DA 17-0685

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 214

STATE OF MONTANA,

Plaintiff and Appellee,

v.

KALEB EDWARD DANIELS,

Defendant and Appellant.

APPEAL FROM: District Court of the First Judicial District,
In and For the County of Lewis and Clark, Cause No. BDC-2017-20
Honorable Michael F. McMahon, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Caitlin Boland Aarab, Boland Aarab PLLP, Great Falls, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Tammy K Plubell, Assistant Attorney General, Helena, Montana

Leo John Gallagher, Lewis and Clark County Attorney, Jeff Sealey, Deputy County Attorney, Helena, Montana

Submitted on Briefs: May 8, 2019

Decided: September 10, 2019

Filed:

Clerk

Justice James Jeremiah Shea delivered the Opinion of the Court.

¶1 Defendant Kaleb Edward Daniels appeals the jury verdict and sentence of the First Judicial District, Lewis and Clark County, finding him guilty of attempted deliberate homicide, aggravated burglary, and tampering with or fabricating evidence.

¶2 We address the following issues on appeal:

> *Issue One: Whether this Court should invoke plain error review of the District Court's note on the verdict form regarding alternative lesser included offenses.*
>
> *Issue Two: Whether there was sufficient evidence to convict Daniels of evidence tampering.*
>
> *Issue three: Whether Daniels received ineffective assistance of counsel.*

We affirm.

PROCEDURAL AND FACTUAL BACKGROUND

¶3 On the afternoon of December 28, 2016, Marshall and Sonja Buus drove to their cabin near Wolf Creek. At trial, the Buuses testified to their perception of the events that followed. As they arrived, they noticed a strange vehicle, a Dodge Durango, parked next to their cabin. The Buuses observed the lights were on inside the cabin and realized they had come upon two men, later identified as Daniels and his accomplice, Jory Strizich, burglarizing their cabin. As the Buuses neared the back of their cabin, Sonja saw two individuals running away. Marshall then parked their truck, grabbed his coat, and ran toward the cabin yelling, "What the hell are you doing in my cabin?" Daniels ran from the cabin, got into the Durango, and started it. Marshall approached the Durango, leaned into the vehicle, and yelled at Daniels, "What the hell are you doing here?" Marshall saw Daniels reach into his pocket and pulled out what Marshall described as a "chrome-plated

automatic pistol." Daniels pointed the handgun in Marshall's face and yelled, "Get back" or "Get out." Marshall backed up and told Daniels to put the gun away. Sonja then retrieved Marshall's .45 caliber semiautomatic handgun from their vehicle and ran it to Marshall before retreating towards the cabin.

¶4 Marshall continued to yell at Daniels to "put the God damn gun away." Daniels, who by now was out of the vehicle, aimed the gun towards Marshall and pulled the trigger. Marshall testified that he heard a click, which he interpreted to mean there was no bullet in the chamber of Daniels' gun or that the bullet was defective. Marshall then heard Daniels chamber a round. As he continued to yell at Daniels to put the gun away, Marshall noticed Strizich approaching him from the other side of the Durango. Marshall yelled at Strizich to "[s]tay the hell away." Despite his warning to Strizich, Strizich kept coming towards Marshall. So, Marshall fired a round at the ground. Stizich remained undeterred. Marshall intended to shoot the ground again, but, as he pulled the trigger, Strizich "step[ped] into the bullet," yelled, "you shot me," and fell behind the vehicle. Marshall told Strizich to stay put and that the Buuses would get him some help, but Strizich began crawling away.

¶5 At this point, according to Marshall's testimony, Daniels fired in Marshall's direction. Marshall then fired a shot at some trees near Daniels, with the intention of scaring him. Daniels ran off to one side of the property, and Marshall circled the cabin and witnessed Daniels run down toward the road, stop and fire a round back over his shoulder in Marshall's direction. Daniels repeated this maneuver as he ran east down the

road. Marshall again offered to help Strizich, but Strizich continued crawling down the road without stopping. At 2:16 p.m., Sonja called 911 and reported the incident.

¶6 The Buuses entered their cabin following the shooting incident and noticed items from around the cabin had been collected and stacked by the door, the television set was unplugged, a hammer that did not belong to the Buuses was in the cabin, and drawers were opened and belongings were rifled.

¶7 After Daniels fled from the Buus property, he ran toward a neighboring property. There, Daniels approached Michael Ettinger, the Buuses' neighbor, who testified that Daniels asked for a ride into Wolf Creek to get gas. Ettinger agreed, and the two men drove to the gas station. Although Ettinger testified that he did not observe a gun on Daniels' person, Daniels was wearing a baggy jacket that could easily have concealed a gun. When the two men arrived at the gas station, Ettinger testified that Daniels set off on foot in the direction of Great Falls. Ettinger testified that he then noticed multiple law enforcement personnel gathering and grew suspicious of Daniels. At 3:02 p.m., Ettinger called 911.

¶8 Another Wolf Creek resident, Jerry Burgin, was at home with his wife when he saw Daniels open the door to the Burgins' pickup and then walk up to the Burgins' home and knock on the door. Burgin had learned from local news reports that there was a shooting in Wolf Creek, that a suspect was at large, and that the suspect was described as wearing a red jacket. Daniels was wearing a red jacket. At 5:19 p.m., Burgin called 911.

