

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0643

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DANIEL TODD COLLINS,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Third Judicial District Court,
Deer Lodge County, The Honorable Ray J. Dayton, Presiding

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STATEMENT OF THE ISSUES

1. Did the district court properly deny Appellant's motion for a mistrial when, after the prosecutor inadvertently set his witness notes on a juror's chair during the lunch recess to tape down an electrical cord, the juror's post recess possession of the notes immediately came to the district court's attention while the State was questioning its first witness, the district court and the parties privately questioned the juror, who assured the court that no other juror had seen the notes, and the district court replaced this juror with the alternate?

2. Did the district court properly exercise its discretion in denying Appellant's last-minute motion to continue the trial to obtain an unidentified expert witness whose existence and proposed testimony were speculative?

3. On the first morning of the jury trial, did the district court properly deny Appellant's motion continue the trial based upon his claim that he wanted to retain private counsel but he had not diligently taken the necessary steps to do so, and the private attorney he had contacted could not guarantee that he would represent Appellant if the court postponed the trial?

4. Has Appellant met his heavy burden of proving his ineffective assistance of counsel claim raised on direct appeal?

STATEMENT OF THE CASE

By Amended Information, the State charged Appellant Daniel Collins (Collins) with two counts of felony Criminal Child Endangerment, Operating a Vehicle Without Liability Insurance in Effect, Expired Registration, Driving While Suspended or Revoked, Failure to Slow, Use Caution or Move Away from Stationary Emergency Vehicle, and Unlawful Possession of an Open Alcoholic Beverage Container in a Motor Vehicle. (D.C. Doc. 44.) On the first day of trial, before empaneling the jury, Collins pled guilty to everything but the two counts of Criminal Child Endangerment. (6/24/19-6/25/19 Jury Trial Tr. [Tr.] at 14-21.)

The district court granted Collins' first motion to continue the trial so he could explore obtaining an expert witness. (4/3/19 Hearing Tr. at 27.) The court rescheduled the jury trial for June 24, 2019. (D.C. Doc. 23.)

At the June 5, 2019 final pretrial conference, Collins again moved the court to postpone his trial so he could have the opportunity to save money to *possibly* find and retain an expert witness who could *possibly* testify that his liver function somehow impacted the results of his breath test. (6/5/19 Hearing Tr. at 12-13.) The district court denied this request. (*Id.* at 13-14.)

On the first day of trial, Collins orally moved the court again to postpone the trial so he could replace his court appointed counsel with privately retained counsel. (Tr. at 8-12.) After a phone call with potential privately retained counsel,

the district court denied Collins' last-minute motion to continue the trial. (Tr. at 12-13.)

During the testimony of the State's first witness, Montana Highway Patrol Trooper Fowler, the parties and the district court learned that the prosecutor had inadvertently left his witness notes on the seat of Juror Scott's chair while taping down an electrical cord during a recess. (Tr. at 193-94.) After speaking with Juror Scott and determining the no other juror had seen the prosecutor's notes, the district court replaced Juror Scott with the alternate juror and the court denied Collins' motion for a mistrial. (Tr. at 200-02.)

The jury found Collins guilty of two counts of Criminal Child Endangerment. (Tr. at 365-66.) On the first Count of Criminal Child Endangerment, the district court sentenced Collins to 10 years in prison, with 4 years suspended. On the second count, the court imposed a concurrent 10-year suspended sentence. (D.C. Doc. 79.)

STATEMENT OF THE FACTS

I. The offenses

On November 2, 2018, Trooper Fowler of the Montana Highway Patrol was working the night shift, patrolling in Anaconda-Deer Lodge County. Around 10 p.m., he saw a vehicle parked on the side of Montana Highway 1. Trooper

Fowler pulled in behind the vehicle to make sure the occupants of the vehicle were safe and did not need assistance. (Tr. at 166, 172.) Trooper Fowler spoke with the driver of the vehicle and learned the vehicle had run out of gas, but someone was coming to bring gas to the vehicle's occupants. (Tr. at 173.) While Trooper Fowler was in his vehicle checking the identification of the driver, another car came within inches of hitting his vehicle. Because of the speed of the vehicle and the wind, the vehicle rocked the patrol car as it passed by. (Tr. at 175-76.) The passing vehicle did not slow down for Trooper Fowler's vehicle or move over. (Tr. at 176.) After Trooper Fowler was certain that the stranded motorist had help on the way, he decided to go have a conversation with the driver of the vehicle who had nearly hit his patrol car. (*Id.*)

As Trooper Fowler caught up to and followed the vehicle that had almost hit his vehicle, he observed that the driver of the vehicle was weaving in his lane and crossing the fog line, which was a sign that the driver was under the influence. (Tr. at 179.) Trooper Fowler also observed that the vehicle did not have license plates/registration. (*Id.*) He initiated a traffic stop. (Tr. at 179-80.)

