IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0016

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DONALD GARZA,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Eighteenth Judicial District Court, Gallatin County, the Honorable Peter B. Ohman Presiding

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STATEMENT OF ISSUES

1. Must Appellant Donald Garza's (Don) convictions be reversed because the State presented evidence that he was an ex-convict and the court took no steps to cure the inherent prejudice associated with this inflammatory evidence?

2. Must Don's conviction of Count 1 be reversed because the court's instructions allowed the jury to convict him based on conduct over which the State had no criminal jurisdiction? If yes, is Don entitled to resentencing on the now-unbundled Counts 2 and 3?

3. Must Don's convictions of Counts 5 and 6 be reversed because the court's instructions allowed the jury to convict him without unanimously agreeing on the specific act or acts forming the bases for those convictions?

STATEMENT OF CASE

Don was charged by Amended Information with committing the following offenses "in Gallatin County, Montana":

> Count 1: Incest with his stepdaughter A.G. by knowingly having sexual contact with A.G. on numerous occasions, including at times when A.G. was under age 12, on or between April 1, 2010 through August 31, 2017;

> Count 2: Incest with his stepdaughter B.G. by knowingly having sexual contact with B.G. on numerous occasions on or between April 1, 2013 through December 2016;
>
> Count 3: Sexual intercourse without consent with A.G. on numerous occasions when she was under age 16 and incapable of consent on or between April 1, 2010 through August 31, 2017;
>
> Count 5: Sexual abuse of children for knowingly possessing on or about June 20, 2019, a visual medium in which a child is engaged in sexual conduct, consisting of "up to five" photographs of unrelated minors;
>
> Count 6: Sexual abuse of children for knowingly possessing on or about June 20, 2019, a visual medium in which a child is engaged in sexual conduct, consisting of "photographs/videos" of A.G. [1]

(*See* D.C.Doc. 14.)

Don entered not guilty pleas. (D.C.Doc. 15.) During Don's three-day jury trial, the State presented evidence that he had previously been in prison in violation of an order in limine it had not opposed. (Tr. at 509; *see also* D.C.Doc. 61; Tr. at 215-16.) Defense counsel objected, but the court failed to take any action to enforce the order or cure the prejudice from the violation. (Tr. at 509, 584.) Don later moved for a

[1] Count 4 was severed for purposes of trial and later dismissed on the State's motion. (*See* D.C.Docs. 58, 93, 95.)

mistrial, which was denied. (Tr. at 563; Excerpts of Transcript re: Denial of Motion for Mistrial, attached as Appendix A, Tr. at 583-87.)

The State presented evidence that Don had sexual contact with A.G. in the state of Utah when she was under age 12. (*See* Tr. at 202, 486-90.) Defense counsel did not request, and the court did not provide, any instructions informing the jury that Don was not charged in Count 1 with that conduct or prohibiting the jury from finding Don guilty of Count 1 based on that out-of-state conduct. (*See gen.* D.C.Doc. 68, Jury Instructions, attached as Appendix B; D.C.Doc. 69.)

The State presented evidence of, and invited the jury to convict Don based on, four discrete images in support of Count 5, and two images and one video in support of Count 6. (*See* State's Exs. 28-33, admitted at 324, 328 and published at 329-31; State's Ex. 65-D, admitted and published at 394; Tr. 614-16.) Defense counsel did not request, and the court did not provide, a specific-act unanimity instruction requiring all jurors to unanimously agree upon the commission of the same specific act or acts constituting the offenses alleged in Counts 5 and 6. (*See gen.* App.B; D.C.Doc. 69.)

The jury found Don guilty of all charges and found A.G. was under age 12 at the time of the commission of Count 1. (D.C.Doc. 70, Verdict, attached as Appendix C.)

On Counts 1 through 3, the court imposed the mandatory 100-year prison term required for Count 1 and ordered Don to serve 35 years before becoming eligible for parole. (Excerpts of Sentencing Transcript, attached as Appendix D, at 20-22; D.C.Doc. 90, Sentencing Order, attached as Appendix E, at 1.) The sentences were ordered to run concurrently. (App.D at 22; App.E at 5, 7, 9.)

Don timely appealed his judgment.

STATEMENT OF FACTS

I. Trial Testimony

Don married Michelle Holbrook in 2007 in Utah. (Tr. at 193-94.) Michelle had two daughters from a prior relationship, B.G. and A.G. (Tr. at 189-90.) Don and Michelle later had two children together: a daughter, C.G., and a son, D.G. (Tr. at 196, 203.) The family moved to Belgrade, Montana in April 2010. (Tr. at 202.)

While Michelle held two jobs and travelled often for work, Don stayed at home with the kids. (Tr. at 199, 243-46.) As such, he was the

primary housekeeper, cook, chauffeur, and disciplinarian. (Tr. at 268-69, 280, 284, 476.) Don was "very strict" with his stepdaughters. (Tr. at 285.) They could not date or text boys, their cellphone usage was limited and monitored, and they could not participate in extracurricular activities or hang out with friends after school. (Tr. at 207, 259-60, 283-85.) A.G. and B.G. testified Don would say mean things and would sometimes throw things when he got mad. (Tr. at 428, 430, 508-09.) He once struck A.G. (Tr. at 500-01.)

Michelle was unhappy in her marriage for many years. (Tr. at 268.) She testified Don ceased having sexual relations with her after D.G. was born, explaining he was suffering from erectile dysfunction. (Tr. at 204-05.) The girls were aware of the marital problems. (Tr. at 472-73, 551.) They resented Don for taking their mom away and for not pulling his own weight, leaving their mother to struggle to make ends meet. (Tr. at 468-70, 472-73, 547-48.)

The couple separated in December 2016. (Tr. at 235.) Michelle later moved to Cheyenne, Wyoming. (Tr. at 189, 235.) She requested the court limit Don's parenting time to a few hours of supervised

visitation in Casper every other weekend. (Tr. at 264-66.) They were also fighting over Michelle's federal pension. (Tr. at 266-67.)

While those proceedings were still pending, Tr. at 267, B.G., age 20, disclosed to Michelle that Don had sexually abused her as a child. (Tr. at 264-67.) Before reporting the alleged abuse to the police, Michelle and B.G. consulted with A.G., age 19. (Tr. at 262-63.) A.G. disclosed sexual abuse as well. (Tr. at 534.) Eventually, Michelle—not her adult daughters—contacted law enforcement. (Tr. at 263.)

