IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 17-0237

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CHARLES HENRY PINNER,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Fifteenth Judicial District Court,
Roosevelt County, The Honorable David J. Cybulski, Presiding

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STATEMENT OF THE ISSUES

1. Should this Court invoke plain error to review Appellant's unsupported claim of prosecutorial misconduct?

2. Has Appellant met his heavy burden of proving that his trial counsel provided ineffective assistance of counsel (IAC)?

3. Has Appellant demonstrated any ground for this Court to employ the cumulative error doctrine?

4. The State concedes that $10 of the information technology fee and costs for the jury trial and court appointed counsel should be stricken from the judgment.

STATEMENT OF THE CASE

On December 15, 2015, the State charged Appellant Charles Pinner (Pinner) with Sexual Intercourse Without Consent and Aggravated Kidnapping. Pinner committed these offenses on an Amtrak train traveling through Montana in April 2015. (D.C. Docs. 1, 4.) Court appointed counsel Steven Scott and Terrance Toaves represented Pinner at trial and sentencing. (D.C. Doc. 11.)

Defense counsel filed a motion in limine to prohibit the State from introducing evidence of Pinner's criminal record or disciplinary record with

Amtrak. (D.C. Doc. 116.) The parties reached a stipulation about this motion. (9/19/16-9/23/16 Transcript of Jury Trial [Tr.] at 636.)

A jury found Pinner guilty of Sexual Intercourse Without Consent, resulting in bodily injury, and Aggravated Kidnapping. (D.C. Doc. 132.) The district court sentenced Pinner to the Montana State Prison for 60 years and restricted Pinner's parole eligibility until he completes Phases I and II of sexual offender treatment. (D.C. Doc. 146.) The court imposed a $20 technology fee—$10 for each offense. Over Pinner's objection, the court ordered Pinner to reimburse the State for the cost of trial and for defense counsel expenses. (1/18/17 Sentencing Transcript [Sent. Tr.] at 16-17, 22, 15; D.C. Doc. 146.)

STATEMENT OF THE FACTS[1]

On April 19, 2015, 68-year-old Patsy Shepherd (Patsy) lost more than happy memories from a vacation when Amtrak train attendant Pinner raped her, turning Patsy's bucket list, once in a lifetime trip into a nightmare. Patsy grew up in the small town of Franklin, North Carolina, with her 10 siblings. Her father logged and

[1]Pinner peppers his Statement of Facts with matters that are irrelevant to the issues raised on appeal. He accuses the district court of inserting racial overtones into Pinner's case (Appellant's Br. at 3); accuses that it was impossible for Pinner to get a fair cross section of the community on his jury (Appellant's Br. at 4); and insinuates that the gender split of the jury somehow deprived him of a fair trial (Appellant's Br. at 5). Pinner has not raised any of these claims on direct appeal.

farmed. Her mother ran the household and cared for the children. (Tr. at 136-37.) The family was poor and faced many hungry days. (Tr. at 137, 146.) At ten years old, Patsy stepped in to raise the younger children and run the household because her mother passed away. (Tr. at 137-38.)

When Patsy's siblings were older, she moved to Atlanta and worked in accounting for Sears and Walmart. (Tr. at 138.) Patsy married briefly at age 17, got divorced and never remarried. At age 69, Patsy continued to work part time for H&R Block. She also took care of her two-year-old great niece while Patsy's niece was at work. (Tr. at 138-40.)

In May 2014, Patsy's baby sister Jenny died. Patsy cared for Jenny during her illness. The two of them were very close and had always dreamed of traveling around the country since neither of them had done much traveling. Sadly, Jenny passed away before the two could travel together. After Jenny's death, Patsy's younger sister, Lois, was visiting Patsy. Patsy told Lois that she wanted to take a trip and especially wanted to see the western part of the United States. Lois was very interested, as was their older sister Betty. (Tr. at 141-43.) At the time of trial, Lois was 65 years old, Patsy was 69 years old, and Betty was 79 years old. (Tr. at 135,

144, 287.) Due to poor health, Betty could not testify in person at trial. In lieu of her in person testimony, the State presented Betty's videotaped deposition. (*See* Tr. at 134.)[2]

In planning the bucket list trip, Patsy quickly concluded that flying was too expensive. Traveling by train was much more affordable and a good way to see the country and meet people from other places. (Tr. at 142.) Patsy worked with Dina, a travel agent who worked with Amtrak through another agency. Dina and Patsy became fast friends. Dina understood the significance of the trip and wanted to help Patsy achieve this dream. Dina planned a trip allowing Patsy and her sisters to travel through 40 states. (Tr. at 464.) The three sisters saved and planned. (Tr. at 142-43.) The trip was a way for them to live out a dream of their deceased baby sister, Jenny. (Tr. at 146.) Before Patsy, Lois and Betty departed on their trip, Dina gave them her cell phone number. She had developed a friendship with the three women, was concerned about the three senior citizens traveling such a long distance, and wanted to make sure if there were any problems along the way she could help them out. (Tr. at 466.)

[2]Although it is clear that the jury heard Betty's videotaped deposition, Pinner did transmit the deposition on appeal. Since Betty's testimony does not impact the issues Pinner has raised, the State will not cite to any of Betty's deposition testimony.

Patsy bought a ticket to ride in coach, while Lois and Betty purchased tickets to share a small sleeper roomette. In April 2015, the three sisters started their train trip from Gainsford, Georgia. By the time the train arrived in Chicago, Patsy was not feeling well. Patsy called Dina to see if she could move into a sleeper roomette on the trek from Chicago to Glasgow, Montana. (Tr. at 150-51.) At Glasgow the three sisters planned to get off the train for a few days to visit Lois's son Adam. (Tr. at 157.)

At Chicago, Patsy and her sisters had to switch trains. Dina had arranged for Patsy to move to a sleeper roomette but it was in a different car from her sisters' roomette. (Tr. at 159.) Beginning in Chicago, Pinner was the attendant for Lois's and Betty's car. When Pinner found out that the sisters were not in the same car, he told them he had room for Patsy in his car. (Tr. at 159.) Upon first impression, Patsy did not find Pinner to be very professional. He used vulgar language. Patsy provided two examples. Pinner instructed another Amtrak employee to talk with the supervisor about where Pinner was placing Patsy because he did not want to "deal with that bitch." (Tr. at 160.) On cross-examination, Patsy, after reviewing her prior statement, corrected herself and said Pinner actually stated he did not want to "deal with that shit." (Tr. at 205.) When Patsy told Pinner all she wanted to do was take a shower and rest. Pinner responded that she could do anything she wanted on his car, including running up and down the halls naked. (Tr. at 160-62.)

