

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0179

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DOMINGO JOSE PALAFOX,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Nineteenth Judicial District Court,
Lincoln County, The Honorable Matthew J. Cuffe, Presiding

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STATEMENT OF THE ISSUES

1. Viewing the evidence in the light most favorable to the prosecution, did the State present sufficient evidence that Appellant tampered with a witness on two separate occasions?
2. Should this Court consider Appellant's unpreserved claim that he was denied a fair trial because of alleged prosecutorial misconduct?
3. Has Appellant met his heavy burden of proving that he received ineffective assistance of counsel based on his claim that defense counsel failed to object to alleged instances of prosecutorial misconduct?

STATEMENT OF THE CASE

On June 25, 2020, the State charged Appellant Domingo Palafox with one count of felony aggravated animal cruelty, and two counts of felony tampering with witnesses and informants. (D.C. Doc. 4.) The State alleged in Count II of the Information that:

on or about June 11, 2020, at Lincoln County, Montana, the Defendant believing that an official proceeding or investigation was pending, purposely or knowingly attempted to induce or otherwise cause a witness or informant, Gideon Davis, to testify or inform falsely; withhold any testimony, information, document, or thing; or not appear at any proceeding or investigation to which the witness or informant has been summoned.

In Count III of the Information, the State alleged that:

on or about June 11, 2020, at Lincoln County, Montana, the Defendant believing that an official proceeding or investigation was pending, purposely or knowingly attempted to induce or otherwise cause a witness or informant, Jeremiah Davis, to testify or inform falsely; withhold any testimony, information, document, or thing; or not appear at any proceeding or investigation to which the witness or informant has been summoned.

Id.

Attorney Scott B. Johnson represented Palafox in the criminal matter.

(D.C. Doc. 7.) On July 6, 2020, Palafox pled not guilty to all three charges.

(D.C. Doc. 10.) The district court scheduled a jury trial for November 17, 2020.

(D.C. Doc. 11.)

On November 12, 2020, without the benefit of a plea agreement, Palafox moved to change his plea on the aggravated animal cruelty charge and moved for a bench trial on the two counts of witness tampering. (D.C. Doc. 25.) On November 16, 2020, Palafox pled guilty to aggravated animal cruelty. (D.C. Doc. 31.) On December 23, 2020, the district court held a nonjury trial on the two counts of witness tampering. (D.C. Doc. 32; 12/23/20 Transcript of Jury Trial [Tr].)

At the close of the State's case, Palafox moved to dismiss both witness tampering charges based on insufficient evidence. The district court denied the motion. (Tr. at 91-93.) At the conclusion of the nonjury trial, the district court found Palafox guilty of two counts of witness tampering. (Tr. at 130-42.)

On February 8, 2021, the district court sentenced Palafox to the Department of Corrections for two years for aggravated animal cruelty. (D.C. Doc. 45 at 2.) The district court sentenced Palafox to ten years in prison on the first count of witness tampering, and sentenced Palafox to a ten-year suspended prison sentence on the second count of witness tampering. (*Id.*) Palafox filed a timely notice of appeal. (D.C. Doc. 49.)

STATEMENT OF THE FACTS

Gideon Davis (Gideon) has known Palafox a long time and considered him to be a good friend. Gideon was aware that around February 2020 Palafox got two dogs. (Tr. at 35.) Gideon left the area for a while, and when he returned in the spring, Palafox only had one dog. Gideon asked what happened to the other dog. Palafox responded by showing him a video in which Palafox had tied the dog to a tree, poured gas on it, and lit it on fire. The rope melted, and the dog managed to run away. (Tr. at 36-37.) This made Gideon very upset, and he told Palafox that he had gone too far. Gideon's statement made Palafox angry. (Tr. at 37-38.)

Even though Gideon found the video disturbing, he continued to socialize with Palafox for several weeks until the subject of the video came up again. Palafox told Gideon that if anyone spoke up about the video, he would put a \$10,000 hit on their head. Gideon took this to mean that anybody who snitched

“was dead.” (Tr. at 39.) Gideon knew that Palafox had the financial means to make good on his threat, because he had received a monetary settlement for an injury he had sustained. (Tr. at 40.) Prior to Palafox’s statement, Gideon had still been contemplating whether he should speak up about the video Palafox had shown him. (Tr. at 40.) Gideon did not see Palafox socially after this incident. (Tr. at 41.)

