IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0506

STATE OF MONTANA,

Plaintiff and Appellee,

v.

EDWARD JEFFREY ALLEN,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Thirteenth Judicial District Court, Yellowstone County, the Honorable Ashley Harada, Presiding

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STATEMENT OF THE ISSUES

I. An accused has a fundamental right to a unanimous verdict. The State accused Edward Allen of two counts of sexual assault, but it never explained what specific illegal conduct constituted each offense. Additionally, the district court never instructed the jury that it must unanimously agree that specific conduct occurred prior to rendering a verdict. Allen was convicted of one count and acquitted of the other. Was Allen's right to a unanimous verdict violated?

II. The prosecutor's theme during closing argument was that J.E. was "credible and consistent on the things that matter," in her opinion "it [wa]s against reason and common sense that [J.E] would have fabricated something like this[,]" and Edward Allen was a liar. Does this Court's unequivocal stance that attorneys shall not invade the province of the jury by commenting on witness credibility favor reversal of the conviction?

III. Did the lack of a unanimous verdict coupled with the prosecutor's misconduct prejudice Edward Jeffrey Allen's right to a fair trial?

STATEMENT OF THE CASE

Edward Jeffrey Allen ("Allen") was charged with count I, sexual assault, count II, sexual assault, and count III, indecent exposure. (D.C. Doc. 3.) Later, the State filed an Amended Information adding count IV, indecent exposure, in the alternative to count III. (D.C. Doc. 35.) Allen was accused of touching J.E.'s penis on two occasions and exposing

Allen's penis on one occasion when J.E. was under the age of 16 and Allen was more than three years older. (D.C. Doc. 35.)

During a four-day trial, the State's theme was J.E "ha[d] been credible and consistent on the things that matter." (Tr. Day 4, at 51.) According to the State, "it [was] against reason and common sense that [J.E] would have fabricated something like this[.]" (Tr. Day 4, at 17.) Rather, the State argued, Allen was lying "to escape accountability for what he did." (Tr. Day 4, at 19 (Attached as Appendix B).)

Allen denied ever assaulting J.E. or exposing himself. (Tr. Day 3, at 176–77.) He said J.E. was a young boy trying to escape the responsibilities of his first job but whose story had so many inconsistencies the jury should doubt its veracity. (Tr. Day 4, at 29–49.) For example, J.E. initially reported that one incident occurred around Christmas, but testified it was months after or during summer. (Tr. Day 1, at 134; Tr. Day 3, at 83 & 122.) He told the investigating officer he ejaculated, but later denied ejaculating and said the officer was lying. (Tr. Day 2, at 96; Tr. Day 3, at 98.) He told his mother Allen touched him three times but later he denied that statement too. (Tr. Day 3, at 54 & 95–96.)

The State, the defense, and the district court all failed to identify which alleged acts were being charged as count I and which were being charged as count II. The charging documents made identical factual allegations. (D.C. Doc. 35.) Nothing in the presentation of the case clarified to the jury that count I and count II each depended on a singular set of facts. The jury instructions explained that all 12 jurors had to unanimously agree that Allen was guilty or not guilty, but the instructions did not inform the jury that it also needed to unanimously rely on the same facts to render a guilty verdict. (D.C. Doc. 57.) Similarly, the verdict forms did not distinguish which one of the two alleged incidents was the basis for each count. (D.C. Docs. 59 & 60.)

The jury acquitted Allen of all the charges, except count II, sexual assault. (D.C. Docs. 59–62.) Allen was sentenced to 30 years in Montana State Prison with 10 years suspended. (D.C. Doc. 74.) He timely appealed. (D.C. Doc. 81.)

STATEMENT OF THE FACTS

1. The allegations: In early summer 2018, J.E. did not want to work at Allen Tool Repair. Shortly thereafter, he accused Edward Allen of sexually assaulting him.

When J.E. was in the fifth grade, he worked for his great uncle,

Edward Jeffrey Allen ("Allen"), at Allen's Tool Repair for several months before summer break started. (Tr. Day 3, at 69 & 97.) During the school year, J.E. only worked on Saturdays but during summer break he was expected to work three days a week. (Tr. Day 3, at 11 & 14.) He made excuses often and did not want to work. (Tr. Day 3, at 15.) J.E.'s mother, Dawn Escobar ("Dawn"), encouraged him to work because it was good for him. (Tr. Day 3, at 16.)

Allen was frustrated that J.E. missed so much work and warned J.E. that he would be fired if he continued to miss work. (Tr. Day 3. at 116.) Shortly thereafter, on Saturday, June 27, 2019, while on the way to work, J.E. told Dawn that Allen was touching him inappropriately. (Tr. Day 3, at 18–19 & 60.) J.E. and Dawn went home instead of going to Allen's Tool Repair. (Tr. Day 3, at 74.) Dawn called her aunt, Cheri Allen ("Cheri"), who is Allen's wife. (Tr. Day 3, at 19.) Cheri came to the house. (Tr. Day 3, at 20.) J.E. told Cheri that Allen talked about sex and masturbation at work, touched J.E.'s penis on two separate occasions, and exposed his penis on one occasion. (Tr. Day 3, at 46, 80–93.) Cheri called the police because she "want[ed] this mess cleaned up" and Dawn was not going to call. (Tr. Day 3, at 159.) Officer Brian Weaver arrived

at the house and took initial statements. (Tr. Day 2, at 54.) Later, the case was transferred to Detective John Tate, who arranged a forensic interview with Deputy Matthew McCave. (Tr. Day 2, 107–10.) None of the officers collected any physical evidence. (Tr. Day 2, at 144–47; Tr. Day 4, at 34.)

