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.

BRIEF OF APPELLEE

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

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STATEMENT OF THE ISSUES

1. Whether Miller in the trial court below or before this Court properly fulfilled his burden of proving the prosecution's peremptory challenge during voir dire was improperly based upon race under *Batson*.[1]

2. Did Miller's trial counsel provide ineffective assistance by withdrawing the *Batson* challenge?

3. Should this Court decline to exercise plain error review of Miller's unpreserved claim of prosecutorial misconduct?

STATEMENT OF THE CASE

Appellant Beau Herman Miller (Miller) appeals his conviction of one count of assault with a weapon entered by Cascade County District Court, the Honorable John A. Kutzman, presiding. (D.C. Doc. 82.) This case began when Miller rode and stood up through the sunroof of his Mercury Cougar in the daylight hours of June 26, 2018, in Great Falls, repeatedly yelling at, while pointing a handgun toward, two occupants of a white truck whom Miller, with his wife driving, chased at excessive speeds through town. (4/29/19 Trial Tr. [Tr.] at 423, 477, 479:9-14, 568; State's Ex. 1, Doug Rogers' Dep. at 19:14, 23:7; State's Ex. 17.) Once law enforcement stopped Miller at gunpoint, a warrant-search of Miller's vehicle

[1] *Batson v. Kentucky*, 476 U.S. 79 (1986).

revealed a pistol, less than 60 grams of marijuana, and a marijuana grinder. (*Id*. at 589-92.) The jury ultimately convicted Miller of one count of assault with a weapon against one of the two occupants of the white truck, Brandon Campbell, but acquitted Miller of assaulting the other occupant, Jolene Ehnot. (*Id*. at 733.) The court sentenced Miller to nine years at Montana State Prison. (D.C. Doc. 82.)

STATEMENT OF THE FACTS

Around 4:00 p.m. on June 26, 2018, Beau Miller and his wife Amber drove their Mercury Cougar in Great Falls and chased a white truck near the intersection of 4th Street South and 10th Avenue South. (Tr. at 568.) While Amber drove, Miller stood upright through the car's sunroof, repeatedly yelling, "Pull the fuck over," and pointing his .45 ACP Hi-Point handgun at the individuals in the truck. (*Id*. at 423, 477, 479:9-14; State's Ex. 1, Rogers' Dep. at 19:14, 23:7; State's Ex. 17.)

Miller's two victims driving in the white truck, a 2002 GMC Sierra, were Brandon Campbell and his fiancée, Jolene Ehnot. (*Id*. at 528.) Campbell was on 10th Avenue South when he saw an African American male standing up through the sunroof of a tan Mercury Cougar waving a gun at them and at one time pointing the gun at Campbell's head. (*Id*. at 530:13.) Ehnot called police dispatch. (*Id*. at 530.) Campbell said he was scared while Miller was chasing him, and he

drove at excessive speeds to get away from him (*id.* at 532:17), believing Miller was going to shoot him and Ehnot. (*Id*. at 533.) Campbell and Miller were previously acquainted; Campbell had met Miller in prerelease six years before. (*Id*. at 535.) One month before Miller's gun chase, Campbell had run into Miller at a convenience store, where Miller asked him to come over to his house to check out some audio speakers in Miller's car, which Campbell did, without hostility or antagonism of any sort. (*Id*.)

Ehnot told the jury Miller had waved his gun at her and she had seen him point his gun at Campbell's head. (*Id*. at 427-28.) Ehnot's call to 911 was published to the jury. (*Id*. at 429.) Ehnot described being hysterically frightened. (*Id*. at 428.)

Officer Kevin Supalla of the Great Falls Police Department was in the area and saw Miller's car behind Campbell's truck northbound on 9th Street South. (*Id*. at 569-70.) The two vehicles pulled into a credit union parking lot. (*Id*. at 570.) Supalla stopped, quickly exited his patrol car, unholstered his service pistol, and pointed his gun at the occupants of the Mercury—Miller and his wife. (*Id*. at 571.) As Supalla walked past the Millers' car, he could smell an overheated engine, making him suspect the Mercury had been chasing the white truck for some time. (*Id*. at 573.) Supalla requested backup and waited. (*Id*. at 572.)

Campbell's white truck then began to leave the area. (*Id*. at 575.) Other responding officers stopped Campbell's truck. After the police cleared Miller and Amber from the Mercury, Supalla saw, in plain view, a black semi-auto Hi-Point pistol on the backseat floorboard behind the driver's seat. (*Id*. at 578.) Supalla also smelled marijuana coming from inside the car as he stood near the passenger-side window. (*Id*.) Supalla heard Miller state he was just trying to protect his family, a statement that seemed odd to Supalla because it appeared counterintuitive. (*Id*. at 590.)

Two other eyewitnesses saw Miller chase Campbell. Gene Meek told the jury he had heard someone loudly shouting, "Pull over, motherfucker." (*Id*. at 404.) Meek observed a black male hanging out of a gold or beige car chasing a white truck, which was trying to get away. (*Id*. at 404-05.) Meeks saw the male banging one hand on the top of his car and holding what Meeks assumed was a gun in his right hand. (*Id*.)

The other eyewitness, Doug Rogers, said he called 911 after seeing a black male hanging out of a gold or beige car, angrily wielding a handgun in his right hand and yelling, "Pull the fuck over," while the car was chasing a white truck. (Tr. at 423, 477, 479:9-14: State's Ex. 1, Rogers' Dep. at 16:14-19, and 23:7; State's Ex. 17.)

After Supalla stopped Miller in the parking lot, Miller was mirandized, and he agreed to answer questions. (*Id*. at 597-98.) Miller said he had seen a male whom he had previously known as "B" or Brandon driving in the area. (*Id*. at 586:24; Ex. 23 Video DVD, at minute 02:30-02:35, 03:15.) Miller claimed: he wanted to protect his family; Campbell had threatened his family; he wanted to fight Campbell and settle things like "men in the streets"; Campbell had stolen money from him about a month before; and "it just escalated from there." (*Id*. at 00:00 to 00:11, 03:15, 04:45.) Miller confessed to Supalla that he had held the gun in the car, but said the gun had not come out of the car at any time, and he never pointed it at anyone. (*Id*. at 06:50-06:56, 07:05.) Miller also said he had told his wife what to do. (*Id*. at 21:22.) Miller said: "I know we're both going to jail." (*Id*. at 04:00.) Supalla asked why Miller thought he and his wife would be going to jail. (*Id*. at 04:00-04:15.) Miller replied, "What do you mean? There's a damn gun in that car." (*Id*.)

