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***State v. Blaz*: Drawing the Lines for Admitting Evidence of Prior Crimes**

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**PRECAP; STATE V. BLAZ: DRAWING THE LINES FOR
ADMITTING EVIDENCE OF PRIOR CRIMES**

Rachel Pannabecker

ORAL ARGUMENT is set for Monday, May 1, 2017, at 10:30 a.m. in the Strand Union Building, Ballroom A on the campus of Montana State University, Bozeman, Montana.

I. QUESTION PRESENTED

Did the District Court err when it admitted evidence of a prior domestic violence incident between Appellant and his spouse in Appellant's trial for the deliberate homicide of his infant daughter?¹

II. INTRODUCTION

Appellant Matthew Blaz ("Blaz") was charged with, and convicted by a jury of, the deliberate homicide of his 2-month-old daughter.² The District Court sentenced Blaz to life in prison without the possibility for parole.³ Before trial, Blaz sought to prevent the State from introducing evidence of a prior domestic violence incident between Blaz and his wife pursuant to Montana Rules of Evidence (MRE) 404(b) and 403.⁴ Rule 404(b) limits the admissibility of evidence of prior "crimes, wrongs, or acts,"⁵ and Rule 403 prohibits evidence that is more prejudicial to the defendant than probative of the issue.⁶

On appeal, Blaz argues that the District Court erred when it denied Blaz's motion in limine to exclude this evidence.⁷ Blaz maintains that if the jury had not heard the evidence of the prior domestic violence incident, his trial would have ended differently, and thus the resulting error was not harmless error.⁸ Consequently, Blaz argues that he did not receive a fair trial.⁹

¹ Brief of Appellant, *Montana v. Blaz*, 2016 WL 3043446 at *1 (Mont. May 24, 2016) (No. DA 14-0807).

² *Id.*

³ Brief of Appellee, *Montana v. Blaz*, 2016 WL 6827325 at *1 (Mont. Nov. 16, 2016) (No. DA 14-0807).

⁴ Brief of Appellant, *supra* note 1, at *13.

⁵ MONT. R. EVID. 404(b) (2015).

⁶ MONT. R. EVID. 403 (2015).

⁷ Brief of Appellant, *supra* note 1, at *1.

⁸ *Id.*

⁹ *Id.*

III. FACTUAL BACKGROUND

A. Facts of Present Case

Blaz has been married to his wife, Jen, for about five years.¹⁰ They had three children, A.B, Kiera, and Matti.¹¹ A.B. is Blaz's 7-year-old son; Kiera is Jen's 14-year-old daughter and Blaz's stepdaughter; and Matti was Blaz and Jen's daughter, who was two months old when she died on August 16, 2013.¹²

On August 16, 2013, Blaz stayed home with Kiera and Matti after he dropped Jen off at work at 8:15 a.m.¹³ Matti was a healthy, happy baby.¹⁴ After dropping Jen off at work, Blaz watched some TV with Matti.¹⁵ Keira went to the neighbor's house to bring back her friend, Serenity, for a play-date in Keira's room in the basement.¹⁶ At around 10:00 a.m., Blaz went outside to talk to the mailman.¹⁷ While Blaz was talking to the mailman, Serenity's brother, Brooks, biked over to the Blaz's house to play with Serenity and Kiera down in the basement.¹⁸ Before heading downstairs, he stopped next to Matti, who was lying on a blanket on the floor.¹⁹ Brook testified that Matti was crying when he saw her, so he tickled her stomach for about ten seconds before heading downstairs to see what his sister and Kiera were doing, and he did not pick Matti up.²⁰ Matti was still crying when Brooks headed downstairs.²¹ Brooks found Serenity and Kiera playing with stuffed animals and left shortly afterwards.²² While Brooks was still downstairs, Blaz opened the door and asked the three of them if they had picked up or touched Matti.²³ The girls said no, and Brooks answered that he had tickled Matti's stomach but did not pick her up, and Blaz yelled, "okay," and shut the door.²⁴ When Brooks left the house, Matti was still lying on a blanket on the living room floor, crying.²⁵

Blaz's version of the story is slightly different. Blaz testified that he could see Brooks holding Matti through the window while he was standing outside talking to the mailman.²⁶ Next, Blaz heard a loud

¹⁰ Brief of Appellee, *supra* note 3, at *1.