At trial, B.G. testified Don started coming into her bedroom at night, lying next to her in bed, and touching her breasts and butt after they moved to Montana. (Tr. at 420-24.) B.G. testified this conduct happened "frequent[ly] – a lot." (Tr. at 422-24.) Although B.G. initially testified this abuse started when the family lived in a green house in Belgrade, she described Don coming into a bedroom she shared with A.G. (Tr. at 420-21.) B.G. later retracted the statement about A.G. being present during this initial contact once she realized she did not share a bedroom with A.G. in the green house. (Tr. at 421.)

B.G. testified the "same stuff" occurred "a lot" when she later shared a bedroom with A.G., and their beds were about six feet apart. (Tr. at 422-23.) All of this testimony conflicted with her statement to the police that the abuse started when she was in high school, and none of the above conduct was charged in the Amended Information. (*See* Tr. at 210-13, 222, 225-26 (dates when they shared this room); D.C.Doc. 14 at 2; D.C.Doc. 1 at 11.)

B.G. testified Don continued to touch her breasts and butt when she and A.G. shared a bunk bed and while A.G. was sleeping in the top bunk; when all six of her family members slept mere feet away from each other in a camping trailer while Don was building a house for the family in a rural area known as Clarkston; and when the whole family moved into the open, unfinished basement of the partially-built home. (Tr. at 424, 431-33, 436-37.)

Separate from these incidents, B.G. testified she suffered from "episodes" in high school where, about every other week, she would feel drowsy, have difficulty comprehending things, and would black out. (Tr. at 424, 426-27, 436, 439-40, 444.) Michelle explained B.G. would "talk about strange things" that didn't make any sense and do silly

things. (Tr. at 247, 286-87.) B.G. testified she often recalled having vivid nightmares involving Don raping her the day following an "episode." (Tr. at 426.) B.G. saw medical providers for these "episodes" and was prescribed anti-anxiety medication; apparently, no abuse was suspected. (Tr. at 251, 428-29.) Her episodes ended after she stopped living with Don. (Tr. at 448.)

A.G. once saw Don "dry humping" B.G. while he was asleep. (Tr. at 518-19.) She never witnessed any other sexual contact between Don and B.G. (Tr. at 506, 517.) Michelle never witnessed any sexual contact between Don and B.G. (Tr. at 291.)

A.G. testified when she was seven or eight years old and living in Utah, Don showed her a pornographic video of a man and woman having sexual intercourse and rubbed her vagina underneath her underwear as she watched the video. (Tr. at 486-87.) This happened "a couple of times." (Tr. at 488.) Another time when they were living in Utah, Don made A.G. stroke his penis. (Tr. at 489-90.) A.G. was 10 years old when she moved from Utah to Montana in April 2010. (Tr. at 202.) None of this conduct was charged in the Amended Information. (*See* D.C.Doc. 14.)

A.G. testified no sexual contact occurred in Montana until after her brother was born. (Tr. at 495-97.) D.G. was born in mid-February 2012, about a month before A.G. turned 12. (Tr. at 190, 203.) She explained Don started sleeping on the couch when D.G. was an infant and, at some point, he later started making her sleep on the couch with him so that he could fondle her breasts and vagina. He also would go into her bedroom and do the same. This happened "pretty often." (Tr. at 495-96.) Don again told her they should stop, and they did for awhile, but "it started up again." (Tr. at 497.) When the prosecutor asked A.G. if she knew how old she was "at that time," she vaguely responded "between the ages of 10 and 12." (Tr. at 497.) He then asked if any touching or fondling occurred prior to her 12th birthday. A.G. responded yes. (Tr. at 498.) The prosecutor never asked A.G. if she recalled this abuse occurring prior to her 12th birthday in Montana.

A.G. testified she and Don had sexual intercourse in her bed when she shared a bedroom with B.G. This occurred about three times a week while B.G. was sleeping a few feet away. (Tr. at 503-04, 506, 554.) A.G. testified Don, who weighed about 180 pounds at the time, continued to have sexual intercourse with her when she shared a bunk

bed with B.G. and while B.G. was sleeping in the lower bunk; when she lived in the Clarkston camper with all of her family members present and sleeping mere feet away; and when they all lived together in the open basement of the Clarkson house. (Tr. at 512, 515-16, 523-24, 554-57.)

Michelle never witnessed any sexual contact between Don and A.G. (Tr. at 291.) B.G. did not witness any sexual contact or intercourse. (*See* Tr. at 464.) When she was in high school, she told A.G. "what was happening" between her and Don and asked A.G. if "the same thing" was happening to her. A.G. denied any sexual abuse and told B.G. not to say anything. (Tr. at 464-65; 520.) Neither girl told anyone else about the alleged abuse until after the contested divorce proceedings were pending. (Tr. at 464, 478-80, 558.)

A.G. testified Don continued to have sexual intercourse with her when she would visit him after Don and Michelle separated. (Tr. at 526.) At this time, she started having "episodes" somewhat similar to those B.G. had experienced, except that she testified Don had sex with her during her "episodes." (Tr. at 526-27.) A.G. was over 16 years of age when Don and Michelle separated. (Tr. at 525; *see* D.C.Doc. 14 at 2,

Count 3 based on A.G.'s age.) A.G. stopped having "episodes" after she stopped visiting Don. (Tr. at 533.)

In June 2019, law enforcement seized a Samsung Galaxy J320 cellphone, a green thumb drive, and some SD external storage cards from a camping trailer identified as Don's residence by non-testifying informers. (Tr. at 137-38, 144-46, 160-61, 312-13.) None of the seized devices were password protected. (*See* Tr. at 367, 410.)

Michelle confirmed Don owned a similar green thumb drive when they were married, and he would use it to back up data from his computer. (Tr. at 241-42.) The seized thumb drive contained four images of two different young girls in various states of undress that had been downloaded from the internet at some time by an unidentified person and that had been saved onto that device in 2012 by an unidentified person. (State's Exs. 28-31; Tr. at 322-28, 356-61.) During closing argument, the prosecutor identified these four images as the factual bases for Count 5. (Tr. at 614.) [2] Law enforcement could not determine when these files were last viewed or accessed. (Tr. at 357-58.)

[2] The prosecutor incorrectly referred to these images as Exhibits 28-32. (Tr. at 615.)

One of the SD cards contained a video of a topless A.G. running towards the camera outside at the family's Clarkston property that was shot by an unidentified person in 2015, according to the file's metadata. (State's Ex. 65-D; Tr. at 393, 397-98, 543.) It also contained two still images of a nude A.G. walking around the Clarkston camper taken with a Samsung G900V cellphone camera by an unidentified person on April 19, 2015, according to the images' metadata. (State's Exs. 32-33; Tr. at 349-55, 410, 535, 543-44.) During closing argument, the prosecutor identified the two photographs and the video of A.G. as the factual bases for Count 6. (Tr. at 614-16.)

