IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0040

STATE OF MONTANA,

Plaintiff and Appellee,

v.

KENNETH RAYMOND TIPTON,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Fourteenth Judicial District Court,
Meagher County, The Honorable Randal I. Spaulding, Presiding

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STATEMENT OF THE ISSUES

Whether Tipton's conviction for Count I is reviewable under the plain error doctrine or alleged ineffective assistance of counsel and, if so, was Tipton improperly convicted under an *ex post facto* law when the relevant criminal conduct occurred after the effective date of the statute.

Whether Counts II and III, which charged Tipton with an offense not in effect for the time period at issue, should be remanded for retrial.

STATEMENT OF THE CASE

Kenneth Raymond Tipton sexually abused his great nephew, T.B. (born in February 2002), and his two great nieces, A.B. (born in January 2008) and V.B. (born in December 2004) between 2015 and 2017. (Docs. 99, 104, 120.) Tipton was charged with Indecent Exposure to a Minor as to V.B., pursuant to § 45-5-504(1)(b), MCA, and Sexual Abuse of Children as to A.B. and T.B., pursuant to § 45-5-625(1)(c), MCA. (Docs. 1-3, 42, 44-45.) Based on the text of the Amended Information and jury instructions given, Count I was charged pursuant to the 2015 version of § 45-5-504(1)(b), MCA, and Counts II and III were charged pursuant to the 2017 version of § 45-5-625(1)(c), MCA. (Docs. 45, 97-98.) Tipton did not raise any claims associated with the effective dates of the statutes or related time periods of the alleged offenses.

The jury convicted Tipton of all three counts. (Doc. 99.) The court sentenced Tipton to the following consecutive sentences: Count I, 50 years at the Montana State Prison (MSP) with 40 years suspended; Count II, 100 years at MSP with 70 years suspended; and Count III, 50 years at MSP with 40 years suspended. (09/09/19 Tr.; Doc. 120.) The court designated Tipton as a Level II sex offender and ordered that Tipton was ineligible for parole for 20 years and until he completed Phases I and II of MSP's sex offender treatment program. (*Id*.)

STATEMENT OF THE FACTS

T.B., V.B., and A.B. are related to Tipton through their paternal grandfather, Richard Baker. Tipton is Richard Baker's brother and they both live(d) in White Sulphur Springs. Richard and Francine Baker (Grandparents) have several children, including Frank, William, and Barb. Barb has two children with Jonathan Early (Early) and they live in White Sulphur Springs. Frank is married to Michelle, and they have five children; Ax.B., T.B., V.B., A.B., and E.B. (collectively, the Frank Baker Family). William is married to Sarah, and they have two children.

Prior to the summer of 2017, the Frank Baker Family regularly went to Barb's house during the holidays and T.B. and V.B. stayed at Barb's house over

holiday/school breaks. (Tr-2 at 266-68; Tr-3 at 143; Tr-5 at 258-59, 264.)[1] When they were in town, Barb took them to see Tipton and other family members at Tipton's house. (*Id*.) The Frank Baker Family also joined the large, extended family gatherings at Lake Sutherlin over the Fourth of July holiday because that was Grandparents' wedding anniversary. (Tr-3 at 122-25, 129, 180-85.)

On or about July 4, 2015, V.B. went inside a camper to change her clothes and, after she was completely undressed, Tipton came in and took his shorts down low enough to expose his genitals. (Tr-2 at 272-75, 297, 310-11, 331.) V.B. shouted out and T.B. came in and helped her get covered and away from Tipton. (*Id*.) Tipton threatened V.B. not to tell anyone or he would come after her. (*Id*.)

At trial, T.B.'s version of the event differed slightly from V.B.'s. T.B. recalled opening the camper door and seeing V.B. and Tipton undressed, but stated he closed the door and left. (Tr-3 at 46-47, 88-89, 95-97.) T.B. testified that he thought the incident was weird and should not have happened, but did not tell anyone. (*Id*.)

T.B. described an incident that occurred prior to July 2016, when he was riding with Tipton in his car, and they went to the Town Pump in

[1] Since the trial transcripts are not consecutively paginated, citations to the trial transcript will be as follows: 4/29/19 Tr. (hereinafter, Tr-1); 4/30/19 Tr. (hereinafter, Tr-2); 5/1/19 Tr. (hereinafter, Tr-3); 5/2/19 Tr. (hereinafter, Tr-4); 5/3/19 Tr. (hereinafter, Tr-5); and 5/4/19 (hereinafter, Tr-6).

White Sulphur Springs. (Tr-3 at 49-54, 86-88, 94-95.) Tipton's card did not work in the ATM and Tipton then drove out of town and said to T.B., "Let's go watch porn." (*Id*.) Tipton stopped in a secluded place, turned off the car, and found a pornographic video on his phone. (*Id*.) Tipton took off his pants and masturbated while watching the video. (*Id*.) T.B. saw the video and Tipton masturbating which "weirded him out." (*Id*.)

In 2016, the extended family went to Billings over the Fourth of July holiday and stayed at the Big Horn Resort because Early had inherited some money and wanted to treat everyone. (Tr-2 at 291-93; Tr-3 at 55, 135-45; Tr-5 at 183-84, 276-79.) In addition to Early and Barb and their two kids, Early invited the Frank Baker Family, Tipton, and Tipton's girlfriend, Amanda Tilson. (*Id*.) Contrary to every other person who testified at trial, in his interview with law enforcement, Tipton claimed that he and Amanda were not at the resort at the same time as the Frank Baker family. (Tr-4 at 223-25, 241.)

According to T.B. and Michelle, T.B. stayed in Tipton's and Amanda's room one night. (Tr-3 at 54-62, 74-75, 84-85, 93-94.) T.B. stated that late that night, Tipton asked T.B. to come to Walmart with him to get some coffee creamer. (*Id*.) On the way back, Tipton turned into a parking lot and turned off the car. (*Id*.) Tipton accessed a pornographic video on his phone and asked T.B. if he wanted to hold the phone and T.B. said, "no." (*Id*.) Tipton took down his pants

and asked T.B. to masturbate with him, to which T.B. again said, "no." (*Id*.) Tipton proceeded to masturbate to the video and then drove them back to the motel. (*Id*.) T.B. testified that he saw Tipton's penis and the pornographic video and that Tipton's actions "creeped him out," but he did not tell anyone right away. (*Id*.) T.B. explained he finally told his parents about it after V.B. had disclosed what Tipton had done with her at his house in late 2016. (*Id*.)

