

IN THE SUPREME COURT OF THE STATE OF MONTANA
CAUSE NO. DA 23-0461

STATE OF MONTANA,

Plaintiff and Appellee,
and

DONALD EDWARD FOSTER,

Defendant and Appellant.

Appellant/Defendant's Opening Brief

On Appeal from the District Court of the Thirteenth Judicial District Court
of the State of Montana, In and For Yellowstone County

Before the Honorable Michael G. Moses
Cause No. DC-21-625-IN

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STATEMENT OF THE ISSUES

- I. Appellant's counsel was ineffective when she failed to object to multiple charges which were precluded under Montana's statutory protections against multiple charges which are lesser included offenses or offenses that constitute the same transaction.
- II. Appellant's right to due process was violated when he was excluded from a critical stage of the proceedings, where he had not waived his appearance. His absence constituted a structural error. Alternatively, it cannot constitute harmless error.

STATEMENT OF THE CASE

The present case involves the story of Appellant Donald Foster ("Foster"), who on the night of May 3, 2021, took his adopted mother and a house guest, Mercedes, hostage at knife point and later gun point. First, Foster threatened both Mercedes and his adopted mother with a knife, then tied both of them up. Foster's adopted mother escaped and notified authorities, who responded and along with Foster's brother, negotiated with Foster throughout the night. During which time, Foster sexually assaulted and raped Mercedes. Foster forced Mercedes to perform oral sex upon him, attempted to vaginally penetrate her, and when that was unsuccessful, he penetrated her anally.

Eventually, Mercedes along with police negotiators and Foster's brother convinced Foster to give up, which he did with Mercedes in tow. Mercedes and Foster were both taken to the hospital to receive forensic exams. The State charged Foster with four counts of aggravated sexual intercourse without consent, three counts of attempted sexual intercourse without consent, and one count of aggravated kidnapping. This was eventually amended to three counts of aggravated sexual intercourse without consent, two counts of attempted sexual intercourse without consent, and two counts of aggravated kidnapping.

The acts the State used to charge the four counts of aggravated sexual intercourse without consent occurred on the same date, at the same location, and with the same victim, meaning they constituted the same transaction. Specifically, the first count charged Foster for penetrating Mercedes' mouth with his penis, and the second and third count charge Foster for anally penetrating Mercedes two times. However, this was one attack that started with Foster forcing her to perform oral sex then moving to what Foster wanted to be vaginal penetration, albeit unsuccessful, followed by anal penetration, followed by a second failed attempt at vaginal penetration followed by another anal penetration. Additionally, both counts of attempted sexual intercourse without consent were part of the completed sexual intercourse without consent.

While these acts deserve to be charged and punished, the charges must be legal and in line with the facts of the case. Here, there was one aggravated sexual intercourse without consent, one date, one location and one person, but the State divided it into five separate crimes to create multiple additional charges in violation of Montana's statutory prohibitions. Further, Foster's counsel did not object to the multiple charges, or challenge them in any way, which constitutes ineffective assistance of counsel, and prejudiced Foster. As such the Court should, at a minimum, vacate the impermissible counts and remand for resentencing. Additionally, based upon the numerous multiple charges, the Court should determine that Foster suffered prejudice and reverse and remand for retrial on the one count of aggravated sexual intercourse without consent, and affirm the aggravated kidnapping counts, which Foster does not challenge.

Additionally, Foster was subject to two jury trials, and despite double jeopardy not attaching, Foster's fundamental right to be present at every critical stage of the proceedings was violated, and Foster suffered prejudice as a result. Specifically, on the first day of the first jury trial, a Friday, and after the jury had been selected, the State received a vague letter from Foster's cellmate alleging Foster had confessed to the cellmate. The State turned a copy over to Foster's defense counsel. Thereafter, defense counsel, the prosecutor, and the court met in-chambers, on the record, during the trial with Foster not present; and neither informing him of

the new evidence nor the in-chambers meeting with the judge on the record, to determine a way forward. Foster's desires and decision to proceed forward or not were completely circumvented by this event. Although the Judge was adamant the court would be empaneling a jury that day, the State requested the court refrain from swearing in the jury, to avoid allowing Foster's double jeopardy right from attaching. Foster's counsel, without consulting Foster, consented to this arrangement, and the court then, in that meeting without any further consideration or information from Foster, agreed not to swear in the jury. Thereby preventing Foster's right to double jeopardy from attaching. The jury was selected that day, but was purposely not sworn in. The following Monday, trial resumed, wherein it appears Foster remained unaware of what occurred in-chambers the prior Friday, the first day of jury trial. Ultimately, the State moved for a continuance of trial to allow the State and defense to interview the cellmate. Foster's attorney consented to the continuance; again, and apparently, without consulting Foster. The court granted the continuance without any inquiry of Foster and released the fourteen jurors selected.

Foster was then required to wait four additional months to be trialed on all the counts alleged by the State, and found guilty by a new jury, on each count. Thereafter, Foster was sentenced to five Life sentences, one for each count of aggravated sexual intercourse without consent, and for each count of attempted

sexual intercourse without consent, all run concurrently, but consecutively to the 100 years, or 50 years for each count, of aggravated kidnapping.

Foster alleges that his counsel was ineffective for failing to object to the counts which would have been barred by Montana's statutory protections against multiple charges, or multiple prosecutions for the same offense. Further, Foster alleges that he was denied his fundamental right to be present at every critical stage of the proceedings against him.

Foster asks the Court to reverse the convictions and remand for a new trial on the basis that his fundamental right to be present at all critical stages of the proceedings was violated. Further, hold that Foster suffered prejudice based upon the unauthorized multiple charges that were levied against him in violation of Montana's statutory provisions, and therefore dismiss the counts which are violative to Montana's protections against multiple charges, and remand for resentencing on the remaining counts; or if the Court deems proper, reverse the convictions on all charges on the basis that his fundamental rights were violated and double jeopardy should have attached had his counsel not been ineffective.

SUMMARY OF ARGUMENT

The State bifurcated Foster's heinous act into five separate charges, in violation of Montana's prohibition against multiple charges for the same offense or transaction.

Foster's fundamental right to be present at every critical stage of the proceedings against him was violated when the court met with the State and defense counsel, without Foster being present, and addressed newly discovered evidence against Foster, and decided to refrain from swearing in the jury, which the court had intended to do, to prevent Foster's fundamental protection from double jeopardy from attaching, so as to allow the State to continue the trial without risking a double jeopardy challenge.

