DA 20-0221

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 251N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

GARY WAYNE TEMPLE, JR.,

Defendant and Appellant.

APPEAL FROM: District Court of the Eighth Judicial District,
In and For the County of Cascade, Cause No. BDC-18-569
Honorable Elizabeth A. Best, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Laura Reed, Attorney at Law, Missoula, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Katie F. Schulz, Assistant Attorney General, Helena, Montana

Joshua Racki, Cascade County Attorney, Stephanie L. Fuller, Deputy County Attorney, Great Falls, Montana

Submitted on Briefs: November 10, 2022

Decided: December 27, 2022

Filed:

Clerk

Justice Beth Baker delivered the Opinion for the Court

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, we decide this case by memorandum opinion. It shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 A Cascade County jury found Gary Wayne Temple, Jr., guilty of criminal distribution of dangerous drugs from a series of incidents occurring between July 2017 and February 2018. Temple argues that he received ineffective assistance when his counsel did not demand a witness accountability or accomplice jury instruction; that the admission of hearsay statements unduly prejudiced him; that the District Court should have granted Temple's motions for a mistrial after witness statements referenced Temple's prior incarceration and law enforcement investigations; and that, taken together, these claims amounted to cumulative error. We conclude that Temple's counsel did not provide ineffective assistance because an accomplice jury instruction would have contradicted Temple's theory of innocence; that Temple's motion in limine was not specific enough to preserve his hearsay challenges; and that the District Court did not abuse its discretion when it denied Temple's motions for mistrial. We affirm.

¶3 On September 11, 2018, the State charged Temple with two counts of criminal distribution of dangerous drugs. The charges arose from two controlled drug transactions in November 2017. The State later amended its charges to one count of criminal

distribution of dangerous drugs based on Temple's continuous conduct between July 2017 and February 2018.

¶4 Four lay witnesses—all involved in distributing methamphetamine in the Great Falls area—testified against Temple at his December 2019 trial. One of these witnesses, Derek Lohmeyer, worked as a confidential informant after his arrest in 2017. Lohmeyer testified that he arranged a drug transaction with another witness, Danielle Wilson. Wilson initially met Lohmeyer in a Walmart parking lot for this transaction, but she did not have any drugs with her. Wilson and Lohmeyer then went to a gas station where Lohmeyer recognized Temple's truck. Wilson got into Temple's truck and returned to Lohmeyer with methamphetamine. Lohmeyer arranged a second controlled transaction with Wilson. Again, Wilson did not immediately have drugs to give Lohmeyer. This time, Wilson went to a motel and returned with drugs.

¶5 Wilson's testimony supported Lohmeyer's description of the controlled drug transactions. She explained that she met Temple in his truck on both occasions to obtain drugs for Lohmeyer. Wilson further testified that Temple sold her drugs for her own use between October 2017 and December 2017. Lohmeyer suffered a relapse while serving as a confidential informant and cut ties with law enforcement. Lohmeyer testified that, during this time, Temple sold him drugs on one occasion.

¶6 The State's third lay witness, Donny Ferguson, testified that she distributed an estimated ten pounds of drugs to Temple from the summer of 2017 through December 2017. Ferguson testified that she first met Temple when she fronted him drugs to sell and

then repay her. Ferguson also testified that she had contact with Temple while they were both incarcerated.

¶7 The State's fourth lay witness, Brian Osborn, testified that he served as "protection" for Temple during Temple's drug transactions. Osborn testified that he witnessed Temple engage in conduct that appeared to be the distribution of drugs, including going into a house and coming out with drugs and going into a house with drugs and coming out with cash.

¶8 In addition to the four lay witnesses, the State called three law enforcement officers to testify about the controlled transactions between Lohmeyer and Wilson. Agent Luke Smith, from the Montana Division of Criminal Investigation, drove Lohmeyer to the controlled transactions and testified that, though he did not see Temple, he saw a vehicle that matched Lohmeyer's description of Temple's truck. Detective Jack Hinchman testified that he witnessed Temple in his truck after the second controlled transaction had been completed. Detective Thomas Lynch also testified that he saw Temple at the first controlled transaction and Temple's truck near the second controlled transaction. When asked how he was familiar with Temple, Lynch testified that he knew Temple from "previous investigations."

