

IN THE SUPREME COURT OF THE STATE OF MONTANA

Cause No. DA 23-0503

STATE OF MONTANA,

Plaintiff and Appellee,

v.

RICK DENNIS STROBEL

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana First Judicial District Court,
Lewis & Clark County, the Honorable Michael McMahan, Presiding

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STATEMENT OF THE ISSUES

1) The District Court abused its discretion when it denied Strobel's motion to dismiss and for directed verdict for insufficient evidence to prove Strobel's intent to coerce by threat, the performance of an act, or omission.

2) The District Court abused its discretion when it admitted prejudicial jury instructions over objection.

3) The District Court abused its discretion by arbitrarily denying Strobel's objections to leading questions that prejudicially affected the fundamental fairness of the trial.

4) The unpreserved errors in this case merit plain error review because they implicate fundamental rights where failure to review them "may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process.

5) A verdict based on the fair and impartial deliberations of a jury requires that the jury review evidence that is not unfairly prejudicial propensity evidence.

6) A verdict based on jury instructions that did not fully and fairly instruction on the law tainted the verdict and prejudiced Strobel's right to due process.

7) A verdict based on fair and impartial jury deliberations requires that the jury consider evidence free from the improper and impermissible prejudicial actions and comments of the prosecutor.

8) Strobel's trial was unfair because he received ineffective assistance of Counsel, where there was no plausible justification. Alternatively, the record showed that counsel's actions were irretrievably flawed, and these actions prejudicially affected the outcome of his sentencing.

9) Cumulative Error- Strobel's conviction for intimidation was tainted by preserved and unpreserved prejudicial errors, as well as ineffective assistance of counsel, which culminated in a due process and fair trial violation.

10) The District Court unlawfully sentenced Strobel for the revocation of his suspended sentence by misinterpreting and

misapplying MCA §46-18-203(7)(b), resulting in a miscalculation of street time credit for 326 days without a documented violation.

STATEMENT OF THE CASE

The state charged Strobel with one count of Intimidation under §45-5-203(1)(a), MCA. (Doc. 1.) The state filed a Petition to Revoke in BDC 2019-172, alleging he violated his suspended sentence due in part to the new charge of Intimidation. (BDC 2019-172, Doc. 26.) An Amended Petition to Revoke was filed with the same Report of Violation attached. (BDC 2019-172, Doc. 26.) Strobel entered denials in both matters. (Doc. 6; (BDC 2019-172, Doc. 26).) An Omnibus Hearing was held, no pretrial evidentiary motions were filed, or notices of mental defect, or affirmative defenses. (Doc. 12.) Three bond reduction hearings were held, with the lowest bond set at \$100,000. (Doc. 13; 12.14.2022 Bond Tr.; Doc. 14; 2.1.2023 Bond Tr.; Doc. 19; 3.22.2023 Bond Tr.)

A Notice of Reassignment of counsel was filed on 2/27/2023. (Doc. 15; BDC 2019-172 Doc. 43.) Strobel sought an acquittal at trial by general denial, and during the Pretrial Conference, the parties

indicated there were no issues that needed attention. (Doc. 19.) Neither party filed a Motion in Limine or Trial Briefs in this case.

The jury received Jury Instruction #28, a rape shield instruction, and Jury Instruction #26, a special unanimity instruction for continuous conduct. (Doc. 30 at 30, 32.) The only eyewitness, Curt McAlpin, provided a prior inconsistent statement, and with no corroborating evidence; however, the state would not rely on the prior inconsistent statement to convict. (Jury Tr. at 194-197, 199.) The parties briefly discussed 404b other acts evidence, but no balancing test was conducted or definitive boundaries set. (Jury Tr. at 6-17)

At trial, Strobel's counsel admitted Strobel's guilt by saying he had made a threat verbatim, but didn't mean it. (Jury Tr. at 161, 162, 260.)

The Jury deliberated for approximately one hour. (Jury Tr. at 279.) Strobel was convicted by a verdict of guilty. (Jury Tr. at 281.) He was sentenced to five years at Montana State Prison, to run consecutively to his six-year sentence for revocation. (Sent Tr. at 51-52.)

At sentencing on his Revocation, Strobel was found to have violated the conditions of probation solely due to this noncompliance count, when the court took judicial notice, having not admitted or pleaded guilty to the other counts in the report of violation. (5.3.2023 Evid. Tr. at 5; BDC 2019-172 Doc 60; 5.17.2023 Sent Tr.at 49.)

Strobel appealed the Intimidation conviction in DA 23-503 and filed an out-of-time appeal regarding the revocation conviction in DA 25-135, which were consolidated into DA 23-503 by the Court.

STATEMENT OF THE FACTS

At the time of this incident, Rick Strobel was on SSDI for disabilities related to a traumatic brain injury (TBI) from an accident that happened in 2008. (Doc. 34, 39.) The fluctuating symptoms and individualized diagnoses of TBI leave it susceptible to suspicions of malingering. (Doc. 39, 35, 34.) Suspicion edges its way into reports suggesting the ailment may be overstated. (Doc. 39, 35, 34; Sent Tr. at 21) This is the thread running through Rick Strobel's case.

Facts Related to the Charged Offense

Rick Strobel began serving his probation sentence with Adult Probation and Parole (AP&P) starting November 28, 2019, after being convicted of protection order violations involving his wife. (BDC 2019-172, Doc. 26.) Compliance with AP&P programs required Strobel to submit random urinalysis tests (UA's) at the Helena Pre-Release Center (Center), a Department of Corrections (DOC)-affiliated facility. (BDC 2019-172 Doc. 26.) On November 9, 2022, Strobel visited the Center to submit a drug test sample. (Doc. 1.) Curt McAlpin, a part-time security guard and the alleged victim, met Strobel when he first walked in and described him as agitated, belligerent, and unhappy to be there. (Jury Tr. 178, 179, 180,182-183) McAlpin, a 38-year veteran of law enforcement, escorted Strobel to a secured area for testing. (Jury Tr. at 178, 190, 195.) That day, the Center was staffed by three on-duty security personnel and 15 staff members. (Jury Tr. at 173, 192.) Fifty cameras, both inside and outside, covered the facility, including various secured areas and the security bubble. (Jury Tr. at 174, 177, 178, 190,195.) McAlpin said that after he told Strobel the test results,

Strobel “became very belligerent and argumentative,” again, and said that there was a conspiracy to take his freedom. (Jury Tr. 184.) McAlpin said Strobel said If he had a gun, he’d shoot the place up.” (Jury Tr. 186.) Strobel always denied making a threat involving a gun, but admitted to complaining loudly about how the UAs were being handled. (Doc. 1, BDC Doc. 26, Doc. 36; Jury Tr. at 214-215.)

