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 APPELLEE

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

APPEARANCES:

AUSTIN KNUDSEN
Montana Attorney General
BJORN BOYER
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
bjorn.boyer@mt.gov

KIRSTEN PABST
Missoula County Attorney
BRIAN C. LOWNEY
Deputy County Attorney
200 West Broadway Street
Missoula, MT 59802-4292

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

CHAD WRIGHT
Appellate Defender
MICHAEL MARCHESINI
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147

ATTORNEYS FOR DEFENDANT
AND APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 5

SUMMARY OF THE ARGUMENT 16

ARGUMENT 18

I. Standard of review 18

II. The district court did not err by allowing Grubb to testify via two-way video; however, even if the district court erred, it was harmless 19

A. The district court did not err by allowing Grubb to testify via video during the middle of the COVID-19 pandemic 19

1. Allowing Grubb to testify via video from a federal prison during the COVID-19 pandemic served an important public policy 20

2. Grubb's testimony maintained the traditional hallmarks of reliability 28

3. Whitaker's remaining arguments regarding his confrontation rights are without merit 29

B. Even if the district court erred by allowing Grubb to testify by video, such error was harmless 32

III. The district court did not err by admitting video of L.M.'s forensic interview 34

A. L.M.'s forensic interview was admissible as a prior inconsistent statement 34

B. Whitaker opened the door to the State admitting the forensic interview to rebut his opening argument that L.M.'s disclosure was the result of improper coaching.....37

C. Even if the district court erred in admitting the forensic interview, such error was harmless 40

IV. The cumulative error doctrine does not apply 41

V. This court should reverse and vacate Whitaker's conviction for sexual assault.....43

CONCLUSION 44

CERTIFICATE OF COMPLIANCE.....44

TABLE OF AUTHORITIES

Cases

City of Missoula v. Duane,
2015 MT 232, 380 Mont. 290, 355 P.3d 729 ..... 20, 21, 31, 32

Delaware v. Van Arsdall,
475 U.S. 673 (1986) 32

Maryland v. Craig,
497 U.S. 836 (1990) 19, 20, 28

Stand Up Mont. v. Missoula Cnty. Pub. Sch.,
2022 MT 153, 409 Mont. 330, 514 P.3d 1062 21

State v. Bailey,
2021 MT 157, 404 Mont. 384, 489 P.3d 889 21

State v. Board,
135 Mont. 139, 337 P.2d 924 (1959) 37

State v. Comacho,
960 N.W.2d 739 (Neb. 2021) 22

State v. Darrell Smith,
2020 MT 304, 402 Mont. 206, 476 P.3d 1178 ..... 41, 42

State v. Guill,
2010 MT 69, 355 Mont. 490, 228 P.3d 1152 37

State v. Hanson,
283 Mont. 316, 940 P.2d 1166 (1997) 42

State v. Howard
2011 MT 246, 362 Mont. 196, 265 P.3d 606 34

State v. Martell,
2021 MT 318, 406 Mont. 488, 500 P.3d 1233 ..... 21, 31, 32, 33

State v. McGhee,
2021 MT 193, 405 Mont. 121, 492 P.3d 518 37

State v. Mederos,
2013 MT 318, 372 Mont. 325, 312 P.3d 438 ..... 34, 35, 36, 37

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

State v. Olman,
2022 Ohio 2647 (Ohio Ct. App. 7th Dist. 2022) 22

State v. Sheriff,
190 Mont. 131, 619 P.2d 181 (1980) 37-38

State v. Smith,
2021 MT 148, 404 Mont. 245, 488 P.3d 531 ..... 18, 40

State v. Tate,
985 N.W.2d 291 (Minn. 2023) 22

State v. Van Kirk,
2001 MT 184, 306 Mont. 215, 32 P.3d 735 33

State v. Veis,
1998 MT 162, 289 Mont. 450, 962 P.2d 1153 ..... 37, 39, 41

State v. Walsh,
2023 MT 33, 411 Mont. 244, 525 P.3d 343 ..... *passim*

State v. Whitlow,
285 Mont. 430, 949 P.2d 239 (1997) 38

State v. Williams,
2010 MT 58, 355 Mont. 354, 228 P.3d 1127 43

Other Authorities

Montana Code Annotated
§ 46-20-701(1) 40

Montana Constitution
Art. II, § 24 ..... 18, 19

Montana Rules of Evidence
Rule 106 37
Rule 801(d)(1)(A) 34

Code of Federal Regulations

Tit. 28, § 527.30 ..... 29, 30

Tit. 28, § 527.31 ..... 30, 31

United States Constitution

Amend. VI 18, 19

McGrath, C.J., *Letter to Montana Courts of Limited Jurisdiction Judges*, March 20, 2020, https://courts.mt.gov/external/virus/Ltr%20to%20COLJ%20Judges%20re%20COVID-19%20032020.pdf?ver=2020-03-20-115517-333 27

Updated Judicial Branch COVID-19 Protocols (December 21, 2020), https://covid19.mt.gov/_docs/COVID-19-Memo-from-Chief-Justice-McGrath-December-2020.pdf 2

Updated Judicial Branch Covid-19 Protocols (May 17, 2021), https://courts.mt.gov/external/virus/COVID-19%20Memo%20from%20Chief%20Justice%20McGrath%20051721.pdf 4, 24, 27

Centers for Disease Control and Prevention, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, June 9, 2021, at pg. 9 (available at https://stacks.cdc.gov/view/cdc/107037) 26

Montana COVID-19 Dashboard, Hospitalizations and ICU Bed Occupancy, https://montana.maps.arcgis.com/apps/MapSeries/index.html?appid=7c34f3412536439491adcc2103421d4b (last updated 5/5/23, 9:59 a.m.) 23

Bolton, Aaron, *Montana Reaches 2,000 COVID-19 Deaths, with Over 100 in the Past Week*, Montana Public Radio, September 29, 2021, https://www.mtpr.org/montana-news/2021-09-29/montana-reaches-2-000-covid-19-deaths-with-over-100-in-the-past-week (last accessed January 11, 2024) 24

Marquez N., Ward J.A., Parish K., Saloner B., Dolovich S., *COVID-19 Incidence and Mortality in Federal and State Prisons Compared with the US Population, April 5, 2020, to April 3, 2021*, JAMA, October 6, 2021, 2021;326(18):1865 (https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8495600/) (last accessed January 11, 2024) 27

Miller, Sara G., *Delta Variant is "Greatest Threat to Eliminating Covid in U.S., Fauci Says,"* NBC News, June 22, 2021, https://www.nbcnews.com/health/health-news/delta-variant-greatest-threat-eliminating-covid-u-s-fauci-says-n1271933 (last accessed January 11, 2024) 24

STATEMENT OF THE ISSUES

1. Whether the district court violated Appellant's right to confrontation by allowing Jamie Grubb to testify via video from a federal prison in Illinois during the COVID-19 pandemic.

2. Whether the district court abused its discretion by admitting the victim's forensic interview into evidence.

3. Whether the cumulative error doctrine applies.

4. Whether Appellant's conviction for sexual intercourse without consent and sexual assault violated double jeopardy.

STATEMENT OF THE CASE

Missoula County charged Appellant Wes Whitaker (Whitaker) with one count each of sexual intercourse without consent (SIWOC), incest, and sexual assault. (Doc. 220.) The charges stemmed from Whitaker sexually abusing his three-year-old stepdaughter, L.M. (Docs. 1, 220.) Although the abuse had been ongoing, the State charged Whitaker with only one incident that occurred on or about July 1, 2018. (Doc. 220; 5/20/20-12/15/21 Hr'gs Tr. (Tr.) at 1656.) Whitaker represented himself at trial. (Doc. 117.)