¶9 Temple took the stand in his defense and testified that he bought personal use amounts of methamphetamine from Ferguson during the summer and fall of 2017, but that he did not distribute any of these drugs. Temple admitted to possessing methamphetamine in Wilson's presence and that he frequently saw Wilson during the time period at issue, but

he denied ever selling drugs to Wilson. Temple also denied that he sold drugs to Lohmeyer and denied the entirety of Osborn's testimony.

¶10 Temple moved twice for a mistrial, when Ferguson testified that she and Temple had been in jail prior to Temple's trial and after Lynch testified that he was familiar with Temple from "previous investigations." The District Court denied both motions.

¶11 The jury convicted Temple, and the District Court sentenced him as a persistent felony offender to thirty years in the Montana State Prison with ten years suspended, to run consecutively to Temple's prior convictions.

Claim One: Ineffective Assistance of Counsel

¶12 Temple argues that because the outcome of his case turned on witness credibility, his counsel should have requested an accomplice jury instruction that the lay witnesses' testimonies should be viewed with distrust. Temple argues that his counsel had no justifiable reason to not request such an instruction under § 26-1-303(4), MCA. The State counters that counsel was not ineffective because requesting an accomplice jury instruction would have conflicted with Temple's defense theory of innocence.

¶13 We review claims for ineffective assistance of counsel de novo because they raise mixed questions of law and fact. *State v. Heavygun*, 2011 MT 111, ¶ 8, 360 Mont. 413, 253 P.3d 897 (citations omitted). We consider whether counsel performed deficiently and, if so, whether counsel's deficient performance prejudiced the defendant. *Whitlow v. State*, 2008 MT 140, ¶ 10, 343 Mont. 90, 183 P.3d 861 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)).

¶14 To "eliminate the distorting effects of hindsight," we review the performance of counsel under a "highly deferential" standard. *Worthan v. State*, 2010 MT 98, ¶ 10, 356 Mont. 206, 232 P.3d 380 (citation omitted). Counsel's performance is deficient when it falls "below an objective standard of reasonableness measured [by] prevailing professional norms." *Whitlow*, ¶ 20. The party claiming ineffective assistance must overcome a presumption "that, under the circumstances, the challenged action might be considered sound trial strategy." *State v. Gunderson*, 2010 MT 166, ¶ 69, 357 Mont. 142, 237 P.3d 74 (citing *Whitlow*, ¶ 21 (quotation omitted)).

¶15 Temple had multiple attorneys over the course of his case. One, who represented him prior to trial, requested an accomplice jury instruction. When the District Court questioned Temple's trial counsel whether to include the accomplice jury instruction, counsel explained that Temple's circumstances were "not a sort of accountability or accomplice" situation. Counsel stated, "We've considered it. It's not applicable to this case, so it's not a sort of oversight by any of the parties." Because the record reflects that counsel expressed why he did not demand an accomplice jury instruction, the issue is appropriate for consideration on appeal. *See State v. Upshaw*, 2006 MT 341, ¶ 33, 335 Mont. 162, 153 P.3d 579 (citation omitted).

¶16 Juries are to be instructed that a witness's testimony is to be distrusted, pursuant to § 26-1-303(4), MCA, when a person is "legally accountable for the acts of the accused." "Counsel is not ineffective for failing to request an accomplice instruction where such an instruction would be inconsistent with the theory of defense, such as a claim of innocence."

State v. Flowers, 2018 MT 96, ¶ 28, 391 Mont. 237, 416 P.3d 180 (citing *State v. Roots*, 2015 MT 310, ¶ 8, 381 Mont. 314, 359 P.3d 1088). In such a situation, counsel's decision to forego an accomplice jury instruction is considered tactical. *Flowers*, ¶ 28 (citations omitted).

