IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 25-0461

STATE OF MONTANA,

Plaintiff and Appellee,

v.

SHAUN LEE KUHNHAUSEN,

Defendant and Appellant.

OPENING BRIEF OF APPELLANT

On Appeal from the Montana Tenth Judicial District Court, Fergus County, DC-2022-027, The Honorable Heather Perry, Presiding

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STATEMENT OF THE CASE

This is an appeal from the final judgment and sentence of the Tenth Judicial District Court, Fergus County, issued by The Honorable Heather Perry, on June 26, 2025, adjudging Appellant Shaun Lee Kuhnhausen (Mr. Kuhnhausen) guilty, after a May 16, 2025, jury verdict, finding him guilty of:

- Count I (Negligent Arson, felony violation of § 45-6-102, M.C.A.);
- Count II (Negligent Arson, misdemeanor violation of § 45-6-102, M.C.A.); and
- Count III (Negligent Endangerment, misdemeanor violation of § 45-5-208, M.C.A.).

(D.C. Doc. 181, Judgment and Sentence, Exhibit **A**).

The District Court sentenced him to ten (10) years, five (5) suspended, and imposed restitution in the amount of $4,390,467.77 and prosecution costs in the amount of $45,611.70, on Count I; six (6) months in county jail on Count II, and one (1) year in county jail for Count III, all concurrent, but stayed pending appeal (D.C. Doc. 181, Exhibit **A**; D.C. Doc. 182, Order for Restitution Following Hearing, Exhibit **B**; Transcript, May 29, 2025, at 104-109).

Mr. Kuhnhausen challenges this order.

Mr. Kuhnhausen also appeals from the District Court's denial of his pretrial motion to dismiss Counts I and II (D.C. Doc. 51, Order Denying Motion to Dismiss Counts I and II: Felony and Misdemeanor Charges of Negligent Arson, Exhibit **C**).

Mr. Kuhnhausen also appeals from several prejudicial trial errors as discussed below, including the District Court's denial of his motion for a mistrial.

COMBINED STATEMENT OF FACTS AND PROCEDURE

By Information filed June 2, 2022, the State charged Mr. Kuhnhausen with Counts I-III for his alleged failure to extinguish a recreational campfire he had on his private property on October 4, 2021, in Fergus County, that the State alleged caused the South Moccasin wildfire north of Lewistown, which damaged over 10,000 acres, including both public and private lands, and specifically property belonging to local ranchers (D.C. Doc. 3).

The State alleged Mr. Kuhnhausen had been at his property the night before the fire began with a couple friends and started a campfire in a fire ring with inadequate safety precautions or oversight, and negligently allowed the fire to escape the fire ring, which it alleged grew into a conflagration that endangered the lives and property of others (D.C. Docs. 1, 3).

Fergus County Sheriff Deputy Glenn Sweet responded to the scene and interviewed witnesses (Transcript, March 1, 2023, at 3-5; Transcript, May 14, 2024, at 17-19).

On October 6, 2021, Deputy Sweet, along with Montana Department of Criminal Investigation (DCI) Agent Mark Strangio interviewed Mr. Kuhnhausen, which the District Court suppressed, determining it was involuntary on the basis

the officers unlawfully compelled the same by leveraging his probation status thereby placing Mr. Kuhnhausen in "the classic penalty situation" (D.C. Doc. 49; Transcript, March 1, 2023, at 55-60).

On October 27, 2022, in addition to Mr. Kuhnhausen's motion to suppress, he also filed a motion to dismiss Counts I and II, arguing that the criminal offense of "negligent arson" specifically excepted "a negligent campfire" which is governed by § 76-13-123, M.C.A., and therefore, the State charged him with offenses not cognizable under Montana law and, regardless, could not establish every element of the offense (D.C. Doc. 33).

The District Court conducted a hearing March 1, 2023, during which it indicated it was inclined to deny the motion, but allowed defense counsel an opportunity to address the State's new argument and exhibit, namely House Bill 145 from 2007, that it claimed showed the Legislature's intent to allow multiple theories of liability for a negligent fire that causes injury, death, or property damage (Transcript, March 1, 2023, at 50; D.C. Doc. 48).

Mr. Kuhnhausen responded on March 10, 2023, challenging the State's purported "legislative history" argument, and House Bill 145, when the Official Annotator's Notes and Official Comments to § 45-6-102, M.C.A., made clear that the offense of "misuse of campfires" is addressed by § 76-13-123, M.C.A. (failure to extinguish a recreational campfire), regardless of the State's position the

Legislature's amendments in 2007, *vis-à-vis* House Bill 145, implicitly amended, or repealed, this note (D.C. Doc. 50).

On March 22, 2023, the District Court agreed with the State's prosecutorial discretion to charge an offense, and that once it filed the Information and had "no further burden for proof with regard to [the] charges until trial" (D.C. Doc. 51).

With regard to cognizability of the offense, the District Court reasoned:

> [T]he Court does not find it necessary or proper to delve into the supplementary materials referenced by counsel to interpret that statute fully and correctly. Here, the Court finds it can both accurately apply the statute and respect the intent of the legislature by looking no further than the language of the statute itself. The elements of negligent arson are clearly delineated within the statute defining that offense. The Court finds nothing about that statute ambiguous or unclear, meaning that further investigation is unnecessary and inappropriate in applying or explaining it.
> …
> In the Court's view, nothing about the State's charging decision required it to impermissibly twist or otherwise modify the plain language of the negligent arson statute. Moreover, there is no ambiguity that would necessitate or even allow the Court to delve into the type of analysis Defendant argues is applicable here. The statute is understandable on its face, and nothing in it prevents the State from bringing a charge of negligent arson under the instant circumstances. Doing so is well within their legal discretion, and the Court sees nothing confusing or out of the ordinary about their factual allegations or the law they identify at issue. Frankly speaking, the Court finds he legislative history, commission comments, and annotations far more confusing and ambiguous here than the statute itself. As a result, the Court declines to delve even further into counsel's many arguments based on that

> supplementary material here because it finds, as a threshold matter, such a dive unnecessary.
>
> (D.C. Doc. 51).

A week before trial, on May 7, 2024, the State disclosed the report of Deputy State Fire Marshal Sean Edwards.

During a pretrial hearing conducted on May 10, 2024, defense counsel objected to the late disclosure of his expert opinions and requested a continuance of trial, however, the State represented that Mr. Edwards would only testify as to the facts, and would not offer expert testimony (Transcript, May 10, 2024, at 3-8).

Specifically, the State said during the hearing that "Assistant Fire Marshal Mr. Edwards is not a wildland fire specialist. So, we were not using him as a wildland fire investigator. His photos, his drone views, his collections, and his observations is what we were gonna rely on with him" (Transcript, May 10, 2024, at 7).

The jury trial commenced on May 13, 2024, and concluded May 16, 2024.

