FILED
11/15/2022
Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 20-0474

DA 20-0474

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 231

STATE OF MONTANA,

Plaintiff and Appellee,

v.

BENJAMIN PITKANEN III,

Defendant and Appellant.

APPEAL FROM: District Court of the Eighth Judicial District,
In and For the County of Cascade, Cause No. DDC 19-251
Honorable John W. Parker, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Michael Marchesini, Assistant Appellate Defender, Helena, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Katie F. Schulz, Jonathan M. Krauss, Assistant Attorneys General, Helena, Montana

Joshua A. Racki, Cascade County Attorney, Amanda Lofink, Deputy County Attorney, Great Falls, Montana

Submitted on Briefs: September 21, 2022

Decided: November 15, 2022

Filed:

Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 Benjamin Pitkanen III appeals from the judgment entered by the Eighth Judicial District Court after jury trial finding him guilty of the charge of Assault with a Weapon, a felony. He challenges trial evidentiary rulings and the calculation of credit toward his sentence for time served. We consider:

> *1. Did the District Court err by admitting the victim's hospital statement at trial as a prior inconsistent statement?*
>
> *2. Did the District Court err by admitting evidence of a conversation between the Defendant and his girlfriend as an admission by party-opponent?*
>
> *3. Did the District Court err in its calculation of Defendant's credit toward his sentence for time served?*

¶2 We affirm in part, reverse in part, and remand for entry of an amended judgment.

FACTUAL AND PROCEDURAL BACKGROUND

¶3 On March 24, 2019, Karson Bird and his friend, Justin Newbreast, visited Erin McCoun-Larocque's home on 13th Street in Great Falls, Montana. The group was drinking, with Bird having consumed about five shots of vodka over a period of roughly 30 minutes. He testified to being "buzzed" from the drinks, but otherwise aware of his surroundings. Newbreast and McCoun-Larocque were sitting on couches, while Bird was sitting in a recliner, sketching and trying to connect to Wi-Fi, when Pitkanen entered the home. After a brief greeting between Pitkanen and McCoun-Larocque, a physical altercation occurred between Pitkanen and Bird involving pushing, hitting and Pitkanen wrapping his arms around Bird. The men were separated, and Bird and Newbreast left to find a ride to the hospital.

¶4 Bird presented to a local hospital bleeding from two wounds to his back and a minor wound to his face. Law enforcement was contacted by medical staff. Officer Formell and Officer Kinsey interviewed Bird and Newbreast, both of whom told the officers they had been walking down an alley when an unidentified assailant demanded Bird's backpack. When Bird refused, he was stabbed twice in the back before the assailant fled. Officer Formell recorded part of this conversation, wherein he asked about the backpack, the contents of the backpack, and the alleged assailant.

¶5 After receiving these statements, the officers stepped out of the room, leaving Bird, Newbreast, and Bird's mother, who had just arrived, alone for about 15-20 minutes. Believing the statements given by Bird and Newbreast were not the truth, the officers re-entered the room and, again recording the conversation, interviewed Bird a second time. Bird changed his story, stating Pitkanen had stabbed him during an altercation at McCoun-Larocque's house. Bird said Pitkanen had tried to "punk him out" by saying "get up, move" while Bird was seated in the recliner. When Bird began to gather up his things, Pitkanen asked, "what are you doing," to which Bird answered, "what does it look like I'm doing?" Bird related that Pitkanen then punched him, pushed and stabbed him, and then fell into a table, wherein Pitkanen had cut his hand. Bird said he did "not really see" the knife, and that he did not realize he had been stabbed "until I felt, like, it leaking."

¶6 Officers arrested Pitkanen several days later, finding no knives or weapons, but noting a laceration on his left palm for which he was treated prior to being taken to jail. He was charged with Assault with a Weapon pursuant to § 45-5-213(1)(a), MCA.

