ORIGINAL



DA 20-0270

# IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 18

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JOR-EL RUBEN QUIROZ,

Defendant and Appellant.



APPEAL FROM: District Court of the First Judicial District,
In and For the County of Lewis and Clark, Cause No. DDC 2018-464
Honorable James P. Reynolds, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

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

For Appellee:

Austin Knudsen, Montana Attorney General, Mardell Ployhar, Assistant Attorney General, Helena, Montana

Leo John Gallagher, Lewis and Clark County Attorney, Helena, Montana

Submitted on Briefs: November 17, 2021

Decided: January 25, 2022

Filed:

Clerk

Justice James Jeremiah Shea delivered the Opinion of the Court.

¶1 Defendant Jor-el Quiroz appeals the March 19, 2020 Judgment and Commitment Order of the First Judicial District Court, Lewis and Clark County, following a trial in which a jury found him guilty of five of seven charged offenses. On appeal, Quiroz challenges his convictions for aggravated kidnapping, assault with a weapon (knife), and sexual intercourse without consent, arguing his counsel was ineffective for failing to object to statistical testimony regarding the frequency of false sex crime allegations. We address:

*Whether Quiroz received ineffective assistance of counsel when his attorney failed to object to expert testimony on the statistical likelihood that his accuser was lying.*

¶2 We reverse Quiroz's conviction for Sexual Intercourse Without Consent, a felony, in violation of § 45-5-503(1), MCA. We affirm his remaining convictions.

## FACTUAL AND PROCEDURAL BACKGROUND

¶3 On the morning of Saturday, August 25, 2018, Helena police arrested Quiroz after his on-again, off-again girlfriend, S.C., alleged that he had detained and abused her over the previous day and night. The State charged Quiroz with seven offenses:

> Count I: Aggravated Kidnapping, a felony, in violation of § 45-5-303(1)(c), MCA;
>
> Count II: Assault with a Weapon (knife), a felony, in violation of § 45-5-213(1)(b), MCA;
>
> Count III: Partner or Family Member Assault (PFMA) (second offense), a misdemeanor, in violation of § 45-5-206(1)(a), MCA;
>
> Count IV: Assault with a Weapon (hammer), a felony, in violation of § 45-5-213(1)(a), MCA;
>
> Count V: Strangulation of a Partner or Family Member, a felony, in violation of § 45-5-215(1)(a), MCA;

Count VI: Sexual Intercourse Without Consent, a felony, in violation of § 45-5-503(1), MCA; and

Count VII: Criminal Possession of Dangerous Drugs (methamphetamine), a felony, in violation of § 45-9-102(1), MCA.

¶4 The jury returned a split verdict, finding Quiroz guilty of Counts I, II, III, VI, and VII, and not guilty of Counts IV and V. The District Court handed down concurrent sentences of life in prison for the aggravated kidnapping and sexual intercourse without consent convictions, 20 years for assault with a weapon (knife), five years for methamphetamine possession, and one year in the Lewis and Clark County jail for PFMA. Quiroz does not contest his convictions for Counts III and VII. Quiroz appeals his convictions for Counts I, II, and VI.

¶5 Quiroz and S.C. dated intermittently for about five months until Quiroz's arrest. They used drugs together, including methamphetamine, and S.C. stated that Quiroz was physically abusive to her throughout their relationship. Twice over the summer, S.C. "ran away" to Washington to stay with friends in an attempt to get sober and put distance between Quiroz and herself. S.C. stated she was afraid of Quiroz and that he was stalking her.

¶6 On Wednesday, August 22, 2018, S.C. and her best friend Sammi were on their way to a bar when they saw Quiroz in a park and gave him $20 for some marijuana. The three stayed up all night drinking in S.C.'s room while S.C.'s two young daughters and her friend, Vickie, who often stayed over to babysit, slept in bedrooms upstairs. S.C. and Quiroz had not seen each other in a few weeks, and Quiroz initially told Sammi that he did

not want to see S.C., but after reconnecting in the park, the two spent most of the next three days together. On Thursday morning, S.C. sent a text message to Quiroz asking him to come over to have sex with her. Quiroz spent both Wednesday and Thursday nights at S.C.'s house.

