In the Supreme Court for the State of Montana

Supreme Court No. DA 22-0547

STATE OF MONTANA,

Plaintiff & Appellee,

-vs-

DANIEL CHRISTOPHER ROWE,

Defendant and Appellant.

Appellant's Opening Brief

On Appeal from the First Judicial District Court,
Broadwater County, Hon. Christopher David Abbott, Presiding

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Statement of the Case

Daniel Christopher Rowe appeals from his conviction for one count of Sexual Assault with a sentencing enhancement from a factual finding that the complaining witness was under the age of 16 and Rowe was three or more years older than the complaining witness. (Appendix A & Dkt. 98.1).

A jury convicted Rowe on December 16, 2021. (Appendix A). On June 27, 2022, the district court sentenced Rowe to a thirty-five year term of imprisonment in the Montana State Prison with twenty of those years suspended. (Id.) The court restricted Rowe's parole eligibility until he had completed Phase I of the Sexual Offender Program. (Id.) Two psycho-sexual evaluations determined that Rowe was a Level 1 sexual offender.

Rowe filed a timely notice and this appeal follows.

Statement of the Issues

The district court erred in allowing the State to admit voluminous evidence regarding uncharged acts Rowe allegedly committed in Fergus County.

The district court incorrectly instructed the jury on the legally appropriate *mens rea* instructions despite clearly established law by this Court on that issue.

Rowe's right to be personally present during a critical stage was violated when the court, having instructed defense counsel not to contact Rowe, reconvened to discuss whether three jurors should be allowed to attend a Christmas concert in the middle of deliberations.

Finally, it was prosecutorial misconduct to trivialize the standard of proof during voir dire, and Rowe's counsel was ineffective in failing to object.

Statement of the Facts

The State charged Rowe with one count of sexual assault on a person under the age of sixteen. The complaining witness in the case, H.B., was twenty-four years old at the time of the trial. At the time of the alleged abuse, H.B. was Rowe's brother-in-law. H.B. was considerably younger than his sister, Mari Korpi, who was Rowe's wife. Because of the age difference, Rowe was "sort of a father figure" to H.B. "growing up." (Dec. 14, 2021, Tr. at 68).

At trial, Korpi would characterize Rowe and H.B.'s relationship as "like two peas in a pod, like father and son. . . ." (Id. at 205). "[H.B.] did not have a dad growing up and [Korpi's] opinion of the situation was [she and Rowe] were being a really good fill-in for [H.B.] because he didn't have a dad." (Id.) In Korpi's opinion, H.B. "admired [Rowe] greatly." (Id.)

Before a very acrimonious divorce, Rowe and Korpi had been married "[a]lmost 16 years." The marriage produced 4 children. After H.B. made his complaint, child protection specialists from the Department of Health and Human Services also investigated Rowe for possible abuse against his own children. That investigation concluded with a finding that any allegations Rowe had abused his children was unsubstantiated, and the case was closed. (Dkts. 12 & 14).

Although Rowe and Korpi divorced in "spring of 2019," (Dec. 14, 2021 Tr. at 212), their marriage began to dissolve when Rowe stopped repressing his homosexuality. At trial, Rowe testified "our marriage broke up because I finally decided that I was going to be myself and I did not feel that it was fair for [Korpi] to have to put up with me

fighting between both lifestyles." (Dec. 15, 2021, Tr. at 184).

For Rowe, the fight between the two lifestyles was a bitter one. Both he and Korpi were deeply religious and recognized their church viewed homosexuality as a sin. (Dec. 14, 2021, Tr. at 223-224; Dec. 15, 2021, Tr. at 184). In fact, the couple originally met in church. (Dec. 15, 2021, Tr. at 184). Rowe and Korpi married young, 18 and 19 years old, respectively. (Id. at 185).

Rowe "wanted to be the best" he could be, "the best husband" he could be, and "[t]he best lead and role model" he could be. To those ends, he committed to Korpi's religious lifestyle, which was considerably more strict than Rowe's own upbringing. The couple committed to homeschooling the children and "there wasn't a life outside of the church per se." (Dec. 15, 2021, Tr. at 185-186).

Despite his commitments, Rowe was unable to escape his latent homosexuality. Years before their divorce, Rowe disclosed his feelings to Korpi and the couple "decided they could pray it away." Rowe took additional steps. "I decided to fight my homosexuality. I decided to go to different churches, speak with different pastors. I spent a couple of

years doing that and different counseling. I went to retreats that were made to change you. I did everything I could to not be that person that I was inside." (Id. at 187). Inevitably, Rowe's fight was unsuccessful, and the couple divorced and formulated a parenting plan for the care of their children.

Before H.B. came forward, Korpi believed she and Rowe were "coparenting well." (Dec. 14, 2021, Tr. at 213). Despite this belief, Korpi kept notes of what she perceived to be Rowe's failings as a parent because she "was told that [keeping notes] was the wise thing to do no matter how much you trusted the person that I had been married to and divorced." (Id. at 223).

On what Korpi believed to be January 3, 2020, Korpi and Rowe had an argument about Rowe disclosing to the couple's two boys that "he was gay and wanted a gay lifestyle. . . ." (Id. at 240). Rowe had previously told this to their daughters a year earlier. The disclosure to the daughters was "very uncomfortable for [Korpi] and them." (Id. at 239).

Korpi made it clear to Rowe that she "wanted it to be okay that"

she "didn't want a gay lifestyle." (Id. at 240). Approximately two weeks after Korpi's disavowal of Rowe's "gay lifestyle," her brother, H.B., accused Rowe of multiple instances of sexual abuse in multiple counties, all of which had occurred years earlier. (Id.)

H.B.'s allegations spanned Broadwater, Fergus, Meagher, and Lewis & Clark counties. (Dkt. 1). For reasons not fully explained in the record, H.B.'s allegations were consolidated into a single count of sexual assault under a common scheme theory.[1]

According to H.B., Rowe abused him in Townsend in 2008, in White Sulphur Springs in 2012, in Helena in 2012, and in Lewistown in 2013. (Dkt. 1). Rowe vehemently denied the allegations when interviewed by police. When asked to speculate why H.B. would say that Rowe had abused him, Rowe stated that he did not know, but in response to the officer's invitation Rowe conjectured that "maybe

[1]The state also charged Rowe with one count of deviate sexual conduct. The district court severed the two counts and Rowe eventually entered a plea agreement with the state by which he would enter an Alford plea to an amended charge of disorderly conduct.

because he [H.B.] is gay too and doesn't want to be." (State's Ex. 4A[2] at 20:14-16). Despite the fact that it was invited by his interrogators, Rowe's speculation would be used against him repeatedly during his trial.

