IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 17-0141

STATE OF MONTANA,

Plaintiff and Appellee,

v.

KENNETH ARNOLD OSCHMANN,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, The Honorable Mary Jane Knisely, Presiding

APPEARANCES:

TIMOTHY C. FOX
Montana Attorney General
ROY BROWN
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
Fax: 406-444-3549
Roy.Brown2@mt.gov

SCOTT D. TWITO
Yellowstone County Attorney
MORGAN E. SHAW
Deputy County Attorney
P.O. Box 35025
Billings, MT 59107-5025

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

CHAD WRIGHT
Appellate Defender
LISA S. KORCHINSKI
Assistant Appellate Defender
Office of the Appellate Defender
Appellate Defender Division
555 Fuller Avenue
P.O. Box 200147
Helena, MT 59620-0147

ATTORNEYS FOR DEFENDANT
AND APPELLANT

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STATEMENT OF THE CASE

On August 11, 2015, the State of Montana charged Appellant Kenneth Oschmann (Oschmann) with Count I: Partner or Family Member Assault (PFMA), a felony, in violation of Mont. Code Ann. § 45-5-206(1)(a), and Count II: Criminal Destuction of or Tampering with a Communication Device, a misdemeanor, in violation of Mont. Code Ann. § 45-6-105(1)(b). (D.C. Doc. 3.)

On April 4, 2016, a jury trial was held. (D.C. Doc. 40.) After jury selection and opening statements, during an in-chambers conference with the parties and the bailiff, the court noted that Juror # 3, Julie Durrett (Durrett), needed to be excused for medical reasons. (D.C. Doc. 40; 4/4/16 Tr. at 99.) The court directed the bailiff to move David Peterson (Peterson), first alternate, to replace Durrett on the jury. (*Id*.) On April 5, 2016, the jury returned a unanimous guilty verdict on both counts. (D.C. Docs. 47-48.) During the polling of the jury, the court and parties discovered that the second alternate, John Fischer (Fischer), served on the jury rather than Peterson. (D.C. Doc. 44; 4/5/16 Tr. at 347.) After the jury was excused, the court recalled Fischer to the courtroom and repolled him "for the record to confirm his affirmative to the unanimous verdict." (Min. Entry D.C. Doc. 44.)

On August 4, 2016, Oschmann filed a notice of reassignment of counsel replacing his attorney, Edward Werner (Werner), with David Sibley (Sibley). (D.C. Doc. 54.) On September 29, 2016, Oschmann, through Sibley, filed an untimely Motion to Set Aside Jury Verdict and Grant the Defendant a New Trial and Brief in Support, and the State filed a response. (D.C. Docs. 57-58.) The district court considered the motion on the merits and issued an order denying it. (D.C. Doc. 60.)

Oschmann filed two pro se documents, a motion and letter, requesting the court find Sibley ineffective. (D.C. Doc. 61; letter attached to D.C. Doc. 62.) On December 2, 2016, the district court held a Stage-1 *Finley* hearing,[1] determined that Sibley was not ineffective, (12/2/16 Tr. at 14), and subsequently issued an order denying Oschmann's pro se filings. (D.C. Doc. 69.)

On December 2, 2016, the court sentenced Oschmann to fifteen (15) years at the Montana State Prison as a persistent felony offender for Count I, PFMA, and six months at the Yellowstone County Detention Facility for Count II, destruction/tampering of a communication device, to be served consecutively. (D.C. Docs. 66, 68; 12/2/16 Tr. at 29.) Oschmann appeals. (D.C. Doc. 72.)

STATEMENT OF THE FACTS

I. Facts related to jury selection and juror replacement

A. Voir Dire

On April 4, 2016, a jury trial was held. (D.C. Doc. 40; 4/4/16 Tr.) During voir dire, the court explained to prospective jurors that the purpose of the proceeding was to "find 12 of you who can be fair and impartial to both the State

[1] A *Finley* claim occurs when a defendant complains about effectiveness of counsel. Upon a showing of a seemingly substantial complaint about counsel, the district court conducts a hearing to determine the validity of the defendant's claim. *State v. Finley*, 276 Mont. 126, 142-43, 915 P.2d 208, 218-19 (1996), *overruled on other grounds by State v. Gallagher*, 2001 MT 39, 304 Mont. 215, 19 P.3d 817.

and to the Defendant in this case." (Tr. at 19.) The court then swore in all the prospective jurors "to make true answers concerning their qualifications." (D.C. Doc. 40; Tr. at 19.)

The parties asked the prospective jurors questions to determine whether they had any bias or prejudice, and to find fair and impartial jurors. (Tr. at 19, 24.) The State elicited answers from several prospective jurors, including prospective juror Fischer, who would ultimately serve on the jury. (Tr. at 40, 51.) After questioning, the parties passed the jury panel for cause. (D.C. Doc. 40.) The court recessed and held an in-chambers conference with the parties to select the jury and exercise preemptory challenges. (Tr. at 80; D.C. Doc. 40.) The parties selected a jury of twelve, and Court directed the parties to include two alternate jurors pursuant to Mont. Code Ann. § 46-16-118, the alternate jury selection statute. (Tr. at 82; *See* D.C. Doc. 60 at 2.) The parties exercised strikes from each pool of potential alternates to select the first and second alternate for trial:

> **Court**: . . . so the first group of alternates will be Crystal Brown, David Peterson, and Katherine Coolon, and the State's strike?
>
> **State**: Crystal Brown
>
> **Court**: And Defense?
>
> **Defense**: Katherine Coolon, please.
>
> **Court**: Which makes David Peterson your first alternate. And the second group is Larry Button, John Fischer and Valerie Kosman.