¶7 On Friday morning, S.C. drove Quiroz to his mother's house in East Helena so that he could pick up some clothes. The doors were locked and no one was home, so they waited on the porch for an hour or two. S.C. testified that Quiroz asked for her phone, took it, and kept it for the rest of the day and night. While looking through her phone, Quiroz saw text messages between S.C. and Dan O'Malley, a former Helena police detective and her daughter's grandfather, about Quiroz's drug addiction. S.C. testified that Quiroz became angry, pulled out a pocketknife, and threatened her, saying she "knew too much" and that she "was talking to the wrong people" about Quiroz's drug addiction. S.C. testified that Quiroz "stabbed [the knife] on my leg and he kept poking my leg with it." She testified, "He told me that if I made a noise, that he would stab me."

¶8 Eventually, Quiroz's mother arrived with his sister and her children. S.C. testified that Quiroz led her to the back bedroom and threatened her not to say or do anything to arouse suspicion while he packed. Quiroz's mother and sister testified that the family left to go swimming while Quiroz was in the shower and S.C. waited in the back bedroom. S.C. disputed this claim, testifying that Quiroz did not take a shower at his mother's house. S.C. testified that after Quiroz's family left and Quiroz and S.C. were alone in the house, he began interrogating her about "what he thought I knew." S.C. testified that because she

"had no idea what he was talking about," Quiroz became angry and hit her across the face so hard that she saw stars.

¶9 Quiroz stated that upon returning to S.C.'s house, she made dinner and put her children to bed before joining him upstairs. S.C. testified that Quiroz made her walk straight upstairs to her room, past her children and Vickie, who were downstairs, and made her sit on her hands at the foot of her bed while Quiroz continued to threaten her. S.C. testified that Quiroz became violent. S.C. testified that Quiroz: held the knife with the blade underneath her throat and said he would kill her if she did not tell him what she knew; hit her on her shin with the wooden handle of a hammer she had stored in her dresser; hit her with a braided belt that left a distinct woven pattern on her leg; tied her hands behind her back with a bandana and kicked her onto the floor; and strangled her with a cell phone cord, completely cutting off her airway. S.C. testified that Quiroz then forced her to take a bath while he watched, threatening that if she "moved or did anything out of the ordinary," he would kill her or her children.

¶10 S.C. testified about her own drug use at that time. On direct examination, S.C. testified that she had been clean since her trip to Washington. On cross-examination, S.C. acknowledged that she had smoked meth as recently as Tuesday, August 21, two nights before the incidents with Quiroz. S.C. testified that she did not do any drugs that night but that Quiroz tried to force her to smoke meth in the bathroom, resulting in a tussle from which she got away, telling him "you will have to kill me first." As a result, Quiroz allegedly choked her and hit her with a wet belt. S.C. testified that Quiroz then made her shower with him, told her that she hadn't "done anything to appease him," and forced her

to perform oral sex and have vaginal intercourse in the shower. S.C. then went downstairs to make breakfast while Quiroz remained in the shower. Before going downstairs, S.C. saw her phone on her bed and put it in her pocket.

¶11 While alone downstairs, around 6:30 a.m., S.C. sent a Facebook message to Detective O'Malley, pleading for help. The message read:

> DO NOT MESSAGE ME BACK Jor El is here threatening to kill me at my house hes held me against my will since yesterday 2pm HELP AGAIN DO NOT MESSAGE BACK AND DO NOT MAKE NOTICE COPS ARE HERE IM HOME HE WILL HURT ME.

At 6:42 a.m., she sent a second message to Detective O'Malley: "Please wake up! He said hed plant drugs and try and dose us if I called for help!!!! Help!!" At 7:09 a.m., Quiroz sent a text message to S.C.'s phone saying that he was going to sleep. At 7:23 a.m., S.C. sent a message to 911 asking for help. She provided her address and wrote:

> My ex is holding me against my will has threatened to kill me and stab and has hit me and abusing me I have children if he sees cop cars I will be hurt please help immediately he has threatened to plants [sic] drugs and dose me and my kids do not respond back to my phone as he will see or hear it his name is Jor El Quiroz.

(Full capitalization removed).

¶12 Helena Police Officer Britney Benz responded to the call. She parked around the corner and approached the townhouse on foot. Officer Benz testified that she immediately saw S.C. running out of the building holding a small child. Officer Benz testified that S.C. "appeared very upset. . . . She was whispering, crying, just overall very distraught, very concerned." Other officers arrived, entered the apartment, and arrested Quiroz, who was sleeping upstairs in S.C.'s bed. Officer Benz and S.C. went inside the townhouse. Vickie

emerged from an upstairs bedroom with her young son. Officer Benz testified that she "appeared to have just woken up." Vickie told Officer Benz that she had been in the house the entire night but had not heard anything.

