

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0490

SHELBY RAGNER,

Petitioner and Appellee,

v.

STATE OF MONTANA,

Respondent and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Eighteenth Judicial District Court,
Gallatin County, The Honorable Rienne H. McElyea, Presiding

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STATEMENT OF THE ISSUE

Whether the district court erred in granting Shelby Ragner (Ragner) postconviction relief based on his claim that his trial counsel provided ineffective assistance of counsel (IAC) for failing to call a witness at trial when the district court found that Ragner did not identify the witness to trial counsel and overlooked that the testimony from this witness would have conflicted with Ragner's own statements and other evidence presented at trial, making it impossible for Ragner to meet his heavy burden of proving his IAC claim.

STATEMENT OF THE CASE

On May 19, 2019, the State charged Ragner with aggravated sexual intercourse without consent, alleging that Ragner used force while knowingly having sexual intercourse with C.M. without C.M.'s consent. (DC-19-189-B Doc. 4.)¹ On July 1, 2019, attorney Alexander Jacobi (Jacobi) filed a notice of appearance on Ragner's behalf. (*Id.*, Doc. 11.)

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¹ This district court record is part of the record that was transmitted on appeal. The district court took judicial notice of the criminal case record during the postconviction proceeding without objection and in its order at issue on appeal. (4/30/24 Hr'g Tr. at 9-11 [4/30 Tr.]; D.C. Doc. 64, attached as App. A.)

The district court conducted a jury trial on October 20, 2020, through October 23, 2020. (10/20/20-10/23/20 Transcript of Jury Trial [Tr. (1), Tr. (2), Tr. (3)]) The jury found Ragner not guilty of aggravated sexual intercourse without consent, but found him guilty of sexual intercourse without consent. (DC-19-189-B Doc. 99.)

Prior to the sentencing hearing, Jacobi submitted a letter from Ragner's friend Max Weimer (Weimer). (*Id.*, Doc. 110, attached as App. C.) Weimer addressed Ragner's good character and expressed concern that Ragner had not been able to give his account of the events of March 9, 2019. (*Id.*)

Jacobi recommended that the district court defer imposition of Ragner's sentence for 6 years. (DC-19-189-B Doc. 119 at 6.) The court sentenced Ragner to 10 years in prison with 4 years suspended. (*Id.*, Doc. 113.) In its reasoning for the sentence imposed, the district court stated:

[Ragner] was tasked with keeping the women safe. The victim in this case was one of those women and she had too much to drink, so much so that she could not stand on her own while she was waiting outside for a ride and the Defendant had to prop her up against a wall.

Defendant admitted later to an officer investigating this matter that the victim was too drunk to consent. And that should have been the end of the story; it was not. Defendant went to sleep on the couch with the victim even though he had his own room. He claimed that the victim was the aggressor and wanted the sexual activity. *The victim was not capable of consent[.]*

(*Id.*, Doc. 119 at 4; emphasis added.)

The district court also expressed skepticism of Ragner's allegation that C.M. made the false accusation against him to take over his spot in the apartment where he was living:

The Court sat through a trial where the victim had to be cross examined, had to tell her story, where pictures of her naked body were presented to the jury in a public forum in a public setting. It is hard to square that an individual would go through that kind of circumstance just to get an apartment.

(*Id.* at 5.)

Ragner appealed, arguing that the district court: improperly applied Montana's rape shield statute, improperly instructed the jury regarding the mental state applicable to sexual intercourse without consent, and plainly erred in failing to give a specific unanimity instruction. *State v. Ragner*, 2022 MT 211, ¶ 2, 410 Mont. 361, 521 P.3d 29. On October 25, 2022, this Court affirmed Ragner's conviction. *Id.* ¶¶ 44-45.

On May 12, 2023, Ragner filed a petition for postconviction relief, alleging that his trial counsel, Jacobi, provided IAC because he failed to: (1) investigate Ragner's case, thereby failing to call fact and character witnesses; (2) retain an expert witness to rebut the sexual assault examination results; (3) move to suppress Ragner's statements; (4) prepare Ragner for trial or for possibly testifying at trial; and (5) properly inform Ragner of a plea offer. (D.C. Doc. 1.) Ragner filed an

amended petition, adding a claim that the State denied him due process by failing to select his jury pool in the manner proscribed by statute. (D.C. Doc. 34.)

Ragner briefly referenced his friend Weimer in his amended petition, stating:

Over the year, Mr. Ragner told his public defender about his friend Max Weimer, whose home he went to right after Ms. McConnell and Mr. Allred replaced him with [C.M.] as their roommate. Mr. Ragner told Mr. Weimer the details of the night, and how he was being accused of something he did not do. The public defender did not contact Mr. Weimer to get his impressions, nor did he call him as a witness at trial.

(*Id.* at 17.) The amended petition did not allege that Ragner showed Weimer any injuries.

Ragner filed a supporting affidavit. (D.C. Doc. 2, attached as App. D.)

Ragner stated that he had provided Jacobi with photographs of injuries the victim caused him, but Jacobi failed to use them at trial. (App. D at 3:23.) He also claimed that on the night in question he had consumed “a lot of alcohol” and was “in and out of consciousness.” (*Id.* ¶ 21.) Ragner asserted that the victim had grabbed his hand and forced his hand inside of her. (*Id.*) Ragner also alleged that the trial testimony “did reveal [C.M.] *told everyone in the car ride back*” to the apartment that “Shelby was going to fuck me tonight.” (*Id.* 5:43 (emphasis added).)

In Ragner’s affidavit, he *does not* state that he informed Jacobi that the morning after the events in question, he went to Weimer’s house and told him what had happened and showed him physical injuries. (App. D.)

Jacobi filed an affidavit generally addressing and denying Ragner’s allegations. (D.C. Doc. 11, attached as App. F.) The State filed a response to Ragner’s amended petition. (D.C. Doc. 39.) The district court held an evidentiary hearing on April 30, 2024 through May 1, 2024. (4/30 and 5/1 Transcript of Hearing [Tr.])²

On May 15, 2024, the parties submitted proposed findings of fact and conclusions of law. (D.C. Docs. 62-63.) Ragner offered the following findings:

6. While they were waiting for Mr. Allred to arrive, [C.M.] began to shout, “Shelby’s going to fuck me when we get home,” in an exited and happy manner. Mr. Ragner was embarrassed and put his hand over her mouth so the other people outside on the sidewalk could not hear. [C.M.] continued exclaiming this inside the car on the ride home[.]

....

10. What the jury didn’t know was that Mr. Ragner also had bite marks and [hickeys] on his body from C.M. However, law enforcement didn’t bother for several weeks to interrogate him via telephone regarding charges that could result in a one-hundred-year prison sentence. By this time, Mr. Ragner’s bite marks and [hickeys] were healed.

