DA 21-0086

IN THE SUPREME COURT OF THE STATE OF MONTANA

THE STATE OF MONTANA,

Plaintiff and Appellee,

v.

LUKE STROMMEN,

Defendant and Appellant.

OPENING BRIEF OF APPELLANT

ON APPEAL FROM THE MONTANA SEVENTEENTH JUDICIAL DISTRICT COURT, VALLEY COUNTY, CAUSE No. DC-18-32
THE HONORABLE JOHN W. LARSON, PRESIDING

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I. STATEMENT OF THE ISSUES

A. Shari Vanino's video testimony from Nantucket violated the Due Process and Confrontation Clauses of the United States and Montana Constitutions where she was both available to testify in person and the significance of her opinions demanded face-to-face confrontation.

B. Shari Vanino's opinions were improper statistical testimony.

C. The District Court erred in denying Luke Strommen's motion to depose Francis Favis and erred in denying two motions for mistrial where the State violated two separate Orders *In Limine* during its opening statement, one of which prohibited any mention of Favis.

D. The State unconstitutionally shifted the burden of proof to Luke Strommen and prejudiced his right to a fair trial when it was allowed to elicit testimony and argue that the alleged victim lacked motivation to lie.

II. STATEMENT OF THE CASE

In 2018, former Valley County Undersheriff, Luke Strommen (Luke), ran for Sheriff. During the campaign, it was rumored he let a minor, J.U., out of trouble in exchange for sex. The rumor was proven false.

While investigating the J.U. rumor, the State learned Luke had a consensual relationship with 17-year-old S.B. The State obtained S.B.'s phone and discovered an email address Luke used, drewsbrew55@gmail.com. In his email there was one photo of S.B. lifting up her sweater revealing her bra.[1] Based on his response to the

[1] Another photo of a vagina was found, which S.B. claimed she took of herself. In discovery, Luke learned the photo was a screenshot.

photo, Luke was charged with Sexual Abuse of Children. After the District Court denied his motions to dismiss, he entered into a plea agreement and was sentenced to 10 years, all suspended. Doc. 157.

This appeal involves the ancillary charge that arose from the S.B. investigation. After reading an online article posted by the Glasgow newspaper mentioning the "drewsbrew55" email, J.R., who lived in Washington, called her mother Janet Rodgers (Janet). J.R. told her mom she exchanged a consensual nude photo via email with Luke in 2013, when she was over 18. J.R. then told her mom of an alleged "consensual" sexual relationship with Luke that began in 2009 when she was 14. After Janet called local law enforcement, State Agent Bruce McDermott (McDermott) investigated J.R.'s allegations. J.R. claimed her relationship with Luke was "consensual," but illegal because she was 14. In 2018, Luke was charged with Sexual Intercourse Without Consent for the alleged 2009 relationship with J.R.

At trial, the State needed to explain J.R.'s 9-year delay in reporting. To do so, it called "blind expert" Shari Vanino (Vanino) to testify.[2] Over Luke's objection, Vanino was allowed to testify via two-way video. During trial, Luke learned that, despite Vanino's previous representations of "unavailability," she was in fact available to testify in person. She improperly testified that it is rare for alleged victims to immediately report abuse. Her opinions were the centerpiece of the State's case.

[2] Vanino regularly testifies for the State, as this Court has addressed her testimony in *State v. Quiroz,* 2022 MT 18, 407 Mont. 263, 502 P.3d 166 and *State v. Grimshaw*, 2020 MT 201, 401 Mont. 27, 469 P.3d 702. Colorado has also reversed a conviction because of her testimony. *People v. Marx*, 2009 COA 138, 467 P.3d 1196 (Colo. Ct. App. 2019).

In its opening statement, the State violated two District Court Orders *in Limine*. The District Court sustained only one of Luke's objections - regarding J.R.'s then-boyfriend, now fiancé, Francis Favis (Favis). Although it denied a mistrial, the District Court read a cautionary instruction. The State's violation of the Order *in Limine* prejudiced Luke because the State opposed Luke's efforts to depose Favis, (J.R. claimed Favis knew everything) after J.R. threatened to cease all cooperation if he was interviewed.

Throughout trial, the State bolstered J.R.'s credibility. In addition to calling Vanino who provided opinion testimony regarding delayed reporting, it asked two witnesses why J.R. would want to hurt Luke and his family. In closing, it asked the jury to consider why J.R. would lie, and invited the jury to conclude that if she was lying she would have to be a sociopath, evil, and worse than a child molester. The State argued in closing that if Luke was innocent, he would shout as loud as he could that he "didn't do it," but "he never denie[d] it."

The jury convicted Luke of sexual intercourse without consent. He was sentenced to 40 years with a 10 year parole restriction. He timely appealed.

III. STATEMENT OF THE FACTS

A. Luke is charged for his alleged 2009 relationship with J.R.

Luke was charged by Third Amended Information alleging a single count of Sexual Intercourse without Consent, in violation of Mont. Code Ann. § 45-5-503(3)(a). Doc. 241. The charge related to the alleged relationship with J.R. that she claimed began in September 2009, in a Great Falls hotel room, when she was 14. J.R.'s mother, Janet, first reported the alleged relationship to law enforcement in

2018. Tr. July 15, 2020, 646:3 to 647:18. At the time of the report, J.R. was 23. At the time of trial, she was 25.

Luke never provided a statement about the alleged relationship with J.R. and did not testify at trial. At trial J.R. testified that the relationship was consensual, but that she was incapable of consent because of her age. Tr. July 14, 2020, 422:5-13. She testified to several sexual encounters beginning at the age of 14 involving sexual intercourse. *Id*. at 455:5-14. Luke denied any sexual relationship with J.R. He called his wife, Tara Strommen (Tara), to testify about the hotel stay in Great Falls. Tara's recollection differed in significant ways from J.R.'s. Tara testified to numerous instances of conduct that contradicted J.R.'s story. Luke also called his mother-in-law, Debra Dulaney, whose testimony conflicted with the testimony of J.R., Janet, and Mary Jean Peterson, J.R.'s aunt.

J.R. first disclosed her alleged relationship with Luke to her mother after reading an online article mentioning the "drewsbrew55" email she used to send Luke a nude photo when she was over 18. J.R. claims she was worried investigators would find the sexual image she sent Luke. The article related to the S.B. investigation.

J.R.'s mother contacted local law enforcement, and McDermott called J.R. on November 7, 2018. J.R. told McDermott that her friend, Alliea Nyenhuis (Alliea), knew about her alleged relationship with Luke in 2009, while it was occurring. Doc. 211, p. 1. McDermott discussed with J.R. the importance of having witnesses to verify her story so it did not appear she was "just jumping on a bandwagon." *Id*. at p.2. J.R. said Alliea would "totally verify my story" and had known about it "for so many years." *Id*. at p. 1

One day later, McDermott learned Alliea could not verify J.R.'s story. She did not remember J.R. telling her anything about a relationship with Luke. He asked J.R. if anyone else knew about her and Luke from 2009. J.R. said "I don't think so." *Id*. Nearly nine months later, on or about July 30, 2019, J.R. told McDermott that Kelsey Remus (Kelsey) could verify her story. *Id*. at p. 2.

