

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 17-0571

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

KENNETH WAYNE JONES,

Defendant and Appellant.

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**BRIEF OF APPELLEE**

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On Appeal from the Montana Thirteenth Judicial District Court,  
Yellowstone County, The Honorable Rod Souza, Presiding

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### **STATEMENT OF THE ISSUE**

Has Appellant met his heavy burden of proving that he received ineffective assistance of trial counsel based upon his allegation that defense counsel, through a routine pretrial conversation with the prosecutor about matters of record, caused the State to make a late decision to call an expert witness at his Incest trial to testify about recognized victim behaviors in child sexual abuse cases?

### **STATEMENT OF THE CASE**

On July 11, 2016, the State charged Appellant Kenneth Jones with one count of Incest, a felony, and one count of Tampering with Witnesses and Informants, a felony. (D.C. Doc. 3.) Jones relied upon the defense of general denial. (D.C. Doc. 14.)

On February 2, 2017, 11 days prior to trial, the State filed a notice of its intent to call Wendy Dutton as an expert witness at trial to “educate the jury on counter-intuitive victim behaviors, including but not limited to recantation, cooperation with abuser and delayed disclosure.” (D.C. Doc. 26, attached to Appellant’s Br. as App. A, at 1.) In its notice, the State recognized that, pursuant to the omnibus order, its disclosure was untimely. (*Id.*) In the notice, the State explained:

The State met with Defense Counsel on February 2, 2017 and learned the Defendant is likely to argue the victim’s conduct did not

comport with what one would expect of a victim of incest. Further, the State learned the Defendant will likely cross-examine the victim and her sister about a recantation of the same or similar abuse reported in Arkansas, years prior to this case being investigated by the Billings Police Department. Based on discussion with Defense Counsel, the State anticipates the Defendant will likely make the argument the witness recanted before, therefore the jury should not believe her now.

(Appellant's App. A at 2.)

The district court considered the State's expert witness disclosure at a pretrial conference. (2/08/17 Transcript of Hearing [Hr'g Tr.]) The court conducted a jury trial on February 13 through 15, 2017. (2/13/17-2/15/17 Transcript of Jury Trial [Tr.]) Jones did not call any witnesses. (Tr. at 663.) At trial, Jones informed the court that he did not wish to testify, stating:

Well, after listening to all these lies, you can tell that they outright was done lying, and you're just keeping on believing them, and just get it over it.

(Tr. at 661.)

The jury found Jones guilty of Incest and Tampering with Witnesses and Informants. (D.C. Docs. 44-45.) The district court sentenced Jones to life in prison for the Incest conviction and a concurrent ten-year sentence for the Tampering with Witnesses conviction. (D.C. Doc. 60.)

## **STATEMENT OF THE FACTS**

### **I. The offenses**

At the time of trial E.J. was a sophomore in high school and lived with her mom and three sisters in Fromberg. (Tr. at 288-29.) E.J. was born in Arkansas and lived there until her family moved to Montana. (Tr. at 291-92.) When E.J. was about eight years old, her father, Jones, began “touching on” her. (Tr. at 303.) The first time it happened, E.J. and her father were watching television together. E.J. fell asleep and awoke to her father touching her breasts on top of her clothing. Jones did not say anything to E.J., and E.J. got up and went to bed. (Tr. at 304.)

Over a period of time, Jones progressed to using his hands to touch E.J.’s vagina. (Tr. at 306.) E.J. and a younger sister attempted to run away but did not make it very far before M.J. interceded and E.J. disclosed the sexual abuse. (Tr. at 306-07.) Upon returning home, M.J. told their mom what E.J. had told her. E.J. then told her mom that Jones had been touching her sexually. E.J.’s mom, Laura, confronted Jones when he arrived home from work. Jones acted shocked and said he would never hurt E.J. Laura told Jones she would kill him if she ever found out it was true. (Tr. at 307-08, 418.) Jones surmised that if he had ever touched E.J. he must have been asleep when he did so. (Tr. at 308, 418.) Laura wanted to believe Jones but E.J.’s disclosure always remained in the back of her head. (Tr. at 418.)

Laura recalled that, after this, Jones called the whole family together and said that “he would never touch them like that. If he did, he had to have been asleep.” (Tr. at 419.) Jones tearfully said that “he loved them, and he was sorry if he did it.” (*Id.*)

Jones did not sexually abuse E.J. for a few months, but then the sexual abuse resumed. (Tr. at 308.) M.J., who was acting out at school, eventually confided in a school counselor that Jones was sexually abusing her sister, E.J. (Tr. at 309, 367.) A woman came and talked with E.J., and her father was removed from the family’s home. Jones moved into a second house on the property where the family lived. At this time Jones started using methamphetamine. (Tr. at 309-10.) Jones convinced E.J. and M.J. to tell the authorities that they had lied about the sexual abuse. Jones promised that if E.J. said it was a lie, he would never do it again. (Tr. at 312.) E.J. wanted to believe him. (Tr. at 313.) E.J. complied because she felt like she was putting everyone through a lot, and living apart was hard on her mom and other siblings. E.J. felt like it might all be her fault. (Tr. at 311-12.)