STATEMENT OF FACTS

On May 3, 2021, Mercedes (identified as M. in various documents within the record), then 18 years old got into a fight with her mother, after the fight, Mercedes decided to leave and go stay with her older friend, Judy. Transcript of Proceedings, January 19, 2023, Day Three, Second Jury Trial ("Tr. Day 3 2nd JT"), 44:14-45:19. Mercedes considered Judy as a second grandmother and had stayed with Judy previously. *Id.*, 42:18-43:13. Upon arrival, Mercedes met Foster, who is Judy's adopted son and who had been staying with Judy. *Id.*, 45:25-46:1,

After saying hello to Judy, Mercedes settled into an upstairs bedroom near Judy's room. *Id.*, 48:12-14. Sometime later, Mercedes was awoken by Foster knocking and informing Mercedes that her mother called, and she should come with Foster to call her mother back. *Id.*, 49:20-50:11. When Mercedes declined saying she would call her mother the following day, Foster charged into the room

brandishing a knife causing Mercedes to scream. *Id.*, 50:25-52:3. Judy emerged from her bedroom and saw Foster holding the knife. Foster demanded Judy and Mercedes follow his instructions or face terrible consequences. *Id.*, 52:10-53:17. Both complied, and were tied up with various items. *Id.*, 54:8-55:12. After Judy and Mercedes were restrained, Foster took them downstairs, placing Judy in a bathroom, and Mercedes into his bedroom. *Id.*, 56:9-59:17.

While Judy was in the bathroom, Foster sequestered Mercedes in his bedroom with the door partially open. *Id.*, 61:12-17. Foster instructed Mercedes to remove her clothing, and Mercedes complied. *Id.*, 62:12-63:8. While Mercedes was sitting on the bed, Foster approached her and forced her to perform oral sex on him, he then had Mercedes lay on the bed where he climbed on top of her attempting to have vaginal sex with her, which proved unsuccessful. *Id.*, 63:14-66:2. After Foster “couldn’t get it in,” he became frustrated and anally raped Mercedes. *Id.*, 65:25-66:9.

During this encounter, Judy fled from the bathroom and left the house. *Id.*, 66:13-21. Based on Mercedes testimony, Foster forced or attempted to force Mercedes to perform oral sex upon him twice, and at some point, achieved ejaculation. *Id.*, 66:22-67:14.

Over the course of the next several hours, Foster would be on and off the phone with police, hostage negotiators, and Foster’s brother, all of whom were attempting to resolve what had now become a hostage situation. *Id.*, 71:15-74:25.

While these calls were ongoing, and in the intermission between the calls, Foster continued to be sexually aggressive with Mercedes raping her in between and at times, while on the phone with officers calling. *Id.*, 75:1-80:23.

Mercedes, along with negotiators and Foster's brother, convinced Foster to surrender and let Mercedes go. *Id.*, 90:9-91:17. Mercedes was transported to a clinic for medical treatment and to complete a rape kit, and the investigation into Foster began in earnest. *Id.*, 91:18-92:2; Transcript of Proceedings, January 17, 2023, Day One, Second Jury Trial ("Tr. Day 1 2nd JT"), 142:11-19, 143:3-10.

On August 26, 2022, a Friday, Foster's case proceeded to its first jury trial on the merits. See Transcript of Proceedings, August 26, 2022, Day 1 Jury Trial ("Tr. Day 1, 1st JT"), generally. At the outset, outside the presence of the jury, the State asked the court to address the defense motions to exclude DNA evidence, associated testimony from an expert, along with a 911 call and associated foundational witness which were not timely disclosed by the State. Tr. Day 1, 1st JT, 6:21-22:22. Along with counsel, Foster was personally present at this hearing. *Id.*, 4:10-18. The court reserved ruling upon the defense motion to exclude, and *voir dire* began. *Id.*, 22:14-19, 25:12-20. *Voir dire* proceeded as normal until the lunch break, when the State informed the court that it had received an unsolicited letter from Foster's cell mate, who was now a potential witness who the State had not had an opportunity to interview or otherwise verify the allegations made in the letter. *Id.*, 115:21-116:9.

After lunch, on the record, the Defense Counsel, the prosecution and the Court met in chambers without Foster. Prior to announcing the letter's arrival, the State inquired if the court intended to impanel the jury on that day or wait until Monday, to which the court responded, "No, we are impaneling the jury today." *Id.*, 115:12-20. Along with informing the court about the newly received letter and potential witness, the State then informed the court that it had concerns about impaneling the jury on that day because doing so could impact the State's response to the new letter. *Id.*, 115:21-116:15. The State requested the court not empanel the jury, and instead wait until the following week. *Id.*, 116:13-15.

Defense counsel began by stating "...Mr. Foster is not present for this conversation." *Id.*, 116:17-18. When questioned why Mr. Foster was not present, defense counsel replied, "He does not know yet this has happened." *Id.*, 116:20-21. Yet, defense counsel went on to say, in regard to the new potential witness (cell mate) "...in talking with the State, I think if they get the statement, the idea would be to request more time before proceeding to trial so that if there is anything substantive that this individual has they (the State) have the opportunity to find that out, we have the opportunity to follow it up and then we will proceed to trial." *Id.*, 117:1-7. Foster's counsel went further to say "...there is concern if a jury is impaneled, you know, how can we proceed, what if there is something in there that

is substantive would create an issue for appeal if it is not allowed in trial...” *Id.*, 117:10-14.

In response to these representations, the court changed its position regarding impaneling the jury, “My inclination in light of what I just heard each of you will want to be engaged in the interview over the weekend. So my inclination originally was, no, we are not going to impanel this jury that was my intentions today. But double jeopardy will attach if we do... So my inclination is that – in fact, my ruling will be that we will not impanel this jury until Monday morning at nine o’clock.” *Id.*, 117:18-118:2. Although it did not change the court’s position, the court noted it was “a little uncomfortable that he (Foster) is not here.” *Id.*, 118:11-12.

The remainder of the day was spent completing *voir dire*, and by 3:00 p.m. the fourteen jury members were selected and seated. Tr. Day 1, 1st JT, 166:15-19. However, the court did not swear in the jury, instead the court admonished the jury, and told the jury to return on Monday. *Id.*, 166:16-21.

The following Monday, the court and parties reconvened in chambers outside the presence of the jury. Transcript of Proceedings, August 29, 2022, Jury Trial Day 2, (“Tr. Day 2, 1st JT”), 3:1-9. It is unclear within the transcript whether Foster was present at this meeting because he was not addressed by the Court nor his counsel. During this meeting, the court excluded all DNA evidence and related testimony, due to the State’s late disclosure of the evidence to the defense. *Id.*, 18:3-6; 18:24-

19:5. However, the court determined testimony by the newly disclosed cell mate would be allowable at the then proceeding trial. *Id.*, 11:4-12:12.

The State moved for a continuance to allow both parties to interview the newly disclosed cell mate witness, which the defense did not oppose and the continuance was granted by the court. *Id.*, 21:10-13, 22:13-14, 23:1-4. The court cautioned that based on the continuance, the then excluded DNA evidence was now properly disclosed and would be admissible at any new trial setting. *Id.*, 24:1-25:4.

The court never addressed, at any point, Foster's absence at the prior meeting, nor did it take any action to confirm that Foster understood or agreed with the actions taken at the prior meeting.

Following the continuance of the previous, Foster's case moved forward to a second jury trial, where a new jury was seated, and after four days the trial ended on January 20, 2023, with the jury returning guilty verdicts on each count of the State's Information. See Doc. 84-90, Verdict Forms. On June 15, 2023, Foster was sentenced. See Doc. 107, Judgment. Following the entry of judgment, Foster timely appealed.

