IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0350

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JOSEPH MICHAEL CROWELL,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Eleventh Judicial District Court, Flathead County, the Honorable Robert B. Allison, Presiding

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STATEMENT OF THE ISSUES

Issue I: Can a three-year-old's coached hearsay statement and an admission contradicted by all other evidence, taken together, assume a character of trustworthiness such that a reasonable person would rely and act upon it in the most important of her own affairs? If not, did the State present sufficient evidence in its case-in-chief to overcome Joseph Crowell's motion to dismiss?

Issue II: Even if Joe's admission were true, the State's evidence established an intervening attack. Did the State present evidence sufficient to establish Joe's actions and not Amber's caused serious bodily injury?

Issue III: Flathead County charged Joe Crowell with aggravated assault in 2015 but waited until after his sentence in Washington was fully completed- nearly three years- to bring his case to trial. Did the District Court err under Mont. Code Ann § 46-18-403(1), by denying Joseph Crowell credit against his Montana sentence for his presentence incarceration in Washington?

STATEMENT OF THE CASE

In 2019, Joseph Crowell was convicted by a Flathead County jury of a 2015 aggravated assault. (D.C. Doc 57; Attached as Appendix A.)

Joe was charged on July 13, 2015. (D.C. Doc. 5.) The Information alleged that on June 9, 2015, Joe caused Linda Ravicher serious bodily injury while he and Amber Nicole Smelt were staying with her at her home in Kila, Montana. (D.C. Doc 1, 3.) On July 15, 2015 the Flathead County district court issued a warrant for Joe's arrest and set bail. (D.C. Doc 4.)

On June 12, 2015, the Flathead County Sheriff's department recorded a forensic interview with Amber's three-year-old daughter, A.B. (State's Exhibit 29, 6/12/15 recorded forensic interview with A.B.) The interview was conducted at the Children's Advocacy Center in Kalispell. (1/28/2019- 1/31/2019 Trial Transcript, "Tr." at 363, 380.)

The night of Linda's injuries, Amber and Joe left Linda's house and drove together to Washington State. Joe was arrested in Washington for DUI and other charges. (Tr. at 467.) He was incarcerated in Washington between 2015 and 2018. Flathead County opted not to serve the warrant for the aggravated assault charge until March 2018, when Joe was set to be released from prison in Washington. (D.C. Doc. 6.)

Joe's jury trial commenced in January 2019. (Tr. at 7.)

During its case in chief, the State introduced a recording of A.B.'s forensic interview into evidence. (Tr. at 381; State's Exhibit. 29.) A.B. did not testify.

The State flew two Washington law enforcement officers to Flathead County for the trial. (Tr. at 18-19.) The State elicited extensive and detailed testimony regarding Joe's arrest in western

Washington. (Tr. at 446-479.) This testimony was followed by that of a Washington detective who recounted a custodial interview with Joe. (Tr. at 494-518.)

At the end of the State's case in chief, Joe's counsel made an oral motion for a directed verdict (herein referred to as a motion to dismiss. Mont. Code Ann. §46–16–403, MCA; *State v. McWilliams*, 2008 MT 59, ¶36; 341 Mont. 517, 178 P.3d 121.) (Tr. at 542-546; Attached as App. B.) Arguing that both primary pieces of evidence implicating Joe were inherently unreliable, Joe moved to dismiss for insufficient evidence. (Tr. at 546.) The Court denied the motion. (Tr. at 548, Attached as App. C.)

Joe was convicted by a jury of aggravated assault. (D.C. Doc. 57.) He was sentenced as a persistent felony offender to fifty years at MSP, none suspended. (D.C. Doc 57; App. A; 4/18/2019 Sentencing Transcript, "4/18/2019 Tr." at 22.)

At the April 18, 2019 sentencing hearing, Joe's counsel argued credit for time served should be calculated starting from the date Joe was arrested in 2015. (4/18/2019 at 13-14.) The court credited Joe with only days he was incarcerated within the geographic boundary of

Montana and denied credit for any presentence incarceration spent in Washington State. (4/18/2018 Tr. at 22.)

Joe filed a timely notice of appeal. (D.C. Doc. 61.)

STATEMENT OF THE FACTS

Three-year-old A.B. was in the kitchen with her grandma Linda on the evening Linda was attacked. (State's Exhibit 29.) Investigators suspected Joe, but A.B.'s mother, Amber Smelt, was also present. A.B. met with a forensic interviewer two days later. (State's Exhibit 29.) The interviewer started by giving A.B. the answer he anticipated from her, but A.B. responded with a clear picture of what she really saw:

Q: I heard about someone named Joe.
A.B: Yeah
Q: Who's Joe?
A.B. [No response]
Q: I heard something happened. Did you see something happen?

A.B. Happen, yeah.
Q: What happened?
A.B. Um, grandma got a red eye.
Q: Grandma got a red eye?
A.B. Yeah.
Q: How did that happen?
A.B. Mommy kicked her.
Q: Mommy kicked her?
A.B. Yeah. (State's Exhibit 29,[1] Tr. at 415-417.)

[1] For the convenience of the Court, undersigned counsel has transcribed portions of the recorded interview.

At the time of trial, A.B. had no independent recollection of the event and did not testify. The State called the forensic interviewer, Devon Kuntz, and the recording of A.B.'s interview was admitted into evidence through him. (Tr. at 381.) Kuntz described his training and experience interviewing young children. (Tr. at 364-365, 395.) His training emphasized the importance of using proper interview techniques with child witnesses. (Tr. at 398.) He noted that children are very adaptive at A.B.'s age, they can pick up on linguistic patterns and quickly adjust to them. (Tr. at 390.) For this reason, Kuntz estimated children in the three-to-four-year age range are the most susceptible to suggestive questioning techniques. (Tr. at 397, 408.) Kuntz knew going into his interview with A.B. that investigators believed Joe was responsible for Linda's attack. (Tr. at 380, 410-411.)

In his interview with A.B., Kuntz at times framed his questions using the open ended, non-suggestive techniques that he had been trained were particularly important with children so young. (State's Exhibit 29; Tr. at 365, 434.) At other times, his questions became much more suggestive. (State's Exhibit 29.) Early on, Kuntz suggested Joe kicked grandma's eye:

Q: So tell me everything that you saw happen to gramma.
A.B. [No Response]
Q. *You said mom and Joe kicked her eye*.
A. No, I said gramma. (State's Exhibit. 29; Tr. at 420.)

At trial, Kuntz agreed this had been a leading question. He acknowledged A.B. had only said mommy kicked grandma. (Tr. at 420.)[2] Kuntz expressed with 20/20 hindsight it was clear he should not have used Joe's name. (Tr. at 391.) He noted the first time he introduced Joe's name A.B. corrected him, resisting his suggestion that Joe was involved. ("No, I said gramma.")(Tr. at 387.)