M.J. also told the authorities that she had lied because she did not want her family “being separated and stuff.” (Tr. at 369.) M.J. said that she had made everything up to get out of the trouble she was having at school. (Tr. at 420.) Afterwards, Jones decided to move the family to Montana because he “needed to straighten up [his] family and get it back right.” (Tr. at 370.) The family moved

from Arkansas to Melstone, Montana and, for a time, it seemed like things were better. Eventually though, Jones resumed using methamphetamine. (Tr. at 370-71.)

After E.J. and M.J. recanted and the family moved to Montana, Jones' sexual abuse of E.J. escalated to Jones putting his penis in E.J.'s vagina. At first E.J. tried to stop him, but later she just stopped fighting it. The sexual intercourse was painful. (Tr. at 313-14.) E.J. had never had sexual intercourse before. (Tr. 315.)

At some point, the family moved to Billings. (Tr. at 317.) While the family lived in Billings, Jones regularly used methamphetamine. Jones acted paranoid while he was using meth. He stayed up late with E.J. and forced E.J. to have sex. (Tr. at 318.) In the family's home in Billings, E.J. slept downstairs. Jones subjected her to sexual intercourse almost every night. Sometimes E.J. tried to protest but Jones responded by hitting her. (Tr. at 319-20.) Jones slapped E.J. across the face and choked her by putting his hand around her throat. E.J. stopped resisting because there was "no point in trying." (Tr. at 321.)

M.J. explained that while Jones was using meth he was "mean." (Tr. at 373.) He got mad at "every little-bitty thing." (*Id.*) He hit all of them, but he mostly hit E.J. (*Id.*)

Around March 2016, while the family was living in Billings, Jones returned to Arkansas with E.J. and M.J. (Tr. at 294, 300.) They remained in Arkansas for



about three months. (Tr. at 300.) M.J. said she went to Arkansas because her boyfriend just broke up with her, and she knew E.J. was going, and E.J. wanted M.J. to be with her. (Tr. at 376.) E.J. went to Arkansas because her dad told her she had to go with him. (Tr. at 346.) While Jones, E.J., and M.J. were in Arkansas, Laura and the other two girls moved to Fromberg. (Tr. at 294.)

In Arkansas, sometimes at Jones, E.J., and M.J. stayed at Jones' mother's house, sometimes they stayed in motels, and sometimes they stayed in their vehicle. (Tr. at 295-97.) Jones' sexual abuse and physical abuse of E.J. worsened. Jones choked E.J. more often and hit her hard enough to make her nose bleed. (Tr. at 322.) Jones made E.J. stay awake with him two or three days at a time. Jones started calling E.J. his girlfriend, which made her feel "nasty." (Tr. at 323.) Jones kept E.J. with him at all times. (Tr. at 324.)

Jones told E.J. never to tell anyone what he was doing to her. (Tr. at 332.) He told her that if she told about the abuse it would be her fault. Jones also threatened that if E.J. told about the abuse he would kill everyone. E.J. believed him. (Tr. at 333.) Jones said if anyone was ever suspicious, E.J. needed to point the finger at M.J.'s boyfriend. (*Id.*)

While staying in a motel in Arkansas, M.J. saw her dad having sex with E.J. (Tr. at 378.) M.J. was shocked, but did not know what she should do. She wanted to call her mom and tell her, but she was scared to do so. (Tr. at 379.) M.J. asked

E.J. if their dad was doing anything to her. E.J. responded, “No.” (*Id.*) M.J. persisted, and E.J. kicked her out of the bathroom and shut the door. (*Id.*)

Later, M.J. confronted E.J. again while they were alone in the vehicle. E.J. made M.J. promise not to tell anyone. After M.J. agreed, E.J. confided in her about the sexual abuse and said that Jones thought E.J. was his “girlfriend.” (Tr. at 380.) All M.J. wanted to do was leave and to take E.J. with her. E.J. said they could not leave because their dad would hurt her. (*Id.*) After this exchange, M.J. saw Jones having sex with E.J. while they were staying in a camper. (Tr. at 382.) M.J. also heard her father ask E.J., “Why are you tightening up?” (Tr. at 385.) Sometimes M.J. heard moaning, and sometimes she heard E.J. say “stop.” (*Id.*)

Jones and the girls returned to Montana because E.J. “had something wrong down there.” (Tr. at 324.) E.J.’s vaginal area was swollen and it really hurt when E.J. peed. (Tr. at 325.) One day, before leaving for Montana, E.J. called her sister into the bathroom and showed M.J. her vaginal area. It was obvious something was wrong. M.J. was scared. E.J. finally had to show Jones. Jones said that he thought it was spider bites or some kind of bites. Jones got his buddy to get some medicine. (Tr. at 386.)

