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 APPELLEE

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

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STATEMENT OF THE ISSUES

1. Whether the prosecution's delayed disclosure of a police report constituted a *Brady* violation when Severson had the allegedly exculpatory evidence from an independent source, Severson declined to ask for a continuance after receiving the report two weeks before trial, and the allegedly exculpatory evidence was inadmissible and would not have changed the outcome of the trial.

2. Whether the State's questions regarding items stolen from Severson's residence that could be associated with drug dealing and his failure to request an examination of a witness's phone constituted prosecutorial misconduct when he failed to object to some of the questions, acquiesced to curative instructions, and the questions did not affect the outcome of his trial.

STATEMENT OF THE CASE

The State charged Appellant Kyle Lee Severson with deliberate homicide after he shot and killed Tyler Hayden (Tyler) at a gas station in Sidney, Montana. (Docs. 3, 4.) The State filed an Amended Information, adding a witness tampering charge after Severson attempted to pay Dalton Watson (Dalton) $30,000 to change his story about what transpired. (Docs. 27, 29.) The district court granted Severson's motion to sever the charges. (Doc. 182.) Severson ultimately entered a nolo contendere plea to the tampering charge. (Doc. 322). Severson went to trial on

the deliberate homicide charge, and a jury convicted him of the lesser-included charge of mitigated deliberate homicide. (Doc. 226.)

The district court sentenced Severson to 40 years in prison for mitigated deliberate homicide and 8 years for witness tampering to run concurrently. (Docs. 313 at 4, attached to Appellant's Br. as App. A; 324, attached to Appellant's Br. as App. B.)

STATEMENT OF THE FACTS

I. The offense

On July 2, 2019, Severson sat in the backseat of an SUV with his three-year-old daughter while his girlfriend Karina Orcoza-Angel (Karina) and her sister Jessica went into the Loaf 'N Jug convenience store to buy snacks. (10/1/20 Trial Tr. at 47.) While the girls were inside the store, Tyler and Dalton pulled into the parking lot and parked next to the SUV. (State's Trial Ex. 32 [Gem Video] at 6:00.)

Dalton and Tyler had been gambling at the South 40 casino but "were having no luck on the machines" and decided to meet up with friends at a different casino. (9/30/20 Trial Tr. at 140.) They decided to stop at the Loaf 'N Jug first so Tyler could buy some Newport cigarettes. (*Id.*)

Dalton parked his Jimmy next to the SUV, and Dalton and Tyler entered the convenience store. (*Id.* at 141-42; Gem Video at 6:00-6:34.) Dalton did not recognize the SUV but noticed that it had temporary plates. (9/30/20 Trial Tr. at 142.)

Dalton went to wash his hands while Tyler stood in line waiting to buy cigarettes. (*Id.* at 143-44; Defense Trial Ex. E Final Side by Side [Ex. E] at 0-0:39.) Dalton noticed Karina and her sister were in the store. (9/30/20 Trial Tr. at 143-44.) Dalton recognized Karina and knew she was Severson's girlfriend. (*Id*.) Corey Nelson (Nelson), the store clerk, said that Tyler seemed to register that Karina and Jessica were there, but he did not remember hearing Tyler say anything to either of them. (9/29/20 Trial Tr. at 85.) Tyler moved away from Karina and Jessica more than once, like he was "purposely ke[eping] his distance." (*Id.* at 85-86; Ex. E at 0:39-1:38.)

Dalton left the convenience store and returned to the Jimmy while Karina and Jessica checked out and Tyler waited in line. (Ex. E at 1:09-1:16; Gem Video at 7:40-7:48; 9/30/20 Trial Tr. at 144-46.) Severson testified that Dalton gestured toward him and said something he could not make out. (10/1/20 Trial Tr. at 171.) Severson said he began to roll his window down further to ask Dalton what his problem was, but Dalton got back into the Jimmy before Severson could say

anything. (*Id.*) At trial, Dalton said he never said anything to Severson that night, and Severson never said anything to him. (9/30/20 Trial Tr. at 146.)

Karina and Jessica left the store after checking out and got back in the SUV. (Gem Video at 8:16-8:25.) Karina told Severson that Tyler had given her some looks, and that she thought it was weird he was not shopping while in the convenience store. (9/29/20 Trial Tr. at 43; 10/1/20 Trial Tr. at 171.) Tyler bought a pack of Newport cigarettes, walked out of the convenience store less than a minute after Karina and Jessica, and got back in the Jimmy on the passenger side. (Gem Video at 8:35-8:45.)

As Tyler got in the Jimmy, Karina backed the SUV out of the parking spot and began to pull forward. (Gem Video at 8:45-9:00.) Tyler opened the Jimmy's door and began to get out, and at the same time, Karina stopped the SUV. (*Id.* at 9:00.) Tyler walked up to the rear driver's side of the SUV where Severson sat with the window half rolled down. (*Id.* at 9:05; 10/1/20 Trial Tr. at 65.) Severson testified that Tyler "approached at a pretty brisk pace;" however, surveillance video showed Tyler's feet approaching the SUV at a walking pace. (10/1/20 Trial Tr. at 172; Gem Video at 9:00-9:06.) Karina also testified that Tyler "walked" to the SUV. (10/1/20 Trial Tr. at 65.) One second after Tyler approached the SUV, Severson shot Tyler, and his body fell to the ground as Karina drove off. (Gem Video at 9:05-9:06.)

After Karina drove away from the Loaf 'N Jug, Severson told her to take him to the law and justice center, and he turned himself in. Severson told Officer Tanner Gomke that Tyler had approached the SUV and that Severson had shot him. (9/29/20 Trial Tr. at 44.) Severson said that Tyler's hands "were in a normal posture" as he approached the SUV and demonstrated with his arms down at his sides. (*Id.*) Severson said Tyler's hands were raised when he shot him and that Tyler "did[not] have any weapons in his hands." (*Id.* at 44-45, 65.) At trial, Karina testified that she did not see any weapon on Tyler that night either. (10/1/20 Trial Tr. at 83.)

The night of the homicide, Karina told law enforcement that after Severson shot Tyler, he said, "Why did I do that?" (*Id.* at 80.) Karina admitted at trial that even though she witnessed the homicide and claimed she knew Severson was scared, she still asked Severson why he shot Tyler and said that she did not think Severson should have shot him. (*Id.* at 87-88.)

