IN THE SUPREME COURT FOR THE STATE OF MONTANA

No. DA 23-0137

STATE OF MONTANA,

Plaintiff and Appellee,

v.

GRANT WEST,

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

On Appeal from Montana's Eleventh Judicial District Court,
Flathead County, The Honorable Robert B. Allison Presiding

APPEARANCES:

ATTORNEYS FOR DEFENDANT AND APPELLANT:

GREGORY D. BIRDSONG
Birdsong Law Office
P.O. Box 4051
Santa Fe, NM 87502

ATTORNEYS FOR PLAINTIFF AND APPELLEE:

Austin Miles Knudsen
Kathryn Fey Schulz
Montana Attorney General's Office
P.O. Box 201401
Helena, MT 59620-1401

Travis R. Ahner
Flathead County Attorney's Office
820 S. Main
Kalispell, MT 599-1

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STATEMENT OF THE ISSUES

1. Whether the district court erred when it summarily denied West's Brady motion, when it denied West's motion for a directed verdict and when it allowed the prosecution to present the overlay video during closing argument.

2. Whether the prosecution, by improperly soliciting character testimony and portraying West as an addict who was "high on pills and adrenaline" undermined his right to a fair trial.

3. Whether West received ineffective assistance of counsel.

4. Whether cumulative errors denied West a fair trial.

STATEMENT OF THE CASE

Procedural History

Defendant And Appellant Grant West, appeals the Judgment and Sentence entered February 16, 2023 by the Montana's Eleventh Judicial District Court, Flathead County, finding him guilty of Felony Robbery, Felony Aggravated Kidnapping, and Felony Criminal Possession of Dangerous Drugs. (Appendix A)

The case originated April 15, 2022 when the Flathead County Attorney filed an Information charging West with Robbery, a felony, in violation of Mont. Code Ann. §45-5-401 with a dangerous weapon enhancement pursuant to Mont. Code Ann. §46-18-221, Aggravated Kidnapping, a felony, in violation of Mont. Code

Ann. §45-5-303 and Criminal Possession of Dangerous Drugs, a felony, in violation of Mont. Code Ann. §45-9-102. (DC03)[1] West was arraigned in district court on May 19, 2022.[2] (DC15)

December 16, 2022 West filed a motion to exclude the testimony of witness Shalyn Coker. (DC39). West advised that, Coker was "the only individual to identify West as the perpetrator, citing West's voice." (*Id.*) West contended that a Brady violation occurred because, despite being "interviewed numerous times by officers and counsel for the defendant," defense counsel was not notified until Friday December 16, that Coker was hearing impaired. Counsel argued that, with the trial set to commence on Monday December 19, the State's failure to disclose the hearing impairment immediately put West at an unfair disadvantage in violation of his due process rights. The district court denied West's motion and the matter proceeded to jury trial.

Judgment was entered pursuant to a jury verdict rendered in open court on December 21, 2022. (DC32, DC33) A Presentence Investigation Report was filed February 13, 2023. (DC34) Sentencing was held February 16, 2023, at which time West was sentenced to the Montana State Prison for a total of 40 years with 290

[1] The record of the District Court is referenced by the case register number in DC-22-155. For example, DC01 refers to the first document identified in the district court case register.

[2] The record from below does not include transcripts of the May 19, 2021 Arraignment or any pretrial hearings prior to the trial.

days credit for time served. (Appendix A) The sentencing order was filed February 17, 2023. (*Id.*) West filed his Appeal with the Montana Supreme Court February 24, 2024. (DC63)

Facts of Case

A. Investigation and Witness Statements

CFPD Officer Johnson met with Shalyn Coker, Jessica Baumgartner and Wendy Sunde, employees at the pharmacy at the time of the robbery. (Def. Ex. A 0:46) Officer Johnson did not separate the witnesses but interviewed them as a group. Coker tentatively identified the perpetrator as Grant West, "His shoes looked really familiar. The way he was talking, his voice… everything. I'm almost a hundred percent it was him." (*Id.*) Coker said West was disabled and, "He normally walks with a cane…. he always walks with his cane…. He walks bad. He has to have a cane or he limps really fucking bad" (*Id.* 11:09-52)

The witnesses agreed the perpetrator carried a small black handgun with "something orange" on it. (Def. Ex. A 12:55) Sunde said the perpetrator held the gun in his left hand against his body while Baumgartner said he held the gun in his right hand pointed it at Sunde "the whole time." (*Id.*) Surveillance video shows that the perpetrator held the gun in his right hand, and he appears to have held the gun by his side – pointing down – through the entire robbery, which lasted about 30 seconds. (St. Ex. 9 5:28-6:00)

Officer Johnson and all three witnesses watched store surveillance video together. (Def. Ex. A 20:46 et seq.) After observing the perpetrator in the video surveillance video for about 30 seconds, Coker told Officer Johnson, "So I can tell you, almost a hundred percent, it's Grant West." (*Id.* 23:30) Coker commented, "And I recognize his shoes, too, for some weird reason." (*Id.* 26:54) As the video review proceeded, Coker commented, "I don't know why, but I knew it was him instantly – just by his voice and those shoes." (*Id.* 31:45)

Detective Craig McConnel interviewed each witness separately, leaving the two witnesses not being interviewed together where they discussed the incident and compared recollections. (Def. Ex. A 1:05, et seq.) Detective McConnell then interviewed the witnesses together in the pharmacy where they discussed whether the perpetrator pointed the gun at anyone and in which hand the gun was held. (*Id.*) Sunde – in violation of HIPAA – pulled Mr. West's pharmacy record described his history to Detective McConnell, "He… started out slow, like they always do and then started getting it more frequently in higher quantity and 'lost them' (making air quotes) …." (*Id.* 152:10) The pharmacy record indicated West had last filled his prescription on April 5, 2021 when he received 90 pills. (St. Ex. 20)

West was taken into custody and interviewed by Detective McConnell (St. Ex. 24) In the interview video, West can be seen signing his acknowledgment of his Miranda warning with his left hand. (*Id.* 2:35) West told Detective McConnell

he had been injured in an auto accident in 2011 and had been dealing with the pain since that time. (*Id.* 5:45) He detailed history of back and hip pain and a leg that had recently broken due to osteostenosis in the knee that led to bone collapse. (*Id.* 6:00-6:40) West said his prescription for Percocet had recently been increased because of the leg pain "until they get it figured out" and determine whether he would need surgery, and he was currently taking three Percocet a day for his pain. (Id. 6:40-7:00) West told Detective McConnell he had been at his house all night and that a "friend from down the street" named Jimmy came by and borrowed his car. (Id. 8:22-10:30). (*Id.* 8:22) West told Detective McConnell, "No way I could have walked into a store. I don't even walk around my house without that thing (indicating his cane) …. Muscle pains actually fold me over…. I cannot stand without that thing. (*Id.* 19:40-19:48) West said he had refilled his prescription just over a week earlier. (*Id.* 22:40-22:50)