¹¹ *Id.*

¹² Brief of Appellee, *supra* note 3, at *1; Brief of Appellant, *supra* note 1, at *4.

¹³ Brief of Appellee, *supra* note 3, at *1.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Brief of Appellee, *supra* note 3, at *4; Brief of Appellant, *supra* note 1, at *2.

¹⁷ Brief of Appellant, *supra* note 1, at *4.

¹⁸ Brief of Appellee, *supra* note 3, at *2; Brief of Appellant, *supra* note 1, at *4.

¹⁹ Brief of Appellee, *supra* note 3, at *2.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at *2-3.

²⁴ *Id.* at *3.

²⁵ Brief of Appellant, *supra* note 1, at *3.

²⁶ *Id.* at *5.

scream.²⁷ He told the mailman that he needed to get back inside, and the mailman answered in the affirmative, exclaiming that he needed to “get [his] ass in there.”²⁸ The mailman denied ever making that statement to Blaz.²⁹ When Blaz got inside, Brooks was hovering over Matti and ran downstairs when Blaz asked what happened.³⁰ Blaz noticed two marks on Matti’s neck and tried to calm her.³¹ Blaz yelled downstairs to inquire about what happened to Matti and the reason for the marks he found on her neck, and Brooks ran outside shortly afterwards.³²

Later that day around noon, Blaz brought a pork sandwich to Jen for her lunch at work.³³ He gave Matti a bottle of milk and laid her down for a nap.³⁴ Before arriving at her office, Blaz spoke with Jen on the phone but did not tell her anything about Matti being injured, and Jen was not worried about Matti.³⁵ Jen was unaware of Matti being injured until Blaz, Kiera, and Matti arrived to pick her up from work at 4:00 p.m.³⁶ In the car, Blaz mentioned to Jen that Brooks dropped Matti while he was talking to the mailman and Matti had some pinch marks on her neck.³⁷ When they stopped at Wal-Mart, Jen turned Matti around to take her out of her car seat.³⁸ Jen immediately knew that something was wrong with Matti because her coloring was gray, her eyes were bulging out, and her breathing was funny.³⁹ Alarmed, Jen insisted that they go the hospital right away.⁴⁰ Matti then took a few last breaths and stopped breathing.⁴¹ Jen told Blaz to stop driving and dial 9-1-1.⁴²

By the time the ambulance arrived, Matti was not breathing, her eyelids were purple, and she had no heartbeat.⁴³ She was unresponsive to CPR and needed a bag mask, but her heart restarted.⁴⁴ Matti was very pale and cool to the touch and had bruising on the front of her neck, back, and ear.⁴⁵ When she arrived at the hospital, Matti’s eyes were fixed and dilated, indicating that her brain had stopped functioning—Matti’s brain had been “obliterated.”⁴⁶ After learning from the doctors that her brain injuries were

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at *6–7.

³⁰ *Id.* at *5.

³¹ Brief of Appellee, *supra* note 3 at *4.

³² Brief of Appellant, *supra* note 1, at *5–6.

³³ Brief of Appellee, *supra* note 3, at *3.

³⁴ *Id.* at *16.

³⁵ *Id.* at *3.

³⁶ *Id.* at *4.

³⁷ *Id.*

³⁸ *Id.* at *5.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at *6.

⁴⁶ *Id.* at *6–7.

beyond medical help, Jen and Blaz chose to take Matti off of life support.⁴⁷ Matti died five to ten minutes later.⁴⁸

Emergency room doctor Debra Lewis and pediatrician Michael Seaton treated Matti when she arrived at the hospital.⁴⁹ Dr. Seaton and Dr. Lewis both testified that Matti's two skull fractures were not consistent with simple falls.⁵⁰ When babies fall off changing tables, shopping carts, or are dropped, they usually suffer from hematomas that cause minor bumps under the skin and sometimes a minor crack in the skull—Matti's injuries were "way beyond that."⁵¹

