IN THE SUPREME COURT OF THE STATE OF MONTANA
CAUSE NO. DA 22-0043

STATE OF MONTANA,

Plaintiff and Appellant,

and

CORY ANN RUKER,

Defendant and Appellee.

Appellant/Defendant's Opening Brief

On Appeal from the District Court of the First Judicial District
of the State of Montana, In and For the County of Lewis and Clark

Before the Honorable Michel Menahan
Cause No. DC-25-2020-277

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STATEMENT OF THE ISSUES

1. The District Court erred by granting the State's request, over defense's objections, on the first day of trial to allow a previously undisclosed and unnamed witness to testify.
2. The District Court erred by allowing the newly disclosed witness to testify via Zoom, over Defense's objection, without making a case-specific determination that doing so was necessary to further an important public policy.

STATEMENT OF THE CASE

On July 19 & 20, 2021 a jury trial was held in the Montana First Judicial District Court, for Lewis and Clark County, with the Honorable Michael Menahan presiding. The jury found Cory Ann Rucker ("Cory") guilty of Count I: Exploiting an Older Person and Count III: Theft of Identity (Doc. 98)[1]. On December 2, 2021 a sentencing hearing was held and Cory was sentenced to the Montana Department of Corrections for a period of 10 years with 5 years suspended for Count I, and 10 years with 5 years suspended for Count III, to run concurrently (Doc. 98). Final judgment was entered on December 7, 2021 (Doc. No. 98). Cory filed a Notice of Appeal on January 25, 2022. (Doc. No. 101). This appeal ensued.

[1] Count II was in the alternative to Count I.

Cory appeals only her conviction on Count III: Theft of Identity. On the first day of trial, prior to voir dire, the State disclosed they had recently discovered they had no foundational witness for a key piece of evidence and requested they be able to call the newly disclosed, as yet unnamed witness, and that the witness be allowed to testify via Zoom. Cory objected on the grounds the State failed to provide the required notice of the witness and allowing testimony via Zoom violated the Sixth Amendment Confrontation Clause. Ultimately, the district court overruled Cory's objection, and allowed the witness to testify. This error lead directly to Cory's conviction on Count III.

SUMMARY OF ARGUMENT

The State failed to disclose a key foundational witness prior to trial, in violation of their duties under Mont. Code Ann. § 46-15-322, and Cory's right to due process. Further, the newly disclosed witness was allowed to testify via Zoom, violating Cory's right to confront the witnesses against her under the Sixth Amendment to the United States Constitution and Article II, Section 24 of the Montana Constitution.

Moreover, these errors were not harmless, as the State had no other witness to provide the testimony provided by the newly disclosed witness. Without the testimony of the undisclosed witness, the State would not have been able to present any evidence to the jury as it relates to Count III.

STATEMENT OF FACTS

At some point in October 2019, Cory's ailing mother, Anna Barbe ("Anna"), moved from Townsend to Helena to live with Cory. (District Court Record ¶ 350). This move would last less than four months but during that time, a large amount of unauthorized withdrawals were made from Anna's bank accounts and someone applied for and used a Capital One credit card in Anna's name, without her permission. (DCR ¶¶ 36-38). This gave rise to an investigation by the Helena Police Department, who ultimately targeted Cory as the perpetrator. (DCR ¶¶ 35-38). The State initially filed an Information against Cory alleging only Count I: Exploitation of an Older Person or in the alternative Count II: Theft. (DCR ¶¶ 12-14; Doc. No. 4). The possible witnesses identified by the State in the Information did not contain any Capitol One representative. (DCR ¶¶ 13-14; Doc. No. 4). Later, the State moved the court to allow the filing of an Amended Information to add Count III: Theft of Identity, a violation of Mont. Code Ann. § 45-6-332, alleged to have occurred on or about January 22, 2020, through March 23, 2020, in Lewis and Clark County. (DCR ¶ 36; Doc. No. 17). The facts alleged to support this additional count relied exclusively on records received from Capitol One in response to an investigative subpoena from Helena Police Department. (DCR ¶¶ 36-37; Doc. No. 15). The State alleged probable cause based upon the credit application being completed in Anna's name and Social Security Number but including Cory's email and physical address.

