IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0547

STATE OF MONTANA,

Plaintiff and Appellee,

v.

BEAU HERMAN MILLER,

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

On Appeal from Montana Eighth Judicial District Court, Cascade County
The Honorable John A. Kutzman, Presiding

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Respectfully submitted this 15th day of March, 2021.

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II. Whether counsel for the defendant provided ineffective assistance of counsel when he withdrew Miller's *Batson* challenge to the State's peremptory strike?

III. Whether Miller was deprived of a fair trial by the State's improper comments in closing arguments and provided ineffective assistance of counsel by failing to object to prosecutor's improper comments in closing argument.

STATEMENT OF THE CASE

Beau Herman Miller ("Miller") was charged in Montana Eighth Judicial District Court, Cascade County with two counts of Assault with a Weapon, misdemeanor Criminal Possession of Dangerous Drugs, and misdemeanor Criminal Possession of Drug Paraphernalia.

The State alleged that on June 26, 2018, Miller purposely or knowingly caused reasonable apprehension of serious bodily injury to Brandon Campbell and to Jolene Ehnot with a weapon when Miller stood through the sunroof of a

Mercury vehicle, driven by Amber Miller, while pointing a gun at the individuals in a truck which they chased through Great Falls.

Law enforcement stopped the vehicles, interviewed the parties involved and obtained a search warrant to search Miller's vehicle. Inside the Mercury, law enforcement found a pistol, less than 60 grams of marijuana, and a marijuana grinder.

At the start of Miller's jury trial, the parties conducted voir dire. During a recess, a prospective juror notified the bailiff that she wished to speak to the Court. She told the parties she might not be fair as a juror because she was not white, she had observed the defendant was African American, and she had personally experienced racial discrimination on multiple occasions in Great Falls.

The State moved to strike the potential juror for cause. Miller objected and the Court denied the motion.

The State subsequently used a peremptory challenge to remove this juror from the venire. Miller objected that it violated Miller's right to equal protection of the law to permit the State to use its peremptory challenge to remove the only non-white juror from the venire in the trial of an African American defendant based upon race.

The State denied that it was motivated by race and contended that it made a race-neutral decision to exercise its peremptory strike against the juror based upon the juror's statement that she might not be fair.

Rather than deciding whether the State's explanation was race-neutral as required of *Batson*, the Court permitted further voir dire of the juror. The juror maintained that her concern with serving on this jury was that it made her uncomfortable and emotional based upon her personal experiences of racial discrimination.

After this questioning, Miller withdrew his challenge to the State's peremptory strike. The Court did not build a record or provide an explanation or ruling on the *Batson* challenge.

Witnesses for the State and defense testified at trial, as well as Miller. During closing arguments, the prosecutor repeatedly commented on witness credibility, Miller's guilt, and facts not in evidence, all undermining Miller's presumption of innocence and the purview of the jury to determine Miller's guilt.

The jury ultimately convicted Miller of one count of assault with a weapon against Brandon Campbell, criminal possession of dangerous drugs and drug paraphernalia. The jury found Miller not guilty of assault with a weapon against Ehnot.

The Court sentenced Miller to 9 years imprisonment at the Montana State Prison. Miller appeals.

STATEMENT OF THE FACTS

Jolene Ehnot traveled in a white truck driven by Brandon Campbell in Great Falls when Beau Miller and his wife passed them in a gold Mercury vehicle on June 26, 2018. Ehnot claimed she saw Miller stand up through the sunroof of the vehicle, dance around, and point a gun at the back of their vehicle as he followed them. *Id.* Ehnot told Campbell not to pull over and called 911. TR 427.

Two bystanders- Gene Meeks and Doug Rogers- contacted law enforcement to report that two vehicles drove by at high rate of speed, and that a black male stood out of the sunroof of one of the vehicles, yelling "pull the fuck over." TR 404-405, 422; State's Exhibit 3. Doug Rogers claimed he observed a handgun in the male's hand, and asked his friend if that was a gun. TR 686.

Great Falls police officers stopped the two vehicles, removed all occupants at gunpoint, and questioned them. Ehnot and Campbell claimed that they saw Miller standing through the sunroof of the Mercury pointing a gun at them while they drove on Overlook Drive. TR 427, 532.

Miller contended that Campbell stole money from him one month prior. TR 600. Miller was trying to protect his family because Campbell had threatened him and his family and Miller believed Campbell was dangerous. TR 624, 629, 632.

On June 26, 2018, Miller noticed Campbell only after Campbell swerved his car towards the Mercury and Amber had to swerve to avoid collision. TR 621. Miller told Amber to follow Campbell to try to defend them from Campbell. TR 621, 625. Miller explained he wanted Campbell to pull over because he wanted to know who he was dealing with, to put an end to this and deal with it man to man. TR 654. Miller contended everyone could walk away peacefully. *Id.*

Miller acknowledged the presence of a firearm in the vehicle but denied that he ever pointed it at anyone or held it out of the vehicle. TR 640-42. Miller denied seeing Ehnot or knowing that she was in Campbell's vehicle. TR 641. Miller admitted to law enforcement that he possessed marijuana in the Mercury.

Law enforcement obtained a search warrant and located inside the Mercury a pistol, less than 60 grams of marijuana and a marijuana grinder. TR 474.

In advance of trial, the parties filed several pretrial motions. The State sought, among other things, to exclude witness and video surveillance by Miller regarding Miller's contact with Campbell in November, 2018 where Campbell chased Miller in a vehicle, and it sought to prohibit Miller from arguing the affirmative defense of justified use of force. TR 123, 646

At a hearing on April 24, 2019, Miller confirmed that he did not intend to rely on the affirmative defense of justifiable use of force. TR 123. The Court ruled that it would permit Miller to present evidence of an alleged confrontation

where Campbell tried to run Miller off the road in November, 2018, which could impeach Campbell's testimony that he was afraid of Miller. TR 151.

At the April 29, 2019 trial, the State conducted voir dire and passed the jury for cause. TR at 153, 252. During a recess in Miller's voir dire, a prospective juror indicated that she wished to speak with the Court outside of the presence of the other jurors. TR 302.

