

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DC 12-106C

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DIANA ARNOLD,

Defendant and Appellant.

OPENING BRIEF OF APPELLANT

On Appeal from the Montana Eighteenth Judicial District Court,
Gallatin County, The Honorable John Brown, Presiding

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STATEMENT OF ISSUES

- I. Whether the district court abused its discretion by failing to properly instruct the jury about Ms. Arnold's mental defect or disease defense?
- II. Whether the district court abused its discretion by failing to include a jury verdict form that properly included the options of "Guilty," "Guilty by Reason of Mental Defect or Disease," and "Not Guilty"?
- III. Whether the district court abused its discretion when it sustained the State's objection to its own evidence and did not allow the jury to hear the audio recording of a key witness?

STATEMENT OF THE CASE

This is an appeal from an eight-day jury trial during which the district court deprived Ms. Arnold of a fair trial when it failed to allow the jury a full and complete review of the evidence, failed to properly instruct the jury with regards to Ms. Arnold's documented mental health disorders, and then prevented the jury from properly accounting for Ms. Arnold's mental health disorders in its verdict.

Ms. Arnold was charged with attempted deliberate homicide and aggravated burglary. Because the State refused to appreciate the severity of Ms. Arnold's mental health disorders and did not provide a reasonable alternative, Ms. Arnold proceeded to trial on July 17, 2013.

During the trial, the defense repeatedly attempted to demonstrate Henry David McDunn's inconsistent statements and the way that his story evolved from the day of the incident through to his testimony during trial. (Trial Transcript, DC-12-106C, p. 559). To assist the jury's understanding, the defense sought to introduce a taped interview of Mr. McDunn replete with inconsistencies from the day of the incident, and, as it turned out, his trial testimony. (*Id.* at p. 556). The district court denied the defense's request at the prosecution's objection, and in so doing, prevented the jury from hearing the highest and best form of evidence. (*Id.* at p. 561).

In addition, the defense presented lay and expert testimony demonstrating Ms. Arnold's significant mental health disorders. Based on this testimony, the defense proposed a verdict form (*See* Appendix Exhibit A) allowing the jury to find her guilty, not guilty, not guilty by reason of mental defect or disease, or guilty but mentally ill or defective. (*Id.* at 1660—62). The defense proposed a related jury instruction (*See* Appendix Exhibit B) informing the jurors that if they found Ms. Arnold guilty or not guilty because of a mental illness or defect, that she would be subject to further proceedings before the district court. (*Id.*). The district court refused to use the verdict form or provide the related instruction. (*Id.* at p. 1664).

During deliberations, the jurors sent a question out to the district court, “requesting the written Montana Code in regard to mental disease or defect....” (*Id.* at p. 1912). Over Ms. Arnold’s objection, the district court refused to provide the statute but rather referred to the jurors to the instructions already given. (*Id.* at p. 1914). After deliberating for nearly fifteen hours, the jury found Ms. Arnold guilty of attempted deliberate homicide and aggravated burglary. Those verdicts led to the instant appeal.

STATEMENT OF FACTS

On March 6, 1999, Ms. Arnold’s life was forever altered. That evening, as she was returning to Bozeman from an art symposium in Yuma, Arizona, Ms. Arnold suffered a traumatic brain injury when she was rear-ended by a tractor-trailer. (Trial Transcript, DC-12-106C, p. 1026). The tractor-trailer hit Ms. Arnold’s small truck with enough force to total the vehicle. (*Id.*). Because the truck was an older model without headrests, Ms. Arnold’s head was forced back and unseated the truck’s rear window. (*Id.*). On the rebound, her head bounced off the steering wheel. (*Id.*).

Not long after, Ms. Arnold realized that she was having problems remembering things and remembering people—people whom she had known for years. (*Id.* at p. 1031). Her brain would sometimes just shut down and she would be unable to access information. (*Id.* at p. 1026). Ms. Arnold began “los[ing]

time” and “los[ing] events.” (*Id.* at p. 1064). When Ms. Arnold began losing time and events, she realized that that she had suffered a traumatic brain injury. Ms. Arnold began working with doctors and therapists to manage as best she could. But in some ways, her life became defined by that head injury.

