IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0420

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CHARLES MICHAEL BYRNE,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Third Judicial District Court,
Powell County, the Honorable Ray J. Dayton, Presiding

APPEARANCES:

CHAD WRIGHT
Appellate Defender
HALEY CONNELL JACKSON
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147
HCJackson@mt.gov
(406) 444-9505

ATTORNEYS FOR DEFENDANT
AND APPELLANT

TIMOTHY C. FOX
Montana Attorney General
TAMMY K PLUBELL
Interim Bureau Chief
Appellate Services Bureau
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

KATHRYN MCENERY
Powell County Attorney
409 Missouri Avenue
Suite 301
Deer Lodge, MT 59722

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Montana Code Annotated

Montana Rules of Appellate Procedure

STATEMENT OF THE ISSUES

1. Prosecutors are prohibited from eliciting witness vouching testimony and from personally vouching for an alleged victim's credibility. After agreeing to not question any witnesses on the alleged victim's credibility at trial, the State elicited testimony from four witnesses vouching for M.G.'s credibility. The State then highlighted that testimony during closing argument and told the jury that M.G. was reliable. Did the State undermine Mr. Byrne's right to a fair trial?

2. Alternatively, did the district court err when it ordered an unspecified amount of restitution that was not supported by affidavit or testimony?

STATEMENT OF THE CASE

In 2018, the State charged Charles Byrne with three counts of sexual intercourse without consent for conduct that allegedly occurred sometime between 2009 and 2011. (D.C. Docs. 6, 65.) The alleged victim was M.G., who was under the age of 12 at the time of the alleged offenses and 15 at the time of trial. (D.C. Docs. 6, 65; Trial Tr. at 374.) Mr. Byrne denied the allegations. (Trial Tr. at 710.) As the prosecutor would later emphasize to the jury, this case was entirely about whether the jury believed M.G. (Trial Tr. at 160, 785-802, 809, 824.)

Mr. Byrne filed a motion in limine to bar the State from eliciting lay or expert testimony vouching for M.G.'s credibility. (D.C. Doc. 27 at 2-3.) The State responded that it did not intend to do so, but later stated

that it "reserve[d] the right to proffer experts when proper foundation is laid." (D.C. Docs. 28 at 1, 58 at 8.) At a motions hearing, Mr. Byrne again reiterated his concern over the State eliciting testimony vouching for M.G.'s credibility. (9/4/18 Tr. at 13.) Mr. Byrne was particularly concerned about expert testimony. (9/4/18 Tr. at 13.) The State assured the court and Mr. Byrne that it would not ask any questions regarding whether M.G. was credible:

> [PROSECUTOR]: I don't believe there's going to be any request uh, by the State to ask whether sh . . ., um, the victim is, alleged victim, is believable or not. I think that's where the . . .
>
> THE COURT: Yeah.
>
> [PROSECUTOR]: concern is.

(9/4/18 Tr. at 15.) The court acknowledged there was a narrow exception to the rule that expert witnesses cannot testify to an alleged child victim's credibility when "a real super, high tuned uh, fine tuned uh, foundation" is laid. (9/4/18 Tr. at 16.)

> THE COURT: . . . But we don't - - we're not even going to see any effort of that as I understand it.
>
> [THE PROSECUTOR]: No, no your honor. The, the closest thing that I could possibly see would be a request uh, from the uh, the woman who conducted the expert or the uh, forensic interview, of what was the child's demeanor at the time of the

> interview. Um, but again that is not asking uh, whether you believed her. It was, what did you observe? Uh, and then jury will be allowed to make their own conclusions from that your honor.
>
> THE COURT: Alright, but in any event the State understands the uh, Defense's concerns and is in agreement?
>
> [PROSECUTOR]: Uh, yes, your honor.

(9/4/18 Tr. at 16.) At the final pretrial hearing, the court noted that "[e]verybody knows what they can testify to and what they can't" and that the State agreed there would be no credibility-boosting testimony. (9/11/18 Tr. at 20-21.)

During its opening argument at trial, the State emphasized that the one important issue for the jury to decide was whether M.G. was lying. (Trial Tr. at 160.) The State then proceeded to question four of its witnesses regarding M.G.'s credibility.

Jane Hammett, a nurse who conducted a forensic interview and medical exam of M.G., testified as an expert about her findings. (Trial Tr. at 576-627.) The State asked Ms. Hammett if she saw "signs of dishonesty or that [M.G.] had been coached." (Trial Tr. at 599.) Ms. Hammett responded, "No." (Trial Tr. at 599.)

Fredericka Grunhuvd, a therapist who worked with M.G. for several years before and after the alleged abuse and who was close with M.G.'s family, testified about her therapy sessions with M.G. (Trial Tr. at 526-32, 539.) The State asked Ms. Grunhuvd if M.G. "present[ed] signs of extreme dishonesty" and "manipulation." (Trial Tr. at 530.) Ms. Grunhuvd responded: "No." (Trial Tr. at 530.) In response to the State's questions, on cross-examination defense counsel tried "to clear" up Ms. Grunhuvd's testimony on M.G.'s credibility by asking if M.G. showed signs of untruthfulness. (Trial Tr. at 541.) Ms. Grunhuvd responded, "rarely," and "[v]ery minimal[ly]." (Trial Tr. at 541.) On redirect, the State referred to Ms. Grunhuvd's testimony about M.G.'s "rare untruthfulness" and asked if M.G. lied about "anything more extreme than . . . about turning in her homework." (Trial Tr. at 556-57.) Ms. Grunhuvd responded, "No." (Trial Tr. at 557.)