McAlpin said that he did not call the police or request assistance from staff on duty that day because he was following protocol. (Jury Tr. at 190, 191.) McAlpin emailed his supervisors to report Strobel’s behavior after Strobel left. (Jury Tr. at 190, 191.) The following day, Strobel’s probation officer told the Center to contact police. (Jury Tr. at 234.) HPD Officer Weems responded to the complaint and interviewed McAlpin. (Jury Tr. at 211-213.) McAlpin told Weems that he was not fearful of Strobel during the incident, but he was gravely concerned about what might happen next. (Jury Tr. at 194-195.) In contrast, at trial, McAlpin testified that he became so terrified during the incident that he experienced lasting effects, including hypervigilance. (Jury Tr.

at 190, 198.) There is no evidence corroborating any of McAlpin's statements. (ROA, BDC 22-577.)

Facts about the Trial

Despite Strobel's probation status and counsel's suspicion of a tainted affidavit, Defense counsel did not file any pre-trial evidentiary motions. No notice of Strobel's mental defect disability at the time of the crime, or a current neurological report, was filed at Omni. (Doc. 12, 34.)

On the morning of the trial, the parties briefly discussed: unreviewed discovery by Strobel, jury instructions (except for #28), the admissibility of propensity evidence without clear boundaries or a balancing test, and the state's offer of proof for witnesses McAlpin and Weems, excluding Lyons without response from the court. (Jury Tr. at 6-18.) The offer of proof indicated the testimony would be to establish probation status as a reason to be at the Center, and the context. (Jury Tr. at 6-18.)

During voir dire and at trial, the prospective jurors were repeatedly assured that the parties would do everything possible to

conclude the trial that night, rather than having it spill over into the next day. (Jury Tr. at 101, 102, 269, 27, 5.)

Strobel sought an acquittal by general denial at trial. (Doc. 1, BDC Docs. 26, 36; Jury Tr. at 214-215.) However, Defense counsel admitted to the jury that Strobel had made a threat verbatim from McAlpin, but that he didn't mean it. (Jury Tr. 119, 126.) Testimony was admitted of Strobel's denials. (Jury Tr. at 214, 259.)

During the trial, the prosecutor took actions in the presence of the jury with the court's tacit consent, which were impermissible or improper. *Supra*, p Strobel objected to a series of leading questions and one irrelevant question. (Jury Tr. at 174, 182, 184, 187, 194, 197, 227, 202, 269.)

State's witness, McAlpin, confirmed a prior inconsistent statement where he described not being afraid of Strobel, and that the alleged threat was abstract and not concrete. (Jury Tr. 199.)

State's Witness Weems confirmed McAlpin gave him a statement that Strobel's alleged threat did not make him fearful. (Jury Tr. at 225.) State' witness, Lyons, testified about what actions she allegedly took to

hunt Strobel down without any probative value and was overwhelmed with inflammatory propensity testimony. (Jury Tr. at 230-231.)

At the end of the state's case, the judge included Jury Instruction #28, the Rape Shield instruction, over Strobel's objection. (Jury Tr. at 241.) Strobel moved to dismiss and for a directed verdict, arguing that the state failed to provide sufficient evidence that Strobel lacked legal authority or that he coerced McAlpin to act or not act. (Jury Tr. at 241-245.) The court denied the motions, citing circumstantial evidence that after McAlpin told Strobel the outcome, Strobel became angry and allegedly made a threat. (Jury Tr. at 245.) In other words, there was circumstantial evidence in the form of the timing. (Jury Tr. at 245.)

Deliberations began at 5:29 p.m. with instructions to the jurors to place food orders. (Jury Tr. at 279.) The jury returned with a verdict of guilty at 6:39 p.m. (Jury Tr. at 281.)

At sentencing, the court inquired about Strobel's mental defect under MCA §46-15-311 because Strobel filed a premature petition for post-conviction relief, mentioning that assigned counsel/s did not take his disability of traumatic brain injury seriously in preparation for trial.

(Sent. Tr. at 8-9, Doc. 36.) The court sentenced Strobel on his revocation for BDC 2019-172. (BDC 2019-172 Doc. 60.) The court did not include a written portion of the reasons for denying credit for elapsed time. (BDC 2019-172 Doc. 60.) Strobel was denied approximately 326 days of elapsed time credit at the time of sentencing, according to the records and testimony of AP&P Lyons. (Appendix B at 1-2.) BDC 2019-172 Doc. 26; Sent. Tr. at 24-29.) McAlpin appeared for sentencing and did not request restitution. (Sent. Tr. at 31.)

STANDARD OF REVIEW

This Court reviews legal determinations de novo. This includes issues of denial of a motion to dismiss for insufficient evidence, *State v. Bennett*, 2022 MT 73, ¶ 7, 408 Mont. 209, 211, 507 P.3d 1154; and ineffective assistance of counsel, *State v. Kougl*, 2004 MT 243, ¶ 12, 323 Mont. 6, 97 P.3d 1095, and whether instructions as a whole fully and fairly inform a jury of the applicable law, *Peterson v. St. Paul Fire & Marine Ins. Co.*, 2010 MT 187, ¶ 45, 357 Mont. 293, 239 P.3d 904.

This Court reviews evidentiary rulings for abuse of discretion. This includes determining the relevance and admissibility of

evidence, *State v. Derbyshire*, 2009 MT 27, ¶ 19, 349 Mont. 114, 201 P.3d 811; whether to exclude evidence due to a danger of unfair prejudice. *State v. Belanus*, 2010 MT 204, ¶ 15, 357 Mont. 463, 240 P.3d 1021.

This Court may review unpreserved errors that implicate fundamental rights where failure to review them “may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process.” *State v. Finley*, 276 Mont. 126, 137, 915 P.2d 208, 215 (1996)

This Court generally does not address issues of prosecutorial misconduct related to a prosecutor's statements that were not objected to at trial. *State v. Haithcox*, 2019 MT 201, ¶ 23, 397 Mont. 103, 447 P.3d 452 (citations omitted). This Court may, however, invoke plain error review and consider an unpreserved claim alleging prosecutorial misconduct in situations implicating a defendant's fundamental constitutional right and when failure to review the alleged error may result in a manifest miscarriage of justice, leave unsettled the question

of the fundamental fairness of the proceedings, or compromise the integrity of the judicial process. *Haithcox*, ¶ 23 (citing *State v. Aker*, 2013 MT 253, ¶ 21, 371 Mont. 491, 310 P.3d 506).