On August 27, 2019, Luke's counsel interviewed J.R. in Washington. That same day, prior to the defense interview, J.R. called McDermott to ask if he interviewed Kelsey. McDermott had not interviewed Kelsey, so no one knew what Kelsey was going to say. *Id*.

Without knowing Kelsey's story, J.R. told Luke's counsel Kelsey (not Alliea) was the friend she told, but she was never present during any sexual encounter with Luke. *Id*. J.R. was adamant her first encounter with Luke occurred in September 2009, in a hotel room in Great Falls with Luke's wife and children present. Tr. July 14, 2020, 322:18-21; 328:20 to 329:11. Unbeknownst to J.R., Kelsey's story didn't match:

> I remember babysitting and you [J.R.] had to be like 14 or younger and I already knew but he [Luke] came home while we were there and his wife was gone and he's like hey I brought some rolos and it was like wow good cover up and then he took you downstairs and had sex with you.

Doc. 211, p 3. Kelsey was adamant this encounter occurred during the summer of 2009, and the alleged relationship had been occurring for some time prior. Tr. July 16, 2020, 938:9 to 939:14. Kelsey was the only *contemporary* witness to the alleged relationship. Now, J.R.'s story was wrong. Her timeline did not match.

When J.R. learned what Kelsey's story was, she changed her story to match, claiming Kelsey's story "sparked a memory." Tr. March 9, 2020 at 14:20 to 15:13. J.R.'s new version of events was shared with Luke shortly before his March trial was scheduled to begin. *Id*. This is discussed further below.

B. The District Court denies Luke's Motion to Depose Favis.

There was, however, another witness who knew about J.R.'s relationship with Luke. J.R. told McDermott her boyfriend, Favis, had known about her alleged relationship with Luke for years prior to November 2018. McDermott knew Favis was significant. He told J.R. in November 2018:

> It's like why would you want to say to this girl, no it didn't happen when you have this guy that you're with [Favis], *you told him for two years now* [since 2016], *so it's not like you're just jumping on a bandwagon and you have proof* that I .. I can't share you the .. share with you aspects of my investigation but stuff you've already told me gives you instant credibility with me.

Doc. 211, p. 2.

J.R. said Favis "knows everything. And actually I told him long before any of this every [sic] came up. I ... I shared my ... what happened with him and he ... so he's known about it for years." Doc. 147, p. 2. Without ever speaking to Favis, McDermott concluded that "[J.R.] confided in two people about this sexual relationship, one being [Favis] who she's been with for two years now ... eliminating any claim of false reports or false claims." Doc. 211, p. 7.

When Luke sought to interview Favis, J.R. threatened to cease all cooperation with the State. She would not even reveal his name without a court order. Doc. 147, p. 3. The State told the District Court it believed "J.R. [would] become an

uncooperative witness in the event Favis is compelled to be deposed." Doc. 144, p. 3. The State opposed Luke's effort to interview Favis.

Luke was forced to file a Motion to depose Favis. The State opposed his Motion. The District Court denied Luke's Motion. It found Favis' deposition was "beyond the scope" of the case, and what J.R. told him "years later was beyond the scope of the events alleged in this case." Doc. 150, p. 3. The District Court specifically prohibited Luke from speaking with Favis *at all* to investigate J.R.'s allegations or to assess J.R.'s credibility.

C. Over Objection, Vanino is allowed to Testify via Video.

The State gave notice that it would call Vanino as an expert at trial. On February 26, 2020, the State argued that Vanino had a conflict, was unavailable, and needed to testify via video:

> MR. BUCHLER: Her conflict is -- is as such. She has a Tuesday night therapy session that is -- is treating adults of children who have been sexually abused. It's the State's understanding that this is a -- it's been an ongoing therapy session. She can't reschedule it because the -- the children of these parents are in their individual breakout sessions at that time. So to reschedule the parents' session would necessitate rescheduling a variety of different children's therapy sessions.

Tr. Feb. 26, 2020, 4:21 to 5:6.

Luke objected to Vanino testifying via video. Luke demanded her personal appearance at trial, noting trial had been scheduled for some time and there were concerns with her opinions about delays in reporting being "normal and acceptable." *Id*. at 6:23 to 8:6. Luke offered to work around Vanino's schedule and offered to allow her to testify out of order. *Id*. at 8:1-6. The State asserted it was "not practical" for Vanino to personally appear given the trial's location in Glasgow, Montana. *Id*.

at 8:11-14. Over Luke's objections, the District Court allowed Vanino to testify via video. It gave *no* rationale in its Order. Doc. 184.

On the eve of his March 2020 trial, Luke learned J.R. changed her story to align with Kelsey's timeline, which the State recognized "changed the whole defense theory about this case[.]" Tr. March 9, 2020, 6:9 to 9:14. The disclosure by J.R. changed the entire timeline of J.R.'s allegations against Luke. Rather than beginning September 12, 2009, in a Great Falls hotel room, J.R.'s story changed to the summer of 2009. *Id*. at 4:20 to 15:13. The District Court granted Luke's motion for a continuance and reset the trial for July 2020.

At a pretrial hearing on June 24, 2020, the State again told the District Court Vanino "has a significant conflict ... She has a parent group that she does every Tuesday night. And if she doesn't do her part ... the children's group can't go forward." Tr. June 24, 2020, 5:9-17. The State did not speak to Vanino before this hearing "because the Court had already allowed her video testimony" and it again reiterated "she has a significant commitment that she cannot get out of Tuesday night that would be right in our case in chief that she can't miss, Your Honor." *Id*. at 5:23 to 6:8. The State again emphasized part of the basis for her video testimony request was because she lived in Denver and "it's significant travel for her to get to Glasgow, Montana." *Id*. at 6:10-15.

No COVID-19 related concerns were presented *or even suggested* about Vanino's video testimony. Ever.

Prior to trial, Luke filed a Point Brief regarding Vanino's testimony. He objected to any testimony about statistics. Doc. 247. Vanino testified to a number

of statistical conclusions; such as it being "rare" for an alleged victim to immediately report sexual abuse. Tr. July 15, 2020, 556:22-25. Her testimony included numerous statistics disguised as victim behavior, such as it would be "unusual" to immediately report. *Id*. at 557:1-15.

