IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0263

STATE OF MONTANA,

Plaintiff and Appellant,

v.

THOMAS JOSEPH BRENNAN,

Defendant and Appellee.

BRIEF OF APPELLANT

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, The Honorable Mike Menahan, Presiding

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STATEMENT OF THE ISSUE

Whether the district court erred as a matter of law when it granted Thomas Joseph Brennan's (Brennan) motion for a new trial and incorrectly dismissed his conviction for sexual abuse of children.

STATEMENT OF THE CASE

Lewis and Clark County charged Brennan with one count of sexual abuse of children and four counts of sexual assault. (Doc. 3.) The charges arose after Brennan's 14-year-old stepdaughter, A.H., disclosed that he would enter her bedroom after she showered and watch her get dressed or change clothes. (Docs. 2 at 3, 3 at 3.) A.H. also alleged that Brennan had subjected her to sexual contact by pressing his genitals against her body, grabbing her buttocks, and touching her breast and vaginal areas. (*Id*. at 2-3.)

The State charged Brennan with one count of sexual abuse of children, in violation of Mont. Code Ann. § 45-5-625(1)(a) and (2)(b), based on his conduct of entering A.H.'s bedroom after she showered and watching her get dressed. (Docs. 2, 3 at 2 (Count V).) The State also charged Brennan with four counts of sexual assault based on A.H.'s allegations that he touched her inappropriately. (Doc. 2 at 1, 3-4.) Brennan proceeded to trial and the jury convicted him of the count of

sexual abuse of children. (Doc. 53 at 3.) However, the jury found Brennan not guilty of the four counts of sexual assault. (*Id*. at 1-2.)

Following Brennan's conviction for sexual abuse of children, he moved the district court for a new trial or, in the alternative, to overturn the jury's verdict and find him not guilty of the offense. (Docs. 59, 60 (citing Mont. Code Ann. § 46-16-702).) Brennan argued that "[t]he evidence presented could not, and did not, support the application of [Mont. Code Ann. § 45-5-625] to [his] behavior." (*See* Docs. 59 at 1, 60 at 3-6.) Brennan argued that the subsection he was charged under, Mont. Code Ann. § 45-5-625(1)(a), only applied to conduct such "as child pornography." (Doc. 60 at 5.)

The State responded and argued that the statute went beyond the criminalization of child pornography. (Doc. 61 at 2 ("(1)(a) criminalizes exhibition of sexual conduct of a child, actual or simulated, without regard for medium").) Rather, it included "any [and] all conduct amounting to what the legislature has defined as sexually abusing children." (*Id*. at 3.) The State contended that it had presented testimony that Brennan "used a child (A.H.) in an exhibition of sexual conduct to arouse his own sexual response or desire." (*Id*.) Consequently, the State asked the district court to deny Brennan's motion. (*Id*.)

After the State's response, the district court issued a 6-page order granting Brennan's motion and dismissing his conviction for sexual abuse of children.

(*See* Doc. 70 at 6 ("Count V of the State's Information is hereby DISMISSED with prejudice.").) The lower court found that A.H.'s testimony on the issue was largely uncontested, but offered that "[t]his evidence, though alarming, does not demonstrate the Defendant employed, used, or permitted the employment or use of A.H. in an exhibition of sexual conduct, actual or simulated." (*Id*. at 5-6.) The court concluded that, although "Brennan's account of the incident largely corroborated the testimony of A.H., neither of which established the elements constituting the crime of sexual abuse of children." (*Id*.) Following the dismissal of Count V, the State timely appealed. (*See* Doc. 74.)

STATEMENT OF THE FACTS

A.H.'s disclosures

One evening, A.H.'s best friend, H.H., came over to her house to spend the night. (1/8/24-1/9/24 Trial Tr. (Trial Vol. I) at 255-56.) The girls mostly hung out in A.H.'s upstairs bedroom and played on their phones and did their nails. (*Id*. at 239, 257-58.) At one point, they went downstairs to the living room. (*Id*. at 257-58.) Brennan and Torrie, A.H.'s mother,[1] were also in the room. (*Id*.) While in the living room, H.H. would later testify she saw Brennan put his hands on A.H.'s

[1] Torrie married Brennan in 2017, but their relationship began in 2012 when A.H. was three years old. (*See* Trial Vol. I at 328; 1/10/24 Trial Tr. (Trial Vol. II) at 5, 29.)

thighs and "butt." (*Id*. at 258, 262.) Brennan also had his hands "really close to [A.H.'s] private areas" and he was "always . . . hugging on her." (*Id*. at 258, 262 (stating that Brennan was "very touchy with her").)

H.H. had a stepfather, and was "uncomfortable" with the situation and the way Brennan treated A.H. (*Id*. at 258, 262.) H.H. claimed she was "tired" and that she needed to go back to A.H.'s room because she was ready to go to bed. (*Id*. at 262.) After they left the living room, H.H. asked A.H. if Brennan's behavior was normal. (*Id*. at 259.) A.H. responded, "Yes, but it shouldn't be." (*Id*. at 259.) A.H. then told H.H. "about some of the behavior happening." (*Id*.) H.H. told A.H. "that she needed to speak up about it." (*Id*.)

When they were back at school, H.H. told A.H. that she would tell the school counselor about Brennan if A.H. did not. (*See* Trial Vol. I at 228-29.) A.H. told H.H. "that it kept happening, and she would get very upset about it." (*Id*. at 259.) H.H. did not believe A.H. was safe. (*Id*. at 259.) A.H. was afraid to talk to the counselor, but "happy" H.H. made her tell and said later that she may not have told someone otherwise. (*See id*. at 229-30 ("And so like that kind of gave me no choice, which I was kind of happy she told me to, because I don't think I probably would have told. I would just be like too scared to go in.").) A.H. wanted the

counselor to "help [her] through it, and help to . . . stop it." (*Id*. at 230.) A.H. went to the counselor's office and told her about Brennan's actions. (*See id*. at 228-29, 259.)

The counselor contacted the police and reported Brennan. (Doc. 2 at 3 (affidavit of probable cause stating that A.H. "reported to a school counselor that she was being sexually abused by her stepfather, the Defendant").) A deputy sheriff was dispatched and spoke to A.H. (Doc. 2 at 3.) A.H. reported that Brennan would enter her room while she changed clothes. (*Id*.) A.H. stated that Brennan would not leave until she was dressed and that it happened multiple times. (*Id*.) A.H. also reported that Brennan would touch her buttocks when she unloaded the dishwasher, and that he would lie in bed with her and touch her buttocks and legs. (*Id*.)