The State called several witnesses, including several local ranchers, and Mr. Kuhnhausen's friend, Randee Jo Brown, who testified that she and Mr. Kuhnhausen, and another friend drove up to the property, listened to music, and enjoyed a little campfire in a fire pit on Mr. Kuhnhausen's property and that after they were done, Mr. Kuhnhausen doused same with five (5) to seven (7) big buckets of water from the ditch nearby, stirred it was a large stick, and made sure it

was no longer smoking and was fully extinguished (Transcript, May 14, 2024, 118-122, 129-131, 136-137).

The State also called Mr. Edwards as a "fact witness" who assisted the sheriff's office with investigating the wildfire, but admitted he had no training or experience with wildland fires, only structure-fires (Transcript, May 14, 2024, at 246).

Upon questioning by the State, Mr. Edwards testified that the campfire did not appear to have been doused with water or stirred with a stick. Defense counsel objected and requested a sidebar with the judge on the issue (Transcript, May 14, 2024, at 195).

The following exchange took place outside the presence of the jury:

> MR. YELLIN: Yes, Your Honor. I think we're getting into expert testimony which is this witness was not noticed up as an expert. And we had this discussion, I think it was Friday, about this witness. It was my understanding that he'd be a fact witness. I think that was the representation made to the Court. And it was my understanding that that's how it was gonna go. He was gonna talk about that this is a picture and go through the pictures. But now we're getting into forensics, basically.
>
> COURT: Well, but Mr. Yellin isn't whether or not he observed evidence of water or he observed evidence of stirring what he sees in real time there, that is fact testimony.
>
> MR. YELLIN: I think it's a combination of the two Your Honor.

COURT: It might be hybrid, but he was, he was identified in the information as a deputy fire marshal.

MR. YELLIN: He wasn't identified as an expert, Your Honor. And the other thing about it was we got his report a week ago and because of that I brought this to the Court's attention that we may need additional time. Now they're bringing up all this other evidence that this guy is, he may be presenting as an expert. That's why I, that was one of the main reasons why I was thinking that we needed more time, Your Honor. And the State represented to the Court that he was gonna be a fact witness, not an expert witness. And that's why they, that's why they brought Bonebrake in a year and a half after or more, about a year and a half after the incident, Your Honor. This is not an expert and was not noticed up as such. And it's highly prejudicial now because of the testimony and the delay in providing his report to us.

COURT: Okay, Mr. Sipe go ahead and respond.

MR. SIPE: Okay. I'm presenting him as a fact witness. This is his fact. He has some background in it, but it's not any different than a lay person would have in regards to their observations, in regards to stirring or in regards to that water being there. He was there 22 hours later and his observations on what he saw. I'm not asking him for an expert opinion. I'm just asking him what he saw.

MR. YELLIN: The question is, how do you know it wasn't stirred? That is. That's beyond the realm of common knowledge Your Honor. How do you know? It's basically forensics Your Honor. Because if it wasn't, why don't they just offer the picture, not have anybody talk about it? Because the picture's right there. This is highly prejudicial, Your Honor, and there's no notice.

COURT: So, this is what I would say, as the deputy fire marshal, which they gave notice of, that we've known since June of 2022 he was a deputy fire marshal,

and he was a fact witness. So, he was on the scene presumably within some reasonable amount of time after the fire. Okay. So, I think what he can testify to is, was it, did it appear to have water doused on it? Did it appear to be stirred? No. No. Or you can, you can preface that with in your training as a deputy fire marshal, when you just look at something, do you have training to just determine and leave it very, very short? Do you have training to determine whether initially, when you're just viewing the scene, whether something had water on it or whether it was stirred? Just do yes or no. We won't go into it any further than that unless Mr. Yellin chooses to go into it.
MR. SIPE: I'm fine with that.

COURT: Okay. Mr. Yellin, do you have any other things you want to put of record sir for offers of proof?

MR. YELLIN: The only other thing I would say is I don't know if they're gonna try to do something else and we don't have to run back in here Your Honor. Is there gonna be anything that's gonna be along this sort of forensic that we need to address is what I'm wondering.
MR. SIPE: Your Honor, I believe that Mr. Edwards is a fact witness. And I'm asking him the factual questions.

COURT: All right, but he's out there as part of the official investigation, Mr. Yellin. So, to the, to the point of, are they going to ask him investigation questions? I think we can all agree that, like law enforcement, a deputy fire marshal will answer questions of investigation. Now, he's already said that he's not an expert in wildland fire, but they surely, in the same way that when Sergeant Johnson testifies, he's gonna testify as to his investigation. Mr. Edwards was out there in his official capacity. So, to some extent, he does get to testify to his official investigation.

MR. YELLIN: But he doesn't get to testify as an expert unless they give notice Your Honor. There was no notice. That's the point. And then they gave us the report last

week. If this was a given, we should've had this report a long time ago. That's . . . why they told you he would just be a fact witness.
. . .

COURT: I don't think he's given expert testimony either, outside his knowledge as he would normally do with a crime scene investigation. I think he's right, right down the middle of the line on his crime scene investigation. There in his official capacity. So, while we won't go into his experience and training and all of the details, he gets to testify about what he was out there doing in his official capacity and what he saw and what his first sense impressions were. So, Mr. Yellin, if there's nothing else you want to say for appeal, we'll go back out and resume.

MR. YELLIN: I just want to say for the record Your Honor I understand that a witness can testify that that's a fair and accurate depiction of the scene without them being the person taking the photograph. But the Court was saying that because you took the photographs that was part of my expectation, and that's not the case at all Your Honor. Why even give notice of expert witnesses if they don't have to give? I just don't understand if you're gonna give expert testimony, why there's the rule that you give an expert witness disclosure.

COURT: Well, I'm not convinced that whether or not you can tell if there was water poured on it or if it was stirred is expert testimony. That's sort of like asking, is the horse lame? So, you're a town kid, and maybe you don't know, but everybody else does. That's not expert testimony. Now, what's expert testimony is calling the vet and saying, what is the cause of the lameness? That's the expert testimony. But as the horse walks around in a circle in front of the vet clinic, we can all tell whether or not it's lame.

> MR. YELLIN: I understand that Your Honor. That's why I objected when I did, because the question was, why, how did you know that it wasn't? And that to me is.
>
> COURT: And so, I've already precluded that.
>
> MR. YELLIN: I understand, I understand.
>
> COURT: So. Okay. All right, let's go back out and see how we do. Thanks, everyone.
>
> (Transcript, May 14, 2024, at 196-202).

The State continued its questioning of Mr. Edwards regarding whether the campfire had been doused with water or stirred, and Mr. Edwards testified that the presence of "white powdery ash" indicated the fire had not been extinguished (Transcript, May 14, 2024, at 204).