State: State would strike Valerie Kosman.

Court: And Mr. Werner?

Defense: Larry Button.

Court: Which will make John Fischer the alternate.

(Tr. at 82-83.) The court reconvened, announced the jury selection, and stated that "[t]he first alternate will be David Peterson, and the second alternate will be John Fischer." (Tr. at 83-84.) The court then dismissed prospective jurors who were not selected and swore in the jury. (*See* D.C. Doc. 60 at 5; D.C. Doc. 40 at 2; Tr. at 84.) The parties then gave their opening arguments. (Tr. at 86-94.)

B. Juror replacement with alternate

After opening arguments, the court recessed and held an in-chambers conference with the parties and the bailiff. (Tr. at 98-99.) The court observed that Juror 3, Julie Durrett had to be excused for medical reasons. (*Id*.) Without objection, the court stated, "I will move Mr. Peterson to Ms. Durrett's spot." (Tr. at 99.) The court directed the bailiff to "tell [Durrett] she is excused, and David Peterson will move to her spot." (*Id*.) The bailiff responded, "You want him to physically move to her spot?" and the court replied, "Yes. Thank you." (*Id*.) The conference concluded, and the jury was brought back into court, was seated, and the State called its first witness. (*Id*.) Unbeknownst to the court or parties, after the conference, Fischer, the second alternate, joined the jury instead

of Peterson, the first alternate. (D.C. Doc. 60 at 3.) The record does not explain why or how this happened.

C. Discovery that the second alternate juror replaced Juror Durrett

Trial continued, witnesses testified, and the parties gave closing arguments. Immediately before the jury retired to deliberate, the court excused David Peterson, who, by inadvertence, was the de facto remaining alternate. (*See* 4/5/16 Tr. at 345; D.C. Doc. 44.)[2] The jury deliberated for two hours and forty minutes and subsequently returned a unanimous guilty verdict on both counts. (D.C. Docs. 44, 47, 48; Tr. at 346-47.) When defense counsel requested the jury be polled, the court realized when it polled for "Mr. Peterson" that Fischer had served on the jury. (Tr. at 347, 349-51.) The court then relieved the twelve jurors of their service, including Fischer. (Tr. at 349; D.C. Doc. 44 at 2.) After the parties further discussed the error, the court recalled Fischer "to discuss the mishap in replacing Juror # 3 on the previous day," and Fischer was "polled again for the record to

[2] The court, without reference to who it was speaking to, stated, "I'm sorry about that. You are excused at this time with our thanks. You are still under the same admonition that I've advised you of during the course of the trial, and if we need you, we will certainly call you back. Thank you very much." (Tr. at 345.) The court later clarifies that the alternate juror excused was Peterson, as explained herein. (Tr. at 351; D.C. Doc. 44.)

confirm his affirmative to the unanimous verdict." (Min. Entry D.C. Doc. 44.)

The court discussed the issue with Fischer:

> **Court**: So I think I—is there any chance it was David Peterson, not Darrell Peterson—so the court – when the court excused Ms. Durrett with the allergy, David Peterson, Alternate No. 2, was to replace Julie Durrett; and Mr. Fischer—John Fischer who is here present in court now was to be the alternate. When we excused the alternate, it appears—you're Mr. Fisher; is that correct, sir, and you were Juror 14?
>
> **Fischer**: Correct.
>
> **Court**: That David Peterson who had replaced Ms. Durrett is the juror who was excused, and Mr. Fischer deliberated, so that is where we are for the evening. So with that in mind, thank you very much, Mr. Fischer, for returning and clarifying for us, and when I polled the jury on behalf of Mr. Werner's request, that would explain why you didn't answer to Mr. Peterson, because Mr. Peterson is the alternate who left, and you replaced Ms. Durrett in the deliberations. Thank you very much, and you are excused.

(Tr. at 351.)

D. Motion for new trial and the district court's order

On September 29, 2016, Oschmann filed an untimely Motion to Set Aide Jury Verdict and Grant the Defendant a New Trial and Brief in Support, alleging that an error occurred when Fischer joined the jury. (D.C. Doc. 57 at 2.) Oschmann stated that although the motion was filed past the 30-day deadline post verdict, the court could *sua sponte* find the interests of justice required a new trial to prevent a palpable miscarriage of justice. (*Id*.) Oschmann stated the "procedural safeguards of trial are among the most important safeguards protected

under the constitution" and reasoned that if they are violated, the court should consider granting Oschmann a new trial. (*Id*.) Oschmann stated there is "no way to know, now, how juror 13 might have decided differently than those who eventually deliberated[.]" (*Id*. at 3.) The State responded that the motion was untimely as it was outside the 30-day window of the guilty verdict per Mont. Code. Ann. § 46-16-702, and that there was no dispute the alternate jurors took the same oath as the other jurors and acted in every respect as jurors, thus the interests of justice did not require a new trial. (D.C. Doc. 58 at 3.)

