DA 17-0237

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 54N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CHARLES HENRY PINNER,

Defendant and Appellant.

APPEAL FROM: District Court of the Fifteenth Judicial District,
In and For the County of Roosevelt, Cause No. DC 15-44
Honorable David Cybulski, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Moses Okeyo, Assistant Appellate Defender, Helena, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Tammy K Plubell, Assistant Attorney General, Helena, Montana

Joel M. Thompson, Daniel M. Guzynski, Kenneth Varns, Special Deputy County Attorneys, Helena, Montana

Submitted on Briefs: February 13, 2019

Decided: March 5, 2019

Filed:

Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 A jury convicted Charles Henry Pinner of committing Sexual Intercourse Without Consent, a felony in violation of § 45-5-503, MCA, and Aggravated Kidnapping, a felony in violation of § 45-5-303, MCA. Pinner was tried in the Fifteenth Judicial District Court, Roosevelt County, and now appeals his conviction. We affirm the jury's verdict but reverse and remand to correct the costs and technology fee imposed in Pinner's sentence.

¶3 In the spring of 2015, a 68-year-old woman, Patsy Shepherd (Patsy) and her two sisters, Betty and Lois, were traveling westbound on an Amtrak train across Montana. The three women were from North Carolina and took the trip wanting to see the western United States. Beginning in Chicago, the three sisters became acquainted with Pinner, who was the Amtrak attendant assigned to their train cars. On the afternoon of April 19, 2015, Patsy was in her sleeper room, sitting in a chair by the window, when Pinner entered, locked the door, and attacked her. Patsy testified that Pinner, "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 . . . . Then he pulled my pants down around my ankles. He was on top of me. Then he started doing terrible things." Pinner performed oral sex on Patsy and

penetrated her vagina with his fingers and penis. Pinner ejaculated on Patsy, got up off the floor, and before leaving the room said, "now I've banged all three of you blondes."

¶4 Following the assault, Patsy took a shower and noticed that she was bleeding from her vagina. She also described pain and bruising on her legs, arms, breasts, and back. A short time later, the three sisters got off the train in Glasgow, Montana, for a planned three-day visit with Lois' son. During the visit in Glasgow, Patsy was still bleeding and experiencing pain. She withdrew from the group and wanted to go home but did not tell anyone about the rape because she "didn't want to mess up Lois and Betty's trip."

¶5 The sisters left Glasgow and rode the train to Seattle, where Patsy was separated from her two sisters because of a problem with her ticket. After boarding the train alone, Patsy became distressed and decided to tell the police about the rape. Patsy got off the train in Kelso, Washington, where she was escorted by the police to a local hospital for a sexual assault examination by a certified SANE nurse. The examination revealed injuries consistent with Patsy's account of the assault.

¶6 In December 2015, Pinner was charged by Information in Roosevelt County, Montana, with Sexual Intercourse Without Consent, § 45-5-503, MCA, and Aggravated Kidnapping, § 45-5-303, MCA. After a five-day jury trial in September 2016, Pinner was convicted of both felony counts.

¶7 Pinner is a black male and argues the prosecutor "employed dog-whistle racism" throughout the trial, which worked to deny Pinner "due process and equal protection of laws" and should result in a new trial. He contends the State "exploited racist concepts and

frames to brand Pinner as an animalistic, simple-minded brute, and to brand the complaining witness and her sisters as southern ladies to bolster their credibility" and secure a conviction.

¶8 No objections on these grounds were made at trial. Generally, this Court does not review issues of prosecutorial misconduct relating to statements that were not objected to during trial. *State v. Lawrence*, 2016 MT 346, ¶ 6, 386 Mont. 86, 385 P.3d 968 (citations omitted). However, we may discretionarily review such issues under the plain error doctrine. *State v. Lackman*, 2017 MT 127, ¶ 9, 387 Mont. 459, 395 P.3d 477. The purpose of this doctrine is to correct error not objected to during trial that affects the "fairness, integrity, and public reputation of judicial proceedings." *Lawrence*, ¶ 9 (citation omitted). We conduct a plain error review only in situations that "implicate a defendant's fundamental constitutional rights" and "when failing to review the alleged error may result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the proceedings, or compromise the integrity of the judicial process." *State v. Aker*, 2013 MT 253, ¶ 21, 371 Mont. 491, 310 P.3d 506. We review allegations of prosecutorial error de novo. *State v. Dobrowski*, 2016 MT 261, ¶ 8, 385 Mont. 179, 382 P.3d 490.

¶9 The Court takes very seriously Pinner's assertions that racial prejudice was invoked by the prosecutor to inflame the jury and secure a conviction. Given the lack of objection to any such conduct during the trial, our review is confined to plain error review, requiring Pinner to carry the burden of proving the prosecutor's statements implicated his fundamental constitutional rights, and that this Court's failure to review the alleged error

would result in a miscarriage of justice or undermine the fairness or integrity of the judicial process. *State v. Gunderson*, 2010 MT 166, ¶ 100, 357 Mont. 142, 237 P.3d 74. "[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." *Gunderson*, ¶ 100.