¶9 At 5:25 p.m., Lewis and Clark County sheriff deputies apprehended Daniels near the Burgins' residence, over ten miles from where the initial incident at the Buus property occurred. Daniels initially provided a false name but eventually told the deputies his identity. When Deputy Jeffery Stoltz, one of the officers who apprehended Daniels, conducted a pat down search, Daniels told him, "go ahead and search" because he "wasn't going to find anything." When Daniels was arrested, he was not in possession of a firearm.

¶10 Deputy Paul Weber went to the Buus property immediately following Sonja's 911 call. Deputy Weber testified that Marshall gave him the keys to the Durango that Daniels and Strizich had left on the Buus property. Marshall also gave Deputy Weber his .45 caliber handgun, from which Marshall estimated that he had fired two shots.

¶11 The day after the incident, on December 29, 2016, Sergeant Brett Friede brought a metal detector to the Buus property to search for shell casings. Sergeant Friede was instructed to look for .45 caliber shell casings, which would have been ejected from Marshall's gun. Sergeant Friede testified that he located one spent .45 caliber casing in the snow between the Durango and the cabin. Sergeant Friede then swept the area where Marshall indicated Daniels had been standing when he fired at Marshall. Sergeant Freide also testified that he searched down the road and located tracks where Strizich had fled and been found by a law enforcement dog team. The snowplow had driven through prior to the deputies having an opportunity to investigate the scene, and Sergeant Friede was unable to locate a weapon or other shell casings along the road or in the ditch next to the road.

¶12 Detective William Pandis testified that his investigative team recovered a total of three .45 caliber shell casings from Marshall's gun near the vehicles and on the east side of the Buus cabin. Detective Pandis testified that the only .45 caliber bullet recovered was the one in Strizich's leg. Detective Pandis and Sergeant Friede testified that they recovered five empty .25 caliber shell casings near the southwest corner of the cabin—two were located by sight and three by the metal detector. Detective Pandis also recovered two .25 caliber bullets from an embankment where Sergeant Friede located the shell casing with the metal detector. The State's expert witness on firearms, Lynette Lancon, testified that the five .25 caliber shell casings recovered by deputies were fired from the same gun. Marshall testified that he did not know of any friend, relative, or guest who had used a .25 caliber gun on the Buus property.

¶13 At trial, the State also introduced evidence from a game camera mounted on the Buus property at the time of the incident. The State presented stills from the game camera that captured Strizich and Daniels and footage of the Buuses standing near the Buus cabin. Daniels' DNA was found on a cigarette butt outside of the cabin, and Daniels' fingerprints were found on a tote inside the cabin.

¶14 After obtaining a search warrant, the sheriff deputies also searched the Durango. Detective Robert Kinyon located two pistols on the passenger's seat: a .45 caliber 1911 handgun in a case and a .40 caliber Smith & Wesson handgun with the serial number filed off laying directly on the seat. Deputies also found a set of bolt cutters and other items in the vehicle.

¶15 Sergeant Friede testified that it would be extremely difficult to locate a gun disposed of in the area between the Buus property and the Ettinger property or surrounding area, describing that even using a metal detector to sweep: "[Y]ou have to be within a foot and a half of [an object] to read it. . . . [Y]ou can't sweep through the trees, or tall grass or anything else. . . . [The metal detector] just doesn't work." Deputies did not return to sweep the area after the snow melted in the spring, and the handgun Daniels allegedly used in the shooting was never recovered.

¶16 On January 17, 2017, the State charged Daniels with attempted deliberate homicide, a felony, in violation of § 45-4-103(1), MCA, and § 45-5-102(1)(a), MCA; aggravated burglary, a felony in violation of § 45-6-204(2), MCA; and tampering with or fabricating physical evidence, a felony in violation of § 45-7-207(1)(a), MCA. The State later amended the information to include an alternative charge of aggravated burglary by accountability, a felony in violation of §§ 45-2-301, -302(3), 45-6-204(2), MCA. Daniels pled not guilty to the offenses.

¶17 On July 10-12, 2017, the District Court presided over a three-day jury trial. During voir dire, the State described the four charged offenses but explained that the jury would only be asked to return verdicts as to three counts.[1] During opening statements, the State told the jury:

[1] The State explained that:

> [There were] alternate ways to get to a possible conviction o[n] the aggravated burglary count . . . [T]he second count and the third count are alternative counts, and they both allege aggravated burglary. . . . [T]he first theory [was] that Mr. Daniels knowingly entered or remained unlawfully in an occupied structure

> [W]e're going to ask you to find [Daniels] guilty of Count 4, which is tampering with or fabricating physical evidence. And that is for ditching the .25 caliber pistol. Deputy Stoltz and Detective Pandis will tell you that Mr. Daniels no longer had the .25 caliber pistol when he was arrested. He ditched that sometime between leaving the Buuses' cabin, running down the road, and the two hours when he was arrested in Wolf Creek.

¶18 During closing arguments, the State told the jury:

> You know, the other piece of this, was there a gun involved? The State alleges that [Daniels] committed the offense of tampering or fabricating physical evidence by making that gun unavailable. He got rid of the gun. And so if you think there was a gun, and you think that he was the one [who] got rid of it, then that is tampering with or fabricating physical evidence.

The State later concluded, "And the gun disappeared. That is tampering." Daniels argued at trial that he did not use a gun during the incident, and therefore, he could not have "ditched" the gun after fleeing. Daniels requested and received lesser included and alternative offense instructions for the charges of burglary and burglary by accountability.