(DCR ¶ 36; Doc. No. 15). This information could only be found on the credit application. Further, the State's list of possible witnesses contained within the Amended Information did not identify any Capitol One representative or the intention to seek out a Capitol One representative to testify at trial. (DCR ¶ 43-44; Doc. No. 17).

On June 02, 2020, Cory filed Defendant's Initial Motion and Request for Discovery, requesting among other things "the names, addresses, and statements of all persons whom the prosecutor may call as witnesses in its case-in-chief." (DCR ¶¶ 19-21; Doc No. 8). Cory's request laid out the requirements contained in Mont. Code Ann. § 46-15-322 and *Brady v. Maryland*, 373 U.S. 83 (1963). *Id*. Thereafter, the district court issued its Order on Defendant's Initial Motion and Request for Discovery, ordering among other things that the State disclose "the names, addresses, and statements of all persons whom the prosecutor may call as witnesses in its case-in-chief." (DCR ¶¶ 24-25; Doc. No. 10).

On July 1, 2021, Cory filed her Witness List, disclosing all witnesses she may have called at trial. (DCR ¶¶ 89-90; Doc. No. 50). The docket shows the State never filed a standalone witness list; however, in addition to those on the Amended Information, the State did, on June 28, 2021, file a Motion to Endorse Additional Witnesses on Information, identifying six more witnesses but no Capitol One representative or intent to seek a Capitol One representative. (DCR ¶¶ 68-69; Doc.

No. 30). On July 1, 2021, the district court granted the State's Motion. (DCR ¶ 82; Doc. No. 43) In addition to its motion, on July 1, 2021, the State filed twelve subpoenas for possible witnesses, but none for a Capitol One representative. (Doc. No. 31-42)

On July 16, 2021, on the Friday before the Monday trial, the State filed a subpoena for "Capital One (USA), N.A., (Custodian of Records)." (DCR ¶ 204; Doc. No. 74). On the same day, the State filed an Opposed Motion to Continue Trial pointing to a possible shortage of court reporters as making it necessary to continue. (DCR ¶¶ 136-138; Doc. No. 72).

On Monday, July 19, 2021, at the outset of the first day of trial, the State addressed the district court stating "it came to the State's attention during trial preparations last week that we did not have endorsed a custodian of record for Capital One Bank. There is an application which was received through an investigative subpoena from Capital One that the State had intended to introduce." (Tr. 6:16-21). The State then put two issues before the court (1) if the testimony from the unnamed Capitol One representative would be allowed at all, and (2) if allowed, would the unnamed witness be allowed to testify via Zoom. (Tr. 7:3-11) Cory objected to both allowing the unnamed witness to testify and allowing the witness testimony to occur via Zoom. (Tr. 8:20-25, 9:1-6).

The State argued that they were not in violation of their duty to disclose, citing to two precedential cases from the 1960s, *State v. Romero*, 146 Mont. 77, 82, 404 P.2d 500, 502 (1965) and *State v. Olsen*, 152 Mont. 1, 11, 445 P.2d 926, 929 (1968). (Tr. 7:17-25, 8:1-4). While the State acknowledged the Zoom issue was a "sticky issue with the Supreme Court these days," they argued the circumstances in Cory's case were distinguishable because Capitol One had a policy not to allow employee travel to testify, and expected testimony was to be confined to laying the foundation for introducing the aforementioned credit application. (Tr. 8:5-12). The State in particular argued this Court's precedent from *State v. Mercier*, 2021 MT 12, 403 Mont. 34, 479 P.3d 967, did not apply or was distinguishable from the facts in Cory's case. (Tr. 8:13-16).

