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STATE OF MONTANA
Case Number: DA 23-0409

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0409

STATE OF MONTANA,

Plaintiff and Appellee,

v.

KATHERINE ANNE PROCTOR,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, The Honorable Kathy Seeley, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF THE ISSUES

1. Whether the court abused its discretion by allowing the State to present expert testimony on non-accidental trauma (NAT).

2. Whether the court properly denied Proctor's motion to suppress evidence obtained during a search of her cell phone conducted pursuant to a warrant.

3. Whether Proctor has proven that plain error review of alleged prosecutorial misconduct is warranted.

4. Whether Proctor's ineffective assistance of counsel (IAC) claim is appropriate for direct appeal; if yes, whether Proctor has met her heavy burden of proving it.

5. Whether the cumulative error doctrine requires reversal of Proctor's conviction.

STATEMENT OF THE CASE

On September 29, 2021, St. Peter's Hospital (St. Pete's) in Helena life-flighted four-month-old P.P. to Logan Medical Center (Logan) in Kalispell. (12/5/22-12/15/22 Tr. (Tr.) 592, 603.) P.P.'s Logan medical team concluded that P.P.'s extensive injuries—hypoxic ischemic brain injury, subdural hematoma, cerebellar laceration, cervical spine injury, multiple rib fractures, and bilateral

retinal hemorrhages—were unequivocally consistent with NAT.[1] (*Id.* 734, 744, 771.) A subsequent search of Appellant Katherine Ann Proctor's cell phone pursuant to a warrant revealed several photographs of P.P. with various facial injuries over her four-month life. (Tr. 1517; Trial-Exs. 42-61.)

The State charged Proctor with felony Assault on a Minor and, alternatively, felony Accountability for Assault on a Minor. (Doc. 154.) The court denied Proctor's cell phone data suppression motion and motion to exclude NAT expert testimony. (Doc. 215; 9/20/22 Tr. 142-46.) After a 10-day trial, the jury, in under 5 hours, convicted Proctor of Assault on a Minor, finding also that P.P. was under 36 months of age and the offense resulted in serious bodily injury. (Tr. 2175; Doc. 280.) Proctor is serving a 20-year prison sentence. (Doc. 319.)

STATEMENT OF THE FACTS

I. The offense

A. P.P.'s first four months

In May 2021, P.P. entered the world healthy. (Tr. at 546, 996, 1004, 2003.) P.P.'s father, Tim Proctor, a then-canine handler for the Montana Highway Patrol, and her mother, Proctor, a then-Assistant Attorney General, took parental leave to

[1] Proctor refers to P.P.'s diagnosis as Shaken Baby Syndrome (SBS); the State uses NAT, P.P.'s actual diagnosis. (Tr. 754.)

care for P.P. (*Id.* 1147, 1055, 1800, 1804.) Following P.P.'s arrival, Tim was sending people "sexually explicit texts" and having an affair. (Tr. 997-98.)

When P.P. was one month old, Tim noticed an abrasion on her nose and blood in her eye, and speculated that P.P. rubbed her nose on her sleep sack's velcro. (Tr. 1142, 1148-49, 1194; Trial-Ex. 44.) P.P.'s pediatrician, Dr. Loomis, hadn't noticed these injuries at her two-week checkup. If she had, Dr. Loomis would've admitted P.P. for "an abuse workup" as infant nose abrasions are abnormal. (Tr. 566-67.)

On July 3, Tim slipped while carrying P.P. in her car seat. As he was falling, Tim caught P.P.'s leg against the car seat. Worried that he may have hurt her, Tim took P.P. to St. Pete's the next day. P.P. had no bruising or other abnormal findings. (*Id.* 553, 1011-12.)

Two days later, Proctor returned to work. Proctor oddly didn't talk much about P.P. or share pictures of her with her colleagues. (*Id.* 1813-16.) Tim returned to work a week later. Because Tim had to immediately attend an out-of-town work conference, P.P.'s maternal grandmother helped care for P.P. (*Id.* 1010, 1148, 1784, 1790-91.)

By then, P.P.'s nose abrasion had faded, causing maternal grandmother to believe the injury was caused by P.P.'s fingernails. (*Id.* 1787-89.) Maternal grandmother also noticed a couple of "odd," "dark spot[s]" on P.P.'s face that

looked "like something just pressed a little too hard," but that she wouldn't have classified as bruises because they weren't "multicolored." (*Id.* 1789-90.)

At P.P.'s two-month checkup with Dr. Loomis, Tim and Proctor (collectively Parents) reported that P.P. had "been acting normally" following the July 3 accident. (*Id.* 552-53.) Dr. Loomis diagnosed a "little broken blood vessel" in P.P.'s eye as a minor subconjunctival hemorrhage, likely caused by coughing, sneezing, or crying. (*Id.* 554, 583-84.) Parents, however, never informed Dr. Loomis how long this spot had been present. (*Id.* 554-55.) Had P.P.'s hemorrhage been as pronounced as it was a month earlier, Dr. Loomis "would have expected a large amount of force or trauma" to have caused it. (*Id.* 583-84.)

Beginning in August, Parents had closed on a property in Choteau, P.P. had noticeable bruises on her cheeks, and paternal grandmother came to help care for P.P. (Trial-Exs. 48-50; Tr. 1000, 2004.) Paternal grandmother pointed out "two different marks on [P.P.]'s face" that were "very small, very faint" to Parents, who were aware. (*Id.* 2014.) After tummy time, paternal grandmother noticed that the end of P.P.'s nose was a little irritated, but she never witnessed tummy time cause an abrasion. (*Id.* 2015, 2033.)

By mid-August, P.P. started attending daycare at 3 R's and Tim started working for MHP based in Great Falls. (*Id.* 823, 1001.) Because his work location changed, Tim moved to the Choteau property and listed their Helena home.

(*Id.* 1001-02.) Meanwhile, Proctor and P.P. planned to move into a Helena apartment until Proctor received approval to work remotely from Choteau. (*Id*. 1004, 1131.)

On August 20, P.P. arrived at daycare with dime-sized, greenish-colored bruises on "her forehead and left jawline." (Tr. 875-76; State's Exs. 51, 52.) On September 4, 2021, at a family wedding, Proctor's brother noticed P.P.'s forehead bruise. (Tr. 1823, State's Exs. 54, 55.) Although he thought the bruise appeared "superficial," he asked Proctor what caused it. (Tr. 1823, 1825.) Proctor told him that P.P. "bounced a toy off of her own face." (*Id.* 1825.)

When P.P. arrived at daycare on September 7, she had dime-sized, green bruises on "both cheekbones and [her] forehead." (Tr. 878-79; Trial-Exs. 56-59.) On September 13, P.P. arrived at daycare with a "rug burn on her nose." (Tr. at 897.) Tim took leave from September 20-23 to take care of P.P., who was ill. (*Id*. at 1022-23, 1167-68.) The evening of September 23, P.P.'s paternal grandfather arrived to help the family move out of the Helena home while Tim returned to Choteau. (*Id.* 1022, 1675.) When Tim left Helena, P.P. didn't have a black eye. (*Id.* 1023.)

Proctor was off work on September 24 and Tim was in Choteau. (*Id.* 1813.) That day, P.P. had a black eye and a bruise on her forehead. (Trial-Exs. 60-61.) Paternal grandfather saw the marks on P.P.'s face, but wouldn't have called them

bruises as they "were quite small;" he guessed P.P.'s fingernails caused them. (Tr. 1686-87.)

When Tim saw P.P. on September 25, he asked Proctor what happened to P.P.'s eye. Proctor said that P.P. hit herself in the face with a toy. (*Id.* 1174, 1196-97.) Tim remained in Choteau or Great Falls until September 28. (*Id.* 1023.)

On September 27, a daycare employee noticed P.P.'s black eye when she arrived at daycare. When asked, Proctor explained that P.P. had hit herself with a toy that was in her hand. (*Id.* 820-21, 900.) When Proctor picked up P.P. from daycare that day, a different employee, Haven Hawke, asked Proctor what happened to P.P.'s eye. Proctor, again, said that P.P. hit herself in the face with a toy. (*Id.* 850.) Haven found Proctor's explanation suspicious as Haven had given P.P. "a toy multiple times in her hand, including that day," and P.P. was never able to "grasp the toy," let alone "hit herself hard enough to bruise under her eye." (*Id.* 850-51.) Haven promptly reported her concerns to 3 R's owner, Susan Anderson. (*Id.* 820-21.)

Tim returned to Helena midday on September 28, frustrated at how much of the house still needed to be packed before closing the next day. (*Id.* 1023-25.) When Tim collected P.P. from daycare, she was awake and alert, but wasn't her normal fussy self when placed in her car seat. (*Id.* 594, 1025-26.) Tim brought P.P.

to the Helena house, where Parents continued to pack. After P.P. consumed her usual 125 mL bottle around 6:30 p.m., Tim placed her on the floor. (*Id.* 1027-28.)

Meanwhile, daycare staff convened to discuss P.P.'s records. Even though P.P. had only briefly been attending daycare, she "had come in several times with bruises," and had sporadic attendance.[2] (*Id.* 821-22.)