Gina Dalrymple, a therapist who worked with M.G. after the alleged abuse, also testified about her therapy sessions with M.G. (Trial Tr. at 630, 638.) Ms. Dalrymple testified that on one occasion she had a conversation with M.G. about the allegations against Mr. Byrne. (Trial Tr. at 662-63.) The State asked Ms. Dalrymple if she saw "any signs of

manipulation out of [M.G.]" or "any signs of dishonesty of [M.G.]." (Trial Tr. at 663-64.) Mr. Byrne objected, but the court overruled without explanation. (Trial Tr. at 664.) Ms. Dalrymple responded, "No." (Trial Tr. at 664.)

Finally, Wendy Dutton testified as a blind expert witness for the State. (Trial Tr. at 166.) Among other topics, the State questioned Ms. Dutton about malicious false reports of sexual abuse and whether they are "normal." (Trial Tr. at 206, 252.) Ms. Dutton testified malicious false reports are "rare." (Trial Tr. at 252.) The State further questioned Ms. Dutton on whether children ever misidentify their abuser. (Trial Tr. at 210.) Although she did not give exact statistics, Ms. Dutton testified it is "rare" and "doesn't happen very often." (Trial Tr. at 210.)

During closing argument, the State continued its theme to the jury that the case was about M.G.'s credibility. (Trial Tr. at 785-802, 809, 824.) The State informed the jury that whether M.G. was lying was "key to [they jury's] entire decision." (Trial Tr. at 789.) The State acknowledged the trial testimony "was not clean" and "not pretty" and that M.G.'s memory was "not great." (Trial Tr. at 821-22.) But the State promised the jury that M.G. was "a reliable witness." (Trial Tr. at 799.)

The State also repeatedly emphasized Ms. Dutton's likelihood testimony, telling the jury that "it is incredibly rare for a person to mistake the identity" of the perpetrator and that it "is an incredibly rare instance" that someone other than the accused committed the abuse. (Trial Tr. at 797, 822.)

The jury found Mr. Byrne guilty of all three charges. (Trial Tr. at 827.) The court ordered a psychosexual evaluation and presentencing investigative report ("PSI"). (Trial Tr. at 830.) [redacted] There was no affidavit of loss or any other documents supporting the restitution request attached to the PSI or submitted independently to the court.

At the sentencing hearing, the PSI author testified that he recommended Mr. Byrne pay restitution for M.G.'s ongoing counseling and mental health treatment. (5/17/19 Tr. at 30.) The PSI author

[1] The PSI is a confidential document that is not accessible to the public. Mont. Code Ann. § 46-18-113(1). Pursuant to Mont. R. App. P. 10(7), Mr. Byrne has redacted from the publicly filed version of this brief information cited solely from the PSI.

informed that Medicare was covering some of the costs and that Mr. Byrne should not be required to pay the amount covered by insurance. (5/17/19 Tr. at 30.) M.G.'s mom testified that she believed M.G. would need ongoing counseling. (5/17/19 Tr. at 43.) Nobody testified how much counseling M.G. received as a result of the offenses, how much counseling M.G. would need in the future as a result of the offenses, or how much money M.G.'s mom paid and would continue to pay for the counseling. (5/17/19 Tr.)

The court sentenced Mr. Byrne to 300 years at Montana State Prison with a 150-year parole restriction. (5/17/19 Tr. at 70, attached as App. A; D.C. Doc. 151, attached as App. B.) The court ordered that Mr. Byrne pay M.G.'s "prior and ongoing counseling and therapy costs resulting from the offenses" not covered by insurance, limited to $50,000. (5/17/19 Tr. at 72; D.C. Doc. 151 at 5.)

Mr. Byrne timely appealed.[2]

[2] The Notice of Appeal does not appear in the district court documents but can be found on the Montana Supreme Court's public docket page for Mr. Byrne's appeal.

STATEMENT OF THE FACTS

When M.G. was a young child, she lived with her brother and mother in Deer Lodge, Montana. (Trial Tr. at 279-282, 380.) M.G.'s father lived in California and was not involved in M.G.'s life. (Trial Tr. at 279, 381.) M.G. did not like her father, did not have a good relationship with her father, and had anger toward her father. (Trial Tr. at 280, 381, 445.) M.G.'s mom had a boyfriend named Calvin, whom M.G. also did not like. (Trial Tr. at 468, 477.)

Prior to starting kindergarten, M.G. was a "very angry" child. (Trial Tr. at 529, 540-42.) She was "hostile," "overly irritable," "really defiant," and "mood[y]." (Trial Tr. at 529-31, 540.) M.G. had a persistent pattern of angry outbursts and temper tantrums and was particularly hostile toward her mom. (Trial Tr. at 529-30, 540-44.) When M.G. began kindergarten, she was referred to Alta Care, a school-based mental health treatment program. (Trial Tr. at 520, 538.) After an initial assessment, M.G. was diagnosed with oppositional defiance disorder, a "serious emotional disturbance." (Trial Tr. at 525, 528.) M.G.'s therapist believed M.G.'s issues were due to M.G. not having a father and with her

mom struggling with boundaries. (Trial Tr. at 556.) M.G. began daily counseling. (Trial Tr. at 543.)

While living in Deer Lodge, M.G.'s family became friends with Mr. Byrne, his wife, Rachel, and their two children. (Trial Tr. at 290-93.) The families "g[o]t along greatly," spent many weekends and holidays together, and were "close." (Trial Tr. at 293-94.) Mr. Byrne was a good friend to M.G.'s mom and helped her when needed. (Trial Tr. at 299.) Mr. Byrne and Rachel occasionally watched M.G. and her brother when M.G.'s mom had to work. (Trial Tr. at 294-99, 688.) M.G.'s mom trusted Mr. Byrne and never saw Mr. Byrne behave inappropriately toward M.G. (Trial Tr. at 298-99, 310-11.)

