IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0083

STATE OF MONTANA,

Plaintiff and Appellee,

v.

WES LEE WHITAKER,

Defendant and Appellant.

BRIEF OF APPELLANT

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

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STATEMENT OF THE ISSUES

1. Wes had a constitutional right to confront the State's witnesses face to face. The District Court let Jamie Grubb testify by video that Wes confessed to him, without making any case-specific findings on why video testimony was necessary. Did the court violate Wes's confrontation right?
2. The District Court let the State bolster L.M.'s trial testimony by repeatedly admitting her consistent, out-of-court hearsay statements about the alleged abuse. Did the court abuse its discretion?
3. Did Wes's convictions of both sexual intercourse without consent (SIWC) and its lesser-included offense of sexual assault violate double jeopardy?

STATEMENT OF THE CASE

On July 7, 2018, Wes Whitaker's wife, Jessica, told police her three-year-old daughter L.M. (Wes's stepdaughter) told her Wes had sexually abused her. (Tr. at 1187–90.) L.M. repeated this allegation to a sexual assault nurse examiner (S.A.N.E.) and in a video-recorded forensic interview. (Tr. at 1027–29; State's Ex. 2.)

The State charged Wes with SIWC. (Doc. 3.) Later, the State added counts of incest and sexual assault. (Docs. 80, 220.) The information alleged all three offenses occurred on or about July 1, 2018. (Doc. 220 at 2.) After initially being appointed counsel, Wes represented himself before and during trial.

On February 6, 2020, the State moved to have Jamie Grubb—a federal prisoner in Illinois—testify by video because transporting him to Montana would be "impractical." (Doc. 75.) Wes objected on confrontation grounds. (Doc. 84.)

After the COVID-19 pandemic subsequently struck, the District Court issued a blanket ruling in May 2020 that "all witnesses," including Grubb, could testify by video. (Tr. at 9, 40; Doc. 125.) The court briefly reiterated at a January 2021 hearing that Grubb could testify by video, but it implied its ruling would be the same regardless of the pandemic. (Tr. at 397–98.) Grubb took the virtual witness stand five months later, at the June 2021 trial, after this Court and the District Court had eased courtroom COVID-19 restrictions. (Tr. at 1111.) Grubb testified Wes had confessed to him in detail about his sexual abuse of L.M. (Tr. at 1115–24.)

L.M. testified and made the same accusations she had made to the S.A.N.E. nurse and forensic interviewer. (Tr. at 784–94.) Over Wes's hearsay objections, the S.A.N.E. nurse read aloud L.M.'s prior statements to her verbatim, and the State played L.M.'s forensic interview video for the jury. (Tr. at 1023–30, 1098–1104, 1131–36.)

The jury found Wes guilty on all three counts. (Doc. 338.) The prosecutor recommended the sentences for each count run concurrently, because all three charges were "based on the same act." (Tr. at 1656.) The District Court agreed and sentenced Wes to 100 years without parole on each count, to run concurrently. (Doc. 371, Judgment, Attached as Appendix A.) Wes filed a timely notice of appeal. (Docs. 378, 384.)

STATEMENT OF THE FACTS

Jessica's and L.M.'s Allegations

Jessica and Wes began dating in 2016. (Tr. at 805.) Jessica had a child from a previous relationship, L.M., who was just three years old at the time of the allegations. (*See* Tr. at 803.) In 2017, Jessica and Wes got married and had their own child together, A.W. (Tr. at 803–08.) The

family moved from Billings to Missoula in the spring of 2018. (Tr. at 816.)

By early summer 2018, Jessica and Wes were on the verge of divorce. They fought and argued often. (Tr. at 811–16.) On multiple occasions after fighting, Jessica would take the kids and stay with a friend or her mother for a few nights. (Tr. at 812, 824.) Wes told Jessica he wanted a divorce. (Tr. at 903.) He also threatened to seek full custody of the children, which made Jessica angry. (Tr. at 894–900.)

Then, on July 7, 2018, Jessica claimed Wes had sexually abused L.M. She alleged she was giving L.M. a bath when L.M. spontaneously said Wes had touched her "diamond." (Tr. at 845.) When Jessica asked L.M. what her "diamond" was, Jessica claims L.M. "pointed down to her private parts and said her pee-pee." (Tr. at 845.)

Jessica called her friend Brittany and cryptically asked to stay with her that night. (Tr. at 846.) Brittany called the police. (Tr. at 847.) Officer Ken Smith responded to Jessica's house as she was loading her children and belongings into the car while Wes slept. (Tr. at 847–48, 1188–90.) Jessica told Officer Smith that L.M. had said Wes touched her vagina. (Tr. at 1190.) L.M. told Officer Smith the same. (Tr. at

1194.) Jessica also told Officer Smith L.M. "had previously been abused" but did not elaborate. (Tr. at 1199.)

Wes was arrested in his bedroom, and Officer Smith escorted Jessica and L.M. to First STEP Clinic, a child advocacy center. (Tr. at 850–51, 1197.) Adeline Wakeman, a S.A.N.E. nurse, examined L.M. at about 1:30 a.m. (Tr. at 1002.)

Wakeman's examination did not turn up anything "medically significant." (Tr. at 1016.) A vaginal swab tested negative for the presence of semen, saliva, or male DNA. (Tr. at 1031, 1283–85.) L.M.'s hymen was not compromised or damaged in any way. (Tr. at 1035.)

The next day, L.M. met with Cat Otway at First STEP for a forensic interview. (Tr. at 855, 1094.) Otway read Wakeman's report prior to the interview. (Tr. at 1096.) Otway then questioned L.M. for 25 minutes and recorded the conversation on video. (Tr. at 1097–98; Ex. 2.)

Between the night of Wes's arrest and July 10, Wes placed three calls to Jessica from jail.[1] In them, he neither admitted nor denied the allegations, instead expressing hopelessness and resignation that the

[1] Recordings of these calls were admitted and published at trial. (Tr. at 851–52, 854, 860; State's Exs. 1A, 1B, 1C.)

accusations were going to lead to him spending years in prison. (Exs. 1A, 1B, 1C.) In the third and final call, Wes told Jessica—after she had repeatedly accused, yelled at, and berated him—that he felt like a "failure," he had made mistakes in his life, he did not treat the kids "fairly," and he did not want the kids "to know that this is what their dad is." (Ex. 1C at 00:14:40–00:15:40.)

Jessica claimed at trial that on one occasion at their home in Missoula, she had fallen asleep in the living room with L.M., but when she woke up, L.M. was in the parents' bedroom. (Tr. at 826.) This was not unusual, as L.M. commonly slept in bed with Wes and/or Jessica. (Tr. at 819, 843.) Jessica claimed she saw L.M. exit the bedroom "zipping up her onesie pajamas," which made Jessica suspicious. (Tr. at 826.) Jessica had "no idea" when this happened. (Tr. at 826.)

Jessica also testified that on one occasion at the beginning of July 2018, she fell asleep in the living room, woke up, and walked into the bedroom to see Wes lying on the bed in his boxers and L.M. standing on the floor in front of him with no shirt on. (Tr. at 827–30.) Jessica said "it looked like he was pulling up L.M.'s pants." (Tr. at 828.) She said Wes "jumped up" in a panic and ran into the bathroom, while Jessica said,

"what the fuck is going on here?" (Tr. at 828.) Jessica claimed she noticed Wes had a partial erection. (Tr. at 831.)

