

**IN THE SUPREME COURT OF THE STATE OF MONTANA**

No. DA 24-0056

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

CHAD JEROME WOLFCHILD,

Defendant and Appellant.

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**BRIEF OF APPELLEE**

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On Appeal from the Montana Eighth Judicial District Court,  
Cascade County, The Honorable David Grubich, Presiding

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

STATEMENT OF THE ISSUES ..... 1

STATEMENT OF THE CASE ..... 1

STATEMENT OF THE FACTS ..... 2

SUMMARY OF THE ARGUMENT ..... 7

ARGUMENT..... 9

I. Standard of review.....9

II. Viewing the evidence in a light most favorable to the prosecution, the State proved the elements of felony theft by common scheme beyond a reasonable doubt.....10

III. Wolfchild does not meet his burden to firmly convince this Court to invoke plain error review of his claim that the State was required to charge him with separate misdemeanor thefts instead of a single charge of felony theft by common scheme .....16

CONCLUSION .....20

CERTIFICATE OF COMPLIANCE.....21

## TABLE OF AUTHORITIES

### **Cases**

<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966) .....	7
<i>State ex rel. Fletcher v. Dist. Court</i> , 260 Mont. 410, 859 P.2d 992 (1993) .....	19
<i>State v. Burnett</i> , 2022 MT 10, 407 Mont. 189, 502 P.3d 703 .....	9
<i>State v. Cazier</i> , 2019 MT 259N, 398 Mont. 445, 455 P.3d 453 .....	9
<i>State v. Ferre</i> , 2014 MT 96, 374 Mont. 428, 322 P.3d 1047 .....	17
<i>State v. Fleming</i> , 2019 MT 237, 397 Mont. 345, 449 P.3d 1234 .....	9
<i>State v. George</i> , 2020 MT 56, 399 Mont. 173, 459 P.3d 854 .....	9, 10
<i>State v. Kortan</i> , 2022 MT 204, 410 Mont. 336, 518 P.3d 1283 .....	17, 18
<i>State v. Oie</i> , 2007 MT 328, 340 Mont. 205, 174 P.3d 937 .....	17
<i>State v. Partain</i> , 2025 MT 83, 421 Mont. 37, 567 P.3d 932 .....	19
<i>State v. Rowe</i> , 2024 MT 37, 415 Mont. 280, 543 P.3d 614 .....	17
<i>State v. Weigand</i> , 2005 MT 201, 328 Mont. 198, 119 P.3d 74 .....	15

### **Other Authorities**

#### Montana Code Annotated

§ 45-2-301(8) .....	passim
§ 45-6-101(8) .....	11, 15

#### Montana Supreme Court Internal Operating Rules

Section I, 3(c) .....	passim
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## **STATEMENT OF THE ISSUES**

1. Whether, viewing the evidence in a light most favorable to the prosecution, the State proved all the elements of felony theft by common scheme beyond a reasonable doubt.

2. Whether Appellant has met his burden of establishing that plain error review of his claim, that the State was required to charge him with separate counts of misdemeanor theft rather than felony theft by common scheme, is warranted.

## **STATEMENT OF THE CASE**

The State charged Appellant Chad Wolfchild (Wolfchild) with Theft by common scheme, and because the value of all the items stolen exceeded \$1,500, the State charged the offense as a felony. (Doc. 3.) The State alleged that Wolfchild entered the Scheels sporting goods store (Scheels) in Great Falls numerous times between June 6 and June 10, 2022, selected merchandise that he concealed in his pants or shorts, and left the store without purchasing the concealed merchandise. (Doc. 1.) The total value of the merchandise was \$1,676.88. (*Id.*)

Wolfchild waived his right to a jury trial. (Docs. 45, 47.) The district court conducted a bench trial on October 2, 2023. (Doc. 50.) At trial, after conferring with his attorney, Wolfchild decided to not testify and to continue to invoke his

right to remain silent, and the defense presented no witnesses. 10/2/23 Trial Tr. (Tr.) at 117; Doc. 50.)

The district court found Wolfchild guilty of the offense of felony theft by common scheme and stated in detail its findings and conclusions on the record. (Tr. at 139-49.) The district court subsequently issued its Findings of Fact, Conclusions of Law, and Verdict. (Doc. 52, attached to Appellant's Br. as App. 1.)

