

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0040

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

EDMUND ALVIN ADAMS,

Defendant and Appellant.

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**BRIEF OF APPELLEE**

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On Appeal from the Montana Twenty-First Judicial District Court,  
Ravalli County, The Honorable Jennifer B. Lint, Presiding

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## **STATEMENT OF THE ISSUES**

1. Did the district court correctly admit the testimony of the Appellant's older adopted daughter because any unfair prejudice did not substantially outweigh its high probative value?
2. Did the Appellant's counsel provide ineffective assistance for not requesting additional limiting instructions for the prior bad act evidence?

## **STATEMENT OF THE CASE**

On July 27, 2023, a jury convicted the Appellant, Edmund Adams (Adams), of three counts of incest and two counts of sexual intercourse without consent (SIWOC). (District Court Document (Doc.) 80.) The victim, R.A., was Adams's adopted daughter. (7/21/23-7/26/23 Trial Tr. (Trial Tr.) at 220-21.) On the date the State charged Adams, he was 71,<sup>1</sup> and R.A. was 9.<sup>2</sup> (Doc. 45.) R.A. testified that Adams began sexually assaulting her when she was 4. (Trial Tr. at 255, 260.)

Prior to trial, Adams moved to suppress prior bad act evidence. (Doc. 37.) This included the testimony of his older adopted daughter, A.P., who said that Adams had sexually abused her when she was a young girl. (*Id.*) The district court denied Adams's motion and allowed the State to present A.P.'s testimony.

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<sup>1</sup> Adams's date of birth is September 24, 1950. (Trial Tr. at 372, 516.)

<sup>2</sup> R.A.'s date of birth is September 23, 2012. (Trial Tr. at 221-22, 516.)

(Doc. 68 at 7-10.) It found the testimony was probative to show Adams's motive, intent, knowledge, preparation, and plan, under Mont. R. Evid. 404(b) (Rule 404(b)), and its probative value was not substantially outweighed by unfair prejudice under Mont. R. Evid. 403 (Rule 403). (*Id.*) It summarized: "This pattern ties the past and present evidence together through the lens of a common, non-propensity motive that is specific to these instances of alleged sexual abuse, which are particular in their nature: rape of an adopted daughter." (*Id.* at 10.) On appeal, Adams has challenged the district court's admission of the older adopted daughter's testimony. (Appellant's Brief (Br.) at 28-43.)

During trial, the district court provided the model jury instruction that addresses the limited nature of prior bad act evidence admitted under Rule 404(b), and the parties addressed the limited nature of the evidence extensively during closing arguments. (Trial Tr. at 598-640; Doc. 79 at Instr. 21.) On appeal, Adams argues his counsel provided ineffective assistance for not requesting additional limiting instructions at the time the State offered the prior bad act evidence. (Br. at 43-51.)

## STATEMENT OF THE FACTS

### **I. The offense**

The victim, R.A., was born September 23, 2012. (Trial Tr. at 221-22, 516.) On July 23, 2015, the State placed R.A. with Adams and his wife, Michele, after R.A. had been removed from the custody of her biological mother. (*Id.* at 204-07, 231, 245, 478-85, 516.) Culturally, R.A. was considered Michele's granddaughter because that is "the Indian way." (*Id.* at 203-04, 478.) But further explanation revealed that Michele is R.A.'s great aunt. (*Id.*) Adams and Michele adopted R.A. on September 13, 2017. (*Id.* at 220-21, 478.)

During R.A.'s third grade year, she talked to her friend on the playground about things that her dad, Adams, had done to her. (*Id.* at 209-10, 260-62.) R.A.'s friend told her Adams was abusing her, which confused R.A. (*Id.*) R.A. thought abuse was "Like getting beat up," but R.A.'s friend convinced her to tell the teacher. (*Id.*) After recess, R.A. reported to school officials that Adams had been doing various sexual things to her. (*Id.*) R.A. later detailed Adams's sexual abuse in a forensic interview. (*Id.* at 298, 301-02.)

During trial, R.A. testified that Adams's abuse first started happening when she was about four years old and it continued until she reported it when she was nine years old. (*Id.* at 255, 260.) R.A. testified that she did not live with Adams and Michele anymore because she had "been sexed." (*Id.* at 255.) She said she did not

know if other parents did to their children what Adams did to her, and she “felt nervous and scared, and I felt like that I was the only one.” (*Id.* at 259.)

R.A. testified that Adams would take her to his shop, which was separated from their home. (*Id.* at 256-57, 370-71.) Adams kept ice cream in a shop freezer. (*Id.*) R.A. said that Adams had her “suck on his private part” before he would give her ice cream. (*Id.* at 257.) R.A. said this happened many times. (*Id.* at 257-59, 265, 269.) R.A. also loved stuffed animals and My Little Pony toys, and Adams sometimes gave her those items as a “reward or a prize” after he abused her instead of ice cream.<sup>3</sup> (*Id.* at 253, 260, 266, 273-77, 493-98.)

R.A. testified that Adams also abused her in various ways in the house. (*Id.* at 264, 269-72, 278-79.) She said she did “The mouth part” to Adams on a couch near the stairs. (*Id.* at 269-70.) R.A. testified that Adams once “fitted” his private part into her “poop part.” (*Id.* at 262-63.) She said Adams did this to her on the floor of his bedroom next to the dresser. (*Id.* at 270-71.) R.A. said “it was really bad,” and it hurt where she goes “poop” and in her “tummy.” (*Id.* at 262-63.) She said, “Then I told him to stop, and then we, like, stopped. And then I, like, went back to my room and just, like, checked if I was okay, if I was bleeding or not.”

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<sup>3</sup> During trial, R.A. identified multiple toys from her bedroom and specified which ones were a “reward” for Adams’s sexual abuse and which toys were from other sources. (Trial Tr. at 266, 273-77.)

(*Id.*) R.A. testified that she was okay. (*Id.* at 263-64.) R.A. said this happened when she was seven. (*Id.* at 264-65.)

R.A. testified that Adams tried to put his “pee spot” in her front private part but it did not fit. (*Id.* at 264.) R.A. said, “Because the thing, his private spot, was too big. And when he tried to put it in, like the spot on me, like, hurt a lot.” (*Id.* at 264.) R.A. said this happened more than one time when she was around eight or nine. (*Id.* at 264-65.) She said this happened once in the hot tub room and “It happened a lot when we got out of the hot tub room.” (*Id.* at 264, 271.) R.A. testified that while she was in the hot tub with Adams, Adams used his fingers to rub the inside of her private parts, which she confirmed was her vagina. (*Id.* at 271-72.) She said that Adams also once had her suck on his private part in the hot tub room. (*Id.* at 271.)