Testifying on his own behalf, Miller told the jury he had not pointed his gun at Campbell. (Tr. at 640:18.) He just wanted Campbell to pull over so they could fight and handle their differences "like men in the streets." (*Id*. at 634:8-23.) Miller admitted that after chasing Campbell's truck, when Campbell would not pull over, Miller pulled the gun out, but he asserted he never showed it to anyone. (*Id*. at 639.)

SUMMARY OF THE ARGUMENT

***Batson* Challenge**. The only *Batson* prong at issue in this appeal is Step 3—whether Miller established purposeful discrimination through the prosecutor's use of peremptory challenges. This Court should hold that Miller's abandonment in the trial court of any attempt to fulfill his Step 3 burden bars consideration by this Court of his newly raised arguments against the prosecutor's facially race-neutral explanations. In any event, his arguments are meritless. Even if this Court were to examine the issue further, the prosecution's Step 2 explanations sufficed to foreclose the *Batson* claim. Further, defense counsel agreed that venireperson Aravjo-Costa should not be on the jury, and defense counsel all but vouched for the prosecutor's credibility and lack of racial motivation.

IAC. Miller fails to prove either element of his nonrecord-based IAC claim. Clear record references show Miller's trial counsel acted with deliberation and consciously researched law governing *Batson*, and on such sufficient additional facts he solicited from Aravjo-Costa, to formulate a tactical reason that, with Miller's personal consent, Aravjo-Costa should not be on the jury.

Prosecutor's argument. This Court should decline to exercise plain error review of Miller's unpreserved claim that the prosecutor committed misconduct in closing arguments by commenting on the credibility of the trial witness and Miller. A threshold inquiry into the claim shows that the prosecutor was simply

commenting on conflicts and contradictions in their respective testimonies and summarizing the evidence, testimony, and instructions. The prosecutor did not offer her own personal opinions about witness testimony or invade the province of the jury. Even still, Miller strategically decided to not object to any of the prosecutor's statements and instead responded to each of the prosecutor's contentions in turn; thus, there is no manifest miscarriage of justice, and plain error review is unwarranted. Miller received a fair and impartial trial and was not prejudiced by the prosecutor's statements.

ARGUMENT

I. Miller has failed to show the prosecutor's use of a peremptory challenge to strike Venireperson Ione Aravjo-Costa violated the principles of *Batson v. Kentucky*.

A. Standard or review and applicable law

When considering a *Batson* challenge, this Court will defer to the trial court's findings of fact unless they are clearly erroneous, and will review the trial court's application of the law de novo. *State v. Ford*, 2001 MT 230, ¶ 7, 306 Mont. 517, 39 P.3d 108. When considering a trial court's ruling on a challenge whether a litigant has exercised their use of peremptory challenges in a discriminating manner, this Court will defer to the trial court's findings of fact, unless clearly

erroneous, and will review the trial court's application of the law de novo. *State v. Barnaby*, 2006 MT 203, ¶ 47, 333 Mont. 220, 142 P.3d 809, citing *Ford*, ¶ 7.

In *Batson*, the United States Supreme Court established the rule that, in a criminal case, the state cannot utilize its peremptory challenges to remove prospective jurors on the basis of race. The Court held that purposeful racial discrimination by the government in the jury selection process was a violation of the Equal Protection Clause of the Constitution. *Batson*, 476 U.S. at 89.

The Court set out a three-pronged procedure for the trial court to use when determining whether a violation has occurred. First, the defendant must make a prima facie case of purposeful discrimination. Second, the State must provide race-neutral explanations for its peremptory strikes and, third, the trial court must then determine whether the defendant has established purposeful discrimination. *Batson*, 476 U.S. at 97-98 (as discussed in *Ford*, ¶ 16). This Court adopted the tri-part test in *Ford*, as discussed in *State v. Falls Down*, 2003 MT 300, ¶ 45, 318 Mont. 219, 79 P.3d 797.

B. During voir dire, Miller abandoned his burden of establishing purposeful discrimination after the prosecutor provided a race-neutral explanation.

Here, defense counsel formally made his *Batson* challenge at a sidebar (Tr. at 359:16) before the court swore in the 12 jurors and dismissed the venire. Thus, it appears that under the circumstances of this case defense counsel did make a

timely *Batson* Step 1 challenge. As shown in the argument that follows, however, defense counsel then abandoned his Step 3 burden entirely.

1. *Batson*'s Step 1 was mooted.

The single fact that Aravjo-Costa was the lone minority juror was insufficient for Miller's counsel to establish a prima facie case. *See United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994) (holding that a prima facie case is not shown by the single fact of striking the lone minority juror, even if there is no obvious reason for the strike in the record.) More crucially, whether or not Miller made a prima facie showing is mooted once the proponent of the strike offers a race-neutral reason for the peremptory challenge. *Hernandez v. New York*, 500 U.S. 352, 359 (1991) (plur. opp'n); *State v. Falls Down*, 2003 MT 300, ¶ 47, 318 Mont. 219, 79 P.3d 797. The State submits, however, for reasons discussed more fully below, and notwithstanding the mootness of Step 1, that it is important to note defense counsel's statements where he initially raised his *Batson* claim:

> But it's clearly a violation of equal protection because it's clear no matter how you try and slice it up or square the circle, it's based on race. I understand the State is going to want to say that—or did say that it's because this lady is very uncomfortable, but—and that she does not want to sit on this jury and so forth and so on.

(Tr. at 360:3-9.)

2. *Batson*'s Step 2 burden was met by the prosecutor when she unquestionably offered race-neutral reasons.

"[I]f the requisite [prima facie] showing has been made [by the defendant], the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question." *Hernandez*, 500 U.S. at 358-59. Even before Miller formally raised his *Batson* challenge, the prosecutor explained she was going to use a peremptory challenge to strike Venireperson Aravjo-Costa. (Tr. at. 314:5-7) When defense counsel initiated the Step 1 *Batson* challenge, the prosecutor explained her reasoning:

> Before the Court was a juror who specifically brought to the Court's attention that she could not be fair. She made the statement in chambers in front of the Court, and I quote because I wrote this down, "I will be not fair."
>
> 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.

(*Id*. at 364-65.)