The State presented no evidence regarding who owned the Samsung G900V nor was the phone entered into evidence. Don was not the only person in the house with a cellphone in 2015; both girls had cellphones and external storage devices, and Michelle had a laptop and later a tablet. (Tr. at 240-41, 285.)

Non-testifying informants told law enforcement that Don also used a bedroom in the farmhouse on the property where the camping trailer was parked. (Tr. at 137-38.) Officers seized a toiletry bag, which Michelle identified as belonging to Don, from that bedroom. (Tr. at 163,

261.) Inside was an unmarked bottle containing a pill identified using an internet search as a 10-milligram dose of Ambien. (Tr. at 163-65.) Michelle testified Don had a prescription for Ambien for insomnia when they were married. (Tr. at 260.) He kept the Ambien, as well as B.G.'s anti-anxiety medication, in a basket by the kitchen sink, where anyone could access it. (Tr. at 261.) An emergency room doctor opined a 10-milligram dose of Ambien "would" render a teenage girl very sleepy and "could" cause amnesia "potentially." (Tr. at 184, 186.) A search of the seized cellphone revealed someone had visited pornographic websites using the phone's internet browser, including some referencing drugging and/or Ambien. (Tr. at 363-64.)

II. Motion for Mistrial

Defense counsel filed an unopposed motion in limine to exclude "any reference" to Don's criminal history and prior incarceration as irrelevant, not admissible for any non-propensity purpose, and unfairly prejudicial under Mont. R. Evid. 402-04. (D.C.Doc. 61.) The court granted the motion, rendering the evidence inadmissible. (Tr. at 215-16.)

During direct examination, A.G. volunteered the following information:

> I remember once talking to [Don] in that red house, and I said something, like, "Why do you have sex with me when I don't want to?" Something along those lines, and he accused me of, pretty much, calling him a rapist, and said that if he ever went back to prison, he would make it count.

(Tr. at 509.)

Defense counsel immediately asked to approach the bench; A.G. audibly apologized; and the judge responded, "We can do that at break." (Tr. at 509.) However, the court did not take a break until after both the State and defense had rested, and the court had told the jury "that would submit the testimony and evidence to you that would be considered for the trial, and the case will be submitted to you for your deliberations." (Tr. at 560.)

At his first opportunity, defense counsel moved for a mistrial, arguing A.G.'s testimony deprived him of a fundamentally fair trial based "on the facts and not the person." (Tr. at 563.) The court denied the motion, concluding: the statement was "gratuitous"; it was not dwelled upon; the court did not observe any reaction from the jurors; and "the statement was not overly prejudicial in light of the other

testimony presented." (App.A at 584-85.) The jury was never instructed to disregard the testimony.

STANDARDS OF REVIEW

This Court reviews the denial of a motion for a mistrial for an abuse of discretion. *State v. Partin*, 287 Mont. 12, 17-18, 951 P.2d 1002, 1005 (1997).

This Court may discretionarily review an issue not raised at trial where an appellant "assert[s] a claim that, if valid, would implicate a significant constitutional right," and "failing to review the alleged error may result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the proceedings, or compromise the integrity of the judicial process." *State v. Valenzuela*, 2021 MT 244, ¶¶ 10, 12, 405 Mont. 409, 495 P.3d 1061 (internal quotation marks omitted) (reviewing double jeopardy claim and finding no error); *see also State v. Carnes*, 2015 MT 101, 378 Mont. 482, 346 P.3d 1120 (reviewing jury instruction error and reversing conviction).

An ineffective assistance of counsel (IAC) claim may be raised for the first time on appeal if it is record-based or the error appears on the face of the record and "there could not be any legitimate reason for what

counsel did." *See State v. Kougl*, 2004 MT 243, ¶¶ 11, 14-15, 323 Mont. 6, 97 P.3d 1095.

Although a court has broad discretion in instructing the jury, that discretion is "ultimately restricted by the overriding principle that jury instructions must fully and fairly instruct the jury regarding the applicable law," which is a question of law this Court reviews de novo. *Missoula v. Zerbst*, 2020 MT 108, ¶ 9, 400 Mont. 46, 462 P.3d 1219 (internal quotation marks omitted). "If the jury instructions prejudicially affect the defendant's substantial rights, the error is not harmless" and reversal is required. *Zerbst*, ¶ 9.

SUMMARY OF THE ARGUMENT

Don's adult stepdaughters accused him of years of sexual abuse only after Don and their mother were embroiled in a contested divorce case. Although their family of six often slept together in close quarters, there were no eyewitnesses. No forensic evidence was presented. It was their words against Don's general denial.

One of his stepdaughters, after being advised by the prosecutor not to do so, informed the jury that Don told her if he was going back to prison, he was going to make it count. The court failed to enforce its

order in limine excluding evidence of Don's prior incarceration by immediately striking it and admonishing the jury to disregard it. Having failed to do so, the court had no choice but to grant Don's motion for a mistrial, particularly where, in the prosecutor's words, there were "so many, essentially, prior bad acts . . . admitted" at trial. Given the highly prejudicial nature of this evidence, the lack of any curative instruction, and the lack of corroboration of the complaining witnesses' somewhat incredible allegations, Don should have been granted a new trial.

Don's constitutional rights to due process and to effective assistance of counsel were infringed by the jury instructions in this case in two ways. First, the jury was not fully and fairly instructed regarding the law applicable to his case because the jury was not instructed that Don had been charged in Count 1 with committing incest with A.G. in Montana, or that it could not convict Don based on conduct committed wholly in another state. Because the State presented evidence that Don committed incest with A.G. in Utah, it is impossible to tell whether the jury's verdict on Count 1 was based on Montana conduct, or conduct over which the State had no criminal

jurisdiction. Indeed, it is likely the jury based its specific finding that A.G. was under 12 at the time of the offense on the Utah conduct—which, if it had occurred, must have occurred before A.G. turned 12. The conviction on Count 1 must be reversed. Don is entitled to resentencing on Counts 2 and 3 because the court bundled all three sentences together, rendering it impossible to tell what sentence the court would have imposed without the conviction on Count 1.

Secondly, Don's rights to due process and to effective assistance of counsel, and his constitutional right to a unanimous verdict on Counts 5 and 6 were violated by the lack of a specific-act unanimity instruction. Because the State presented evidence that Don committed multiple disparate illegal acts subsumed under each of those counts—the alleged knowing possession of discrete images of purported child pornography—the jury should have been instructed that they had to reach a unanimous verdict on at least one specific criminal act before finding guilt for either multiple-act count. Without such an instruction, it is impossible to tell whether the jurors did so, and those convictions must be reversed.

ARGUMENT

I. Don's convictions must be reversed because the State presented evidence that he had previously been in prison in violation of the court's order in limine and the court took no action to cure that error.