The court issued an order denying the motion for new trial. (D.C. Doc. 60.) Although observing that the motion was untimely, and a narrow exception from case law was likely inapplicable, the court nonetheless considered the motion on the merits. (*Id*. at 4.) The court stated that upon discovery of the juror error, it "made further inquiry of Juror 14, John Fischer, to confirm that he had been sworn, deliberated and that the guilty verdict was his verdict true." (*Id*. at 3.) The court observed that "while the issue was novel, the case had undisputedly been deliberated and decided by twelve selected, sworn jurors." (*Id*.) The court noted that under Mont. Code Ann. § 46-16-702, the motion for new trial must "specify the grounds for a new trial." (*Id*.) The court observed that the "broad allegations" in the motion were "without support" and did not "constitute specific grounds for a new trial." (*Id*.) The court reasoned that a defendant's constitutional right to an

impartial jury is served by establishing whether jurors have bias or prejudice through voir dire. (*Id*.) The court noted that under Mont. Code Ann. § 46-16-118, alternate jurors are selected "in the same manner as principal jurors." (*Id*. at 5.) The court observed that alternate jurors take the same oath, preemptory challenges were properly executed as to the alternate jurors, and the alternates were sworn to follow the court's directives. (*Id*.) Consequently, the court found there was "no evidence of prejudice or that the interest of justice would be served by granting a new trial." (*Id*.)

II. Facts related to IAC claims against Werner and Sibley

A. Werner's representation

On April 5, 2016, the jury found Oschmann guilty of the offenses. (D.C. Doc. 44.) When the court polled the jury, the parties discovered that the second alternate replaced Juror Durrett rather than the first alternate. (4/5/16 Tr. at 347.) The court asked if anything further needed to be addressed. (Tr. at 352.) Defense counsel Werner replied:

> I guess also with the juror issue, I will tell you frankly, Your Honor, of the top of my head, I don't know for sure what to think of that, actually, twelve people were there. I think the best course of action is I guess I will look into it going forward. I'm not in a position to make a motion for mistrial necessarily, but I will look into it and deal with it with the County Attorney's Office.

(Tr. at 353.) The court responded that it would "absolutely research it as well, should you file a motion." (*Id.*)

On July 11, 2016, Werner moved for the court to set a status hearing regarding Werner's continued representation of Oschmann. (D.C. Doc. 52.) On July 14, the court held a status hearing to discuss the pending IAC claim. (7/14/16 Tr. at 2-3.) Werner confirmed that Oschmann was unhappy with Werner's representation. (Tr. at 8.) The court directed Oschmann to file his IAC complaints in written form with the clerk of court. (Tr. at 6, 8.) On August 3, 2016, the public defender's office reassigned counsel of record from Werner to Sibley. (D.C. Doc. 54.)

B. Sibley's representation

On September 8, 2016, Sibley moved to continue sentencing to research and file a motion for new trial on the alternate juror issue, reasoning he had not yet had time to fully research the issue because he was newly appointed to represent Oschmann. (9/8/16 Tr. at 2-3.) The State objected because Oschmann did not move for a new trial within the 30-day window following the guilty verdict under Mont. Code. Ann. § 46-16-702, but also recognized the court could grant the motion "in the interest of justice" outside the 30-day window. (Tr. at 4-5.) The Court decided to give Sibley the opportunity to research "whether ethically that is

an appropriate motion." (Tr. at 6.) The court continued, "[m]y guess would be that is why Mr. Werner didn't file it, but we will see." (Tr. at 6.)

On September 29, 2016, Sibley filed a Motion to Set Aide Jury Verdict and Grant the Defendant a New Trial and Brief in Support. (D.C. Doc. 57.) Sibley reasoned that "procedural safeguards of trial" are important and there was "no way to know" whether Peterson would have concurred in the verdict. (*Id*. at 2-3.) The court considered the motion on the merits and denied it, concluding the interests of justice did not require a new trial because voir dire was properly conducted, preemptory challenges were properly done, alternate jurors were under the same admonition and sworn to follow the court's directives, and there was no prejudice. (D.C. Doc. 60.)

On October 28, 2016, Oschmann wrote a pro se letter to the court, alleging Sibley was ineffective. (Attached to D.C. Doc. 62.) On November 18, 2016, Oschmann filed a pro se "Motion to Set Aside Jury Verdict and Grant Defendant a New Trial," wherein he again asserted Sibley was ineffective due to a "conflict of interest" and that Werner was ineffective due to alleged trial errors, including failing to file a motion for new trial. (D.C. Doc. 61.) The State responded. (D.C. Docs. 64-65.) The court set a Stage-1 *Finley* hearing for December 2, 2016, to consider Oschmann's pro se filings. (D.C. Docs. 62-63.)

