, 261 Mont. at 512, 862 P.2d at 419; *Mayes*, 251 Mont. at 374, 825 P.2d at 1206. In the exercise of this discretion, the court must be cognizant that "[t]he more testimony" or portion of a testimonial exhibit repeated or replayed, or the more times it is repeated or replayed, "the greater the danger of undue emphasis." *Harris*, 247 Mont. at 417, 808 P.2d at 460 (quoting with approval *Chambers*, 726 P.2d at 1276).

> Even with the best of procedures, it would not be proper under the statute for the court to reread a transcript or replay a videotape of a witness's entire story

> just because the jury wants to review all of the testimonial matter that happens to be available or because the jury wants to review the general credibility of the witness. Undue emphasis and delay would be too likely.

Harris, 247 Mont. at 417, 808 P.2d at 460 (quoting with approval *Chambers*, 726 P.2d at 1276).

¶20 We have further recognized that a request for repeat or replay of all of the testimony or statements of a party or witness, however "critical" to the disputed matters at issue, is not the type of limited request contemplated or authorized by § 46-16-503(2), MCA. *Mayes*, 251 Mont. at 374, 825 P.2d at 1206. Nor, for example, is a request to rehear or replay a substantial portion of the testimony or recorded statements of a key witness "on a critical point of proof" in regard to "which several witnesses" also testified. *Evans*, 261 Mont. at 513, 862 P.2d at 420. Rather, the type of limited request contemplated and authorized by § 46-16-503(2), MCA, in the discretion of the court is a request for repeat or replay of a specific segment of testimony or the portion of a testimonial exhibit regarding a particular matter, such as the physical characteristic of something, time, or other similarly "limited request," "but not the entire[ty]" or a "large amoun[t]" of the testimony or recorded statements of a witness. *Harris*, 247 Mont. at 417-18, 808 P.2d at 460 (citing and quoting *Chambers*, 726 P.2d at 1276—internal punctuation omitted). *Accord Greene*, ¶ 23 (citing *Harris* (quoting *Chambers*)); *Evans*, 261 Mont. at 512, 862 P.2d at 419. Section 46-16-503(2), MCA, merely authorizes the court, in its discretion, "to refresh the jury's recollection of trial testimony" or testimonial exhibits "under certain limited circumstances." *Harris*, 247 Mont. at 417, 808 P.2d at 459. "If, after this careful exercise

of discretion, the court decides to repeat" or replay "some testimony" or portion of a testimonial exhibit to the jury, it must "do so in open court in the presence of the parties or their counsel or under [an]other strictly controlled [protocol] of which the parties have been notified." *Harris*, 247 Mont. at 417, 808 P.2d at 460 (quoting *Chambers*, 726 P.2d at 1276). *Accord Greene*, ¶ 23 (citing *Harris* (quoting *Chambers*)).

¶21 Here, the replays at issue were not replays of the testimony of a party or witness given at trial or by pretrial deposition or affidavit. Rather, they were pertinent prior recorded statements of the defendant. The game camera footage included two inextricably related but distinct types of information—Hoover's non-verbal physical acts of violence toward his son *and* his contemporaneous verbal statements. While the recording of his non-verbal conduct would have constituted independent stand-alone proof of physical acts sufficient for proof of the causation or bodily injury elements of PFMA, his concurrent verbal statements were inextricably part and parcel of those acts and constituted proof of the requisite mental state for PFMA not provided by the recording of his physical acts alone. *See* § 45-5-206, MCA (providing that PFMA requires the defendant to "*purposely or knowingly* caus[e] bodily injury to a partner or family member"—emphasis added).[4] In contrast, the interrogation video consisted of Hoover's verbal statements in response to formal police interrogation. It further captured his inextricably-linked demeanor which was essential for jury assessment of the veracity and credibility of those statements. The

[4] Here, Instruction 14 further instructed the jury that it may "infer . . . purpose and knowledge from the Defendant's acts . . ."

game camera footage and interrogation videos at issue were thus inherently testimonial in nature for purposes of § 46-16-503(2), MCA, and the related common law rule. *See Nordholm*, ¶¶ 6 and 11 (police body camera videos that captured conversations between an officer and the defendant and other witnesses); *Herman*, ¶¶ 36-39 (prior inconsistent written statement of a witness); *Bales*, ¶¶ 9 and 16 (taped post-fatality traffic accident interview).