M.G. testified that Mr. Byrne sexually abused her on three different occasions when she lived in Deer Lodge. (Trial Tr. at 391-92.) M.G. initially testified that she did not know what grade she was in when these incidents occurred, but later said she thinks she was in first or second grade. (Trial Tr. at 391, 449.) M.G. said that one of the incidents occurred at Mr. Byrne's house. (Trial Tr. at 392.) M.G. initially testified that she did not remember if anyone other than Rachel was at the house when the incident occurred, but later testified that her brother, her mom,

and the Byrnes' two kids were also there while she was abused. (Trial Tr. at 393-94, 454.) M.G. initially testified that she did not know what time of the year this incident occurred, but later testified it occurred in the fall. (Trial Tr. at 414, 430, 455.) M.G. testified that after Rachel asked M.G. to get something out of a bedroom, Mr. Byrne followed her into the room and put his fingers inside her vagina. (Trial Tr. at 393-98.) Rachel remained in the living room, just down the hall from the bedroom. (Trial Tr. at 452.) M.G. did not remember what she was wearing or if Mr. Byrne removed her clothes or his clothes. (Trial Tr. at 396.) M.G. thinks she screamed during the incident. (Trial Tr. at 453-54, 473-74.) M.G. testified the bedroom door was open the entire time. (Trial Tr. at 452, 472.) After the incident, M.G. went with the Byrne family to a shooting range. (Trial Tr. at 454.)

Rachel did not remember Mr. Byrne being along with M.G., (Trial Tr. at 698), and did not testify to ever hearing a scream while watching M.G. (Trial Tr. at 680-702.) No other person who M.G. said was at the house when this incident allegedly occurred testified to this occurrence or to noticing anything unusual with M.G. on this day. (Trial Tr. at 276-359.)

M.G. testified that a second incident occurred at her house during a family gathering of at least 10 people. (Trial Tr. at 403-04.) M.G. initially testified it was a holiday, but later acknowledged she told the forensic interviewer she did not know if it was a holiday. (Trial Tr. at 403, 457-58.) M.G. conceded during her testimony that she did not know when the incident occurred but that her mom told her it was Thanksgiving. (Trial Tr. at 458-59.) M.G.'s mom denied having a conversation with M.G. about when this occurred. (Trial Tr. at 343.) M.G. did not remember if she was in school at the time. (Trial Tr. at 403.) M.G. testified that everyone was hanging out when her mom told her to get something out of her upstairs bedroom. (Trial Tr. at 405.) M.G. said Mr. Byrne picked her up, carried her up the stairs, put her on a bed, and penetrated her with his fingers and penis. (Trial Tr. at 405-06, 410.) M.G. did not remember if Mr. Byrne took off her shirt or his clothes. (Trial Tr. at 406-08.) M.G. did not remember if the bedroom door was closed. (Trial Tr. at 408-09.) M.G. did not remember how long the incident lasted. (Trial Tr. at 412.) After it happened, M.G. testified that she went downstairs and acted like everything was normal. (Trial Tr. at 407.)

M.G.'s mom recalled a Thanksgiving at which she asked M.G. to clean her room and M.G. being mad at her for doing so. (Trial Tr. at 307-08.) While M.G.'s mom remembered Mr. Byrne going upstairs after M.G., she "didn't think anything about" any of it and M.G. never said anything to her when she came back downstairs. (Trial Tr. at 310, 339.) M.G.'s mom recalled M.G. being quiet. (Trial Tr. at 339.) M.G.'s cousin remembered seeing M.G. upset and crying when she returned downstairs, but he believed it was due to M.G. not wanting to clean her room. (Trial Tr. at 565.) Rachel and M.G.'s mom's boyfriend recalled Mr. Byrne going upstairs with M.G. but did not testify to observing anything unusual. (Trial Tr. at 669-71, 697-98.)

M.G. testified to a third incident that occurred at her house. (Trial Tr. at 414.) M.G. testified she did not remember what time of day or year it occurred. (Trial Tr. at 414-15, 462.) M.G. testified she had "no idea" how old she was when the incident occurred. (Trial Tr. at 417, 448.) M.G. testified her family, her mom's boyfriend, and the Byrne family were all at her house at the time. (Trial Tr. at 415.) M.G. testified that she was changing out of her pajamas in her mom's bedroom when Mr. Byrne came into the room, pulled off her underwear, and put his penis inside her

vagina. (Trial Tr. at 415-17.) After the incident, M.G. went downstairs and acted normal. (Trial Tr. at 419.) No other person who was at the house when this incident allegedly occurred testified to this occurrence or to noticing anything unusual with M.G. on this day. (Trial Tr. at 276-360, 665-678, 680-702.)

M.G. did not allege any other abuse. M.G. said she was certain Mr. Byrne abused her these three times and denied that her father or mother's boyfriend ever physically hurt or inappropriately touched her. (Trial Tr. at 382, 391-92, 404, 420, 477.) M.G. did not remember the order in which the three incidents occurred, nor did she remember how much time separated them. (Trial Tr. at 392, 400, 402.) M.G. testified that she did not know if she told her counselors about the abuse, but the counselor M.G. was seeing at the time of the alleged abuse testified that M.G. never disclosed any abuse. (Trial Tr. at 441, 532, 537, 558.) The counselor also testified that during the time in which M.G. alleged she was being abused M.G. was making progress at counseling and the counselor did not see any "red flags." (Trial Tr. at 531, 548-57.)

M.G.'s mom testified that at some point in time when M.G. was between six and eight years old, M.G. began to throw fits if she had to go

to the Byrnes' house. (Trial Tr. at 304, 351.) M.G.'s mom testified, however, that it was common for M.G. to throw fits over places she had to go and people she had to see and that it was not limited to when she went to the Byrnes' house. (Trial Tr. at 304-05, 351.)

