

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ESANDRO ROMAN RODRIGUEZ,

Defendant and Appellant.

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**BRIEF OF APPELLANT**

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

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## **STATEMENT OF THE ISSUES**

1. Whether there was sufficient evidence to convict Esandro Rodriguez of aggravated burglary by accountability, given the ringleader's conduct at issue occurred *outside* the home, not inside.

2. Alternatively, whether Esandro's accountability convictions for both aggravated burglary and assault with a weapon violated double jeopardy.

## **STATEMENT OF THE CASE**

Based on events that allegedly occurred September 27, 2019, the State charged Esandro Rodriguez with six criminal counts. (District Court Documents (Docs.) 2, 47.) Four of these counts were charged by accountability and were based on the actions of the primary instigator, Jesse Daniels. (Doc. 47.) Those accountability-based charges included assault with a weapon of William Dayrider, assault with a weapon of Leah Gray, aggravated burglary, and misdemeanor assault. (Doc. 47.) The other two counts which the State did not charge by accountability were aggravated kidnapping of William and aggravated kidnapping of Amanda Brown. (Doc. 47.)

After a five-day trial, the jury acquitted Esandro of aggravated kidnapping of William. (Doc. 162.) The District Court also dismissed the misdemeanor assault charge for insufficient evidence. (4/26/2021–4/30/2021 Trial Transcript (Trial Tr.) at 1006–07.) The jury found Esandro guilty of the remaining direct charge for the aggravated kidnapping of Amanda, and the three remaining charges where he was held responsible for Jesse’s conduct: two counts of assault with a weapon and one count of aggravated burglary. (Doc. 162.) The predicate offense for the aggravated burglary was Jesse’s assault with a weapon against Leah, which the State mistakenly claimed occurred inside her home. (Trial Tr. at 1471, 1475; Doc. 161, Instr. 25.)

The District Court sentenced Esandro to the Montana State Prison for a combined term of 40 years with 15 suspended. (Doc. 182 at 3.) That included 10 years straight for aggravated kidnapping, plus 10 years with five suspended for each of the remaining three counts, all running consecutively. (Doc. 182 at 3–4.) Esandro filed a timely notice of appeal. (Doc. 186.)

## **STATEMENT OF THE FACTS**

On the night of September 27, 2019, at around 10 or 11 p.m., Jesse and his girlfriend, Lauren Aviles, set out with Esandro to find Michael Crawford, who owed them \$400. (Trial Tr. at 762.) Lauren drove the three toward Michael's mobile home in Countryside Village. (Trial Tr. at 527–28.) As they approached the mobile home park, they spotted Michael, his girlfriend, Amanda, and his mother's partner, William. (Trial Tr. at 560–61.)

Lauren pulled up beside Michael, Amanda, and William. (Trial Tr. at 561, 745.) Jesse demanded that Michael give them the money he owed them. (Trial Tr. at 561, 746, 762.) Esandro did not say anything to Michael. (Trial Tr. at 746.) Michael panicked and took off running back towards his house. (Trial Tr. at 561, 747, 762.) Amanda and William also ran off, but Jesse and Esandro allegedly chased them down and made them get into Lauren's car. (Trial Tr. at 561–62.)

Jesse held William at gunpoint in the car, and Esandro allegedly pulled a gun and held it to Amanda's side. (Trial Tr. at 562–64, 663.) Lauren then drove the group to Michael's mobile home. (Trial Tr. at



562.) As they were driving, Jesse handed a phone to William and ordered him to try and get ahold of Michael. (Trial Tr. at 668, 677.)

At the home, Michael's mother, Leah Gray, was standing on the porch smoking a cigarette. (Trial Tr. at 665, 749, 779.) Numerous people lived in the home, including Michael, Leah, Amanda, William, and several others. Michael arrived and ran inside to hide, while Leah remained on the porch. (Trial Tr. at 779–80.)

Lauren pulled her car up to the home moments later, and Jesse, Esandro, Amanda, and William got out of the car. (Trial Tr. at 583.) Jesse brought William onto the porch and up to the front door, while Esandro and Amanda waited several feet behind them. (Trial Tr. at 665.)

