IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0267

STATE OF MONTANA,

Plaintiff and Appellee,

v.

WALLIS SINZ,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, The Honorable Kathy Seeley, Presiding

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STATEMENT OF THE CASE

Wallis Dean Sinz was charged with three counts of felony sexual intercourse without consent (SIWOC) (Counts I-III) and two counts of felony sexual assault (Counts IV and IV) for assaulting his two eight-year-old nieces, D.B. and K.B., over a period of six months. (Docs. 1-3.)

During *voir dire*, several prospective jurors disclosed prior experiences that were relevant to the pending charges, but some assured the court that their

background did not make them a biased juror. (Tr. at 8-154.)[1] In addition to testimony from the victims, their parents and older sister (M.B.), the forensic interviewer, and the physician who examined the girls, the State also presented testimony from Dr. Wendy Dutton who provided general testimony about the behaviors of sexually abused children without objection. (Tr. at 418-90.)

During deliberations, the jury submitted two questions to the court. (Tr. at 603-05, 616; Docs. 73. 74.) The jury found Sinz guilty of Count I, sexual intercourse without consent against D.B.; Count II, sexual intercourse without consent against K.B.; Count III, lesser-included offense of sexual assault against K.B.; Count IV, sexual assault against K.B.; and Count V, sexual assault against D.B. (Doc. 75.)

STATEMENT OF THE FACTS[2]

In the fall of 2016, Sinz and his brother, Willis, moved to Montana to be near their brother, J.B. (hereinafter, Father), his wife, A.L. (hereinafter, Mother) and their four daughters, (M.B. (age 14), E.B. (age 11), and twins, K.B. and D.B. (age 8.) (Tr. at 178, 275-99, 321-47, 491-99, 529-32.) Sinz spent several days a

[1]Because the transcript for the three-day trial is one continuously paginated document, citations will simply be "Tr."

[2]Facts relevant to *voir dire* and the jury questions during deliberation are set forth below in the applicable argument sections.

week hanging out at the family's residence and would join them for meals and other family outings. (*Id*.) Sinz brought gifts to the girls such as MP3 players, books, and stuffed toys and also brought his laptop and movies over to watch with the younger girls. (*Id*.)

Sinz started babysitting the children in the spring of 2017 when Mother attended a college course on Wednesday afternoons. (Tr. at 321-47.) According to Mother, the twins liked to snuggle while watching television and sometimes they would sit on Sinz's lap under a blanket on a chair in the living room. (*Id*.) Mother recalled one night she got home sooner than usual and when she walked in, Sinz jumped up out of the chair and left quickly. (*Id*.) Mother stated that following that incident, when she got home from class the door would be locked. (*Id*.) Sinz said he did not lock the doors, but sometimes the girls did. (*Id*. at 546.)

Over the Memorial Day weekend, Sinz went camping with Father and the four girls and one of M.B.'s friends. (Tr. at 286-99, 321-54.) K.B. and D.B. said they slept with Sinz on a couch that pulled out to a bed in the pop-up camper; Sinz stated he slept on a couch. (*Id*.) After the first night, K.B. said her stomach was upset and Sinz took her home, because he was not feeling well too. (Tr. at 292-99, 548.) Sinz babysat all four girls overnight in early June 2017, when their parents went to a concert in Billings. (*Id*. at 334-35.) Sinz was also at their home in late

June 2017, when he and D.B. cleaned the bathroom prior to the family leaving for a trip. (*Id*. at 209-33, 550-52.)

In early July 2017, M.B. learned that the twins had a "secret" about Sinz, but they would not tell her what it was. (Tr. at 264-70.) Soon after, D.B. told her parents she had a secret and eventually told Mother what Sinz had been doing to her and her sister. (Tr. at 290-99, 228-47.) Mother contacted the police and all four girls were forensically interviewed at the Child Advocacy Center by Paula Samms. (Tr. at 174-95, 355-97.)

At trial, D.B. described that when Sinz was at her house, he rubbed her "privates" and "front end" underneath her clothing when she sat on his lap in the brown chair. (Tr. at 208-33.) D.B. explained it happed on many occasions. (*Id*.) D.B. also saw Sinz rub K.B.'s privates and she drew a picture of Sinz touching her sister. (*Id*. at 228; Ex. 18.) D.B. reported that sometimes it felt good when Sinz rubbed her privates but said it hurt when he "reached down too far." (*Id*. at 217.) D.B. described and drew a picture of a specific instance in the bathroom when Sinz kissed and licked her privates and she explained that it felt good. (*Id*. at 208-33; Ex. 16.) Sinz told D.B. not to tell anyone about him rubbing her privates and explained she thought she would get in trouble if she told. (*Id*. at 224-33.)

K.B. told the jury that Sinz put his hand on her "vagina" when she sat on his lap in the brown chair with a blanket covering them. (Tr. at 234-57.) Sinz also

rubbed her "vagina" when she and her sisters were at his house. (*Id*.) K.B. explained that sometimes it felt good, but other times it did not because his fingernails were sharp. (*Id*.) K.B. described an event that took place in the family's camper when she slept next to Sinz. (*Id*.) K.B. said that when it was almost morning, Sinz touched her "vagina" with his "vagina" which K.B. described as being between his legs in the front of his body. (*Id*.) K.B. described how Sinz put "his vagina" inside her vagina and that it felt like a big sausage. (*Id*.)

Like D.B., Sinz told K.B. not to tell anyone about him touching her vagina and said if she did he would not come back. (Tr. at 234-57.) K.B. believed that her parents would yell at her if she told and not let her see her uncle again. (*Id*.) K.B. clarified that she liked her uncle, but she did not like it when he rubbed her vagina. (*Id*.) K.B. also drew pictures of Sinz touching her vagina with his hands and with his vagina. (*Id*. at 252-53; Ex. 12.)

K.B. and D.B. had sexual assault exams on July 31, 2017, by Dr. Erin Keefe. (Tr. at 302-19.) According to Dr. Keefe, the girls' exams were normal and she found no physical evidence of trauma. (*Id*.) However, the lack of evidence did not surprise Dr. Keefe because an examining physician is unlikely to see any evidence of trauma after 72 hours of an alleged sexual assault. (*Id*.) Dr. Keefe testified that even if there was vaginal penetration, it is uncommon to see scarring or other physical evidence of an assault because that particular part of a female's body has

a rich blood supply and heals very well. (*Id*.) Dr. Keefe explained that for the girls to have felt either pleasure or pain when their genitalia was touched, their vulva had to be penetrated. (*Id*.)

