DA 20-0037

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 318

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DALE STEVEN MARTELL,

Defendant and Appellant.

APPEAL FROM: District Court of the Fourth Judicial District,
In and For the County of Missoula, Cause No. DC-18-758
Honorable Robert L. Deschamps, III, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Alexander H. Pyle, Assistant Appellate Defender, Helena, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Michael P. Dougherty, Assistant Attorney General, Helena, Montana

Kirsten H. Pabst, Missoula County Attorney, Matt Jennings, Chief Deputy County Attorney, Missoula, Montana

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Decided: December 21, 2021

Filed:

Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Dale Steven Martell appeals a Fourth Judicial District Court judgment on his jury conviction for theft of property exceeding $1,500 in value. Martell argues that the District Court improperly allowed a State witness to appear by two-way video at trial in violation of his constitutional right to confront witnesses. We agree but hold the error to be harmless and thus affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 The State charged Martell with felony theft in violation of § 45-6-301(1), MCA, for purposely or knowingly obtaining or exerting unauthorized control over $2,780 he received after cashing a check with EZ Money Check Cashing and Loans (EZ Money). The check was issued by Lakefield Veterinary Group (Lakefield), located in Kent, Washington. After EZ Money cashed the check, its bank alerted EZ Money employee Louise Doty that the check was altered or fictitious. Doty contacted Lakefield and learned that the check originally had been issued to a lawn-care company in January for $510. Doty contacted Martell, informed him that the check was altered or fictitious, and requested he return the money. Martell told Doty he would bring the cash back within the week, but he failed to do so. After attempting to contact Martell numerous times over the next few weeks, Doty reported Martell to the Missoula Police Department. Martell was arrested and charged with felony theft. The State's amended information alleged that

> [o]n or about or between the 1st and 13th days of June, 2018, the above-named Defendant purposely or knowingly obtained or exerted unauthorized control over money owned by EZ Check Cashing and Loans with the purpose of depriving the owner of the property. The value of the property exceeds $1,500 and does not exceed $5,000.

¶3 Before trial, the State moved the District Court to allow Alecia Drevon—Lakefield's Accounts Payable Supervisor—to testify by two-way video. The State argued that video testimony was proper because "the distance and expense to secure a witness from Washington State to provide only a few minutes testimony is unreasonable and impractical[,]" and transporting a witness 481 miles would be "overly burdensome and . . . unnecessarily expensive when her testimony is expected to only last several minutes." Martell objected, arguing that the use of video testimony would violate his constitutional right to face-to-face confrontation of testimonial witnesses under Article II, Section 24 of the Montana Constitution. The District Court orally granted the State's motion the morning of trial, explaining that the State had "made a reasonable showing that it's impractical to haul someone 481 miles each direction" for "more or less foundation type testimony."

¶4 Doty testified without objection at trial to the notice she received from the bank that the check was altered or fictitious and to her conversation with Lakefield that the check originally was issued for a different amount, payable to another business.[1] She discussed her contact with Martell after learning the check was altered or fictitious and his failure to return the money after promising to do so, despite her continued efforts.

¶5 A bank representative testified to the process the bank used to flag the check as altered or fictitious. Missoula Police Detective Stacey Lear explained her training and experience in investigating fraud and financial crimes and testified to her investigation,

[1] The District Court sustained Martell's later hearsay objection to another question about Doty's conversations with Lakefield, but this testimony remained without objection.

including her unsuccessful attempts to make contact with Martell and her conversation with Lakefield.

¶6 Drevon appeared via two-way video. She was sworn in, and the jury and Martell could see and hear her. The State examined her contemporaneously, but Martell declined to cross-examine her. She testified that Lakefield had never done business with Martell and that the check originally was issued to a lawn-care business in January for a different amount.

¶7 After the State rested, Martell moved to dismiss for insufficient evidence, arguing that the State had failed to prove the mental state element. The State disagreed, arguing that Martell's mental state could be inferred from Doty's testimony that she had informed him numerous times that the check was altered or fictitious, and he failed to return the cash after receiving such notice. The District Court agreed with the State, pointing additionally to Drevon's testimony that Martell had no prior relationship with Lakefield.