Aravjo-Costa told the Court that she was the victim of race discrimination in Great Falls on numerous occasions. TR 303. She explained that she had been falsely suspected of crimes based on her race: she was pulled while driving home from work late at night seven to ten times that year without cause, she was wrongfully suspected of theft, shoved and otherwise mistreated on account of her race. TR 304-06. Aravjo-Costa said she was judged because she was not white, and people mistook her as Native American or Mexican, though she is Dutch-American. TR 304-05. She stated that she might not be a fair juror because she experienced racial discrimination and she saw that the defendant was not white. TR 308. The Court inquired:

THE COURT:	And does having -- first of all, I'm sorry that that happened to you in this community.
	Do you think that having experienced that firsthand makes you lean toward Mr. Miller here, and --
ARAVJO-COSTA:	It might be.
THE COURT:	-- feel sympathy for him?

ARAVJO-COSTA: It might, yeah. It might be. I don't know what happened in this case, what he did or did not do, but it might be, I be not fair, because I know what's not being white in a place there is a lot of white people.

THE COURT: Can you see how from his perspective

ARAVJO-COSTA: Yeah.

THE COURT: -- having somebody on the jury –

ARAVJO-COSTA: Yeah.

THE COURT: -- who lives in the community who isn't white and has endured some of this, would be helpful?

ARAVJO-COSTA: No. I don't see, because I got really emotional and because this happened many times. It was not one time or two. I say the other day, two years ago, I was with my husband and in Lewistown. We were in the McDonald's there, and I saw a white man -- my husband is white. He's a tall guy.

So I -- when he pushed me out of the way, because he was thinking I was alone, but then he saw my husband. And my husband call him outside to talk with him outside, but he get afraid of my husband. He didn't do. I try to calm down my husband so they did not get in a fight. Because of that, people thinking, kind of joking about it, and I also got emotional because it was not one time. It was many times.

THE COURT: Okay.

…

THE COURT: He's presumed innocent.

ARAVJO-COSTA: What?

THE COURT: He is presumed to be innocent, right?

ARAVJO-COSTA: Yeah.

THE COURT: You understand that, so if the State does not convince you that he did it, then you vote to find him not guilty, right?

ARAVJO-COSTA: Yeah, if I see he's innocent, yeah.

THE COURT: Do you think you can do that?

ARAVJO-COSTA: I don't -- I don't feel it's possible. That's why I try to talk with her at the beginning, but because I didn't have the room, yeah, because she ask different questions. And then Mr., there, also, different questions, so I did not have the room to tell anything about this, about how I feel.

Because I felt after I saw him, yeah, I didn't know also he wasn't a white guy. I just saw when I was already in the courtroom. And I feel that that isn't -- it's a concern because I would not really -- it might be that I be not fair, because of my personal experience.

THE COURT: Well, not fair in what way?

ARAVJO-COSTA: In what way, because I know how it is to be not white, yeah?

THE COURT: And does the experience that you've had being nonwhite in this community cause you to favor the State or the Defendant?

ARAVJO-COSTA: At the moment, I don't know, because I still -- I don't know what is going on, yeah?

TR 304-308.

The State moved to strike Aravjo-Costa for cause from the jury pool based on "her repeated statements of she 'will be not fair' or 'cannot be fair,' the standard is fairness and impartiality to both sides of this proceeding. She's indicated on every - two if not more occasions that she cannot be fair in this case." TR 309-10.

Miller objected to the State's motion to strike Aravjo-Costa for cause. TR 310. Although he had a hard time understanding the juror, Miller understood that Aravjo-Costa was uncomfortable because she had experienced racism in Great Falls. TR 311. Miller was not sure if she was concerned that she may experience

more victimization because of her race if she sat on the jury. Tr. 312. Miller cited to *Batson v. Kentucky*, noting that Aravjo-Costa's statements put "race and racism squarely in the bull's-eye here." TR 312-13; *Batson* (1986), 476 U.S. 79.

The Court denied the State's motion, finding "she doesn't want to be on the jury because she thinks it's going to put her in a hard place because of her background," but that did not disqualify her from serving as a juror. TR 313, 318.

Voir dire recommenced and Miller passed the jury for cause. TR 357.

When the parties exercised their peremptory strikes, the State used its last challenge to remove Aravjo-Costa. TR 359.

Miller contended that the State's use of the peremptory was "clearly a violation of equal protection" because it was based on race. TR 359-60.

In response, the State contended its peremptory challenge against Aravjo-Costa was not racially motivated (TR 346), but based upon the juror's statement that she said she "will not be fair." TR 364-66.

The State continued:

> The Court even inquired into whether it could be helpful to the Defendant to have somebody who has experience with racial discrimination, and she maintained her response. She said "no." In addition, my basis for bumping Ms. Costa is -- that was why I made my challenge for cause, and I think the State has challenge for cause when any juror says pointblank "I cannot be fair." And the standard for jury selection is fairness and impartiality to both sides. You have an inherent challenge for cause.
>
> Here Ms. Costa, during Mr. van der Hagen's voir dire of her, expressed opinions that the criminal justice system is too harsh. She also reiterated that

> this is not the case for her, and it's not an appropriate case for her when Mr. van der Hagen asked when she raised her hand.
> …
> And so because this …this juror has outright said "I cannot be fair." The State has grave concerns. I would even point out when asked if she would be more harsh towards the State and more helpful and more in line with the Defendant, she still said, no, she could not be fair.
>
> And so for all of those reasons, when I have a juror telling me she cannot exercise fairness and impartiality, it has, with all due respect, nothing to do with her race and everything to do with the fact that she stated "I cannot be fair."

TR 365-66.

The Court inquired of counsel what the remedy was if the Court disallowed the State's peremptory strike, and took a recess to research the matter when it received no satisfactory answer. TR 361, 368-69, 371. The Court expressed frustration that voir dire had taken most of the day and that the State used its last peremptory challenge on the only person who was not white. TR 371.

Although the State and Miller had passed the jury for cause, (TR 252, 357), Miller suggested that the parties inquire further of Aravjo-Costa. TR 372. Aravjo-Costa reiterated that she felt uncomfortable and emotional (TR 376-77) because there was an African American man standing trial, and because of the discrimination she suffered in the community, that that she could not look at the evidence without getting emotional. TR 377. She explained that she had never been on a jury, that she did not have this system in her country, and this was her first time. *Id*. She did not fear that she would be discriminated against by the other

jurors if she sat on the jury panel, but stated explicitly, "it's emotional because I know what is not being white. I don't know what he did, the Defendant did or did not do yet. But I know how I fee – how it is to be discriminated. Only one person with color, because I was discriminated many times." TR 378.

Miller subsequently withdrew his objection to the State's use of its peremptory strike against Aravjo-Costa. TR 381.

The Court did not rule on whether the State had articulated a race-neutral explanation for exercising its peremptory strike to eliminate the only non-white juror from Miller's venire. TR 382.

The jury panel was then sworn and trial commenced.