....

13. . . . Mr. Weimer testified *he observed [hickeys] all over* Shelby’s body, as well as bite marks

....

² Each day of the hearing transcript begins anew with page 1, so the State will cite to the transcript by month and day followed by the page number.

15. When defense attorney, Alex Jacobi, testified at the Post Conviction Hearing, he admitted he was aware Shelby had gone to Mr. Weimer’s house just hours after the encounter between Shelby and [C.M.], but did not ever interview or contact Mr. Weimer at all as a potential witness at trial.

....

24. Mr. Jacobi admitted he did not ask Shelby clarifying questions regarding the letter. He did not ask how it was possible for [C.M.] to pull Shelby onto her. Had he done so, he would have learned that [C.M.] was on the floor [in] the living room, and Shelby on the couch, and she pulled his arm to get [him] to engage with her again on the floor, pulling him down onto her.

(D.C. Doc. 62 at 4-7 (emphasis added).)³

On August 6, 2024, the district court entered its Findings of Facts, Conclusions of Law and Order. (Attached as App. A.) In relevant part, the district court found:

9. . . . After a night of drinking, Justin picked up Petitioner, [Ciana] and C.M. and gave them a ride home. Justin was sober and the other three individuals were in varying states of inebriation. On the ride home, C.M. said, “Shelby’s going to fuck me.”

....

11. Detective Ross contacted Petitioner. Petitioner voluntarily spoke with the detective two times shortly after March 9,

³ There is no evidence in the record to support a finding that C.M. was ever on the floor, including Ragner’s own statements. The State will address the inaccuracy of the other proposed findings in the argument section of its brief, and/or how the proposed findings conflict with Ragner’s written statement he provided to his attorney, his interviews with Detective Ross, and his text message to his therapist, as well as other evidence the State presented at trial. There are inaccuracies related to all Ragner’s IAC claims, but the State has only provided examples related to the IAC claim at issue on appeal.

2019. Petitioner admitted to digitally and orally penetrating C.M. Petitioner told the detective that C.M. was too inebriated to consent. Petitioner acknowledged that he likely gave the injuries to C.M.

12. Max Weimer is a friend of Petitioner. Petitioner went to see Mr. Weimer on the morning after the incident. Mr. Weimer described Petitioner's appearance as disheveled and in a state of shock. Petitioner told Mr. Weimer what happened during the preceding evening. Petitioner told Mr. Weimer Petitioner *had bruises all over his body*. Mr. Weimer told Petitioner to document those injuries. Petitioner lifted his sleeve and Mr. Weimer saw a few of the injuries. Mr. Weimer described the injuries as small pock marks, hickeys and bite marks.

....

17. Petitioner sent Mr. Jacobi a written statement of everything he could remember. Petitioner's Post Conviction Relief hearing Exh. A.⁴

(App. A at 3, 5.)

In its legal conclusions, the court recognized that Ragner had not identified Weimer as a witness. (App. A at 13:15.) But the court stated that it was not Ragner's obligation "to recognize the value of a witness." (*Id.*) The district court then concluded:

16. Mr. Weimer could have provided eye witness testimony to the injuries on Petitioner's body the morning after the incident. Mr. Weimer described those injuries as "pock marks, hickeys and bite marks." This witness had direct evidence to challenge the State's allegations that Petitioner was the aggressor. Mr. Jacobi's trial strategy was that CM was the aggressor. This witness had direct evidence to support Mr. Jacobi's trial strategy. Mr. Weimer's observations of Petitioner's body hours after the sexual encounter

⁴ This exhibit is attached as App. E.

were exculpatory. Mr. Jacobi failed to recognize or explore the significance or value of Mr. Weimer's testimony. Mr. Jacobi did not ask his investigator to reach out to Mr. Weimer.

(*Id.* ¶ 16.) The district court concluded that Jacobi's investigation related to Weimer fell below an objective standard of reasonableness. (*Id.* at 14:17.)

The district court finally concluded:

It is obvious the jury rejected Petitioner's behavior as forceful. C.M. stated, "Shelby's going to fuck me" in the car on the ride home from the bars. If the jury had been aware of bite marks on Petitioner's body in conjunction with C.M.'s statement in the car, there is a reasonable probability that the results would have been different. The eyewitness testimony of bite marks on Petitioner's body would serve to challenge the "without consent" element of the offense.

(*Id.* at 14:41 (emphasis added).)⁵ The district court therefore reversed Ragner's conviction for SIWOC and released him from incarceration. (Cause No. DC-19-189-B Doc. 141, attached as App. B.)

The district court considered and rejected Ragner's IAC claims based on Jacobi's failure to call Ragner's therapist at trial and his failure to retain an expert to challenge Dr. Davenport's testimony. (App. A at 12-13:14.) The district court did not address the merits of Ragner's remaining IAC claims. (*Id.* at 14:20.)⁶

⁵ The paragraph numbering of the district court's conclusions of law jumps from 17 to 40-41, then back to 18.

⁶ The district court did, however, make some factual findings related to the undecided IAC claims. For example, the district court found numerous facts related to Ragner's decision not to testify. (App. A at 6:25-26.)

The State appeals the district court's findings, conclusions and orders related to witness Weimer.

STATEMENT OF THE FACTS

I. Criminal case/Cause No. DC-19-189-B

C.M. and Ciana have been friends since high school. (Tr. (1) at 103.) In March 2019, Ciana lived in Bozeman with her boyfriend, Justin, and their roommate, Ragner, who Ciana had known since seventh grade. (*Id.* at 105-07.) Prior to March 2019, Ragner had lived with Ciana and Justin for about six months. About a week before Ciana's 21st birthday, Ragner expressed a romantic interest in her. Ciana told him that she did not feel the same way about him and only wanted to be friends. (*Id.* at 108, 110.)

Ragner had met C.M. a few times. C.M. had no romantic interest in Ragner, but Ragner had confided to Ciana that he found C.M. to be very attractive. (*Id.* at 109-10.) Justin also knew that Ragner thought C.M. was attractive. (Tr. (2) at 98.) Ciana was concerned that Ragner used her friends as a dating pool and once had to confront him after he texted her friend a sexual photograph of himself. (*Id.* at 55.) Ragner responded that he had been drunk when he sent the picture. (*Id.*)

On March 8, 2019, Ciana planned to go out with C.M. to celebrate her recent 21st birthday. Another friend, Marie, joined the celebration. The three women met

at Ciana's house before heading to Bozeman's downtown area. (Tr. (1) at 111-13.) Ciana invited Justin to come with them, but he wanted to stay home, so the group invited Ragner to come along, hoping that would deter other men at the local bars from bothering them. (*Id.* at 112.)