Around 7:45 p.m., on September 28, Tim's colleague, Dustin LeRette, arrived at Tim's house to pick up work-related items. When LeRette arrived, he walked across the threshold of the open door between Tim's garage and house. LeRette heard P.P. crying. (*Id.* 1481-83.)

Leaving Proctor alone in the home with P.P., who remained on the floor, Tim walked outside to meet LeRette. (*Id.* 1029-30.) Approximately ten minutes later, Proctor walked outside near LeRette and Tim before returning inside. Proctor appeared stressed. (*Id.* 1483-86.)

Shortly after, Tim went inside and noticed that P.P. had been moved from the floor to her car seat, and was asleep. Later that evening, Proctor stayed at the house packing. Tim took P.P. to Proctor's apartment. (*Id.* 1030, 1487.) P.P. appeared "listless," only waking up for "a little bit" around 9 p.m. to consume less

[2] On September 29, Susan reported their concerns to Child and Family Services (CFS). (Tr. 824-25.)

than a 10 mL bottle. (*Id.* 702, 1030-32, 1040.) P.P. didn't wake when Tim changed her diaper and put her in pajamas. (*Id.* 1040-41.)

The Owlet monitor was placed on P.P. around 11 p.m. (*Id.* 1032-33.) P.P.'s "heart rate was between 60 and 70," which was abnormally low for her. (*Id.* 1037, 1314.) Despite finding P.P.'s heartrate "alarming," Parents went to bed. (*Id*. 559, 1037.) Around 1:30 a.m., Tim heard a noise and went to P.P.'s room. When he picked up P.P., she didn't wake. (*Id.* 1041.)

P.P. also didn't wake for her usual 6 a.m. feeding. (*Id.* 1042.) Parents noticed "one side of her body twitching." (*Id.* 703.) Despite P.P. appearing "fairly unresponsive," Proctor called the on-call pediatrician, who advised Proctor to take P.P. to the ER. (*Id.* 703, 1043-44.)

B. P.P.'s hospitalization

Shortly after 7 a.m., P.P. was admitted to St. Pete's. (*Id.* 593-94.) P.P. was "lethargic and wasn't responding like a four-month-old should." (*Id.* 594.) Dr. Coil noticed a bruise on P.P.'s right eye. (*Id.* 595.) When asked, Parents "felt it was from her hitting her head while she was laying on her belly, or she potentially held a toy up and hit her head with that, or she smacked herself in the face with her own hand." (*Id.* 596.) Due to P.P.'s age, Dr. Coil didn't find Parents' theories plausible. (*Id*.)

Dr. Coil noted that P.P.'s anterior fontanelle, which is "normally soft and somewhat squishy," was "tense and bulging a little bit." (*Id.* 596-97.) When the

anterior fontanelle is tense, "that usually means that there is increased pressure inside of [the] skull," which is concerning because if there is "too much pressure inside [the] skull, then it smashes the brain." (*Id.* 599.)

P.P. was also actively seizing and "making some funny noises and crying." (*Id.* 600.) Despite her lungs sounding clear, P.P.'s oxygen level dropped in the ER. (*Id.* 597-98.) Dr. Coil ordered bloodwork, a urine sample, and a brain CT. (*Id.* 600.) P.P.'s bloodwork didn't indicate an infection. Her nasal swab tested negative for COVID-19 and positive for rhinovirus.[3] (*Id.* 610, 619.) P.P.'s CT showed a "massive anoxic brain injury." (*Id.* 601.)

Dr. Loomis arrived at the hospital to support Parents after learning that P.P. was admitted to the ER "with a devastating injury." (*Id.* 556-57.) Despite the severity of P.P.'s condition, Proctor made a point to tell Dr. Loomis that she "had been excited about [P.P.'s] well-child check" scheduled for that day. (*Id.* 557.) Proctor wanted Dr. Loomis to know that P.P. "had been rolling and reaching to grab for things." (*Id.* 558.)

Because of P.P.'s life-threatening brain injury, Dr. Coil arranged to fly P.P. to Logan for intensive pediatric care. (*Id.* 601-02.) Dr. Coil followed Logan's pediatric intensivist Dr. Stidham's instructions to place P.P. on a Versed drip to

[3] P.P.'s rhinovirus symptoms had completely resolved by the time of her positive test. (Tr. 695.)

sedate her and help control her seizures. (*Id.* 672-73.) Dr. Coil also started P.P. on hypertonic saline "to help treat any potential high pressure or evolving swelling in the brain" and antibiotics in case she had a bacterial infection. (*Id.* 673-75.)

Proctor flew with P.P. while Tim stayed in Helena to close on the Helena house before driving to Kalispell. (*Id.* 1179.) Before landing at Logan, Proctor texted Tim a picture of intubated P.P., telling him that she was getting some sun. (Trial-Exs. 121A, 121B; Tr. 1528.) Meanwhile, St. Pete's reported P.P.'s injuries to CFS.[4] (Tr. 1496.)

At Logan, Dr. Stidham conducted a thorough exam of P.P., ordering labs to get P.P.'s baseline, a chest X-ray to check P.P.'s intubation tube position, a brain MRI, and an EEG to assess P.P.'s seizure activity. (*Id.* 678, 681, 690-91, 699.) Dr. Stidham asked Proctor about P.P.'s black eye. (*Id.* 678.) Proctor reported that P.P. hit her eye with a toy several days earlier. Dr. Stidham found Proctor's explanation concerning because P.P.'s age would've made it very difficult for her to bring a "toy to her face with enough force to cause a bruise." (*Id.* 705-06.)

[4] The ACLU argues that courts should "rigorously apply[] procedural safeguards against privacy infringement . . . to digital searches and seizures conducted in the context of child abuse investigations," in part because of the harm to children, particularity minority children, caused by being removed and placed in foster care. (ACLU Br. at 18-21.) P.P. was placed with family after being discharged from Logan, three days after law enforcement obtained a warrant to search Proctor's cell phone. (*See* Tr. 1793, 2018.)

Initially, Dr. Stidham's leading diagnosis was SIDS or a "near-SIDS event," which P.P.'s labs ultimately refuted: her kidney and liver function were normal, and there was no "global lack of oxygen injury to the rest of the body." (*Id.* 682-83, 685.) P.P. had no fever, and her white blood cell count was normal. (*Id.* 696.)

After P.P.'s chest X-ray showed rib fractures on her right side, NAT moved up the list of possible diagnoses, prompting a skeletal survey. (*Id.* 687, 697.) P.P.'s MRI showed she had a cerebral laceration. (*Id.* 635.) P.P. had "fluid within joint spaces at the junction of the skull and the cervical spine." (*Id.* 640.) P.P.'s CT showed a small subdural hemorrhage. (*Id.* 628.) Concerned that these injuries were caused by abuse, Dr. Schmidt, a pediatric neurosurgeon, ordered a repeat MRI of P.P's brain and cervical spine and a repeat CT. (*Id.* 927-28.)

Within the first 48 hours, Dr. Stidham informed Parents that P.P.'s injuries were consistent with NAT. Tim became "upset" and "vomited in the bathroom." (*Id.* 714-15, 1045.) Proctor focused on asking questions regarding the timing of the injuries. (*Id.* 715-16.) After hearing P.P.'s diagnosis, Tim learned that Proctor had been "struggling" before P.P.'s injuries. (*Id.* 1046.) Tim asked Proctor if she had caused P.P.'s injuries; Proctor didn't ask Tim the same. (*Id.* 1049-50.)

Dr. Stidham requested Dr. Remington, an ophthalmologist, examine P.P., which he did on October 1. Dr. Remington only dilated the right eye to allow the left eye to be used as a physical indicator of sudden increase in brain pressure.

P.P.'s right eye had extensive retinal hemorrhages and a significant macular edema. (*Id.* 779-80, 787-90.)

By the following week, P.P.'s seizures were under control. However, on October 8, P.P. developed pneumonia. That same day, her CT showed that P.P.'s subdural hemorrhage had increased in size, requiring a bedside procedure to drain the blood collection. (*Id.* 717-19.)

On October 12, Dr. Stidham extubated P.P. (*Id.* 725.) Once extubated, P.P. had difficulty "clearing her secretions" and had "noisy upper airway breathing," resulting in reintubation. (*Id.* 725.) Afterward, Parents were seen "walk[ing] by the front of the NICU, laughing, swinging hands," and it appeared that "they were joking" with each other. (*Id.* 1240.) Proctor was smiling. (*Id*.)

The next day, Proctor lacerated P.P.'s finger while clipping her fingernails (Tr. 1182, 1241; Trial-Ex. 102.) P.P.'s visible injury was reported to CFS because Proctor used clippers in violation of the PICU's known practice of banning use of clippers to prevent infection that can lead to death. (*Id.* 1242-43, 1250, 1254.)

Because new fractures may not have been "evident on initial x-rays," and "as the bones heal, the fractures become more evident," Dr. Stidham requested a repeat skeletal survey. (*Id.* 720-21.) Despite being told its protocol, Proctor questioned "the need to do so." (*Id.* 721.)

