DA 21-0030

IN THE SUPREME COURT OF THE STATE OF MONTANA

2023 MT 147

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CORENA MARIE MOUNTAIN CHIEF,

Defendant and Appellant.

APPEAL FROM: District Court of the Eighth Judicial District,
In and For the County of Cascade, Cause No. ADC 18-776
Honorable John W. Larson, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Shannon Sweeney, Attorney at Law, Palmer, Puerto Rico

For Appellee:

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

Josh Racki, Cascade County Attorney, Carolyn Mattingly, Deputy County Attorney, Great Falls, Montana

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Submitted on Briefs: May 24, 2023

Decided: August 1, 2023

Filed:

Clerk

Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 Corena Marie Mountain Chief (Mountain Chief) appeals from the jury verdict and subsequent November 19, 2020 Judgment of Conviction and Sentencing Order and the September 25, 2020 Opinion and Order Denying Defendant's Motion for a New Trial, issued by the Eighth Judicial District Court, Cascade County. We affirm.

¶2 We restate the issues on appeal as follows:

1. Did the District Court err in excluding evidence, pursuant to the Rape Shield statute, that J.L.D. was abused by other men?

2. Did the District Court err in admitting evidence of other uncharged bad acts?

3. Was Mountain Chief denied a fair trial when the State solicited testimony from a witness who vouched for the victim's credibility?

4. Whether the District Court's COVID-19 mask requirement violated Mountain Chief's right to a fair trial?

5. Whether the District Court abused its discretion by limiting the parties respective voir dire times to 45 minutes?

6. Whether the District Court abused its discretion by denying Mountain Chief's motion for a mistrial for failure of the State to disclose an investigative note?

FACTUAL AND PROCEDURAL BACKGROUND

¶3 The State charged Mountain Chief with two felony offenses—Trafficking of Persons and Sexual Abuse of Children. Prior to trial, the trafficking offense was dismissed. At the first trial, the jury was unable to reach a unanimous verdict on the remaining charge and the court declared a mistrial. Following retrial, Mountain Chief was convicted of the Sexual Abuse of Children offense. She was sentenced to 100 years at the Montana

Women's Prison, with 50 years suspended and given credit for the time she had been incarcerated from arrest to sentencing.

¶4 In relation to the Sexual Abuse of Children offense, the State alleged Mountain Chief knowingly sold her four-year-old daughter, J.L.D., to Eugene Sherbondy (Sherbondy) for sex at his home in Great Falls. Additional facts will be discussed as necessary in discussion of the issues below.

STANDARDS OF REVIEW

¶5 The parties do not dispute the standards of review applicable to this matter. We review evidentiary rulings for an abuse of discretion. *City of Missoula v. Duane*, 2015 MT 232, ¶ 10, 380 Mont. 290, 355 P.3d 729; *State v. Daffin*, 2017 MT 76, ¶ 12, 387 Mont. 154, 392 P.3d 150. As a court's decision to exclude evidence pursuant to the Rape Shield statute implicates a defendant's constitutional right to confront witnesses and present a complete defense, we review such decisions de novo. *State v. Twardoski*, 2021 MT 179, ¶ 26, 405 Mont. 43, 491 P.3d 711; *State v. Ragner*, 2022 MT 211, ¶ 12, 410 Mont. 361, 521 P.3d 29. We review denials of a motion for a mistrial for an abuse of discretion. *State v. Pierce*, 2016 MT 308, ¶ 17, 385 Mont. 439, 384 P.3d 1042. We, likewise, review denials of a motion for new trial for an abuse of discretion. *State v. Oschmann*, 2019 MT 33, ¶ 6, 394 Mont. 237, 434 P.3d 280. We generally do not review issues raised for the first time on appeal, but may do so under the plain error doctrine in situations that implicate a defendant's fundamental constitutional rights and failure to review the asserted error may result in a manifest miscarriage of justice, leave unsettled the question of the fundamental

fairness of the proceedings, or compromise the integrity of the judicial process. *State v. Hayden*, 2008 MT 274, ¶ 17, 345 Mont. 252, 190 P.3d 1091; *State v. Akers*, 2017 MT 311, ¶ 10, 389 Mont. 531, 408 P.3d 142. Finally, we review issues regarding time limits for voir dire for abuse of discretion. *State v. Michaud*, 2008 MT 88, ¶ 13, 342 Mont. 244, 180 P.3d 636.

