IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0629

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JOSHUA RICHARD BROWN,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, The Honorable Ashley Harada, Presiding

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STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion during the Appellant's trial for Sexual Abuse of Children by refusing to give Privacy in Communications lesser-included offense instructions.

2. Whether the State established probable cause to charge Brown with Sexual Abuse of Children or, in the alternative, Attempted Sexual Abuse of Children.

3. Whether sufficient evidence existed to support Brown's conviction for Sexual Abuse of Children.

4. Whether the district court erred in holding that Mont. Code Ann. § 45-5-625 is not unconstitutionally vague as applied to Brown.

5. Whether the district court imposed a legal sentence when it declined to apply an exception to Brown's mandatory minimum sentence.

STATEMENT OF THE CASE

On December 18, 2018, the State filed an Information charging Appellant Joshua Brown (Brown) with felony Sexual Abuse of Children, in violation of Mont. Code Ann. § 45-5-625, and the district court issued a warrant for Brown's arrest. (Docs. 3, 4.) The district court arraigned Brown on December 18, 2019. (Docs. 8, 9.)

Brown filed a motion to dismiss the Information for lack of probable cause, the State responded, and Brown replied. (Docs. 13, 14, 22, 25.) The State filed a motion to strike, or alternatively, permission to file a sur-reply because Brown raised a constitutional challenge to Mont. Code Ann. § 46-5-625(1)(c) for the first time in his reply brief. (Doc. 26.) The State filed a sur-reply with the court's permission. (Doc. 32.)

The State filed an Amended Information charging Brown with Sexual Abuse of Children or, in the alternative, Attempted Sexual Abuse of Children. (D.C. Doc. 34.) Brown filed a motion to dismiss the Amended Information, which the court denied after a hearing. (Docs. 39, 40, 48, 70.)

Brown filed Defendant's Index of Proposed Jury Instructions and Defendant's Point Brief on the Lesser Included Instruction—Violation of Privacy in Communications, and the State filed a response. (Docs. 59, 60, 65.) Brown proposed a Special Verdict form that would have allowed the jury to find Brown Not Guilty of Sexual Abuse of a Child and Not Guilty of Attempted Sexual Abuse of Children but Guilty of Privacy in Communications. (Doc. 61.)

A jury trial was held July 31 through August 5, 2020. (7/31/20-Jury Trial Transcript [7/31/20 Trial Tr.].) The district court refused to give Brown's proposed lesser-included offense instructions. (Trial Tr. at 369; Doc. 79 at 2.) Brown failed to appear on the last day of trial. (Trial Tr. at 394; Doc. 81.) Defense counsel

notified the court he was unable to locate Brown. (*Id*.) The court determined that Brown was voluntarily absent, and the trial would continue in his absence, but recessed for approximately two-and-a-half hours to allow time for law enforcement and defense counsel to locate him. (*Id*.) Brown was not located and not present after the recess, so the court granted the State's motion for a bench warrant of $100,000. (*Id*.)

The district court instructed the jury on the elements of Sexual Abuse of Children in pertinent part as follows:

> To convict the Defendant of the offense of Count I, Sexual Abuse of Children, the State must prove the following elements:
>
> 1. That the Defendant by any means of communication, including electronic communication, encouraged L.H. to engage in sexual conduct, actual or simulated;
>
> 2. That L.H. is under 16 years of age, and
>
> 3. That the Defendant acted knowingly.

(D.C. Doc. 86, Instr. No. 17.)

The district court, without objection, further instructed the jury that:

> "Sexual conduct" means lewd exhibition of the genitals, breasts, pubic or rectal area, or other intimate parts of any person.

(D.C. Doc. 86, Instr. No. 20.) The jury found Brown guilty of Count I: Sexual Abuse of Children. (D.C. Docs. 81 at 2, 88, 167.)

A multijurisdictional law enforcement task force located Brown shortly after the jury reached its guilty verdict. (Doc. 143 at 3.) Brown appeared in court on the bench warrant. (Docs. 90, 91.) The court dismissed the bench warrant, but remanded Brown to the Yellowstone County Detention Center without bond until sentencing and ordered Brown to undergo a psychosexual evaluation. (Docs. 91-93.)

Defense counsel, William D'Alton, filed a motion to withdraw as Brown's attorney, and the court set a hearing on the matter. (Docs. 94-96.) Brown filed a Motion for New Trial with Brief in Support. (Docs. 97-98.) The court granted Mr. D'Alton's motion to withdraw as counsel, and public defender Justin Stark filed a Notice of Appearance. (Docs. 101-02.) Through Stark, Brown filed a Motion for Leave to Supplement Motion for New Trial and for Additional Time for Briefing and the State filed its response. (Docs. 113-14.) Brown filed his supplemental brief, the State responded, and Brown replied. (Docs. 120-22.)

On February 12, 2021, attorney Daniel Minnis filed a Notice of Appearance on Brown's behalf. (Doc. 132.) Brown filed an Amended Motion for New Trial or in the Alternative Motion for Post-Conviction Relief. (Doc. 134.) The State responded and Brown replied. (Docs. 135-36.) The court held a hearing and denied Brown's motion. (Docs. 142-43.)

Brown moved to continue the sentencing hearing to allow him to undergo an evaluation to determine whether he was suffering unusual and substantial duress at the time he committed the crime. (Doc. 153.) As part of his motion, Brown requested a hearing under Mont. Code Ann. § 45-5-223 to determine if he qualified for an exception to the mandatory minimum sentence. (*Id*.) The State responded in opposition to a preliminary hearing regarding applicability of an exception and Brown replied. (Docs. 152, 154.) The district court issued its order resetting the sentencing hearing, indicating the court would consider the applicability of an exception to the mandatory minimum during the sentencing hearing. (Doc. 155.)

Prior to sentencing, Adult Probation and Parole Officer Jessica Skogen prepared a Presentence Investigation Report (PSI). (Doc. 150.) The PSI attached a psychosexual evaluation report from Licensed Clinical Social Worker Mike Sullivan (Sullivan) and a report from psychologist Donna Veraldi. (*Id*.)

