IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0030

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CORENA MARIE MOUNTAIN CHIEF,

Defendant and Appellant.

OPENING BRIEF OF APPELLANT

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

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ISSUES PRESENTED

1. Whether the district court failed to uphold its gatekeeper function by excluding relevant defense evidence under Montana's Rape Shield statute, and by allowing evidence of the defendant's prior bad acts.
2. Whether the State committed plain error, in violation of the defendant's rights, by soliciting testimony from a witness who vouched for the credibility of the victim at trial.
3. Whether the district court's COVID-19 procedural orders beg questions of the judicial process's integrity and fundamental fairness.
4. Whether the aggerate errors compromise the trials fairness.

STATEMENT OF THE CASE

On December 6, 2018, the Cascade County Attorney filed a direct information and affidavit in support alleging that Ms. Corena Mountain Chief (Corena) committed the offenses of, Count I: Trafficking of Persons, a felony, in violation of Mont. Code Ann. §45-5-702(b) and Count II: Sexual Abuse of Children, a felony, in violation of Mont. Code Ann. §45-5-625(1)(c). (D.C. ¶2) A warrant was issued for Corena's

arrest, with bond fixed at $250,000. (D.C. ¶3) Corena was taken into custody December 5, 2018. (D.C. ¶4) On December 27, 2018, Corena was entered pleas of not guilty to both charges. (D.C. ¶6) On September 23, 2019, Count I: Trafficking of Persons was dismissed. (D.C. ¶32, 33)

Corena proceeded to a jury trial. Trial lasted two days. (2019 Tr.) The jury was unable to reach a unanimous decision; the court declared a mistrial. (*Id.*) On November 12, 2019, a new trial was set, and new counsel was appointed to represent Corena. (D.C. ¶¶49,52)

On April 27, 2020, the State continued citing the COVID-19 pandemic. (D.C. ¶60) Trial was reset with pandemic procedures in place. (D.C. ¶64) On June 29, 2020, Corena proceeded to her second trial, which lasted four days. (D.C. ¶104-107) Corena was found guilty at trial. (D.C. ¶114) Corena was sentenced on November 2, 2020, to serve one hundred (100) years at Montana State Women's Prison, with fifty (50) years suspended, and a parole restriction of twenty-five (25) years. On July 31, 2021, the defense motioned for a new trial in the interest of justice, which was denied. (D.C. ¶¶116, 122) Corena now asserts her right to appeal.

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STATEMENT OF FACTS

On July 2, 2020, Corena was adjudicated guilty of Sexual Abuse of Children. (D.C. ¶2) The State's alleged that Corena knowingly provided her 4-year-old daughter to Eugene Sherbondy (Sherbondy) for sex at his home in Great Falls, Cascade County, Montana. (*Id*.)

FIRST TRIAL

The State motioned in limine to exclude evidence of any sexual conduct or reports of sexual abuse of J.L.D., citing Montana's Rape Shield Law, Mont. Code Ann. § 45-5-511, and Mont. R. Evid. 401, 403, and 608. (D.C. ¶28) The State's motion was granted. At the pre-trial conference, defense counsel recorded a confrontation issue, specifically the defense's inability to interview J.L.D prior to trial. (Oct. 1, Pre-Trial Tr.)

At trial, defense counsel moved to introduce the video produced by the state during discovery, of J.L.D.'s 2013 forensic interview. (2019 Trial Tr.) The state objected to the video. (*Id*. ¶13) The video was not admitted. Defense objected to D.L.'s testimony. (*Id*. ¶¶15, 16) Argument was heard, and the court allowed D.L. to testify. (*Id*. ¶18)

The court limited voir dire to 45 minutes, a jury was selected and impaneled.

During the first day of trial, the state offered five witnesses, two photo exhibits, and the recorded and a redacted video of Corena's interview with law enforcement. (*Id*. passim, 2019 Trial Tr., passim) Defense counsel made efforts to introduce evidence to rebut J.L.D.'s testimony, to include her 2018 forensic interview and Facebook post. The evidence was not admitted. (*Id*. 143, 147) The defense objected to opinion testimony from an unqualified Det. Cunningham. (*Id*.¶¶196, 198) Outside the presence of the jury, counsel informed the court that theory of defense relied on the 2018 interview, questions of the Facebook post, as well as other statements from her 2013 interview, these items were excluded. (*Id*.¶¶216, 223) The jury was unable to reach a verdict; the court declared a mistrial. (*Id*. 269)

SECOND TRIAL

After a stay of trial proceedings due to the COVID-19 pandemic, criminal jury trials resumed in Cascade County. (D.C. ¶¶60, 61.) The Court issued a district wide order that matters set for jury trial would proceed and that **absent extraordinary circumstances . . . the**

Court will *not* be continued. (D.C. ¶65, emphasis from original) The court ordered counsel to provide a case-specific questionnaire to be sent to potential jurors, which "shall include the names of attorneys, witnesses, and parties" to "cut down the time allowed for voir dire, so that there is less contact with the potential juror panel with COVID-19." (D.C. ¶61) Health protocols were addressed on the record at each pre-trial conference leading up to trial.[1] (D.C. Doc (App(s). C – G, infra).

At the second trial, all prior trial objections remained preserved. (D.C. ¶66). All defense reference to the 2013 forensic interview or Facebook during opening statements was prohibited. (*Id*.) All prior exhibits admitted in the first trial, were ordered admitted. (D.C. ¶85) Defense counsel requested the court's holdover order to be withdrawn, and the limits on defendant's opening statement removed. (D.C. ¶82) The defense asserted the defendant's constitutional right to present a defense and requested admission of the 2018 and 2018 forensic interviews, which was denied (D.C. ¶¶82, 86, 99, 97) The defense repeatedly objected to the court's automatic excusal of potential jurors for cause, asserting the defendant's constitutional right to an impartial

[1] A pre-trial conference was held May 28, 2020, but the defendant was not present due to coordination issues with the detention facility, the matter continued to the next day. (D.C. ¶75)

jury. (D.C. ¶98) Defense counsel repeatedly objected to the court's mask order citing the defendant's constitutional rights. (D.C. ¶¶69, 75, 78, 84, 92, 97, and 116, see also App. C-G, and 2020 Tr. passim, infra.)

Prior to trial, forty-seven (47) potential jurors were excused from duty by the court, based on responses to the special COVID screening questionnaires. (D.C. ¶¶90, 91, 93, 94) The court again limited voir dire to 45 minutes, for each party, over defense's repeated objections. (2020 Tr.¶¶469) The court did not allow counsel additional time; defense counsel did not pass the jury for cause. (*Id*.)

The state offered four witnesses: J.L.D., D.L, Dr. Nancy Maynard, and Det. Cunningham. (*Id*. passim) The state offered two photo exhibits, and a redacted video of Corena's interview. (*Id*.)

Defense counsel was permitted to ask the limited question of J.L.D regarding her 2018 interview and Facebook but was precluded from full examination regarding 2013 forensic interview. (2020 Tr.¶¶546) Counsel made argument that questions of both the 2018 and 2013 forensic interviews were appropriate for cross-examination because "this trial relies on her memory and veracity." (2020 Tr.¶¶547) Defense counsel argued the information was not to impugn her

character but her memory. (*Id*.) The court maintained its prior ruling, and precluded any questions related to J.L.D.'s character. (*Id*.) Defense reoffered the 2013 forensic interview to rebut testimony offered by Dr. Maynard. (2020 Tr.¶¶623). The state objected and the defense was overruled. (*Id*.)

