

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0041

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JAMES MICHAEL PARKER,

Defendant and Appellant.

BRIEF OF APPELLEE

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

APPEARANCES:

AUSTIN KNUDSEN
Montana Attorney General
TAMMY K PLUBELL
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
tplubell@mt.gov

CAITLIN BOLAND AARAB
Boland Aarab PLLP
11 5th Street North, Suite 207
Great Falls, MT 59401

ATTORNEY FOR DEFENDANT
AND APPELLANT

JOSHUA RACKI
Cascade County Attorney
JENNIFER QUICK
Deputy County Attorney
121 4th Street North, Suite A
Great Falls MT 59401

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

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STATEMENT OF THE ISSUES

1. Whether Appellant's claim that the district court abused its discretion in refusing to provide the jury his "witness legally accountable" instructions is properly before this Court when the Appellant specifically withdrew the instructions, informing the court that the instructions were merely placeholders, but that was not how the evidence came out at trial.

2. Whether the district court properly exercised its discretion in denying Appellant's motion for a mistrial based upon his assertion that the prosecutor vouched for the credibility of the State's witnesses and/or made disparaging remarks about defense counsel, when the district court sustained Appellant's objections to the comments and provided the jury with a cautionary instruction.

STATEMENT OF THE CASE

By amended information, the State charged Appellant James Parker (Parker) with felony deliberate homicide, pursuant to Mont. Code Ann. § 45-5-102(1)(a), two counts of felony assault with a weapon, and felony tampering with witnesses or informants. (D.C. Doc. 89.) The district court conducted a jury trial on September 10 through September 21, 2021. (9/10/21-9/21/21 Transcript of Jury Trial [Tr.])

Prior to his jury trial, Parker submitted proposed jury instructions. (D.C. Doc. 350.) Parker proposed “witness legally accountable” instructions to be provided for witnesses Brian McGillis, Matthew Swett, Tim Hansen, and Michael Perez. (*Id.*, Def.’s Proposed Instrs. 6-10.) When the district court and the parties preliminarily discussed Parker’s proposed instructions, the district court expressed that it was unwilling to give the “witness legally accountable” instructions four times, but was willing to consider argument on the four witnesses being listed in one instruction. (Tr. at 1169.) Defense counsel agreed that one instruction would be appropriate. (Tr. at 1170.)

The State urged the court to reserve ruling on the “witness legally accountable” instructions because the court had not heard sufficient testimony to even bring these instructions into play. (*Id.*) The State also urged that if Parker’s defense theory was one of complete denial, then he would not be entitled to an accomplice instruction because there can be no accomplice when the defendant denies committing the offense. (Tr. at 1169-70.) The court reserved ruling on “witness legally accountable” instructions.

During the final settling of jury instructions, the district court stated:

Defendant’s No. 6 through 9, I do want to discuss this. I have looked at the cases. I am not convinced that this—these instructions, with any modification, are appropriate. All of them talk in terms of another person being legally accountable for the conduct of the

Defendant, and I don't think that's consistent with the Defendant's theory.

(Tr. at 1719-20.)

Parker withdrew his proposed "witness legally accountable" jury instructions, explaining:

Your Honor, we will withdraw all of those accountability instructions. That's just not the way the evidence ended up coming out, so it's just, sort of, why we had it in there. That's not how it came out. We'll withdraw.

(Tr. at 1720.)

After the State's closing argument, Parker moved for a mistrial, arguing that the prosecutor committed misconduct by vouching for the credibility of witnesses and by accusing the defense counsel of misleading or deceiving the jury. (Tr. at 1901-02.)¹ The district court denied the motion for a mistrial, but provided the jury a curative instruction. (D.C. Doc. 401, Court's Jury Instr. 38, attached as App. A.) The district court instructed the jury:

¹Parker moved for a mistrial on two other occasions during the trial. (Tr. at 129 and 1002.) In a footnote, Parker states that the second motion for a mistrial is not at issue in this appeal. (Appellant's Opening Br. at 31 n.5.) Parker mentions the first motion for mistrial in the Factual and Procedural Background section of his brief (Appellant's Br. at 31), but offers no analysis in his brief of how the district court abused its discretion in denying the first motion for mistrial. Consequently, Parker has abandoned any claim on appeal regarding the district court's ruling on the first motion for mistrial. *Skinner v. Allstate Ins. Co.*, 2005 MT 323, ¶ 9, 329 Mont. 511, 127 P.3d 359; *see also State v. Whalen*, 2013 MT 26, ¶ 32, 368 Mont. 354, 295 P.3d 1055.

The Court has found that on occasion the prosecutor improperly expressed her own opinions on witness credibility, or vouched for them. You are instructed to disregard any such personal opinions of the prosecutor about credibility of witnesses.

The Court has further found that on occasion the prosecutor's argument was an attack on the personal integrity of defense counsel. This is improper, and you are to disregard such attacks.

(App. A.)

The jury found Parker guilty of deliberate homicide, one count of assault with a weapon,² and tampering with witness or informant. (D.C. Doc. 403.) The district court sentenced Parker to 55 years in prison for the deliberate homicide conviction, 10 years in prison, consecutive, for the assault with a weapon conviction, and 10 years in prison, concurrent to the consecutive sentences, for the tampering with witness or informant conviction. (D.C. Doc. 419, attached to Appellant's Br. as App. A.)

STATEMENT OF FACTS

Surveillance video from Scheels, a sporting goods store in Great Falls, Montana, depicts Parker purchasing a hatchet, with a blade length of 2.75 inches, on March 1, 2018. (State's Ex. 3; Tr. at 1767, 1771.) After purchasing the hatchet,

²The jury found Parker not guilty of the charge of assault with a weapon on Dakota Gopher. (D.C. Doc. 403.)

Parker routinely had it on his person and routinely showed it to others.³ (Tr. at 752, 1545, 1561.)

On March 16, 2018, Albert Ledeau (a/k/a Chris) had an altercation with Brian McGillis (Brian) at Ranessa Ledeau's (Ranessa) house in Great Falls. (Tr. at 580-81.) Chris explained that Brian was trying to fight Dakota Gopher (a/k/a Hunter), after Hunter tried to kick him out of Ranessa's house. (Tr. at 380-81, 580-81.) Brian is Parker's cousin. (Tr. at 741.) Chris interceded and physically threw Brian out of Ranessa's house. (Tr. a 580-81.)

