IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0078

STATE OF MONTANA,

Plaintiff and Appellee,

v.

STANLEY JOSEPH OLIVER,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, The Honorable Shane Vannatta, Presiding

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STATEMENT OF THE CASE

Following physical altercations with his girlfriend, Alyson Robbins, Stanley Joseph Oliver was charged with Count I, felony strangulation, Count II, felony partner or family member assault (PFMA), and Count III, misdemeanor unauthorized use of a motor vehicle. (Docs. 1-3.) Oliver called Alyson several times from jail asking her to change her statement and leave town and was charged with two counts of tampering with witnesses. (Docs. 12-13, 27-29.)

When it was alleged that a juror made a passing comment near a State-witness, the court granted Oliver's motion to replace that juror with the alternate. (Tr-2 at 8-12, 82-85, 109-11, 241-45; Tr-3 at 105-08.)[1] During the trial, the court overruled some of Oliver's hearsay objections to the officers describing what the eyewitnesses reported. (Tr-2.) During her closing argument, Oliver's counsel encouraged the jury to listen to the jail calls again and did not object when the State played Oliver's jail calls during its closing argument or when the jury asked to listen to the calls during deliberation. (Tr-3.)

Oliver was convicted of Counts II through V and the court sentenced him to a net sentence of 10 years with the Department of Corrections with 4 years suspended and ordered him to pay $335 in surcharges/fees and $2,534.03 in jury costs. (12/5/19 Tr.; Doc. 49.)

STATEMENT OF THE FACTS

Alyson and Oliver began an on again, off again, relationship in 2017. (Tr-1(c) at 42-46, 61-78.) In the spring of 2019, Alyson and her two children came to Missoula to purchase a truck with her tax return money and stayed with Oliver at a

[1] There are three separate transcripts for the first day of trial, so citations will be: pretrial conference ("Tr-1(a)"); *voir dire* ("Tr-1(b)"); and instructions and testimony ("Tr-1(c)"). Citations to the second day of trial will be "Tr-2," and the third day of trial will be "Tr-3."

hotel and his mother's house for a couple days. (*Id*.) Alyson purchased a truck on March 10, 2019, and the bill of sale was made out to her. (*Id*.; 134-36; Exs. 3-5.) About a week later, they went to stay with Clayton Pierre. (*Id*.)

On the evening of March 19, 2019, to stay warm when the power went off, Alyson and her youngest daughter huddled in bed with a blanket. (Tr-1(c) at 46-48, 78-97, 138-50.) Oliver began calling Alyson names and degrading her, so she grabbed a blanket and went to the living room with her daughter. (*Id*.) Oliver was angry that Alyson took a blanket and argued with her and followed her to the living room. (*Id*.) Oliver grabbed Alyson by her hair, flung her to the ground, and kneeled on her throat. (*Id*.) Eventually, Oliver let Alyson up and returned to the bedroom while Alyson stayed with her daughter. (*Id*.)

Early the next morning, Alyson began gathering her things to leave. (Tr-1(c) at 48-51, 97-117.) When Oliver tried to stop Alyson and said he wanted her truck, a physical and verbal altercation took place and moved inside the trailer. (*Id*.) Alyson hid the truck paperwork from Oliver and when she refused to give him her truck, their argument escalated. (*Id*.) Alyson ran into Clayton's room and Oliver followed and tackled her in front of Clayton. (*Id*.,150-65.) Alyson landed on a plastic bucket, which shattered and cut her back. (*Id*.; Exs. 8-12.) Oliver struck Alyson in the face, injuring her left eye. (*Id*.) Clayton hollered at Oliver, and Oliver left in Alyson's

truck. (*Id*.) Clayton made Alyson call 911, but she hung up. (*Id*.) The dispatcher called back and determined their location. (*Id*.)

Missoula County Sheriff's Office Deputies Paul Von Gontard and Joshua Edison responded. (Tr-2 at 17-86.) Clayton met the deputies out front and explained there had been a domestic incident and that Oliver left in Alyson's truck. (Tr-1(c) at 150-65; Tr-2 at 15-30, 42-50.) When Alyson came out of the house, the officers immediately noticed her face was covered in blood and she had a cut above her right eye which required six stitches. (*Id*.; Ex. 2.)

Alyson was hesitant to explain what happened and said she had simply fallen. (Tr-1(c) at 52-53; Tr-2 at 15-30, 42-50.) Alyson was crying and visibly upset and told the officers that she loved Oliver and did not want him to get into trouble. (*Id*.) Eventually, Alyson told them about the assault and the incident the night before. (*Id*.; Tr-2 at 15-30, 42-60.) Alyson gave the truck paperwork to the officers, which was crumpled and had blood on it. (*Id*.) The officers had to convince Alyson to get examined at the hospital for her facial injury and concern about injuries to her throat and the fact she had said she recently miscarried a baby. (*Id*.)

Oliver was charged with strangulation, felony PFMA, and unauthorized use of a motor vehicle. (Docs. 1-3.) Alyson's truck was eventually located at Oliver's mother's, but neither set of keys were located. (Tr-1(c) at 141-42.) Between

March 24 and April 6, Oliver called Alyson 77 times from jail; Alyson answered 7 of the calls because she wanted her truck keys that Oliver's family had refused to give her. (*Id*. at 55-60, 117-44; Tr-2 at 86-111; Ex. 1.)[2]

On the first call, Oliver told Alyson that he just wanted to get out and go to Spokane and asked, "Can you try and drop this shit or what?" (Call-1.) During the next call, Oliver asked Alyson what she was going to do about this "bullshit" and told her to drop the charges, but when she responded that the State controlled the case, Oliver instructed her to "tell them you 'aint gonna testify." (Call-2.) Oliver told Alyson she needed "to get the fuck out of Montana" and go to Spokane where he would meet her. (*Id*.)

On April 3rd, Oliver instructed Alyson to call his lawyer and amend her story and then suggested what she should say by telling her that, "I pretty much thought maybe [Clayton's daughter] attacked you." (Call-3.) Oliver also told Alyson he was "tryin' to get [her] to smarten up and amend [her] story" and when Alyson said his brother and sister-in-law were threatening her, Oliver threatened to tell them where she was. (*Id*.)

[2] Exhibit No. 1 contains the following calls: March 24, 2019 (Call-1); April 1, 2019 (Call-2); first call on April 3, 2019 (Call-3); second call on April 3, 2019 (Call-4); third call on April 3, 2019 (Call-5); April 5, 2019 (Call-6); and April 6, 2019 (Call-7).

