IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0581

STATE OF MONTANA,

Plaintiff and Appellee,

v.

SCOTT WAYNE ELLISON,

Defendant and Appellant.

REDACTED BRIEF OF APPELLANT

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, the Honorable John A. Kutzman, Presiding

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STATEMENT OF THE ISSUES

Issue I: The State alleged Scott Ellison was guilty of indecent exposure to a minor by masturbating in front of his son, then also introduced extensive unrelated evidence of indecent exposure toward a different child. Did the State's charging decision violate Ellison's due process right to be apprised of nature of the allegation against him? Can the Court be confident the jury was unanimous about determining the victim of the crime?

Issue II: Did the State's counsel commit prosecutorial misconduct when it caused lay witnesses to bolster the credibility of the children's allegations, personally vouched for the truth of the complaining witnesses' testimony, and urged a guilty verdict based on victim sympathy?

STATEMENT OF THE CASE

In 2018, Cascade County charged Scott Ellison with two sex offenses after his adopted son J.E. alleged abuse. (District Court Documents (D.C. Doc.) 1,2; 7/15/- 7/17/2018 Combined Transcripts (Tr.) at 215-216.) The State amended the Information, ultimately charging six separate offenses, three counts of incest, Mont. Code Ann. § 45-5-

507, two of sexual intercourse without consent, Mont. Code Ann. §45-5-503, and one of indecent exposure to a minor, Mont. Code Ann. §45-5-504. (D.C. Doc. 31.1; 31.2; attached as Appendix A.) The allegations pertain generally to Ellison's four adopted children, J.E., O.E., B.E., and K.E. The children were between nine and twelve years old at the time of the alleged offenses. (Tr. at 222.)

The case proceeded to a jury trial. Midtrial, defense counsel made a motion for a mistrial on the basis that surprise testimony from J.E. exposed the jury to hearing uncharged and prejudicial propensity evidence. (Tr. at 308.) The court ruled against the motion. (Tr. at 340-344; attached as Appendix B.)

Ellison was convicted of all six offenses. (D.C. Doc. 94, 103, pg. 5; Appendix C.) The district court sentenced Ellison to six consecutive 100-year prison terms with no time suspended, resulting in a 600-year custodial sentence. (D.C. Doc. 103, pg. 5.)

Ellison filed a timely appeal. (D.C. Doc. 105.)

STATEMENT OF THE FACTS

On a Friday in late April 2018, J.E. ran away from home. He took off running after a fight with his brother. (Tr. at 224.) J.E.'s adoptive

parents, Scott Ellison and his then-wife Tasia, looked everywhere. (Tr. at 225.) It became an all-out search of the neighborhood. (Tr. at 225.) Several hours passed and J.E. had not returned home so Tasia went to the police department to ask for their help. (Tr. at 225.) Around dusk, the police department brought J.E. home. (Tr. at 226.) Tasia let J.E. calm down for a few days before she asked him what was going on. (Tr. at 226.) She made an appointment with J.E.'s therapist, Lisa Anderson, so he could talk to her about the reasons he ran away. (Tr. 248, 252.)

Like all of the Ellison's four adopted children, J.E.'s life prior to joining the Ellison family was marked by severe abuse. J.E. began living with Scott and Tasia in 2011 through a foster care placement, but in 2013 returned to living with blood relatives for a short time. (Tr. at 250, 278-279.) When J.E.'s biological cousin tried to kill him by suffocation, he returned to the Ellison home. (Tr. at 251, 278.) In 2016, the Ellison's legally adopted J.E. and three other children, O.E., K.E. and B.E. (Tr. at 222, 250-251.)

J.E.'s early childhood trauma caused him to suffer from post-traumatic stress disorder, (PTSD), depression, anxiety and oppositional defiance disorder. (Tr. at 250.) O.E., K.E. and B.E. also had mental

health struggles, including anxiety and PTSD. (Tr. at 250.) It was a bumpy road at times, and both Tasia and Scott attended trainings to help them learn how to be supportive and handle the sometimes-challenging behavior of their children. (Tr. at 250, 280-281.)

The Sunday morning after J.E. ran away, Tasia found a letter he wrote saying "my dad raped my sister." (Tr. at 229.) Tasia thought J.E. was referring to his biological father, who had been abusive to J.E., and who was in prison for raping someone else. (Tr. at 228-229, 242, 296-297.) When Tasia spoke with J.E., he told her he had meant his adoptive father, Scott, had raped his sister O.E. (Tr. at 242.) Tasia didn't believe J.E. at first and asked O.E. why J.E. said dad had raped her. (Tr. at 243.) O.E. told her mom it wasn't true. (Tr. at 246.) Then Scott and Tasia talked, and Scott admitted to Tasia he had demonstrated how to masturbate in front of J.E. (Tr. at 261.) He told Tasia he may have masturbated while the other children were in his bed as well but he didn't think they could see. (Tr. at 261.) Eventually Tasia called Child Protective Services, (CPS), who had initially determined the report did not warrant an investigation, but now asked Tasia to come into the CPS office. (Tr. at 255.)

Tasia was very fearful that CPS would take the children away from her. (Tr. at 255.) She couldn't think about anything else as she drove to the CPS office. (Tr. at 268.) When she arrived at the office, the first thing she asked the CPS worker was, "are you taking my children?" (Tr. at 269.) The CPS worker responded that the answer to that question depended on whether Tasia could keep Scott out of the house and away from the children. (Tr. at 269.)

Scott had already offered to move out of the house for the time being so CPS wouldn't take the kids. (Tr. at 259.) Tasia told Scott she wanted him to move out permanently. (Tr. at 259, 283.) Scott had disclosed an affair previously and Tasia was unhappy in the marriage. (Tr. at 283-284.) She had been looking for a sign to leave, and Tasia felt this made her decision clear. (Tr. at 298.)

On May 1, 2018, J.E., O.E., B.E., and K.E. all participated in forensic interviews at the Child Advocacy Center in Great Falls. (Tr. at 270-271.) During J.E.'s interview, he said Scott had demonstrated how to masturbate after J.E. had asked some questions about the topic. He denied further abuse. (Tr. at 419; State's Exhibit 20.) O.E. made disclosures of abuse but said that Ellison had not raped her. (Tr. at 420;

State's Exhibit 21.) K.E. denied abuse and said J.E. was lying. (Tr. at 420; State's Exhibit 24.) O.E. participated in a second forensic interview in August, where she described several additional incidents of sexual abuse including an allegation that Ellison once had sex with her. (Tr. at 420; State's Exhibit 22.) At trial, a recording of J.E. and K.E.'s forensic interviews and both of O.E.'s interviews were admitted into evidence. (Tr. at 419-422.)