Pinner allowed Patsy to shower in a deluxe room, rather than using the community shower. After Patsy showered, Pinner told her that since that deluxe room was empty, she should stay there. The room was nicer than the roomette Dina had arranged for her. (Tr. at 161-62.)

At dinner that evening, the three sisters shared a table with a nice man named Dave. The four moved from the dining car to the observation car where they met another man named Greg. (Tr. at 164-65.) Eventually the five of them went to Patsy's room. Patsy does not drink alcohol, but everyone else had one glass of wine. Charles brought the wine to Patsy's room. Patsy got the impression that Charles wanted to be included in their group. (Tr. at 166.) Charles referred to Patsy and her sisters as "the blondes." (Tr. at 167.) Lois recalled that in Pinner's presence Dave told a joke and inserted Pinner's name into the joke. Pinner seemed to be annoyed and offended. (Tr. at 313.)

After about 45 minutes the group broke up. Patsy was unaware that there was a door for her room, so she pulled the curtain and went to bed. (Tr. at 167.) The sofa in the room folded out into a bed. The following morning, April 19, 2015, Patsy felt better. She and her sisters went to breakfast. The train was getting pretty close to Glasgow, where they would get off to stay with Adam a few days. (Tr. at 171-72.)

After breakfast, Patsy returned to her room. As she was sitting in the chair, looking out the window, Pinner came to the door and said "I'm here." (Tr. at 174.) Patsy told him to come in. Pinner entered her room and pulled the door closed and locked it. This was the first time Patsy realized there was an actual door to her room. (Tr. at 174.) After closing and locking the door, Pinner also pulled the curtain. Patsy explained that Pinner came over and "started grabbing at me, licking at me, kissing on me. Then he grabbed me by my shirt, here and started pulling at me. And pulled me down into the floor." (Tr. at 174.)

Patsy continued:

> He [Pinner] pulled my shirt up, he was grabbing at me, licking on me, kissing on me, pulling my clothing. Pulled my shirt up over my head, pulled my bra and camisole off. All this was around my neck. The he pulled my pants down around my ankles. He was on top of me. Then he started doing terrible things. Pawing and grabbing and pinching and pulling. I was pinned to the floor, I couldn't do anything. I asked him to stop. I told him I could not do that. And I kept telling him no.

(Tr. at 175.) Pinner penetrated Patsy's "private parts" with his hands. He also put his mouth on her "private parts." (*Id*.) Pinner penetrated Patsy's vagina with his penis. It was very painful. Patsy believed that Pinner ejaculated because she washed it off of her body later. (Tr. at 176.) When Pinner finished, he got up and said, "Now I've banged all three of you blondes." (Tr. at 176-77.) Pinner left and Patsy managed to get to her feet. All she could think about was getting into the

shower. Patsy tearfully explained, "I was dirty. I felt filthy, I felt dirty[.] I felt violated." (Tr. at 177.)

When Patsy showered, there was blood dripping from her vagina. Patsy had already gone through menopause. (Tr. at 176-77.) Patsy used toilet tissue to catch the blood. (Tr. at 233-34.) Patsy's legs, arms, back, and breasts hurt. She felt ashamed. (Tr. at 177-78.) After Patsy got out of the shower, Betty came to her room. Betty asked her if she was alright. Patsy did not tell her what Pinner had done. Pinner kept walking down the hall. Patsy asked Betty to lock the door, because she did not want Pinner in her room. (Tr. at 178.)

When Betty finally opened the door, Pinner came back in. He tried "messing with" Betty and Patsy but they both pushed him away and told him to get out. (Tr. at 178.) He finally left but kept walking by offering them food and drinks. For Patsy "it was just so humiliating, disgusting. He wanted to be chatty just like nothing had, nothing had happened." (Tr. at 179.) Patsy "didn't want nobody to know." (*Id*.) She "just wanted to put it behind" her. (*Id*.) Patsy tried hard to "shut it out." (*Id*.)

After breakfast that morning, Lois did not feel well. Lois found an empty room that was quiet and dark, and laid down on the couch. Lois was hoping to rest before they got to Glasgow. As she was resting, Pinner came in and got behind her. Pinner told Lois, "I banged both your sisters, now it's your turn." (Tr. at 320.) Pinner started biting her and licking her. By the time he reached for her clothing,

Lois managed to sit up and push him back. She told him she was going to get Dave. Pinner responded "shit on Dave." (Tr. at 317.) Lois was shocked. (Tr. at 317.) Lois wanted to get away from Pinner and wanted to wash her face because Pinner's saliva was on her face and eyelashes. (Tr. at 319.)

Lois got away from Pinner and found Dave. Lois told Dave that Pinner was acting crazy. Dave sat with Lois, Patsy, and Betty until the train arrived in Glasgow. (Tr. at 321-22.) When Lois found Dave, she appeared to be very nervous and Dave thought something was wrong. Lois asked if Dave could stay with her and her sisters until they got off in Glasgow. (Tr. at 405-06.) Lois was jumpy and eventually told Dave that Pinner had "groped" her. (Tr. at 407.) Dave observed that Patsy's and Betty's behavior was markedly different from all of his other encounters with them. (Tr. at 409.)

When the train arrived at Glasgow, Patsy's sisters reminded her that it was her turn to tip Pinner. Patsy did so but it was one of the hardest things she ever had to do. (Tr. at 180.) Patsy wanted to "hurt him not tip him." (Tr. at 180.) When Patsy got off the train and saw her nephew Adam, she went straight to him. (*Id*.) When Lois saw Adam at the train station, she felt relieved and safe. She did not tell her sisters about her encounter with Pinner because she did not want to ruin her sisters' trip. (Tr. at 325-26.)

Adam had a brief encounter with Pinner during which he told Adam to "take care of my three blondies." (Tr. at 440.) Patsy seemed upset and irritable and not her normal, jovial self. Patsy's mood did not improve during the visit. (Tr. at 442, 444.) At Adam's house, Patsy told Lois that she had a black eye. Lois told Patsy to please not say anything unpleasant in front of Adam. Patsy immediately took another shower. (Tr. at 181.) Patsy used makeup to conceal the bruise under her eye. (Tr. at 236.) She also had bruises on her inner thighs, her stomach, and her breast. (Tr. at 235-36.)

During the visit with Adam, Patsy withdrew from everyone. She really wanted to go home, but she did not want to ruin the trip for her sisters. (Tr. at 182.) Lois observed that Patsy was tearful and quiet. Lois attributed this to Patsy not feeling well. (Tr. at 327-28.) Patsy said something to Lois about Pinner being a filthy SOB. Lois shut her down and said, let's just enjoy our time with Adam. When Lois later learned what happened to Patsy, she felt horrible for not allowing Patsy to talk. (Tr. at 328.)