¶7 Before trial, believing Bird would be unavailable to testify, the State took Bird's deposition. However, Bird appeared and testified, explaining that his initial story to officers had been a lie he had told to avoid getting Pitkanen in trouble. He testified that, after he met privately with his mother and Newbreast, he decided to tell the police what had really happened. When asked what he had then told the officers, Bird said he could not remember the entirety of his statement, but when asked what he remembered, he responded:

> I just told them that – like what happened, like that I was sitting on the chair in Erin's house, and Ben came – come into the door and went back to the back room, grabbed his shoes, and came right to me when there was like several other seats open to sit on the couch, or – but he came to me and tried to tell me to get up and it's his chair. And he said it in a type of way that was disrespectful

The prosecutor then interjected, "Hold on a second. . . . You said [Pitkanen] said it in a type of way that was disrespectful?" Bird answered affirmatively, and explained that Pitkanen told him to "[g]et the fuck up. This is my chair. This is my spot," and, "Get up." When asked how he responded, Bird said he told Pitkanen, "'Fuck that. I ain't gonna get up. Like. I just said, like, 'You ain't gonna punk me out.'"[1] Bird then stated, "[w]hen he threw his shoes and hit me in the face, that's when I jumped up and pushed him back."

¶8 Bird then gave an account of the altercation, the stabbing, and his exit from the house with Newbreast. The State moved to introduce the video testimony from the hospital

[1] In response to a question from the prosecutor, Bird explained that his phrase, "you ain't gonna punk me out," meant he would not permit Pitkanen to tell him what to do or make him do something he did not want to do.

recordings. Defense counsel did not object to video Exhibit 16, which contained Bird's first account, but objected to video Exhibits 17 and 18, which contained Bird's second hospital account, on the ground it was improper bolstering of testimony by a similar, or consistent, prior statement. The District Court overruled the Defense's objection, reasoning it was "admissible as a prior inconsistent statement."

¶9 During Detective Mahlum's testimony, the State asked him to relate part of a recorded phone conversation between Pitkanen, who was then in jail, and Pitkanen's girlfriend, Ms. Klein. The Court overruled the defense's hearsay objection, stating "I find conclusively this constitutes an admission of a party opponent for rule purposes," but made no evidentiary ruling that Pitkanen had adopted Klein's statement as his own in the conversation. Detective Mahlum testified:

> Ms. Klein speaks with Mr. Pitkanen and indicates – her statement is something to the effect of: 'It's my fault that you stabbed,' – I don't recall if it was Karson or – but, 'It was my fault that you stabbed him,' something to that effect. Mr. Pitkanen then responds, 'No, baby. Don't worry about it. It wasn't your fault,' something to that effect. I don't recall the exact verbatim of the statement.

¶10 The jury found Pitkanen guilty, and he was sentenced to 40 years with 20 years suspended. Pitkanen had been incarcerated for 492 days between his arrest and sentencing, but the District Court determined he was entitled credit for only 223 days of incarceration, based upon the number of days from his arrest in this matter to his sentencing in another matter.

¶11 Pitkanen appeals trial evidentiary rulings and the sentence credit for time served.

STANDARD OF REVIEW

¶12 This Court reviews evidentiary rulings for an abuse of discretion. *State v. Oliver*, 2022 MT 104, ¶ 18, 408 Mont. 519, 510 P.3d 1218 (citing *State v. Smith*, 2021 MT 148, ¶ 14, 404 Mont. 245, 488 P.3d 531). An abuse of discretion occurs when a court "acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice." *Oliver*, ¶ 18. Further, a court's evidentiary rulings must be supported by rules and principles of law, and as such, when an evidentiary ruling is based on conclusions of law, this Court is tasked with determining whether the court correctly interpreted the law. *State v. Smith*, 2021 MT 148, ¶ 14, 404 Mont. 245, 488 P.3d 531. This Court reviews a district court's sentence de novo for legality. *State v. Mendoza*, 2021 MT 197, ¶ 8, 405 Mont. 154, 492 P.3d 509. A sentence is legal if "it falls within the parameters set by applicable sentencing statutes and if the sentencing court adheres to the affirmative mandates of those statutes." *Mendoza*, ¶ 8.