Trooper Fowler walked up to the driver's window, introduced himself, and explained that he had stopped the driver, later identified as Collins, because Collins had almost hit him. Collins was argumentative and denied that he had almost hit Trooper Fowler's parked vehicle. Trooper Fowler observed an open container of

alcohol, and asked Collins whether he had been drinking. Collins responded “no.” (Tr. at 182.) Trooper Fowler identified the female passenger in the vehicle as Melinda Mitchell. Her two young children, aged two and seven, were in the back seat of the car. (Tr. at 182, 270-71.) Mitchell admitted that she had consumed around five beers, but she had not seen Collins drink any alcohol. (Tr. at 273-74.)

Trooper Fowler could detect the odor of an alcoholic beverage coming from the vehicle. He asked Collins for his driver’s license. Collins responded that he did not have one. Collins added that his license was suspended. (Tr. at 185.) Mitchell informed Trooper Fowler that the open container of alcohol was hers. (Tr. at 187.) Trooper Fowler asked Collins to come to his vehicle and instructed Mitchell to stay in Collins’ vehicle with her children. (Tr. at 188-89.) Trooper Fowler could smell the odor of an alcoholic beverage coming from Collins. (Tr. at 189.) Collins admitted that he had consumed alcohol. (Tr. at 191.)

Collins performed standardized field sobriety tests. On the Horizontal Gaze Nystagmus (HGN) test, Trooper Fowler observed all six clues indicative of impairment, which included a lack of smooth pursuit in both eyes, distinct and sustained nystagmus at maximum deviation in both eyes, and the onset of nystagmus prior to 45 degrees. (Tr. at 213.)

On the walk-and-turn test, during the instructional phase of the test Collins lost his balance. (Tr. at 215-16.) While performing the test, Collins raised his arms,

missed heel-to-toe, and improperly completed the turn. (Tr. at 216.) These clues were indicative of impairment. (Tr. at 217.) On the one-leg-stand, Collins dropped his foot and hopped. These clues were also indicative of impairment. (Tr. at 218.)

Finally, Trooper Fowler had Collins perform the modified Romberg test. Trooper Fowler asked Collins to close his eyes, tilt his head back, and, when he believed 30 seconds had passed, to tilt his head forward, open his eyes and say stop. People who are not impaired usually end the test within one or two seconds of 30 seconds. People who are impaired often take longer than 30 seconds to end the test. Collins tilted his head forward at 40 seconds and forgot to say stop, which were both indicators of impairment (Tr. at 319-20.)

Based upon Collins performance on the field sobriety tests, Trooper Fowler arrested him. (Tr. at 321.) After Trooper Fowler read Collins the implied consent advisory form, Collins agreed to provide a breath sample. (Tr. at 222, 224.) The breath sample showed Collins' blood alcohol concentration to be .105. (Tr. at 225; State's Ex. 5.)

II. Motions to continue

At a final pretrial hearing, defense counsel requested that the district court continue the jury trial because Collins had recently disclosed to him that when he was six years old his left eye had been "knocked out of his head," so it did not

track normally. (4/3/19 Final Pretrial Conference Tr. at 20.) Defense counsel requested a continuance so he could investigate finding a medical expert to determine whether this could impact the results of the HGN test. (*Id.*) The district court granted a continuance and asked defense counsel how much time he needed. Defense counsel requested a 60-day postponement of the trial, and the court granted the request. (*Id.* at 24-27.) The court rescheduled the jury trial to June 24, 2019. (D.C. Doc. 25.)

At the June 5, 2019 final pretrial conference, defense counsel requested that the district court grant him another continuance, as set forth below:

MR. MILLER: Um, your honor, my client has asked me to move the Court to vacate the June trial date and to reschedule the matter after September 1st. Um, it's known Mr. Collin[s] has been out on his uh, uh, out on bond for the last few months and although we had a couple of bumps early on he has been complying with 24/7. Uh, he's full time employed for Copper City Lawn and Tree Service and he's trying to accumulate enough money to be able to retain uh, a doctor uh, who can look at his liver and, and perhaps give expert opinions as to his liver function [if] that might relate to a defense in this case. Um, I believe that the Defendant has a colorable defense if uh, uh, if an expert can be located to say that. He does not have the funds otherwise to uh, gain those examinations and the—my agency won't fund it. So, I'd ask the Court to uh, again vacate the trial date of June pending the case til after September 1st.

