IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0631

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JAMES HOUSTON PARKER,

Defendant and Appellant.

APPELLANT'S PRINCIPAL BRIEF

On Appeal from the Montana Eighth Judicial District Court of Cascade County, the Honorable John A. Kutzman, Presiding

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STATEMENT OF THE ISSUES

Issue I: The to trial by jury and due process require the State prove beyond a reasonable doubt every element of a criminal offense, including the requisite state of mind. The State proposed a jury instruction omitting the specific purpose element of tampering with evidence, replacing it with general knowingly. Trial counsel failed to object, the district court instructed the jury accordingly, and James Parker was convicted of two counts of tampering. Does the erroneous instruction warrant this Court's invocation of plain error review?

Issue II: Did Parker's trial attorney render constitutionally ineffective assistance by failing to object to the legally deficient elements instruction and prejudice Parker when evidence in the record supported a knowingly state of mind but not specific purpose?

Issue III: Ethical rules prohibit lawyers from presenting issues with no basis in the law and from knowingly making misstatements of law to courts, opposing counsel, and the jury. Claims of prosecutorial misconduct are measured by reference to such rules. As a matter of seemingly first impression, does proposing, allowing the trial court to ultimately issue without correction, and highlighting during closing argument an elements instruction that blatantly misstates the law to the State's advantage constitute prosecutorial misconduct?

STATEMENT OF THE CASE

The State charged Parker by Information with one count of Aggravated Assault and two counts of Tampering with or Fabricating Physical Evidence ("Tampering") in the District Court for the Eighth Judicial District (hereinafter "trial court" or "district court"). (D.C. Doc. 3.) The State's Information accurately stated that Tampering requires, *inter alia*, an accused "altered, destroyed, concealed, or removed any record, document, or thing **with purpose** to impair its verity or availability in the proceeding or investigation." (D.C. Doc. 3, at 2 (emphasis added) (citing Mont. Code Ann. § 45-7-207(1)(a).)

Before trial, the State proposed as State's 19 and 20 (one for each count) Tampering elements instructions completely omitting the requirement that Parker have destroyed evidence "with purpose to impair its verity or availability in the proceeding or investigation" and replaced it with "The Defendant acted knowingly." (*See* Trial Tr. Day 1, at 6:2–4; Trial Tr. Day 2, at 235:20–237:2.)[1] During the settling of instructions, the district court proposed giving these deficient instructions, and Parker's trial counsel failed to object. (Trial Tr. Day 2, at 235:20–237:2.) The trial court accordingly submitted the erroneous Tampering elements

[1] There was only one proposed jury instruction filed with the district court, which was filed by the defense. However, it is clear from the above-referenced portions of the trial transcript that the State submitted proposed jury instructions to the district court by other means.

instructions to the jury (along with an instruction reciting the relevant portion of the Tampering statute verbatim). (D.C. Doc. 84, Nos. 20–22; Trial Tr. Day 3, at 64:14–66:1.) While the jury found Parker not guilty of Aggravated Assault, it found him guilty of both counts of Tampering. (D.C. Doc. 85.)

STATEMENT OF THE FACTS

On the evening of the events giving rise to this case, P.H. broke up with her boyfriend, who is also the father of her children. (Trial Tr. Day 2, at 159:13–19.) Around ten p.m., P.H. went to a neighboring apartment to seek support from Parker's mother and to drink alcohol because she was nervous about the breakup. (Trial Tr. Day 2, at 159:13–163:5, 166:18–24.) Indeed, P.H. was "in a bad situation" with her ex, who was upset and "blowing up" her phone with text messages and calls until 2:18 a.m. that night. (Trial Tr. Day 2, at 106:13–25, 162:1–9, 175:16–176:21, 193:14–17, 201:2–23.) Around eleven p.m., P.H. wanted to get some of her things from her ex's house located approximately half a mile away; Parker's mother asked Parker to accompany P.H. "so she can feel alright", and despite not wanting to because Parker knew P.H.'s ex, he walked there with her. (Trial Tr. Day 2, at 92:12–21, 163:10–24, 171:16–173:16). The last thing P.H. remembers of that night was sitting in lawn chairs outside Parker's mother's apartment drinking with Parker and his mother between three and four a.m. (Trial Tr. Day 2, at 164:21–166:11.) Tragically, someone assaulted P.H. sometime

between her last memory and four a.m. when she arrived at a Town Pump with a bloody and swollen face. (Trial Tr. Day 2, at 88:13–22.) P.H. testified she had no memory of the assault. (Trial Tr. Day 2, 176:22–177:11.) In fact, no one testified at trial to witnessing the assault.

I. The Investigation

Police officers responded to the call at Town Pump and eventually went to Parker's mother's apartment, where they noticed pools of blood on the sidewalk and smelled bleach. (Trial Tr. Day 2, at 92:18–94:9.) There was evidence admitted at trial that Parker would clean the entryway to his mother's apartment when spills occurred. (Trial Tr. Day 2, at 208:22–25.) Officers located Parker asleep in a chair in the living room with blood and bleach on his shoes and bleach on his socks; Parker was immediately arrested. (Trial Day 2, at 95:5–16, 100:12–16, 209:3–8.) The police further seized a hammer and a curtain rod they believed were weapons used in P.H.'s assault and an empty bottle of bleach from a nearby community dumpster. (Trial Tr. Day 2, at 96:1–6, 108:21–109:11.) At this point, the police were mistakenly convinced that Parker was the one who assaulted P.H.

The police executed a body search warrant in one of their interview rooms. (Trial Tr. Day 3, at 28:14–21.) The officers/detectives executing the warrant believed Parker had blood on his lips. (Trial Tr. Day 3, at 30:20–24.) However, at no point did the same officers/detectives inform Parker that they wanted to collect

a sample of what they believed was blood on his lip, and Parker, who licks his lips "all the time" did so before they could collect the sample. (Trial Tr. Day 3, at 31:11–32:4.)

