

**MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY**

Montana Democratic Party, Mitch Bohn,

Plaintiffs,

Western Native Voice, Montana Native
Vote, Blackfeet Nation, Confederated Salish
and Kootenai Tribes, Fort Belknap Indian
Community, and Northern Cheyenne Tribe,

Plaintiffs,

Montana Youth Action, Forward Montana
Foundation, and Montana Public Interest
Research Group,

Plaintiffs,

v.

Christi Jacobsen, in her official capacity as
Montana Secretary of State,

Defendant.

Consolidated Case No.: DV 21-0451

Judge Michael G. Moses

**ORDER DENYING DEFENDANT'S
MOTION TO STRIKE TESTIMONY OF
KENDRA MILLER**

Defendant Christi Jacobsen (“the Secretary”) submitted a motion and brief in support to strike the testimony of Kendra Miller. (Dkt. 253; Dkt. 245). The Court previously ruled on this issue during trial and will, for the second time, deny the Secretary’s motion as discussed below.

Memorandum

Pursuant to Rule 103(a)(1), the Secretary requests that the Court strike the testimony of Kendra Miller after the Secretary objected to her testimony during trial. *See* Mont. R. Evid. 103(a)(1). The Secretary asserts that the Court erroneously concluded that Ms. Miller’s testimony was admissible as lay witness testimony.

Pursuant to Rule 701, “[i]f the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue.” Mont. R. Evid. 701.

The Secretary cites to *State v. Clark* for the proposition that admitting Ms. Miller’s testimony was error because her “testimony was not rationally based on her own perception”, “[s]he did not speak with any of the individuals she identified regarding their voter registration”, and “did not speak with any of the county election administrators that provided responses to the records request she relied on.” (Dkt. 254 at 6). However, those kinds of conversations that Ms. Miller did not engage in are

exactly what *State v. Clark* describes would make Ms. Miller's testimony inadmissible. In *Clark*, the Montana Supreme Court describes the witness's "proposed testimony was not based on his own perceptions. He proposed to summarize alibi evidence gathered from interviewing other persons regarding the crimes charged in the original information." *State v. Clark* (1984), 209 Mont. 473, 485, 682 P.2d 1339, 1346; *see also* *First Bank (N.A.)-Billings v. Clark* (1989), 236 Mont. 195, 202, 771 P.2d 84, 89, overruled in part, *Jacobsen v. Allstate Ins. Co.*, 2009 MT 248, ¶ 66, 351 Mont. 464, ¶ 66, 215 P.3d 649, ¶ 66 ("A lay witness may not testify to such evidence gathered from interviews with other persons.").

Ms. Miller testified that she does consulting work for the Montana Federation of Public Employees ("MPFE") and through that work she "manage[s] their database of members, how that interacts with those who are registered to vote." (Tr. Transcr. 750:3-10 (Aug. 17, 2022)). Through her job with MPFE, Ms. Miller was asked "to determine the individuals and the...total number of people who had been prevented from voting due to House Bill 176 in the 2021 municipal election." (Tr. Transcr. 756:23-757:3). To get this information, MPFE sent a public records request "to all 56 counties, asking them to identify individuals who had attempted to register on Election Day or the afternoon prior to Election Day for the 2021 municipal election." (Tr. Transcr. 757:6-10).

The Secretary points out that Bradley Seaman, the Missoula County Elections Administrator, testified that in Missoula, the elections office does not "track voters who

appeared after the deadline” but because of the public records request that was submitted, they “were asked to track that and provided that in accordance with the request.” (Tr. Transcr. 1048:16-25 (Aug. 18, 2022)). The Secretary cites to Mr. Seaman’s testimony that elections administrators use a voter database to ensure the accuracy of voter registration forms, which Ms. Miller would not have access to. (*See* Tr. Transcr. 1055:20-1057:120).

However, regardless of whether Ms. Miller had access to a database to confirm the accuracy of voter registration forms, Ms. Miller cross-checked whether the registrants from the public records request were ultimately officially registered using data provided by the Secretary of State’s Office that is accessible to the public. (Tr. Transcr. 764:7-20). This step effectively moots the issue of unreliable voter registration applications and the need to check a database only accessible by election administration personnel. Thus, the Court does not find that Ms. Miller’s lack of access to the database Mr. Seaman used to be a fundamental problem with her testimony.

Moreover, in considering whether Ms. Miller’s testimony required “scientific, technical, or other specialized knowledge” such that her testimony would be considered “expert” pursuant to Rule 702, the Court considered the process through which Ms. Miller took to get to the number she determined. Ms. Miller received the voter registration forms requested through the public records request sent to elections offices concerning individuals that attempted to register on Election Day or the afternoon prior

to Election Day for the November 2021 municipal election. (Tr. Transcr. 757:6-19). Then Ms. Miller determined the number of counties in which a municipal election occurred in November 2021 to be 37 counties; of these 37, 3 counties did not respond to the public records request. (Tr. Transcr. 758:4-759:16). From the responses received from elections administrators, Ms. Miller was able to identify 268 Montanans that attempted to register to vote either on Election Day or the afternoon prior to Election Day. (Tr. Transcr. 760:7-23). Ms. Miller checked that all 268 Montanans that attempted to register ultimately had their registrations processed after Election Day and became registered voters by checking the Secretary of State's voter file. (Tr. Transcr. 764:7-20). Ms. Miller took this step to ensure that there were no other issues with their registration precluding their eligibility to vote in Montana. (Tr. Transcr. 765:8-18). To determine who, out of those 268 Montanans, was actually prevented from voting, Ms. Miller, using information from the Secretary of State's website, excluded individuals who did not have an election to vote in, individuals who could have voted in the county they moved from, and individuals who did not attempt to register in person. (Tr. Transcr. 766:3-770:16). Thus, Ms. Miller's process did not require expertise in any particular field but, as Ms. Miller agreed, her analysis was basically a compilation of data and just a matter of math. (Tr. Transcr. 806:14-25).

The Secretary points out that elections administrators only kept the data about people who attempted to register after noon the day before Election Day and on

Election Day pursuant to the public records request and not in the ordinary course of business. The “[p]ublic records and reports” exception to hearsay includes “records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report...” Mont. R. Evid. 803(8). Thus, the public records request constituted a matter observed pursuant to a duty imposed by law.

In sum, the Court finds that Ms. Miller properly testified as a lay witness to data compilation that did not require specialized skill or knowledge. Rather, Ms. Miller’s testimony was rationally based on her perception and is helpful to the determination of a fact in issue. Moreover, Ms. Miller’s data compilation came from data from the Secretary of State’s Office, which is accessible to the public, and from data received from county election administrators pursuant to a public records request.

The Court, being fully informed, having considered all briefs on file and in-court arguments, makes the following decision:

IT IS HEREBY ORDERED that the Secretary’s Motion to Strike Testimony of Kendra Miller is **DENIED**.

DATED September 19, 2022

/s/ Michael G. Moses
District Court Judge

cc: David Dewhirst
Leonard Smith
Dale Schowengerdt
Ian McIntosh
William Morris
E. Lars Phillips
David Knobel
Stephanie Command
Jessica Frenkel
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