An accused has a constitutional right to a fair trial on the charged offenses by an impartial jury. U.S. Const. Amend. VI; Mont. Const. art. II, § 24. The admission of an accused's "prior trouble with the law [and] specific criminal acts" is generally not permissible because "it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him" his constitutionally-guaranteed "fair opportunity to defend against a particular charge." *Michelson v. U.S.*, 335 U.S. 469, 475 (1948). A defendant's prior criminal history "is highly prejudicial by nature due to the great risk that it will emotionally provoke the jury to desire to punish the defendant for prior bad conduct or, at least, give the prior bad acts evidence undue weight over the actual case-specific evidence of guilt or innocence centrally at issue." *State v. Pelletier*, 2020 MT 249, ¶ 26, 401 Mont. 454, 473 P.3d 991.

"[P]rior crimes are highly prejudicial to the defendant, and usually irrelevant for purposes of the charged crime." *State v. Derbyshire*, 2009

MT 27, ¶ 51, 349 Mont. 114, 201 P.3d 811. Moreover, "[a] defendant must not be convicted merely because he is an unsavory person, or on the rationale that because he committed a crime in the past, he has a defect of character that makes him more likely than people generally to have committed the charged offense." *Derbyshire*, ¶ 22 (internal quotation marks and citation omitted).

The rules generally "barring proof of other crimes should be strictly enforced in all cases where applicable, because of the prejudicial effect and injustice of such evidence, and should not be departed from except under conditions which clearly justify such a departure." *State v. Rogers*, 2013 MT 221, ¶ 32, 371 Mont. 239, 306 P.3d 348.

This Court applies the cumulative evidence test to determine whether the improper admission of prior crimes evidence was harmless or reversible error. *Derbyshire*, ¶¶ 46-47. Where "the tainted evidence was not admitted to prove an element of the offense, then the admission of the evidence will be deemed harmless only if the State demonstrates that the quality of the tainted evidence was such that there was no reasonable possibility it might have contributed to the conviction." *Derbyshire*, ¶ 47 (that the officers who searched the defendant's home

were "probation officers" and the defendant was "on probation" were not elements of the charged drug offense). The same standard applies when a defendant moves for a mistrial based on the admission of such evidence in violation of an order in limine excluding it. *See Partin*, 287 Mont. at 18, 951 P.2d at 1005. In making this determination, the Court considers whether the trial court cured the prejudice by promptly instructing the jury to disregard the evidence. *See Partin*, 287 Mont. at 21, 951 P.2d at 1007-08. *See also, e.g., State v. Brush*, 228 Mont. 247, 251-52, 741 P.2d 1333, 1335-36 (1987) (court "immediately" and "promptly" admonished jury); *State v. Ford*, 278 Mont. 353, 357, 360-61, 926 P.2d 245, 247, 249 (1996) (court admonished jury "immediately" after the witness finished testifying); *State v. Walker*, 280 Mont. 346, 352-53, 930 P.2d 60, 63-64 (1996) (court gave "prompt" admonition after short recess in chambers to discuss issue); *State v. Maier*, 1999 MT 51, ¶¶ 58, 63-64, 293 Mont. 403, 977 P.2d 298 (court "promptly" admonished jury); *State v. Long*, 2005 MT 130, ¶¶ 17-18, 27, 327 Mont. 238, 113 P.3d 290 (court "promptly" admonished jury after a short recess); *State v. Michelotti*, 2018 MT 158, ¶¶ 19, 23-24, 392 Mont. 33,

420 P.3d 1020 (relying on court's "quickly-given" admonishment after a short recess).

This Court's decision in *Partin* is instructive here. Like Don, Partin moved prior to trial to exclude evidence that Partin had previously been arrested; the State did not oppose the motion; and the court granted the motion. However, the State's handwriting expert testified in violation of the order in limine that he had compared the alleged forgery at issue in Partin's trial to handwriting samples in the possession of the police department due to Partin's prior arrest. *Partin*, 287 Mont. at 14-15, 951 P.2d at 1003. Partin objected and moved for a mistrial. Changing course, the prosecutor argued the evidence was admissible and, in any event, any prejudice could be cured through a cautionary instruction because the jury would not likely be biased against Partin just because he had been arrested in the past on some unknown charge. The court denied the motion and promptly instructed the jury "to consider only the facts and not prior crimes allegedly committed." 287 Mont. at 15, 18, 951 P.2d at 1003, 1005.

On appeal, this Court held the court abused its discretion in denying Partin's motion for mistrial. The Court rejected the State's

belated attempts to argue the evidence was admissible after having acquiesced in the motion in limine, stating "we will not countenance such position-shifting by addressing that argument here." *Partin*, 287 Mont. at 20, 951 P.2d at 1007. Recognizing "the introduction of other crimes evidence inevitably involves prejudice to the defendant," 287 Mont. at 19, 951 P.2d at 1006, the Court also concluded "the prosecutor's acquiescence in—and the Court's grant of—the motion . . . reflect that all involved conceded the prejudicial effect of evidence of" Partin's prior arrest. 287 Mont. at 20, 951 P.2d at 1007. Similarly, this Court concluded "resolving any doubt about the efficacy of the cautionary instruction in the favor of the prosecution would be inappropriate" where the testimony was the subject of a motion in limine to which the State had acquiesced. 287 Mont. at 20, 22, 951 P.2d at 1007-08. The Court concluded it was reasonably possible that the tainted evidence contributed to Partin's conviction because it could have buttressed the expert's somewhat conflicting testimony while simultaneously impugning Partin's credibility and character; there were no eyewitnesses; and the curative instruction was an inadequate remedy. 287 Mont. at 18-19, 22, 951 P.2d at 1006, 1008.

As in *Partin*, Don filed a motion in limine to exclude evidence of his prior incarceration; the State did not oppose the motion; the court granted the motion and excluded the evidence; when a State's witness violated the court's order in limine, Don contemporaneously objected; and Don later requested a mistrial outside the presence of the jury. For the reasons discussed in *Partin*, the State should not be permitted to argue on appeal that A.G.'s testimony was admissible or not prejudicial, or that any prejudice could have been cured by a "cautionary instruction." Because the State acquiesced in the motion in limine, "resolving any doubt" in its favor "would be inappropriate." *See Partin*, 287 Mont. at 22, 951 P.2d at 1008. *See also Montana v. Byrne*, 2021 MT 238, ¶¶ 22, 34, 405 Mont. 352, 495 P.3d 440 (same).