At the hearing, the court asked Oschmann to explain how Sibley was ineffective. (12/2/16 Tr. Tr. at 3.) Oschmann explained he wanted Sibley to file an IAC claim against Werner, but Sibley had declined. (Tr. at 4.) Oschmann also disputed the motion for new trial filed by Sibley, arguing it had "clerical errors" and was deficient. (Tr. at 5.)

As to Werner's representation, the court explained that it advised Werner he could "file a motion before the court" but, since it was a novel issue, "it took some time to research it and to make the decision whether or not to file such a motion." (Tr. at 5-6.) The Court explained that the "issue regarding Mr. Werner at that time was resolved internally within their law firm, the State Office of the Public Defenders Office, and you were appointed new counsel to assist you." (Tr. at 14.)

As to Sibley's representation, the court explained Oschmann "requested that your attorney be substituted, and you received a new attorney with a new pair of eyes to look at this and the make the ethical determination of whether it was appropriate to bring such a motion before the court[.]" (Tr. at 6.) The Court noted, "Mr. Sibley, a very seasoned criminal defense attorney was appointed to review the novel issue that we've discussed regarding the jury, and he researched it, and the Court has considered it on the law and on the merits." (Tr. at 14.) Even though the motion was "filed approximately 175 days" post-verdict, the court explained it had "considered [the] motion on the merits" and, after "doing substantial research,"

denied it. (Tr. at 6-7.) The court noted it relied on and cited the "correct statutes" in making its decision. (Tr. at 5.)

The court determined Oschmann's complaints did "not rise to a level of a seemingly substantial ineffective assistance of counsel complaint." (Tr. at 14.) The court found that "Mr. Sibley, as counsel in this case, has not been deficient" and "he has done what he has been appointed to do." (Tr. at 15.) The court subsequently entered an order denying both of Oschmann's pro se filings, reasoning that attorney/client relationship was "very much intact" as they were "meeting, communicating, and specifically discussing sentencing issues and post-conviction remedies." (D.C. Doc. 69 at 4-5.) The court found that Oschmann's complaint was not "sufficient to justify appointment of new counsel." (*Id*. at 4.)

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion in finding the interests of justice do not require a new trial. A technical, immaterial violation of the alternate juror statute occurred, and Oschmann fails to show any prejudice from this technical violation. To the contrary, voir dire was properly conducted, the alternates were properly selected, and the alternates were under the same oath and admonitions from the court as the primary jurors. The courts findings of fact that juror Fischer was sworn, deliberated, and his verdict was true was supported by a

preponderance of the evidence. The court's finding that the juror error occurred at "the inception of trial" was similarly supported by a preponderance of the evidence.

Oschmann's IAC claim against his first counsel Werner is moot since it is based on an allegation that Werner should have filed a motion for new trial, which was filed by Oschmann's second counsel Sibley. Even if this Court considers the merits of the IAC claim, Oschmann suffered no prejudice from Werner's representation because Sibley filed the motion, and the record also shows that Werner exercised reasonable professional judgment.

Similarly, Oschmann's IAC claim against his second counsel Sibley fails. Even though Sibley did not cite the relevant portion of the jury selection statute, Sibley explained the substance of the trial irregularity nonetheless. Oschmann fails to show how the result of the proceedings would have been different had Sibley cited the statute because the court properly focused on whether the interests of justice required a new trial, and cited Mont. Code Ann. § 46-16-118 in its order denying a new trial. Further, Oschmann suffered no prejudice because alternate juror two replaced Juror Durrett rather than alternate juror one. Oschmann passed the jury for cause, including both alternates, and received a fair trial from a fully empaneled jury.

STANDARD OF REVIEW

This Court generally reviews a district court's decision to grant or deny a motion for new trial for an abuse of discretion. *State v. Morse*, 2015 MT 51, ¶ 18, 378 Mont. 249, 343 P.3d 1196. To the extent that a district court makes findings of fact, those findings must be made by a preponderance of the evidence and will be reviewed for clear error. *Morse*, ¶ 18.

This Court reviews IAC claims on direct appeal according to the standards under *Strickland v. Washington*, 466 U.S. 668 (1984). *State v. Weber*, 2016 MT 138, ¶ 11, 383 Mont. 506, 373 P.3d 26 (citation omitted). IAC claims are mixed questions of law and fact which this Court reviews de novo. *State v. LaField*, 2017 MT 312, ¶ 11, 390 Mont. 1, 407 P.3d 682 (citing *State v. Clary*, 2012 MT 26, ¶ 12, 364 Mont. 53, 270 P.3d 88).

ARGUMENT

I. The district court properly exercised its discretion in denying Oschmann's motion for a new trial because the interests of justice did not require a new trial.

A district court may grant the defendant a new trial "if required in the interest of justice" and "if justified by law and the weight of the evidence." *State v. Strang*, 2017 MT 217, ¶ 46, 388 Mont. 428, 401 P.3d 690 (citing Mont. Code Ann. § 46-16-702). In the event a motion for a new trial is filed beyond the

statutory 30-day post-verdict deadline, the district court has inherent authority to grant a new trial to "remedy a palpable miscarriage of justice." *Morse*, ¶ 25.