During closing arguments, the prosecutor made multiple statements that invaded the province of the jury and deprived Miller of the presumption of innocence and a fair trial.

The prosecutor repeatedly commented upon the credibility of the witnesses and suggested to the jury that Miller lied. The prosecutor argued that the State's witnesses were truthful, stating that Gene Meeks had no motive to fabricate his testimony TR 683, 687. The prosecutor claimed Doug Rogers had no motive to fabricate his testimony. TR 685; 687. The prosecutor vouched for Ehnot, commenting on Ehnot's "very real fear" many times. TR 689. She said Ehnot's testimony "was not concocted" out of fear of Campbell. TR 699. She contended

that Ehnot's statements were worthy of belief. TR 723. The prosecutor commented that the State's law enforcement witnesses did not believe Miller. TR 694.

The prosecutor contended that Miller's witness lied, saying that Hanson had "every reason to fabricate something to help his friend." TR 698-99.

The prosecutor also insinuated that Miller lied at trial because when he spoke to law enforcement on scene he had, "no concocted story yet." TR 701. She again suggested he lied by rhetorically asking the jurors, "are all four of those witnesses lying, or is Beau Miller lying?" TR 701. She characterized Miller's statements as self-serving. TR 701, 725. She said that Miller's statements that Campbell ran him of the road on two occasions were "fabrications that never occurred." TR 721.

The prosecutor also commented on Miller's failure to present evidence. She told the jurors that she thought it "interesting that Mr. Miller didn't testify to anything regarding the November incident." TR 724. She commented on Miller's failure to present evidence in the form of a video recording of Campbell running Miller off the road in November. TR 724. The prosecutor pointed out the absence of a justifiable use of force defense, which requires the admission of evidence by the Defendant to prove the affirmative defense. TR 697-98.

The prosecutor also invaded the province of the jury by making repeated conclusory statements of Miller's guilt. She suggested the reasons to find Miller guilty included "that the Defendant was charged." TR 726. She stated, "we are here because the Defendant is guilty," and that Miller's actions are "illegal" and "criminal." TR 683. She repeated that Miller's actions were illegal and criminal. TR 701, 703. Concerning the November incident, she said it wouldn't undo Miller's crime on June 26, 2018: "that still occurred. It still happened. A crime was committed." TR 702. She repeated that "the crime had already been committed." TR 726.

At the conclusion of the jury trial, the jurors found Miller guilty of one count of Assault with a Weapon of Brandon Campbell, guilty of criminal possession of dangerous drugs (marijuana) and guilty of criminal possession of drug paraphernalia. Dkt 67. The jury found Miller not guilty of Assault with a Weapon against Ehnot. Dkt 67.

At the July 23, 2019 Sentencing Hearing, the Court sentenced Miller to 9 years in Montana State Prison, with 119 days credit for time served.[1] The Court also sentenced Miller at that time on a separate criminal offense of Riot to one year

[1] The State subsequently moved to dismiss Criminal Possession of Dangerous Drugs and Drug Paraphernalia with prejudice because the Court had inadvertently failed to sentence Miller on these charges at the July 23, 2019 sentencing hearing. Dkt. 81.

with 57 days credit in the Montana State Prison to run consecutively to his 9 year sentence. Dkt 77.

Miller filed a Notice of Appeal on September 20, 2019. Dkt 85.

STANDARD OF REVIEW

In reviewing a district court's denial of a *Batson* challenge, the appellate court defers to the district court's findings of fact unless they are clearly erroneous. The Court reviews the district court's application of the law *de novo*. *State v. Ford*, 2001 MT 230 P 7, 306 Mont. 517, P 7, 39 P.3d 108, P 7 (citations omitted).

The district court's application of the law regarding the timeliness of a *Batson* –type challenge is reviewed *de novo*. *State v. Parrish*, 2005 MT 112, ¶ 9, citing *Ford*, ¶7 (citations omitted).

Structural error is that 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 (citation omitted). Exclusion of jurors on the basis of race is a structural error that cannot be harmless. *Id*., at 240, citing *Brecht v. Abrahamson*, 507 U.S. 6190, 629 -30 (1993). Structural error is presumptively prejudicial and not subject to harmless error review. *Id.* at ¶ 38-39.

While a party must make a timely and specific objection to preserve an issue for the purposes of appeal, *State v. Earl*, 2003 MT 158, ¶ 23, this Court has inherent power to review an issue not preserved in the district court for plain error,

where failing to review the claimed error at issue may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial proceedings, or may compromise the integrity of the judicial process. *State v. Finley* (1996), 276 Mont. 126, 137-38 (overruled on other grounds by *State v. Gallagher*, 2001 MT 39).

The Court may review closing argument objections not stated at trial under plain error review if the Court is persuaded that the prosecutor's comments resulted in a manifest miscarriage of justice, undermined the fundamental fairness of trial, or compromised the integrity of the process. *State v. Cooksey*, 2012 MT 226, ¶40.

Claims of ineffective assistance of counsel constitute mixed questions of law and fact which we review de novo. *Whitlow v. State*, 2008 MT 140, ¶ 9 (citation omitted).

SUMMARY OF THE ARGUMENT

The district court permitted the State to exercise a peremptory strike to eliminate the only non-white venire member in the trial of Miller, an African American male. The district court erred by permitting the State's race-based use of its peremptory strike against the juror without obtaining a credible, race-neutral explanation. This structural error requires reversal.

Counsel was deficient in failing to maintain his *Batson* objection to the State's use of its peremptory strike, which prejudiced Miller by potentially precluding review of the challenge on appeal and by acquiescing to the structural error which prejudiced Miller.

The prosecutor made improper comments during closing argument which prejudiced Miller by undermining the presumption of his innocence, shifting the burden of proof to Miller to establish a defense and to present evidence to prove his innocence, and improperly expressed her own opinion as to Miller's guilt, undermining the province of the jury. These improper comments individually and cumulatively require reversal under plain error review.

Trial counsel provided ineffective assistance of counsel by failing to object to highly improper statements during the prosecutor's closing argument, which deprived Miller of a fair trial by obviating the role of the jury to determine Miller's guilt or innocence.

ARGUMENT

I. Whether the District Court erred in permitting the State to exercise its use of a peremptory strike in a discriminatory manner to remove the only non-white juror from the jury pool of a black male without providing adequate race-neutral explanation?

All citizens are guaranteed equal protection under the law. U.S. Const. Amend. 14; Article II, Section 4 of Montana Constitution. These constitutional

provisions eliminate governmental discrimination based upon race, gender, religion, or political philosophy. *Ford*, ¶ 10.