The State then asked Mr. Edwards if he was "aware of any fire restrictions in place on October 4th or October 3rd?" to which defense counsel immediately objected and requested a sidebar (Transcript, May 14, 2024, at 212).

Prior to retreating to chambers, the District Court made the following remark in the presence of the jury: "All right, you can have one [side bar]. But around here, Mr. Yellin, everybody knows about the fire restrictions. We, every sheriff's office, everybody. It's common knowledge" (Transcript, May 14, 2024, at 213).

Once the parties were in the judge's chambers, defense counsel moved for a mistrial on the basis of the court's remark:

> That's highly prejudicial. That goes directly to the heart of the government's case of proving negligent arson, Your Honor. And by the Court saying it's common knowledge, the implication is that my client knew about that. And so, the Court is putting its thumbprint and its imprinter [*sic*] on that fact Your Honor. So that is highly prejudicial. And because of that, and that alone, I move for a mistrial. Beyond that Your Honor, as part of our motion to dismiss, we raised this whole 76-13-123 in connection with 76-13-121 as a basis to dismiss the case. Because my client should have been charged under this statute and I thought the government was being nuanced and cautious by not bringing out the fire restrictions previously. Because the State was aware that by doing so, it would be opening the door to a renewal of our motion as well as additional jury instructions on this particular statute or series of statutes.
> . . .
> I'm renewing my motion to dismiss because they're raising now in front of the jury that there was a violation of the fire restrictions. And because of that, I believe that the jury now should be instructed on that particular statute Your Honor and maybe even a lesser included even if it's outside of the criminal code section, because there's a penalty related to lighting a fire when it's a restriction under 76-13-123. Your Honor, with regard to the Court's comment, the Court, my memory may not be 100% all the time, but I distinctly remember the Court saying, it is common knowledge that there were fire restrictions at that time. That was, that's what I heard. I guess the record will speak for itself, Your Honor, but that's what I heard because when I got up to object, that was the basis, that was the basis.
>
> (Transcript, May 14, 2024, at 213-16).

The State reiterated that its prosecutorial discretion allows it to determine which offense to charge, and the District Court agreed, but offered to caution the jury to disregard the remark, which defense counsel rejected, and renewed his motion for a mistrial on the basis the court's remark was "highly prejudicial."

The District Court denied the motion, and once the parties were back in the presence of the jury offered the following cautionary instruction instead —"[t]he jury shall disregard and not consider any testimony or comments made either by the Court or counsel regarding any county fire restrictions that, any county fire restrictions in October of 2021 that may or may not have been in effect" (Transcript, May 14, 2024, at 216-18).

The State continued its direct questioning of Mr. Edwards, including questions about the weather and relative humidity and its effect on wildfire growth overnight, to which defense counsel objected, to no avail (Transcript, May 14, 2024, at 219, 243).

Mr. Edwards admitted during recross-examination that wildland fires were not his area of expertise (Transcript, May 14, 2024, at 246).

In its rebuttal closing argument, the State argued to the jury that "based on the nature and the circumstance and the weather that that was a known risk and a known danger that Mr. Kuhnhausen was aware of and took it upon himself to ignore" (Transcript, May 14, 2024, at 49).

The State's actual wildfire expert, Jeffrey Bonebrake, testified on the third day of trial, May 15, 2024. He characterized the fire in the fire ring as a "campfire" (Transcript, May 15, 2024, at 41).

Notably, both the State and the Court repeatedly characterized it as "campfire" and the State never disputed that it was started for recreational purposes.

Mr. Bonebrake testified that he could not precisely pinpoint the wildfire's origin and various other mechanisms could have caused it, such as a vehicle spark or a spontaneous combustion (Transcript, May 15, 2024, at 51, 69, 74, 105).

After the State rested its case, the defense determined not to call any witnesses, including Mr. Kuhnhausen (Transcript, May 15, 2024, at 154-55).

The parties settled jury instructions outside the presence of the jury.

The defense requested a result-oriented "purposely" instruction which the District Court denied, using the conduct-oriented instruction as proposed by the State in Instruction No. 19 — "[a] person acts purposely when it is the person's conscious object to engage in conduct of that nature" (Transcript, May 15, 2024, at 177-80).

The next morning, on the last day of trial, May 16, 2024, the parties revisited jury instructions before closing arguments.

The defense requested the statutory definition of "negligent" be included in Instruction No. 21, which the District Court also denied (Transcript, May 16, 2024, at 2-5).

Specifically, counsel for Mr. Kuhnhausen proposed "that the first sentence should be read, a person acts negligently when an act is done with a conscious disregard, that the result, should be aware of the result of the risk of failing to extinguish a campfire" (Transcript, May 16, 2024, at 4).

In other words, counsel requested a result-oriented instruction.

During closing arguments, the State made the following remarks, over objection:

> I'm very honored that I have been elected five different times in three different counties. . . I was elected in Musselshell County. I was elected in Golden Valley County. And I've been elected twice and appointed in Fergus County. I am the government for Fergus County. I don't believe that that should be disparaging, and it is not a duty that I take lightly. I'm honored to do it. I bring this case before you because I believe that there was a crime committed.
> . . .
> Is there independent evidence, separate evidence that water was put on that campfire? Were we able to corroborate that? I don't believe there's any evidence that there was water put on that fire. I don't believe there's any evidence that shows that.
>
> (Transcript, May 16, 2024, at 49-52).

The jury deliberated and returned a guilty verdict on all three (3) charges (Transcript, May 16, 2024, at 56-57).

Sentencing took place on December 16, 2024, however, it was ultimately continued, over Mr. Kuhnhausen's objection, when it became evident that the State did not produce affidavits, losses may have been duplicated, and its' witnesses lacked specificity of damages and supporting documentation for the amount of restitution sought by the State. Mr. Kuhnhausen also objected to the costs of prosecution (Transcript, December 16, 2024, at 5, 8, 97-105).

Specifically, defense counsel objected to a continuance of the restitution hearing on the basis the State failed to meet its burden and should not be afforded another bite at the apple — "make clear that I object to that [so] there's no mistake about it on the record because it's been some time since we got to this point" (Transcript, December 16, 2024, at 100).

The District Court agreed that more specific documentation was required, but implicitly overruled Mr. Kuhnhausen's objection to a continuance and reconvened the hearing on May 29, 2025. After hearing testimony from various witnesses, the District Court ordered $4,390,467.77, in restitution and imposed prosecution costs of $45,611.70, both over Mr. Kuhnhausen's objection, and then proceeded to the sentencing portion of the hearing, where it sentenced Mr.

Kuhnhausen per the State's recommendation (Transcript, May 29, 2025, at 66-72, 100-09).