The second part of the *Batson* process, requiring the proponent of the strike to offer a race-neutral reason for the peremptory strike "does not demand an explanation that is persuasive, or even plausible," as long as the explanation was facially race-neutral. *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995) (per curiam).

"Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.* Aravjo-Costa expressly stated she could not be fair. Based on bad experiences Aravjo-Costa had had in being a Dutch native and being discriminated against, and moreover, expressly affirming she could not be fair to the defendant or the State, the prosecutor believed Aravjo-Costa would not be an impartial juror. (Tr. at 365-66; *see also id*. at 366:2-7: "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.'").

The prosecutor's race-neutral explanations reflect the core purpose of peremptory challenges. *See J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 147 (1994) (O'Connor, J., concurring) (recognizing the peremptory challenge exists today to allow for the selection of impartial juries: "'Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of eliminat[ing] extremes of partiality on both sides, thereby assuring the selection of a qualified and unbiased jury.'") (quoting *Holland v. Illinois*, 493 U.S. 474, 484 (1990) (citations omitted)); *see*, *e.g.*, *People v. Richie*, 635 N.Y.S.2d 263, 266 (App. Div. 1995) (stating proffered explanations based on a juror's familial relationship to a corrections officer or prior jury service are not facially pretextual).

The trial court implicitly found that the State satisfied its Step 2 burden, most manifestly when defense counsel withdrew his *Batson* objection entirely after questioning Aravjo-Costa further. (*See* Tr. 381-82; *see also id.*: Court: "All right. I am satisfied."). *See Saiz v. Ortiz*, 392 F.3d 1166, 1180 (10th Cir. 2004) (the trial court's finding of no discrimination may be implicit); *Purkett*, 514 U.S. at 768-69 (per curiam) (the denial of objections is an implicit finding of lack of discriminatory intent). Miller's counsel consulted with Miller directly, and counsel withdrew not only his *Batson* challenge but any objection to the State's peremptory strike of Aravjo-Costa. (*Id*. at 382.) Plainly and strategically, Miller did not want Aravjo-Costa sitting on his jury. (*See id*. at 382:6-11.)

3. *Batson*'s Step 3 burden, abandoned by Miller in the trial court, should bar consideration by this Court of Miller's new-found assertions on appeal.

a. Defense counsel made no timely rebuttal or evidentiary effort to meet his Step 3 burden.

After the State offered its race-neutral explanation, the *Batson* challenge then moved to Step 3, where Miller needed to produce evidence of intentional discrimination. *See Purkett*, 514 U.S. at 768 ("[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike."). Miller, however, only withdrew his *Batson* challenge. (Tr. at 381-82.)

There is no doubt—and Miller's appellate counsel does not attempt to argue otherwise—that the trial judge credited the race-neutral explanations proffered by

the prosecution to defend its strike. Having folded on his *Batson* challenge, defense counsel did not attempt, for example, to compare juror responses to show evidence of discrimination, as allowed under *Miller-El v. Dretke*, 545 U.S. 231 (2005), and *Snyder v. Louisiana*, 552 U.S. 472 (2008), nor give any other example of purposeful discriminatory behavior by the prosecutor. Therefore, this Court should not be persuaded that Miller made any attempt to provide further evidence on which the trial court could determine the prosecutor's peremptory strike was discriminatory.

b. Miller's Step 3 challenge is untimely and should be barred from consideration in this Court.

It was incumbent upon Miller to make a full record at Step 2 or Step 3 of a *Batson* hearing. *See State v. Parrish*, 2005 MT 112, ¶ 15, 327 Mont. 88, 111 P.3d 671 ("It remains the duty of the party seeking to raise a *Batson*-type claim, however, to come forward in a timely manner and follow the clear dictates of our discussion in *Ford*.") Because defense counsel produced no evidence of purposeful discrimination under Step 3 of the *Batson* challenge, and, thus, did not allow the trial court to rule more fully upon the issue, the situation is similar to that under a traditional *Batson* challenge, as in *Ford*, ¶ 27, where defense counsel failed to make a *Batson* challenge until after the jury is sworn.

This Court has stressed that effective objections must be timely. *See State v. McWilliams*, 2008 MT 59, ¶ 45, 341 Mont. 517, 178 P.3d 121 (stating: "To be

timely, an objection must be made as soon as the grounds for the objection become apparent."). The timeliness requirement should apply with no less importance under *Batson*'s three-step process. Specifically, defense counsel could advise the trial judge that the judge has not yet ruled on a particular challenge, or seek from her an express credibility determination with respect to the prosecutor's race-neutral explanation, or request a relevant clarification—whichever the particular circumstances demand. Indeed, one federal circuit court of appeals has found defense counsel's silence to be an important consideration in determining whether relief should be granted. *See United States v. Perez*, 35 F.3d 632, 637 (1st Cir. 1994) ("[I]f defense counsel felt that the trial court had failed to actually assess the prosecutor's credibility or had made a precipitous or erroneous judgment, it should have pointed this out. . . . Since defendant failed to pursue the matter further at voir dire, upsetting the judgment for lack of a more detailed explanation by the trial court in this case would make little sense."); *see also Galarza v. Keane*, 252 F.3d 630, 643 (2d Cir. 2001) (Walker, C.J., dissenting) ("A few choice words from [defense] counsel, who properly should bear responsibility for this debacle, would have saved years of direct and collateral review by avoiding this problem altogether.").

If Miller had made a timely rebuttal, the trial court could have conducted evidentiary proceedings to determine if discrimination existed, for example, by

making *Miller-El/Snyder* side-by-side comparisons. However, Miller did not provide the trial court with the required proof, but simply gave up any effort on his *Batson* challenge, and essentially agreed with the prosecutor.

Having failed to meet his Step 3 burden in the trial court, Miller should not be permitted to raise objections analyzed for the first time here on appeal. *Cf. Snyder*, 552 U.S. 483 ("[A] retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial. In that situation, an appellate court must be mindful that an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable."). Therefore, the trial court's acceptance of the prosecutor's explanation for striking Venireperson Aravjo-Costa must be upheld.

c. This Court's admonition that trial courts fully develop reviewable records is distinguishable based on Miller's positions in the trial court.