D. The State Violates Orders *in Limine*.

Luke's jury trial took place in person, in Glasgow on July 13-17, 2020. During its opening statement, the State violated two District Court's orders granting Luke's Motions *in Limine*. Docs. 151, 178, 179. First, the State discussed excluded emails:

> But then something happens in the investigation where the news media reports. And even though [J.R.] doesn't want to be involved, she's still tracking what's happening here with Mr. Strommen. She is tracking it, watching social media, watching the news reports. And she realizes something from a news report -- that there's an email that's been --
>
> MR. HOLDEN: Objection, Your Honor. This is the subject of a Motion in Limine.
>
> MR. GUZYNSKI: I'm not going to violate a Motion in Limine.
>
> MR. HOLDEN: You just did.
>
> MR. GUZYNSKI: No, I didn't -- that's not the Judge's order, Your Honor.
>
> MR. HOLDEN: I move for a mistrial, Judge.
>
> THE COURT: I'm going to allow him to proceed.
>
> MR. GUZYNSKI: And what happens in the news media is the news media releases an email, and that's when [J.R.] knows that this life that she wants to protect -- that she doesn't want to be involved in this case -- is jeopardized. She knows that email is the same email that she used with Mr. Strommen.

Tr. July 13, 2020, 232:4 to 233:18.

The second violation occurred moments later:

France [Francis Favis] answers the phone and says, "Don't ever call here again." Then –

MR. HOLDEN: Your Honor, I'm going to object. That violates the Court's Motion in Limine. Move for a mistrial.

THE COURT: We're continuing through your objection.

MR. GUZYNSKI: I don't know what you are talking about.

MR. HOLDEN: You do too.

MR. GUZYNSKI: It's absurd.

Id. at 234:19 to 235:4.

Luke made a record:

It was a clear violation of the Court's order. I mean, to even suggest that at -- first off, that it was ridiculous, is wrong. The Court's order was very clear.

* * *

They tried to get you to change it multiple times. They want to backdoor what you kept out. And if I had done that, if I had done that, Judge, we would have some serious discussions about whether or not that was appropriate or not. But just because the State does it, doesn't mean that they should get a pass here, Judge.

* * *

You excluded any and all reference to Francis Favis -- any at all ... The State objected to me taking his deposition.

In fact, [J.R.] said she would not cooperate if I went and deposed him. She literally said, "I won't cooperate if you allow Mr. Holden to depose him." And what did the State do, they talked to him about -- France, he's a nurse, his life partner -- and then they talk about the phone call.

I read your order last night . . . it specifically says nothing about Francis Favis's phone call in this trial at all. And the State just brought it up in their opening again. And they -- they don't like that order either, Judge . . . but it is totally inappropriate, Your Honor. And I don't mean to say "totally inappropriate," but I have no other words. I'm shocked. I'm shocked.

* * *

> ***And so I move for a mistrial -- I still move for a mistrial. But to the extent the Court has -- will deny the mistrial, then I think we have to have a curative instruction, Your Honor***. And let me tell you why I'm upset about this . . . The emails, as the Court is aware, have nothing to do with this particular allegation .... But the State has constantly tried to backdoor some type of veracity, some type of character building of J.R. with those emails. And you properly excluded them, Your Honor, and your order is very clear.
>
> And I was the one trying to push the issue with Francis Favis, and you were very clear on that. There is no information on Francis Favis. And so I move for a mistrial on Francis Favis, too, Your Honor, to the extent you denied that. And we certainly would ask for a curative instruction[.]

Id. at 254:18 to 258:4.

Counsel continued: "Your order on the specific issue on the Francis Favis phone call, which was the order for clarification, said, 'There will be no reference to the Francis Favis phone call at all.' I read it last night -- 'at all.' That's a violation of your order, too." *Id*. at 263:12-17.

The District Court reiterated: "Well, I'm clear that that occurred -- that there was a reference to the Francis Favis phone call, and that was my order not to have that phone call referenced." *Id*. at 263:18-21.

The next morning, the District Court denied Luke's objection related to the e-mail reference. Luke argued that "a curative instruction cannot put the toothpaste back into the tube and mentioning the specific information that was excluded reinforces that information." Tr. July 14, 2020, 286:5-24. However, the District Court sustained Luke's objection regarding the State's discussion of the Favis phone call. It denied Luke's motion for a mistrial. It did read a curative instruction. *Id*. at 295:13 to 296:2.

E. Vanino Testifies via Video from Nantucket.

On Wednesday morning, July 15, 2020, Vanino testified via video. The State elicited the following testimony:

> Q. Have you testified before as an opinion witness?
>
> A. Yes, I have.
>
> Q. And how many times?
>
> A. I believe today is my 83rd time.
>
> Q. And can you generally summarize the courts you've testified in.
>
> A. Sure. So I've testified -- like I said, I testify for the military, so in court-martial cases for the Navy. I've testified many times in Montana. I testify in civil court, district court, and county court as well. And I've testified, I don't know, maybe seven different states; I've testified, like, Colorado, Montana, Wyoming, Oregon, Washington, Virginia, Illinois -- I think that's it. So, you know, typically criminal cases similar to this one, just all over the place.
>
> Q. And have you testified in this part of Montana in a county east of here called Roosevelt County, which is Wolf Point, Montana?
>
> A. Yes, I have.
>
> Q. And When you testified in that trial how long ago was that?
>
> A. I don't remember; maybe three years ago, something like that.
>
> Q. Did you travel to Wolf Point during that testimony?
>
> A. Yes, I did. I flew into the Wolf Point Airport, I believe -- or Glasgow Airport. It was a cute little airport.

Tr. July 15, 2020, 549:18 to 550:23.

Vanino also testified on direct about the parent group she says she runs on Tuesday night and used as the reason she needed to testify via video. *Id*. at 561:23

to 563:23. It was only on cross that Luke learned Vanino was still traveling "all over the place" and there was in fact no Tuesday night parent group:

Q. And where are you today?

A. I'm in Massachusetts.

Q. Where in Massachusetts are you?

A. I'm in Nantucket.

Q. Okay. Where is Nantucket, is it an island?

A. It's off the coast of Massachusetts.

Q. Okay. And yesterday was Tuesday, correct?

A. Correct.

Q. And you talked with Mr. Guzynski about a parent group counseling that you run on Tuesday evenings?

A. Yes.

Q. Did you participate in that group yesterday?

A. No, we're not able to do in-person therapy due to COVID.

Q. And you didn't –

A. So those services are on pause right now.

Q. And you don't hold that group via video?

A. No.

Q. And you mentioned COVID, are you in quarantine?

A. No, I'm not.

Q. So you could have been here today in person?

MR. GUZYNSKI: Objection, Your Honor. The Court has expressly given her permission to be by video.

> THE COURT: The Court has; there's an order of the Court so we can proceed to other issues, Ms. Ranta.

Id. at 596:3 to 597:19.