STANDARDS OF REVIEW

- I. "A claim of ineffective assistance of counsel constitutes a mixed question of law and fact that we review de novo." *State v. Brandt*, 2020 MT 79, 399 Mont.

415, ¶ 10, 460 P.3d 427 (citing *State v. Hooper*, 2016 MT 237, 385 Mont. 14, ¶ 5, 386 P.3d 548).

- II. Whether a criminal defendant's right to be present at the critical stages of his trial has been violated is a question of constitutional law, for which this court exercises plenary review. *State v. McCarthy*, 2004 MT 312, 324 Mont. 1, ¶ 29, 101 P.3d 288, citing *State v. Kennedy*, 2004 MT 53, 320 Mont. 161, ¶ 13, 85 P.3d 1279 (internal citation omitted).
- III. Under the plain error doctrine, this court may discretionarily review claimed errors that implicate a criminal defendant's fundamental constitutional rights, even if no contemporaneous objection was made, where failing to review the claimed error may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process. *State v. Stokes*, 2024 MT 32, 415 Mont. 208, ¶ 1, 543 p.3d 601.

IV.

ARGUMENT

I. FOSTER'S COUNSEL WAS INEFFECTIVE BY NOT RAISING A STATUTORY MULTIPLE CHARGES OBJECTION TO SEVERAL COUNTS OF CONVICTION WHEN SOME COUNTS CONSTITUTED LESSER INCLUDED OFFENSES AND OTHERS WERE PART OF THE SAME TRANSACTION

A. THE COURT SHOULD REVIEW FOSTER'S IAC CLAIM ON DIRECT APPEAL

The Sixth and Fourteenth Amendment to the United States Constitution and Article II, Section 24 of the Montana Constitution guarantee the right to effective assistance of counsel. *State v. Aker*, 2013 MT 253, 371 Mont. 491, ¶ 34, 310 P.3d 506. This Court has adopted the standard applied in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) to review ineffective assistance of counsel (IAC) claims, that is "a defendant must prove both (1) that counsel's performance was deficient, and (2) that counsel's deficient performance prejudiced the defense." *Garding v. State*, 2020 MT 163, 400 Mont. 296, ¶ 15, 466 P.3d 501 (citing *Whitlow v. State*, 2008 MT 140, 343 Mont. 90, ¶ 10, 183 P.3d 861); *State v. Crider*, 2014 MT 139, 375 Mont. 187, ¶ 34, 328 P.3d 612.

Generally, this Court will review IAC claims on direct appeal only when the record sufficiently answers "why" counsel did or did not take a certain course of action. *State v. Kime*, 2013 MT 14, 368 Mont. 261, ¶ 31, 295 P.3d 580. . However, non-record-based claims may be raised on direct appeal where counsel either failed to do something that was required, or did something for which there is no plausible justification. *State v. Schaeffer*, 2014 MT 47, 374 Mont. 93, ¶ 35, 321 P.3d 809, citing *State v. Kougl*, 2004 MT 243, 323 Mont. 6, ¶ 15, 97 P.3d 1095.

For instance, this Court has repeatedly found it appropriate to review IAC claims on direct appeal where defense counsel failed to evaluate the statute under

which their client was charged and advise the defendant accordingly. *State v. Becker*, 2005 MT 75, 326 Mont. 364, ¶¶ 18-19, 110 P.3d 1, citing *Kennedy v. Maggio*, 725 F.2d 269, 270-72 (5th Cir. 1984). This has been especially true when defense counsel has failed to object under Montana’s statutory protections against multiple charges, many times referred to as Montana’s “statutory double jeopardy” provisions. See *Becker*, ¶ 17 (“...we conclude that it is appropriate to analyze this case under Becker’s ineffective assistance of counsel claim.”); *State v. Williams*, 2010 MT 58, 355 Mont. 354, ¶ 16, 228 P.3d 1127 (analyzing IAC raised for the first time on direct appeal); *State v. Brandt*, 2020 MT 79, 399 Mont. 415, ¶ 32, 460 P.3d 427 (“Brandt’s ineffective assistance of counsel claim is the appropriate vehicle to address the unpreserved multiple conviction challenges...”); *State v. Ellison*, 2018 MT 252, 393 Mont. 90, ¶ 25, 428 P.3d 826 (this “Court has held that failure to make a valid objection based on the statutory prohibition on multiple charges constitutes deficient performance under *Strickland*.”).

In the present case, Foster’s counsel failed to address the multiple charges that Foster faced, several of which were barred by Montana’s statutory protection against multiple charges. Accordingly, this Court should review Foster’s unpreserved IAC claim on direct appeal.

**B. FOSTER’S COUNSEL’S FAILURE TO OBJECT TO THE
MULTIPLE CHARGES WHICH WERE IN VIOLATION OF**

MONTANA’S STATUTORY PROVISIONS WAS DEFICIENT PERFORMANCE

This Court has plainly stated that a failure to make any motion in the district court raising the application of Montana’s multiple conviction statute, when it is applicable, is almost certainly per se deficient performance on the part of defense counsel. *Ellison*, ¶ 26, citing to *Becker*, ¶ 25.

Here, no motion or objection was made by Foster’s counsel when several counts of conviction were barred by Montana’s statutory protections against multiple charges.

Specifically, Foster was charged with three counts of Aggravated Sexual Intercourse Without Consent, and two counts of Attempted Sexual Intercourse Without Consent. As will be explained in more detail below, both of the Attempted Sexual Intercourse Without Consent counts are lesser included to the Aggravated Sexual Intercourse Without Consent counts and were barred by statute. Additionally, the three counts of Aggravated Sexual Intercourse Without Consent constitute a single transaction or course of conduct and as such, being convicted for multiple charges is statutorily barred.

In an attempt to simplify this, Counts I, II, and III are part of the same attack (transaction or course of events), Count IV and V are lesser included charges meaning all five of these counts should be one singular count.

In relevant part, Montana’s statute barring multiple prosecutions reads:

(1) When the same transaction may establish the commission of more than one offense, a person charged with the conduct may be prosecuted for each offense.

(2) A defendant may not, however, be convicted of more than one offense if:

(a) one offense is included in the other;

...

Mont. Code Ann. § 46-11-410 (2023).

An “included offense” is statutorily defined to include an attempt to commit the offense charged or an attempt to commit an offense that is included in the offense charged. Mont. Code Ann. § 46-1-202(9)(b).

To determine whether offenses are part of the "same transaction" under Mont. Code Ann. § 46-11-410, courts look to the facts underlying the charged offenses, including the defendant's motivation by a common purpose or plan. *State v. Ellison*, 2018 MT 252, ¶ 21, 393 Mont. 90, 428 P.3d 826 (internal quotations and citations omitted). "Whether two offenses arise from the same transaction or involve the same criminal objective does not depend on the elements of the charged offenses, but rather on the defendant's underlying conduct and purpose in engaging in that conduct." *Ellison*, ¶ 21, citing *State v. Glass*, 2017 MT 128, 387 Mont. 471, ¶ 12, 395 P.3d 469. Offenses arise from the same transaction when a defendant's underlying conduct which gives rise to each prosecution is motivated by a single purpose to accomplish the same criminal objective. *State v. Neufeld*, 2009 MT 235, 351 Mont. 389, ¶ 20, 212 P.3d 1063.

