DA 19-0547

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 92

STATE OF MONTANA,

Plaintiff and Appellee,

v.

BEAU HERMAN MILLER,

Defendant and Appellant.

APPEAL FROM: District Court of the Eighth Judicial District,
In and For the County of Cascade, Cause No. CDC 18-451
Honorable John A. Kutzman, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Jennifer Dwyer, Avignone, Banick & Williams, PLLC, Bozeman, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Attorney General, Helena, Montana

C. Mark Fowler, Attorney at Law, Tumwater, Washington

Joshua A. Racki, Cascade County Attorney, Jennifer Quick, Deputy County Attorney, Great Falls, Montana

Submitted on Briefs: November 3, 2021

Decided: May 17, 2022

Filed:

Clerk

Justice Dirk Sandefur delivered the Opinion of the Court.

¶1 Beau Herman Miller (Miller) appeals his July 2019 judgment of conviction and sentence on the offense of Assault with a Weapon, a felony. We address the following restated issues on appeal:

1. *Whether the District Court erroneously allowed the State to peremptorily strike the only non-white member of the jury venire based on her statements that she could not be fair due to her personal experiences with racial discrimination?*

2. *Whether various unpreserved assertions of error regarding the prosecutor's closing argument and rebuttal comments constitute plain error?*

3. *Whether Miller received ineffective assistance of counsel based on withdrawal of his initial Batson challenge and failure to object to various prosecutor statements during closing and rebuttal argument?*

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 On the late afternoon of June 26, 2018, a man (Gene Meek) in a business parking lot heard a commotion and looked up to see a gold car chasing a white pickup truck at a high rate of speed northbound on River Drive along Broadwater Bay in the City of Great Falls. The man saw a red-haired woman driving the gold car with "a black man," later identified as Miller, "hanging out of the sunroof" and "beating on the top of the car" with what appeared to be handgun,[1] yelling "pull over, Motherfucker." Another man in the same parking lot (Doug Rogers) saw essentially the same thing. The first man called 911

[1] The witness clarified at trial that he was unsure because the vehicles were "moving so fast," but "assum[ed]" that the "object in his hand" "was a gun."

and reported the incident and, while still on the phone, then saw both vehicles race by in "the other direction."

¶3 An adult male was driving the white pickup with his fiancé riding in the passenger seat. The female passenger later testified that they were driving around Great Falls when they noticed Miller following them in the gold car. She said that they both recognized the passenger as Miller and saw him brandishing a gun inside the car. She recalled seeing Miller at some point stand up through the sunroof and "point[] the gun at us" toward "the back of our vehicle." The woman testified that she immediately called 911 and remained on the phone with the operator as her fiancé was driving to the police station with Miller's car chasing behind. She testified that "when we got down to Broadwater" Bay, she "looked over" and saw the gold car pull up in parallel "right next to the [driver's side of] the truck," with Miller pointing the gun at her fiancé's head. She said her fiancé immediately "hit the brakes," "spun the vehicle around," and sped north in the other direction to get away. Miller's car turned around as well. The chase continued north, and then east up 10th Avenue South in Great Falls until the couple saw a police car and began following it, the gold car still chasing behind. Based on the multiple 911 calls, police cars eventually converged on the vehicles in the chase. Police sequentially stopped each and detained the occupants of both at gunpoint. Police subsequently obtained a warrant to search Miller's car and found inside a .45 caliber handgun, a small quantity of marijuana, and a marijuana grinder.

¶4 At trial, Miller testified that the chase started after he and his wife were stopped at a traffic light on 10th Avenue South and Fox Farm Road and saw the white pickup swerve into their lane, nearly striking their car. He said that he immediately recognized the pickup driver as an acquaintance who had previously borrowed money from him, and who had threatened him and his wife when confronted about paying it back. He testified that he heard the man "cussing" at them as the pickup "swerve[d] toward [their] car," and that it would have hit them if his wife had not immediately swerved away. He testified that the white truck immediately sped away and that he told his wife to follow and the chase was on. At trial, Miller acknowledged that he directed his wife to chase the white pickup, but asserted that he did so only in defense of himself and his wife based on the incident at the stoplight and prior threats made by the pickup driver. Consistent with his initial statement to police at the scene, Miller testified that he wanted to catch up and confront the pickup driver so that they could settle their differences in the street "like men." He acknowledged having a gun in his hand at some point during the chase, but denied ever holding it outside the car, or pointing or otherwise brandishing it toward anyone. The State ultimately charged Miller with two counts of felony assault with a weapon, misdemeanor possession of marijuana, and misdemeanor possession of drug paraphernalia, and the matter proceeded to trial in late April 2019.

¶5 During jury voir dire, the bailiff advised the judge and parties after a break that a prospective juror (Juror) wished to speak with the judge outside of the presence of the venire. In chambers, with both parties present, the Juror stated that, based on a multitude

of personal experiences with racial discrimination in the Great Falls community, she had concerns about being a juror on a case involving a black defendant. She explained that she was of Dutch ancestry, non-white, and frequently mistaken for being a Mexican or Native American. She stated that, due to her dark skin color, police had frequently stopped her at night "for nothing" when she was on the way home from work. She said that storeowners have often treated her with suspicion and that, on one occasion, somebody shoved her because she was not white. She thus stated that, "I think *I would be not fair* . . . because I was the victim of a lot of discrimination in this town." (Emphasis added.) The court then inquired:

> [Court]: So you've experienced discrimination firsthand?
>
> [Juror]: Yeah, a lot.
>
> [Court]: . . . I'm sorry that that happened to you in this community. Do you think that having experienced that firsthand makes you lean toward [the accused] here, and . . . [may cause you to] feel sympathy for him?
>
> [Juror]: It might. . . . I don't know what happened in this case, what he did or did not do, but it might be, *I be not fair*, because I know what's not being white in a place [where] there is a lot of white people.
>
> [Court]: Can you see how from his perspective . . . having somebody on the jury . . . who lives in the community who isn't white and has endured some of this, would be helpful?
>
> [Juror]: *No. I don't see*, because I got really emotional and because this happened many times. It was not one time or two.
>
> . . .
>
> [Court]: [The accused] is presumed to be innocent, right?
>
> [Juror]: Yeah.

[Court]: You understand that, . . . *if the State does not convince you that he did it, then you vote to find him not guilty*, right?

[Juror]: Yeah, if I see he's innocent, yeah.

[Court]: Do you think you can do that?

[Juror]: I don't—*I don't feel it's possible*. That's why I try to talk with [the prosecutor] at the beginning, but because I didn't have the room, yeah, because she ask different questions. And then [defense counsel], there, also, different questions, so I did not have the room to tell anything about this, about how I feel. Because I felt after I saw him, yeah, I didn't know also he wasn't a white guy. I just saw when I was already in the courtroom. *And I feel* that that . . . it's a concern because *I would not really—it might be that I be not fair*, because of my personal experience.

[Court]: Well, not fair in what way?

[Juror]: . . . [B]ecause I know how it is to be not white, yeah?

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

[Juror]: At the moment, I don't know, because I still—I don't know what is going on, yeah?

[Court]: [Does the State] have any questions for her?

[State]: I don't have any questions.

(Emphasis added.) Based on the Juror's stated inability to be fair and impartial, the State moved to strike her from the venire for cause. Defense counsel objected on the stated ground that "race and racism [are] squarely in the bulls-eye here." After further discussion with counsel, the court denied the motion on the stated ground that the Juror's discomfort with being on the jury did not afford her "the luxury of" being sent "home."

¶6 Later, before passing the remaining venire for cause, defense counsel asked the panel whether there was "anyone here who feels that he or she can't sit on this case, that this is just not the case for you for whatever reason?" The same prospective juror raised her hand, but said "no" when counsel asked if she "want[ed] to talk with the judge again about that." Defense counsel then passed the remaining venire for cause and, off the record, the parties exercised their respective peremptory challenges. After the State used its final peremptory challenge to strike the subject Juror, the District Court reconvened the parties outside the presence of the jury, noted the State's use of its final peremptory challenge, and asked, "so . . . does this create a . . . problem . . . [under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986)] and what do we do about it?"

¶7 The court first turned to defense counsel who replied:

> I'm objecting on equal protection grounds, because no matter how the State tries to square it, and I don't believe that . . . [it's] invidious discrimination . . . in other words, intentional discrimination. . . . That is not going on here. I have no reason to suspect that. But it's clearly a violation of equal protection because . . . 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 . . . it's because this lady is very uncomfortable . . . [and] does not want to sit on this jury. . . . [T]hey've done it in other cases where people have been very uncomfortable sitting on the jury, but this is completely different. . . . [W]hen you get . . . an equal protection challenge like this, I believe there's strict scrutiny that's applied. . . . I don't think the State can square the circle.

The State countered that its primary reason for peremptorily striking the Juror was her own statement that she could not be fair. It further noted, secondarily, that she also stated that "the criminal justice system is too harsh[], . . . this is not the case for her, and [that] it's not an appropriate case for her."

¶8 After further record discussion, the court granted defense counsel's unopposed request to make additional inquiry to try to get a clearer statement of the Juror's objection to serving in this case. In response to the initial question, "why you do not want to sit on this jury," the following colloquy ensued:

> [Juror]: First of all, it's because I'm—*I would get too emotional*. . . . I saw now the [d]efendant, and because I was really discriminated [against] here, many, many times, *I feel not comfortable* to be at the jury this time. . . . [I]t's also because [this is] my first time in the United States . . . on a jury. . . and then *it's extra . . . stress*. . . . I never been in a jury, not in my country, because we have other system. And this is the first time here, and because all that . . . I went through, *I don't think that I'm going to be a good person at this time*.
>
> . . .
>
> [Counsel]: Do you feel like you'll be discriminated against in the jury room?
>
> [Juror]: No, . . . but I may not be the right person at the moment. . . . [Yes,] [i]t's emotional because I know what [it's like] not being white. I don't know what . . . the defendant did or did not do yet. But I know I feel—how it is to be discriminated [against]. Only one person with color, because I was discriminated many times. Many people look at me, and they think I'm a Native American. They're really unprepared, and they think that I'm Native American or Mexican. . . . I am just a Dutch person—citizen. . . . [T]here are many people like me in the Netherlands, but people [here] don't know the difference.
>
> [Counsel]: . . . [*Is*] *this . . . just too traumatic of an experience for you to really be able to be fair*?
>
> [Juror]: *Yes*.

(Emphasis added.) After the bailiff escorted the Juror out, defense counsel notified the court that "[w]e're withdrawing the *Batson* challenge . . . for the reason that it appears . . . that [the Juror is] just too emotional to be able to be a fair and impartial juror." The court

thus excused the Juror, impaneled and swore the remaining venireman, and proceeded with trial.

¶9 Following deliberation, the jury returned a verdict finding Miller guilty of assaulting the pickup driver with a weapon, misdemeanor possession of marijuana, and misdemeanor possession of drug paraphernalia. The jury found him not guilty of pointing a gun at the passenger, however. At sentencing, the District Court dismissed the misdemeanor drug charges on the State's motion, and then sentenced Miller to a nine-year prison term for assault with a weapon, with no time suspended. Miller timely appeals.

STANDARD OF REVIEW

¶10 Failure to contemporaneously object to an asserted error generally constitutes a waiver of the right to seek appellate review. *See* §§ 46-20-104(2) and -701(2), MCA; *State v. Long*, 2005 MT 130, ¶ 35, 327 Mont. 238, 113 P.3d 290 (issues raised for the first time on appeal are generally not reviewable on appeal because the objector failed to give the lower court the opportunity to correct the asserted error without prejudice). However, as a narrow exception to the waiver rule, we may, in our discretion, review an unpreserved assertion of error under the common law plain error doctrine upon an affirmative showing of: (1) a plain or obvious error; (2) that implicates a constitutional or other substantial right; and (3) which will, if not corrected, result in a manifest miscarriage of justice or otherwise prejudicially undermine the fundamental fairness of the proceeding or compromise the integrity of the judicial process. *State v. Finley*, 276 Mont. 126, 134-38, 915 P.2d 208, 213-15 (1996) (citing *United States v. Atkinson*, 297 U.S. 157, 160, 56 S. Ct. 391, 392

(1936), *inter alia*), *partially overruled on other grounds by State v. Gallagher*, 2001 MT 39, ¶ 21, 304 Mont. 215, 19 P.3d 817. *See also State v. Favel*, 2015 MT 336, ¶¶ 30-48, 381 Mont. 472, 362 P.3d 1126 (Mckinnon, J., specially concurring—contrasting "traditional" plain error analysis under *Finley* and *Atkinson* with inconsistent "threshold" analytical approach); *State v. Whitehorn*, 2002 MT 54, ¶¶ 15-18, 309 Mont. 63, 50 P.3d 121 (discussing *Finley* formulation of common law plain error doctrine); *State v. Clausell* (*Clausell I*), 2001 MT 62, ¶¶ 53-54, 305 Mont. 1, 22 P.3d 1111 (discussing analytical inconsistencies in Montana plain error doctrine jurisprudence).[2] Upon review of a denial of a *Batson* equal protection challenge, we review any challenged finding of fact only for clear error and any challenged conclusion or application of law de novo for correctness. *State v. Ford*, 2001 MT 230, ¶¶ 7 and 18, 306 Mont. 517, 39 P.3d 108. Record-based claims of ineffective assistance of counsel present mixed questions of law which we review de novo. *Whitlow v. State*, 2008 MT 140, ¶ 9, 343 Mont. 90, 183 P.3d 861 (internal citation omitted).