Vanino's opinion testimony occupied nearly the entire Wednesday morning of trial. Her opinions cover 77 pages of the transcript on appeal. Vanino's opinions were the key to the State's case. The State elicited Vanino's opinions about delayed reporting, when and why it occurs, to whom the disclosure is made, and the supposed difficulty in detailing the alleged abuse. *Id*. at 556:22 to 570:11; 584:23 to 595:5. She also testified at length about adults who abuse children. *Id*. at 572:10 to 584:22. Each area of her blind opinions was designed to explain away J.R.'s changing (or lack of) memory and delayed disclosure. She testified to statistics disguised as behavior, such as it being "rare" for an alleged victim to immediately report.

Luke moved for a mistrial or dismissal of the charge based upon Vanino's representations about her unavailability. *Id*. at 673:9 to 682:20. The Court denied the motion, but admitted it was "a little surprising where she is[.]" *Id*. at 680:6.

F. The State Shifts the Burden.

J.R. testified on direct on July 14, 2020:

> Q. (By Mr. Guzynski) J.R., as you sit here today, is there anything -- is there any reason you would want to hurt Mr. Strommen that you know of?
>
> A. No.
>
> Q. Any reason you would want to hurt Tara?
>
> A. No.
>
> Q. What about those three girls? Is there any reason you would do anything to maliciously hurt them?

A. No.

Tr. July 14, 2020, 401:5-15.

On Thursday, July 16, 2020, the State asked Tara:

Q. And you don't know of any reason why [J.R.] would want to hurt you, do you?

* * *

MR. HOLDEN: It also violates the burden, Your Honor, so I'll just have -- can I make a constitutional objection? Thank you, Your Honor.

THE COURT: Overruled.

Q. (By Mr. Guzynski) You don't know of any reason why [J.R.]would want to hurt you, do you?

A. I don't, other than she just -- I don't know if she was jealous of us or what. I don't know.

Q. Do you remember when I asked you that question back in March of 2020, and you affirmatively answered, "No." Do you remember that?

A. I don't remember.

* * *

Q. (By Mr. Guzynski) And when we talked back in March of 2020, I asked you: "Do you know of any reason why [J.R.] would want to hurt you Ms. Strommen?" And what was your answer?

A. It was, "No."

Q. And do you know of any reason why [J.R.] would want to hurt your three daughters?

A. No.

* * *

Q. Do you have any reason to know why [J.R.] would want to hurt the Defendant, Luke Strommen?

A. No.

Tr. July 16, 2020, 1019:3 to 1021:6.

During the State's closing argument, it asserted the jury should ask why J.R. would lie or falsify her allegation. Tr. July 17, 2020, 1088:4 to 1091:25. It bolstered J.R.'s credibility using Vanino's[3] and Kelsey's[4] testimony, asking why J.R. would lie about Luke, and arguing J.R. was committed to the truth. If the jury thought J.R. was lying, the State suggested the jury would have to believe she was a sociopath, evil, and worse than a man that would hurt a child. *Id*. at 1090:20 to 1091:6.

The State asked the jury to think about:

> why would [J.R.] make up this lie? What would motivate her to do that, to put herself through that? Money? No. Scorned woman? No.
>
> Why would she come back here ten years later after having lived here and face this? When you think about somebody that would hurt a child, somebody that would sexually prey on a child, I think lots of us are somewhat horrified, upset, about the mere thought of somebody hurting a child. I would say to you something, I would argue, ladies and gentlemen, that there's something worse than that. Something worse than somebody hurting a child sexually. And that is the person that would come into a courtroom, totally make up a false allegation to an innocent man. Make up a grand lie to hurt Mr. Strommen in this fashion out of thin air. I would say that is worse than a man that would hurt a child. To put Mr. Strommen, his family, his children, through this as a grand lie. *What would that person look like? It would be a sociopath*.
>
> Would that person look like? *Did you see that person this week?* Is that the person that testified on the stand that you heard through her tears? *You may find that such a person that would do that would almost be evil*.
>
> * * *
>
> When [J.R.] tells her story you may find that she tells the story of what happened in her mind to what she lived, what she experienced. *She can't*

[3] Tr. July 17, 2020, 1080:25 to 1086:6; 1099:23 to 1100:16; 1110:18-22.

[4] Tr. July 17, 2020,1098:7 to 1102:10; 1106:1 to 1111:14.

> *make up the facts if she has a commitment to the truth. If you have a commitment to the truth you can't make up the facts*.

Id. at 1090:4 to 1091:25 (emphasis added).

The State also said to the jury:

> Now the question was asked of Janet, did Mr. Strommen ever admit -- did Mr. Strommen ever admit to sexually assaulting [J.R.]? She answered, "No." Certainly she said that *he never denied it*. *He never denied it*.
>
> *How would you act? How would any of you act if you were being accused of one of the most horrific crimes there is? Would you deny it? Would you exclaim as loud as you could, "I didn't do it. I didn't do it." But he never denies it*.

Id. at 1105:6-15 (emphasis added).

IV. STANDARD OF REVIEW

This Court exercises plenary review and applies de novo review to constitutional interpretations of the Sixth Amendment of the United States Constitution and Article II, Section 24 of the Montana Constitution. *State v. Stock*, 2011 MT 131, ¶ 16, 361 Mont. 1, 256 P.3d 899 (citing *State v. Norquay*, 2011 MT 34, ¶ 13, 359 Mont. 257, 248 P.3d 817).

The denial of a motion to depose a witness is reviewed for an abuse of discretion. *State v. Tilly*, 227 Mont. 138, 144, 737 P.2d 484, 488 (1987). When that denial involves the interpretation of a statute or constitutional right, review is de novo. *State v. Hoff*, 2016 MT 244, ¶ 11, 385 Mont. 85, 385 P.3d 945.

The standard of review on a motion for mistrial is unclear. This Court has said it reviews for an abuse of discretion, but also "whether there is clear and convincing evidence that the court's ruling is erroneous." *Compare State v. Erickson*, 2021 MT 320, ¶ 17, 406 Mont. 524, 500 P.3d 1243 *with State v. Flores*, 1998 MT 328, ¶ 52,

292 Mont. 255, 974 P.2d 124. However, when a District Court's rulings "involve the Constitution or the rules of evidence, our review is ... de novo." *State v. Patterson*, 2012 MT 282, ¶ 10, 367 Mont. 186, 188, 291 P.3d 556. Because ruling on a motion for mistrial involves the determination of whether the defendant's Constitutional right to a fair and impartial trial was violated, de novo review should apply. *State v. Denny*, 2021 MT 104, 404 Mont. 116, 485 P.3d 1227; *Patterson*, ¶ 10.

The Court reviews "a district court's evidentiary rulings for an abuse of discretion. If evidence has been improperly admitted, however, we will find reversible error based on prejudice to the defendant where there is a reasonable probability that the inadmissible evidence might have contributed to the conviction." *State v. Gowan*, 2000 MT 277, ¶ 9, 302 Mont. 127, 13 P.3d 376. When a District Court's rulings "involve the Constitution or the rules of evidence, our review is ... de novo." *Patterson*, ¶ 10.

