IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0019

STATE OF MONTANA,

Plaintiff and Appellee,

v.

SACRAMENTO JUAN DOMINGUEZ JR.,

Defendant and Appellant.

AMENDED BRIEF OF APPELLANT

On Appeal from the Montana Seventeenth Judicial District Court,
Valley County, the Honorable Yvonne Laird, Presiding

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STATEMENT OF THE ISSUES

1. Did the State compromise the trial's integrity and fairness through remarks lowering the standard for conviction, through leveraging non-evidence, and through improperly bolstering the complainant's credibility? Alternatively, was defense counsel ineffective in failing to object to these errors?

2. In *State v. Johnson*, 2023 MT 143, 413 Mont. 114, 533 P.3d 335, this Court reversed as an abuse of discretion the imposition of probation conditions that prohibited using the internet and internet-capable devices. This sentencing court imposed the same conditions as in *Johnson*. Did the court abuse its discretion?

STATEMENT OF THE CASE

The State charged Sacramento Juan Dominguez, Jr., with three counts of incest under Mont. Code Ann. § 45-5-507(1). (D.C. Doc. 3.) Sacramento pleaded not guilty. (D.C. Doc. 7.5.)

At trial, the State introduced and used prior consistent statements to show the complainant was consistent, reliable, and truthful. (Trial Day 1 at 163, 165, 167–68, 182, Day 2 at 280, 291, 303, 305.) The State remarked that guilty verdicts were appropriate because "[p]eople get

convicted of this sort of offense all the time" based on similar evidence, proof beyond a reasonable doubt does not require "certainty," and reasonable doubts need to be "reliable." (Trial Day 2 at 303–04 (attached at App. A).) Defense counsel did not object to any of this. The jury delivered guilty verdicts. (Trial Day 2 at 310.)

The District Court imposed concurrent sixty-year prison sentences, each of which included ten years of imprisonment that were suspended. (D.C. Doc. 80 (attached at App. C); 4/19 Tr. at 36–44.) Sacramento objected that probation conditions prohibiting use of the internet were overbroad and lacked a nexus. (4/19 Tr. at 21–23.) The District Court overruled Sacramento's objection and imposed the conditions. (4/19 Tr. at 38–39 (attached at App. B); D.C. Doc. 80 at 16–17.) This Court granted an out-of-time appeal.

STATEMENT OF THE FACTS

I. Underlying facts

Sacramento and his daughter A.F. did not have a close relationship. A.F. grew up with her mother, mostly in Texas, and not with Sacramento, who resided in Wyoming and Montana. (Trial Day 1 at 147.) But after A.F. and A.F.'s mother moved to the Seattle area,

A.F.'s mother concluded A.F. might do better in a small town. (Trial Day 2 at 215.) A.F., then sixteen-years-old, was sent to Glasgow to live with Sacramento, whom she testified she had never even met before. (Trial Day 1 at 147.)

Sacramento had the idea to go camping for the two to bond and build a closer relationship. (Trial Day 2 at 234.) On an August Saturday a couple weeks after A.F. arrived, the two drove to near Vandalia Dam on the Milk River. In the late afternoon and early evening, they pitched a tent, rolled out a sleeping bag for A.F. and a blanket for Sacramento, and explored the area. (Trial Day 1 at 150.)

At some point during the day, Sacramento discovered A.F. using Sacramento's marijuana vaporizer pen, which Sacramento had through a medical marijuana card. (Trial Day 2 at 216.) Playing it cool, Sacramento permitted A.F. to continue to use the pen under his supervision. (Trial Day 2 at 216–17.) The vaporizer pen contained an indica strain of marijuana, which Sacramento testified tends to "mellow[] you out" and "put[] you to sleep." (Trial Day 2 at 217.) Despite it being summer and their campsite being not far from the Canada border, A.F. retired to the tent around 6:00 or 7:00 p.m. (Trial

Day 1 at 73.) Sacramento got into the tent not long after. Both Sacramento and A.F. testified they fell asleep around 8:00 or 9:00 p.m. (Trial Day 1 at 153, Day 2 at 217.) In the morning, Sacramento and A.F. returned to town. (Trial Day 2 at 217.) A day later, A.F. began alleging Sacramento had violated her while they were in the tent. (Trial Day 1 at 162–63.)

A.F. testified that shortly after she fell asleep in the tent, she woke to Sacramento penetrating her vagina with his penis. She testified it happened again around midnight, and again around 2 to 4 a.m. (Trial Day 1 at 155–159, 174.) A.F. testified that each time, Sacramento slid down her pants and underwear, began penetrating her, and then pulled back up her pants and underwear after he was done. (Trial Day 1 at 173–76.) A.F. testified that only upon the third time this occurred did Sacramento ejaculate. She testified the ejaculate got on her and a blanket, and Sacramento cleaned it up with a shirt. (Trial Day 1 at 175–76.)