The police sent the hammer, curtain rod, empty bleach bottle, Parker's shoes, Parker's latent fingerprints, and buccal swabs of Parker and P.H., *inter alia*, to the State Crime Lab for analysis. (Trial Tr. Day 2, at 116:5–13, 142:22–143:4.) The analysis determined there was no blood or fingerprints on the curtain rod or the hammer. (Trial Tr. Day 2, at 117:5–18, 143:15–144:21.) One fingerprint was found on the bleach bottle matching Parker. (Trial Tr. Day 2, 121:12–15.) As to the blood on the shoes, the analysis determined at least two individuals contributed to the DNA information: P.H. was conclusively established as one—Parker was excluded as a contributor to the major DNA profile. (Trial Tr. Day 2, at 152:7–154:10.) There is no indication in the record that the police ever sought collection of P.H.'s ex's DNA sample—or that the State Crime Lab was ever asked to analyze the same.

II. Trial

At trial, the district court properly instructed the jury of the elements the State had to prove to convict Parker of Aggravated Assault. (D.C. Doc. 84, No. 18.) During closing, the State carefully went through each of the elements for the charge, including the third: a mental state element. (Trial Tr. Day 3, at 73:3–

74:14.) Defense counsel argued in closing the State failed to prove several elements and posited that P.H.'s ex—who knew where she was and was angry about the fresh breakup—could have been the assailant. (Trail Tr. Day 3, at 77–88.) The jury appropriately found Parker not guilty of Aggravated Assault. (D.C. Doc. 85.)

In contrast, the State, the trial court, and defense counsel all failed to ensure the jury was properly instructed and understood the elements of Tampering. The State's proposed Tampering elements instructions omitted the requirement that Parker have destroyed evidence "with purpose to impair its verity or availability in the proceeding or investigation" and replaced it with "The Defendant acted knowingly." (D.C. Doc. 84, Nos. 21, 22.) Defense counsel failed to object to the deficient instruction. (Trial Tr. Day 2, at 235:20–237:2.) The trial court was accordingly unaware that the instruction was a misstatement of the law and issued it to the jury with the specific instruction to find Parker guilty if he acted knowingly. (D.C. Doc. 84, Nos. 21, 22; Trial Tr. Day 3, at 64:14–66:1.)

During closing—and unlike the assault charge where the State carefully discussed each element, including the state of mind element—the State only discussed the first two elements of Tampering, stopping short of the clear misstatement of law that only knowingly was required. (Trial Tr. Day 3, at 74:15–75:19.) With a Tampering instruction that eliminated an element of the offense in

hand and instruction from district the court to find Parker guilty if he merely acted knowingly, the jury found Parker guilty of both Tampering counts. (D.C. Doc. 85.)

STANDARD OF REVIEW

"This Court generally 'will not consider issues raised for the first time on appeal when the appellant had the opportunity to make an objection at trial.'" *State v. Daniels*, 2019 MT 214, ¶ 24, 397 Mont. 204, 448 P.3d 511 (quoting *State v. Weaver*, 1998 MT 167, ¶ 24, 290 Mont. 58, 964 P.2d 713, *superseded by statute on unrelated grounds*). However, the Court "may discretionarily review claimed errors that implicate a criminal defendant's fundamental constitutional rights, even if no contemporaneous objection is made" under plain error review. *Daniels*, ¶ 25 (quoting *Weaver*, ¶ 25).

Plain error review is warranted if the appealing party: "(1) demonstrate[s] the claimed error implicates a fundamental right and (2) firmly convince[s] this Court that failure to review would result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial proceedings, or compromise the integrity of the judicial process." *State v. Williams*, 2015 MT 247, ¶ 16, 380 Mont. 445, 358 P.3d 130 (quoting *State v. Carnes*, 2015 MT 101, ¶ 13, 378 Mont. 482, 346 P.3d 1120). This Court's power to invoke plain error review "is inherent in the appellate process itself." *State v. Finley*, 276 Mont. 126, 134,

915 P.2d 208, 213 (1996), *overruled in part on unrelated grounds by State v. Gallagher,* 2001 MT 39, ¶ 21, 304 Mont. 215, 19 P.3d 817.

"The standard of review of jury instructions in criminal cases is whether the instructions, as a whole, fully and fairly instruct the jury on the law applicable to the case." *Weaver*, ¶ 28 (citing *State v. Patton*, 280 Mont. 278, 286, 930 P.2d 635, 639 (1996)).

"Only record-based ineffective assistance of counsel claims are considered on direct appeal. . . . To the extent such claims are reviewable, they present mixed questions of law and fact" subject to de novo review. *State v. Ugalde*, 2013 MT 308, ¶ 28, 362 Mont. 234, 311 P.3d 772 (citations and internal quotation marks omitted).

"This Court generally will not address issues of prosecutorial misconduct pertaining to a prosecutor's statements not objected to at trial. 'We may review such an issue, however, under the plain error doctrine.'" *Ugalde*, ¶ 27 (internal citations omitted) (quoting *State v. Aker*, 2013 MT 253, ¶ 21, 371 Mont. 491, 310 P.3d 506).

SUMMARY OF THE ARGUMENT

The trial court, defense counsel, and the State all failed to safeguard Parker's constitutional rights to trial by jury and due process, which required the jury to determine the State proved all elements of Tampering beyond a reasonable doubt.

However, the jury was not properly instructed of all the elements because the element that required Parker to act "with purpose to impair the evidence's verity or availability" was replaced with a less burdensome knowingly element. The jury accordingly determined Parker was guilty of Tampering not based on the elements of the offence, violating his due process rights. While the erroneous instruction was not objected to at trial, this Court should invoke plain error review to correct the error because failure to do so would undermine the fundamental fairness of Parker's trial.

Parker received ineffective assistance of counsel because his trial counsel failed to object to the erroneous instruction. This failure cannot be considered a strategic or tactical decision because specific purpose is a more exacting and narrower mental state than knowingly. Parker suffered prejudice because of his counsel's deficient performance and is entitled to a new trial.