The district court held a sentencing hearing. (11/30/21 Sentencing Transcript [Sent. Tr.]; Doc. 160.) Sullivan testified for the State. (Sent. Tr. at 11-70; Doc. 160.) Dr. Veraldi testified for Brown. (Sent. Tr. at 71-79.) Brown made a statement. (9/7/16 Tr. at 14-16.) The court sentenced Brown to 100 years at the Montana State Prison with 90 years suspended, imposed a 10-year parole restriction, and designated Brown as a Level I Sexual Offender under *Id.* § 46-23-509(3)(b). (Sent. Tr. at 99; Doc. 167 at 2.)

STATEMENT OF THE FACTS

I. The offense[1]

On August 22, 2018, Brown sent multiple text messages to his stepdaughter, L.H., offering her $1,000 if she engaged in sexual conduct:

Brown:	If you are my really good girl I will give you just about anything you want . . .
L.H.	I just want money
Brown:	You are amazing . . . I want to give you like 1000$ (sic)
L.H.	I wish lol
Brown:	No for real . . . What will you do for me?
L.H.:	Idk . . . .
Brown:	What could you do? Something that would please me a lot, or something major . . .
L.H.:	idk
Brown:	I could give you money for the next 20 years . . . lol
L.H.:	Lol
Brown:	Me pick?
L.H.:	Ya idk
Brown:	. . . I will say an idea. You promise I can trust you . . .?
L.H.:	Sure

[1]Text messages are verbatim.

Brown: yes I can trust you? (sic) Don't say a word to anyone ever. Not one friend, no one but me and you right?

L.H.: What Ok

Brown: What we are talking about. No one can ever know . . . right?

L.H.: K Ya

Brown: You promise

L.H.: Yes

. . . .

Brown: So I'm going to tell you my idea OK if it weirds you out you can tell me and I won't say anything like that again

L.H.: K but I'm not doing anything with you that's gross and your way older than me
Plus your my moms husband so
. . . .

Brown: I was thinking you would look really amazing in a thong or really cool panties . . . or nude of course . . . and I know you're young BTW. But you are still beautiful. but it would be amazing to see you dancing or just laying on Your bed on your stomach and you just leave the door open a crack so I could see you?

Or leave the door unlocked and have a bunch of soap in your hair and eyes and I peaked in the shower on you?

Never touch you at all . . .

Uggh is that really bad? Prob shouldn't have said that

L.H.: That's gross josh

Brown: Was Just a thought. . .lol
I know sorry

L.H.: Don't talk to me again thanks
I'm scared to even see you right now because of that

Brown: What I was mostly joking

. . . .

I was just trying to pay you a complement and say that you're gorgeous for a young lady

L.H.: I don't care

. . . .

What if I told my mom what would happen you would be in big trouble you know that right

Brown: Ya I know

. . . .

Please don't ever say anything that would be horrible you promised. Plus just so you know Your mom is the one you gave me the thought

. . . .

She just sent me a porn video last week of a mom making her daughter learned some things from her stepfather . . . lol

I was blown away that she sent it to me she didn't mean it for you but still that's where I was getting the idea

L.H. ultimately reported the text messages to her parents and to law enforcement. (Trial Tr. at 210, 214.)

II. The lesser-included offense instruction

Brown first argued for the lesser-included instruction of Privacy in Communications in a point brief, proposed instructions, and proposed verdict form. (Docs. 59-61.) The State articulated its objection in its response. (Doc. 65.) The court heard extensive argument on this issue at trial. (Trial Tr. at 358-69.) Defense counsel argued Brown's conduct met the elements of privacy in communications, as it was a lesser type of culpability than Sexual Abuse of Children. (*Id*. at 359-60.) Defense counsel conceded that his theory of the case required acquittal on Sexual Abuse of Children. (*Id*. at 363.)

Reciting Mont. Code Ann. § 46-1-202(9)(a), the court said a "lesser-included offense is defined as an offense that is established by proof of the same or less than all the facts required to establish the commission of the offense charged." (Trial Tr. at 365.) The court clarified that under the statute, "facts" meant the elements of the offense. (*Id.*) The court concluded that "the elements are completely different for these two offenses." (*Id*.)

The court further found that Brown's theory of defense required acquittal of Sexual Abuse of Children. (*Id*. at 366-67.) Defense counsel agreed that his theory required acquittal of the felonies, but not of the lesser-included offense. (*Id*. at 367.) The court concluded that defense counsel was raising a charging issue, not a lesser-included offense issue. (*Id*.)

The court refused to give the lesser-included offense instructions. (*Id*. at 369.)

Brown filed a motion to reconsider inclusion of a lesser-included offense instruction the next day. (Trial Tr. at 402; Doc. 80.) The court stated, "[w]hen looking at privacy in communications and sexual abuse of children, there are certainly more differences between those two offenses than just the degree." (Trial Tr. at 405.) The court denied Brown's motion. (*Id*. at 406.)

III. Sentencing

A. Brown's request for an exception to the mandatory minimum sentence pursuant to Mont. Code Ann. § 46-18-222(3).

Brown requested a hearing under Mont. Code Ann. § 46-18-222 in his motion to continue sentencing. (Doc. 153.) Brown indicated he suffered unusual and substantial duress at the time he committed the offense and wanted Dr. Veraldi "to determine if Defendant meets criteria for variance from mandatory minimums." (Doc. 153 at 1.)

In its order granting the continuance, the court held:

> Defendant is also seeking a special hearing wherein the Court would determine if an exception to the mandatory minimums would apply, pursuant to Mont. Code Ann. §§ 46-18-222 and 46-18-223. A separate hearing is not necessary. The Court can make a determination

> regarding applicability of the mandatory minimum and whether an exception applies at sentencing for the sake of judicial economy.

(Doc. 155). Brown did not file an objection.

B. Brown's jail phone calls to his fiancée

At sentencing, the State played recordings of telephone calls between Brown and his fiancée, Molly Mangus (Mangus) while Brown was in jail awaiting sentencing. (Sent. Hr'g Tr. at 6-7; State's Ex. 1.) The first call was from September 3, 2021, during which Brown asked Mangus if her family understood that he had been charged because he made comments in a text message and that he did not touch or molest anyone. (State's Ex. 1, Track 09-03-21_1944 at 27:20-27:30 (09/03/21 Rec.). Brown complained to Mangus, "I was drinkin' with my buddies and made some comments to this little slutty 13-year-old [laughs] . . . ." (*Id.* at 27:37-27:43.)

