IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0518

STATE OF MONTANA,

Plaintiff and Appellee,

v.

GARY RICHARD JONES,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Thirteenth Judicial District Court, Yellowstone County, the Honorable Donald L. Harris, Presiding

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STATEMENT OF THE ISSUES

Issue One: Trial counsel objected to two questions from the State soliciting repetition of the alleged child victim's accusations. The district court overruled the objections, allowing in a flood of inadmissible hearsay that bolstered the child's testimony through repetition and provided vivid, inflammatory details about the alleged abuse that went beyond what the child testified to. Did the district court err when it overruled trial counsel's hearsay objections?

Issue Two: Trial counsel failed to object to additional hearsay elicited by the State from six different witnesses. The hearsay again bolstered the child's testimony through repetition of her accusation and provided even more vivid, inflammatory details about the alleged abuse that went beyond what the victim testified to. Was Mr. Jones' trial counsel ineffective when he failed to object to the State's extensive use of hearsay at trial?

Issue Three: Did cumulative error occur as a result of the combined effect of the hearsay erroneously admitted over defense objection and the inadmissible hearsay defense counsel failed to object to?

STATEMENT OF THE CASE

Gary Jones was charged with one count of sexual intercourse without consent, in violation of Mont. Code Ann. § 45-5-503, on April 22, 2022. (Information (District Court Document (Doc.) 4)). The State sought a penalty enhancement pursuant to Mont. Code Ann. § 45-5-503(4)(a) for a victim under 12 years old and an offender over 18 years old. (Omnibus Hearing Memorandum (Doc. 16)).

The case proceeded to a three-day jury trial, after which the jury found Mr. Jones guilty and found that the offense met the requirements for the sentence enhancement. (Verdict (Doc. 41)). Mr. Jones was sentenced to 100 years at the Montana State Prison, with credit for time served. (Judgment (Doc. 61), attached as Appendix A). The court ordered a twenty-five year parole restriction, restitution of $4,444.54 to the Montana Crime Victim's Compensation Fund, designated Mr. Jones a Level 1 sexual offender, and ordered him to participate in sexual offender treatment. (Doc. 61). Mr. Jones timely appealed. (Notice of Filing (Doc. 64)).

STATEMENT OF THE FACTS

Mr. Jones was accused of having oral sex with his stepdaughter,

K.S., who was five years old when she first accused Mr. Jones of sexual abuse and seven years old at trial. (Motion for Leave to File Information (Doc. 1); May 31, 2023, Transcript of Proceedings (Jury Trial Day Two Tr.) at 331). K.S. was the accuser and the only person with personal knowledge of the alleged offense. (Doc. 1). K.S. testified at trial. (Jury Trial Day Two Tr. at 330-347).

K.S. testified that Mr. Jones no longer lived with her because he hurt her. (Jury Trial Day Two Tr. at 332). She told the jury, "He put his penis in my mouth." (Jury Trial Day Two Tr. at 332). She testified that this happened more than once, in her own room and in her parents' room, when her mom would be Door Dashing, in the morning and at night. (Jury Trial Day Two Tr. at 333, 334, 341). She said it hurt, made her sad, and felt yucky. (Jury Trial Day Two Tr. at 332, 334). She said that her sister was around when this happened, so Mr. Jones would put a blanket over her so her sister could not see. (Jury Trial Day Two Tr. at 333). She stated that she told her grandma, sister, and mom this was happening. (Jury Trial Day Two Tr. at 333). K.S. testified that the alleged abuse started the day after Mr. Jones moved into her family's home, and that it happened every day, twice a day. (Jury Trial Day Two

Tr. at 344).

K.S. did not remember the first day she met Mr. Jones, which her mother testified was when she was two years old. (Jury Trial Day Two Tr. at 343; May 30, 2023, Transcript of Proceedings (Jury Trial Day One Tr.) at 163, 173). She also said she did not remember if she told her mom what happened on the same day she told her grandmother, and she did not remember what she and her mom talked about regarding the incident in the two years after her initial accusation. (Jury Trial Day Two Tr. at 338, 342).

Whittney Seibert, K.S.'s mother, testified at trial. (Jury Trial Day One Tr. at 161-198; Jury Trial Day Two Tr. at 203-219). Whittney testified that K.S. was "very consistent" with her accusations on the day of her initial statement. (Jury Trial Day One Tr. at 183). She testified that when she heard her daughter's responses during a forensic interview following the allegation, she believed her daughter was telling the truth. (Jury Trial Day One Tr. at 194). She testified that K.S. had nightmares and told her the nightmares were about "Gary putting his penis in her mouth." (Jury Trial Day One Tr. at 197). Whittney testified that K.S. was "[v]ery consistent. Her story has never changed." (Jury

Trial Day Two Tr. at 205).

Two videos were entered into evidence through Whittney. One was a video of Whittney, Mr. Jones, and K.S. hours after the initial accusation. In the video, Whittney asks K.S. if Mr. Jones put his penis in her mouth, to which K.S. says no. (Defense Exhibit A at 00:16).[1] She says she "forgot he didn't" put his penis in her mouth. (Defense Exhibit A at 00:29). In the other video, taken around the same time that day, K.S. again says she forgot that Mr. Jones did not put his penis in her mouth. (Defense Exhibit B at 00:03).[2] When Whittney asks K.S., "So where did you see this happen then?," K.S. says "at home" "in mom and dad's bedroom" "with dad." (Defense Exhibit B at 00:26-01:20). K.S. tells Whittney, "it was only [my sister] and me and dad home." (Defense Exhibit B at 01:22).

Tammy Seibert, K.S.'s grandmother, testified at trial. (Jury Trial Day One Tr. at 114-142). Tammy testified that on August 2, 2021, she

[1] Although this video is listed as a defense exhibit, it was played and published by the State during Whittney's direct examination. (Jury Trial Day Two Tr. at 217).

[2] This video is also listed as a defense exhibit, but was also played and published by the State during Whittney's direct examination. (Jury Trial Day Two Tr. at 217).

was babysitting K.S., cutting her hair, and K.S. told her, "My daddy put his penis in my mouth." (Jury Trial Day One Tr. at 119, 120). This was the first time K.S. had told anyone this, as far as the evidence at trial showed. (*See* Jury Trial Day One Tr. at 1-199; Jury Trial Day Two Tr. at 200-384; June 1, 2023, Transcript of Proceedings (Jury Trial Day Three Tr.) at 385-435). Defense counsel did not object. (*See* Jury Trial Day One Tr. at 120).