R.A. testified that Adams had shown her videos on his phone of an adult sucking on another adult’s private part to teach her how to do it correctly. (*Id.* at 277-78.) Adams told R.A. that he wanted her to suck on his private part “To make it feel good.” (*Id.* at 278.) When asked if it hurt to suck on Adams’s private part, R.A. responded, “It felt normal.” (*Id.*) She said, “It kind of felt like a big Popsicle. It’s going, like, big in your mouth. It’s like in there, and it’s kind of like back and forth.” (*Id.*) R.A. said it generally did not hurt, but once she “was gagging,” and

she “puked out spaghetti by the couch in the living room.” (*Id.* at 278-79.) She said, “We cleaned it up with a towel when we were done.” (*Id.*)

R.A. described a clear liquid that came out of Adams’s private part into her mouth. (*Id.* at 279-80.) “Like when this thing that comes out. That was like pee or something, but he said it’s not pee. I don’t know what it was, but it tastes really weird.” (*Id.* at 279.) R.A. said it happened “Like every time I tried to suck his private part.” (*Id.* at 280.) She said that sometimes she would just rub Adams’s private part because she did not like the weird taste of the stuff that came out. (*Id.* at 280-81.) R.A. said, “I didn’t want to suck it.” (*Id.* at 280.)

Adams was partially retired, but he had a business that provided laser engraving services out of his shop. (*Id.* at 519-20, 525-27.) His wife worked as a nurse at the hospital, usually from 8 a.m. to 6:30 p.m. on Mondays through Thursdays. (*Id.* at 254, 516-17.) Adams picked R.A. up from school, and his wife would come home after work. (*Id.* at 254, 519.) At times Michele worked on weekends, and on Fridays Michele watched her grandchildren in Missoula. (*Id.* at 517-18.) When Michele was not at home, Adams usually supervised R.A. if she was not in day care. (*Id.* at 519.) On occasion, Adams’s wife would go out of town, and R.A. would stay home alone with Adams. (*Id.* at 266-68.) R.A. testified that on multiple occasions when Michele was not home, Adams gave her “an R&R drink

with Pepsi in it and ice with it.” (*Id.* at 266-68.) Michele testified that she and Adams occasionally drank R&R and Diet Pepsi in the evening. (*Id.* at 520.)

After R.A. reported Adams’s sexual abuse during the spring of 2022, the State removed R.A. from Adams’s care and placed her initially with her elementary school principal so she could finish third grade in her school. (*Id.* at 210, 222, 233-34.) After removal, R.A. was fearful, hypervigilant, and confused. (*Id.* at 226-27.) She was embarrassed and believed the abuse was her fault. (*Id.* at 227, 229.)

After the school year, the State moved R.A. to a foster home in Great Falls with her younger half-sister. (*Id.* at 222.) R.A.’s case worker testified that R.A. struggled in that placement because “she was worried that the foster father in the home was doing the same thing to the foster mother that [Adams] was doing to her.” (*Id.* at 247.) The case worker explained that R.A. did not like the sexual abuse that Adams subjected her to and she associated it with fear and pain. (*Id.* at 247-48.) R.A. was uncomfortable with the foster parents’ heterosexual relationship and as a young child, R.A. did “not have the ability to understand the difference between a consensual adult sexual relationship and what was happening to her in her adoptive home.” (*Id.* at 248.)

R.A. continued to struggle in subsequent placements. (*Id.* at 222-23.) R.A. even asked if she could return to Adams and Michele if Adams stopped sexually

assaulting her. (*Id.* at 227-28.) At one point, R.A. wrote a letter to Adams and Michele. (*Id.* at 281-82.) R.A. never sent the letter, but she described it during trial.

(*Id.*)

A. I didn't want to get Ed in trouble, and I was, like, very upset. So I just like—just like thinking, like, it's my fault.

Q. Thinking it was your fault. Do you remember when you wrote that letter?

A. When I was meeting with Lenny and Leigh at Great Falls.

Q. You were in Great Falls. What does that letter say?

A. Dear Mom and Dad, I'm so sorry that the cops got Ed. It's my fault. I like what my dad Ed did when he did bad stuff to me. That's what I want you to know. Love, [R.A.].

Q. Okay. You didn't end up sending them that letter; right?

A. No.

Q. Was there anything else you were feeling when you wrote that letter that you think it's important for us to know?

A. I didn't really like it. I was just saying that.

Q. You didn't really like it. You were just saying that.

A. Yeah. Like thinking it was my fault and I didn't want to get him in trouble.

(*Id.*)

## II. Procedural history

On May 20, 2022, the State charged Adams with four counts of SIWOC based on his abuse of R.A. (Docs. 1-3.) The State later filed an Amended Information that charged Adams with three counts of felony incest, in violation of Mont. Code Ann. § 45-5-507(1) and (5), and two counts of felony SIWOC, in violation of Mont. Code Ann. § 45-5-503(4)(a). (Docs. 45, 48-49.) The State alleged R.A.'s age varied between 4 and 9 years old during the offenses and Adams's age varied from 65 to 71. (Doc. 49.)

On June 9, 2023, Adams filed multiple motions in limine, which included a request to prohibit propensity evidence of prior bad acts. (Doc. 37.) Adams specifically challenged evidence of his internet search history and testimony from his older adopted daughter who claimed that Adams had abused her in a similar manner years before. (*Id.* at 7-10.) After briefing, the district court denied Adams's requests to exclude this evidence. (Docs. 37, 43, 51, 68.)

The district court relied on *State v. Daffin*, 2017 MT 76, ¶ 4, 387 Mont. 154, 392 P.3d 150, and *State v. Madplume*, 2017 MT 40, ¶ 30, 386 Mont. 368, 390 P.3d 142, to find the older adopted daughter's testimony relevant under Mont. R. Evid. 401 and 404(b).<sup>4</sup> (Doc. 68 at 7-10.) The district court explained that the evidence

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<sup>4</sup> Adams does not appeal the district court's denial of his motion regarding his internet search history. (Br. at 26-52.)

had “a tendency to make the charged offenses more probable because of the ‘knowingly’ and ‘without consent’ elements of the offenses.” (*Id.* at 9.) It showed Adams’s motive was his fixation with incestuous underage sex with his adopted daughters and showed his conduct with the victim was knowing rather than innocent, innocuous, or accidental. (*Id.* at 9-10.) The similarities between the two allegations showed Adams’s preparation or plan to adopt a child in need and then groom and sexually abuse them. (*Id.*)

The district court found this evidence more probative than prejudicial under Rule 403 and summarized: “This pattern ties the past and present evidence together through the lens of a common, non-propensity motive that is specific to these instances of alleged sexual abuse, which are particular in their nature: rape of an adopted daughter.” (*Id.* at 10.)

The four-day jury trial began on July 21, 2023. (Doc. 79.) During its opening statement, the State explained, “And you’re also going to hear that over the course of the past several years the defendant has used [R.A.] to act out his sexual desires with particularly young girls and in this case his adopted daughter.” (Trial Tr. at 186.) The State briefly summarized the expected testimony of the older adopted daughter and explained that the evidence taken together would tell R.A.’s story. (*Id.* at 191-92.)

