

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0044

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JOSEPH RICHARD POLAK II,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, The Honorable Rod Souza, Presiding

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STATEMENT OF THE ISSUES

Whether the State's arguments during its opening and closing remarks constituted plain error.

Whether Polak's ineffective assistance of counsel claims are appropriately raised on direct appeal and, if so, whether Polak's attorney was constitutionally ineffective.

STATEMENT OF THE CASE

In the early morning hours of April 28, 2015, Joseph Richard Polak, II, shot and killed Scott Hofferber in front of Andrea Sattler. *State v. Polak*, 2018 MT 174, ¶ 4, 392 Mont. 90, 422 P.3d 112. Polak fled the scene and was apprehended two days later after hitting police cars with his truck. *Polak*, ¶ 7. Detectives did not find the gun Polak used to kill Scott and Polak later claimed he shot Scott in self-defense. *Polak*, ¶¶ 5, 7. A jury convicted Polak of deliberate homicide, tampering with evidence, and criminal endangerment. *Polak*, ¶ 11.

This Court reversed Polak's tampering with evidence conviction due to insufficient evidence and reversed Polak's homicide conviction, concluding the trial court had erred by excluding evidence about the presence of drug paraphernalia and Andrea's alleged use of methamphetamine the night of the homicide. *Polak, supra*.

Polak was retried and convicted of deliberate homicide with the use of a weapon. (4/08/19 through 4/12/19 Trial (Tr.)¹; Doc. 199.) Polak was sentenced to the Montana State Prison for 60 years for the homicide and a consecutive 10 years for the use of a weapon. (*Id.*; 11/21/19 Tr.)

STATEMENT OF THE FACTS

I. Relevant facts

In the spring of 2015, Andrea was cleaning trailers on Lake Elmo Drive along with her friend, Jennifer McGraw, who lived in Trailer No. 31 with Alicia Armbruster, and Mike Flomm. (Tr. at 350-64, 382-87, 395-402, 404-07, 424-26, 449-65, 500-05, 979-80.) Scott lived in a camper behind Trailer No. 31. (*Id.*) Andrea had an apartment, but when she was working at the trailer park, she and her daughter stayed with Jennifer. (*Id.*) In early April 2015, Andrea and Scott began a romantic relationship which Andrea tried to keep secret because she was married. (*Id.*) Andrea and Scott met Polak in mid-April and Andrea got the impression Polak was interested in dating her, but she did not reciprocate. (*Id.*) Andrea remained friendly with Polak and, while she believed Polak was jealous of Scott based on Polak's comments, she did not sense any problems

¹The five-day trial transcript is consecutively paginated, so citations to the transcript will be "Tr."

between Polak and Scott, including on April 26, 2015, when they were all working together on Trailer No. 27. (*Id.*)

The next day, Andrea helped Polak purchase a used car from her father-in-law, Dennis. (Tr. at 364-71, 385-402, 426-27, 463-69, 530-32, 983-4.) Andrea gave Dennis the \$800 from Polak and took the plates off the car, replacing them with other plates she had from a different vehicle. (*Id.*) Jennifer drove the car to the trailer park and removed the plates and returned them to Andrea. (*Id.* at 408-09.)

Polak was upset that the car did not have license plates and he wanted his money back because he needed to buy another car to get out of town. (Tr. at 470-91.) Andrea said she could return some of the money that day and they agreed to meet later at Andrea's apartment when she went home to shower. (*Id.*) However, Andrea did not go home to shower because her shower stuff was in her car which Jennifer had borrowed and did not return until 2 a.m. (*Id.* at 364-71, 385-402, 536.) When Jennifer got the keys from Andrea, she did not believe Andrea was under the influence of drugs. (*Id.*)

Cellphone records showed that the two weeks before the shooting, there was constant phone and text activity on Polak's ZTE cellphone including communications with Andrea and Scott. (Tr. at 763-75, 801-21, 845-78.) Between April 21 and 27, there were 14 calls between Scott and Polak. (*Id.*) On April 27th,

Scott called Polak at 5:50 p.m., and the call lasted about 4 minutes. (*Id.*) Polak called Scott at 6:28 p.m., but Scott did not answer. (*Id.*)

Later that night, Andrea and Polak were constantly communicating by phone and text messages. (*Id.* at 806-78.) Polak's text messages to Andrea included terms of endearment but also messages indicating he was irritated with her and Scott and accused them of making fun of him. (*Id.*) Around midnight, Polak and Andrea spoke on the phone twice for a total of 17 minutes. (*Id.*) At 12:07 a.m., Polak texted Andrea good night and that he missed her already, but Andrea did not respond. (*Id.*) None of the text messages from Polak to Andrea on April 27th concerned the car deal. (*Id.*)

Andrea's records showed that a text message went to the phone Alicia was using at about 2:23 a.m. (Tr. at 410-15, 428-30.) Andrea agreed that she texted Alicia to come smoke marijuana with her that night, but did not think she wrote it at 2:23 a.m., explaining that the transmission of the text could have been delayed because her phone was not holding a charge. (*Id.* at 537-47.) After Andrea fell asleep around 2 a.m., Scott came to check on her. (*Id.*) Andrea denied that she and Scott smoked or ingested methamphetamine that night. (*Id.* at 551.)

At about that same time, Zachary Lozier and Polak left a casino and Zachary followed Polak so Polak could drop off his car. (Tr. at 916-55.) Zachary testified that after he drove them to get Polak a hamburger at Burger King downtown, Polak

got a phone call and asked Zachary to drive him to Lake Elmo Trailer Court because he needed to pick up some money. (*Id.*) In June 2015, Zachary told the detectives that Polak was going to get money from Scott; however, at the trial, Zachary testified that Polak was getting \$100 from a girl over a car deal. (*Id.*) Polak told Zachary to park on the opposite side of the trailer park from Trailer No. 27 and said he would be right back when he got out of the car. (*Id.*)

Around 2:30 a.m., when Andrea and Scott turned out the lights to leave Trailer No. 27, they noticed a black car with tinted windows driving slowly through the trailer park and then back towards the main road. (Tr. at 472-81, 548-60; Ex. 31.) Scott stopped to make sure Andrea's car was locked, and Andrea saw a person walking towards them and recognized Polak, who said, "Where's my money? I want my money!" (*Id.*) Polak appeared frustrated and angry, and Andrea walked back towards Scott because she was scared. (*Id.*)

Polak continued walking towards them until he was about six feet away and said to Scott, "What's your problem, bro?" (Tr. at 481-91, 632-51; Ex. 18.) Scott replied, "You're my problem, bro." (*Id.*) Andrea described Scott as calm when he said, "Here, you're going to need this," and pulled out a small catspaw tool from his pocket which he held at his waist. (*Id.*) Scott did not take a step towards Polak or swing the tool at him. (*Id.*) Polak backed up two steps, pulled out a gun, and fired one shot into Scott's chest. (*Id.*) Polak did not say anything and ran off.