2. The charges: Five months later, the State charged Edward Allen with two identical counts of sexual assault.

The State charged Allen with two factually identical counts of sexual assault. (D.C. Doc. 3.) The Amended Information read:

> **COUNT I: SEXUAL ASSAULT (FELONY)**
> **(Punishable by life imprisonment or by imprisonment in the state prison for a term of not less than 4 years or more than 100 years, and a fine not to exceed $50,000)**
>
> The alleged facts constituting the offense are:
>
> That the Defendant, EDWARD JEFFREY ALLEN (born in July 1960), knowingly subjected another person to sexual contact without consent, to wit: on or about fall and early-winter 2018, the Defendant knowingly subjected J. (born in 2007) to sexual contact without his consent by touching his penis, at a time when J. was under 16 years of age, and the Defendant was 3 or more years older than J.; occurring in Yellowstone County, Montana; all of which is a violation of Section 45-5-502, Montana Code Annotated, and against the peace and dignity of the State of Montana. In compliance with Section 46-1-401, Montana Code Annotated, the State gives notice of its intent to seek a penalty enhancement under Section 45-5-502(3), Montana Code Annotated, whereby the Defendant shall be punished by life imprisonment or by imprisonment in the state prison for a term of not less than four years or more than 100 years and may be fined not more than $50,000.

COUNT II: SEXUAL ASSAULT (FELONY)
(Punishable by life imprisonment or by imprisonment in the state prison for a term of not less than 4 years or more than 100 years, and a fine not to exceed $50,000)

The alleged facts constituting the offense are:

That the Defendant, EDWARD JEFFREY ALLEN (born in July 1960), knowingly subjected another person to sexual contact without consent, to wit: on or about fall and early-winter 2018, the Defendant knowingly subjected J. (born in 2007) to sexual contact without his consent by touching his penis, at a time when J. was under 16 years of age, and the Defendant was 3 or more years older than J.; occurring in Yellowstone County, Montana; all of which is a violation of Section 45-5-502, Montana Code Annotated, and against the peace and dignity of the State of Montana. In compliance with Section 46-1-401, Montana Code Annotated, the State gives notice of its intent to seek a penalty enhancement under Section 45-5-502(3), Montana Code Annotated, whereby the Defendant shall be punished by life imprisonment or by imprisonment in the state prison for a term of not less than four years or more than 100 years and may be fined not more than $50,000.

(D.C. Doc. 35.)

3. The trial: During a four-day trial, J.E.'s story was inconsistent, and Edward Allen denied any wrongdoing.

At trial, J.E. testified that Allen started talking about inappropriate topics at work and Allen would force J.E. to shave Allen's face. J.E. told Detective McCave his coworker, Tara Lynn Kulesa ("Kulesa") walked in during one of the shaving incidents and was speechless. (Tr. Day 3, at 142.) Tara testified she never saw the shaving incident or any strange behavior. (Tr. Day 3, at 148.)

J.E. told the jury that Allen touched his penis on two occasions, both times on a Saturday at Allen's Tool Repair in the bathroom. (Tr.

Day 3, at 80–83.) Dawn was sure J.E. said Allen touched him inappropriately on three occasions, but J.E. denied ever saying Allen touched him more than twice. (Tr. Day 3, at 54 & 95–96.)

J.E. alleged that on both occasions Allen made excuses about why he wanted to see J.E.'s penis, once to measure his penis, using a special tape measure that he collected from his work bench despite having one in his pocket, and the other time to check the color of J.E.'s sperm. (Tr. Day 3, at 81, 84, & 177.) He said on one occasion Allen was very apologetic but the other time he "begged" J.E. to participate and then acted very thankful. (Tr. Day 4, at 82 & 85.) According to J.E., Allen asked to suck J.E.'s penis during the second incident, but J.E. said no. (Tr. Day 3, at 113.) On both occasions, J.E. said he sat on Allen's lap, Allen rubbed J.E.'s naked, flaccid penis, and J.E. did not ejaculate. (Tr. Day 3, at 81, 84 & 112.) However, Dr. Cynthia Brewer, a medical doctor who performed a general physical exam on J.E., and Officer Weaver both testified that J.E. told them he ejaculated. (Tr. Day. 2, at 96, 203 & 215–16.)

During trial, J.E. testified the incidents happened in November and in summer when it was sunny out, not cold. (Tr. Day 3, at 83 & 96.)

However, he told Detective Tate the latter incident occurred in December or March. (Tr. Day 2, at 134–35.) He also told Deputy McCave the latter incident occurred during winter. (Tr. Day 2, at 181–82.)