[2] Correction of an unpreserved error as plain error fundamentally requires a showing, *inter alia*, that the asserted error was indeed plain, *State v. Tadewaldt*, 2010 MT 177, ¶ 20, 357 Mont. 208, 237 P.3d 1273; *State v. Upshaw*, 2006 MT 341, ¶ 26, 335 Mont. 162, 153 P.3d 579; *State v. Godfrey*, 2004 MT 197, ¶ 38, 322 Mont. 254, 95 P.3d 166, and in fact resulted in substantial prejudice to the accused. *See, e.g., State v. Schaeffer*, 2014 MT 47, ¶ 24, 374 Mont. 93, 321 P.3d 809; *State v. White*, 2014 MT 335, ¶ 36, 377 Mont. 332, 339 P.3d 1243; *State v. Wagner*, 2009 MT 256, ¶ 21, 352 Mont. 1, 215 P.3d 20; *State v. Arlington*, 265 Mont. 127, 153, 875 P.2d 307, 322 (1994); *United States v. Olano*, 507 U.S. 725, 735, 113 S. Ct. 1770, 1778 (1993).

DISCUSSION

¶11 1. *Whether the District Court erroneously allowed the State to peremptorily strike the only non-white member of the jury venire based on her statements that she could not be fair due to her personal experiences with racial discrimination?*

¶12 While Miller timely asserted a *Batson* equal protection challenge below, he later affirmatively withdrew it following supplemental examination of the subject Juror. His re-assertion of the challenge on appeal is thus unpreserved. *See In re Marriage of Remitz*, 2018 MT 298, ¶ 12, 393 Mont. 423, 431 P.3d 338; *State v. Micklon*, 2003 MT 45, ¶ 10, 314 Mont. 291, 65 P.3d 559, *overruled in part on other grounds by City of Kalispell v. Salsgiver*, 2019 MT 126, ¶¶ 36-42, 396 Mont. 57, 443 P.3d 504 (holding that active acquiescence or participation by defendant in imposition of illegal sentence does not preclude application of *Lenihan* exception to waiver rule). The unpreserved assertion of error is accordingly subject to review and correction in this case only upon satisfaction of the requisite elements for demonstration of plain error as applied to the established process and standards that determine whether the subject use of a peremptory challenge violates an accused's federal and state constitutional rights to equal protection of law.

¶13 The use of peremptory challenges to strike prospective jurors on the basis of race violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the similar protection guaranteed by Article II, Section 4, of the Montana Constitution. *State v. Warren*, 2019 MT 49, ¶ 33, 395 Mont. 15, 439 P.3d 357; *Ford*, ¶¶ 9-10; *Batson*, 476 U.S. at 89, 106 S. Ct. at 1719. However, only purposeful racial discrimination in the use of peremptory challenges in the jury selection process violates an

accused's fundamental federal and state constitutional rights to equal protection of law. *Ford*, ¶ 16 (citing *Batson*, 476 U.S. at 89, 106 S. Ct. at 1719); *Powers v. Ohio*, 499 U.S. 400, 409-15, 111 S. Ct. 1364, 1370-73 (1991) (14th Amendment Equal Protection Clause "prohibits . . . [use of] peremptory challenges to exclude otherwise qualified and unbiased persons from" jury service "solely by reason of their race"—citing *Batson* and further noting for purposes of standing the common right and interest of the excluded juror and the accused "in eliminating racial discrimination" from the jury selection process). As applied to alleged racial discrimination,[3] a three-prong test determines whether a timely challenged peremptory strike constitutes purposeful racial discrimination in violation of federal and state constitutional equal protection guarantees: (1) the challenging party must make a prima facie showing that the subject peremptory strike was purposeful race-based discrimination by the striking party; (2) if so, the burden shifts to the striking party to state a race-neutral purpose for striking the subject venireperson; and (3) if so, the burden shifts back to the challenging party to show by a preponderance of the record circumstances and evidence that the strike constituted purposeful race-based discrimination rather than some other race-neutral discrimination. *Ford*, ¶¶ 9 and 16 (citing *Batson*); *Foster v. Chatman*, 578 U.S. 488, 499-500, 136 S. Ct. 1737, 1747 (2016) (citing *Batson*); *Batson*, 476 U.S. at

[3] The *Batson* equal protection test has developed and expanded in scope to similarly apply to other forms of suspect discrimination in the jury selection process, such as gender discrimination, and now equally applies to suspect discriminatory use of peremptory challenges by criminal defendants and civil litigants. *Ford*, ¶ 19-20 (internal federal citations omitted). *See similarly State v. Falls Down*, 2003 MT 300, ¶ 44, 318 Mont. 219, 79 P.3d 797 (internal citations omitted).

96-98, 106 S. Ct. at 1723-24. At each stage of the process, the court must determine whether the appropriate party has met his or her burden of proof or persuasion. *Batson*, 476 U.S. at 96-98, 106 S. Ct. at 1723-24. Except to the extent that they may involve conclusions or applications of law, lower court determinations on the parties' respective showings under the three-prong *Batson* analysis are generally matters of fact subject to review only for clear error. *State v. Barnaby*, 2006 MT 203, ¶¶ 54-55, 333 Mont. 220, 142 P.3d 809.[4]

¶14 Under the first prong, a prima facie showing of race-based discrimination requires a showing that the subject venireman is a "member of a cognizable racial group" and of relevant facts and circumstances that under the totality of the circumstances support an inference of purposeful race-based discrimination by the striking party. *Batson*, 476 U.S. at 96, 106 S. Ct. at 1723. Facts and circumstances relevant to support or refute an inference of purposeful race-based discrimination *may* include, *inter alia*, a pattern of strikes against

[4] We once again admonish that the parties and the court accordingly have affirmative duties to make a sufficient record regarding their respective *Batson* burdens and assessment points to facilitate effective appellate review. *Ford*, ¶ 18 (an adequate *Batson* record "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"—internal citation omitted). *Accord State v. Warren*, 2019 MT 49, ¶¶ 33-38, 395 Mont. 15, 439 P.3d 35 (citing *Ford* and *State v. Parrish*, 2005 MT 112, ¶ 19, 327 Mont. 88, 111 P.3d 671). However, in our discretion, we may nonetheless review *Batson* challenges under the applicable standard of appellate review where the record is sufficient to facilitate such review. *See Barnaby*, ¶¶ 54-55 (admonishing district court for not providing detailed rationale for denial of *Batson* challenges but nonetheless affirming based on record manifestation of "highly credible race-neutral explanations" for peremptorily striking three Native American tribal members); *Falls Down*, ¶¶ 46-48 (noting that court made no findings of fact as to reason for denial of *Batson* challenge but nonetheless affirming where the record was sufficient for appellate review). *See also Galarza v. Keane*, 252 F.3d 630, 640 n.10 (2d Cir. 2001) ("talismanic recitation of specific words" not required "in order to satisfy *Batson*").

veniremen of the same racial group or the nature of the striking party's questions and statements during voir dire. *Batson*, 476 U.S. at 96-97, 106 S. Ct. at 1723. The first prong of the *Batson* test does not require that the challenging party and stricken venireperson share or be of the same racial group. *Powers*, 499 U.S. at 402, 111 S. Ct. at 1366. *Accord Ford*, ¶ 19 ("[a]ny racially-motivated reason for striking a prospective juror is prohibited under *Batson*, whether the prospective juror shares the racial identity of the defendant or not"—citing *Powers*, 499 U.S. at 409, 111 S. Ct. at 1370). The challenging party need show only facts and circumstances sufficient to support an inference that "race was a substantial motivating factor" for the subject strike. *Currie v. McDowell*, 825 F.3d 603, 605-06 (9th Cir. 2016). However, a peremptory strike of the only minority venireperson is insufficient alone for a prima facie showing of purposeful discrimination. *See United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994). *See also State v. Falls Down*, 2003 MT 300, ¶¶ 12 and 46-48, 318 Mont. 219, 79 P.3d 797 (declining to address whether the State's removal of "the only juror of a different ethnic background" "established a prima facie case of purposeful discrimination").

¶15 Under the second *Batson* prong, the striking party must state a race-neutral explanation related to the particular case at issue and which, *inter alia*, may not be based on a party's assumption or intuition that the subject venireperson would favor the challenging party based on their shared race. *Batson*, 476 U.S. at 97, 106 S. Ct. at 1723. Consequently, mere denial of a discriminatory motive or purpose, or cursory assertion of "good faith" intent to obtain a fair and impartial jury, are insufficient to satisfy the striking

party's burden under the second prong of the *Batson* analysis. *Batson*, 476 U.S. at 98, 106 S. Ct. at 1723-24. On the other hand, however, the striking party's explanation need not be sufficient to justify a challenge for cause. *Batson*, 476 U.S. at 97, 106 S. Ct. at 1723. "Unless a discriminatory intent is inherent in the [striking party's] explanation," the court must accept the offered rationale as "race-neutral" for purposes of the second prong of the *Batson* test. *Warren*, ¶ 34 (quoting *Hernandez v. New York*, 500 U.S. 352, 360, 111 S. Ct. 1859, 1866 (1991), and citing *Purkett v. Elem*, 514 U.S. 765, 768, 115 S. Ct. 1769, 1771 (1995)). Because the challenging party has the ultimate burden under the third prong of the analysis to show purposeful discrimination, he or she "may respond" to the striking party's explanation "to demonstrate [that] the proffered [race-neutral] reason is pretextual." *Warren*, ¶ 34 (citing *Batson*, 476 U.S. at 98, 106 S. Ct. at 1724).

¶16 Under the third prong, the determinative question is whether the striking party's asserted race-neutral explanation is credible. *Snyder v. Louisiana*, 552 U.S. 472, 477 and 484-85, 128 S. Ct. 1203, 1208 and 1212 (2008). *Accord Warren*, ¶ 34 (citing *Purkett*, 514 U.S. at 768, 115 S. Ct. at 1771). As explained by the Supreme Court:

> [T]he best evidence of discriminatory intent often will [often] be the demeanor [(*i.e.*, credibility)] of the attorney who exercises the challenge. In addition, race-neutral reasons for peremptory challenges often invoke a juror's demeanor (*e.g.*, nervousness, inattention), making the trial court's firsthand observations of even greater importance. In this situation, the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the [striking party].

Snyder, 552 U.S. at 477, 128 S. Ct. at 1208 (internal punctuation and citations omitted). At the third stage, a credible race-neutral explanation generally refutes the earlier inference of purposeful discrimination while an incredible, implausible, fantastic, or pretextual explanation strengthens and confirms the initial inference of purposeful discrimination. *Snyder*, 552 U.S. at 484-85, 128 S. Ct. at 1212. But, as further explained by the Supreme Court:

> In evaluating the race neutrality of an . . . explanation [for a peremptory challenge], a court must . . . keep in mind the fundamental [equal protection] principle that . . . [the subject] action . . . [does not violate equal protection] solely because it results in a racially disproportionate impact. Proof of racially discriminatory intent or purpose is required. . . . "Discriminatory purpose" . . . implies that the [subject] selected a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Hernandez, 500 U.S. at 359-60, 111 S. Ct. at 1866 (alterations in original omitted). Determination of the credibility or lack of credibility of the striking party's asserted race-neutral explanation "lie[s] peculiarly within" the fact-finding discretion of the trial court and, "in the absence of exceptional circumstances," is thus generally subject to the same deferential standard of review applicable to other trial court findings of fact. *See Snyder*, 552 U.S. at 477, 128 S. Ct. at 1208 (internal punctuation and citations omitted). *Accord Ford*, ¶ 18.

¶17 Here, Miller asserts that he timely objected and made a prima facie showing of purposeful racial discrimination by the State in the use of its final peremptory challenge to strike the only non-white venireperson. He asserts that the State then failed to meet its

responsive burden of providing a race-neutral explanation for the strike, and that the District Court then erroneously failed to find that the strike constituted purposeful racial discrimination. As a threshold matter of fact, the record manifests, and the State does not contest, that the subject Juror was a member of a cognizable racial group or class, at least insofar as she appeared and was often perceived to be of predominantly non-caucasian descent similar to persons of Hispanic or Native American ancestry.

¶18 However, even upon assertion of his initial *Batson* objection, defense counsel conceded that he had "no reason to suspect," and in fact did not "believe," that the strike constituted or involved "invidious" or "intentional discrimination" *by the State*. In essence, he merely asserted, rather, that the *Juror's assertion* that she was uncomfortable and could not be fair based on *her experiences* with racial discrimination itself supported a prima facie inference of purposeful racial discrimination. However, the mere facts that the subject Juror was apparently a member of a cognizable racial group or class, and that *she thought*, however sensibly or not, that she could not in any event be fair due to *her own experiences* with racial discrimination, were insufficient alone to support a logical inference that *the State* purposely discriminated against her based on her race. Consequently, even before the withdrawal of his initial *Batson* challenge, Miller did not meet his initial burden of making a prima facie showing that the State purposefully or intentionally struck the Juror from the venire based in whole or in part upon her race, nor did the record manifest sufficient facts and circumstances to support any such inference for purposes of plain error review. As essentially conceded by defense counsel upon

withdrawal of the initial *Batson* challenge, the Juror's unequivocal responses upon supplemental voir dire examination clearly manifested not only a complete lack of any factual basis for an inference of purposeful racial discrimination by State, but that the only evident racial discrimination in the jury selection process was that made by the Juror against herself. Thus, whether based on the manifest lack of sufficient supporting circumstantial indicia, or the withdrawal of the initial challenge, Miller's initially asserted *Batson* objection was insufficient to meet his initial burden of making a prima facie showing of purposeful racial discrimination by the State.

