IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0049

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CHARLES MICHAEL BYRNE,

Defendant and Appellant.

ANDERS BRIEF OF APPELLANT

On Appeal from the Montana Third Judicial District Court,
Powell County, the Honorable Kurt Krueger, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Authorities

Montana Constitution

United States Constitution

MEMORANDUM ACCOMPANYING MOTION TO WITHDRAW

SUMMARY OF PROCEDURAL AND FACTUAL HISTORY

Following a reversal by this Court (2021 MT 238) after a jury trial, this case was tried anew before a jury on three counts of sexual intercourse without consent.

Counsel for Mr. Byrne filed a motion for production of discovery, including much of what is mandated to disclose in the omnibus statute on October 13, 2021 and it was granted. D.C. Docs. 167, 168.

On November 15, 2021, the district court filed an order setting the final pretrial and trial for April. D.C. Doc. 169. On that same day the district court set bail at $50,000 with conditions including being allowed to travel to and reside in Illinois during the pendency of the case and a requirement to be monitored by GPS. D.C. Doc. 170. Mr. Byrne posted bail on November 19, 2021. D.C. Doc. 171.

On December 22, 2021, Christopher Miller moved to withdraw as counsel for Mr. Byrne, leaving Jamie Upham as Mr. Byrne's attorney of record once the order was signed on January 31, 2022. D.C. Docs. 173, 174.

On March 16, 2022 the parties jointly filed a motion to continue the trial and it was granted on March 21, 2022, resetting the trial for August 22, 2022. D.C. Docs. 175, 176.

On June 15, 2022, the State substituted counsel; Meghann Paddock took the reins from Daniel Guzynski. D.C. Doc. 177.

Also on June 15, 2022, the State filed their witness lists including both fact and expert witnesses. D.C. Doc. 175.

On August 8, 2022, defense counsel filed a motion to continue the trial on the grounds that she needed more time to prepare; the State took no position on the motion. D.C. Doc. 184. The district court initially denied the motion. D.C. Doc. 187. The district court reversed itself on the day of the final pretrial conference and granted a continuance upon the renewed motion to continue put forth by Joshua Demers, who appeared in the case for the defense for the first time in the record. D.C. Doc. 189. Mr. Byrne expressly waived his right to a speedy trial at that hearing in open court. D.C. Docs 188.1, 189. The district court set the trial for May 22, 2023. D.C. Doc. 189.

On January 27, 2023, defense counsel filed a motion in limine seeking to exclude any picture of the alleged victim (hereafter referred

to as 'M') during the time period of the allegations on the basis that any picture would be severely prejudicial and lacking in relevance. D.C. Doc. 191. The State filed 16 motions in limine on the same day. D.C. Doc. 192. On April 28, 2023 the district court ruled that the State's requested exhibit 1 which was a picture of the alleged victim as a child when the allegations occurred would be excluded because it would be overly prejudicial and arouse sympathy for the victim and hostility toward Mr. Byrne as it was a picture of her with her third-grade class. D.C. Doc. 202. However, the State's exhibit 2, which was also a picture of the alleged victim when the alleged crimes occurred, was allowed on the basis that it was relevant for the State to prove the alleged victim's age at the time of the alleged offenses. D.C. Doc. 202.

On May 9, 2023 a joint stipulation was filed agreeing that the parties would avoid any reference to the prior trial in this matter and waiving any objections to the video appearance of Scott Howard, retired Powell County Sherriff, and Susan Keller, LCSW, as well as any defense witnesses other than the Defendant. D.C. Doc. 203. In doing so, Mr. Byrne waived his right to have those witnesses personally

present during trial, and the State waived its right to have any defense witnesses other than Mr. Byrne appear personally to testify.

Trial began on May 22, 2023. Voir dire included several in-chambers sessions with jurors singled out and questioned regarding their knowledge of the parties and witnesses, for which both parties, including Mr. Byrne, were present. 5/22/22 Trial Tr. at 16-44. There were no disputes between the parties during this section of voir dire. As voir dire continued, several jurors were excused for cause by the State without objection and the parties executed their peremptories without any dispute or irregularities. 5/22/22 Trial Tr. at 44-122. After executing the peremptories, further voir dire was conducted without any disputes or objections from either party and the jury was empaneled. 5/22/22 Trial Tr. at 122-138. No jurors were struck for cause by the defense.

The judge then attended to practical matters for the jury and read the jury the preliminary jury instructions without objection from either party. 5/22/22 Trial Tr. at 138-147.

Each party gave an opening statement, during which no objections or disputes occurred. 5/22/22 Trial Tr. at 147-164.

The State's first witness was Wendy Dutton who testified without any objections from the defense as a blind expert witness about children's response to trauma in general, how trauma affects memory, and delayed disclosures of abuse by children. 5/22/22 Trial Tr. at 165-220. Dutton was subsequently cross-examined by defense counsel without any objections from the State. 5/22/22 Trial Tr. at 220-230. The State conducted re-direct with no objections from defense. 5/22/22 Trial Tr. at 230-236. The defense did not conduct any re-cross-examination.

After Dutton's testimony, the district court adjourned for the day. 5/22/22 Trial Tr. at 237. Before adjourning the State put on the record that the parties stipulated that all of the selected jurors were present since empanelment, and that Mr. Byrne was personally present during all critical stages of trial up to that point. 5/22/22 Trial Tr. at 238.

On day two of trial, the State began by calling M's cousin Jason Burks, who was present during one of the counts that allegedly occurred on Thanksgiving in 2009. 5/23/22 Trial Tr. at 246, 251. Mr. Burks testified without any objections and was cross-examined by defense counsel without objection from the State. 5/23/22 Trial Tr. at

246-260. The State conducted a brief re-direct without any objections. 5/23/22 Trial Tr. at 260.

The State next called Lisa Gomez, M's mother. 5/23/22 Trial Tr. at 261. During Ms. Gomez's testimony, the State offered exhibit 2 (the picture of M at the time of the alleged offense) which had been allowed by the district court's order in limine, and the defense renewed its objection, which was overruled. 5/23/22 Trial Tr. at 267. The exhibit was admitted and published by distribution to the jury. 5/23/22 Trial Tr. at 267.