The prosecutors' decision to replace the mandatory specific purpose element with a less burdensome knowingly element—without any legal basis to do so—violates several Montana Rules of Professional Conduct. Such unethical conduct amounts to prosecutorial misconduct that deprived Parker of a fair trial, requiring a new one.

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ARGUMENT

I. The Court should invoke plain error review and conclude the trial court violated Parker's constitutional rights to trial by jury and due process by instructing the jury to find Parker guilty of Tampering if he acted knowingly instead of with the specific purpose to impair evidence.

"The right to trial by jury and the right to due process of law are fundamental and both are explicitly guaranteed by the Montana and the United States Constitutions." *Daniels*, ¶ 32 (citing Mont. Const. art. II, §§ 17, 24, 26; U.S. Const. amends. VI, XIV; *Weaver*, ¶ 26). Both this Court and the Supreme Court of the United States interpret these rights to "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506, 509, 115 S. Ct. 2310, 2313 (1995) (citing *Sullivan v. Louisiana*, 508 U.S. 275, 277–278, 113 S. Ct. 2078, 2080 (1993)); *Daniels*, ¶ 32 (citing *State v. Newman*, 2005 MT 348, ¶ 19, 330 Mont. 160, 127 P.3d 374 (Nelson, J., specially concurring) ("The right due process necessarily encompasses the right to a fair trial, the right to have the state prove every element of a charged offense beyond a reasonable doubt, and the presumption of innocence.").

"The district court's function during trial is 'to instruct the jury on every issue or theory finding support in the evidence, and . . . [to] accurately and correctly state the law applicable in a case.'" *Daniels*, ¶ 34 (quoting *State v. King*,

2016 MT 323, ¶ 10, 385 Mont. 483, 385 P.3d 561). "In criminal matters, juries must be 'instructed on the mental state pertinent to the crime charged.'" *State v. Marfuta*, 2024 MT 245, ¶ 37, 418 Mont. 353, 557 P.3d 1260 (quoting *State v. Ilk*, 2018 MT 186, ¶ 18, 392 Mont. 201, 422 P.3d 1219); *see also* Mont. Code Ann. § 45-2-103. "Jury instructions that relieve the State of its burden to prove every element of the charged offense beyond a reasonable doubt violate the defendant's due process rights." *City of Missoula v. Zerbst*, 2020 MT 108, ¶ 10, 400 Mont. 46, 462 P.3d 1219 (citing *State v. Iverson*, 2018 MT 27, ¶ 11, 390 Mont. 260, 411 P.3d 1284).

a. The Tampering statute and this Court's related precedent require that a defendant act with the specific purpose to impair the availability of physical evidence.

Tampering has two separate subsections, each with its own separate criminal act and mental state requirements. Mont. Code Ann. § 45-7-207(1)(a), (b). The State charged both counts of Tampering against Parker under subsection (1)(a). (D.C. Doc. 3, at 2, 3.) Subsection (1)(a) states:

> (1) A person commits the offense of tampering with or fabricating physical evidence if, believing that an official proceeding or investigation is pending or about to be instituted, the person:
>
> (a) alters, destroys, conceals, or removes any record, document, or thing **with purpose** to impair its verity or availability in the proceeding or investigation;

Mont. Code Ann. § 45-7-207 (emphasis added). This Court has consistently set forth the elements of (1)(a) Tampering as "(1) the defendant had knowledge of or believed an official proceeding or investigation was pending or imminent; (2) the defendant took action to conceal physical evidence pertinent to the proceeding or investigation; and (3) the defendant **had the intent to purposely** impair the availability of physical evidence." *Daniels*, ¶ 45 (emphasis added) (citing *State v. Polak*, 2018 MT 174, ¶ 36, 392 Mont. 90 422 P.3d 112); *see also State v. Staat,* 251 Mont. 1, 8–9, 822 P.2d 643, 644 (1991); *see also State v. Nelson*, 2014 MT 135, ¶¶ 17–21, 375 Mont. 164, 334 P.3d 345. There can be no doubt from the plain language of the Tampering statute and this Court's precedent interpreting the same that a conviction for subsection (1)(a) Tampering requires a jury determination that, beyond a reasonable doubt, the defendant acted with the specific purpose to impair physical evidence.

b. Acting with a specific purpose, or what was formally called specific intent, is fundamentally a different and less burdensome to prove mental state than knowingly.

When the criminal code was changed in 1973, the common-law concepts of general intent and specific were replaced with the statutorily-defined criminal mental states of purposefully, knowingly, and negligently. *State v. Mills*, 2018 MT 254, ¶ 19, 393 Mont. 121, 428 P.3d 834. While "specific intent" was also removed from the vernacular of the criminal code in 1973, the concept that certain crimes

require proof of specific intent, now called "specific purpose," was not. *E.g.*, *Mills*, 2018, ¶ 19 (discussing theft); *State v. Starr*, 204 Mont. 210, 218–19, 664 P.2d 893, 897–98 (1983) (discussing aggravated kidnapping, theft, and burglary).[2]

Tampering unequivocally requires the defendant act with the specific purpose to impair the availability of physical evidence. Purposefully is the most culpable mental state, defined: "a person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is the person's conscious object to engage in that conduct or to cause that result." Mont. Code Ann. § 45-2-101(65); *Marfuta*, ¶ 37. This is fundamentally different than and incompatible with the mental state of knowingly, merely "refers to a state of mind in which a person acts, while not toward a certain objective, at least with full knowledge of relevant facts and circumstances." *Marfuta*, ¶ 37 (citing *State v. Miller*, 1998 MT 177, ¶ 22, 290 Mont. 97, 966 P.2d 721); Mont. Code Ann. § 45-2-101(35)). Specific purpose—or acting with the conscious object to engage in specific conduct or cause a specific result—is a far narrower mental state than knowingly, which specifically does not require acting toward a certain objective. One can easily imagine a wide variety of conduct that could fairly be described as knowingly but not with a specific purpose:

[2] Some of these crimes give the State options between proving specific purpose or the more general purposefully and knowingly; Tampering does not. *Compare* Mont. Code Ann. §§ 45-6-204, 45-6-301 *with* Mont. Code Ann. § 45-7-207.