After K.S. made this initial statement to Tammy, Tammy grabbed her phone, hit record, and asked K.S. to repeat herself, which she did. (Jury Trial Day One Tr. at 121). This video was admitted into evidence as State's Exhibit 1. (Jury Trial Day One Tr. at 122). Defense counsel stipulated to the admission of the video. (Jury Trial Day One Tr. at 4, 122). In the video, Tammy asks K.S., "What did your daddy do?" (State's Exhibit 1 at 00:01). K.S. responds, "He was sticking his penis into my mouth." (State's Exhibit 1 at 00:03). Tammy asks her when this happened, and K.S. replies, "At morning times and at dark times." (State's Exhibit 1 at 00:15). K.S. says it happens when her mom is not home and that Mr. Jones would cover her with a blanket so her sister could not see what was happening. (State's Exhibit 1 at 00:20).

Herman "Lucky" Seibert, K.S.'s grandfather, testified at trial. (Jury Trial Day One Tr. at 142-161). Lucky testified that K.S. "verbalized what she had said on the recording, that this is something that had happened," referring to the video recording of K.S. saying Mr. Jones had "put his penis in my mouth." (Jury Trial Day One Tr. at 152; State's Exhibit 1). He also testified that K.S. "used her hand just like this," as he made what the State described for the record as a "C-shaped motion toward his mouth." (Jury Trial Day One Tr. at 152, 153). Defense counsel did not object. (*See* Jury Trial Day One Tr. at 152, 153).

Dr. Cynthia Brewer, who saw K.S. for a medical exam on August 26, 2021, related to her allegation of sexual abuse, testified at trial. (Jury Trial Day Two Tr. at 299-328). Dr. Brewer testified that she was trained in forensic interviewing of children and trained to watch out for signs that a child's accusation has been coached. (Jury Trial Day Two Tr. at 311, 317). She also testified that she does not start her exams by asking children to be truthful. (Jury Trial Day Two Tr. at 323).

The State asked Dr. Brewer if K.S. knew why she was seeing Dr. Brewer. (Jury Trial Day Two Tr. at 313). Dr. Brewer started to reply, "She told me that she was there to see me because her dad…" (Jury

Trial Day Two Tr. at 313). Defense counsel objected on hearsay grounds.[3] (Jury Trial Day Two Tr. at 313). The district court overruled the objection without asking for a response from the State and without giving a reason for its ruling. (Jury Trial Day Two Tr. at 313). Dr. Brewer answered,

> She had told me that she was there to see me because her dad had put his penis in her mouth… She told me that when it happened… she felt like she was going to throw up, that it hurt her mouth, her throat. She told me that her dad wanted her to stick her tongue out, and she couldn't because it hurt too much. She made motions to show me what had happened to her.

(Jury Trial Day Two Tr. at 313, 314). She described the motions K.S. made, including that "she put her hand in a circular formation and moved it back and forth from her mouth in a longitudinal pattern." (Jury Trial Day Two Tr. at 314). Dr. Brewer also testified that K.S. had "…said that her father had hidden her under her blankets." (Jury Trial Day Two Tr. at 315). The defense did not object to that statement. (*See*

[3] There appears to be a typo in the transcript. During the direct examination by the prosecutor of State's witness Dr. Cynthia Brewer, there is an objection made to hearsay regarding a statement made by K.S. to Dr. Brewer. The transcript says that Mr. Ryan—co-counsel to Ms. Hendricks, the prosecutor conducting the direct examination—makes the objection. However, it is clear from context that it is defense counsel objecting to the hearsay being elicited by the State. (*See* Jury Trial Day Two Tr. at 313).

Jury Trial Day Two Tr. at 315).

Officer Brandon Lange, who responded to Tammy and Lucky's house when they initially contacted law enforcement, testified at trial that K.S. made a similar disclosure of sexual assault to him. (Jury Trial Day Two Tr. at 223). Defense counsel did not object. (*See* Jury Trial Day Two Tr. at 223).

Terrah Hall, K.S.'s therapist, testified at trial. (Jury Trial Day Two Tr. at 348-357). The State asked Ms. Hall, "Did [K.S.] confirm a disclosure of sexual abuse to you?" (Jury Trial Day Two Tr. at 352). Defense counsel objected on hearsay grounds. (Jury Trial Day Two Tr. at 352). The district court overruled the objection, without asking the State for a response and without explanation for its ruling. (Jury Trial Day Two Tr. at 352).

Ms. Hall answered, "[K.S.] did disclose to me that she had been sexually abused by Gary Jones." (Jury Trial Day Two Tr. at 352). The State asked Ms. Hall three separate times if K.S. ever wavered on her disclosure. (Jury Trial Day Two Tr. at 352, 353, 354). Ms. Hall answered, "Never, and we've probably seen each other for 60-plus sessions…" (Jury Trial Day Two Tr. at 352). Ms. Hall testified, "She's

never said she lied, she's never taken it back" and that K.S. told her she only lied about it once when she was with her mom and Mr. Jones. (Jury Trial Day Two Tr. at 353). Again, she said "Never. And not just with me, I mean her grandma, her family, her mom, other people have been in this." (Jury Trial Day Two Tr. at 354). The defense did not object. (*See* Jury Trial Day Two Tr. at 352, 353, 354).

There was other evidence introduced at trial. Wendy Dutton testified as an expert in child sexual abuse and discussed how children react, including potty training regression. (Jury Trial Day Two Tr. at 229-299). There was testimony about how K.S. had been fully potty trained, but since the allegation had regressed and was wetting the bed. (Jury Trial Day One Tr. at 171). K.S. had also engaged in self-harm. (Jury Trial Day One Tr. at 195). There was also testimony that a live camera, like a nanny-cam, had been set up in K.S.'s bedroom, but was moved to the playroom by Mr. Jones. (Jury Trial Day One Tr. at 177). Finally, there was testimony that K.S. sometimes did not want to leave her grandma and grandpa's house, especially when Mr. Jones was the one who came to pick her up. (Jury Trial Day One Tr. at 145).

In its opening statement, the State started by telling the story of

K.S.'s initial accusation. The State said, "[K.S.] tells Grandma Tammy, 'My daddy puts his penis in my mouth.'" (Jury Trial Day One Tr. at 106). The State said Tammy Seibert then pulled out her phone and recorded a video. (Jury Trial Day One Tr. at 106). "[K.S.] repeats herself loud and clear, 'My daddy puts his penis in my mouth.'" (Jury Trial Day One Tr. at 106). The defense did not object to either of these statements. (*See* Jury Trial Day One Tr. at 106).

In closing, the State referred to the statements K.S. had made to other witnesses: "In fact, [K.S.] not only told Grandma Tammy, you've heard she told her Grandpa Lucky; her sister; she told Detective Lange; Dr. Brewer; her therapist, Terrah Hall. She told all them that the Defendant put his penis in her mouth, and she told all of you, too." (Jury Trial Day Three Tr. at 390). The prosecutor continued:

> [K.S.] told all of you -- grandma, grandpa, sister, mom, Detective Lange, Dr. Brewer, Terrah Hall -- she told all of those people over the course of two years that the Defendant put his penis in her mouth. That's seven or eight of your centerpieces to your puzzle at least right there.