Jones bought E.J. “Vagisil stuff” to put on her vaginal area. (Tr. at 351.) M.J. looked at E.J.’s vaginal area again, and it was much worse. It was “huge and swollen” with steady yellow drainage. (Tr. at 387.) E.J. was in pain. E.J. cried and

screamed every time she peed because it was so painful. M.J. pleaded with her dad to take E.J. to the hospital. He responded by saying E.J. just needed to put more medicine on it. (Tr. at 387-88.) Finally, Jones decided to return to Montana. (Tr. at 324.)

It took four days to drive from Arkansas to Montana. E.J. was in pain the whole time. Jones accused E.J. of “trying to make it noticeable” by not walking right. It made him angry. (Tr. at 325-26.) When they arrived home, they told Laura that E.J. had spider bites on her private area. (Tr. at 423.) Laura looked at E.J.’s vaginal area. It was like nothing she had ever seen before, and it looked very painful. Laura wanted to take E.J. to the hospital immediately, but E.J. kept insisting that she did not want to go. (Tr. at 423-24.) Jones kept telling E.J., “Hurry up and make it better. That way, your mom won’t take you.” (Tr. at 327.) Finally, after two or three days, Laura insisted, and took E.J. to the hospital. (Tr. at 423-24.) E.J. felt like her vagina “started closing up,” and she was very scared. (Tr. at 327.)

In the emergency room, E.J. finally told her mom that Jones had been sexually abusing her. (Tr. at 330.) Laura explained that while the two of them were

alone, she asked E.J., “[I]s something going on that you want to tell me about?”

(Tr. at 426.) Laura elaborated:

And so we get in there, and I asked her if there was something—if somebody was doing something to her, you know. I didn’t know—they’d been gone for three months, two or three months, I hadn’t seen them.

And she said, “Yes.” And I said “What?” And she told me that her dad had did that to her. I said, “Doing what?” And she said, “The whole thing.” Having intercourse with her.

(*Id.*)

On the morning of June 9, 2016, E.J. went to the emergency room with her mother, Laura. (Tr. at 479-80.) E.J. complained of genital irritation and swelling. Tina Hedin is a registered nurse in the emergency department at the Billings Clinic. (Tr. at 475.) Upon examining E.J., Hedin saw that E.J. had open lesions and swelling to her vaginal area. She became concerned that E.J. was suffering from a sexually transmitted disease. (Tr. at 481-82.) When Hedin left the examination room and then returned, Laura told Hedin that E.J. had just told her that her father had been sexually abusing her. (Tr. at 482, 484.) Hedin made a report to law enforcement, with E.J.’s and her mother’s approval. (Tr. at 487.)

Sergeant Hart of the Billings Police Department put out an attempt-to-locate on Jones. (Tr. at 263, 271.) At about 2:30 p.m., on June 9, 2016, Sergeant Hart successfully contacted Jones by telephone. (Tr. at 266, 272.) Sergeant Hart told Jones he would like to speak with him about his daughter. Jones responded

defensively. Sergeant Hart told him that his daughter was okay but law enforcement needed speak with him. Jones expressed no concern for E.J. He wanted to know the whereabouts of his other daughters and declined to meet with Sergeant Hart. (Tr. at 273-74.) During Sergeant Hart's phone conversation with Jones, Jones rambled and sounded very paranoid. (Tr. at 277.)

Detective Robinson of the Billings Police Department met with E.J. and Laura at the emergency room. (Tr. at 508, 510.) Laura was frightened for her safety and for her daughter's safety. Detective Robinson's first goal was to find Jones. (Tr. at 510.) Laura described the vehicle that she believed Jones was driving. (*Id.*) Using GPS, law enforcement located the vehicle at the Pelican Truck Stop in East Laurel. (Tr. at 514.) Jones was not with the vehicle. (Tr. at 515.) Since this vehicle belonged to Laura, Detective Robinson arranged to take the vehicle to the hospital so Laura and E.J. would have transportation when E.J. was discharged. (Tr. at 516.)

E.J. was at the emergency room for about 12 hours, receiving IV antibiotics. E.J. spoke with the police while she was at the emergency room. (Tr. at 330.) Laura called M.J. from the hospital and instructed her not to let Jones into the house. When M.J. asked why, Laura responded, "He's been raping [E.J]." (Tr. at 389.) Laura and her daughters had previously made a plan that if they needed to leave the house in an emergency they would go to the softball field down the road.