The constitutions also provide a fundamental right to a fair and impartial jury. U.S. Const. Amend. 6 and 14; Article II, Sections 24 and 26 of Montana Constitution.

The United States Supreme Court applied the Equal Protection clause to the jury selection process first in *Batson v. Kentucky* (1986), 476 U.S. 79. The Court held that in a criminal case, the state cannot use its peremptory challenges to remove prospective jurors on the sole basis of race. *Id.* The Court "reaffirmed repeatedly [its] commitment to jury selection procedures that are fair and nondiscriminatory." *Ford*, ¶ 19 (citing *J.E.B. v. Alabama ex rel. T.B.* (1994), 511 U.S. 127, 128.

The Court since expanded the scope of *Batson* to forbid any party from utilizing peremptory challenges to exclude prospective jurors based on race regardless of whether the potential juror shares racial identity with the defendant or based on gender. *Casiano v. Greenwway Enters.*, 2002 MT 93, ¶25 (citations omitted); *State v. Falls Down*, 2003 MT 300, ¶ 44 (citing *Powers v. Ohio* (1991), 499 U.S. 400).

A. *Batson* violations constitute structural errors, requiring reversal.

Errors in the jury selection process constitute structural error. *State v. LaMere*, 2000 MT 45, ¶ 39. Structural errors include 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, quoting *Arizona v. Fulminante* (1991), 499 U.S. 279, 310. "Such error is typically of constitutional dimensions, precedes the trial, and undermines the fairness of the entire proceeding." *Van Kirk*, ¶ 38.

Other courts have found that a *Batson* violation constitutes structural error. *Williams v. Woodford*, 396 F.3d 1059, 1069 (9th Cir. 2005)(Rawlins, J. dissent) (citing *Powers v. Ohio*, 499 U.S. 400)[2].

This Court has held that if the error at issue is structural, the inquiry ends and the verdict is reversed. *Van Kirk*, ¶ 41. By contrast, if the error is trial error, an error that occurs during the presentation of the case to the jury, then the analysis proceeds to whether the error was harmless under the circumstances. *Van Kirk*, ¶ 41; *LaMere*, ¶ 25.

[2] *See also United States v. Angel*, 355 F.3d 462, 470-71 (6th Cir. 2004) ("Although the plain error standard of review generally applies to claims raised for the first time on appeal, any racial discrimination in jury selection constitutes structural error that requires automatic reversal." (citations omitted)); *Tankleff v. Senkowski*, 135 F.3d 235, 240 (2d Cir. 1998); *Winston v. Boatwright*, 649 F.3d 618, 632 (7th Cir. 2011); *United States v. Kimbrel*, 532 F.3d 461, 469 (6th Cir. 2008).

Structural error is presumptively prejudicial and not subject to harmless error review jurisprudence or the harmless error statute found at Mont. Code. Ann. § 46-20-701. *Van Kirk*, ¶ 38. "Structural error is automatically reversible and requires no additional analysis or review." *Van Kirk*, ¶ 39; see also *United States v. Hamilton*, 391 F.3d 1066, 1071 (9th Cir.2004) (holding that "[w]e only review for plain error or assess whether an error is harmless when the error is not structural" (citation omitted)).

Because a *Batson* violation is a structural error, the Court should address the merits of Miller's claims and in this case, reverse the district court.

Batson requires that a defendant first establish a prima facie case of purposeful discrimination. *Batson*, 476 U.S. at 93; *Ford*, ¶ 16. The defendant must show that the State had a racially motivated reason for striking the prospective juror, and any other relevant facts and circumstances creating an inference that the State used the peremptory jury selection practice to exclude members of the jury panel discriminatorily. *State v. Warren*, 2019 MT 49, ¶ 34, (citing *Batson*, 476 U.S. at 96).

If a prima facie case of discrimination has been stated, the burden shifts to the proponent to provide race-neutral explanations of its peremptory strikes. *Warren*, ¶ 34; *State v. James*, 2010 MT 175, ¶ 23 (further citation omitted). The prosecutor must give a clear and reasonable specific explanation of his 'legitimate

reasons' – those which do not deny equal protection- for exercising the challenges to satisfy the second prong of *Batson*. *James*, ¶ 48 (Leaphart, J. dissenting) (citing *Batson*, 476 U.S. at 98, n. 20 (further citation omitted). "A denial of equal protection occurs if the decision-maker selected a particular course of action at least in part because of, not merely 'in spite of' its adverse effects upon an identifiable group." *James*, ¶ 48 (internal quotations omitted)(citations omitted).

Finally, the trial court must determine whether the defendant has established purposeful discrimination. *James*, 2010 MT 175, ¶ 23. "It is not until the third step that the persuasiveness of the justification becomes relevant- the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." *Johnson v. California, 545 US 162, 171* (2005).

Purposeful discrimination does not require racial animus, i.e., ill will or animosity toward a racial minority. See, e.g., *Currie v. McDowell*, 825 F.3d 603, 605-06 (9th Cir 2016). However, a strike is "racially motivated" where it is based on the juror's race. The defendant must demonstrate that "race was a substantial motivating factor" in the prosecutor's use of the peremptory strike. *Id.*, citing *Cook v. LaMarque*, 593 F.3d 810, 815 (9th Cir. 2010).

District courts must provide detailed reasoning for the basis of denying a *Batson* challenge even where the defendant simply objects to the state's use of

peremptory challenges. *State v. Barnaby*, 2006 MT 203, ¶ 55. District courts must follow the procedural mandate of *Ford* and *Parrish* to build a record and provide a full explanation for the denial of a *Batson* challenge in order for this Court to review adequately the denial of such a challenge on appeal. *Id.*

Here, the State attempted to remove Aravjo-Costa for cause when the Court conducted its first individual voir dire with her and again by exercising its last peremptory challenge to remove her from the venire. TR 310, 312, 359. Miller made a prima facie showing of racial discrimination by explaining that the State peremptorily struck the only non-white juror on the panel at trial of an African American. TR 311-13, 359, 361 364; *see e.g. Warren*, ¶ 35.

The burden of production then shifted to the State to offer a race-neutral explanation for the strike. The State denied that it was motivated by race, and explained that it was because the juror said she "will not be fair," the criminal justice system was harsh, and she said it was not an appropriate case for her. TR 365. Through the State's argument, it was clear that its reason to strike Aravjo-Costa was "because this juror has outrights said 'I cannot be fair.'" TR 365-66.