The district court initiated a 20-minute break in the proceedings during Ms. Gomez's direct examination, during which a juror sent the court a note that said, "If the defendant's son Eric works at the prison, we could have a potential problem." 5/23/22 Trial Tr. at 292. In an individual voir dire in chambers, the juror reported that his son worked with Mr. Byrne's son at the prison and that he had just then realized it. 5/23/22 Trial Tr. at 292. He stated that his son and Mr. Byrne's son were friends, that Mr. Byrne's son gave his son rides while his car was inoperable, and Mr. Byrne's son shared his elk meat with them. 5/23/22 Trial Tr. at 292. He said the only time Mr. Byrne's son had mentioned

anything about his "family situation" was to mention that he (Mr. Byrne's son) either bought a house for or from Mr. Byrne. 5/23/22 Trial Tr. at 293. He said that the situation would not affect his ability to remain impartial and averred that he would not talk to anyone, including Mr. Byrne's son about the case. 5/23/22 Trial Tr. at 293-294. He said he met Mr. Byrne's son about three weeks before he received his jury summons. 5/23/22 Trial Tr. at 294. Upon questioning from the defense, the juror said that he had not mentioned his jury summons to Mr. Byrne's son and that he had not mentioned any of this to any of the other jurors. 5/23/22 Trial Tr. at 295. After excusing the juror from chambers, the parties, with Mr. Byrne present, discussed the situation and neither party nor the judge had any objections to the juror remaining on the jury. 5/23/22 Trial Tr. at 296.

Upon returning from the break, the district court read to the jury the following stipulation agreed to by the parties:

> This is a stipulation and agreement between the parties. The parties have agreed that certain facts are true. You must accept as true that Mr. Charles Byrne was released from incarceration on an unrelated matter in Illinois on October 9th, 2015, and was released from probation on the same matter on October 10th, 2017. This stipulation is to be considered evidence only of Mr. Byrne's release from incarceration and probation on an unrelated Illinois matter. You're not to speculate as to the nature of the

> incarceration or probation. You must not consider this stipulation for any other purpose.

5/23/22 Trial Tr. at 296.

The direct examination of Ms. Gomez concluded with no objections from the defense. 5/23/22 Trial Tr. at 303. Defense cross-examined Ms. Gomez with no objections from the State. 5/23/22 Trial Tr. at 304-311. The State conducted re-direct without any objections from the defense. 5/23/22 Trial Tr. at 311-313. Defense did not re-cross-examine Ms. Gomez.

The State next called Dee Allen, who M lived with briefly in Drummond. 5/23/22 Trial Tr. at 315. There were no defense objections during her direct examination. 5/23/22 Trial Tr. at 315-327. Defense counsel cross-examined her without objection from the State. 5/23/22 Trial Tr. at 327-331. The State conducted a brief re-direct-examination without objection from the defense. 5/23/22 Trial Tr. at 331-332.

The State next called M to the stand. 5/23/22 Trial Tr. at 333. When the State attempted an in-court identification with M, asking M to identify Mr. Byrne in the courtroom, the defense objected. 5/23/22 Trial Tr. at 342. The judge paused the proceedings and an in-chambers discussion followed that was not on the record. Upon resuming the record, the district court said toward the State, "Counsel, if you would

ask your next question, please." 5/23/22 Trial Tr. at 343. Later that day, outside the presence of the jury, defense counsel made the record that the judge had granted the objection to the in-court identification. 5/23/22 Trial Tr. at 407.

M could not chronologically place the allegations because she did not know in what order they occurred. 5/23/22 Trial. Tr. at 354. M testified that there was no penetration in the second allegation she testified about:

> A. He just picked me up and sat me on the bed, pulled my pants down, along with my underwear and *used his fingers* to *touch the outside of my vagina*.
> Q. Okay. What were his fingers doing that time?
> A. The same thing that they had done before, just rubbing up and down.
> Q. And was it rubbing up and down inside the skin of your vagina?
> A. (Witness indicates no.) Like *on the outside*.
> Q. How did that feel on your body?
> A. His fingers were rough not so good.
> Q. Was that on the tissue, kind of the thinner skin in your vaginal area or on the external skin?
> A. *The external*.

5/23/22 Trial Tr. at 359-360 (emphasis supplied).

She described it three different times as "outside," "outside," and "external."

Defense counsel objected when the State repeated the question of whether there was penetration on the basis that the question had been asked and answered, but the objection was overruled. 5/23/22 Trial Tr. at 352.

Much later in the trial, defense counsel moved to dismiss the count discussed above for insufficient evidence based on M's testimony that the touching occurred solely on the outside[1]. 5/24/22 Trial Tr. at 606-607.

The State continued its direct examination of M without further objection from the defense. 5/23/22 Trial Tr. at 352-378. Defense counsel conducted a brief cross-examination of M without any objections from the State. 5/23/22 Trial Tr. at 379-381. The State asked two re-direct-examination questions without objection from the defense. 5/23/22 Trial Tr. at 382.

[1] This defense motion to dismiss for insufficient evidence is the basis of the merits brief completed by appellate counsel for Mr. Byrne, which Mr. Byrne would not allow counsel to file with this Court resulting in this *Anders* brief. Counsel continues to believe this is a meritorious issue. The unfiled brief is attached at Appendix B.

The State's next witness was Calvin Wight who testified on direct examination, cross-examination and re-direct-examination without any objections from either party. 5/23/22 Trial Tr. at 383-401.

After Wight's testimony, the parties met out of the presence of the jury and the State noted for the record that the chosen jurors and Mr. Byrne had all been present for all critical stages of trial that day to which the defense did not object. 5/23/22 Trial Tr. at 402. Discussion of a juror who had had his hearing device adjusted, a future jury instruction conference, the timing of all the witnesses to come, and the off-record conference regarding the in-court identification discussed above was then had, without any disputes arising. 5/23/22 Trial Tr. at 402-408.

The State then called Rachel Tate, Mr. Byrne's ex-wife, to the stand. 5/23/22 Trial Tr. at 408. Ms. Tate was examined by both parties without any disputes arising. 5/23/22 Trial Tr. at 408-440.

The State's next witness was Scott Howard, the retired Sherrif of Powell County, who testified over a video feed without objection from the defense. 5/23/22 Trial Tr. at 441. The defense explained on the record that it had no objection to Mr. Howard testifying by video

because Mr. Howard was undergoing "significant medical treatment…that renders him immunocompromised." 5/23/22 Trial Tr. at 405-406. The defense questioned Mr. Howard about a "Hyper List," which is a computer-generated list of addresses at which law enforcement had had contact with individuals, and whether Mr. Howard had created a Hyper List on Ms. Gomez. 5/23/22 Trial Tr. at 456-459. The defense offered the Hyper List as an exhibit, the State objected on the basis that it should be redacted first, and the district court held the objection in abeyance. 5/23/22 Trial Tr. at 458-459.

After Mr. Howard's cross-examination, the district court released the jury for the day. 5/23/22 Trial Tr. at 460.