At the end of the visit, Patsy dreaded getting back on the train, but she did it. In Seattle, there was a mix up with her ticket. Her sisters got to board the train, but Patsy had to go back to the station. It was a frustrating and tiring process to get her ticket straightened out. Patsy was the last person to board. Once she got to her seat

she “totally lost it.” (Tr. at 183-84.) Patsy told an attendant that she needed to speak with somebody because something had happened. (Tr. at 184-85.)

Patsy called Dina and told her what Pinner had done. (Tr. at 186.) When Patsy called Dina on April 25, 2015, she was crying and said, “Dina, he came to my cabin, he threw me to the floor and he raped me.” (Tr. at 469.) Patsy identified her attacker as “Charles”. Patsy told Dina that she had tried to hold everything inside but she was hurting. (Tr. at 469-70.) Dina convinced her that she had to report this to the police. Dina stayed on the phone with Patsy and made a three way call to Amtrak and the local police department. (Tr. at 186; State’s Ex. 1.)

Meanwhile, Lois and Betty were in the dining car waiting for Patsy to meet them for breakfast. Lois kept texting Patsy and had the waiter page Patsy. Eventually, the assistant conductor came and told Lois and Betty that Patsy had been taken off the train because she had been raped. (Tr. at 331.)

In Kelso, Washington, Patsy got off the train. The police were waiting for her and took her to the hospital. (Tr. at 186-88.) Although Patsy had her cell phone she could not make herself call her sisters to let them know what was happening. (Tr. at 187-88.)

Sharla Hixson (Hixon) is a staff nurse in the emergency department of Peace Health St. Johns Hospital in Longview, Washington. She has worked in the capacity for over 30 years. (Tr. at 478.) She has been specially trained and certified

as a SANE nurse to collect evidence and take a history from alleged sexual assault victims. (Tr. at 479.) On April 25, 2015, Patsy came to the emergency department. When Hixon first met Patsy it was very difficult for Patsy to maintain eye contact with her. Patsy was clearly embarrassed by her circumstances bringing her to the hospital. (Tr. at 487.) As Patsy discussed her sexual victimization, she was sad, tearful, and withdrawn. (Tr. at 488.)

Patsy told Hixon her attacker's name is "Charles". "She said he pinched her and clawed at her. She said she felt so dirty and she pretty much described every injury that I later documented." (Tr. at 490.) When Hixon physically examined Patsy she observed bruising on one of Patsy's shoulders, circular bruising on her navel, where Patsy said Pinner had pinched her, bruising on her inner thigh, bruising on her labia minora, bruising on her clitoral hood, and bruising on her buttocks. (Tr. at 491-92.) Hixon photographed the injuries she observed. (Tr. at 496; State's Exs. 13-19.) The quality of the photographs to Patsy's vaginal area were very poor. (Tr. at 501.) All of Patsy's injuries were consistent with the history she provided. (Tr. at 498.)

Dr. Solbert separately physically examined Patsy. (Tr. at 517-18.) Dr. Solbert also observed bruising over various areas of Patsy's body and observed bruising when she conducted a pelvic exam. (Tr. at 519.) Patsy had bruising on her labia minor and within the area of the peritoneum close to her urethral opening.

(Tr. at 522.) Patsy reported that the person who had sexually assaulted her had grabbed and poked at her and penetrated her vagina with his penis. All of Patsy's injuries were consistent with the history that she provided. During Dr. Solbert's interaction with Patsy, she was very withdrawn and quiet. (Tr. at 523, 525.)

Detective Travers from Amtrak met Patsy at the hospital. He took her to a motel and explained that she would get back on the train the next day and meet up with her sisters in Los Angeles. The next day, Patsy reunited with her sisters. (Tr. at 191-92.) Patsy finished out the train trip with her sisters because it was such an important trip and she did not want to ruin it for her sisters. (Tr. at 196.)

Patsy never told her other siblings about her victimization. (Tr. at 198.) Patsy now sees a psychiatrist and a counselor. She takes medication to help her sleep because she suffers from nightmares. This experience has been the hardest thing Patsy has endured in her life. Patsy suffers from depression. She has stopped attending church and singing. Patsy has withdrawn from everyone except her family. (Tr. at 200-01.) Patsy forbade Lois from telling their brothers what happened to her. When they returned to Montana for Pinner's trial, it was under the guise of visiting Adam. (Tr. at 344.)

Michael MacDonald (MacDonald), an investigator with the Amtrak Police Department, interviewed Pinner on April 30, 2015. (Tr. at 596, 601.) MacDonald recorded the interview. (Tr. at 605; State's Ex. 21.) MacDonald informed Pinner

that there was an allegation made against him, and asked him if he remembered anything out of the ordinary occurring on the Amtrak train on April 19, 2015. (Tr. at 607.) Pinner said he did not remember anything unusual but then suddenly said "[O]h there was three sisters that I helped out." (Tr. at 608.) Pinner claimed to have placed Patsy in Room 5, a roomette, rather than Room D, the deluxe room where he actually placed her. (*Id*.) Pinner never mentioned Room D during his interview. (*Id*.) Throughout the first interview Pinner talked about how nice the three sisters were. (Tr. at 642.)

Pinner provided a written statement to MacDonald. (Tr. at 620; State's Ex. 61.) Pinner stated that he only acted in the "right way" toward the three sisters. He helped them off the train, was happy to serve them, and they each gave him a tip. (*Id*.)

MacDonald interviewed Pinner a second time the next day. MacDonald again recorded the interview. (Tr. at 627; State's Ex. 23.) In both interviews, Pinner indicated that he had no disciplinary history with Amtrak. (Tr. at 629.) MacDonald determined that Pinner had a "pretty lengthy" disciplinary history. (*Id*.) In the second interview, Pinner told MacDonald that the three sisters and some others had a social gathering in Room D. In the first interview Pinner had never mentioned Room D, instead stating that Patsy was in Room 5. (Tr. at 631.)

During the second interview, Pinner inquired which sister was accusing him of wrongdoing. In the first interview, he asked what the sisters, in combination

were complaining about. (Tr. at 632, 641.) Pinner also seemed to know details that MacDonald had not disclosed to him. For example, Pinner suggested that if someone was accosted on the train, the person surely would have screamed or fought back—two things that Patsy did not do. MacDonald never shared with Pinner that Patsy had reported that she just froze. She did not scream or fight back. (Tr. at 641.)