Marie met Ragner for the first time that night. (*Id.* at 65.) Justin, the designated driver, dropped the group downtown at the Rockin' R at about 8:30 p.m. None of them were intoxicated. (*Id.* at 113-14.) The group alternated between the Rockin' R and Bar 9. They consumed some alcohol and danced. (*Id.* at 117-18.) According to Marie, C.M. did not interact with Ragner at all. (*Id.* at 68.)

Ciana recalled that while dancing as a group, Ragner tried to grind on C.M. Ciana could tell that C.M. had no interest in that because she would immediately dance away from Ragner. There was never a time during the evening that C.M. expressed any romantic interest in Ragner. (*Id.* at 118-19.) Marie confirmed that Ragner attempted to dance with C.M., and C.M. very obviously and repeatedly danced away from Ragner. (*Id.* at 73.) C.M.'s body language made it very clear that she was not interested in Ragner. She did not want to sit next to him and did not want to closely interact with him. C.M. made sure she was never alone with Ragner. (*Id.* at 100-01.)

At one point, Marie and Ragner were at the table alone. The two made small talk. Ragner told Marie he loved her. This made Marie uncomfortable, so she let the conversation die to curtail any further interaction with Ragner. (*Id.* at 72.)

Ciana acknowledged that, as the evening wore on, she became drunk, but by the end of the night, C.M. was the most drunk of the group. (*Id.* at 121.) Marie confirmed that C.M. had been very intoxicated. She was slurring her speech and weaving. (*Id.* at 72.) Marie explained that earlier in the evening Ragner had seemed intoxicated, but she thought he stopped drinking around 9:30 p.m. when the group started dancing. Marie's impression was that, by the end of the evening, Ragner was not that intoxicated. (*Id.* at 71.) Marie stopped drinking around 11 p.m. (*Id.*)

Ciana recalled that at closing time, the group waited outside for Justin to pick them up. Ragner began holding on to C.M. At one point, Ragner was holding C.M. around her waist. C.M. clearly did not want to be held by him and shouted for Ragner to let her go while she also called Ciana's name. Ragner covered C.M.'s mouth. (*Id.* at 122.)

Marie recalled that by this time, neither C.M. nor Ciana could walk on their own without falling. Thus, Marie helped Ciana, and Ragner helped C.M. (*Id.* at 76.) Outside of the bar, Ciana attempted to take off down the street, and Marie tended to her. When Marie got Ciana back to Ragner's and C.M.'s location,

Ragner was holding C.M. up against a wall. Ragner had his hands up around C.M.'s face and neck. (*Id.* at 78.) A group of girls approached C.M., asking if she was okay. They asked C.M. if she knew Marie, and if she felt safe going home with her. (*Id.* at 77.)

Ciana recalled Ragner grabbing C.M. from behind, and C.M. elbowing him. She also saw the two females approach and ask C.M. if she was okay. Ciana did not hear C.M.'s answer, but she told the females that they all had a safe ride home. (*Id.* at 123.) Ciana thought that during the car ride home, C.M. was afraid that Ragner was going to try and have sex with her because she shouted, in a scared manner, "Shelby's going to fuck me." (Tr. (2) at 44, 57.) This was not in a flirtatious way but rather "[i]n a scared way." (*Id.* at 57.)

When Justin arrived, Ciana got in the front seat. Ragner, C.M., and Marie rode in the back, with C.M. sitting in the middle. (Tr. (1) at 77.) Justin observed that C.M. was "pretty darn drunk," as was Ciana. Marie and Ragner were less drunk. (Tr. (2) at 104-05.) Marie recalled that on the car ride home, Ciana and C.M., who are fluent in French were speaking to each other in French. (Tr. (1) at 77.) Justin confirmed this. (Tr. (2) at 105.) Marie did not testify to hearing C.M. say, "Shelby's going to fuck me," during the car ride. (Tr. (1) at 63-102.) Justin dropped Marie off at her apartment. (*Id.* at 79.) Marie knew that she got home at 2:30 a.m., because she texted her mom that she was home. (*Id.* at 96.)

When Justin arrived at his and Ciana's home, he helped Ciana inside and Ragner helped C.M. (Tr. (2) at 6.) Once inside, Ciana helped C.M. take off her boots and then C.M. "pretty much immediately faceplanted on the couch." (*Id.* at 7.) C.M. immediately fell asleep. Ciana did not see C.M. move again or hear her say anything. Ciana went to bed. (*Id.* at 8.)

According to Justin, C.M.'s condition deteriorated during the car ride home. (*Id.* at 107.) During the car ride, Justin never heard C.M. say "Shelby is going to fuck me," which he thought he would remember if C.M. had said it. (Trial Tr. (2) at 131-32.) After C.M.'s collapse onto the couch, Justin did not see her move or hear her speak. (*Id.* at 108.) Justin had about a 15-minute conversation with Ragner before going to bed. Ragner was aware and engaged in the conversation. (*Id.* at 141.)

After Justin and Ciana went to their bedroom, Justin came back out to get a bowl to put beside Ciana. He had already done this for C.M. (*Id.* at 109.) Ragner was lying on the couch, perpendicular to C.M., with his shirt off. Justin had never seen Ragner with his shirt off before this incident. Justin could not tell whether Ragner was asleep or awake. (*Id.*)

When Ciana came out to the living room on March 9, 2019, she saw Ragner's underwear on the floor, and the couch cushions were all askew. (*Id.* at 9.)

When Justin got up for work, he also saw socks and men's underwear wedged underneath the edge of the couch. (*Id.* at 115.)

C.M. later remembered the beginning of the evening at Ciana's house, arriving at the Rockin' R, and dancing. She also recalled being outside the bar waiting for Justin to pick them up. (*Id.* at 176.) Ciana and Marie were some distance from C.M. and Ragner, and C.M. remembered yelling for them to come to her. She yelled their names and waved. She recalled that Ragner then put his hand over her mouth and nose. She elaborated:

And at first I was confused. I didn't know why he would do that. And I remember grabbing his hand and trying to loosen his hand from my face and he wouldn't let go. And with his other arm, he was holding my shoulders against his chest. So, I began to cry. I was panicked and I was scared because I knew that that wasn't something normal to do to someone I dropped to my knees to the ground to get out of his grasp and some women approached me who had been walking across the street and asked if I was okay, and I asked them not to leave me alone with him

(*Id.* at 176-77.)

When Ciana and Marie returned to C.M.'s location, she grabbed Ciana by the arm and told her not to leave her alone with Ragner because she was afraid he would try to sleep with her if they were alone. (*Id.* at 178.) C.M. does not remember the car ride home or getting inside Ciana's house. (*Id.* at 179.)

