IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0604

STATE OF MONTANA,

Plaintiff and Appellee,

v.

BOBBY FRANCIS LOWRY,

Defendant and Appellant.

# APPELLANT'S PRINCIPAL BRIEF

On Appeal from the Montana First Judicial District Court of Lewis and Clark County, the Honorable Michael F. McMahon, Presiding

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### United States Supreme Court Cases



### Ninth Circuit Court of Appeals Cases



### Montana Supreme Court Cases

**Montana Constitution**



**United States Constitution**



**Rules**

## STATEMENT OF THE ISSUES

Issue I: The right to a fair and impartial trial precludes prosecutors from injecting their opinions and beliefs into a jury trial, especially concerning a defendant's guilt or innocence. On two separate occasions during closing argument, the prosecutor told the jury she believed Lowry had committed the charged offenses. Do these unobjected-to expressions of Lowry's guilt warrant this Court's invocation of plain error review to grant him a new trial?

Issue II: Did Lowry's trial attorney render constitutionally ineffective assistance by failing to: (1) object to the prosecutor's improper expressions of Lowry's guilt; (2) object to the admission of a highly prejudicial video that lacked authentication; (3) object to a State witness testifying about the substance of the video despite having no admissible personal knowledge thereof; and (4) raise the issue of Lowry being seen in handcuffs by potential jurors in time to interview the jurors.

## STATEMENT OF THE CASE

The State charged Defendant/Appellant Bobby Lowry by Information with one count of Aggravated Assault in the First Judicial District Court of Lewis and Clark County (hereinafter "trial court" or "district court"). (D.C. Doc. 4.) The State later filed an Amended Information adding an alternative count of Accountability for Aggravated Assault. (D.C. Doc. 39.) The jury found Lowry not guilty of Aggravated Assault and guilty of Accountability for Aggravated Assault. (D.C. Doc. 108.) The district court accordingly entered a Judgment and Commitment. (D.C. Doc. 159.)

After trial, Lowry's trial counsel moved for a mistrial based on potential jurors seeing Lowry in handcuffs. (D.C. Doc. 122.) After a hearing in which Lowry presented evidence, the motion was denied. (D.C. Doc. 156; *see generally* Aug. 9, 2023 Hr'g Tr.)

## STATEMENT OF THE FACTS

Leading up to Lowry's jury trial, Kaleb Verley, Garret Hamilton, and Wesley Rhodes all pleaded guilty to Aggravated Assault (or accountability therefor) after assaulting S.H. in his cell at the Lewis and Clark County Detention Center (hereinafter "jail"). (Trial Tr. 258:7–261:19, 325:20–326:23, 337:15–338:16.) Each of these men were compelled to testify at Lowry's trial under a grant of use immunity, and each had wildly conflicting accounts of what happened.

Verley testified: (1) he alone assaulted S.H.; (2) no one assisted him assault S.H.; (3) there was no plan to assault S.H.; and (4) Lowry did not hit S.H. (Trial Tr. 259:15–261:7.) Hamilton testified: (1) there was no plan to assault S.H.; (2) he did not remember Lowry being present when S.H. was assaulted; and (3) he did not see Lowry hit anyone. (Trial Tr. 326:24–327:15.) Rhodes testified: (1) there was a plan to assault S.H.; and (2) he did not see Lowry hit anyone. (Trial Tr. 338:17–339:16, 342:2–4.) Lowry testified in his own defense that (1) he did not hit or touch S.H. in any way; and (2) he did not participate in any plan to assault S.H. (Trial Tr. 355:22–357:7.)