- A person may pick up what they believe to be an abandoned bicycle while cleaning up garbage in a roadside ditch; while they might know that removing the bicycle could deprive the owner of it, they are not acting with the specific purpose to do so as required by (1)(a) theft. Mont. Code Ann. § 45-6-301.
- A person involved in a hunting accident may scratch an itch on their hand because they have an eczema outbreak and it itches; while they may know that doing so could remove gunpowder residue, that does not mean they did so with the specific purpose to impair the residue as physical evidence as required by (1)(a) Tampering. Mont. Code Ann. § 45-7-207.
- If kids egg a house and the homeowner cleans up the egg, did they commit Tampering with the specific purpose to impair evidence, or was their specific purpose simply to clean their property?

There is simply no conceivable reason that honors a defendant's constitutional rights to replace a required specific purpose mental state with general knowingly because it presents the possibility that a conviction is based on a mental state that does not constitute the crime. *See Marfuta*, ¶ 37; *Mills*, ¶¶ 15–20; *Starr*, 204 Mont. at 218–19, 664 P.2d at 897–98; Mont. Code Ann. § 45-2-103.

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c. The given Tampering elements instruction impermissibly misstated the law and relieved the State of its burden to prove the specific purpose of impairment element.

Despite Tampering's requirement that a defendant acted with purpose to impair physical evidence, the trial court instructed the jury:

> To convict the Defendant of Count II: Tampering with Evidence, the State must prove the following elements:
> i. The Defendant believed that an official proceeding or investigation was pending or about to be instituted.;
> AND
> 2. The Defendant destroyed an item of evidence;
> AND
> 3. The Defendant acted knowingly.
> If you find from your consideration of all the evidence that all of these elements have been proved beyond a reasonable doubt, then you should find the Defendant guilty.
> If, on the other hand, you find from your consideration of all the evidence that any of these elements has not been proved beyond a reasonable doubt then you should find the Defendant not guilty.

(D.C. Doc. 84, Nos. 21, 22; Trial Tr. Day 3, at 64:14–66:1.) This instruction misstated the law to the jury by replacing the specific purpose of impairment element with a general knowingly element and specifically instructed the jury that if the knowingly element was proven (along with the first two elements) "you should find the Defendant guilty." (D.C. Doc. 84, No. 21; Trial Tr. Day 3, at 64:14–66:1.) As a result of this error, the State was unjustifiably relieved from the burden of proving beyond a reasonable doubt the more narrow and most culpable specific purpose mental state.

d. The conflicting instruction containing the plain language of the Tampering statute does not negate the erroneous elements instruction.

The trial court also gave the jury an instruction that recited the statutory language of Tampering:

> A person commits the offense of tampering with or fabricating physical evidence if, believing that an official proceeding or investigation is pending or about to be instituted, the person alters, destroys, conceals, or removes any record, document, or thing with purpose to impair its verity or availability in the proceeding or investigation.

(D.C. Doc. 84, No. 20.) The State will likely argue that this instruction negates the faulty Tampering elements instruction because jury instructions are reviewed as a whole for whether they "fully and fairly instruct the jury on the law applicable to the case." *Weaver*, ¶ 28 (citing *Patton*, 280 Mont. at 286, 930 P.2d at 639). While the full law was in the instructions, they were anything but fair to Parker.

This Court has long recognized that giving conflicting jury instructions on a material issue is reversible error. *E.g.*, *State v. Rolla*, 21 Mont. 582, 587, 55 P. 523, 525 (1898) ("when conflicting propositions of law are given upon a material point, one correct and the other incorrect, the judgment will be reversed. It cannot be assumed in such case that the jury will follow the correct statement of the law."); *Wells v. Waddell*, 59 Mont. 436, 444, 196 P. 1000, 1002 (1921) ("[A] jury composed of laymen cannot be expected to determine which of two conflicting instructions correctly states the law. They are entirely at liberty to follow either one

and neither the trial court nor this court can determine which one was the determining factor in arriving at the verdict."); *Swenson v. Buffalo Bldg. Co.*, 194 Mont. 141, 151, 635 P.2d 978, 984 (1981) (citing *Bohrer v. Clark*, 180 Mont. 233, 590 P.2d 117 (1978)) ("The giving of conflicting instructions on a material issue has been held to be reversible error by this Court."). Here, the conflicting statements of law given to the jury on the material issue of mental state justifies reversal on its own.

"'American jurisprudence depends on a jury's ability to follow instructions and juries are presumed to follow the law that courts provide.'" *State v. Wienke*, 2022 MT 116, ¶ 32, 409 Mont. 52, 511 P.3d 990 (quoting *State v. Sanchez*, 2008 MT 27, ¶ 57, 341 Mont. 240, 177 P.3d 444). If any presumption is to be made about which of the conflicting instructions the jury followed, it must be presumed it followed the erroneous elements instruction. Indeed, while the statutory instruction was just that: the statutory language of Tampering, the Tampering elements instructions—in which specific purpose was replaced with knowingly—instructed the jury "If you find from your consideration of all the evidence that all of these elements have been proved beyond a reasonable doubt, **then you should find the Defendant guilty**." (D.C. Doc. 84, Nos. 21, 22 (emphasis added).) As such, the presumption that the jury followed instructions leads to one conclusion: the jury found Parker guilty of Tampering based not on the law, but on the faulty

elements instruction containing the district court's command to determine Parker's guilt based thereon.

Moreover, it would be terrible public policy to permit prosecutors to propose and trial courts to issue elements instructions that lessen the State's burden to prove all elements beyond a reasonable doubt so long as the correct, statutory language appears in another instruction. If the Court were to condone what was done in this case, it would give overzealous, unscrupulous, or simply inattentive prosecutors permission to employ this tactic. However, and as set forth more fully below, it is unethical for attorneys to misstate the law to courts and third parties such as opposing counsel and jurors. Likewise, it is unethical to advance positions that are not supported by the law. Permitting the State to secure unjust convictions through unethical conduct will erode the public's trust in a fair criminal justice system. This Court's centuries-old precent and public policy demand condemnation of giving one instruction that quotes the statutory crime language followed by one that materially misstates the elements with direction from the judge to determine guilt based upon the erroneous instruction, as was done here.

e. Failure to review the jury instruction error would call into question the fundamental fairness of Parker's Tampering convictions.