In order to gain some semblance of control, Ms. Arnold developed elaborate routines and systems to help her manage her life. (*Id.* at p. 1032). And while these systems and routines helped her cope with the effects of her traumatic brain injury, many of her routines would seem odd, or even crazy, to those who did not know her. For instance, before she could deal with the burn piles dotting her twenty-acre property, Ms. Arnold would cover the interior of her car in plastic, put a change of “throw-away” clothes in the back of her car (including oversized shoes to go over her regular shoes), fill small containers with gas and/or diesel fuel, and load a small caliber pistol and related accessories into her car to ward off the many animals that frequented her property. (*Id.* at p. 1080—85, 1105—06).

On May 30, 2012, Ms. Arnold found herself in David McDunn’s home, dressed as if she were dealing with a burn pile and with all her usual accessories such as cans of gasoline, matches, the small pistol, and her throw-away clothes and shoes. (*Id.* at p. 1308:22-25). Although Ms. Arnold does not remember how she got to the home or why she had gone there, *id.* at 1089—91, Ms. Arnold did know the McDunns. A few years before, she had, for a brief time, rented them an

apartment below her home. (*Id.* at p. 1055). In addition, Ms. Arnold had been forced to defend a lawsuit brought by the McDunns related to their damage deposit—the lawsuit and related appeals dragged on for almost three years. *See McDunn v. Arnold*, 2013 MT 138, 303 P.3d 1279, 370 Mont. 270.

During her criminal trial, Ms. Arnold testified that while she remembers being in the McDunn’s home and going through some files, she could not remember her reason for doing so. (Trial Transcript p. 1097). Ms. Arnold testified that the experience was “kind of dazed dream thing” that was “not always logical” and it mirrored her earlier experiences of losing time and/or forgetting her purpose for undertaking certain actions. (*Id.*). When she realized that Mr. McDunn was returning home, she testified that she started towards the front of the house “to meet Dave at the front door and leave.” (*Id.* at p. 1098).

Despite her efforts to leave, Mr. McDunn had other ideas. Ms. Arnold testified that when he saw her, Mr. McDunn, who was almost a foot taller and one hundred pounds heavier, he head butted her and told her, “[Y]ou’re in my house, I can kill you.” (*Id.* at p. 1099—1101). Mr. McDunn then savagely beat Ms. Arnold, including biting her all over her back. (*Id.* at p. 1139). During the encounter, the pair wrestled over Ms. Arnold’s small caliber pistol. (*Id.* at p. 1134—37). Mr. McDunn was twice struck. (*Id.*). And while Ms. Arnold admits to pulling the trigger once, to ensure the gun discharged harmlessly down the hall,

she testified that the remaining rounds were discharged as a result of the parties' struggles. (*Id.*).

When Mr. McDunn finished his savage attack, he pinned her face down to the floor, where she remained until law enforcement arrived. (*Id.* at p. 1141). Ms. Arnold could not remember how much time had elapsed during the beating and “was [just] trying to figure out how [she]’d gotten there, what, if it, even if it was still real at this point.” (*Id.*). After being treated for her many injuries, Ms. Arnold was charged with deliberate attempted homicide and aggravated burglary.

During the eight-day trial, the jury heard a significant amount of testimony, much of it in regards to Ms. Arnold’s mental illnesses and defects before, during, and after the incident. And to a person, all of the experts—those provided by the defense and the prosecution—agreed that Ms. Arnold suffered from a host of mental illnesses. (*Id.* at p. 1341). All agreed that there was objective mental damage—a traumatic brain injury—caused by the wreck in 1999. (*Id.*). All agreed that she was not malingering. (*Id.* at pp. 1387, 1542). And all agreed that she had suffered from tremendous external stressors in addition to her internal mental illnesses. (*Id.* at pp. 1389, 1462, 1542).