¶13 Officer Benz took photographs of S.C.'s injuries: swelling, redness, and bruising on her left cheek, a red mark consistent with a hand on S.C.'s left thigh, a red welt in a distinct pattern that was consistent with a woven belt, and small red dots "almost kind of petechiae" on S.C.'s left shin. S.C. showed Officer Benz a mark on her leg where Quiroz allegedly pressed the knife to her skin. Other physical evidence included: a pocketknife that officers seized from Quiroz's pants pocket when he was arrested; a wet, woven belt that officers found on the bathroom floor; a wooden claw hammer that officers found in S.C.'s bedroom dresser drawer; and two bags of suspected methamphetamine. Officer Benz testified that there was a phone cord plugged into a phone in the bedroom, but she did not take it into evidence and did not take any photographs of S.C.'s neck.

¶14 Officer Benz interviewed Quiroz at the detention center where he admitted to having spent the last few days with S.C. but denied holding her against her will and claimed to have had consensual sexual intercourse with her in her bedroom and bathroom every day since the two reconnected. During the interview, Quiroz asked Officer Benz, "How am I – how am I being charged with a PFMA? Like we were cool. We were chilling. . . . She made breakfast. I had just eaten, she was just laying down in the bed next to me and like I fell asleep and . . . ." In November, after Quiroz was arrested, he apologized in a letter to S.C., writing: "I am so sorry. I got out of hand. . . . I was trying to hurt you because I was hurt, I was wrong."

¶15 At trial, several witnesses who had seen Quiroz and S.C. together that week testified. Sammi had provided her cell phone to detectives who made screen shots of her communication with Quiroz. The messages show that at 11:17 p.m. on Friday night, Sammi asked Quiroz why S.C. wasn't responding to her messages that day, to which Quiroz responded, "Idk she's being weird as fuck." Defense counsel pointed out that Sammi had apparently deleted two messages that were later extracted from Quiroz's phone indicating that S.C. had possibly not slept in several days. S.C.'s brother, Silas, testified that he and S.C. were doing meth together, among other drugs, "all summer long," and that S.C.'s reputation in the community for truthfulness was "not good."

¶16 At trail, the State called Dr. Sheri Vanino, a licensed clinical psychologist and trauma specialist practicing in Denver, Colorado. Dr. Vanino testified as a blind expert about the dynamics of sexual abuse and the cycle of domestic violence. Dr. Vanino had previously testified as an expert on this subject approximately 80 times in criminal and civil courts in five states, including Montana. Dr. Vanino explained why some common myths about rape are incorrect, including the myth that rapes are commonly committed by strangers, that victims usually fight back, and that a rape victim will necessarily have evidence of obvious injuries. Dr. Vanino further testified that most rapes are never reported, and that many domestic violence relationships include sexual violence.

¶17 The prosecutor asked Dr. Vanino:

> COUNSEL: One final topic. Can you talk about false reporting by women who have experienced sexual assault?
>
> DR. VANINO: Sure. So, I think there's a myth, this goes back to the rape myth . . . there is a myth out there that lots of women are running around

falsely reporting to either get revenge or maybe money when in reality what we know the much bigger issue is that people aren't reporting. . . . or they delay reporting it. Statistically it's a very, very low number of people who are falsely reporting sexual assaults.

¶18 The prosecutor continued:

COUNSEL: Do you have any – I will represent to you that what we have here is a victim who is 27 and a partner who's about the same age, an alleged partner about the same age. She made the report. Are there any studies as to that situation as to the percentage of false reports as far as you know, any studies in that?

DR. VANINO: Well, so, I mean, are you asking me about the statistics?

COUNSEL: Yes.

DR. VANINO: So somewhere between 2 and 7 percent, they say, of sexual assault reports are false. So somewhere between 2 and 7 percent. It depends on the study you look at and how they're defining false reports. So I don't – I wouldn't be able to say what percent of those 2 to 7 percent are a scenario where the person is dating the person, but it's very low. It is much, much, much lower than the 2 to 7 percent.

Again, [a] lot of the 2 to 7 percent are people covering something up or super, super, super mentally ill or, within that, they are not naming someone. So I don't know the statistic of that scenario that you just laid out to me. I don't know that there is a research that looks at that, but the point being within the research is that it's highly low. It's a very low number because it doesn't match up with a standard false report.

Defense counsel did not object to Dr. Vanino's testimony.

