IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0604

STATE OF MONTANA,

Plaintiff and Appellee,

v.

BOBBY FRANCIS LOWRY,

Defendant and Appellant.

BRIEF OF APPELLEE

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

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STATEMENT OF THE ISSUES

Whether the State's arguments during its closing statement constituted plain error.

Whether Appellant's ineffective assistance of counsel claims are appropriately raised on direct appeal and, if so, whether Appellant's attorney was constitutionally ineffective.

STATEMENT OF THE CASE

On November 30, 2021, Bobby Francis Lowry (Lowry) was charged with aggravated assault, in violation of Mont. Code Ann. § 45-5-202. Prior to trial, the State amended the charges to include an accountability theory as an alternative charge. (Docs. 39, 75.)

After a two-day trial, the jury convicted Lowry under the accountability for aggravated assault. (Trial Tr. at 424; Doc. 108.)

STATEMENT OF THE FACTS

On October 26, 2021, S.H. was cleaning his cell in the Lewis and Clark Count Detention Center when four men entered and called him a "snitch." (Trial Tr. at 297, 304.) One of those men was Lowry. (*Id*. at 298.) S.H. was attacked, and ended up underneath the bunkbed, where he lost consciousness. (*Id*. at 304.) When he came to, S.H. slid out from underneath the bed. (*Id*. at 306.) He realized he had

defecated as a result of the attack. (*Id*. at 306.) Not wanting to draw attention to the assault, S.H. cleaned up the blood and stool and reported to detention officers that he fell. (*Id*. at 306-07.) S.H. believed he would be attacked again if he told the truth to law enforcement. (*Id*. at 307.)

S.H. was sure he was attacked by Lowry. (*Id*. at 317.) He testified that all four men were attacking him while he was under the bed. (*Id*. at 315-17.) All three codefendants testified to varying versions of events. (*Id*. at 258-62, 325-28, 337-43.) Kaleb Verly testified that he alone assaulted S.H. and no plan existed with any other inmates. (*Id*. at 259-60.) Garrett Hamilton initially testified that he could not remember if he assaulted S.H. (*Id*. at 326.) Finally, Wesley Rhodes testified that there was an agreement to fight S.H. between the four inmates. (*Id*. at 338.) Each of the other men pleaded guilty to either aggravated assault or accountability for aggravated assault. (*Id*. at 261, 326, 338.) However, all three men denied that Lowry had assaulted S.H. (*Id*. at 261, 327, 342.)

Detention Officer DeLouis Ball observed S.H. after the attack. (*Id*. at 199.) He observed injuries to S.H.'s face and back and noticed S.H. was limping. (*Id*.) S.H. suffered from a broken nose and a series of broken vertebrae in his lower back. (*Id*. at 269-70.)

Officer Ball testified about the layout of the pod and the positions of the cameras within the pod. (*Id*. at 195-98, 204.) Officer Ball testified that the cameras could see approximately halfway into S.H.'s cell. (*Id*. at 204.)

Lewis and Clark County Deputy (and later Detention Officer) Zachary Blair investigated the assault. (*Id*. at 219-22.) After speaking with S.H., Officer Blair reviewed video at the jail of Pod 3, where the assault took place. (*Id*. at 224.) He observed Lowry in that video. (*Id*.) Officer Blair then obtained a copy of the surveillance video and placed it into evidence. (*Id*.) Officer Blair testified that he recognized the footage entered into evidence. (*Id*. at 225.) The district court admitted the exhibit without objection. (*Id*.)

While the jury viewed the surveillance footage, Officer Blair identified Lowry and his three codefendants. (*Id*. at 228-29.) As the individuals moved in and out of the cells, Officer Blair again identified them. (*Id*. at 228-34.) Officer Blair also testified to his observation of Lowry's use of the kiosk, positing that Lowry was not reporting the assault, but rather scrolling, based on a view he was able to see while initially observing the surveillance at the jail. (*Id*. at 237-38.) Lowry later confirmed he was checking the kiosk, likely to see if he had any correspondence from his wife. (*Id*. at 351-52.)