DISCUSSION

¶6 *1. Did the District Court err in excluding evidence, pursuant to the Rape Shield statute, that J.L.D. was abused by other men?*

¶7 Prior to trial, the State brought a motion to preclude, pursuant to Montana's Rape Shield statute, evidence of any sexual conduct or reports of sexual abuse of J.L.D., the victim, other than that related to the offense being tried. The District Court granted the motion. Mountain Chief argues it was reversible error for the District Court, pursuant to the Rape Shield statute, to preclude admission of alternate sources of the J.L.D.'s sexual knowledge—namely, she was abused by other men. As J.L.D. was 4 years old at the time of the abuse, Mountain Chief asserts that being precluded from presenting evidence of sexual abuse by other men, she was unable to rebut this presumption. Mountain Chief also asserts the preclusion of evidence pursuant to the Rape Shield statute precluded her from fully offering evidence of J.L.D.'s motive to fabricate the allegations. According to Mountain Chief, her defense "theory was that J.L.D. had a motive to fabricate accusations against her mother because she [Mountain Chief] was supplied and used drugs with Sherbondy, and that because her mother neglected her and had assets that would benefit the family, she should be in jail." Mountain Chief asserts this case to be similar to

Twardoski, where this Court determined the lower court's preclusion of evidence of sexual abuse perpetrated by another on the victim prevented the defendant from receiving a fair trial.

¶8 The State asserts Mountain Chief's defense did not depend on showing J.L.D. made up Sherbondy's sexual assault as her defense was not that the abuse did not occur, but rather that she did not knowingly cause it. During her law enforcement interview, Mountain Chief admitted she brought J.L.D. to Sherbondy's home and witnessed him engaging in sexual conduct with J.L.D., but she did not cause the sexual abuse. The State also asserts *Twardoski* is distinguishable as, in that case, the conduct of the other abuse was so unique and nearly identical—a particular game of "truth or dare"—it resulted in a straight-line connection between the prior act and the charged offense which is not present in this case. From our review of the record, we agree with the State.

¶9 In 1975, Montana joined most other states by adopting a rape shield law precluding admission of evidence related to the sexual conduct of the victim. *State v. Awbery*, 2016 MT 48, ¶ 17, 382 Mont. 334, 367 P.3d 346 (citing 1975 Mont. Laws ch. 129, § 1). Although rape shield legislation originally focused on adult rape victims, most jurisdictions include child victims of sexual abuse within the statute's protections. In 1985, Montana broadened the applicability of the Rape Shield statute to include all types of sexual abuse. *Awbery*, ¶ 18 (citing 1985 Mont. Laws ch. 172, § 3).

¶10 Montana's Rape Shield statute, § 45-5-511(2), MCA, precludes evidence "concerning the sexual conduct of the victim[.]" The law is designed to prevent the trial

of the charge against the defendant from becoming a trial of the victim's prior sexual conduct. *State v. Colburn*, 2016 MT 41, ¶ 22, 382 Mont. 223, 366 P.3d 258 (*Colburn I*). The statute provides two narrow exceptions: (1) evidence of the victim's past sexual conduct with the offender, or (2) evidence of specific instances of the victim's sexual activity to show the origin of semen, pregnancy, or disease that is at issue in the prosecution. *State v. McCaulou*, 2022 MT 197, ¶ 23, 410 Mont. 291, 518 P.3d 862. Neither exception is at issue here.

¶11 Rape shield statutes eliminate the need for victims to defend incidents in their past and minimize the trauma of testifying. *Awbery*, ¶ 18. However, the policy of protecting against the trial becoming a trial of the victim "is not violated or circumvented if the offered evidence can be narrowed to the issue of the complaining witness' veracity." *State v. Anderson*, 211 Mont. 272, 284, 686 P.2d 193, 200 (1984). Conflict can arise between rape shield statutes and a defendant's right, arising from the Sixth Amendment and Article II, Section 24, of the Montana Constitution, to confront his accusers and present evidence in his defense. *Awbery*, ¶ 19. "Neither the Rape Shield Law nor the defendant's right to confront and to present evidence are absolute. The Rape Shield Law cannot be applied to exclude evidence arbitrarily or mechanistically and it is the trial court's responsibility to strike a balance between the defendant's right to present a defense and a victim's rights under the statute." *Awbery*, ¶ 20 (internal citations omitted).