(*Id.*) Scott stumbled back and said, “I can’t believe you did that, man.” (*Id.*)

Andrea ran to tell someone to call 911, went back and grabbed her purse, and then went to Trailer No. 31. (*Id.*, 622.) Andrea denied she retrieved her purse because it had methamphetamine in it. (*Id.*)

Polak ran back to Zachary’s car, jumped in, and said, “Go, go, go!” (Tr. at 916-55.) Zachary described Polak as frantic but quiet as they drove away. (*Id.*) Eventually, Zachary asked him what happened, Polak replied, “I think I might have shot him.” (*Id.*) Zachary testified he did not see Polak with a gun before or after the shooting and claimed he did not hear the gunshot over his car stereo. (*Id.*)

Jennifer was awake playing a game on her iPad and heard the gun shot. (Tr. at 371-81, 387-402.) When she went outside to investigate, Andrea shouted that Polak shot Scott and ran to Trailer No. 31. (*Id.*) Andrea came running into the trailer yelling to Alicia that “he” shot Scott. (*Id.*; Tr at 413-18, 428-35.) Jennifer and Alicia did not believe Andrea was high and described her as being upset, scared, and in shock. (*Id.*) Jennifer called 911 while Alicia rendered aid to Scott. (*Id.*; Ex. 21)

At 2:31 a.m., Billings Police Department (BPD) Officer Jeff Stovall was at a convenience store in Billings Heights and he heard a loud bang, which he thought was a firecracker. (Tr. at 295-322.) At 2:34 a.m., 911 received a call that a man had been shot at Trailer No. 27 on Lake Elmo Drive. (*Id.*) Stovall responded and

observed Scott on his right side on top of wooden lattice from the porch with a ten-inch pry tool or catspaw near his right hand and a bullet wound to his left chest. (*Id.*, 747-49; Exs. 2-8, 11-17.) Stovall located a single .45 caliber shell casing in the street near Trailer No. 27 and placed an evidence placard over it; nothing else was observed in the street. (*Id.*; Exs. 4, 7-10.)

Inside Trailer No. 27, Stovall noticed a glass pipe on the bathroom counter. (Tr. at 302, 319-322, 834; Ex. A.) Stovall testified that based on his training and experience it appeared the pipe was used to ingest methamphetamine, but he did not know if it had been recently used. (*Id.*) The pipe was seized, but not sent to the crime lab for testing. (*Id.*)

Neither Jennifer nor Alicia told Stover that Andrea witnessed the shooting because Andrea asked them not to because she was scared. (Tr. at 380-82, 399, 419-21, 491-95.) Andrea stayed in Trailer No. 31 until 10 that morning when, with the assistance of her attorney, she arranged to be interviewed at BPD. (*Id.*) Detective Brad Tucker interviewed Jennifer, Alicia, and Andrea. (Tr. at 742-63, 843; Ex. 33.)

Detectives examined Andrea's cellphone and noted that her text messages had been deleted. (Tr. at 763-75, 848-78.) However, Verizon records for Andrea's cellphone contained a log of incoming and outgoing phone calls, and incoming text message content. (*Id.*) Based on those records, detectives identified numbers for

Jennifer's cellphone, Scott's two cellphones, and a ZTE phone belonging to Polak (who went by the nickname Ghost) and obtained warrants for those phones' data which included call logs from Scott's phones and call and text message logs (no content) from Polak's ZTE phone that covered the time period leading up to the shooting. (*Id.*) Officers determined that the last incoming or outgoing call or text on Polak's ZTE phone was 9:26 p.m. on April 28th and he activated his new Asus cellphone at 3 p.m. on April 29th. (Tr. at 763-75, 801-21, 845-78.)

Officers searched for Polak and finally learned his general location and what vehicle he was driving. (Tr. at 726-37.) In the early morning hours of April 30, 2015, officers arrested Polak. (*Id.*)²

II. Relevant procedures

Polak was charged with Count I, deliberate homicide, Count II, tampering with evidence, Count III, criminal endangerment, and Count IV, criminal possession of dangerous drugs. (Docs. 1, 3.) The court severed Count IV, which the State later dismissed. (Docs. 12, 19, 22, 44, 102-03.) In November 2015,

² Polak attempted to evade arrest by ramming his truck into a patrol car and a federal marshal's vehicle, but he was eventually apprehended. *Polak*, ¶ 7. In the truck, officers located a loaded 9mm handgun, a large amount of cash, and methamphetamine. *Id.* These specific facts were not presented at Polak's second trial pursuant to the court's order granting Polak's motion in limine in part. (*See* Doc. 158; Tr. at 21-24, 334-38, 716-21.)

Polak was convicted of the remaining three counts, but this Court reversed the deliberate homicide conviction and acquitted Polak of tampering with evidence.

Polak, supra.

Jami Rebsom was assigned to represent Polak upon remand and she filed a motion in limine to exclude Polak's drug use and prior bad acts/criminal history (including the circumstances surrounding Polak's April 30th arrest and his possession of methamphetamine). (Docs. 127, 139.) Polak argued that if the State presented evidence concerning the arrest, Polak would have to explain that the reason he resisted was because he possessed methamphetamine which would be highly prejudicial. (03/21/19 Tr.) The State argued the events surrounding Polak's arrest were evidence of flight and consciousness of guilt. (*Id.*; Doc. 145.)

The district court denied in part and granted in part Polak's motion in limine. (Doc. 158.) The court excluded evidence about Polak's criminal history and evidence of Polak's drug use/possession unless Polak denied using methamphetamine and the State chose to impeach him with his prior statement that he used methamphetamine daily. (*Id.* at 1-3.) The court also excluded the details surrounding Polak's arrest, noting that since the criminal endangerment charge was not being retried, that event was not "inextricably linked" to the homicide charge.

(*Id.* at 3.)³ However, the district court denied Polak’s motion concerning the general fact that Polak was not located for two days, concluding that “[t]he fact that Polak fled the scene on April 28, 2015 and was not apprehended until April 30, 2015 is relevant and admissible” because it constituted evidence of flight. (*Id.* at 2.)

On the first day of trial, the State explained it interpreted the court’s order to prohibit testimony about Polak striking the patrol cars, resisting arrest, and possessing methamphetamine, but argued it should be able to present evidence that Polak possessed a firearm (which was not the murder weapon) when he was arrested. (Tr. at 21-24.) The court denied that request and reiterated that specific details related to the criminal endangerment conviction could not be presented. (*Id.*) The court explained the State could elicit the following narrowly tailored testimony about his arrest: when Polak encountered law enforcement on April 30th, he “attempted to evade apprehension and was uncooperative.” (Tr. at 24.)

