IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0395

STATE OF MONTANA,

Plaintiff and Appellee,

v.

J CEE FELDE,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Second Judicial District Court,
Silver Bow County, The Honorable Brad Newman, Presiding

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STATEMENT OF THE ISSUE

Did the district court correctly decide Felde's multiplicitous convictions claim where the State permissibly convicted him on four separate criminal offenses based on each of the four child pornography images Felde possessed?

STATEMENT OF THE CASE

Appellant J Cee Felde appeals three out of the four sexual abuse of children convictions entered in the Butte-Silver Bow County District Court, the Honorable Brad Newman, presiding. (D.C. Doc. 65; see Opening Br. at 10, requesting vacatur of convictions for Count 2, Count 3 and Count 4.)

This case began on January 21, 2016, when an Internet Crimes Against Children (ICAC) investigator contacted the Butte-Silver Bow Law Enforcement Department. (D.C. Doc. 1 at 1-2.) The ICAC's contact led to the discovery that digital file images of different children engaged in sexual conduct had been downloaded to an IP address, which led to Felde. (*Id*.)

The State originally charged Felde by Information with 100 felony counts of Sexual Abuse of Children (Possession), in violation Mont. Code Ann. § 45-5-625(1)(e) (2015). (D.C. Doc. 4.) On September 8, 2016, pursuant to a plea agreement, Felde pled guilty only to Count I of the original Information. (D.C. Doc. 15.) The plea agreement did not include any promise by the State to dismiss

or amend the remaining 99 counts. (D.C. Doc. 16.) At the change of plea hearing, Felde admitted there was a factual basis for his single guilty plea. (9/8/16 Tr. at 9:23, 14:20.) At the close of the hearing, Felde filed a motion to dismiss Counts 2 through 100, together with a supporting brief, arguing he committed one crime, not several, and, as he just pled guilty to one charge, the other charges were mutltiplicitous, in violation of double jeopardy. (D.C. Doc. 17.)

The court denied Felde's dismissal motion, but ordered the State to file an Amended Affidavit and an Amended Information, which it did on December 12, 2016, charging Felde only with the offenses of Counts 1 through 49. (D.C. Doc. 23.) Soon afterward, Felde renewed his motion to dismiss all counts except Count I. (D.C. Doc. 33.) After hearing oral argument from the parties, the district court entered an order on May 17, 2017, denying Felde's renewed dismissal motion. (D.C. Doc. 43.)

The district court ruled that Mont. Code Ann. § 45-5-625(l)(e) provides that each medium, each image possessed, or each electronic communication, as defined in Mont. Code Ann. § 45-5-625(5)(a), constitutes a separate offense. (D.C. Doc. 43.) Further, the district court agreed with the State that it was entitled to pursue multiple charges where Felde committed separate acts of downloading and possessing illegal images on separate occasions and/or involving separate victims. (D.C. Doc. 43.) Afterward, the State and Felde entered into another written plea

agreement requiring Felde to plead guilty only to additional Counts 2-4, but reserving Felde's right to appeal his issue of multiple counts. (D.C. Doc. 54.)

STATEMENT OF THE FACTS

Because the appeal issue here is primarily a legal one, the dispositive facts are few. Felde admitted to investigators, and admitted during his plea colloquy, and on January 27, 2016, the day a search warrant for Felde's residence was executed, that he had downloaded images that depicted child pornography from the file sharing network Gnutella. (D.C. Doc. 1; 9/8/16 Tr. at 9:23, 14:20; 9/21/17 Tr. at 14-16.) The four images at issue here respectively correspond to Counts 1-4 listed and described on page 1 of Exhibit A attached to, and incorporated into, the Amended Information. (D.C. Docs. 28, 30.) For clarity, the State has obtained a more legible copy of Exhibit A, page 1, and attaches closeups of the first four images in its appendix. The State will discuss other record facts in the arguments that fellow.