Defense objected to Det. Cunningham's opinion testimony. (2020 Tr.¶¶633, 634, 635, 2020 Tr.¶809, 815) Argument was heard, and again the defense made an offer to introduce the 2013 interview. (2020 Tr.¶¶637-642) Defense counsel informed the court that a note written by Det. Cunningham about J.L.D. was discovered and had exculpatory value; the defense moved for a mistrial. (2020 Tr.¶¶683-685) Defense's motion was denied. (2020 Tr.¶¶898, 899) Defense renewed the request to play J.L.D.'s interview, the parties could not agree on redactions, and the video was not played at the second trial. (2020 Tr.¶¶896) The defense called Jonni Fenner as a witness, and Corena testified on her own behalf. Outside the presence of the jury, counsel moved for a mistrial citing the constitutional challenges surrounding masks. (2020 Tr.¶¶898) The court denied the request. (*Id*.) The jury found Corena guilty.

On July 31, 2020, the defendant moved for a new trial in the interest of justice. (D.C. ¶116) The state filed a response, and the court denied the defendant's motion with a written order. (D.C. ¶121,122)

COVID-19 PROTOCOLS AND RELATED FACTS

At the time of Corena's trial, the COVID-19 pandemic was at its height. By June 12, 2020, only three months after the state's first case was detected, more than 500 Montanans had tested positive for the virus and 18 people had died. (App. H). Montana's Governor Steve Bullock declared a State of Emergency on March 12, 2020. (App. I). On March 17, 2020, Montana Supreme Court Chief Justice Mike McGrath, issued the first memorandum for Montana courts to reduce risks in accordance with State measures. (App. J) Although courts remained open in a limited capacity, most jury trials came to a halt as courts followed various statewide emergency orders. The Eighth Judicial District resumed jury trials, with new protocols. (D.C. ¶64) State v. Mountain Chief, June 29, 2020, was first to proceed in Cascade County. (*Id*.). Corena's trial was among the first commence in a post-COVID world.

The courts were faced with the unprecedented task of creating plans for jury trials that were responsive to the health crisis *and* safeguarded criminal defendants' constitutional and statutory rights. The court in Corena's case ordered all persons present at trial, to include testimonial witnesses, counsel, and the defendant, to always wear a face mask. (D.C. ¶¶92, 97, 122) Defense counsel repeatedly objected to the mask requirement citing the accused's right to a fair trial. (D.C. ¶¶69-97; 2020 Tr. passim) Following trial, prior to sentencing, counsel filed a Motion for New Trial on constitution grounds, which was denied. (D.C. ¶¶116, 121, 122)

Pre-Trial Hearings

May 26, 2020, the court informed the parties masks would be required in the courtroom. (App. C, p. 277 ln. 23.)

May 29, 2020, the court acknowledged anticipation of an update from the health department if anything more would need to be done to prepare the courtrooms for trial. (App. D.)

June 9, 2020, the court, and defense counsel appeared from Missoula, without masks, while Corena and counsel for the state appeared remotely. (App. E.) Defense counsel requested jury selection

at the district county fairgrounds and informed the court that the trial he anticipated the following week was not automatically dismissing 'COVID Vulnerable' people. (App. E, p. 8.) The court expressed people asked to be excused for COVID reasons, their request would likely be granted. (App E. at 9-10.) Defense objected on the record and provided a written objection. (App. E, at 11, D.C. ¶98.)

June 23, 2020, defense advised the court that voir dire at the fairground would require additional time. (App. F, 306.) State's counsel advised everyone entering the fairgrounds for this matter would need to be screened by county health. (App. F, 309.) The court advised that voir dire would continue to be limited to 30 or 45 minutes. (App. F, 310.) Jury selection was limited to no-public members, speakers and microphones were confirmed, as well as space for social distancing to accommodate health and logistics. (App. F, 311-314.) Trial was confirmed for the Cascade County Courthouse. (App. F. 316.) Defense counsel advised at a prior out-of-jurisdiction trial the week prior, using masks between counsel and client 'became unworkable' and that the court, prosecution, and witnesses to the action did not wear masks. (App. F, 319) Defense objected to 'not being able to see the facial

expressions and reactions' of witnesses and asked for clarification on the mask requirement. (App. F, 320). The court stated that the type of mask would not be specified, and that if provided, a face-shield would be a sufficient mask. (App. F, 321) The special covid questionnaire's lack of a separate excusal form was discussed, the court stated, "there's enough language in the form . . . for me to take it as being under oath, and for me to assume they're requesting an excuse." (App. F, 322.) The defense objected. (*Id*.)

June 26, 2020, defense counsel objected to the automatic excusal of jurors, 45-minute limit of voir dire, and witnesses wearing masks. (App. G) Defense cited specific jurisdictions hosting trials without witnesses in masks. (App. G, at 343, 345.) The court provided masks would be required for all witnesses, and those masks could be cloth or plexiglass. (App. G, 344.) The court relayed that the bench would have a plexiglass shield. (*Id*.) Juror seating to accommodate social distancing was discussed, to include the jury box and courtroom gallery, and it was confirmed health staff would be taking temperature checks. (App. G, 345-349.)

June 29, 2020, Trial, Defense motioned to switch courtrooms, to accommodate a larger space with better positions for the jury to view witnesses, the motion was denied. (2020 Tr.¶465-468, 471.) Defense argued the 45-minute limit set for voir dire, citing unique circumstances, the court denied the request. (Tr.¶469.) Defense moved the court to allow witnesses to testify without masks citing confrontation issues and witness credibility observations, the State objected advising masks were a policy throughout the courthouse. (2020 Tr.¶477.) The court denied the motion and reminded counsel masks were an absolute requirement. (2020 Tr.¶478.)

June 30, 2020, Trial, defense objected to witnesses testifying in masks, objection is overruled "no other safety direction has been advised." (2020 Tr.¶491.) Defense requested less restrictive alternative to cloth a cloth mask for the witness stand. (*Id.*) During cross-examination of J.L.D., the state informed the court, "Your honor, I don't believe the jury can hear what the witness is saying" to which the judge responded, "excuse me" and the state repeated the concern, the witness was advised to speak up. (2020 Tr.¶¶548) Defense advised J.L.D. that "it's just really kind of hard to hear also through the mask". (2020

Tr.¶550) Trial continued, and the court advised witnesses to speak up because of their masks 'holding' their voice twice on the record, in front of the jury. (2020 Tr.¶¶577, 609.).

July 1, 2020, Trial, the court advised defense witness to speak up 'because you are masked.' (2020 Tr.¶¶824, 609.)

July 2, 2020, Trial, Defense moved for a mistrial. (2020 Tr.¶¶897-898.)

SUMMARY OF ARGUMENT

The district court misapplied Montana's Rape Shield statute which precluded the defendant from offering evidence relevant and necessary to dispute facts and impeach witnesses at trial. The defendant was not permitted to cross-examine the complaining witness fairly or fully, and as a result could not offer the jury the available evidence of alternative sources of sexual knowledge, motive to fabricate, and other critical impeachment testimony. The resulting prejudice was not harmless.

At trial, the prosecution elicited improper testimony that vouched for victim's credibility during trial, over counsel's repeated objections. At trial, state's investigator testified directly about the credibility, believability, and general opinions about what is typical of a child-

forensic interview without qualification or proper foundation. The investigator's testimony improperly bolstered the complaining witnesses testimony. The result was a plain error, that violated the due process rights of the defendant.