Later on April 3rd, Oliver again told Alyson she "needed to get to Washington" and after telling her the call was recorded, Oliver instructed her to call his attorney and "amend your story; I'm not telling you to lie, just amend your story." (Call-4.) Later that day, Oliver again instructed Alyson to call his attorney to "amend her story," referenced Clayton's daughter again as the attacker, and said he would get Alyson to Spokane. (Call 5.)

On April 5th, Oliver instructed Alyson to write out an amended statement and have it notarized. (Call-6.) When Alyson said she could not believe he was asking her to change her statement, Oliver got angry and swore at her, telling her to "straighten the fuck up." (*Id*.) During the last call, Oliver told Alyson that "the wolves are on the way. I told them what you did." (Call-7.) Alyson explained that when Oliver used the term "wolves," he was referring to Child and Family Services and that he was threatening to get her children removed from her care. (Tr-1(c) at 86-111.)

Oliver's version of events and the jail calls differed substantially from Alyson's and Clayton's testimony. (Tr-2 at 111-236.) Oliver claimed they never argued about the truck, that he had paid for it, and Alyson was supposed to put his name on the bill of sale. (*Id*.) According to Oliver, when he got up to get ready for work the morning of March 20th, and asked Alyson if everything was alright, she threw her underwear at him that was wrapped around a fetus that she said she

had just miscarried. (*Id*.) Oliver testified Alyson tried to stop him from running out of the room and she tripped on a bucket and fell into the door jam. (*Id*.) Oliver claimed he did not see or interact with Clayton that morning and drove to his mother's where he cried himself to sleep. (*Id*.) According to Oliver, during his calls to Alyson from jail, he was simply trying to get her to tell the truth about what had happened. (*Id*.) When asked why he told her to leave town and that he would tell his brother where to find her, Oliver said he was under duress and suffering from PTSD. (*Id*.)

Both parties discussed Oliver's calls during closing arguments. (Tr-3 at 16-104.) The State played portions of the calls and during her closing, Robin Hammond, Oliver's attorney, invited and encouraged the jurors to listen to the jail calls again if they had questions about what was said. (Tr-3 at 75, 92.)

When the jury sent a note to the court asking to hear the jail calls, Hammond and the State agreed they should hear the calls, and Hammond stated that the "full recordings" should be played in "open court." (Tr-3 at 108-12.) The jurors listened to the calls in the courtroom and returned to deliberations. (*Id*.) Hammond reminded the court to make sure the audio disc did not go back with the jurors to prevent "unfettered access" and problems recently addressed by this Court. (*Id*.)

STANDARD OF REVIEW

This Court "review[s] rulings on motions to interrogate the jury for an abuse of discretion." *State v. Cunningham*, 2018 MT 56, ¶ 8, 390 Mont. 408, 414 P.3d 289.

Evidentiary rulings are reviewed for abuse of discretion, which occurs when a court "acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice." *State v. Smith*, 2021 MT 148, ¶ 14, 404 Mont. 245, 488 P.3d 531. "A district court's evidentiary rulings must be supported by the 'rules and principles of law;' therefore, 'to the extent that a discretionary ruling is based on a conclusion of law [this Court] must determine whether the court correctly interpreted the law." *Id.*

"Failure to contemporaneously object to alleged prosecutorial misconduct during opening or closing statements generally constitutes waiver of the right to raise that issue on appeal;" however, such issues may be considered under the plain error doctrine. *State v. Polak*, 2021 MT 307, ¶ 9, 406 Mont. 421, 499 P.3d 565.

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.*

The Court reviews sentences of over one year for legality and will review *de novo* whether the court adhered to the applicable sentencing statute. *State v. Moore*, 2012 MT 95, ¶ 10, 365 Mont. 13, 277 P.3d 1212.

SUMMARY OF THE ARGUMENT

The court did not abuse its discretion when it granted Oliver's request to substitute the alternative juror for Juror-12 who allegedly made a passing comment while leaving the courthouse. The court did not find that juror misconduct occurred but, out of an abundance of caution, replaced Juror-12. The district court's reasoned approach to the situation limited the possibility of juror confusion or distraction and preserved Oliver's right to a fair trial.

The district court did not abuse its discretion or commit reversible error when it overruled Oliver's hearsay objections during the deputies' testimony. The deputies' descriptions of what Alyson and Clayton reported to them were admissible pursuant to Mont. R. Evid. 801(d)(1)(A) and did not constitute improper bolstering. Alyson's and Clayton's failure to recall some events or what they stated to the deputies are considered inconsistent statements. And, since their testimony contained intertwined consistent and inconsistent statements, the district court did not abuse its discretion when it allowed the deputies to describe their interactions with Alyson and Clayton. Nonetheless, if this Court determines the

court erred by overruling Oliver's objections, it was harmless because their statements were consistent and amounted to cumulative evidence.

Oliver did not object to the State playing the jail calls during its closing remarks, so Oliver must establish plain error review is necessary to consider alleged prosecutorial misconduct. He has not met this burden. First, Oliver's claim that his right to confront witnesses was violated is unavailing because recorded jail phone calls are not "testimonial statements." Second, failure to reach this issue would not create a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the proceedings, or compromise the integrity of the judicial process. When the State played the calls, which were admitted without objection and constituted direct evidence of alleged witness tampering, it was part of proper argument about what the jury could infer from those recordings. The State's closing argument did not deny Oliver a fair trial.

Plain error review is also not warranted to address how the district court handled the jury's request to hear the jail calls during deliberation. This Court need not even consider plain error review on this issue because Oliver fails to advance sufficient specific legal analysis and under the doctrine of invited error, because Hammond not only did not object to the request, but she encouraged the jury to listen to them in her closing argument. Even if this Court considers plain error, Oliver has not demonstrated the second prong of plain error because he fails

to identify or explain how the jury placed undue influence on the recordings over the testimony.

In the alternative to his plain error claims, Oliver argues that Hammond was ineffective for not objecting during the State's closing and for agreeing to let the jury hear the calls during deliberation. Neither of these IAC claims are appropriate for direct appeal since they are non-record based and Oliver has not established Hammond had no plausible justification for her actions. Thus, they should be denied without prejudice.