Jessica testified that after this event, she told Wes she did not trust him around L.M. (Tr. at 844.) Yet Jessica also took the whole family on a vacation to Whitefish right after this happened. (Tr. at 844.)

Detective Crystal Crocker interviewed Wes at the jail. (Tr. at 1214.) Wes said his and Jessica's marriage had been deteriorating, and they fought a lot. (Tr. at 1216.) Crocker asked Wes about the incident where Jessica walked in on him and L.M. in the bedroom. (Tr. at 1217.) According to Crocker's recollection, Wes told her he went to bed that night drunk, with his clothes on, and the bedroom door locked. (Tr. at 1217–18.) When he woke up, the door was open, he was undressed, and L.M. was in his bed with no clothes on. (Tr. at 1218.) Wes said he told L.M. to put clothes on and was helping her get dressed when Jessica walked into the room. (Tr. at 1218.)

Wes denied to Crocker that he had sexually abused L.M. (Tr. at 1221.) When Crocker told him she did not believe him and pressed him to give a different answer, Wes told her he did not "remember" ever

sexually abusing L.M. (Tr. at 1222.) Wes told Crocker he believed "Jessica had planted these ideas in L.M.'s mind." (Tr. at 1215.)

L.M. testified at trial. By that time, she was six years old. (Tr. at 781.) She stated when she was three, Wes touched her "private parts," which she described as where she goes both poop and pee. (Tr. at 785.) She testified Wes called her "front part" her "diamond." (Tr. at 789.) L.M. said Wes would touch her using both his hands and his penis. (Tr. at 789.) When asked if he touched the inside or outside of her private parts, L.M. answered, "Both, I think." (Tr. at 790.) L.M. said this happened more than once but could not say how many times or when it happened. (Tr. at 790.) L.M. said Wes told her that if she told anyone, he would call the police and have her mother taken away. (Tr. at 794.) Wes personally cross-examined L.M., and L.M. did not recognize him. (Tr. at 801.)

Dr. Donna Zook, a clinical psychologist and expert witness for the defense, explained it was common for children as young as L.M. to fuse disparate memories together and believe the newly formed, fabricated memories were real. (Tr. at 1512.) She testified toddlers often cannot

accurately identify the source experience on which a particular memory is based. (Tr. at 1513.)

Mark Moser, Jessica's uncle, met with Wes numerous times after his arrest and had lengthy, heartfelt conversations with him at the jail. (Tr. at 1324–26, 1335.) Moser told Wes he believed Jessica may have wanted to "escape the situation with" him and coached L.M. to make the allegations in order to get him out of her life. (Tr. at 1329.)

Jamie Grubb's Video Testimony

At a May 27, 2020 hearing, the State noted "many" of its witnesses would appear in person—including Jessica and L.M., who lived over 400 miles away in Glasgow, Montana (Tr. at 782, 802)—but that Grubb "will have to appear via video." (Tr. at 40.) Wes objected. (Tr. at 40.) Referring to its blanket ruling a week earlier that "all witnesses" could testify remotely, the District Court responded, "[B]ased on my prior statements about allowing video testimony under the COVID-19 conditions, [ ] I will grant your request." (Tr. at 40.)

The prosecutor asked the court to put this order in writing, because the federal prison required a written order to make Grubb available by video. (Tr. at 45.) The District Court responded, "Well, I

believe it's a writ." (Tr. at 45.) The prosecutor clarified, "That is generally what they ask for" when there is a request to transport an inmate out of custody. (Tr. at 45.) But the prosecutor said the prison assured him a standard court order was "sufficient for their ability to allow him to appear by video. I'm not asking to take him out of custody, just having him appear." (Tr. at 46.)

The court complied with the prosecutor's request and issued a written order allowing Grubb to testify by video. The order contained no explanation. (Doc. 125.)

After a few continuances of the trial date, the State referenced the court's prior order on Grubb at a January 26, 2021 hearing. (Tr. at 397.) The court chimed in and said, "Right. And that's an obvious situation where that – the only way we can get testimony from that witness – and it's happened even before COVID-19 where I've had trials with a federally protected witness or federally incarcerated witness testifies remotely [sic]." (Tr. at 397–98.) Wes again objected, and the court overruled. (Tr. at 398.) The court did not mention Grubb again until he took the virtual witness stand five months later on June 22, 2021.

Shortly before trial, on June 9, 2021, the court observed how much the pandemic had receded, saying, "more and more people are vaccinated," "[t]he county is beginning to relax on social distancing," and "there seems to be a lot more travel going on" and much more "close association occurring." (Tr. at 481–82.) The court said of the many Montana-based witnesses, "I expect that most of these witnesses will be available to testify in the courtroom." (Tr. at 482.) When trial convened shortly thereafter, the District Court announced it would not require masks in the courtroom. (Tr. at 569.)

The State called Grubb to testify by video on the second day of trial. (Tr. at 1106.) Wes objected yet again that this violated his right to confront adverse witnesses. (Tr. at 1106–07.) The court responded tersely, "I understand. It's overruled." (Tr. at 1107.)

On roughly ten occasions during Grubb's video testimony, Grubb indicated he could not hear the prosecutor's or Wes's questions. Grubb responded to various questions by saying: "I'm sorry. Can you say that again?" (Tr. at 1112.) "I'm sorry?" (Tr. at 1112.) "Sorry. You're really quiet." (Tr. at 1112.) "I did not hear what you said." (Tr. at 1115.) "I'm sorry. You cut out there for a second. Could you repeat that?" (Tr. at

1117.) "I'm sorry?" (Tr. at 1117.) "I'm sorry. Can you repeat that?" (Tr. at 1124.) "Sorry. Can you repeat that?" (Tr. at 1125.) "Say that again." (Tr. at 1128.) "I'm sorry. You cut out halfway through that." (Tr. at 1129.)

In the midst of these constant technological disruptions, Grubb testified he and Wes shared a cell when they were both inmates at the Missoula County Detention Facility. (Tr. at 1115.) Grubb told the jury Wes confided in him about a time he got into bed with L.M. and "ended up sexually rubbing myself up against her. And then my wife came home, and almost caught us." (Tr. at 1119.) Grubb said Wes told him that on another occasion while lying in bed with L.M., "I would rub my dick against her vaginal area and her anus." (Tr. at 1120.)

Grubb then testified a "major thing that struck me" was that Wes said he told L.M. to refer to her vagina as her "diamond." (Tr. at 1120.) Grubb said Wes told him he had L.M. use this "diamond" codeword to reduce the chance someone else would find out about his abuse. (Tr. at 1124.)

Wes asked Grubb on cross-examination if it was true Grubb had spread "false rumors" about Wes prior to them becoming cellmates and

that they "didn't get along very well" as a result. (Tr. at 1129.) Grubb answered, "I'm sorry. You cut out halfway through that." (Tr. at 1129.) Wes had to repeat the question, and then Grubb answered no. (Tr. at 1129.) Wes also asked Grubb if he had rifled through his case "paperwork" while they shared a cell, implying this was how he came to know details about the alleged abuse, but Grubb denied doing so. (Tr. at 1130.)