Parker's trial counsel did not make a contemporaneous objection to the erroneous elements instruction, and the Montana Code Annotated Section 46-20-701(2) criteria are inapplicable in this case. Accordingly, this Court may exercise

its inherent power of plain error review only if the error claimed implicates Parker's fundamental constitutional rights and if "failure to review would result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial proceedings, and compromise the integrity of the judicial process." *Williams*, ¶ 16 (quoting *Carnes*, ¶ 13).

"The right to trial by jury and the right to due process of law are fundamental and both are explicitly guaranteed by the Montana and the United States Constitutions." *Daniels*, ¶ 32 (citing Mont. Const. art. II, §§ 17, 24, 26; U.S. Const. amends. VI, XIV; *Weaver*, ¶ 26). The fundamental right to due process necessarily includes "the right to a fair trial [and] the right to have the state prove every element of a charged offense beyond a reasonable doubt[.]" *Daniels*, ¶ 32 (citing *Newman*, ¶ 19). Indeed, this Court has found that failure to properly instruct the jury on material issues in a criminal case implicates a defendant's fundamental rights to due process and a fair trial. *See, e.g.*, *State v. Lundblade*, 191 Mont. 526, 529, 625 P.2d 545, 548 (1981); *State v. Akers*, 2017 MT 311, ¶ 16, 389 Mont. 531, 536 P.3d 142; *State v. Deveraux*, 2022 MT 130, ¶ 37, 409 Mont. 177, 512 P.3d 1198.

In *Lundblade*, the defendant's theft conviction was reversed after the Court invoked plain error review because the trial court failed to give a proper elements jury instruction. 191 Mont. at 529, 625 P.2d at 548. The trial court did instruct the

jury that the State needed to prove each element of the offense in the statute describing the offense. *Lundblade*, 191 Mont. at 530, 625 P.2d at 548. But instead of including the statutory language in an instruction, the court simply recited the State's charging document that included the elements of theft. *Lundblade*, 191 Mont. at 530, 625 P.2d at 548. The Court invoked plain error review and reversed because "failure to instruct on the elements of the crime constitutes 'plain error'[.]"*Lundblade*, 191 Mont. at 530, 625 P.2d at 548 (citing *State v. Poncelet*, 187 Mont. 528, 535, 610 P.2d 698, 703 (1980)).

Here, like in *Lundblade* where the Court invoked plain error and reversed for failing to properly instruct the jury on the elements of the crime, the trial court failed to give the jury an elements instruction that set forth the elements of Tampering. Rather, the Tampering elements instruction misstated the required mental state and unquestionably implicates Parker's fundamental constitutional rights to a fair trial and due process. Failure to review an error of this magnitude would leave unsettled the question of the fundamental fairness of Parker's trial. There is simply no way to know whether the jury convicted Parker based on the specific purpose language in the statutory recitation instruction or the more general knowingly standard in the erroneous elements instruction. But if we presume the jury followed the trial court's instructions to find Parker guilty if he acted knowingly, then the jury convicted Parker without determining the State had

proved all the actual elements of Tampering. Either way, the fundamental fairness of Parker's trial is plainly in question.

In the end analysis—and because the State, Parker's trial counsel, and the district court all failed to—the only way to ensure the fundamental fairness of Parker's trial is for this Court to invoke plain error review, determine the erroneous jury instruction violated Parker's rights to fair trial and due process of law, and reverse Parker's two convictions for Tampering.

II. The Court should grant Parker's ineffective assistance of counsel claim because there is no plausible justification for agreeing to a jury instruction that replaces specific purpose with general knowingly and because Parker was prejudiced.

"The right to effective assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution, as incorporated through the Fourteenth Amendment, and by Article II, Section 24 of the Montana Constitution." *State v. Kougl*, 2004 MT 243, ¶ 11, 323 Mont. 6, 97 P.3d 1095. This Court analyzes ineffective assistance of counsel (IAC) claims using the two-pronged test from *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Kougl*, ¶ 11. "The defendant must demonstrate that (1) counsel's performance was deficient or fell below an objective standard of reasonableness, . . . and (2) establish prejudice by demonstrating that there was a reasonable probability that, but for counsel's errors, the result of the proceeding

would have been different." *Kougl*, ¶ 11 (internal citations and quotation marks omitted).

a. Direct appeal of Parker's IAC claim is proper because his counsel was faced with an obligatory action of advocating for a Tampering instruction that included the requisite mental state.

Many IAC claims on direct appeal are not reviewable because the record does not reveal the "why" for counsel's decision, thus leaving the Court with no basis to overcome the strong presumption that counsel's decisions were within the broad range of appropriate trial tactics. *Kougl*, ¶¶ 14–17. However, if counsel is faced with an obligatory action or there is "no plausible justification" for counsel's action, then "whether the reasons for defense counsel's actions are found in the record or not is irrelevant." *Kougl*, ¶ 15. Rather, the inquiry is whether any legitimate reason for counsel's decision exists. *Kougl*, ¶ 15. This Court has previously recognized that failure to advocate for proper jury instructions constitutes a decision with no legitimate reason, thus enabling review of an IAC claim despite no "why" for counsel's decision in the record. *See, e.g.*, *Kougl*, ¶ 20; *State v. Johnston*, 2010 MT 152, ¶¶ 15–16, 357 Mont. 46, 237 P.3d 70; *State v. Rose*, 1998 MT 342, ¶ 18, 292 Mont. 350, 972 P.2d 321.