Generally, S.H. testified that his memory of the event was impaired due to the nature and severity of his injuries. (Trial Tr. 304:18–306:16.) More specifically, he could clearly remember details from before being knocked unconscious—such as Verley and Rhodes hitting him—but he (understandably) had difficulties remembering details after being knocked unconscious. (Trial Tr. 314:3–16.) While S.H. testified that he regained consciousness under his bed and was repeatedly kicked, he could not "specifically say that his foot was at this end or that end like I said or where" or any specifics at all regarding who may have kicked him when or how. (Trial Tr. 305:15–20, 314:11–318:15.) Indeed, S.H. was under a bed and all the men in the jail were wearing orange pants and shoes, of course he would not know who exactly was kicking him. (Trial Tr. 317:20–

318:15.) Nevertheless, and although he could not say when or how Lowry hit him with any specificity, he testified Lowry "attacked" him. (Trial Tr. 317:7–19.)

One video from a camera positioned above and across the room from S.H.'s cell was admitted into evidence. (Ex. 3.) The video was admitted without objection through the State's witness, Officer Zachary Blair. (Trial Tr. 224:9–225:17.) However, Officer Blair did not testify to any personal knowledge of what as depicted by the video, i.e. he was not present during the assault, nor was he the one who recorded the video. (*See* Trial Tr. 219:10–238:3, 243:7–251:3.) Rather, Officer Blair simply obtained and watched the video as part of his investigation into the assault. (Trial Tr. 224:9–11.) In other words, proper foundation/authentication was not laid for admission of the video. Nevertheless, Officer Blair went on—without objection from trial counsel—to state opinions, speculate, and characterize the video in highly prejudicial fashion to Lowry. (Trial Tr. 227:21–238:1.)

The video speaks for itself and generally shows Verley, Hamilton, Rhodes, and Lowry enter S.H.'s cell, Lowry leave the cell, re-enter, and then leave again, the other three men leave, and finally S.H. leaves the cell. (*See generally* Ex. 3.) Importantly for the purposes of this appeal, the video did not show the assault itself or who participated in it, nor did it show the men forming a plan to assault S.H. as the State alleged.

The jury accordingly was tasked with sorting through the five witnesses' wildly conflicting accounts of what happened without much more than a blurry video to help them. Instead of letting the jury decide the case based on the evidence, the prosecutor decided to twice tell the jury her own opinion of Lowry's guilt. Specifically, the prosecutor stated in the middle of closing argument, "the State believes that Bobby Lowry either committed the offense personally against [S.H.] or, at the very least, he aided and abetted others in committing this beatdown against [S.H.]." (Trial. Tr. 394:4–7.) At the end of her closing, she said:

> But what the State would tell you is this: We didn't charge Mr. Lowry because he was there, we charged Mr. Lowry because, upon review of the evidence, the State firmly believes that Mr. Lowry, number one, knew what was going on, and, number two, made every attempt he could to assist it, or, in the alternative, that, number three, as [S.H.] testified, Mr. Lowry assaulted [S.H.] himself.

(Trial Tr. 400:8–16.) Defense counsel did not object, and the jury convicted Lowry of Accountability for Aggravated Assault. (D.C. Doc. 108.)

## STANDARD OF REVIEW

"This Court generally will not address issues of prosecutorial misconduct pertaining to a prosecutor's statements not objected to at trial. We may review such an issue, however, under the plain error doctrine." *State v. Ugalde*, 2013 MT 308, ¶ 27, 372 Mont. 234, 311 P.3d 772 (internal citations and quotation marks omitted). Plain error review is warranted if the appealing party: "(1) demonstrate[s] the claimed error implicates a fundamental right and (2) firmly convince[s] this Court

that failure to review would result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial proceedings, or compromise the integrity of the judicial process." *State v. Williams*, 2015 MT 247, ¶ 16, 380 Mont. 445, 358 P.3d 130 (quoting *State v. Carnes*, 2015 MT 101, ¶ 13, 378 Mont. 482, 346 P.3d 1120). This Court's power to invoke plain error review "is inherent in the appellate process itself." *State v. Finley*, 276 Mont. 126, 134, 915 P.2d 208, 213 (1996), *overruled in part on unrelated grounds by State v. Gallagher,* 2001 MT 39, ¶ 21, 304 Mont. 215, 19 P.3d 817.