Severson testified that Tyler said something as he approached the SUV, but he could not make out what Tyler had said, he only knew it was "vulgar." (*Id.* at 173.) Severson testified that he was scared of Tyler based on prior interactions. Severson said that roughly 15 months before the homicide, Tyler and a friend of his had followed Severson in a car. (10/1/2020 Trial Tr. at 163.) Severson said he thought he had lost them at one point, but then Tyler approached him head-on in a

residential area. (*Id.* at 164.) Severson stopped his car, and Tyler pulled up next to him. (*Id.*) Severson said he rolled down his window, and Tyler called him "a little guy or little man or something like that" and then started to get out of his car. (*Id.* at 165.) Before Tyler could get out of the car, Severson sprayed Tyler in the face with pepper spray and drove off. (*Id.*)

Less than a month later there was another incident at an IGA parking lot. Video admitted at trial showed Tyler opening Severson's passenger side door, pulling Karina's brother out, and punching him. (Defense Trial Ex. H.) Severson got out and began punching Tyler. (*Id.*) Severson said he began carrying a gun after the IGA incident because he was scared of Tyler. (10/1/2020 Trial Tr. at 162.) However, Severson also admitted that he had gone "around bragging [about] the IGA incident" after it happened, telling a friend that he "whooped Tyler's ass." (*Id.* at 203.) Severson also claimed that in between the macing and IGA incidents, Tyler was berating him in an apartment parking lot, showed Severson his gun, and told him to give him his money. (*Id.* at 165.)

II. The alleged burglary and Dalton's cellular phone

On October 31, 2019, Severson filed a Motion to Compel Discovery requesting, among other things, "[a]ny information and reports of law enforcement person[ne]l and/or correctional staff of witnesses or suspects who are in possession

of the Defendant's property or Karina Orcoza-Angel's property taken from the Defendant and Karina's residence." (Doc. 20 at 2.)

At a hearing on the motion to compel, Severson's counsel told the court that it was regarding a burglary of Severson's home. (December 11, 2019 Motions Hr'g Tr. at 13.) The prosecutor explained that she believed that Severson's counsel was "referring to . . . something that happened after [the homicide] and there's an ongoing investigation. The State has not received any information about it other than, I think, that there's an ongoing investigation." (*Id.* at 14.)

The court asked the prosecutor whether the State had turned over any impeachment evidence they had on any of the State's witnesses. (*Id.* at 17-18.) The State responded that she did not know that anything in the investigation "would be, specifically, impeachment," but said the State had turned over anything they had gotten from law enforcement thus far. (*Id.*)

On January 7, 2020, the district court issued an order denying Severson's request for information related to the alleged burglary investigation because Severson "ha[d] not indicated i[t]s relevance to these proceedings" nor had he "made a presentation of substantial need for the information." (Doc. 44 at 10-11.) The court instructed the State that should it enter into any agreement in the burglary matter with a potential witness/suspect and/or defendant that included

offering testimony in Severson's trial, any such agreement needed to be disclosed to the defense. (*Id.* at 10.)

On January 24, 2020, the Sidney Police Department sent the Richland County Attorney's Office a Request for Prosecutorial Review requesting the prosecution of Keaston Johns and Logan Krauser for various potential offenses related to a burglary at Severson's home on July 3, 2019. (Exs. A, B, attached to Doc. 197.)

In a Supporting Report, Lieutenant Travis Rosaaen explained that law enforcement served a search warrant for Dalton's residence on August 6, 2019. (Ex. D, attached to Doc. 197.) Law enforcement discovered Karina's medical marijuana card in a safe. (*Id.*) Karina told law enforcement that her medical marijuana card had been in her purse when it was stolen from her residence. (*Id.*)

Lieutenant Rosaaen interviewed Dalton the following day, on August 7, 2019. (*Id.*) During the interview, Dalton told Lieutenant Rosaaen that some of his friends were coming and going from his residence after the homicide and that Karina's medical marijuana card had shown up a few days after Tyler died. (*Id.*) Dalton panicked and put the card in the safe. (*Id.*) Eventually, Dalton told Lieutenant Rosaaen that Logan Krauser and Immanuel Brown committed the burglary. (*Id.*) Dalton said they had shown up at the homicide crime scene flashing money and that they had given him approximately $300 in $20-dollar bills. (*Id.*)

Concerned that there was insufficient evidence to prosecute Johns and Krauser, the prosecutor sent the investigative files to the Attorney General's Office for an independent review. (Ex. 1, attached to Doc. 203.)

On September 4, 2020, Severson filed another Motion to Compel Discovery. (Doc. 151.) Severson asked the court "to order the State to provide, no later than September 11, 2020, any reports, videos, audio recordings, and any other evidence . . . relating to the burglary or attempted burglary of [Severson's] home[.]" (*Id.* at 1.) Severson explained that the defense believed Tyler's friends committed the burglary. (*Id.*)

The State responded, stating that the investigation indicated the burglary happened after the homicide. (Doc. 175.) The State explained that after receiving the review requests, it had requested further investigation and then sent the file off for an independent review. (*Id.* at 1-2.) The State received the file back with an opinion from the Attorney General's Office on September 9, 2020. (*Id.*; Ex. 1, attached to Doc. 203.) The State said it did not believe the investigative files from the burglary had any relevance to Severson's homicide case. (Doc. 175 at 2.) The State asked the court to conduct an in-camera review of the files to determine whether there was any relevance to Severson's case. (*Id.* at 2-3.)

The court held a hearing to address pending motions on September 11, 2020. The State requested that evidence of any burglary or trespass of Severson's

residence be excluded from trial unless the defense laid the proper foundation for justifiable use of force. (9/11/20 Motions Hr'g Tr. at 5-7.) The State pointed to the court's previous order, stating that everything really depended on what Severson "kn[e]w at the time he pulled the trigger." (*Id.* at 7.)

The defense told the court it had heard second and third hand that Tyler's and Dalton's girlfriends were involved in the burglary. (*Id.* at 40-42.) Severson asserted that if Tyler and Dalton were part of some plan to burglarize Severson's residence that night, it would go to Dalton's credibility at trial. (*Id.* at 42.)

The State confirmed that the burglary took place after the homicide, that the State did not think it was relevant to the homicide, and that the two suspected individuals were not witnesses for the homicide trial. (*Id.* at 44-45.) The State explained that it believed the investigative files should be reviewed in camera to determine whether there was any relevance to the homicide case. (*Id.* at 45.) The court instructed the State to provide the information regarding the burglary directly to Severson's counsel that day, September 11, 2020. (*Id.* at 47-48.)

On September 18, 2020, Severson filed a document that asserted the burglary was relevant to the homicide. (Doc. 197.) Severson noted that Dalton admitted to receiving cash taken from Severson's house. (*Id.* at 3-4.)