The Information

After the forensic interviews and an in-custody interview with Ellison, the Cascade County district attorney charged Scott Ellison with three counts of incest as to J.E., K.E. and O.E. (D.C. Doc. 31.2; App. A.) The State charged two additional counts of sexual intercourse without consent (SIWOC) as to O.E. and K.E. and one count of indecent exposure to a minor. (D.C. Doc. 31.2.) The Information cites the respective statutory language but does not specify a factual basis for any charge. (D.C. Doc. 31.2.) The affidavit for leave to file an Information contains a single undifferentiated narrative that also did not attribute factual allegations to any specific charge. (D.C. Doc. 31.1.)

The allegations all span the same 16-month time period. (D.C. Doc. 31.1.)

While the amended Information, jury instructions and verdict form identify a victim in five of the six Counts, Count II, indecent exposure, has no named victim. (D.C. Doc. 30; DC. Doc 31.1; D.C. Doc. 31.2., D.C. Doc. 92, D.C. Doc. 94, attached as App. D.) At trial, the Court asked the prosecution for clarification on which factual allegation corresponded to which Count, because it was not apparent from the affidavit. (7/15- 7/16/2018 "Alt." Tr. at 23-24.[1]) The Court wanted to clarify its concerns about the possibility of multiple convictions for the same conduct and double jeopardy. (Alt. Tr. at 23-24.)

Multiple separate allegations of indecent exposure

The State's opening statement revolves around J.E. (Tr. at 214-218.) The State's case unfolded after J.E. disclosed a time when Ellison taught J.E. how to masturbate by demonstrating this to him. (Tr. at 216.) The State told the jury they would hear Scott Ellison admit this much was true. (Tr. at 216.) The State told the jury J.E. would testify

[1] The testimony of the four child witnesses is contained in a separate transcript marked "7-15 & 7-16-19 Jury Trial Day 1 &2", herein referenced as "Alt. Tr."

that the incident of masturbation evolved into sexual touching. (Tr. at 216.) The remainder of the State's opening argument indicates the jury would hear from the other children but did not go into detail about those allegations. (Tr. at 216-218.)

Early in the trial, the district court preemptively raised concerns about the introduction of any testimony regarding B.E., one of the Ellison's adoptive children, because upon the Court's review of the Information and supporting affidavit, she did not appear to be a complaining witness. (Tr. at 262-264.) When Tasia referenced allegations pertaining to B.E. in her testimony, the Court paused the proceedings and asked to speak to the parties. (Tr. at 262.) The State assuaged the Court's concerns by stating: "she's part of that Count II, indecent exposure." (Tr. at 264.) After reviewing the amended Information and relying on the prosecution's representation, the Court decided, "I'm going to allow the examination as to [B.E.] to continue with respect to this indecent exposure aspect." (Tr. 263-264.)

All four adopted children testified, but the State called B.E. first. (Alt. Tr. at 4-18.) The State elicited extensive testimony from B.E. regarding sexual contact with Ellison. (Alt. Tr. at 4-18.) The prosecutor

asked B.E. about going into Scott's bedroom and playing the game truth or dare. (Alt. Tr. at 9.) She testified he touched his private while she was in his bed but she could not see anything because he was covered by a blanket. (Tr. at 9-10.) B.E. testified that Ellison made her stand naked in the shower while he was also unclothed. (Tr. at 10-12.) She also testified Scott once asked her to put a vibrator ball on his penis. (Tr. at 12.) The prosecution called B.E.'s counselor, Lee Ann Lewis. (Tr. at 360.) The State elicited testimony from Ms. Lewis regarding B.E.'s mental health diagnosis, (Tr. at 365-366), her ability to process the sexual abuse she endured, (Tr. at 366-367) and how her diagnosis causes her to recount information in a flat monotone manner. (Tr. at 360-367.) In its closing argument, the prosecution highlighted the testimony it had elicited from B.E. (Tr. at 557.)

The other children's testimony

O.E. testified next. (Alt. Tr. at 26-43.) O.E. was the named victim in two counts, incest and SIWOC. (D.C. Doc. 31.2.) When testifying about the allegation that Ellison had sexual intercourse with her, O.E. once said she felt penetration from his penis but also testified she could

not recall what happened and she "didn't remember it going in." (Alt. Tr. at 33.)

K.E. testified next. (Alt. Tr. at 46-58.) K.E. was the named victim in two counts, incest and SIWOC. (D.C. Doc. 31.2.) He had denied any abuse in his forensic interview, stating his brother J.E. made everything up. (State's Ex. 24; Tr. at 420.) In court, he testified about instances of sexual touching and anal penetration while in bed with Ellison. (Alt. Tr. at 46-58.)

J.E. traveled from Helena for the trial and testified last. (Alt. Tr. at 78-99.) He was the named victim in one count of incest. (D.C. Doc. 31.2.) J.E. was living at Shodair Hospital at that time after threatening to kill his sister. (Alt. Tr. at 87, 93.) Three weeks prior, the two Cascade County prosecutors interviewed J.E. in preparation for trial. (Alt. Tr. at 99.) There was no other witness in the room and the interview was unrecorded. (Tr. at 318.)

J.E.'s surprise testimony

The parties expected J.E. to say that Ellison had demonstrated masturbating in front of J.E. and that J.E. had been made to touch Ellison's penis, as was alleged in the charging documents. (D.C. Doc.

31.1.) For the first time at trial, J.E. stated instead that Ellison performed oral sex on him every week for up to a year. (Alt. Tr. at 90-99.) He also described an incident of anal penetration for the first time on the witness stand. (Alt. Tr. at 88.) J.E. testified he had told the prosecutor everything he had just stated when they met a few weeks prior. (Alt. Tr. at 102-104.)

Defense counsel made a motion for a mistrial, arguing the surprise testimony caused irreparable prejudice because the jury had now heard highly damaging propensity evidence of uncharged bad acts. (Alt. Tr. at 102.) The uncharged evidence brought the potential that the jury would find Ellison guilty "through the roof" because the new evidence "taints my client in a way totally worse than all prior testimony." (Alt. Tr. at 101.) This surprise testimony would "make it extremely likely that my client will get convicted of the sexual intercourse without consent, when they may not have otherwise." (Tr. at 308.) Ellison argued a new trial was necessary. (Tr. at 335.)