¶10 Pinner vaguely references plain error review but fails to articulate the doctrine's standards and present an argument that the standards have been satisfied. "[T]o obtain plain error review, 'we still require the assertion of plain error to be raised and argued on appeal.'" *In re B.H.*, 2018 MT 282, ¶ 15, 393 Mont. 352, 430 P.3d 1006 (internal quotation omitted) (citation omitted). Offering a survey of cases that rightly challenged racial prejudice in the criminal trial setting, Pinner contends the prosecutor here acted likewise by using "carefully inserted code words to arouse fear and loathing of Pinner in the jury's mind." However, the alleged "code words" Pinner relies on for his argument were either never said, are taken out of context in his briefing, or simply fail to carry the asserted hidden messages. For example, Pinner claims the prosecution attempted to characterize him as "a crude, vulgar, small-minded, animal who made lewd sexual advances toward white women—groping and raping white women to exercise power and control over them" because he held "racial animosity toward all white women." The transcript reflects that prosecutors never referred to Patsy or her sisters as white, or to Pinner as black, and made no effort to establish that Pinner possessed racial animosity toward white women. Pinner makes repeated claims that he was depicted as an "animalistic, simple-minded brute" and

a "black brute" by the prosecution, but the trial transcript is utterly void of such characterizations. The solitary use of the word "animal" occurred during the opening statement when a prosecutor described how, during the assault, Pinner, "began kissing on [Patsy], clawing at her, biting at her, like an animal. While the prosecutor could have been more judicious in his choice of words, that single instance, viewed in context of the whole record, does not support Pinner's contention that he was depicted as an "animalistic, simple-minded brute."

¶11 Another example of Pinner's stretching of the record, and perhaps more troubling, is his claim the prosecutor referred to him as a "sexual predator" and accused him of "viciously attacking and raping the most 'vulnerable and defenseless, old' southern lady"—a characterization Pinner asserts "dangerously invoke[s] the antebellum image of the black male as beast." The record demonstrates it was the defense attorney, not the prosecutor, who used the term "sexual predator." A prosecutor described Patsy as "vulnerable," but did not use the term in the phrase as quoted, nor reference anyone's race or attempt to degrade Pinner's dignity. Neither did he describe the victim or her sisters as "Southern Belles" or invoke racial prejudice in any discernable way.[1, 2]

[1] Pinner cited to four pages in the trial transcript to support this allegation. The prosecutor's description of Patsy as "vulnerable" is found on one of the pages but the other three are unrelated and, along with the rest of the record, provide no support for these allegations of misconduct.

[2] The State admits that the prosecutor's use of the word "bitches" during his opening statement, though not used in the way Pinner attests, was not borne out in later testimony. Though improper, we conclude that this was insufficient by itself to warrant plain error review.

¶12 It is clear from our review that Pinner has strained to construct a racial prejudice narrative that we find to be unsupported in the record as a whole. Pinner has failed to carry his burden of demonstrating plain error review is warranted in this case, and we are not convinced that in the absence of our review, this claimed error would result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial or proceeding, or compromise the integrity of the judicial process.

¶13 Second, Pinner argues he received ineffective assistance of counsel. Article II, Section 24 of the Montana State Constitution and the Sixth Amendment to the United States Constitution guarantee a defendant the right to effective counsel in all criminal proceedings. Ineffective assistance of counsel claims present mixed questions of fact and law that we review de novo. *Aker*, ¶ 22. Pinner must establish 1) his attorney's performance fell below an objective standard of reasonableness, and 2) a reasonable probability exists that but for his counsel's conduct, the outcome of the proceeding would have been different. *Robinson v. State*, 2010 MT 108, ¶ 12, 356 Mont. 282, 232 P.3d 403 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)).

¶14 Pinner claims that by failing to object to the introduction of other bad acts he committed, including a work infraction and the sexual advances he made against Patsy's sisters, defense counsel provided deficient performance. However, even assuming objections should have been offered, Pinner has failed to establish how exclusion of the evidence would have altered the outcome of the proceeding. Pinner argues his attorney "allud[ed] to consensual oral sex between Pinner and Shephard," and thus undermined his

defense that no sexual contact occurred. We see no indication of this in the transcript and, to the extent such an allusion was possibly made, we do not believe, as Pinner posits, the "[j]urors could have construed [it] as an admission of guilt." Finally, Pinner argues that, during his closing argument, defense counsel improperly indicated "he would have advocated more vigorously and in more graphic 'detail' . . . if the jury had more men." This, as the State points out, is another example of Pinner pulling words out of context. Defense counsel was describing the logistical challenges of removing a brassiere from another person, which he said would require him "to go into more detail" if the jury was comprised of more men. This was a comment about the functioning of women's clothing, not an admission by defense counsel of an inability to zealously advocate for his client because the jury was composed substantially of women. Pinner has failed to establish that his attorney was ineffective.

¶15 Lastly, Pinner challenges the District Court's imposition of court costs without inquiring into his ability to pay. Section 46-8-113(3), MCA; *State v. Madplume*, 2017 MT 40, ¶ 40, 386 Mont. 368, 390 P.3d 142. Pinner also objects to the court technology fee imposed on him, arguing that it was improper for a $10 fee to be imposed for each of his two charged offenses, instead of just one fee. Section 3-1-317(1)(a), MCA; *State v. Pope*, 2017 MT 12, ¶ 32, 386 Mont. 194, 387 P.3d 870. The State concedes these cost issues.

¶16 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the

Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review, and cumulative error does not warrant reversal.

¶17 Affirmed in part, reversed in part, and remanded for entry of an amended judgment to strike the jury costs and costs of defense counsel and to correct the imposition of fees.

/S/ JIM RICE

We concur:

/S/ JAMES JEREMIAH SHEA
/S/ BETH BAKER
/S/ LAURIE McKINNON
/S/ INGRID GUSTAFSON