This Court has admonished trial courts to "develop fully a record for review—a record that includes all relevant facts and information relied upon by the trial court to render its decision, as well as a full explanation of the court's rationale." *Barnaby*, ¶ 52 (*citing Ford*, ¶ 18). The Court's admonition is not applicable under the circumstances here, given that Miller does not contend, as the appellant did in *Barnaby*, ¶ 51, that the district court improperly applied *Batson*'s

Step 3. Miller asserts the record was inadequate for the trial judge to decide Step 2. (Opening Br. at 11: "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.") Further, Miller blames the trial court for not making an adequate record nor any inquiry on Step 3 because—and not merely in spite of the fact—Miller's counsel withdrew the *Batson* challenge.

> However, Miller's counsel subsequently stated that he was withdrawing the *Batson* challenge to [the] 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.

(Opening Br. at 25.) Miller thus acknowledges that withdrawal of his *Batson* challenge led the trial court to stop making any further inquiries. In *State v. Micklon*, 2003 MT 45, ¶ 10, 314 Mont. 291, 65 P.3d 559, the Court reiterated that "'[it] will not put a district court in error for an action in which the appealing party acquiesced or actively participated.'" *Id.* (declining to consider whether interest could accrue on the unpaid portion of Micklon's fines) (quoted case omitted). If, as Miller argues, his withdrawing the *Batson* challenge led the trial court to commit error by not more fully developing a record or proceeding to Step 3, then his counsel's own acts continued this alleged error. Moreover, Miller did not object to the court's supposed error in not developing the record further notwithstanding his withdrawal. *See State v. Smith*, 2005 MT 18, ¶ 10, 325 Mont. 374, 106 P.3d 553 (a

party waives the right to appeal an alleged error by a district court when the appealing party acquiesced in, actively participated in, or did not object to the error.)

The record in the instant case suffices for this Court to dispose of Miller's resurrected *Batson* challenge. The judge need not have decided Step 3. The trial court reasonably accepted, without further examination, the prosecutor's uncontradicted, common sense justifications. *Cf. People v. Reynoso*, 31 Cal. 4th 903, 943, 74 P.3d 852, 879 (2003) (stating "where the unexamined race-neutral excuse belies common sense or is contradicted by defense counsel, we cannot presume that the prosecutor has exercised the peremptory challenge in a constitutional manner").

The trial court was in the best position to evaluate the demeanor and credibility of the prospective juror and the prosecutor—along with defense counsel's concession that Aravjo-Costa would not make a suitable juror for either party, and his concession about the prosecutor's non-discriminatory intent. While the trial judge did not render its conclusion *in haec verba*, he was not required to do so. *See Galarza*, 252 F.3d at 640 n.10 (noting the trial court does not have to give a "talismanic recitation of specific words in order to satisfy *Batson*" and that a "general crediting of the prosecutor's race-neutral explanations" will typically suffice).

Miller should not be permitted to contradict his *Batson* challenge withdrawal or his acquiesce and silence about further record development; Miller should be held to his trial court position. *See, e.g.*, *State v. James*, 2010 MT 175, ¶ 26 n.3, 357 Mont. 193, 237 P.3d 672 (noting that appellant in his reply brief argued that the reason for striking the juror was not race-neutral, without acknowledging or distinguishing the concession made in the opening brief that the prosecution provided a race-neutral reason: "This . . . is unacceptable appellate practice and a violation of briefing obligations under M. R. App. P. 12. We hold [the appellant] to the concession made in his opening brief."); *see also, generally, Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 600-01 (9th Cir. 1996) (discussing judicial estoppel doctrine that precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position).

C. Plain error review is inapplicable in view of Miller's *Batson* challenge withdrawal and acquiescence to the prosecutor's explanation.

Where a defendant has failed to raise an objection, this Court will not review the claim unless the defendant meets his burden to demonstrate that the claim requires application of the plain error doctrine. *State v. Gray*, 2004 MT 347, ¶¶ 16-22, 324 Mont. 334, 102 P.3d 1255. This Court may review an unpreserved claim alleging a violation of a fundamental constitutional right under the common

law plain error doctrine where the defendant establishes failing to review the claimed error 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. Taylor*, 2010 MT 94, ¶¶ 12-13, 356 Mont. 167, 231 P.3d 79. An error is plain only if it leaves one "firmly convinced" that some aspect of the trial, if not addressed, would result in a manifest miscarriage of justice, call into question the fairness of the trial or proceeding, or compromise the integrity of the judicial process. *Taylor*, ¶ 17. This Court invokes plain error review "sparingly, on a case-by-case basis, according to narrow circumstances, and by considering the totality of the circumstances." *State v. Williams*, 2015 MT 247, ¶ 16, 380 Mont. 445, 358 P.3d 127.

Miller has not met his burden to demonstrate that his *Batson* claim should be reviewed under the plain error doctrine. Miller, through his counsel, agreed that allowing Aravjo-Costa to serve on the jury would be injurious to Miller: she would likely vote to convict Miller. (Tr. 382:11.) Although Miller proposed the 3-step *Batson* inquiry, he later withdrew it.

By withdrawing his *Batson* challenge, Miller waived his objection to the State's peremptory strike of Aravjo-Costa, and he may only obtain review of his claim by demonstrating that he is entitled to review under the plain error doctrine. *See Turk v. Turk*, 2008 MT 45, ¶ 17, 341 Mont. 386, 177 P.3d 1013 (stating that

parties to a civil case waived their objection to the jury instructions when they withdrew their proposed instructions); *Gray*, ¶¶ 16-22 (declining to apply plain error review where defendant asked for the language he was objecting to on appeal). Miller acquiesced in the alleged error. In *Gray*, this Court declined to apply plain error review where a defendant had acquiesced in the error that he alleged on appeal. *Gray*, ¶¶ 20-22. This Court should similarly decline to exercise plain error review of Miller's *Batson* claim.

II. The appeal record does not show that defense counsel was ineffective for withdrawing the *Batson* challenge.

A. Standard of review and applicable law

This Court considers IAC claims on direct appeal only if they are record-based. *State v. Ugalde*, 2013 MT 308, ¶ 28, 372 Mont. 234, 311 P.3d 772 (citing *State v. Aker*, 2013 MT 253, ¶ 22, 371 Mont. 491, 310 P.3d 506). When reviewable, such claims present mixed questions of law and fact that are reviewed de novo. *Id.*

The Sixth and Fourteenth Amendments to the United States Constitution and Art. II, § 24, of the Montana Constitution guarantee a defendant's right to the effective assistance of counsel. *Hammer v. State*, 2008 MT 342, ¶ 10, 346 Mont. 279, 194 P.3d 699. To succeed on a claim that counsel was ineffective, a defendant must demonstrate both: "(1) that counsel's performance was deficient, and (2) that

counsel's deficient performance prejudiced the defense." *Whitlow v. State*, 2008 MT 140, ¶ 10, 343 Mont. 90, 183 P.3d 861 (citing *State v. Racz*, 2007 MT 244, ¶ 22, 339 Mont. 218, 168 P.3d 685); *see Strickland v. Washington*, 466 U.S. 668, 687 (1984). To satisfy the second prong of *Strickland*, a defendant "must demonstrate that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Morgan*, 2003 MT 193, ¶ 9, 316 Mont. 509, 74 P.3d 1047 (quoting *Strickland*, 466 U.S. at 694). The probability must be high enough to undermine confidence in the outcome. *Hammer*, ¶ 11.