"Only record-based ineffective assistance of counsel claims are considered on direct appeal. . . . To the extent such claims are reviewable, they present mixed questions of law and fact" subject to de novo review. *Ugalde*, ¶ 28 (citations and internal quotation marks omitted).

## SUMMARY OF THE ARGUMENT

This Court has clearly and repeatedly warned prosecutors not to express their personal opinions of a defendant's guilt or risk reversal for violating a defendant's right to a fair and impartial trial. The prosecutor here chose to ignore these clear warnings and twice told the jury in closing she believed Lowry committed the charged offenses. The prosecutor's improper remarks leave unsettled the fundamental fairness of Lowry's trial because there is a reasonable

likelihood the jury's deliberations were tainted by the weight of the prosecutor's irrelevant, inadmissible, and prejudicial remarks.

Lowry was constitutionally entitled to effective assistance of counsel. However, his trial counsel's performance was deficient because, without objection, she permitted a highly prejudicial video to be admitted without authentication, a State witness without personal knowledge to testify as to his opinions of the video's contents, the prosecutor to offer her improper opinion on Lowry's guilt during closing, and the jurors to be excused before seeking examination of the effect of viewing Lowry in handcuffs. Combined, these four omissions prejudiced Lowry's right to a fair trial on only admissible evidence.

## ARGUMENT

### I. The prosecutor's two improper expressions of Lowry's guilt justify plain error review because they constitute prosecutorial misconduct, left unsettled the fundamental fairness of Lowry's trial, and denied Lowry the right to a fair trial.

The right to a fair and impartial jury, as guaranteed by Article II, Section 24, of the Montana Constitution and the Sixth Amendment to the United States Constitution, is a fundamental right. *State v. Lawrence*, 2016 MT 346, ¶ 17, 386 Mont. 86, 385 P.3d 968. As the Supreme Court of the United States explained in *Holbrook v. Flynn*:

> Central to the right to a fair trial, guaranteed by the Sixth and Fourteenth Amendments, is the principle that "one accused of a crime is entitled to have his guilt or innocence determined solely on the

> basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at a trial."

475 U.S. 560, 567, 106 S. Ct. 1340, 1345, 89 L. Ed. 2d 525 (1986) (quoting *Taylor v. Kentucky*, 436 U.S. 478, 485, 98 S. Ct. 1930, 1934, 56 L. Ed. 2d 468 (1978)). Prosecutorial misconduct—such as injecting a prosecutor's irrelevant and inadmissible suspicions into closing argument—is an appropriate basis to invoke plain error review. *State v. Hayden*, 2008 MT 274, ¶ 30, 345 Mont. 252, 190 P.3d 1091; *State v. Lehrkamp*, 2017 MT 203, ¶ 20, 388 Mont. 295, 400 P.3d 697. "Prosecutorial misconduct 'may be grounds for reversing a conviction and granting a new trial if the conduct deprives the defendant of a fair and impartial trial.'" *State v. French*, 2018 MT 289, ¶ 21, 393 Mont. 364, 431 P.3d 332 (quoting *Hayden*, ¶ 27).

**a. The prosecutor telling the jury that she believes Lowry committed the charged offense was blatantly improper.**

"A prosecutor may not comment about the guilt of an accused[.]" *French*, ¶ 21. This Court has set forth at length the reasons why a prosecutor's comments about the guilt of the defendant are improper, including:

> (1) a prosector's [sic] expression of guilt invades the province of the jury and is an usurpation of its function to declare the guilt or innocence of an accused; (2) the jury may simply adopt the prosecutor's views instead of exercising their own independent judgment as to the conclusions to be drawn from the testimony; and (3) the prosecutor's personal views inject into the case irrelevant and inadmissible matters or a fact not legally proved by the evidence, and

> add to the probative force of the testimony adduced at the trial the weight of the prosecutors' personal, professional, or official influence.