The experts differed, however, in their assessment of Ms. Arnold’s mental fortitude and whether she had acted purposely or knowingly on May 30, 2012. The defense witnesses testified that Ms. Arnold’s mental disease and/or defect had

prevented her from “appreciate[ing] or conform[ing] her conduct to the requirements of the law at the time of the criminal conduct charged,” *id.* at p. 1394—95 and opined that these mental diseases and/or defects may have led to a dissociative state, in which Ms. Arnold was not in full control of her mental faculties or processes during much of the incident. (*Id.* at pp. 1351. 1401). And despite conceding that “the culmination of stressors [leading up to the incident] had finally become the last straw” for Ms. Arnold, the State’s experts stopped short of concluding that Ms. Arnold’s many mental diseases and/or defects had led to her actions that day.

After hearing the testimony of these many experts, and a wide array of lay witnesses, the jury was given the case. During deliberations, it became clear that the jury was unsure what to do with the voluminous evidence of Ms. Arnold’s mental illness and how that could or should impact their verdict. (*Id.* at p. 1912). Unfortunately, the district court rebuffed the jury’s attempt to gain a better understanding of the intersection of her mental illness and the law and after fifteen hours of deliberation, the jury found Ms. Arnold guilty. (*Id.* at p. 1914).

STANDARD OF REVIEW

After “a party proposes an instruction which is rejected by the trial court, that party has made a sufficient objection” and this Court reviews the district court’s decision for an abuse of discretion. *State v. Redlich*, 2014 MT 55, ¶ 26,

374 Mont. 135, 321 P.3d 82 (citations omitted). An abuse of discretion occurs when a district court “acts arbitrarily without employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice.” *State v. Cook*, 2012 MT 34, ¶ 12, 364 Mont. 161, 272 P.3d 50. “[T]o constitute reversible error, any mistake in rendering jury instructions must prejudicially affect a defendant’s substantial rights.” *Redlich*, ¶ 26.

Similarly, the Court’s “standard of review of a discretionary trial court ruling, including the use of a special verdict form, is whether the court abused its discretion.” *Barthule v. Karman*, 268 Mont. 477, 488, 886 P.2d 971 (1994).

“Admitting or refusing evidence lies within the sound discretion of the trial judge.” *State v. Kowalski*, 252 Mont. 166, 171, 827 P.2d 1253 (1992). The same “abuse of discretion” standard of review applies to the Court’s review of “a district court’s admission of rebuttal testimony.” *Redlich*, ¶ 32 (citing *State v. Hart*, 2000 MT 332, ¶ 20, 303 Mont. 71, 15 P.3d 91). A court abuses its discretion if it acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice. *State v. Derbyshire*, 2009 MT 27, ¶ 19, 349 Mont. 114, 201 P.3d 811.

SUMMARY OF ARGUMENT

First, when the district court refused to provide the defense’s proposed instruction stating, “If you find Defendant guilty OR not guilty by reason of mental

disease or defect, there will be further proceedings conducted that do not involve the jury,” it prejudiced Ms. Arnold’s substantive rights. The proposed instruction sought only to explain one of the ways in which the jury could address Ms. Arnold’s mental illnesses and defects. In the absence of this clarifying instruction, the jury was could only accept the reality of Ms. Arnold’s mental illness and defects if it found her not guilty.

Second, the district court abused its discretion when it deprived the jury of the option to find Ms. Arnold guilty but mentally ill or defective. The district court’s erroneous decision to remove this option from the purview of the jury prejudiced Ms. Arnold’s substantive rights because it required the jury to find her not guilty if it found that she was mentally ill or defective. The district court’s decision therefore misapplied the law and the facts by presenting the jury a mutually exclusive decision with regards to Ms. Arnold’s mental condition and accountability.

Third, the district court abused its discretion when it refused to allow the defense to impeach Mr. McDunn with his prior inconsistent recorded statement. Because the district court deprived the jury of the opportunity to hear the tone, the cadence, and the way in which the prosecution’s lead witness changed his story, the district court improperly prevented Ms. Arnold from presenting the best evidence of the true series of events.

