IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0528

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ROBERT DAN FRENCH,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, the Honorable Elizabeth A. Best, Presiding

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STATEMENT OF THE ISSUES

When procuring jury pools, the clerk must mail notice to the persons selected and certify the non-responders to the sheriff who shall serve notice personally. Failing to substantially comply with these requirements undermines the goals behind the jury selection statutes. Did the Cascade County Clerk and Sheriff substantially comply with these requirements when the Clerk failed to certify non-responders and the Sheriff failed to personally serve any non-responders?

A criminal conviction cannot stand when proof of an essential element is based solely on uncorroborated, prior inconsistent statements. The only evidence French penetrated K.K. came from her inconsistent statements that lacked any corroboration. Did the court err when it denied French's motion to dismiss Count I for insufficient evidence?

STATEMENT OF THE CASE

Robert Dan French appeals his convictions after a jury trial in Cascade County, including the denial of his Motion to Dismiss Count I and Motion for New Trial and for Hearing. (Doc. 237, Amended Sentencing Order and Judgment, attached as Appendix A; Doc. 258,

Order Denying Motion for New Trial, attached as Appendix B; Doc. 195, Order Denying Defendant's Motion to Dismiss Count I, attached as Appendix C.)

In May of 2019, the State charged French with Count I: felony Sexual Intercourse Without Consent (SIWC) against K.K., in violation of Montana Code Annotated § 45-5-503 (2017); Count II: felony Sexual Assault against A.M., in violation of § 45-5-502; and Count III: felony SIWC against K.E., in violation of § 45-5-503. (Doc. 2.) The allegations spanned August 1, 2015, through September 13, 2018.[1] (Doc. 2.)

The court held a three-day jury trial in April of 2022. (Doc. 190, 192, 196.) At the close of the State's case-in-chief, French moved to dismiss Count I for insufficient evidence, which the court denied. (Doc. 193–95.) The jury found French guilty of each count and the court sentenced him to Montana State Prison for 100 years, none suspended, with a 25-year parole restriction on each count, all sentences running concurrently. (Doc. 198, 237.) French timely appealed. (Doc. 236.)

[1] The parties agreed to use the 2017 statutory penalties for sentencing purposes, even if the acts underlying Count III may have occurred while the 2015 version was in effect. (7.17.23 Sentencing Transcript at 6.)

About four weeks after giving notice of appeal, French discovered irregularities in the Cascade Count District Court's jury procurement process and moved for a new trial, which included a request for an evidentiary hearing. (Doc. 239, and the attached transcript from August 21, 2023 (8.21.23 Tr.), at 19–23, 29–32, 40–42.) This Court stayed French's appeal while the trial court decided his motion. (Doc. 248.)

The district court initially set a hearing on the motion for new trial, continued it twice upon request of the parties, but ultimately denied the motion without a hearing. (Doc. 240, 246, 247, 253, 254, 258.) French objected to the court's failure to hold a hearing. (Doc. 259.)

STATEMENT OF THE FACTS

Trial

In 2018, French lived in Tracy, Montana, with his longtime partner Tammy, raising two sons. (4.25–4.27.22 Jury Trial Tr. (Trial Tr.) at 217–18; Doc. 208 at 7.) They also provided in-home healthcare for Tammy's grandmother. (Trial Tr. at 218.) French served in the military, had his GED and a commercial driver's license, and was employed in various fields, including concrete work, auto part sales, and welding. (Doc. 208 at 7.) French and Tammy had frequent visitors,

including a part-time caregiver for Tammy's grandmother, as well as other friends who often brought their children over. (Trial Tr. at 215, 219, 224, 376–78.)

In August and September of 2018, three girls claimed French had touched them in an inappropriate, sexual manner. (Doc. 1.) A.M., who was twelve years old at the time of trial, testified that about four years prior, she would sometimes hang out at Tammy and French's house to play with their sons while her mother cared for Tammy's grandmother. (Doc. 1; Trial Tr. 337–39.) A.M. claimed French tickled her and placed his hand under her clothes and touched her vagina during some of these visits. (Trial Tr. at 339, 343–44.) The jury convicted French of sexual assault based on this testimony. (Doc. 198.)

A second girl, K.E., testified that when she was nine years old, she and her brother would spend the night with French's sons, and French would touch the inside of her vagina with his fingers. (Trial Tr. at 482, 486, 488–90, 501.) The jury convicted French of SIWC based on this testimony. (Doc. 198.)

The State based Count I on allegations four-year-old K.K. made after Tammy and French babysat her at their home. (Doc. 1–2; Trial Tr.

at 392, 401–03.) At trial, K.K., who had reached age eight, was reluctant to testify. (Trial Tr. at 393–96.) When asked if anything bad ever happened to her, what that bad thing was, and if she recalled telling anyone about it, K.K. responded "no" or "I don't know." (Trial Tr. at 395–96.) The court allowed the State to admit K.K.'s prior inconsistent statements said to her parents, Josie and Greg, as impeachment testimony. (Trial Tr. at 396–98, 405–06, 475–79.) The court also admitted a video portion of K.K.'s forensic interview with Sergeant Katie Cunningham of the Great Falls Police Department as a prior inconsistent statement. (Trial Tr. at 422, 434–35, 439; State's Exhibit 14 at 16:30–28:42, 31:07–37:14.)

Greg testified that, after picking K.K. up from Tammy and French's home, K.K. said, "[L]ast night was weird. [T]he dad out there put his front butt in my mouth." (Trial Tr. at 478–79.) Greg relayed this to Josie who called law enforcement. (Trial Tr. at 479.) A couple days later, Cunningham interviewed K.K. who hardly spoke and disclosed nothing. (Trial Tr. at 405, 432, 478.) Cunningham interviewed K.K. again three days later, but again, K.K. disclosed nothing. (Trial Tr. at 405, 432.)

