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STATE OF MONTANA,

Plaintiff and Appellee,

v.

KEVIN WESLEY SANDBERG,

Defendant and Appellant.

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**REPLY BRIEF OF APPELLANT**

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On Appeal from the Montana Fourth Judicial District Court,  
Missoula County, the Honorable Jason T. Marks, Presiding

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## INTRODUCTION

The fundamental issue for the jury to resolve in this case was who was telling the truth about what happened in Bert's tent—Kevin or Tammany. The State used two unfair methods to tip the scales in its favor: repeatedly referring to Tammany as a “victim” and asking the jury to infer Kevin was a drug dealer because he wanted to erase personal data from his lost cell phone. This Court should not condone the State's convict-at-all-costs approach to this case, which invaded the jury's province as the arbiter of credibility and undermined the trial's truth-seeking function. This Court should reverse Kevin's convictions and remand for a fair trial.

## ARGUMENT

### **I. The repeated use of the term “victim” in this case is reviewable and reversible error.**

The State's effort to parse each utterance of the term “victim” into scattered and harmless one-offs of varying reviewability asks this Court to ignore the forest for the trees. Each individual instance might have been defensible in a vacuum, but cumulatively, the State undermined the presumption of innocence and denied Kevin a fair trial. “Repeated improper statements create cumulative prejudice, and we accordingly

view them collectively rather than individually.” *State v. Byrne*, 2021 MT 238, ¶ 32, 405 Mont. 352, 495 P.3d 440 (quoting *Anderson v. BNSF Ry.*, 2015 MT 240, ¶ 78, 380 Mont. 319, 354 P.3d 1248). Kevin’s arguments regarding improper use of the term “victim” are reviewable and meritorious.

**A. Each improper use of the term “victim” is reviewable.**

For the reasons explained in Kevin’s opening brief, each instance of the State, a witness, or the court referring to Tammany as a “victim” is reviewable error because it is preserved or because it qualifies for review under this Court’s plain error doctrine. (Appellant’s Br. 27-29.) Alternatively, trial counsel’s failure to object contemporaneously to the State’s “victim” references in voir dire and its opening statement and to the court’s reference in jury instructions constituted ineffective assistance of counsel. (Appellant’s Br. 29-31.)

The State generally does not dispute that Kevin preserved his objection to use of the term “victim” during the evidentiary portion of trial. (Appellee’s Br. 33-34 & n.2.) The State also does not dispute that its “victim” references during its voir dire and opening statement are *reviewable* under the plain error doctrine, but rather argues that they

are not *reversible* under that standard. (Appellee’s Br. 28-29.)

Accordingly, the State only seriously contests the reviewability of the court’s use of the term during jury instructions.

The State asserts that Kevin “acknowledge[d]” that the issue of the court’s use of the term “victim” in its jury instructions was “unpreserved[.]” (Appellee’s Br. 27 (citing Appellant’s Br. 28).) To the contrary, immediately preceding the page cited by the State, Kevin argued that his standing objection to the term “victim” preserved his objection to the jury instruction language, particularly because the court recognized it “would be highly problematic” if it referred to Tammany as a victim when overruling the objection. (Appellant’s Br. 27 (quoting Tr. at 312-13).) Because the trial court not only had the opportunity to rule on the issue of whether anyone could use the term “victim,” but also expressly acknowledged that it should *not* use that term itself before ultimately doing so, this issue is preserved for this Court’s review without resort to the plain error doctrine. *State v. Montgomery*, 2010 MT 193, ¶¶ 11-13, 357 Mont. 348, 239 P.3d 929 (refusing to apply waiver rule where district court “was given the opportunity to rule on the issue”). Even if invocation of the plain error

doctrine is required, however, the State's arguments in opposition go to the merits of Kevin's arguments about the jury instructions, not their reviewability. (Appellee's Br. 30-32.) This issue is reviewable.