Pathologist Dr. Walter Kemp conducted an autopsy on Matti on August 17, 2013.⁵² Dr. Kemp found ten millimeters of thick, greenish-black fluid in her stomach, which is inconsistent with what partially digested milk would look like.⁵³ Dr. Kemp opined that Matti died because of another person's intentional and harmful act and that her sustaining a strong, forceful impact against a broad surface caused her injuries.⁵⁴ His report further stated that a fall or dropping of Matti could not have caused her injuries.⁵⁵ Matti had a subgaleal hemorrhage, retinal hemorrhage, and left skull fracture that was the result of the mendosal suture popping open from the force of the blow on the left side of her head.⁵⁶ This hemorrhaging was of the "abuse and motor vehicle type," and Dr. Kemp concluded that Matti died as a result of a homicide.⁵⁷

B. *Facts of Blaz's Prior Offense*

Thirty-seven days prior to Matti's death, Blaz committed the offense of Partner Family Member Assault (PFMA).⁵⁸ When Blaz came home drunk from a softball game one night, he wanted to hold Matti, who was two-weeks old at the time.⁵⁹ Blaz kept dozing off, so Jen took Matti from Blaz's arms and told him she was going to change and feed her.⁶⁰ Blaz became upset that Jen took Matti away from him.⁶¹ Blaz came up behind Jen, grabbed her hair, threw her on the ground, and started banging her head against the floor.⁶² Jen was holding Matti during the assault.⁶³

⁴⁷ *Id.* at *7.

⁴⁸ *Id.*

⁴⁹ *Id.* at *6.

⁵⁰ *Id.* at *7.

⁵¹ *Id.* at *7–8.

⁵² *Id.* at *17.

⁵³ *Id.* at *18 (contradicting Blaz's earlier testimony that he fed her a bottle of milk earlier that day).

⁵⁴ *Id.* at *19.

⁵⁵ *Id.*.

⁵⁶ *Id.* at *20.

⁵⁷ *Id.* at *19–20.

⁵⁸ *Id.* at *20.

⁵⁹ *Id.* at *21.

⁶⁰ *Id.* at *21–22.

⁶¹ *Id.* at *22.

⁶² *Id.*

⁶³ *Id.*

Blaz then took Matti back from Jen, who was yelling at Blaz to give Matti back.⁶⁴ Kiera and her friend were downstairs, and they yelled at Blaz to stop hurting Jen.⁶⁵ Blaz yelled, “You better shut that bitch up or I will.”⁶⁶

IV. SUMMARY OF THE ARGUMENTS

A. Appellant Matthew John Blaz

1. *Evidence Regarding the PFMA was inadmissible under MRE 404(b) because it was not admissible to show motive.*

Blaz argues that the evidence regarding the PFMA should not have been admitted by the district court. MRE 404(b) provides that evidence of a “crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.”⁶⁷ However, this evidence can be admitted for some other purpose, such as to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”⁶⁸ Blaz argues that the State has not proposed any permissible uses of the PFMA evidence; that it was only used to show Blaz “had a character which was violent, aggressive, or abusive in nature;” and that this type of character led him to kill Matti.⁶⁹

Blaz argues that the PFMA was not admissible to show motive, and he breaks this argument into two different theories. First, Blaz argues that the evidence was not probative of a common motive from Blaz’s feelings toward Jen and her children living in the household.⁷⁰ For the common motive theory to be applicable, the State must be able to demonstrate that Blaz had a motive to injure Matti through the PFMA against Jen.⁷¹ Blaz maintains that, because the PFMA occurred when Blaz tried to hold Matti affectionately, it does not reflect a motive to hurt Matti later.⁷² Supporting his assertion, there was no evidence that Blaz was intending to threaten or harm Matti during the PFMA.⁷³ The State must also be able to show that Blaz had a reciprocal motive to get at Jen through harming Matti.⁷⁴ The PFMA does not indicate that Blaz held hostile feelings towards Jen, which would cause him to kill Matti to get back at

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ MONT. R EVID. 404(b).

⁶⁸ *Id.*

⁶⁹ Brief of Appellant, *supra* note 1, at *18.

⁷⁰ *Id.* at *20.

⁷¹ *Id.*

⁷² *Id.* at *24.

⁷³ *Id.*

⁷⁴ *Id.* at *20.