B. Counsel's failure to prosecute the *Batson* objection was not IAC, particularly shown by Miller's personal agreement with Mr. van der Hagen's chosen tactic that was announced following his legal research and follow-up examination of Aravjo-Costa.

Where an IAC claim is predicated on a failure to object at trial, an IAC petitioner such as Miller must show that an objection would have been proper and would have been sustained. *State v. Jenkins*, 2001 MT 79, ¶ 11, 305 Mont. 95, 23 P.3d 201. Miller, in his opening brief, presents various arguments that Mr. van der Hagen, contrary to the actions he took in the trial court, had in fact sound legal bases from which a *Batson* objection (in all three stages) could have been based. Miller's appellate arguments hold no water because Miller overlooks the significance of his trial counsel's actions shown in the record.

The ultimate and "decisive question" under *Batson* is whether the prosecutor's explanations "should be believed." *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003). When questioning Aravjo-Costa further, Miller's counsel solicited a clear admission from Aravjo-Costa that her past traumatic experiences made her unable to be fair to either Miller or the State. (Tr. 379:13-17.) This testimony comported with, and therefore verified, the prosecutor's explanation; more significantly, defense counsel's explanation of why Miller personally did not want Aravjo-Costa on his jury was the same credible, non-discriminatory demeanor-based explanation. (*Id*. at 382:6-11: Defense counsel, implicitly noting her emotional fragility, said "she will simply go along with convicting . . . she would not exercise independent judgment required by law, and she would convict.") Miller and his counsel's reason for excluding Aravjo-Costa mirrored, and thereby confirmed that the prosecutor's explanation was credible.

Moreover, strategic choices made after thorough investigation of law and facts relevant to plausible options are generally unchallengeable. *Strickland*, 466 U.S. at 690. In assessing the reasonableness of Mr. van der Hagen's decision to affirm that Aravjo-Costa should be stricken, this Court must be "highly deferential" to avoid "the distorting effects of hindsight," and "indulge a strong presumption that [his] conduct falls within the wide range of reasonable

professional assistance." *Williams v. Woodford*, 384 F.3d 567, 610 (9th Cir. 2002), quoting *Strickland*, 466 U.S. at 689.

Here, the record shows Mr. van der Hagen researched the case law not once but twice. (Tr. at 359:11-12, 374:5-12, 380:18.) He stated that he wanted to find this Court's most recent *Batson* pronouncement (*id*. at 374:11), and, when conducting additional examination of Aravjo-Costa (*id*. at 376-80), he consulted with and obtained express concurrence from Miller. (*Id*. at 382:7.) These acts demonstrate Mr. van der Hagen's decision was informed and objectively reasonable. *Cf. Cox v. Donnelly*, 387 F.3d 193, 198 (2d Cir. 2004) ("[A] strategic decision is a 'conscious, reasonably informed decision made by an attorney with an eye to benefitting his client.'"). As shown, Mr. van der Hagen's plain, tactical reasoning cannot be second-guessed. *See Gallo v. Kernan*, 933 F.Supp. 878 (N.D. Cal. 1996) (record showed tactical reason not to impeach crying assault victim witness with prior inconsistent statement, noting that impeachment is a matter of trial tactics according to *Gustav v. United States*, 627 F.2d 901, 906 (9th Cir. 1980)).

Finally, Miller's own personal assessment, in and of itself, was a dispositively debilitating reason why trial counsel would not and could not pursue the *Batson* challenge further; procedurally, as well as substantively, it was going nowhere. *Cf. Stankewitz v. Woodford*, 365 F.3d 706, 720 n.7 (9th Cir. 2004) ("An

attorney's performance is not deficient where . . . it reflects a reasonable strategic choice that aligns with his client's wishes."). While this record does not show the full context of Mr. van der Hagen's off-the-record conversation with Miller about Aravjo-Costa, there may exist additional facts pointing to supplementary reasons why Miller agreed to Mr. van der Hagen's expressed tactic. The Supreme Court has warned against second-guessing counsel's decisions, considering counsel's intimate and outside-of-the-record knowledge of a case:

> Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence.'

Harrington v. Richter, 562 U.S. 86, 105 (2011), citing *Strickland*, 466 U.S. at 689. Mr. van der Hagen's representation could not have been deficient. *Strickland*, 466 U.S. at 687-88 (no obligation to raise meritless arguments on a client's behalf).

Lastly, with respect to the *Strickland* prejudice prong, Miller's expression of satisfaction with his jury (directly inferable from his dissatisfaction with having Aravjo-Costa serve on his jury), is toxic to his claim of prejudice. *See Gantt v. State*, 241 Md. App. 276, 209 A.3d 812, 829-30 (2019) (IAC claimant protested the State's use of the peremptory strike, but happily accepted the jury it produced). Miller waived the prejudice prong, if not his IAC claim *in toto*, because his counsel

did what Miller believed should have been done, which was to select a jury that excluded Aravjo-Costa. *See id*.

In sum, because no substantial reasons existed for pursuing a *Batson* challenge, and in fact, there is express evidence showing that Miller did not want Venireperson Aravjo-Costa on his jury, no basis exists for Miller to assert on appeal that his counsel should not have withdrawn his *Batson* challenge.

III. This Court should decline to exercise plain error review of Miller's unpreserved claim of prosecutorial misconduct.

A. Standard of review and applicable law

This Court generally will "not address issues of prosecutorial misconduct pertaining to a prosecutor's statements not objected to at trial." *State v. Ugalde*, 2013 MT 308, ¶ 27, 372 Mont. 234, 311 P.3d 772 (citing *State v. Aker*, 2013 MT 253, ¶ 21, 371 Mont. 491, 310 P.3d 506; *State v. Longfellow*, 2008 MT 343, ¶ 24, 346 Mont. 286, 194 P.3d 694). However, this Court may review such issues under the plain error doctrine. *Aker*, ¶ 21 (citations omitted). The decision to invoke plain error is discretionary. *Id*.