SUMMARY OF THE ARGUMENT

The law controlling Felde's appeal issue claim is the multiple convictions statute. Mont. Code Ann. § 46-11-410. Felde overemphasizes the number of charges brought against him. In doing so, he ignores two main purposes of the

multiple convictions statute, Mont. Code Ann. § 46-11-410. Plainly, when a criminal transaction is considered, § 46-11-410(1) directs what prosecutors may charge, while § 46-11-410(2) directs what prosecutors may not charge.

Felde argues he committed the same transaction when he downloaded child porn computer files because he downloaded them at or about the same time. Felde's "same time" theory is not only incorrect, but beside the point. The plain language of the statute governing the illegal possession of child pornography demonstrates that the legislature intended to allow per-image convictions for possession regardless of when they were possessed, when each or all was download, on which individual computer hard drive they were found, or from which law enforcement seizure event.

Thus, even if for argument's sake Felde simultaneously downloaded each image, his downloaded images depict separate child victims displayed on distinct and separate "physical media" (computer image files). Each count was distinguishable from the other, not identical, and thus permitted under the statute.

More importantly, the main justiciable controversy that this Court should decide is Felde's disagreement that he committed four prosecutable acts, not one uniform act, and therefore is permitted the protection of the multiple conviction statute. As the State shows, he is wrong. Felde implies the multiple convictions statute does not go far enough in restricting prosecutor discretion. However, since

it is up the legislature to address that alleged deficiency, Felde should address his policy argument to that body.

ARGUMENT

Montana's multiple convictions statute does not prohibit a conviction based on each child pornography image possessed.

A district court's decision on a claim concerning a statutory prohibition on multiple convictions presents a question of law to be reviewed for correctness. *State v. Becker*, 2005 MT 75, ¶ 14, 326 Mont. 364, 110 P.3d 1.

A. As a threshold matter, Felde apparently confuses the multiple convictions statute.

In his brief, Felde repeatedly mentions punishments almost interchangeably with convictions and charges. (Opening Br. at 9-10, 13-14, 16, 19-20, 22.) Felde may implicitly believe a charge is a form of punishment, that criminal cases do not evolve, and that (despite being presumed innocent of all charges) a defendant facing multiple charges will be convicted of all charges. To the extent Felde implies this, each of these assumptions is unsound. Felde fails to focus sufficiently on the fact that the salient purpose of the multiple charges statute is to prevent multiple convictions in certain narrow cases:

> Multiple charges. (1) When the same transaction may establish the commission of more than one offense, a person charged with the conduct may be prosecuted for each offense.

(2) *A defendant may not, however, be convicted of more than one offense if*:

(a) one offense is included in the other . . . .

Mont. Code Ann. § 46-11-410 (emphasis supplied.) Deeming "charges" the functional equivalent of convictions for purposes of double jeopardy is impractical because, for other reasons, the State must have an opportunity to present its case. *State v. Pinkerton*, 270 Mont. 287, 293, 891 P.2d 532, 536 (1995). "By its plain language, § 46-11-410(2), MCA, is not implicated by the State's charging decisions. Rather, it is implicated only after a conviction is obtained, and even then, only when a defendant is convicted of multiple offenses." *State v. Allen*, 2016 MT 185, ¶ 11, 384 Mont. 257, 376 P.3d 791.

Felde does not predicate his argument for reversible error on an exact number of child pornographic images; rather, he asserts he possessed all the images on the same medium and at the same place and time. (*See* Opening Br. at 14.) For clarity, the State will thus focus its discussion on the four images that resulted in his four valid convictions.

/ / /

B. Under Montana's sexual abuse of children statute, possession of each image of child pornography is a separate offense.

1. The statute under which Felde was convicted permits prosecution for each visual medium that allows an image to be displayed.

Felde was convicted under Mont. Code Ann. § 45-5-625(1)(e) for "knowingly possess[ing] any visual or print medium, including a medium by use of electronic communication in which a child is engaged in sexual conduct, actual or simulated." Pursuant to Mont. Code Ann. § 45-5-625(5)(d), a "visual medium" means and includes "any disk, diskette, or other physical media that allows *an image* to be displayed on a computer or other video screen *and any image* transmitted" there. (Emphasis supplied). Here, a single computer file qualifies as a discrete unit of a "physical medium" and together with its displayable image constitutes a single visual medium. The article "an" and pronoun "any" used in § 45-5-625(5)(d)(ii), as the State has emphasized in the quotation above, demonstrate the legislature intended each image to be a discrete determiner by which specific class (visual medium) might be chosen.