> Under the rape shield statute, a court balancing the interests of the defendant with those protected by the Rape Shield Law should require that the defendant's proffered evidence is not merely speculative or unsupported. The court should also consider whether the proffered evidence is relevant

> and probative under M. R. Evid. 401 and 402, whether the evidence is merely cumulative of other admissible evidence, and whether the probative value of the evidence is outweighed by its prejudicial effect under M. R. Evid. 403. The court must balance these considerations to ensure a fair trial for the defendant while also upholding the compelling interest of the Rape Shield Law in preserving the integrity of the trial and keeping it from becoming a trial of the victim.

Twardoski, ¶ 27 (internal quotation marks and citations omitted).

¶12 Mountain Chief contends her defense at trial was that of general denial—to put the State to its burden of proof. She asserts the District Court's Rape Shield exclusion "precluded [her] from challenging the veracity of the complaining witness" at trial, that failing to permit "cross-examination about specific statements made during the complaining witness's recorded forensic interview restricted [her] constitutional right to confrontation" and that had she "been able to conduct fair cross-examination at trial she would have been able to dispute the critical facts and inferences necessary to support her theory of defense." Despite these allegations, she fails to connect the dots of her argument. Mountain Chief does not seriously deny taking J.L.D. to Sherbondy's home or that Sherbondy sexually abused J.L.D. and the evidence presented by the State that these things occurred was uncontested. The remaining elements to be proven by the State are that Mountain Chief knowingly caused the abuse perpetrated by Sherbondy. Mountain Chief fails to explain how J.L.D.'s obtainment of sexual knowledge through other sexual abuses assists in defense of the State's proof on these elements. While there may have been some similarities between the Sherbondy abuse and J.L.D.'s abuses by other men—such as forced use of drugs—unlike in *Twardoski*, the specific modus operandi was not so unique

or particular that this evidence established a straight-line connection to Mountain Chief's defense. Further, the fact that Mountain Chief had, at other times, either placed J.L.D. in a situation which resulted in or failed to protect her from sexual abuse by other men had significant potential to prejudice Mountain Chief and further bolster the State's case.

¶13 Here, we conclude the District Court appropriately balanced Mountain Chief's rights to confront her accusers and present a full defense with J.L.D.'s rights under the Rape Shield law and we find no error.

¶14 *2. Did the District Court err in admitting evidence of other uncharged bad acts?*

¶15 Mountain Chief asserts the District Court committed reversible error when it permitted evidence of other bad acts—namely, it permitted the State to present testimony of Mountain Chief's other daughter, D.L.D., that Mountain Chief had tried to marry D.L.D. off to Sherbondy when D.L.D. was around 13 years old. Mountain Chief asserts this evidence violated M. R. Evid. 403 and 404 as there "is no logical connection between the acts of a preteen marriage proposal and the sexual abuse of a four-year-old." Mountain Chief contends that since the trafficking offense was dismissed, this evidence was at best minimally relevant and only served to prejudice her by demonstrating a propensity for bad behaviors—in essence, she asserts any minimal relevance was outweighed by the danger of unfair prejudice.

¶16 M. R. Evid. 402 precludes the admission of evidence which is not relevant. M. R. Evid. 403 provides that even if evidence is relevant, it may be excluded if its probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the

issues, or misleading [to the] jury[.]" "This is a 'fact-specific balancing test' favoring admission—'the risk of unfair prejudice must substantially outweigh the evidence's probative value.'" *State v. Murphy*, 2021 MT 268, ¶ 15, 406 Mont. 42, 497 P.3d 263 (quoting *State v. Haithcox*, 2019 MT 201, ¶ 16, 397 Mont. 103, 447 P.3d 452). M. R. Evid. 404(b) provides that evidence "of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith" but may be admissible for other purposes such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