Cory argued that the State's filing of the Capitol One subpoena "late on Friday" before the Monday trial date denied her right to be advised of the witness against her. (Tr. 8:21-25, 9:1-6). Further, Cory argued that allowing the appearance via Zoom violated her right to confront and cross-examine witnesses against her. *Id.*

The district court overruled Cory's objections and granted the State leave to call the unnamed witness and allow the witness to testify via Zoom. (Tr. 9:7-19). The district court reasoned:

"Okay. So I'll grant the State's request and allow them to call a foundational witness, stressed on the foundation. This is just laying foundation for other testimony.

So, I think that unlike a crime lab employee, who's actually testing perhaps drugs or testing a person's blood who is offering substantive testimony, this is foundation testimony which the defense in most instances would nearly stipulate to, which they are not here.

So, I'm not going to have the State of Montana have to pay for a witness to fly here from the State of Illinois just to lay foundation for some financial records, so the objection is overruled."

(Tr. 9:7-19).

On the second day of trial, the State called the representative from Capital One, Jeremy Bloxson ("Jeremy"), based upon the record, this is when Cory first learned of the witness' actual name. (Tr. 252:23-25).

On direct examination, Jeremy testified to several facts:

He has been a fraud investigator for Capitol One for four years;
He is a certified fraud examiner and a certified financial crimes investigator;
He works with law enforcement;
He investigates subpoenas from law enforcement;
He reviewed documents specific to Anna Barbe;
He identified State's Exhibit 10 as being a credit card application and testified that application was specific to Anna Barbe;
He testified that application information includes name, date of birth, social security number, email address, phone number and physical address;

He identified State's Exhibit 11 as being credit card statements specific to Anna Barbe;
He testified that the address on the account was 862 Abbey Street, Helena, Montana 59601;
He identified State's Exhibit 12 as being a letter from Capitol One to the "true named party" advising them the fraudulent account was being removed from their credit;
He testified that Capitol One notified Anna Barbe of the fraud on May 5, 2021.

(Tr. 253:1-258:7)

On cross-examination, Jeremy admitted that it was "hard to know" who actually completed the credit card application. (Tr. 258:12-24).

On re-direct, Jeremy testified that the charges listed on the credit statement contained only charges within the State of Montana, and in particular at Wal-Mart Supercenter and the Grand Bar in Roundup, Montana. (Tr. 259:5-18).

After Jeremy's testimony was complete, the State recalled an earlier witness, stating "…in light of the exhibits we just introduced, the State would like to recall Detective (Nathan) Casey just to speak to that portion of the investigation." Thereafter, Detective Casey provided testimony based upon the exhibits previously introduced by the undisclosed Capitol One witness' testimony. (Tr. 260:18-264:1). Specifically, Detective Casey was able to contained in the State's exhibits and compare that information to both Anna and Cory's information. *Id*.

Detective Casey was the State's last witness, following the Defense's case in chief, and closing arguments, the jury convicted Cory of Count I and Count III.

STANDARDS OF REVIEW

This Court "exercises plenary review of constitutional questions and review a district court's interpretation of the Sixth Amendment to the United States Constitution and Article II, Section 24 of the Montana Constitution de novo." *State v. Mercier*, 2021 MT 12, ¶ 11, 403 Mont. 34, 479 P.3d 967; *State v. Bailey*, 2021 MT 157, ¶ 17, 404 Mont. 384, 489 P.3d 889.

This Court reviews other legal conclusions of law for correctness subject to de novo review. *City of Missoula v. Duane*, 2015 MT 232, ¶ 10, 380 Mont. 290, 355 P.3d 729. Evidentiary rulings are reviewed for an abuse of discretion. *Id.* 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. Mackrill*, 2008 MT 297, ¶ 37, 345 Mont. 469, 191 P.3d 451.

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT ALLOWED TESTIMONY BY A PREVIOUSLY UNDISCLOSED AND UNNAMED WITNESS.

In Montana prosecutors are statutorily required to provide the defense with certain information, relevant to this case:

> "Upon request, the prosecutor shall make available to the defendant for examination and reproduction the following material and information within the prosecutor's possession or control:

> (a) the names, addresses, and statements of all persons whom the prosecutor may call as witnesses in the case in chief[.]"

Mont. Code Ann. § 46-15-322(1).