¶19 While the *Batson* analysis could certainly end there, interwoven with the procedural sequence below was the State's concurrent statement of a race-neutral explanation for peremptorily striking the subject Juror, i.e., the Juror's own repeated and unequivocal statements that she could not be fair due to her asserted traumatic experiences as the subject of racial discrimination. The Juror's initial and supplemental verbal and non-verbal voir dire responses directly corresponded to and supported the State's race-neutral explanation for peremptorily striking her, as distinct from her own non-race-neutral explanation for *why she could not be fair*. Based on the totality of the relevant record facts and circumstances not subject to genuine material dispute, and the State's corresponding race-neutral explanation, Miller has not shown on appeal that the District Court plainly or obviously erred in allowing the State to peremptorily strike the subject Juror from the jury venire under the totality of the record facts and circumstances in this case. Nor has he shown that doing so resulted in a manifest miscarriage of justice or otherwise prejudicially

undermined the fundamental fairness of the trial or compromised the integrity of the judicial process. We hold that the State's peremptory strike of the subject Juror was not plain error under the three-prong *Batson* equal protection analysis.

¶20 2. *Whether various unpreserved assertions of error regarding the prosecutor's closing argument and rebuttal comments constitute plain error?*

¶21 Miller next asserts that, during closing and rebuttal argument, the State made a multitude of improper and prejudicial statements of personal opinion regarding his guilt, comments on facts not in evidence, comment on his failure to assert a justifiable use of force defense, his failure to present testimony or other evidence regarding a later incident involving him and one of the alleged victims, and comments regarding the relative credibility or truthfulness of various witnesses. As applicable to the States as a matter of substantive due process implicit in the Fourteenth Amendment Due Process Clause, the Sixth Amendment to the United States Constitution,[5] and Article II, Sections 24 and 26, of the Montana Constitution, similarly guarantee criminal defendants the right to a fair trial before an impartial jury. *State v. Hayden*, 2008 MT 274, ¶ 27, 345 Mont. 252, 190 P.3d 1091. *See also State v. Kingman*, 2011 MT 269, ¶ 18, 362 Mont. 330, 264 P.3d 1104 (the

[5] *See State v. Quiroz*, 2022 MT 18, ¶ 22, 407 Mont. 263, ___ P.3d ___ (Sixth Amendment right to effective assistance is applicable to the States through the Fourteenth Amendment—citing *State v. Kougl*, 2004 MT 243, ¶ 11, 323 Mont. 6, 97 P.3d 1095 (same)); *State v. LaField*, 2017 MT 312, ¶ 26, 390 Mont. 1, 407 P.3d 682 (same); *Ramos v. Louisiana*, ___ U.S. ___, 140 S. Ct. 1390, 1397 (2020) ("Sixth Amendment right to a jury trial is fundamental to the American scheme of justice and incorporated against the States under the Fourteenth Amendment"— Sixth Amendment's jury unanimity requirement applies to state criminal trials); *Pointer v. Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 1068 (1965) (Sixth Amendment's "right of an accused to confront the witnesses against him . . . is made obligatory on the States by the Fourteenth Amendment").

right to a "fair trial" by an "impartial jury" similarly guaranteed by U.S. Const. amends. VI and XIV and Mont. Const. art. II, §§ 17 and 24); *State v. Dawson*, 233 Mont. 345, 354, 761 P.2d 352, 358, 1988 (criminal defendants have a "constitutional right to trial by an impartial jury"—citing U.S. Const. amend. VI and Mont. Const. art. II, § 24). Also implicitly guaranteed to the criminally accused as fundamental liberty interests under the Fourteenth Amendment Due Process Clause are the related rights to the presumption of innocence and the requirement that the government prove every element of a charged offense beyond a reasonable doubt. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 1692 (1976) (presumption of innocence); *In re Winship*, 397 U.S. 358, 363-64, 90 S. Ct. 1068, 1072-73 (1970) (government burden of proof). *See similarly* Mont. Const. art. II, § 17 (Montana due process clause).[6] In conjunction with various fair trial rights implicit as a matter of substantive due process, criminal defendants also have a federal and state constitutional right against compelled self-incrimination. U.S. Const. amends. V and XIV;[7] Mont. Const. art. II, § 25. Prosecutorial comments or other misconduct that substantially undermine or infringe upon those fundamental constitutional rights improperly violate those rights and are remediable by reversal of conviction if substantially prejudicial to the accused under the totality of the circumstances in each case. *See, e.g.*, *State v. Gladue* (*Gladue II*), 1999 MT 1, ¶ 27, 293 Mont. 1, 972 P.2d 827; *State v. Gray*,

[6] *See also* §§ 26-1-401, -402, -403(2), 46-16-201, and -204, MCA.

[7] The Fifth Amendment right against self-incrimination applies to the States through the Fourteenth Amendment Due Process Clause. *Malloy v. Hogan*, 378 U.S. 1, 6-11, 84 S. Ct. 1489, 1492-95 (1964).

207 Mont. 261, 266-68, 673 P.2d 1262, 1265-66 (1983); *State v. Bain*, 176 Mont. 23, 28, 575 P.2d 919, 922 (1978); *State v. Toner*, 127 Mont. 283, 287-88, 263 P.2d 971, 974 (1953).

A. Improper Prosecutorial Comment Infringing/Undermining Constitutional Rights.

¶22 Except as otherwise prohibited by applicable constitutional rights, statutory rules of procedure, and rules of evidence, criminal prosecutors have wide latitude to present and elicit relevant incriminating evidence and to challenge any evidence presented by the defense. Accordingly, based on the evidence, applicable law as stated in the jury instructions, and his or her "*analysis of the evidence*," the prosecutor may properly comment on and argue *"for any position or conclusion*" regarding the nature, quality, or effect of the evidence in relation to the applicable law and the prosecutor's burden of proof. *See State v. Campbell*, 241 Mont. 323, 328-29, 787 P.2d 329, 332-33 (1990) (noting general duty of prosecutor, "if convinced of . . . guilt . . . [to] lead the jurors to a like assessment by pointing out . . . that evidence which cannot reasonably justify any other conclusion"—citing Annotation, *Propriety and Prejudicial Effect of Prosecutor's Argument to Jury Indicating His Belief or Knowledge as to Guilt of Accused*, 88 A.L.R.3d 449, 454-55 (1978)); *State v. Musgrove*, 178 Mont. 162, 172, 582 P.2d 1246, 1252-53 (1978) (quoting former Montana Canons of Professional Ethics DR 7-106(C)(3)(4) (1973) and noting a prosecutor's assertion of fact as a permissible inference *apparently* "based on his analysis of the evidence"). However, an accused's fundamental due process right to a

fair jury trial, and related constitutional rights to the presumption of innocence, against compelled self-incrimination, and the state's burden of proof beyond a reasonable doubt, impose or implicate a number of highly nuanced restrictions on the otherwise broad latitude that prosecutors have in eliciting and commenting on the evidence and applicable law in criminal trials.

(1) Improper Comment of Facts Not in Evidence and Assertion/Attestation to Personal Knowledge of Facts.

¶23 At trial, the prosecutor may not assert or comment on facts not in evidence in the case. *State v. Makarchuk*, 2009 MT 82, ¶ 24, 349 Mont. 507, 204 P.3d 1213; *State v. Daniels*, ¶ 26, 317 Mont. 331, 77 P.3d 224; *Gladue II*, ¶ 14 (citing *State v. Stringer,* 271 Mont. 367, 381, 897 P.2d 1063, 1071 (1975)); *State v. Thompson*, 176 Mont. 150, 157, 576 P.2d 1105, 1109 (1978) (citing *State v. Toner*, 127 Mont. 283, 263 P.2d 971 (1953)); *State v. Papp*, 51 Mont. 405, 410, 153 P. 279, 281 (1915); M. R. P. Cond. 3.4(e) (2004) ("[a] lawyer shall not . . . allude to any matter . . . not supported by admissible evidence"). Nor may the prosecutor assert or attest to personal knowledge of a pertinent fact. *Hayden*, ¶¶ 26, 28, and 31-32 (holding that prosecutor improperly invaded the province of the jury by personally "vouching" for the propriety of a police search); M. R. P. Cond. 3.4(e) (2004) ("[a] lawyer shall not . . . assert personal knowledge of facts in issue").

(2) Improper Expression of Direct Personal Opinion Regarding Witness Credibility/Truthfulness and the Guilt of the Accused.

¶24 Subject to court control in accordance with applicable law, the jury is the exclusive judge of the credibility, veracity, weight, and effect of the evidence. Sections 26-1-201

through -203, MCA. Accordingly, the prosecutor generally may not: (1) elicit a witness's direct personal opinion or belief as to whether another witness or the accused, or his or her testimony, was credible, believable, reliable, or truthful; (2) express a direct personal opinion or belief that a witness, or his or her testimony, was or was not credible, believable, reliable, or truthful; (3) personally vouch for the veracity or credibility of a witness or his or her testimony; (4) directly characterize a witness statement as a lie, or a witness or the accused as a liar or as having lied. *State v. Byrne*, 2021 MT 238, ¶¶ 23-34, 405 Mont. 352, 495 P.3d 440 (prosecutor improperly invaded province of jury by eliciting multiple expert opinions as to the credibility and truthfulness of the child victim and then stating direct personal opinion that the victim/witness was a "reliable witness"—internal citations omitted); *Hayden*, ¶¶ 26, 28, and 31-32 (prosecutor improperly invaded the province of the jury by asking a witness "to comment directly" on the credibility and truthfulness of two other witnesses and then stating direct personal opinions that certain witnesses were "believable" and that another's testimony was reliable—internal citations omitted); *State v. Soraich*, 1999 MT 87, ¶ 19, 294 Mont. 175, 979 P.2d 206 (citing *United States v. Frederick*, 78 F.3d 1370, 1378 (9th Cir. 1996)); *Stringer*, 271 Mont. at 380-81, 897 P.2d at 1071-72 ("highly improper to characterize either the accused or the witnesses as liars or offer personal opinions as to . . . the credibility of" a witness—internal citations omitted); M. R. P. Cond. 3.4(e) (2004) ("[a] lawyer shall not . . . state a personal opinion as to . . . the credibility of a witness"); *Musgrove*, 178 Mont. at 172, 582 P.2d at 1252-53 (closing argument characterization of "the testimony of a witness as lies or the party or a witness

. . . as a liar" is "highly improper" "in most instances"—citing former Montana Canons of Professional Ethics DR 7-106(C)(3)(4) (1973)). The prosecutor similarly may not express a direct personal opinion or belief that the accused is guilty or the one who committed the charged offense. *Stringer*, 271 Mont. at 380-81, 897 P.2d at 1071-72 (a lawyer may not offer "personal opinion[]" as to "the guilt or innocence of the accused"—prosecutor statement of "strong [personal] belief . . . that these crimes were committed" and that the accused "committed the crimes"—internal citations omitted); M. R. P. Cond. 3.4(e) (2004) ("[a] lawyer shall not . . . state a personal opinion as to the justness of a cause . . . [or] the guilt or innocence of an accused"). Nor may the prosecutor assert or imply that the court has previously made a determination indicative of the accused's guilt. *Stringer*, 271 Mont. at 380-81, 897 P.2d at 1071.

¶25 However, while the jury is the exclusive judge of the credibility and veracity of witness testimony, and the effect of the evidence, a party may dispute and "overcome" the presumption of truthfulness of a witness "by any matter that has a tendency to disprove the truthfulness of [the] witness's testimony" including, *inter alia*, the witness's "demeanor or manner[,] . . . bias . . . for or against any party involved in the case[,] . . . interest . . . in the outcome . . . or other motive to testify falsely[,] . . . inconsistent statements . . . [,] an admission of untruthfulness[,]" or any "other evidence contradicting the witness's testimony." Section 26-1-302(1), (3)-(4), and (7)-(9), MCA. *See also*, § 46-16-201, MCA (statutory rules of evidence and M. R. Evid. "are applicable . . . to criminal actions[] except as otherwise provided"); M. R. Evid. 607 and 608(b) (any party may attack the credibility

of any witness with permissible evidence for proving/disproving witness's character for truthfulness). In those regards, as here, Montana juries are commonly instructed, *inter alia*, that:

> You are the sole judges of the credibility, that is, the believability, of all the witnesses testifying in this case, and of the weight, that is, the importance, to be given their testimony. . . . While you have discretion in judging the effect of evidence, you must exercise that discretion in accordance with these instructions.
>
> . . .
>
> In determining what the facts are in the case, it may be necessary for you to determine what weight should be given to the testimony of each witness. To do this you should carefully consider all the testimony given, the circumstances under which each witness has testified, and every matter in evidence that tends to indicate whether a witness is worthy of belief. You may consider:
>
> 1. The appearance of the witnesses on the stand, their manner of testifying, their *apparent candor*, their apparent fairness, their apparent intelligence, their knowledge and means of knowledge on the subject upon which they have testified.
>
> 2. Whether the witnesses have *an interest in the outcome of the case* or any *motive, bias or prejudice*.
>
> 3. The *extent to which* the witnesses are either *supported or contradicted by other evidence* in the case.