The State failed to give a race-neutral explanation to proceed to the third step, where the court would determine whether Miller carried the burden to establish purposeful discrimination, and the 'persuasiveness of the justification' by the State is assessed. *Warren*, ¶ 37.

Here, a bare assessment of the justification shows it was not persuasive. The State overemphasized and mischaracterized Aravjo-Costa's statements, claiming she said she "will not be fair." Tr. 365. The State also treated her statements as though they were unrelated to race.

Aravjo-Costa did not say she will not be fair; in fact her statements showed that she was impartial. She said, "I *think* I would not be fair here today, *because I was victim of a lot of discrimination* in this town." TR 304[3]. When the Judge asked whether her experiences of racial discrimination make her lean toward Mr. Miller, she said, "it might be. *I don't know what happened in this case, what he did do or did not do*, but it might be, I be not fair, because I know what's not being white in a place there is a lot of white people." TR 305. The Court asked if the juror thought that could help Mr. Miller, and she said no, explaining further her experience of racial discrimination. TR 306. Aravjo-Costa explained, "I felt after I saw him, yeah, I didn't know he wasn't a white guy. I just saw when I was already in the courtroom. And I feel that that isn't – it's a concern because I would not really, it might be that I not be fair, *because of my personal experience… because I know how it is to be not white*." Tr. 308. The court asked Aravjo-Costa whether she favored the State or Defendant as a result of her experiences and

[3] All emphasis in this paragraph supplied.

Aravjo-Costa explained that she favored neither side. “At the moment, I don’t know, because I still—I don’t know what is going on, yeah?” TR 308.

During the second individual voir dire of Aravjo-Costa, she reiterated, “It’s emotional because I know what is not being white. I don’t know what he did, the Defendant did or did not do yet. But I know how I feel, -- how it is to be discriminated. Only one person with color, because I was discriminated many times.” TR 378. When asked to confirm whether she could be fair to both sides, she explained, “I come here and, you know, then I saw the Defendant. And I don’t think that’s right, -- the right time for me to be in the jury today.” TR 379-80.

Aravjo-Costa therefore repeatedly refused to favor either party prior to the presentation of the evidence. TR 305, 308, 379. Further, Aravjo-Costa’s statements that she “might” not be fair were all tied to her race, her experience of racial discrimination, and the fact that Miller was not white. TR 304-308, 378-79.

The State’s explanation that it struck Aravjo-Costa because she said she “would not be fair” purposely ignored that the juror actually demonstrated that she was impartial to each side, and ignored that the juror’s concerns about fairness were exclusively based on Aravjo-Costa’s race and the defendant’s race. The State’s explanation was not race-neutral and not persuasive.

Consequently, permitting the State to exercise its peremptory strike to eliminate the only non-white juror from Miller’s trial was error. This error was

structural and therefore automatically reversible, requiring no additional analysis or review by this Court. *Van Kirk*, ¶ 39.

B. Even under plain error review, the Court should reverse Miller's conviction.

This Court has the inherent ability to review a claimed error even without contemporaneous objection. This Court has stated:

> While we acknowledge the constraints of § 46-20-701(2), MCA, we also recognize our inherent power and paramount obligation to interpret Montana's Constitution and to protect the various rights set forth in that document. Accordingly, we hold that this Court may discretionarily review claimed errors that implicate a criminal defendant's fundamental constitutional rights, even if no contemporaneous objection is made and notwithstanding the inapplicability of the § 46-20-701(2), MCA, criteria, where failing to review the claimed error at issue may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process.

State v. Finley, 915 P.2d at 215 (1996).

The Court invokes plain error review to correct error not objected to at trial which affects the fairness, integrity and public reputation of judicial proceedings. *Finley*, 915 P.2d at 213. The defendant bears the burden of demonstrating the need for review which overcomes the error which occurred by failing to object. *State v. Reichmand*, 2010 MT 228.

This Court should address the merits of Miller's *Batson* challenge even if it finds the issue was not preserved by Miller. Miller did lodge his objections to the

State's attempts to strike Aravjo-Costa for cause and peremptorily before the venire was sworn, rendering the objection timely. However, Miller's counsel subsequently stated that he was withdrawing the *Batson* challenge to State's sixth peremptory strike. TR 381. Therefore, the Court did not proceed to make a record or determination of whether the State had offered a race-neutral explanation for exercising the peremptory against the only non-white juror.

Although this Court has declined to address the merits of a *Batson* challenge that it found were not timely preserved for appeal (*Ford*, ¶ 29, *Casiano*, ¶ 28, *Parrish* , ¶20), those cases are distinguishable because Miller objected prior to the venire being sworn.

Furthermore, this Court's determination that the challenge is not preserved if raised after the jury is impaneled and sworn and the venire dismissed, was based on the concern that the untimeliness would (1) impair the ability of the challenged attorney to effectively defend her strikes and (2) deprive the district court of the ability to cure any error in the proceedings in a timely fashion. *Ford*, ¶ 27. Those reasons are inapplicable to this case.

Here, the State was afforded the opportunity to defend her strikes. TR 363-66. Also, the district court was poised to cure the error by disallowing the State to strike Aravjo-Costa, and taking away one of Miller's peremptory strikes to make the jury panel numbers fair. TR 362.

Moreover, the district court could have simply empaneled a new venire, as *Batson* expressly acknowledged that if discrimination occurred, a trial court may discharge the venire and select a new jury from a panel not previously associated with the case. *Id* ¶ 23. Though a delay in the trial would be inconvenient, the desire to avoid the delay caused by calling a new jury is an insufficient reason to find that an untimely objection bars review of the structural challenge present in this case . *Ford*, ¶ 25.

Declining to review Miller's *Batson* claim risks a manifest miscarriage of justice by depriving him of a fundamentally fair trial and implicates the integrity of the judicial proceedings. As stated above, a *Batson* violation meets these prerequisites for the same reason that such a violation constitutes structural error. Specifically, such error "undermines the fairness of the entire proceeding." *Van Kirk*, ¶ 38. The impartiality of the jury "goes to the very integrity of our justice system." *LaMere*, ¶ 50. Therefore, such errors affect the fairness, integrity and public reputation of judicial proceedings, qualifying it for plain error review even in the absence of objection by the defendant.

