IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0013

STATE OF MONTANA,

Plaintiff and Appellee,

v.

KELLY BEVERLY BALL,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, The Honorable Elizabeth Best, Presiding

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STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion by sustaining an objection to an allegedly inadmissible comment but not ordering the evidence to be stricken from the record or instructing the jury to disregard the comment.

2. Has Ball met his burden to demonstrate that his counsel was deficient when he failed to object when the district court sustained his objection but did not give the jury a curative instruction?

STATEMENT OF THE CASE

On October 20, 2020, a Cascade County jury found Appellant Kelly Ball (Ball) guilty of felony intimidation based upon his threats to Warren Ellis (Ellis). (10/20/20 Transcript of Jury Trial [Tr.] at 145; Docs. 36, 43.) The court ordered a Presentence Investigation Report (PSI) and set a sentencing hearing. (Doc. 45.) On December 7, 2020, the court sentenced Ball to a three-year commitment to the Department of Corrections (DOC), with all time suspended. (12/7/20 Sentencing Transcript at 11; Doc. 53.)

STATEMENT OF THE FACTS

On appeal, Ball does not contest the sufficiency of the evidence convicting him of felony intimidation. The State's evidence presented at trial consisted of testimony from Cascade County Sheriff's Department (CCSD) Deputy Joshua

Harris (Tr. at 146-56, 175-80); CCSD Lieutenant Bob Rosipal (Lt. Rosipal) (Tr. at 141-45.); and the victim of Ball's crime, Ellis (Tr. at 109-41). Ball was the only witness for the defense. (Tr. at 161-74.) Instead, Ball asserts that he was deprived the right to a fair trial because although the district court sustained his objection to Lt. Rosipal's statement, the court did not strike the comment from the record or instruct the jury to disregard the statement.

Victim's testimony

At trial, Ellis testified that on September 19, 2019, he was working at a business named CC Pet LLC (CC Pets). (Tr. at 110.) Ellis was the general manager of CC Pets and was greeting trucks arriving at the business. (*Id.*) Ellis testified that "a vehicle pulled into the parking lot, pulled into our loading dock area with a trailer in tow, blocked off our loading dock area, and then [Ball] got out of the truck and proceeded to go off property on to a property that's adjacent to our property." (*Id.*) Ellis recounted that Ball left the CC Pets property on a bicycle accompanied by his two dogs. (*Id.* at 110-11.)

When Ball returned to his parked truck, Ellis and another employee, Michael Martinez (Martinez) met him by Ball's truck and "told him that he was in a private business parking lot and he was blocking our loading dock and that he would need to immediately move his vehicle." (Tr. at 111, 123.) On cross-examination, Ellis denied that he initially spoke to Ball in anger or irritation when he asked Ball to

move his truck. (*Id.* at 124-25.) Ellis testified that Ball "became irate" after he told him he couldn't park in the business's loading dock, even though Ellis approached Ball as he would any person or customer to ask them to please move their vehicle because they were blocking trucks from entering. (*Id.* at 111, 117.) Ellis described Ball's reaction:

> He was very agitated. He was very verbally abusive. He was yelling at both myself and my other employee that was there at the time, screaming obscenities, telling us, you know, every four[-]letter word he could lay his tongue to, is the way he was engaging us.

(*Id.* at 112.) Ellis admitted that once Ball started using profanity toward him that it evolved into more of a "back and forth," and that he also started "cussing." (*Id.* at 126-27.) Ellis admitted that although he remained more reserved than Ball, he was also getting upset. (*Id.* at 127.)

Ellis further explained that Ball's two dogs were agitated because Ball was upset, and that they were "making circles and getting progressively closer to us when we were standing outside." (*Id.* at 112-13.) Ellis said that he told Ball to put his dogs in his vehicle because the owner of CC Pets had dogs in the facility and if Ball's dogs got into the facility via the open loading dock door that the owner would shoot them. (*Id.* at 113.) Ellis denied threatening to harm Ball's dogs in any way but testified that he did not want Ball's dogs "to go in the building and cause a problem with the other dogs or the employees." (*Id.* at 129.) Ball told him that his dogs would attack Ellis if Ball chose to have them do so. (*Id.* at 113, 129.)