¶19 After the parties presented their cases-in chief, and following *in camera* discussions, the District Court concluded, "the State will rest. There will be no motions for a directed verdict by the defense under 46-16-403." The District Court discussed the

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> located on Little Wolf Creek Road with the purpose to commit the offense of theft. . . . [a]nd . . . in the course of committing the offense . . . [Daniels], or another participant in the offense, was armed with a weapon.

The State further explained that the second, alternative theory of liability on the charge of aggravated burglary alleged that:

> [E]ither before or during the commission of the offense of aggravated burglary by Jory Strizich of an occupied structure located on Little Wolf Creek Road, and with the purpose to commit or facilitate such commission, [Daniels] solicited, aided, abetted, agreed, or attempted to aid Jory Strizich in the planning or the commission of the offense of aggravated burglary.

jury instructions and verdict form with both parties, and neither party raised any objection to the verdict form, other than to renumber the offenses charged.

¶20 On July 12, 2017, the District Court instructed the jury, explaining each distinct offense and that the jury must decide each count separately. The District Court instructed that Daniels "may be found guilty or not guilty of any or all of the offenses charged, except for the alternative counts. Your finding as to each count must be stated in a separate verdict." The District Court also included a separate instruction clarifying the burglary charges and how the jury was to proceed.[2]

¶21 During closing arguments, the State described the verdict form and the analysis for the alternative or lesser included offenses. Daniels' counsel also described all the charges and the alternative or lesser included offenses. The District Court then provided the jury with the following verdict form:

[2] Jury Instruction 35 stated:

> [Daniels] is charged in Count II with the crime of AGGRAVATED BURGLARY and in Count III with the crime of AGGRAVATED BURGLARY BY ACCOUNTABILITY. These charges are made in the alternative and in effect allege that [Daniels] committed an unlawful act which constitutes either the crime of AGGRAVATED BURGLARY or the crime of AGGRAVATED BURGLARY BY ACCOUNTABILITY. If you find that [Daniels] committed an act or acts constituting one of the crimes so charged, you then must determine which of the offenses so charged was thereby committed.
>
> . . .
>
> If you find [Daniels] guilty of one of the alternative offenses, you cannot find him guilty of the other.

COUNT I:

To the charge of **ATTEMPTED DELIBERATE HOMICIDE**:

_____ Guilty _____ Not Guilty

COUNT II:

To the charge of **AGGRAVATED BURGLARY**:

_____ Guilty _____ Not Guilty

OR

To the lesser included offense of **BURGLARY**:

_____ Guilty _____ Not Guilty

OR

COUNT III:

To the alternative charge of **AGGRAVATED BURGLARY BY ACCOUNTABILITY**:

_____ Guilty _____ Not Guilty

OR

To the lesser included offense of **BURGLARY BY ACCOUNTABILITY**:

_____ Guilty _____ Not Guilty

[NOTE: Pursuant to the Court's instructions, the Defendant may not be found "not guilty" of both alternatives or lesser included offenses or he may be found "guilty" of one. He may not be found "guilty" of both alternatives and lesser included offenses.]

COUNT IV:

To the charge of **TAMPERING WITH OR FABRICATING PHYSICAL EVIDENCE**:

_____ Guilty _____ Not Guilty

(Emphasis in original.)

¶22 The jury found Daniels guilty of attempted deliberate homicide, aggravated burglary, and tampering with or fabricating physical evidence. On February 15, 2017, the State filed a notice that it would seek designation of Daniels as a Persistent Felony Offender (PFO), within the meaning of § 46-1-202(18), MCA.

¶23 On September 13, 2017, the District Court held a sentencing hearing and designated Daniels as a PFO. The District Court sentenced Daniels to confinement at the Montana State Prison for sixty years with no time suspended for the offense of attempted deliberate homicide, forty years with no time suspended for the offense of aggravated burglary, and twenty years with no time suspended for the offense of tampering with or fabricating physical evidence. The District Court imposed the sentences to run consecutively, pursuant to § 46-18-502(4), MCA.

STANDARDS OF REVIEW

¶24 This Court generally "will not consider issues raised for the first time on appeal when the appellant had the opportunity to make an objection at trial." *State v. Weaver*, 1998 MT 167, ¶ 24, 290 Mont. 58, 964 P.2d 713, *superseded by statute on other grounds*. Indeed, "[f]ailure to make a timely objection during trial constitutes a waiver of the objection. . . ." Section 46-20-104(2), MCA.

¶25 This Court may sparingly and on a case-by-case basis discretionarily review claimed errors that implicate a criminal defendant's fundamental constitutional rights, even if no contemporaneous objection is made and even if no exception under § 46-20-701(2), MCA, applies, where failing to review the claimed error at issue may: (1) result in a manifest miscarriage of justice; (2) leave unsettled the question of the fundamental fairness of the trial or proceedings; or (3) compromise the integrity of the judicial process. *Weaver*, ¶ 25 (citing *State v. Finley*, 276 Mont. 126, 137, 915 P.2d 208, 215 (1996), *overruled in part on other grounds by State v. Gallagher*, 2001 MT 39, ¶ 21, 304 Mont. 215, 19 P.3d 817).