Dr. Remington's October 19 eye exam confirmed his initial findings, "with the exception that some of the hemorrhages were clearing," and he found "retinoschisis in the left eye," which means her retina was splitting. (Tr. at 790-92.) P.P. had bilateral, extensive hemorrhages present in all three layers of her retinas. (*Id.* 1078-79.)

P.P. was discharged on October 31. (*Id.* 1203.) P.P.'s brain damage is irreversible. (Tr. at 381, 386-87, 499.) Although P.P.'s motor cortex was "relatively spared," P.P.'s occipital lobe and frontal cortex were severely damaged. (*Id.* 387.) By the time of trial, 18-month-old P.P. was "just getting ready to take her first steps" and could mimic words. (*Id.* 1115-16, 2020.) With severe cases of brain injuries, like P.P.'s, as the person ages, they usually require "full-time care" and are unable to "function independently in the world." (*Id.* 955.)

II. Pretrial motions

A. Suppression motion

Relevant to this appeal, Proctor moved to suppress information obtained from the search of her cell phone seized pursuant to the October 15 Search Warrant (SW) and searched pursuant to the October 28 SW, arguing that the warrants were overbroad. (Doc. 6.)

The court denied Proctor's suppression motion. (Doc. 215 at 23.) The court explained that the warrants supported seizing and searching Proctor's cell phone based, in part, on the following information in the warrants' applications: Proctor called the on-call pediatrician the morning P.P. was admitted to St. Pete's; an Owlet monitor was placed on P.P. the evening before and Parents were able to view the Owlet data in real time; Parents were living separately; Tim was working in Great Falls; Parents were reportedly on their phones for a significant amount of time after learning the doctors diagnosed P.P. with NAT; and Detective Van Dyke's experience and training had led him to believe Proctor's phone included evidence pertaining to P.P.'s injuries, health history, and care. (*Id.* 16-18.)

Acknowledging that the October 28 SW's "language allow[ed] the search of numerous areas of information contained on the phone," the court further explained the October 28 SW didn't authorize an overbroad search because it limited the search of data to a specific offense and time range of five months, from P.P.'s birth to the SW's date. (*Id.* 18-19.)

B. Motion to exclude NAT expert witness testimony

Pursuant to Mont. R. Evid. 702, Proctor moved to exclude testimony regarding NAT, including any derivatives of the diagnosis. (Doc. 15.)

At the hearing, Dr. Wells, a pediatrician since 1996, a board-certified child abuse pediatrician since 2003, and the director of the Kempe Center, explained

that, since its creation, NAT has gone by various names, including SBS, which rose to popularity in the 1980s and 90s. (8/26/22 Tr. 24.) Dr. Wells explained that "in some circles [SBS] raised controversy because it really speaks to a mechanism, when "'syndrome' suggests . . . there are a series of tests that can be done to diagnose that syndrome." (*Id.*) Consequently, the medical community has moved away from referring to NAT as SBS in order to better capture "the breadth of the constellation of findings in abusive head trauma rather than pointing to a specific mechanism." (*Id.* 25.) NAT, however, remains "a very well supported medical diagnosis," recognized by various associations, including the American Academy of Pediatrics (AAP). (*Id.* 25-26.) NAT/AHT[5] is "the number one cause of death in children under a year from head injury." (*Id.* 25.)

Like any diagnosis, diagnosing NAT is based on the patient's history, physical exam, X-rays, and lab findings. (*Id.* 27.) The patient's history and presentation create a constellation of findings, and medical staff then explore "differential diagnos[e]s that could cause those findings." (*Id*.) During this process of narrowing down a list of causes, medical providers can "fairly quickly" create a smaller list to guide further assessment. (*Id.* 29.)

[5] At the hearing, abusive head trauma (AHT) was used interchangeably with NAT. (8/26/22 Tr. 26.)

If the medical provider observes an "unexplained brain bleed, unexplained swelling, and retinal hemorrhages," then AHT "should be fairly high in the differential [diagnosis]." (*Id*. 78.) That said, Dr. Wells explained, those three symptoms do not automatically equate to abuse, nor is NAT considered a default diagnosis. (*Id.* 78, 81.)

Dr. Wells explained that various mechanisms cause injuries consistent with NAT: "one mechanism could be shaking, another mechanism could be slamming, another mechanism could be . . . a high-speed motor vehicle crash." (*Id.* 83.) Impact can include impact "into a soft surface," and "the chin striking the chest, or the head striking the back of the neck." (*Id.* 83-84.) These mechanisms result in biomechanically the brain moving inside the skull, before stopping very rapidly, resulting in the brain and eyes continuing to move. (*Id.* 84-85.)

Proctor's expert, Dr. Galaznik, confirmed that different mechanisms can cause injuries consistent with AHT, asserting "only the shaking allegation . . . has come under challenge." (9/20/22 Tr. 85.) Dr. Galaznik explained that there are biomechanical studies done using dummy infants, lambs, and piglets, that do not support "that the repetitive acceleration/deceleration that might be generated in an abusive shaking of a 12 pound infant[6] would be predicted to be a primary mechanical of any grossly visible retinal hemorrhages or any primary brain

[6] At the time of P.P.'s hospitalization, she weighed 10 lbs. (Tr. 1880-81.)

injury." (*Id.* 88-90, 93.) That said, Dr. Galaznik admitted that shaking an infant can cause rib fractures and death. (*Id.* 93-94, 136.)

At the conclusion of the hearing, the court denied Proctor's motion, reasoning:

> I'm not hearing anything about wholesale in pediatric practice in the [USA] we have rejected the idea that you can shake a baby, have rotational forces, and cause brain damage or retinal hemorrhage . . . the [AAP] has reaffirmed the notion that there is such a thing . . . I'm not hearing anything that tells me that the state of the science has changed to where I'm not going to let the state offer their witnesses.

(*Id.* 142-43.) The court ultimately concluded that whether P.P. was diagnosed correctly was a question for the jury; Proctor didn't present information that the "science is unreliable." (*Id.* 146.)

III. NAT expert trial testimony

Before the State charged Proctor, Dr. Wells reviewed P.P.' s medical records, and advised the State to find a pediatric radiologist to review P.P.'s scans. (Tr. at 361-62, 1287.) Dr. Dance, a pediatric interventional radiologist at Primary Children's Hospital, reviewed P.P.'s medical records from July 4, 2021 through December 8, 2021. (*Id.* 351, 365-67.)

Dr. Dance observed that P.P. had a "severe diffuse hypoxic ischemic injury," that caused most of P.P.'s brain to "literally melt away in an irreversible way." (*Id.* 368-69.) The only reason P.P. didn't die from her brain injury was because "her

skull wasn't fused," allowing her brain to adapt to the "swelling without herniating." (*Id.* 389.)

Drs. Wells and Dance both opined that, based on the severity of P.P.'s brain injury, P.P. would've been "immediately symptomatic," meaning it couldn't have been inflicted before her last "normal interaction, which would include a normal feeding." (*Id.* 520, 1358, 1361.) Thus, P.P.'s injury most likely occurred between 6 p.m. and 3 a.m. (*Id.* 404, 1382-83.) Dr. Wells explained that "the constellation of brain injuries that [P.P.] had were most consistent" with "acceleration/ deceleration and rotational force." (*Id.* 1302.)

Two of Proctor's experts opined that P.P.'s brain injury was likely caused by a clot in her sagittal sinus vein, and that P.P.'s medical providers didn't rule this out as a cause because they didn't perform a Magnetic Resonance Venography. (*Id.* 1732-33, 1755, 1942, 1948.) However, the rare times Dr. Wells had observed a sagittal sinus clot in infants, it was a result of AHT. (*Id.* 1372-73.)

Dr. Dance confirmed that P.P. had a cerebellum laceration, a "very uncommon" injury that is "a telltale sign of [a] rapid noncontact shaking-type mechanism." (*Id.* 392.) Proctor's expert, Dr. Mack, opined that calling P.P.'s injury a laceration was "a step too far" and that P.P. simply had a cerebellar cleft, which means there was "fluid where it doesn't belong inside of the parenchyma of the brain," which wasn't caused by shaking. (*Id.* 1706-07.)

P.P.'s spine MRI established that she had neck injuries at the top of her spine, with fluid present within the C1 and C2 joint spaces, indicating stretching of those joint spaces. P.P.'s neck injury, which was consistent with whiplash, was severe enough that she was required to wear a "C-collar for six to eight weeks" to help immobilize her neck to prevent further injury. (*Id.* 407-08, 659-60.)

Proctor's expert, Dr. Scheller, a pediatric neurologist, confirmed fluid was present "in the ligament where the skull meets the back of the neck from some kind of stretch there," but couldn't say that there was "damage" there. (*Id.* 1973.) To Dr. Scheller, P.P. being intubated in the ER was "the most likely explanation" for the fluid being present. (*Id.* 1975-76.) Dr. Coil "one hundred percent" disagreed. (*Id.* 2047.)