The procedural orders of the court unreasonably infringed on the defendant's right to a fair trial. Specifically, the unreasoned time limits and mandatory use of masks at critical stages of trial prevented proper voir dire, prevented proper assessment of testimonial witness credibility, and prejudiced the defendant.

Finally, when considered in totality, the district court's evidentiary rulings, the improper bolstering, and procedural errors constituted cumulative error.

STANDARD OF REVIEW

Evidentiary rulings are reviewed for an abuse of discretion. *Missoula v. Duane*, 2015 MT 232, ¶ 10, 380 Mont. 290, 355 P.3d 729. Abuse of discretion occurs if the district court acted arbitrarily and without the employment of conscientious judgment or in a manner that exceeds the bounds of reason, resulting in substantial injustice. *State v. Mercier,* 2021 MT 12, 403 Mont. 34, 479 P.3d 967. All other legal

conclusions of law are evaluated for correctness and are subject to de novo review. *Mercier*, ¶ 12 citing *Duane*, ¶ 10.

De novo review is required for appellate review of a district court's decision to exclude evidence pursuant to the rape shield statute, as such decisions necessarily implicate a defendant's constitutional right to confront witnesses and present a complete defense. *State v. Twardoski*, 2021 MT 179, 405 Mont. 43, 491 P.3d 711.

The Montana Supreme Court reviews the denial of a motion for a mistrial to determine whether the district court abused its discretion. *State v. Sliwinski*, 2018 MT 310N, ¶ 9, 394 Mont. 390, ¶ 9, 432 P.3d 708, ¶ 9. A district court's denial of a motion for a new trial is also reviewed by this Court to determine whether the court abused its discretion, and to the extent the district court makes findings of fact, those findings are reviewed for clear error. *State v. Oschmann*, 2019 MT 33, ¶ 6, 394 Mont. 237, ¶ 6, 434 P.3d 280, ¶ 6.

When addressing issues surrounding voir dire and jury selection, this court applies an abuse of discretion standard. *State v. Harville*, 2006, MT 292 ¶ 7, 334 Mont. 380, 147 P. 3d 222.

The Montana Supreme Court may choose exercise Plain Error Review, when a claimed error invokes a criminal defendant's fundamental rights. *State v. Taylor*, 2010 MT 94, 356 Mont. 167, 231 P.3d 79. Plain Error Review is appropriate where failure to review the claimed error may result in a manifest miscarriage of justice, leave unsettled a question of fundamental fairness of the trial or proceedings, or compromise the judicial process's integrity. *State v. Akers*, 2017 MT 311, 389 Mont. 531, 408 P.3d 142. "The Plain Error Doctrine is used on a case-by-case basis and considers the totality of the case's circumstances." *Akers*, 2017 MT 311, 389.

The Montana Supreme Court exercises plenary review of constitutional questions and applies de novo review to a district court's constitutional interpretations of the Sixth Amendment of the United States Constitution and Article II, Section 24 of the Montana Constitution. *State v. Mercier*, 2021 MT 12, ¶ 11, 403 Mont. 34, ¶ 11, 479 P.3d 967, ¶ 11 (internal citations omitted).

ARGUMENT

The Sixth Amendment of the United States Constitution and Article II Section 24 of the Montana Constitution guarantee criminal

defendants the right to confront their accusers, and to present evidence in their defense before an impartial jury.

I. District Court Evidentiary Errors

District court judges serve as gatekeepers at trial, with the discretion to admit relevant evidence and power to exclude unduly prejudicial evidence. *State v. Passmore,* 2010 MT 34, ¶ 69, 355 Mont. 187, ¶ 69, 225 P.3d 1229, ¶ 69 (internal citations omitted). This gatekeeping responsibility is inherent in the district court's authority. *Id.*

1. Rape Shield Law and Erroneously Precluded Evidence

"[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *State v. Twardoski*, 2021 MT 179, 405 Mont. 43, 491 P.3d 711 citing *State v. Reams*, 2020 MT 326, ¶ 18, 402 Mont. 366, 477 P.3d 1118 (quoting *State v. Glick*, 2009 MT 44, ¶ 29, 349 Mont. 277, 203 P.3d 796). Where Montana's Rape Shield statute conflicts with a defendant's constitutional rights, courts *must* balance the defendant's defense rights and the alleged victim's interests under the statute. *State v. Colburn*, 2016 MT 41, ¶ 43, 382 Mont. 223, ¶ 43, 366 P.3d 258, ¶ 43 (emphasis added) "A district court

may not apply the Rape Shield Law to bar *all* evidence concerning a victim's past sexual conduct *State v. Lake*, 2019 MT 172, ¶ 28, 396 Mont. 390, ¶ 28, 445 P.3d 1211, ¶ 28 (citing *State v. Walker*, 2018 MT 312, 394 Mont. 1, 433 P.3d 202, ¶ 55) (emphasis in original). "The Rape Shield Law cannot be applied to exclude evidence arbitrarily or mechanistically . . . it is the trial court's responsibility to strike a balance between the defendant's right to present a defense and a victim's right's rights under the statute." *State v. Awbery*, 2016 MT 48, ¶ 20, 382 Mont. 334, 367 P.3d 346. (Internal citations omitted) Rape Shield policy "is not violated or circumvented if the offered evidence can be narrowed to the issue of veracity." *State v. Anderson* (1984), 211 Mont. 272, 284, 686 P.2d 193, 200. Courts are required to balance the interests of an evidentiary rule excluding evidence with the defendant's constitutional right to present a defense on a case-by-case basis. *State v. Colburn*, 2016 MT 41, ¶ 42, 382 Mont. 223, ¶ 42, 366 P.3d 258, ¶ 42, citing *State v. Lindberg*, 2008 MT 389, 347 Mont. 76, 196 P.3d 1252 (citing *Lajoie v. Thompson* (9th Cir. 2000), 217 F.3d 663, 673, where the court explained that evidence concerning the non-consensual sexual

abuse of a young child was unlikely to draw unfavorable and unwanted impressions from a jury).

In *Colburn* this Court explained, the Rape Shield statute "is designed to prevent the trial of the charge against the defendant from becoming a trial of the victim's prior sexual conduct" and reflects "society's recognition that a rape victim's prior sexual history is irrelevant to issues of consent or the victim's propensity for truthfulness." *Colburn*, ¶ 22. For the balance to tip in favor of admission, the defendant must proffer evidence that is "relevant and probative." *Colburn*, ¶ 25. The evidence must also not be "merely speculative or unsupported," "merely cumulative of other admissible evidence," or have its "probative value . . . outweighed by its prejudicial effect." *Colburn*, ¶ 25. "The purpose of these considerations is to ensure a fair trial for the defendant while upholding the compelling interest of the Rape Shield Law in preserving the integrity of the trial and keeping it from becoming a trial of the victim." *Colburn*, ¶ 25.