When asked why he did not tell anyone sooner, J.E. testified that he liked the job, he did not really know what was happening, and, although he was scared, the job gave him something to do. (Tr. Day 3, at 82.) Dr. Brewer relayed that J.E. claimed he did not disclose the events because "the mafia" rented Allen's garage and he was scared they would come for his family. (Tr. Day 2, at 217.) J.E. did not tell this mafia story to the police, his mother, or the jury. (Tr. Day 4, at 46.)

4. The jury instructions: The district court failed to provide a specific unanimity instruction.

The jury was instructed, "all twelve of you must agree that the defendant is either guilty or not guilty in order to reach a verdict." (D.C. Doc. 57, at Instruction 9.) The jury was also provided a separate offense instruction. (D.C. Doc. 57, at Instruction 20.) The jury received two instructions addressing the issues in sexual assault, instruction 22, entitled "Issues in Count I: Sexual Assault" and instruction 23, entitled "Issues in Count II: Sexual Assault." (D.C. Doc. 57, at Instructions 22 &

23.) The instructions listed identical elements of sexual assault for each count. (D.C. Doc. 57, at Instructions 22 & 23.) The first element read, "The Defendant subjected J. to sexual contact by touching his penis on or about Fall and early-winter 2018[.]" (D.C. Doc. 57, at Instructions 22 & 23.) After the first element, a parenthetical in each instruction read, respectively, "(and on a date different than Count I)" and "(on a date different than Count II)." (D.C. Doc. 57, at Instructions 22 & 23.) Defense counsel did not propose a specific-act unanimity instruction. (D.C. Doc. 52.) As a result, the district court did not instruct the jury to unanimously agree which sexual assault, if any, occurred prior to rendering a guilty verdict or that it had to agree regarding the respective different date. (D.C. Doc. 57.)

5. Closing argument: The State argued J.E. was "credible and consistent," the idea that J.E. could be lying was "preposterous," and it was "against reason and common sense that [J.E.] would have fabricated something like this[.]"

During closing argument, the prosecutor argued that J.E. lying was "preposterous." (Tr. Day 4, at 16.)

> Children lie, everyone knows that. The State is not denying that. Children lie about eating candy before dinner. Children lie about tracking mud into the house; blame the dog, blame a sibling. But to say that [J.E] created a lie of this

> magnitude, a lie that ultimately subjected him to the reality of having to tell his mother, tell his family members, tell multiple members of law enforcement, tell a doctor, tell a counselor, tell prosecutors and come in here and tell a room full of strangers that the defendant molested him, makes no sense.
> The risk to [J.E.], the fallout, the embarrassment, the shame, the trauma that he will have to deal with for the rest of his life is real. It is real and it is not going away.
> …
> It is against reason and common sense that [J.E] would have fabricated something like this to get out of a job he did not even have to do.

(Tr. Day 4, at 16–17.) The prosecutor continued, "[J.E.] has been consistent where it matters." (Tr. Day 4, at 22.) "We do not live in a society that has an expectation that a 12-year-old child will accurately describe sexual conduct that they have no real understanding of to begin with." (Tr. Day 4, at 22.) It was "one of the most traumatic experiences imaginable" and "the defendant's ailments are nothing compared to what [J.E.] will have to face for the rest of his life." (Tr. Day 4, at 24–25.)

The prosecutor argued Allen was lying "to escape accountability for what he did." (Tr Day 4, at 19.) "The defendant has been so utterly pedantic about extraneous details about this trial," Allen's witnesses "offered nothing of substance," and he was "victim blaming." (Tr. Day 4,

at 23–25.) According to the prosecutor, Allen did not adequately explain himself—"And as easy as that, after seeing all the evidence, hearing all the testimony and telling his story at the end, he gets to just say no," he did not commit sexual assault. (Tr. Day 4, at 25.)

The only time the State summarized the elements of sexual assault, the prosecutor said, "the law requires you to find that on two occasions when [J.E.] was in the 6th grade, an old man touched his penis knowingly." (Tr. Day 4, at 20.) Her rebuttal closing was short and reiterated the State's position—"J.E. has been credible and consistent on the things that matter." (Tr. Day 4, at 51.)

6. The verdict: The jury acquitted Edward Allen of one count of sexual assault and convicted him of the other.

Six hours after deliberations started, the jury acquitted Allen on count I of sexual assault and both counts of indecent exposure. (D.C. Docs. 59, 61, & 62.) Allen was convicted on count II, sexual assault. (D.C. Doc. 60.) The verdict forms did not identify what alleged incident the jury used as the factual basis for convicting Allen. (D.C. Docs. 59 & 60.)

STANDARD OF REVIEW

This Court may, in its discretion, review and correct an unpreserved assertion of error upon a showing of: (1) a plain or obvious error; (2) that affected a constitutional or other substantial right; and (3) which prejudicially affected the fundamental fairness or integrity of the proceeding. *State v. Abel*, 2021 MT 293, ¶ 4, 406 Mont. 250, 498 P.3d 199 (internal citations omitted).

A district court's discretion in formulating jury instructions is "ultimately restricted by the overriding principal that jury instructions must fully and fairly instruct the jury regarding the applicable law." *City of Missoula v. Zerbst*, 2020 MT 108, ¶ 9, 400 Mont. 46, 462 P.3d 1219.