Under Montana's sexual abuse of children statute, therefore, possession of each image of child pornography is a separate offense. *See State v. Berger*, 212 Ariz. 473, 474, ¶ 3, 134 P.3d 378 (2006) (construing two Arizona statutes that are similar to Montana's that criminalize "possessing . . . any visual depiction in

which a minor is engaged in exploitive exhibition or other sexual conduct" and that define visual depiction as "includ[ing] each visual image that is contained in . . . [a] photograph or data stored in any form and that is capable of conversion into a visual image"); *see also State v. Jensen*, 217 Ariz. 345, 348 n.5, ¶ 6, 173 P.3d 1046 (2008) (stating possession of child pornography is "defined in terms of the visual image itself rather than any specific media or physical object containing the image"). Thus, regardless of whether Felde acquired the images simultaneously, his possession of each image constitutes a separate offense. *See State v. McPherson*, 228 Ariz. 557, 560, ¶ 7, 269 P.3d 1181 (2012).

Accordingly, Felde did not commit a single act for which the district court subjected him to more than one punishment; rather, he committed four separate acts of possession of child pornography in violation of the statute proscribing the sexual abuse of children. Because Felde was properly convicted of multiple counts of sexual abuse of children, the district court did not impose multiple punishments for a single offense in violation of the prohibition against double jeopardy.

2. Images #1-4 show electronic file images created at different times, accessed by Felde at different times, with depictions of different victims.

Felde's arguments fail because the Amended Information, supporting affidavit, and supporting Exhibit A clearly set forth multiple specific and distinct

offenses that occurred during distinct times, differing by little as one second and as much as several weeks.

Images #1-4 are separate and distinct from each other. The filename for Image #1 indicates an 8-year-old girl performing a sex act on presumably an adult. The format for Image #1 is .AVI (Audio Video Interleave), which is a movie format. (*See* Wikipedia article, *Comparison of video container formats*, *https://en.wikipedia.org/wiki/Comparison_of_video_container_formats*) (accessed Wednesday, July 29, 2020.) Image #2 involves a purportedly 11-year-old Filipina child prostitute in .MPG (MPEG-1 Video File), another movie format. Image #3 involves a 4-year-old child involved in a sex act in a different movie format, .MKV (Matroska Multimedia Container). Image #4 involves an 11-year-old child identified as Jenny in .AVI format. (*See* State's Appendix A.)

Images #1-4 use child pornography abbreviations such as Pedo or PTHC. *See State v. Mattocks*, 2020-Ohio-3858, ¶ 13 (Ct. App.) (stating "pedo" is a common abbreviation for pedophile or pedophilia and "pthc" is a common abbreviation for preteen hardcore). Contrary to what Felde states in his opening brief (Opening Br. at 19, n.3), Images #1-4 were each created at distinct times, and accessed, presumably by Felde, at distinct times.

- Image #1 created 01/06/2016, 09:14:54 a.m.;
  accessed 01/08/2016, 11:25:24 p.m.

- Image #2 created 01/06/2016, 02:27:30 p.m.; accessed 01/27/2016, 08:44:56 a.m.

- Image #3 created 01/05/2016, 03:20:32 p.m.; accessed 01/27/2016, 08:44:57 a.m.

- Image #4 created 01/05/2016, 10:04:08 a.m.; accessed 01/08/2016, 11:25:24 p.m.

(D.C. Doc. 28, Ex. A.)

Both Images #2 and #3 were apparently accessed in quick temporal sequence, as they were accessed only a second apart. Nevertheless, Images #2 and #3 contain different victims and are therefore different images. Felde downloaded Image #4 more than an hour after downloading Image #3.