Upon resuming trial on day three, Mr. Howard was put back on the stand by the State, again cross-examined by the defense and then subjected to a brief re-direct (for the second time) by the State. 5/24/22 Trial Tr. at 467-475. No objections were lodged by either party during the course of his testimony.

The State next called Fredericka Grunhuvd who provided therapy for M and she provided testimony in direct, cross and re-direct without any objections lodged by either party. 5/24/22 Trial Tr. at 476-501.

The State's next witness was Gina Dalrymple, another therapist, who provided direct, cross, and redirect testimony without any objections from the parties. 5/24/22 Trial Tr. at 501-534.

The next witness called by the State was therapist Susan Keller, appearing by video. 5/24/22 Trial Tr. at 534. There was no objection by the defense to this witness testifying via video. Unlike Mr. Howard's video appearance, here the defense did not explain its decision to stipulate to a video appearance. Ms. Keller was subject to direct, cross, and re-direct with no objections lodged by either party. 5/24/22 Trial Tr. at 534-550.

The court then released the jury for their lunch break and the parties met outside the presence of the jury. 5/24/22 Trial Tr. at 551. First discussed was the Hyper List testimony elicited by defense counsel. 5/24/22 Trial Tr. at 551. The State was concerned defense had elicited the testimony for impermissible purposes and the district court echoed that sentiment. 5/24/22 Trial Tr. at 551-554. The defense clarified its purpose in eliciting the testimony regarding the Hyper List was to clarify what at what addresses Ms. Gomez had met with police on certain dates. 5/24/22 Trial Tr. at 552-554. No objections or rulings

were made in the discussion. The Hyper List was never admitted as an exhibit.

Following that, the parties settled jury instructions. 5/24/22 Trial Tr. at 555. Defense inquired of the district court whether Mr. Byrne must be present for the settling of jury instructions and the district court said "no." 5/24/22 Trial Tr. at 555. Nothing further was said by anyone regarding Mr. Byrne's presence at the settlement of jury instructions. It is unclear from the record whether Mr. Byrne was present. The defense stipulated to all the State's proposed instructions and offered none of its own. 5/24/22 Trial Tr. at 555-557. The district court refused two of the State's proposed instructions with no position taken by the defense other than having stipulated to them. 5/24/22 Trial Tr. at 556.

Upon re-convening with the jury present after the lunch break, the State called Jane Hammett, the First Step examining nurse. 5/24/22 Trial Tr. at 557. Ms. Hammett testified on direct examination with no objections from the defense. 5/24/22 Trial Tr. at 557-592. During cross-examination, the State objected to a defense question about something specific M said in the forensic interview on the basis of

hearsay and the defense withdrew the question in response. 5/24/22 Trial Tr. at 600. The State conducted re-direct without any objections from the defense. 5/24/22 Trial Tr. at 602-605.

The State then rested its case. 5/24/22 Trial Tr. at 606.

Upon the State resting, the defense, outside the presence of the jury, moved to dismiss for insufficient evidence pursuant to Mont. Code Ann. § 46-16-403, arguing that the State had failed to produce sufficient evidence such that any rational trier of fact could find the element of penetration for one of the counts:

> Specifically, [M] testified that it was touching only on the outside on two different occasions. Mr. Byrne has been charged with sexual intercourse without consent. Penetration is a necessary element of all three charges, and I think it's pretty clear that we don't have testimony on penetration in all three charges. 5/24/22 Trial Tr. at 606.

The state objected to the motion, arguing that M actually meant internal or inside when she said outside and external and misspoke because of her ignorance of the female anatomy:

> It's the State's position that [M] did indeed testify regarding penetration of the vulva. Specifically, as we heard today from Ms. Hammett, the labia majora inward constitutes the vulva. [M] did discuss the skin that was touched being in the genitalia area and consistent with Ms. Hammet's description of the vulva provided here today.
>
> Certainly, the fact that [M] lacks the words, at 19 years old, to articulate that does not render it insufficient to go to the jury.

> We believe that she has testified to penetrative acts on three separate occasions and that that should be sufficient and is sufficient to go to the jury, and we would ask that Your Honor deny the Defense's motion at this time.

5/24/22 Trial Tr. at 608.

The district court denied the motion[2]. 5/24/22 Trial Tr. at 608.

Mr. Byrne testified on his own behalf. 5/24/22 Trial Tr. at 610. When the defense was done with its direct examination of Mr. Byrne the court and counsel went into chambers out of the presence of the jury for an off-the-record conference at the request of the State. 5/24/22 Trial Tr. at 623. It is not clear from the record what was said in the conference or if Mr. Byrne was present for the conference.

During the defense's re-direct, the State objected to a question from the defense pertaining to why M would name him as the perpetrator on the basis that it called for speculation. 5/24/22 Trial Tr. at 638. The objection was sustained. 5/24/22 Trial Tr. at 638.

The defense rested after Mr. Byrne's testimony and the district court excused the jury. 5/24/22 Trial Tr. at 641. The State put on the record that all jury members and the parties, including Mr. Byrne had

[2] This denied motion is the basis for the unfiled merits brief appellate counsel drafted but that Mr. Byrne instructed him to not file, which is attached at Appendix B.

been present for all critical stages of trial to that point. 5/24/22 Trial Tr. at 642.

The State also put on the record that Mr. Byrne's testimony had indicated a "surprise" undisclosed alibi defense that they would be commenting on in their closing argument and that because Mr. Byrne brought it up it should not be considered unconstitutional burden-shifting. 5/24/22 Trial Tr. at 642; 5/25/22 Trial Tr. at 645-649. The district court ruled that the State was not permitted to comment that Mr. Byrne failed to call any witnesses to support his alibi defense. 5/25/22 Trial Tr. at 649. Defense counsel explicitly agreed with the district court's ruling. 5/25/22 Trial Tr. at 650.

The district court then read the jury instructions to the jury. 5/25/22 Trial Tr. at 650-660.

The parties then gave their closing arguments. In closing, the State (incorrectly labeling it the third allegation) argued that M's testimony on the second allegation described penetration:

> She also told you about a third time, the time at his house, the house on Idaho Street here in town. She told us that he came in when she was getting something out of the room for Rachel, and he picked her up and sat her on the bed just like every time. He pulled her underwear down and he touched her vagina. And we had some difficulty here talking about anatomy. Right? She

> described his fingers as being rough and it did not feel good. And we talked about what part of her vagina he was touching. She said the outside skin. I submit to you that [M], at 19 years old, does not have a working definition of the vulva as you've been instructed. [The defense objects to facts not in evidence.]
>
> So as we discussed with [M] and as we discussed with Jane Hammett, the vulva, all of that tissue is extremely vascular. There's a lot of blood in it. It's really sensitive. So I submit to you that when [M] is feeling on her body rough fingers, not feeling good, rough fingers on regular skin doesn't not feel good. It's a noticeable feeling but it doesn't hurt. Rough fingers on sensitive vascular tissue inside your vulva, yeah, that's a noticeable feeling.
>
> So I submit to you that that also is penetration, that that also is sexual intercourse.