The second call occurred on October 4, 2021. (Sent. Tr. at 7; State's Ex. 1, Recording 10-04-21_1423 [10/04/21 Rec.].) Brown and Mangus discussed the upcoming sentencing hearing and whether L.H. would testify. Brown commented,

> What are they gonna come in and say? Well yeah, he sent those text messages [laughs]. . .it's three years later she's really tore up about it still, I mean what are they going to say? She didn't get raped or touched or molested. . . (10/04/21 Rec. at 7:28-7:51.)

Brown and Mangus agreed that L.H. was just "pissed off" at the time and "egged on by her brothers and her mom." (*Id.* at 8:30-8:37.) Brown surmised that L.H.'s mother probably felt bad that he was in jail and that "[L.H.'s] sleepin' with some 25-year-old black guy and she's knocked up or somthin' [laughs], ya know?" (*Id.* at 9:00-9:10.) Brown continued, "That's the state of things . . . not like they're goin' to church [laughs]." (*Id.* at 9:10-9:19.)

Brown then commented the parole board would not like it if he was in prison for "some text messages" and that it would "look bad on the judge." (*Id.* at 13:45-13:57.) Brown told Mangus, "The minute I'm sentenced, I'm filing all these appeals, we're going after the whole ball of wax." (*Id.* at 14:25-14:30.)

C. Expert witness testimony

At the sentencing hearing, Sullivan testified about the psychosexual evaluation he conducted of Brown. (Sent. Hr'g Tr. at 11-70; Doc. 150 at 12.) Sullivan testified that he had conducted more than 2000 psychosexual evaluations over the course of his career and had been a part of the Montana Sex Offender Treatment Association, a group of clinicians, since its inception in 1988. (*Id.* at 12-13.) Sullivan explained that the purpose of a psychosexual evaluation is to determine "the most appropriate level of risk for the purpose of [sex offender]

registration, and then to make recommendations for treatment based on the idea of least restrictive alternative." (*Id.* at 14.)

In preparation for conducting Brown's psychosexual evaluation, Sullivan reviewed the "fairly extensive" discovery from the State. (*Id.* at 15.) Included in that discovery was defense counsel's pretrial interview with L.H., which Sullivan confirmed disclosed more information than offered at trial that supported Brown's conviction. (*Id.* at 16.)

Sullivan also testified that Brown provided a self-report in which Brown blamed other people for his actions. (*Id.* at 16.) Sullivan explained that Brown negatively described L.H.'s mother "as alcoholic, describing her as loose sexually, abusive physically, verbally, having engaged in numerous infidelities during the course of their relationship. . . ." (*Id.* at 17.) Brown described himself as a savior to L.H.'s mother and a positive influence on their family. (*Id.*) Brown described L.H. as a "bit of a trouble child." (*Id.* at 18.) Brown also told Sullivan he was intoxicated on the worksite with coworkers and "engaging in some horseplay verbally" with L.H. when he sent her the messages, and that his phone was broken and inaccurately captured some of his voice to text messages. (*Id.*)

Sullivan testified that while Brown described some history of depression and anxiety, he did not present with "clinically significant symptoms of either." (*Id.* at 23-24.) Sullivan explained that Brown did not suffer from "any condition that

would compromise his ability to conform his behavior to expectation standards, laws, et cetera." (*Id.* at 24.) Sullivan also found significant that when Brown was a lay minister, Brown had been sexually involved with a person with whom he had a pastoral relationship. (*Id.* at 26.)

Sullivan testified that Brown had "a pretty good understanding of what's okay and not okay[]" and indicated no symptoms of posttraumatic stress disorder or trauma. (*Id.* at 31, 33.) Sullivan reported that Brown had a strong attraction to early pubescent children, which is generally ages 12-15, and exhibited histrionic and narcissistic characteristics. (*Id.* at 36-39.) Sullivan explained that Brown displayed many narcissistic characteristics including a sense of entitlement, interpersonally exploitative by taking advantage of others to achieve his own ends, and a lack of empathy. (*Id.* at 39.) Sullivan confirmed that Brown's narcissistic features would "make treatment difficult." (*Id.* at 41.) Sullivan also explained that on the validity scales, Brown scored as an individual who took "great effort to appear more healthy than he likely is," and who struggled with both substance abuse and sexual compulsive behaviors that would "most definitely continue in the future without some remediation both on his part and through treatment services." (*Id.* at 43.) Sullivan summarized that Brown "accepts minimal responsibility for his behaviors across the board, and in particular as it relates to this current offense

which he minimizes a great deal, rationalizes conduct, and tends to project responsibility externally, so pushing it out. . .on the victim[.]" (*Id.* at 26.)

Sullivan testified that he knew and respected the defense's expert, Dr. Veraldi. (*Id.* at 54.) However, Sullivan reviewed Dr. Veraldi's report from her evaluation of Brown and found a "source flaw" that concerned him. (*Id.*) Sullivan explained that Dr. Veraldi's evaluation "relied solely on self-report of the subject . . . and did not appear to review or utilize or rely on other data, like the discovery, as well as the Defense interviews of the victim and the victim's mother." (*Id.* at 55.) Sullivan explained that he disagreed "with the ultimate conclusions and findings based on what I believe to be a lack of thorough examination of the case at least per what is outlined in [Dr. Veraldi's] report." (*Id.* at 67.)

Dr. Veraldi testified that her evaluation was limited to determining whether Brown was acting under unusual and substantial duress at the time he committed his crime. (*Id.* at 72.) Dr. Veraldi testified that she conducted four different tests on Brown to evaluate emotion and personality. (*Id.* at 73-74.) Dr. Veraldi explained she interviewed Brown about his life to recreate Brown's perceptions at the time he committed the crime and reconstruct his state of mind. (*Id.* at 74.)

Dr. Veraldi concluded that "according to [Brown], he was . . . in a chronic stress situation . . . being subjected to things that were emotionally abusive to him,

and I believe that this set the basis for his experiencing duress at that time." (*Id.* at 74-75.) Dr. Veraldi admitted she did not diagnose Brown with a DSM-V diagnosis because she "could not justify the diagnostic criteria for any diagnosis[.]" (*Id.* at 75.) She qualified that "people can be subject to chronic stress situations which do affect their functioning and their judgment. According to Mr. Brown, he was during that time." (*Id.*) Dr. Veraldi testified that Brown used coping mechanisms to deny to himself and others that he was having a difficult time. (*Id.*)

On cross-examination, Dr. Veraldi testified that she did not fact check Brown's version of events because the sort of testing she conducted was not enhanced by collateral information. (*Id.* at 78.) Dr. Veraldi tested Brown's perception during the time surrounding his crime and the only information that would have been helpful was any mental health treatment records from that same period. (*Id.* at 78-79.) Dr. Veraldi told the court that her evaluation of Brown was "a really difficult type of evaluation to do, but things that people think can give them corroboration don't necessarily do that." (*Id.* at 79.)

