IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0290

STATE OF MONTANA,

Plaintiff and Appellee,

v.

KYLE LEE SEVERSON,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Seventh Judicial District Court,
Richland County, the Honorable Olivia Rieger, Presiding

APPEARANCES:

CHAD WRIGHT
Appellate Defender
MICHAEL MARCHESINI
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147
Michael.Marchesini@mt.gov
(406) 444-9505

ATTORNEYS FOR DEFENDANT
AND APPELLANT

AUSTIN KNUDSEN
Montana Attorney General
TAMMY K PLUBELL
Bureau Chief
Appellate Services Bureau
P.O. Box 201401
Helena, MT 59620-1401

CHARITY McLARTY
Richland County Attorney
300 12th Avenue NW
Sidney, MT 59270

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Laws and Constitutional Provisions

STATEMENT OF THE ISSUES

1. Whether the prosecutor's withholding of exculpatory evidence constituted a *Brady* due process violation.
2. Whether the prosecutor's repeated misconduct violated Kyle Severson's constitutional right to a fair trial.

STATEMENT OF THE CASE

On the night of July 2, 2019, Kyle Severson defended himself, his girlfriend, and his 3-year-old daughter against Tyler Hayden, a man who had violently assaulted Kyle on several prior occasions. Immediately after shooting Tyler, Kyle turned himself in to law enforcement and claimed self-defense.

The State charged Kyle with deliberate homicide under Mont. Code Ann. § 45-5-102. (District Court Document (Doc.) 4.) The jury found him guilty of the lesser-included offense of mitigated deliberate homicide under Mont. Code Ann. § 45-5-103. (Doc. 226.) The District Court sentenced Kyle to 40 years in the Montana State Prison. (Doc. 313 at 4 (Mitigated Deliberate Homicide Judgment, attached as Appendix A).) Kyle was also charged with witness tampering, pled no lo contendere, and received an eight-year concurrent sentence. (Docs. 27,

322, 324 (Tampering Judgment, attached as Appendix B).) Kyle filed a notice of appeal. (Doc. 334.)

STATEMENT OF THE FACTS

Kyle's Act of Self-Defense

Kyle and Tyler were teenagers living in Sidney. They had long been acquaintances, but their relationship eventually turned sour when Tyler started harassing and bullying Kyle.

In March 2018, Tyler approached Kyle in a parking lot, berated and shoved him, pulled a gun, and made Kyle give Tyler the money in his pockets. (10/1/2020 Trial Transcript (10/1 Tr.) at 165.) Kyle later sent Tyler a Facebook message referencing "the time you pulled a gun on me," and Tyler did not deny that this happened. (10/1 Tr. at 165–67, 207; Defense Exhibit (Ex.) II.)

On April 25, 2018, Kyle was driving with his brother-in-law, Juan, when Tyler followed them into an IGA parking lot, stopped his car, got out, and violently attacked them. Tyler opened Juan's passenger door, tried to pull Juan out, and started punching him. (10/1 Tr. at 123–24.) The fight continued between Tyler, Juan, and Kyle and was captured on surveillance video. (Defense Ex. H; 10/1 Tr. at 118–19.) Tyler was

yelling and making threats the whole time, saying that whenever he encountered Kyle, he would fight him. (10/1 Tr. at 127–28, 162.) Although not introduced at trial, Tyler sent Kyle a Facebook message afterwards saying, "Expect that every time u see me." (Doc. 299, Ex. 7.) After this incident, Kyle began carrying a gun for protection from Tyler. (10/1 Tr. at 162.)

Kyle also feared Tyler because he knew Tyler "knows how to fight." (9/29/2020 Trial Transcript (9/29 Tr.) at 60.) Kyle had witnessed Tyler punch other people aggressively and without provocation. (9/29 Tr. at 60; 10/1 Tr. at 169.) Dr. Shannon Weisz, a psychologist who would testify as an expert in Kyle's defense, diagnosed Kyle with post-traumatic stress disorder (PTSD) due to Tyler's repeated violent assaults, threats, and harassment. (10/2/2020 Trial Transcript (10/2 Tr.) at 37–41; Doc. 118, Ex. B.)

A little over a year after Tyler's last assault, on the night of July 2, 2019, Kyle, Karina, her sister Jessica, and Kyle and Karina's 3-year-old daughter got in Karina's car to go to Loaf 'N Jug for snacks. (9/29 Tr. at 42.) Kyle and his daughter sat in the back.

Surveillance footage from a business across the street from Loaf 'N Jug partially captured the events that night. (State's Ex. 32, admitted and published at 9/29 Tr. at 223–30.) When Karina's vehicle pulled into a parking spot, Karina and Jessica went inside, and Kyle and his daughter waited in the car. (9/29 Tr. at 42; Ex. 32 at 0:40–1:12.)

About five minutes later, Tyler and his friend Dalton Watson pulled up next to Kyle's vehicle. (9/29 Tr. at 42–43; Ex. 32 at 5:50–6:00.) Dalton drove, and Tyler was in the passenger seat. Dalton and Tyler went in the store while Karina and Jessica were still inside. (Ex. 32 at 6:20–6:35.) Dalton claimed that his and Tyler's only purpose for going to the Loaf 'N Jug was to purchase cigarettes in between gambling at two different locations in town. (9/30/2020 Trial Tr. (9/30 Tr.) at 140–43.)

Tyler had a baggie of meth and a meth pipe in the glove compartment of Dalton's car. (9/30 Tr. at 55, 186; 10/1 Tr. at 34–36.) A subsequent autopsy report would show that Tyler was under the influence of meth, marijuana, alcohol, and Xanax at the time of the incident. (9/30 Tr. at 42–48, 51; Defense Ex. G.)

Karina testified that when Dalton and Tyler entered the store, she was scared because she knew Tyler was dangerous. She tried to hurry

out of the store to avoid a confrontation with him. (10/1 Tr. at 48, 62, 106–07.) She and Jessica got in line to check out, and Tyler got in line behind them. (10/1 Tr. at 62.) Tyler called her a "bitch" under his breath. (10/1 Tr. at 62.) Surveillance video from inside the store indicated Tyler had an indecipherable bulging object in his sweatshirt pocket that the defense would argue was a gun. (Defense Ex. D at 6; 10/1 Tr. at 140–46.)

Dalton exited the store first (Ex. 32 at 7:40), followed by Karina and Jessica about 30 seconds later (Ex. 32 at 8:15). Tyler came out last, about 20 seconds after Karina and Jessica. (Ex. 32 at 8:35.) As Dalton walked out of the store, he noticed Kyle sitting in the rear driver's side seat of Karina's car. (9/30 Tr. at 146.) Dalton gave conflicting statements that he said nothing to Kyle (9/30 Tr. at 146) and that he made a "smartass remark to Kyle" (9/30 Tr. at 181–82).

Dalton testified that when he got back in his car, he put a .22 pistol in his sweatpants waistband. (9/30 Tr. at 138, 147, 182.) He claimed he did this because he was afraid of Kyle. (9/30 Tr. at 147, 182.) But he conversely claimed the encounter with Kyle seemed like a "friendly encounter." (9/30 Tr. at 182–84.) When Karina got back in her

car, she told Kyle that she ran into Tyler in the store. (9/29 Tr. at 43; 10/1 Tr. at 64.)