Mr. Kuhnhausen now appeals to this Court from the District Court's judgment and sentence.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's denial of a motion to dismiss, including when the issue involves mixed questions of aw and fact as to the sufficiency of the State's probable cause to support the statutory elements of the crime charged. *State v. Giffin*, 2021 MT 190, ¶¶ 8-11, 405 Mont. 78, 491 P.3d 1288. Similarly, the district court's interpretation and construction of statutory language is a matter of law which this Court reviews for correctness, or *de novo*. *State v. Schultz*, 2025 MT 142, ¶ 7, 422 Mont. 504, 571 P.3d 685.

This Court's "*de novo*" standard of review "for correctness" when reviewing issues of law is not one of deference and affords no discretion to the district court's rationale or decision. *Planned Parenthood v. State*, 2015 MT 31, ¶ 25, 378 Mont. 151, 342 P.3d 684 ("review *de novo* [means] without deference to the trial court's decision"); *Siebken v. Voderberg*, 2012 MT 291, ¶ 20, 367 Mont. 344, 291 P.3d 572 ("[a] *de novo* review affords no deference to the district court's decision and we independently review the record…").

This Court reviews jury instructions to determine whether the instructions, as a whole, fully, and fairly instruct the jury on the law and it will reverse a criminal conviction when the district court abused its discretion in giving an instruction which "prejudicially affected the substantial rights of the defendant." *State v. Pierce*, 2025 MT 257, ¶ 19, 424 Mont. 516, 578 P.3d 932.

A decision regarding the admissibility of expert testimony during trial is reviewed for an abuse of discretion which occurs when a district court acts arbitrarily or unreasonably, resulting in substantial injustice.

However, "judicial discretion must be guided by the Rules of Evidence, applicable statutes, and principles of law." *State v. Grimshaw*, 2020 MT 201, ¶ 17, 401 Mont. 27, 469 P.3d 702. An "abuse of discretion" standard or review also applies to a district court's refusal to grant a mistrial. *State v. Smith*, 2020 MT 304, ¶ 12, 402 Mont. 206, 476 P.3d 1178.

The Court reviews a sentence for "legality." *Schultz*, ¶ 7. The appropriate measure of restitution is a question of law, which is reviewed for correctness. *State v. Johnson*, 2011 MT 116, ¶ 13, 360 Mont. 443, 254 P.3d 578.

SUMMARY OF ARGUMENT

Not only should the District Court have dismissed the negligent arson charges on the basis they were statutorily barred, but the prejudicial statements of the Court itself, along with its trial rulings, should have resulted in a mistrial.

Reversal by this Court is required.

Aside from the Court's improper comment to the jury regarding Mr. Kuhnhausen's guilt, numerous other errors plagued the lower court proceedings, rendering meaningless Mr. Kuhnhausen's due process rights to a fair trial by an impartial judge and jury.

Such additional issues include the erroneous jury instructions and the testimony of Deputy Fire Marshal Sean Edwards, both of which prejudiced Mr. Kuhnhausen's right to a fair trial.

Prosecutorial misconduct in the State's closing argument also requires reversal.

All of these errors independently, or cumulatively, require reversal by the Court.

If not reversed on these bases, the Court should vacate the District Court's order of restitution.

ARGUMENT

I. THE DISTRICT COURT SHOULD HAVE DISMISSED THE NEGLIGENT ARSON CHARGES IN COUNTS I AND II.

An Information must inform a defendant regarding the nature of the offense and the State cannot charge a legally incognizable offense. *State v. Rowe*, 2024 MT 37, ¶ 20, 415 Mont. 280, 543 P.3d 614; *State ex rel. Keyes v. Mont. Thirteenth Jud. Dist. Court*, 1998 MT 34, ¶¶ 16, 20, 288 Mont. 27, 955 P.2d 639. In *State v. Hembd*, 197 Mont. 438, 439, 643 P.2d 567, 568 (1982), this Court reversed a conviction for attempted negligent arson because it is "nonexistent crime."

This Court should remedy "the substantive prejudicial effect of [the State's] initial charging error" and order the charges dismissed. *Rowe*, ¶ 20; *see also*, *Hembd*, 197 Mont. at 442, 643 P.2d at 569.

Contrary to the District Court's rationale, dismissal is still required regardless of an initial determination of probable cause. *Ramsey v. Yellowstone Cnty. Just. Ct*., 2024 MT 116, ¶ 18, 416 Mont. 472, 549 P.3d 458.

It is undisputed that a "recreational campfire" is at issue in this case, and liability for failing to extinguish the same is governed by § 76-13-123, M.C.A., and not the criminal offense of negligent arson codified in § 45-6-102, M.C.A., which must be predicated on the purposeful act of starting a fire, as opposed to the purposeful act of starting a campfire or "recreational fire."

While the District Court reasoned that the State enjoyed prosecutorial discretion to charge either offense, this premise must also be rejected. Section 76-13-123, M.C.A., is specific to Mr. Kuhnhausen's actions in this case and precludes the State from charging "negligent arson" as a matter of law.

> 76-13-123. Failure to extinguish recreational fire.
> A person who fails to extinguish a recreational fire that the person has set or ignited or in which the person has been left in charge or who negligently allows the fire to spread from the area described in 76-13-121 is subject to the penalty provided in 50-63-102 and is subject to the provisions of 50-63-103.

Under § 50-63-102, M.C.A., the "[a] person who sets or leaves a fire that spreads and damages or destroys property of any kind not belonging to the person is subject to a civil penalty of not less than $50 or more than $500." Section 50-63-103 and -104, M.C.A., outline the recoverable damages for the failure to extinguish a recreational campfire and authorizes a civil suit by a property owner against the offender for the recovery of property damages.

In contrast, the criminal offense of negligent arson, provides in § 45-6-102(1), M.C.A., that:

> [a] person commits the offense of negligent arson if the person purposely or knowingly starts a fire or causes an explosion, whether on the persons own property or property of another, and thereby negligently:
> (a) places another person in danger of death or bodily injury, including a firefighter responding to or at the scene of a fire or explosion; or

(b) places property of another in danger of damage or destruction.

§ 45-6-102(1), M.C.A.

The offense requires proof of both: 1) purposely starting a fire; and 2) negligently placing property in danger, and for the felony enhancement, negligently putting people in danger of death or bodily harm. *Hembd*, 197 Mont. at 440, 643 P.2d at 568. While the term "fire" is not defined in this part of the Montana Code, in the Official Annotator's Notes regarding the Montana Legislature's adoption of the statute a "fire" is clearly distinguished from a recreational fire or "campfire."

The Official Annotator's Notes state the following regarding the elements of the offense of negligent arson:

> Negligent Arson requires three elements: (1) the offender must purposely or knowingly start a fire or cause an explosion; (2) this conduct must then be followed by a negligent act or omission, which (3) places either a person or some property in danger of injury. The action has two important features. First, it prohibits the use of fire or explosives which endanger persons or property whether or not injury or damage result. Second, it prohibits the burning of one's own property where there is high probability that adjoining property will be damaged.
> . . .
> **Damage which results from misuse of campfires is dealt with in M.C.A., 76-13-123 rather than with this provision**. Similarly, damage from fires negligently started is punished under M.C.A., 50-63-102. The wording for this section on Negligent Arson has been

> adapted from the Model Penal Code provision on reckless arson. (emphasis added).