In sum, multiple separate transactions establish the commission of multiple offenses, as were charged. It is elementary that separate acts can be charged in an information as separate offenses. *See* Mont. Code Ann. § 46-11-404, -410; *State v. Sanderson*, 214 Mont. 437, 451, 692 P.2d 479, 487 (1985). The foregoing record facts refute Felde's contention that his possession of the four child pornography images constituted a single offense; he in fact downloaded and accessed the images on different occasions. No double jeopardy violation occurred here.

C. The State's prosecution of Felde for each of the four discrete child porn images did not violate his double jeopardy protections.

"The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal[; i]t protects against a second prosecution for the same offense after conviction[; a]nd it protects against multiple punishments for the same offense." *Brown v. Ohio*, 432 U.S. 161, 165, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977) (quotations and citations omitted). "In contrast to the double jeopardy protection against multiple trials, the final component of double jeopardy—protection against cumulative punishments—is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature." *Ohio v. Johnson*, 467 U.S. 493, 499, 104 S. Ct. 2536, 81 L. Ed. 2d 425 (1984). "Because the substantive power to prescribe crimes and determine punishments is vested with the legislature, . . . the question under the Double Jeopardy Clause whether punishments are 'multiple' is essentially one of legislative intent[.]" Id. at 499, 104 S. Ct. at 2541 (citations omitted).

As noted previously, Mont. Code Ann. §§ 45-5-625(1)(e), -625(5)(d)(ii), provide that knowingly possessing any visual or print medium in which a child is engaged in actual or simulated sexual conduct is an offense. A "visual medium" is defined as any physical media that allows such an image to be displayed. Physical media can be digital because the offense expressly includes the use of "electronic

communication," defined as "a sign, signal, writing, image, sound, data, or intelligence of any nature transmitted or created in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system." Mont. Code Ann. § 45-5-625(5)(a). Of course, "visual medium" in the physical sense certainly entails a photograph or videotape and any undeveloped film (negative). Mont. Code Ann. § 45-5-625(5)(d)(i).

However, because the Montana legislature chose to expressly define several media types, one of which requires additional steps and equipment before the images they contain can be viewed, it follows that the legislature intended discrete computer files to serve as the type of transmission at issue here, which are individually prosecutable. *Cf. United States v. Lamb*, 945 F. Supp. 441, 451 (N.D.N.Y. 1996) (construing the Federal Protection of Children Act and asserting the explicit reference in that Act to media of a type that requires additional steps and equipment before the images they contain can be viewed supports the proposition that Congress intended to sweep the type of transmission at issue here within the ambit of the statute).

Notably, this Court has upheld convictions under § 45-5-625(5)(d)(ii) where the "visual media" at issue were individual computer files with descriptions and titles indicative of child pornography files, even though those files had been deleted but nevertheless were forensically discovered on unallocated spaces on the

defendant's hard drive. *State v. Harrington*, 2017 MT 273, ¶ 3, 389 Mont. 236, 405 P.3d 1248 (holding definition of possession in § 45-2-101(59) was not unconstitutionally vague as applied to defendant in a § 625(5)(d)(ii) prosecution because he knowingly sought out multiple child pornography files to download; he knowingly controlled the files of child pornography on his laptop sufficiently to delete them).

Put another way, because the Montana statutes establish that media may be either hard-print or digital, but specify that the crime of possession can be qualified by particular modes of transmission (here, electronic communication), the legislature intended the term "media" to be broad enough to include the specific digitally displayed images possessed here by Felde. Single computer files, such as one formatted under electronic standards like .MPG., .MKV, and .AVI, are each single instances of a physical medium because they each allow an image to be displayed on a computer screen. *See, e.g., Harrington*, ¶ 7-8 (upholding convictions in a case involving 24 suspected child pornography images that led to with 24 counts of sexual abuse of children); *see also Berger* (reasoning that because a "visual depiction" is defined under the Arizona statute to include "each visual image that is contained in an undeveloped film, videotape or photograph or data stored in any form and that is capable of conversion into a visual image," the

statute makes the possession of each image of child pornography a separate offense).

