IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0323

STATE OF MONTANA,

Plaintiff and Appellee,

v.

RANDY VAUGHN SNEED,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Eighteenth Judicial District Court,
Gallatin County, The Honorable John C. Brown, Presiding

APPEARANCES:

AUSTIN KNUDSEN
Montana Attorney General
BREE GEE
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
Bree.gee2@mt.gov

AUDREY S. CROMWELL
Gallatin County Attorney
BRADLEY D. BOWEN
Deputy County Attorney
1709 W. College, Ste. 200
Bozeman, MT 59715

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

CHAD WRIGHT
Appellate Defender
CAROLYN GIBADLO
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147

ATTORNEYS FOR DEFENDANT
AND APPELLANT

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1. Whether the district court abused its discretion in admitting the testimony of the State's expert witness.

2. Whether Appellant properly preserved his objections to testimony he alleges to be prejudicial, and, if so, whether admission of the testimony was harmless error.

3. Whether Appellant's right to a fair trial by an impartial jury was violated when the district court denied Appellant's request to admonish jurors against checking their phones during trial.

STATEMENT OF THE CASE

On February 12, 2019, the State, by Amended Information, charged Appellant Randy Vaughn Sneed (Sneed), with one count of felony Strangulation of a Partner or Family Member (First Offense), one count of misdemeanor Partner or Family Member Assault (First Offense), and one count of misdemeanor Endangering Welfare of Children. (Doc. 11.) The Eighteenth Judicial District Court conducted a jury trial. (6/22/2020-6/24/2020 Jury Trial Transcripts; Docs. 95-97.) The jury convicted Sneed of Count I: felony Strangulation of a Partner or Family Member, first offense, in violation of Mont. Code Ann. § 45-5-215(1)(a) (2017); Count II: misdemeanor Partner or Family Member Assault, first offense, in violation of Mont.

Code Ann. § 45-5-206(1)(a); and Count III: Endangering Welfare of Children, a misdemeanor, contrary to Mont. Code Ann. § 45-5-622(1) (2017). (Docs. 103, 136.)

For Count I the district court committed Sneed to the Department of Corrections for 5 years with 3 years suspended; Count II, to the Gallatin County Detention Center for 12 months with 11 months, 21 days suspended; and for Count III, to the Gallatin County Detention Center for 6 months, all suspended. (5/5/2021 Sentencing Hearing Transcript [Sent. Hr'g Tr.] at 17, 20-21.) The court ordered the three counts to run concurrently. (*Id.* at 23; Doc. 136, attached to Appellant's Br. as App. A.)

STATEMENT OF THE FACTS

I. Facts related to the offense

A. Victim Kateland Stephens's testimony

On January 11, 2019, Kateland Stephens (Stephens) reported to law enforcement that Sneed had "choke slammed" her on the bed and refused to let her take their infant, I.S., with her when she left to drive Sneed's son to school. (6/23/2020 Jury Trial Transcript [Day 2 Tr.] at 41.) Stephens testified that while she was holding a sleeping I.S. and trying to walk out of their bedroom, Sneed shoved her three or four times to stop her from leaving the house with I.S. (*Id.* at 243.) Stephens stated that Sneed grabbed her face, poked her in the eye, then

"shoved me so hard on the shoulder that I went flying back into our glass screen door[,]" which woke I.S. (*Id.* at 243-44.)

Stephens explained Sneed "got infuriated and grabbed me by my throat, ran me around the side of the bed, and pinned me down and started holding me down[,] [and] put all his weight into me." (Day 2 Tr. at 245-46.) Stephens stated Sneed "grabbed on very tight, very roughly . . . screaming at me more." (*Id.*) She testified I.S. was lying on Stephens's chest while Sneed held her down. (*Id.* at 247.) Stephens testified, "I couldn't breathe at certain points and I started to see black spots . . . I could feel the pressure enough where I couldn't even swallow." (*Id.*) Stephens said that Sneed then raised his hand as if to strike her, but appeared to change his mind, then "reached down with both hands and held me down even longer with both [hands]." (*Id.* at 247.) As Stephens tried to pull Sneed's hands off her throat, I.S. rolled off Stephens's chest onto the bed and Sneed "snatch[ed] her up and [took] her." (*Id.* at 248-49.)

During Stephens's trial testimony, the State introduced text messages between Sneed and Stephens from October 14 and 15, 2019. (Day 2 Tr. at 213-35; State's Exs. 1-12.) Sneed told Stephens in those messages that she needed to return to his house with their child or he would burn her belongings. (*Id.* at 221; State's Ex. 3.) Sneed sent Stephens a picture with all of her belongings in a plastic bag in

the garage along with a threat: "You need to talk to me now before this goes any farther." (Day 2 Tr. at 222; State's Ex. 4.) Stephens testified that Sneed called her a few times in between sending her text messages, but "every time I would answer he would be screaming at me, so I would hang up and receive these text messages for not responding." (Day 2 Tr. at 223-34.) Stephens ultimately had law enforcement officers and her father accompany her to retrieve her belongings from Sneed's house, except for her computer, which Sneed claimed he could not find. (*Id.* at 225-26.)

Sneed continued to call Stephens, who returned to Sneed's house the next day so their child could see Sneed and so Stephens could hopefully retrieve her computer. (Day 2 Tr. at 227-28.) While she was at Sneed's house, he took their child into the bedroom and locked the door. (*Id.* at 228.) Stephens was finally able to leave with I.S. the next day, but Sneed texted her and threatened to kill Stephens's dog if Stephens did not return to his house with I.S. (*Id.* at 230-31.) Stephens testified that although she continued to live with Sneed through January 2019, their relationship did not improve. (*Id.* at 235.)

B. Sneed's statements during the investigation, hearing testimony, and trial testimony

Sneed testified on his own behalf at trial. He testified that when Stephens "scooped" I.S. from the bed, he "jumped up out of bed[,]" and "block[ed] the walkway out." (6/24/2020 Jury Trial Transcript [Day 3 Tr.] at 69-70.) Sneed

claimed that when he told law enforcement on January 11, 2019, that he had grabbed Stephens's neck, he meant he was "directing her towards the bed . . . [and] if there was any pressure applied, the pressure was applied in directing her . . . to the bed." (*Id.* at 71.) When law enforcement arrived at Sneed's home, Sneed told them "I grabbed her by her throat." (State's Ex. 20 at 03:35-03:37.) At trial, Sneed conceded he told officers he "grabbed" Stephens by the throat, but actually meant he "pushed" her by the throat. (Day 3 Tr. at 62, 79, 84.) Sneed admitted that what he did was "wrong" because "you should never put your hands on another human being." (*Id.* at 84.)