A.F. testified her phone died around 4:00 a.m. (Trial Day 1 at 179.) In a prior statement to law enforcement, she said she checked her still-alive phone around 5:00 or 5:15 a.m., which was how she knew the

last alleged penetration occurred around that time—not the 2 to 4 a.m. time she testified to at trial. (Trial Day 1 at 195.) Despite having gone to bed so early, A.F. denied using any substance while they were camping. (Trial Day 1 at 172.)

Sacramento denied A.F.'s allegations, but given their disturbing nature, encouraged A.F. to go to law enforcement. (Trial Day 1 at 166, 194.) In an interview with law enforcement, Sacramento explained that because he was sleeping and high, he could not remember the time period in which A.F. said the conduct occurred, that he hoped the alleged conduct didn't occur, and that, indeed, it didn't occur. (Trial Day 1 at 194.) Although the investigating officer introduced these statements at trial, neither the interview nor additional context were introduced. (Trial Day 1 at 194.) Additionally, around the same time period as when A.F. made her allegations, Sacramento got A.F. a pregnancy test; there was some dispute about whether the test related to A.F.'s allegations or to something else. (Trial Day 2 at 218–19.)

A.F. gave law enforcement the shirt, pants, and underwear she claimed she was wearing during the camping trip. (Trial Day 1 at 185.) The underwear was blue with a black band. (Trial Day 2 at 244.) Law

enforcement additionally seized the sleeping bag, blanket, and tent from the camping trip, as well as some shirts. (Trial Day 1 at 185.) Using buccal swabs, law enforcement collected A.F.'s and Sacramento's DNA. (Trial Day 1 at 185.)

Though A.F.'s story did not suggest ejaculate had gotten on her underwear, the only DNA testing of any of the seized items targeted a spot of suspected ejaculate on the blue-and-black underwear. From the sample, the crime lab extracted (1) a sperm cell fraction and (2) a non-sperm, epithelial cell fraction. (Trial Day 1 at 139.) The sperm cell fraction matched Sacramento's DNA profile. (Trial Day 1 at 140.) The non-sperm, epithelial fraction showed a mixture of "at least three individuals," one of which was Sacramento. (Ex. A, offered and admitted (Trial Day 1 at 137).) The testing of A.F.'s supposed underwear did not result in a match to A.F.'s DNA profile. (Trial Day 1 at 142–44.)

The reason became clear when Sacramento saw a photo of the tested underwear. Sacramento recognized the underwear as a pair that had once belonged to his ex-wife.[1] (Trial Day 2 at 219, 244–45.) After

[1] Sacramento's ex-wife is not A.F.'s mother.

Sacramento and his ex-wife had separated, Sacramento cleaned out their house and ended up with a bunch of his ex-wife's clothes, including the blue-and-black underwear, which he had put in a bag and deposited in a closet in his Glasgow home. (Trial Day 2 at 241.) This was just a few months before A.F. arrived. (Trial Day 2 at 219.) At trial, Sacramento produced a photo, taken from when he and his ex-wife were still together, of his ex-wife wearing what Sacramento testified were the blue-and-black underwear, though the underwear in the photo are obscured by a partially see-through teddy. (Ex. 1, offered and admitted (Trial Day 2 at 221).)

In rebuttal, the State called Sacramento's ex-wife, who claimed to still possess the underwear in the defense's photo exhibit. (Trial Day 2 at 257.) The ex-wife produced a photo, taken the day prior, of the referenced underwear in her possession. (Ex. D, offered and admitted (Trial Day 2 at 258–59.) Due to the partial obstruction of the underwear in the defense's exhibit, it is difficult to compare the underwear in the ex-wife's photo exhibit with the underwear in the defense's photo exhibit. (*Compare* Ex. 1 *with* Ex. D.)

II. Inadmissible evidence and misconduct

In voir dire, the State informed potential jurors that "[t]he way these cases work is I get an investigative file, and I have a bunch of pieces of evidence. And we have what we call is [sic] Rules of Evidence. So, generally, things that we know are not always able to be presented to a jury." (Trial Day 1 at 58–59.)

At trial, the State asked A.F. "specifically" what she told a peer the day after the camping trip. A.F. specified that she told the peer that Sacramento had raped her. (Trial Day 1 at 163.) A.F. testified she told another person the same thing. (Trial Day 1 at 165.) The State asked A.F. whether she told law enforcement the same thing, and A.F. testified she did. (Trial Day 1 at 167–68.)

When the investigating officer testified, the State had him "reiterate" what A.F. had told him. The officer reiterated that A.F had said she and Sacramento "went on a camping trip . . . and that she had been sexually assaulted by him three times that night." (Trial Day 1 at 182.)

Defense counsel raised no objection to the introduction of any of the out-of-court statements. (*See* Trial Day 1 at 163–182.)