The parties also discussed the admissibility of evidence concerning interactions between Andrea, Scott, and Polak on April 14, 2015, when Polak, who was high at the time, told Andrea he planned to shoot drugs and have sex with her, causing her to call Scott who confronted Polak. (Tr. at 6-15, 262, 329.) The court

³ Polak mistakenly asserts on appeal that the court ruled that the specific details of Polak’s apprehension on April 30 (crashing into the patrol cars and resisting arrest) was admissible. (Opening Br. (Br.) at 4, 7.)

concluded that event was favorable and unfavorable to both sides, so if any evidence about the exchange was introduced, the entire event would be admissible. (*Id.*) The parties agreed to merely state that was the date Polak met Andrea and Scott. (*Id.*)

The State also foreshadowed its intent to use leading questions during Alicia's testimony to ensure she did not tell the jury that a couple days before the homicide, she, Andrea, Scott, Polak, and others, were using methamphetamine at the trailer park and everything was fine between everyone. (Tr. at 15-21.) The State believed that Alicia's statement would explain how the methamphetamine pipe ended up in Trailer No. 27 and that it was not Andrea's pipe. (*Id.*) The State further explained it wanted to make sure Polak knew this information could come out if he asked Andrea or Alicia about using methamphetamine. (*Id.*) The court approved of the State's intent to lead Alicia on this narrow topic, and Rebsom concurred. (*Id.*)

Issues related to Polak's cellphone records were also raised prior to trial. (Tr. at 25-34, 41-46, 240-41.) When the State explained its intent to introduce evidence about the phone Polak had with him when arrested, Rebsom indicated she only knew about the ZTE records and both she and Polak claimed they had not seen the Asus records. (*Id.*) The State explained all the records had been provided in discovery and showed Rebsom a summary of the data. (*Id.*) After reviewing the

summary, Rebsom did not see anything that was detrimental to the defense, but asked for a disc containing the original data, which the State provided. (*Id.*) Rebsom declined the court's offer for additional time, but maintained her objection. (*Id.*)

The court also considered the State's argument that Polak should not be allowed to now claim he knew Scott had been a mixed martial arts (MMA) fighter because, at the first trial, Polak only testified that he knew Scott had a reputation for violence and that he liked to fight. (Tr. at 338-47, 231-39, 252-57, 261-62.) The court disagreed and concluded Polak could testify that he had knowledge that Scott had been an MMA fighter but explained this information could not be admitted unless and until Polak testified he knew that fact and that was a reason he feared for his life and felt justified in shooting Scott. (*Id.*)

III. Relevant trial facts and procedures

Dr. Robert Kurtzman testified that the bullet entered Scott's upper front left chest area and travelled in a slightly downward trajectory, angling from right to left. (Tr. at 651-723; Exs. 23-29, 49.) Defense witness Dr. Thomas Bennett opined that based on the trajectory of the bullet, if Polak had held the gun at a 90-degree angle at his waist and was about 4 feet away, Scott would have been slightly leaning forward with his left shoulder when he was shot. (Tr. at 878-916.)

Ballistics expert Lynette Lancon testified that based on her examination of the .45-caliber bullet recovered from Scott and the type/amount of gunshot residue on Scott's sweatshirt, Scott was killed with a .45 caliber Glock automatic handgun from a distance of more than 3 feet. (Tr. at 568-607.)

Tests of Scott's blood indicated he was under the influence of methamphetamine when he was killed and had ingested marijuana shortly before being shot. (Tr. at 680-723; Ex. 36.) Dr. Bennett explained that in addition to being a stimulant, methamphetamine can cause people to be paranoid, violent, and aggressive. (*Id.* at 900-16.) According to Dr. Bennett, the high level of methamphetamine in Scott's blood indicated he had developed a tolerance to the drug from using it over time. (*Id.*) However, Dr. Kutzman testified that because the postmortem blood sample taken from Scott was from a vena cava (a central blood sample) instead of the person's extremities (peripheral blood sample) the actual level of methamphetamine in Scott's blood when he died could have been three times less than what the postmortem testing showed. (*Id.* at 683-91.)

Methamphetamine use by those involved in the shooting was repeatedly at issue during the trial. For instance, when Rebsom asked Stovall about the term "eight-ball" to describe a quantity of methamphetamine, the State objected, and the court sustained the objection. (Tr. at 322.) At the next recess, the court asked the parties to declare the scope of the testimony each expected to bring out concerning

methamphetamine use by those involved. (Tr. at 326-44.) Rebsom intended to bring out the fact Scott had methamphetamine in his system that night and that a methamphetamine pipe was found in Trailer No. 27. (*Id.*) Rebsom also referenced *Polak, supra*, that stated Andrea's alleged use of methamphetamine was relevant but that she expected Andrea to deny using methamphetamine that night. (*Id.*)

The State explained it was trying very hard to limit specific details about methamphetamine use by the parties, including the fact that Polak had allegedly sold an eight-ball of methamphetamine to Scott who had not yet paid him. (Tr. at 326-44.) Andrea had vouched for Scott and in the context of him not getting paid for the eight-ball, Polak had stated that if Scott tried to fight him, he would shoot him. (*Id.*) The court explained that witnesses could be asked if they used methamphetamine on April 28th and, if they denied using that day, counsel could try and impeach them. (*Id.*)

The April 30th events were revisited the first day of trial when Rebsom complained that the State had mentioned in its opening statement that Polak had evaded apprehension and argued that nothing about the criminal endangerment offense was admissible. (Tr. at 334-38.) The court reiterated that its ruling allowed the State to discuss the fact Polak's apprehension was delayed and that he was not cooperative. (*Id.*) Rebsom did not recall the court's order allowed

testimony about him being uncooperative and the court disagreed that it had altered its earlier ruling. (*Id.*)

Prior to Detective Tucker's testimony, the court reminded the State that he could only explain that Polak had evaded apprehension and was uncooperative. (Tr. at 716-21.) Rebsom reiterated her objection and complained the court's ruling forced her to ask Polak why he did not want to be arrested, and Polak would have to admit he possessed methamphetamine. (*Id.*) The court explained that was a trial strategy decision for Rebsom, but suggested Polak would not have to make such an admission. (*Id.*)

When the court recessed during Detective Tucker's direct examination, the State explained it had provided summary documents of the text messages between Polak and Andrea to Rebsom, but added that since the messages included discussions about drug deals/sales/use, the State did not intend to introduce the documents as exhibits. (Tr. at 782-93.) In response, Rebsom stated that while she had Andrea's phone records, she did not believe she had any of the messages Polak sent to Andrea. (*Id.*) The parties and Detective Tucker essentially had an open-court discussion about the records at issue and in what form they were made available to the defense and how Rebsom could navigate through the information. (*Id.*) The State provided the records to Rebsom again. (*Id.*)

The next day, Rebsom confirmed she had the records for Polak's ZTE cellphone and Andrea's cellphone, but stated she did not believe the times had been correctly described by Tucker. (Tr. at 797-800.) After confirming that the form of the cellphones' records/data depended on whether it was collected with extraction software from the physical phone or obtained from the cellphone provider, the court explained that Rebsom could raise those concerns through cross-examination with Tucker. (*Id.*) Rebsom did just that, and Tucker realized he had miscalculated the times for Polak's ZTE cellphone communications. (*Id.* at 844-72.)