Ineffective assistance of counsel claims are mixed questions of law and fact this Court reviews de novo. *State v. Tucker*, 2008 MT 273, ¶ 13, 345 Mont. 237, 190 P.3d 1080.

SUMMARY OF THE ARGUMENT

The State failed to distinguish between the two counts of sexual assault, and, as a result, there is a genuine possibility that some of the jurors relied on J.E.'s description of Allen touching his penis in the

bathroom in November while other jurors relied on J.E. saying Allen touched his penis in the spring or summer. The State made identical allegations in the charging documents and then failed to distinguish between the counts during its presentation of the case. The jury had reason to doubt both allegations. J.E.'s allegations were inconsistent, and he testified to illogical details occurring during both incidents. Given Allen was acquitted of one allegation but convicted of the other, there is a genuine possibility of a compromise guilty verdict based on different allegations, which violates Allen's right to a unanimous verdict. This Court should reverse the conviction and remand for a new trial.

The prosecutor repeatedly and consistently invaded the province of the jury by vouching for J.E.'s credibility. Her central theme was, "J.E. was consistent where it matters," and J.E. "ha[d] been credible and consistent on the things that matter." (Tr. Day 4, at 22 & 51.) According to the prosecutor, any other explanation was "preposterous" and "makes no sense," because it was "against reason and common sense that [J.E.] would have fabricated something like this[.]" (Tr. Day 4, at 16–17.) Her closing argument ignored the law and how the

evidence applied to it and, instead, emphasized her opinion that J.E. was credible. Additionally, the prosecutor opined that Allen was lying "to escape accountability for what he did." (Tr. Day 4, at 19.) The prosecutor's repetitive commentary robbed the jury of its independent role of assessing witness credibility. The comments undermined the fundamental fairness of the trial. There is genuine risk that the jury adopted the prosecutor's personal views instead of exercising its own independent judgment. This Court should reverse this conviction and remand for a new trial.

ARGUMENT

I. Edward Allen's constitutional right to a unanimous verdict was violated because the jury was not instructed that it must agree on which sexual assault, if any, occurred.

The Sixth Amendment of the United States Constitution, incorporated to the states through the Fourteenth Amendment, guarantees a defendant a "trial by an impartial jury." U.S. Const. amend. VI & XIV. A defendant's right to an impartial jury imposes an "unmistakable" and "indispensable" requirement that verdicts be unanimous. *Ramos v. La.*, 590 U.S.___, 140 S.Ct. 1390, 1395–97 (2020) (plurality opinion of Gorsuch, J.). The Montana Constitution provides:

"In all criminal actions, the verdict shall be unanimous." Mont. Const. art. II, § 26. "Since the right to a unanimous verdict is explicit in the Declaration of Rights in Montana's Constitution, it is a fundamental right." *State v. Weaver*, 1998 MT 167, ¶ 26, 290 Mont. 58, 964 P.2d 713 (superseded by statute on other grounds).

A unanimous verdict promotes "more open-minded and more thorough deliberations." *Ramos*, 140 S.Ct. at 1401 (other citations omitted). To allow anything less than a unanimous verdict "fences out a voice from the community, and undermines the principle on which our whole notion of the jury now rests." *Ramos*, 140 S.Ct. at 1417–18 (Kavanaugh, J., concurring) (quoting Marshall, J., dissenting in *Johnson v. La.*, 406 U.S. 399, 402 (1972)). Without a unanimous verdict, (1) the jury is more likely "to cover up wide disagreement among the jurors about just what the defendant did, or did not, do" because it can avoid discussing the specific factual details of each element; and (2) "unless required to focus upon specific factual detail, [jurors] will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire." *Richardson v. U.S.*, 526 U.S. 813, 819 (1999).

The right to a unanimous verdict demands that all jurors "be in agreement as to the principal factual elements underlying a specified offense" before reaching a verdict. *State v. Hardaway*, 2001 MT 252, ¶ 70, 307 Mont. 139, 36 P.3d 900. As a general rule, the jurors may find different evidence persuasive, but they must agree on the bottom line—what offense, if any, occurred. *State v. Vernes*, 2006 MT 32, ¶ 25, 331 Mont. 129, 130 P.3d 169. When factual differences rise to the level of establishing separate offenses, unanimity is required. *Schad v. Arizona*, 501 U.S. 624, 632 (1991). No person may be convicted unless all twelve jurors agree there was sufficient proof of specific illegal conduct. *Schad*, 501 U.S. at 632–33.

Consistent with that general rule, this Court has repeatedly distinguished between alternative means of proving a singular offense and facts that are so disparate they exemplify two inherently different offenses. *State v. Wells*, 2021 MT 103, ¶¶ 17–19, 404 Mont. 105, 485 P.3d 1220. For example, purposely and knowingly are alternative means of satisfying the *mens rea* element in an aggravated assault charge. *State v. Warnick*, 202 Mont. 120, 128–130, 656 P.2d 190, 194–195 (1982). As such, jurors may rely on different facts to establish the

mental state without creating separate offenses. *Warnick*, 202 Mont. at 128–130, 656 P.2d at 194–195. Similarly, jurors may rely on different facts to establish the element of "a material step" in an attempted deliberate homicide charge. *Vernes*, ¶ 25. In both instances, the factual differences that a jury may find persuasive do not rise to the level of creating multiple, separate offenses. *Warnick*, 202 Mont. at 128–130, 656 P.2d at 194–195; *see also Vernes*, ¶ 25.