B. Jury Trial

Motion to Exclude Testimony. Trial was set for Monday, December 19, 2022. On Friday, December 16, 2022 West filed a Motion to Exclude Testimony for Brady Violation arguing he had been informed "less than one business day prior to trial" that Shalyn Coker, the witness who identified the perpetrator as Grant West based, most significantly, upon recognizing his voice, was hearing impaired. (DC039) Citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963) and *State v.*

Stewart, 200 MT 379, ¶20, 303 Mont. 507, 16 P.3d 391, West argued that all three elements required to establish a *Brady* violation were met. (*Id.*) Specifically: 1) The State possessed evidence favorable to the defense; 2) the prosecution suppressed the favorable evidence; and 3) had the evidence been produced, there was a reasonable probability the outcome of the proceedings would have been different. (*Id.* citing *State v. Weisbarth*, 2016 MT 214, ¶20, 384 Mont. 424, 378 P.3d 1195)

Counsel argued that it was pertinent that the person who identified West, by his voice, suffered a hearing impairment, and the State's failure to disclose this information until the eve of trial constituted "an extreme injustice to West." (*Id.*) "Due to the State violating the Defendant's due process rights and withholding exculpatory evidence, the Defendant hereby respectfully requests this Court order that Coker be precluded from testifying in this matter." (*Id.*)

The district court heard argument in chambers before commencement of the trial. (12/19/2022 Hrg. Tr. 12:11, et seq.) The State argued that there was no Brady violation because "there wasn't information suppressed. It was actually given to Defense counsel. And defense counsel also had an opportunity to interview this witness, and did interview this witness…. No questions were asked regarding any hearing impairment. And the State did divulge that information to Defense." (*Id.* 12:22-13:6) The State admitted that despite learning of Coker's hearing

impairment on Tuesday, December 13, 2022 and defense counsel was not advised until December 16, 2022 the day before trial was set to commence. (*Id.* 13:21-24)

The district court denied the motion to exclude Coker's testimony holding her impairment "goes to the weight" and that "on cross-examination you can ask her about her level of hearing impairment." (12/19/2022 Hrg. Tr. 15:18-14) The court dismissed the argument that timely disclosure would have mattered, saying, "I'm not sure why it took three days… to get Mr. Wenz that information, but… I highly doubt that that would have given time to get a doctor located." (*Id.* 16:1-5) The court erroneously concluded, "In Mr. Wenz's motion, he indicated he wasn't moving to continue the trial because his client's in custody… and I probably wouldn't grant that in any case…."[3] (*Id.* 16:6-10)

Shalyn Coker. Coker's testimony at trial was markedly different than her statements immediately after the robbery. (12/19/2022 Hrg. Tr. 203:11, et seq.) While acknowledging she had always seen West walking with a cane, she now denied knowing why, despite having previously described his disability as extreme to investigating officers. (*Id.* 207:20:208:1) Coker testified she was "a hundred percent deaf in my left ear." (*Id.* 208:25-210:14) On cross-examination, Coker

[3] Defense counsel did not indicate no continuance would be requested. On the contrary, counsel argued that, if a continuance was necessary "to allow time for briefing due to the failure of the city to provide exculpatory evidence," the delay should be attributed to the prosecution and not count against West's right to a speedy trial and requested that West be released from custody pending a new trial date. (DC039)

confirmed that she had not disclosed her hearing impairment to anyone during the course of several interviews by investigators and attorneys for both sides. (12/19/2022 Hrg. Tr. 227:9-228:5) Coker maintained her hearing impairment had nothing to do with the case, and "It has never bothered me or affected anything I have ever done." (Id. 228:8-12) When specifically asked if the issue might be relevant when the issue was a voice identification, Coker concede, "I think – I don't know." (Id. 228:24-229:1)

Coker said, the perpetrator was wearing "A maroon sweatshirt, sunglasses, a mask and a beanie," as well as "White shoes with blue stitching." (*Id.* 216:20-25) Coker described the perpetrator's handgun as being "a black gun with a little bit of orange on it… close to the safety," which he held "in his right hand." (*Id.* 217:13-19, 218:3-10)

Coker said she had previously seen West wearing white shoes "a couple of times outside the pharmacy." (*Id.* 217:1-12) When asked how many times she had seen West before the robbery, Coker said she saw him shopping at Super 1 "at least two times before he became a customer" in "probably 10 years." (12/19/2022 Hrg. Tr. 229:2-13) Coker agreed that the shoes she described the perpetrator wearing were cheap, white shoes, very commonly found, and that she saw "a lot" of such shoes come through Super 1. (12/19/2022 Hrg. Tr. 245:10:1) Coker also agreed that there was nothing distinctive about the perpetrator's shoes to identify

them as being worn by West. (*Id.* 246:2-5) When asked if she recalled telling officers the shoes seized from West's home "don't look like the shoes I saw," Coker equivocated that, "That's because they showed me the whole shoe…I'd only seen the top part. So, they did look different." (*Id.* 246:10-22)

Coker was adamant in her testimony, denying her previous inconsistent statements and, when specifically reminded what she had said, she replied, "I don't think so." (12/19/2022 Hrg. Tr. 230:12, et seq.) Coker said she heard the perpetrator say "Percocet 10" twice – "plain as day" – even though Sunde – who was standing closer – had told Officer Johnson the man was mumbling so badly she had to ask him to repeat himself. (*Id.* 231:7-15, 232:4) Coker denied having told investigators West needed a cane to walk or saying, "he has to have a cane, or he limps really fucking bad." (*Id.* 234:10-235:4)

Coker also conceded that the robber, "did not look like he knew who I was." (*Id.* 247:2-5)

Jessica Baumgartner. Baumgartner testified that she heard the perpetrator ask for Percocet, ask if there was an office and – when she asked if she should go into the bathroom – he said "Yes." (12/19/2022 Hrg. Tr. 260:15, et seq.) Baumgartner said she thought the perpetrator "asked for Percocet twice and, the first time, it was quieter, kind of like mumbling…." And that "It was hard to hear him the very first time." (*Id.* 265:3-5, 270:2-7) Baumgartner said the perpetrator

held the handgun in his right hand and was wearing white sunglasses with dark lenses. (*Id.* 271:1-18) Baumgartner described the handgun as black with orange "around… the midpart and the top." (*Id.* 275:8-11) Baumgartner maintained she did not see the inside of the perpetrator's gun but she saw "more orange" than on the weapon recovered from West's home. (*Id.* 276:3-12)

Wendy Sunde. Sunde testified regarding West's prescription history with the pharmacy in great detail. (*Id.* 294:6, et seq., citing St. Ex. 20) West's history, as described by Sunde, included eight prescriptions for Hydrocodone between May 18th and June 16, 2021 related to dental work and prescriptions for Oxycodone (Percocet) commencing in December 28, 2021 when West appeared to have filled prescriptions of 25 tablets at two pharmacies on the same day. (*Id.* 298:4-14) Sunde conceded that a double prescription West received occurred when West changed pharmacies to Super 1 which could have caused confusion. (*Id.* 348:10, et seq.) Sunde – despite testifying that West's dosage of Percocet increased on doctor's orders, described the progression in dosage and an early refill due to spilled pills as "red flags" commenting "No one's blood pressure medication ever gets lost. It's usually a controlled substance." (*Id.* 303:12-21) On cross-examination, Sunde was not surprised to learn that West had 64 Percocet from his prescription at the time of his arrest but would not concede that it showed he was using the drug as prescribed but still maintained "I see red flags." (*Id.* 356:14-25)