Prior to Polak testifying, the court reviewed his constitutional rights and confirmed that Polak had reviewed all the evidence with Rebsom. (Tr. at 951-54.) Rebsom advised the court that she reviewed all the evidence with Polak, including the phone records she obtained during trial, and confirmed that Polak was "absolutely prepared to testify." (*Id.*)

According to Polak, on April 27, 2015, he drove Dennis's car to an outdoor shooting range at 17 Mile to shoot with his .45 caliber Glock. (Tr. at 955-70, 994-1002.) When he drove back, the car overheated and he stopped at a casino where Zachary met him. (*Id.*) According to Polak, Andrea called him and was upset that the plates were still on the car and told him to return the car to her at her apartment or Trailer No. 27 and she would give him \$100 dollars back. (*Id.*) After

dropping the car off at Andrea's apartment, Polak explained he put his Glock in his sweatshirt pocket and got into Zachary's car. (*Id.*)

Polak claimed Zachary took him to the Burger King near the trailer park, not downtown as Zachary had stated, and when he was confronted with that fact during cross-examination, Polak stated Zachary would have to be wrong "in order for the timeline to fit." (Tr. at 964, 1008-09.) According to Polak, he was eating his hamburger when they arrived at the trailer park and he instructed Zachary to park across the median from Trailer No. 27. (Tr. at 955-74, 1002-24.) Polak claimed that he was still eating his hamburger as he walked toward Andrea in the parking lot and when he put his hand out as a gesture for money, Andrea did not seem to know what he was talking about. (*Id.*) According to Polak, he then heard Scott say, "Hey mother fucker," and when Polak asked Scott what his problem was, Scott allegedly replied, "You're my problem, bro" and "You're going to bleed bitch." (*Id.* at 970.) Polak testified that Scott lunged at him with the catspaw raised up in his right hand. (*Id.*) Polak backed up two steps and took out his gun. (*Id.*) Polak testified that Scott said, "Go ahead," and Polak shot him. (*Id.*) Polak stated that he shot Scott instead of running away because Scott would have caught him. (*Id.* at 974, 1024-25.)

When asked what he was thinking when he fired the gun, Polak testified, "[T]here was no decision process, it was just, I don't want to die," and further

claimed he did not completely draw his gun or aim. (Tr. at 971-75.) According to Polak, after he shot Scott, Scott turned to his left and walked back to the trailer. (*Id.*) Polak claimed he was unsure if he hit Scott and did not learn Scott had died until he was arrested. (*Id.*)

On cross-examination, Polak admitted he did not know exactly what was in Scott's hand, only that it had glinted in the light. (Tr. at 1002-35.) Polak conceded that this was the first time he claimed that Scott had raised the tool up in the air or that Scott lunged at him. (*Id.*) Polak also conceded he had not mentioned eating/holding a hamburger in his prior testimony or that he dropped it. (*Id.*) Polak also testified for the first time that after he shot Scott, he watched him for a couple seconds and described Scott as walking away. (*Id.*) Polak claimed that he did not call the police because he did not think they could keep him safe from Scott since he thought it was "in all likelihood that he was fine" and that he "had no proof that I'd even been attacked." (*Id.* at 1028, 1030.) Polak denied that he was under the influence of methamphetamine when he shot Scott. (*Id.* at 1035.)

The State called Detective Ryan Kramer to rebut Polak's story about going to the shooting range as justification for why his Glock was in his sweatshirt when he went to the trailer park. (Tr. at 1044-52.) Kramer explained that Polak's ZTE cellphone records established that between 2 p.m. on April 27th and the early

morning hours of April 28th, there were incoming/outgoing calls/texts nearly every 15 minutes on Polak's cellphone. (Tr. at 1044-52.)

The cellphone records contained location data for which cell towers transmitted the calls/texts, thereby establishing the general location of Polak's cellphone since it was in constant use. (Tr. at 1044-52.) Most of the calls/texts on Polak's phone during that time period passed through the AT&T tower near the Lake Elmo Trailer Park, and a few transmissions passed through the cell tower near downtown. (*Id.*) The location records established that Polak's phone had not received or sent any data through the cell tower north of town where the shooting range was located. (*Id.*) In detective Kramer's opinion, Polak's cell phone had not traveled to the 17 Mile shooting range on April 27th. (*Id.*)

STANDARD OF REVIEW

This Court will generally not address "prosecutorial misconduct pertaining to a prosecutor's statements not objected to at trial." *State v. Smith*, 2021 MT 148, ¶ 41, ___ Mont. ___, ___ P.3d ___; *State v. Mercier*, 2021 MT 12, ¶ 13, 403 Mont. 34, 479 P.3d 967. However, such issues may be considered under the plain error doctrine. *Id.* Plain error review is discretionary and exercised "sparingly, on a case-by-case basis, according to narrow circumstances, and by considering

the totality of the circumstances.” *State v. Haithcox*, 2019 MT 201, ¶ 23, 357 Mont. 103, 447 P.3d 452.

Ineffective assistance of counsel (IAC) claims present mixed questions of law and fact and are reviewed *de novo*. *State v. Ward*, 2020 MT 36, ¶ 15, 399 Mont. 16, 457 P.3d 955. Generally, this Court will not consider non-record-based IAC claims on direct appeal. *Id.*

SUMMARY OF THE ARGUMENT

Since Polak did not raise any objections during the State’s opening or closing remarks, the only way his prosecutorial misconduct claim may be considered is if he firmly convinces this Court that plain error review is warranted. However, Polak cannot meet his burden because the State’s arguments to the jury did not violate Polak’s substantial rights, render his trial unfair, or compromise the integrity of the judicial process. It was not improper for the State to point out that the people involved in this matter lived very different lifestyles that involved drugs and to prepare the jury for the expected focus Polak would place on Andrea’s alleged methamphetamine use and Scott being positive for methamphetamine.

The State’s comments sought to remind the jurors that despite his lifestyle, Scott was still entitled to protection under the law and to explain why the witnesses may have acted in ways foreign to the jurors. The State’s comments related to

Polak's behaviors constituted appropriate argument about inferences the jury could draw from the evidence presented; the State did not tell the jury Polak was a drug user. In the context of the entire case, the State's arguments to the jury were within the established norms of professional conduct and did not infect the trial with unfairness.

Polak's IAC claims are not appropriate for review on direct appeal since the record does not reveal the reasons why Rebsom did/did not perform a certain way and Polak does not assert there was no plausible justification for Rebsom's alleged errors. Rebsom's unsworn self-proclaimed inadequacies do not equate to a developed record and does not support Polak's IAC claims.