In closing arguments, the State used the prior consistent statements and declared A.F.'s truthfulness. Noting the evidence that A.F. "told you the same thing during this trial that she told her family and that she told law enforcement in 2018," the State explained, "She has been consistent in her recall because she's telling the truth." (Trial Day 2 at 280.) The State later asserted, "[A.F.]'s story makes sense because it is the truth, and it's been consistent" and "you can rely on [A.F.]" (Trial Day 2 at 291.) The State distilled the case as about "who is telling the truth about what occurred." The State declared, "[A.F.] is telling the truth. And because of that, I'm going to request that you find Sacramento Dominguez guilty as charged of these offenses." (Trial Day 2 at 291.)

Defense counsel raised no objection to any of this. (*See* Trial Day 2 at 280–91.) The defense's closing arguments argued the State had not met its burden due to reasonable doubts and remaining questions. (Trial Day 2 at 299–300.) The defense noted A.F.'s DNA was not matched to the tested underwear. (Trial Day 2 at 295.) The defense argued the tested underwear was the same underwear as pictured in

the exhibit introduced by the defense and which A.F. could have taken from Sacramento's closet. (Trial Day 2 at 299.)

In rebuttal, the State defined proof beyond a reasonable doubt as "proof of such a convincing character that you would rely on it in the important [sic] of your own affairs." (Trial Day 2 at 303.) This "is the standard that's been used to convict people in America for time [immemorial]." (Trial Day 2 at 303.) The State sympathized with how it was "difficult" when there were only two conflicting witness accounts and there was not "an admission or it being on camera." (Trial Day 2 at 303–304.) But the State explained, "People get convicted of this sort of offense all the time without that evidence. Do not think you cannot convict him because you want a little bit more." (Trial Day 2 at 304.)

The State elaborated, "You'll also notice it [the reasonable doubt instruction] doesn't say that you can't have doubt. It's beyond a reasonable doubt. Not beyond a shadow of a doubt, not without certainty. We don't get certainty." (Trial Day 2 at 304.)

The State also explained, "Beyond a reasonable doubt; you can have doubt, you can even conceive of another option. The question is, is it reliable? Could you rely on it? Who can you rely on between the

parties here? What do you know? (Trial Day 2 at 304.) The State referenced and argued A.F.'s consistency three additional times. (*See* Trial Day 2 at 303 ("[A.F.]'s been consistent."), 304 ("[A.F.] was consistent."), 305 ("Look at her consistency.").) The State argued the jury should convict because A.F.'s testimony was more reliable than Sacramento's testimony. (Trial Day 2 at 304.)

III. Objection to internet probation conditions

The presentence investigation report recommended the following probation conditions apply should Sacramento receive a suspended sentence:

> 43. *The Defendant shall not have access to the internet without prior permission from the Probation & Parole Officer and sexual offender therapist*, nor can the Defendant have on any computer he/she owns any software that is intended for data elimination, encryption or hiding data. If Internet access is allowed, the Defendant must allow the Department to install rating control software and conduct random searches of the hard drive for pornography or other inappropriate material.
> 44. *The Defendant shall not possess or use any computer or other device with access to any on-line computer service including, but not limited to "Cloud" data storage, without the prior written approval of the Probation & Parole Officer*. The Defendant shall allow the Probation & Parole Officer to make unannounced examinations of his/her computer, hardware, and software, which may include the retrieval and copying of all data from his/her computer and computing and data storage devices. The Defendant shall allow the

> Probation & Parole Officer to install software to restrict the Defendant's computer access or to monitor the Defendant's computer access. The Defendant shall not possess encryption or stenography software. The Defendant shall not utilize software designed to eliminate traces of internet activity. The Defendant shall provide records of all passwords, internet service, and user identifications (both past and present) to the Probation & Parole Officer and immediately report changes. The defendant shall sign releases to allow the Probation & Parole Officer to access phone, wireless, internet, and utility records.
> . . .
> 51. *The Defendant shall not have a cell phone, or such other technology/device with photo, video, or Internet capabilities*.

(D.C. Doc. 78 at 16–17 (emphases supplied).)

At sentencing, defense counsel objected on various grounds to conditions "starting with 39." (4/19 Tr. at 21.) Defense counsel stated, "[T]hen we start getting down into like 51, no internet." Defense counsel explained there was "no nexus to the internet" and that "in this day and age it's nearly impossible to get around without internet." (4/19 Tr. at 21–22; *accord* 4/19 Tr. at 23.)

The District Court overruled the objection and found "there is a nexus for the conditions that prevent you from having access to the internet" based on facts such as Sacramento had previously viewed online pornography, engaged in an online chat with an adult for masturbation purposes, and deleted his browsing history after viewing

legal pornography as a free person. (4/19 Tr. at 38–39.) The internet-related conditions are numbered 43, 44, and 51 in the written judgment. (D.C. Doc. 80 at 16–17.)