(*Id.*) Despite giving testimony completely inconsistent with her statements after the robbery, Sunde refused to concede that her memory immediately after the event was better than days later. (*Id.* 333:14, et seq.) Sunde recalled that all three witnesses were interviewed together and reviewed the surveillance videos together and discussed what they were watching. (*Id.* 336:11-338:9)

Officer Johnson. Columbia Falls Police Officer Mike Johnson testified that he wasn't sure which witness first mentioned West as a possible suspect, saying the three witnesses were "all kind of talking over each other – or interjecting. (12/19/2022 Hrg. Tr. 392:1-15) Officer Johnson said that, when the women indicated Coker "may know more" he didn't ever think to separate her from the other witnesses – even though it could be important to do it so that witness doesn't influence the others – because he was "just trying to collect as much information as I could" and "I didn't feel it was a good thing to separate the girls and send them all out by themselves." (*Id.* 390:20-391:5, 392:16-393:13)

Detective McConnell. Columbia Falls Police Detective Craig McConnell testified that he arrived at the scene while the witnesses were reviewing surveillance videos and that he interviewed them separately. (*Id.* 12/19/2022 Hrg. Tr. 478:3, et seq.) Detective McConnell described Coker's interview as unusual, "Right off the bat, though, she kind of was smiling at me, which was a little odd, and she said I know who did this, I grew up with him… I'm 150 percent certain it

was Grant West." (*Id.* 479:1-10)

Detective McConnell testified that he interviewed West, who appeared to be in pain West attributed to injuries to his right knee, low back and hip from a car accident in "Octoberish, '21." (*Id.* 482:16-483:8) Detective McConnell said West told him he took Percocet for the pain, and he recalled West saying he took one or two pills a day. (*Id.* 483:17-23) Detective McConnell agreed West seemed to be in pain, having trouble sitting and "kind of hunched over… moaning when he moved his leg." (*Id.* 520:111-16) Detective McConnell did not ask West to stand without his cane, and said he signed his acknowledgment of rights form with his left hand. (*Id.* 520:17-521:15)

Detective McConnell stated West denied leaving his home the night of the robbery, but did say he loaned his car to "a fella that lives down the street in the trailer park named Jimmy." (*Id.* 483:24-484:5) West did not provide an address for Jimmy other than to say he lived "down the road" at a "trailer park." (*Id.* 484:14-17) Detective McConnell said, "The violent Crimes Task Force scoured the earth for Jimmy. No Jimmy." (*Id.* 508:20-25) Asked what he meant when he testified the "scoured the earth for Jimmy," Detective McConnell did not look for Jimmy, did not know when the authorities began the search for Jimmy, and did not if the investigator knocked on every door when the trailer park was canvassed." (*Id.* 524:3-16) Detective McConnell agreed that Jimmy could have been staying in a

home without being on the lease, and that – since the canvass wasn't done until a day or more later – could have left town. (Id. 524:17-24)

Detective McConnell said the recovered a pair of Skecher sneakers from West's home that were similar to the ones described by Coker but did not exactly match ever detail. (12/19/2022 Hrg. Tr. 487:6-16, 489:1-5, St. Ex. 26[4])

Detective McConnell located and identified several prescription pill bottles with West's name on them, but none of them matched the description of the Percocet 10 bottle stolen from the pharmacy. (*Id.* 489:6-493:11, State Ex. 30-33) Detective McConnell testified that "all the bottles, as far as I recall, were prescribed to West." (*Id.* 497:10-498:1, St. Ex. 38)

According to Detective McConnell, the handgun recovered from West's home - "… a black 9-millimeter Hi-Point handgun, front-rear orange sights, and…. orange safety on/off switch" – matched the description given by the witnesses. (12/19/2022 Hrg. Tr. 495:8-10) Detective McConnell testified to finding two pairs of sunglasses in West's vehicle but said neither matched the white-framed shades worn by the perpetrator. (*Id.* 501:10-18, St. Ex. 42) Detective McConnell agreed that – though West was left-handed – the perpetrator was holding the handgun in his right hand and that the witnesses could not have seen the safety on West's

[4] Photographic exhibits were not provided from the district court as part of the record from below. They are, nevertheless, referenced here.

handgun from that perspective. (*Id.* 531:7-22) Detective McConnell conceded that one usually holds a handgun in the "strong, dominant hand." (*Id.*531:23-524:12)

Over objection by defense counsel that Detective McConnell could not testify how the photos were created, Detective McConnell compared digitally enhanced still-frame photographs of the perpetrator's shoes, extracted from surveillance video to the shoes recovered from West's home during the search.[5] (12/19/2022 Hrg. Tr. 501:24-505:25) Detective McConnell did not testify that the right shoe was an exact match, though he noted similarities, mainly "that dark blue color… And…the rest of the sneaker being that white." (*Id.* 506:112-507:3) Detective McConnell said only that the left shoe was similar to the enlarged still-frame because of "the blue stripe, the blue sole that wraps up to that to, and then the rest being white throughout." (*Id.* 507:4-9) On cross-examination, however, Detective McConnell agreed that the shoe in the still-frame was not an exact match for West's shoe. (*Id.* 528:21-529:14)

Detective McConnell testified that a search of West's home, vehicle, the surrounding area and the route from Super 1 to the home did not turn up a maroon hoodie, gray wind pants with a white stripe, white-framed sunglasses, a beanie of

[5] Defense counsel objected on the grounds Detective McConnell did not create the enlargements, was not present when they were created, and could not lay a foundation for how they were received and processed. (12/19/2022 Hrg. Tr. 502:20-503:12)

the type worn by the perpetrator or the fabric tote seen in the video and described by the witnesses. (12/19/2022 Hrg. Tr. 532:13-533:25)

Though Coker did not tell Detective McConnell she had a hearing impairment, he opined, "The way I would think is her other ear is probably twice as strong, so she didn't have any issues hearing." (12/19/2022 Hrg. Tr. 514:8-20) Detective McConnell agreed that, if she had done so, he would have "asked her more questions regarding that," and that a witnesses hearing is especially important when "the person has a soft voice" or is mumbling. (*Id.* 515:5-19)

Edwin Kile. Half Moon Mobile Home Park manager Edwin Kile testified that he had managed the trailer park since 2000. (12/19/2022 Hrg. Tr. 554:9-13) Mr. Kile agreed that there were instances where residents had someone living in their trailer or staying on their couch without him knowing it and, that just because he didn't have a "Jimmy" registered, that didn't mean there wasn't a "Jimmy" living in the trailer park. (*Id.* 557:2-557:13)

