DA 21-0013

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 253N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

KELLY BEVERLY BALL,

Defendant and Appellant.

APPEAL FROM: District Court of the Eighth Judicial District,
In and For the County of Cascade, Cause No. BDC-19-631
Honorable Elizabeth A. Best, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, James Reavis, Assistant Appellate Defender, Helena, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Bree Gee, Assistant Attorney General, Helena, Montana

Josh Racki, Cascade County Attorney, Ashley A. Archer, Deputy County Attorney, Great Falls, Montana

Submitted on Briefs: December 7, 2022

Decided: December 27, 2022

Filed:

Clerk

Justice Laurie McKinnon delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Kelly Beverly Ball (Ball) appeals his conviction and sentence for felony intimidation, § 45-5-203, MCA, from the Eighth Judicial District Court, Cascade County.

¶3 The following facts were elicited through witness testimony at trial. On September 3, 2019, Ball drove his truck and trailer to Black Eagle Storage to meet the owner of one of the storage units. Black Eagle Storage neighbors a warehouse owned by CC Pet LLC (CC Pet). Both businesses are accessed through the same turnoff from the highway. Ball parked his truck and trailer outside CC Pet because he could not get through the locked gate to Black Eagle Storage. Warren Ellis (Ellis), the victim and general manager of CC Pet, watched Ball park but did not stop him immediately from parking next to the warehouse.

¶4 After Ball parked, he exited his truck with his two German Shepherd dogs, grabbed a bicycle, and rode up the hill to Black Eagle Storage. While Ball was at the storage unit meeting the storage unit holder, he saw Ellis and Michael Martinez (Martinez), another CC Pet employee, observing where his truck was parked and writing down his license plate number. Ball rode his bicycle back down the hill to confront Ellis and Martinez. Once

Ball returned to the parking spot, Ball and Ellis recalled different versions of the ensuing confrontation.

¶5 According to Ball, Ellis started cussing at him for parking outside CC Pet and that Ellis called him a "bitch boy." Ball stated that he tried to leave the scene as fast as he could, but Ellis continued to reprimand him and threatened to shoot Ball's dogs if he did not put them in the truck. Ball testified that Ellis's statements made him upset and he "had a little bit of verbal" back at Ellis. Ball put his dogs in the truck and drove away. He alleged that he called the Sheriff because he was "concerned enough" about his exchange with Ellis. Later, while Ball was sitting in his truck at his home, Officer Bob Rosipal (Officer Rosipal) arrested him. Officer Joshua Harris (Officer Harris) also drove to Ball's home to speak with Ball after Ellis explained to Officer Harris what happened. Officer Harris questioned Ball if he had threatened Ellis. Ball denied the accusation.

¶6 Ellis said that he did not first confront Ball about his parking location because he thought Ball could be a friend of CC Pet's owner. When Ball returned to his truck, Ellis told Ball that he "was in a private business parking lot and he was blocking [CC Pet's] loading dock and that he would need to immediately move his vehicle." Ellis explained that Ball responded to the request using profanity and became verbally abusive. However, Ellis conceded he was also upset and called Ball four letter words. The yelling between Ellis and Ball allegedly agitated Ball's dogs, who started circling and getting closer to the loading dock. Ball told Ellis that he could make his dogs attack him, but Ball refrained from instructing his dogs to do so. According to Ellis, Ball told him he "was going to go

into the cab" and "retrieve a firearm and shoot [him]."[1] Ellis said he believed "[Ball] was going to shoot [him]." When Ball drove off with his dogs, Ellis said he called 911. Officer Harris responded and spoke to Ellis at the scene before he drove across town to question Ball.

¶7 On October 19, 2020, the District Court held a pretrial status conference. During the hearing, the District Court instructed the attorneys, "No speaking objections—both of you have tried cases with me and we're all on the same page. No speaking objections."

¶8 At trial, the District Court delivered preliminary jury instructions, including the following:

> From time to time, counsel may make objections and motions and I will rule on them. Most of the time, I will make these rulings in your presence. You should not conclude from any of my rulings that I have an opinion on the merits of the case or that I favor one side or the other. If I sustain an objection to a question and do not permit a witness to answer, you should not guess what the answer might have been or draw any inference from the question itself.

After the parties gave opening statements, they settled final jury instructions. The State said it did not anticipate any M. R. Evid. 404(b) evidence so the District Court withdrew its own instruction discussing "Evidence of Other Acts." The State also informed the District Court and defense counsel that it would not admit intoxication evidence so it moved to withdraw the proposed jury instruction regarding intoxication.