(Jury Trial Day Three Tr. at 397). "What about the edge pieces?" the State continued, referring to the video of K.S. at home with her mom and the defendant after her initial accusation:

> You heard about those, the only time [K.S.] wavered in her disclosure was when she was with the Defendant. Even then she still tells you about how she knows what oral sex is, she learned it from the Defendant in his bedroom, another big piece of the puzzle evidence corroborating [K.S.]'s disclosure.

(Jury Trial Day Three Tr. at 397). The State then reference Dr. Brewer's testimony: "[K.S.] gave details of her sexual abuse that she seemingly couldn't have known, but for actually experiencing that abuse herself -- the hand motions, the head motion, sore throat, the gag reflex, the taste of pee. More pieces." (Jury Trial Day Three Tr. at 397).

The State played two of the videos again during closing. First, the State played the portion of the video taken by Whittney the evening of K.S.'s initial statement. In the video, K.S. said, "'I saw it at home in your bedroom. Only dad was there, nobody else -- only [my sister] and me and dad were home.'" (Jury Trial Day Three Tr. at 395). In rebuttal, the State played the video of K.S.'s initial statement to her grandmother[4] and said, "[W]e will let [K.S.] have the last word." (Jury Trial Day Three Tr. at 423). The last thing the jury heard was K.S., five years old, in the video taken by her grandmother, saying that Mr. Jones

[4] The record states only "video played" and does not indicate the specific video played. (Jury Trial Day Three Tr. at 423). However, it is clear from context that the State is played a video of K.S. accusing Mr. Jones of sexual assault, which is only explicitly done in State's Exhibit 1.

put his penis in her mouth. (Jury Trial Day Three Tr. at 423; State's Exhibit 1).

On the omnibus form, defense counsel indicated he planned to file a motion in limine to exclude prior crimes, wrongs, or acts. (Doc. 16). The defense never filed this motion. Additionally, counsel indicated he would introduce character evidence at trial. (Doc. 16). No character evidence was introduced. (*See* Jury Trial Day One Tr. at 1-199; Jury Trial Day Two Tr. at 200-384; Jury Trial Day Three Tr. at 385-435). Defense counsel filed no motions in limine, nor did he respond to any of the State's motions in limine. At the final pretrial conference, defense counsel told the court he had filed a trial brief. (May 24, 2023, Transcript of Proceedings (Final Pretrial Tr.) at 2). There is no trial brief from the defense in the record. (*See generally* Docs. 1–66).

STANDARDS OF REVIEW

This Court reviews a district court's evidentiary rulings for an abuse of discretion. *State v. Smith*, 2021 MT 148, ¶ 14, 404 Mont. 245, 488 P.3d 531. However, the "district court's evidentiary rulings must be supported by the rules and principles of law; therefore, to the extent that a discretionary ruling is based on a conclusion of law... [this Court]

must determine whether the court correctly interpreted the law." *Smith*, ¶ 14 (internal citations and quotations omitted).

This Court reviews ineffective assistance of counsel claims *de novo*. *State v. Bryson*, 2024 MT 315, ¶ 23, 419 Mont. 490, 560 P.3d 1270.

SUMMARY OF THE ARGUMENT

At trial, the district court overruled defense hearsay objections to two questions about out-of-court statements of K.S. accusing Mr. Jones of sexual abuse. These statements were offered for their truth, were consistent with the child's testimony at trial, were not offered to rebut a charge of subsequent fabrication, and did not qualify for any exceptions to the hearsay rule. The inadmissible hearsay statements bolstered K.S.'s testimony and provided additional, graphic details that were not otherwise available through admissible evidence. Mr. Jones is entitled to a new trial due to the district court's erroneous admission of prejudicial hearsay statements.

Mr. Jones' trial counsel failed to object to volumes of other hearsay at trial. Trial counsel did not object to the testimony of six different adult witnesses—including a medical professional and a mental health professional—recounting K.S.'s prior out-of-court statements accusing

Mr. Jones of sexual abuse. Additionally, trial counsel stipulated to the admission of two videos containing K.S.'s damaging prior out-of-court statements.

These statements were offered for their truth, were consistent with K.S.'s testimony at trial, were not offered to rebut a charge of subsequent fabrication, and did not qualify for any exceptions to the hearsay rule. All of the statements were harmful to the defense, either because they bolstered K.S.'s trial testimony or because they provided inflammatory details that were not otherwise available through admissible evidence. There was no legitimate reason for trial counsel's failure to object to these statements. Without the admission of this extensive inadmissible hearsay, there is a reasonable possibility Mr. Jones would not have been convicted. Mr. Jones is entitled to a new trial with effective counsel.

Finally, the combination of the hearsay erroneously admitted over defense objection and defense counsel's failure to object to additional inadmissible hearsay denied Mr. Jones the right to a fair trial. The cumulative error doctrine demands reversal.

ARGUMENT

I. The district court erred when it overruled trial counsel's hearsay objections to K.S.'s out-of-court accusations.

A. The statements of K.S. offered by Dr. Brewer and Ms. Hall were hearsay statements.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Mont. R. Evid. 801(c). A statement may be oral, or it may be the nonverbal conduct of a person if the conduct is intended to be an assertion. Mont. R. Evid. 801(a). Hearsay is generally inadmissible unless it falls under an exception. Mont. R. Evid. 802. The statements of K.S. admitted through Dr. Cynthia Brewer and Terrah Hall over defense objection were inadmissible hearsay.

First, they were out-of-court statements offered for the truth of the matter asserted; they were introduced and used as substantive evidence that Mr. Jones sexually abused K.S. When the State asked Dr. Brewer over defense objection why she had seen K.S., Dr. Brewer answered, "She had told me that she was there to see me because her dad had put his penis in her mouth." (Jury Trial Day Two Tr. at 313).

The State asked Dr. Brewer about other "noteworthy details" of K.S.'s statements. (Jury Trial Day Two Tr. at 313). Dr. Brewer testified,

> She told me that… she felt like she was going to throw up, that it hurt her mouth, her throat. She told me that her dad wanted her to stick her tongue out, and she couldn't because it hurt too much. She made motions to show me what had happened to her. She just said that it hurt really, really bad and she felt like her head was going back so much that she thought it was going to hit the wall.

(Jury Trial Day Two Tr. at 313).

Defense counsel also objected to hearsay from Terrah Hall, K.S.'s therapist. (Jury Trial Day Two Tr. at 352). The State asked Ms. Hall, "Did [K.S.] confirm a disclosure of sexual abuse to you?" (Jury Trial Day Two Tr. at 352). Ms. Hall answered, "[K.S.] did disclose to me that she had been sexually abused by Gary Jones." (Jury Trial Day Two Tr. at 352).