¶26 We review jury instructions in criminal cases to determine whether the instructions, as a whole, fully and fairly instruct the jury on the law applicable to the case. *Weaver*, ¶ 28 (citing *State v. Patton*, 280 Mont. 278, 286, 930 P.2d 635, 639 (1996)); *State v. Schmidt*, 2009 MT 450, ¶ 26, 354 Mont. 280, 224 P.3d 618. A district court has broad discretion in formulating jury instructions, and we will not reverse on the basis of its instructions absent an abuse of discretion that prejudicially affects a defendant's substantial rights. *State v. Kaarma*, 2017 MT 24, ¶ 7, 386 Mont. 243, 390 P.3d 609.

¶27 We review de novo whether sufficient evidence supports a conviction. *State v. Polak*, 2018 MT 174, ¶ 14, 392 Mont. 90, 422 P.3d 112. There is sufficient evidence to support a conviction if "after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Polak*, ¶ 34 (citing *State v. Rosling*, 2008 MT 62, ¶ 35, 342 Mont. 1, 180 P.3d 1102; *State v. Roedel*, 2007 MT 291, ¶ 35,

339 Mont. 489, 171 P.3d 694); *State v. Michelotti*, 2018 MT 158, ¶ 9, 392 Mont. 33, 420 P.3d 1020.

¶28 Ineffective assistance of counsel claims are mixed questions of law and fact, which this Court reviews de novo. *State v. Kougl*, 2004 MT 243, ¶ 12, 323 Mont. 6, 97 P.3d 1095.

DISCUSSION

¶29 *Issue One: Whether this Court should invoke plain error review of the District Court's note on the verdict form regarding alternative lesser included offenses.*

¶30 This Court will invoke plain error review sparingly, and only if the error claimed implicates a party's fundamental constitutional rights and if "failing to review the claimed error at issue may: (1) result in a manifest miscarriage of justice; (2) leave unsettled the question of the fundamental fairness of the trial or proceedings; or (3) compromise the integrity of the judicial process." *Weaver*, ¶ 25; *State v. Aker*, 2013 MT 253, ¶ 21, 371 Mont. 491, 310 P.3d 506 (quoting *State v. McDonald*, 2013 MT 97, ¶ 8, 369 Mont. 483, 299 P.3d 799); *Finley*, 276 Mont. at 137, 915 P.2d at 215.

¶31 Simply requesting that this Court review an unpreserved issue under the plain error doctrine is not enough. *State v. Norman*, 2010 MT 253, ¶ 17, 358 Mont. 252, 244 P.3d 737. The party requesting plain error review bears the burden of "firmly convinc[ing]" this Court that the claimed error implicates a fundamental right and that such review is necessary. *Norman*, ¶ 17.

¶32 The right to trial by jury and the right to due process of law are fundamental and both are explicitly guaranteed by the Montana and the United States Constitutions. Mont. Const. art. II, §§ 17, 24, 26; U.S. Const. amends. VI, XIV; *see also Weaver*, ¶ 26. The right to due process necessarily encompasses the right to a fair trial, the right to have the state prove every element of a charged offense beyond a reasonable doubt, and the presumption of innocence. *State v. Newman*, 2005 MT 348, ¶ 19, 330 Mont. 160, 127 P.3d 374 (Nelson, J., specially concurring) (citing *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 1692 (1976)).

¶33 This Court concluded that issues such as a jury's uncertainty or confusion about whether a unanimous verdict is required or a failure to instruct the jury on the state's burden of proof in a criminal trial call into question the fundamental fairness of the trial process. *State v. Dasen*, 2007 MT 87, ¶¶ 39, 41, 43, 337 Mont. 74, 155 P.3d 1282 (citing *Weaver*, ¶ 27 and ultimately declining to undertake plain error review); *Akers*, ¶¶ 16-17, 20-21 (invoking plain error review and reversing a defendant's conviction). Conversely, this Court declined to invoke plain error review and concluded that no questions of fundamental fairness existed where a defendant was convicted of tampering with evidence, but it was unclear whether some members of the jury convicted the defendant of tampering with a gun or tampering with a car. *State v. Wilson*, 2007 MT 327, ¶¶ 35-40, 340 Mont. 191, 172 P.3d 1264.

¶34 The district court's function during trial is "to instruct the jury on every issue or theory finding support in the evidence, and . . . [to] accurately and correctly state the law applicable in a case." *State v. King*, 2016 MT 323, ¶ 10, 385 Mont. 483, 385 P.3d 561

(internal quotations omitted). We have previously declined to hold a district court in error or assume prejudice to the defendant in instances where a verdict form contained an error or misstatement of law, but where a district court otherwise properly instructed the jury, and the defendant did not object to the verdict form. *See Schmidt*, ¶¶ 35-36, 38, 40 (concluding that prejudice could not be presumed from the verdict form).

¶35 The District Court orally and via written instructions instructed the jury that each count charged a distinct offense, and that the jury must decide each count separately. However, the District Court noted on the verdict form that Daniels "may not be found 'not guilty' of both alternatives or lesser included offenses." Neither party objected to the oral or written instructions.

¶36 Daniels argues this Court should invoke plain error review and conclude that the District Court violated Daniels' right to a fair trial by jury and due process of law when it instructed the jury on the verdict form that Daniels "may not be found 'not guilty' of both alternatives or lesser included offenses." Daniels argues the District Court's note on the verdict form amounted to a directed verdict in a criminal case, in violation of Daniels' constitutional rights to trial by jury and due process of law. Daniels argues that the verdict form usurped the jury's role, took away Daniels' presumption of innocence, and relieved the State of its burden to prove guilt beyond a reasonable doubt. Accordingly, Daniels argues the District Court's error clearly involves a violation of his fundamental rights and that failure to review the error on the verdict form would call into question the fundamental fairness of his trial.