5/25/22 Trial Tr. at 681-682.

The defense objected to the State's assertion that M "does not have a working definition of the vulva as you've been instructed," because that alleged fact had not been established in the evidence. 5/25/22 Trial Tr. at 681-682. There had been no testimony from either M or the expert who testified about the female anatomy about the quality or quantity of M's anatomic knowledge. 5/25/22 Trial Tr. at 682. The district court summarily overruled the objection[3]. 5/25/22 Trial Tr. at 682.

[3] The court erred in its ruling. The erroneous ruling is pertinent as it demonstrated the court's misunderstanding of the evidence in its error in denying the motion to dismiss for insufficient evidence which is addressed in the unfiled merits brief attached at Appendix B.

The defense then gave a closing argument wherein the State lodged no objections. 5/25/22 Trial Tr. at 688-709. The State gave a rebuttal argument with no objections from the defense. 5/25/22 Trial Tr. at 709-721.

As the jury began its deliberations, the district court admonished defense counsel regarding a comment defense counsel made during his closing argument. 5/25/22 Trial Tr. at 723. Defense counsel had said in closing argument:

> "It's the State's job to prove his case beyond a reasonable doubt. And that's a stupid phrase. I hate that phrase, "beyond a reasonable doubt." It's useless to us as humans. What the Judge instructed you is it's – proof beyond a reasonable doubt is proof of such convincing character that a reasonable person would rely and act upon it in the most important of his or her own affairs."

5/25/22 Trial Tr. at 707.

Defense counsel apologized to the district court. 5/25/22 Trial Tr. at 723. No sanctions of any sort on either counsel or Mr. Byrne were discussed.

Defense counsel then argued to the district court that the State mischaracterized the number of M's prior disclosures and that he was not able to object at the time because it would require mentioning that

the case had already been tried once, which had been proscribed by the district court. 5/25/22 Trial Tr. at 724-725. After hearing a response from the State, the district court abruptly shifted its focus and unexpectedly demanded that counsel for defense stand. 5/25/22 Trial Tr. at 726. The district court again admonished defense counsel outside the presence of the jury, this time regarding the undisclosed alibi defense the State protested earlier. 5/25/22 Trial Tr. at 726-727. This admonishment was apropos of nothing the State had just said in its response. No formal sanctions were discussed on either defense counsel or Mr. Byrne, although the district court alleged that defense counsel "challenged that rule of your professional responsibility of making, of promoting – As an officer of this court, you're not allowed to make false statements. And clearly, there was no evidence [of Mr. Byrne traveling to Illinois contemporaneously with the allegations as Mr. Byrne testified that he did]." 5/25/22 Trial Tr. at 727. The district court seemed to be scolding defense counsel for relying upon Mr. Byrne's uncorroborated testimony in his closing argument.

The State then again put on the record that the chosen jury, counsel, and Mr. Byrne had been present for all critical stages of trial.

5/25/22 Trial Tr. at 729. The State also addressed a clerical matter regarding the jury instructions with no position taken by the defense. 5/25/22 Trial Tr. at 730.

The jury returned with guilty verdicts on all three counts. 5/25/22 Trial Tr. at 731-732. Defense counsel requested and the district court ordered that the jury be polled and the jury voted unanimously on all three counts. 5/25/22 Trial Tr. at 733-734.

On October 26, 2023, the State filed a motion to allow three of its sentencing hearing witnesses to appear by video, the defense did not object and the district court granted the motion. D.C. Docs. 224, 226.

On October 30, 2023, the district court sentenced Mr. Byrne. At the hearing, defense requested no changes or corrections to the PSI. 10/30/23 Sent. Hrg at 4. The State then requested to correct the number of days Mr. Byrne was credited for time served prior to trial, asking that he receive credit for 1242 days. 10/30/23 Sent. Hrg at 5. The defense concurred with that request. 10/30/23 Sent. Hrg at 5.

The State called Lisa Gomez, M, Brandie Dunlavey, Susana Sigafus, and Joanna Monroe to testify at the sentencing hearing. 10/30/23 Sent. Hrg at 3. Three of the witnesses appeared via video.

The defense did not object during the course of their testimony or to them appearing by video. Each party made its respective recommendation for sentencing and Mr. Byrne gave a brief statement. 10/30/23 Sent. Hrg at 40, 47, 53.

The defense, during its sentence recommendation, argued that its investigator sought feedback from the jurors after trial and one or two of the jurors "definitively said it was the Defense's job to prove his innocence." 10/30/23 Sent. Hrg at 51. Defense counsel did not make a formal objection or motion about the allegation, but instead just said, "and we're all well aware that that is problematic given the instructions that the Court provided to the jury." 10/30/23 Sent. Hrg at 51.

After the parties gave their respective recommendations, Mr. Byrne asked to be heard. 10/30/23 Sent. Hrg at 53. The exchange between Mr. Byrne and the district court was as follows in its entirety:

> The Court: At this time you'd like to make a statement?
> The Defendant: Actually, I'd like to address your Honor about – I was told that I was never to make an outburst during the trial. And I was never given the chance to ask for a mistrial on a couple things, and I was told that I should be able to do that at this time, and I was asking about legal advice. If it's not, your Honor, I understand.

The Court: I'm not sure I understand your request. You're asking for a mistrial at this time?

The Defendant: I actually wanted to ask for a mistrial because I've been told –

The Court: Those are issues you can review with counsel at another time. This isn't appropriate at this time.

The Defendant: Okay. Thank you, your Honor.

10/30/23 Sent. Hrg at 53.

The Court sentenced Mr. Byrne to three consecutive 100-year sentences, with a 50-year parole restriction on each. 10/30/23 Sent. Hrg at 55-56. The district court ordered Mr. Byrne to complete Phase I and II of the MSOTA sexual offender treatment program before parole eligibility and gave Mr. Byrne credit for 1242 days of credit for time served with no objection from defense. 10/30/23 Sent. Hrg at 56. No fines or fees were imposed. D.C. Doc. 233 (Attached as App. A).