Both statements were out-of-court statements made by K.S. before trial. Both statements were offered to prove the truth of the matter asserted. The statements referred to K.S. saying that Mr. Jones had put his penis in her mouth and details relating to that. These statements were relevant only if they were true. Additionally, the State used these statements in its closing as substantive evidence of Jones's guilt. In

closing, the State referred to the hearsay testimony from Dr. Brewer, saying,

> [Dr. Brewer] told you that when she met with [K.S.], [K.S.] was able to provide a lot of detail; that [K.S.] disclosed the hand motion going to and from her face, indicating she knew what oral sex looked like or about how [K.S.] disclosed that her throat hurt and it made her feel like she needed to throw up when the Defendant was assaulting her, indicating she knew what a gag reflex was or [K.S.] talked about her loose tooth that wiggled when the Defendant had his penis in her mouth…

(Jury Trial Day Three Tr. at 392). The State referred to K.S.'s statements to Ms. Hall and Dr. Brewer, along with those to other witnesses, as the "centerpieces" to the puzzle the jury had to solve. (Jury Trial Day Three Tr. at 397). Clearly, the State was using these statements for their truth. *See State v. Ripple*, 2023 MT 67, ¶ 19, 412 Mont. 36, 527 P.3d 951 ("…the State's use of these out-of-court statements during closing further underscored the obvious hearsay purpose of offering these statements."); *State v. Laird*, 2019 MT 198, ¶ 80, 397 Mont. 29, 447 P.3d 416 (holding that prior out-of-court statements that could have been admitted as non-hearsay were improperly used for their truth as evidenced by the State's repeated reference to the statements in opening, questioning of other witnesses,

and closing); *State v. Butler*, 2021 MT 124, ¶ 16, 404 Mont. 213, 487 P.3d 18 ("…if out-of-court statements are admissible only for a non-hearsay purpose, those statements cannot be used as substantive evidence, that is for the truth of the matter asserted.").

Second, the statements did not fall under any of the definitions of non-hearsay; they were not prior consistent or inconsistent statements. A prior consistent statement is not hearsay if it "is offered to rebut an express or implied charge against the declarant of subsequent fabrication, improper influence or motive." Mont. R. Evid. 801(d)(1)(B). For a prior consistent statement to be admissible, "(1) the declarant must testify at trial and (2) be subject to cross-examination concerning her statement, and (3) the statements to which the witness testifies must be consistent with the declarant's testimony, and (4) the statement must rebut an express or implied charge of subsequent fabrication, improper influence or motive." *Smith*, ¶ 19 (internal citations and quotations omitted). To be admissible as a prior consistent statement, the statement being admitted must have been made before the alleged motive to fabricate arose. *Smith*, ¶ 32. Additionally, the prior consistent statement may only be admitted after the declarant has

testified. *State v. Brandon*, 264 Mont. 231, 246, 870 P.2d 734 (1994) ("[B]efore prior statements qualify for admission under the rule, the declarant must testify and be subject to cross-examination." (Internal citations omitted)).

Here, K.S.'s prior statement to Dr. Brewer was admitted before K.S. had testified and been subject to cross-examination. (Jury Trial Day Two Tr. at 313, 330-347). Dr. Brewer testified before K.S. testified. That alone means the hearsay testimony of Dr. Brewer cannot be a prior consistent statement. *See Brandon* at 246. Even if Dr. Brewer had testified after K.S., the statements were not offered to rebut a charge of *subsequent* fabrication. Every hearsay statement made by K.S. and offered by Dr. Brewer was one that K.S. had made *after* her initial accusation. The only suggestion of fabrication in this case was the suggestion that K.S.'s grandparents had coached her to make the initial accusation. (Jury Trial Day One Tr. at 112). Because the hearsay statements K.S. made to Dr. Brewer were after the initial accusation, not before, they do not qualify for admission as prior consistent statement. *See Smith*, ¶ 32.

The statements made by K.S. to Ms. Hall, her therapist, also do not qualify as prior consistent statements. Ms. Hall testified after K.S. (Jury Trial Day Two Tr. at 330-337, 348-357). However, these statements were all made by K.S. to Ms. Hall after the initial accusation and so do not rebut a charge of subsequent fabrication. *See* Mont. R. Evid. 801(d)(1)(B); *Smith*, ¶ 32.

The statements also were not admissible as prior inconsistent statements. The hearsay statements of K.S., testified to by Ms. Hall and Dr. Brewer, were consistent with K.S.'s testimony. K.S. testified that Mr. Jones put his penis in her mouth; that it hurt, made her sad, and felt yucky; that it happened when her mom was not home; that if her sister was around, the defendant would cover her with a blanket; and that it started the day after Mr. Jones moved into her family home and that it happened twice a day, every day. (Jury Trial Day Two Tr. at 332; 333; 334; 341; 344). There was nothing in K.S.'s testimony that was inconsistent with the statements she made to Dr. Brewer or Ms. Hall.

Importantly, K.S.'s statements were not inconsistent merely because her testimony contained fewer details than the hearsay statements. *See Smith*, ¶ 30, 31. In *Smith*, this Court held that hearsay

admitted at trial was not inconsistent to the witness's testimony when the witness "mentioned certain facts" in the out-of-courts statements "that she did not mention at trial…" *Smith*, ¶ 31. As in *Smith*, here the differences between the out-of-court statements K.S. made to Dr. Brewer and Ms. Hall and the testimony she gave at trial "are better classified as omissions rather than inconsistencies." *Smith*, ¶ 31. Additionally, witnesses can only answer the questions the State asks; if the State does not ask its witness a question eliciting specific details, it cannot then claim inconsistent statements to get those details in. *See Smith*, ¶ 31. Here, the State did not ask K.S. about the "noteworthy details" Dr. Brewer testified to. (Jury Trial Day Two Tr. at 313; *see* Jury Trial Day Two Tr. at 330-347).

Although lack of memory can qualify as an inconsistency, here the facts K.S. could not remember were not the facts that were admitted through the testimony of Dr. Brewer and Ms. Hall. *See*, *e.g.*, *State v. Mederos*, 2013 MT 318, ¶ 17, 372 Mont. 325, 312 P.3d 438 ("A claimed lapse of memory represents an inconsistency…"). She did not remember the first day she met Mr. Jones, which testimony from her mother revealed was when she was two years old, she did not remember if she

told her mom on the same day as her initial accusation, and she did not remember the details of her conversations with her mom over the prior two years. (Jury Trial Day Two Tr. at 338, 343; Jury Trial Day One Tr. at 163, 173). Additionally, as in *Smith*, K.S. testified "coherently and clearly at trial" and "[t]o the extent there were inconsistencies, they were relatively immaterial." *Smith*, ¶ 30.

Moreover, with regard to hearsay testimony from Dr. Brewer, a prior inconsistent statement also may only be admitted after the declarant has testified. Just like a prior consistent statement, a statement cannot be inconsistent with a witness's testimony until the witness has actually testified. *See Brandon* at 246.