After M.G. finished second grade, M.G.'s family moved to Drummond. (Trial Tr. at 382.) M.G.'s mom and Rachel testified that shortly after the move, they had a conversation with M.G. about inappropriate touching and asked M.G. if Mr. Byrne ever inappropriately touched her. (Trial Tr. at 311-15, 698.) M.G. nodded but did not provide any information. (Trial Tr. at 311.) Nothing was disclosed to law enforcement. (Trial Tr. at 313-14.) M.G. testified that she did not remember telling her mom and Rachel that Mr. Byrne inappropriately touched her, but that her mom told her it happened. (Trial Tr. at 467.)

M.G. continued receiving therapy through Alta Care when she moved to Drummond. (Trial Tr. at 638.) M.G.'s therapist in Drummond, Gina Dalrymple, said she believed M.G. had experienced a trauma in the past. (Trial Tr. at 644.) M.G. disclosed something to Ms. Dalrymple about sexual abuse, but she never provided any details. (Trial Tr. at 648, 650.)

When M.G. was in eighth grade, her mom moved to Kalispell and M.G. moved in with a family friend, Dee, in Drummond. (Trial Tr. at 259, 471.) Dee noticed that M.G. occasionally wet the bed. (Trial Tr. at 260-61.) It happened "quite often" right after M.G. moved in with Dee, which Dee thought was due to M.G. transitioning to a new house and not being with her family. (Trial Tr. at 261.) Ms. Dutton testified that bed wetting can be a symptom of sexual abuse but acknowledged it does not mean one was sexually abused and can be caused by other things. (Trial Tr. at 202, 232, 245-46.) M.G.'s brother also wet the bed. (Trial Tr. at 352, 358.) There was no allegation that M.G.'s brother was abused and no evidence of any abuse. (Trial Tr. at 357.)

When M.G. was living with Dee, M.G. told Dee that her mom was very protective of her because her mom was abused when she was little. (Trial Tr. at 263.) M.G. then told Dee that she had been sexually abused as well. (Trial Tr. at 263-66.) M.G. testified that she did not disclose the abuse earlier because she did not want to hurt Rachel and because she was not ready to talk about it. (Trial Tr. at 435.) Dee notified M.G.'s mom, who contacted law enforcement. (Trial Tr. at 266, 317.) M.G. had a forensic interview but declined a physical examination. (Trial Tr. at

317-18, 600-01, 608.) About a year later, M.G. agreed to a physical examination. (Trial Tr. at 608.) The examination revealed no significant findings. (Trial Tr. at 601.) Law enforcement interviewed Mr. Byrne, who emphatically denied the allegations. (Trial Tr. at 708-10.)

At the time of trial, M.G. was a sophomore in high school. (Trial Tr. at 287.) M.G. did not remember what Mr. Byrne looked like and had trouble recognizing him in the courtroom. (Trial Tr. at 388.)

STANDARDS OF REVIEW

Under the plain error doctrine, this Court may review prosecutorial misconduct even where no contemporaneous objections were made. *State v. Hayden*, 2008 MT 274, ¶ 30, 345 Mont. 252, 190 P.3d 1091; *State v. Lawrence*, 2016 MT 346, ¶ 6, 386 Mont. 86, 385 P.3d 968. This Court reviews claims under the plain error doctrine when failing to review the error may result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the proceedings, or compromise the integrity of the judicial process. *Hayden*, ¶ 17. "Once the doctrine is invoked, this Court's review is grounded in [its] inherent duty to interpret the constitution and to protect individual rights set forth in the constitution." *Lawrence*, ¶ 6 (quotation omitted).

The Court reviews whether a district court had statutory authority to impose a sentence de novo. *State v. Dodge*, 2017 MT 318, ¶ 6, 390 Mont. 69, 408 P.3d 510. Restitution awards present mixed questions of law and fact, which the Court also reviews de novo. *Dodge*, ¶ 6.

SUMMARY OF THE ARGUMENT

In a "he said-she said" case where the key issue for the jury to decide was whether M.G. was telling the truth, the prosecutor improperly vouched for M.G.'s credibility throughout trial. This Court has repeatedly admonished prosecutors not to elicit testimony vouching for an alleged victim's credibility and not to assert personal knowledge or otherwise use their professional office to influence jurors. Doing so constitutes prosecutorial misconduct and deprives the defendant of a fair and impartial trial where the *jury*, not the State's witnesses and the prosecutor, decide who is credible and whether the defendant is guilty.

Here, despite assuring Mr. Byrne and the court pretrial that the State would not elicit testimony on M.G.'s credibility, the prosecutor did just that. He questioned four witnesses—including two experts—on M.G.'s credibility, emphasized the resulting credibility testimony during closing argument, and personally vouched for M.G.'s credibility moments

before the jury was tasked with deciding whether M.G. was telling the truth. It was for the jury, *not* the State's witnesses and the prosecutor, to decide whether M.G. was telling the truth. The testimony and comments by the prosecutor invaded the province of the jury and undermined Mr. Byrne's constitutional right to a fair trial. Mr. Byrne is entitled to a new trial under plain error review.

Alternatively, the Court must remand for a new restitution hearing. The district court imposed an unspecified restitution amount that was not supported by affidavit or testimony. The restitution is illegal and must be reversed.

ARGUMENT

I. The prosecutor's misconduct of repeatedly vouching for M.G.'s credibility throughout trial undermined Mr. Byrne's right to a fair trial and warrants plain error review.