The State argued against a mistrial saying Ellison had notice of the potential for J.E.'s testimony. (Tr. at 310.) The State also argued Ellison was on notice that the State may introduce Rule 404(b)

evidence, which the prosecutor said he does as standard practice in child sex offense cases because you can "never know what the kids will say" at trial. (Tr. at 312.)

Stating the situation was quite problematic, the court took the noon hour to reflect. (Tr. at 339.) Ultimately, the court ruled against the motion for a mistrial. (Tr. at 340-344, App. B.)

Short of a mistrial, the district court sought to address a secondary issue which arose from J.E.'s surprise testimony. (Tr. at 308.) In order to properly impeach J.E. about whether he told the prosecution about regular oral sex previously, Ellison would need to be permitted to call one of the prosecutors as a witness. (Tr. at 308.)

The district court determined initially it would allow this testimony. (Tr. at 540.) But the State responded it would move to continue the trial in order to request a writ of supervisory control from the Montana Supreme Court. (Tr. at 540.) The parties agreed on a stipulated fact the court would read to the jury instead. (Tr. at 540.) The statement read:

> During this trial you heard testimony from J.E. regarding an out of court interview with the State's attorneys, Ryan Ball and Matt Robertson. J.E. testified that he had told the State's attorneys that the Defendant performed oral sex on him on an almost

> weekly basis. It is a stipulated fact and is evidence in this case that J.E. did not make this statement or relay this information to the State's attorneys during pre-trial preparation or during his forensic interview.
>
> (D.C. Doc. 90.)

Objections to bolstering the credibility of the child witnesses

Throughout trial, Ellison made a series of sustained objections to witness bolstering and invading the province of the jury. (Tr. at 252-253, 473-474, 500, 504, 520.) When Tracy Hemry, the forensic interviewer, testified the State asked whether it was typical for a child not to disclose abuse initially but make additional disclosures later, as O.E. had. (Tr. at 474.) The court sustained Ellison's objection on the basis that the State had improperly elicited an expert opinion from a lay witness. (Tr. at 474.) The State elicited the same opinion from Agent Noah Scott, a detective in the Department of Justice who observed all the forensic interviews in this case. (Tr. at 486.) Agent Scott testified it was very common for child victims of sex offenses to hide what had happened at first and wait until the perpetrator was out of the house before making accurate disclosures. (Tr. at 500-504.)

Agent Scott also conducted a May 2018 custodial interview with Ellison, which was admitted into evidence. (Tr. at 490; State's Exhibit

No. 26.) In this interview, Ellison told Agent Scott he had demonstrated for J.E. how to masturbate after J.E. asked questions about the topic. (State's Exhib. 26.) When Ellison was J.E.'s age, an older cousin had done the same with him. (State's Exhib. 26.) Ellison denied the other allegations.

Agent Scott testified he had conducted "probably at least a thousand" interviews with suspects in child sex cases. (Tr. at 519.) Following this testimony, the prosecutor asked Agent Scott whether, "most of those suspects do as Mr. Ellison did here and kind of hedge?" (Tr. at 519.) After a sustained objection, the prosecutor re-phrased its question to ask whether most suspects admit some things, but not the "full meat and potatoes of what's going on." (Tr. at 520.) The prosecutor then asked whether this was what Agent Scott saw going on in his interview with Ellison. (Tr. at 520.) The Court sustained another objection. (Tr. at 520.)

Jury instructions

At the settling of jury instructions, as to the indecent exposure charge, the Court's law clerk asked, "Are we going to put the alleged complaining witness in there? Because I don't think the jury's going to

know or may not know who is this offense directed to." (Tr. at 457.) The State elected not to clarify the instruction because it stated it had intended the charge to encompass all four of the Ellison children and all of the allegations in the charging affidavit. (Tr. at 457-458.)

The Court concluded that giving a specific unanimity instruction for each count was going to be necessary to try to "solve the loosey-goosey way this was charged." (Tr. at 458).

The State's closing argument

The prosecutor began the State's closing argument with a prolonged and impassioned reminder of how difficult each of the children's lives had been before their adoption. (Tr. at 548-560.) The State asked the jury to consider after all these kids had been through, "can you only imagine the safety they must have felt?" when they were brought into the Ellison home. (Tr. at 549.) The prosecutor argued Ellison's crimes were particularly egregious because of how emotionally vulnerable J.E., O.E., B.E., and K.E. were, and how badly they all had needed, at last, a safe, stable home. (Tr. at 548-550.) The prosecutor argued, Ellison was "guilty of the pain, trauma, and sexual acts he inflicted…," (Tr. at 560.) For this reason, the State argued:

> It's so egregious. He violated that protective capacity. He was the one. He was their adoptive father. He promised them he would keep them safe and protect them. Ultimate betrayal. He was the one that violated them. He was the one that took that safety, that stability, that protection away. (Tr. at 550.)

As a military man, the State argued, Ellison should have wanted to protect and serve. (Tr. at 550.) The State continued to emphasize the impact of abuse on the Ellison children and concluded its closing argument by once again reminding the jury that the victims were, "four kids who jumped from the frying pan into his (sic) foster care and instability, into the fire that was sexual abuse at the hands of this man…" (Tr. at 560.)

In Ellison's closing argument, counsel articulated a theory that Tasia encouraged the four children to exaggerate their claims of abuse in order to make sure Ellison could not come back into their lives. (Tr. at 564.) Tasia had motivation to do this because she was so afraid of CPS involvement and wanted Scott permanently out of the kids' lives. (Tr. at 563-564.) Ellison argued J.E. especially had a strong motivation to exaggerate his claims. (Tr. at 564.) As to the SIWOC charge relating to O.E., counsel asked the jury to consider the testimony carefully when

it decided whether the State had proved the element of penetration beyond a reasonable doubt. (Tr. at 563-564.)

On rebuttal, the prosecutor responded to Ellison's argument about the unreliability of J.E.'s testimony. The prosecutor responded by saying that while Tasia had a hard time believing J.E. at first, "…we all know. We all know that he was telling the truth that Scott Ellison did this." (Tr. at 565.) When arguing the element of penetration necessary to prove SIWOC as to O.E., the State assured the jury that Ellison was "[g]uilty as charged for SIWOC. You saw [O.E.'s] forensic interview. You heard her testify. This happened to her." (Tr. at 557.) In conclusion, the prosecutor reminded the jury again the Ellison children had been repeatedly re-traumatized by Ellison and "had to go back into counseling, where each one of them are today still." (Tr. at 567.)