¶9 Officer Harris testified that when he arrived at CC Pet, he spoke with Ellis and Martinez. Ellis "seemed kind of frazzled of sorts . . . visibly upset . . . not in an angry

[1] The record shows that Ball never had any weapons, such as a gun, in his truck; Ellis admitted that he never saw Ball with a firearm.

fashion, but he seemed bothered by something, a little bit on edge, very upset." Officer Harris commented that Ellis's behavior was consistent with that of people who report crimes. When Officer Harris met Ball at his house in the alley, he described Ball's demeanor:

> [Ball] was very agitated in an angry fashion. He was very upset that we were there. He had to be placed in handcuffs for our safety and his, because he kept trying to pull away and would not listen to instructions to stop moving around and stop trying to put his hands in his pockets and whatnot, so we had to secure him in handcuffs to maintain some control.

Officer Harris explained further that he handcuffed Ball because Ball refused to keep his hands out of his pockets, and Officer Harris was concerned that he had a firearm based on the report that Ball was threatening to shoot people. Officer Harris testified that Ball told him that he left the parking spot next to CC Pet to avoid confrontation with Ellis because Ellis was yelling and hollering at him. Officer Harris returned to CC Pet to question Ellis and Martinez again; both employees confirmed the accuracy of their previous version of events. Officer Harris also testified that the Sheriff's Office did not have any notes about a call from Ball regarding the incident and that Ball never told him that he tried to call police.

¶10 Officer Rosipal also testified about his encounter with Ball. He said he responded to Ball's home based on a report of someone who was driving a white truck with a trailer threatening to shoot people with a gun. Since Officer Rosipal allegedly found Ball sitting in the truck outside his house matching the description, he patted down Ball for weapons, which he did not find. The State examined Officer Rosipal:

Q: Lieutenant Rosipal, when you contacted the defendant, what was his demeanor at the time?

A: Very agitated.

Q: In what sort of way?

A: It was like he was under the influence of something, whether it was alcohol and/or drugs. But he was agitated that we were even there.

Q: Okay.

A: With my past experiences with Mr. Ball, every time I'm there, it's the same.

Defense counsel objected to this testimony, and the District Court sustained the objection. This was the only testimony about prior bad acts that the jury heard. Defense counsel did not move to strike Officer Rosipal's testimony or ask the District Court for a curative instruction, nor did the District Court sua sponte strike the statement or give a curative instruction.

¶11 The jury found Ball guilty of felony intimidation based upon his threats to Ellis. The District Court sentenced Ball to a three-year commitment to the Department of Corrections, with all time suspended. Ball does not contest the sufficiency of the evidence against him on appeal.

¶12 We review a district court's evidentiary rulings for abuse of discretion. *State v. Huerta*, 285 Mont. 245, 254, 947 P.2d 483, 489 (1997). This includes the admissibility of character evidence. *Huerta*, 285 Mont. at 254, 947 P.2d at 489. "Abuse of discretion occurs if the district court acted arbitrarily and without the employment of conscientious

judgment or in a manner that exceeds the bounds of reason, resulting in substantial injustice." *State v. Mercier*, 2021 MT 12, ¶ 12, 403 Mont. 34, 479 P.3d 967.

¶13 For ineffective assistance of counsel (IAC) claims, our review is de novo "because ineffective assistance of counsel claims constitute mixed questions of law and fact." *Deschon v. State*, 2008 MT 380, ¶ 16, 347 Mont. 30, 197 P.3d 476. "Where ineffective assistance of counsel claims are based on facts of record in the underlying case, they must be raised in the direct appeal and, conversely, where the allegations of ineffective assistance of counsel cannot be documented from the record in the underlying case, those claims must be raised by petition for post-conviction relief." *State v. White*, 2001 MT 149, ¶ 12, 306 Mont. 58, 30 P.3d 340.

¶14 Ball argues for the first time on appeal that the District Court erred when it failed to cure Officer Rosipal's character testimony by either striking the testimony or issuing a cautionary instruction. Ball asserts that the first statement made by Officer Rosipal—"It was like he was under the influence of something, whether it was alcohol and/or drugs"—prejudiced his case because it was the first time the jury had heard Ball was acting under the influence during the confrontation. Second, Ball contends that Officer Rosipal's other statement—"With my past experiences with Mr. Ball, every time I'm there, it's the same"—violated M. R. Evid. 404(b) and prejudiced his case by suggesting to the jury that Ball was more likely to have committed the charged offense because Ball always had an agitated character during police encounters. Ball complains that this testimony was prejudicial because the State had withdrawn jury instructions relating to M. R. Evid. 404(b)

evidence and intoxication, "misleading the District Court and defense counsel into believing prior bad acts would not be coming up in the trial."