As the case progressed toward trial, the state provided notice that, despite the presence of the Fergus County allegations in the charging document, it would "not be prosecuting the Fergus County allegation but [the prosecutor believed] that absent at 404(b) motion that these allegations are admissible evidence." (Dkt. 70 at 2). Rowe's counsel moved to exclude evidence of the Fergus County incident. The state believed evidence of the Fergus County allegations were permissible under both Rule 404(b) and the ever ubiquitous Transaction Rule. The court recognized the distinction between the Fergus County allegations and allegations from other counties was that H.B. was over the age of 16 when the Fergus County incident allegedly occurred. (Dec. 13, 2021, Tr. at 10).

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[2]A copy of State's Ex. 4A appears in the Court's record. Unlike State's Ex. 4B, 4A is a complete copy of Rowe's interrogation with the exception of minor redactions.

The court ultimately denied Rowe's motion in limine to preclude reference to the Fergus County incident. The district court's oral reasoning and ruling was lengthy and is included as Appendix B. The State was able to articulate a pretrial non-propensity purpose for the evidence that did not present unfair prejudice. However, the State's use of that evidence extended far beyond its articulated purpose.

After these oral rulings, Rowe's trial moved to voir dire. The State began to discuss the concept of proof beyond a reasonable doubt with the jury. The State elicited examples of "some important life decisions" they had made. (Dec. 13, 2021 Tr. at 111). The answers included "marriage," "career," "having children." (Id. at 111-112). The State then volunteered other examples including "starting a new business" "investing a really – lot of money in something," and "moving to Montana." (Id. at 112). Despite telling the venire that "we're looking for a high standard of confidence, but we're not looking for 100 percent guarantee," the State continued to compare the standard to marriage ("not every marriage works out), having children ("my wife and I, we have had some miscarriages", or a business ("[m]aybe a business fails").

These comments did not draw an objection from Rowe's counsel, nor did they elicit correction from the district court.

The State's first witness was Lynelle Amen, a licensed clinical professional counselor and blind expert witness who works with children's advocacy centers and is also a trained forensic interviewer. Ms. Amen came at the State's behest to "provid[e] information to help educate the jury." (Dec. 14, 2021 Tr. at 28). She affirmed that her role at Rowe's trial was to "testify about general issues associated with sex cases involving minors." (Id.)

After a lengthy recitation of her credentials, Ms. Amen began her tutorial for the jury by explaining "sexual abuse myths, rape myths –" (Id. at 30). She dispelled the myth of stranger danger by informing the jury that children are normally abused by someone they know and who has access to the child. (Id.) Ms. Amen opined on how victims respond to abuse including whether they resist or freeze. (Id. at 235). Ms. Amen also educated the jury on why alleged victims delay disclosure of their abuse. (Id. at 35-37). Ms. Amen then took the jury through the stages of victimization. (Id. at 37-43).

The preceding topics were presented to the jury without objection from defense counsel. It was only when Ms. Amen begin to testify about "memories and how people form memories, specifically how children form memories in these events," that defense counsel objected. (Id. at 43). Defense counsel's objection was one of "foundation." Although the evidentiary rule was not specified, it is presumed counsel objected under *Mont. R. Evid. 703*, Basis of opinion testimony by experts. Counsel for the state offered to lay foundation and successfully did so. (Id. at 44). Ms. Amen then went on to elucidate the "different types of memory labels" that those in her field use. Again, defense counsel objected. The objection was overruled. (Id.) The jury's education on child memory continued for approximately 5 pages of transcripts.

On cross-examination, defense counsel probed Ms. Amen on child memory. (Id. at 55-56).

On redirect, the state attempted to clarify Ms. Amen's answers in light of the questions posed on cross-examination. The questions were directly related to memory. Before defense counsel could conduct a

recross examination, which the district court always allows, (Id.at 63), the prosecutor lodged an objection regarding scope. The objection was overruled. Defense counsel questioned Ms. Amen on the science of memory and Ms. Amen began by referencing "journal articles," and "all the research that has been done." Counsel then went on to question Ms. Amen about false memory and articles that she had reviewed on the subject. Ms. Amen indicated that she had reviewed several articles on false memory. When counsel began to question Ms. Amen about this aspect of memory, the State objected that the line of questioning was "well beyond" the scope of his redirect examination. (Id. at 65). The objection was sustained.

The State's next witness was H.B., the alleged victim in the case. After running H.B. through his allegations pertaining to events which occurred in Meagher, Lewis & Clark, and Broadwater counties, the prosecutor asked H.B. about a hunting trip he took with Rowe to Fergus county. H.B. acknowledged this trip occurred after he had turned 18. H.B. told the jury that in 2013 Rowe, James Matthews, and he drove to Lewistown and "set up our headquarters at James

Matthews' either fiancee at that time or wife. His wife's family's house." (Id. at 102).

The prosecutor elicited from H.B. that he was able to find the house again during the investigation. (Id. at 102-103). H.B. then went on to explain the details of the location of the house and its interior in great detail. (Id. at 103-106). H.B.'s testimony about this so-called "transactional evidence" included details about the streets the house was on, the neighborhood, the "interesting layout of the house," the "dark and warm" feeling of the guest room, the detached kitchen, "the queen sized bed, maybe a hide-a-bed," the fact that walls were dark and warm, maybe wood," and the shape of the couches. (Id.) Only after this seemingly irrelevant recitation of minutiae did H.B. recount the allegations of abuse by Rowe.

As the trial progressed, the prosecutor called at least three other witnesses to bolster H.B.'s testimony about the house in Fergus county.

The state's next witness was Konnie Birdwell, the owner of the residence in Lewistown. Mrs. Birdwell vaguely recalled a time when her son-in-law, James Matthews, brought H.B. and Rowe on a hunting

trip to Fergus County. Mrs. Birdwell thought H.B. and Rowe "stayed in the camper but I'm not 100 percent sure." (Dec. 15, 2021, Tr. at 29).

The prosecutor asked Mrs. Birdwell about her house and to "describe the interior and the mood and the colors." Defense counsel's "relevance" objection was overruled. (Id.) Mrs. Birdwell obliged.

> Open format, so when you come in the front door, there's about an 8 by 8 porch that has another door that goes into my living room. Then it is open from the front window all the way to the kitchen window, which is about 40 foot by 20 foot. Connecting rooms and you've got a living room and then a dining room and then the kitchen is in the back.