The jury ultimately convicted Lowry of accountability for aggravated assault. (*Id*. at 424; Doc. 108.) After the trial, Lowry's attorney, Robin Ammons

(Ammons), filed a motion for new trial, arguing that the potential jury panel witnessed Lowry in handcuffs prior to voir dire, prejudicing Lowry. (Doc. 122.) Ammons requested significant video footage of the courthouse, and entered 24 exhibits into the record, in addition to Lowry's testimony at an evidentiary hearing. (3/6/23 Tr. at 3; 8/9/23 Tr. at 9-33.)

During oral argument on the motion, Ammons stated that she and Lowry worked on this motion and review of discovery "a great deal." (8/9/23 Tr. at 34.) In her belief, she presented her best case for this motion. (*Id*.)

STANDARD OF REVIEW

This Court will generally not address "prosecutorial misconduct pertaining to a prosecutor's statements not objected to at trial." *State v. Mercier*, 2021 MT 12, ¶ 13, 403 Mont. 34, 479 P.3d 967; *State v. Smith*, 2021 MT 148, ¶ 41, 404 Mont. 245, 488 P.3d 531. However, such issues may be considered under the plain error doctrine. *Id.* Plain error review is discretionary and exercised "sparingly, on a caseby-case basis, according to narrow circumstances, and by considering the totality of the circumstances.-" *State v. Haithcox*, 2019 MT 201, ¶ 23, 357 Mont. 103, 447 P.3d 452.

This Court reviews ineffective assistance of counsel (IAC) claims on direct appeal according to the standards under *Strickland v. Washington*, 466 U.S. 668

(1984). *State v. Weber*, 2016 MT 138, ¶ 11, 383 Mont. 506, 373 P.3d 26 (citation omitted). Claims of ineffective assistance of counsel are mixed questions of law and fact which this Court reviews *de novo*. *Weber*, ¶ 11.

SUMMARY OF THE ARGUMENT

Since Lowry did not raise any objections during the State's closing argument, the only way his prosecutorial misconduct claim may be considered is if he firmly convinces this Court that plain error review is warranted. However, Lowry cannot meet his burden because the State's argument to the jury did not violate Lowry's substantial rights, render his trial unfair or compromise the integrity of the judicial process. Considering the context of the argument, the statements were not improper because they were made to explain the alternate charge and to preview Lowry's argument related to his mere presence at the scene of the assault. In the context of the entire case, the State's arguments to the jury were within the established norms of professional conduct and did not infect the trial with unfairness.

Lowry is unable to show how Ammons' representation was deficient. Although this Court may decide not to review IAC claims on direct appeal if the record is silent, the record before this Court establishes that Ammons was not deficient and Lowry did not suffer prejudice, thus, Lowry fails in his high burden

under *Strickland*. It was not deficient when Ammons did not: (1) object to the State's appropriate arguments to the jury; (2) make a meritless objection as to the authentication of the jail surveillance video; (3) make a meritless objection to Officer Blair's testimony regarding the identities and movements of the four codefendants; or (4) move for mistrial when a potential juror may have seen Lowry momentarily in handcuffs, choosing instead to gather evidence related to the issue and file a motion for new trial. Additionally, Lowry cannot establish that had Ammons performed differently in those circumstances, he would have been acquitted.

ARGUMENT

I. The State's arguments during its closing remarks did not constitute plain error.

Both the Sixth Amendment to the United States Constitution, and article II, section 24, of the Montana Constitution, guarantee criminal defendants "the right to a fair trial by a jury." *Haithcox*, ¶ 24. "A prosecutor's misconduct may be grounds for reversing a conviction and granting a new trial if the conduct deprives the defendant of a fair and impartial trial." *Id*. However, this Court generally will not address claims of prosecutorial misconduct if there were no contemporaneous objections made to the allegedly improper statements. *Id*. ¶ 23.