¶17 The State asserts the evidence that Mountain Chief, in exchange for a house and a cell phone, tried to get D.L.D. to marry Sherbondy when D.L.D. was approximately 13 years old was properly admitted as evidence of Mountain Chief's motive for the Sexual Abuse of Children offense—a motive to barter her children to Sherbondy in exchange for property or money. The State further contends the evidence was probative of Mountain Chief's state of mind—knowingly—during the incident. "Evidence of other crimes or acts can be admitted under Rule 404(b) if it serves to demonstrate that 'separate acts can be explained by the same motive.'" *Murphy*, ¶ 13 (quoting *State v. Blaz*, 2017 MT 164, ¶ 14, 388 Mont. 105, 398 P.3d 247). "In *Blaz*, we cautioned that the State's argument the defendant's prior act of domestic violence was admissible to demonstrate the motive of 'general hostility or complete disregard for others, without more, would define motive very broadly and cast a wide net,' potentially admitting evidence for improper propensity purposes." *Murphy*, ¶ 13 (quoting *Blaz*, ¶ 15).

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

Murphy, ¶ 13 (quoting *State v. Dist. Court of the Eighteenth Judicial Dist.*, 2010 MT 263, ¶ 59, 358 Mont. 325, 246 P.3d 415 (*Salvagni*)) (emphasis in original).

¶18 Here, the motive—financial desperation—is the cause and the charged and uncharged act are effects; "*that is, both acts are explainable as a result of the same motive*." *Murphy*, ¶ 13 (quoting *Salvagni*, ¶ 59) (emphasis in original). Further, Mountain Chief admitted she brought J.L.D. to Sherbondy's place and witnessed the sexual assault, but asserts she did not knowingly cause the assault or accept property or money.[1] D.L.D.'s testimony undermines Mountain Chief's defense of being a passive observer to a more active participant and provides evidence of Mountain Chief's desperation and willingness to barter her children for property or money, providing evidence of her mental state.

¶19 Given the State's allegations and theory of the case, the testimony from D.L.D. that Mountain Chief tried to get D.L.D. to marry Sherbondy when she was barely a teenager in exchange for property was relevant to the issue of motive—financial desperation—for the

[1] When asked if she received money for selling her daughter to Sherbondy, Mountain Chief replied, "No. I don't remember."

Sexual Abuse of Children offense. Thus, the issue is whether the evidence's probative value is outweighed by its danger of unfair prejudice, confusion of the issues, or would be misleading to the jury. From our review of the record, it is clear the District Court understood both the evidence's probative value and potential prejudicial impact and properly balanced these considerations.[2] From this record, we cannot determine the District Court abused its discretion in admitting D.L.D.'s testimony.

¶20 *3. Was Mountain Chief denied a fair trial when the State solicited testimony from a witness who vouched for the victim's credibility?*

¶21 Mountain Chief next takes issue with the testimony of Detective Katie Cunningham, the investigating detective, in asserting her right to a fair trial was violated. Mountain Chief asserts Detective Cunningham was not designated or qualified as an expert witness, but yet testified similar to an expert witness, improperly offering opinion testimony "that J.L.D.'s statements during the forensic interview were credible, and that J.L.D. was believable and had no motive to lie[.]" Mountain Chief asserts this testimony inappropriately bolstered J.L.D.'s testimony. The State contends that Detective Cunningham did not testify as an expert but rather her training and experience, including law enforcement training and specialized training as a child forensic interviewer, provided the foundation for her to

[2] In discussing the issue prior to evidentiary presentation on the morning of the first day of the 2019 trial, the District Court noted that the State had dismissed the trafficking offense indicating some reservation as to the relevancy of the testimony to the offense being tried, but also recognizing its relevancy as to the motive the State was attempting to establish. After balancing these considerations, the District Court exercised reasonable discretion to determine the evidence admissible.

testify as a lay witness as to whether J.L.D. exhibited signs of deception or coaching during her forensic interview.[3]

¶22 It is the sole province of the jury to determine the credibility of witnesses and the weight to be given to their testimony. *State v. Byrne*, 2021 MT 238, ¶ 23, 405 Mont. 352, 495 P.3d 440. Generally, a witness is not permitted to comment on another witness's credibility. *Hayden*, ¶¶ 26, 31.