Defendants have a fundamental due process right to a fair trial by a jury. *Hayden*, ¶ 27. "The prosecutor is the representative of the State at trial and must be held to a standard commensurate with his or her position." *Lawrence*, ¶ 20. This means "the prosecutor may not seek victory at the expense of the defendant's constitutional rights" and must "respect the defendant's right to a fair and impartial trial." *State ex rel.*

Fletcher v. District Court, 260 Mont. 410, 415, 859 P.2d 992, 995 (1993). When a prosecutor's misconduct deprived the defendant of a fair and impartial trial, reversal with remand for a new trial is the appropriate remedy. *Hayden*, ¶ 27 (citing *Clausell v. State*, 2005 MT 33, ¶ 11, 326 Mont. 63, 106 P.3d 1175); *State v. Sanchez*, 2008 MT 27, ¶ 51, 341 Mont. 240, 177 P.3d 444 (citing *State v. Stringer*, 271 Mont. 367, 381, 897 P.2d 1063, 1072 (1995)). Even in the absence of an objection at trial, this Court has an "inherent duty" to protect against such prosecutorial misconduct through plain error review. *Lawrence*, ¶ 22; *Hayden*, ¶ 33.

A. The prosecutor improperly elicited testimony from four witnesses vouching for M.G.'s credibility and personally vouched for M.G.'s credibility during closing argument.

This Court has consistently held that "the determination of the credibility of witnesses and the weight to be given their testimony is solely within the province of the jury." *Hayden*, ¶ 26 (quotation omitted). A witness may not comment on the credibility of another witness's testimony, nor can a prosecutor elicit such testimony. *Hayden*, ¶¶ 26, 31. Doing so is misconduct and reversible error. *Hayden*, ¶ 31.

Similarly, it is "highly improper" for a prosecutor to comment directly on a witness's credibility. *State v. Aker*, 2013 MT 253, ¶ 26, 371

Mont. 491, 310 P.3d 506; *Hayden*, ¶ 28. "[T]he Court has been unequivocal in its admonitions to prosecutors to stop improper comments and [it has] made it clear that [it] will reverse a case where counsel invades the province of the jury." *Hayden*, ¶ 28 (quotation omitted). As observed by the United States Supreme Court, "a prosecutor's improper suggestions and assertions to a jury 'are apt to carry much weight against the accused when they should properly carry none.'" *Lawrence*, ¶ 20 (quoting *Berger v. U.S.*, 295 U.S. 78, 88 (1935)). The prosecutor's comment may "unfairly add[] the probative force of his own personal, professional, and official influence to the testimony of the witnesses." *Hayden*, ¶ 33. The jury "may simply adopt the prosecutor's views instead of exercising their own independent judgment as to the conclusions to be drawn from the testimony." *Hayden*, ¶ 28 (quotation omitted).

In *Hayden*, the Court reversed and remanded for a new trial when the prosecutor improperly elicited witness vouching testimony and personally vouched for witnesses' credibility during closing argument. *Hayden*, ¶ 34. During direct examination of a police officer, the prosecutor elicited opinion testimony that he believed the victim and another key fact witness were telling the truth in their initial statements.

Hayden, ¶¶ 12, 31. During closing argument, the prosecutor told the jury it could "rely on" the officer's testimony and that both the officer and the victim were "believable." *Hayden*, ¶¶ 14, 32.

The Court held the prosecutor's conduct undermined the fairness of the trial. *Hayden*, ¶ 34. The Court determined the questioning of the police officer on witnesses' credibility was "unacceptable" and "invade[d] the province of the jury." *Hayden*, ¶ 31. The Court likewise concluded that the prosecutor "impinged the jury's role" when he gave his own opinion during closing argument that the witnesses were "believable." *Hayden*, ¶ 32. "It is for the jury, not an attorney trying a case, to determine which witnesses are believable and whose testimony is reliable." *Hayden*, ¶ 32. The Court concluded the prosecutor's conduct "created a clear danger that the jurors adopted the prosecutor's views instead of exercising their own independent judgment" and reversed under plain error review. *Hayden*, ¶ 33.

In addition to eliciting lay witness vouching testimony and personally vouching during closing argument, prosecutors are also prohibited from eliciting expert testimony on the credibility of the alleged victim. *State v. Grimshaw,* 2020 MT 201, ¶ 21, __ Mont. __, 469 P.3d 702.

Improper expert vouching includes testimony on false accusations that imply the alleged victim is telling the truth. In *Grimshaw*, the prosecutor elicited testimony from its blind expert witness on rape myths and the behaviors of victims during a sexual intercourse without consent trial. *Grimshaw*, ¶ 22. The prosecutor then asked the expert about false reporting statistics, and the expert testified that between two and eight percent of sexual assault reports are false. *Grimshaw*, ¶ 22. The Court held that such testimony "clearly commented on, and improperly bolstered, the credibility" of the alleged victim's testimony. *Grimshaw*, ¶ 24. Such testimony implied there was a 92-98% chance the alleged victim was telling the truth about the sexual assault. *Grimshaw*, ¶ 32. Because the case was a "he said-she said" case that turned solely on the credibility of the parties and "which party the jury believes," the Court concluded the improper vouching "tipped the scales to an unfair trial." *Grimshaw*, ¶¶ 32-33. The Court reversed Mr. Grimshaw's conviction and remanded for a new trial. *Grimshaw*, ¶ 35; *see also State v. Brodniak*, 221 Mont. 212, 222, 718 P.2d 322, 329 (1986) (holding an expert witness's testimony in a sexual assault case on "the statistical percentage of false

accusations was improper comment on the credibility" of the alleged victim).

This Court has applied a "narrow exception" to the general rule that an expert witness may not comment on the credibility of an alleged victim's testimony when the alleged victim is a "very young" child at the time of trial, "exhibits contradictory behavior," and when the expert is "properly qualified." *State v. Rogers*, 2011 MT 105, ¶ 26, 360 Mont. 334, 253 P.3d 889; *State v. Scheffelman*, 250 Mont. 334, 342, 820 P.2d 1293, 1298 (1991); *State v. Hensley*, 250 Mont. 478, 481-82, 821 P.2d 1029, 1031-32 (1991) (holding that exception does not apply when the accuser was 16 years old at trial even though the abuse allegedly occurred when she was seven). This is presumably the exception requiring the "real super, high tuned uh, fine tuned uh, foundation" the court referred to pretrial that the State insisted would not apply. (9/4/18 Tr. at 16.) The State never argued below that any of the witnesses' testimony would be admissible under this exception, nor could it, as M.G. was not a "very young" child at the time of trial—she was 15 years old—and none of the witnesses were deemed "properly qualified" to give an opinion on M.G.'s credibility.