¶37 The State responds that this Court should not exercise plain error review and should not consider Daniels' claim that a typographical error in the verdict form denied him his right to a jury trial and to due process of law. The State argues that considering the instructions as a whole, the District Court carefully and thoroughly instructed the jury, and there is no way that the typographical error on the verdict form impacted the jury's verdict in any manner. Moreover, counsel for both parties agreed to and abided by these instructions during closing arguments.

¶38 Dispositive to our analysis, the State argues that although Daniels' counsel advocated for the jury to find Daniels guilty of the lesser offense of burglary by accountability, the jury found Daniels guilty of aggravated burglary. Thus, the State contends, there was no need for the jury to get to the portion of the verdict form that contained the alleged typographical error. We agree.

¶39 Although Daniels' claim of jury instruction error implicates his fundamental right under the United States and Montana Constitutions, *see* Mont. Const. art. II, §§ 17, 24, 26; U.S. Const. amends. VI, XIV; *Norman*, ¶ 18, Daniels has not met the second requirement to necessitate plain error review: he has not demonstrated the typographical error on the verdict form calls into question the fundamental fairness of the trial. *See Norman*, ¶ 17; *Wilson*, ¶¶ 36-40. Assuming, for the sake of argument, that the note on the verdict form may raise questions of fundamental trial fairness, the error pertained only to the alternative or lesser included offenses, which the jury never considered because it convicted Daniels on the charge of aggravated burglary. Thus, the jury never reached the alternative counts—which were prefaced by "ORs" on the verdict form.

Daniels' argument that the note advising the jury that he "may not be found 'not guilty' of both alternatives or lesser included offenses" amounted to a directed verdict in a criminal case is belied by the fact that the jury only convicted Daniels on the primary aggravated burglary charge. Because the jury found Daniels guilty of aggravated burglary, it did not reach the alternative or lesser included offenses and made no finding of guilt on those charges.

¶40 Daniels has not convinced this Court that failing to review the error would leave unsettled the question of the fundamental fairness of the trial or proceedings. *See Norman*, ¶ 17; *Wilson*, ¶¶ 36-40. We decline to exercise plain error review.

¶41 *Issue Two: Whether there was sufficient evidence to convict Daniels of evidence tampering.*

¶42 We review a jury's verdict to determine only whether sufficient evidence supports it, "not whether the evidence supports a different conclusion or verdict." *State v. Jackson*, 2009 MT 427, ¶ 23, 354 Mont. 63, 221 P.3d 1213. It is the exclusive function of the jury "to determine the credibility of witnesses, to resolve evidentiary conflicts, and to assign such weight to the evidence as it may determine." *State v. Armstrong*, 189 Mont. 407, 434, 616 P.2d 341, 356 (1980) (citations omitted); *State v. Bekemans*, 2013 MT 11, ¶ 20, 368 Mont. 235, 293 P.3d 843; *see Rosling*, ¶ 44; *see also* § 46-16-403, MCA (evidence insufficient to go to jury).

¶43 Direct evidence is not necessary to establish the elements of a criminal offense. *State v. Vukasin*, 2003 MT 230, ¶ 20, 317 Mont. 204, 75 P.3d 1284. "A criminal conviction may be based entirely on circumstantial evidence." *State v. Field*,

2005 MT 181, ¶ 18, 328 Mont. 26, 116 P.3d 813 (internal citations omitted); *State v. Maetche*, 2008 MT 184, ¶¶ 11, 15, 24-25, 343 Mont. 464, 185 P.3d 980 (despite a defendant's argument that the State's only evidence was circumstantial and insufficient to establish the defendant's affirmative conduct and that she caused the damage to the apartment, we affirmed a district court's conclusion there was sufficient evidence to prove the defendant was guilty of criminal mischief by accountability because the damage was purposeful, the defendant was present at the scene while the damage was occurring over a two-week period and knew about it, and witnesses observed the defendant indirectly contributing to the destruction); *Wilson*, ¶ 34 (affirming a district court's denial of a defendant's motion for a directed verdict on the charge of tampering with a gun and concluding there was sufficient testimony and circumstantial evidence to support the tampering charge); *State v. Landis*, 2002 MT 45, ¶ 32, 308 Mont. 354, 43 P.3d 298.

¶44 Circumstantial evidence is "that which tends to establish a fact by proving another and which, though true, does not of itself conclusively establish that fact but affords an inference or presumption of its existence." Section 26-1-102(1), MCA; *Vukasin*, ¶ 20. "Circumstantial evidence need only be of sufficient quality and quantity to legally justify a jury in finding guilt beyond a reasonable doubt, taking into consideration all of the facts and circumstances surrounding the charged offense collectively." *Landis*, ¶ 32; *State v. Hart*, 191 Mont. 375, 391, 625 P.2d 21, 30 (1981) (affirming a trial court's conviction of theft by accountability based upon substantial circumstantial evidence).