While incarcerated pretrial, Whitaker admitted to his cellmate, Jamie Grubb (Grubb), that he had sexually abused L.M. (Tr. at 1115-20.) On February 6, 2020,

prior to the onset of any COVID-19 restrictions, the State moved for Grubb to testify via two-way video because Grubb, who had since been convicted on federal charges, was incarcerated in a federal facility in Pekin, Illinois. (Doc. 75.) The State cited the impracticality of transporting Grubb from Illinois to Missoula as the basis for its motion. (*Id.*) Whitaker objected to the video testimony, citing the confrontation clause. (Doc. 84.) The court did not rule on the State's motion prior to the onset of the COVID-19 pandemic in March 2020.

In March 2020, courts began confronting the pandemic, which was "the most significant public health emergency in more than a hundred years." (*Updated Judicial Branch COVID-19 Protocols* (December 21, 2020).) The district court first referenced COVID-19 precautions at a hearing on March 19, 2020, when it ordered L.M.'s therapists to testify via video at an upcoming hearing. (11/27/19-4/22/20 Hr'gs Tr. at 91-92.) Regarding the therapists, the court stated that "[t]hey're not going to be in the courtroom, we're going to utilize electronic methods for their protection as well as ours." (*Id.* at 92.)

At a hearing on May 20, 2020, the district court stated that it was allowing witnesses the opportunity to testify via video for "cases in June and July" 2020. (Tr. at 9.) The court further explained the COVID-19 protocols, which required all parties to wear masks, screening out high-risk individuals from the jury pool, spreading out the jury between courtrooms during voir dire, putting up dividers in

the courtroom, and screening people entering the courtroom for symptoms. (Tr. at 9-12.)

A week later, at a hearing on May 27, 2020, the prosecutor acknowledged the court's prior order allowing witnesses to testify via video but asked the court to issue an order specifically allowing Grubb to testify remotely. (Tr. at 40.) The court granted the State's motion, stating that it was doing so "based on my prior statements about allowing video testimony under the COVID conditions[.]" (*Id.*) In later proceedings, the court continued to express reluctance about requiring people to travel from out-of-state to Montana, stating in an October 7, 2020 hearing that "[i]t's theoretically possible to bring them to Montana, but given all the COVID restrictions and everything else, I'm finding it more appropriate to have them testify [remotely]." (Tr. at 225.)

The precautions were not just theoretical. Whitaker was required to isolate at the jail because of a COVID-19 outbreak there. (*Id.* at 282.) The court noted that: "It's been very difficult in these COVID times to get everything working. People get sick. People's immediate others get sick. People in detention get placed in isolation. All of these things happen that are not normal." (*Id*. at 281.)

The court reiterated that the precautions it was taking with COVID-19 were "to keep everybody safe," and that the court did not believe it was "wise" for "everybody's health" to bring in out-of-state witnesses because the court "[did not]

want them bringing COVID to the courtroom . . . ." (*Id.* at 292, 296.) The court further expressed its preference for out-of-state witnesses to testify via video, stating that it did not want to "have to worry about all the transport issues and the COVID issues that can come up." (*Id.* at 296.)

The COVID-19 precautions carried through to the time of Whitaker's trial, which commenced on June 18, 2021. (*See* Tr. at 484, 569.) Just prior to Whitaker's trial, this Court issued revised protocols, which returned the decision to require facemasks in court to local judges. (*Updated Judicial Branch Covid-19 Protocols* (May 17, 2021).) The updated protocols continued to encourage remote appearances for those "considered to be at high-risk if exposed to COVID-19 . . . ." (*Id.*) The district court also continued to take extensive COVID-19 precautions at the trial, which included not allowing the parties to approach the witness stand, remaining socially distanced, checking everyone's temperature for fever every day, cordoning off the parties and witnesses behind plexiglass, asking (but not requiring) people to wear masks, and conducting voir dire at the Double Tree Hotel conference center to allow for more space. (*Id.* at 562, 565, 569, 579-80.)

Grubb testified at the trial via video, consistent with the district court's prior order and COVID-19 precautions. (Tr. at 1109-10.) Grubb's video allowed the court and the jury to see Grubb during his testimony and allowed Grubb to see Whitaker. (Tr. at 1113-14.)

L.M., who had been three years old at the time of the abuse, and was six years old at the time of trial, struggled to recall more than the basic details of the sexual abuse. (*See* Tr. at 784-98.) Citing L.M.'s inability to recall, and over Whitaker's objection, the prosecutor admitted statements L.M. had made to the sexual assault nurse examiner and a video of L.M.'s forensic interview. (*Id.* at 1023-30, 1098-1104, 1131-36.)

After deliberating, the jury found Whitaker guilty of all three counts. (Doc. 338.) At sentencing, the court found Whitaker was not amenable to rehabilitation due to his "extremely serious" criminal history, including his prior sexual offenses against children and his inability to remain law abiding during any "substantial period before this crime." (Doc. 371 at 3-4.) The court sentenced Whitaker to 100 years without parole and designated him as a Tier III sexual offender. (*Id.* at 2-4.)

STATEMENT OF THE FACTS

L.M.'s mother, Jessica Moser (Jessica), met Whitaker on a dating website in 2016. (Tr. at 805.) L.M., who was born in September 2014, was approximately one and a half years old when Jessica and Whitaker started dating. (*Id.* at 803, 805.) Jessica and Whitaker began living together in Billings soon thereafter, and they married on June 22, 2017. (*Id.* at 806-08.) Whitaker's and Jessica's first daughter together, A.W., was born a couple of days after the wedding. (*Id.* at 803.)

Jessica and Whitaker soon began struggling in their marriage. (Tr. at 811.) Following a fight, Jessica left with the children to stay "a couple of nights" with her friend Brittany Anthony (Brittany). (*Id.* at 812.) Jessica threatened to break up with Whitaker unless he went to marriage counseling with her. (*Id.* at 816.) Whitaker agreed, and they went a couple of times, but stopped when Whitaker received a promotion that required the family to move to Missoula in April 2018. (*Id.*)

In Missoula, Jessica and Whitaker continued to have marital problems. (Tr. at 824.) During one fight in June 2018, Jessica yelled at Whitaker, and he responded by hitting her in the mouth. (*Id.* at 815, 824.) After the fight, Jessica took the children and went to stay with her mother in Glasgow for a few days. (*Id.* at 824.) Whitaker threatened Jessica that he would report her to law enforcement for kidnapping the children and that he would obtain custody of them. (*Id.* at 899-900.) Jessica returned to Missoula after Whitaker apologized and promised that "everything was going to be okay[.]" (*Id.* at 824.) Jessica went back because she "loved him" and "wanted to make things work for [the] kids." (*Id.* at 825.)

Jessica first became suspicious that Whitaker might be sexually abusing L.M. after the move to Missoula. (Tr. at 826.) Jessica described how, on one occasion, she fell asleep on a futon in the living room with L.M. next to her. (*Id.*)

When she woke up, L.M. was gone. (*Id.*) Jessica then noticed L.M. coming out of Whitaker's bedroom and that she was zipping up her onesie pajamas. (*Id.*)

On another occasion, Jessica warned L.M. that "grown-ups" should not "touch [her] privates." (Tr. at 827.) L.M. responded by asking, "even your daddy?" (*Id.*) Jessica did not ask L.M. any additional questions on why she would say that, but later reported she was "shocked" by L.M.'s response. (*Id.*)

Jessica described another incident, which occurred around July 1, 2018, after Whitaker had been drinking. (*Id.* at 838-42.) Jessica had been sleeping on the futon in the living room when she awoke to a noise coming from her bedroom. (*Id*. at 827.) Jessica went into the bedroom and saw Whitaker lying on his side, facing away from her toward the wall. (*Id.* at 827-29.) L.M. was standing naked in front of him. (*Id.* at 828-30.) As Jessica entered the room, Whitaker was pulling up L.M.'s underwear. (*Id.*) Whitaker only had boxers on. (*Id.* at 830.) Jessica went into "panicked Mom mode" and started confronting Whitaker. (*Id.* at 833.) Whitaker was surprised by Jessica's appearance, and he jumped up, went to the bathroom, and shut the door. (*Id.* at 828-30.) Jessica observed that Whitaker had an erection. (*Id.*)

Jessica asked L.M. what had happened, but L.M. "wouldn't say anything." (Tr. at 832.) Whitaker exited the bathroom and stood behind Jessica as she questioned L.M. (*Id.*) L.M. started to say something, but then stopped. (*Id.* at

832-33.) Jessica asked Whitaker to leave so that she could talk to L.M., but Whitaker refused. (*Id.*) Jessica later confronted Whitaker about what had happened. (*Id*. at 839-40.) Whitaker told Jessica that L.M. had been asleep on the bed when she rolled off onto the floor, which was the noise that woke Jessica. (*Id.* at 839.) Jessica told Whitaker that his story was not "add[ing] up," but Whitaker denied doing anything to L.M. (*Id.* at 840.)