After this encounter though, Palafox came to Gideon’s family residence and threatened that Gideon and his family were “done for.” (Tr. at 41.) Palafox drove up honking and screaming. Gideon ran outside. Palafox accused Gideon of being a narc and said he was going to put a hit on Gideon, and that Gideon’s family was not safe. (Tr. at 42.) At this time, Gideon had not made a report to law enforcement about the disturbing video Palafox had shown him. (Tr. at 42.) Palafox’s threats to harm Gideon and his family scared him. (Tr. at 56.)

Gideon’s brother, Jeremiah Davis (Jeremiah), explained that on June 11, 2020, Palafox pulled up to Jeremiah’s family home in his vehicle yelling that he was going to have his brother “taken care of,” because “he was a snitch.” (Tr. at 62.) Gideon believed this was a viable threat. (*Id.*) After this encounter, Gideon went to the local Town Pump to get gas. Palafox pulled up and started threatening Gideon again. Palafox said he would have Gideon “taken care of.” (Tr. at 63.) According to Jeremiah, Palafox threatened his whole family, including himself and his mom and dad. (Tr. at 64.) Jeremiah recalled that inside the Town Pump,

Palafox got in his face yelling and spitting at him. (Tr. at 67.) Jeremiah pushed Palafox and ultimately pled guilty to disturbing the peace. (Tr. at 66.) Jeremiah interpreted Palafox's threats to mean that he intended to send someone to beat up Jeremiah and his family members. (Tr. at 76.)

At trial, Deputy Fisher of the Lincoln County Sheriff's Office testified that on June 12, 2020, he went to the Davis residence in Lincoln County to speak with Gideon and Jeremiah about a threat Palafox had made to them the previous day. (Tr. at 22-24.) Deputy Fisher recalled that Palafox threatened something to the effect that snitches would be dealt with. Gideon seemed intimidated by this threat. (Tr. at 24.) At the time, Deputy Fisher believed Palafox's statements created a perception of a threat but it was not an actual threat made to a specific person. (Tr. at 26.) Deputy Fisher suggested that Gideon and Jeremiah pursue an order of protection. (*Id.*) Deputy Fisher explained however that he did not consider the possibility of Palafox tampering with a witness because he was not aware of the totality of the situation including the animal cruelty investigation. (Tr. at 31-32.)

Katie Davis is the police chief for the city of Troy. On March 9, 2020, Chief Davis received a report from a private citizen about a dog near the citizen's home that was in distress. Chief Davis located the dog curled up under a pine tree next to the driveway of the citizen informant. The dog appeared to have several injuries, was very weak, and was in very bad shape. (Tr. at 73-74.) After taking the

dog to a vet, Chief Davis went to great effort to find the dog's owner. (Tr. at 75-76.) As a result of those efforts, Chief Davis received tips that the dog belonged to Palafox. Chief Davis also learned that there may be a video of what happened to the dog. (Tr. at 76.)

To follow up on the information concerning a video, Chief Davis attempted to contact Gideon. Gideon's father intercepted the call and informed Chief Davis that she was not going to be talking with his son because his son had been told to watch his back. Gideon also instructed his father to watch his back. (Tr. at 76-77.) Chief Davis interpreted this to mean that Gideon was afraid to speak with her. (Tr. at 75.)

Chief Davis personally contacted Palafox in mid-May and informed him she was investigating what happened to his dog. (Tr. at 78.) On June 13, 2020, Chief Davis learned from Jeremiah about an incident involving Palafox that had occurred at the Davis home on June 11, 2020. (Tr. at 78-79.) On June 15, 2020, Chief Davis interviewed Gideon and Jeremiah who expressed great fear of Palafox and anticipated extreme violence. Gideon wanted to get an order of protection. (Tr. at 80-81, 88.) It was very apparent to Chief Davis that Gideon and Jeremiah perceived that Palafox had threatened real harm to them and their family. (Tr. at 81, 86.) The June 15, 2020 interview was the first time that Gideon mentioned to

Chief Davis anything about the videotape Palafox had showed him depicting what Palafox had done to the dog. (Tr. at 42, 82.)