Prosecutorial misconduct may be grounds for reversal of a conviction "if the conduct deprives the defendant of a fair and impartial trial." *State v. Walton*, 2014 MT 41, ¶ 13, 374 Mont. 38, 318 P.3d 1024. But this Court will "not presume prejudice from the alleged prosecutorial misconduct; rather, the defendant must show that the argument violated his substantial rights." *Aker*, ¶ 24 (quotation marks

and citation omitted). When reviewing claims of prosecutorial misconduct, the alleged improper statements must be considered in the context of the entire argument. *Aker*, ¶ 24.

This Court has explained that an attorney invades the province of the jury and engages in improper behavior when he characterizes the defendant or witnesses as liars or offers personal opinions on a witness's credibility. *Aker*, ¶ 26. But it "is proper 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." *Id.* (quotation marks and citation omitted). Similarly, "comment is appropriate 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 in the instructions to the jury." *Aker*, ¶ 27 (quotation marks and citation omitted).

B. This Court should decline to exercise plain error review.

Miller argues that the prosecutor's comments provided "opinion[s] of Miller's guilt [that] pervaded her closing argument statements and denied Miller a fair trial." (Opening Br. at 32.) Miller concedes his counsel never objected to the

prosecutor's comments.[2] For the following reasons, this Court should decline to exercise plain error review.

When a prosecutorial misconduct argument is made for the first time on appeal, this Court first "determine[s] whether the defendant's fundamental constitutional rights have been implicated." *State v. Ritesman*, 2018 MT 55, ¶ 21, 390 Mont. 399, 414 P.3d 261 (citation omitted). Even then, this Court "will not invoke the plain error doctrine to reverse a conviction when 'the alleged error did not result in a miscarriage of justice, raise a question as to the fundamental fairness of the proceedings, or compromise the integrity of the judicial process.'" *Id.* (citation omitted.) Miller has not met his burden to firmly convince this Court that failure to reach the merits of his prosecutorial misconduct claim would result in a manifest miscarriage of justice.

This Court has repeatedly refused to conduct plain error review of a prosecutor's comments regarding witness credibility, "even in cases where [this Court has] concluded that the comments were improper." *Aker*, ¶ 29. For example, in *State v. Lindberg*, 2008 MT 389, ¶¶ 33-34, 347 Mont. 76, 196 P.3d 1252, this Court declined to exercise plain error review where the prosecutor referred to a defense witness "as a 'liar' while arguing the State's

[2] Miller agrees and further concedes that his counsel's "reasons for failing to object are not in the record." (Opening Br. at 41.)

evidence was genuine and truthful." This Court concluded that "the prosecutor's comments d[id] not rise to a level sufficient to invoke the plain error doctrine." *Lindberg*, ¶ 35.

In *Aker*, this Court listed many other cases in which this Court declined to exercise plain error review of allegedly improper closing arguments regarding witness credibility. *Aker*, ¶ 30 (citing *State v. Rose*, 2009 MT 4, ¶¶ 105-07, 348 Mont. 291, 202 P.3d 749 (prosecutor argued in closing that defendant had told "the big lie"); *State v. Lacey*, 2012 MT 52, ¶¶ 18-26, 364 Mont. 291, 272 P.3d 1288 (prosecutor argued that the State's witness was "candid," whereas the defendant was not candid and was, "by God," guilty); *State v. McDonald*, 2013 MT 97, ¶¶ 5-17, 369 Mont. 483, 299 P.3d 799 (prosecutor argued that the State's witnesses were "completely believable" and "telling [the jury] the truth"); *State v. Thorp*, 2010 MT 92, ¶¶ 18, 26-28, 356 Mont. 150, 231 P.3d 1096 (prosecutor told the jury that the victim was "a very credible witness" who had "no reason to lie" and that the jury should believe the victim); *State v. Racz*, 2007 MT 244, ¶¶ 35-36, 339 Mont. 218, 168 P.3d 685 (prosecutor stated that the State's witness had "no reason to lie," was "honest," and "told the truth"); *State v. Arlington*, 265 Mont. 127, 157-61, 875 P.2d 307, 325-28 (1994) (prosecutor stated that defendant lied to the jury); *State v. Rodgers*, 257 Mont. 413, 417-20, 849 P.2d 1028, 1031-33 (1993) (prosecutor called

defendant and his son liars)). These cases demonstrate that this Court should decline to conduct plain error review in this case.

Miller cites *State v. Hayden*, 2008 MT 274, 345 Mont. 252, 190 P.3d 1091, to argue that this Court should review his prosecutorial misconduct argument under the plain error doctrine. (Opening Br. at 30.) But *Hayden* is an egregious example of prosecutorial misconduct, and it does not establish that plain error should be applied in this case. The prosecutor in *Hayden* "unfairly added the probative force of his own personal, professional, and official influence to the testimony of the witnesses[]" by inquiring of one witness about the credibility of other witnesses, by arguing that two of the State's witnesses were "believable" and that the jury could "rely on" the investigating officer's testimony, and by improperly vouching for the efficacy of the officer's search of a residence and stating that the officers did "good work" in searching for drugs. *Hayden*, ¶¶ 14, 31-32, 33.

Unlike in *Hayden*, the prosecutor here did not repeatedly offer her personal opinions about witness testimony or vouch for state witnesses. Instead, the "thrust of the prosecutor's comments at issue here was argument about the evidence and the instructions, rather than interjecting h[er] personal opinion*." See*, *e.g.*, *McDonald*, ¶ 15 (declining to exercise plain error review where the prosecutor had stated that the State's witnesses were "telling you the truth," and one state witness

was "a completely believable witness," and the prosecutor "did not believe" the defendant's comments).