It makes sense the Montana legislature would intend per-image prosecutions since child pornography possession amplifies the abuse each child victim suffers. *See generally* David P. Shouvlin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 Wake Forest L. Rev. 535, 545 (1981) ("[P]ornography poses an even greater threat to the child victim than does sexual abuse or prostitution[; b]ecause the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place."). Because Felde was properly convicted of four individual counts of possession of child pornography, the trial court did not impose multiple punishments for a single offense in violation of the Double Jeopardy Clause.

D. Felde's remaining arguments are meritless.

1. Felde's enhanced protections argument does not surmount clear legislative intent.

Felde wrongly calls for enhanced protections that exceed the protection afforded under the test set forth in *Blockburger v. United States*, 284 U.S. 299 (1932) (dealing with the issue of multiple violations of the same statutory provision). Legislative intent is dispositive here. *See State v. Savaria*, 284 Mont. 216, 945 P.2d 24 (1997) (discussing *State v. Crowder*, 248 Mont. 169, 810 P.2d

299 (1991) where the defendant was charged with two violations of "possession of dangerous drugs" based on the same transaction. "[L]ook[ing] to the second test set forth in *Blockburger*," this Court in *Crowder* upheld the conviction and stated that "in order to determine the 'allowable unit of prosecution' courts must look to the legislative intent since discretion is with the Legislature to impose punishments subject only to constitutional limitations.").

Here, Felde does not make even a proper *Blockburger* assertion. His "same-transaction" and "included offenses" arguments boil down to his assertion that since law enforcement raided his house and seized his computer on the same day, he could only have committed one undifferentiated criminal act. (*See* Opening Br. at 19.)

Felde's undifferentiated or unitary act assertion is patently incorrect in light of the supporting affidavit, Exhibit A, and the express wording of Mont. Code Ann. §§ 45-5-625(1)(e) and -625(5)(d) regarding "an" image or "any" image in "any visual or print medium." The image can be a photograph itself, or a computer image file that is specifically designed to display an image. Moreover, the language in the statute does not divide possession based on *when* the medium was obtained. So, if, as this Court has expressly declared, "possession of such photographs alone renders one in violation of § 45-5-625(1)(e)," *State v. Harrington*, 2017 MT 273, ¶ 16, 389 Mont. 236, 405 P.3d 1248, it follows that

possession of computer image files alone renders one in violation of § 45-5-625(1)(e). Lastly, § 45-5-625(1)(e) proscribes possession and not downloading or accessing.

The State under § 45-5-625(1)(e) was permitted to obtain a conviction against Felde for his possession of each computer image file, that is each "physical medium," regardless of whether they were downloaded at the same time and found stored on his computer at the same time. Moreover, downloading a pornographic digital file under § 45-5-625(1)(e) is not determinative for possession. This Court in *Harrington* said as much when it expressly approved the Ninth Circuit's reasoning that "in an electronic context, a person can possess or receive child pornography without downloading it if he or she seeks it out and exercises dominion and control over it." *Harrington*, 2017 MT 273, ¶ 17 (citing and relying on *United States v. Romm*, 455 F.3d 990, 1000 (9th Cir. 2006)).

Notwithstanding the foregoing, Felde's images were not possessed at the exact same time. Exhibit A shows they were accessed at discretely different times on one day and on a separate time on another day. Felde's incantation that his child porn downloading and file storage were a single criminal act does not magically transform a statute permitting per-image counts into a statute mandating counts per-computer only. Felde's enhanced protections argument cannot overcome clear legislative intent and plain statutory language. Moreover, since Felde makes no

claim against the sexual abuse of children statute, which is presumptively constitutional, his call for enhanced protection is bootless. *State v. Davison*, 2003 MT 64, ¶ 8, 314 Mont. 427, 67 P.3d 203 (a legislative enactment is presumed to be constitutional and will be upheld on review except when proven by the defendant to be unconstitutional beyond a reasonable doubt).