¶8 During jury deliberations, the jury asked the District Court two questions: "What does exerted unauthorized control over cash mean?" and, "Does [exerting unauthorized control] need to be an initial act?" Regarding the first question, the court instructed the jury to apply the "common English definition" of the words. For the second question, the court answered "Yes" over the State's objection. A unanimous jury found Martell guilty of felony theft, and the District Court sentenced him to three years, all suspended.

STANDARDS OF REVIEW

¶9 We exercise plenary review of constitutional questions and review a district court's interpretation of the Sixth Amendment to the United States Constitution and Article II,

Section 24 of the Montana Constitution de novo. *State v. Mercier*, 2021 MT 12, ¶ 11, 403 Mont. 34, 479 P.3d 967; *State v. Bailey*, 2021 MT 157, ¶ 17, 404 Mont. 384, 489 P.3d 889.

DISCUSSION

¶10 *1. Did the District Court violate Martell's right to confront witnesses against him under the United States and Montana Constitutions by allowing a State witness to appear by two-way video at trial?*

¶11 Both the Montana Constitution and the United States Constitution grant a defendant the right to face-to-face confrontation of witnesses. U.S. Const. amend. VI ("[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"); Mont. Const. art. II, § 24 ("[i]n all criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face"). The Confrontation Clause "guarantees [a defendant's] right to fully cross-examine testimonial witnesses." *Bailey*, ¶ 41 (citing *State v. Stock*, 2011 MT 131, ¶ 29, 361 Mont. 1, 256 P.3d 899). "Cross-examination is an essential function in our justice system because it assists in the production of truth; confrontation 'ensur[es] that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings.'" *Bailey*, ¶ 41 (citing *Mercier*, ¶ 16, and quoting *Maryland v. Craig*, 497 U.S. 836, 846, 110 S. Ct. 3157, 3163 (1990)).

¶12 Under Montana's Confrontation Clause, a witness may testify by two-way video only upon "an adequate showing on the record that the personal presence of the witness is impossible or impracticable to secure due to considerations of distance or expense." *Bailey*, ¶ 42 (quoting *City of Missoula v. Duane*, 2015 MT 232, ¶ 25, 380 Mont. 290,

355 P.3d 729). The State must demonstrate that "dispensing with literal face-to-face confrontation" is "necessary to further an important public policy." *Bailey*, ¶ 42 (internal quotations omitted). As we held in both *Mercier* and *Bailey*, judicial economy, added expense, or inconvenience alone are not important public policies sufficient to preclude the constitutional right of a defendant to face-to-face confrontation at trial. *Mercier*, ¶ 26; *Bailey*, ¶ 45.

¶13 In granting the State's motion to allow Drevon to testify by video, the District Court explained:

> I think that the State has made a reasonable showing that it's impractical to haul somebody 481 miles each direction to talk about whether or not this is a legitimate check written on their account or not. And it's more or less foundation type testimony. It's minor. I just think it's an appropriate place to use this kind of testimony.

¶14 Martell argues that the State failed to sufficiently establish that the use of video testimony was necessary to further an important public policy. He asserts that the District Court's reasoning for granting the State's motion was flawed because the court did not make a case-specific finding demonstrating the actual necessity of using video testimony for the witness.

¶15 The State concedes that the District Court erred by allowing Drevon to testify by video but argues that the error was harmless. The Confrontation Clause applies to Drevon's testimony despite the District Court's characterization of the testimony as "more or less" foundational. *Mercier*, ¶ 27. The State therefore was required to show that allowing Drevon to testify by video furthered an important public policy apart from judicial economy. *See Mercier*, ¶¶ 20, 26; *Bailey*, ¶ 45. The circumstances are indistinguishable

from *Mercier*, where the State moved the district court to allow a witness to testify by video because travel expenses were "impractical," and from *Bailey*, where the witness "would be required to spend the entire [workday] traveling" in order to testify in person. *See Mercier*, ¶ 7; *Bailey*, ¶ 43. The State here asserted only that the "distance was overly burdensome" and that "travel is unnecessarily expensive." The District Court's finding that travel would be "impractical" was insufficient to demonstrate the necessity of video testimony that our recent holdings require. Because the District Court made no case-specific finding establishing an important public policy reason for the video testimony apart from judicial economy, allowing Drevon to testify by video violated Martell's constitutional right to confrontation. *Mercier*, ¶ 28; *Bailey*, ¶ 45.