In the present case, the defense requested and the district court ordered the disclosure of the names of all witnesses the State intended to call in their case in chief. This leaves little doubt the State failed to meet this statutory requirement. First, the State did not disclose the Capitol One witness, or the intent call any witness from Capitol One, much less disclose who that witness was, prior to trial. There was no disclosure in the initial Information, the Amended Information, the Motion to Endorse Additional Witnesses on Information, or in any of the subpoenas prior to July 16, 2021. Moreover, the actual witness' name was not known until he was called to testify, on the second day of trial.

At trial, the State argued *State v. Romero* and *State v. Olsen* supported their contention that the duty to disclose was not violated by the circumstances of the present case. However, this belief was misplaced, as both cases are distinguishable and support Cory's position.

In *State v. Romero*, five days before trial, the prosecutor motioned to endorse additional witnesses, including one identified as Raymond Wise, whose actual name turned out to be Raymond E. Wise, Jr. More critically, the defense counsel made no objection to Mr. Wise's testimony during the trial, unlike the present case. *Romero*, at 82, 404 P.2d at 502.

"The failure of the county attorney to endorse the name of a witness on the information was not error where the failure was inadvertent and the county attorney **timely informed** the court-appointed counsel for the defendant of the omission and of the intention to move the court for an order permitting the endorsement of the witness on the information." *Id.* (emphasis added) citing *State v. Johnston*, 140 Mont. 111, 367 P.2d 891 (1962). While it is arguable the State's failure to disclose was inadvertent, it was certainly not timely, failing to meet the *Romero* standard and establishing error.

Here, the State did not give five days' notice, it gave no notice at all, providing the defense with no opportunity to interview the witness or prepare for the witnesses testimony. Further, unlike defense counsel in Romero, Cory did object to the State's failure to provide adequate notice of the witness prior to trial.

State v. Olsen also fails to provide support for the State's actions, rather it again supports Cory's position on appeal. *State v. Olsen* involved the analysis of Section 94-6208, R.C.M.1947's requirement that known witnesses be endorsed on the information at the time of its filing, this requirement is now found in Mont. Code Ann. § 46-11-401(2). *Olsen*, at 11, 445 P.2d at 932. In *State v. Olsen*, the prosecutor asked to endorse a new witness on the information, based upon surprising testimony from a previously disclosed witness. *Id*. Unlike the present case, the prosecutor in *State v. Olsen* had no knowledge of the need to use the undisclosed witness or any

reason to believe they needed the undisclosed witness, until testimony from another witness lead to the need. *Id.*

In the present case, the State always intended to prove Count III, and the only tangible evidence upon which testimony could be given was the credit card application (Exhibit 10), the credit card statements (Exhibit 11), and the letter from Capitol One to Anna (Exhibit 12) which could only be admitted after the foundation was laid by the undisclosed Capitol One witness. Thus, the State knew or should have known about the need for a Capitol One representative to establish the State's case, and should have sought out such a representative prior to the Friday before Monday's trial.

Allowing this untimely identification of a State's witness when the State should have known about the need for such a witness, properly disclosed the intent to call a witness from Capitol One and who that witness was well prior to trial, was an abuse of discretion by the district court. The State provided no good cause for the late disclosure and the district court arbitrarily and without employment of conscientious judgment by not making further inquiry into why the State failed to meet its statutory mandates and its own order.

This Court should set aside Cory's conviction on Count III because the district court abused its discretion and to not do so would be a further deprivation of Cory's right to due process. `

II. THE DISTRICT COURT ERRED AND VIOLATED CORY'S SIXTH AMENDMENT RIGHTS WHEN IT ALLOWED THE UNDISCLOSED WITNESS TO APPEAR VIA ZOOM, OVER THE DEFENSE'S OBJECTION.

At trial, the State argued the facts of the present case distinguished the present case from *State v. Mercier*, 2021 MT 12, ¶ 27, 403 Mont. 34, 479 P.3d 967 (finding error allowing a foundational witness to appear via two-way video). In particular the State argued the foundational nature of expected testimony by the undisclosed Capitol One witness and Capitol One's alleged policy of not allowing employee travel to testify distinguished the present case and justified a departure from this Court's precedent in *State v. Mercier*.