C.M. next remembers waking up on the couch. It was dark outside. Ragner was sitting on her legs as she lay flat on her back. Ragner had his fingers inside of

her vagina. C.M. was confused. (*Id.* at 179.) She later explained, “I was still very drunk at that point and I didn’t know if what was happening was real or not. I was just confused. And I remember looking around and trying to move my arms and feeling like they were just made out of lead and that I couldn’t move them. And then I guess I lost consciousness again.” (*Id.* at 180.) The next thing C.M. remembered was her alarm going off in the morning. She got up. She found her jeans on the floor. She went to the bathroom, put on her jeans and boots, and left for work. (*Id.*)

After arriving at work, C.M. started to notice that she was sore and had sharp pains in her vaginal area. She went to the restroom. When she pulled down her pants, she noticed she had bite marks along her inner thighs. C.M. “felt outside of” herself, “It was like I was looking at someone else’s body. I could see someone’s teeth marks on my legs and I didn’t know how they’d gotten there.” (*Id.* at 183.) C.M. discovered that she had multiple bite marks and bruises from her neck to her knees. (*Id.*) When C.M. saw and felt all the injuries to her body, they made her feel “completely violated.” (*Id.* at 192.)

Ragner sent C.M. a message on Instagram asking her if she was okay. He wanted to make sure she had made it to work safely. (*Id.*) C.M. did not respond to the message.

Ellen Keller Gillies was C.M.'s manager at Café M, a local coffee shop. At 7 a.m. on March 9, 2019, C.M. showed up for her shift. (*Id.* at 146-48.) Ellen immediately noticed something was off with C.M. Typically, C.M. was very positive, bubbly, outgoing, and great with the customers. (*Id.* at 148-49.) Ellen left the shop to run errands. When she returned, C.M. asked her to get C.M.'s shift covered for the following day. This was unusual for C.M. because she was a very good, dependable employee. C.M. confided in Ellen that she had been sexually assaulted. (*Id.* at 150.) Ellen immediately sent C.M. home. C.M. said that she just wanted to be with her mom. (*Id.* at 151.) C.M.'s behavior changed after her disclosure. She was scared to be in the shop alone. She cried and had panic attacks. She called out on her shifts about every other week. It was obvious that C.M. was struggling. (*Id.* 152-53.)

The morning of March 9, 2019, C.M. exchanged some text messages with Ciana. C.M. had started to remember fragments of the previous evening. (*Id.* at 187.) She explained that, by this time, "I knew that I didn't consent. I knew how I felt about [Ragner] sober and that I only thought of him as a friend and not in any romantic way. And I know myself well enough to know that my feelings don't change when I'm drinking like that. I knew that I'd been afraid of him. The last clear memory I have, I knew that I was afraid." (*Id.* at 188-89; State's Ex. 2.)

Ciana received a text from C.M. stating that Ragner had had sex with her while she was blacked out and that she had woken up with a lot of bruises. (*Id.*; State’s Ex. 2.) Ciana texted Ragner, asking if he had had sex with C.M. He responded, “No.” He then amended his response, stating, “Well, it depends on what you define as sex and we did stuff.” (Tr. (2) at 12.) When Ciana texted Ragner, he was in his room. Ciana avoided him for most of the day until she and Justin spoke with him in the evening. (*Id.* at 13.)

Ragner gave Justin three different versions of what had happened. First, Ragner denied it completely. Next, he said he did have sex with C.M. Finally, Ragner claimed that basically C.M. raped him. (*Id.* at 13-14.) Justin and Ciana told Ragner that he needed to move out. (*Id.*)

After C.M. left work on March 9, 2019, she went to her apartment, packed a bag, and headed to Ennis to be with her family. She knew she was not brave enough to go the hospital on her own and needed her family’s support. (*Id.* at 189.)

C.M.’s mother, Sarah, lives in Ennis. She was expecting C.M. to arrive for a visit later in the day on March 9, 2019. Sarah received a text from C.M. in the morning, saying she was on her way. Sarah sent a text back to say she was happy C.M. was arriving earlier than expected. Right after Sarah sent the text, C.M. called. She was really upset and said, “Mom, something happened. I just need to come home.” (*Id.* at 157.)

C.M. was so upset that Sarah told her to pull over and said she would come to her. C.M. responded that she just wanted to get home. When C.M. arrived about 40 minutes later, she was trying not to cry, but when she saw her mom, she started crying. Sarah took C.M. to the hospital in Ennis. Dr. Davenport, a practicing physician and chief of staff at the Madison Valley Medical Center, completed a sexual assault examination of C.M. in the center's emergency room on March 9, 2019. There was no Sexual Assault Nurse Examiner (SANE) available that day. (*Id.* at 65-67.) Two nurses were present during the exam, and the victim advocate was present for most of it. (*Id.* at 67.)

Dr. Davenport knew Sarah because she is a radiology tech at the hospital. Also, C.M. was a pre-med student and she had previously shadowed Dr. Davenport for about two weeks. (*Id.*) C.M. was very quiet throughout the examination. She was calm, but tearful at times. (*Id.* at 71.) She was having trouble swallowing. She had bruising and pain around her left collarbone and the left side of her neck. She had bite marks on her breasts and her inner thighs. She also had pain in her vaginal area. (*Id.* at 72.) Dr. Davenport observed abrasions and scratches on the top and bottom of C.M.'s vagina. She had an abrasion on her cervix and some thin, yellow discharge in her vaginal vault. (*Id.* at 77-78.)

Dr. Davenport photographed all of C.M.'s physical injuries. (*Id.* at 72-73; State's Exs. 5-17.) He opined that the injuries to C.M.'s vagina and cervix were

caused by some sort of forceful penetration. The injuries could have been caused by fingernails and/or fingers. (Tr. (2) at 89.)

Detective Ross of the MSU Police Department interviewed C.M. on March 18, 2019. (*Id.* at 208-10.) Afterward, Detective Ross interviewed Ragner twice. (*Id.* at 231-32; State's Exs. 1A, 1B.) During Ragner's interviews, he claimed he was "pretty drunk" by the end of the evening on March 9, 2019. (Tr. (2) at 247.) Ragner claimed that C.M. had initiated the physical contact between them. He stated he had wanted to say "yes" but felt it was the wrong thing to do. (Tr. (3) at 13-14.) Ragner told Detective Ross that C.M. had been too drunk to consent. (State's Trial Ex. 1A at 25:50-52.) But Ragner also maintained that C.M. not only initiated the sexual contact but basically forced him to subject her to sexual contact. (*Id.* at 38:50-55.)