Ten months later, while in the car with her mother, K.K. said that French "peed in her mouth." (Trial Tr. at 405.) This led to a third interview with Cunningham where K.K. said French put "his part where he pees" in her mouth. (State's Ex. 14 at 17:00–17:30.) K.K. said it happened in the living room of French's home, while Tammy slept nearby in a chair, and French's sons were in their bedrooms. (State's Ex. 14 at 20:25–21:00.) K.K. said it felt like a "bug with a lot of legs" in her mouth and nothing came out of the part French pees with while it was in her mouth. (State's Ex. 14 at 22:20–22:45, 32:00–32:55.)

Nearly two years later, K.K. was taking a shower and told Josie the shower "felt like when a boy puts his thing there." (Trial Tr. at 406.) Josie asked what K.K. meant because nobody should be putting anything "there" and K.K. replied, "except Robert." (Trial Tr. at 406.) Josie clarified that K.K. said "that's what it feels like when a boy tries to put his penis there[,]" and pointed to her vagina. (Trial Tr. at 417–18.)

At the close of the State's case-in-chief, French moved to dismiss the charge involving K.K. for insufficient evidence. (Trial Tr. at 577; Doc. 193.) He argued that the State relied exclusively on K.K.'s prior

inconsistent statements to prove Count I, but a conviction cannot rest solely upon prior inconsistent statements. (Doc. 193.)

The court denied French's motion. (Doc. 195.) It reasoned, "Although the proof was thin, the State presented corroborative evidence to support K.K.'s inconsistent statements[,]" including her parents testifying about statements K.K. made to them, her demeanor while she made those statements to them,[2] and witnesses describing K.K.'s disclosure being made after she spent the night at French's home. (Doc. 195 at 3.) "I may be erring here, but I believe I'm following the law, . . . there is corroboration of some parts of [K.K.'s] out-of-court statements, and that corroboration goes to the reporting to her parents. . . . she was at [French's] home on the dates in which she identified the – the alleged offenses[.]" (Trial Tr. at 582–83.) "This evidence does corroborate the out of court statements, if only weakly." (Doc. 195 at 3.) The jury convicted French of SIWC of K.K. (Doc. 198.)

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[2] Contrary to the court's recollection, K.K.'s parents did not testify about K.K.'s demeanor when while she made the prior inconsistent statements. (*See* Trial Tr. at 399–420, 475–481.)

Venire issues

French filed a Motion for New Trial and Hearing pursuant to § 46-16-702(1) eighteen days after Tina Henry, the Cascade County District Court Clerk, testified to using an irregular process for procuring jury pools. (Doc. 239; 8.21.23 Tr. at 1, 21, 29–30.) Questions about Henry's process first arose August 11, 2023, when another criminal defendant objected to the jury panel for his trial, which was comprised of two different lists "combined due to a lack of juror's responding" to their notice for jury duty. (Doc. 239 at 9.)

Henry and Cascade County Sheriff Jesse Slaughter testified on August 21, 2023, in the matter of *State v. Hinkle*, BDC-22-242, a drug possession case scheduled for trial the next day. (8.21.23 Tr. at 1–3, 6.) The same judge presiding over French's case presided over *State v. Hinkle*. (8.21.23 Tr. at 1.) The judge asked Henry and Slaughter to testify about their jury notification processes out of concern for potential structural errors in relation to their duties under § 3-15-405. (8.21.23 Tr. at 3–4.) French attached a transcript of their testimony in *Hinkle* to his motion for a new trial, as his request was based partly on that testimony. (Doc. 239, 255.)

French argued that when Henry mailed notices for his jury pool, she "did not certify the list of non-responders to the Sheriff[,]" who did not personally serve any of the non-responders, in "complete contravention of § 3-15-405," which constituted a substantial failure to comply with the requisite statutory procedure. (Doc. 255 at 1–3.) In the State's response to French's motion for a new trial, it conceded that, when Henry procured French's venire, "the names of those who did not respond were not certified to the sheriff for [any] attempts at personal service." (Doc. 252 at 11.)

Henry had been the clerk "since COVID[,]" or since January of 2020.[3] (8.21.23 Tr. at 21.) Prior to August of 2023, Clerk Henry drew jury pools on an annual basis; she received a list of names in May or June, and notified those selected the following August or September by mailing a letter, questionnaire, and a return envelope. (8.21.23 Tr. at 20.) If a person did not respond to their notice, "[n]othing" happened to that person "[b]ecause we were in COVID." (8.21.23 Tr. at 21.) Henry

[3] Henry became Clerk of Court in January of 2020. Staff Directory – Tina Henry (cascadecountymt.gov), www.cascadecountymt.gov/directory.aspx?eid=6 (accessed Dec. 31, 2024). Mont. R. Evid. 201(f) (allowing courts to take judicial notice of facts not reasonably in dispute at any stage of the proceeding), 902(5).

designated those names as "not deliverable" in her jury procurement records. (8.21.23 Tr. at 21.)

So, from January of 2020 until August of 2023, Henry did not certify any persons who failed to respond to their jury notice so the sheriff could attempt personal service. (8.21.23 Tr. at 21, 29–30.) Henry began certifying non-responders to the sheriff after questions arose about her jury procurement process in August of 2023. (8.21.23 Tr. at 22; Doc. 239 at 9.) Neither Henry nor the sheriff were aware of the jury notification statute (§ 3-15-405) prior to that. (8.21.23 Tr. at 22–23; Doc. 239 at 5.)

Henry testified that, for *State v. Hinkle*, she sent notices to 200 people to procure a jury panel for the August 22, 2023, trial. (8.21.23 Tr. at 3, 23.) Of those 200 persons, 80 people who responded were not excused and were designated as "checked in." (8.21.23 Tr. at 25.) Henry excused about 66 people who responded to the notice. (8.21.23 Tr. at 23–24.) That left about 54 non-responders, though Sheriff Slaughter received a list of about 63 people to personally serve. (8.21.23 Tr. at 13, 16.) Of the 63 non-responders that Slaughter attempted to serve

personally, seven were successfully served, 47 did not answer the door, and nine were the wrong address. (8.21.23 Tr. at 13.)