Montana Criminal Jury Instruction 1-103 (2009) (Instruction No. 6 here—emphasis added). As here, juries are further instructed in accordance with § 26-1-303, MCA, that "[i]f you believe that any witness has willfully testified falsely as to any material matter . . . , you must reject such testimony as you believe to have been false and . . . [may] view the rest of the testimony with distrust and in your discretion disregard it." *Montana*

Criminal Jury Instruction 1-103 (2009) (Instruction No. 6 here). Putting those instructions in context, juries are then commonly instructed, as here, that:

> it is your duty . . . to follow the law as . . . [stated in the jury instructions]. You should not decide this case contrary to these instructions . . . Counsel, however, . . . may comment and argue to the jury upon the law as given in these instructions . . . The function of the jury is to decide the issues of fact resulting from the . . . [charge at issue] and the [d]efendant's plea of "not guilty."

Montana Criminal Jury Instruction 1-102 (2009) (Instruction No. 4 here).

¶26 Accordingly, in contrast to a statement of or akin to a direct personal opinion, prosecutorial closing arguments and comments are generally proper if made in the context of discussing the evidence, how it relates or corresponds to the law as stated in the jury instructions (including specified witness veracity and credibility assessment guidelines), and reasonable inferences supported by the evidence. *See State v. McDonald*, 2013 MT 97, ¶ 15, 369 Mont. 483, 299 P.3d 799 (construing prosecutor comments that he "did not believe" the asserted defense theory, that the state's witnesses had a lesser interest in the outcome than the accused, and that a state's witness was "completely believable," were in context, proper arguments on the evidence in reference to the specified witness assessment guidelines—not improper statements of direct personal opinion as to the relative credibility of the witnesses); *State v. Lacey*, 2012 MT 52, ¶¶ 17-19 and 24-26, 364 Mont. 291, 272 P.3d 1288 ("[c]ounsel should focus on the facts of a case, inferences that reasonably can be drawn from these facts, as instructed by the court, and application of the law to these facts and reasonable inferences"—noting impropriety of "reliance on God" to support her

assertion of defendant's guilt but holding that balance of prosecutor assertions that the state's witness was "candid," defendant was not, and that defendant was "by God" guilty were in context encompassed within "an otherwise well supported, and permissible, commentary on the evidence and the credibility of witnesses" and thus not "so far from permissible" to be plain error); *Gladue II*, ¶ 21 ("prosecutor's remark that the evidence supported every charge . . . against [the accused] was . . . [permissible] comment on the evidence . . . and what that evidence established" rather than statement of direct "personal opinion as to the guilt of the defendant").[8] The prosecutor may thus properly comment on "the gravity of the crime charged" and "the volume of evidence," *Thompson*, 176 Mont. at 157, 576 P.2d at 1109 (quoting 23A C.J.S. Criminal Law § 1090, page 129 and holding, *inter alia*, that prosecutor comment that "perjury in a homicide case could have disastrous effects in that an innocent man could be hanged or a killer go free" was in context a permissible "comment on the gravity of the crime charged"), and point out and comment on contradictions and conflicts in the testimony and other evidence. *Gladue II*, ¶¶ 15 and 19; *Stringer*, 271 Mont. at 380, 897 P.2d at 1071; *State v. Stewart*, 253 Mont. 475, 482-83, 833 P.2d 1085, 1089-90 (1992) (citing *Musgrove*, 178 Mont. at 172, 582 P.2d at 1253; M. R. P. Cond. 3.4 (1985), and noting continued congruence of *Musgrove* principles with M. R. P. Cond. 3.4 (1985)).

[8] *See also, e.g.*, *State v. Dobrowski*, 2016 MT 261, ¶ 30, 385 Mont. 179, 382 P.3d 490 (prosecutor statement that defendant "got the cart before the horse" was a permissible figurative metaphor used to "explain [state's] theory of the case" rather than an improper statement of personal opinion).

¶27 While expression of direct "personal opinions on witness credibility" are improper, the prosecutor may nonetheless comment on, suggest, point-out, and argue reasonable inferences[9] that jury may draw from the evidence including, *inter alia*, comment on the "credibility of witnesses" as a "comment on the evidence" based on "conflicts and contradictions in testimony." *State v. Thorp*, 2010 MT 92, ¶¶ 18 and 26, 356 Mont. 150, 231 P.3d 1096; *State v. Green*, 2009 MT 114, ¶ 33, 350 Mont. 141, 205 P.3d 798 (quoting *Gladue II*, ¶ 15, as distinguished from the improper statements of direct personal opinion flagged in *Stringer*, 271 Mont. at 380, 897 P.2d at 1063); *Gladue II*, ¶¶ 15 and 19; *Thompson*, 176 Mont. at 157, 576 P.2d at 1109 (quoting 23A C.J.S. Criminal Law § 1090, page 129); *State v. Armstrong* (*Armstrong II*), 189 Mont. 407, 426-27, 616 P.2d 341, 352-53 (1980) (quoting Montana Canons of Professional Ethics DR 7-106(C)(4) distinguishing improper statement of "personal opinion as to the justness of the cause, . . . the credibility of a witness, . . . [or] the guilt or innocence of an accused" from permissible argument "*for any position or conclusion with respect to the matter stated therein*" based on the prosecutor's "*analysis of the evidence*"—emphasis added)).[10] The prosecutor may

[9] "An 'inference' is a deduction which the trier of fact may make from the evidence." Section 26-1-501, MCA.

[10] *See also State v. Longfellow*, 2008 MT 343, ¶¶ 22-23 and 26-28, 346 Mont. 286, 194 P.3d 694 (prosecutor assertion in SIWC case that "defendant's case [was] based purely on speculation and trickery" not improper absent showing that the "trickery" assertion was an improper statement of direct personal opinion regarding witness credibility or truthfulness rather than permissible argument on the evidence based on "conflicts and contradictions in testimony" and "reasonable [jury] inferences" therefrom).

similarly argue *on the evidence* that the accused is guilty, committed the crime, or that the state has met its burden of proof. *See Campbell*, 241 Mont. at 329, 787 P.2d at 333 (distinguishing improper statement of personal opinion or belief from permissible argument that "the inescapable conclusion from the evidence was that [the accused] had committed the crimes"); *Armstrong II*, 189 Mont. at 426-27, 616 P.2d at 352-53 (disapproving of the simile "[t]his man is guilty as sin" but distinguishing it "in context with the language of the remainder of the closing argument" as an argument *based on* "the *State's analysis of the evidence*" rather than "an expression of the [prosecutor's] personal opinion"—emphasis added).[11] Thus, while often highly nuanced, the dividing line between an improper and proper prosecutorial argument or comment regarding witness credibility or truthfulness or the guilt of the accused is whether, in the context of the entirety of the particular opening statement or closing argument at issue, the argument or comment is more akin to a statement of the prosecutor's personal opinion or direct characterization of the accused or a witness as "lying" or a "liar" (or his or her testimony as a "lie"), or rather, an argument or comment based on the prosecutor's *analysis of the evidence* regarding the

[11] Nor is it necessarily misconduct or prejudicial error "every time" that the prosecutor uses a variant of the terms "lie" or "liar" in a closing argument. *Stringer*, 271 Mont. at 380, 897 P.2d at 1071. *See also Campbell*, 241 Mont. at 327-28, 787 P.2d at 332 ("extensive characterization of [accused] as a liar [on] rebuttal" argument based on noted conflicts between his trial testimony and earlier statements and "in response to" defense closing argument characterization of him as "the most candid witness we've had" and not "the type of man who's just going to come in here and make up a story to cover for himself" not plain error); *Gladue II*, ¶ 25 (defense assertions or characterizations regarding witnesses may sometimes open the door to otherwise objectionable state comments on rebuttal—internal citations omitted); *Musgrove*, 178 Mont. at 172, 582 P.2d at 1252-53 (characterization of witness testimony as "lies" or the "party or a witness" as a "liar" is "highly improper" "*in most instances*"—emphasis added).

nature, quality, or effect of the evidence and supported inferences in relation to the applicable law. *See, e.g.*, *McDonald*, ¶¶ 10 and 15; *Lacey*, ¶¶ 17-19 and 24-26; *Thorp*, ¶¶ 18 and 26; *Green*, ¶ 33; *Gladue II*, ¶¶ 15, 19, and 21; *Stringer*, 271 Mont. at 380, 897 P.2d at 1071; *Stewart*, 253 Mont. at 482-83, 833 P.2d at 1089-90; *Campbell*, 241 Mont. at 328-29, 787 P.2d at 333; *Armstrong*, 189 Mont. at 426-27, 616 P.2d at 352-53; *Musgrove*, 178 Mont. at 172, 582 P.2d at 1252-53; *Thompson*, 176 Mont. at 157, 576 P.2d at 1109.

(3) Improper Comment Regarding the Presumption of Innocence/Burden of Proof.

¶28 The presumption of innocence and state burden of proof beyond a reasonable doubt are related fundamental fair trial rights implicit in the Fourteenth Amendment Due Process Clause. *See Estelle*, 425 U.S. at 503, 96 S. Ct. at 1692; *Winship*, 397 U.S. at 363-64, 90 S. Ct. at 1072-73. Accordingly, at trial, the prosecutor may not directly, indirectly, or implicitly assert or suggest that the accused has the burden of proving his or her innocence, or of disproving the state's evidence or truthfulness of a state's witness. *See Byrne*, ¶ 33 (holding that prosecutor's repeated comments on child victim's lack of motive to testify falsely and repeated rhetorical questions as to "why would she lie" together in context improperly suggested that the accused had the burden of proving that victim was untruthful—but distinguishing that "[i]solated" "argument of 'why would she lie'" would not have been improper). *See also State v. Newman*, 2005 MT 348, ¶¶ 28-30 and 32, 330 Mont. 160, 127 P.3d 374 (Nelson, J., specially concurring—prosecutor undermined defendant's presumption of innocence by criticizing her failure to present evidence which would corroborate her testimony and improperly referring to matters not in evidence).

However, the prosecutor generally may comment on the absence of, or defendant's failure to present evidence or other witness testimony to support his or her otherwise unsupported testimonial assertions at trial, opening statement assertions of fact or representation that the defense will present exculpatory or contradictory evidence, or an asserted defense theory of the case. *See Makarchuk*, ¶¶ 11 and 22-26 (permissible prosecutor comment that defendant failed to present phone records or corroborating testimony from other witnesses in support of his testimonial assertion that he made a pertinent phone call—internal citations omitted); *Soraich*, ¶¶ 22-25 (prosecutor comments on defense failure to present evidence to support opening statement assertions that a state's witness made inconsistent statements and that defendant was wearing different gloves were not an improper attempts to shift the burden of proof but rather permissible comments on unsupported defense opening statement assertions or "theories" relative to the strength of the state's case—internal citations omitted).

(4) Improper Comment on Accused's Failure to Testify or Speak with Police.

¶29 In accordance with an accused's federal and Montana constitutional rights against self-incrimination, the prosecutor generally may not directly or indirectly comment on the silence of a defendant after he or she has asserted the right to remain silent, whether in regard to not testifying at trial or not speaking with police following a *Miranda* advisory. *Town of Columbus v. Harrington*, 2001 MT 258, ¶¶ 18-21, 307 Mont. 215, 36 P.3d 937 (prosecutor comment that there was no evidence contradicting the testimony of a state's witness was an improper comment on non-testifying defendant's right to remain silent at

trial where the comment implicitly referred to missing evidence that could have only come from the testimony of the defendant); *State v. N. Hart*, 154 Mont. 310, 312-16, 462 P.2d 885, 887-89 (1969) (prosecutor comment that defense counsel failed to "offer any evidence to controvert [the] story" told by a state's witness was improper where the contrary evidence could have come only from the testimony of the non-testifying defendant—internal federal citations omitted); *State v. S.B. Hart*, 191 Mont. 375, 384, 625 P.2d 21, 26 (1981) (internal citation omitted); *Griffin v. California*, 380 U.S. 609, 611-15, 85 S. Ct. 1229, 1231-33 (1965) (prosecutor comment that only the non-testifying defendant would know how the victim died was an improper comment on defendant's right to remain silent at trial). In contrast, however, prosecutor comments to the effect that the testimony of a state's witness is unrefuted or uncontradicted, or that the defense presented no witness or witness testimony contradicting the testimony and evidence presented by the state, is not an improper comment on the defendant's right to remain silent at trial if the comment does not, under the totality of the circumstances, necessarily pertain or refer specifically to the defendant's failure to testify, or to testimony that necessarily could come only from the defendant. *See State v. Rodarte*, 2002 MT 317, ¶¶ 11-15, 313 Mont. 131, 60 P.3d 983 (repeated prosecutor comment on defense failure to present any witness testimony indicating that the victim had "any reason" to "lie or make this up" not improper where the comment did not refer to the defendant or any other particular witness and because the prosecutor may "point out [pertinent] facts" which the defendant "could have . . . controverted" through the testimony of "persons other than the defendant"—internal

citation omitted); *Soraich*, ¶¶ 22-23 (comment on defense failure to present evidence to support opening statement assertion that a state's witness made inconsistent statements not improper comment on his right to remain silent where the alleged inconsistent statements were made to a person other than the defendant); *State v. Armstrong* (*Armstrong I*), 170 Mont. 256, 261-62, 552 P.2d 616, 619 (1976) ("rhetorical questions . . . amount[ing] to comments that there was 'no evidence' or 'no testimony' to rebut the inferences raised by the state's evidence" were in context proper arguments on the strength of the state's evidence rather than improper comments on the silence of the accused), *partially overruled on other grounds by State v. Johnson*, 221 Mont. 503, 512-14, 719 P.2d 1248, 1254-55 (1986); *Lockett v. Ohio*, 438 U.S. 586, 594-95, 98 S. Ct. 2954, 2959-60 (1978) (prosecutor assertion that state's evidence was "unrefuted" and "uncontradicted" not improper comment on defendant's failure to testify). *Accord State v. Gladue* (*Gladue I*), 208 Mont. 174, 181-84, 677 P.2d 1028, 1032-33 (1984) (distinguishing *Lockett*—internal citations omitted).