When a defendant fails to raise claims of prosecutorial misconduct at trial, he may not assert them on appeal unless he convinces this Court the alleged error warrants invocation of the plain error review doctrine. *State v. Polak*, 2021 MT 307, ¶ 9, 406 Mont. 421, 499 P.3d 565. Plain error review is discretionary and exercised "sparingly, on a case-by-case basis, according to narrow circumstances, and by considering the totality of the circumstances." *Haithcox*, ¶ 23. Plain error review applies only "in situations that implicate a defendant's fundamental constitutional rights when failing to review the alleged error may result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the proceedings, or compromise the integrity of the judicial process." *State v. Aker*, 2013 MT 253, ¶ 21, 371 Mont. 791, 310 P.3d 506.

This Court "consider[s] claimed improper statements by the State during closing arguments 'in the context of the entire argument'" and measures prosecutorial misconduct by reference to established norms of professional conduct. *Mercier*, ¶ 37 (citations omitted). "A prosecutor's misconduct may be grounds for reversing a conviction and granting a new trial if the conduct deprives the defendant of a fair and impartial trial." *Haithcox*, ¶ 24 (quoting *State v. McDonald*, 2013 MT 97, ¶ 10, 369 Mont. 483, 299 P.3d 799). "[I]t is not enough that the prosecutors' remarks were undesirable or even universally condemned [but rather] the relevant question is whether the comments 'so infected the trial with

unfairness as to make the resulting conviction a denial of due process.'" *Id.* ¶ 24 (quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)).

While this Court may employ plain error review to reverse prosecutorial misconduct, the burden remains on the appealing party to convince this Court such review is necessary. *McDonald*, ¶¶ 10, 17; *Aker*, ¶ 24. This Court will not presume prejudice from charges of prosecutorial misconduct; rather, the defendant must show that the alleged prosecutorial misconduct violated the defendant's substantial rights. *Haithcox*, ¶ 24, *Mercier,* ¶ 37; *State v. Lehrkamp*, 2017 MT 203, ¶ 15, 388 Mont. 295, 400 P.3d 697 ("defendant must demonstrate, from the record, that the prosecutor's [alleged] misstatements prejudiced him"). Isolated instances of improper prosecutorial comments during closing argument are generally insufficient to demonstrate the level of prejudice necessary under the totality of the circumstances. *State v. Miller*, 2022 MT 92, ¶¶ 37-38, 408 Mont. 316, 510 P.3d 17.

"A prosecutor's argument is not plain error if made in the context of discussing the evidence presented and how it should be used to evaluate a witness's testimony under the principles set forth in the jury instructions." *Aker*, ¶ 27. Accordingly, a prosecutor may properly comment on and argue for any conclusion regarding the nature, quality, or effect of the evidence in relation to the applicable law and the prosecutor's burden of proof based on the evidence, applicable law as stated in the jury instructions, and his or her "analysis of the

evidence." *Miller*, ¶ 22; *see also State v. Campbell*, 241 Mont. 323, 328-29, 787 P.2d 329, 332-33 (1990); *State v. Musgrove*, 178 Mont. 162, 172, 582 P.2d 1246, 1252-53 (1978).

Lowry has not made the threshold showing of what fundamental right was implicated by the State's arguments or that failing to review the claimed improper comments would 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." *Aker*, ¶ 21. The allegedly improper statements were part of the State's arguments to the jury and were proper "comments on the gravity of the crime charged, the volume of evidence, credibility of witnesses, inferences to be drawn from various phases of evidence, and legal principles involved . . . ." *Smith*, ¶ 43; *Mercier*, ¶ 37.