Jessica was conflicted about what to do. (*See* Tr. at 842-44.) She did not call the police because she was still in denial and was desperate to keep her marriage intact. (*Id.* at 842.) On the other hand, she no longer trusted Whitaker to be around L.M. or A.W. and would not leave him alone with them. (*Id.* at 844.)

On July 7, 2018, at approximately 8 p.m., Jessica was giving L.M. and A.W. a bath when L.M. spontaneously volunteered that Whitaker had "touched her diamond." (Tr. at 845.) Jessica had never heard L.M., or anyone else in the family, use the euphemism "diamond" before, so she asked L.M. what her "diamond" was. (*Id.*) L.M. responded by "point[ing] down to her private parts and said her pee-pee." (*Id*.)

At the time of L.M.'s disclosure, Whitaker was asleep in the bedroom. (Tr. at 847.) Jessica got L.M. and A.W. dressed. (*Id.* at 846.) While doing so, she texted Brittany that something bad had happened and asked Brittany if she and the

children could stay at her house. (*Id.* at 846, 919.) Brittany agreed and called 9-1-1, even though Jessica did not ask her to do so. (*Id.* at 919-21.)

Missoula Police Department (MPD) Officer Ken Smith (Officer Smith) responded to the call. (Tr. at 1188.) Upon arrival, Officer Smith observed that Jessica was distraught, "broke down and crying," and "[s]he seemed to be thinking of any other thing that could have possibly been that caused [L.M.] to make these statements." (*Id.* at 1190-91.) L.M. spontaneously disclosed to Officer Smith that Whitaker had touched her "right here" while pointing at her crotch. (*Id.* at 1194.) Officer Smith did not ask L.M. any questions. (*Id.* at 1191.)

Sexual Assault Nurse Examiner Adeline Wakeman (Wakeman) responded to the First Step Clinic and started L.M.'s medical exam at approximately 1:30 a.m. (Tr. at 1002.) Wakeman did not locate anything "medically significant" during the exam, which is typical of 85 to 95 percent of forensic exams done for suspected child sexual abuse. (*Id.* at 1010, 1016.) Wakeman observed some redness around L.M.'s vaginal opening; however, the redness could not be correlated to sexual abuse. (*Id.* at 1016-19.) During the exam, L.M. reported that her "diamond" hurt because "[d]addy pushes in and out really fast like this." (*Id.* at 1029.) Wakeman observed that L.M. moved her pelvis back and forth to mimic what Whitaker had done. (*Id*.)

Officers arrested Whitaker soon after Jessica left the residence. (Tr. at 1202.) Whitaker began calling Jessica immediately after arriving at the jail, while Jessica and L.M. were still at the police station and First Step. (Tr. at 850.) During the first call, Jessica explained to Whitaker the disclosure L.M. had made in the bathtub. (Tr. at 851, Ex. 1a at 1:55-2:22.) Whitaker did not deny the abuse but, instead, asked Jessica if she was the one who had called the cops. (Ex. 1a at 2:22-2:49.)

Whitaker called Jessica again the next day. (Tr. at 851, Ex. 1b.) During that call, Jessica told Whitaker they were "done" because she could not trust him around L.M., but also promised him he could continue to see his daughter, A.W. (Ex. 1b at 2:39-3:45.) Whitaker expressed his belief that he would not get out of prison. (*Id.* at 3:45-3:50.) Jessica indicated that she was still conflicted – that she was in a "hard spot" because she still had feelings for him and she had "married [him] for a reason." (*Id.* at 3:50-4:15.)

Whitaker said he did not want A.W. to know him "for this" and that he would just plead guilty to the charges and not "make you guys get drug through . . . the court system . . . ." (Ex. 1b at 4:17-5:40, 9:48-10:07.) Whitaker asked Jessica if she "truly believed" he had abused L.M., to which Jessica responded that she did not know; on the one hand she did not want to believe Whitaker would commit the abuse, but on the other hand she had to believe her "little girl." (*Id.* at 10:20-10:47.)

Child forensic interviewer Cat Otway (Otway) conducted a forensic interview with L.M. on July 9, 2018. (Tr. at 1095.) During the forensic interview, L.M. pointed to her groin and her buttocks to show where Whitaker had given her "owies." (*Id.* at 1098, Ex. 2 at 4:19-4:35.) She said that the abuse occurred in the "living room."[1] (*Id.* at 5:00-5:08) L.M. stated the abuse happened "two, three, four" times. (*Id.* at 5:20-5:25.)

L.M. thrust her hips to show what Whitaker had done to her. (Ex. 2 at 4:40-4:45.) She stated Whitaker had used his "diamond," which had hair on it, to touch her "butt." (*Id.* at 5:20-5:51; 6:45-7:06.) She said Whitaker had "wakeded me up to do that." (*Id.* at 7:20-7:28.) L.M. reported that she told Jessica about the abuse even though Whitaker had told her not to. (*Id.* at 8:30-9:00; 12:50-13:07.) She described how Whitaker's "diamond" had gone on the outside of her "diamond" and that blood had come out of his "diamond." (*Id.* at 14:10-14:38; 21:40-22:15.)

At the time of trial, L.M. was six years old, double her age from when the sexual abuse had occurred. (Tr. at 781.) She recalled that Whitaker touched her on her private parts. (*Id.* at 784-85.) She identified that the "private parts" Whitaker had touched were those she used to go both "potty" and "poop." (*Id.* at 785.) L.M. testified that Whitaker had referred to her front private part as her "diamond," and

[1] Although Jessica suspected the abuse occurred in the bedroom, L.M.'s statement that the abuse occurred in the living room was not inconsistent because L.M. reported multiple instances of abuse.

that Whitaker had used his own private parts and his hands to touch her. (*Id.* at 789.)

L.M. struggled to recall many of the details of the abuse she told to Wakeman during the forensic exam or to Otway during the forensic interview. (*See* Tr. at 785-93.) For example, L.M. could not definitively recall how old she was at the time of the abuse, the codeword Whitaker had used to describe his own genitalia, the frequency of the abuse other than it happened more than once, whether there had been penetration, where in their house the abuse had occurred, or when she told her mother about the abuse. (Tr. at 785, 789-92.) She did not recall her forensic exam or forensic interview. (*Id*. at 793.) She could not identify Whitaker, telling him during his cross-examination that she did not know who he was. (*Id.* at 801.)

The night following the forensic interview, L.M. made additional disclosures to Jessica, describing how Whitaker would "spit on his hand" and then put the spit "on his thingy" in preparation for the sexual abuse. (Tr. at 858.) Whitaker then "stuck his thingy inside of her and in her butt." (*Id.* at 857.)

Whitaker called Jessica again from the jail after L.M. made those disclosures. (Tr. at 851, Ex. 1c.) During the phone call, Jessica was angry and confronted Whitaker. (Ex. 1c at 1:45-3:19.) Whitaker still did not deny the abuse but, instead, asked if Jessica was going to keep him from seeing A.W. (*Id.* at 3:10-

4:16.) Although Whitaker did not directly deny the accusations, he tried to insinuate that Jessica had planted ideas of abuse in L.M.'s head. (*Id.* at 4:30-5:25.) When Jessica asked Whitaker if he felt guilty, Whitaker responded that "if [L.M.] really thinks that Dad hurt her . . . and if it is true, then I don't deserve to be out." (*Id.* at 6:15-6:50.)