M.B. testified about learning her sisters had a secret and confirmed they would sit with Sinz on the brown chair with blankets over them. (Tr. at 258-70.) M.B. also testified that Sinz tried to touch her privates once and it made her uncomfortable and a letter she wrote about the incident was admitted. (*Id*.; Ex. 20A.)

Samms testified about her interviews of the girls. (Tr. at 355-98.) The court did not permit the State to play the interviews of K.B. and D.B., but did allow the State to inquire with Samms about certain details that were inconsistent with the girls' testimony. (*Id*.) Samms explained that when K.B. talked about Sinz rubbing her, she referred to her genitals as her "front end" and described the pain she felt from Sinz occurred when he went "deep" into her front end. (*Id*.) When K.B. talked to Samms about the camper incident, she had difficulty talking about it and drew a picture. (*Id*.) K.B. struggled with describing what Sinz touched her with and at first said it had a tip and she did not want to look down at it because it was gross. (*Id*.) K.B. said it felt like a banana and a sausage that got big. (*Id*.)

Samms testified that D.B. said it felt good when Sinz rubbed her genitals until he started to push too hard and it hurt. (Tr. at 355-98.) D.B. also said that she

would move his hand up to where it felt good and away from the part where he hurt her. (*Id*.) D.B. told Samms she was afraid to tell what was happening with Sinz because she thought the police would arrest her because it felt good. (*Id*.)

Dr. Wendy Dutton, who has extensive experience and education in the field of child sexual abuse, provided general information about children who disclose sexual abuse. (Tr. at 418-90.) Dr. Dutton was a "blind expert" as she knew no facts related to the case and throughout her testimony, emphasized she was not offering any comment on the credibility of K.B. or D.B. (*Id*. at 424, 455, 457, 463.)

Dr. Dutton testified that children are less likely to be abused by a stranger, and explained that "it's more frequent that children are abused by someone they know, either through family relationships or other types of relationships" (*e.g*., neighbors, babysitter, teachers, coaches, clergy). (Tr. at 425.) Related to that is the process of victimization which frequently involves familiarity between the perpetrator and victim that increases over time. (*Id*. at 425-34.) Dr. Dutton testified that based on her interviews with child victims, it was "not uncommon" for the child to report that someone was in the house/room when the abuse occurred. (*Id*. at 432.)

The process of victimization contributes to why children often delay in reporting the abuse to others. (Tr. at 434-37.) Dr. Dutton explained it is "common

for children to wait weeks, months, and even years before they tell someone about sexual abuse." (*Id*. at 435.) Factors that may increase the time for disclosure include how close the relationship is between perpetrator and victim ("the closer the relation is the longer the delay is likely to be") and the extent the child feels complicit in the abuse (i.e., if the touching felt good to the child, it may cause confusion and increased feelings of shame/fault which delays disclosure). (*Id*. at 435-36.) Dr. Dutton testified that whether a disclosure is immediate or delayed has no correlation to whether the accusation is true or false. (*Id*., 457.) Nor does the amount of detail in a statement correlate to its veracity or whether the child exhibits emotions during the interview. (*Id*. at 464, 477, 479-80.)

According to Dr. Dutton, children will usually disclose abuse in one of three ways: accidentally (*e.g*., a video/photo comes to light or someone sees abuse occurring); prompted (*i.e.,* someone asking direct questions); or purposeful (*i.e*., child chooses to tell someone, usually someone they think will believe them). (Tr. at 436-40.)

Dutton explained there are generally, but not exclusively, two types of false allegations. (Tr. at 450-53, 467.) The "more common" is an erroneous report where, upon investigation, there is a normal explanation for the child's statements (*e.g.,* touching during bath time). (*Id*.) The other is a malicious report "which tends to be more rare." (*Id*. at 451.) This type of report is usually connected to an

ulterior motive or attempt to secure secondary gain. (*Id*.) Dr. Dutton testified that when incidents of false malicious

> happen, they tend to occur most commonly, but not exclusively, in two situations. The first is generally involving young children whose parents are involved in a high conflict divorce or custody dispute. . . . The [second situation is] typically the teenage girls. And usually the goal or ulterior motive is trying to cover up the fact that they are having consensual sex with somebody.

(*Id*. at 451-52.)

When asked during cross-examination if she was there to comment on the credibility of K.B. and D.B. or whether the allegations are true, Dr. Dutton, responded she was not, adding "it wouldn't be appropriate." (Tr. at 457.) Dr. Dutton confirmed that people can be wrongfully accused and she has testified in cases for the State where the defendant was acquitted, but when asked she had no idea the percentage of cases in which that occurred. (*Id*. at 458, 466.) Dr. Dutton agreed with defense counsel that the two types of false reports she discussed on direct were not the exclusive reasons for false allegations. (*Id*. at 467.) When explaining how information about child sex abuse victims is gathered, Dr. Dutton clarified that factors a researcher may look at in a child's statement is "different from what a jury does when the jury listens to all the witnesses and then makes an assessment of credibility[.]" (*Id*. at 480.)

Willis Sinz and Sinz testified for the defense. Willis testified that he never saw his brother doing anything inappropriate with the girls, but admitted he was

not with Sinz when he babysat the girls or on the camping trip. (Tr. at 491-518.) Willis also stated that he had warned Sinz about spending time with the girls, but his brother did not take his advice. (*Id*.)

Sinz agreed he watched movies, sat with the girls in a chair, and had been alone with them the nights Mother was at class and when they went to the concert. (Tr. at 522-55.) Sinz also admitted he often wrapped himself in a blanket because he was from Arizona and would be cold. (*Id*.) Sinz denied touching any of the girls. (*Id*.)

STANDARD OF REVIEW

Ineffective assistance of counsel (IAC) claims present mixed questions of law and fact and are reviewed *de novo*. *State v. Ward*, 2020 MT 36, ¶ 15, 399 Mont. 16, 457 P.3d 955. Appellate courts "review IAC claims on direct appeal if the claims are based solely on the record." *Ward*, ¶ 15.

This Court will not consider claims, even constitutional claims, raised for the first time on appeal. *State v. George*, 2020 MT 56, ¶ 4, 399 Mont. 173, 459 P.3d 854. Plain error review is discretionary and exercised "sparingly, on a case-by-case basis, according to narrow circumstances, and by considering the totality of the circumstances." *State v. Haithcox*, 2019 MT 201, ¶ 23, 397 Mont. 103, 447 P.3d 452 (citation omitted).

Whether a criminal defendant's constitutional rights were violated is a question of constitutional law over which this Court exercises plenary review. *State v. Hatfield*, 2018 MT 229, ¶ 16, 392 Mont. 509, 426 P.3d 569.