(6/5/19 Hearing Tr. at 12.) The State objected to this request. (*Id.*) The district court denied the motion to continue. (*Id.* at 14.)

Before jury selection on the first day of trial, defense counsel informed the court that Collins had contacted attorney Tyson McLean to consider taking on his

defense. Defense counsel explained that Mr. McLean had told him he would consider representing Collins if the court continued the jury trial. (Tr. at 8.) The district court immediately telephoned Mr. McLean, and the following exchange occurred:

MR. TYSON MCLEAN: I was called by uh, Daniel, I believe on Wednesday of last week asking if I could represent him for his trial that he did tell me was happening today, on Monday, and I told him that I would be uh, unavailable. The next day I told him look, I can't turn around and do a jury trial whatever, five days from now, whatever it was, four days from now. Um, but that is, this was to be continued by you, the Court, um I could help him out in the future if it were to be continued, but I told him also that because he had Defense counsel that all of that needed to be done through Defense counsel and I wasn't going to be able to substitute in as counsel or do any work on the case uh, until you, as the Court, and the State and his Defense counsel could uh, continue it out and um, you know, allow me the time appropriate and necessary to prepare for something like his trial if he's going with. So, that's about all the information I have. He was never, we don't have—he's not my current client. He's only a perspective [sic] client and that's, that's about all the information I provided for him um, knowing that at the end of the day it's the Court's decision if it wants to continue and have him have new counsel.

THE COURT: Alright, uh Mr. McLean let me clarify one ambiguity. You indicated that you could render help to him uh, if I continued the case. If I continue the case will you assume representation of Mr. Daniel Collins in his trial?

MR. TYSON MCLEAN: Well, that, that's difficult to answer. I mean he has to be able to obviously enter a relationship agreement with me and also pay a retainer to do so. And we never discussed the costs of that. Um, he indicated that he may have money coming in, but it may not be an amount—I, I don't know. I don't have an answer, because I haven't been able to even tell him yes or no if I could, if I

could be his attorney based on does—can he pay for a private attorney. That has not been answered to me.

(Tr. at 10-11.)

The court denied the motion to continue, explaining:

I—that’s just a prospective representation. There’s no arrangement having been made and, and to this point uh, all indications are that Mr. Collins is to that extent at least indigent and would not be able to make arrangement for counsel.

(Tr. at 12.)

Collins interjected that he had the money to retain private counsel. The court asked why Collins had not informed Mr. McLean that he had the resources to retain him, to which Collins responded, “We never got that—your honor, we never got that far into the conversation.” (Tr. at 13.) The court replied, “Alright, well then, you’re not ready to seek a continuance.” (*Id.*)

III. Motion for mistrial

The State’s first witness was Trooper Fowler. (Tr. at 166.) Trooper Fowler did not begin testifying until after the lunch recess. (Tr. at 151.) During a recess from Trooper Fowler’s testimony, the court held an in-chambers meeting, explaining:

Here’s what happened. Uh, it was brought to the attention of the Judge uh, during examination of Trooper Fowler that uh, juror number seven, Eric Scott, was reading something uh, and rather than ask him about it right there, risk spoilage or whatever else might happen or

contamination, uh I took [a] break. Uh, and asked the bailiff to ask him what he was reading and to not say anything else to anybody else, just to find out what it was and let me know what he found out.

Trooper Fowler's cro. . . , or examination outline, the Prosecutor's outline of the witness.

....

He said it was on his seat when he got back from lunch. How long have you been a Trooper? Nine years. In that time have you received any special training? DRE expert. What's a DRE expert?

....

It's got questions and answers on it. So, he's obviously gone.

....

We got to get rid of [Eric] Scott.

(Tr. at 192-93.) The prosecutor then interjected:

Oh my gosh your honor, I think I know what happened. I was helping uh. . .

....

I was, I was taking um, that downstairs to talk to Trooper uh, Fowler during lunch and Sheila was taping down the electrical cord and I think I set it down while I went to tape down the electrical cord and I must not have picked it up.

(Tr. at 193-94.)

Defense counsel moved for a mistrial, arguing:

[E]xposure to the juror of the, of the prosecution's case notes uh, certainly should not have occurred and has, has tainted that juror. Um, and at this point your honor, I'm not sure how we save the trial uh,

unless we just let Mr. Scott go and, and seat the alternate, which leaves us without an alternate.