Alternatively, Oliver cannot meet either IAC prong. The record establishes that Hammond chose to address the jail calls head on by providing argument and evidence to support Oliver's explanation of the calls while countering the State's interpretation of the calls. This constituted reasoned trial strategy that this Court may not second guess with the benefit of hindsight. Oliver also fails to establish that but for Hammond's allegedly deficient performance, he would not have been convicted. Oliver advances only conclusory suggestions that the recordings had a "deleterious effect" and ignores the trial strategy that Hammond implemented to undermine Alyson's version of events. The fact that Oliver was ultimately convicted is inefficient to establish prejudice.

Finally, the State agrees this matter should be remanded for the sole purpose of conducting a more thorough inquiry into Oliver's ability to pay jury costs.

ARGUMENT

I. The district court's handling of alleged jury misconduct was not an abuse of discretion.

A. Relevant facts

At the start of the second day of trial, the court was advised that the crime victim advocate, Cheryl Patch, heard one of the jurors say something as she and Clayton were leaving the courtroom the day before. (Tr-2 at 8-12.) Patch told the court that as they walked out, a female juror walked by and "said something about being brave." (*Id*.) Patch explained the juror spoke so softly that no one seemed to acknowledge hearing it and she was not one hundred percent about what was said. (*Id*.) Patch described the juror, and the court and parties discussed how to identify the juror. (*Id*.) Hammond asked the court to admonish the jurors about drawing any conclusions about the case. (*Id*.) The trial proceeded with the two deputies' testimony. (Tr-2 at 14-81.)

At the next break, the parties and court determined the juror Patch described was Juror No. 12 (hereinafter, "Juror-12"). (Tr-2 at 82-85.) Hammond expressed "serious concerns about" the juror's ability to be fair, and the court asked the parties to consider replacing that juror with the alternate "to preserve all fairness to Mr. Oliver." (Tr-2 at 83.) Hammond did not ask the court to interview Juror-12, and the court repeated its admonishments to the jurors. (*Id*.)

Before presentation of the defense's case, Hammond explained that she and the State "have agreed that [Juror-12] could be excused in favor of the alternate stepping in, given the statement she made." (Tr-2 at 109-11.) The court granted Hammond's unopposed motion. (*Id*.) Before the jury was excused for the day, Hammond suggested the court inquire with Juror-12 to verify Patch's account and to determine if the juror made a prejudgment about the case. (*Id*. at 241-45.) The court explained it did not want to create any unnecessary confusion or possible taint to the remaining jurors by singling out Juror-12 at that time. (*Id*.) The court reasoned it was better to simply make Juror-12 the alternate juror through a seemingly normal course of procedure. (*Id*.) When Hammond expressed concern about keeping Juror-12 as an alternate, the court explained,

> If we inquire [now], we risk the possibility that we somehow taint or interfere with the jury process, and exclude her, then, as a potential juror. Given right now there is no apparent harm. And I would agree that if [Juror-12] is going to deliberate with the jury [due to a juror becoming ill or otherwise unavailable], Ms. Hammond, she would be subject to inquiry.

(*Id*. at 244-45, 263.)

Directly following closing remarks, the court advised Juror-12 that she was the alternate and did not have to deliberate with the jury. (Tr-3 at 105-08.) The jury returned its verdict without needing an alternate juror.

B. The district court did not abuse its discretion when it did not inquire directly with Juror-12 after granting Oliver's motion to replace that juror with the alternate.

The trial court's treatment of alleged juror misconduct, specifically whether to inquire with the juror or not, should be reviewed for abuse of discretion. *Cunningham*, ¶ 8.[3] The record demonstrates that the court's handling of Juror-12's passing comment was not arbitrary or lacking "conscientious judgment" and did not "exceed[] the bounds of reason, resulting in substantial injustice." *Smith*, ¶ 14.

Because the trial court is able to observe the jurors and to decide the potential for prejudice when allegations of juror misconduct are raised, the trial court has significant latitude when ruling on such matters. *State v. Gollehon*, 262 Mont. 293, 303, 864 P.2d 1257, 1263-64 (1993) (citation omitted). This Court gives the trial court's ruling considerable weight, and will defer to that determination, absent a showing of prejudice. *Id.*

Here, the court conducted the necessary inquiry with Patch to learn what had happened. Patch stated that she was not sure anyone but her even heard Juror-12's softly spoken statement. Notably, the court did not formally determine that

[3] Oliver's request to review this issue under plain error is misplaced. (Opening Brief (Br.) at 33-36.) The doctrine of plain error review is reserved for issues that were not raised or addressed during trial. *Polak*, ¶ 9. Here, the issue of alleged juror misconduct and Hammond's suggestion that the court inquire with Juror No. 12 was placed squarely before the court.

Juror-12's action amounted to juror misconduct. Instead, to "preserve all fairness" to Oliver, the court suggested the juror be replaced in a way that would not taint, distract, or confuse the jury.

Oliver formally moved to replace Juror-12 with the alternate, without Juror-12 being interviewed. At that stage, the parties and court were acting out of an abundance of caution as there had been no finding of juror misconduct. The court expressed this fact when it noted there had been no "apparent harm." There was no cause to question Juror-12 at that point as the parties agreed she would become the alternate. The court's granting Oliver's unopposed motion was not an abuse of discretion.

Nor did the court abuse its discretion when it declined to inquire with Juror-12 at the end of the second day of trial. The court offered a thoughtful and well-reasoned explanation. There had been no taint/harm at that time (*i.e.*, no formal misconduct declared), and the court assured Hammond it would inquire if Juror-12 had to be called in to deliberate.

Nothing in the record suggests that Juror-12's softly spoken comment to herself created any "inherent prejudice" requiring immediate inquiry. (Br. at 35-36.) The cases Oliver cites, *State v. Eagan*, 178 Mont. 67, 79, 582 P.2d 1195, 1202 (1978) and *State v. Stringer*, 271 Mont. 367, 383, 897 P.2d 1063 (1995),

do not support the conclusion that the district court abused its discretion by not inquiring with Juror-12 once it was determined she would simply be replaced by the alternate.

In *Stringer*, after jury selection, but before the jurors were sworn in, the defense informed the court that Stringer knew one of the jurors and there had been problems between Stringer, the juror, and the juror's daughter. *Stringer*, 271 Mont. at 383-84, 897 P.2d at 1073. The district court denied Stringer's request to inquire with the juror. *Id*. This Court concluded the trial court erred by failing to immediately investigate the allegation a juror intentionally concealed relevant information during *voir dire*. *Id*.