Finally, the State opposes Kevin's alternative assertion of ineffective assistance of counsel relating to the non-objection during the State's voir dire and opening statement and during the settling of jury instructions. (Appellee's Br. 32-33.) The State contends this Court should decline to consider the IAC claim because "the record does not show counsel's motivation." (Appellee's Br. 32.) Notably, the State does not address Kevin's argument that there was no plausible justification for failing to object to those instances. (Appellant's Br. 31.) If, indeed, it is as obvious as the State asserts that "Sandberg was still required to object to the jury instructions" separately despite his standing objection to use of the term "victim" (*see* Appellee's Br. 29), then there was no plausible justification for failing to lodge that objection, constituting deficient performance. *See State v. Weber*, 2016 MT 138, ¶¶ 22-28, 383 Mont. 506, 373 P.3d 26. The State similarly argues Kevin has failed to show prejudice from counsel's failure to object, but this assertion requires evaluating the substance of his claims. (Appellee's Br. 33.) As

such, this Court should review Kevin’s challenge to the uses of the term “victim” on its merits.

**B. In this case, the use of the term “victim” deprived Kevin of his right to a fair trial, undermined his presumption of innocence, and invaded the province of the jury.**

On the merits, the State characterizes its use of the term “victim” as innocuous and harmless in light of other evidence presented at trial. (Appellee’s Br. 33-38.) But this case exemplifies those in which use of the term “victim” is improper *and* prejudicial: the he-said/she-said credibility battle where the jury’s role is to determine if the State has proven that a complainant was, in fact, a victim of a crime. (Appellant’s Br. 15-26, 31-33.)

The State resists this conclusion by reciting evidence—notably, without citations to the record, *contra* Mont. R. App. P. 12(1)(g) & (2)—and conclusions the State has drawn therefrom in order to argue that this case is one in which there was no dispute that the complainant was a victim of *something*. (Appellee’s Br. 37-38.) Had the State provided citations to the record in support of its factual assertions, it would have been forced to acknowledge that the evidence it relied upon to argue it

“easily proved” lack of consent or coercion (Appellee’s Br. 37) was, in actuality, ambiguous and subject to defense-favorable interpretations.

For example, the fact that Tammany cried and probably was afraid when Kevin *verbally* confronted her about leaving him for dead in a parking lot and stealing all of his hard-earned savings (*see* Tr. at 472, 533, 539) does not necessitate an inference that she was present only under threat or coercion; upset feelings do not mean someone committed a crime. The parties vigorously disputed whether Kevin “brandished weapons,” as opposed to fidgeting with a toy; “broker[ed] a deal for the oral sex” rather than caving to her repeated requests to perform the act; or stole from Tammany, as opposed to temporarily placing a bag that might have contained weapons out of reach in the interest of safety. (*Compare* Appellee’s Br. 37, *with* Tr. at 527-28, 542, 550-53.) And Kevin’s statement during a police interview that he “let’ Tammany go” does not mandate a sinister connotation that he detained her until that moment (Appellee’s Br. 37); that statement just as easily could be interpreted to mean he did not stop her from leaving then *or at any point prior*, as he consistently maintained. (Tr. at 598-602; *see also*

Tr. at 545 (testifying Tammany went to the bathroom alone in the middle of their discussion).)

The State cannot feign ignorance of the ambiguity inherent in the non-testimonial evidence and that the jury’s interpretation of such evidence would depend upon the credibility of the witnesses to what happened in and around Bert’s tent. (See Tr. at 644-47 (State beginning closing argument with discussion of Tammany’s and Kevin’s respective credibility).) To address that problem, the State “subtl[y] but powerful[ly]” bolstered Tammany’s credibility by repeatedly referring to her as a victim, telegraphing to the jury that the State and its witnesses believed that Tammany’s version of events was truthful. *State v. Sperou*, 365 Or. 121, 140, 442 P.3d 581, 595 (2019).

A closer examination of the out-of-jurisdiction cases cited by the State highlights their legal and factual distinctions from this case and, by extension, how the references to Tammany as a “victim” were neither innocuous nor harmless in this he-said/she-said case. Two cases cited by the State applied legal principles that differ materially from Montana law. See *State v. Myers*, 619 S.W.3d 578, 583-84 (Mo. Ct. App. E.D. 2021) (applying Missouri precedent that permits prosecutor to

state witness is telling the truth as long as prosecutor does not assert personal knowledge of facts); *Jackson v. State*, 600 A.2d 21, 23-25 (Del. 1991) (concluding defendant failed to show “victim” references were plain error, defined as “so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process”).