Palafox called one witness at trial, his partner Winter Haugen. (Tr. at 95-96.) Haugen testified that on June 11, 2020, she rode to Gideon's house with Palafox. When they arrived at the residence, Palafox honked his horn repeatedly. Palafox was angry. (Tr. at 27-28.) Jeremiah came out of the house and Palafox said to him, "tell your brother I know he's a narc and I'll see him in court." (Tr. at 98.) Haugen claimed that just prior to this exchange, Palafox had called his attorney to see about slander charges against Gideon. (Tr. at 98-99.) According to Haugen, when Gideon walked around the corner, Palafox repeated the same statement to Gideon. Palafox then left the Davis property and drove to the Town Pump. (Tr. at 100-01.)

Haugen said that when she and Palafox arrived at the Town Pump, he walked inside the store. Palafox walked out a few minutes later and Jeremiah ran after him. Haugen was in the car parked on the side of the road. She was not sitting in the store's parking lot. (Tr. at 102-03.) Haugen never saw Palafox say anything to anyone. (Tr. at 103.)

Haugen acknowledged that Palafox was angry when he went to Gideon's home because she told him that Gideon was "saying stuff" about him and accusing him of hurting one of their dogs. (Tr. at 107.) By this time, Haugen was aware that Palafox was charged for lighting their dog on fire but did not believe that

accusation even though he pled guilty to the charge. (Tr. at 111, 115.) Haugen assumed the dog simply ran away and never asked Palafox what happened to the dog. (Tr. at 112, 115.)

SUMMARY OF THE ARGUMENT

The State presented sufficient evidence to support two counts of witness tampering involving Gideon and Jeremiah. Palafox, knowing he was the suspect in an animal cruelty investigation, and knowing that he had shown Gideon a video depicting the animal cruelty, went to Gideon's house, called him a narc or a snitch, and told him that he and his family were done for. After Jeremiah watched this criminal conduct occur, Palafox threatened harm to Jeremiah and his family at the Town Pump. Palafox's clear intent was to have both Gideon and Jeremiah keep their mouths shut about Palafox's criminal conduct. Consequently, the district court properly denied Palafox's motion to dismiss for insufficient evidence, and properly found Palafox guilty of two counts of witness tampering.

Palafox failed to meet his burden of proving that plain error review is warranted for his claims of prosecutorial misconduct because he cannot establish any misconduct. Palafox failed to meet his burden of proving ineffective assistance of counsel based on failure to object to prosecutorial misconduct because Palafox

failed to prove there was a legitimate basis for defense counsel to object or that had defense counsel objected there was a reasonable probability of a different outcome.

ARGUMENT

I. The standard of review

This Court reviews a district court's denial of a motion to dismiss a criminal charge for insufficient evidence de novo. *State v. Hren*, 2021 MT 264, ¶ 16, 406 Mont. 15, 496 P.3d 949, citing *State v. McAllister*, 2016 MT 14, ¶ 6, 382 Mont. 129, 365 P.3d 1062. “A motion to dismiss for insufficient evidence is appropriate only if, viewing the evidence in the light most favorable to the prosecution, there is not sufficient evidence upon which a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt.” *Hren*, ¶ 16, quoting *McCallister*, ¶ 6 (citations omitted). The standard of review for sufficiency of the evidence to support a verdict is also de novo. Again, this Court reviews the evidence in the light most favorable to the prosecution, to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Colburn*, 2016 MT 246, ¶ 7, 385 Mont. 100, 386 P.3d 561.

This Court may discretionarily review claimed errors that implicate a criminal defendant's fundamental constitutional rights, even if no contemporaneous objection is made under plain error review. *State v. Lackman*,

2017 MT 127, ¶ 9, 387 Mont. 459, 395 P.3d 477. This Court exercises plain error review only where failing to review the claimed error may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial, or may compromise the integrity of the judicial process. *Id.* The Court uses its inherent power of common law plain error review sparingly, on a case-by-case basis, and only in this narrow class of cases. *Id.*

This Court reviews claims of ineffective assistance on direct appeal if the claims are based solely on the record. *State v. Cheetham*, 2016 MT 151, ¶ 14, 384 Mont. 1, 373 P.3d 54. Ineffective assistance of counsel claims are mixed questions of law and fact, which this Court reviews de novo. *State v. Ailer*, 2018 MT 18, ¶ 9, 390 Mont. 200, 410 P.3d 964.