Ryan Stoll. Detective Stoll testified regarding his participation in the investigation. (12/19/2022 Hrg. Tr. 569:9, et seq.) On direct examination, Detective Stoll said he attempted to establish the existence of Jimmy, and that the trailer park down the road from West's home was canvassed. (*Id.* 570:3-571:3) Detective Stoll testified he identified a vehicle matching the description of West's vehicle "travelling the route to and from the robbery" in a surveillance video, but

was unable to conclusively identify the vehicle as West's (*Id.* 590:1-4, 572:8-19) The video also showed least two other dark green SUVs like West's traveling past Smith's during the time around the robbery. (*Id.* 596:21-598:4) Detective Stoll said he could not definitively say which, if any, of the vehicles belonged to West, who was driving the vehicles, or where the vehicles were coming from or going to. (*Id.* 598:5-599:15)

Detective Stoll spoke with Mr. Kyle by telephone regarding Jimmy and that it was his "understanding" that a canvas of every residence in the court was made. (12/19/2022 Hrg. Tr. 584:5-20) Detective Stoll said he "believed" 27 residents were "attempted to be visited" and that the investigation included "running vehicle license plates for some of the trucks and things…." but Jimmy was not found. (*Id.* 584:24-585:9) Detective Stoll conceded that he never went to the trailer park, that investigators did not begin looking for Jimmy until roughly five days after the robbery and that it was possible Jimmy was couch surfing or had taken off by the time investigators began looking for him. (12/19/2022 Hrg. Tr. 593:19-594:25) Detective Stoll testified that the investigation did not disprove West's assertion that Jimmy borrowed his vehicle. (*Id.* 595:1-4)

Based on his review of the witness interviews immediately after the robbery, Detective Stoll agreed that no witness immediately identified West as the perpetrator and that, in his experience – especially when there are multiple

witnesses to an event – it's important to separate the witnesses to make sure they don't influence one another. (12/19/2022 Hrg. Tr. 601:1-18)

Motion for Directed Verdict

At the conclusion of the State's case, defense counsel asked the district court to enter a directed verdict arguing that, even in the light most favorable to the State, a reasonable juror could not convict West of the crimes charged. (12/19/2022 Hrg. Tr. 609:10, et seq.) The motion was denied without argument or inquiry by the district court. (*Id.*)

Grant West. West testified in his own defense. (12/19/2022 Hrg. Tr. 611:10, et seq.) West testified he was unable to walk without support due to serious injuries including a collapsed disk, a fracture of his right femur and knee joint and a diagnosis of osteostenosis "which is basically the blood flow to the bone has died." (*Id.* 611:23-612:22) West said his osteostenosis, diagnosed in late February 2022, was painful and made him unable to walk without support or stand for long periods of time. (*Id.* 613:3-11) West then reviewed his medical records which showed his use of pain medications coincided with his degenerative bone condition and that his dosages were increased by his doctor as the pain got progressively worse. (*Id.* 613:16, et seq.)

West testified regarding his use of Percocet, which started February 25, 2021. (12/19/2022 Hrg. Tr. 613:24, et seq.) West said he had asthma from age two,

for which he had an inhaler prescription at Smith's Pharmacy in addition to his other meds. (*Id.*) West said he asked to move his prescriptions to Good Medicine Pharmacy in December 2021.[6] (*Id.*) December 28, 2021, West picked up his prescription for pain meds from Good Medicine Pharmacy. (*Id.*) Later West got a robocall from Smith's to pick up his prescription, and collected what he thought was his inhaler. (*Id.*) When he got home and discovered the prescription was not for his inhaler, West called his doctor and was told to hold onto the prescription against future need. (*Id.* 615:25) West then described his escalating pain and increased prescribed medications, but insisted he took the Percocet only as prescribed, though that the need increased significantly on February 16th, 2021 causing him to go to urgent care. (*Id.* 616:1-617:10) West was diagnosed with osteostenosis and his medication was increased to up to three pills a day – one every eight hours. (*Id.* 616:11-619:14) West testified his prescription was increased again in late March 2022 to provide for extra med "in case I needed more. Because he said they could be taken up to four times a day – every six hours – if needed." (*Id.* 620:5-21)

West said that, on the evening of April 4, 2022, "It was the middle of the night, I was having a bad night with my leg, I got up to take medicine, pulled it out

[6] What the pharmacy at Super 1 was called at that time.

of my cabinet, which is on other side of the door frame to the left…. I opened it up, put one in my hand, set it on the counter, got a sip out of my sink, went to grab it, knocked it off, bounced off the toilet…. You know, kind of almost did the swirl thing as it bounced, went in. As soon as it went in, I tried to grab it, but it sucked in water….” (*Id.* 621:7-622:13) West said he called the doctor’s office the next morning, told them what had happened, and the doctor ordered a replacement prescription. (*Id.* 623:8-624:1) West filled his prescription for 90 tablets of Percocet, on schedule, on May 5, 2022 – eight days before the robbery – and was still on the medication. (*Id.* 624:8-625:3) On cross-examination, West denied committing the robbery on April 13, 2022. (*Id.*625:10, et seq.) West denied his dosage increased gradually because he was “developing a tolerance” for the medication, maintaining he took them “as I’m prescribed.” (*Id.* 629:24-630:2) West denied that his dosage increased “because one’s not doing it anymore,” asserting, “It wasn’t a tolerance…. February, when it broke, it immediately went to three.” (*Id.* 630:3-17) On redirect examination, West said he had owned the white shoes for more than 10 years and that the handgun was passed on to him from his mom when he was 18. (*Id.* 636:23-637:7) West testified that, no matter how many pills he took, he wouldn’t be able to walk around for five minutes, using long strides, thorough a store. (*Id.* 637:14-20)

Closing Arguments and Attorney Conduct

In chambers conference before closing arguments, the prosecution advised the district court it intended to play a video of West walking on the sidewalk outside a local pawn shop overlaid with a video of the perpetrator walking through Super 1 during the robbery. (12/19/2022 Hrg. Tr. 649:17, et seq.) Defense counsel objected, noting that there was no foundation for the overlay, which was apparently "made by somebody in the County Attorney's Office. We don't know the technology that was used necessarily, we don't know how it was made, we don't know if the frame rates are the same, if the speed is the same." (*Id.* 650:7-16) The State responded that the ten second video overlay was made using videos that were already admitted into evidence, and advised the court it intended to play the overlay video six times during closing argument. (*Id.* 650:21-651:10) The district court allowed the presentation, holding "I do believe it is a form of an overlay… and it's argument…. I'll allow it." (*Id.* 652:19-23)

In his closing argument, State counsel recounted the witness testimony as if there were no inconsistencies, contradictions or uncertainties. (12/19/2022 Hrg. Tr. 656:7, et seq.) According to the prosecutor, Coker knew West "right away by that voice, by that build, complexion, male, mannerisms, size, shoes, voice…." (*Id.*) The prosecutor described West as a desperate addict:

> He demanded those pills that he's on, that he needed more of, that he's ramping up, that he's going from one a day to two a day to three a day, that he's having incidents where they're falling down sinks or

> falling down toilets. That's what he needed more of. That's what he wanted. That's his brand…. We have the Defendant's prescription history of ramping pills up; one, two, three. Losing pills. Wendy Sunde says those are red flags. Getting two prescriptions on the same day, getting another prescription within four days. Losing pills; she says people never lose the heart medication, they don't fall down the sink, they don't fall down the toilet, but the narcotics do."