On cross-examination, Sneed agreed that the order of protection hearing afforded him full opportunity to explain what happened on January 11, 2019. (Day 3 Tr. at 86-87.) He admitted he "gave a vague explanation [at that hearing] because this is a terrifying experience, as your words can be manipulated and it had nothing to do with this case." (*Id.* at 87.) Sneed then described the incident:

> There was no standing over her for any amount of time. As soon as she hit the bed, as soon as she went back on the bed, her arms let go of the baby. My left arm was underneath the baby and my right arm went from her throat to -- what's the word for it -- cradling my baby and I spun away from her, and I told her to get the fuck out of my house.
>
> . . . .
>
> I know that's excessive, but that's what happened. Further question?

(Day 3 Tr. at 102.) However, Sneed agreed with the prosecutor that he was "emotional" and "angry" when he refused to allow Stephens to leave their house and "pushed her by the throat on to the bed." (*Id.* at 97, 100.) Finally, Sneed insisted he was "absolutely not" out of control, nor powerless, but instead "controlled the whole situation, actually." (*Id.* at 110-11.)

C. Deputy Clark's testimony

Deputy Clark of the Gallatin County Sheriff's Office initiated the investigation into Sneed's January 11, 2019, conduct after talking to Stephens on the phone. (Day 2 Tr. at 40-41.) Deputy Clark testified that Stephens cried throughout their interview and appeared fearful of Sneed. (*Id.* at 42.) Deputy Clark observed redness in the shape of a hand on Stephens's neck, slight bruising near her left ear, and left eye puffiness. (*Id.*) Stephens told him that Sneed had stuck his finger in her left eye. (*Id.* at 43.) Deputy Clark took photographs of Stephens's injuries, which were admitted as evidence. (*Id.*)

Deputy Clark also interviewed Sneed, who admitted he "grabbed Ms. Stephens by the throat[.]" (Day 2 Tr. at 59.) Sneed demonstrated his actions by "rais[ing] his . . . left hand up in a grasping motion, [and] stat[ed] I grabbed her by the throat." (Day 2 Tr. at 59-60.) Deputy Clark arrested Sneed for felony strangulation of a partner or family member. (*Id.* at 68.)

II. Facts involving the expert witness's testimony at issue on appeal

Physician Tiffany Kuehl (Dr. Kuehl) testified for the State as an informational expert witness. (6/22/2020 Jury Trial Day 1 Transcript [Day 1 Tr.] at 212-68.) Dr. Kuehl advised she was an emergency physician and the medical director of the Sexual Assault Forensic Nursing Team at Bozeman Health. (*Id.* at 217.) Dr. Kuehl explained she was testifying as an expert witness to provide opinions based upon her knowledge and expertise, not as a fact witness. (*Id.* at 220.) The prosecutor asked Dr. Kuehl to explain the difference between a fact witness and an informational expert witness. (*Id.* at 219-20.) Dr. Kuehl responded that a fact witness testifies about "something [that] actually happened on a certain day[,]" and "an expert witness is asked to provide opinions on the basis of their knowledge and experience and expertise in an area." (*Id.* at 220.)

A. Dr. Kuehl's testimony comparing legal and medical definitions of strangulation

After Dr. Kuehl confirmed she was an expert witness, the following exchange occurred:

> [Prosecutor]: So in the context of being a medical professional, could you define the term "choking"?
>
> [Dr. Kuehl]: Choking is obstruction of the airway, usually by some object that's inside the airway. Like I choked on some food . . .
>
> [Prosecutor]: In the context of being a medical professional, could you define "strangulation"?

[Dr. Kuehl]: Strangulation is an injury that occurs through mechanical, external compression of the neck to the point of an alteration in level of consciousness through impairment of breathing or circulation.

. . . .

It means that it's an injury that is occurring usually through application of force to the outside of the neck to obstruct or block the blood flow to the brain or block the flow of air into the lungs.

[Prosecutor]: If strangulation is defined as purposely or knowingly impeding the normal breathing or circulation of the blood of another person by applying pressure on the throat or neck of the person, how does that compare with your understanding of that term from a medical perspective?

[Dr. Kuehl]: It's nearly identical. I think it's consistent.

[Prosecutor]: [W]hat is the difference between choking and strangulation?

[Dr. Kuehl]: So choking is something that is internal to the airway that's blocking the air flow, and strangulation is an external compression involving the obstruction of circulation. Sometimes also blocking the airway through external compression.

[Prosecutor]: And why is that differentiation important?

[Dr. Kuehl]: There's some confusion because of some of the lay terms of being choked out or held in a choke hold, such that often patients will say I was choked, whereas they don't mean that they got food stuck in their throat to the point that they couldn't breathe. They mean that someone had their hands

> around their neck and were applying pressure to the point of having loss of consciousness.

(Day 1 Tr. at 220, 222-23.) Dr. Kuehl also explained that it was common for people to report "strangulation" as "being choked." (*Id.* at 223-24.) Defense counsel did not object. (*Id.* at 223-25.)

B. Dr. Kuehl's testimony describing strangulation signs and symptoms

The prosecutor asked Dr. Kuehl to explain the difference between signs and symptoms of strangulation. (Day 1 Tr. at 230.) Dr. Kuehl explained the signs are "physical, visible indicators subsequent to a strangulation injury," and "symptoms are the subjective feelings of illness and pain" that can include "dizziness." (*Id.* at 230-31.) Dr. Kuehl testified that "[i]t's actually rare to see external signs of injury," [and] "more than 50 percent of patients that I examine after a strangulation even that leads to the point of unconsciousness actually have no visible marks at all to their neck." (*Id.* at 233-34.)

The prosecutor asked Dr. Kuehl what it would mean to her if a patient reported dizziness and "almost passed out, but did not." (Day 1 Tr. 243-44.) Defense counsel objected and argued the doctor was not allowed to offer a second opinion on Stephens's diagnosis. (*Id.* at 244.) The State responded Dr. Kuehl was not offering an opinion on diagnosis but whether those reported symptoms were

consistent with strangulation. (*Id.* at 244.) The court overruled Sneed's objection because the prosecutor had asked the question as a hypothetical. (*Id.* at 244.)