Less than a week later, A.H. participated in a forensic interview. (Doc. 2 at 3.) During the interview, A.H. disclosed that Brennan had been inappropriately touching her and walking in her room while she changed clothes. (*Id*. at 3.) Specifically, A.H. stated that Brennan would act like he needed to get something from the room or set something down. (*Id*.) Brennan would stay in the room and just watch while A.H. tried to cover herself with her towel and get dressed. (*Id*.) Brennan would only leave when A.H. was done getting dressed. (*Id*.)

A.H. also stated during her interview that Brennan would "snuggle" with her under the covers while in bed. (Doc. 2 at 4 (stating that Brennan "crawled into her

bed").) A.H. reported she would feel Brennan's "privates" pressed against her buttocks. (*See id*.) A.H. further reported that Brennan would grab her buttocks when she loaded the dishwasher and when they were "wrestling." (*Id*. at 3.) She said that Brennan would grab her buttocks when no one else was around. (*Id*.) When they drove in the car together, A.H. said, Brennan would rest his hands on her thigh near her vagina. (*Id*. at 4.) Brennan would also asked her weird questions like "if she shaved down there." (*Id*. (stating that Brennan was "referring to her privates").)

Brennan was interviewed the next day and admitted that he would "playfully smack[]" A.H.'s buttocks. (Doc. 2 at 4.) Brennan stated that it was a "family game" they played. (*Id*.) Brennan did not dispute that he "snuggl[ed]" with A.H. in bed, and said that he did not think it was inappropriate. (*Id*.) Brennan said that he would pull A.H. to him and play with her hair or rub her stomach. (*Id*.) Brennan also agreed that he would go into A.H.'s bedroom, but denied having done so when she was changing. (*See id*. (Brennan did "not remember a time where he was in there while she was changing").)

Trial

Following his interview, Brennan was arrested and charged by Information with one count of sexual abuse of children and four counts of sexual assault.

(Docs. 2 at 4, 3 at 1-3.) Prior to trial, the State alleged that Torrie had repeatedly attempted to get A.H. to recant her allegations against Brennan and change her story. (*See* Docs. 16 at 1, 27 at 1-3; *see also* Trial Vol. I at 359 (prosecutor questioning Torrie whether she told Brennan she would get A.H. "to change her story so this would all be a faint memory").) Torrie was ultimately charged with felony witness tampering in violation of Mont. Code Ann. § 45-7-206. *State v. Torrie Dawn Brennan*, DC-25-2023-407 (Lewis and Clark).[2]

At trial, A.H.[3] testified that Brennan would touch her "inappropriately" on her thigh and breast area, and it would make her "feel uncomfortable." (Trial Vol. I at 217.) She stated that this started when she was around eight or nine years old. (*Id*. at 218, 227.) When they would drive in the car, A.H. stated, Brennan would place his hand on her thigh near her vagina, and "it would aggressively go up closer and closer and closer." (*Id*. at 219 (stating that she "would try and move" away when he did this).)

A.H. stated that Brennan would also smack or grab her buttocks. (Trial Vol. I at 226.) The last time it happened, she was doing the dishes and Brennan came

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[2] The Court may take judicial notice of Torrie's criminal case pursuant to Mont. R. Evid. 202(b)(6). *See Farmers Plant Aid, Inc. v. Fedder*, 2000 MT 87, ¶ 27, 299 Mont. 206, 999 P.2d 315 ("Our Rules of Evidence provide that a court may take judicial notice of 'records of any court of this state or of any court of record of the United States or any court of record of any state of the United States.'").

[3] A.H. was 15 years old at the time of trial. (Trial Vol. I at 230.)

into the kitchen and "smacked, like grabbed [her] butt out of nowhere for no reason, and that would just happen randomly." (*Id*.) A.H. felt weird and uncomfortable and told Brennan that she did not like it and wanted it to stop. (*Id*.) Brennan got mad and walked away. (*Id*.) A.H. acknowledged that the family would "rough house," and sometimes played a game where they would hit each other on the arm or smack each other on the "butt." (*Id*. at 226-27.) However, A.H. stated that Brennan would *always* hit her on the buttocks. (*See id*. ("But it was like his go-to thing to go to my butt.").)

A.H. testified that Brennan would kiss her on the lips. (Trial Vol. I at 232.) Although Brennan kissed all his kids[4] on the lips, A.H. stated, he would "kind of get mad" if you asked him to stop. (*Id*.) Specifically, A.H. testified that when Brennan kissed her on the lips, she pulled away and he "pulled [her] back in." (*Id*. at 232-33.) A.H. told Brennan that she did not want a kiss, and he got mad and asked why not. (*Id*. at 233.) A.H. testified that she responded, "I really don't care if you kiss me on the cheek, but I don't want to be kissed on the mouth." (*Id*.)

Brennan would also "cuddle" with A.H. in her twin bed. (Trial Vol. I at 220-21.) A.H. said that her bed was against the bedroom wall, and Brennan would "big spoon" her from behind. (*Id*. (describing that she "would be facing the wall,

[4] Brennan's other four children lived with their mother in Oregon most of the year but stayed at his house during school holidays and "summers." (*See* Trial Vol. I at 328-29.)

and he would be behind [her]").) They would be under the blankets and A.H. could feel his penis touching her "butt, and kind of going underneath [her]." (*Id*. ("It was hard, and it would sometimes move. But I don't know.").) A.H. said that when Brennan would "spoon" her, one of his hands would be touching her breast area and one hand would be placed on her leg. (*Id*. at 221-22.) A.H. testified that Brennan would "grab" her breasts "in a way, and kind of like [i]f we would be like cuddling, he would like have his hand on them." (*Id*. at 219-20.)

When Brennan would pull A.H. into his body, she felt "trapped," like she "couldn't get away." (Trial Vol. I at 223.) A.H. stated that she would try to move away from Brennan and act like she was resituating her body so he was not touching her so "fully." (*Id*.) But with the wall and the small bed, "it didn't really happen." (*Id*.) A.H. described how the cuddling typically lasted an hour or so, or until she fell asleep. (*Id*.) Sometimes Torrie would walk upstairs while A.H. and Brennan were cuddling on the bed. (*Id*. at 222-23.) When that happened, Brennan "would kind of move away [and] sit up." (*Id*.)