(Id. at 29-30).

Again, the prosecutor asked Mrs. Birdwell, "what are the colors like in the house?" (Id. at 30). Defense counsel objected on relevance grounds, and the objection was overruled. (Id.) Mrs. Birdwell went on to describe her house as having "[h]ickory hardwood floor clear to the kitchen. Vinyl on the floor in the kitchen. I have hickory cupboards. I have solid surfaced counters, dark brown. A big fireplace with a mantle. Just typically two couches in the living room but right now there's a tree and everything's rearranged. Just an area rug." (Id. at 30-31). The prosecutor pressed for more detail asking "[a]s far as colors

of the walls, are they bright, are they dark, what do they look like?" (Id.) Mrs. Birdwell described "one accent wall that's kind of a sea bone green, and the rest are kind of a cream colored, light." (Id. at 31).

Because this description presumably contrasted with H.B.'s description of the house as "warm and dark," the prosecutor asked Mrs. Birdwell to describe her house after her 2015 remodel. Before the remodel, the house was "much darker. Tongue and grove [*sic*] wood all over the walls, much cabin-like. I think we had started the floors at that point. So probably hardwood in the living room and tile in the dining room. The tongue in groove was most prominent, very dark. You know, we put Sheetrock and painted all that." (Id.)

Mrs. Birdwell was then asked to describe the dimensions of her house. Despite being granted a continuing objection, defense counsel objected again citing rules 402 and 403. Defense counsel also objected that the testimony was "bolstering." (Id. at 32). The objection was overruled. Mrs. Birdwell went on to describe interior dimensions of her house and the locations of the bedrooms. Mrs. Birdwell told the jury about a "weird accordion door thingy," but that they had removed that

thingy because "kids play in there and I want the doors open." (Id. at 33).

Although Mrs. Birdwell did not recall where H.B. and Rowe slept, she went on to describe the room H.B. described in his testimony. (Id. at 33-35).

The state next called James Matthews, a youth pastor, to testify about the hunting trip to his in-laws' house. Although Rowe's counsel objected arguing the testimony was "cumulative, irrelevant and 403, 404," the objection was overruled. Pastor Matthews confirmed H.B.'s testimony that the hunting trip occurred in 2013. (Dec. 15, 2021, Tr. at 42). Pastor Matthews confirmed the date because he looked it up on his phone and had at least one photo from that weekend. (Id.) The photo was introduced over objection as State's Exhibit 3. (Id.)

Pastor Matthews continued to testify that his in-laws lived within the city limits of Lewistown, "on Boulevard Street and – I know it well because we – my wife and I got married in the back yard there." (Id. at 44). Like H.B. before him, Pastor Lewis testified that H.B. and Rowe "stayed at the residence." However, Pastor Lewis believed Rowe and

H.B. either stayed in a camper or an unattached shack that "used to be like a hairdressing salon from the previous owner or something like that." (Id. at 46).

The prosecutor asked Pastor Matthews about H.B.'s demeanor and how H.B. and Rowe were acting. Pastor Matthews described the "general vibe" as "super positive." (Id. at 47). However, the "vibe" changed as the group were returning from the trip and, to Pastor Matthews, it felt "weird. . . . I don't know if I can describe it. At the time I probably would have just said we're all pooped out." (Id.) Defense counsel objected that the testimony was "highly speculative about vibes." (Id. at 48). Over yet another overruled objection, the prosecutor pressed Pastor Matthews to explain the "vibe." After testifying that H.B. "seemed very unhappy on the way out and home . . .", Pastor Matthews acknowledged that, despite racking his brain, he could not say he observed any specific sexual behavior between H.B. and Rowe. (Id. at 48-49).

After Pastor Matthews, the prosecutor called Sergeant Honeycutt, an officer from the Lewistown Police Department. (Id. at 52). Sergeant

Honeycutt informed the jury that he investigates "child crimes, child sexual crime, child physical abuse crimes," and DUIs. (Id.) At this point, Rowe's counsel requested to be heard *in camera*. The request was granted and defense counsel again renewed her objection to the evidence surrounding the allegations from Fergus county. (Id. at 52-53).

In chambers, defense counsel argued the State was presenting evidence that was "well beyond what's 404 permissible, 404(b)." Counsel argued the evidence was "violating [her] client's right to due process. We cannot continue to have cumulative evidence about an uncharged crime. We are on our third witness on an uncharged 404(b) matter." (Id. at 53-54). Sharing some of defense counsel's concern, the court inquired of the prosecutor. The prosecutor responded that the evidence was "not just 404(b) motive. It's intent as part of transaction, and I don't know how cumulative it is." (Id. at 54). The prosecutor noted "the first witness was ten minutes. The second witness was ten minutes. Sergeant Honeycutt is going to be ten minutes." (Id).

The prosecutor continued to justify his Fergus county witnesses

as "part of the transaction of the overall long-term crime as to Mr. Rowe against [H.B.] and that's number one. Number two is [H.B.] was cross-examined as to the clarity of his memory on the Lewistown events." Finally, the prosecutor informed the court that he expected Sergeant Honeycutt's testimony to be "quite short." (Id. at 55).

After some oral deliberation, the court informed the prosecutor, "I will allow you to put on some brief testimony by Sergent Honeycutt. It does need to be brief in scope because we are starting to stray into a long time tying down this particular incident." The court also indicated it would read a cautionary instruction.

Defense counsel renewed her objection.

> I don't agree, your Honor. I think yesterday the State was within the same transaction. Today he's proving a sexual assault in Fergus County, and at a minimum, I would ask that you, again, give a limiting instruction before this testimony and a stronger limiting instruction that states that the Court understands that there has been substantial and cumulative evidence presented as to this Fergus County matter.

(Id. at 56-57).

The court declined stating that it would not comment on the evidence and went on to articulate its view of the evidence.

> It's actually being offered more, as I understand it, to say we have – one, you have to understand the relationship and this helps bear on that part of the relationship. Two, it's being offered more, as I see it, to corroborate [H.B.'s] account. That's the whole sequence of events by shoring up the time line and helping understand the motivations and helping understand the intentions.
>
> I don't see it as, you know characterizing. I don't think there's a huge risk in the context of this case with all of [H.B's] allegations against Mr. Rowe, and the only difference being that one of those allegations happens after he's 16 and was therefore charged, that it creates a risk of undue prejudice. I don't consider it to be a due process violation and I don't consider it to be a violation of the rules. Any way you characterize this as transactional or other acts, it doesn't matter.