SUMMARY OF THE ARGUMENT

Pinner has failed to demonstrate that plain error review of his prosecutorial misconduct claims are warranted. Pinner accuses the prosecutor of inserting racial bias into the trial through the use of hidden code words. A careful examination of the record, though, does not bear out Pinner's very serious accusations. Pinner's claim to the contrary, there was nothing wrong with the prosecutor commenting that the victim was from the south when she in fact was from the south. Pinner's suggestion that the prosecutor attempted to portray the victim and her sisters as "southern belles" while he portrayed Pinner as a "black brute" cannot withstand the weight of the trial transcript. The prosecutor could not blind the jury to Pinner being black and Patsy being white, but he did nothing to use the difference in their races to gain an untoward advantage. The jury convicted Pinner based upon overwhelming evidence of his guilt, not based upon his race.

Pinner has wholly failed to meet his heavy burden of proving ineffective assistance of counsel. He offers no meaningful analysis to support his claim, and the trial record clearly refutes all of his allegations.

Since the district court did not make a meticulous and significant inquiry into Pinner's ability to pay costs of the jury trial and defense counsel the State concedes that the judgment should be amended to strike those costs from the record. The State also concedes that the information technology fee should be amended from $20 to $10.

ARGUMENT

I. The standard of review

This Court may discretionarily review claimed errors that implicate a criminal defendant's fundamental constitutional rights, even if no contemporaneous objection is made under plain error review. *State v. Lackman*, 2017 MT 127, ¶ 9, 387 Mont. 459, 395 P.3d 477. This Court exercises plain error review only where failing to review the claimed error may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial, or may compromise the integrity of the judicial process. *Id*. The Court uses its inherent power of common law plain error review sparingly, on a case-by-case basis, and only in this narrow class of cases. *Id*.

This Court reviews claims of IAC on direct appeal if the claims are based solely on the record. *State v. Cheetham*, 2016 MT 151, ¶ 14, 384 Mont. 1, 373 P.3d 54. IAC claims are mixed questions of law and fact, which this Court reviews de novo. *State v. Ailer*, 2018 MT 18, ¶ 9, 390 Mont. 200, 410 P.3d 964.

Criminal sentences involve question of law and fact, which this Court reviews de novo. The Court's review is confined to determining whether the sentencing court had statutory authority to impose the sentence, whether the sentence falls within parameters set by the applicable sentencing statutes, and whether the sentencing court adhered to the affirmative mandate of the applicable sentencing statutes. *State v. Clawson*, 2018 MT 160, ¶ 8, 392 Mont. 51, 421 P.3d 269.

II. Pinner has not met his burden of demonstrating that plain error review of his alleged claims of prosecutorial misconduct is warranted.

A prosecutor's misconduct may be grounds for reversing a conviction and granting a new trial if the conduct deprived the defendant of a fair and impartial trial. *Clausell v. State*, 2005 MT 33, ¶ 11, 326 Mont. 63, 106 P.3d 1175. If a timely objection is not made at trial, however, the issue is waived. Mont. Code Ann. § 46-20-104(2). The Court can review such an unpreserved issue under the plain error doctrine. *State v. Aker*, 2013 MT 253, ¶ 21, 371 Mont. 491, 310 P.3d 506. But it is Pinner's burden to establish that sparingly used plain error review is

appropriate in his case because the claimed misconduct: (1) implicates a fundamental constitutional right; and (2) failing to review this claim may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may implicate the judicial integrity of the process. *State v. Evans*, 2012 MT 115, ¶ 25, 365 Mont. 163, 280 P.3d 871. "[A] mere assertion that constitutional rights are implicated or that failure to review the claimed error may result in a manifest miscarriage of justice is insufficient to implicate the plain error doctrine." *State v. Gunderson*, 2010 MT 166, ¶ 100, 357 Mont. 142, 237 P.3d 74.

Here, Pinner offers no analysis of why plain error review is warranted in the first instance other than unsupported assertions that the prosecutor interjected racial bias into the trial. Pinner instead jumps right to a merits argument of his alleged prosecutorial misconduct claim. He attempts to build his allegation of alleged prosecutorial misconduct upon on a theory that the prosecutor interjected racial bias into the proceeding through the use of "carefully inserted code words." (Appellant's Br. at 30.) But, a careful review of the record shows that the prosecutor's comments in opening and closing statements were founded upon the evidence that it intended to introduce and did introduce at trial. The prosecutor never referred to the victim in this case as "white" and to Pinner as "black." There is nothing to support Pinner's charge that the prosecutor referred to him by using

derogatory terms like "simple minded brute" or "black brute." (*See* Appellant's Br. at 22-27.)

Pinner accuses that through the prosecutor's opening and closing statements he attempted to create a favorable image of Patsy and her sisters as "southern belles" to contrast with a negative image of Pinner as a "black beast." (Appellant's Br. at 32-33.) The prosecutor used neither description.

During the opening statement, the prosecutor introduced the jury to Patsy. He told the jury that Patsy grew up with her 10 siblings in Franklin, North Carolina, a small town in the Appalachian Mountains. Patsy's family was poor. Prior to Patsy's train trip with her sisters, she had not traveled very often or very far. (Tr. at 110.) Growing up poor in the south and devoting a life to hard work hardly evokes the stereotype of "southern belle."

Regarding Patsy's and her sisters' first encounter with Pinner, the prosecutor said:

> The defendant kindly insisted they travel together, "oh no, no, no, you shouldn't be up there, be up here with your sisters" it was light, light load, there was a room, he said they could just stay in the car together. The red cap who brought their luggage and assisted them asked about changing their records to reflect that she was going to be in a different area and the defendant dismissed that idea just saying something along the lines of "I don't need to mess with that shit." The defendant was upon first meeting for these ladies, different from any attendant that they had up to that time and had after that time. He was, as they will tell you, far less professional and far more familiar. He seemed nice and helpful but he also struck the sisters [as] vulgar and crude and inappropriate at times. When they asked–when Pat asked if she

> could take a shower, he said you can do anything you want. You can run around naked on my train. And again, these are southern ladies and this just kind of wasn't what they were used to.

(Tr. at 113.) Rather than portraying Patsy and her sisters as "southern belles," the prosecutor explained that these were women who had suffered through hard times. They were not the type of people who send back a meal because the order was wrong; they were not demanding; they were not difficult. (Tr. at 113.) All of the prosecutor's remarks were later born out through the witnesses' trial testimony.

Pinner repeatedly accuses that the prosecutor informed the jury Pinner called the three sisters the "blonde bitches." (Appellant's Br. at 30.) During the opening statement, the prosecutor told the jury that Pinner called the three sisters "the blondes" or "the three blondes," not the "blonde bitches" as Pinner claims. (Tr. at 113.) This too was born out through trial testimony. (Tr. at 167.) Pinner's claim to the contrary, the prosecutor did not tell the jury that Pinner referred to Patsy and her sisters as "Appalachian bitches." (Appellant's Br. at 30.)

