IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0169

STATE OF MONTANA,

Plaintiff and Appellee,

v.

KAYLEA LYNN MULLENDORE,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, the Honorable Colette Davies, Presiding

APPEARANCES:

CHAD WRIGHT
Appellate Defender
CAROLYN GIBADLO
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147
cgibadlo@mt.gov
(406) 444-9505

ATTORNEYS FOR DEFENDANT
AND APPELLANT

AUSTIN KNUDSEN
Montana Attorney General
TAMMY K PLUBELL
Bureau Chief
Appellate Services Bureau
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

SCOTT D. TWITO
Yellowstone County Attorney
VICTORIA CALLENDER
AMANDA TIERNAN
Deputy County Attorneys
P. O. Box 35025
Billings, MT 59107

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Authorities

Montana Constitution

United States Constitution

Other Authorities

STATEMENT OF THE ISSUES

I. Spencer Budde died from blunt force trauma caused by Joyce Duncan crashing into the back of Kaylea Mullendore's car and projecting it down a steep hill into another car. There was insufficient evidence to show Kaylea's decision to buckle Spencer in the backseat with a standard seatbelt was the "cause in fact" of Spencer's death.

II. Alternatively, defense counsel was ineffective for failing to object to irrelevant, prejudicial evidence and failing to offer instructions defining the causal relationship between Kaylea's conduct and Spencer's death.

III. The district court erred when it allowed unqualified and undisclosed expert testimony about a complex traffic collision from two law enforcement officers.

IV. The parties agreed that a single sentence regarding the limitation on Kaylea's parenting rights would be read as an instruction to the jury. The district court warned the State not to otherwise mention the subject because of its prejudicial impact. The State twice exceeded the stipulation and court's order *in limine*. Did the district court err when it denied Kaylea's motion for a mistrial?

V. Did the district court err in ordering Kaylea to pay restitution for lost wages?

STATEMENT OF THE CASE

Ten months after a multiple vehicle wreck caused by another driver, the State charged Kaylea Mullendore with seven offenses related to the death of her young son, paralyzation of her daughter, and injuries to her niece: count I, vehicular homicide while under the

influence; count II, negligent vehicular assault; counts III–VI, criminal endangerment; count VII, driving while suspended. (Doc. 5.) Months later, the State filed an Amended information alleging count I, vehicular homicide while under the influence or, in the alternative, count II, negligent homicide; count III, negligent vehicular assault, or, in the alternative, count IV, criminal endangerment; counts V—VIII, criminal endangerment; count IX, driving while suspended. (Doc. 86.)

After a six-day jury trial and nearly eight hours of deliberations, the jury acquitted Kaylea on count I, vehicular homicide while under the influence, but convicted her of count II, negligent homicide. It acquitted her of count III, negligent vehicular assault, but convicted her of count IV, criminal endangerment. The jury did not reach verdicts in counts V–VIII. The jury convicted Kaylea of count IX, driving while suspended. (Doc. 155.)

For the negligent homicide conviction, Kaylea was sentenced to twenty years with five suspended. For the criminal endangerment conviction, she was sentenced to ten years, all suspended and running concurrently. She was also ordered to pay $13,282.48 in restitution, including $9,458.19 in lost wages. (Doc. 186; Sent. Tr. at 142.)

STATEMENT OF THE FACTS

1. Three car wrecks occurred in quick succession.

Kaylea met with Brandi Castro and Nicole Butler at Brandi's house to catch up while the children played. For two hours, the women chatted as their children played in the yard. (Tr. at 1166.) Around five o'clock, Nicole and Kaylea decided to take the children swimming. (*Id*.) Kaylea's five-year-old son, Spencer, and her six-year-old niece, Teegan, wanted to ride with Nicole but Kaylea said no because Nicole's car did not have enough seatbelts. (Tr. at 1167.) Instead, Teegan sat in Kaylea's front seat, Spencer sat in the backseat behind Kaylea, and Kaylea's daughter, Amyah, sat behind Teegan on the passenger side. Teegan was in a booster seat. (Tr. at 389–391.) Amyah and Spencer both wore seatbelts in the backseat, but when Amyah placed the shoulder strap under her arm and behind her back, her brother copied. (Def.'s Exhibit E.)

As Kaylea drove southbound on 32nd Street West in Billings, Montana, she saw a group of teens who were involved in a car accident with a Roto-Rooter van. The van driver and the teens were waiting for help. Kaylea slowed her car and asked the teens if they were okay. (St.'s

Exhibit 19a, at 3.)

Joyce Duncan rammed her Chevy Uplander van into the back of Kaylea's Acura sedan without braking. Duncan was traveling 31 miles per hour and was distracted by the other accident on the road. (Tr. at 796, 1248, & 1272.) Duncan's Uplander weighed over a thousand pounds more than Kaylea's Acura. (Tr. at 1277.) When the cars collided, Duncan's airbag exploded, and her spare tire spun off the rear of her vehicle. (Tr. at 791, 802, 947.) Kaylea's car shot forward, like a billiard ball that had just been hit by the cue ball. (Tr. at 1008.)

Duncan slammed into Kaylea's car 247 feet before the crest of a steep hill known as "tummy tickle" hill. (Tr. at 1296.) The violent collision shot Kaylea's car forward over a small bridge before ultimately colliding 515 feet later with a large Yukon SUV. (Tr. at 1302.) Kaylea's car hit the side and went under the hood of the Yukon. (Tr. at 1261–62.) Kaylea, Amyah, Teegan, and Spencer were all transported to the hospital. Kaylea had a head injury and a broken collarbone. (Tr. at 616.) Amyah sustained permanent injuries and is paralyzed as a result. (Tr. at 711.) Spencer was killed in the accident. (Tr. at 182.)

2. Kaylea Mullendore's blood was drawn twice, once for medical purposes only and once for legal purposes.

As Kaylea was being treated in the ambulance, an unidentified EMT placed two large ports in her arm to administer treatment. (Tr. at 571.) At the hospital, Kaylea was treated by a medical team including Jennifer Perich, a registered nurse. (Tr. at 559.) The hospital records indicated Perich took a urine sample from Kaylea, but the same records did not indicate who took a blood sample and Perich did not remember. (Tr. at 565–66.) She assumed that whoever took Kaylea's blood used the ports installed in the field to withdraw the blood because that would be customary for medical draws. (Tr. at 574–75.)

The blood test results generated at the hospital warned, "Results to be used for Medical Treatment Only." (St.'s Exhibit 49a, pg. 1.) The emergency room doctor explained that he did not rely on the results of low-level blood alcohol tests when treating Kaylea or other patients. (Tr. at 625.) The medical results indicated an alcohol level of 61 mg/dl. (St.'s Exhibit 49a, pg. 1.) Kaylea and Nicole explained that they were not drinking in the hours they were together before taking the kids swimming. (Tr. at 1171.) Although officers found beer bottles in the

trunk, the car belonged to Kaylea's sister, Kaylea's brother borrowed the car previously, and he was a drinker. (Tr. at 235.)

Ellen Buer, a registered nurse, drew Kaylea's blood for a legal blood draw. (Tr. at 1180.) Unlike the field port installation, she was required to use a nonalcoholic pad to clean Kaylea's arm and her training "emphasized to always have a new IV or new stick to obtain a legal blood draw." (Tr. at 1194.) The forensic results from the sterile draw showed that Kaylea had no alcohol or drugs in her blood. (St.'s Exhibit 52.)

The administrative director of the hospital's laboratory, explained "we don't have, like, a chain of custody." (Tr. at 652.) The forensic lab tested whole blood. (Tr. at 700.) The hospital's analyzer tested serum or plasma. (Tr. at 638.) Testing serum or plasma produces results ten to twenty percent higher than results from testing whole blood. (Tr. at 700.) The chemistry test used by the hospital's analyzer can also produce positive results from other substances, such as alcohol wipes, when testing for ethyl alcohol. (Tr. at 648.) The analyzer's results are not reviewed for accuracy, they are simply reported. (Tr. at 647.) The forensic results are produced and reviewed by two forensic scientists to

ensure accuracy. (Tr. at 696.) The administrative director could not recall what the standard deviation was for the analyzer but acknowledged that it was significant and may have caused the results to vary by as much as 20 milligrams. (Tr. at 651.)