Ellis told Ball several times he was going to call the police. (Tr. at 114.) He testified that Ball responded by using profanity and cursing at Ellis. (*Id*.) Ellis then testified that Ball told him that he "was going to go into the cab of his gun (sic) and retrieve a firearm and shoot [Ellis]." (*Id.* at 113) Ball then "went to go into the cab of the truck." (*Id.* at 114) Ellis explained that Ball crouched down as he accessed the passenger side of his truck, and Ellis "believed [Ball] was going to get a gun [and shoot me]." (*Id.* at 114-15.)

Ellis admitted that he never saw Ball with a firearm. (Tr. at 130.) However, Ellis was "concerned about the whole situation[]" because he had "never seen anybody react the way [Ball] reacted to a simple request to move the vehicle . . . [and he had] never had anybody go from zero to sixty as quick as he did." (*Id.*) Ellis said that as Ball reached into his truck, he backed up to the business's loading dock door and called 911. (*Id.* at 116, 131-32.) At that point, Ellis stated that Ball called his dogs, got into his truck, and left the parking lot. (*Id.* at 132.)

Deputy Harris's testimony

Deputy Harris testified that he responded to a report on September 3, 2019, about a male who had threatened to shoot two other males. (*Id*. at 147.) Upon arrival at CC Pets, Deputy Harris spoke with Ellis and Martinez. (*Id.*) Deputy Harris reported that Ellis "seemed kind of frazzled of sorts . . . visibly upset . . . not in an angry fashion, but he seemed bothered by something, a little bit on edge, very

upset." (*Id.*) Deputy Harris explained that Ellis's behavior was very consistent with that of people who report crimes. (*Id.* at 148.)

Deputy Harris then testified that Ball was not present at CC Pets so he traveled to an alley after receiving a report that Ball was there. (Tr. at 148.) Deputy Harris described Ball's demeanor during his interaction with him:

> [Ball] was very agitated in an angry fashion. He was very upset that we were there. He had to be placed in handcuffs for our safety and his, because he kept trying to pull away and would not listen to instructions to stop moving around and stop trying to put his hands in his pockets and whatnot, so we had to secure him in handcuffs to maintain some control.

(*Id.* at 149.) Deputy Harris explained that he handcuffed Ball after Ball refused to stop putting his hands in his pockets because based on the report that Ball had threatened to shoot people, he was concerned that Ball had a firearm. (*Id.* at 150.)

Deputy Harris further distinguished Ball's agitation from that of the victim, Ellis. (*Id.*) He said that Ball was "upset at [Deputy Harris] and the other deputies that were in the area." (*Id.* at 150.) Deputy Harris said that Ball claimed Ellis had approached him yelling and hollering, very agitated and upset, so Ball told Deputy Harris that he had left the area to avoid a confrontation. (*Id.* at 151.) Deputy Harris testified that Ball told him Ellis had threatened to shoot his dogs. (*Id.*) After speaking with Ball, Deputy Harris returned to CC Pets to again speak with Ellis and Martinez; they confirmed that the version of events they previously described was accurate. (*Id.* at 151-52.)

Court instructions to counsel and to the jury

The court held a pretrial status conference on October 19, 2020. (10/19/20 Pretrial Hearing Transcript [10/19/20 Hr'g Tr.] Tr.) At that hearing, the district court reminded the attorneys, "No speaking objections—both of you have tried cases with me and we're all on the same page. No speaking objections." (*Id*. at 5.)

At trial, after the jury was seated and sworn, the court gave the jury preliminary jury instructions. (Tr. at 81-91.) Part of those instructions included the following:

> From time to time, counsel may make objections and motions and I will rule on them. Most of the time, I will make these rulings in your presence. You should not conclude from any of my rulings that I have an opinion on the merits of the case or that I favor one side or the other. If I sustain an objection to a question and do not permit a witness to answer, you should not guess what the answer might have been or draw any inference from the question itself.

(*Id.* at 89.) Following opening statements, the court excused the jury for a lunch break and the parties settled final jury instructions. (*Id.* at 95-107.) The State advised that it did not anticipate any Montana Rule of Evidence 404(b) evidence, so the court withdrew the corresponding jury instruction. (Tr. at 97.)