In later 2016, V.B. was visiting Barb in White Sulphur Springs and she took them to Tipton's house. (Tr-2 at 275-86, 308-10.) V.B. stated that while the adults (Tipton, Tipton's brother, Barb, and Early) were in the kitchen smoking marijuana, V.B. was sitting on the couch in the living room adjacent to the kitchen. (*Id*.) Tipton repeatedly came into the living room and paced around in front of V.B. adjusting his body and pointing downward. (*Id*.) Tipton was wearing boxershorts and eventually V.B. realized Tipton was drawing her attention to his exposed penis. (*Id*.)

When she looked at his penis, Tipton asked V.B. if she enjoyed it and sat down next to her on the couch to show her a photo on his phone. (Tr-2 at 275-86, 308-10.) The first photo Tipton showed V.B. was of a glass full of money but then Tipton swiped to the next photo which was of a man's penis. (*Id*.) V.B. was shocked and moved to another couch. (*Id*.) V.B. stayed the night there and slept on a reclining couch in the living room and when she woke up the next morning,

Tipton was sleeping underneath the edge of the recliner's foot/leg rest which made V.B. feel weird. (*Id*.) V.B. explained that after this incident she did not trust Tipton and did not want to stay away from home. (*Id*.)

Tipton also showed pornography to A.B. sometime in 2016 or 2017. (Tr-3 at 8-39.) A.B. and V.B. were at Tipton's house and he asked them to come to his bedroom; V.B. did not go, but A.B. did. (*Id*.) A.B. stated that Tipton showed her a picture of a naked woman on his phone and printed pictures of naked men and women. (*Id*.) When they left the room, Tipton told A.B. not to tell anyone, which scared A.B. (*Id*.) A.B. did not say anything about the incident until after V.B.'s disclosure and she realized someone would believe her. (*Id*.)

In early 2017, Sarah noticed that V.B. no longer wanted to stay overnight at her house, which Sarah felt was out of character for V.B. (Tr-3 at 102-06.) At trial, V.B. confirmed that she no longer liked to stay over at people's houses because it caused her anxiety after what Tipton had done to her, but she did not want to explain that to anyone. (Tr-2 at 270-71, 286-87.) Michelle also noted that V.B. stopped wanting to stay overnight at friends' houses. (Tr-3 at 138-45.)

When V.B.'s behaviors persisted into May 2017, Frank and Michelle asked the children what was going on. (Tr-3 at 102-06, 138-45.) V.B. was afraid her parents would be mad at her if she explained what was bothering her. (*Id*.) After they reassured her that was not the case, V.B. told them about the two incidents

involving Tipton. (*Id*.) Michelle described V.B.'s demeanor as scared when she told them what Tipton had done. (*Id*.)

In July 2017, officers seized several cellphones, including three "smart phones," two "Blackberry phones," and five "flip-phones" from Tipton's home. (Tr-3 at 221-37; Tr-4 at 9-11.) As the warrant was being served, Amanda commented that it was probably because of something "that f-ing [V.B.]" had reported. (Tr-4 at 60.)

The devices and memory cards seized from Tipton's house were sent to Detective Jim Woog for data extraction and forensic analysis. (Tr-4 at 11-27.) Woog recovered two deleted videos from one of Tipton's storage discs. (Tr-4 at 82-115, 156-58, 165-75.) The videos were dated December 25, 2014, and showed children, including T.B. and V.B., playing in a small bedroom at Barb's house. (*Id*.) Woog also discovered a June 18, 2017 text message from Tipton to Amanda that included a nude photograph of Tipton. (Tr-4 at 127-28, 146, 162.)

It was not until after V.B. disclosed what Tipton had done, that T.B. came forward and disclosed to Michelle what Tipton had done to him which led to T.B. being forensically interviewed in early August 2017. (Tr-3 at 39-100, 142; Tr-4 at 30-40.) During that interview, T.B. disclosed the two incidents that occurred in Tipton's car as well as other times Tipton undressed in front of T.B. that made him feel uncomfortable. (*Id*.)

A.B. had not disclosed anything to her parents, but when she was forensically interviewed in November 2017, she disclosed that Tipton had been showing her pornography over a period of time. (Tr-3 at 142-43, 8-39.) A.B. disclosed that beginning in 2014 (when she was six years old), Tipton showed her photos and videos of naked people and their genitals several different times. (*Id*.) Tipton told A.B. not to tell anyone, so she did not say anything until her siblings did. (*Id*.)

When detectives interviewed Tipton and Amanda in March 2018, the couple's request to be interviewed together was denied. (Tr-4 at 195-96.) Tipton admitted he looked at pornography and had nude photos of himself on his phone, but denied ever sending a nude photo of himself to anyone, including Amanda. (*Id*. at 198-204.) This was contrary to what was discovered on his cell phone and Amanda's statement to law enforcement and trial testimony. (*Id*.) When asked whether he was around the Baker children at the lake, Tipton claimed he made a point to stay away from them. (*Id*. at 212.) Later, Tipton expanded his claim, stating that he was never around children. (*Id*. at 226-28, 263.) Tipton also claimed he barely knew V.B. and T.B. and "may not even recognize them," adding he had not seen them for two or three years. (*Id*.) However, at trial, in addition to the recovered videos Tipton had of his niece and nephew playing at Christmas

time, nearly every person that testified refuted Tipton's claim that he was never around children.

Tipton was charged on August 31, 2018, with Count I, Indecent Exposure to a Minor, pursuant to § 45-5-504(1)(b), MCA, as to V.B. between 2016 and 2017; Count II, Sexual Abuse of Children, pursuant to § 45-5-625(1)(c), MCA, as to A.B. between 2014 and 2017; and Count III, Sexual Abuse of Children, pursuant to § 45-5-625(1)(c), MCA, as to T.B. between 2015 and 2017. (Docs. 1-3.) In March 2019, the State was granted leave to file an Amended Information which only amended the date range for Count I to "2015 to 2017." (Docs. 42, 44-45.)

At trial, Dr. Wendy Dutton testified as a "blind expert" in the field of child sexual abuse for the State so she did not interview the victims or offer any opinion on their veracity. (Tr-2 at 183-258.) Dr. Dutton educated the jury about forensic interview protocols as well as common dynamics in child sexual abuse cases and why children behave the way they do in those situations. (*Id*.) Dr. Dutton explained that children often delay in disclosing sexual abuse and often do not appreciate the concept of time like adults and, therefore, their recollections may not include precise dates/times. (*Id*.) Dr. Dutton described the process of victimization which involves the following stages: victim selection; engagement; grooming; assault; and concealment. (*Id*.) Dr. Dutton testified that a sex offender will often abuse someone they know (*i.e*., family member, child of a friend) who is vulnerable

due to their age or circumstances. (*Id*.) The offender will then build rapport with the child and once the child is comfortable around the offender, the offender will begin to "groom the child" to desensitize the child to the idea of sexual conduct by the offender which may include escalation of innocent physical touching to intimate touching and showing the child pornography. (*Id*.) Dr. Dutton further explained that it is common for offenders to assault a child when others are present. (*Id*.)