3. The lead investigator first met Kaylea four months after the accident.

Four months after the accident, Kaylea first met with Hunter Cook, an "officer, basic," who was new to the force, but leading the investigation. (Tr. at 426.). Cook had been an officer for less than three years and only training on the crash investigation team for a few months. (Tr. at 425.) As part of the team, he was trained in photography and using a three-dimensional scanner. (Tr. at 432.)

During their meeting, Cook told Kaylea that on November 23, 2019, her license was suspended. (St.'s Exhibit 19a, pg. 18.) She did not know it had been suspended and it was reinstated two weeks after the accident. (Tr. at 376; St.'s Exhibit 19a, pg. 18.) Despite Kaylea's surprise, Cook accused Kaylea of fleeing the scene to avoid getting in trouble for driving without a license. (St.'s Exhibit 19a, pg. 19.) During trial, the State argued Kaylea driving while her license was suspended was the cause Spencer's death. (Tr. at 1384.)

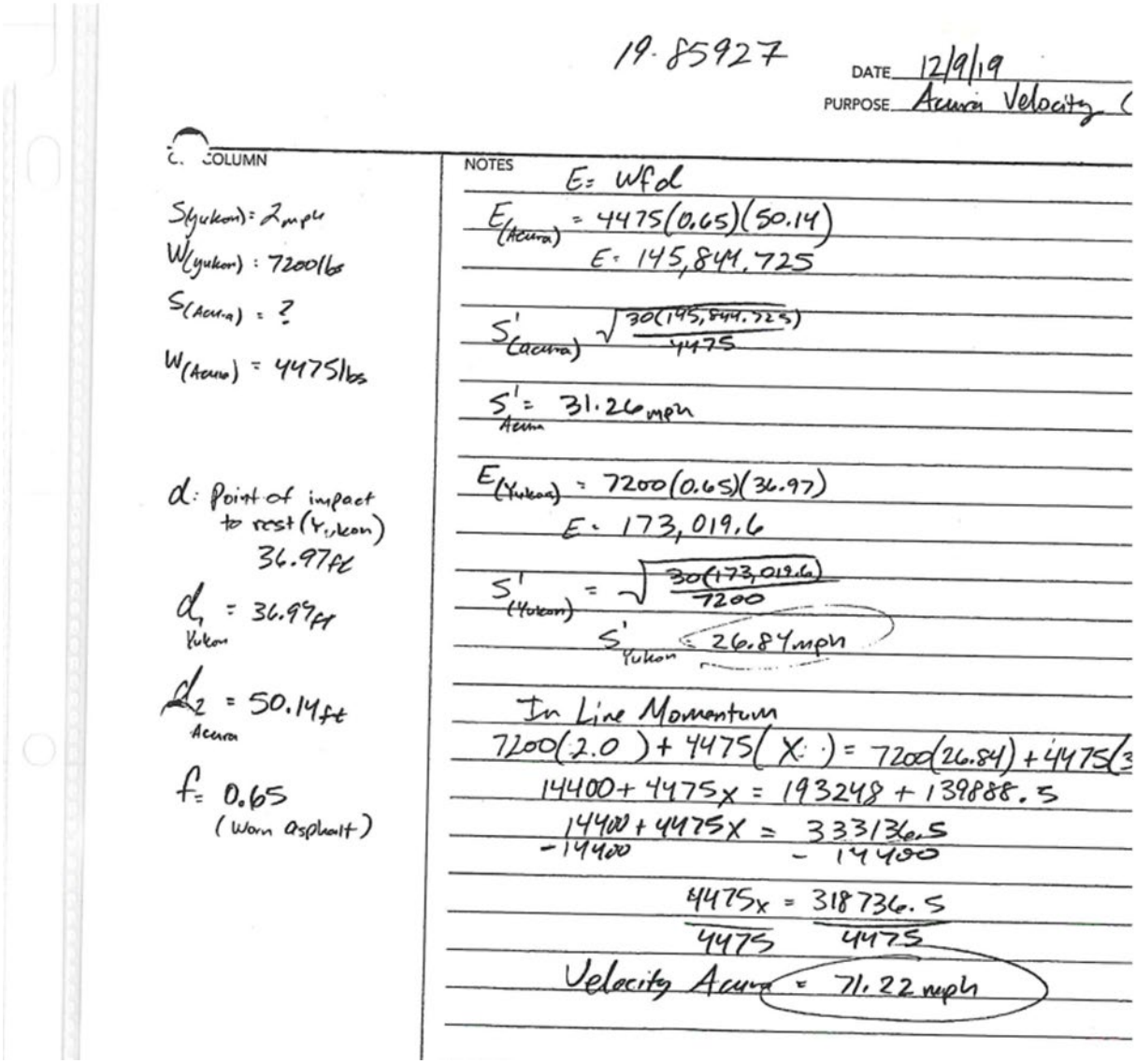
Cook confessed he was not an expert in accident reconstruction. The prosecutor asked him if he was trained as an expert and he candidly responded, "No, I was not." (Tr. at 360.) He was not familiar with the Accreditation Commission for Traffic Accident Reconstruction ("ACTAR") or the requirements to be ACTAR certified. (Tr. at 426–27.) Despite his lack of qualifications, he attempted to calculate Kaylea's speed and alleged during their initial meeting that she was traveling 72 miles per hour when she hit the Yukon. (St.'s Exhibit 19a, pg. 4, 10.) He claimed to see "hard acceleration" marks that "came from [her] vehicle," and said she must have been driving intentionally based on the trajectory of her vehicle. (*Id*. pg. 8.) He also believed Spencer and Amyah were not wearing any seatbelts. (*Id.* pg. 12.) During trial, the State called officer Gabrielle DeNio to corroborate Cook's testimony, but DeNio, like Cook, had not been noticed up as an expert witness and her calculations were never disclosed to the defense. (Tr. at 774.)

4. Cook and DeNio calculated Kaylea's speed, recreated her trajectory, and opined that she intentionally accelerated, despite not being expert accident reconstructionists.

Kaylea repeatedly objected to Cook's testimony as speculative, lacking in foundation, and unqualified. (Tr. at 392, 395, 401, 411, 418,

423, 542, 543.) Cook opined that Kaylea's vehicle traveled over a small bridge, but "then just south of that, there is a drop off into, like, a patch of woods. So, she did not go into the irrigation ditch, and she did not go off the embankment down into the woods." (Tr. at 404.) According to Cook, Kaylea's car only traveled off the curb onto a "grass area." (Tr. at 431.) DeNio testified that the area would have been a "smooth transition" and described it as a "grassy area" "that could be driven on." (Tr. at 752–53.)

Cook also testified that based on his "calculation" Kaylea intentionally accelerated to "a little over 71 miles per hour" when she hit the Yukon. (Tr. at 418.) He relied on the following calculation, which he had never previously attempted:


19-85927 DATE 12/9/19
PURPOSE Accura Velocity (
COLUMN
NOTES
S(yukon) = 2 mph
W(yukon) = 7200lbs
S(Accura) = ?
W(Accura) = 4475lbs
d: Point of impact to rest (Yukon) 36.97ft
d1 Yukon = 36.97ft
d2 Accura = 50.14ft
f = 0.65 (Worn asphalt)
E = Wfd
E(Accura) = 4475(0.65)(50.14)
E = 145,844.725
S'(Accura) √30(145,844.725)/4475
S'Accura = 31.26 mph
E(Yukon) = 7200(0.65)(36.97)
E = 173,019.6
S'(Yukon) = √30(173,019.6)/7200
S'Yukon = 26.84 mph
In Line Momentum
7200(2.0) + 4475(X) = 7200(26.84) + 4475(
14400 + 4475X = 193248 + 139888.5
14400 + 4475X = 333136.5
-14400 -14400
4475X = 318736.5
4475 4475
Velocity Accura = 71.22 mph

(Def.'s Exhibit F.) He used the gross vehicle weights he found on the internet, which is the maximum weight a vehicle can operate with. (Tr. at 471.) He later explained that his calculation would have been more accurate if he had used the curb weight, the weight of the vehicle without passengers or cargo, and added the weight of the passengers. (Tr. at 472.) He also used a co-linear formula, which is for head on

collisions, when "there would be other formulas that would get a more accurate result" since the Yukon turned causing Kaylea to hit it at an angle. (Tr. at 478.)