¶22 On each of the replays of testimonial evidence here, the District Court inexplicably failed to notify the parties of the jury requests and, in addition to failing to confer with the parties, further failed to make any attempt to determine precisely what portion of those testimonial exhibits were sought, the precise purpose or difficulty that prompted the requests, what portions, if any, would be narrowly responsive thereto, and to then carefully "weigh the probative value" of those portions of the subject videos "against the danger of undue emphasis" before making a discretionary decision as to whether and to what extent, if any, to allow replay *under the supervision of the court and parties*. Consequently, notwithstanding that the jury did not have unlimited access to replay the videos and that the bailiff carefully replayed only the admitted portions thereof, the District Court erroneously authorized the bailiff to replay the game camera footage (twice) and the interrogation video (once) without notice to the parties in violation of § 46-16-503(2), MCA, and the related common law rule.[5]

[5] State does not dispute that the un-noticed replay of both videos was erroneous—it merely asserts that Hoover's briefing focuses on the interrogation video replay.

¶23 As to the State's assertion of harmless error, the District Court denied Hoover's motion for a new trial by analogizing the circumstances of this case to those in *Giddings* and *Hart* where we concluded that violations of § 46-16-503(2), MCA, and the related common law rule constituted harmless error under the standard articulated in *State v. Van Kirk*, 2001 MT 184, 306 Mont. 215, 32 P.3d 735 (construing § 46-20-701(1), MCA). Under the two-tier harmless error analysis, a violation of § 46-16-503(2), MCA, and the related common law rule is trial error rather than structural error. *Nordholm*, ¶ 12; *Hart*, ¶ 35. *See also Van Kirk*, ¶ 40. While mere trial error is not necessarily reversible in every case, trial error is nonetheless reversible unless the State meets its burden of making a record-based showing that there is "no reasonable possibility" that the subject trial error "contributed to the conviction." *Van Kirk*, ¶ 47. The State may satisfy its high burden by pointing to other admitted "evidence that proved the same facts as the tainted evidence" *and* showing by qualitative comparison that it could not reasonably have contributed to the conviction. *Van Kirk*, ¶ 47. However, if the tainted evidence was the only evidence tending to prove an element of the charged offense, no basis for qualitative assessment exists and the non-structural error is reversible. *Van Kirk*, ¶ 47.

¶24 In *Giddings*, the district court erroneously allowed into the jury room for unrestricted replay an admitted video recording of two police interrogation interviews of a murder suspect the day after the murder. *Giddings*, ¶¶ 95-96. During the trial, the court allowed the State to publicize the interrogation video to the jury with the aid of a corresponding written transcript due to the poor visual and audio quality of the recording.

Giddings, ¶¶ 95 and 97. Over the defendant's objection, the court allowed the recording of the video into the jury room for unrestricted viewing with the other trial evidence, but without the corresponding written transcript provided during the trial. *Giddings*, ¶ 95. On appeal, we held that the allowance of the video interview recording into the jury room was harmless error because there was no reasonable possibility that it contributed to the conviction based on its "limited evidentiary value" without the accompanying transcript and the resulting fact that "any evidentiary value that the jury may have derived from the videotape came from watching [it] with the aid of [the] transcript during the trial." *Giddings*, ¶ 97.

¶25 *Hart* involved a negligent homicide conviction based on an incident where an intoxicated driver accidentally struck and killed a pedestrian at night and then fled the scene. *Hart*, ¶¶ 6-7. The pertinent issue on appeal was whether the bailiff's erroneous provision of video equipment to the jury to play an admitted video recording of a patrol-car video (merely showing the accident scene in the daylight the next day) without prior notice and authorization of the judge was harmless error. *Hart*, ¶¶ 28-30 and 35. On the jury's request, the bailiff brought in video replay equipment, queued up the daylight crime scene video, and then left and did not return to retrieve the equipment until 5-10 minutes later. *Hart*, ¶¶ 29-30. The accident scene video was one of three patrol car videos (the other two of which showed a still-view of the defendant's yard and subject vehicle the next day but also captured the defendant's off-camera audio admissions to officers that he "hi[t]

something" the night before at the subject time and location). *Hart*, ¶¶ 28 and 33.[6] On appeal, aside from a lingering question as to whether the jury actually viewed the other two patrol-car videos in the limited time before the bailiff returned for the equipment, we noted that the three patrol-car videos that went into the jury room were not the only evidence of the defendant's guilt. *See Hart*, ¶ 36. As to the qualitative comparison between the tainted patrol-car videos and the other evidence of the defendant's guilt, we noted that the other evidence was the victim's blood found on the defendant's vehicle after the accident and also independent witness testimony regarding the defendant's prior alcohol consumption before the accident, his admission "to hitting something or someone" the night of the accident, and a witness's observation of seeing the defendant's "pick-up truck bounce[] up and down as it passed over [the pedestrian's] body." *Hart*, ¶¶ 6 and 36. We thus held that the erroneous playback of one or more of the patrol-car videos was harmless error because they were not essential to the State's case and were at most cumulative of other stronger evidence "admitted to establish the same facts." *Hart*, ¶ 36.