DISCUSSION

¶13 *1. Did the District Court err by admitting the victim's hospital statement at trial as a prior inconsistent statement?*

¶14 Pitkanen argues the District Court erred by overruling his hearsay objection to video Exhibits 17 and 18, which captured Bird's second hospital statement to police, and admitting them as a prior inconsistent statement, because the videos were actually consistent with Bird's trial testimony. Because no foundation was laid for admission of the exhibits as a prior consistent statement, *see Smith*, ¶ 19, Pitkanen argues the videos served only to improperly bolster Bird's testimony. The State argues the District Court

properly admitted these videos as an intertwined consistent and inconsistent statement. *See State v. Howard*, 2011 MT 246, ¶ 31, 362 Mont. 196, 265 P.3d 606 (citing *State v. Lawrence*, 285 Mont. 140, 948 P.2d 186 (1997)) ("it was not an abuse of discretion for the District Court to admit consistent statements along with inconsistent ones where the nature of the witness's testimony made it difficult for the court to separate the consistent from the inconsistent portions of the prior statement").[2]

¶15 As the State notes, Bird made a number of statements at trial that he did not make in the prior recorded hospital statement, and vice versa. However, as we have explained, "simply because [the victim] mentioned certain facts in [a prior] forensic interview that she did not mention at trial, or vice-versa," does not render the prior statement inconsistent to the witness's trial testimony. *Smith*, ¶ 31. A close comparison of Bird's prior statement with his trial testimony reveals, and despite Bird's testimony he could not remember the entirety of that statement, that the versions were substantially similar, with no substantive difference, except for Bird's addition to the actions immediately preceding and leading to the altercation between Bird and Pitkanen, which Bird newly offered at trial, and is quoted

[2] The State's arguments to demonstrate prior inconsistency for admission of Exhibits 17 and 18 include references to differences between Bird's trial testimony and his first hospital statement, Exhibit 16, and his deposition. However, while Bird's Exhibit 16 statement obviously gave an entirely different story than Bird gave at trial, it was admitted into evidence, without objection. That statement does not provide the inconsistency between Bird's trial testimony and his second hospital statement that was foundationally necessary for admission of video Exhibits 17 and 18. Regarding Bird's deposition, when Bird surprisingly appeared at trial, the prosecutor advised the court, "I don't believe it's proper to be admitted into evidence at this time," and upon agreement of the parties, the court struck the deposition from the record. Thus, we do not consider the State's references to these items.

above. Bird's trial version of this point portrayed Pitkanen as confronting Bird aggressively and without provocation, which helped explain the instigation of the altercation and was relevant to the charge. While this portion of Bird's trial testimony was arguably inconsistent with his prior statement on the point within Exhibits 17 and 18, this difference did not serve as a basis for the State to introduce the entirety of Exhibits 17 and 18 as a prior inconsistent statement. Notably, trial courts should parse out the consistent from the inconsistent, unless to do so would leave "the witnesses' testimony disjointed and confusing." *State v. Mederos*, 2013 MT 318, ¶ 18, 372 Mont. 325, 312 P.3d 438.[3]

¶16 The State argues any error in overruling Pitkanen's hearsay objection to the video statement was harmless, as there was no reasonable possibility that its admission might have contributed to the defendant's conviction, citing *Smith*, ¶ 34, *State v. Van Kirk*, 2001 MT 184, ¶ 43, 306 Mont. 215, 32 P.3d 735, and *State v. McComber*, 2007 MT 340, ¶ 26, 340 Mont. 262, 173 P.3d 690. Pitkanen's argument that the video exhibit was a consistent statement that improperly bolstered Bird's testimony serves to establish for purposes of harmless error analysis that the State indeed introduced untainted evidence to prove the same facts during the trial. *See State v. Van Kirk*, ¶ 43. We therefore ask whether, qualitatively, there was any reasonable possibility the tainted evidence might have contributed to the conviction, and conclude there was not. *Van Kirk*, ¶¶ 43-44. The jury

[3] Bird's trial testimony on this point was more favorable to the State's case, which the prosecutor obviously caught during examination of Bird. Ironically, the difference in versions may have supported a request by the *defense* to admit this portion of the prior statement to undermine, as inconsistent, Bird's trial version of Pitkanen's aggressiveness.

was provided more than adequate information to support finding the elements of the charge, and we conclude the video exhibits did not create a risk of improperly contributing to the conviction.