III. Facts related to Deputy Clark's testimony regarding Sneed's felony charge and calls from the detention center

Deputy Clark explained that he did not allow Sneed to call Stephens after he arrested him "[b]ecause she is now [Sneed's] victim[,] [a]nd pursuant to [Mont. Code Ann. §] 45-5-209, a no-contact order gets issued for any violence that's domestic related." (Tr. Day 2 at 70, 72.) Deputy Clark did not return to Sneed's house because he needed to download his recordings from the investigation and write "the affidavit of probable cause, which was substantial because it was a felony." (*Id.* at 72.) Defense counsel did not object. (*Id.*)

A. Deputy Clark's explanation of Gallatin County Detention Center inmate phone system

The prosecutor asked Deputy Clark to explain the phone system for inmates at the Gallatin County Detention Center. (Day 2 Tr. at 72-74.) Deputy Clark testified he was a former detention officer at the Gallatin County Detention Center and familiar with the InTelMate call monitoring system there. (*Id.* at 72.) He testified that InTelMate asks the inmate caller for payment and warns them the call is being recorded. (*Id.* at 72-73.) He explained the call is authenticated by the

inmate saying their name and entering their inmate identification number. (*Id.* at 73.) The system also advises the call recipient that the call is being recorded. (*Id.*)

B. Deputy Clark's testimony laying foundation for Sneed's jail phone calls

Deputy Clark advised he had reviewed Sneed's jail phone call on January 11, 2019, placed at 3:44 p.m. from the jail's "E Pod" phone 2. (Day 2 Tr. at 73.) The prosecutor asked:

[Prosecutor]: Deputy Clark, how do you know [Sneed's] inmate ID? How did you review these calls?

[Deputy Clark]: Because I have access to TelMate.

[Prosecutor]: And that number 39308, who does that belong to?

[Deputy Clark]: Randy Sneed.

[Prosecutor]: And so that number corresponds to the calls that he made?

[Deputy Clark]: Yes.

[Prosecutor]: Okay. And you were able to review the records and they tell you which phone number was called, correct?

[Deputy Clark]: Yes.

[Prosecutor]: And they tell you which phone in the detention center makes the call, correct?

[Deputy Clark]: Yes, from which pod.

[Prosecutor]: And it would be E Pod in this case. What's E Pod?

[Deputy Clark]: That's a high-risk, violent crimes pod.

[Defense counsel]: Objection. Move to strike, Your Honor.

[DISTRICT COURT]: Overruled.

(Day 2 Tr. at 74-75.)

C. Sneed's phone call to his mother

Deputy Clark testified he had reviewed an audio file contained in State's Exhibit 26, which was a call Sneed made on January 11, 2019, at 5:44 a.m. to his mother. (Day 2 Tr. at 75, 78.) State's Exhibit 26, timestamp 02:41-03:41, was then admitted and played for the jury. (*Id.* at 78.) During that call, Sneed told his mother that Stephens had shared text messages with law enforcement that resulted in the State adding new charges against him. (State's Ex. 26 at 02:44-02:49.) Sneed complained to his mother, "if [Stephens] wants me out makin' money to pay for her fuckin' kid she needs to shut the fuck up, ok?" (*Id.* at 02:49-02:55.) "I texted [Stephens] tellin' her not to fuckin' call the cops because fuckin' I'm gonna lose everything because of it and that's tampering with a witness." (State's Ex. 26 at 3:00-3:09.) His mother said, "Oh my god, I fucking knew this was gonna happen." (*Id.* at 05:00-05:04.) Sneed responded, "it happened" and "it's my fault." (*Id.* at 05:04-05:07.) Sneed asked his mother whether his dogs were being cared for, and she told him she did not know. (*Id.* at 05:30-05:36.) Sneed told his mother to "get

in touch with the fuckin' dumb bitch and make sure the dogs are fed" because she never took care of his dog. (*Id.* at 05:36-05:46.)

IV. Facts related to Juror R.

During voir dire, Juror R. expressed, "I . . . definitely don't want to be here." (Day 1 Tr. at 152.) Juror R. explained that he was a self-employed homebuilder and if he was away from work for jury duty that "work just isn't getting done[.]" (*Id.* at 153.) Defense counsel asked him if his work would affect his "ability to remain faithful to the idea of a unanimous jury and actively participating in those deliberations?" (*Id.* at 154.) Juror R. responded that he had "no problem speaking my mind . . . but, yeah, I will be distracted I'm sure of it." (*Id.*)

Defense counsel, with no objection from the State, moved to excuse Juror R. for cause. (Day 1 Tr. at 154.) The district court declined to remove Juror R., telling him, "I'm not going to excuse you for cause because if I excuse you for cause, I'm going to have eight people raise their hands." (*Id*.) Juror R. told the court, "I get it." (*Id.*) The court explained to Juror R. that the lawyers might still use their preemptory challenges to remove him from the jury, but the court would not remove him for cause. (*Id.*) Juror R. said that he understood and "[l]ike I said, I'll speak my mind." (*Id.* at 154-55.) Neither party used a preemptory challenge to remove Juror R. from the jury. (*See id.* at 167-73.)

Defense counsel asked for a short recess before he called Sneed, his last witness, to the stand. (Day 3 Tr. at 43.) The court granted a recess and, before bringing the jury back to the courtroom, asked counsel if they had any issues to discuss. (*Id.* at 43-44.) The State did not, but defense counsel responded, "Your Honor, it sounds like at least one of the jurors has been checking his phone. I believe that they were admonished beforehand, but I just wondered if the Court would either re-admonish or perhaps collet their cell phones." (*Id.* at 44.) The court explained that the rule was that jurors could not use their phones to communicate about the trial but it did not take jurors' phones away from them until they began deliberations. (*Id.* at 44.) The court continued, "[s]o one of [the] jurors is just out, probably the guy on the corner, the contractor guy?" Defense counsel concurred and the court commented, "[p]robably checking his phone, I bet." (*Id*.) Defense counsel agreed. (*Id*.) The court advised:

> I'm not going to admonish him about that because I don't care if he's looking at it a little bit because he's—frankly, I would rather have him looking at his phone than dozing off because he's been sleeping some because I've been watching, but I'm not going to say anything to him, but I will tell you, [defense counsel] though, they can't talk about the trial and when they're deliberating they won't have their phones, okay?