B. The statements of K.S. offered by Dr. Brewer and Ms. Hall did not qualify for any hearsay exceptions.

K.S. testified at trial, so the only applicable hearsay exceptions would be those for which the availability of the declarant is immaterial. *See* Mont. R. Evid. 803. The child hearsay exception would not apply here because K.S. was not unavailable. *See* Mont. Code Ann. § 46-16-220. Although both of the statements were made by K.S. to medical professionals, the medical treatment exception to the hearsay rule also does not apply to K.S.'s statements. The medical treatment exception

provides that "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment" are not excluded by the hearsay rule. Mont. R. Evid. 803(4). However, this Court has held that similar statements of a young child to medical professionals do not qualify for the medical treatment exception to the hearsay rule. *State v. Harris*, 247 Mont. 405, 413, 808 P.2d 453 (1991); *State v. Whipple*, 2001 MT 16, 304 Mont. 118, ¶ 25, 19 P.3d 228.

The rationale behind the medical treatment exception to hearsay is that "[t]he declarant who seeks medical treatment possesses a selfish motive in telling the truth because the declarant knows that 'the effectiveness of the treatment [the declarant] receives may depend largely upon the accuracy of the information [the declarant] provides.'" *Whipple*, ¶ 22 (quoting *Harris* at 412). However, "the rationale behind the medical treatment exception is less forceful where a very young child is concerned. The child might not comprehend the necessity of telling a doctor the truth in order to aid diagnosis and treatment."

Whipple, ¶ 23 (internal citations and quotations omitted). In *Whipple*, this Court held that the medical treatment exception to the hearsay rule did not apply where two young children, ages eight and nine, made statements to a doctor at an appointment they attended after disclosing sexual assault. *Whipple*, ¶¶ 5, 25.

In *Harris*, this Court held, "Because we cannot be assured of the reliability of statements made by young children to their counselors, we hold that statements made to the child's counselor cannot be admitted into evidence under the medical treatment exception to the hearsay rule." *Harris* at 413. The Court set out a test for conditions under which hearsay testimony by a therapist who is an expert in treating child victims of sexual abuse may still be admitted under the residual hearsay exceptions. *Harris* at 414. The test requires the hearsay to be the most probative evidence of the material fact at issue. *Harris* at 414. The test clearly is not satisfied here, as the proffered hearsay was not the most probative evidence of material fact, since K.S. herself also testified directly to the issues.

K.S. was only five years old at the time of her appointment with Dr. Brewer and was between five and seven when she met with Ms.

Hall. Dr. Brewer testified, "I don't usually start my exams with children saying that they have to be truthful, I just start asking questions." (Jury Trial Day Two Tr. at 323). There is no indication in the record that K.S. believed she needed to be truthful in order to receive effective treatment. *See Whipple*, ¶25. So, the hearsay statements of K.S. offered by Dr. Brewer and Ms. Hall were not admissible under the medical treatment exception to hearsay nor under the residual hearsay exception. *See* Mont. R. Evid. 803(4); Mont. R. Evid. 803(24).

C. The evidentiary error prejudiced Mr. Jones by bolstering K.S.'s testimony.

Once an evidentiary ruling is deemed erroneous, it is "incumbent on the State to demonstrate that the error at issue was not prejudicial." *State v. Van Kirk*, 2001 MT 184, ¶ 42, 306 Mont. 215, 32 P.3d 735. The State must point not only to other admissible evidence proving the same facts as the tainted evidence, but also "demonstrate that the *quality* of the tainted evidence was such that there was no reasonable possibility that it might have contributed to the defendant's conviction." *Van Kirk*, ¶ 44 (emphasis in original). The inquiry is whether there is "a reasonable possibility that the inadmissible evidence might have

contributed to" Mr. Jones' conviction. *Smith*, ¶ 34 (internal citations and quotations omitted).

This Court has held, "Inadmissible evidence is not prejudicial so long as the jury was presented with admissible evidence proving the same facts as the tainted evidence." *Smith*, ¶ 34 (internal citations omitted). However, the line must be drawn somewhere; when the inadmissible evidence qualitatively outweighs the admissible evidence, the defendant's right to a fair trial has been abrogated. The repeated admission of K.S.'s inadmissible hearsay bolstered her testimony and provided vivid details beyond her testimony, prejudicing Mr. Jones.

Research shows that "repetition of a plausible statement increases a person's belief in the referential validity or truth of that statement."[5] This is called the "illusory truth effect"—the psychological phenomenon that "repetition increases perceived truth."[6] The more someone hears a statement, the more likely they are to believe the statement to be true.

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[5] Lynn Hasher, et al., *Frequency and the Conference of Referential Validity*, 16 Journal of Verbal Learning and Verbal Behavior 107, 111 (1977).
[6] Aumyo Hassan & Sarah Barber, *The Effects of Repetition Frequency on the Illusory Truth Effect*, 6 Cognitive Research: Principles and Implications 38, 2 (2021).

Numerous courts have held repetition at trial of a victim's pretrial accusations lends those accusations a false credibility and undue persuasive effect amongst the jurors. *See*, *e.g.*, *People v. Memon*, 145 A.D.3d 1492, 1493 (N.Y. App. Div. 2016) ("[T]he admission of prior consistent statements may, by simple force of repetition, give to a [factfinder] an exaggerated idea of the probative force of a party's case" (internal citations and quotations omitted).); *Ventura v. United States*, 927 A.2d 1090, 1103 (D.C. 2007) ("[T]he exclusion of prior consistent statements is intended to avoid the prejudice of unfairly bolstering the witness'[s] credibility" (internal citations and quotations omitted).); *Modesitt v. State*, 578 N.E.2d 649, 651–52 (Ind. 1991) (stating "the drumbeat repetition of the victim's original story" unfairly bolsters the victim's credibility); *People v. Tidwell*, 410 N.E.2d 1163, 1165 (Ill. App. Ct. 1980) (stating that "'corroboration by repetition' is precisely one of the prejudicial effects" the rule against prior consistent hearsay statements is supposed to avoid (internal citations omitted).).

The improper admission of K.S.'s hearsay statements to Dr. Brewer and Ms. Hall were prejudicial because of their repetition of K.S.'s testimony. K.S. testified that Mr. Jones put his penis in her

mouth. (Jury Trial Day Two Tr. at 332). Dr. Brewer testified that K.S. had told her the same at her appointment and Ms. Hall testified that K.S. had told her the same and had never wavered in their 60-plus sessions. (Jury Trial Day Two Tr. at 313; Jury Trial Day Two Tr. at 352). Ms. Hall did not just repeat or reiterate K.S.'s accusations, she assured the jury that K.S. had repeated the accusations with consistency to Ms. Hall over and over again, throughout at least sixty sessions over a two-year period. The more the jurors heard K.S.'s prior accusations—and about how remarkably consistent she was in those accusations over the course of two years—the more likely they were to give her testimony undue weight.