Here, there was no evidence that Juror-12 knew any person involved in the trial or that she had concealed any relevant information during *voir dire* that would impact her ability to be impartial. Nor was there an allegation Juror-12 had any prior involvement with Oliver that would make her biased against him. Juror-12's passing comment and the court's and parties' joint solution to simply replace her did not leave a potential biased juror on the jury, as occurred in *Stringer*.

Nor was Juror-12's vague passing comment similar to the facts in *Eagan* where the alleged juror misconduct was overt and egregious. On the evening of the third day of trial, an empaneled juror was at a bar and told another person that Eagan was guilty and half of the jurors were friends with the victim. *Eagan*,

178 Mont. at 69-76, 582 P.2d at 1197-200. The defense brought the matter to the court's attention and the person from the bar testified about what occurred while the juror claimed anything he said had been in jest. *Id.* The court and parties agreed the juror should be removed and replaced with an alternate, which the court did the following day. *Id.* Eagan's motion for a mistrial based on the court's handling of that issue was denied. *Eagan, supra*.

This Court reversed the court's order, noting the following concerns with the trial court's actions: not immediately replacing the juror with the alternate, despite the juror's admission he ignored the court's instructions not to talk to others which suggested he may have contaminated the other jurors; not asking the juror why he believed some jurors were friends with the victim; and not consulting with other jurors to make sure the juror had not expressed his prejudgment to them. *Eagan,* 178 Mont. at 77-78, 582 P.2d at 1201.

Key to the decision in *Eagan* was that the trial court: (a) had found the juror was guilty of improper conduct, which "tend[ed] to injure the defendant" by possibly contaminating the rest of the jury; and (b) did not investigate the allegation that some jurors were friends with the victim. *Eagan, supra*. That is not like what occurred here. Juror-12's quiet passing comment did not indicate she had decided Oliver was guilty or that she, or other jurors, were friends with Alyson. In *Eagan* there was no question the juror had disregarded the court's

instructions. Here, Patch's description of Juror-12's conduct did not establish Juror-12 violated the court's instructions or that she was biased against Oliver.

In *Eagan*, this Court stated, "*if jury misconduct is shown tending to injure the defendant*," the defendant is presumed to have been prejudiced, but that presumption may be rebutted. *Eagan*, 178 Mont. at 79, 582 P.2d at 1202 (emphasis added). Later, this Court clarified that the "burden of rebutting a presumption of prejudice shifts to the State 'only after there has been a threshold showing of misconduct which *injures or prejudices the defendant*.'" *Gollehon*, 262 Mont. at 303, 864 P.2d at 1264 (emphasis in original).

Juror-12's softy spoken comment to herself did not rise to the level of "shown" juror misconduct "tending to injure" Oliver. Under the facts presented, the court did not need to make a formal determination of juror misconduct when the parties agreed the matter could be resolved by simply making Juror-12 the alternate. The fact the court and parties chose to replace Juror-12 with the alternate did not create a presumption of prejudice. As the court explained, there had been no harm at that point and unless Juror-12 was called to deliberate, there was no need to inquire further.

When a trial court is satisfied that any alleged improper comments by a juror are benign, it has the discretion whether to further inquire. *See Gollehon*, *supra*; *State v. Kirkland*, 184 Mont. 229, 242-43, 602 P.2d 586, 594 (1979) (recognizing

some jury inquiries could "inject error into the trial where none existed before" and unnecessarily disrupt proceedings or distract jurors, Court declined to mandate an affirmative duty to interrogate jurors about possible exposure to media coverage, leaving decision to trial court's discretion); *Cunningham*, ¶¶ 27-31 (court did not abuse its discretion when it declined to poll jury for possible effects of improper influence due to media publicity).

The court did not abuse its discretion. The court exercised a thoughtful and practical approach to ensuring Oliver's jury was fair and impartial which was supported by both parties. As this Court observed in *Gollehon*, the trial court was "in the best position to evaluate the incident, and in the absence of a showing of prejudice, [this Court should] defer to the court's determination" that Oliver received a fair trial. *Gollehon*, 262 Mont. at 303, 864 P.2d at 1264.

II. The district court did not abuse its discretion when it overruled Oliver's hearsay objections.

Hearsay, is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," and generally inadmissible at trial. Mont. R. Evid. 801(c), 802.

However, Mont. R. Evid. 801(d)(1) provides that an out-of-court statement is not hearsay when the declarant testifies at trial and is subject to cross-examination

concerning the statement under two separate circumstances: (A) when the out-of-court statement is "inconsistent with the declarant's testimony;" and (B) when a statement that is "consistent with the declarant's testimony . . . is offered to rebut an express or implied charge against the declarant of subsequent fabrication, improper influence or motive." Mont. R. Evid. 801(d)(1)(A), (B).

During the deputies' testimony, Oliver raised hearsay objections to some of the State's questions about their interactions with Alyson and Clayton. (*See* Tr-2 at 18, 22-24, 27, 54-55, 61.) The court overruled the objections, noting that both witnesses had testified and been subject to cross-examination. (*Id*.)

While it appears the court relied on Mont. R. Evid. 801(d)(1) to allow the statements, the court did not specify whether it was under subsection (A) or (B). Despite this fact, this Court may nonetheless affirm its rulings. *See State v. Laster*, 2021 MT 269, ¶ 39, 406 Mont. 60, 497 P.3d 224 (Court "will affirm a lower court judgment if it reached the correct result even if for a wrong or unarticulated reason"). The record supports that the statements were admissible under subsection (A).[4]

[4] The State concedes that Rule 801(d)(1)(B) would not apply to the deputies' testimony about Alyson's statements because any motive Alyson may have had to fabricate her statement, such as Oliver's alleged infidelity, would have been formed prior to the deputies arriving. *See State v. Lunstad*, 259 Mont. 512, 857 P.2d 723, 726 (1993). The record does not include an alleged motive for Clayton to have lied, so Subsection B would not apply to him either.

Rule 801(d)(1)(A) applied because both Alyson and Clayton had difficulty recalling the events.[5] Claimed lapses of memory represents an inconsistency under 801(d)(1)(A). *Smith*, ¶ 22. Additionally, when the nature of the declarant's trial testimony makes it difficult for the court to parse out the consistent from the inconsistent portions of the prior statement, a court may admit consistent statements in conjunction with inconsistent statements. *State v. Mederos*, 2013 MT 318, ¶ 18, 372 Mont. 325, 312 P.3d 438.