P.P. had new fractures on "the posterior media, . . . the 10th and 11th rib[s]," which were highly specific for child abuse. (*Id.* 435.) And P.P.'s right fifth rib fracture was likely over seven days old. (*Id.* 418-19.) As Dr. Wells explained, fractured ribs trigger an abuse evaluation because an infant's ribs are "very cartilaginous," making them "more bendable" and less fragile than adult ribs, so when rib fractures are present in infants, the concern becomes "that there was compression front to back or there was a bending or fulcruming" across them. (*Id.* 1292-93.) Proctor's expert, Dr. Sullivan, a pediatric orthopedic surgeon,

opined that P.P.'s fracture of her fifth rib "is at least two months old" and could've been caused by her vaginal birth. (*Id.* 1597-99.)

P.P.'s scans also indicated she had bilateral, proximal femur fractures "that "occur[ed] right where the cartilage meets the bone." (*Id.* 423-24, 1301.) P.P.'s right tibia was also fractured. (*Id.* 437-39, 1301.) As Dr. Dance explained, "a lot of force was applied to that bone for it to break," and "torsional forces near the junction of the cartilage in the bone" caused P.P.'s femur fractures. (*Id.* 428-29.) Dr. Wells agreed, explaining that these fractures might occur if there "is tension along the length of the bone," causing the end of the bone to be "pulled off" at the growth plate. (Tr. at 1295.) This type of fracture can also occur from "a really violent shaking," but most commonly "it's just a yank" on the leg that causes it. (Tr. at 1296, 1299.) As Dr. Dance explained, P.P.'s femur fractures were "hands down the most specific injury" that supported that P.P.'s injuries were a result of child abuse. (*Id.* 432.)

Dr. Sullivan disagreed with the State's experts, opining that P.P.'s femurs looked "reasonably normal," and that if they had been fractured, a surgeon would've operated on her to "put pins across the hip in order to keep" it from displacing and P.P. "would have been put in a body cast." (*Id.* 1587-89.) Dr. Wells, however, explained that P.P.'s femur fractures wouldn't have required a cast

because the area of the fracture was "cartilaginous," allowing the fractures to "heal on their own." (*Id.* 2096.)

P.P.'s scans also indicated her left thumb and right pinky toe were both fractured. (*Id.* 440, 442.) Dr. Sullivan believed medical staff caused these fractures. (*Id.* 1611-12, 1618.)

Dr. Sullivan ultimately concluded, based on Proctor's Vitamin D levels testing deficient two weeks after P.P. was hospitalized, that P.P. may have had nutritional rickets, a rare disorder that is caused by a Vitamin D deficiency making a person more susceptible to fractures. (*Id.* 445, 1583-86.) However, P.P.'s labs at Logan didn't indicate a need to test for Vitamin D. (*Id.* 752.) Nor did Dr. Dance's review of P.P.'s images indicate P.P. had rickets. (*Id.* 443.)

To Dr. Dance, the odds of P.P. simultaneously having "cerebral sinovenous thrombosis and rickets" was "less than a trillion." (*Id.* 508.) Truly, P.P.'s case was "one of the worst" Dr. Wells had seen that didn't result in death. (*Id.* 1476.) And, because P.P. had so many injuries that were highly specific for child abuse, Dr. Dance uses P.P.'s case to "teach the residents and the medical students how to find [NAT]." (*Id.* 491.)

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion by allowing the State to present NAT expert testimony at Proctor's trial. The NAT expert testimony, which included testimony regarding shaking—one of the many mechanisms that causes injuries consistent with NAT—satisfied Mont. R. Evid. 702's requirements. However, even if the court erred in admitting NAT expert testimony, the error was harmless because of the overwhelming evidence the State presented that the only reasonable medical explanation for P.P.'s various injuries was child abuse.

The court also correctly denied Proctor's cell phone data suppression motion. The October 28 SW listed 24 categories of data with sufficient particularity based on the circumstances of the case and the nature of the evidence sought. The October 28 SW also didn't authorize an overbroad search: specific messages were excluded and the searches were limited to evidence of P.P.'s aggravated assault, injuries, and care over a five month period. But, even if the court erred, the error was harmless as any potentially tainted evidence was either cumulative or played a minor role in Proctor's trial.

Moreover, Proctor has not established that the State's comments in closing arguments regarding her pre-investigative internet search for defense counsel, her character, her defense, and the strength of the State's case were improper or prejudicial. As such, Proctor has not established that this Court declining to review

Proctor's prosecutorial misconduct claim will result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial or proceedings, or compromise the integrity of the judicial process.

Nor has Proctor established that her counsels' decision to not object to the State's comments in closing arguments requires this Court to review Proctor's non-record-based IAC claim. Even so, Proctor cannot establish that her counsel was ineffective for not objecting to specific statements in the State's closing arguments because the challenged statements did not amount to improper comment that prejudiced Proctor's right to a fair trial.

For the foregoing reasons, Proctor has also failed to meet her burden under the cumulative error doctrine.

STANDARDS OF REVIEW

This Court reviews a court's denial of a limine motion for abuse of discretion. *State v. Santoro*, 2024 MT 136, ¶ 15, 417 Mont. 92, 551 P.3d 822.

This Court reviews a district court's denial of a suppression motion to determine whether its factual findings are clearly erroneous and whether its legal conclusions are correct. *State v. Neiss*, 2019 MT 125, ¶ 13, 396 Mont. 1, 443 P.3d 435. This Court reviews de novo a court's legal conclusion of whether a search warrant is sufficiently particular. *Id.*

This Court reviews de novo record-based IAC claims raised on direct appeal. *State v. Dellar*, 2025 MT 111, ¶ 19, 422 Mont. 124, 569 P.3d 534.

ARGUMENT

I. The court properly denied Proctor's motion to exclude NAT expert testimony.

Both Proctor and the Innocence Network (Network) argue that the court erred in allowing NAT expert testimony because NAT is an unreliable diagnosis.[7] (Appellant's Br. (Br.) at 29; Network's Br. at 14-15.) Montana Rule of Evidence 702 governs the admissibility of expert testimony. Expert testimony is required when the subject matter "is sufficiently beyond common experience [so] that the opinion of the expert will assist the trier of fact to understand the evidence or to determine a fact in issue." *Hulse v. DOJ, Motor Vehicle Div.*, 1998 MT 108, ¶ 48, 289 Mont. 1, 961 P.2d 75.

Rule 702 looks at three questions: "(1) whether the expert field is reliable, (2) whether the expert is qualified,[8] and (3) whether the qualified expert reliably

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[7] Admitting it is outside the scope of its brief, the ACLU nonetheless asserts, without any support, that "SBS diagnoses are scientifically unreliable." (ACLU Br. at 19.) This Court should disregard the ACLU's blanket statement, which far exceeds the scope of the subject on which this Court authorized the ACLU to submit an amicus brief.

[8] Proctor doesn't challenge that the State's experts weren't qualified to testify about NAT and the mechanisms that cause injuries consistent with that diagnosis. (*See* Br. 29-32.)

applied the reliable field to the facts." *Santoro*, ¶ 23. "The first two questions are for the trial court to resolve, the third—whether the qualified expert reliably applied the reliable field to the facts—is left to the jury" to resolve. *Id*.

The *Daubert*[9] test helps determine whether the expert field is reliable. *Hulse*, ¶ 53. However, "the *Daubert* test should only be used to determine the admissibility of novel scientific evidence." *Hulse*, ¶ 56. "Medical diagnosis is not novel scientific evidence and therefore the *Daubert* standard does not apply." *State v. Price*, 2007 MT 269, ¶ 24, 339 Mont. 399, 171 P.3d 293. *Daubert*, therefore, doesn't apply to NAT, a recognized medical diagnosis.

Nevertheless, Proctor seeks to paint NAT as unreliable by asserting that biomechanical studies do not support that shaking—one of the many mechanisms that can cause injuries consistent with NAT—causes retinal hemorrhages, subdural hemorrhages, and a hypoxic brain injury. (Br. 29-32.) Despite Proctor's contention, the State wasn't required to prove NAT was reliable by proving the reliability of the shaking mechanism, which isn't even a diagnostic criterion of NAT. Indeed, one of the reasons the AAP transitioned from diagnosing SBS to NAT was to account for the injuries, and not diagnose based on mechanism, especially when there are multiple mechanisms that result in injuries consistent with NAT.

[9] *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993)

However, even if *Daubert* applies, the State laid appropriate foundation for the admission of testimony regarding the shaking mechanism causing P.P.'s various injuries. First, the reliability of the shaking mechanism is capable of being tested. *See Hulse*, ¶ 52. Two of Proctor's experts testified concerning studies of dummy infants and young animals testing whether the shaking mechanism can result in the common constellation of injuries consistent with AHT. (9/20/22 Tr. 88-90; Tr. 1886-95.) Studies have also been done after someone confessed to shaking an infant or it was witnessed and then the infant had specific injuries. (Tr. 1356-58, 1878-80.)

Second, various experts testified about peer reviewed publications supporting that the shaking mechanism can result in the constellation of injuries consistent with NAT. (8/26/22 Tr. 23, 117-19; Tr. 1356-58, 1878-89; 9/20/22-Exs. 36-37); *see Hulse*, ¶ 52. Third, the State's experts carefully limited their testimony concerning the mechanisms that caused P.P.'s injuries. *See Hulse*, ¶ 52. Drs. Wells and Dance specifically qualified their testimony that certain injuries of P.P.'s were most consistent with an acceleration/deceleration and rotational force, but neither of them definitively concluded that shaking, with or without impact, was the exact mechanism that caused P.P.'s injuries.