STANDARDS OF REVIEW

This Court may review unpreserved errors that implicate substantial rights when failing to do so "may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process." *State v. Finley*, 276 Mont. 126, 137, 915 P.2d 208, 215 (1996).

Ineffective assistance of counsel claims may be reviewed de novo on direct appeal by this Court when there is no plausible justification for defense counsel's conduct. *State v. Weber*, 2016 MT 138, ¶¶ 11, 22, 383 Mont. 506, 37 P.3d 26.

This Court reviews suspended sentence conditions for an abuse of discretion. *Johnson*, ¶ 6.

SUMMARY OF THE ARGUMENT

The government must prove guilt beyond a reasonable doubt to obtain a conviction. This is a foundational principle of American

criminal law. In this case, instead of attempting to overcome that bar to conviction through legitimate means, the State moved the bar and overcame it through inadmissible evidence.

The State asserted guilty verdicts don't require certainty. Yet the law establishes the opposite—that convictions require moral certainty. The State asserted reasonable doubts must be reliable. Yet the law establishes the opposite—that it is *proof beyond* a reasonable doubt that must be the sort of evidence a person would rely on in the person's most important affairs. The State asserted it met its burden because "people get convicted of this sort of offense all the time" based on similar evidence. The State is not at liberty to leverage facts not in evidence that are legally irrelevant to the particular matter being tried.

The State also repeatedly introduced inadmissible statements, explicitly used those statements to bolster the complainant's truthfulness, and generally declared the complainant's truthfulness. In combination, the errors call into question the trial's fairness and integrity and warrant reversal through plain error review. Alternatively, defense counsel's unreasonable failure to object to the errors was ineffective assistance of counsel that warrants reversal.

If this Court does not reverse the convictions, it should reverse the probation conditions prohibiting use of the internet and internet-capable devices. This Court has previously determined such conditions are overbroad and an abuse of discretion. The same conclusion applies here.

ARGUMENT

I. The trial's fairness and integrity were compromised.

A. The State diluted the standard for conviction by leveraging non-evidence about other trials and misdescribing reasonable doubt and proof beyond it.

In rebuttal remarks addressing the defense's argument that the State had not met its burden, the State diluted the burden.

First, the State asserted that "[p]eople get convicted of this sort of offense all the time" based on the same sort of evidence, so the jury should "not think you cannot convict him because you want a little bit more." (Trial Day 2 at 304.)

The State's comment attacked core principles of a criminal jury trial. "The jury's function is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged." *State v. E.M.R.*, 2013 MT 3, ¶ 24, 368 Mont. 179, 292 P.3d 451 (quoting

Shannon v. U.S., 512 U.S. 573, 579 (1994)). "The role of the attorney in closing argument is to assist the jury in analyzing, evaluating and applying the evidence," which may include stating "contention[s] as to the conclusions that the jury should draw from the evidence. . . . [But] [t]o the extent an attorney's closing argument ranges beyond these boundaries it is improper." *U.S. v. Garza*, 608 F.2d 659, 662–63 (5th Cir. 1979) (internal quotation marks and citation omitted). It is prosecutorial misconduct to "bring to the attention of the jury matters that the prosecutor knows to be inadmissible, . . . by . . . making impermissible comments or arguments." *State v. Krause*, 2021 MT 24, ¶ 26, 403 Mont. 105, 480 P.3d 222 (internal quotation marks and citation omitted). Thus, a "prosecutor may not assert or comment on facts not in evidence." *State v. Miller*, 2022 MT 92, ¶ 23, 408 Mont. 316, 510 P.3d 17. Doing so "undercuts the defendant's right to have a jury's verdict based only upon evidence that is presented in open court and is thereby subject to scrutiny by the defendant." *U.S. v. Blevins*, 960 F.2d 1252, 1260 (4th Cir. 1992).

Besides the State's assertion in closing arguments, there was no evidence presented in this trial about other people getting convicted in

other trials based on similar evidence. Accordingly, the State asserting and arguing personal knowledge about such matters was improper.

There was no evidence introduced about what other juries have done based on similar evidence because the whole topic was irrelevant and inadmissible. Such evidence and comments "referring to what another jury may have done are clearly improper." *U.S. v. Mitchell*, 1 F.3d 235, 240 (4th Cir. 1993.). Such comments raise "concern that a defendant might be convicted based upon the disposition of the charges against [another], rather than upon an individual assessment of the [particular] defendant's personal culpability." *Blevins*, 960 F.2d at 1260. This undermines a criminal jury's narrow "purpose and duty"—to resolve a particular case and "decide if the State has proven the defendant's guilt beyond a reasonable doubt, based on the facts presented." *State v. Ritesman*, 2018 MT 55, ¶ 27, 390 Mont. 399, 414 P.3d 261 (internal quotation marks and citation omitted); *accord E.M.R.*, ¶ 24.