In *Kougl*, the defendant was convicted of operating a methamphetamine lab after defense counsel failed to seek an instruction that accomplice's testimony is to be viewed with distrust and must be corroborated. *Kougl*, ¶ 27. The Court

reasoned there was no doubt several witnesses who testified against the defendant were accomplices. *Kougl*, ¶ 20. Accordingly, there existed no "no plausible explanation for not asking for instructions" because the trial court would have been obliged to give them if asked. *Kougl*, ¶ 24. "Trial counsel had nothing to lose in asking for both of these instructions. Her client, however, risked losing his liberty." *Kougl*, ¶ 21. The Court found this error prejudiced the defendant because while both the State and defense counsel argued to the jury that they should view the accomplices' testimony with distrust, argument does not have the same force of law given by the judge. *Kougl*, ¶ 26. The defendant's IAC claim was accordingly granted and his conviction reversed. *Kougl*, ¶ 27.

Similarly, in *Johnston*, the defendant's trial counsel failed to object to a general knowingly instruction when the offense of obstructing a peace officer requires instruction "that an individual obstructing a peace officer must engage in conduct under the circumstances that make him or her aware that it is highly probable that such conduct will impede the performance of a peace officer's lawful duty." *Johnston*, ¶¶ 12, 15.[3] This Court found that the more general knowingly instruction improperly "reduc[ed] the State's burden in proving the crime."

[3] While there can be no doubt Tampering requires the specific purpose to impair the availability of evidence, even if knowingly could be used as a replacement, *Johnston* suggests that the general knowingly instruction given here would still not suffice. *Compare* (D.C. Doc. 84, Nos 13, 21, 22) *with Johnston*, ¶¶ 9–17.

Johnston, ¶ 16. Defense counsel accordingly had nothing to lose by seeking the appropriate knowingly instruction and there was no plausible justification for not seeking the instruction. *Johnston*, ¶ 16. The Court further found prejudice to defendant because the prosecutor was permitted to argue, under the erroneous instruction, that simply being dishonest to an officer constituted general knowing (it does not). *Johnston*, ¶ 16. As such, the Court granted the IAC claim and reversed and remanded for a new trial. *Johnston*, ¶ 17.

Here, like in *Kougl* and *Johnston* where there was no plausible justification for not seeking favorable jury instructions that the defendant was clearly entitled to, there was no plausible justification for defense counsel's failure to advocate for a Tampering elements instruction that accurately conveyed the law. As set forth above, the specific purpose state of mind required to prove Tampering is narrower than—and is fundamentally incompatible with—a general knowingly state of mind. Just like in *Johnston*, here the general knowingly instruction impermissibly reduced the State's burden of proving Tampering. By failing to object to the State's proposed jury instruction and allowing the trial court to instruct the jury that Parker need only have acted knowingly, counsel subjected Parker to the unreasonable risk of being convicted for something less than required. There is simply no tactical or strategic reason to ever lessen the State's burden by diminishing the mental state the State is required to prove. As such, not only is

Parker's IAC claim appropriate for review in this direct appeal, but the first prong of the *Strickland* test is met. *See Kougl,* ¶ 24.

b. Parker was prejudiced by the erroneous instruction because trial testimony, if believed by the jury, supported a knowingly state of mind but not specific purpose.

To demonstrate the second prong of IAC, "a defendant need not demonstrate that he would have been found not guilty had his counsel taken different action. He must establish only that there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different." *Rose*, ¶ 19 (citing *Strickland*, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome, but it does not require that a defendant demonstrate that he would have been acquitted." *Kougl*, ¶ 25 (internal quotation marks omitted).

Here, prejudice can readily be inferred because, under this Court's conflicting jury instruction precedent, "It cannot be assumed in such case that the jury will follow the correct statement of the law*." Rolla*, 21 Mont. at 587, 55 P. at 525. Prejudice can also be shown because there was evidence in the record that, if believed by the jury, could have supported its determination that Parker acted knowingly but would not support that he acted with the specific purpose to impair evidence.

As to the first count of Tampering, there was evidence admitted at trial that Parker would clean the entryway to his mother's apartment when spills occurred. (Trial Tr. Day 2, at 208:22–25.) Defense counsel also suggested to the jury in closing that Parker's bloody shoe could be explained by simply walking into his mother's apartment in the dark, rather than because he assaulted P.H. as the State argued. (Trial Tr. Day 3, at 82:9–14.) If the jury believed this evidence and theory, then it could have determined he accidentally walked through the puddle of blood on his way inside and began cleaning up the blood because he has cleaned up spills in that location previously. In other words, the jury could have determined that although he was not acting with the specific purpose of impairing the blood as evidence—but was rather acting with the purpose of simply cleaning up the entryway of his mother's apartment—he nonetheless acted knowingly. Thus, there is a "reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different." *Rose*, ¶ 19 (citing *Strickland*, 466 U.S. at 694).

Regarding the second count of Tampering, there was evidence admitted at trial that Parker routinely licked his lips. (Trial Tr. Day 3, at 32:2–4.) But there was no testimony that police ever informed Parker they wanted to collect what was on his lips, with one detective affirmatively testifying she had no memory of so informing Parker. (Trial Tr. Day 3, at 31:11–32:4.) If the jury believed this

evidence, then it could have determined Parker licked his lips out of habit but was nonetheless "aware of his conduct" pursuant to the given definition of knowingly. (D.C. Doc. 84, No. 13.) However, if the jury was properly instructed that Parker must have acted with the purpose of impairing the availability of what was on his lips, it appropriately could have decided he did not act purposefully but was simply acting out of habit. Thus, there is a "reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different." *Rose*, ¶ 19 (citing *Strickland*, 466 U.S. at 694).