When Kuntz's questions were open-ended, A.B.'s answers were consistent with her initial response:

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[2] In both the State's direct and upon cross-examination, Kuntz expressed regret that he introduced Joe's name and suggested to A.B. he was involved in Linda's attack. (Tr. at 391, 420.) During cross examination he readily acknowledged A.B. has never said she saw Joe kick her grandma's eye:
Defense Counsel: [Q]: Isn't it true, however, that prior to your statement -- your question on line 6 where your question was, quote, you said gramma and Joe kicked her eye, end quote, until that point she had never said Joe kicked her eye?
A. You're right.
Q. So do you believe that that's a leading question in that format?
A. Yes.
Q. Do you believe that that could have been confusing to her?
A: Yes. (Tr. at 421.)

Q: So you were in your highchair, were you, is that when grandma got a red eye?
A.B: Yeah.
Q. And who made her eye red?
A.B. Um, mommy.
Q: Mommy did?
A.B. Yeah. (Tr. at 422; State's Exhibit 29.)

…

Q: So, [A.B.], you said mommy kicked grandma.
A.B. Uh-huh.
Q: *And then what happened next?*
A.B. Um, I called gramma really loud.
Q: You called gramma?
A.B. Yeah.
Q: And then what happened?
A.B. I cried.
Q: You cried?
A.B. Yeah.
Q: How come you cried?
A.B. For gramma.
Q: You cried for gramma?
A.B. Yeah. (State's Exhibit 29.)

. . .

A.B. still had not identified Joe. The interviewer then planted the suggestion for a third time that not only mommy but also Joe hurt grandma. Still, A.B. didn't bite:

Q: Did something else happen to grandma?
A.B. Yeah.
Q: What did you see?
A.B. Um dogs.
Q: Dogs.
A.B. Yeah. I have lots of dogs, I have five dogs.

Q: That's a lot of dogs. What were they doing? Were they inside or outside when grandma got her red eye?
A.B. Inside.
A.B. Dog kicked the eye.
Q: Dog kicked the eye?
A.B. Yeah.
Q: Whose eye?
A.B. Grandma's.
Q: Okay, did you say dog, or Joe?
A.B. Yeah.
Q. Okay, all right. (State's Exhibit 29; Tr. at 425.)

. . .

By now, A.B. had repeated several times that her mommy hurt Linda and still had not mentioned Joe. Kuntz then became very direct with his questions. A.B. finally obliged:

Q: So, to get her red eye, what hit her eye?
A.B. Mommy did.
Q: Mommy did?
A.B. Yeah.
Q: *What did mommy hit her eye with*?
A.B. [after contemplation] A rock.
Q: *Did someone else hit grandma's eye too? Who hit grandma too?*
A.B. Uh, mommy.
Q: Mommy?
A.B. Yeah and Joe too.
Q: And what did Joe hit grandma with?
A.B: [long pause, A.B. looks around the room] Uh, a rock.
Q: Were you still in your highchair or somewhere else?
A.B: I go somewhere else.
Q What made the hitting stop?
A.B. I was dizzy.
Q How come you were dizzy?
A.B. Uh, from the hippopotamus. (State's Exhibit 29, Tr. at 426, 430-431.)

. . .

A rock was not involved in Linda's attack. (Tr. 265, 433.) After A.B. had identified her mother as Linda's attacker at least four times, the interview ended when Kuntz finally got the answer he anticipated initially:

Q: Okay, you said that grandma had a red eye and that she got kicked and hit --
Q: And who did that to her?
A.B. Um, Joe.
Q: Joe?
A.B. Yeah.
Q: Anyone else?
A.B. No. (Tr. at 439; State's Exhibit 29.)

At the end of A.B.'s interview, Flathead County investigators still suspected Joe. So much so, they never interviewed A.B.'s mother, Amber.

A.B.'s Mother, Amber

Amber Smelt was raised by her biological aunt, Linda. (Tr. at 174.) Linda had watched Amber become derailed by drug addiction for years. (Tr. at 175.) She saw opiates transform Amber from a bright young woman into what Linda described as a "drama queen", willing to manipulate others and lie. (Tr. at 233.) Linda had witnessed Amber in

the emergency room very convincingly pretend to be in severe pain in order to secure a prescription for pain medication. (Tr. at 176, 233-34.) Linda was now also raising Amber's daughter, A.B, after Child Protective Services placed her in Linda's care. (Tr. at 177-178.)

Joe was Amber's boyfriend. He loved Amber. (Tr. at 537.) In May 2015, Amber asked Joe to come out to Kila to help her take care of a new litter of puppies for Linda while she was away for work, so Joe came along. (Tr. at 183-184.) But Joe and Amber were also facilitating one another's abuse of drugs and alcohol. (Tr. at 564.)

By early 2015, CPS had just about reached the end of the road in their effort to reunify Amber with A.B. Amber was one screw up away from having her rights as a parent terminated, and her addiction was getting the better of her. (Tr. at 181-182, 235.) A few days before the attack, Linda broke the news to Amber that CPS had finally decided to terminate her parental rights. (Tr. at 235-36.) This news caused tension between them, because Amber perceived that Linda was the obstacle keeping her from getting her daughter back. (Tr. at 238-39.)

Linda's Injuries

The last thing Linda remembers from June 9, 2015 was arriving home from work.[3] (Tr. at 205, 213.) After the attack, when she was able to gather herself, Linda walked with her dogs to her neighbor Kathy's house. (Tr. at 350.) Kathy called another neighbor, Judy Windauer, an ER nurse, who went to Kathy's and called for help. (Tr. at 346.) At trial, Judy stated Linda's condition - exhibiting confusion, memory loss, a weak pulse, "raccoon eyes", and vomiting- were all signs of serious head trauma. (Tr. at 350-354.) Judy testified she "had no clue what happened to [Linda]", but it was clear to her Linda needed urgent medical attention. (Tr. at 358.) Judy confirmed she was not involved in Linda's treatment. (Tr. at 358.) Through Linda, the State entered numerous enlarged photographs of Linda, some from immediately after the attack and some from later at the hospital, demonstrating the extent of her injuries. (State's Exhibits 7-13, Tr. at 207-211.)

Responding to a 911 call placed from Linda's house, Flathead County Sergeant Keith Stahlberg arrived at the Kila home to find only

[3] Linda suffered memory loss as a result of her injuries. While she testified at trial, she has no recollection of the attack.

three-year-old A.B. sitting in her highchair watching cartoons. (Tr. at 310.) Amber and Joe had left Kila, driving through the night to Washington. In the very early morning hours, somewhere in Idaho, Amber called her CPS case manager and left a message asking to speak about custody of her daughter. (Tr. at 615.)

Joe's Statement

In addition to surrounding counties in Northwestern Montana, the Flathead County police department sent a dispatch to law enforcement in Washington State to be on the lookout for a 2015 Subaru with Montana plates. (Tr. at 446-447.) Amber drove most of the way from Kila but she and Joe had an argument in the car and Amber pulled to the shoulder of a busy highway and got out. (Tr. at 627.) Joe got behind the wheel and took the first exit off the highway, exiting behind a Washington police vehicle. (Tr. at 450.) The officer recognized the vehicle from the Flathead County dispatch. (Tr. at 447.) Joe did not cooperate with law enforcement as they stopped the vehicle and he was arrested. (Tr. at 450-470.)

