IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0523

STATE OF MONTANA,

Plaintiff and Appellee,

v.

MICHAEL VOYLES,

Defendant and Appellant.

BRIEF OF APPELLEE

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

APPEARANCES:

AUSTIN KNUDSEN
Montana Attorney General
ROY BROWN
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
roy.brown2@mt.gov

SCOTT D. TWITO
Yellowstone County Attorney
SARAH HYDE
JOHN RYAN
Deputy County Attorneys
P.O. Box 35025
Billings, MT 59107-5025

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

CLARK R. RAMSEY
Ramsey Law, PLLC
2722 3rd Ave. North, Ste. 320
Billings, MT 59101

ATTORNEY FOR DEFENDANT
AND APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF THE ISSUES

1. Whether this Court should invoke plain error review to consider if the district court should have sua sponte given a specific-act unanimity instruction. Alternatively, whether defense counsel rendered ineffective assistance of counsel (IAC) when counsel did not specifically request such an instruction.

2. Whether Appellant has met his burden to show he is entitled to plain error reversal of his convictions based on the prosecutor's cross-examination of defense character witnesses and statements made during closing argument.

3. Whether, when viewed in the light most favorable to the State, any rational juror could have found that Appellant committed a third sexual intercourse without consent (SIWOC) offense.

4. Whether Appellant has met his burden to show cumulative error.

STATEMENT OF THE CASE

The State charged Appellant Michael Voyles with three counts of SIWOC, all occurring between August 2006 and 2010, and all counts occurring against the same victim, the child K.L. (Doc. 3.)

A jury convicted Voyles of all three SIWOC counts. (Doc. 142.) The district court sentenced Voyles to 80 years at the Montana State Prison for each offense, to run concurrently. (Doc. 156.)

STATEMENT OF THE FACTS

I. The offenses

In August 2020, 24-year-old K.L. was scrolling through Facebook and discovered a picture of Voyles—in front of a charter bus with several young children. He immediately made a decision. He picked up the phone and contacted the sheriff's office to report that Voyles had sexually abused him when he was a child. He did not want other children to suffer what he had gone through. (Trial Tr. at 191-92, 346-47, 186; *see also* State's Ex. 1, *offered, admitted, and published at* 193.)

K.L. grew up in Laurel with his mom, J.W; his eldest brother R. and sister M.; his brother who was two years older, E.L.; and his younger sister, J. (Trial Tr. at 270.) K.L. "didn't really have a relationship with" his dad. (*Id*. at 274.) J.W.'s relationship with her husband had been "pretty awful" and they divorced in 1998 when K.L. was two years old. (*Id*. at 274-76.) J.W. ran an in-home daycare from 6 a.m. to 6 p.m. (*Id*. at 276-77.)

J.W. described K.L. as a quiet and introverted young boy. (Trial Tr. at 295-96.) He didn't do well socially, and usually stayed at home. (*Id*. at 297, 299.) When he was nine to ten years old, he was a heavier child, which impacted his self-esteem. (*Id*. at 299.) However, K.L. was kind and helpful. He helped J.W. by playing with and taking care of the daycare kids. (*Id*. at 296.) He even comforted a

terminally ill baby, letting him sleep on his shoulder and taking him for a walk. (*Id*.)

In the early 2000s, Voyles, an over-the-road truck driver (Trial Tr. at 511), was hanging out with "a group of [neighborhood] boys[,]" including K.L.'s older brother R., who was then in 8th grade. (*Id*. at 277-78.) Voyles introduced himself to J.W. along with several boys, explaining he wanted to take R. and the other boys somewhere. (*Id*. at 272.) J.W. thought "they were just going to [Voyles'] house to play games, because he had a pinball machine or something[.]" (*Id*. at 275.) J.W. would see Voyles with R. about once a week. (*Id*. at 278-79.)

In 2001, Voyles' house burned down and J.W. allowed him to live in her driveway in his motor home. (Trial Tr. at 278.) J.W. would see Voyles daily for several months. (*Id*. at 280.) Voyles would come into the house to use the shower and eat dinner with J.W.'s family. (*Id*. at 281.) J.W. and her sons helped Voyles tear down his burned structure and relocate, and even helped him rebuild his roof. (*Id*. at 282.) After moving back into his own place, Voyles still came over to J.W.'s house occasionally for meals. (*Id*.) At some point, J.W. noticed that Voyles and R. had stopped hanging out. (*Id*. at 280-281.)

Soon thereafter, J.W.'s younger boys E.L and K.L. began hanging out with Voyles around once a week. (Trial Tr. at 283.) Voyles would take them to his house, and they would watch movies, have sleepovers, and go fishing. (*Id*.) J.W.

trusted Voyles and felt that K.L. was missing a father figure. (*Id*. at 284-85.) She did not consider Voyles threatening because he was "basically an overgrown kid" who liked to play on the computer and watch movies. (*Id*. at 293.) At this time, J.W. was single and running her daycare 12 hours a day. (*Id*. at 283.)

From 2002 to 2006, J.W. was remarried to Darrell Lawrence, who was physically abusive toward J.W. and verbally abusive toward the rest of the family. He did not allow anyone else to be around the family, so K.L. and E.L. only sporadically saw Voyles. (Trial Tr. at 285-87.) In 2006, J.W. and Lawrence divorced, and Lawrence moved out, never seeing the family again. (*Id*. at 285-88.)

In 2006, E.L. turned to substance abuse and moved in with his father intermittently, while K.L. began hanging out with Voyles again. (Trial Tr. at 288.) K.L. testified he was ten years old in 2006 and that he had called Voyles for reasons he could not remember. (*Id*. at 337.) Voyles picked K.L. up and took him to his house at 56th and Danford. (*Id*.) K.L. would continue to go over to Voyles' house once every few weeks. (*Id*. at 338.) Sometimes, they would just hang out and watch movies. Other times, Voyles would sexually abuse him. (*Id*.)

During the period from 2006 to 2009, K.L. explained Voyles "performed oral sex on me multiple times" at Voyles' house.[1] (Trial Tr. at 338-39, 342.) J.W.

[1] The details are addressed in relation to a sufficiency of the evidence claim below.

had no idea about the abuse. She had obtained second job due to lack of child support. Thus, she worked around 22 hours a day, and up to 6 days a week—at her home daycare from 6 a.m. to 6 p.m., then at a bar from 6:15 p.m. until 3:15 a.m. (*Id*. at 290-91.)

However, when K.L. was 11 or 12 years old, J.W. did notice a shift in his behavior. (Trial Tr. at 301.) K.L. became "angry and destructive" and would punch his fist through "walls and doors and windows[.]" (*Id*. at 302.) He did not do well academically. (*Id*.) He no longer wanted to shower, cut his hair, or use deodorant. (*Id*.) He did not allow anyone to touch him. (*Id*.) He told his counselor he "wanted to go off to the woods and live alone." (*Id*. at 303.) K.L. was bullied at school, and eventually ended up at the Yellowstone Boys and Girls Ranch. (*Id*. at 300-01.)