Jesse angrily demanded that Leah tell him where Michael was. (Trial Tr. at 665, 782.) When she said she did not know, Jesse told her he “wasn't playing.” (Trial Tr. at 782.) Jesse pulled out his gun and pressed it to Leah's stomach. (Trial Tr. at 749, 783.)

While Esandro remained silently in the background with Amanda, Jesse barged in through the doorway of the trailer, demanding to know where Michael was. (Trial Tr. at 839.) As he stormed into the house,

Jesse knocked over a two-year-old girl who was standing in the doorway, with his gun still in his hand.<sup>1</sup> (Trial Tr. at 584, 749, 821–22, 844–45.) William and Leah also went inside, although there was conflicting testimony about in what order they did so in relation to Jesse. (Trial Tr. at 665, 783.)

Jesse ran through the living room and into the kitchen, where he and William came face to face. (Trial Tr. at 672, 784–85.) There were a number of people inside the house yelling at him to leave and for someone to call 9-1-1. (Trial Tr. at 585, 672, 783.) Jesse became overwhelmed by the number of people and ran out of the trailer. (Trial Tr. at 672, 784.) William testified Jesse was inside the trailer for a total of only about ten seconds. (Trial Tr. at 672.)

Jesse had his gun in his hand during the few seconds he spent inside the house. (Trial Tr. at 667–68.) But William testified that Jesse only ever pointed the gun at him on the street and in the car, never in the house. (Trial Tr. at 669–71.) He also testified Jesse did not threaten

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<sup>1</sup> This act apparently formed the basis of the misdemeanor assault by accountability charge against Esandro. (Docs. 2, 47.) The District Court dismissed this count at the close of the State's case-in-chief, given the conflicting information about how this occurred and whether Jesse directly or indirectly knocked over the young girl. (4/28 Trial Tr. at 1006–07.)

him or say anything to him when they faced off in the kitchen. (Trial Tr. at 678.) William did not see Jesse point his gun at anyone else inside the house. (Trial Tr. at 678.) Leah similarly testified that after Jesse jammed his gun in her stomach on the porch, he did not point his gun at or threaten anyone inside the trailer. (Trial Tr. at 796, 802.) Celeste, another resident of the home, likewise testified Jesse did not threaten anyone inside the home. (Trial Tr. at 839.)

Jesse ran out of the house and ordered Esandro and Amanda to get back in the car, and they complied. (Trial Tr. at 585.) As they left, Celeste observed that Esandro and Amanda “seemed like they had nothing to do with what that guy [Jesse] was talking about or anything. They just stood there . . . they seemed like they didn’t really have any part” in the incident. (Trial Tr. at 834.)

Celeste confirmed Esandro did not say anything during the entire interaction at the mobile home. (Trial Tr. at 834.) Esandro—a Native American man born with fetal alcohol syndrome and who suffers from major depressive disorder—had turned 18 years old just weeks before the incident. (Doc. 174 at 1, 9.)

The State presented no evidence that Esandro—or even Jesse for that matter—knew ahead of time that Jesse would pull a gun on Leah or barge into her house. As the prosecutor conceded in closing argument when discussing Esandro’s accountability for Jesse’s actions, “[L]et’s be honest. There wasn’t a whole lot of planning going on here, was there? There was not a lot of time.” (Trial Tr. at 1472.)

Once Esandro, Jesse, and Amanda were back in Lauren’s car, Jesse confiscated Amanda’s cell phone. He then used it to communicate with Michael and demand money from him. (Trial Tr. at 587, 592, 752.) Eventually, Michael got the money together, and he agreed to meet up at a McDonald’s parking lot. (Trial Tr. at 600–01, 758, 767.) At the McDonald’s, Jesse got out of the car and talked to Michael, with his gun still in his hand. (Trial Tr. at 601, 759.) Michael gave Jesse the money. (Trial Tr. at 758.) Jesse then walked back to the car and ordered Esandro to release Amanda, which he did. (Trial Tr. at 601.)