Jen.⁷⁵ Blaz argues that the single occurrence of the PFMA, as opposed to repeated instances, is not demonstrative of a continuing pattern of violence towards Jen that would support a desire to kill Matti as a way to get back at Jen.⁷⁶

With regards to the second motive theory, Blaz argues that the State was incorrect in offering the PFMA offense, conviction, and no contact order to show that Blaz had a motive and incentive to hide Matti's injuries in reference to the delay in taking Matti to the hospital.⁷⁷ Blaz contends that the PFMA did not provide any insight into delaying medical attention to Matti because it is not evidenced by consciousness of guilt of the PFMA.⁷⁸ A person who has injured another would delay seeking medical attention for that person to avoid punishment regardless of whether he or she has previously committed an assault.⁷⁹ Blaz would theoretically delay seeking medical attention for Matti because he knew of the assault's illegality, regardless of his prior PFMA.⁸⁰ Therefore, Blaz argues that the PFMA does not further the State's theory that the PFMA provided motive to delay medical attention.⁸¹

2. *The PFMA evidence was not admissible under 404(b) to show opportunity.*

Blaz also argues that the PFMA no contact order was not admissible to show that Blaz had the opportunity to kill Matti.⁸² Blaz contends that the State's theory does not make logical sense because it does not successfully show that Blaz's presence in the home in August was relevant to Blaz's presence in the home in July when he committed the PFMA.⁸³ Further, the issue of opportunity is not at issue because the undisputed facts demonstrate that Blaz was staying at home with Matti when Jen went to work the day of Matti's death.⁸⁴ Blaz argues that the State cannot use a prior offense to prove a point that is not at issue in the case.⁸⁵ To the extent the State was using the no contact order to show Blaz failed to abide to court orders, the evidence has no bearing on the undisputed fact of opportunity.⁸⁶

⁷⁵ *Id.* at *24.

⁷⁶ *Id.*

⁷⁷ *Id.* at *26.

⁷⁸ *Id.*

⁷⁹ *Id.* at *27.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at *28.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at *29.

3. *The PFMA evidence was not admissible to show absence of mistake or accident.*

Blaz argues that the PFMA evidence was not admissible to show that there was an absence of mistake or accident because Blaz is not claiming that he accidentally killed Matti.⁸⁷ Rather, Blaz claims that he did not kill Matti and that Matti died because of injuries sustained when Brooks dropped her on her head earlier that day.⁸⁸ A fundamental prerequisite to the State admitting this evidence on the theory of mistake or accident is that the defendant claim he made a mistake in killing the victim.⁸⁹ Therefore, this evidence is unfounded and inadmissible.⁹⁰

4. *The PFMA was also inadmissible under Rule 403 because it is overly prejudicial.*

Blaz argues in the alternative that, if the evidence would be admissible under Rule 404(b), Rule 403 guards against the admission of the PFMA because its prejudice to the defendant is outweighed by its probative value to the issue of the case.⁹¹ Blaz contends that admitting the evidence prompted the jury to decide the case on an improper basis—that Blaz was a bad man because he hurt his wife and that because he is a bad man he also killed his daughter.⁹² Additionally, Blaz argues that the PFMA evidence increased the jury's hostility towards Blaz because of what he did to Jen, and this hostility misled and distracted them from the actual events of August 16, 2013.⁹³

5. *The District Court's error in admitting the evidence was not harmless beyond a reasonable doubt*

Next, Blaz argues that the admission of the PFMA evidence contributed to the jury's determination that Blaz was guilty of Matti's homicide.⁹⁴ Because the jury was influenced by Blaz's prior assault against his wife, they used it to support their conclusion that Blaz killed Matti.⁹⁵ Had the District Court properly denied admission of the evidence, the jury never would have heard it and would not have been able to use it to support their guilty verdict.⁹⁶ Even though the jury was given a limiting instruction not to use the evidence to infer bad character, Blaz contends

⁸⁷ *Id.*

⁸⁸ *Id.* at *30.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at *33.

⁹² *Id.* at *36.

⁹³ *Id.*

⁹⁴ *Id.* at *38.