Improper expert vouching testimony resembles expert evidence on polygraph testing, which this Court recently reaffirmed is inadmissible. *State v. Walker*, 2018 MT 312, 394 Mont. 1, 433 P.3d 202. In *Walker*, the Court rejected the defendant's argument that testimony about polygraph results is admissible expert evidence. *Walker*, ¶ 24. The Court determined such testimony "improperly comments on a witness's credibility and invades the province of the jury." *Walker*, ¶ 22. It "deprive[s] the defendant of the common sense and collective judgment of his peers, derived after weighing facts and considering the credibility of witnesses, which has been the hallmark of the jury tradition." *Walker*, ¶ 19.

Mr. Byrne's trial was littered with inadmissible vouching testimony and comments. After assuring the court and Mr. Byrne before trial that he would not elicit any testimony on witness credibility, the prosecutor did just that. The prosecutor asked Ms. Grunhuvd whether M.G. showed "signs of extreme dishonesty" and "manipulation," to which Ms. Grunhuvd responded, "No." (Trial Tr. at 530.) During redirect examination, the prosecutor referred to Ms. Grunhuvd's testimony about "rare untruthfulness" and asked whether M.G. ever lied about anything

more than not turning in her homework. (Trial Tr. at 556-57.) Ms. Grunhuvd replied, "No." (Trial Tr. at 557.) During Ms. Dalrymple's testimony, the prosecutor asked whether she saw "signs of manipulation out of [M.G.]" or "any signs of dishonesty of [M.G.]," to which Ms. Dalrymple responded, "No." (Trial Tr. at 663-64.) When Ms. Hammet testified, the prosecutor asked whether she saw "signs of dishonesty or that [M.G.] had been coached." (Trial Tr. at 599.) Ms. Hammet responded: "No." (Trial Tr. at 599.) Like *Hayden*, where the prosecutor's questioning of one witness on credibility was "unacceptable," the prosecutor's questioning of these three witnesses on M.G.'s credibility was "unacceptable" and "invade[d] the province of the jury." *Hayden*, ¶ 31.

In addition, the State elicited expert testimony from Ms. Dutton that "improperly bolstered" M.G.'s credibility with scientific probability evidence. *See Grimshaw*, ¶ 24. The State asked Ms. Dutton whether malicious false reports of sexual abuse are "normal," to which Ms. Dutton responded that they are "rare." (Trial Tr. at 252.) The State further questioned Ms. Dutton on whether children ever misidentify their abuser. (Trial Tr. at 210.) Ms. Dutton testified it is "rare." (Trial Tr. at

210.) When pressed by the State, "How rare is this?" Ms. Dutton testified, "It doesn't happen very often." (Trial Tr. at 210.)

Like the statistical evidence in *Grimshaw* and *Brodniak*, and the polygraph evidence in *Walker*, the expert's testimony that malicious false reports are "rare," and misidentifications of abusers are "rare," "clearly commented on, and improperly bolstered, the credibility" of M.G. *Grimshaw*, ¶ 24; *see Brodniak*, 221 Mont. at 222, 718 P.2d at 329; *Walker*, ¶ 22. Just as the expert's testimony in *Grimshaw* that between two and eight percent of sexual assault reports are false implied there was a 92-98% chance the alleged victim was telling the truth and the defendant was guilty, Ms. Dutton's testimony that false reports are "rare" implied it would be "rare" that M.G. was lying about Mr. Byrne abusing her, and it would thus be "rare" that Mr. Byrne was not guilty. *See Grimshaw*, ¶ 32. It makes no meaningful difference whether she couched her opinion in terms of percentage points or probabilistic descriptors. The functional message remained that scientifically it was unlikely that Mr. Byrne was not guilty. In a criminal trial, the "purpose and duty" of the jury is to "decide if the State has proven the defendant's guilt beyond a reasonable doubt, based on the particular facts presented." *State v. Ritesman*, 2018

MT 55, ¶ 27, 390 Mont. 399, 414 P.3d 261 (quotation omitted). Ms. Dutton's testimony provoked the jury to decide the question of M.G.'s credibility and Mr. Byrne's guilt on Ms. Dutton's belief that it is scientifically rare that a person falsely accuses one of sexual assault, not on the particular facts presented. "Such credibility-boosting expert testimony is improper." *Grimshaw*, ¶ 25.

Finally, not only did the prosecutor elicit improper vouching testimony from four witnesses, but he also personally commented on M.G.'s credibility during closing argument. Right after emphasizing to the jury that M.G.'s credibility was "key to [the jury's] entire decision," the prosecutor informed the jury that M.G. was "a reliable witness." (Trial Tr. at 789, 799.) Like the prosecutor in *Hayden*, who improperly told the jurors during closing argument that the witnesses were "believable," the prosecutor "impinged the jury's role" when he gave his own opinion during closing argument that M.G. was "reliable." *Hayden*, ¶ 32.

Moreover, during closing argument the prosecutor repeatedly emphasized Ms. Dutton's testimony, telling the jury that "it is incredibly rare for a person to mistake the identity" of the perpetrator and that it

"is an incredibly rare instance" that someone other than the accused committed the abuse. (Trial Tr. at 797, 822.) Just like the *Grimshaw* prosecutor's improper emphasis of testimony implying there was a strong statistical chance the alleged victim was telling the truth, the prosecutor's use of Ms. Dutton's testimony to argue it would be "incredibly rare" that M.G. was not telling the truth and thus "incredibly rare" that Mr. Byrne was not guilty was highly improper. *Grimshaw*, ¶¶ 16, 33. It was for the jury, not the prosecutor or Ms. Dutton, to determine whether M.G.'s testimony was reliable and whether Mr. Byrne was guilty. *Hayden*, ¶ 32.