K.L. stopped associating with Voyles in 2009, but—just like when R. and E.L. stopped hanging out with Voyles—J.W. did not know at the time why the relationship had dissolved.[2] (Trial Tr. at 293-94.) K.L., being so young, at first thought it was "normal," but after several incidents of sexual abuse, he started realizing that older people "shouldn't really be doing this to a kid" and it was not normal. (*Id*. at 343.) He was 16 years old when he reached the full realization that

[2] At sentencing, J.W. would testify that another of her sons had been sexually abused by Voyles, but he was not yet ready to come forward. (Sentencing Tr. at 12, 15.)

Voyles' sexual abuse was not normal, after watching an episode of Law and Order. (*Id*. at 345.) K.L. explained that these were "traumatic experiences" that were difficult to remember, and that he had repressed some of the memories. (*Id*. at 342.) As a result of "repress[ing] it for the longest time," K.L. realized it "made [him] a harsher person" until he came to terms with the abuse and disclosed it to the police. (*Id*. at 343-44.)

In 2019, K.L. finally disclosed to his mother. He texted J.W. late one night and asked if she "remembered an old friend of ours[.]" J.W. said "Yes," and K.L. responded, "He did bad things to me." (Trial Tr. at 303.) J.W. attempted to learn more, but K.L. would either tear up and appear sad or angrily shut down the conversation. (*Id*. at 304-05.) While J.W. did reach out to law enforcement to inquire about whether there was a statute of limitations, she did not press K.L. any further. (*Id*. at 305-06.)

In 2020, after K.L. saw the photograph of Voyles with young children and called the authorities, he told his mom, "I finally called [the sheriff's department]." (*Id*. at 306-07.)

II. The investigation

On August 11, 2020, Deputy Bry Townsley met K.L. at his house in Laurel. (Trial Tr. at 250-51.) He observed that K.L. looked like he had been crying. (*Id*. at

252.) K.L. identified Voyles as the other participant of sexual acts, which occurred at Voyles' residence, on 56th and Danford, within the boundaries of Yellowstone County. (*Id*. at 252-53.)

Detective James Dahl interviewed K.L. (Trial Tr. at 193-94.) Detective Dahl attempted to have Voyles come in for an interview, but Voyles refused. (*Id.* at 195.) Detective Dahl eventually got Voyles on the phone. (*Id*. at 196.) He informed Voyles that the case was about molesting children,[3] whereupon Voyles became very "nervous" and started using "broken sentences[.]" (*Id*. at 197.) Detective Dahl told him about his right to an attorney and tried to hang up the phone, but Voyles kept talking. (*Id*. at 197-98.)

Voyles confirmed he knew K.L., he was friends with K.L.'s mother, and he stayed in a camper outside their house in 2001. (*Id*. at 198.) Voyles explained that he was friendly with K.L. from 2001 to 2004 and "they would go fishing and hang out." (*Id*. at 199.) Voyles alleged he "removed himself from the situation because" K.L.'s brother "had started making some accusations about him doing some things so he wanted to get out of there." (*Id*.)

[3] The transcript states "He wanted to know what it was about, and I said it was about mow left being [sic] children[.]" (Trial Tr. at 196.) This mistake is clarified in the next sentence when the prosecutor asks about "molesting kids[.]" (*Id*.)

Voyles directly asked Detective Dahl if K.L. was accusing him of "raping him." (Trial Tr. at 222.) Voyles continued explaining that he had been "accused of these types of things in the past." (*Id*. at 224.) Voyles explained that allegations had "followed him ever since." (*Id*. at 225.) Voyles inquired where K.L. had said the incidents had taken place. (*Id*. at 225-26.)

On September 16, 2020, Deputy Townsley met Voyles outside Voyles' residence. (Trial Tr. at 255.) Voyles changed his story and said he only interacted with K.L.'s family over a period of three or four months in 2001. (*Id*. at 258.) Voyles also now said he had no contact with K.L. because he was "busy with work[.]" (*Id*.)

Unprompted, Voyles later called Deputy Townsley and offered up more information. (Trial Tr. at 259-60.) Voyles explained in his follow-up call that K.L. had told him "that [K.L.'s] brothers were making fun of [K.L.], teasing him that if he hung out with [Voyles] that he would be molested." (*Id*. at 260.) Voyles also relayed that he had received a letter in his mailbox that said "perv" a couple weeks prior to his last interaction with Deputy Townsley. (*Id*.)

Detective Dahl later learned that Voyles was a bus driver for the City of Billings MET Transit Service. He discovered that, even after the charges were filed in this case, Voyles "had been taking young people on his routes." (Trial Tr. at 228, 230-31.) Upon further investigation, Detective Dahl learned that the

children on the MET bus that Voyles would drive around were not citizen riders but would typically be the same "children time after time just riding around all day with him while he was at work." (*Id*. at 229.)

STANDARDS OF REVIEW

Specific Unanimity: "The standard of review of jury instructions in criminal cases is whether the instructions, as a whole, fully and fairly instruct the jury on the law applicable to the case." *State v. Weaver*, 1998 MT 167, ¶ 28, 290 Mont. 58, 964 P.2d 713.

IAC: Claims of ineffective assistance of counsel constitute mixed questions of law and fact, which this Court reviews de novo. *State v. St. Marks*, 2020 MT 170, ¶ 15, 400 Mont. 334, 467 P.3d 550.

Prosecutorial Misconduct: For unpreserved claims, this Court generally does "not address issues of prosecutorial misconduct pertaining to a prosecutor's statements not objected to at trial." *State v. Wells*, 2021 MT 103, ¶ 13, 404 Mont. 105, 485 P.3d 1220 (citation omitted); *see also State v. Lawrence*, 2016 MT 346, ¶ 12, 386 Mont. 86, 385 P.3d 968. When the argument is made for the first time on appeal, this Court may discretionarily review the prosecutorial misconduct claim under the plain error doctrine. *Lawrence*, ¶¶ 6, 9. This Court uses its inherent power of common law plain error sparingly, on a case-by-case basis, and only in

a narrow class of cases. *State v. Lackman*, 2017 MT 127, ¶ 9, 387 Mont. 459, 395 P.3d 477.

Sufficiency of the Evidence: This Court reviews the question of whether sufficient evidence supports a criminal conviction de novo. *State v. McCoy*, 2021 MT 303, ¶ 25, 406 Mont. 375, 498 P.3d 1266 (citation omitted). This Court considers the evidence presented in the light most favorable to the prosecution, and it will uphold a conviction where "any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt." *McCoy*, ¶ 25 (citation omitted).

SUMMARY OF THE ARGUMENT

Specific Unanimity: Voyles did not object to the jury instructions offered at trial, and, therefore, he has waived the argument he now makes on appeal that the court should have given a specific-act unanimity instruction. In any event, Voyles has not identified a specific-act unanimity problem—that is, that the State alleged multiple criminal events within a single count. At no time did the State allege that the three separate counts of SIWOC contained multiple illegal acts within those separate counts. Rather, the State charged Voyles with three separate acts of SIWOC, based on three events, against one victim, in the specified time frame of 2006 to 2010. Finally, any possible prejudice was cured by the district

court and the parties together modifying the offense instruction to specify that each of the three events were separate and took place at different times in the 2006 to 2010 time frame.