Tyler got back in Dalton's car. Moments later, Karina backed out of her parking spot and began to pull forward to leave. (Ex. 32 at 8:50; 9/29 Tr. at 44.) Tyler asked Dalton if that was Kyle in the car next to them, and Dalton said yes. (9/30 Tr. at 148.) Tyler then got out of Dalton's car and approached Kyle's open window, and Karina stopped the car. (Ex. 32 at 9:00; 10/1 Tr. at 65.) The surveillance video's view of Tyler was largely blocked by Karina's car at this point, and it shows only Tyler's feet approaching Kyle's vehicle. (Ex. 32 at 9:00–9:05.)

Dalton claimed that as Tyler got out and approached Kyle, his demeanor was "normal, slow[ ]moving, he wasn't in very much of a hurry." (9/30 Tr. at 150.) Dalton testified that Tyler said to Kyle as he approached, "'Hey, buddy, it's been a long time. How you been doing' in a friendly way." (9/30 Tr. at 150.)

Contrary to Dalton's testimony, Kyle testified that Tyler "approached at a pretty brisk pace, pretty quick . . . similar kind of like the IGA deal." (10/1 Tr. at 172.) As Tyler got closer, Kyle said he "knew that he was obviously going to be violent." (10/1 Tr. at 172.)

Karina and Kyle both testified Tyler said something "aggressive," "taunting," or "vulgar" to Kyle as he approached, although they could not make out his words. (10/1 Tr. at 65, 173.) Karina said she saw Tyler's hands "fidgeting in his pockets like he was trying to grab something." (10/1 Tr. at 66–67.) Kyle testified, "Karina started saying something about how it looked like he had something" on him, and Kyle "notice[d] that too." (10/1 Tr. at 172.) Although Kyle could not explicitly make out a weapon in Tyler's hands, he could not tell whether or not Tyler's hands were empty. (9/29 Tr. at 45, 58, 72; 10/1 Tr. at 234.)

As Tyler arrived at Kyle's window, Kyle—anticipating yet another violent assault—instinctively grabbed a pistol off the car floor, pointed it out the window, pressed it to Tyler's chest, and pulled the trigger. (9/30 Tr. at 151; 10/1 Tr. at 172, 210.)

After Kyle fired the shot, Tyler dropped to the ground, and Karina drove off. (Ex. 32 at 9:08.) According to Karina, Kyle was upset at what had just occurred, and he "kept saying he was sorry" and asking, "Why did I do that?" (10/1 Tr. at 68, 80.) Kyle demanded Karina take him to the police station immediately so he could turn himself in, and she did. (10/1 Tr. at 68.)

Kyle presented himself to the dispatcher in the lobby and told her "he was at Loaf 'N Jug, and he shot Tyler Hayden." (9/29 Tr. at 20.) Kyle appeared "panicked," "upset," and was vomiting. (9/29 Tr. at 20, 42, 52, 54.)

Kyle patiently waited in the lobby for deputies to arrive, at which point they took him into custody. (9/29 Tr. at 20.) He waived his *Miranda* rights and freely told Officer Gomke everything that happened. (9/29 Tr. at 42, 54; Doc. 104, Ex. 1[1].)

Kyle told Gomke about the history between him and Tyler and that, based on Tyler's past assaults, Kyle feared him. (10/1 Tr. at 212–13.) Although he described Tyler's IGA assault, Kyle neglected to mention the March 2018 incident when Tyler mugged him at gunpoint. (10/1 Tr. at 213.) Kyle said he was scared because Tyler seemed high and was therefore unpredictable—Tyler's pupils were "large," which "caught his attention." (9/29 Tr. at 61.)

Gomke asked Kyle why he shot Tyler, and Kyle said he "felt threatened," "thought he was going to hurt him," and thought Tyler

[1] The video of this interview is in the record, but it was not played for the jury.

might hurt Karina or their daughter. (9/29 Tr. at 46, 49, 50, 55, 59, 62.) Kyle likewise testified that he pulled the trigger because, "I didn't want to get hurt, I didn't want my daughter to get hurt since she was sitting right next to me." (10/1 Tr. at 175–76.) Gomke asked Kyle if he saw a weapon in Tyler's hands, and he said he could not tell one way or the other. (9/29 Tr. at 45, 58, 72.)

Back at the Loaf 'N Jug, Dalton rushed out of his car after Tyler was shot. He sprained his knee on the sidewalk, limped over to a few feet beyond Tyler, picked a gun up off the ground, and put it back in his car before tending to Tyler.[2] (Ex. 32 at 9:12–9:32; 9/30 Tr. at 153.)

In his initial interview with police the night of the incident, Dalton did not mention anything about this gun. (9/30 Tr. at 58.) Months later, during a September 2019 interview, police confronted Dalton about the gun he picked up off the ground near Tyler. Dalton claimed this was his own pistol, which "had blow[n] out of his waistband" when he got out of his car and sprained his knee, flew

[2] Officers found this .22 pistol in Dalton's vehicle after the incident. (9/30 Tr. at 75.)

through the air, and coincidentally landed near Tyler's body. (9/30 Tr. at 58.)

Contrary to Dalton's theory about his flying gun, the defense argued Tyler was holding this pistol and was preparing to assault or kill Kyle with it. The defense argued Tyler dropped the gun when Kyle shot him, and Dalton picked it up and put it in his car to conceal the fact that Tyler was intending to harm Kyle. (10/2 Tr. at 207.)

The State's Suppression of Exculpatory Evidence

In the days before the shooting, Kyle and Karina heard rumors Tyler was planning to rob and "hurt" Kyle. (9/29 Tr. at 56–57.) Mere hours after the shooting, when Karina returned to her and Kyle's home, she discovered their home had indeed been burglarized. (10/1 Tr. at 69–71.)

Police investigated this burglary, and by August 2019, they identified Tyler's girlfriend, Keaston Johns, as a primary suspect. Two additional suspects were friends with Dalton and often stayed at his apartment. (Doc. 197, Exs. A, B, D, E.)

Police also searched Dalton's apartment during an unrelated drug raid, and they discovered in his personal safe various items stolen from

Kyle's home during the burglary, including Karina's identification card and watch. Investigators also learned that just hours after the shooting, Keaston gave Dalton $300 in cash that she had stolen from Kyle's home.[3] (Doc. 197, Exs. D, E; 9/30 Tr. at 60–66, 162–68.)

When the defense filed a motion to compel discovery of this law enforcement information about the burglary on October 30, 2019, the State vigorously objected. (Docs. 20, 26.) The State asserted if the defense wanted information about the burglary investigation, it could do its own investigation. (Doc. 26 at 2.) The State promised the burglary was completely irrelevant to the shooting. (Doc. 26 at 3; 12/11/2019 Hearing Transcript (12/11/2019 Tr.) at 14.) Based on these representations, the District Court denied the defense's discovery motion on January 6, 2020. (Doc. 44 at 10–11.)