When the prosecutor commented that the "State believe[d]" Lowry committed the offense against S.H., she did so in the context of explaining the alternate charges. (Trial Tr. at 394.) Immediately preceding that statement, the prosecutor informed the jury that "The State has charged Bobby Lowry with aggravated assault, or in the alternative, accountability for aggravated assault." (*Id.*) Immediately after the alleged prejudicial statement, the State began talking about the jury instructions, the elements of aggravated assault, the issue of accountability and the testimony that established each of the elements. (*Id*. at 394-95.)

Although perhaps inartful in delivery, the prosecutor's comment related to her "belief" as to Lowry's guilt was made "in the context of discussing the evidence presented and how it should be used to evaluate a witness's testimony under the principles set forth in the jury instructions." *Aker*, ¶ 27; *Polak*, ¶ 18. Specifically, the prosecutor pointed to relevant instructions and testimony needed for the jury to convict Lowry of either aggravated assault or accountability for aggravated assault. Accordingly, the statement is not plain error. *See id*.

Similarly, the prosecutor was discussing another jury instruction in the context of the second purportedly prejudicial statement. Anticipating Lowry's argument that he was merely present during the time of the offense, the State argued:

> I understand the judge's instructions and, obviously, No. 23 that Mr. Lowry's mere presence in the pod is not enough to convict him of accountability to aggravated assault. But what the State would tell you is this: We didn't charge Mr. Lowry because he was there, we charged Mr. Lowry because, *upon review of the evidence*, the State firmly believes that Mr. Lowry, number one, knew what was going on, and, number two, made every attempt he could to assist it, or, in the alternative, that, number three, as [S.H.] testified, Mr. Lowry assaulted [S.H.] himself.

(Trial Tr. at 400 (emphasis added).)

While potentially problematic when taken out of context, the State was appropriately commenting on "applicable law as stated in the jury instructions, and

his or her 'analysis of the evidence.'" *Miller*, ¶ 22 (emphasis removed). These statements do not rise to the level of plain error.

Additionally, the State reminded the jury several times that they were the finders of fact, the sole judges of credibility, and needed to examine the evidence to make those determinations. (Trial Tr. at 396-99.) The court instructed the jury that its duty was to resolve factual questions and determine the credibility of the witnesses. (Doc. 107.) *See Smith*, ¶ 49 (courts presume jury followed instructions).

Contrary to the cases cited by Lowry, the State did not inform the jury of a previous guilty verdict in a prior proceeding. *See State v. French*, 2018 MT 289, 393 Mont. 364, 431 P.3d 332. Nor did it assert a personal belief without connection to the law or the evidence as occurred in *State v. Stringer*, 271 Mont. 367, 897 P.2d 1063 (1995), or *Musgrove.* The State did not elicit credibility testimony from other witnesses or personally attest to the believability of the witnesses or the reliability of the police in its closing. *See State v. Hayden*, 2008 MT 274, 345 Mont. 525, 190 P.3d 1091. The prosecutor did not suggest that Lowry could no longer be presumed innocent. *See State v. Lawrence*, 2016 MT 346, 386 Mont. 86, 385 P.3d 968. The prosecutor permissibly based her closing remarks upon the law the jury was instructed to follow and the evidence presented.

The prosecutor did not engage in misconduct during her closing remarks. When viewed as a whole, Lowry has not shown that he is entitled to plain error

review because he failed to show that any of the cited prosecutorial closing statements were improper or resulted in a manifest miscarriage of justice, undermined the fundamental fairness of the trial, or otherwise compromised the integrity of the judicial process, whether viewed individually or cumulatively.

II. Lowry's IAC claims are meritless, and/or fail to establish any prejudice.

The right to effective assistance of "counsel in criminal prosecutions is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article II, Section 24 of the Montana Constitution." *Worthan v. State*, 2010 MT 98, ¶ 10, 356 Mont. 206, 232 P.3d 380. This Court applies the two-part IAC test set forth in *Strickland* which requires both of the following prongs: (1) counsel's performance was deficient or fell below the objective standard of reasonableness; and (2) the defendant was prejudiced by counsel's deficient performance. *Weber*, ¶ 21.