After Grubb's testimony, Detective Crocker testified Grubb reached out to her in April 2019 and told her, among other things, about Wes's use of the term "diamond." (Tr. at 1230–31.) Crocker testified this information was "investigatively significant" because "that information wasn't public." (Tr. at 1231–32.) She said the only way Grubb could have known about that term is if Wes discussed it with him. (Tr. at 1232.)

The prosecutor previewed Grubb's testimony in opening statements. (Tr. at 763.) Then, in closing arguments, the prosecutor repeatedly discussed Grubb's testimony, including a reference to it just four sentences in. (Tr. at 1607.) The prosecutor went on to say Jessica's testimony about walking in on Wes pulling up L.M.'s pants in the

bedroom "is corroborated by Jamie Grubb, the Defendant's cellmate who says that the Defendant told him that his wife caught him this time." (Tr. at 1618.)

The prosecutor said "of particular note" in Grubb's testimony were Grubb's statements about the "diamond" codeword. (Tr. at 1619.) The prosecutor said, "And that's notable because Detective Crocker told you that that word, 'diamond,' was in no public document in this case. It was not available to the public . . . And so how did Mr. Grubb know the word 'diamond'? The only way he could have known is because the Defendant told him." (Tr. at 1620.) The prosecutor said Grubb's testimony was proof Wes had made an "outright confession." (Tr. at 1619.)

Use of Hearsay to Bolster L.M.'s Testimony

During six-year-old L.M.'s direct examination, the prosecutor asked if she remembered talking to a "nurse," talking to someone with "glasses," or "being in a room that had a videotape running" three years earlier, apparently referring to Wakeman and Otway. (Tr. at 792–93.) L.M. said she did not remember those things. (Tr. at 792–93.)

Based on L.M.'s inability to recall which strangers she talked to when she was three years old, the prosecutor sought to admit L.M.'s entire statements to Wakeman and Otway as "prior inconsistent statements." (Tr. at 1024–26, 1082–83.) The prosecutor argued L.M.'s "lack of memory" about these conversations created the "inconsistency" between her prior statements and present testimony. (Tr. at 1024–26, 1082–83.) The District Court initially disagreed, saying L.M.'s lack of memory about talking to Otway and Wakeman opened the door only to evidence she in fact talked to them, not to the content of her statements to them. (Tr. at 1025.) But the prosecutor was persistent and eventually persuaded the court to admit these statements in their entirety. (Tr. at 1026.) Wes objected and later moved for a mistrial on hearsay grounds, but to no avail. (Tr. at 1024–26, 1082–84, 1486–87.)

Wakeman testified she was a nurse practitioner with two bachelor's degrees, a master's degree, and a doctorate. (Tr. at 998–99.) She had received specialized training to be a S.A.N.E. nurse. (Tr. at 999.) And she had performed between 150 and 200 S.A.N.E. exams in her career. (Tr. at 1001.)

Wakeman had with her on the witness stand a copy of her examination report, which in turn contained her notes on L.M.'s statements. (Tr. at 1005.) Wakeman read those notes to the jury verbatim. (Tr. at 1027–30.)

Wakeman quoted L.M. as saying to her, "Are you going to look here (points to vagina) and take my underwear off?" (Tr. at 1027.) Wakeman said she asked L.M., "What do you call that place?" and L.M. answered, "My diamond." (Tr. at 1028.) Wakeman testified L.M. then said, "Daddy told me not to talk to mom and not to go to the doctor." (Tr. at 1028–29.)

Wakeman asked L.M. if any part of her body hurt, and she said, "My diamond." (Tr. at 1029.) She asked L.M. when that pain started, and L.M. answered, "Daddy pushes in and out really fast like this," while moving her pelvis back and forth. (Tr. at 1029.) Wakeman again asked L.M., "When did your diamond start hurting?" and L.M. answered, "When Daddy touched my diamond." (Tr. at 1030.) The prosecutor asked Wakeman in the midst of the questioning, "And are those quotes from L.M.?" Wakeman answered, "Yes." (Tr. at 1029.)

Otway was a forensic nurse with 33 years of experience. (Tr. at 1093.) She received a S.A.N.E. certification and had conducted "over a thousand forensic interviews of children." (Tr. at 1092–94.)

Otway assured the jury of the trustworthiness of the forensic interview process, discussing the "child friendly" and "developmentally appropriate" techniques she employs, the "comfortable" atmosphere she creates to encourage the child to "give details or disclosure of events that may have happened to them," how she builds rapport with the child, and how she uses special techniques to engage with a toddler like L.M. (Tr. at 1087–92.) With that in mind, the prosecutor played the video of the forensic interview for the jury over Wes's hearsay objection. (Tr. at 1098; Ex. 2.)

The prosecutor paused the 25-minute video roughly 16 times to have Otway explain to the jury what techniques she was employing to ensure the accuracy of L.M.'s responses. (Tr. at 1100–04, 1131–36.) At the prosecutor's behest, Otway explained away L.M.'s playful and carefree demeanor in the video as normal for a toddler who had been sexually abused. (Tr. at 1102, 1136.)

In the video, Otway asked L.M. to tell her about a time she got an "owie" on her body. (Ex. 2 at 00:04:20.) L.M. pointed to her vagina and butt, said Wes gave her those owies, did a pelvic thrusting motion to demonstrate, and appeared to say it happened between two and four times. (Ex. 2 at 00:04:20–00:05:25.) She said Wes's "diamond" touched her butt. (Ex. 2 at 00:05:25–:50.) When Otway asked what Wes's diamond was, L.M. pointed to her crotch and said it had hair on it. (Ex. 2 at 00:06:50–00:07:20.) When Otway asked L.M. what her diamond was for, L.M. did a pelvic thrust and said, "For doing like this for my dad." (Ex. 2 at 00:10:48–:58.) Otway asked L.M. if Wes ever told her not to tell anybody about what he was doing, and L.M. said yes, Wes told her to not tell her mom. (Ex. 2 at 00:12:50–00:13:00.) L.M. also said Wes's diamond first touched the "outside" of her diamond, and then he "opened it." (Ex. 2 at 00:14:12–:50.)

The Redundant Sexual Assault Conviction

After the State filed its first amended information adding charges of incest and sexual assault, Wes filed a motion to dismiss those charges. (Doc. 119.) He cited state and federal constitutional double jeopardy protections and the statutory double jeopardy provision at

Mont. Code Ann. § 46-11-410(2). (Doc. 119.) Wes asserted the additional charges were lesser included offenses that were barred under § 46-11-410(2). (Doc. 119 at 3.) The District Court denied Wes's motion without analysis. (Doc. 148.)

The only two incidents the State discussed in opening statements were the time Jessica said she walked in on Wes pulling up L.M.'s pants and claimed he had a partial erection, and the time L.M. walked out of the bedroom while zipping up her pajamas. (Tr. at 752, 756.) Jessica testified the pants incident happened at the beginning of July 2018—consistent with the date on the State's information. (Tr. at 837–38.) She could not remember when the onesie pajama incident happened. (Tr. at 826.)