The fact the jury acquitted Parker of the Aggravated Assault charge is crucial to consider in the prejudice analysis. Had the jury determined Parker was the one who assaulted P.H., then the natural inference is he attempted to clean up the blood to cover up his crime. Indeed, the State argued to the jury that—under its flawed theory of the case—Parker committing the assault tended to prove he knowingly destroyed evidence of it, and vice versa. (Trial Tr. Day 3, at 73:3–75:19.) But what about a person who walks through a pool of blood outside their front door at four a.m. and starts cleaning it up after a night of drinking, all before passing out sitting in a chair? Does cleaning up blood on your property necessarily lead to an inference that your specific purpose is to destroy evidence? Does licking your lips out of habit without any notice that the police intend to collect evidence from your lips necessarily lead to an inference that your specific purpose

is to destroy evidence? Of course they do not, and if the jury was given the opportunity to discuss these possibilities with an elements instruction that properly instructed it on the law, it could have decided that Parker was not acting with the specific purpose to destroy evidence, despite being generally aware of his conduct.

In the end analysis, the Court should grant Parker's IAC claim and grant him a new trial because there is no plausible justification for trial counsel's failure to advocate for a proper Tampering instruction and because Parker was prejudiced by this failure.

III. The State committed prosecutorial misconduct by proposing a blatant misstatement of law jury instruction and subsequently seeking to gain an unfair advantage over Parker therefrom.

Claims of prosecutorial misconduct are measured "by reference to established norms of professional conduct." *Ugalde*, ¶ 43 (quoting *State v. Passmore*, 2010 MT 34, ¶ 48, 355 Mont. 187, 225 P.3d 1229). Indeed, this Court has referenced the Montana Rules of Professional Conduct when analyzing claims of prosecutorial misconduct. *E.g., Aker*, ¶ 26 (citing Mont. R. Prof. Cond. 3.4(e)). "Misconduct implies that there was some knowing, bad faith scheme or action by a prosecutor for the purpose of gaining an unfair advantage over the defendant." *State v. Dannels*, 226 Mont. 80, 93, 734 P.2d 188, 197 (1987). "A new trial may be granted 'where the prosecutor's actions have deprived [a] defendant of a fair and

impartial trial.'" *Ugalde*, ¶ 43 (quoting *State v. Gray*, 207 Mont. 261, 266–67, 673 P.2d 1262, 1265–66 (1983)).

Various Montana Rules of Professional Conduct prohibit a lawyer from presenting legally unsupportable issues and making false statements of law. Mont. R. Prof. Cond. 3.1(a)(1) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein: (1) without having first determined through diligent investigation that there is a bona fide basis in law and fact for the position to be advocated[.]"); Mont. R. Prof. Cond. 3.2(a)(1) ("A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer[.]"); Mont. R. Prof. Cond. 3.2(a)(2) ("A lawyer shall not knowingly: . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel[.]"); Mont. R. Prof. Cond. 4.1(a) ("In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person[.]").

Here, it is inconceivable the prosecutors were unaware that the instruction they proposed was a material misstatement of the law. The statute itself requires the defendant act "with purpose to impair [the evidence's] verity or availability in such a proceeding or investigation." Mont. Code Ann. § 45-7-207(1)(a). The

Information charging Parker with two counts of Tampering contained the proper mental state. (D.C. Doc. 3, at 2.) The statutory instruction proposed by the State and offered by the Court accurately conveyed the statute. (D.C. Doc. 74, at No. 20.) Every case in which this Court has set forth the elements of Tampering requires the same purposely state of mind. *E.g.*, *Polak*, ¶ 36 ("the defendant had the intent to purposely impair the availability of physical evidence"); *Daniels*, ¶ 45 (same); *see also State v. Staat*, 251 Mont. at 8–9, 822 P.2d at 644. The annotator's note to the Tampering statute clearly states that "[t]o establish the offense, it must be shown that the accused . . . [acted] with the purpose of impairing the availability or verity of physical evidence". Mont. Code Ann. § 45-7-207 (Annotator's Note). The Montana pattern jury instruction requires the same. M.C.J.I. 7-105(a) (2022).

Moreover, during closing—and in contrast to the assault charge where the State carefully discussed each element, including the state of mind element—the State only discussed the first two given elements of Tampering, stopping short of the clear misstatement of law that only knowingly was required. (Trial Tr. Day 3, at 74:15–75:19.) This suggests the prosecutor giving the closing argument was not only aware of the misstatement of law but further aware that reciting a false statement of law to the jury in closing is clearly misconduct under this Court's precedent. *See, e.g.*, *State v. Labbe*, 2012 MT 76, ¶ 27, 364 Mont. 415, 276 P.3d 848 ("It is improper for a prosecutor to misstate the law." (citing cases)). Rather

than endeavor to fix the misstatement in the Tampering elements instruction, as ethically required, the State carefully pressed the advantage it obtained with a less burdensome mental state element and obtained a conviction in clear violation of Parker's rights.

There exists not a single basis in the law for advancing the position that the third element required merely a knowingly state of mind. How could any experienced and ethically behaving lawyer start with the above-cited sources (or whatever other sources they started with) and propose eliminating an element entirely and replacing it with a less burdensome element? The effect of the prosecutors' presentation of a such a legally unsupportable position—combined with defense counsel ineffectively failing to object and the trial court's failure to detect the material misstatement of law—was to relieve the State of its requirement to prove all the elements of Tampering beyond a reasonable doubt. Rather, the jury was instructed to find Parker guilty if it found the State proved the legally deficient elements; all of which amounts to a violation of Parker's substantial rights to a fair trial and due process. The Court should accordingly review the prosecutors' conduct under plain error, condemn the offering of clearly deficient jury

instructions that seek to give the State unfair advantages at trial, and reverse Parker's Tampering convictions.[4]

CONCLUSION

All three legal actors in Parker's trial—the State, Parker's trial counsel, and the trial court—failed to uphold his constitutional rights to a fair trial and due process when the jury was instructed to find Parker guilty of Tampering if he generally acted knowingly instead of with specific purpose to impair evidence. In rare circumstances like these, the only way to ensure the fundamental fairness of Parker's trial is to invoke plain error review. Through this review, the Court should determine the prosecutors' misconduct and the erroneous jury instruction violated Parker's rights to fair trial and due process of law, reverse Parker's two convictions for Tampering, and remand for a new trial. Alternatively, the Court should reverse Parker's convictions because he received ineffective assistance of counsel.