(Tr. at 194.) The prosecutor agreed that the court should excuse Juror Scott from the jury panel and replace him with the alternate juror. (*Id.*)

The prosecutor further suggested speaking with Juror Scott to determine if he had shared anything from the prosecutor's notes with other jurors. (Tr. at 194.) When the court and the parties spoke with Juror Scott, he stated that he had picked up notes sitting on his chair, but no other jurors saw the notes. (Tr. at 196, 198.) The court explained that, through no fault of Juror Scott, it would have to replace Juror Scott with the alternate juror, but the court also needed to be certain that none of the other jurors had seen the notes. Juror Scott responded:

I was the only one that held onto it and I was the only one that looked at it and nobody even asked me what the paper was.

(Tr. at 198.)

The court gave both attorneys an opportunity to question Juror Scott. Both attorneys declined. (Tr. at 200.) Juror Scott again volunteered that no other juror had noticed it or read anything from the paper on his chair. (*Id.*) The court denied defense counsel's motion for a mistrial, dismissed Juror Scott, and seated the alternate juror. (Tr. at 202.)

SUMMARY OF THE ARGUMENT

Neither structural error nor prosecutorial misconduct occurred in Collins' trial. Rather, during the lunch recess the prosecutor inadvertently placed his witness notes on a juror's chair so he could tape down an electrical cord. The prosecutor forgot to pick up his witness notes when he left the courtroom. Juror Scott returned from the lunch recess to find the notes on his chair. He picked up the notes and read along as the prosecutor questioned Trooper Fowler. The district court noticed that Juror Scott seemed to be reading from something, took a recess, and asked the bailiff to discretely find out what Juror Scott was reading. Once the bailiff had done so, the court and the parties questioned Juror Scott, and the prosecutor realized what had happened.

Juror Scott assured the court and the parties that only he had seen the notes. He did not share them with any other juror, and no other juror had even asked what he was holding. Under these circumstances, the district court properly dismissed Juror Scott from the jury panel and replaced him with the alternate juror. The district court also properly denied Collins' motion for a mistrial because there was no evidence to suggest that any other juror had been exposed to extraneous or inadmissible evidence.

The district court properly denied Collins' second motion to continue his trial to attempt to obtain an expert witness. Collins failed to establish diligence or

the likelihood that the expert witness he wished to pursue even existed. The district court also properly denied Collins' motion that he made on the morning of trial to continue the jury trial. Collins informed the court he wished to obtain private counsel and had spoken to Tyson McLean the previous week. But it was the court, not Collins, that developed the record by telephoning McLean. The court learned that Collins had spoken with McLean the previous Wednesday. Although McLean had informed Collins that he could not represent him without a continuance, the two never discussed the cost of representation. Thus, McLean could not assure the court that, if the court continued the trial, McLean would represent Collins. Under these circumstances the district court properly exercised its discretion in denying the last-minute motion to continue.

Collins' ineffective assistance of counsel claim, based on his allegation that defense counsel failed to retain expert witnesses, is not record-based. The record does not establish what actions defense counsel did or did not take or the reasoning for the actions defense counsel did or did not take.

Collins fails to prove his ineffective assistance of counsel claim alleging that defense counsel should have insisted the district court question every juror after discovering that the prosecutor inadvertently left his witness notes on Juror Scott's chair. The district court interviewed Juror Scott in the parties' presence and gave the parties an opportunity to question Juror Scott. Juror Scott unequivocally stated

that he was the only juror who saw the witness notes. He did not show the notes to another juror and no other juror asked him about the notes. The district court then dismissed Juror Scott and replaced him with the alternate juror. There was no reason for defense counsel to ask the district court to do more.

ARGUMENT

I. The standard of review

This Court reviews a district court's denial of a mistrial for an abuse of discretion. *State v. Pierce*, 2016 MT 308, ¶ 17, 385 Mont. 439, 384 P.3d 1042. It applies a deferential standard because the trial judge is in the best position to make that determination. In determining whether to grant or deny a motion for mistrial, the trial court is tasked with determining whether a defendant has been denied a fair and impartial trial. *Id.* ¶ 24.

This Court also reviews a ruling on a motion for a continuance for abuse of discretion. *Pierce*, ¶ 16. A “district court cannot be overturned on appeal in absence of a showing of prejudice to the movant.” *Id.*, quoting *State v. Klemann*, 194 Mont. 117, 120, 634 P.2d 632, 634 (1981).