Sentencing

At sentencing, the State recommended that the incest and SIWOC counts, each carrying a mandatory 100-year sentence, run consecutively with no time suspended. (Sentencing Tr. at 614-615.) The prosecutor started to express the State's reasoning for recommending the most severe option by stating:

[State] [I]nstead of saving these kids even more trauma by taking a plea agreement, saving them from having to testify in front of 12 strangers on the jury, 12, 13, all the court staff, people in the audience, he forced each one of them to get up there and talk about what happened to them, relive that again, even after the forensic interviews they had done, even after talking to Mr. Robertson and I, revictimized over and over and over.

(Sentencing Tr. at 610.)

The district court judge interrupted counsel's train of thought to remind the State the defendant had a right to a trial and it would "not be entertaining any such argument." (Sentencing Tr. at 612.)

The prosecution also recommended the maximum 100-year sentence, in a 4-100 year sentencing range, for the indecent exposure to a minor charge. (Sentencing Tr. at 614.) Mont. Code Ann. §45-5-504(3)(b). The State recommended this count be set to run concurrent to Count I. The Court responded, "The problem I have with making [Count II] concurrent to Count I is that that's the count for masturbating in front of the first kid, and that's how you got all of this rolling. So I don't think it would be appropriate to make that concurrent, and I'm making it consecutive. (Sentencing Tr. at 631-632.)

The district court asked to be reminded about B.E.'s status in the case while discussing restitution, "We have three kids who were victims, right, or am I missing a fourth?" (Sentencing Tr. at 636.) Although the State had represented B.E. to be "part of Count II" during trial, the State now responded, "Your Honor, the fourth was not charged." (Sentencing Tr. at 636.)

STANDARD OF REVIEW

This Court applies plain error review to claims that implicate a defendant's fundamental rights, "where failing to review the claimed error may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process." *State v. Godfrey*, 2004 MT 197, ¶ 22, 322 Mont. 254, 95 P.3d 166. Even in the absence of an objection at trial, this Court has an inherent duty "to protect individual rights set forth in the constitution". *State v. Lawrence*, 2016 MT 346, ¶ 22, 386 Mont. 86, 385 P.3d 968.

The test of the sufficiency of a charging document is whether the defendant is apprised of the charges and whether he will be surprised. *State v. Wilson*, 2007 MT 327, ¶ 25, 340 Mont. 191, 172 P.3d 1264.

This court reviews jury instructions in a criminal case to determine whether the instructions, as a whole, fully and fairly instruct the jury on the law applicable to the case. *State v. Crawford,* 2002 MT 117, ¶ 15, 310 Mont. 18, 48 P.3d 706.

Although this Court generally does not address prosecutorial misconduct not objected to at trial, the Court may discretionarily review such violations under the plain error doctrine. *State v. Lawrence*, 2016 MT 346, ¶ 6, 386 Mont. 86, 385 P.3d 968.

SUMMARY OF THE ARGUMENT

Scott Ellison did not receive a fair trial when erroneously admitted evidence of uncharged misconduct weighed heavily in the jury's deliberations. The evidence steered the jury away from careful consideration of the charged offenses towards conviction based on a sense Mr. Ellison abused his children and must be "guilty of something." This was caused by the State's failure to give sufficient notice of the substance of Count II, indecent exposure. The charging decision violated Ellison's due process right to notice of the charges against him and prejudiced his defense. The State chose to leave the allegations of Count II amorphous and ambiguous rather than defined

"as definitely as can be determined" not to accommodate the memory of a young witness but to increase its chances of securing a conviction on all counts. The omission allowed the State to usher in highly prejudicial propensity evidence pertaining to a fourth adopted daughter, B.E. The State never cured the confusion in the charging document, leaving any identified victim or allegation out of both the jury instructions and verdict form. (D.C. Doc. 92, instruction no. 28-30; D.C. Doc. 94.). The resulting prejudice both standing alone and combined with the jury's exposure to prejudicial propensity evidence from J.E.'s surprise testimony denied Ellison a fair trial and warrants plain error review.

Next, the State's overzealous trial strategy amounted to prosecutorial misconduct. In a case where the decision of whether to convict hinged upon whether the jury believed the Ellison children told the truth, the prosecutor gave the jury his personal assurance that "we all know [J.E.] was telling the truth that Scott Ellison did this." (Tr. at 565.) And, after O.E.'s testimony regarding the penetration necessary to prove sexual intercourse without consent waivered, the prosecutor assured the jury, "This happened to her." (Tr. at 557.) The prosecution elicited testimony from two lay witnesses, including law enforcement, to

bolster the credibility of the children's testimony and comment on Ellison's guilt. Both strategies invaded the province of the jury and undermined Mr. Ellison's constitutional right to a fair trial.

Confidence in the jury's convictions was further undermined when in its closing argument the prosecution focused the jury too closely on the fragility and emotional vulnerability of the alleged victims instead of establishing proof beyond a reasonable doubt of any specific offense charged. Paired with the State's generalized moral rebuke, this over-emphasis on sympathy for the children rather than consideration of each of the six specific offenses charged undermined confidence in the jury's verdicts. The due process violation and prosecutorial misconduct prejudiced Mr. Ellison's defense. He is entitled to a new trial under plain error review.

ARGUMENT

I. Mr. Ellison was denied due process of law because the Information was insufficient to inform him of the nature of the charge in Count II, prejudicing his defense.

A fair trial requires that an accused has the ability to prepare a defense. *State v. Couture,* 2010 MT 201, ¶ 77, 357 Mont. 398, 240 P.3d 987. To that end, the accused must be given notice of the charge

itself. *See, State v. Goodenough,* 2010 MT 247, ¶ 20, 358 Mont. 219, 245 P.3d 14. A charging document must allow a person of common understanding to know what is intended. *State v. Steffes*, 269 Mont. 214, 223, 887 P.2d 1196, (1994). This right, foundational to a fair trial, is protected by the Fifth Amendment's Due Process Clause and the Sixth Amendment provision granting the accused the right to be "informed of the nature and cause of the accusation." *Russell v. United States,* 369 U.S. 749, 761, (1962). This due process protection is codified in Montana by Mont. Code Ann. §46-11-401, requiring a criminal charge be a "plain, concise, and definite statement of the offense charged, including ... the time and place of the offense as definitely as can be determined."