A.H. also described in detail how Brennan would watch her change clothes in her bedroom after she showered. (Trial Vol. I at 224-26.) A.H. said that it happened "[l]ike every other shower time." (*Id*. at 224.) The prosecutor asked A.H. to describe the last time that it happened, and she said that she had just taken a

shower and walked to her bedroom. (*Id*.) A.H. started to change, and Brennan walked in and sat on the bed. (*Id*.) A.H. said that Brennan just watched her as she turned her back to him and tried to hold her towel over body as she changed into clothes. (*Id*. ("I had my back facing him as best as I could.").) A.H. affirmed that it was difficult to keep herself covered with the towel while also trying to change into clothes. (*See id*. (stating it was "hard" to get changed while holding the towel over herself).)

While she changed, A.H. said, Brennan would just sit on the bed, watch her, and "talk about himself and stuff." (Trial Vol. I at 224-25 (stating the last time it happened Brennan was asking if she wanted to go to "a store" with him).) This made A.H. feel "weird and uncomfortable." (*Id*. at 225 ("Like 'Why couldn't you ask me after I was done changing?'").) When Brennan would talk to A.H. while she changed, she observed that his voice would become "slower, and softer." (*Id*.)

A.H. had a lock on her door and she would try to lock it to keep Brennan out of her room while she changed. (Trial Vol. I at 225-26 (stating that she wanted "to have privacy").) Nevertheless, A.H. testified, Brennan would still unlock the door and come into her room. (*See id*. at 225 (describing the lock on the door as the type where someone "could use anything" to push the lock in and unlock the door); *see also* Doc. 2 at 3 (A.H. stating during the forensic interview that if she tried to lock the door, Brennan would bang on it until she opened it).)

A.H. testified that she told Torrie about Brennan walking into her room and watching her change clothes. (Trial Vol. I at 229.) A.H. stated that she had gone to Torrie's room and told her about Brennan. (*Id*.; *see also id*. at 242 ("I told her that it makes me uncomfortable when Tom comes in my room and watches me change").) Torrie told A.H. that she would talk to Brennan. (*Id*. at 229.) However, after A.H. told her mother, Brennan's behavior did not change or stop. (*See id*. at 229 ("I did tell my mom about him walking in and watching me change, and she told me that she would talk to him, and it never changed."); *see also id*. at 242 ("I thought that it would change or it would stop, but it didn't.").)

After A.H. told her school counselor about Brennan, A.H. said, Torrie became "upset" and "was very mad that I told." (Trial Vol. I at 231.) Torrie told A.H. not to speak with the counselor or any of the teachers. (*Id*. ("She didn't want me talking to anybody about it, not even [the counselor].").) After Brennan was arrested, he started staying in a camper at the fairgrounds. (*Id*. at 231-32.) A.H. alleged that Torrie "got really mad" and took her to see Brennan's camper. (*Id*. at 231.) A.H. testified that Torrie was yelling at her and said: "This is where he's staying. You can be comfortable in our house." (*Id*.)

On cross-examination, A.H. confirmed that, about two weeks before she told her school counselor about Brennan's behavior, she had told H.H. that she was "cutting" herself on her thighs and had showed her the cuts. (Trial Vol. I at 250.)

A.H. was also questioned about another incident she mentioned during her forensic interview where she alleged that Brennan had walked into her room while another friend and her were changing clothes. (*Id*. at 251-54.) This was during a "sleepover" when they were both changing clothes and were undressed (*See id*. at 251, 253.) After, the friend, "A[]," told A.H. that it had made her uncomfortable. (*Id*. at 252.) A.H. "apologized because [she] did not know [t]hat he was going to walk in like that." (*Id*. at 252.)

In addition to A.H.'s testimony, her grandmother, Monique, testified. (Trial Vol. I at 267.) Monique stated that she had observed an incident with Brennan and A.H. in the summer of 2022 that caused her to be concerned. (*Id*. at 267.) Monique had been staying at the house and sleeping in her camper parked outside. (*See id*. at 267.) Monique stated that she went inside the house and used the bathroom around bedtime. (*Id*. at 268.) After she came out of the bathroom, she looked in A.H.'s bedroom and saw Brennan lying in A.H.'s bed and "spooning her" underneath the covers. (*Id*. at 268-69.) She described their positions on the bed as "the wall, A.H., and [then] Tom." (*Id*.) Monique recounted that "[i]t was mid-July." (*Id*. at 269.)

Brennan's behavior struck Monique as "disturbing." (Trial Vol. I at 268-69 ("And so I was just very, very disturbed, just seeing what I saw.").) She offered, "It was just like, 'Let's just play the waters and see where it's going,' because over the

years I felt uncomfortable [with] the extent of cuddling that there was." (*Id*. at 273.) Based on her concerns, Monique told Torrie that she had observed Brennan in A.H.'s bed. (*Id*.) Monique testified that she told Torrie because she hoped Torrie would do something about it. (*Id*. at 267-69, 274.) At A.H.'s age, Monique did not think Brennan should "be cuddling with a daughter or stepdaughter that way." (*Id*. at 269-70.) Specifically, she was concerned because Brennan was "cuddling with my granddaughter when she's developing and being a little bit too old to be underneath a blanket with someone[.]" (*Id*. at 273.) Monique further observed, "And then when she expresses and has a concern about it, and the other adults are not taking care of that, I have a big[,] huge concern about that." (*Id*. at 274.)

Detective Cody Colbert (Det. Colbert) with the Lewis and Clark County Sheriff's Office testified that he was present at Brennan's police interview. (Trial Vol. I at 281.) A recording and transcript of Brennan's interview was published to the jury and admitted into the district court record. (*Id*. at 284-85.) After rewatching the interview, Det. Colbert stated that Brennan appeared to be aware of each of A.H.'s allegations before Det. Colbert told him about the alleged incidents. (*Id*. at 304 ("Every time I asked a question about one of the allegations, Mr. Brennan knew of what situation I was talking about."); *see also id*. at 313 ("It just surprised me that the specific incidents he brought up, and had an explanation

for them.").) Det. Colbert thought Brennan "seemed to be putting a different spin on it." (*Id*. at 313.)

Specifically, Brennan did not deny cuddling A.H. in the interview, and brought up the alleged conduct when Det. Colbert asked if he knew why law enforcement wanted to interview him. (Trial Vol. I at 322.) Brennan also brought up A.H.'s allegation that he would watch her after she showered. (*Id*. at 322.) Brennan admitted that he had gone in "while [A.H.] was changing." (*Id*. at 315 ("He was not denying that that happened.").) However, Brennan claimed that he did not understand that A.H. was uncomfortable with his actions. (*See id*.)