(Day 3 Tr. at 44-45.) Defense counsel responded, "Thank you, Your Honor." (*Id.* at 45.) The court asked defense counsel if he had anything else to discuss, to which he answered, "[n]o, thank you. (*Id*.)

SUMMARY OF THE ARGUMENT

This Court should decline to consider Sneed's novel argument on appeal that the State's expert, Dr. Kuehl, impermissibly compared the medical and legal definitions of the term "strangulation" because he did not object at trial. Further, the district court did not abuse its discretion when it allowed Dr. Kuehl to answer the prosecutor's hypothetical questions that included facts from the case. Montana Rule of Evidence 704 allows experts to testify to the ultimate issue in a case. Dr. Kuehl did not offer her opinion as to whether Sneed possessed the requisite mental state or committed the offense.

The district court properly exercised its broad discretion to admit probative evidence. Even if this Court concludes that the district court abused its discretion by admitting evidence that was more prejudicial than probative, cumulative error does not support reversal because it was harmless trial error.

ARGUMENT

I. Dr. Kuehl properly testified as an informational expert witness.

A. Standard of review

This Court reviews a district court's evidentiary rulings for an abuse of discretion. *State v. Laird*, 2019 MT 198, ¶ 43, 397 Mont. 29, 447 P.3d 416. Abuse of discretion occurs if the district court acted arbitrarily and without the

employment of conscientious judgment or in a manner that exceeded the bounds of reason, resulting in substantial injustice. *State v. Mercier*, 2021 MT 12, ¶ 12, 403 Mont. 34, 479 P.3d 967.

B. Sneed waived any objection to Dr. Kuehl's testimony comparing the legal and medical definitions of "strangulation" because he did not object to her testimony at trial.

This Court has repeatedly held that "[g]enerally, a defendant must make a timely objection to properly preserve an issue for appeal." *State v. Rogers*, 2013 MT 221, ¶ 27, 371 Mont. 239, 306 P.3d 348 (citing *State v. Daniels*, 2011 MT 278, ¶ 31, 362 Mont. 426, 265 P.3d 623 (internal citation omitted); *see also* Mont. Code Ann. §§ 46-20-104(2), -701. "To be timely, the objection must be made as soon as the grounds for the objection are apparent." *Rogers*, ¶ 27. "Failure to lodge a timely objection constitutes a waiver of the objection and precludes raising the issue on appeal." *Id.* This Court's consistent application of the "timely-objection rule has been motivated by concerns of judicial economy and fundamental fairness, both of which require alleged errors to be brought to the attention of the district court so that actual error can be prevented or corrected at the first opportunity." *Id*.

Sneed's Mont. R. Evid. 702 argument is a new theory that the State did not have the opportunity to address below, and the district court did not have the opportunity to consider. For the first time on appeal, Sneed argues that Dr. Kuehl opined outside her area of expertise when she testified about the similarity of the

legal and medical definitions of "strangulation." (*See* Appellant's Br. at 17-20.) However, this Court cannot "put a district court in error for an action in which the appealing party acquiesced or actively participated." *Daniels*, ¶ 36. Here, Sneed never objected to Dr. Kuehl's testimony comparing the legal definition with the medical definition of strangulation. (Day 1 Tr. at 222-23.) Since Sneed failed to properly raise his objection to the testimony in the district court, he has waived his appellate review. This Court should decline to consider Sneed's new theory on appeal.

Because Sneed did not properly preserve his evidentiary issue for appeal by first raising it in the district court, the only possible avenue for this Court to address Sneed'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 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.

Sneed 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 Sneed 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.

In the event this Court chooses to address the merits of Sneed's claim, Sneed cannot prevail because he cannot show that failure to review Dr. Kuehl's testimony would incur a manifest miscarriage of justice or compromise the fairness or integrity of his trial.

C. If the Court does consider Sneed's argument, Dr. Kuehl's testimony did not violate Mont. R. Evid. 702 but helped the jury understand the meaning of "strangulation."

Montana Rule of Evidence 702 provides that an expert who has specialized knowledge that will assist the trier of fact to understand the evidence or to determine a fact in issue may testify in the form of an opinion or otherwise. Expert witness "testimony in the form of an opinion otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." *Cartwright v. Scheels All Sports, Inc.*, 2013 MT 158, ¶ 40, 370 Mont. 369, 310 P.3d 1080 (citing Mont. R. Evid. 704). This Court has recognized that "an expert witness may properly testify as to an ultimate issue of fact[,]" but cannot "render a legal conclusion or improperly apply the law to the facts." *Id.* ¶ 43. Under Montana law,

> [a] person commits the offense of strangulation of a partner or family member if the person purposely or knowingly impedes the normal breathing or circulation of the blood of a partner or family member by: (a) applying pressure on the throat or neck of the partner or family

> member; or (b) blocking air flow to the nose and mouth of the partner or family member.

Mont. Code Ann. § 45-5-215(1)(a)-(b) (2017).

Sneed provides a short quote from *Hulse v. DOJ, Motor Vehicle Div.*, 1998 MT 108, 289 Mont. 1, 961 P.2d 75, to support his argument that "Dr. Kuehl violated Rule 702 and exceeded her expertise." (Appellant's Br. at 17-18[1].) Sneed quotes *Hulse* to assert that trial courts are obligated under Mont. R. Evid. 702 to screen evidence for relevancy and reliability. (Appellant's Br. at 18.) However, that paragraph from *Hulse* summarizes the United States Supreme Court's rejection of "the Frye general acceptance standard for admissibility of expert testimony concerning novel scientific evidence in response to the liberalized requirements of Rule 702, F.R.Evid." *Hulse*, ¶ 52 (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. at 579, 588-90 (1993).) It is inapplicable to the facts here.

Here, Sneed did not object to Dr. Kuehl's testimony for lack of qualification and did not oppose the State's motion to endorse Dr. Kuehl as an expert on strangulation. (Docs. 82-83.) In its motion, the State notified Sneed that Dr. Kuehl "will educate jurors on the signs and symptoms of strangulation, and educate jurors on why strangulation does not often produce visible neck injuries . . . [and] may include an expert opinion based on hypothetical facts as to whether an individual

[1] Sneed mistakenly cites *Hulse*, ¶ 27. The citation is *Hulse*, ¶ 52.

was strangled." (Doc. 82 at 2.) Dr. Kuehl's testimony was admissible because it provided the jurors the necessary knowledge about strangulation to competently evaluate the evidence.