### **STATEMENT OF THE FACTS**

On June 6, 2022, Wolfchild entered the Great Falls Scheels on three separate occasions. (Tr. at 18, 21.) During the first visit, a female accompanied Wolfchild. (6/6/22 video 1; Exs. 1<sup>1</sup>-2; Tr. at 21.) He selected one box of fishing line and shortly thereafter selected a second box. (6/6/22 video 2; Tr. at 21-22.) He then placed them down the back of his shorts (6/6/22 video 3; Tr. at 22) and, without paying for the items, left the store with the female. (6/6/22 video 4; Ex. 2; Tr. at 22.) Scheels' exterior surveillance footage shows Wolfchild removing something from the back of his shorts and handing it to the female. (6/6/22 video 5; Tr. at 25-26.)

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<sup>1</sup> Exhibit 1 is a thumb drive that contains June 2022 surveillance footage from cameras inside and outside of Scheels and electronic copies of the Trial Exhibits. (See Doc. 51, Exhibit List).

During the second visit on June 6, footage shows Wolfchild, alone, entering the store wearing a different shirt (6/6/22 video 6; Ex. 4; Tr. at 26), selecting two arrow rests (6/6/22 video 7; Ex. 3; Tr. at 26-28), concealing them down the front of his shorts (6/6/22 video 8; Tr. at 26-27), and leaving without paying (6/6/22 video 9; Tr. at 28).

During the third visit on June 6, Wolfchild entered the store carrying some items (Ex. 4) and approached the return counter, where he presented four items (6/6/22 video 10 at 0:00:09; Ex. 5), claimed that he had purchased the items but did not have a receipt, and requested a refund (*see generally* 6/6/22 video 10; Tr. at 29-33). Based on his representations, Wolfchild obtained a refund consisting of a Scheels gift card in the amount of \$736.92. (6/6/22 video 10 at 0:02:10-0:02:17; Ex. 13; Tr. at 33, 91-92.)

On June 7, 2022, Wolfchild entered Scheels (6/7/22 video 1; Tr. at 42-43), selected a box of fishing line (6/7/22 video 2; Tr. at 43) and a box containing an arrow rest (6/7/22 videos 3-4; Tr. at 43-45) valued \$408.99 in total (Tr. at 46, 92-93), and then entered the food prep area of the store carrying the two items in his hand (6/7/22 video 5; Tr. at 44-45). Wolfchild moved momentarily out of view of the surveillance cameras and, when he came back into view, he was no longer holding the items. (6/7/22 video 6; Tr. at 45-47.) Store personnel subsequently searched the vicinity but did not locate either item. (Tr. at 37.) Before exiting the

store, Wolfchild selected an item, attempted to pay for it using a debit or credit card, which was declined, and then exited holding the debit or credit card in his hand. (6/7/22 video 8; Tr. at 46-47; Ex. 7.)

Scheels loss prevention employees operated adjustable surveillance cameras to continue observing Wolfchild and follow his movements in real time after he exited. (6/7/22 videos 9-10; Tr. at 50.) Outside of the store, Wolfchild walks away and descends a set of stairs from the parking lot to a sidewalk. (6/7/22 videos 9-10; Tr. at 48-50.) While descending the stairs, Wolfchild is momentarily out of view on the 6/7/22 video 10, but can be seen on the 6/7/22 video 9 at 0:00:06-0:00:07 being joined at the bottom of the stairs by the same female who accompanied him the day before. (*See also* Ex. 8; Tr. at 48.)

As the two walk away, Wolfchild can plainly be seen on the surveillance footage, zoomed in on him, holding a box in his hand that he was not holding when he exited Scheels. (6/7/22 video 10 at 0:00:29; Exs. 8-9.) He and the female walk together toward a pawn shop across the street. (6/7/22 videos 9-10; Ex. 9; Tr. at 48-49). As they approach the entrance of the pawn shop, Wolfchild either hands something to the female or places something in her purse/bag. (6/7/22 video 10 at 0:01:22-0:01:24; Tr. at 48-50.) The female enters the pawn shop as Wolfchild remains outside and continues to walk to the end of the block. (6/7/22 video 10 at 0:01:27-0:01:36; Tr. at 48.)