The prejudicial impact of this repetition had a special potency because the State conveyed K.S.'s prior statements through the testimony of two medical professionals who regularly worked with victims of child sexual abuse. *See Nitz v. State*, 720 P.2d 55, 61 (Alaska Ct. App. 1986) (discussing the fundamental unfairness of repeating a child witness's accusations "through a parade of articulate, experienced, adult witnesses who impart to the child's statements the mature eloquence of adulthood and a sense of their own credibility" while

adding "nothing of substance but the force of repetition"); *accord Stone v. State*, 536 N.E.2d 534, 540 (Ind. Ct. App. 1989) (holding the victim-witness's credibility became "increasingly unimpeachable as each adult added his or her personal eloquence, maturity, emotion, and professionalism to [the victim's] out-of-court statements").

Given the importance of K.S.'s testimony to the State's case—she was the accuser and the only witness to testify directly to Mr. Jones' alleged sexual crimes—the State cannot show the improper bolstering of her testimony had no possible effect on the verdict.

D. The inadmissible hearsay prejudiced Mr. Jones by providing vivid, inflammatory details about the abuse that went beyond what K.S. testified to.

Even if the repetition of K.S.'s statements alone was not prejudicial, the inadmissible hearsay statements provided additional details more vivid and incriminating than K.S.'s own testimony and certainly prejudiced Mr. Jones. In *Smith*, this Court held, "Given the quality of admissible, untainted evidence presented at trial, there is not a reasonable possibility that the forensic interview contributed to Smith's conviction." *Smith*, ¶ 35. In *Smith*, however, the other evidence supporting Smith's conviction was stronger than in this case. It

included multiple incriminating statements from the defendant. *Smith*, ¶ 8. Moreover, the erroneously admitted hearsay did not provide important details beyond what the child victim testified to. *Smith*, ¶¶ 34, 35. Therefore, the admission of the inadmissible video of the forensic interview was held to be harmless. *Smith*, ¶ 35. Here, however, there were no incriminating statements from the defendant, and the erroneously admitted hearsay included significant details the jury did not otherwise hear from K.S.

The hearsay evidence presented by Dr. Brewer was more detailed than K.S.'s testimony. K.S. testified that Mr. Jones put his penis in her mouth and that it hurt, made her sad, and felt yucky. (Jury Trial Day Two Tr. at 332, 334). Dr. Brewer testified not only that K.S. told her Mr. Jones put his penis in her mouth, but also "that her dad wanted her to stick her tongue out, and she couldn't because it hurt too much." (Jury Trial Day Two Tr. at 313). She described the motions K.S. made, testifying, "she put her hand in a circular formation and moved it back and forth from her mouth in a longitudinal pattern." (Jury Trial Day Two Tr. at 314). This is information that was admitted *only* through Dr. Brewer, *i.e.*, only through inadmissible hearsay. So, even if

"[i]nadmissible evidence is not prejudicial so long as the jury was presented with admissible evidence proving the same facts as the tainted evidence," the jury was *not* presented with admissible evidence proving the same facts as the hearsay statements of K.S. admitted through Dr. Brewer. *Smith*, ¶ 34.

The State used this inadmissible hearsay in its closing argument to convince the jury of Mr. Jones's guilt. The State told the jury, Ms. Hall "talked to you about how she's been working with [K.S.] since right after this disclosure almost two years ago and that [K.S.] has never wavered in her disclosure to her," thereby bolstering K.S.'s testimony. (Jury Trial Day Three Tr. at 396). Additionally, the State told the jury, "[K.S.] gave details of her sexual abuse that she seemingly couldn't have [known], but for actually experiencing that abuse herself -- the hand motions, the head motion, sore throat, the gag reflex…" saying those were "more pieces" in the jury's puzzle of the case. (Jury Trial Day Three Tr. at 397). These were the details only admitted by Dr. Brewer's testimony—inadmissible evidence of facts not otherwise proven by admissible evidence. (*See* Jury Trial Day Two Tr. at 313).

The hearsay statements of K.S. admitted through Dr. Brewer and Ms. Hall over defense objection were prejudicial. The statements bolstered K.S.'s testimony through the power of repetition and added additional, graphic details on which the State relied as substantive evidence. (*See* Jury Trial Day Three Tr. at 397; Jury Trial Day Two Tr. at 313, 314). Had the jury not heard Dr. Brewer's vividly detailed testimony about the abuse or Ms. Hall's statements about K.S.'s consistency in her accusations over the span of two years and 60 counseling sessions, it may well have doubted K.S.'s testimony and reached a different verdict. The district court's erroneous admission of this inadmissible hearsay prejudiced Mr. Jones, demanding reversal.

II. Trial counsel was ineffective when he failed to object the extensive hearsay elicited by the State.

The right to counsel is guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution and by Article II, Section 24 of the Montana Constitution. The right to counsel is a right to effective counsel. *State v. Sawyer*, 2019 MT 93, ¶ 13, 395 Mont. 309, 439 P.3d 931; *McMann v. Richardson*, 397 U.S. 759, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970). When evaluating whether a defendant received effective assistance of counsel, "the ultimate inquiry must concentrate

on the fundamental fairness of the proceeding." *Weaver v. Massachusetts*, 582 U.S. 286, 300, 137 S. Ct. 1899, 198 L. Ed. 2d 420 (2017) (internal citations and quotations omitted).

This Court applies the United States Supreme Court's two-prong test when analyzing ineffective assistance of counsel claims. *Bryson*, ¶ 29; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *Oliphant v. State*, 2023 MT 43, ¶ 37, 411 Mont. 250, 525 P.3d 1214. First, the defendant must show that defense counsel was deficient, meaning counsel "made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." *Oliphant*, ¶ 37 (internal citations and quotations omitted). Second, the defendant must show that counsel's performance prejudiced the defendant. *Oliphant*, ¶ 37.

Before this Court reaches the two-prong test, it must determine whether the ineffective assistance of counsel claim is appropriate for direct appeal. *State v. Earl*, 2003 MT 158, ¶ 39, 316 Mont. 263, 71 P.3d 1201. Claims based on facts in the record must be raised on direct appeal. *State v. White*, 2001 MT 149, ¶ 12, 306 Mont. 58, 30 P.3d 340.

Additionally, claims of ineffective assistance of counsel are reviewed on direct appeal when "no plausible justification exists for the actions or omissions of counsel." *State v. Secrease*, 2021 MT 212, ¶ 14, 405 Mont. 229, 493 P.3d 335 (internal citations and quotations omitted).

Mr. Jones's ineffective assistance of counsel claim is appropriate for direct appeal because no plausible justification existed for trial counsel to fail to object to the extensive inadmissible hearsay. The inadmissible hearsay bolstered K.S.'s testimony, provided more prejudicial detail than K.S. herself testified to, and did not help the defense in any way. Defense counsel knew this hearsay was damaging, as evidenced by his effort to keep some of the hearsay out. (Jury Trial Day Two Tr. at 313, 352). The inadmissible hearsay was especially damaging given that K.S. was seven years old at the time of trial and six adults testified to inadmissible prior consistent statements, lending veracity to K.S.'s testimony. There was no plausible justification for counsel's failure to object to these statements.