*State v. Stringer*, 271 Mont. 367, 381, 897 P.2d 1063, 1071–72 (1995); *see also State v. Musgrove*, 178 Mont. 162, 172, 582 P.2d 1246, 1252 (1978). Indeed, "the United States Supreme Court has rightly observed that a prosecutor's improper suggestions and assertions to a jury are 'apt to carry much weight against the accused when they should properly carry none.'" *Lawrence*, ¶ 20 (quoting *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 39 L. Ed. 1315 (1935)).

In *Musgrove*, the prosecutor remarked during closing argument:

> We told you that we were going to give you every shred of evidence that we had, whether it was good or bad because we were convinced that all the evidence would convince you beyond a reasonable doubt the defendant was responsible for the death of John Linker.
>
> Now, we have kept our bargain. And after hearing all this testimony, I'm convinced that Musgrove is a liar and he is responsible.

178 Mont. at 171, 582 P.2d at 1252. This Court found that while the first part of the argument was proper, in the second part "the prosecutor is expressing his personal opinion as to the guilt or innocence of the accused and it is therefore highly improper." *Musgrove*, 178 Mont. at 172, 582 P.2d at 1252. The Court reversed for other reasons and did not conduct the prejudice analysis. *Musgrove*, 178 Mont. at 172, 582 P.2d at 1252.

In *Stringer*, the prosecutor made several improper remarks during closing, including "Mr. Stringer is the defendant. He's is one [sic] that's charged. He's the

one that committed the crimes. I have a strong belief in this case that these crimes were committed." 271 Mont. at 380, 897 P.2d at 1077. This Court reversed based on, *inter alia*, the prosecutor's improper remarks. *Stringer*, 271 Mont. at 384, 897 P.2d at 1073.

In *French*, the prosecutor stated in rebuttal closing: "Yeah, we tried him once, we convicted him, and he appealed up here. That's why we're up here for a second [trial]." *French*, ¶ 19. Defense counsel did not object. *French*, ¶ 19. On appeal, the State conceded that the prosecutor's remark "implicated the fundamental fairness of the proceedings", and this Court reversed and remanded for a new trial under plain error review. *French*, ¶ 22.

Here, during closing argument, the prosecutor twice told the jury her irrelevant opinion that, in essence, Lowry was guilty:

- "the State believes that Bobby Lowry either committed the offense personally against [S.H.] or, at the very least, he aided and abetted others in committing this beatdown against [S.H.]." (Trial. Tr. 394:4–7.)
- "But what the State would tell you is this: We didn't charge Mr. Lowry because he was there, we charged Mr. Lowry because, upon review of the evidence, the State firmly believes that Mr. Lowry, number one, knew what was going on, and, number two, made every attempt he could to

assist it, or, in the alternative, that, number three, as [S.H.] testified, Mr. Lowry assaulted [S.H.] himself." (Trial Tr. 400:8–16.)

Just like the prosecutor in *Musgrove* saying "I'm convinced that Musgrove . . . is responsible." and the prosecutor in *Stringe*r saying "He's the one that committed the crimes", here the prosecutor's comments that she believed Lowry committed the charged offenses were undeniably improper and implicated Lowry's right to a fair and impartial trial. The only question for this Court to resolve is whether these comments leave "unsettled the question of the fundamental fairness of the trial proceedings[.]" *French*, ¶ 8.

**b. The prosecutor's improper remarks prejudiced Lowry, leaving unsettled the question of whether he received a fair and impartial trial.**