In contrast, in *Weaver*, the State charged the defendant with four counts of sexual assault and alleged multiple acts were perpetrated under each count. *Weaver*, ¶¶ 7 & 36. When considered independently, each alleged assault was a separate offense. *Weaver*, ¶ 36. Weaver was acquitted of two counts and convicted of two counts. *Weaver*, ¶ 19. Although the trial court instructed the jury on general unanimity and on separate offenses, this Court reversed Weaver's convictions because the jury was never instructed that it must unanimously agree as to the principal factual elements for each assault. *Weaver*, ¶¶ 29 & 40. Even with a general unanimity instruction and a specific offense instruction, there was "a genuine possibility of jury confusion" such that the convictions may have rested upon "different jurors concluding that the

defendant committed different acts." *Weaver*, ¶ 34 (quoting *U.S. v. Echeverry*, 719 F.2d 974, 975 (9th Cir. 1983)).

To avoid jury confusion on remand, the trial court was required to "augment the general instruction to ensure the jury underst[ood] its duty to unanimously agree to a particular set of facts." *Weaver*, ¶ 34 (quoting *Echeverry*, 719 F.2d at 975). "[T]he special instruction serves to direct the jurors to reach a unanimous verdict on at least one specific criminal act before finding guilt for the multiple-act count." *State v. Harris*, 2001 MT 231, ¶ 12, 306 Mont. 525, 36 P.3d 372 (citing *Weaver*, ¶¶ 33–35). Model Criminal Jury Instruction 1-106(a), is the specific-act unanimity instruction that embodies the *Weaver* holding.

The State has broad discretion to charge separate counts, but it must base each charge on separate discrete acts, so as not to offend a defendant's constitutional and statutory right against double jeopardy. *State v. Hamilton*, 2007 MT 223, ¶ 45, 339 Mont. 92, 167 P.3d 906. In *State v. Mathis*, 2022 MT 156, 409 Mont. 348, 515 P.3d 758, the State charged the defendant with two counts of incest. Count I charged Mathis with incest between December 2016 and December 2017. *Mathis*, ¶ 6. Count II charged Mathis with incest between December

2017 and March 2018. *Mathis*, ¶ 6. At trial, T.N., his father, and his sister described multiple different occasions in which Mathis forced T.N. to touch her breasts during both periods of time. *Mathis*, ¶ 15. The jury convicted Mathis of incest between December 2016 and December 2017 (count I), but it acquitted her of incest between December 2017 and March 2018 (count II). *Mathis*, ¶ 19. Each verdict was clearly dependent on different acts based on the different corresponding timelines. *Mathis*, ¶ 19. On appeal, this Court declined to employ plain error review because "the State's case did not emphasize two specific instances of abuse, but rather, a continuous course of conduct" and was therefore subject to an exception to the *Weaver* rule. *Mathis*, ¶ 47.

Allen has a constitutional right to a unanimous verdict, which requires the jury to agree "as to the principal factual elements underlying a specified offense." *Hardaway*, ¶ 70. In this case, the State alleged Allen committed two distinct assaults and charged him accordingly. As such, the jurors needed to agree that specific illegal conduct formed the basis of each charge prior to reaching a verdict.

Like in *Weaver*, the State alleged that multiple incidents of sexual abuse occurred but failed to distinguish which acts constituted each

count. In this case, nothing in the charging document, presentation of the case, opening and closing arguments, or instructions informed the jury which specific act formed the basis of each count. The allegations in the Amended Information were identical. The State did not identify either allegation as count I or II during its opening or closing arguments. The only time the State addressed the elements of sexual assault it failed to provide any clarification and instead argued, "the law requires you to find that on two occasions when [J.E.] was in the 6th grade, an old man touched his penis knowingly." (Tr. Day 4, at 20.) Rather than explain how the evidence proved each count, the State argued that J.E. had no reason to lie about any of the allegations, so they must be true.

The jury in this case, like the jury in *Weaver*, received a separate offenses instruction and a general unanimity instruction, but it was not instructed to agree on the "bottom line"—which act occurred. The district court should have "augment[ed] the general instruction to ensure the jury underst[ood] its duty to unanimously agree to a particular set of facts." *Weaver*, ¶ 34. To fully inform the jury, the

district court needed to provide the jury with the specific-act unanimity instruction in Model Criminal Jury Instruction 1-106(a).

This case is not like *Mathis*, where the State distinguished among the two counts by identifying distinct time periods and each course of conduct during the distinct time period served as a singular count. In *Mathis*, starting with the charging documents and ending with the verdict form, the State established different time periods to distinguish the two counts. But, here, the charging documents and verdict forms did not identify two different time periods to distinguish the charges. Here, the charging document identically alleged that count I and count II occurred "on or about fall or winter 2018." Similarly, the verdict forms did not name specific timelines to distinguish the counts.