Both the State and Judge Menahan relied heavily upon the expected testimony's foundational nature, with Judge Menahan going so far as to imply the defense should have stipulated to the admittance of the evidence and stating "[T]his is just laying foundation for other testimony."

However, *State v. Mercier* forecloses any differentiation between foundational or other witnesses. Specifically, this Court in *State v. Mercier* stated:

> "The State urges that the nature of the testimony—foundational with no substantive force—weighs in favor of approving the video testimony. However, nowhere in the text of the Confrontation Clause is there language limiting the type of testimonial evidence to which the right to physical confrontation applies. See U.S. Const. amend. VI; Mont. Const. art. II, § 24; *State v. Clark*, 1998 MT 221, ¶ 22, 290 Mont. 479, 964 P.2d 766 (reversible error to allow a forensic report to be admitted by the written deposition of a technician absent the physical presence of the technician because neither the nature of the witness nor the

> evidence which may be entered based upon the witness's testimony impacts the right to confront the witness).”

State v. Mercier, 2021 MT 12, ¶ 27, 403 Mont. 34, 479 P.3d 967.

In *State v. Mercier*, this Court relied upon the reasoning in the U.S. Supreme Court’s opinion in *Maryland v. Craig*, 497 U.S. 836, 844, 110 S. Ct. 3157, 3162-63, 111 L. Ed. 2d 666 (1990). *Craig* summarized the purpose of the Confrontation Clause as "ensur[ing] reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding," a purpose that is fulfilled by "guarantee[ing] the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *Craig*, 497 U.S. at 844, 110 S. Ct. at 3162-63 (quoting *Coy v. Iowa*, 487 U.S. 1012, 1016, 108 S. Ct. 2798, 2801, 101 L. Ed. 2d 857 (1988)).

In *Craig* the U.S. Supreme Court set forth the "Craig standard" of necessity and reliability, which this Court adopted in *State v. Mercier*. *Mercier*, at ¶ 18. The Craig standard contains two prongs, both must be satisfied. *Id*. First it must be shown that denial of physical face-to-face confrontation is necessary to further an important public policy. *United States v. Carter*, 907 F.3d 1199, 1205-1206 (9th Cir. 2018). The second prong of the Craig analysis requires the district court to determine that reliability of the testimony is otherwise assured. *Carter*, 907 F.3d at 1206.

The first prong requires "something more than [] generalized findings" of policy concerns. *Coy*, 487 U.S. at 1021, 108 S. Ct. at 2803. "[A] defendant's right to 'physical, face-to-face confrontation at trial' may be compromised by the use of a remote video procedure only upon a 'case-specific finding' that [] the denial of physical confrontation 'is necessary to further an important public policy[.]'" *Carter*, 907 F.3d at 1208 (quoting *Craig*, 497 U.S. at 858, 110 S. Ct. 3170); see also *California v. Green*, 399 U.S. 149, 189, 90 S. Ct. 1930, 1951 (1970) (Harlan, J., concurring) (noting a criminal defendant's constitutional rights cannot be neglected merely to avoid "added expense or inconvenience"); *Carter*, 907 F.3d at 1208 (holding judicial economy and "added expense or inconvenience" is insufficient to extend *Craig*).

To satisfy *Craig's* second prong of reliability, the hallmarks of confrontation must be present—the non-physically present witness must be under oath and understand the seriousness of his or her testimony, be subject to cross-examination, and permit assessment of the witness's veracity by the factfinder. *Mercier*, at ¶ 21. In the present case, Cory does not dispute that *Craig's* second prong was likely satisfied, instead Cory contends that the district court erred when it did not did not make case-specific findings that the undisclosed witness' testimony would satisfy *Criag's* second prong of reliability.