D. Imposition of sentence

Brown asked the court to apply Mont. Code Ann. § 46-18-222 and deviate from the mandatory minimum sentence because he was acting under duress. (Sent. Tr. at 86.) Defense counsel conceded that while Brown's actions constituted an offense, "the deeds are at the lower end of the possible offenses in that area. . . ."

(Sent. Tr. at 87.) Brown told the court he was deeply ashamed and regretful; he explained that at the time he committed the crime he was at a low point in his life, drinking daily, and in a tumultuous relationship with the victim's mother. (*Id.* at 89.)

The district court informed Brown that she was going to impose the recommendation of the State and explained:

> [T]he things you say today, sir, are entirely different than what you've been saying on the telephone. . . You called [L.H.] a slutty 13-year-old and made comments about she's probably pregnant by now with some black man. . . which is just so offensive. . .today you tell me that you've never tried to minimize your conduct, but that's not true, you have repeatedly made excuses, and starting with the explanation that this was a joke, or that your talk to text wasn't working, the sun was in your eyes, your co-workers egged you on, you were drunk, this was [L.H.'s mother's] idea, and none of these excuses impress upon me that you truly appreciate the gravity of your behavior.

(*Id.* at. 93.) The court continued, "I want to point out something that I think has kind of escaped you, you've ruined [L.H.'s] life." (*Id.* at 93-94.)

The court told Brown she agreed he could be rehabilitated, but based upon Sullivan's testimony, she had serious concerns that Brown could be compliant with treatment. (*Id.* at 95.) The court explained that Brown's crime was a very serious offense and the community needed to be protected. (*Id*. at 97.) The court stated that she did not find an exception to the mandatory minimum, noting that Dr. Veraldi's evaluation was based on Brown's perceptions and not the full picture. (*Id*. at 98.) The court stated, "this sentence is appropriate, considering all of the information

I've heard today and the information I received throughout the trial and during the course of this case." (*Id*. at 99.)

Brown did not enter an objection to his sentence. (*Id*. at 100-01.)

SUMMARY OF THE ARGUMENT

The district court properly exercised its discretion when it refused to give Brown's lesser-included offense instructions for Privacy in Communications on the charge of Sexual Abuse of Children because the evidence presented did not support the instructions.

The district court correctly found that the State met its burden of probable cause to support charging Brown by Information with Sexual Abuse of Children. Further, the jury was presented with overwhelming evidence that Brown sent the victim a series of text messages encouraging her, by promise of money, to engage in sexual conduct.

This Court need not address Brown's as-applied constitutional challenges to Mont. Code Ann. § 45-5-625 because he raises them for the first time on appeal. To the extent this Court does evaluate any of his claims, it should find that the statute is not unconstitutional as applied to Brown.

Finally, Brown is mistaken that the district court failed to follow sentencing procedure under Mont. Code Ann. § 46-18-222. The court thoroughly and properly

considered the applicability of an exception to the mandatory minimum sentence. The district court relied on compelling evidence to find that Brown was not under unusual and substantial duress when he committed Sexual Abuse of Children and correctly declined to apply an exception.

ARGUMENT

I. The district court properly refused to give Brown's lesser-included offense instructions because Privacy in Communications is not, as a matter of law, a lesser-included offense of Sexual Abuse of Children.

A. Standard of review

This Court reviews a district court's refusal to give a jury instruction on a lessor-included offense for abuse of discretion. *State v. Freiburg*, 2018 MT 145, ¶ 10, 391 Mont. 502, 419 P.3d 1234 (citing *State v. Daniels*, 2017 MT 163, ¶ 9, 388 Mont. 89, 397 P.3d 460). This Court "reviews for correctness the legal determinations a lower court makes when giving jury instructions, including whether the instructions, as a whole, fully and fairly instruct the jury on the applicable law." *Freiburg*, ¶ 10 (citing *State v. Lackman*, 2017 MT 127, ¶ 8, 387 Mont. 459, 395 P.3d 477). "Reversible error will occur only if the jury instructions prejudicially affect the defendant's substantial rights." *Freiburg*, ¶ 10 (citing *Daniels*, ¶ 9.) A "defendant is prejudiced by the failure to give a

lesser-included offense instruction when the evidence could warrant a jury finding the defendant guilty of a misdemeanor instead of a felony." *Id.*

B. Relevant law regarding definition of a lesser-included offense

An "included offense" is statutorily defined as one that "is established by proof of the same or less than all the facts required to establish the commission of the offense charged." Mont. Code Ann. § 46-1-202(9)(a). This statute does not define a "lesser" included offense, so this Court has "applied the test articulated in *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), to determine whether an offense is a lesser-included offense." *State v. Denny*, 2021 MT 104, ¶ 29, 404 Mont. 116, 485 P.3d 1227. "In the context of a defendant's entitlement to jury instructions on an alleged lesser-included offense, we have characterized the *Blockburger* test as stating that 'separate distinct offenses require proof of additional facts, where lesser-included offenses do not.'" *Denny*, ¶ 29 (internal citations omitted). The "facts" refer to "the statutory elements of the offense and not the individual facts of each case." (*Id.*)

C. Brown was not entitled to a jury instruction on Privacy in Communications; it is a separate offense that requires proof of additional facts to those facts required to prove the offense of Sexual Abuse of Children.