Whitaker and Grubb were cellmates for approximately two weeks of the total six months they were in jail together. (Tr. at 1115.) The first night they were cellmates, Grubb asked Whitaker about his charges. (*Id.* at 1118.) Whitaker told Grubb that he was charged with incest against his three-year-old daughter. (*Id.* at 1117.) That night, Whitaker denied committing the offense and claimed the allegations stemmed from Jessica being angry with him. (*Id.* at 1118.) Grubb shared with Whitaker information about his own child pornography and child stalking charges. (*Id.* at 1112, 1118.)

During the second night of being cellmates, Whitaker opened up more about his charges. (Tr. at 1118-19.) Whitaker shared that he used to drink and that he regretted things he had done after drinking. (*Id.*) Grubb asked Whitaker if his drinking had anything to do with his charges. (*Id.* at 1119.) Whitaker responded that he thought so. (*Id.*)

Whitaker discussed the allegations with Grubb more on the third night. (Tr. at 1119.) Whitaker described how there was a night he got drunk and then got

into bed with his daughter. (*Id.*) Whitaker claimed he "kind of lost sight of what was happening" as he started "sexually rubbing [himself] up against her." (*Id.*) Whitaker told Grubb that Jessica came home and almost caught him. (*Id.*)

Whitaker further described that, on another occasion when he was in bed with L.M., he rubbed his "dick against her vaginal area and her anus[.]" (Tr. at 1120.) Whitaker told Grubb that he and L.M. came up with "diamond" as a codeword for her vaginal area. (*Id.*) Grubb said Whitaker denied penetrating L.M., reporting that he only "rubbed himself on the outside." (*Id.* at 1122.)

When asked why he would report what Whitaker told him, Grubb responded that, even though he also had child sex offense charges, Whitaker's charges were against "his own flesh and blood." (Tr. at 1124.) Grubb reported that Whitaker had a picture of L.M. up in his cell and Grubb was disgusted that Whitaker would still have the picture up despite his charges. (*Id*. at 1124-25.) Grubb reported that he never saw Whitaker with any paperwork in his cell, and Whitaker confirmed at a pretrial hearing that he did not have any discovery in his possession during that time. (*Id.* at 1126-27, 1601.)

Although Whitaker was never subjected to cross-examination, he testified during his opening argument and through the questions he asked of witnesses. (*See*, *e.g.*, Tr. at 766-68, 908.) In his opening argument, Whitaker blamed Jessica and the investigation for L.M.'s disclosures, stating that "[q]uestions were asked

and interpreted without further explanations and were inappropriate and misleading." (*Id.* at 768.) Whitaker claimed that the prosecutor would attempt to withhold evidence regarding the investigative process, stating:

> How can anyone trust vague, confusing and misleading evidence or police who are over-zealous and influenced by personal feelings and animosities? In fact, that's unethical. And [the prosecutor] will try to keep that away from you, possibly desperately. It is unethical.

(*Id.*)

After claiming the prosecutor would violate ethical duties by withholding evidence from the jury, Whitaker moved on to attack the forensic exam and forensic interview, stating:

> In this trial, you will hear critical testimony that will break down that forensic exam [the prosecutor] talked to you about and the forensic interview. We will understand more about standards of practice for forensic interviewing, the risks of interviewing improperly, child sexual development and its significance in legal proceedings, common myths, scientific evolution for forensics, dos and don'ts, as well as interviewing and the accuracy of the memory of children.
>
> You will hear testimony in areas relating to victim behaviors, reactions, and characteristics regarding spontaneous disclosures and the impact of influencing, persuading, coaching, reenforcing and advocacy have on children, my little girl, L.M.

(Tr. at 769.)

Prior to L.M.'s testimony, Whitaker objected to the State calling L.M. as a witness, stating in front of the jury that L.M.'s "testimony has been tainted and

coached, and [the prosecutor] would invite the jury to assume that it's her own words." (Tr. at 780.)

During his case-in-chief, Whitaker called his own expert witness, Dr. Donna Zook (Dr. Zook), to criticize the forensic interview. (*Id.* at 1468-85.) Dr. Zook had reviewed the forensic interview and her testimony consisted of going through a transcript of it with Whitaker and providing line-by-line critiques of Otway's performance. (*Id.*) Dr. Zook testified that Otway had suggested and/or reinforced many of L.M.'s answers. (*Id*.)

Whitaker continued this theme during his closing argument. (*See* Tr. at 1627.) Whitaker claimed that Otway and Wakeman were biased and lacked objectivity, and called them "liars," whose sole purpose was to "deceive" the jury. (*Id.* at 1627-29.) Whitaker alleged Otway had "used leading and suggestive questions" and then interpreted L.M.'s answers to "fit her bias." (*Id.* at 1629.) Despite Whitaker's claims of bias, the jury found him guilty of sexually abusing L.M. after approximately one hour and ten minutes of deliberations. (*Id*. at 1640-41.)

SUMMARY OF THE ARGUMENT

The district court did not err by allowing Grubb to testify via video. Grubb was incarcerated in a federal penitentiary in Illinois. At the time of trial in June

2021, the COVID-19 pandemic was in full swing, with the worst to come. The Delta variant was just emerging and would lead to Montana's highest hospitalization and fatality numbers shortly after Whitaker's trial. In June 2021, the CDC recommended that inmates not be transferred between jurisdictions absent enumerated necessary circumstances that were not present here. Under these case-specific circumstances, the district court did not err by allowing Grubb to testify via video.

The district court did not abuse its discretion by admitting L.M.'s forensic interview. The interview was admissible as a prior inconsistent statement because L.M. could not recall at trial several of the facts she had spoken about during the forensic interview. It was also admissible to rebut Whitaker's allegations during his opening argument that L.M.'s statements were the product of coaching during the interview. The State was entitled to play the interview so the jury could determine for itself whether Otway had engaged in coaching as Whitaker claimed.

However, even if admitting the video was error, it was harmless. Jessica testified that L.M. had made the same or similar statements to her near in time to the forensic interview. Whitaker did not object to Jessica's testimony. Therefore, Whitaker was not prejudiced because the forensic interview was merely cumulative to Jessica's testimony.

Finally, Whitaker's conviction for sexual assault should be vacated because it was premised on the same criminal act as his SIWOC conviction.

ARGUMENT

I. Standard of review

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

This Court reviews "evidentiary rulings for an abuse of discretion." *State v. Smith*, 2021 MT 148, ¶ 14, 404 Mont. 245, 488 P.3d 531. "A district court abuses its discretion when it acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice." *Id.* Where the discretionary ruling is based on a conclusion of law, this Court must determine whether the district court correctly interpreted the law. *Id.*

/ / /

II. The district court did not err by allowing Grubb to testify via two-way video; however, even if the district court erred, it was harmless.

A. The district court did not err by allowing Grubb to testify via video during the middle of the COVID-19 pandemic.

The Confrontation Clause of the United States Constitution guarantees a criminal defendant the right to "be confronted with the witnesses against him." U.S. Const. amend. VI. Similarly, the Montana Constitution guarantees a criminal defendant the right "to meet the witnesses against him face to face . . . ." Mont. Const. art. II., § 24. The purpose of the Confrontation Clause is to ensure reliability of testimony by "subjecting it to rigorous testing in the context of an adversary proceeding . . . ." *Mercier*, ¶ 16 (quoting *Maryland v. Craig*, 497 U.S. 836, 844 (1990)).

However, physical "face-to-face" confrontation is not an absolute right, though it should not be "easily dispensed with[.]" *Craig*, 497 U.S. at 850. "[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.'" *Mercier*, ¶ 17 (quoting *Craig*, 497 U.S. at 850).