The prosecutor's fair argument emphasized the credibility instruction and remarked on the grounds (such as motive) by which the jury could evaluate the eyewitness's credibility. (*See* Tr. at 687:3-4: prosecutor: "Jury Instruction No. 6 is going to guide you in determining the credibility of the witnesses.") Each of Miller's alleged offending statements by the prosecutor, when viewed in proper context, instead display discussions of how the presence or absence of motive or reasons to fabricate should be used to evaluate a witness's testimony under the principles set forth in the jury instructions. Such are the common mechanics of all trials: express or implied charges of fabrication, and improper influence or motive, when properly raised by the State or defense during trial, are the legitimate grist for jury argument. *See generally*, *e.g.*, *State v. Teters*, 2004 MT 137, ¶ 25, 321 Mont. 379, 91 P.3d 559 (discussing Mont. R. Evid. 801(d)(1)(B) and the four requirements that must be satisfied before a witness's prior statements qualify for admission, which include that their statement must rebut an express or implied charge of subsequent fabrication, improper influence or motive).

For example, here, the prosecutor's comments spoke of self-evident facts that were natural consequences of Miller's cross-examinations. As just one of many examples, Miller's counsel cross-examined victim Ehnot. (Tr. 437-63.)

Miller's counsel repeatedly and vigorously reviewed Ehnot's inconsistent statements (*e.g.*, *id*. at 446:2: "Now, which do you think it was?"), while repeatedly emphasizing the emotional trauma that Ehnot experienced when she made such statements (*e.g.*, *id*. at 459:11, defense counsel to Ehnot: "And that was a very, very, frightening situation?"). The prosecutor's remarks, implicitly referencing the Ehnot cross-examination, suggested reasonable, logical and permissible inferences for the jury's consideration.

> The argument I anticipate from Mr. van der Hagen will be, She was so scared of Brandon that she was willing to say anything, and she just fabricated all of this. And look at that in light of the other evidence you have, ladies and gentlemen, the other witnesses who corroborate her, her very real fear during that 911 call. She was terrified. She was hiding on the floorboard, afraid for her life.

(*Id*. at 689:2-9.) The prosecutor in the foregoing quote was justified in responding to Miller's implicit charges of fabrication and emphasizing that Ehnot's traumatic experience was real and genuine. The above-discussed example illustrates Miller's other supposed instances of improper arguments are actually proper and thus definitively unworthy of plain-error consideration. *See also State v. Hanson*, 283 Mont. 316, 326, 940 P.2d 1166, 1172 (1997) ("[W]e will not consider it reversible error every time an attorney comments on the credibility of a witness.").

For these reasons, the prosecutor's other statements require little if any discussion. The right to a fair trial does not transform a reviewing court into a roving censor, parsing closing arguments for the smallest impropriety. Only

egregiously improper closing arguments violate due process. *Donnelly v. DeChristoforo*, 416 U.S. 637, 647-48 (1974). Long-standing Montana law supports a prosecutor's inquiry into, and argument against, a defendant's fabrication if the prosecutor does not characterize the accused as a liar or offer personal opinions as to credibility. *See State v. Gladue*, 1999 MT 1, ¶ 15, 293 Mont. 1, 972 P.2d 827 (a prosecutor may comment on conflicts and contradictions in testimony); *State v. Ford*, 278 Mont. 353, 363, 926 P.2d 245, 250 (1996) (stating that closing arguments that point out inferences that can be drawn from the evidence presented are proper); *Arlington*, 265 Mont. at 157, 875 P.2d at 325; *Rodgers*, 257 Mont. at 417, 849 P.2d at 1031; *State v. Musgrove*, 178 Mont. 162, 172, 582 P.2d 1246, 1252-53 (1978).

Here, the prosecutor focused on conflicts and contradictions in Miller's testimony and inferences that could be drawn therefrom. (*Id*. at 695-703.) The prosecutor also rightly talked about what was not said by the witnesses. Contrary to Miller's claims, his failure to testify regarding certain matters, and the prosecutor's highlighting those testimonial omissions, are legitimate bases for jury argument. A defendant has a constitutional right to decide if and when to testify. *Brooks v. Tennessee*, 406 U.S. 605, 611-12 (1972). However, a defendant who does testify and takes the stand in his or her own defense waives the right to remain silent and is subject to cross-examination regarding the credibility of that

testimony. Because the prosecutor's comments concerned Miller's credibility as a trial witness, such comments on what matters Miller did not relate were in accord with the long-standing rule that when a defendant takes the stand, the government may assail his credibility like that of any other witness—a rule that serves the trial's truth-seeking function. *State v. Kinney*, 230 Mont. 281, 286, 750 P.2d 436, 439 (1988) (citing with approval *Brown v. United States*, 356 U.S. 148, 154-55 (1958)).

Moreover, any defendant who proposes defenses without proof is subject to legitimate argument about the absence of proof. In a slightly different context, this Court has declared that it is not improper for a prosecutor to direct the jury's attention to matters suggested by defense counsel such as, for example, when a defendant's theory lacks evidentiary support. *See State v. Soraich*, 1999 MT 87, ¶ 23, 294 Mont. 175, 979 P.2d 206 (prosecutor was entitled to comment on the failure of defense counsel to call an investigator as a witness as mentioned in opening statements; the defense theory advanced in the opening statement was not substantiated). Here, the prosecutor was right to point out that Miller's defense included his implicit belief of "being justified in the use—in chasing them [the victims] around." (*Id*. at 695:25.) Miller does not get to propose justifications for his conduct without scrutiny into the absence of proof supporting his conduct.

Moreover, the prosecutor's insistence on Miller's guilt was not improper given that her statement was couched in terms of the evidentiary elements of the crime the State emphasized it had to prove. (*See*, *e.g*. Tr. at 696:14-19, prosecutor: "[W]e talked about in voir dire of what the State has to prove in order for you to find the Defendant guilty.")

The challenged comments proposed a reasonable, permissive inference to the triers of fact, and were appropriate. Thus, it was proper for the prosecutor to summarize Officer Supalla's reaction of disbelief to Miller's first comments upon being stopped at the crime scene, and the conflicts and contradictions in Miller's testimony. Supalla testified without objection to his reaction of disbelief about Miller's comments about protecting his family. (*Id*. at 590.) Proper argument followed, as Supalla's disbelief was material and relevant to Miller's spoken reply to Supalla, which involved Miller essentially confessing to wrong-doing.

> You also heard Officer Supalla's disbelief in the Defendant's explanation. "You're trying to protect your family by chasing another vehicle?" And the Defendant admits, "I know; I know; I know," as if he knew it was utterly unbelievable. The Defendant confesses: "It was all me, all me."

(*Id*. at 694:10-17.) Moreover, Miller's counsel knew Supalla's expression of disbelief was transactional evidence because counsel mentioned it in the defense opening. (*Id*. at 393:14.) Unlike in *Hayden*, there is no "clear danger that the jurors adopted the prosecutor's views instead of exercising their own independent

judgment." *Hayden*, ¶ 33. Miller was not denied a fair and impartial trial based on the prosecutor's comments. Accordingly, this Court should decline to apply plain error review.