(12/19/2022 Hrg. Tr. 659:15, et seq.)

The prosecutor showed the jury an overlay of two videos. (*Id.* 667:25, et seq.) He described the first as the perpetrator entering Super 1 and the second as West walking from his vehicle into Gold Rush Pawn. (*Id.*) The prosecutor looped the ten-second clips six times and, after playing the overlay video for a full minute, the prosecutor proclaimed that they were the same person. (*Id.*)

In his second closing argument, the prosecutor acknowledged that the perpetrator wasn't limping when he exited Super 1 but maintained that he had "a pronounced limp" on the way into the store and wasn't limping when he left because "the adrenaline went through the roof." (12/19/2022 Hrg. Tr. 686:4-687:3) "That's why Grant West, when the adrenaline was coming as he's driving to it and getting ready to go that adrenaline's going, that's why he can make it without a cane on the way in, and that's why he's walking a whole lot better on the way out." (*Id.*) The prosecutor minimized all of the holes in his case, arguing it didn't matter that the pill bottle from the robbery wasn't found because, "There were pills everywhere" and that it didn't matter that the sweatshirt, pants and hat weren't located because, "the shoes and gun were." (*Id.* 689:19-690:6)

The jury returned a verdict of guilty on all four charges. (12/19/2022 Hrg. Tr. 703:10, et seq.)

STANDARDS OF REVIEW

This Court reviews evidentiary rulings in a criminal case for an abuse of discretion. *State v. Bomar*, 2008 MT 91, ¶14, 342 Mont. 281, 182 P.3d 47. The Court treats a motion to exclude an eyewitness identification as a motion to suppress. *City of Billings v. Nolan*, 2016 MT 266, ¶15, 385 Mont. 190, 383 P.3d 219 (citing *State v. Baldwin*, 2003 MT 346, ¶11, 318 Mont. 489, 81 P.3d 488). The Court reviews denial of a motion to suppress to determine whether the court's findings of fact are clearly erroneous, and whether those findings are correctly applied as a matter of law. (*Id.*)

This Court reviews denial of a motion for directed verdict – properly denoted as a motion to dismiss for insufficient evidence – de novo. *State v. McWilliams*, 2008 MT 59, ¶37, 341 Mont. 517, 178 P.3d 121 (citing *State v. Skinner*, 2007 MT 175, ¶14, 338 Mont. 197, 163 P.3d 399; *State v. Swann*, 2007 MT 126, ¶19, 337 Mont. 326, 160 P.3d 511).

SUMMARY OF THE ARGUMENT

Grant West was improperly convicted due to judicial error, prosecutorial misconduct and ineffective assistance of counsel.

The district court erred when it dismissed West's Brady motion for

exclusion of Shalyn Coker's testimony due to an undisclosed hearing impairment of unknown character and origin. Defense counsel had no opportunity to reinterview Coker or arrange a rebuttal witness. West – given no opportunity to effectively confront the witness – was denied a fair trial.

The district court committed further error when it denied West's motion for a directed verdict. The testimony of the three eyewitnesses – even if viewed in the light most favorable to the prosecution – did not establish beyond a reasonable doubt that West was the person who robbed the pharmacy at Super 1 Foods. Shalyn Coker, claimed to have recognized West's voice from a few mumbled words after having spoken to him "at least twice" in the previous decade and by his cheap, white shoes which she agreed she saw lots of customers wear.

Other than the shoes, no of the items resembling those described by the witnesses – a maroon hoodie, gray wind pants with a white stripe, white-framed sunglasses, a beanie, a fabric tote from an area hospital – were found in West's home, vehicle, the surrounding area, or the route from the store to his home. According to the witnesses the handgun used in the robbery – a black handgun with orange accents – did not exactly match the Hi-Point 9mm pistol recovered from West's home. The Hi-Point is a commonly found handgun that has been called "the cheapest gun in the world." Moreover, black handguns with orange accents are not uncommon, or even unusual. Even Detective McConnell admitted

neither the shoes nor the gun exactly matched the witness descriptions.

The perpetrator left Super 1 with a bottle of 100 Percocet tablets. The bottle was not recovered, and the pills recovered from West's home were not proven to have come from the stolen bottle as opposed to the prescription he had filled a few days earlier. The prosecution, unable to offer admissible evidence that West had the means and motive to commit the robbery, solicited prejudicial character testimony to imply that West was a drug addict hyped up on pills and adrenaline, despite clear evidence that he was taking prescribed medication in an appropriate manner. Even so, the evidence presented by the State did not overcome West's presumption of innocence or support conviction beyond a reasonable doubt. The district court's failure to seriously address the motion without inquiry was an abuse of discretion.

It was prosecutorial misconduct to solicit inflammatory, unqualified lay character testimony that implied West committed the crime because he was an addict and was physically able to perform the robbery because he was high on pills and adrenaline. The prosecution committed more serious misconduct when, in closing argument, it showed the jury a highly-prejudicial video overlay of West and the perpetrator and declared – without supporting evidence or witness testimony – that both videos portrayed West.

West's attorney failed to: 1) effectively challenge inconsistent witness

testimony; 2) introduce medical records or testimony to show that West was not an addict and could not – under any circumstances – have walked into the store and committed the robbery; 3) introduce testimony that – unlike the perpetrator – West shoots his gun with his left hand; 4) call into question numerous investigative errors and oversights; 5) object to second-hand testimony, unsubstantiated allegations and improper opinion testimony that West was an addict and that his drugs and adrenaline made it physically possible for him to commit the robbery. Defense counsel did not once, during the entire trial, argue that West was entitled to a presumption of innocence or that the State had not proven its case beyond a reasonable doubt. In fact, the only time the jury heard the term "beyond a reasonable doubt" was during voir dire and the reading of the jury instructions. West did not have effective representation of counsel.

ARGUMENT

Grant West was improperly convicted due to judicial error, prosecutorial misconduct and ineffective assistance of counsel.

1. The district court erred when it summarily denied West's Brady motion, when it denied West's motion for a directed verdict and when it allowed the prosecution to present the overlay video during closing argument.

The district court erred when it dismissed West's Brady motion for exclusion of Coker's testimony despite the fact that: 1) Coker – who had identified West as the perpetrator largely by his voice – was completely deaf in one ear; 2)

the prosecution had discovered this about a week before trial but had not disclosed it until the day before trial commenced[7]; and 3) Even upon request by the district court and counsel, the prosecution failed to disclose exactly how it had become aware of the impairment or how serious the impairment was.

Similarly, the district court erred by denying the defense motion for a directed verdict at the end of the State's case without inquiry or hearing further argument on defense allegations that the evidence presented could not lead a reasonable juror to convict West of the robbery.

Finally, the district court erred when it allowed the prosecution to present an overlay of two videos – produced by "someone in the county attorney's office" – during closing argument.

a. The district court's failure to conduct further inquiry into Coker's hearing impairment before allowing her to testify put the defense at an unfair disadvantage and was an abuse of discretion.