Defense counsel requested that the order to complete the MSOTA Phase I and II be altered to include any equivalent in light of the Department of Corrections' (DOC) ongoing restructuring of its sexual offender treatment regime [presumably to ensure that Mr. Byrne is able to complete whatever program is on offer from DOC at the prison when Mr. Byrne's time to begin treatment comes]. 10/30/23 Sent. Hrg at 58.

The State appeared to share the same concerns as defense counsel, but was cut off by the district court judge. 10/30/23 Sent. Hrg at 58. The district court judge quickly rejected that request, expressing skepticism of the DOC's new sexual offender treatment regime. 10/30/23 Sent. Hrg at 58-59 ("…I'm not encouraged by [DOC's] new proposed consideration.")

On December 4, 2023, the district court issued a Judgment and Sentence consistent with the oral pronouncement. D.C. Doc. 233. Mr. Byrne filed a timely notice of appeal. D.C. Doc. 235.

DISCUSSION OF APPELLANT'S CLAIMS THAT MIGHT ARGUABLY SUPPORT AN APPEAL

Pursuant to Mont. Code Ann. § 46-8-103(2) and *Anders v. California*, 386 U.S. 738, 744 (1967), undersigned counsel informs the Court that the record might arguably support the following claims on appeal in addition to the one meritorious claim that counsel has identified that Mr. Byrne will not permit counsel to argue as a standalone issue. (*see* App. B.) Appellate counsel has no obligation to raise every possible non-frivolous issue on appeal. *Rosling v. State*,

2012 MT 179, ¶32, 366 Mont. 50, 285 P.3d 486; *Miller v. State*, 2012 MT 131, ¶14, 365 Mont. 264, 280 P.3d 272.

I. The record might arguably support a claim that the district court erred when it admitted a picture of the alleged victim into evidence over the objection of defense.

Pertinent Facts

On January 27, 2023, defense counsel filed a motion in limine seeking to exclude any picture of M during the time period of the allegations on the basis that any picture would be severely prejudicial and lacking in relevance. D.C. Doc. 191. The State's exhibit 2, a picture of the alleged victim when the alleged crimes occurred, was admitted on the basis that it was relevant for the State to prove the alleged victim's age at the time of the alleged offenses. D.C. Doc. 202. During Ms. Gomez's testimony, the State offered exhibit 2 and the defense renewed its objection, which was overruled. 5/23/22 Trial Tr. at 267. The exhibit was admitted and published by distribution to the jury. 5/23/22 Trial Tr. at 267.

Pertinent Law

"A district court's decision regarding the admissibility of evidence will not be reversed absent an abuse of discretion." *State v. Buslayev*,

2013 MT 88, ¶9, 369 Mont. 428, 299 P.3d 324. "In considering the admissibility of photographs, a district court must determine whether the probative value of the photos outweighs any prejudicial effect." *Buslayev*, ¶9; Mont. R. Evid. 401; 403.

"A cause may not be reversed by reason of any error committed by the trial court against the convicted person unless the record shows that the error was prejudicial." Mont. Code Ann. § 46-20-701.

When inadmissible evidence is introduced to prove an element of a crime, to prove harmlessness "the State must [be able to show] admissible evidence that proves the same facts as the tainted evidence, and must 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. *State v. Peplow*, 2001 MT 253, ¶49, 307 Mont. 172, 36 P.3d 922.

Mr. Byrne could assert that exhibit 2 was irrelevant to any fact in dispute, unduly prejudicial because it inflamed the jury's passions, and was thus inadmissible. He could further argue the admission and publishing of this inadmissible exhibit might reasonably have contributed to his conviction, and that it therefore demands reversal.

II. The record might arguably support a claim that trial counsel was ineffective for waiving the personal presence of two witnesses for the State.

Pertinent Facts

On May 9, 2023 counsel for defense waived any objections to the video appearance at trial of Scott Howard, retired Powell County Sherriff, and Susan Keller, LCSW. D.C. Doc. 203. The defense explained on the record that it had no objection to Mr. Howard testifying by video because Mr. Howard was undergoing "significant medical treatment…that renders him immunocompromised." 5/23/22 Trial Tr. at 405-406. The record is silent regarding any explanation for defense's waiver of Ms. Keller's personal presence.

Pertinent Law

The Montana and U.S. Constitutions guarantee criminal defendants the right to confront and cross-examine adverse witnesses personally, face-to-face, in the courtroom. U.S. Const. amends. VI and XIV; Mont. Const. art. II, §24; *State v. Strommen*, 2024 MT 87, ¶17, 416 Mont. 275, 547, P.3d 1227. However, "the contemporaneous trial testimony of a prosecution witness is admissible via two-way video conferencing upon an affirmative case-specific prosecution showing, and

corresponding trial court findings, that (1) the witness is unavailable for personal face-to-face cross-examination in the courtroom, and (2) denial of such personal face-to-face cross-examination is necessary to further an important public policy with the reliability of the testimony ... otherwise assured." *State v. Hogues*, 2024 MT 304, ¶29, 419 Mont. 322, 561 P.3d 1 (internal quotations omitted).

Claims of ineffective assistance of counsel present mixed issues of law and fact that this Court reviews de novo. *State v. Clary*, 2012 MT 26, ¶ 12, 364 Mont. 53, 270 P.3d 88.

The Sixth Amendment of the United States Constitution and Article II, Section 24 of the Montana Constitution guarantee the right to effective assistance of counsel. Ineffective assistance of counsel claims fall into two categories: record-based and non-record based. *State v. Novak*, 2005 MT 294, ¶ 18, 329 Mont. 309, 124 P.3d 182. This Court hears only record-based ineffective assistance claims on direct appeal. *Novak*, ¶ 18. This Court determines whether the record discloses why counsel took, or failed to take, the action in controversy when determining whether an ineffective assistance of counsel claim is appropriate for direct, record-based review. *Novak*, ¶ 18. A claim of

ineffective assistance of counsel must be raised in a petition for post-conviction relief if the allegation cannot be documented from the record. *Novak*, ¶ 18. However, in rare instances, this Court will consider a claim on direct appeal if there is no plausible justification for counsel's conduct. *State v. Fender*, 2007 MT 268, ¶10, 339 Mont. 395, 170 P3d 971.