The State responded, noting the court's prior ruling and asserting that it had relied on that order in determining that the burglary investigation did not need to

be turned over. (Doc. 203 at 1.) The State maintained that because the burglary occurred after the homicide and because Dalton was at the Loaf 'N Jug and the law and justice center during the burglary, it should not be admitted into evidence at trial. (*Id.* at 4.)

On September 24, 2020, Severson filed another Motion to Compel Discovery, asking the court to compel the State to provide access to Dalton's phone in court, outside the jury's presence, so that the parties could inspect the device for any potentially exculpatory evidence. (Doc. 210 at 1.)

The case proceeded to trial by jury on September 28, 2020. At the end of the first day of trial, the court and the parties addressed the issue of Dalton's phone and the admissibility of the burglary information in general outside the jury's presence. (9/28/20 Trial Tr. at 273.)

The State said everything went to justifiable use of force, and Severson did not know about the burglary at the time of the homicide, noting there was no evidence of conspiracy and no indication that Tyler or Dalton knew about the burglary before it happened. (*Id.* at 273-74.)

The district court said that Severson could ask Dalton "questions for his biases, his motives for testimony, and anything for impeachment purposes." (*Id.* at 274, 283.) The court also instructed that the parties would meet in the courtroom at noon the following day with Dalton to attempt to access the phone. (*Id.* at 284.)

The following day, the court held a hearing outside the jury's presence. The State disclosed that when she had called Dalton the day before and told him to come to court to unlock the phone, he asked if he had to and told her he might not remember the password. (9/29/20 Trial Tr. at 101-02.) Dalton was sworn in, and the district court asked Dalton if he remembered the password from roughly a year and a half before, and he said he did not. (*Id*. at 103.)

Dalton testified that he frequently would get locked out of his phone because he would use "really intricate and random" passcodes so that "no one else could guess them." (*Id.* at 107.) Because he always got locked out, Dalton said he now used an easy-to-remember code—1111. (*Id.*)

The court asked Dalton if any of his testimony would change if the court "told [him] that law enforcement can get into [the phone] anyways?" (*Id.* at 108.) Dalton told the court it would not change his answers. (*Id.*) The court had Dalton attempt to unlock the phone with his thumbprint, but it did not work. (*Id*. at 109.)

The court asked Severson if he would like a continuance to have the data extracted from the phone, and Severson's counsel responded that he did not want a continuance. (*Id.* at 114.) The court told the State that it believed it was reckless for the State not to have retrieved the data from Dalton's phone to determine whether there was anything on it. (*Id*. at 111.) The court said the State should have investigated and pursued what was on Dalton's cellphone. (*Id*. at 114-15.)

The State responded that it had preserved the phone but that it was not the State's job to investigate on behalf of the defense. (*Id.* at 115.) The State also noted that the defense never requested to do their own independent download from the phone. (*Id.*) Severson's counsel replied that it only realized the relevance and importance of Dalton's phone once the State provided the burglary investigative files. (*Id.* at 116.)

Severson filed a Motion to Dismiss on Grounds of *Brady* Violations and Prosecutorial Misconduct, asserting the case should be dismissed due to the State's delayed disclosure of the burglary and for its failure to extract data from Dalton's phone. (Doc. 224.) The court reserved ruling on the alleged *Brady* violation but issued sanctions. (9/29/20 Trial Tr. at 234-35.) The court said Severson could question both Chief Kraft and Dalton about the existence of the phone, the fact that it was not analyzed, that they could not know what is on it, and also that Dalton claimed not to know his phone's password after asking if he had to disclose it. (*Id.* at 235.)

During cross-examination of Chief Kraft, Severson elicited that Dalton's phone had been in police custody since the homicide, that the court ordered Dalton to provide his passcode, that Dalton asked the prosecutor if he had to, that Dalton then claimed he did not know the passcode to his phone, and that they did not know what evidence may be on the phone. (9/30/20 Trial Tr. at 72-73.)

Severson also elicited that as early as August 7, 2019, law enforcement was aware that Dalton had confessed to receiving $300 from the burglary of Severson's and Karina's residence, that suspects of the burglary had ties to Tyler and Dalton, that Karina's medical marijuana card was found in Dalton's safe during a drug bust on his residence, that Dalton was never charged for receipt of stolen property, and that he received a pretrial diversion for the drug possession charge he incurred after the search of his home. (*Id.* at 58-66.)

During the rebuttal of Chief Kraft, the State asked if the defense ever asked to access and download Dalton's phone. (*Id.* at 109.) Chief Kraft said he believed the defense had. (*Id.*) The State asked if the defense had asked to examine the phone independently, and Severson objected and explained outside of the jury that the State was attempting to shift the burden regarding the phone after the court had issued sanctions. (*Id.* at 110-15.) Severson declined to have the jury instructed on the issue and instead asked the State to accept the sanctions. (*Id.* at 119-20.)

The court denied Severson's motion to dismiss for the alleged *Brady* violation after trial. (Doc. 229.) The court stated that while the State suppressed whatever may be present on Dalton's phone, there was no way to know if it contained exculpatory evidence, which in turn meant Severson had not established

that there was a reasonable probability that the outcome of the trial would have been different. (*Id*. at 2-3.) The court further explained that:

> The Court was able to observe the evidence as it was presented and determine that while th[e] [cellphone] was certainly relevant and important, it was peripheral to the case. In the context of this case and the evidence presented, the actions, or inaction, by the State does not warrant [dismissal]. The Court has adequately imposed sanctions upon the State as the Defendant was allowed to question Mr. Watson and Chief Kraft regarding the phone and the lack of analysis of the phone to determine if evidence existed [o]n the phone.

(*Id.* at 3.)

Two weeks after his conviction, Severson filed a motion asking the district court to release Dalton's phone directly to a forensic examiner. (Doc. 274.) At the hearing on the motion, the State said it did not object to the extraction of the phone data if the court conducted an in-camera review of the phone. (11/18/20 Motion Hr'g Tr. at 32.) The court granted Severson's motion and said it would conduct an in-camera review. (Doc. 310 at 4.)

At a hearing on May 24, 2021, the district court explained that it was currently trying to compile the data pulled from Dalton's cellphone, which it had already reviewed. (05/24/21 Hr'g on Defendant's Attorneys' Withdrawal Tr. at 5-7.) The court informed the parties that there was not much on the phone. (*Id.* at 5-6.) The court provided copies of the cellphone data to both parties. (Doc. 335.)