During the third day of trial, DeNio started to testify that she also tried to calculate Kaylea's speed. (Tr. at 775.) Kaylea objected because it called for expert testimony, any calculations she made were not disclosed to the defense, and the defense was not provided notice that DeNio would testify as an expert. (Tr. at 774–77.) The State admitted that it just decided that day to have DeNio try to calculate Kaylea's speed, it did not disclose the handwritten calculations it had and that it was referring to during DeNio's testimony, and it did not provide notice to the defense, so it was "not going to die on this hill." (Tr. at 777–79.) The district court sustained Kaylea's objection. (Tr. at 778.)

The next day, the State, again, questioned DeNio about Kaylea's speed based on her understanding of Newton's law of physics. (Tr. at 830–31.) Kaylea renewed her objection, but, inconsistent with its prior ruling, the district court overruled the objection. (Tr. at 830–31.) DeNio then proceeded to opine that Kaylea must have intentionally accelerated because she did not believe the force of Duncan's car would

have projected Kaylea's car over "tummy tickle" hill. (Tr. at 831.)

Although Cook claimed he saw tracks from a "hard acceleration" that "came from [Kaylea's] vehicle," he could not identify them in a single picture from the scene or in the three-dimensional scan that covered the entire crash scene. (St.'s Exhibit 18a, at 7:11; Tr. at 438–534.) DeNio "believe[d] that there were maybe some acceleration marks." (Tr. at 737.)

David Rochford, a certified Accident Reconstructionist, testified as an expert for the defense. (Tr. at 1211.) He was a police officer for 30 years and then, for 20 years, pursued a career in accident reconstruction. (Tr. at 1209.) He completed over a thousand hours in accident reconstruction courses and attained his ACTAR certification. (*Id.*) He explained that accident reconstruction relies on Newton's three laws of motion. (Tr. at 1269.) The second law explains, in part, how an object's rate of acceleration depends on the different weight of the objects applying force. (Tr. at 1269–71.) A lighter object will have a greater acceleration rate when force is applied by a heavier object. (*Id.*) Duncan's crash data retrieval ("CDR") recorded her speed at 31 miles per hour when she slammed into Kaylea, and she did not brake. (Tr. at

1272–73.) Rochford was able to calculate that Kaylea was traveling 6.61 miles per hour when she was hit. (Tr. at 1280.) Duncan's Uplander weighed 4,948 pounds whereas the Acura only weighed 3,836 pounds. (Tr. at 1277.) Because of the 1000-pound weight difference, Kaylea's car was immediately shot forward to a post impact speed of 20.35 miles per hour. (Tr. at 1295.) Then, because Kaylea's Acura was on a downward slope, it continued to accelerate to 26.6 miles per hour when it crested "tummy tickle" hill 247 feet after she was hit. (Tr. at 1298.) "Tummy tickle" hill has a steep, eight percent grade, which then accelerated Kaylea's car to 54.4 miles per hour before she crashed into the Yukon. (Tr. at 1299–1300.) The Yukon and Acura collided at a 40-degree angle. (Tr. at 1282.) The co-linear formula that Cook relied upon was for head on collisions at less than a 10-degree angle, which is why, when combined with his use of inaccurate vehicle weights, Cook's speed calculation was so inaccurate. (Tr. at 1282.) Rochford explained that Kaylea's Acura was coasting; while her speed was increasing, she was not causing the acceleration. (Tr. at 1304.) Additionally, there were no "hard acceleration" marks in any of the photos or three-dimensional imaging. (Tr. at 1242.)

5. The State theorized Kaylea caused her children's injuries because she buckled them in adult seatbelts.

The State alleged that Kaylea negligently caused Spencer's and Amyah's injuries because they were not in child car seats and she failed to notice that they removed their shoulder straps or, alternatively, she did not put them in seatbelts at all. (Tr. at 162.) Dr. Lindsey Troy testified that, according to the American Pediatric Association, children under six years old and under sixty pounds should be in a five-point restraint. (Tr. at 184–85.) Then, the State solicited the same information from Dr. Karen Breetz. (Tr. at 714.) Cook believed the children were not wearing any seatbelts, although he never saw the children at the accident, because the seatbelts were not locked into place. (Tr. at 483.) However, he could not explain how pre-tensioners work, the mechanism that causes seatbelts to lock into place. (Tr. at 392–93.) His opinion was inconsistent with Dr. Troy concluding, based on his injuries, that Spencer was wearing a lap belt but not a shoulder strap. (Tr. at 190.) Dr. Breetz also concluded that Amyah was wearing a lap belt but not a shoulder strap based on her injuries. (Tr. at 715.)

The State argued, Kaylea "should not have put Spencer in a car

without a car seat, and the defendant should have made sure his seatbelt was on correctly…but those were her choices. And they were negligent." (Tr. at 1394.) According to the State, "[u]se your rear-view mirror. Take a quick look. Pull over. Double check that the children are…strapped the way they're supposed to be" because "who's that on? That is on the driver. And in this case, that was the mother." (Tr. at 1439.)

During deliberations, the jury asked the district court "What is the Montana seatbelt law for children?" (Tr. at 1449.) The judge refused to instruct the jury about the law on seatbelt usage nor was it instructed according to Mont Code Ann. § 61-13-106, that failure to comply with the seatbelt and car seat laws is not negligence.

6. The State also argued Kaylea was not supposed to be alone with her children, therefore, she caused her children's injuries.

Prior to trial, the State sought to introduce evidence from Kaylea's pending dependency and neglect case. The district court recognized the extremely prejudicial impact of the evidence and ordered the State not to address the issue in any manner. (March 23, 2022, Hrg. at 28; Tr. at 239.) The parties agreed the court would read a jury instruction stating

that, because of a court order, Kaylea was only allowed to have supervised contact with her children. (March 23, 2022, Hrg. at 48.) The State violated the order in *limine* twice. First, it asked Kaylea's sister, Bryn Kojetin, if she was also under the court's order or if she was allowed to have unsupervised visits with the children and, second, it asked Michelle Moore, Kaylea's mother, about her current relationship status with Amyah, inviting Moore to respond that she adopted Amyah. (Tr. at 237–39 & 719.) As a result of the order in *limine* violations, the jury heard that Kaylea, unlike the rest of her family, could not be alone with her children and, ultimately, the district court terminated her parental rights. (Tr. at 239 & 719.) Kaylea moved for a mistrial after the second violation, but the district court denied the motion. (Tr. at 779–80.)

During the deliberations, the jury sent a question asking the court, "[w]hat was the custody agreement at the time of the crash?" (Tr. at 1449.) They were told to refer to the jury instructions and their collective memory. (Tr. at 1450–51.)

7. After nearly eight hours of deliberations, the jury acquitted Kaylea of two counts, convicted her of two counts, and hung on the rest.

The jury deliberated for nearly eight hours. (Tr. at 1449 & 1480.) Eventually, the district court read the cautionary instruction for potentially hung jurors. The jury acquitted Kaylea of the alcohol related charges but convicted her of negligently causing her son's death and criminally endangering her daughter. (Tr. at 1478–81.)

STANDARD OF REVIEW

This Court reviews de novo whether sufficient evidence supports a conviction. *State v. Christensen*, 2020 MT 237, ¶ 11, 401 Mont. 247, 472 P.3d 622. This Court considers the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Christensen*, ¶ 11.