¶16 *2. Did the State meet its burden to show the error was harmless?*

¶17 The constitutional deprivation of a defendant's right to confrontation is a trial error subject to harmless error review. *Bailey*, ¶ 46 (quoting *Mercier*, ¶ 31). The State, "as the 'beneficiary of a constitutional error[,]'" must prove, beyond a reasonable doubt, that the error was harmless. *Mercier*, ¶ 31 (quoting *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 828 (1967)); *Bailey*, ¶ 46. In determining whether an error was harmless, "[w]e consider the importance of the witness'[s] testimony in the prosecution's case, whether the testimony was cumulative, and the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points." *Mercier*, ¶ 31 (citation and quotation omitted). We "look[ ] not to the quantitative effect of other admissible evidence, but rather to whether the fact-finder was presented with admissible evidence that proved the same facts as the tainted evidence proved."

Mercier, ¶ 31 (citing *State v. Van Kirk*, 2001 MT 184, ¶ 43, 306 Mont. 215, 32 P.3d 735, emphasis omitted). If the tainted evidence goes to an element of the crime charged and is the only evidence tending to prove that element, we are compelled to reverse. *Van Kirk*, ¶ 45. If there is admissible evidence on the same element, the State must demonstrate "that the *quality* of the tainted evidence was such that there was no reasonable possibility that it might have contributed to the defendant's conviction." *Van Kirk*, ¶ 44 (emphasis in original).

¶18 The State acknowledges that Drevon's testimony went to an element of the offense, as it tended to show that Martell obtained or exercised unauthorized control over the cash. It asserts, however, that her testimony was cumulative evidence that the check was fictitious or altered because the testimonies of Doty, the bank representative, and Detective Lear all established that the check was fake.

¶19 Martell contends that Drevon's testimony went to the mental state element of the offense, which he asserts the State was required to prove Martell had on June 1, 2018, when he obtained the cash. Although neither the charging documents nor the "to-convict" instruction narrowed commission of the offense to a specific date, Martell points to Jury Instruction No. 4 and the District Court's answer to the jury's second question to argue that the District Court instructed the jury on that specific-date mental state element. According to Martell, this additional element became the law of the case because of the State's failure to object to Jury Instruction No. 4. Martell asserts that the State could not establish without Drevon's testimony that he purposely or knowingly obtained or exerted unauthorized control over the cash on June 1, 2018. The State responds that, as it argued

at trial, the "purposely or knowingly" requirements of theft were satisfied by Doty's testimony, not by Drevon's statements, and the instruction did not establish the law of the case.

¶20 Jury Instruction No. 4 stated, in part, that "[a]n Information has been filed charging the Defendant, Dale Martell, with the offense of Theft, alleged to have been committed in Missoula County, State of Montana, *on or about* June 1, 2018. The Defendant has pled not guilty." (Emphasis added). According to the transcript, however, the District Court misread Jury Instruction No. 4 to the jury by stating, "on *or before* June 1, 2018" (emphasis added). During jury deliberations, the jury asked, "Does [exerting unauthorized control] need to be an initial act?" Overruling the State's objection, the court answered, "Yes."