The cumulative error doctrine applies only when an appellant establishes multiple errors that collectively prejudice his due process rights. *State v. Cunningham*, 2018 MT 56, ¶ 32, 390 Mont. 408, 414 P.3d 289.

SUMMARY OF THE ARGUMENTS

The District Court abused its discretion when it denied Strobel's motion to dismiss and directed verdict because of insufficient evidence to prove coercion; and when it admitted unrelated and prejudicial jury instructions and arbitrarily denied Strobel's objections to leading questions that prejudicially contributed to an unfair trial.

The unpreserved errors in this case warrant plain error review. The jury was given unfairly prejudicial propensity evidence and evidence manipulated by the prosecutor.

Strobel received ineffective assistance of counsel, both on the record and without plausible justification, which irretrievably prejudiced his trial and the outcome of sentencing.

Strobel's conviction for intimidation was tainted by both preserved and unpreserved prejudicial errors, as well as ineffective assistance of counsel, which ultimately, in unison, culminated in a due process and fair trial violation. The District Court unlawfully sentenced Strobel for the revocation of his suspended sentence by misinterpreting and misapplying MCA §46-18-203(7)(b), resulting in a miscalculation of street time credit for 326 days without a documented violation.

ARGUMENTS

I. The District Court abused its discretion in denying Strobel's motion for dismissal and directed verdict due to insufficient evidence of specific intent to coerce, warranting reversal.

The offense of Intimidation requires the state to prove that Strobel made a threat "with the purpose to cause another to perform or omit the performance of any act." Mont. Code Ann. § 45-5-203(1)(a)

"[C]ircumstantial evidence may provide sufficient evidence to prove a mental state, but this is only true when the evidence is strong enough to

permit a reasonable juror to conclude the mental state existed beyond a reasonable doubt. *State v. Plenty Hawk*, 285 Mont. 183, 186– 87, 948 P.2d 209, 209, 211 (1997).

After the state had concluded its case, Strobel moved for dismissal and a directed verdict on the basis that the state had not provided sufficient evidence to prove Strobel’s” intent to coerce an act or omission of an act,” or to prove Strobel was without legal authority to make a threat. (Jury Tr. at 241.)

The court denied the motions based on circumstantial evidence that after McAlpin told Strobel the result, Strobel became angry and allegedly made the threat. (Jury Tr. at 245.) The circumstantial evidence of the timing of the alleged threat was sufficient evidence for the court. (Jury Tr. at 245.)

Strobel’s case is analogous to *State v. Plenty Hawk*. Plenty Hawk was found drunk in the street, and when help arrived, he complained and threatened the attending medical and police personnel the whole time he was engaged with them. *Id* at 186. Although Plenty Hawk had never stated such, the state argued that Plenty Hawk made threats

with the intention of persuading the deputy to release him. *Id at 186*. The state believed his intent could be inferred from his actions, and many witnesses corroborated the timing of the threat. *Id at 186*. This Court held that Plenty Hawk's statements to the deputies were merely “a continuation of his belligerent attitude” he had when he first encountered police, as opposed to threats made with the purpose of causing the deputies to act. *Plenty Hawk*, 285 Mont. 183, at 184, 948 P.2d at 209-10 (1997).

Here, although Strobel was not in jail, he was in a DOC-affiliated Pre-Release facility, designed to exert control over its residents and visitors upon entry. (Jury Tr. at 177,178, 190.) Similar to *Plenty Hawk*, McAlpin testified that when Strobel first entered the facility, he was belligerent and argumentative, unhappy to be there, and continued to complain throughout his entire appointment. (Jury Tr. at 178, 179, 180.)

Similar to *Plenty Hawk*, Strobel also did not state an intent to coerce, and the state inferred Strobel’s intent based on the timing of the

alleged threat. (Jury Tr. at 256-258.) However, in Strobel's case, there is no corroborating evidence of the timing. *Id* at 186, (Jury Tr. at 199 .)

Below is McAlpin's testimony about Strobel's alleged threat involving a gun and whether McAlpin inferred Strobel was coercing him not to report test results. (Jury Tr. 184-186, 186-190.)

McAlpin's testimony of Strobel's alleged threat.
(Jury Tr. at 184, line 4-186.)

Downs: Okay, what did he say after you told him you were going to send the results?

McAlpin: He stated that this was a conspiracy and that I was trying to take his freedom.

Downs: You were trying [to] take his freedom, okay. And did you – and did he say anything else?

McAlpin: No.

Downs: Okay.

McAlpin: Again, I told him that it was being sent off and that they will be contacting him.

Downs: Okay. And so, he said he -- so you said he -- you said that it was a conspiracy, and I'm sorry, what was the other thing?

McAlpin: That I was trying to take his freedom away.

Downs: Okay. And then after that, did he say anything else?

McAlpin: No.

Downs: Did he say anything about that he was going to –

Defense: Objection, Your Honor, leading.

Court: Sustained.

Downs: So, did you speak with Officer Weems?
McAlpin: I did.
Downs: And you spoke with him in about a day; is that correct?
McAlpin: Correct.

Downs: So, I'm going to hand you what's been marked---or I'm sorry, a transcript provided by the defense.

Court: It's just going to be used to refresh recollection?

Downs: Yes. Judge.

Court: Mr. Abdul-Baki, any objection?

Abdul-Baki: No, Your Honor.

Court: He's going to provide you the document, sir. Don't read it out loud. It's just to refresh your recollection. Thank you.

Downs: Page 2, line 10. Does that refresh your recollection?

McAlpin: Yes, it does.

Downs: So what happened?

McAlpin: After I explained to him I was going to get ahold of the program director, the center's director, and probation and parole he -- as he was telling me that I was trying to take his freedom away, he said, "if" he had a gun, he would shoot the place up.

McAlpin's testimony of Strobel's intent to coerce.

(Jury Tr. 186, line 25, 190, line .)

Downs: Okay. And so, what was your understanding, why did he say that, what was his intention if you know?

McAlpin: I would say to either intimidate, coerce, or try to have me alter my protocol.

Downs: He didn't want you to send the results? Is that your take?

McAlpin: Yes.

Defense: **Objection**, Your Honor, leading.

Court: **Sustained**, but he can rephrase.

Downs: So he said, "If I had a gun, I'm going to shoot this place up." And so, you took that as he was saying that –

Defense: Objection, Your Honor, same premise.

Court: I don't think he finished the question. Let me finish the question, and then I'll consider your objection.

Downs: So you took that as something?

McAlpin: I took it as a threat and intimidation that he would be either there or come back with extreme prejudice.

Downs: And you say extreme prejudice. What do you mean?

McAlpin: Retaliation.