When considering the first *Strickland* prong, there is a "strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 689; *State v. Hagen*, 2002 MT 190, ¶ 26, 311 Mont. 117, 53 P.3d 885 (A silent record cannot rebut the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."). In order to eliminate the distorting effects of

hindsight, judicial scrutiny of counsel's performance must be highly deferential. *Strickland*, 466 U.S. at 689; *Whitlow v. State*, 2008 MT 140, ¶ 15, 343 Mont. 90, 183 P.3d 861. Courts should "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* As the Supreme Court explained, "[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689. The Supreme Court has warned against second-guessing counsel's decisions in light of counsel's intimate and, outside of the record, knowledge of the case. *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

The second *Strickland* prong requires a defendant to demonstrate a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different, or, in other words, the alleged deficiency created "[a] reasonable probability . . . sufficient to undermine confidence in the outcome [of the proceeding]." *Worthan*, ¶ 16; *Strickland*, 466 U.S. at 694. Because a successful IAC claim requires both *Strickland* prongs, if a defendant cannot establish one prong of the test, there is no need to address the other prong. *Whitlow*, ¶ 11.

Before reaching the merits of an IAC claim on direct appeal, this Court must determine whether the allegations are properly raised. *Weber*, ¶ 22. If the reason for counsel's alleged act/omission can be discerned from the record, this Court can

properly address the claim on direct appeal; however, if the reason for counsel's acts/omission are not found in the record, the defendant must raise the claim in a petition for postconviction relief. *Weber*, ¶ 22. "Claims that involve alleged omissions of trial counsel are usually not well suited for consideration on direct appeal." *State v. Ward*, 2020 MT 36, ¶ 18, 399 Mont. 16, 457 P.3d 955.

A. Lowry has not established Ammons was deficient, nor that Lowry was prejudiced.

Lowry cites to the proposition that this Court may decide IAC claims on a silent record when there is "no plausible justification" for Ammon's actions, however, he fails to provide any discussion on how Ammons' performance reached this lofty standard. (Appellant Br. at 14.) This Court has recognized that "[s]uch situations are 'relatively rare.'" *State v. Crider*, 2014 MT 139, ¶ 36, 375 Mont. 187, 328 P.3d 612 (quoting *State v. Kougl*, 2004 MT 243, ¶ 15, 323 Mont. 6, 97 P.3d 1095). While this Court could decline to examine these claims given the lack of explanation by Ammons, Lowry is unable to show on the record as it exists that Ammons was deficient, or that he suffered actual prejudice, failing both prongs of *Strickland*.

Since counsel's performance is presumed constitutionally effective, a person alleging IAC bears the heavy burden of overcoming the strong presumption that counsel's decisions fell within the wide range of reasonable professional conduct. *Whitlow*, ¶¶ 20-21; *Strickland*, 466 U.S. at 689; *State v. Pelletier*, 2020 MT 249,

¶ 38, 401 Mont. 454, 473 P.3d 991 (attorney's performance is "constitutionally deficient only if it 'fell below an objective standard of reasonableness measured [by] prevailing professional norms' under the totality of the circumstances at issue"). Accordingly, the inquiry must be "whether counsel's assistance was reasonable considering all the circumstances" and "every effort must be made 'to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'" *Whitlow*, ¶¶ 14-15 (citing *Strickland*, 466 U.S. at 689).

"A defendant must do more than just show that the alleged errors of a trial counsel 'had some conceivable effect on the outcome of the proceeding.'" *State v. Dineen*, 2020 MT 193, ¶ 25, 400 Mont. 461, 469 P.3d 122. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Dineen*, ¶ 25; *Strickland*, 466 U.S. at 686.