Even if this Court considers Polak's four enumerated IAC claims, Polak's reliance upon Rebsom's self-critique is unavailing and cannot establish how Rebsom's performance was deficient when she did not: (1) object to the State's appropriate arguments to the jury; (2) elicit from Polak his knowledge that Scott was an MMA fighter; (3) request the State resubmit all the discovery and more thoroughly challenge Tucker's qualifications to testify; or (4) re-initiate plea negotiations after the trial started. Additionally, Polak cannot establish that had Rebsom performed differently in those four circumstances, he would have been acquitted or that the State would have considered, let alone accepted, any defense counteroffers once the trial started.

ARGUMENT

I. The State’s arguments during its opening and closing remarks did not constitute plain error.

A. Relevant facts

During *voir dire* the State asked the panel if they agreed that the law should apply equally for victims regardless of their background. (Tr. at 96-97.) To further diffuse potential bias the jurors may have had against Scott (who had used methamphetamine near the time of his death) and Andrea (who the defense alleged used methamphetamine that night), the State addressed the changes in the Billings community, including an increase in drug use and the fact that methamphetamine was part of the case. (Tr. at 98-108, 132-33.) Rebsom also discussed the issue of methamphetamine with the jury panel. (Tr. at 175-81.)

Just like its *voir dire*, and in anticipation of facts/argument coming out about methamphetamine use by persons involved in the case—certainly given this Court’s decision in *Polak, supra*—during its opening statement, the State explained that the jurors would hear Scott had methamphetamine in his system when he was shot, but argued he was still a “human being” and “entitled to full protection of the law.” (Tr. at 279.) The State also addressed the nature of the lifestyles of the victim, defendant, and witnesses:

In the next few days, we’re going to talk about a world that many of you are probably not familiar with. It’s a world that exists right here in Billings, but it might as well be in a separate universe,

because it's so different than what most of us know. In this world people use methamphetamine. In this world people are up in the about in the middle of the night when most people are home sleeping in their beds. In this world people make really bad decisions, do things that don't make sense. In this world the Defendant had the street name of Ghost, that's how his friends knew him by, is Ghost.

(Tr. at 272-73.)

During her opening statement, Rebsom focused on the fact that Scott had a high level of methamphetamine in his system when he was shot and asserted that Andrea was putting together a "shindig" to use methamphetamine that night and asserted that Andrea retrieved her purse after Scott was killed because it contained methamphetamine. (Tr. at 283, 289-90.)

During its closing argument, the State referred back to the "foreign" world described in its opening and *voir dire* where people are out and about at 2:30 a.m. (Tr. at 1074.) Throughout its argument, the State acknowledged that this was the world where Scott, Andrea, Polak, Jennifer, and Alicia all lived around the time of the shooting. (*Id.* at 1075-89.) The State also acknowledged Andrea had made terrible decisions that night and explained no one was asking the jury to approve of the witnesses' or Scott's way of life. (*Id.*)

During her closing argument, Rebsom argued that Polak and Zachary were winding their night down when the incident occurred as opposed to Scott, Andrea, Jennifer, and Alicia who were just starting their party. (Tr. at 1095.) Rebsom again focused on Scott's toxicology report and Dr. Bennett's testimony to support

Polak's claim that Scott was the aggressor because of his high level of methamphetamine. (Tr. at 1100.)

In its rebuttal closing, the State refuted Rebsom's claim that Polak and Zachary were "winding down" by pointing to Polak's statements that they planned to go out after going to the trailer park. (Tr. at 1104-05.) The State also rhetorically asked, "when does [Polak] sleep?" and pointed to the exchange with Polak on cross-examination when he had to admit his initial claim that he slept next to Andrea was refuted by the fact he was text messaging her at that time. (*Id.*)

The State pointed out that Polak tried to make it sound like it took mere seconds for the shooting and that he did not even aim the gun; yet he also told the jury that Scott told him to "go ahead" when he pulled out his gun. (Tr. at 1106-07.) The State argued that Polak's claim he did not know Scott was dead was contradicted by the fact that Zachary knew Scott was dead at 10 a.m. the next day and Polak and Zachary talked later that day for an hour and a half. (Tr. at 1108-11.) The State also noted the abrupt change in Polak's communications with Andrea (65 text messages the day before and none after the shooting). (*Id.*) Finally, the State contrasted Polak's denial that he used methamphetamine and claim he shot in self-defense with Dr. Bennett's testimony that people who use methamphetamine are up for days and are paranoid and aggressive, arguing to the jury that Polak's "story is a lie." (Tr. at 1114.)

B. Plain error review is unwarranted to consider alleged improper comments during the State’s arguments to the jury.

Both the Sixth Amendment to United States Constitution, and Article II, Section 24, of the Montana Constitution, guarantee criminal defendants “the right to a fair trial by a jury.” *Haithcox*, ¶ 24; *Smith*, ¶ 42. “A prosecutor’s misconduct may be grounds for reversing a conviction and granting a new trial if the conduct deprives the defendant of a fair and impartial trial.” *Id.* However, this Court generally will not address alleged claims of prosecutorial misconduct if there were no contemporaneous objections made to the allegedly improper statements. *Haithcox*, ¶ 23. In such circumstances, the appellant must convince this Court the alleged error warrants invocation of the plain error review doctrine. *Id.*; *State v. Lehrkamp*, 2017 MT 203, ¶ 15, 388 Mont. 295, 400 P.3d 697 (Court will not review prosecutor’s actions absent a timely objection unless they implicate defendant’s fundamental constitutional rights).

Plain error review is discretionary and exercised “sparingly, on a case-by-case basis, according to narrow circumstances, and by considering the totality of the circumstances.” *Haithcox*, ¶ 23; *State v. Aker*, 2013 MT 253, ¶ 23, 371 Mont. 791, 310 P.3d 506. Plain error review applies only “in situations that implicate a defendant’s fundamental constitutional rights when failing to review the alleged error may result in a manifest miscarriage of justice, leave unsettled the question of

the fundamental fairness of the proceedings, or compromise the integrity of the judicial process.” *Aker*, ¶ 21; *Mercier*, ¶ 35.

This Court “consider[s] claimed improper statements by the State during closing arguments ‘in the context of the entire argument’” and measures prosecutorial misconduct by reference to established norms of professional conduct. *Mercier*, ¶ 37; *Smith*, ¶ 42. “[I]t is not enough that the prosecutors’ remarks were undesirable or even universally condemned [but rather] the relevant question is whether the comments ‘so infected the trial with unfairness as to make the resulting conviction a denial of due process.’” *Haithcox*, ¶ 24 (quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)).