On appeal, Oschmann does not argue that his constitutional right to a fair and impartial jury was compromised,[3] nor does Oschmann argue for or explain how the interest of justice requires a new trial. (Appellant's Br. at 14-18.) Rather, Oschmann argues that he should receive a new trial because the district court did not follow Mont. Code. Ann. § 46-16-118(3), when the second alternate juror rather than the first alternate juror replaced Juror Durrett. (*Id*.) Oschmann further argues the district court's factual findings are erroneous. (*Id*.)

[3] A material failure to substantially comply with Montana statutes governing the procurement of a trial jury must be treated as structural error. *State v. LaMere*, 2000 MT 45, ¶ 50, 65, 68, 298 Mont. 358, 2 P.3d 204. However, this Court has also clarified:

> While it is true statutory jury selection procedures are designed to protect against violations of the *underlying right to a fair and impartial jury*, not every violation of the statutory process governing the formation of a trial jury results in reversal. *Technical departures from the jury selection statutes and violations which do threaten the goals of random selection and objective disqualification do not constitute a substantial failure to comply*.

State v. Bearchild, 2004 MT 355, ¶ 15, 324 Mont. 435, 103 P.3d 1006 (citing *LaMere*, ¶¶ 55, 58) (emphasis added).

A. A technical departure from the jury selection statute occurred but does not implicate Oschmann's substantial rights or the interests of justice.

Oschmann argues the district court failed to follow Mont. Code Ann. § 46-16-118(3), because according to the statute, the alternate must serve "in the order in which they are called" and "may not join the jury in its deliberation unless called upon by the court to replace a member of the jury." (Appellant's Br. at 13.)

However, a technical violation not implicating the defendant's substantial rights requires that Oschmann show prejudice. *See Bearchild*, ¶ 24. In *Bearchild*, this Court stated that the harmless error standard "applies to technical or immaterial violations of the statutory jury selection scheme" and that "[p]rejudice will not be presumed where the record shows the district court's error affected neither the constitutional or jurisdictional rights of the defendant, and the defendant on appeal has failed to demonstrate prejudice to his substantial rights resulting from the trial error." *Bearchild*, ¶ 24. Montana Code Annotated §§ 46-20-701(1)-(2) provides that "any error defect, irregularity or variance that does not affect substantial rights must be disregarded" and "a cause may not be reversed by reason of any error committed by the trial court against the convicted person unless the record shows that the error was prejudicial." This Court has observed that that a "failure to comply with a statutory procedural requirement must be considered in the context of other relevant statutory provisions." *State v.*

Pipkin, 1998 MT 143, ¶ 19, 289 Mont. 240, 961 P.2d 733 (concluding the failure to address the salutation on a warrant to a specific officer was a statutory violation, but it did not prejudice or implicate the defendant's substantial rights).

The technical violation here is immaterial to Oschmann's substantial rights. The Montana and United States Constitutions guarantee a defendant a right to a fair trial by an impartial jury. Mont. Const. Art. II, §§ 17, 24; U.S. Const. amend. VI. The purpose of voir dire is to determine a "prospective juror's partiality, that is, his or her bias and prejudice" which "enables counsel to intelligently exercise their preemptory challenges." *State v. Herrman*, 2003 MT 149, ¶ 23, 316 Mont. 198, 70 P.3d 738. An alternate juror ". . . is in every respect a juror. The alternate is accepted after voir dire, sits with the jurors through oral argument, and is governed by the admonitions of the district court." *State v. Grant*, 221 Mont. 122, 128-29, 717 P.2d 562, 567 (1986). Although a "defendant is entitled to an impartial jury, he has no right to a particular juror." *State v. Aguado*, 2017 MT 54, ¶ 42, 387 Mont. 1, 390 P.3d 628 (citing *Bearchild*, ¶ 21.)

Here, the district court correctly concluded that the interests of justice do not require a new trial because (1) voir dire was properly conducted to determine any jurors bias or partiality; (2) the alternate jurors were properly selected in the same manner as the principal jurors and both parties exercised preemptory strikes in choosing the alternate jurors; (3) the alternate jurors took the same oath as the

principal jurors and were sworn to follow the court's directives; and (4) there is no evidence of prejudice or that the interest of justice would require a new trial. (D.C. Doc. 60 at 5.)

Although this Court has not addressed this precise issue, when the second alternate serves on the jury rather than the first alternate, other courts have determined that an out-of-order assignment of an alternate to the jury did not require reversal. In *United States v. Levesque*, 681 F.2d 75, 80 (1st Cir. 1982), defendant argued the district court committed reversible error after a juror was excused from the jury, and the first alternate was to take the jurors place, but the next person in line for the second alternate position "somehow . . . jump[ed] over" the "more senior alternates" and served on the jury. *Id*. The First Circuit recognized that "not every violation of Rule 24[4] calls for reversal" and rather reversal was only required if the irregularity "affects substantial rights." *Id*. Finding that the alternate who served as a juror "would have been expected to do so had vacancies occurred in the regular panel" and that this "was not a case where an *additional* person was allowed to sit in on jury deliberations, thus destroying the sanctity of the jury[,]" the court determined that there was no evidence of "such prejudice or impact upon substantial rights as constitutes cause for reversal." *Id*. at

[4] *See* Fed. R. Crim. P. 24(c). The federal rule similarly requires that alternate jurors replace principal jurors in "the same sequence in which the alternates were selected."