This Court entertains plain error review of closing argument where it is persuaded the prosecutor's comments "resulted in a manifest miscarriage of justice, undermined the fundamental fairness of the trial, or compromised the integrity of the judicial process." *State v. Cooksey*, 2012 MT 226, ¶ 40, 366 Mont. 346, 286 P.3d 1174.

V. SUMMARY OF ARGUMENT

Vanino was available to testify in person. She represented that she could not travel to Glasgow because she ran a Tuesday night group therapy session in Denver. This was not true in July 2020. At trial Vanino testified from Nantucket. Despite her previous representations, she was not running a Tuesday night therapy session.

Vanino's opinions were indispensable for the State's case. She provided "blind" testimony on delayed reporting and numerous other character issues including lack of memory. She improperly testified to statistical conclusions, such as the rarity of immediate disclosure of abuse. Her opinions about victim behavior were essential for the State. Her opinions required face-to-face confrontation. Vanino's video testimony, granted solely for her convenience, denied Luke his right to Due Process and Confrontation under the United States and Montana Constitutions.

Luke should have been allowed to depose Favis. J.R. claimed she told him about Luke years prior to 2018. The State resisted all of Luke's efforts to interview Favis or reveal his name. In violation of a clear Order *it sought*, the State discussed Favis' phone call in its opening statement. Luke should be given a new trial and the opportunity to depose Favis.

The State shifted the burden. Throughout trial it unconstitutionally asked questions about J.R.'s lack of motive to hurt Luke or his family. During its closing, the State impermissibly commented on Luke's silence by arguing if Luke were innocent he would have shouted "I didn't do it" but he did not. Luke should be given a new trial.

VI. ARGUMENT

A. Nantucket is not Denver or Glasgow, and allowing Vanino's video testimony violated Luke's Constitutional right to Confrontation.

The United States and Montana Constitutions provide Luke the right to confront the witnesses against him. The Sixth Amendment provides "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The Montana Constitution provides "[i]n all

criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face[.]" Mont. Const. art. II, § 24.

An essential element of the Confrontation Clause is:

> the opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Mattox v. United States, 156 U.S. 237, 242 (1895); *accord Maryland v. Craig*, 497 U.S. 836, 845 (1990); *Coy v. Iowa*, 487 U.S. 1012 (1988); *California v. Green*, 399 U.S. 149 (1970).

The Confrontation Clause is a procedural guarantee that "commands, not that evidence be reliable, but that reliability be assessed in a particular manner by testing in the crucible of cross-examination." *Crawford v. Washington*, 541 U.S. 36, 61 (2004). Justice Scalia noted that the right of confrontation is not a "preference reflected by the Confrontation Clause; it is a constitutional right *unqualifiedly guaranteed*." *Craig*, 497 U.S. at 860 (Scalia, J. joined by Brennan, Marshall, and Stevens JJ. dissenting) (emphasis added).

"[A]t its core, 'the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.'" *Coy*, 487 U.S. at 1016. The United States Supreme Court recognizes "the profound effect upon a witness of standing in the presence of the person the witness accuses" and the "witness may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts." *United States v. Carter*, 907 F.3d 1199, 1205 (9th Cir. 2018) (*quoting Coy*, 487 U.S. at 1019-1020)

(internal quotations omitted).[5]

This Court has consistently interpreted the right of confrontation as requiring face-to-face confrontation. *State v. Mercier*, 2021 MT 12, ¶¶ 16-17, 403 Mont. 34, 479 P.3d 967. Luke's right to face-to-face confrontation is not satisfied by two-way video unless the State demonstrates on the record that: 1) the witness is not available; 2) dispensing with face-to-face confrontation is "necessary" to further an important public policy, and 3) the reliability of the testimony is otherwise assured. *State v. Martell,* 2021 MT 318, ¶ 12, 406 Mont. 488, 500 P.3d 1233; *Mercier,* ¶ 18; *Carter*, 907 F.3d at 1206; *Craig*, 497 U.S. at 850. The *Craig* standard is "stringent" and "must be reserved for rare cases[.]" *Carter*, 907 F.3d at 1206.

This Court has repeatedly held that "judicial economy, added expense, or inconvenience alone are not important public policies sufficient to preclude the constitutional right of a defendant to face-to-face confrontation at trial." *Martell,* ¶12. The time and expense of traveling to testify does not justify dispensing with face-to-face confrontation. *Martell*,¶ 15; *Mercier*, ¶ 28; see also *Melendez Diaz v. Massachusetts*, 557 U.S. 305, 325 (2009) (The Confrontation Clause "is binding" and may not be disregarded "at our convenience."). The Court has previously held that this analysis applies to a State's expert who provides opinion testimony. *State v. Bailey*, 2021 MT 157, ¶ 44, 404 Mont. 384, 489 P.3d 889.

1. Vanino was available.

The State failed to demonstrate Vanino was unavailable to testify in person. There was no showing whatsoever that Vanino's could not personally appear in

[5] Certiorari denied by *Carter v. United States*, 2019 LEXIS 4274 (U.S. June 24, 2019).

Montana for one serious felony trial. *Mercier*, ¶ 20. Rather, Vanino represented to the Court that she had group therapy in Denver she could not miss by traveling to Glasgow on a specific day. Her travel to Nantucket belies any suggestion she could not travel in July 2020[6] or that her group therapy prevented her personal attendance at trial. At trial, Vanino admitted that she had traveled to Nantucket and was not holding group therapy *at all*.

Her availability was elicited by the State. Vanino testified *on direct* that she previously traveled to Montana to *testify in person in Glasgow*. Tr. July 15, 2020, 550:11-23. She discussed the parent group, but it was only on cross that she admitted she was in fact *not even conducting that group*. When asked point blank if she was available to testify at Luke's trial in Montana, the State objected. Despite the State opening the door, the District Court sustained the objection and Vanino did not answer. *Id*. at 596:18 to 597:21.

Vanino was available to testify in person. This is not an argument about whether a therapy session makes a witness "unavailable" in the constitutional sense. This is a case where at trial Luke discovered that *there was no group therapy session at all*. Vanino's group therapy was the only basis upon which she was purportedly "unavailable." The discussion about the impracticality of flying her from Denver was premised on her group therapy session. If she could fly to Nantucket, she could fly to Glasgow. In allowing her video testimony, the District Court did not find Vanino was unavailable - it made no findings at all. Doc. 184. Worse yet, at trial the District Court prevented Luke from inquiring about her availability once it was clear she

[6] Glasgow is 690 miles from Denver, whereas Nantucket is 2,060 miles from Denver.

traveled to Nantucket and there was no group therapy.