The circumstances in Sneed's case are readily distinguishable from those in *State v. Howard*, 195 Mont. 400, 637 P.2d 15 (1981). Sneed relies on *Howard* to argue that Dr. Kuehl "opined outside her area of expertise" when she compared the legal and medical definitions of "strangulation." (*See* Appellant's Br. at 17-20.) However, the doctor in *Howard* testified, "I think that somebody tried to murder [the victim]." *Howard*, 195 Mont. at 403, 637 P.2d at 16. This Court explained, "the fact that the doctor's opinion on intent went to an ultimate issue is not basis for its exclusion." *Howard*, 195 Mont. at 404, 637 P.2d at 17. Instead, this Court found the doctor's testimony in *Howard* invaded the province of the jury when he "inferred from the nature of the injuries that the person who inflicted them did so with the intent to murder[,] [because] the jury was as qualified as the doctor to draw an inference from the circumstantial evidence as to intent, and therefore the doctor's opinion on intent was inadmissible under Rule 702, Montana Rules of Evidence." *Howard*, 195 Mont. at 405, 637 P.2d at 17.

As Sneed points out, Dr. Kuehl spoke to what constitutes "strangulation," but "omitted the mens rea and partner/family member elements." (Appellant's Br. at 19.) Dr. Kuehl's testimony confirmed that the legal definition of "strangulation"

accurately reflected that of the medical definition. Dr. Kuehl never testified about whether she believed Sneed acted with the requisite mental state. The jury was left to decide whether Sneed acted purposely or knowingly and to determine which testimony to accept as credible and true.

D. Dr. Kuehl did not tell the jury to convict Sneed but properly based an opinion on facts presented hypothetically at trial.

Pursuant to Mont. R. Evid. 703, "[t]he facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing." Mont. Code Ann. § 26-10-703. As noted by the Commission Comments to Rule 703, "Montana law also supports the rule that an expert may base his opinion upon hypothetical questions." Mont. Comm. Comments, citing *Pickett v. Kryger*, 151 Mont. 87, 96, 439 P2d 57 (1968) ("[I]t is not error to pose a hypothetical question which does not include all the evidence supporting the questioner's theory of the case, nor can error be predicated upon a general objection that does not state the specific ground wherein the question is faulty.") This Court found many years ago:

> In putting the hypothetical question to the expert, [the State] had a right to assume as established, for the time being, all the facts in evidence tending to support their theory . . . . It was for the jury to say, after considering all the evidence introduced by both sides, whether the facts, thus assumed as established for the time being, were really established, and whether the opinion of the witness was worthy of consideration.

State v. Peel, 23 Mont. 358, 364, 59 P. 169 (1899). The United States Supreme Court found, "[i]t has long been accepted that an expert witness may voice an opinion based on facts concerning the events at issue in a particular case even if the expert lacks first-hand knowledge of those facts." *Williams v. Illinois*, 567 U.S. 50, 67 (2012). The United States Supreme Court held:

> Under settled evidence law, an expert may express an opinion that is based on facts that the expert assumes, but does not know, to be true. It is then up to the party who calls the expert to introduce other evidence establishing the facts assumed by the expert. While it was once the practice for an expert who based an opinion on assumed facts to testify in the form of an answer to a hypothetical question, modern practice does not demand this formality and, in appropriate cases, permits an expert to explain the facts on which his or her opinion is based without testifying to the truth of those facts. See Fed. Rule Evid. 703.

Williams, 567 U.S. at 57.

Sneed incorrectly concludes that Dr. Kuehl's responses to the prosecutor's hypothetical scenarios told the jury she thought Sneed was guilty of strangling Stephens. (*See* Appellant's Br. at 17.) Without providing specific citations from the record, Sneed generally asserts that the State "fed [Dr. Kuehl] the facts of the case and asked her to opine whether the legal elements of strangulation were met." (*Id.* at 16.) The record demonstrates Dr. Kuehl's testimony answered whether certain symptoms and signs were consistent with a strangulation injury.

The prosecutor asked Dr. Kuehl, "[i]f a person is asked how did you stop her and the response is 'I grabbed her by the throat,' how is that statement . . .

consistent with strangulation as we defined it?" (Day 1 Tr. at 242.) The court overruled Sneed's objection and Dr. Kuehl testified:

> grabbing the neck implies that a physical force of compression has been applied to the neck. In terms of whether that would impede the blood flow, it would meet the definition of strangulation if the victim had symptoms of impairment of consciousness in any way.

(Day 1 Tr. at 243.) Dr. Kuehl explained that whether "grabbing the neck" qualified as strangulation depended upon "how much force was applied, the duration that it was applied, and basically, resulting in . . . what symptoms did it result in." (*Id*.) Dr. Kuehl appropriately testified to the amount of pressure and the various symptoms that were consistent with strangulation, but she did not draw any legal conclusions. The district court properly allowed Dr. Kuehl's expert witness testimony.

Sneed's attempt to distinguish the doctor's testimony in *State v. Rogers*, 1999 MT 35, 297 Mont. 188, 992 P.2d 229, from Dr. Kuehl's testimony fails to demonstrate error. In *Rogers*, the defendant argued to exclude the testimony of the victim's treating physician Dr. Dusing because the State had not laid proper foundation to qualify Dr. Dusing as an expert in Rape Trauma Syndrome (RTS) and he testified to the ultimate issue of whether the victim was raped and to the victim's credibility. *Rogers*, ¶ 14. This Court "conclude[d] that Dr. Dusing did not testify about RTS and, therefore, the State was not required to qualify him as an

expert on that subject." *Rogers*, ¶ 15. Instead, this Court found that Dr. Dusing "carefully limited his testimony to his observations of [the victim] as compared with other women in his professional experience who reported being raped; he did not state that her emotions were consistent with—and appropriate for—women who had been raped." *Rogers*, ¶ 18.