¶30 Moreover, a defendant who voluntarily testifies at trial waives his or her constitutional rights against self-incrimination regarding matters at issue and, like any witness, is thus subject to cross-examination on matters within the scope of his or her direct testimony including, *inter alia*, inconsistencies between his or her trial testimony and prior statements or pre-*Miranda* advisory silence. *State v. Wilson*, 193 Mont. 318, 324-26, 631 P.2d 1273, 1276-78 (1981) (permissible cross-examination and comment on inconsistency between defendant's trial testimony and prior silence before *Miranda* advisory—citing

Brown v. United States, 356 U.S. 148, 154-155, 78 S. Ct. 622, 626 (1958), and distinguishing *Doyle v. Ohio*, 426 U.S. 610, 617-19, 96 S. Ct. 2240, 2244-45 (1976) (prosecutor may not cross-examine and comment on inconsistency between defendant's trial testimony and his prior silence after post-arrest *Miranda* advisory));[12] *Jenkins v. Anderson*, 447 U.S. 231, 235-38, 100 S. Ct. 2124, 2127-29 (1980) (prosecutor may cross-examine/comment on inconsistency between trial testimony and silence or statements prior to *Miranda* advisory). *Accord Clausell I*, ¶¶ 56-61 (permissible opening statement, case-in-chief, cross-examination, and closing argument references to inconsistency between defendant's trial testimony and his pretrial silence or statements before *Miranda* advisory and after a *Miranda* advisory and waiver); *State v. Graves*, 272 Mont. 451, 460-61, 901 P.2d 549, 555 (1995) (permissible cross-examination and comment on inconsistency between defendant's trial testimony and silence prior to *Miranda* advisory—"[d]efendant alleges statements referencing his silence did not

[12] In *Doyle*, the defendants made no statements to police after being arrested on drug possession charges, but then later testified at trial and for the first time gave a plausible exculpatory account of their actions to which "there was little if any direct evidence to contradict it." *Doyle*, 426 U.S. at 612-13, 96 S. Ct. at 2242. "[F]or impeachment purposes . . . to undercut" the new story, the prosecutor cross-examined each defendant as to "why he had not [earlier] told the frameup story" to police when arrested. *Doyle*, 426 U.S. at 613, 96 S. Ct. at 2242. The state asserted that the discrepancy between a defendant's post-arrest silence and an exculpatory story told for the first time at trial "gives rise to an inference that the story was fabricated somewhere along the way" that it is thus only fair to allow the prosecutor, for the limited purpose of impeachment, to question the defendant and comment as to why or how it is that the story is only coming out for the first time at trial. *Doyle*, 426 U.S. at 616, 96 S. Ct. at 2244. The Supreme Court held, however, that the right to remain silent and the prophylactic purpose of *Miranda* advisories override the state's impeachment need because "every post-arrest silence is insolubly ambiguous" and an arrestee's post-arrest silence is not necessarily anything more than the exercise of his or her right to remain silent. *Doyle*, 426 U.S. at 617-18, 96 S. Ct. at 2244-45.

distinguish between post- and pre-Miranda warnings" and thus "asserts these statements, in their entirety, were improper[,]" but "[w]e agree with the State[]" that the "defendant was not silent"), *overruled on other grounds by State v. Herman*, 2008 MT 187, ¶12 n.1, 343 Mont. 494, 188 P.3d 978; *Campbell*, 241 Mont. at 327, 787 P.2d at 332 (when a defendant elects to testify at trial to deny "commission of the crime" a "wide latitude of cross-examination" is permissible—citing *State v. Rhys*, 40 Mont. 131, 136, 105 P. 494, 496 (1909)); *State v. Wiman*, 236 Mont. 180, 187, 769 P.2d 1200, 1204 (1989) (permissible comment on prior statements made after *Miranda* warning); *State v. White*, 200 Mont. 123, 125-28, 650 P.2d 765, 767-68 (1982) (permissible cross-examination of defendant regarding what he said or did not say to police post-arrest but before *Miranda* advisory—citing *Wilson*), *overruled on other grounds by State v. Montoya*, 1999 MT 180, ¶¶ 12-15, 295 Mont. 288, 983 P.2d 937; *State v. Furlong*, 213 Mont. 251, 258, 690 P.2d 986, 989 (1984) (distinguishing permissible cross-examination and comment inconsistency between trial testimony and pre-*Miranda* from impermissible cross-examination/comment on inconsistency between trial testimony and post-*Miranda* silence—citing *Doyle*).[13] Consequently, while it is improper for a prosecutor to express a direct personal opinion about the credibility or truthfulness of a witness, or to elicit testimony and then comment

[13] The prosecutor may similarly elicit testimony and then comment on a defendant's post-arrest silence before a *Miranda* advisory even if the defendant does not testify at trial. *State v. Sullivan*, 280 Mont. 25, 33-34, 927 P.2d 1033, 1038-39 (1996) (holding that state permissibly elicited case-in-chief testimony and made closing argument reference to non-testifying defendant's post-arrest but pre-*Miranda* silence on way to police station but contrarily holding that similar testimony and comment on his post-*Miranda* silence violated his right to remain silent—applying *Doyle* to each scenario).

on the defendant's assertion of the right to remain silent or his or her post-*Miranda* failure to speak with police, a prosecutor may properly "point out . . . inconsistencies" between the defendant's trial testimony and any pretrial statements or pre-*Miranda* silence to support an inference and argument that he "changed his story after having time to think about the consequences." *Green*, ¶¶ 33-34. The prosecutor may similarly ask and "argue which of the two versions provided by [the defendant] was the truth." *Green*, ¶ 34. *See similarly Lacey*, ¶¶ 20 and 23 (noting defendant concession of no *Doyle* error and accompanying lack of support for assertion that prosecutor's appeal to jury to "consider what [the defendant] stayed away from in his testimony on direct exam" was not a permissible "suggest[ion] [of] negative inferences from" the "avoidance of issues when the defendant chooses to testify").

(5) Prosecutorial Comments At Issue.

¶31 From his opening statement through closing argument, the asserted defense theory of the case, without assertion of a justifiable use of force defense, was two-fold: (1) the alleged male victim tried to run his truck into the Miller vehicle, or at least run it off the road, at a Great Falls stoplight, to which Miller reasonably reacted by chasing the alleged victims around town to settle the matter and thereby protect his wife or family, and (2) Miller truthfully asserted that he never pointed a gun at the alleged victims and that the contradictory assertions of the alleged victims and two third-party eyewitnesses were not truthful. Against that backdrop, Miller singles out, out of context, a myriad of State closing argument and rebuttal statements as improper statements of personal opinions

regarding witness credibility and his guilt, comments on facts not in evidence, and comments infringing on the presumption of innocence and attempting to shift the burden of proof to the defendant, to wit:

- "[w]e are here because the [d]efendant is guilty of assault with a weapon";
- "[y]ou heard about the investigation that ensued and that the [d]efendant was charged";
- characterization of Miller's actions as "senseless, . . . illegal, and . . . criminal";
- characterization of Miller's "actions of pointing a loaded firearm at the victims, chasing them through the streets of Great Falls" as "criminal";
- "that's a little too late"—"[t]he crime had already been committed";
- characterization of two third-party eye-witnesses presented by the State were "ordinary citizen[s]" with "no motive to fabricate" what they saw;
- pointing out the female victim's "very real fear" of Miller indicated in her 911 call demeanor and her similar demeanor on the witness stand as corroborative of her testimony;
- asserting that the demeanor and substance of the female victim's testimony was inconsistent with the defense assertion that she "concocted" her story under pressure from her fiancé;
- there was no jury instruction on justifiable use of force and Miller did not assert a justifiable use of force defense—"[a] crime was committed" and "[y]ou cannot take matters into your own hands";
- "[i]s there anything in these instructions that tells you that it's lawful to chase somebody down at gunpoint because you're angry"—"[t]hat's illegal";
- Miller did not "testify to anything regarding" a later incident where the male victim allegedly followed him around town in a threatening manner;
- the defense presented no video recording of the alleged later incident between Miller and the alleged male victim;

- asserting that any inconsistency between the testimonial accounts given by the victims at trial were not the sort that would render the female's testimony "not worthy of belief";

- characterizing a defense witness as "a friend of the [d]efendant with every reason to fabricate."

In context, however, none of the cited statements were phrased as, or even akin to, statements of *direct personal opinions* regarding Miller's guilt or the credibility or truthfulness of a witness or his or her testimony. Rather, they were in essence largely arguments on the *evidence, jury instructions* (including witness assessment criteria, elements of the offense, and State's burden of proof), and *reasonable inferences* from the evidence regarding the strength and effect of the evidence in relation to the State's burden of proof. Some were more tailored arguments on the evidence and instructions in direct response to defense counsel's express and implied assertions that, rather than purposeful or knowing criminal behavior as alleged by the State, Miller was merely reacting in a reasonable and understandable manner to what he reasonably perceived as the male victim's threatening behavior. The prosecutor comments "that's a little too late" and that "[t]he crime had already been committed" were assertions on the evidence that Miller had already pointed the gun at the victim(s) as charged in response to defense counsel's assertion that the male victim, not Miller, was responsible and could have prevented the incident by not fleeing from Miller and simply pulling over so that they could have peaceably resolved their differences. Similarly, the prosecutor's reference to the fact that "an investigation ensued" and that Miller "was charged" were not express or implied

assertions that those facts were themselves indicative of guilt but rather, in context, were either a comment on the evidence responding to defense counsel's assertion that, had the alleged victims' version of events been true, they would have more quickly acquired the assistance of law enforcement, or argument on the evidence that the charged offenses for which the State was seeking a guilty verdict were based on Miller's conduct rather than his assertions regarding the alleged illegality or misconduct committed by the male driver of the white truck.

¶32 Next is the puzzling flap over a later incident that allegedly occurred between the male victim and Miller four months *after* the charged incident. As previewed in his opening statement, Miller called a friend to testify that, four months after the charged incident, the alleged male victim in the earlier incident spotted Miller and the friend stopped at a Great Falls gas station, followed them out of town, and then ultimately attempted to assault them by running their vehicle off the road. While the objective relevance, if any, of the subsequent incident is unclear from the record, defense counsel stated to the jury that, consistent with the defense theory of the case, the alleged male victim later again attempted to assault Miller by running his vehicle off the road, just like he had four months earlier.[14] After testifying to that effect on direct in the defense case-in-chief,

[14] The trial transcript includes an oblique reference to an earlier State objection to evidence or reference to the subsequent November incident in the form of a passing court comment that it would similarly allow defense evidence and reference to prior domestic violence allegedly committed by the alleged male victim against the alleged female victim as evidence of the female's motive to testify falsely in support of the State's case at trial. The comment indicated that the court viewed the alleged domestic violence evidence on "about . . . the same footing as the [subsequent] November incident," neither of which appeared to be "terribly persuasive."

Miller's friend acknowledged on cross-examination that neither he nor Miller reported the alleged November incident to police, but nonetheless asserted that it was recorded on video. On re-direct, he asserted that Miller captured the alleged incident on cell phone video while the friend was driving. Defense counsel then asked, "[a]nd there was a surveillance video" of the incident, to which the friend answered, "correct."

¶33 During the State's closing argument, the prosecutor asserted in passing that the friend's account of the alleged November incident was not supported by the evidence, but that it did not matter anyway because the charged "crime was committed" back in June. During the defense closing argument, after discussing the evidence and favorable defense inferences, counsel launched into a non-sequitur recap of the testimony from Miller's friend regarding the alleged November incident, characterized it as "assault with a weapon" committed *against* Miller, and summed-up with:

> That's what he wants you to know. He thought he was going to get run off the road and die or be seriously hurt. And I think that sums it up . . . I can go on. We can keep talking about the facts, the evidence. We can go on. I can go on. But . . . [i]t's time for you to do what's right, to do justice. . . . But before I go, I ask you to . . . hold the State to their burden of proof, proof beyond a reasonable doubt, and to do right, to do justice . . . because he is innocent.