Prosecutorial Misconduct: Most of Voyles' unpreserved prosecutorial misconduct claims fail because Voyles merely presents a laundry-list recitation of statements without context, and without identifying any potential prejudice. However, while the State concedes that two cross-examination questions were improper, in which the prosecutor questioned defense witnesses about allegations of prior charges as an "officer of the court," Voyles does not meet his burden to show his unpreserved claim would result in a manifest miscarriage of justice, raise a question as to the fundamental fairness of the proceedings, or compromise the integrity of the judicial process. Here, both the prosecutor and defense confirmed before the jury that the prior conduct at issue was based on mere allegations and rumors, not prior convictions. Additionally, the jury was given a curative instruction for the specific incidents of conduct, which was read before and after testimony. Finally, the existence of rumors and allegations of prior conduct was cumulative of statements that Voyles had told police, relayed during the State's case-in-chief.

Sufficiency of the Evidence: In the light most favorable to the State, any rational juror could find that Voyles committed a third SIWOC act based on K.L.'s

testimony on redirect after his recollection was refreshed regarding an oral sex incident that occurred after K.L. saw Voyles viewing pornography through the reflection of a fish tank. This incident has several factual distinctions from the other two oral sex SIWOC incidents described by K.L. on direct. Voyles' assertion on appeal merely amounts to a claim that the evidence could have supported a different result, which is a different question from the sufficiency of the evidence. The totality of K.L.'s testimony identified three events, all occurring in Voyles' home, in Yellowstone County, and all occurring from 2006 to 2010 while K.L. was 9-12 years old.

ARGUMENT

I. Voyles does not identify any cognizable specific unanimity claim; this Court should accordingly decline to review the claim under either plain error or IAC.

A. Background

The State offered three offense instructions that differentiated between the three counts of convictions by referencing each count as occurring "on a date different than" the other counts. (Doc. 141, Plaintiff's Offered Instrs. 21-23, notated as "Modified.") During the settling of jury instructions, the Court explained its intent to modify the offense instructions for Counts I-III:

> Now, 21, 22, and 23, I had a question about making sure that it was a unanimous decision as to the date, because Count I is a different

> date than Count II, Count II is a different date than Count III, et cetera, so I added just a little note that said "with all of you agreeing on the date", because I think they all need to be in agreement as to that specific event.

(Trial Tr. at 580.) The court and the parties extensively worked on the language.

(*Id*. at 581-83.) Finally, the court proposed:

> [COURT]: Let me print out 21, 22 and 23 for you guys, and then you can tell me if that's acceptable.
>
> [STATE]: Your Honor, I think the parties are in agreement on Instructions 21, 22 and 23.
>
> [DEFENSE]: With one reservation before, I asked you to switch the two paragraphs, and I think we've decided not to, but get it on the record that I had requested that the final two paragraphs should be in reverse order.
>
> [COURT]: Got it. So 21, 22 and 23, I will give as modified.

(Trial Tr. at 583-54.) Accordingly, the jury was instructed in Count I, for example:

> **Issues in COUNT I: Sexual Intercourse Without Consent**
>
> To convict the Defendant of sexual intercourse without consent, the State must prove the following elements, occurring within Yellowstone County, Montana:
>
> 1. The Defendant had sexual intercourse with K.L. **(and on a date different than COUNT II and COUNT III with all of you agreeing as to that event between August, 2006 and August, 2010)**; and
>
> 2. K.L. was incapable of consent; and
>
> 3. The Defendant acted knowingly.

(Doc. 140, Given Instr. 21 (emphasis added, remainder of instruction omitted).) Counts II and III were correspondingly modified to delineate and exclude the other counts based on the dates and instances of those specific events. (*See* Doc. 140, Given Instrs. 22-23.)

B. Plain error

Generally, a party's failure to object to a perceived error at trial constitutes a waiver of the issue on appeal. *State v. Mathis*, 2022 MT 156, ¶ 42, 409 Mont. 348, 515 P.3d 758 (citing Mont. Code Ann. § 46-20-104(2)). More specifically, Mont. Code Ann. § 46-16-410(3) provides that a defendant "may not assign as error any portion of the instructions or omission from the instructions unless an objection was made specifically stating the matter objected to, and the grounds for the objection, at the settlement of instructions." Here, Voyles did not object to the lack of a specific unanimity instruction in the district court and, accordingly, his argument for error is now barred on appeal.

"If a defendant had the opportunity to object to a jury instruction at trial but failed to do so," this Court will "ordinarily not examine the issue unless it qualifies for plain error review." *Mathis*, ¶ 23 (citation omitted); "Plain error review is used sparingly and only in situations that implicate a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the proceedings, or compromise the integrity of the judicial process." *Id.*, ¶ 23.

Here, Voyles argues for the first time on appeal that a specific unanimity instruction was required because the jury "could not have agreed unanimously on a specific act for all three counts because it was never presented with every element of a third SIWOC." (Appellant's Br. at 33.) Voyles continues that, while the prosecution presented evidence of two events, "the jury never received any evidence of a distinct separate third event that occurred[.]" (*Id*. at 19.) As to possible prejudice, Voyles argues a danger exists that the jury could have borrowed or aggregated elements from one count and applied them to a different count. (*Id*.)

First, plain error review is unwarranted because Voyles mistakes the core applicability of a specific unanimity instruction. A specific unanimity instruction is required when a prosecutor "alleges multiple unlawful acts under a single count" such that the jury could reasonably fail to "'unanimously agree to a particular set of facts' so as to prevent the possibility of a conviction resulting from 'different jurors concluding that the defendant committed different acts.'" *Wells*, ¶ 20 (quoting *Weaver*, ¶ 34.) "Stated differently, '[w]hen a genuine possibility exists that different jurors will conclude a defendant committed disparate illegal acts subsumed under [a] single count, the 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.'" *Mathis*, ¶ 44 (citing *State v. Harris*, 2001 MT 231, ¶ 12, 306 Mont. 525, 36 P.3d 372 (abrogated on grounds unrelated to

specific unanimity by Robinson v. State, 2010 MT 108, ¶ 12 n.1, 356 Mont. 282, 232 P.3d 403)).

Weaver is the classic case in which the State improperly charged a defendant for multiple unrelated acts, spanning a length of time, merged into a single count. In *Weaver*, the State charged Weaver with one count of sexual assault as to the child J.M. *Weaver*, ¶ 9. But J.M. had testified at trial as to "several incidents of sexual assault" occurring "during the five years that he was Weaver's little brother [at the Big Brother Program]." *Id*. ¶ 17. The State also charged one count of sexual assault as to the child D.M. *Id*. ¶ 13. But D.M. had testified to "several incidents of sexual assault, but provided no specific dates or times for these incidents." *Id*. ¶ 17. The jury found Weaver guilty of both counts. *Id*. ¶ 19.