Sneed's argument comparing *State v. Clifford*, 2005 MT 219, 328 Mont. 300, 121 P.3d 489, is likewise unpersuasive and distorts its holding. There, the defendant argued the court properly allowed a handwriting expert to testify about the similarities and dissimilarities between documents of unknown authorship and documents the defendant had written, but it should not have allowed the expert to testify to the ultimate conclusion that the defendant had authored certain letters. *Clifford*, ¶ 31. However, the district court found that Mont. R. Evid. 704 allowed the expert to testify to the ultimate conclusion of who wrote the letters. *Clifford*, ¶ 32. This case supports the admissibility of Dr. Kuehl's testimony because she only testified that certain signs and symptoms indicate strangulation, not that Sneed committed the offense.

Dr. Kuehl was absolutely permitted to testify about her opinion on hypothetical facts provided during direct examination. The court instructed the jury:

> To convict the Defendant Randy Sneed of the offense of strangulation of a partner or family member, the State must prove the following elements:
>
> One, that Randy Sneed impeded the normal breathing or circulation of the blood of Kateland Stephens by applying pressure to her throat or neck; and two, that Kateland Stephens was a partner of Randy Sneed; and three, that Randy Sneed acted purposely or knowingly.
> If you find from your consideration of the evidence that all of these elements have been proved beyond a reasonable doubt, then you should find Randy Sneed guilty. If, on the other hand, you find from your consideration of the evidence that any of these elements has not been proved beyond a reasonable doubt, then you should find Randy Sneed not guilty.

(Day 3 Tr. at 151.) Dr. Kuehl did not testify that Sneed strangled Stephens or acted purposely or knowingly. This Court should disregard Sneed's argument.

II. Any error committed by the district court was harmless trial error.

Generally speaking, "[a]ll relevant evidence is admissible" at trial unless otherwise provided by law. Mont. R. Evid. 402. "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Mont. R. Evid. 401. However, relevant evidence "*may* be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of

cumulative evidence." *State v. Strizich*, 2021 MT 306, ¶ 34, 406 Mont. 391, 499 P.3d 575 (quoting Mont. R. Evid. 403) (emphasis in original).

"District courts have broad discretion to weigh the relative probative value of evidence against the risk of unfair prejudice." *Id.* (quoting *State v. Madplume*, 2017 MT 40, ¶ 32, 386 Mont. 368, 390 P.3d 142). Rule 403 is "a fact-specific balancing test." *Id.* (citing *State v. Haithcox*, 2019 MT 201, ¶ 16, 397 Mont. 103, 447 P.3d 452). The district court is in the best position to determine whether evidence is unfairly prejudicial. *Id.* (internal citations omitted). "Probative evidence always is prejudicial to some degree." *Strizich*, ¶ 35. "Even if evidence rises to the level of unfair prejudice, 'the Rule 403 balancing test favors admission[.]'" *Id.*

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.*

A. Deputy Clark's statements were relevant, but any error the trial court committed was harmless.

Sneed asserts Deputy Clark's description of the jail pod in which Sneed was housed as the "high-risk, violent crimes pod" was irrelevant, or, in the alternative, more prejudicial than probative. (Appellant's Br. at 24-26.) The State questioned Deputy Clark about the origin of certain jail phone calls to show Sneed made the call to his mother and to lay the foundation for State's Exhibit 26. In *State v. Peterson*, 227 Mont. 503, 741 P.2d 392 (1987), the district court "admitted evidence of telephone calls from various phone numbers in Montana to Texas." *Peterson*, 227 Mont. at 506, 741 P.2d at 394. The State asserted that the defendant made the calls, and presented evidence of calls from Texas to Montana. *Id.* However, "[n]o evidence was presented to link defendant to any of the phone calls." *Id.* The State argued that it was proper to infer "defendant had knowledge of the drug shipment as evidenced by the phone calls." *Id.* Although this Court reversed on a different issue, it noted "a proper foundation must be developed before introduction of the telephone calls can be allowed." *Id.*

Even assuming Deputy Clark's comments were prejudicial, they do not warrant reversal of Sneed's conviction. To the extent Deputy Clark's description of Sneed's jail pod was unduly prejudicial, any error was harmless because Deputy Clark's comment did not contribute to Sneed's conviction. *State v. Van Kirk*, 2001 MT 184, ¶ 47, 306 Mont. 25, 32 P.3d 735. Sneed himself testified "I grabbed

[Stephens] by the throat," "pushed [Stephens] by the throat on to the bed," and "controlled the whole situation." Deputy Clark testified to his interactions with both Sneed and Stephens, and both Sneed and Stephens testified about the incident. The jury was also well-educated by Dr. Kuehl about strangulation. Absent Deputy Clark's statements, there was sufficient admissible evidence to prove Sneed committed the offense of strangulation. Further, the quality of Deputy Clark's statements was not so inflammatory as to prejudice the jury and deprive Sneed of a fair trial.

B. State's Exhibit 22 was relevant to show Sneed's state of mind and motive; Sneed did not provide a sufficient basis for his vague objection to admission of State's Exhibit 22 upon which the district court could have found undue prejudice.

Sneed failed to properly preserve his objection to the recorded order of protection hearing testimony. During his testimony at the order of protection hearing, Sneed testified that he and Stephens had been involved in an intimate relationship and that he was angry with her. His testimony was relevant under Mont. R. Evid. 402. Sneed's Motion in Limine provided an insufficient basis for his objection to State's Exhibit 22:

> [Defense counsel]: Your Honor, we're going into the subject matter I think the Court has ruled on in the Motion in Limine regarding text messages. I would just like to make an objection for the record, and ask that those same objections apply to this—
>
> [COURT]: Be renewed?

> [Defense counsel]: Yes, and that it apply not just to the text messages, but also this testimony and the recording, but Your Honor has ruled on the subject matter so I'm just making a record.

(Day 2 Tr. at 211-12; Doc. 29.) The court overruled Sneed's objection but gave him "a standing objection to these issues, consistent with his—the prior briefing." (Day 2 Tr. at 211-12.) Sneed's briefed argument asserted that the admitted text messages between Sneed and Stephens were irrelevant under Rules 401 and 402, or, if relevant, unfairly prejudicial. (Doc. 29 at 3-4.)

The argument in Sneed's Motion in Limine does not provide sufficient facts upon which the district court could have made a different determination for exclusion of Sneed's prior statements at the hearing. Even if the recording provided little probative value to the charges Sneed faced, his lack of specific objection did not provide the district court facts from which it could find undue prejudice. "[T]his is precisely the point of requiring a specific objection at trial." *Strizich*, ¶ 38.