At trial, Patsy testified that after Pinner raped her, he stated, "Now I've banged all three of you blondes." (Tr. at 176-77.) The prosecutor said during opening that Pinner told Patsy, "Now I've banged all three of you blonde bitches." (Tr. at 118.) There is no way of knowing if the prosecutor misspoke or based upon Patsy's statements, this is what he expected her testimony to be.

The State offers the above examples to demonstrate that in addition to Pinner failing to offer any analysis of why plain error review is appropriate, he has also based his underlying prosecutorial misconduct claim on accusations that are either not born out by the trial transcript, are taken out of context, or are not supported by precise citations to the trial transcript. Mont. R. App. P. 12(1)(g); *In re C.V.*, 2016 MT 307, ¶ 24, 385 Mont. 429, 384 P.3d 1084.

Pinner also accuses that the prosecutor "appealed to jurors' virulent prejudice by suggesting, without an evidentiary basis, that Pinner had racial animosity toward all white women – from the white female supervisor he called a 'bitch,' to the three southern ladies he derogatorily called 'blonde bitches.'" (Appellant's Br. at 31.) The record establishes that the prosecutor *never* asserted that Pinner called his female supervisor a "bitch." Rather, the prosecutor explained in his opening statement that Patsy was somewhat taken aback by Pinner because she thought he used vulgar language. As set forth above, what the prosecutor actually quoted Pinner as stating to the red cap concerning paperwork was "I don't need to mess with that *shit*." (Tr. at 113, emphasis added.) During defense counsel's closing argument, he mistakenly informed the jury that during the prosecutor's opening statement, Patsy had attributed to Pinner the statement "I don't need to mess with that *bitch*." (Tr. at 894-95.) During rebuttal, the prosecutor corrected defense counsel's mistake. (Tr. at 905.) The transcript supports the

prosecutor's position. (Tr. at 113.) It also undercuts Pinner's theory that the prosecutor attempted to paint the picture that Pinner had racial animosity toward all white women. (Appellant's Br. at 30.)

Pinner accuses the prosecutor of committing racially motivated, grievous error by allegedly telling the jury that "three southern ladies were very afraid and 'intimidated by Pinner and sought protection from a white, male passenger on the train, Dave Roberts." (Appellant's Br. at 32, citing Tr. at 910.) Again, the prosecutor did not refer to Dave as white. Nor did the prosecutor portray Dave as a chivalrous hero to the three "southern belles." Rather, the prosecutor was responding to defense counsel's suggestion that the claim against Pinner had been either fabricated or Patsy had misidentified her attacker. The prosecutor actually stated:

> You've heard from Dave Roberts, again unchallenged testimony from Dave Roberts that Lois did in fact come to him and say Charles groped me. He's gone crazy, please stay with us. And in reference to the other three sisters, if there's this misidentification of the phantom train rapist, he testified clearly that they all appeared to be intimidated by Charles. And he took it seriously and he believed them and stayed with them. Is Dave Roberts part of this grand conspiracy?

(Tr. at 910.) The prosecutor referenced facts from the trial testimony—something he was permitted to do.

Pinner cites to pages 887 and 904 of the trial transcript to support his assertion that in the State's rebuttal closing remarks the prosecutor characterized

the defense's theory as "fabrication" and called Pinner the "'phantom rapist on the train'—a 'sexual predator' who hunted 'easy,' 'vulnerable' or 'soft targets." But, page 887 of the trial transcript is *defense counsel's* closing remarks during which he references the trial testimony of one of the State's experts and then explains why Pinner does not fit the profile of a sexual predator. (Tr. at 887.) Page 904 of the trial transcript also captures defense counsel's remarks. (Tr. at 904.)

Pinner also mistakenly asserts that the *prosecutor* theorized there was a "phantom rapist" on the train. The prosecutor actually labeled Pinner's defense that Patsy mistakenly identified her rapist as Pinner, and, a shoddy investigation allowed the misidentification to stand, as the defense's theory of a "phantom," or unidentified rapist. (*See* Tr. at 878-885, Defense Counsel's Closing Argument.)

The prosecutor did not ever point out to the jury that Pinner is black. The prosecutor did not describe Patsy and her sisters as white. Importantly, the jury could see that Pinner is black and that Patsy and her sisters are white. The prosecutor could not hide this information from the jury. But the prosecutor did nothing to attempt to exploit Pinner's race to the State's advantage. Yet, Pinner supports his claim of racism by citing to cases where the prosecutor did attempt to use a defendant's race and racial stereotypes to the State's unfair advantage. *See Buck v. Davis*, 137 S. Ct. 759 (2017) (Defense counsel provided IAC during a capital sentencing proceeding when he called an expert witness who testified that

Buck's race predisposed him to violent conduct when the principal point of dispute at the penalty phase was future dangerousness); *State v. Monday*, 257 P.3d 551, 557 (Wa. 2011) (prosecutor interjected racial prejudice into the trial proceedings by repeatedly invoking an alleged African American anti snitch code to discount the credibility of a black witness on the basis of race alone); *United States v. Doe*, 903 F.2d 16 (D.C. Cir. 1990) (the trial court erroneously admitted irrelevant evidence about the drug trafficking of Jamaicans, other than the two Jamaican defendants, and the prosecutor compounded the error in his closing argument by using the defendants' ancestry as evidence of their guilt); *State v. Wilson*, 404 So. 2d 968, 969-71 (La. 1981) (the prosecutor's closing argument was filled with direct and indirect appeals to racial prejudices when the prosecutor made such statements as the "black defendants" were out to shoot and kill "whitey" and the two animals [defendants] decided to go out and shoot white honkies); *Miller v. North Carolina*, 583 F.2d 701, 704, 707 (4th Cir. 1978) (during closing argument the prosecutor made references to the defendants as "these black men" and argued that in the rape trial a defense based on consent was inherently untenable because no white woman would ever consent to have sexual intercourse with a black man). These cases are important, appropriately decided cases but are readily distinguishable from the facts in Pinner's case.

Pinner further asserts that the prosecutor improperly called him an animal. (Appellant's Br. at 38.) The prosecutor actually stated:

> He [Pinner] shut the door, the sliding door, and he locked it and closed the curtain behind it. And he attacked Pat without warning. As she sat in that chair, against the window. She was defenseless as the defendant began kissing on her, clawing at her, biting at her, like an animal she will tell you.

(Tr. at 117.) The prosecutor did not call Pinner an animal. Rather, the prosecutor described Pinner clawing and biting at Patsy "like an animal." (*Id*.) This is far different from *State v. Kingman*, 2011 MT 269, 362 Mont. 330, 264 P.3d 1104.