Joe was drunk when he was taken into custody. A preliminary breath test revealed his blood alcohol content ("BAC") was 0.291. (Tr. at

483, 519.) At the station forty-five minutes later, Joe's BAC was 0.275, and 0.270 (Tr. at 484, 519). Within twenty minutes, a Washington State detective, Corey Robinson, began an interview with Joe that lasted about an hour and half. (Tr. at 495.) Robinson was investigating Joe's interactions with law enforcement in Washington and a soon-dispelled suspicion Joe kidnapped Amber. (Tr. at 492, 521-522.)

Just prior to the interview, Robinson read several Flathead County police reports, including one written by Sergeant Stahlberg. (Tr. at 526-527.) He read in Stahlberg's report that Flathead County law enforcement had responded to a 911 call at a home in Kila, Montana. (Tr. at 497, 526, 528.) Stahlberg found A.B. in the home and when he asked her what happened she responded that her mommy, Amber, had gotten into a fight with Joe. (Tr. at 328, 526-527.)

Joe's interview reflected his intoxication. His speech was slurred. (Tr. at 496.) Initially, he even agreed with Robinson's geographic miscalculation when the detective suggested Joe and Amber would have traveled through Helena on their way from Kila to western Washington. (Tr. at 500-501.)

Early in the interview, Robinson asked Joe what happened to Linda back in Montana. Joe told several conflicting versions of events. (Tr. at 506.) He first reported Linda was fine when he and Amber left the house, then said he thought maybe she fell down the stairs. (Tr. at 506.) Instead of telling Joe what A.B. had really said, Robinson confronted Joe with a claim A.B. had reported that Joe hurt Linda, ("they go, what happened, she goes, Joe did it.") (Tr. at 525-526, 528.) Eventually, Joe told Robinson that he'd pushed Linda with both hands over the downstairs kitchen table, she flipped over and landed on her face. (Tr. at 512-514.) He thought she was briefly knocked unconscious. (Tr. at 514.) He said when he pushed her, Linda had a phone in her hand and was getting ready to call 911. (Tr. at 513.) When the phone fell, the batteries popped out. (Tr. at 534.) He told Robinson he next went over to Linda on the floor, said, "why do you have to be such a bitch?" Then he and Amber left. (Tr. at 514.) He said he didn't mean to hurt Linda, he just freaked out. (Tr. at 515.) At the time Joe was pulled over, he was driving while his license was suspended. (Tr. at 503.) Joe told Robinson he had tried to outrun the Washington police officers as

they made a traffic stop because he didn't have a license and decided to run. (Tr. at 503.)

Before the end of the interview, Joe told Robinson he had been lying to him. (Tr. at 520.) He said he'd lied in order to stick up for Amber and protect her. (Tr. at 511, 520, 525.) He hadn't wanted Amber, or her daughter A.B. to have to be involved. (Tr. at 537-538.) And, he said in truth he did not harm Linda. (Tr. at 537, 539.) At the 2019 trial, Joe testified that he was outside when Amber attacked Linda. (Tr. at 596-598.) He admitted to the jury he had lied to the detective in Washington because he worried if he described what Amber had done to her aunt, then CPS would terminate Amber's parental rights to her three-year old-daughter once and for all. (Tr. at 639-640.)

Joe's drunken custodial account did not match up with Sergeant Stahlberg's investigation of the scene. (Tr. at 534-535.) When Stahlberg swept the house upon arrival, he did not notice anything askew in the kitchen, including the kitchen table and chairs. (Tr. at 331.) He found signs of struggle but only upstairs, none in the kitchen. (Tr. at 315, 327.) While he found a phone on the floor with the batteries knocked out, it was upstairs on the second floor not in the kitchen. (Tr. at 322.)

While in the Kalispell hospital recovery center, Linda spoke with a Flathead County detective about her injuries. In reference to Joe's statement that he had pushed her, Linda told the detective, "It didn't – that didn't happen from falling over a table." (Tr. at 263.)

At trial Linda reiterated this belief:

[Defense Counsel]: So as [the detective] was referencing your facial and head injuries and falling over the table was your feeling that the injuries that you had were not caused from falling over a table, that you had to have been kicked or hit?

Linda: That's correct. I don't remember this conversation, but I do remember that I had bruising all across my back, all down my arms, on both sides of my face, my ears. I had a cut over my left eye. And so it seems reasonable to me as I know the extends of these injuries front and back from my waist up -- it seems reasonable to me that I could have said to him how could you receive these injuries from being pushed over a table. But do I remember saying that to him? I don't.

(Tr. at 263-264.)

Although detective Robinson "agree[d] it's a possibility" at trial that people who have consumed three-and-a-half times the legal limit may at times get confused when being questioned, he never did a follow up interview when Joe was more sober. (Tr. at 525, 531, 540.) Flathead County did not send a detective to Washington, and never attempted their own interview with Joe. (Tr. at 531.)

Within a week or two, Amber was back in Flathead County. (Tr. at 249.) She tried to visit Linda as she recovered at the Brendan House. (Tr. at 249.) Hospital security were under orders from the Flathead County sheriff's department not to let her in, so she was turned away. (Tr. at 249-253.) Amber did not try to see Linda again. (Tr. at 257.) Linda estimated that for the first year and a half after her injuries, no detective, police officer or sheriff's deputy ever asked Linda whether she knew how to get in touch with Amber. (Tr. at 257.) If anyone had asked, she would have given them Amber's phone number. (Tr. at 257.)

The State's closing arguments

The State concluded its argument:

> Ladies and gentleman, review those instructions that the Court has given you, serious bodily injury, purposely or knowingly. The Defendant knew what he did. It was his purpose to shove that woman who confronted him over that table, to harm her when she told him he needed to get out because she owed him money, how dare she. When she hit her head that's serious bodily injury, when she sustained that significant head trauma that she has no memory (sic) that she's a different person as a result of that.
>
> Ladies and gentlemen, on June 9, 2015, Joseph Crowell caused serious bodily injury to Linda Ravicher because she confronted him.
> (Tr. at 739-740.)

After over four hours of deliberation, the jury convicted Joe of aggravated assault. (Tr. at 775; D.C. Doc. 47.) He was sentenced as a persistent felony offender to 50 years at Montana State Prison, none suspended. (D.C. Doc. 57.)

Two Flathead County Warrants

At the time of his Washington arrest, Joe was on probation in Flathead County. The county had petitioned to revoke his suspended DOC sentence a few days prior and a warrant was issued. (Appendix D.)[4] On June 12, 2015, Cowlitz County Washington filed a fugitive Information based on the Flathead County warrant related to the revocation. (Appendix E.)[5] The Cowlitz Superior court reviewed the

[4] App. D contains the following documents from *State v. Crowell*, Flathead County Cause No. DC-08-168B: Case Register Report, D.C. Docs. 36 (Petition for Revocation), 39 (Bench Warrant), 54 (Order of Revocation). Mr. Crowell requests the Court to take judicial notice of these documents pursuant to Mont. R. Evid. 202(b)(6) (providing that all courts in Montana may take judicial notice of records of any court in this state).