R.A. testified in detail about the various ways Adams had sexually abused her. (*Id.* at 255-91.) The State provided an exhibit that included the search history from Adams’s Google account between 2014 and 2022. (*Id.* at 376-80, 387-98; State’s Ex. 31.) R.A. arrived for placement in Adams’s home in July 2015, and she was three years old. (Trial Tr. at 395-96.) On August 10, 2015, Adams searched for “Three year old orgasm.” (*Id.* at 395-96; Ex. 31 at 60.) A few months later, Adams searched for “Teaching 3 year old daughter to suck cock story.” (*Id.*) During the subsequent four years, Adams repeatedly searched phrases that were consistent with the abuse R.A. described. (Trial Tr. at 390-98; Ex. 31 at 26-60.) On November 13, 2020, Adams visited a site titled “father makes his daughter suck his cock,” and searched for “making daughter suck my cock.” (Trial Tr. at 394; Ex. 31 at 26.)

The State called A.P. (Trial Tr. at 386-87, 405-24.) A.P. testified that Adams is her biological uncle and adoptive father. (*Id.* at 406.) A.P. went to live with Adams and his prior wife in rural Washington state when A.P. was about two or three years old. (*Id.* at 405-09, 412.) A.P. was the youngest of five children in the home and the only female child. (*Id.*) A.P. testified that Adams had sexually abused her when she was a child. (*Id.* at 409-16.) The abuse began when A.P. was

9 and continued until she was almost 14 years old.<sup>5</sup> (*Id.* at 409.) A.P.’s adopted mother—Adams’s wife at the time—worked out of town as a night nurse, and she did not know about the abuse when it was occurring. (*Id.* at 414-15, 422-23.)

A.P. said the abuse started with Adams waking her up in the middle of the night to give her a bath. (*Id.* at 409-10.) Adams brought her little white bottles that A.P. later learned contained whiskey. (*Id.*) He told her to “shoot them down” so she would not taste it, and she would become intoxicated. (*Id.*) The abuse included sexual touching, oral sex, anal sex, and vaginal sex. (*Id.* at 411-12.) The vaginal sex started when A.P. was about 13. (*Id.*) Adams tried when A.P. was younger, but A.P. “cried too much because it was too painful.” (*Id.* at 412.) After some of the assaults, Adams gave A.P. gifts like money and earrings. (*Id.* at 415.)

Eventually, A.P. told one of her older adoptive brothers about the abuse, and Adams never assaulted her again. (*Id.* at 413, 423-24.) When A.P. was 15, Adams told her and her siblings that he and their adoptive mother were getting a divorce. (*Id.* at 414.) Adams apologized to A.P. for the abuse, and A.P. forgave him. (*Id.* at 414, 419-20.) A.P. told her adoptive mother about the abuse when she was 16, and her mother reported it to the police. (*Id.* at 414-15.) A.P. chose not to pursue criminal charges and said she “chose to leave it up to God’s judgment.” (*Id.* at

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<sup>5</sup> Based on A.P.’s testimony that she was 15 in 1996, the abuse ended in approximately 1995. (Trial Tr. at 416.)

415.) A.P. did not know R.A., but she chose to cooperate with the investigation in this case. (*Id.* at 416.) She explained:

I wanted to protect someone else, that I had learned that someone else had been affected in the same way I had. And I know that we don't feel like we have a voice when we're assaulted, so I wanted to be a voice for someone else.

(*Id.*) During cross-examination, Adams attempted to impeach A.P. based on her testimony that she had chosen to forgive him and that she had later sought monetary assistance from him. (*Id.* at 416-24.)

Adams called multiple witnesses who testified that they believed his denial of the charged conduct. (*Id.* at 436, 444-45, 451, 513-15.) Those witnesses, and others, generally testified to R.A.'s numerous issues, including her diminished intellect and large physical stature. (*Id.* at 425-60, 478-515.) One witness, who was a close friend and neighbor of Adams and frequently watched R.A., described R.A. as a big girl, intellectually delayed, and struggling to get along with children at school. (*Id.* at 426-31, 463-64.) The neighbor testified that R.A. did not understand a lot of things, did not have a lot of personality, and struggled to communicate. (*Id.*)

Michele testified that R.A. had received extensive medical care and been in various forms of counseling from the moment she moved in with them. (*Id.* at 488-91, 509-13, 521-24.) Michele said R.A. had a general aversion to physical affection. (*Id.* at 485-88, 524.) However, the case worker who worked with R.A. after removal from the Adams's care said that R.A. liked to be hugged and touched,

but she also needed space at times, which is common with sexual abuse survivors. (*Id.* at 235-36.) Michele said that Adams had a diminished sex drive and had suffered from erectile dysfunction for about six or seven years.<sup>6</sup> (*Id.* at 501-02.) She also said that she had never seen any indication of injury on R.A.'s mouth, genitals, anal area, or knees. (*Id.* at 490-91, 509.)

Mary Pat Hansen (Hansen), the clinical supervisor at First Step Resource Center at St. Patrick Hospital in Missoula testified that R.A. participated in a forensic interview and a physical exam. (*Id.* at 293, 298-302.) The State did not introduce the forensic interview as evidence, but Adams cross-examined the State's witnesses extensively regarding the potential for manipulating a child into saying incorrect information with leading or suggestive questions. (*Id.* at 316-30, 345-56.) Hansen explained the extensive training required of forensic interviewers and methods used to minimize suggestive or leading questions. (*Id.*)

The physical exam did not indicate any history of sexual abuse. (*Id.* at 293, 299-316, 330.) However, Hansen explained that most physical exams in similar circumstances produce a normal result—even with a history of sexual abuse that involved the penetration of the vagina—because of the healing properties of the

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<sup>6</sup> The State introduced a filled prescription list for Adams from the local pharmacy that included an erectile dysfunction medication between January 2020 and October 2021. (Trial Tr. at 592-96; State's Ex. 32.) It showed that Adams had filled prescriptions for more than 300 pills during that period. (*Id.*)

tissue in the area. (*Id.*) Hansen said blunt force penetrating trauma may in some cases cause a hymen transection, which would indicate a history of sexual abuse. (*Id.* at 312.) But the only definitive indicators of vaginal intercourse are pregnancy, certain sexually transmitted diseases, and DNA evidence. (*Id.*)

R.A. started puberty early, at eight years old. (*Id.* at 462.) R.A.'s primary care provider testified that in early puberty cases it is customary to investigate the possibility of sexual abuse. (*Id.* at 464-67.) During a visit with Michele present, the provider asked R.A. if she had been sexually abused or touched inappropriately. (*Id.* at 464-67, 472-74.) R.A. said no. (*Id.*) The provider said she did not observe during R.A.'s physical exams any bruising or marks that would have indicated sexual abuse or she would have reported it. (*Id.*)

Valerie Widmer (Widmer), the director of a local children's advocacy center, testified for the State. (*Id.* at 331-34.) Widmer explained the stages of victimization, the delayed disclosure of sexual abuse, and the difficulties child victims of sexual abuse have in recalling specific dates. (*Id.* at 334-45.) R.A. had previously testified that she did not tell her mom sooner because "I didn't want her to get so upset." (*Id.* at 289.)