While this Court may employ plain error review to reverse prosecutorial misconduct, the burden remains on the appealing party to convince this Court such review is necessary. *State v. McDonald*, 2013 MT 97, ¶¶ 10, 17, 369 Mont. 483, 299 P.3d 799; *Aker*, ¶ 24. This Court will not presume prejudice from charges of prosecutorial conduct; rather, the defendant must show that the alleged prosecutorial misconduct violated the defendant’s substantial rights. *Smith*, ¶ 42; *Haithcox*, ¶ 24; *Mercier*, ¶ 37; *Lehrkamp*, ¶ 15 (“defendant must demonstrate, from the record, that the prosecutor’s [alleged] misstatements prejudiced him”). “A prosecutor’s argument is not plain error if made in the context of discussing the

evidence presented and how it should be used to evaluate a witness's testimony under the principles set forth in the jury instructions." *Aker*, ¶ 27.

Polak has not made the threshold showing of what fundamental right was implicated by the State's arguments or that failing to review the claimed improper comments would result in a "manifest miscarriage of justice, leave unsettled the question of fundamental fairness of the proceeding, or compromise the integrity of the judicial process." *Aker*, ¶ 21. The allegedly improper statements were part of the State's arguments to the jury and were proper "comment[s] on the gravity of the crime charged, the volume of evidence, credibility of witnesses, inferences to be drawn from various phases of evidence, and legal principles involved." *Smith*, ¶ 43; *Mercier*, ¶ 37.

The jury was properly instructed that what comments the attorneys made during opening and closing arguments were not evidence. (Tr. at 345; Doc. 170.) See *Smith*, ¶ 49 (courts presume jury followed instructions).

When it described the "foreign world" Billings' jurors were not likely to know existed during *voir dire* and its arguments to the jury, the State was trying to mitigate any judgment the jurors may have against Scott and Andrea. The State coupled its remarks with comments about treating all people the same through the judicial process—even if they were abusing drugs—and to acknowledge the witnesses' actions may have seemed strange to the jurors. The State's arguments

were aimed at convincing the jury not to use the fact that the people involved in this event may have been involved with drugs to conclude the laws should apply differently to them. *See Haithcox, supra* (State’s comments at *voir dire* and during arguments to the jury were intended to address juror bias; State did not unnecessarily emphasize racial slurs or exploit racial prejudice).

The State’s reference to Polak’s nickname was relevant to the officers’ testimony about his calls and texts and how he was identified. Polak offers nothing but conjecture that by referring to “Ghost” as a street name implied Polak used drugs. The State’s reference to Polak’s alias did not “so infect[] the trial with unfairness as to make the resulting conviction a denial of due process.” *Haithcox*, ¶ 24.

To minimize the impression the defense tried to paint during its closing, it was not until its rebuttal closing argument that the State pointed out it was not just Scott and Andrea who were not sleeping. The State’s comments pointed to circumstantial evidence that was admitted without objection (*e.g.*, Polak’s constant texting in a 24-hour period; use of deadly force against Scott because paranoid about Scott’s intentions) along with the defense witness’ testimony about the effects of methamphetamine, to suggest that the jury could infer Polak may have also used methamphetamine. The State did not refer to Polak as a “druggie” or state he possessed or used methamphetamine.

The State’s argument about what could be inferred about Polak from the evidence admitted at trial was not improper. “While it is generally improper for the prosecution to offer *personal opinions* as to the credibility of the accused or the witnesses . . . it is proper for a prosecutor to comment on conflicts and contradictions in testimony, as well as to comment on the evidence presented and suggest to the jury inferences which may be drawn therefrom.” *McDonald*, ¶ 14 (emphasis in original). Considering the challenged comments in the context of the trial and arguments as a whole, Polak has not established how his substantial rights were violated or that the prosecutors acted beyond established norms of professional conduct *Mercier*, ¶ 37.

While each case must be evaluated on a case-by-case basis when considering when to invoke plain error review, it is notable that out of the multiple appeal requests to apply this sparingly used doctrine of review for alleged prosecutorial misconduct, this Court has concluded a prosecutor committed plain error during closing remarks on only two occasions. *See State v. Lawrence*, 2016 MT 346, 386 Mont. 86, 385 P.3d 968; *State v. Hayden*, 2008 MT 274, ¶ 33, 345 Mont. 252, 190 P.3d 1091.

Using plain error review, a majority of this Court reversed Lawrence’s conviction based on the prosecutor’s closing statement that “[t]he presumption of innocence that you came into this trial with no longer exists at this point.”

Lawrence, ¶¶ 7-12. Significant to the majority’s conclusion was the “gravity of the presumption of innocence” in the criminal justice system. *Lawrence*, ¶ 12. By telling the jury that the presumption of innocence no longer applied to the defendant, the prosecutor violated the defendant’s substantial rights and committed prosecutorial misconduct. *Lawrence*, ¶¶ 13-23.

Using plain error review of alleged prosecutorial misconduct, this Court reversed Hayden’s conviction when the prosecutor elicited testimony from one witness that bolstered the credibility of other witnesses and improperly vouched for its witnesses. *Hayden*, ¶¶ 31-33. Also, during closing argument, the prosecutor made several improper comments including that two of the State’s witnesses were believable, the jury could “rely on” the investigating officer’s testimony, the prosecutor was sure all the items found in a search were related to drugs, and that the officers did “good work” in searching for drugs. *Id.*

Here, the State did not elicit credibility testimony from other witnesses or personally attest to the believability of the witnesses and reliability of the police in its closing. Nor did the State suggest that Polak could no longer be presumed innocent. Rather, and just like in *Aker*, the State’s “closing arguments focused on why the jury should believe that party’s witnesses and not those of the other side.” *Aker*, ¶ 31. The prosecutor based his closing remarks upon the evidence presented and properly argued to the jury what it could infer from the evidence about Polak.

See Mercier, ¶ 38 (State’s closing remarks were to rebuke the defense attorney’s arguments and characterization of Mercier’s actions; when record was reviewed as whole, alleged improper not manifest miscarriage of justice); *Smith*, ¶ 51 (State’s arguments made in context of discussing evidence).

Neither prosecutor engaged in misconduct during their opening or closing remarks. Polak has not shown that he is entitled to plain error review because he failed to establish that the State’s arguments to the jury resulted in a manifest miscarriage of justice, left unsettled the question of the fundamental fairness of the trial or proceedings, or may have compromised the integrity of the judicial process.

II. Polak’s attorney was not constitutionally ineffective.

The Sixth and Fourteenth Amendments to the United States Constitution, and Article II, Section 24 of the Montana Constitution, guarantee criminal defendants the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984); *Whitlow v. State*, 2008 MT 140, ¶ 10, 343 Mont. 90, 183 P.3d 861. This Court applies the two-pronged *Strickland* test to address IAC claims to determine whether counsel’s performance was deficient and, if so, whether the defendant suffered prejudice as a result. *Whitlow*, ¶ 10.