The jurors had reason to doubt both allegations and may have relied on different underlying facts to render the guilty verdict. For example, some jurors may have doubted J.E.'s story about Allen collecting a tape measure before the first incident despite J.E. admitting Allen always carried one in his pocket. Other jurors may have doubted that Allen asked to perform oral sex on a flaccid penis during the latter incident. Some jurors may have doubted that Allen

would beg J.E. to participate after previously being apologetic. Jurors had reason to doubt either allegation, but, without open-minded, thorough deliberations, Allen's jury could "cover up wide disagreement among the jurors about just what [Allen] did, or did not, do[.]" *Richardson*, 526 U.S. at 819.

Additionally, if the jury assumed the counts were distinguished by chronological order, it would have been illogical for the jury to convict Allen of count II. J.E. told the jury the earlier incident occurred in November whereas he could not identify when the latter incident occurred. All the jury knew was that the assault that allegedly occurred in December, March, or summer happened after the November assault, so it could correspond with count II. If the jury assumed the counts were in chronological order, it confusingly convicted Allen of the incident that J.E. could not provide a timeline for.

Without discussing the specific allegations, the jury could "simply conclud[e] from testimony, say, of bad reputation, that where there is smoke there must be fire." *Richardson*, 526 U.S. at 819. The State encouraged the jury to adopt this approach when it repeatedly argued

that J.E. would not lie about something of this magnitude if nothing occurred. (Appendix B, at 16–17.).

This Court should invoke plain error review or, in the alternative, find that Allen's counsel was ineffective for failing to offer a specific-act unanimity instruction. Ineffective assistance of counsel occurs when counsel provides unreasonable and deficient performance that prejudices the accused. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984); *State v. Larsen*, 2018 MT 211, ¶ 7, 392 Mont. 401, 425 P.3d 694. An ineffective assistance of counsel claim is reviewable on direct appeal when "there could not be any legitimate reason for what counsel did" or did not do. *State v. Kougl*, 2004 MT 243, ¶ 15, 323 Mont. 6, 97 P.3d 1095.

There can be no plausible justification for an attorney's failure to request a jury instruction that properly states the law where such instruction would refute the State's case against the accused. See, e.g., *Kougl*, ¶ 20 (concluding failure to offer a warranted instruction that would have "str[uck] at the heart of the State's case" was ineffective assistance of counsel). Here, Model Criminal Jury Instruction 1-106(a), would have refuted the State's case with the law.

Defense counsel had everything to gain by seeking the specific-act unanimity instruction, which would have prevented the possibility of the jury convicting Allen without agreeing on a specific criminal act. There was no legitimate reason for counsel not to request the special instruction. The failure to do so was unreasonable performance.

The unreasonable performance was prejudicial. Or, viewed through the lens of plain error review, the obvious error prejudicially affected the fundamental fairness or integrity of the proceeding. The "ultimate inquiry" for prejudice is "the fundamental fairness of the proceeding." *Strickland*, 466 U.S. at 696. The lack of a specific-act unanimity instruction "certainly brings into question the fundamental fairness of [the] trial." *Weaver*, ¶ 27. Prejudice is also present when there is "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Larsen*, ¶ 7 (quoting *Kougl*, ¶ 11).

In this case, thorough jury deliberations likely would have uncovered wide disagreement among the jurors. Jurors doubted J.E.'s credibility, evidenced by their decision to acquit Allen on all but one count. Had the jury discussed the underlying factual allegations in both

counts, it would have been forced to consider J.E.'s credibility as it related to each count. But, without the specific-act unanimity instruction, it avoided discussing with specificity what details it doubted and why. Instead, the jurors could reach a compromise verdict of finding Allen guilty of one count but acquitting him of the other based on the general presumption that "where there is smoke there must be fire."

The fairness of Allen's trial rested on the assumption that his jury would thoroughly deliberate prior to reaching a verdict. *See Weaver*, ¶ 27. A specific-act unanimity instruction would have fully informed the jury of its obligation to discuss the underlying factual elements of each count. Counsel's failure to request a specific-act unanimity instruction was unjustifiable, unreasonable, and prejudicial ineffective assistance of counsel that is reversible on direct appeal. Alternatively, plain error review is necessary to avoid a miscarriage of justice because the error was obvious, affected Allen's constitutional right to a unanimous verdict, and prejudicially affected the fundamental fairness of the proceeding.

II. The prosecutor repeatedly argued that J.E. was "credible and consistent on the things that matter" and Allen was a liar. Her misconduct encouraged the jury to adopt her opinion about witness credibility rather than form its own.