On January 24, 2020, law enforcement officers investigating the burglary sent the prosecutor two "request[s] for prosecution" of the

[3] The State conveniently declined to prosecute Dalton for possession of stolen property from the burglary. (9/30 Tr. at 61.) And after finding Dalton in possession of methamphetamine during the drug raid, the State offered Dalton a generous pretrial diversion agreement. (9/28 Tr. at 274.) The District Court admonished the prosecutor, "it was a bad idea to do a deferred prosecution with a witness in a homicide." (9/28 Tr. at 274.)

primary burglary suspects, Logan Krauser and Keaston. (Doc. 197, Exs. A, B.) The accompanying police reports detailed Dalton's possession of the stolen property from Kyle's home. (Doc. 197, Exs. D, E.)

Without notifying defense counsel or the District Court about these documents, the prosecutor sat on the requests until July 2020, at which point she referred the cases to the State Attorney General's office for further review. (Doc. 175 at 2; Doc. 197, Ex. C.) The prosecutor never brought charges for the burglary. (9/30 Tr. at 64.)

The defense filed another motion to compel discovery of the burglary information on September 4, 2020. (Doc. 151.) At a September 11 hearing, the State reiterated its objection to disclosure on the basis the burglary was totally irrelevant. (9/11/2020 Hearing Transcript (9/11/2020 Tr.) at 45–46.) Over the prosecutor's repeated protestations, the District Court ordered the State to give Kyle the burglary reports, reasoning he deserved access to them as the victim of the crime. (9/11/2020 Tr. at 46.)

Upon reviewing the burglary reports, the defense argued the State had deliberately suppressed "a treasure trove" of relevant, exculpatory evidence. (Doc. 191 at 1; Doc. 197 at 1.) Defense counsel explained that,

based on the reports, it appeared Tyler, Dalton, Keaston, and two other friends had conspired to burglarize Kyle's home. (Doc. 197 at 2.) Contrary to Dalton's innocent explanation for him and Tyler running into Kyle at the Loaf 'N Jug, it appeared the two intercepted Kyle there with the purpose "to inflict harm and violence on Kyle in an effort to slow up" his progress in returning home while the burglars finished the job. (Doc. 197 at 2; 9/22/2020 Hearing Transcript (9/22/2020 Tr.) at 38–39, 49–50.)

In light of this late-breaking information about Dalton's connection to the burglary, the defense moved to compel discovery of the contents of Dalton's cell phone, which the State had seized the night of the shooting and held ever since. (Doc. 210.) Defense counsel asserted the phone likely contained exculpatory evidence regarding the planning of the burglary and the true motives of Tyler and Dalton that night. (Doc. 210 at 2.) Counsel emphasized that had the State provided the burglary reports when first asked roughly a year earlier, "the issue of Mr. Watson's phone could have been addressed long ago." (Doc. 210 at 4; 9/28/2020 Trial Transcript (9/28 Tr.) at 281–82.)

On the second day of trial, the court expressed regret for its denial of the initial October 2019 motion to compel discovery of the burglary information. (9/29 Tr. at 118.) The court said it was falsely "led to believe that the [burglary] information was not in any way shape or form relevant," when it clearly was. (9/29 Tr. at 118–22.)

The court asked the State if it had ever examined Dalton's phone during the 15 months it sat in evidence. (9/28 Tr. at 281–82.) The prosecutor said no, because she had no reason to believe it contained exculpatory evidence. (9/28 Tr. at 282.) The District Court sharply questioned the prosecutor how she could know the phone did not contain exculpatory evidence without ever having looked at it. (9/28 Tr. at 282–83.) The court said, "I'm very troubled by this evidence and the disclosure. I'm – the Court is worried about *Brady* violations here. I'm worried about exculpatory or inculpatory evidence not being disclosed." (9/28 Tr. at 283.)

The court ordered that during lunch the next day, Dalton would present his phone to the court and allow the parties to review it for exculpatory information. (9/28 Tr. at 284.) When the prosecutor told Dalton about this, Dalton asked if he had to unlock his phone for the

judge. (9/29 Tr. at 101.) The prosecutor told him only that she could not give him legal advice. (9/29 Tr. at 101.)

Dalton then claimed he could not remember his passcode. (9/29 Tr. at 102–06.) As a result of Dalton's convenient forgetfulness, the parties could not open his phone. (9/29 Tr. at 109–10.) The court stated it was "suspicious" of Dalton's claimed lapse of memory. (9/29 Tr. at 115.)

The court vented at the State's "reckless" failure to examine Dalton's phone sooner, given the potential it contained exculpatory evidence. (9/29 Tr. at 111–14.) The court stated, "I have significant concerns for the record that this is a *Brady* violation." (9/29 Tr. at 111.) The court then said, "Jeopardy has attached so, I'm very concerned, very concerned." (9/29 Tr. at 114.)

Because trial had already begun, and it would take time for law enforcement to hack into Dalton's phone, the court asked the defense if they wished for a continuance. (9/29 Tr. at 114.) Defense counsel answered no, explaining Kyle had "been in custody for 15 months already" and wished to see the case resolved without further delays. (9/29 Tr. at 114; 10/1 Tr. at 20–21.)

The State argued it had satisfied its *Brady* obligations by simply notifying the defense it possessed Dalton's phone, and it sought to blame the defense for not requesting the phone's contents earlier. (9/29 Tr. at 115.) The District Court rejected this view, explaining the defense could not have known the potential relevance of Dalton's phone prior to getting the reports from the burglary investigation, which the State had improperly withheld for a year. (9/29 Tr. at 119.)

The defense then moved under *Brady* to exclude Dalton from testifying. (9/29 Tr. at 122.) The court stated that "a sanction of some sort is warranted" because there was no way to tell if the withheld evidence was exculpatory, and "therein lies some prejudice to the Defendant." (9/29 Tr. at 234–35.) The court reiterated the State's withholding had caused "prejudice to the Defendant and his right to have due process and present a defense," as well as to the court's ability "to issue a proper ruling" on the *Brady* motion. (9/29 Tr. at 235; 9/30 Tr. at 115.) Because the court could not make a "finding of clear exculpatory value" of the unknown contents of Dalton's phone, however, the court said it could not determine at that time whether or not a *Brady* violation had occurred. (Doc. 223 at 2.)

As a "sanction," the court said it would allow the defense to cross-examine State witnesses about the burglary, the State's lenient treatment of Dalton with respect to the burglary and his drug charge, and the lack of analysis of Dalton's phone. (9/29 Tr. at 235–38; 9/30 Tr. at 66; Doc. 223.) But the court declined to exclude Dalton from testifying. (9/29 Tr. at 235–36; Doc. 223.)

On the third day of trial, the defense filed a motion to dismiss the case with prejudice due to the prosecutor's *Brady* violations. (Doc. 224; 9/30 Tr. at 210.) The next morning, on the fourth day of trial, the court said it would reserve its ruling on this motion until after trial. (10/1 Tr. at 21.) At the same time, the court reiterated its concern with the State's withholding of potentially exculpatory evidence on Dalton's phone. The court referred to the situation as "a disaster" that could have been avoided had the prosecutor handed over the burglary reports back in October 2019. (10/1 Tr. at 22–23.) The court also described the prosecutor's actions as "a failure of justice." (10/1 Tr. at 23.)