The prosecutor's conduct of eliciting testimony from four witnesses vouching for M.G.'s credibility, emphasizing such testimony during closing argument, and personally vouching for M.G.'s credibility "invade[d] the province of the jury" and was "highly improper." *Hayden*, ¶ 31; *Aker*, ¶ 26.

B. The prosecutor's misconduct deprived Mr. Byrne of a fair trial and warrants plain error review.

"A prosecutor's misconduct may be grounds for reversing a conviction and granting a new trial if the conduct deprives the defendant of a fair and impartial trial." *Hayden*, ¶ 27; *see also Lawrence*,

¶ 13. Defense counsel's failure to object to prosecutorial misconduct does not relieve a prosecutor of the prosecutor's own duty to refrain from improper conduct. *Lawrence*, ¶ 17. Even in the absence of objection, it is this Court's "inherent duty" to protect against prosecutorial misconduct through plain error review. *Lawrence*, ¶ 22 (reversing under plain error review when the prosecutor told the jury during closing argument that the presumption of innocence no longer existed); *State v. French*, 2018 MT 289, ¶¶ 21-22, 393 Mont. 364, 431 P.3d 332 (reversing under plain error review when the prosecutor told the jury during closing argument that the defendant had been found guilty at a prior trial); *Hayden*, ¶ 32 (reversing under plain error review when the prosecutor told the jury during closing argument that certain witnesses were believable and vouching for the efficacy of a police search). The purpose of the plain error doctrine is to correct an error that affects the "fairness, integrity, and public reputation of judicial proceedings." *Lawrence*, ¶ 9 (quotation omitted). Plain error review is appropriate when failing to review the misconduct would leave unsettled the fundamental fairness of the trial and compromise the integrity of the judicial process. *Lawrence*, ¶¶ 9, 11-12; *Hayden*, ¶¶ 17, 30.

The prosecutor's misconduct here warrants plain error review and reversal. Like *Grimshaw*, this was a "he said-she said" case that turned solely on the credibility of the parties and "which party the jury believe[d]." *Grimshaw*, ¶¶ 32-33. The prosecutor made this abundantly clear when he emphasized in both his opening and closing arguments that "the one important" issue for the jury to decide was whether M.G. was lying; that whether M.G. was lying was "key to [the jury's] entire decision." (Trial Tr. at 160, 789.)

M.G. said Mr. Byrne abused her. (Trial Tr. at 391-92.) Mr. Byrne consistently denied doing so. (Trial Tr. at 710.) M.G.'s trial testimony that Mr. Byrne committed sexual intercourse without consent while multiple people were right nearby could have led the jury to question her credibility. M.G. testified the abuse occurred three times while up to 10 additional people were in the same house. (Trial Tr. at 403-10, 415, 454.) M.G. testified that on one of the occasions the door was open the entire time and she thinks she screamed. (Trial Tr. at 452-54, 472-74.) There was no physical evidence. (Trial Tr. at 601.) As the prosecutor admitted during closing argument, the trial testimony "was not clean" and "not pretty." (Trial Tr. at 821.) As the prosecutor also conceded, M.G.'s

memory was "not great." (Trial Tr. at 822.) Fully aware of the case's shortcomings, the prosecutor decided to improperly vouch for M.G.'s credibility to prove the State's case. The prosecutor elicited testimony from four witnesses—including two experts—vouching to the jury that M.G. was credible. The prosecutor exaggerated this testimony during closing argument, telling the jury twice that it would be "*incredibly* rare" that someone other than Mr. Byrne abused M.G. (Trial Tr. at 797, 822 (emphasis added).) Then, moments before the jury would decide whether M.G. was telling the truth, the prosecutor personally vouched for M.G.'s credibility, promising the jury that M.G. was "a reliable witness." (Trial Tr. at 799.)

This was not a case where there was one isolated, improper vouching statement by one witness or one improper vouching comment during closing argument. *See, e.g.*, *State v. McDonald*, 2013 MT 97, ¶¶ 12, 17, 369 Mont. 483, 299 P.3d 799 (refusing to apply plain error review when prosecutor stated during closing argument that witnesses were "completely believable" and "telling [the jury] the truth" by distinguishing from the "multiple errors" in *Hayden*). Instead, this was a case where improper vouching permeated the entire trial. This was a

case where the State convinced the jury M.G. was telling the truth and Mr. Byrne was guilty by improper vouching. When there are "multiple errors committed by the prosecutor," the misconduct leaves unsettled the question of the fundamental fairness of the proceedings. *Aker*, ¶ 28 (citing *Hayden*, ¶¶ 29-33).

Trial counsel's failure to object to all but one of the prosecutor's improper questions and failure to object to the prosecutor's comments during closing argument only amplified the effect of the improper vouching. Without objection from defense counsel, the jury likely deliberated under the misconception that it was acceptable for witnesses and the prosecutor to opine on M.G.'s credibility and that those opinions should be weighed in determining Mr. Byrne's guilt. The jury could well have concluded that because four witnesses—including two experts—and the prosecutor believed M.G. was telling the truth and Mr. Byrne was guilty, the jury too should believe M.G. and find Mr. Byrne guilty. *See Lawrence*, ¶ 18 ("When the prosecutor told the jury the presumption of innocence no longer existed and his lawyer raised no objection or argument in opposition to that assertion, the jury could well have concluded that the prosecutor was correct.").