Ineffective assistance of counsel claims are mixed questions of law and fact this Court reviews de novo. *State v. Tucker*, 2008 MT 273, ¶ 13, 345 Mont. 237, 190 P.3d 1080.

This Court reviews a trial court's determination regarding the qualification and competency of an expert witness for an abuse of

discretion. *State v. Harris*, 2008 MT 213, ¶ 6, 186 P.3d 1263, 344 Mont. 208.

This Court reviews a trial court's decision to grant or deny a motion for a mistrial for an abuse of discretion. *State v. McCarthy*, 2004 MT 312, ¶ 41, 324 Mont. 1, 101 P.3d 288.

"Whether a sentence is legal is a question of law subject to de novo review." *State v. Ingram*, 2020 MT 327, ¶ 8, 402 Mont. 374, 478 P.3d 799 (citing *State v. Daricek*, 2018 MT 31, ¶ 7, 390 Mont. 273, 412 P.3d. 1044). This Court "determine[s] legality by considering only whether the sentence falls within statutory parameters, whether the district court had statutory authority to impose the sentence, and whether the district court followed the affirmative mandates of the applicable sentencing statutes." *State v. Steger*, 2021 MT 321, ¶ 7, 406 Mont. 536, 501 P.3d 394.

SUMMARY OF THE ARGUMENT

Joyce Duncan, not Kaylea, was the "but-for" and intervening superseding cause of Spencer's death. The State erroneously told the jury it could convict Kaylea based on remote and accidental conduct that was irrelevant and did not create a foreseeable risk of Spencer's

death. Placing Spencer in an adult seatbelt was not negligent nor was Spencer's death a foreseeable risk when Kaylea drove the short distance across town to the swimming pool. Duncan caused Spencer's death when she failed to pay attention while driving and slammed into the back of Kaylea's car. Because the State's theory of causation was legally prohibited and relied on unrelated, attenuated acts, Kaylea's negligent homicide conviction must be vacated. No reasonable juror could find that she was the cause in fact of her son's death.

In the alternative, Kaylea's counsel was ineffective for failing to object to the State's legally prohibited argument that failing to comply with seatbelt and car seat laws could establish negligence. The jury was never told that under Mont. Codee Ann. § 61-13-106 a violation of these minor traffic laws does not constitute negligence. Counsel was also ineffective for failing to offer an instruction that explained the requisite causal relationship between Kaylea's conduct and Spencer's death and an instruction defining an intervening superseding act. Because of the incomplete instructions, the jury mistakenly believed that even remote or accidental acts could establish the causation element and the jury

had no legal pathway to acquit Kaylea even if it believed that Duncan slamming into her should have severed any prior culpability.

To shift the blame from Duncan to Kaylea, the State relied on a new officer's uneducated, untrained, and unqualified "expert" opinions that should have been excluded under Rule 702. Officer Cook admitted he was not trained in accident reconstruction and the State never tried to qualify him as an expert. Regardless, he attempted to recalculate Kaylea's speed and trajectory and claimed the children were not wearing seatbelts. He opined Kaylea caused the accident that killed her son and paralyzed her daughter. His testimony far exceeded what he personally observed and, because he was not an expert, should have been excluded.

The State then snuck in Officer DeNio's "expert" opinions during re-direct examination after the district court inexplicably reversed its prior ruling excluding her testimony. Her testimony should have been limited because the State's decision mid-trial to have her regurgitate Cook's calculations without providing notice or the basis of her opinions to defense counsel violated the plain language of Mont. Code Ann. § 46-15-322.

Cook's and DeNio's uneducated hypotheses were critical to undermine Kaylea's accident reconstruction expert. Through her expert, Kaylea explained that she did not intentionally accelerate to an unbelievable speed of 72 miles per hour in 500 feet. Instead, she veered into the ditch, not a "small grassy area," and her airbag deployed causing her to lose control. However, Cook and DeNio were two law enforcement voices undermining the one accident reconstruction expert and they were adamant that their misguided opinions were correct.

The district court erred when it denied Kaylea's motion for a mistrial. The district court acknowledged how incredibly prejudicial any extraneous information about Kaylea's dependency and neglect case was to her defense. As such, the district court permitted one carefully crafted sentence to be read to the jury. The State twice violated the order in *limine* and, as a result, the jury needlessly found out that Kaylea, unlike the rest of her family, needed supervision when visiting her children and, ultimately, her parental rights were terminated. The jury focused on the irrelevant facts and asked questions about the "custody agreement" during deliberations. The State's violations invited

the jury to speculate about her prior parenting, including to assume incorrectly that she had previously endangered her children.

Lastly, the district court imposed an illegal sentence when it ordered Kaylea to pay $9,458.19 for lost wages because the clear and unambiguous meaning of Mont. Code Ann. § 46-18-243 "provides for recovery of victim expenses involving a cash payment or outlay," which does not include lost wages.

ARGUMENT

I. The State failed to prove Kaylea's actions were the actual cause of Spencer's death.

The district court erred when it denied Kaylea's motion to dismiss the negligent homicide charge because of insufficient evidence. (Tr. at 1146.) To establish negligent homicide, the State must prove the defendant's gross deviation from the standard of care after being rear-ended was the actual cause (or "cause in fact") of the resulting death and the victim was "'foreseeably endangered' in a manner and to a degree of harm which was foreseeable." *Christensen*, ¶ 156. Causation is only established if the State proves "the event would not have occurred but for [the defendant's] conduct; conversely, the defendant's conduct is not a cause-in-fact of the event if the event would have occurred without

it." *Christensen*, ¶ 156. Causation must be proven beyond a reasonable doubt. *Christensen*, ¶ 157.

Here, the State needed to prove: 1. Kaylea acted with gross negligence, 2. the negligent acts were the actual cause of Spencer's death, and 3. Spencer's death was reasonably foreseeable. *See Christensen*, ¶ 156. The State failed under every prong.

A. Kaylea did not cause Spencer's death by buckling him in an adult seatbelt.

Failing to comply with car seat requirements "does not constitute negligence," and the lack of a booster seat or shoulder strap was not the cause in fact of Spencer's death.

1. Failing to comply with seatbelt and car seat requirements "does not constitute negligence."

Section 61-13-103 prohibits a driver from operating a vehicle unless the occupants are wearing a seatbelt, or, when applicable, riding in a car seat. But, "failure to comply with 61-13-103 does not constitute negligence." Mont. Code Ann. § 61-13-106.

The State repeatedly introduced the American Pediatric Association's seatbelt recommendations and then argued Kaylea was negligent for not abiding by them. (Tr. at 184–89, 714–15, 1384–85,

1439.) Cook testified "all three children should have been in the backseat with full safety seats strapped into the vehicle." (Tr. at 424.) The State's argument directly contradicts Mont. Code Ann. § 61-13-106, which unequivocally states that failing to comply with seatbelt or car seat requirements is not negligence. The State's argument was legally incorrect and should have been excluded.

2. The State failed to establish that buckling Spencer with a standard seatbelt was the "cause in fact" of Spencer's death.

The State needed to offer definitive, nonspeculative evidence that Kaylea's actions were the cause in fact of Spencer's death—it did not. In *Kostelecky v. Peas in a Pod, LLC*, the plaintiffs alleged that the day care provider caused head trauma to their infant daughter. *Kostelecky v. Peas in a Pod, LLC*, 2022 MT 195, ¶ 13, 410 Mont. 239, 518 P.3d 840. The district court granted summary judgment for the defendants as to the causation element because the expert medical evidence could not determine whether the trauma was accidental or not. *Kostelecky*, ¶ 11. This Court affirmed that medical expert testimony that a "specified occurrence, conduct, or mechanism of injury, disease, or other medical condition *could, may, or might have possibly* caused or contributed to, or

is the suspected or assumed cause or contributing cause" of an injury is "neither competent nor relevant proof of causation of that matter." *Kostelecky* ¶ 23 (citing *State v. Vernes*, 2006 MT 32, ¶¶ 15–19, 331 Mont. 129, 130 P.3d 169) (emphasis added). Expert medical testimony is only relevant and probative to causation if it establishes that the "occurrence, nature, cause, and/or prognosis of an alleged bodily or mental injury, disease process, or other medical condition…is given on a more probable than not basis, i.e., a more likely than not basis, or other similar or greater level of certainty of opinion." *Kostelecky* ¶ 23.