¶23 "Both the Sixth Amendment of the United States Constitution and Article II, Section 24[,] of the Montana Constitution guarantee criminal defendants the right to a fair trial by a jury." *Hayden*, ¶ 27. In *Hayden*, the prosecutor questioned a witness as to the credibility of other witnesses. This Court determined admission of this evidence called into question the fundamental fairness of the trial, ultimately concluding this "line of questioning, which elicited [the witness's] opinion on the credibility of other witnesses, is unacceptable and invades the province of the jury." *Hayden*, ¶ 31. Similarly, admission of the opinion evidence of Detective Cunningham to the effect that she did not believe J.L.D. exhibited deception or coaching during her forensic interview calls into question the fundamental

[3] Despite the record being replete with objection to Detective Cunningham's testimony as both an undisclosed expert and as invading the province of the jury in determining the credibility of witnesses, Mountain Chief appears to assert plain error review is applicable to this issue—asserting a heading entitled "Improper Bolstering, Plain Error" and later stating that Detective Cunningham's "improper testimony violated [Mountain Chief's] right to a fair trial under the United States and Montana Constitutions, it is a plain error and [Mountain Chief's] conviction should be reversed." She does not assert plain error beyond these references and inclusion of the standard of review for plain error review. The State counters that Mountain Chief fails to show her right to a fair trial was violated. As discussed in this opinion, whether the issue was preserved, we agree with the State that Mountain Chief has failed to establish the fundamental fairness of her trial was compromised. *See State v. Trujillo*, 2020 MT 128, ¶ 6, 400 Mont. 124, 464 P.3d 72.

fairness of the trial. While we agree a "lay witness may testify to opinions or inferences that rationally relate to the perception of that witness and are helpful to a clear understanding of the witness's testimony or the determination of a fact in issue[,]" and that a "witness's training can provide a sufficient foundation for them to provide lay opinion testimony[;]" in this instance, it was an abuse of the court's discretion to admit this evidence. *State v. Champagne*, 2013 MT 190, ¶ 35, 371 Mont. 35, 305 P.3d 61.[4] From her testimony, it is clear the State presented Detective Cunningham as an undisclosed expert.[5] She did not merely lay the foundation for admission of Mountain Chief's recorded law enforcement interview and outline her investigation, but rather was questioned in a manner designed to bolster J.L.D.'s testimony, invading the province of the jury.

¶24 As admission of Detective Cunningham's opinion testimony was error, we must then determine whether it violated Mountain Chief's right to a fair trial. Not every error

[4] In *Champagne*, the State elicited testimony from a forensic interviewer to demonstrate that interviewer had training to identify whether a victim had been coached and permitted the interviewer "to testify about a matter to which she had training and experience: whether a victim had been coached." *Champagne*, ¶ 13. This case is distinguishable from *Champagne* in that the testimony went beyond Detective Cunningham testifying as per her training to identify the signs or indicators of a victim being coached but rather was permitted to testify that she had no concerns as to J.L.D.'s ability to be truthful and that she "believed" J.L.D.

[5] Throughout the entirety of the second trial, the District Court directed the evidentiary framework and previous rulings made during the first trial would guide the parties' presentations, repeatedly requiring the parties to show how the evidence was presented during the first trial when discussing issues with counsel. The State did not elicit this bolstering testimony from Detective Cunningham during the first trial. As such, Mountain Chief's counsel was blindsided and disadvantaged by this new evidence. Had Detective Cunningham been identified as an expert, Mountain Chief would have had opportunity to prepare for cross-examining her as an expert and/or obtaining a defense expert to counter her testimony.

violates a defendant's right to a fair trial. *See Oschman*, ¶ 26. Further, we will not put a District Court in error for a ruling in which the appellant acquiesced or participated. *In re Marriage of Stevens*, 2011 MT 106, ¶ 28, 360 Mont. 344, 253 P.3d 877.