81 (emphasis added); s*ee also United States v. Love*, 134 F.3d 595, 601 (4th Cir. 1998) (the district court's failure to replace principal jurors with alternates "in the order in which they are called" under Fed. R. Crim. P. 24(c) did not necessitate a new trial for lack of prejudice to defendant's substantial rights).

Because Oschmann fails to show, or even argue, that this technical violation prejudiced his rights, or the interests of justice mandates a new trial, his argument fails. A defect that does not affect a defendant's substantial rights "must be disregarded." Mont. Code Ann. § 46-20-701(1). The district court properly exercised its discretion in denying the motion for new trial.

B. The district court did not clearly err in its factual findings, which were made were made by a preponderance of the evidence.

To the extent that a district court makes findings of fact, those findings must be made by a preponderance of the evidence and will be reviewed for clear error. *Morse*, ¶ 18. A finding is clearly erroneous if it is not supported by substantial evidence, if the district court misapprehended the effect of the evidence, or if this Court's review of the record convinces it that the district court made a mistake. *State v. Talksabout*, 2017 MT 79, ¶ 8, 387 Mont. 166, 392 P.3d 574.

Oschmann disputes the accuracy of the district court's finding in its order denying the motion for new trial that it "made further inquiry of Juror 14, John Fischer, to confirm that he had been sworn, deliberated and that the guilty

verdict was his verdict true." (D.C. Doc. 60 at 3; *accord* Min. Entry D.C. Doc. 44.) Oschmann argues that while the court "assumes" that Fischer deliberated, "there is no time or place in the record where the district court received confirmation from John Fischer that he was sworn, whether he deliberated and whether the guilty verdict was his verdict true." (Appellant's Br. at 15, 16.)

To address this allegation, the record must be traced back to when the irregularity was discovered. When the court polled the jury, it reached Juror No. 3's position, vacated by Juror Durrett due to a medical condition, and stated, "Mr. Peterson, is this your verdict—I'm sorry, maybe I—Mr. Peterson . . . ." Fischer responded, "I was No. 14." (4/5/16 Tr. at 347.) After the guilty verdict was read and the jury was polled, the court excused the jurors. (Tr. at 349.) The minute entry confirms and states the names of all twelve jurors, including Fischer, who were relieved of their duties. (D.C. Doc. 44 at 2.) When the court recalled Fischer to the court room and re-polled him, it asked, "You're Mr. Fischer; is that correct, sir, and you were Juror 14?" and Fischer responded "Correct." (Tr. at 351.) The court then found:

> That David Peterson who had replaced Ms. Durrett is the juror who was excused, and *Mr. Fischer deliberated*, so that is where we are for the evening. So with that in mind, thank you very much, Mr. Fischer, for returning and clarifying for us, and when I polled the jury on behalf of Mr. Werner's request, that would explain why you didn't answer to Mr. Peterson, because *Mr. Peterson is the alternate who left, and you replaced Ms. Durrett in the deliberations*. Thank you very much, and you are excused.

(Tr.at 351.) (Emphasis added.)

The finding that Fischer served on the jury and deliberated is not clearly erroneous because Fischer was there, in Juror # 3's position, during the original polling of the jury, and was excused along with the other eleven members of the jury after polling. (D.C. Doc. 44 at 2.) Peterson, the only other remaining de facto alternate, had already been excused shortly before deliberations.[5] It is undisputed that 12 people served on the jury. (D.C. Doc. 60 at 3.) Therefore, by necessity, Fischer deliberated. Oschmann contends that the district court "assumes" that Fischer deliberated, but the district court, as the person who presided over the trial and observed that Fischer was in Juror # 3 Durrett's position, was in the best position to make the finding, and all 12 jurors were accounted for in the record. (*See* D.C. Doc. 44 at 2.) The finding that Fischer was sworn is not clearly erroneous because, as an alternate, Fischer was sworn in with the jury shortly before opening arguments. (D.C. Doc. 40 at 2; Tr. at 84.) The finding that Fischer's guilty verdict was true is not clearly erroneous because, although the

[5] (*See* 4/5/16 Tr. at 345 (where the court excused the alternate), Tr. at 351 (the court explained that "Peterson is the alternate who left[.]"); *See also* D.C. Doc. 44 at 2 (The minute entry confirms that "the alternate juror is excused until called by the Court, should that be necessary" and it was determined during the polling of jury that "Alternate Juror #2 John M. Fischer sat as Juror #3 for the duration of the trial and deliberations.")

polling of the jury was interrupted when the juror error was discovered, Fischer did not contradict the guilty verdict during either the original polling of the jury, or when he was recalled to discuss the error. (4/5/16 Tr. at 347, 351.) The verdict forms verify the verdict as to both charges was a unanimous guilty verdict, which also was read aloud in open court. (D.C. Doc. 47-48; 4/5/16 Tr. at 346.) Finally, even if this Court determines the finding was in error, it should not be given any effect, because Oschmann fails to explain how the district court abused its discretion in determining interests of justice did not require a new trial.