After trial, the District Court denied the motion to dismiss, explaining that because no one knew what information Dalton's phone contained, the defense could not satisfy the first prong of a *Brady* claim:

that the State possessed evidence favorable to the accused. (Doc. 229 at 3.)

The defense moved post-trial to have a State forensic examiner hack into Dalton's phone and examine its contents. (Docs. 274, 281.) The State objected, calling this "a treacherous request into a trial witness's private information." (Doc. 280 at 3.) The court granted the motion and ordered the State to begin the lengthy process of extracting data from Dalton's locked phone. (Doc. 310.)

Five months later, after Kyle's sentencing, the Division of Criminal Investigation successfully gained access to Dalton's phone. (5/24/2021 Hearing Transcript (5/24/2021 Tr.) at 5–7.) The phone data was filtered through a program called Cellebrite, placed on a USB drive, and filed under seal on June 29, 2021. (Doc. 335.) Kyle's trial counsel withdrew on May 24, 2021, and never reviewed this data. (5/24/2021 Tr. at 5–6.)

The cell phone data includes written communications from both Dalton and Tyler. Tyler had used Dalton's phone to access his own Facebook Messenger account. One Facebook Messenger conversation

between Tyler and Shammar Brown occurred from 10:38 p.m. on July 1 to about 3:06 p.m. on July 2, 2019, just hours before the shooting.

In it, Brown apparently references a fight between him and Tyler in which Tyler pulled a gun on him. Brown said to Tyler, "Cant even throw hands resortin to your heater," and "Go ahead stay warm w/ your lil piece," to which Tyler responded, "U tried and jumped me u dumb dumb fool." Brown also said, "you pulled out some heat." (Doc. 335 (Messages from 7/1/2019 at 10:38:45 p.m., 7/1/2019 at 10:38:57 p.m., 7/2/2019 at 5:17:07 a.m., and 7/2/2019 at 3:06:27 p.m., attached as Appendix C).)

Additional Prosecutorial Misconduct

Intimidating the Defense

In July 2020, the prosecutor moved the District Court for permission to eavesdrop on Kyle's phone calls with his attorney. (Doc. 122 at 3–7; 8/24/2020 Hearing Transcript at 36–43.) The State had been recording all of Kyle's calls from jail, including to his attorney. (Doc. 122 at 1–2.) The State argued Kyle had been using the wrong jail phone to call his attorney and thereby waived his attorney-client privilege. (Doc.

122 at 3–7.) The State asked the court to rule that "the State is allowed to listen to said calls." (Doc. 122 at 7.)

The District Court denied the State's request, because the jail's own written policy had explicitly assured Kyle his calls with his attorney would not be monitored. (Doc. 180 at 2–4.) The court suggested that to grant the State its wish would violate Kyle's attorney-client privilege. (*See* Doc. 180 at 3.)

Before Kyle's trial, the State also charged Karina with deliberate homicide by accountability. (*See* Docs. 157 at 1, 172 at 1–2, 196 at 1.) The State did this even though its own evidence showed Karina did nothing more than bump into Tyler in the store, tell Kyle she thought Tyler had a weapon in his hands as he approached Kyle, and drive off in a panic after Kyle pulled the trigger. The District Court dismissed Karina's charge for lack of probable cause on August 24, 2020, one month before Kyle's trial began. (*See* Docs. 157 at 1, 172 at 1–2, 196 at 1.)

Burden Shifting

On the third day of trial, the State asked one of the detectives on the case, Travis Rosaaen, a series of questions about how the defense

never sought to inspect the contents of Dalton's phone. (9/30 Tr. at 109–10.) The defense objected. (9/30 Tr. at 112–13.) The District Court reminded the State that its own conduct—not the defense's—had caused the suppression of potentially exculpatory evidence on Dalton's phone and hampered Kyle's ability to present a defense. (9/30 Tr. at 115.) The court then said, "I don't think that you get to shift the burden of providing exculpatory information, in your possession, to the Defendant." (9/30 Tr. at 115.) The prosecutor moved on.

Telling the Jury Kyle was a Drug Dealer

The defense filed a pre-trial motion in limine to exclude any suggestion to the jury Kyle was a drug dealer, which the State had wanted to introduce.[4] (*See* Doc. 176 at 1; Doc. 186 at 1.) Kyle was in fact a medical marijuana provider, not a drug dealer. (10/1 Tr. at 176.) The District Court granted the motion and ordered the State not to mention Kyle's supposed drug dealing. (9/11/2020 Tr. at 60–63; Doc. 186.)

[4] The District Court record does not appear to contain this motion, which the docket identifies as document number 150. The record does, however, contain the State's response to and the District Court's order on the motion, both of which explicitly reference the defense motion to exclude this evidence.

Despite this order, the prosecutor went out of her way to tell the jury Kyle was a drug dealer. During Karina's cross-examination, the prosecutor zeroed in on the specific items stolen during the burglary. After Karina confirmed the theft of various items, the prosecutor asked her, "And isn't it true they stole more than that?", "Isn't it true that guns were also stolen?", and "What about drugs?" Karina answered yes, the thieves also stole guns and drugs. (10/1 Tr. at 78–79.)

The prosecutor then asked Karina about $2,000 in cash the thieves stole, saying, "Where did that money come from?" (10/1 Tr. at 79.) Defense counsel objected, and the prosecutor withdrew the question. (10/1 Tr. at 79–80.) But the prosecutor circled back, asking Karina, "Isn't it true that people also know that you would have had cash, guns, and drugs in your house?" (10/1 Tr. at 88.) Defense counsel objected, and the court sustained. (10/1 Tr. at 89.) The prosecutor's next question was, "Isn't it true that Kyle posted pictures on social media, various forms, of cash and drugs?" (10/1 Tr. at 89.) Defense counsel again objected and asked for a sidebar. (10/1 Tr. at 89.)

The defense argued, and the District Court agreed, that the prosecutor had violated the order in limine barring inquiry into Kyle's

alleged drug dealing. (10/1 Tr. at 89–97.) The court asked defense counsel what remedy he wanted. (10/1 Tr. at 93.)

Counsel responded that the prosecution had "intentionally violated" the order in limine and was apparently "trying to bait us into, asking for a mistrial or something er [sic] at this junction. It sure seems like it." (10/1 Tr. at 94.) Counsel argued, "My client's rights have been violated again and again and again. And they continue to be violated today by these prosecutors intentionally violating an order in limine." (10/1 Tr. at 94–95.)

Defense counsel asked for a jury instruction that the prosecutor's questions were "inappropriate." (10/1 Tr. at 95.) Counsel said he might ask for a mistrial, "depending upon whether we get the instruction to the jury and it's curative enough." (10/1 Tr. at 95.) The court said, "I'm going to grant the Defendant the ability to raise the motion for mistrial. I am because I think that is absolutely your right." (10/1 Tr. at 97.)

The court then said of the prosecutor's flagrant violation of the order in limine, "I am beyond frustrated with the way that this trial has gone. It has been a mess. I can't believe that the seriousness of this charge and seriousness of this prosecution yields to such fast and loose

playing with the rules, the law, the court rules, the Court's orders." (10/1 Tr. at 98.) The court continued, "The question, and I'm going to put the parties on notice, is whether this is a manifest injustice where jeopardy has attached on a mistrial to where Mr. Severson could or could not be tried again. That is how serious we are, the conjunction [sic] we're at right now." (10/1 Tr. at 99.)