To perform their duty, jurors must ascertain whether they can or "cannot say, after having reviewed all the evidence, that they have an abiding conviction, to a moral certainty, of the guilt of the accused."

Agnew v. U.S., 165 U.S. 36, 51 (1897). The State's assertion that other jurors convict in similar circumstances served to dilute the necessity of moral certainty among this case's jurors based on the case's particular facts and to force a moral dilemma on jurors if doing their duty might result in acquittal where other juries have convicted "all of the time." (Trial Day 2 at 304.) The State's comment was improper.

Second, the State explained to the jury that it could convict without certainty, explaining, "We don't get certainty." (Trial Day 2 at 304.) Yet "an abiding conviction, to a moral certainty, of the guilt of the accused" is precisely what a finding of guilt beyond a reasonable doubt requires. *Agnew*, 165 U.S. at 51. The State again diluted the standard.

Third, the State explained that to find guilt beyond a reasonable doubt "you can have doubt" but "the question is, is it reliable? Could you rely on it?" (Trial Day 2 at 304.) The State then pivoted to argue that "between the parties here," Sacramento was unreliable and A.F. was reliable. (Trial Day 2 at 304.)

The State's suggestion that jurors have to be able to "rely" on doubt gets the standard backwards. It is "[p]roof beyond a reasonable doubt" that requires "proof of such a convincing character that a

reasonable person would rely and act upon it in the most important of his or her own affairs." *State v. Lucero*, 214 Mont. 334, 693 P.2d 511 (1984) (citation omitted). By contrast, reasonable doubt itself is not the sort of proof that a reasonable person would rely upon but is instead the "kind of doubt that would make a person hesitate to act." *Holland v. U.S.*, 348 U.S. 121, 140 (1954).

In combination, the State telling jurors they didn't need to be "certain" to convict, they needed to have "reliable" doubts to establish reasonable doubt, and that other juries convict based on similar evidence diminished and undermined the standard for conviction in this case.

B. The State bolstered the complainant by arguing prior consistent statements and asserting the complainant's truthfulness.

Upon lowering the bar to conviction, the State cleared that bar by improperly bolstering the complainant.

The Montana Rules of evidence render prior consistent statements generally inadmissible. *See, generally*, *State v. Smith*, 2021 MT 148, ¶¶ 18–19, 33, 404 Mont. 245, 488 P.3d 531. Under Mont. R. Evid. 401 through 403, such statements are inadmissible when used for the

general purpose of bolstering witness testimony because "mere repetition does not imply veracity." *State v. Scheffelman*, 250 Mont. 334, 340, 820 P.2d 1293, 1297 (1991) (quoting Weinstein & Berger, *Weinstein's Evidence* 801 (1988)); *accord* Montana Evidence Commission, Comment, Mont. R. Evid. 801 ("[N]o amount of repetition makes the [witness's] story more probable."). Such statements may be admitted under Mont. R. Evid. 801(1)(B) only when "offered to rebut an express or implied charge against the declarant of subsequent fabrication, improper influence or motive."

The State introduced prior consistent statements by A.F. regarding the alleged conduct at issue four times —three times through the testimony of A.F. herself and one time through law enforcement testimony. (Trial Day 1 at 163, 165, 167–68, 183.) However, the defense never made or implied any charge against A.F. of subsequent fabrication, improper influence, or motive. None of these prior consistent statements were admissible under Rule 801(1)(B) or the Montana Rules of Evidence.

The State nonetheless explicitly used the inadmissible prior consistent statements for the inadmissible purpose of bolstering the

complainant's credibility and testimony. Contrary to the law's position that mere repetition does not make a witness's story more probable, *see Scheffelman*, 250 Mont. at 340, 820 P.2d at 1297, the State repeatedly argued the prior consistent statements as evidence that the complainant was consistent and thus reliable and truthful. (*See* Trial Day 2 at 280 ("She has been consistent in her recall because she's telling the truth."), 291 ("[A.F.]'s makes sense because it is the truth, and it's been consistent"; "[Y]ou can rely on [A.F.]."), 303 ("[A.F.] was consistent."), 305 ("Look at her consistency.").)

The State also declared, "I'm going to request that you find Sacramento Dominguez guilty as charged of these offenses" because—without qualification—"[A.F.] is telling the truth." (Trial Day 2 at 291.) This statement was improper because it straddled the line of the State "express[ing] a direct personal opinion or belief that a witness . . . was . . . truthful" or "personally vouch[ing] for the veracity or credibility of a witness or his or her testimony." *Miller*, ¶ 24. Such comments raise the possibility of the jury being persuaded by "the weight of the prosecutors' [sic] personal, professional, or official influence" or the jury "simply adopt[ing] the prosecutor's views." *State v. Hayden*, 2008 MT 274, ¶ 28,

345 Mont. 252, 190 P.3d 1091 (citation omitted). That risk was especially present in this case because, in voir dire, the State had told jurors that it "know[s]" things that cannot always be "presented to a jury." (Trial Day 1 at 58–59.) That "[A.F] is telling the truth" might seemingly be one of those things. (Trial Day 2 at 291.)

