IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0518

STATE OF MONTANA,

Plaintiff and Appellee,

v.

GARY RICHARD JONES,

Defendant and Appellant.

# BRIEF OF APPELLEE

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

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## ISSUES PRESENTED

1a. For Appellant's preserved claim—when the district court overruled Appellant's two hearsay objections in which the treating physician and therapist repeated the child accuser's allegation Appellant sexually abused her—whether the recitations were harmless when: (1) the accuser testified, was subject to cross-examination, and testified to the same thing; and/or (2) the recitations were cumulative of same facts adduced from other witnesses and video exhibits, admitted without objection.

1b. Whether this Court should reach Appellant's unpreserved arguments—embedded throughout Appellant's first-raised issue—claiming the therapist and physician testified to additional hearsay. If so, whether Appellant meets his burden to show plain error.

2. Whether this Court should review Appellant's ineffective assistance of counsel (IAC) claim on direct appeal, when Appellant argues no plausible explanation justifies his counsel's failure to object to hearsay in video exhibits and in witness testimony, but the record shows: (1) counsel stipulated to the State's video containing the accuser's first disclosure, in exchange for the State stipulating to defense videos depicting the accuser backtracking; (2) counsel lodged hearsay objections several times during the trial; (3) some witness statements were not hearsay; and (4) counsel actively solicited the accuser's out-of-court statements to

support his theory the accuser was not credible. If so, whether Appellant has met his burden to show IAC and prejudice.

3. Whether Appellant can prove cumulative error.

## CASE PRESENTED

After a jury trial, Appellant Gary Richard Jones was found guilty of sexual intercourse without consent (SIWOC) against his adopted daughter, five-year-old K.S., occurring between August 2020 through August 2021. (Doc. 41; Trial Tr. at 431, hereafter "Tr. page #".) He was sentenced to Montana State Prison for 100 years with a 25-year parole restriction. (Doc. 61 at 1-2; Sent. Tr. 31-32.)

## FACTS PRESENTED

### I. The background

In 2016, K.S., a girl, was born to Whittney Seibert and Gregory Anguiano. (Tr. 163.) Anguiano soon thereafter left Montana and never had a relationship with K.S. (Tr. 172-73.)

In December 2019—after meeting earlier that year on a dating app—Jones and Whittney married. Jones legally adopted K.S. and brought his child from a prior relationship, S., into the blended family. (Tr. 107, 173-74.)

Whittney had been a McDonalds manager for 14 years. In 2020, she was working three jobs—additionally working at Dollar Tree and Door Dash—all while studying college Business Administration full-time. (Tr. 163.)

Jones worked at Tech by Design. (Tr. 167.) He was otherwise "focused on his [computer] gaming" for "multiple hours at a time." (Tr. 175.) He played video games until 4 a.m., then fell asleep when he was supposed to be helping get the kids ready in the morning. (*Id*.)

K.S. and S. had separate bedrooms. Whittney originally had cameras in both rooms so she could check in on them remotely. (Tr. 177.) When Jones would sleep in after staying up playing video games—and while Whittney was already out working—she would check the cameras remotely in the morning, see that the kids weren't ready, drive back, and wake Jones up to get the kids ready. (Tr. 175.)

In 2021, Jones decided K.S. was "mature enough to not have a camera" in her room, and he "put it downstairs in the rec room." (Tr. 177, 215-16.) The camera in S.'s room was not removed. At the time, K.S. was five years old and S. was six years old. (Tr. 177.)

Jones and Whittney's sex life was "not very much at all[]" active. (Tr. 174.) Jones admitted to Whittney he had a pornography addiction and he was going to meetings for that addiction. Once, Whittney went to check on something the home

computer—not anything illicit—and Jones appeared defensive and took the computer. (Tr. 178-79.)

## II. The disclosure

During the school year, K.S. and S. would be at school until 1:30 or 2:30, then would be watched by Whittney's parents, Tammy Seibert and Herman "Lucky" Seibert. (Tr. 167-68, 132, 143-45, 156.) In the summer, the kids would be at Tammy and Lucky's house during the day while Whittney and Jones worked. Otherwise, if Whittney was working, the kids would be with Jones. (Tr. 168.)

Jones would pick up the kids in the evening from Lucky and Tammy's house. (Tr. 149.) Beginning late 2020 or early 2021, Lucky noticed that when Jones would arrive, K.S. would "scream and run away, she would cry, [and] she did not want to go home." (Tr. 145.) There was "fear in her reaction" and the grandparents had an "inkling" that something was going on, but "never in our wildest dreams would we think that it was sexual abuse." (Tr. 157.) Whittney also witnessed that when K.S. would have to go with Jones "she would start crying profusely, wanting to go with [Whittney instead]." (Tr. 169.)

In the beginning of 2021, K.S. began to have panic attacks, and wet the bed "quite often." While she was previously potty-trained by three years old, when she

was five years old, she was having "accidents every night" and peeing "behind the door[,]" explaining that Jones wouldn't let her go to the bathroom. (Tr. 170-71.)

On August 2, 2021, in the afternoon, Tammy was watching the grandkids and decided to give the girls a haircut. (Tr. 105, 119-20.) While Tammy was giving K.S. a haircut, K.S. asked, "Grandma, can I tell you something?" Tammy responded, "Yes." K.S. said, "Will you keep it a secret?" Tammy responded, "I don't know." K.S. said, "My daddy put his penis in my mouth." Tammy turned on her phone, hit the record button, and asked K.S. to tell her again. (Tr. 120-21.)

**TAMMY**: Okay, what did your daddy do?

**K.S.**: He was sticking his penis into my mouth. Wait, why are you putting it on tape?

**TAMMY**: When?

**K.S.**: Why are you putting it on tape?

**TAMMY**: When?

**K.S.**: Um at morning times, and at dark times.

**TAMMY**: Is your mommy home?

**K.S.**: No, she is not home when my dad is sticking his penis in my mouth.

**TAMMY**: And where is [S.] when he is doing this?

**K.S.**: Um, at home.

**TAMMY**: What is she doing though?

**K.S.**: She is playing but my dad, my dad keeps covering me up in the blanket that way so I can't see what my dad is doing …with me.

**TAMMY**: Okay.

**K.S.**: So that's what was happening.

(State's Ex. 1, admitted at Tr. 122, published at Tr. 132-33.)

Tammy texted Lucky. Lucky arrived home ten minutes before Jones arrived for pickup. (Tr. 123.) Lucky called the police. (Tr. 148.)

When Jones arrived, Lucky took him to the back bedroom and showed him K.S.'s disclosure video. (Tr. 124, 148.) Jones denied the allegation and tried to leave with the girls. (Tr. 125, 149.) But Lucky and Tammy said, "No, you're not taking the girls anywhere[]" and conveyed their intent to keep the girls there until police arrived. (Tr. 125, 149.)

Jones called Whittney—who was working her second job at Door Dash—and explained Lucky was "calling him a pedophile." (Tr. 179.) Whittney arrived next, distraught. (Tr. 125, 181.) Tammy showed Whittney the video. (Tr. 126, 181.)