It would have been confusing to the jury and witnesses to parse out consistent statements from the inconsistent statements because the witnesses' memory lapses occurred throughout their testimony.[6] Therefore, the district court did not abuse its discretion when it allowed the officers to recount some statements Alyson and Clayton made to them. *Mederos*, ¶ 18.

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[5] *See* Tr-1(c) at 81-82 (Alyson stated the stress and trauma of the event made it hard for her to remember); and 154, 158, 160 (Clayton stated a prior head injury impacts his memory and he is on disability).

[6] Examples of Alyson's lack of recollection: *See* Tr-1(c) at 44 (how long at Oliver's mother's), 47 (how long first assault lasted) 49, 51 (how received eye injury), 79-82 (details about evening of the 19th) 112-15 (when she had miscarriage), 109, 118 (how Oliver got the truck keys from her), 118-23 (order of events, such as how many times she went to the truck, when Oliver left/returned or followed her inside, or when they grabbed axe and golf club). Examples of Clayton's lack of recollection: *See* Tr-1(c) at 154 (not sure how many times Oliver struck Alyson), 158-59 (not sure of any oral rental agreement), 160 (not sure how long couple was at his trailer).

Even if this Court determines the court erred by overruling Oliver's hearsay objections, "[n]ot every error committed by a District Court is reversible." *Smith*, ¶ 34 (citation omitted); *see also* Mont. Code Ann. § 46-20-701(1) ("A cause may not be reversed by reason of any error committed by the trial court against the convicted person unless the record shows that the error was prejudicial.").

A "defendant is not prejudiced by hearsay testimony when the statements that form the subject of the inadmissible hearsay are admitted elsewhere through the direct testimony of the 'out-of-court' declarant or by some other direct evidence." *State v. Veis*, 1998 MT 162, ¶ 26, 289 Mont. 450, 962 P.2d 1153; *State v. Mensing*, 1999 MT 303, ¶ 18, 297 Mont. 172, 991 P.2d 950 ("[W]here the declarant testifies at trial and the defendant is given the opportunity to cross-examine regarding the statements at issue, the improper admission of the declarant's out-of-court statements is considered harmless.") Admission of erroneous evidence is harmless if other admissible evidence established the same fact and there was no "reasonable possibility that its admission might have contributed to the defendant's conviction." *State v. McOmber*, 2007 MT 340, ¶ 26, 340 Mont. 262, 173 P.3d 690; *Smith*, ¶ 34.

Here, the deputies' descriptions of what Alyson and Clayton reported had already been admitted through the witnesses' testimony and cross-examinations. *See Veis*, ¶ 28; *Smith*, ¶¶ 34-35; *Mensing*, ¶ 18. Oliver's claim that without the

deputies' testimony Alyson's and Clayton's testimony was "not as believable" (*see* Br. at 33) fails to acknowledge that Alyson's and Clayton's testimony about the elements of the PFMA was consistent. It also fails to note they consistently testified to other corroborating circumstantial evidence (*e.g.*, both said Oliver called Alyson fat; both described Oliver tackling Alyson in Clayton's room, crashing onto a bucket that broke; both testified Alyson hid the paperwork in Clayton's room; both described Alyson hanging up the 911 call). Alyson's version of events was also confirmed by the jail calls. The record supports that there was no reasonable possibility that the trial's outcome would have been different had the court sustained Oliver's objections. *See McOmber*, ¶ 26.

Oliver's claim that the State presented the deputies' description of events only to "bolster" or "varnish" the eyewitnesses' testimony is unsupported. (Br. at 30.) The deputies' testimony was simply cumulative of Alyson's and Clayton's testimony. Moreover, during its closing remarks, the State focused on the testimony of the eyewitnesses and did not place any undue emphasis on what they reported to the deputies.

When the record is considered as a whole, there is no reasonable possibility that the few hearsay statements included in the deputies' description of their interactions with Alyson and Clayton contributed to Oliver's convictions. *Smith*, ¶¶ 34-35. The deputies' recitations of the witnesses' comments had little impact

on the trial as they "did no more than repeat admissible in-court testimony." *McOmber*, ¶ 35.

III. Plain error review is unwarranted to consider alleged prosecutorial misconduct.

Oliver argues that the State placed undue emphasis on Oliver's jail calls during its closing remarks. (Br. at 38-41.) Since Hammond did not object during the State's closing, this Court need not consider this claim unless Oliver firmly convinces this Court the alleged error warrants invocation of plain error review. *Smith*, ¶¶ 15, 41. In the alternative, Oliver argues Hammond was ineffective for not objecting.[7]

Plain error review is discretionary and exercised "sparingly, on a case-by-case basis, according to narrow circumstances, and by considering the totality of the circumstances." *State v. Haithcox*, 2019 MT 201, ¶ 23, 397 Mont. 103, 447 P.3d 452. Plain error review applies only "in situations implicating a defendant's fundamental constitutional rights and when failure to review the alleged error may result in a manifest miscarriage of justice, leaving unsettled the question of the fundamental fairness of the proceedings, or compromise the integrity of the judicial process." *Smith*, ¶¶ 15, 41.

[7] Oliver's IAC claims are addressed at Section V, *infra.*

Oliver cannot meet the first prong of plain error review. Contrary to Oliver's argument, his right to confrontation was not implicated because jail calls are not "testimonial. (Br. at 36, 38.) The right to confrontation bars extrajudicial "testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington,* 541 U.S. 36, 53-54 (2004). The test for determining whether an out-of-court statement is "testimonial" is "whether a reasonable person in the declarant's situation would have made the statement 'with a primary purpose of creating an out-of-court substitute for trial testimony.'" *Michigan v. Bryant,* 562 U.S. 344, 358 (2011).

Nothing in the jail calls suggest they were to generate an "out-of-court substitute for trial testimony." The calls were initiated by Oliver, and he obviously would not have knowingly created damaging trial evidence against himself. In fact, Oliver's repeated warnings to Alyson about the calls being recorded established he was trying to avoid just that. There is no evidence that any law enforcement agency had any part in the telephone calls other than to make them available to inmates.

Alyson testified at trial and was subject to cross-examination about the calls. Oliver did not assert his right to confrontation was violated when the calls were played for the jury during trial, when they were admitted as an exhibit, or

when the jury asked to hear them during deliberations. "One 'must object to improper testimony when it is offered or abide the result.'" *State v. Gardner*, 2003 MT 338, ¶ 49, 318 Mont. 436, 80 P.3d 1262 (citation omitted). Moreover, Oliver does not assert Hammond was ineffective for not objecting to admission of the calls.