II. The State presented sufficient evidence of two counts of witness tampering to withstand a motion to dismiss and to support the district court's guilty verdicts.

A. Introduction

Palafox argues that the State failed to present sufficient evidence for the witness tampering charges to either withstand a motion to dismiss following its case-in-chief, or to support the district court's guilty verdict. Palafox's argument fails because, as set forth below, it is built entirely upon a faulty representation of the evidence the State presented at trial.

Pursuant to Mont. Code Ann. § 45-7-206:

A person commits the offense of tampering with witnesses and informants if, believing that an official proceeding or investigation is pending or about to be instituted, the person purposely or knowingly attempts to induce or otherwise cause a witness or informant to:

- (a) testify or inform falsely;
- (b) withhold any testimony, information, document or thing;
- (c) elude legal process summoning the witness or informant to testify or supply evidence; or
- (d) not appear at any proceeding or investigation to which the witness or informant has been summoned.

The trial record demonstrates that the State presented sufficient evidence to withstand a motion to dismiss for insufficient evidence and to support the district court's guilty verdicts.

Palafox preliminarily argues that his statement to Gideon that Palafox would put a hit out on anyone who snitched about the video he made of lighting the dog on fire, cannot be factored in to support the sufficiency of the State's evidence. Although the State agrees that the district court could not *convict* Palafox based on that statement, Palafox's statement was still relevant and admissible to give context to the threats he made on June 11, 2020, to Gideon and Jeremiah. Palafox acknowledges as much because he did not object to the admissibility of his statement. And, as Palafox recognizes, the district court did not convict Palafox based on this statement.

Palafox further argues that his guilty plea to aggravated animal cruelty has no bearing on his guilt for tampering with witnesses. But the State had to present

evidence of an official pending investigation, and that pending investigation was for aggravated animal cruelty. The only reference to Palafox's guilty plea at the trial came after his partner, Haugen, testified that she never believed there was a video depicting animal cruelty. On cross-examination, the prosecutor properly asked her if she was aware that Palafox had admitted to that conduct. (Tr. at 115.) And it was Palafox who requested a bench trial. The district court who decided the verdict on the witness tampering charges also accepted Palafox's guilty plea on the animal cruelty charge and was, therefore, aware that Palafox had admitted to this conduct.

Finally, to the extent Palafox argues that the State did not present evidence that Palafox started the dog on fire, there was no reason for the State to do so. Palafox pled guilty to aggravated animal cruelty. Thus, there was no need for the State to present any evidence to prove that charge.

B. Witness tampering involving Gideon

Palafox seems to argue that each witness consistently testified that all he told Gideon was he would see him in court—meaning that he intended to file a civil slander suit against Gideon. But Gideon testified Palafox drove up to his family home honking and yelled at him that him *and his family* were done for. Palafox called him a narc and said he would put a hit out for him. According to Chief Davis's testimony, by this time Palafox knew he was being investigated for animal cruelty. Gideon did not testify that Palafox threatened he would see him in court as

Palafox argues. Rather, he testified that Palafox threatened that Gideon and his family were “done for.” (*See* Tr. at 41-42.) It was Haugen who testified that all Palafox said to Gideon is that he would see him in court. As the trier of fact, the district court found Gideon’s testimony to be more credible than Haugen’s testimony. It is not this Court’s function on appeal to substitute its evaluation of the evidence for that of the district court. This Court defers to the district court’s judgment on issues of witness credibility. *State v. Fish*, 2009 MT 47, ¶ 29, 349 Mont. 286, 204 P.3d 681, citing *State v. Billman*, 2008 MT 326, ¶ 45, 346 Mont. 118, 194 P.3d 58.