Brian lives in Rocky Boy, but was in Great Falls on March 16, 2018. Brian was drinking with Parker at one of Parker's friend's houses. (Tr. at 743.) Brian thought the friend's name was Tony. (Tr. at 744.) Tony and Parker got into an argument that resulted in a physical fight. Parker left. Brian remained at the house and continued drinking. Brian said the next thing he knew Tony and his nephews were beating him up. (Tr. at 745.) Brian ran from the house. He ran into a police officer and reported that he "got jumped." (Tr. at 746.)

Lloyd Geaudry's (Lloyd) 45th birthday was on March 22, 2018. A group of people gathered to celebrate at Ranessa's house. (Tr. at 375-76.) Both Hunter and

³Some witnesses referred to the hatchet as a tomahawk or an ax. For consistency the State will refer to the weapon as a hatchet.

Chris attended the birthday celebration. (Tr. at 375-76, 582.) Parker was not part of the birthday celebration. (Tr. at 582.)

At about 1 a.m. on March 23, 2018, Hunter and Chris briefly left the party to go to a nearby Town Pump. (Tr. at 585.) Hunter waited in the car while Chris went inside to make a purchase. (Tr. at 376.) Chris ran into Brian, and they talked outside. The two shook hands and resolved any beef between them from the March 16 incident. (Tr. at 585.) Brian told Chris he did not want any more trouble. (Tr. at 753.) Hunter and Chris returned to the party. (Tr. at 377.)

Brian was hanging out with Parker on the evening of March 22, 2018, and the early morning hours of March 23, 2018, at his cousin Wawa's house. (Tr. at 751.) Parker had his hatchet with him. (Tr. at 752.) After Brian went to the Town Pump, he told Parker about running into Chris. Parker was "pissed" about it. Parker left to find Chris. Brian went after Parker and told him to just forget about it. (Tr. at 755.)

Parker went to a house and confronted two guys on the porch about why they had beat Brian up two weeks ago. (Tr. at 256.) Brian eventually got to the porch and he ended up hitting Chris. (Tr. at 257.) Brian and Chris rolled around on the ground for a while. Chris told Brian that if he stopped fighting, Chris would let him up. Brian stopped, Chris let him up, Brian apologized, and the two shook hands. (Tr. at 759.) Parker and Brian both returned to Wawa's house. (Tr. at 760.)

Parker's friends came and picked up Parker and Brian. Parker was exchanging messages and trash talking on his phone. (Tr. at 761-62.) The next thing Brian knew, his group ended up at a park planning to fight the other group. (Tr. at 762.)

According to Chris, shortly after returning from the Town Pump, there was a knock on the door. Chris opened the door and went outside where he talked to Parker. Out of nowhere, someone hit Chris on the side of the head. (*Id.*) Chris assumed it was Brian who had hit him. He was upset and ran to his brother Tony's house. Tony lived about a block away. (Tr. at 586-87.) During the early morning hours of March 23, 2018, Anthony Moresette-Nava (Tony) was at home asleep when someone began pounding on his door. It was his cousin Chris, who stated that he needed Tony's help. Tony went with Chris. (Tr. at 1515-16.)

Chris and Parker messaged each other on Facebook.⁴ (Tr. at 588; State's Ex. 58.) Chris wanted to have a fist fight with Parker. Chris messaged Parker, "No cops. No weapons. Us and you guys." (Tr. at 593.) Parker responded, "Where ya wanna meet? No weapons, right? Let's do it." (Tr. at 594.) Chris took Parker's message to mean that they had agreed upon a fist fight. (*Id.*)

Collin Brown (C.J.) lives with his girlfriend Cheyenne Hoven (Cheyenne) and their three young children. (Tr. at 1614-15.) On May 22, 2018, Tim Hanson (Tim) was playing beer pong at Collin's girlfriend's house. Michael Perez (Mike)

⁴Parker goes by Jimmy Podvin on Facebook. (Tr. at 591.)

and Matthew Swett (Matt) were also there. (Tr. at 851.) Tim received a phone call from Parker saying that people were ganging up on one of his friends, and Parker needed bodies to participate in a fight. (Tr. at 852.) Along with Tim, C.J., Mike, and Matt all agreed to come to Parker's aid. None of them had weapons. Tim's understanding was that two groups were going to engage in a fist fight. (Tr. at 853.)

The group took Cheyenne's truck. C.J. drove. The group met up with Parker and Brian. Tim did not know either of them. (Tr. at 854.) Parker told Tim that some people had beat up his friend and this group was now bullying Brian and Parker. Parker said it was time to settle the disagreement. Parker showed Tim a hatchet and said it was his "self defense." (Tr. at 855.) Tim recalled that either he, or one of his friends, said that they should leave the hatchet in the truck. (Tr. at 856-57.) Tim absolutely wanted Parker to leave the hatchet in the truck because there was no need for it. (*Id.*) During the fight, Tim never possessed the hatchet. He denied that Parker ever gave the hatchet to him during the fight. (Tr. at 857.)

Hunter, who drives a Silver BMW, agreed to drive the other group to the fight location. Hunter was in the driver's seat, Tony was in the front passenger seat, Nathan Morsette-Nava (Nate), Tony's brother, was behind Hunter in the back seat, Chris was in the middle of the back seat, and Lloyd was on the other side of

Chris. (Tr. at 383-84, 1461.) The group went to a park by Great Falls High School. (Tr. at 1518.) Tony felt outnumbered when they met the other group. (Tr. at 1519.)

Hunter suffers from a bad shoulder that easily dislocates, and from liver disease that makes his body feel worn out and weak. Hunter keeps a wooden handle next to him on the floor of his car. Upon parking at the location of the fight, Hunter opened his car door and stood near it. (Tr. at 390.) To Hunter, it looked like the other side had more fight participants than his friends did. (Tr. at 391.)

As Hunter stood, holding a wooden handle, he saw a body on the ground straight ahead of his car. (Tr. at 391.) Hunter did not know whose body was on the ground. (Tr. at 393.) Hunter saw Parker walking away from the body on the ground towards Hunter. As Parker got closer, Hunter saw Parker had a hatchet or a tomahawk in his hand. Hunter had repeatedly seen Parker carrying the same hatchet. Hunter had held the hatchet, and he knew it was sharp. (Tr. at 396.) Hunter described Parker as having a shaved head with tattoos all over his face and head. (Tr. at 385.)

After exiting Hunter's car, someone pushed Tony, Tony tripped over the curb, and, while he was on the ground, he was punched and kicked. (Tr. at 1519.) Someone hit Tony with something that had a handle. (Tr. at 1520.) The red sweater that Tony was wearing in the fight later had a big hole in it where someone had hit him. (Tr. at 1522-23; State's Ex. 56.) Tony sustained some significant bruising,

which Detective Mahlum subsequently photographed. (Tr. at 815-16, 1524; State's Exs. 59-66, admitted without objection.)