[5] App. E contains Cowlitz County (Washington) Superior Court documents. Mr. Crowell requests the Court take judicial notice of these documents pursuant to Mont. R. Evid. 202(b)(6) (records of any court of record of any state of the United States are noticeable as law); Mont. R. Evid. 201(b)(2) (a fact is noticeable if not in reasonable dispute because it may accurately and readily be determined), and (d) (a court shall take notice upon request if supplied with the necessary information).

Flathead county warrant and authorized Joe's continued detention. (Appendix E.) Bail was set in both the fugitive from justice proceeding and pursuant to the Washington charges. (Appendix E.) On November 5, 2015, Joe plead to the Washington charges. (Appendix E.) Joe subsequently waived extradition. (Appendix E.) Montana did not initiate his transport, however. The Flathead County attorney chose not to serve the aggravated assault warrant until March 16, 2018, after Joe had fully served his Washington sentence. (D.C. Doc 6.)

Joe was first appointed counsel on March 29, 2018. (D.C. Doc. 5.)

Standard of Review

This Court will overturn a conviction if there is not sufficient evidence, viewed in a light most favorable to the prosecution, such that a rational trier of fact could find each of the essential elements of the charged offense beyond a reasonable doubt. *State v. Laird,* 2019 MT 198, ¶ 59, 397 Mont. 29, 447 P.3d 416.

This Court reviews the denial of a motion to dismiss for insufficient evidence *de novo. State v. Swann,* 2007 MT 126, ¶¶ 18–19, 337 Mont. 326, 160 P.3d 511.

This Court's review of whether a sentencing court had statutory authority to impose a sentence, whether the sentence falls within statutory parameters, or whether the court adhered to statutory mandates is *de novo*. *State v. Claassen*, 2012 MT 313, ¶ 14, 367 Mont. 478, 481, 291 P.3d 1176. Appellate review of such a claim is appropriate even if no objection is made at the time of sentencing. *State v. Lenihan* 184 Mont. 338, 343, 602 P.2d 997 (1979), 1000; *State v. Erickson*, 2005 MT 276, ¶27, 239 Mont. 192, 124 P. 3d 119.

Summary of the Argument

The Flathead County investigation of a 2015 aggravated assault was sloppy. Linda Ravicher was badly injured, and the only witness- a three-year-old-girl- identified her mother as the perpetrator. And yet the girl's mother was never interviewed by Montana law enforcement.

There is no dispute that Linda suffered serious bodily injury on June 9, 2015. However, the State's evidence could not establish an essential element of the charged offense: that Joe's actions caused Linda's serious bodily injury. An investigation full of holes and a decision to delay prosecution left the State unable to meet its burden.

The primary evidence against Joe, A.B.'s coached hearsay statements and his own interview, were both too unreliable to sustain a conviction. A.B.'s recorded forensic interview was hearsay. Her initial account established a different perpetrator and intervening cause of injury. She implicated Joe only after being heavily coached to change her story. In Joe's custodial interview with a Washington state detective, he had a blood alcohol content of nearly 0.30, a level that for some would be deadly. He gave conflicting accounts of the previous evening in Kila, at times agreeing with the detective regarding obvious errors. But during the interview, Joe admitted shoving Linda over her kitchen table while she was starting to call 911. During the interview, the Washington detective lied to Joe, telling him that a witness, A.B., had told investigators arriving at the scene that "Joe did it." The evidence gathered at the scene did not corroborate Joe's story. By the end of the interview, Joe had retracted much of what he said.

A recording of the forensic interview with three-year-old A.B. was admitted at trial. When the interviewer used open-ended questions, A.B. consistently identified her mother as her grandma's sole attacker.

But after improperly suggestive and leading questions, A.B. eventually identified Joe too. A.B.

Even taken in a light most favorable to the State, no rational trier of fact could rely upon the two unreliable statements to conclude that Joe, beyond a reasonable doubt, caused Linda's serious bodily injury. Two sources of unreliable evidence cannot establish Joe's guilt; zero and zero cannot make one.

In addition, even assuming Joe's in-custody admission that he pushed Linda over a table were true, the State did not provide any evidence with which a rational trier of fact could make the legal conclusion that the impact from Joe's shove caused serious bodily injury, as defined by statute. Because the State's evidence also established there was an intervening attack: Amber stomped on Linda's head repeatedly after she was pushed. The State built a case that entirely relied upon conflating the causes of Linda's injury, those caused by Joe and those caused by Amber.

Upon the close of the State's case-in-chief its evidence was insufficient to establish an essential element of the crime of aggravated

assault- that Joe was the cause of Linda's serious bodily injury. The district court erred when it denied the motion to dismiss.

Next, at sentencing, the district court erred when it denied Joe credit for the time he was incarcerated in Washington prior to being sentenced for his Washington offenses. Montana Code Ann. § 46-18-403(1) requires a Montana court to credit presentence incarceration "directly related" to a Montana prosecution. Under the plain language of Mont. Code Ann. § 46-18-403(1), there is no exception for presentence incarceration occurring out of state. Once Flathead county charged Joe with aggravated assault, and the warrant issued, his incarceration in Washington was directly related to this case. The District Court exceeded its statutory authority when it declined to credit Joe with days of incarceration that occurred in Washington but were directly related to a Montana offense.

ARGUMENT

I. The State's case-in-chief was comprised of evidence that was both too unreliable and legally insufficient to overcome Joseph Crowell's motion to dismiss.

After a poor investigation and delayed prosecution, the State chose to rely on coached child hearsay and an uncorroborated admission to convict Joseph Crowell of a crime committed by his girlfriend. Convictions based entirely on unreliable evidence cannot stand. *State v. Giant*, 2001 MT 245, ¶ 24, 307 Mont. 74, 37 P.3d 49, overruled on other grounds by *State v. Swann*, 2007 MT 126, ¶ 18, 337 Mont. 326, 160 P.3d 51. Sufficiency of the evidence is a determination that depends on the facts specific to a case and requires the State produce evidence that could establish guilt beyond a reasonable doubt. *State v. Hocevar,* 2000 MT 157, ¶ 23, 300 Mont. 167, 7 P.3d 329. Proof beyond a reasonable doubt is proof of such a convincing character that a reasonable person would rely and act upon it in the most important of her own affairs. The State failed to produce evidence of such a character in this case.

The State's case against Joe depended upon two separate statements, one coached hearsay statement from a three-year-old eyewitness, A.B., and the other was Joe's own drunken admission. Both were inherently unreliable. "Holding that two forms of evidence, each unreliable in its own right, nonetheless, when taken together, are sufficient to prove guilt beyond a reasonable doubt, accords the sum of

the evidence a characteristic trustworthiness that neither of its constituent parts possess." *Giant,* ¶39. The State's evidence was too unreliable to meet its high burden.