Pleading that does not identify alleged facts with enough specificity to give a defendant 'reasonable certainty of the nature of the accusation against him is defective, although it may follow the language of the statute.' *Russell,* 369 U.S. at 765; *Steffes*, 269 Mont. at 224. Criminal pleading "…must descend to particulars." *United States v. Cruikshank*, 92 U.S. 542, 558. (1875.)

Specificity in a criminal charge is also necessary to protect against double jeopardy. A criminal charge is only constitutionally sufficient if the record can "show with accuracy to what extent [a defendant] may plead a former acquittal or conviction" in any subsequent prosecution. *Russell v. United States*, 369 U.S. 749, 763–64, (1962). It must give the defendant reasonable notice so as to avoid being charged twice for the same offense. *State v. Goodenough*, 245 3d 14, ¶20, 358 Mont. 219, 245 P. 3d 14. (2010).

The State's charging documents in this case shed little light as to the nature and cause of Count II, indecent exposure to a minor, and was insufficient to give Ellison notice of the charge. The Information only mirrors the statutory language, and Count II, does not name a victim in either the amended Information or accompanying affidavit. The affidavit contains separate allegations that Ellison both exposed himself to his son J.E. by demonstrating how to masturbate as well as several allegations of sexual exposure toward B.E., who is not named as a victim in any of the other charged offenses.

While indecent exposure to a minor is defined as a crime against a person, the State intentionally left the victim unnamed and ambiguous

in its charging documents, jury instructions and verdict form. Mont. Code Ann. §45-5-504; (D.C. Doc. 31.1; D.C. 92, instruction no. 28-30; D.C. Doc. 94; App. A, App. D.)

There was no legitimate justification for the vagueness of the State's allegation. The leniency afforded prosecutors to charge large and imprecise time frames in child sex abuse cases is due to *young children's* fallible memories for specific dates. *State v. Little,* 260 MT 460, 471, 861 P.2d 154, (1993). Because child witnesses may have trouble distinguishing dates and time with specificity, this Court had given leeway to allow the State to make allegations that span long periods of time. *State v. D.B.S.*, 216 Mont. 234, 239, 700 P.2d 630 (1985), overruled on other grounds by *State v. Olson*, 286 Mont. 364, 951 P.2d 571 (1997). In such cases, when a "continuing course of conduct" is alleged, further specificity as to time is not required. *D.B.S.,* 216 Mont. 234, 240 (1985). This logic does not hold for a *prosecutor's* tactical decision to omit naming a victim in its charging document. The State's tactical decision did nothing to accommodate children's memories.

Generally, a charging document must "charge the crime with certainty and precision." *State v. Hem*, 69 Mont. 57, 60, 220 P. 80, (1923). In this case, the State's charging decision had nothing to do with the specific challenges of prosecuting a child sex case. The State only left its indecent exposure charge vague so that it could introduce propensity evidence pertaining to a fourth child. This way of charging Count II failed to define the charge with enough specificity to allow adequate due process. *See*, *State v. Hem*, 69 Mont. 57, 220 P. 80, (1923)(internal citation omitted) ("If the prosecution may await the commencement of the trial and then, for the first time, select one of a class of acts included in the terms of the information upon which a conviction will be asked," neither the accused nor his attorney can possibly be prepared to meet the proof.")

Here, intentionally leaving the charging decision vague cleared the way for the introduction of B.E.'s otherwise inadmissible and highly prejudicial allegations. Reading the Information together with the State's presentation of the case, the indecent exposure charge was clearly based on masturbating in front of J.E. This is conduct to which Ellison made admissions, which the State emphasized repeatedly. At

the settling of jury instructions, the prosecution revealed for the first time that not only were J.E. and B.E. both meant to be alleged victims in Count II, so were all four children. (Tr. at 457- 458.) However, at sentencing, the State reversed itself and represented that the alleged misconduct relating to B.E. was "not charged." (Tr. at 636.) With the State's constantly changing tactics, Ellison could not possibly know precisely what conduct he must defend himself against. Although trial counsel did not object, the resulting prejudice warrants plain error review and requires reversal.

A. The ambiguity prevented Ellison from the ability to effectively defend against the charge.

Because of its representation that B.E. was "part of Count II", Ellison was left unable to make an appropriate objection. The evidence regarding B.E. was admitted without the benefit of scrutiny under Rule 403 for causing unfair prejudice and confusion of the issues or Rule 404(b) as "bad acts" propensity evidence. Mont. R. Evid. 403; Mont. R. Evid 404(b). This unfairly increased the chances a jury would convict Ellison of all the charged offenses.

The evidence regarding B.E. was extensive and highly prejudicial, but only valuable as propensity evidence. Although Ellison had already

admitted to exposing himself to J.E., the State still specifically argued that Ellison also made B.E. stand naked in the shower with him and, in a separate incident, asked her to put a vibrating ball on his penis. (Tr. at 557.) The State further leveraged the propensity value by always referring to four victims instead of three. (Tr. at 560.) This extra evidence, and extra victim, urged the jury to convict simply because they considered Ellison a bad man. *See*, *State v. Dist. Ct. of the Eighteenth Jud. Dist.,* 2010 MT 263, ¶ 47, 358 Mont. 325, 246 P.3d 415; ("Essentially, Rule 404(b) disallows the inference from bad act to bad person to guilty person.")

In *State v. Lacey*, this court reversed a SIWOC conviction when similarly prejudicial sexual propensity evidence was introduced. *State v. Lacey*, 2010 MT 6, ¶ 33, 355 Mont. 31, 224 P.3d 1247. This Court held it was not admissible evidence under the transaction rule, as the State argued, because the "bad acts" evidence in question pertained to the defendant's sexual advances on other persons at other times. *Lacey*, ¶32. In *Lacey*, the evidence was prejudicial because it served merely as propensity evidence used to paint the defendant as a "lecherous old man." *Lacey*, ¶33. Here, B.E.'s testimony was valuable only as the kind

of propensity evidence this Court rejected in *Lacey*. As in *Lacey*, the evidence relating to B.E. was merely admitted to increase the chances the jury would convict Ellison because they think of him as a man prone to sexually abusing all of his adopted children.

B. The unanimity instructions given did not solve the "loosey-goosey" way the prosecution charged its case.

The right to a unanimous jury verdict represents a fundamental right protected by Article II, Section 26 of the Montana Constitution. *State v. Vernes,* 2006 MT 32, ¶ 21, 331 Mont. 129, 130 P.3d 169 (citing *State v. Weaver,* 1998 MT 167, ¶ 26, 290 Mont. 58, 964 P.2d 713). "Unanimity means more than an agreement that the defendant has violated the statute in question; it requires substantial agreement as to the principal factual elements underlying a specific offense." *State v. Redlich*, 2014 MT 55, ¶ 19, 374 Mont. 135, 321 P.3d 82 (quoting *Vernes*, ¶21.)