In two other cases cited by the State, the courts found no prejudice resulting from use of the term “victim” because it was undisputed that the complaining witness was a victim of a crime. *State v. Godinez Juarez*, 489 P.3d 231, 241-42 (Utah Ct. App. 2021)<sup>1</sup> (“[T]he manner in which Godinez Juarez defended the case made it clear that Teens were indeed the victims of some sort of crime.”); *State v. Madden*, 2017-Ohio-8894, ¶¶ 11, 31-34, 100 N.E.3d 1203 (Ohio Ct. App. 2017) (finding no plain error in use of term “victim” “where the fact of an assault was not in dispute”; complainant had jaw fractured in three places, required surgery, and was hospitalized for more than one week). Similarly, in

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<sup>1</sup> Three out-of-state citations in the Opening Brief in this matter correctly identified the state from which each decision originated but did not specify the deciding court in accordance with citation formatting rules: *Godinez Juarez*, *State v. Carrera*, 517 P.3d 440 (Utah Ct. App. 2022), and *State v. Nomura*, 79 Hawai’i 413, 903 P.2d 718 (Haw. Ct. App. 1995). (See Appellant’s Br. 25, 30-31.) Counsel apologizes to the Court for any confusion resulting from those incomplete citations.

*State v. Jones*, 231 N.C. App. 433, 436, 752 S.E.2d 212, 215 (2013), the court took pains to distinguish its finding of no prejudice from cases in which the defendant provided testimony that contradicted the alleged victim’s assertions. And finally, in two other cases cited by the State, the courts concluded that the defendants were not prejudiced by the trial courts using the word “victim” once or twice in jury instructions—a far cry from the pervasive “victim” references from various parties throughout this case. *Nomura*, 79 Hawai’i at 417-18, 903 P.2d at 722-23; *State v. Henderson*, 155 N.C. App. 719, 721-24, 574 S.E.2d 700, 702-04 (2003); *see also Myers*, 619 S.W.3d at 584 (term used only twice, once in voir dire and once in opening statement). Notably, none of the State’s cases holds that use of the term “victim” is *never* problematic.

Although the State strenuously denies that referring to Tammany as a “victim” was improper or could have tipped the scales of Kevin’s trial, it does so only after its strategy prevailed. The State would not have used that terminology at trial or opposed Kevin’s objection to the same if the word “victim” did not carry powerful rhetorical and emotional weight. *See State v. Strommen*, 2024 MT 87, ¶ 30, 416 Mont. 275, 547 P.3d 1227 (“The State’s assertion of harmless error on appeal

is thus squarely contradicted by the record and its own conduct below.”). And this was, in fact, a close case, as illustrated by the jury’s pre-verdict deadlock on one count. (Tr. at 686-87.) This Court should reject the State’s post-hoc pretense; hold that repeated use of the term “victim” elides the defendant’s presumption of innocence and deprives him of a fair trial where, as here, the defense is that no crime occurred; and reverse and remand for a new trial.

**II. The district court committed reversible error when it allowed the State to question Kevin about unproven and irrelevant alleged prior bad acts.**

**A. The State’s cross-examination was improper under any theory of admissibility.**

The State defends the admission of its phone-wiping cross-examination on the same bases articulated by the district court: (1) The evidence did not fall under Rule 404(b) because it showed consciousness of guilt; and (2) it was “valid impeachment.” (Appellee’s Br. 39-41; App. C at 621.) Both rationales fall apart under logical scrutiny.

This Court has held that Rule 404(b) does not apply “to evidence establishing consciousness of guilt regarding the crime *with which the defendant is charged.*” *State v. Berosik*, 1999 MT 238, ¶ 27, 296 Mont. 165, 988 P.2d 775 (emphasis added) (quoting *State v. Moore*, 254 Mont.

241, 245, 836 P.2d 604, 607 (1992)). The trial record demonstrates that the State's theory of admissibility was that Kevin's request to his girlfriend to wipe his phone demonstrated consciousness of guilt of his alleged *drug dealing*. (Tr. at 615-16 ("And you know that drug dealers often use their phone in order to engage in drug transactions; is that fair to say? . . . And so your phone being wiped, were you of that ilk would remove any of that evidence; is that fair to say?").) Kevin was not charged with any drug-dealing offenses. (D.C. Doc. 37.) The State's cross-examination was not permissible under a consciousness of guilt rationale. *See Berosik*, ¶ 27.

