DA 17-0494

# IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 36

STATE OF MONTANA,

Plaintiff and Appellee,

v.

SHAWN JOSEPH WARD,

Defendant and Appellant.

APPEAL FROM: District Court of the First Judicial District,
In and For the County of Lewis and Clark, Cause No. ADC 2016-63
Honorable Mike Menahan, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Michael Marchesini, Assistant Appellate Defender, Helena, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Micheal S. Wellenstein, Assistant Attorney General, Helena, Montana

Leo Gallagher, Lewis and Clark County Attorney, Fallon Stanton, Deputy County Attorney, Helena, Montana

Submitted on Briefs: August 21, 2019

Decided: February 11, 2020

Filed:

Clerk

Justice James Jeremiah Shea delivered the Opinion of the Court.

¶1 Defendant Shawn Joseph Ward appeals from the June 8, 2017 Judgment and Commitment of the First Judicial District Court, Lewis and Clark County, following his conviction of Partner Family Member Assault (PFMA). We address the following issues on appeal:

> *Issue One: Whether Ward received ineffective assistance of counsel.*
>
> *Issue Two: Whether the record establishes that the District Court allowed testimonial material into the jury room during deliberations.*

¶2 We affirm.

## PROCEDURAL AND FACTUAL BACKGROUND

¶3 The State charged Ward with PFMA, a felony, in violation of § 45-5-206(1)(a), MCA, and Criminal Endangerment, a felony, in violation of § 45-5-207(1), MCA. He was tried by jury on March 20-21, 2017. The charges stem from an incident involving Ward, his partner Chariot, and their eight-month old baby. On January 17, 2016, Ward's neighbors overheard loud arguing, thuds, and a baby crying coming from the upstairs apartment where Ward and Chariot lived. The neighbors went up to Ward's apartment out of concern for Chariot's and the baby's safety and called law enforcement.

¶4 During law enforcement's investigation, Chariot gave three separate interviews. Her first interview was with Officer Haven of the Helena Police Department, who had initially responded to the incident. He testified at trial that Chariot admitted she and Ward had been arguing but denied that Ward had hit her. During his testimony, Officer Haven

stated he did not observe any injuries to Chariot, but he was unsure if she was wearing any makeup. Officer Haven also described Chariot's calm demeanor during his interview and did not observe any signs that she was intoxicated.

¶5 Officer Haven testified that Chariot had warned Ward the neighbors had called law enforcement, and Ward left the apartment. As Officer Haven was speaking with Chariot, Ward called her and agreed to speak to Officer Haven on the phone. Officer Haven was able to convince Ward to return to the apartment. Officer Haven testified that when Ward returned, he determined that Ward had been drinking. Ward denied that he had hit Chariot, but acknowledged he was not supposed to be drinking because he was on probation. Officer Haven decided not to arrest Ward for PFMA, but instead for violating his probation.

¶6 The next morning, Chariot called law enforcement and requested a follow-up interview. Officer Tangen responded to Ward and Chariot's apartment and recorded his interview with her on his body camera. During the interview, Chariot told Officer Tangen that she did not want to get Ward in trouble but stated that "[Ward] beat the shit out of me." She then described to Officer Tangen how Ward struck her in the face multiple times, grabbed her hair, threw her to the ground, and kicked her. Chariot told Officer Tangen that she had not consumed alcohol the night of the incident. Officer Tangen testified at trial that he observed during the interview that Chariot's face was "black, swollen, [and] bruised." Chariot also told him that she had applied makeup to conceal her injuries before Officer Haven arrived. Officer Tangen testified that he did not observe any signs that Chariot was intoxicated.

¶7 A few days after the incident, Chariot was interviewed again by Detective Shanks. A Helena Friendship Center victim advocate was also present during this interview. The interview was recorded. Detective Shanks testified that he did not observe any bruising on Chariot's face during the interview, but he noticed she was wearing a thick layer of makeup. During the interview, Chariot stated that Ward grabbed her by the hair, kicked her, and struck her repeatedly, and she did not see how Ward could deny assaulting her. She told Detective Shanks she was intoxicated the night of the incident.

¶8 Prior to trial, Ward's first attorney filed a motion in limine to prohibit the State from mentioning Ward's prior criminal history, that Ward was on probation at the time of the charged offense, and any other alleged illegal conduct by Ward not charged or at issue in the case. The State did not object, and the District Court granted the motion.