As a result of these errors and abuses of discretion, Ms. Arnold was deprived of a fair trial. The only remedy is to reverse and remand for a new trial.

ARGUMENT

I. THE DISTRICT COURT SHOULD HAVE INSTRUCTED THE JURY THAT IT COULD FIND MS. ARNOLD GUILTY BUT MENTALLY ILL OR DEFECTIVE TO ACCOUNT FOR THE UNCONTESTED EVIDENCE THAT SHE SUFFERED FROM MENTAL ILLNESSES AND DEFECTS.

The district court abused its discretion when it affirmatively prevented the jury from grasping the legal significance of Ms. Arnold's agreed-upon mental illnesses. The district court's refusal to provide the defense's proposed instruction stating, "If you find Defendant guilty OR not guilty by reason of mental disease or defect, there will be further proceedings conducted that do not involve the jury," prejudiced Ms. Arnold's substantive rights because the proposed instruction sought only to clarify one of the ways in which the jury could address Ms. Arnold's mental illnesses and defects. (*See* Appendix Exhibit B). In the absence of this clarifying instruction, the jury was left adrift and could only accept the reality of Ms. Arnold's mental illness and defects if it found her not guilty. Such a choice was no choice at all and failed to properly account for the uncontested evidence.

Pursuant to M.C.A. § 46-14-311, a court must consider a defendant's claim that "at the time of the commission of the offense...[she] was suffering from a mental disease or defect or developmental disability that rendered the defendant

unable to appreciate the criminality of the defendant's behavior or to conform [her] behavior to the requirements of law....” Section 46-14-311 makes clear that this is not a discretionary task for the district court, but a mandatory, affirmative task based on the defendant’s claim and the evidence presented during the trial. *See State v. Smith*, 2000 MT 57, ¶ 11, 299 Mont. 6, 997 P.2d 768. Because the Court must consider such evidence when it sentences a mentally ill or defective defendant like Ms. Arnold, it should have given the jury the same opportunity.

Much of the testimony presented during the trial revolved around Ms. Arnold’s mental state before, during, and after the incident on May 30, 2012. There was no dispute that Ms. Arnold was involved in a violent wreck during which her head bounced off the rear window and the steering wheel after a tractor-trailer slammed into her small truck. (Trial Transcript, DC-12-106C, p. 1026). There was no dispute that Ms. Arnold suffered from mental deficits as a result of this violent wreck, including the fact that she would “lose time” and “lose events.” (*Id.* at p. 1064). There was no dispute, and the State’s expert testified, that Ms. Arnold suffered from a host of “mental illnesses for which she has had treatment for many, many years.” (*Id.* at p. 1472). And there was no dispute that Ms. Arnold’s actions on May 30, 2012 could not have been anticipated based on her past history.

Most importantly, there was no dispute that Ms. Arnold had many external stressors in her life, “[t]he last straw being what happened a week prior to that, there was an adverse legal judgment against her, and from the information I [the State’s expert] was able to review, that was the last straw in a culmination of situational stressors.” (*Id.* at p. 1462). And when Ms. Arnold faced this “last straw,” Dr. William Stratford, one of two psychiatrists authorized to evaluate those sent to the State Hospital, testified that Ms. Arnold’s “ability to appreciate or conform to the requirements of the law...[was] very, very diminished.” (*Id.* at p. 1393). Similarly, the State’s expert, Dr. Virginia Hill, testified that “the situational stressors just...capsized her.” (*Id.* at p. 1463).