Oliver has not demonstrated how a fundamental constitutional right was infringed by the State playing his jail calls at trial, because the calls did not implicate his right to confrontation. Several courts have determined that jail calls are not testimonial for the purposes of the right to confrontation. *See, e.g., United States v. Jones*, 716 F.3d 851, 856 (4th Cir. 2013) *cert. denied*, 134 S. Ct. 496 (2013) (fact jail telephone calls are recorded and may be used in a subsequent criminal prosecution, does not transform statements made during the recorded call into testimonial statements); *Malone v. Kramer*, 2010 U.S. Dist. LEXIS 33548 (E.D. Cal. 2010) aff'd, 453 Fed. Appx. 754 (9th Cir. 2011), *cert. denied*, 565 U.S. 1238, 132 S. Ct. 1642, 182 L. Ed. 2d 239 (2012); *State v. Ohio Hang Saechao*, 98 P.3d 1144 (Ore. App. 2004) (recorded jailhouse telephone conversations are more closely akin to the "off-hand, overheard remark" statements identified in *Crawford* as not implicating the core concerns of the Confrontation Clause).

In addition to failing to establish what constitutional right was implicated by the State's closing, Oliver also fails to meet the second prong of the plain error

review test because failing to review the State's closing comments will not 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." *Smith*, ¶¶ 15, 41.

This Court "review[s] alleged improper statements during a closing argument 'in the context of the entire argument'" and measures prosecutorial misconduct by reference to established norms of professional conduct. *Smith*, ¶ 42. "A prosecutor's misconduct is ground for reversing a conviction" and granting a new trial if the conduct deprives the defendant of a fair and impartial trial. *Id*. "[I]t is not enough that the prosecutors' remarks were undesirable or even universally condemned [but rather] the relevant question is whether the prosecutors' 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)). 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. *Haithcox*, ¶ 24.

Oliver is incorrect that the State placed "undue emphasis on the calls" by playing the calls 16 times during its closing. (Br. at 37.) Rather, the State played *parts* of each call in conjunction with argument about what the jury could infer

from that particular excerpt. Playing the calls during its closing argument was no different than when a prosecutor plays a 911 call or DUI video for the jury to offer context to its comments on the objective, direct evidence presented at trial. "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." *Smith*, ¶ 51 (citation omitted).

As this Court has repeatedly held, when examining alleged prosecutorial misconduct, this Court "consider[s] the context of the entire proceedings." *Polak*, ¶ 18. Hammond argued that the entirety of the calls should come in because they were the crux of both tampering with witness charges and consistently emphasized the importance of the calls. During his testimony, Oliver gave alternative explanations about the meaning of their phone conversations. It was wholly appropriate for the State to play the recordings as part of closing comments to present arguments in response to Oliver's testimony when he offered a different interpretation of his instructions to Alyson. Nothing about the State's closing argument "so infected the trial with unfairness" that Oliver was denied due process. *Haithcox*, ¶ 24.

The calls were direct, non-testimonial, evidence of Oliver's alleged tampering with evidence charges. Therefore, just like any other direct, objective

evidence that was admitted at trial, the State had every reason and obligation to address the jail calls during its closing comments. An alleged plain error "should 'firmly convince' th[is] Court that there was a 'serious mistake' that demands consideration." *State v. Griffin*, 2016 MT 231, ¶ 6, 385 Mont. 1, 386 P.3d 559. Oliver has not carried this burden.

IV. Plain error is unwarranted to consider the jury's request to listen to the jail calls during deliberation.[8]

A. Plain error need not even be considered.

First, Oliver failed to articulate or present legal argument why plain error should apply to this issue. Instead, he simply wove passing comments about the court's handling of this issue in his prosecutorial misconduct argument concerning the State's closing argument. (Br. at 38.) This Court is not responsible for "conduct[ing] legal research on behalf of a party" or "develop[ing] legal analysis that might support a party's position." *State v. Cybulski*, 2009 MT 70, ¶ 13, 349 Mont. 429, 204 P.3d 7.

Second, Hammond expressly encouraged and invited the jury to listen to the calls during deliberation. Such active acquiescence in an alleged error invokes the "doctrine of invited error" and precludes application of plain error, as this Court

[8] Oliver's corresponding IAC claim is addressed *infra* at Section V.

has acknowledged. *See State v. Favel*, 2015 MT 336, ¶ 33 n.2, 381 Mont. 472, 362 P.3d 1126 (plain error precluded when defendant herself proposed the faulty remedy or action) (citing *United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997) (en banc)).

B. The court did not commit plain error by allowing the jury to listen to the jail calls.

If plain error is considered, Oliver must "firmly convince" this Court that the trial court made a "serious mistake" that implicated a fundamental constitutional right and that 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." *Griffin*, ¶ 6; *Smith*, ¶¶ 15, 41. Oliver has not met his burden.

Oliver asserts only his right to confrontation was violated. (Br. at 36.) However, as noted above, Oliver's jail calls were not testimonial in nature and did not implicate the Confrontation Clause. *Jones, supra; United States v. Sobamowo*, 892 F.2d 90 (D.C. Cir. 1989), *cert. denied*, 498 U.S. 825 (1990) (replaying tapes during deliberations is not a stage in the trial that implicates the Confrontation Clause). Since Oliver fails to meet the first plain error prong, this Court need not consider this issue further. Nonetheless, Oliver also cannot establish that failing to review this issue will result in a manifest miscarriage of justice or compromise the

integrity of the judicial process because he cannot demonstrate how the jury placed any undue emphasis on Exhibit No. 1 over witness testimony.

Section 46-16-504, MCA, provides that "all exhibits" deemed "necessary" may be taken into the jury deliberation room. Like jury requests to re-hear testimony pursuant to § 46-16-503, MCA, this statute is tempered by the common law rule "against submitting testimonial materials to the jury for unsupervised and unrestricted review during deliberations" to prevent the jury from "unduly empha[sizing] such evidence to the exclusion of other testimony." *See e.g., State v. Bales*, 1999 MT 334, ¶¶ 19-20, 297 Mont. 402, 994 P.2d 17 (citations omitted); *State v. Johnson*, 1998 MT 107, ¶ 52, 288 Mont. 513, 958 P.2d 1182; *State v. Giddings*, 2009 MT 61, ¶¶ 94-98, 349 Mont. 347, 208 P.3d 363; *State v. Hart*, 2009 MT 268, ¶¶ 27-37, 352 Mont. 92, 214 P.3d 1273; *State v. Nordholm*, 2019 MT 165, 396 Mont. 384, 445 P.3d 799.