Perhaps recognizing this fatal flaw, the State offers a new theory of admissibility on appeal, suggesting for the first time that Kevin asked his girlfriend to wipe his phone in order to erase text messages or call records in the timeframe that Kevin and Tammany were in Bert's tent, and that this request showed "consciousness of guilt as related to his conversations with Adkins[.]" (Appellee's Br. 40-41.) But this theory misses the mark, too, because Kevin was not charged with committing the crime of "conversations with Adkins[.]" *See Berosik*, ¶ 27.

Moreover, the *only* record citations offered to support the State's new argument were Kevin's testimony that he attempted to call Sampson Adkins and texted him "WTF?" when Kevin found out Sampson would not come to talk to Kevin and Tammany after saying he would. (Appellee's Br. 40-41 (citing Tr. at 545, 548).) The State utterly fails to offer a logical connection between a "WTF" text and call timestamps—which the State all but admits would be corroborative or cumulative at most, even if the State's speculation about the phone records' contents were correct (Appellee's Br. 40-41)—and consciousness of guilt of the crimes with which Kevin was charged. *See Berosik*, ¶ 27. The State concludes its insincere argument by reverting back to the real purpose for its phone-wiping cross-examination—to assert to the jury that Kevin was, in fact, a drug dealer. (Appellee's Br. 41.) The State relied heavily on that assertion to convince the jury to convict Kevin of the different crimes the State actually charged. (*E.g.*, Tr. at 649-50 (“[Y]ou can infer there can never be consent in this circumstance with a pissed off drug dealer threatening to kill you if you don't make good on the debt.”), 655 (“[H]e doesn't really want people to know that he's a

meth user or meth dealer.”), 656 (“[H]e’s not a drug dealer that you can mess with.”).)

Because this was not “consciousness of guilt” evidence as defined by Montana law, Rule 404 applies. *See Berosik*, ¶ 27. Kevin’s opening brief explains in detail why this evidence was irrelevant and offered for an inadmissible purpose under Rule 404. (Appellant’s Br. 33-40.)

Accordingly, it could not constitute “valid impeachment,” as the district court concluded and as the State maintains on appeal (App. C at 621; Appellee’s Br. 41). (*See* Appellant’s Br. 38-40.) *See also State v. Lake*, 2022 MT 28, ¶¶ 37-40, 407 Mont. 350, 503 P.3d 274 (explaining specific instances of prior bad conduct offered to rebut good character evidence must be relevant to that good character evidence).

**B. The State has failed to demonstrate that there was no reasonable possibility the improper cross-examination might have contributed to the verdict.**

The State alternatively asserts that any error in permitting this cross-examination was harmless. (Appellee’s Br. 42-43.) In doing so, the State once again recites its interpretation of the trial evidence without a single citation to the record. (Appellee’s Br. 42-43.)

The State must overcome “a very high bar” to show there was no reasonable possibility this tainted evidence might have contributed to Kevin’s conviction. *State v. Reichmand*, 2010 MT 228, ¶ 23, 358 Mont. 68, 243 P.3d 423. As explained previously in this brief, Section I.B., *supra*, this case presented a credibility battle for the jury to determine the meaning of ambiguous evidence—far afield from the “overwhelming” case the State now claims it presented (Appellee’s Br. 43). The State’s improper and speculative innuendo to the jury that Kevin wanted to wipe his phone in order to hide evidence of unrelated criminal activity was yet another unfair thumb on the scale to Kevin’s detriment. And the State would have had no need to resort to this inappropriate cross-examination if the State believed its case was as airtight as it now claims. *See Strommen*, ¶ 30. This Court should conclude the State has failed to show that the improper phone-wiping cross-examination was harmless.

**C. Kevin’s alternative argument that the improper cross-examination was unfairly prejudicial is reviewable and meritorious.**

If this Court disagrees that Rules 402 and 404 precluded the State’s phone-wiping cross-examination, Kevin respectfully submits

that Rule 103(d) of the Montana Rules of Evidence permits this Court to “tak[e] notice of plain errors affecting substantial rights” under these circumstances. The trial court plainly erred, affecting Kevin’s substantial right to due process and a fair trial, by failing to exclude the cross-examination under Rule 403. *See Andrew v. White*, 604 U.S. ----, 145 S. Ct. 75, 81-82 (2025) (recounting history of United States Supreme Court precedent holding Due Process Clause prohibits introduction of unduly prejudicial evidence that renders trial fundamentally unfair).