A "criminal defendant is entitled to a jury instruction on a lesser-included offense if based on the evidence, the jury could find the defendant guilty of the

requested lesser, rather than the greater, offense." *Denny*, ¶ 27. This Court applies a two-step test articulated in *State v. Castle*, 285 Mont. 363, 367, 948 P.2d 688, 690 (1997), to determine whether a district court was obligated to give a proposed lesser-included offense instruction at trial. *Denny*, ¶ 27. First, this Court determines whether the offense, as a matter of law, constitutes a lesser-included offense of the offense charged. (*Id.*) If it does, the Court then determines "whether there was sufficient evidence to support the lesser-included offense instruction." (*Id.*) "If both criteria are met, then the District Court must give the proposed instruction." (*Id.*)

Brown argues that the district court abused its discretion when it declined to give his lesser-included offense instructions on Privacy in Communications. However, Privacy in Communications does not pass the "*Blockburger* test" to qualify as a lesser-included offense of Sexual Abuse of Children or Attempted Sexual Abuse of Children. The Privacy in Communications statute and the Sexual Abuse of Children statute have additional elements the other statute does not have. This is not a situation where one offense requires proof of a fact which the other does not.

The elements of Sexual Abuse of Children are: That the Defendant, by any means of communication, including electronic communication, encouraged a child to engage in sexual conduct, actual or simulated; that the child is under 16 years of

age; and that the Defendant acted knowingly. *See* Mont. Code Ann. § 45-5-625 (2017). Similarly, the elements of Count II: Attempted Sexual Abuse of Children are identical, except that it only requires a material step in the completion of the offense. *See* Mont. Code Ann. §§ 45-4-103, 45-5-625(1)(c) (2017).

The elements for Privacy in Communications are: that the Defendant had the purpose to terrify, intimidate, threaten, harass, annoy, or offend; and that the Defendant communicated with another by electronic communication by using obscene, lewd, or profane language, suggesting a lewd or lascivious act, or threatening to inflict injury or physical harm to the person or property of the person. *See* Mont. Code Ann. § 45-8-213. Privacy in Communications enumerates a separate, unique element of having the purpose to terrify, intimidate, threaten, harass, annoy, or offend. None of the alternatives within the Privacy in Communications elements equate with the Sexual Abuse of Children element of encourage to engage in sexual conduct. The two offenses do not have the same factual proof (terror, intimidate, threaten, harass, annoy, or offend versus encourage). The Privacy in Communications options of causing terror, intimidation, threatening, harassment, annoying or offending cannot be considered the same type of harm as encouraging sexual conduct.

Application of the *Blockburger* test compels the conclusion that Privacy in Communication is not a lesser-included offense of Sexual Abuse of Children.

Therefore, the analysis fails under the first prong of the *Castle* test. The court was under no obligation to instruct the jury on Privacy in Communications, and correctly declined to do so.

The State certainly could have charged an alternative theory of Privacy in Communications; however, that is strictly within the purview of the State and is not something the defense can manipulate or adjust. In this case, the State did not charge Privacy in Communications as an alternative theory, and it was not a lesser-included offense. The district court correctly concluded that Privacy in Communications and Sexual Abuse of Children are separate, distinct offenses.

II. The State established probable cause in its Amended Information to charge Brown with Sexual Abuse of Children.

A. Standard of review

"[W]here the question is whether the affidavit in support of a motion for leave to file an information directly in the district court is legally or factually sufficient, it is a mixed question of law and fact that [this Court] will review de novo." *State v. Giffin*, 2021 MT 190, ¶ 11, 405 Mont. 78, 491 P.3d 1288.

B. The district court did not err when it denied Brown's motion to dismiss the Amended Information.

Pursuant to Mont. Code Ann. § 46-11-201, "[i]f it appears that there is probable cause to believe that an offense has been committed by the defendant, the

judge. . . . shall grant [to the State] leave to file the information[.]" "E]vidence to establish probable cause need not be as complete as the evidence necessary to establish guilt." *Giffin*, ¶ 15. The supporting affidavit need not make out a prima facie case that the defendant committed an offense; rather, a probability that the defendant committed the offense is sufficient. (*Id.*)

Regarding Count I, Sexual Abuse of Children, the affidavit stated: Brown, who was over the age of 18, sent text messages to L.H., who was 12 years old, encouraging her to engage in sexual conduct. (Doc. 34.) Regarding Count II, charged in the alternative, the affidavit stated: Brown, who was over the age of 18, sent text messages to L.H., who was age 12, in an attempt to persuade and/or entice and/or encourage her to engage in sexual conduct. (Doc. 34.)

In its order denying Brown's motion to dismiss, the district court stated:

> The Defendant focuses on whether the text messages rise to the level of the definition of sexual conduct. This focus is ill-timed. As stated above, and in the Defendant's own brief, the State must allege facts that establish a mere probability the Defendant committed the offense, not whether the facts meet the statutory definition of certain elements. The State has sufficiently alleged facts to demonstrate there is a mere probability the Defendant has committed the offense of sexual abuse of a child and attempted sexual abuse of a child. Thus, the Court finds the facts alleged are sufficient to establish probable cause.

(Doc. 70 at 6.)

On appeal, Brown appears to contend that the State failed to allege facts sufficient to establish probable cause he committed Sexual Abuse of Children

because his conduct did not meet the definition of "sexual conduct" under Mont. Code Ann. § 45-5-625(5)(b)(i)(F). (Appellant's Br. at 2, 9.) Brown's assertion that his suggestions were not lewd nor encouraged exhibition of L.H.'s intimate body parts were questions for the jury. (Appellant's Br. at 9, "While [Brown] did suggest that the stepdaughter be clad in panties or a thong, he did not encourage her to do so in a vulgar or bawdy manner. The suggestion . . . was not lewd.") However, the determination of whether Brown's conduct was lewd was a question of fact within the province of a jury. It was not necessary for the State to prove beyond a reasonable doubt in its charging documents. Probable cause exists when reasonable grounds for suspicion, based on the circumstances themselves, warrant a reasonable and prudent person to believe that a crime has been committed. *Widdicombe v. State ex rel. Lafond*, 2004 MT 49, ¶ 15, 320 Mont. 133, 85 P.3d 1271.

The court properly dismissed Brown's motion to dismiss the Amended Information.

III. When reviewed in the light most favorable to the prosecution, the State presented sufficient evidence from which the jury could find, beyond a reasonable doubt, that Brown committed Sexual Abuse of Children.

A. Standard of review

This Court reviews claims of insufficient evidence do novo. *State v. Burnett*, 2022 MT 10, ¶ 15, 407 Mont. 189, ___ P.3d ___. "When reviewing whether

sufficient evidence exists to support a verdict, [this Court] view[s] the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt." (Id.) "It is the factfinder's role to evaluate the credibility of witnesses, weigh the evidence, and ultimately determine which version of events should prevail." (Id.) It is immaterial to this Court's review whether the evidence could have supported a different result. (Id.)