Indeed, the error here is more egregious than the error in *Partin* for two reasons. First, the jury in *Partin* learned only that the defendant had previously been arrested, *i.e.*, suspected of a crime. In contrast, the jury here learned Don had previously committed and been convicted of another crime or, possibly, crimes, and his criminal conduct was serious enough to require his incarceration in prison. Although A.G. did not reveal Don's crime of conviction, the jury knew Don was

not convicted of shoplifting; he did something serious enough to land him in *prison*. That evidence was highly prejudicial and inflammatory evidence that invited the jury to convict Don based on his status as an ex-con and character as a "bad man" rather than the facts of this case.

Moreover, unlike in *Partin*, the court did not give the jury a prompt curative instruction to disregard the tainted evidence. Although the evidence was indisputably inadmissible as a result of the court's prior order and Don contemporaneously objected to it, the court failed to address the issue immediately. The court should have struck A.G.'s testimony from the record and admonished the jury to disregard it. *See, e.g.*, *Brush*, 228 Mont. at 251, 741 P.2d at 1335. At a minimum, the court should have granted Don's request for a sidebar or taken a short recess to address the issue outside the presence of the jury and then cured the error promptly upon return. The court's failure to enforce its own order in limine in a prompt fashion was, itself, error that rendered the substantial prejudice from the inadmissible statement uncured.

Having failed to promptly cure the error, the court had no choice but to grant Don's motion for mistrial. The fact that Don was an ex-

convict was not probative of any of the elements of the charged offenses here—at least not without relying on the prohibited propensity inference. As such, the evidence should have been—and was—properly excluded under Rules 402-404. The State cannot demonstrate that the *quality* of the tainted evidence here was such that there was no reasonable possibility it might have contributed to Don's convictions. The evidence was excluded for the very reason that it was the type of evidence that would likely unduly persuade a jury to prejudge Don and deny him the opportunity to have his case decided based on the facts pertaining to the charged offenses here. The prejudicial effect of that prior bad acts evidence was multiplied here because, as the prosecutor admitted, there were "so many, essentially, prior bad acts . . . admitted" in this case, Tr. at 566, including uncharged acts committed in another jurisdiction, Tr. at 486-90, and other uncharged acts that predated the charged offenses, Tr. at 420-23.

Moreover, the jury was instructed that it was to judge whether the State met its burden of proving the charges beyond a reasonable doubt based on "all of the evidence in the case"; that they were to be "governed by the evidence introduced at trial"; and that they could discuss "all of

the evidence you have seen and heard in this courtroom about this case together with the law which relates to this case as contained in the instructions." (App.B, Instr.Nos. 2.5, 2.6, 3.6.) The jury was also told that it got to decide the weight to give to any particular evidence before it. (App.B, Instr.No. 2.6.) The court never instructed them that A.G.'s testimony that Don had been to prison before was not evidence; that Don's objection was sustained; that A.G.'s statement was stricken from the record; that they jury should disregard the evidence completely; or even that the evidence could not be used as proof that Don had a criminal character or propensity to commit crimes and that he likely acted in conformity with that character at the time of the charged offenses. (*See gen*. App.B.) This Court generally will not presume that the jury has ignored their duties to follow the trial court's instructions. *See, e.g., Brush*, 228 Mont. at 251, 741 P.2d at 1335; *see also Long*, ¶ 25; *Michelotti*, ¶ 23. Under these circumstances, there was nothing preventing the jury from relying on this highly prejudicial and inflammatory evidence to conclude that Don did something really bad before, he was a bad man, and he likely did the something bad this time, too. Indeed, the jury was instructed it *should* consider all of the

evidence—including this piece—when rendering its verdict. The risk that it followed the court's instructions and did so in this case undermines confidence in the jury's verdicts here.

That is particularly true because the State's case on Counts 1 through 3 rose or fell on the credibility of B.G. and A.G, who did not report the alleged abuse to law enforcement until their mother was embroiled in a contested divorce from Don and then only after discussing their stories with each other first. As in *Partin*, 287 Mont. at 18, 951 P.2d at 1006, there were no eyewitnesses to any sexual misconduct—despite the complaining witnesses' somewhat incredible allegations that they were abused essentially nightly with their entire family of six mere feet away. No forensic evidence was presented. (*See* Tr. at 411.) Not only did the inadmissible testimony impugn Don's credibility and character, but it had the added effect of buttressing the testimony of Don's stepdaughters. *See Partin*, 287 Mont. at 20, 951 P.2d at 1007. Thus, it is more than reasonably possible that this inflammatory evidence prejudiced Don's defense on Counts 1 through 3.

Nor can it be said that the evidence regarding Counts 5 and 6 was so strong that it's not reasonably possible that the qualitative effect of

this highly prejudicial evidence influenced the jury's verdict on those counts as well. No one testified Don took either of the two pictures or video of A.G. that were the subject of Count 6, and no one testified that they saw Don download the four images that were the subject of Count 5. Nor did anyone testify that Don knew the images and video were present on the electronic storage devices seized by police. The seized devices were not password protected and could have been accessible to anyone living with Don. The cellphone that was recovered was not the cellphone that was used to take the images and video of A.G. that was the subject of Count 6. And at the pertinent time, there were numerous people in the household who had the means and knowledge to download the images and to take the allegedly offending photographs and video of A.G. But the jury learned that only one of those persons had been to prison before—Don. That testimony was powerful evidence from which the jury could have concluded that Don was the most likely culprit because he was an ex-convict with a criminal character, regardless of the actual facts of this case.

Based on the foregoing, this Court cannot have confidence in the jury's verdicts on any of the charges here. Don's right to a

fundamentally fair trial was violated, and he is entitled to a new trial on all counts.

II. The jury was not fully and fairly instructed on the applicable law regarding the Utah allegations.

A. The court plainly erred in instructing the jury.

The Fourteenth Amendment and Article II, Section 17, of the Montana Constitution guarantee a person will not be deprived of liberty without due process of law. *Zerbst*, ¶ 30. In addition, Article II, Section 24 of the Montana Constitution provides a person accused of a crime "shall have the right to . . . a . . . trial by an impartial jury of the county or district in which the offense is alleged to have been committed." *See also* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury of the State . . . wherein the crime shall have been committed. . . .").

> [A] defendant may not waive nor stipulate to a court's jurisdiction over his criminal case. Jurisdiction addresses the court's authority to adjudicate the proceeding. Thus, in a criminal proceeding, the prosecution must establish that the trial court has the authority, or jurisdiction, to preside over the trial.

City of Helena v. Frankforter, 2018 MT 193, ¶ 18, 392 Mont. 277, 423 P.3d 581 (internal citations omitted). Section 46-2-101(1)(a), MCA

provides a person is subject to prosecution in Montana for an offense "committed either wholly or partly within the state."