Contrary to Felde's contentions, the district court never declared his charges were exactly the same. (*See* Opening Br. at 16, Felde states "The district court declared Felde's charges were exactly the same.") Felde is mistaken; he has simply quoted the judge's *obiter dicta* prefacing the charges to which Felde would plead guilty. The judge was plainly using shorthand descriptions of the charges. (9/21/17 Tr. at 14-15; 14:9, "Do you understand the charge against you?") *See Giacomelli v. Scottsdale Ins.*, 2009 MT 418, 354 Mont. 15, 221 P.3d 666 (stating the trial court's suggestion that a party litigant had a claim against the board of horseracing was merely *obiter dicta* and, therefore, not an appropriate basis for an assignment of error) (quoting *Black's Law Dictionary*, (10th Ed. 2014) at 1240, defining "obiter dictum" as "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential").

Admittedly, the counts against Felde did derive from the same statutory provision, and were, as the district court expressly stated, "similar allegation[s]." Felde interprets the trial judge's dicta out of context; the judge was not announcing

an opinion or any part of an opinion about the charges. *See generally United States v. Kilmartin*, 944 F.3d 315, 332 (1st Cir. 2019) ("[J]udicial dicta often include imprecise shorthands."). Ultimately, nothing stated by the court in this record shows it contradicted its ruling that each charge is predicated on distinct distinguishing facts. (*See* D.C. Doc. 43 at 6-7.)

2. The federal law Felde cites is distinguishable, and he misrelies on non-Montana state law.

a. Felde errs in relying on federal law.

Felde's citation to federal law is inapposite. His cited federal cases involve two distinct child porn offenses for the same criminal transaction. *See United States v. Teague*, 722 F.3d 1187, 1190-91 (9th Cir. 2013) (two separate counts in the indictment here charged Teague with the offense of receipt based on the computer files and with the offense of possession based on both the computer files and the CD files; therefore multiplicitous and constitutionally impermissible); *United States v. Harvey*, 829 F.3d 586, 590 (8th Cir. 2016) (receipt and possession charges under two different statutes); *United States v. Benoit*, 713 F.3d 1, 15 (10th Cir. 2013) (absent a clear indication that Congress intended multiplicitous punishments for receipt and possession, both convictions could not stand). Here, Felde's convictions stem from charges under a single statute, Montana's sexual abuse of children statute that prohibits possession of distinct child porn images.

Felde's belief that the federal government treats multiple child porn images possession as a unitary act that cannot be separately punished is belied by the fact that the federal sentencing scheme provides for sentencing increases based on the number of images possessed. *See, e.g., United States v. Salcido,* 506 F.3d 729, 735 (9th Cir. 2007) (ruling a sentence enhancement under U.S. Sentencing Guidelines Manual § 2G2.2 was appropriate based on defendant's possession of more than 600 images); *see also United States v. Holt*, 510 F.3d 1007, 1011-12 (9th Cir. 2007) (holding application of vulnerable victim and sadistic or masochistic image adjustments was not impermissible double counting because the adjustments account for distinct wrongs).

b. Because this case involves possession of child pornographic images, the fact that non-Montana states charge differently for possession of illicit substances is neither here nor there.

Felde's argument that other states charge differently under drug possession statutes misses the mark by a long shot. His argument that illicit images should be treated no differently than illicit drugs ignores material differences between those types of contraband. The State knows of no technology that can transmit illicit drugs electronically in digital format. More importantly, Felde ignores those non-Montana jurisdictions with similar child pornography statutes that *do* permit per-image convictions as were permissibly obtained in the instant case. Alaska,

Arizona, Florida, Tennessee, and Utah treat each image possessed as a separate criminal offense. *See* Alaska Stat. § 11.61.127(c) (2020); Ariz. Rev. Stat. Ann. §§13-3551(11), 13-3553(A)(2) (2020); Fla. Stat. § 827.071(5) (2020); Utah Code Ann. § 76-5a-3(3) (2020). Tennessee provides that each image may be charged as a separate count. It also provides that if an individual possesses more than 50 images, it is classified as a Class C felony, but if the individual possesses more than 100 images, it is classified as a Class D felony. Tenn. Code Ann. § 39-17-1003(b), (d) (2020).