¶9 Ward was appointed new counsel two months before trial. On the first day of trial, the State informed the District Court that it would be difficult to avoid the fact that Ward had been arrested the night of the incident because he was in violation of his probation for drinking. Ward's new counsel stipulated to the State introducing evidence that Ward "wasn't supposed to be drinking," as long as his probation status was not explicitly mentioned. The District Court agreed and notified the parties it intended to issue a limiting instruction which was approved by both parties.

¶10 During trial, however, Ward's counsel failed to object when Chariot testified that she was mad at Ward "for drinking while he was on probation." Ward's counsel also failed to object when Officer Haven testified that Ward thought Chariot had told him during his investigation that "[Ward] had been drinking, [and] that he was on probation." Ward's

counsel also did not object when the State mentioned Ward's probation status during opening statements and later elicited testimony in that regard. Ward's counsel further stated multiple times that Ward was not supposed to be drinking at the time of the charged offense.

¶11 Chariot testified multiple times during trial that she had been drinking that night, and Ward did not cause her facial injuries. Chariot testified that the reason she told Officer Tangen the next day that Ward assaulted her was because she was mad at him for drinking while he was on probation and wanted to get Ward into trouble. She testified she was still drunk the morning she gave her interview with Officer Tangen. Chariot attributed her actions the night of the incident and the days after to her intoxication, anger, and mental health conditions. She also testified that Detective Shanks pressured her to say that Ward had assaulted her in the interview.

¶12 The State sought to introduce redacted audio and video recordings of Officer Tangen's and Detective Shanks' interviews with Chariot as evidence, arguing that these interviews were relevant to impeach Chariot's testimony and as evidence of Chariot's prior inconsistent statements. Ward's counsel objected and argued that the interviews contained hearsay and prior bad acts evidence. The District Court overruled Ward's counsel's objections and admitted the redacted interviews into evidence, which were played for the jury. Transcriptions of the redacted interviews were prepared for the jury to follow along with the recordings. For purposes of appeal, the parties stipulated that unredacted copies of the interviews would be admitted into the record as Exhibits 24 and 25 but would not be shown to the jury.

¶13 After closing arguments, the parties engaged in further discussion regarding the redacted interviews. In relevant part, the following exchange between the District Court, the County Attorney, and Defense Counsel occurred:

> THE COURT: I know that Exhibits 24 and 25 are not to go back into the jury room—or 17A, the transcription. There was another transcription that was essentially read to them, but it wasn't offered into evidence. We can keep it as part of the Court's record. But is there anything that you're concerned with about going back? I guess, [Defense Counsel], is that—
>
> [DEFENSE COUNSEL]: I mean, I think my biggest concern would be obviously the video that I've already objected to. I feel like having them watch that is going to place undue importance on those pieces of evidence, which I already objected—
>
> THE COURT: Okay.
>
> [DEFENSE COUNSEL]: —to them in the first place.
>
> THE COURT: So [the bailiff] . . . once [the bailiff] puts the jury in the jury room, [the bailiff will] come back and collect that evidence and take it back.
>
> [COUNTY ATTORNEY]: Maybe we can go through it with [the bailiff] just to make sure something's not going back that [the bailiff] ought to hang onto.
>
> THE COURT: Okay. If you could, I would appreciate that. All right. Thank you.

¶14 The jury found Ward guilty of PFMA, and not guilty of Criminal Endangerment.

## STANDARDS OF REVIEW

¶15 Ineffective assistance of counsel (IAC) claims are mixed questions of fact and law that are reviewed de novo. *State v. Hinshaw*, 2018 MT 49, ¶ 8, 390 Mont. 372, 414 P.3d 271; *State v. Larsen*, 2018 MT 211, ¶ 6, 392 Mont. 401, 425 P.3d 694; *State v. Weisweaver*, 2010 MT 198, ¶ 7, 357 Mont. 384, 239 P.3d 952. We review IAC

claims on direct appeal if the claims are based solely on the record. *Hinshaw*, ¶ 21; *State v. Main*, 2011 MT 123, ¶ 48, 360 Mont. 470, 255 P.3d 1240.

¶16 This Court reviews a district court's decision on evidence that may be taken into the jury room during deliberations for an abuse of discretion. *State v. Nordholm*, 2019 MT 165, ¶ 8, 396 Mont. 384, 445 P.3d 799 (citing *State v. Stout*, 2010 MT 137, ¶ 29, 356 Mont. 468, 237 P.3d 37) (citation omitted). A district court abuses its discretion when "it acts arbitrarily, unreasonably, or without employing conscientious judgment, resulting in substantial injustice." *Nordholm,* ¶ 8 (citing *State v. Hart*, 2009 MT 268, ¶ 9, 352 Mont. 92, 214 P.3d 1273).