While discussing Henry's testimony at the end of the hearing, Hinkle's counsel asserted that Henry's failure to certify those who failed to respond to jury notices to the sheriff would constitute reversible error if Hinkle were found guilty by a jury derived from a pool that excluded the non-responders. (8.21.23 Tr. at 36, 41.) The court and Cascade County Attorney were both "inclined to agree" that the failure to certify and serve non-responders "constitute[d] structural error." (8.21.23 Tr. at 42; Doc. 239 at 7.) The court vacated Hinkle's trial and all other trials for the following month based on "several serious errors in providing notice to jurors[,]" including the clerk's failure to certify non-responders to the sheriff, and ordered the clerk and sheriff to begin complying with § 3-15-405. (Doc. 239 at 5, 7.)

That same court denied French's motion for a new trial and request for hearing as untimely. (Doc. 258.) The court stated there was no provision for extending the post-verdict 30-day time limit under § 46-16-702(2), despite also acknowledging that French raised his motion "in the interests of justice" under § 46-16-702(1). (Doc. 258 at 2.) And,

despite Henry's admission to never certifying non-responders to the sheriff for personal service from January of 2020 until August of 2023, and the State conceding to a lack of certification and personal service for French's jury pool, the court incorrectly stated that "the issues identified for the 2023 jury pool are the result of changes in practices in 2023. French was convicted in 2022." (Doc. 258 at 2–3.)

The court reasoned that French failed to present evidence that his jury panel was "skewed" and not representative of "a true cross-section of the community[.]" (Doc. 258 at 3.) The court explained that it "observed and presided over *voir dire* and the trial and is satisfied that French had a fair and impartial jury and trial." (Doc. 258 at 3.)

The court also stated French could claim that new evidence existed in his case, such as the order vacating trials from *State v. Hinkle*. (Doc. 258 at 3.) The court applied four factors from the new evidence test used in *State v. Clark*, 2005 MT 330, ¶ 34, 330 Mont. 8, 125 P.3d 1099, and concluded it was "not convinced that speculative arguments about jury empanelment more than a year prior" constituted evidence, French did not show his failure to investigate the jury procurement process earlier was not a result of his own lack of

diligence, and that whatever new evidence French discovered was, or would be, immaterial to his new trial request. (Doc. 258 at 3–4.)

STANDARDS OF REVIEW

The denial of a motion for new trial concerning violations of the jury formation statutes is a conclusion of law, reviewed for correctness. *State v. LaMere*, 2000 MT 45, ¶ 14, 298 Mont. 358, 2 P.3d 204. Discretionary rulings, including rulings on whether to hold an evidentiary hearing, are reviewed for an abuse of discretion. *Marble v. State*, 2015 MT 242, ¶ 13, 380 Mont. 366, 355 P.3d 742.

The denial of a motion to dismiss for insufficient evidence is reviewed de novo. *State v. Kirn*, 2012 MT 69, ¶ 8, 364 Mont. 356, 274 P.3d 746 (citing *State v. Swann*, 2007 MT 126, ¶¶ 17–19, 337 Mont. 326, 160 P.3d 511).

SUMMARY OF THE ARGUMENTS

The district court erred by denying French's motion for a new trial because the clerk and sheriff failed to "certify and serve" when procuring his jury pool—a substantial failure to comply with the express language in § 3-15-405. Henry admitted doing "nothing" with the non-responders when procuring jury pools during the pandemic,

which included French's jury pool. The court erroneously concluded the clerk's errors did not encompass French's jury pool. It incorrectly found French's motion to be untimely and incorrectly required French to prove his panel was skewed. The court also applied an ill-fitting "new evidence" test to deny the motion for a new trial.

The court should have granted French a hearing, at minimum, where he could have provided evidence of the number of non-responders arbitrarily excluded from his panel. The court also should have granted French a new trial based on the evidence French provided from Henry's testimony. The failure to "certify and serve" was plainly a substantial failure to comply with § 3-15-405, which contravened the principles of randomness and objective criteria the jury selection statutes are intended to protect.

The court also erred by denying French's motion to dismiss Count I for insufficient evidence. The only evidence proving penetration, an essential element of SIWC, came from K.K.'s unsworn, prior inconsistent statements. No other testimony corroborated this essential element. French's SIWC conviction unlawfully stood on K.K.'s prior inconsistent statements alone and therefore must be dismissed.

ARGUMENTS

I. The Clerk and Sheriff failed to substantially comply with § 3-15-405 when drawing French's jury pool.

The Montana jury selection statutes provide objective procedures for the random selection of jurors to secure the right to a fair and impartial jury for criminal defendants. U.S. Const. amend. VI and XIV; Mont. Const. art. II, §§ 24 and 26; *LaMere*, ¶¶ 33–35.

Since statehood, this Court has repeatedly held that failing to substantially comply with these statutory procedures amounts to a denial of the fundamental right to trial by a fair and impartial jury, and is automatically reversible without proof of prejudice. *LaMere*, ¶ 19; *see also State v. Landry*, 29 Mont. 218, 74 P. 418 (1903) (noting the right to a "panel drawn in substantial conformity with" statutory requirements has been "recognized since" *Dupont v. McAdow*, 6 Mont. 226, 9 P. 925 (1886)); *State v. Groom*, 49 Mont. 354, 141 P. 858 (1914) (stating "substantial compliance" with "the law in drawing" a jury "is required"); *State v. Miller*, 49 Mont. 360, 141 P. 860 (1914); *State v. Diedtman*, 58 Mont. 13, 190 P. 117 (1920) (explaining that a "substantial departure from the statutory method" of selecting a jury would "nullify the statute itself"); *State v. Hay*, 120 Mont. 573, 194 P.2d