Additionally, the State's evidence was insufficient to prove Joe caused serious bodily injury. "T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 363-64, (1970). The district court should have granted Joe's motion to dismiss if, applying the beyond a reasonable doubt standard, the evidence presented in the State's case-in-chief could not demonstrate *he* "cause[d] serious bodily injury to another." Mont. Code Ann. §45-5-202(1), §46-16-403. Serious bodily injury is defined by statute in Montana Code Ann. §45-2-101(66). The State presented no evidence Joe's push instead of Amber's kicks caused Linda's serious bodily injury. The State failed to prove the essential element that *Joe caused* Linda "serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ." Mont. Code Ann. § 45-2-101(66)(ii).

Two unreliable forms of evidence put together, and an intervening attack, cannot establish the essential elements of aggravated assault beyond a reasonable doubt. Even viewed in a light most favorable to the prosecution, the State did not meet its burden: "Simply put, zero and zero cannot make one." *Giant,* ¶ 39.

A. The recording of three-year-old A.B.'s forensic interview was hearsay and even so most reliably shows the State's only eyewitness identified a different perpetrator and an intervening cause of injury.

Three-year-old A.B.'s 2015 recorded forensic interview is hearsay too unreliable and legally insufficient to sustain Joe's conviction. To make out its case-in-chief, the State extracted the most unreliable part. Right off the bat A.B. told the interviewer she saw her mother attacking her grandma. She identified Joe only after she was repeatedly fed the suggestion.

Nevertheless, in opposing Joe's motion to dismiss, the State afforded more weight to three-year-old A.B.'s eventual acquiescence with the forensic interviewer's repeated suggestion that Joe hurt her grandma than her initial spontaneous recollection about her mother. Kuntz himself provided a metric by which to assess contradictions in A.B.'s statements and this metric instructs the opposite. He testified that a

three-year-old can easily be coached by suggestive questioning, but a child's open-ended narrative indicates truth.

A.B.'s recorded interview was admitted without objection, but the strikingly unreliable nature of A.B.'s coached statements against Joe remain. A.B.'s hearsay statements are unreliable under any analysis available to this Court: the Sixth Amendment Confrontation Clause and Article II, §24 of the Montana Constitution, the Montana child hearsay statute, and Rule 804(b)(5) of the Montana Rules of Evidence. Each govern admissibility with the core purpose of ensuring evidence is reliable. *Crawford v. Washington*, 541 U.S. 36, 61 (2004) (the ultimate goal of the Confrontation Clause is to ensure the reliability of evidence.)

The numerous elements of Montana's 2003 child hearsay statute put an emphasis on determining whether a child's hearsay statements are reliable and trustworthy. *See* Mont. Code Ann. §46-16-220, *supra.* Child hearsay such as A.B.'s is "presumptively unreliable and inadmissible for Confrontation Clause purposes." *Idaho v. Wright,* 497 U.S. 805, 818 (1990), quoting *Lee v. Illinois,* 476 U.S.530, 543 (1986). In essence, Montana's child hearsay statute, and its preceding case law, requires the proponent for admission to overcome this presumed

inadmissibility by demonstrating why the statements are reliable. *State v. J.C.E.*, 235 Mont. 264, 273-275, 767 P. 2d 309 (1988); *State v. Osborne*, 1999 MT 149, ¶¶23-24, 295 Mont. 54, 982 P. 2d 1045; *State v. S.T.M.*, 2003 MT 221, ¶34, 217 Mont. 159, 75 P. 3d 1257. Even if reliable, still, the statute prefers any other admissible probative evidence. The proponent of the hearsay must demonstrate the out-of-court statement is both evidence of a material fact and more probative than any other evidence available through reasonable means. Mont. Code Ann. §46-16-220(1)(d).

A.B.'s statements in their entirety are hearsay, but a review of the context and circumstances of her statements against Joe in particular reveal just how shaky the State's case-in-chief really was. Spontaneity and consistent repetition are factors used to measure whether a child declarant is likely to have been telling the truth when the statement was made. *Idaho v. Wright*, 497 U.S. 805, 822, (1990); *S.T.M.,* ¶ 20. A.B. was asked repeatedly what she saw happen to her grandma. When Kuntz used open ended questions, A.B. initially and repeatedly thereafter provided a version of events that named her mother as the

sole attacker. A.B. consistently reported her grandma had gotten a red eye, and her grandma's eye was red because her mommy kicked her.

By contrast, A.B.'s coached statement implicating Joe is far less reliable. When the interview of a young child is conducted in a suggestive manner, the reliability of their statement is diminished. *Idaho v. Wright*, 497 U.S. 805, 826, (1990); Mont. Code Ann. §46-16-220, *supra*; *S.T.M.,* ¶ 20. From the very first Kuntz's questions suggested an expectation that A.B. also implicate Joe. He began the interview stating, "I heard about someone named Joe", followed by, "I heard something happened. Did you see something happen?" Still, A.B. responded that she saw mommy kick grandma and give her a red eye. But the suggestion continued. Kuntz next outright told A.B. Joe was involved, saying "you said mom and Joe kicked grandma." At trial, Kuntz acknowledged he was mistaken, to this point the only person A.B. had said kicked grandma was mommy. A.B. even corrected him. She responded, "No, I said gramma."

These circumstances framing A.B.'s statements against Joe are not trustworthy enough to meet the requirements for admission set by the child hearsay exceptions of Mont. Code Ann §46-16-220. Nor are they

trustworthy enough for admission generally under Rule 804(b)(5). Mont. R. Evid. 804(b)(5); *State v. Osborne*, 1999 MT 149, ¶ 16, 295 Mont. 54, 982 P.2d 1045. The Sixth Amendment Confrontation Clause similarly prevents conviction based solely on A.B.'s statements under *Crawford*. A.B.'s statements against Joe were testimonial. By the time the State chose to prosecute their case, A.B. was unavailable because, now age six, she had no independent recollection of the events of three and a half years earlier. The increasingly suggestive nature of Kuntz's questions diminished the reliability of A.B.'s statements significantly over the course of the recorded interview. A.B. was asked numerous times over again what she saw happen to her grandma. So many times, she presumably found that her initial answer did not satisfy her interviewer because she changed it. But Joe had no opportunity to cross-examination A.B. to test the veracity of her changing story. *Crawford*, 541 U.S. 36, 59(2004). A.B.'s earlier consistency fell apart: When A.B. was coached to name an object mommy used to hit grandma, she named a rock. But the parties agreed there was no rock involved in Linda's attack. Only when she was coached to name *who else* besides mommy kicked grandma, she relented and agreed to Kuntz's suggestion that Joe

hit grandma too. A.B. added Joe also hit grandma with a rock. Again, there was no rock. Kuntz never explained to A.B. the importance of telling the truth and the record contains no evidence three-year-old A.B. had the ability to understand the concept. *See*, Mont. Code Ann. §46-16-220 (3)(a)(iv-v). A.B. also told Kuntz that at the point when Joe hit grandma she was no longer in her highchair. But Sergeant Stahlberg found A.B. still in her highchair when he arrived at the scene. And although she had just repeatedly said she saw her mommy kicking grandma, this time, when Kuntz asked her whether anyone else besides Joe kicked or hit grandma she responded "no." By the time she began agreeing with Kuntz's suggestion that Joe hurt her grandma, A.B.'s coached hearsay statements did not nearly comprise proof of such a convincing character that a reasonable person would rely and act upon it in the most important of her own affairs.