M.J. decided to take herself and her sisters to the softball field because she was afraid to remain at the house. (Tr. at 390.)

When E.J. and her mom left the hospital, Laura drove to a nearby gas station for fuel. As she pulled up at the gas pump she saw Jones in a jeep. (Tr. at 429-30.) He was wearing a wig and an eyepatch. (Tr. at 302, 430.) Laura got back in her car to leave, and Jones kept coming towards them. She did not have a cell phone, so she hollered for someone to call the police. (Tr. at 430.) Jones kept telling E.J. to get into his vehicle. (Tr. at 434.)

As Detective Robinson was still attempting to locate Jones, he received a dispatch that Jones had confronted E.J. and Laura at a gas station. Detective Robinson found E.J. and Laura huddled near the clerk inside the Conoco station. They were worried and scared. As Detective Robinson explained that he would follow them back to their residence in Fromberg, E.J. pointed to a vehicle that she recognized as belonging to her dad's friend across the street near the Albertsons store. (Tr. at 519-21.) Detective Robinson stopped the vehicle and found Jones sitting on the passenger side of the vehicle. (Tr. at 523-24.) The vehicle Jones was in was different from the vehicle he had been in when he approached E.J. at the gas station. (Tr. at 526.) Detective Robinson detained Jones for questioning. (Tr. at 529.)

Jones agreed to speak with Detective Robinson and told Detective Robinson he was a meth addict. (Tr. at 533.) Jones informed Detective Robinson that he had not been in a sexual relationship with anyone for quite some time. Jones said he had lost all sexual desire and did not want to “agitate” it. (Tr. at 535.) Jones denied having a girlfriend, a mistress, or seeking out prostitutes. (*Id.*)

During the interview Jones explained that while he, E.J., and M.J. were in Arkansas, they had both complained of severe insect bites from their thigh areas up to their waists. (Tr. at 606.) Jones elaborated that E.J. had what he thought were insect bites to her groin area. Jones had inspected E.J.’s private area and described her vaginal area as “nasty as hell.” (Tr. at 606-07.) Jones said E.J.’s vaginal area had been swollen and there was a large amount of discharge. Jones claimed he had asked E.J. if she wanted to go to the doctor but she refused. (Tr. at 607.)

Jones explained that he got E.J. some Neosporin and some medicated pads and other over the counter medication. When E.J.’s condition worsened, Jones decided to return to Montana. (Tr. at 607-08.) Jones was frustrated and angry with E.J. because he did not believe she was keeping her vaginal area clean, which caused her condition to worsen. (Tr. at 611.) Jones claimed that he was the person who finally insisted that E.J. go to the doctor once they returned to Montana. (Tr. at 612.)

During the interview, Jones never asked how E.J. was doing. Detective Robison finally told Jones that E.J. might have a sexually transmitted disease. Jones volunteered that he had never had a sexually transmitted disease. (Tr. at 617-19.) Jones agreed to submit to a sexual assault kit. (Tr. at 619.) At the conclusion of the examination, Jones attempted to flee. (Tr. at 622.)

Dr. Brewer is a board-certified family physician who practices at the Billings Clinic. (Tr. at 242.) The medical professionals who cared for E.J. at the emergency room consulted with Dr. Brewer on E.J.'s case because E.J. had presented in the emergency room with what appeared to be a severe case of herpes. (Tr. at 250, 253.)

Dr. Brewer reviewed photographs of E.J. taken in the emergency room and later reviewed her medical charts. (Tr. at 250-51.) E.J. had multiple ulcers over her entire genitalia, both sides of her labia, and both sides of her groin area going down to her buttocks. E.J.'s condition was excruciatingly painful. Her culture returned positive results for type 1 herpes. Type 1 herpes is a sexually transmitted disease. (Tr. at 253-54.)

Jones tested positive for type 1 and type 2 herpes. E.J. could have contracted herpes type 1 by having sexual intercourse with Jones. (Tr. at 256.) A person with



herpes would not have to have visible lesions or ulcers himself to transmit the disease through sexual contact. (Tr. at 258-59.) Dr. Brewer explained:

And there's a couple of different reasons for that. The first one is that you can have no ulcers and have what we call asymptomatic viral shedding of the virus and have absolutely no symptoms at all and still transmit the disease to the victim.

The second option is that a person who has an active lesion, once they have intercourse with the victim, typically the incubation period, meaning the time that the virus has enough time to replicate and cause a disease, is a whole other week. And if you have had an occurrence, and your ulcers on the alleged perpetrator have completely healed, it can take a week for the victims to actually present, and the disease course can actually last up to three weeks.