Nate explained that on the other side of the fight, he only knew Parker and Brian. (Tr. at 1462.) After the two groups began fighting, Nate fought Brian most of the time. (Tr. at 1468.)

Nate explained that as he and Brian were fighting: "That's when I see Parker going over to Tony at the time, and he swung something at him, and I thought Tony got hit by it, so he dropped[.]" (Tr. at 1469.) Nate said Tony got hit with an ax or a hatchet. (*Id.*) Nate tried to take the weapon away from Parker, who was wearing blue jeans and a short-sleeved, plaid, flannel shirt. (Tr. at 1470.) As Nate was scuffling with Parker over the hatchet, he yelled that his group was done fighting. (Tr. at 1471.) According to Nate, everyone from both groups scattered. (Tr. at 1473.)

Meanwhile, Parker had approached Hunter with the hatchet. Parker swung at Hunter and Hunter put up his wooden handle to defend himself. Hunter tripped as he walked backwards to get away from Parker. As Hunter was on the ground, Parker grabbed the handle from him. Parker raised the hatchet as if he intended to strike Hunter. He looked angry and was breathing hard. Hunter begged him not to hit him with the hatchet. Parker spared him and went back to the grassy area where everyone was still fighting. (Tr. at 397-98.)

Hunter jumped into his car, started the car, and took off towards the body on the ground. Hunter swerved around the body, turned his lights off and continued driving around the park. A bunch of guys ran towards his car yelling. Somebody on the passenger side of the car hit his car with something. (Tr. at 403.) Hunter looped around the park again with his window cracked, listening for his friends. Hunter heard Tony yelling at him, so he unlocked the car and Tony jumped in. Shortly, Nate opened the back door and jumped into the back seat. Nate told Hunter they had to go back and get Lloyd. This is when Hunter learned Lloyd was the body on the ground. Lloyd was Hunter's best friend. (Tr. at 405-06.)

Hunter approached Lloyd's body from the opposite direction. Nate jumped out, picked up Lloyd's body and got him into the back seat. (Tr. at 406.) When Hunter drove to Lloyd and Nate put him in the car, Tony later explained, "I knew my cousin [Lloyd] was dead then, when I seen him get in the car, and his head was damn near laid off his shoulders." (Tr. at 1525.) Hunter let Tony out near the Parkdale Apartments, and continued to the hospital emergency room. (*Id.*) Lloyd died.

Hunter believed he had agreed to participate in a mutually agreed upon fist fight. Hunter did not expect anyone to have a weapon. When Parker had the hatchet poised over Hunter, Hunter thought he was going to die. (Tr. at 407.)

After arriving at the fight location and getting out of the car, all Chris really remembered was getting beat up. Chris recalled someone kicking him as he was on the ground. (Tr. at 596-97.) After being kicked, Chris recalled getting up and running to his grandma's house. (Tr. at 598.) Chris's grandma later told him that Lloyd had been killed and he needed to go to the police station. (Tr. at 600.)

According to Tim, after arriving at the park, the two groups approached each other and a fight broke out. Tim did not really know any of the participants from the other group. (Tr. at 860.) He knew he took swings at a guy and the guy took swings at him. (*Id.*) He thought someone hit him with a stick or a tree branch. (Tr. at 861.) He knew that afterwards he had dried blood on him, but not a lot of blood. The day after the fight, Tim's hands were bruised and cut. He knew he had a little bit of blood on his shirt and a couple of drops on his shoes. (Tr. at 862-63.) Tim did not recall seeing Parker during the fight. (Tr. at 865.) He did not see Parker hit anyone with the hatchet. (Tr. at 866.)

When somebody shouted that the police were on the way, Tim ran to the truck. He and his friends loaded up and realized that Mike was not in the truck. (Tr. at 864.) C.J. drove, and Tim was in the front passenger seat. Parker and Brian were in the back seat. (Tr. at 867.) As the group was driving away, Tim saw a body lying in the street, but it did not look like Mike, so they continued to an alleyway to throw stuff away. (Tr. at 868-69.) When they got to the alleyway, Tim got out

because he was in the front passenger seat. Tim threw stuff in a dumpster. Parker then handed him the hatchet and told him to throw it away. Tim complied. (Tr. at 869.) The group dropped Parker and Brian off at an apartment building, and the rest of them returned to Cheyenne's house. (Tr. at 870.) Tim still did not know that Lloyd was dead. (Tr. at 871.)

Later, Tim and his friends decided to drive around to look for Mike. While doing so, Parker texted or called Tim to say that the person Tim had seen lying on the street was dead. Tim's heart dropped and he panicked. The group tried to piece together what could have happened. They found Mike and then agreed to tell the police that had all been together watching a movie. (Tr. at 872-73.) Although Tim initially lied to the police, he later told the police the truth about the events of the evening. (Tr. at 874.)

Matt did not know any of the people his group fought with. (Tr. at 713.) He recalled taking "somebody right off to the side, and I choked them out into the grass and then left them there." (*Id.*) He claimed not to remember much else about the fight. (*Id.*) He later acknowledged that he spoke with the police. When he initially talked with the police he lied because he was scared. (Tr. at 714.) Later, Matt gave a statement to Detective Burrows that was truthful. (Tr. at 714-15.)

Matt told Detective Burrows that Parker had had a hatchet:

I remember telling him that I had looked over, and I seen [Parker] had it in his left hand, holding his shirt, and he had struck

him right in the neck on his left side with the hatchet, and then, it was pretty much over at that point. Everybody had left—or were leaving.

(Tr. at 716, 821, 823.) Matt explained:

My plan was just to get into a fistfight, which, you know, bunch of adults [meet] up in a street, fight, go home, but that's not how it turned out.

(Tr. at 719.)

After Parker's group left the scene of the fight, Matt recalled, they stopped in an alleyway to throw things away. He could not remember if the group threw away the hatchet or clothes. (Tr. at 719-20.) Matt did not personally throw the hatchet away, but the group got rid of it because "it had just been used in a murder." (Tr. at 720.) The group then dropped Parker and his friend off near an apartment complex and returned to C.J.'s house. (Tr. at 719.)

Matt recalled that he had had a little blood on his shirt, so he threw it away because he was scared. Tim also had a little bit of blood on his shirt and on his knuckles. (Tr. at 721, 723.)