First, Sneed's hearing testimony was admissible as an admission of a party-opponent. Montana Rule of Evidence 801(a) defines a "statement" as any oral or written assertion. "Statements made by a party-opponent and offered against that party are not hearsay and can be allowed into evidence as admissions." *State v. Davis*, 2016 MT 206, ¶ 9, 384 Mont. 388, 378 P.3d 1192 (citing Mont. R. Evid. 801(2); *State v. Smith*, 276 Mont. 434, 441, 916 P.2d 773, 777 (1996)). This Court

has explained that "a confession is a statement by the defendant that he committed the crime, while an admission is a statement by the defendant of some specific fact or facts that could tend to establish guilt or some element of the offense." *Davis*, ¶ 9.

Second, the State offered the testimony to demonstrate Sneed's motive and state of mind. In *State ex rel. Mazurek v. Dist. Court*, 2000 MT 266, ¶ 21, 302 Mont. 39, 22 P.3d 166, this Court recognized that the United States Supreme Court held "that a defendant's testimony in a prior trial generally is admissible in evidence against him in later proceedings because '[a] defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives' . . . ." *Mazurek*, ¶ 21 (citing *Harrison v. U.S.*, 392 U.S. 219, 222 (1968). Sneed admitted he found messages from Stephens to her former boyfriend saying she wanted to end her relationship with Sneed, which he "took personally" and motivated him to tell Stephens to move out of his house. (State's Ex. 22 at 04:20-04:40.) Sneed also conceded he was angry Stephens was not in love with him and they fought about it after he confronted her about the messages. (*Id.* at 05:50-06:00.) The State offered Sneed's recorded testimony to demonstrate he was upset, angry, and unable to cope with Stephens leaving the house with their infant child on the day he strangled Stephens.

C. Cumulative error does not support reversal.

Under Montana's harmless error analysis, any error committed by the district court was harmless. This Court has "adopted a two-step analysis to determine whether an error "prejudiced the criminal defendant's right to a fair trial and is therefore reversible." *State v. Buckles*, 2018 MT 150, ¶ 17, 391 Mont. 511, 420 P.3d 511 (citing Van Kirk, ¶ 37.) "The first step in conducting harmless-error analysis is to determine whether the error is structural error or trial error." *Buckles*, ¶ 17 (citing *Van Kirk*, ¶ 37). "A structural error affects the framework within which the trial proceeds, while trial error typically occurs during the presentation of a case to the jury." *Id.* (citing *Van Kirk*, ¶¶ 38, 40). "Trial error can be reviewed qualitatively for prejudice relative to other evidence introduced at trial; thus, the error is subject to harmless-error review." *Id.* (citing *Van Kirk*, ¶ 40). Here, reference to Stephens's order of protection against Sneed could only be trial error.

The second step of the harmless-error analysis is application of the "cumulative evidence" test. *Buckles*, ¶ 18. "Where individual errors would be insufficient alone, the sum of these errors can serve as a basis for reversal under the cumulative error doctrine." *State v. Smith*, 2020 MT 304, ¶ 16, 402 Mont. 206, 476 P.3d 1178. "The cumulative evidence test asks whether the fact finder was presented with admissible evidence providing the same facts as the tainted evidence." *State v. Larson*, 2015 MT 271, ¶ 33, 381 Mont. 94, 356 P.3d 488. An

abundance of other admissible evidence was offered to prove Sneed strangled Stephens.

The court instructed the jury regarding what elements the State must have proven to convict Sneed of Count I, strangulation of a partner or family member:

> One, that Randy Sneed impeded the normal breathing or circulation of the blood of Kateland Stephens by applying pressure to her throat or neck; and two, that Kateland Stephens was a partner of Randy Sneed; and three, that Randy Sneed acted purposely or knowingly.

(Day 3 Tr. at 151.) The State submitted evidence to prove Sneed committed the offense through its expert's testimony, the treating medical provider, Deputy Clark's testimony, Deputy Clark's recording of his initial encounter with and arrest of Sneed, Stephens's testimony, and Sneed's own testimony.

Sneed himself testified at trial he was angry and upset with Stephens and that he grabbed Stephens's neck. Sneed admitted he held out his arm to block Stephens from leaving, he acted on emotion, he refused to let Stephens leave the house with their child, and he pushed her by the throat onto the bed. "The testimony of a single witness the jury finds credible 'is sufficient for proof of any fact, except perjury and treason.'" *State v. French*, 2018 MT 289, ¶ 16, 393 Mont. 364, 431 P.3d 332 (citing Mont. Code Ann. § 26-1-301; *State v. Bowen*, 2015 MT 246, ¶ 30, 380 Mont. 433, 356 P.3d 449). "A witness is presumed to speak the truth, and the jury is the "exclusive judge" of a witness's credibility." Mont. Code Ann. § 26-1-302. "The jury 'has a prerogative to accept or reject testimony' and to determine what

evidence to believe." *French*, ¶ 16. Sneed's testimony alone was enough for the jury to convict him, yet it was admitted alongside significant evidence proving the same facts.

Sneed was "entitled to a fair trial, not to a trial free from errors." *Smith*, ¶ 16. The evidence admitted apart from State's Exhibit 22 supports Sneed's conviction, so the quality of Deputy Clark's statements "was such that there was no reasonable possibility that it might have contributed to the defendant's conviction." *Van Kirk*, ¶ 44. If this Court determines any of Deputy Clark's statements were admitted in error, the admission was harmless.

III. Sneed did not raise the issue of jurors sleeping at trial and did not object to the district court's decision to not admonish jurors against possession of their phones during trial.

A. Standard of review

The question of whether a defendant ultimately received a fair trial in accordance with due process is a question over which this Court exercises plenary review. *State v. Geren*, 2012 MT 307, ¶ 28, 367 Mont. 437, 291 P.3d 1144. A trial court "has significant latitude when ruling on" matters relating to juror misconduct and will give "considerable weight" to its determinations, as "the trial court is in the best position to observe the jurors and determine the potential for prejudice

when allegations of jury misconduct are raised." *State v. Oliver*, 2022 MT 104, ¶ 32, 408 Mont. 519, 510 P.3d 1218.

B. Sneed asked the court to admonish the jurors about cell phone use during the trial but did not preserve the issue for appeal.