(Tr. at 259.)

A person who has tested positive for both type 1 and type 2 herpes might shed only one type or the other through intercourse. It did not cause Dr. Brewer any concern that E.J. only tested positive for type 1 herpes, while Jones tested positive for both type 1 and type 2 herpes. (Tr. at 259-60.)

To cope with Jones' physical and sexual abuse, E.J. sometimes cried, she sometimes zoned out, and she sometimes considered suicide. Most recently she attempted suicide by overdosing on medicine. (Tr. at 334-36.)

At trial, the State introduced a letter Jones had sent to Laura and his daughters after his arrest. (State's Ex. 2-N, attached as App. A.) In the letter, Jones

blamed drugs and the devil for his bad conduct, but professed to be getting close to God, and promised to never turn back. Jones stated:

I love all 5 of you and I'm very [disappointed] in myself for my actions and [there] are days I can't remember and that frightens me and know that I made somebody that means more to me than anything afraid of me or hate me makes me hate myself but I'm ready to do right and stay right with God you all know that dope had [control] of me but I hate to have a[n] excuse but it was exactly that poison.

(*Id.*) Jones argued that all he needed was one more chance to be a part of their lives. (*Id.*)

## **II. Expert witness disclosure and testimony**

### **A. Pretrial**

At the pretrial conference, defense counsel initially objected to the State's late notice of calling Dutton as an expert witness. (Hr'g Tr. at 3.) The district court responded:

I mean, witnesses in a case such as this are blind experts are certainly not uncommon in the State, in this District, or anywhere, and these blind experts may often offer testimony about behaviors children may exhibit or what have you, and I read the State's Expert Disclosure, apparently it was given in response to, uh, perhaps some arguments that may be made, and specifically even I think the Montana Supreme Court has affirmed in multiple cases—uh, not just this type of testimony, but Ms. Dutton testifying as a blind expert in these cases. . . . The issue here is notice. So, the remedy is not—while certainly a witness could be stricken—for the most part, it's my understanding, uh, what the statute com – contemplates for late disclosure is a continuance—uh, continuance to allow you sufficient time to interview or depose Ms. Dutton, or, alternatively, to retain your own expert to rebut any of her opinions. So, I guess I don't want

to decide this right now, but I need to get an understanding of where the parties are at, and I am fully cognizant of, uh, what Mr. Jones has previously stated at status hearings about his desire to go to trial.

*Id.*

After the court tipped its hand that it most likely would not exclude Dutton's testimony but rather would postpone the trial if Jones so wished, the court took a recess to allow defense counsel to speak with Jones. (*Id.* at 10.) Following the recess, defense counsel told the court that after discussing it with their client, the defense withdrew its objection and would be prepared to cross-examine Dutton.

(*Id.*)

The following exchange then occurred:

COURT:     Alright, just to be clear, uh, State did disclose, uh, expert witness, uh, Wendy Dutton. She is expert in matters of child sexual abuse, uh, your attorney—your attorneys were going to move to strike that testimony, uh, based on the timing of the disclosure. Uh, apparently that motion's going to be withdrawn. Have you had sufficient time to discuss that with your attorneys?

DEFENDANT:     Yes, sir.

COURT:     Okay. And I would ask the attorneys to certify you've discussed those issues, the different options that perhaps you, uh—perhaps the case could be continued for a short period of time or perhaps you could attempt to retain your own expert to rebut Ms., uh, Dutton, but at this time you do not want to do that, is that correct, Mr. Siegman?

J. SEIGMAN:     Yes, sir. Yes, sir.

COURT:     Okay. And you've had sufficient time to talk about that with Mr. Jones?

J. SEIGMAN: Yes, Sir.

COURT: And, Mr. Jones, uh you believe that going to trial on Monday is in your best interest?

DEFENDANT: It'll make it scarier, but yes, Sir.

....

COURT: Okay. And you've had, uh, sufficient time to meet with your client, go over discovery, talk with him about anticipated testimony from State's witnesses?

J. SEIGMAN: Yes, Sir, and our office has done diligence of interviewing the family members in this case. Um, [E.], [M.], and Laura, who are—we anticipate will be giving the State's testimony. We have transcripts. We've done our due diligence regarding those interview—those victims—witnesses.

COURT: Okay. And have you been—had the opportunity to talk with Mr., uh, Jones about areas of cross-examination based on all of that discovery and all of your interviews?

J. SEIGMAN: Yes, we've been in ongoing conversations with him since the beginning of this case.

COURT: Okay. And you believe you're making a good strategic decision with regard to Ms. Dutton, as far as interviewing her and not relying or attempting to hire your own expert.