For the reasons stated above, the district court plainly erred in permitting the State to utilize its peremptory strike against Aravjo-Costa where the State's explanation failed to provide a race-neutral explanation for removing the juror. The State's explanation repeatedly focused upon Aravjo-Costa's statements that

she might not be fair, despite that Aravjo-Costa's statements demonstrated she was impartial. The State ignored that Aravjo-Costa's explanation was exclusively race-based: Aravjo-Costa experienced false accusations of crimes, was subject to baseless traffic stops and other abuses on account of her race, and mentioned these experiences because she observed that the defendant in this trial was not white. The court erred by permitting the State to use its peremptory strike based upon the race.

If the Court does not automatically reverse this structural error, it should exercise plain error review and reverse.

II. Whether the defendant received ineffective assistance of counsel when counsel withdrew his objection to the State's peremptory strike which removed the only non-white person from the jury pool based on race.

The effective assistance of counsel is guaranteed by the Sixth Amendment of the United States Constitution and Article II, Section 24 of the Montana Constitution.

This Court has adopted the two-pronged test of *Strickland v. Washington* (1984), 466 U.S. 668, in judging ineffective assistance of counsel claims. *State v. Crider*, 2014 MT 139, ¶ 34. In order to show ineffective assistance of counsel, "a defendant must prove both (1) that counsel's performance was deficient, and (2) that counsel's deficient performance prejudiced the defense." *Crider*, ¶ 34.

In analyzing prejudice, the defendant must show a "reasonable probability that the result of the proceeding would have been different but for counsel's deficient performance." *State v. Brown*, 2011 MT 94, ¶ 12 (citation omitted). A reasonable probability means a probability sufficient to undermine confidence in the outcome, but it does not require that a defendant demonstrate that he would have been acquitted. *Clausell v. State*, 2005 MT 33, p 19, citing *State v Kougl*, 2004 MT 243, ¶ 25.

Generally, the trial court record must adequately document why counsel acted in a particular manner in order for this Court to review a claim of ineffective assistance and determine whether counsel's actions fall below the reasonable standard for professional conduct. *Ford v. State*, 2005 MT 151, ¶ 15, citing *State v. Jefferson*, 2003 MT 90, ¶ 49.

In considering a petition for postconviction relief, the Court in *Ford v. State*, 2005 MT 151, determined that trial counsel's failure to raise a timely objection to what he perceived as discriminatory use of the State's peremptory challenges cannot be a trial strategy or tactical decision, thereby rendering counsel's performance appropriate for review. *Ford.* 2005 MT at ¶ 17. The Court found the failure to make a meritorious objection to the discriminatory use of the State's peremptory challenge could only prejudice Ford. *Id.*, at ¶ 17.

In the case at hand, Miller's counsel rendered ineffective assistance by consenting to and potentially waiving the challenge to the State's race-based use of its peremptory strike to remove the only non-white juror from Miller's jury pool. Counsel properly raised a *Batson* challenge, but then stated he withdrew it, creating the risk that this Court would not review the equal protection violation on appeal. (See e.g., *State v. Ford*, 2001 MT 230, ¶ 29, *Casiano*, ¶ 28, *Parrish* , ¶20).

Trial counsel's performance was deficient in turning to Aravjo-Costa's explanation for why she felt uncomfortable as a juror, rather than holding the State to its burden to articulate legitimate, non-discriminatory reasons for its peremptory strike. The juror's explanation for why she felt she did not want to serve on the jury was irrelevant to the *Batson* analysis of whether the State based its decision to strike Aravjo-Costa based on race. Inquiring of Aravjo-Costa further relieved the State of its obligation to provide a legitimate, race-neutral explanation of its peremptory challenge.

During the individual voir dire, counsel confirmed that Aravjo-Costa was not concerned about being discriminated against by the other jury members; she clarified that the case was emotional because she was not white and the Defendant was not white, and she had been discriminated against based on race. TR 378.

When that individual voir dire with Aravjo-Costa concluded, Miller's *Batson* objection remained meritorious, but his counsel failed to contend that the

State's reasoning was not race-neutral. In fact, from this subsequent voir dire, counsel could only infer that Aravjo-Costa would be favorable to the defendant because she was wrongfully suspected of illegal behavior in the past. TR 304, 306-07. Nothing from the second inquiry with Aravjo-Costa indicated that her discomfort justified the waiver of the *Batson* objection, and the court had already determined that was insufficient reason for a for-cause strike. TR 313.

Moreover, Aravjo-Costa's explanation of why she could not be fair actually demonstrated that she *would* be fair. When asked whether that experience caused her to favor the State or the Defendant, she responded, "At the moment, I don't know, because I still—I don't know what is going on…" TR 308. Aravjo-Costa thus showed she was willing to hear the evidence presented at the trial before making a decision, and was impartial.

Counsel's withdrawal of the *Batson* challenge was ineffective for failing to maintain his objection to the structural error with the composition of the jury pool. Counsel's explanations for withdrawing the objection (TR 381-82), did not establish a legitimate tactical decision where the State's peremptory strike was so clearly based on race, regardless of Aravjo-Costa's feelings about being a juror. Because counsel waived the obligation of the State to present a race neutral reason for the peremptory strike, and because this potentially relieved the district court from developing a record for review, Miller's assistance of counsel was deficient.

III. Whether Miller was deprived of a fair trial and due process of law by highly improper statements by prosecutor in closing argument, and whether Miller's counsel was ineffective in failing to object to them.

The prosecutor's comments during closing argument were improper and prejudiced Miller's right to a fair and impartial trial. Because Miller's counsel did not object to these statements, this Court reviews them for plain error. *Finley*, 276 Mont. at 134.

The plain error doctrine applies in situations that implicate a defendant's fundamental constitutional rights, and where failing to review the alleged error may result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the proceedings, or compromise the integrity of the judicial process. *State v. Clausen*, 2020 MT 100, ¶¶ 24-25 (citation omitted).

The right to a fair trial is guaranteed to all citizens under the Sixth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment and Article II, Section 24 of the Montana Constitution. *Clausen*, ¶¶ 24-25 (citations omitted).

To afford a defendant due process of law, the State must prove every element of a charged offense beyond a reasonable doubt. *State v. Newman*, 2005 MT 348, ¶ 23 (Nelson, J. Concurring)(citation omitted). This burden is closely related to the presumption of innocence which is an essential component of a criminal prosecution. *Newman*, ¶ 23-24.

Prosecutor's comments in closing argument concerning facts not in evidence and the defendant's failure to present evidence are improper and contravene the presumption of innocence. *Newman*, ¶¶ 29-30. The prosecutor need not explicitly state that the defendant is responsible for establishing his innocence to be improper; the risk that the prosecutor's statements would suggest to the jury to disregard the presumption of innocence is sufficient to find the defendant was denied a fair trial. *Id.*, ¶¶ 32-33. The prosecutor's misconduct may be grounds for reversing a conviction and granting a new trial if it deprives the defendant of a fair and impartial trial. *State v. Hayden*, 2008 MT 274, ¶ 27 (citation omitted).