¶25 From our review of the record, although Mountain Chief asserted a general denial defense, she did not seriously contest and acquiesced to J.L.D. being credible in asserting sexual abuse by Sherbondy. During her testimony, Mountain Chief admitted to telling law enforcement that: J.L.D. was not a story teller; she saw Sherbondy laying J.L.D. down and trying to touch her in both the living room and the hallway; she thought Sherbondy was sexually attracted to her daughters; she remembered Sherbondy trying to grab J.L.D.'s bottom; Sherbondy touched J.L.D. and she was scared to say anything; she took J.L.D. to Sherbondy's home and left J.L.D. alone with Sherbondy for 5-10 minutes after Sherbondy had on two occasions expressed desire to marry her other 13-year-old daughter; Mountain Chief thought Sherbondy was creepy and sexually attracted to her daughters; and that she believed J.L.D. at the time Mountain Chief was interviewed by law enforcement. Given this, we cannot find Mountain Chief was denied a fair trial because of the admission of Detective Cunningham's testimony that, in her opinion, J.L.D. did not show signs of deception or coaching during her forensic interview.

¶26 *4. Whether the District Court's COVID-19 mask requirement violated Mountain Chief's right to a fair trial?*

¶27 Mountain Chief asserts the requirement for jurors to wear face masks during voir dire precluded counsel from ensuring full examination of juror's fitness to serve as counsel could not assess each juror's facial expression to make determinations regarding "all

emotions that go into the consideration of whether that person can be a fair and impartial juror." Mountain Chief also asserts requiring witnesses to wear masks during their testimony violated her right of confrontation under both the Sixth Amendment of the U.S. Constitution and Article II, Section 24, of the Montana Constitution and also "denied the jury the ability to use demeanor in its critical credibility determination." Finally, Mountain Chief asserts that requiring her to wear a mask throughout trial and while testifying violated her Fifth and Sixth amendment rights under the U.S. Constitution and was a violation of her due process and equal protection rights. The State responds that, while Mountain Chief objected to witnesses wearing masks before the District Court, she did not raise any constitutional right such as the right of confrontation, and, as such, this Court should decline to review the claim. Alternately, the State contends this Court should determine under the two-prong test set forth in *Maryland v. Craig*, 497 U.S. 836, 110 S. Ct. 3157 (1990), there was no violation of Mountain Chief's right to confrontation. We agree with the State.

¶28 Although Mountain Chief repeatedly expressed objection to witnesses wearing masks while testifying, she did not specifically assert violation of any specific constitutional right before the District Court. Mountain Chief did express to the District Court objection as far as not being able to see the face and facial expressions of the witnesses. In response, the District Court indicated that utilization of face shields, rather

than masks, would be permitted.[6] Despite this, neither Mountain Chief nor her counsel chose to wear a face shield rather than a mask and they did not provide face shields for or request jurors or witnesses wear face shields once at trial, despite being given the opportunity to do so.

¶29 Although Mountain Chief did not specifically assert violation of her right of confrontation before the District Court, we find no such violation.

> The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witness against him." U.S. Const. amend. VI. Similarly, the Montana Constitution provides that "[i]n criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face." Mont. Const. art. II, § 24. Following the United States Supreme Court, many state courts have analyzed witness presence under the Confrontation Clause, noting the protection of the confrontation right is, in part, guaranteed through a "face-to-face meeting with witnesses appearing before the trier of fact." [*State v.*] *Mercier*, [2021 MT 12,] ¶ 16[, 403 Mont. 34, 479 P.3d 967] (quoting [*Craig*, 497 U.S. at 844, 110 S. Ct. at 3162-63]) (citations omitted)).
>
> However, the Supreme Court has recognized that physical face-to-face confrontation, while preferred, is not an absolute requirement, and has approved alternative witness participation in certain circumstances. *See Mercier*, ¶ 17. In *Craig*, the Supreme Court affirmed a Maryland state statute that permitted the use of a one-way video stream in order to protect the interests of a child who had been sexually assaulted, where the State had presented evidence the child would sustain anxiety and fear if required to physically appear before the defendant, and that the child's ability to testify would be compromised. The Supreme Court upheld the statute, noting the State had provided an important public policy for use of technology to present the testimony. This holding became the two-prong *Craig* standard, under which, first, there must be a case-specific finding made by the trial court that "denial of physical face-to-face confrontation is necessary to

[6] The wearing of a face shield would address the issue about which Mountain Chief complained as it would permit others to see the wearer's face and facial expressions.