If the ineffective assistance of counsel claim can be documented in the record, this Court uses the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984). *State v. Tellegen*, 2013 MT 337, ¶ 15, 372 Mont. 454, 314 P.3d 902. "Under this test, the defendant must demonstrate (1) that counsel's performance was deficient, and (2) that counsel's deficient performance prejudiced the defendant." *Tellegen*, ¶ 15. Under the first part of this test, this Court examines whether counsel's conduct fell below an objective standard of reasonableness in the context of all circumstances and according to prevailing professional norms. *Tellegen*, ¶ 16. Under the second part of the *Strickland* test, this Court examines whether there is a reasonable probability that counsel's lack of reasonable professional

conduct renders the results unreliable or the proceedings fundamentally unfair. *Tellegen*, ¶ 16.

"An attorney is not required to make all possible objections during a trial, and may legitimately decide to forego certain objections as a matter of trial tactics." *State v. Morsette*, 2013 MT 270, ¶19, 372 Mont. 38, 309 P.3d 978.

Mr. Byrne could argue that counsel had no plausible explanation to not object to the video testimony, that failing to object was ineffective assistance of counsel, and there is a reasonable chance the outcome would have been different had these witnesses' testimonies been disallowed.

III. The record might arguably support a claim that trial counsel was ineffective for failing to move to excuse for cause a juror who knew Mr. Byrne's son.

Pertinent Facts

A juror sent the court a note that said, "If the defendant's son Eric works at the prison, we could have a potential problem." 5/23/22 Trial Tr. at 292. In an individual *voir dire* in chambers, the juror reported that his son worked with Mr. Byrne's son at the prison and that he had just then realized it. 5/23/22 Trial Tr. at 292. After excusing the juror

from chambers, the parties, with Mr. Byrne present, discussed the situation and neither party nor the judge had any objections to the juror remaining on the jury. 5/23/22 Trial Tr. at 296.

Pertinent Law

Mr. Byrne has a fundamental constitutional right, under both the federal and state constitutions, to an impartial jury. U.S. Const. amend. VI; Mont. Const. art. II, § 24. This right is codified: a juror may be challenged for cause when the juror has "a state of mind in reference to the case or to either of the parties that would prevent the juror from acting with entire impartiality and without prejudice to the substantial rights of either party." Mont. Code Ann. § 46-16-115(2)(j). When there is doubt about the impartiality of a juror, district courts must err on the side of excusing that juror. *State v. Anderson*, 2019 MT 190, ¶ 15, 397 Mont. 1, 446 P.3d 1134; *State v. Kebble*, 2015 MT 195, ¶ 15, 380 Mont. 69, 353 P.3d 1175).

A prospective juror's removal is required when a serious question arises about a juror's ability to be fair and impartial. *Russell*, ¶ 14. Critically, a for-cause challenge does not require a defendant to show that the prospective juror has a "fixed opinion" of guilt. *State v. Golie*,

2006 MT 91, ¶ 25, 332 Mont. 69, 134 P.3d 95. A district court "abuses its discretion if it fails to grant a challenge for cause when a juror's statements during voir dire raise serious doubts about the juror's ability to be fair and impartial." *State v. Allen*, 2010 MT 214, ¶ 25, 357 Mont. 495, 241 P.3d 1045.

This Court will not review the failure to challenge jurors for cause when the record is silent as to why trial counsel failed to act and is also silent as to whether there was no plausible justification for failing to act. *State v. Roedel*, 2007 MT 291, ¶¶38-39, 339 Mont. 489, 171 P.3d 694.

IV. The record might arguably support a claim that trial counsel was ineffective for failing to ensure Mr. Byrne's presence during the settling of instructions.

Pertinent Facts

When the parties settled jury instructions, counsel for defense inquired of the district court whether Mr. Byrne must be present for the settling of jury instructions and the district court said "no." 5/24/22 Trial Tr. at 555. Nothing further was said by anyone regarding Mr. Byrne's presence at the settlement of jury instructions. It is unclear from the record whether Mr. Byrne was present.

Pertinent Law

This Court employs plenary review to determine whether a violation of a criminal defendant's right to be present at all critical stages of his trial has occurred. *Roedel*, ¶35.

This Court has held that defendants do not have a right to personal presence at the jury instruction conference. *Roedel*, ¶¶60-62. "Section 46–16–410(4), MCA, specifically allows for the defendant's absence from the settling of jury instructions. The statute makes no mention of the need for the court to obtain the defendant's voluntary, intelligent, and knowing waiver." *Roedel*, ¶62.

"An attorney is not required to make all possible objections during a trial, and may legitimately decide to forego certain objections as a matter of trial tactics." *Morsette*, ¶19.

Mr. Byrne could argue that he was not present at the settling of jury instructions, he had a right to be present, and this violated his right to be present at all critical stages of trial and thus demands reversal.

V. The record might arguably support a claim that the district court held an off-the-record conference with counsel in violation of Mr. Byrne's rights.

Pertinent Facts

Upon conclusion of Mr. Byrne's direct examination, the court and counsel went into chambers out of the presence of the jury for an off-the-record conference at the request of the State. 5/24/22 Trial Tr. at 623. It is not clear from the record what was said in the conference or if Mr. Byrne was present for the conference. Defense counsel made no motion or objection regarding the conference.

Pertinent Law

Defendants have the constitutional right to appear and defend their criminal prosecution in person. Mont. Const. art. II, §24. This right is a fundamental right to appear at all stages of trial deemed "critical," and that can only be waived voluntarily, knowingly, and intelligently. *Roedel*, ¶59.

This Court generally does not address issues raised for the first time on appeal. *State v. Hatfield*, 2018 MT 229, ¶ 15, 392 Mont. 509, 426 P.3d 569.

Mr. Byrne could argue that the district court held an off-the-record conference with counsel without him present in violation of his

right to be personally present at all critical stages of trial and that doing so prejudiced him.

VI. The record might arguably support a claim that the district court erred by admonishing defense counsel for comments made during his closing argument.

Pertinent Facts

After closing arguments were made and the jury was in deliberations, the district court admonished defense counsel regarding a comment defense counsel made during his closing argument. 5/25/22 Trial Tr. at 723. Defense counsel said in closing argument:

> "It's the State's job to prove his case beyond a reasonable doubt. And that's a stupid phrase. I hate that phrase, "beyond a reasonable doubt." It's useless to us as humans. What the Judge instructed you is it's – proof beyond a reasonable doubt is proof of such convincing character that a reasonable person would rely and act upon it in the most important of his or her own affairs."

5/25/22 Trial Tr. at 707.

Defense counsel apologized to the district court. 5/25/22 Trial Tr. at 723. No sanctions of any sort on either counsel or Mr. Byrne were discussed.