This Court has repeatedly held that "a defendant must make a timely objection to properly preserve an issue for appeal." *Rogers*, ¶ 27 (citing *Daniels*, ¶ 31; *see also* Mont. Code Ann. §§ 46-20-104(2), -701). "To be timely, the objection "must be made as soon as the grounds for the objection are apparent." *Id.* "Failure to lodge a timely objection constitutes a waiver of the objection and precludes raising the issue on appeal." *Id.* This Court's consistent application of the "timely-objection rule has been motivated by concerns of judicial economy and fundamental fairness, both of which require alleged errors to be brought to the attention of the district court so that actual error can be prevented or corrected at the first opportunity." *Id*. "Acquiescence in error takes away the right of objecting to it." Mont. Code Ann. § 1-3-207.

Sneed asked the court to admonish the jury, but because he did not object or move to question the juror regarding his phone use, it is a new theory that the State did not have the opportunity to address below and the district court did not have the opportunity to consider. Although the district court responded to Sneed's request, it was not a true objection, so this Court cannot "put a district court in error for an action in which the appealing party acquiesced or actively

participated." *Daniels*, ¶ 36. Here, Sneed did nothing more than make an informal request; did not provide specific facts upon which to base his concerns. It was the court, not Sneed, who raised the possibility that Juror R. was sleeping. Since Sneed failed to properly raise his objection to the testimony in the district court, he has waived his appellate review. This Court should decline to consider Sneed's new theory on appeal.

C. The Court should not conduct plain error review.

Because Sneed did not properly preserve his evidentiary issue for appeal by first raising it in the district court, the only possible avenue for this Court to address Sneed'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 compromise the integrity of the judicial process. *West*, ¶ 23; *see also King*, ¶ 39.

Sneed 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 Sneed 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. In the event this Court chooses

to address the merits of Sneed's claim, Sneed cannot prevail because he cannot show that failure to review the district court's decision would incur a manifest miscarriage of justice or compromise the fairness or integrity of his trial.

Sneed argues the district court "erred when it refused to inquire about Juror R.'s inattentiveness." (Appellant's Br. at 32.) However, it was the court who observed and mentioned that Juror R. was sleeping and determined it was not so problematic as to address it. Sneed did not object to Juror R.'s conduct as a juror and did not specifically identify Juror R. as one of the jurors he alleged was using his phone until the court asked if Juror R. was an offender. The district court advised it had been watching the jury and specifically Juror R. The court exercised its discretion and determined that any inattentiveness Juror R. may have displayed did not affect Sneed's right to a fair trial.

Sneed takes great liberty in his interpretation of *State v. Eagan*, 178 Mont. 67, 78, 582 P.2d 1195, 1201 (1978), to assert that, to preserve a fair trial for the defendant, it is the trial judge's duty to "investigat[e] and remediat[e] credible concerns of juror inattentiveness or misconduct." (Appellant's Br at 33-34.) However, *Eagen* merely states the "duty to preserve a fair trial for the defendant rests in the first instance upon the trial judge." *Eagan*, 178 Mont. 67, 78, 582 P.2d 1195, 1201.

In *Eagan*, the sole issue on appeal was "whether there was impropriety in the handling of a problem that arose during defendant's trial when one of the empaneled jurors made statements in a public place, outside the place of trial, indicating his prejudice, and implying that others on the jury panel might also be prejudiced against defendant." *Eagan*, 178 Mont. at 68, 582 P.2d at 1196. The court brought that juror before it in chambers, where the juror denied knowing the third person, said he had been merely joking, and "stated he had not discussed the case with any of the other jurors. When the juror was excused after his examination, there was a discussion by court and counsel as to whether he was 'under the influence' or hung over, or whether he was in fact hard of hearing." *Id.* at 76-77, 582 P.2d at 1200. This Court held that the improper conduct of one juror is charged to the entire jury "since the jurors operate as a unit, and since public policy demands that misconduct be discouraged and insofar as possible prohibited." *Id.* at 78, 582 P.2d at 1201. Because Sneed did not demonstrate jury misconduct, and because the court determined there was none, there was no presumption of prejudice to him. *See id. Eagan*, 178 Mont. at 79, 582 P.2d at 1202.

The other cases Sneed cites are likewise inapposite. In *State v. Mott*, 29 Mont. 292, 297, 74 P. 728, 730 (1930), a juror concealed his hostility toward the defendant in voir dire but later commented that defendant should be hung. *Id.* at 304. In *United States v. Barrett*, 703 F.2d 1076, 1082 (9th Cir. 1982), a juror

"asked to be removed from the panel because he had been sleeping during the trial." The jury convicted the defendant and the court denied defendant's motion to interview the juror. *Id.* Unlike *Barrett*, there was no self-reporting juror nor did defense counsel report specific conduct.

In *Geren*, the case most closely on point, the district court did not observe jurors sleeping as defendant alleged. *Geren*, ¶¶ 33, 37. This Court noted that the defendant "did not identify how the matter came to his attention, or why he did not bring this matter to the District Court's attention at the time of trial." *Id.* ¶ 35. This Court held the district court did not abuse its discretion when it denied defendant's motion for a new trial because defendant did not "demonstrate that the court acted arbitrarily without conscientious judgment or exceeded the bounds of reason, and that the court's abuse of discretion was prejudicial." *Id.* ¶ 36. As in *Geren,* the trial judge in this case was "present throughout the course of the trial and having observed the jurors firsthand, is in a better position than [this Court] to determine the validity of [Sneed's] objections." *Id.* ¶ 37.

Sneed did not preserve this issue for appeal because he did not object. Even assuming he had, the court properly exercised its discretion when it declined to admonish the jury against looking at their cell phones.

CONCLUSION

This Court should affirm the district court's evidentiary rulings. If this Court finds that the district court abused its discretion by allowing admission of evidence, the Court should conclude that the error was harmless and affirm Sneed's conviction and sentence.

Respectfully submitted this 17th day of March, 2023.

AUSTIN KNUDSEN
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: */s/ Bree Gee*
BREE GEE
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,419 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Bree Gee
BREE GEE

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 03-17-2023:

Carolyn Marlar Gibadlo (Attorney)
PO Box 200147
Helena MT 59620
Representing: Randy Vaughn Sneed
Service Method: eService

Audrey S. Cromwell (Govt Attorney)
1709 W. College St.
Ste 200
Bozeman MT 59715
Representing: State of Montana
Service Method: eService

Electronically signed by Wendi Waterman on behalf of Bree Williamson Gee
Dated: 03-17-2023