It was during this time when she had “capsized,” when her ability to appreciate or conform was “very, very diminished,” that the evidence shows that Ms. Arnold was acting in a dissociative state or dissociative fugue.¹ Dr. Bowman Smelko testified that “[t]he daydream-like state, the out-of-body kind of experience, the fragmented, off pieces is absolutely consistent with a dissociative state,” and that Ms. Arnold “was in a dissociative state up until the time of when she was in the house and saw [Mr. McDunn].” (*Id.* at p. 1332, 1351). And while the State’s experts stopped short of diagnosing Ms. Arnold as dissociative at the

¹ “The predominant disturbance [during a dissociative fugue] is sudden, unexpected travel away from home or one’s customary place of work, with inability to recall one’s past.” *Diagnostic and Statistical Manual of Mental Disorders*, 300.13 (2000).

time of the incident, Dr. Tim Casey, one of Ms. Arnold's providers at the State Hospital, agreed that the scientific literature makes clear that a person like Ms. Arnold can be "very well functioning and [still] be dissociative." Dr. Hill, the State's other expert, admitted that a person can undertake complex processes during an amnesiac (or fugue) state. (*Id.* at pp. 1496, 1565).

This expert understanding of dissociation is particularly relevant where Ms. Arnold has never disputed the bulk of the State's factual allegations. She does not dispute that the interior of her car was covered in plastic. She does not dispute that she was wearing throw-away clothes and throw-away shoes. She does not dispute that she was in the McDunn's home with fuel, paper, and matches. But all these allegations demonstrate is that Ms. Arnold was prepared, as she was each and every time, to burn a slash pile. These acknowledgments do nothing to support the State's case that she went to the McDunn's home with a plan to kill anyone—particularly with Ms. Arnold's eccentricities and documented mental illnesses.

Where it is mandated that the district court must consider the evidence of mental illness and/or defect in its sentencing decision, the jury should have at least been given the option to consider such evidence. "It is the duty of the court to instruct the jury on the law." *State v. Kougl*, 2004 MT 243, ¶ 26, 323 Mont. 6, 97 P.3d 1095, and specifically, "[i]t is the duty of the [d]istrict [c]ourt to instruct the jury on every issue or theory which has support in the evidence," *State v. Popescu*,

237 Mont. 493, 495, 774 P.2d 395, 396 (1989) (citations omitted). There is no question that the issue of Ms. Arnold's mental illness and/or defect was present in the record—the record is replete with testimony about her condition.

The defense's proposed jury instruction clarified for the jury that they did have this option—that they could hold Ms. Arnold accountable for what happened that day but still get her the help that every testifying expert agrees she still needs. To strip the jury of that knowledge was to deprive them of an option, to prejudice Ms. Arnold's substantive rights, and to imply to the jury that if they found her mentally ill or defective, they had to find her not guilty. That is simply not the law, and to imply otherwise was reversible error.

Therefore, this Court should reverse the district court because it abused its discretion in refusing to give the defense's proposed clarifying jury instruction.

II. THE DISTRICT COURT SHOULD HAVE USED DEFENDANT'S PROPOSED VERDICT FORM ALLOWING THE JURY TO FIND MS. ARNOLD GUILTY BUT MENTALLY ILL OR DEFECTIVE BASED ON THE PLETHORA OF EVIDENCE DEMONSTRATING HER MENTAL ILLNESSES AND DEFECTS.

In the same way that it divested the jury of its right to properly consider the legal impact of Ms. Arnold's documented mental illnesses, it abused its discretion and deprived the jury of the option to find Ms. Arnold guilty but nonetheless mentally ill or defective. The district court's erroneous decision to deprive the jury

of this option prejudiced Ms. Arnold's substantive rights because it required the jury to find her not guilty if it found that she was mentally ill or defective. The district court's decision therefore misapplied the law and the facts by requiring the jury to make a mutually exclusive decision with regard to Ms. Arnold's mental condition and accountability.

M.C.A. §§ 46-14-311 and 312 make clear that a defendant can commit a crime while concurrently suffering from a mental illness or defect "that rendered the defendant unable to appreciate the criminality of the defendant's behavior or to conform the defendant's behavior to the requirements of law." It was that legal reality that the defense's proposed verdict form sought to convey to the jury. The proposed verdict form had options for "Not Guilty," "Guilty," "Guilty but mentally ill and/or mentally defective," and "Not Guilty by reason of mental disease and/or defect." (*See* Appendix Exhibit A). The proposed verdict form also made clear that, "If you find Ms. Arnold guilty, but mentally ill and/or mentally defective or not guilty by reason of mental illness and/or defect, Ms. Arnold will not be released from custody and there will be further proceedings by this Court." (*Id.*). And while the State may argue that the defense's proposed options and supplementary language were unnecessary, the jury's question to the district court demonstrated otherwise.