According to Shawn Rate, assistant manager at First Security Pawn, when the female asked to pawn the arrow rest in her possession, store personnel requested she provide a form of identification, compared the information on the Montana tribal identification she provided with information in their own system, and confirmed the identity of the female as Carla Jean Cree Medicine (Cree Medicine). (Tr. at 96-98.) Approximately 20 minutes later, Cree Medicine exited the pawn shop carrying a slip of paper in her hand (6/7/22 video 11; Tr. at 50-51), which later investigation indicated was a receipt (*see* State's Ex. 14) she received after pawning one arrow rest and receiving \$50 in cash. The female joined Wolfchild who was sitting outside a building near the pawn shop. (6/7/22 video 11 at 0:00:28-0:00:31; Tr. at 51-52.)

Wolfchild next entered Scheels on June 9, 2022 (6/9/22 video 1), selected two arrow rests (6/9/22 videos 2-3; Ex. 11) with a total value of \$529.98 (Ex. 13, Tr. at 93), concealed them down his pants (6/9/22 video 5), and left the store without paying (6/9/22 video 6; *see also* Tr. at 55-59).

On June 10, 2022, the same female who had been with Wolfchild previously entered Scheels carrying three boxes and was followed moments later by Wolfchild. (6/10/22 video 1; Tr. at 59.) The female went to the return counter, presented two arrow rests and a box of fishing line, identical to ones previously selected, concealed, and not paid for by Wolfchild, and requested a refund.

(6/10/22 video 2; Ex. 11; Tr. at 59-60.) Store personnel recognized her as having been with Wolfchild previously and called law enforcement. (Tr. at 61-62.) Scheels return desk personnel declined to give the female a refund, and she left the desk carrying the three boxes. (*Id.*) She exited the store, walked down the same set of stairs as on June 9, and sat on a step partway down. (6/10/22 video 3 at 0:00:01-0:00:17.) Shortly thereafter, Wolfchild exited the store and walked to the female's location (*id.* at 0:00:48-0:00:55), where she showed him one or more of the boxes (*id.* at 0:00:55-0:00:58). Within moments, Great Falls Police Department (GFPD) officers arrived and confronted Wolfchild and the female. (6/10/22 video 3 at 0:01:03-0:01:09; Tr. at 64.)

Officers escorted Wolfchild and the female to Scheels' loss prevention office, obtained information from the loss prevention employees, and watched footage of Wolfchild and the female on Scheels' surveillance system. (Tr. at 64-67.) Loss prevention employee Tysen Conley (Conley) provided the officers with printouts of receipts showing the price of the items that Scheels had, to that date, identified as those Wolfchild had stolen. (Ex. 13; Tr. at 69.) Conley was present when Wolfchild agreed to be interviewed by an officer and when Wolfchild admitted that he had stolen multiple fishing lines and arrow rests because his car had broken down, he had no money, and the purpose of the thefts was to quickly obtain some money. (Tr. at 65.)

GFPD Officer Samuel Wavra (Officer Wavra) responded to Scheels on June 10, 2022. (Tr. at 101.) Officer Wavra testified that, in the basement of Scheels in the loss prevention office, he advised Wolfchild of his *Miranda*<sup>2</sup> rights, that Wolfchild understood those rights, and that Wolfchild agreed to be interviewed. (Tr. at 105.) Officer Wavra testified that Wolfchild admitted to him that he had stolen items from Scheels in order to obtain money to get his car out of impound. (Tr. at 107.) Officer Wavra also testified that Wolfchild admitted that earlier in the week he had stolen the two arrow rests that Cree Medicine then attempted to return that day. (Tr. at 107-09.)