Ragner told Detective Ross that C.M. bit the inside of his left bicep and told him that she liked that sort of thing. Ragner said this left a "little mark." (*Id.* at 26:30-36.) Ragner admitted that he bit C.M. on her breasts and thighs. (*Id.*) Ragner admitted to performing oral sex on C.M. and inserting his fingers and hand into her vagina, but he claimed C.M. had forced him to do so. (*Id.* at 26:21-23, 38:50-55, 44:45-45:05.) Afterwards, Ragner fell asleep, but awoke to C.M. grabbing his arm and throwing him on top of her on the couch, so he did the same thing again. (*Id.* at 27:22-50.)

Detective Ross asked if it left a mark when C.M. bit his arm. Ragner replied, “It wasn’t super noticeable, but yeah.” (*Id.* at 38:10-11.) Ragner stated that it did not surprise him that he left some “pretty good marks” on C.M. (*Id.* at 38:21-25.)

II. Postconviction case/Cause No. DV-23-478-B

Ragner retained attorney Colin Stephens as an expert to support his IAC claims. Stephens filed a written report, which was admitted at the evidentiary hearing regarding Ragner’s IAC claims. (Pet’r’s Ex. 4.)

Ragner did not testify at the evidentiary hearing. (*See* 4/30-5/1 Tr.) Weimer testified that he and Ragner had been friends since middle school. Weimer grew up in Kalispell but lived in the Bozeman area for a portion of the time that Ragner lived in Bozeman. (4/30 Tr. at 77-78.) Weimer stated that Ragner showed up at his apartment “somewhat early” on March 9, 2019. He was “disheveled” and “sort of not himself.” (*Id.* at 80.) Ragner was not upset, but maybe “in a state of shock.” (*Id.*)

What Weimer could recall from this visit was Ragner telling him that during the previous evening he had been “fading in and out of consciousness” and “There’s a pussy in my face. I guess this is happening[.]” (*Id.* at 81.) Weimer responded that that seemed kind of crazy and told Ragner he “might want to be careful from this point on.” (*Id.*) Weimer said Ragner *told* him he had “bruises all

over his body.” (*Id.*) Weimer told Ragner “to go take pictures of that and document that.” (*Id.*) Weimer had been watching a lot of Law and Order and it “seemed like the right thing to do.” (*Id.* at 83.)

Ragner’s postconviction counsel inquired of Weimer whether he had seen the bruises. Weimer responded, “I recall him lifting up his sleeve and showing me a few of them, yeah.” (*Id.* at 82) Weimer stated the bruises looked like “small pockmarks, you know, hickeys, bite marks.” (*Id.*)

Weimer admitted that he never reached out to Jacobi even though he recalled giving Ragner a ride to and from Jacobi’s office on one occasion for about an hour-long meeting. (*Id.* at 85.) When Ragner’s counsel asked Weimer if he was aware of whether Ragner had told Jacobi about him, Weimer responded, “I wasn’t at that point. I believe he did. He—from my recollection, Shelby tried to get a lot of people and none of us [were] contacted.” (*Id.* at 85.) Weimer stated that “he felt like there was nothing I could do because I wasn’t given an opportunity to.” (*Id.* at 88.)

Weimer was not aware of what Ragner told the investigative detective and whether that was consistent with what Ragner told him. All Weimer’s information came strictly from Ragner. (*Id.* at 90-91.) When asked what information he would have provided if he had been called as a witness at trial, he responded, “I’m not positive.” (*Id.* at 91.) He stated that since it happened five years ago, there was “a

lot I've forgotten." (*Id.*) When pressed, Weimer stated that he would have testified that Ragner "appeared to have experienced a traumatic event the night before, and that he had bruises on his body, and that I told him to take pictures of them." (*Id.* at 93.)

Ragner did not testify at the hearing, so there is no testimony from him that he informed Jacobi of going to Weimer's house and showing him any marks on his body.

Stephens, Ragner's expert, testified that he has been retained as an expert in 10 to 12 postconviction cases to provide his opinion about trial counsel's performance in the underlying criminal cases. He concluded that defense counsel was ineffective in all the cases he reviewed. (*Id.* at 206.) In Ragner's case, Stephens based his opinions regarding Jacobi's performance on the contents of the postconviction petition and supporting documents. (*Id.* at 207.) Stephens did not interview anyone. His review was a paper review. (*Id.* at 256.) Stephens was unaware of what witnesses Jacobi had interviewed in Ragner's criminal case. (*Id.* at 212.) Stephens was unaware that the State had obtained a search warrant for Ragner's cell phone. (*Id.* at 213.) He expressed concerns that Jacobi had thought Ragner was guilty, and believed that Jacobi had said as much in his affidavit. (*Id.* at 215.) Stephens also believed that Jacobi had stated in his affidavit, "I thought he was guilty until maybe the last day," or something along those lines.

(*Id.*)⁷ Jacobi testified at the hearing that he did not believe Ragner was guilty.

(5/1 Tr. at 33.)

When the State inquired of Stephens how he could provide an opinion about the thoroughness of Jacobi’s investigation when he had not reviewed things in the criminal case such as all the discovery, Stephens responded:

That’s fair. That’s—I mean a lot of this is taken from the Petition itself, from, you know, the exhibits that were there. And, frankly, just my knowledge of the poor public defenders who are—who don’t have the luxury that I do as private counsel of not having 300 cases. So, I guess it’s an inference that I draw also based on that.

(4/30 Tr. at 216.)

Ragner’s counsel questioned Stephens about the value of evidence that tended to show Ragner had physical injuries on his body, including hickeys and bite marks, after the events of March 9, 2019, and whether such evidence would dispute the theory that the sexual intercourse was without consent. (*Id.* at 176.)

Stephens answered that it would undermine the validity of the nonconsensual nature of the sexual encounter, but it was not a “silver bullet by any means”

(*Id.*) Stephens further opined that Jacobi should have interviewed Weimer, “based what has since been developed by you.” (*Id.*) Stephens did not review the photographs of C.M.’s injuries. (*Id.* at 220-21.)

⁷ Ragner made this statement in *his* affidavit. (App. D at 6:54.) There is no such statement in Jacobi’s affidavit. (App. F.)

Stephens later opined that Jacobi should have interviewed Weimer, *assuming he knew* that Ragner had gone to visit Weimer. (5/1 Tr. at 189.) Stephens did not know whether Jacobi had this information before the trial. (*Id.* at 200.) In rebuttal, Ragner’s counsel posed the following question to Stephens:

And again, do you believe Max Weimer would’ve been a crucial fact witness for Mr. Ragner having seen the injuries to Mr. Ragner, *the hickeys all over his body and [bite] marks?*

(*Id.* at 207 (emphasis added).)⁸ Stephens responded, “Yeah. And just potentially to Mr. Ragner’s overall emotional state that morning, yeah.” (*Id.* at 207-08.)