On rebuttal, the prosecutor stated in pertinent part that:

> We hear that [the alleged male victim] viciously ran them off the road . . . [and] about [the] November incident that could constitute assault with a weapon. The problem with either of these two stories is that neither of them were ever reported to law enforcement. I'd submit to you that these are fabrications that never occurred. . . . Where is this recording? I even asked the Defendant about it when he testified. Do you have something on your phone that's pertinent to this case? . . . I think it's interesting that

> [Defendant] didn't testify to anything regarding the November incident. . . . [His friend] wants you to believe this terrifying event in November[,] [a]nd he doesn't call 911? [Defendant] doesn't call 911? They both tell you they have cellphones. Certainly capable of doing so. Instead, he calls a friend, because he's afraid things are going to go terribly wrong. You don't call a friend. You call the cops. . . . [T]hat doesn't make sense.

Certainly, it is improper for the prosecutor to express a direct personal opinion regarding the credibility or truthfulness of a witness or a witness's testimony, or to suggest that the defendant has the burden of proving his or her innocence. However, here, Miller voluntarily testified at trial and, *inter alia*, denied having anything on his cell phone that might be pertinent to the facts at issue at trial. He affirmatively presented testimony from his friend regarding the alleged November incident and the existence of a corroborating video that Miller purportedly recorded with his cell phone. While the "fabrication" characterization was precariously close to an improper comment on the truthfulness of a witness's testimony, the prosecutor did not expressly characterize the witness's testimony as a "lie," and then further went on to point out the manifest lack of evidentiary support for the alleged later instance of the male victim's misconduct, as illogically proffered by the defense as justification for Miller's alleged perception of threatening behavior by the victim four months *earlier*. Thus, in context, the prosecutor's statement was clearly more akin to a comment on the evidence that the November incident story was not supported by the evidence under circumstances that would allow the jury to infer that the witness had a manifest motive to testify falsely, and in fact accordingly did so, rather than a statement of the prosecutor's direct personal opinion that the testimony was not truthful.

¶34 Miller similarly singles out, out of context, the prosecutor's characterization of his trial testimony as "self-serving" and related comments that the jurors heard the responding police officer's "disbelief in [his] explanation" (that he was chasing the alleged victims around town to protect his family), and that Miller then told the officer "that's all I got" and did not "have anything else" to say—"no [other] explanation, no concocted story yet." In context, however, the prosecutor was clearly commenting on the evidence regarding the inconsistency between Miller's limited real-time, post-*Miranda*-advisory[15] statements to police at the scene and his far more detailed trial testimony, including details stated for the first time at trial. The "self-serving" characterization was similarly in reference to one of the witness-credibility-assessment criteria specified in the jury instructions. While the "no concocted story yet" comment also precariously approached the line of impropriety by implying that any inconsistent subsequent statement by Miller would have been "concocted" and thus deceitful, the comment did not directly or indirectly characterize any of Miller's subsequent trial testimony as a "lie," "concoction," or the like, and was clearly in context more akin to a comment on the evidence, rather than a direct statement of the prosecutor's personal opinion as to the credibility of a witness or his or her testimony.

¶35 Miller finally singles out, out of context, the prosecutor's comment that the alleged female victim was "[q]uite frankly[] . . . acting on her own accord," commenting that the female's account was not the type of "story concocted by somebody that's in fear of

[15] The responding officer testified at trial, and Miller does not dispute, that he gave Miller a *Miranda* advisory immediately upon detaining him at the scene of the initial traffic stop of the Miller vehicle.

somebody they're engaged to be married to," and related rhetorical question as to whether "four of [the State's] witnesses [are] lying or is . . . Miller lying." Again however, the prosecutor's comments regarding the alleged female victim's motivation and account of events were, in context, comments on the evidence (i.e., her consistent demeanor and circumstance in her recorded 911 call, recorded pretrial statements, and trial testimony) and suggestion of reasonable inferences supported thereby. The prosecutor's comments and rhetorical question were further in direct response to the asserted and manifest defense theory of the case that Miller and his friend were truthful while the alleged victims and eyewitnesses were not, and defense counsel's similar related closing argument statement, to wit:

> Ladies and Gentlemen . . . you heard . . . quite a story. It's a shocking story. . . . [N]ot just one story—it's "stories." They told multiple versions of what happened that day within that one little story, within that one little circle. . . . I submit to you that what is really happening here is that [the alleged victims] have completely exaggerated as much as they can what really happened here. . . . Miller never pointed a pistol at anyone, especially [the alleged victims].

Thus, in context, the record does not support Miller's assertion that the prosecutor's comment on the alleged female victim's motivation and account of events, and her related rhetorical question as to who was lying, were either direct characterizations of a witness or his or her testimony as a "liar," "lying," or a "lie," or otherwise statements of direct personal opinion as to the credibility or truthfulness of a witness. In sum, we hold that Miller has not met his burden of demonstrating that any of the prosecutor's cited closing or rebuttal arguments or comments were improper.

¶36 We note further that, even upon demonstration that a particular prosecutorial argument or comment is improper in violation of a defendant's fair trial rights, such prosecutorial misconduct is not remediable by reversal of conviction absent an affirmative record-based showing by the defendant that the violation actually prejudiced his or her right to a fair trial under the totality of the circumstances. *State v. Duffy*, 2000 MT 186, ¶ 35, 300 Mont. 381, 6 P.3d 453; *Soraich*, ¶ 20 (citing *State v. Arlington*, 265 Mont. 127, 150, 875 P.2d 307, 325 (1994)). In other words, actual prejudice from prosecutorial misconduct in violation of a constitutional fair trial right is not and will not be presumed—the defendant must demonstrate that the violation rendered the trial unfair under the totality of the circumstances including, *inter alia*, consideration of any improper prosecutorial comment in the context of the subject opening statement or closing arguments as a whole. *Gladue II*, ¶ 27 (internal citations omitted); *Thompson*, 176 Mont. at 158, 576 P.2d at 1109-10. *Accord McDonald*, ¶ 10 (internal citations omitted).

¶37 In assessing whether demonstrated violations of fair trial rights actually resulted in an unfair trial, isolated instances of improper prosecutorial comments during closing argument are generally insufficient to prejudice an accused's right to a fair trial. *See State v. Wells*, 2021 MT 103, ¶¶ 27-28, 404 Mont. 105, 485 P.3d 1220; *State v. Laird*, 2019 MT 198, ¶¶ 143-44, 397 Mont. 29, 447 P.3d 416 (Baker, J., dissenting); *State v. Ritesman*, 2018 MT 55, ¶¶ 27-28, 390 Mont. 399, 414 P.3d 261; *Clausell v. State (Clausell II)*, 2005 MT 33, ¶¶ 17-18, 326 Mont. 63, 106 P.3d 1175; *Clausell I*, ¶¶ 44-45; *State v. Hanson*, 283 Mont. 316, 325-26, 940 P.2d 1166, 1172 (1997). *See also, e.g.*, *State v. Aker*, 2013 MT

253, ¶¶ 16-19 and 29-31, 371 Mont. 491, 310 P.3d 506 (prosecutor assertion in child sex case that jury could either believe child victim or defendant and his friends, that victim had "no motive" or "other reason" to lie and "was telling . . . the truth," and that defense witnesses "lied" were improper under the circumstances but not plain error where defense counsel asked defense witnesses whether they "cooked up a story" and would "lie for" their friend, both closing arguments "focused on why the jury should believe that party's witnesses and not those of the other side," and the prosecutor's assertions were "tied . . . to [the] evidence" and instruction of jury to determine "witness credibility" upon consideration of "every matter in evidence that tends to indicate whether a witness is worthy of belief"—internal punctuation omitted); *Lacey*, ¶¶ 17-19 and 24-26 (noting impropriety of "reliance on God" to support her assertion of defendant's guilt but holding that balance of prosecutor assertions that the state's witness was "candid," defendant was not, and that defendant was "by God" guilty were in context encompassed within "an otherwise well supported, and permissible, commentary on the evidence and the credibility of witnesses" and thus "not so far from permissible" to be plain error); *Thorp*, ¶¶ 18-19, 25-26, and 29-30 (unsolicited law enforcement officer testimony that victim's account "seemed credible," and twice-repeated prosecutor assertion that child sex abuse victim's testimony satisfied all elements of the charged offense, that only remaining jury question was "whether you believe her," and that "I think you will find [her] . . . very credible . . . [with] no reason to lie, I think you will believe her," and that "you should" did not constitute plain error when viewed in context and defendant made tactical decision to

merely seek cautionary instruction regarding prosecutor comments rather than mistrial); *State v. Rose*, 2009 MT 4, ¶¶ 104-07, 348 Mont. 291, 202 P.3d 749 (assertions that defendant "told you so many untruthful things" and told you the "big lie" were improper but not plain error under the circumstances); *State v. Lindberg*, 2008 MT 389, ¶¶ 28-35, 347 Mont. 76, 196 P.3d 1252 (characterization of defense witness as a "liar" who told a "bold-face lie," state's witnesses as "genuine and truthful," and comment on defendant failure to present evidence to support the defense theory of the case was not plain error where prosecutor "did not comment . . . on whether [he] invoked his *Miranda* rights, or whether he remained silent after doing so"); *State v. Racz*, 2007 MT 244, ¶¶ 16 and 34-36, 339 Mont. 218, 168 P.3d 685 (assertions that police officer had "no reason to lie," was "honest," "did not . . . lie to make the case or himself look better," and "simply told the truth" was improper statement of personal opinion regarding witness credibility but not plain error under the circumstances); *Hanson*, 283 Mont. at 325-26, 940 P.2d at 1172 ("isolated" statement of direct personal opinion that defense witness was "lying" and that prosecutor did not "think [he] was being honest" was not prejudicial in context); *Arlington*, 265 Mont. at 157-58, 875 P.2d at 325-28 (repeated assertions that defendant "lied" improper but not plain error where evidence of guilt and use of excessive force was "overwhelming" and based on more than "the testimony of the defendant and the victim"); *State v. Rodgers*, 257 Mont. 413, 417-19, 849 P.2d 1028, 1031-32 (1993) (summarily holding that assertion that defendant and son were "liars" was not plain error); *State v. Statczar*, 228 Mont. 446, 457, 743 P.2d 606, 613 (1987) (prosecutor comment that her

"office [is] too busy to prosecute innocent persons" and "[w]e don't have time to spend chasing people that we believe are innocent or have time to frame people" was an improper personal opinion regarding the guilt of the accused but not sufficient to warrant mistrial—internal punctuation omitted). In contrast, a multitude of improper closing argument comments may have the cumulative effect of substantially undermining or prejudicing the fundamental fairness of the trial under the totality of the circumstances, particularly where the ultimate question of guilt hinges exclusively on the relative credibility of the parties' witnesses. *See, e.g.*, *Byrne*, ¶¶ 32-35; *Hayden*, ¶¶ 31-32.

¶38 Here, as previously noted, Miller has failed to meet his initial burden of showing that any of the cited prosecutorial comments were improper in violation of any constitutional fair trial right. However, to the extent that at least two of the prosecutor's comments came precariously close to being improper, we once again take this opportunity to caution prosecutors that they are treading on precariously "thin ice" every time they: (1) characterize a witness as a liar, lying, having lied, or witness testimony as a lie; (2) personalize otherwise permissible comments and arguments on the evidence in terms of "I think," "I believe," or the like; or (3) make assertions regarding the credibility, believability, reliability, or truthfulness of a witness or witness testimony, or the guilt of the accused, without careful reference to the evidence. *See Lindberg*, ¶ 34; *Arlington*, 265 Mont. at 158, 875 P.2d at 325. Nonetheless, to the extent that a couple of the prosecutor's comments were close to being improper here, Miller has in any event failed to demonstrate that they resulted in an unfair trial under the totality of the circumstances, whether viewed

individually or cumulatively. Thus, upon our review of the record as a whole, we hold that Miller has not demonstrated that any of the cited prosecutorial closing argument and rebuttal comments, *inter alia*, either were improper or resulted in a manifest miscarriage of justice, undermined the fundamental fairness of the trial, or otherwise compromised the integrity of the judicial process, whether viewed individually or cumulatively. We hold that Miller has failed to demonstrate the cited prosecutorial arguments and comments, *inter alia*, constituted plain error.