232 (1948) (recognizing that a defendant has a right to an impartial jury summoned according to law); *State v. Porter*, 125 Mont. 503, 242 P.2d 984 (1952) (courts must "substantially comply with the statutes in procuring a jury"); *State v. Deeds*, 130 Mont. 503, 305 P.2d 321 (1957) ("Repeatedly this court has required the trial court to substantially comply with the statutes in procuring a jury"); *Dvorak v. Huntley Project Irrigation Dist.*, 196 Mont. 167, 639 P.2d 62 (1981) (concluding that "no actual prejudice has been shown is irrelevant" when the court "went well beyond a mere technical departure from the jury selection statutes"); *Solberg v. County of Yellowstone*, 203 Mont. 79, 659 P.2d 290 (1983) (new trial ordered because the jury selection process was the same faulty process used in *Dvorak*); *Robbins v. State*, 2002 MT 116, 310 Mont. 10, 50 P.3d 134 (*Robbins II*) (retroactively applying *LaMere* in return to "*per se* rule of reversal for a failure to substantially comply with Montana statutes governing procurement of a trial jury").

One brief aberration from the rule occurred in *State v. Robbins*, 1998 MT 297, 292 Mont. 23, 971 P.2d 359 (*Robbins I*). There, the clerk failed to mail notice to jurors, nor were any served personally as required by statute; instead, she merely summoned jurors by telephone.

Robbins I, ¶ 51. This Court found that the clerk failed to substantially comply with the statute, but departed from a century of precedent to affirm Robbins' conviction because he failed to establish prejudice. *Robbins I*, ¶ 52. Despite finding the clerk's method constituted a substantial failure to comply with the statute, the Court applied harmless error analysis and found that Robbins provided no actual evidence that people of a particular group or class—such as the indigent—were necessarily excluded from his venire, resulting in an impartial jury. *Robbins I*, ¶ 53. However, fourteen months later, this Court returned to the long-held rule that prejudice need not be shown when there is a failure to substantially comply with the jury procurement statutes. *LaMere*, ¶ 61 (overruling *Robbins I* to the extent it held that a violation of the juror notification statute could be harmless error) *see also Robbins II*, ¶¶ 16–17 (granting Robbins the new trial that was denied in *Robbins I*).

Montana's juror notification statute, § 3-15-405, states:

> The clerk of court shall serve notice by mail on the persons drawn as jurors and require the persons to respond by mail as to their qualifications to serve as jurors. The clerk of court may attach to the notice a jury questionnaire and a form for an affidavit claiming an excuse from service provided for in 3-15-313. If a person fails to respond to the notice, the clerk

> shall certify the failure to the sheriff, who shall serve the notice personally on the person and make reasonable efforts to require the person to respond to the notice.

"[C]ourts are bound by a statute's plain meaning." *Deschamps v. Mont. Twenty-First Jud. Dist. Ct.*, 2024 MT 15, ¶ 18, 415 Mont. 94, 542 P.3d 392 (citing Mont. Code Ann. § 1-2-101). "If the language is clear and unambiguous, no further interpretation is required." *Ravalli Co. v. Erickson*, 2004 MT 35, ¶ 11, 320 Mont. 31, 85 P.3d 772. The pertinent language here, "If the person fails to respond to the notice, the clerk shall certify the failure to the sheriff, who shall serve the notice personally[,]" is easily understood. Essentially, the clerk and sheriff must "certify and serve" the non-responders to jury notice.

In *LaMere*, the clerk and sheriff failed to "certify and serve" the non-responders to jury notice. *LaMere*, ¶¶ 9, 15. To procure a panel, the clerk selected 200 names but did not mail notice; instead, she used the telephone and never requested the sheriff personally serve the 70 individuals who did not answer. *LaMere*, ¶¶ 4, 9–10. The trial court found this telephonic method was reasonable and not prejudicial. *LaMere*, ¶ 11.

This Court found the failure to summon the entire panel or array "totally undermined" the purpose of juror notification to ensure a randomly drawn venire. *LaMere*, ¶¶ 71–72. "[O]ver one-third of the prospective jurors were excluded from possible jury service" under the "phone-only notification method[.]" *LaMere*, ¶ 70. The lower court "erred in concluding that the statutes on impaneling a trial jury do not require the mailing or personal service of a written jury summons to prospective jurors[,]" which they "plainly do[.]" *LaMere*, ¶ 17. This Court reversed, reasoning LaMere "demonstrated that the substantial failure to comply with the [jury notification statute] materially undermined the purpose of the [] statutes to provide for random selection of jurors" based on "objective criteria" and no proof of prejudice was necessary. *LaMere*, ¶ 75; *see also State v. Highpine*, 2000 MT 368, ¶¶ 39–41, 303 Mont. 422, 15 P.3d 938 (reversing due to the same defective process); *Dvorak*, 196 Mont. at 170, 639 P.2d at 64 (finding a substantial failure to follow jury-formation statutes when the clerk, acting without the judge present, put juror names on paper slips, not capsules, and did not shake the box before drawing names).

The defective process used to form French's venire is similar to that in *LaMere*, *Highpine*, and *Robbins II*. Though Henry mailed notices, she did not certify non-responders to the sheriff, thus the sheriff did not attempt personal service on anyone. Common to all, the "certify and serve" requirement was not met. The same violation in this case as in *LaMere*, *Highpine*, and *Robbins II* demands the same result: reversal and remand for a new trial.

The failure to "certify and serve" is a failure to substantially comply with § 3-15-405. Section 3-15-405 imposes four duties: the clerk must (1) mail notice and (2) certify non-responders to the sheriff; the sheriff must (3) serve personally and (4) make reasonable efforts to require a response to the notice. Here, the clerk and sheriff failed to meet three of the four requirements. That is plainly not substantial compliance.