¶45 A person commits the offense of tampering with or fabricating physical evidence "if, believing that an official proceeding or investigation is pending or about to be instituted, the person . . . alters, destroys, conceals, or removes any record, document, or thing with purpose to impair its verity or ability in the proceeding or investigation . . . ." Section 45-7-207(1)(a), MCA; *Rosling*, ¶¶ 39, 41 (affirming a conviction for tampering with evidence where a witness saw the defendant arrive near the victim's house, the witness did not see other cars coming and going, the defendant's shoeprints were found in the victim's yard, the victim's blood was on the defendant's clothing, and the defendant laundered his clothes later that day). The State must prove beyond a reasonable doubt that: (1) the defendant had knowledge of or believed an official proceeding or investigation was pending or imminent; (2) the defendant took action to conceal physical evidence pertinent to the proceeding or investigation; and (3) the defendant had the intent to purposely impair the availability of physical evidence. *Polak*, ¶ 36 (citing *State v. Nelson*, 2014 MT 135, ¶¶ 17-18, 375 Mont. 164, 334 P.3d 345). A defendant completes the *actus reus*, or forbidden act, when he conceals or attempts to conceal physical evidence pertinent to the proceeding or investigation. *See Polak*, ¶¶ 37-38; *see also State v. Stout*, 2010 MT 137, ¶¶ 89, 118 n.14, 356 Mont. 468, 237 P.3d 37 (describing the *actus reus* in the deliberate homicide statute); *State v. Weatherell*, 2010 MT 37, ¶ 13, 355 Mont. 230, 225 P.3d 1256 (describing the elements of the offense of partner or family member assault); *State v. Martine*, 371 P.3d 510, 514-15, 521-22 (Or. Ct. App. 2016) (the court reversed a defendant's conviction for tampering with physical evidence after concluding the State failed to prove

the requisite *actus reus* because no reasonable jury could find that the object the defendant destroyed was actually physical evidence related to the defendant's case and hence that the defendant had destroyed or suppressed the evidence impairing its verity or availability in a pending proceeding).

¶46 Although failure to locate the physical evidence may result in the reversal of a tampering conviction based upon insufficient evidence, *see Polak*, ¶ 37, a person may be convicted of tampering with or fabricating evidence based on circumstantial evidence that not only places a defendant at the crime scene, but connects him to the crime. *Rosling*, ¶ 43.

¶47 In *State v. Polak*, we held that the state failed to introduce sufficient evidence to support a conviction of evidence tampering and reversed a jury verdict convicting the defendant. *Polak*, ¶¶ 38-39. The defendant challenged the sufficiency of evidence in a pretrial motion and on appeal when the state failed to produce the gun used in the homicide. *Polak*, ¶ 37. During trial, the defendant took the stand and neither defense counsel nor the state inquired as to how or whether the defendant disposed of the gun, or even asked for the location of the gun. *Polak*, ¶ 37. We concluded that "bare suspicion from which inferences can be drawn is insufficient for a finding of beyond a reasonable doubt." *Polak*, ¶ 38. We held that the state failed to prove the requisite mental state and an overt act of concealment necessary for a conviction. *Polak*, ¶¶ 37-39.

¶48 In this case, the jury found Daniels guilty of the charge of tampering with or fabricating evidence. Daniels argues that like in *Polak*, there was insufficient evidence to support his conviction for tampering with evidence. Daniels argues the State failed to

produce evidence of an overt act by Daniels aimed at hindering prosecution. Instead, the State simply speculated that Daniels disposed of a firearm to purposely impair prosecution by presenting evidence that Daniels was alleged to have a firearm during the burglary. Daniels notes that he did not have a gun on his person when he was arrested, and no gun was recovered. Daniels argues that "speculation" that he disposed of a firearm to purposely impair prosecution is insufficient to sustain a conviction for tampering with evidence. Accordingly, Daniels argues his conviction for tampering with evidence must be reversed, and a judgment of acquittal must be entered on that count.

¶49 The State responds that it presented overwhelming circumstantial evidence that somewhere between the Buus property, where the jury determined Daniels fired shots at Marshall using a .25 caliber handgun, and the secluded area in Wolf Creek where officers apprehended Daniels, Daniels disposed of the handgun with the purpose of hindering an investigation that he had to know was imminent. Further, the State argues that the area Daniels covered between the two locations—approximately ten miles—combined with the winter weather conditions, made it extremely difficult, if not impossible, for law enforcement to find the discarded handgun. We agree.

¶50 The present case is distinguishable from *Polak*. In *Polak*, we held that the state presented insufficient evidence that the defendant disposed of the handgun, offering bare suspicion as to what occurred between the commission of the crime and when the defendant was apprehended. *Polak*, ¶ 38. The sum total of the state's evidence in *Polak* was that the defendant had a firearm during the commission of the crime, a shell casing was recovered at the scene, and the defendant did not have the firearm when he was

arrested days later. *Polak*, ¶¶ 7, 38. In this case, witnesses testified that Daniels had a handgun, that he fired the gun at Marshall, that he fled the scene, and that he no longer had the gun when he was apprehended three hours later. Shell casings were found at the scene to corroborate the victims' accounts. All of the casings found matched a .25 caliber gun that did not belong to the Buuses. Marshall testified that, to his knowledge, none of his family or friends had ever fired a .25 caliber gun on his property. The State also presented game camera footage of Daniels on the Buus property, and Daniels' counsel acknowledged he was on the property with the intent to burglarize their cabin. Daniels also provided law enforcement with a false name when he was apprehended and told deputies to, "go ahead and search" because they "w[eren't] going to find anything."