¶21 Martell has not persuaded us that the State was required to prove he committed the offense *on* June 1, 2018. Martell relies on decisions holding that a proposed "to-convict" jury instruction becomes the law of the case when the State has the opportunity to object but fails to do so, regardless whether the instruction contains an unnecessary element. *State v. Azure*, 2008 MT 211, ¶ 23, 344 Mont. 188, 186 P.3d 1269; *State v. Crawford*, 2002 MT 117, ¶ 25, 310 Mont. 18, 48 P.3d 706 (citing *State v. Hickman*, 954 P.2d 900 (Wash. 1998) for the proposition that the "[S]tate assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the 'to convict' instructions to the jury"). *See also State v. Cline*, 170 Mont. 520, 555 P.2d 724 (holding that the State was bound to prove the elements of the crime set out in the "to-convict" instruction when the State had failed to object to the proposed instructions).

¶22 Martell correctly points out that the State did not object to Jury Instruction No. 4. But the instruction did not create an additional element. It was not the instruction advising the jury what it needed to find "to convict" Martell of the charged offense. Instruction No. 4 was a preliminary instruction, providing background information to the jury before opening statements commenced. The District Court misspoke when it said "on or *before*" in reading the instruction to the jury, but the written instruction the jury had during deliberations reflected language in the Information that Martell was charged for committing the theft "on *or about* June 1, 2018" (emphasis added). This "on or about" language does not impose on the State a requirement to prove Martell purposely or knowingly obtained or exerted unauthorized control over the cash when he first cashed the check on June 1, 2018. The court instructed the jury at the end of trial to "consider all of the instructions as a whole." The "to-convict" instruction, Jury Instruction No. 16, contained no reference to the June 1 date. Read together, the jury instructions fully and fairly apprised the jury of the applicable law and did not impose an element requiring that the State prove the requisite mental state on the date Martell cashed the check.

¶23 The District Court's supplemental jury instruction in response to the jury's second question, which deviated from the settled trial instructions, did not become the law of the case. The State properly objected to the court's suggested answer as erroneous. As the State pointed out, it was not required to prove that Martell intended to exert unauthorized control over the money at the time he cashed the check. The Information charged Martell with "purposely or knowingly obtain[ing] or exert[ing] unauthorized control over [the] money" "[o]n or about *or between* the 1st and 13th days of June, 2018"

(emphasis added). Under § 45-6-301(1)(b), MCA, the State needed to prove only that Martell "knowing[ly] exert[ed] . . . control" with "a purpose to deprive" and that EZ Money was "deprived of . . . property." *State v. White*, 230 Mont. 356, 358-59, 750 P.2d 440, 441 (1988). There is no requirement under § 45-6-301(1)(b), MCA, that Martell had the requisite mental state on the date he cashed the check, as opposed to the date on which he learned the check was fictitious and failed to return the money. The District Court abused its discretion in answering "yes" to the jury's second question because it was not a correct statement of law and did not accurately reflect the charges.

¶24 Martell finally argues that Drevon's testimony that Lakefield had never done business with him led the jury to convict because evidence that he "subsequently learned the check was bogus was not nearly as strong" as Drevon's testimony. We disagree. Drevon testified that the check was fictitious or altered, which tended to show that Martell obtained or exerted unauthorized control over the $2,780 from EZ Money. But the bank representative and Detective Lear established independently that the check was fraudulent. And Doty testified directly about Martell's unauthorized control over the cash. The call log memorializing Doty's seven attempts to contact Martell were admitted into evidence as well. Finally, Detective Lear testified that she alerted Lakefield that a check it had written to a lawn care company was either "intercepted" or counterfeited.

¶25 Drevon's testimony was cumulative. The testimonies of Doty, the bank representative, and Detective Lear all tended to show that Martell knowingly obtained or exerted unauthorized control over the $2,780 cash. The bank representative provided authoritative evidence to demonstrate the check was fraudulent. Doty testified that,