The defense presented testimony from Dr. Bowman Smelko who agreed that the research Dr. Dutton relied upon was correct, but argued that the way the State elicited information from Dr. Dutton could be misconstrued as correlating to a defendant's innocence/guilt. (Tr-5 at 21-121.) During cross-examination, Dr. Smelko agreed that Dr. Dutton had specifically explained to the jury her testimony was not to be considered a comment on the credibility of the victims or on the ultimate issues of fact before the jury. (*Id*.) Dr. Smelko also agreed that there would be no appropriate motive or intent behind an adult showing a child pornography. (*Id*. at 96-97.)

STANDARD OF REVIEW

Plain error review is discretionary and exercised "sparingly, on a case-by-case basis, according to narrow circumstances, and by considering the totality of the

circumstances." *State v. Haithcox*, 2019 MT 201, ¶ 23, 357 Mont. 103, 447 P.3d 452.

Ineffective assistance of counsel (IAC) claims present mixed questions of law and fact and are reviewed de novo. *State v. Ward*, 2020 MT 36, ¶ 15, 399 Mont. 16, 457 P.3d 955. Generally, this Court will not consider non-record-based IAC claims on direct appeal. *Id.*

This Court's review of constitutional issues is plenary. *State v. Hislop*, 2016 MT 130, ¶ 7, 383 Mont. 482, 373 P.3d 834.

SUMMARY OF THE ARGUMENT

This Court should not reach Tipton's unpreserved *ex post facto* claim related to Count I since neither plain error review nor an ineffective assistance of counsel (IAC) claim on direct appeal are appropriate to consider Tipton's challenge to this conviction because evidence supported he committed Indecent Exposure to a Minor in 2016, well after the effective date of the charged statute. Thus, Tipton cannot establish his conviction for Count I violated *ex post facto* principles. Moreover, Tipton cannot establish that this Court should even reach his claims related to Count I.

Plain error review is not warranted to consider this claim since failing to review Tipton's argument concerning Count I will not result in a miscarriage of

justice or leave unsettled whether he was afforded a fundamentally fair trial process given that the jury's verdict is supported by evidence of Tipton's conduct in 2016. Nor is consideration of Tipton's Count I arguments appropriate under IAC since the claim is not record-based and there are plausible reasons the attorney chose not raise an issue with Count I.

Even if this Court reaches Tipton's Count I claim, Tipton cannot establish that his counsel was ineffective since he cannot demonstrate that but for his attorney's failure to propose an alternate jury instruction (such as a lesser included instruction for events that occurred prior to October 2015), he would not have been convicted of Indecent Exposure to a Minor because, had the issue been raised, the State would have clarified that Jury Instruction No. 21 applied to events after October 2015 and V.B.'s testimony about Tipton's 2016 conduct at his house established the elements of that offense.

Likewise, plain error is not appropriate because failure to review this claim would not result in a miscarriage of justice or call into question the fundamental fairness of the trial. While the State presented evidence that Tipton exposed himself to V.B. in 2015 and 2016, only the incident in 2016 included facts establishing Tipton exposed himself to arouse or gratify his sexual response. Thus, Tipton was not convicted of an *ex post facto* law. The integrity of the judicial

process was not compromised and Tipton's conviction for Count I should be affirmed.

Should this Court nonetheless determine Tipton's conviction on Count I did violate *ex post facto*, it should reverse his conviction and remand the matter for a new trial. Remanding for only resentencing on a misdemeanor would be improper since V.B. described two distinct events, one of which occurred well-after the Indecent Exposure to a Minor became effective in 2015.

In contrast, the subsection of the Sexual Abuse of Children statute the State relied upon in its charging documents and jury instructions did not go into effect until October 1, 2017. Since neither A.B. nor T.B. alleged any criminal conduct by Tipton after that date, his convictions for Counts II and III violated *ex post facto*. The State, therefore, agrees that unlike Count I, both prongs of the plain error review test can be met as to Counts II and III and, therefore, those convictions should be reversed.

Since those two convictions were the result of trial error based on defective charging documents and jury instructions that neither party nor the court noticed, this is not a question of whether sufficient evidence supported these counts. Rather, the trial error resulted from the jury not being instructed on the elements that related to Tipton's alleged criminal conduct. In its charging documents, the State set forth probable cause to establish Tipton's actions with A.B. and T.B. met

the elements of Sexual Abuse of Children under the 2015 statute (persuading or enticing a child to engage in sexual conduct). Tipton was convicted on Counts II and III through a judicially defective process, not for insufficient evidence. Accordingly, the proper remedy is to remand those counts for retrial.

ARGUMENT

I. Tipton's conviction for Count I should be affirmed.

Tipton argues that because the State referenced an incident that occurred prior to the October 1, 2015 effective date of the Indecent Exposure to Minors statute, that he was improperly convicted under an *ex post facto* law. In criminal matters, a law is *ex post facto* if it: (1) punishes as a crime an act that was not unlawful when committed; (2) makes punishment for a crime more burdensome; or (3) deprives a person charged with a crime of any defense available under the law at the time the act was committed. *Hislop*, ¶ 10.

However, Tipton's argument fails to acknowledge that the State presented sufficient evidence that he exposed himself to V.B. in 2016, thereby independently supporting the jury's guilty verdict on Count I separate from consideration of the 2015 incident. Tipton's argument is also presented for the first time on appeal as he did not raise any objection to Count I or its related jury instructions. *See* § 46-20-104, MCA (failure to make timely objection during trial constitutes waiver

of issue for appeal). Thus, the only way this Court may consider his challenge to Count I is through an IAC claim or plain error review; neither of which are appropriate under the facts presented.

A. Tipton's conduct with V.B. in late 2016 supported the jury's guilty verdict for Count I and the court's authority to sentence Tipton for Indecent Exposure to a Minor.

Under § 45-5-504(1) (2015), MCA:

> A person commits the offense of indecent exposure if the person knowingly or purposely exposes the person's genitals or intimate parts by any means, including electronic communication as defined in 45-5-625(5)(a) under circumstances in which the person knows the conduct is likely to cause afront or alarm in order to . . . (b) arouse or gratify the person's own sexual response or desire or the sexual response or desire of any person.