### **SUMMARY OF THE ARGUMENT**

Officer Wavra testified that when he interviewed Wolfchild, Wolfchild admitted the reason he had repeatedly stolen merchandise from Scheels was because he had no money and he was trying to obtain the funds to get his car out of impound, and Wolfchild does not dispute this on appeal. Wolfchild also does not dispute that he committed thefts on June 6 and June 9, 2022, that were clearly captured by video surveillance, nor does he dispute that the total value of the items he stole on those two days was \$1266.90. The only theft that Wolfchild challenges is the theft on June 7, 2022, involving an arrow rest and a box of fishing line with a

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<sup>2</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

total value of \$408.99, and which relates exclusively to the items that Cree Medicine pawned on June 7 (an arrow rest) and attempted to return to Scheels for a refund on June 10 (two arrow rests and a box of fishing line). Wolfchild argues that, because Cree Medicine had been in Scheels at least once prior to June 10, she had the opportunity to steal the items that she pawned and attempted to return herself. Wolfchild's assertion that the evidence presented at trial could have equally resulted in a different outcome, i.e., that Cree Medicine stole all the items she pawned and attempted to return, is immaterial to this Court's analysis of the sufficiency of the evidence against him.

The totality of the evidence presented at trial, when viewed in a light most favorable to the prosecution, was sufficient for a rational trier of fact to find Wolfchild guilty of all the essential elements of the offense of felony theft by common scheme.

For the first time on appeal, Wolfchild argues that the State was required to charge him with each predicate offense included in the common scheme as separate misdemeanors, and, in failing to do so, the State caused a miscarriage of justice and deprived him of fundamental fairness in his criminal proceedings. His assertion, however, completely ignores the plain statutory language of Mont. Code Ann. § 45-6-301(8), which expressly allows the aggregation of the values of individual thefts committed pursuant to a common scheme. Moreover, this Court

has long held that when the facts support a possible charge of more than one crime, the decision of which crime is charged is solely a matter of prosecutorial discretion.

Importantly, in its charging documents the State specifically pled each theft making up the common scheme. And the State proved each discrete theft beyond a reasonable doubt. The State did not deny Wolfchild due process, and Wolfchild cannot establish that plain error review of his claim is warranted.

## **ARGUMENT**

### **I. Standard of review**

This Court reviews claims of insufficient evidence de novo by viewing “the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt.” *State v. Burnett*, 2022 MT 10, ¶ 15, 407 Mont. 189, 502 P.3d 703 (citing *State v. Fleming*, 2019 MT 237, ¶ 9, 397 Mont. 345, 449 P.3d 1234).

When this Court reviews unpreserved claims of error, it employs the plain error doctrine sparingly, on a case-by-case-basis, and considers the totality of circumstances of each case. *State v. George*, 2020 MT 56, ¶ 5, 399 Mont. 173, 459 P.3d 854 (citations omitted). It is not enough for a party seeking review of an

unpreserved issue under the plain error doctrine to simply request that this Court review it. *Id.* The party seeking plain error review bears the burden of firmly convincing this Court that the claimed error “implicates a fundamental right and that such review is necessary to prevent a manifest miscarriage of justice or that failure to review the claim may leave unsettled the question of fundamental fairness of the proceedings or may compromise the integrity of the judicial process.” *Id.*

**II. Viewing the evidence in a light most favorable to the prosecution, the State proved the elements of felony theft by common scheme beyond a reasonable doubt.**

Wolfchild plainly admits on appeal that he stole merchandise on June 6 and June 9, 2022, valued at \$1,266.90, and that those thefts were fully captured on surveillance footage. (Appellant’s Br. at 10.) Additionally, Wolfchild does not contest that his purpose in stealing the items, which he even admitted to, was to try to obtain money because he was broke and he needed to get his vehicle out of impound. The only portion of the common scheme for which Wolfchild claims the evidence was insufficient is the theft on June 7 of the two items valued at \$408.99. At trial however, the State presented overwhelming evidence, when viewed in the light most favorable to the prosecution, that proved the June 7 portion of the common scheme beyond a reasonable doubt.

The essential elements of the offense of theft are set forth in Mont. Code

Ann. § 45-6-301:

(1) A person commits the offense of theft when the person purposely or knowingly obtains or exerts unauthorized control over property of the owner and:

(a) has the purpose of depriving the owner of the property;

(b) purposely or knowingly uses, conceals, or abandons the property in a manner that deprives the owner of the property; or

(c) uses, conceals, or abandons the property knowing that the use, concealment, or abandonment probably will deprive the owner of the property.