Meanwhile, K.S. told Lucky "what she had said on the recording, that this is something that had happened." (Tr. 152, 160.) Lucky also noted that K.S. "used

her hand just like this (indicating),[1] and I mean as a male, you know what that meant." (Tr. 152-53.) Lucky was "extremely angry" and "frustrat[ed]" to "hear something like that come out of a little five-year-old girl's mouth." (Tr. 149.)

Billings Police Department Officer Brandon Lange arrived on scene. While Officer Lange did not directly question K.S., "she did make a spontaneous disclosure" related to the sexual assault while Officer Lange was speaking with Whittney. Officer Lange noted that Whittney was "in disbelief," and was further "minimizing some of [K.S's] claims[.]" He referred K.S. and Whittney to medical resources and to detectives for a forensic interview. He contacted Child Protective Services (CPS.) (Tr. 222-25.)

Whittney assured Officer Lange that Jones "would not be staying at the residence and that she would take sole custody of [K.S.]." (Tr. 227.) They left in separate cars: Jones and S. in one car, and K.S. and Whittney in the other car. However, Jones ended up back at their house that night. (Tr. 182-83.)

Tammy felt sick to her stomach and Lucky was "extremely concerned[.]" (Tr. 126-27, 153.) In the morning, Lucky called police again and highlighted that the girls were still in Jones's care. (Tr. 153.)

[1] The State clarified, "if I could just identify that the witness made a C-shaped motion toward his mouth." The Court responded, "It's on the record." (Tr. 153.)

## III. Confronting K.S., CPS involvement, the result, and the therapy.

Back at their house the night of the disclosure, Jones and Whittney confronted K.S. (Tr. 183.) Whittney recalled they were "trying to see whether or not [K.S.] would change" her story. (Tr. 183-84.) Whittney observed K.S. was frustrated, confused, scared, and distraught. (Tr. 184-85, 218.) Whittney took two videos of the interaction:

> **WHITTNEY**: Are you scared of your dad?
>
> **K.S.**: No.
>
> **WHITTNEY**: What?
>
> **K.S.**: No.
>
> **WHITTNEY**: No what?
>
> **K.S.**: I'm not scared of my dad.
>
> **WHITTNEY**: Did he put his penis in your mouth? And tell the truth! Did he put his penis in your mouth?
>
> **K.S.**: No.
>
> **WHITTNEY**: Did he put his penis in your mouth?
>
> **K.S.**: I said no.
>
> **WHITTNEY**: Say it louder!
>
> **K.S.**: No.
>
> **WHITTNEY**: Why are you telling people that he put his penis in your mouth?

**K.S.**: Because I forgot he didn't.

**WHITTNEY**: What do you mean?

**K.S.**: I just forgot that he didn't.

**WHITTNEY**: You don't tell lies, [K.S.]. Are you scared of your dad?

**K.S.**: [*pause*] No.

**WHITTNEY**: Do you love your dad?

**K.S.**: Yeah.

**WHITTNEY**: Can you tell him I love you?

**K.S.**: Dad I love you.

**JONES**: Love you too.

**WHITTNEY**: Get up there and give him a hug and a kiss.

**K.S.**: [*complies*]

(Def.'s Ex. A, admitted at Tr. 4-5, published at Tr. 217.) Whittney asked similar questions, and K.S. again responded she "forgot that [Jones] didn't" put his penis in her mouth. (*See* Ex. A.) The conversation continued:

**K.S.**: I just forgot that he didn't put his penis in my mouth 'cause I forgot.

**WHITTNEY**: What do you mean you forgot? Cause he didn't do it!

**K.S.**: I just forgot that . . . I did . . . I didn't . . . like . . .

**WHITTNEY**: So where did you see this happen then?

**K.S.**:  I . . . at home.

**WHITTNEY**:  At home where?

**K.S.**:  At our house.

**WHITTNEY**:  Where?

**K.S.**:  Here.

**WHITTNEY**:  On what?

**K.S.**:  [inaudible, sounds like "*bed*"]

**WHITTNEY**:  What do you mean?

**K.S.**:  I don't know.

**JONES**:  You saw it somewhere, so where did you see it?

**WHITTNEY**:  Where did you see this happen?

**K.S.**: In the bedroom.

**WHITTNEY**: What bedroom?

**K.S.**:  In mom and dad's bedroom.  In your guys' bedroom.

**WHITTNEY**:  With who?

**K.S.**:  Dad.

**WHITTNEY**:  And?

**K.S.**: Nobody else.  Only dad. It was only [S.] and me and dad home. Without you home.

**WHITTNEY**:  If dad didn't do it to you then what was happening? Where did you get this information?

**K.S.**: I don't know.

**WHITTNEY**: [K.S.]?

**K.S.**: What?

**WHITTNEY**: Where did you get this information?

**K.S.**: I don't know where I got thi— …where I got it.

**WHITTNEY**: But dad never touched you in that way, did he?

**K.S.**: No.

**WHITTNEY**: He didn't hurt you, he didn't touch you?

**K.S.**: [*no response*]

**WHITTNEY**: [K.S.,] you need to say words.

**K.S.**: No.

(Def.'s Ex. B, admitted at Tr. 4-5, published at Tr. 217.[2])

Whittney was later angry at herself for insisting to her daughter "it didn't happen[.]" (Tr. 185, 217-18.) Whittney herself was molested throughout her childhood from two different predators and never received any mental health treatment. Her actions regarding her daughter's disclosure made her relive her own experiences. (Tr. 186-88.)

[2] The State was unable to play Def.'s Ex. B. A replacement exhibit was supplemented to this record. (3/3/26 Notice.)

Jones appeared angry that night. Whittney put the kids to bed, while Jones went downstairs to play video games. Whittney was "still in the unknown[]" as she was cleaning the dishes and thinking about her own abuse experiences in relation to what her daughter had disclosed. (Tr. 189.)

The next day, Jones, Whittney, S., and K.S. went the CPS office in the afternoon. The girls were individually questioned, followed by Whittney and Jones. (Tr. 190-91.) CPS placed the girls in the grandparents' custody, and Lucky picked them up that night. (Tr. 127, 153, 192.) Jones punched a hole in the hallway wall. Later, Whittney and Jones went out to dinner with Jones' family. Jones told his family the girls were "at a sleep over." (Tr. 191-92.)

Whittney soon began to feel suicidal. Extended family members reached out, but Jones "wouldn't let" Whittney "talk to them without [him] being present." A week later, Whittney moved out and stayed with her sister for mental support. (Tr. 192-93.) After hearing the forensic interview and talking with CPS, Whittney decided to "believe [her] daughter." She was reunited with the girls on August 14, 2021. (Tr. 195.) She immediately ceased talking with Jones and later got a divorce. (Tr. 203.) Whittney moved into her parent's house until she could get Jones removed from her house. (Tr. 129-30.)