An offense is considered "indecent exposure to a minor if the person commits an offense under subsection (1) and the person knows the conduct will be observed by a person who is under 16 years of age and the offender is more than 4 years older than the victim." § 45-5-504(3)(a) (2015), MCA. Absent good cause to the contrary, the penalty for this offense is a term of imprisonment for a term of not less than 4 years or more than 100 years and/or a fine not to exceed $50,000. § 45-5-504(3)(b) (2015), MCA.[2]

[2] These statutes became effective on October 1, 2015. *See* § 1-2-201(1)(a), MCA (unless otherwise prescribed in enacted legislation, statues take effect on the first day of October following its passage).

The jury was properly instructed on the elements required to convict Tipton of Count I. (*See* Docs. 97-98, JI Nos. 19, 21.) It is unrefuted that V.B. turned 12 years old in 2016 and, thus, was under the age of 16 at the time. It is also unrefuted that Tipton was more than 4 years older than V.B.

Based on the evidence presented at trial, a rational trier of fact could have found the essential elements of Indecent Exposure to a Minor based on Tipton's actions at his home in 2016, when he exposed his penis to V.B., asked her if she enjoyed seeing his penis, sat down next to her on the couch, and tricked her into looking at a picture of a penis on his phone. The jury's verdict on Count I is supported by the evidence; Tipton exposed his penis to a child under the age of 16 for his own sexual pleasure or to elicit a response from V.B.

Since the criminal conduct that supported the jury's verdict for Count I occurred after the effective date of Indecent Exposure to a Minor and the jury included the special verdicts on the ages of V.B. and Tipton, the district court imposed a legal sentence when Tipton was sentenced pursuant to § 45-5-504(3)(b) MCA (2015).

B. Challenge to Count I is not properly before this Court

Since Tipton did not object to how the jury was instructed on Count I or argue that he should only be sentenced for misdemeanor indecent exposure, he is

precluded from asserting those arguments on appeal unless this Court chooses to review the issue as an IAC claim on direct appeal or apply the plain error doctrine.

1. IAC inappropriate for direct appeal

The Sixth and Fourteenth Amendments to the United States Constitution, and Article II, Section 24 of the Montana Constitution, guarantee criminal defendants the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984); *Whitlow v. State*, 2008 MT 140, ¶ 10, 343 Mont. 90, 183 P.3d 861. This Court applies the two-pronged *Strickland* test to address IAC claims to determine whether counsel's performance was deficient and, if so, whether the defendant suffered prejudice as a result. *Whitlow*, ¶ 10.

When IAC is alleged on direct appeal, before reaching the merits of the argument, this Court must first determine if it is appropriate to consider the claim; that is, whether the claim is "record-based." *Ward*, ¶ 20. This is "because the question of whether counsel's conduct was based on the exercise of reasonable professional judgment generally demands that [this Court] inquire why counsel acted as alleged" by reviewing a developed court record. *State v. Crider*, 2014 MT 139, ¶ 35, 375 Mont. 187, 328 P.3d 612 (to consider IAC claim on direct appeal, record must reveal "reasoning underlying a counsel's actions or omissions"); *State v. Sinz*, 2021 MT 163, ¶ 22, ___ Mont. ___, ___ P.3d ___ (alleged acts/omissions by trial counsel "are often ill suited for consideration on

direct appeal"). The only exception to this rule is if there is no plausible justification for the alleged deficient performance. *Crider*, ¶ 36 (if no legitimate reason for counsel's actions, why counsel acted is irrelevant).

This Court would have to speculate as to why counsel did not argue that only the 2016 incident applied to Count I. The record is also silent on why defense counsel did not argue that different jury instruction(s) should have been given for Count I based on the effective date of the applicable statute. *Sinz*, ¶ 26 (IAC claim inappropriate for direct appeal because would have to speculate about why counsel acted/did not act).

Nor has Tipton established there is no plausible justification for counsel not raising that issue. For instance, it is possible his counsel did not want to eliminate testimony from the children and their mother about the event at the lake because it provided an avenue to attack both children's credibility (*i.e.*, T.B.'s version of events did not match with V.B.'s; testimony from Amanda and other defense witnesses suggested that in 2015 Tipton was not even at the lake long enough to need to change clothes).

Since there is a plausible reason not to want to sever the 2015 event out of the trial and the record is undeveloped as to why counsel did not assert arguments about the statute's applicability date, this Court should not consider this IAC claim on direct appeal.

2. Plain error review is unwarranted

Tipton relies upon *State v. Price*, 2002 MT 284, ¶ 23, 312 Mont. 458, 59 P.3d 1122, to argue that plain error review is appropriate. (Opening Brief (Br.) at 28-31.) However, *Price* is distinguishable from the situation presented here because Price was charged with a continuous course of conduct, not discreet events such as the 2016 incident at Tipton's house.

In 1999, Price was accused of not paying child support between March 1988 and May 1996. *Price*, ¶¶ 6-11. Prior to 1993, nonsupport was only a misdemeanor, but that year the Legislature amended the offense to also include felony penalties and the amendments went into effect October 1, 1993. *Price*, ¶ 16. On appeal, Price argued that his conviction for felony nonsupport violated *ex post facto* because his failure to make child support payments from March 1988 to October 1993 was punishable only as a misdemeanor. *Price*, ¶ 27.

Because Price had not raised this argument to the district court, this Court first considered whether plain error review was warranted. *Price*, ¶¶ 23-25. Ultimately, this Court invoked plain error review once it concluded that: (1) Price's fundamental constitutional right to be free from *ex post facto* laws was at issue; and (2) the fundamental fairness of Price's trial was at issue because Price was charged with a continuous course of conduct and he may have been convicted for conduct that occurred prior to the effective date of the new statute. *Price*, ¶ 25.

While Tipton's right to be free from *ex post facto* laws is at issue, unlike *Price,* where the defendant was charged with a continuous course of conduct over a five-year period, here, the fundamental fairness of Tipton's trial was not implicated given that V.B.'s description of Tipton's conduct at his house in 2016 supported the jury's Count I guilty verdict on its own.

Tipton asserts that since the State argued Tipton committed indecent exposure in both 2015 and 2016, that it cannot be known what the jury relied upon to convict him for Count I. Tipton's claim is undermined by the fact that the 2015 incident at the lake did not include evidence that Tipton exposed himself for sexual gratification, which is a required element under either the 2013 or 2015 version of indecent exposure. While V.B. testified that Tipton exposed himself to her in the camper, which certainly constituted evidence of grooming, there was no evidence to establish how Tipton gratified his own sexual response when he did so.

Therefore, there was not sufficient evidence for the jury to convict Tipton on Count I for the 2015 event alone. In contrast, the State presented evidence that Tipton's actions in 2016 were intended to gratify his sexual response (repeatedly paraded in front of V.B. trying to get her to look at his penis, asked her if she liked his penis after she saw him exposing himself, and then sat next to her and tricked her into looking at a photo of a penis).