SUMMARY OF THE ARGUMENT

Sinz's IAC claim is not properly before this Court because there are multiple plausible explanations for why counsel performed the way she did during *voir dire*. Since the record does not address the reasons for defense counsel's trial strategies during *voir dire*, Sinz's IAC claim should be dismissed without prejudice. This Court could deny Sinz's IAC claim on the merits. Sinz cannot overcome the strong presumption that defense counsel's performance was outside the wide range of reasonable trial strategies. Nor can Sinz establish that but for defense counsel's alleged deficiencies, he would not have been convicted.

Sinz did not object to Dr. Dutton's testimony and, therefore, waived appellate review of his claim that her testimony infringed on his presumption of innocence. Sinz's argument that plain error review applies to this claim is not compelling. Fatal to Sinz's complaint about Dr. Dutton's testimony about statistical data is that Dr. Dutton did not provide any statistical data to the jury. Nor was the State's one reference to Dr. Dutton's testimony in closing result in a miscarriage of justice. This Court has repeatedly held that expert testimony in

child sexual abuse cases—that does not comment directly on the credibility of witnesses—is admissible as it helps the jury understand the evidence and determine the facts of the case.

This Court has already rejected Sinz's argument that the fact an expert's testimony was consistent with some of evidence presented to support the victim's allegations is not the equivalent to commenting on the victim's credibility. The jurors were consistently and repeatedly told they were the sole determiners of witnesses' credibility. Under the totality of the circumstances, Dr. Dutton's testimony did not undermine the factfinding process. Sinz cannot establish that Dr. Dutton's testimony actually infringed upon a fundamental right or firmly demonstrate that not reviewing this unpreserved claim will "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."

Sinz also failed to establish that plain error review was appropriate to consider his argument that his right to be present was violated when the district court responded to a jury question without consulting either party. Even if it is assumed that event constituted a "critical stage," Sinz cannot establish that by instructing the jury to continue deliberating created a manifest miscarriage of justice or undermined the fundamental fairness or compromised the integrity of his trial. The record does not support interpretation of what the jury question meant or

that the court's response nullified the jury instructions. Considering the totality of the record, Sinz failed to establish that plain error review is warranted to consider his right to be present claim. Even if this Court forgives Sinz's failure to lodge an objection, the record also supports that the court's actions constituted harmless error as Sinz was not prejudiced.

ARGUMENT

I. Sinz's IAC claim related to *voir dire* is inappropriate for review on direct appeal and, even if this Court chooses to address this claim, Sinz has not established that Mittlestadt's performance was ineffective.

A. Relevant facts

During *voir dire*, several prospective jurors were excused for various reasons. (Tr. at 8-154.) The court excused 15 prospective jurors for personal hardships or medical issues and, eventually, 16 were excused for cause. (*Id.)* L.S. expressed strong feelings about protecting her children and did not believe she could be impartial. (*Id.)* H.H. asked to be excused due to the subject matter at issue. (*Id.)* The remaining 14 jurors were excused for cause because they, a family member, or close friend, were a sexual assault victim and when questioned, stated they did not believe they could be impartial based on that experience [6 were excused in open court (K.B., S.S., B.C., P.G., P.H., and P.L) and 8 excused

following in-chambers *voir dire* (D.W., M.S., D.F., E.S., R.K., P.C., B.S., and K.H.)]. (*Id.)*

For instance, R.K. was excused after he disclosed he was a recovering alcoholic and his granddaughter had been sexually assaulted by her step-dad and explained that "as far as I am concerned, if they are accused of child molestation, they are guilty." (Tr. at 82-86.) P.C. was excused because 30 years ago he was accused of molesting a child and agreed he could not set aside his experience and just look at the facts of this case. (*Id.)* B.S. was excused based on her career treating sexual assault victims as a nurse, the feelings she had for victims, and when the court asked if she could set aside her experiences and apply the law, B.S. replied, "I don't know that I could." (*Id.)* K.H., who also had experience in military law enforcement, was excused after he shared that his niece was sexually assaulted by her step-father and stated that "if there's a girl that brings something forward, something must have happened. It would be hard to convince me otherwise," and firmly stated he could not set aside that belief. (*Id*. at 90-91.)

During in-chambers *voir dire*, prospective jurors, L.M. and D.C., disclosed personal experiences they felt were relevant, but unlike those jurors described above, both assured the court and parties they could remain impartial. (Tr. at 87-88, 97-98.) Relevant to this appeal, the following exchange took place with prospective juror D.C.

Court: What did you feel you needed to tell us about?

D.C.: More of a full disclosure. My brother-in-law -- actually my ex-brother-in-law is in prison for a very similar crime to my niece, who I believe was eight years old at the time. There was plenty of years that had passed before she accused him, and she did it because of her little sister. It's hard to say what it will be like during trial, but right now I don't think that it will be an issue but - -

Court: Okay.

D.C.: Just full disclosure.

Court: All right. Mr. Gallagher, do you want to ask any questions?

Gallagher: I [do] judge. Just could you set it aside if the Judge were to instruct you that - - set that aside and decide the case on the basis of the facts you heard in court this week? Could you do that?

D.C.: That's what I'm saying. The answer to that now is yes. It's a different situation going through trial and whatnot, so - -

Court: But you - -

D.C.: As of right now, yes.

Court: You felt you needed to disclose this to us so we're aware?

D.C.: Yes.

Court: Thank you, [D.C.]. We'll see you after lunch.

(Tr. at 87-88.)

Defense counsel, Teal Mittelstadt, followed up with D.C. during *voir dire* and asked him about his prior service as a juror. (Tr. at 129-30.) D.C. described his jury service at a DUI trial, explained it was "interesting" and "confusing." (*Id*.) When Mittelstadt asked why it was confusing, D.C. replied there were different statements and perceptions from the two sides, but added that "there was a lot of video evidence that ultimately helped" them reach a verdict. (*Id*.) When Mittelstadt asked if any prospective jurors had experience with Child Protective Services, D.C. volunteered that he did when his niece and nephew had issues with their mother. (*Id*. at 146-47.)

Sinz argues Mittelstadt was ineffective for not interrogating D.C. further to get him to admit he was biased or using a preemptory challenge to remove D.C. from the jury, arguing he was "presumptively biased." (Opening Brief (Br.) at 25-30.)