Jacobi testified at the evidentiary hearing that he has been practicing law in Montana since 2011 and has been employed with the State Public Defender’s Office the entire time. (*Id.* at 8.) Jacobi filed a notice of appearance that he would be representing Ragner in his criminal case on July 1, 2019. (DC-19-189-B.) Jacobi worked with investigator Glen Farrell (Farrell) to investigate Ragner’s case and develop a defense. (5/1 Tr. at 10-11.) Jacobi communicated with Farrell throughout the case. (*Id.* at 11.)

⁸ Again, this is a mischaracterization of Weimer’s testimony. (4/30 Tr. at 83.) Defense counsel made the mischaracterization a third time during her closing remarks. (“Mr. Weimer was also vital because he testified, Your Honor, that *he observed marks all over Shelby’s body that looked like hickeys.*” (5/1 Tr. at 214 (emphasis added).) Defense counsel then suggested that C.M. and Ragner had the “same kind of markings all over them to show that this would’ve been consensual contact.” (*Id.*)

Jacobi explained he had had trouble accessing any of his notes in Ragner's case because the Office of the Public Defender had switched case management systems, and all hard files had been destroyed. (*Id.* at 22.) Everything in the hard copy files should have been scanned into the new case management system before the hard copy file was destroyed, but it does not appear that this occurred. (*Id.*) Jacobi acknowledged that he was not the best at logging his time into the time log records. When he reviewed the time log for Ragner's case, it did not accurately reflect the time he spent on Ragner's defense. (*Id.* at 24.)

For example, Jacobi did not log any time he spent interviewing witnesses in advance of trial. The time logs reflected that he had spent 40 hours on Ragner's case, but that did not include most of his trial preparation or time spent meeting with Ragner. (*Id.* at 25-26.)

Ragner had provided Jacobi with a list of witnesses to speak with, along with his account of the events on March 9, 2019. (App. E.) Weimer was not included on that list. In Ragner's written statement to Jacobi, he did not claim he had awakened to C.M. straddling his face, as Weimer testified, nor did he disclose that to Detective Ross. (5/1 Tr. at 13-14.) Ragner did not inform Jacobi that he went to Weimer's house on March 9, 2019, and showed him injuries on his body.

(*Id.* at 177.)⁹ When Ragner’s counsel questioned Jacobi about the importance of calling Weimer as a witness at trial, he responded, “Max Weimer coming—first of all, he didn’t provide that information to me.” *Id.*

In Ragner’s written statement to Jacobi describing his version of his encounter with C.M., he stated that C.M. “bit my inner left arm and left *a mark*[,] [w]hich told me that she liked biting and hickeys.” (App. E at 7.) In the same statement, he quoted a text he sent to his therapist on March 10, 2019, where he omitted this detail. (*Id.* at 11.) During Ragner’s statement to Detective Ross, he explained that he:

[made] sure to text my therapist everything, everything I remember. Especially that night while I was trying to sleep, I could not sleep, so everything was playing back in my head. So I text her immediately, that way she could like document it so that way it’s fresh out of my mind and not distorted. And then I get angry because I’m like wait, this isn’t my fault.

(State’s Ex. 1A at 31:03-33.)

In Ragner’s statement to Detective Ross, he said:

And at one point she bites my left arm, the inside of my bicep, and sucks on it and leaves a little mark. And at that point it kind of tells me that she likes that sort of thing, and I kind of do that to the breasts, thighs, and yeah I think that’s it.

⁹ In questioning Jacobi, Ragner’s counsel incorrectly stated that Weimer saw “bruises all over” Ragner. (5/1 Tr. at 177.) Weimer’s testimony was that Ragner lifted his sleeve, and he saw a few marks on his arm. (4/30 Tr. at 82.) He later described the marks as pockmarks, bruises, and/or hickeys. (*Id.*)

(State’s Trial Ex. 1A at 23:30-52.) Detective Ross later asked if C.M. left a mark on his arm. Ragner responded, “It wasn’t super noticeable, but yeah.” (*Id.* at 39:10-11.)

In Jacobi’s affidavit, he explained:

Mr. Ragner provided two photos of his injuries. Ostensibly, the photos showed *a bite mark* on his arm. The photos, included in respondent’s Proposed exhibit A, were in color. There was a slight discoloration that *could be* an injury. Compared to the convincing photos of the complaining witness’ bite injuries, I found the photos Mr. Ragner provided to be unpersuasive. I feared the jury would find the photos showing no injury to Mr. Ragner while highlighting the injuries on the complaining witness to be to Mr. Ragner’s disadvantage.

(App. F at 4.)

SUMMARY OF THE ARGUMENT

The district court misapprehended the effect of Weimer’s purported trial testimony by failing to analyze it considering the trial testimony and evidence as a whole, and incorrectly concluded that Ragner overcame the strong presumption that Jacobi performed within the wide range of reasonably professional assistance when he did not call Weimer as a witness at trial. Ragner did not tell Jacobi that he went to Weimer’s house the morning after he raped C.M. and showed Weimer injuries. There was no reason for Jacobi to know of Weimer’s existence. Even if

Jacobi had known this information, he would not have performed deficiently by choosing not to call Weimer to testify at trial, considering the other evidence.

The district court further erred in concluding that there was a reasonable probability of a different outcome if Weimer had testified at Ragner's trial because the district court did not evaluate Weimer's proposed testimony when considering the other evidence presented at trial, including that C.M. was too drunk to consent to sexual intercourse and Ragner's statement to Detective Ross that C.M. had left a small mark on his arm that was barely visible.

ARGUMENT

I. The standard of review

This Court reviews a district court's grant or denial of postconviction relief to determine whether the factual findings are clearly erroneous and whether its legal conclusions are correct. *Garding v. State*, 2020 MT 163, ¶ 12, 400 Mont. 296, 466 P.3d 501, citing *Rose v. State*, 2013 MT 161, ¶ 15, 370 Mont. 398, 304 P.3d 387. A finding of fact is clearly erroneous if "it is not supported by substantial evidence, the court has misapprehended the effect of the evidence," or this Court's review of the record convinces it that "[a] mistake has been committed." *State v. Passwater*, 2015 MT 159, ¶ 9, 379 Mont. 372, 350 P.3d 382, quoting *State v. Arago*, 2014 MT 89, ¶ 9, 379 Mont. 391, 321 P.3d 841. Ineffective assistance of

counsel claims are mixed questions of law and fact, which this Court reviews de novo. *Id.*

II. The district court erred in granting Ragner relief on his IAC claim based on Jacobi not calling Weimer as a trial witness, when Ragner failed to meet his heavy burden of proving either deficient performance or prejudice.