The court again told defense counsel, "I'll give you an opportunity until your case in chief is concluded to make your motion for a mistrial." (10/1 Tr. at 99.) The court then instructed the jury that the State's questioning was inappropriate. (10/1 Tr. at 100–01.)

The next day, after the defense rested, the court asked defense counsel yet again if he wished to move for a mistrial, and counsel answered no. (10/2 Tr. at 94–95.) The court reiterated now was the chance to ask for a mistrial, but counsel responded, "No, we are not requesting a mistrial." (10/2 Tr. at 95.)

STANDARDS OF REVIEW

This Court exercises plenary review of alleged *Brady* violations. *State v. Hren*, 2021 MT 264, ¶ 17, 406 Mont. 15, 496 P.3d 949. "A district court's decision on a motion to dismiss charges in a criminal

case presents a question of law that this Court reviews de novo." *State v. Colvin*, 2016 MT 129, ¶ 10, 383 Mont. 474, 372 P.3d 471.

"Ineffective assistance of counsel claims raise mixed questions of law and fact" that the Court reviews de novo. *State v. Savage*, 2011 MT 23, ¶ 20, 359 Mont. 207, 248 P.3d 308.

SUMMARY OF THE ARGUMENT

In the year before trial, the State misleadingly asserted the burglary of Kyle's home the night of the shooting had no relevance to this case, even though the State knew this implicated its key witness, Dalton. At the same time, the State kept Dalton's phone in its possession without ever looking at it. The State's cagey withholding of information about the burglary deprived the defense of any reason to request access to Dalton's phone, until it was too late.

As it turns out, Dalton's phone had exculpatory information on it all along: evidence that the day before the shooting, Tyler had pulled a gun on another man during an altercation. Had this been timely disclosed, it would have rebutted Dalton's testimony that Tyler was unarmed and peaceful the night of the shooting. It also would have bolstered Kyle's testimony that Tyler assaulted him with a gun in the

past and enhanced the reasonableness of Kyle's self-defense claim. Instead, the State intentionally turned a blind eye to the existence of this evidence in a cunning attempt to dodge any discovery obligations.

The State's actions amounted to a bad faith suppression of evidence favorable to the defense. This was a *Brady* due process violation that demanded—and still demands—dismissal with prejudice.

Unfortunately, this was far from the only instance of prosecutorial misconduct in this case. The prosecutor tried to listen in on Kyle's legal strategy discussions with his attorney, intimidated Karina with a frivolous prosecution, shifted the burden to the defense to produce exculpatory evidence, and portrayed Kyle and Karina to the jury as dangerous, drug-dealing thugs. This pattern of prosecutorial misconduct violated Kyle's constitutional right to a fair trial.

ARGUMENT

I. The State's withholding of exculpatory evidence on Dalton's phone violated Kyle's constitutional right to due process under *Brady v. Maryland*.

"In our system of justice, [ ] prosecutors occupy a unique position of public trust." *State v. Weisbarth*, 2016 MT 214, ¶ 32, 384 Mont. 424, 378 P.3d 1195. They "must ensure above all else that justice is done

which necessarily requires that they provide a defendant, regardless of the nature of the offense, due process of law." *Weisbarth*, ¶ 32. As the District Court rightly fumed below, the prosecutor's crafty suppression of evidence in this case amounted to "a failure of justice" that caused "prejudice to the Defendant and his right to have due process and present a defense." (9/30 Tr. at 115; 10/1 Tr. at 23.)

The United States and Montana constitutions guaranteed Kyle due process and, by extension, "a meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006); *State v. Reams*, 2020 MT 326, ¶ 18, 402 Mont. 366, 477 P.3d 1118. Kyle could not present a complete defense while the State withheld material, exculpatory evidence from him. *State v. Fisher*, 2021 MT 255, ¶ 28, 405 Mont. 498, 496 P.3d 561 (citing *California v. Trombetta*, 467 U.S. 479, 485 (1984)).

The prosecution's suppression of evidence favorable to an accused violates due process "where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). To establish a *Brady* violation, the defendant bears the burden to show: (1) the State

possessed evidence favorable to the defense; (2) it suppressed the evidence; and (3) the suppression prejudiced the defense. *Colvin*, ¶ 13.

Evidence is "material"—and its suppression prejudicial—if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). "The defendant is not required to show that the evidence would have led to acquittal." *Colvin*, ¶ 13. Rather, the defendant's burden is simply to show the suppression of evidence "undermine[s] confidence in the verdict." *Wearry v. Cain*, 577 U.S. 385, 392 (2016) (internal quotations omitted).

"Favorable" evidence includes both exculpatory and impeachment evidence. *Bagley*, 473 U.S. at 676. "[I]mpeachment evidence is especially likely to be material when it impugns the testimony of a witness who is critical to the prosecution's case." *Weisbarth*, ¶ 26.

The State "alone can know what is undisclosed." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). For this reason, the prosecutor has a proactive "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Whitley*, 514 U.S. at 437. Although the State does not have to "collect" evidence for

the defense, the State cannot "frustrate or hamper" the defense's efforts to access evidence the State already possesses. *Fisher*, ¶ 30; *State v. Wagner*, 2013 MT 47, ¶ 26, 369 Mont. 139, 296 P.3d 1142.

Even if the exact nature of the evidence at issue is unknown—and thus its material value speculative—the defendant can still establish a *Brady* violation by showing "bad faith on the part of" the State in preventing access to the evidence. *State v. Villanueva*, 2021 MT 277, ¶ 28, 406 Mont. 149, 497 P.3d 586. "Bad faith" may include the State concealing evidence "out of animosity to the defense or to deceptively secure conviction." *Fisher,* ¶ 31. The State's "negligent" suppression of evidence may also establish a *Brady* violation if the evidence is "material," "vital to the defense," and exculpatory. *State v. Giddings*, 2009 MT 61, ¶ 52, 349 Mont. 347, 208 P.3d 363.

The prosecutor must disclose favorable evidence not at the last possible moment, but rather "at such a time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case." *United States v. Celis*, 608 F.3d 818, 835 (D.C. Cir. 2010). The State's suppression of exculpatory evidence in advance of trial may cause the defense to "abandon lines of independent

investigation, defenses, or trial strategies that it otherwise would have pursued." *Bagley*, 473 U.S. at 682.

Evidence in the State's possession need not itself be admissible to fall under *Brady*. *Weisbarth*, ¶ 24. Such evidence may be favorable to the defense by aiding "the development of defense strategy and investigation" or leading to the discovery of other exculpatory information. *Weisbarth*, ¶ 24.

Dismissal of a case with prejudice may be an appropriate remedy for a *Brady* violation. *See State v. Halter*, 238 Mont. 408, 411–13, 777 P.2d 1313, 1315–17 (1989); *State v. Swanson*, 222 Mont. 357, 362, 722 P.2d 1155, 1158 (1986).

A. By denying the *Brady* motion to dismiss because the contents of Dalton's phone were unknown, the District Court misunderstood the law and rewarded the State for its concealment of evidence.