The State proposed jury instructions on aggravated burglary, and the District Court gave those instructions. (Trial Tr. at 1014–16.) One of those instructions stated, “A person commits the offense of aggravated burglary if the person knowingly enters or remains unlawfully within

an occupied structure and knowingly or purposely *commits any offense* within the occupied structure and in effecting entry is armed with a weapon.” (Doc. 161, Instr. 21 (emphasis added).) This was a departure from the charging documents, which had defined aggravated burglary as unlawfully entering an occupied structure “with *the purpose to commit* an offense therein”—referring to a separate subsection of the aggravated burglary statute. (Doc. 2 at 3; Doc. 47 at 5 (emphasis added).)

Another instruction that the State offered and the District Court gave said that to convict Esandro of aggravated burglary, the State had to prove several elements, including that Jesse “knowingly or purposely *committed the offense of Assault with a Weapon in the occupied structure.*” (Doc. 161, Instr. 25 (emphasis added).)

In closing arguments, the State made its theory of Esandro’s legal accountability for aggravated burglary clear: Jesse had entered Leah’s home unlawfully and then assaulted her with a weapon *inside* the home, thus establishing the necessary predicate offense for aggravated burglary. In discussing the elements of aggravated burglary, the prosecutor stated, “Jesse James Daniels knew that he *committed the*

*offense of assault with a weapon inside that structure.* He pointed that gun at Leah on the porch *and in the building.*” (Trial Tr. at 1471 (emphasis added); *see also* Trial Tr. at 1475 (prosecutor suggesting Jesse kicked in Leah’s door and *then* pointed a gun at her.)

The prosecutor also argued the elements of the two assault with a weapon charges were satisfied by evidence that Jesse “threatened William Dayrider with that gun” and “threatened Leah Gray with that gun.” (Trial Tr. at 1472.) The jury found Esandro guilty of both aggravated burglary and its predicate offense of assault with a weapon against Leah. (Trial Tr. at 1535; Doc. 162.)

### **STANDARDS OF REVIEW**

This Court reviews a claim of insufficiency of the evidence *de novo*, “[r]egardless of whether it was raised below.” *State v. Robertson*, 2014 MT 279, ¶ 16, 376 Mont. 471, 336 P.3d 367; *accord State v. Sutton*, 2018 MT 143, ¶ 13, n. 3, 391 Mont. 485, 419 P.3d 1201. The crux of a sufficiency claim is whether, “after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Polak*, 2018 MT 174, ¶ 34, 392 Mont. 90, 422 P.3d 112. The

reason for de novo review is that “there either is, or is not, sufficient evidence to convict.” *State v. Azure*, 2008 MT 211, ¶ 13, 344 Mont. 188, 186 P.3d 1269.

Under the plain error doctrine, this Court “may discretionarily review claimed errors that implicate a criminal defendant’s fundamental constitutional rights, even if no contemporaneous objection was made, where failing to review the claimed error may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process.” *State v. Wagner*, 2009 MT 256, ¶ 12, 352 Mont. 1, 215 P.3d 20.

Claims of ineffective assistance of counsel present mixed issues of law and fact which this Court reviews de novo. *State v. Tellegen*, 2013 MT 337, ¶ 5, 372 Mont. 454, 314 P.3d 902.

### **SUMMARY OF THE ARGUMENT**

If the State was going to hold Esandro legally accountable for Jesse’s conduct—even for the things Esandro did not anticipate Jesse would do—it had to at least strictly comply with the elements of the

charged accountability offenses. It failed to do so with the aggravated burglary charge.

The prosecutor argued to the jury that Jesse assaulted Leah with a weapon inside her home and that this was the predicate offense to the aggravated burglary charge. The District Court likewise instructed the jury—upon the State’s request—that Jesse’s assault with a weapon inside the home was an element of the aggravated burglary charge. But Jesse assaulted Leah with a weapon outside her home, not inside. No reasonable jury could interpret the evidence otherwise. Absent proof that Jesse committed this assault during the ten seconds he spent inside the home, there was insufficient evidence to show Esandro was responsible for Jesse’s supposed commission of an aggravated burglary.