In *Kingman,* appellant Kingman argued on appeal that the prosecutor violated his right to dignity under article II, section 4 of the Montana Constitution when at sentencing the prosecutor argued to the court that Kingman did not need to be treated with respect because he was an animal that needed to be caged. *Id*., ¶ 54. Defense counsel objected to the prosecutor's comments. *Id*., ¶ 55. This Court concluded that the prosecutor's comments were inappropriate. *Id*., ¶ 57. Nonetheless, the Court concluded that the prosecutor's offensive comments had no impact on the sentence the district court imposed. Thus, Kingman was not entitled to a new sentencing hearing before a different judge. *Id*., ¶¶ 59-60.

Pinner also cites this Court to *State v. Roache*, 595 S.E.2d 381 (N.C. 2004) to support his claim that the prosecutor here committed misconduct. In *Roache*, the appellant raised objections to several statements of the prosecutors closing

argument for the first time on appeal, including the prosecutor's comparison that the defendant and his codefendant killed like a pack of wild dogs and were high on the taste of power and blood over their victims. *Id*. at 416. In *Roache*, the court concluded the prosecutor's remarks were improper but did not render the defendant's conviction fundamentally unfair. *Id*.

Pinner *implies* plain error review is necessary by citing to *State v. Lawrence*, 2016 MT 346, 386 Mont. 86, 386 P.3d 968. The circumstances in *Lawrence* were far different than those presented here. During the closing argument in *Lawrence*, the prosecutor erroneously informed the jury that at the time of closing argument the defendant no longer was presumed innocent. *Id*., ¶ 10. Due to the gravity of the presumption of innocence and its bedrock foundation within the criminal justice system, this Court considered the merits of the claim and granted Lawrence a new trial. *Id*., ¶¶ 12-23. The undisputed comment at issue in *Lawrence* is obviously distinguishable from the accusations Pinner makes here.

Further, in the context of closing arguments, there are many instances where the Court has declined to conduct plain error review of a prosecutor's comments made during closing argument even if the Court concludes that the comments were inappropriate. *See, e.g.,* S*tate v. Ugalde*, 2013 MT 308, ¶ 62, 372 Mont. 234, 311 P.3d 772 (Court declined to conduct plain error review when prosecutor purported to speak for the victim); *State v. Lacey*, 2012 MT 52, ¶¶ 19, 26, 364 Mont. 291,

272 P.3d 1288 (Court declined to conduct plain error review of prosecutor's comment during closing that 'by God' the defendant is guilty); *State v. Rose*, 2009 MT 4, ¶¶ 107, 111, 348 Mont. 291, 202 P.3d 749 (Court declined to conduct plain error review of prosecutor's statements that the defendant told the jury the big lie because he believed the jury was gullible); *State v. Lindberg*, 2008 MT 389, ¶¶ 16-19, 34-35, 347 Mont. 76, 196 P.3d 1252 (Court declined to exercise plain error review when, during closing, the prosecutor characterized one witness's testimony as a bold-face lie and argued that defendant did not present any witnesses to dispute the State's evidence); *State v. Arlington*, 265 Mont. 127, 157-58, 875 P.2d 307, 325 (1994), (Court declined to exercise plain error review when, during closing, prosecutor stated numerous times that defendant had lied to the jury); *State v. Rodgers*, 257 Mont. 413, 416, 419, 849 P.2d 1028, 1032 (1993) (Court declined to exercise plain error review when prosecutor characterized the testimony of defense witness as "deliberate lie" and stated the defendant lied to the jurors' faces).

Here, the prosecutor repeatedly cautioned the jurors that nothing the attorneys said was evidence, and the jury should base its decision on its recollection of the witnesses' testimony and the admitted exhibits. (Tr. at 850, 856-57, 905.) The prosecutor also tied its comments to the evidence presented at trial. A prosecutor may comment on '"conflicts and contradictions in the

testimony, as well as comment on the evidence presented and suggest to the jury the inferences which may be drawn therefrom.'" *State v. Thorp*, 2010 MT 92, ¶ 26, 356 Mont. 150, 231 P.3d 1096, quoting *State v. Green*, 2009 MT 114, ¶ 33, 350 Mont. 141, 205 P.3d 798.

Pinner further urges that the prosecutor vouched for Patsy's credibility by providing reasons to the jury why Patsy's testimony was credible. In *State v. Pedro S.*, 865 A.2d 1177 (Conn. App. Ct. 2005), the Connecticut court considered a claim that the prosecutor had expressed her personal opinion concerning the victim's credibility in a sexual abuse case. *Id.* at 1182-83. In concluding that the prosecutor's remarks did not constitute prosecutorial misconduct, the court explained:

> It was not improper for the prosecutor to argue that her case rested on the victim's testimony and to comment on the strength of that testimony. The issue is whether the prosecutor injected a personal opinion about the victim's credibility into the argument or if the argument was grounded in a discussion of the evidence presented at trial. Here, the argument reflects that the prosecutor discussed the victim's credibility by inviting the jury to consider "signs" of truthfulness and reliability.
>
> . . . .
>
> The prosecutor couched her argument in terms of suggesting how the jury might evaluate the victim's testimony and did not personally

> guarantee the victim's credibility or imply that she had knowledge of the victim's credibility outside of the record.

Id. at 1183.

Here, the prosecutor merely informed the jury that through the process of reaching its decision it could consider whether Patsy and her sisters had provided credible testimony, or, on the flip side, Pinner was the victim of a misidentification and a shoddy investigation. The inference is unavoidable that somebody is not believable. *See, e.g. United States v. Moreland*, 622 F.3d 1147, 1162 (9th Cir. 2010). The prosecutor appropriately told the jury that it could consider each witness's motive for the testimony he or she provided. Moreover, a prosecutor is entitled to point out inconsistencies in the evidence and to argue which version is the truth. *State v. Branham*, 2012 MT 1, ¶ 23, 363 Mont. 281, 269 P.3d 891, *citing Green*, ¶ 34.

Pinner cannot meet his burden of proving that failing to review his prosecutorial misconduct claims may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may implicate the judicial integrity of the process by launching accusations to which he provides no citation to the record, misconstrues the citations to the record he does provide, or attributes comments to the prosecutor, which defense counsel actually made. This Court should decline to invoke plain error review of his prosecutorial misconduct claims.