Henry did not certify non-responders to the sheriff from January of 2020 until August of 2023. (8.21.23 Tr. at 20–21, 29–30.) French's trial occurred in April of 2022. Since Henry drew jury pools annually, and received a list of names for the pool in May or June and notified those selected the following August or September, Henry mailed notices

for French's jury pool in August or September of 2021. This falls squarely within the period when the "certify and serve" requirements were not performed in Cascade County.

The district court clearly erred when it found that French presented no evidence that the clerk and sheriff improperly summoned his jury pool. Henry's testimony proved otherwise. The State even conceded that "the names of those who did not respond were not certified to the sheriff for [any] attempts at personal service." (Doc. 252 at 11.) Henry's faulty process predated the 2023 jury pool and was not, as the district court said, a "result of changes in practices in 2023." (Doc. 258 at 3.) The failure to "certify and serve" existed prior to 2023 and included French's jury pool. The court correctly vacated upcoming trials after receiving Henry's testimony in *State v. Hinkle* because Henry's faulty process created a structural error. But the court wrongly denied French's motion for a new trial after erroneously finding that the failure to "certify and serve" did not impact French's jury pool.

Between 54 and 63 persons out of 200 (approximately 30%) required personal service after failing to respond to notice for the 2023 jury pool. French's pool, procured in August or September of 2021, likely

suffered a similar impact. Henry's need to combine two jury lists for another trial in August of 2023 due to the inordinate number of non-responders suggests this was a broad problem in Cascade County District Court. The court erred in denying French's motion for a new trial and abused its discretion when it declined to grant a hearing where French could present evidence of the number of non-responders excluded from his jury pool.[4]

A. French timely requested a new trial under § 46-16-702(1), *Solberg*, and *Morse*.

Timeliness regarding a motion for new trial based on violations of the jury selection statutes depends on the particular point in which knowledge of the violations is gained. *Solberg*, 203 Mont. at 84, 659 P.2d at 292. Solberg did not object to the selection process used for his jury until submitting his opening appellate brief, more than one year after the trial. *Solberg*, 203 Mont. at 83, 659 P.2d at 292. He did so after learning of the error when this Court published *Dvorak*. *Solberg*, 203

[4] French asserted in a motion to continue the hearing that the Cascade County Attorney limited access to discovery and that the clerk could not provide "directly to defense" the notices and summons sent to those selected for French's jury panel, which hampered his ability to provide evidence through affidavit. (Doc. 257.)

Mont. at 82–84, 659 P.2d at 292. Solberg requested a new trial because his trial took place within weeks of the *Dvorak* trial, and the clerk admitted using the same faulty jury selection procedure for both. *Solberg*, 203 Mont. at 82–83, 659 P.2d at 291–92. This Court ordered a new trial for Solberg and rejected the opposition's "strenuous[]" argument that Solberg's request was untimely. *Solberg*, 203 Mont. at 83, 659 P.2d at 292. This Court held that if a party is "without knowledge or means of knowledge during trial, he may, upon gaining knowledge of selection irregularities, make his objection known in a motion for new trial. "Th[is] rule does not limit the time period for making the objection, rather it defines a particular point as being timely." *Solberg*, 203 Mont. at 84, 659 P.2d at 292.

A party has "a right to rely on the judge and clerk to follow their statutory duties." *Solberg*, 203 Mont. at 84, 659 P.2d at 292 (citing *Dvorak*, 196 Mont. at 171–72, 639 P.2d at 64); *see also United States v. Aviles*, 623 F.2d 1192, 1198 (7th Cir. 1980) (courts presume public officers properly perform their duties); *Gallego v. United States*, 276 F.2d 914, 917 (9th Cir. 1960) ("presumption of regularity supports the official acts of public officers"). Because French had a right to rely on

the public officers correctly performing their duties in procuring his jury pool, he had no reason to speculatively investigate whether the clerk of court was complying with her statutory duties. Once the clerk's substantial failure to comply with § 3-15-405 became known, French swiftly moved for a new trial based on that failure. He did not lack diligence in discovering the problem. The district court incorrectly concluded French lacked diligence in this regard.

Henry testified on August 21, 2023, that she did not certify non-responders in accordance with § 3-15-405 throughout 2021 and 2022, which meant the sheriff did not personally serve *any* non-responders when French's venire was procured. French moved for a new trial 18 days later. French did not raise this issue for the first time on appeal like Solberg, he took the additional step of obtaining a stay of this appeal so the district court could conduct a hearing and rule on the new trial motion before presenting it here. The period between Henry's faulty procurement of French's venire and his discovery of this error cannot count against him in evaluating timeliness based on the "when knowledge is gained" rule under *Solberg*. French acted timely under the circumstances.

The district court erroneously found French's motion untimely by relying on the 30-day deadline from § 46-16-702(2). But French filed the new trial motion pursuant to § 46-16-702(1). "The language of [§ 46-16-702(1)] is clear that a court has the authority to consider granting a new trial and is guided in its decision only by the interest of justice." *State v. Morse*, 2015 MT 51, ¶ 26, 378 Mont. 249, 343 P.3d 1196. "The Legislature did not insert a time limitation on the court's authority to act under subsection (1), nor did it restrict the manner in which the issue may first be raised." *Morse*, ¶ 26.

The provisions of § 46-16-702(1) allow courts to grant a new trial when required by the interests of justice under its "inherent authority," notwithstanding the 30-day deadline under § 46-16-702(2). *Morse*, ¶ 29. The interests of justice have no timeline. *Morse*, ¶¶ 20–29; *see also Lott v. State*, 2006 MT 279, ¶ 20, 334 Mont. 270, 150 P.3d 337 ("The central function of the courts is the pursuit of justice"). To find a defense motion, untimely under § 46-16-702(2) precludes the court from considering facts which potentially warrant a new trial under subsection (1), which would render the pertinent provisions of

subsection (1) ineffective. *Morse*, ¶ 27. French's motion for new trial was timely under *Morse*.