Thus, unlike *Price*, where this Court concluded, "it [was] impossible to determine the period of nonpayment for which [Price] was convicted," here, the facts establish that Tipton committed the offense of Indecent Exposure to a Minor in 2016, after the statute's October 1, 2015 effective date. *See Price*, ¶ 28. Accordingly, Tipton cannot establish that failing to review the claimed error "may result in a manifest miscarriage of justice," "leave unsettled the question of fundamental fairness," or "compromise the integrity of the judicial process." *Price*, ¶ 23. Tipton has not established sufficient basis for this Court to apply the sparingly used doctrine of plain error to consider his unpreserved claim concerning Count I. *Haithcox*, ¶ 23.

Neither plain error review nor a direct-appeal IAC claim is appropriate to reach Tipton's unpreserved *ex post facto* claim concerning Count I. Tipton's Count I claim should be denied and his conviction for that offense affirmed. Nonetheless, even if this Court chooses to consider this unpreserved argument, his arguments are unavailing.

C. Tipton cannot establish that his counsel was ineffective.

Tipton cannot establish both *Strickland* prongs; namely, how his trial attorney's failure to ask for a lesser-included jury instruction caused him prejudice. To establish the prejudice prong, Tipton must demonstrate there was a "'reasonable probability' that, without counsel's error, 'the result of the proceeding

would have been different.'" *State v. Dineen*, 2020 MT 193, ¶ 25, 400 Mont. 461, 469 P.3d 122*; Strickland*, 466 U.S. at 694. This "is a heavy burden," and, as such, "[t]he benchmark for judging any [IAC] claim must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Dineen*, ¶ 25; *Strickland*, 466 U.S. at 686.

Assuming, only for the sake of argument, that Tipton's counsel should have argued for the "lesser-included" instruction for the 2015 event as Tipton argues (*see* Br. at 30-31),[3] it would not have resulted in a not guilty verdict because sufficient evidence established that Tipton committed Indecent Exposure to a Minor based on Tipton's actions at his home in 2016.

It is insufficient to simply suggest different actions by his counsel may have impacted the outcome of the trial. *See Dineen*, ¶ 25 (appellant claiming IAC must "do more than just show that the alleged errors of a trial counsel 'had some conceivable effect on the outcome of the proceeding'"). *See also, State v. Kaarma*, 2017 MT 24, ¶ 7, 386 Mont. 243, 390 P.3d 609 ("To constitute reversible error, any mistake in instructing the jury must prejudicially affect the defendant's

[3]Tipton does not argue that his counsel should have requested a specific unanimity instruction for Count I. *See State v. Wilkes*, 2021 MT 27, ¶ 25 n.8, 403 Mont. 180, 480 P.3d 823. Tipton has waived appellate review of such a claim and may not augment his theory of appeal in his reply. *See* Mont. R. App. P. 12(3); *State v. Myran*, 2012 MT 252, ¶ 19, 366 Mont. 532, 289 P.3d 118.

substantial rights."). Tipton has not demonstrated there is a reasonable probability for a different outcome had other jury instructions been offered for Count I. Tipton has not met his heavy burden of establishing how he was prejudiced by his counsel's alleged deficient performance concerning Count I. Since both *Strickland* prongs must be established, this Court may reject Tipton's IAC claim without evaluating his counsel's performance.

D. No plain error; Tipton's substantial rights were not violated

Even if this Court invokes plain error review to consider whether Tipton was subjected to an *ex post facto* law in Count I, there was sufficient evidence to support the guilty verdict for Count I based on V.B.'s testimony about Tipton's actions in 2016. While Tipton points to testimony from other witnesses that may differ from V.B.'s account, when considering whether sufficient evidence supported a verdict, the evidence is viewed "in the light most favorable to the prosecution" to determine if "any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt." *Dineen*, ¶¶ 10, 14.

As established above, Tipton's reliance on *Price*, where it was impossible to determine what facts supported the verdict because of the continuing course of conduct that was charged, is unavailing under the facts presented here. Tipton's reliance on *California v. Hiscox*, 136 Cal. App. 4th 253 (Cal. App. 1st Dist. 2006),

is also unavailing given the fact a decision by a California intermediate appeals court is not binding on this Court as well as multiple distinguishing facts.

First, unlike this case, California conceded that plain error review was warranted. *Hiscox*, 136 Cal. App. 4th at 258. Second, Hiscox was charged with 11 counts of lewd and lascivious conduct with multiple victims over a 4-year period. *Hiscox, supra*. Here, Count I alleged one victim who described 2 distinct interactions with Tipton. Third, in *Hiscox*, "none of the witnesses were certain" about when the events at issue took place and the record lacked reliable evidence connecting the alleged offenses to any particular time. *Id*. California relied on "generic" victim accounts and "testimony describing a series of essentially indistinguishable acts of molestation" and the jury was not tasked with making findings concerning the date when the offenses occurred. *Id*. at 256. Thus, Hiscox argued, it was impossible to "know whether even one verdict was based on an act" committed after the new "First Strike" sentencing statute's effective date. *Id*. at 259. The appeals court agreed and held the record was inadequate to support sentencing under the new law. *Hiscox, supra*.

That was not the case here with Count I. In contrast to V.B.'s testimony, the victims in *Hiscox* were not asked, and did not provide, details tied to specific events or time periods. Moreover, unlike the record in *Hiscox*, here it is possible to know the jury's verdict on Count I was supported by evidence of an act committed

after the statute's effective date based on V.B.'s account of the 2016 incident and the fact the 2015 incident did not meet all the required elements for indecent exposure.

Contrary to Tipton's argument, *Wilkes* is neither relevant nor instructive to the issue presented. (Br. at 26-27.) Wilkes was convicted of a lesser-included offense, possession of dangerous drugs, but the jury had not been tasked with stating the total weight of the drugs Wilkes possessed, which was relevant to the statutorily mandated fine. *Id*. The district court imposed a $10,000 fine based on the market value of the drugs. *Id*. This Court reversed the sentencing court's imposition of the fine given the absence of a special verdict delineating the total weight of drugs Wilkes possessed. *Wilkes*, ¶ 28.

Here, the jury did make the necessary additional findings relevant to Indecent Exposure to a Minor: that V.B. was under 16 years old and Tipton was 4 or more years older than V.B. It was uncontroverted that V.B. was 14 years old at trial. And, as established above, the evidence supported that Tipton committed the offense of Indecent Exposure to a Minor in 2016.