(Id. at 58).[3]

Finally, the prosecutor indicated that he wanted "to make it clear[:] I'm not intending to ask him anything as to the substance of the investigation or what [H.B.] stated to him or any witness or any of the testimony." (Id.)

After a cautionary instruction tailored to *Mont. R. Evid. 404(b)* purposes, Sergeant Honeycutt's testimony continued. (Dec. 15, 2021,

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[3]At the conclusion of the trial, the court would instruct the jury that the "only purpose of admitting that evidence was to attempt to show the defendant's motive or intent." (Dec. 15, 2021, Tr. at 260).

Tr. at 61). Contrary to the promised confines, the prosecutor asked Sergeant Honeycutt about his work investigating crimes involving children, his work with the Central Montana Child Advocacy Center – Sergeant Honeycutt was "the President and Board member" – and his training as a child forensic interviewer. (Id. at 61). The record reveals striking similarities between Sergeant Honeycutt's credentials and the State's blind expert, Ms. Amen.

The prosecutor then asked Sergeant Honeycutt about his investigation into H.B.'s allegations. (Id.) Sergeant Honeycutt testified that he interviewed H.B., Pastor Matthews, the owner of the house in Lewistown, and "a couple of potential witnesses for the camper, that they weren't sure if this occurred in the house or the camper." (Id. at 62). The prosecutor then asked Sergeant Honeycutt if he had visited the residence and whether his observations "match[ed] the description from [H.B.]. Over objection, Sergeant Honeycutt testified that the house was "very similar" to the description given by H.B. (Id. at 63).

> It has been remodeled since [H.B.] had been there, and. . . Mrs. Birdwell was able to walk me through in [H.B.'s] recollection of what he remembered she commented on, and she was able to show me that little portion that had not

been remodeled, the wood paneling and some of those pieces. (Id.). The prosecutor asked Sergeant Honeycutt to affirm that he found wood paneling in the house. He did. "There was some right next to the stairwell, yes." (Id.).

The prosecutor then asked Sergeant Honeycutt about his interview with H.B., especially H.B.'s demeanor. Sergeant Honecutt, a trained forensic interviewer, testified that H.B. was

> [v]ery calm until the part where we started talking about the actual offense that had occurred, then he became very nervous. Through my training and experience, that's very relevant when you talk with children and —

At this point, defense counsel objected. That objection was sustained. (Id. at 64). The Court admonished Sergeant Honeycutt not to talk about "your impression about witnesses." Sergeant Honeycutt apologized to the court. In response to the prosecutor's next question, Sergeant Honeycutt testified H.B. appeared "very calm. He appeared to be truthful." (Id.) Again, defense counsel objected. The court instructed the jury to the effect that "[t]he only people who get to decide in this case whether the witnesses are truthful or not are you folks."

The prosecutor then asked Sergeant Honeycutt to describe H.B.'s

"physical characteristics" during the interview. Sergeant Honeycutt responded: "Okay. We have said calm. I'm trying to use the correct words here without causing more issues. Confident." (Id. at 65).

The state called one more witness, a detective from Broadwater County, and then rested. Outside the presence of the jury, defense counsel moved for a mistrial "based on the fact that there has been cumulative 404(b) evidence produced because the State has provided so much evidence regarding the Lewistown matter. I think we've talked about that extensively but I just think for the record I do need to move for a mistrial." (Id. at 105). That motion was denied without response from the State. (Id.) Defense counsel also moved to dismiss based on insufficient evidence, especially the paucity of evidence regarding H.B.'s age within the wide-ranging course of conduct alleged. That motion was denied.

Along with other witnesses, Rowe testified in his own defense and vehemently denied H.B.'s allegations. (Id. at 182-205). At the conclusion of the defense case, the court and the parties commenced to settling jury instructions. (Id. at 252).

As with many cases such as this, a discussion ensued regarding the correct definitions of "knowingly" and "purposely." The state acknowledged "this particular instruction has bedeviled many people." (Id. at 251). Defense counsel's proposed instruction 9 read: "A person acts knowingly when the person is aware of his or her conduct." (Appendix C). The court noted each party had presented competing "knowingly" instructions. "We have plaintiff's 9 and defendant's 9, and it's the knowingly instruction, and I think the difference here is that the State wants to add result-based definition as well. . . ." (Id. at 250).

After hearing from the State, the court stated

> This is an – I mean, this is an area where I feel like I've spent a lot of time over the years thinking about this instruction, and it's an area that's a frequent source of appeals because people give just the conduct instruction with nothing else, and that results in reversals which, of course, I'd prefer to avoid if there's a conviction.
>
> . . . .
>
> So I think the State's instruction's better unless there's some reason why the defense wants to have conduct only instruction, but I would think you'd want to have the option.

(Id. at 251).

Defense counsel argued "I think we have to give one or the other.

I don't think we can do an or." (Id. at 252). The court disagreed.

> That's not true. So the definition – you know, like the instructions that come along with the pattern instructions refers to Rothacre[4] [*sic*], I think, and that was the case where back in the day they would just give you all four and wouldn't give any guidance to just about their applicability, ant that is problematic. But the Court has never held, that I'm aware of, that you can only instruct on one. In fact, there's a whole host of offenses for which there's an element that there's a conduct element and an element that might be a fact or circumstance element and an element that is a result element and the meaning of knowingly varies based on the element. So I think that the more accurate instruction would be the one that the State's proposing.

(Id.) Consistent with that ruling, the State's instruction was given. It read: "A person acts knowingly when the person is aware of his or her conduct, or the person is aware there exists the high probability that the person's conduct will cause a specific result." (Appendix C). Defense counsel objected to the instruction as given. (Id. at 253).

A similar situation arose with the definition of "purposely." Defense counsel offered proposed instruction 10, which read "A person acts purposely when it is the person's conscious object to engage in conduct of that nature." (Appendix C). The court noted "the definition

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[4]State v. Rothacher, 272 Mont. 303, 901 P.2d 82 (1995).

of sexual conduct involves the purpose – you know, for the purpose to arouse or gratify, and arouse, I think, arguably is a result as opposed to conduct. I think all you have to do is add purpose is to add the words or cause such a result." (Dec. 15, 2021, Tr. at 251-253). Defense counsel did not object to the court's rewriting the instruction. The instruction ultimately given to the jury was: "A person acts purposely when it is the person conscious object to engage in conduct of that nature or cause such a result." (Appendix C).