While only intentional or deliberate suppression of evidence is a per se violation of due process, Negligent or passive suppression will justify overturning a conviction if the suppression resulted in prejudice to the defendant. *State v. Patterson* (1983), 203 Mont. 509, 512, 662 P.2d 291, 293 (citing *United States v. Keogh*, 391 F.2d 138 (2nd Cir.); *United States v. Consolidated Laundries Corp.*,

[7] The State disclosed Coker's impairment on Friday. The trial began the following Monday.

291 F.2d 563 (2nd Cir. (1961)); *State v. Craig* (1976), 169 Mont. 150, 153, 545 P.2d 649, 651).

"Generally, suppressed evidence must be material to either guilt or punishment. *Brady v. Maryland*, 373 U.S. 83 S.Ct. 1194. In order to amount to denial of due process, negligently suppressed evidence must be vital to the defense of the accused." *State v. Patterson* (1983), 203 Mont. 509, 512-13, 662 P.2d 291, 293 (quoting *United States ex rel. Thompson v. Dye*, 221 F.2d 763 (3rd Cir. (1955)), cert. den., 350 U.S. 875, 76 S.Ct. 120). To obtain a new trial, the accused must show more than suppression; he must show the evidence was material and of some substantial use to him. *Patterson* (citing *United States v. Tomaiolo*, 378 F.2d 26 (2nd Cir. (1967)), cert. den., 389 U.S. 886, 88 S.Ct. 159). The suppressed evidence must be exculpatory, i.e., would have tended to clear the accused of guilt, to vitiate a conviction. *Patterson* (citing *Brady*; *Loraine v. United States*, 396 F.2d 335 (9th Cir. (1968)), cert. den., 393 U.S. 933, 89 S.Ct. 292; *Lee v. United States*, 388 F.2d 737 (9th Cir. (1968)))

Coker – who claimed despite very little contact over the previous 10 years, to have recognized the voice of West from a few soft-spoken words – was, not only hearing impaired, but completely deaf in one ear. She failed to disclose this information to anyone until the week before trial. The State, instead of notifying defense counsel immediately, failed to inform defense counsel until the day before

trial. This deprived West of a meaningful opportunity to confront Coker on her impairment, challenge her credibility based on the impairment, request she undergo hearing tests or otherwise verify her reliability as a witness, procure an expert witness to challenge her reliability or otherwise effectively advocate on West's behalf. Therefore, the degree to which Coker's hearing impairment affected her ability to credibly identify West as the perpetrator was never subjected to challenge by the defense, despite the fact that such evidence was both material and exculpatory to West's case, and the suppression of the evidence was prejudicial to West.

b. The district court's denial of West's motion for a directed verdict was taken without consideration of the evidence presented by the State and was an abuse of discretion.

Mont. Code Ann. §46-16-403 provides that, "When at the close of the prosecution's evidence, or at the close of all evidence, the evidence is insufficient to support a finding or verdict of guilty, on its own motion or on the motion of the defendant, dismiss the action and discharge the defendant…." "A defendant is entitled to a directed verdict of acquittal if reasonable persons could not conclude from the evidence, taken in a light most favorable to the prosecution, that guilt was proven beyond a reasonable doubt." *State v. Billedeaux*, 2001 MT 9, ¶8, 304 Mont. 89, 18 P.3d 990 (citing *State v. Bromgard* (1993), 261 Mont. 291, 293, 862 P.2d 1140, 1141). (see also *State v. Ohl*, 2022 MT 241, ¶8, 411 Mont. 52, 521 P.3d 759

(citing *State v. Cybulski*, 2009 MT 70, ¶42, 349 Mont. 429, 204 P.3d 7; Mont. Code Ann. §46-16-403.) Determinations of the credibility and weight of testimony are within the exclusive province of the jury, and conflicting testimony does not render the evidence insufficient to support a guilty verdict. *McWilliams*, ¶37. (citing *State v. Borsberry*, 2006 MT 126, ¶20, 332 Mont. 271, 136 P.3d 993; *State v. Shields*, 2005 MT 249, ¶19, 328 Mont. 509, 122 P.3d 421).

Here, beyond the inconsistencies and contradictions in the eyewitness testimony, it was not – even if found credible – sufficient to prove beyond a reasonable doubt that West robbed the pharmacy. West was primarily identified by voice recognition of Shalyn Coker, a woman who had known West since childhood but had only spoken to West "at least two times" in the previous ten years. Coker claimed to have recognized the mumbling perpetrator as West by his voice and to have recognized his shoes – which she described as "older, kind of cheaper, kind of Walmart brand…with blue stitching." The shoes in evidence were pair of white Sketchers – the third largest footwear brand in the United States, owned by 28 percent of sneaker owners.[8] Both Coker and Detective McConnell conceded they did not match the shoes Coker described the perpetrator wearing. Assuming, for

[8] https://www.statista.com/forecasts/1351944/skechers-sneakers-brand-profile-in-the-united-states#:~:text=What%20is%20the%20usage%20share,the%20United%20States%20own%20Skechers; https://en.wikipedia.org/wiki/Skechers#:~:text=Skechers%20is%20the%20third%20largest,the%20United%20States%20by%20revenue

the sake of argument, that Coker honestly believed that – after hearing the perpetrator mumble a dozen words in a soft, voice – she recognized the voice as that of someone with whom she had spoken "at least two times" in the previous decade, her identification cannot be seen as establishing the identity of the perpetrator beyond a reasonable doubt. Even if one believes West's shoes matched the perpetrator's shoes – which Coker denied in a later interview – it is insufficient since white shoes are common and Skechers are literally everywhere.

The evidence linking West's handgun to the robbery was tenuous at best. Two witnesses said the perpetrator was holding a "black handgun" with orange accents. Assume they are giving credible testimony – it was a black handgun with orange accents. That does not prove that the gun taken from West's house is that weapon. The Hi-Point 9mm pistol recovered from West's home has been described as the least expensive handgun in the world.[9] That fact makes it unreasonable to assume West owned the only Hi-Point 9mm in the area. Moreover, the Hi-Point 9mm pistol's black body with orange accents is unique, or even uncommon and McConnell admitted it did not match the witness description of the perpetrator's weapon. Without further evidence, no reasonable person could conclude with certainty that West's handgun was the weapon used in the robbery.

[9] https://www.thesoutherntrapper.com/pages/top-5-least-expensive-handguns; Internet restrictions prevent easy determination of exactly how many Hi Point handguns have been sold in the United States.

The witnesses described the robber as wearing a maroon hoodie, gray wind pants with a white stripe, white-framed sunglasses, a beanie and carrying a fabric tote from an area hospital. None of these items were found in West's home, vehicle, the surrounding area, or the route from the store to his home. The perpetrator left Super 1 with a bottle of 100 Percocet tablets. The bottle was not recovered, and the pills recovered matched the prescription he had filled days earlier.

Means, motive and opportunity, though not elements of a crime are critical indicia of guilt or innocence. Means is the ability of a suspect to commit a crime, motive is the reason the suspect decided to commit the crime, and opportunity describes whether or not the suspect had the actual chance to perform the crime. While West may have had the opportunity to commit the crime in this case, the State failed to prove beyond a reasonable doubt that he had either the motive or the means to do so.