Finally, Tipton's reliance on *State v. Southwick*, 2007 MT 257, ¶ 27, 339 Mont. 281, 169 P.3d 698, is also unavailing because in that case, none of the alleged criminal conduct occurred after the enactment of the statute. Here, the alleged conduct relevant to Count I straddled the enactment date, which is more

like the situation presented in *Price*. Moreover, as established, V.B.'s account of the 2016 incident was sufficient to convict Tipton of Indecent Exposure to a Minor independent from the 2015 event which did not include evidence Tipton's act of exposing himself to V.B. in the camper was for sexual gratification.

Tipton's argument that this Court should remand for sentencing on the "lesser included" offense of "simple" indecent exposure is unavailing. (Br. at 31.) As noted above, the elements of indecent exposure (*e.g.*, "simple" indecent exposure according to Tipton) were established by V.B.'s testimony about the 2016 event (Tipton exposed his genitals to V.B. for his own sexual gratification) not the 2015 camping event. Since the jury issued the required additional findings related to the ages of V.B. and Tipton, the district court properly sentenced him for Indecent Exposure to a Minor.

E. Even if this Court reverses the jury's verdict on Count I, the matter should be remanded for a new trial, not resentencing.

Finally, even if this Court concludes that, like *Price*, the jury instructions improperly allowed the jury to find Tipton guilty based on acts that occurred before and after the effective date of the Indecent Exposure to a Minor's effective date, the appropriate remedy is to reverse his conviction for Count I and remand for a new trial. *See Price*, ¶¶ 27, 30. It would be improper to simply remand Count I for resentencing as a misdemeanor when the record supports that Tipton committed the offense of felony Indecent Exposure to a Minor in 2016.

Similarly, if this Court determines Tipton's counsel was ineffective for not requesting alternative jury instruction as to Count I, the appropriate remedy is to reverse and remand for a new trial. *See State v. Resh*, 2019 MT 220, 397 Mont. 254, 448 P.3d 1100 (pursuant to an IAC claim, Court reversed conviction and remanded for new trial when jury instructions failed to distinguish definition of consent" between sexual intercourse without consent and sexual assault). *See also*, *City of Missoula v. Zerbst*, 2020 MT 108, 400 Mont. 46, 462 P.3d at 1219 (when, over defense objection, court improperly instructed jury on definition of consent from 2017 amendments that were not in effect at the time of offense, conviction reversed and matter remanded for new trial); *State v. Bradley*, 269 Mont. 392, 396, 889 P.2d 1167, 1169 (1995) (when instructions omitted part of applicable subsection, conviction reversed and new trial ordered).

II. Since Tipton's convictions for Counts II and III were the result of an ex post facto application of the law due to defective charging documents and jury instructions that charged legally inapplicable offenses, those convictions should be reversed and remanded for a new trial.

Both the federal and Montana constitutions prohibit the *ex post facto* application of laws. U.S. Const. art. I, § 10; Mont. Const. art. II, § 31. *Hislop*, ¶ 10. In line with these constitutional protections is the well-established principle "that in criminal cases, the law in effect at the time of an alleged offense applies in any subsequent criminal prosecution." *Zerbst*, ¶ 12.

In Counts II and III, the State charged Tipton with violating § 45-5-625(1)(c), MCA, between 2015 and 2017. In 2015, subsection (1)(c) stated that a person commits the offense of Sexual Abuse of Children if he

> knowingly, by any means of communication, including electronic communication, persuades, entices, counsels, or procures a child under 16 years of age or a person the offender believes to be a child under 16 years of age to engage in sexual conduct, actual or simulated.

§ 45-5-625(1)(c), MCA (2015). In 2017, subsection (1)(c) was amended to prohibit a person from

> knowingly by any means of communication, including electronic communication or in person, persuades, entices, counsels, coerces, encourages, directs, or procures a child under 16 years of age or a person the offender believes to be a child under 16 years of age to engage in sexual conduct, actual or simulated or to view sexually explicit material or acts for the purpose of inducing or persuading a child to participate in any sexual activity that is illegal.

§ 45-5-625(1)(c), MCA (2017) (emphasis added to indicate new language). The amended provision became effective October 1, 2017. *See* 2017 Mont. Laws Ch. 134, Sec. 1.

Neither A.B. nor T.B. alleged criminal conduct by Tipton that occurred after October 1, 2017, in their forensic interviews or at trial. Thus, the 2015 version of subsection (1)(c) applied to Tipton's offenses. Although the State alleged facts to

support both parts of subsection (1)(c) in its supporting affidavits,[4] in the charging documents and jury instructions, only the newly enacted portion of subsection (1)(c) was set forth. The amended information charging Counts II and III alleged violations of a portion of § 45-5-625(1)(c), MCA, that was not in effect during the time period the State alleged Tipton committed Sexual Abuse of Children against T.B. and A.B.

Thus, the charging instrument contained a criminal statute that was legally inapplicable to Tipton's conduct based on *ex post facto*. Tipton did not raise this *ex post facto* issue to the district court. Therefore, just as he did with Count I, Tipton requests this Court to nonetheless review his unpreserved claim concerning Counts II and III using plain error review or pursuant to an IAC claim.

Unlike the circumstances surrounding Count I, where plain error review was not warranted (evidence established Tipton committed the offense of Indecent Exposure to Minors after the statue's effective date), no evidence established that Tipton's criminal conduct toward T.B. and A.B. occurred after October 1, 2017.

[4]The following alleged facts in the charging documents support that Tipton "persuade[d], entice[d], [or] counsel[ed]" A.B. and T.B. to engage in sexual conduct: Tipton explicitly asked T.B. to masturbate with him in the car in Billings while showing him pornography; Tipton showed A.B. pornography on multiple occasions to "groom[] [her] for sexual activity by sexualizing their relationship" which was supported by Tipton's criminal history which established Tipton had used pornography to groom three male victims prior to sexually assaulting them in Washington State. (Docs. 1, 42.)

Thus, the State agrees that the verdicts on Counts II and III violated *ex post facto* constitutional provisions and should be reversed and remanded for a new trial.

"It has long been settled" that when "a defendant [] succeeds in getting his first conviction set aside, through direct appeal or collateral attack, because of some error in the proceedings leading to conviction," the proper remedy is to remand for retrial. *Lockhart v. Nelson*, 488 U.S. 33, 38 (1988); *Montana v. Hall*, 481 U.S. 400, 403-04 (1987) (per curiam) (when charging document defective because state relied on statute not in effect at time of offense, retrial permitted on other statute that was in effect); *Lee v. United States*, 432 U.S. 23 (1977) (re-prosecution of defendant not barred by Double Jeopardy Clause where information failed to allege the requisite intent required by underlying criminal statute); *United States v. Ball*, 163 U.S. 662 (1896) (Double Jeopardy Clause did not protect a defendant from retrial after the trial court initially dismissed the case due to a flawed indictment).