In *Christensen*, a doctor overprescribed medication but the coroner determined that the patients' deaths were "accidental overdose deaths" caused from "mixed drug toxicity." *Christensen*, ¶ 153. Other factors may have contributed to the patients' deaths, such as unprescribed drugs, intentional overuse, or suicide. The State failed to present evidence that it was the doctor's prescriptions that were the "but for" cause of the death, therefore, the evidence was insufficient. *Christensen*, ¶¶ 154–57.

Here, the State did not offer any evidence that putting Spencer in the backseat and buckling him with a standard seatbelt was the "but

for" cause of Spencer's death. Dr. Troy testified that the cause of Spencer's death was "blunt force injuries" "consistent with a car accident." (Tr. at 182–83.) When asked more specifically to say with "medical certainty what caused the blunt force injuries," she explained "his car accident." (Tr. at 183.) Dr. Troy did not explain—or offer an opinion with any degree of medical certainty—that Spencer's standard seatbelt was the cause of his death.

Duncan slammed into Kaylea's Acura, pushing her over the steep hill, where she crashed into the Yukon. Duncan's actions were the actual cause in fact of Spencer's death. The State failed to prove that Kaylea's acts alone were the cause in fact of Spencer's death. Even if it had been proper to consider whether Spencer was properly restrained, the State did not establish that the use of standard restraints was the cause in fact of Spencer's lethal blunt force trauma.

B. The jury acquitted Kaylea of the allegation that she was intoxicated because the medical blood draw was unreliable.

If, under the State's theory, Kaylea's negligent act was drinking, it must prove that her drinking was the "cause in fact" of Spencer's death; therefore, it must prove "but-for" Kaylea's drinking she would not have

gotten in the accident, and Spencer would not have died. *Christensen*, ¶ 156. If the jury believed that Kaylea's ability to drive her car was diminished and her drinking caused Spencer's death, it was instructed to convict her of vehicular homicide while under the influence. (Doc. 156, at Instrs. 19–21.) The jury acquitted her of the alcohol charge.

The jury's verdict matched the forensic testing, which confirmed that Kaylea was not drinking and had no other substances in her system. (St.'s Exhibits 52.) Nicole testified they were not drinking earlier in the day. (Tr. at 1171.) The on-scene officer observed that Kaylea did not appear intoxicated. (Tr. at 342–43.) The same officer transported Kaylea to the hospital, and did not notice any alcohol smell, slurred speech, red or glossy eyes, or any other indicators of impairment in the hours he spent in close contact with her. He was trained to look for and document those signs. (Tr. at 343.) Instead, he described her as alert and oriented. (Tr. at 333.) Kaylea drove off the road, because, as Rochford explained, Kaylea was propelled off the side of the road when Duncan slammed into her from behind and her airbag likely deployed causing her to swerve and crash into the Yukon. (Tr. at 1244 & 1316.)

The blood draw for the forensic testing occurred three hours after the accident. If Kaylea had alcohol in her system, it would have been detected through forensic testing. According to the forensic scientist, blood dissipates at an average rate of .015 grams per 100 milliliters per hour. (Tr. at 679.) Therefore, if the medical test was accurate and Kaylea had a blood alcohol content of 61 mg/dl, the forensic test also should have detected alcohol, but it did not.

The medical blood test was most likely contaminated. Buer, when drawing blood for forensic testing, was required to use a nonalcoholic pad to clean Kaylea's arm and her training "emphasized to always have a new IV or new stick to obtain a legal blood draw." (Tr. at 1194.) When Kaylea's blood was drawn while urgently attending to her head injury and broken bone, the same catheters were used that were initially used for administering unknown medication and treatment in the ambulance. (Tr. at 574–75.) Buer's testimony was very clear that re-using a catheter for a forensic test was unacceptable, while it would be common practice for a medical blood draw. The training for medical blood draws differs from forensic blood draws, because, as the emergency doctor explained, he does not rely on the accuracy of the

hospital results for alcohol testing when treating a patient. (Tr. at 625.) The medical blood test explicitly warned that it was not to be used for legal purposes. (St.'s Exhibit 49a, pg. 1.)

The State also failed to establish that the process the hospital used to test the blood during Kaylea's hectic treatment was reliable. The hospital did not have a chain of custody. (Tr. at 652.) The administrator did not know the standard of deviation for the analyzer but acknowledged that it could be significant and, in this case, may have caused the results to vary significantly. (Tr. at 651.) The process also tested serum or plasma, unlike the forensic lab which tests whole blood, so the results may be inflated by ten to twenty percent. (Tr. at 638, 700, & 702.) The administrator could not identify who drew Kaylea's blood or who oversaw the analyzer. (Tr. at 647.) The unknown tech did not need special qualifications, and no one checked their work, unlike the scrupulous standards at the forensic lab that tested two samples and checked the results by two forensic scientists. (Tr. at 647 & 699.)

When viewed in the light most favorable to the State, the evidence failed to establish that Kaylea was intoxicated. The forensic test proved

Kaylea was not drinking, just like the officers observed and Nicole testified. The medical sample was likely contaminated when the EMT used an alcohol swab to clean Kaylea's arm and when the blood was drawn despite the catheter having been used for other purposes. The jury, like the emergency room doctor and like the results warned, did not find the medical results convincing and acquitted Kaylea of vehicular homicide while under the influence.

C. Joyce Duncan ramming into the back of Kaylea's car at 31 mph and propelling her down a steep hill was an intervening, superseding act that broke any causal chain.

Duncan hitting Kaylea was an intervening and superseding act that severed any prior culpability for putting Spencer and Amyah in the backseat and buckling them in the standard seatbelts. An intervening act is a force that comes into motion after the time of the accused's alleged negligent conduct and combines with the accused's alleged negligence to injure the victim. *S.W. v. State*, 2024 MT 55, ¶ 39, 415 Mont. 437, __P.3d ___. A superseding intervening act is an unforeseeable event that severs the accused's liability. *Estate of Strever v. Cline*, 278 Mont. 165, 177, 924 P.2d 666, 673 (1996). A grossly negligent act by a third party "may be considered unforeseeable" and

"criminal or intentional actions of a third person may not be foreseeable." *Estate of Strever*, 278 Mont. at 176, 924 P.2d at 672 (citing *Sizemore v. Montana Power Co.,* 246 Mont. 37, 47, 803 P.2d 629, 635–36 (1990)). Whether an intervening act cuts off culpability for causation may be decided as a matter of law. *Estate of Strever*, 278 Mont. at 179, 924 P.2d at 674.

Duncan slamming into Kaylea's car and projecting her over "tummy tickle" hill was a superseding, intervening act. Kaylea could not anticipate that she would see a car accident, slow to check on the passengers of the vehicle, and, despite the multiple cars on the side of the road and obvious accident on the clear, sunny day, Duncan would be distracted while driving and hit her at full speed. Furthermore, Duncan testified that she was distracted but then tried to brake, but her brakes supposedly failed. (Tr. at 797–98.) If true, Duncan's brakes failing was unforeseeable. Kaylea expected Duncan to follow the law, pay attention to the road, and brake when Kaylea slowed her car.

Even though Amyah and Spencer were buckled in standard rather than child seatbelts, the subsequent injuries that flowed from Duncan's crash were not foreseeable. Kaylea's vehicle ended up traveling over 500

feet because she was near the top of a very steep hill when she was hit. Her vehicle was projected off the road causing her airbag to deploy, and then launched down a steep hill. "Tummy tickle" hill caused Kaylea's car to accelerate over 50 miles per hour. Although there is always a risk associated with driving, Kaylea reasonably believed that she would not be violently rear ended and shot down a hill during the short drive across town to take the children swimming.