Challenges to the jury panel for civil trials may be made, and the whole panel set aside, when the jury was not notified as prescribed by law. Mont. Code Ann. § 25-7-222. Section 25-7-222 contains no deadline for such a challenge. Juries for criminal trial are formed in the same manner as in civil trials. Mont. Code Ann. § 46-16-111. It is unreasonable to require a strict deadline for challenges to the panel in criminal trials, where fundamental liberty rights are at stake, but maintain no such deadline regarding civil matters. "Most of Montana's structural error jurisprudence arises from criminal trials, in which [this Court is] particularly sensitive to the fair trial rights of defendants." *Suzor v. International Paper Company*, 2016 MT 344, ¶ 30, 386 Mont. 54, 386 P.3d 584. This rationale further supports a finding that French's motion was timely.

French did not lack diligence in moving for a new trial within 18 days of discovering the error. He acted timely under these unique circumstances. Given the fundamental rights at stake, the court should have exercised its inherent power and granted French a new trial.

B. French did not need to prove his jury panel was skewed.

The court further erred by denying French's motion for new trial because he failed to provide evidence that his venire was skewed, biased, or did not represent a true cross-section of his community. (Doc. 258 at 3.) French did not claim systemic exclusion of a distinctive group from his venire in violation of the Sixth Amendment; he claimed there was a failure to substantially comply with the jury procurement statutes. *See LaMere*, ¶¶ 62–63 (citing *Duren v. Missouri*, 439 U.S. 357 (1979); *Taylor v. Louisiana*, 419 U.S. 522 (1975)). A cross-section challenge requires evidence to establish the underrepresentation of a distinctive group in the venire; a challenge to the venire based on a failure to substantially comply with its formation statutes does not. *LaMere*, ¶¶ 62–64. The "object of inquiry" for each are "entirely different subject matters." *LaMere*, ¶ 62.

The *LaMere* Court explained at length why a failure to substantially comply with the jury formation statutes is not amenable to harmless error analysis. *LaMere*, ¶¶ 39–54. To apply harmless error review to a violation of the jury formation statutes "merely invites abstract and unguided speculation about the possibility of prejudice in

an individual case; it is pure conjecture as to whether a properly selected jury would have decided a case differently than an improperly selected jury[.]" *LaMere*, ¶ 26.

A material failure to comply with these statutes cannot be treated as harmless error because the "error precedes the presentation of any evidence to the jury" and thus "cannot be quantitatively assessed for its prejudicial impact" at trial; "it affects the very framework from which the trial proceeds;" and "the impartiality of the jury goes to the very integrity of our justice system," which "cannot be considered harmless error." *LaMere*, ¶ 50. Thus, the court erred by concluding it was "satisfied that French had a fair and impartial jury" and by denying the motion for new trial based on a failure to establish prejudice.

Nor was French necessarily required to present evidence that a particular group was, or sufficient number of persons were, excluded from his venire through Henry's faulty process. In *Robbins I*, this Court found the clerk's faulty method for procuring jurors constituted a substantial failure to comply with the relevant statutes. *Robbins I*, ¶ 51. It did not base this finding on the identity of those excluded or the total number of exclusions. *Robbins I*, ¶¶ 51, 53.

Similarly, this Court granted a new trial in *Highpine* based on the clerk's faulty process, not because the faulty process resulted in the exclusion of an identifiable group or a particular percentage of the pool. *Highpine*, ¶¶ 38–40. "A departure from the statutory scheme that directly or materially affects the random nature or objectivity of the jury selection process establishes a substantial violation *independently of the departure's consequences in an individual case*." *LaMere*, ¶ 60 (emphasis added).

The failure to "certify and serve" in French's case directly impacted the random nature and objectivity of the jury selection process in his case. "[A] sample, however large, that is limited to those who respond to a mail inquiry is not a random sample, and, more important, [] such a sample may be biased[.]" *See U.S. v. Gometz*, 730 F.2d 475, 482 (7th Cir. 1984). "[I]t is quite indisputable that selection on a basis of who returns a questionnaire and who does not is *not random selection*." *Gometz*, 730 F.2d at 483 (Cudahy, J., concurring in part and dissenting in part) (emphasis in original). This Court "will not countenance" a "largely voluntary jury system" that allows prospective jurors to excuse themselves from jury duty simply by failing to respond to a mailed jury

notice. *See LaMere*, ¶ 73. "A failure to summon one or more of the jurors drawn" is "a substantial failure to comply with" § 3-15-405. *LaMere*, ¶ 72 (internal quotations omitted).

Henry's decision not to certify non-responders to the sheriff was arbitrary and subjective. Henry was not even aware of her obligations under § 3-15-405 until August of 2023, and testified she did not certify non-responders because "we were in COVID." (8.21.23 Tr. at 21–23.) This was not an objective basis to exclude persons from jury duty as set forth in §§ 3-15-301 through 3-15-303. No court or other authority gave Henry permission to unilaterally exclude all non-responders from French's jury pool through criteria of her choice.

Nor can the failure to respond to jury notice itself be considered objective criteria from which Henry could excuse jurors. Henry's defective process was subjective because it allowed individuals to arbitrarily disqualify themselves by choice, forgetfulness, or personal whim, not by statutory criteria. Non-responders could shirk jury duty by ignoring the jury notice, just like the telephonic method in *LaMere* excluded prospective jurors who did not answer the phone. *See LaMere*, ¶ 74. The failure to "certify and serve" non-responders when procuring

French's jury pool was plainly a substantial failure to comply with § 3-15-405, which contravened the principles of randomness and objectivity.

C. The *Clark* "new evidence" test is not appropriate for evaluating this structural error.

In denying French's request for a new trial, the court stated that French could claim new evidence, e.g., court orders directing the clerk and sheriff to comply with § 3-15-405, entitled him to a new trial. The court then cursorily applied four of the five "new evidence" factors from *Clark*, ¶ 34, and concluded French failed the test. But the *Clark* test is inadequate to determine whether a new trial is warranted based on a material departure from the jury procurement statutes.