2. There was no important public policy offered for Vanino's video testimony, nor did the District Court articulate any.

Even if Vanino was "unavailable," the State made no argument or showing that dispensing with face-to-face confrontation was necessary to further an important public policy. *Mercier*, ¶¶ 26-28. None of its arguments mentioned *any* public policy reasons for Vanino's video testimony. Significantly, none of the State's arguments mentioned the COVID-19 pandemic, even in June 2020. Tr. June 24, 2020, 5:9-17. The State's argument for Vanino's video testimony was her convenience. Luke offered to work around Vanino's schedule and call her out of order, which was denied. Vanino's convenience is not a legitimate basis for disregarding the Montana and United States Constitutions. *Martell*,¶ 15; *Mercier*, ¶ 28. A non-existent group therapy session cannot be either. *Id*.

This Court has previously ordered a new trial where the State's expert witness was allowed to testify via two-way video based upon distance, expense, timing, and work load. *Bailey*, ¶ 44. The expert was a testimonial witness who could not testify via video absent the State making the proper showing, which witness convenience or judicial economy does not satisfy. The State's "vague and unverified claims" could not satisfy its burden. *Bailey*, ¶ 45. Further, the error was not harmless because the expert witness provided the only evidence on a topic essential to the State. *Bailey*, ¶¶46-49. Here, Vanino was the *only* witness called by the State to provide opinion testimony on delayed disclosure and victim behavior. Without her, the State could not explain J.R.'s inconsistent and ever-changing story.

The District Court failed to make any findings as to Vanino's unavailability or

that any important public policy made her video testimony necessary. Doc. 184. Such arguments on appeal are prohibited. *Planned Parenthood v. State*, 2015 MT 31, ¶ 32, 378 Mont. 151, 160, 342 P.3d 684 ("Our cases are legion for the proposition that we will not consider on appeal an issue not raised in the District Court.") (Cotter, J. dissenting).

A mistrial was denied. A motion to dismiss was denied. No remedy was provided to Luke. His right to Confrontation was violated under both Montana and federal law. The issue here is not just about Vanino's video testimony; it is about the underlying representation she made to secure video testimony for her sole convenience. She is a paid prosecution witness who has never testified for a defendant. Tr. July 15, 2020, 550:24 to 551:20. She has appeared in person in Montana before. *Id*. at 549:18 to 550:23. Her credibility was key to the State's case.

Vanino's testimony demanded face-to-face confrontation. She was the only expert called to testify. She was central to the State's theory of the case. Her opinion testimony occupied nearly the entire Wednesday morning of trial. Vanino's "job" was to educate the jury about victim behavior. The State called her to educate the jury and to give them a basis to understand behavior, to understand what's normal, what's not, what the myths are and why victims act the way the do. *Id*. at 556:22 to 570:11; 584:23 to 595:5.

Vanino testified at length about delayed reporting. She described why and to whom disclosures are made. She provided opinion testimony on how difficult it is to deal with abuse and testified at length about adults who abuse children. Vanino testified that it would be "rare" to immediately tell someone about being abused. She

told the jury that it was unusual to disclose right away. Vanino gave her opinions about why a consenting teenager would delay a disclosure. She opined about emotional and psychological development. She spoke of grooming and discussed teenagers' vulnerability. She talked about how an adult who survived abuse would report once they are safe or worried about another victim. *Id*.

Each area of Vanino's testimony was designed to explain J.R.'s version of events and the inconsistencies in her different stories - to make them "normal" and "common" so the jury would believe her. Her opinion testimony was so critical that the State was unwilling to go to trial without her. As an expert, her credibility needed to be tested in a face-to-face meeting in front of the jury.

3. Vanino's video testimony was not harmless error.

Denial of Luke's right to confrontation was not harmless error. The State cannot meet its burden to prove *beyond a reasonable doubt* that the error was harmless. *Martell*, ¶ 17. When the Court considers the importance of Vanino's testimony to the State's case, the non-cumulative nature of Vanino's testimony, and that no other witness testified on the subjects Vanino did, it should conclude that the error was not harmless. *See e.g. Mercier*, ¶¶ 30-33. The State needed Vanino's testimony to explain J.R.'s behavior in this case. It spent significant portions of its closing statement using Vanino's testimony to bolster J.R.'s credibility, and repeatedly argued her testimony was "uncontroverted." Tr. July 17, 2020. 1080:25, 1085:7. If Luke had been allowed to question Vanino about her "unavailability" the jury could have further evaluated her credibility. Where she failed to correct her own representations, none of her testimony is credible.

The State should concede error. If it refuses, Luke reserves his right to reply to any argument the State makes as to harmless error.

4. The District Court Erred When it Prohibited Luke from Cross-Examining Vanino on her Alleged Unavailability.

It was error for the District Court not to allow inquiry into Vanino's representation of her unavailability. Vanino is an expert witness who was paid to testify. Wide latitude is given when cross-examining paid expert witnesses. *Clark v. Bell*, 2009 MT 390, ¶ 22, 353 Mont. 331, 220 P.3d 650. Her credibility was at issue and was crucial to Luke's defense. The State made her availability an issue when it solicited testimony about the 83 courts in which she has testified, including Montana courts. Tr. July 15, 2020, 549:18 to 550:23. She testified on direct about her purported Tuesday night therapy group. Luke's cross focused on her credibility and her relationship to the prosecution. She was questioned about her friendship and Facebook posts with the State. *Id*. at 612:20 to 614:12. She was questioned about the number of times she testified for a defendant - which is zero. *Id*. at 551:1-5.

Luke should have been allowed to question her about her representations to secure her video appearance. The jury should have learned why she failed to correct her representation about her "unavailability." The jury should have heard why Vanino could travel to Nantucket but not Glasgow. If the jury knew she failed to correct her representation, it would have impacted the jury's evaluation of the veracity of the rest of her testimony. The District Court's error in not allowing Luke's questions illustrates why any potential assertion by the State that the error is harmless should be rejected.

B. Vanino improperly offered statistical testimony.

Montana law is settled - expert testimony regarding the frequency of false accusations in sexual assault or rape cases is inadmissible as an "improper comment on the credibility of [the victim]." *State v. Brodniak*, 221 Mont. 212, 222, 718 P.2d 322, 329 (1986); *see also State v. Rodriguez*, 2021 MT 65, ¶ 36, 403 Mont. 360, 483 P.3d 1080; *State v. Grimshaw*, 2020 MT 201, ¶ 24, 401 Mont. 27, 469 P.3d 702.

"An expert witness may not comment on the credibility of the victim's testimony." *Rogers v. State*, 2011 MT 105, ¶ 26, 360 Mont. 334, 253 P.3d 889. Expert testimony about witness credibility "improperly invades the jury's function by placing a stamp of scientific legitimacy on the victim's allegations." *State v. Harris*, 247 Mont. 405, 409, 808 P.2d 453, 455 (1991) (citing *Brodnia*k, 212 Mont. at 222, 718 P.2d at 329).