B. Sinz's IAC claim is inappropriate for direct review.

The right to counsel in a criminal proceeding is protected by the Sixth Amendment to the United States Constitution, as incorporated through the Fourteenth Amendment, as well as article II, section 24 of the Montana Constitution. *State v. Stratton*, 2017 MT 112, ¶ 9, 387 Mont. 384, 394 P.3d 192. When IAC is alleged on direct appeal, before reaching the merits of the argument, this Court must first determine if it is appropriate to consider the claim; that is, whether the

claim is "record-based." *Ward*, ¶ 20; *State v. Larsen*, 2018 MT 211, ¶ 8, 392 Mont. 401, 425 P.3d 694 (citing *State v. Kougl*, 2004 MT 243, ¶ 14, 323 Mont. 6, 97 P.3d 1095 (only when the record on appeal explains "why" an attorney acted a certain way, will Court address IAC claim on direct appeal).

"'A record which is silent about the reasons for the attorney's actions or omissions seldom provides sufficient evidence to rebut' the strong presumption that counsel's conduct falls within the wide range of reasonable professional conduct." *Larsen*, ¶ 8 (quoting *State v. Sartain*, 2010 MT 213, ¶ 30, 357 Mont. 483, 241 P.3d 1032). If an IAC claim is "based on matters outside the record, [this Court] will not review it on direct appeal, recognizing that the defendant may raise the issue in a postconviction proceeding" where a record may be developed. *Ward*, ¶ 20. The exception to this general rule occurs if the appellant establishes there was "no plausible justification" for the alleged deficient performance. *Larsen*, ¶ 8.

There is nothing in the record to explain why Mittelstadt chose not to inquire further with D.C. during *voir dire* about his niece's case or why she did not exercise one of the preemptory challenges to excuse D.C. Sinz's arguments on appeal are rooted in speculation and fail to overcome the threshold determination required for this Court to consider an IAC claim on direct review. *Ward*, ¶¶ 20, 22 (when Court could only speculate as to why trial counsel did not make an objection, IAC claim is not susceptible to review on direct appeal).

Sinz suggests that Mittelstadt should have "extensively questioned" D.C. to "expand on the details of his personal experience with the abuse of his niece, and connect these up with his possible reaction to issues" in his case. (Br. at 27-28.) Sinz further speculates that such questioning "usually results in a juror acknowledging qualifications to his impartiality which support a challenge for cause." (*Id.)* With no authority or evidence from the record, Sinz adds to this conjecture by claiming D.C.'s personal experience "naturally and inevitably create[d] bias against [Sinz]." (*Id.)*

Sinz points to nothing in the record that establishes D.C. would not be impartial. *Whitlow v. State*, 2008 MT 140, ¶ 30, 343 Mont. 90, 183 P.3d 861 (hereinafter, Whitlow II) ("Disqualification based on a juror's alleged prejudice is necessary only where jurors form fixed opinions on the guilt or innocence of the defendant which they would not be able to lay aside and render a verdict based solely on the evidence presented in court."). An IAC claim based on speculation must fail. Moreover, unlike the other jurors who explicitly stated they could not be impartial, D.C. specifically stated he could be impartial, despite his experience. Jurors' answers during *voir dire must* be taken at face value and treated as truthful.

In addition to his speculations, Sinz cannot demonstrate there were no plausible reasons for Mittelstadt's decisions during *voir dire*. *State v. Whitlow*, 2001 MT 208, ¶ 21, 306 Mont. 339, 33 P.3d 877 (hereinafter, Whitlow I) (declined

to consider IAC claim regarding *voir dire* on direct appeal since defendant "would have to go beyond the trial record" to "establish that his trial counsel's decision not to question or challenge prospective jurors was not the product of sound trial strategy").

Sinz's argument fails to account for all the other variables Mittelstadt was dealing with in choosing how to use the preemptory challenges and that, in her estimation, there were six other potential jurors that she believed to be less favorable than D.C. Or, perhaps, there was something about D.C. that made Mittelstadt believe D.C. would be a good juror for the defense. For instance, Mittelstadt may have believed that D.C.'s experience on the DUI trial would be favorable to the defense given his description of the need for video evidence to resolve the issue because of different witness statements. This is just one of many plausible reasons Mittelstadt may have had to not use a preemptory challenge on D.C.

Contrary to Sinz's claim, Mittelstadt did not have an obligation to inquire further with D.C. in chambers or exercise a preemptory challenge to excuse D.C. Sinz speculates that since 15 other jurors were excused for cause, Mittelstadt had plenty of preemptory challenges to use. (Br. at 29.) Sinz further speculates that it was alright if Mittelstadt alienated D.C. because if the challenge for cause was unsuccessful, then she would just use a preemptory challenge. (Br. at 28.) These

speculations completely ignore the multitude of reasons Mittelstadt believed that 6 other potential jurors would not be good for the defense.

Sinz's IAC claim is better suited for consideration in postconviction proceedings. Accordingly, this Court should decline to review this issue on direct appeal. *Stratton*, ¶ 10 (Court declined to consider an IAC claim on direct appeal when it would have to "speculate on every conceivable reason counsel elected not to" act in a certain way).

Nonetheless, should this court consider this claim, Sinz has failed to establish sufficient factual basis or advance any applicable legal argument to support his claims. A defendant claiming ineffective assistance of counsel must ground his or her proof on facts within the record and not on conclusory allegations. *State v. St. John*, 2001 MT 1, ¶¶ 38-37, 304 Mont. 47, 15 P.3d 970.

C. Sinz cannot establish both prongs of IAC claim.

This Court applies the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) to address IAC claims. *Whitlow II*, ¶ 10. The first prong requires the defendant to show that his counsel's performance was deficient and to meet the second prong, the defendant must show his counsel's deficient performance prejudiced the defense. *Whitlow II*, ¶ 10 (citing *Strickland*, 466 U.S. at 687). This Court may consider the *Strickland* prongs in either order, and need not consider both if one is dispositive of an IAC claim. *Whitlow II*, ¶ 11.

To demonstrate that Mittelstadt's performance was deficient, Sinz must prove that her performance fell below an objective standard of reasonableness. *Whitlow II*, ¶ 10. Sinz bears a heavy burden and "must overcome the presumption that, under the circumstances," counsel's decisions could fall within the wide range of reasonable professional conduct. *Sartain*, ¶ 30; *Strickland*, 466 U.S. at 689. This includes overcoming the presumption that, under the circumstances, the alleged error could be considered sound trial strategy. *Strickland*, 466 U.S. at 689; *Whitlow II*, ¶¶ 31-39. And, since this great deference is given to counsel's tactical and strategic decisions, it is rare that a reviewing court will consider decisions by counsel during *voir dire* as outside the wide range of reasonable professional conduct. *State v. Henderson*, 2004 MT 173, ¶ 5, 322 Mont. 69, 93 P.3d 1231; *State v. Racz*, 2007 MT 244, ¶ 28, 339 Mont. 218, 168 P.3d 685 (just like his "reasoning for not challenging a juror, a lawyer's rationale for not asking further questions is a 'matter of internal thought processes'" and part of his trial tactics).