⁹⁵ *Id.*

⁹⁶ *Id.*

that the jury could not escape the clear implication from the nature of the PFMA that Blaz was a violent and aggressive person who was repeating a pattern of violence.⁹⁷ Because of the reasonable probability that the jury used the PFMA to determine his guilt, Blaz argues that he did not receive a fair trial and that the District Court's error in admitting the evidence was not harmless error.⁹⁸

B. Plaintiff and Appellee State of Montana

1. The PFMA evidence was properly admitted under Rule 404(b) to show motive and absence of mistake or accident.

The State first argues the PFMA was properly admitted to show that Blaz had a motive to disregard Matti's safety, which was apparent in his assault against Jen and the homicide of his daughter.⁹⁹ The State contends that Blaz completely disregarded Matti's safety when he assaulted Jen because Jen was holding Matti while Blaz beat her head against the floor.¹⁰⁰ Blaz knew that Matti, like her mother, was also unsafe during the PFMA assault.¹⁰¹ The State then applies Blaz's motive to disregard Matti's safety to his killing of Matti on August 16, 2013.¹⁰²

The State also argues that the PFMA no contact order evidence provided a motive for why Blaz neglected to take Matti to the hospital sooner.¹⁰³ As part of his PFMA suspended sentence, the city court ordered that Blaz have no contact with Jen.¹⁰⁴ Blaz knew that if he took Matti to the hospital, the hospital would have revealed to the city that he was violating his no contact order with Jen and provided grounds to revoke his prior sentence.¹⁰⁵ While a defendant may delay seeking medical attention for his or her victim to avoid punishment for a *present* offense, a motive also exists to delay medical attention for the victim because seeking medical attention might result in the revocation of his *prior* suspended sentence.¹⁰⁶

2. The District Court's Admission of the PFMA Evidence did not violate Rule 403.

Next, the State argues that the probative value of the PFMA evidence was not substantially outweighed by the danger of any unfair

⁹⁷ *Id.* at *39.

⁹⁸ *Id.*

⁹⁹ Brief of Appellee, *supra* note 3, at *25.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at *26.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

prejudice and that Blaz has not shown that the PFMA evidence was overly prejudicial to him.¹⁰⁷ The State provides two bases for this contention: (1) the jury was instructed by both the prosecutor and the District Court to not use the PFMA evidence to consider him a bad character, and this instruction properly cured any unfair prejudice stemming from the PFMA evidence; and (2) the PFMA evidence was probative because it supported Blaz's motive¹⁰⁸ and strengthened the inference that Blaz had killed Matti.¹⁰⁹ In addition, the State argues that the PFMA evidence was probative because it rebuts Blaz's suggestion that Brooks caused Matti's injuries by accidentally dropping her.¹¹⁰

3. *Even if the District Court did err in admitting the PFMA evidence, the error was harmless.*

Finally, the State contends that the admission of the PFMA evidence was harmless because of the medical evidence showing that Matti was not injured as a result of Brooks dropping her, because of Blaz's inconsistent and incredible testimony regarding the offense, because of the District Court's cautionary instruction, and because the State admonished the jury in closing argument to not improperly use the PFMA evidence.¹¹¹ Thus, even if the jury did not hear evidence regarding the PFMA, the verdict would still have been returned as guilty.

First, the State argues that the medical evidence and testimony contradicts Blaz's story that Brooks accidentally dropped Matti.¹¹² Dr. Lewis and Dr. Kemp both opined that Matti's injuries could not have been sustained from being dropped on the floor.¹¹³ They both testified that the severity of Matti's injuries could only be the result of a person intentionally banging Matti's head against a flat, broad object to commit a homicide.¹¹⁴ The medical evidence also contradicts Blaz's statements that he was unaware of the severity of Matti's injuries until they went to Murdoch's at 3:30.¹¹⁵ Dr. Kemp testified that Matti would not have been acting like a normal baby after suffering a nine centimeter skull fracture, cerebral laceration, subdural and subarachnoid brain hemorrhaging, hemorrhaging in the spinal cord and extensive retinal hemorrhaging in both eyes.¹¹⁶ This evidence, coupled with the fact that Jen knew that something was wrong with Matti immediately upon looking at her, makes

¹⁰⁷ *Id.* at *28–29.