This Court exercised plain error review, holding that the district court should have given a specific unanimity instruction because

> the two counts on which Weaver was convicted charged him with a series of unrelated allegations of sexual misconduct taking place over a period of years. It is not clear from either the jury instructions or the verdict form whether the jury unanimously agreed upon at least one specific underlying act of sexual assault for each count. We . . . hold that the District Court should have given an instruction to make it clear to the jury that it was required to reach a unanimous verdict on at least *one specific act for each count*.

Weaver, ¶ 38 (emphasis added).

Here, the State never wavered from its allegation that Voyles committed three separate acts of SIWOC, in three specific events at three specific times,

against one victim, K.L.[4] Correspondingly, the State charged Voyles with three separate counts of SIWOC, and the jury convicted Voyles of three counts of SIWOC. This is not a case where the prosecution "allege[d] multiple unlawful acts under a single count[.]" *See Wells*, ¶ 20. While Voyles' argument might raise a sufficiency of the evidence argument for the third count, it does not raise any specific-act unanimity problem here.

Second, plain error review is further unwarranted because, even assuming *arguendo* that a specific unanimity instruction could have been appropriate, the district court and the parties together crafted an instruction to mitigate any unanimity concern by specifying—within each offense instruction for Counts I-III—that each event was separate and needed to occur at a different time than the other events in the other counts. *See, e.g.,* Doc. 140, Given Instr. 21 (" . . . and on a date different than **COUNT II** and **COUNT III** with all of you agreeing as to that event between August 2006 and August 2010"). While the district court took this action possibly out of an overabundance of caution to ensure unanimity, the court also mitigated any possible prejudice by imposing an essentially de facto

[4] *See, e.g.,* K.L.'s testimony at Trial Tr. at 339 (K.L. specifically testifying he remembered "three times" that Voyles gave him oral sex); State's closing argument at Trial Tr. at 616 (explaining that K.L. "testified that on three separate occasions between 2006 and 2010, the Defendant performed oral sex on him . . ."; *id*. at 596 (. . . Defendant performed oral sex on [K.L.] on three separate occasions that he could clearly remember . . ."); *id*. at 601-02 (". . . you've heard direct evidence from [K.L.] that on three occasions" the oral sex incidents occurred).

specific unanimity instruction. Voyles does not explain how this given instruction was inadequate, even as compared to the pattern specific-act unanimity instruction contained at 1-106(a).[5] To Voyles' benefit, this language was inserted specifically into the offense instruction itself.

Finally, Voyles fails to identify any possible prejudice to show his claim implicates "a manifest miscarriage of justice, leave[s] unsettled the question of the fundamental fairness of the proceedings, or compromise[s] the integrity of the judicial process." *Mathis*, ¶ 23. This Court "presume[s] that the jury upholds its duty and follows a district court's instructions." *State v. Erickson*, 2021 MT 320, ¶ 27, 406 Mont. 524, 500 P.3d 1243 (citing *State v. Michelotti*, 2018 MT 158, ¶ 23, 392 Mont. 33, 420 P.3d 1020). Assuming the jury followed the given instructions, the danger Voyles identifies is not possible. Voyles suggests that the jury could have borrowed or aggregated elements from one offense to apply to other offenses. To accept this argument, the jury would not only have to disregard the offense instructions (with the supplemented separate offense and time language), but it would also have to disregard the given separate offense instruction:

> Each count charges a distinct offense. You must decide each count separately. The defendant may be found guilty or not guilty of any or

[5] *Compare to* 1-106(a) instruction in 2022 Criminal Jury Instructions, Chapter 1, Preliminary and General Instructions, available at https://courts.mt.gov/Courts/boards/CriminalJuryInstructionsCommission.

> all of the offenses charged. Your finding as to each count must be stated in a separate verdict.

(Doc. 140, Given Instr. 17; *see also* Given Instr. 7, general unanimity instruction.) In any event, for precisely the reason that the State never attempted to merge multiple acts into a single count, there is no reason why the separate offense instruction was inadequate to ensure unanimity here.

Accordingly, the jury unanimously convicted Voyles of Counts I, II, and III, and unanimously agreed per the offense instruction that each event as detailed in the counts was separate and occurred at a different time in the 2006 to 2010 period. Moreover, at the defense's request, the jury was individually polled as to each count and each juror confirmed the guilty verdict. (Trial Tr. at 626-28.) No specific-act unanimity instruction was required. Because no error occurred, the plain error doctrine does not apply.

C. IAC

Here, while recognizing that the plain error inquiry and the IAC inquiry are not the same, for the reasons discussed above in asserting that the exercise of this Court's sparingly-used plain error review is not necessary to preserve the fundamental fairness of the trial proceeding, this Court should likewise conclude that defense counsel's failure to object and offer a specific unanimity instruction was not deficient and did not prejudice Voyles by raising a reasonable probability

that the trial result would have been different but for counsel's performance. *See, e.g.*, *St. Marks*, ¶ 24 (finding lack of prejudice in IAC claim after rejecting plain error review of unpreserved instructional error claim). As explained above, such an instruction would not have been appropriate to raise given the State never charged multiple acts within one count; or, alternatively, the district court alleviated any specific-act concern by requiring that the jury find that each count was distinct from the other counts and occurred on separate dates.

II. Voyles fails to meet his burden to show entitlement to plain error reversal from his unpreserved claims of prosecutorial misconduct.

In analyzing a claim under plain error, this Court "first determine[s] whether the defendant's fundamental constitutional rights have been implicated.'" *State v. Ritesman*, 2018 MT 55, ¶ 21, 390 Mont. 399, 414 P.3d 261 (citing *Lawrence*, ¶ 9). "Even then, [this Court] will not invoke the plain error doctrine to reverse a conviction when 'the alleged error did not result in a manifest miscarriage of justice, raise a question as to the fundamental fairness of the proceedings, or compromise the integrity of the judicial process.'" *Id.* (citing *Lawrence*, ¶ 11).

This Court will not undertake a full analysis of the alleged error each time a party requests plain error review. *State v. Griffin*, 2016 MT 231, ¶ 7, 385 Mont. 1, 386 P.3d 559. Conducting a full analysis to determine whether to find plain error

would "defeat the underlying rule that a party must object to error at trial, because errors should be brought to the attention of the trial court where they can be initially addressed." *Ritesman*, ¶ 12 (citing *Griffin*, ¶ 7.)

A. Unpreserved claim challenging "officer of the court" language in cross-examination of State witnesses on rumors and allegations of prior conduct

1. Background

Despite a local rule only allowing two character witnesses, the district court decided not to restrict Voyle's presentation of character witnesses. (Trial Tr. at 423-24, 430.) In opening statements, defense counsel told the jury that Voyles intended to present evidence of good character from "several now adults who were children at the time that Mr. Voyles befriended them." (*Id*. at 106.) Defense counsel explained that he would present several witnesses who thought of Voyles as a good person and "father" figure, and who denied that Voyles had ever sexually assaulted them. (*Id*. at 109.)