C.J. could not recall any specific details of the fight. At one point, C.J. saw Lloyd on the ground and heard someone yell that it was time to go. (Tr. at 1624.) After C.J.'s group got in the truck and drove off, Parker told him to stop in an alleyway. Parker handed Tim a hatchet to throw away. (Tr. at 1625.) C.J. then dropped Parker and his friend (Brian) off at an apartment complex. (Tr. at 1628.)

C.J. later told the police that he saw Parker holding Lloyd in a headlock and beating him up. (Tr. at 1642.)

Brian claimed he had been trying to stop the fight when he saw a body lying on the ground. (Tr. at 766.) His group jumped in the truck and left. The group drove a few blocks and stopped in an alley. Brian said he was intoxicated and he did not see what happened in the alley. (Tr. at 767.) Later, Parker and Brian got out of the truck and walked to Parker's girlfriend's house. (*Id.*) On the way, Parker told Brian that he had been getting "a beat down" and he had to defend himself with whatever he had. Brian said Parker had the ax. (Tr. at 768-69.)

Brian was really scared and all he wanted was to get back to his aunt's house. He wanted to get away from Parker because he knew Parker had hurt someone. (Tr. at 770-71.) Someone from Parker's girlfriend's house gave Brian a ride to near his aunt's house. Brian cried and told his aunt he thought Parker had killed someone. Brian's aunt gave him a ride back to Rocky Boy. Once Brian was there, he contacted a criminal investigator, Steven Cochran, and told him that he had been at a place where someone "got serious hurt—more than hurt." (Tr. at 772-73.)

Mike McCoy (McCoy) is 64 years old and a life-long resident of Great Falls. McCoy met Parker for the first time on March 23, 2018, when Parker turned up at his house. (Tr. at 656-57.) In March 2018, Nancy Brown (Nancy), a family friend,

was staying in McCoy's basement. (Tr. at 658.) Nancy had a friend, Maggie Boyer (Maggie), as a house guest. (Tr. at 664.) The evening of March 23, 2018, Christian Petty (Petty), who lives in Fort Benton, spent the night at McCoy's house. Christian drives a Nissan Pathfinder. In March of 2018, Michael Lott (Lott) was also staying at McCoy's house. (Tr. at 658-59.)

McCoy explained that at about 5 to 5:30 a.m. on March 23, 2018, two people knocked on his front door. McCoy stayed on his couch and Lott opened the door. (Tr. at 660.) Although McCoy did not know the two people at his door, he later identified them as Parker and Brian. Parker wanted to see Maggie. McCoy learned that Parker and Maggie were dating. (Tr. at 664.) McCoy asked Christian to go downstairs to get Maggie. (Tr. at 665-66.) Maggie seemed surprised to see Parker and asked what he was doing there. She then returned to the basement. McCoy allowed Parker to go downstairs. (Tr. at 666-67.) Brian remained upstairs. (Tr. at 667.)

After about ten minutes, Maggie and Parker came back upstairs. Maggie, Parker, and Brian then all went into the upstairs bathroom and shut the door. (Tr. at 668.) When Parker came out of the bathroom, he was wearing a fresh white t-shirt. It still had fold marks and looked to be fresh out of the package. (Tr. at 669.) McCoy observed that Brian appeared uncomfortable, as if he did not want to be at McCoy's house. (Tr. at 671.) McCoy used Christian's car to give Parker, Maggie,

and Brian a ride. (Tr. at 673.) To McCoy's surprise, only Brian got out of the car at 8th Street and 7th Avenue South. Parker and Maggie wanted to return to McCoy's house. The group got back to McCoy's house between 8 and 8:30 a.m. (Tr. at 675-76.) Law enforcement arrived at McCoy's house later and took Parker into custody. (Tr. at 677.)

In March 2018, Christian had been staying at McCoy's house. (Tr. at 1362.) Christian recalled that during the early morning of March 23, 2018, Maggie arrived at Mike's house around 1 a.m. Between 3:30 and 4 a.m., Parker showed up at Mike's house with a friend. Christian saw Parker and Maggie arguing in the kitchen, and Parker pinning Maggie up to the fridge. Parker accused Maggie of sleeping with Lloyd, and Maggie admitted that she had done so. Parker told Maggie that he had gotten payback for what she had done. Later Parker stated that he killed Lloyd with a hatchet. (Tr. at 1365.)

Rostell Beston (Rose) was also staying at McCoy's house on March 23, 2018. (Tr. at 1590.) According to Rose, when Parker showed up, he looked angry, and Maggie seemed really scared. (Tr. at 1595-97.) Parker and Maggie went into the bathroom together. Rose saw Parker turning off the water faucet when Maggie opened the bathroom door. (Tr. at 1598.)

Parker and his friend wanted a ride somewhere, so Christian allowed McCoy to use his car to give Parker and his friend a ride. When McCoy returned, Parker

was still with him. (Tr. at 1367.) Christian told law enforcement officers what he had seen and heard back in 2018. (Tr. at 1368.)

Christian received a subpoena to testify in Parker's trial in October 2019, while incarcerated at the Cascade County Detention Center. (Tr. at 1369.) Parker asked Christian to tell "the judge" that he had been on drugs and did not remember anything that occurred back in March 2018. (Tr. at 1370.) Christian did write to the judge on Parker's case, but only to state that Parker wanted him to make a false statement. At this point, Christian was scared for his personal safety. (Tr. at 1370-71.) Christian received threats that his throat would be slit if he testified against Parker. (Tr. at 1371.) Christian received a second subpoena for Parker's trial in June 2020. Afterwards, he was attacked in his cell. (Tr. at 1374.)

Brian explained that Parker was the only person at the fight who had a hatchet. Brian did not see any of the other fight participants with any type of weapon. (Tr. at 774-75.)

After Ranessa learned that Parker had killed Lloyd, she messaged him on Facebook. (Tr. at 1569, 1577-78; State's Ex. 57.) The message exchange stated:

Ranessa: U really fucked up this time huh?? smh
Ranessa: Ur NEVER welcome in my home again Chops! I
cant believe u had to take someones life!
STUPID!!!
Ranessa: Yea thats right. . .u took lloyds life. . .for wat??
Ranessa: I hope you know ur not going to get away with
this.

Parker: Don't worry I'mma kill myself

(State's Ex. 57.)

Detective Burrows of the Great Falls Police Department took Parker into custody the afternoon of March 23, 2018. (Tr. at 1682, 1693.) Detective Burrows collected Parker's shoes because he could visibly see what appeared to be blood on the shoes. (Tr. at 1696; State's Exs. 193A and 193B.) Surveillance videos from local businesses showed that on the evening of March 22, 2018, and in the early morning hours of March 23, 2018, Parker was wearing a plaid shirt. (Tr. 1812.) When Detective Burrows interviewed Parker on the afternoon of March 23, 2023, he was not wearing a plaid shirt, and officers never found a plaid shirt. (Tr. at 1814.)