In a criminal trial, the jury must find the existence of every fact necessary to constitute the crime charged beyond a reasonable doubt. Witness credibility is solely within the province of the jury, and a jury is free to believe all, a part of, or none of the testimony of any witness. When evidence conflicts, the jury decides which version of events will prevail. *State v. Quiroz*, 2022 MT 18, 21-36, 407 Mont. 263, 502 P.3d 166 (internal citations and quotations omitted).

Luke preserved his objection to Vanino's statistical testimony and objected again during re-direct. Doc. 247, Tr. July 15, 2020, 623:13 to 624:13.

Vanino's testimony that it is "rare" for alleged victims to immediately report is a comment on, and improperly bolsters, J.R.'s credibility. The clear inference of the "rare" testimony is that J.R. should be believed regardless of the credibility issues

raised by Luke. Vanino testified that it is "unusual" and "rare" for alleged victims to immediately report. Vanino's testimony, in essence, vouched for J.R.'s credibility. Vanino's testimony excused the jury from critically thinking about J.R.'s credibility. Nothing about J.R.'s story had to make sense, because no matter what J.R. said, it was explained away as victim behavior. It is normal that J.R. would forget the details of her assault. *Id*. at 586:19 to 595:5. It is "rare" that she would have reported right away. *Id*. at 556:22-25. Immediate reports are "unusual." *Id*. Vanino replaced the words "true" and "false" with "normal," "unusual," and "rare." Vanino's "victim behavior testimony" was statistical testimony in disguise. She did not have to mention numbers - the words "normal," "unusual," and "rare" provide the same inference.

The District Court abused its discretion in admitting Vanino's opinions over Luke's objections. As a result, Luke's right to a fair trial was violated. The error was not harmless. The admission of Vanino's opinions on the rarity of immediate reporting ultimately tipped the scales to an unfair trial. This Court reversed convictions in *Grimshaw* and *Quiroz* where Vanino testified to statistics. It should do so here.

C. The District Court erred when it denied Luke's motion to depose Favis and did not declare a mistrial.

1. Luke's right to present a defense was violated when he was prohibited from deposing Favis.

Luke "must be given 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *State v. Villanueva*, 2021 MT 277, ¶ 23, 406 Mont. 149, 497 P.3d 586; *State v. Reams*, 2020 MT 326, ¶ 18, 402

Mont. 366, 477 P.3d 1118. "Whether that right is rooted directly in the Due Process Clause, U.S. Const. amend. XIV, or in the Compulsory Process or Confrontation Clauses, U.S. Const. amend. IV, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Reams*, ¶ 18. This right imposes upon the State a duty to preserve and provide exculpatory evidence to the defendant. *Villanueva*, ¶ 23. "[A] witness belongs to neither party, and neither party should obstruct the other party's access to witnesses." *State v. Smith*, 235 Mont. 99, 103, 765 P.2d 742, 744 (1988). As part of that right, Luke should have been allowed to depose Favis.

Luke moved under Mont. Code Ann. § 46-15-201. The District Court's Order did not address any of Luke's arguments. Instead, it found Favis' testimony was "beyond the scope" of the case. Doc. 150, p. 3. It ignored that Favis was involved in 2018. Luke called J.R. in 2018. Favis answered and spoke with Luke. Favis purportedly told Luke never to call J.R. again. This testimony was within the scope of this case as much as J.R.'s mother's testimony. Janet spoke to Luke on the phone within minutes of Favis. Luke was allowed to interview Janet, and she was allowed to testify. The State refused to make Favis available for an interview, and Luke was not allowed to depose him.

Favis is more significant than just the phone call. He has direct evidence of J.R.'s credibility. J.R. said Favis "knows everything. And actually I told him long before any of this every [sic] came up. I ... I shared my ... what happened with him and he ... so he's known about it for years." Doc. 147, p. 2. On this basis, the State determined J.R. was credible. McDermott concluded that this "eliminat[ed] any claim

of false reports or false claims." Doc. 211, p. 7.

What makes Favis more significant is J.R.'s response to Luke's request to him - she threatened to cease all cooperation. The State believed "J.R. [would] become an uncooperative witness in the event Favis is compelled to be deposed." Doc. 144, p. 3. Because Luke could not interview Favis, Luke could not learn what, if anything, he knew about J.R.'s purported relationship with Luke. In this regard, the "if anything" is significant. If he knew nothing, then J.R.'s credibility was severely damaged.

Compounding this error, the District Court also refused to let Luke question J.R. about:

> 2) J.R.'s statement that Francis Favis knows everything about her alleged relationship with Defendant; 3) J.R.'s refusal to identify her boyfriend, now known to be Francis Favis; and 4) J.R.'s refusal to allow the State and/or Defendant to speak with Francis Favis and J.R.'s threat to cease all cooperation with the State in this case if Francis Favis was interviewed or deposed.

Doc. 179, p. 5. This deprived the jury of critical evidence from which it could decide J.R.'s credibility. J.R. had already lied about one person she told (Alliea) and changed her story to fit with another's (Kelsey).

Depriving Luke of the opportunity to speak to Favis, or question J.R. about her threat to cease all cooperation, was error and deprived him of his right to present a complete defense.

2. Luke was denied a fair and impartial trial when the State was allowed to discuss excluded evidence in its opening.

When deciding a motion for mistrial, the District Court must determine whether Luke's constitutional right to a fair and impartial trial was violated. *State*

v. Denny, 2021 MT 104, 404 Mont. 116, 485 P.3d 1227. This is inherently a question of constitutional interpretation that must be reviewed de novo.

The District Court excluded the 2013 emails referenced by the State in its opening because they were irrelevant under Mont. R. Evid. 402. Nothing about the 2013 emails would tend to show that Luke committed the crime alleged in 2009 and 2010. The State's saying in its opening, "And she realizes something from a news report -- that there's an email that's been ..." injected into Luke's trial evidence related to J.R.'s emails when she was over 18 and allegations from another case - that of S.B. In S.B.'s case, Luke was charged with sexual abuse of children for using his email address (the email referenced by the State) to possess a bra photo in 2014 - allegations entirely separate from J.R.'s allegation. The District Court severed the Counts involving S.B. from J.R.'s case and excluded reference to the email at Luke's request precisely to avoid this type of prejudice.

The State's violation of the District Court's order reminded the jury about S.B.'s case and made them curious about emails they never saw. This Court has reversed a conviction when this occurs. *State v. Franks*, 2014 MT 273, 376 Mont. 431, 335 P.3d 725. In doing so, the Court found that evidence of this nature, involving sexual abuse of a child, is "highly inflammatory ... [i]ndeed no evidence could be more inflammatory or more prejudical[.]" *Franks*, ¶ 17 (internal citations and quotations omitted).