A. Non-record-based IAC claims are inappropriate for direct appeal.

When IAC is alleged on direct appeal, before reaching the merits of the argument, this Court must first determine if it is appropriate to consider the claim; that is, whether the claim is “record-based.” *Ward*, ¶ 20. This is “because the question of whether counsel’s conduct was based on the exercise of reasonable professional judgment generally demands that [this Court] inquire why counsel acted as alleged” by reviewing a developed court record. *State v. Crider*, 2014 MT 139, ¶ 35, 375 Mont. 187, 328 P.3d 612 (to consider IAC claim on direct appeal, record must reveal “reasoning underlying a counsel’s actions or omissions). The only exception to this rule is if there is no plausible justification for the alleged deficient performance. *Crider*, ¶ 36 (if no legitimate reason for counsel’s actions, why counsel acted is irrelevant).

Polak’s IAC claims are inappropriate for review on direct appeal because the record does not reveal why Rebsom performed the way she did and Polak has not asserted there was no plausible justification for Rebsom’s actions.

Polak relies exclusively on Rebsom’s sentencing memorandum as the basis for his four IAC claims. (Br. at 39-40 (citing Doc. 183).) In her memorandum, Rebsom set forth allegedly “undisputed facts” that she believed supported acquittal and described her surprise that the jury convicted Polak. (Doc. 183; 09/06/19 Tr. at 24-25.) To explain how such an outcome occurred, and with the benefit of

hindsight and post-trial conversations of the jurors, Rebsom then evaluated her performance, concluding that “Looking back at trial, there are things, I as Mr. Polak’s lawyer wish I would have done.” (Doc. 183 at 6-7.)

Polak fails to appreciate Rebsom’s unsworn self-critique is not equivalent to a “developed a record” with which this Court may evaluate her performance. Other than speculating that it was the court’s repeated admonishments that may have caused her to not elicit Polak’s alleged knowledge about Scott’s being an MMA fighter, Rebsom’s memorandum offered no explanations as to “why” she acted/did not act in certain circumstances. Since the record (including Rebsom’s hindsight regrets) lacks explanations for why Rebsom performed as she did, Polak’s IAC claims are not appropriate for direct appeal.

Finally, neither Rebsom’s memorandum nor Polak’s opening brief allege any circumstance where Rebsom was “faced with an obligatory, non-tactical action, for there [was] no plausible justification for defense counsel’s actions.” *Cridler*, ¶ 36. Unlike the trial counsel in *State v. Trull*, 2006 MT 119, ¶ 22, 332 Mont. 233, 136 P.3d 551, Rebsom did not allege in a post-trial sworn affidavit that she had no plausible justification for failing to perform a certain way. *Trull*, ¶ 26 (Court considered IAC claim on direct appeal only because trial counsel averred there was no plausible justification for not asking for continuance; but held performance was not deficient).

Polak's IAC claims are not record-based and are inappropriate for direct review. This Court should deny these claims without prejudice so they could be considered in postconviction proceedings.

Even if this Court reviews one or more of Polak's IAC claims, Polak has failed to demonstrate that Rebsom's performance was deficient and that he was prejudiced as a result.

B. Polak has not established Rebsom was constitutionally ineffective.

Since counsel's performance is presumed constitutionally effective, a person alleging IAC bears the heavy burden of overcoming the strong presumption that counsel's decisions fell within the wide range of reasonable professional conduct. *Whitlow*, ¶¶ 20-21; *Strickland*, 466 U.S. at 689; *State v. Pelletier*, 2020 MT 249, ¶ 38, 401 Mont. 454, 473 P.3d 991 (attorney's performance is "constitutionally deficient only if it 'fell below an objective standard of reasonableness measured [by] prevailing professional norms' under the totality of the circumstances at issue"). Accordingly, the inquiry must be "whether counsel's assistance was reasonable considering all the circumstances" and "every effort must be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Whitlow*, ¶¶ 14-15 (citing *Strickland*, 466 U.S. at 689).

These bedrock principles are why this Court has repeatedly explained that “self-proclaimed inadequacies on the part of trial counsel in aid of a client on appeal do not hold great persuasive value with this Court.” *Garding v. State*, 2020 MT 163, ¶ 16, 400 Mont. 296, 466 P.3d 501. As this Court explained,

Only after a trial and guilty verdict can it be known that “Plan A defense” did not succeed, and raise interest in a “Modified Plan A defense” or an alternative “Plan B defense,” but the *law expressly prohibits such consideration*. Instead of strategic alternatives, we are to consider whether the performance actually rendered by counsel constituted reasonable professional service under the circumstances, with a strong presumption that it did.

Garding, ¶ 22 (internal citations omitted) (emphasis added).

Significantly, Polak offers no analysis of how his trial counsel’s performance was deficient beyond Rebsom’s self-criticisms, which this Court has stated holds little value. Nor has Polak established the second *Strickland* prong by demonstrating there is a reasonable probability that the outcome would have been different but for Rebsom’s four alleged errors. *Pelletier*, ¶ 38; *Strickland*, 466 U.S. at 687.

“A defendant must do more than just show that the alleged errors of a trial counsel ‘had some conceivable effect on the outcome of the proceeding.’” *State v. Dineen*, 2020 MT 193, ¶ 25, 400 Mont. 461, 469 P.3d 122. “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot

be relied on as having produced a just result.” *Dineen*, ¶ 25; *Strickland*, 466 U.S. at 686.

When addressing alleged prejudice, a court must consider the strength of the case against the defendant and the likelihood of success of the actions counsel failed to take. *State v. Henderson*, 2004 MT 173, ¶ 9, 322 Mont. 69, 93 P.3d 1231; *State v. Haldane*, 2013 MT 32, ¶ 37, 368 Mont. 396, 300 P.3d 657 (IAC claim cannot succeed when predicated on counsel’s failure to take an action which, under the circumstances, would likely not have changed the outcome of the proceeding). When considering this prong, it is important to note that Rebsom’s version of “undisputed facts” was not accurate as the State pointed out during the sentencing hearing. (11/21/19 Tr. at 32.)

1. Failing to object during State’s opening and closing remarks

Under the totality of the circumstances, Polak cannot establish that Rebsom’s failure to object or request a mistrial based on proper arguments during the State’s opening and closing arguments was outside the realm of reasonable performance. *Whitlow*, ¶¶ 20-21; *Strickland*, 466 U.S. at 689. As established above, neither prosecutor made improper arguments to the jury that necessitated an objection. And, had Rebsom made objections that lacked merit, she risked drawing unwanted attention to those issues.