To prevail on a motion for a new trial grounded on newly discovered evidence, the defendant must satisfy a five-part test:

> (1) The evidence must have been discovered since the defendant's trial;
> (2) the failure to discover the evidence sooner must not be the result of a lack of diligence on the defendant's part;
> (3) the evidence must be material to the issues at trial;
> (4) the evidence must be neither cumulative nor merely impeaching; and
> (5) the evidence must indicate that a new trial has a reasonable probability of resulting in a different outcome.

Clark, ¶34.

This test is inadequate to evaluate French's motion. French's "new evidence" was newly discovered evidence of a violation in the statutory jury procurement process, not newly discovered trial evidence, such as a witness recantation or exonerative DNA. *See Morse*, ¶ 30 (victim's post-trial recantation contradicted her trial testimony); *House v. Bell*, 547 U.S. 518, 528, 540–41 (2006) (evidence of semen found on victim's clothing was presented at trial as consistent with House, but later determined to be from the victim's husband after trial). "New evidence" of a structural error in the criminal process is different than factual evidence of guilt or innocence. As such, French's evidence of the failure to "certify and serve" when procuring his venire cannot be evaluated under the third, fourth, and fifth *Clark* factors: (3) whether it was "material to the issues at trial[,]" (4) "neither cumulative nor merely impeaching[,]" nor (5) whether it would "indicate that a new trial has a reasonable probability of resulting in a different outcome."[5] Just as structural errors are not amenable to harmless error analysis because

[5] There is no dispute French's "new evidence" of the failure to "certify and serve" was discovered post-trial, satisfying the first prong. French also did not lack diligence in discovering this evidence, as argued above, satisfying the second prong.

they "cannot be assessed by this Court against 'the record' for 'prejudicial impact[,]'" the structural error that occurred here cannot be assessed under the *Clark* factors because three of those factors require assessment against the trial record. *See LaMere*, ¶ 53.

The clear mandate of *LaMere*, and a century of precedent before it remains: "Where the defendant shows there has been a substantial or material deviation from statutory procedures . . . a presumption of prejudice obtains." *LaMere*, ¶ 61. French established, and the State conceded, that Henry failed to certify non-responders when procuring his jury pool. In turn, Sheriff Slaughter did not personally serve any non-responders. This is a substantial failure to comply with § 3-15-405, prejudice is presumed, and therefore this Court should order the district court to grant French a new trial.

II. The conviction for Count I cannot stand because evidence of an essential element was based solely on uncorroborated, prior inconsistent statements.

Article II, Section 17 of the Montana Constitution and the Due Process Clause of the United States Constitution protect the accused "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is

charged." *State v. Davis*, 2012 MT 129, ¶ 11, 365 Mont. 259, 279 P.3d 162. "*Each element* of a criminal offense must be proven by sufficient evidence." *City of Helena v. Strobel*, 2017 MT 55, ¶ 11, 387 Mont. 17, 390 P.3d 921 (emphasis added). When the evidence is insufficient to support a verdict of guilty, at the close of the prosecution's evidence, the court may dismiss the charge. Mont. Code Ann. § 46-16-403. Acquittal is appropriate if reasonable persons could not conclude from the evidence, taken in a light most favorable to the prosecution, that guilt has been proved beyond a reasonable doubt. *White Water*, 194 Mont. at 87–88, 634 P.2d at 638.

To convict a person of SIWC, the State must prove an act of penetration beyond a reasonable doubt because it is essential to the definition of "sexual intercourse." Mont. Code Ann. §§ 45-5-503; 45-2-101(68)(a) ("sexual intercourse" means penetration of the vulva or mouth of one person by the penis or body member of another); *White Water*, 194 Mont. at 88, 634 P.2d at 638.

"[A] prior inconsistent statement admitted as substantive evidence under Rule 801(d)(1)(A), M.R. Evid., although admissible, is insufficient by itself to support a conviction without corroboration by

independent evidence." *State v. Giant*, 2001 MT 245, ¶ 30, 307 Mont. 74, 37 P.3d 49 (overturned on other grounds) (citing *White Water*, 194 Mont. at 88–89, 634 P.2d at 638–39); *Strobel*, ¶ 11. "A prior inconsistent statement is a statement made by a declarant that the declarant later contradicts during testimony at trial." *Strobel*, ¶ 11 (citing Mont. R. Evid. 801(d)(1)(A)). "Corroborative evidence is additional evidence of a different character *to the same point*." Mont. Code Ann. § 26-1-102(3) (emphasis added). Corroboration is sufficient as "long as *each element* of the offense finds support in some independent, reliable evidence of guilt besides the prior statement[.]" *State v. Torres*, 2013 MT 101, ¶ 27, 369 Mont. 516, 299 P.3d 804. (emphasis added).

Evaluating prior inconsistent statements for their sufficiency to sustain a conviction "inevitably involves a review of the degree of reliability" of those statements. *Giant*, ¶ 23. This Court has analyzed this issue at length and concluded that "requiring corroboration is the best way to ensure that the variations in the reliability of [out-of-court] statements are addressed in a way that can support a conviction beyond a reasonable doubt." *Giant*, ¶¶ 32–35; *White Water*, 194 Mont. at 89–90, 634 P.2d at 639; *Strobel*, ¶¶ 18–19. Even if prior statements seem

reliable, they must be corroborated by other evidence. *Giant*, ¶¶ 32–34 (citing *State v. Stringer*, 271 Mont. 367, 382, 897 P.2d 1063, 1072 (1995).

Stringer, a domestic violence case, provides an example of the corroborative evidence necessary to survive a motion for an acquittal based on insufficient evidence involving a prior inconsistent statement. *Stringer*, 271 Mont. 367, 897 P.2d 1063. Stringer argued that the only evidence underlying his assault and kidnapping convictions was the prior written inconsistent statement of the victim, his ex-wife. *Stringer*, 271 Mont. at 381, 897 P.2d at 1072. At trial, she recanted the prior statement written and signed one day after the incident in which she alleged Stringer threw her against a wall, started to stab and slash at her with a knife, repeatedly slapped her, and forced her to leave her apartment. *Stringer*, 271 Mont. at 371–72, 382, 897 P.2d at 1066, 1072.