¶17 Temple denied distributing drugs. He presented a defense admitting to possessing personal amounts of methamphetamine but not in an amount sufficient to distribute. Temple argued that the lay witnesses offered him to law enforcement as a fake source to protect their main suppliers. Temple did not raise a partial defense by claiming that the four lay witnesses were legally accountable for his conduct or that they acted in concert with him; he instead insisted that he did not distribute drugs to any of the witnesses.

¶18 Temple now contends that the witnesses all had motives to lie because they were involved in drug distribution, and an accomplice jury instruction was therefore appropriate. Temple argues that because he did not claim "total innocence" when he testified to possessing dangerous drugs, an accomplice jury instruction would not have conflicted with his theory of defense. Temple was not charged, however, with possessing dangerous drugs. He was charged with distributing dangerous drugs. An accomplice jury instruction therefore would have conflicted with Temple's claims that he did not distribute dangerous drugs.

¶19 Temple's counsel acted within the range of reasonable professional assistance when he did not request an accomplice jury instruction because doing so would have been inconsistent with Temple's theory of defense. Counsel's performance did not fall below

an objective standard of reasonableness. *See Flowers*, ¶ 29. Because we determine that counsel did not perform deficiently, we need not consider whether counsel's performance prejudiced Temple. *See Gunderson*, ¶ 68 (citation omitted).

Claim Two: Hearsay Objections

¶20 Temple contends that the statements Wilson and Lohmeyer made to law enforcement officers were hearsay and inadmissible as prior consistent statements. Though Temple did not object to the challenged statements at trial, he maintains that his previous counsel's general objection to hearsay in a pretrial motion in limine adequately preserved these challenges. Temple's counsel at trial did not withdraw the motion in limine, and the court granted the motion to the extent that it would normally "enforce the rules of evidence."

¶21 Detective Lynch testified that Wilson informed him that Temple supplied her with drugs, but Wilson could not recall during her direct examination that she made this statement. The State also questioned Lohmeyer about a statement he made to law enforcement after he was arrested; the State asked Lohmeyer whether he made such a statement but never asked Lohmeyer what he had said. Temple argues that Detective Lynch's testimony recalling Wilson's and Lohmeyer's statements did not meet the requirements of an admissible prior consistent statement because they made the challenged statements post-arrest, when they had motives to lie. Temple argues that the State used this evidence unfairly to bolster the credibility of its witnesses.

¶22 We generally do not review issues that were not objected to at trial. *State v. Smith*, 2021 MT 148, ¶ 15, 404 Mont. 245, 488 P.3d 531. If a party uses a motion in limine to "preserve an objection for appeal," it "must make the basis for [the] objection clear to the district court." *State v. Crider*, 2014 MT 139, ¶ 20, 375 Mont. 187, 328 P.3d 612. In *Crider*, we held that the defendant's motion in limine preserved evidentiary objections for appeal because it referenced specific inadmissible evidence of prior bad acts, including particular dates and allegations, and provided a legal theory for excluding the evidence. *Crider*, ¶¶ 22-23.

¶23 Contrarily, when a motion in limine is not specific but makes only "broad general objections," "we will not put a trial court in error where that court has not been given the opportunity to rule on the admissibility of evidence and to correct itself." *State v. Vukasin*, 2003 MT 230, ¶¶ 27, 29, 317 Mont. 204, 75 P.3d 1284 (quotation omitted). In *Vukasin*, the defendant challenged statements on appeal that he did not object to at trial, arguing that his motion in limine preserved his challenges. *Vukasin*, ¶ 27. This Court held that, unlike motions in limine that addressed objections to evidence with specificity, the defendant's motion did not preserve his objection for appeal because the motion "did not identify either the specific witness or the specific testimony to which he now object[ed] on appeal." *Vukasin*, ¶ 35. This Court held that "the motion's objection to the admission of any 'hearsay testimony' . . . [was not] specific enough to alert the trial judge to the testimony he was challenging." *Vukasin*, ¶ 35.