In the alternative, even if the evidence showed Jesse assaulted Leah with a weapon inside the home, then Esandro’s convictions for both aggravated burglary and the lesser-included predicate offense of assault with a weapon would violate his constitutional and statutory protections against double jeopardy. The State illegally piled on against Esandro by convicting him twice for Jesse’s single act of assaulting Leah with a weapon. If Esandro’s aggravated burglary by accountability



conviction stands, this Court should reverse his duplicative conviction of assault with a weapon against Leah. It should do so under plain error or, alternatively, ineffective assistance of counsel.

### **ARGUMENT**

#### **I. The State presented insufficient evidence that Esandro was guilty of aggravated burglary by accountability, because the predicate offense occurred outside the home.**

The State argued Esandro was legally accountable for Jesse pulling a gun on Leah on her porch and then running through her house for ten seconds. This did not establish the elements of aggravated burglary.

Due process protects people like Esandro “against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364 (1970); *see* U.S. Const. amend. XIV; Mont. Const. art. II, § 17. The State had the burden to convince the “trier of fact beyond a reasonable doubt of the existence of every element of the offense.” *Jackson v. Virginia*, 443 U.S. 307, 316 (1979).

Aggravated burglary requires proof of the following elements: (1) “the person knowingly enters or remains unlawfully in an occupied

structure”; (2) the person either “has the purpose to commit an offense in the occupied structure” or “the person knowingly or purposely commits any other offense within that structure”; and (3) the person is armed with a weapon or attempts to inflict bodily injury. Mont. Code Ann. § 45-6-204(2); *see* Doc. 161, Instr. 25.<sup>2</sup>

**A. In this case, aggravated burglary required proof of Jesse’s actual commission of assault with a weapon inside the home.**

Although the charging documents defined the second of the above aggravated burglary elements under the “purpose to commit an offense” standard, the State’s theory of the case at trial clearly centered on the “commits any other offense” language of § 45-6-204(2)(a)(ii). The jury instructions stated that to find Esandro guilty of aggravated burglary by accountability, the jury had to find that Jesse “*committed the offense* of Assault with a Weapon in the occupied structure.” (Doc. 161, Instr. 25 (emphasis added); *see* Doc. 161, Instr. 21 (“A person commits the offense

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<sup>2</sup> Because the State charged Esandro by accountability, it also had to prove that he was legally accountable for Jesse’s actions. The jury was instructed that a person is legally accountable for the actions of another when, “either before or during the commission of an offense, and with the purpose to promote or facilitate such commission, the person solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense.” (Doc. 161, Instr. 22.)

of aggravated burglary if the person . . . commits any offense within the occupied structure.”.) And the prosecutor emphasized in closing argument that Esandro was guilty of aggravated burglary by accountability precisely because Jesse “committed the offense of assault with a weapon inside that structure. He pointed that gun at Leah on the porch and in the building.” (Trial Tr. at 1471.)

“[W]here the State has the opportunity to object to a proposed jury instruction before it is given to the jury but fails to do so, that instruction, whether or not it includes an unnecessary element, becomes the law of the case once delivered, and the jury is accordingly bound by it.” *Azure*, ¶ 23. “The law of the case is applied to hold the government to the burden of proving each element of a crime as set out in a jury instruction to which it failed to object, even if the unchallenged jury instruction goes beyond the criminal statute’s requirements.” *Azure*, ¶ 28. “In cases to which the doctrine of law of the case applies, the evidence must conform to the unchallenged jury instructions to support a conviction.” *Azure*, ¶ 28.

The State did not object to the given instructions that defined aggravated burglary as requiring *actual commission* of an offense inside

an occupied structure, rather than mere purpose to commit an offense. In fact, the State itself offered these instructions. (Trial Tr. at 1014–16.) The “law of [this] case” was that aggravated burglary required proof that Jesse committed the offense of assault with a weapon inside Leah’s home. “[T]he jury was bound thereby.” *State v. Crawford*, 2002 MT 117, ¶ 25, 310 Mont. 18, 48 P.3d 706.

**B. Jesse did not commit the predicate offense inside the home.**

All the pertinent evidence at trial showed that Jesse assaulted Leah with a weapon on the front porch. None of it showed Jesse did so inside the home.