III. Severson's prior drug use

On September 4, 2020, Severson filed a Motion in Limine to Prohibit Introduction of Evidence Relating to Prior Drug Use.[1] In a motions hearing on September 11, 2020, Severson's counsel explained that the motion was regarding a drug transaction involving Severson back in 2017. (9/11/20 Hr'g Tr. at 59.) The district court ruled that the State could not bring in evidence of Severson's drug dealing in its case-in-chief, but said it would reserve ruling on the motion for purposes of rebuttal, depending on what evidence was presented by the defense, cautioning the defense that it could open the door. (*Id.* at 62-63; Doc. 186.)

At trial, Karina testified that she had come home from the law and justice center after the homicide to find that her residence was trashed and some property was missing, including a television, about $2,000 in cash, Severson's guitar, a shotgun, her purse, a phone, an Apple watch, and her medical marijuana card. (10/1/20 at 70-72.)

On cross-examination, the State asked if other items were stolen. (*Id.* at 78.) Karina agreed that more was taken. (*Id.*) The State asked if more than one gun was stolen, and Karina said that two guns were missing. (*Id.*) The State asked if any

[1] As Severson notes, the record does not contain the motion. (Appellant's Br. at 21.) However, the State's response, the court's order, and the hearing on the motion are in the record.)

drugs were taken, and Karina said a small amount of marijuana was missing too. (*Id.* at 79.) The defense did not object to any of these questions.

After Karina testified that Tyler was known for the trouble he got into, the State asked Karina if it was also true that people in Sidney would have known that she and Severson had cash, guns, and drugs in their house. (*Id.* at 88.) Severson objected on the grounds of argumentative and speculation. (*Id.* at 89.) The court sustained the objection. (*Id.*)

The State asked if Severson posted pictures on social media of cash and drugs. (*Id.*) Severson objected and said he believed the State was violating the motion in limine order that prevented the State from eliciting evidence of Severson's alleged drug dealing or drug activity in its case-in-chief. (*Id.*)

The State said it believed the defense had opened the door. (*Id.* at 90.) The district court found that the defense had not opened the door and admonished the parties to consult the court outside of the jury's presence before assuming a door had been opened. (*Id.* at 93.) The court asked Severson what he wanted as a remedy. (*Id.*)

Severson asked the court to instruct the jury that Severson was a licensed medical marijuana provider, that there is nothing illegal about being a medical marijuana provider, and to instruct that the State's questions were inappropriate. (*Id.* at 95.) Severson also asked to reserve the right to ask for a mistrial if the

problem did not appear to be properly corrected. (*Id.*) The court told Severson that he had until his case-in-chief was concluded to make a motion for a mistrial. (*Id.* at 99.)

The court gave the following instructions to the jury:

> The State asked a question before we took a break and previously the Court issued an order prohibiting the State from asking those question[s] and the State asked the question in violation of the Court's order, the Defendant objected. I'm instructing the jury now that question that was asked and the answers that were given should not enter into your deliberation in any way as asking the question at this juncture was a violation of this Court's order.

(*Id.* at 100-01.)

During Severson's testimony, Severson explained that he was a licensed medical marijuana provider and that to get that licensure, his landlord signed a notarized permission form, a background check was run, and his fingerprints were taken. (*Id.* at 176.) He explained that he could not have a criminal history and that it was legal for him to possess marijuana in his home. (*Id.*)

Severson never moved for a mistrial or objected to the court's curative instruction.

SUMMARY OF THE ARGUMENT

Severson has not established a *Brady* violation because he already had the allegedly exculpatory evidence. Severson also waived or acquiesced to any potential *Brady* claim by not requesting a continuance once the burglary investigative files were turned over. There is also no reasonable probability that the outcome of Severson's trial would have been different because whether or not Tyler had a gun in his pocket was not relevant to Severson's defense when it was undisputed that Severson did not see any weapon on Tyler before he shot him.

This Court should decline to reach the merits of Severson's various prosecutorial misconduct claims because he waived them by failing to object and by acquiescing to any alleged error. Even if this Court reaches the merits, assuming the prosecutor's statements were improper, Severson was not prejudiced.

ARGUMENT

I. Standard of review

A motion to dismiss based on the State's failure to disclose exculpatory evidence is a question of law which this Court reviews for correctness. *State v. Williams*, 2018 MT 194, ¶ 16, 392 Mont. 285, 423 P.3d 596. This Court's review of constitutional questions, including alleged *Brady* violations, is plenary. *State v. Ilk*, 2018 MT 186, ¶ 15, 392 Mont. 201, 422 P.3d 1219.

This Court generally does not address issues of prosecutorial misconduct pertaining to a prosecutor's statements not objected to at trial. *State v. Palafox*, 2023 MT 26, ¶ 16, 411 Mont. 233, 524 P.3d 461. However, this Court may discretionally review claimed errors that implicate a criminal defendant's fundamental constitutional rights, even if no contemporaneous objection is made, under plain error review. *Id.* ¶ 17. This Court uses its inherent power of common law plain error review sparingly, only in cases "that implicate a defendant's fundamental constitutional rights when 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." *State v. Lehrkamp*, 2017 MT 203, ¶ 11, 388 Mont. 295, 400 P.3d 697.

This Court reviews claims of ineffective assistance of counsel (IAC) on direct appeal if the claims are based solely on the record. *State v. Cheetham*, 2016 MT 151, ¶ 14, 384 Mont. 1, 373 P.3d 54. IAC claims present mixed questions of law and fact and are reviewed de novo. *Palafox*, ¶ 18.

II. This Court should decline to review Severson's *Brady* claim because he waived the claim by failing to request a continuance when the police report was disclosed two weeks before trial.

A defendant's failure to request a continuance when evidence is disclosed before or during trial constitutes a waiver of any *Brady* violation. *See, e.g.*,

Madsen v. Dormire, 137 F.3d 602, 605 (8th Cir. 1998); *United States v. Higgins*, 75 F.3d 332, 335 (7th Cir. 1996); *Williams v. State*, 995 S.W.2d 754, 761 (4th Cir. 1999); *State v. Brown*, 2017 Ohio 4231, ¶ 10 (Ohio Ct. App. 2017).

Here, Severson received the burglary police reports two weeks before trial but declined to request a continuance to investigate whether Dalton's cellphone contained anything important. At the beginning of the trial, after the court determined that Dalton's phone should be examined for any potential exculpatory evidence, the court asked if Severson would like a continuance, and Severson declined. The proper remedy for the late disclosure of the police report was a request for a continuance, but Severson declined the express invitation to do so. This Court should decline to review his claim.

III. Severson has not met his burden to establish a *Brady* violation because he already had Tyler's Facebook records, there is no reasonable probability the trial outcome would have been different, and the State did not have a duty to examine Dalton's phone.

Pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), in all criminal cases, the prosecution has a duty to provide the defense any exculpatory or impeachment evidence in its possession. *McGarvey v. State*, 2014 MT 189, ¶ 16, 375 Mont. 495, 329 P.3d 576. "The prosecutor's failure to turn over evidence that is favorable to the defense and material to the defendant's guilt or punishment can violate a defendant's Fourteenth Amendment guarantee of due process, and therefore,

require a new trial." *State v. Reinert*, 2018 MT 111, ¶ 16, 391 Mont. 263, 419 P.3d 662 (citations omitted). "Within the meaning of *Brady*, material evidence is that evidence which, had it been disclosed, the result of the proceeding would have been different." *Id.* (citation omitted). To constitute material evidence, the evidence must be "more than conclusory or speculative." *State v. Colvin*, 2016 MT 129, ¶ 12, 383 Mont. 474, 372 P.3d 471 (citation omitted).

A defendant seeking to demonstrate a *Brady* violation must establish that: "(1) the State possessed evidence, including impeachment evidence, favorable to the defense; (2) the prosecution suppressed the favorable evidence; and (3) had the evidence been disclosed, a reasonable probability exists that the outcome of the proceedings would have been different." *State v. Weisbarth*, 2016 MT 214, ¶ 20, 384 Mont. 424, 378 P.3d 1195. "There is no *Brady* violation when the accused or his counsel knows before trial about the allegedly exculpatory information and makes no effort to obtain its production." *State v. St. Dennis*, 2010 MT 229, ¶ 51, 358 Mont. 88, 244 P.3d 292 (citation omitted).

Under the "first prong, evidence that is 'favorable to the defense' is that which 'has the potential to lead directly to admissible exculpatory evidence.'" *State v. Mathis*, 2022 MT 256, ¶ 34, 409 Mont. 348, 515 P.3d 758 (citation omitted). Satisfaction of the first prong requires "more than mere speculation that evidence would be favorable." *State v. Fisher*, 2021 MT 255, ¶ 29, 405 Mont. 498,

496 P.3d 561 (citation and internal quotation marks omitted). If the evidence was potentially exculpatory, but its exculpatory value is unknown, this Court generally looks for proof of bad faith on the part of the State. *Id.* ¶ 31 (citation omitted).

This Court has emphasized that there is a distinction between the State's duty to gather evidence and its duty to preserve exculpatory evidence. *State v. Wagner*, 2013 MT 47, ¶ 31, 369 Mont. 139, 296 P.3d 1142 (citation omitted). While investigators may not "hamper the accused's right to obtain exculpatory evidence, police officers are not required to take initiative or assist the defendant with procuring evidence on his own behalf." *McGarvey*, ¶ 16; *see also State v. Heth*, 230 Mont. 268, 272, 750 P.2d 103, 105 (1988) (law enforcement has no affirmative duty to gather exculpatory evidence); *Arizona v. Youngblood*, 488 U.S. 51, 59 (1988) (State has no duty to perform any particular test or use any particular investigatory tool).

"[A] defendant's right to due process 'is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense[.]'" *State v. Root*, 2015 MT 310, ¶ 19, 381 Mont. 314, 359 P.3d 1088 (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)). While "a showing of prejudice to the defendant does not require showing that the evidence would guarantee acquittal," a defendant still must show "that the suppressed evidence could reasonably be taken to put the whole case in such a different light as to

undermine confidence in the verdict." *Id.* ¶ 29 (citations and internal quotation marks omitted).

A. The record indicates that the Facebook Message exchange between Tyler and Brown was provided to the defense before trial.

While this Court has adopted the Ninth Circuit Court of Appeals' view that a *Brady* claim cannot have a due diligence requirement, "defense counsel cannot ignore that which is given to him or of which he is otherwise aware." *Garding v. State*, 2020 MT 163, ¶ 31, 400 Mont. 296, 466 P.3d 501 (citation omitted).

The record indicates that Severson's counsel already had Tyler's Facebook messages well before trial. During the hearing held outside the jury's presence on September 29, 2020, the State confused Dalton for Severson initially, ultimately explaining it had provided Tyler's Facebook records to the defense but had not examined Dalton's phone. (9/29/20 Trial Tr. at 112.) Indicative of its disclosure, the State included Tyler's Facebook records in its exhibit list. (Doc. 83 at 3.) Severson also admitted a Facebook Messenger exchange between himself and Tyler into evidence at trial. (Defense Trial Ex. II.)

In the end, Dalton's cellphone contained no evidence of a conspiracy to burglarize Severson's home. On appeal, the only evidence on the phone that Severson claims is exculpatory is the Facebook Messenger exchange between Tyler and Shammar Brown (Brown). (Attached to Appellant's Br. as App. C.)

Severson already had Tyler's Facebook records. Severson cannot establish a *Brady* claim based on evidence he was already in possession of but chose not to attempt to introduce at trial.

B. Severson has not established that the outcome of his trial would have been different if the police report had been provided to Severson earlier.

Severson has not met his burden of establishing a *Brady* claim because there is no reasonable probability that the outcome of Severson's trial would have been different if the burglary investigative files had been turned over sooner.

Severson claims that the Facebook messages between Tyler and Brown "bolstered the reasonableness" of Severson's fear of Tyler, undercut Dalton's credibility, and could have uncovered more admissible exculpatory evidence, such as opinion or reputation testimony from Brown. However, the phone did not contain any admissible exculpatory evidence and, even if the evidence had been admitted at trial, there is no reasonable probability it would have affected the outcome of the trial.

1. The messages on Dalton's phone would not have been admissible.

A defendant who raises a justifiable-use-of-force defense may offer evidence of the victim's character only in limited circumstances. "First, the character evidence must be 'a pertinent trait of character of the victim . . . .'" *State v. Hauer*,

2012 MT 120, ¶ 27, 365 Mont. 184, 279 P.3d 149 (quoting Mont. R. Evid. 404(a)(2)). If character evidence is admissible under Mont. R. Evid. 404, Mont. R. Evid. 405 governs the methods for proving character. *State v. Montgomery*, 2005 MT 120, ¶ 16, 327 Mont. 138, 112 P.3d 1014. A victim's character may be proved:

> (a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
>
> (b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, or where the character of the victim relates to the reasonableness of force used by the accused in self defense, proof may also be made of specific instances of that person's conduct.

Mont. R. Evid. 405.

"Evidence of a victim's violent character is not an 'essential element' of a justifiable-use-of-force defense." *Hauer*, ¶ 27 (citation omitted). In a justifiable-use-of-force defense, an accused must establish that he knew of the specific instances of conduct and that those incidents led the accused to use the specific level of force. *Montgomery*, ¶¶ 18-20. If the prior conduct was unknown to the accused, those specific instances of conduct are irrelevant and inadmissible. *Id.* (citing Mont. R. Evid. 402).