customary with standard procedure, she attempted to verify the legitimacy of the check when Martell brought it in before she cashed it for him. She explained, "our procedure is to call the bank, verify it's a valid account; call the . . . maker of the check [if unfamiliar to her] . . . and verify with them that, yes, indeed they did write the check." She was not able to confirm that the check was "legit" but cashed it anyway, trusting Martell—a longtime customer—after he explained that he needed the money right away for his son's graduation party. This was late in the afternoon on Friday, June 1, 2018. Doty testified without objection that she reached the business on whose account the check was drawn the following Monday morning and learned that the check had been issued for a different dollar amount to someone else and cashed earlier that year. Her call log, also admitted without objection after the State laid a proper foundation, confirmed that this call took place at 11:15 a.m. on Monday, June 4. She called Martell "immediately" and told him the check was fictitious and he needed to return the money. Martell responded that he was going to call the company because he "did the work." Doty called Martell "at least seven times," including each day that week; despite telling her that he would, Martell did not return the funds. Doty's testimony and her notes were the only direct evidence that Martell knew the check was bad, as she plainly told him, and he responded that he would return the money.

¶26 From our review of the record, it is evident that, on the whole, the jury was fully and fairly instructed on the law applicable to the case as charged, and the jury was presented with admissible evidence that proved the same facts as the tainted evidence proved. The State has met its burden to show that, when compared to the permissible trial evidence, "the quality of the tainted evidence was such that there was no reasonable possibility that it

might have contributed to the defendant's conviction." *Van Kirk*, ¶ 44. We conclude that the District Court's error was harmless.

CONCLUSION

¶27 The District Court's admission of two-way video testimony violated Martell's constitutional right to face-to-face confrontation. Because the error was harmless, we affirm his conviction.

/S/ BETH BAKER

We Concur:

/S/ JIM RICE

Justice Dirk Sandefur, specially concurring.

¶28 I disagree with the Court's acceptance of the State's disingenuous assertion on appeal that the remote testimony of Alecia Drevon (to the effect that Lakefield had never done business with Martell and that it in fact issued the subject check to a separate lawn care business for a different amount than when presented to EZ Money by Martell for cashing with an altered recipient and amount) was not essential to the State's proof of the charged offense for purposes of harmless error review. As recognized by the State at the time of presentation at trial, Drevon's testimony was the critical piece of primary evidence from the source of the check necessary to prove that it was not authentic as presented for cashing, an essential fact that was also the only primary indication that Martell was aware of that fact at the time of presentation of the check to EZ Money for cashing, *as charged by the State*. How the only essential primary evidence can become merely cumulative on

appeal, much less that there was "no reasonable possibility" that it "contributed to [Martell's] conviction," *Van Kirk*, ¶ 47, simply defies logic and is fundamentally unfair if the allowance of the remote testimony was indeed a constitutional violation.

¶29 I nonetheless concur in the ultimate affirmation of Martell's conviction, but for different reasons. For the reasons stated in *Mercier*, ¶¶ 42-51 (McGrath, C.J., specially concurring), I would conclude that the District Court did not err in allowing the State to present Drevon's key testimony remotely via modern two-way videoconferencing. I continue to find the *Bailey* and *Mercier* rationale to be a wholly inadequate basis upon which to categorically preclude modern videoconferencing as an alternative means of adequately implementing the constitutional right to confront adverse witnesses. As a preliminary matter, nothing in the Sixth Amendment, nor in the "face to face" requirement of Article II, Section 24, of the Montana Constitution, necessarily requires that the witness and defendant be sitting across from each other in the courtroom. Modern recognized exceptions to in-court confrontation belie any such requirement. The rationale for those exceptions, that we will allow such remote testimony in the presence of a sufficiently important government interest (such as in the interest in protecting child sex abuse victims of tender age), does nothing to explain how remote videoconferencing affords defendants adequate constitutional confrontation in those cases, but not in cases where a similar government interest is not present.

¶30 Conspicuously absent in *Craig*, *Bailey*, and *Mercier* is any holding, much less an articulated compelling basis upon which to conclude, that modern two-way videoconferencing is not the substantial equivalent of personal face-to-face confrontation

in the courtroom based on anything other than that it did not exist over 230 years ago at the time of proposal and ratification of the Bill of Rights in 1789-91. *See*, *contra*, *Mercier*, ¶¶ 23-25 (acknowledging questionable continued validity of *Craig* rationale in light of *Crawford v. Washington*, 541 U.S. 36, 61, 124 S. Ct. 1354, 1370 (2004) (noting that Confrontation Clause is a "procedural [right to test the reliability of the testimonial statement with cross-examination] rather than a substantive guarantee" of testimonial reliability)). Further illustrating the point, Martell made no attempt to cross-examine Drevon in this case. How can the lack of personal face-to-face confrontation in the courtroom be error here where the defendant did not even exercise his confrontation right to cross-examine the subject witness, much less articulate any basis or manner in which it substantially prejudiced him?