This Court considers only record-based ineffective assistance of counsel claims on direct appeal. To the extent such claims are reviewable, they present

mixed questions of law and fact, which the Court reviews de novo. *State v. Chafee*, 2014 MT 226, ¶ 11, 376 Mont. 267, 332 P.3d 240.

II. The district court properly exercised its discretion in denying Collins’ motion for a mistrial based upon Juror Scott inadvertently reviewing the prosecutor’s witness notes because the court replaced Juror Scott with the alternate juror.

A. There was no structural error.

Structural error is the type of error that “affects the framework within which the trial proceeds, rather than simply an error in the trial process itself.” *State v. Van Kirk*, 2001 MT 184, ¶ 38, 306 Mont. 215, 32 P.3d 735, quoting *Arizona v. Fulimonte*, 499 U.S. 279, 310 (1991). A structural error generally precedes the trial and undermines the fairness of the entire trial proceeding. *Id.* Structural error is presumptively prejudicial and automatically reversible. *Van Kirk*, ¶ 38-39. Examples of structural error include *Gideon v. Wainwright*, 372 U.S. 335 (1963) (a total deprivation of the right to counsel); *Tumey v. Ohio*, 273 U.S. 510 (1927) (lack of an impartial trial judge); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (discriminatory exclusion of grand jurors of a defendant’s race); and *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (denial of the right to self-representation). In *State v. LaMere*, 2000 MT 45, ¶ 50, 298 Mont. 358, 2 P.3d 204, this Court held that errors in the jury selection process violating the defendant’s right to an impartial jury are structural errors.

Collins urges that structural error occurred in his trial because, when the prosecutor inadvertently left his witness examination notes on Juror Scott's chair during the lunch recess, the prosecutor deprived him of his Constitutional right to a fair and impartial jury and there was no way to remedy the situation. Thus, he urges, he is entitled to an automatic reversal and a new trial. (Appellant's Br. at 14-17.) But Collins has not offered exactly how he was deprived of his right to a fair and impartial jury.

Presumably, Collins is claiming that, by Juror Scott being exposed to the prosecutor's witness notes, he received extraneous information. Although the notes are not part of the record, the reference to the notes suggests that Juror Scott was simply reading along while the prosecutor asked questions and Trooper Fowler answered them. There is nothing in the record to suggest that Juror Scott received any information from looking at the prosecutor's witness notes other than the information Trooper Fowler provided from the witness stand. But even labeling the prosecutor's notes as extraneous information does not entitle Collins to an automatic reversal.

By way of example, and not to suggest any juror misconduct here, when a defendant makes a claim of juror misconduct, he still must show that he was deprived of a fair and impartial trial. *State v. Strang*, 2017 MT 217, ¶ 15, 388 Mont. 428, 401 P.3d 690. In *State v. MacGregor*, 2013 MT 297, 372 Mont. 142,

311 P.3d 428, this Court explained, “Juror misconduct based on extraneous communications must be reviewed on a case-by-case basis, and in the context of the entire record.” *Id.* ¶ 19. The Court further recognized that the trial court is “uniquely qualified to appraise whether extraneous information resulted in prejudice,” and it accords “substantial weight to that determination.” *Id.*

In this case, for example, if a juror had committed misconduct by taking the prosecutor’s notes off the prosecutor’s table during a recess, the error would not be considered structural. Rather, the juror misconduct must still have resulted in prejudice to the defendant. Likewise, it should not be considered structural error under the circumstance of a prosecutor inadvertently leaving witness notes on a juror’s chair during a lunch recess when the prosecutor placed the notes on the unoccupied chair to tape down an electrical cord.

B. There was no prosecutorial misconduct.

Prosecutorial misconduct includes such conduct as prosecutorial vindictiveness, where there is objective proof that a prosecutor penalized a person for exercising his constitutional rights. *See United States v. Goodwin*, 457 U.S. 368, 372 (1982); *State v. Knowles*, 2010 MT 186, ¶ 28, 357 Mont. 372, 239 P.3d 129. It is also misconduct for a prosecutor to invade the province of the jury to ask one witness to comment on another witness’s credibility or for the prosecutor to vouch for a witness’s credibility. *See State v. Hayden*, 2008 MT 274, ¶¶ 28, 32,

345 Mont. 252, 190 P.3d 1091. It is similarly improper for a prosecutor to express an opinion as to the defendant's guilt. *See State v. Dobrowski*, 2016 MT 261, ¶ 30, 385 Mont. 179, 382 P.3d 490.