During interviews with Detective Burrows on March 23 and 24, 2018, Parker never identified Tim, C.J., Matt, or Mike as having been involved with the fight. Parker claimed that he arrived at the fight alone. Business surveillance videos disproved Parker's claim. (Tr. at 1751-52.) Parker also claimed he stayed on his feet the entire fight (Tr. at 1739) and he volunteered that "there won't be any DNA on me." (Tr. at 1740; *see also* State's Exs. 190, 192.)

Parker did not testify at trial, but the court allowed jurors to read a transcript of Parker's testimony from a pretrial hearing, without objection. (Tr. at 1565-67;

8/30/19 Motion Hr'g [8/30/19 Tr.])⁵ Parker stated that on March 23, 2018, he had been with his cousin Brian, Tim, Matt, C.J., and Mike. (*Id.* at 9.) Parker did not really know C.J., Matt, or Mike. (*Id.* at 14.) Parker admitted that he brought a hatchet to the fight that occurred on March 23, 2018, but claimed that he gave it to Tim. (*Id.* at 15.) Parker said he gave it to Tim and told him to make sure nobody used weapons. (*Id.* at 39.) Parker did not make this claim during either of his interviews with Detective Burrows. (Tr. at 1737.) Tim denied that Parker gave him the hatchet either before or during the fight. (Tr. at 857.)

When Detective Burrows interviewed Tim, Tim was very upset and emotional. (Tr. at 1764.) Tim provided his cell phone records to law enforcement. The cell phone records corroborated the information Tim shared with law enforcement and disproved the information Parker provided to law enforcement. (Tr. at 1760.)

Parker also stated that Brian had a knife, Matthew had a knife, and Tim had brass knuckles. (8/30/19 Tr. at 17.) Parker acknowledged, though, that none of them used those weapons during the fight. (*Id.* at 41-42.)

Parker claimed that after the fight ended, Tim, Matt, and Brian all had blood on them. (*Id.* at 19.) Parker stated that he had approached Hunter because he had

⁵The district court informed Parker at the hearing that anything he testified about at the hearing could be used against him at his criminal trial. Parker indicated he understood. (8/30/19 Tr. at 8.)

an ax handle and that he had grabbed Hunter's shirt and told him to drop it. Thus, Parker claimed he had the hatchet at this time because Hunter hit him with the ax handle and the hatchet fell to the ground. (*Id.* at 22-23.) Parker testified that after he lost possession of the hatchet:

And, I went down to grab it, and then that's when I had that tug-of-war with one of the guys. And then—and then, everybody all of a sudden jumped on both of us, and I blacked out.

(*Id.* at 23.)

Parker testified that when he “came to” Tim handed him the hatchet back. (*Id.*) After this, Parker returned to C.J.'s truck. (*Id.* at 26.) Parker did not make any of these claims during his two interviews with Detective Burrows. Instead, Parker insisted that he stayed on his feet the entire fight. (Tr. 1739.)

When the prosecutor asked Parker if he used the hatchet during the fight, he initially responded that he was not going to answer the question. (*Id.* at 44.) After the court overruled the objection to the question, Parker answered, “I just used it once.” (*Id.* at 45.) Parker testified that he used the hatchet on Tony. (*Id.* at 47.) Parker did not make this admission during his interviews with Detective Burrows. (Tr. at 1749.) DNA testing established that Tony's DNA was on Parker's right shoe. (Tr. at 986, 993-94; State's Ex. 252.)

After everyone got into C.J.'s truck, they went into an alleyway to dispose of the knife and brass knuckles, and someone asked Parker about the hatchet. Parker

said it was in the back, so Tim grabbed it, wiped it off with his shirt, and threw it in the dumpster. (*Id.* at 27.)

Parker testified that there was no way that Lloyd's blood was on him because he never got near Lloyd during the fight. Parker claimed any blood he had on his clothing was his own blood. (*Id.* at 43.) DNA testing at a private lab established that Lloyd is visually included as a possible contributor to the DNA mixture profile on one of Parker's shoes. (Tr. at 1349; State's Ex. 260.) This means that the mixture profile from Parker's shoe is 759,000 times more likely to be observed if it originated from Lloyd and three unknown, unrelated individuals, than if it was from four unknown, unrelated individuals. This statistical result is strong support for inclusion in the mixture. (Tr. at 1349.)

Lloyd suffered a gaping, sharp-force wound on his left lateral neck. (Tr. at 1107; State's Exs. 185-87.) Lloyd sustained a fracture within his cervical spine. (Tr. at 1108.) A vertebral artery on Lloyd's left side was transected. (Tr. at 1109.) Lloyd died because of a sharp-force injury to his neck. (Tr. at 1113.) Lloyd's manner of death was homicide. A hatchet like the one Parker purchased on March 1, 2016, could have caused Lloyd's fatal injury because it was both sharp and weighty. (Tr. at 1117.) It appeared that Lloyd's fatal injury resulted from one wound that had to have been inflicted by a sharp and weighty object. (Tr. at 1118.) The sharp-force injury caused an incision within the soft tissue of Lloyd's neck,

the muscle, the subcutaneous tissue—going down to the bone—then fracturing the bone and transecting the vertebral artery. (Tr. at 1120.)

SUMMARY OF THE ARGUMENT

Parker’s claim that the Court erred by not giving the jury his “witness legally accountable” instructions is not properly before this Court because Parker withdrew these instructions, and thereby waived an objection and acquiesced in any alleged error. Parker has not asked this Court to invoke plain error review of his claim, which is a prerequisite for plain error review. And, even if Parker had requested this Court to conduct plain error review, he could not meet his heavy burden to prove such review is warranted because neither the evidence nor Parker’s defense of absolute denial supported such instructions. This Court should conclude that Parker has waived this claim on appeal.

The district court properly exercised its discretion in denying Parker’s motion for a mistrial based on his allegation that the State vouched for the credibility of its witnesses and made disparaging remarks about defense counsel. On appeal, Parker cites only two instances of alleged misconduct and offers only minimal analysis to support his claim. This Court should only consider these two alleged incidents of misconduct in reviewing whether the district court properly denied the motion for a mistrial. Even assuming, without conceding, that Parker

could prove these two remarks were improper vouching, he has failed to establish any prejudicial impact from the comments. The two comments must be considered in the context of how they were made and considering the prosecutor's closing argument as a whole. The evidence against Parker overwhelmingly established his guilt. And the district court gave the jury a cautionary instruction that it must disregard any comment the prosecutor made vouching for a witness's credibility and any disparaging comment the prosecutor made about defense counsel. This Court presumes that the jury follows the district court's instructions. Also, the district court was in the best position to judge any prejudicial impact from the prosecutor's alleged improper comments. Parker failed to prove that the district court abused its discretion in denying the motion for a mistrial.