Downs: Okay. So he says -- correct me if I'm wrong so he says something about a gun and shooting everybody?

McAlpin: (Nodding head.)

Downs: Okay. How did you take that?

McAlpin: I took that as that's a threat and intimidation, and that I'm going have to make a plan B to either secure -- get him out, secure the building, secure my residents, secure my staff.

Downs: And why?

McAlpin: He said "if "he had a gun.

Downs: So, do you know if he had a gun?

McAlpin: I did not know if he had a gun on him. We did not search him. I didn't know if he had a gun in a vehicle. I don't know if he had one somewhere else, or if he's coming back in five minutes, ten minutes, half an hour, hour, a day.

Downs: Okay. So you --

McAlpin: It gave me grave concern.

Downs: So you didn't pat search him when he was in the facility?

McAlpin: No.

Downs: . And he makes that reference about shooting people. Did you take that from -- from your understanding, did you think that -- who was he referencing? Do you have any idea?

Downs: I would say shooting the building or shooting at individuals inside the building, whether it was me.

Downs: So you were in fear for yourself?

McAlpin: Yes.

Downs: Who else were you fearful for?

McAlpin: My fellow employees and a hundred-plus residents.

Downs: Okay. So then you testified that at some point he – Does he leave, or what happens?

McAlpin: He made the threats of shooting the place up.

Downs: Let me stop you there. So you took it -- was that a threat to you?

McAlpin: Yes, sir.

Downs: Okay. So --

McAlpin: I escorted him to the family room, to the foyer. He went out through the main door. I watched him leave the premises. Then I went into our security bubble, informed the two to three other security staff that was there what had transpired. We have cameras throughout the building, inside and out, and made sure he left. And then that caused me enough distraught – I was distraught enough where I needed to watch those cameras literally my entire shift to make sure that he wasn't coming back.

Downs: So, who did you notify?

McAlpin: I sent an email to the program director.

The state's inference that Strobel intended to coerce relied only on the “timing” of the threat and is based on uncorroborated testimony. (Jury Tr. at 259.) McAlpin was fearful, but the jury did not hear him say that Strobel inferred a threat to coerce him not to report results. (Jury Tr. 186-190.)

The state's inference based on circumstantial evidence of timing did not establish that Strobel made a threat with the intent to coerce McAlpin not to report a UA test; instead, his alleged threat was part of a series of rantings and blustering behaviors.

When viewed in the most favorable light to the state, the evidence is not strong enough to allow a reasonable juror to conclude that the mental state existed beyond a reasonable doubt. The proper remedy is reversal.

II. Strobel's conviction was tainted by prejudicial errors and ineffective assistance of counsel, violating his right to due process.

1. Preserved Errors

A. The District Court abused its discretion by arbitrarily denying or allowing leading questions over Strobel's objections, contributing to an unfair trial.

A trial court has broad discretion in determining the relevance and admissibility of evidence. However, it must adhere to the Rules of Evidence. *State v. Derbyshire*, 2009 MT 27, ¶ 19, 349 Mont. 114, 201 P.3d 811. "Repeated improper statements create cumulative prejudice, and we accordingly view them collectively rather than individually."

Anderson, ¶ 78. When multiple errors are committed by the prosecutor, the cumulative effect of the misconduct leaves unsettled the question of the fundamental fairness of the proceedings. *Aker*, ¶ 28. Jury instructions and prosecutorial comments to the jury that it is the jury's duty to evaluate the witnesses' credibility do not cure or erase the State's multiple improper questions to witnesses or comments made in closing arguments. *State v. Byrne*, 2021 MT 238, ¶ 32, 405 Mont. 352, 368–69, 495 P.3d 440, 451–52.

During the trial, the prosecutor engaged in manipulating testimony, making it heavily coached so the jury received filtered testimony, thereby violating the defendant's due process rights. (Jury Tr. at 157, 158, 195, 195, 195,273 (bolstering the credibility of the state's witnesses); 194-197(bolstering the explanation of a prior inconsistent statement before impeachment); 226-227 (eliciting vouching of one witness for another); 172, (173 x2), 173, 174 (x2), 175 (x3), 176, 177, 178, 179, 180, 181, (182 x2), 183, 184, (185 x2), (187 x2), 188, (189 x2), 190, 192, 193, 194-197, (195 x3), 196, (197 x4), 198, 202,

203, 204, 211, 211, 211,215, 216, 222, 225-227, 229, 230, (231 x2), 236 (x3), 237 (x2); (leading questions);

Before the trial, during a recorded police interview, McAlpin stated that he was not afraid of Strobel at the time of the incident. (Jury Tr. at 199.) At trial, he testified he was terrified. (Jury Tr. at 179-204.) McAlpin's prior inconsistent statement was unknown to the jury during this part of the direct examination, as McAlpin had not been cross-examined and impeachment had not yet occurred.

The state wanted an explanation for McAlpin's inconsistent statements and created one by separating his fear levels: one where McAlpin was not afraid of Strobel because he gave his statement to police a day later, and another where he was terrified during the incident, as he testified at trial. (Jury Tr. at 194-197.)

By the time Strobel began cross-examination, his method of impeachment had already been undermined by the state's use of leading questions in the segment below. (Jury Tr. at 194-197.)

Excerpt of bolstering before impeachment with leading questions.

Downs: And did you have a conversation with Officer Weems?

McAlpin: I did.

Downs: And that was about the next day or so?

McAlpin: It was. It was the next morning, I believe.

Downs: Okay. And so, when you spoke with Officer Weems, did you have the same concern then as you did the day before?

Baki-Abul: Objection, Your Honor, leading.

Court: Overruled.

Downs: So you spoke to the officer about it the next day. Is that fair to say?

McAlpin: I explained to him that I had grave concerns and apprehension that something was going to happen.

Downs: So you have the transcript in front of you. Do you recall telling Officer Weems that at that point, you did not have reasonable apprehension within the day or so after?

McAlpin: He was not there, but I told him I had grave concerns that something could happen.

Downs: Okay. So would you say it lessened to some extent in a day? Is that fair to say?

Baki-Abul: Objection, again, leading, Your Honor.

Court: Sustained.

Downs: Well, let me just re-ask the question. You're describing being in a small room or a room in the prerelease behind a secure door with Mr. Strobel making these threats about shooting people, okay, right? Is that correct?

McAlpin: That is correct.

Downs: Okay. Now, at that time, you expressed you were fearful, you were scared?

McAlpin: Yes.

Downs: Did you have that same level of fear and being scared when you talked to Officer Weems the next day?

Baki-Abul: Your Honor, I'm going to renew my objection, leading.

Downs: It's not leading.