In *Hayden*, this Court reversed based in part on prosecutorial statements that witnesses were "believable." *Hayden*, ¶¶ 32–33. The Court also reversed in *State v. Byrne*, 2021 MT 238, ¶¶ 30, 35, 405 Mont. 352, 495 P.3d 440, where the State vouched the complainant was a "reliable witness." The State's declaration of the complainant's truthfulness and argumentation of inadmissible prior consistent statements sounds in the same impropriety as in *Hayden* and *Byrne*.

C. Combined, the multiple errors denied a fair trial and qualify for plain error review.

This Court generally does not review errors that were not objected to below. *State v. Lawrence*, 2016 MT 346, ¶ 6, 386 Mont. 86, 385 P.3d 968. But errors that call into question whether a defendant received a fair trial are reviewable through plain error review. *Lawrence*, ¶¶ 6, 9.

In *Hayden*, this Court determined the State's "multiple errors" warranted reversal under plain error review. *State v. McDonald*, 2013

MT 97, ¶ 12, 369 Mont. 483, 299 P.3d 799 (summarizing *Hayden*). The State elicited inadmissible testimony bolstering the credibility of the alleged victim, and the prosecutor effectively testified in closing arguments by offering his own opinions about witness testimony and the State's investigation. *Hayden*, ¶¶ 31–32. Reviewing the errors because the record left "unsettled the question of the fundamental fairness of the proceedings," this Court reversed. *Hayden*, ¶ 33.

In *Lawrence*, this Court concluded the State misadvising the jury about the nature of a core component of the trial warranted reversal under plain error review. The prosecutor incorrectly asserted, in closing arguments and before deliberations began, that the presumption of innocence "no longer exists at this point." *Lawrence*, ¶ 19. This Court reversed because the statement violated a "bedrock principle of law," *Lawrence*, ¶ 16, and such improper prosecutorial assertions are "apt to carry much weight against the accused when [it] should properly carry none," *Lawrence*, ¶ 20 (quoting *Berger v. U.S.*, 295 U.S. 78, 88 (1935)).

This case rests at the confluence of *Hayden* and *Lawrence* and similarly warrants reversal under plain error review. Similar to

Hayden, the State used closing arguments to assert personal knowledge. For example, the State advised the jury that "people get convicted of this sort of offense all the time without that evidence," so "[d]o not think you cannot convict him because you want a little bit more" (Trial Day 2 at 304), and the State declared "[A.F.] is telling the truth." (Trial Day 2 at 291.)

And similar to the State undermining the presumption of innocence in *Lawrence*, the State here undermined that presumption's partner principle of law—the necessity of proof beyond a reasonable doubt to convict. The State incorrectly commented that proof beyond a reasonable doubt did not require certainty when, in fact, it requires moral certainty. The State also incorrectly commented that reasonable doubt itself has to be "reliable" when, in fact, it is proof *beyond* a reasonable doubt that has to be the sort that a jury would rely upon in its more important affairs. These statements worked in connection with the State's assertion that other juries convict in similar cases to confuse (or to bring to bear improper pressure upon) the jury regarding the necessity having "an abiding conviction, to a moral certainty, of the

guilt of the accused" based on the evidence presented in this case. *Agnew*, 165 U.S. at 51.

Also similar to *Hayden*, the State introduced and used inadmissible evidence for the purpose of bolstering the accused. The inadmissible evidence in *Hayden* was commentary on the complainant's credibility. *Hayden*, ¶¶ 31–32. The State here similarly declared the complainant was truthful. And the State connected the complainant's prior consistent statements to the complainant's credibility, arguing the inadmissible statements showed A.F. "has been consistent in her recall because she's telling the truth." (Trial Day 2 at 280.)

In *State v. Lunstad*, 259 Mont. 512, 516–17, 857 P.2d 723, 725–26 (1993), this Court found the introduction of prior consistent statements to "bolster" the complainant to be reversible in a similar case where only the complainant testified about the alleged abuse. This reflects what this Court has recognized elsewhere—that in a case turning on the credibility of the complainant, inadmissible evidence bolstering the complainant's credibility may influence the jury's verdict. *See, e.g.*, *State v. Grimshaw*, 2020 MT 201, ¶ 33, 401 Mont. 27, 401 Mont. 227 (reversing for "improper use of credibility-boosting statistical evidence"

in a "he said-she said" case); *Hayden*, ¶¶ 31–33 (reversing where inadmissible evidence and improper arguments bolstered the complainant's credibility).