¶39 3. *Whether defense counsel's withdrawal of his Batson challenge and failure to object to allegedly improper statements by the prosecutor constituted ineffective assistance of counsel?*

¶40 Faced with the narrow prospect of establishing plain error on Issues 1 and 2, Miller alternatively asserts that he received ineffective assistance of counsel (IAC) based on counsel's withdrawal of the *Batson* challenge and failure to object to the prosecutor's allegedly improper closing argument statements. The Sixth and Fourteenth Amendments to United States Constitution, and Article II, Section 24, of the Montana Constitution, similarly guarantee criminal defendants the right to effective assistance of counsel. *Whitlow*, ¶ 10; *State v. McElveen*, 168 Mont. 500, 501-03, 544 P.2d 820, 821-22 (1975); *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984) (citing *McMann v. Richardson*, 397 U.S. 759, 771 n.14, 90 S. Ct. 1441, 1449 (1970)). However, the performance of counsel is constitutionally ineffective only if both deficient and prejudicial. *State v. Herrman*, 2003 MT 149, ¶ 17, 316 Mont. 198, 70 P.3d 738. A performance is constitutionally deficient only if it "fell below an objective standard of reasonableness

measured [by] prevailing professional norms" under the totality of the circumstances at issue. *Whitlow*, ¶ 20. *Accord Strickland*, 466 U.S. at 688-89, 104 S. Ct. at 2064-65. A deficient performance was prejudicial only upon a showing of a reasonable probability that the outcome would have been different but for the deficient performance. *Ariegwe v. State*, 2012 MT 166, ¶¶ 15-16, 365 Mont. 505, 285 P.3d 424; *Heath v. State*, 2009 MT 7, ¶ 17, 348 Mont. 361, 202 P.3d 118; *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. The performance of counsel is presumed constitutionally effective—IAC claimants bear the heavy burden of overcoming that strong presumption. *Whitlow*, ¶ 21; *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. The mere fact that defense counsel failed to assert a particular available defense, or take an available defensive action, is generally insufficient alone to establish that the performance of counsel was constitutionally ineffective. *See State v. Mahoney*, 264 Mont. 89, 101-02, 870 P.2d 65, 73 (1994). Ineffective assistance of counsel claims predicated on a failure to object at trial require the defendant to show that an objection would have been proper and, if made, should have been sustained. *State v. Jenkins*, 2001 MT 79, ¶ 11, 305 Mont. 95, 98, 23 P.3d 201 (citing *Rodgers*, 257 Mont. at 421, 849 P.2d at 1033); *Kills on Top v. State*, 273 Mont. 32, 51, 901 P.2d 1368, 1380 (1995)).

¶41 We previously held under Issue 1 that Miller has not shown that the District Court erroneously allowed the State to peremptorily strike the subject Juror from the jury venire under the totality of the record facts and circumstances in this case. We held under Issue 2 that he has further failed to show that any of the cited prosecutor closing argument and

rebuttal statements, *inter alia*, were improper in violation of any of his constitutional fair trial rights. We held under both Issues that he also failed to show that either assertion of error was prejudicial in any event. For the same reasons, we hold that Miller has neither shown that defense counsel's withdrawal of his initial *Batson* challenge, nor his failure to object to the cited prosecutor statements, *inter alia*, either constituted deficient performance or prejudiced any of his substantial rights for purposes of his alternative ineffective assistance of counsel claim.

CONCLUSION

¶42 We hold that neither the peremptory removal of the only non-white member of the jury venire, nor any of the cited prosecutor comments or arguments, constituted plain error under the circumstances of this case. Nor did defense counsel's withdrawal of his initial *Batson* challenge, or his failure to object to any of the cited prosecutor comments or arguments, constitute ineffective assistance of counsel under the circumstances of this case. Affirmed.

/S/ DIRK M. SANDEFUR

We concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ INGRID GUSTAFSON
/S/ LAURIE McKINNON

Justice Laurie McKinnon, concurring.

¶43 I write separately to emphasize that the right to have juries selected in a nondiscriminatory manner is grounded in the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and in Article II, Section 4, of the Montana Constitution (titled "Individual Dignity"). It is a right which belongs to jurors and citizens as a whole, and thus its application is not limited to the accused. When a person is excluded from participating in our democratic processes, such as a trial, solely because of that person's race, gender, or ethnicity, the promise of equality under the law dims and the integrity of our judicial system is compromised. The peremptory strike is the tool for carrying out this discriminatory conduct.

¶44 To begin, the peremptory strike is not a fundamental right protected by a constitutional guarantee, even as applied to the defendant. While the right has existed for two centuries, the right arises from statutes and rules which provide for peremptory strikes, state the manner in which they may be exercised, and establish the number of strikes that may be used. Without this authorization, parties would have no right to exercise a peremptory strike.[1] To be sure, the peremptory strike has come to be considered a necessary part of a trial by jury and one of the most important rights of an accused. The wrongful denial of the right is also reversible error in a criminal trial. See *State v. Cudd*,

[1] The Arizona Supreme Court issued a rule change effective January 1, 2022, which completely eliminated the peremptory strike in Arizona. *See* Ariz. Sup. Ct. Or. No. R-21-0020 (Aug. 30, 2021). The Arizona rule change followed other states' reexamination of the peremptory strike and its use as a tool for discriminatory jury selection.

2014 MT 140, ¶ 6, 375 Mont. 215, 326 P.3d 417. Nonetheless, the peremptory strike exists because it is considered to be a tool that furthers parties' confidence in the fairness and impartiality of the trier of fact, as its essential nature allows it to be exercised without inquiry and without being subject to the court's control. The peremptory strike permits rejection of a juror without having to provide a demonstrable or designated basis tailored to prove a cognizable reason of partiality. It allows the litigant to strike jurors for even the most subtle of discerned biases, for portended impressions of the juror, and for unaccountable prejudices based merely on the juror's appearance, gestures, demeanor, and responses to questions propounded in voir dire. It protects a litigant with animus for a juror from having to seat that juror after losing a strike for cause or from seating a juror for whom there was an insufficient basis to bring a cause challenge despite the litigant's belief that the juror would be biased. Similarly, a juror may express doubt about being able to be fair, but then the opposing counsel or judge ostensibly "rehabilitates" the juror; in this scenario, the peremptory challenge remains an option for the litigant to prevent the juror from being seated. Further, without the peremptory strike, trial counsel might be deterred from asking probing questions during voir dire for fear that any hostility inadvertently raised could not be remedied through a peremptory strike. Finally, the peremptory strike alleviates the randomness of the cross-section built into the venire pool required by the Sixth Amendment by allowing the parties to exercise their own intuitive judgment regarding perceived juror biases. Thus, in criminal and civil jury trials, the peremptory strike fosters both the perception and reality of an impartial jury. "The function of the [peremptory] challenge is

not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they will try the case will decide on the basis of the evidence placed before them, and not otherwise." *Swain v. Alabama*, 380 U.S. 202, 219, 85 S. Ct. 824, 835 (1965) (*overruled on other grounds by Batson*, 476 U.S. at 80, 106 S. Ct. at 1713-14). In this way, the peremptory strike promotes the principle that "to perform its high function in the best way[,] justice must satisfy the appearance of justice." *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 625 (1955).

¶45 However, despite these purported virtues, the freedom to exercise peremptory strikes has guaranteed that "the problem of racial exclusion from jury service [will] remain[] widespread and deeply entrenched."[2] It is in this context that the Equal Protection Clause arose as a bookmark to address discriminatory jury selection. Ratified in 1868 in the wake of the Civil War, the Equal Protection Clause of the Fourteenth Amendment provides that no State "shall deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Equal Protection Clause guarantees that states will not exclude members from a defendant's jury on account of race, or on the false assumption that members of his race as a group are not qualified to serve as jurors. To enforce the Fourteenth Amendment's protections, Congress passed the Civil Rights Act of 1875, which made it a criminal offense for state officials to exclude individuals from jury

[2] U.S. Comm'n on Civil Rights, *Book 5: 1961 Commission on Civil Rights Report*, 90 (1961).

service on account of race. 18 U.S.C. § 243 ("Exclusion of jurors on account of race or color").

¶46 Likely one of the most important decisions in the United States Supreme Court's jurisprudence addressing discrimination in jury selection, and from which *Batson* and its progeny derive, was *Strauder v. West Virginia*, 100 U.S. 303 (1879). In *Strauder*, the Court recognized that a defendant is denied equal protection of the law when tried before a jury from which members of his race have been excluded by the state's purposeful discriminatory conduct. The Court explained in *Strauder*:

> [The Fourteenth Amendment] is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the [white] race enjoy. The true spirit and meaning of the amendments . . . cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealous and positive dislike, and that [s]tate laws might be enacted or enforced to perpetuate the distinctions that had long before existed. Discriminations against them had been habitual. . . . It was in view of these considerations the Fourteenth Amendment was framed and adopted.

Strauder, 100 U.S. at 305-06. *Strauder*'s close temporal proximity to ratification of the Fourteenth Amendment is important. As was explained in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72 (1872):

> "[N]o one can fail to be impressed with the one pervading purpose found in [] all [the amendments], lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the

> protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over them."

In *Strauder*, the Court recognized that when black Americans are singled out by the color of their skin, when they are citizens and otherwise qualified to serve as jurors, it is "practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others." *Strauder*, 100 U.S. at 308. Significantly, the Court in *Strauder* also recognized the right of all citizens to participate in the administration of the law by serving on juries. *Strauder*, 100 U.S. at 308.

¶47 The principles announced in *Strauder* have never been questioned in any subsequent opinion of the Court. Rather, the question following *Strauder* was how a defendant meets his burden of proving purposeful discrimination on the part of the State. In 1965, in *Swain*, the Court had to decide whether a black defendant was denied equal protection of the law when the State exercised its peremptory challenges to exclude members of his race from the jury. Swain was convicted of a capital offense in Talladega County, Alabama, and sentenced to death. Swain presented evidence that no black juror had served on a jury in Talladega County in more than a decade. The prosecutor in *Swain* had struck all six black persons included in the jury venire. While the Court indicated that the Equal Protection Clause placed some limitations on the prosecutor's exercise of peremptory challenges, it rejected Swain's claim because Swain had failed to prove that the prosecutor acted purposefully. *Swain*, 380 U.S. at 224-26, 85 S. Ct. at 838-39. Thus, the Court struck a

balance between the historical privilege of the peremptory challenge free of judicial control and the Fourteenth Amendment's constitutional prohibition of exercising peremptory challenges based on race. Although the Court rejected Swain's attempt to establish an equal protection claim premised solely on the pattern of jury strikes in his own case, the Court acknowledged that proof of the systematic exclusion of black citizens through the use of peremptories over a period of time might establish an equal protection violation. *Swain*, 380 U.S. at 224-28, 85 S. Ct. at 838-40. The Court also recognized not only the right of a defendant to a non-discriminatory jury selection process, but that an excused black juror has the "right and opportunity to participate in the administration of justice enjoyed by the white population." *Swain*, 380 U.S. at 224, 85 S. Ct. at 838.

¶48 *Swain* was decided in 1965. In *Batson*, decided in 1986, the Court could no longer ignore the widespread and rampant racist manipulation of the jury selection process and thus moved towards removing racial discrimination in jury selection by modifying *Swain*'s evidentiary requirement of proving purposeful conduct. The "central concern" of the *Batson* Court was to "put an end to governmental discrimination on account of race." *Batson*, 476 U.S. at 85, 106 S. Ct. at 1716. Accordingly, under *Batson*, based on the pattern of strikes in only the defendant's case, if the peremptory raises a prima facie case of a racial bias, the strike may be challenged and the proponent must then advance a race-neutral explanation for the strike. *Batson*, 476 U.S. at 96-98,106 S. Ct. at 1723-34. While the fundamental principle underlying *Batson* remained that "a 'State's purposeful or deliberate denial to [black citizens] on account of race participation as jurors in the administration of

justice violates the Equal Protection Clause[,]'" *Batson*, 476 U.S. at 84, 106 S. Ct. 1716 (quoting *Swain*, 380 U.S. at 203-204, 85 S. Ct. at 826-27), this principle was based upon three premises: (1) the right of the defendant to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria; (2) the right of a member of the community not to be assumed incompetent for, and be excluded from, jury service; and (3) the need to preserve public confidence in the fairness of our system of justice. The *Batson* Court thus recognized that, in addition to a defendant's right to be tried by a jury from which members of his race have not been excluded, *jurors* may not be excused on account of their race without violating the Equal Protection Clause.

¶49 In the 1991 *Powers* decision, decided five years after *Batson*, the State used peremptory challenges to remove seven black venirepersons from the jury. Powers, a white man, objected to the State's use of its peremptories, arguing that *Batson* does not depend on whether the defendant and the excluded jurors share the same race. Significantly, while the Court sustained the *Batson* challenge, it did not do so on the theory that the defendant's equal protection rights were violated; rather, it did so on the basis that the equal protection rights of the *excluded jurors* were violated. *Powers*, 499 U.S. at 410-16, 111 S. Ct. at 1370-74. Justice Kennedy, writing for the Court, began by explaining that "jury service is an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to [] civic life." *Powers*, 499 U.S. at 402, 111 S. Ct. at 1366. The Court reiterated that in the many cases since *Strauder*, the premise has never been questioned that racial discrimination in the qualification or

selection of jurors offends the dignity of persons and the integrity of the courts. *Powers*, 499 U.S. at 402, 111 S. Ct. at 1366. The Court reaffirmed its reasoning in *Batson* that a prosecutor's discriminatory use of peremptory challenges harms not just the defendant, but the excluded jurors and the community at large. *Powers*, 499 U.S. at 402, 111 S. Ct. at 1366 (citing *Batson*, 476 U.S. at 87, 106 S. Ct. at 1718). Importantly, the *Powers* Court explained more profoundly the nature of the interest needing protection—that is, the opportunity for ordinary citizens to participate in the administration of justice, which has long been recognized as one of the principal justifications for retaining the jury system. *Powers*, 499 U.S. at 406-07, 111 S. Ct. at 1368-69; *see also Duncan v. Louisiana*, 391 U.S. 145, 147-158, 88 S. Ct. 1444, 1446-52 (1968). The Court reasoned:

> The jury system postulates a conscious duty of participation in the machinery of justice . . . . One of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse.