Sinz's critique of Mittelstadt's performance during *voir dire* offers only conjecture and speculation. Sinz also misrepresents what juror D.C. said while in chambers when he claims that D.C. stated he could "probably" be fair. (Br. at 26-27.) Rather, D.C. reported his history only because he felt obligated to disclose the information, not because it impacted his ability to be fair and impartial. Sinz

has not established how Mittelstadt's informed strategic decision not to use a preemptory challenge to excuse D.C., was unreasonable. Thus, the first prong of *Strickland* cannot be met, and this claim must be denied.

Nor has Sinz established the second *Strickland* prong. To meet this prong, Sinz must demonstrate "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Kougl*, ¶ 11. When addressing the prejudice prong, a court must consider the strength of the case against the defendant and the likelihood of success of the actions counsel failed to take. *Henderson*, ¶ 9; *State v. Haldane*, 2013 MT 32, ¶ 37, 368 Mont. 396, 300 P.3d 657 (IAC claim cannot succeed when predicated on counsel's failure to take an action which, under the circumstances, would likely not have changed the outcome of the proceeding).

Sinz did not establish how the outcome would have been different had Mittelstadt interrogated D.C. about his niece's victimization. Instead, Sinz merely guesses that such an interrogation "usually results in a juror acknowledging qualifications to his impartiality." (Br. at 28.) He offers no authority for such a claim and nothing in the record supports that D.C. would have done a 180 degree turn away from his voluntary, affirmative, and repeated statements that he could be a fair and impartial juror.

Sinz also cannot establish that had Mittelstadt used a preemptory challenge to remove D.C. that he would not have been convicted. "'A defendant must do more than just show that the alleged errors of a trial counsel 'had some conceivable effect on the outcome of the proceeding.'" *State v. Dineen*, 2020 MT 193, ¶ 25, 400 Mont. 461, 469 P.3d 122 (citation omitted). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Dineen*, ¶ 25; *Strickland*, 466 U.S. at 686.

Sinz suggests that Mittelstadt's failure to remove D.C. from the jury pool created a "structural defect" of his trial. (Br. at 30 (citing *State v. Charlie*, 2010 MT 195, ¶ 40, 357 Mont. 355, 239 P.3d 934.)) However, *Charlie* concerned a defendant's constitutional right to be present, not whether a defendant was prejudiced by his counsel's alleged deficient performance during *voir dire*. Moreover, application of the "structural error" and presumption of resulting prejudice is in direct conflict with the standard for determining prejudice in IAC cases: that there is "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different."

Sinz cannot establish that had Mittelstadt interrogated Sinz further he would have been excused for cause and he would not have been convicted. Nor can Sinz establish that had Mittelstadt used a preemptory challenge that he would not have

been convicted. Sinz's IAC claim should be rejected because he cannot establish that (1) Mittelstadt's performance was deficient and (2) but for her alleged deficient performance Sinz would not have been convicted of sexually assaulting his two nieces.

II. Dr. Dutton testified without objection and Sinz's argument that her testimony, which this Court has previously endorsed, should be barred as contrary to the presumption of innocence does not meet the standards for plain error review.

Sinz's claim that Dr. Dutton's testimony was a "direct attack on the presumption of innocence" is unsupported in fact and law and his failure to assert an objection to Dr. Dutton's testimony constituted a waiver of this issue. (Br. at 30-35.) *See State v. Reynolds*, 243 Mont. 1, 9, 792 P.2d 1111, 1116 (1990) ("when expert testimony in child sexual abuse cases has not been objected to at trial as improper, [Court] will not entertain the issue on appeal").

Sinz asserts that this Court should nonetheless reach this issue using the doctrine of plain error review. *State v. Christensen*, 2020 MT 237, ¶ 78, ___ Mont. ___, ___ P.3d ___ ("Absent plain error, allegations that constitutional rights have been violated cannot be raised for the first time on appeal."); *State v. Akers*, 2017 MT 311, ¶ 10, 389 Mont. 531, 408 P.3d 142; *State v. Favel*, 2015 MT 336, ¶ 13, 381 Mont. 472, 362 P.3d 1126. This Court will invoke plain error review only when the appellant (1) demonstrates that the alleged error implicates a fundamental

right; and (2) "firmly convince[s] this Court that a failure to review the claimed error would result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial or proceedings, or compromise the integrity of the judicial process." *Akers*, ¶ 10; *Favel*, ¶ 23.

Sinz's argument on appeal does not meet the criteria for invoking plain error review. Sinz asserts that plain error review is appropriate because of the policy against a defendant "undergo[ing] the ordeal of trial presumptively guilty, on account of his case sharing typical features gleaned from general research." (Br. at 35-36.) His argument is unavailing.

This Court has consistently held that in child sexual abuse cases, if an expert's "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue" that testimony is admissible but the expert may not comment on the credibility of the victim. *State v. Grimshaw*, 2020 MT 201, ¶ 21, 401 Mont. 27, 469 P.3d 702 (citing Mont. R. Evid. 702); *State v. Robins*, 2013 MT 71, ¶ 16, 369 Mont. 291, 297 P.3d 1213; *State v. Morgan*, 1998 MT 268, ¶ 29, 1 Mont. 347, 968 P.2d 1120.

This Court has repeatedly affirmed the use of an expert to explain the complexities of child sexual abuse and provide guidance to help a jury understand and judge the victim's testimony and has repeatedly affirmed that such testimony does not infringe upon the jury's duty to decide the credibility of the victim.

See, e.g., *Morgan*, ¶¶ 29-30 (allowing expert to explain behaviors associated with child sexual assault victims "does not impinge upon" jurors' obligation to evaluate victim's credibility); *Robins*, ¶ 16 (an expert's testimony on complexities in child sexual abuse cases "educates and enlightens the jury" which "then make[s] a more informed decision when it assesses the victim's credibility"); *State v. Given*, 2015 MT 273, ¶ 46 n.2, 381 Mont. 115, 359 P.3d 90.

Allowing an expert to testify under Rule 702 does not infringe upon a defendant's presumption of innocence. Nor has Sinz established that failing to consider his argument will "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." *Akers*, ¶ 10.