But this Court found sufficient corroborating evidence of the ex-wife's prior inconsistent statement to hold that the district court properly denied Stringer's motion to acquit. *Stringer*, 271 Mont. at 382, 897 P.2d at 1072. The corroborating evidence included: (1) photos of the ex-wife's injuries; (2) testimony about her hysterical demeanor when

law enforcement arrived; (3) the fact that she was walking outside without a coat or socks late at night; and (4) officer testimony that the statements from other witnesses at the scene were consistent with one another. *Stringer*, 271 Mont. at 382, 897 P.2d at 1072. This evidence sufficiently corroborated the elements of assault and kidnapping to affirm the denial of Stringer's motion to acquit. *See Stringer*, 271 Mont. at 382, 897 P.2d at 1072.

In *White Water*, which controls the instant matter, this Court affirmed a trial court's dismissal of a SIWC charge for insufficient evidence because the only evidence of penetration was based on inconsistent statements of the alleged victim. *White Water*, 194 Mont. at 90, 634 P.2d at 639.

The State alleged that White Water, while staying at his ex-wife's home, placed his hand down the back of his former stepdaughter's pants. *White Water*, 194 Mont. at 86, 634 P.2d at 637. The ex-wife saw this and reported it to law enforcement. *White Water*, 194 Mont. at 86, 634 P.2d at 637. The sheriff who interviewed the daughter wrote her statement by hand, which alleged that White Water put his hand down the back of her pants, and then moved it to the front and penetrated her

vagina with his finger. *White Water*, 194 Mont. at 86–87, 634 P.2d at 637. A social worker who witnessed the interview corroborated the sheriff's version of the girl's statement. *White Water*, 194 Mont. at 88, 634 P.2d at 638.

At trial, the daughter testified White Water put his hand on her butt and removed it when her mother appeared, but repudiated the prior, unsworn statement written by the sheriff. *White Water*, 194 Mont. at 87–88, 634 P.2d at 637–38. She felt the sheriff misunderstood what she said and twisted her statements around. *White Water*, 194 Mont. at 87–88, 634 P.2d at 637–38. The ex-wife's testimony corroborated that White Water put his hand down the back of her daughter's pants but did not corroborate the allegation of vaginal penetration. *White Water*, 194 Mont. at 88, 634 P.2d at 638. The social worker witnessed the prior statement being made but could not corroborate the factual allegations within the statement. *See White Water*, 194 Mont. at 88, 634 P.2d at 638. This Court affirmed the trial court's dismissal of the SIWC charge for insufficient evidence because the only evidence of penetration was based on the prior inconsistent statement of the alleged victim, but no

other evidence corroborated penetration. *White Water*, 194 Mont. at 90, 634 P.2d at 639.

Here, just like in *White Water*, the only evidence of penetration came from K.K.'s prior inconsistent statements. The court concluded there was "thin" evidence to "weakly" corroborate K.K.'s prior inconsistent statements, but the court was incorrect. (Doc. 195 at 3.) No evidence at all—not from K.K.'s parents, nor from Katie Cunningham—corroborated any statement that French penetrated K.K. No one testified to witnessing French do anything to K.K., thus any act K.K. alleged by French in her out-of-court statements was never corroborated. Her parents' testimony corroborated only that K.K. spent a night at French's home, that K.K.'s statement upon returning home upset her father, and this prompted her mother to call law enforcement. No evidence at trial corroborated K.K.'s prior inconsistent statement alleging penetration.

Contrary to the court's findings, neither parent testified about K.K.'s demeanor when she made any statement. (Doc. 195 at 3.) The court also concluded that "K.K.'s reports" to her parents corroborated her prior inconsistent statements, but K.K.'s reports to her parents *were*

the prior inconsistent statements. (Doc. 195 at 3.) No evidence corroborated the *content* of K.K.'s prior statements that French touched her sexually, much less that he penetrated her mouth or vagina. Absent any independent evidence corroborating the essential element of penetration, French's motion to dismiss Count I for insufficient evidence should have been granted.

Moreover, K.K.'s prior statements were not reliable. They were unsworn and inconsistent with each other. At trial, under oath, K.K. did not remember anything. Prior to trial, she told her father that French "put his front butt in [her] mouth." Ten months later, she told her mother he peed in her mouth. In the forensic interview, she said he put his penis in her mouth, but nothing came out of it. Nearly two years later, while showering, K.K. suggested that French tried putting his penis in her vagina. One statement indicated French penetrated K.K.'s mouth, another suggested he ejaculated in her mouth, while the third indicated he did not. K.K.'s fourth statement made no mention of her mouth, instead it suggested a possible attempt at vaginal penetration. (Trial Tr. at 406, 417–18.) The inconsistencies across these out-of-court statements demonstrates their lack of reliability.

CONCLUSION

Based on the arguments above, French requests this Court remand and order the district court to grant the motion to dismiss Count I, resulting in an acquittal for Count I.

French also requests the Court order the district court to grant French a new trial on the remaining two counts. If the Court agrees Count I was supported by insufficient evidence, then the Court should declare that the Double Jeopardy Clause bars a second trial for Count I and any new trial shall pertain only to Counts II and III. *See Burks v. United States*, 437 U.S. 1, 11 (1978). ("[T]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.")

If this Court affirms the denial of French's motion to dismiss Count I, but remands for a new trial or a hearing based on the failure to substantially comply with § 3-15-405, then the remand should encompass all three counts.

Respectfully submitted this 31st day of December, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 8,491, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Jeff Wilson
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APPENDIX

CERTIFICATE OF SERVICE

I, Jeff N. Wilson, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 12-31-2024:

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