Montana Code Annotated § 45-6-301(8) further provides that “[a]mounts involved in thefts committed pursuant to a common scheme or the same transaction, whether from the same person or several persons, may be aggregated in determining the value of the property.”

As provided by Mont. Code Ann. § 45-6-301(7)(b)(i), theft of property with a value exceeding \$1,500 but less than \$5,000 constitutes a felony offense.

Montana Code Annotated § 45-2-101(8) defines a common scheme as “a series of acts or omissions resulting in a pecuniary loss to the victim of at least \$1,500, or \$1,500 in value, motivated by a purpose to accomplish a single criminal objective or by a common purpose or plan that results in the repeated commission of the same offense or that affects the same person or the same persons or the property of the same person or persons.”

The testimony and evidence at trial proved that Wolfchild entered Scheels on June 7, selected a box of fishing line and an arrow rest, carried them to an area in the store where he was momentarily out of the view of the surveillance cameras, and, when he returned to view, he was no longer carrying the items. Loss prevention employees searched the vicinity and did not locate the items. This evidence was sufficient for a rational trier of fact to infer that Wolfchild concealed the items in his shorts when he stepped out of view, especially in light of the surveillance footage from June 6 and 9 that showed he was very fast and efficient at concealing items down his shorts, and that after the items were concealed the surveillance cameras did not show an outline or other indicator of the items' presence.

Furthermore, loss prevention employee Conley testified that on June 7 he and other loss prevention staff watched Wolfchild in real time with the store's interior and exterior surveillance cameras. They observed he was not holding any box when he exited the store and started to walk across the parking lot with Cree Medicine. Conley testified he zoomed a camera in and could very clearly see that Wolfchild was holding a box that exactly matched the box of the arrow rest that he had selected that day and that he had been carrying when he walked briefly out of camera view in the store.

Conley continued to zoom in and follow Wolfchild and Cree Medicine as they approached the pawn shop across the street, and, based on his training and experience, Conley testified that he observed Wolfchild moving in a manner that was entirely consistent with him handing the box to Cree Medicine or putting it in her bag/purse. Moreover, after Cree Medicine entered the pawn shop alone, there is no dispute that she pawned an arrow rest that matched the one Wolfchild had selected, walked out of camera view with, and, after exiting the store, could clearly be seen holding while walking toward the pawn shop.

Wolfchild challenges the sufficiency of the evidence concerning: (1) the box containing an arrow rest (valued at \$279.99) that Cree Medicine pawned on June 7, and (2) the two boxes containing arrow rests (total value of \$529.98) and one box of fly-fishing line (valued at \$129) that Cree Medicine attempted to return to Scheels for a refund on June 10. Officer Wavra testified at trial that Wolfchild had admitted he was the one who stole the two arrow rests that Cree Medicine attempted to return on June 10. Although he did not testify at trial, Wolfchild asserts on appeal, without support in the record, that he did not make this admission. Even without Wolfchild's admission to Officer Wavra, the other evidence the State presented established beyond a reasonable doubt that the arrow rests Cree Medicine attempted to return exactly matched the arrow rests the surveillance footage clearly shows Wolfchild stealing on June 9.

Wolfchild challenges the sufficiency of evidence related to the incident on June 7, arguing that surveillance cameras did not capture footage of him actually concealing the merchandise that he had selected that day. However, while the surveillance cameras did not capture him concealing the boxes on his person, they captured footage of Wolfchild selecting two boxes, one containing fishing line and the other containing an arrow rest, walking to another area inside the store while still holding the boxes in his hand, stepping momentarily out of view of the cameras, then returning to view but no longer holding the boxes in his hands. Loss prevention employees subsequently searched the surrounding area and did not locate either box. This is sufficient circumstantial evidence for a rational trier of fact to infer that Wolfchild concealed the boxes on his person while momentarily out of camera view.

The strong circumstantial evidence that Wolfchild concealed the items when he stepped out of camera view is not the only evidence from which a rational trier of fact could have determined Wolfchild committed the June 7 portion of the common scheme theft. Loss prevention employees also observed Wolfchild by camera in real time as he exited the store, observed that he was not holding any boxes in his hands as he exited, zoomed an exterior camera in on him and Cree Medicine as they were walking away, and captured footage of Wolfchild holding a

box that matched the one that he had selected and had been carrying inside the store as he walked out of camera view.