Just as Sinz attempts to argue here, in *Robins*, this Court rejected the appellant's argument that Wendy Dutton's testimony encroached into the jury's province of evaluating the credibility of child sex abuse victims. *Robins, supra*. In *Robins*, Dutton testified, just as she did in this case, "about the process of victimization, how victims disclose abuse, children's typical reactions to abuse, the most common situations when children make false allegations, and the proper protocol for conducting a forensic interview with a child." *Robins*, ¶ 7. Also, and just as she did here, Dutton did not comment on the facts of the case, give an

opinion about whether the victim had been abused, or comment on the victim's credibility. *Id*.

In rejecting Robins' claim, this Court explained that "the fact that Dutton's testimony was consistent with the victim's allegations does not mean that Dutton vouched for the victim or commented on her credibility." *Robins*, ¶ 14. This is precisely the thrust of Sinz's argument: that since the events in his case mirror some of the general situations described by Dr. Dutton, her testimony is "telling [the jury] that there is a high probability that the children's accusations are true." (Br. at 32.) In addition to this Court already rejecting such a position in *Robins*, there are several other problems with this argument.

First, nowhere in Dr. Dutton's testimony did she refer to any factor as creating a "high probability" that a child had been sexually assaulted. Nor did the State suggest that Dr. Dutton's testimony created a "high probability" that Sinz was guilty. Sinz's argument to that effect misstates the record.

Second, Sinz's argument completely ignores the numerous and clear statements that Dr. Dutton made throughout her testimony that her descriptions of general characteristics found in child assault cases were not comments on the credibility of K.B. and D.B. The State emphasized that fact in its closing arguments.

Third, Sinz also fails to appreciate that the jurors were consistently reminded by the attorneys and district court that they alone determined the credibility of the witnesses. The jury was repeatedly reminded during *voir dire* and in the jury instructions that Sinz was presumed innocent of the charges, the State must prove every offense beyond a reasonable doubt, and evaluation of the witnesses' credibility was solely within the jury's charge. (Doc. 71, JI Nos. 3, 4.)

The jury was also specifically instructed on application of Dr. Dutton's testimony, including an explicit instruction that her testimony may not be considered "to be an opinion by her that D.B. and K.B. have told the truth." (Doc. 71, JI Nos. 22, 23.) "American jurisprudence depends on a jury's ability to follow instructions and juries are presumed to follow the law that courts provide." *State v. Sanchez*, 2008 MT 27, ¶ 57, 341 Mont. 240, 177 P.3d 444.

Under the facts of this case, Sinz cannot establish his presumption of innocence was implicated or infringed by Dr. Dutton's testimony. Accordingly, this Court should not invoke plain error review to consider his unpreserved claim. *Akers*, ¶ 10. Sinz also cannot establish the second criteria for plain error review and "firmly convince this Court that a failure to review the claimed error would 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." *Akers*, ¶ 10.

Sinz argues that Dr. Dutton's testimony contained improper "statistical" evidence. (Br. at 30-35.) The problem with that claim is that Dr. Dutton did not reference any numerical data or statistics concerning child sexual assault victims. Dr. Dutton testified as a blind witness and explained aspects of child sexual abuse in general terms.

Dr. Dutton's general comments included the following phrases that Sinz incorrectly identifies as "statistics"; false accusations by children are "very rare";[3] when false allegations are made it is "commonly" because of a custodial battle or a teenage girl wants to change her circumstances; "oftentimes" members of the victim's family are nearby when the abuse occurs; children are abused "more-frequently" by someone they know; that delayed disclosure "commonly" occurs when the perpetrator is a close relative or if the child found the experience pleasurable. (Br. at 31-33.) Contrary to Sinz's characterization of Dr. Dutton's testimony, none of these statements represent numerical or quantitative data.

Sinz further alters Dr. Dutton's testimony when he asserts that she said "there is a high probability the children's accusations are true." (Br. at 32.) But, again, nowhere in Dr. Dutton's testimony did she offer a comment on the truth of

[3]Dr. Dutton did not testify that false accusations are "very rare," rather, she stated "malicious false reports [tend] to be *more* rare" than erroneous reports. (Tr. at 450-51.) (Emphasis added.) It was the prosecutor who stated during closing that incidents of "malicious false allegations of child sex abuse are *very* rare." (Tr. at 594.) (Emphasis added.)

the victims' statements in any way. (Br. at 32.) Sinz takes that misstatement of fact and further distorts Dr. Dutton's testimony by claiming it encouraged the jury to infer "guilt on generalized research data having nothing to do with the evidence in the actual case" because his case "is a typical case of 'documented' child sexual abuse, therefore he is probably guilty . . . ." (Br. at 32, 34.)

The crucial problem with Sinz's argument is that it is not based on the actual record. His theory on appeal is similar to the argument this court rejected in *Robins, supra*. Just like this Court observed in *Robins*, merely because some of the factors discussed by Dr. Dutton were present in the case against Sinz, it did "not mean that [Dr.] Dutton vouched for the victim or commented on her credibility." *See Robins*, ¶ 14. *Robins* controls here and Sinz cannot establish that it was error to admit Dr. Dutton's testimony.

Dr. Dutton's testimony contained no statistical data, which this Court recently found to be problematic in *Grimshaw, supra* (court erred in overruling objection to expert providing statistical data on rates of false reports); *see also State v. Brodniak*, 221 Mont. 212, 718 P.2d 322 (1986) (expert witness may offer opinion of whether the victim was suffering from rape trauma syndrome, but testimony about statistical percentages of false accusations was improper comment on witness credibility).

In *Grimshaw*, the victim was an adult and the defendant's step-cousin. *Grimshaw, supra*. The State presented an expert to explain general behaviors and common myths about rape victims. *Id*. Over objection from the defense, the witness testified that "only 16 to 20 percent" of sexual assault victims make a report and 2 to 8 percent of sexual assault cases are based on false reports. *Grimshaw*, ¶ 14. In its closing, the State emphasized the statistics, particularly the 2 to 8 percent range of false reports. *Grimshaw*, ¶ 16.

Grimshaw argued he was prejudiced by the statistical data because the case became a "'trial by statistic,' rather than one based on the specific facts of [the] case." *Grimshaw*, ¶ 19. Citing *Brodniak*, this Court agreed and like its discussion in that case, drew a distinction between expert testimony on typical factors related to a syndrome (battered women; child victim) and "statistical probability testimony" which this Court concluded created a numerical likelihood of whether the victim was telling the truth and, thus, infringed on the jury's role. *Grimshaw*, ¶¶ 23-27.