Court: I'll sustain, but he can rephrase.

Downs: How did you feel when you talked to Officer Weems?

McAlpin: I told Officer Weems that I had reasonable apprehension and grave concerns that something was going to happen.

Downs: Okay.

McAlpin: I had some real -- I guess I wouldn't so much call it -- I guess I would call it fear. I had a hundred-plus people I had to be responsible for.

Downs: Sure. Okay. So, Judge, may I approach?

Court: Thank you.

Downs: Do you recall -- I'm going to grab the transcript. Thank you. Page four, line 12, can you please read that to yourself? Okay. So does that -- so do you recall having that conversation with Officer Weems within a day or so?

McAlpin: Yes.

Downs: And so what explanation do you have about the day after?

McAlpin: At that particular time, the level of threat had de-escalated to a point.

Downs: Okay. Okay. So your fear changed over a period of time. Is that fair to say?

Baki-Abul: Objection, Your Honor, leading.

Court: Sustained, but he can rephrase.

Downs: So, were you as scared when you talked to Officer Weems, the same level of fear as you were the day of this incident with Mr. Strobel?

McAlpin: No.

Baki-Abul: Objection, Your Honor, move to strike.

Court: Overruled.

The court's implied approval of the pretense of refreshing a recollection when no such state of mind was involved shows a disregard for, or at best, an arbitrary approach to ensuring a fair trial. The court abused its discretion by admitting evidence through leading questions that violated Strobel's right to due process and a fair trial.

Defense counsel objected to the prosecutor's leading questions, which, through their repetition and narrow focus, ignored McAlpin's previously candid accounts in favor of the state's own manipulated versions more aligned with its desired outcome. A jury hearing testimony of this nature would be misleading. It would prejudice the jury, leading to a tainted legal outcome and Strobel's right to a fair trial.

The court abused its discretion in rulings based on objections to these same improper questions by not adhering to the rules of evidence, which prejudiced the outcome of the trial and rendered it unfair.

B. The District Court abused its discretion by admitting Jury Instruction #28, which prejudicially affected Strobel's substantial right to a fair trial

The District Court abused its discretion by arbitrarily denying or allowing leading questions over Strobel's objections,

contributing to an unfair trial. A jury instruction must, as a whole, fully and fairly inform the jury of the applicable law and correctly define the elements of the offense. *State v. Carnes*, 2015 MT 101, ¶ 6, 378 Mont. 482, 346 P.3d 1120. This Court must view all the evidence in determining whether the instruction had an impact on the jury. *State v. Martinez*, 188 Mont. 271, 281, 613 P.2d 974, 979 (1980). "Jury instructions that relieve the State of its burden to prove every element of the charged offense beyond a reasonable doubt violate the defendant's due process rights." *State v. Iverson*, 2018 MT 27, ¶ 11, 390 Mont. 260, 411 P.3d 1284 (citations omitted)

The language in Jury Instruction #28 is verbatim from MCA §45-5-511(4), as subsection of a collection of statutes known as "rape shield laws," which explicitly apply to sexual crimes..” *State v. Gerstner*, 2009 MT 303, ¶¶ 42-43, 353 Mont. 86, 94, 219 P.3d 866, 872.

In *Gerstner*, a sex crime case, the District Court instructed the jury verbatim from MCA § 45-5-511(4). *Gerstner* argued that by giving this instruction, the court improperly commented on the evidence. ¶ 41 *Gerstner* further argued that the instruction confused the jury because it could have thought “presumption” meant he was precluded from arguing that lack of an immediate outcry had any relevance in the case. In denying *Gerstner*’s objection, the District Court reasoned that MCA § 45-5-511(4) explicitly applies to sexual crimes in general and could assist the jury under the circumstances presented. *Id.* ¶42 The District Court noted that the instruction did not prevent *Gerstner* from making a defense argument because he admitted the alleged contact occurred, but that it wasn’t sexual, which had nothing to do with an untimely complaint. *Id.* ¶43.

Here, *Strobel*’s case does not involve a sexual crime; therefore, a jury instruction based on the Rape Shield statutes is not relevant for guiding the jury. On that basis alone, its application in law and fact has no connection to the facts of this case, except in the context of a sex crime, and unfairly instructs the jury of an unrelated law to the facts.

Strobel argues that Instruction #28 prevented him from adequately defending himself at trial and was prejudicial because the state manipulated testimony with the same evidence. (Jury Tr. at 194-197.) The general presumption of truthfulness outlined in MCA §26-1-302 states,

“A witness is presumed to speak the truth. The jury or the court, in the absence of a jury, is the exclusive judge of a witness's credibility. This presumption may be controverted and overcome by any matter that has a tendency to disprove the truthfulness of a witness's testimony. The matters include, but are not limited to: (7) inconsistent statements of the witness or (8) other evidence contradicts the witness's testimony.”

Jury Instruction #28 establishes an additional presumption of truthfulness, narrowly focused on a single circumstantial fact: the failure to make a timely complaint. (Doc. 30) The jury is instructed to dismiss this as irrelevant to the witness's credibility, according to Instruction #28. Strobel's complete defense includes the ability to impeach the state's witness by challenging the presumption of truthfulness with an

“inconsistent statement of the witness” or “other evidence that contradicts the witness’s testimony.” MCA §26-1-302.

Before the trial, McAlpin told an officer he was not afraid of Strobel, but at trial, he testified he was terrified. (Jury Tr. at 199) The state tried to rehabilitate McAlpin’s prior inconsistent statement by explaining it based on its theory of two levels of fear: one where McAlpin was not afraid of Strobel because he made the statement a day later to police, and another where McAlpin was terrified during the incident, as testified at trial. (Jury Tr. at 198.) This explanation relied on the delayed complaint, which created the time gap between the incident and its reporting to establish two levels of fear. (Jury Tr. at 194-196. 199)

Strobel cross-examines McAlpin to impeach him, aiming to use his prior inconsistent statement, which suggests he might not have been as fearful as he testified, and that matches the level of fear expressed in the police interview. (Jury Tr. at 199.) The lapse in reporting is the only circumstantial evidence besides McAlpin’s prior inconsistent statements that Strobel can use to impeach him.

With the inclusion of Jury Instruction #28, the defense bears the burden of overcoming a specific fact presumption of truthfulness regarding the untimely complaint. The very circumstantial evidence that is the subject of this presumption is also the evidence Strobel intends to use to argue that the untimely complaint is relevant—probative circumstantial evidence showing that someone, not a sexual crime victim, wasn't terrified at all; otherwise, they would have called the security guards or police to deescalate the terrifying situation.