Adams called Dr. Cara Laney, a psychology professor at a small liberal arts school in Idaho, who testified as an expert in human memory and psychology. (*Id.* at 556-59.) Dr. Laney testified extensively about how false or contaminated memories

can seem real to people, as if the remembered event happened even though it did not. (*Id.* at 560-92.) She testified that the forensic interview of R.A. was appropriately conducted. (*Id.* at 575, 591.) But she raised concerns about the second child on the playground to whom R.A. first disclosed the abuse. (*Id.* at 575-78.)

After the parties rested, the district court instructed the jury. (*Id.* at 598.)

Instruction 21 provided:

The State has offered evidence that Edmund Adams engaged in other wrongs or acts at another time. That evidence is not admitted to prove the character of Edmund Adams or to show he acted in conformity with alleged prior behavior. The only purpose of admitting that evidence is to show proof of motive, common scheme and/or intent. You may not use this evidence for any other purpose. The [sic] Edmund Adams is not being tried for that other wrong or act. He may not be convicted for any other wrong or offense aside from the charges at issue in this case. You may not use any evidence of other wrongs to prove that he has a propensity to commit the offenses charged. For the jury to convict the [sic] Edmund Adams of any other offense than that charged in this case may result in unjust double punishment of the [sic] Edmund Adams.

(*Id.*; Doc. 79 at Instr. 21.)

In closing, the State relied on the vivid details R.A. provided of Adams's sexual abuse and the consistencies in the evidence that supported her allegations.

(Trial Tr. at 598-607.)

Before the State referenced the evidence of Adams's internet search history and the testimony from A.P., it reiterated the limited nature of the evidence. (*Id.* at 607-08.) The State explained:

We heard the internet search history evidence, and it's important that we characterize its relevance in this case. The judge has instructed you just now, and you'll get a copy of an instruction that tells you that there's this evidence that exists outside of what happened with [R.A]. And where does that fit for the jury's deliberation?

Where it doesn't fit, what we don't do with that is we don't look at that and assume that the defendant is a bad person. We don't assume because he looked at certain things he must have done this to [R.A]. We don't look at that and immediately snap-judge the defendant. Where you do put that is, What motivates the defendant? What are his intentions?

You're going to be asked to determine that the defendant acted knowingly, that he's aware of his conduct. And part of that analysis necessarily requires that you think, Why would this happen? Why would he do this? And in this case that search history informs us. This search history illustrates what the defendant's sexual preferences are, what his sexual desires are. We see that in the search history, and he acted that out in his conduct with [R.A].

*(Id.)*

The State reiterated the instruction's application to A.P.'s testimony and the limited nature of its relevance to their deliberations. *(Id. at 609-10.)* It said:

We also have [A.P.], and that same instruction applies to her testimony. The jury does not get to listen to [A.P.] and think, Well, if he's done it before, he must've done it this time. That's not fair, and that's not what the law says. We're deciding [R.A.]'s case today.

But what the jury can do is, again, say, What motivates the defendant, and was this part of his preparation or plan? When faced with a decision of whether or not to agree to adopt a young female, was it part of the defendant's preparation or plan to, in fact, do that, knowing that he had done it before and that he had benefited from sexually abusing [A.P.]? In this case, the evidence shows that the defendant knew what that was and he knew it was wrong. He

apologized to [A.P.], and he told her he wasn't going to do it again. He told her it was gross, or whatever words she used.

This was no mistake. The defendant knew the conduct, knowingly. The defendant had that intent and that motivation to sexually abuse a young girl, and specifically a daughter.

*(Id.)*

Adams argued that he did not sexually abuse R.A., and he reiterated the limited purpose of the evidence he has challenged on appeal. (*Id.* at 616-32.)

Again, the pornography searches and the [A.P.] evidence, I appreciate that the state took time to distinguish for you what you can and cannot do with that evidence. What you cannot do is say, I believe [A.P.]'s testimony, so he must have done this crime against [R.A]. The instructions say, no, you cannot do that.

You cannot say Mr. Adams looks at some disgusting pornography that's incest related; therefore, he must be guilty. The jury instructions say that's not allowed.

Those facts, if believed, only go to the limited purpose which the instruction will tell you. And that is intent, motive, common scheme. It's what the instruction says.

*(Id.* at 626.) During his request to the jury to find him not guilty based on the evidence, Adams diminished the credibility of A.P.'s testimony. (*Id.* at 631.)Your

own common sense, the physical evidence in the case, and not Ed's first daughter came in and said she was molested so [R.A.] must have been molested too. Did it make sense in your mind that someone waits 30 years to report and that someone forgives their abuser and takes money from them and spends time with them willingly? Does that comport?

*(Id.)*

During its rebuttal closing, the State responded to Adams's argument regarding A.P.'s testimony and reiterated its limited application. (*Id.* at 640.)

And then finally, when talking about [A.P.], Ms. Lockwood said somebody that waited 30 years to report it. Well, she didn't. She told us she didn't wait 30 years. Again, mischaracterizing the evidence. [A.P.], formerly [S.], told us that she told her brother and then she told her then adoptive mom and she put it in the hands of God, were her words, and she moved on with her life.

It wasn't until Detective Hachenberger called her on the phone cold that she ever talked about it again. And she came here to tell you all about it. So you get to consider her motivations. You get to consider whether [A.P.] seemed motivated to get back at the defendant or do anything to lie or make something up. So you get to assess her credibility. But then remember the context that that testimony fits in. We're not talking about [A.P.]. We're talking about the defendant and what motivated him to assault [R.A].

(*Id.*)

The jury deliberated for 3 and a half hours. (*Id.* at 645.) It convicted Adams of all 5 counts. (*Id.* at 646-51; Doc. 80.) The district court sentenced Adams to 5 consecutive 100-year prison sentences with a 25-year parole restriction. (11/16/23 Tr. at 12-15; Doc. 92.)