In *Twardoski*, this Court considered whether the court's evidentiary ruling preventing the defendant from introducing evidence to support his theory that the victim had transferred the abuse committed on her

by another individual to the defendant. The defense's theory was that the victim had motive to fabricate accusations against the defendant because he provided and used drugs with the victim's mother, which caused her to despise him and want him out of her life. *Twardoski*, ¶ 4. Applying Rape Shield, the court precluded Twardoski from presenting evidence of the victim's other abuse, which effectively prevented him from cross-examining the victim's veracity. *Twardoski*, ¶ 32. On review, it was decided that the precluded evidence of the victim's other abuse was neither speculative nor unsupported; it was contemporaneous, relevant, and admissible under the Rules of Evidence. *Twardoski*, ¶ 28, 29. It was determined that the probative value of the evidence was not substantially outweighed by dangers of unfair prejudice, confusion of the issues, or misleading the jury because Twardoski's entire defense depended on undermining the victim's credibility by demonstrating that the allegations against him had been fabricated. *Twardoski*, ¶ 30. This Court held that the district court erred in the application of the Rape Shield statute, in violation of the defendant's constitutional guarantees to confront his accuser and present evidence in his defense; his conviction was reversed and remanded for new trial. *Twardoski*, ¶ 37.

Similarly, Corena's entire defense depended on undermining the victim's credibility by demonstrating that the allegations against her had been fabricated. In Corena's case, the district court excluded the introduction of specific evidence intended to rebut the victim's knowledge of sexual abuse, motive to fabricate the allegations, and impeachment her testimony at trial. (D.C. ¶¶99, 97) As in *Twardoski* and *Colburn*, the district court misapplied the Rape Shield statute to preclude defense evidence, in violation of Corena's constitutional rights. The district court failed to balance Corena's fundamental rights with the victim/s under the Rape Shield law, thereby compromising the integrity of the trial.

a. Alternative Sources of Sexual Knowledge

The district court's broad Rape Shield ruling precluded Corena from presenting evidence of alternative sources J.L.D.'s of sexual knowledge and the specific facts of those events. At trial, J.L.D. stated that after having been drugged "he (Sherbondy) was having sex with me". (2020 Tr. ¶523) Pediatrician Dr. Nancy Maynard testified that the physical examination she conducted of J.L.D. in 2018 was inconclusive of abuse. (2020 Tr. ¶609). During the state's closing, the district court

permitted, over objection, the state to reference of Dr. Maynard's testimony. (2020 Tr. ¶¶902, 927)

In *Twardoski*, the defendant sought to admit evidence that the sexual acts alleged against him were nearly identical to prior abuses of the victim from only days before. *Twardoski*, ¶10. The evidence was well supported because the alleged abuser had been charged with crimes of sexual abuse against victim, for the reasons alleged. *Twardoski*, ¶28, 29. The evidence relevant and admissible because Twardoski's sole defense was that the allegations against him had been fabricated; his entire case depended on undermining the victim's credibility. *Twardoski*, ¶30.

Like *Twardoski*, Corena's case had no physical evidence, her defense depended entirely on undermining J.L.D.'s credibility by demonstrating the allegations against her had been fabricated. The defense sought to offer evidence to challenge the veracity of her memory and demonstrate other sources of sexual knowledge. Given that J.L.D. was 4 years old it would be logical to infer that her knowledge of sex came from a single source. (D.C. ¶¶82, 99) The defense was unable to rebut this inference because of the limine order, despite having offered

evidence for this limited purpose. (D.C. ¶82, 99; 2020 Tr. ¶¶846-7; Def. Trial Ex. C)

b. Motive to Fabricate

In cases where the victim is a child, "lack of sexual experience is automatically in the case without specific action by the prosecutor. A defendant therefore must be permitted to rebut the inference a jury might otherwise draw that the victim was so naive sexually she could not have fabricated the charge." *State v. Jacques* (Me. 1989), 558 A.2d 706, 708.

The district court's Rape Shield ruling precluded Corena from fully offering evidence of J.L.D.'s motive to fabricate the allegations, over defense's repeated objections. The defenses' theory was that J.L.D. had a motive to fabricate accusations against her mother because she (Corena) was supplied and used drugs with Sherbondy, and that because her mother neglected her and had assets that would benefit the family, she should be in jail. (2020 Tr. ¶ Day 3, passim) The defense intended to establish J.L.D.'s motive to fabricate by publishing the video interview to challenge veracity and offer evidence of coaching to demonstrate a motive to fabricate. (D.C. ¶82; 2020 Trial Tr, 637-642)

c. Impeachment Evidence, Defense Motion for Mistrial

Defendants have the right to discover exculpatory evidence. Exculpatory evidence is evidence which is "favorable to an accused" and "material either to guilt or to punishment." *Brady v. Maryland* (1963), 373 U.S. 83, 83 S. Ct. 1194. "'Favorable' evidence includes not only that evidence tending to exculpate the accused, but also any evidence adversely affecting the credibility of the government's witnesses." *United States v. Trevino* (4th Cir. 1996), 89 F.3d 187, 189 (4th Cir. 1996) (citations omitted). "Material" evidence means "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley* (1985), 473 U.S. 667, 682, 105 S. Ct. 3375.

Mont. Code Ann. § 46-15-322 requires disclosure of all materials or information that tends to mitigate or negate the defendant's guilt. Negligent suppression requires a reversal of a conviction where the result would have been different had the evidence been disclosed. *State v. Craig* (1976), 169 Mont. 150, 153, 545 P.2d 649, 651 citing *Simos v. Gray*, D.C., 356 F.Supp. 265. To obtain a new trial, the accused must

show the suppressed evidence was material and had exculpatory value. *Craig*, ¶ 651 (internal citations omitted).

This case turned entirely J.L.D.'s credibility. Between days two and three of trial, a note was discovered that stated J.L.D. "is a huge liar". (2020 Tr. ¶¶684-690) Defense moved for a mistrial. (2020 Tr. ¶ 689-691) Given the limits of the limine order, foundational challenges for introducing the note prevented its introduction through available witnesses at trial. (2020 Tr. ¶ 795-798) In an attempt to cure the issue, Kathy Little Dog (J.L.D.'s guardian), the source of the note's contents, was made available. However, defense elected not to call the witness. (2020 Tr. ¶ 795, 899) The district court denied counsel's motion for a mistrial. (2020 Tr. ¶ 899)

Corena could not effectively impeach witnesses at trial because of the ordered Rape Shield. The note was material, and it was exculpatory. Disclosure of this note prior to both trials would certainly have been favorable to Corena, especially since Corena was precluded from offering other evidence to rebut J.L.D.'s testimony. Ultimately, neither counsel could prepare to introduce evidence they did not know existed. The defense was hamstringed by the late discovery disclosure.

It cannot be concluded that the verdict against Corena is worthy of confidence because neither counsel could incorporate this critical disclosure and were denied the opportunity to impeach trial witnesses.

d. Exclusion was Not Harmless

Corena's constitutional rights impinged by the district court's misapplication of the Rape Shield statute. At both trials, defense counsel argued that the shielded evidence was relevant and had probative value central to Corena's theory of defense. Defense emphasized the evidence's purpose was admissible because it was clearly identifiable and available for this limited purpose. The proffered evidence was not cumulative, its distinct purpose was to undermine the witness's credibility and rebut testimony offered by the state at trial.

The district court failed to balance the evidence as required; Corena's conviction should be reversed and remanded for a new trial.

2. Erroneously Admitted Evidence

The district court abused its discretion by allowing prejudicial and confusing evidence of Corena's past conduct at trial; the evidence should have been excluded under Mont. R. Evid. 403 and 404.