B. The district court properly denied Brown's motion to dismiss for insufficient evidence because the jury could conclude beyond a reasonable doubt that Brown committed Sexual Assault of a Child.

Brown's argument that he did not encourage L.H. to engage in sexual conduct contradicts both common sense and the undisputed evidence at trial. Brown does not dispute that his text messages contained language asking L.H. to allow him to observe her in panties or a thong or nude, lying on her bed or dancing. (Appellant's Br. at 9.) However, Brown illogically asserts that he "did not mention genitals, breasts, pubic or rectal areas or other intimate parts of the body." (Appellant's Br. at 9.) Brown further asserts that his suggestion for L.H. to wear panties or a thong and allow him to observe her was not lewd because "he did not encourage her to do so in a vulgar or bawdy manner." (*Id.*) Brown fails to mention that in addition to asking L.H. to pose in underwear that exposed her intimate parts, he also encouraged L.H. to pose nude on her bed or to allow him to observe her in

the shower. (*See* State's Exs. 10-12.) Both scenarios encourage L.H. to engage in sexual conduct by engaging in lewd exhibition of her intimate parts.

Here, the jury was tasked with determining, beyond a reasonable doubt, whether Brown committed Sexual Abuse of Children that Brown knowingly, by any means of communication, including electronic communication, encouraged L.H. to engage in sexual conduct actual or simulated, and that L.H. was under 16 years of age. (Jury Instr. 17; Mont. Code Ann. § 45-5-625(1)(c).) For this offense, "knowingly" meant that Brown was aware there existed a high probability that his conduct would cause a specific result. Mont. Code Ann. § 45-2-101(35), Jury Instr. 23. "Sexual conduct" includes lewd exhibition of the genitals, breasts, pubic or rectal area, or other intimate parts of any person. Jury Instr. 20; Mont. Code Ann. § 45- 5-625(5)(b)(i)(F).

The jury was entitled to determine that Brown's conduct was lewd. Where the Legislature has not defined a statutory term, we consider the term to have its plain and ordinary meaning, and may consider dictionary definitions, prior case law, and the larger statutory scheme in which the term appears. *State v. Christensen*, 2020 MT 237, ¶ 95, 401 Mont. 247, 472 P.3d 622 (citing *State v. Alpine Aviation, Inc.*, 2016 MT 283, ¶ 11, 385 Mont. 282, 384 P.3d 1035; *Giacomelli v. Scottsdale Ins. Co.*, 2009 MT 418, ¶ 18, 354 Mont. 15, 221 P.3d 666.) While not defined in

the statute, the online Black's Law Dictionary defines "lewd" as "the term that also means indecent, pornographic, obscene and lascivious." *See* https://thelawdictionary.org/?s=lewd

In *State v. Marshall*, 2007 MT 198, ¶ 7, 338 Mont. 395, 165 P.3d 1129, the defendant, Marshall, was charged with attempted sexual abuse of children. Marshall moved to dismiss his conviction based upon insufficiency of the evidence, arguing that "while his inquiry as to whether J.M. was going to strip in return for money was certainly inappropriate, it did not indicate an attempt to engage J.M. in sexual conduct, as [he] did not show J.M. any money, and it was made outside the presence of other people." *Marshall*, ¶ 25. This Court disagreed and found that the conviction was proper because the jury was allowed to consider Marshall's comment in the context of his other grooming behaviors. *Id.* ¶ 26.

Marshall also argued that the State failed to prove that his specific purpose was to employ the victim in sexual conduct. *Id.* ¶ 28. The district court there instructed the jury that "lewd" meant "the gross flouting of community standard in respect to sexuality or nudity in public." *Id.* ¶ 29. This Court held that although if J.M. had immediately accepted Marshall's offer she would have flouted her nudity at his request, it was

> somewhat more probable . . . that the jury inferred that Marshall's intention was to have J.M. pose for him in private, in such a manner that he could perform his previously expressed fantasies. Such action with an eleven-year-old minor certainly flouts community standards,

> and the jury therefore could have found, beyond a reasonable doubt, that Marshall sought to employ J.M. in sexual conduct, namely a lewd exhibition of her intimate parts.

Marshall, ¶ 29. The facts of the instant case are very similar to those in *Marshall*.

Here, the jury was instructed that "lewd" meant gross flouting of community standard in respect to sexuality (or nudity in public). Jury Instr. 21. Brown contacted L.H. by text message and offered L.H. money if she allowed him to observe her wearing thong underwear, panties, or naked. Brown phrased his texts as questions for L.H. Only when L.H. reacted very negatively did Brown suggest he was "mostly joking," offered multiple explanations for the content, claimed it was a joke or a compliment, that it was L.H.'s mother's idea, and that it was faulty voice-to-text messaging. (State's Exs. 13-19.) Brown disagrees with the jury's determination of the facts in this case but fails to demonstrate the jury found him guilty based upon insufficient evidence. "The existence of alternative interpretations of circumstantial evidence does not mean that both interpretations are equally persuasive." *Christensen*, ¶ 118. It is "within the province of the jury to determine which will prevail." *State v. Elliott*, 2002 MT 26, ¶ 36, 308 Mont. 227, 43 P.3d 279.

As noted in *Marshall*, supra, the jury was authorized to find that having L.H., a 12-year-old, pose for Brown in private certainly contravenes community standards. The jury could therefore find, beyond a reasonable doubt, that Brown

sought to employ L.H. in sexual conduct in the form of a lewd exhibition of her intimate parts. *Marshall*, *supra*, at ¶ 29. Viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. The district court did not err.

IV. Montana Code Annotated § 45-5-625, Sexual Abuse of Children, is not unconstitutionally vague.

A. Standard of review

"We review de novo a District Court's interpretation of statute, determining whether the trial court's interpretation is correct." *Christensen*, ¶ 13 (citation omitted). "A statute is presumed constitutional unless it conflicts with the constitution, in the judgment of the court, beyond a reasonable doubt." *Id.* "The party challenging the constitutionality of a statute bears the burden of proof; if any doubt exists, it must be resolved in favor of the statute." *Christensen*, ¶ 13 (citing *Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 12, 382 Mont. 256, 368 P.3d 1131).