This Court's opinion in *State v. Williams* is instructive in the present case, because in *Williams*, the State charged Williams with both sexual intercourse without consent and sexual assault (a lesser included to sexual intercourse without consent) based upon one attack which Williams carried out against his victim. ¶ 6. Williams entered his victim's room, choked, threatened to kill her, then kissed her, touched her all over her body, and penetrated her vagina with his finger. *Id.*, ¶ 7. While these facts could give rise to either a sexual intercourse without consent (due to the penetration of the victim's vagina), or sexual assault (based upon the other acts of sexual contact), this Court determined these actions were part of the same attack, and sexual assault is a lesser included of sexual intercourse without consent, therefore Mont. Code Ann. § 46-11-410(2)(a) precluded the State from prosecuting both of the counts. *Id.*, ¶ 30.

The facts in *Williams* are similar to the present case, all actions were taken within the same short time period, that is within the same attack, and while, like Williams actions, Foster's actions could constitute separate offenses had they occurred on separate occasions, separate dates, locations, or events too remote in time to constitute one offense; however, Foster's actions occurred on the same date, location, involved the same complaining witness, and constitute a singular attack, and therefore only one count may stand.

C. COUNTS IV AND V WERE LESSER INCLUDED OFFENSES TO COUNTS I, II, AND III, AND WERE BARRED BY STATUTE

Foster was charged with three counts of Aggravated Sexual Intercourse Without Consent, and two counts of Attempted Sexual Intercourse Without Consent; however, the record shows that both counts of Attempted Sexual Intercourse Without Consent were part of the same transaction or occurrence as the Aggravated Sexual Intercourse Without Consent and are statutorily defined as lesser included offenses, barring prosecution of the Attempted Sexual Intercourse Without Consent charges.

Here, both counts of Attempted Sexual Intercourse Without Consent read identically charging Foster for his actions when he “unsuccessfully tried to penetrate M.’s (born September 2002) vagina with his penis...”. The record shows after Foster unsuccessfully attempted to penetrate Mercede’s vagina, Foster immediately repositioned and raped her anally, which was charged as both counts II and III, alleging Foster “penetrated M.’s (born September of 2002) anus with his penis...”

In its motion to file information, the State alleged the following facts:

Regarding what they claim is the first attack:

“He (Foster) attempted to penetrate M.’s vagina with his penis, but was unsuccessful. M. reported that he penetrated her anus.”

Doc. 71.

Further, regarding what they claim is a second attack:

“Ignoring M., the Defendant again unsuccessfully attempted to penetrate her vagina with his penis. After his attempts at vaginal penetration were unsuccessful, the Defendant again penetrated M.’s anus with his penis.”

Doc. 71.

Testimony at trial shows that Mercedes was a victim of a horrible attack, beginning with Foster’s failed attempt at vagina rape, and then moving during the same attack to anal rape.

State: And you think the Defendant at that point was trying to have you sex with you, vaginal sex with you?

Mercedes: Yeah.

State: Did that happen?

Mercedes: He tried.

State: When you say he tried, what do you mean?

Mercedes: That he tried to penetrate me but wasn't able to.

State: How do you know that?

Mercedes: I don't know how else to explain it other than like he couldn't get it in.

State: So what happened when he couldn't get it in?

Mercedes: He got like really frustrated. I think he kept calling me a bitch. And then he tried to give me anal sex. And it was extremely painful.

Tr. Day 3, 65:20-66:9.

Then again during the subsequent penetration:

State: Did the Defendant try to have vaginal sex with you again at that point in time?

Mercedes: Yes, he did try and then again he just couldn't penetrate so then he resulted back to anal sex.

Tr. Day 3, 82:19-22.

As tragic as these events are, Foster's attempts at vaginal penetration was part of the anal penetration, making it part of the same transaction and each count charged as an attempt is statutorily defined as an "included offense" which cannot be prosecuted along with the completed offense of sexual intercourse without consent.

D. COUNT I AND III WERE PART OF THE SAME TRANSACTION OR CONTINUING COURSE OF CONDUCT AS COUNT II AND BARRED BY MONTANA'S STATUTE AGAINST MULTIPLE OFFENSES

Count I charged that Foster "penetrated M.'s (born September 2002) mouth with his penis..."

Similar to the above argument, this count was part of the same attack as Count II, specifically within its motion to file information, the State alleged the following facts:

"The Defendant told M. to open her mouth. M. hesitated initially, prompting the Defendant to grab her by the shoulders. The Defendant forced his penis into her mouth, causing her to gag. Subsequently, the Defendant forced down onto the bed. He attempted to penetrate M.'s vagina with his penis, but was unsuccessful. M. reported that he penetrated her anus. After a short time, the Defendant told M. to put her clothing back on. He walked her upstairs, and into J.'s bedroom."

Doc. 71.

Again, testimony at trial reveals that this was part of the same attack that led to one of the instances of attempted vagina penetration and anal rape:

State: Tell me, if you can, everything you can remember about being forced to perform oral sex on the Defendant?

Mercedes: I mean, obviously I gagged a ton, I guess. Like, it was not a good experience. Like, I mean, this being my first sexual experience is really shitty. Pardon my language. I apologize.

State? What made it stop?

Mercedes: He stopped. And then he tried to get on top of me.

Tr. Day 3, 64:13-22.

Sexual intercourse means “penetration of the vulva, anus, or mouth of one person by the penis of another person...” Mont. Code Ann. § 45-2-101(68)(a). Sexual intercourse can be completed by penetration of any of the three identified orifices, and if completed without consent then it is sexual intercourse without consent. See Mont. Code Ann. § 45-5-503.

Here, Foster committed sexual intercourse without consent, but it was one attack, meaning it should have been one charge, not three separate charges for the same course of conduct. By charging Foster with multiple counts of aggravated sexual intercourse without consent, the State violated Mont. Code Ann. § 46-11-410(2)(d) (barring multiple charges that differ only in that one is defined to prohibit a specific instance of the conduct).

Moreover, it is clear that Foster’s underlying conduct which gave rise to each of the charges was motivated by the purpose of accomplishing the same criminal objective, that is, to satisfy his own sexual desires by raping Mercedes. See *State v. Neufeld*, 2009 MT 235, 351 Mont. 389, ¶ 20, 212 P.3d 1063.

The State took what should have been one charge and turned it into five charges, which Foster's counsel failed to object to in any way. As this Court has held in multiple cases, this constitutes deficient performance on the part of defense counsel.

E. FOSTER WAS PREJUDICED BY HIS COUNSEL'S DEFICIENT PERFORMANCE

To prevail on an IAC claim, a defendant must show his counsel's deficient performance prejudiced his defense. *Crider*, ¶ 34. A defendant 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." *Becker*, ¶ 21 (internal citations omitted).