In closing argument, the State focused almost exclusively on the pants incident. (*See* Tr. at 1607–18.) Referring to this, the prosecutor said, "And so on those facts alone . . . that is sufficient on its own to convict him of these three offenses." (Tr. at 1618.) The prosecutor commented that the same instances of Wes "touching" L.M., which proved the sexual contact element of sexual assault, also progressed to

"penetration," which proved the intercourse element of SIWC. (Tr. at 1613–16.)

At sentencing, the State recommended 100 years on each count, without parole, to run concurrently. (Tr. at 1656.) The prosecutor explained, "I am recommending that those counts run concurrent, Your Honor, largely for procedural reasons. *I think that they are all based on the same act*. And so I think it's at least arguable that they should merge for sentencing." (Tr. at 1656 (emphasis added).)

STANDARDS OF REVIEW

"This Court exercises plenary review of constitutional questions and applies de novo review to a district court's constitutional interpretations." *State v. Mercier*, 2021 MT 12, ¶ 11, 403 Mont. 34, 479 P.3d 967; *accord State v. Valenzuela*, 2021 MT 244, ¶ 7, 405 Mont. 409, 495 P.3d 1061.

A district court's evidentiary rulings are reviewed for an abuse of discretion. *State v. Smith*, 2021 MT 148, ¶ 14, 404 Mont. 245, 488 P.3d 531. However, to the extent an evidentiary ruling is based on a conclusion of law, this Court determines whether the district court correctly interpreted the law. *Smith*, ¶ 14.

SUMMARY OF THE ARGUMENT

The State's two most important witnesses were L.M. and Grubb. These were the only two people to offer *direct* evidence of Wes's guilt. The State deprived Wes of the chance to confront Grubb face to face, and it improperly bolstered L.M.'s trial testimony.

Grubb's video testimony violated Wes's constitutional right to confrontation. The State presented no argument or evidence, and the District Court made no case-specific findings, as to why it was *necessary*—as opposed to merely convenient—for Grubb to testify remotely. The remote testimony sheltered Grubb, allowing him to make his explosive claims without having to stand face-to-face with the man he was accusing.

L.M. testified to the same allegations she made to Otway and Wakeman. Those statements were not admissible as "prior inconsistent statements"; they were pure hearsay. The only function their admission served was to bolster L.M.'s trial testimony through the force of repetition. The more the jury heard L.M.'s accusations—particularly through the testimony of highly credentialed, professional witnesses—the more likely it was to believe them.

Each of these errors independently prejudiced Wes and merits reversal. But these errors also worked in tandem to significantly enhance the State's body of evidence and undermine Wes's constitutional right to a fair trial. The doctrine of cumulative error demands reversal.

This Court must also vacate Wes's sexual assault conviction. Sexual assault is a lesser-included offense of SIWC, and Wes was convicted of both based on the same transaction. This violates double jeopardy.

ARGUMENT

I. The District Court violated Wes's face-to-face confrontation right when it let Jamie Grubb snitch on Wes from the comfort of a distant video monitor.

A. Wes had a right to confront Grubb "face to face," meaning in person.

Under the United States Constitution, "the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The Confrontation Clause "guarantees the defendant a face-to-face meeting with witnesses appearing before the tier of fact." *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988). This means "the right *physically* to face those who testify against him." *Coy*, 487 U.S. at 1017 (quoting

Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987) (plurality opinion)) (emphasis added).

The Montana Constitution makes this physical confrontation right even more explicit: "In all criminal prosecutions the accused shall have the right . . . to meet the witnesses against him *face to face*." Mont. Const. art. II, § 24 (emphasis added).

"[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'" *Coy*, 487 U.S. at 1017. The purpose of compelling a state witness to confront the accused face to face is to "enhance[ ] the accuracy of factfinding at trial," *Maryland v. Craig*, 497 U.S. 836, 846 (1990), because "[i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back,'" *Coy*, 487 U.S. at 1019.

Video testimony is not "face to face" testimony. There are "important practical differences" between the two. *United States v. Carter*, 907 F.3d 1199, 1207 (9th Cir. 2018); *accord Vazquez Diaz v. Commonwealth*, 167 N.E.3d 822, 845–49 (Mass. 2021) (Kafker, J., concurring) (noting video testimony prevents jurors from assessing the

witness's eye contact and body language, shelters the witness from the imposing solemnity of the courtroom and the truth-inducing glare of the defendant and jurors, and is often rife with technical issues that cause disjointed communication); *Bonamarte v. Bonamarte*, 263 Mont. 170, 174, 866 P.2d 1132, 1134 (1994) (highlighting the benefits of live witness testimony).[2]

"Any procedure that allows an adverse witness to testify remotely necessarily diminishes 'the profound [truth-inducing] effect upon a witness of *standing in the presence* of the person the witness accuses.'" *Carter*, 907 F.3d at 1206–07 (quoting *Coy*, 487 U.S. at 1020) (emphasis in original). Video testimony and face-to-face testimony simply "are not constitutionally equivalent." *United States v. Yates*, 438 F.3d 1307, 1315 (11th Cir. 2006); *accord United States v. Bordeaux*, 400 F.3d 548, 554–55 (8th Cir. 2005).

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[2] *See also* Meghan O'Connell, *Zoom Jury Trials: The Inability to Physically Confront Witnesses Violates A Criminal Defendant's Right to Confrontation*, 52 Stetson L. Rev. 329, 359–60 (2022); Liz Bradley & Hillary Farber, *Virtually Incredible: Rethinking Deference to Demeanor When Assessing Credibility in Asylum Cases Conducted by Video Teleconference*, 36 Geo. Immigr. L.J. 515, 546–555 (2022); Susan A. Bandes & Neal Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, 68 Buff. L. Rev. 1275, 1294–1305 (2020) (all discussing how video testimony is a poor substitute for in-person testimony).

B. Because Wes's best chance to impeach Grubb was to face him in the courtroom, the District Court could not let Grubb testify by video without first satisfying *Craig*.

Courts may not dispense with the constitutional right to in-person confrontation unless they first satisfy the "stringent" *Craig* standard, which is to be "reserved for rare cases." *Carter*, 907 F.3d at 1206.

The United States Supreme Court held in *Craig* that "in certain narrow circumstances," the right to physical confrontation may be circumscribed. *Craig*, 497 U.S. at 848. But the Court stated physical confrontation may not "easily be dispensed with." *Craig*, 497 U.S. at 850. Rather, "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial *only* where denial of such confrontation is necessary to further an important public policy and *only* where the reliability of the testimony is otherwise assured." *Craig*, 497 U.S. at 850 (emphasis added). This is the two-part "*Craig* analysis." *Mercier*, ¶ 18.

Although *Craig* itself dealt with one-way video testimony, this Court—along with countless others—applies *Craig* to two-way video testimony as well. *Mercier*, ¶ 22; *Carter*, 907 F.3d at 1207–08 (collecting cases in which courts apply *Craig* to two-way video).