¶24 Temple's situation is similar to that in *Vukasin*. Temple's motion in limine stated, "The Court should prohibit hearsay." The motion set forth the general rules against hearsay but did not object to specific statements Temple expected any witness would make. The court's order reflected that it would apply its ruling in accordance with the rules of evidence. When he failed to object at trial, Temple did not give the District Court an opportunity to consider the hearsay prohibition or any applicable exception in light of the specific testimony and rule on its admissibility. *See Vukasin*, ¶ 29. Therefore, we conclude that Temple waived these challenges and do not further consider them.

Claim Three: Motions for Mistrial

¶25 Temple moved for a mistrial twice: once because Ferguson testified that both she and Temple were incarcerated prior to trial and once because Detective Lynch testified that he was familiar with Temple from "previous investigations." In both instances, the District Court considered whether other evidence outweighed any resulting prejudice against Temple. The court also offered to provide curative jury instructions. It did so for Ferguson's testimony, but Temple declined a curative statement for Lynch's testimony.[1]

¶26 We review a district court's denial of a motion for mistrial for abuse of discretion. *State v. Novak*, 2005 MT 294, ¶ 15, 329 Mont. 309, 124 P.3d 182 (citation omitted). District courts abuse their discretion when they act arbitrarily "without the employment of conscientious judgment" or exceed the bounds of reason. *State v. Zimmerman*, 2018 MT 94, ¶ 13, 391 Mont. 210, 417 P.3d 289. "We will affirm the District Court's

[1] Temple argues that Wilson also alluded to Temple's incarceration, but he did not object to Wilson's statement at trial. We therefore decline to consider it now.

decision if the trial judge acted rationally and responsibly." *Novak*, ¶ 25 (citation omitted). A district court, when ruling on a motion for a mistrial, considers "whether the defendant was denied a fair and impartial trial." *Novak*, ¶ 25 (citation omitted). Because mistrial is "an exceptional remedy, . . . remedial action short of a mistrial is preferred unless the ends of justice require otherwise." *Novak*, ¶ 26 (citation omitted).

¶27 Applying these standards, when determining whether a statement unfairly contributed to a defendant's conviction, we consider the strength of other evidence against the defendant, how the statement prejudiced the defendant, and the effect of a cautionary instruction on any potential prejudice. *State v. Ankeny*, 2018 MT 91, ¶ 36, 391 Mont. 176, 417 P.3d 275 (citations omitted).

¶28 We first consider Temple's initial motion for a mistrial. In *State v. Erickson*, a district court denied the defendant's motion for mistrial after a State witness testified that the defendant had been incarcerated at the Montana State Prison. 2021 MT 320, ¶ 11, 406 Mont. 524, 500 P.3d 1243. This Court held that the court did not abuse its discretion due to the weight of other evidence presented and the curative instruction it gave. *Erickson*, ¶ 27. The court instructed the jury to not assume that the defendant was more likely guilty of the present offense as a result of the objected statements and to judge the defendant "based only on the evidence . . . submitted . . . regarding this offense and that alone." *Erickson*, ¶ 27.

¶29 Here, the other testimony against Temple provided ample evidence to convict him without Ferguson's statement. The State presented four theories under which the jury

could convict Temple of distributing dangerous drugs: (1) Temple distributed drugs to Wilson on a consistent basis between October 2017 and December 2017; (2) Temple distributed drugs to Wilson, who then sold them to Lohmeyer during the two controlled transactions in November 2017; (3) Temple distributed drugs while Osborn provided protection; and (4) Temple distributed drugs to Lohmeyer on one occasion after Lohmeyer cut ties as a law enforcement informant. The State provided direct witness testimony to support all of these theories. We agree with the District Court that, based on this evidence, the jury would be unlikely to assign "a great deal of import" to Ferguson's isolated statement that Temple had been incarcerated prior to trial. The District Court nonetheless instructed the jury that "[i]ncarceration is sometimes part of the legal process. You should not make any inference of guilt or any credibility determination of the Defendant based solely on the fact that the Defendant may have been incarcerated at some point during a legal proceeding." "We presume that the jury upholds its duty and follows a district court's instructions." *Erickson*, ¶ 27 (citation omitted). If Ferguson's statement did prejudice Temple, we conclude that this jury instruction adequately cured any such prejudice, and the District Court did not abuse its discretion when it denied Temple's first motion for a mistrial. *See Erickson*, ¶ 27.