The *Craig* test sets forth a two-prong analysis, which first requires a district court to make a "case-specific finding . . . that 'denial of physical face-to-face

confrontation is necessary to further an important public policy." *State v. Walsh*, 2023 MT 33, ¶ 10, 411 Mont. 244, 525 P.3d 343 (quoting *Mercier*, ¶ 18). Second, "the reliability of the testimony" must otherwise be assured. *Mercier*, ¶ 18. This Court has adopted the rationale set forth in *Craig* as it applies to witnesses appearing via two-way video technology. *Mercier*, ¶ 22; *see also City of Missoula v. Duane*, 2015 MT 232, ¶ 21, 380 Mont. 290, 355 P.3d 729.

Below, the State will first address the necessity prong, which was satisfied because allowing Grubb to testify via video was necessary to further the important public policy of preventing the spread of COVID-19. Next, the State will address the reliability prong, which was also met because the video testimony satisfied the traditional hallmarks of cross-examination. Finally, the State will address several arguments raised in Whitaker's opening brief.

1. Allowing Grubb to testify via video from a federal prison during the COVID-19 pandemic served an important public policy.

A specific important public policy concern, rather than a generalized policy concern, is required to dispense with physical face-to-face confrontation. *Mercier*, ¶ 19. There must be a "case-specific" rationale to allow a particular witness to appear via video. *Id.* Furthermore, a witness may testify via video if there is an "adequate showing" that the "personal presence of the witness is impossible or

impracticable to secure due to considerations of distance or expense." *State v. Bailey*, 2021 MT 157, ¶ 42, 404 Mont. 384, 489 P.3d 889.

However, a showing that procuring the witness at trial is "impossible" or "impracticable" does not obviate the State's burden to also demonstrate that dispensing with face-to-face confrontation will be "necessary to further an important public policy." *Bailey*, ¶ 42. "[J]udicial economy, added expense, or inconvenience alone are not important public policies sufficient to preclude the constitutional right of a defendant to face-to-face confrontation at trial." *State v. Martell*, 2021 MT 318, ¶ 12, 406 Mont. 488, 500 P.3d 1233. Although judicial economy, expense of the witness attending in-person, and inconvenience to the witness, standing alone, cannot justify video testimony, all three may be important factors in determining whether video testimony violates the confrontation clause. *See Mercier*, ¶ 20 (affirming the holding in *Duane*, ¶ 21).

This Court has found that taking precautionary measures to stem the spread of COVID-19 constitutes an important public policy consideration. *Walsh*, ¶ 11. In fact, in analyzing COVID-19 related masking requirements in public schools, this Court held that "[s]temming the spread of COVID-19 is unquestionably a *compelling* [governmental] interest." *Stand Up Mont. v. Missoula Cnty. Pub. Sch.*, 2022 MT 153, ¶ 20, 409 Mont. 330, 514 P.3d 1062 (citation omitted; emphasis in original). Moreover, the specially concurring opinion in *Mercier*, which was

authored in January 2021 in the middle of the COVID-19 pandemic, noted that "a public health crisis [] could ultimately justify abrogation of in-person, face-to-face confrontation as necessary to further an important public policy." *Mercier*, ¶ 41 n.1 (Gustafson, J., specially concurring).

Courts across the country have found that preventing the spread of COVID-19 is a sufficiently important public policy to justify allowing a witness to appear via two-way video. *See*, *e.g.*, *State v. Olman*, 2022 Ohio 2647, ¶ 87 (Ohio Ct. App. 7th Dist. 2022); *State v. Tate*, 985 N.W.2d 291, 301-03 (Minn. 2023); *State v. Comacho*, 960 N.W.2d 739, 754-56 (Neb. 2021). In *Olman*, the Ohio Court of Appeals analyzed the video testimony of a witness who was incarcerated in another state when he testified at Olman's trial. *Olman*, ¶ 87. The prison where the witness was incarcerated had experienced a surge in COVID-19 cases prior to the trial. *Id.* Under those circumstances, the Ohio Court of Appeals held that "[p]reventing the infection of the judge, court staff, jury, and parties is a significant public policy reason warranting the remote testimony of [the witness]." *Id*.

In *Walsh*, the State sought to call a witness who was residing in Greece at the time of the trial in April 2021. *Walsh*, ¶ 4. In addition to logistical travel concerns, the district court also noted that requiring the witness to travel would violate a COVID-19-related Do Not Travel advisory issued by the U.S. State Department. *Walsh*, ¶ 5. This Court concluded that requiring the witness to travel

"in contravention to official advisories . . . could well have placed [the witness], the court, the other witnesses, and the defendant into a heightened risk of contracting COVID-19." *Walsh*, ¶ 11. Under those circumstances, this Court concluded that allowing the witness "to appear by video was supported by appropriate public policy considerations." *Id.*

At the time of Whitaker's trial in June 2021, COVID-19 was still a very serious concern. Although COVID-19 hospitalizations experienced a summer-time lull in 2021 and a vaccine was available, the peak of the pandemic did not occur until a couple of months after Whitaker's trial.[2] Hospitalizations peaked on October 12, 2021 when 510 Montanans were hospitalized due to COVID-19.[3] For a stretch of approximately two weeks in early September 2021, Montana intensive care units were overwhelmed, with more people admitted than there were beds available.[4]

At the time of Whitaker's trial, the highly contagious Delta variant of COVID-19 was starting to take the nation by storm and was causing a fresh wave

---

[2] *See* Montana COVID-19 Dashboard, *Hospitalizations and ICU Bed Occupancy*, https://montana.maps.arcgis.com/apps/MapSeries/index.html?appid=7c34f3412536439491adcc2103421d4b (last updated 5/5/23, 9:59 a.m.).

[3] *Id.*

[4] *Id.*

of concern about its rapid spread.[5] The Delta variant was more contagious and caused more severe symptoms than the prior variants.[6] The Center for Disease Control (CDC) named the Delta variant a "variant of concern" the week before Whitaker's trial.[7] The Delta variant would lead to one of the deadliest weeks of the pandemic in Montana, when the state averaged 13 deaths per day in September 2021, and an astonishing 100 people died during the week spanning September 22-29, 2021.[8]

In his opening brief, Whitaker argues that the COVID-19 rationale for allowing Grubb to testify via video "did not apply by the time of Grubb's testimony 15 months into the pandemic." (Appellant's Brief (Br.) at 31.) Whitaker notes that this Court eased the COVID-19 restrictions on May 17, 2021. (*Id*.) He attempts to isolate certain data points, such as the declining number of cases in June 2021, to paint a picture that the COVID-19 pandemic was over by the time of his trial and that, accordingly, Grubb's video testimony was unnecessary. (Br. at

---

[5] Sara G. Miller, *Delta Variant is "Greatest Threat to Eliminating Covid in U.S., Fauci Says,"* NBC News, June 22, 2021, https://www.nbcnews.com/health/health-news/delta-variant-greatest-threat-eliminating-covid-u-s-fauci-says-n1271933 (last accessed January 11, 2024).

[6] *Id.*

[7] *Id.*

[8] Aaron Bolton, *Montana Reaches 2,000 COVID-19 Deaths, with Over 100 in the Past Week*, Montana Public Radio, September 29, 2021, https://www.mtpr.org/montana-news/2021-09-29/montana-reaches-2-000-covid-19-deaths-with-over-100-in-the-past-week (last accessed January 11, 2024).

31-32.) As indicated above, the pandemic was still in full swing—the highly contagious Delta variant was emerging and was projected to increase cases and fatalities. In fact, because of the Delta variant, the worst of the pandemic was still to come. The important public policy of stemming COVID-19 was more important than ever at the time of Whitaker's trial.

The district court allowed Grubb's video testimony specifically because of the COVID-19 pandemic. In his opening brief, Whitaker faults the district court for not making a finding based on Grubb's vulnerability to the virus. (Br. at 33.) Pursuant to *Walsh*, the district court was not required to assess Grubb's specific vulnerability to the virus to find that his testimony via video was necessary to prevent the spread of COVID-19. Instead, the court was required to find that requiring Grubb to testify in person would place him, the court, other witnesses, or even Whitaker himself at a heighted risk. *Walsh*, ¶ 11.