After the venire was sworn in this case, the court read proposed preliminary instruction number 2.1, which informed the jury that an "Information has been filed charging [Don] with the offenses of incest, sexual intercourse without consent, and sexual abuse of children." (*See* Tr. at 6-7, 94-95; *see also* 8/4 Tr. at 17-18; D.C.Doc. 69, Court's Proposed Preliminary Instruction Nos. 1-3; App.B., Instr.No. 2.1.) Contrary to the pattern instruction on which the court based this instruction, *see* Montana Criminal Jury Instruction (MCJI) 1-104, the court did not inform the jury when or where the offenses were alleged to have been committed.

The State presented evidence that Don rubbed A.G.'s vagina on a couple of occasions and once made her stroke his penis when they were living in Utah and she was under the age of 10. (Tr. at 202, 486-90.) Under § 46-2-101(1)(a), MCA, it is indisputable that the State lacked jurisdiction to prosecute Don for that wholly out-of-state conduct, and the jury could not have found Don guilty of incest based on that conduct.

Yet, the court's instructions here authorized the jury to do just that. The jury was instructed that Don was charged with incest—but not where or when he allegedly committed that offense. (App.B, Instr.No. 2.1.) They jury was further instructed it could find Don guilty of incest in Count 1 if the State proved beyond a reasonable doubt that Don knowingly had sexual contact with his stepdaughter A.G. and, if it so found, that it must then determine whether A.G. was under the age of 12 at the time of the commission of the offense. (App.B, Instr.Nos. 2.1, 4-5, 7-8; App.C.) The jury made the requested finding and Don was convicted of incest and sentenced to 100 years in prison as a result of the aggravating factor of A.G.'s age. But there is no way to tell whether the jury found Don committed incest with A.G. when she was under age 12 based on the alleged Utah conduct or any conduct that occurred "wholly or partially in the state" of Montana as required by § 46-2-101(1)(a), MCA.

None of the court's instructions required the jury to find that Don committed Count 1 wholly or partly within the state of Montana, or instructed the jury that it could not convict Don based on conduct that

occurred wholly in another state. (*See gen.* App.B.) Nor did the court instruct the jury on the specific jurisdictional limitations set forth in § 46-2-101(1)(a), MCA. In fact, the jury was not instructed that its use of the Utah evidence was limited in any way. To the contrary, the jury was instructed it should discuss and base its verdict on *all* of the evidence presented; the jury should give the evidence the weight and importance it deemed proper; the court's instructions included *all* of the laws necessary for the determination of the case; and the jury should not rely on its own or anyone else's understanding of the law. (*See* App.B, Instr.Nos. 1.2, 2.5, 2.7, 3.1, 3.6.)

Read in their entirety, the court's instructions and verdict form indicated the jury *could* find Don guilty of Count 1 *regardless of where or when the conduct took place*, so long as it found the State proved beyond a reasonable doubt the essential elements of the offense. But that is not the law: the State had no power to convict Don based on conduct committed wholly in Utah. As such, the court failed to fully and fairly instruct the jury regarding the law applicable to Count 1 in this case.

"To constitute reversible error, a mistake in rendering jury instructions must prejudicially affect the defendant's substantial rights." *Zerbst*, ¶ 27 (internal quotation marks and citation omitted). This Court will reverse under plain error review where a jury instruction error implicates a defendant's fundamental constitutional right to due process of law and calls into question the fundamental fairness of his trial and conviction. *Zerbst*, ¶¶ 33 (incorrect definition of consent); *see also Carnes*, ¶ 13 (error in mental state instruction).

It is impossible for this Court to ascertain from the jury's verdict upon which conduct the conviction on Count 1 is based—the Utah incidents over which the court lacked jurisdiction, or any Montana conduct. *See State v. Tipton*, 2021 MT 281, ¶ 20, 406 Mont. 186, 497 P.3d 610 (prejudice shown where instructions allowed jury to convict based either on conduct that would violate *ex post facto* prohibition or conduct that wouldn't, or both and "there is no practical or possible way for this Court" to determine upon which conduct the jury's guilty finding was based). As such, the error in the instructions undermines confidence that Don's conviction was based on conduct actually subject

to the State of Montana's jurisdiction, and Don's substantial rights were prejudiced by the error.

There is a real possibility that Don's conviction of Count 1 rests on the Utah allegations. A.G.'s testimony regarding the sexual contact that occurred in Utah was far less equivocal and vague than her testimony about what happened in Montana *and, importantly, when*. A.G. moved to Montana when she was 10; any sexual contact that occurred in Utah necessarily happened when she was under 12. In contrast, her testimony regarding her age when Don "resumed" sexual contact with her in Montana was not definitive. Although A.G. indicated *some* sexual contact happened before she turned 12, she was never asked and never directly testified that Don had sexual contact with her *in Montana before her twelfth birthday*. The instruction error prejudiced Don's defense by subjecting him to a 100-year mandatory minimum sentence that may not have otherwise been applicable.

The prejudice related to this instruction error was multiplied by the admission of the highly prejudicial testimony that Don was an ex-convict. *See State v. Smith*, 2020 MT 304, ¶ 16, 402 Mont. 206, 476 P.3d 1178 (under cumulative error doctrine, court may assess aggregate

prejudicial effect of multiple errors). The jury heard Don was an ex-con who sexually assaulted his young stepdaughter in Utah, and they were not told that neither of these facts could be used to convict him for committing incest under Count 1. Under these circumstances, it's reasonably possible that the jury convicted Don of Count 1 based on wholly out-of-state conduct and impermissible propensity inferences.

This Court may reach the merits of this unpreserved claim under the plain error doctrine. The erroneous instructions in this case implicate Don's fundamental constitutional rights to be prosecuted in the place where the offense was committed and to due process of law. Due process necessarily encompasses the right not to be prosecuted by an entity lacking the authority to do so and in a State with a sufficient nexus to the crime to render the application of the State's law against him fundamentally fair and not arbitrary. There is no evidence that Don or A.G. had any connection to Montana at the time that the Utah incidents occurred. (*See* Tr. at 549, describing Montana as "the great unknown.") Failure to review this claim would leave unsettled the fundamental fairness of Don's trial and would call into question the integrity of the judicial system in light of the State's potential exercise

of authority to punish a person where it had none. This Court should vacate Don's conviction of Count 1 because the court failed to fully and fairly instruct the jury on the law, that error prejudiced his substantial rights, and plain error review is warranted under these facts.

B. Alternatively, counsel provided deficient performance that prejudiced Don's defense by not requesting proper instructions.