The District Court felt boxed in. On the one hand, it knew the State had done something wrong by never examining Dalton's phone and by concealing its potential relevance. On the other hand, the court did not know what information Dalton's phone contained, because the State never opened it. Believing the State's successful concealment of

this evidence rendered it powerless to find a *Brady* violation, the court resigned itself to denying the defense's motion. (Doc. 229.)

But the District Court was not powerless. The court could have, and should have, found a *Brady* violation for "bad faith on the part of" the State. *Villanueva*, ¶ 28. It was the prosecutor's "animosity to the defense" and desire to "deceptively secure conviction" that caused Dalton's unexamined phone to sit idle in an evidence locker for 15 months. *See Fisher*, ¶ 31.

For almost a year, the State inaccurately promised the District Court the burglary had no relevance to Kyle's case whatsoever. (Doc. 26 at 3; Doc. 130 at 21; Doc. 175 at 3; 12/11/2019 Tr. at 14; 9/11/2020 Tr. at 46.) When the defense asked for law enforcement information about the burglary, the prosecutor responded it was not her responsibility to share that information, and the defense should do its own investigation. (Doc 26 at 2; 12/11/2019 Tr. at 10–12; 9/29 Tr. at 115.) The prosecutor's stonewalling deflected attention from the potential relevance of Dalton's phone and ran out the clock on the defense's ability to examine it. (9/29 Tr. at 116, 119; 10/1 Tr. at 23.)

The State also decided to never analyze Dalton's phone on its own. The prosecutor knew Dalton's phone *could* contain exculpatory evidence, but as long as she did not *know* that for certain, she would not be obligated to disclose anything to the defense. The prosecutor acted in accordance with the saying, "Where ignorance is bliss, 'tis folly to be wise."[5]

The prosecutor ignored that the purpose of discovery is to search for truth, not to remain deliberately ignorant of it. *State v. Pope*, 2017 MT 12, ¶ 22, 386 Mont. 194, 387 P.3d 870. The prosecutor's job was not to win at all costs; it was to "ensure above all else that justice is done" and "provide [Kyle] . . . due process of law." *Weisbarth*, ¶ 32. There was good reason to believe Dalton's phone contained exculpatory information. To uphold Kyle's due process rights, the prosecutor should have checked.

There was no legitimate excuse or explanation for the State's deception, stonewalling, and failure to examine the evidence in its possession. The prosecutor engaged in a deliberate effort to "frustrate or

[5] Thomas Gray, *Ode On A Distant Prospect Of Eton College* (1747).

hamper" the defense out of animosity and to secure a conviction without having to contend with inconvenient exculpatory or impeachment evidence. *See Wagner*, ¶ 26. This was a "bad faith" concealment of evidence that established a *Brady* violation.

B. As it turns out, the phone did contain exculpatory evidence, underscoring the State's *Brady* violation.

Despite the prosecutor's best efforts to prevent examination of Dalton's phone—including objecting to the "treacherous request" to inspect it after trial—we now know the phone *did* contain exculpatory evidence. Although not what defense counsel expected, the phone contained evidence Tyler pulled a gun on another man during an altercation as recently as *the day before the shooting*. This evidence was clearly favorable to the defense.

1. The withheld evidence bolstered the reasonableness of Kyle's fear of Tyler.

Kyle testified he knew Tyler to be a violent person, and he feared Tyler was going to pull a weapon on him the moment before he shot him. The concealed evidence of the messages between Tyler and Brown lent credibility to Kyle's testimony.

For one, if Tyler had pulled a gun on Brown to gain the upper hand during an altercation, that made it more likely Kyle was telling the truth about Tyler pulling a gun on him in March 2018. Kyle's testimony about this March 2018 incident was critical to establish his reasonable fear of Tyler's violence. (10/1 Tr. at 165.) But there were no witnesses or police reports to corroborate Kyle's testimony. (10/1 Tr. at 165–67, 207.) And in his state of distress, Kyle neglected to mention this incident to Gomke during his interview right after the shooting—an omission from which the prosecutor made hay. (10/1 Tr. at 213.) The prosecutor hammered Kyle's story in closing argument, insisting the jury should not believe that Tyler ever mugged Kyle at gunpoint. (10/2 Tr. at 196.)

The evidence that Tyler pulled a gun on Brown during a dispute made Kyle's story more probable. Had the jury believed Tyler pulled a gun on Kyle in the past, it would have understood the reasonableness of Kyle's fear that Tyler was about to pull a gun on him the night of the incident. The withheld evidence lent validity to Kyle's asserted fear of imminent harm from Tyler.

2. The withheld evidence undercut Dalton's credibility.

If Tyler was casually carrying a gun on his person the day before the incident—such that he was able to quickly draw it during a fight with Brown—that suggested he routinely carried a gun. This in turn made it more likely he had a gun on him the night of the incident.

The question whether Tyler carried a gun was critical because it bore directly on Dalton's credibility. Dalton repeatedly swore to police and the jury Tyler was unarmed the night of the shooting, and the gun Dalton picked up off the ground was his own. If Tyler had a gun on him the night of the shooting, then Dalton was a liar.

Defense counsel tried to attack Dalton's story about the gun on cross-examination. But without the withheld evidence, "counsel was unable to make a record from which to argue" compellingly the gun was Tyler's, not Dalton's. *See Davis v. Alaska*, 415 U.S. 308, 318 (1974) (holding the right to effective cross-examination demands admission of relevant witness impeachment evidence).

To make Dalton's cross-examination effective, "defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw

inferences relating to the reliability of [Dalton]." *Davis*, 415 U.S. at 318. This meant showing the jurors evidence Tyler routinely carried a gun and had pulled it on another man shortly before this shooting. Timely access to such evidence would have bolstered the defense's cross-examination of Dalton and helped undermine his credibility.

If the jury knew Dalton was lying about the gun, then the State's case would have fallen apart. The jury was instructed, "If you believe that any witness has willfully testified falsely as to any material matter in the case . . . you have the right to view the rest of the testimony with distrust and in your discretion disregard it." (Doc. 276, Instr. 3.)

Dalton's testimony was central to the State's case. Aside from Kyle and Karina, Dalton was the only eyewitness to the shooting. Kyle and Karina testified Tyler approached Kyle in a fast, aggressive manner while shouting vulgar threats and preparing to draw a weapon. Dalton testified they were lying and that Tyler approached slowly, calmly, and spoke to Kyle in a "friendly" tone of voice, saying, "Hey, buddy, it's been a long time. How you been doing?" (9/30 Tr. at 150.)

Whether Tyler approached Kyle in a threatening or friendly manner had everything to do with the reasonableness of Kyle's fear of

imminent harm. If the jury knew Dalton was lying about the gun, then it may well have disregarded his entire testimony, throwing the heart of the State's case into disarray.

3. The withheld evidence would have prompted a defense investigation that could have uncovered more admissible, exculpatory evidence.

The evidence of Tyler's messages with Brown the day before the shooting would have been favorable to the defense even if it had not been directly admitted at trial. *See Weisbarth,* ¶ 24. The defense undoubtedly would have investigated this incident further, at minimum seeking to interview Brown about it. *See Bagley*, 473 U.S. at 682.