Mont. R. Evid. 404(b) is designed to ensure that jurors "do not impermissibly infer that a defendant's prior bad acts make that person a bad person, and therefore, a guilty person." *State v. Madplume*, 2017 MT 40, ¶ 22, 386 Mont. 368, ¶ 22, 390 P.3d 142, ¶ 22 citing *State v. Dist. Court of the Eighteenth Judicial Dist.*, 2010 MT 263, ¶ 47, 358 Mont. 325, 246 P.3d 415 ("*Salvagni*"). When offered as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, evidence of prior bad acts is admissible. Id. ¶ 23. If a proponent can "clearly articulate how that evidence fits into a chain of logical inferences, no link of which may be the inference that the defendant has the propensity to commit the crime charged" the evidence is admissible. *State v. Clifford*, 2005 MT 219, ¶ 48, 328 Mont. 300, 121 P.3d 489 (quoting *United States v. Himelwright*, 42 F.3d 777, 782 (3rd Cir. 1994))

"The distinction between admissible and inadmissible Rule 404(b) evidence turns on the intended purpose of the evidence, not its substance." *Madplume*, ¶ 23 (citing *Salvagni*, ¶¶47, 62-63). "To prevent the permissible uses from swallowing the general rule barring propensity evidence, the trial court *must* ensure that the use of

Rule 404(b) evidence is "clearly justified and carefully limited." *Madplume*, ¶23 (quoting *State v. Aakre*, 2002 MT 101, ¶12, 309 Mont. 403, 46 P.3d 648) (emphasis added). "Where the probative value of evidence is substantially outweighed by its unfair prejudice, admission of the evidence may be reversible error." *State v. Franks*, 2014 MT 273, ¶16, 376 Mont. 431, 335 P.3d 725, citing *State v. Pendergrass*, 179 Mont. 106, 112-13, 586 P.2d 691 (1978). In certain circumstances, the material may be so prejudicial that it severely undermines the fairness of a trial, and new trial is the only remedy. Franks, ¶16 (citing Havens v. State, 285 Mont. 195, 200-01, 945 P.2d 941, 944 (1997) where a new civil trial was ordered, internal citations omitted)

In *Madplume*, this Court determined that the district court properly admitted evidence of prior bad acts after finding the circumstances of both events were sufficiently similar and relative in time to logically show a common motive and intent to commit the predicate offence, an element of the charge. *Madplume*, ¶30. The similarities included specific actions, location, substance use, and behavior. *Madplume*, ¶26.

It was affirmed, evidence of the prior act was admissible under Mont. R. Evid. 404(b). The Court distinguished *Madplume* from, *Franks*, below.

Franks was charged with sexual intercourse without consent and sexual assault. Prior to trial, the defense moved to exclude any mention of the defendant's previous charge and acquittal, to include press. *Franks*, ¶4. The motion was denied, the district court determined the evidence was not of Franks' character, but offered to explain the victim's disclosure, and thereby admissible. *Franks*, ¶4. At trial, the prosecution referenced to the prior charge, and implied that defendant had a propensity for child molestation. *Franks*, ¶5. References continued throughout trial; Franks motioned for a new trial but was denied. *Franks*, ¶9. On review, this Court noted the district court had the full benefit of hindsight to know the purpose of the evidence and acknowledge that its admission for that purpose would be an abuse of discretion. *Franks*, ¶22. Franks' conviction was reversed and remanded for new trial. *Id*.

Corena's case is distinguishable from *Madplume*, and analogous to *Franks*. In Corena's case the district court failed to make a finding of similar circumstance justify admission of her prior acts as evidence of

motive. At trial one, defense objected to the testimony of D.L., arguing that her testimony was irrelevant and highly prejudicial. (2019 Tr. ¶15) The State replied that D.L.'s testimony was evidence of motive and should be permissible. (*Id*.) The district court failed to ensure that the evidence was clearly justified and carefully limited. (2019 Tr. ¶16) The prior bad acts proffered by the state were not predicate offenses to Corena's charge, nor where they similar in time, or alleged conduct. The offered testimony of Corena's teenage daughter (D.L.) who alleged that her mother had tried to marry her off to Sherbondy at the age of 12; contrast to the alleged charge that Corena had allegedly procured or sold her four-year-old daughter for sexual abuse by Sherbondy. (2019 Tr. ¶¶15-18) There is no logical connection between the acts of a pre-teen marriage proposal and sexual abuse of a four-year-old. The state offered "we're trying to prove she had a motive to sell her children for drugs and money". (2019 Tr. ¶17) The district court reminded the state that the original charge of trafficking had been dismissed, implying some doubt, but still admitted the evidence this purpose (*Id*.)

The state failed to demonstrate how the evidence fell into a chain of logical inferences that did anything other than demonstrate Corena

had a propensity for bad behaviors. (2019 Tr. ¶¶158-170) There was no demonstration to support a finding that Corena had motive from one instance to give rise or opportunity to the next.

The district court should have excluded the evidence at the second trial, because even if it were offered for an admissible purpose, the danger of unfair prejudice far outweighed its probative value.[2] D.L's testimony was not limited for its proffered purpose, it was character evidence of Corena's propensity for drug abuse, homelessness, and her association with Sherbondy. The State's opening offered D.L. would testify "a little bit about the timeline, where they were when she was with her mom, and the things that happened with her mom so you can get a sense of what was going on in that household, the issues that her mother had." (2020 Tr. ¶513) D.L. testified at length about her tumultuous relationship with Corena, Corena's addictions, and complex family dynamics. The district court allowed the permissible 404(b) evidence to be swallowed by the general rule by it failing to ensure that it was clearly justified and carefully limited.

[2] As mentioned above, Facts: Over defense objection, at Trial 1, the State was permitted to call motive witness D.L. at Corena's trial. (2019 Tr. ¶15) The district court's ruling on evidence was carried over to Trial 2, with the objection remaining preserved for review. (D.C. ¶66)

The evidence should have been excluded because it was unfairly prejudicial. "Unfair prejudice may arise from evidence that arouses the jury's hostility or sympathy for one side, confuses or misleads the trier of fact, or unduly distracts the jury from the main issues." *State v. Bieber*, 2007 MT 262, ¶59, 339 Mont. 309, 170 P.3d 444. The district court did not sufficiently evaluate prejudice to the defendant, despite the benefit of hindsight. The details of D.L.'s testimony prejudiced Corena; it aroused sympathy by emphasizing the negative aspects of Corena's character, not a motive. This improper use of character evidence had strong potential to sway the outcome of the trial because it could be inferred from D.L.'s testimony that because Corena had committed bad acts, that she was a bad person, and therefore a guilty person.

The district court abused its discretion by allowing evidence of Corena's past conduct to be admitted at trial when it should have been excluded under Mont. R. Evid. 403 and 404 because its probative value was outweighed by the danger of unfair prejudice.

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3. Improper Bolstering, Plain Error

The determination of the credibility of witnesses and the weight to be given their testimony is within the sole province of the jury. *State v. Byrne*, 2021 MT 238, ¶1, 405 Mont. 352, 495 P.3d 440, citing *State v. Brodniak* (1986), 221 Mont. 212, 718 P.2d 322. A witness may not comment on the credibility of another witness's testimony, nor can a prosecutor elicit such testimony. *State v. Hayden*, 2008 MT 274, 345 Mont. 252, ¶¶26, 31, 190 P.3d 1091 (citing *State v. St. Germain*, 2007 MT 28, ¶27, 336 Mont. 17, 153 P.3d 591; *State v. Hensley*, 250 Mont. 478, 481, 821 P.2d 1029, 1031 (1991)). This Court has held that where a case turns solely on the credibility and believability of the parties, improper vouching 'tip the scales toward an unfair trial.' *State v. Grimshaw*, 2020 MT 201, 401 Mont. 27, ¶¶32, 35; 469 P.3d 702. A violation of this type undermines a defendant's right to a fair trial by plain error. *Hayden*, ¶34.