III. Pinner has failed to meet his heavy burden of proving his IAC claim.

A. Introduction

"The United States and Montana Constitutions guarantee criminal defendants the right to effective counsel." *State v. Weber*, 2016 MT 138, ¶ 21, 383 P.3d 506, 373 P.3d 26. This Court analyzes claims of IAC under the two-part test the United States Supreme Court announced in *Strickland v. Washington*, 466 U.S. 668 (1984). *McGarvey v. State*, 2014 MT 189, ¶ 24, 375 Mont. 495, 329 P.3d 576. In order to prove IAC, a defendant must show: (1) that counsel's performance was deficient, and (2) that counsel's deficient performance prejudiced the defendant. *McGarvey*, ¶ 24.

In order to prove the deficient performance prong, the defendant must demonstrate that counsel's performance "fell below an objective standard of reasonableness considering prevailing professional norms, and in the context of all circumstances." *McGarvey*, ¶ 25. The defendant must overcome a strong presumption that "counsel's defense strategies and trial tactics fall within a wide range of reasonable and sound professional decisions." *State v. Turnsplenty*, 2003 MT 159, ¶ 14, 316 Mont. 275, 70 P.3d 1234. Under the second prong of the *Strickland* test, a defendant must establish that but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *Id*. Because a defendant must prove both prongs of *Strickland*, if a defendant fails

to prove either prong this Court need not consider the other. *Rose v. State*, 2013 MT 161, ¶ 22, 370 Mont. 398, 304 P.3d 387.

B. Discussion

Pinner claims his trial counsel provided ineffective assistance because they: (1) failed to move to exclude evidence from Lois and Betty that Pinner groped them on the same day he raped Patsy; (2) inappropriately allowed MacDonald to testify about Pinner's significant disciplinarian record with Amtrak; and (3) suggested during closing argument that Pinner had consensual oral sex with Patsy and told the jury defense counsel would have advocated more vigorously if the jury had more men. As set forth below, Pinner has failed to meet his heavy burden of proving both prongs of *Strickland* in any regard.

1. Pinner's sexual assault of Lois[3]

At trial, Lois testified that on the same morning Pinner raped Patsy, he also accosted Lois in her room where he bit at her, licked her and pulled on her clothing. Lois escaped from his grasp. Without establishing that such a motion had some likelihood of success, Pinner cannot meet his burden of proving that counsel performed deficiently and due to that deficiency there was a reasonable probability of a different outcome. Pinner has offered no meaningful analysis of his IAC

[3]Pinner has not transmitted Betty's videotaped deposition, which the jury heard during the trial. Consequently, the State cannot include Betty's testimony in responding to Pinner's argument.

claim. This Court has repeatedly held that it is not its obligation to conduct legal research on behave of a party or to develop legal analysis that might support a party's position. *State v. Gunderson*, 2010 MT 166, ¶ 12, 357 Mont. 142, 237 P.3d 74; Mont. R. App. P. 12(1).

Even assuming defense counsel had filed a motion in limine, the State no doubt would have argued that what Pinner did to Patsy's sisters, on the same morning that he raped Patsy, was admissible under both Mont. R. Evid. 404(b) and Mont. Code Ann. § 26-1-103, referred to as the transaction rule. For example, under Rule 404(b), the State could have argued that the evidence was admissible to show motive, opportunity and/or to rebut Pinner's claim of mistaken identity.

2. MacDonald's testimony about Pinner's disciplinary record

a. Facts

Defense counsel filed a motion in limine to prohibit MacDonald from discussing Pinner's disciplinary record with Amtrak. The parties reached a stipulation for resolving this issue to both parties' satisfaction. During MacDonald's direct examination, the following exchange occurred between the prosecutor and MacDonald:

> **(By Mr. Guzynski)** Agent MacDonald in this second interview, again Mr. Pinner indicates to you and the other officer, that he has no disciplinary history, is that right?
>
> **A.** Correct.

Q. And without going into the history, I just want you to answer, does he have a disciplinary history?

A. I would consider pretty lengthy, yes.

(Tr. at 629.)

Later in the direct examination the court interjected a question to MacDonald:

THE COURT: So if you let somebody upgrade and you don't tell anybody you're okay[.] But if they find out your behind's in trouble?

A. Yes, definitely.

THE COURT: Kindness is not allowed?

A. (By witness) Well, officially you should have changed the paperwork and obviously there's a fee difference.

THE COURT: Well yeah, I assume there's a fee difference. Is that a serious enough to lose your job thing? Or is it just serious enough that they look at you and are mean and say you've been reprimanded?

A. (By witness) With his background, I would say that would be grounds for termination.

(Tr. at 632-33.) Defense counsel requested to speak with the court out of the jury's presence. (Tr. at 633.)

The following exchange occurred in chambers:

MR. TOAVS: So, Judge the reason I asked for the side bar is that, prior to the commencement of trial, the Defense had filed a motion [in] limine to exclude any references to Mr. Pinner's prior criminal history. . .

THE COURT: I remember that.

MR. TOAVS: And references to his prior disciplinary history.

THE COURT: Right.

MR. TOAVS: We had reached the stipulation with Mr. Guzynski, where instead of arguing it and having the court make a ruling. We agreed to compromise and the compromise was that they would elicited [sic] from [the] witness that . . .

THE COURT: That he had a history. . .

MR. TOAVS: And [he] would answer yes, and give no explanation.

THE COURT: Uh huh.

MR. TOAVS: And now he has and I am not blaming Mr. Guzynski, but the witness has . . .

THE COURT: Volunteered.

MR. TOAVS: Volunteered, he has characterized the history as lengthy.

. . . .

MR. TOAVS: Extensive, he said I would, he said, I would, I would consider his history as lengthy. And then in response; and I was going to leave it at that but then in response to your questions, Judge, he gave an opinion that he would have been terminated because of his extensive criminal --- or his extensive disciplinary history. And so now I don't know what to do. But my thought is, is for the Court to, maybe prepare an instruction that you give saying that this witness, I guess I am open to suggestions. But my thought was there should be some instruction to the jury that his opinion about or characterization of Mr. Pinner's [disciplinary] history is . . .

. . . .

> **MR. TOAVS:** . . . But that his, that his characterization of Mr. Pinner's employment history should be stricken and instructed not to consider that. Along with his opinions about, what, you know, his employment because he is an investigator with [the] police department. And now he's given an opinion that he would have been fired.

(Tr. at 633-35.) The State agreed with providing the jury a cautionary instruction. (Tr. at 636.)

With the parties' stipulation, (Tr. at 638-39), the district court instructed the jury:

> During the testimony of Amtrak police officer Michael MacDonald, he characterized the defendant['s] disciplinary history with Amtrak in a negative way and he speculated concerning the effect of allowing guest's [sic] to use Room D without a proper ticket. The parties to this case stipulate none of the defendant's employment's [sic] history is related to passenger [complaints] about him. Further you are to disregard [O]fficer MacDonald's opinions concerning the defendant's employment performance. Remember my rule about having a fair trial following the rules. This is part of that fair trial following the rules.