Here, the prosecutor inadvertently set his witness notes on a juror's unoccupied chair during a recess so he could tape down an electrical cord. The prosecutor accepted full responsibility for his mistake. But the prosecutor did not commit misconduct through his inadvertence.

There is nothing in the record to support a theory that the prosecutor intentionally left his trial notes on the juror's chair to influence that juror, or other jurors, through extraneous evidence. Rather, the prosecutor was on his way out of the courtroom during a recess when he stopped to help another court employee address a safety hazard. Because of this action, Collins asks this Court to assume that he was denied his right to a fair and impartial juror.

When the court observed that Juror Scott appeared to be reading something he was holding in his hand, the court called a recess, asked the bailiff to discretely question Juror Scott, and then brought this to the attention of both the prosecutor and defense counsel. The prosecutor pieced together what had occurred and acknowledged that the court would have to excuse Juror Scott from the jury and replace him with the alternate juror. It was also the prosecutor who indicated that it

was incumbent upon the court and counsel to determine if Juror Scott had showed any of the other jurors the notes he had found on his chair.

Juror Scott explained that he had returned from the recess to find something on his chair. He picked up the paper and held it. As Trooper Fowler was testifying, Juror Scott realized it was the prosecutor's questions for Trooper Fowler with the answers the prosecutor anticipated from Trooper Fowler. Juror Scott assured the court and counsel numerous times that no other juror saw what he was holding, no juror asked what he was holding, and he did not share any information about what he was holding with any other juror. Consequently, the court excused Juror Scott from jury service and replaced him with the alternate juror. Even defense counsel acknowledged this was a reasonable solution.

Collins leans heavily on this Court's decision in *State v. Lawrence*, 2016 MT 346, 386 Mont. 86, 385 P.3d 968, to support his claim of prosecutorial misconduct. But in *Lawrence* this Court concluded that the prosecutor committed misconduct during closing argument when she informed the jury that the defendant's presumption of innocence no longer existed. *Id.* ¶ 19. As this Court recognized in *Lawrence*, "there are few principles in our criminal justice system as fundamental as the presumption of innocence." *Id.* ¶ 15. In this case, the prosecutor's inadvertent act of setting down witness notes on a juror's chair during a recess to

tape down an electrical cord is not comparable to the prosecutor telling the jury that the defendant was no longer presumed innocent.

Collins' accusations of "egregious and unprecedented" prosecutorial misconduct do not withstand the strength of the trial record, which establishes what occurred and how the district court capably addressed a simple mistake resulting from the prosecutor's good deed. But, even if this Court were to label the prosecutor's honest mistake as misconduct, Collins still must prove that he was denied a fair and impartial trial. He has failed to do so, and he cannot do so, because the district court reasonably replaced Juror Scott with the alternate juror.

C. Collins cannot demonstrate that inadmissible evidence contributed to his conviction.

A mistrial is appropriate when a reasonable possibility exists that inadmissible evidence contributed to the conviction. *State v. Michelotti*, 2018 MT 158, ¶ 8, 392 Mont. 33, 420 P.3d 1020. Collins' claim fails because there is nothing in the record to suggest that Juror Scott received inadmissible evidence, but, even assuming he did, the district court removed Juror Scott from the jury panel. Also, Juror Scott assured the Court repeatedly and emphatically that the other jurors did not see what he was holding and did not even ask him what he was holding. Collins argues that the district court should not have believed Juror Scott and should have interviewed every juror on the panel. The district court had no reason not to believe Juror Scott. As such, there was no reason for the district court

to risk contaminating the rest of the jurors by subjecting each of them to questioning about something they had not seen. And by the same rationale, there was no reason for the district court to provide the jury with a cautionary instruction.

The district court properly exercised its discretion by replacing Juror Scott with the alternate juror and denying Collins' motion for a mistrial.

III. The district court properly exercised its discretion in denying Collins' two late-filed motions to continue his jury trial.

A party seeking a continuance must demonstrate sufficient diligence in preparing for trial. *State v. Duncan*, 2008 MT 148, ¶ 37, 343 Mont. 220, 183 P.3d 111, citing Mont. Code Ann. § 46-13-202(2). Demonstrating that a continuance is in the interest of justice is not enough; the movant must also make an affirmative showing of his due diligence.