After the State rested, Torrie testified on behalf of Brennan. (Trial Vol. I at 326.) Torrie immediately testified that she had no doubt in her mind that Brennan was innocent. (*See* Trial Vol. I at 327.) Torrie stated that she met Brennan when she was single mom, abusing drugs, and just trying "to make ends meet." (*Id*. at 327-28 ("Being a single parent is never easy, but you do what you have to do to make ends meet.").) However, she testified that since she met Brennan, "Our life has been nothing but a dream for what I could compare to what my life used to be." (*Id*. at 328; *see also id*. at 356-58 (agreeing that she and Brennan had "a happy life together," that she "didn't want A.H.'s disclosure to be true," and that her "life changed drastically after [the] disclosure").)

Torrie stated that the first time she heard that A.H. was "uncomfortable" with Brennan's contact was when the school counselor called her. (Trial Vol. I at 337.) However, Torrie admitted that A.H. had spoken to her earlier because A.H. was upset that Brennan "barged" into her bedroom. (*Id*. at 337, 342-44 ("It never became an issue until she came to me upset that he barged in.").) Torrie did not deny that A.H. told her that she had just "gotten out of the shower, [and] was in a towel in her room changing." (*Id*. at 343.)

However, when Torrie talked to Brennan, he explained that the door was "ajar," and told her, "Like the door was open. What do you mean barge in?" (*Id*. at 337, 342-43.) Brennan told Torrie that he had gone into A.H.'s room to tell her to come watch television with him, as they regularly watched "shows" together. (*Id*. at 343 ("Hey, bud, come downstairs, and let's go watch our show.").) Torrie agreed with defense counsel that she thought the event was "innocuous." (*Id*. at 343-44; *see also id*. at 342 (Torrie stating: "Well, why wasn't your door shut or at least locked if you're changing?").)

Torrie did not dispute that she spoke with Brennan after she was informed of the allegations against him. (Trial Vol. I at 349-51, 363 (affirming that she spoke to him after A.H.'s forensic interview).) Torrie said that she went home to pack a bag for A.H., and told Brennan: "The Detective told me he has to charge you." (*Id*. at 349-50 ("I told him they had enough to charge him, and by that time I feel like

A.H.'s bag was packed, and we were out the door.").) Torrie also agreed that she called Brennan on the phone the day before he spoke with law enforcement, and they had a conversation about the investigation. (*See id*. at 350-51 ("So he told me that they had enough to charge him, that they wanted him to come the next day."), 364-65.) Torrie did not deny that she told Brennan about the nature of the allegations. (*Id*. at 364 (stating they had discussed that A.H. told the interviewer about the "[c]uddling" and "the time that he walked into her room with the door open").) Torrie stated that they made the "mutual decision" for Brennan to go and speak with detectives. (*Id*. at 351.) Torrie also did not deny that she told A.H. not to talk to her counselor or any of her teachers anymore. (*Id*. at 359; *see also id*. at 335 (stating that she told H.H. "to stay away from my daughter").)

After Brennan was arrested and bonded out of jail, Torrie confirmed, she drove A.H. to where he was staying at the fairgrounds. (*See* Trial Vol. I at 353-54.) When asked why she took A.H. to the fairgrounds, Torrie stated that she had stayed with Brennan the night before and A.H. had said that she felt "abandoned." (*See id*. at 354 ("Once she found out that I had left her, abandoned her for the night, and I was like, 'Excuse me. That is not what happened."').) Torrie testified that she told A.H., "This is where I stayed last night." (*Id*.) Torrie stated that she was simply trying to explain to A.H. that she did not stay at "a luxury Hilton hotel." (*See id*.)

Brennan testified next. (Trial Vol. II at 35.) He agreed that he would cuddle with A.H., and did not dispute that he would play with her hair, "strok[e] her stomach," and rest his hand on her thigh while they were driving. (*See id*. at 30.) Brennan also did not deny that they sometimes cuddled under the covers in her bed. (*Id*. at 33 ("If she wants me to.").) He agreed that he would be underneath her "butt," but denied that he ever had an erection. (*See id*. at 48, 52-53.)

Brennan stated that he never "grabbed" A.H.'s buttocks, but did admit to "smacking" them. (Trial Vol. II at 37.) Brennan recounted an incident where he "snuck up behind [A.H.] as she was getting into the dishwasher and swatted her on the butt." (*Id*. at 38.) Brennan recalled that A.H. told him to "stop." (*Id*.) However, Brennan claimed not to know that A.H. "felt sexually uncomfortable" with his behavior. (*See id*. at 39; s*ee also id*. at 30 ("Q Did she ever act towards you like you were making her uncomfortable? A Never.").) Brennan denied that he ever watched A.H. get dressed after she took a shower. (*Id*. at 35 ("I've never watched her get dressed ever.").) He stated that he may have "cracked the door" of the bathroom while A.H. was in it, but never while she was in the shower or getting dressed. (*Id*. at 36, 54.)

The prosecution asked about a recorded phone call Torrie made to Brennan while he was in jail. (Trial Vol. II at 53.) Brennan admitted that Torrie said she would talk to A.H. about the allegations and get her to "change it up or make them

understand." (*Id*. at 53.) Brennan claimed that A.H. was telling a completely different "story" to Torrie, and both agreed that A.H.'s "story was wrong[.]" (*Id*. at 53.) However, Brennan then contradicted himself and claimed that they did not know what A.H.'s story was at the time of the phone call. (*Id*. at 55.)

During deliberations, the jury sent a note to the district court with four questions. (Trial Vol. II at 159, 161.) Specifically,

> Question Number One says: Did he unlock the bathroom door?
>
> Question Two: What was the first mention in her words of erection, backslash, he got hard?
>
> Question Three: Did they talk to A[]?[5]
>
> Question Four: What did Tom do to make H[.H.] uncomfortable?

(*Id*. at 161; *see also* Doc. 54.) With the agreement of both parties, the district court responded to the note and instructed the jury: "you must rely on your collective memory as to the testimony and evidence presented." (Doc. 54.)

The jury returned a verdict convicting Brennan of one count of sexual abuse of children, but finding him not guilty on the four counts of sexual assault. (Doc. 53.) Brennan moved for a new trial or for the court to find him not guilty, and argued that: "From the time of the filing through trial, the State has never alleged,

[5] "A[]," the friend A.H. reported was staying at their house and changing clothes when Brennan walked into her bedroom, did not testify at trial. H.H., A.H.'s other friend, did testify. (Trial Vol. I at 255-65.)

nor has it ever presented, facts that showed the existence of probable cause to support the charge that Thomas employed or used A.H. in an exhibition of sexual conduct." (Doc. 59 at 1.)