Under the first prong of the *Craig* test, the State must make "an adequate showing of necessity" for a particular witness's remote testimony. *Craig*, 497 U.S. at 855. The District Court must then make a "case-specific finding of necessity." *Craig*, 497 U.S. at 858; *accord Coy*, 487 U.S. at 1021 (declining to make an exception to the Confrontation Clause absent any "individualized findings" that "particular witnesses needed" accommodation). This is a two-step process: the trial court must first "hear evidence" and then "determine" remote testimony is necessary. *Craig*, 497 U.S. at 855; *accord Yates*, 438 F.3d at 1315 ("The court generally must: (1) hold an evidentiary hearing and (2) find [ ] that the denial of physical, face-to-face confrontation at trial is necessary to further an important public policy.").

This condition of a case-specific finding of necessity requires "something more than [ ] generalized findings of policy concerns." *Mercier*, ¶ 19. Concerns about "added expense or inconvenience," "generalized judicial economy," and the impracticality of long-distance travel do not satisfy *Craig*'s necessity prong. *Mercier*, ¶ 26; *State v. Martell*, 2021 MT 318, ¶ 15, 406 Mont. 488, 500 P.3d 1233; *State v. Bailey*, 2021 MT 157, ¶ 42, 404 Mont. 384, 489 P.3d 889.

C. *Craig* did not permit Grubb's video testimony because there was no evidence or findings that it was necessary for him to testify remotely.

1. The State's actual motive behind its request—to avoid the hassle of transporting a federal inmate—did not satisfy *Craig*.

The State wanted Grubb to testify by video simply because transporting him to Montana would be "impractical."[3] (Doc. 75.) That single word was the only explanation the State ever offered about why it was necessary to dispense with Wes's constitutional right to confront Grubb in person.

Even if transporting a federal inmate across state lines could be considered "impractical," the logistical hassle of doing so would not satisfy *Craig*'s necessity prong. *See Martell*, ¶¶ 3, 15 (holding the district court's finding that it was "impractical" to have an out-of-state, minor foundational witness travel to Montana to provide "only a few minutes [of] testimony" violated *Craig*). Moreover, the transport of federal inmates to testify in state court is a well-established and federally supported practice.

[3] The State filed its motion before the COVID-19 pandemic and did not mention COVID-19 as a reason for Grubb's remote testimony. (Doc. 75.)

The Federal Bureau of Prisons routinely transfers inmates so they may testify in state court trials. The Bureau's own regulations state it may consider a request by a state court "that an inmate be transferred to the physical custody of state or local agents pursuant to state writ of habeas corpus ad prosequendum or ad testificandum." 28 C.F.R. § 527.30 (1981). A writ of habeas corpus ad testificandum "orders the custodian of an individual in custody to produce the individual before the court . . . to appear to testify," and "[s]tate courts may issue such writs to prisoner custodians to produce federal prisoners."[4]

The prosecutor and District Court were aware of this writ process but simply chose not to use it. When the prosecutor asked the court for a written order so the federal prison would allow Grubb to testify by video, the court initially responded, "Well, I believe it's a writ." (Tr. at 45.) The prosecutor clarified the writ process is for taking a federal inmate "out of custody" and transporting him to Montana. (Tr. at 45–

[4] U.S. Marshals Service, *Home > What We Do > Service of Process > Criminal Process > Writ of Habeas Corpus*, usmarshals.gov, https://www.usmarshals.gov/what-we-do/service-of-process/criminal-process/writ-of-habeas-corpus (last visited Sept. 20, 2023).

46.) But since the State was not even *asking* the prison to transport Grubb, a writ was not necessary. (Tr. at 45–46.)

It may well have been a headache for the State to draft a writ, file it, wait for a response, and then help coordinate Grubb's travel. But avoiding a headache is not a "necessity" under *Craig*. *Martell*, ¶ 15; *Bailey*, ¶ 42; *Mercier*, ¶ 26. "[C]onstitutional protections have costs." *Coy*, 487 U.S. at 1020. The State was not free to dispense with Wes's constitutional right simply to save time, effort, or expense.

This is especially true given the gravity of this case and this witness. Wes faced a mandatory sentence of 100 years in prison if convicted of either SIWC or incest. *See* Mont. Code Ann. §§ 45-5-503(4)(a)(i), 45-5-507(5)(a)(i) (2017). Grubb was a key witness who was going to claim Wes had confessed to him. *Cf. Mercier*, ¶ 27; *Martell*, ¶ 15 (both holding *Craig*'s necessity requirement applies even to inconsequential foundational witnesses). If the State was ever going to assume the inconvenience of filing a writ to produce a federal inmate at trial, this was the case in which to do it. The importance of the jury observing Grubb's demeanor as he testified in Wes's physical presence far outweighed the inconvenience of transporting him to Montana.

2. The general existence of the COVID-19 pandemic did not necessitate Grubb's video testimony in June 2021.

The District Court ruled in May 2020 that, due to the omnipresent COVID-19 pandemic at that time, "all witnesses," including Grubb, could testify by video. (Doc. 125; Tr. at 9, 40.)

The court reiterated its ruling at a January 21, 2021 hearing. (Tr. at 397–98.) But the court did not clearly articulate the basis for this renewed ruling, saying only it was "an obvious situation" that Grubb would have to testify remotely. (Tr. at 397–98.) The court then seemingly implied its ruling would be the same even absent the pandemic, simply because Grubb was a federal prisoner. (Tr. at 398.) The court never mentioned Grubb again before he testified five months later.

None of this amounts to a "case-specific finding of necessity." *Craig*, 497 U.S. at 855, 858. To the extent the District Court meant to say it would have allowed Grubb's remote testimony on the sole basis that he was a federal inmate (*see* Tr. at 398), that was not a necessity under *Craig*, as discussed above. And to the extent the District Court was basing its decision on the general existence of the COVID-19

pandemic, that rationale did not apply by the time of Grubb's testimony 15 months into the pandemic.

The Montana judicial system eased its COVID-19 restrictions on May 17, 2021, a month before trial.[5] As the District Court acknowledged as Wes's trial commenced in June 2021, the severity of the pandemic had sharply declined in the preceding months. The court explicitly acknowledged that "more and more people are vaccinated," the "county is beginning to relax on social distancing," and "there seems to be a lot more travel going on." (Tr. at 481–82.) The court did not even require masks during the trial. (Tr. at 569.)

The District Court's observations that the pandemic was receding were correct. In the months leading up to the trial, vaccines became widely available. According to the Centers for Disease Control (CDC), the number of people in the United States who received at least one COVID-19 vaccine dose increased from zero in December 2020 to

[5] Memorandum from Mike McGrath, Chief Justice, Montana Supreme Court, to Montana District Court Judges et al., https://perma.cc/8GMX-YFVY (May 17, 2021) (loosening COVID-19 safety protocols for the Montana judicial system in light of "the availability of effective vaccines" and updated public health guidance).

roughly 180 million by the time of the June 2021 trial.[6] Similarly, by April 2021—two months before trial—roughly 70% of federal inmates had been offered a COVID-19 vaccine.[7] By the same token, the number of weekly new hospitalizations from COVID-19 in the U.S. dropped precipitously from roughly 115,000 per week at the start of 2021 to less than 15,000 per week at the time of Wes's trial.[8]

Despite the District Court's awareness in June 2021 that the pandemic was not nearly as disruptive as it once was, it never revisited its ruling on Grubb's video testimony. By the time Grubb took the virtual witness stand, the District Court's COVID-19-based rationale for his remote testimony was badly outdated.