¹⁰⁸ *See* above, where the motive to disregard Matti's safety and prevent the revocation of his suspended sentence is discussed.

¹⁰⁹ Brief of Appellee, *supra* note 3, at *29.

¹¹⁰ *Id.*

¹¹¹ *Id.* at *37.

¹¹² *Id.* at 30.

¹¹³ *Id.* at 30–32.

¹¹⁴ *Id.* at 31.

¹¹⁵ *Id.* at 35–37.

¹¹⁶ *Id.*

Blaz's claim that he "believed Matti was fine and did not know the extent of her injuries until around 3:00 pm," unbelievable.¹¹⁷ Additionally, Dr. Kemp's autopsy calls into question Blaz's claim that he gave Matti a bottle of milk when the autopsy revealed a thick, greenish black substance in Matti's stomach.¹¹⁸ Dr. Kemp testified that milk in an infant's stomach looks white and sticky, not greenish black, and that he therefore "would be suspicious" if he was told that the deceased had consumed milk prior to their death.¹¹⁹

Second, the State contends that Blaz's inconsistent statements about the events surrounding Matti's death, taken in context with other witness testimony refuting his statements, demonstrates that Blaz is not credible and that his story placing the blame on Brooks for accidentally dropping Matti is not believable.¹²⁰ Blaz gave conflicting statements in his interviews with Officer St. Pierre, Officer McCarthy and Officer Holland, and he gave conflicting statements to Jen, Dr. Kemp, and at trial.¹²¹ Blaz contradicts himself with statements relating to when the incident occurred, when he had lunch with Jen, when he laid Matti down for a nap, whether he fed Matti a bottle of milk, whether he actually saw Brooks holding Matti, and whether or not he gave Matti a bath.¹²² Blaz's statements also conflict with other witness testimony regarding whether he gave Matti a bottle of milk; whether Brooks was holding Matti; whether the mailman said, "get your ass in there" after Matti screamed; whether Matti actually screamed; and when the incident occurred.¹²³

V. ANALYSIS

The Court will likely focus most of its attention on Rule 404(b). While Rule 403 is inherent in the balancing of evidence for Rule 404(b) issues, it is not the sole focus of this case and will probably not determine the outcome of whether the District Court properly admitted the PFMA evidence. If the Court finds that the District Court erred in admitting the evidence, the Court's focus will turn to whether or not the admission was a harmless error; that is, whether the jury would have still returned a guilty verdict if they did not hear the PFMA evidence.

The Court's ruling on whether the evidence was properly admitted under Rule 404(b) will solidify a boundary for future 404(b) cases. If the Court holds that the evidence was properly admitted, it will broaden the scope of 404(b) and allow admittance of evidence that walks the line of admissibility. However, if the Court holds that the evidence should not

¹¹⁷ *Id.* at 36–37.

¹¹⁸ *Id.* at 34–35.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 32–36.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

have been admitted at the District Court, the Court is narrowing the scope of 404(b) in Montana to only allow evidence that shows a direct alternative purpose regarding motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.¹²⁴

Despite the PFMA evidence having extreme probative value, the policy behind discouraging its admission lies in the practical experience that its disallowance prevents serious risk of confusion of issues, unfair surprise and unfair prejudice.¹²⁵ Allowing the jury to hear that Blaz committed an offense where he assaulted his victim in the exact same way that he allegedly killed this victim is extremely prejudicial. Specifically, it creates the impermissible inference that Blaz is more likely to commit the current crime because he committed one in the past. This adds unnecessary and irreparable weight to the likelihood that the defendant committed the crime without providing the necessary evidence to support his guilt. A conviction based on evidence that does not connect the defendant's actions surrounding the events of the crime to the crime itself is susceptible to a new trial on the basis that the defendant did not receive a fair trial.