Here, the district court's concern about COVID-19 permeated the pretrial hearings and trial. The district court repeatedly expressed its concern about requiring witnesses to travel to Montana from other states. (*See*, *e.g.*, Tr. at 225, 269, 309-10, 336, 416-17, 482.) The court continued to take precautions, including encouraging people to wear masks, conducting voir dire in a conference center, sequestering witnesses and parties behind plexiglass during examination, and disallowing parties from approaching witnesses. Although the court could have

issued a more detailed ruling, the record is replete with the court's concerns and its rationale for allowing Grubb to appear remotely.

Furthermore, at the time of trial, the CDC continued to recommend that inmates not be transferred to other jurisdictions to testify at court proceedings. As of June 9, 2021, the CDC recommended "[l]imit[ing] transfers of incarcerated/detained persons to and from other jurisdictions and facilities unless necessary for medical evaluation, medical isolation/quarantine, clinical care, extenuating security concerns, release, or to prevent overcrowding."[9] The CDC further recommended that courts "[i]mplement lawful alternatives to in-person court appearances where permissible."[10] Additionally, if an inmate was transferred between jurisdictions, the CDC recommended quarantining the inmate for 14 days.[11]

The CDC recommendations were aimed at combatting a major crisis. During the first year of the pandemic, the incident rate of COVID-19 infections in the

/ / /

[9] Centers for Disease Control and Prevention, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, June 9, 2021, at pg. 9 (available at https://stacks.cdc.gov/view/cdc/107037).

[10] *Id*.

[11] *Id.* at 17.

prison population was over three times that of the general U.S. population, and the prisoner death rate from COVID-19 was over twice that of the U.S. population.[12]

This Court recognized the problem early in the pandemic when Chief Justice McGrath wrote a letter to all Montana courts of limited jurisdiction, acknowledging that "[d]ue to the confines of [correctional] facilities, it will be virtually impossible to contain the spread of the virus." (McGrath, C.J., *Letter to Montana Courts of Limited Jurisdiction Judges*, March 20, 2020.) To curtail the risk to inmates, Chief Justice McGrath asked the courts to conduct "as many hearings as you can using video and other remote technology [to] curtail the risk of exposure and transmission of the virus." *Id.*

The month prior to Whitaker's trial, on May 17, 2021, Chief Justice McGrath issued an updated memo that allowed courts to "continue using remote-hearing . . . for cases," required that "[a]ttorneys or litigants who are considered to be at high-risk if exposed to COVID-19 [] be allowed to appear remotely if requesting to do so," and pointed the courts to CDC guidelines to determine who should be allowed to appear remotely. *Id.* At the time of trial, this Court still

[12] Marquez N., Ward J.A., Parish K., Saloner B., Dolovich S., *COVID-19 Incidence and Mortality in Federal and State Prisons Compared with the US Population, April 5, 2020, to April 3, 2021*, JAMA, October 6, 2021, 2021;326(18):1865 (doi:10.1001/jama.2021.17575) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8495600/ (last accessed January 11, 2024).

recognized the pandemic to be a serious concern that required courts to take active efforts to prevent its spread.

Had the district court required Grubb to attend the trial in Missoula in person, it would have been in contravention of CDC guidelines. It would have put Grubb, the inmates in the Missoula and federal facilities, courtroom staff, jurors, and the parties at unnecessary risk. Furthermore, transporting Grubb would have created immense logistical problems and required him to quarantine for up to 28 days (up to 14 upon arrival in Missoula and 14 additional days upon return to Pekin, Illinois). Accordingly, there were important public policy concerns that required Grubb to testify by video to prevent the spread of COVID-19 and to prevent Grubb from being required to isolate in quarantine for almost a month. This case is like *Walsh*, and the district court did not err by allowing Grubb to testify by video.

2. Grubb's testimony maintained the traditional hallmarks of reliability.

The second *Craig* prong requires that the reliability of the two-way video testimony be ensured by the traditional hallmarks of confrontation that exist when a witness is physically present in the court room. *Walsh*, ¶ 10. Those traditional hallmarks are achieved by "the witness being placed under oath, testifying in the view of the jury, and being subject to cross-examination." *Id.*

Here, Grubb's video testimony afforded Whitaker the traditional hallmarks of confrontation. Grubb was placed under oath and he testified in front of the jury. Whitaker and the jury could see Grubb, and Grubb was required to look Whitaker in the eye and identify him in front of the jury. The record indicates that Whitaker was able to submit Grubb's testimony to the crucible of cross-examination and to ask all the questions he desired.

Whitaker claims that "technical issues broke up the flow of the questioning," which may have allowed Grubb additional time to reflect on his answer. (Br. at 38.) While the record indicates that Whitaker "cut out" midway through one question, Grubb's response to the question was ultimately unequivocal. (Tr. at 1128-29.) Furthermore, Grubb could not have benefited from the additional time to think about his answer because he did not, at first, hear or understand the question. Grubb's video testimony was reliable.

3. Whitaker's remaining arguments regarding his confrontation rights are without merit.

Whitaker argues that the State's only rationale for Grubb to appear via video was the impracticality of transporting Grubb from federal prison. (Br. at 27.) Whitaker cites 28 C.F.R. § 527.30 to claim that the State could have easily transported Grubb by utilizing a writ of habeas corpus ad testificandum (Writ). (*Id*. at 28.) Whitaker's arguments fail to paint the whole picture.

State prosecutors may request a Writ to transfer a federal inmate to the physical custody of a state agent to procure the inmate's testimony at trial. 28 C.F.R. § 527.30. The Writ is directed to the warden of the federal institution holding the prisoner, who decides whether to grant or deny the Writ. *Id.* The warden may grant the writ "only" in a case that "the inmate's appearance is necessary, that state and local arrangements are satisfactory, *that the safety or other interests of the inmate . . . are not seriously jeopardized*, and that federal interests, which include those of the public, will not be interfered with, or harmed." 28 C.F.R. § 527.31 (emphasis added). "Authorization may not be given where substantial concern exists over any of these considerations." *Id.*

As noted above, the CDC recommended not transferring prison inmates from one jurisdiction to another. The CDC further recommended that agencies utilize remote appearances to prevent COVID-19 spread. Here, granting the Writ would have violated 28 C.F.R. § 527.31 because transporting Grubb would have put him at unnecessary risk of contracting COVID-19 and because Grubb could have contracted the virus in Montana and transferred it back to the federal facility. The CDC recommended against such travel specifically to prevent the substantial risk to inmates' safety that COVID-19 presented. In this case, the procedures set in place for obtaining a Writ supported Grubb appearing by video.

Whitaker further cites a Bureau of Prisons (BOP) policy from November 25, 2020, to claim that the BOP was allowing inmate transport provided the inmate quarantined before traveling. (Br. at 33.) However, the BOP's November 25, 2020 policy update did not mention transfers pursuant to a Writ. (*See* Br. at 33 n.9.) The BOP moves prisoners for any number of reasons, including transport post-sentencing, for the prisoner's own hearings or trials in federal court, transfer to resolve a prisoner's state court case pursuant to the Interstate Agreement on Detainers, or from one federal facility to another to prevent overcrowding, etc. However, a Writ in this case would have been governed specifically by 28 C.F.R. § 527.31 and required the warden to make additional findings prior to the transfer. As noted above, a warden must consider the safety of the inmate. The BOP policy that Whitaker references does not control transfers pursuant to a Writ.

Whitaker further faults the State for only citing the impracticality of transporting Grubb as the rationale for seeking his appearance via video. The State's reliance on the "impracticality" of transporting Grubb stemmed from a common misunderstanding of this Court's decision in *Duane*. *See Mercier*, ¶ 20. After the State filed its motion, this Court decided *Mercier*, which clarified *Duane* and held that "judicial economy, added expense, or inconvenience alone are not important public policies sufficient" to dispense with physical face-to-face confrontation. *See Martell*, ¶ 12. Accordingly, the prosecutor's initial reliance on

Duane to request a video appearance due to the impracticality of transporting Grubb was likely misplaced.