The judge's stated purpose for including Jury Instruction #28 was not to instruct the jury on the law; instead, it was to punish Strobel for attempting to impeach McAlpin. (Jury Tr. at 199-201.) When explaining why he was including Jury Instruction #28, over objection, he described the Defense's cross-examination of an intellectually functioning adult male security officer as "an attack on Mr. McAlpin about when he contacted law enforcement, the timing of it. I think the instruction is necessary based on that examination." (Jury Tr. at 199-201.)

Instruction #28 misled the jury with incorrect law and unfairly influenced the verdict because:

1) The minimal evidence in the case relied entirely on McAlpin's testimony, and denying the defense a way to challenge McAlpin's presumed honesty through impeachment leaves the jury to consider evidence without Strobel's defense, making the verdict unfair and influenced by this limitation.

2) When the state strengthened its explanation of McAlpin's prior inconsistent statements before impeachment, it achieved its goal of staying ahead of cross-examination. This manipulation of the impeachment had prejudiced Strobel's ability to present a complete defense, as the impeachment was already compromised before the first question was asked.

3) The state was allowed to present the same evidence not as an untimely complaint but to explain a prior inconsistency. However, the defense was unable to show the same evidence because a jury instruction deemed it irrelevant, which affected the verdict and was unfairly prejudicial to Strobel.

The objections to this jury instruction were preserved, and it deprived Stroble of his fundamental right to due process because he has

a right to a jury informed of the applicable law in deliberations, so that they will not render a tainted verdict; thus, reversal is the appropriate remedy.

2. Plain Errors

Strobel's case contained unpreserved errors that affected his due process rights and undermined the integrity of the judicial process and the fairness of the proceedings. Strobel had a due process right not to be convicted without the State proving every fact necessary for the charged offense. *State v. Finley*, 276 Mont. 126, 137, 915 P.2d 208, 215 (1996)

A. A verdict based on fair and impartial jury deliberations requires the jury to review evidence that is not unfairly prejudicial.

“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” M. R. Evid. 404(b). The aim of Rule 404(b) is to ensure jurors do not impermissibly infer that a defendant's prior bad acts make that person a bad person, and therefore, a guilty person. *State v. Dist. Court of the Eighteenth Judicial Dist.*, 2010 MT 263, ¶ 47, 358 Mont. 325, 246 P.3d 415.

Evidence rises to the level of being unfairly prejudicial only “if it arouses the jury's hostility or sympathy for one side without regard to its probative value, if it confuses or misleads the trier of fact, or if it unduly distracts from the main issues.” *State v. Hicks*, 2013 MT 50, ¶ 24, 369 Mont. 165, 296 P.3d 1149 (citing *State v. Huether*, 284 Mont. 259, 265, 943 P.2d 1291, 1295 (1997)).

To prevent the permissible uses from swallowing the general rule barring propensity evidence, the trial court must ensure that the use of Rule 404(b) evidence is “clearly justified and carefully limited.” *State v. Aaker*, 2002 MT 101, ¶12, 309 Mont. 403, 46 P.3d 648. 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.” *State v. Clifford*, 2005 MT 219, ¶ 48, 328 Mont. 300, 121 P.3d 489 (internal quotation omitted).

Here, Strobel's probation status raised issues about balancing the admission of other acts evidence, unfairly prejudicial character evidence, and the prosecution's goal in admitting otherwise inadmissible character evidence. However, apart from the suggested purposes for invoking 404 (b) exceptions by the defense and the court, the state did not specify the purpose for all the negative and inflammatory testimony presented at trial from the state's witnesses. (Jury Tr. at 231-232, 252, 254, 255-258.) The vague pretrial discussion revealed that there were no clear rules or boundaries. (Jury Tr. at 6-18.) The judge did not conduct a balancing test of the proposed testimony or determine whether the prejudicial effect outweighed its probative value. (Jury Tr. at 6-18.) To make matters worse, no objections were raised during these inflammatory sessions involving character propensity evidence by Strobel's attorney.

In its offer of proof, the state indicated that McAlpin would testify about Strobel being on probation and needing to complete UAs. (Jury Tr. at 8-10.) McAlpin's testimony contained a lot of unfairly prejudicial character testimony. (Jury Tr. at 178,.) Weems would testify about

knowing Strobel was on probation and how consequences would follow. (Jury Tr. at 8-10.) Additionally, there is no offer of proof explaining what purpose Lyons was supposed to serve in his testimony.

Strobel was harmed by the introduction of impermissible propensity evidence that had no probative value and did not provide any connection to motive or opportunity during the trial. (Jury Tr. at 170, 177, 182, 204, 214, 229, 230 (x3), 231 (x3), 232, 236, 237.)

As shown below, Lyons's testimony consisted of unfairly prejudicial propensity evidence with no probative value. (Jury Tr. at 229-232.) She had no personal knowledge of the incident. (Jury Tr. at 229-232.) She portrayed Strobel as a flawed individual in need of being hunted down, depicting him as a dangerous fugitive, despite no links to gun-related crimes. (Doc. 39.) The only purpose of her testimony was impermissible propensity evidence that was unfairly prejudicial.

The prosecutor used leading questions filled with innuendo and insinuation. He disparaged Strobel's character by highlighting McAlpin's ability as a man with a unique "barometer" to spot suspicious characters, like Rick Strobel, because of his extensive background in

law enforcement and all the people he has interacted with (Jury Tr. at 174, 175, 192, 193, 198, 258). The prosecutor told the jury in Opening Statements, “Curt has been a public servant for a big portion of his career, and he’s dealt with all manner of people, all sorts of people throughout his career, okay. He’s dealt with about everybody you could deal with, and this one stood out. This one gave him grave concern that the defendant might get a gun and start shooting everybody, a mass shooting, another one.” (Jury Tr. at 158).

The jury received tainted evidence that was irrelevant to determining Strobel’s guilt or innocence and was unfairly prejudicial because it aroused the jury’s hostility and sympathy for one side without regard to its probative value. It confused and misled the jury and it unduly distracted from the main issues. Any defendant who is not protected by the Rules of Evidence against inadmissible propensity evidence faces an unfair trial. When the actions of the state, defense counsel, and the court, taken together, disregard due process obligations, it results in a miscarriage of justice that warrants plain error review.

B. A verdict based on fair and impartial jury deliberations requires the jury to be instructed fully and fairly on the law.

Jury Instruction #26, MCJI 1-106 (a), regarding Continuous Conduct, was an unnecessary inclusion that went unchallenged at trial. This oversight warrants plain error review because the jury instruction confuses the jury about the key differences between “acts” and “elements” needed for a conviction, effectively shifting the burden of proof away from the state.