¶51 While it is true that the "mere failure to locate evidence, without more, is insufficient for a conviction of evidence tampering," *Polak*, ¶ 37, the State presented evidence that Daniels traveled over ten miles between the Buuses' cabin and the Burgins' home, where Daniels was arrested, within the span of just a few hours. The area was covered with snow, heavily wooded, with thick underbrush and a creek nearby. As the State correctly points out, there were innumerable opportunities for Daniels to dispose of the gun. The State presented ample circumstantial evidence for a reasonable jury to conclude that Daniels acted to conceal physical evidence—the handgun—pertinent to the proceeding or investigation with the purpose of hindering an imminent investigation. *See* § 45-7-207(1)(a), MCA; *Polak*, ¶ 36; *Nelson*, ¶¶ 17-18; *Vukasin*, ¶ 20.

¶52 As to whether there was sufficient evidence for the jury to find that Daniels had knowledge of or believed an official proceeding or investigation was pending or imminent; Daniels disposed of the gun having just fled the scene of the crime, and literally while in the process of trying to evade capture by the police. An investigation does not get any more pending or imminent than that.

¶53 The dissent contends that this Opinion "graft[s] on a temporal requirement to the *Polak* decision—that merely not locating evidence is now sufficient to convict a defendant of tampering with evidence if the defendant is apprehended within a shorter time span—and also condone[s] a practice whereby law enforcement is *not even required to make a search* for the missing evidence." Dissent, ¶ 3 (emphasis in original). It does no such thing. This Opinion applies the exact same standard of review that we applied in *Polak*. We reviewed the evidence de novo in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Polak*, ¶ 34. By its very nature, such a review is going to be case-specific, because the evidence is case-specific. As discussed above, Opinion, ¶ 50, the evidence in this case is distinguishable from the evidence—or more to the point, the lack of evidence—that was presented in *Polak*. Thus, applying the same standard of review, we reach a different outcome.

¶54 The facts and circumstances of this case are of such a quality and quantity as to legally justify a jury in determining guilt beyond a reasonable doubt. *See Polak*, ¶ 34; *Landis*, ¶ 32. We conclude there was sufficient evidence for a reasonable jury to find the

elements of evidence tampering, § 45-7-207(1)(a), MCA, beyond a reasonable doubt. *See Roedel*, ¶ 35; *Rosling*, ¶¶ 35, 43. We affirm the jury's guilty verdict on this charge.

¶55 *Issue three: Whether Daniels received ineffective assistance of counsel.*

¶56 The Sixth and Fourteenth Amendments of the United States Constitution and Article II, Section 24 of the Montana Constitution guarantee the right of a criminal defendant to effective assistance of counsel. This Court analyzes ineffective assistance of counsel (IAC) claims using the two-pronged test articulated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2064 (1984). *Whitlow v. State*, 2008 MT 140, ¶ 10, 343 Mont. 90, 183 P.3d 861.

¶57 To prevail on an IAC claim, a defendant must show (1) that counsel's performance was deficient—making errors so serious that counsel was not functioning as "counsel" guaranteed by the Sixth Amendment—and (2) that the deficient performance prejudiced the defendant, in that the errors "were so serious as to deprive the defendant of a fair trial . . . ." *Whitlow*, ¶ 10 (quoting *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064). When scrutinizing whether counsel was deficient, courts should not analyze counsel's conduct with hindsight; instead, courts should presume that counsel's conduct falls within a range of acceptable professional assistance, and a defendant must overcome that presumption. *Whitlow*, ¶¶ 15-16. Further, decisions concerning tactics and strategy based on reasonable professional judgment and thorough investigation should be left to counsel's discretion. *State v. Schowengerdt*, 2018 MT 7, ¶ 31, 390 Mont. 123, 409 P.3d 38 (citing *Whitlow*, ¶¶ 18-19).

¶58 The two prongs of the *Strickland* test need not be addressed in the same order; if a defendant makes an insufficient showing on one, his claim necessarily fails. *State v. Gallagher*, 2005 MT 336, ¶ 25, 330 Mont. 65, 125 P.3d 1141 (internal citations omitted). "If it is easier to dispose of an [IAC] claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Dawson v. State*, 2000 MT 219, ¶ 21, 301 Mont. 135, 10 P.3d 49 (citing *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069).

¶59 Daniels argues both pongs of the *Strickland* test are satisfied and urges this Court to conclude he did not receive effective assistance of counsel when his counsel failed to object to the verdict form and failed to move for dismissal of the tampering with evidence charge based on insufficient evidence. Daniels argues that these deficiencies cannot be considered tactical or strategic decisions and that he suffered prejudice as a result of his counsel's deficient performance. Accordingly, Daniels urges this Court to reverse his case and remand for a new trial.

¶60 The State responds that Daniels has failed to prove his IAC claims because he cannot prove prejudice for either claim. Even though defense counsel did not move to dismiss the tampering charge at the conclusion of the State's case, Daniels was still able to raise that claim on direct appeal. Moreover, Daniels cannot prove that defense counsel's failure to catch the typographical error in the verdict form resulted in a reasonable probability of a different outcome. Further, since the jury found Daniels guilty of the more serious offense, aggravated burglary, the State argues that the jury did not need to proceed to the portion of the verdict form that contained the typographical

error. Additionally, there was overwhelming evidence to support defense counsel's strategy. We agree.