### **SUMMARY OF THE ARGUMENT**

The district court correctly exercised its broad discretion to admit A.P.'s testimony. The State focused its case on R.A.'s vivid descriptions of Adams's extensive abuse and the corroborating evidence. In addition to the limiting

instruction provided by the district court, the State expressly limited its reliance on A.P.'s testimony in the presentation of its case and in its closing argument to address Adams's general denial defense. Adams does not dispute that A.P.'s testimony was highly probative to show that Adams had a motive and intent to have sex with his adopted daughter R.A., he prepared and planned to abuse R.A. for his sexual pleasure, and he knowingly abused R.A. Rule 403 requires a district court to perform a fact-specific balancing test that favors admission. Based on the facts in this case, the district court correctly exercised its broad discretion to admit A.P.'s testimony, and Adams has failed to show that any resulting prejudice from that ruling substantially outweighs the evidence's high probative value.

This Court should not review Adams's ineffective assistance of counsel (IAC) claim because it is not record-based. If this Court does review it, Adams has failed to meet his heavy burden to prove deficient performance or prejudice. The law does not require additional limiting instructions as he asserts, and Adams cannot prove that his counsel's choice not to request them fell below an objective standard of reasonableness. He cannot prove prejudice either because the district court instructed the jury as legally required, and the State comprehensively reiterated the limitations of A.P.'s testimony during its closing argument, as Adams has acknowledged. The State provided and primarily relied on R.A.'s compelling testimony and corroborating evidence. Adams cannot meet his burden

to show that the provision of additional limiting instructions would have caused a substantial likelihood of acquittal.

## ARGUMENT

### **I. The district court correctly exercised its discretion to allow A.P.’s testimony.**

#### **A. Standard of review**

“District courts have broad discretion to determine the admissibility of evidence.” *State v. Daffin*, 2017 MT 76, ¶ 12, 387 Mont. 154, 392 P.3d 150. This Court reviews “evidentiary rulings for an abuse of discretion, which occurs when a district court acts arbitrarily without conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice.” *Id.* “To the extent an evidentiary ruling is based on a district court’s interpretation of the Montana Rules of Evidence, our review is de novo.” *Id.*

#### **B. A.P.’s testimony was relevant and properly admitted to show Adams’s motive, intent, preparation, plan, and mental state.**

When a defendant has challenged evidence for inappropriate character propensity and unfair prejudice, the analysis includes Mont. R. Evid. 401-404(b).<sup>7</sup>

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<sup>7</sup> The only evidentiary error Adams has asserted on appeal is based on Rule 403. (Br. at 26-43.) However, to apply the balancing test in that rule this Court must consider the theories of admissibility based on Mont. R. Evid. 401-404(b). *See Stewart*, ¶¶ 53-71.

*State v. Stewart*, 2012 MT 317, ¶¶ 53-71, 367 Mont. 503, 291 P.3d 1187. “All relevant evidence is admissible, except as otherwise provided by constitution, statute, these rules, or other rules applicable in the courts of this state.” Mont. R. Evid. 402. Relevant evidence is that “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Mont. R. Evid. 401. “Relevant evidence may include evidence bearing on the credibility of a witness or hearsay declarant.” *Id.* “Rule 401’s basic standard of relevance is a ‘liberal’ one.” *Stewart*, ¶ 58.

Rule 404(b) prohibits the introduction of evidence of other crimes, wrongs, or acts only when that evidence is presented to prove “action in conformity therewith.” Mont. R. Evid. 404(b). As the Montana Supreme Court has explained:

It is a frequent misconception that this rule bars *evidence*. It does not. It prohibits, rather, *a theory of admissibility*: using evidence of other crimes, wrongs, or acts to prove the defendant’s subjective character, disposition, or propensity (e.g., that she is inclined to wrongdoing in general, or that she tends to commit a particular type of wrongdoing) in order to show conduct in conformity with that character on a particular occasion.

*State v. Dist. Court of the Eighteenth Judicial Dist.*, 2010 MT 263, ¶ 47, 358 Mont. 325, 246 P.3d 415 (emphasis in original) (hereinafter *Salvagni*). “[E]vidence of prior bad acts, including uncharged crimes, is admissible for other purposes such ‘as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.’” *Daffin*, ¶ 15 (quoting Mont. R. Evid. 404(b)).

“The distinction between admissible and inadmissible Rule 404(b) evidence turns on the intended purpose of the evidence, not its substance.” *State v. Madplume*, 2017 MT 40, ¶ 23, 386 Mont. 368, 390 P.3d 142.

A.P.’s testimony was unquestionably relevant because Adams’s prior persistent sexual assaults of an adoptive daughter had a tendency to make the existence of R.A.’s sexual abuse more probable. *See* Mont. R. Evid. 401-402. The district court correctly found A.P.’s testimony met this standard because it indicated that Adams had a fixation with incestuous underage sex with his adopted daughters. As the district court explained:

Evidence of the prior alleged abuse tends to make it more probable that the Defendant acted knowingly because he knowingly engaged in such behavior previously. This alleged abuse also makes it more probable than it would be without the evidence that the Defendant is willing to pursue sexual gratification with his underaged descendants and/or persons in a father-daughter relationship with him.

(Doc. 68 at 9.)

The district court correctly identified several theories of admissibility in Rule 404(b) that were unrelated to Adams’s propensity to commit the offenses of conviction. *See Daffin*, ¶ 15 (“Rule 404(b) other acts evidence is admissible if the proponent can ‘clearly articulate how that evidence fits into a chain of logical inferences, no link of which may be the inference that the defendant has the propensity to commit the crime charged.’”) (quoting cases).

The district court correctly found A.P.’s testimony was admissible to prove motive and intent. Adams forwarded a general denial defense, which required the State to prove that he committed the charged offenses knowingly. This Court has previously held that the State’s burden to prove mental state in these circumstances supported the admission of similar evidence under Rule 404(b). *See State v. Peterson*, 2024 MT 5, ¶¶ 4, 18-20, 415 Mont. 34, 541 P.3d 776 (holding the testimony of three witnesses who asserted they had been sexually abused by the defendant previously was admissible under Rule 404(b) to prove intent); *Daffin*, ¶¶ 21-23 (“The testimony of Daffin’s ex-wife, long-time acquaintances, and former victims about Daffin’s behaviors served to prove that he knowingly groomed and sexually assaulted the victims of the charged crimes.”); *Madplume*, ¶ 30 (evidence of the defendant’s attempted sexual assault of a different victim in very similar circumstances shortly before the State alleged he raped and killed the victim was properly admitted to support motive and intent).

Here, A.P.’s testimony showed Adams acted knowingly and his conduct was not innocent, innocuous, or accidental. Similar to *Daffin*, ¶ 20, A.P.’s testimony showed Adams’s longstanding sexual fixation with underage girls. But Adams focused his sexual fixation on his young adopted daughters, which provided more compelling support for the admission of A.P.’s testimony in this incest case. Moreover, it provided evidence of the preparation and plan Adams used to sexually

abuse R.A. With both R.A. and A.P., Adams gained access to a vulnerable young child by adoption when her mother was unable to care for her. A.P.'s testimony showed Adams had used this grooming process before and knew that he could use it again to act out his sexual fantasies with his newly adopted daughter R.A.