A. Collins' motion to continue to obtain an expert witness.

Collins argues the district court abused its discretion when it refused to grant his continuance two weeks before trial so he could obtain an expert about his liver function and how that may have impacted the results of his breath test. Collins fails to mention that the court had previously granted him a continuance so he could obtain an expert to testify about an eye condition he claimed to have that may have impacted his performance on the HGN test. Even though the court granted the

continuance, Collins did not obtain an expert witness on this topic. Notably, Collins did not share the existence of his eye condition with defense counsel at the outset of his case. Nonetheless, the district court granted Collins' continuance request.

Collins' request to continue the trial a second time was based upon a new theory about his liver function. The Public Defender's Office found the theory speculative enough that it would not release funds to pay for such an expert should Collins be able to find one. Collins' request for a continuance was based upon speculation that maybe such an expert existed and, if so, maybe the expert would testify in a way to cast doubt on his blood alcohol test results.

Collins did not diligently seek to retain an expert witness about his liver function prior to requesting his second continuance. If Collins suffered from a liver condition, he had the information long before he sought his second motion to continue. Collins did not provide the district court with any information about why he had waited so long to attempt to obtain such an expert, other than to say he had begun saving up money. While it is true that the district court expressed skepticism about Collins' ability to save money to find and retain an expert in the time he requested for a continuance, it is also true that Collins did not provide the district court with any information about what steps he had taken to find such an expert. When the district court denied Collins' motion to continue, it had the benefit of

knowing that it had already granted Collins one motion to continue to obtain an expert to testify about his alleged eye condition and Collins had failed to so do.

Both the existence of the expert witness Collins hoped to find and the nature of the testimony the unidentified expert could provide were based upon speculation. Thus, Collins also failed to demonstrate that a continuance was in the furtherance of justice. The district court properly exercised its discretion in denying Collins' motion to continue the jury trial.

B. Collins' motion to continue requested on the day of trial to allow him to retain private counsel.

Collins argues that the district court abused its discretion in denying his motion to continue that was made on the first day of trial to enable him the opportunity to retain private counsel. Collins primarily relies upon this Court's holding in *State v. Garcia*, 2003 MT 211, 317 Mont. 73, 75 P.3d 313. *Garcia* is factually distinguishable.

The State charged Garcia with sexual intercourse without consent, and Garcia received court appointed counsel. The court scheduled Garcia's jury trial for January 29, 2001. *Id.* ¶ 5. In December 2000, Garcia contacted private counsel, Steve Hudspeth, about representing him at trial. Hudspeth agreed to represent Garcia for \$3,000, providing that Garcia obtain a continuance of the trial date and on the condition that Hudspeth would not represent Garcia on any appeal. *Id.*

Because Garcia was incarcerated and Hudspeth was on vacation over the December holidays, Garcia did not transmit the \$3,000 to Hudspeth until January 11, 2001. On the same day, Garcia filed a generic motion to continue, indicating only that defense counsel needed more time to prepare. The district court denied the motion. *Id.* ¶ 6. On January 12, 2001, Hudspeth informed the district court that Garcia had acquired the necessary funds to retain him and Hudspeth was willing to represent Garcia provided the court granted the continuance. Consequently, Garcia filed a renewed motion to continue, stating that he wished to substitute court appointed counsel with privately retained counsel, but retained counsel needed more than 10 days to prepare for trial. Garcia agreed to waive his right to a speedy trial. *Id.* ¶ 7.

The district court denied the motion to continue based on the untimeliness of the request, the competence of court appointed counsel, speedy trial concerns, and court docket considerations. *Id.* ¶ 15. Under the circumstances of *Garcia*, this Court concluded that Garcia had exercised diligence in retaining private counsel. *Id.* ¶ 23. Garcia had contacted private counsel over a month before his scheduled trial. Also, the difficulty in the logistics of retaining private counsel was due in large part to Hudspeth's scheduled holiday vacation. Garcia also filed his motion to continue more than two weeks in advance of his trial.

Here, Collins did not even make initial contact with McLean until the Wednesday before his jury trial. Also, Collins did not discuss the specifics of a retainer fee with McLean. Nonetheless, on the morning of trial, with the prospective jury waiting, the district court took the time to call McLean to investigate this issue. Unlike in *Garcia*, McLean could not assure the district court that the only thing standing in the way of McLean representing Collins was a continuance. Instead, McLean made it very clear that Collins had not retained him. Because McLean's representation of Collins was only theoretical, the district court denied his motion to continue. When Collins proclaimed that he had the money to retain McLean, the district court inquired why he had not discussed this with McLean. Collins responded that it just had not come up.