3. Felde's policy arguments are bootless.

Felde's remaining arguments rest on policy assertions. He repeatedly emphasizes the prosecution charged him with 100 counts later reduced to 49 counts. The quantity of counts, Felde apparently argues, proves the prosecutor in this case acted with too much discretion, thus proving Felde suffered prejudice for his alleged single criminal transaction. Felde expressly asserts that this Court should refuse to create a preference for prosecutors carving as many charges as they can out of a single act. (Opening Br. at 14.)

This case involves only four convictions based on four images. As the State argues, *supra*, the section of the multiple convictions statute at issue here relates to certain narrow types of cases in which the State cannot obtain convictions. Mont. Code Ann. § 46-11-410(2). Felde advances no colorable claim of prejudice

regarding charges that never became convictions. Emphasizing 96 or 45 previous counts simply points to matters not properly before this Court. *See, e.g., State v. Williams,* 2010 MT 58, ¶ 20, 355 Mont. 354, 228 P.3d 1127 (noting the State chose to charge Williams only for the first attack on Jane Doe even though information mentioned a second attempted attack on Jane Doe as she tried to leave the house. "This second attempted attack could have formed the basis for additional charges that might have altered our discussion of the matter regarding two separate transactions. We must take the case as it comes to us.").

Felde's position is simply an *argumentum in terrorem*: from fear of unrestricted prosecutorial discretion, it must follow that prosecutors need further restriction.[1] But the fact Felde could have been convicted on additional charges is neither here nor there, as this Court does not review issues based upon hypothetical injury. *See City of Billings v. Public Serv. Comm'n*, 193 Mont. 358, 366, 631 P.2d 1295, 1301 (1981) (Montana courts not empowered "to rule on issues which are speculative, conjectural and academic, which are unnecessary to resolution of an existing controversy or which merely seek legal advice on eventualities which may or may not arise in the future").

[1] Without agreeing with Felde's policy argument approach, the State is compelled to note the prosecutor in this case twice pared down the counts to the final four counts for which the State would agree Felde should plead guilty. Such paring down demonstrates judicious exercise of prosecutorial discretion. The prosecutor in this case should not, in effect, be impugned for doing the very thing Felde implies she should have done.

Moreover, and in any event, Felde's policy argument was rejected by this Court in *Allen*, 2016 MT 185, ¶ 13, *supra*. Just as Felde essentially argues here, Allen contended Mont. Code Ann. § 46-11-410 "could be used as an unreasonable weapon" because "if the matter is simply one of prosecutorial discretion or largesse, an overly zealous prosecutor could have levied an individual charge against Allen for every character typed into the text message." *Allen*, ¶ 13. This Court concluded that Allen raised only a policy concern. *Id*. "[I]t is not for the judiciary to undertake review of the State's charging decisions absent a statutory or constitutional violation." *Id*. Where, by its plain language, § 46-11-410 is not violated by the State's charging decisions, there is "no mechanism for courts to examine those decisions." *Id*.

Felde must therefore acknowledge there is already a governing restriction upon prosecutors "carving as many charges as they can out of a single act." This Court may not omit what has been inserted in legislation, nor insert what has been omitted. Mont. Code Ann. § 1-2-101 (2019) (statutory construction rule). The duty of this Court is simply to construe the law as it finds it. *Hammill v. Young*, 168 Mont. 81, 85, 540 P.2d 971, 974 (1975). The State's charging decisions in this case did not violate § 46-11-410; if, as Felde implies, § 46-11-410 does not go far enough to restrict prosecutors, then he should raise his concern with the legislature,

not here. *See Hammill*, 168 Mont. at 85, 540 P.2d at 974 (rejecting policy arguments that should be addressed to the legislature).

CONCLUSION

This Court should affirm Felde's convictions.

Respectfully submitted this 3rd day of August, 2020.

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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 4,993 words, excluding cover page, table of contents, table of authorities, signatures, certificate of service, certificate of compliance, and appendices.

/s/ C. Mark Fowler
C. MARK FOWLER

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0395

STATE OF MONTANA,

Plaintiff and Appellee,

v.

J CEE FELDE,

Defendant and Appellant.

APPENDIX

CERTIFICATE OF SERVICE

I, C. Mark Fowler, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 08-03-2020:

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