The State responded that the court should not overturn the jury's guilty verdict because it had presented testimonial evidence that Brennan committed sexual abuse of children pursuant to Mont. Code Ann. § 45-5-625(1)(a). (Doc. 61 at 3.) The State contended that Brennan was incorrect that the statute only applied to material forms of child pornography, '[b]ut, not a person viewing an exhibition of sexual conduct of a child in person." (*See id*. at 2.) The State argued that subsection (1)(a) of the statute "criminalizes exhibition of sexual conduct of a child, actual or simulated, without regard for medium." (*Id*. at 2.) Critically, the State asserted that "(1)(a) criminalizes the very conduct which gives rise to all the other ways the statute contemplates a person can commit sexual abuse of children." (*Id*. at 2.)

Brennan did not file a reply brief, and the district court granted the motion and dismissed Count V of the Information. (*See* Docs. 63, 70.) The court agreed with Brennan's argument that "the plain language of the statute does not support the States's allegation—that simply watching A.H. change clothes or get dressed

after a shower is a criminal act punishable by life imprisonment."[6] (Doc. 70 at 4-5.) Accordingly, the court found that "a change in the verdict is justified by the weight of evidence and the Montana Code Annotated." (*Id*. at 6.)

SUMMARY OF THE ARGUMENT

The district court erred as a matter of law and committed reversible error when it granted Brennan's motion for a new trial and dismissed his conviction for sexual abuse of children. Critically, Brennan's conduct, as alleged in the Information and proven at trial, satisfied the plain language of Mont. Code Ann. § 45-5-625(1)(a). The district court misinterpreted the sexual abuse of children statute to find that Brennan's conduct was not prohibited under Montana law when it concluded that subsection (1)(a) only applies to tangible forms of child pornography, like photos or videos. In contrast, the plain language of the statute encompasses all forms of child pornography, whether recorded or observed in a live performance. Thus, pursuant to the statute's plain meaning, Brennan used A.H. in an exhibition of actual sexual conduct to arouse or gratify his sexual desires.

[6] The State notes that life imprisonment is the maximum sentence allowed for sexual abuse of children under subsection 2(b), but it is not the mandatory minimum. *See* Mont. Code Ann. § 45-5-625(2)(b) ("[I]f the victim is under 16 years of age, a person convicted of the offense of sexual abuse of children shall be punished by life imprisonment or by imprisonment in the state prison for a term of *not less than 4 years* or more than 100 years and may be fined not more than $10,000[.]") (emphasis added).

Further, based on its erroneous interpretation of the statute, the district court incorrectly determined that the weight of the evidence did not support Brennan's conviction and erred when it dismissed Count V of the Information. Based on A.H.'s compelling testimony, and the other evidence at trial, the State presented sufficient evidence, viewed in the light most favorable to the prosecution, that Brennan committed sexual abuse of children when he repeatedly watched his 14-year-old stepdaughter change into clothes after she showered.

ARGUMENT

I. Standards of review

The "standard of review of a trial court's ruling on a motion for a new trial depends on the basis of the motion." *State v. Bomar*, 2008 MT 91, ¶ 15, 342 Mont. 281, 182 P.3d 47. Generally, this Court reviews a ruling on "a motion for a new trial for abuse of discretion, while acknowledging the underlying assertion may involve a different standard of review." *Id*. ¶ 15.

However, as applicable here, when a lower court changes a verdict based on its interpretation of a statute, this Court reviews to determine whether the district court's interpretation of the law is correct. *State v. Bell*, 277 Mont. 482, 485-86, 923 P.2d 524, 526 (1996) (citing *State v. Christensen*, 265 Mont. 374, 375, 877 P.2d 468, 468-69 (1994)).

Additionally, this Court "review[s] claims of insufficient evidence de novo." *State v. Brown*, 2022 MT 176, ¶ 22, 410 Mont. 38, 517 P.3d 177 (quoting *State v. Burnett*, 2022 MT 10, ¶ 15, 407 Mont. 189, 502 P.3d 703); *see also State v. McWilliams*, 2008 MT 59, ¶ 42 n.2, 341 Mont. 517, 178 P.3d 121 ("Where a motion for a new trial under § 46-16-702, MCA, is based on sufficiency of the evidence, we review the grant or denial of that motion de novo."). The Court "view[s] the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt." *Brown*, ¶ 22 (quoting *Burnett*, ¶ 15). "It is the factfinder's role to evaluate the credibility of witnesses, weigh the evidence, and ultimately determine which version of events should prevail." *Id*.

II. The district court committed reversible legal error when it granted Brennan's motion for a new trial and dismissed his conviction for sexual abuse of children.

The district court's order acknowledged that the State presented evidence establishing that Brennan, "on numerous occasions, entered the bedroom of his stepdaughter as she showered or emerged from a shower, and watched her change into clothing, making her feel uncomfortable." (Doc. 70 at 5.) The district court concluded that this evidence did not satisfy the elements of sexual abuse of

children and ruled that a change in the verdict was "justified by the weight of evidence and the Montana Code Annotated." (*Id*. at 6.)

However, a review of the plain language of the statute and this Court's caselaw demonstrates that the lower court incorrectly concluded that Brennan's conduct did not violate Montana law. Further, the district court erred by concluding that the weight of the evidence did not support Brennan's conviction as sufficient evidence was presented by the State to show that he violated Mont. Code Ann. § 45-5-625(1)(a).

A. The district court misinterpreted Mont. Code Ann. § 45-5-625(1)(a) and incorrectly concluded that Brennan, as a matter of law, did not use A.H. in an exhibition of actual sexual conduct.

The district court misinterpreted the plain language of the statute and erred when it adopted Brennan's argument that his conduct did not satisfy the elements of sexual abuse of children. Specifically, Brennan's motion argued that the statute simply did not apply to his behavior and, therefore, the State failed to allege or present facts establishing probable cause that he "employed or used A.H. in an exhibition of sexual conduct." (Doc. 59 at 1; *see also* Doc. 60 at 3 ("Montana Code Annotated §45-5-625 does not apply to the facts of the case.").) Primarily, Brennan contended that subsection (1)(a) applied to "child pornography," and not the conduct described in A.H.'s testimony, i.e., that he repeatedly would watch her get dressed or change into clothes after she showered. (*See* Doc. 60 at 5.)

Brennan's argument is incorrect as subsection (1)(a) of the child sexual abuse statute plainly applies to a broad spectrum of crimes against children, including crimes where no pictures or videos of the sexual abuse were recorded or tangibly memorialized. *See State v. Marshall*, 2007 MT 198, ¶¶ 6, 25-29, 338 Mont. 395, 165 P.3d 1129 (defendant's verbal offer of money to 11-year-old if she would strip nude and show him her "crotch" established elements of attempted sexual abuse of children).