In those cases, this Court explained that to prevent undue influence, the jury cannot be granted unfettered access to an exhibit that is "testimonial in nature." Thus, if the jury asks to review such a restricted exhibit, the court must consult the parties and determine any risk that the jury would place undue emphasis on the exhibit to the exclusion of trial testimony and permit access/review to limit such risk. That is what occurred here.

Even assuming the recorded jail calls were "testimonial in nature," the jury did not have unrestricted access to listen to them repeatedly. The calls were played only one time and neither Oliver's nor Alyson's portions of the calls were highlighted over the other and both parties asserted the calls supported their theory of the case. There was no risk of undue emphasis to the exclusion of other testimony because the calls included both Alyson's and Oliver's statements, not just Alyson's version of events.

Oliver offers only vague speculation that the jury placed undue emphasis on the recordings. Oliver's argument lacks explanations as to how only the parts of the calls that were detrimental to him were emphasized over the trial testimony or why hearing calls one additional time more would make the jurors less likely to accept Oliver's version of the conversation over Alyson's. *Cybulski*, ¶ 13 (not Court's obligation to develop appellant's legal arguments).

Oliver's reference to an additional three-step inquiry from *State v. Harris*, 247 Mont. 405, 417, 808 P.2d 453, 460 (1991), is not compelling. In *Harris*, this Court held that to comply with the common law principles for preventing the jury from placing undue emphasis on trial testimony it requested to hear again under § 46-16-503, MCA, the trial court should (1) determine which information the jury sought; (2) identify the difficulty the jury was having that prompted the request; and (3) read-back only the precise testimony that will address the jury's specific

issue/disagreement. *Harris, supra*. This additional inquiry has been applied to trial *exhibits* in only two recent cases. *See State v. Hayes*, 2019 MT 231, ¶ 15, 397 Mont. 304, 449 P.3d 826; *State v. Hoover*, 2021 MT 276, 406 Mont. 132, 497 P.3d 598. Both of these cases are distinguishable.

In *Hayes*, the exhibit at issue was the victim's forensic interview that the defense opposed playing during the trial and when the jury asked to hear excerpts during deliberation. Here, the defense did not object to the jury hearing the calls at any time. And, unlike a forensic interview, Exhibit No. 1 was a recorded conversation between the defendant and victim, not an interview offering only one person's version of events. In addition, in *Hayes*, the record did not reveal what parts of the victim's interview were played during trial or deliberations. Here, there is no uncertainty about what the jury heard.

This situation is also unlike *Hoover* where the court allowed the jury to watch exhibits without notifying the parties first. *Hoover, supra*. Moreover, the videos, one of which was Hoover's law enforcement interview, were played more than once for the jury. *Id*. Here, the court consulted with the parties, followed Hammond's suggestion that the jury should hear the exhibit in open court, and played it only once. The district court's handling of the jury's request to listen to Exhibit No. 1 during deliberations was appropriate.

Oliver's fundamental right to confrontation was not violated and failing to review this issue will not result in a manifest miscarriage of justice because Oliver's and Alyson's testimony at trial did not vary significantly from the recorded jail calls and the recordings were cumulative of other evidence. *See e.g., Bales*, ¶¶ 29-30 (no undue emphasis to exclusion of trial testimony when exhibit statements consistent with testimony and were cumulative); *Giddings*, ¶¶ 97-98 (at worst, exhibit was cumulative); *Hart*, ¶¶ 36-37. Moreover, as established, the State and Oliver believed the calls supported their theory of the case and version of events. *See Hart*, ¶ 36 ("not only was other evidence admitted to establish the same facts, but the DVDs supported both the State's and Hart's case theories and were used by both sides."); *Johnson*, ¶53 (allowing jury to review victim's annotated transcript was just result when exhibit supported defense theory).

Oliver has not shown how the jail calls prejudiced him to the exclusion of Oliver's and Alyson's trial testimony about the calls, and plain error review is unwarranted. *See Bales*, ¶¶ 27, 30.

V. Hammond was not 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.

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. The only exception to this rule is if there is no plausible justification for the alleged deficient performance. *Crider*, ¶ 36.

Oliver alleges Hammond was ineffective for not objecting during the State's closing remarks and for agreeing to let the jury listen to the jail calls during deliberation. (Br. at 39-41.)

A. Neither IAC claim is appropriate for direct review

This Court should decline to reach both IAC claims on direct appeal because they are record-based claims and Hammond had plausible reasons for wanting the jury to hear the calls multiple times. *See Crider*, ¶¶ 35-36; *State v. Lindberg*,

2008 MT 389, ¶ 40, 347 Mont. 76, 196 P.3d 1252 (IAC considered on direct appeal "[o]nly when the record will fully explain why counsel took, or failed to take, action").

Without any legal argument or analysis, Oliver asserts there was no plausible justification for Hammond's decisions and offers only a conclusory criticism that Hammond did not know the law and "seemingly unaware of the deleterious effect the repeated playing of the call audio would have on Mr. Oliver's right to a fair trial." (Br. at 41.) Contrary to Oliver's conclusory assertion, Hammond's decision not to object to the State playing the jail calls and encourage the jury to listen to the calls again during deliberation were part of her professional judgment and constitute plausible justification for her actions/non-actions.

Hammond acknowledged that the calls included some "prejudicial aspects" but advocated for the jury to hear the unredacted recordings to provide context she believed favored Oliver. (*See* Tr-1(a) at 11.) Hammond's trial strategy emphasized the importance of the jury hearing the entirety of the calls and she offered alternative interpretations of the nature of the conversations. Hammond believed the calls were helpful to the defense.

Hammond's actions were based on her assessment of the evidence and professional judgment on how to best defend her client; both clearly "plausible justifications" for her actions. Since the record does not include sufficient

information for this Court to assess Hammond's trial strategy, Oliver's IAC claims should be dismissed without prejudice. *Crider*, ¶¶ 35-36.

Nonetheless, if this Court considers these IAC claims, Oliver cannot meet both *Strickland* prongs.