> further an important public policy." *Mercier*, ¶ 18. Secondly, the reliability of the testimony must be maintained by such hallmarks as the witness being placed under oath, testifying in the view of the jury, and being subject to cross-examination. *Craig*, [497 U.S. at 845-46, 110 S. Ct. at 3163-64].

State v. Walsh, 2023 MT 33, ¶¶ 9-10, 411 Mont. 244, 525 P.3d 343.

¶30 Mountain Chief's trial was held in June of 2020, during the peak of the COVID-19 pandemic and before any vaccines were available. At the time, masks were the primary means of stopping the spread of the highly deadly COVID-19 virus. No credible claim can be made that protection of public health—including the protection of jurors, witnesses, litigants, and court personnel—is not an important public policy.[7] Thus, the District Court order requiring masks or face shields satisfies the first prong of *Craig*. Further, the reliability of the testimony was maintained. Witnesses appeared in-person, testified under oath, and were subject to cross-examination, and although given the opportunity to do so, Mountain Chief did not provide witnesses with facial shields and neither she nor her attorney wore a face shield. The District Court properly balanced Mountain Chief's constitutional rights with the health and safety of the public. Mountain Chief has failed to

[7] We have, in fact, found that reducing the spread of COVID-19 is a compelling policy interest. *Stand Up Mont. v. Missoula Cty. Pub. Sch.*, 2022 MT 153, ¶ 20, 409 Mont. 330, 514 P.3d 1062. Further, at this time, the State of Montana was under a public health emergency, pursuant to Executive Order No. 2-2020 specifically providing that "proactively implementing mitigation measures to slow the spread of the virus is in the best interests of the State of Montana and its people[.]" This public health emergency was likewise, recognized by this Court which instructed courts that, "[w]hile we must maintain our core constitutional services, we are obligated to care for the health and safety of our employees and the public we serve." Memorandum from Mike McGrath, Chief Justice, Montana Supreme Court, to Montana District Court Judges et al. (March 17, 2020) (https://perma.cc/P9J3-T758).

establish a constitutional violation of her right to confrontation by the District Court's requirement that jurors, witnesses, and litigants wear masks or face shields during trial.

¶31 *5. Whether the District Court abused its discretion by limiting the parties respective voir dire times to 45 minutes?*

¶32 Mountain Chief asserts she did not receive a fair trial as her voir dire was limited to 45 minutes. Upon the expiration of her voir dire time, the District Court would not provide her additional voir dire time, and Mountain Chief refused to pass the jury for cause. Mountain Chief notes at her first trial voir dire was limited to 45 minutes, but that this limitation should not have remained in place due to the sensitive nature of the allegations, complexities of racial and other biases, and COVID-19 protocols. Mountain Chief asserts she objected to the court's dismissal of 47 jurors for cause related to the COVID-19 protocols and specifically noted an issue with a particular juror. Mountain Chief provides that, in response to defense counsel's final voir dire question regarding reasonable doubt, a female juror offered that she had previously served on a rape case as a juror. That juror described that she came to the decision to go along with everybody else, but it bothered her until later when the judge indicated to the jury it had made the right decision. Mountain Chief baldly asserts this juror's statements imply some bias towards individuals accused of sex crimes and confusion related to reasonable doubt, but does not explain how. The State contends the District Court did not abuse its discretion when it limited voir dire to 45 minutes per side as the District Court's procedure resulted in a thorough examination of the potential jury pool. Prior to in-person voir dire, jurors completed two pretrial jury questionnaires containing detailed questions concerning potential jury bias. During

in-person voir dire, the District Court along with counsel first conducted individual voir dire of jurors identified to have potential conflicts. Following this, each party was permitted an additional 45 minutes voir dire.