In *Hayden*, the prosecutor improperly elicited vouching testimony from other state witnesses, and personally vouched for the witness's credibility, the Court reversed and remanded for a new trial. *Hayden*, ¶34. During direct examination of the investigating police officer, the

prosecutor elicited opinion testimony that the officer believed the victim and another key fact witness were telling the truth in their initial statements. *Hayden*, ¶¶12, 31. This Court determined that questioning of the police officer about the witnesses' credibility was "unacceptable" and "invade[d] the province of the jury and reversed his conviction. *Hayden* ¶31.

In *Byrne*, the prosecutor elicited testimony of the victim's credibility from several witnesses at trial, the jury convicted Byrne of sexual intercourse without consent. *Byrne*, ¶1. No physical evidence was offered, the jury was left to consider the witness' credibility to make their determination of guilt based on these testimonies alone. *Byrne*, ¶¶6,7. The victim testified to repeat abuses, specific sex acts, body parts, details of her clothing and behavior after the incident. *Id*. The prosecution elicited testimony of the victim's credibility from other witnesses referred to the credibility testimony in closing argument. *Id.* This Court held, that the crucial rules developed to ensure a jury makes the conclusion of credibility were not followed, and reversed Byrne's conviction. *Byrne*, ¶35. The *Byrne*, stated:

> Had this been a case where M.G.'s credibility was not the core issue for the jury to decide, the error may have been more

> tolerable. However, from the opening statement to the conclusion of the trial, this case was about M.G.'s credibility and believability. It was crucial that rules developed to ensure that the jury makes the conclusion of the credibility of witnesses be followed.
>
> *Byrne*, ¶35

Corena's entire case was based on the credibility and believability of J.L.D. At trial, J.L.D. offered very few details of her abuse. No physical evidence was presented at trial. At trial, the state elicited testimony from the investigating detective to bolster the testimony of the victim. The detective was not an opinion witness, yet the state was allowed to elicit this testimony from her based on her knowledge, experience, and opinions that J.L.D.'s statements during a forensic interview were credible, and that J.L.D. was believable and had no motive to lie, all over defense's repeated objections. The testimony of State's Witness, Det. Cunningham was improperly permitted.

Direct Examination:

State: You've testified that you have special treating as a forensic interviewer to include watching for signs of whether a child has been coached, is that right?

Defense: Your honor, I'm going to object to foundation. Also, she is not styled as an opinion witness in this area. . . it invades other cases that prevent the witness from talking about credibility of other witnesses.

Court: So, I'll overrule and allow the witness to answer.

Det. Cunningham
(Witness): Yes, I do have specialized training. (2020 Tr. 633-634).

. . .

State: When you were observing [victim's] testimony, did you observe any signs of her
being coached?

Defense: Objection

Court: Same ruling. Go ahead. You can answer.

Witness: No, I did not see any signs of deception or coaching.

State: And what would some of those signs include?

Witness: Generally, children who were being coached or repeating a statement from someone else will usually use the phrase verbatim several times in an interview. Their inability to answer explicit details, sensory details. They have a hard time answering follow-up questions. So generally, they'll just give a vast statement, and then kind of think it's done and over with, and then they can't really come back and answer specific details within that statement.

State: And you did not observe any of these signs during the interview of [victim]?

Witness: No.
(Id. ¶ 634-635)

The judge confirmed to defense counsel the objections had been preserved and would be continuing, and that participating in cross-

examination of the witness on issues of credibility would not waive defense's objection. (2020 Tr. ¶ 624) Defense counsel proceeded to cross Det. Cunningham on her opinions offered on direct examination.

Cross-Examination:

Defense: Does J.L.D.'s statement give you any concern about her ability to observe things and be truthful?

Witness: No. (Id. ¶ 702)

. . .

Defense: You testified yesterday you didn't see any evidence of coaching?

Witness: No. (Id. ¶ 703)

. . .

Witness: I felt like J.L.D. was trying to convey her turbulent relationship with the mother, the abuse sustained. And she moved on again which is not uncommon.

Defense: So, she's going back to topic, though. She's not really moving on, right?

Witness: Right, which again, is not uncommon.

Defense: And there's not really a playbook, right? People talk different right?

Witness: mm-hmm. And she's 12. (Id. ¶ 705)

. . .

Defense: Okay. Now you said you believed J.L.D. right?

Witness: I do. (Id. ¶ 751)

. . .

Defense: You're supposed to be fair and impartial, right?

Witness: Yeah. Point toward the facts that lead me to believe her.

Defense: And nothing is going to change your mind at this time, right?

Witness: Now? I still believe.

. . .

Defense: Do you believe DJ?

Witness: I do. (Id. ¶ 761)

Redirect:

State: And so, going to your experience in forensic interview, in your experience how do kids typically tell stories?

Witness: Depending on the age level, every kid is different, and they all develop at different rates.

Defense: Objection to lack of foundation.

Court: I'm going to overrule.

Witness: Generally, younger children tend to jump around a lot. Oftentimes they know why they're there, so they just try to quickly spit it out and get it done with. Older kids sometimes will do the same thing, but they can generally give it in a more complete and concise fashion as long as the interviewer is able to follow along appropriately but they do tend to jump around a lot. (Id. ¶ 807)

The witness was allowed to testify about the general responses and patterned behaviors of children during forensic interviews.[3] The witness was not qualified as a child forensic interview expert, yet she answered approximately twenty of the State's inquiries about the 'general' and 'typical' behaviors of children during forensic interviews. The defense objected her testimony was "commenting on the credibility of another witness", the court again overruled. (Id. ¶ 809) The State continued to question the witness about commonalities of forensic interviews and usual child responses. (Id.¶ 811-812)

State: During J.L.D.'s interview, did you have any reason to believe at that time that J.L.D. was lying?

Witness: No. (Id. ¶ 809-810)

Det. Cunningham improperly vouched for the J.L.D. at trial. Det. Cunningham was not properly qualified as an expert and no exception to allow her opinion testimony exists. Corena was convicted because the jury found J.L.D. credible, it is likely they found her credible because of Det. Cunningham's testimony. Although the prosecution did not personally vouch, that fact does not change the result: the jury found

[3] Detective Cunningham testified for approximately six (6) hours during day two and three of the 2020 trial. (D.C. ¶121, p. 4)

the victim credible because another state's witness offered bolstering testimony to credit the victim's behavior and responses without proper foundation. In a criminal trial, the "purpose and duty" of the jury is to "decide if the State has proven the defendant's guilt beyond a reasonable doubt, based on the particular facts presented." *State v. Ritesman*, 2018 MT 55, ¶ 27, 390 Mont. 399, ¶ 27, 414 P.3d 261, ¶27. Det. Cunningham's repeated statements about what is typical in a forensic interview and J.L.D.'s credibility invaded the juror's province to fairly assess the information offered to them.

This improper testimony violated of Corena's right to a fair trial under the United States and Montana Constitutions, it is a plain error and Corena's conviction should be reversed.