However, ultimately, the district court did not grant the State's motion on that rationale. In May 2020, when pandemic restrictions were being implemented, the district court readdressed the State's motion related to Grubb and stated that it was granting the motion "based on my prior statements about allowing video testimony under the COVID conditions." (Tr. at 40.) Thereafter, although the court did not always specifically reference Grubb, it continued to talk about out-of-state witnesses appearing via video to stem the spread of COVID-19. Here, the court's concern about Grubb, an out-of-state witness in a federal institution, was case-specific. The district court did not err by allowing his video testimony.

B. Even if the district court erred by allowing Grubb to testify by video, such error was harmless.

A constitutional violation of a defendant's right to face-to-face confrontation is trial error and subject to harmless error review. *Martell*, ¶ 17. The State carries the burden of proving, beyond a reasonable doubt, that the error was harmless. *Id.* In determining whether an error was harmless, this Court will "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 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)).

This Court does not look "to the quantitative effect of other admissible evidence, but rather to whether the fact-finder was presented with admissible evidence that proved the same facts as the tainted evidence proved." *Mercier*, ¶ 31 (quoting *State v. Van Kirk*, 2001 MT 184, ¶ 43, 306 Mont. 215, 32 P.3d 735 (emphasis removed)). When there is admissible evidence proving the same element as the tainted evidence, this Court will not reverse if "the State [demonstrates] '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.'" *Martell*, ¶ 17 (quoting *Van Kirk*, ¶ 44 (emphasis in original)).

Grubb testified that Whitaker had confessed to him that he sexually "rubbed" his penis against L.M.'s private parts. (Tr. at 1122.) The evidence was cumulative of L.M.'s testimony and went to prove the sexual contact element of the incest and sexual assault charges. However, Jessica had also walked in on Whitaker and L.M. and observed that Whitaker had an erection and L.M. was in a state of undress. The State also admitted three of Whitaker's jail calls to Jessica, wherein Jessica confronted Whitaker about the allegations. Whitaker did not deny the allegations and, instead, told Jessica that he did not want his own daughter to know him and that he would go to court and plead guilty.

Whitaker's confession to Grubb was unrecorded. Grubb was a convicted sex offender and a jailhouse informant. These circumstances diminished the quality of

Grubb's testimony. L.M.'s testimony, Jessica's observations, and Whitaker's statements made on a recorded jail line proved the same sexual contact element and were qualitatively superior to Grubb's testimony. The State has shown that the error was harmless beyond a reasonable doubt.

III. The district court did not err by admitting video of L.M.'s forensic interview.

A. L.M.'s forensic interview was admissible as a prior inconsistent statement.

"Not all out-of-court statements constitute hearsay." *State v. Mederos*, 2013 MT 318, ¶ 15, 372 Mont. 325, 312 P.3d 438. A prior statement is admissible as non-hearsay where a "declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement" and the prior statement is "inconsistent with the declarant's [trial] testimony[.]" Mont. R. Evid. 801(d)(1)(A). A claimed lapse of memory at trial regarding facts attested to during the prior statement creates an inconsistency between the trial testimony and the prior statement for the purposes of Mont. R. Evid. 801(d)(1)(A). *State v. Howard*, 2011 MT 246, ¶ 31, 362 Mont. 196, 265 P.3d 606.

"A court may admit consistent statements in conjunction with inconsistent statements where the nature of a witness's testimony makes it difficult for the court to separate the consistent from the inconsistent portions of the prior statement."

Mederos, ¶ 17. The district court may properly admit consistent statements with inconsistent statements where parsing and excising the consistent statements would make "the witnesses' testimony disjointed and confusing." *Id.*

L.M.'s trial testimony was both consistent and inconsistent with her forensic interview. L.M. articulated at trial that Whitaker had used his hand and his "private parts" to touch her "private parts." (Tr. at 789.) L.M. recalled that Whitaker had called her "private parts" her "diamond." (*Id.*) However, L.M. could not recall that Whitaker had also referred to his own genitalia as his "diamond." At trial, L.M. could not recall how many times the abuse had occurred but, when prompted by the prosecutor, agreed that it had happened more than once. In contrast, during the forensic interview, L.M. said the abuse had occurred between two to four times.

During the forensic interview, L.M. said the abuse occurred in the living room of her house. However, at trial, she could not recall where in the house the abuse occurred. At trial, L.M. could not remember if anything had "come out" of Whitaker's "private part." (Tr. at 790.) In contrast, during the forensic interview, L.M. stated that "blood" had come out of his "diamond." (Ex. 2 at 21:40-22:15.) At trial, L.M. could not definitively recall if Whitaker had penetrated her. However, during her forensic exam with Wakeman she described Whitaker "push[ing] in and out really fast." (*Id.* at 1029.) Similarly, during her forensic interview, L.M.

repeatedly thrust her hips to simulate how Whitaker had given her "diamond" "owies." (Ex. 2 at 4:19-4:45.)

L.M.'s trial testimony could "be described as vague at times and somewhat unclear." *Mederos*, ¶ 17. L.M. was only three years old at the time of the abuse and was six years old at the time of trial. L.M.'s trial testimony was disjointed and she could only remember the basic details of the abuse. In contrast, during the forensic interview, she was more descriptive, saying, for example, that Whitaker's "diamond" was "hairy" and that he had given her "owies." (Ex. 2 at 4:19-5:51.)

In addition to lacking memory as to the specifics of the abuse, L.M. demonstrated an overall lack of memory. She could not recall participating in the forensic exam or the forensic interview. She did not recognize Whitaker as the person in the courtroom cross-examining her.

Although L.M.'s forensic interview was partially consistent with her trial testimony, it would not have been reasonable to parse out the consistent statements. Parsing out the statements would have required the jury to hear half of an obviously edited video, which would have confused the jury. Worse, in his opening statement, Whitaker alleged that the prosecutor was going to attempt to unethically withhold evidence. Not only would playing half of an edited video have confused the jury, it also would have supported Whitaker's claim that the

prosecutor was going to withhold evidence. Pursuant to *Mederos*, the district court did not abuse its discretion by admitting the forensic interview.

B. Whitaker opened the door to the State admitting the forensic interview to rebut his opening argument that L.M.'s disclosure was the result of improper coaching.

When one party "broaches a certain topic that would otherwise be off limits, 'the opposing party has the right to offer evidence in rebuttal[.]'" *State v. Guill*, 2010 MT 69, ¶ 39, 355 Mont. 490, 228 P.3d 1152 (quoting *State v. Veis*, 1998 MT 162, ¶ 18, 289 Mont. 450, 962 P.2d 1153). "A party may rebut an allegation of bias by offering testimony to explain the initial suggestion or correct a false impression given by the other party." *Id.* A defendant may "open the door" to such rebuttal evidence by creating a "false impression" during his opening argument, even if the evidence is otherwise inadmissible. *State v. McGhee*, 2021 MT 193, ¶ 21, 405 Mont. 121, 492 P.3d 518. One party is not allowed to "parry with sharpened blade [] and expect only a sheathed blade in return." *State v. Board*, 135 Mont. 139, 145, 337 P.2d 924, 928 (1959).

The doctrine of completeness provides that when part of a "recorded statement or series thereof is introduced by a party," the "adverse party may inquire into or introduce any other part of such item of evidence or series thereof." Mont. R. Evid. 106. "The purpose of this rule is to avoid a misleading and unfair impression which can result when matters are presented out of context." *State v.*

Sheriff, 190 Mont. 131, 136, 619 P.2d 181, 184 (1980). The doctrine applies when admitting the balance of the recorded statement will "throw light upon the parts already admitted or bear on the same subject." *State v. Whitlow*, 285 Mont. 430, 444, 949 P.2d 239, 248 (1997).