The jury in this case was confronted with completely contradictory testimony from the several people who were present at the assault of S.H. Verley testified: (1) he alone assaulted S.H.; (2) no one assisted him assault S.H.; (3) there was no plan to assault S.H.; and (4) Lowry did not hit S.H. (Trial Tr. 259:15–261:7.) Hamilton testified: (1) there was no plan to assault S.H.; (2) he did not remember Lowry being present when S.H. was assaulted; and (3) he did not see Lowry hit anyone. (Trial Tr. 326:24–327:15.) Rhodes testified: (1) there was a plan to assault S.H.; and (2) he did not see Lowry hit anyone. (Trial Tr. 338:17–339:16, 342:2–4.) S.H. testified that Lowry "attacked" him but was unable to give any

specifics of how or when. (Trial Tr. 314:11–320:17.) Lowry testified: (1) he did not hit or touch S.H. in any way; and (2) he did not participate in any plan to assault S.H. (Trial Tr. 355:22–357:7.) Moreover, the video did not show the meeting where the State alleged the plan to assault S.H. was formed, nor did it show the assault of S.H. itself. As such, the jury's task was to decide from the conflicting testimony and the video evidence whether Lowry actively participated in the assault as alleged by the State or whether Lowry was merely in the vicinity of the assault as argued by the defense.

Instead of letting the jury decide from the evidence it was presented who and what to believe, the prosecutor essentially testified that she "believes that Bobby Lowry [] committed the offense" and that she "firmly believes that Mr. Lowry, number one, knew what was going on, and, number two, made every attempt he could to assist it, or, in the alternative, that, number three, as [S.H.] testified, Mr. Lowry assaulted [S.H.] himself." (Trial Tr. 394:4–7, 400:8–16.) The second improper remark was at the very end of the State's closing. *See State v. Dannels*, 226 Mont. 80, 93, 734 P.2d 188, 197 (1987) (stating "Misconduct implies that there was some knowing, bad faith scheme or action by a prosecutor for the purpose of gaining an unfair advantage over the defendant."). Both the substance and the timing of the prosecutor's improper remarks were designed to, and indeed did, invade the province of the jury by adding the weight of the prosecutor's

personal, professional, and official influence. This leaves unsettled the question of whether the jury simply adopted the prosecutor's inadmissible opinion or was otherwise overly influenced in their deliberations thereby. As such, the fundamental fairness of Lowry's trial is in question; this Court should accordingly invoke plain error review, reverse his Accountability for Aggravated Assault conviction, and grant him a new trial free from the State's improper influence on the jury.

## II. Trial counsel's several instances of ineffective assistance of counsel prejudiced Lowry.

"The right to effective assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution, as incorporated through the Fourteenth Amendment, and by Article II, Section 24 of the Montana Constitution." *State v. Kougl*, 2004 MT 243, ¶ 11, 323 Mont. 6, 97 P.3d 1095. This Court analyzes ineffective assistance of counsel ("IAC") claims using the two-pronged test from *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Kougl*, ¶ 11. "The defendant must demonstrate that (1) counsel's performance was deficient or fell below an objective standard of reasonableness, . . . and (2) establish prejudice by demonstrating that there was a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Kougl*, ¶ 11 (internal citations and quotation marks omitted).

Many IAC claims on direct appeal are not reviewable because the record does not reveal the "why" for counsel's decision, thus leaving the Court with no basis to overcome the strong presumption that counsel's decisions were within the broad range of appropriate trial tactics. *Kougl*, ¶¶ 14–17. "Only when the record will fully explain why counsel took, or failed to take, action in providing a defense for the accused may this Court review the matter on direct appeal." *State v. White*, 2001 MT 149, ¶ 20, 306 Mont. 58, 30 P.3d 340. However, if counsel is faced with an obligatory action or there is "no plausible justification" for counsel's action, then "whether the reasons for defense counsel's actions are found in the record or not is irrelevant." *Kougl*, ¶ 15. Rather, the inquiry is whether any legitimate reason for counsel's decision exists. *Kougl*, ¶ 15.

**a. Trial counsel's performance was deficient for failing to object to the prosecutor's several improper expressions of Lowry's guilt.**

"Generally, an alleged failure to object . . . to prosecutorial misconduct at trial has been deemed record-based, and therefore appropriate for direct appeal." *White*, ¶ 15 (citing *Hagen v. State*, 1999 MT 8, ¶ 10, 293 Mont. 60, 973 P.2d 233).