It is a well-established rule of statutory construction that specific provisions prevail over general provisions, and it is presumed "that the Legislature does not pass meaningless legislation." *Oster v. Valley Co*., 2006 MT 180, ¶ 17, 333 Mont. 76, 140 P.3d 1079.

Under § 1-2-102, M.C.A., "[i]n the construction of a statute, the intention of the legislature is to be pursued if possible" such that "[w]hen a general and particular provision are inconsistent, the latter is paramount to the former, so a particular intent will control a general one that is inconsistent with it." And "[i]t is a maxim of statutory interpretation that a general statute will yield to a specific statute." *State v. Berdahl*, 2017 MT 26, ¶ 20, 386 Mont. 281, 389 P.3d 254 (citing *Simms v. Schabacker*, 2014 MT 328, ¶ 29, 377 Mont. 278, 339 P.3d 832).

Where a particular or "special statute" addresses a specific criminal offense, it will prevail over "a general legislative enactment." *Taylor v. Dept. of Fish, Wildlife & Parks*, 205 Mont. 85, 91-92, 666 P.2d 1228, 1231 (1983) ("[w]e recognize the rule of statutory construction which provides that special statutes will prevail over general statutes").

All of these arguments and authorities were ignored by the District Court in preference to prosecutorial discretion and the State's purported "legislative history" argument, which must be rejected.

While a prosecutor enjoys some latitude in charging an offense, such discretion is not unlimited, and the charged offense must be legally cognizable under the law. *Rowe*, ¶ 20*; Hembd*, 197 Mont. at 439, 643 P.2d at 568.

Additionally, the 2007 Amendments in HB 145 did not change or alter the Official Notes, to which this Court defers. *State v. Giffin*, 2021 MT 190, ¶ 8, 405 Mont. 78, 491 P.3d 1288 (following "[t]he official comments to Montana's leave to file information statute, § 46-11-201, M.C.A."); *Warren v. Campbell Farming Corp*., 2011 MT 324, ¶ 10, 363 Mont. 190, 271 P.3d 36 (following "instructive" Official Comments to § 35-1-461, M.C.A.); *Modern Mach. v. Flathead Cnty*., 202 Mont. 140, 147-48, 656 P.2d 206, 211 (1982) ("[t]his section is better understood by looking to the Official Comment to section 30-2-704(2), M.C.A.").

Specifically, with respect to Title 45, this Court has found such comments controlling as to whether a defendant's alleged actions are culpable under the charged offense. *State v. Whiteshield*, 185 Mont. 208, 211-12, 605 P.2d 189, 191 (1980) (affirming dismissal of felony escape charge because "the official commission comment" to § 45-7-306, M.C.A. made "clear" that the actions of "respondents were punishable only under the misdemeanor section of the escape statute").

The District Court should have reached the same result.

In addition to the Official Annotator's Note which makes clear that "misuse of campfires" is addressed by § 76-13-123, M.C.A., the Legislature's Official Comments to § 45-6-102, M.C.A., indicate:

> The provisions of subsection (1) are to be construed as pertaining to affirmative knowing and purposeful acts and are not intended to include omissions to report, control or combat a fire which has placed a person in danger of bodily injury or death, or an occupied structure in danger of damage or destruction. If a person starts a fire negligently or fails to control a fire thus placing persons or property in danger the act is made punishable by R.C.M. 1947, section 28-115 [now M.C.A., 76-13-123].

Both the Annotator's Note and Official Comments remain in the current Montana Code. The State's attempt to argue that the 2007 amendments to § 76-13-123, M.C.A., which merely excised redundant language and authorized an additional civil restitution penalty, somehow abrogated this directive from the Montana Legislature as to what actions qualify as negligent arson must be rejected.

Even if the Legislature intended to amend, or should have amended, its Official Note to § 45-6-102, M.C.A., when it amended § 76-13-123, M.C.A., in 2007, it did not do so. The Court will not presume the Legislature intended to "implicitly repeal" a "statutory scheme" because the Legislature is "presumed to act with knowledge of existing law." *Alkire v. Mun. Court, City of Missoula*, 2008 MT 223, ¶ 11, 344 Mont. 260, 186 P.3d 1288 (citation omitted). "[I]t is further presumed that the Legislature 'does not intend to interfere with or abrogate a

former law relating to the same matter unless the repugnancy between the two is irreconcilable.'" *Alkire*, ¶ 12 (citation omitted).

A court must "presume that the legislature would not pass meaningless legislation." *State v. McGowan*, 2006 MT 163, ¶ 15, 332 Mont. 490, 139 P.3d 841. If a statutory scheme arguably "subverts" a prosecutor's discretion, "then it is up to the legislature, not this Court, to change the law." *Paulsen v. Huestis*, 2000 MT 280, ¶ 22, 302 Mont. 157, 13 P.3d 931.

Additionally, courts "must assume that the legislature does not perform idle acts" and "[a]n interpretation that gives effect is always preferred to one that makes a statute void or treats a statute as mere surplusage." *Formicove, Inc. v. Burlington N.*, 207 Mont. 189, 194, 673 P.2d 469, 471 (1983) (citing § 1-3-223, M.C.A.). A statute is interpreted "as a whole," with effect given to the entire statutory scheme and "the intent of the legislature." *U.S.W., Inc. v. Mont. Dept. of Revenue*, 2008 MT 125, ¶ 20, 343 Mont. 1, 183 P.3d 16. "[A]n absurd result will be avoided when a "reasonable explanation can be given consistent with the legislative purpose." *State v. Trimmer*, 214 Mont. 427, 432-33, 694 P.2d 490, 493 (1985).

Contrary to the State's position, there is nothing in the legislative history to indicate the Legislature intended to change the culpability for a negligently extinguished campfire from a criminal misdemeanor to only a civil penalty. This would render § 76-13-123, M.C.A., meaningless. Rather, the Legislature in 2007

omitted the "misdemeanor" language from § 76-13-123, M.C.A., because it was redundant of the language in § 76-13-112, M.C.A. (providing for misdemeanor penalty for violation of any statute in Part I) and inserted into § 76-13-122 through -125, additional references to the civil restitution provisions and penalties in § 50-63-102 and -103 to ensure that property owners could be compensated.

Perhaps the most salient evidence of the Legislature's intent is that it did not deem appropriate to change the language or § 76-13-112, M.C.A., in either HB 145 or HB 130. "[T]he Legislature is presumed to act with knowledge of existing law." *Ross v. City of Great Falls*, 1998 MT 276, ¶ 17, 291 Mont. 377, 967 P.2d 1103. Specifically, § 76-13-112, M.C.A., provides, in relevant part, that "a person who violates this part or part 2 or any rule adopted pursuant to this part or part 2 is guilty of a misdemeanor and shall be punished by a fine of not more than $500 or imprisonment in a county jail for not more than 6 months or both."