B. Brown waived his challenge to Mont. Code Ann. § 45-5-625 as unconstitutional because it is void-for-vagueness as applied to him because he failed to raise his argument below.

Because Brown did not raise the arguments below, this Court should not consider Brown's as-applied void-for-vagueness claim that he did not have actual notice of what would qualify as a criminal act under Mont. Code Ann. § 45-5-625

because the words "lewd" and "exhibition" are undefined by statute. (Appellant's Br. at 10-11.) This is a different challenge than the one Brown asserted in district court, where he asserted the term "encourage" is vague and renders the statute unconstitutional as applied to him. (Doc. 25 at 8.)

"[A] claim that a statute authorizing a sentence is unconstitutional on its face may be raised for the first time on appeal, but the exception does not apply to as-applied constitutional challenges." *State v. Coleman*, 2018 MT 290, ¶ 8, 393 Mont. 375, 431 P.3d 26. "A defendant's facial constitutional challenge is based on the defendant's allegation that the *statute* upon which his sentence was based is unconstitutional—i.e., his sentence is illegal." *Coleman*, ¶ 9. "Therefore, we address facial constitutional challenges to sentencing statutes even if they are raised for the first time on appeal." (Id.) "On the other hand, a defendant's as-applied constitutional challenge is based on the defendant's allegation that his *sentence* is unconstitutional—i.e., his sentence is objectionable." (Id.)

C. To the extent this Court addresses the merits of Brown's arguments, this Court should find that Mont. Code Ann. § 45-5-625 is not unconstitutional as applied to Brown.

"Statutes are presumed constitutional, and a party challenging a statute's constitutionality must establish beyond a reasonable doubt that the statute is unconstitutional; any doubt must be resolved in favor of the statute." *Christensen*,

¶ 131 (citing *State v. Knudson*, 2007 MT 324, ¶ 12, 340 Mont. 167, 174 P.3d 469). "A void for vagueness challenge to a statute may be raised on two different bases: (1) "facial," where the statute is so vague that it is rendered void on its face, or (2) "as-applied," where the statute is vague as applied to the facts of a particular situation." *Id.* (citing *Knudson* ¶ 16). "A vagueness as-applied analysis has two elements: (1) whether the statute provides actual notice to citizens, and (2) and whether the statute provides minimal guidelines to govern law enforcement." *Christensen*, ¶ 131 (citing *State v. Dixon*, 2000 MT 82, ¶ 28, 299 Mont. 165, 998 P.2d 544).

"In determining whether a statute provides actual notice to citizens, this Court must determine whether the statute provides a person of ordinary intelligence fair notice that their contemplated conduct is forbidden." *Christensen*, ¶ 132 (citing *Dixon*, ¶ 28). "A statute challenged for vagueness as-applied to a particular defendant must be examined in light of the conduct with which the defendant is charged in order to determine whether the defendant could have reasonably understood that his conduct was proscribed." *Christensen*, ¶ 132 (citing *Knudson*, ¶ 21). "The statute need not provide 'perfect clarity and precise guidance' but it must give a person fair notice that his conduct is forbidden." *State v. Samples*, 2008 MT 416, ¶ 17, 347 Mont. 292, 198 P.3d 803.

This Court has explained that "[w]here the Legislature has not defined a statutory term, we consider the term to have its plain and ordinary meaning, and may consider dictionary definitions, prior case law, and the larger statutory scheme in which the term appears." *Christensen*, ¶ 95. Further, this Court has determined that the words "repeatedly," "harassing," and "intimidating," which are used in the offense of Stalking under Mont. Code Ann. § 45-5-220 "have commonly understood meanings[]. . .[and a] person of average intelligence would recognize and understand these terms without recourse to legislative definitions." *State v. Adgerson*, 2003 MT 284, ¶ 26, 318 Mont. 22, 78 P.3d 850.

1. Lewd

Brown argues that "lewd" is too vague a term to provide him notice that the content of his text messages to a 12-year-old child comprised forbidden conduct. (Appellant's Br. at 11, "Paintings by Michelangelo in the Sistine Chapel are not "lewd" even though they may contain nudity.") His argument is a non sequitur—no person of ordinary intelligence would not grasp that asking a child to display themselves in underwear or naked to an adult is anything but forbidden conduct. *See Christensen*, ¶ 132. Further, the commission comments to the Indecent Exposure statute are inapplicable to Brown's offense. Brown argues that his text messages to L.H. could not be lewd because he "did not suggest actions that would affront observers." That (Appellant's Br. at 11.) That criterion comprises one of the

elements for Indecent Exposure, Mont. Code Ann. § 45-5-504, which is a completely different offense that involves the offender using his own nudity to commit the offense.

The jury properly determined that Brown's conduct was lewd because Brown reasonably understood that his conduct was criminal. More than a century ago, the United States Supreme Court explained that the words "obscene," "lewd" and "lascivious[]". . . signify that form of immorality which has relation to sexual impurity, and have the same meaning as is given them at common law in prosecutions for obscene libel. *Swearingen v. United States*, 161 U.S. 446, 451, 16 S. Ct. 562, 563 (1896). This longstanding definition is echoed by the modern-day Black's Law Dictionary definition of lewd as "indecent, pornographic, obscene and lascivious." https://thelawdictionary.org/lewd/.

2. Exhibition

The term "exhibition" is easily understood within the context of the statute. Brown asserts that "exhibition" requires a public display and he did not ask L.H. to display her intimate parts publicly. (Appellant's Br. at 12-13.) As previously discussed, this Court has rejected the argument that "exhibition" requires public display. *See Marshall*, ¶ 29. However, another definition of exhibition merely means a showing or presenting to view. https://www.dictionary.com/browse/exhibition. More importantly, the distinction is irrelevant. Brown's encouragement of L.H. to

display her intimate parts to him was criminal conduct, no matter the setting. It is impossible to reconcile Brown's argument with any acceptable interpretation of Brown's conduct: "[Brown] suggested settings he thought cute and had some redeeming social value if actually observed by others. Suggesting brevity of attire, such as thongs or panties, is not itself lewd." (Appellant's Br. at 11.)