A. Introduction

This Court analyzes IAC claims under the two-pronged test the United States Supreme Court established in *Strickland v. Washington*, 466 U.S. 668 (1984). *Garding*, ¶ 15, citing *Whitlow v. State*, 2008 MT 140, ¶ 10, 343 Mont. 90, 183 P.3d 861. In the district court, it was Ragner’s burden to prove that (1) Jacobi’s performance was deficient, and (2) Jacobi’s deficient performance prejudiced the defense. *Id.*, citing *Whitlow*, ¶ 11.

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.” *Whitlow*, ¶ 15, quoting *Strickland*, 466 U.S. at 689. To overcome this presumption, a defendant must “identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment.” *Whitlow*, ¶ 16, quoting *Strickland*, 466 U.S. at 690. This Court then determines whether, “in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent

assistance.” *Id.* This Court makes every effort “to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct . . . and to evaluate the conduct from counsel’s perspective at the time.” *Whitlow*, ¶ 15, quoting *Strickland*, 466 U.S. at 689.

The focus of this Court’s analysis under the prejudice prong of *Strickland* is whether counsel’s deficient performance renders the trial result unreliable or the proceedings fundamentally unfair. *State v. Miner*, 2012 MT 20, ¶ 12, 364 Mont. 1, 271 P.3d 56. To establish prejudice in the district court, Ragner had to prove that, but for Jacobi’s failure to call Weimer at trial, a reasonable probability exists that the result of the proceeding would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceedings. *Id.*

B. The district court misapprehended the effect of the evidence Ragner presented at the evidentiary hearing and incorrectly concluded that Ragner met his burden of proving Jacobi performed deficiently by failing to call Weimer as a witness at trial.

The district court correctly found that Ragner did not identify Weimer as a witness for Jacobi, even though he provided names of other witnesses, including his therapist, Julie Frederick, and the exact text he sent to her the day after he raped C.M. (*See App. E.*) The district court failed to appreciate that without Ragner telling Jacobi about Weimer *before the trial*, there was no conceivable reason

Jacobi would have known of Weimer or what possible testimony he could offer. The district court assumed that Ragner mentioned Weimer to Jacobi *before* trial, but there was no testimony presented to support this assumption. Jacobi could not remember when he became aware of Weimer, but knew he had submitted a letter to the district court from Weimer prior to sentencing. Ragner chose not to testify at the evidentiary hearing.

Importantly, Weimer was not out with Ragner, C.M., Ciana, and Marie on the evening in question, so he had no firsthand knowledge of what occurred. Weimer did not observe C.M. avoiding any close contact with Ragner during the group's evening out. Weimer had no idea of Ragner's or C.M.'s intoxication levels. Weimer did not observe that by the end of the evening C.M. was so drunk she could not walk on her own. He did not watch C.M. face-plant onto the couch and immediately pass out upon returning to Ciana's and Justin's apartment. Weimer did not know that Ragner admitted to Detective Ross that C.M. was too drunk to consent. Weimer did not see the bruises all over C.M.'s body.

Jacobi clearly knew of Weimer prior to the sentencing hearing because he filed a letter from Weimer in support of Ragner. (App. C.) The letter was Weimer's opinion of Ragner's character and his personal belief that Ragner was innocent but was never allowed to tell his side of the story at trial. Notably, like Ragner's written statement to Jacobi and his postconviction affidavit, Weimer's letter says

nothing about Ragner going to Weimer's house the morning of March 9, 2019, and *telling Weimer* that he had bruises all over his body or that Weimer only saw marks on Ragner's arm.

The postconviction record does not establish when Jacobi learned of Weimer's identity as one of Ragner's friends, but it does establish that Jacobi thought of Weimer as another character witness. Jacobi testified that he knew Ragner had spoken with Weimer, but Jacobi did not state that he knew Ragner had spoken with Weimer just hours after his sexual contact with C.M. and there are no facts in the record to support a finding that Jacobi had this knowledge.

Importantly, Jacobi testified at the evidentiary hearing that Ragner never disclosed to him that he went to Weimer's house and showed him marks on his arm. Jacobi's testimony in this regard is consistent with Ragner not including this detail in his lengthy text message to his therapist meant to contemporaneously document everything. Ragner also did not include this information in his written description of events that he provided Jacobi or in his affidavit supporting his postconviction petition. If Weimer was such a critical witness, as Ragner now claims, and Ragner painstakingly provided so many other details, this is a glaring omission.

Ragner's own expert, Stephens, testified that Weimer's testimony was "no silver bullet by any means." (4/30 Tr. at 176.) Stephens opined that Jacobi should have called Weimer as a trial witness if he had known about Weimer before trial.

But, even if Jacobi knew of Weimer before trial and knew that Ragner went to Weimer's house on March 9, 2019, and showed Weimer some marks on his arm, Jacobi still would not have performed deficiently by not calling Weimer as a witness at trial for the following reasons.

First, despite Ragner's repeated claims that Weimer saw bruises all over Ragner's body, Weimer testified that what he *saw* was a few marks on Ragner's arm that he described as pockmarks, hickeys, or bruises. If Weimer would have provided this testimony at trial, it would have conflicted with Ragner's own statement to Detective Ross, that C.M. bit his upper left bicep and left a small mark that was barely noticeable. Ragner's statement to Detective Ross is corroborated by the photograph Ragner took of his arm and provided to Jacobi.

Second, Jacobi explained that the photograph depicted a slight discoloration that *could* have been an injury. But Jacobi strategically concluded this photograph was not persuasive for Ragner's defense, especially considering the photographs depicting the injuries C.M. had on her neck, breasts, inner thighs, and other parts of her body, and the injuries to her vaginal area.

Third, the evidence presented at trial overwhelmingly established that C.M. was passed out drunk and was incapable of consenting to anything. Ragner admitted this to Detective Ross. Even assuming C.M. bit Ragner's arm either during nonconsensual sexual intercourse or while struggling with Ragner outside the Rockin' R while Ragner had his hand over her mouth and nose, C.M. was still too intoxicated to consent to a sexual encounter with Ragner, let alone initiate it.

Finally, Jacobi had no legal basis to suppress Weimer's statement to Detective Ross, so he had to prepare for trial knowing that the jury would hear Ragner's statements. Jacobi certainly did not want to give the State more ammunition against Ragner by calling a witness who would provide testimony that conflicted with Ragner's own statement. As this Court has recognized, *Strickland* instructs courts evaluating IAC claims to "keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *State v. Dineen*, 2020 MT 193, ¶ 23, 400 Mont. 461, 469 P.3d 122, quoting *Strickland*, 466 U.S. at 690.