Every witness who saw Jesse point the gun at Leah testified this occurred on the front porch. (Trial Tr. at 687, 749, 783.) Every witness who saw Jesse inside the home testified that although he had the gun in his hand and allegedly knocked over a toddler with it in the doorway, he did not point it at anyone or threaten anyone inside. (Trial Tr. at 678, 795–96, 802, 839.) All he did inside the house was look for Michael, and after ten seconds, when confronted by everyone in the house, he ran away. (Trial Tr. at 672, 784–85.) Critically, Leah—the subject of the assault with a weapon charge that formed the predicate offense for

aggravated burglary—never suggested Jesse pointed his gun at or threatened her *inside* the home. (Trial Tr. at 776–804.)

As the prosecutor explained to the jury, Jesse committed assault with a weapon when “[h]e threatened William Dayrider with that gun. He threatened Leah Gray with that gun. He pointed those guns at them.” (Trial Tr. at 1472.) None of that occurred inside the house. The evidence showed only that Jesse assaulted William with a gun on the street and in the car, and that he assaulted Leah with a gun on her porch.

The prosecutor simply got the facts wrong when he told the jury in closing that Jesse “committed the offense of assault with a weapon *inside that structure*. He pointed that gun at Leah on the porch *and in the building*.” (Trial Tr. at 1471 (emphasis added).) The evidence showed Jesse assaulted Leah with a weapon only on the front porch, not “in the building.”

Leah’s front porch was not an “occupied structure” within the meaning of the aggravated burglary statute. That term refers to “any building, vehicle, or other place suitable for human occupancy or night lodging of persons or for carrying on business . . . including any

outbuilding that is immediately adjacent to or in close proximity to an occupied structure and that is habitually used for personal use or employment.” Mont. Code Ann. § 45-2-101(47).

This Court has made clear that “occupied structure” refers to an enclosed space in which humans either reside or conduct business. *See State v. Sunday*, 187 Mont. 292, 299, 609 P.2d 1188, 1193 (1980) (holding a horse tack shed that was used as part of a horse rental business was an occupied structure); *State v. Kyle*, 192 Mont. 374, 379, 628 P.2d 260, 263 (1980) (holding a furnished mobile home on a sales lot was an occupied structure); *State v. Pierce*, 255 Mont. 378, 382, 842 P.2d 344, 347 (1992) (holding a bunkhouse that a farmer used to store farming materials was an occupied structure); *State v. Gollehon*, 262 Mont. 293, 298, 864 P.2d 1257, 1261 (1993) (holding a cell block in a prison was an occupied structure). Leah used her unenclosed front porch to get fresh air and smoke cigarettes, not to sleep or conduct business.

As an analogy, this Court has held that vehicles are not typically “suitable for human occupancy” and thus not occupied structures, even though humans are commonly present in them. *State v. Bashor*, 188

Mont. 397, 424, 614 P.2d 470, 485 (1980). As with a vehicle, Leah's mere frequent presence on her porch did not make it an occupied structure, because she did not reside or do business in it.

This Court has already implicitly held a front porch is not an occupied structure. In *State v. Fish*, 190 Mont. 461, 621 P.2d 1072 (1980), the defendant was convicted of attempted burglary. Fish showed up at the victim's house, stepped up onto the front porch, and banged on the door, shouting for the victim to come out and fight him or else Fish would come in. *Fish*, 190 Mont. at 465–66, 621 P.2d at 1075. The victim did come out, and a gunfight ensued. *Fish*, 190 Mont. at 466–68, 621 P.2d at 1075–76.

On appeal, this Court reversed Fish's attempted burglary charge for insufficient evidence. *Fish*, 190 Mont. at 469, 621 P.2d at 1077. The Court held, "Mere knocking or pounding on a door does not reach far enough towards the accomplishment of the alleged desired result *to gain entry into an occupied structure* necessary to establish the crime of attempted burglary." *Fish*, 190 Mont. at 469, 621 P.2d at 1077 (emphasis added). In other words, Fish did not commit attempted burglary because he did not attempt to cross the threshold from the

porch into the house—the true occupied structure. Implicit in the Court’s decision was the common-sense conclusion that while Fish was standing on the victim’s front porch—even though he was not welcome there—he was not in an “occupied structure.”