II. COVID-19 Protocols

The courtroom mask order was an unreasonable invasion of the defendant's constitutional rights.

1. Right to an Unbiased Jury

The right to a trial by an impartial jury is applied to the States by the Due Process Clause of the Fourteenth Amendment. *Parker v. Gladden* (1966), 385 U.S. 363, 87 S. Ct. 468. The Montana Constitution

guarantees that every criminal defendant has a fundamental right to a speedy public trial by an impartial jury. *State v. LaMere*, 2000 MT 45, ¶ 33, 298 Mont. 358, ¶ 33, 2 P.3d 204, ¶ 33 see *Woirhaye v. Montana Fourth Jud. Dist. Court*, 1998 MT 320, PP 11, 16, 292 Mont. 185, PP 11, 16, 972 P.2d 800, PP 11, 16 (citing Article II, Sections 24 and 26 of the Montana Constitution).

a. Voir Dire Limited to 45 Minutes

The Supreme Court of Montana uses a balancing test to weigh the essential right to an impartial jury against the broad discretion of a court to oversee the administration of a trial. *LaMere*, ¶466.

A district judge has "great latitude in controlling voir dire." *State v. Grant*, 2011 MT 81, ¶8, 360 Mont. 127, 252 P.3d 193, citing *LaMere* ¶ 339. In its role as an oversight administrator, the court must "be able to set reasonable limits on voir dire." *Id.* In setting such limits, the court must balance the need for thorough investigation of possible juror bias with the duty to conduct trial in a speedy and fair manner. *Id.* ¶339, 621 P.2d ¶466. To be set, reasonable limits must have due regard for fairness to both parties. *Borkoski v. Yost*, 182 Mont. 28, 32, 594 P.2d 688, 690 (1979). "The voir dire process, especially in cases given a great

amount of publicity, is essential to ensure that Defendant is adjudged by fair and impartial jurors. It is this objective for which the Court must strive, not expeditious selection of a jury." *State v. Nichols* 225 MT. 438, 734 P2d 170, 174 (1987).

At Corena's 2019 trial (pre-covid) the court informed the parties he would limit voir dire to 45 minutes for each side. (D.C. ¶35, Transcript) At Corena's 2020 trial, during the height of the pandemic, the court informed the parties, that voir dire would remain limited to 45 minutes. (2020 Tr. 469-473) Counsel objected, stating specifically that given the sensitive nature of the allegation, complexities of racial and other biases, in addition to the ordered COVID-19 protocols, that 45 minutes would not be sufficient time to voir dire the pool of potential jurors. (*Id*.) Counsel emphasized that the pool had not fully returned the pre-trial questionnaires, and therefor would require additional time for inquiry to address specific lines of questioning that had been ignored, avoided, or otherwise not addressed in advance. (*Id*., D.C. ¶98) Counsel also objected to the court's dismissal of 47 jurors, for cause noting that the broad dismissal added risks of bias that may require additional questioning, and thereby time. (*Id*.)

In Corena's case, there was no indication that her constitutional right to an impartial jury was balanced with the court's administration of a speedy trial and protect public safety measures. (2020 Tr. 472) Instead, the pace of the trial was tailored to the district court's pre-pandemic administration. (*Id.*) Defense counsel repeatedly requested additional time to conduct voir dire, citing the need to explore important issues of bias, the nature of the charge, in addition to complying with safety and logistics of the venue. (2020 Tr. 469-473, D.C. ¶98) The court denied the defensel's request each time. (2020 Tr. 469-473) In response to defense counsel's final voir dire question about reasonable doubt, a female juror offered that she had previously served as a juror on a rape case. (Id. ¶ 457)

> Juror: I listened to what all the rest of the jurors had to say. And I had a better understanding that it wasn't exactly one thing. And somehow, I came to a decision that I could go along with what everybody else was saying about it. But it bothered me after that until the judge came back and talked to us after the trial, and said, you all made the right decision. So, it wasn't a black and white thing. Just . . .
>
> Counsel: Why -- why did the judge say you made the right decision?
>
> Juror: From what he told us, the only reason he gave us that information is one of the members of the jury asked,

> did we make the right decision. So, somebody else must have had some questions, too. I don't have any answer to that, though he just said this person has been going through a series of trials for a long time and has basically been able to evade what he thought justice needed to do. I'm just reporting what I heard from that trial.

It was at this moment that district court informed defense counsel that his time was up. (Id. ¶458) Defense counsel was not able to question further. (*Id.*) The defense did not pass the jury cause. (Id. ¶ 458) This juror may have been selected.[4] These statements imply some bias toward individuals accused of sex crimes, as well as relay confusion related specifically to reasonable doubt, and the role of the jury as a fact-finding body. The fact that the defense was not allowed to investigate, elaborate, or clarify the juror's particular response, and the potential responses it may have elicited or carried with it into deliberations is an error against Corena's constitutional right. Corena relied on the constitutional guarantee that an impartial jury would hear the facts of her case. It was required that public safety protocol also be balanced with her constitutional rights, to ensure fair due process, they

[4] At the time of this final question, two Jurors with the same last name were seated in the pool. Both were female and were referred to during voir dire as Miss Thomas. When the final roll was called, both jurors were announced. One was called as a mistake and was allowed to leave. The other remained on Corena's jury. (D.C. ¶103, Trial Tr. 960)

were not; judicial efficiency and public safety were not balanced with Corena's right to an impartial jury.

The limits imposed by the district court were not properly balanced with the defendants right to a fair trial. The administration of voir dire, and the limits put into place at Corena's trial were counter to the investigatory function of voir dire. The district court's actions were unreasonable and imbalanced.

This error, an abuse of discretion, violated Corena's foundational right to be tried before an unbiased jury, as a result her conviction must be reversed.

b. Mask Requirement During Voir Dire

During voir dire, all participants were required to wear masks and abide by social distance mandates. During this process counsel was unable to ensure full examination of juror's fitness to serve on Corena's jury. For potential jurors, counsel was unable to tell if someone is scoffing, confused, impatient, bored, skeptical, all emotions that go into the consideration of whether that person can be a fair or impartial juror.

Jury selection absolutely relies on counsel's ability to see micro and macro-facial expressions. It is indisputable that challenges for cause occur after a potential juror scoffs or smirks at another juror's answer or counsel's question. Corena's counsel did not pass the jury for cause. The restrictions imposed by the district court did not balance safety and efficiency with a defendant's right to due process.

Requiring social distancing and cloth masks that obscured the faces of potential jurors during voir dire questioning begs question of the integrity of the judicial process and Corena's right to an impartial jury.

2. Confrontation Clause

The Confrontation Clause guarantees a criminal defendant the right to confront her accusers "face-to-face." U.S. Const. amend VI, Mont. Const. art. II Section 24. A crucial part of the reliability guaranteed by the Confrontation Clause depends on the jury's ability to look at the witness face-to-face and judge his demeanor. Requiring witnesses to wear a mask denied the jury the ability to use demeanor in its critical credibility determination. A defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation

at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured. *State v. Stock*, 2011 MT 131, 361 Mont. 1, 256 P.3d 899 citing *Maryland v. Craig* (1990), 497 U.S. 836, 110 S. Ct. 3157.