The State does not dispute that Kevin objected to the State’s phone-wiping cross-examination as irrelevant and as inadmissible prior bad act evidence under Rule 404(b) of the Montana Rules of Evidence. (Appellee’s Br. 42.) The State contends, however, that “[t]he record does not show that Sandberg ever objected based on Rule 403, nor did the district court conduct a 403 balancing.” (Appellee’s Br. at 42.)

Although it is true trial counsel did not expressly cite Rule 403 when making the post-hoc record of the unrecorded sidebar conference about the evidence (App. C at 621), this Court should consider Kevin’s arguments about the phone-wiping cross-examination holistically on

their merits rather than scrupulously parsing nominal distinctions between three intrinsically interrelated rules—particularly because the State’s harmless error argument requires this Court to weigh this evidence’s prejudicial nature in any event (*see* Appellee’s Br. 42-43).

Rules 402, 403, and 404 of the Montana Rules of Evidence are all housed within Article IV of the Montana Rules of Evidence, entitled “Relevancy and Its Limits[.]” Rule 402 provides that relevant evidence is generally admissible; Rule 403 provides that even relevant evidence may be excluded if it is unfairly prejudicial; and Rules 404 to 411 place specific constraints on the admission of categories of evidence that carry particular risks of unfair prejudice despite their intuitive relevance. *See* Mont. R. Evid. 402 to 411. The balancing act between relevance and unfair prejudice is the foundation of Rule 404 and its counterparts. *See Lake*, ¶¶ 32, 44 (emphasizing that prior bad acts evidence under Rule 404(b) must be carefully limited because of “its manifestly inherent risk of unfair prejudice”); *see also Old Chief v. United States*, 519 U.S. 172, 180-82 (1997) (interpreting materially identical Federal Rules of Evidence).

The purpose of the contemporaneous objection rule is to permit the trial court to rule on an issue—here, the admissibility of highly prejudicial and questionably relevant evidence. *See Montgomery*, ¶¶ 11-13. It strains credulity to suggest that a trial court grappling with the admissibility of marginally relevant prior bad acts evidence offered to prove the character of a criminal defendant and action in conformity therewith would be helplessly unaware that such evidence also might be unfairly prejudicial relative to its probative value unless defense counsel utters the magic words: “Four Zero Three.” Indeed, this Court itself sometimes has addressed both Rule 403’s and Rule 404’s requirements simultaneously in its analysis of evidentiary errors, tacitly acknowledging their logical overlap. *See, e.g., State v. Rowe*, 2024 MT 37, ¶ 27, 415 Mont. 280, 543 P.3d 614; *Lake*, ¶¶ 32, 44; *State v. Pelletier*, 2020 MT 249, ¶¶ 24-28, 401 Mont. 454, 473 P.3d 991 (“[P]rior bad acts evidence is highly prejudicial by nature[.]”); *State v. Zimmerman*, 2018 MT 94, ¶¶ 30-31, 391 Mont. 210, 417 P.3d 289.

As argued in Kevin’s opening brief, the State’s speculative assertion that Kevin wanted his girlfriend to wipe data from his phone to hide that he was a drug dealer was extraordinarily prejudicial and

was not probative of any fact in issue in this trial. (Appellant’s Br. at 40-42.) Because this case was, at its core, a credibility battle, the State’s below-the-belt blows violated Kevin’s right to a fair trial—the *ultimate* substantial right in a criminal case. *See* Mont. R. Evid. 103(d). This Court should reverse and remand.

### **CONCLUSION**

In a trial that boiled down to the comparative credibility of two witnesses, it was fundamentally unfair for the State to place not one, but two thumbs on its side of the scale by labeling Tammany a “victim” and portraying Kevin as a dangerous drug dealer. This Court should reverse Kevin’s conviction and remand so that he may have the fair trial to which he is constitutionally entitled.

Respectfully submitted this 18<sup>th</sup> day of July, 2025.

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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 3,637, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Charlotte Lawson  
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## CERTIFICATE OF SERVICE

I, Charlotte Lawson, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 07-18-2025:

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