The district court correctly found A.P.'s testimony was admissible because it was relevant and met multiple theories of admissibility under Rule 404(b) that were independent of Adams's character or propensity to commit the charged offenses.

**C. The district court correctly exercised its broad discretion to find the probative value of A.P.'s testimony was not substantially outweighed by the danger of unfair prejudice.**

“Even where other-acts evidence is relevant to an issue other than character or the defendant's propensity to commit the charged offense, and is thus not excluded under Rule 404(b), the evidence is still subject to balancing under Rule 403.” *Stewart*, ¶ 67 (internal quotations omitted). The rule provides that relevant “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Mont. R. Evid. 403. Relevant evidence will not be excluded under Rule 403 simply because it is prejudicial. *State v. Given*, 2015 MT 273, ¶ 32, 381 Mont. 115, 359 P.3d 90. Rather, the rule favors admission

and only applies when the risk of unfair prejudice substantially outweighs the evidence's probative value. *Peterson*, ¶ 21. “[S]uch evidence is inadmissible only when it will prompt the jury to decide the case on an improper basis.” *Given*, ¶ 33.

In its Rule 403 analysis, the district court correctly explained that the probative value of A.P.’s testimony was more probative than prejudicial. It reasoned:

Distasteful evidence is not automatically prejudicial and the nature of the charges in this case necessitates evidence of negative behaviors. The State describes a pattern of behavior by Defendant that would be shown by [A.P.]’s testimony, which is the same pattern of behavior alleged in this case. This pattern ties the past and present evidence together through the lens of a common, non-propensity motive that is specific to these instances of alleged sexual abuse, which are particular in their nature: rape of an adopted daughter.

(Doc. 68 at 10.)

Adams argues A.P.’s testimony was unfairly prejudicial because it was remote in time. While “neither nearness in time nor similarity is a prerequisite for the admission of evidence of other crimes, wrongs, or acts,” *Given*, ¶ 31 (citing *Salvagni*, ¶ 56), they are both appropriate considerations to determine probative value under Rule 403. *See Salvagni*, ¶ 56. But Adams has only addressed remoteness in time. He wholly avoids the striking similarities in the circumstances described by R.A. and A.P. The two must be considered together in a Rule 403 balancing. *See Given*, ¶ 31 (citing *Salvagni*, ¶ 56); *State v. Pelletier*, 2020 MT 249, ¶ 25, 401 Mont. 454, 473 P.3d 991 (depending on the nature of the evidence and

the purpose offered, remoteness in time may diminish the probative value of other acts evidence). As the district court correctly found, A.P.'s testimony was highly probative and addressed the very things that Rule 404(b) expressly allows—the motive, intent, preparation, and plan to rape R.A.

Adams adopted both R.A. and A.P. when they were very young from family members who could not care for them. R.A. and A.P. were vulnerable little girls who had to rely on Adams as their father and caregiver. Adams developed a relationship with them both as the only girl child in the home—R.A. an only child and A.P. the youngest child. Adams abused the girls when their mothers were working long hours or out of town. He subjected both girls to anal, vaginal, and oral sex. He numbed them with alcohol. Despite the abuse, both girls developed a trust for Adams that caused them to delay disclosure. R.A. believed it was normal to provide sexual acts for her father in exchange for ice cream and stuffed animals. A.P. endured years of abuse and numerous false promises from Adams that he would stop raping her before she finally told one of her older brothers about the abuse after she became a teenager.

To the extent the passage of time undermined the probative value of A.P.'s testimony, the similarities dramatically outpaced it in support based on the nature of the evidence and its purpose. *See Given*, ¶ 31 (citing *Salvagni*, ¶ 56); *Pelletier*, ¶ 25. Moreover, this Court has not established an arbitrary time limit for prior act

evidence that would exclude probative evidence. *See State v. Brogan*, 272 Mont. 156, 167, 900 P.2d 284, 291 (1995) (citing *State v. Tecca*, 220 Mont. 168, 172, 714 P.2d 136, 139 (1986); *State v. Ray*, 267 Mont. 128, 133, 882 P.2d 1013, 1016 (1994)). Here, the strikingly similar circumstances were highly probative despite the passage of time.

Adams attempted to undermine A.P.'s testimony by claiming her allegations were unsubstantiated. A.P. personally testified that Adams had sexually abused her in similar circumstances to R.A. This was the best evidence of the prior abuse, and Adams has cited no authority that requires further corroboration. These circumstances are distinguishable from the prior act evidence that this Court held was unfairly prejudicial in *Pelletier*, ¶¶ 13-28. In that case, the only evidence offered was the defendant's forced acknowledgement on cross-examination that he had been investigated for sexual assault 14 years earlier when he was a minor. *Id.* ¶ 10. The prior victim did not testify, and nothing in the record provided the result of the investigation, which left the only remaining purpose for the evidence to be propensity. Here, A.P. testified, and Adams cross-examined her, which allowed the jury to assess her credibility. This does not raise the same prejudicial concerns as those in *Pelletier*, ¶¶ 13-28.

Adams relies heavily on *Peterson*, ¶¶ 21-30. In that case, the State charged the defendant with felony sexual assault for allegedly putting his hand between his

11-year-old step-granddaughter's legs and moving his fingers when they were watching television one night. *Id.* ¶ 2. During trial, three other girls testified that Peterson had previously sexually assaulted them. *Id.* ¶¶ 7-8. The first said Peterson “exposed himself when she went to his home to retrieve her mother’s belongings.” *Id.* ¶ 7. The second, who was Peterson’s niece, said “she and Peterson had sexual intercourse three times a week or more during a year that she lived with him after running away from home at age twelve.” *Id.* ¶ 8. The third, who was also Peterson’s niece, said “Peterson began sexually assaulting her from when she was five years old until she was around fourteen.” *Id.*

This Court affirmed the admission of the three girls’ prior acts testimony to show motive and intent under Rule 404(b), but it noted “the relative probative value of the specific manner and frequency in which the State referenced and elicited witness references to them at trial is another matter under M. R. Evid. 403.” *Id.* ¶ 20. In *Peterson*, ¶¶ 24-25, the State made the prior act testimony a center point of its case from its opening statement to its rebuttal closing, which amplified the inherently prejudicial nature of the evidence. Moreover, the charged conduct of touching the victim’s vagina on one occasion over her pants paled in comparison to the two nieces’ testimony of repeated forced sexual intercourse over extended periods. *Id.* ¶ 23. “[T]he extent of the other acts evidence here overwhelmed the singular incident with which Peterson stood charged.” *Id.* ¶ 26.

This made it more likely that the jury improperly convicted Peterson based on his prior conduct. *Id.* ¶¶ 21-26.