In the construction of a statute, this Court first looks "to its plain language; if the language is clear and unambiguous on its face, [the Court] need not engage in any further construction." *State v. Felde,* 2021 MT 1, ¶ 16, 402 Mont. 391, 478 P.3d 825. The Court "give[s] words in the statute their usual, ordinary meaning." *Felde*, ¶ 16. The Court "may not insert what has been omitted or omit what has been inserted." *Felde,* ¶ 16 (citing Mont. Code Ann. § 1-2-101).

"Statutory construction is a holistic endeavor and must account for the statute's text, language, structure, and object." *City of Missoula v. Fox*, 2019 MT 250, ¶ 18, 397 Mont. 388, 450 P.3d 898 (quotation marks and citation omitted). The Court "construe[s] a statute by reading and interpreting the statute as a whole, 'without isolating specific terms from the context in which they are used by the Legislature.'" *Felde*, ¶ 19 (quoting *Mont. Sports Shooting Ass'n v. State*, 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003).

Further, "[w]here the Legislature has not defined a statutory term, [the Court] consider[s] the term to have its plain and ordinary meaning, and may consider dictionary definitions, prior case law, and the larger statutory scheme in which the term appears." *State v. Christensen*, 2020 MT 237, ¶ 95, 401 Mont. 247, 472 P.3d 622. The Court "may also consider similar statutes from other jurisdictions and legislative history for guidance in interpreting a statute." *Giacomelli v. Scottsdale Ins. Co.*, 2009 MT 418, ¶ 18, 354 Mont. 15, 221 P.3d 666. "Statutory construction should not lead to absurd results if a reasonable interpretation can avoid it." *Mont. Sports Shooting Ass'n*, ¶ 11.

Reviewing the district court's order, it swiftly found, without analysis, that A.H.'s testimony failed to satisfy the elements of the crime of sexual abuse of children. (Doc. 70 at 6 ("Brennan's account of the incident largely corroborated the testimony of A.H., neither of which established the elements constituting the crime of sexual abuse of children.").) This was legal error. Examining the plain language of the statute, the district court incorrectly concluded that a stepfather who watched his 14-year-old stepdaughter get dressed after a shower did not commit sexual abuse of children.

1. Under the statute's plain and ordinary meaning, Brennan used A.H. in an exhibition of actual sexual conduct.

Montana law establishes that "[a] person commits the offense of sexual abuse of children if the person . . . knowingly employs, uses, or permits the employment or use of a child in an exhibition of sexual conduct, actual or simulated." Mont. Code Ann. § 45-5-625(1)(a) (2021). As applicable here, A.H.'s testimony established facts that Brennan used her in an exhibition of sexual conduct under the plain meaning of the terms.[7]

Although the district court's order did not analyze the plain meaning of "use," Black's Law Dictionary provides many definitions of the term, highlighting the statute's broad nature and application. *See* Black's Law Dictionary 1855 (Bryan A. Garner, ed., 11th Ed., Thomson Reuters 2019) ("To employ for the accomplishment of a purpose; to avail oneself of . . . ; To take advantage of someone for selfish purposes; to make (a person) an involuntary means to one's

[7] The State notes that "use" is synonymous with "employ." *See* Black's Law Dictionary 1541 (Henry Campbell Black, et al. ed., 6th Ed., West 1990) ("To make use of; . . . to employ"). Thus, in addition to having used A.H. in an exhibition of sexual conduct, the State asserts that Brennan likewise employed her for purposes of subsection (1)(a). However, because Brennan also used A.H., it is not necessary for the Court to consider whether "employs" should be only applied to situations where the defendant is alleged to have paid or given property to the child. *See Marshall*, ¶¶ 6, 25-29 (defendant attempted to "employ" a child for use in an exhibition of sexual conduct when he offered to give the child $150 if she would strip nude and show him her "crotch").

own ends . . . ; To take usu. improper advantage of (a situation, position, etc.) . . . ."); *see also* Black's Law Dictionary 1541 (Henry Campbell Black, et al. ed. 6th Ed., West 1990) ("To make use of; to convert to one's services; to employ; to avail oneself of; to utilize; to carry out a purpose or action by means of; to put into action or service, especially to attain an end.").

Further, "exhibition"[8] or "exhibit" is also defined broadly, and includes "[t]o show off or to display." *See* Black's Law Dictionary 573 (Henry Campbell Black, et al. ed. 6th Ed., West 1990); *see also* The Merriam-Webster Dictionary 228 (Frederick C. Mish, et al. ed. Merriam-Webster, Inc. 2004) ("To display esp. publicly . . . *Synonyms* DISPLAY, SHOW, PARADE, FLAUNT").

Under the plain meaning of these terms, a person who watches a naked child change clothes or get dressed utilizes that child in a display of a live act. As alleged in the charging documents, the State's allegations that Brennan would knowingly enter A.H.'s bedroom so he could watch her reluctantly display her nude body, while unsuccessfully attempting to cover herself with a towel, satisfied the plain language of the statute that requires a defendant to use the child in an exhibition of sexual conduct. (*See* Doc. 2 at 3-4.) Specifically, that Brennan took advantage of

[8] Most dictionaries, such as Black's Law Dictionary, refer to "Exhibit" when examining the definition of "Exhibition." *See* Black's Law Dictionary 573 (Henry Campbell Black, et al. ed. 6th Ed., West 1990).

A.H., and the situation of her coming out of the shower, to walk into her room so he could view her unwillingly displayed nude or partially clothed body.

2. Brennan's actions satisfied the definition of sexual conduct because he used a depiction of A.H.'s nude and partially clothed body to arouse or gratify his sexual desires.

The district court also incorrectly determined that Brennan did not engage in sexual conduct when he watched A.H. get dressed after she had showered. Sexual conduct is a broadly defined term under Montana law, and applies to multiple and various forms of sexual acts and conduct. *See* Mont. Code Ann. § 45-5-625(5)(b)(i)-(ii); *see also Felde*, ¶ 17 ("Section 45-5-625, MCA, proscribes multiple variants of conduct by which a person engages in sexual abuse of children by exploiting them for child pornography."). Indeed, examining the statutory structure of subsection (5)(b), which lists the various statutory definitions of sexual conduct, the term is defined "disjunctively, listing a number of alternatives that meet the definition . . . ." *Brown,* ¶ 12.