**DISCUSSION**

¶17 *Issue One: Whether Ward received ineffective assistance of counsel.*

¶18 In order to show IAC, "a defendant must prove both (1) that counsel's performance was deficient, and (2) that counsel's deficient performance prejudiced the defense." *State v. Crider*, 2014 MT 139, ¶ 34, 375 Mont. 187, 328 P.3d 612 (citing *Whitlow v. State*, 2008 MT 140, ¶ 10, 343 Mont. 90, 183 P.3d 861). IAC claims may be brought on direct appeal when the record sufficiently answers why counsel did or did not take a particular action. *Hinshaw*, ¶ 21 (citing *State v. Kime*, 2013, MT 14, ¶ 31, 368 Mont. 261, 295 P.3d 580) (citation omitted). If it is not apparent from the record why counsel took a particular course of action, IAC claims may be more appropriate for review in a petition for postconviction relief. *Hinshaw*, ¶ 21; *Rose v. State*, 2013 MT 161, ¶ 18, 370 Mont. 398, 304 P.3d 387 (citation omitted). *See also* §§ 46-21-101-203, MCA, (governing proceedings for postconviction relief). Claims that involve alleged omissions of trial

counsel are usually not well-suited for consideration on direct appeal. *Hinshaw*, ¶ 21; *State v. Briscoe*, 2012 MT 152, ¶ 15, 365 Mont. 383, 282 P.3d 657.

¶19 Ward asserts he received ineffective assistance of counsel when his trial attorney failed to object to witnesses' and the State's references to his probation status, and even referenced his probation status herself. Ward argues these references were irrelevant, immaterial, and prejudicial. The State argues that this Court should not address Ward's IAC claim on direct appeal because the record is silent as to why defense counsel did not object to the probation references and testimony concerning the condition that Ward abstain from drinking. We agree.

¶20 "When considering whether to review an IAC claim on direct appeal, we first must determine whether the claim is based on the trial record." *State v. Sawyer*, 2019 MT 93, ¶ 13, 395 Mont. 309, 439 P.3d 931. We will address a claim of IAC on direct appeal if the reasons for counsel's action, or inaction, is apparent from the record on appeal. *Sawyer*, ¶ 13. Conversely, if the claim is based on matters outside the record, we will not review it on direct appeal, recognizing that the defendant may raise the issue in a postconviction proceeding to develop a record as to the reasons for counsel's actions. *Sawyer*, ¶ 13.

¶21 Ward argues his IAC claim is appropriate for review on direct appeal because there is no plausible justification for his counsel's failure to object to testimony about his probation status or the fact that the terms of his probation prohibited him from drinking. But as the State points out, there are a number of strategic reasons why Ward's counsel may have thought it advantageous to allow this testimony into evidence. For example,

Chariot never testified at trial that Ward hit her; rather, she testified that she "was mad at him for drinking while he was on probation. Because I knew it was wrong." This testimony supported a defense strategy that Chariot's anger at Ward was because of his probation violation instead of because he had hit her. Ward was arrested at the scene, not for PFMA but for the probation violation. Ward's attorney may have thought it strategically advantageous to point out that if Ward was guilty of PFMA, that would have been the basis for his arrest. Ward's attorney also elicited favorable testimony from Officer Haven regarding his interaction with Ward the night of his arrest that necessitated reference to Ward's probation. Officer Haven testified that Ward was adamant that nothing had happened, but Ward knew he was not supposed to be drinking. Officer Haven told Ward that his honesty was going to go a long way with him.

¶22 Ultimately, we can only speculate as to why Ward's attorney did not object to evidence of his probation status and the prohibition on his drinking. This is precisely why Ward's IAC claim is not susceptible to review on direct appeal. It is not apparent from the record why Ward's counsel did not object to the references made about his probation and probation terms. We therefore decline to review Ward's claim of IAC on direct appeal.

¶23 *Issue Two: Whether the record establishes that the District Court allowed testimonial material into the jury room during deliberations.*

¶24 Jurors may take into the jury room any written jury instructions that were read by the district court, personal notes taken during the proceeding, and "all exhibits that have been received as evidence in the cause that in the opinion of the court will be necessary."