West had no motive to rob the pharmacy. The evidence clearly showed that he had a legal prescription for Percocet and had obtained 90 tablets just eight days before the robbery. Sixty-six Percocet – the original prescription less three pills per day – were recovered from West's home.

West did not have the means to commit the robbery. It was unrefuted that West had severe physical impairments that made it impossible for him to walk

without a cane or a walker. The prosecution implicitly acknowledged this fact by attempting to show that West was able to commit the crime despite his disability only because he was "high on pills and adrenaline." Grant West lacked the means to do the things the perpetrator was seen doing in the surveillance video.

The State's ploy to establish means and motive by speculating that West was motivated by drug addiction and was physically able to commit the crime because he was "high on pills and adrenaline" does not meet the standard of proof necessary to overcome his presumption of innocence. Taken as a whole, no reasonable factfinder could conclude the evidence presented by the prosecution supported conviction beyond a reasonable doubt.

c. The district court erred when it allowed the prosecution to introduce during closing argument new evidence consisting of a highly prejudicial video overlay for which no foundation was established.

The determination of whether evidence is relevant and admissible is within the discretion of the district court and will not be overturned except upon a showing of abuse of discretion. *State v. Forsythe*, 2017 MT 61, ¶13, 387 Mont. 62, 390 P.3d 931 (citing *State v. Levanger*, 2015 MT 83, ¶7, 378 Mont. 397, 344 P.3d 984).

Mont. R. Evid. 901 requires authentication or identification of certain evidence as a condition precedent to its admissibility. "The requirement 'is satisfied by evidence sufficient to support a finding that the matter in question is

what its proponent claims.' Authentication or identification may be accomplished by a witness's testimony that a matter is what it is claimed to be." *State v. High Elk*, 2006 MT 6, ¶32, 330 Mont. 259, 127 P.3d 432 (citing Mont. R. Evid. 901(a), 901(b)(1)). In *High Elk*, the foundation requirement was met when a police officer testified regarding where and when the photographs were taken.

In this case, the evidence in question was a video introduced by the prosecution in closing argument. It was an overlay of two videos created by an unidentified source using an unknown method during closing argument. No witness was called to lay a foundation for entry of the video into evidence. Neither the creator of the overlay video nor the means by which it was produced was identified or subjected to cross-examination. The district court allowed the prosecution to show the video to the jury six times, denying West an opportunity to challenge the credibility of the video or its creator in any way and prejudicing his defense. The district court's admission of the video over the objection of defense counsel was an abuse of discretion.

2. The prosecution improperly solicited character testimony regarding whether West had the means and the motivation to commit the robbery and portrayed West as an addict who was "high on pills and adrenaline."

"Except as otherwise narrowly provided by an exception to the general rule, evidence regarding the character (including but not limited to evidence of a particular character trait) of a party, witness, or hearsay declarant is not admissible

for the purpose of proving that the person acted in 'conform[ance] therewith on a particular occasion.'" *State v. Lake*, 2022 MT 28, ¶26, 407 Mont. 350, ¶26, 503 P.3d 274 (citing Mont. R. Evid. 404(a)) "The 'general prohibition' of Rule 404(b) 'comes into play whenever the nature of the evidence might tempt the jury to decide the case against the defendant on an improper propensity basis,' and thus 'applies to any conduct, criminal or noncriminal, that effectively impugns or reflects negatively on the defendant's character.'" *Id.* (citing *State v. Stewart*, 2012 MT 317, ¶62, 367 Mont. 503, 291 P.3d 1187, Mont. R. Evid. 404(b)).

While there are exceptions under which character evidence can be admitted, they are limited and the character evidence must not, in any case be more prejudicial than probative because, "Although the government will hardly admit it, the reasons proffered to admit prior-bad-act evidence may often be a Potemkin, because the motive, we suspect, is often mixed between an urge to show some other consequential fact as well as to impugn the defendant's character." *United States v. Sampson*, 980 F.2d 883, 886 (3d Cir. 1992).

Although not admissible to show bad character or propensity to commit the charged offense, evidence of prior bad acts is admissible for other purposes such "as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Mont. R. Evid. 404(b). "The distinction between admissible and inadmissible Rule 404(b) evidence turns on the intended purpose of

the evidence…. [A] district court must analyze the proposed evidence to determine whether it supports the particular purpose asserted by the State." *State v. Aakre*, 2002 MT 101, ¶11, 309 Mont. 403, 407-08, 46 P.3d 648, 651 (discussing *State v. Sweeney*, 2000 MT 74, ¶19, 299 Mont. 111, 116, 999 P.2d 296, 300). For character evidence to be admissible under an exception such as to show motive, "the commission of the first crime or act (drug addiction) should give rise to a motive or reason for the defendant to commit the second crime (robbery)." *State v. Sweeney*, 2000 MT 74, ¶25, 299 Mont. 111, 118, 999 P.2d 296, 301.[10]

It is not, however, sufficient for the prosecution to simply say, "West committed this robbery because he was an addict" without proof. "Mere reference to a permissible purpose is insufficient for admission of other acts evidence under Rule 404(b). Other acts evidence is admissible for a permissible Rule 404(b) purpose only if 'the proponent [can] clearly articulate how that evidence fits into a chain of logical inferences, *no link of which may be the inference that the defendant has the propensity to commit the crime charged*.'"[11] *State v. Madplume*, 2017 MT 40, ¶23, 386 Mont. 368, 390 P.3d 142. (quoting *State v. Clifford*, 2005 MT 219, ¶48, 328 Mont. 300, 121 P.3d 489, *see also Lake*, ¶27).

[10] Parenthetical notes added.

[11] Emphasis added.

Drug addiction is a highly negative character trait that carries significant stigma. Numerous studies demonstrate that jurors give greater weight to negative character evidence than to favorable evidence. Robert G. Lawson, *Credibility and Character*, 50 Notre Dame L. Rev. 758, 776 (1975). Any negative trait carries more weight with a jury than positive traits, and juries can fixate on negative information about a defendant's character. *See* Weiten & Crowdus, *The Effects of Positive and Negative Information on Person Perception*, 21 Hum. Rel. 383 (1963); Levin, Wall, Dolezal & Norman, *Differential Weighing of Positive and Negative Traits in Impression Formation as a Function of Prior Exposure*, 97 J. Experimental Psychology 114 (1973); Brooks & Doob, Justice and the Jury, 31 J. Sco. Issues 175 (Summer 1975). Moreover, drug addiction has been shown to engender much higher stigmatization than most other characteristics including obesity, dementia, homelessness, criminal history and alcoholism. Robin Room, *Stigma, Social Inequality and Alcohol and Drug Use*, Drug and Alcohol Review, (March, 2005), pp 143-155. It is unlikely the prosecution could have chosen a more prejudicial way to try to establish that West had the means and motive to commit the crime with which he was charged than to solicit opinion testimony strongly implying to the jury West committed the robbery because he was a drug addict.