Oschmann argues, without citation, that the court mischaracterized *when* Fischer joined the jury, and "made it seem as if" Fischer served on the jury rather than Peterson "during deliberations only." (Appellant's Br. at 17.) The court did no such thing. The record indicates that the error occurred immediately after opening arguments, when Juror Durrett was excused for medical reasons, and the court directed the bailiff to move Peterson to the jury. (Tr. at 99.) The court confirmed this fact in its order denying the motion for new trial, stating, "[a]s the Court polled the jury it came to the Court's attention *at the inception of trial* that Juror 14, John Fischer, had taken the place of the excused juror rather than Juror 13, David Peterson as the Court had instructed." (D.C. Doc. 60. at 3 (emphasis added).) Regardless, Oschmann fails to explain why this fact matters for this

Court's consideration in determining whether the district court erred in concluding the interests of justice do not require a new trial.

The district court's findings were supported by substantial evidence, and Oschmann fails to show that the court misapprehended any evidence or made any mistake. Therefore, the district court did not clearly err in its findings.

II. Oschmann's IAC claim against Werner is moot or meritless, and his claim against Sibley is meritless.

A. Applicable law

The right to effective assistance of counsel in criminal prosecutions is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by article II, section 24 of the Montana Constitution. *LaField*, ¶ 26. This Court applies the two-part IAC test set forth in *Strickland*, which requires a finding on both of the following prongs: (1) counsel's performance was deficient or fell below the objective standard of reasonableness; and (2) the defendant was prejudiced by counsel's deficient performance. *Weber*, ¶ 21.

When considering the first *Strickland* prong, there is a "strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Whitlow v. State*, 2008 MT 140, ¶ 15, 343 Mont. 90, 183 P.3d 861; *Strickland*, 466 U.S. at 689; *LaField*, ¶ 26. The second *Strickland* prong requires a defendant to demonstrate a reasonable

probability that, but for counsel's deficient performance, the result of the proceeding would have been different, or, in other words, the alleged deficiency created "[a] reasonable probability . . . sufficient to undermine confidence in the outcome of the proceeding." *Worthan v. State*, 2010 MT 98, ¶ 16, 356 Mont. 206, 232 P.3d 380; *Strickland*, 466 U.S. at 694. Because a successful IAC claim requires both *Strickland* prongs be met, if a defendant cannot establish one prong of the test, there is no need to address the other prong. *Whitlow*, ¶ 11.

B. Werner IAC Claim.

1. Mootness

Oschmann's IAC claim against Werner is based solely on Werner's failure to file a motion for new trial. Oschmann mistakenly argues "no plausible justification" exists for Werner's failure to file the motion for new trial and "no tactical decisions" could have justified the inaction. (Appellant's Br. at 23.) Oschmann ignores that, at his instigation, a second court appointed attorney, Sibley, took over for Oschmann and filed a motion for new trial. (D.C. Docs. 54, 57; 7/14/16 Tr. at 8; 9/8/16 Tr. at 6.)

"Mootness is a threshold issue which must be considered before addressing the underlying dispute." *Povsha v. City of Billings*, 2007 MT 353, ¶ 19, 340 Mont. 346, 174 P.3d 515 (citation omitted.) The question of mootness is whether this Court can grant effective relief, which will depend on the specific factual and

procedural circumstances of the case and the relief sought by the appellant. *Progressive Direct Ins. v. Stuivenga*, 2012 MT 75, ¶ 49, 364 Mont. 390, 276 P.3d 867 (citation omitted). An issue becomes moot when it ceases to exist because of some happening or event and the court cannot grant effective relief. *Cape v. Crossroads Corr. Ctr*., 2004 MT 265, ¶ 25, 323 Mont. 140, 99 P.3d 171 (citation omitted).

Oschmann's motion for new trial was filed by his second attorney, was considered on the merits, and denied. Therefore, Oschmann's complaint against Werner is moot.

2. Deficiency

Oschmann argues that Werner was deficient because "he did not timely object to the alternate juror error" and failed to file a motion for a new trial within 30 days. (Appellant's Br. at 21.)

Werner need not have contemporaneously objected to the alternate juror error. Because it was a novel issue when the error was discovered, Werner did not yet know the basis for an objection. Werner explained, "I don't know for sure what to think of that" and that he would "look into it going forward." (4/5/16 Tr. at 353.) Werner preserved the issue, and the court affirmed he had time to research and file a motion for new trial if needed. (*Id*.; 12/2/16 Tr. at 5-6.) Werner retained

the statutory ability to file a motion for new trial as a right, within 30 days of the guilty verdict. Mont. Code Ann. § 46-16-702(2).

Werner did not file the motion, presumably because he assumed the motion lacked merit. (Tr. at 353.) Regardless, Oschmann fails to rebut the strong presumption that Werner acted within the bounds of reasonable professional judgment by not filing a motion for new trial, especially because the district court ultimately found such a motion meritless. (D.C. Doc. 60 at 5.)