Additionally, as Wolfchild and Cree Medicine approached the pawn shop, loss prevention employee Conley watched the footage from the zoomed-in camera and, despite the footage being less clear than when they were closer to the store, he observed movement by Wolfchild consistent with giving or handing something to Cree Medicine or placing it in her bag/purse before she entered the pawn shop. Moreover, the arrow rest Cree Medicine pawned on June 7 after she entered the pawn shop alone and the fishing line she attempted to return to Scheel's on June 10 matched the two items Wolfchild had selected on June 7 and had been holding when he briefly walked out of camera view.

When reviewing the totality the evidence de novo in a light most favorable to the prosecution, the State presented sufficient evidence upon which a rational trier of fact could find Wolfchild guilty beyond a reasonable doubt, not only of the thefts he admitted to committing on June 6 and June 9, but also the theft he committed on June 7 as part of the theft by common scheme. *Burnett*, ¶ 15. Wolfchild's theory, that Cree Medicine had the opportunity to steal the items from June 7—especially since she is the person who pawned an item and attempted to return other items—and that could have supported a different result, “is immaterial to this Court's review” of the sufficiency of the evidence. *Id.* (citing *State v.*

*Weigand*, 2005 MT 201, ¶ 7, 328 Mont. 198, 119 P.3d 74). Aggregating the value of the items stolen by Wolfchild on June 7 with the value of the items he admitted to stealing on June 6 and 9 resulted in a loss to Scheels of \$1,500 or greater, thereby meeting the value necessary to qualify under Mont. Code Ann. § 45-2-101(8) as a common scheme and under Mont. Code Ann. § 45-6-301(7)(b)(i) as a felony.

**III. Wolfchild does not meet his burden to firmly convince this Court to invoke plain error review of his claim that the State was required to charge him with separate misdemeanor thefts instead of a single charge of felony theft by common scheme.**

For the first time on appeal, Wolfchild argues that by failing to charge him separately for each predicate offense the State included under the common scheme charge, the State “created a miscarriage of justice and raises the question of fundamental fairness in the trial and proceedings.” (Appellant’s Br. at 15.) He argues that “[n]ot one offense alleged in the State’s information and affidavit meets the monetary element for a felony, only [by] combining all three offenses could the offenses be a felony.” (*Id.* at 17.) Wolfchild asserts that “[h]ad the State specifically pleaded each offense as individual counts [he] would have benefited by having the possibility of being convicted of a misdemeanor.” (*Id.*) Thus he urges plain error review is warranted.

In support of this argument, Wolfchild quotes from *State v. Rowe*, 2024 MT 37, ¶ 20, 415 Mont. 280, 543 P.3d 614.<sup>3</sup> The issue in *Rowe*, however, was whether the district court erred in admitting evidence of subsequent uncharged acts of sexual assault as proof of a motive or plan to commit a number of earlier sexual assaults that the State had charged as a common scheme. *Id.* ¶ 18. The Court held that the charge of sexual assault by common scheme was a “fictional offense that is not cognizable under Montana law” and further held that *common scheme offenses are exclusive to property crimes* resulting in a pecuniary loss to the victim. *Id.* ¶¶ 20, 22.

The Court explained in *Rowe* that, when the State charges repeated property crimes (the predicate offenses) under the umbrella offense of common scheme, the State must specifically identify each predicate offense individually in the charging documents and, at trial, the verdict or court finding must state the individual finding for each predicate offense. In this case, the Information and Motion for Leave to File Information Direct and Affidavit in Support (Appellant’s App. 2)