Fourth, the shaking mechanism resulting in a constellation of injuries consistent with NAT is generally accepted in the medical field. *See Hulse*, ¶ 52. At

trial, Dr. Wells referenced a recent study from questionnaires sent to children's hospitals that supported that the majority of medical providers believe it is highly likely that shaking an infant causes subdural hematomas, retinal hemorrhages, and even death. (Tr. 1472.)

Importantly, other courts have concluded that expert testimony concerning NAT, including testimony regarding the shaking mechanism, is admissible. *See State v. Leibhart*, 662 N.W.2d 618, 627-28 (Neb. 2003); *Middleton v. State*, 980 So.2d 351, 355-59 (Miss. Ct. App. 2008). Thus, the court didn't abuse its discretion when it allowed NAT expert testimony, which inevitably included testimony that the shaking mechanism could have caused P.P.'s numerous injuries.

Proctor's reliance on *State v. Strizich*, 286 Mont. 1, 952 P.3d 1265, 1371-72 (1997), to argue that evidence of NAT was inadmissible is misplaced. (Br. 30.) In *Strizich*, this Court concluded, based on statutes that didn't authorize admission of PBT results at trial and experts agreeing that the PBT equipment, when used in the field, was highly unreliable, that PBT results may be used only to estimate a person's alcohol concentration when establishing probable cause for DUI. *Strizich*, 286 Mont. at 11-13, 952 P.3d at 1371-72.

But, here, there is no disagreement among the experts that NAT is a reliable diagnosis recognized by the medical community. Rather, there is minority disagreement that the shaking mechanism can cause the three main injuries that are

consistent with NAT. (*See* Tr. 1472-74.) Moreover, unlike PBTs, there is no statute prohibiting the admissibility at trial of NAT or the shaking mechanism.

The absurdity of Proctor's and the Network's position is best highlighted by the outcome that would have occurred if they had prevailed on their Rule 702 arguments: P.P.'s own *treating physicians* wouldn't have been able to inform the jury of *the diagnosis* that *each of them made* based on *their observations* of P.P.'s life-threatening injuries and their years of training and experience. Rather than thwarting the State's ability to prosecute Proctor for child abuse, the court correctly determined NAT expert testimony was admissible and would assist the jury in determining how four-month-old P.P., who couldn't speak for herself, sustained her serious injuries.

However, even if this Court finds that evidence of the shaking mechanism and NAT are subject to debate, that doesn't render the evidence inadmissible. The trial court has broad discretion in determining whether to admit the testimony. *Hulse*, ¶ 48. Trial courts "presented with scientific evidence, novel or not, [are] encouraged to liberally construe the rules of evidence so as to admit all relevant expert testimony." *Hulse*, ¶ 63. "Absolute certainty of result or unanimity of scientific opinion is not required for admissibility" and it is "better to admit relevant scientific evidence in the same manner as other expert testimony and allow its weight to be attacked by cross-examination and refutation." *Hulse*, ¶ 49.

Here, the district court correctly concluded that Proctor hadn't undermined the admissibility of NAT expert testimony, but rather had presented arguments that went to the weight of the evidence. By admitting NAT expert testimony, Proctor was able to attack its reliability through cross-examination and through her expert witnesses explaining the perceived weaknesses of P.P.'s NAT diagnosis.

Finally, the Network, not Proctor, argues that the court erred in allowing NAT expert testimony because the experts didn't reliably apply the field to the facts. (Network's Br. 14-16.) The Network's contention disregards that prong three isn't a question for the court, but rather for the fact-finder. *See Santoro*, ¶ 23. Even so, the record supports that the State's experts did reliably apply the NAT field to the facts of P.P.'s case.

In support of its argument, the Network cites to Proctor's brief, asserting that the experts didn't consider possible alternative diagnoses for P.P.'s injuries. (Network's Br. 16.) The record proves otherwise. P.P. arrived at Logan with SIDS as the leading diagnosis. After lab results and various imaging, Logan narrowed down P.P.'s diagnosis to NAT. At trial, P.P.'s medical providers explained why other diagnoses—specifically the rare diagnoses of rickets and sagittal sinus thrombosis—didn't explain P.P.'s injuries. (*See* Tr. 744, 747, 769-70, 773-74, 960-69, 984-85, 1091.) Moreover, the jury heard extensive evidence about what NAT is, each of P.P.'s injuries, and how those injuries were most consistent with

NAT. The record establishes that the jury could have reasonably concluded that the State's experts reliably applied the field to the facts.

However, even if this Court concludes that testimony regarding NAT and the shaking mechanism was inadmissible, there was compelling overlapping evidence establishing that P.P.'s injuries had been inflicted. The admission of inadmissible evidence is harmless if the State demonstrates that the jury "was presented with admissible evidence that proved the same facts as the tainted evidence and, qualitatively, by comparison, the tainted evidence would not have contributed to the conviction." *State v. Van Kirk*, 2001 MT 184, ¶ 47, 306 Mont. 215, 32 P.3d 735.

The State presented overwhelming testimony, without mention of the mechanism of abuse, that P.P.'s injuries—hypoxic brain injury, cerebellar laceration, bilateral rib fractures, bilateral femur fractures, a tibial fracture, toe fracture, finger fracture, bilateral 360-degree retinal hemorrhages, and a subdural hemorrhage—had no other reasonable explanation than child abuse. And, importantly, the State wasn't required to prove the exact mechanism Proctor used to cause P.P.'s injuries. Even so, testimony concerning mechanisms causing P.P.'s injuries didn't focus solely on shaking. Testimony supported that soft impact couldn't be ruled out as a cause of P.P.'s injuries, P.P.'s rib fractures were likely caused by squeezing, and her femur fractures could've been caused by pulling.

Thus, even if the NAT evidence was inadmissible, it wasn't prejudicial given the overlapping evidence presented that P.P.'s injuries were all inflicted.

II. The court correctly denied Proctor's motion to suppress evidence obtained from her cell phone.

Proctor and the ACLU argue that the court erred in not suppressing evidence from her cell phone data search because the October 28 SW (hereinafter, Warrant) lacked particularity and was overbroad. (Br. at 38; ACLU Br. at 11.)

The Fourth Amendment and Mont. Const. art. II, § 11, govern searches of cell phones. *State v. Mefford*, 2022 MT 185, ¶ 15, 410 Mont. 146, 517 P.3d 210. These constitutional provisions require that warrants be based on probable cause and particularly describe the place to be searched and the things to be seized.

The Fourth Amendment's specificity requirement prevents officers from engaging in "a general, exploratory rummaging in a person's belongings," by limiting discretion and providing specific guidance to the officer executing the warrant as to what can and cannot be searched and seized. *State v. Seader*, 1999 MT 290, ¶ 11, 297 Mont. 60, 990 P.2d 180. The Fourth Amendment's specificity requirement has two aspects: particularity and breadth. *Neiss*, ¶ 57. Here, the court correctly denied Proctor's motion to suppress her cell phone evidence because the Warrant satisfied both aspects of specificity.

A. The Warrant described with particularity the evidence sought from Proctor's phone.

Particularity requires that the warrant "clearly state what is sought."[10] *Neiss*, ¶ 57. A warrant is sufficiently particular under the Fourth Amendment if the warrant (1) "identif[ies] the specific offense for which the police have established probable cause," (2) "describe[s] the place to be searched," and (3) "specif[ies] the items to be seized by their relation to designated crimes." *United States v. Ulbricht*, 858 F.3d 71, 99 (2d Cir. 2017).

The level of detail necessary in a warrant varies based on the case circumstances and the nature of evidence sought. *Seader*, ¶ 13. Warrants that describe generic categories of items are not per se invalid so long as "a more precise description of the items subject to [seizure] is not possible." *Id.* Descriptions in warrants are sufficiently particular if the terms "allow the executing officer to distinguish between items that may or may not be seized." *Seader*, ¶ 12.

Indeed, search warrants for digital data "may contain some ambiguity . . . so long as law enforcement agents have done the best that could reasonably be expected under the circumstances, have acquired all the descriptive facts which a

[10] Below, Proctor used particularity interchangeably with breadth before largely arguing that the Warrant was overbroad. (Docs. 12-13.) Although the two concepts are separate, the State addresses Proctor's particularity argument as if she clearly raised it below because caselaw consistently intertwines particularity and breadth.

reasonable investigation could be expected to cover, and have insured that all those facts were included in the warrant." *Ulbricht*, 858 F.3d at 100.

The Warrant specifically requested evidence related to the offense of Aggravated Assault, for which there was probable cause to investigate. It also described the place to be searched: Proctor's cell phone.

Finally, the Warrant specified the items sought with sufficient detail. The Warrant authorized law enforcement to obtain 24 categories of data from Proctor's phone, including text messages, internet search history, and images. (8/26/22-Ex. 28.) Although the data categories are arguably generic, that does not undermine their particularity because a more precise description of the items sought was not possible. Moreover, the categories were limited to evidence of Aggravated Assault and P.P.'s health and injuries. Based on the case circumstances and the evidence sought, the Warrant was sufficiently particular.