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Lt. Rosipal's testimony and Ball's objection

Lt. Rosipal testified briefly regarding his encounter with Ball on the day in question. (Tr. at 141-45.) Lt. Rosipal had responded to the report of someone who was driving a white pickup with a trailer threatening to shoot people with a gun. (*Id.* at 141-42.) Ball was sitting in a pickup that matched the reported pickup's description outside of Ball's residence. (*Id.* at 142-43.) Lt. Rosipal conducted a pat search of Ball. (*Id.* at 144.) He did not find a weapon on Ball's person. (*Id.*) The State questioned Lt. Rosipal:

> Q: Lieutenant Rosipal, when you contacted the defendant, what was his demeanor at the time?
>
> A: Very agitated.
>
> Q: In what sort of way?
>
> A: It was like he was under the influence of something, whether it was alcohol and/or drugs. But he was agitated that we were even there.
>
> Q: Okay.
>
> A: With my past experiences with Mr. Ball, every time I'm there, it's the same.

Defense counsel objected and the court sustained the objection. (*Id.* at 145.) The prosecutor responded, "[n]o further questions, Your Honor." (*Id.*) Defense counsel did not move to strike the statement, nor did the district court order it stricken. (*Id.*) The district court did not instruct the jury to disregard the statement. (*Id.*) After

confirming that neither party had further questions for Lt. Rosipal, the court excused him as a witness. (*Id.*)

Ball's testimony

Ball testified on his own behalf. (Tr. at 161-74.) Ball testified that when Ellis approached him Ellis was "cussing" at him and called him "bitch boy." (*Id.* at 166-67.) Ball testified that he never threatened to shoot anyone and "couldn't get out of there fast enough." (*Id.* at 167-69.) While testifying under cross-examination, Ball explained his reaction to law enforcement when they contacted him that day:

> I was probably, at first—I was probably a little—because I get hassled a lot by them. They tend to harass me a lot. I was probably a little agitated with them at the point.

(*Id.* at 174.)

Ball also testified that his exchange with Ellis "concerned me enough to call the Sheriff, to call the dispatch." (*Id.* at 169-70.) However, Deputy Harris testified on rebuttal that the sheriff's office uses the "Zuercher system" to track calls for service and notes are added to calls to give officers information. (*Id.* at 176.) The State asked Deputy Harris if the system's notes would have included information about a call from Ball regarding the incident Ellis reported. (*Id.*) Deputy Harris testified:

> Yes, it would have [been in the notes]. If another party in an incident calls in and advises us that—or if somebody else calls in relating to a call to give further information, dispatch will log that person's name with their telephone number so that we can get in contact with them

> so we can have the truest and most accurate depiction of what took place.

(*Id.* at 177.) Deputy Harris also testified that Ball never told him that he had called law enforcement. (*Id.* at 177, 179.)

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion when it sustained Ball's objection to Lt. Rosipal's testimony but did not instruct the jury to disregard his statement. Contrary to Ball's assertion, a court is not required to give the jury a curative instruction after it sustains an objection to inadmissible testimony. In fact, this Court has held that curative instructions can sometimes be harmful by emphasizing testimony that should be disregarded.

Even assuming Lt. Rosipal's comments were prejudicial, they do not warrant reversal of Ball's conviction. Ball himself testified that he had a history with law enforcement and put the evidence at issue when he testified that "I was probably a little agitated" because law enforcement "tends to harass me a lot." Absent Lt. Rosipal's statements, there was sufficient admissible evidence to prove Ball committed the offense of intimidation. Further, the quality of Lt. Rosipal's statements was not inflammatory so as to prejudice the jury and deprive Ball of a fair trial.

Ball's claim is not appropriate for review on direct appeal because the record on direct appeal does not show that counsel was ineffective for not requesting a curative instruction after the court sustained counsel's objection to Lt. Rosipal's testimony. Further, Ball's claim fails under *Strickland* and counsel's decision to not object falls within the range of reasonable professional assistance. To the extent Ball determines he has an IAC claim, he can pursue a remedy under postconviction relief.

This Court should affirm Ball's conviction.