Accordingly, because the Official Comment to § 45-6-102, M.C.A., still instructs that a person who negligently fails to control or extinguish a recreational campfire does not commit the offense of negligent arson, but rather § 76-13-123, M.C.A., the District Court should have dismissed the negligent arson charges against Mr. Kuhnhausen. His actions do not qualify as negligent arson as a matter of law and his convictions for Counts I & II must be reversed.

II. THE DISTRICT COURT SHOULD HAVE DECLARED A MISTRIAL.

A motion for a mistrial should be granted when the defendant has been denied a fair and impartial trial by the objectionable evidence, testimony, or in this case, a comment by the court, which often occurs when the same can be said to have contributed to the conviction. *State v. Ankeny*, 2018 MT 91, ¶ 36, 391 Mont. 176, 417 P.3d 275; *State v. Bollman*, 2012 MT 49, ¶ 33, 364 Mont. 265, 272 P.3d 650. "In determining whether a prohibited statement contributed to a conviction, we consider the strength of the evidence against the defendant, the prejudicial effect of the testimony, and whether a cautionary instruction could cure any prejudice." *Ankeny*, ¶ 36 (citing *Bollman*, ¶ 33).

Under Rule 614(b), M.R.Evid., a court may question a witness in front of the jury but a judge "must be cautiously guarded so as not to constitute express or implied comment." Rule 605, M.R.Evid., provides, "[t]he judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point."

Rule 2.3, M.C.Jud.Cond., requires judges to act in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and avoids impropriety or the appearance of impropriety.

Similarly, Rule 3.3, M.C.Jud.Cond., provides "[a] judge shall not testify as a character witness in a judicial, administrative, or other adjudicatory proceeding or otherwise vouch for the character of a person in a legal proceeding, except when duly summoned."

"[A] judge should refrain from conduct that reflects adversely on their impartiality and/or indicate bias towards one side." *Judicial Stds. Comm'n of Mont. v. Baugh*, 2014 MT 149, ¶ 9, 375 Mont. 257, 334 P.3d 352 (citing Rule 1.2 M.C.Jud.Cond.). In *Baugh*, a District Court judge violated the Code of Judicial Conduct when he made prejudicial and improper comments during a criminal trial, in the presence of the jury.

During Mr. Kuhnhausen's trial, both the District Court and prosecutor made improper comments aimed towards defense counsel's "city boy" and "out-of-town" persona, and appealed to the jury's local and "hometown" rancher community, to which the District Court clearly identified by her statements during trial.

While perhaps innocuous or intended to be lighthearted when singularly referenced, the combined prejudicial effect of these statements in front of the jury cannot be ignored.

This Court can take judicial notice that Governor Greg Gianforte appointed District Court Judge Perry in 2022 to replace retiring Judge Oldenburg, noting in his public announcement on June 7, 2022, that she is "[a] graduate of Geyser High School, and fourth generation rancher" who "served as County Attorney for Judith Basin since 2020" and "previously represented farmers [and] ranchers…" (*See https://news.mt.gov/GovernorsOffice/Gov_Gianforte_Appoints_Heather_Perry_to_Tenth_Judicial_District_Court*).

The District Court's most inappropriate comment — "around here, Mr. Yellin, everybody knows about the fire restrictions" — not only violated the above rules governing judicial conduct, but it severely prejudiced Mr. Kuhnhausen's right to a fair trial.

First, there was no actual evidence introduced of any fire restrictions, let alone that Mr. Kuhnhausen was aware of them (Transcript, May 14, 2024, at 212-13).

Second, and more egregiously, the District Court essentially instructed the jury of Mr. Kuhnhausen's guilt, telling jurors he knew of the fire restrictions and the associated danger drought posed to surrounding ranches, but decided to have a campfire anyway. *See* § 45-6-102(1)(b), M.C.A. (negligent arson requires a person to "knowingly" start a campfire which "negligently places property or another in danger of damage or destruction").

The jury is the sole judge of the facts on the issue of guilt or innocence and it is their sole charge to decide whether the State has established the elements of the offense. A court's invasion of that role taints the presumption of innocence. "[I]f the effect of a question or comment is to permit a reasonable inference that implies the trial judge's opinion as to the defendant's innocence or guilt, this constitutes a violation of defendant's statutory right and thus requires reversal." *State v. Boudoin*, 106 So. 3d 1213, 1227 (La. App. 5th Cir. 2012).

Jurors respect the esteemed office of judge and it "strains credulity to believe" they would ignore or disregard statements made by the judge. *See State v. Brown*, 1999 MT 339, ¶ 27, 297 Mont. 427, 993 P.2d 672 (Nelson, J., specially concurring).

This is true when the remark is, as is here, a strong statement of the District Court's view of the facts directly at issue on the question of guilt.

The District Court's improper comment here not only impugned Mr. Kuhnhausen's presumption of innocence and implied his negligence in having a campfire during a drought, but more flagrantly aligned her with the prosecution and emotionally appealed to the ranching community's fear of wildfire and their recent shared tragedy. The statement transformed the atmosphere of the trial from one of impartiality to one of partisanship, where the District Court and prosecution

aligned with local ranching families to the antagonism of Mr. Kuhnhausen, and his counsel, who were cast as out-of-town villains.

Jurors hold judges in high esteem, which necessarily requires that they demonstrate impartiality in order to protect the integrity of this largely self-policed position of public trust. *See Draggin' Y Cattle Co. v. Addink*, 2016 MT 98, ¶ 24, 383 Mont. 243, 371 P.3d 970 (judges "should aspire at all times to conduct that ensures the greatest public confidence in their independence, impartiality, integrity, and competence") (quoting Preamble to M.C.Jud.Cond.). To that end, a trial judge should not express personal opinion to the jury and effectively "exploit" the position of public trust "to satisfy [their own] personal desires." *Baugh*, ¶ 36 (citing *In re Deming*, 736 P.2d 639, 659 (Wa. 1987)).

It is apparent from the record that the District Court was acutely aware of her mistake. Her improperly expressed sentiment exacerbated an already emotionally-charged trial, which could not be remedied by her immediate and *sua sponte* offering of a curative instruction. This is not a case where a witness or attorney makes an improper comment or violates an order in *limine*.

Rather, when a judge makes a prejudicial statement, the curative effect of an instruction is effectively meaningless. *Brown*, ¶ 27. "Such a disclaimer is not a panacea for pervasive and biased judicial action" and often does not alleviate the

appearance of impartiality. *Kennedy v. Los Angeles Police Dept*., 901 F.2d 702, 710 (9th Cir. 1989).