In cases involving a failure to object to a violation of Montana's statutory prohibitions against multiple prosecutions, this Court has looked to the ultimate outcome of the case to determine if prejudice is present, and to determine if the case should be resentenced or only the offending charge dismissed.

For example, in *Becker*, this Court determined that Becker had suffered prejudice following a jury trial because the district court sentenced Becker on three counts to consecutive terms, when one of the counts was statutorily barred from prosecution and Becker's counsel failed to object based upon Montana's bar to multiple prosecutions. ¶¶ 21-24. Absent Becker's counsel's deficient performance,

Becker's sentence would have likely been less than what was pronounced, and this Court vacated the one improper count and remanded for resentencing. *Id.*, ¶ 26.

Likewise, in *Ellison*, Ellison's counsel failed to make an objection based upon the statutory prohibition on multiple charges, and following a jury trial was convicted and sentenced on multiple counts, one of which was barred by statute. ¶¶ 25-26. This Court determined that Ellison suffered prejudice because he would have been sentenced to less counts had Ellison's counsel made the proper objection. *Id.*, ¶ 26.

In contrast, in *Williams*, this Court determined that Williams had not suffered prejudice because his sentences for both sexual assault and sexual intercourse without consent were run concurrently, and in line with a plea deal that Williams entered into. ¶¶ 30, 34. Williams' plea agreement called for him to be sentenced to 30 years with five years suspended on each count run concurrently, which the district court followed. *Id.*, ¶ 34. Additionally, the district court advised Williams that sexual assault "probably" constituted a lesser included of sexual intercourse without consent. *Id.*, ¶ 36. Based upon this, Williams did not suffer prejudice because the maximum sentence for sexual intercourse without consent alone was more than the sentence imposed, and Williams likely benefited from the plea agreement. *Id.*, ¶ 37. The Court vacated Williams' conviction for sexual assault, and left Williams' conviction and sentence for sexual intercourse without consent undisturbed.

In the present case, Foster suffered prejudice because he was convicted on five counts when only one was authorized by statute. Further he did not enter into a plea agreement and although his sentences were concurrent, the number of counts likely influenced the sentencing court's decision.

Initially, this calls upon this Court to dismiss Counts I, III, IV, and V as they are "included offenses," for which Foster's convictions should be dismissed as a baseline. Further, this Court should remand for resentencing in line with *Ellison* and *Becker*, because Foster did not enter into a plea agreement and was sentenced to multiple counts that were statutorily prohibited. However, in this case, the Court should go further by vacating Foster's conviction and remanding for a new trial on Counts I-V, as amended to remove all unauthorized charges.

Prejudice may result "when the jury considers a person facing multiple charges to be a bad man and tends to accumulate evidence against him until it finds him guilty of something." *State v. Duncan*, 2008 MT 148, 343 Mont. 220, ¶ 26 183 P.3d 111; *State v. Bingman*, 229 Mont. 101, 110, 745 P.2d 342, 347 (1987). While this rule generally applies to cases involving an improper joinder of charges, it should apply here as well.

The jury was faced with five counts, when only one should have been properly before it, which likely would cause a reasonable juror to look upon Foster with

suspicion and prejudice. For this reason, the Court should consider reversing and remanding for a new trial.

II. FOSTER'S RIGHT TO DUE PROCESS WAS VIOLATED WHEN HE WAS EXCLUDED FROM A CRITICAL STAGE OF THE CRIMINAL PROCEEDINGS AGAINST HIM.

To determine whether the right to be present has been violated, this Court analyzes: (A) whether the alleged violation occurred at a "critical stage" of the proceedings; (B) whether the defendant had validly waived the right to be present; and (C) whether any violation of the right to be present was structural error or subject to harmless error review. *State v. Zitnik*, 2023 MT 131, 413 Mont. 11, ¶¶ 13, 15, 532 P.3d 477 (internal citations omitted).

While this argument was not raised below Foster asks the Court to invoke plain error review. This Court invokes plain error review "on a case-by-case basis, according to narrow circumstances, and by considering the totality of the circumstances." *State v. Williams*, 2015 MT 247, 380 Mont. 445, ¶ 16, 358 P.3d 127. Defendants alleging plain error must demonstrate the error implicated a fundamental right and not reversing the error would result in a "manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial or proceedings, or compromise the integrity of the judicial process." *State v. Akers*, 2017 MT 311, 389 Mont. 531, ¶¶ 13, 17, 408 P.3d 142.

Foster argues that he was absent during a “critical stage” of trial, which calls into question the fundamental fairness of the trial proceedings and was a violation of Foster’s due process rights. This Court has consistently, though not uniformly, accepted review in cases alleging violations of a defendant’s right to be present, and should do so here. See *State v. Zitnik*, 2023 MT 131, ¶ 13, 413 Mont. 11, 532 P.3d 477; *State v. Tapson*, 2001 MT 292, 307 Mont. 428, ¶ 14, 41 P.3d 305 (review was appropriate where Tapson's counsel waived Tapson's right to be present but nothing in the record indicated Tapson himself knew of his right to be present or waived that right); *State v. Bird*, 2002 MT 2, 308 Mont. 75, ¶¶ 37-38, 43 P.3d 266 (reviewing Bird’s absence during *voir dire* because the record did not establish he was informed of his right to be present and he waived that right); *State v. Kennedy*, 2004 MT 53, 320 Mont. 161, ¶¶ 28-30, 85 P.3d 1279 (review was appropriate where defendant was never informed of his right to be present during an in-chamber conversation the court had with a juror).

A defendant has the fundamental right to be present at all "critical stages" of the criminal proceedings against him. *State v. Blake*, 2016 MT 212, 384 Mont. 407, ¶ 7, 377 P.3d 1213 (internal citations omitted). This Court has emphasized that Article II, Section 24 of the Montana Constitution expressly guarantees a criminal defendant the right to be present at all stages of his trial. *Rosling v. State*, 2012 MT 179, 366 Mont. 50, ¶ 35, 285 P.3d 486.

Moreover, this Court has stated that no “principle of law, relating to criminal procedure, is better settled than that, in felony cases, nothing should be done in the absence of the prisoner.” *State v. Tapson*, 2001 MT 292, ¶ 16, 307 Mont. 428, 41 P.3d 305.

In the present case, Foster was excluded from and had no knowledge of a meeting between the court, counsel for the State and defense counsel, during which the impact of newly disclosed evidence was discussed, and the court was convinced to not impanel the jury which had already been selected, to avoid invoking Foster’s right to avoid double jeopardy. This was a critical stage of the proceedings which Foster had a right to be at and for which Foster did not waive his attendance, and Foster’s absence constituted structural error, or at least was not harmless error.

A. WHEN FOSTER WAS EXCLUDED FROM A MEETING BETWEEN THE COURT, STATE AND HIS COUNSEL WHERE NEWLY DISCOVERED EVIDENCE WAS DISCUSSED AND FOSTER’S RIGHT TO BE PROTECTED FROM DOUBLE JEOPARDY WAS IMPACTED, THE MEETING CONSTITUTED A “CRITICAL STAGE” OF THE PROCEEDINGS.