¶33 In a criminal case, the purpose of voir dire is to determine a prospective juror's partiality and voir dire "enables counsel to properly raise a challenge for cause and to intelligently exercise peremptory challenges." *Michaud*, ¶ 26. While judicial conduct of a trial can affect the substantive rights of a defendant, "the court also has a duty to conduct the trial in a speedy and fair manner" and "has great latitude in controlling voir dire." *State v. LaMere*, 190 Mont. 332, 339, 621 P.2d 462, 466 (1980). In *Michaud*, a defendant contended the district court erred by limiting voir dire for his misdemeanor DUI trial to 15 minutes. In affirming the district court's conduct, we noted the district court engaged in a comprehensive voir dire before turning voir dire over to individual counsel, both the State and the defendant had the opportunity to discuss potential bias and prejudice with jurors, both had opportunity to discuss concepts such as reasonable doubt with jurors, and both were invited to offer written voir dire questions prior to trial—although neither submitted any questions. Here, jurors responded to two juror questionnaires prior to commencement of in-person voir dire and, similar to *Michaud*, the District Court engaged in a comprehensive voir dire along with counsel prior to then providing each side an additional 45 minutes for voir dire where both the State and Mountain Chief had opportunity to discuss bias, prejudices, and racial issues with jurors as well as additional concepts such as reasonable doubt. While we would encourage district courts not set rigid time limits for

voir dire in complex felony trials, we recognize the need for courts to manage trials within broader timeframes and in consideration of overall caseload demands. We also recognize the pressure on the District Court in this instance to protect potential jurors from a pandemic while also protecting Mountain Chief's rights to a speedy and fair trial. Given these requirements, in this case, we cannot find the District Court abused its discretion in limiting voir dire as it did.

¶34 *6. Whether the District Court abused its discretion by denying Mountain Chief's motion for a mistrial for failure of the State to disclose an investigative note?*

¶35 Between day two and day three of trial, an investigative note contained in Detective Cunningham's file was discovered and provided to the defense.[8] The source of the note made by Detective Cunningham was Kathy Little Dog, J.L.D.'s aunt with whom J.L.D. resides. The note provided that J.L.D. "is a huge liar." The defense determined that the note could not be admitted through available witnesses at trial,[9] was prejudiced by its late discovery, and made a motion for a mistrial. In an attempt to avoid the mistrial, the State offered to make Kathy Little Dog available for a defense interview and then, if necessary, the defense could call her as a witness. The District Court denied the mistrial. After interviewing Kathy Little Dog, the defense elected not to call her as a witness, instead obtaining testimony from Detective Cunningham that J.L.D. had a reputation for not being

[8] The existence of this note was not known to the State and when it was discovered during trial it was immediately provided to the defense.

[9] The State had listed Kathy Little Dog as a potential witness but elected not to call her, and, as such, she was no longer in attendance at trial.

truthful. Further, the District Court sanctioned the State for the late disclosure by precluding it from calling Little Dog to testify on rebuttal.

¶36 Mountain Chief continues to assert the late disclosure of Detective Cunningham's note prejudiced the defense; whereas the State asserts Mountain Chief was properly given the opportunity to highlight J.L.D.'s reputation for untruthfulness and the District Court's sanction of precluding the State from calling Little Dog in rebuttal was an adequate sanction for the unintentional late production of Detective Cunningham's investigation note.

¶37 Mountain Chief has failed to establish how the unintentional late disclosure of Detective Cunningham's investigatory note prejudiced her. Upon learning of the note, she was permitted to interview Kathy Little Dog and to call her as a witness if she desired. After interviewing Little Dog, Mountain Chief elected not to call her as a witness indicating her testimony in regard to J.L.D.'s reputation of untruthfulness was not as compelling as eliciting such from Detective Cunningham—which Mountain Chief was ultimately able to do. Under the circumstances presented here, we do not find the District Court abused its discretion in denying Mountain Chief's motion for a mistrial based on the unintentional late disclosure of Detective Cunningham's note.

CONCLUSION

¶38 The District Court did not abuse its discretion in managing the evidentiary presentation under the Rape Shield statute, balancing the relevancy and prejudice in admission of evidence of other uncharged bad acts, and in conducting trial in such a manner

as to assure Mountain Chief a speedy and fair trial while also attempting to reasonably protect jurors, witnesses, counsel, and court staff from the deadly COVID-19 virus. Although the District Court erred in permitting Detective Cunningham to improperly offer opinion testimony as to J.L.D.'s credibility, given Mountain Chief's admissions and lack of serious contest to J.L.D.'s assertion of being sexually abused by Sherbondy, we cannot find Mountain Chief was denied a fair trial because of the admission of this testimony.

¶39 Affirmed.

/S/ INGRID GUSTAFSON

We concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ DIRK M. SANDEFUR
/S/ JIM RICE