ARGUMENT

I. The standard of review

When a claim of instructional error is preserved for appeal, this Court reviews a district court's decisions regarding jury instructions for an abuse of discretion. *State v. Wienke*, 2022 MT 116, ¶ 16, 409 Mont. 52, 511 P.3d 990. To constitute reversible error, any mistake in instructing the jury must prejudicially affect the defendant's substantial rights. *Id.* This Court reviews a district court's

denial of a motion for a mistrial for an abuse of discretion. *State v. Krause*, 2021 MT 24, ¶ 11, 403 Mont. 105, 480 P.3d 222.

II. Parker’s claim that the district court erred in failing to provide the jury with his “witness legally accountable” instructions is not properly before the Court because Parker withdrew the proposed instructions.

Parker asserts that the district court erred by refusing to give his “witness legally accountable” instructions. But Parker very clearly withdrew these instructions, informing the district court that based on how the evidence came out, the instructions were not supported by the evidence. By withdrawing the instructions, Parker waived any objection to the district court’s failure to give the proposed instructions he withdrew. Failure to make a timely objection constitutes a waiver of the objection and precludes raising the issue on appeal. Mont. Code Ann. § 46-20-702(2); *State v. Sittner*, 1999 MT 103, ¶¶ 12-13, 294 Mont. 302, 980 P.2d 1053.

Also, Mont. Code Ann. § 46-20-701(2) provides:

Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded. A claim alleging an error affecting jurisdictional or constitutional rights may not be noticed on appeal if the alleged error was not objected to as provided in 46-20-104, unless the convicted person establishes that the error was prejudicial as to the convicted person’s guilt or punishment and that:

(a) the right asserted in the claim did not exist at the time of the trial and has been determined to be retroactive in its application;

(b) the prosecutor, the judge, or a law enforcement agency suppressed evidence from the convicted person or the convicted person's attorney that prevented the claim from being raised and disposed of; or

(c) material and controlling facts upon which the claim is predicated were not known to the convicted person or the convicted person's attorney and could not have been ascertained by the exercise of reasonable diligence.

None of the exceptions set forth above apply to Parker's case to excuse his withdrawal of the proposed jury instructions about which he now complains.

Even assuming, without conceding, that the district court had made an erroneous preliminary ruling on the "witness legally accountable" instructions, Parker's act of withdrawing the proposed instructions amounted to acquiescence in the error. Acquiescence in an error takes away the right of objecting to it. Mont. Code Ann. § 1-3-207; *State v. Daniels*, 2011 MT 278, ¶ 36, 362 Mont. 426, 265 P.3d 623; *State v. Holt*, 2011 MT 42, ¶ 17, 359 Mont. 308, 249 P.3d 470; *State v. English*, 2006 MT 177, ¶ 71, 333 Mont. 23, 140 P.3d 454.

This Court may discretionarily review unpreserved claims alleging errors implicating a defendant's fundamental rights under the plain error doctrine. *State v. George*, 2020 MT 56, ¶ 4, 399 Mont. 173, 459 P.3d 854. The party requesting reversal because of plain error bears the burden of firmly convincing this Court that (1) the claimed error implicates a fundamental right and (2) the failure to review the claimed error may lead to a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial, or may compromise

the integrity of the justice process. *Id.* ¶ 5. Importantly, Parker has not asked this Court to invoke the plain error doctrine to review his unpreserved claim of instructional error. As this Court has explained, “To invoke plain-error review, ‘we still require the assertion of plain error to be raised and argued on appeal.’” *State v. Strizich*, 2021 MT 306, ¶ 33, 406 Mont. 391, 499 P.3d 575, quoting *In re B.H.*, 2018 MT 282, ¶ 15, 393 Mont. 352, 430 P.3d 1006. This Court has also refused to invoke the plain error doctrine when a party raises such a request for the first time in a reply brief. *Strizich*, ¶ 33, citing *State v. Fleming*, 2019 MT 237, ¶ 40, 397 Mont. 345, 449 P.3d 1234.

Even if Parker had asked this Court to invoke plain error review of his unpreserved claim, he could not meet his burden of proving that plain error review is appropriate because he was not entitled to a “witness legally accountable” instruction based on his defense and the evidence presented at trial.

Montana law provides that “[a] person may not be found guilty of an offense on the testimony of one responsible or legally accountable for the same offense . . . unless the testimony is corroborated by other evidence that in itself and without the aid of the testimony of the one responsible or legally accountable for the same offense tends to connect the defendant with the commission of the offense.” Mont. Code Ann. § 46-16-213. Legal accountability exists when “either before or during the commission of an offense with the purpose to promote or facilitate the

commission, the person solicits, aids, abets, agrees, or attempts to aid the other person in the planning or commission of the offense.” Mont. Code Ann. § 45-2-302(3). Pursuant to Mont. Code Ann. § 26-1-303, a district court should give a witness legally accountable instruction “on all proper occasions” that “testimony of a person legally accountable for the acts of the accused ought to be viewed with distrust[.]” *Id.*

In *State v. Johnson*, 257 Mont. 157, 163, 848 P.2d 496, 499 (1993), *overruled on other grounds in City of Helena v. Frankforter*, 2018 MT 193, ¶ 18, 392 Mont. 277, 423 P.3d 581, this Court held that it is within the district court’s discretion to judge whether the case before it is a “proper occasion” to give the “witness legally accountable” instruction. *Johnson*, 257 Mont. at 163, 848 P.2d at 499.

More recently, in *State v. Charlo-Whitworth*, 2016 MT 157, 384 Mont. 50, 373 P.3d 845, this Court explained:

However, the propriety of that instruction presupposes the existence of an accomplice. Section 45-2-302(3), MCA. Accordingly, if the defendant claims at trial that he did not commit the acts for which he is being tried, he cannot then ask the court to instruct the jury that a testifying witness aided the defendant in the commission of those acts. In other words, a person cannot be an accomplice to a person who did not commit the crime. Further, if there is no evidence to suggest that a testifying witness is legally accountable, then it is not proper to give the accomplice liability instruction. *State v. Hall*, 2003 MT 253, ¶ 30, 317 Mont. 356, 77 P.3d 239.

Charlo-Whitworth, ¶ 12.