K.S. was previously happy-go-lucky and outspoken and liked dancing, unicorns, and singing. (Tr. 168-69.) In addition to the previous panic attacks,

emotional attachment to Whittney, and potty accidents every night and regression, (Tr. 170-71), after her disclosure, K.S. began digging her thumb into her dresser and pulling down "as hard as she could until she dr[ew] blood." K.S. did so because she said, "she didn't want her blood anymore." One time, K.S. also somehow obtained a razor blade in the bath and Tammy came back to find that the bath was full of blood and K.S. was "bleeding in the water." K.S. would lock herself in the bathroom and try to "pull out her eyelashes[,]" explaining she "didn't want them anymore." She screamed in her sleep and was "acting like she was pushing somebody away[,]" and her nightmares were about Jones's sexual assaults. (Tr. 195-97.) She was inconsolable and mad. (Tr. 130.)

Family Physician Dr. Cynthia Brewer saw K.S. for a medical exam in August 2021. She first interviewed Whittney, who explained that K.S. was potty trained at two and half years old but had started wetting the bed again a few months prior. (Tr. 308-10.) K.S. disclosed to Dr. Brewer her dad put his penis in her mouth and described details surrounding the abuse. (Tr. 314-17.)

Terrah Hall, Licensed Clinical Social Worker (LCSW) began seeing K.S. for therapy in August 2021. Hall affirmed that K.S. said she was sexually abused by Jones. Hall explained that "the only time" K.S. ever said it "didn't happen" was when her mom did not believe her, and K.S. did so because "she was scared she was going to get in trouble[.]" (Tr. 351-53.)

## IV. K.S.'s testimony

K.S. was seven years old at trial. (Tr. 331.) She testified she used to live with Jones but doesn't anymore because "he hurt me." (Tr. 332.) K.S. said, "He put his penis in my mouth." She said it made her sad. (*Id.*) K.S. further detailed her sister S. was there. She reported Jones put a "blanket over" K.S. so that S. "couldn't see" the abuse. (Tr. 333.)

K.S. testified it happened more than once. She explained it happened in both her bedroom and in Jones's bedroom. K.S. explained that when it ended, she would walk out of the room because Jones let her go. (Tr. 333-34.)

K.S. affirmed the oral sex hurt her. She said it felt "yucky" because Jones "peed before he did that at night[,]" affirming she meant he peed before he put his penis in her mouth. She also affirmed it tasted yucky. (Tr. 334.)

K.S. affirmed she first told Tammy about the abuse, and she told other people including her sister and mom. (Tr. 333.)

On cross-examination, the following discussion occurred:

> **DEFENSE**: Doing okay? So when [Jones] did this, did you ever say—I believe you said it was in his bedroom?
>
> **K.S.**: In his bedroom, my bedroom when mom was Door Dashing, when it was nighttime, and when mom was at work in the morning.
>
> **DEFENSE**: And you said that [S.] came in; was it just that once?
>
> **K.S.**: No, a bunch of times, and he covered the blanket over me and said, "Go play."

**DEFENSE**: Said "go play" to who?

**K.S.**: [S.]

(Tr. 340-41.) When asked why she went into Jones's room, K.S. responded, "Because he told me to come in there, and the rest of the times [that it happened] I shouldn't have listened to him." (Tr. 341-42.) K.S. further explained she didn't like Jones because "the next day [after she first met him and he started living with them] he started putting his penis in my mouth, literally the next day." K.S. explained that the abuse happened every day, twice a day. She said, "morning and night, every single day, morning, night, morning, night." K.S. explained that Whittney was never home when it happened because "at night she was Door Dashing, and at morning she was working[.]" (Tr. 343-44.)

## V. Blind expert

Dr. Wendi Dutton, blind expert, explained that if a caretaker accuses the child of lying or takes the perpetrator's side against the child, a risk is raised that the child will recant—and resultingly having behavioral, emotional, or psychological problems. These problems can manifest in anxiety, depression, regression in potty trailing, night terrors, nightmares, bed wetting, and temper tantrums. Self-harm in children can occur including "biting themselves, hitting their heads on a wall and sometimes cutting or scratching themselves."

(Tr. 240-42.) Indica of disassociation of stressful environments might relate to answers like "I forgot" or "I don't remember[.]" (Tr. 288-89.) If "the questioner is upset or angry, certainly that can cause children to pull back and not want to talk about it because they are afraid of the reaction they are getting." (Tr. 252.) The perpetrator being in the room "generally doesn't work out well for disclosures" because the child will then be "unlikely to make a disclosure." (Tr. 252-53.)

## VI. K.S.'s medical appointment with Dr. Brewer

Dr. Brewer has been certified in training for child sexual abuse. (Tr. 302.) But for medical appointments, the "main reason is to examine them and make sure that their bodies are fine," and to evaluate them for sexually transmitted diseases, refer for further tests if needed, and examine if "there have been any physical injuries." (Tr. 304.)

Dr. Brewer repeatedly affirmed that the primary purpose of K.S.'s visit was a "medical exam," for which K.S. was referred to her. (Tr. 306, 308, 321-22.) Prior to the exam and outside K.S.'s presence, Dr. Brewer asked Whittney for "all of [K.S.]'s medical history" since birth. (Tr. 308-09.) She next spoke with K.S. In accordance with her training, she asked questions in an "open, non-leading manner[.]" (Tr. 311.) Dr. Brewer observed K.S. was talkative and open and

"speaks at an older age" than her biological age of five. (Tr. 312.) The State further inquired:

> **STATE**: You mentioned that [K.S.] knew why she was there to see you; what was that reason?
>
> **BREWER**: She told me that she was there to see me because her dad—
>
> **DEFENSE**[3]: Objection, Your Honor. May we approach?
>
> **COURT**: What's your objection?
>
> **DEFENSE**: Hearsay.
>
> **COURT**: Overruled. You may proceed.
>
> **STATE**: Dr. Brewer, you may answer the question.
>
> **BREWER**: She had told me that she was there to see me because her dad had put his penis in her mouth.

(Tr. 313.) The State's examination continued without further objection:

> **STATE**: Was that consistent with the reason that you understood her to be there from information that what you got in the referral?
>
> **BREWER**: Yes.
>
> **STATE**: Was she able to provide you any more noteworthy details about this disclosure?
>
> **BREWER**: Yes, she was.
>
> **STATE**: And what were some of those?

[3] The State agrees defense counsel objected and there appears to be a transcript typo.

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

**STATE**: So she made some motions, you said, what generally were those, if you could describe them?

**BREWER**: Do you want me to describe or show—probably best to describe, okay, so she put her hand in a circular formation and moved it back and forth from her mouth in a longitudinal pattern.

(Tr. 313-14.) Later, the State asked, without objection:

**STATE**: Did she tell you anything about maybe other physical experiences that she had during the assault?

**BREWER**: Yeah, she said that her father had hidden her under the blankets, I believe. She also told me that she had a sore throat, and I thought that was noticeable because she's had tonsillectomy so that's a kid that shouldn't otherwise be getting sore throats.

She always [sic] had told me that her right front incisor, the middle tooth, had been very wiggly at the time, and she also told me that the other tooth had already been gone by the time that her dad placed his penis in her mouth.