The danger of joining multiple charges in a single trial is that the jury will "accumulate evidence against [the defendant] until they are ready to "find him guilty of something." *State v. Orsborn*, 170 Mont. 480, 489, 555 P.2d 509, 515 (1976). Multiple allegations of misconduct in a single charge may lead to conviction "merely by creating a bad taste

in the jury's mouth rather than proving a specific incident…beyond a reasonable doubt." *State v. Weaver,* 1998 MT 167, ¶ 23, 290 Mont. 58, 964 P.2d 713. Joinder of multiple charges is not unfairly prejudicial to a defendant where the "alleged fact of the separate offenses was sufficiently distinct to allow the jurors to keep them separate in their minds…" *State v. Orsborn,* 170 Mont. 480, 489, 555 P.2d 509 (1976).

An unanimity jury instruction may serve to prevent juror confusion in child sex cases when multiple instances of misconduct are alleged in a single count. *State v. Weaver*, 1998 MT 167, ¶ 23, 290 Mont. 58, 964 P.2d 713. In *Weaver*, the defendant was charged with four counts of sexual assault. *Weaver*, ¶ 7. A different alleged victim was named in each count. At trial, the jury was presented with multiple allegations of sexual misconduct against each child over a period of years. *Weaver,* ¶ 17. This Court invoked plain error review to reverse the conviction and grant a new trial when the jury had not been instructed they must unanimously agree at least one act amongst the multiple alleged had occurred. *Weaver*, ¶ 38.

Since *Weaver*, this Court has reviewed the need to prevent jury confusion with an unanimity instruction in numerous other sex offense

cases. *See*, *State v. Goodenough,* 2010 MT 247, ¶ 2, 358 Mont. 219, 245 P.3d 14; *State v. Darryl Hamilton,* 2007 MT 223, ¶ 43, 339 Mont. 92, 167 P.3d 906; *State v. Harris*, 2001 MT 231, ¶ 15, 306 Mont. 525, 36 P.3d 372, overruled on other grounds by *Robinson v. State*, 2010 MT 108, 356 Mont. 282, 232 P.3d 403. In each of these cases, a victim was specifically named, and the multiple instances of misconduct alleged all related to the same victim. In cases where a conviction requires only that a jury unanimously agree one incident of abuse against a single victim occurred, an instruction asking the jury for unanimity on specific facts is sufficient.

Here the confusion the prosecution created could not be remedied by the unanimity jury instructions given. The district court hoped giving unanimity instruction on Count II would solve the "loosey-goosey" way the prosecution charged the case. (Tr. at 458.) But the confusion the State caused could not be resolved. Ellison's jury could not know what they should try to be unanimous about. Neither the charging documents, jury instructions nor the verdict form limited the exposure conduct to either J.E., B.E. or anyone else. (D.C. Doc. 31.1.; D.C. Doc 92; D.C. Doc 94.) This is the kind of case where a jury still

could have been non-unanimous about the material fact of the identity of a victim. *See*, *State v. Wells*, 2021 MT 103, ¶16, ____ P. 3d _____ (May 4, 2021).

In closing argument, the State specifically argued Count II was established by Ellison admittedly masturbating in front of J.E. (Tr. at 553-554.) But the State also highlighted evidence pertaining to abuse of B.E. and secured the admission of evidence related to B.E. by claiming it was also "part of Count II." (Tr. at 262-264, 557.) The State did not explicitly argue evidence regarding B.E. was associated with a particular charge, but the five remaining charges named a different victim (not B.E.) and the State's arguments about B.E. loosely mirrored the elements of indecent exposure. (Tr. at 557.) According to the State, the jury was also meant to consider whether evidence from K.E. or O.E. established Count II, although the State did not argue this. (Tr. at 457-459.) Under these circumstances, Ellison's jury could not know which victim they were supposed to be unanimous about. As the district court law clerk identified, the jury was very unlikely to know who Count II pertained to or know what evidence they were meant to consider. (Tr. at

457.) Thus, the unanimity instructions given did not ensure a unanimous verdict.

C. The ambiguity compromised Ellison's ability to protect himself from future double jeopardy.

When the bounds of the factual allegations meant to be part of a criminal charge are not clearly defined, a defendant cannot protect himself from future double jeopardy. *State v. Goodenough*, 245 3d 14, ¶20, 358 Mont. 219. (2010). This violates a defendant's due process right to notice of a charge and can be grounds for reversal. *See, Valentine v. Konteh*, 395 F.3d 626, 635 (6th Cir. 2005) (defendant's due process right to notice was violated by charging document that failed to differentiate specific victims and incidents because the defendant could not be sure what double jeopardy would prohibit in any future prosecution.)

Here, Ellison cannot know whether or not he has been prosecuted for alleged misconduct toward B.E. The prosecutor represented in the sentencing proceeding that B.E. was not a victim in this case after all, and that the allegations and evidence presented regarding B.E. was "not charged." (Tr. at 636.) The prosecutor's conflicting representations, first that B.E. was "part of Count II" and then that conduct relating to B.E. was "not charged" leaves Ellison vulnerable to double jeopardy in a

future prosecution. The State's shifting representations render the pleading constitutionally insufficient when they deny Ellison the ability to "show with accuracy" whether or not he has been charged with conduct related to B.E. *Russell,* 369 U.S. at 763–64.

D. The cumulative effect of the jury's exposure to propensity evidence from multiple sources prejudiced Ellison's defense.

The cumulative error doctrine mandates reversal of a conviction where numerous errors, when taken together, have prejudiced the defendant's right to a fair trial. *State v. Cunningham*, 2018 MT 56, ¶ 32, 390 Mont. 408, 414 P.3d 289 (citation omitted).

J.E.'s surprise testimony that Ellison had performed oral sex on him weekly exposed the jury to highly prejudicial misconduct. Although even the State was surprised, the district court avoided granting a mistrial by determining the pattern of conduct was in fact charged because a single incident of oral sex was alleged in the amended affidavit. (Tr. at 330-344, App. B.) *See*, *City of Billings ex rel. Huertas v. Billings Mun. Court*, 2017 MT 261, ¶ 19, 389 Mont. 158, 404 P.3d 709. ("A mistrial is an 'exceptional remedy' and therefore a remedial action

short of a mistrial is preferred unless the ends of justice require otherwise.") (internal citations omitted).