There was no evidence—and there certainly were no case-specific findings—that the general existence of the pandemic made it necessary

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[6] Centers for Disease Control (CDC), *CDC COVID Data Tracker > Trends in Number of COVID-19 Vaccinations in the US*, cdc.gov, https://covid.cdc.gov/covid-data-tracker/#vaccination-trends (Updated May 11, 2023).

[7] Liesl M. Hagan, et al., *COVID-19 Vaccination in the Federal Bureau of Prisons, December 2020–April 2021*, 39 Vaccine 5883, 5887 (2021).

[8] Centers for Disease Control (CDC), *CDC COVID Data Tracker > Trends in United States COVID-19 Hospitalizations, Deaths, Emergency Department (ED) Visits, and Test Positivity by Geographic Area*, cdc.gov, https://covid.cdc.gov/covid-data-tracker/#trends_weeklyhospitaladmissions_select_00 (last visited Sept. 20, 2023).

for Grubb in particular to testify remotely. *Cf. Mercier*, ¶ 19 (requiring "something more than [ ] generalized findings of policy concerns" to satisfy *Craig*). There was no suggestion, for instance, that Grubb was infected with or particularly vulnerable to COVID-19. Nor was there evidence the federal prison refused to transport Grubb on account of COVID-19. To the contrary, starting November 25, 2020—seven months before trial—the policy of the Bureau of Prisons was to allow for inmate transport, so long as the inmate was not actively infected with COVID-19 and observed a quarantine period before traveling.[9]

This Court and many others have addressed how the COVID-19 pandemic fits into the *Craig* necessity analysis. The clear consensus of these decisions is the simple existence of the pandemic, without more, does not qualify as a "case-specific finding of necessity" for remote testimony under *Craig*. *See, e.g., Newson v. State*, 526 P.3d 717, 721 (Nev. 2023) ("Abstract concerns related to the pandemic generally are not an adequate justification for dispensing with a defendant's right to in-person confrontation."); *C.A.R.A. v. Jackson Cnty. Juv. Off.*, 637

[9] Federal Bureau of Prisons, *BOP Modified Operations*, bop.gov, https://www.bop.gov/coronavirus/covid19_status.jsp (Updated November 25, 2020).

S.W.3d 50, 59 (Mo. 2022) ("[W]itness-specific findings of a particular risk associated with COVID-19 . . . are required to meet the necessity prong."); *State v. Tate*, 969 N.W.2d 378, 388 (Minn. Ct. App. 2022) (holding the state may not merely "rest on the general existence of the pandemic" to establish necessity).

In *State v. Walsh*, 2023 MT 33, 411 Mont. 244, 525 P.3d 343, this Court allowed a witness to testify remotely from Greece on account of the pandemic. The district court had made explicit, on-the-record findings that the witness would have to travel over 11,000 miles round-trip and that the CDC and U.S. State Department had issued "do not travel" warnings for Greece, given the alarmingly high infection rates there. *Walsh*, ¶¶ 5, 11. This Court affirmed based on the district court's "substantive, detailed findings" of necessity for that particular witness. *Walsh*, ¶ 11.

Other courts have likewise allowed remote testimony on account of COVID-19, but *only* when the trial court made a case-specific finding that the pandemic posed a unique barrier to a particular witness's live testimony. *See, e.g., State v. Comacho*, 960 N.W.2d 739, 755 (Neb. 2021) (allowing remote testimony for a witness who was actively infected

with, and experiencing symptoms from, COVID-19 during trial); *Tate*, 969 N.W.2d at 389 (allowing remote testimony for a law enforcement witness who was exposed to COVID-19 and subject to a mandatory 14-day quarantine period that included the dates of trial); *State v. Milko*, 505 P.3d 1251, 1257 (Wash. Ct. App. 2022) (allowing remote testimony for two out-of-state witnesses in July 2020 due to the witnesses' documented medical conditions that made them particularly vulnerable to complications from COVID-19).

By the same token, many courts have rejected remote testimony absent evidence of necessity above and beyond the simple existence of the pandemic. *Newson*, 526 P.3d at 721 (holding that "preventing the spread of COVID-19" was not a case-specific finding of necessity that justified the witness's remote testimony); *United States v. Casher*, No. CR 19-65-BLG-SPW, slip op. at *3–*4 (D. Mont. June 17, 2020) (denying two witnesses' requests to testify remotely in June 2020 due to their moderate health conditions and generic concerns of contracting the virus); *State v. Stefanko*, 193 N.E.3d 632, 635, 641 (Ohio Ct. App. 2022) (holding a prisoner's remote testimony was not warranted simply

because local COVID-19 restrictions made inmate transport cumbersome).

The State and District Court never intended to have Grubb face Wes in person, even absent the pandemic. (*See* Doc. 75; Tr. at 398.) The District Court heard no evidence, and made no finding, about why the COVID-19 pandemic meant Grubb could not testify in person in June 2021. This did not comport with *Craig*. Grubb's video testimony violated Wes's constitutional right to confront adverse witnesses face to face.

D. There is a reasonable possibility evidence of Wes's "outright confession" might have impacted the verdict.

"[T]he State, as the 'beneficiary of a constitutional error[,]' bears the burden of proving that the error was *harmless beyond a reasonable doubt*." *Mercier*, ¶ 31 (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)) (emphasis added); *accord Carter*, 907 F.3d at 1210.

To assess the impact of this Confrontation Clause violation, this Court must excise Wes's alleged confession and determine, based on the remaining evidence, whether the case clearly would have turned out the same. *Mercier*, ¶¶ 28, 31; *Coy*, 487 U.S. at 1021–22. In doing so, the Court must 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*, ¶ 31.

Grubb's testimony was unique and central to the State's case. "A confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.'" *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991). Grubb, unlike any other witness, testified Wes explicitly confessed to the crime. And he made this bold allegation from the comfort of a distant room with a video monitor, rather than in the imposing presence of lawyers, courtroom observers, a judge, twelve jurors, and Wes.

The remote testimony shielded Grubb from the truth-inducing pressures of a live courtroom and stifled Wes's cross-examination. It was far easier for Grubb to lie about Wes's purported confession when he did not have to look Wes in the eye or feel the pressure of the jurors inquisitively glaring at him as he spoke. *See Vazquez Diaz*, 167 N.E.3d at 845–49 (Kafker, J., concurring); *Carter*, 907 F.3d at 1206–07. When Wes tried to directly confront Grubb about his personal animosity

toward Wes to show his motive to lie, technical issues broke up the flow of the questioning and potentially allowed Grubb additional time to reflect on his answer. (Tr. at 1129.) The video testimony also deprived the jurors of the chance to observe the tension between Wes and Grubb and how Grubb would act in Wes's immediate physical presence.

The State presented testimony about Wes's alleged "outright confession" in violation of Wes's constitutional right to confront this adverse witness face to face. Grubb's testimony purported to directly establish Wes's guilt. It played a monumental role in the prosecution's case (*see, e.g.*, Tr. at 1607, 1618–20), and it was not cumulative. The State cannot prove this improper admission of confession evidence was "harmless beyond a reasonable doubt"—i.e., that it clearly had zero impact on the verdict. *See Mercier*, ¶ 31; *Carter*, 907 F.3d at 1210. This constitutional error demands reversal.