¶61 Daniels' IAC claim can be resolved on the record before us. *See Norman*, ¶ 20. First, Daniels cannot demonstrate he was prejudiced when his counsel failed to move to dismiss the tampering with evidence charge at the close of the State's case. *See Whitlow*, ¶ 10. As we previously concluded, there was sufficient evidence for a reasonable jury to convict Daniels of tampering with or fabricating evidence. Second, Daniels cannot show that his counsel's failure to object to the verdict form caused him prejudice. *See Gallagher*, ¶ 25; *Dawson*, ¶ 21. While it is true that what a jury is told versus what it should have been told is significant, *State v. Rose*, 1998 MT 342, ¶ 19, 292 Mont. 350, 972 P.2d 321, as we previously discussed, the jury instructions, when viewed as a whole, properly instructed the jury on the applicable law, *see Weaver*, ¶ 28; *Schmidt*, ¶¶ 35, 38, 40. More to the point, the typographical error on the verdict form never came into play because the alternative and lesser included offenses were never considered. Thus, Daniels was not prejudiced by the error. Accordingly, Daniels cannot show the alleged errors were so significant that he was deprived of a fair trial or that but-for counsel's alleged errors, the result of the proceeding would have been different. *See Gallagher*, ¶ 25; *Rose*, ¶ 19. We conclude Daniels cannot show he was denied effective assistance of counsel. *See Kougl*, ¶ 12.

CONCLUSION

¶62 Daniels has not met his burden to convince this Court it is necessary to review the note on the jury verdict form under the plain error doctrine. Further, after assessing the

sufficiency of the evidence, we conclude the jury reasonably found Daniels guilty of tampering with or fabricating evidence, and we will not disturb the jury's verdict. Finally, Daniels was not denied effective assistance of counsel when his counsel failed to object to the verdict form and failed to move to dismiss the evidence tampering charge following the State's presentation of its case. We affirm.

/S/ JAMES JEREMIAH SHEA

We Concur:

/S/ MIKE McGRATH
/S/ BETH BAKER
/S/ JIM RICE

Justice Ingrid Gustafson, concurring in part and dissenting in part.

¶63 I concur with the Majority's holding on Issue One. I dissent, however, from the Majority's opinion regarding Issue Two, because the State did not prove that Daniels committed an overt act to conceal the .25 caliber pistol. At trial, the State proved that Daniels had a gun when he shot at Marshall Buus and then did not have a gun on him when he was arrested. The State argued, and the Majority agreed, that the distance Daniels covered between the shooting at the Buuses' cabin and his apprehension, combined with the weather and terrain made it "extremely difficult, if not impossible, for law enforcement to find the discarded handgun." Opinion, ¶ 48. It is disingenuous for the State to claim it was "impossible" for law enforcement to find the gun, and therefore Daniels must have engaged in an overt act to conceal its whereabouts, when law

enforcement simply did not search for the gun beyond the small area around the Buuses' cabin.

¶64 At trial, both Detective Pandis and Sergeant Friede testified to using metal detectors to search for bullet casings near the Buuses' cabin and down a small stretch of Little Wolf Creek Road—in the direction where Daniels and Strizich escaped. Between the two, they were able to discover a few bullet casings where the shooting took place and some keys and a flashlight in an area where Daniels apparently fell while fleeing. Detective Pandis testified that he returned to the Buuses' cabin in June, after the snow melted, to search for bullets—and was able to find two—but did not testify to doing any search for the missing gun. Sergeant Friede testified to searching with his metal detector Strizich's track to the cabin where Strizich was found, but did not search Daniels's track or return after the snow melted to search for the gun. There was no testimony from any officer that the search for the gun went any farther than the area of the road where Daniels's and Strizich's tracks diverged.

¶65 In *Polak*, we found that the "mere failure to locate evidence, without more, is insufficient for a conviction of evidence tampering." *Polak*, ¶ 37. We held that "[b]are suspicion from which inferences can be drawn is insufficient for a finding of beyond a reasonable doubt" after Polak was convicted of tampering with evidence because he had the firearm when he used it to kill Scott Hofferber, and then did not have the firearm when he was arrested two days later. *Polak*, ¶ 38. Here, Daniels was convicted of tampering with evidence because he had the gun when he shot at Marshall Buus, but did not have a gun on him when he was arrested three hours later. Though the Majority

attempts to distinguish this case from *Polak* by highlighting the distance Daniels traveled and his statement that police would not find anything on him if they searched him, the only actual distinguishing factor between this case and *Polak* is the time difference between three hours and two days. The Majority has now both grafted on a temporal requirement to the *Polak* decision—that merely not locating evidence is now sufficient to convict a defendant of tampering with evidence if the defendant is apprehended within a shorter time span—and also condoned a practice whereby law enforcement is *not even required to make a search* for the missing evidence. Just as in *Polak*, here the State did not produce evidence that Daniels committed an overt act to conceal the gun used in this case. *Polak*, ¶ 38. I would therefore hold that there was insufficient evidence for a reasonable jury to find the elements of evidence tampering beyond a reasonable doubt, and reverse Daniels's conviction for tampering with evidence. *Polak*, ¶ 39.

¶66 As I would determine that the State lacked sufficient evidence to prove that Daniels tampered with evidence in this case, I believe that counsel for Daniels should have raised the issue below. However, given the Majority's holding on Issue Two, counsel's failure to raise the issue would not have changed the outcome such that any error in doing so was harmless. I therefore concur with the Majority on Issue Three.

/S/ INGRID GUSTAFSON

Justices Laurie McKinnon and Dirk M. Sandefur join in the dissenting Opinion of Justice Gustafson.

/S/ LAURIE McKINNON
/S/ DIRK M. SANDEFUR