The final contested issue was each side's proposed verdict form. The court characterized Rowe's proposed verdict form as "your's asking for, in essence, a special verdict form which goes instance by instance. . . ." (Dec. 15, 2021, Tr. at 264). Defense counsel agreed. "I think it's really important that we do that to make sure that we get some confirmation that there has been unanimity." (Id.) The State opposed the defense's proposed instruction and relied instead on the pattern instruction. The prosecutor sought support for his argument in part by raising the issue of the Lewis & Clark County allegations. "The other issues is that there may be more than one Lewis & Clark County event.

I mean, there actually is. Well, maybe not." (Id. at 264). The court interjected: "It was very unclear from what I gathered." (Id. at 265).

After a lengthy and somewhat confusing discussion, the court denied Rowe's proposed verdict form. (Id. at 267).

After the parties' closing arguments, the jury began to deliberate at approximately 2:47 p.m. (14:47) (Dec. 16, 2021, Tr. at 127). At 5:22 p.m. (17:22), the court reconvened without Rowe being present. The court concluded "given the nature of the inquiry, I didn't have defense counsel call him to let him even know that we're doing this. So that's why he's not here." (Id. at 129-130). The jury was present. The nature of the inquiry was the length of deliberation in relation to a planned power outage in the courthouse the following day. A second consideration, expressed by one juror, was that three of the jurors wanted to attend a Christmas program that evening. "We've got three people who want to see their grandkids and kids." (Id. at 131-132).[5] After input from the jurors, the court sent the jury back to its deliberation room and discussed the matter with the parties. The state

[5]The record does not reflect the identity of the jurors that addressed the court.

proposed the jury could break "a little before 6:00 and come back at 7:30" providing the court issued the proper admonition. (Id. at 134). Defense counsel opined "I think if they want to go home, go to their Christmas concert, I think it's not fair to the defendant to have them missing that, and I think that it does put pressure on them." (Id. at 135). It was decided that the jury would be admonished, excused so that a few jurors could attend a Christmas concert, and then they jury would return later that evening to resume deliberations. Defense counsel objected. (Id. at 136).

The jury returned and the court gave it "an extra admonishment because normally we sequester the jury during deliberations and we're breaking that." (Id. at 137). One juror asked to speak. "As far as I'm concerned, I can stay and go on. That way we don't have these other nine jurors sitting there twiddling their thumbs. They're in kindergarten, they've got a lot of years to go watch them. So I don't know how the others feel, but I would be willing to do that." (Id. at 137-138). A second juror put his or her oar in: "I'm going to be that I can probably catch a video. Somebody will probably take their phone

and tape them, the important parts. I can do that." (Id. at 138). Ultimately, the group decided to skip the concert and continue its deliberations.

Ultimately, Rowe was convicted and the jury found H.B. to under the age of 16 and Rowe three or more years older. (Id. at 142).

On May 27, 2022, after a sentencing hearing, the district court sentenced Rowe to 35 years in the Montana State Prison with 20 of those years suspended. (Dkt. 22). Rowe now appeals.

Summary of the Arguments

The district court erred in allowing the State to present bolstering, cumulative, and unfairly prejudicial evidence surrounding H.B.'s allegations that Rowe assaulted him in Fergus County. While H.B.'s testimony on the topic alone may have been permissible under the Rules of Evidence and the Transaction Rule, the sheer volume of other testimony provided by the three other witnesses was, at minimum, unfairly prejudicial to Rowe and extended far beyond any permissible purpose.

The district court erred as a matter of law in instructing the jury

on the mental state elements. In so doing, it lowered the State's burden of proof. Further, the instructions were contrary to clearly established law as repeatedly set forth by this Court.

The district court plainly erred when it convened outside of Rowe's presence to discuss whether the jury would be excused so three jurors could attend a Christmas concert.

Finally, the prosecutor committed prosecutorial misconduct by trivializing the burden of proof. The court committed plain error when it allowed the prosecutor to undermine the evidentiary burden of beyond a reasonable doubt. Counsel was also ineffective in allowing the State to do so.

Standards of Review

A district court's evidentiary ruling is reviewed for abuse of discretion. *State v. Cunningham*, 2018 MT 56, ¶ 8, 390 Mont. 408, 414 P.3d 289. "An abuse of discretion can be found if the district court acts arbitrarily without the employment of conscious judgment, or exceeds the bounds of reason resulting in a substantial injustice." *State v. Sage*, 2010 MT 156, ¶ 21, 357 Mont. 99, 235 P.3d 1284.

However, when the district court's evidentiary ruling is based on an interpretation of an evidentiary rule or statute, the standard of review is *de novo*. *State v. Passmore*, 2010 MT 34, ¶ 51, 355 Mont. 187, 225 P.3d 1229.

This Court reviews jury instructions to determine whether, as a whole, they fully and fairly instruct the jury on the law applicable to the case. *State v. Hall*, 2003 MT 253, ¶ 24, 317 Mont. 356, 77 P.3d 239. A district court's decisions regarding jury instructions are reviewed for an abuse of discretion and this Court will only reverse if the jury instructions prejudicially affected the defendant's substantial rights. *State v. Gerstner*, 2009 MT 303, ¶ 15, 353 Mont. 86, 219 P.3d 866.

This Court exercises plenary review over constitutional questions, including alleged violations of a defendant's right to be present at all critical stages of trial *State v. Charlie*, 2010 MT 195, ¶ 21, 357 Mont. 355, 239 P.3d 934.

This Court generally does not address issues of prosecutorial misconduct pertaining to a prosecutor's statements not objected to at trial. *State v. Aker*, 2013 MT 253, ¶ 21, 371 Mont. 491, 310 P.3d 506.

However, the Court may discretionarily review claimed errors that implicate a defendant's fundamental constitutional rights, even if no contemporaneous objection is made under plain error review. *State v. Lackman*, 2017 MT 127, ¶ 9, 387 Mont. 459, 395 P.3d 477. Plain error review is exercised when failing to review the claimed error may result in a manifest miscarriage of justice, may leave unsettled the question of fundamental fairness of the trial proceedings, or may compromise the integrity of the judicial process. *Id.*

Claims of that a defendant received ineffective assistance of counsel are mixed questions of fact and law, which are reviewed *de novo*. *State v. Kougl*, 2004 MT 243, ¶ 12, 323 Mont. 6, 97 P.3d 1095.