While the State's violation here is not like *Franks*, the fact remains that introduction of this information casts the same impermissible shadow over these proceedings - the risk that Luke would be convicted because the jury was hostile

toward him or because he had a propensity to commit this crime. *Franks*, ¶ 20.

The State's second violation of the District Court's order involved the repeated mention of Favis. The District Court "specifically preclude[d] the following areas of testimony or inquiry: 1) Defendant's phone call with Francis Favis[.]" Doc. 179, p. 5. The State proceeded to do just the opposite. It told the jury about Luke's 2018 call to J.R. where Favis purportedly answered and told Luke never to call again. The State knew Luke could offer no evidence to counter this because Luke was prohibited from deposing Favis (argued above).

Luke moved for a mistrial but it was denied. This error was the culmination of the District Court's previous error, at the State's urging, that prevented Luke from discovering anything about Favis. The State went so far as to tell the District Court that J.R. would not cooperate if Favis was interviewed or deposed. It was the State who sought the order prohibiting even the mention of Favis. Having succeeded, the State introduced the very evidence it sought to exclude.

Luke was placed in an untenable situation. He should not have been forced to object during the State's opening. The curative instruction did not solve the States' violations of the District Court's orders. It only reinforced emails and a phone call. The jury was left to fill in the blanks.

D. The State unconstitutionally shifted the burden of proof to Luke.

The Sixth Amendment and Article II, Section 24 guarantee Luke the right to a fair trial. *State v. Byrne*, 2021 MT 238, ¶ 23, 405 Mont. 352, 495 P.3d 440. The burden of proof in a criminal case never changes - it rests with the State from beginning to end. *Territory v. Rowand*, 8 Mont. 110, 120, 19 P. 595, 599 (1888);

Sandstrom v. Montana, 442 U.S. 510, 520 (1979).

"The prosecutor is the representative of the State at trial. . . [and] a prosecutor's improper suggestions and assertions to a jury are apt to carry much weight against the accused *when they should properly carry none*." *State v. Lawrenc*e, 2016 MT 346, ¶ 20, 386 Mont. 86, 385 P.3d 968 (emphasis added). Even if the defendant fails to object, the State is not relieved of its "duty to refrain from improper methods calculated to produce a wrongful conviction[.]" *Lawrence*, ¶ 17 (*quoting Berger v. United States*, 295 U.S. 78, 88 (1935). This is because a prosecutor "is in a peculiar and very definite sense the servant of the law" whose interest in a criminal case "is not that it shall win a case, but that justice shall be done." *Berger*, 295 U.S. at 88.

This Court analyzes whether the prosecutor made improper comments, and if so, whether the comments prejudiced the defendant's right to a fair trial. *Byrne*, ¶ 18. Credibility is for the jury to decide, and it is improper for the prosecution to elicit testimony about or offer his or her opinions on witness credibility. *Byrne*, ¶¶ 23-24. It is improper for the prosecution to shift the burden of proof to the defendant to produce a motive for witness testimony. *Byrne*, ¶¶ 33-34. If a prosecutor's comments prejudice a defendant's right to a fair trial, the proper remedy is reversal. *Byrne*, ¶ 18.

The State improperly solicited testimony from more than one witness about J.R.'s motivation, which implied that J.R. had to be telling the truth because she had no reason to lie. In turn, the State used that testimony to bolster J.R.'s credibility in its closing. It said J.R. was "committed to the truth." Tr. July 17, 2020, 1090:4 to 1091:25. It implied that if the jury thought J.R. was lying, it would have to believe she was a sociopath, evil, or worse than a man that would hurt a child. *Id*. The State

had to make these arguments because without these improper suggestions, J.R.'s testimony did not make sense. The testimony and comments in closing were improper. *Byrne*, ¶ 30.

The improper testimony and comments prejudiced Luke resulting in a violation of his right to a fair trial. Like *Byrne*, this case involves repeated improper statements that created cumulative prejudice. *Byrne*, ¶ 32. And like Byrne, this case hinged on J.R.'s credibility. Only J.R.'s testimony spoke directly to what occurred. *Byrne*, ¶ 33.

The State asked J.R. and Tara about J.R.'s motivation to hurt Luke or his family. In closing, it argued that if J.R. was lying, she would have to be a sociopath, evil, and worse than a child molester. Indeed, these statements "wrongly suggest that if [J.R.] is not deliberately lying, she *must* be telling the truth, and that if [J.R.] lacked an obvious incentive to lie, she *must* be sincere." *Byrne*, ¶ 33 (emphasis in original). These "repeated comments tend to place the burden on [Luke] to account for and explain [J.R.'s] motive to testify." *Id.* Asking these types of questions "invites the jury to accept the prosecution's case unless [Luke] provides some positive answer to that question." *Id.* The State invited the jury to concluded that if they did not think J.R. was a sociopath, evil, or worse than a child molester, they needed to believe her and find Luke guilty.

Compounding this prejudice, the prosecutor improperly argued that because Luke "never denied" the charges, he must be guilty, because an innocent person would "exclaim as loud as you could, 'I didn't do it. I didn't do it.'" Tr. July 17, 2020, 1105:6-15

The State's closing argument improperly commented on Luke's decision not

to testify at trial. *Griffin v. California*, 380 U.S. 609, 614 (1965). Its argument implied that because Luke "never denied" the allegations and did not "exclaim as loud as [he] could, "I didn't do it. I didn't do it[,]'" he was guilty. Its argument also implied that Luke had some affirmative burden to testify or otherwise produce evidence showing his innocence. Luke had no such burden. *Lawrence*, ¶ 16; T*aylor v. Kentucky*, 436 U.S. 478 (1978). In effect, the State "solemnized 'the silence of the accused into evidence against him.'" *State v. Gladue*, 208 Mont. 174, 179, 677 P.2d 1028, 1031 (1984) (improper for State to comment in closing on defendant's failure to testify).

"This Court has been unequivocal in its admonitions to prosecutors to stop improper comment and we have made it clear that we will reverse a case where counsel invades the province of the jury[.]" *Byrne*, ¶ 24. The State's closing argument invaded the province of the jury and improperly commented on Luke's right not to testify.

VII. CONCLUSION

In light of Vanino's testimony, the State failed to satisfy its threshold burden of showing she was unavailable to testify in person. This single fact is enough to reverse Luke's conviction and order a new trial. The State should concede error.

RESPECTFULLY SUBMITTED this 2nd day of May, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Opening Brief of Appellant is printed with a proportionately spaced Times New Roman 14-point font; is double spaced except for footnotes and for quoted and indented material; and the word count calculated by WordPerfect 2021 for Windows does not exceed 10,000 words, i.e., is 9,913 words, excluding table of contents, table of authorities, appendix, certificate of service and certificate of compliance.

DATED this 2nd day of May, 2022.

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