¶17 *2. Did the District Court err by admitting evidence of a conversation between the Defendant and his girlfriend as an admission by party-opponent?*

¶18 The District Court permitted Detective Mahlum to testify about what he heard from a recorded phone call between Pitkanen, who was in jail, and his girlfriend, Ms. Klein, as an admission by a party opponent. Again, Detective Mahlum stated:

> Ms. Klein speaks with Mr. Pitkanen and indicates – her statement is something to the effect of: 'It's my fault that you stabbed,' – I don't recall if it was Karson or – but, 'It was my fault that you stabbed him,' something to that effect. Mr. Pitkanen then responds, 'No, baby. Don't worry about it. It wasn't your fault,' something to that effect. I don't recall the exact verbatim of the statement.

¶19 A statement is not hearsay if the statement is offered "against a party and is (A) the party's own statement, in either an individual or a representative capacity," or second, "(B) a statement of which the party has manifested an adoption or belief in its truth." Rule 801(d)(2)(A) and (B). The District Court's limited comment while admitting the testimony results in a disagreement between the appellate arguments of Pitkanen and the State about the basis for admission of the statement. Pitkanen argues the statement was admitted under Rule 801(d)(2)(B) and was therefore error because the District Court did not make the requisite foundational finding for admission under that provision. The State answers that Rule 801(d)(2)(B) is irrelevant to the inquiry because Klein's statement—"It's my fault you stabbed him"—was not admitted for its truth, but merely to demonstrate context for

Pitkanen's reply, and therefore did not require a hearsay exception. However, in play here was more than merely the *context* for the statement—these words were also the *content* of the statement. The "you stabbed him" phrase used by Klein was the substance to which Pitkanen replied, was offered for that substance, and was briefly cited for such in the prosecutor's closing argument. Thus, we consider whether the statement was properly admitted as an exception to hearsay under Rule 801(d)(2)(B).

¶20 In *State v. Widenhofer*, 286 Mont. 341, 950 P.2d 1383 (1997), we held that, for admission of evidence under Rule 801(d)(2)(B), the court must make an express finding that the party against whom (here, Pitkanen) the statement by another (here, Klein) is offered into evidence, adopted the statement made by the other person or otherwise acquiesced in the statement. *Widenhofer*, 286 Mont. at 349, 950 P.2d at 1383; *see also* Rule 801(d)(2)(B) ("a statement of which the party has manifested an adoption or belief in its truth"). We held in *State v. Francis*, 2001 MT 233, ¶ 15, 307 Mont. 12, 36 P.3d 390, that the District Court erred when it failed to make an express determination that the defendant did in fact adopt the statement of another. Here, while the District Court stated generally that it deemed the statement "an admission of a party opponent for rule purposes," this fell short of the requisite finding that Pitkanen had adopted or acquiesced in the statement for purposes of admission under Rule 801(d)(2)(B), and thus was error.

¶21 Considering the State's harmless error argument, substantial other admissible evidence was also admitted to prove Pitkanen had stabbed Bird, including: Bird's physical injuries; Bird's testimony about the altercation, including being wrapped by Pitkanen's

arms; the testimony of witness McCoun-Larocque; the blood on the recliner where Bird had been sitting; and the testimony of the officers about their investigation.[4] *See Van Kirk*, ¶ 43. Qualitatively, while treated as an admission, the short responsive statement attributed to Pitkanen was a minimal one. Detective Mahlum's account of the conversation was vague and uncertain, and very brief. The jury, tasked with credibility and weight determinations, may well have seen, even if taken as true, Pitkanen's short, quick response to his girlfriend's proffered *mea culpa* as merely reassurance to a loved one that she was not responsible for his predicament. We conclude the statement was not so qualitatively significant that there was a "reasonable possibility that this evidence might have contributed to the defendant's conviction." *Van Kirk*, ¶ 44.