Section 46-16-504, MCA. However, the submission of testimonial materials to the jury for unsupervised and unrestricted review is prohibited. *Nordholm*, ¶ 10; *Stout*, ¶ 29; *State v. Herman*, 2009 MT 101, ¶ 38, 350 Mont. 109, 204 P.3d 1254; *State v. Bales*, 1999 MT 334, ¶ 24, 297 Mont. 402, 994 P.2d 17; *State v. Harris*, 247 Mont. 405, 417, 808 P.2d 453, 460 (1991). The rule prevents the jury from giving undue emphasis to one witness's statements to the exclusion of evidence presented by other witnesses. *Nordholm*, ¶ 10. We have held that testimonial materials include tape recordings of a police interview, *see Bales*, ¶ 24, written witness statements, *see Herman*, ¶ 39, tape recordings of witness statements, *see State v. Mayes*, 251 Mont. 358, 374, 825 P.2d 1196, 1206 (1992), and an entire transcript of a victim's testimony, *see Harris* 247 Mont. at 417-18, 807 P.2d at 460.

¶25 If it can be determined that the District Court allowed testimonial materials to go back to the jury, we look to the totality of the circumstances to determine whether undue emphasis was placed on the evidence and if so, whether the defendant was prejudiced. *Bales*, ¶¶ 24-25. Unsupervised access of testimonial video evidence to the jury results in undue emphasis. *Nordholm*, ¶ 14 (finding that unrestricted access to testimonial video evidence allows the jury to replay the video testimony, thus giving the video testimony undue emphasis).

¶26 Ward argues that the district court abused its discretion by sending testimonial materials—specifically, the redacted audio and video recordings of Chariot describing the assault to Officer Tangen and Officer Shanks—into the jury room during deliberation. For purposes of our disposition of this issue, we need not decide whether the redacted audio

and video recordings constitute testimonial materials. Assuming the redacted recordings do constitute testimonial materials, the record does not establish that they actually went to the jury room for deliberation.

¶27 After closing arguments, the District Court conferred with the County Attorney and Defense Counsel specifically for the purpose of addressing which materials would go back to the jury room. After it was confirmed that the unredacted recordings, and the written transcriptions of the redacted recordings, would not be provided to the jury, the District Court asked Defense Counsel if there was anything else that she was concerned might be improperly provided to the jury during its deliberations. Defense Counsel responded that her "biggest concern" was the recordings to which she had already objected because she felt the jury would then place "undue importance on those pieces of evidence . . . ." The District Court acknowledged Defense Counsel's concern but did not specifically rule on her objection. Instead, the District Court advised counsel how the evidence would be provided to the jury, at which time the County Attorney interjected that he and Defense Counsel could "go through [the evidence] with [the bailiff] just to make sure something's not going back that [the bailiff] ought to hang onto." Responding to the County Attorney's suggestion, the District Court stated, "[i]f you could, I would appreciate that. All right. Thank you." This conversation represents the last reference to this issue in the record.

¶28 Ward reads this conversation and concludes, "[b]y all indications, the District Court sent the recordings . . . into the jury room during deliberations." But this same conversation equally indicates the opposite conclusion. First, it makes little sense that the

County Attorney, Defense Counsel, and the District Court would all agree that the written transcriptions of the redacted interviews—including the transcription that was entered into evidence—would not be provided to the jury, but the recordings themselves would. Second, after objecting to the recordings going to the jury, but without receiving a ruling on her objection, Defense Counsel and the County Attorney agreed to jointly review the evidence before it was submitted to the jury "just to make sure something's not going back" to the jury that should not. Since the record is silent on this issue beyond this point, Ward asks us to assume that after his attorney and the County Attorney jointly reviewed the evidence, Ward's attorney capitulated and agreed that the recordings could go back to the jury room, notwithstanding her earlier objection which was never ruled upon. It is just as reasonable to assume, however, that the matter was never taken up again because the County Attorney agreed that the recordings should not go back to the jury. "[T]he appellant bears the burden of establishing error." *State v. Aakre*, 2002 MT 101, ¶ 43, 309 Mont. 403, 46 P.3d 648. Ward has not carried his burden in this case.

**CONCLUSION**

¶29 The record is unclear why Ward's counsel did not object to the State's references made about his probation status and probation terms, or why Ward's counsel made her own references to Ward's drinking that night. Ward's IAC claim thus is not susceptible to review on direct appeal. Ward's claim is denied without prejudice to his right to seek review through a petition for postconviction relief. Ward has failed to establish that the redacted interviews were provided to the jury during its deliberations. Thus, Ward cannot

establish that the District Court abused its discretion and that he suffered prejudice as a result. We affirm.

/S/ JAMES JEREMIAH SHEA

We Concur:

/S/ MIKE McGRATH
/S/ BETH BAKER
/S/ DIRK M. SANDEFUR
/S/ INGRID GUSTAFSON
/S/ LAURIE McKINNON
/S/ JIM RICE