Also, a “single witness’ testimony is sufficient to prove a fact, and the State may use circumstantial evidence to prove any element of an offense.” *State v. McCoy*, 2021 MT 303, ¶ 30, 406 Mont. 375, 498 P.3d 1266, quoting *State v. Kaske*, 2002 MT 106, ¶ 25, 309 Mont. 445, 47 P.3d 824. For example, in *State v. Motarie*, 2004 MT 285, 323 Mont. 304, 100 P.3d 135, Phil Iverson reported Motarie to law enforcement for poaching an elk. Within a month, Iverson received a phone call from an unidentified person whose voice he recognized as Motarie’s voice. *Id.* ¶¶ 2-3. Motarie told Iverson, “You’re a dead mother fucker, [sic] you’ll never live to see your next birthday.” *Id.* ¶ 3. A jury found Motarie guilty of tampering with a witness. *Id.* On appeal, Motarie argued the State presented insufficient evidence to prove all the elements of the offense, but this Court affirmed the jury’s

verdict. *Id.* ¶¶ 1, 7. Regarding the element of intent, this Court explained, “It could certainly be inferred that Motarie could have intended that his threats stop Iverson from cooperating with law enforcement.” *Id.* ¶ 7. The same is true here. Gideon testified that an angry Palafox came to his house honking and yelling that Gideon and his family were “done for.” Gideon’s testimony alone is sufficient to sustain the witness tampering charge. But Gideon’s brother Jeremiah also testified that when Palafox came to the house, he heard Palafox call Gideon a snitch and threatened that he would have him taken care of and “shit like that.” (Tr. at 62.)

Also, conflicting testimony does not mean the evidence is insufficient to support a guilty verdict. *McCoy*, ¶ 30, citing *State v. Wood*, 2008 MT 298, ¶ 43, 345 Mont. 487, 191 P.3d 463. While Palafox wanted the district court to believe that he went to Gideon’s house to inform him that he intended to file a lawsuit against him, Gideon’s testimony established that Palafox threatened harm to him and his family members.

Finally, Palafox’s argument that the district court found him guilty based on him exercising his right to file a lawsuit against Gideon for slander is misplaced. The district court stated *if* all Palafox did was state that he knew Gideon was a narc and he would see him in court, the elements of the crime would still be satisfied because Palafox would have been threatening a meritless lawsuit to get Gideon to

withhold testimony or testify falsely when Palafox ultimately pled guilty to aggravated animal cruelty.

Palafox additionally argues that the State failed to prove that on June 11, 2020, Palafox believed an official investigation into the charge of animal cruelty was imminent or pending. Palafox asserts that the State failed to prove this element because Gideon did not speak to law enforcement until after Palafox's threats made on June 11, 2020. The State presented evidence from Chief Davis that Palafox knew of the criminal investigation as of mid-May 2020 because she personally contacted Palafox to so inform him. There was no other evidence presented to contradict Chief Davis's testimony. Also, Palafox threatening Gideon based on a mistaken belief that Gideon had reported him to law enforcement does not give Palafox a free pass.

Palafox was obviously aware that he had shown the video depicting the animal cruelty to Gideon and that Gideon would be able to testify about the video at a future trial on the animal cruelty charge.

Viewing the evidence in the light most favorable to the State, the State presented sufficient evidence to withstand a motion to dismiss for insufficient evidence and to support the guilty verdict of tampering with a witness—Gideon.

C. Witness tampering involving Jeremiah

Palafox argues that there is insufficient evidence to withstand a motion to dismiss or to support a conviction for witness tampering involving Jeremiah because

there was insufficient evidence that Palafox believed Jeremiah was a witness in an official investigation and there was insufficient evidence that Palafox's statements to Jeremiah were intended to thwart his participation in an official investigation.

Importantly, Jeremiah's testimony about Palafox threatening him and his family at the Town Pump are uncontradicted. Palafox not only threatened Gideon, but he also threatened Jeremiah and Jeremiah's mom and dad. When Palafox made these threats, he had no idea what Gideon had shared with Jeremiah about the video of the animal cruelty. In other words, as far as Palafox knew, Jeremiah, through information gained from Gideon, could have been a witness in the animal cruelty case.