The prejudicial effect of the jury's exposure to allegations of other criminal conduct pertaining to B.E. was exacerbated by J.E.'s testimony. The parties' stipulation instructed the jury only that J.E. had not previously told the State's attorneys about regularly occurring oral sex. (D.C. Doc. 90.) This remedy served only as impeachment evidence implicating J.E.'s credibility. The instruction could not cause the jurors to unhear the highly prejudicial propensity evidence contained in J.E.'s surprise testimony.

Both errors caused the jury to be exposed to evidence of Ellison's propensity to commit sex offenses generally. Taken together, the propensity evidence was so prominent it encouraged a jury to punish Ellison regardless of guilt or innocence of the charged offenses.

The prejudice resulting from the State's charging decision renders the outcome of Scott Ellison's trial not worthy of confidence, warrants plain error review and remand for a new trial.

II. The prosecutor's repeated misconduct deprived Scott Ellison of a fair trial.

Criminal defendants have the right to a fair trial by a jury. This right, the foundation of our criminal justice system, is guaranteed by both the Sixth Amendment of the United States Constitution and Article II, Section 24 of the Montana Constitution. *State v. Hayden*, 2008 MT 274, ¶ 27, 345 Mont. 252, 190 P.3d 1091.

"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. Prosecutorial misconduct can deprive a defendant of a fair and impartial trial and serve as grounds for a new trial. *Clausell v. State,* 2005 MT 33, ¶11, 326 Mont. 63, 106 P.3d 1175; *Hayden*, ¶¶ 26-27. "[A] prosecutor's improper suggestions and assertions" may implicate the fundamental fairness of a trial because they "are apt to carry much weight against the accused when they should properly carry none.'" *Lawrence*, ¶ 20 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). This Court has been adamant and "unequivocal in its admonitions to prosecutors to stop improper comments and…ha[s] made it clear that [it] will reverse a case where

counsel invades the province of the jury." *Hayden,* ¶ 28; *Stringer,* 271 Mont. 367, 381, 897 P.2d 1063 (1995).

A. The prosecutor improperly elicited testimony to bolster the credibility of the complaining child witnesses.

The jury is the exclusive judge of a witness's credibility. Mont. Code Ann. § 26-1-302; *Hayden*, ¶ 26 (citing *State v. Brodniak*, 221 Mont. 212, 222, 718 P.2d 322, 329 (1986)). A witness may not comment on the credibility of another witness's testimony, nor can a prosecutor elicit such testimony. *Hayden*, ¶¶ 26, 31. *State v. St. Germain,* 2007 MT 28, ¶ 27, 336 Mont. 17, 153 P.3d 591; *State v. Hensley,* 250 Mont. 478, 481, 821 P.2d 1029 (1991). Doing so is misconduct and can constitute reversible error. *Hayden*, ¶¶ 33-34.

In *State v. Hayden*, two of the State's witnesses made pre-trial statements to law enforcement which incriminated the defendant but then recanted their statements at trial. *Hayden*, ¶¶ 5, 9. The prosecutor elicited testimony from the investigating police officer about whether he believed the witnesses had told the truth in their earlier statements. *Hayden*, ¶ 12. The Court held this line of questioning eliciting the police officer's opinion on the credibility of other witnesses was "unacceptable"

because it "invades the province of the jury." *Hayden*, ¶ 31. Hayden was prejudiced because the officer's testimony improperly lent credibility to the witness's prior statements. This Court reversed because it found the prosecutor's conduct, together with comments made during closing argument, called into question the fundamental fairness of the trial. *Hayden*, ¶¶ 30–34.

The prosecution in Ellison's case recognized the weakness of its case was the inconsistency of the child witnesses' disclosures. Each child made initial statements during their first forensic interviews which either denied any abuse or denied the penetration necessary to prove SIWOC. These initial statements contradicted each child's second forensic interview where the children did an about face and alleged sexual contact or penetration. To prove its case, the State needed to convince the jury the Ellison children's initial statements were not accurate, but that they told the truth during the second round of forensic interviews. Like in *Hayden*, here the prosecution sought to resolve the contradictions in the children's reports by bolstering their credibility with the testimony of other witnesses.

The prosecution "invade[d] the province of the jury" by asking two lay witnesses, the forensic interviewer and a law enforcement officer, to weigh in on the inconsistencies between each child's statements. An expert may testify on the credibility of an alleged child victim who "exhibits contradictory behavior in a sexual abuse case." *Rogers v. State,* 2011 MT 105, ¶26, 360 Mont. 334, 253 P. 3d 889, (citing *State v. Geyman*, 224 Mont. 194, 200–01, 729 P.2d 475 (1986)). But, the witness must be an expert and the State must show they are properly qualified. *State v. Scheffelman*, 250 Mont. 334, 342, 820 P.2d 1293 (1991). This narrow exception applies only to qualified expert witnesses, it does not open the door for the admission of expert opinions from lay witnesses. *See, Geyman,* 224 Mont. at 200, 729 P.2d at 479. Neither Tracy Hemry or Detective Noah Scott were expert witnesses. Their opinion testimony as to why childrens' disclosures are supposedly more accurate after a perpetrator is out of the house invaded the province of the jury.

The prosecution also invaded the province of the jury when it asked Agent Scott whether "most suspects do as Mr. Ellison did and kind of hedge" during a custodial interview. (Tr. at 519.) The answer given by Agent Scott, who had just testified he had done "probably a

thousand" in-custody interviews of suspects in child sex abuse cases, would necessarily reveal whether he believed Ellison was telling the truth about the extent of his actions. The State's improper question gave the jury the opportunity to align its opinion with that of Agent Scott in a question exclusively reserved for the jury to decide.

B. The prosecutor personally vouched for both the truthfulness of the children's testimony and the infallibility of the State's case.

It is improper for a prosecutor to offer personal opinions as to the credibility of its witnesses. *Hayden*, ¶ 28. This conduct also "invades the jury's province" and is "highly improper behavior." *State v. Racz*, 2007 MT 244, ¶36, 339 Mont. 218, 168 P. 3d 685; Mont. R. Prof. Cond. 3.4 (e)(lawyers shall not state personal opinion as to the credibility of a witness). Statements by a prosecutor expressing a personal opinion about the guilt of the accused are also improper. *State v. Stringer,* 271 Mont. 367, 380, 897 P.2d 1063 (1995).