Severson asserts that evidence indicating Tyler had a gun during an incident with Brown would have made Severson's claim that he shot Tyler out of fear that Tyler might have had a weapon more reasonable. (Appellant's Br. at 33-34.) There is no indication in the record that Severson had any knowledge about the incident between Tyler and Brown at the time he killed Tyler. Because Severson was unaware of the alleged incident, that specific incident of conduct would not have been admissible because it would have been irrelevant to the reasonableness of Severson's asserted belief that his use of deadly force was necessary.

Severson also claims that the messages would have undercut Dalton's credibility regarding the gun Dalton said he picked up off the ground. However, extrinsic evidence may not be used to impeach the credibility of a witness. Mont. R. Evid. 608(b).

Severson also claims that if he had the Facebook Messenger messages earlier, he could have investigated the incident between Brown and Tyler, and Brown potentially would have testified that Tyler had a reputation in the community for being quick to pull out a gun. (Appellant's Br. at 37-38.) Severson's claim that Brown could have testified to Tyler having a reputation for being quick to draw a gun is speculative and a thinly veiled attempt to introduce impermissible specific instances of conduct unknown to Severson at the time of the homicide and not an actual character trait of the victim.

2. Even if the incident between Brown and Tyler were admissible, Severson has not established a reasonable probability that the outcome of trial would have been different.

Assuming Severson would have been able to successfully admit testimony related to the alleged incident between Brown and Tyler under any of Severson's proposed theories, it would not have changed the outcome of Severson's trial. Despite Severson's assertion, the case did not hinge on Dalton's credibility regarding whether he picked up his own gun off the ground.

In his interview after the homicide, Severson told law enforcement that Tyler's hands were down at his sides in a "normal posture" as he walked toward the vehicle. Severson indicated to law enforcement that Tyler's hands were raised right before Severson shot him. Severson and Karina testified that they did not see a weapon on Tyler. At trial, Karina also admitted that she asked Severson why he shot Tyler and that she did not believe Severson should have shot him. The security camera video from across the street showed that a mere five seconds passed from Tyler stepping out of the Jimmy and Severson shooting him. Even if Tyler had a gun in his pocket but had not revealed it to Severson, Severson's belief that he needed to shoot Tyler to defend himself would not have been reasonable.

Severson has failed to meet the third prong of *Brady* because he has not established that the trial outcome would have been different had the burglary investigative files been provided to the defense earlier.

B. The State had no duty under *Brady* to extract data off Dalton's cellphone, and Severson has not established that the State acted in bad faith rather than negligence.

Severson asserts that the State suppressed the contents of Dalton's phone by failing to extract the contents. (Appellant's Br. at 32-33.) However, the State has no duty to perform any particular investigatory tool. In *Youngblood*, the United States Supreme Court "strongly disagree[d]" with the Arizona court's implication that the defendant's due process rights were violated by the State failing to utilize a specific test on semen samples in the case. *Youngblood*, 488 U.S. at 58.

In *Youngblood*, biological swabs were taken from a young boy as part of a sexual assault kit. *Id.* at 52-53. Law enforcement also retained the boy's clothing, which contained semen stains. *Id.* at 52. The sexual assault kit samples were properly refrigerated, but the clothing was not. *Id.* At trial, Youngblood argued that the boy mistakenly identified him as his attacker. *Id.* at 53-54. Experts testified that had specific tests been conducted immediately after the sexual assault kit was taken or if the clothing had been properly refrigerated, a blood type test could have been run and compared with Youngblood's blood type to either confirm he was the attacker or rule him out. *Id.* at 54. The United States Supreme Court held that Youngblood's due process rights were not violated because the State was under no obligation to utilize any particular test, and Youngblood was able to elicit the failure to conduct these tests at trial in support of his defense. *Id.* at 58-59.

Severson's argument mirrors that rejected by the United States Supreme Court. The State has no duty to run any particular test or utilize any specific investigatory tool. The question in Severson's case is whether suppression of the burglary investigative files violated Severson's due process rights because it could have led to admissible exculpatory evidence, i.e., something admissible and exculpatory on Dalton's cellphone.

The late disclosure of the burglary investigative files did not deprive Severson of his due process rights pursuant to *Brady* because Dalton's phone contained no admissible evidence favorable to Severson's defense. However, Severson was able to use the suggestion that the phone could have exculpatory evidence to his advantage. The district court's sanctions for the delayed disclosure allowed Severson to introduce evidence that the State had the phone but did not examine it, that Dalton had asked if he had to provide the password before he said he could not remember it, that Tyler's and Dalton's girlfriends were suspects in the burglary, that Dalton received money and items stolen in the burglary, and imply that something exculpatory could be on Dalton's phone.

The State's failure to realize that Dalton's possession of money and items from Severson's home implicated Dalton's credibility or motive to testify is not indicative of bad faith. This Court has adopted a bad faith requirement for instances in which the exculpatory value of the disputed evidence is unknown.

State v. Craig, 169 Mont. 150, 153, 545 P.2d 649, 651 (1976) (citing *United States v. Keogh*, 391 F.2d 138 (2d Cir. 1968)). Here, the exculpatory value, or lack thereof, is known because the contents of Dalton's phone are known. Therefore, this Court's bad faith analysis is inapplicable. Further, this Court adopted the bad faith requirement for potentially exculpatory evidence from *Keogh*.

In *Keogh*, the court cited examples of bad faith. *Keogh*, 391 F.2d at 147 (citing *People v. Savvides*, 1 N.Y.2d 554 (1956) (prosecutor failed to correct a witness's known false testimony that they did not receive a plea offer in exchange for their testimony at trial); *Napue v. Illinois*, 360 U.S. 264 (1959) (same); *Miller v. Pate*, 386 U.S. 1 (1967) (prosecutor repeatedly referred to stains on defendant's shorts as blood stains and said it was type "A" but postconviction testing revealed it was paint and the prosecutor knew that at the time of trial); *United State ex rel. Meers v. Wilkins*, 326 F.2d 135 (2d Cir. 1964) (two witnesses of a crime said the defendant was not one of the individuals they saw commit the crime, and the prosecution suppressed those two witnesses' statements).

Here, the prosecution's failure to recognize the potential impeachment value of the burglary investigative files does not amount to bad faith. At the initial motion to compel hearing, the prosecutor had not yet received the investigative files and did not know who the alleged burglary suspects were nor that Dalton had admitted to receiving money from the burglary. The State explained during another

hearing on September 11, 2020, that the State had relied on the court's prior ruling that the burglary was not relevant to the homicide and asserted that the burglary could not have gone to the reasonableness of Severson's fear because Severson did not know about the burglary that occurred after the homicide. The State repeatedly told the court the alleged burglary happened after the homicide, that no witnesses from Severson's case were among those suspected of committing the robbery, and that, therefore, it was irrelevant. While the prosecution was wrong that it had no relevance because it could have impeachment value, the State's conduct was far from the intentional conduct referenced in *Keogh*.