The District Court should have declared a mistrial on the basis her spontaneous statement amounted to "structural error" because it tainted the impartiality of the entire process, infecting and contaminating the framework of the trial as to render it fundamentally unfair to Mr. Kuhnhausen. *State v. Strommen*, 2024 MT 87, ¶ 29, 416 Mont. 275, 547 P.3d 1227 (citing *State v. Van Kirk*, 2001 MT 184, ¶¶ 38-39, 306 Mont. 215, 32 P.3d 735).

It should also be noted that the prejudicial effect of the District Court's comment was compounded when considering the prosecutor's closing argument where he identified himself to the jury as the local "government," again reinforcing the "us against them" mentality and creating a controversy where local ranchers, many of whom sat on the jury, were aligned with the judge and prosecution, depriving Mr. Kuhnhausen of a fair trial.

Reversal is the only remedy.

III. DEPUTY FIRE MARSHAL SEAN EDWARDS' TESTIMONY PREJUDICED MR. KUHNHAUSEN'S SUBSTANTIAL RIGHTS.

Rule 701, M.R.Evid., authorizes a lay witness to give an opinion based on their perception and helps the jury understand their testimony regarding a fact in issue, while Rule 702 governs testimony by experts who use their "scientific, technical, or other specialized knowledge" to assist the fact finder in understanding evidence or determining facts. While professionals can testify under either Rule, any testimony as a "fact witness" must be related to the professional's "perceptions and conclusions based on extensive experience and training." *State v. Kaarma*, 2017 MT 24, ¶¶ 84-85, 386 Mont. 243, 390 P.3d 609.

"If testimony crosses from lay to expert testimony the witness must be recognized as an expert by the court or error occurs." *Kaarma*, ¶ 86. A fire professional may testify to his personal observations, but not what those observations mean unless his training permits the same.

Here, Mr. Edwards' testimony exceeded the boundaries of Rule 701 and crossed into the realm of expert testimony. He admittedly had no training in how to detect whether a campfire was extinguished, or "relative humidity" and its effect on the growth of a wildfire overnight. As such, his testimony should have been preluded at trial. *Massman v. Helena*, 237 Mont. 234, 242, 773 P.2d 1206, 1211 (1989) (fireman's testimony was beyond the scope of Rule 701).

This testimony was unduly prejudicial to Mr. Kuhnhausen as Mr. Edwards' testimony was disclosed a week before trial (over objection) and, moreover, spoke directly to the element of negligence of failing to extinguish the campfire and thus likely contributed to his conviction. *Kaarma* ¶ 89 ("this is particularly imperative where the inadmissible evidence goes to the proof of an element of the crime charged").

Reversal on this basis is required.

However, the questioning of Mr. Edwards continued with the State inquiring whether he was "aware of any fire restrictions in place" which the State implicitly took advantage of in its rebuttal closing argument when it argued to the jury that "the weather that was a known risk and a known danger that Mr. Kuhnhausen was aware of and took it upon himself to ignore" (Transcript, May 16, 2024, at 49).

Additionally, the comment on "fire restrictions" lead to the District Court's prejudicial comment that "around here, Mr. Yellin, everybody knows about the fire restrictions" which resulted in the motion for a mistrial (Transcript, May 14, 2024, at 212).

As argued below, this improper comment resulted in additional prejudice to Mr. Kuhnhausen's fair trial rights, not remedied by the Court's curative jury instruction, requiring reversal.

IV. PROSECUTORIAL MISCONDUCT REQUIRES DISMISSAL.

It is reversible error if prosecutorial misconduct prejudices a defendant's substantial rights. *State v. Mercier*, 2021 MT 12, ¶ 37, 403 Mont. 34, 479 P.3d 967. Alleged improper comments by a prosecutor are reviewed in the context of the entire argument. *State v. McDonald*, 2013 MT 97, ¶ 14, 369 Mont. 483, 299 P.3d 799.

A prosecutor should not express a direct personal opinion or belief that the accused is guilty and should not assert or attest to personal knowledge of a pertinent fact. *State v. Miller*, 2022 MT 92, ¶ 23, 408 Mont. 316, 510 P.3d 17; *see also*, Rule 3.4(e), M.R.P.Cond. ("[a] lawyer shall not . . . assert personal knowledge of facts in issue"); *State v. Stringer*, 271 Mont. at 380-81, 897 P.2d at 1071-72 (a lawyer may not offer "personal opinion" as to "the guilt or innocence of the accused" prosecutor statement of "strong [personal] belief . . . that these crimes were committed" and that the accused "committed the crimes").

In fact, this Court has repeatedly "caution[ed] prosecutors that they are treading on precariously 'thin ice' every time they . . . personalize otherwise permissible comments and arguments on the evidence in terms of "I think" [or] "I believe." *Miller*, ¶ 38. The prosecutor in this case did just that, telling the jury "I believe that there was a crime committed" and also said "I don't believe there's

any evidence that there was water put on that fire. I don't believe there's any evidence that shows that" (Transcript, May 16, 2024, at 49-52).

These improper comments prejudiced Mr. Kuhnhausen's right to a fair jury trial, as guaranteed by the Sixth Amendment, U.S. Const., and Art. II, § 24, Mont. Const., and his related constitutional rights to the presumption of innocence, against compelled self-incrimination, and the state's burden of proof beyond a reasonable doubt.

Specifically, the prosecutor told the jury he believed Mr. Kuhnhausen committed the crime he was charged with, i.e., that he was guilty. This is clear prosecutorial misconduct, especially when he prefaced such statements with his important role as the government, and being elected "five different times in three counties," which exacerbated the prejudice to Mr. Kuhnhausen. This Court has noted its concern that "the jury may simply adopt the prosecutor's views instead of exercising their own independent judgment as to the conclusions to be drawn from the testimony." *Stringer*, 271 Mont. 367, 897 P.2d at 1071-1072.

Similarly, the prosecutor's improper statements to the jury regarding his belief that Mr. Kuhnhausen did not attempt to extinguish the campfire went to the heart of the issue to be resolved by the jury.

There was testimony on both sides of this issue. The prosecutor's improper statements not only misrepresented the record, but they improperly added to the probative force of the trial testimony.

Reversal is required.

V. JURY INSTRUCTIONS NOS. 19 AND 21 PREJUDICED MR. KUHNHAUSEN'S SUBSTANTIAL RIGHTS.

If the District Court's jury instructions, as a whole, did not fully and fairly instruct the jury on the law, to the prejudice of the defendant's substantial rights, this Court will reverse. *Pierce*, ¶ 19. Such as the case here with respect to Instructions Nos. 19 and 21, where Mr. Kuhnhausen requested result-based instructions as opposed to conduct-based instruction regarding the State's burden to prove the mental states of both "purposely" and "negligently."