Alternatively, this Court may correct this error through the lens of an IAC claim. A person accused of a crime has the right to the effective assistance of counsel under Article II, Section 24 of the Montana Constitution and the Sixth Amendment to the United States Constitution. *See, e.g., State v. Resh*, 2019 MT 220, ¶ 15, 397 Mont. 254, 448 P.3d 1100; *Strickland v. Washington*, 466 U.S. 668, 686 (1984). A defendant may prevail on an IAC claim on direct appeal where counsel made an error for which there is no plausible justification or legitimate strategic reason, and there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *See Kougl*, ¶ 15; *Strickland*, 466 U.S. at 687, 694; *see also Tipton*, ¶ 18 ("There being no plausible justification for defense counsel's [error] . . ., it naturally follows that defense counsel's conduct

falls outside the bounds of reasonable professional assistance."). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

There can be no plausible justification for an attorney's failure to request jury instructions that properly state the law where such instructions would enable the defense to refute an improper basis for convicting the defendant. *See Tipton*, ¶ 16 (failure to prevent *ex post facto* application of law imposing a greater sentence); *Resh*, ¶¶ 16-17 (failure to offer proper "without consent" instruction regarding sexual assault); *State v. Chafee*, 2014 MT 226, ¶ 18, 376 Mont. 267, 332 P.3d 240 (failure to offer mere presence instruction). Here, trial counsel made no effort to ensure the jury knew it could not convict Don of Count 1 based on conduct that occurred wholly outside Montana. He did not object to the court's truncated preliminary instruction regarding the charges or request the court give the entire first paragraph of MCJI 1-104. He did not request the court instruct the jury that it "must find that" that the sexual contact in Count 1 occurred in Montana and that it "cannot find Mr. Garza guilty for any act that he committed in Utah." (*See* Tr. at 612, prosecutor's closing.) Nor did he request an instruction

setting forth the substance of § 46-2-101(1)(a), MCA, *i.e.*, that a person may be convicted of an offense committed either wholly or partly in Montana; or, conversely, an instruction indicating a person may not be convicted of an offense committed wholly in a different state.

Counsel's failure to take any affirmative steps to ensure the jury was so instructed constitutes constitutionally deficient performance that falls below the standard of objective reasonableness. There can be no legitimate strategic reason for counsel's failure to take these steps, which would have ensured the jury did not convict Don of Count 1 based on uncharged conduct outside the State's jurisdictional reach. Don's IAC claim is reviewable here, and prong one of *Strickland* is met.

It is reasonably probable that the jury—or at least some of the jurors—convicted Don of Count 1 based on the Utah conduct. Proper instructions could have easily prevented that result. As discussed above, the State presented evidence that Don committed incest in Utah and in Montana, and, due to counsel's error, there is no practical or possible way for this Court to ascertain which conduct led to Don's conviction for Count 1. *See Tipton*, ¶ 20. As such, counsel's deficient performance prejudiced his defense.

Moreover, although A.G. was clearly under age 12 when the family lived in Utah, she never directly testified she was under 12 when Don had sexual contact with her in Montana. This indicates the jury may have based its verdict on Count 1 on the Utah conduct, or the jury's belief that Don was an ex-con and a bad man likely to commit whatever offenses he was charged with in this case, or both. Because this Court cannot have confidence that the jury actually convicted Don of Count 1 based on conduct over which the State had jurisdiction, that conviction must be reversed.

C. The vacation of Don's conviction of Count 1 requires remand for resentencing on Counts 2 and 3.

When a defendant is sentenced on multiple counts and one of them is later vacated on appeal, "the sentencing package imposed by the court has become unbundled," and the trial court has the authority "to put together a new package reflecting its considered judgment as to the punishment the defendant deserve[s] for the crimes of which he [i]s still convicted." *United States v. Carter*, 907 F.3d 1199, 1211 (9th Cir. 2018) (internal quotation marks omitted). Employing similar logic, this Court will remand for resentencing when a portion of the defendant's original sentence is determined to be illegal and that illegality "affects

the entire sentence," and this Court "cannot discern what the [sentencing judge] would have done" absent the mistake. *State v. Heath*, 2004 MT 58, ¶ 51, 320 Mont. 211, 89 P.3d 947 (internal quotation marks omitted).

Here, the court explicitly "bundled" Counts 1 through 3 together, imposing the mandatory 100-year prison sentence required for Count 1 on all three counts, adding a lengthier discretionary parole restriction on all three counts, and running those identical sentences concurrently. (App.D at 20-22.) Before doing so, the judge confirmed A.G. was under 12 and noted his hands were "somewhat tied" by the mandatory minimum sentence attached to Count 1. (Sent. Tr. at 15, 18.) Although neither Count 2 nor 3 carried the same mandatory minimum sentence, the court nonetheless imposed that sentence on each of those counts, explaining each of the three sentences was based on "the age of the *victims*" as well as the "ongoing term of the *offenses*." (App.D at 21 (emphasis added).) Although the court could have exercised its discretion to impose the same sentences on Counts 2 and 3 regardless of the outcome of Count 1, the court acknowledged its hands were somewhat tied by the conviction of Count 1, and it explicitly based it

sentence on Counts 2 and 3, in part, on facts related to Count 1 and vice versa.

Thus, it is clear the sentencing judge imposed a single, bundled sentence on Counts 1 through 3, the reversal of Don's conviction of Count 1 effectively unbundles the court's sentencing package on Counts 1 through 3, and it is not possible to ascertain what sentences the court would have imposed on Counts 2 and 3 absent Don's conviction on Count 1. *See Heath*, ¶ 51. This case should be remanded for resentencing on Counts 2 and 3 so that the court "can put together a new package reflecting its considered judgment as to the punishment the defendant deserve[s]" for those now-unbundled counts without consideration of the mandatory minimum sentence applicable to the now-vacated conviction in Count 1. *See Carter*, 907 F.3d at 1211.

III. The lack of a specific-act unanimity instruction requires reversal of Counts 5 and 6.

The Sixth and Fourteenth Amendments to the United States Constitution protect the right to a unanimous verdict. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1397 (2020). So, too, does Article II, Section 26 of the Montana Constitution, providing "[i]n all criminal actions, the verdict shall be unanimous."