Additionally, the record shows that trial counsel apparently did not object to much of the inadmissible hearsay because trial counsel seemed to have a misunderstanding of the law. In response to a

conversation about hearsay and whether Whittney was going to testify to K.S.'s statements, trial counsel said,

> And I would say even if she did, if caution was exercised, I think the US Supreme Court caselaw, as well as the Montana Supreme Court caselaw, would indicate that when statements are made to a family member or otherwise, making a report, essentially, that they are non-testimonial in nature as opposed to a police officer or somebody undertaking a criminal investigation.

(Jury Trial Day One Tr. at 6). Trial counsel was incorrect. While the non-testimonial nature of a statement would affect the confrontation clause analysis, K.S. testified and was subject to cross examination, so confrontation was not at issue. (Jury Trial Day Two Tr. at 330-347). Trial counsel may have been thinking about the child hearsay exception under § 46-16-220. However, this also did not apply because it requires the child to be "unavailable" as a witness and, again, K.S. testified. § 46-16-220(1)(c). Trial counsel clearly believed this applied to hearsay, as that was the topic of the conversation. (Jury Trial Day One Tr. at 6). His belief that he could not object to hearsay because the statement was made to a family member and therefore non-testimonial is clear from the record and shows he had no legitimate reason to fail to object to the extensive inadmissible hearsay admitted at trial.

A. Trial counsel was deficient when he failed to object to the extensive hearsay presented by the State at trial.

Whether counsel was deficient considers "whether counsel's assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688. This Court will determine whether trial counsel's conduct was reasonable at the time of the conduct. *Whitlow v. State*, 2008 MT 140, ¶ 16, 343 Mont. 90, 183 P.3d 861; *Strickland*, 466 U.S. at 690.

Trial counsel failed to object to testimony from six different witnesses regarding inadmissible hearsay statements of K.S. Tammy Seibert, K.S.'s grandmother, testified that K.S. told her Mr. Jones put his penis in her mouth. (Jury Trial Day One Tr. at 119). K.S.'s grandfather, Lucky, testified that K.S. verbalized to him what she had said in the video of the initial accusation, which was that Mr. Jones put his penis in her mouth. (Jury Trial Day One Tr. at 152; State's Exhibit 1 at 00:03). Additionally, he testified that K.S. had made a c-shaped motion toward her mouth. (Jury Trial Day One Tr. at 152, 153). Officer Lange also testified that, when he responded to the grandparent's house after K.S.'s initial disclosure, K.S. made a similar disclosure to him. (Jury Trial Day Two Tr. at 223).

Whittney, K.S.'s mother, testified that K.S. was "very consistent" and "[h]er story has never changed." (Jury Trial Day One Tr. at 183; Jury Trial Day Two Tr. at 205). She also testified that K.S. told her she had nightmares about "Gary putting his penis in her mouth." (Jury Trial Day One Tr. at 197).

Although trial counsel objected to Dr. Brewer's initial testimony about hearsay from K.S., trial counsel did not object again after his initial objection was overruled. (*See* Jury Trial Day Two Tr. at 299-328). Dr. Brewer testified to additional hearsay statements of K.S. She testified that K.S. made motions with her hands: "she put her hand in a circular formation and moved it back and forth from her mouth in a longitudinal pattern." (Jury Trial Day Two Tr. at 314). She also testified K.S. had "…said that her father had hidden her under her blankets." (Jury Trial Day Two Tr. at 315).

Additionally, although trial counsel objected to Ms. Hall's initial testimony about hearsay from K.S., trial counsel did not object again after his initial objection was overruled. (*See* Jury Trial Day Two Tr. at 348-357). Ms. Hall testified to additional hearsay statements of K.S. Three times, the State asked Ms. Hall if K.S. had ever waivered in her

account, and three times Ms. Hall said she never had. (Jury Trial Day Two Tr. at 352, 353, 354). "Never. And not just with me, I mean her grandma, her family, her mom, other people have been in this." (Jury Trial Day Two Tr. at 354).

Finally, trial counsel stipulated to the admission of the videos at trial. In the video taken by Tammy, K.S. said Mr. Jones "was sticking his penis into my mouth." (State's Exhibit 1 at 00:03). In the video taken by Whittney later than evening, Whittney asks K.S., "So where did you see this happen then?" (Defense Exhibit B at 00:26). K.S. says "at home" "in mom and dad's bedroom" "with dad." (Defense Exhibit B at 00:26-01:20).

These were all hearsay statements. They were prior out-of-court statements offered for the truth of the matters they asserted. Mont. R. Evid. 801(c). The motion described by Lucky was a statement by K.S. (Jury Trial Day One Tr. at 152, 153). A child acting out an accusation of a sexual act to an adult is meant as an assertion; K.S. was showing Lucky what happened. *See* Mont. R. Evid. 801(a). Officer Lange's testimony was hearsay because the implication was that K.S. told Officer Lange Mr. Jones had put his penis in her mouth. Additionally, it

was hearsay for witnesses to say that K.S. had always been consistent in her story, because these statements imply multiple hearsay statements from K.S. K.S.'s statements in the videos are hearsay because they are prior out-of-court statements offered to prove the truth of what K.S. asserted.

None of these statements were admissible. They did not qualify for admission as prior consistent or inconsistent statements. *See* Mont. R. Evid. 801(d)(1). The statements also did not qualify for admission under any exceptions to the hearsay rule. *See* Mont. R. Evid. 803.

Trial counsel had no rational reason for failing to object to these statements. All the statements were damaging to the defense, as they either bolstered K.S.'s testimony through repetition or they provided inflammatory details that were not introduced to the jury through K.S. The testimony from Lucky about the gesture K.S. made was especially damaging as it provided more information than K.S.'s own testimony and suggested to the jury that K.S. knew what oral sex looked like. The videos were especially damaging as they showed statements made by K.S. to the jury, both bolstering her testimony and providing emotional moments.

Additionally, it appears that trial counsel's reason for failing to object was a misunderstanding of the law. (*See* Jury Trial Day One Tr. at 6). "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *State v. Wright*, 2021 MT 239, ¶ 18, 405 Mont. 383, 495 P.3d 435 (internal citations and quotations omitted). Trial counsel's misunderstanding of the hearsay rules—a point fundamental to this case, considering the extensive testimony to inadmissible hearsay—is unreasonable performance.

B. Trial counsel's deficient performance in failing to object to the State's extensive hearsay evidence prejudiced Mr. Jones.

To show prejudice, a defendant must show a reasonable probability that the result of the proceeding would have been different but for counsel's deficient performance. *State v. Walter*, 2018 MT 292, ¶ 14, 393 Mont. 390, 431 P.3d 22. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding." *State v. Miner*, 2012 MT 20, ¶ 12, 364 Mont. 1, 271 P.3d 56 (internal citations omitted). "The prejudice inquiry focuses on whether

counsel's deficient performance renders the result unreliable or the proceedings fundamentally unfair." *Stock v. State*, 2014 MT 46, ¶ 19, 374 Mont. 80, 318 P.3d 1053 (internal citations omitted).