A set forth fully above, the prosecutor improperly told the jury her own beliefs about the guilt of Lowry during closing argument. (Trial Tr. 394:4–7, 400:8–16.) Without being subject to cross-examination or confrontation, the prosecutor essentially testified that, in her inadmissible opinion, Lowry was guilty. Defense counsel chose not to object. Had she objected, the district court would

have been obligated to, at a minimum, issue curative instruction. *See, e.g.*, *State v. Wing*, 2008 MT 218, ¶ 34, 344 Mont. 243, 188 P.3d 999; *State v. Criswell*, 2013 MT 177, ¶ 45, 370 Mont. 511, 305 P.3d 760. Regardless, trial counsel's performance was objectively deficient because she allowed highly prejudicial, inadmissible opinion testimony that Lowry was guilty to be considered by the jury.

**b. Trial counsel's performance was deficient for failing to object to the admission of the video that lacked authentication.**

"Generally, an alleged failure to object to the introduction of evidence . . . at trial has been deemed record-based, and therefore appropriate for direct appeal." *White*, ¶ 15 (citing *Hagen*, ¶ 10).

"The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Mont. R. Evid. 901(a). Rule 901 provides a non-exhaustive list of ways this requirement for evidence to be admitted at trial may be met, including "Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be." Mont. R. Evid. 901(b)(1).

This Court has consistently held that the person who took a photograph is not necessarily required to authenticate a photograph; rather, any witness with personal knowledge of what the photograph depicts who testifies the evidence is a true and accurate representation satisfies Rule 901. *E.g.*, *Pilgeram v. Hass*, 118 Mont. 431, 449, 167 P.2d 339, 348 (1946) (ruling photographs properly

authenticated where witness testified "that although he did not take the photograph it was nevertheless a correct representation" based on him personally being at the scene depicted in the photograph); *State v. High Elk*, 2006 MT 6, ¶ 35, 330 Mont. 259, 127 P.3d 432 (ruling that Rule 901 was satisfied where "police officer testified the photographs were taken shortly after he and Allen arrived at the hospital, and that they were true and accurate depictions of the wounds he observed on Allen."). The same applies to admission into evidence of videotapes. *E.g.*, *State v. Christenson*, 250 Mont. 351, 359–60, 820 P.2d 1303, 1308–09 (1991) (finding that a videotape showing the search of defendant's residence was properly authenticated by police officer's testimony who was present during search).

Here, the State did not present any witness who testified about how the video was made, nor did it seek admission through any witness with personal knowledge of the contents of the video, i.e. someone in or with a view of the room of the jail depicted in the video during the assault. Rather, the State sought admission of the video through Officer Blair, who was not personally present for the assault. The foundation laid by the State prior to seeking admission of the video into evidence consisted solely of Officer Blair's testimony that he obtained and watched the video prior to trial. (Trial Tr. 224:9–16.) Such testimony is categorically deficient for authentication under Rule 901. Indeed, if it were otherwise, Rule 901's requirements would be eviscerated by any witness—no

matter how little personal knowledge they have of the taking of a video or the scene it displays—who simply views the video before trial. Trial counsel did not object to its admission even though it was not authenticated, which constitutes deficient performance. (Trial Tr. 225:13–16.)

**c. Trial counsel's performance was deficient for failing to object to the highly prejudicial testimony of Officer Blair regarding the video.**

"Generally, an alleged failure to object to the introduction of evidence, or to object to the testimony of a witness . . . at trial has been deemed record-based, and therefore appropriate for direct appeal." *White*, ¶ 15 (citing *Hagen*, ¶ 10).