**STATE**: And for maybe those of us that don't know, is that a general age where kids start to lose their teeth?

**BREWER**: Yes, that is true.

**STATE**: What conclusions, if any, did you make about [K.S.'s] health following this exam?

**BREWER**: During the physical exam, her throat actually looked fine, it was not red, I did not see any findings for sexually transmitted

> diseases in her mouth, she was speaking well, she was swallowing fine, but she was noted to have the two front teeth that were coming in so the tooth that she had told me was wiggly and was already gone and the new adult teeth were coming in on her two bottom teeth.

(Tr. 315-16.)

On cross-examination, Dr. Brewer again affirmed she was principally concerned about a patient's health and to diagnose illnesses or assess the patient's condition. (Tr. 321-22.) Dr. Brewer explained that there was no allegation that the sexual assault caused K.S.'s teeth to fall out, there were other possible causes of sore throat, and there were other possible causes of bedwetting. (Tr. 324-25.) She admitted there were no physical exam findings that would be residual from child sexual abuse. (Tr. 325-26.)

## VII. LCSW Hall's testimony

LCSW Hall is "certified in trauma focus cognitive behavior therapy" and is "certified in parent-child interaction therapy" and a training coordinator in "evidence-based trauma assessment." She has been previously qualified as an expert on child sexual abuse and assault. She began seeing K.S. in August 2021. (Tr. 349-51.) The State asked LCSW Hall the following:

> **STATE**: Did [K.S.] confirm a disclosure of sexual abuse to you?
>
> **DEFENSE**: Judge, at this point I would object on hearsay grounds.
>
> **COURT**: Overruled. You may answer.

**HALL**: [K.S.] did disclose to me that she had been sexually abused by Gary Jones.

(Tr. 352.)

Without objection, the State asked if K.S. had ever waivered on that disclosure, and Hall responded not in "60-plus sessions," and explained that discussing the abuse was the purpose of therapy. (*Id*.)

On cross-examination, defense counsel solicited more information from LCSW Hall about K.S.'s statements to her:

**DEFENSE**: When [K.S.] confirmed that disclosure to you, what did she disclose had happened?

**HALL**: That [Jones] put his penis in her mouth.

**DEFENSE**: On how many occasions?

**HALL**: Lots of times.

**DEFENSE**: Lots of times? And when did she say this started?

**HALL**: She couldn't actually tell me, she said it had been going on for so long. It was at least at this house and the house before so . . .

**DEFENSE**: Did she ever say that it started the day that she met [Jones]?

**HALL**: She has never said that to me.

**DEFENSE**: Did she ever say that it happened every day?

**HALL**: She said it happened lots, so many times, she can't remember.

**DEFENSE**: Did she ever say it happened every morning?

**HALL**: She did say it would happen in the morning when her mom was at work and at night when she was Door Dashing.

**DEFENSE**: And did she confirm that it never happened when her mom was there?

**HALL**: She said it never happened when her mom was there.

. . . .

**DEFENSE**: What circumstances did she tell you led to her being back with her mom?

**HALL**: That [Jones] was out of the house and that her mom believed her and so she got to back home and that was it.

(Tr. 355-56.) Defense counsel confirmed with Hall that K.S. said she was happy to be back with her mom and happy Jones was gone. (Tr. 356-57.)

## VIII. Jones's IAC claim

### A. Stipulated exhibits

The State's exhibit was the video of K.S.'s initial disclosure to Tammy. (State's Ex. 1.) The defense exhibits were the two videos in which Whittney and Jones confronted K.S. the night of the disclosure and K.S. recanted. (Def.'s Exs. A-B.) Near the beginning of trial—with all parties present and outside the presence of the jury—the State put on the record that "last week the parties stipulated to the introduction of three exhibits" and specified Def.'s Exs. A and B

and State's Ex. 1. (Tr. 4-5.) The court admitted the exhibits upon stipulation. (*Id*.)

In opening argument, defense counsel argued:

> As the State eluded [sic] to, you will see videos in this case, short videos, but videos that demonstrate one thing quite clearly, and that is the complainant, [K.S.] in this matter, is someone very susceptible to suggestibility, someone who says things to make people around her happy with what she is saying. […] [Y]ou are going to have conflicting statements from [K.S.], on one occasion she says this, and on another occasion she says this. [*remainder of paragraph omitted*].

(Tr. 113.)

**B. Hearsay objections**

During Whittney's testimony, when she was asked by the State about K.S.'s forensic interview, defense counsel stated, "I will just object on hearsay grounds[,]" which was overruled. (Tr. 194.) And counsel raised two additional hearsay objections to Dr. Brewer's and LCSW Hall's testimonies. (Tr. 313, 352.)

**C. Solicitation of hearsay**

The defense solicited K.S.'s statements through its cross-examination of several witnesses and through the stipulated video exhibits. (Tr. 160-61 (soliciting K.S.'s statements from Lucky); Tr. 355-56 (same, LCSW Hall); State's Ex. 1 (same, Tammy); Def.'s Exs. A-B (confrontation video).)

## SUMMARY OF THE ARGUMENT

Regarding the two preserved objections to statements by the treating physician Dr. Brewer and K.S.'s therapist LCSW Hall repeating K.S.'s allegations that Jones sexually abused her, the error was harmless. K.S. testified at trial, was subject to cross-examination, and recounted the same facts. Moreover, Jones expressly stipulated to the State's video exhibit of K.S.'s initial disclosure where K.S. said the same thing. Finally, other witnesses testified to the same facts without objection.

Jones's unpreserved hearsay challenges embedded in his first-raised issue regarding the subsequent statements from Dr. Brewer and LCSW Hall also fail under the plain error standard. K.S.'s statements to physician Dr. Brewer were admissible because they were made with an intent consistent with seeking medical treatment when she described physical pain from the oral sex and changes to her mouth, throat, and teeth—and those statements were relied upon by Dr. Brewer when making decisions regarding diagnosis or treatment. LCSW Hall's testimony that K.S.'s story had been consistent in therapy was not hearsay because it was not offered for the truth of the matter asserted but was instead offered in response to Jones's attacks on K.S.'s credibility and veracity. Regardless, Jones cannot meet his plain error burden because both expert's testimonies were cumulative of other

witnesses' testimonies also given without objection, and K.S.'s core allegation was compellingly consistent—from her initial disclosure to her trial testimony.

Finally, regarding IAC, the record strongly suggests that Jones's counsel had knowledge about the evidentiary hearsay rules, because he lodged hearsay objections several times for several witnesses. Otherwise, Jones's strategy was to solicit or otherwise stipulate to K.S.'s out-of-court statements to attempt to show K.S. was not credible or changed her story. Nonetheless, this Court should decline to speculate on counsel's motivations on a cold record. This Court should hold that Jones's IAC claim is not record based and is thus inappropriate for direct appeal. Alternatively, the record shows that Jones's counsel was not deficient, but was instead an extremely capable advocate who attacked K.S.'s credibility and veracity in numerous ways. Jones fails to meet his burden to show either deficient performance or prejudice.

## STANDARDS OF REVIEW

"Whether evidence is relevant and admissible is left to the sound discretion of the district court and will not be overturned on appeal absent an abuse of that discretion." *State v. Whipple*, 2001 MT 16, ¶ 17, 304 Mont. 118, 19 P.3d 228.