Here, the State offered one prior act witness, the circumstances were substantially similar, and the State maintained A.P.'s testimony as a collateral part of its case. In its opening statement, the State merely stated A.P. would testify that Adams had sexually abused her as a child. It did not specify the abuse. A.P. testified near the end of the State's case, and her testimony simply confirmed that Adams had sexually abused her in the same ways he had abused R.A. A.P.'s testimony did not approach the abhorrent nature of R.A.'s vivid descriptions of Adams's abuse, such as sucking on Adams's private part like a popsicle and once having it so deep in her throat that she puked up spaghetti. *See Peterson*, ¶ 23. The State focused its closing argument on R.A.'s testimony of Adams's abuse and the circumstantial evidence that supported her allegations. Before it mentioned any prior act evidence, the State comprehensively reviewed the limiting instruction that the district court had provided and explained the limited purpose of A.P.'s testimony. The State did not belabor A.P.'s testimony or even reference the nature of the abuse. It briefly argued that her testimony supported the limited Rule 404(b) purposes of motive, intent, knowledge, preparation, and plan. The State reiterated the limited purpose of A.P.'s testimony during its rebuttal closing and only

addressed A.P.'s testimony further to explain the factual inaccuracies in Adams's closing.

Adams argues the State "explicitly reminded" the jury during its closing that Adams's abuse of A.P. "went unprosecuted and unpunished." (Br. at 39.) The State said nothing in its closing argument that could be interpreted as even a mere reference to this assertion. In its rebuttal closing, the State responded to Adams's attempt to impeach A.P. during his closing argument because she did not disclose Adams's abuse for 30 years. The State provided the jury with the facts. It said, A.P. "told us that she told her brother and then she told her then adoptive mom and she put it in the hands of God, were her words, and she moved on with her life." (Trial Tr. at 640.) The State then immediately explained to the jury that it had the opportunity to judge A.P.'s credibility and reminded them of the limited purpose of her testimony.

Adams quotes A.P.'s testimony that she had initially moved on from Adams's abuse without pursuing criminal charges because she "chose to leave it up to God's judgment," and she chose to testify because she "wanted to protect someone else." (Br. at 39 (quoting Trial Tr. 415-16).) But the State never referenced this testimony beyond what was necessary to respond to Adams's factually incorrect closing argument. This includes the State's opening statement, which included one sentence that summarized the strange circumstances that

resulted in the discovery of A.P. during the investigation and the choices she made after she left Adams's care.<sup>8</sup> It is clear from the record that the purpose of this singular statement was to address Adams's impending impeachment of A.P. It did not, however, improperly highlight A.P.'s testimony in a manner that meaningfully increased prejudice.

Adams asserts the district court failed to do enough to reduce the prejudice of A.P.'s testimony. But the district court, throughout the trial court proceedings, followed the required procedures for prior act evidence as outlined by this Court in *Salvagni*, ¶ 49. This included "giving an instruction on the limited scope for which the jury may consider the evidence." *Given*, ¶ 28. Adams has provided no authority that required the district court to provide more instructions. (Br. at 40.) This is a relevant consideration for the Rule 403 balancing, but Adams acknowledges that the State "cautioned the jurors at length" about the limited nature of the evidence during its closing. (Br. at 39.) Based on this record, it cannot be persuasively argued that the jury did not understand the limited purpose of A.P.'s testimony or that it meaningfully increased prejudice.

A.P.'s testimony was prejudicial. *See Given*, ¶ 32 (noting the highly inflammatory nature of child molestation evidence); *Stewart*, ¶ 68 (evidence that

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<sup>8</sup> The State's comments about A.P. during its opening statement were limited to two paragraphs of the transcript. (Trial Tr. at 191-92.)

tends to prove guilt is prejudicial) (citing cases). But Rule 403 “does not require the exclusion of relevant evidence simply because it is prejudicial.” *Id.* ¶ 33. Rather, it requires “a fact-specific balancing test favoring admission.” *State v. Murphy*, 2021 MT 268, ¶ 15, 406 Mont. 42, 497 P.3d 263 (internal quotations omitted). The probative value of A.P.’s testimony was high, and Adams has failed to show the district court abused its broad discretion when it found the resulting prejudice did not substantially outweigh that probative value.

**D. If this Court holds the district court erred, it was harmless trial error.**

“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(1). The evidentiary error alleged by Adams is a trial error. *State v. Van Kirk*, 2001 MT 184, ¶¶ 41-42, 306 Mont. 215, 32 P.3d 735. To determine whether a defendant’s right to a fair trial was prejudiced, this Court subjects trial errors to harmless error review. *Id.* ¶¶ 37-39. This Court determines if an error was harmless with the cumulative evidence test. *Stewart*, ¶ 46. “If the tainted evidence was admitted to prove an element of the offense, then the State must direct us to admissible evidence that proves the same facts as the tainted evidence and demonstrate that the quality of the tainted evidence was such that there was no reasonable possibility it might have contributed to the conviction.” *Id.*

Adams agrees that the State introduced A.P.'s testimony to prove Adams's mental state and intent. (Br. at 41.) As the district court correctly instructed the jury, mental state cannot be proven directly. (Doc. 79 at Instr. 17.) The jury permissibly could rely on all the facts and circumstances to support its finding that Adams knowingly imposed the sexual abuse on R.A. It began with R.A.'s detailed testimony regarding the abuse, which unquestionably supported Adams's mental state. R.A. said Adams frequently supervised her alone, he took her to the shop for oral sex and rewarded her with ice cream and toys, he taught her how to give him oral sex with pornographic videos, he told R.A. the sexual acts made him feel good, and he provided her with R&R whiskey mixed with soda when Michele was not there.

The jury could have relied on R.A.'s testimony alone to support its mental state determination. But this is not merely a "he-said/she-said" case because of the independent corroboration of much of R.A.'s testimony. (Br. at 42.) Michele and other witnesses confirmed that Adams frequently supervised R.A. alone while Michele was at work or out of town. The State admitted photographs that showed the locations where the abuse occurred exactly as R.A. described. The State admitted photographs that included stuffed animals that R.A. identified as given to her by Adams as rewards for sexual acts. Michele testified that her and Adams's drink of choice in the evening was R&R and Diet Pepsi. Moreover, Michele testified that Adams had a low sex drive and could not have sex regularly due to erectile

dysfunction. But Adams's pharmacy records told the jury a different story because he had filled prescriptions for more than 300 pills of erectile dysfunction medication between January 2020 and October 2021. (Trial Tr. at 592-96; State's Ex. 32.)

All these facts corroborated R.A.'s testimony and provided the jury with circumstantial evidence to support its finding that Adams knowingly committed the sexual abuse. Even more compelling evidence of Adams's mental state, however, was his internet search history, which he does not challenge on appeal. This further corroborated R.A.'s testimony and independently supported the jury's finding that Adams acted knowingly. During the years R.A. said the abuse occurred, Adams searched an excessive number of times for content directed at sex with a young child and how to teach a young child to perform those sexual acts. (Trial Tr. at 395-96; State's Ex. 31.) For example, when R.A. was three years old, Adams searched for "Three year old orgasm" and "Teaching 3 year old daughter to suck cock story." (Trial Tr. at 395-96; State's Ex. 31 at 60.)