This Court considers alleged improper statements during closing argument in the context of the entire argument. *State v. McDonald*, 2013 MT 97, ¶ 10 (citation omitted). The defendant must show that the prosecutor's argument violated his substantial rights. *Id.*

A. The prosecutor's opinion of Miller's guilt pervaded her closing argument statements and denied Miller a fair trial.

It is well settled that closing arguments which reflect a prosecutor's personal opinion as to the guilt of the defendant are improper. *State v. Glaude*, 1991 MT 1, ¶ 21 (citing *State v. Stringer*, (1995), 271 Mont. 367, 380-81, 897 P.2d 1063, 1071; *State v. Stewart* (1992), 253 Mont. 475, 482-83, 833 P.2d 1085, 1089-90; *State v. Campbell* (1990), 241 Mont 323, 328-29, 787 P.2d 329, 332-33; *State v. Statczar*

(1987), 228 Mont. 446, 457, 743 P.2d 606, 613); see also *State v. Musgrove* (1978), 82 P.2d 1246, 1252 (Prosecutor's closing statements that defendant was liar and was responsible were highly improper expressions of personal opinion as to the guilt or innocence of the accused).

The Court explained:

> (1) a prosecutor's expression of guilt invades the province of the jury and is an usurpation of its function to declare the guilt or innocence of an accused;
> (2) the jury may simply adopt the prosecutor's views instead of exercising their own independent judgment as to the conclusions to be drawn from the testimony; and
> (3) the prosecutor's personal views inject into the case irrelevant and inadmissible matters or a fact not legally proved by the evidence, and add to the probative force of the testimony adduced at the trial the weight of the prosecutors' personal, professional, or official influence.

Stringer, 271 Mont. at 381, 897 P.2d at 1071-72 (citation omitted).

Here, the prosecutor undermined the jury's authority to declare the guilt or innocence of the accused by repeatedly expressing her conclusion of Miller's guilt. She informed the jurors that, "we are here because the Defendant is guilty of assault with a weapon." TR 683. She repeatedly told the jurors that Miller's actions are illegal and criminal, which undermined the juror's need to exercise their own judgment and added the weight of the prosecutor's opinion and assessment of the case. TR 683, 701, 703. She told the jurors that a crime had been committed by Miller (TR 702, 726), that it occurred, that it happened. TR 702. The prosecutor's assessment of the case and personal judgment of Miller's guilt was further belied

by her reference to the fact that Miller was charged at the end of the police investigation, implying that jurors could accept the police and prosecutor's conclusions instead of exercising their own judgment. TR 726.

Each of these prosecutor's comments made clear to the jury that Miller's guilt was a foregone conclusion and usurped the role of the jurors. These statements plainly conveyed to the jurors the prosecutor's belief that Miller was guilty, that he committed the crime, and that it happened the way the State said it did. The prosecutor's improper statements invaded the province of the jury and undermined Miller's right to a fair trial, requiring reversal.

B. The prosecutor's comments on evidence not in the record were impermissible and shifted the burden of proof to Miller.

It is improper for the prosecution to comment on evidence not of record during closing argument. *State v. Glaude*, ¶ 14 (citing *State v. Stringer* (1995), 271 Mont. 367, 381, 897 P.2d 1063, 1071.

Here, the prosecutor repeatedly commented on Miller's failure to present a defense. This Court held that the affirmative defense of justifiable use of force "requires the defendant to produce sufficient evidence on the issue to raise a reasonable doubt of his guilt and that the State's burden is to prove beyond a reasonable doubt the elements of the offense charged, which does not include the absence of justification." *State v. Daniels* (1984), 210 Mont. 1, 15-16, 682 P.2d 173, 181 (citations omitted).

Since a defendant must put forth evidence in order to avail himself of the affirmative defense, the prosecutor's comments on the absence of the defense were tantamount to comments on Miller's failure to prove his innocence. The prosecutor elicited testimony from Miller about Miller's failure to raise the affirmative defense of justifiable use of force. TR. 646. Then, during closing, the prosecutor commented on Miller's failure to assert the justifiable use of force and noted that the jurors were not given an instruction regarding the justifiable use of force defense. TR 697-98, 702. The prosecutor said:

> [E]ven if, which the facts and evidence don't support, Brandon had swerved at the Defendant, there is no jury instructions that says that his actions subsequently were justified under the law. He told you he had not asserted justifiable use of force or self-defense. Those are – when I asked him, he said no. And even if – even if, and the facts and evidence don't support this, Brandon had followed Beau Miller in November of 2018, some five, six months after this - - I remind you Brandon and Jolene were in South Dakota – that doesn't [undo] the actions on June 26, 2018. That still occurred. It still happened. A crime was committed. You cannot take matters into your own hands… The Defendant's actions… are not justified under the law.

TR 702-03.

Furthermore, the prosecutor improperly commented during closing argument on Miller's failure to testify regarding the November incident and Miller's failure to present any video evidence of the alleged car chase in November. (TR 724 The prosecutor said, "I think it's interesting that Mr. Miller didn't testify to anything regarding the November incident," and asked the jurors, "Where is this recording?" *Id.*

The prosecutor's questions and closing statements on Miller's failure to present evidence undermined the presumption of Miller's innocence by improperly shifting the burden of proof to Miller to establish the affirmative defense. Since Miller had no obligation to testify or present evidence, the prosecutor's repeated comments on his failure to produce evidence at trial undermined the presumption of evidence, shifted the burden of proof to the defendant and relieved the obligation of the State to prove its case beyond a reasonable doubt.

C. The prosecutor repeatedly made improper comments as to the credibility of witness testimony.

Finally, it is improper for the prosecution to offer a personal opinion regarding the credibility of a witness. *Glaude*, ¶ 15 (citations omitted). It is "highly improper to characterize either the accused or the witnesses as liars or offer personal opinions as to credibility. In addition, [this Court] recognized that the Rules of Professional Ethics prohibit a lawyer from asserting personal opinions as to the credibility of a witness…" *State v. Stringer*, (1995), 271 Mont. 367, 897 P.2d 1063 (citations omitted).