The evidence presented at trial overwhelmingly established that two groups of men agreed to engage in a fist fight as a means of resolving a prior conflict. It was only Parker who brought a weapon—the hatchet—despite his text message clarifying that there would be no weapons involved. Every other witness involved in the fight who testified at trial expressed their belief that they had agreed to participate in a fist fight.

Here, Parker admitted that he wielded the hatchet at Tony. Tony’s brother, Nate, did see Parker strike Tony with something. Tony testified that he was struck with something hard that resulted in the injuries that the police photographed. The State presented photographs of the hole in the sweater Tony was wearing during the fight, as well as photographs of the injuries Tony sustained. Thus, Parker’s own testimony established the elements of the assault with a weapon charge for which the jury found Parker guilty. And the State presented other corroborating evidence that Parker hit Tony with the hatchet.

Parker defended against the deliberate homicide charge by denying that he was ever near Lloyd during the fight, so he certainly never hit Lloyd with a hatchet. In other words, Parker adamantly denied that he committed this crime. Because Parker denied even being in Lloyd’s vicinity during the agreed-upon fist fight, including making a bold claim that none of Lloyd’s DNA would be anywhere on him, he could not have had an accomplice in committing the

deliberate homicide. *Charlo-Whitworth*, ¶¶ 11-12. Since Parker could not have had an accomplice to a crime that he claimed he did not commit, he was not entitled to an accomplice instruction.

To the extent that Parker argues that he was entitled to an accomplice instruction under a theory of felony murder pursuant to Mont. Code Ann. § 45-5-102(1)(b), the State did not charge Parker with felony murder. The State charged, and proved beyond a reasonable doubt, that Parker alone caused Lloyd's death.

If Parker had asked this Court to invoke plain error review of his unpreserved claim, plain error review would not have been warranted.

III. The district court properly exercised its discretion in denying Parker's motion for a mistrial based upon alleged prosecutorial misconduct during closing arguments.

Parker next argues that the prosecutor committed misconduct during closing argument because "she repeatedly vouched for the credibility of the State's witnesses." (Appellant's Br. at 50.)

A. Relevant facts

Parker objected to the prosecutor vouching for the witnesses' credibility four times during the State's closing argument. On the first occasion, the prosecutor addressed defense counsel's implications during cross-examination that the State had met with and coached its witnesses:

When asked, Dakota—or Hunter—told Defense counsel that the State told him to tell the truth. I submit to you that Defense counsel suggesting that we told him what to say, like they’ve done with many of the witnesses, would have resulted in a much different presentation. What you got was the raw truth from these witnesses.

. . . .

If the State had suggested or told the witnesses what to say, instead of a real and raw description of what they could remember from their perception that night, with minor inconsistencies in timing a detail, they would all have the exact same story, saying they all saw the exact same thing, and that the Defendant did it, period. What you heard is the truth. Hunter’s statement is truthful. He remembers the event from his perspective, and he can only—

(Tr. at 1860-61.) At this point defense counsel objected on the grounds that the prosecutor was improperly bolstering the credibility of the witness. The district court sustained the objection. (Tr. at 1861.)

The second instance occurred when the prosecutor addressed defense counsel’s questioning of Hunter about his unrelated incarceration:

Here, the hatchet deflected off a stick used to defend himself. Are we really going to split hairs and say that that injury couldn’t have been from the tomahawk? And moreover, what does Hunter have to gain? Like so many of the other witnesses, he was brought here under court order at the State’s request. He testified in front of 12 strangers. Defense counsel made him—a big deal about him being in jail on some unrelated offense, and I submit to you that that does not render him incapable of telling the truth. And moreover—

(Tr. at 1862.) Defense counsel objected on the grounds of improper vouching, and the district court sustained the objection. (*Id.*)

The third instance occurred when the prosecutor was reviewing Matt's testimony with the jury, she commented:

Defense objected, at one point, during this witness[']s testimony—is this witness testifying from their own memory, or what they told detectives? Yet, they used transcript from three and a half years ago to attempt to confuse the witness and ignored the testimony from their own memory.

(Tr. at 1878.) Defense counsel objected on the grounds that this remark was improper vouching and a personal attack on defense counsel, and the district court sustained the objection. (*Id.*)

Defense counsel's fourth objection was to a slide from the prosecutor's PowerPoint she used during closing argument. (Tr. at 1881-82.) The State agreed to remove that portion from the PowerPoint. (Tr. at 1882.)

Defense counsel made a general objection that the prosecutor should not be using the words "red herring" during her argument. (Tr. at 1889.) The district court declined to limit the prosecutor's argument in that manner. (Tr. at 1890.)

During a break after the State's closing argument, defense counsel moved for a mistrial, arguing:

I counted, about eight different times when Ms. Quick vouched for the credibility of the different witnesses in this case. She attacked the integrity of opposing counsel, claiming that we're doing trial tactics and doing tricks, suggesting that I was tricking [Hunter] into changing his testimony. She also kept reusing the word—that's a red herring, that's a red herring, and that's a trial tactic to make the jury think that I wasn't attacking the evidence, but rather trying to trick them. One of

the times, she even said—had it on the PowerPoint—and I know you can't see it—[Christian] got up here and told the truth.

(Tr. at 1901.)

The prosecutor responded to the motion:

Well, and, Judge, what I was using was consistent with—or truthful in their statements. It's proper for a prosecutor to comment on conflicts and contradictions in testimony, as well as to comment on the evidence presented, and suggest to the jury inferences that can be drawn there from, Judge.

(Tr. at 1904-05.)

The district court agreed with defense counsel that there were instances of the prosecutor vouching and making personal attacks on defense counsel, but the court denied the motion for a mistrial. (Tr. at 1902, 1905.) Based on the court's assessment, the State requested that it give the jury a cautionary instruction. (Tr. at 1905.)

The district court proposed wording for a cautionary instruction that addressed vouching and personal attacks on defense counsel. Parker did not object to the court's proposed instruction. (Tr. at 1908.) Prior to defense counsel's closing argument, the court read the cautionary instruction to the jury. (Tr. at 1911; State's Ex. A.) The court instructed the jury that it had found on occasion that the prosecutor had improperly expressed her opinions on witness credibility and attacked the personal integrity of defense counsel. (*Id.*) The court instructed the jury to disregard the comments and attacks. (*Id.*)

B. Discussion

This Court employs a two-step process to review a trial court's denial of a motion for mistrial. First, the Court considers whether the prosecutor's conduct was improper; if so, the Court considers whether the improper conduct prejudiced the defendant's right to a fair trial. *Krause*, ¶ 25.