A prosecutor's personal opinions are particularly problematic because:

> (1) [his] expression of guilt invades the province of the jury and is an usurpation of its function to declare the guilt or innocence of an accused;

> (2) [it] creates a clear danger the jury may adopt the prosecutor's views instead of exercising their own independent judgment as to the conclusions to be drawn from the testimony; and
> (3) the prosecutor's personal views unfairly add the probative force and weight of the prosecutors' personal, professional, or official influence to the testimony of the witnesses.

Hayden, ¶28 (reformatted and citations omitted.)

The prosecutor in this case personally vouched for the truth of J.E. and O.E.'s testimony. These were the two witnesses whose testimony was most in need of rehabilitating. J.E., in particular, who had a strong motivation to exaggerate his claims. (Tr. at 563.) The jury was specifically instructed not all of what he said on the witness stand was true. (D.C. Doc 90.) In this context, the State argued that while it was too painful for J.E.'s mother to believe at first, the prosecutor assured the jury, "…we all know. We all know that he was telling the truth that Scott Ellison did this."(Tr. at 565.) By telling the jury "we all know" J.E. was telling the truth about what Ellison had done, the prosecutor engaged in "highly improper behavior" that gave the jury his personal view that J.E. was not lying. *Racz*, ¶ 36.

The prosecutor similarly pressed too hard to rehabilitate O.E., who had wavered in her testimony regarding the element of penetration. The State assured the jury that Ellison was "[g]uilty as

charged for SIWOC. You saw [O.E.'s] forensic interview. You heard her testify. *This happened to her*." (Tr. at 557.) The State alleged both incest and SIWOC as to O.E. By telling the jury "this happened to her", meaning penetration happened, the prosecution again crossed the line from argument about what the evidence established to outright telling the jurors what was true and what was not. (Tr. at 548-560.) The comment invaded the province of the jury by offering the prosecutor's personal assurance that O.E.'s testimony regarding penetration was true and Ellison was therefore guilty of SIWOC.

Finally, the prosecutor's comments referencing the State's burden of proof also went beyond argument and became a personal assurance of the infallibility of the State's case when he told the jury Scott was guilty as charged, "there's no doubt about it", "no doubt at all." (Tr. at 558, 555.) These comments amount to the prosecutor's personal assurance that Scott Ellison was guilty.

C. The prosecution used victim sympathy to urge conviction on "all six counts."

The State undermined the fairness of Ellison's trial by putting sympathy for the Ellison's adopted children at the center of its closing remarks. A jury's "purpose and duty is to decide if the State has proved

the defendant's guilt beyond a reasonable doubt, based on the facts presented, not to decide the case on the basis of sympathy or advocacy for the victim." *State v. Ritesman*, 2018 MT 55, ¶ 27, 390 Mont. 399, 414 P.3d 261 (internal citations and quotations omitted). A defendant's right to a fair trial is jeopardized by a prosecutor's improper appeals to the sympathy, emotions, or passions of the jury. *See*, *Ritesman*, ¶ 27; *State v. Ugalde*, 2013 MT 308, ¶ 117, 372 Mont. 234, 311 P.3d 772 (McKinnon, J., dissenting). The Due Process Clause of the Fourteenth Amendment may be implicated if evidence describing "the effect of the crime on the victim and [the victim's] family" is "so unduly prejudicial" it renders a trial unfair. *Payne v. Tennessee,* 501 U.S. 808, 821, 825 (1991); *Ugalde,* ¶ 52.

In *State v. Ritesman*, a domestic violence case, the prosecutor told the jury during closing argument, "My job as the State, and your job as jurors, is to make sure that [the victim] is safe, to make sure that she is heard, and that we give the control back to her. You can do that with the verdict of guilty." *Ritesman*, ¶ 9. This Court held the prosecutor's comment was improper and implicated Ritesman's right to a fair trial. *Ritesman*, ¶ 27.

As in *Ritesman*, the prosecutor here put the jury in the improper position of being advocates for the adopted children and put responsibility for their emotional healing in the jury's hands. (Tr. at 548-560.) The prosecutor repeatedly emphasized these children were deserving of extra protection because of their history prior to adoption. (Tr. at 448-450.) Then, the prosecutor provided encouragement for the jury to consider the emotional pain of the victims in their assessment of guilt or innocence. (Tr. at 560; arguing Ellison was "guilty of the pain, trauma, and sexual acts he inflicted…") Finally, the State suggested the effect of Ellison's alleged conduct should figure into juror's deliberations by arguing it caused the children to return to therapy "where they remain today." (Tr. at 567.) The combined effect of the prosecutor's argument instilled the idea that it was up to the jury not to victimize the adopted children further with acquittal on any count and instead trust that their sympathy was an appropriate reason to find Ellison guilty on "all six counts."

D. The misconduct prejudiced Ellison's right to a fair trial and warrants plain error review.

Scott Ellison has a constitutional right to a fair trial. See U.S. Const. amends. VI, XIV; Mont. Const. art. II, §§ 17, 24. A fair trial

results in a "verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). The prosecutor undermined confidence in the jury's verdicts by using personal assurances of the complaining witnesses' credibility and appeals to sympathy for the victims to ensure jurors resolved any doubts in favor of a finding of guilt.

Failure to review the prosecutor's actions would "result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the proceedings, [and] compromise the integrity of the judicial process." *See Hayden*, ¶ 17. In *Ritesman* this Court affirmed the conviction only when it determined the improper comment was an "isolated incident of alleged misconduct" that hadn't compromised the integrity of the trial. *Ritesman*, ¶¶ 27- 28. Here, the prosecutor's comments were not "very brief deviations from the prosecutor's overall approach." *State v. McDonald*, 2013 MT 97, ¶ 16, 369 Mont. 483, 299 P.3d 799. The prosecutor repeatedly assured the jury the Ellison children were telling the truth, both with his own assurances and through other witness testimony. The State's focus on the vulnerability of the children distracted the jury from its purpose of deciding whether the specific allegations charged in fact did occur. This

Court should conduct plain error review because, taken together, the prosecutor's misconduct prejudiced Scott Ellison's constitutional right to a fair trial.

CONCLUSION

Scott Ellison respectfully requests this Court reverse his convictions and remand for a new trial.

Respectfully submitted this 26th day of May, 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 9302, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Kathryn Hutchison
KATHRYN HUTCHISON

APPENDIX

Amended Affidavit and Information .....App. A

District Court ruling on motion for mistrial.....App. B

Judgment and Sentence .....App. C

Count II Jury Instructions and Verdict Form ..... App. D

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 05-26-2021:

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