As this Court has stated, “Jury instructions that relieve the State of its burden to prove every element of the charged offense beyond a reasonable doubt violate the defendant's due process rights.” *State v. Iverson*, 2018 MT 27, ¶ 11, 390 Mont. 260, 411 P.3d 1284 (citations omitted). Reversible error occurs only if the instruction prejudicially affects the defendant’s substantial rights. *State v. Mafuta*, 2024 MT 245, ¶¶ 36, 41-44, 418 Mont. 353, 557 P.3d 1260.

The presence of Jury Instruction #26 likely confused the jury, especially since Strobel was charged with only a single act of intimidation, making a “special” unanimity instruction unnecessary. Unanimity Instruction #29 was sufficient to clarify the requirements.

The ambiguous language of Instruction #26, including phrases like “any one or more of such acts,” only serves to obscure the critical distinction between “elements” and “acts,” increasing the risk of juror confusion. Although Jury Instruction #29 aimed to clarify, it did not fully eliminate confusion about the definitions of “act” and “element.” Trial testimony described multiple “acts” during the incident, including acts that established evidence of the four elements, where all four needed to be proved beyond a reasonable doubt to obtain a lawful conviction for the offense of Intimidation.

A comparison of Jury Instruction #26 to Jury Instruction #16 supports juror confusion regarding acts and elements. Jury Instruction #16 states, “A material ‘element’ of every offense is a voluntary ‘act.’” It’s easy to see how a juror might confuse “element” with “act” because of this instruction and then misinterpret Instruction #26, thinking that only one act is necessary for a conviction instead of all four elements.

Jury Instruction # 26 contains language that a defendant could be found guilty based on “any one or more of the acts charged,” which

undermines Strobel's due process rights, especially since he faced only one count.

The combination of the scant amount of evidence, other instructions with terms defining elements and acts, and the jury's rapid verdict—without seeking clarification on any of the instructions—suggests that the jury may have believed it was enough to convict based on a single act, rather than on all four elements, relieving the state of its burden of proof.

This jury instruction deprived Stroble of his fundamental right to due process by informing the jury of the inapplicable law to consider in deliberations; thus, plain error review is appropriate, and a remedy of reversal is warranted.

C. A verdict based on fair and impartial jury deliberations requires that the jury consider evidence free from the improper and impermissible prejudicial actions of the prosecutor.

Prosecutors should not encroach on the jury's role, as there is a real risk that jurors would merely accept the prosecutor's argument rather than using their judgment. At trial, the prosecutor may not assert or comment on facts not in evidence in the case. *State v.*

Stringer (1995), 271 Mont. 367, 381, 897 P.2d 1063, 1071. M. R. P. Cond. 3.4(e) (2025) “[a] lawyer shall not ... allude to any matter ... not supported by admissible evidence”).

In *Grimshaw*, because the case was a “he said-she said” case that turned solely on the credibility of the parties and “which party the jury believe[d],” the Court concluded the improper vouching “tipped the scales to an unfair trial.” *State v. Grimshaw*, 2020 MT 201, ¶¶ 32-33, 401 Mont. 27, 469 P.3d 702.

“Repeated improper statements create cumulative prejudice, and this Court accordingly views them collectively rather than individually.” *State v. Byrne*, 2021 MT 238, ¶32, 405 Mont. 352, 495 P.3d 440. (quoting *Anderson*, ¶ 78). “When there are multiple errors committed by the prosecutor, the cumulative effect of the misconduct leaves unsettled the question of the fundamental fairness of the proceedings.” *State v. Aker*, 2013 MT 253, ¶ 28, 371 Mont. 491, 310 P.3d 506

Jury instructions and prosecutorial comments informing the jury that it is their duty to evaluate witnesses’ credibility do not correct or eliminate the State’s multiple improper questions to witnesses or

comments made during closing arguments. *State v. Byrne*, 2021 MT 238, ¶ 32, 405 Mont. 352, 368–69, 495 P.3d 440, 451–52.

Here, the prosecutor made numerous and repeated comments and actions that left the fundamental fairness of Strobel’s trial unsettled. He made inflammatory false statements of fact. (Jury Tr. at 231-232, 252, 254, 255-258.) He also cited evidence as fact to support the guilt of an element when the court removed the question under a sustained objection. (Jury Tr. at 242, 255, 258, 259.) He expressed negative comments about Strobel’s character. (Jury Tr. at 204, 254.) He engaged in burden shifting. (Jury Tr. at 225-226.) Questioned the defendant’s right to silence (Jury Tr, at 259-260). Appealed to law and order. (Jury Tr. at 193, 204, 256, 257, 258, 259, 260, 269.)

At Closing, he misrepresented the law to the jury by repeatedly melding the “reasonable person” standard with the specific intent objective standard for intent to coerce. (Jury Tr. at 159, 253, 258-259, 273.)

Other improper and prejudicial actions include bolstering and vouching for the state’s witnesses. (Jury Tr. at 256, 273.), (Jury Tr. at

157, 158, 195,258, 273.),(Jury Tr. at 194-197; 174, 175, 192, 193, 198, 258.)

The cumulative effect of the prosecutor's actions, particularly where it was one person's word against another, and the credibility of one witness, McAlpin is all the state had to present to the jury, the leading questions, persistent manipulation of testimony attacks on Strobel's character all contributed violation of Strobel's fundamental right to due process and a fair trial.

3. Ineffective Assistance of Counsel

On direct appeal, this Court may review ineffective assistance of counsel if there is "no plausible justification" for counsel's performance. *State v. Kougl*, 2004 MT 243, ¶ 15, 323 Mont. 6, 97 P.3d 1095. Counsel's actions of record were without plausible justification, constituting ineffective assistance of counsel, making Strobel's trial unfair.

A. Admission of client's guilt, misapprehension of law.

"An attorney's ignorance of a point of law that is fundamental to his case, combined with his failure to perform basic research on that point, is a quintessential example of unreasonable performance under

Strickland.” *State v. Walter*, 2018 MT 292, ¶ 15, 393 Mont. 390, 431 49 P.3d 22 (quotations omitted).

Strobel’s case is similar to *State v. Jefferson*, where Jefferson was charged with attempted deliberate homicide. Jefferson went to trial, denying attempted deliberate homicide, hoping to be found guilty of a lesser charge. However, his counsel prevented him from arguing for a lesser offense when he started the trial by admitting guilt to felony assault. Jefferson was ultimately convicted of the more serious charge of attempted deliberate homicide. *State v. Jefferson*, 2003 MT 90, 315 Mont. 146, 69 P.3d 641.