Like the district court in *Mercier*, the district court in the present case focused upon the possible expense of having a witness from Capitol One travel to Montana to testify and like *Mercier*, this focus does not satisfy *Craig's* first prong and constitutes reversable error. The facts of the present case are even more compelling than those in *Mercier*, the State represented to the district court that Capitol One's policy prevented any travel by employees to testify. However, the State and district court merely accepted this response by Capitol One and did not press further or seek a further court order compelling Capitol One to comply with the subpoena. The bald acceptance of an alleged corporate policy cannot be enough to establish the impossibility or impracticability articulated by this Court in *City of Missoula v. Duane*, 2015 MT 232, ¶ 10, 380 Mont. 290, 355 P.3d 729, which standard was reaffirmed in Mercier, at ¶ 20. See *Duane*, at ¶ 20 ("simply stated it must be shown 'the personal presence of the witness is impossible or impracticable[.]'").

Even if the facts could show that the Capitol One witness' presence was impossible or impracticable so as to excuse the physical presence of the witness because such exception was "necessary to further an important public policy," the district court failed to make case-specific findings supporting such an exception. See *Craig*, 497 U.S. at 850, 110 S. Ct. at 3166; *Mercier*, at ¶ 20; see also *Carter*, 907 F.3d at 1208 (quoting *Craig*, 497 U.S. at 858, 110 S. Ct. 3170) ("[A] defendant's right to 'physical, face-to-face confrontation at trial' may be compromised by the use

of a remote video procedure only upon a 'case-specific finding' that [] the denial of physical confrontation 'is necessary to further an important public policy[.]'").

Both the district court in Mercier and district court for the case at bar pointed to the potential cost of having the witnesses travel to testify. *Mercier*, at ¶ 26. The *Mercier* Court determined this was not sufficient to satisfy the Criag test or meet the district court's requirement to make case-specific findings that the denial of physical confrontation was necessary to further an important public policy. *Mercier*, at ¶¶ 26 & 28.

The present case is on all fours with *State v. Mercier*, and like *Mercier* the facts of the present case constitute reversible error. The district court erred by allowing Zoom testimony, over Cory's objection when it expressed the opinion that foundational testimony holds a lower place in the hierarchy of Constitutional protections and further erred by making a general conclusion that the additional cost of having a witness travel to Montana to testify justified dispensing with in-person testimony by the witness.

III. THE DISTRICT COURT'S ERRORS WERE NOT HARMLESS.

When reviewing errors, this Court first determines if the error was a "structural" or "trial" error. *State v. Van Kirk*, 2001 MT 184, ¶ 41, 306 Mont. 215, 32 P.3d 735. "Structural" errors are those that "'affect [] the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" *Van Kirk*, ¶

38 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S. Ct. 1246, 1265, 113 L. Ed. 2d 302 (1991)). Structural errors are reversible and require no additional analysis for prejudice. *Van Kirk*, ¶ 39. Conversely, trial errors, which typically occur during the presentation of the case to the jury, are "amenable to qualitative assessment by a reviewing court for prejudicial impact relative to the other evidence introduced at trial" and are subject to harmless error review. *Van Kirk*, ¶ 40 (citing Montana's harmless error statute, Mont. Code Ann. § 46-20-701(1)); *Mercier*, at ¶ 30.

The errors in the present case constitute a constitutional deprivation of the Cory's confrontation right and a trial error subject to harmless error review. *Mercier*, at ¶ 30. The State, as the "beneficiary of a constitutional error[,]" bears the burden of proving that the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L. Ed. 2d 705 (1967). The "assessment of harmlessness cannot include consideration of whether the witness' testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation[,]" and instead harmlessness must "be determined on the basis of the remaining evidence." *Coy*, 487 U.S. at 1021-22, 108 S. Ct. at 2803. Reviewing court's consider "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, [and] the presence or absence of evidence corroborating or contradicting the testimony of the witness on material

points[.]" *Mercier*, at ¶ 30 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 1438, 89 L. Ed. 2d 674 (1986)). Overwhelming evidence absent the tainted evidence in favor of guilt will not alone uphold a conviction. *Van Kirk*, ¶ 43 (overruling prior decisions that analyzed whether there was "overwhelming evidence" to support the conviction because such a test is a subjective inquiry that weighs the relative volume of the evidence presented). This Court instead has employed the more restrictive "cumulative evidence" test, which "looks [] to whether the fact-finder was presented with admissible evidence that proved the same facts as the tainted evidence proved." *Van Kirk*, ¶ 43.