In this case, the State's bolstering of the complainant may have had a similar prejudicial effect. The defense reduced the power of the State's DNA evidence through pointing out that A.F.'s DNA was not matched to the tested underwear and through arguing the tested underwear were actually underwear formerly belonging to Sacramento's ex-wife. In turn, the State's case relied substantially on the credibility of A.F. and her allegations. The State's improper bolstering of A.F.'s credibility through prior consistent statements and bold declarations that she was "telling the truth" made it more likely the jury would accept A.F.'s allegations as truthful. (Trial Day 2 at 280.)

Cases where this Court has affirmed despite the improper introduction of prior consistent statements have not contained such explicit and extensive prosecutorial arguments that the prior consistent statements bolstered the complainant's credibility. *See State v. Pitkanen*, 2022 MT 231, ¶ 16, 410 Mont. 503, 520 P.3d 305 (noting no

use of prior consistent statements in closing); *State v. Oliver*, 2022 MT 104, ¶ 29, 408 Mont. 519, 510 P.3d 1218 (noting no use of prior consistent statements in closing); *Smith*, ¶ 50 (noting that the State's argument about prior consistent statements was limited). Here, the complainant's consistency—and asserted truthfulness—as derived from her prior consistent statements was the State's major theme in closing arguments. (*See* Trial Day 2 at 280, 291, 303, 305.) Similar to *Hayden*, the improper bolstering is among several errors warranting reversal due to the cumulative effect of undermining the trial's fairness and the process's integrity.

D. Alternatively, defense counsel's failure to object to the errors was ineffective assistance of counsel.

Defense counsel did not object when the State introduced the inadmissible evidence or when the State made the improper comments discussed above. Defense counsel's repeated failure to object was ineffective assistance of counsel.

The United States and Montana Constitutions guarantee the accused the right to effective assistance of counsel. S*trickland v. Washington*, 466 U.S. 668, 686 (1984) (citing U.S. Const. amend. VI); *Weber*, ¶ 21 (citing Mont. Const. art. II, § 24). A violation of that right

occurs when defense counsel's performance falls "below an objective standard of reasonableness" and, but for that performance, a reasonable probability of a different outcome to the proceedings exists. *Strickland*, 466 U.S. at 688, 694. The analysis's ultimate focus is on the fundamental fairness of proceedings. *Strickland*, 466 U.S. at 696. This Court may review claims of ineffective assistance of counsel raised on direct appeal when there could be "no plausible justification" for counsel's performance. *Weber*, ¶ 22.

Generally, "decisions on the timing and number of objections lie within counsel's tactical discretion." *State v. Matson*, 227 Mont. 36, 47, 736 P.2d 971, 978 (1987). However, that tactical discretion encompasses only "reasonable" choices—if a decision to not object is unreasonable, it meets the first prong of *Strickland*'s test of ineffective assistance of counsel. *Whitlow v. State*, 2008 MT 140, ¶ 18 n. 4, 343 Mont. 90, 183 P.3d 861.

Defense counsel's failures to object were unreasonable performance for which there is no plausible justification. For the defense, the State's introduction of the inadmissible prior consistent statements was all downside because the State could and did use those statements to

bolster the complainant's testimony on the trial's central disputed issue. Objecting when the State elicited such statements would have prevented their admission because they were, in fact, inadmissible. Also, objecting when the State used such statements to bolster the complainant's testimony in closing argument would have prevented the State from trying to persuade the jury through nefarious and illegal means. Sacramento cannot conceive of a plausible justification or reasonable basis for counsel to have let the State flout the rules of evidence and introduce and use prior consistent statements to bolster the complainant and to prove the State's case.

The same applies to the State's comments about the standard for conviction. There would be no conceivable strategic reason to permit the State to lessen its burden for conviction by misdescribing the beyond a reasonable doubt standard and by asserting personal knowledge of other cases in which other juries have convicted other defendants on similar evidence. The failures to object were unreasonable and without plausible justification.

Strickland's prejudice prong requires assessing whether "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial

whose result is reliable." *Strickland*, 466 U.S. at 687. Thus, prejudice is established by "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. In accordance with the prejudice standard's reference to "errors," *Strickland*, 466 U.S. at 687, 694, "[s]eparate errors by counsel . . . should be analyzed together to see whether their cumulative effect deprived the defendant of his right to effective assistance." *Sanders v. Ryder*, 342 F.3d 991, 1001 (9th Cir. 2003); *see also Dugas v. Coplan*, 428 F.3d 317, 335 (1st Cir. 2005) ("*Strickland* clearly allows the court to consider the cumulative effect of counsel's errors in determining whether a defendant was prejudiced.") (citation omitted). Indeed, "common sense dictates that cumulative errors can render trials fundamentally unfair." *Williams v. Anderson*, 460 F.3d 789, 816 (6th Cir. 2006).