ARGUMENT

I. Standard of review

"Evidentiary rulings are reviewed for an abuse of discretion." *State v. Mercier*, 2021 MT 12, ¶ 12, 403 Mont. 34, 479 P.3d 967. "Abuse of discretion occurs if the district court acted arbitrarily and without the employment of conscientious judgment or in a manner that exceeds the bounds of reason, resulting in substantial injustice." *Id.*

This Court only considers record-based ineffective assistance of counsel (IAC) claims on direct appeal. *State v. Howard*, 2011 MT 246, ¶ 18, 362 Mont. 196, 265 P.3d 606. To the extent IAC claims are appropriately raised on direct appeal, this Court reviews the claims *de novo*. *Id.*

II. The district court did not err when it sustained Ball's objection and did not give the jury a curative instruction.

A. Ball failed to argue below that his right to a fair trial was prejudiced by the district court's lack of a curative instruction.

For the first time on appeal, Ball argues that his right to a fair trial was prejudiced when the district court "did not strike [Lt.] Rosipal's inadmissible testimony and did not instruct the jury to disregard [Lt.] Rosipal's highly damaging statement." (Appellant's Br. at 11.) Below, Ball objected to Lt. Rosipal's statement, but did not object when the district court did not strike the evidence from the record or instruct the jury to disregard the testimony. Ball has thus waived review of this issue.

Before addressing the merits of Ball's prejudice argument, this Court must first determine whether that argument has been properly preserved for appeal. *State v. LaFreniere*, 2008 MT 99, ¶ 11, 342 Mont. 309, 180 P.3d 1161. This Court refuses to consider issues or arguments raised for the first time on appeal. *Id.* In order to properly preserve an issue or argument for appeal, a party must first timely raise an objection or argument in the district court. *State v. Aker*, 2013 MT 253, ¶ 26, 371 Mont. 491, 310 P.3d 506. Also, "an objection must be specific in order to preserve the issue for appeal." *LaFreniere*, ¶ 12 (citation omitted); *see also State v. Thompson*, 2017 MT 107, ¶ 17, 387 Mont. 339, 394 P.3d 197 (stating that the

Court generally requires an appellant to show an objection was made at trial on the same basis as the error asserted on appeal).

Here, Ball never objected when the district court sustained his objection but did not order the testimony stricken and did not order the jury to disregard the testimony. Ball did not move to strike the testimony or request a curative instruction. (*See* 10/20/20 Tr.) Since Ball failed to properly raise his prejudice argument in the district court, he has waived appellate review. *LaFreniere*, ¶¶ 12-14.

B. Plain error review is not available to Ball.

Since Ball did not properly preserve his due process issue for appeal by first raising it in the district court, the only possible avenue for this Court to address Ball's argument is under this Court's plain error review. This Court employs plain error review sparingly, on a case-by-case basis, and only where the defendant shows that failing to review the claimed error may result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process. *State v. West*, 2008 MT 338, ¶ 23, 346 Mont. 244, 194 P.3d 683; *see also State v. King*, 2013 MT 139, ¶ 39, 370 Mont. 277, 304 P.3d 1.

Ball has not asked the Court to invoke the plain error doctrine. Having failed to request plain error review in his opening brief, it is too late for Ball to ask for

plain error review in a reply brief. *King*, ¶ 40 ("[W]e will not apply the plain error doctrine when it was raised for the first time in a reply brief.") This Court should decline to exercise plain error review.

C. If this Court does consider the issue, the lack of a curative instruction did not prejudice Ball's right to a fair trial.

The "standard for determining reversible error is whether there was a reasonable possibility that the inadmissible evidence might have contributed to the conviction." *State v. Brush*, 228 Mont. 247, 252, 741 P.2d 1333 (1987). "[T]o grant a new trial, the defendant must have been deprived of a fair and impartial trial or it is clearly within the interest of justice. *Id.* at 252-53. "Because the trial court is in the best position to observe the jurors and determine the effect of questionable testimony it is given a latitude of discretion in its rulings on prejudicial evidence." *Id.*

1. The absence of a curative instruction is not automatically reversible error.

Ball mistakenly asserts that a court "must sustain the objection, strike the evidence from the record, and instruct the jury to disregard." (Appellant's Br. at 10, *citing State v. West*, 252 Mont. 83, 91, 826 P.2d 940, 945 (1992).) Rather than set forth a bright line rule in *West*, this Court described a presumption: "We have previously stated that when counsel opposes the admission of evidence and the District Court sustains counsel's objection, strikes the evidence from the record,

and instructs the jury to disregard the evidence, the error that is committed is presumed cured." *See West*, 252 Mont. at 91. The *West* Court did **not** hold that a district court errs if it sustains an objection but does not strike the evidence from the record and/or admonish the jury. In addition, the *West* Court found that the court's reading of a jury instruction (not a curative instruction) was half of what cured the error made by the State's inaccurate statement that the evidence of intoxication was "incontrovertible." *Id.*, 252 Mont. at 92.