"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

(quotation omitted.) "To the extent such claims are reviewable, 'they present mixed questions of law and fact that we review de novo.'" *Aker*, ¶ 22.

## ARGUMENT

### I. For the two preserved statements, the error was harmless. If this Court considers Jones's attachment of subsequent unpreserved hearsay allegations to his preserved claim, Jones does not show plain error.

#### A. As Jones acknowledges, the scope of his claim is to the comments to which he objected.

At trial, Jones preserved an objection to the following two statements:

> **BREWER**: She had told me that she was there to see me because her dad had put his penis in her mouth.
>
> . . . .
>
> **HALL**: [K.S.] did disclose to me that she had been sexually abused by Gary Jones.

(Tr. 313, 352.)

Here, on one hand, Jones acknowledges he is only challenging the "two questions about out-of-court statements of K.S. accusing Mr. Jones of sexual abuse" and he directly quotes those two statements in his first issue—the hearsay evidentiary challenge. (Appellant's Br. 14, 16-17.) However, in the same challenged issue, Jones peppers in subsequent unobjected-to statements from Dr. Brewer and LCSW Hall, alleging the statements are hearsay from K.S., and

further arguing the State cannot prove the recitations were harmless. (*Id*. 17-18, 31-32.) But—in later briefing his IAC claim—Jones acknowledges that "trial counsel objected" to both experts "initial testimon[ies] about hearsay from K.S.," repeating K.S.'s core allegation, but argues his counsel committed IAC when he "did not object again after his initial objection was overruled." (*Id*. 38.)

This Court has "repeatedly held that we will only consider on appeal objections made at trial which are timely and specific." *State v. Brasda*, 2003 MT 374, ¶ 32, 319 Mont. 146, 82 P.3d 922. Here, Jones faults his counsel for failing to object to the same unpreserved errors of alleged hearsay to which he strategically incorporates into his preserved claim—apparently to shift his burden to prove plain error for unpreserved claims to the State to show the unpreserved allegations of error are harmless. The State respectfully submits that the scope of the preserved claim should be cabined to the statements to which Jones's objection was responsive, particularly here when Jones directly acknowledges the unobjected-to hearsay claims are unpreserved.

Accordingly, the State will first address Jones's preserved challenge to the two comments, and will explain that, even if the evidence was inadmissible, the error was harmless. Next—out of an abundance of caution—the State will address Jones's unpreserved arguments of subsequent hearsay, and will explain that, while

neither expert's testimonies were hearsay, even if so, the unpreserved claims do not qualify for plain error reversal.

**B. The admission of the two statements was harmless.**

The erroneous admission of evidence is trial error. *State v. Francis*, 2001 MT 233, ¶ 23, 307 Mont. 12, 36 P.3d 390. For trial error, this Court inquires whether there is a "reasonable possibility that the inadmissible evidence might have contributed to" Jones's conviction. *State v. Van Kirk*, 2001 MT 184, ¶ 42, 306 Mont. 215, 32 P.3d 735. Inadmissible evidence is not prejudicial so long as the jury was presented with admissible evidence proving the same facts as the tainted evidence. *Van Kirk*, ¶ 43. A witness's testimony regarding prior out-of-court statements is cumulative and, thus, harmless error, when those statements mirror other statements admitted by the trial court without objection. *State v. Mederos*, 2013 MT 318, ¶ 24, 372 Mont. 325, 312 P.3d 438 (citation omitted).

Under *Veis*, this Court "will not reverse a district court for committing error which did not prejudice the defendant," and "a defendant is not prejudiced by the introduction of inadmissible hearsay testimony when the hearsay statements are separately admitted through the testimony of the declarant or through other direct evidence." *State v. Mensing*, 1999 MT 303, ¶ 18, 297 Mont. 172, 991 P.2d 950

(citing *State v. Veis*, 1998 MT 162, ¶ 26, 289 Mont. 450, 962 P.2d 1153.)[4] This Court's long-established holdings "reflect the fact that when a defendant has the opportunity to cross-examine a declarant because he or she is present at trial and testifies, the dangers that the hearsay rule seeks to avoid are not present and, therefore, hearsay regarding the declarant's out-of-court statement that is admitted during another witness's testimony is harmless." *Veis*, ¶ 26.

In *Veis*, a child sexual abuse case, this Court determined that statements from the two accusing boys' therapist relating the identity of Veis as the abuser was inadmissible hearsay. *Veis*, ¶¶ 20-24. But this Court rendered the error harmless when both boys identified Veis as the abuser, one boy identified Veis as the abuser through a written letter, Veis had the opportunity to cross-examine both boys. *Id*. ¶ 28. This Court held the hearsay from the therapist "was simply cumulative of the boys' own testimony[.]" *Id*.

In *Mederos*, another child sexual abuse case, the examining physician testified that the accuser "had disclosed digital/vaginal penetration." This Court held that, when the defense had stipulated to the admission of a forensic report

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[4] The *Veis* hearsay precedent is well-settled and routinely applied. *See, e.g. State v. Ripple*, 2023 MT 67, ¶ 21, 412 Mont. 36, 527 P.3d 951; *Notti v. State*, 2008 MT 20, ¶¶ 35-38, 341 Mont. 183, 176 P.3d 1040; *see also Aker v. Fletcher*, CV 17-86-H-JTJ, 2022 U.S. Dist. LEXIS 153204 (D. Mont. Aug. 22, 2022) (federal district court characterizing the *Veis* precedent as applying "specifically to inadmissible hearsay[]" and having a "longer lineage" than the *Van Kirk* test.)

with the same facts, the examining physician's testimony "would qualify as cumulative of the previously admitted documents." *Mederos*, ¶¶ 23-24.

Here—assuming error for admitting the two statements Jones challenges repeating K.S.'s allegations of Jones's sexual abuse—the error was harmless under *Veis* because K.S. testified at trial, was subject to cross-examination, and testified to the very same facts. *Veis*, ¶ 26; Tr. 332 ("[Jones] put his penis in my mouth."). Additionally, like in *Mederos* where the defense stipulated to other evidence relaying the same statement, Jones expressly stipulated to the admission of K.S.'s first disclosure to her grandma Tammy on video, wherein K.S. said the same thing. (Tr. at 4-5; State's Ex. 1 ("He was sticking his penis into my mouth.").) Finally, even assuming for argument's sake *Veis* somehow did not apply, the error was harmless because the statements were cumulative under *Van Kirk* and mirrored other statements admitted without objection. *Mederos*, ¶ 24; Tr. 120 (Tammy's recitation of K.S.'s disclosure); Tr. 152-53 (Lucky's recitation); State's Ex. 1 (K.S.'s stipulated recorded disclosure); Tr. 332 (K.S.'s testimony).