Unlike the experts in *Brodniak* and *Grimshaw*, Dr. Dutton did not testify to any statistical probabilities. Rather, Dr. Dutton's testimony consisted of general information and factors relevant to child sexual assault victims. Also unlike *Grimshaw*, where this Court concluded the State emphasized the statistical data, no such improper emphasis occurred here.

Sinz asserts that by mentioning Dr. Dutton in the opening statement and closing statement, the State improperly emphasized evidence that challenged his presumption of innocence. Sinz also claims that during its closing argument the State referred to Dr. Dutton's testimony as "evidence" thereby which directly challenged his presumption of innocence. Again, Sinz distorts the record.

The State mentioned Dr. Dutton twice in its closing. Nothing in the State's closing remarks distorted Dr. Dutton's testimony as a commentary on the veracity of the girls' testimony. Nor did the State improperly emphasize any aspect of Dr. Dutton's testimony.

First, the State reminded the jury about Dr. Dutton's description of the process of victimization. (Tr. at 587, 593-94.) Second, the State reminded the jury that "Dr. Dutton wasn't here to comment on the girls' credibility, but what she told you is that incidents of malicious false allegations of child sex abuse are very rare. And I would submit to you this is not one of those cases." (*Id*.)

Defense counsel argued that "you heard Wendy Dutton testify and try to inform you on child sex abuse, and I think what it can come down to would be that we can't tell who has been abused and we can't tell who has not. There is no diagnostic criteria." (Tr. at 601.) In its rebuttal closing, the State did not address the defense's comments on Dr. Dutton's testimony. (Tr. at 601-02.) The State agreed that the case hinged on whether the jurors believed the girls or Sinz and

then pointed out that, unlike the defendant, the girls had no motive to tell them something that was not true. (*Id*.)

Although the prosecutor did say the "incidents of malicious false accusations of child sex abuse are very rare" instead of just "rare," Sinz cannot establish how that one comment created plain error. *See Christensen*, ¶ 79 (raising prosecutorial misconduct for first time on appeal; defendant must demonstrate alleged misconduct violated his substantial rights). This Court will not presume prejudice related to comments made by the prosecutor and does not isolate challenged comments upon review. (*Id*.) Rather, this Court "considers the challenged comments on the context of the trial and the closing argument as a whole." (*Id*.) Under this standard, Sinz cannot establish that the prosecutor's statements improperly emphasized Dr. Dutton's testimony.

Contrary to Sinz's argument, Dr. Dutton's testimony did not undermine the fairness of Sinz's trial or the "factfinding process." *Favel*, ¶ 25 (citation omitted). Sinz had the opportunity to cross-examine Dr. Dutton and explore her opinions. And during that cross-examination, Dr. Dutton admitted there were more than two reasons for a false report to be made. (Tr. at 467.)

Under these "narrow circumstances, and by considering the totality of the circumstances," this Court should not apply the "sparingly-used" doctrine of plain error review. *Haithcox*, ¶ 23. Sinz has not established that his constitutional

presumption of innocence was at all infringed by Dr. Dutton's testimony. *Akers*, ¶ 10. Nor do his arguments "firmly convince this Court that a failure to review the claimed error would 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." *Akers*, ¶ 10.

III. The district court did not commit reversible error when it responded to a jury question without seeking input from the parties and instructed the jury to continue deliberating and reach a verdict on as many counts as possible.

A. Relevant facts

The jury began deliberating shortly after 4 p.m. (Tr. at 603.) About two hours later, the jury submitted a question that the court presented to the defendant, his counsel, and the State. (*Id*.) The jury asked for clarification about which facts went to which count, specifically, why there was only one sexual intercourse without consent charge concerning D.B. (Doc. 73.) Following discussion with the parties, the court wrote back to the jury, "I cannot answer your questions. You must review the evidence and the instructions." (*Id*.) There was open-court discussion about future jury questions and whether the parties needed to be there. (Tr. at 604-05.) The district court explained it would probably call them in to consult. (*Id*.)

The jury forwarded another question that the district court answered at approximately 8:30 p.m., without input from the parties. (Doc. 74.) The question and response were as follows:

> Question: What happens if we cannot come to a unanimous decision for Counts 1, 2, or 3? Do we still move on to the lesser charge? Or do we continue to deliberate until we are unanimous?
>
> Response: You should work to come to a unanimous verdict on Counts 1, 2, and 3. However, if you cannot come to a unanimous verdict on Counts 1, 2, and 3, you may move on to Counts 4 and 5.

(Doc. 74.) The jury returned its verdict at 8:45 p.m. (Tr. at 605.)

After the jury was excused, the court told the parties about the second question and explained, "I took it upon myself to answer it." (Tr. at 616.)

B. Sinz has not met his burden to establish plain error review is appropriate.

Sinz argues for the first time on appeal that his right to be present was violated. This Court will not consider arguments, including a right to be present claim, raised for the first time on appeal. *George*, ¶ 4; *Hatfield*, ¶ 25; *State v. Robertson*, 2014 MT 279, ¶ 39, 376 Mont. 471, 336 P.3d 367; *State v. Reim*, 2014 MT 108, ¶ 40, 374 Mont. 487, 323 P.3d 880.

Sinz speculates the court purposely waited to tell the parties about the second question until after the verdict and asserts he was relieved of his burden to preserve this issue because he had no "meaningful opportunity to object." (Br. at

19 n.4.) However, the record establishes that after being advised about the second question and response, Sinz did not make any comment or objection. Nor did he move for a new trial under Mont. Code Ann. § 46-16-701. *See State v. Northcutt*, 2015 MT 267, ¶ 4, 381 Mont. 81, 358 P.3d 179 (after jury reached its verdict, defendant "timely moved for a new trial" based on judge's interactions with the jury when he was not present and preserved issue for appeal).

Therefore, Sinz is incorrect that the State must establish harmless error. (Br. at 21.) Rather, Sinz bears the burden of persuading this Court that plain error review should be invoked. *See Reim*, ¶ 41 (when violation of right to be present considered for plain error review, burden of persuasion is on the defendant); *George*, ¶ 5; *Hatfield*, ¶ 30; *Robertson*, ¶ 40.

When considering whether a district court has violated a defendant's right to be present, this Court will usually first consider whether the defendant was excluded from a "critical stage" of the proceeding and whether he waived his right to be present. *State v. Wilson*, 2013 MT 70, ¶ 12, 369 Mont. 282, 297 P.3d 1208. A critical stage is "any step of the proceeding where there is a potential for substantial prejudice to the defendant." *Charlie*, ¶ 40.