In *State v. Denny*, 2021 MT 104, 404 Mont. 116, 485 P.3d 1227, this Court noted that curative instructions can sometimes do more harm than good. *Denny*, ¶ 25. There, Denny argued that "the District Court wrongly denied his motions for mistrial based on [a witness's] testimony that he had communicated with [the defendant] 'at the county jail,'" and made a second motion after a law enforcement witness referred to the audio recording [exhibit] as a "jail visitation." *Id.* ¶ 15. Denny "argue[d] that both references to "jail" revealed to the jury Denny's status as an inmate and was highly prejudicial." *Id.* This Court pointed out that Denny did not request a curative instruction and agreed with the district court that "a curative instruction would have done very little to remedy any prejudice" to the defendant, and "only would have drawn further attention to [the defendant's] status as an inmate." *Denny*, ¶ 22.

The substance of Lt. Rosipal's testimony had little, if any prejudicial effect, which would have only been increased with a curative instruction. In *State v. Michelotti*, 2018 MT 158, ¶ 21, 392 Mont. 33, 420 P.3d 1020, a law enforcement officer testified that the defendant had an active arrest warrant while under investigation for the current charges. *Michelotti*, ¶ 19. Defense counsel immediately objected, citing a Rule 404 prior bad act violation. *Id.* The district court determined that although the officer's comment was somewhat prejudicial and indicated prior interest by law enforcement, "mentioning an active arrest warrant does not rise to the prejudicial level of mentioning a prior conviction, prior incarceration, or the defendant being on probation." *Id.* Although the district court there did give a curative instruction, this Court held only that "a cautionary instruction **may** cure the prejudicial effect of otherwise inadmissible evidence." *Id.* (emphasis added).

Here, Lt. Rosipal testified that Ball seemed to be under the influence of alcohol and/or drugs and was agitated, which was the "same" as his past experiences with Ball. (*See* Tr. at 145.) Lt. Rosipal's testimony is similar to the witness statements in *Michelotti*, which included language this Court deemed impermissible but not prejudicial to the defendant's rights to a fair trial. (The inadmissible evidence was "a single, unsolicited statement by a witness

to which there was a contemporaneous objection[.]" *Michelotti*, ¶ 15.) Like in *Denny*, a curative instruction would have drawn attention to irrelevant information and that mentioned nothing about a prior arrest, prior incarceration, or probation status. Had the court given a curative instruction in this case, the jury may have focused on Lt. Rosipal's vague statement of "every time, it's the same," rather than disregard it.

This Court has "long noted that juries are presumed to follow the law provided by courts." *State v. LaFournaise*, 2022 MT 36, ¶ 41, 407 Mont. 399, 504 P.3d 486 (citing *State v. Favel*, 2015 MT 336, ¶ 28, 381 Mont. 472, 362 P.3d 1126). Here, the district court instructed the jury about objections and what to do if the court sustained an objection. (Tr. at 89.) Although defense counsel objected after Lt. Rosipal volunteered his comment about his "past experiences with Mr. Ball . . . [being] the same" rather than in response to a question posed by the State, the court had instructed the jury to disregard answers to questions that generated an objection. Ball presents no evidence to overcome the presumption that the jury ignored its instructions and declined to follow the law.

2. The absence of a curative instruction was harmless error and does not warrant reversal of Ball's conviction.

A cause may not be reversed by reason of any error committed by the trial court against the convicted person unless the record shows that the error was prejudicial. Mont. Code Ann. § 46-20-701. "The standard for establishing

prejudice is whether a substantial right was denied." *Brush*, 228 Mont. at 250 (citing Mont. Code Ann. § 46-20-701). Under the cumulative error doctrine, the "defendant must establish prejudice; a mere allegation of error without proof of prejudice is inadequate to satisfy the doctrine." *State v. Smith*, 2020 MT 304, ¶ 16, 402 Mont. 206, 476 P.3d 1178.