Voyles called character witnesses such as Tamara Grimm, Special Olympics organizer; Donna Riley, family friend of Voyles; and several now-adult men who were children from 9 to 14 years old at the time they met Voyles, including Randy Riley, John Mace, John Strecker, David Webber, and Daniel Knop. (Trial Tr. at 467-68, 525-26, 551, 561.) Grimm and Donna Riley would testify that they never heard of anything inappropriate happening between Voyles and any children.

(*Id*. at 399, 467-68.) The other witnesses would testify that, as children, Voyles never sexually abused them. (*Id*. at 479-80, 482, 507, 529, 557, 570.)

Prior to the State's cross-examination of Voyles' witnesses, the State explained its intent to cross-examine the witnesses on "prior charges or potentially rumors" to ascertain witness knowledge of disparaging rumors or common reports affecting Voyles' reputation. (Trial. Tr. at 401.) Specifically, the State intended to cross-examine the witnesses on some 1987 dismissed charges of "lewd or lascivious acts with children." (*Id*. at 403-04.) In response, Voyles conceded that "the rules that permit, when we opened the door, I think the State can offer evidence, I don't think it should prejudice the Defendant" because the prior conduct was "just showing allegations[.]" (*Id*. at 416.) However, Voyles asked for a curative instruction. (*Id*. at 417.)

The State also alerted the court and the defense that it intended to "inquire as to rumors of other victims that have been identified who have come forward" to the defense witnesses to test their bases of opinion of Voyles' reputation. (Trial Tr. at 423.) Defense counsel had no objection, as long as the questions were posed to the witnesses as awareness of rumors. (*Id*. at 424.)

Finally, the State wanted to explain that the rumors and charges "could be established as true," citing *State v. Clark*, 209 Mont. 473, 682 P.2d 1339 (1984), as

support for assertion of a fact as "an officer of the court[.]" (*Id*. at 425-26.) The court immediately asked defense counsel:

> [COURT]: Is that sufficient for Defense?
>
> [DEFENSE 1]: What do you think, [other defense counsel]?
>
> [DEFENSE 2]: Yes, Your Honor.

(*Id*. at 425-26.)

After confirming the 1987 charges were based on "an actual event" through the State's presentation of NCIS data, the court and the parties agreed that a curative instruction would be read both before the defense witness testimony and after. (Trial Tr. at 425-27.) The parties "crafted [the] instruction" together, based on Montana precedent and *Michelson v. United States*, 335 U.S. 469, 481 (1948), and "with the assistance of the Court." (*Id.* at 428.) Accordingly, the district court gave the jury the following curative instruction both before the State's cross-examination and at the close of the presentation of the defense:

> You have heard testimony about prior bad conduct, or rumors about prior bad conduct, of the defendant and you are to consider the inquiry only for the limited purpose of evaluating the witness' testimony as to the sufficiency of the grounds upon which they base their statements of defendant's good character.

(Doc. 140, Given Instr. 26.)

With the consent of the defense and the court for its cross-examination approach (including specific instances of prior conduct and asserting facts as an

officer of the court), and after the court read the above instruction immediately preceding Grimm's testimony, the prosecutor asked Grimm:

> [STATE]: If I'm telling you that [the 1987 charges] are true as an officer of this Court, you still can't tell us if your opinion changes?
>
> [GRIMM]: I would ask for specifics and more details, I would—I would rather not be judgmental, and I would like to know what was going on, what was the situation.

The State also asked Grimm about "rumors from neighbors" about Voyles abusing neighborhood children, as well as prior accusations of "letters in the mailbox saying 'perv'" and whether Grimm's opinion would change. Grimm again offered that she would want more information. (Trial Tr. at 437-38.)

The State asked a similar question to Donna Riley, "as an officer of this Court if I'm telling you [the 1987 charges] are true," would Riley's opinion change, to which Riley responded, "I would need the details." (*Id.* at 472.) In accordance with defense counsel's previous assertion that such questioning was permissible (*id*. at 425-26), Voyles never specifically objected to the two times the prosecutor used the "officer of the court" language.[6]

[6] Voyles did object to a different variation of a question to Riley when the prosecutor began with the language "But if I'm telling you that it's true—" as an assertion of the truth of the accusation, to which the court immediately responded, "I think she's asking if it would change her opinion of the Defendant if she was aware, she's allowed to ask that." (Trial Tr. at 472.)

2. Discussion

For the first time on appeal—and despite Voyles' concession below that he opened the door and his full consent to all the evidence the prosecution wanted to present—Voyles argues that the prosecutor improperly "questioned witnesses about their knowledge of 1987 charges" without mentioning the charges had been "dismissed." (Appellant's Br. at 28.) Voyles also argues that the prosecutor improperly talked about rumors of other sexual conduct with other victims. (*Id*.) Finally, Voyles argues that the prosecutor improperly stated as "an officer of the Court" that the allegations were "true." (*Id*.)

As an initial matter, it was not an error for the prosecutor to cross-examine witnesses who had endorsed Voyles' character about whether the witnesses had heard about Voyles' prior bad acts. Mont. R. Evid. 405(a) ("On cross-examination, inquiry is allowable into relevant specific instances of conduct"); *Michelson*, 335 U.S. at 479 (character witness may be asked whether he's heard about defendant's prior arrests). Indeed, "[w]hen the accused presents evidence" of "his good character in general, he opens the door to all legitimate cross-examination and must, therefore, accept the consequences which result." *State v. Reinert*, 2018 MT 111, ¶ 33, 391 Mont. 263, 419 P.3d 662 (citing *State v. Carter*, 285 Mont. 449, 458, 948 P.2d 1173, 1178 (1997)) (in *Carter*, approving of the State's cross-examination about prior DUI convictions when the defendant opened the door to character

testimony). Thus, the State was allowed to inquire into prior conduct because "while the law gives defendant the option to show as a fact that his reputation reflects a life and habit incompatible with commission of the offense charged, it subjects his proof to tests of credibility designed to prevent him from profiting by a mere parade of partisans." *Michelson*, 335 U.S. at 479. Here, Voyles presented seven character witnesses who opined that Voyles did not have a reputation for abusing children. The State was entitled to rebut Voyles' opening the door to character by raising specific instances of conduct, including rumors and allegations of other conduct.

However, while the State otherwise concedes that the prosecutor likely erred in interpreting *Clark* as *allowing* the State to proffer an assertion based on rumors as an "officer of the court,"[7] *Clark* is nonetheless instructive on how this Court evaluates potential prejudice in accordance with the seminal U.S. Supreme Court *Michelson* case in which: "(1) [] the trial court took pains to ascertain that the prior crime was an actual event; (2) the trial court instructed the jury to consider the inquiry only for the limited purpose of evaluating a witness's testimony; [and]

[7]While the *Clark* court approved of the prosecution's cross-examination as "proper" impeachment of witness opinion testimony—even when the prosecutor stated during cross-examination "as an officer of the court" that a fact at issue to prior conduct "could be established as true," *Clark*, 209 Mont. at 490, 682 P.2d at 1348—the appellate issue in *Clark* appears to have been not the validity of that particular statement but whether the inquiry into "specific instances of conduct" was proper cross-examination. *Id*. at 488, 682 P.2d at 1347.