The offense of negligent arson in § 45-6-102(1), M.C.A., provides, in relevant part, that "[a] person commits the offense of negligent arson if the person purposely or knowingly starts a fire or causes an explosion, whether on the person's own property or property of another, and thereby negligently: (a) places another person in danger of death or bodily injury, including a firefighter responding to or at the scene of a fire or explosion; or (b) places property of another in danger of damage or destruction."

The offense of negligent arson requires proof of both: 1) purposely starting a fire; and 2) negligently placing property in danger, and for the felony

enhancement, negligently putting people in danger of death or bodily harm. *Hembd*, 197 Mont. at 440, 643 P.2d at 568. The State must establish that the defendant "intended to start a fire." *In re G.T.M.*, 2009 MT 443, ¶ 22, 354 Mont. 197, 222 P.3d 626.

In other words, the defendant must intend a certain result. And for the second element of negligence, such intent must negligently result in danger to property and/or people. Culpability does not hinge on the conduct of a starting a fire, but rather the result of failing to extinguish it.

Thus, Mr. Kuhnhausen proposed the following result-based instruction: "a person acts purposely when it is the person's conscious object to cause such a result," however, the Court gave the following conduct-based instruction in Instruction No. 19 — "[a] person acts purposely when it is the person's conscious object to engage in conduct of that nature" (Transcript, May 15, 2024, at 177-80).

Mr. Kuhnhausen also proposed the following first sentence in Instruction No. 21: "a person acts negligently when an act is done with a conscious disregard, or when the person should be aware of the result of the risk of failing to extinguish a campfire" (Transcript, May 16, 2024, at 4).

"Jury instructions that 'relieve the State of its burden to prove every element of the charged offense beyond a reasonable doubt violate the defendant's due process rights." *Pierce*, ¶ 29 (citing *City of Missoula v. Zerbst*, 2020 MT 108, ¶ 10, 400 Mont. 46, 462 P.3d 1219). This Court has found prejudicial error when a District Court erroneously given a conduct-based instruction when the offense required a result-oriented instruction. *State v. Johnston*, 2010 MT 152, ¶ 17, 357 Mont. 46, 237 P.3d 70.

While this Court has not decided explicitly the issue of whether the offense of negligent arson is a conduct or result-based offense, it is Mr. Kuhnhausen's position that it is a result-based offense because it criminalizes the negligent outcome of an action, not the intent to cause the outcome itself. The jury instructions in Nos. 19-21 allowed the members of the jury to convict Mr. Kuhnhausen based solely on his alleged intent to start a campfire, which is not unlawful conduct (as already argued in Section I above). The State was required to prove the intent *vis-à-vis* an unlawful result and the jury should have been instructed on the same.

Accordingly, these erroneous jury instructions affected his substantial rights, requiring reversal.

VI. CUMULATIVE ERROR REQUIRES REVERSAL

This Court has recognized that "[t]he cumulative error doctrine mandates reversal of a conviction where numerous errors, when taken together, have prejudiced the defendant's right to a fair trial." *Smith*, ¶ 16. The cumulative effect of the aforementioned errors, even if the Court deems one or more individually harmless, prejudiced Mr. Kuhnhausen substantial rights such that the only remedy is a new trial, not plagued with errors. *Smith*, ¶ 35 "[t]he numerous errors discussed above, when taken together, prejudiced Smith's right to a fair trial, mandating reversal of Smith's conviction under the doctrine of cumulative error").

Mr. Kuhnhausen respectfully requests such cumulative error review, and reversal, if the Court does not reverse on a single issue.

VII. THE RESTITUTION ORDER MUST BE VACATED.

A court must order restitution in an amount which fully compensates victims for a pecuniary loss; however, it is the State's burden to substantiate the same with record evidence. *State v. Pierre*, 2020 MT 160, ¶¶ 12-13, 400 Mont. 283, 466 P.3d 494.

Under § 46-18-242(1)(a)(ii), M.C.A., the restitution amount shall be supported by "an affidavit that specifically describes the victim's pecuniary loss and the replacement value in dollars of the loss, submitted by the victim."

Section 46-18-243(1)(a), M.C.A., authorizes "all special damages, but not general damages, substantiated by evidence in the record, that a person could recover against the offender in a civil action arising out of the facts or events constituting the offender's criminal activities." Similarly, § 46-18-244(2), M.C.A., provides that "[i]n the proceeding for the determination of the amount of restitution, the offender may assert any defense that the offender could raise in a civil action for the loss for which the victim seeks compensation."

The State failed to meet its burden at the initial sentencing hearing and the District Court, over objection, ordered another hearing to allow the State another shot at proving restitution. When the State has failed to meet its initial burden with respect to restitution, the remedy is to strike the restitution award imposed on the defendant. *See, e.g., State v. Cole*, 2020 MT 259, ¶¶ 16, 18, 401 Mont. 502, 474

P.3d 323; *State v. Breeding*, 2008 MT 162, ¶ 20, 343 Mont. 323, 184 P.3d 313.

The State's untimely and unjustified failure to initially provide restitution documentation requires this Court to vacate the restitution order. *People v. Weeks*, 490 P.3d 672, 677 (Colo. App. 2020).

The first restitution hearing was six (6) months after the jury's verdict, and the second hearing came more than a year later. Because "[t]he government failed to meet its burden of proof" the Court should "decline to give it a second bite at the apple . . . to make the record that it failed to make in the first instance." *U.S. v. Campbell*, 372 F.3d 1179, 1183 (10th Cir. 2024).

The District Court's imposition of costs for prosecution charges in the amount of $45,611.70 must also be vacated as unlawful.

While § 46-18-232(1), M.C.A., authorizes the imposition of costs for "expenses specifically incurred by the prosecution," as defense counsel argued to the District Court, it is "patently unfair in the sense that . . . [y]ou have to pay to prosecute yourself" which violates Mr. Kuhnhausen's due process rights and his right to the presumption of innocence under the Fifth Amendment, U.S. Const., and Art. II, § 17, Mont. Const. (Transcript, December 16, 2024, at 8).

The burden of proof is on the prosecution to demonstrate guilt beyond a reasonable doubt.

Mr. Kuhnhausen should not be charged with compensating the State for performing its own statutory and constitutional obligations to the detriment of his own.

CONCLUSION

As established by the foregoing arguments and legal authorities, numerous errors require reversal of Mr. Kuhnhausen's convictions, and he respectfully requests this Court to order dismissal of the charges against him, with prejudice, at least with respect to Counts I and II.

Alternatively, Mr. Kuhnhausen respectfully requests the Court to vacate the District Court's restitution order and imposition of prosecution costs.

Respectfully submitted this 27th day of January, 2026.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this opening 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 not more than 10,000 (9,925) words, excluding caption, certificate of service, and certificate of compliance.

/s/ Jeremy S. Yellin, Esq.
Jeremy S. Yellin, Esq.

APPENDIX