3. Community standard

Brown briefly argues that he could not know what may violate Mont. Code Ann. § 45-5-625 because the State did not present evidence defining "community standard." Whether Brown's conduct contravened the community standard was a question of fact properly left to the jury. Brown's reliance on *State v. Price* is misplaced, as that case involved the crime of obscenity, which requires the State to prove that something is obscene if, "taken as a whole the material, applying contemporary community standards, appeals to the prurient interest in sex." Mont. Code Ann. § 45-8-201(2)(b)(i). Here, community standard was not an element of the crime, but a question of fact for the jury.

4. Victim's age

Brown's argument that a victim's age is vague is nonsensical. Brown argues that the age for penalty enhancement under Mont. Code Ann. § 45-5-625 is vague because "the statute does not specify whether, in determining age, one should round to the nearest year, or whether one day past the 12th birthday makes the

person over twelve but not yet 13." (Appellant's Br. at 13.) An individual is either 12 years of age or not under the Sexual Abuse of Children statute: If the victim was 12 years of age or younger and the offender was 18 years of age or older at the time of the offense, the offender:

> (i) shall be punished by imprisonment in a state prison for a term of 100 years. The court may not suspend execution or defer imposition of the first 10 years of a sentence of imprisonment imposed under this subsection (4)(a)(i) except as provided in **46-18-222**(1) through (5), and during the first 10 years of imprisonment, the offender is not eligible for parole. The exception provided in **46-18-222**(6) does not apply.

Montana law draws a bright line regarding age. In Montana, a person can only obtain a driver's license at age 16, or at age 15 if they have passed a driver's education course. *See* Mont. Code Ann. § 61-5-105(1)(a). It is unlawful for any licensee to sell alcohol to someone under 21 years of age. *See* Mont. Code Ann. § 16-3-301(5)(a). Montana Code Annotated § 45-5-501(1)(b)(iv) provides that a victim of a sexual crime is incapable of giving consent if the victim is "less than 16 years old." There is no ambiguity in Mont. Code Ann. § 45-5-625; L.H. was 12 years old.

Montana Code Annotated § 45-5-625 clearly applies to Brown such that he had actual notice that his conduct was prohibited. None of the terms Brown challenged are vague. It is obvious Brown knew his conduct was prohibited

because Brown attempted to vow L.H. to secrecy. "Don't say a word to anyone ever. . . . No one can ever know, right?" (State's Ex. 3.) There is sufficient guidance for law enforcement to enforce the statute. This Court should affirm the district court's order denying Brown's motion to dismiss.

D. Brown has waived review of his claim that his sentence under Mont. Code Ann. § 45-5-625(4) is unconstitutional because he raises his argument for the first time on appeal.

Brown also contends for the first time on appeal that the 100-year prison sentence required by Mont. Code Ann. § 45-5-625(4)(i) violates the cruel and unusual punishment provisions of the Eighth Amendment to the United States Constitution and Article II, § 22 of the Montana Constitution. (Appellant's Br. at 14-16.) This Court cannot address Brown's arguments because it is a change in theory and presents novel arguments that the district court did not have opportunity to address.

(Appellant's Br. at 15; "A 100-year sentence is cruel and unusual for a crime that was merely an inappropriate text message.") As this Court explained in *Coleman*, "pursuant to *State v. Lenihan*, we permit a defendant to challenge the legality of his sentence for the first time on appeal." *Coleman*, ¶ 7 (citing *State v. Lenihan*, 184 Mont. 338, 343, 602 P.2d 997 at 1000 (1979)). Under *Lenihan*, this Court differentiates between an "illegal" sentence and an "objectionable" sentence. *Coleman*, ¶ 7 (citing *State v. Strong*, 2009 MT 65, ¶ 11, 349 Mont. 417, 203 P.3d

848). "A sentencing condition is illegal if the sentencing court lacked statutory authority to impose it, if the condition falls outside the parameters set by the applicable sentencing statutes, or if the court did not adhere to the affirmative mandates of the applicable sentencing statutes." *Coleman*, ¶ 7 (citations omitted). This Court "may address illegal sentences for the first time on appeal, [but will] refuse to address objectionable sentences not challenged below." *Id.*

The district court imposed a legal sentence within statutory parameters. Therefore, it is not reviewable under *Lenihan.* As Brown makes an as-applied challenge for the first time on appeal, this Court should decline to review it.

V. The district court properly found that Brown was not acting under "duress" as contemplated by the statute and correctly concluded that an exception under Mont. Code Ann. § 46-18-222(3) did not apply.

Montana Code Annotated § 46-18-222(3) provides that the mandatory minimum sentence for Sexual Abuse of Children under Mont. Code Ann. § 45-5-625(4)[2] does not apply if:

> (3) the offender, at the time of the commission of the offense for which the offender is to be sentenced, was acting under **unusual and substantial duress**, although not such duress as would constitute a defense to the prosecution[.] (emphasis added).

[2] The 2017 version of Mont. Code Ann. § 45-5-625 required the sentencing court to impose a minimum ten-year sentence unless an exception applied. The Legislature amended the statute to create a 25-year mandatory minimum sentence.

An error that does not affect the defendant's substantial rights is not a ground for reversal of a conviction or sentence. Mont. Code Ann. § 46-20-701(1). A district court judge must determine whether to apply a mandatory minimum sentence exception based on a preponderance of the evidence, including information submitted at trial, during the sentencing hearing, and the parts of the presentence investigation that the court relies upon. Mont. Code Ann. § 46-18-223(3). The record reflects that the district court correctly applied the law to the facts of the instant case.

Contrary to Brown's claim, the sentencing record shows that the district court exhaustively considered whether Brown acted under "unusual and substantial duress." The court's order advised it would address Brown's argument for an exception at the sentencing hearing. Montana Code Ann. § 46-18-223(1) only mandates a hearing prior to imposition of sentence; it does not require a separate setting. The substantial testimony and evidence presented at Brown's sentencing hearing was the same evidence on which Brown relied to argue he qualified for an exception to the mandatory minimum sentence. The court made extensive oral findings on its reasons for imposition of sentence, including why the court found that an exception did not apply. Further, the court indicated an exception did not apply in its written judgment.

Brown's request for remand should be denied.

CONCLUSION

For the reasons set forth above, the State respectfully requests that this Court affirm Brown's conviction and judgment.

Respectfully submitted this 27th 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 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 9,090 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

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CERTIFICATE OF SERVICE

I, Bree Williamson Gee, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 05-27-2022:

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