(3) there was no specific objection made by the defense attorney." *Clark*, 209 Mont. at 490, 682 P.2d at 1348. Here, Voyles fails to show he suffered prejudice entitling him to plain error reversal from his unpreserved claim that it would result in a manifest miscarriage of justice, raise a question as to the fundamental fairness of the proceedings, or compromise the integrity of the judicial process.

First, this situation shows less potential prejudice than if the prosecutor had discussed the hypothetical validity of actual prior convictions, which the district court expressly precluded prior to cross-examination here. (*See* Trial Tr at 403-404, 422 (ruling).) Indeed, during the character witness testimony, both the State and the defense clarified that the prior conduct constituted mere allegations and rumors, not prior convictions. (*Id*. at 500 (defense counsel again confirmed with Randy that the allegations of prior conduct were "accusations" not "convictions," and Randy testified that accusations "could be made up"); (*id*. at 518 (State responding—upon defense witness' Mace's comment he had heard only "unsubstantiated" rumors—that "I mean that's fair, they're accusations, [not] convictions, and only Mr. Voyles and the minor know the truth; right?").) Thus, to the extent the prosecutor's comments could be viewed as "vouching" for the existence of particular facts, by necessity those "facts" could only conceivably be that allegations through 1987 charges existed, not that it could be legally

established that Voyles had molested anyone else. And, in anti-climactic testimony, the character witnesses' various reasonable responses to the prosecutors' questions made clear they would need more information than just mere allegations to accept a fact as true. Further blunting the potential prejudice, the prosecutor framed the questions in the hypothetical, attempting to push past the validity of the allegations to prompt the witnesses to offer opinions on whether the existence of such knowledge would change their respective opinions of Voyles' character. Given the context of the entire cross-examination, there was little opportunity for a prejudicial takeaway from the specific incidents of conduct based on unsubstantiated allegations.

Second, in accordance with *Michelson*, not only did the court confirm outside the jury's presence that the allegations were real events, but the parties and the court together crafted a jury instruction to specifically address any perceived misconceptions about how the jury should consider the prosecution's mention of specific instances of conduct. The jury was instructed that the rumors and allegations were only relevant to be considered for the "limited purpose of evaluating the witness' testimony as to the sufficiency of the grounds upon which they base their statements of defendant's good character." Thus, the jury, assumedly following the given instruction, was left with weighing the credibility of

the witnesses as to their opinions and reputation testimony in support of Voyles, against the State's allegations of rumors of prior conduct.

Third, the existence of the allegations and rumors of prior conduct—including the fact of prior accusations against Voyles pertaining to sexual conduct—were cumulative of evidence already admitted in the State's case-in-chief. Voyles' own statements to police established that: (1) K.L.'s brother had accused Voyles of sexual offenses (Trial Tr. at 199); Voyles had received a letter in his mailbox calling him a "perv" (*id*. at 260); and Voyles had been "accused of these types of things [sexual offenses] in the past" and the allegations had "followed him ever since" (*id*. at 224-25).

Accordingly, while the State concedes that the prosecutor couched her questions in improper language, Voyles fails to show entitlement to plain error reversal of his convictions. Fundamentally, the defense paraded seven character witnesses attempting to show that Voyles did not sexually abuse others, thus Voyles could not have abused K.L. These circumstances might clarify the defense's pre-cross-examination consent to the State's requests, including the planned course of mentioning allegations of prior conduct "as an officer of the court." (*See* Trial Tr. at 425-26.) While the language used by the prosecutor was improper, in this special circumstance of incredibly cumulative character witness

defense testimony, it did not tip the scales to show a manifest miscarriage of justice.

B. Unpreserved claims allegedly pertaining to the prosecutor's burden of proof and reasonable doubt standard

Voyles raises an unpreserved claim that the prosecutor improperly stated in closing that "if you have reasonable doubt, it has to be as to the elements of the crimes charged. *Reasonable doubt to periphery is not sufficient basis upon which to acquit.* It's actually not about the little details, it's about the details that matter. The State has proved the elements of all three charges beyond a reasonable doubt." (Appellant's Br. at 29, emphasis added to highlight comment Appellant disputes.) In context, the prosecutor immediately beforehand was summarizing Voyles' physician's testimony that Voyles had reported a claim of erectile dysfunction long "after [K.L.] came forward[,]" which did not directly dispute the timing of events or elements of the offense anyway. (Trial Tr. at 617-18.) Voyles does not explain why this statement was improper or how he suffered prejudice. And the jury was otherwise properly instructed that "beyond a reasonable doubt does not mean beyond any doubt or beyond a shadow of a doubt." (Doc. 140, Given Instr. 5.) The jury was also instructed regarding the presumption of innocence. (*Id*.)

In another unpreserved claim, Voyles alleges that the State shifted its burden of proof for meeting its case beyond a reasonable doubt to him when the State asked the jury to consider "what motive has the defense shown for [K.L.] to make

any of this up?" (Appellant's Br. at 29.) But, immediately before the comment, the State had explained that jurors were the "sole judges of credibility" and the jury could "evaluate motive." (Trial. Tr. at 599.) The jury was instructed in this case that it could evaluate "[w]hether the witnesses have an interest in the outcome of the case or any motive, bias or prejudice." (Doc. 140, Given Instr. 4.) As explained above, the jury was given the proper "reasonable doubt" jury instruction. This Court has explained that "jurors are presumed to have followed the repeated instructions given to them regarding the State's burden of proof." *State v. Hardy*, 2023 MT 110, ¶ 70, 412 Mont. 383, 530 P.3d 814 (citation omitted). It is unlikely the jury viewed an isolated comment as a direct admonition to abandon the given instructions regarding the State's burden.

C. Unpreserved claim highlighting the prosecutor's closing argument referencing K.L. as the "perfect victim"

In another unpreserved claim, Voyles argues that the prosecutor invaded the province of the jury by referring to K.L. as "the perfect victim." (Appellant's Br. at 29.) In context, the prosecutor explained:

> Remember Dr. Dutton's testimony on the process of victimization. The Defendant selected [K.L.] as the perfect victim, step one, young, introverted, low self-esteem, . . . [further explaining the five factors of victimization and relaying that to K.L.'s testimony].
>
> * * *
>
> [K.L.] was the perfect victim. He was quiet, he was introverted, he struggled to make friends . . .

* * *

> [The Defendant capitalized on [K.L.'s] vulnerability. . .
>
> [Further commenting on how Voyles ingratiated himself with J.W.'s family and sexually abused K.L. while J.W. was distracted working 22 hours a day].