A critical stage includes "any step of the proceeding where there is potential for substantial prejudice to the defendant." *State v. Charlie*, 2010 MT 195, 357 Mont. 355, ¶ 40, 239 P.3d 934 (internal citation omitted). The right to be present thus attaches "whenever the defendant's presence 'has a relation, reasonably substantial,

to the fullness of his opportunity to defend against the charge.'" *State v. Reim*, 2014 MT 108, 374 Mont. 487, ¶ 36, 323 P.3d 880 (quoting *Charlie*, ¶ 40).

Analogous to the present case, this Court has found that a video conference between the court, prosecutor and defense counsel at which newly discovered evidence was discussed, was a critical stage of the prosecution because it had a reasonably substantial relation to the defendant's right to defend against the charges. *Charlie*, ¶ 41. While the *Charlie* Court determined this was not a structural error and the State had the burden persuasion to show the error was harmless, the present case is distinguishable, as will addressed below. ¶¶ 41, 45.

In the present case, without Foster present, the court, prosecutor and defense counsel gathered in chambers to discuss a newly discovered letter from Foster's cell mate. Tr. Day 1, 1st JT, 115:12-117:2. During this discussion, the State requested the court not impanel the jury on that day to avoid double jeopardy attaching because it had not had time to interview the cell mate, if the statements in the letter were true, or what the cell mate would say if called to testify. *Id.*, 115:21-116:15.

With Foster absent and without advising or consulting Foster, defense counsel, acquiesced to the State's plan to avoid Foster's right to double jeopardy attaching, and later to the State's desire for a continuance.

Given the importance of the decision not to impanel the jury (implicating a fundamental right), along with the discussion of newly discovered evidence

(analogous to *Charlie*), the meeting between counsel and the court on the first day of trial was a critical stage of the prosecution because it had a reasonably substantial relation to Foster's right to defend against the charges.

B. FOSTER DID NOT VALIDLY WAIVE HIS RIGHT TO BE PRESENT AT THE MEETING.

During the meeting defense counsel noted that “Mr. Foster is not present for this conversation,” and went on to indicate that Foster was totally unaware of the proceedings (“[h]e does not know yet this has happened”). *Id.*, 116:17-21.

The right to be present is a fundamental right, and like all fundamental rights guaranteed by the Constitution, it may only be waived by a defendant who does so specifically, voluntarily, and knowing. *Bird*, ¶ 35. And one who does not know his rights cannot waive his rights. *Bird*, ¶ 36, citing *State v. Allison*, 116 Mont. 352, 360, 153 P.2d 141, 145 (1944).

In *Bird*, this Court established a rule that “a trial court must explain to the defendant, on the record, the defendant's constitutional right to be present at all critical stages of the trial, including in-chambers individual *voir dire*, and that if a defendant chooses to waive that right, the court must obtain an on-the-record

personal waiver by the defendant acknowledging that the defendant voluntarily, intelligently and knowingly waives that right.” *Bird*, ¶ 38.

This rule was refined in *State v. Zitnik*, 2023 MT 131, ¶¶ 26-27, 413 Mont. 11, 532 P.3d 477, “waiver” is defined as the voluntary abandonment of a known right. *Zitnik*, ¶ 26, citing *Tapson*, ¶ 24. The fundamental right to appear and defend may only be waived through an informed, intelligent, and recorded waiver. *Zitnik*, ¶ 26, citing *State v. Mann*, 2006 MT 160, 332 Mont. 476, ¶ 12, 139 P.3d 159. Any waiver of a constitutional right must be made specifically, voluntarily, and knowingly; and it cannot be presumed a defendant has waived fundamental rights. *Zitnik*, ¶ 26; *Bird*, ¶ 35. Only the defendant retains the ability to waive their right to be present. *Zitnik*, ¶ 26; *Matt*, ¶ 26. If a defendant chooses to waive his right to be present at a critical stage of the trial, the court must obtain an on-the-record personal waiver by the defendant acknowledging the defendant voluntarily, intelligently, and knowingly waives that right. *Zitnik*, ¶ 26; *Bird*, ¶ 38.

In *Zitnik*, Zitnik was unaware of a question sent to the court by the jury, and was not consulted or advised he had a right to be consulted, prior to the court providing a response to the jury. ¶ 27. Based upon the lack of affirmative record showing Zitnik waived his right to be present at a critical stage of the proceedings, this Court determined that Zitnik had not waived his right to be present. *Id.*

In contrast, in *State v. Cates*, 2009 MT 94, 350 Mont. 38, ¶ 36, 204 P.3d 1224, Cates affirmatively waived his right to double jeopardy by personally putting forward two separate mistrial motions before the court declared a mistrial. This Court determined that Cates' actions and colloquy with the court demonstrated that Cates was clearly willing to give up his right to have a trial completed by a particular tribunal. *Id.*

The situation in *Cates* is not similar to facts before this Court, instead like *Zitnik* and *Bird*, Foster had no knowledge of the meeting, the new evidence or the implications of the decision not to impanel the jury, as such he could not have waived his right to not be present at the meeting. Further, the record shows that the court never addressed Foster during the second day of the jury trial, when the impact of the previous meeting came to fruition and Foster's jury trial continued. In fact, throughout the entirety of the two days of Foster's first jury trial, the transcript shows Foster was addressed only one time:

The Court: Good morning, Mr. Foster, I'm Judge Moses.

The Defendant: Good morning.

Tr. Day 1, 1st JT, 4:16-18.

Clearly, Foster did not affirmatively waive his right not to be present and nothing in the record indicates otherwise.

C. THE LACK OF FOSTER'S PRESENCE AT THE MEETING IMPACTING FOSTER'S FUNDAMENTAL RIGHT TO AVOID

DOUBLE JEOPARDY WAS STRUCTURAL ERROR, OR IN THE ALTERNATIVE IT WAS NOT HARMLESS ERROR

Once a violation and lack of waiver is established, it must be determined if the violation constitutes a "structural defect," which requires automatic reversal, as the error is subject to harmless-error analysis. *State v. Matt*, 2008 MT 444, 347 Mont. 530, ¶ 38, 199 P.3d 244. If the error is not a "structural defect," then the State carries the burden of proof to demonstrate there is no reasonable possibility that the violation prejudiced the defendant; and, must persuade the Court, based upon the record, and given the interests the right of presence was designed to protect, that any violation was harmless. *State v. Zitnik*, 2023 MT 131, ¶ 28, 413 Mont. 11, 532 P.3d 477, citing *State v. Charlie*, 2010 MT 195, 357 Mont. 355, 239 P.3d 934.