Moreover, it is the reliability of A.B.'s coached statement against Joe at issue, regardless that it was admitted into evidence. In *State v. Giant*, this Court overturned a conviction that was based solely on a prior inconsistent statement corroborated by unreliable evidence.

Giant, ¶41. The State introduced evidence of the defendant's flight from the scene in an effort to provide corroboration. *Giant*, ¶15. The evidence of flight was certainly admissible, but this Court determined it was *too unreliable* to sustain a conviction. *Giant*, ¶39. The victim in *Giant* had initially identified her husband as her attacker, but later recanted and said it was her son who caused her harm. *Giant*, ¶ 6. The flight evidence was admissible as substantive evidence, but this Court determined that because both prior inconsistent statements and evidence of flight are inherently unreliable, the combination of the two could not establish the elements of the offense beyond a reasonable doubt. *Giant*, ¶39. As in *Giant*, here, A.B.'s statement against Joe was admitted into evidence but remain too unreliable to sustain his conviction. "Zero and zero cannot make one." *Giant*, ¶39.

While the entirety of A.B.'s interview was hearsay, A.B.'s spontaneous recollections, repeated several times throughout the interview, are the most reliable of her statements. This part of the State's case-in-chief presented a fatal problem to its case: A.B. consistently and repeatedly identified a different perpetrator, Amber, and an intervening cause of injury. As will be further discussed below,

the State's case was legally insufficient because it did not present evidence to establish Joe's actions and not Amber's caused Linda serious bodily injury. As in *Giant*, given the circumstances of A.B.'s statement against Joe, even in a light most favorable to the prosecution, three-year-old A.B's coached hearsay identification of Joe as one of Linda's two attackers is both too unreliable and insufficient to establish Joe's guilt.

B. Joe's drunken statement that he pushed Linda over a table was inherently unreliable, but even if true did not establish that Joe caused Linda's serious bodily injury.

Joe's admission was both too unreliable to prove guilt beyond a reasonable doubt, and insufficient to establish he caused serious bodily injury. Custodial admissions and confessions, by their very nature, are unreliable. An accused "under the strain of suspicion may tinge or warp the facts..." *Opper v. United States,* 348 U.S. 84, 89–90, (1954). "[T]he high incidence of false confessions" necessitates other evidence to confirm their reliability. *U.S. v. Lopez–Alvarez,* 970 F.2d 583, 589(9th Circuit)(1992). The U.S. Supreme Court warns:

> "We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement, which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence

> independently secured through skillful investigation." *Escobedo v. Illinois*, 378 U.S. 478, (1964).

Joe's statement to detective Robinson was inherently unreliable. It was contradicted by A.B.'s eyewitness account of Amber kicking Linda while she was on the ground. And while outside evidence confirms a crime did occur, the physical evidence gathered by Sergeant Stahlberg also did not corroborate Joe's version of events. Stahlberg did not notice any signs of struggle in the kitchen. The kitchen table and chairs were not askew. He found a phone with the batteries knocked out in a bedroom upstairs, not in the kitchen as Joe said. When Stahlberg arrived at the scene, A.B. told him her mommy and Joe had been in a fight with each other, not that Joe had hurt her grandma. And, within the same interview his admission was made, Joe explained to detective Robinson he had been lying to him out of a desire to protect Amber.

Moreover, the circumstances under which Joe's statement was given implicate two factors that have troubled this Court: manipulative interrogation techniques used by police, and a defendant's diminished capacity to make use of his or her faculties during questioning. *State v. Eskew*, 2017 MT 36, ¶ 16, 386 Mont. 324, 390 P.3d 129. (naming both as relevant factors used by a district court when assessing the

voluntariness of a confession.) Early in the interview detective Robinson misrepresented to Joe that A.B. had identified him as her grandma's attacker. This Court has repeatedly held that law enforcement officers may not use lies to obtain confessions or admissions for a criminal proceeding. *Eskew,* ¶ 28; *State v. Grey*, 274 Mont. 206, 211, 907 P.2d 951, 954 (1995); *State v. Allies*, 186 Mont. 99, 113, 606 P.2d 1043, 1051(1979) (lying to a suspect about how much is known about his involvement in a crime to obtain a confession is "particularly repulsive to and totally incompatible with the concept of due process").

Robinson twisted A.B.'s words to mislead Joe into thinking it would be his word against A.B's. In addition, Joe was drunk when he made his statement. He had not just had a few too many, Joe's blood alcohol content was at least 0.270, more than three times the legal limit to operate a vehicle. In this inebriated condition, he made the poor decision to lie to detective Robinson about what happened to Linda because he believed he could protect Amber. He told Robinson as much even before the interview ended. Joe was not asked to confirm any of his statements once he was more sober. These circumstances further diminish the reliability of Joe's custodial admission.

In its argument opposing Joe's motion to dismiss, the State argued that A.B. and Joe's statements taken together were reliable enough that a rational finder of fact could find Joe's guilty beyond a reasonable doubt. Meanwhile, as outlined above, neither of the two statements examined separately- a three-year-old's coached hearsay response to repeated suggestive questioning and a man's drunken effort to protect his girlfriend from CPS involvement- could be said to be of such a character that a reasonable person would rely and act upon it in the most important of her own affairs.

The State further argued that the two statements together with evidence that Joe drove with Amber to Washington and once there attempted to allude law enforcement was sufficient to survive a motion to dismiss. (Tr. at 548.) The State argued Joe's flight demonstrated consciousness of guilt. (Tr. at 547-548.) But evidence of flight is also not reliable evidence of guilt. The U.S. Supreme Court has identified as a "matter of common knowledge," men who are innocent sometimes flee crime scenes too. *Wong Sun v. United States*, 371 U.S. 471, 484, (1963) Thus, in Montana, this Court has frequently held evidence of flight is not sufficient in itself to prove guilt. *State v. Davis,* 2000 MT 199, 300

Mont. 458, 5 P.3d 547; *State v. Hall,* 1999 MT 297, ¶ 47, 297 Mont. 111, 991 P.2d 929; *State v. Patton*, 280 Mont. 278, 290, 930 P.2d 635 (1996). Here, trial testimony established other reasons why Joe initially ran from law enforcement in Washington. Joe was caught driving a car that was not his with a suspended driver's license while he was highly intoxicated. Joe as likely as not told Robinson he knew he was in trouble when he was pulled over for any of these reasons. This tenuous connection to the events in Kila does little to elevate the reliability of the remainder of the State's evidence. *See*, *State v. Bonning,* 60 Mont. 362, 199 P. 274, 275 (1921), *overruled in part by State v. Campbell,* 146 Mont. 251, 405 P.2d 978 (1965) (Evidence of flight because of one crime cannot be considered on the trial of another.); *See also*, *Giant* ¶40 (evidence of flight was too unreliable to be sufficient corroboration of a prior inconsistent statement.); *Hickory v. United States*, 160 US. 408, 417, (1896). (evidence of flight "scarcely comes up to the standard of evidence tending to establish guilt.")