C. Even assuming error, no prejudice exists.

No prejudice exists from the substance of the prosecutor's statements. First, the prosecutor properly argued elements of credibility for the jury to consider while respectfully emphasizing that the jury needed to follow the court's instructions regarding witnesses. (*Id*. at 685:12, "as Judge Kutzman has instructed you;" 687:5-6, referring to Instr. No. 6, "You are the sole judges of the credibility of the witnesses testifying in this case;" 696:15, referring to Instr. Nos. 15, 16 on the elements of the crime that the State needed to prove; and 700:1-7, explaining and summarizing Instr. No. 6.) Finally, Miller's argument that prejudice exists from the prosecutor's comments because of his reliance on the defense of general denial of the charges is mistaken. Miller relied on implied justification of his conduct based on charges that his victims were the aggressors. The fact that Miller raised no formal self-defense assertion before the jury is neither here nor there.

Established precedent also shows a strong, long-standing respect for Montana juries. Common sense is a hallmark of this jury tradition. *Lindberg v. Leatham Bros.*, 215 Mont. 11, 22, 693 P.2d 1234, 1241 (1985) (criticizing the viewpoint that casts the jury as being unable to sort out the different theories of a

case as "very paternalistic" and showing a lack of confidence in the intelligence and common sense of the average juror); *State v. Bashor*, 188 Mont. 397, 414, 614 P.2d 470, 482 (1980) (citing *United States v. Alexander*, 526 F.2d 161, 168 (8th Cir. 1975), suggesting common sense and collective judgment of one's peers, derived after weighing facts and considering the credibility of witnesses, have been the hallmark of the jury tradition); *State v. Thompson*, 164 Mont. 415, 424, 524 P.2d 1115, 1120 (1974) (stating that in searching for the truth, a jury is permitted to use common sense unfettered by illogical restraints). "American jurisprudence depends on a jury's ability to follow instructions and juries are presumed to follow the law that courts provide." *State v. Sanchez*, 2008 MT 27, ¶ 57, 341 Mont. 240, 177 P.3d 444.

Given the long-standing latitude afforded prosecutors in Montana and the strong respect given to Montana juries in making credibility determinations, this Court should conclude Miller's various assertions of prejudice lack merit. The facts of this case, and most especially the evidence Miller adduced to show his criminal actions were somehow justified, show Miller's claims of prejudice are empty.

Here, not only is there no prejudice from the substance of the prosecutor's arguments, but any potential prejudice was cured by defense counsel's decisions to refute each argument in turn rather than to object. (*See* Tr. at 703-20, defense

closing argument.) Correspondingly, that choice makes this case even more inappropriate for plain error review. As in other cases rejecting plain error review, Miller "made a seemingly strategic decision not to object to the prosecutor's misstatement." *State v. Lackman*, 2017 MT 127, ¶ 31, 387 Mont. 459, 395 P.3d 477. Under the circumstances, Miller has not met his burden of showing that failure to review the prosecutor's closing argument may result in a manifest miscarriage of justice or call into question the fundamental fairness of his trial.

D. Miller can make no claim of IAC based on the prosecutor's proper closing argument.

Deference to counsel's tactical decisions in closing argument is particularly important because of the broad range of legitimate defense strategies at that stage. *Yarborough v. Gentry*, 540 U.S. 1, 4 (2003) (per curiam) ("Because 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."); *United States v. Necoechea*, 986 F.2d 1273, 1281 (9th Cir. 1993), quoting *Strickland*, 466 U.S. at 689; *United States v. Molina*, 934 F.2d 1440, 1448 (9th Cir. 1991) ("From a strategic perspective, for example, many trial lawyers refrain from objecting during closing argument to all but the most egregious misstatements by opposing counsel on the theory that the jury may construe their objections to be a sign of desperation or hyper-technicality . . . . Whatever the actual explanation, *Strickland* requires us to

'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance'"), also quoting *Strickland*, 466 U.S. at 689.

In addition, because an objection may cause undue focus by the jury on the damaging remarks, a tactical decision not to object to the remarks generally does not demonstrate deficient performance. *Julius v. Johnson*, 840 F.2d 1533, 1538-39 (11th Cir. 1988). Where a prosecutor's argument had an arguable basis, there was no ineffectiveness for failure to object. *Dubria v. Smith*, 224 F.3d 995, 1004 (9th Cir. 2000) (en banc).

Miller cannot rebut the presumption that his counsel's failure to object to the prosecutor's statements made in argument "might be considered sound trial strategy." *Paradis v. Arave*, 954 F.2d 1483, 1494 (9th Cir. 1992), quoting *Strickland*, 466 U.S. at 689 (the Ninth Circuit rejected Paradis's contention that his counsel's failure to object to alleged prosecutorial misconduct in closing argument, stating that Paradis could not be retried for Palmer's murder and "no other jury . . . can do your job now," constituted IAC because it encouraged the jurors to convict Paradis regardless of whether the state had carried its burden of proving Palmer was killed in Idaho. Paradis failed to present any evidence to support this speculation. Moreover, the jurors were instructed to acquit Paradis if they found the murder did not occur in Idaho. In light of those circumstances, Paradis failed to rebut the presumption of sound trial strategy).

Furthermore, "[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." *United States v. Necoechea*, 986 F.2d 1273,1281 (9th Cir. 1993), quoting *Strickland*, 466 U.S. at 689; *United States v. Molina*, 934 F.2d 1440, 1448 (9th Cir. 1991) ("From a strategic perspective, for example, many trial lawyers refrain from objecting during closing argument to all but the most egregious misstatements by opposing counsel on the theory that the jury may construe their objections to be a sign of desperation or hyper-technicality . . . . Whatever the actual explanation, *Strickland* requires us to 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,'"), also quoting *Strickland*, 466 U.S. at 689

Here, as shown above, the prosecutor's statements had more than arguable bases, as they were all proper statements in view of the evidence and the legitimate inquiries about witness testimony. Miller's IAC claim fails at the outset.

/ / /

CONCLUSION

There being no showing of error in this record, this Court should affirm Miller's convictions.

Respectfully submitted this 19th day of August, 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 9,358 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, and any appendices.

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I, C. Mark Fowler, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 08-19-2021:

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