The district court misapprehended the value Weimer's testimony would have had at trial and did not consider such testimony along with all the trial testimony and evidence when it concluded that Ragner overcame the strong presumption that Jacobi performed within professional norms when he did not call Weimer as a witness at trial.

Ragner contributed to the district court’s misapprehension of the facts by repeatedly overstating what Weimer could have testified about at trial. For example, at the conclusion of the evidentiary hearing, Ragner’s counsel stated, “Mr. Weimer was also vital because he testified, Your Honor, that *he observed marks all over Shelby’s body that looked like hickeys.*” (5/1 Tr. at 214 (emphasis added).) Ragner’s counsel told the district court that C.M. and Ragner had the “same kind of markings all over them to show that this would’ve been consensual contact.” (*Id.*) Ragner repeated this misstatement of Weimer’s testimony in his proposed factual findings. (“ . . . Mr. Weimer testified *he observed [hickeys] all over Shelby’s body, as well as bite marks.*”) (D.C. Doc. 62 at 5:13.) And Jacobi did not testify, as Ragner claimed in his proposed findings, that “he was aware Shelby had gone to Mr. Weimer’s house just hours after the encounter between Shelby and [C.M.]” (*Id.* ¶ 15.)

But, even if this Court agrees with the district court’s conclusion that Jacobi performed deficiently by not calling a witness at trial whom Ragner had not identified as a trial witness with relevant testimony, the district court erred in concluding that Ragner met his heavy burden of proving that he was prejudiced by Jacobi’s failure to call Weimer as a trial witness.

C. The district court misapprehended the effect of the evidence and incorrectly concluded that Ragner met his burden of proving he was prejudiced by Jacobi's failure to call Weimer as a witness at trial.

To prove prejudice, this Court has explained, "A defendant must do more than just show that the alleged errors of a trial counsel 'had some conceivable effect on the outcome of the proceeding.'" *Dineen*, ¶ 25, quoting *State v. Peart*, 2012 MT 274, ¶ 23, 367 Mont. 153, 290 P.3d 706. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Cheetham v. State*, 2019 MT 290, ¶ 9, 398 Mont. 131, 454 P.3d 673, quoting *Strickland*, 466 U.S. at 686.

The district court here incorrectly concluded that if the jury had heard testimony from Weimer about the "bite marks" on Ragner's body in conjunction with C.M.'s statement during the car ride home, that "Shelby's going to fuck me," there was a reasonable probability of a different outcome because this would "serve to challenge" the without consent element. (App. A at 14:41.)

No one testified at the evidentiary hearing about C.M. stating "Shelby's going to fuck me." Yet, in Ragner's proposed findings, he claimed that C.M. was shouting "Shelby's going to fuck me when we get home" in an "excited and happy manner." (D.C. Doc. 62 at 4:6.) There is no testimony from the postconviction hearing that supports this finding.

During the trial, the jury heard Ragner's statement to Detective Ross that C.M. repeatedly made this statement during the car ride home. (State's Trial Ex. 1A.) But Justin, who was the designated driver and sober, testified that he did not hear C.M. make this statement and he would have heard it if she had done so. Marie, a passenger in the car, who had stopped drinking earlier in the evening, did not testify that C.M. made such a statement. Ciana, who by all accounts was very drunk, testified that C.M. made such a statement but it was a fearful statement not a flirtatious statement.

Ciana's testimony that C.M. was scared when she made this statement, whether inside or outside of the car, is supported by the testimony concerning Ragner tightly holding C.M. against his shoulders with his hand over her mouth and nose, C.M.'s testimony that this frightened her, and C.M.'s, Marie's, and Ciana's testimony that two young women stopped out of concern for C.M.'s safety. C.M.'s last memory of the evening was of being afraid of Ragner.

If Weimer had testified at trial, the most he could have offered, based on his testimony at the evidentiary hearing, was that Ragner came to his house disheveled and almost in a state of shock, and that Ragner showed him a few marks on his arm that Weimer told him to photograph. The value of this proposed testimony must be evaluated by considering all the testimony presented at trial.

For example, Ciana and Justin both testified that Ragner was interested in C.M., but C.M. had no interest in him. Ragner, who claims to have nothing but respect for women, had sent a picture of his penis to one of Ciana's friends in the past. When Ciana confronted Ragner, he said he had been drunk.

On the evening that the group went out, it was apparent to both Ciana and Marie that C.M. kept her distance from Ragner. Marie stopped drinking long before the bars closed, so she had sobered up by closing time. Marie testified that Ragner also sobered up by the end of the evening, despite his assertion in his statement to Jacobi that he was in and out of consciousness.

No one disputed that C.M. was so intoxicated by the end of the evening that she could not walk on her own. Justin testified that she was the drunkest member of the group. Justin and Ciana testified that when they got back to their apartment and helped C.M. take off her boots, she immediately passed out on the couch. Justin, on the other hand, had a 15-minute conversation with Ragner during which Ragner was aware and engaged.

This trial testimony contradicts the assertions Ragner made to Detective Ross that C.M. forced him to engage in sexual intercourse when he was in and out of consciousness. And, importantly, Ragner told Detective Ross, presumably to explain why C.M. had bruising and bite marks on various parts of her body, that she bit him on his left bicep, leaving a small mark, which Ragner claimed indicated

that C.M. liked that kind of thing. Ragner later clarified that the mark C.M. left was hardly visible.

Ragner also admitted that C.M. was too drunk to consent. Yet he still chose to remain on the couch rather than going to his own bedroom.

Even if C.M. bit Ragner's arm and left a small mark, that has no bearing on whether she consented to sexual intercourse or was even capable of consenting. It is just as likely that C.M. was trying to fight off Ragner's attack on her body. C.M. remembered being afraid when Ragner had pinned her into him with his hand over her nose and mouth. That was one of the last things C.M. could remember.

The district court considered Weimer's proposed trial testimony in isolation and erred in concluding that with Weimer's testimony there was a reasonable probability of a different outcome.

///

CONCLUSION

The State respectfully requests that this Court reverse the order of the district court granting Ragner postconviction relief on his IAC claim concerning Weimer's testimony and reinstate Ragner's conviction for sexual intercourse without consent.

Respectfully submitted this 7th day of November, 2024.

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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 9,849 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 24-0490

SHELBY RAGNER,

Petitioner and Appellee,

v.

STATE OF MONTANA,

Respondent and Appellant.

APPENDICES

8/6/24 Findings of Facts, Conclusions of Law and Order.....	Appendix A
8/7/24 Order for Release From Prison	Appendix B
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List of witnesses to speak with, along with Ragner’s account of the events on March 9, 2019	Appendix E
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CERTIFICATE OF SERVICE

I, Tammy K Plubell, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 11-07-2024:

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