Here, the district court recognized that "[s]exual conduct means [the] depiction of a child in the nude or in a state of partial undress with the purpose to abuse, humiliate, harass, or degrade the child or to arouse or gratify the person's own sexual response or desire or the sexual response or desire of any person." (Doc. 70 at 5 (quoting Mont. Code Ann. § 45-5-625(5)(b)(ii)); *see also* Doc. 52 at 37 (Instruction No. 33).) The plain and ordinary meaning of "depiction" includes

"the way that something is represented or shown, or something that represents or shows something." Cambridge University Press, https://dictionary.cambridge.org/us/dictionary/english/depiction (Accessed July 15, 2024). Thus, watching a naked 14-year-old girl dress after showering would constitute a depiction of a child in the nude.

Notably, other appellate courts have interpreted this term broadly in the context of laws prohibiting sexual crimes against children. For example, the Delaware Supreme Court closely examined the meaning of "depiction" in the case of a man who surreptitiously spied on a child victim changing clothes while he hid behind a shower curtain. *Zambrana v. State*, 118 A.3d 773, 774-75 (Del. 2015). The defendant was convicted under a statute that prohibited soliciting or causing a child to engage in certain sexual acts, such as "[n]udity, if such nudity is to be depicted for the purpose of the sexual stimulation or the sexual gratification of any individual who may view such depiction." *See Zambrana*, 118 A.3d at 777.

On appeal, the defendant argued that the plain meaning of the word "depiction," which was not defined by the statute, required the "preservation of the victim's nude image in some tangible form, such as a picture, painting, or photograph, in order for 'nudity' to be a prohibited act . . . ." *Zambrana*, 118 A.3d at 777. The Delaware Supreme Court disagreed and found that although the word could be defined to include "a physical representation such as a photograph or

video, the term 'depiction' can also be defined more broadly to include the presentation of a live performance." *Id*. at 777, 780 ("[W]e adopt a broader definition of 'depiction,' which encompasses not only tangible representations, but also presentations of live conduct.").

The Delaware Supreme Court ultimately concluded that the more expansive definition of depiction was supported by the facts of the underlying case and affirmed the conviction. *Zambrana*, 118 A.3d at 777-80 (recognizing "that a 'depiction' can include live conduct intended to allow the viewer to observe nudity for the purpose of sexual gratification"). *Zambrana* based its reasoning on the United States "Supreme Court's analysis in *New York v. Ferber*, a key decision in obscenity law that permitted states to ban the sale of child pornography." *Zambrana*, 118 A.3d at 777 (citing *New York v. Ferber*, 458 U.S. 747, 762-65 (1982)).

Importantly, the Delaware Supreme Court recognized that in *Ferber* the United States Supreme "Court included 'live performances' in its discussion of 'depictions,' and concluded that a depiction can include a live performance of nudity, a sexual act, or a simulation of sexual activity designed for the sexual gratification of the audience." *Zambrana*, 118 A.3d at 777-78 (citing *Ferber*, 458 U.S. at 764-85); *see also Ferber*, 458 U.S. at 762 ("The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*.") (emphasis in original).

Furthermore, in its decision, the Delaware Supreme Court looked to the legislative purpose of the law and the statute as a whole, and concluded that both supported the more expansive definition. *Zambrana*, 118 A.3d at 778. The court recognized that the legislative purpose of the Delaware law was to '"increase the protection afforded to Delaware's children from pedophiles' and facilitate prosecution of adults who solicit children for sexual purpose." *Id*. Consequently, it reasoned that "[t]o conclude that the General Assembly intended to punish predators who solicit children to take off their clothes for their own sexual gratification only if the predator creates a tangible depiction of the child directly conflicts with the express purpose of the statute." *Id*. Further, *Zambrana* recognized that interpreting "depiction" to only include images preserved in physical form would render other terms in the statute "surplusage," and would be inconsistent with other prohibited acts that specifically applied to a tangible reproduction of the abuse. *Id*. at 778-79 ("It would therefore not be 'sensible' to conclude that the act of soliciting nudity requires some manner of recording or reproduction.").

Importantly, *Zambrana* highlighted *Ferber*'s distinction between the harm caused by the act of child abuse itself and the harm caused by the recording and distribution of the material. *Zambrana*, 118 A.3d at 779-80 (citing *Ferber*, 458 U.S. at 759 ("[T]he materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their

circulation."). Recognizing that the Delaware law criminalized both the presentation of live conduct and the distribution or possession of that act, the court in *Zambrana* concluded that to interpret "depiction of nudity [to] require[] a physical representation of that nudity would thus collapse the intentional distinction in the statute between the abuse itself and the creation of pornographic material portraying the underlying abuse." *Zambrana*, 118 A.3d at 780.

Similarly, here, the structure, body, and legislative intent of Montana's sexual abuse of children statute counsels this Court to apply a broad interpretation of "depiction" to include live exhibitions of child sexual abuse, and not just tangible forms of child pornography, such as photos or videos. First, like the Delaware statute at issue in *Zambrana*, interpreting sexual conduct under Mont. Code Ann. § 45-5-625(1)(a) to only apply to child sexual abuse that is recorded in some form would render other provisions in Montana's sexual abuse of children statute redundant and superfluous. Specifically, the other criminal acts expressly listed under Mont. Code Ann. § 45-5-625(1) that specifically criminalize filming, recording, possessing, and distributing tangible forms of child pornography. *See, e.g.*, Mont. Code Ann. § 45-5-625(1)(b), (1)(d), (1)(e), (1)(g).

Second, an interpretation of "depiction" under Mont. Code Ann. § 45-5-625(5)(b)(ii) that only applied to tangible forms of pornography would run counter to the guiding purpose behind child sexual abuse laws and the dual harms

these laws seek to both prevent and prohibit. Namely, the harm caused to the child when the abuse is recorded and distributed, in addition to the harm caused by the commission of the act itself. As discussed in *Zambrana*, criminalizing the recording of child sexual abuse, but not the underlying act itself, would be nonsensical. *Zambrana*, 118 A.3d at 779; *see also Ferber*, 458 U.S. at 759 (recognizing that the distribution of child pornography is "intrinsically related to the sexual abuse of children").

Under the facts of this case, it would be absurd to conclude that Brennan did not commit a crime simply because he did not film or photograph A.H. while she changed clothes, and only personally viewed her naked and partially clothed body in person rather than watch a recording of it. Indeed, the district court essentially found that because Brennan did not film his conduct, it did not violate Montana law. This Court should reject this absurd interpretation of the child sexual abuse statute.