In *Hall*, the United States Supreme Court reversed this Court and held that Hall could be retried for sexual assault after his conviction for incest was reversed based on *ex post facto* principles. *Hall*, 481 U.S. at 404. The State originally charged Hall with sexual assault for abusing his 12-year-old stepdaughter in the summer of 1983. *Id. at* 401-402. The court granted the defense motion to dismiss in which Hall argued he should have been charged with the more specific offense

of incest. *Id*. The State then charged Hall with incest, and he was convicted. *Id*. Hall appealed, arguing that his conviction violated *ex post facto* because Montana's incest statute was not amended to include stepchildren until October 1983, after the alleged criminal conduct. *Id*. This Court agreed and reversed Hall's conviction as a violation of *ex post facto* and further held that he could not be retried for sexual assault based on double jeopardy principles. *Id*.

The United States Supreme Court agreed Hall had been improperly convicted of incest under *ex post facto* principles, but held the State could retry Hall for sexual assault. *Hall*, 481 U.S. at 403-404. The Court relied upon the "venerable principl[e] of double jeopardy jurisprudence that the successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict poses no bar to further prosecution on the same charge." *Id*. (internal citations and quotations omitted). Since Hall's conviction was reversed due to a trial defect (Hall was tried for violating a legally inapplicable statute) and not because the evidence could not sustain the jury's verdict, retrying him for sexual assault did not offend double jeopardy principles. *Id*.

Just like Counts II and III here, the incest statute Hall was originally convicted under was not in effect at the time of his alleged criminal conduct. *See Hall*, 481 U.S. at 404 ("[R]espondent's conduct apparently was criminal at the time he engaged in it. If that is so, the State simply relied on the wrong statute in its

second information. It is clear that the Constitution permits retrial after a conviction is reversed because of a defect in the charging instrument.").

In contrast to reversing a conviction based on trial error, the United States Supreme Court has "held that when a defendant's conviction is reversed by an appellate court on the sole ground that the evidence was insufficient to sustain the jury's verdict, the Double Jeopardy Clause bars a retrial on the same charge." *Lockhart*, 488 U.S. at 39 (citing *Burks v. United States*, 437 U.S. 1, 18 (1978)); *Hall*, 481 U.S. at 402. As the Court explained,

> *Burks* was based on the view that an appellate court's reversal for insufficiency of the evidence is, in effect, a determination that the government's case against the defendant was so lacking that the trial court should have entered a judgment of acquittal, rather than submitting the case to the jury. Because the Double Jeopardy Clause affords the defendant who obtains a judgment of acquittal at the trial level absolute immunity from further prosecution for the same offense, it ought to do the same for the defendant who obtains an appellate determination that the trial court *should* have entered a judgment of acquittal.

Lockhart, 488 U.S. at 39 (citations omitted) (emphasis in original). Based on this rationale, the Double Jeopardy Clause will bar retrial only where a reversal or dismissal is the "functional equivalent" of acquittal. *See, e.g., McDaniel v. Brown*, __ U.S. ___, ___, 130 S. Ct. 665, 672 (2010). This exception does not apply here because, contrary to Tipton's attempt to frame the issue as one of sufficiency of the evidence (*see* Br. at 13-18), the only legal ground that supports his claims

concerning Counts II and III is *ex post facto* (the inapplicability of § 45-5-525(1)(c), MCA (2017) was on legal grounds, not factual).

Notably, in *Lockhart*, when the appellant's conviction was reversed because evidence was erroneously admitted and, absent that evidence, there was insufficient evidence to support a conviction, the Supreme Court held the Double Jeopardy Clause did not preclude retrial. *Lockhart, supra*. The Supreme Court reasoned that the reversal based on trial court error in the admission of evidence rather than on the presentation of an insufficient case requiring acquittal. *Lockhart, supra*. The decision in *Lockhart* exemplifies the distinction the Court made in *Burks* between evidentiary insufficiency (*e.g.*, State "failed to prove its case") and "trial error," which 'implies nothing with respect to the guilt or innocence of the defendant,' but is simply 'a determination that [he] has been convicted through a judicial process which is defective in some fundamental respect.'" *Burks*, 437 U.S. at 15.

Reversals resulting from faulty charging documents or erroneous jury instructions are not the equivalent of an acquittal, but rather are a type of "trial error" that does not bar retrial of the defendant. *Burks*, 437 U.S. at 15; *Brazzel v. Washington*, 491 F.3d 976, 981 (9th Cir. 2007) (conviction overturned because of jury instruction error, remedy is to remand for a new trial); *Hall*, 481 U.S. at 403 n.1 (incest conviction reversed on *ex post facto* grounds was not "an implied acquittal of the offense of sexual assault"). This Court has employed the same

rationale. *See Price*, ¶¶ 27, 30 (reversed conviction and remanded for new trial following determination of *ex post facto* violation under plain error review when charging document did not set out proper version of statute).

Reversals due to other trial errors also call for retrial. *See Resh*, *supra* (remanded for new trial when jury not instructed on applicable version of the law); *Zerbst*, *supra* (remanded for new trial when jury given wrong definition of consent based on new law); *Bradley*, 269 Mont. at 396, 889 P.2d at 1169 (conviction reversed and new trial ordered when instructions omitted part of applicable subsection); *United States v. Tateo*, 377 U.S. 463 (1964) (defendant whose conviction is overturned in collateral proceedings on the ground that a guilty plea entered by him during trial was not voluntary but induced in part by comments of the trial judge may be tried again for the same crimes without violating double jeopardy clause). Trial errors that do not foreclose subsequent prosecution also include circumstances when the State's conduct caused a conviction to be reversed. *See State v. Hayden*, 2008 MT 274, ¶ 33, 345 Mont. 252, 190 P.3d 1091 (using plain error review, reversed and remanded for new trial due to prosecutor misconduct).

As the United States Supreme Court explained, when neither the parties nor the court realize a trial error, such as occurred here, remanding the matter to correct the error is necessary to ensure the "sound administration of justice:"

> Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has

> obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest.

Tateo, 377 U.S. at 466.

Contrary to part of Tipton's argument (Br. at 13-18), he is not entitled to an order acquitting him on Counts II and III because the issue presented on appeal is not one of sufficiency of the evidence, but rather whether there was a trial error that resulted in violation of *ex post facto* principles. Tipton cites to no binding authority that when a defendant is improperly convicted for an offense that was not in effect for the period charged that the jury verdict should be reclassified as not supported by sufficient evidence, thereby requiring reversal with orders to enter an acquittal. *See State v. Redlich*, 2014 MT 55, 374 Mont. 135, 321 P.3d 82 (Court has "repeatedly held that it is not within our purview to 'conduct legal research on [a party's] behalf, to guess as to [the party's] precise position, or to develop legal analysis that may lend support to that position.").