Three forms of unreliable evidence taken together cannot assume a character of trustworthiness than none of the constituent parts possess. *Giant* ¶39. The State's evidence must reach a quality such that

the applicable legal standard of *beyond a reasonable doubt* can be met to survive a motion to dismiss. Because here the evidence the State presented in its case-in-chief fell far below this standard, such that no rational trier of fact could find each essential element of aggravated assault *beyond a reasonable doubt*, it was insufficient to prove Joe's guilt. The district court erred when it denied defense counsel's motion to dismiss.

But even if Joe's admission is taken as true, and in a light most favorable to the prosecution, as outlined below it is still insufficient to establish the essential element that Joe caused Linda serious bodily injury.

C. The State presented argument but no evidence as to whether Linda's debilitating injuries were caused by Joe's push or Amber's kicks.

A successful criminal prosecution generally requires proof of three distinct elements: (1) the occurrence of a specific injury or loss (2) that someone is criminally responsible for that loss or injury and (3) *the identity of the doer of the crime*. 7 Wigmore on Evidence § 2072 (James H. Chadbourn ed., 1978)(*emphasis supplied*). Even in its best light, the State's evidence was insufficient to demonstrate the third element.

The parties did not and do not now dispute that Linda suffered serious bodily injury. Joe agrees that given the State's evidence, a rational trier of fact could find that Linda was seriously injured, and that someone is criminally responsible for her injury. But neither establish an essential element of aggravated assault; that *Joe's actions* were the cause of Linda's serious injuries. Thus, as to the third element, based in a light most favorable to the State no rational trier of fact could conclude beyond a reasonable doubt that *Joe caused* Linda's serious bodily injury: Amber's intervening kicks and the lack of medical testimony prevent it.

Nevertheless, the State argued without evidence that Joe's shove- the only act the State explicitly attributes to Joe- caused Linda's serious bodily injury. But the contention that Joe caused Linda serious bodily injury as defined by statute when he pushed her over a table is mere conjecture. The State offered no medical evidence, nor testimony- expert or lay- to support this contention. The photographs of Linda were not accompanied by any expert testimony explaining the type of impact that could have caused her injuries. The State produced no medical records or testimony from any of Linda's treating medical staff. A neighbor and

ER nurse who helped Linda get to the hospital testified that Linda's injuries were serious -a fact not in dispute- but was not able to offer any insight into how they were caused. Instead, Judy testified she had "no idea" what happened to Linda. The State never asked Judy whether Linda's injuries could have been caused by hitting her head after being pushed over a table. The State simply did not present any evidence that Joe caused the serious bodily injury that Linda suffered.

The State relied instead upon a conflation of the injuries Linda suffered. That is, if Joe's statement is assumed fact, (he pushed Linda over the table), the State's argument still attributes the end result (Linda's injuries) to just one of its causes (Joe's push) and not the other, (Amber's kicks.) Critically, the State's own -and only- eyewitness consistently recalled an intervening attack perpetrated by Amber. Linda's testimony described the long-term mental and physical impact of the attack on her life. But this testimony and the numerous enlarged photographic exhibits of Linda's brutalized head reflect her injuries after she was both shoved by Joe and kicked by Amber.

As Linda herself pointed out, these injuries were not caused from being pushed over a table alone. Nevertheless, in both its opening and

closing arguments, the State argued that Joe's shove alone caused Linda serious bodily injury. ("When [Linda] hit her head that's serious bodily injury.") But no evidence in the record supports this mixed legal and factual conclusion, and common sense refutes it. In Linda's words, when pausing to survey her injuries, "[This] couldn't have happened from a table. It didn't – that didn't happen from falling over a table." (Tr. at 263.)

Ultimately, in its best light, the State could prove only that Joe shoved Linda over a table, and Linda suffered serious bodily injury. The State presented no evidence and thus could not prove beyond a reasonable doubt that Joe's actions caused these injuries. The district court erred when it denied Joe's motion to dismiss and must be reversed.

II. Mont. Code Ann. § 46-18-403(1) requires crediting Joseph Crowell with a portion of his presentence incarceration served in Washington.

A. Joe was erroneously denied credit he requested for days when he was subject only to bailable offenses and held directly related to his Montana charges.

In the alternative, on appeal, Crowell requests 116 days credit for his presentence incarceration in Washington between July 15, 2015, when

he was charged by Flathead county, and November 5, 2015, when he was sentenced for Washington offenses. The District Court erred when it failed to credit Crowell's sentence with these days of incarceration directly related to a Montana prosecution.

Montana Code Ann. § 46-18-403(1) requires a Montana court to credit presentence incarceration "directly related" to a Montana prosecution. *State v. Erickson*, 2008 MT 50, ¶ 21, 341 Mont. 426, 177 P.3d 1043 ["Erickson II"]. Pre-conviction jail time credit toward a sentence granted by statute is a "matter of right." *Murphy v. State,* 181 Mont. 157, 160–61, 592 P.2d 935, 937 (1979) (citations omitted). In pertinent part, § 46-18-403(1) states, "A person incarcerated on a bailable offense against whom a judgment of imprisonment is rendered must be allowed credit for each day of incarceration prior to or after conviction." Whether a district court properly credits time served is not a discretionary act, but a legal mandate. *State v. Hornstein,* 2010 MT 75, ¶ 12, 356 Mont. 14, 229 P.3d 1206.

The period of Joes incarceration in Washington prior to his November 2015 sentencing for Washington offenses is directly related to the Montana aggravated assault prosecution. When a defendant is

subject to multiple pending cases, a direct relationship exists between a specific case and the defendant's incarceration if (1) all cases are for bailable offenses, and (2) the case at issue would have held the defendant incarcerated if he posted bond in the other case(s). *State v. Pavey*, 2010 MT 104, ¶ 25, 356 Mont. 248, 231 P.3d 1104; *State v. Henderson*, 2008 MT 230, ¶ 10, 344 Mont. 371, 188 P.3d 1011. Joe's presentence incarceration in Washington meets both criteria.

First, all of Joe's pending cases were bailable offenses. In both Montana and Washington, before conviction, all offenses except capital offenses are bailable. Mont. Const. art. II, § 21; § 46-9-102, MCA; *see also* Wash. Const. art. I, § 20 ("All persons charged with crime shall be bailable by sufficient sureties . . ."). Neither the Washington nor Montana offenses with which Joe was charged are capital offenses. In fact, Washington has abolished the death penalty. *State v. Gregory,* 192 Wash. 2d 1, 18, 427 P3d 621(2018) (holding Washington's death penalty unconstitutional because it is imposed in an arbitrary and racially biased manner).