Arguments

1. Fergus County Evidence

"Although the government will hardly admit it, the reasons proffered to admit prior-bad-act evidence may often be a Potemkin, because the motive, we suspect is often mixed between an urge to show some other consequential fact as well as to impugn the defendant's character." *United States v. Sampson*, 980 F.2d 883, 886 (3d Cir. 1992).

In Rowe's case, the motive appears to have been less directed toward impugning Rowe's character and more toward an equally impermissible bolstering of H.B.'s credibility.

To guard against these improprieties, a district court must analyze the proposed evidence to determine whether it supports the particular purpose asserted by the State. *State v. Aakre*, 2002 MT 101, ¶ 11, 309 Mont. 403, 407-408, 46 P.3d 648, 651 (discussing *State v. Sweeney*, 2000 MT 74, ¶ 19, 299 Mont. 111, 116, 999 P.2d 269, 300)). For character evidence to be admissible under the motive exception, "the commission of the first crime or act should give rise to a motive or reason for the defendant to commit the second crime." *Sweeney*, at ¶ 25. That connection cannot be a broad or vague description of "general hostility," as such a standard could be "potentially encroaching upon impermissible use of motive as propensity evidence." *State v. Blaz*, 2017 MT 164, ¶ 15, 388 Mont. 105, 111, 398 P.3d 247, 253.

Similarly, this Court has "been careful to limit the transaction rule's application, noting that it should not be used to avoid Rule 404(b)'s prohibition against character evidence." *State v. Lamarr*, 2014

MT 222, ¶ 14, 376 Mont. 232, 332 P.3d 258 (*citing State v. Stout*, 2010 MT 137, ¶¶ 38-39, 356 Mont. 468, 237 P.3d 37). "Further, we have held that evidence offered under the transaction rule is subject to fact-specific balancing under M. R. Evid. 403, which allows the court to exclude relevant material when its prejudicial effect substantially outweighs its probative value." *Lamarr*, ¶ 19 (*citing and quoting State v. Hardman*, 2012 MT 70, ¶ 16, 364 Mont. 361, 276 P.3d 839).

In Rowe's case, H.B. provided testimony about the Fergus County incident. For the sake of argument, Rowe will assume this limited testimony was permissible for a non-propensity purpose and not subject to *404(b)* exclusion. Again, for the sake of argument, Rowe would further grant the court's ruling that H.B.'s testimony regarding Fergus County was admissible under the transaction rule. No such benefits can extend to the sheer breadth of evidence the court allowed, however.

The state called three witnesses to bolster H.B.'s testimony about uncharged conduct. Mrs. Birdwell had little recollection of H.B. or Rowe even being at her residence. Her testimony was solely for the purpose of lending credibility to H.B.'s testimony about the house's

mood, colors, structure, etc. The same holds true for Pastor Matthews. The most egregious and unfairly prejudicial testimony came from Sergeant Honeycutt whose testimony supported Mrs. Birdwell's but also thrice commented on his observations of H.B.'s credibility ("truthful" "confident" and "calm").

Although the State did not specifically argue *Mont. R. Evid. 801*, not even that rule would permit such testimony. *See Tome v. United States*, 513 U.S. 150, 158 (1995) (prior consistent statements are not admissible "to counter all forms of impeachment or to bolster the witness merely because she has been discredited.")

Rowe's counsel repeatedly objected to the Fergus County evidence citing Rules 403, 404, 402, and the Due Process Clause. With limited exceptions, her objections were overruled and a cumulative amount of unfairly prejudicial evidence was introduced through three witnesses with virtually no relevant testimony to the offenses actually charged. While the district court did read a cautionary instruction and sustain two objections when Sergeant Honeycutt vouched for H.B.'s credibility, the instructions were insufficient to protect against a flood of

inflammatory, cumulative, and irrelevant evidence. *Sage*, ¶ 42.

While the court may have accepted the State's initial assertions that the Fergus County evidence would be limited and have a specific non-propensity purpose, the court failed to exercise continued diligence to guard against *403* prejudice. Evidence of a prior bad act must be analyzed under *Mont. R. Evid. 403* "for relative probative value and for prejudicial risk of misuse of propensity evidence." *Old Chief v. United States*, 519 U.S. 172, 182 (1997). Evidence of other crimes, wrongs, or acts may unduly prejudice the jury against the defendant, regardless of the purpose for which the evidence is nominally admitted. *Sage*, ¶ 36. "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. Evidence used to bolster the credibility of a witness is also subject to *Rule 403* balancing. *See e.g. United States v. Cordoba*, 194 F.3d 1053, 1063 (9th Cir. 1999) (citing cases in which *Rule 403* justified preclusion of polygraph examinations to bolster a witness's credibility); *State v. Walker*, 2018

MT 312, ¶ 40-41, 394 Mont. 1, 433 P.3d 202 (Rule 403 among other rules justifies exclusion of expert psycho-sexual testimony to improperly bolster a defendant's claim of innocence).

Where this type of evidence is admissible under either *Rule 404(b)* or the transaction rule, the State still has a responsibility to be prudent in the use of that evidence. In *State v. Franks*, 2014 MT 273, 376 Mont. 431, 335 P.3d 725, an allegation of past child molestation was probative under an exception to *Mont. R. Evid. 404(b).* Nevertheless, this Court was troubled by the State's limitless use of that evidence to malign the defendant during opening, during cross examination, and during closing. *Franks*, ¶ 19. The Court should be similarly troubled by evidence which is so blatantly used to bolster the credibility of the complaining witness. The probative-prejudicial balance tips toward unfair prejudice when the Court considers the State's actual use of the evidence.

If possible, a court should determine whether the prejudicial details of certain evidence can be excluded or avoided while preserving the probative nature of the evidence. In *State v. Fleming*, 2019 MT

237, 397 Mont. 345, 449 P.3d 1234, this Court noted the Defendant's prior conviction for providing alcohol to minors may be admissible to show that he knew the risk of providing alcohol to minors but the details underlying that conviction, that it resulted in the minor's death, were extremely prejudicial. The State capitalizing on that advantage repeatedly to convict Fleming was wholly improper.

In Rowe's case, it was possible to allow H.B. to testify about the events that occurred in Fergus County without bringing in three additional witnesses to bolster his credibility.