The district court again admonished defense counsel a few minutes later, during the same conversation, regarding an alleged

undisclosed alibi defense. 5/25/22 Trial Tr. at 726-727. No formal sanctions were discussed on either defense counsel or Mr. Byrne in this instance either. The district court alleged that defense counsel "challenged that rule of your professional responsibility of making, of promoting – As an officer of this court, you're not allowed to make false statements. And clearly, there was no evidence [of Mr. Byrne traveling to Illinois contemporaneously with the allegations as Mr. Byrne testified that he did]." 5/25/22 Trial Tr. at 727. The district court seemed to be scolding defense counsel for relying upon Mr. Byrne's uncorroborated testimony that he had been in Illinois during one of the allegations in defense counsel's closing argument. The jury was in deliberations and there is nothing in the record indicating that it ever knew of these admonishments.

Pertinent Law

> A fair trial—which is a basic requirement of due process—requires that any judge who is biased or partial with regard to a particular matter or party be disqualified from hearing the case. The Montana Code of Judicial Conduct provides, "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." M. C. Jud. Cond., Rule 2.12(A); *Reichert v. State*, 2012 MT 111, ¶ 50, 365 Mont. 92, 278 P.3d 455. This includes situations in which the "judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute

in the proceeding." M. C. Jud. Cond., Rule 2.12(A)(1). It includes also situations in which the judge "previously presided as a judge over the matter in another court." M. C. Jud. Cond., Rule 2.12(A)(5)(d).

State v. Strang, 2017 MT 217, ¶22, 388 Mont. 428, 401 P.3d 690(some citations and internal quotations omitted).

Whenever a party to any proceeding in any court shall file an affidavit alleging facts showing personal bias or prejudice of the presiding judge, such judge shall proceed no further in the cause. If the affidavit is filed against a district judge, the matter shall be referred to the Montana Supreme Court. If the affidavit is in compliance with subsections (a), (b), and (c) below, the Chief Justice shall assign a district judge to hear the matter. If the affidavit is filed against a judge of a municipal court, justice court, or city court, any district judge presiding in the district of the court involved may appoint either a justice of the peace, a municipal judge or a city court judge, to hear any such proceeding.

(a) The affidavit for disqualification must be filed more than thirty (30) days before the date set for hearing or trial.

(b) The affidavit shall be accompanied by a certificate of counsel of record that the affidavit has been made in good faith. An affidavit will be deemed not to have been made in good faith if it is based solely on rulings in the case which can be addressed in an appeal from the final judgment.

(c) Any affidavit which is not in proper form and which does not allege facts showing personal bias or prejudice may be set aside as void.

(d) The judge appointed to preside at a disqualification proceeding may assess attorneys fees, costs and damages against any party or his attorney who files such disqualification without reasonable cause and thereby hinders, delays or takes unconscionable advantage of any other party, or the court. Mont. Code Ann. §3-1-805.

A claim of judicial bias requesting disqualification of a judge must be brought within a reasonable time after the moving party learns the facts forming the basis for the claim that the judge should be disqualified. *State v. Howard*, 2017 MT 25, ¶23, 389 Mont. 356, 405 P.3d 1263.

> Generally, this court does not address issues raised for the first time on appeal. We invoke plain error review sparingly, on a case-by-case basis, according to narrow circumstances, and by considering the totality of the circumstances. Obtaining plain error review of an unpreserved issue requires the appellant to: (1) demonstrate the claimed error implicates a fundamental right and (2) firmly convince this Court that failure to review would result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial proceedings, or compromise the integrity of the judicial process.
>
> Howard, ¶23 (internal quotations and citations omitted).

VII. The record might arguably support a claim that the district court erred when it refused to hear a mistrial motion from Mr. Byrne.

Pertinent Facts

At the sentencing hearing, after all of the testimony and after the parties gave their respective recommendations, Mr. Byrne asked to be heard. 10/30/23 Sent. Hrg at 53. The exchange between Mr. Byrne and the district court was as follows in its entirety:

The Court: At this time you'd like to make a statement?

> The Defendant: Actually, I'd like to address your Honor about – I was told that I was never to make an outburst during the trial. And I was never given the chance to ask for a mistrial on a couple things, and I was told that I should be able to do that at this time, and I was asking about legal advice. If it's not, your Honor, I understand.
>
> The Court: I'm not sure I understand your request. You're asking for a mistrial at this time?
>
> The Defendant: I actually wanted to ask for a mistrial because I've been told –
>
> The Court: Those are issues you can review with counsel at another time. This isn't appropriate at this time.
>
> The Defendant: Okay. Thank you, your Honor.
>
> 10/30/23 Sent. Hrg at 53.

Defense counsel never subsequently moved for a mistrial.

Pertinent Law

"A district court's determination of whether to grant a motion for mistrial must be based on whether the defendant has been denied a fair and impartial trial. A mistrial should be denied for technical errors or defects that do not affect the substantial rights of the defendant and the record is sufficient to establish the defendant's guilt. A mistrial is appropriate, however, when a reasonable possibility exists that inadmissible evidence may have contributed to the

conviction." *State v. Denny*, 2021 MT 104, ¶16, 404 Mont. 116, 485 P.3d 1227 (internal citations and quotations omitted).

> (1) Following a verdict or finding of guilty, the court may grant the defendant a new trial if required in the interest of justice. A new trial may be ordered by the court without a motion or may be granted after motion and hearing.
>
> (2) The motion for new trial must be in writing and must specify the grounds for a new trial. The motion must be filed by the defendant within 30 days following a verdict or finding of guilty and be served upon the prosecution.
>
> (3) On hearing the motion for a new trial, if justified by law and the weight of the evidence, the court may:
>
> (a) deny the motion;
>
> (b) grant a new trial; or
>
> (c) modify or change the verdict or finding by finding the defendant guilty of a lesser included offense or finding the defendant not guilty.
>
> Mont. Code Ann. §46-16-702.

Mr. Byrne could argue he was moving for a new trial and the district court erred by summarily denying that motion without hearing the basis for the argument.

VIII. The record might arguably support a claim that a live-in cousin named Kristen was the actual perpetrator of the alleged crimes and that counsel was ineffective for failing to reveal this.

Pertinent Facts

Upon review of the record, appellate counsel was unable to identify any facts directly pertinent to this claim.

Pertinent Law

To show ineffective assistance of counsel, a defendant must prove (1) that counsel's performance was deficient, and (2) that counsel's deficient performance prejudiced the defense. *State v. Ward*, 2020 MT 36, ¶18, 399 Mont. 16, 457 P.3d 955. When it is unclear from the record why counsel took a particular course of action or failed to take a particular course of action, ineffective assistance of counsel claims are better suited for review in a petition for post-conviction relief. *Ward*, ¶18. "Claims that involve alleged omissions of trial counsel are usually not well-suited for consideration on direct appeal." *Ward*, ¶18. When a "claim is based on matters outside the record, [this Court] will not review it on direct appeal, recognizing that the defendant may raise the issue in a postconviction proceeding to develop a record as to the reasons for counsel's actions." *Ward*, ¶20.