The conclusion that a front porch is not an occupied structure jibes with the wording of the aggravated burglary statute. One of the elements of that offense is that “the person knowingly enters or remains unlawfully *in* an occupied structure.” § 45-6-204(2) (emphasis added). Another element is that the person “commits any other offense *within* that structure.” § 45-6-204(2)(a)(ii) (emphasis added). The term “within,” when used as a preposition, is “a function word [used] to indicate enclosure or containment.”<sup>3</sup> Jesse could not logically commit an offense “within” or “in” Leah’s open-air, unenclosed, and uncontained porch. *See* § 45-6-204(2).

The assault with a weapon against Leah simply did not occur “within” an occupied structure. The State thus failed to present evidence of a necessary element of its aggravated burglary charge. *See* § 45-6-204(2)(a)(ii). Absent such proof, this Court should reverse the

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<sup>3</sup> <https://www.merriam-webster.com/dictionary/within>.



aggravated burglary conviction for insufficient evidence and order the District Court to enter a judgment of acquittal. *See Polak*, ¶¶ 35, 39 (stating the proper remedy for an insufficiency claim is reversal and remand for a judgment of acquittal).

**II. In the alternative, Esandro's convictions for both aggravated burglary and assault with a weapon violated double jeopardy.**

Even if the evidence could be construed to show Jesse committed assault with a weapon inside the house (it cannot), that would create another problem: a double jeopardy violation.

Esandro had a fundamental right under the Montana and United States constitutions to be free from double prosecution for the same offense. Mont. Const. art. II, § 25; U.S. Const. amend. V; *see State v. Guillaume*, 1999 MT 29, ¶ 8, 293 Mont. 224, 975 P.2d 312. Not only did the State hold Esandro accountable for Jesse's unplanned assault with a weapon against Leah, but it piled on by getting two convictions out of this single act.

As Montana's double jeopardy statute explains, "A defendant may not [ ] be convicted of more than one offense if . . . one offense is included in the other." Mont. Code Ann. § 46-11-410(2)(a). A lesser-

included offense is an offense that is “established by proof of the same or less than all the facts required to establish the commission of the offense charged.” Mont. Code Ann. § 46-1-202(9)(a). The term “facts” in this context “refers to the statutory elements of the offenses, not the individual facts of the case.” *State v. Beavers*, 1999 MT 260, ¶ 30, 296 Mont. 340, 987 P.2d 371.

**A. Because assault with a weapon was a lesser-included offense of aggravated burglary in this case, Esandro could not lawfully be convicted of both.**

One of the elements of aggravated burglary is that the offender either intended to commit an offense inside the occupied structure or did commit an offense therein. § 45-6-204(2)(a)(i)–(ii). As the State and District Court instructed the jury, aggravated burglary in this particular case required proof that Jesse—and by accountability, Esandro—actually committed the offense of assault with a weapon inside Leah’s house. (Doc. 161, Instrs. 21, 25; Trial Tr. at 1471.)

When a statute lists multiple ways of committing an offense, the “offense” for purposes of a double jeopardy analysis is defined by how the State prosecutes the case and how the District Court instructs the

jury. *See State v. Russell*, 2008 MT 417, ¶ 23, 347 Mont 301, 198 P.3d 271.

In *Russell*, the defendant was charged with felony homicide under Mont. Code Ann. § 45-5-102(1)(b). The felony homicide statute listed “myriad [ ] possible predicate felonies.” *Russell*, ¶ 23. The State’s theory of the case was that Russell committed one predicate felony: aggravated assault. *Russell*, ¶¶ 23–24. The district court likewise “defined the felony homicide charge to include aggravated assault in its instructions to the jury.” *Russell*, ¶ 23.

This Court held that “the charge, *as applied to Russell*, included aggravated assault as an element of felony homicide.” *Russell*, ¶ 23 (emphasis added). Because aggravated assault was an element of felony homicide and thus a lesser-included offense in that case, Russell’s convictions for both offenses violated double jeopardy. *Russell*, ¶¶ 24–25.