Duncan was negligent when she either stopped paying attention to the road in front of her or she drove a vehicle without properly functioning brakes. Her actions set in motion the accident that caused Spencer's death. It was Duncan, not Kaylea, that caused Spencer's death.

II. Alternatively, defense counsel was ineffective when she allowed the State to argue a causation theory that was legally prohibited and failed to offer jury instructions for critical legal issues.

The Sixth and Fourteenth Amendments of the United States Constitution and Article II, Section 24 of the Montana Constitution guarantee the right to counsel in criminal prosecutions. *Whitlow v. State*, 2008 MT 140, ¶ 10, 343 Mont. 90, 183 P.3d 861. The right to counsel necessarily includes effective assistance. *McMann v.*

Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970). When evaluating whether a defendant received effective assistance, "the ultimate inquiry must concentrate on the fundamental fairness of the proceeding." *Weaver v. Mass.*, 582 U.S. 286, 300, 137 S.Ct. 1899, 1911 (2017) (internal quotes omitted).

The defendant must prove that counsel's performance was deficient, so that she did not function as "counsel" as guaranteed by the constitutional right. *Whitlow*, ¶ 10. Second, the defendant must show the deficient performance prejudiced her defense. *Whitlow*, ¶ 10.

"An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance[.]" *State v. Wright*, 2021 MT 239, ¶ 18, 405 Mont. 383, 495 P.3d 435 (quoting *Hinton v. Alabama*, 571 U.S. 263, 274, 134 S.Ct. 1081, 1089 (2014)). Counsel is expected to "evaluate the statute[s]" and "advise [the accused] accordingly." *State v. Becker,* 2005 MT 75, ¶ 19, 326 Mont. 364, 110 P.3d 1. This Court enforces the principle that "counsel's erroneous advice on a critical point 'cannot be excused as a strategic or tactical

judgment but could have sprung only from a misunderstanding of the law.'" *Becker,* ¶ 19.

Here, Kaylea's IAC claim is properly before the Court, because it was counsel's duty to object to irrelevant seatbelt evidence and submit jury instructions on gross negligence and causation.

A. Counsel should have objected to the seatbelt evidence.

There was no "tactical" reason for allowing the State to make a legally incorrect, yet extremely prejudicial argument to the jury about buckling Spencer in a standard seatbelt. Counsel failed to object when she needed to. Counsel should have known that Spencer not being in a booster seat or shoulder strap could not establish negligence. Instead, counsel conceded that Kaylea should have put Spencer in a booster seat but argued it would not have made a difference. (Tr. at 1420.) Counsel should have relied on Mont. Code Ann. § 61-13-106 and had the court instruct the jury that Kaylea buckling Spencer in a standard seatbelt "does not constitute negligence."

Dr. Troy's and Dr. Breetz's testimony about the recommendation that children under 60lbs should be in a booster seat with a shoulder strap was irrelevant but extremely prejudicial. (Tr. at 184–91 & 714.)

The State even went so far as to falsely tell the jury that Dr. Troy testified that a booster seat would have saved Spencer's life. (Tr. at 1393.) The prosecutor showed the jury a picture of a five-point car seat that she believed was ideal. (Tr. at 185.) Cook opined that "all three children should have been in the backseat with full safety seats strapped into the vehicle." (Tr. at 424.) The purpose of the evidence was to inflame the jury by implying that one choice could have saved Spencer's life. The jury was told to convict Kaylea based on a theory that should have been precluded as irrelevant and prejudicial, but counsel failed to object.

B. Counsel should have submitted an instruction explaining the requisite causal relationship between Spencer's death and Kaylea's conduct.

Defense counsel has an obligation to offer jury instructions and use the law to "strike at the heart of the State's case." *State v. Kougl*, 2004 MT 243, ¶ 20, 323 Mont. 6, 97 P.3d 1095. To establish negligent homicide, Mont. Code Ann. § 45-2-201 defines the causal relationship between conduct and result. Importantly, it explains that when the risk of death is the element of the offense, like in negligent homicide, it needs to be death that is foreseeable, not just a general risk. Mont. Code

Ann. § 45-2-201(3). Alternatively, if the actual result is not the same as the probable (foreseeable) result, the element can be established if the injury or the harm is similar—unless the actual result is "too remote or accidental." Mont. Code Ann. § 45-2-201(3)(b).

The jury instruction that defined "negligently" compounded the failure to consider Duncan causing the crash. The jury was instructed:

> A person acts negligently when an act is done with a conscious disregard of the risk, or when the person should be aware of the risk.
>
> The risk must be of a nature and degree that to disregard it involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. "Gross deviation" means a deviation that is considerably greater than lack of ordinary care.

(Doc. 156, at Ins. 16.) Negligently is defined in Montana Code Annotated as, "consciously disregard[ing] a risk that the result will occur or that the circumstance exists or when the person disregards a risk of which the person should be aware that the result will occur [.]" Mont. Code Ann. § 45-2-101(43). Under § 45-2-101, the risk is not any risk, but the risk of the result alleged in the crime.

> If negligently causing a particular result is an element of an offense and the result is not within the risk of which the offender is aware or should be aware, either element can nevertheless be established if:

> (a) the actual result differs from the probable result only in the respect that a different person or different property is affected or that the actual injury or harm is less; or
>
> (b) the actual result involves the same kind of injury or harm as the probable result, unless the actual result is too remote or accidental to have a bearing on the offender's liability or on the gravity of the offense.

Mont. Code Ann. § 45-2-201(3). The instruction given to the jury also deviated from the pattern negligence instructions. The clear direction in the pattern instruction is to "insert applicable conduct related to the case" so that the risk of the conduct the jury is contemplating is clear. Mont. Pattern Instr. 2-105.

Here, "that the result will occur" was omitted and no applicable conduct was inserted in the instruction, and it was not supplemented by an additional instruction explaining the causal relationship between conduct and result. Per the given instructions, Kaylea could be convicted if she disregarded "the risk." The jury was never told the State needed to prove Kaylea's "conduct was both the 'cause-in-fact' of [Spencer]'s death and that [Spencer] was foreseeably endangered" in a manner and to a degree of harm consistent with the actual or probable result. *Christensen*, ¶ 156.

There is no plausible justification for counsel failing to offer a jury instruction defining the requisite causal relationship between Kaylea's conduct and Spencer's death. Even though the district court had broad discretion when formulating the jury instructions, "that discretion [wa]s limited by the overriding principle that jury instructions must fully and fairly instruct the jury regarding the applicable law." *State v. Miller*, 2008 MT 106, ¶ 11, 342 Mont. 355, 181 P.3d 625. Asking for the instruction only could have benefited Kaylea. It would have prevented the State from incorrectly arguing that even "remote or accidental" acts could establish causation. But, because counsel did not ask for an instruction, the jury never heard the applicable law and the State repeatedly argued that even a tenuous relationship between Kaylea's conduct and Spencer's death made her culpable.

C. Counsel should have defined the intervening, superseding act.

Defense counsel argued that Duncan hitting Kaylea was the actual cause of Spencer's death. (Tr. at 1400 & 1430.) Yet she failed to ask for an instruction defining an intervening, superseding act. If the jury believed Kaylea was negligent for using standard seatbelts, it may have also believed that Duncan crashing into her was an unforeseeable

act that severed culpability. However, counsel never provided the jury with the legal path to acquit Kaylea. Without an instruction defining an intervening superseding act, the jury had to convict Kaylea even if they believed that Duncan's unforeseeable and reckless driving overrode Kaylea's decision to use standard seatbelts. Counsel's failure to provide the instruction the jury could rely on to acquit Kaylea constituted deficient performance and prejudiced Kaylea — satisfying both prongs of *Strickland*'s IAC requirements.