A prosecutor "may not seek victory at the expense of the defendant's constitutional rights" and must "respect the defendant's right to a fair and impartial trial." *Fletcher*, 260 Mont. at 415, 859 P.2d at 995. Mr. Byrne had a due process right to a fair trial at which *the jury*, not the State's witnesses and prosecutor, decided whether M.G. was credible and whether Mr. Byrne was guilty. *See Hayden*, ¶ 32. The prosecutor violated this right when he repeatedly elicited testimony vouching for M.G. and then personally vouched for M.G.'s credibility right before the jury was sent to deliberate. As in *Hayden*, the prosecutor "invaded the role of the jury" and "'created a clear danger that the jurors adopted the prosecutor's views instead of exercising their own independent judgment.'" *Hayden*, ¶¶ 28, 33 (quoting *Stringer*, 271 Mont. at 381, 897 P.2d at 1071-72). The prosecutor's conduct "unfairly added the probative force of [the prosecutor's] own personal, professional, and official influence to the testimony of the witnesses." *Hayden*, ¶ 33. This "tipped the scales to an unfair trial." *See Grimshaw*, ¶¶ 32-33.

A fair trial results in a "verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). There can be no confidence in a verdict reached only after multiple witnesses and the prosecutor improperly

vouched for the alleged victim's credibility. The prosecutor's conduct leaves unsettled the fundamental fairness of Mr. Byrne's trial. Reversal and remand for a new trial is required. *Hayden*, ¶ 34.

II. Alternatively, the unspecified restitution order that was not supported by affidavit or testimony is illegal.

If a person is found guilty of an offense and the sentencing judge finds that a victim sustained a pecuniary loss, the sentencing judge shall require payment of restitution. Mont. Code Ann. § 46-18-201(5). "Although restitution is mandatory, the sentencing court must comply with detailed procedures and qualifications before it is authorized to impose a sentence of restitution." *Dodge*, ¶ 12 (quotation omitted). One of these procedures is outlined in Mont. Code Ann. § 46-18-242, which requires a victim seeking restitution to submit evidence specifically describing his or her pecuniary loss under oath in an affidavit or by testifying at sentencing. This requirement "is designed to ensure that restitution awards comply with basic principles of due process and that awards are reliable." *Dodge*, ¶ 13. Failure to comply with Mont. Code Ann. § 46-18-242 renders the restitution order illegal. *State v. Pritchett*, 2000 MT 261, ¶ 13, 302 Mont. 1, 11 P.3d 539.

In addition to requiring an affidavit or testimony on loss, a district court imposing restitution "must set a specific amount of restitution." *State v. Dietsch*, 2013 MT 245, ¶ 24, 371 Mont. 460, 308 P.3d 111 (citing Mont. Code Ann. § 46-18-244(1)). "This means that the amount of restitution must be stated as a specific amount of money." *State v. Guill*, 2011 MT 32, ¶ 52, 359 Mont. 225, 248 P.3d 826 (quotation omitted). In *Guill*, the district court ordered the defendant to pay restitution for the cost of mental health treatment for the victim but did not impose a specific amount. *Guill*, ¶ 52. Upon State concession, the Court held the open-ended restitution award violated Mont. Code Ann. § 46-18-244(1) and was, therefore, illegal. *Guill*, ¶ 53. The Court reversed the restitution order and remanded for further proceedings. *Guill*, ¶ 53; *see also State v. Jay*, 2013 MT 79, ¶¶ 46-47, 369 Mont. 332, 298 P.3d 396 (upon State concession, the Court reversed an open-ended restitution award and remanded for entry of an amended judgment).

The court's restitution order here is illegal in both regards. M.G.'s mom never provided an affidavit of loss or testified to the amount of loss sustained as a result of Mr. Byrne's offenses. While M.G.'s mom testified that she believed M.G. would need future counseling, there was no

testimony regarding how much counseling M.G. received in the past, how much counseling M.G. would need in the future, and, importantly, how much money M.G.'s mom spent and expected to spend on M.G.'s counseling. (5/17/19 Tr.) Further, the court failed to "set a specific amount of restitution," instead simply ordering Mr. Byrne to pay M.G.'s past and future counseling costs up to $50,000. (D.C. Doc. 151 at 5.) If the Court does not reverse Mr. Byrne's conviction and remand for a new trial, it must reverse the restitution order and remand for a new restitution hearing. *Dodge*, ¶ 15; *Guill*, ¶ 53; *Pritchett*, ¶ 24; *Jay*, ¶ 49. Because the restitution is facially illegal, the Court can review the unpreserved issue under the *Lenihan* exception, which permits appellate review of illegal sentences even where the defense failed to object in district court. *State v. Lenihan*, 184 Mont. 338, 343, 602 P.2d 997, 1000 (1979).

CONCLUSION

The State compromised Mr. Byrne's right to a fair trial by repeatedly vouching for M.G.'s credibility. Mr. Byrne respectfully asks this Court to reverse his conviction and remand for a new trial.

Alternatively, the Court must reverse the illegal restitution order and remand for a new hearing.

Respectfully submitted this 17th day of September, 2020.

OFFICE OF STATE PUBLIC DEFENDER
APPELLATE DEFENDER DIVISION
P.O. Box 200147
Helena, MT 59620-0147

By: /s/ Haley Connell Jackson
HALEY CONNELL JACKSON
Assistant Appellate Defender

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook 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 7598, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Haley Connell Jackson
HALEY CONNELL JACKSON

APPENDIX

CERTIFICATE OF SERVICE

I, Haley Connell Jackson, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 09-17-2020:

Kathryn McEnery (Prosecutor)
409 Missouri Avenue
Deer Lodge MT 59722
Representing: State of Montana
Service Method: eService

Timothy Charles Fox (Prosecutor)
Montana Attorney General
215 North Sanders
PO Box 201401
Helena MT 59620
Representing: State of Montana
Service Method: eService

Electronically signed by Gerri Lamphier on behalf of Haley Connell Jackson
Dated: 09-17-2020