### C. Jones fails to meet his plain error burden for his unpreserved hearsay claim.

#### 1. The claim is unpreserved

As Jones expressly acknowledges—any challenge to LCSW Hall and Dr. Brewer's subsequent testimonies containing alleged hearsay are unpreserved because his counsel did not object to the subsequent comments reciting K.S.'s

statements. (*See* Appellant's Br. at 38.) This Court will not consider "issues presented for the first time on appeal" because they are "untimely" and because it is "fundamentally unfair to fault the trial court for failing to rule on an issue it was never given the opportunity to consider." *State v. LaFreniere*, 2008 MT 99, ¶ 11, 342 Mont. 309, 180 P.3d 1161. Thus, the only possible avenue for Jones to raise the claim is under plain error review. This Court employs plain error review sparingly, on a case-by-case basis, and only where the defendant shows that failing to review the claimed error may result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process. *State v. King*, 2013 MT 139, ¶ 39, 370 Mont. 277, 304 P.3d 1.

Here, Jones has not asked the Court to invoke plain error but has instead opted to attempt to insert unpreserved arguments into his preserved claim. Having failed to request plain error review in his opening brief, this Court will not entertain a plain error request for the first time in a reply brief. *King*, ¶ 40. This Court should decline to exercise plain error review of the alleged hearsay errors relating to the subsequent statements from Dr. Brewer and LCSW Hall.

**2. LCSW Hall's testimony was not hearsay**

In *Mederos*, Appellant argued that clinical social worker Dawn English recounted hearsay when "English repeated hearsay statements . . when the State

asked English whether the accuser had been consistent about [accuser A.S.'s] allegations and the identity of the abuser" and English responded that A.S. had been "completely consistent." *Mederos*, ¶ 26. This Court held that the recitation was not hearsay and counsel had not committed IAC, explaining:

> English's testimony regarding A.S.' prior consistent statement likely would not qualify as hearsay under M. R. Evid. 801(c). English did not restate A.S.'s prior consistent statements in court to prove the "truth of the matter asserted" in the statements. Rather, English testified in response to Mederos's attacks on A.S.' veracity as a witness. *See State v. Robins*, 2013 MT 71, ¶ 11, 369 Mont. 291, 297 P.3d 1213 (discussing situations in which it would be appropriate for an expert witness to testify about a child sexual abuse victim's credibility.) English contended that A.S. consistently alleged that Mederos had engaged in sexual conduct with her. Mederos's counsel legitimately could have believed that he did not have grounds to object to the statement as hearsay. [citing *Aker*, ¶ 36].

*Id*.

Here, like the social worker in *Mederos*, LCSW Hall's statement that K.S. had been consistent in therapy sessions was not offered for the truth of the matter asserted. Like in *Mederos*, Jones's approach at trial was to attempt to show that K.S. was not credible. The statements were not hearsay.

### 3. Dr. Brewer's testimony was admissible under Mont. R. Evid. 803(4).

Montana Rule Evidence 803(4) provides an exception to the hearsay rule for:

> Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or

> sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

For admissibility, the statements (1) "must be made with an intention that is consistent with seeking medical treatment," and (2) "must be statements that would be relied upon by a doctor when making decisions regarding diagnosis or treatment." *Whipple*, ¶ 22.

In *Whipple*, the treating physician received two girls alleging sexual abuse for medical treatment but determined that "physical examination was unnecessary" based on their report. *Id*. ¶ 19. Whipple argued that the girls' appointment was not "motivated by a desire to obtain medical treatment" and thus their statements were not reliable. *Id*. ¶¶ 20, 23-25. This Court agreed, while acknowledging that "there are instances in which we have allowed physicians to testify as to statements made to them by youthful patients." *Id.* ¶ 24 (citing *State v. Thompson*, 263 Mont. 17, 865 P.2d 1125 (1993).) This Court contrasted *Thompson*—in which the child had actual physical complaints—and in which "the circumstances indicate that the child victim's statements were made with the intention of seeking effective treatment." *Id*. ¶ 25 (citing *Thompson*, 263 Mont. at 30, 865 P.2d at 1133-34.) This Court thus narrowly held that the there were no "facts of the instant case" that "contain sufficient indicia of reliability such as those present in *Thompson*." *Id*.

Here, unlike in *Whipple*, K.S.'s statements made to Dr. Brewer were for the purpose of seeking treatment and providing her with the factual details required to render treatment. K.S. claimed physical injuries, including a sore throat and teeth falling out. She also complained of specific pain during the sexual abuse. She said, "it hurt really, really bad and she felt like her head was going back so much that she thought it was going to hit the wall." (Tr. 314.)

K.S.'s statements to Dr. Brewer were also of a type reasonably relied upon by a physician when making diagnosis and treatment decisions—including the allegation that sexual abuse occurred. Dr. Brewer incorporated K.S.'s medical history of a tonsillectomy to conclude that K.S. "shouldn't otherwise be getting sore throats." (Tr. 315.) Dr. Brewer conducted a medical examination of K.S.'s mouth, and discussed her medical investigation and findings based on the information K.S. provided. Based on the statements K.S. made, Dr. Brewer made an informed determination. Without the statements as to the circumstances of the referral for necessity of treatment, Dr. Brewer could not have reasonably made that determination. Because the hearsay statements testified to by Dr. Brewer satisfied both parts of the Rule 803(4) test, they were admissible under the exception for statements for purposes of medical treatment or diagnosis.

#### 4. Jones fails to show plain error.

Even assuming Jones was able to establish any error, he fails to meet his plain error burden to show prejudice. As this Court's precedent shows, in cases unlike here where Appellant had preserved the issue and this Court evaluated the case under the State's burden of proving harmlessness—the similar circumstances show that Jones cannot meet his plain error burden.

For example, in *Smith*, this Court found harmless the admission of an entire forensic interview containing facts to which the victim did not testify. *State v. Smith*, 2021 MT 148, ¶ 35, 488 Mont. 245, 488 P.3d 531. This Court explained that the victim's "unfaltering testimony at trial established all the facts necessary for the jury to convict Smith." *Id.* While this Court acknowledged that the forensic interview "bolstered and lent credibility to her testimony[,]" this Court reasoned that "other witnesses" provided testimony "tending to lend the same credibility to [the victim's] trial testimony—testimony to which Smith did not object." *Id.*

Similarly, in *Whipple*—while this Court found error in admitting the hearsay of the circumstances of the offense children told to the treating physician—it found the testimony harmless as "largely repetitive" of the admitted "testimony of [the accusers] and their mother[.]" *Id.* ¶ 27.

The circumstances here suggest even less potential prejudice than in *Smith,* where an "hour-long, video-recorded" forensic interview was admitted containing recitations of out-of-court statements and additional unrelated incidents were admitted over objection. *See Smith*, ¶¶ 6, 35. And unlike in *Smith* and *Whipple* in which this Court considered the more demanding harmless error standard, for preserved claims here, Jones does not demonstrate that failing to review the unpreserved claims of hearsay will result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process.