Detective McConnell, in describing the evidence as "overwhelming" said,

(12/19/2022 Hrg. Tr. 508:4-12) "You have the shoes, the weapon we found, *the pill addiction*, being there a week prior, *all the other prescriptions*, his limp, the walk." (*Id.* 508:14-19, emphasis added)

Even if the evidence had been otherwise admissible under a 404(b) exception, the State had an ongoing duty, as an officer of the court, to use the evidence responsibly. In this case, the probative-prejudicial balance was tipped when the prosecution showed the jury the overlay videos of West and the perpetrator six times and asserted that, "Ladies and gentlemen, that's the same person…." Rather than call a qualified witness or advise the jury to come to its own conclusion, the prosecution testified regarding what the overlay showed. This testimony, in closing argument was highly prejudicial and West was given no opportunity to confront the "witness" or to rebut the allegation. Grant West was denied a fair trial because of prosecutorial misconduct.

3. West received ineffective assistance of counsel.

West's attorney was ineffective. Defense counsel occasionally lodged objections and challenged the inconsistencies in the eyewitness testimony obliquely, but he missed many errors and did not present argument in support of his objections or actively confront witnesses with their previous inconsistent statements. Defense counsel failed to object to the improper police procedure in which the eyewitnesses were interviewed together and essentially collaborated on

their testimony or seek to have all or part of their testimony stricken. Counsel touched on the fact that West was left-handed, but asked neither West nor his brother if he was a left-handed shooter.[12] West's attorney asked why law enforcement didn't get fingerprints from the store to exclude West as a suspect, but didn't ask why they didn't get fingerprints from West's vehicle to include or exclude Jimmy – who West said had borrowed the vehicle.

While defense counsel got several witnesses to concede that Officer McConnell's failure to separate the witnesses was problematic, he lodged no objection. "'The Due Process Clause of the Fifth and Fourteenth Amendments forbids a lineup that is unnecessarily suggestive and conducive to irreparable mistaken identification.' Thus, in case such at this, where no right to counsel attached to the identification procedure because it occurred before the commencement of judicial criminal proceedings, 'due process protects the accused against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures.'" *State v. Lara* (1978), 179 Mont. 201, 204, 587 P.2d 930 (citing *Kirby v. Illinois* (1972), 406 U.S. 682, 691, 92 S.Ct. 1877, 1883; *Neil v. Biggers* (1972), 409 U.S. 188, 93 S.Ct. 375) By failing to move to exclude the testimony of the three eyewitnesses – who

[12] Counsel has confirmed that Grant West is, in fact a left-hand dominant shooter.

testimony establish collaborated in their statements regarding the robbery – counsel failed to provide effective representation.

Defense counsel did not object when the prosecution elicited unqualified opinion testimony from Sunde, Detective McConnell, and Detective Stoll that West was an addict and that his addiction or adrenaline made it physically possible for him to commit the robbery. Defense counsel did not call a qualified medical witness – such as West's doctor – to testify regarding the extent of West's infirmity and rebut the theory that West was physically capable of committing the robbery with the aid of painkillers and adrenaline. On the contrary, counsel allowed prosecution lay witnesses – a pharmacist and two police detectives – to give what the jury could reasonable believe was "expert" testimony regarding those questions without raising an objection. Nor did counsel object to the introduction of unsubstantiated second-hand evidence by Detectives McConnell and Stoll that law enforcement "scoured the earth" looking for Jimmy even though the defense was denied an opportunity to confront anyone who actually conducted the investigation.

While it may be argued that some of counsel's actions were tactical, many of them could not reasonably be so categorized. Defense counsel's repeated failure to lodge or support valid objections, or to effectively challenge inconsistencies, misrepresentations, unsupported testimony and highly prejudicial statements by the

prosecution denied West effective representations of counsel. Counsel failed to even fulfill the simplest requirement of effective advocacy. Defense counsel did not once, during the entire trial, argue that West was entitled to a presumption of innocence or that the State had not proven its case beyond a reasonable doubt. In fact, the only time the jury heard the term "beyond a reasonable doubt" was during voir dire and the reading of the jury instructions. West did not have effective representation of counsel.

4. Taken together, the cumulative errors denied West a fair trial on the merits.

While a defendant is not entitled to a trial free from errors, he or she is entitled to a fair trial. "The doctrine of cumulative error requires reversal of a conviction where a number of errors, taken together, prejudice a defendant's right to a fair trial." *State v. Cunningham*, 2018 MT 56, ¶32, 390 Mont. 408, 414 P.3d 289 (citing *State v. Hardman*, 2012 MT 70, ¶35, 364 Mont. 361, 276 P.3d 839). "The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal." *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007) (citing *Chambers v. Mississippi*, (1973) 410 U.S. 284, 290 n.3).

Though this Court has held "the cumulative effect of errors will rarely merit reversal" *Cunningham*, ¶33 (citing (*State v. Lawrence*, 2016 MT 346, ¶27, 386

Mont. 86, 385 P.3d 968 (Baker, J. concurring)), reversal is appropriate where the defendant can establish proof of prejudice. In *State v. Cunningham*, the Court reversed the defendant's conviction when multiple errors denied him the opportunity to effectively impeach a prosecution witness and prejudiced his ability to present a defense. *Cunningham*, ¶33.

In this case, the district court's refusal to bar Coker's testimony or continue the trial denied the defense an opportunity to competently confront her about her impairment. Next, the district court erred when it allowed unqualified lay witnesses and law enforcement to give opinion testimony speculating that West was a drug addict and that, under the influence of drugs and adrenaline he committed the robbery despite his severe disability. The court also erred when, in light of the paucity of evidence presented, it dismissed West's motion for dismissal due to insufficient evidence without serious consideration. The court's decision to allow the State to present the overlay video of West entering Gold Rush Pawn and the perpetrator entering Super 1 foods without admonishing counsel against testifying, then allowing the prosecutor to so – not just once, but on both closing arguments – was error that opened the door for improper highly-prejudicial prosecutorial testimony with little or no probative value. Finally, the district court, even without objection of counsel, should have inquired pointedly into the extent to which the testimony of the three eyewitnesses was tainted by the highly suggestive

circumstances of the initial interview. Even if this Court should determine each of these errors, individually, is harmless – which West contends is not the case – they cumulatively denied West a fair trial.

CONCLUSION

West respectfully requests the Court reverse his conviction and remand the case for a new trial based on errors committed by the district court, prosecutorial misconduct, and ineffective assistance of counsel. Alternatively West requests a remand for a new trial based on cumulative error that denied West a fair trial.

Respectfully submitted this November 1, 2024.

Gregory D. Birdsong
Birdsong Law Office
P.O. Box 4051
Santa Fe, NM 87502
406-529-6988
birdsonglaw@gmail.com

CERTIFICATE OF COMPLIANCE

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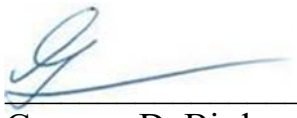

Gregory D. Birdsong

CERTIFICATE OF SERVICE

I, Gregory Dee Birdsong, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 02-18-2025:

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

Travis R. Ahner (Govt Attorney)
820 South Main Street
Kalispell MT 59901
Representing: State of Montana
Service Method: eService

Tammy Ann Hinderman (Attorney)
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena MT 59620
Representing: Grant Alan West
Service Method: eService

Electronically Signed By: Gregory Dee Birdsong
Dated: 02-18-2025