The qualitative impact of R.A.'s detailed testimony and the extensive evidence that corroborated it far outweighed the impact of A.P.'s testimony. *See Stewart*, ¶¶ 45-51. If this Court holds the district court abused its broad discretion to admit A.P.'s testimony, it was harmless trial error.

## **II. This Court should reject Adams’s IAC claim.**

### **A. Standard of review**

“Only record-based ineffective assistance of counsel claims are considered on direct appeal.” *State v. Aker*, 2013 MT 253, ¶ 22, 371 Mont. 491, 310 P.3d 506 (quoting *State v. Howard*, 2011 MT 246, ¶ 18, 362 Mont. 196, 265 P.3d 606). “To the extent such claims are reviewable, ‘they present mixed questions of law and fact that we review de novo.’” *Id.*

### **B. Law applicable to IAC claims**

This Court reviews IAC claims by applying the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To show IAC, a petitioner has a burden to demonstrate by a preponderance of the evidence that: (1) counsel’s performance was deficient; and (2) the deficient performance prejudiced the defense. *State v. Mikesell*, 2021 MT 288, ¶ 19, 406 Mont. 205, 498 P.3d 192.

Counsel’s performance is deficient if it falls “below an objective standard of reasonableness measured under prevailing professional norms and in light of the surrounding circumstances.” *Whitlow v. State*, 2008 MT 140, ¶ 20, 343 Mont. 90, 183 P.3d 861. There is a strong presumption that counsel’s actions were within the broad range of reasonable professional assistance. *Mikesell*, ¶ 19.

To establish that the defendant was prejudiced by counsel’s deficient performance, a defendant must demonstrate a reasonable probability that, but for

counsel's deficient performance, the result of the proceeding would have been different. *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The likelihood of a different result must be "substantial." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

**C. Adams's IAC claim is not appropriate for review on direct appeal.**

This Court "will not speculate on counsel's alleged errors" without a complete record. *Mikesell*, ¶ 20. This Court will address an IAC claim on direct appeal only if the record "explains why counsel did not do something." *State v. Sawyer*, 2019 MT 93, ¶ 13, 395 Mont. 309, 439 P.3d 931. If the claim instead is based on matters outside the record, this Court will not review it on direct appeal, and the defendant may raise the issue in a postconviction proceeding. *Id.* This Court will consider a claim not based on the trial record if there is "no plausible justification" for counsel's action or inaction. *State v. Wittal*, 2019 MT 210, ¶ 13, 379 Mont. 155, 447 P.3d 1039 (citation omitted). However, "claims involving alleged omissions of trial counsel are often ill-suited for consideration on direct appeal." *Mikesell*, ¶ 21.

Adams has argued his counsel should have requested more limiting instructions for the prior act evidence.<sup>9</sup> He cites no authority that required more

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<sup>9</sup> Although Adams does not challenge on appeal the admission of his internet search history, he has alleged that his counsel provided ineffective assistance by not requesting additional limiting instructions at the time the State offered both his internet search history and A.P.'s testimony. (Br. at 43-52.)

limiting instructions. Rather, the record shows the district court followed the required procedures for prior act evidence as outlined by this Court in *Salvagni*, ¶ 49. The State does not dispute that Adams’s counsel could have requested more instructions. *See Salvagni*, ¶ 49 (This Court left the timing of the limiting instructions to the discretion of trial counsel—“the defendant may request.”). But the record does not explain why she did not. Contrary to Adams’s assertion, there are plausible justifications for not requesting additional instructions. *See Wittal*, ¶ 13. This Court has recognized that additional instructions may actually cause more prejudice when they repeatedly highlight the prior act evidence. *See State v. Lake*, 2022 MT 28, ¶ 43, 407 Mont. 350, 503 P.3d 274.

Without a record basis to explain his counsel’s actions, Adams’s IAC claim is not appropriate on direct appeal. *See Mikesell*, ¶¶ 20-23.

**D. If this Court considers Adams’s IAC claim, he has failed to meet his burden to prove it.**

Adams cannot meet his burden to prove either prong of his IAC claim. As explained above, Adams’s counsel may have made a strategic choice to not request additional limiting instructions to not draw unnecessary attention to the prior bad act evidence. *See Lake*, ¶ 43. That decision would not fall “below an objective standard of reasonableness measured under prevailing professional norms and in light of the surrounding circumstances.” *Whitlow*, ¶ 20.

Adams incorrectly argues that the law mandates a limiting instruction at the time the evidence is presented. (Br. at 45-46.) This Court in *Salvagni*, ¶ 49, expressly held: “If the court determines that the evidence is admissible, the defendant may request an instruction under Rule 105.” This Court in *Salvagni*, ¶ 49, expressly left the provision of a limiting instruction to the discretion of Adams and his trial counsel. The existence of a model jury instruction does not undermine trial counsel’s strategic choice regarding the parameters of its use or the strong presumption that counsel’s actions were within the broad range of reasonable professional assistance. *See Mikesell*, ¶ 19. Adams has failed to meet his burden to prove his counsel provided deficient performance. *See Whitlow*, ¶ 20.

To meet the prejudice prong of his IAC claim, Adams must show that a limiting instruction provided at the time the evidence was admitted would have created a substantial likelihood that he would have been acquitted. *See Strickland*, 466 U.S. at 694; *Richter*, 562 U.S. at 112. Adams has failed to meet this burden because the record shows that the jury was well instructed on the limited application of the prior bad act evidence. The district court provided a limiting instruction with the general instructions. Adams acknowledged during trial and now on appeal that the State during its closing argument comprehensively explained the limited application of both the internet search history and A.P.’s

testimony. Adams's counsel reiterated the limited application of the evidence during her closing argument, and the State reiterated it again in rebuttal.

To conclude the jury would have acquitted Adams based on these proposed limiting instructions is not reasonable. Based on the extensive testimony unrelated to the prior bad act evidence, the jury had plenty of evidence to convict Adams. The State will not comprehensively belabor that evidence again here, but R.A.'s testimony was compelling and corroborated. The jury rejected Adams's defense because it was not convincing. Additional limiting instructions would not have changed the result. Adams has failed to meet his burden to prove either element of his IAC claim, and this Court should affirm his convictions.

### **CONCLUSION**

The State respectfully requests this Court affirm Adams's convictions and sentences.

Respectfully submitted this 21st day of October, 2025.

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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,953 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

*/s/ Brad Fjeldheim*

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## CERTIFICATE OF SERVICE

I, Brad Fjeldheim, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 10-21-2025:

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