However, when a defendant was not prejudiced by his absence from an event, this Court need not definitively determine if that event constituted a critical

stage or whether there was a valid wavier. *See Wilson*, ¶ 13; *State v. Godfrey*, 2009 MT 60, ¶ 26, 349 Mont. 335, 203 P.3d 834. Similarly, since Sinz cannot establish the second prong for plain error review, this Court need not definitively determine whether the court's written response to the second jury question was a "critical stage."[4]

Sinz has established the first prong of plain error review. *George*, ¶ 7; *Hatfield*, ¶ 29. The United States and Montana constitutions both guarantee a defendant's right to be present at all critical stages of the proceedings against him. U.S. Const. amend. VI; Mont. Const. art. II, § 24; *State v. Matt*, 2008 MT 444, ¶¶ 16-17, 347 Mont. 530, 199 P.3d 244 *overruled on other grounds by Charlie*, *supra*.[5] The right to be present is a fundamental right under Montana's constitution. *Id*.

However, just as in *George*, *Hatfield*, *Robertson*, and *Reim*, Sinz's argument does not "firmly convince this Court that a failure to review the claimed error would result in a manifest miscarriage of justice, leave unsettled the question of the

[4]By asserting this premise, the State does not concede the event at issue was a "critical stage" where there was a potential for "substantial prejudice" to Sinz and his opportunity to defend against the charges.

[5]*Matt* was overruled to the extent it "imposed a presumption of prejudice where the defendant is excluded from a critical stage of the proceedings in matters of non-structural error." *Charlie*, ¶ 45.

fundamental fairness of the proceedings, or compromise the integrity of the judicial process." *Akers*, ¶ 13.

Sinz asserts that the court violated Mont. Code Ann. § 46-16-503(2) (information requested by the jury "may be given, in the discretion of the court, after consultation with the parties"). (Br. at 18-19.) While the statute contemplates the court getting input from the parties, it clearly leaves the response in the court's discretion and does not "expressly prohibit the court" from answering a question as it deems appropriate, regardless of the parties' comments. (Br. at 20.)

Sinz also speculates that the purpose of Mont. Code Ann. § 46-16-503(2) is to ensure the district court's response is "accurate" but fails to establish how the court's response was contrary to law or contravened the instructions already provided to the jury. (Br. at 19-20.) Contrary to Sinz's argument, the court's response did not contravene Jury Instruction 31.

The court's response did not direct the jury to simply move on to the last two counts and not consider the lesser-included offenses for the first three counts. The court directed the jury to try and reach a unanimous verdict on the first three counts with no limitation on whether it was on the charged offense or lesser-included offense. Significantly, the jury returned its verdict within 15 minutes of the court

responding. This demonstrates that while waiting for the court's response, the jury continued deliberating and, most likely, the question to the court became moot.

Sinz's claim of prejudice centers on his position that the State's evidence concerning penetration was ambiguous and scarce and that the jury was struggling with that evidence. (Br. 21-23.) The evidence presented by Dr. Keefe was not confusing. As the State succinctly and correctly summarized in is closing: the part of a prepubescent girls' genitalia that causes feelings of pleasure is the clitoris and feelings of pain occur at the hymen and that to reach those parts, the vulva must be penetrated. (Tr. at 582.) Both K.B. and D.B. described how Sinz's actions caused pleasure and pain which equated to penetration of their vulvas. (Tr. at 583-84.)

Based on the jury's first question, it appears they were struggling with matching the sexual intercourse without consent counts to specific events. This may have occurred because during its closing remarks, the State described two factual scenarios for each victim that amounted to sexual intercourse without consent (Tr. at 585) but there was only one sexual intercourse without consent charge related to D.B. The jury's questions did not mean it was confused about the definition of penetration.

Sinz's presumption that the jury was struggling with the evidence related to penetration does not establish a miscarriage of justice or concern he was denied fundamental fairness or question the integrity of the proceedings. Nor does Sinz's

improper reference to the different penalties for the offenses somehow made the court's response to the second question more prejudicial. (Br. 22.) Sinz speculates that had the court consulted with the parties, either one "may well have suggested" a different response. Sinz's conjecture is insufficient to establish "a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the proceedings, or compromise the integrity of the judicial process." It also ignores the fact that a court maintains the ultimate discretion on responding to juror questions and Sinz cannot establish the court would have answered any differently had the parties been consulted.

Finally, Sinz's reliance on *State v. Tapson*, 2001 MT 292, ¶ 14, 307 Mont. 428, 41 P.3d 305 and *Northcutt, supra,* is not compelling. (Br. at 24.) First, both of those cases involved the judge speaking directly with the jurors, not sending a written response back to the jury. The crux of the decision in *Tapson* was the fact there was no record of the interactions between the judge and jurors so possible prejudice to the defendant was unknowable. In *Northcutt*, this Court concluded that the record was sufficient to establish the interactions between the judge and jurors was harmless error. *Northcutt*, ¶ 19.

In addition to the plain error cases cited above, this case is more akin to *Godfrey, supra* (a harmless error case), which dealt with the court submitting written responses to jury questions. In that case, the court met with both parties

six times to answer ten jury questions and answered one question without consulting with either party. *Godfrey*, ¶ 27. In concluding that Godfrey was not prejudiced, this Court observed that since the questions came during deliberations, the court's actions had no "bearing upon the evidence" and further noted that the court's responses to the jury question were "consistent with the court's original charge to the jury." *Godfrey*, ¶¶ 35-36.

Like *Godfrey*, the court's actions here were consistent with the jury instructions and did not confuse the jury; especially considering the jury came back with a verdict 15 minutes after the court responded to its second question. Under the facts presented, Sinz has not established the second plain error review prong and this Court may decline to consider this claim further.

Nonetheless, even if this Court determines Sinz did not have a meaningful opportunity to preserve this claim so plain error review is not the mechanism of review, the record supports that the court's actions amounted to harmless error,

Regardless of which party carries the burden of persuasion, the record does not support the second plain error prong (a miscarriage of justice, lack of fundamental fairness, a compromised judicial process) but does support harmless error ("given the interests the right of presence was designed to protect . . . there is no reasonable possibility that the violation prejudiced the defendant."). *Charlie*, ¶ 45.

Although the court advised the jury to keep deliberating without first consulting with either party, the record demonstrates that the error was harmless for the same reasons set forth above. *Godfrey*, ¶¶ 35-36.

CONCLUSION

This Court should affirm Sinz's convictions and uphold his judgment and sentence.

Respectfully submitted this 22nd day of October, 2020.

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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 9,914 words, excluding certificate of service and certificate of compliance.

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CERTIFICATE OF SERVICE

I, Kathryn Fey Schulz, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 10-22-2020:

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