During his opening argument, Whitaker alleged that the prosecutor would "desperately" and "unethical[ly]" attempt to withhold evidence from the jury. (Tr. at 768.) Although Whitaker did not specifically identify the evidence the prosecutor would attempt to withhold, he then immediately moved on to talk about the various things that could have influenced L.M.'s testimony, identifying L.M.'s forensic interview as chief among those malign influences. Whitaker foreshadowed Dr. Zook's testimony by promising to produce "critical testimony" that would "break down" the interview. (*Id*. at 769.) Whitaker directly alleged that L.M.'s disclosures were the product of the "influencing, persuading, coaching, reenforcing, and advocacy" that resulted from the forensic exam and forensic interview. (*Id.*) Whitaker asked the jury to "not hold [him] accountable for the mistakes that were made" during the exam and interview. (*Id.*)

During his opening argument, Whitaker introduced the theory that L.M.'s testimony would be tainted because of a "coached" forensic interview. In front of the jury, Whitaker objected to L.M. testifying at all, reiterating the same theory. Furthermore, as promised in his opening, Whitaker called Dr. Zook to "break

down" the forensic interview. Dr. Zook provided a line-by-line critique of Otway's questions and opined that L.M.'s answers were the product of coaching via leading questions and improper reinforcement of L.M.'s answers. Whitaker's claim of a coached forensic interview performed by a biased advocate was a major theme of his case.

Admitting the forensic interview was proper to rebut Whitaker's characterization of the interview during his opening statement. Although the prosecutor introduced the forensic interview prior to Dr. Zook's testimony, Whitaker had already made his intent clear long before the introduction of the video. He desired to attack the validity of the forensic interview and, at the same time, prevent the State from rebutting his theory by keeping the jury from viewing the video itself.

By arguing in his opening statement that L.M. was coached, and repeating his allegation prior to L.M.'s testimony, Whitaker opened the door to admitting the entire recorded statement so the jury could determine whether, in fact, L.M. was coached. Whitaker cannot claim coaching occurred and then prevent the jury from seeing the very evidence that would prove or disprove his theory. Therefore, even if the district court erred in admitting the forensic interview as prior inconsistent statements, this Court should still affirm the district court's ruling, even if it arrived at the right result for the wrong reason. *See Veis*, ¶ 16.

C. Even if the district court erred in admitting the forensic interview, such error was harmless.

The erroneous admission of a forensic interview is trial error and subject to harmless error analysis. *Smith*, ¶ 34. This Court will not reverse "unless the record shows that the error was prejudicial." *Id*. (quoting Mont. Code Ann. § 46-20-701(1)). The error is prejudicial if there is a reasonable possibility that the inadmissible evidence contributed to the conviction. *Id.* "Inadmissible evidence is not prejudicial so long as the jury was presented with admissible evidence proving the same facts as the tainted evidence." *Id.*

The introduction of L.M.'s forensic interview was harmless because Jessica testified to the same or similar statements L.M. made to her near the time of the assault. Whitaker did not object to Jessica's testimony about L.M.'s statements. Jessica testified about L.M.'s initial disclosure that "[Whitaker] had touched her diamond" and then identified her vagina as her "diamond." (Tr. at 845.) Jessica's testimony was more detailed than the forensic interview about what L.M. had said. Without objection, Jessica testified that L.M. had disclosed that Whitaker "stuck his thingy in her and in her butt[,]" that it happened multiple times, and that Whitaker self-lubricated by applying spit to his penis before penetrating her. (*Id.* at 858.)

Furthermore, admitting L.M.'s consistent statements was harmless because L.M. was present at the trial and subject to cross-examination. Therefore, "the

danger[] that the hearsay rule seeks to avoid [was] not present" in this case." *Veis*, ¶ 26. On appeal, Whitaker argues that this Court should overrule *Veis* and its progeny that have found prior consistent statements to be harmless error. He argues that prior consistent statements, by definition, will always be cumulative to the declarant's trial testimony and, therefore, the harmless error exception swallows the hearsay prohibition. (Br. at 47.)

This Court should decline Whitaker's invitation. While repetition of a declarant's testimony using out-of-court statements might lead to bolstering in some cases, that is not what occurred here. First, L.M.'s trial testimony was also inconsistent with her forensic interview. Therefore, playing the forensic interview provided fodder for cross-examination on L.M.'s faulty memory. Given the facts of this case, and because the statements also came in through Jessica, Whitaker has not met his heavy burden of showing that this Court should overrule *Veis*. Accordingly, if admitting the forensic interview was error, such error was harmless.

IV. The cumulative error doctrine does not apply.

This Court will only apply the cumulative error doctrine to reverse "a conviction where numerous errors, when taken together, have prejudiced the defendant's right to a fair trial." *State v. Darrell Smith*, 2020 MT 304, ¶ 16,

402 Mont. 206, 476 P.3d 1178 (citation omitted). To prevail on a claim of cumulative error, "[t]he defendant must establish prejudice; a mere allegation of error without proof of prejudice is inadequate to satisfy the doctrine." *Id.*

"[T]he cumulative effect of errors will rarely merit reversal" because a defendant is only "entitled to a fair trial, not to a trial free from errors." *Darrell Smith*, ¶¶ 16-17. The defendant may establish prejudice by showing that two or more individually harmless errors rose to the level of depriving him of a fair trial. *Darrell Smith*, ¶ 16. To prevail, the defendant must first carry his burden of establishing that the district court erred. *State v. Hanson*, 283 Mont. 316, 326, 940 P.2d 1166, 1172 (1997).

In this case, the cumulative error doctrine does not apply because, for the reasons noted above, the district court did not err by allowing Grubb to testify via video or by admitting the forensic interview. Furthermore, even if the district court did err, Whitaker was not prejudiced. Regarding Grubb's testimony, Whitaker was not prejudiced because his own recorded statements were introduced as evidence of guilt. Moreover, L.M.'s testimony, when combined with Jessica's testimony and her observations of Whitaker having an erection with L.M. in a state of undress were sufficient alone to prove Whitaker's guilt beyond a reasonable doubt. Nor was Whitaker prejudiced by the admission of the forensic interview. L.M. made the same or similar statements to Jessica near in time to the forensic interview.

Jessica testified to those statements without objection. Jessica's statements on what L.M. had told her were more detailed than the forensic interview. Therefore, Whitaker was not prejudiced by the forensic interview.

V. This court should reverse and vacate Whitaker's conviction for sexual assault.

Although the evidence supported a finding that Whitaker engaged in multiple acts of sexual abuse on more than one day, the State only charged Whitaker for conduct that occurred on or about July 1, 2018. At sentencing, the State conceded that all three charges were "based on the same act" and agreed that it was "at least arguable that [the charges] should merge for sentencing." (Tr. at 1656.) Under similar circumstances, this Court has held that double jeopardy precluded the State from convicting a defendant for both SIWOC and sexual assault when the two charges were based on a singular criminal act. *State v. Williams*, 2010 MT 58, ¶ 30, 355 Mont. 354, 228 P.3d 1127. The State concedes that *Williams* applies to the facts of this case. Therefore, like in *Williams*, the Court should remand this case to the district court to vacate Whitaker's conviction for sexual assault while leaving his convictions for SIWOC and incest undisturbed.

CONCLUSION

For the foregoing reasons, the Court should affirm Whitaker's convictions for SIWOC and incest. The Court should remand the case to the district court to vacate Whitaker's conviction for sexual assault.

Respectfully submitted this 11th day of January, 2024.

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

By: */s/ Bjorn Boyer*
BJORN BOYER
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 9,981 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

/s/ Bjorn Boyer
BJORN BOYER

CERTIFICATE OF SERVICE

I, Bjorn E. Boyer, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 01-11-2024:

Kirsten H. Pabst (Govt Attorney)
200 W. Broadway
Missoula MT 59802
Representing: State of Montana
Service Method: eService

Michael Marchesini (Attorney)
555 Fuller Ave
Helena MT 59601
Representing: Wes Lee Whitaker
Service Method: eService

Electronically signed by Janet Sanderson on behalf of Bjorn E. Boyer
Dated: 01-11-2024