3. Prejudice

Even if this Court determines this IAC claim is not moot and Werner was deficient, there is no prejudice. Oschmann argues that if Werner would have filed the motion for new trial and raised Mont. Code. Ann. § 46-16-118(3), it "would have created a different outcome" for Oschmann, as "a different juror, the correct juror, would have sat in No. 3's place." (Appellant's Br. at 24.) Oschmann continues that "David Peterson should have sat on the jury as the alternate, not John Fischer." (*Id*.)

This inferential leap ignores several facts. First, Werner did not have the opportunity to raise the juror error until it was discovered post-trial and verdict, so even if Werner timely raised the issue, his only remedy was filing a motion for a new trial, not juror substitution. *See* Mont. Code Ann. § 46-16-118 (alternate jurors may only replace jurors "prior to the time the jury arrives at its verdict[.]")

Oschmann must also assume the filing of a motion explaining the statutory violation would have created a different outcome because, presumably, the court would rule in his favor. But the court's ultimate ruling on the issue proves otherwise, because while the court recognized a procedural irregularity occurred, it properly focused on the prejudicial effect of the error and whether the interest of justice required a new trial. (D.C. Doc. 60 at 3, 5.)

Further, Oschmann states that another of Werner's alleged deficiencies is "failure to file a motion for a new trial within 30 days" as allowed by Mont. Code Ann. § 46-16-702. (Appellant's Br. at 21.) But this alleged deficiency did not result in prejudice. As the court correctly observed, any potential prejudice from Werner not filing the motion for new trial was cured through OPD providing Oschmann new counsel, Sibley, who did file the motion. (12/2/16 Tr. at 14.) While the motion was untimely, the court nonetheless fully "considered [the] motion on the merits[,]" (Tr. at 7), and relied on and cited the "correct statutes" in making its decision. (Tr. at 5.)

Thus, Oschmann fails to meet either prong of the *Strickland* test to show that Werner was ineffective.

C. Sibley IAC Claim

1. Deficiency

Oschmann argues that, although Sibley filed a motion for new trial, Sibley was deficient because his motion inadequately failed to cite Mont. Code Ann. § 46-16-118(3). (Appellant's Br. at 26.)

Sibley was not deficient. Although Sibley did not cite the portion of the statute supporting that a statutory error occurred, Sibley explained the technical violation nonetheless, reasoning it was "undisputed fact that the 14th juror was selected to replace one of the original jurors, when a 13th was available" and stated the court could conclude this is "adequate cause" for a new trial. (D.C. Doc. 57 at 2.) Sibley also argued that the court could grant his motion in the interests of justice and that the violation prejudiced Oschmann's fundamental rights, reasoning, "the procedural safeguards of trial are among the most important safeguards protected under the constitution" and "there is no way to know, now, how juror 13 might have decided differently than those who eventually deliberated." (*Id*. at 2-3.) In other words, Sibley made the only substantive argument he could make. The argument simply lacked merit, which is why Oschmann cannot prove prejudice, as explained herein.

2. Prejudice

Without explaining how Sibley's alleged deficiency prejudiced Oschmann's substantial rights, Oschmann simply argues that the omission of the statute "was prejudicial" to Oschmann. (Appellant's Br. at 26.) Despite the insufficient briefing, the State will nonetheless address it.

There is no prejudice. The district court understood a technical violation of Mont. Code Ann. § 46-16-118 occurred, since the court cited the statute in its order denying the motion for new trial. (D.C. Doc. 60 at 2, 5.) Sibley citing the statute would not have made his motion for new trial any more persuasive, and Oschmann failed to show there is a reasonable probability of a different outcome. Indeed, it would not have changed the court's consideration in evaluating whether Oschmann suffered prejudice and whether the interests of justice required a new trial. (D.C. Doc. 60 at 5.) The court stated it relied on and cited the "correct statutes" in making its decision. (Tr. at 5.) As explained above, Oschmann also fails to show prejudice from the underlying technical violation itself. Oschmann passed the jury for cause (4/4/16 Tr. at 80), did not use a preemptory strike against Fischer (Tr. at 83) and the alternates were properly procured. (Tr. at 82-83.)

Thus, Oschmann fails to meet either prong of the *Strickland* test to show that Sibley was ineffective.

CONCLUSION

Oschmann fails to show that the district court abused its discretion in concluding the interest of justice do not require a new trial, thus the district court's order should be affirmed. Regarding Oschmann's IAC claim against his first counsel, the claim is moot. Finally, Oschmann's IAC claims against both his counsel lack merit, as Oschmann fails to show either of his counsel were ineffective.

Respectfully submitted this 5th day of October, 2018.

TIMOTHY C. FOX
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: */s/ Roy Brown*
ROY BROWN
Assistant Attorney General

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 6,934 words, excluding certificate of service and certificate of compliance.

/s/ Roy Brown
ROY BROWN

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 10-05-2018:

Scott D. Twito (Prosecutor)
Yellowstone County Attorney's Office
PO Box 35025
Billings MT 59107
Representing: State of Montana
Service Method: eService

Lisa S. Korchinski (Attorney)
Office of the Appellate Defender
555 Fuller Avenue
Helena MT 59620
Representing: Kenneth Arnold Oschmann
Service Method: eService

Electronically signed by Janet Myers on behalf of Roy Lindsay Brown
Dated: 10-05-2018