Palafox was fully aware that Jeremiah had heard him threaten Gideon that he was "done for." Thus, the district court was correct in its assessment that Jeremiah had witnessed Palafox commit the criminal offense of witness tampering involving Gideon. When Palafox made the threats to Gideon, Palafox was aware of the ongoing animal cruelty investigation. Palafox's threats to Jeremiah served no other purpose than to scare Jeremiah into keeping his own mouth shut, as well as inducing Jeremiah to convince Gideon to do the same.

III. Palafox has failed to meet his burden of establishing that plain error review is warranted for his claims of prosecutorial misconduct.

Palafox argues for the first time on appeal that the prosecutor committed misconduct by referencing evidence not in the record, misstating evidence in the record, and attacking Haugen's credibility.

"Misconduct by a prosecutor may form the basis for granting a new trial where they prosecutor's actions have deprived the defendant of a fair and impartial trial." *Clausell v. State*, 2005 MT 33, ¶ 11, 326 Mont. 63, 106 P.3d 1175. If a timely objection is not made at trial, however, the issue is waived. Mont. Code Ann. § 46-20-104(2). The Court can review such an unpreserved issue under the plain error doctrine. *State v. Aker*, 2013 MT 253, ¶ 21, 371 Mont. 491, 310 P.3d 506. But it is Palafox's burden to establish that sparingly used plain error review is appropriate in his case because his claimed misconduct: (1) implicates a fundamental constitutional right; and (2) failing to review this claim may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may implicate the judicial integrity of the process. *State v. Evans*, 2012 MT 115, ¶ 25, 365 Mont. 163, 280 P.3d 871. "[A] mere assertion that constitutional rights are implicated or that failure to review the claimed error may result in a manifest miscarriage of justice is

insufficient to implicate the plain error doctrine.” *State v. Gunderson*, 2010 MT 166, ¶ 100, 357 Mont. 142, 237 P.3d 74.

Palafox offers no analysis of why plain error review is appropriate in this case. This Court should decline to exercise plain error review for this reason alone. Even so, Palafox could not meet the standard to warrant plain error review.

Palafox’s first example of alleged misconduct is the prosecutor questioning his only witness, Haugen, about video surveillance at the Town Pump where Palafox made threats to Jeremiah. During Haugen’s cross-examination, the following dialogue occurred concerning the Town Pump incident:

Q. And it is your testimony that Domingo did not interact with Jeremiah in any way?

A. As far as I saw, no.

Q. Okay. And is it your testimony that Domingo did not taunt Jeremiah in any way?

A. I didn’t see him taunt him.

Q. Is it your testimony that Domingo did not threaten Jeremiah or his brother in any way?

A. No, he didn’t.

Q. And, so if—So are you aware that there is video surveillance of that parking lot?

A. Yes, I am. Yes.

Q. And if the video that was reviewed that day relating to this incident indicated that Domingo was, in fact, interacting with Jeremiah, would that—is it still your testimony that that didn't happen.

A. I didn't see it. So. . .

Q. Okay. So you're not testifying it didn't happen, you are just testifying you didn't see it?

A. Yes.

(Tr. at 110-11.)

Palafox believes that this line of questioning constituted misconduct because the Town Pump security video footage was not in evidence. But there was no reason for the State to admit the video footage into evidence because Haugen clarified that she was not testifying that certain things did not happen, she was simply testifying that *she* did not see certain things happen.

Palafox next argues that the prosecutor committed misconduct during Chief Davis's rebuttal testimony. During Chief Davis's direct examination during rebuttal, the following exchange occurred:

Q. . . . Did you review the video of the incident that took place at Town Pump?

A. I did watch it briefly.

Q. And does that video include footage that was taken in the parking lot?

A. Yes.

Q. And was your review of the video consistent with Ms. Haugen's testimony a few minutes ago about what took place in the parking lot.

A. She would not have been able to see it from her vantage point.

(Tr. at 124-25.) There was nothing objectionable about Chief Davis recalling her observations from her review of the video footage. Also, Chief Davis's testimony was consistent with Haugen's testimony. Haugen testified that she did not see any encounter in the parking lot between Jeremiah and Palafox. Chief Davis testified that based on Haugen's location she was not able to see what the video footage depicted.