Dr. Brewer's recitation of K.S.'s statement that she was hidden under a blanket was cumulative of K.S.'s testimony. (State's Ex. 1; Tr. 333.) Jones's counsel solicited the same testimony from K.S. (Tr. 340-41.) Dr. Brewer's recitation of the movements of K.S.'s hands was repetitive of Lucky's testimony, given without objection. (Tr. 152-53.) Her testimony of the medical and sensory effects, that the abuse "hurt" K.S. and she felt like she was going to throw up, was, like in *Whipple*, "largely repetitive" of K.S.'s direct testimony that the abuse hurt her and Jones's penis tasted and felt yucky. (Tr. 334.) Dr. Brewer's recitation of K.S.' bedwetting issues came from unobjected-to testimony from Whittney. (Tr. 170-71.) Regardless, Dr. Brewer acknowledged that the medical evidence of a missing tooth, sore throat, and bedwetting were not conclusive of sexual abuse, and

that teeth fall out naturally at K.S.'s age. (Tr. 315-16, 324-26.) Thus, there was little potential prejudice from this medical-effects testimony.

Regarding LCSW Hall's testimony that K.S was consistent, Whittney also testified, without objection, that K.S. was "very consistent" with her initial disclosure and she did not doubt what she said, and her story never changed. (Tr. 183, 205.) Jones's counsel later seized on Whittney's prior testimony by reminding her that K.S. retracted her story upon her and Jones's confrontation with K.S., which Whittney admitted. (Tr. 211-12.) In any event, there was no manifest miscarriage of justice from LCSW Hall's testimony. The State was entitled to rebut Jones's allegations that K.S.'s story was not consistent and K.S. was not credible, that K.S. had recanted, that K.S. was "following a script" and was coached, and that K.S. and Tammy were concocting a story to try to get rid of Jones because they did not like him. (Tr. 402, 404, 408-09, 411-12, 415.)

K.S.'s core allegation—from her prior disclosures to her trial testimony—was reliably consistent, making plain error review even less appropriate for the tertiary and cumulative statements from Dr. Brewer and LCSW Hall. K.S. repeatedly disclosed: (1) her dad put his penis in her mouth; (2) it happened at morning and night when her mom was Door Dashing or working; and (3) her sister S. was around, but Jones would cover K.S. with a blanket.

Dr. Brewer's and LCSW Hall's testimonies were also rendered a footnote as compared to other compelling testimony regarding the tragic impact that the abuse had on K.S., evidenced through her loss of bladder control and bedwetting, apparent suicide attempt in the bath as a young child, her attempts to pull out her eyelashes and get rid of her blood, and her persistent nightmares and screaming in her sleep—which, as she testified, was directly related to Jones's sexual abuse. K.S. suffered dramatic adverse effects. K.S. was so scared of Jones that she acted fearful and would scream and cry when Jones came to pick her up from her grandparent's house. But K.S. courageously disclosed the abuse to a trusted adult, her grandmother. She followed that by disclosing to whoever she could about the abuse, including her grandfather, police, and forensic interviewer, physician, and therapist. This was true even considering the immense pressure from Jones and Whittney upon them confronting her—when Whittney aggressively confronted and gaslighted K.S. and told her the abuse didn't happen. K.S.'s voice nonetheless only grew more confident as she tried to tell her mom something occurred in their bedroom and with her "dad" and "Nobody else. Only dad. It was only [S.] and me and dad home. Without you home." (*See* Def.'s Ex. B.)

Finally, Jones had numerous opportunities to sexually abuse K.S. when Whittney was working three jobs while going to college. Jones removed the camera from K.S.'s room ostensibly based on her "maturity," but he did not

remove the camera from his older biological daughter's room. And after K.S.'s disclosure, Jones blocked Whittney from contacting her relatives.

This Court should decline to reverse based on Jones's unpreserved hearsay allegations because Jones fails to even advocate for, much less meet, his burden to show plain error.

## II. This Court should decline to review the IAC claim on direct appeal. Alternatively, the claim would fail on the merits.

### A. The claim is not record-based.

Before addressing an IAC claim on direct appeal, this Court must first determine whether the record is sufficient to determine whether counsel was ineffective. *State v. Mikesell*, 2021 MT 288, ¶ 20, 406 Mont. 205, 498 P.3d 192. The definitive question which clarifies whether claims are record-based or not is "why counsel took the particular course of action?" *Mikesell*, ¶ 20 (citation omitted.) If the claim is based on matters outside the record on appeal, this Court will not review it and allow the defendant to pursue the claim in postconviction proceedings. *Id.* But this Court will review a non-record-based claim if "no plausible explanation" exists for counsel's inaction. *Id.* ¶ 22.

Counsel's use of objections lies within his or her discretion. *Riggs v. State*, 2011 MT 239, ¶ 53, 362 Mont. 140, 264 P.3d 693. Objections may, or may not, be made for any number of reasons. *Id.* "Claims based on trial counsel's alleged

omissions frequently are ill-suited for direct appeal because an omission 'indicates that non-record based information explains trial counsel's decisions.'" *State v. West*, 2026 MT 13, ¶ 45, 426 Mont. 139, 583 P.3d 205.

Jones argues his claim is record based by referencing a brief pretrial discussion wherein Jones's counsel referenced the "non-testimonial" nature of possible hearsay in response to the district court's question about the effect of the "mom testifying before the victim[.]" (Tr. 6.) But counsel's apparent confrontation clause reference does not show that he lacked knowledge of the evidentiary hearsay rules, nor did it show counsel felt encumbered to not raise hearsay objections at trial. To the contrary, counsel lodged a hearsay objection when the State asked Whittney—the same mom the court referenced in the previous pretrial discussion—about K.S.'s forensic interview. (Tr. 194.) And, as evidenced by Jones's first claim, his counsel lodged hearsay objections two additional times for two other witnesses.

Moreover, counsel strategically stipulated to the introduction of the State's video containing K.S.'s prior statements in exchange for the State's stipulation for Jones to introduce the videos of Whittney and Jones confronting K.S. and K.S. withdrawing her disclosure. Counsel had an obvious dual purpose—to keep out potential hearsay when it would not be beneficial to Jones—and to solicit hearsay

to attempt to bolster Jones's theory that K.S.'s story was not consistent or to highlight the defense's video exhibits where K.S. denied Jones abused her.

For LCSW Hall's subsequent testimony on K.S.'s consistency in therapy, counsel might have "legitimately could have believed that he did not have grounds to object to the statement as hearsay." *Mederos*, ¶ 26. Regarding Dr. Brewer's subsequent testimony, counsel might have reasonably believed that the medical exception applied, as evidenced through counsel's cross-examination confirming Dr. Brewer's conclusions were solely for the purpose of medical treatment. (Tr. 321-22.)

But this Court should not hazard a guess about defense counsel's motives and decisions on a deficient record. The Supreme Court has warned against such actions by reviewing courts:

> Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence."

*Harrington v. Richter*, 562 U.S. 86, 105 (2011).) If the record were developed, and counsel were given the opportunity to explain his justifications for strategy—including the justifications he and Jones discussed confidentially—defense counsel's choice of strategy, if ultimately found reasonable, would not be IAC. But these arguments are better served when a fully developed record is permitted.

For example, in *Mikesell*, appellant argued that counsel committed IAC and misunderstood the application of the hearsay rule when she allowed the State to present the entire forensic interview without objection. *Mikesell*, ¶ 18. This Court declined to consider the claim on direct appeal and held that the record implied a plausible justification for counsel's actions, that defense counsel "may have viewed [the accuser's] forensic interview as a strategic key to Mikesell's defense[]" and defense counsel highlighted inconsistencies from the forensic interview in cross-examination and closing argument. *Id*. ¶ 23.