In *State v. Van Kirk*, 2001 MT 184, 306 Mont. 215, 32 P.3d 735, this Court "articulated the analytical framework for determining whether an error prejudiced the convicted person's right to a fair trial and is, therefore, reversible." *State v. Derbyshire*, 2009 MT 27, ¶ 43, 349 Mont. 114, 201 P.3d 811. First, this Court "determine[s] whether the error is structural error or trial error." *Id.* (citing *Van Kirk*, ¶ 37.) "Structural error is the type of error that affects the framework within which the trial proceeds." *Id.* (citing *Van Kirk*, ¶ 38.) It "is typically of constitutional dimensions, precedes the trial, and undermines the fairness of the entire trial proceeding." *Id.* Structural error is automatically reversible and requires no additional analysis or review. *Id.* ¶ 44 (citing *Van Kirk*, ¶ 39). By contrast, trial error is the type of error that occurs during presentation of a case to the jury. *Derbyshire*, ¶ 44 (citing *Van Kirk*, ¶ 40). This Court can qualitatively review trial error for prejudice relative to other evidence introduced at trial. *Id.* Trial error is, therefore, not presumptively prejudicial, is not automatically reversible, and is subject to harmless error review. *Id.*

If the error is trial error, the "second step in the *Van Kirk* analysis is to determine under the cumulative evidence test whether the trial error was harmless." *Derbyshire*, ¶ 47 (citing *Van Kirk*, ¶¶ 41, 43); *State v. Peplow*, 2001 MT 253, ¶¶ 46-47, 307 Mont. 172, 36 P.3d 922). "The cumulative error doctrine requires reversal where numerous errors, when taken together, have prejudiced a defendant's right to a fair trial." *Denny*, ¶ 24. "When determining whether a prohibited statement contributed to a conviction, a court must review the prejudicial influence of the inadmissible evidence together with the strength of the evidence against the defendant and whether a cautionary jury instruction could cure any prejudice." *Id.*

Applying the analysis here, Ball cannot establish prejudice due to Lt. Rosipal's remark because there was plentiful admissible evidence establishing facts relevant to elements of the offense of intimidation. "[I]f the tainted evidence was admitted to prove an element of the offense, then the State must direct us to admissible evidence that proves the same facts as the tainted evidence and demonstrate that the quality of the tainted evidence was such that there was no reasonable possibility it might have contributed to the conviction." *Derbyshire*, ¶ 47 (citing *Peplow*, ¶ 49; *Van Kirk*, ¶¶ 44-45). Montana Code Annotated § 45-5-203(1) provides:

> A person commits the offense of intimidation when, with the purpose to cause another to perform or to omit the performance of any act, the person communicates to another, under circumstances that reasonably tend to produce a fear that it will be carried out, a threat to perform without lawful authority any of the following acts:

(a) inflict physical harm on the person threatened or any other person;
(b) subject any person to physical confinement or restraint; or
(c) commit any felony.

Here, Ellis testified at length and in detail explaining how Ball's conduct on that day caused him fear that Ball intended to shoot him with a firearm. (Tr. at 114-15.) Further, Deputy Harris testified about his impression of Ellis's demeanor and told the jury that Ellis's distress was consistent with other victims of crime. Then, Ball told the jury during his testimony that he had a history of encounters with law enforcement and that he was agitated because they "hassled" him in the past. The jury was entitled to rely on one or all of the witness statements to determine the facts. Further, it was "within the province of the trier of fact to evaluate the credibility of witnesses, and determine what weight to assign to their testimony." *State v. Duncan*, 2008 MT 148, ¶ 45, 343 Mont. 220, 183 P.3d 111. Ellis and Deputy Harris provided admissible evidence to establish Ball's guilt. Lt. Rosipal's vague statements were not pertinent to establishing the facts of Ball's conviction.