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<sup>3</sup> Wolfchild also cited *State v. Cazier* in support of his argument but incorrectly cited it in the body of the brief and the table of authorities as 2019 MT 259. The correct citation is 2019 MT 259N, 398 Mont. 445, 455 P.3d 453, an unpublished opinion, and like all unpublished opinions this Court issues, pursuant to Section I, Paragraph 3(c)(ii), of the Montana Supreme Court Internal Operating Rules, it is expressly stated that the opinion “shall not be citable as binding precedent.” See also *State v. Oie*, 2007 MT 328, ¶ 16, 340 Mont. 205, 174 P.3d 937; *State v. Ferre*, 2014 MT 96, ¶ 15, 374 Mont. 428, 322 P.3d 1047; *State v. Kortan*, 2022 MT 204, ¶ 19 fn. 2, 410 Mont. 336, 518 P.3d 1283.

described the umbrella offense (felony theft by common scheme) and each of the predicate offenses that the State included under that umbrella: (1) two separate thefts on June 6, two items stolen each time, total value of \$736.92, and, later that same day, a fraudulent return of the stolen items for a gift card refund in the same amount; (2) one theft of two items on June 7 valued at \$409.98; and (3) a theft of two items valued at \$529.98 on an unspecified date that Wolfchild admitted to the officer he had committed (and for which additional review of video surveillance footage by loss prevention staff identified the date as June 9). As charged, each of the predicate offenses were specifically identified and described in an individual paragraph, and as aggregated under the common scheme umbrella stated that the value of the items stolen exceeded \$1,500. (*Id.*) Similarly, the district court, as the trier of fact, expressly identified the date and valuation of each predicate offense and found Wolfchild guilty of each predicate offense beyond a reasonable doubt under the common scheme umbrella. (Appellant’s App. 1.)

It is important to note that in Wolfchild’s argument, he does not address Mont. Code Ann. § 45-6-301(8), which the Montana Legislature enacted to expressly allow the aggregation of the values of repeated thefts committed pursuant to a common scheme, precisely as the State did in Wolfchild’s case.

Moreover, this Court has long held that “[i]n Montana, county attorneys direct under what conditions a criminal action is commenced, and they supervise

and control such action until completion, subject only to restrictions imposed by law.” *State v. Partain*, 2025 MT 83, ¶ 33, 421 Mont. 37, 567 P.3d 932 (citing *State ex rel. Fletcher v. Dist. Court*, 260 Mont. 410, 414, 859 P.2d 992, 995 (1993)). This Court held in *Partain* that “[w]hen the facts of a case support a possible charge of more than one crime, the crime to be charged is a matter of prosecutorial discretion.” *Id.* While the facts alleged in Wolfchild’s charging documents would have been sufficient to charge him with multiple individual offenses of misdemeanor theft, the same facts were likewise sufficient to charge him with felony theft by common scheme. It was within the State’s discretion, pursuant to Mont. Code Ann. § 45-6-301(8), to aggregate the value of all the items Wolfchild stole from Scheels and to charge each of the predicate offenses as part of a common scheme.

The State appropriately exercised its discretion to charge Wolfchild with one count of felony theft by common scheme instead of charging him with a number of individual misdemeanor thefts. Wolfchild’s argument that “[i]f the State had properly charged each offense, it would have been possible to find him guilty of one, two, or three [misdemeanor] offenses” is correct only in the sense that being convicted of misdemeanors is, of course, what he would prefer. (Appellant’s Br. at 19.) Wolfchild’s preference, however, does not warrant plain error review. Wolfchild ignores that if the State had failed to prove each of the predicate

offenses under the common scheme, leaving the aggregated value under \$1,500, the only option the trier of fact would have had was to find him not guilty of felony theft by common scheme. The State is authorized to choose which offense to charge when the facts support a possible charge of more than one crime. Here, the State assumed the risk of proving all the predicate offenses, and its failure to do so would have resulted in an acquittal. Wolfchild has failed to demonstrate how his fundamental rights were affected by the State's decision to charge a single offense by common scheme, and he has not met his burden to firmly convince this Court that the error he claims implicates a fundamental right.

### **CONCLUSION**

The State requests that this Court affirm Wolfchild's conviction for theft by common scheme and deny his request for plain error review.

Respectfully submitted this 23rd day of June, 2025.

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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 4,849 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

*/s/ Carrie Garber*  
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## CERTIFICATE OF SERVICE

I, Carrie L. Garber, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 06-23-2025:

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Electronically signed by Janet Sanderson on behalf of Carrie L. Garber  
Dated: 06-23-2025