(Trial Tr. at 594-95, 596-97.)

This Court "do[es] not isolate the challenged comments on review[,]" but rather considers "the challenged comments in the context of the trial and the closing argument as a whole." *State v. Palafox*, 2023 MT 26, ¶ 27, 411 Mont. 233, 524 P.3d 461 (citation omitted). Here, the prosecutor was accurately summarizing J.W.'s testimony about the changes in K.L.'s emotional disposition and behavior around the time of Voyles' sexual abuse, and directly relating that with Dr. Dutton's blind testimony about the five-step process of victimization. This Court has explained that it is proper to comment on "the evidence presented and suggest to the jury inferences which may be drawn therefrom." *State v. Aker*, 2013 MT 253, ¶ 26, 371 Mont. 491, 310 P.3d 506; *accord United States v. Sayetsitty*, 107 F.3d 1405, 1409 (9th Cir. 1997) (stating that prosecutors make reasonable inferences from the evidence presented at trial). As the prosecutor couched her argument in the context of the evidence presented, the comments are likely not even improper. *See, e.g., Pope v. Haynes*, 2022 U.S. Dist. LEXIS 130860, *7, Case No. 2:21-cv-00265 (W.D. Wash., July 22, 2022) (rejecting "perfect victim" prosecutorial misconduct

claim when the comments were reasonable inferences based on the trial record), *COA denied in Pope v. Haynes*, 2023 U.S. App. LEXIS 7600 (9th Cir. Mar. 29, 2023). Finally, Voyles fails to even argue that he suffered any specific prejudice from his unpreserved claim; thus, the claim necessary fails the second prong of plain error review.

D. Unpreserved claim challenging the prosecutor's cross-examination of Grimm regarding her knowledge of Voyles' prior conduct at Special Olympics

Voyles raises another unpreserved claim on appeal arguing that the State's cross-examination of Voyles' character witness, Tamara Grimm, was improper because the prosecutor "implied" that Voyles could have sexually abused Special Olympics children. (Appellant's Br. at 27.)

Grimm, the local coordinator for the Special Olympics, testified during the defenses' direct examination that Voyles was a bus driver, who also coached track and field and basketball, for the Special Olympics. (Trial Tr. at 395, 398-99.) She explained that she trusted Voyles, and no parents or kids had ever complained. (Trial Tr. at 399.)

On-cross examination, the prosecutor inquired into the basis of Grimm's opinion:

> [STATE]: And when you are at those events, is he also at the event or just with the bus or how is he sort of involved during those four days?

[GRIMM]: During those four days, if he had time, he was at the event and he stayed and watched the athletes; if there was not time, because we had six venues to get to, then he would be on the road, picking up other athletes at other venues.

[STATE]: When you have these events and Mr. Voyles is involved, is there any opportunity for him to be alone with the children or are there multiple adults and chaperones around?

[GRIMM]: There are multiple adults and multiple chaperones.

[STATE]: And tell me about some of these kids and their varying disabilities; are some of them nonverbal?

[GRIMM]: Yes.

[STATE]: And so yesterday you had mentioned that you never heard a child make an allegation or the parent of a child make an allegation; is that accurate?

[GRIMM]: Correct.

[STATE]: So if some of these children are nonverbal, then you wouldn't really know if they were able to make accusations; right?

(Trial Tr. at 434-35.) Grimm again explained that nonverbal kids usually had another adult chaperone, so were never alone. (Trial Tr. at 436.)

Here, through Voyles' questioning of Grimm about whether any complaints were made about Voyles from parents and children at the Special Olympics, Voyles directly put Grimm's knowledge of the nature and scope of her belief at issue. The prosecution did not commit misconduct when it asked Grimm about the circumstances by which Grimm had knowledge of Voyles' associations with special needs children during the Special Olympics. The jury was unlikely to have

reached the conclusion that Voyles abused other children based on the prosecutor's mere questions about the details surrounding the events and Grimms' response that children are usually double-supervised by adults. And no jury instructions allowed the jury to convict Voyles based on speculation from possible implicit suggestions not related to the SIWOC conduct at issue against K.L.

E. Off-hand comment

The State concedes that, after Randy Riley's testimony concluded, the offhand comment that Randy was "one of the lucky ones," which Voyles objected to, was improper. However, because the jury was properly instructed on how to view character evidence, including specific incidents of conduct, and because the prosecutor's statement was "a very brief deviation" from the overall approach, the comment does not create a "clear danger that the jurors adopted the prosecutor's views instead of exercising their own independent judgment." *Wells*, ¶ 28.

III. In the light most favorable to the State, any rational juror could have found that Voyles committed three separate acts of SIWOC.

A. Background

1. Direct testimony

During the time from 2006 to 2010, K.L. testified, Voyles "performed oral sex on me multiple times" at Voyles' house. (Trial Tr. at 338-39.) He explained that he remembered "three times" specifically. (*Id*. at 339.)

The prosecutor then prompted K.L. to talk "about those specific events," and told him to start with the first one. (Trial Tr. at 339.) Confusingly, K.L. started with an event that did not appear to be SIWOC. K.L. explained that he remembered that there was a fish tank at Voyles' house. K.L. explained that he was ten years old in 2006 and he was "sitting on [Voyles'] couch watching a movie" and he "caught a reflection" of "[Voyles] watching pornography in that reflection of his fish tank." (*Id.*) K.L. explained that he said, "I don't think this is right." (*Id*. at 340.) K.L. explained that Voyles then "stopped," and they finished watching the movie, whereupon K.L. "asked if he could take me home." (*Id*.)

Immediately after describing this incident, the prosecutor prompted K.L to describe "another time that might stick out in your memory[,]" and K.L. responded:

> There is another time where he basically did the same thing, and then he asked if I wanted to watch, I was confused, and I said, "Sure", and then eventually, me being a prepubescent boy, eventually hormones kicked in, I got an erection, and eventually he performed oral sex on me while masturbating.

(*Id*.)

Immediately after describing this event, the prosecutor asked, "Is there another specific time that sticks out in your mind?" (*Id*.) K.L. explained that he was "about 11 and a half" years old and this incident too was at Voyles' house, and he couldn't remember any details other than "we eventually ended up, in the crude

way of putting it, in the 69 position while he gave me oral sex, and I basically masturbated him." (Trial Tr. at 341-342.) This occurred on the living room floor between the couch and the TV. (*Id*. at 363.)

2. Cross-examination

On cross-examination, defense counsel asked K.L. several questions about the details and dimensions of the fish tank and how the reflection came about. (Trial Tr. at 351-52.) Defense counsel asked about the location of Voyles' computer, depicting pornography, in relation to the fish tank. (*Id*. at 353-54.) Finally, defense counsel confirmed that K.L.'s explanation of the first incident where he caught the reflection from the fish tank did not involve "any sexual contact[.]" (*Id*. at 354.)