In *Charlie*, a jury trial was set to occur January 5, 2009, when on December 30, 2008 the State disclosed a newly discovered video of Charlie's arrest. ¶ 7. The next day, the court convened a teleconference with counsel for the State and defense counsel, Charlie was incarcerated and not immediately available. *Ibid*. In reaction to the newly discovered evidence, the parties and the court agreed the January 7, 2009, trial date should be vacated so that the parties, especially the defense, could evaluate the impact on the case and possible plea negotiations. *Id*. On January 6, 2009, at a scheduled status hearing, the court informed Charlie of what happened at the December 31, 2008 telephone conference and asked if Charlie was ok with what happened, to which, Charlie agreed that he was, and the court stated "I want him to

be up to speed so there's no question about we talked when he wasn't present." *Id.* This Court found the December 30, 2008, phone conference was a critical stage of Charlie's trial, but did not constitute structural error. *Id.*, ¶ 41.

The Court relied upon several facts to determine there was no structural error and Charlie was not prejudiced, first the teleconference was quickly convened to address newly discovered evidence, in this Court's opinion had Charlie been involved in the conversation and insisted on going to trial this Court would likely be presented with an IAC claim based upon defense counsel's not viewing the videotape, and the court presented Charlie the option to go to trial when he appeared at the January 6, 2009 hearing. *Id.*, ¶¶ 41, 46-47.

In the present case, without Foster present, the court, prosecutor and defense counsel gathered in chambers to discuss a newly discovered letter from Foster's cell mate. Tr. Day 1, 1st JT, 115:12-117:2. During this discussion, the State requested the court not impanel the jury on that day to avoid any double jeopardy issues because it had not had time to interview the cell mate and did not know if he would be called as a witness, if the statements in the letter were true, or what the cell mate would say if called to testify. *Id.*, 115:21-116:15.

Defense counsel noted that "Mr. Foster is not present for this conversation," but went on to add "...the idea would be to request more time before proceeding to trial so that if there is anything substantive that this individual has they (the State)

have the opportunity to find that out, we have the opportunity to follow it up and then we will proceed to trial. *Id.*, 116:17-117:7. Additionally, defense counsel indicated Foster was totally unaware of the proceedings, the new evidence, and the State's desire to avoid impaneling the jury (“[h]e does not know yet this has happened”). *Id.*, 116:20-21.

Based upon the parties representations, and despite expressing concern about Foster's absence (“I'm a little uncomfortable he's not here”), the court determined to avoid impaneling the jury as it originally intended to do, and wait until the following Monday to swear the jury in to avoid a potential double jeopardy issue. *Id.*, 117:18-118:2, 118:11-12. The court informed both counsels that the jury would be released for the weekend and that it was the court's new intention that the jury be sworn in the following Monday. *Id.*, 118:4-9.

The following Monday, the court and parties reconvened in chambers outside the presence of the jury. Tr. Day 2, 1st JT, 3:1-9. It is unclear within the transcript whether Foster was present at this meeting; however, the accompanying minute entry indicates that Foster was present. See Doc. 57. During this meeting, the court excluded all DNA evidence and related testimony, due to the State's late disclosure of the evidence to the defense. *Id.*, 18:3-6; 18:24-19:5. However, the court determined testimony by the newly disclosed cell mate would be allowable at the then proceeding trial. *Id.*, 11:4-12:12.

The State moved for a continuance to allow both parties to interview the newly disclosed cell mate witness, which the defense did not oppose and was ultimately granted by the court. *Id.*, 21:10-13, 22:13-14, 23:1-4. The court cautioned that based on the continuance, the then excluded DNA evidence was now properly disclosed and likely to be admissible at the new trial setting. *Id.*, 24:1-25:4.

Importantly, the court never addressed, at any point, Foster's absence at the prior meeting, nor did it take any action to confirm that Foster understood or agreed with the actions taken at the prior meeting.

As previously discussed, this meeting was a critical stage of the proceedings, and Foster did not waive his presence at the meeting, so the question becomes "was Foster's exclusion from the meeting a structural defect, and if not was it harmless error?"

D. FOSTER'S ABSENCE WAS STRUCTURAL ERROR

Structural error usually affects the framework of the trial, precedes the actual trial, and is presumptively prejudicial. *State v. Kaarma*, 2017 MT 24, 386 Mont. 243, ¶ 88, 390 P.3d 609. "Structural" error is that type of error that "affects the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Kaarma*, ¶ 38, quoting *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S. Ct. 1246, 1265, 113 L. Ed. 2d 302, 331 (1991); *State v. LaMere*, 2000 MT 45, 298 Mont. 358, ¶ 48, 2 P.3d 204.

This Court in *LaMere* extracted a list of examples from the *Fulminante* Court's opinion of those errors that were deemed harmless and therefore not "structural:"

"The Fulminante Court cited a string of sixteen cases in which constitutional violations have been deemed harmless, including the following categories of violations: (1) unconstitutionally overbroad jury instructions at the sentencing stage of a capital case; (2) admission of evidence at the sentencing stage of a capital case in violation of the Sixth Amendment Counsel Clause; (3) jury instruction containing an erroneous conclusive presumption; (4) jury instruction misstating an element of the offense; (5) jury instruction containing an erroneous rebuttable presumption; (6) erroneous exclusion of defendant's testimony regarding the circumstance of his or her confession; (7) restriction on a defendant's right to cross-examine a witness for bias in violation of the Sixth Amendment Confrontation Clause; (8) denial of a defendant's right to be present at trial; (9) improper comment on defendant's silence at trial, in violation of the Fifth Amendment Self-Incrimination Clause; (10) statute improperly forbidding trial court giving a jury instruction on a lesser included offense in a capital case in violation of the Due Process Clause; (11) failure to instruct the jury on

the presumption of innocence; (12) admission of identification evidence in violation of the Sixth Amendment Confrontation Clause; (13) admission of the out-of-court statement of a non-testifying co-defendant in violation of the Sixth Amendment Confrontation Clause; (14) confession obtained in violation of the Massiah rule; (15) admission of evidence obtained in violation of the Fourth Amendment; (16) denial of counsel at a preliminary hearing in violation of the Sixth Amendment Counsel Clause.”

LaMere, ¶ 44 (internal citations omitted).

The common thread among all these examples are they occurred during the presentation of the case to the jury and therefore can be “quantitatively assessed in the context of other evidence presented.” *LaMere*, ¶ 37, quoting *Fulminante*, 499 U.S. at 307-08, 111 S. Ct. at 1264, 113 L. Ed. 2d at 330 (additional citations omitted).

However, when an error precedes the actual trial, and the proof of harm, or lack of harm, is virtually impossible to adduce then the error is structural and requires reversal. *LaMere*, ¶¶ 37, 47-48. In such a situation, Mont. Code Ann. § 46-20-701 (harmless error) does not apply and no showing of prejudice is required. *Id.*, ¶¶ 51-54.

While this Court has applied structural error sparingly, it has consistently found structural error where the error involves a fundamental right of a defendant.

For instance, structural error exists when there is a material failure to substantially comply with statutes governing the procurement of a trial jury (*LaMere*, ¶ 50), and when a defendant is excluded from in chambers individual *voir dire* proceedings (*Bird*, ¶¶ 39-40).