The constitutional right to unanimity "means more than an agreement that the defendant has violated the statute in question; it requires substantial agreement as to the principal factual elements underlying a specific offense." *State v. Vernes*, 2006 MT 32, ¶ 21, 331 Mont. 129, 130 P.3d 169 (citing *State v. Weaver*, 1998 MT 167, ¶ 33, 290 Mont. 58, 964 P.2d 713, *abrogated, in part, on other grounds by State v. Deines*, 2009 MT 179, ¶¶ 14-16, 351 Mont. 1, 208 P.2d 857); *accord, e.g.*, *U.S. v. Echeverry*, 719 F.2d 974, 975 (9th Cir. 1983). Thus, when necessary to avoid jury confusion or ignorance regarding the applicable law, the trial court must instruct the jury that "in order to find the defendant guilty, you must unanimously agree upon the commission of the same specific act [or acts]." *Weaver*, ¶ 39; *see also* MCJI 1-106(a). The potential for confusion necessitating a specific-act unanimity instruction arises when the government prosecutes a greater number of alleged criminal acts than there are charged offenses. *Weaver*, ¶¶ 33-35; *State v. Harris*, 2001 MT 231, ¶ 12, 306 Mont. 525, 36 P.3d 372, *abrogated in part on other grounds by Robinson v. State*, 2010 MT 108, ¶ 12, 356 Mont. 282, 232 P.3d 403 (when the State presents evidence that the "defendant committed disparate illegal acts subsumed

under the single count, the special instruction serves to direct the jurors to reach a unanimous verdict on at least one specific criminal act before finding guilt for the multiple-act count"). In that situation, a guilty verdict will not necessarily mean the jury unanimously agreed on a specific criminal act. Without instruction to the contrary, some jurors may have concluded the defendant violated the law through act X, other jurors through act Y, and still other jurors not through any "specific incident . . . beyond a reasonable doubt" but rather because the allegations in total "creat[ed] a bad taste in the jury's mouth." *Weaver*, ¶ 23. That is, "[t]he jury may have unanimously believed that [the defendant] was guilty of something without actually agreeing unanimously on precisely which acts he was guilty." *Weaver*, ¶ 30.

In *Weaver*, the State urged the jury to convict the defendant of two counts of sexual assault, each of which alleged several "discrete incidents of sexual assault" taking place over periods of time. *Weaver*, ¶¶ 1, 17, 36. This Court determined the failure to provide a specific-act unanimity instruction implicated the fundamental right to a unanimous verdict, *Weaver*, ¶ 26, and "[u]certainty about the nature of the verdict in this case—*i.e.*, whether the jurors were unanimous in their verdict,

certainly brings into question the fundamental fairness of Weaver's trial," *Weaver*, ¶ 27. Under plain error review, this Court reversed.

In *State v. Felde*, 2021 MT 1, ¶ 22, 402 Mont. 391, 478 P.3d 825, this Court construed § 45-5-625(1)(e), MCA, as "permit[ting] the prosecution and conviction of a separate offense for each image the defendant possessed." That is, the statute allows a separate conviction of sexual abuse of children "for each image of child pornography" that a defendant possesses. *Felde*, ¶ 23.

Like this Court, the Utah Supreme Court has construed that state's child pornography statute as providing that "each individual 'visual representation' of child pornography that is knowingly possessed by a defendant constitutes the basis for a separate offense" and permitting a separate prosecution and conviction for each photograph depicting child pornography in the defendant's possession. *State v. Morrison*, 31 P.3d 547, 556 (Utah 2001) (quoted in *State v. Case*, 467 P.3d 893, 900-01 (Utah Ct. App. 2020)). Given that holding, the Utah Court of Appeals concluded that a specific-act unanimity instruction was required where the State charged a defendant with 7 counts of possession of child pornography but presented 37 images that the State

identified as potential child pornography without specifically linking any of the counts with any specific image. The appellate court held, "once the State failed to elect which act of possessing . . . child pornography supported each charge in the amended Information, the jury should have been instructed that it needed to unanimously agree on which specific criminal act or image satisfied each charge to convict." *Case*, 467 P.3d at 901. *See also People v. Hachler*, 2007 WL 4171622 at *5 (Cal. Ct. App. 2007) (specific-act unanimity instruction required where the State presented numerous images of a variety of children which might constitute child pornography in support of a single charge of possession of child pornography).

This Court should hold the same here. During closing argument, the prosecutor invited the jury to convict Don of Count 5 based on his alleged knowing possession of four discrete images of two different unrelated females. (Tr. at 614.) And the prosecutor invited the jury to convict Don of Count 6 based on his alleged knowing possession of two photographs and one video of A.G. (Tr. at 614-16.) Under *Felde*, Don's possession of each image and video was a separate offense that could have been prosecuted individually. Thus, the number of discrete

incidents supporting each offense (four and three, respectively) exceeded the number of offenses charged (two), and the State did not elect which act supported each charge during trial. Yet, the jury was not instructed that Don had a constitutional right for them to agree specifically on at least one of the criminal acts alleged in each count.

This Court should conclude the court's failure to give a specific-act unanimity instruction in this case constitutes reversible plain error because, as in *Weaver*, the State urged the jury to convict Don of two counts of sexual abuse of children, each of which was based on multiple acts of alleged knowing possession of discrete images of child pornography, and there exists a genuine possibility the jury was confused or unaware of the necessity to reach agreement on a particular set of facts comprising the offenses in Count 5 and 6. As in *Weaver*, this Court must reverse Don's convictions on Counts 5 and 6 under plain error review.

Alternatively, reversal is required for counsel's failure to request a specific-act unanimity instruction in this multiple-acts case. There can be no legitimate reason for an attorney's failure to request such an instruction where the State presents evidence regarding multiple

discrete acts in support of a single charge such as occurred here. *See, e.g., Tipton*, ¶ 16. Defense counsel had nothing to lose by seeking the instruction, which would have prevented the jury from convicting Don without agreeing on a specific criminal act or convicting solely because the combined effect of the images created a bad taste in the jury's mouth. The failure to request a specific-act unanimity instruction here constituted unreasonable performance.

That error prejudiced Don's defense. The lack of a specific-act unanimity instruction "certainly brings into question the fundamental fairness of [the] trial." *Weaver*, ¶ 27. It is reasonably probable that jurors convicted Don without agreeing on a specific criminal act and could have convicted him based on the cumulative effect of all of the images creating a bad taste in the jurors' mouths. *See Weaver*, ¶¶ 23, 30. The danger of the latter result was multiplied here by the State's introduction of highly prejudicial evidence of Don's prior incarceration that could have led the jury to believe Don was a bad man likely to do bad things. The combined effect of that highly prejudicial evidence and the lack of a specific-act unanimity instruction undermines confidence

in the jury's verdicts on Counts 5 and 6. *Smith*, ¶ 16. This Court should reverse those convictions.

CONCLUSION

Don's convictions should be reversed.

Respectfully submitted this 10th day of August, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,998, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Tammy A. Hinderman
TAMMY A. HINDERMAN

APPENDIX

Excerpts of Transcript re: Denial of Motion for Mistrial,
Tr. at 583-87 ..... Appendix A

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Excerpts of Sentencing Transcript, Sent. Tr. at 20-25..... Appendix D

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CERTIFICATE OF SERVICE

I, Tammy Ann Hinderman, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 08-10-2022:

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