B. Hammond did not perform deficiently.

Since Hammond's performance is presumed constitutionally effective, Oliver bears the heavy burden of overcoming the strong presumption that Hammond's decisions fell within the wide range of reasonable professional conduct. *Whitlow*, ¶¶ 20-21; *Strickland*, 466 U.S. at 689. When considering whether Oliver met this burden, "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).

"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; *Strickland*, 466 U.S. at 689 ("There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.").

Hammond knew Oliver's calls were admissible and she developed a trial strategy to address them. Hammond fought hard to get unredacted recordings of Oliver's calls before the jury to provide context as well as corroboration of Oliver's testimony. Hammond argued the calls demonstrated that Alyson had no hesitation in accepting the calls, wanted to leave the state for her own reasons, and was paranoid. (*See e.g.*, 9/13/19 Tr.; Tr-1(a) at 5-8; Tr-1(c) at 11-18, 125-33, 145-49.) Thus, Hammond believed it would benefit Oliver if the jury heard the calls multiple times.

Hammond's strategy was to emphasize Alyson's actions/comments during the calls to undermine her credibility while highlighting Oliver's testimony as the rational explanation of their conversations. For instance, Hammond questioned Alyson why she kept accepting the calls if Oliver was trying to bully her into recanting. Hammond also pointed to Alyson's speech patterns and questioned whether she was under the influence when she took the calls. Finally, Hammond also pointed to Alyson's proclaimed fear about Oliver's brother and his sister-in-law attacking or stalking her, arguing it was paranoia and not grounded in reality.

Oliver cannot establish how Hammond's decision not to object during the State's closing was outside the realm of acceptable professional judgment. A defense attorney's use of objections "lies within his or her discretion" as there are numerous reasons an objection may or may not be made. *Riggs v. State*,

2011 MT 239, ¶ 53, 362 Mont. 140, 264 P.3d 693. Moreover, as established above, there was no basis for Hammond to oppose the State replaying parts of the jail calls during closing. "Counsel is not ineffective for failing to pursue a meritless strategy or one with an unlikely chance of success based upon the exercise of reasonable judgment." *State v. Payne*, 2021 MT 256, 405 Mont. 511, 496 P.3d 546. Objections to the State's use of the jail calls during its closing would have been meritless and contrary to Hammond's trial strategy.

Nor can Oliver establish that Hammond acted outside the wide range of reasonable professional conduct when she agreed the jury could listen to the jail calls during deliberation. To bolster the defense's version of events, Hammond confidently and repeatedly encouraged the jury to listen to the calls carefully and multiple times. Just as with her decision not to object during the State's closing argument, this was Hammond's trial strategy and does not constitute deficient performance. *See State v. Artis*, 137 N.E.3d 587, ¶¶ 38-39 (Ct. App. Ohio) (counsel's agreement to allow the jury to listen to the recorded jail calls between defendant and victim was trial strategy; "a reviewing court may not second-guess decisions of counsel which can be considered matters of trial strategy" and "it is well-established that debatable strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel, even if, in hindsight, it looks as if a better strategy had been available").

Hammond believed that given the proper context, the phone calls undermined Alyson's version of events and she fought hard to get the entirety of the calls before the jury to provide context and corroboration of Oliver's testimony. Oliver fails to establish how Hammond's performance was deficient. "The question is not merely whether counsel's conduct flowed from strategic decisions and trial tactics but, rather, whether it was based on 'reasonable' or 'sound' professional judgment." *Whitlow*, ¶ 19.

C. Oliver was not prejudiced by Hammond's performance

Oliver also fails to establish the second *Strickland* prong by demonstrating there is a reasonable probability that the outcome would have been different but for Hammond's alleged deficient performance. *Strickland*, 466 U.S. at 687. When addressing the prejudice prong, a court must consider the strength of the case against the defendant and the likelihood of success of the actions counsel failed to take. *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).

Oliver's unsupported allegations about how he was prejudiced by Hammond's performance are insufficient to establish his ICA claims. Oliver advances only the conclusory comment that the calls had a "deleterious effect"

and the observation that the jury found him guilty. Ineffective assistance of counsel claims must be grounded on facts and not merely on conclusory allegations. *State v. Wright*, 2001 MT 282, ¶ 31, 307 Mont. 349, 42 P.3d 753. In addition to the recordings themselves, both Alyson and Oliver confirmed and repeated portions of their conversations when they testified. *See State v. Wing*, 2008 MT 218, 344 Mont. 243, 188 P.3d 999 (IAC failed because no prejudice when audio tape of other witnesses' conversation allowed to go to the jury because of strength of evidence establishing guilt).

Oliver has not demonstrated how the outcome of his trial would have been any different had Hamond objected during the State's closing argument or not agreed with the court allowing the jury to listen to the jail calls during deliberation.

VI. No cumulative error

Since Oliver has failed to establish any prejudicial errors occurred during his trial, the cumulative error doctrine is inapplicable. "Mere allegations of error without proof of prejudice are inadequate to satisfy the doctrine [of cumulative error]." *Giddings*, ¶ 100 (Court declined to consider cumulative error when it considered each claim separately and determined no prejudice).

VII. Imposition of jury costs

Pursuant to §§ 46-18-232(1), (2), MCA, while a court may impose costs when sentencing a defendant, including jury costs, such costs may not be imposed "unless the defendant is or will be able to pay them," and in making such a determination, the court "shall take into account the financial resources of the defendant, the future ability of the defendant to pay costs, and the nature of the burden that payment of costs will impose." Specific to jury costs, this Court has held that a trial court cannot impose jury costs upon an indigent criminal defendant "without first scrupulously and meticulously determining the defendant's ability to pay." *Moore*, ¶ 18.

Oliver challenges only whether the district court followed the affirmative mandates when imposing jury costs. While the court did reduce the jury costs by one-fifth, the record does not reflect the district court "scrupulously and meticulously" considered Oliver's ability to pay jury costs.

Thus, the State agrees this matter should be remanded to the district court for a specific determination of Oliver's ability to pay jury costs by evaluating Oliver's financial resources, his future ability to work and pay costs, and the nature of the burden that payment of jury costs will impose. *See Moore*, ¶ 21.

CONCLUSION

Oliver's convictions should be affirmed. This matter should be remanded for the sole purpose of conducting hearing to consider Oliver's ability to pay jury costs.

Respectfully submitted this 14th day of February, 2022.

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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 9,848 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/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 02-14-2022:

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