Powers, 499 U.S. at 406, 111 S. Ct. 1368 (quoting *Balzac v. Puerto Rico*, 258 U.S. 298, 310, 42 S. Ct. 343, 347 (1922)). Additionally, quoting Alexis de Tocqueville, Justice Kennedy wrote:

> The institution of the jury raises the people itself, or at least a class of citizens, to the bench of judicial authority and invests the people, or that class of citizens, with the direction of society.
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> . . . . .
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> . . . The jury . . . invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society; and the part which they take in the Government. By obliging men to turn their attention to affairs which are not exclusively their own, it rubs off that individual egotism which is the rust of society.
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> . . . . .

> I do not know whether the jury is useful to those in litigation; but I am certain it is highly beneficial to those who decide litigation; and I look upon it as one of the most efficacious means for the education of the people which society can employ.

Powers, 499 U.S. at 407, 111 S. Ct at 1368. The *Powers* Court explained, "[j]ury service preserves the democratic element of law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people." *Powers*, 499 U.S. at 407, 111 S. Ct at 1368. The Court further explained that, with the exception of voting, jury service is the most significant opportunity of participating in the democratic process; jury service affords citizens the valuable opportunity of participating in a process of government, an experience hopefully that will foster a respect for the law. *Powers*, 499 U.S. at 407, 111 S. Ct at 1369. Accordingly, "[w]hether jury service be deemed a right, a privilege, or a duty, the State may no more extend it to some of its citizens and deny it to other on racial grounds than it may invidiously discriminate in the offering and withholding of the elective franchise." *Powers*, 499 U.S. at 408, 111 S. Ct at 1369 (quoting *Carter v. Jury Comm'n of Greene County*, 396 U.S. 320, 330, 90 S. Ct. 518, 523 (1970)). The Court in *Powers* rejected the notion that no particular stigma or dishonor results if a prosecutor uses the raw fact of skin color to determine the objectivity or qualifications of a juror; instead, it held that such a view contravenes accepted equal protection principles and affirmed that race cannot be a proxy for determining juror bias or competence. *Powers*, 499 U.S. at 410, 111 S. Ct. at 1370. Racial discrimination in the selection of jurors castes "doubt on the integrity of the judicial process" because the jury acts as a vital check against the wrongful exercise of

power by the State. *Powers*, 499 U.S. at 411, 111 S. Ct. at 1371. The intrusion of racial discrimination into the jury selection process damages both the fact and the perception of this guarantee. *Powers*, 499 U.S. at 411, 111 S. Ct. at 1371.

¶50 Discrimination during the jury selection process condones violations of the Equal Protection Clause within the very institution entrusted with its enforcement, and in so doing invites cynicism respecting the jury's neutrality and its obligation to adhere to the law. This cynicism may be aggravated if race is implicated in the facts that the jury must consider at trial: for example, the trial of white police officer Derek Chauvin for the murder of George Floyd, a black man. When jurors are allowed to be selected on the basis of race, a constitutional violation occurs during the trial itself—an overt wrong, often apparent to the entire jury panel, which casts doubt over the obligation of the parties, the jury, and the court to adhere to the law throughout the trial of the case. The purpose of the jury system is to impress upon the defendant—and the community as a whole—that a verdict of conviction or acquittal is given in accordance with the law by persons who have been selected lawfully and who have been fair. The verdict will not be accepted or understood in these terms if the jury is chosen by unlawful means at the outset. The Court in *Powers* recognized the dual rights of the defendant and the excused juror when it held "[b]oth the excluded juror and the criminal defendant have a common interest in eliminating racial discrimination from the courtroom." *Powers*, 499 U.S. at 413, 111 S. Ct. at 1372.

¶51 During the same term that the Court decided *Powers*, it also decided *Edmonson v. Leesville Concrete Co*, 500 U.S. 614, 111 S. Ct. 2077 (1991), a negligence case not

involving any state actors. The defendant, Leesville, used two of its three peremptory challenges authorized by statute to remove black persons from the prospective jury. Edmonson, who was black, objected on the basis of *Batson*. In rendering its decision, the Court revisited *Powers*, making clear that race-based peremptory challenges violate the equal protection rights of those excluded from jury service. *Edmonson*, 500 U.S. at 618, 111 S. Ct. at 2081. Discrimination based on race in selecting a jury in a civil proceeding harms the excluded juror no less than discrimination in a criminal trial. *Edmonson*, 500 U.S. at 618. In either case, "race is the sole reason for denying the excluded venireperson the honor and privilege of participating in our system of justice." *Edmonson*, 500 U.S. at 619, 111 S. Ct. at 2082. The Court recognized, however, that racial discrimination, though invidious in all contexts, violates the Constitution only when it may be attributed to state action. *Edmonson*, 500 U.S. at 619, 111 S. Ct. at 2082. Thus, the Court had to answer the following question: to what extent may a litigant in a civil case be subject to the Constitution's restrictions?

¶52 The *Edmonson* Court began by observing that the Constitution structures the government; confines its actions; and, regarding certain individual liberties and other specified matters, confines the actions of the States. *Edmonson*, 500 U.S. at 619, 111 S. Ct. at 2082. With few exceptions, constitutional guarantees of individual liberty and equal protection do not apply to actions of private entities. Nonetheless, while the conduct of private entities lies beyond the purview of the Constitution in most instances, governmental authority may dominate an activity to such an extent that its participants must be deemed

to act with the authority of the government and, as a result, be subject to constitutional restraints. *Edmonson*, 500 U.S. at 620, 111 S. Ct. at 2082. The Court made several observations about whether jury selection was a state activity. First, it observed that peremptory strikes are statutorily authorized by the legislature and can be exercised only when the legislature deems it appropriate to allow parties to exclude a given number of persons who otherwise would satisfy the requirements for service on a jury. *Edmonson*, 500 U.S. at 620, 111 S. Ct. at 2083. Second, the Court observed that when private parties make extensive use of state procedures with the overt, significant assistance of state officials, state action may be found. Here, the Court noted the state established: (1) qualifications for jury service; (2) the location and summoning of prospective jurors; (3) the voter lists used to obtain a cross-section of venirepersons; and (4) the per diem for jury service. *Edmonson*, 500 U.S. at 622-23, 111 S. Ct. at 2084. The Court also explained that by enforcing a discriminatory peremptory challenge, a court has not only made itself part of the biased act, but has elected to place its power, property, and prestige behind the alleged discrimination. *Edmonson*, 500 U.S. at 624, 111 S. Ct. at 2085. Finally, the Court observed that jury selection is a traditional function of government since the jury system performs the critical governmental functions of guarding the rights of litigants and ensuring continued acceptance of the laws by all people. *Edmonson*, 500 U.S. at 624-25, 111 S. Ct. at 2085. "Though the motive of a peremptory challenge may be to protect a private interest, the objective of jury selection proceedings is to determine representation of a governmental body." *Edmonson*, 500 U.S. at 626, 111 S. Ct. at 2086. The sole purpose of the peremptory

challenge is to "permit litigants to assist the government in the selection of an impartial trier of fact." *Edmonson*, 500 U.S. at 620, 111 S. Ct. at 2083. The fact that the government delegates some portion of this power to private litigants does not change the governmental character of the power exercised; therefore, the "selection of jurors represents a unique governmental function delegated to private litigants by the government and attributable to the government for purposes of invoking constitutional protections against discrimination by reason of race." *Edmonson*, 500 U.S. at 626-27, 111 S. Ct. at 2086. If peremptory challenges based on race were permitted, "persons could be required by summons to be put at risk of open and public discrimination as a condition of their participation in the justice system." *Edmonson*, 500 U.S. at 628, 111 S. Ct. at 2087. The injury to excluded jurors would be the "direct result" of governmental delegation and participation. *Edmonson*, 500 U.S. at 628, 111 S. Ct. at 2087.

¶53 Post *Batson*, the Court has continued to emphasize that prospective jurors have a right to a nondiscriminatory jury selection procedure. In *Batson* and its progeny, the Court has recognized and protected the right of the prospective juror to participate in our democratic process through the administration of justice, tethered that right to the Equal Protection Clause, and reasoned that purposeful and overt racial discrimination cannot exist in the very institution entrusted with its enforcement if the integrity of—and public confidence in—the judicial system is to remain intact. In *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, 114 S. Ct. 1419 (1994), the Court extended *Batson* to discriminatory preemptory strikes based on gender and, once again, reaffirmed these principles.

¶54 Drawing on protections afforded to both the excused juror and the litigant, the Court explained in *J.E.B.*:

> Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded participation in the judicial process. The litigants are harmed by the risk that the prejudice that motivated the discriminatory selection of the jury will infect the entire proceedings . . . . The community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders.

511 U.S. at 140, 114 S. Ct. at 1427. When state actors exercise peremptory challenges based on gender stereotypes, they "ratify and reinforce prejudicial views of the relative abilities of men and women." *J.E.B.*, 511 U.S. at 140, 114 S. Ct. at 1427. Because these stereotypes have "wreaked injustice in so many spheres of our country's public life, active discrimination by litigants on the basis of gender during jury selection 'invites cynicism respecting the jury's neutrality and its obligation to adhere to the law.' " *J.E.B.*, 511 U.S. at 140, 114 S. Ct. at 1427 (quoting *Powers*, 499 U.S. at 412, 111 S. Ct. at 1371). "All persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination." *J.E.B.*, 511 U.S. at 141-42, 114 S. Ct. at 1428. The Court explained "the right to nondiscriminatory jury selection procedures belongs to the potential jurors, as well as to the litigants . . . [and] . . . [t]he exclusion of even one juror for impermissible reasons harms that juror and undermines public confidence in the fairness of the system." *J.E.B.*, 511 U.S. at 142, 114 S. Ct. at 1428, n.13.

Gender-based discrimination in jury selection sends a message "to all those in the courtroom, and all those who may later learn of the discriminatory act, [] that certain individuals, for no reason other than gender, are presumed unqualified by state actors to decide important questions upon which reasonable persons could disagree." *J.E.B.*, 511 U.S. at 146, 114 S. Ct. at 1428. *J.E.B.* made it clear that the equal opportunity to participate in the fair administration of justice is fundamental to our democratic system. It not only furthers the goals of the jury system, but it reaffirms the promise of equality under the law—"that all citizens, regardless of race, ethnicity, or gender, have the chance to take part directly in our democracy." *J.E.B.*, 511 U.S. at 146, 114 S. Ct. at 1430. When persons are excluded "from participation in our democratic processes solely because of race or gender, this promise of equality dims, and the integrity of our judicial system is jeopardized." *J.E.B.*, 511 U.S. at 146, 114 S. Ct. at 1430.

¶55 Montana's own Equal Protection Clause, contained in Article II, Section 4, of the Montana Constitution, was ratified in 1972. That section provides:

> Section 4. Individual dignity. The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

Section 4 sets forth fundamental rights which are guaranteed to all Montanans. By its very terms, this section of the Montana Constitution is broader than the Equal Protection Clause of its federal counterpart—perhaps, in part, because the Delegates to the Montana Constitutional Convention did not have the benefit of the foregoing precedent. When the

Montana Constitution was ratified, *Swain* was the controlling authority. While *Swain* recognized the Fourteenth Amendment prohibited exercising peremptory challenges based on race, it did little to protect that right, as the Court refused to find an equal protection claim premised solely on the pattern of jury strikes in Swain's case. *Batson*, decided in 1986, attempted to remedy the problem by holding that purposeful discrimination could be proven based on the pattern of strikes in the case itself. Following *Batson* came the noteworthy cases of *Powers*, *Edmonson*, and *J.E.B.*, which enhanced and defined the equal protection analysis. The foregoing federal precedent, at a minimum, should guide any analysis of an equal protection violation under Montana's Constitution. That precedent clearly establishes that when a person is excluded from participation in our democratic process solely because of race, gender, or ethnicity, the promise of equality under the law and the integrity of our judicial system are compromised. Section 4 would further extend this protection to prohibit equal protection violations based on "culture, social origin or condition, or political or religious ideas."

¶56 In my view, the foregoing precedent highlights the importance the Supreme Court has placed on the public's confidence in the nondiscriminatory functioning of the courts. When a jury is selected in a discriminatory manner and in violation of the Equal Protection Clause, a constitutional violation occurs during the trial itself—visible to the entire jury panel, witnesses, court staff, and any other observer. When a jury is selected through a discriminatory process, the public's confidence in the lawfulness of the verdict is compromised. All persons, when granted the opportunity to serve on a jury, have the right

not to be excluded based on discriminatory criteria. It is a right belonging to citizens as a whole, and thus its application is not limited to the accused. In my opinion, we should remind ourselves of these venerable principles, and never lose sight of them.

/S/ LAURIE McKINNON