Second, during this time, the pending aggravated assault charge would have held Joe incarcerated had he posted bail in the other cases.

On July 13, 2015, the Flathead County attorney charged Joe with the present offense. On July 15, 2015, the District Court issued a warrant for Joe's arrest, setting bail at $100,000. (D.C. Doc. 4.) From this date, had Joe posted bail in both his Washington case and the Flathead County revocation matter, he would still "have been held on the charge in this case." *Henderson*, ¶ 10.

Joe would have been held on the present offense due to the outstanding warrant. This Court has determined that a direct relationship may be established by the issuance of a warrant, when, as here, the State failed to timely execute a warrant. In *State v. Graves*, the Court took the issuance of a Montana warrant rather than service of the warrant as the marker establishing a direct relationship with Graves' incarceration. *State v. Graves*, 2015 MT 262, 381 Mont. 37, 355 P.3d 769. The defendant in *Graves* was sentenced by an Oregon court pursuant to a revocation on November 18, 2011. On December 12, 2011, a Montana court issued a warrant for Graves. Graves was serving a two-year sentence which was to run concurrently with his Montana sentence. *Graves*, ¶34. Nonetheless, Graves spent the next 17 months incarcerated in Oregon before being transferred to Montana. *Graves*, ¶

34. When Graves was sentenced in Montana, the State argued that the credit for time served must be calculated from the date he was extradited to Montana. On appeal, this Court determined that Graves was due credit starting on the date the Montana court *issued the warrant for his arrest* instead. Citing *State v. West*, this Court noted that due process requires the State to execute an arrest warrant without unreasonable delay, including when the accused is incarcerated. *State v West*, 2008 MT 338, ¶33, 346 Mont. 244, 194 P. 3d 683. Thus, the Court determined that in Graves case, credit must be calculated from the issuance of the warrant because "Graves should not be penalized for the State's failure to timely execute the arrest warrant and extradite Graves." *Graves*, ¶ 35.

Joe was in the same situation as Graves. While Flathead County charged Joe in July 2015 and obtained a warrant two days later, it failed to execute the warrant for nearly three years. The record establishes that Flathead County had no trouble finding Joe. The Flathead County sheriff's department was in direct communication with Cowlitz County from the day Joe was arrested. Flathead County provided Cowlitz County the warrant and petition to revoke in Joe's

probation revocation proceeding without delay. This result would also recognize the general reality of law enforcement's regular use of warrant databases throughout the country, making warrants and arrests in one state known to law enforcement in another. *See, Utah v. Strieff*, 136 S. Ct. 2056, 2073 (2016) (Kagan, J., dissenting) (discussing the routine police practice of checking for outstanding warrants). As in *Graves*, Joe should not be penalized for the State's unexplained failure to timely execute the warrant.

Montana Code Ann. 46-18-403(1) requires a Montana court to credit those days of incarceration against a Montana sentence. *See*, *Hornstein*, ¶¶ 16-18. The Flathead county district court staked a claim to Joe's incarceration by issuing a warrant. *Graves*, ¶ 35; *Henderson*, ¶ 10; *Erickson II*, ¶¶ 22-23; *Erickson I,* ¶¶ 22, 24-25. Under *Graves*, the District Court's issuance of the warrant combined with Joe's incarceration establishes a direct relationship starting on July 15, 2015. *Graves*, ¶ 35. Like the defendant in *Graves*, Joe should not be penalized because the State failed to officially serve its warrant for three years after he was arrested in Washington. *Graves*, ¶ 35.

B. The plain language of Mont. Code Ann. 46-18-403(1) makes no exception for presentence incarceration served in another state.

This Court interprets a statute according to its plain language, being careful "simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." Mont. Code Ann. §1-2-101 *State v. Strong*, 2015 MT 251, ¶ 13, 380 Mont. 471, 356 P.3d 1078.

The plain language of Montana Code Ann. §46-18-403(1) makes no exception for presentence incarceration served in another state. Mont. Code Ann. § 46-18-403(1) identifies "incarcerat[ion] on a bailable offense" for which "a judgment of imprisonment is rendered" as the only precursors to credit, without mention of where the incarceration occurs. "Where the statutory language is plain, unambiguous, direct and certain, the statute speaks for itself and there is nothing left for the court to construe." *State v. Running Wolf,* 2020 MT 24 ¶15, 398 Mont. 403, 457 P. 3d 218. Here, the statute's language reveals no reason why a defendant held in another state on a Montana warrant should not receive credit for his incarceration before he is extradited to Montana.

This Court has held that a direct relationship to a Montana prosecution existed when a defendant was held in another state but subject to a Montana warrant in several cases already. In *Graves*, *Milligan* and *Allison* this Court awarded or upheld credit under these same factual circumstances. *See Graves*, ¶ 35; *See also*, *State v. Milligan*, 2008 MT 375, ¶¶12, 32-33, 346 Mont. 491, 197 P. 3d 956 (concluding that a defendant held in Idaho on a Montana warrant was entitled to credit for his incarceration before extradition); *State v. Allison*, 2008 MT 305, ¶ 8, 346 Mont. 6, 192 P.3d 1135, (affirming lower court's calculation of credit for time served in Oregon starting from the date a Montana court issued a bench warrant.) Like these cases, Joe is entitled to an additional 116 days of credit for presentence incarceration directly related to this case regardless that the incarceration occurred in Washington.

Contrary to the plain language of Montana Code Ann. §46-18-403(1), in *In re Woods*, 166 Mont. 537, 535 P.2d 173 (1975), this Court, interpreted a precursor to § 46-18-403(1), stating, "This statute . . . has no application to time served in other state's [sic] prisons or jails." In a decidedly succinct decision, the Court did not explain the reasoning

behind this interpretation or provide any supporting authority. *Woods*, 166 Mont. 537, 538, 535 P.2d 173 (1975).

This Court has not cited or relied on *In re Woods* in the 45 years since it was issued. *Woods* is an outdated outlier and inconsistent with the plain language of Mont. Code Ann. §46-18-403(1). This Court should formally overrule it.

In summary, Joe requests credit for 116 days when he was otherwise bail eligible, but had he posted bond in Washington, still would have been held incarcerated due to this Montana case.

CONCLUSION

Because the State did not present sufficient evidence to convict Joseph Crowell of aggravated assault, he respectfully requests this Court reverse the district court denial of his motion to dismiss and remand for acquittal.

In the alternative, Joe requests that the Court remand, directing the district court to credit him for 116 days of presentence incarceration in Washington directly related to this case.

Respectfully submitted this 3rd day of February, 2021.

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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 9980, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Kathryn Hutchison
KATHRYN HUTCHISON

APPENDIX

CERTIFICATE OF SERVICE

I, Kathryn Grear Hutchison, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 02-03-2021:

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