The testimony could not be assured, because the ability to see the facial micro-expressions of the testifying witnesses, was from the view of the jury. "[Jurors] are the sole judges of the credibility. . . of all the witnesses testifying in this case." (D.C. ¶104, ¶2) This instruction defers the credibility decision to the trier of fact. This task relies in large part on jurors' ability able to observe non-verbal cues to assess witnesses' veracity and accuracy. When a witness wears a mask, it substantially decreases a juror's ability to complete this task.

A juror must be able to see the face of the witness. Other state and federal courts have found that a defendant is deprived of a face-to-face encounter with a witness who testifies in court wearing a ski mask or a disguise that conceals "almost all of [the witness's] face from view." *People v. Sammons* (1991) 191 Mich.App. 351, see also, *Romero v.*

State (Tex. Crim. App. 2005), 173 S.W.3d 5023.[5] Allowing the witness to use a mask would effectively "remove the 'face' from 'face-to-face confrontation.'" *Romero*, ¶ 506, see also *U.S. v. Alimehmeti* (S.D.N.Y. 2018) 284 F.Supp.3d 477, 489 [court rejected undercover officer's use of disguise, "such as using a niqab" while testifying because it would compromise the jury's ability to evaluate the credibility of the officer]. "The facial expressions of a witness may convey much more to the trier of facts than do the spoken words." *Romero,* ¶ 682.

Speech is more than just expulsion of sound waves, it is a full presentation of self, especially through facial expression. Approximately 65% of communication is nonverbal.[6] It is undeniable that face masks cover a majority of an individual's facial cues and micro-expressions. Requiring testimonial witnesses to wear a facemask interferes with a fundamental aspect of a jury trial. Jurors must be able to fully evaluate whether a witness is lying or expressing emotions inconsistent with

[5] In Romero, the Texas Court decided it was a violation of the Confrontation and Due Processes Clauses to allow a witness's face by testifying testified " . . . wearing dark sunglasses, a baseball cap pulled low over his eyes, and a jacket with an upturned collar, leaving visible only Vasquez's ears, the tops of his cheeks, and the bridge of his nose, the trial court, over defense counsel's objection, allowed [the witness] to testify in the "disguise." *Romero v. State* (Tex. Crim. App. 2005), 173 S.W.3d 5023

[6] *Nonverbal Communication in Psychotherapy Psychiatry* (Edgmont) (2010);7(6):38-44, GN Foley, JP Gentile

their words. According to multiple scientific studies, people make up their mind concerning many traits like trustworthiness, competency, aggressiveness, within 100 milliseconds of exposure to facial clues.[7] Facial expressions are used by 87% of lay people in judging credibility; observers judge credibility based on a person's facial expression more than that person's emotion or ability to make eye contact.[8]

Being able to see the entire face of each witness, counsel, and the defendant are all critical to a juror's ability to judge credibility. The juror's ability to fairly judge credibility is critical to maintaining Corena's right to confront the witnesses. Reasonable alternatives to satisfy public safety, judicial efficiency, and protect due process should have been required and made available as defense counsel had proposed. In this case, they were not. As a result, Corena's fundamental right to confrontation was violated.

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[7] Willis & Todorov, *First Impressions: Making up Your Mind After a 100-ms Exposure to a Face*, Psychological Science 17:592.

Todorov, Baron & Oosterhof, *Evaluating Face Trustworthiness: A Model Based Approach***,** Social Cognitive and Affective Neuroscience, Volume 3 Issue 2, June 2008.

[8] Wessel, Drevland, Eilersten, & Magnussen. *Credibility of the Emotional Witness: A Study of Ratings by Court Judges***,** Law, and Human Behavior, 30(2): 221-30, May 2006.

3. Implicit Bias and Self-Incrimination

Requiring Corena to wear a mask throughout trial was a violation of her sixth and fifth amendment rights.[9]

Due process requires courts to consider whether the appearance of the defendant will prejudice the jury, and courts must take care to avoid such prejudice. *Estelle v. Williams,* 425 U.S. 501 (1976). This is why defendants cannot be tried in prison garb or be required to wear shackles without evidence of clear threats to the safety and order of the proceeding. *Id*. ¶ 505; *Deck v. Missouri* (2005), 544 U.S. 622, 125 S. Ct. 2007. The same consideration must be given to a defendant in a facemask. The history of masks in America is one steeped in villainy. Masks have been associated, explicitly and subconsciously, with people up to no good or need to hide something from others. The prejudicial effect of a facial covering may be even more serious for a Native American woman like Corena, as evidenced by recently cultural and historical discussions.[10] The subconscious and implicit bias associated with masks, particularly masks worn by individuals of color, cannot be cured, or removed by court order.

Being able to see Corena's face was critical to her due process rights and equal protection.

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[9] Mont. Const. art. II Section 25

[10] *See* Aaron Thomas, "Why I don't feel safe wearing a face mask. I'm a Black man living in this world. I want to stay alive, but I also want to stay alive." Boston Globe (April 5, 2020) *available at* https://www.bostonglobe.com/2020/04/05/opinion/why-i-dont-feel-safe-wearing-face-mask/.

4. Motion for a New Trial

Corena's motion for a new trial was improperly denied. The grounds raised by counsel were appropriately specific and timely. Given the constitutional implications set forth on the record, and now on appeal, the district court's order should be reversed and Corena should receive a new trial. The public safety issues have been alleviated in Montana, witnesses are no longer required to be distanced or wear masked.

In the interest of justice, the district court's order denying Corena's motion for a new trial should be reversed.

III. Cumulative Error Doctrine

Even if the above issues do not individually warrant reversal the cumulative effect of these errors do warrant reversal.

"The cumulative error doctrine mandates reversal of a conviction where numerous errors, when taken together, have prejudiced the defendant's right to a fair trial." *State v. Cunningham*, 2018 MT 56, ¶32, 390 Mont. 408, 414 P.3d 289 (citations omitted). This Court and others consistently recognize "[t]he cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error." *United States v. Rivera*,

900 F.2d 1462, 1469 (10th Cir. 1990), see *State v. Derbyshire*, 2009 MT 27, ¶¶52-53, 349 Mont. 114, 201 P.3d 811. To that end, it is agreed that "[u]nless an aggregate harmlessness determination can be made, collective error will mandate reversal just as surely as will individual error that cannot be considered harmless." *Id.*

Once a defendant has established and alleged prejudice, the burden is on the State to demonstrate the errors' combined harmlessness. *State v. Van Kirk*, 2001 MT 184, ¶47, 306 Mont. 215, 32 P.3d 735. In Corena's case, it cannot be determined that the aggregate effect of the errors were harmless. The district court made a series of erroneous of evidentiary rulings that deviated from the Rules of Evidence, Montana's Shield Statute, authorities of the State of Montana and other jurisdictions, and the Montana and United States Constitution. COVID-19 created challenges beyond the control of the court and either party but irrefutably impinged Corena's Constitutional rights and fair due process of law.

CONCLUSION

The fundamental fairness of Corena's trial was undermined by the evidentiary errors throughout trial. These errors exposed the jury to

prejudicial prior bad acts and prevented the jury from viewing critical defense evidence for fair and full consideration. The unprecedented challenges due to the novel corona virus compromised the fundamental fairness of Corena's trial.

Corena Mountain Chief respectfully requests her conviction be reversed.

Respectfully submitted this 19th of December 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 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 Mac is 9,999, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Shannon Sweeney
SHANNON SWEENEY
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APPENDIX

CERTIFICATE OF SERVICE

I, Shannon Leigh Sweeney, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 12-19-2022:

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