¶31 I specially concur in the Court's ultimate holding.

/S/ DIRK M. SANDEFUR

Chief Justice Mike McGrath joins in the special concurrence of Justice Sandefur.

/S/ MIKE McGRATH

Justice James Jeremiah Shea, dissenting.

¶32 While the plurality correctly concludes that the District Court's admission of the video testimony violated Martell's constitutional right to face-to-face confrontation, the plurality incorrectly concludes the error was harmless. Therefore, I dissent.

¶33 The plurality correctly concludes that the District Court erred by allowing Drevon's video testimony in violation of Martell's constitutional right under the Confrontation Clause. *Mercier*, ¶ 28; *Bailey*, ¶ 45. Video testimony, whether one-way or two-way, is qualitatively different than having the witness present in the courtroom. The remote and detached nature of video conferencing does not comport with the purpose of the Confrontation Clause—"to compel accusers to make their accusations in the defendant's presence—which is not equivalent to making them in a room that contains a television set beaming electrons that portray the defendant's image. Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones." *Amendments to the Fed. Rules of Crim. Procedure*, 2002 U.S. LEXIS 9432, at *3 (U.S. 2002) (Scalia, J., concurring (citing *Craig*, 497 U.S. 836, 110 S. Ct. 3157 (1990))).

¶34 At the outset, I take issue with the plurality's interpretation of the relevant jury instructions. When determining whether a jury was fully and fairly instructed, we consider the instructions as a whole. *City of Missoula v. Zerbst*, 2020 MT 108, ¶ 12, 400 Mont. 46, 462 P.3d 1219. In this case, Instruction No. 4 instructed the jury that Martell was charged with committing the theft "on or about June 1, 2018." Instruction No. 16 instructed the jury, in pertinent part, that Martell "purposely or knowingly obtained or exerted unauthorized control over the cash." Considering the instructions as a whole, a guilty verdict required the jury to find that "on or about June 1, 2018" Martell "purposely or knowingly obtained or exerted unauthorized control over the cash." The plurality concludes "[t]his 'on or about' language does not impose on the State a requirement to

prove Martell purposely or knowingly exerted unauthorized control over the cash when he first cashed the check on June 1, 2018." Opinion, ¶ 22. But the plurality fails to acknowledge that instructing the jury that the alleged offense was committed "on or about June 1, 2018" still means something—that being the approximate date of the offense.

¶35 The plurality notes that § 45-6-301(1)(b), MCA, does not require "that Martell had the requisite mental state on the date he cashed the check, as opposed to the date on which he learned the check was fictitious and failed to return the money." Opinion, ¶ 23. While this is true, the State still must establish that Martell learned the check was fictitious and failed to return the money "on or about June 1, 2018," as the jury was instructed. We do not require the State to allege the time and place of a criminal offense "with impossible precision." *State v. Clark*, 209 Mont. 473, 481, 682 P.2d 1339, 1343 (1984). However, even when time is not a material ingredient of the offense, the time of the offense must be alleged "as definitely as possible under the circumstances of the case." *Clark*, 209 Mont. at 481, 682 P.2d at 1344. But rather than requiring the State to prove Martell purposely or knowingly committed a theft "on or about June 1, 2018," as the instructions collectively required, the plurality concludes it was sufficient for the jury to convict Martell upon finding that he purposely or knowingly exerted unauthorized control over the cash at some *indefinite* point after June 1, 2018.