II. The State bolstered L.M.'s testimony with repeated, inadmissible restatements of her pre-trial allegations.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. M. R. Evid. 801(c). Hearsay is inadmissible at trial absent an applicable exception. M. R. Evid. 802. This rule applies

"regardless of whether the declarant testifies in court." *State v. Oliver*, 2022 MT 104, ¶ 27, 408 Mont. 519, 510 P.3d 1218.

A. L.M.'s inability to recall that she met with Otway and Wakeman three years earlier did not make the content of her statements to them inconsistent with her testimony.

An out-of-court statement is not hearsay if "the statement is . . . inconsistent with the declarant's testimony." M. R. Evid. 801(d)(1)(A). By this Rule of Evidence's own plain language, the prior out-of-court "statement" must be inconsistent with the declarant's "testimony." A "statement" is defined as "an oral or written assertion." M. R. Evid. 801(a). L.M.'s oral "assertion" to both Wakeman and Otway was, in brief, that Wes had sexually abused her. That was consistent with her testimony.

The State argued that because L.M. did not remember whether she talked to a nurse, someone with glasses, or someone with a videotape three years earlier, her prior statements to Otway and Wakeman were "inconsistent" with her testimony. In making this argument, the State oversimplified and misconstrued the law on prior inconsistent statements, confusing the District Court in the process.

This Court held in *State v. Lawrence*, 285 Mont. 140, 159, 948 P.2d 186, 198 (1997) that a witness's "lapse of memory" at trial can make a prior statement "inconsistent" for purposes of the hearsay exemption. The witness there gave pre-trial interviews with police in which she answered questions about the events surrounding a homicide. *Lawrence*, 285 Mont. at 156, 948 P.2d at 196. At trial, when asked those same questions *about the homicide*, "most of her testimony was that she couldn't remember." *Lawrence*, 285 Mont. at 157, 948 P.2d at 196. The state argued, and the district court agreed, her prior declarative statements of fact to police could be introduced at trial, because they were inconsistent with her testimony that she did not remember those facts. *Lawrence*, 285 Mont. at 157, 948 P.2d at 196.

In analyzing this issue on appeal, this Court first sought to reconcile "two divergent holdings on the issue of whether a lapse of memory *concerning a fact* is inconsistent with a prior declaration *of that fact*." *Lawrence*, 285 Mont. at 158, 948 P.2d at 197 (emphasis added). The Court decided to follow the holding of *State v. Devlin*, 251 Mont. 278, 825 P.2d 185 (1991), which it restated as, "[A] witness' claimed lapse of memory *as to certain facts* is inconsistent with any prior

declarative statements *concerning those facts*." *Lawrence*, 285 Mont. at 159, 948 P.2d at 197 (emphasis added).

In other words, "To be inconsistent, a prior statement must either directly contradict or be materially different from the expected testimony at trial. The inconsistency must involve a material, significant *fact*." *Pearce v. State*, 880 So.2d 561, 569 (Fla. 2004) (emphasis added).

The only arguable inconsistency here was that a six-year-old girl did not remember off the top of her head whether she met briefly with two strangers when she was three. If anything, L.M.'s testimony was "inconsistent" with *the fact she met with* Otway and Wakeman, not with what she said to them. If a witness cannot recall making a prior statement, "*the fact that the statement was made* may be proved by another witness." *Hawn v. State*, 300 So.3d 238, 242 (Fla. Dist. Ct. App. 2020) (emphasis added). This is what the District Court intuitively understood before the State convinced it otherwise. (Tr. at 1025 ("Well, I think [Wakeman] can say that the child responded to her questions. I am not hearing any exception applicable as to what the child told this witness.").)

The *substance* of L.M.'s prior statements was entirely consistent with the *substance* of her trial testimony. L.M.'s statements to Wakeman and Otway detailing the alleged abuse thus did not qualify as "prior inconsistent" statements that would be excluded from the hearsay definition. They were purely out-of-court statements offered to prove the truth of the matter asserted, and as such were inadmissible hearsay. M. R. Evid. 801(c), 802.

B. This evidentiary error allowed the State to bolster the trial testimony of Wes's accuser, thereby prejudicing his defense.

Once an evidentiary ruling is deemed erroneous, it is "incumbent on the State to demonstrate that the error at issue was not prejudicial." *State v. Van Kirk*, 2001 MT 184, ¶ 42, 306 Mont. 215, 32 P.3d 735. To do this, the State must point not only to other admissible evidence proving the same facts as the tainted evidence, but also "demonstrate that the *quality* of the tainted evidence was such that there was no reasonable possibility that it might have contributed to the defendant's conviction." *Van Kirk*, ¶ 44 (emphasis in original).

1. The repetition of L.M's word-for-word prior accusations unfairly bolstered her testimony.

L.M.'s prior consistent hearsay statements prejudiced the defense because they bolstered her trial testimony through the force of repetition. Research shows that "repetition of a plausible statement increases a person's belief in the referential validity or truth of that statement."[10] This is called the "illusory truth effect"—the psychological phenomenon that "repetition increases perceived truth."[11] The more someone hears a statement, the more likely they are to believe the statement to be true.

Numerous courts have held repetition at trial of a victim's pre-trial accusations lends those accusations a false credibility and undue persuasive effect amongst the jurors. *See, e.g., People v. Memon*, 145 A.D.3d 1492, 1493 (N.Y. App. Div. 2016) ("[T]he admission of prior consistent statements may, by simple force of repetition, give to a [factfinder] an exaggerated idea of the probative force of a party's

[10] Lynn Hasher, et al., *Frequency and the Conference of Referential Validity*, 16 Journal of Verbal Learning and Verbal Behavior 107, 111 (1977).
[11] Aumyo Hassan & Sarah Barber, *The Effects of Repetition Frequency on the Illusory Truth Effect*, 6 Cognitive Research: Principles and Implications 38, 2 (2021).

case."); *Ventura v. United States*, 927 A.2d 1090, 1103 (D.C. 2007) ("[T]he exclusion of prior consistent statements is intended to avoid the prejudice of unfairly bolstering the witness' credibility."); *Modesitt v. State*, 578 N.E.2d 649, 651–52 (Ind. 1991) (stating "the drumbeat repetition of the victim's original story" unfairly bolsters the victim's credibility); *People v. Tidwell*, 410 N.E.2d 1163, 1165 (Ill. App. Ct. 1980) (stating that "'corroboration by repetition' is precisely one of the prejudicial effects" the rule against prior consistent hearsay statements is supposed to avoid).

The improper admission of the forensic interview video and L.M.'s verbatim statements to Wakeman were prejudicial *because of their repetition* of L.M.'s testimony. The more the jurors heard L.M.'s prior consistent accusations, the more likely they were to give her testimony undue weight. *Cf. State v. Nordholm*, 2019 MT 165, ¶¶ 13–14, 396 Mont. 384, 445 P.3d 799 (banning testimonial evidence in the jury room during deliberations because of the risk that jurors will *repeatedly review* that evidence and, in so doing, give that evidence "undue weight").