Lastly, a narrow interpretation of depiction would also be inconsistent with the broad legislative purpose of Mont. Code Ann. § 45-5-625, which is to criminalize a wide variety of sexual crimes perpetrated against children. *See Felde*, ¶ 20 (noting the "statute's broad purpose to protect victimization of children"). Consistently with this broad purpose, this Court has previously interpreted the sexual abuse of children statute to conclude that an adult merely viewing a nude child, in person, would satisfy the elements of Mont. Code Ann. § 45-5-625(1)(a).

In *Marshall*, the alleged conduct did not include any photos or videos of the child, nor any attempts by the defendant to record the child. *See Marshall*, ¶¶ 5-6. There, Marshall's 11-year-old neighbor asked him for $150. *See id*. ¶¶ 5-6. Marshall responded by asking the child what she would do for the money and stating, "[a]re you going to strip for me?" *Id*. ¶ 6. Marshall also asked to see the girl's "crotch" and proposed to lick it. *Id*. Marshall was convicted of attempted sexual abuse of children and appealed, arguing that insufficient evidence supported his conviction. Specifically, Marshall asserted the State had failed to prove that his specific purpose was to employ the girl in sexual conduct. *Id*. ¶¶ 10, 28.

However, this Court affirmed and found that sufficient evidence supported Marshall's conviction for attempted sexual abuse of children under Mont. Code Ann. § 45-5-625(1)(a). *Marshall*, ¶¶ 28-30. Although the case involved a different definition of sexual conduct under subsection (5)(b),[9] the Court concluded that Marshall's attempted conduct satisfied the elements of sexual abuse of children under subsection (1)(a) of the statute. The Court affirmed his conviction, even though the child refused to take Marshall up on his offer, because the jury likely "inferred that Marshall's intention was to have [the girl] pose for him in private, in

[9] The Court applied a definition of sexual conduct that included "the lewd exhibition of the genitals or other intimate parts of a person." *Marshall*, ¶ 23 (citing Mont. Code Ann. § 45-5-620(1)(f) (2005)). This section was amended in 2007, and the definition is now found at Mont. Code Ann. § 45-5-625(5)(b)(i)(F).

such a manner that he could perform his previously expressed fantasies." *Id*. ¶ 29. The Court concluded that this evidence established that Marshall sought to employ the girl in sexual conduct. *Id*.

The Court's application of the sexual abuse of children statute in *Marshall* directly contradicts any argument that Mont. Code Ann. § 45-5-625(1)(a) only criminalizes documentary forms of "child pornography," such as videos or photos. Rather, this decision highlights that the Court interprets subsection (1)(a) to be consistent with the broad legislative intent behind the law, specifically preventing the victimization of minors by prohibiting and preventing sexual crimes involving children in all forms. This Court should broadly interpret "depiction" to be consistent with this legislative purpose and conclude that this term includes the live display of a nude or partially clothed child.

Consequently, the district court erred as a matter of law by concluding that watching a minor child get dressed after taking a shower fails to satisfy the elements of sexual abuse of children pursuant to subsection (1)(a), or that this conduct does not constitute sexual conduct under Mont. Code Ann. § 45-5-625(5)(b)(ii).

B. The district court erred by concluding that the weight of the evidence did not support Brennan's conviction for sexual abuse of children.

In addition to incorrectly concluding that Brennan's conduct did not violate Mont. Code Ann. § 45-5-625(1)(a) as a matter of law, the district court also

incorrectly found that the weight of the evidence did not support the jury's guilty verdict. As discussed, when viewing the evidence in the light most favorable to the prosecution, the State presented sufficient evidence that Brennan used A.H. in an exhibition of sexual conduct. Namely, that he repeatedly entered A.H.'s bedroom after she had showered, would not leave, and watched her change clothes for the gratification of his personal sexual desires.

At trial, the jury was presented with compelling testimony from A.H. that Brennan would repeatedly enter her room after she had showered and would watch her change into clothes. A.H. would attempt to lock her door to keep Brennan out, but she testified that he could easily unlock it and enter her bedroom anyway. Then, instead of immediately leaving A.H.'s room upon observing that she had just showered and was covered in a towel, Brennan would wait in her room and proceed to watch her change clothes while she simultaneously, and unsuccessfully, attempted to keep her nude body covered with a towel. A.H. also recalled that Brennan would not leave her room until she was dressed.

These facts were more than sufficient to establish that Brennan knowingly used A.H. in an exhibition of actual sexual conduct. Specifically, that when he failed to leave the room and stayed to observe a display of A.H.'s partially clothed and nude body, he used A.H. for his own means in a nonconsensual live performance of sexual conduct—a performance for an audience of one. The district

court erred when it concluded that these facts were insufficient to establish that Brennan committed sexual abuse of children under subsection (1)(a) of the statute.

Furthermore, the jury was presented with testimony that established that Brennan used A.H.'s naked and partially clothed body for his own sexual gratification or arousal. "The jury may infer intent from the defendant's acts, including evidence of the defendant's prior acts." *Marshall*, ¶ 26. At trial, the State presented evidence that Brennan would repeatedly touch sensitive areas of A.H.'s body, like her buttocks, in addition to kissing her on the lips. A.H. also testified, as confirmed by Monique, Brennan, and Torrie, that he would cuddle with her in bed.

Although the jury did not find, beyond a reasonable doubt, that Brennan committed sexual assault for this conduct, the jury could still rely on this testimony to infer that Brennan had watched A.H. change clothes for the purpose of his own sexual gratification or arousal. This was particularly true considering that A.H.'s description of the incident recounted in explicit detail how Brennan would talk strangely to her about nothing of consequence while she struggled to shield her exposed body from his gaze. Most chillingly, A.H. described how Brennan's voice would change while he stared at her body, dropping lower and becoming slower. This evidence was more than sufficient to allow the jury to infer that Brennan used A.H. in an exhibition of sexual conduct for the purpose of gratifying or arousing his personal sexual desires.

Applying de novo review, this Court should conclude that the district court erred when it determined that the weight of the evidence did not support the jury's guilty verdict. Accordingly, the Court should reverse the district court's grant of Brennan's motion for a new trial, and remand for reinstatement of the guilty verdict. *See Bell*, 277 Mont. at 489-90, 923 P.2d at 528. Further, the Court should remand with instructions to sentence Brennan in accordance with the jury's guilty verdict. *See Bell*, 277 Mont. at 490, 923 P.2d at 528.

CONCLUSION

This Court should reverse the district court's grant of Brennan's motion for a new trial and remand with instructions to proceed to sentencing on Count V.

Respectfully submitted this 29th day of July, 2024.

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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 9,522 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

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