¶15 As a threshold inquiry, we must determine whether Ball's argument that a curative instruction should have been given or the objectionable testimony stricken has been properly preserved for appeal. *State v. LaFreniere*, 2008 MT 99, ¶ 11, 342 Mont. 309, 180 P.3d 1161. To properly preserve an argument for appeal, a party must first timely raise an objection or argument in the district court. *State v. Aker*, 2013 MT 253, ¶ 26, 371 Mont. 491, 310 P.3d 506. Issues presented for the first time on appeal are untimely and we will not consider them. *LaFreniere*, ¶ 11 (citation omitted). "It is fundamentally unfair to fault the trial court for failing to rule on an issue it was never given the opportunity to consider." *State v. Adgerson*, 2003 MT 284, ¶ 12, 318 Mont. 22, 78 P.3d 850. In general, we require an appellant "to show that an objection was made at trial on the same basis as the error asserted on appeal." *State v. Thompson*, 2017 MT 107, ¶ 17, 387 Mont. 339, 394 P.3d 197.

¶16 Ball objected to Officer Rosipal's testimony during trial and the District Court sustained the objection. Ball failed to move the District Court to strike the evidence and/or issue a curative jury instruction. The District Court is not required to sua sponte provide curative instructions or strike testimony. Since Ball did not request a cautionary instruction or ask that testimony be stricken, he has waived this argument for appellate review.[2]

[2] Ball did not request plain error review.

Accordingly, we decline to address his argument for the first time on appeal under the plain error doctrine.

¶17 Ball also claims that his counsel was ineffective for not filing a motion for a new trial or for a mistrial outside the jury's presence because (1) his counsel objected to Officer Rosipal's testimony; (2) the nature of the evidence was "inflammatory"; and (3) the District Court erred when it did not give the jury a curative instruction. Ball contends that counsel's failure to move for a new trial given Officer Rosipal's damaging testimony, deprived him of a fair trial.

¶18 For this Court to consider IAC claims on direct appeal, the claim must be supported solely by the record. *State v. Rovin*, 2009 MT 16, ¶ 24, 349 Mont. 57, 201 P.3d 780. "Because our review of ineffective assistance of counsel claims is subject to the strong presumption that counsel's actions are within the wide range of reasonable professional assistance, a record which is silent about the reasons for the attorney's actions or omissions seldom provides sufficient evidence to rebut this presumption." *State v. Sartain*, 2010 MT 213, ¶ 30, 357 Mont. 483, 241 P.3d 1032 (internal citations omitted). As such, if the record does not explain the reason why counsel did or did not act, the IAC claim is better suited in a petition for post-conviction relief. *Sartain*, ¶ 30. We may address an IAC claim on direct appeal "in rare instances" and "even if the record does not explain why counsel chose a particular tactic if there is no plausible justification for counsel's conduct." *State v. Fender*, 2007 MT 268, ¶ 10, 339 Mont. 395, 170 P.3d 971. A failure to object may constitute a "non-record based act or omission" because the use or non-use of objections may be "purely tactical." *State v. Hamilton*, 2007 MT 223, ¶ 26, 339 Mont. 92, 167 P.3d

906. We will not offer an explanation for counsel's decisions regarding the timing and number of objections because it "lies within his tactical discretion." *Hamilton*, ¶ 26.

¶19 The record is silent as to why counsel did not request a curative jury instruction or that Officer Rosipal's testimony be stricken. While defense counsel may not have wanted to draw attention to Officer Rosipal's testimony or highlight irrelevant evidence to disfavor Ball's case, this Court is not in the position to speculate counsel's tactical decisions because Ball makes a non-record-based IAC claim, which is more appropriate for post-conviction relief.[3] Therefore, we deny Ball's IAC claim.

¶20 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent. Affirmed.

/S/ LAURIE McKINNON

We Concur:

/S/ MIKE McGRATH
/S/ BETH BAKER
/S/ JAMES JEREMIAH SHEA
/S/ INGRID GUSTAFSON

[3] We will not address Ball's IAC claim under the two-part test from *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), because his IAC claim is not based on the record.