It is not hard to imagine what exculpatory information Brown could have provided. In the small town of Sidney, Brown may well have known Tyler to have a reputation for being quick to draw his gun on people to gain the upper hand in a dispute. Being on the receiving end of Tyler's violence himself, Brown may have been willing to testify in Kyle's defense. Testimony about Tyler's character for violence would have been admissible at trial. *See* M. R. Evid. 404(a)(2) (allowing evidence of "a pertinent trait of character of the victim"); 405(a)

(allowing a party to introduce such evidence in the form of reputation or opinion testimony).

One question in particular the defense surely would have asked Brown is what kind of gun Tyler used on him the day before the shooting. If it was the same .22 pistol Dalton picked up off the ground next to Tyler, that would contradict Dalton's testimony about that gun being his, show the jury Dalton was a liar, and vindicate Kyle's belief that Tyler had a gun and was about to use it on him.

Whether it had been admitted at trial or used for additional defense investigation, the withheld evidence was favorable to the defense.

4. The exculpatory nature of this evidence rounds out the three prongs of a *Brady* violation.

The State possessed Dalton's phone from the night of the shooting until trial, and that phone contained evidence favorable to the accused. This satisfies the first prong of a *Brady* claim. *Colvin*, ¶ 13.

The State held onto Dalton's phone for 15 months while conveniently neglecting to ever examine it. And it deflected attention from the phone's relevance by concealing Dalton's connection to the burglary until the District Court forced it to do so just weeks before

trial. As the District Court implicitly found when it repeatedly rebuked the State and imposed sanctions for failing to disclose the evidence on Dalton's phone, the State suppressed the phone evidence, satisfying the second prong of a *Brady* claim. *Colvin*, ¶ 13.

This case boiled down to a credibility battle between Dalton on the one hand and Kyle and Karina on the other. If the jury believed Dalton, then Tyler was innocently saying "hi" to an old pal when Kyle killed him. If the jury believed Kyle and Karina, Tyler was armed and preparing to gravely harm Kyle and his loved ones when Kyle shot him. The withheld evidence made Dalton's testimony less believable and Kyle's and Karina's more believable.

In a borderline case where the jury was already inclined to give some credence to the defense perspective—as evidenced by its not guilty verdict on the greater charge of deliberate homicide—proper disclosure of this evidence easily could have tipped the scales and persuaded at least one out of twelve jurors to vote differently. This is enough to "undermine confidence in the verdict" and establish prejudice under the third *Brady* prong. *Wearry*, 577 U.S. at 392.

Dismissal with prejudice is the appropriate remedy for the State's deliberate, bad-faith suppression of what turned out to be exculpatory evidence. *See Swanson*, 222 Mont. at 362, 722 P.2d at 1158.

II. The prosecutor's repeated misconduct deprived Kyle of his constitutional right to a fair trial.

Kyle had a constitutional right to a fair trial. U.S. Const. amend. VI; Mont. Const. art. II, § 24; *State v. Erickson*, 2021 MT 320, ¶ 19, 406 Mont. 524, 500 P.3d 1243. "A prosecutor's misconduct may be grounds for reversing a conviction and granting a new trial if the conduct deprives the defendant of a fair and impartial trial." *State v. Hayden*, 2008 MT 274, ¶ 27, 345 Mont. 252, 190 P.3d 1091; *accord State v. Lawrence*, 2016 MT 346, ¶ 13, 386 Mont. 86, 385 P.3d 968. This Court evaluates claims of prosecutorial misconduct "in the context of the case in its entirety." *State v. Stutzman*, 2017 MT 169, ¶ 17, 388 Mont. 133, 398 P.3d 265.

A. Each instance of the prosecutor's misconduct chipped away at Kyle's right to a fair trial.

Kyle had a Sixth Amendment right to counsel and an attorney-client privilege that the prosecutor threatened to undermine by asking to listen to his phone conversations with his attorney. *See* U.S. Const.

amend. VI; *Am. Zurich Ins. Co. v. Montana Thirteenth Jud. Dist. Ct.*, 2012 MT 61, ¶ 9, 364 Mont. 299, 280 P.3d 240. He also had a right to present witnesses in his defense that the prosecutor tried to quash by frivolously prosecuting Karina to send a message about the consequences of backing Kyle. *See State v. Higley*, 190 Mont. 412, 423, 621 P.2d 1043, 1050 (1980). Even though legally unsuccessful, these actions by the prosecutor improperly intimidated the defense witnesses and chilled Kyle's communications with his attorney.

Then, after successfully evading pre-trial disclosure of exculpatory evidence on Dalton's phone, the prosecutor flipped the script at trial and blamed the defense for not examining Dalton's phone. (9/30 Tr. at 109–10.) As the District Court agreed, this was improper burden shifting. (9/30 Tr. at 115.) The prosecutor implied to the jury it was the defense's job to uncover exculpatory evidence in the State's possession. It is the State's job to prove the defendant's guilt, not the defendant's job to find exculpatory evidence to prove his innocence. *State v. Price*, 2002 MT 284, ¶ 33, 312 Mont. 458, 59 P.3d 1122. The prosecutor's burden shifting undermined Kyle's constitutional right to due process. *See Price*, ¶ 33.

Finally, the prosecutor violated an order in limine from the District Court barring inquiry into Kyle's alleged drug dealing. (9/11/2020 Tr. at 60–63; 10/1 Tr. at 89–97; Doc. 186.) The prosecutor peppered Karina with a series of questions—even after the District Court sustained defense counsel's objection—suggesting Kyle and Karina were gun-toting drug dealers. (10/1 Tr. at 78–80, 88.)

Such evidence was irrelevant and inadmissible, as it had no bearing on the shooting, Kyle's credibility, or any other material fact. *See* M. R. Evid. 401, 402. This evidence served only one, inadmissible purpose: to paint Kyle as "an unsavory person" with a "defect of character that [made] him more likely . . . to have committed the charged offense." *State v. Torres*, 2021 MT 301, ¶ 39, 406 Mont. 353, 498 P.3d 1256; *see* M. R. Evid. 403, 404(b). The only reason to tell the jury Kyle was an armed drug dealer was to "emotionally provoke the jury to desire to punish" him. *Torres*, ¶ 40.

It is improper for a prosecutor "under the guise of artful cross-examination to tell the jury the substance of inadmissible evidence." *State v. Krause*, 2021 MT 24, ¶ 30, 403 Mont. 105, 480 P.3d 222. That is what the prosecutor did: use Karina's cross-examination to tell the

jurors she and Kyle were unsavory, dangerous drug dealers and a scourge on their community.

This pattern of prosecutorial misconduct undermined Kyle's right to a fair trial. This demands reversal for either ineffective assistance of counsel or, alternatively, plain error.

B. Kyle's attorney was ineffective for turning down the opportunity for a mistrial.

Kyle had a constitutional right to effective assistance of counsel. *State v. Santoro*, 2019 MT 192, ¶ 14, 397 Mont. 19, 446 P.3d 1141 (citing Mont. Const. art. II, § 24; U.S. Const. amend. VI). His attorney violated that right by failing to move for a mistrial in response to the prosecutor's wanton misconduct.