Palafox next asserts that the prosecutor committed misconduct because she asked Chief Davis what *she* saw on the video footage. The following exchange occurred:

Q. Okay. And what did you see on the video?

A. It appears as when he's walking in he actually turns towards the fuel pumps and is talking on his way in.

Q. Okay.

A. There is no sound.

Q. Okay. And was Jeremiah at the fuel pumps at that point?

A. Yes.

Q. And how would you characterize the manner in which he was talking toward Jeremiah?

A. It—Jeremiah’s reaction was easier to gage, he went from pumping fuel to being instantly upset and going in afterwards.

Q. Okay. And are you able to make any inferences based upon that?

A. I would infer that what Domingo was saying upset him greatly.

(Tr. at 125-26.)

Palafox offers no analysis of why he believes it was misconduct for the prosecutor to question Chief Davis if she reviewed the video footage and, if so, what she observed. By not offering any analysis on these claims, Palafox has failed to comply with M. R. App. P. 12(1)(f). This Court has repeatedly held that it is not its job to conduct legal research on a party’s behalf or to develop legal analysis that may lend support to a party’s position. *State v. Whalen*, 2013 MT 26, ¶ 32, 368 Mont. 354, 295 P.3d 1055.

Also, Palafox ignores defense counsel’s use of what Chief Davis observed on the video footage during his rebuttal cross-examination of Chief Davis about the events at the Town Pump:

Q. Given that there had been an interaction up at the Davises earlier that day, would that reaction you just described be consistent with him suddenly discovery to seeing Mr. Palafox as opposed to being something said to him?

A. I suppose.

Q. Now you are aware there was an officer on the scene already, correct?

A. Investigating a separate incident, yes.

Q. Understood. If there were yelling and screaming and a disturbance of some sort outside would he have not at least responded to that and asked about it?

A. My understanding is the screaming and yelling took place inside the establishment. He was outside handling another case.

Q. So whatever was said, if it were said, wasn't a screaming and yelling kind of discussion to cause Jeremiah to respond, correct?

A. My understanding is that it was not loud outside, correct.

Q. And the video does substantiate that Jeremiah came running into the establishment, correct?

A. Yes.

Q. After he saw, or, I want to say heard something, but after he saw who was going in.

A. Yes.

Q. So Jeremiah went after him? Is that correct.

A. Jeremiah walks in after Mr. Palafox, correct.

(Tr. at 126-28.)

Defense counsel continued his cross-examination by showing Chief Davis another officer's report and engaging in the following exchange:

Q. Okay. Is that Officer Miller's report of that day of that incident?

A. Yes, it is.

Q. Does he describe in here about two thirds of the way down, that he watched that video and deemed that Jeremiah was the aggressor?

A. That would be my understanding since he was charged with assault.

(Tr. at 128.)

During defense counsel's cross-examination of Chief Davis, he relied upon the same video footage that Chief Davis referenced during her direct testimony to portray Jeremiah in a negative light. Even assuming for the sake of argument that the prosecutor improperly referenced the video footage, the prosecutor did not elicit prejudicial evidence against Palafox by so doing. Conversely, during cross-examination, defense counsel elicited testimony from Chief Davis that was favorable to Palafox by establishing that the video showed Jeremiah pursuing Palafox inside the Town Pump where an encounter occurred resulting in Jeremiah being charged for a criminal offense.

Palafox next argues the prosecutor committed misconduct during closing argument in two regards—first by referencing rumors about a video, and second by attacking Haugen's credibility. There was nothing improper in the prosecutor doing so.

During closing argument, the prosecutor remarked:

There [were] rumors about the video.

. . . .

It is quite clear the Defendant in this matter knew there was an ongoing case. They knew of the investigation from Facebook. I think it is public knowledge that Pet Connection had posted contact Chief Davis numerous times.

(Tr. at 131-32.) Palafox primarily argues the prosecutor committed misconduct because there was nothing in the record to suggest rumors about a video. To the contrary, during Chief Davis's direct examination she explained that she posted a picture of the dog on the City Facebook page to find the owner. (Tr. at 75.)