(Tr. at 640.)

b. Pinner failed to prove either deficient performance or prejudice.

The stipulation between the parties may not have been committed to writing, but if it was, it is not part of the appeal record. On appeal, Pinner now accuses that the prosecutor "reneged" on the agreement between the parties. (Appellant's Br. at

46.) This directly conflicts with trial counsel's assurance to the court that it was not accusing the prosecutor of any wrongdoing. (Tr. at 634.)

Pinner mistakenly asserts that the court did not strike MacDonald's answer from the record and defense counsel was ineffective for failing to make certain the court did so. The court instructed the jury to disregard any of MacDonald's opinions about Pinner's employment history. The court also instructed that any infractions Pinner may have had on his record were not based upon customer complaints. (Tr. at 640.) The general rule is that where the trial judge strikes improper statements from the record with an accompanying cautionary jury instruction, any error committed by its introduction is presumed cured. *State v. Dubois*, 2006 MT 89, ¶ 60, 332 Mont. 44, 134 P.3d 82. The jury cannot be presumed to ignore its duty to respect the court's instructions. *Id*.

In violation of Mont. R. App. P. 12(1) and this Court's precedent, Pinner has offered no analysis of his IAC claim. *Gunderson*, ¶ 12. Pinner's IAC claim is wholly without merit.

3. Defense counsel's closing argument

Pinner finally argues that his counsel provided ineffective assistance because, according to his interpretation of the transcript, defense counsel impliedly admitted his guilt and suggested to the predominantly female jury that defense counsel would have advocated more graphically and vigorously if the jury was

made up of more men. Pinner offers no meaningful analysis of his IAC claim. *See Gunderson*, ¶ 12.

Even so, a reading of defense counsel's closing argument clearly demonstrates that he maintained his client's innocence throughout the closing argument. And, the portions of the transcript to which Pinner cites demonstrates that his IAC claim lacks merit. Pinner cites to page 902 of the transcript to argue that defense counsel alluded to the jury that Pinner engaged in consensual oral sex with Patsy. (Appellant's Br. at 49.) During the portion of closing argument to which Pinner cites, defense counsel is pointing out to the jury the logistical problems with Patsy's testimony about how the rape occurred. (Tr. at 900-02.) He asks the jury to consider whether it was physically possible considering the size of the room, Patsy's size, Pinner's size and the victim's timeline for him to have digitally penetrated Patsy, performed oral sex on Patsy and used his penis to subject Patsy to vaginal intercourse. (*Id*.)

Pinner next cites to page 901 of the transcript to support his theory that defense counsel was ineffective for telling the mostly female jury he would have advocated more graphically and vigorously had the jury been made up of more males. At this point in defense counsel's closing, he was again making common sense, logistical arguments. Patsy had testified that Pinner had removed her bra. Defense counsel explained to the jury that Pinner's assault of Patsy allegedly

began while she was sitting on a chair, fully clothed. Defense counsel elaborated that according to Patsy, Pinner:

> walks over to her and he starts kissing her, biting her on the face, licking her. And then gets her bra down by pulling the straps over her shoulders and down to the waist. Which, I've never found that to be very easy to do. But to be down to the waist you're going to have to clear the arms there, okay. Because that just doesn't --- you know. [If] I had a jury with more men on it, I might have to go into more detail.

(Tr. at 901.) Defense counsel is clearly referencing the logistical struggles with removing a woman's bra. He is not informing the jury that he would have advocated more vigorously if the jury was predominantly made up of men. Rather, he is acknowledging that the women on the jury understand the logistical difficulties of which he was speaking so he did not have to provide more detail on the topic.

Pinner has failed to meet his burden of proving that defense counsel provided ineffective assistance during his closing argument.

IV. The cumulative error doctrine does not apply because Pinner has not established any error.

The cumulative error doctrine "refers to a number of errors that, taken together, prejudice a defendant's right to a fair trial." *State v. Novak*, 2005 MT 294, ¶ 35, 329 Mont. 309, 124 P.3d 182; *accord State v. Giddings*, 2009 MT 61, ¶ 100, 349 Mont. 347, 208 P.3d 363; *State v. Bar-Jonah*, 2004 MT 344, ¶ 108, 324 Mont. 278, 102 P.3d 1229. Under the doctrine, "[r]eversal is required . . . once such

accumulated errors are identified as having prejudiced a defendant's right to a fair trial." *Novak*, ¶ 35. It is the defendant's duty to prove the existence of prejudice. *Id*. A mere allegation of error without proof of prejudice is inadequate to satisfy the doctrine. *McGarvey*, ¶ 36.

Pinner has failed to prove any error. Thus, he cannot prove the existence of prejudice under the cumulative error doctrine.

V. The State concedes the district court erred in imposing the technology fee and costs.

Pinner objected to the district court's imposition of costs for the prosecution of his case and for his assigned counsel. A district court may only sentence a defendant to pay costs only if the defendant can pay or will be able to pay those costs. Mont. Code Ann. §§ 46-8-113(4), 46-18-232(2); *State v. Madplume*, 2017 MT 40, ¶ 32, 386 Mont. 368, 390 P.3d 142. These statutes require the court to make a serious inquiry into the defendant's ability to pay the costs. This type of inquiry is particularly important before sentencing a defendant to pay the costs associated with his trial due to the chilling effect a sentence to pay jury costs could have on a defendant's constitutional right to request a jury trial. Thus, trial courts must "scrupulously and meticulously" determine the defendant's ability to pay those costs. *Id*., quoting *State v. Moore*, 2012 MT 95, ¶ 18, 365 Mont. 13, 277 P.3d 1212.

The State concedes that the record does not support a conclusion that the trial court made a scrupulous and meticulous inquiry into Pinner's ability to pay the costs the court imposed. The State also concedes that the district court erred in imposing a court information technology surcharge per count instead of per case. Mont. Code Ann. § 3-1-317(1)(a); *State v. Pope*, 2017 MT 12, ¶¶ 31-32, 386 Mont. 194, 387 P.3d 870. The State concurs with Pinner's request that the Court remand to the district court with instructions to strike: the costs of the jury trial, the costs of appointed counsel and $10 of the information technology surcharge.

CONCLUSION

The State respectfully requests that this Court affirm Pinner's convictions for Sexual Intercourse Without Consent and Aggravated Kidnapping.

Respectfully submitted this 11th day of December, 2018.

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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 9,841 words, excluding certificate of service and certificate of compliance.

/s/ Tammy K Plubell
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CERTIFICATE OF SERVICE

I, Tammy Plubell, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 12-11-2018:

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