As set forth above, in four instances defense counsel objected to the prosecutor's comments on the grounds that the prosecutor was vouching for the credibility of witnesses. Each time, the district court sustained the objections, and it provided the jury with a cautionary instruction when the State completed its closing argument.

The right to a fair trial by jury is guaranteed by the Sixth Amendment of the United States Constitution and by article II, section 24, of the Montana Constitution. *State v. Smith*, 2021 MT 148, ¶ 42, 404 Mont. 245, 488 P.3d 531. The determination of witnesses' credibility and the weight to be given their testimony is solely within the province of the jury. *State v. Byrne*, 2021 MT 238, ¶ 23, 405 Mont. 352, 495 P.3d 440. A prosecutor may comment during closing on the credibility of a witness. *State v. Thorp*, 2010 MT 92, ¶ 26, 356 Mont. 150, 231 P.3d 1096. But, it is improper for a prosecutor to offer personal opinions as to witness credibility. *State v. Aker*, 2013 MT 253, ¶ 26, 371 Mont. 491, 310 P.3d 506.

Alleged improper statements during closing argument must be considered in the context of the entire argument. This Court does not presume prejudice from alleged misconduct. *Smith*, ¶ 42. Also, this Court considers the effect of a cautionary instruction considering the other evidence presented against the defendant. *Thorp*, ¶ 29. This Court has elaborated:

In determining whether a prohibited statement contributed to a conviction, we consider the strength of the evidence against the defendant, the prejudicial effect of the testimony, and whether a cautionary instruction could cure any prejudice.

State v. Erickson, 2021 MT 320, ¶ 25, 406 Mont. 524, 500 P.3d 1243, quoting *State v. Bollman*, 2012 MT 49, ¶ 33, 364 Mont. 265, 272 P.3d 650.

In Parker’s brief, he only references the prosecutor’s comment about Hunter’s testimony being the truth (Appellant’s Br. at 50, citing Tr. at 1861) and the prosecutor’s PowerPoint slide that apparently said, “Nonetheless, [Christian] got up here and told the truth.” (*Id.*, citing Tr. at 1882.) In the first instance, the court sustained defense counsel’s objection and the prosecutor moved on. In the second instance, the prosecutor agreed to remove the objectionable portion from her slide.

Even assuming, without conceding, that the prosecutor’s comment and the comment on the slide were improper, Parker has failed to prove that these comments prejudiced his right to a fair trial. To prove that the comments prejudiced his right to a fair trial, Parker improperly relies upon other claims of

error that he has not raised or briefed on appeal and does not address the cautionary instruction or its effect. (Appellant's Br. at 51-52.) Parker cannot rely upon alleged errors he has not raised or briefed to prove the prejudicial impact of the prosecutor's comments.

The prosecutor's comments were isolated in the context of the lengthy closing argument, during which the prosecutor focused on the testimony and evidence presented to the jury. Moreover, the comments should be considered within the context the prosecutor made them and in the context of the closing argument as a whole.

The State presented overwhelming evidence against Parker, including that Parker purchased and routinely possessed a hatchet prior to the fight; Parker was angry with Chris for his prior assault of Brian and was unwilling to let it go; Parker brought the hatchet to the fist fight after clarifying in a text that there would be no weapons; no other participants in the fight used a weapon; Nate saw Parker strike his brother Tony with something, and Tony testified that someone struck him with an object, and the State presented photographs documenting the hole in Tony's sweater and his injuries; Parker admitted during a pretrial hearing that he struck Tony with the hatchet; Parker claimed that he went to the location of the fight alone, but business surveillance video established that Parker's statement was not truthful; Parker's testimony at a pretrial hearing was inconsistent with his two prior

statements to law enforcement officers; Parker boasted to law enforcement officers that they would not find any of Lloyd's DNA on him; law enforcement officers never recovered the hatchet or the shirt Parker was wearing at the time of the fight; Lloyd's DNA was on one of Parker's shoes; Parker threatened the State's witness who was in jail not to testify against him, but that witness, who was later assaulted, still testified that he heard Parker confess to killing Lloyd; and, when Ranessa accused Parker in a text message of murdering Lloyd, Parker did not respond with a denial but instead told Ranessa not to worry, he was going to kill himself.

Finally, the district court's cautionary instruction more than addressed the main prejudice concern—that the jury would substitute the prosecutor's assessment of witness credibility for its own. The district court affirmatively advised the jury that it had found instances of the prosecutor improperly vouching for the credibility of witnesses, and instructed the jury to “disregard any such personal opinions of the prosecutor about credibility of the witnesses.” (App. A.) This Court presumes that “the jury upholds its duty and follows a district court's instructions.” *Erickson*, ¶ 27.

Considering these circumstances, and even assuming, without conceding, that any of the prosecutor's comments to which Parker objected were improper, Parker failed to prove that the comments prejudicially impacted his right to a fair and impartial trial. “Because the trial court is in the best position to observe the

jurors and determine the effect of questionable statements . . . it is given a latitude of discretion in its rulings on motions for mistrial based on such statements.”

State v. Criswell, 2013 MT 177, ¶ 51, 370 Mont. 511, 305 P.3d 760, quoting *State v. Dubois*, 2006 MT 89, ¶ 61, 332 Mont. 44, 134 P.3d 182. Parker has failed to demonstrate that the district court abused its discretion when it denied his motion for a mistrial and provided the jury with a cautionary instruction.

CONCLUSION

For the reasons set forth above, the State respectfully requests that this Court affirm Parker’s convictions for deliberate homicide, felony assault with a weapon, and tampering with a witness or informant.

Respectfully submitted this 17th day of October, 2023.

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

By: /s/ Tammy K Plubell
TAMMY K PLUBELL
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 9,522 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

/s/ Tammy K Plubell
TAMMY K PLUBELL

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0041

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JAMES MICHAEL PARKER,

Defendant and Appellant.

APPENDIX

D.C. Doc. 401, District Court’s Jury Instruction 38 Appendix A

CERTIFICATE OF SERVICE

I, Tammy K Plubell, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 10-17-2023:

Chad M. Wright (Attorney)
P.O. Box 200147
Helena MT 59620-0147
Representing: James Michael Parker
Service Method: eService

Joshua A. Racki (Govt Attorney)
121 4th Street North
Suite 2A
Great Falls MT 59401
Representing: State of Montana
Service Method: eService

Caitlin Boland Aarab (Attorney)
11 5th St N
207
Great Falls MT 59401
Representing: James Michael Parker
Service Method: eService

Electronically signed by Janet Sanderson on behalf of Tammy K Plubell
Dated: 10-17-2023