As stated, Officer Blair did not have any personal knowledge of the scene depicted in the video. He was in no better position than the jury to analyze the video's contents and come to conclusions about the effect of such on the charges against Lowry. Nevertheless, Officer Blair, without objection from defense counsel, testified at length as to his own opinions and characterizations of what was depicted in the video. (*See* Trial Tr. 219:10–238:3, 243:7–251:3.) For example, Officer Blair identified Lowry in the video multiple times, (Trial Tr. 229:25–231:11,) he stated the video shows Lowry inside S.H.'s cell, (Trial Tr. 249:18–20,) he speculated what Lowry was doing in the video, (Trial Tr. 231:16–19; 233:13–25,) he speculated what S.H. was doing in the video, (Trial Tr. 234:18–235:2,) finally, Officer Blair set forth in a narrative fashion the State's biased characterization of what the video depicts, (Trial Tr. 236:2–237:10.) The most

egregious example of this improper testimony occurs when Officer Blair was asked whether "it appears that Mr. Lowry was trying to message an officer for help?", and he responded:

> No, it did not appear, actually, that he was trying to message an officer for help. If you look closely again, it's difficult to see on this view, but if you zoom in, which is a capability of the jail -- I get it we can't have it here, but . . . He's – he's scrolling. He is not writing a message.

(Trial Tr. 237:13–238:1.) The video could not be zoomed in at trial. (Trial Tr. 237:23.) In sum, not only was Officer Blair permitted, without objection, to characterize the contents of a video that was not authenticated and to which he had no personal knowledge, he was further permitted to testify about matters not in evidence or capable of the jury's own review, i.e. zooming in on the video to reveal details not capable of view otherwise.[1] Trial counsel's failure to object to all this testimony constitutes deficient performance.

**d. The preceding three instances of deficient performance combined to prejudice Lowry and deny him a fair trial.**

Given that the five witnesses with personal knowledge of the assault testified to markedly different versions of events, the video presented a more objective basis for the jury to make its factual determinations. Indeed, the prosecutor encouraged the jury to rewatch the video during her closing argument. (Trial Tr. 396:17–

[1] The prosecutor went on to reference Officer Blair's improper testimony during closing to argue Lowry should be convicted. (Trial Tr. 398:6–10.)

397:11.) The jury went on to rewatch the video twice during deliberations before finding Lowry guilty. (D.C. Doc. 115.) The prosecutor also told the jury she believed Lowry committed the charged offenses. (Trial Tr. 394:4–7, 400:8–16.) Even so, after an afternoon of deliberations, the jury was hung on count one, Aggravated Assault. (D.C. Docs. 102, 103, 115.)

Instead of getting a fair trial on the basis of admissible evidence only, Lowry's jury was given a video that lacked authentication, speculative and prejudicial testimony about the assault from a police officer who had no personal knowledge, and the prosecutor's improper opinion that Lowry was guilty. Combined, there is a reasonable probability that the jury, who was hung on count one, would have similarly be hung as to count two instead of finding Lowry guilty. As such, Lowry's right to effective assistance of counsel was violated, and the Court should grant him a new trial. *See State v. Lamere*, 2005 MT 118, ¶ 7, 327 Mont. 115, 112 P.3d 1005 (stating "a convicted defendant is entitled to a new trial upon establishing that defense counsel rendered ineffective assistance.").

**e. Trial counsel rendered ineffective assistance and prejudiced Lowry for not requesting a mistrial immediately after Lowry was seen in handcuffs by potential jurors.**

"In order to grant a mistrial, the moving party must demonstrate manifest necessity coupled with the denial of a fair and impartial trial." *State v. Hildreth*, 267 Mont. 423, 432, 884 P.2d 771, 777 (1994). The failure to move for a mistrial

can be the basis of an IAC claim, but not if the motion would have been properly denied by the trial court. *See, e.g., Hildreth*, 267 Mont. at 432, 884 P.2d at 777; *State v. Polak*, 2021 MT 307, ¶ 29, 406 Mont. 421, 499 P.3d 565; *State v. Severson*, 2024 MT 76, ¶ 44, 416 Mont. 201, 546 P.3d 765.