Similarly, in *Mederos*, defense counsel stipulated to the admission of video recordings of the child victims' forensic interviews prior to trial. *Mederos*, ¶ 29. Defense counsel cross-examined the victims about the inconsistent statements, and "highlighted the fact that [one victim] testified differently at trial than she had testified during the forensic interviews." *Id.* ¶ 31. This Court noted that counsel's actions appeared within the standard of reasonable professional assistance, detailing that defense counsel might have found that the inconsistencies "prompted Mederos's counsel to stipulate to the admission of the forensic reports for strategic reasons to help undermine the girls' testimony through cross-examination." *Id*. The court ultimately "decline[d] to speculate" on the claimed error on direct appeal and invited Mederos to file a petition for postconviction relief. *Id.* ¶ 37.

Here, "because the trial record does not include [counsel's] explanation of his trial strategy concerning [K.S.'s] prior consistent statements, this Court 'will not speculate' on the claimed error." *See Aker*, ¶ 37 (citation omitted). The record before this Court does not fully or completely explain "why" defense counsel lodged hearsay objections in some circumstances but did not lodge hearsay objections in other circumstances. The record here cannot rebut the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *State v. Rovin*, 2009 MT 16, ¶ 34, 349 Mont. 57, 201 P.3d 780. Because the record is silent on explaining fully why counsel acted in the manner that he did, Jones's claim should be raised in a postconviction proceeding.

**B. The claim would fail on the merits.**

In evaluating an IAC claim, this Court utilizes the two-part test from *Strickland*. *Whitlow v. State*, 2008 MT 140, ¶ 10, 343 Mont. 90, 183 P.3d 861 (citing *Strickland v. Washington*, 466 U.S. 668 (1984).) Under the first part, the defendant must show that counsel's performance was deficient. *Strickland*, 466 U.S. at 687; *Whitlow*, ¶ 10. Under the second part, the defendant must show that counsel's performance prejudiced the defense. *Strickland*, 466 U.S. at 687; *Whitlow*, ¶ 10. If Jones makes an insufficient showing on one prong, this Court need not address the other. *Baca v. State*, 2008 MT 371, ¶ 16, 346 Mont. 474, 197 P.3d 948.

Even if this Court considered Jones's IAC claim on the merits, this Court has rejected similar arguments faulting counsel's treatment of hearsay numerous times. For example, in *Howard*, a child sexual abuse case, this Court recognized defense counsel's trial strategy of using hearsay testimony to question the child's reliability and veracity to create reasonable doubt. *State v. Howard*, 2011 MT 246, ¶ 38, 362 Mont. 196, 265 P.3d 606. This Court further recognized that, even assuming defense counsel had a reasonable possibility of successfully objecting to certain testimony, defense counsel did not provide ineffective assistance under either prong of *Strickland* by failing to object to hearsay statements because counsel "effectively utilized the children's hearsay statements to attack the veracity and credibility of the State's primary witnesses." *Howard*, ¶ 39.

And *Riggs* also involved a sexual assault case against minors. Riggs raised an IAC claim based on his counsel's failure to object when several witnesses offered consistent statements made by the victims. *Riggs*, ¶ 50. Riggs's counsel explained in postconviction proceedings that he wanted to point out the numerous inconsistencies in the victims' statements. *Id.* ¶ 53. This Court recognized that different counsel have different trial strategies and that Riggs's strategy was objectively reasonable. *Id.* ¶ 54.

Here, counsel was not ineffective for failing to object to subsequent statements from Dr. Brewer (*see Notti*, ¶ 44) and LCSW Hall (*see Mederos*, ¶ 26).

Regardless, it is "difficult to establish [IAC] when counsel's overall performance indicates active and capable advocacy." *Richter*, 562 U.S. at 111. Jones's counsel was an active and capable advocate. He attacked K.S.'s credibility and veracity from every possible angle, including by soliciting and introducing K.S.'s out-of-court statements for those purposes.

The first prong of Jones's strategy was to contrast K.S.'s prior disclosures to the defense's video where Whittney and Jones confronted K.S., to argue that K.S. was not credible. Defense counsel cross-examined Whittney whereupon she affirmed that K.S. withdrew her earlier disclosure, per the defense video. (Tr. 211-12.) Counsel noted in closing, "what's important about those videos is another video had been taken earlier that day, and in that same day two different stories are told—one is that my dad puts his penis in my mouth, and the second, no, he didn't. In the span of one day; why?" (Tr. 404.)

The second prong was to show K.S. was not credible by soliciting K.S.'s prior disclosures from other witnesses and comparing them to K.S.'s trial testimony. Counsel noted K.S. testified at trial Jones started abusing her "the day after" they met and it occurred every day, twice a day. Counsel argued this was implausible because K.S. was one year old at the time Jones entered her life and because it conflicted with K.S.'s statements, as drawn out by defense counsel

through LCSW Hall's cross-examination, that K.S. never told her in counseling sessions that the abuse occurred every day, twice a day. (Tr. 411-14.)

The third prong to rebut K.S.'s consistent story, was to suggest that K.S. was "follow[ing] a script[,]" particularly when she talked to Dr. Brewer, to match the story she told her grandmother Tammy, who was in the room when K.S. disclosed to Dr. Brewer. (Tr. 408-09.)

The fourth prong to suggest witnesses had a motive to get rid of Jones. Counsel argued K.S. and her grandparents did not care for Jones. (Tr. 402-03.) Counsel also argued that Whittney had a motivation to believe K.S. so that she could be reunited with K.S. (Tr. 405-06.) Finally, the defense suggested Tammy had a motivation to "control the situation" instead of immediately informing her daughter about the disclosure. (Tr. 403.)

Jones fails to show on this record that his counsel was deficient, much less does he show prejudice from counsel's active and capable advocacy.

## III. Jones fails to prove cumulative error.

"In rare cases this Court may reverse a defendant's conviction 'where numerous errors, when taken together, have prejudiced the defendant's right to a fair trial.'" *West*, ¶ 48 (collecting cases.) "When the defendant fails to establish error, however, the cumulative error doctrine does not apply." *Id.*

Here, Jones has not established his IAC claim is record based, much less has he identified IAC or prejudice. Any possible error for the hearsay claim is harmless. Thus, there is no cumulative error based on the combined effect of the IAC claim and hearsay claim.

## CONCLUSION

For the above reasons, the State of Montana respectfully requests that this Court reject Jones's arguments and affirm Jones's SIWOC conviction.

Respectfully submitted this 25th day of March, 2026.

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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 9,725 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

*/s/ Roy Brown*
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## CERTIFICATE OF SERVICE

I, Roy Lindsay Brown, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 03-25-2026:

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Helena MT 59620
Representing: Gary Richard Jones
Service Method: eService

Electronically signed by Kristin Ashcraft on behalf of Roy Lindsay Brown
Dated: 03-25-2026