Chief Davis explained that after the dog spent a week at the veterinary clinic, Pet Connections Sanctuary cared for the dog. Chief Davis explained that different people shared the dog's photo from the City's Facebook page multiple times, as did Pet Connections Sanctuary. (*Id.*) Consequently, there was a fair amount of publicity about the dog:

Q. Did you, I guess as a result of that publicity, did you begin to receive tips about who might own the dog, what may have happened to it?

A. I did.

Q. And did those tips suggest that the dog had belonged to the Defendant?

A. They did.

Q. Okay and did those tips suggest that there was a video of what had happened to the dog?

A. Yes.

Q. Did you follow up on those tips?

A. I did.

Q. Okay. And when you followed up on those tips were you—did you attempt to contact Gideon Davis with regard to the incident.

A. I did.

(Tr. at 76.) This testimony establishes that there were rumors circulating about the dog and a video. The prosecutor’s statement did not mischaracterize the trial testimony.

Regarding Haugen’s testimony, the prosecutor remarked:

The testimony of Winter Haugen is totally not credible, Your Honor, to think that you would go to all that trouble to go up there and make a statement, “We’re going to see you in Court,” for a slander case and then have a confrontation at Town Pump. And the dog disappears from her house. She doesn’t bother to ask her husband what happened to the dog? It just disappears and that’s okay. That is not normal credible behavior. According to Chief Davis it is quite clear she knew that it was her dog and makes her whole testimony here today not credible.

(Tr. at 132-33.) Similarly, the prosecutor tied her remarks concerning Haugen’s lack of credibility to the trial testimony to argue that Haugen’s testimony in general lacked credibility.

IV. Palafox failed to prove his ineffective assistance of counsel claims based on defense counsel’s lack of objections to what Palafox characterizes as prosecutorial misconduct.

“The United States and Montana Constitutions guarantee criminal defendants the right to effective counsel.” *State v. Weber*, 2016 MT 138, ¶ 21,

383 P.3d 506, 373 P.3d 26. This Court analyzes claims of IAC under the two-part test the United States Supreme Court announced in *Strickland v. Washington*, 466 U.S. 668 (1984). *McGarvey v. State*, 2014 MT 189, ¶ 24, 375 Mont. 495, 329 P.3d 576. In order to prove IAC, a defendant must show: (1) that counsel's performance was deficient, and (2) that counsel's deficient performance prejudiced the defendant. *McGarvey*, ¶ 24.

To prove the deficient performance prong, the defendant must demonstrate that counsel's performance "fell below an objective standard of reasonableness considering prevailing professional norms, and in the context of all circumstances." *McGarvey*, ¶ 25. The defendant must overcome a strong presumption that "counsel's defense strategies and trial tactics fall within a wide range of reasonable and sound professional decisions." *State v. Turnsplenty*, 2003 MT 159, ¶ 14, 316 Mont. 275, 70 P.3d 1234. Under the second prong of the *Strickland* test, a defendant must establish that but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *Id.* Because a defendant must prove both prongs of *Strickland*, if a defendant fails to prove either prong this Court need not consider the other. *Rose v. State*, 2013 MT 161, ¶ 22, 370 Mont. 398, 304 P.3d 387.

Here, for the same reasons that Palafox's request for plain error review fails, Palafox has failed to prove either prong of *Strickland*. Palafox has failed to

establish that defense counsel had a legitimate basis to object to any of the prosecutor's remarks during closing argument. Consequently, his ineffective assistance of counsel claim fails under the first prong of *Strickland*.

But even if this Court were to disagree, Palafox has wholly failed to prove the prejudice prong of *Strickland*. The remarks Palafox has identified as objectionable did not sway the district court against Palafox. Rather, the district court found the testimony of Gideon and Jeremiah to be more credible than that of Haugen.

CONCLUSION

For the reasons argued above, the State requests that this Court affirm the district court's verdict of guilty on two counts of witness tampering.

Respectfully submitted this 22nd 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 6,147 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

/s/ *Tammy K Plubell*

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CERTIFICATE OF SERVICE

I, Tammy Plubell, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 09-22-2022:

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