When addressing alleged prejudice, a court must consider the strength of the case against the defendant and the likelihood of success of the actions counsel failed to take. *State v. Henderson*, 2004 MT 173, ¶ 9, 322 Mont. 69, 93 P.3d 1231; *State v. Haldane*, 2013 MT 32, ¶ 37, 368 Mont. 396, 300 P.3d 657 (IAC claim cannot succeed when predicated on counsel's failure to take an action which, under

the circumstances, would likely not have changed the outcome of the proceeding). "[A] claim of constitutionally ineffective assistance of counsel will not succeed when predicated upon counsel's failure to make motions or objections which, under the circumstances, would have been frivolous, which would have been, arguably, without procedural or substantive merit, or which, otherwise, would likely not have changed the outcome of the proceeding." *Heddings v. State*, 2011 MT 228, ¶ 33, 362 Mont. 90, 265 P.3d 600.

1. Failing to object during the State's closing argument

Under the totality of the circumstances, Lowry cannot establish that Ammon's failure to object based on proper arguments during the State's closing arguments was outside the realm of reasonable performance. *Whitlow*, ¶¶ 20-21; *Strickland*, 466 U.S. at 689. As established above, there were no improper arguments to the jury that necessitated an objection. And, had Ammons made objections that lacked merit, she risked drawing unwanted attention to those issues.

Moreover, this Court has refused to hold that defense counsel is obligated to object in all possible scenarios. *Crider*, ¶ 38. "[B]ecause many lawyers refrain from objecting during . . . closing argument, absent egregious misstatements, the failure to object during closing argument . . . is within the 'wide range' of permissible professional legal conduct." *Kills on Top v. State*, 273 Mont. 32, 51, 901 P.2d 1368, 1380 (1995) (citation omitted); *State v. Lacey*, 2012 MT 52, ¶ 28,

364 Mont. 291, 272 P.3d 1288 (since counsel may choose not to object for strategic reasons, "failure to object does not qualify as unreasonable conduct by trial counsel").

Finally, Lowry offers no analysis or support that had Ammons lodged the objections Lowry claims should have been made, that the outcome would have been different. Lowry failed to establish either *Strickland* prong concerning alleged ineffectiveness during the State's closing argument.

2. Failing to object to the jail surveillance video and the remainder of Officer Blair's testimony

Again, Lowry cannot show that Ammons' failure to object to the admission of the jail surveillance video or Officer Blair's testimony regarding the video was outside the realm of reasonable performance. *Whitlow*, ¶¶ 20-21; *Strickland*, 466 U.S. at 689.

Under Mont. R. Evid. 901, an exhibit is properly authenticated when the court "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." *Id.* This Court provides great deference to the trial court in determining whether evidence has been properly authenticated, holding that "(a)uthenticity for admissibility can be demonstrated by direct or circumstantial evidence and sufficiency of the evidence for foundation is within the discretion of the trial judge." *State v. Cooper*, 161 Mont. 85, 92, 504 P.2d 978, 982

(1972); *see also State v. Hamilton* 185 Mont. 522, 533, 605 P.2d 1121, 1128 (1980).

Prior to Officer Blair's testimony, Officer Ball testified to the locations of the surveillance cameras as they related to this assault. (Trial Tr. at 204, 207-10.) On cross-examination, Officer Ball agreed that the surveillance cameras could see approximately halfway into S.H.'s cell. (*Id*. at 210.) As to the surveillance video, Officer Blair testified that he had experience both as a deputy and as a detention officer in the Lewis and Clark County Detention Center. (*Id*. at 220-22.) Officer Blair testified that he was called to the detention center as a deputy to investigate the assault of S.H. (*Id*. at 222.) After speaking with S.H., Officer Blair reviewed video at the jail of Pod 3, where the assault took place. (*Id*. at 224.) He observed Lowry in that video. (*Id*.) Officer Blair then obtained a copy of the surveillance video and placed it into evidence. (*Id*.) Officer Blair testified that he recognized the footage entered into evidence. (*Id*. at 225.) When taken as a whole, the State sufficiently demonstrated the authenticity of State's Ex. 3. Any objection by Ammons would not have been successful. *See Heddings*, ¶ 33.