This Court has consistently held that "the determination of the credibility of witnesses and the weight to be given to their testimony is solely within the province of the jury." *State v. Hayden*, 2008 MT 274, ¶ 26, 345 Mont. 252, 190 P.3d 1091. This "Court has been unequivocal in its admonitions to prosecutors to stop improper comments and [the Court has] made it clear that [it] will reverse a case where counsel invades the province of the jury." *Hayden*, ¶ 28 (quoting *State v. Stringer*, 271 Mont. 367, 381, 897 P.2d 1063, 1072 (1995)). Offering opinions about a witness's credibility is inappropriate and reversible error. *Hayden*, ¶ 28 (citing *State v. Daniels,* 2003 MT 247, ¶ 26, 317 Mont. 331, 77 P.3d 224; *State v. Rodgers*, 257 Mont. 413, 417, 849 P.2d 1028, 1031 (1993); *State v. Arlington*, 265 Mont. 127, 157, 875 P.2d 307, 325 (1994)). Similarly, a prosecutor is prohibited from "assert[ing] personal knowledge of facts in issue except when testifying as a witness." *Hayden*, ¶ 28 (citing Mont. R. Prof. Cond. 3.4(e); see also *Harne v. Deadmond*, 1998 MT 22, ¶¶ 9–11, 287 Mont. 255, 954 P.2d 732).

In *State v. Stutzman*, 2017 MT 169, 388 Mont. 133, 398 P.3d 265, the accused argued that twin girls fabricated allegations to escape their home and did not understand the gravity of their statements. *Stutzman*, ¶ 9. During rebuttal closing, the prosecutor responded by stating, "[a] not guilty verdict means you don't believe [K.W.] and [R.W.]. It means you think they're lying." *Stutzman*, ¶ 9. Stutzman objected and the prosecutor did not discuss the issue again. *Stutzman*, ¶ 9. Instead, the prosecutor's focus during both closing and rebuttal closing was "the evidence presented at trial and how it proved Stutzman's guilt." *Stutzman*, ¶ 19. Specifically, she identified the evidence that supported each element of the offenses. *Stutzman*, ¶ 18. This Court ruled that, in the context of the entire closing argument, the defendant failed to prove that one isolated statement prejudiced his right to a fair trial. *Stutzman*, ¶¶ 17 & 18.

However, when a prosecutor has intentionally and repetitively bolstered a witness's credibility or inserted inflammatory testimony that was not otherwise part of the record this Court has reversed, or the State has conceded. *See e.g., Hayden*, ¶¶ 14 & 29; *see also State v. Anderson*, DA 19-0353, Order at 1 (Dec. 9, 2020); *State v. French*, 2018

MT 289, ¶¶ 19–22, 393 Mont. 364, 431 P.3d 332. For example, in *Hayden*, the prosecutor, Marvin McCann, asked an officer to opine about whether witness testimony was credible. *Hayden*, ¶ 12. During closing, McCann told the jury it could "rely on" the officer's testimony. *Hayden*, ¶ 14. McCann also claimed to know the search of the house was good because officers do "good work." *Hayden*, ¶ 14. McCann was sure items found in the search were related to drug use and not some alternative as claimed by the defendant. *Hayden*, ¶ 14.

McCann's multiple errors required reversal. Not only was it inappropriate for him to elicit the officer's opinion regarding the witness's credibility but McCann told the jury that in his own opinion the State's witness could be "relied on." *Hayden*, ¶ 32. McCann's closing argument was "direct statements of the prosecutor's opinion" and telling the jury it should believe a witness is "improper prosecutorial arguments which constitute reversible error." *Hayden*, ¶ 32. The case was reversed and remanded for a new trial because "[i]t is for the jury, not an attorney trying a case, to determine which witnesses are believable and whose testimony is reliable." *Hayden*, ¶ 32. Additionally, by inserting his opinion that the search was good and the evidence was

indicative of drug use, there was a clear danger that the jury would adopt the prosecutor's views instead of exercising its own independent judgment. *Hayden*, ¶ 33. McCann's statements during closing argument "unfairly added the probative force of his own personal, professional, and official influence to the testimony of the witnesses." *Hayden*, ¶ 33.

A prosecutor's comments regarding witness credibility are improper for three reasons:

> (1) a prosecutor's expression of guilt invades the province of the jury and is an usurpation of its function to declare the guilt or innocence of an accused; (2) the jury may simply adopt the prosecutor's views instead of exercising their own independent judgment as to the conclusions to be drawn from the testimony; and (3) the prosecutor's personal views inject into the case irrelevant and inadmissible matters or a fact not legally proved by the evidence, and add to the probative force of the testimony adduced at the trial the weight of the prosecutors' personal, professional, or official influence.

Hayden, ¶ 28.

In this case, the prosecutor acted improperly when, instead of focusing on the evidence presented at trial, she repeatedly argued that J.E was credible, and Allen was a liar. Her inappropriate comments started in closing argument and continued throughout rebuttal closing. Unlike in *Stutzman*, the prosecutor did not make one, brief comment in

rebuttal closing. The prosecutor started her closing argument talking about how children lie, but, in her opinion, J.E. would not have lied about something as significant as these allegations. (Tr. Day 4, at 17.) She added facts and opinions into evidence that were not otherwise introduced when stating, "[w]e do not live in a society that has an expectation that a 12-year-old child will accurately describe sexual conduct[.]" (Tr. Day 4, at 17.) Next, she argued J.E. was "consistent where it matters," and later reiterated J.E. was "credible and consistent on the things that matter." (Tr. Day 4, at 17, 22, & 51) By repeatedly sounding her own opinion that J.E. would not lie about something so serious and he was credible, she encouraged the jurors to simply adopt her view rather than independently assess his credibility.