Moreover, this Court has refused to hold that defense counsel is obligated to object in all possible scenarios. *Crider*, ¶ 38. “[B]ecause many lawyers refrain from objecting during . . . closing argument, absent egregious misstatements, the failure to object during closing argument . . . is within the ‘wide range’ of permissible professional legal conduct.” *Kills on Top v. State*, 273 Mont. 32, 51, 901 P.2d 1368, 1380 (1995) (citation omitted); *State v. Lacey*, 2012 MT 52, ¶ 28, 364 Mont. 291, 272 P.3d 1288 (since counsel may choose not to object for strategic reasons, “failure to object does not qualify as unreasonable conduct by trial counsel”).

Finally, Polak offers no analysis or support that had Rebsom lodged the objections Polak claims should have been made, that the outcome would have been different. Polak failed to establish either *Strickland* prong concerning alleged ineffectiveness during the State’s opening and closing remarks.

2. Failing to elicit testimony from Polak about Scott’s history as an MMA fighter

Polak alleges Rebsom was ineffective because she did not elicit testimony from Polak that his fear of Scott was justified because he knew Scott had been an MMA fighter. Review of Polak’s testimony reveals that it was not Rebsom’s poor questioning, but rather Polak’s failure to offer that explanation during his testimony. Polak was present for all the open-court discussions about this issue and was fully aware it was up to him to make that assertion; yet Polak chose not to

mention anything about MMA in his testimony. Not only did Polak have the opportunity to mention his knowledge about Scott's history when Rebsom asked him open-ended questions (*see* Tr. at 974-75, 1038), but he also missed his chance during cross-examination (*see* Tr. at 1018-19). Moreover, given the court's clear directive that until Polak stated he knew Scott had been an MMA fighter that that information could not be brought out, Rebsom would not have been permitted to ask a leading question on that issue. Rebsom did not perform deficiently when she questioned Polak.

Polak has also failed to establish how the outcome could have been different had Rebsom asked him different questions. Polak had every opportunity to present his justifiable use of force defense and describe to the jury why he felt he needed to shoot Scott, including his claim that Scott was lunging at him holding a catspaw, but the jury did not accept his version of events. Polak cannot establish that had he told the jury he knew Scott had been an MMA fighter that he would have been acquitted.

3. Inadequate knowledge of the cellphone records

Because Rebsom did not believe she had received the records of Polak's Asus cellphone, Polak asserts that Rebsom should have requested re-dissemination of the discovery. Such a request would have been met with objection; and rightly so. Prevailing professional norms would not expect Rebsom to believe the

evidence she obtained from prior counsel was not complete. *Strickland*, 466 U.S. at 691 (“counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary”).

When Rebsom believed she had not received the Asus cellphone records, she immediately requested them from the State. Rebsom then reviewed the records, determined they were not detrimental, and while she declined the offer of a continuance, she maintained her objection to alleged late discovery. Under the totality of the circumstances, Rebsom’s performance in this regard did not “[fall] below an objective standard of reasonableness.” *Pelletier*, ¶ 38.

Polak also fails to establish how the outcome would have been different had Rebsom either obtained an entirely new set of discovery or asked for a continuance to review the Asus records. The only information that came out about Polak’s second phone was when it was activated. Polak’s argument that Rebsom should have asked for a continuance due to the alleged late disclosure of the Asus records is misplaced since it was the ZTE records that established Polak lied about going to the shooting range. (Br. at 40-41.) Rebsom confirmed she had had those records during the trial.

Polak also faults Rebsom for not “properly vetting” Kramer to testify about the location records/data. (*Id.*) However, the record reflects Kramer did possess the training and experience to testify about the location records and Polak offers

nothing to the contrary. Thus, Polak cannot establish how he was prejudiced by Rebsom not challenging Kramer's qualifications.

Even if, for the sake of argument, Rebsom should have discovered that the ZTE records established Polak had not been to the shooting range, she could not have prevented the State from impeaching Polak with his testimony from the first trial where he proposed the same justification for why he had his gun with him when he testified that he went for a test drive and did target practice with his Glock earlier that day. (*See* 11/19/15 Tr. at 769-70.) Polak cannot establish that had Rebsom performed differently as to the cellphone records that the outcome would have been any different.

4. Did not sufficiently explore plea negotiations during trial

The court discussed the issue of plea offers in February 2019, and on the first day of trial. (*See* 2/21/19 Tr.; Tr. at 47-55.) The court learned that before the first trial, the State made a formal offer that included an amended charge, but it was declined. (*Id.*) After the case was remanded, the State extended roughly the same offer, but that was also declined. (*Id.*) The week before trial, Polak extended a formal written counteroffer, but then withdrew it. (*Id.*)

Without the State present, the court confirmed that the plea offers for an amended charge had been extended to Polak and that he had a chance to discuss those offers and counteroffer with Rebsom. (Tr. at 50-55.) The court explained

the maximum sentences for deliberate homicide as well as mitigated deliberate homicide and negligent homicide. (*Id.*) Polak explained his involvement in the plea negotiations and told the court that when the court granted his motion in limine and prohibited evidence about the criminal endangerment details, he wanted to withdraw his counteroffer. (*Id.*) Polak believed the court's order "provided an opportunity to get the truth out in this trial, that without it being obfuscated by the events of the 30th, and that I feel like I was justified in what I had to do that night. And I'm willing to put that up before a jury of my peers and have them decide." (*Id.* at 54-55.) Notably, this discussion with the court took place within minutes of the court explaining that the State could only bring out that when Polak encountered police on April 30th he "attempted to evade apprehension and was uncooperative." (Tr. at 24.)

Rather than rely upon his own statement that he felt he was justified in shooting Scott and he wanted to go to trial, Polak improperly relies upon Rebsom's unsworn version of events and self-criticisms which this Court has stated holds little value. *Garding*, ¶ 22. Without the development of the record, consideration of this IAC claim is improper. Nonetheless, even if this claim is considered, Polak has failed to establish that Rebsom was ineffective in handling plea negotiations.

First and foremost, Polak fails to demonstrate how he was prejudiced because nothing in the record supports that the State would have accepted an offer

from the defense at either point Rebsom identified (*i.e.*, when she claimed she had “misunderstood” the court’s ruling about the admissibility of evidence surrounding Polak’s arrest or after the court rejected the negligent homicide jury instruction). In fact, it is highly unlikely the State would have engaged in negotiations at such late junctures in the trial. Thus, Polak cannot establish the *Strickland* prejudice prong for this IAC claim.

Nor does the record establish how Rebsom’s performance was deficient. Within minutes of the court explaining that the State could tell the jury he evaded apprehension and was uncooperative on April 30th, Polak confirmed with the court that he wanted to go to trial. Polak’s decision cannot be blamed on Rebsom’s later claim she “misunderstood” the court’s ruling.

CONCLUSION

Polak’s deliberate homicide conviction should be affirmed.

Respectfully submitted this 10th day of June, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,958 words, excluding certificate of service and certificate of compliance.

/s/ *Katie F. Schulz*

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CERTIFICATE OF SERVICE

I, Kathryn Fey Schulz, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 06-10-2021:

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