¶26 Here, the erroneous replays of the game camera footage and interrogation video were unquestionably testimonial in nature and thus tainted by violations of § 46-16-503(2), MCA, and the related common law rule. In contrast to *Giddings* and *Hart*, where the State independently presented other substantial and more compelling evidence of the defendant's guilt, the State presented no evidence here of the defendant's guilt other than the subject

[6] Also played to the jury at trial, but not admitted into evidence, was the defendant's videotaped deposition. *Hart*, ¶ 28.

game camera footage and interrogation video. The game camera footage and Hoover's subsequent admissions in the post-arrest interrogation video were the only evidence presented by the State to satisfy its burden of proof on the elements of the charged offense and the only evidence upon which the District Court denied Hoover's motion for judgment as a matter of law at the close of the State's evidence.

¶27 Like the District Court, the State attempts to analogize this case to *Giddings* and *Hart* where we further noted, *inter alia*, that the defendant did not assert that the tainted evidence was "critical" to the State's case, *Giddings*, ¶ 97, and was consistent with the other evidence of the defendant's guilt and was "used by both sides." *Hart*, ¶ 36. However, while it is certainly true that Hoover did not use the magic word "critical" in reference to the tainted evidence in his briefing here or below, the fact remains that the game camera footage and interrogation video were the *only* evidence presented by the State to prove Hoover's guilt and were thus unquestionably critical to the State's proof and the jury's finding of his guilt on the elements of PFMA. The fact that Hoover, *in response*, attempted to minimize or spin the State's evidence to support his alternative theory of the case does not reduce the critical importance of the tainted videos to the State's proof and the ultimate jury finding of guilt. Contrary to the assertions of the State and District Court, the dispositive essence of our holding in *Giddings* and *Hart* under the *Van Kirk* criteria was not that the tainted video evidence was consistent with or merely cumulative of evidence presented by the defendant, but that it was consistent with or merely cumulative of the

other independently compelling evidence of the defendant's guilt presented by the State. *See Hart*, ¶ 36; *Giddings*, ¶¶ 97-98.

¶28 The greater the portion of a testimonial exhibit that is repeated or replayed, or the more time it is repeated or replayed, "the greater the danger of undue emphasis." *Harris*, 247 Mont. at 417, 808 P.2d at 460 (quoting with approval *Chambers*, 726 P.2d at 1276). Here, while no portion of Hoover's trial testimony was reread to the jury during deliberations, the bailiff replayed the *entirety* of the admitted portions of both videos, the interrogation video once and the game footage twice. Not one of the replays of the entirety of those videos was the type of *limited* reread or replay of testimonial materials contemplated or authorized by § 46-16-503(2), MCA, as a narrow exception to the related common law, particularly where, as here, they were the only incriminating evidence presented by the State. Moreover, Hoover's singular focus on appeal on the interrogation video does not render the replay of that video any less critical to the State's case or less likely to have contributed to the resulting guilty verdict. The State's opening statement, aggressive cross-examination of Hoover, and its closing arguments show how critically and inextricably intertwined the game camera footage and Hoover's interrogation video were to the proof of its case and the jury's ultimate guilty verdict.

¶29 The dynamiting of the jury after 2½ hours of deliberation gives further indication of how critical the video replays were to the State's case and the likelihood that the subsequent morning video replays contributed to the guilty verdict that did not come until shortly thereafter. Whether viewed in isolation or in conjunction with the similarly erroneous

replay of the related game camera footage to which it pertained, we hold that the State has failed to meet its burden under the *Van Kirk* harmless error analysis of making a record-based showing that there was "no reasonable possibility" that the patently erroneous replay of Hoover's post-arrest interrogation video contributed to his conviction under the circumstances of this case. The District Court thus erroneously denied Hoover's motion for a new trial.

CONCLUSION

¶30 We hold that the District Court erroneously denied Hoover's motion for a new trial based on violation of § 46-16-503(2), MCA, and the related common law rule limiting the rehearing or replay of testimonial evidence during jury deliberations. We therefore reverse Hoover's felony PFMA conviction and remand for a new trial.

/S/ DIRK M. SANDEFUR

We concur:

/S/ MIKE McGRATH
/S/ JIM RICE
/S/ INGRID GUSTAFSON
/S/ BETH BAKER