Ball cites *State v. McCarthy*, 2004 MT 312, 324 Mont. 1, 101 P.3d 288 to assert that a "defendant's demeanor or behavior while communicating is particularly important to a factfinder to determine if the communication was intended to be conveyed in a threatening manner." (*See* Appellant's Br. at 13, citing *McCarthy*, ¶¶ 47-50.) Ball's reliance on *McCarthy* is misplaced because the

discussion there involved the defendant's demeanor as it was related to the reasonableness of the victim's fear, not whether witness testimony about defendant's prior demeanor made it more likely he committed intimidation in the pending case. *See McCarthy*, ¶¶ 47-53. McCarthy alleged that it was not reasonable for the victim of his intimidation charge, his probation officer, to fear that McCarthy would carry out his threat to shoot the county attorney because he had made threats in the past and had not acted upon them. *Id.* ¶ 50. The victim distinguished McCarthy's prior threat behavior to McCarthy's threat underlying the pending charge to explain why he did not have the same fear when McCarthy made his previous threats. *Id.* Here, while Lt. Rosipal's vague remark about Ball's attitude toward him during past interactions did not go to proving an element of Ball's crime, intimidation.

Secondly, the quality of Lt. Rosipal's statements did not rise to a level that contributed to Ball's conviction. This Court has held that "if the tainted evidence was not admitted to prove an element of the offense, then the admission of the evidence will be deemed harmless only if the State demonstrates that the quality of the tainted evidence was such that there was no reasonable possibility that its admission might have contributed to the defendant's conviction." *Van Kirk*, ¶¶ 46-47; *accord State v. McOmber*, 2007 MT 340, ¶ 26, 340 Mont. 262, 173 P.3d 690. In *Van Kirk*, this Court illustrated this situation by an example of if "the State

offers evidence in a DUI case that the defendant is a convicted child molester." *Van Kirk*, ¶ 46. This Court noted in that instance, because the tainted evidence did not go to proving an element of the offense and there was no other evidence establishing the same fact, it would be "virtually impossible" for the State to demonstrate the tainted evidence did not contribute to the defendant's conviction due to "the highly inflammatory nature of child molestation evidence." *Id.* This is not the situation in the instant matter.

Lt. Rosipal's testimony cannot reasonably be grounds for reversal of Ball's conviction. This Court has determined that comments much more specific and damning have not prejudiced a defendant's right to a fair trial. In its analysis of the two jail references in *Denny*, this Court analyzed the impact of two separate witnesses making statements revealing that the defendant had been in jail. *See Denny*, ¶¶ 14-25. This Court held that "most prospective jurors are aware that a defendant charged with a crime may have spent some time in jail." *Denny*, ¶ 25. The Court determined that "it cannot be said that these two references (to jail), in the totality of the evidence, so impacted the jury's deliberations that it influenced every question submitted to the jury" and "deprived Denny of a fair trial." *Id.* Further, absent those two references to jail, "the record was sufficient to establish Denny's guilt, and we do not conclude there was a reasonable possibility that the two references prejudiced the jury and deprived Denny of a fair trial." *Id.* Here,

Lt. Rosipal merely revealed he had prior contact with Ball, not that Ball had a criminal history or was an inmate. There is no reasonable possibility his testimony contributed to Ball's conviction.

Further, Ball himself put the evidence of his history with law enforcement at issue. Although Ball had not yet testified when Lt. Rosipal testified that "[w]ith my past experiences with Mr. Ball, every time I'm there, it's the same" (Tr. at 145), Ball volunteered during cross-examination that he "gets hassled a lot" by law enforcement. (Tr. at 174.) Review of Lt. Rosipal's statement against the strength of the evidence against Ball compels the conclusion that there is no reasonable possibility that Lt. Rosipal's testimony contributed to Ball's conviction.

III. Ball has not demonstrated that his counsel's failure to object to the lack of a curative jury instruction was ineffective assistance of counsel.