> [F]acts surrounding an alleged failure to investigate necessarily do not appear of record in the ordinary case. For that reason, such allegations of ineffective assistance of counsel usually cannot be raised on direct appeal and are appropriately presented in a petition for postconviction relief.
> *Hagen v. State*, 1999 MT 8, ¶28, 293 Mont. 60, 973 P.2d 233.

Mr. Byrne could argue that Kristen was the real perpetrator of the crimes for which he was accused, and counsel was ineffective for failing to investigate this and for failing to put on evidence of it at trial.

IX. The record might arguably support a claim that the trial court erred when it allowed an in-court identification of Mr. Byrne.

Pertinent Facts

During M's direct examination by the State, when the State attempted an in-court identification with M, asking M to identify Mr. Byrne in the courtroom, the defense objected. 5/23/22 Trial Tr. at 342. M stopped talking once the objection was made and the identification never occurred. The judge paused the proceedings and an in-chambers discussion followed that was not on the record. Upon resuming the record, the district court said toward the State, "Counsel, if you would ask your next question, please." 5/23/22 Trial Tr. at 343. Later that day, outside the presence of the jury, defense counsel made the record that the judge had granted the objection to the in-court identification. 5/23/22 Trial Tr. at 407. The district court never allowed there to be an in-court identification of Mr. Byrne.

Pertinent Law

The existence of a justiciable controversy is a threshold requirement to a court's adjudication of a dispute. *Clark v. Roosevelt County*, 2007 MT 44, ¶11, 336 Mont. 118, 154 P.3d 48.

Due process bars admission of evidence from suggestive identification procedures, including those performed in-court, where there is a substantial likelihood of irreparable misidentification. *City of Billings v. Nolan*, 2016 MT 266, ¶19, 385 Mont. 190, 383 P.3d 219.

Mr. Byrne could argue that there was an in-court identification that occurred that was not reflected in the record and that it violated due process.

X. The record might arguably support the claim that the district court erred by sentencing Mr. Byrne to a sexual offender treatment scheme that no longer exists.

Pertinent Facts

At the sentencing hearing, the district court ordered Mr. Byrne to complete Phase I and II of the MSOTA sexual offender treatment program before parole eligibility. 10/30/23 Sent. Hrg at 56.

Defense counsel requested that the order to complete the MSOTA Phase I and II be altered to include any equivalent in light of the

Department of Corrections' (DOC) ongoing restructuring of its sexual offender treatment regime [presumably to ensure that Mr. Byrne is able to complete whatever program is on offer from DOC at the prison when Mr. Byrne's time to begin treatment comes]. 10/30/23 Sent. Hrg at 58. The State appeared to share the same concerns as defense counsel, but was cut off by the district court judge. 10/30/23 Sent. Hrg at 58. The district court judge quickly rejected that request, expressing skepticism of the DOC's new sexual offender treatment regime. 10/30/23 Sent. Hrg at 58-59 ("…I'm not encouraged by [DOC's] new proposed consideration.").

Pertinent Law

"[A]n offender sentenced to complete SOP I and II will meet his sentence requirements by completing the analogous SO-ICPM phase…[I]nmates with sentences requiring SOP treatment [which Mr. Byrne was ordered to complete] may utilize the SO-ICPM programming model [the DOC's new sexual offender treatment regime] to meet their sentence requirements." *State v. Damon*, 2025 MT 12, ¶¶12, 13, 420 Mont. 225, 562 P.3d 1061.

Mr. Byrne could argue that the requirement that he complete Phases I and II of MSOTA sexual offender treatment is illegal.

XI. The record might arguably support the claim that the jury impermissibly put the burden of proof on Mr. Byrne and counsel was ineffective for failing to request a new trial.

Pertinent Facts

The defense, during its sentence recommendation, argued that its investigator sought feedback from the jurors after trial and one or two of the jurors "definitively said it was the Defense's job to prove his innocence." 10/30/23 Sent. Hrg at 51. Defense counsel did not make a formal objection or motion about the allegation, but instead just said, "and we're all well aware that that is problematic given the instructions that the Court provided to the jury." 10/30/23 Sent. Hrg at 51.

Pertinent Law

"A defendant must make a timely objection to properly preserve an issue for appeal." *State v. Paoni*, 2006 MT 26, ¶35, 331 Mont. 86, 128 P.3d 1040.

> "Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to

> assent or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.
>
> However, as an exception to this subdivision, a juror may testify and an affidavit or evidence of any kind be received as to any matter or statement concerning only the following questions, whether occurring during the course of the jury's deliberations or not: (1) whether extraneous prejudicial information was improperly brought to the jury's attention; or (2) whether any outside influence was brought to bear upon any juror; or (3) whether any juror has been induced to assent to any general or special verdict, or finding on any question submitted to them by the court, by a resort to the determination of chance." Mont. R. Evid. 606(b).

"[Mont. R. Evid. 606] is founded on public policy, and is for the purpose of preventing litigants or the public from invading the privacy of the jury room, either during deliberations of the jury or afterward.... [I]f after being discharged and mingling with the public, jurors are permitted to impeach verdicts which they have rendered, it would open the door for tampering with jurors and would place it in the power of a dissatisfied or corrupt juror to destroy a verdict to which he had deliberately given his assent under sanction of an oath ...." *Sandman v. Farmers Ins. Exchange*, 1998 MT 286, ¶ 29, 291 Mont. 456, 969 P.2d 277.

"Juror affidavits may not be used to impeach the verdict based upon internal influences on the jury, such as mistake of evidence or misapprehension of the law." *Sandman*, ¶31.

Mr. Byrne could argue that jury impermissibly put the burden of proof on Mr. Byrne and counsel was ineffective for failing to request a new trial.

CONCLUSION

Undersigned counsel has identified one meritorious issue Mr. Byrne does not wish to contest as a standalone claim. Therefore, counsel should be allowed to withdraw from this representation.

Respectfully submitted this 15th day of October, 2025.

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By: /s/ Gregory Hood
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this *Anders* 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 9,860, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Gregory Hood
Gregory Hood

APPENDIX

CERTIFICATE OF SERVICE

I, Gregory Nelson Hood, hereby certify that I have served true and accurate copies of the foregoing Brief - Anders to the following on 10-15-2025:

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