The prejudicial impact of this repetition had a special potency because the State conveyed L.M.'s prior statements through the testimony of two highly credentialed, professional, convincing witnesses. *See Nitz v. State*, 720 P.2d 55, 61 (Alaska Ct. App. 1986) (discussing the fundamental unfairness of repeating a child witness's accusations "through a parade of articulate, experienced, adult witnesses who impart to the child's statements the mature eloquence of adulthood and a sense of their own credibility" while adding "nothing of substance but the force of repetition"); *accord Stone v. State*, 536 N.E.2d 534, 540 (Ind. Ct. App. 1989) (holding the victim-witness's credibility became "increasingly unimpeachable as each adult added his or her personal eloquence, maturity, emotion, and professionalism to [the victim's] out-of-court statements").

Between the two of them, Wakeman and Otway had decades of experience, numerous advanced degrees, had conducted thousands of examinations or forensic interviews of children, and had honed their examination techniques to ensure truthful reporting. (Tr. at 998–1001, 1092–94.) As the jury heard L.M.'s consistent accusations over and over through the testimony of such qualified, professional witnesses, L.M.'s

trial testimony became "increasingly unimpeachable." *Stone*, 536 N.E.2d at 540.

Given the importance of L.M.'s testimony to the State's case—she was the accuser and the only witness besides Grubb to testify directly to Wes's alleged sexual crimes—the State cannot show the improper bolstering of her testimony had no possible effect on the verdict.

2. To the extent this Court has held prior consistent statements to be automatically harmless, those decisions should be overruled.

Prior consistent statements are, save for certain exceptions not applicable here, inadmissible hearsay. *See* M. R. Evid. 801(c) (defining hearsay), 801(d)(1)(B) (excluding from hearsay only certain types of prior consistent statements), 802 (stating hearsay is presumptively inadmissible). But this Court has held the admission of prior consistent hearsay statements is harmless if the declarant testifies to the same facts at trial. *See, e.g., State v. Veis*, 1998 MT 162, ¶ 26, 289 Mont. 450, 962 P.2d 1153; *State v. Mensing*, 1999 MT 303, ¶ 18, 297 Mont. 172, 991 P.2d 950; *State v. McOmber*, 2007 MT 340, ¶ 35, 340 Mont. 262, 173 P.3d 690; *State v. Ripple*, 2023 MT 67, ¶ 21, 412 Mont. 36, 527 P.3d 951.

The problem with these holdings is that *every* prior consistent statement, by definition, will *always* be cumulative of the declarant's trial testimony. *Baugh v. State*, 585 S.E.2d 616, 619 (Ga. 2003) ("[T]he very nature of a prior consistent statement is that it is repetitive of that to which the witness has already testified."). The Court's holdings in these cases thus seemingly imply all improperly admitted prior consistent hearsay statements are categorically harmless, because the declarant *will always* testify to the same facts at trial. *See Aker v. Fletcher*, No. CV 17-86-H-JTJ, slip op. at *4-5 (D. Mont. Aug. 22, 2022) (discussing how this Court's jurisprudence on prior consistent statements effectively deems such hearsay automatically harmless in all cases).

Prior consistent statements are inadmissible for a reason: to avoid the prejudice of *repeating the declarant's testimony*. *See Ventura*, 927 A.2d at 1103; *Tidwell*, 410 N.E.2d at 1165. Because the harm of these statements is that they repeat the declarant's testimony, the declarant's cumulative testimony cannot logically obviate this harm. *See McGarity v. State*, 856 S.E.2d 241, 249 (Ga. 2021); *Cowart v. State,* 751 S.E.2d 399, 406 (Ga. 2013) (holding courts may not rely on the declarant's

cumulative in-court testimony to prove a prior consistent hearsay statement is harmless, because the harm of the latter is that it repeats the testimony).

Veis and its progeny undercut the rule against prior consistent hearsay statements by rendering it toothless—a rule without a remedy. *Veis* neglected to account for the *reason* the Rules of Evidence banned prior consistent hearsay statements in the first place: to avoid the harm of repetition. *See Aker* at *5. To the extent *Veis* and its progeny hold prior consistent hearsay statements are categorically harmless because of their cumulative factual content, those holdings are "manifestly wrong" and should be overruled. *See State v. Running Wolf*, 2020 MT 24, ¶¶ 21-22, 398 Mont. 403, 457 P.3d 218 (discussing the standard for overruling precedent).

III. The doctrine of cumulative error demands reversal.

Above and beyond their individual prejudice, the cumulative impact of the errors with Grubb's video testimony and L.M.'s hearsay statements violated Wes's constitutional right to a fair trial. *See* U.S. Const. amend. VI; Mont. Const. art. II, § 24; *State v. Smith*, 2020 MT 304, ¶ 16, 402 Mont. 206, 476 P.3d 1178 ("[P]rejudice may result from

the cumulative effect of errors, and . . . the cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error.").

L.M. and Grubb were by far the State's most crucial witnesses. The erroneous admission of Grubb's video testimony and the use of hearsay to bolster L.M.'s trial testimony combined to prop up the State's most important witnesses, unfairly tipping the scales toward the State and depriving Wes of a fair trial. Individually or cumulatively, these errors demand reversal.

IV. Wes's duplicative convictions of SIWC and sexual assault violated his protection against double jeopardy.

"The Fifth Amendment to the United States Constitution and Article II, Section 25, of the Montana Constitution protect citizens from being placed twice in jeopardy for the same offense." *Valenzuela*, ¶ 11 (citing U.S. Const. amend. V., Mont. Const. art. II, § 25). If multiple charges arise from a single incident, double jeopardy forbids convicting a defendant of both the greater and lesser included offenses. *Brown v. Ohio*, 432 U.S. 161, 168–69 (1977). Montana statute likewise states a person may not be convicted of more than one offense arising from the

same transaction if "one offense is included in the other." § 46-11-410(2)(a).

Sexual assault is a lesser-included offense of SIWC. *Taylor v. State*, 2014 MT 142, ¶ 20, 375 Mont. 234, 335 P.3d 1218; *State v. Williams*, 2010 MT 58, ¶ 28, 355 Mont. 354, 228 P.3d 1127. All of Wes's convictions arose from the same incident where Jessica walked in on Wes in the bedroom pulling up L.M.'s pants. The prosecutor explicitly conceded this, saying, "I think that [all three charges] are all based on the same act." (Tr. at 1656.)

Wes's convictions of SIWC *and* its lesser included offense of sexual assault, stemming from the same transaction, violated double jeopardy. This demands dismissal of his sexual assault conviction.

CONCLUSION

Jamie Grubb's video testimony violated Wes's constitutional right to confront the State's witnesses face to face. The State improperly bolstered L.M.'s testimony with repeated instances of inadmissible hearsay. These errors warrant reversal, individually and cumulatively.

Wes was redundantly convicted of both SIWC and sexual assault. Double jeopardy demands dismissal of the lesser-included sexual assault conviction.

Respectfully submitted this 4th day of October, 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 9,966, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Michael Marchesini
MICHAEL MARCHESINI

APPENDIX

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 10-04-2023:

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Dated: 10-04-2023