The defense presented two expert witnesses to help the jury appreciate Ms. Arnold's mental state before, during, and after the incident on May 30, 2012. Dr. Stratford, a long-time psychologist who testifies for the prosecution and the defense and still contracts with the State Hospital made clear his conclusion that in Ms. Arnold, "This is not a normal brain walking around Bozeman, Montana," and that "she clearly suffers from a mental disease or defect as defined in the statutes in the State of Montana." (*Id.* at pp. 1392, 1394). And while Dr. Hill, one of the State's experts, concluded that Ms. Arnold acted with "knowledge or purpose" that day, *id.* at p. 1473, Dr. Hill conceded that a person with a mental illness acting on one "plan" can "start acting on another plan, either consciously or unconsciously." (*Id.* at 1495—96).

It is clear that this evidence of Ms. Arnold's mental illness, presented by the defense and the prosecution, played a large role in the jury's deliberations. During its deliberations, the jurors "request[ed] the written Montana Code in regard to mental disease or defect...." (*Id.* at p. 1912). It can only be assumed that the jurors did so because they wanted to compare the actual language of the code to the instructions and/or verdict form that they were provided by the Court. In response, the defense argued that the jury was entitled to the information so they could understand any differences in verbiage for themselves. (*Id.* at p. 1914). In the alternative, the defense asked that the district court reinstruct the jurors on what

had obviously become a very important factor in their discussions. (*Id.*). Despite the juror's concern over the statutory language and their apparent confusion, and over the defense's objection, the district court refused to provide either the statute itself or re-instruction. (*Id.*).

By failing to provide the statute itself or some other clarifying remarks, the district court abandoned its duty to properly instruct the jury on the law of this State. *See* M.C.A. § 46-14-312. The district court failed to help the jury understand that, as M.C.A. §§ 46-14-311 and 312 make clear, a person can commit a crime based on a mental illness or defect. And the district court failed to help the jury understand that in that situation, a defendant needs help and will be confined unless and until she can overcome those mental demons. *See* Sloat, L., & Frierson, R., *Juror Knowledge and Attitudes Regarding Mental Illness Pleas*, J. OF THE AM. ACAD. PSYCHIATRY L., 33(2), pp. 208-13 (2005) (finding that eighty-four percent of a study group of qualified jurors believed that juries should be informed of potential outcomes before deciding a verdict). Despite this Court's statement that "the question of whether a defendant is able to 'appreciate the criminality of the defendant's behavior or to conform the defendant's behavior to the requirements of the law' is relevant only at sentencing," the jury was entitled to understand the state of the law and how, if at all, their verdict would impact the various options

available to the district court. *State v. Meckler*, 2008 MT 277, ¶ 13, 345 Mont. 302, 190 P.3d 1104.

Therefore, this Court should reverse the district court because it abused its discretion in refusing to give the defense's proposed verdict form.

III. THE DISTRICT COURT SHOULD HAVE ADMITTED MR. MCDUNN'S RECORDED STATEMENT TO PROVIDE THE JURY WITH THE HIGHEST AND BEST EVIDENCE TO HIS INCONSISTENT AND EVOLVING ACCOUNT OF THE INCIDENT.

The district court abused its discretion when it refused to allow the defense to impeach Mr. McDunn with his recorded statement that was wholly inconsistent with the evolving narrative he created starting on May 30, 2012. Because the district court deprived the jury of the ability to hear the tone, the cadence, and the way in which the prosecution's lead witness changed his story from one telling to the next, the district court improperly prevented Ms. Arnold from presenting the best evidence of the true series of events.