Under these circumstances, the district court properly exercised its discretion in denying the untimely motion to continue the trial. As this Court recognized in *Garcia*, the right to counsel of choice may not be used to unreasonably delay trial. *Garcia*, ¶ 32. Here it was reasonable for the district court to conclude that was precisely Collins' intent. If Collins had been truly interested in retaining McLean, he would have discussed cost with McLean. Without having done so, Collins' assurances to the court that he had the money to retain private counsel were hollow. If Collins did not know the cost of private representation, he could not assure the court that he had the money available to retain private counsel.

Here the district court took the time to investigate Collins' proclaimed desire to retain private counsel. It was the district court, not Collins, that took the time to reach out to McLean and make a record of what had transpired. Based upon what the district court learned, it properly denied Collins' motion to continue the trial because Collins failed to establish diligence, first because of the timing of his initial contact with McLean, and second because, although he claimed to have the money to retain McLean, he never discussed the logistics of a retainer with McLean. Collins also failed to establish that the continuance was in the interest of justice when there was no guarantee that even with a continuance McLean would have represented him.

IV. Collins has failed to meet his heavy burden of proving his ineffective assistance of counsel claims.

A. Introduction

Collins finally claims that his trial counsel was ineffective because he did not obtain expert witnesses and failed to insist that the district court question each juror about whether any of the jurors saw the prosecutor's witness notes that he inadvertently left on Juror Scott's chair during the lunch recess.

"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 ineffective assistance of

counsel 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. To prove ineffective assistance of counsel, a defendant must show: (1) that counsel’s performance was deficient, and (2) that counsel’s deficient performance prejudiced the defendant. *McGarvey*, ¶ 24.

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. Collins’ ineffective assistance of counsel claim based on his failure to retain expert witnesses is not record-based.

This Court must first determine whether Collins’ ineffective assistance of counsel claim based upon his allegation that defense counsel failed to obtain expert

witnesses is properly before it on appeal. *State v. Wright*, 2011 MT 99, ¶ 13, 360 Mont. 246, 253 P.3d 838. If the record explains “why” counsel acted or failed to act in providing a defense, this Court may address the issue on direct appeal. *Id.* If the record does not reveal “why” counsel acted in a specific manner, then this Court will dismiss the ineffective assistance of counsel claim without prejudice and allow the defendant to raise the claim in postconviction relief. *State v. Norman*, 2010 MT 253, ¶ 20, 358 Mont. 252, 244 P.3d 737.

Here, the record establishes that defense counsel did seek the first continuance to investigate retaining an expert witness concerning Collins’ alleged eye condition. The record further establishes that Collins did not call such an expert at trial. What the record does not establish is why defense counsel did not call an expert to testify about Collins’ alleged eye condition. For example, perhaps defense counsel was unable to find an expert to testify in the manner that Collins wanted. Consequently, this claim is more appropriate for postconviction relief.

Collins’ claim about an expert on his liver function is even more tenuous. The record establishes that the Office of the Public Defender was unwilling to pay for such an expert, assuming such an expert existed. The record does not establish *why* the Office of the Public Defender made this decision, or what steps defense counsel took to investigate the merits of such expert testimony.

Both of Collins' claims are speculative and not appropriately addressed on direct appeal.

C. Collins has failed to meet his heavy burden of proving his ineffective assistance of counsel claim based on his assertion that trial counsel should have insisted that the district court question every juror about the prosecutor's witness notes.

Collins next argues that his counsel was ineffective because he failed to ask the district court to inquire of every member of the jury whether any jurors other than Juror Scott had seen the prosecutor's witness notes that he inadvertently left on Juror Scott's chair. There was no basis for defense counsel to make such a request because Juror Scott unequivocally stated that no other juror saw what he was holding in his hand or even asked what he was holding in his hand. Neither defense counsel nor the district court had any reason to disbelieve Juror Scott. Juror Scott was very clear that the papers were on his chair. He picked up the papers without showing anyone else. He had no opportunity to discuss them with the rest of the jury, and the district court replaced him with the alternate juror.

Under these circumstances, defense counsel did not perform deficiently by not insisting that the district court interview every jury member and risk unnecessarily contaminating the jury. Collins has also failed to prove a reasonable probability of a different outcome because, had defense counsel made such a request, the request would not have been successful. Collins fails to prove his ineffective assistance of counsel claim.

CONCLUSION

For the reasons argued above, the State requests that this Court affirm Collins' convictions and sentences for Criminal Child Endangerment.

Respectfully submitted this 30th day of November, 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 7,262 words, excluding cover page, table of contents, table of authorities, signatures, certificate of service, certificate of compliance, and appendices.

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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 11-30-2020:

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