J. SEIGMAN: I think we're making a proper choice.

COURT: Okay. And you do have some resources based on her previous testimony in Yellowstone County, uh, to review past testimony and prepare for that?

J. SEIGMAN: Yes, Sir.

COURT: And you'll be able to consult with other individuals in your office about—

J. SEIGMAN: We'll have to, yes.

COURT: —about potential areas of cross-examination?

J. SEIGMAN: We will.

COURT: And, Ms. Barry, you will facilitate an interview before Monday?

M. BARRY: Make every—every effort to.

(*Id.* at 11-13.)

Before trial, defense counsel filed a motion in limine to limit Dutton's testimony to "the general behavior patterns of child sexual abuse victims that may help the jury understand the evidence, with further understanding that her testimony cannot offer opinions about the accuracy, reliability or credibility of a particular witness. . . ." (D.C. Doc. 32.) The State indicated it would comply with the motion in limine. (Tr. at 6.)

## **B. Trial**

During direct examination, Dutton testified that: the relationship between a child sexual abuse victim and the perpetrator can impact if and when a victim discloses the sexual abuse (Tr. at 555-56); the timing of the disclosure has no bearing on the whether the disclosure is true (Tr. at 557); delayed disclosures are common (Tr. at 558); if a child's initial disclosure is met with disbelief this often

results in emotional and behavioral problems for the child and/or risk that the child will recant (Tr. at 562); studies indicate that recantations occur between 4 and 23 percent of the time (Tr. at 563); and child abuse victims have varying emotional reactions when disclosing the abuse (Tr. at 564). She also described: the process of victim selection and grooming (Tr. at 565-72); methods perpetrators use to conceal the sexual abuse (Tr. at 573-74); and coping strategies child abuse victims employ (Tr. at 574-78).

During cross-examination, defense counsel emphasized that: Dutton had not reviewed anything concerning the case the jury was being called upon to decide (Tr. at 590-92); false reports of sexual abuse occur and sometimes result from teenage girls seeking to change their living situations (Tr. at 592-95); and that Dutton testifies more often on behalf of the prosecution than she does on behalf of the defense. (Tr. at 599-600.)

Dutton's testimony did not figure prominently in the State's closing argument. During Jones' closing argument, defense counsel stated:

Well, let me suggest a reason to doubt the State's claim. The State's provided that. Dr. Dutton, she testified earlier today. Thousands of forensic interviews. Thousands. She's done all this training. She's written—she's done publications. She teaches. She helps. She testifies.

Today she indicated that in her career, which dates back now from about 1992 or so, 35 times for the defense 660 times for the prosecution. So we know where she—and she's a firm believer in forensic interviews. A firm believer in doing them right.

But despite all this, she still admitted that people can give false reports of sexual abuse.

. . . .

She also testified this morning that the other situation is with teenage girls. That's another reason why people testify falsely. She testified, Dr. Dutton, that it's either to change their living conditions or to cover up the fact that they're having consensual sex with somebody, that they testify false, that they make false, malicious, or consciously false allegations. And in this case, accusing your own father of incest is about as malicious as you can get.

Let's look at the facts. [E.] and [M.], teenage girls. [E.] and [M.] had plenty of reasons to be upset with their dad. As I told you at the beginning, their father is not perfect. [Their] father was strict with them, perhaps too strict with his upbringing of them for some tastes. He spanked them. He took away their cell phone when they got into trouble. Even worse, he kept two teenagers from having access to Facebook. But worse, he's a meth addict.

. . . .

So there you have it. One if not two teenage girls in bad circumstances that any reasonable person would want to change, and they found a way that kept Ken away. And the premise of this was provided by Dr. Dutton. That's one of the reasons why generally, not applied specifically to this case, but generally, teenage girls give false reports.

(Tr. at 717-720.)

### **SUMMARY OF THE ARGUMENT**

Jones claims he received ineffective assistance of counsel before his incest trial because, through a routine pretrial conversation with the prosecutor, Jones alleges his attorney disclosed confidential information about his defense strategy.

Jones asserts that through this conversation defense counsel tipped off the prosecutor that he intended to attack the victim's credibility at trial by questioning her about her delay in reporting the sexual abuse, her prior recantation, and her willingness to travel to Arkansas with her sexual abuser when she could have stayed with her mom in Montana. Jones claims that this conversation resulted in the State filing a late notice of an expert witness to discuss common topics occurring in child sexual abuse cases, including delayed disclosure and recantations.

The weaknesses in the State's case were well known to the State prior to any pretrial conversation with defense counsel. The exact nature of the conversation is not in the record, but, based upon what Jones has alleged on appeal, his counsel only discussed matters that were in the public record and well known to the prosecutor. Further, the exact exchange between defense counsel and the prosecutor is only relevant to the deficient performance prong of Jones' ineffective assistance of counsel claim. This Court does not need to consider the deficient performance prong of the claim because Jones did not and cannot prove that he was prejudiced by the alleged deficient performance.