Beginning on the day of the incident, Mr. McDunn told a series of stories that he apparently believed were in his best interest. But as is the case whenever one crafts a story out of whole cloth, Mr. McDunn's story changed, developed, and demonstrated irreconcilable inconsistencies as he told and re-told his version of events. And Mr. McDunn admitted as much during cross-examination by the defense. Mr. McDunn admitted that many of his statements during the trial were

new—that he had not told them to the officers shortly after the incident on May 30, 2012 and that he had not told them to the investigators the next day. (*Id.* at p. 951). Rather, Mr. McDunn testified that he was able to “bring back things” only after his therapist “put vibrating things in [his] hand and [he] listened to some noises....” (*Id.*).

Because the only consistency in the many tellings of Mr. McDunn’s story was the inconsistencies, the defense sought to vividly demonstrate these inconsistencies to the jury. As the State’s lead witness, Mr. McDunn’s credibility, or lack thereof, was of key importance in the trial. By playing the audio recording of Mr. McDunn’s interview with investigators the day after the incident, the defense sought to demonstrate “the tone of voice [Mr. McDunn] use[d], the attitude that’s exhibited by the oral testimony, the present sense impressions that the officers [were presented]” and the skeptical tone of the officers’ voices when they were questioning Mr. McDunn. (*Id.* at p. 548).

Despite the jury’s need to place Mr. McDunn’s live trial testimony in context with his earlier two inconsistent tellings, the district court barred the admission of the recorded statement on the prosecution’s hearsay objection. While it is clear that the statement was hearsay, the statement should have nonetheless been admitted. Under rule 803(24) of the Montana Rules of Evidence, a statement traditionally excluded by the hearsay rule may be admitted when it has

“comparable circumstantial guarantees of trustworthiness.” This residual exception “look[s] to the circumstances surrounding a hearsay statement when it is made—the ‘circumstantial guarantees of trustworthiness’ that lend reliability to the hearsay statement in lieu of cross-examination.” *State v. J.C.E.*, 235 Mont. 264, 272, 767 P.2d 309, 314 (1988). “Everything that bears on the credibility of the speaker and the accuracy of his statement counts....” *State v. Hocevar*, 2000 MT 157, ¶ 50, 300 Mont. 167, 7 P.3d 329.

Where Mr. McDunn’s statement was audio recorded by the State’s own investigative officers and there were no objections to the chain of custody from the day of recording until the trial, the recording most certainly had “comparable circumstantial guarantees of trustworthiness.” There was no objection by the prosecution about the trustworthiness of the recorded statement. And because the district court admitted the transcript of the recording, the court conclusively established that it did not have any discomfort with the trustworthiness of the recording.

The defense made clear that from the time Mr. McDunn “started talking, [there was] an evolving story about what happened in the residence.” (*Id.* at p. 559). By seeking admission of Mr. McDunn’s second recorded statement, the defense reasonably and properly sought to show the jury the whole story “out of his own mouth” so that the jury could “listen to [statements] side by side and

consider whether he's telling the same story." (*Id.*). With this purpose in mind and where neither the prosecution nor the district court made any objection to the recording's trustworthiness, the defense should have been entitled to present the highest and best form of evidence as to Mr. McDunn's earlier inconsistent statements.

Therefore, this Court should reverse the district court because it abused its discretion in refusing to admit the recorded, inconsistent testimony of the prosecution's lead witness.

CONCLUSION

Because the district court failed to provide the jury with the highest and best evidence during the trial, failed to provide the jury with a proper clarifying instruction to account for the uncontested evidence of Ms. Arnold's mental illness and defect, and failed to allow the jury to find Ms. Arnold guilty but mentally ill or defective, the district court abused its discretion throughout the eight-day trial and prejudiced Ms. Arnold's substantive right to present her defense. This Court should therefore reverse Ms. Arnold's convictions and remand for a new trial

Respectfully submitted this 10th day of November, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing

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Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

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APPENDIX

Refused Verdict Form Proposed by Defense Ex. A

Proposed Jury Instruction 10 (Refused) Ex. B