For instance, this Court in *State v. Mercier* examined the impact of two photographs on the State's evidence after determining they should be excluded because the foundational witness was improperly allowed to testify via two-way video. *Mercier*, ¶ 32. This Court determined that the State had separate and distinct evidence for the first count against Mercier and affirmed Mercier's conviction on that count, holding the district court's error was harmless for the first count. *Id*. However, when this Court applied the same test to a count of Tampering with Evidence against Mercier this Court held the error was not harmless because the State presented no other testimonial or physical evidence in support of that count. *Mercier*, at ¶ 33. Therefore, for the Tampering with Evidence count, the State failed to meet their burden of showing beyond a reasonable doubt that the error did not

prejudice the defendant and was harmless, leading this Court to set aside Mercier's conviction for Tampering with Evidence. *Id*.

Like the Tampering with Evidence count in *Mercier*, in the present case, the State had only the evidence admitted based upon testimony by the undisclosed Capitol One witness. No other witness provided independent testimony to support Count III, and the State only recalled Detective Casey after the Capitol One witness provided the foundation to admit the physical evidence upon which Detective Casey could provide analysis. The State had no other witness which did or could have provided the foundation to admit the State's evidence for Count III, and without that evidence, Detective Casey could not have provided the testimony which propped up the State's case.

Further, the Capitol One witness, Jeremy Bloxson, provided more than simple foundation to admit the credit card application. First, the State spent time establishing Jeremy's bona fides, presenting the jury with an experienced fraud investigator, who has for years been working with law enforcement to prosecute fraud, making Jeremy's testimony more influential than a mere records custodian. The State made use of the likely sway that Jeremy's credibility had on the jury, having him testify not just that the proposed exhibits were accurate copies of records routinely kept in the course of business by Capitol One, which would have been enough to establish the foundation for admittance. Instead, the State used Jeremy to

establish the records were definitively associated with Anna, the alleged victim. Specifically, the State asked Jeremy whether the credit card application and credit card statements were specific to Anna, which Jeremy testified that they were. The State also had Jeremy identified the address provided on the credit application, a fact the State leaned on heavily by identifying the address as belonging to Cory. Jeremy also testified that Capitol One had determined the account to constitute fraud, foreclosing, in the jury's mind, the possibility that Anna had opened the account herself. Finally, on redirect, Jeremy was asked to testify as to the locations of the various charges made on the fraudulent credit card, a key fact for the State's case. The State may have intended Jeremy's testimony to be foundational only, but it stretched well beyond what was required to admit the State's exhibits and provided the only evidence to support the State's case as it relates to Count III.

The State cannot show the trial errors in this case were harmless beyond a reasonable doubt and this Court should set aside Cory's conviction on Count III.

CONCLUSION

The District Court erred by allowing a previously undisclosed and unnamed witness to testify, when the defense had no prior notice of the State's intent to call the witness and only learned of the witness' actual name at the time the witness was called to testify. The District Court further erred by allowing the previously undisclosed witness to testify by Zoom, despite the defense's objection. These errors

were not harmless and this Court should set aside Appellant's conviction for Count III: Theft of Identity.

DATED this 8th day of April 2023.

PEACE LAW GROUP, LLC

Rufus I. Peace, *Attorney for Appellant/Defendant*

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this Appellant's Opening Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for footnotes, quoted, and indented material; and that the word count calculated by Microsoft Word Professional Edition is 5,115 words, excluding the Table of Contents, Table of Authorities, Certificate of Service, and Certificate of Compliance.

DATED this 8th day of April 2023.

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CERTIFICATE OF SERVICE

I, Rufus I. Peace, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 04-10-2023:

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