Blaz relies heavily on the fact that the PFMA was not admitted to show motive or mistake and that its admittance was overly prejudicial per Rule 403. Blaz hinges this argument on the failure of the jury instructions to eliminate the unfair prejudice, which the State claims to have properly limited by instructing the jury to only use the evidence to determine motive and absence of mistake, not for character purposes. However, a jury instruction does not always cure unfair prejudice.¹²⁶ If it did, then there would be no need for a Rule 403 balancing test.¹²⁷

The PFMA evidence that the State seeks to admit is precisely what Rule 404(b) seeks to avoid. The evidence is of a prior act that supports an inference that Blaz killed his daughter in the same way that he assaulted his wife, and the State has struggled with finding another purpose to admit the evidence under Rule 404(b)(2). The State will likely not be able to show that it supports a lack of mistake because that is only available when the defense claims that they did commit the crime but claim it was an accident.¹²⁸ Blaz's defense is that Brooks killed Matti, not that he killed Matti as an accident. After understanding that Blaz does not claim to have accidentally killed Matti, the Court will likely dismiss the State's contention that the PFMA evidence should be admitted to show a lack of mistake.

The State's motive argument seems to be its strongest. However, the Court will need to dig deeper with regards to whether the PFMA

¹²⁴ MONT. R. EVID. 404(b).

¹²⁵ Fed. Rules of Evid. R. 404(b) (2016), Advisory Committee's Note (2006 Amendment).

¹²⁶ Reply Brief of Appellant, *State v. Blaz*, 2017 WL 589743 at *12 (Mont. Jan. 30, 2017) (No. DA 14-0807) (citing *State v. Dist. Ct. of Eighteenth Jud. Dist.*, Hon. Michael Salvagni, Presiding, 2010 MT 263, ¶49.).

¹²⁷ Reply Brief of Appellant, *supra* note 129, at *12.

¹²⁸ See Brief of Appellant, *supra* note 1, at *29–30.

evidence should be admitted to show that Blaz had a motive to disregard Matti's safety. While Blaz did disregard Matti's safety when he assaulted Jen and while he allegedly killed Matti, to say that this disregard was the direct *motive* for assaulting Jen asks the jury to infer that Blaz's anger towards Jen in the assault is akin to his disregard of Matti's safety. The primary reason that Blaz assaulted Jen was because Blaz wanted to hold Matti, and Jen took Matti away.¹²⁹ Blaz then became angry with Jen, which led him to throw her to the ground and bang her head against the floor.¹³⁰ Blaz's anger towards Jen fueled his motive to hurt her. Put differently, Blaz was motivated by his anger towards Jen, not by his disregard for Matti's safety. Although this disregard was an incidental byproduct of his anger towards Jen, it was not the primary motivation for the assault.

The Court would then need to apply this already distantly connected motive to the killing of Matti. Even if the Court decided that Blaz's assault against Jen was primarily motivated by his disregard for Matti's safety, it would also have to agree with the State that a direct homicide is the result of merely disregarding someone's safety. A deliberate homicide requires a direct action, a purposeful and knowing cause of another person's death.¹³¹ To disregard, by contrast, requires one to "pay no attention to, or treat as unworthy of regard or notice."¹³² The Court would need to somehow be persuaded that Blaz's deliberate action of banging Matti's head against the floor, per the State's theory, was due to a mere "disregard" of Matti's safety.

In the likely event that the Court will determine that there is not a sound enough basis to admit the PFMA evidence under Rule 404(b), the State has a strong case for persuading the Court that the error was a harmless error. Specifically, the medical evidence presented by the State shows that the killing was a result of a deliberate homicide due to the severity of Matti's injuries.¹³³ The medical evidence refutes any suggestion that Matti's injuries were sustained because Brooks dropped Matti on the floor¹³⁴ and therefore makes Blaz's defense not believable. Additionally, the State effectively attacks Blaz's credibility by demonstrating that his testimony was inconsistent, comparing it to Blaz's prior statements and to the statement's made by numerous other witnesses.¹³⁵

¹²⁹ Brief of Appellee, *supra* note 3, at 21–22.

¹³⁰ *Id.*

¹³¹ MONT. CODE ANN. § 45–5–102 (2015).

¹³² MERRIAM-WEBSTER DICTIONARY (last visited April 14, 2017), <https://www.merriam-webster.com/dictionary/disregard>.

¹³³ See Brief of Appellee, *supra* note 3, at *30–37.

¹³⁴ Brief of Appellee, *supra* note 3, at 19–20.

¹³⁵ See Brief of Appellee, *supra* note 3, at *30–37.