III. The State solicited improper expert opinion testimony that harmed Kaylea's defense when it asked Cook and DeNio to reconstruct the accident.

The Montana Rules of Evidence permit both lay opinion and expert opinion testimony. M.R. Evid. 701 & 702. Lay opinion testimony "is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Mont. R. Evid. 701. A lay witness' opinions must be based on his or her personal observations. *Christofferson v. City of Great Falls*, 2003 MT 189, ¶ 49, 316 Mont. 469, 74 P.3d 1021.

Experts may offer opinions based on information they did not personally observe. Mont. R. Evid. 702. An expert may only offer opinions "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue" and the expert must be qualified "by knowledge, skill, experience, training, or education." Mont. R. Evid. 702.

A district court must recognize when "testimony crosses from lay to expert testimony" or error occurs. *State v. Kaarma*, 2017 MT 24, ¶ 86, 386 Mont. 243, 264, 390 P.3d 609. If the district court fails to acknowledge expert testimony, the accused loses her opportunity to challenge the witness' qualifications and the State is improperly allowed to introduce testimony without establishing the foundation. *Kaarma*, ¶ 86–87. The State is required to provide notice before trial of any person it plans to call as an expert and disclose any materials the witness will rely upon, which aids the district court in rendering its decision regarding qualifications. Mont. Code Ann. § 46-15-322(1)(c).

Here, the State disclosed that "all B[illings] P[olice] D[epartment] officers w[ould] testify about their personal observations." (Doc. 144, at 6–7.) During the trial, it asked Cook if he was an expert in accident

reconstruction, and he candidly admitted he was not. (Tr. at 360.) Regardless, the State asked Cook to reconstruct the speed of Kaylea's car, her trajectory, whether the children were wearing seatbelts, and ultimately opine who caused the accident, even though he did not personally observe the accident. Masquerading as an expert, he used outside information and rendered opinions that far exceeded what he was qualified to discuss. The State then used DeNio as an expert to bolster Cook's testimony, despite the State also failing to provide any notice that she would be testifying as an expert and failing to disclose the calculations she used as the basis of her testimony. The district court erred when, over defense counsel's repeated objections, it failed to exclude Cook's and DeNio's unqualified, undisclosed expert testimonies.

A. Cook was not qualified to be an accident reconstruction expert.

As a new police officer with less than three years of experience and no accident reconstruction training, Cook was equipped to investigate simple accidents, not reconstruct complex ones. (Tr. at 359 & 418.) "In cases involving complex accident investigations…it is imperative that the record demonstrate the officer is qualified as an expert on the matter." *State v. James*, 2024 MT 109, ¶ 16, 416 Mont.

412, 549 P.3d 418. An officer may not testify about what caused a complex accident, unless the State presents adequate foundation that he received specialized training and education. *James*, ¶ 16. A police officer's basic "training and experience" does not render him an expert in subjects requiring scientific, technical, or other specialized knowledge. *State v. Nobach*, 2002 MT 91, ¶ 26, 309 Mont. 342, 46 P.3d 618.

An accident reconstructionist is trained in scientific, technical, and other specialized knowledge that qualifies him as an expert. *Wheaton v. Bradford*, 2013 MT 121, ¶ 18, 370 Mont. 93, 300 P.3d 1162. They input specific data, such as the weight of the vehicles, measurements of the resting positions of the vehicle, information from the control module sensors, and observations and measurements from the scene, into scientific and mathematical principles that can then discern the trajectory, velocities, and speed of vehicles. *Wheaton*, ¶ 18. The mathematical and scientific principles demand expertise in physics and Newton's laws of motion. *Delgado v. Unruh*, 2017 WL 957437, *15 (D. Kan. 2017) (noting the accident reconstruction expert calculated velocities, forces, and accelerations using Newton's laws of motion,

standard equations of motion, conservation of momentum, the principle of restitution, vehicle masses, the principles of thermodynamics, and appropriate friction values). Similarly, interpreting the tire marks left by a vehicle, whether yaw marks, acceleration marks, or skid marks, is a technical skill not covered in basic officer training. *Cardona v. Mason and Dixon Lines, Inc.*, 737 Fed.Appx. 978, 982 (11th Cir. 2018); Derek Mayor & Edward J. Imwinkelried, *Forensic Skid Mark Analysis: The Central Importance of the Minor Premise*, 51 No. 2 Crim. Law Bulletin ART 7 (Spring 2015).

The State did not try to qualify Cook as an expert for good reason—he lacked the education, training, skills, and knowledge. The State did not even bother to ask about his educational background or if he had education or training in engineering, physics, biomechanics, or mathematics.

The district court should have recognized that Cook's testimony was unreliable. Cook's hand-drawn calculation was his first-ever attempt to reconstruct a vehicle's speed. He could not do it alone, so he called a previously undisclosed, former instructor for help. (Tr. at 414.) As a result of being inexperienced and lacking credentials, he admitted

that he entered much heavier vehicle weights. (Tr. at 472.) Even more concerning, he admitted that he used the wrong collision formula. (Tr. at 478.)

Cook's testimony was prejudicial because he claimed Kaylea made a "conscious effort" to accelerate to the unbelievable speed of 71 miles per hour. (St.'s Exhibit 19a, at 19.) He claimed the pictures just did not capture the "hard acceleration" marks he saw. (Tr. at 418; St.'s Exhibit 18a, at 4:16–6:11; *see also* Tr. at 456.) He was adamant that Kaylea must have fled the scene intentionally. (St.'s Exhibit 18a, at 18:35–19:00)

Cook was also not qualified to opine whether Amyah and Spencer were wearing seatbelts based on his "basic understanding of how they work." (Tr. at 392.) He did not know how pre-tensioners work, and when asked to explain why they might appear loose or locked, he responded, "I can't speak to it specifically." (Tr. at 393.) The district court should have recognized that because Cook did not see whether the children were buckled and lacked the knowledge to reconstruct what occurred after the fact, his unreliable testimony needed to be limited. The limitation was especially important because Cook's opinion directly

contradicted the treating physician's description of the injuries caused by the violent collision.

Cook was not qualified to speculate about the trajectory of Kaylea's vehicle and he should have been prohibited from testifying that her vehicle traveled into a "little dirt area," and not over the cement curb and into a ditch, like Rochford opined. (Tr. at 411 & 1315) The State used Cook's purported trajectory to argue that Kaylea's airbag did not deploy until she hit the Yukon, whereas Rochford explained that her airbag could have easily deployed at the top of the hill when her vehicle jolted entering and exiting the ditch. (Tr. at 412 & 1244).

Rochford's testimony corroborated that Kaylea lost control after her Acura's airbag exploded and caused her to swerve into the Yukon, but, according to Cook, Kaylea's driving caused the accident with the Yukon. (Tr. at 424.) In Cook's "expert" opinion, her airbag was not in her face, blocking her view of the road, and she intentionally tried to flee the scene. (Tr. at 411–424.) Without training and specialized knowledge, Cook gave the jury an uneducated hunch that matched the State's theory.

As a lay witness, Cook's testimony needed to be limited to what he observed at the scene. The district court should have recognized that Cook's testimony far exceeded lay witness testimony and sustained defense counsel's multiple objections. (Tr. at 411, 417, & 423.)

B. The State failed to provide notice and disclose DeNio's calculations, rendering her expert opinion testimony inadmissible.

DeNio's testimony should have been excluded because the State's last-minute attempt to corroborate Cook's testimony meant it never provided notice nor disclosed DeNio's calculations or opinions to defense counsel. (Tr. at 778.) The State must disclose "all written reports or statements of experts who have personally examined the defendant or any evidence in the particular case, together with the results of physical examinations, scientific tests, experiments, or comparisons[.]" Mont. Code Ann. § 46-15-322(1)(c). The plain language of Montana Code Annotated § 46-15-322, mandates that all materials in the State's possession, whether inculpatory or exculpatory, be provided to the defense. *State v. Knowles*, 2010 MT 186, ¶ 49, 357 Mont. 272, 239 P.3d 129. Because of these clear disclosure violations, the district court

excluded DeNio's opinion about how fast Kaylea was traveling. (Tr. at 778.)