In *Hayden*, this Court exercised plain error and reversed a defendant's conviction for multiple errors by the prosecutor. The Court found that questions to the investigating officer which elicited his impression about the credibility of the statements of the witnesses at the time of the alleged crime was unacceptable and invaded the province of the jury. *McDonald*, ¶ 12 (citing *Hayden*, ¶ 31). The

Court also found that the prosecutor impinged on the jury's role by making comments during closing argument including that the state's witnesses were "believable." *Hayden*, ¶32. The prosecutor's conduct invaded the role of the jury and "created a clear danger that the jurors adopted the prosecutor's views instead of exercising their own independent judgment." *McDonald*, ¶ 13, citing *Hayden*, ¶ 33.

Here, the prosecutor repeatedly commented upon the credibility of the witnesses and suggested to the jury that Miller lied. The prosecutor did not merely comment on contradictions in testimony. The prosecutor argued that the State's witnesses were truthful, stating that Gene Meeks and Doug Rogers had no motive to fabricate their testimony. TR 683, 685 687. The prosecutor vouched for Ehnot, arguing that Ehnot's statements were worthy of belief. TR 723. The prosecutor commented on Ehnot's "very real" fear many times. TR 689. She told the juror Ehnot's testimony "was not concocted" out of fear of Campbell. TR 699.

The prosecutor improperly commented that the State's law enforcement witnesses did not believe Miller. TR 694.

In contrast, the prosecutor's comments regarding the defense witnesses suggested that they lied. The prosecutor contended that Hanson had "every reason to fabricate something to help his friend." TR 698-99.

The prosecutor insinuated that Miller lied at trial by stating Miller had, "no concocted story yet" when he spoke to law enforcement at the time of the alleged offense. TR 701. She again suggested Miller lied, rhetorically asking the jurors, "are all four of those witnesses lying, or is Beau Miller lying?" TR 701. The prosecutor repeatedly characterized Miller's statements as self-serving. TR 701, 725. She suggested that Miller's testimony included "fabrications that never occurred." TR 721.

On this record, Miller has shown that the prosecutor's improper comments constituted plain error. Viewing these prosecutorial errors in the context of the entire case, the Court should reverse. The evidence against Miller was clearly not overwhelming given that the jurors found Miller not guilty on one count of Assault with a Weapon. TR 733. *See*, e.g., *State v. Arlington* (1994), 265 Mont. 127 (exercising plain error review where prosecutor improperly commented on the credibility of defendant but declining to reverse because evidence against defendant was "overwhelming").

Moreover, the comments prejudiced Miller's right to a fair and impartial trial. *Glaude*, ¶ 27. The prosecutor commented on the credibility of witnesses, claimed that Miller and his witness lied, commented on Miller's failure to present evidence and a defense, and repeatedly conveyed her belief of Miller's guilt to the

jury. Although each of these warrant reversal, the accumulation of errors prejudiced Miller's right to a fair trial. *State v. Campbell*, 241 Mont. at 329.

Viewed in the context of the case of the entire case, Miller was prejudiced by these improper comments. *McDonald*, ¶ 10. Without asserting an affirmative defense, (TR 646), Miller relied on a general denial. Miller's defense included his denial that he pointed a firearm at Campbell or took the firearm out of the vehicle, and denied knowing Ehnot was in the vehicle. TR 640-41. Miller contended that Campbell and Ehnot exaggerated what happened (TR 714), and Miller denied that Campbell reasonably apprehended serious bodily injury given Campbell's behavior months later. TR 109-110, 151, 640, 720.

The juror's acquittal of Miller on the charge against Ehnot shows that the jurors clearly considered the content and extent of Miller's testimony, including that he did not see her in the truck.

The prosecutor's impermissible statements about evidence and testimony that Miller *did not* present also necessarily influenced the jury. This included Miller's failure to testify regarding Campbell's conduct in November and failure to produce video, and failure to present evidence that Miller's alleged use of force against Campbell was justified – all of which went directly to Miller's defense of assault against Campbell.

The prosecutor's comments were improper, constitute plain error, and prejudiced Miller's right to a fair trial, requiring reversal.

D. Counsel's failure to object to prosecutor's improper closing argument constituted ineffective assistance of counsel.

As stated above, the effective assistance of counsel is guaranteed by the constitutions. Miller must first demonstrate that counsel's actions fell below an objective standard of reasonableness or were deficient, then show that the deficient performance prejudiced him to the extent that there is a reasonable probability that the result would have been different. *Clausell v. State*, 2005 MT 33, ¶ 19.

In *State v. Stewart*, defendant contended his counsel's failure to object to inappropriate remarks made by the prosecutor during closing arguments was ineffective assistance of counsel. *State v. Stewart*, 833 P.2d at 1089. The Court held that it was highly improper for the prosecutor to express a personal opinion as to the defendant's guilt or innocence, citing Rules of Professional Conduct which prohibit a lawyer from expressing its personal opinion of the guilt or innocence of an accused at trial. *Id*., at 1090.

The *Stewart* Court stated that because it reversed the district court on other grounds, it did not need to decide the whether the statements were so prejudicial as to deprive Stewart a fair trial. *Stewart*, 833 P.2d at 1090. Whether the defendant was deprived of a fair trial is the second step of the *Strickland* test; thus, the court

implicitly determined that the first *Strickland* prong was met- that trial counsel was deficient in failing to object to the prosecutor's improper statements at closing. *Id.*

Here, although counsel's reasons for failing to object are not in the record, it is clear that failing to object to the prosecutor's closing argument was deficient. Counsel's deficiency deprived Miller of a fair trial because it undermined the presumption of innocence heavily relied upon with Miller's general denial of the charges. It permitted the jurors to accept the burden shifting implicit in the prosecutor's comments that Miller failed to present evidence in his defense, including proof to establish the justifiable use of force defense, and video or testimony concerning the November incident which would have impeached Campbell's statement that he was scared of Miller. Counsel's failure to object to the prosecutor's prejudicial statements that assumed and proclaimed Miller's guilt deprived him of a fair trial.

CONCLUSION

For all of these reasons, the court should reverse Miller's convictions and remand for a new trial.

Respectfully submitted this 15th day of March, 2021.

By: /s/ Jennifer Dwyer
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Attorney for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I hereby certify that this Appellant's Opening Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double- spaced except for footnotes and quoted and indented material, and the word count calculated by Microsoft Word for Windows is 9,743 words, excluding certificate of services and certificate of compliance.

By: /s/ Jennifer A. Dwyer

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APPENDIX

CERTIFICATE OF SERVICE

I, Jennifer Dwyer, hereby certify that I have served a true and accurate copy of the foregoing Opening Brief to the following, on March 15, 2021:

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I, Jennifer Ann Dwyer, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 03-15-2021:

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