C. Should this Court find that a *Brady* violation occurred, the proper remedy is a new trial.

Dismissal of criminal charges is a severe sanction reserved for the most egregious or outrageous government misconduct. *State v. Lindsey*, 2011 MT 46, ¶ 45, 359 Mont. 362, 249 P.3d 491. As this Court has noted, when the prosecution fails to disclose exculpatory evidence, the proper remedy is retrial, not dismissal of the charges. *Id.* (citing *Brady*); *State v. Schauf*, 2009 MT 281, ¶ 26, 352 Mont. 186, 216 P.3d 740 (citing *Brady*).

Severson proposes the appropriate remedy in his case is dismissal and cites only to *State v. Swanson*, 222 Mont. 357, 722 P.2d 1155 (1986), in support of his assertion. (Appellant's Br. at 40.) However, Swanson did not allege a *Brady* claim, but instead argued that officers impeded his right to gather exculpatory evidence

by letting a blood sample sit out on the booking room table for days rather than refrigerating it. *Swanson*, 222 Mont. at 360-62, 722 P.2d at 1157-58.

Severson has not provided any authority for deviating from the proper remedy for *Brady* violations. The evidence Severson alleges is exculpatory was not destroyed. Should this Court find a *Brady* violation in Severson's case, the proper remedy is remand for retrial, not dismissal.

IV. This Court should decline to review Severson's prosecutorial misconduct claims because he waived or acquiesced to any potential error.

This Court has repeatedly held that issues raised for the first time on appeal are untimely and that it will not consider them. *State v. LaFreniere*, 2008 MT 99, ¶ 11, 342 Mont. 309, 180 P.3d 1161 (citation omitted). This includes new arguments or changes in legal theory. *Id.*

A party waives the right to appeal an alleged error when the appealing party acquiesced in, actively participated in or did not object to the asserted error. *State v. Winter*, 2014 MT 235, ¶ 17, 376 Mont. 284, 333 P.3d 222. Further, an "objection must be specific in order to preserve the issue for appeal." *LaFreniere*, ¶ 12.

Severson asserts prosecutorial misconduct based on the cross-examination of Karina regarding stolen items that could be indicative of drug dealing. (Appellant's Br. at 22.) However, Severson did not object when the State asked if other items

were stolen. Severson objected to the State's question about whether others knew they had drugs, guns, or cash in the house, but on speculation and argumentative grounds, not prejudice or relevance.

While Severson objected to the State's question of whether Severson posted photos of cash, drugs, and guns on social media and asserted it violated the motion in limine, the court adopted Severson's proposed curative instruction and permitted him to elicit testimony about the requirements for a medical marijuana license. Severson expressly declined to ask for a mistrial and did not object to the court's curative remedies.

Similarly, Severson claims the prosecution committed misconduct by shifting the burden regarding the examination of Dalton's phone. (Appellant's Br. at 41.) However, Severson declined any curative instruction.

Severson has waived appellate review of these misconduct allegations by waiver and acquiescence, and this Court should decline to review them.

A. Even if this Court reviews Severson's misconduct claims, this Court should affirm Severson's conviction because he has not established that he was prejudiced.

Prosecutorial misconduct constitutes reversible error only when it prejudices a defendant's substantial rights. *Lehrkamp*¸¶ 15. When a "defendant claims a prosecutor's remarks violated his right to a fair trial, but the challenged remarks do not implicate another right of the accused such as the right to counsel or the right

to remain silent, our analysis focuses on whether the challenged statements so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Polak*, 2021 MT 307, ¶ 18, 406 Mont. 421, 499 P.3d 565 (citation omitted). In making that determination, this Court considers the context of the entire proceedings. *Id.* (citations omitted). "[I]t is not enough that the prosecutors' remarks were undesirable or even universally condemned." *Id.* (citation omitted; alteration in the original).

This Court will not presume that the alleged prosecutorial misconduct prejudiced the defendant. *Id.* "[R]ather, the defendant must demonstrate, from the record, that the prosecutor's misstatements prejudiced him." *Lehrkamp*, ¶ 15 (citation omitted).

Severson raises several allegations of prosecutorial misconduct; however, even if all of the alleged actions were inappropriate, Severson has not met his burden of establishing prejudice.

Severson first alleges that the State committed misconduct by filing a notice asserting that Severson waived his attorney-client privilege by communicating with counsel on the jail phone, which instructed callers that their calls were recorded. (Appellant's Br. at 40-41.) Not only was the prosecution's request to review the audio denied and the State never listened to the calls, the district court correctly noted that but for the jail's handbook, which instructed inmates they could make

confidential calls on that phone, case law instructed that Severson would have waived his attorney-client privilege. (Doc. 180 at 2-4.)

Severson next claims the State committed prosecutorial misconduct by charging Karina. (Appellant's Br. at 41.) Documents from Karina's case are not part of Severson's district court record; however, the record indicates that the district court granted leave to file an Information against Karina. Following a substitution of judge, the court dismissed the charges. (Doc. 172 at 1-2.) The district court originally found probable cause to charge Karina. While the court ultimately concluded there was no probable cause, Severson has not met his burden of showing that the charge against Karina was improper. Moreover, Severson has failed to establish any prejudice because Karina testified as a defense witness at Severson's trial.

Severson also alleges the State inappropriately questioned whether the defense independently requested to examine Dalton's phone. The witness answered in the affirmative, and when the State followed up to clarify, the defense objected, the defense declined a curative instruction, and the question was never answered. No evidence was admitted at trial that Severson failed to attempt to examine the phone himself.

Finally, Severson claims the prosecution committed misconduct eluding to drug dealing during Karina's cross-examination. However, Karina testified she had

a medical marijuana card on direct, Severson testified on direct that he was a licensed medical marijuana provider, and Karina also testified on direct that a gun was stolen from their residence along with large sums of cash. While the prosecutor asked Karina whether Severson posted pictures of guns, cash, and drugs on social media, both Karina and Severson testified on direct in the defense's case-in-chief regarding the presence of guns, drugs, and large sums of money in their home.

Following Severson's objection, the jury was instructed that the State's questioning was improper and that jurors should disregard it. Further, Severson testified that he had to pass a criminal background check and have a clean criminal history in order to get licensed as a medical marijuana provider. Under the totality of the evidence at trial, the State's questions regarding marijuana, guns, and cash did not prejudice Severson because it was merely cumulative to other evidence.