"The due process clauses of the United States Constitution and Montana Constitution entitle criminal defendants to appear before a jury free from physical restraints." *State v. Hartsoe*, 2011 MT 188, ¶ 22, 361 Mont. 305, 258 P.3d 428, 434. "Although permitted in some situations for security purposes, this Court has cautioned against presenting a defendant in shackles or restraints to the jury when possible because such an appearance can prejudice the jury." *State v. Denny*, 2021 MT 104, ¶ 17, 404 Mont. 116, 485 P.3d 1227 (citing several cases). "Visible shackling at trial creates a high risk of prejudice because it indicates that the court believes there is a need to separate the defendant from the community at large, creating an inherent danger that [the] jury may form the impression that the defendant is dangerous or untrustworthy." *Hartsoe*, ¶ 32 (internal quotation marks omitted) (quoting *Dyas v. Poole*, 317 F.3d 934, 937 (9th Cir. 2002)). Indeed, the jury viewing a handcuffed defendant may "undermine the presumption that the defendant is innocent." *Hartsoe*, ¶ 32.

However, the Court has "noted that the 'right to be free of shackles during trial need not be extended to the right to be free of shackles while being taken back

and forth between the courthouse and the jail.'" *Porter v. State*, 2002 MT 319, ¶ 28, 313 Mont. 149, 60 P.3d 951 (quoting *State v. Baugh*, 174 Mont. 456, 262–63, 571 P.2d 779, 782–83 (1977)). "[A] defendant is not denied a fair trial and is not entitled to a mistrial solely because he was momentarily and inadvertently seen in handcuffs by jury members." *Baugh*, 174 Mont. at 463, 571 P.2d at 783. Rather, the defense must prove prejudice by, for example, interviewing the jurors on the record. *See Baugh*, 174 Mont. at 461–63, 571 P.2d at 782–83.

Before voir dire, and while prospective jurors were waiting outside of the courtroom, Lowry, who was in handcuffs, was placed in view of them by the officer transporting him from the jail to the courtroom. (Aug. 9, 2023 Hr'g Tr. 10:11–31:13.) Trial counsel submitted photos to the district court showing the same in an evidentiary hearing months after trial. (D.C. Doc. 155.) However, trial counsel did not raise the issue with the district court in time to question the jurors, despite Lowry testifying at the evidentiary hearing that he immediately notified his trial counsel of being seen by the jurors. (Aug. 9, 2023 Hr'g Tr. 32:1–10.) The district court accordingly denied Lowry's motion for a new trial because, *inter alia*, there was no evidence submitted from a juror that they saw Lowry in handcuffs or that seeing him in handcuffs prejudiced them against Lowry. (D.C. Doc. 156, at 5–6.)

Had trial counsel raised the handcuff issue immediately after it happened, the trial court could have asked the jurors on the record whether they saw him and, if so, what effect it had on them. *See Baugh*, 174 Mont. At 461–63, 571 P.2d at 782–83. Lowry recognizes that the record is devoid of any indication that such questioning would have resulted in evidence that he was prejudiced. Nonetheless, out of an abundance of caution, he wants to raise this issue now to avoid it being procedurally barred on postconviction relief. *See Hagen*, ¶ 42 (this Court determining IAC claims were procedurally barred in postconviction proceeding because the claims were not raised on direct appeal).

## CONCLUSION

The Court should invoke plain error review and grant Lowry a new trial because the State's improper remarks regarding Lowry's guilt implicate his fundamental right to a fair and impartial trial and leave unsettled the question of the fundamental fairness of his trial. Alternatively, the Court should find Lowry did not receive effective assistance of counsel and grant him a new trial.

Respectfully submitted this 14th of January, 2025.

MURNION LAW

By: /s/ James C. Murnion
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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 typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material, if any, the caption page, the table of contents, the table of authorities, the signature blocks, and the appendix; and the word count calculated by Microsoft Word for Windows is 5,439, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ James C. Murnion
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## CERTIFICATE OF SERVICE

I, James Clarke Murnion, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 01-14-2025:

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