B. The Warrant didn't authorize an overbroad search.

Breadth under the Fourth Amendment requires "that the scope of the warrant be limited by the probable cause on which the warrant is based." *Neiss*, ¶ 57. A broad search warrant doesn't necessarily equate to the warrant lacking specificity. *Ulbricht*, 858 F.3d at 100. Furthermore, "agents are limited by the longstanding principle that a duly issued warrant . . . may not be used to engage in a general, exploratory search." *United States v. Adjani*, 452 F.3d 1140, 1150 (9th Cir. 2006).

The Warrant did not authorize a general, exploratory search. Rather, it limited the data sought by law enforcement in several ways. First, it precluded law enforcement from seizing any conversations, texts or emails with legal counsel, with pastors, clergy, or other religious counsel, or as "agreed upon by legal counsel prior to this search." (8/26/22-Ex. 28, Warrant, 2.)

Second, the data sought was in relation to the aggravated assault of P.P. The Warrant application listed each injury that Proctor had inflicted upon P.P. resulting in her hospitalization and NAT diagnosis. The application also noted that on four occasions P.P. arrived at daycare with unexplainable facial injuries. (8/26/22-Ex. 28, Application 2-5.)

Moreover, the Warrant limited the search temporally. The application centered on P.P.'s injuries observed on September 29, and included facts concerning P.P.'s health and other observed injuries over the course of her short life span. The court correctly, therefore, concluded that the Warrant was naturally limited to a five-month period: P.P.'s birth date to the Warrant's date. These concrete restrictions provided sufficient guidance for law enforcement to discern what evidence they were authorized to seize.

Finally, probable cause supported the search of Proctor's phone for the specific data listed in the Warrant. The application detailed the severity of P.P.'s injuries, which were consistent with NAT. The application also noted that Proctor

had used her phone to call a pediatrician the morning that P.P. was life-flighted to Logan in critical condition. (8/26/22-Ex. 28, Application 2-5.)

The application provided that P.P. was wearing an Owlet monitor the night before she was admitted to the hospital, and that Parents had known P.P.'s heart rate was abnormally low because the Owlet sent data to Parents' phones. The application further noted that the daycare had reviewed their logs, and there were four occasions, beginning in August, when staff had noted that P.P. arrived with bruises on her face. The application stated that P.P. had a black eye when she was admitted to St. Pete's. (8/26/22-Ex. 28, Application 2-5.)

The application also provided that Parents were moving into two separate residences, and that Tim was working in Great Falls. Tim informed Dr. Coil that he had been out of town the week leading up to P.P.'s injuries. And Parents were reportedly on their phones after hearing P.P.'s diagnosis. Finally, the application noted that based on Van Dyke's training and experience, which includes 5 years as a child abuse detective, criminals often use various message capabilities on their phones to facilitate their crimes. (8/26/22-Ex. 28, Application 2-6.)

Based on the information in the application, a reasonable probability existed that evidence concerning the offense of Aggravated Assault, P.P.'s health, and her injuries over the course of her few months of life, was on Proctor's phone.

Proctor's and the ACLU's reliance on *Seader* is misplaced. In *Seader*, ¶ 7, law enforcement searched Seader's van pursuant to a warrant that "authorized the seizure of proceeds of drug sales whether in monies, precious metals, property or anything else of value furnished or intended to be furnished in the exchange for the evidence or contraband relating to the use, sale or manufacture of dangerous drugs." During their search, law enforcement seized a stolen ATV, resulting in Seader being charged with felony theft. *Seader*, ¶ 8. This Court concluded that the "catchall phrase" of "anything else of value" provided "the executing officers no guidance in distinguishing between items that could and could not be seized, as amply illustrated by their seizure of the ATV," rendering "the warrant facially overbroad." *Seader*, ¶¶ 14-16.

Proctor's and the ACLU's argument that the Warrant stating "including, but not limited to" before the list of search categories being the same as "anything else of value," disregards that the qualifying language didn't prevent law enforcement, here, from being able to discern what evidence was authorized to be seized. (*See* Br. 34, 39; ACLU Br. 13.) Here, law enforcement didn't seize any data outside of the listed categories. By Proctor's trial, Van Dyke hadn't completed his review of the data seized from Proctor's phone, and only 20 photos, 2 text messages with photos, use of Pinterest, and a web search for defense counsel were used at trial. (Tr. 1517-28, 1540.) Thus, all of the evidence seized from Proctor's phone fell

within the categories of evidence sought, and was related to P.P.'s health and injuries and the offense of Aggravated Assault as stated in the warrant. Moreover, the evidence admitted was from June-October 2021.

Thus, in denying Proctor's motion, the court correctly concluded "that the search warrant was not overbroad—there was probable cause that the categories of data to be searched contained evidence of the crime of aggravated assault. The phones to be searched were specifically identified. The evidence to be seized covered a limited timeframe" because it was limited to the crime of aggravated assault of P.P., who was born in May 2021.[11] (Doc. 215 at 22.)

C. Even if the court erred, it was harmless.

Even if this Court concludes that the district court erred in denying Proctor's suppression motion, this Court will not reverse if the alleged error was harmless. *See Van Kirk*, ¶ 47. Here, any potentially tainted evidence was either cumulative or played a minor role in Proctor's trial.

[11] Based on the State's arguments below, Proctor, on appeal, contends that the doctrines of severability and inevitable discovery don't apply. (Br. 44-46.) Because the State argues that the Warrant satisfied the specificity requirement, but even if it didn't, the admission of the evidence seized from Proctor's phone was harmless, the State doesn't respond to Proctor's arguments regarding those two doctrines.

1. Photographs

The admission of the photographs, and the State's references to the injuries depicted in the photographs during questioning of medical professionals in its opening statement and closing argument were harmless. First, the jury was instructed that opening statements and closing arguments were not evidence. (Doc. 283); *see State v. Smith*, 2021 MT 148, ¶ 49, 404 Mont. 245, 488 P.3d 531.

Second, the jury found beyond a reasonable doubt that the offense resulted in serious bodily injury to P.P., not that the offense resulted in bodily injury to P.P. The admitted photographs all supported bodily injury, depicting either abrasions or bruises on P.P.'s face over her first four months. Several witnesses also testified to seeing various bruises or abrasions on P.P.'s face during that time. There was also extensive testimony describing P.P.'s black eye.

In light of the significant testimony concerning P.P.'s serious bodily injuries—multiple fractures, various brain injuries, and bilateral retinal hemorrhages—the photographs depicting bruises, which witnesses described, didn't contribute to Proctor's conviction for assault on a minor, causing serious bodily injury.

2. Web history

The State's use of Proctor's web search for counsel was harmless because there was additional testimony that Proctor had secured defense counsel in

October 2021. Tim testified that he took screenshots of the Owlet data while P.P. was in the hospital, at the request of Proctor's attorney. (Tr. 1035) And Proctor's expert, Dr. Scheller, was consulted by Proctor's defense counsel and had reviewed P.P.'s medical records before she was discharged from Logan. (*Id*. 1986-89.) Even so, Proctor's search early on for defense counsel didn't contribute to her conviction, again, based on the overwhelming testimony that Proctor, the last caregiver to be with P.P. alone before P.P.'s health rapidly declined, caused P.P.'s severe injuries.

3. Text messages

Likewise, the admission of two of Proctor's text messages was harmless. Proctor sent text messages, with photos of P.P. intubated, when P.P. was being prepared for transport to Logan and during her life-flight. The first message informed Tim that P.P. was doing great, and the second message informed Tim that they were about an hour away from Logan and that P.P. was getting some sun. (Trial-Exs. 121A-121B.) These text messages, at best, go to Proctor's perplexing responses to the severity of P.P.'s condition. The State presented substantial other evidence about Proctor's odd behavior in relation to P.P.'s life-threatening injuries as circumstantial evidence that she committed the assault against P.P. The admission of the text messages didn't contribute to Proctor's conviction.

III. Proctor hasn't established that the prosecutor's challenged statements constitute plain error.

"Except as otherwise prohibited by applicable constitutional rights, statutory rules of procedure, and rules of evidence, criminal prosecutors have wide latitude to present and elicit relevant incriminating evidence and to challenge any evidence presented by the defense." *State v. Miller*, 2022 MT 92, ¶ 22, 408 Mont. 316, 510 P.3d 17. For instance, a prosecutor "may not assert or comment on facts not in evidence." *Miller*, ¶ 23. Nor can the prosecutor "express a direct personal opinion or belief that the accused is guilty" of the offense charged, or assert "that the court has previously made a determination indicative of the accused's guilt." *Miller*, ¶ 24. The prosecutor may, however, argue, based on the evidence, "that the accused is guilty, committed the crime, or that the state has met its burden of proof." *Miller*, ¶ 27.