B. This Court should decline to review Severson's IAC claim because it is not record-based, and there are tactical reasons why his counsel would have declined to pursue a mistrial.

Severson asserts his counsel was ineffective for not pursuing a mistrial, claiming there was no logical reason not to ask for one. (Appellant's Br. at 43-47.) However, Severson was aware that the contents of Dalton's phone were unknown and that they could either help or hinder his defense on retrial.

This Court reviews IAC claims applying the two-prong test set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). A defendant arguing IAC has a burden to demonstrate by a preponderance of the evidence that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. *Baca v. State*, 2008 MT 371, ¶ 16, 346 Mont. 474, 197 P.3d 948.

A trial counsel's performance is deficient if it falls "below an objective standard of reasonableness measured under prevailing professional norms and in light of the surrounding circumstances." *Whitlow*, ¶ 20. In evaluating whether counsel's performance was deficient, this Court indulges "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id*. ¶ 15 (quoting *Strickland,* 466 U.S. at 689). This highly deferential review of counsel's performance is necessary to "eliminate the distorting effects of hindsight." *Worthan v. State*, 2010 MT 98, ¶ 10, 356 Mont. 206, 232 P.3d 380. The mere fact that counsel failed to take an available measure or action is generally insufficient to establish that counsel's performance was deficient. *State v. Mahoney*, 264 Mont. 89, 101-02, 870 P.2d 65, 73 (1994).

Before reaching the merits of an IAC claim on direct appeal, this Court must first determine whether the claim is record- or nonrecord-based. *State v. Rovin*, 2009 MT 16, ¶ 34, 349 Mont. 57, 201 P.3d 780. This Court will review IAC claims

on direct appeal if the claims are based solely on the record. *Id.* ¶ 24. Because there is a "strong presumption that counsel's actions are within the wide range of reasonable professional assistance, a record which is silent about the reasons for the attorney's actions or omissions seldom provides sufficient evidence to rebut this presumption." *State v. Sartain*, 2010 MT 213, ¶ 30, 357 Mont. 483, 241 P.3d 1032 (quotation marks and citation omitted). Accordingly, if the record does not explain "why" counsel did not take an action, the IAC is more suitable for a petition for postconviction relief. *Id.* A nonrecord-based claim may be addressed on direct appeal, "[i]n rare instances," if there is no plausible justification for defense counsel's actions or omission. *State v. Fender*, 2007 MT 268, ¶ 10, 339 Mont. 395, 170 P.3d 971.

Severson claims a mistrial would have barred retrial because the prosecution goaded him into asking for a mistrial. (Appellant's Br. at 44.) However, as this Court has explained, "a defendant arguing that his mistrial motion was goaded by prosecutorial misconduct 'will succeed only with great difficulty.'" *City of Helena v. Wittinghill*, 2009 MT 343, ¶ 14, 353 Mont. 131, 219 P.3d 1244 (quoting *State v. Mallak*, 2005 MT 49, ¶ 20, 326 Mont. 165, 109 P.3d 209). To succeed, "there must be a finding of 'Machiavellian' design and a vision of future moves worthy of a chess master." *Mallak*, ¶ 20 (citation omitted).

In *Mallak*, this Court rejected defendant's assertions that the prosecution goaded him into a mistrial. *Mallak*, ¶ 26. This Court noted that the prosecution had presented a strong case prior to the grant of the mistrial. *Id.* Similarly, there are no facts in the record that would have supported a belief from the State that Severson was about to be acquitted. At the time of the alleged prosecutorial misconduct, evidence in the record established that Severson shot Tyler within a second of him reaching Severson's window, that Severson said nothing to Tyler before shooting him, that Tyler's hands were raised when he shot him, and that Karina who had witnessed the entire encounter did not believe he should have shot Tyler. The State's questioning in this matter was far more limited and unprejudicial than that which this Court has found to be intentional goading. *See State v. Laster*, 223 Mont. 152, 724 P.2d 721 (1986).

Severson's counsel may reasonably have believed it was better to avoid a mistrial when the defense utilized sanctions to their advantage rather than risk that nothing exculpatory would be found on Dalton's phone. Severson has not established that there was no plausible reason for Severson's counsel to decline to ask for a mistrial, and the reasons why counsel declined to ask for a mistrial are not in the record. This Court should decline to review Severson's IAC claim on direct because it is not record-based.

C. This Court should decline to invoke plain error review because Severson has failed to establish that failing to do so would result in a manifest miscarriage of justice or leave unsettled the question of the fundamental fairness of the proceedings.

Severson alternatively requests that this Court review his claims under the plain error doctrine. (Appellant's Br. at 47-49.) This Court may review a claim alleging a violation of a constitutional right under the plain error doctrine where the defendant invokes this Court's inherent authority and establishes that failure to review the error may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or procedure, or may compromise the integrity of the judicial process. *State v. Taylor*, 2010 MT 94, ¶¶ 12-13, 356 Mont. 167, 231 P.3d 79. An error is plain only if it leaves one "firmly convinced" that some aspect of the trial, if not addressed, would result in one of the previously listed consequences. *Id.* ¶ 17. This Court invokes plain error review "sparingly, on a case-by-case basis, according to narrow circumstances, and considering the totality of the circumstances." *State v. Williams*, 2015 MT 247, ¶ 16, 380 Mont. 445, 358 P.3d 127.

Severson does not raise new claims that he believes warrant reversal under plain error review but instead argues that the claims otherwise raised warrant plain error review and reversal for cumulative error.

"The cumulative error doctrine only allows for reversal when multiple errors, taken together, prejudice a defendant's right to a fair trial." *State v. Kirn*, 2023 MT 98, ¶ 51, 412 Mont. 309, 530 P.3d 1. The defendant has the burden of establishing prejudice, and the "cumulative effect of errors will rarely merit reversal." *Id.* (citation omitted).

Even if the prosecutor's questions constituted error, those alleged errors, independently or together, did not prejudice Severson. It was undisputed that no one saw a weapon on Tyler, that Tyler's hands were raised when Severson shot him, that Severson did not say anything to Tyler before shooting him, and that both Karina and Severson questioned why Severson shot Tyler, which indicates that at the time, they did not believe Severson needed to utilize deadly force for protection.

CONCLUSION

For the foregoing reasons, this Court should affirm Severson's conviction.

Respectfully submitted this 7th day of November, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,964 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Christine Hutchison
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CERTIFICATE OF SERVICE

I, Christine M. Hutchison, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 11-07-2023:

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