A. This Court should decline to review Ball's IAC claim because it is not record-based.

This Court reviews ineffective assistance of counsel claims on direct appeal if the claims are based solely on the record. *State v. Rovin*, 2009 MT 16, ¶ 24, 349 Mont. 57, 201 P.3d 780. Because there is a "strong presumption that counsel's actions are within the wide range of reasonable professional assistance, a record which is silent about the reasons for the attorney's actions or omissions seldom

provides sufficient evidence to rebut this presumption." *State v. Sartain*, 2010 MT 213, ¶ 30, 357 Mont. 483, 241 P.3d 1032 (quotation marks and citation omitted). As a result, if the record does not demonstrate "why" counsel did or did not take an action, the ineffective assistance claim is more suitable for a petition for postconviction relief. *Id.* A claim may be addressed on direct appeal, "in rare instances," if there is no plausible justification for defense counsel's actions or omission. *State v. Fender*, 2007 MT 268, ¶ 10, 339 Mont. 395, 170 P.3d 971.

In this case, there is not an explanation from counsel about why he did not object. "A record that is silent about the reasons for counsel's actions or omissions seldom provides sufficient evidence to rebut the 'strong presumption' that counsel's actions fell 'within the wide range of reasonable professional assistance.'" *State v. Cheetham*, 2016 MT 151, ¶ 35, 384 Mont. 1, 373 P.3d 45 (citations omitted). The lack of objection is an omission, or failure to act, resulting in the absence of any record-based justification, and such challenges clearly fall within the non-record-based rule. *State v. Hamilton*, 2007 MT 223, ¶ 27, 339 Mont. 92, 167 P.3d 906. Further, there may be additional information that pertains to his decision that is not in the record. Like the defense attorney in *Denny*, Ball's attorney may not have wanted to draw any undue attention to Lt. Rosipal's comments. Asking for a curative instruction could have spotlighted irrelevant

information to Ball's disfavor. Instead, the State ended its examination of the officer and he was excused.

Because the record does not contain an explanation from counsel for his failure to object, it would not be appropriate to find counsel ineffective without providing counsel an opportunity to respond to the allegation. But, as the State explains below, the record on appeal demonstrates that counsel was not ineffective, so this claim can be denied in this direct appeal.

B. Even if this Court determines that Ball's IAC claim is record-based, it must fail under the *Strickland* test because Ball cannot demonstrate prejudice.

If this Court determines that an ineffective assistance of counsel claim is based on the record, it analyzes the claim under the two-part test set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a defendant bears the burden of proving: "(1) that counsel's performance was deficient, and (2) that counsel's deficient performance prejudiced the defense." *Whitlow v. State*, 2008 MT 140, ¶ 10, 343 Mont. 90, 183 P.3d 861 (citing *Strickland*, 466 U.S. at 687). "To prevail on an ineffective assistance claim, a defendant must satisfy both prongs of this test. Where the defendant makes an insufficient showing as to one prong of the test, it is unnecessary to address the other prong." *Hammer v. State*, 2008 MT 342, ¶ 10, 346 Mont. 279, 194 P.3d 699

(citing *Whitlow*, ¶ 11); *State v. Ugalde*, 2013 MT 308, ¶ 66, 372 Mont. 234, 311 P.3d 772.

To satisfy the second prong of *Strickland*, a defendant "must demonstrate that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Morgan*, 2003 MT 193, ¶ 9, 316 Mont. 509, 74 P.3d 1047 (quoting *Strickland*, 466 U.S. at 694). The probability must be high enough to undermine confidence in the outcome. *Hammer*, ¶ 11.

Ball has failed to demonstrate that his attorney's performance was deficient or that there is a reasonable probability that but for his attorney's failure to object to the lack of curative instruction, the outcome of his trial would have been different. As previously discussed, Lt. Rosipal's comments were mildly prejudicial and did not rise to a level that could reasonably inflame the jury. A sustained objection need not be followed by a curative instruction in all circumstances, and this Court has agreed that a curative instruction may do more harm than good. *See Denny* ¶¶ 22, 25. Furthermore, Ball put his own history of law enforcement contact and agitation at issue by discussing it during his testimony. The jury was entitled to give Ellis's and Deputy Harris's testimony more weight than it gave to Ball. Based on Ball's questionable assertion that he called law enforcement and the lack of record of such a call, the jury could have reasonably questioned his veracity.

Ball's IAC claim fails under the *Strickland* test, and it should be denied.

CONCLUSION

The State respectfully requests that this Court affirm Ball's conviction.

Respectfully submitted this 9th day of September, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 6,204 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

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CERTIFICATE OF SERVICE

I, Bree Williamson Gee, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 09-09-2022:

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