Only when a prosecutor's comments prejudice a defendant's right to fair trial is reversal appropriate. *Miller*, ¶ 36. This Court will not presume that prosecutorial misconduct violated a defendant's constitutional right to a fair trial; the defendant must demonstrate that the misconduct resulted in an unfair trial under the totality of the circumstances, including consideration of the improper comment in the context of the entire subject closing arguments. *Id.* "[I]solated instances of improper prosecutorial comments during closing argument are generally insufficient to prejudice an accused's right to a fair trial." *Miller*, ¶ 37.

Notably, Proctor does not appeal the court's denial of her motion for new trial based on alleged prosecutorial misconduct. (*See* Doc. 309.) Nor did Proctor object below to any of the statements she challenges on appeal. Generally, this Court will not address on appeal a defendant's unobjected to claim of prosecutorial misconduct. *Miller*, ¶ 10.

However, this Court will sparingly apply plain error review 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. *Id*. Proctor has not established that plain error review of her claims is warranted.

Throughout trial, Proctor's asserted theory of the case was that P.P.'s medical team misdiagnosed her with NAT, the State blindly pursued charges against Proctor based on P.P.'s injuries, and that no one could be guilty of assaulting P.P. because no child abuse occurred. (*See* Tr. 1646, 2126, 2131-35, 2137-39, 2160.) Against that backdrop, Proctor singles out discrete statements in the State's closing arguments, out of context, as improper comments on her pre-investigation search for defense counsel, her improbable defense, her character, and the strength of the State's case.

A. The State's reference to Proctor's web search for counsel was not improper or prejudicial.

Proctor asserts it was prejudicial misconduct when the State solicited, without objection, that Proctor searched online for defense counsel shortly after P.P. was admitted to Logan, and then commented on it in its rebuttal closing. (Br. 53-59.) Importantly, Proctor's web search for counsel occurred well before her right to counsel attached. *See State v. Schneider*, 2008 MT 408, ¶ 21, 347 Mont. 215, 197 P.3d 1020. Moreover, the State, by soliciting and using that evidence, did not impermissibly offer a personal opinion on Proctor's guilt or undermine her presumption of innocence. *See Miller*, ¶¶ 24, 27.

On direct examination, Van Dyke, when asked what stood out to him during his review of Proctor's web history, without objection, offered two things: Proctor used Pinterest and searched for defense counsel. (Tr. 1528.) The State did not ask Van Dyke to elaborate on why that particular search was notable, nor did it ask Van Dyke if that evidence was indicative of Proctor's guilt. Indeed, when viewed in context of the other use of her phone—Pinterest, the day before—a reasonable inference is that Proctor's behavior did not match the circumstances. At that time, it was unclear if P.P. would live and Proctor used her phone for research unrelated to P.P.'s wellbeing. This is further supported by Van Dyke's testimony on redirect noting the absence of specific topics—P.P.'s various injuries—from Proctor's web history. (Tr. 1569.) Because this relevant testimony was admitted without

objection, the State cannot be faulted for commenting on this evidence in closing arguments. *See Miller*, ¶ 23.

Moreover, the State appropriately commented on the online search for counsel, along with other admissible evidence, to highlight that Proctor's actions at the time of P.P.'s hospitalization were inconsistent with her defense that no child abuse occurred, arguing in relevant part:

> And then she gets to the next hospital, and they start finding out more. And that hospital hasn't called CPS yet. And then they figure out this looks like abuse. And you know what Tim did when he was confronted with abuse? He vomited. He threw up, and he cried. And then he looked at her and said, did you do this. He went through a list who could have done this to my kid.
>
> And you know what the defendant did? She looked for a defense attorney. That's what she did. No one had said she did this, and she's looking for a defense attorney while her daughter is dying. She's not looking for a potential other diagnosis. She's not looking up is my kid going to make it. What's hypoxic ischemic? What are these doctors telling me? I have no clue. And all you've heard about is what a good researcher she is, how smart she is, how resourceful she is. And what does she use those resources for? She uses them for herself to get a defense attorney.
>
> And then she doesn't get a second opinion. She gets a defense attorney who contacts an expert and says get me a defense because that's what all of those experts do. They travel around the country.

(Tr. 2171-72.)

Considering these comments in their context, the State was not using evidence of Proctor's internet search as impermissible evidence of her guilt. Instead, the State was arguing that the totality of the evidence—including P.P.'s serious injuries,

Tim's different reaction, Tim asking Proctor if she had harmed P.P., Proctor not obtaining a second opinion on P.P.'s diagnosis, and Proctor not even researching P.P.'s injuries but instead searching for a lawyer—does not support Proctor's defense that no child abuse occurred. In doing so, the prosecutor did not tell the jury that she believed Proctor was guilty because she had searched for defense counsel.

Nor did the State provide a personal opinion of Proctor's guilt; rather, the State included Proctor's internet search as part of its analysis of the evidence. *See State v. Armstrong*, 189 Mont. 407, 616 P.2d 341 (1980) (prosecutor stating "[t]his man is guilty as sin" not misconduct because, in context, it was "based upon State's analysis of the evidence," not the prosecutor's opinion); *State v. Lacey*, 2012 MT 52, ¶¶ 19, 25-26, 364 Mont. 291, 272 P.3d 1288 (prosecutor's statement in closing argument that the jury should find Lacey guilty "because, by God, he is" was insufficient to invoke plain error review). The State also didn't argue that the search for defense counsel resulted in the presumption of Proctor's innocence no longer applying. *See generally State v. Lawrence*, 2016 MT 346, ¶ 16, 386 Mont. 86, 385 P.3d 968.

Proctor's reliance on several out-of-state cases doesn't support that the State committed misconduct. For instance, unlike the prosecutor in *State v. Epsey*, 336 P.3d 1178, 1180-82 (Wash. Ct. App. 2014), here, the State didn't twice remind the jury that Epsey, while fleeing police, "consulted with two attorneys" and "had

lots of time to figure out what story he was going to tell the police" before his recorded interview. Nor did the State here, like the prosecutor in *State v. Angel T.*, 973 A.2d 1207, 1210-15 (Conn. 2009), improperly reference the "defendant's silence in response to police questioning, on advice of counsel."

Finally, the State's mention of Proctor searching for defense counsel is distinguishable from *Commonwealth v. Lang*, 275 A.3d 1072, 1074 (Pa. Super. Ct. 2022). In *Lang*, the commonwealth, over Lang's objection, introduced evidence at his bench trial of Lang's internet searches "for top Pittsburgh criminal attorneys" the day after the release of an investigative report that named various priests accused of sexual misconduct. *Lang*, 275 A.3d at 1076. The judge presiding over the trial "stated the internet search evidence was 'dispositive' in determining [Lang's] guilt." *Id.* 1078. The appellate court concluded "the admission of evidence of Appellee's internet searches for criminal defense attorneys, before he was charged or implicated in any offenses, violated his constitutional right to due process and a fair trial." *Id.* 1084.

Unlike in *Lang,* Proctor didn't object to testimony of her internet search for defense counsel. Also, unlike in *Lang*, the record doesn't suggest that the jury found the State's reference to Proctor searching for defense counsel dispositive of her guilt. Proctor has not established that the challenged statements constitute prejudicial misconduct warranting plain error review.

B. The State's comments regarding Proctor's character, her defense, and the strength of the State's case were neither improper nor prejudicial.

Proctor argues that the State, in rebuttal, impermissibly commented on her character by highlighting its own. (Br. 55-56.) Relevant to Proctor's argument, the State argued in rebuttal:

> And yet, I did what they asked. I got that independent opinion before this case was ever charged because this was a big deal, big enough to have three prosecutors in this courtroom. And we got two independent opinions, one of them before this case was ever charged. That's my character. That's what the state is bringing to this.
>
> And you know what the defendant's character is? Because when people are under pressure. I think their character really comes out. I think that's when you see—you see the truth. And so, [P.P.] is intubated. She's on that gurney. And [Proctor] is by her bedside, and she snaps a photo and she says [P.P.] is doing great. I'm meeting the flight crew. And then they're outside and she's in the sunshine. And she sends a text to Tim saying she's getting a little sunshine. That is mess up. That's messed up. It's like, stay with me Tim, we're in this together.

(Tr. 2170.)

In her closing argument, Proctor reiterated the theme of her defense: no one could be guilty of causing P.P.'s injuries because her injuries were misdiagnosed as NAT. To Proctor, P.P.'s injuries were caused by her having multiple, co-occurring rare disorders that her medical providers failed to adequately test her for, before reaching their NAT diagnosis. In support of her theory, Proctor heavily implied that the criminal charges against her were a conspiracy created by the

State, in which they "made up," "stretch[ed]," and "twist[ed]" the facts of P.P.'s injuries and how they occurred. (Tr. 2126, 2146, 2150, 2158, 2169.)

In this context, it was not misconduct for the State to argue, based on the evidence, that it had not "made up" the allegations against Proctor, but, instead, had obtained two separate outside opinions concerning P.P.'s injuries, one of which occurred before the State even initiated a criminal action against Proctor. Nor was it misconduct for the State to respond to Proctor's good character evidence that was presented at trial and highlighted in her closing. In part, Proctor argued that P.P. could not have been abused because she was taking her child into public places with visible injuries. In response, it was not misconduct for the State to posit that the evidence presented supported that Proctor's otherwise good character traits might change based on life circumstances.