The district court erred when, the following morning without explanation, it overruled its previous ruling and allowed DeNio to testify as an expert witness. Without prior notice or proper disclosure, she testified regarding the conservation of momentum theory and opined that Kaylea's car would not have traveled over "tummy tickle" hill solely from the force of Duncan slamming into her. (Tr. at 831.) To make matters worse, the State snuck the questions in during redirect examination, so Kaylea did not have an opportunity to cross-examine DeNio on the reliability of her calculations and opinions. (*Id.*) Nothing had changed regarding the State's disclosure errors, so the court should have continued to exclude DeNio's expert testimony

C. Cook's and DeNio's unqualified, undisclosed opinions were the backbone of the State's case.

The State used Cook and DeNio's misguided opinions to convince the jury that Kaylea intentionally sped away after being hit by Duncan. (Tr. at 1392–94.) All the witnesses agreed that Kaylea's car accelerated after the accident, but Cook's and DeNio's opinions directly contradicted Rochford's opinion that Kaylea's vehicle was only traveling 52 miles per

hour, the natural result caused by Duncan crashing into Kaylea and propelling her over the slope of the hill. Cook and DeNio corroborated each other's opinions, which encouraged the jury to defer to them over Rochford. Additionally, the State argued that because Cook and DeNio "were there that night", unlike Rochford, their opinions were more reliable. (Tr. at 1445–46.)

It was Cook's opinions that formed the basis of the State's argument that Kaylea intentionally accelerated, fled the scene, did not buckle the children, and ultimately, like Cook testified she "was wrong." (Tr. at 424.) They were further bolstered by DeNio's surprise opinions based on her undisclosed calculations. This Court should reverse Kaylea's conviction and remand for a new trial limiting the testimony of both Cook and DeNio.

IV. The district court erred in denying Kaylea's motion for a mistrial after the State violated the order in *limine* and told the jury her right to parent Amyah was terminated.

Prior bad acts are not admissible to prove the accused acted consistent with their prior misgivings. Mont. R. Evid. 404(b). "The trial court must ensure that any permissible use of evidence that could be barred under Rule 404(b) is 'clearly justified and carefully limited.'"

State v. Flowers, 2018 MT 96, ¶ 20, 391 Mont. 237, 416 P.3d 180. If offered to prove motive, the evidence is still not admissible "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Mont. R. Evid. 403.

In *State v. Erickson*, 2021 MT 320, 406 Mont. 524, 500 P.3d 1243, the State improperly introduced evidence that the defendant was on felony probation and previously incarcerated. *Erickson*, ¶ 21. Although the State did not tell the jury why Erickson was on probation or incarcerated, the comments "invited the jury to speculate" about his prior bad behavior, "including to assume—incorrectly—that his previous conviction had been for a violent offense similar to the current charge." *Erickson*, ¶ 21. Speculation about prior misconduct encourages the jury to prejudge the accused and penalize them for past bad character, rather than on the facts alleged. *State v. Derbyshire*, 2009 MT 27, ¶ 51, 349 Mont. 114, 201 P.3d 811.

A mistrial is appropriate when there is a "reasonable possibility that inadmissible evidence contributed to the conviction." *State v.*

Ankeny, 2018 MT 91, ¶ 36, 391 Mont. 176, 417 P.3d 275. "In determining whether a prohibited statement contributed to a conviction, we consider the strength of the evidence against the defendant, the prejudicial effect of the testimony, and whether a cautionary instruction could cure any prejudice." *Ankeny*, ¶ 36 (quoting *State v. Bollman*, 2012 MT 49, ¶ 33, 364 Mont. 265, 272 P.3d 650).

The jury was charged with determining whether Kaylea was the cause in fact of her son's death and her daughter's severe injuries. The jury learned that she, unlike her sister, could not see her children alone, and her mother adopted Amyah. It was invited to speculate about Kaylea's prior bad behavior, "including to assume" that the loss of her parental rights was relevant because it had been for endangering her children. *See Erickson*, ¶ 21. Speculation about her prior misconduct encouraged the jury to prejudge her and penalize her for past bad character, rather than on the facts alleged. *See Derbyshire*, ¶ 51.

Additionally, unlike the stipulated sentence that she was to be supervised during visits, Amyah being adopted was a permanent decision and a direct reflection on her ability to parent. It told the jury that Kaylea was deemed unfit to mother by the court. The State's tactic

worked as the jury focused on the comments during deliberations and asked the district court for additional clarification. (Tr. at 1449.)

The district court erred in denying the motion for a mistrial because, given the extremely prejudicial nature of the statements, there is a "reasonable possibility that [the] inadmissible evidence contributed to the conviction." *Ankeny*, ¶ 36.

V. The district court erred when it ordered Kaylea to pay restitution for lost wages.

A sentencing court may order the accused to pay restitution for the victim's "pecuniary loss." Mont. Code Ann. § 46-18-241(1). Pecuniary loss is defined as,

> (a) all special damages, but not general damages, substantiated by evidence in the record, that a person could recover against the offender in a civil action arising out of the facts or events constituting the offender's criminal activities, including without limitation out-of-pocket losses, such as medical expenses, loss of income, expenses reasonably incurred in obtaining ordinary and necessary services that the victim would have performed if not injured, expenses reasonably incurred in attending court proceedings related to the commission of the offense, and reasonable expenses related to funeral and burial or crematory services;
> …
> (d) reasonable out-of-pocket expenses incurred by the victim in filing charges or in cooperating in the investigation and prosecution of the offense.

Mont. Code Ann. § 46-18-243. In *State v. Barrick*, 2015 MT 94, 378 Mont. 441, 347 P.3d 241, this Court considered whether pecuniary losses included lost wages. It held, "the clear and unambiguous meaning" of Mont. Code Ann. § 46-18-243 "provides for recovery of victim expenses involving a cash payment or outlay." *Barrick*, ¶ 17. Lost wages that are never earned are not an out-of-pocket expense and, therefore, they are not recoverable as restitution. *Barrick*, ¶ 17.

Just like in *Barrick*, here, the district court erred when it ordered Kaylea to pay $9,458.19 for lost wages that were never earned. (Sent. Tr. at 142; Doc. 159, at Exhibit A.) Lost wages are not recoverable as restitution, because they are not "expenses involving a cash payment or outlay." Therefore, this Court must order the district court to reduce its restitution order by $9,458.19.

CONCLUSION

Kaylea Mullendore did not cause her son's death or her daughter's injuries; Kaylea's conviction for negligent homicide should be vacated and a judgment of acquittal entered due to insufficient evidence. Alternatively, her counsel should be deemed ineffective, and her case should be remanded for a new trial on the negligent homicide charge.

The State introduced unreliable, undisclosed "expert" opinions that undermined Kaylea's defense. The case must be remanded for a new trial with an order limiting the testimony of Cook and DeNio.

This Court should also find that the district court abused its discretion in not granting a new trial when the State twice violated the order in *limine* and remand for a new trial.

Upon remand and retrial, the district court should be instructed that if Kaylea is convicted it may not impose $9,458.19 for lost wages.

Respectfully submitted this 30th day of September, 2024.

OFFICE OF STATE PUBLIC DEFENDER
APPELLATE DEFENDER DIVISION
P.O. Box 200147
Helena, MT 59620-0147

By: /s/ Carolyn Gibadlo
CAROLYN GIBADLO
Assistant Appellate Defender

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 10,546, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Carolyn Gibadlo
Carolyn Gibadlo

APPENDIX

CERTIFICATE OF SERVICE

I, Carolyn Marlar Gibadlo, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 09-30-2024:

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

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

Electronically signed by Kim Harrison on behalf of Carolyn Marlar Gibadlo
Dated: 09-30-2024