Likewise, in *State v. Tellegen*, 2013 MT 337, 372 Mont. 454, 314 P.3d 902, the defendant was convicted of both theft and burglary. The burglary statute required proof that Tellegen unlawfully entered an occupied structure and then either had “the purpose to commit an

offense” inside or actually “commit[ted] any other offense within that structure.” *Tellegen*, ¶ 24 (citing § 45-6-204(1)). As in this case, the State’s theory and the district court’s jury instructions made clear that the burglary charge required proof that Tellegen *actually committed* an offense—particularly, theft—inside the structure. *Tellegen*, ¶ 25. As applied to Tellegen, theft thus became the “predicate offense” to his burglary charge. *Tellegen*, ¶ 25.

On appeal, this Court concluded Tellegen’s convictions for both burglary and its predicate offense of theft violated double jeopardy. *Tellegen*, ¶ 25. The Court reversed Tellegen’s theft conviction based on ineffective assistance of counsel, due to defense counsel’s failure to object to the illegally duplicative charges. *Tellegen*, ¶ 26.

As in *Tellegen* and *Russell*, the State chose—and the District Court agreed—to instruct the jury that in the context of this case, aggravated burglary required proof that Jesse committed assault with a weapon inside the house. As in *Tellegen* and *Russell*, assault with a weapon thus became the lesser-included predicate offense of aggravated burglary. And as in *Tellegen* and *Russell*, Esandro’s conviction of both the greater offense of aggravated burglary and the predicate offense of

assault with a weapon violated Esandro’s protection against double jeopardy. *See Tellegen*, ¶ 25; *Russell*, ¶ 25.

**B. This double jeopardy violation warrants review and reversal for plain error or, alternatively, ineffective assistance of counsel.**

Defense counsel admittedly raised no challenge below to this double jeopardy problem. However, the gravity of leaving Esandro’s duplicative convictions intact—in clear violation of his fundamental constitutional protection against double jeopardy—demands plain error review.

Plain error review is appropriate where the claimed error “implicate[s] a criminal defendant’s fundamental constitutional rights.” *Wagner*, ¶ 12. Esandro had an explicit constitutional right under both the Montana and United States constitutions to be free from double prosecution for the same offense. Mont. Const. art. II, § 25; U.S. Const. amend. V. His dual convictions of aggravated burglary (if that conviction stands) and assault with a weapon plainly violated that constitutional protection. Failing to review this error and allowing Esandro’s double-jeopardy-violating convictions to stand would “result

in a manifest miscarriage of justice” and “compromise the integrity of the judicial process.” *Wagner*, ¶ 12.

Alternatively, if this Court declines plain error review, it should find that Esandro received ineffective assistance of counsel when his attorney failed to object on double jeopardy grounds to his prosecution for both aggravated burglary and assault with a weapon. As in *Tellegen*, it was deficient performance under the first prong of *Strickland v. Washington*, 466 U.S. 668 (1984), for defense counsel to not object to Esandro’s unlawful prosecution for both the greater and the lesser-included offenses. *Tellegen*, ¶ 26. And as in *Tellegen*, this deficient performance prejudiced Esandro by allowing a felony conviction that otherwise should have been dismissed, had counsel properly objected. *Tellegen*, ¶ 26.

Under either a plain error or ineffective assistance of counsel analysis, Esandro’s conviction by accountability for Jesse’s assault of Leah with a weapon should be reversed and dismissed for violating his constitutional and statutory protections against double jeopardy. *See Russell*, ¶ 25 (holding the remedy for a double jeopardy violation is dismissal of the lesser-included offense charge).

## **CONCLUSION**

The State failed to present sufficient evidence of aggravated burglary by accountability. That conviction must be vacated, and the charge dismissed.

In the alternative, if the aggravated burglary conviction stands, then Esandro's conviction by accountability for assault with a weapon against Leah would violate his protection against double jeopardy. The Court should reverse that conviction under the plain error doctrine or, alternatively, for ineffective assistance of counsel due to Esandro's attorney's failure to object to this unlawful double prosecution.

Respectfully submitted this 12th day of April, 2023.

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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 5,115, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/Michael Marchesini  
MICHAEL MARCHESINI



## **APPENDIX**

Judgment.....App. A

## **CERTIFICATE OF SERVICE**

I, Michael Marchesini, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 04-12-2023:

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