3. Redirect

On redirect, the prosecutor confirmed that K.L. could not remember what he had told a defense investigator in a prior interview and refreshed his recollection. (Trial Tr. at 367-68.) K.L. then acknowledged he remembered and responded:

> Basically one of the few times I'd caught the reflection [from the fish tank], and basically I did the natural thing a teenage body would do, I got an erection, and Mike Voyles got down, I unzipped, and he performed oral on me.

(*Id*. at 368.)

4. Motion to dismiss for insufficient evidence

Voyles moved to dismiss "either . . . Count I" or, alternatively, "this case," exclusively under a "disability" theory. Voyles claimed that testimony revealed that K.L. had "ADHD which is tantamount to a disability[,]" which impacted K.L.'s ability "to communicate properly and for his memory to be able to work properly, so again, we dismiss Count I, and in the alternative dismiss the entire thing because of insufficient evidence based on those disabilities[.]" (Trial Tr. at 371-72.) Voyles did not raise any specific argument relating to the sufficiency of the evidence for the fish tank SIWOC incident as relayed on redirect.

The State responded that K.L. had testified to "at least three occasions the Defendant performed oral sex on [K.L.]" (Trial Tr. at 373.) The State continued, in pertinent part:

> Certainly through the testimony of [K.L.] which came out not only on correct [sic, "direct"], *but also on redirect*, that within Yellowstone County there were three incidents of sexual intercourse without consent perpetrated by the Defendant.

(*Id*. at 373, emphasis added.) The district court summarily denied the motion to dismiss, explaining the matter needed to be decided by the jury. (*Id*. at 374.)

B. Discussion

This Court reviews insufficiency of the evidence claims to determine whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt. *State v. Yuhas*, 2010 MT 223, ¶ 7, 358 Mont. 27, 243 P.3d 409. The inquiry is into whether sufficient evidence exists to support the verdict, not whether the evidence could have supported a different result. *State v. Sheehan*, 2017 MT 185, ¶ 17, 388 Mont. 220, 399 P.3d 314. Indeed, this Court's "job as an appellate court [is] to probe the record for evidence to support the fact-finder's determination." *State v. Dineen*, 2020 MT 193, ¶ 14, 400 Mont. 461, 469 P.3d 122.

Voyles does not directly raise a claim that any elements are unsatisfied in the three SIWOC offenses he was convicted of; rather, Voyles argues that while K.L. claimed that "Voyles performed fellatio on him on three separate occasions," he "failed to articulate any specific third occasion." (Appellant's Br. at 31-32.) Voyles acknowledges the prosecutor's follow-up "on redirect," but Voyles contends that this was not K.L.'s explication of a third event but was rather "simply a rehashing" of another SIWOC incident. (*Id.*)

The State disagrees. Voyles' assertion on appeal merely amounts to a claim that the evidence could have supported a different result, which is a different question than the sufficiency of the evidence. Here, in the light most favorable to the State, K.L. testified as to three events, all occurring in Voyles' home, in Yellowstone County, and all occurring from 2006 to 2010, while K.L. was 9-12 years old.

- In one event, Voyles asked him to watch porn, K.L. agreed, K.L. got an erection, and Voyles gave K.L. oral sex while Voyles was masturbating.

- In a second event, Voyles and K.L. got on the living room floor, went into a "69" position, and Voyles gave K.L. oral sex while K.L. masturbated him.

- In a third event (the "fish tank" event testified to on redirect), K.L. caught a reflection from the fish tank of pornography from Voyles' computer, K.L. got an erection, and Voyles gave him oral sex.

Accordingly, the fish tank event is different from the other two events based on K.L.'s descriptions. Unlike both other incidents, there was no masturbation of Voyles. Unlike the incident where K.L. and Voyles watched pornography together first, in the fish tank event, K.L. testified, he only viewed the pornography through the fish tank reflection before Voyles gave him oral sex.

Moreover, K.L.'s statement on redirect implies that it was a common occurrence for Voyles to watch pornography and for K.L. to view the porn through the reflection of the fish tank, as K.L. explained, the incident was "*one of the few times* I'd caught the reflection[,]" further giving clarity to the grooming behavior K.L. described on direct examination related to Voyles viewing pornography in his presence. And K.L.'s explication of a third event is buttressed from K.L.'s clear and repeated testimony, both before his direct testimony and at the conclusion of redirect, that he could remember three discrete incidents in which Voyles gave him oral sex.

Finally, the defense's presentation of its case purposely highlighted the fish tank incident in an attempt to dispute it. Defense counsel specifically attempted to rebut K.L.'s assertion of the third event by questioning several defense witnesses about: (1) their recollection of how long the fish tank had been present at Voyles' house, (Trial Tr. at 510-11, 546-48, 557), and (2) and their recollection of whether pornography had been present on Voyles' home computer, or Voyles had been watching porn. (*Id*. at 513, 541-43, 568.) Further, in closing argument, Voyles highlighted the fact that police never executed a search warrant to discover if the fish tank was still there, or if pornography was still on the computer. (*Id*. at 610-11.) If K.L. had been merely describing a background grooming event, the defense reasonably would not have called three different witnesses to attempt to dispute facts related to the fish tank.

Voyles hedges his bet by arguing that "for whatever other incidents K.L. attempted to articulate on re-direct," K.L. failed to establish "where those other events occurred, and when they occurred." (Appellant's Br. at 32.) Again, the State disagrees. K.L.'s testimony established that Voyles' computer and fish tank were in Voyles' house. (Trial Tr. at 351-54.) K.L.'s testimony confirmed that he received oral sex three times, at Voyles house, on 56th and Danford, in Yellowstone County, in the period from 2006 to 2009. (*Id*. at 338-39, 342-43.)

IV. Voyles has not proven cumulative error.

"The cumulative effect of errors will rarely merit reversal[.]" *State v. Cunningham*, 2018 MT 56, ¶ 33, 390 Mont. 408, 414 P.3d 289. For cumulative errors to warrant reversal, the appellant must establish actual prejudice from the aggregation of more than one otherwise harmless error: "a mere allegation of error without proof of prejudice is inadequate to satisfy the doctrine." *Cunningham*, ¶ 32 (citation omitted). Voyles has not identified any aggregate prejudicial errors from his claims of jury instructional error, prosecutorial misconduct, and contesting the sufficiency of the evidence.

CONCLUSION

This Court should affirm Voyles's SIWOC convictions.

Respectfully submitted this 2nd day of January, 2024.

AUSTIN KNUDSEN
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: */s/ Roy Brown*
ROY BROWN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman 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 9,930 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Roy Brown
ROY BROWN

CERTIFICATE OF SERVICE

I, Roy Lindsay Brown, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 01-02-2024:

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Scott D. Twito (Govt Attorney)
PO Box 35025
Billings MT 59107
Representing: State of Montana
Service Method: eService

Clark Ryan Ramsey (Attorney)
2722 3rd Ave N #320
Billings MT 59101
Representing: Michael Voyles
Service Method: eService

Electronically signed by Wendi Waterman on behalf of Roy Lindsay Brown
Dated: 01-02-2024