Not only did she comment on J.E.'s credibility, but she also opined that Allen was a liar. She argued Allen lied to "escape accountability for what he did." (Tr. Day 4, at 19.) She complained that it was unfair that Allen "gets to just say no," while J.E. suffered "one of the most traumatic experiences imaginable." (Tr. Day 4, at 25.) Then she attacked defense counsel's trial strategy as "utterly pedantic," "offer[ing] nothing of substance" and accused Allen of "victim blaming."

(Tr. Day 4, at 19, 22–23 & 25.) The prosecutor's personal view about why Allen denied the allegations and how he conducted his trial was not evidence, but it told the jury that in her personal, professional, and official opinion the strategy was inappropriate and weak. It implied that his short testimony was professionally unacceptable and cross-examining his accuser was callous.

After commenting on J.E.'s and Allen's credibility, the prosecutor continued to inject her personal opinions in the case by arguing that the possibility that the allegations were false "makes no sense," was "preposterous," and was "against reason and common sense." (Tr. Day 4, at 16–17.) Like McCann in *Hayden*, the prosecutor not only inappropriately commented on witness credibility, but then injected her personal opinions about the quality of the evidence. The prosecutor again failed to root her argument in the evidence of the case and instead made vast, blanket assertions that encouraged the jury to adopt her opinion rather than rely on the evidence.

The prosecutor never addressed how the evidence applied to the elements of sexual assault. The State did not offer any physical

evidence and no other person observed anything in the business to support J.E.'s allegations. Rather, the State's case hinged on who the jury believed. The jury's primary function was to weigh the credibility of J.E. and Allen, and, as such, the prosecutor's statements were that much more prejudicial. The split verdicts indicate the jury doubted J.E.'s credibility, and therefore it may have relied on the prosecutor's professional opinion that children would not lie about this type of allegations to conclude that "where there is smoke there must be fire."

In the context of the entire closing argument, the prosecutor's comments were wildly inappropriate, because, instead of focusing on the law and evidence, she encouraged the jury to believe her perspective. She repeatedly told the jurors that she believed J.E. was credible, so they should too. She opined that any other explanation was ridiculous. She injected her personal opinions about Allen's guilt, the defense strategy, and her perceived unfairness in Allen's right to deny the allegations, instead of focusing on the evidence in the case. This Court does not tolerate such misconduct.

This Court has previously invoked plain error review in a case involving prosecutorial misconduct and it should do so again here. This

Court's stance against prosecutorial misconduct is unequivocal. This Court should reverse the conviction because the prosecutor's comments inappropriately invaded the province of the jury.

III. The two errors, separate or combined, mandate reversal because they urged the jury to convict Edward Allen without deliberating about the details of the allegations and to instead accept the prosecutor's opinion that J.E. was credible.

"The cumulative error doctrine mandates reversal of a conviction where numerous errors, when taken together, have prejudiced the defendant's right to a fair trial." *State v. Cunningham*, 2018 MT 56, ¶ 32, 390 Mont. 408, 414 P.3d 289 (quoting *State v. Hardman*, 2012 MT 70, ¶ 35, 364 Mont. 361, 276 P.3d 839). Prejudice may occur from two or more errors, even if individually the errors are harmless. *Cunningham*, ¶ 32.

Here, the two errors both individually and together prejudiced Allen's right to a fair trial. The lack of specific-act unanimity instruction encouraged the jury to disregard the details of the allegations and instead generally assume that "where there is smoke there is fire." *Richardson*, 526 U.S. at 819. Then, the State compounded the problem when, instead of explaining how the evidence satisfied the specific

elements in each count, it argued children do not lie about things as serious as these allegations, despite that "fact" not being in evidence. (Tr Day 4, at 17.) The State ignored the details of the allegations and encouraged the jury to do the same. Additionally, the jury, not the prosecutor, was responsible for assessing witness credibility. Allen's right to a fair trial rested on the assumption that the jury would unanimously agree on a verdict after thorough, open-minded deliberations that included independently assessing J.E.'s and Allen's credibility. Allen's right to a fair trial was prejudiced by the cumulative errors because the jury did not need to unanimously agree on a verdict nor independently assess witness credibility. Whether the errors are taken together or separately, this Court must reverse the conviction.

CONCLUSION

The district court plainly erred when it failed to provide a specific-act unanimity instruction. Allen's conviction must be reversed because the jury may not have unanimously relied on a singular act as the basis of the verdict. Next, the prosecutor repeatedly vouched for J.E.'s credibility, attacked Allen's credibility, and injected her opinions as "facts." The error prejudiced the fairness of the proceedings because it

was the jury's duty, not the prosecutor's role, to determine witness credibility. Taken separately or together, the errors prejudiced Allen's right to a fair trial and this Court must reverse Allen's conviction and remand the case for a new trial.

Respectfully submitted this 26th day of September, 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 6,997, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Carolyn Gibadlo
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APPENDIX

CERTIFICATE OF SERVICE

I, Carolyn Marlar Gibadlo, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 09-26-2023:

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