This Court evaluates claims of ineffective assistance of counsel using the two-pronged approach articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). *Santoro*, ¶ 15. Under the first prong, the defendant must "demonstrate that 'counsel's performance was deficient or fell below an objective standard of reasonableness.'" *Santoro*, ¶ 15. Conduct with no conceivable strategic basis is not reasonable. *Santoro*, ¶¶ 19–20. Under the second prong, the defendant must "establish prejudice by demonstrating that there was a reasonable

probability that, but for counsel's errors, the result of the proceedings would have been different." *Santoro*, ¶ 15.

After the prosecutor violated the order in limine and asked a barrage of questions about Kyle's supposed drug dealing, defense counsel had no reason not to ask for a mistrial. The only plausible justification for a defense attorney to turn down a mistrial is if counsel believed an acquittal was possible and a mistrial would give the State a second bite at the apple. But this justification would not apply if a re-trial were barred by double jeopardy.

As a general rule, when the defense asks for a mistrial, the State may re-prosecute the case without running afoul of the Double Jeopardy Clause of the U.S. Constitution. *State v. Mallak*, 2005 MT 49, ¶ 18, 326 Mont. 165, 109 P.3d 209. But there is an exception to this rule. When the State intentionally "goads" the defense into moving for a mistrial, and then the defense does so, the Double Jeopardy Clause bars re-prosecution. *Mallak*, ¶ 18; *Oregon v. Kennedy*, 456 U.S. 667, 676 (1982). A prosecutor might attempt to goad the defense into a mistrial in order to salvage a case gone awry and "afford the prosecution a more

favorable opportunity to convict the defendant." *Kennedy*, 456 U.S. at 674; *Mallak*, ¶ 20.

The prosecutor unleashed a torrent of inadmissible questions to Karina likely because she feared the court was about to dismiss the case with prejudice for a *Brady* violation. This improper questioning occurred on the fourth day of trial. Over the preceding days, the court had repeatedly reprimanded the prosecutor for her tactics with Dalton's phone, said this was a possible *Brady* violation, and openly teased the possibility of dismissing the case with prejudice. (9/28 Tr. at 283; 9/29 Tr. at 111, 114.)

The day before the prosecutor's drug-dealing questions, the defense had moved to dismiss with prejudice. (9/30 Tr. at 210; Doc. 224.) The morning of the fourth day of trial, shortly before the prosecutor's violation of the order in limine, the court said it would reserve its ruling on the motion to dismiss until after trial. (10/1 Tr. at 21.) At the same time, the District Court angrily described the prosecutor's withholding of evidence as "a disaster" and "a failure of justice." (10/1 Tr. at 22–23.)

Sensing a dismissal with prejudice may be imminent, the prosecutor tried to bait defense counsel into moving for a mistrial so the

State could get a do-over. The District Court had previously offered the defense a continuance to have time to access Dalton's phone. (9/29 Tr. at 114.) The prosecutor likely believed that in the event of a new trial, the defense would have time to access Dalton's phone, which would placate the District Court and dissuade it from dismissing the case outright.

Defense counsel even acknowledged the prosecutor was "trying to bait us into [ ] asking for a mistrial." (10/1 Tr. at 94.) Unfortunately for Kyle, counsel was apparently unaware of the law that if the prosecutor baits the defense into asking for a mistrial, then double jeopardy bars re-prosecution. *Mallak*, ¶ 18; *Kennedy*, 456 U.S. at 676. Counsel's ignorance on a point of law critical to the case satisfies the deficient performance prong of *Strickland*. *State v. Wright*, 2021 MT 239, ¶ 18, 405 Mont. 383, 495 P.3d 435. There was no plausible strategic reason for counsel to not take the District Court up on any of its several mistrial offers.

This deficient performance prejudiced Kyle. The District Court was clearly frustrated with the prosecutor's pattern of misconduct, had already found the prosecutor violated the order in limine, and repeatedly asked counsel if he wanted to move for a mistrial. The court

even suggested aloud that if a mistrial were granted, it was possible Kyle "could not be tried again." (10/1 Tr. at 99.) Had counsel moved for a mistrial, the District Court likely would have granted it, and double jeopardy would have shielded Kyle from further prosecution.

This Court should hold defense counsel's deficient performance prejudiced Kyle, and it should reverse his conviction.

C. The prosecutor's violation of Kyle's right to a fair trial alternatively demands reversal for plain error.

Regardless of defense counsel's omission, this Court has an inherent duty "to protect individual rights set forth in the constitution" through plain error review. *Lawrence*, ¶ 22. When a prosecutor's improper actions "prejudice a defendant's right to a fair trial, then the proper remedy is reversal." *State v. Lindberg*, 2008 MT 389, ¶ 25, 347 Mont. 76, 196 P.3d 1252.

"The plain error doctrine may be used in situations that implicate a defendant's fundamental constitutional rights, and where failing to review the alleged error may result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the proceedings, or compromise the integrity of the judicial process." *Lawrence*, ¶ 9 (internal quotations omitted). The prosecutor's repeated

misconduct implicated Kyle's fundamental right to a fair trial, warranting plain error review. *See Lawrence*, ¶¶ 9–10.

The prosecutor secured Kyle's conviction through a pattern of intimidating the defense, hiding exculpatory evidence, and making improper and inadmissible comments at trial. This was a close case in which even the small things mattered. Kyle had a legitimate self-defense claim, the State's case hinged on Dalton's shaky credibility, and the jury's acquittal on the greater charge of deliberate homicide showed it viewed the State's case with some skepticism. The prosecutor's pattern of misconduct unfairly tipped the scales against Kyle. Failure to review the propriety of Kyle's conviction would result in a "manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the proceedings, [and] compromise the integrity of the judicial process." *Lawrence*, ¶ 10.

Taken together, the prosecutor's several instances of misconduct combined to violate Kyle's right to a fair trial and demand reversal. *See State v. Ferguson*, 2005 MT 343, ¶ 126, 330 Mont. 103, 126 P.3d 463 ("The doctrine of cumulative error requires reversal of a conviction

where a number of errors, taken together, prejudiced a defendant's right to a fair trial.").

CONCLUSION

The State secured Kyle's conviction through improper means. It hid exculpatory evidence from the defense, amounting to a *Brady* due process violation. This Court should reverse and order the case dismissed with prejudice.

The prosecutor's misconduct also deprived Kyle of his constitutional right to a fair trial. This Court should find his counsel was ineffective for failing to move for a mistrial. In the alternative, the Court should vindicate Kyle's right to a fair trial by reversing his conviction for plain error.

Respectfully submitted this 26th day of June, 2023.

OFFICE OF STATE PUBLIC DEFENDER
APPELLATE DEFENDER DIVISION
P.O. Box 200147
Helena, MT 59620-0147

By: /s/ Michael Marchesini
MICHAEL MARCHESINI
Assistant Appellate Defender

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook 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 9,998, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Michael Marchesini
MICHAEL MARCHESINI

APPENDIX

CERTIFICATE OF SERVICE

I, Michael Marchesini, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 06-26-2023:

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Charity Sue McLarty (Govt Attorney)
300 12th Ave. NW Ste. 7
Sidney MT 59270
Representing: State of Montana
Service Method: eService

Electronically signed by Pamela S. Rossi on behalf of Michael Marchesini
Dated: 06-26-2023