In its case against Jones, the State presented two pieces of evidence that are not commonly available in child sexual abuse cases. First, Jones had herpes, a sexually transmitted disease, and so did his victim. Further, despite E.J.'s fear and



excruciating pain from her physical condition, Jones did not get her medical treatment. Instead, he tried to convince E.J. that she was suffering from spider bites to her vaginal area, which only needed over-the-counter medication and careful attention to cleanliness. And there was no other explanation for how E.J. contracted herpes, a sexually transmitted disease. Second, E.J.'s older sister, M.J., saw Jones having sex with E.J. on at least two occasions and heard things consistent with Jones having sex with E.J. on other occasions.

The State presented overwhelming evidence of Jones' guilt, including a letter that Jones sent his wife and daughters that seemingly acknowledges his guilt, and even assuming Dutton had not testified at his trial, there is not a reasonable probability of a different outcome. Thus, Jones' ineffective assistance of counsel claim fails, and this Court should affirm his convictions.

## **ARGUMENT**

### **I. The standard of review**

Ineffective assistance of counsel claims are mixed questions of law and fact, which this Court reviews de novo. *State v. Daniels*, 2019 MT 214, ¶ 28, \_\_\_ Mont. \_\_\_, 448 P.3d 511.

## **II. Jones failed to meet his heavy burden of proving ineffective assistance of counsel.**

### **A. Introduction**

“The United States and Montana Constitutions guarantee criminal defendants the right to effective counsel.” *State v. Weber*, 2016 MT 138, ¶ 21, 383 P.3d 506, 373 P.3d 26. This Court analyzes claims of ineffective assistance of counsel under the two-part test the United States Supreme Court announced in *Strickland v. Washington*, 466 U.S. 668 (1984). *McGarvey v. State*, 2014 MT 189, ¶ 24, 375 Mont. 495, 329 P.3d 576. In order to prove ineffective assistance of counsel, a defendant must show: (1) that counsel’s performance was deficient, and (2) that counsel’s deficient performance prejudiced the defendant. *McGarvey*, ¶ 24.

In order to prove the deficient performance prong, the defendant must demonstrate that counsel’s performance “fell below an objective standard of reasonableness considering prevailing professional norms, and in the context of all circumstances.” *McGarvey*, ¶ 25. The defendant must overcome a strong presumption that “counsel’s defense strategies and trial tactics fall within a wide range of reasonable and sound professional decisions.” *State v. Turnsplenty*, 2003 MT 159, ¶ 14, 316 Mont. 275, 70 P.3d 1234. Under the second prong of the *Strickland* test, a defendant must establish that but for counsel’s errors, there is a reasonable probability that the result of the proceeding would have been different. *Id.* Because a defendant must prove both prongs of *Strickland*, if a defendant fails

to prove either prong this Court need not consider the other. *Rose v. State*, 2013 MT 161, ¶ 22, 370 Mont. 398, 304 P.3d 387.

**B. This Court does not need to consider the deficient performance prong.**

Jones devotes the majority of his brief to arguing that defense counsel performed deficiently. (Appellant's Br. at 10-15.) In so doing, Jones argues that defense counsel disclosed confidential information about the defense strategy to the prosecutor. Jones then attempts to prove deficient performance by relying upon cases in which the prosecutors, albeit sometimes unintentionally, obtained confidential information concerning the defendants' trial strategies.

Here, however, the prosecutor did not intentionally or unintentionally access confidential information about Jones' defense strategy. At most, the record establishes that as trial approached, the defense counsel and the prosecutor discussed the upcoming trial. The exact nature of that discussion is not part of the record. After that discussion, though, the prosecution did file a late notice that it intended to call Dutton. The prosecutor did attribute the late notice, in part, to her recent conversation with defense counsel.

Even so, all of the matters the prosecutor addressed in her notice should have been obvious to her without having *any* conversation with defense counsel. These are common strategies defense counselors employ when defending against child sexual abuse cases. For example, the prosecutor already knew that E.J. had

delayed disclosing the sexual abuse, and she already knew that E.J. and M.J. had recanted a prior disclosure of sexual abuse in Arkansas. Thus, even assuming defense counsel pointed out these weaknesses in the State's case, the weaknesses were not confidential but were part of the public record. If anything, the prosecutor may have used the pretrial conversation to soften the lateness of her expert witness disclosure. Defense attorneys and prosecutors routinely discuss cases before trials. But such discussions generally cannot be equated to a breach of loyalty and confidentiality. This is easily distinguishable from the circumstances in *St. Germain v. State*, 2012 MT 86, 364 Mont. 494, 276 P.3d 886, where defense counsel turned over to the prosecutor confidential notes from the defense investigator believing that she had to do so in order to call the investigator at trial.