Finally, the thorough and persistent use of this evidence through these witnesses warrants reversal for its cumulative effect. "While perhaps no single one of the errors discussed above would warrant reversal, cumulatively they were prejudicial to the extent that Smith did not receive a fair trial. *State v. Smith*, 2020 MT 304, ¶ 34, 402 Mont. 206, 476 P.3d 1178. *Smith* considered the use of charged-and-then-dismissed conduct of domestic violence. This Court recognized that a single mention of that conduct or those charges may not have been sufficient to warrant reversal. However, the State's unbridled

reliance on that evidence supercharged its prejudicial nature. *Id.*

Given the use and totality of the evidence introduced by the State on the Fergus County incident, no amount of cautionary instruction could cure the prejudice Rowe suffered. This Court should reverse on this issue alone.

B. *Mens Rea* Jury Instructions

This Court has repeatedly held that the offense of sexual assault requires the conduct-based instruction of "knowingly." *State v. Gerstner*, 2009 MT 303, ¶ 29, 353 Mont. 86, 219 P.3d 866. In 2009 - over 10 years before Rowe's trial, this Court explicitly held: "The offense of sexual assault requires the accused knowingly make sexual contact with another. It is the particularized conduct of making sexual contact that makes the statute criminal." *Gerstner*, ¶ 29. This Court specifically rejected Gerstner's argument that sexual assault criminalized a specific result. In response, this Court concluded that a result-based instruction

> would have decreased, rather than increased the State's burden of proof. To convict under the given instruciton that a person acts knowingly when he is aware of his conduct, the jury was required to determine Gerstner knew that his

> admitted contact was sexual. Had the jury been instructed that, to convict, Gerstner only had to be aware of the high probability that the contact was sexual in nature, the State's burden of proof would have been lessened.

Gerstner, ¶ 31.

In light of this clear holding, and the unequivocal ruling that the conduct based definition lessens the State's burden, the court's instruction in Rowe's case is both legally incorrect and prejudicial to Rowe.

That the instruction is offered in the disjunctive is irrelevant. Jury instructions that relieve the state of its burden to prove each element of an offense violate the defendant's right to due process. *State v. Miller*, 2008 MT 106, ¶ 11, 342 Mont. 355, 181 P.3d 625. Instruction 16 provided the jury with two alternatives to convict. "A person acts knowingly when the person is aware of his or her conduct, or when the person is aware there exists a high probability that the person's conduct will cause a specific result." (Appendix C). Rowe's counsel offered the legally correct instruction and repeatedly argued for its use, but it was rejected by the court.

The court should define "knowingly" for offenses that criminalize

particularized conduct as an awareness of one's conduct. *See State v. Lambert*, 280 Mont. 231, 236, 929 P.2d 846, 849 (1996). For the offenses that do not describe particularized conduct but instead the result of conduct, "knowingly" should be defined as an awareness of the high probability that the result will be caused by a person's conduct. *Lambert*, at 236. Applied to sexual offenses, the high probability (result-based) definition is less demanding and less burdensome for the State to prove than awareness or actual knowledge. Accordingly, this Court has repeatedly approved of the "conduct-based" knowingly instruction for sexual offenses. *State v. Deveraux*, 2022 MT 130, ¶ 33, 409 Mont. 177, 512 P.3d 1198 (citing *State v. Harrington*, 2017 MT 273, ¶ 16, 389 Mont. 236, 405 P.3d 1248)

Given both the clear law and the well established recognition that the result-based definition lowers the State's burden of proof, the instruction given in Rowe's case is constitutionally deficient and warrants reversal.

C. Rowe's Personal Presence

Both the United States Constitution and the Montana

Constitution guarantee a criminal defendant the right to be personally present at all critical stages of trial. *State v. Bekemans*, 2013 MT 11, ¶ 25, 368 Mont. 235, 293 P.3d 843 (citing *State v. Charlie*, 2010 MT 195, ¶ 40, 357 Mont. 355, 239 P.3d 934). "A critical stage is 'any step of the proceeding where there is potential for substantial prejudice to the defendant.'" *Bekemans*, ¶ 25 (quoting *Charlie*, ¶ 40) (citing *State v. Matt*, 2008 MT 444, ¶ 17, 347 Mont. 530, 199 P.3d 244 (overruled on other grounds)).

In Rowe's case, the court deliberately informed defense counsel she did not need to contact her client when the court wished to discuss the length of the deliberation and whether to excuse the jury so some could attend a Christmas concert. (Dec. 15, 2021, Tr. at 129). During the exchange, the jury was present, the State was present, the judge was present, as was defense counsel. The proceeding apparently arose in response to a jury question "about how late to stay. . . ." (Id. at 130). Much of the proceeding was the judge addressing the jury directly and the jury speaking with the judge. In *State v. Northcutt*, 2015 MT 267, ¶ 18, 381 Mont. 81, 358 P.3d 179, a judge entered the jury room and

interacted with the jury about what it wanted for dinner while it was deliberating. This was found to be a critical stage and a violation of the defendant's constitutional right to be present.

This is in contrast to *State v. Godfrey*, 2009 MT 60, 349 Mont. 335, 203 P.3d 834, in which this Court found no violation of the right when Godfrey was not present for an in-chambers meeting to address inquiries from the jury during deliberations. *Godfrey*, ¶¶ 26-38. *Godfrey*, however, is fact dependent. This Court noted that at Godfrey's trial, the court and counsel met six times to discuss ten of eleven jury inquiries that primarily requested small segments of trial testimony. Additionally, unlike *Godfrey* where the conferences occurred outside the presence of the jury, the proceeding in Rowe occurred in front of the jury with the court and the jurors essentially engaged in a discussion and the court providing the jury with an "extra admonishment." (Dec. 15, 2021, Tr. at 135).

It is difficult to conceptualize the proceeding that occurred in Rowe's case as not being a critical stage, especially since his counsel objected on the grounds that the court's proposed action was not "fair to

the defendant." (Dec. 15, 2021, Tr. at 135). The stage was critical enough that *everyone* was there–*except* Rowe.

Guidance can be found in the Rule 43 of the Federal Rules of Criminal Procedure, which negates the need for a defendant's presence during a conference or hearing on legal questions. Assuming this Court would apply the same rule, it does not mean what occurred in Rowe's case was simply a conference or hearing on a legal question. The key difference was the presence of the jury and the interaction between the jury and the court. In *United States v. Nelson*, 570 F.2d 258 (8th Cir. 1978), the Eight Circuit held that Rule 43 requires the presence of the defendant at every stage of trial, including presence during communication between the trial court and the deliberating jury."