In *Bird*, the defendant was excluded from in chambers individual questioning of potential jurors during *voir dire*. ¶ 37. In reaction, this Court found structural error and reversed the Bird's conviction. *Id.*, ¶ 40. Additionally, this Court has a long tradition of finding structural error where a defendant was excluded from proceedings that impact a defendant's fundamental rights. See *Reed*, 65 Mont. 51, 62, 210 P. 756, 759 (conviction reversed where defendant was not present for parts of the evidence presented at trial).

The present case is one containing structural error because it occurred before trial, impacted the seating of the jury, and further impacted Foster's constitutional protection against double jeopardy. When the court met with counsel for the State and defense, without Foster present, to determine whether to impanel the jury, it was for the explicit purpose to either allow or not allow Foster's right to double jeopardy to attach. This is because double jeopardy only attaches after the jury is seated and **sworn**, in this case the jury had been selected but the court determined not to swear in the jury to prevent the attachment of double jeopardy. *State v. Cates*, 2009 MT 94, ¶ 29, 350 Mont. 38, 204 P.3d 1224 (emphasis added).

The purpose underlying the protection against double jeopardy is “the belief that ‘the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.’” *Cates*, ¶ 30, quoting *United States v. Dinitz*, 424 U.S. 600, 606, 96 S. Ct. 1075, 1079, 47 L. Ed. 2d 267 (1976) (additional citations omitted). Additionally, in the context of mistrial, which Foster’s situation equates to, when a mistrial is granted the defendant’s valued right to have his trial completed by a particular tribunal is implicated. *Cates*, ¶ 30, citing *Dinitz*, 424 U.S. at 606, 96 S. Ct. at 1079.

Since Foster’s absence constituted structural error, no prejudice need be shown, and this Court should reverse his conviction.

**E. IN THE ALTERNATIVE, THE STATE CANNOT SHOW
FOSTER’S ABSENCE WAS HARMLESS ERROR**

If the Court determines that Foster’s absence was not a “structural defect,” then the State carries the burden of proof to demonstrate there is no reasonable possibility that the violation prejudiced the defendant; and, must persuade this Court, based upon the record, and given the interests the right of presence was designed to protect, that any violation was harmless. *State v. Zitnik*, 2023 MT 131, ¶ 28, 413

Mont. 11, 532 P.3d 477, citing *State v. Charlie*, 2010 MT 195, 357 Mont. 355, 239 P.3d 934.

While the State will likely argue that everyone at the meeting was acting in the best interest of Foster, that is irrelevant, it was Foster's right to be at the meeting when a critical determination that impacted Foster's fundamental rights was made. The State will likely argue that Foster would have consented or have had every reason to consent to not empaneling the jury because he, or his counsel, did not know what evidence would be presented by the newly disclosed witness. However, this is simply not true, Foster would have the best knowledge of what he told his cell mate, and the risk that the cell mate coming forward would pose. Further, Foster was in the best position to, and had an absolute right to, weigh the impact of the risk posed by the newly disclosed witness and demanding the jury be sworn and the trial proceed forward with what evidence had already been disclosed. Yet, Foster was denied this right and was not informed of the impact of the decision made in his absence.

Additionally, the prejudice suffered in Foster's absence would have carried over into the second day of the first jury trial, because Foster remained unaware of the prior meeting, or that the jury was not sworn, or could have been sworn, and what the impact of that decision had upon his rights. This is true, even as Foster (according to the minute entry) listened to the court exclude all DNA evidence and

associated testimony, but then granted a continuance which would allow that then excluded evidence to be reintroduced at the next trial.

In any case, it is not Foster's burden to show he was not prejudiced, instead it is incumbent upon the State to demonstrate that there is no reasonable possibility Foster suffered prejudice as a result of his absence. Additionally, the State is limited to the record as it has been presented to this Court, and if that record does not answer the question of prejudice definitively, then prejudice must be presumed. See *Tapson*, ¶ 31; *Reed*, 65 Mont. at 62, 210 P. at 759 (a deficient record cannot support depriving a defendant of a substantial right, and when the record does not provide support for doing so, the defendant must prevail).

Here, the record shows that Foster was only addressed one time in the two-day jury trial, and that time was only by the judge to say good morning. Even after Foster's absence was noted by Foster's counsel and the court remarked that it was concerned by Foster's absence, the court took no action to follow up or clear up the record in any way. Instead, the court and counsel drove on, appearing to ignore Foster entirely despite making decisions that greatly impacted Foster's fundamental rights.

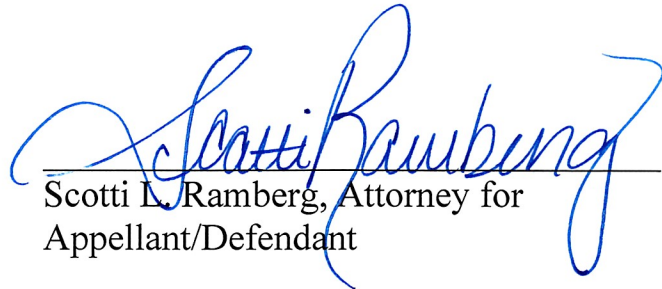
Against this backdrop, the State has a large hill to climb, and it is Foster's contention that the State cannot meet its burden of proof and demonstrate that Foster suffered no prejudice.

CONCLUSION

For the foregoing reasons, Foster asks the Court to reverse the convictions and remand for a new trial on the basis that his fundamental right to be present at all critical stages of the proceedings was violated. Further, hold that Foster suffered prejudice based upon the unauthorized multiple charges that were levied against him in violation of Montana's statutory provisions, and therefore dismiss the counts which are violative to Montana's protections against multiple charges, and remand for resentencing on the remaining counts; or if the Court deems proper, reverse the convictions on all charges on the basis that his fundamental rights were violated and double jeopardy should have attached had his counsel not been ineffective.

DATED this 28th day of January 2025.

PEACE LAW GROUP, LLC



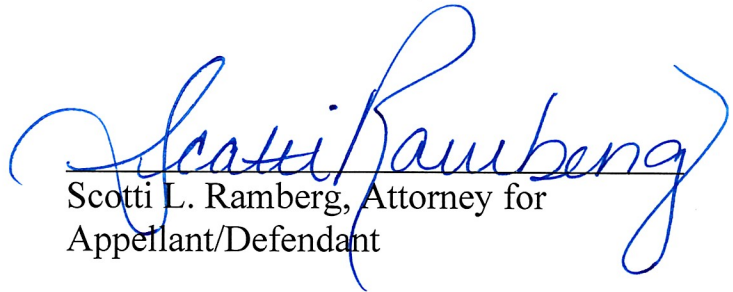
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this Appellant's Opening Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for footnotes, quoted, and indented material; and that the word count calculated by Microsoft Word Professional Edition is 9,078 words, excluding the Table of Contents, Table of Authorities, Certificate of Service, and Certificate of Compliance.

DATED this 28th day of January 2025.

PEACE LAW GROUP, LLC



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CERTIFICATE OF SERVICE

I, Scotti Ramberg, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 01-28-2025:

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