Respectfully submitted this 9th of December, 2023.

MURNION LAW

By: /s/ James C. Murnion
JAMES C. MURNION
Attorney for Plaintiff/Appellant

[4] A Montana case could not be located where prosecutorial misconduct was claimed for a prosecutor successfully getting a judge to give the jury a blatant misstatement of law instruction to the State's advantage. Parker is therefore asking the Court for a novel extension of its prosecutorial misconduct law to include such conduct.

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 typeface of 14 points; is double-spaced except for footnotes, for quoted and indented material, if any, the caption page, the table of contents, the table of authorities, signature blocks, and the appendix; and the word count calculated by Microsoft Word for Windows is 7,845, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and the Appendix.

/s/ James C. Murnion
JAMES C. MURNION

APPENDIX

App. A

Instruction No. 21

To convict the Defendant of Count II: Tampering with Evidence, the State must prove the following elements:

1. The Defendant believed that an official proceeding or investigation was pending or about to be instituted.;

AND

2. The Defendant destroyed an item of evidence;

AND

3. The Defendant acted knowingly.

If you find from your consideration of all the evidence that all of these elements have been proved beyond a reasonable doubt, then you should find the Defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these elements has not been proved beyond a reasonable doubt then you should find the Defendant not guilty.

Given: John A. Kutzman
District Court Judge

Instruction No. 22

To convict the Defendant of Count III: Tampering with Evidence, the State must prove the following elements:

1. The Defendant believed that an official proceeding or investigation was pending or about to be instituted;

AND

2. The Defendant destroyed an item of evidence;

AND

3. The Defendant acted knowingly.

If you find from your consideration of all the evidence that all of these elements have been proved beyond a reasonable doubt, then you should find the Defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these elements has not been proved beyond a reasonable doubt then you should find the Defendant not guilty.

Given: John A. Kutzman
District Court Judge

App. B

MONTANA EIGHTH JUDICIAL DISTRICT COURT
CASCADE COUNTY

STATE OF MONTANA, Plaintiff, vs JAMES HOUSTON PARKER, Defendant.	Cause No. CDC-22-398 **SENTENCING ORDER, JUDGMENT, BOND EXONERATION, & ORDER TO CLOSE**

¶ 1 This case was before the Court on **August 8, 2023** for sentencing. Mr. Parker appeared in custody and with his counsel, Sam Harris. Deputy County Attorney Ball represented the State.

¶ 2 On Count II: Tampering With or Fabricating Physical Evidence, a Felony, the State recommended a 10-year prison term. The Defendant recommended a 5-year suspended DOC commitment. On Count III: Tampering With or Fabricating Physical Evidence, a Felony, the State recommended a 10-year prison term. The Defendant recommended a concurrent 5-year suspended DOC commitment. Mr. Parker exercised his right of allocution.

¶ 3 In determining the sentence, the Court considered the correctional and sentencing policy of the State of Montana, the unique circumstances of this case, the Defendant's prior criminal history, the PSI Report, the Defendant's individual circumstances and needs, and his potential for rehabilitation and to return to productive and responsible status as a citizen of this State. The reasons for the sentence imposed are as follows.

¶ 4 A jury convicted Mr. Parker on Mr. Parker to Count II: Tampering With or Fabricating Physical Evidence, a Felony and Count III: Tampering With or Fabricating Physical Evidence, a Felony. There was reason to believe the area around his residence was the scene of a violent, bloody assault. The jury found him not guilty of the assault but found he had cleaned up blood from the pavement and licked blood off his lip as he was being taken into custody.

¶ 5 His criminal history consists of three felonies and 11 misdemeanors. AP&P's risk assessment tool indicates he is at "high" risk to reoffend. Based on the whole case, including but not limited to the AP&P risk assessment, the prospects of rehabilitating him are questionable.

¶ 6 The statutory range for each of the Tampering counts at issue is 10 years and/or $50,000. The alternatives open to the Court other than prison are commitments to the Department of Corrections or suspended sentences.

¶ 7 In view of the record of the case, the Pre-Sentence Investigation Report, and the presentations at the *Sentencing Hearing*, **IT IS HEREBY ORDERED** that Mr. Parker is sentenced as follows:

> On Count II: Tampering With or Fabricating Physical Evidence, a Felony, a **4-year** commitment to the Department of Corrections for placement in an appropriate facility or program, with **none of the time** suspended.
>
> On Count III: Tampering With or Fabricating Physical Evidence, a Felony, a **2-year** commitment to the Department of Corrections for placement in an appropriate facility or program, with **none of the time** suspended. This sentence shall run **consecutively to** the sentence on Count II.

He is entitled to **426 days** of time-served credit.

¶ 8 The Court specifies no probation conditions because these are straight unsuspended DOC commitments.

¶ 9 If this written judgment and the oral pronouncement of sentence or other disposition conflict, Mr. Parker or the prosecutor may, within 120 days after filing of the written judgment, request that the Court modify the written judgment to conform to the oral pronouncement. The Court shall modify the written judgment to conform to the oral pronouncement at a hearing, and Mr. Parker must be present at the hearing unless Mr. Parker waives the right to be present or elects to proceed pursuant to Mont. Code Ann. § 46-18-115. Mr. Parker and the prosecutor waive the right to request modification of the written judgment if a request for modification of the written judgment is not filed within 120 days after the filing of the written judgment in the sentencing court.

¶ 10 Any bond in this case is hereby **EXONERATED**. The Clerk shall **CLOSE THIS FILE**.

Electronically Signed and Dated Below

cc: Defense Counsel/Sam Harris
Defendant c/o counsel
County Attorney/Ball
Adult Probation and Parole
JCOR Legal (email only)
Cascade County Sheriff's Office
GFPD
Montana State ID (MANS Only)

Electronically Signed By:
Hon. Judge John Kutzman
Sat, Sep 02 2023 09:11:56 AM

CERTIFICATE OF SERVICE

I, James Clarke Murnion, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 12-09-2024:

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Dated: 12-09-2024