Finally, the State highlighting the weaknesses of Proctor's defense while commenting on the strengths of its own case was not prosecutorial misconduct. In its closing argument, the State, tying together the unobjected to evidence presented by the State or solicited by Proctor regarding P.P.'s injuries, argued that once this case left the hospital and entered the courtroom it was "not really about the medicine anymore." (Tr. 2122.) Further arguing that "[t]his is a circus what happened. Parading in doctors whose job is to come in and create doubt, who

represent fringe medical opinions and hope you get fooled. Don't get fooled. The case is never clearer than this." (*Id.* 2122-23.)

Then, in rebuttal, the State argued:

> There is no great conspiracy here. Defense wants you to believe everybody's a villain here. Everybody is not a villain here. This is not some great conspiracy to charge [Proctor] with child abuse.
>
> . . . .
>
> And then COVID. Of course its COVID. I guess any kid that has bruising—by the way, ecchymosis is bruising. It's just a fancy term for it. It's just bruising. So COVID, not the bleeding disorder, gave her bruises. I guess every child that's abused during the COVID times we're just not going to do it. That doesn't even make sense. And also COVID—September 2nd, September 29th, so—and then she's in the hospital all that time and never tests positive and never is symptomatic. That doesn't even—just because somebody stands up here and gives you some theories doesn't mean its true. It's just a sham. It's a sham.
>
> . . . .
>
> The injuries to [P.P.] are not rare in the setting of child abuse. They're not. They are textbook child abuse. It does not get more clear than this. It doesn't. That is it. This is how you prove these cases. And everyone has been attacked because if they can't get you to believe any of these crazy theories, they want to demonize everyone else, including me.

(*Id.* 2165-66, 2167-68, 2169-70.)

The State's characterization of its case and Proctor's defense was grounded in the evidence presented over the course of Proctor's trial and, therefore, didn't constitute prosecutorial misconduct. Proctor's expert, Dr. Scheller, testified that he is

paid to cast doubt about child abuse-related injuries. (Tr. 1980-81, 1985, 1990-91.) Dr. Sullivan admitted that he testified, in a case involving similar injuries to P.P., that the infant's injuries were the result of rickets, not child abuse, despite the parent confessing that he had inflicted the injuries. (*Id.* 1648-51.) Proctor's experts also accused hospital staff of causing P.P.'s neck injury, toe fracture, and pinky fracture.

In comparison, the State's experts testified that it was blatantly obvious and indefensible that P.P.'s injuries were a result of NAT. (Tr. 368, 491.) The State highlighting the strengths of its case while noting the weaknesses in Proctor's case wasn't prosecutorial misconduct. This Court should decline to review Proctor's allegation for plain error.

C. Even if Proctor could establish misconduct, it didn't constitute plain error.

Proctor's assertion that she was prejudiced by the State's comments because the State's case was circumstantial disregards that the evidence against her wasn't entirely circumstantial, nor would it matter if it was. (*See* Br. 61.) The jury was instructed that a defendant can be convicted based on circumstantial evidence alone. (Doc. 283.)

Nevertheless, the State presented overwhelming, direct evidence that P.P.'s injuries were inflicted. P.P., who wasn't yet crawling, walking, or rolling over, had recurring bruises and nose abrasions throughout her first four months. P.P. was incapable of self-inflicting these injuries.

The day after she turned four months old, her brain was dying, she had a subdural hemorrhage, bilateral retinal hemorrhages, bilateral femur fractures, a toe fracture, a pinky fracture, and multiple new and healing rib fractures. Other than NAT, no plausible medical diagnosis explained each of P.P.'s injuries.

The State also presented substantial circumstantial evidence that Proctor inflicted these injuries. Beginning in August, Proctor was P.P.'s primary caregiver as Tim was living and working out-of-town, returning to Helena only on his days off. Although faint bruising was observed on P.P., no new bruising occurred when P.P. was in the care of others. And the timeline of P.P.'s bruising observed by daycare employees coincides with when P.P. was predominantly in Proctor's care. Plus, Proctor told multiple people in response to questions about P.P.'s multiple bruises occurring at different times the same implausible explanation: P.P. hit herself with a toy.

The State also presented compelling testimony, none of which Proctor strongly challenged below or challenges as insufficient on appeal, that Proctor was alone with P.P. approximately 10 to 15 minutes before P.P. was last seen behaving normally. At the end of that time, Tim returned inside the home and found that P.P., who had been lying on the floor, crying, when he left the house, was now asleep and in her car seat. Moreover, the next morning, when it was clear P.P. was

in peril, Parents delayed care by not immediately taking P.P. to the ER. (*See* Tr. 755, 758, 1376.)

Finally, the State presented compelling evidence that Proctor's response to P.P.'s serious, life-threatening injuries was peculiar. While P.P. was in critical condition, Proctor wanted to make sure P.P.'s pediatrician knew that P.P. was rolling over and grabbing things. Proctor took a picture of P.P. intubated on a life-flight and sent it to Tim saying she was getting some sun. Although on her phone during this time, there was no evidence Proctor used it to get a second opinion or research her child's severe injuries.

In response to hearing about P.P.'s NAT diagnosis, Proctor obsessively asked about the timeline of the injuries, despite being told that wasn't what the medical providers were there to do. (Tr. 715-16, 762-64.) Proctor was also seen smiling after P.P.'s failed extubation, and she questioned the utility of Dr. Stidham's request for more imaging to ensure that they hadn't missed any fractures on P.P.'s body. There was more than sufficient evidence for the jury to conclude beyond a reasonable doubt that Proctor caused serious bodily injury to four-month old P.P.

So much so that the admission of Proctor's pre-investigation search for a defense attorney and the State noting that search for purposes of further establishing what her response was to hearing her child's diagnosis, in conjunction with other evidence, doesn't establish that there is a reasonable probability that the

jury would've ignored the other, voluminous and compelling evidence and not convicted Proctor of this offense. Likewise, Proctor hasn't established there is a reasonable probability that the jury wouldn't have convicted her if the State had not, based on the evidence, highlighted Proctor's weak defense, posited a different view of Proctor's character, and noted the strength of its case. Proctor hasn't established that any of the challenged statements amounted to prejudicial prosecutorial misconduct, let alone plain error.

IV. Proctor cannot establish her counsel was ineffective for not objecting to the prosecutor's statements.

The Sixth and Fourteenth Amendments to the United States Constitution and article II, section 24, of the Montana Constitution guarantee a defendant's right to the effective assistance of counsel. This Court applies the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668 (1984), to evaluate whether a defendant has received IAC. *Whitlow v. State*, 2008 MT 140, ¶ 10, 343 Mont. 90, 183 P.3d 861.

This Court should decline to review Proctor's IAC claim on direct appeal because the record does not answer "why" counsel did not object to testimony and argument concerning Proctor's internet search for defense counsel. *See Dellar*, ¶ 20. Moreover, there is a plausible justification for counsels' decision not to object. *See id*. Counsel may have wanted to avoid drawing further attention to the

State's statements by objecting. *See Cunningham v. Wong*, 704 F.3d 1143, 1159 (9th Cir. 2013).

Even if this Court reviews Proctor's IAC claim, Proctor has failed to meet her heavy burden of establishing that her attorneys' performance was deficient and that she was prejudiced as a result. *Strickland*, 466 U.S. at 689. As argued above, the challenged evidence of Proctor searching for defense counsel the day after P.P. had been admitted to Logan and the State then relying on that testimony in rebuttal closing didn't constitute prosecutorial misconduct. As such, Proctor cannot establish that her counsel was deficient for not objecting to the relevant portions of Van Dyke's testimony and the State's rebuttal closing argument.

However, even if Proctor proved deficient performance, Proctor cannot prove that counsels' decision to not object prejudiced her. The State presented substantial, compelling evidence that P.P.'s numerous, severe injuries were the result of child abuse that Proctor inflicted. Thus, even if Proctor's IAC claim is record-based, she cannot establish that she was prejudiced by counsels' allegedly deficient performance.

V. The cumulative error doctrine doesn't warrant reversal.

The cumulative doctrine requires reversal of a conviction where numerous errors, taken together, have prejudiced a defendant's right to a fair trial. *State v.*

Smith, 2020 MT 304, ¶ 16, 402 Mont. 206, 476 P.3d 1178. "The defendant must establish prejudice; a mere allegation of error without proof of prejudice is inadequate to satisfy the doctrine." *Id.* A defendant is "entitled to a fair trial, not to a trial free from errors." *Id.*

As argued above, Proctor hasn't established that the court abused its discretion when it admitted NAT expert testimony. Nor has Proctor established that the district court erred when it denied her suppression motion, because Proctor hasn't established the Warrant lacked specificity. And Proctor hasn't established that the prosecutor's statements amounted to misconduct sufficient for this Court to invoke plain error review or review her challenge as a non-record-based IAC claim. This Court should decline to reverse Proctor's conviction under the cumulative error doctrine.

CONCLUSION

This Court should affirm Proctor's conviction.

Respectfully submitted this 30th 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 12,451 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

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I, Cori Danielle Losing, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 07-30-2025:

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