The circumstances presented here involve a defective charging document and improper jury instruction based on the version of Sexual Abuse of Children in effect for the period charged. The State had alleged sufficient evidence to charge

Tipton with violating the 2015 version of subsection (1)(c) as to both T.B. and A.B. But, because neither the parties, nor the court, realized that the inapplicable portion of subsection (1)(c) was used in the jury instructions, the result was a trial error, not insufficient evidence.

The Supreme Court took care to distinguish between a reversal for insufficiency of the evidence and trial error, explaining that:

> [R]eversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process [that] is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the [defendant] has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring [sic] that the guilty are punished.

Burks, 437 U.S. at 15 (internal quotation marks omitted.)

As this Court has found, a reversal due to an *ex post facto* violation resulting from a flawed charging document is not the "functional equivalent" an acquittal or a determination that the State failed to sufficiently prove the elements of an offense. *See Price, supra.* Accordingly, Counts II and III should be reversed and remanded for a new trial because just like in *Hall*, § 45-5-625(1)(c), MCA (2017) was <u>legally</u> inapplicable to Tipton's conduct. It was not <u>factually</u> inapplicable as was the situation in *State v. Newrobe*, 2021 MT 105, 404 Mont. 135, 485 P.3d 1240 (held,

after mistrial declared in incest case, State barred from prosecuting defendant under amended information that cured fatal deficiency with incest charge by charging sexual intercourse without consent).

In *Newrobe*, the original charging instrument was factually defective because the victim, Newrobe's 16-year-old niece, was not a "descendent" as required to prove incest. *Newrobe*, ¶¶ 5, 7. Prior to the mistrial, the defense had argued that the State could not prove the incest charge because it was a factual impossibility to establish the required familial relationship between the victim and Newrobe to constitute incest. *Newrobe*, ¶ 15. After determining the district court should not have declared a mistrial, this Court observed that the court's error not only gave the State a "tactical advantage over the accused," it also resulted in Newrobe being denied the opportunity for an acquittal since the State could not prove the elements of incest. *Newrobe*, ¶¶ 15-16. *Newrobe* does not apply here given the procedural differences (mistrial vs. *ex post facto*) and the fact the offense at issue was factually inapplicable to Newrobe, not legally inapplicable under *ex post facto* principles as is the case here.

Tipton's reliance on three cases from other jurisdictions is unavailing. (*See* Br. at 13-14) (citing *Commonwealth v. Welch*, 825 N.E.2d 1005 (Mass. 2005) (reversed criminal harassment conviction for a series of homophobic statements made over the course of 18 months after determining it could not consider alleged

acts that occurred after statute's effective date); *State v. Owen*, 669 A.2d 606 (Conn. 1996) (reversed conviction for sexual assault in first degree because evidence did not establish conduct occurred prior to statue's effective date which jury had been instructed on); *Litton Indus. Prods., Inc. v. Gammage*, 668 S.W.2d 319 (Tex. 1984).).

In addition to being non-binding, those cases are procedurally and factually distinguishable. Moreover, of those three cases, only *Welch* applied *ex post facto* principles and *Litton* concerned the authority of the trial court to award treble damages pursuant to the 1973 Deceptive Trade Practices Act when no evidence established the accident at issue occurred prior to Act's effective date.

In *Welch*, unlike the circumstances here, where the defendant did not raise any issue with the sufficiency of the evidence related to the defective charging instrument, the defendant sought a directed verdict based on insufficient evidence. *Welch*, 825 N.E.2d at 1010. Second, the alleged criminal conduct in *Welch* involved a pattern or series of acts over a period of time, like *Price*. *Id*. at 1008. Third, and like Count I discussed above, the alleged criminal conduct in *Welch* straddled the effective date of the statute whereas here, none of the alleged criminal conduct relevant to Counts II and III occurred prior to the effective date. *Id*. at 1008-10.

In *Welch*, the court would not consider alleged homophobic statements that allegedly occurred prior to the effective date leaving only four relevant statements to evaluate for sufficiency of the evidence. *Welch*, 825 N.E.2d at 1014-15. Then, based on the unique elements required under Massachusetts's criminal harassment statute, the *Welch* court determined there was insufficient evidence to support the conviction since there needed to be at least three harassing statements to constitute a pattern or series and two of the four post-effective date statements were not directed at a specific person which the statute required. *Id*.

The *Welch* court did not hold that if none of the alleged criminal conduct occurred after the applicable statute's effective date that there is a *per se* insufficiency of the evidence as Tipton suggests. Rather, the *Welch* holding is more applicable to the analysis discussed above for Count I, with the difference being there was sufficient evidence presented here to establish Tipton committed Indecent Exposure to a Minor after the October 2015 effective date.

In addition to not applying *ex post facto* principles, the charging instrument in *Owen* was not deficient or faulty and the jury was correctly instructed on the applicable law relative to the dates of the alleged criminal conduct. *Owen*, 669 A.2d at 612 (information alleged criminal conduct occurred during the months of October through December 1989 and jury specifically instructed that the effective date of the relevant statute was October 1, 1989). Owen's conviction for

that specific count was reversed because the victim's testimony was not specific enough to establish the assault took place after October 1, 1989 (*e.g.*, victim testimony showed she did remember when specific event occurred, and her testimony established only that an unspecified "incident" with defendant occurred "near" her 10th birthday which was October 20th; questions by counsel were not facts in evidence). *Id*. at 612-13. In contrast, the jury in this case was not instructed on the applicable effective date for Counts II and III, therefore this Court cannot evaluate the jury's application of the facts to the law for sufficiency of the evidence.

Tipton offers no persuasive or binding authority to support his argument that when neither party nor the court realized the charging document (and resulting jury instructions) alleged criminal conduct that occurred after the specified statutory violation became effective that it constitutes a *per se* insufficient record to convict or the "functional equivalent" to an acquittal on the merits for Counts II and III.

Tipton was subjected to *ex post facto* prosecution as a result of trial error which neither the court nor the parties realized. Since he was convicted of Counts II and III pursuant to deficient procedures and not insufficient evidence, the appropriate remedy is to reverse and remand those charges for retrial. *See Price*, *supra*; *Lockhart*, 488 U.S. at 38; *Hall*, 481 U.S. at 403-04; *Lee*, *supra*.

CONCLUSION

This Court should affirm the jury's verdict for Count I and remand the remaining two counts for retrial.

Respectfully submitted this 22nd day of July, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,960 words, excluding certificate of service and certificate of compliance.

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I, Kathryn Fey Schulz, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 07-22-2021:

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