¶22 *3. Did the District Court err in its calculation of Defendant's credit toward his sentence for time served?*

¶23 The District Court awarded Pitkanen 223 days of credit for time served. While Pitkanen was incarcerated from March 27, 2019 to July 30, 2020 (the date of his sentencing herein), for a total of 492 days, the District Court reasoned he was entitled to credit for time served only through November 4, 2019, the date on which he was sentenced in a separate criminal case. Pitkanen argues he is entitled to credit for the entire time he was incarcerated on this charge through his sentencing, pursuant to *Killam v. Salmonsen*, 2021 MT 196, 405 Mont. 143, 492 P.3d 512. The State urges us to reconsider and overrule our holding in

[4] After their initial contact with Justin Newbreast at the hospital with Bird, police could not locate Newbreast during their further investigation, and he did not testify at trial.

Killam and the companion case of *State v. Mendoza*, 2021 MT 196, 405 Mont. 143, 492 P.3d 512, which addressed our precedent in light of the Legislature's more-recent enactment of § 46-18-201(9), MCA (providing, "When imposing a sentence under this section that includes incarceration in a detention facility or the state prison . . . the court shall provide credit for the time served by the offender before trial or sentencing").

¶24 The State well articulates a more exhaustive statutory analysis of the question than previously offered, but we nonetheless conclude, pursuant to our standards governing *stare decisis*, that this ship has already sailed. *See State v. Souther*, 2022 MT 203, ¶ 2, n.1, 410 Mont. 330, ___ P.3d ___ (responding to the State's similar argument, "We decline the parties' invitation to overrule precedent. . . ."); and *State v. Spagnolo*, 2022 MT 228, ¶¶ 11, 15, ___ Mont. ___, ___ P.3d ___ (noting the State's arguments "essentially are the same as those duly considered and rejected in *Killam,*" and concluding "we reaffirm our holding in *Killam*").

¶25 In *Killam*, we noted the continuing confusion regarding the calculation of the credit when a defendant is serving time for more than one sentence:

> Given the variable application of § 46-18-403(1), MCA, to the circumstances of different offenders, it is understandable that defendants—and defendants' counsel—do not understand if or how they will be credited with time served when they have been arrested on an offense, bail has been set on the offense and not posted, yet it is determined the offender is not being held on the "bailable" offense—seemingly allowing courts to ignore the clear documentation existing in the record on the offense or cause for which they are being sentenced.

Killam, ¶ 16. In contrast, we determined the Legislature's enactment of § 46-18-201(9), MCA, quoted hereinabove, "ma[de] the determination of credit for time served

straight-forward" and simply "requires the court, when imposing a sentence on such an offense, to provide credit for time served by the defendant before the defendant's trial or sentencing." *Killam*, ¶ 17.

¶26 "Although *stare decisis* is not a rigid doctrine that forecloses the reexamination of cases when necessary, 'weighty considerations underlie the principle that courts should not lightly overrule past decisions." *Certain v. Tonn*, 2009 MT 330, ¶ 19, 353 Mont. 21, 220 P.3d 384. We noted in *Certain* that "[s]tatutes sometimes fall short of providing clear and consistent direction," but that, when "[f]aced with viable alternatives, *stare decisis* provides the 'preferred course.'" *Certain*, ¶¶ 17 and 19 (quoting *State v. Kirkbride*, 2008 MT 178, ¶ 13, 343 Mont. 409, 185 P.3d 340). More, following *stare decisis* here preserves the sentencing clarity we determined the Legislature had wrought by enacting § 46-18-201(9), MCA. On that point, the State's position would return courts to the confusing task, in cases involving multiple sentences, of assessing the specific "causation" of a defendant's incarceration for purposes of calculating the credit. Consequently, we again decline to revisit our precedent, and hold the District Court erred in its calculation of Pitkanen's credit for time served. He is entitled to an additional 269 days of credit.

¶27 Affirmed in part, reversed in part, and remanded to the District Court for entry of an amended judgment granting Pitkanen a total of 492 days of credit for time served.

/S/ JIM RICE

We concur:

/S/ MIKE McGRATH
/S/ LAURIE McKINNON
/S/ BETH BAKER
/S/ JAMES JEREMIAH SHEA
/S/ INGRID GUSTAFSON
/S/ DIRK M. SANDEFUR