Here, Mr. Jones was prejudiced by trial counsel's failure to object to extensive hearsay that provided more vivid and inflammatory detail than the admissible testimony of K.S. herself. K.S. testified, "[Mr. Jones] put his penis in my mouth." (Jury Trial Day Two Tr. at 332). She said it hurt, made her sad, and felt yucky. (Jury Trial Day Two Tr. at 332, 334).

K.S.'s out-of-court hearsay statements provided more lurid detail and information than K.S. testified to. Two witnesses described hand motions K.S. made: Lucky testified K.S. "used her hand just like this" and made a "C-shaped motion toward his mouth," and Dr. Brewer testified, "she put her hand in a circular formation and moved it back and forth from her mouth in a longitudinal pattern." (Jury Trial Day One Tr. at 152, 153; Jury Trial Day Two Tr. at 314). K.S. did not make these hand motions during her testimony. (*See* Jury Trial Day Two Tr. at 330-347). This was not just inadmissible hearsay that proves the same facts as admissible evidence, as in *Smith*. *Smith*, ¶ 34, 35. This

was inadmissible hearsay that was not otherwise proven with other admissible evidence.

Aside from the volumes of inadmissible hearsay, K.S.'s trial testimony was the only direct evidence of sexual conduct presented to the jury. The other evidence was circumstantial and minimally probative of Mr. Jones's guilt. That included evidence K.S. had regressed in potty training, had self-harmed, did not want to leave grandma and grandpa's house when Mr. Jones came to pick her up, and that Mr. Jones moved a camera that had been in her room. (Jury Trial Day One Tr. at 145, 171, 177, 195). Without K.S.'s numerous and more detailed out-of-court statements to shore up the State's case, it is quite possible the jury would not have elected to convict Mr. Jones.

In opening, the State talked about the inadmissible hearsay the jury would hear. "[K.S.] tells Grandma Tammy, 'My daddy puts his penis in my mouth.'" (Jury Trial Day One Tr. at 106). The State said Tammy then pulled out her phone and recorded a video. (Jury Trial Day One Tr. at 106). "[K.S.] repeats herself loud and clear, 'My daddy puts his penis in my mouth.'" (Jury Trial Day One Tr. at 106).

The State then used the inadmissible hearsay in its closing statement. The State told the jury, "[K.S.] not only told Grandma Tammy, you've heard she told her Grandpa Lucky; her sister; she told Detective Lange; Dr. Brewer; her therapist, Terrah Hall. She told all them that the Defendant put his penis in her mouth, and she told all of you, too." (Jury Trial Day Three Tr. at 390). The State told the jury it had to solve a puzzle, and said,

> [K.S.] told all of you -- grandma, grandpa, sister, mom, Detective Lange, Dr. Brewer, Terrah Hall -- she told all of those people over the course of two years that the Defendant put his penis in her mouth. That's seven or eight of your centerpieces to your puzzle at least right there.

(Jury Trial Day Three Tr. at 397). The State, referring to hearsay testimony about K.S.'s statements from Lucky and Dr. Brewer, said, "[K.S.] gave details of her sexual abuse that she seemingly couldn't have [known], but for actually experiencing that abuse herself -- the hand motions, the head motion, sore throat, the gag reflex… More pieces." (Jury Trial Day Three Tr. at 397). These inadmissible hearsay statements became key pieces of evidence in the State's case.

Additionally, during closing the State played the video of K.S. accusing Mr. Jones of sexual abuse. (State's Exhibit 1; Jury Trial Day

Three Tr. at 423). The State finished rebuttal by saying, "we will let [K.S.] have the last word," and playing the video. (Jury Trial Day Three Tr. at 423). The last thing the jury heard from the parties before deliberation was the inadmissible hearsay of K.S. saying, on video, "He was sticking his penis into my mouth." (Jury Trial Day Three Tr. at 423; State's Exhibit 1).

Trial counsel was deficient for failing to object to inadmissible hearsay statements that bolstered K.S.'s testimony and introduced vivid, inflammatory details to the jury beyond K.S.'s testimony. This extensive hearsay was prejudicial to Mr. Jones and demands reversal.

III. The cumulative effect of the errors in Mr. Jones' case entitles him to a new trial.

"The cumulative error doctrine applies in the rare case in which several errors occur, the cumulative effect of which is to deny the defendant the right to a fair trial." *State v. Severson*, 2024 MT 76, ¶ 45, 416 Mont. 201, 546 P.3d 765 (internal citations omitted). This Court analyzes a cumulative error claim against the background of the case as a whole, with a focus on the nature and number of errors committed, their interrelationship and combined effect, how the district court

addressed those errors, and the strength of the State's case. *Severson*, ¶ 46. If prejudice is shown, reversal is required. *Severson*, ¶ 45.

The combination of the district court admitting inadmissible hearsay over defense objection and defense counsel failing to object to additional inadmissible hearsay denied Mr. Jones the right to a fair trial. The two categories of error together clearly prejudiced Mr. Jones. There were many inadmissible hearsay statements admitted at trial, the combined effect of which was to not only bolster the testimony of seven-year-old K.S., but also to add specific, vulgar details that went beyond K.S.'s testimony. The district court overruled defense objections without asking the State to defend admissibility and without explanation. (Jury Trial Day Two Tr. at 313, 352). Without the inadmissible hearsay statements, the State's case rested on the testimony of K.S., who was seven years old at the time of trial and five years old when she accused Mr. Jones of sexual abuse. (Doc. 1; Jury Trial Day Two Tr. at 331). The other evidence in the case was circumstantial and minimally probative of Mr. Jones guilt. (Jury Trial Day One Tr. at 145, 171, 177, 195; Jury Trial Day Two Tr. at 229-299).

The volumes of inadmissible hearsay evidence tipped the scales in the State's favor and likely influenced the jury's verdict.

The cumulative effect of the erroneous admission of hearsay over defense objection and the failure of trial counsel to object to additional inadmissible hearsay thus denied Mr. Jones the right to a fair trial. The prejudice of the cumulative error to Mr. Jones requires reversal. *Severson*, ¶ 45.

CONCLUSION

This Court should vacate Mr. Jones' conviction and sentence and grant him a new trial due to the district court's error in admitting inadmissible hearsay statements.

Alternatively, this Court should vacate Mr. Jones' conviction and sentence and grant him a new trial due to the ineffective assistance of his trial counsel.

Also in the alternative, the Court should vacate Mr. Jones' conviction and sentence and grant him a new trial due to cumulative error at trial.

Respectfully submitted this 16th day of September, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,921, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Emma N. Sauve
EMMA N. SAUVE

APPENDIX

Judgment.....App. A

CERTIFICATE OF SERVICE

I, Emma Nelson Sauve, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 09-16-2025:

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