Here, as in *St. Germain*, there is no need for this Court to consider the deficient performance prong of *Strickland* because Jones did not and cannot prove the prejudice prong of *Strickland*.

**C. Jones has failed to prove the prejudice prong of *Strickland*.**

Assuming Dutton did not testify as a blind witness at Jones' trial, Jones has failed to prove a reasonable probability of a different outcome. Here, in addition to the victim's compelling testimony, the State had two key pieces of evidence that corroborated that testimony—E.J. had a sexually transmitted disease and Jones tested positive for the same sexually transmitted disease, and M.J. saw Jones

having sexual intercourse with E.J. on more than one occasion in the weeks prior to her disclosure. In this case, Dutton's testimony was unnecessary. Even so, defense counsel used aspects of Dutton's testimony to support a theory that E.J. and M.J. made false reports of sexual abuse.

E.J.'s disclosure of her dad's sexual abuse corresponded with her medical treatment for a sexually transmitted disease. The trial record establishes that E.J., who was not that worldly or experienced, was terrified about what was physically happening to her body. Her dad tried to convince her that she was suffering from spider bites, and all she needed to do was use the medicine he provided her and keep herself clean. While E.J. was at the height of experiencing swelling, excruciating pain, ulcerations, and discharge from her vaginal area, Jones stopped subjecting her to sexual intercourse. When E.J.'s condition worsened, Jones blamed her for not keeping herself clean or using enough of the medicine. M.J. begged Jones to take E.J. to the doctor, but he insisted that E.J. only needed to follow his fatherly instructions and she would heal. It wasn't until E.J.'s mother looked at E.J.'s vaginal area that she insisted on seeking medical care for E.J.

While Jones, E.J., and M.J. were in Arkansas together, but before M.J. was aware of E.J.'s medical condition, M.J. became suspicious that Jones was sexually abusing E.J. One morning in a motel room, M.J. saw Jones having intercourse with

her sister. She also saw Jones having intercourse with E.J. in a camper. Further, M.J. heard things consistent with Jones subjecting E.J. to sexual intercourse.

These are two powerful pieces of evidence that commonly are unavailable to prosecutors. There was little defense counsel could do to counter this compelling evidence.

Also, defense counsel attempted to use Dutton's testimony to support a defense—these two teenage girls made up the allegation of sexual abuse to get their drug-addicted, strict, physically abusive father out of their lives.

Additionally, Jones' conduct after E.J. went to the hospital was also strong evidence of consciousness of guilt. The trial testimony established that Jones wanted no part of E.J.'s medical care at the emergency room, but he did want to have immediate access to E.J. upon her discharge. Jones was obviously watching E.J. and Laura, and approached them in a friend's car at a gas station while wearing a wig and an eye patch. Jones ordered E.J. to come with him. Fortunately, Laura yelled for help. Laura and E.J. sought safety inside the gas station until the police arrived.

Jones responded by enlisting the help of another friend. He waited across the street in another vehicle. E.J. recognized this vehicle as a vehicle belonging to one of Jones' friends. E.J.'s keen observation ultimately resulted in Jones' arrest. Jones then inaccurately informed Detective Robinson that he did not suffer from a

sexually transmitted disease and blamed E.J.'s condition on her failure to keep her vaginal area clean.

Finally, while Jones was in jail, but before his trial, he wrote a letter to his wife and daughters in which he acknowledged hurting someone he loved, even though he could not remember the details of how he did so. Jones begged for another chance and promised that he was repentant and reformed.

Jones has not and cannot prove a reasonable probability of a different outcome in the event Dutton had not testified. Thus, his ineffective assistance of counsel claim fails, and there is no reason for this Court to address whether defense counsel's conduct was deficient.

### **CONCLUSION**

This Court should affirm Jones' convictions and sentence because Jones has failed to prove his ineffective assistance of counsel claim.

Respectfully submitted this 30th day of October, 2019.

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By: /s/ Tammy K Plubell  
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### **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 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 6,862 words, excluding certificate of service and certificate of compliance.

/s/ Tammy K Plubell  
TAMMY K PLUBELL



IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 17-0571

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

KENNETH WAYNE JONES,

Defendant and Appellant.

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**APPENDIX**

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Letter Jones sent to Laura and his daughters after his arrest,

State's Ex. 2-N ..... Appendix A

## **CERTIFICATE OF SERVICE**

I, Tammy Plubell, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 10-30-2019:

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Electronically signed by Janet Sanderson on behalf of Tammy Plubell  
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