Here, similar to *Jefferson*, Strobel sought an acquittal through a general denial at trial, but without the hope of being convicted of a lesser offense. (Doc. 1, BDC Doc. 26, Appendix “X” at 9; Jury Tr. at 214-215.) The state did not have evidence of Strobel admitting to making a threat. The state needed to prove that Strobel made a threat at all.

Strobel’s defense counsel effectively admitted Strobel’s guilt to the jury by stating that Strobel had made the threat exactly as described by the victim, but that he didn’t mean it as a true threat. (Jury Tr. at 161,

162, 260.) In this situation, the state’s evidence of Strobel’s repeated denials, in conjunction with his attorney’s admission, there was no cure. It rendered his trial irrevocably unfair. Strobel’s counsel’s actions constituted ineffective assistance without plausible justification.

B. Strobel’s counsel failed to object to unfairly prejudicial character evidence admitted at trial before the jury.¹

“Generally, an alleged failure to object to the introduction of evidence, or to object to the testimony of a witness, or to object to prosecutorial misconduct at trial has been deemed record-based, and therefore appropriate for direct appeal. *State v. White*, ¶15 2001 MT 149, 306 Mont. 58, 30 P.3d 340. See *Hagan v. State*, 1999 MT 8, ¶20, 293 Mont. 60, 973 P.2d 233 (citing cases and stating that “[t]he absence of an objection by counsel-that is, a failure to object-is a fact easily documented by reviewing the record ...”).

In *Crider*, the record showed that his counsel's actions, including not objecting to irrelevant or prejudicial propensity evidence, were not ineffective because, prior to trial, Crider had used a motion in limine to

¹ See *Infra*, p. for examples of prejudicial testimony at trial made without objection.

exclude 404 (b) and unfairly prejudicial evidence. After weighing the evidence against the risk of unfair prejudice, the court admitted it. The Court concluded that failing to object to the State's use of the evidence fell within the range of competent professional assistance by trial strategy, which included motions in limine to formally object to certain evidence without needing to repeat the objection at trial. *State v. Crider*, 2014 Mt 139, ¶40, 375 Mont. 187, 328 P.3d 612.

Here, counsel did not file any pretrial motions or trial briefs limiting unfairly prejudicial evidence or challenging the state's 404b exclusionary purposes. As such, his omission of objections to the same constitutes ineffective assistance without plausible justification.

C. Failure to adequately discuss the court's concern about Strobel's TBI Mental Defect under §46-18-311 MCA at sentencing.

Courts are required to consider a defendant's mental state, partly to determine the appropriate commitment type and to prevent cruel and unusual punishment. *State v. Korell*, 213 Mont. 316, 690 P.2d 992, (1984). However, this consideration must be based on the defendant's mental condition "at the time of the commission of the offense of which

[he was] convicted.” Additionally, the mental state must have caused the defendant to be "unable to appreciate the criminality of [his] behavior or to conform [his] behavior to the requirements of law.”

Section 46–14–311, MCA. *State v. Rathbun*, 2003 MT 210, ¶ 11, 317 Mont. 66, 70, 75 P.3d 334, 336

Here, the court cited *State v. Coburn*, 2018 MT 246, 393 Mont. 73, 428 P.3d 243, and when it inquired if counsel was proceeding under MCA §46-15-311, counsel stated that “the bar being so high for someone not to be fit to proceed, because he “didn’t see any concern” because from his interactions with Strobel in another county, he was “fit to proceed” and that Strobel understood the proceedings.” (Sent. Tr. at 9-10.)

It appears counsel misunderstood the law. *Infra*, Coburn. Given the limited evidence in the case, any defense evidence that could explain the circumstances might have changed the outcome of the verdict. Therefore, his four public defenders share responsibility for not securing a "time of the crime" evaluation under §45-5-311 MCA, especially since Montana State Prison does not offer treatment for TBI,

and his sentencing was prejudiced by ineffective assistance of counsel as shown on the record.

4. Cumulative Error

As shown in the sections above, due to this large number of significantly prejudicial errors, the jury did not find guilt beyond a reasonable doubt. An accumulation of trial errors collectively undermined the fairness of the trial and were not harmless, justifying the reversal of the verdict and a new trial.

This case illustrates how separate but related errors grew into a fundamentally unfair trial. As previously explained, the court, the State, and defense counsel all share some responsibility in allowing a conviction for Intimidation without requiring the jury to find Strobel guilty of all four elements of the charge.

Cumulative error review protects against focusing only on one aspect of a trial, especially when, as in this case, the entire trial was a miscarriage of justice. Strobel was subjected to a fundamentally unfair Intimidation trial because of a series of errors, some of which were fatal when considered alone.

III. The District Court unlawfully sentenced Strobel for revocation of his suspended sentence by miscalculating elapsed time credit for days without documented violation and stating reasons for the denial.

The State bears the burden of proving that a violation has occurred and that credit for elapsed time should not be granted. Mont. Code Ann. §46-18-203(6). Specific violations established upon the record or recollection of the probation officer are necessary to establish a basis for denial of street time credit for the period claimed. They must be stated by the sentencing court.” *State v. Gudmundsen*, 2022 MT 178, ¶ 13, 410 Mont. 67, 71, 517 P.3d 146, 149 (citations omitted)

Strobel argues that the District Court disallowed credit for eligible elapsed time, resulting in a miscalculation by disregarding the probation officer's records and recollections, as required by §46-18-203(7)(b) MCA.

The reasons for denying credit were not outlined in the Order Revoking Defendant’s Sentence and Amended Judgment and Commitment. (Appendix B. at 3-5) The correct number of elapsed days should be 1,004, not 678, leaving 326 days to be credited to Strobel in BDC 2019-172, as outlined in Appendix B: Recap of the Record.

(Appendix B at 1-2.) Strobel requests that this Court remand for correction of the days attributed at sentencing for street time credit to 1,004 days.

CONCLUSION

Upon determining that: 1) There was insufficient evidence to convict Strobel of Intimidation, and the state failed to prove intent to coerce through threats, this Court should reverse and remand to vacate the verdict. 2) Strobel did not receive effective assistance of counsel, which prejudiced the outcome; this Court should reverse and remand for a new trial. 3) The combined trial errors were not harmless; this Court should reverse or reverse and remand for a new trial. 4) The District Court did not correctly calculate the elapsed time credit; this Court should remand with instructions to credit Strobel with an additional 356 days.

Respectfully submitted this 7th day of July, 2025.

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CERTIFICATE OF COMPLIANCE

Under Rule 11 of the Montana Rules of Appellate Procedure,
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CERTIFICATE OF SERVICE

I, Darcy Ann Critchfield, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 07-09-2025:

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