Rowe would not be raising this claim on appeal had the conference occurred outside the presence of the jury. That example would be more akin to the traditional conferences on questions of law and responses to jury questions. However, it is because this discussion occurred in front of and with the jury, that Rowe should have at least been given the option to be personally present. *See e.g., United States*

v. Parker, 836 F.2d 1080, 1084 (8th Cir. 1987) (finding no prejudice resulting from the defendant's absence when the topic was a question of law, defendant was represented by counsel, and the entire matter was conducted outside the presence of the jury).

In Rowe's case, the discussion affected the framework of the trial and the jury's deliberations. The jury was allowed to engage in a discussion with the court and overhear discussions between counsel. Rowe was denied any direct input into the questions posed during this conference. It would be a different story if Rowe had voluntarily absented himself or had the option to be personally present. The record, however, demonstrates the court deprived him of such a choice. His rights were violated in this instance and reversal is warranted.

D. Trivialization of Standard of Proof

Before a defendant can be convicted in a criminal case, the jury must "reach a subjective state of *near certitude* of the guilt of the accused." *Jackson v. Virginia*, 443 U.S. 307, 315 (1979) (emphasis added). "The process of adjudicating guilt is a major and meticulous undertaking. People do not, 'every single day,' bear the solemn task of

examining evidence and determining an accused's guilt. The comparison – to reflexive, quotidian decisions like 'getting up,' 'having a meal,' and 'travel[ing] to court' . . . is flagrant and seriously distorts the standard [of proof]." *United States v. Velazquez*, 1 F.4th 1132, 1138 (9th Cir. 2021).

Here, the prosecutor's comments during voir dire and in closing do not fall to the level of every day decisions, but they do run afoul of other analogies that have been heavily criticized by courts, specifically for trivializing the standard of proof. In *Velazquez*, the Ninth Circuit noted examples by the prosecutor in Velazquez's case

> are worse and involve less deliberation, scrutiny, and advice-seeking than those that have already been heavily criticized, such as "choosing a spouse, a job, a place to live, and the like." *Victor v. Nebraska*, 511 U.S. 1, 24, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994) (Ginsburg, J., concurring) (quoting Fed. Jud. Ctr. Pattern Crim. Jury Instr. No. 21 (1987)). A committee of distinguished federal judges, reporting to the Judicial Conference of the United States, had criticized formulations containing such examples because they "generally involve a very heavy element of uncertainty and risk-taking" and are thus "wholly unlike the decisions jurors ought to make in criminal cases." *Id.* Justice Ginsburg echoed these concerns, calling such examples "unhelpful." *Id.* So have we, describing the concerns as "well stated." *United States v. Jaramillo-Suarez*, 950 F.2d 1378, 1386 (9th Cir. 1991), as amended on denial of

> reh'g (Dec. 16, 1991). State courts are also in accord with this view. See, e.g., [*People v.*] *Nguyen*, 46 Cal. Rptr. 2d 840, 844-45 [CA Ct. App. 1995]; *Holmes v. State*, 114 Nev. 1357, 972 P.2d 337, 343 (Nev. 1998) ("[P]rosecutorial commentary analogizing reasonable doubt with major life decisions such as buying a house or changing jobs is improper because these decisions involve elements of uncertainty and risk-taking and are wholly unlike the kinds of decisions that jurors must make in criminal trials."). Commentators, too. See, e.g., Michael D. Cicchini, Instructing Jurors on Reasonable Doubt: It's All Relative, 8 Cal. L. Rev. Online 72, 74-75 (2017).

Velazquez, 1 F.4th at 1138 n.2.

In Rowe's case, the court instructed the venire that "[p]roof beyond a reasonable doubt is proof of such a convincing character that a reasonable person would rely and act upon it in the most important of their affairs." (Dec. 13, 2021 Tr. at 31). The examples used and elicited by the prosecutor in voir dire promoted the misconception that investing in a business, getting married, or buying a home are equivalent to the proof needed to convict Rowe beyond a reasonable doubt. As noted above, these analogies involve risk-taking, a process which is contrary to the near certainty needed for a criminal conviction.

In closing, defense counsel attempted to move the bar back to a more legally sufficient analogy by comparing the "magnitude of

evidence" needed to convict Rowe with the "evidence you would require to amputate [your child's] arm." (Dec. 15, 2021, Tr. at 115-116). However, by then, the damage had been done. The proper time for defense counsel to correct the prosecutor's misconduct was during voir dire when the state was in the process of trivializing the burden of proof.

Despite the absence of an objection, this Court should review the prosecutor's comments under the plain error doctrine. Minimizing the burden of proof in a criminal case substantially affected Rowe's fundamental rights and failing to review the error leaves unsettled the fundamental fairness of the proceeding and compromises the integrity of the judicial process. *State v. Taylor*, 2010 MT 94, ¶ 12, 356 Mont. 167, 231 P.3d 79.

If the Court declines plain error review, the claim should be viewed through the lens of *Strickland v. Washington*, 466 U.S. 668 (1984), i.e. ineffective assistance of counsel. To succeed on such a claim, Rowe must establish that his counsel erred. He must also establish prejudice resulting from that error.

Failing to object to comments that undermine the proof beyond a reasonable doubt standard, the very underpinning of the criminal justice system, falls well short of counsel's *Sixth Amendment* duties and professional norms. The prejudice resulting from the error cannot be underestimated. "[A] prosecutor, as a representative of the government, wields considerable influence over a jury." *Velazquez*, 1 F.4th at 1137 (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)). "Because jurors can be swayed by such mischaracterizations, a prosecutor must be especially wary of making any comments that could, in effect, reduce its burdens of proof." *Id.* Similarly, defense counsel must guard and correct any such mischaracterizations.

The prejudice to Rowe in this instance is akin to the prejudice that arises in the deficient "knowingly" instruction that was given by the court. The characterizations by the state impermissibly and unconstitutionally diluted the state's burden and made it easier to convict Rowe. There can be no greater prejudice.

Rowe respectfully requests this Court reverse on this issue.

Conclusion

In light of the individual errors and the totality of the errors in Rowe's case, he respectfully requests this Court vacate his conviction and remand his case to the district court for a new trial.

Respectfully submitted this 27th day of March 2023.

/s/ Colin M. Stephens
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Certificate of Compliance

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that the Appellant's Opening Brief is printed with proportionately-spaced Century Schoolbook typeface of 14 points; is double-spaced except for lengthy quotations or footnotes; and does not exceed 10,000 words. The exact word count, as calculated by my WordPerfect software and excluding tables and certificates, is 9,496.

Dated this 27th day of March 2023.

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CERTIFICATE OF SERVICE

I, Colin M. Stephens, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 03-27-2023:

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