¶36 The plurality errs in its conclusion that Drevon's testimony, which uniquely established Martell's mental state on or about June 1, 2018, was cumulative. The plurality states that "[t]he testimonies of Doty, the bank representative, and Detective Lear all tended to show that Martell knowingly obtained or exerted unauthorized control over the

$2,780 cash." Opinion, ¶ 25. I do not agree with the plurality's conclusion that the bank representative's and Lear's testimony established that Martell *knew* the check was fraudulent when he exerted unauthorized control, whether at the time he initially cashed the check or shortly thereafter. The bank representative's and Lear's testimony may have independently established that the check was fraudulent—a point not in dispute—but could not have independently established that Martell *knew* the check was fraudulent on or about June 1, 2018.

¶37 Doty's hearsay testimony regarding her conversation with Lakefield is neither cumulative nor is it qualitatively similar to Drevon's testimony. When there is *admissible* evidence on the same element the tainted evidence tended to prove, the quality of the tainted evidence must be such that no "reasonable possibility exists that the inadmissible evidence might have contributed to a conviction." *Van Kirk*, ¶ 29. In determining whether evidence is cumulative, we "look[] not to the quantitative effect of other admissible evidence, but rather to whether the fact-finder was presented with admissible evidence that proved *the same facts as the tainted evidence proved*." *Van Kirk*, ¶ 43 (original emphasis).

¶38 While Doty's hearsay testimony—that Lakefield identified a different payor and amount for the check in question—supports an inference that Martell knew the check was bad, it could also support an inference that he had been given a bad check from someone else. This inference is further supported by the facts highlighted in the Opinion: Martell was a longtime customer who responded upon notification that he would contact the company. Opinion, ¶ 25. It is only alongside Drevon's testimony, that Lakefield had never done business with Martell, that the full picture of Martell's mental state is revealed.

Without Drevon's corroborating testimony that Martell was a stranger to the clinic, the jury could have found that Martell was an innocent dupe, uncertain if he had cashed a valid check. The State has not met its high burden to show there is no reasonable possibility that Drevon's testimony did not contribute to Martell's conviction.

¶39 Further, Doty's hearsay testimony regarding Lakefield's knowledge of the check came in after the court ruled that Drevon's video testimony would be admitted, which certainly explains counsel's failure to object. In any event, Doty's statement does not go as far as Drevon's testimony—Doty testified about Lakefield's knowledge of the contents of the original check, which only establishes that the check was fraudulent. Meanwhile, Drevon specifically stated that Lakefield did not know Martell and had never done business with him.

¶40 As the beneficiary of a constitutional error, the State bears the burden of proving that the error was harmless beyond a reasonable doubt. *Mercier*, ¶ 31. "[H]armlessness must 'be determined on the basis of the remaining evidence.'" *Mercier*, ¶ 31 (citing *Coy v. Iowa*, 487 U.S. 1012, 1021-22, 108 S. Ct. 2798, 2803 (1988)). Only Drevon testified that Lakefield had never done business with Martell—testimony that undermined his contention that he did not know the check was fraudulent and therefore purposely and knowingly exercised control over the cash. The State has not met its high burden to show there is no reasonable possibility that Drevon's testimony did not contribute to Martell's conviction.

¶41 The District Court's denial of Martell's motion to dismiss for insufficient evidence as to his mental state illustrates the distinct qualitative importance of Drevon's testimony in establishing Martell's mental state. The court stated:

> The testimony is that [Lakefield] has no relationship or transactions with Dale Martell; yet, Mr. Martell presented a check made out to him from this entity, and accepted cash for it. . . . I think the circumstantial evidence suggests that, when he doesn't have a relationship with this vendor or this company, that any negotiable instrument he presents from this is not legitimate.

¶42 Drevon's testimony was the best evidence in the record to establish Martell's mental state on or about June 1, 2018. The State failed to meet its exceedingly high burden of proving beyond a reasonable doubt that there is no reasonable possibility Drevon's testimony did not contribute to Martell's conviction. I dissent.

/S/ JAMES JEREMIAH SHEA

Justice Ingrid Gustafson and Justice Laurie McKinnon join in the Dissent of Justice Shea.

/S/ INGRID GUSTAFSON
/S/ LAURIE McKINNON