Cumulative errors rendered this trial fundamentally unfair. As the trial transpired, the State's case rested substantially on convincing the jury to accept A.F.'s allegations beyond a reasonable doubt and over Sacramento's denials. Because defense counsel did not object, the State was permitted to expose the jury to extraneous non-evidence regarding

other trials and other defendants and to make arguments lowering the standard for conviction. Also, because defense counsel did not object, the State was permitted to introduce clearly inadmissible prior consistent statements and use that inadmissible evidence to bolster A.F's credibility. In combined effect, these errors were so serious as to deprive Sacramento of a fair trial because, without them, there was a reasonable probability that jurors would have found they did not have an abiding conviction, to a moral certainty, of Sacramento's guilt and thus would not have found Sacramento guilty. This Court should reverse either through plain error review or through ineffective assistance of counsel.

II. The District Court abused its discretion by imposing the same internet-related restrictions that this Court reversed in *Johnson*.

Montana Code Annotated § 46-18-201(4)(p) authorizes a sentencing court to impose "reasonable restrictions or conditions" on a suspended sentence. But "[o]verly broad or unduly punitive conditions are not reasonable." *Johnson*, ¶ 7 (quoting *State v. Coleman*¸ 2018 MT 290, ¶ 6, 393 Mont. 375, 431 P.3d 26). Given the availability of less-intrusive means of supervising internet usage and the necessity of

internet access in modern society, conditions that prohibit a defendant from using the internet or internet capable devices are generally an abuse of discretion. *See Johnson*, ¶ 11.

In *Johnson*, Johnson was convicted of sexual intercourse without consent with a minor. *Johnson*, ¶ 3. Johnson used text messaging and Snapchat to contact the alleged victim. *Johnson*, ¶ 3. Over Johnson's objection, the district court imposed several conditions on Johnson's suspended sentence that included prohibiting, without prior approval, Johnson's access to the internet and internet-capable devices. *Johnson*, ¶ 4. The objected-to conditions in *Johnson* are identical to the conditions numbered 43, 44, and 51 found in Sacramento's judgment. (*Compare Johnson*, ¶ 4, *with* D.C. Doc. 80 at 16–17.)

The *Johnson* Court held the internet-related prohibitions were "overly broad insofar as Johnson is completely prohibited from accessing the internet and certain electronic devices without prior permission." *Johnson*, ¶ 12. While Johnson's use of internet and internet-capable devices warranted "appropriate monitoring," *Johnson*, ¶ 12, "[c]ompletely prohibiting Johnson from accessing the internet or possessing certain electronic devices, including a smart

phone, without prior permission goes beyond what is necessary for Johnson's rehabilitation or the protection of the victim or society," *Johnson*, ¶ 11. Given the necessity of internet access to reasonably participate in modern society, prohibiting internet access frustrates the goal of rehabilitation. *Johnson*, ¶¶ 13–14. The Court remanded for the sentencing court to strike the condition that stated Johnson "shall not have a cell phone, or such other technology/device with photo, video, or [i]nternet capabilities" and for the sentencing court to amend the other challenged conditions to remove language aimed at prohibiting internet access without prior approval. *Johnson*, ¶¶ 13–15.

Johnson applies here but with even more force. Unlike Johnson's offense, Sacramento's offenses were not in any way connected to using internet-based communication platforms or a smartphone. Thus, because prohibiting Johnson from using the internet and internet-capable devices was overbroad, *Johnson*, ¶ 12, the same prohibitions were even more overbroad here. Sacramento echoed *Johnson*'s reasoning in objecting that, "in this day and age," prohibiting internet access or use of a smartphone goes beyond what is necessary and unreasonably interferes with rehabilitation. (4/19 Tr. at 21–22.) The

District Court abused its discretion by overruling the objection. As in *Johnson*, this Court should remand for the District Court to strike the condition numbered 51 and amend the conditions numbered 43 and 44 to remove language that prohibits access to the internet and internet-capable devices.

Sacramento believes the defense objection that the District Court should not prohibit internet access preserved a challenge to all three of conditions 43, 44, and 51. But if this Court concludes the objection was limited to condition 51, defense counsel provided ineffective assistance by not objecting on the same basis to conditions 43 and 44. There was no plausible justification for defense counsel not to have extended his objection to conditions 43 and 44 on the same basis of his objection to condition 51. *Johnson* establishes the merits of such an objection against all three conditions, meaning any failure to object to all three was prejudicial and reversible.

CONCLUSION

This Court should reverse the convictions. Alternatively, this Court should remand for the District Court to strike condition 51 and

amend conditions 43 and 44 to remove language that prohibits access to the internet and internet-capable devices.

Respectfully submitted this 1st day of March, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 6,807, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

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APPENDIX

CERTIFICATE OF SERVICE

I, Alexander H. Pyle, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 03-01-2024:

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