¶30 Temple's second motion for a mistrial argued that, coupled with Ferguson's testimony, Detective Lynch's testimony about "previous investigations" created an undue prejudice against Temple grounded in inadmissible "prior bad acts" evidence. The State argued that it could effectively limit any prejudicial impact from Lynch's testimony if

Lynch explained, on continued examination, the "ongoing nature" of the investigations against Temple and that Lynch was familiar with Temple because his name came up in the investigations related to the present charges. The court acknowledged that the potential prejudice to Temple was that the jury could misunderstand Lynch's testimony to mean that he knew Temple from separate criminal investigations rather than from the ongoing investigation on the present charge. The court also noted, however, that even this mistake would be unlikely to prejudice Temple when compared to the other evidence.

¶31 The State attempted to cure the potential misunderstanding through the following questioning of Detective Lynch:

> Q. Was your first knowledge of the Defendant, Mr. Temple, in this investigation learned after speaking with Mr. Lohmeyer?
>
> A. It was.
>
> Q. And do you recall the date?
>
> A. It was early October.
>
> Q. Would October 9th sound familiar?
>
> A. Yes, it would.
>
> Q. 2017?
>
> A. Correct.
>
> Q. Was it this first buy on November 9th when your focus shifted from Danielle Wilson to the Defendant?
>
> A. It was.

Temple's counsel did not further question Detective Lynch on this matter during cross-examination.

¶32 In *State v. Bollman*, a State witness testified about the defendant's "felony DUIs," a topic undisputedly in violation of the district court's order in limine. 2012 MT 49, ¶ 34, 364 Mont. 265, 272 P.3d 650. We held that the district court did not abuse its discretion when it denied the defendant's ensuing motion for a mistrial because there was "ample evidence" to support the defendant's guilt outside this statement, the statement could not "reasonably be seen as evidence of . . . criminal history or prior bad acts," and the defendant chose to not seek a cautionary instruction to the jury. *Bollman*, ¶¶ 34-36.

¶33 Here, similar to the circumstances in *Bollman*, the jury was presented with other testimony to support Temple's conviction, the detective's testimony did not unambiguously refer to Temple's prior unrelated criminal involvement, and Temple declined a curative jury instruction. As with his first motion, the court noted that the evidence against Temple was "fairly hefty." Numerous other witnesses testified that Temple had been involved with multiple drug transactions over a months-long period. Lynch's isolated statement about "previous investigations" did not prejudice Temple's substantial rights. Lynch's testimony did not apprise the jury of Temple's previous criminal history or any prior convictions. If the jury did misunderstand Lynch, any potential prejudice from the statement was minor in comparison to the weight of the other testimony. Finally, though Temple now argues that the State's attempted curative action through continued examination to clarify Lynch's statement was insufficient, Temple's

counsel chose to deny the option of a curative jury instruction as part of his trial strategy. We will not fault a trial court for the decision to not issue a curative instruction when defense declines such an instruction. *Bollman*, ¶ 36. We conclude that the District Court did not abuse its discretion when it denied Temple's second motion for a mistrial.

Claim Four: Cumulative Error

¶34 "The cumulative error doctrine mandates reversal of a conviction where numerous errors, when taken together, have prejudiced a defendant's right to a fair trial." *State v. Hardman*, 2012 MT 70, ¶ 35, 364 Mont. 361, 276 P.3d 839 (citation omitted). Because we have found no error in Temple's other claims, we need not further consider his cumulative error claim.

¶35 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent. The District Court's judgment is affirmed.

/S/ BETH BAKER

We Concur:

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