Lowry argues that Mont. R. Evid. 901 requires that all video evidence needs to be authenticated by someone who personally witnessed the events captured on the video before it can be admitted into evidence. (Appellant's Br. at 16.) To rule as suggested by Lowry would prevent any surveillance footage from being entered

into evidence unless someone was watching the events unfold on camera as it happened. Such an argument goes far beyond the requirements of Rule 901 and this Court should disregard Lowry's argument.

Lowry also argues that Officer Blair's testimony identifying the individuals in the video and their respective movements was improper and Ammons was deficient in not objecting. (Appellant's Br. at 17-18.) Lowry points to no caselaw in his argument that Officer Blair's testimony was improper, nor that Ammons was deficient. (*Id*.) That is because there was nothing improper about Officer Blair's testimony about the identity and movements of the four codefendants, or his experience regarding the use of the kiosk or any other testimony. Lowry has failed to overcome the strong presumption that Ammons' performance falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689.

3. Even when taken as a whole, Lowry is unable to show the requisite prejudice to warrant reversal.

Because Lowry cannot show on the record that Ammons' performance was deficient in any way, Lowry fails in his claims and this Court should uphold Lowry's conviction. *See Whitlow*, ¶ 11. However, should this Court wish to continue its analysis, Lowry also fails to show how he was prejudiced.

Lowry claims that his trial was full of inadmissible evidence, speculative testimony and improper comments by the prosecutor. (Appellant's Br. at 19.) Lowy argues that the five witnesses to the assault (Lowry, his three codefendants,

and S.H.) testified to markedly different events and, as a result, hung on the aggravated assault charge and instead convicted on accountability for aggravated assault. (*Id*.) Lowry admits that the video "presented a more objective basis for the jury to make its factual determinations." (*Id*. at 18.) Given that none of the stories of the five involved parties could have matched the jury's verdict, it is clear that the jury did rely on the video as the basis for its findings.

In considering the prejudice prong, this Court is to consider whether there was a reasonable probability, but for counsel's errors, the results of the proceeding would have been different. *Strickland*, 466 U.S. at 694. It is of note, however, that Lowry fails to argue that the district court improperly admitted the evidence or ask for plain error review. If the error in failing to object to the video that provided the most "objective" view of the events is to be so prejudicial to warrant overturning the verdict, one would expect Lowry to argue that the district court erred in its admission of the exhibit. Lowry is unable to show that the video was improperly admitted and, thus, unable to show prejudice, just as he failed in establishing Ammons' deficient performance. This Court should affirm Lowry's conviction.

B. Based on the record before the Court, Lowry cannot show prejudice based on Ammon's failure to move for a mistrial.

Lowry provides the relevant caselaw as to this issue. A failure to move for a mistrial may be the basis of an IAC claim, but such claim will not prevail when the motion is without merit or would not have changed the outcome of the proceeding.

Heddings, ¶ 33; *Polak*, ¶ 29. As briefed by the State, and recognized in the district court, case law related to this issue is clear. A defendant is not entitled to a mistrial solely because he was momentarily or inadvertently seen in handcuffs by a juror. *State v. Baugh*, 174 Mont. 456, 463, 571 P.2d 779, 783 (1977).

Additionally, the record is clear that the district court would not have ordered a mistrial for this issue during trial. After a significant evidentiary hearing, Lowry was unable to show how he was prejudiced. The same would have been true if Ammons had raised the issue immediately. Finally, Lowry acknowledges he is unable to prove prejudice, denying him relief under *Strickland*. This Court should deny Lowry's IAC claim as to this issue.

CONCLUSION

Lowry's aggravated assault conviction should be affirmed.

Respectfully submitted this 11th day of July, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 4,886 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Selene Koepke
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