¶19 On cross-examination, defense counsel attempted to discredit Dr. Vanino by questioning the reliability of the research she cited and pointing out that a wide range of human behavior can lead to a similarly wide range of responses to a situation. Defense counsel elicited affirmative responses from Dr. Vanino to the following questions: "You're telling us what some people do [but] some people could do absolutely the

opposite?" and, "In everything you've told us . . . [t]here's no hard and fast rules here, are there?"

¶20 In closing arguments, both sides referenced Dr. Vanino's testimony. In arguing S.C.'s allegations were credible, the prosecution asked rhetorically, "Is [S.C.] one of the 2 to 7 percent according to the study that makes a false report about sexual assault without consent?" Quiroz's counsel conceded that the evidence proved Quiroz was guilty of possessing dangerous drugs but emphasized S.C.'s drug use and evidentiary gaps in her testimony. Referencing Dr. Vanino's testimony, Quiroz's counsel argued that the jury should not rely on "some hired gun" to decide if "somebody's telling you the truth."

## STANDARD OF REVIEW

¶21 Ineffective assistance of counsel (IAC) claims are mixed questions of fact and law that are reviewed de novo. *State v. Ward*, 2020 MT 36, ¶ 15, 399 Mont. 16, 457 P.3d 955; *State v. Hinshaw*, 2018 MT 49, ¶ 8, 390 Mont. 372, 414 P.3d 271; *State v. Kougl*, 2004 MT 243, ¶ 12, 323 Mont. 6, 97 P.3d 1095.

## DISCUSSION

*Whether Quiroz received ineffective assistance of counsel when his attorney failed to object to expert testimony on the statistical likelihood that his accuser was lying.*

¶22 The Sixth Amendment to the United States Constitution, incorporated through the Fourteenth Amendment, and Article II, Section 24, of the Montana Constitution, guarantee a defendant's right to the effective assistance of counsel. *Kougl*, ¶ 11. We will review an IAC claim on direct appeal either when the basis for the claim can be fully explained by the record or there is "no plausible justification" for defense counsel's actions or omissions.

*State v. Larsen,* 2018 MT 211, ¶ 8, 392 Mont. 401, 425 P.3d 694; *Kougl*, ¶ 15.[1]

¶23 When reviewing IAC claims, we apply the two-pronged approach set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). *State v. Colburn*, 2018 MT 141, ¶ 21, 391 Mont. 449, 419 P.3d 1196; *Whitlow v. State*, 2008 MT 140, ¶ 10, 343 Mont. 90, 183 P.3d 861. *Strickland* requires the defendant to show (1) that his counsel's performance was deficient and (2) the deficiency prejudiced his defense. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064; *Kougl*, ¶ 11. The first prong of the *Strickland* test begins with a strong presumption that trial counsel's performance was based on sound trial strategy and falls within the broad range of reasonable professional conduct. *State v. Hamilton*, 2007 MT 223, ¶ 16, 339 Mont. 92, 167 P.3d 906. To overcome this presumption, the defendant alleging IAC must establish that counsel's performance fell below an objective standard of reasonableness. *Whitlow*, ¶ 14; *Bishop v. State*, 254 Mont. 100, 103, 835 P.2d 732, 734 (1992). To show prejudice, the defendant must demonstrate "a reasonable probability" that, but for counsel's error, the result of the proceeding would have been different. *Stock v. State*, 2014 MT 46, ¶ 19, 374 Mont. 80, 318 P.3d 1053 (internal citations omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome," but we do not require a defendant to prove that he would have been acquitted. *Kougl*, ¶ 25 (internal quotations omitted).

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[1] Although the State asserts Quiroz's trial counsel's performance was not deficient and argues alternatively that counsel's performance did not prejudice Quiroz's defense, the State does not contest whether Quiroz's IAC claim is record-based. Therefore, we do not consider this issue.

¶24 Turning first to whether Quiroz's counsel's failure to object to Dr. Vanino's testimony constituted deficient performance, Quiroz argues his counsel's performance was deficient because there was no plausible justification for her failure to object to Dr. Vanino's damaging and "plainly inadmissible" statistical testimony. The State does not substantively address the first prong of the *Strickland* test, other than to summarily state that Quiroz has failed to demonstrate his defense counsel's performance was constitutionally deficient.

¶25 It is well settled in Montana that expert testimony regarding the frequency of false accusations in sexual assault or rape cases is inadmissible as an "improper comment on the credibility of [the victim]." *State v. Brodniak*, 221 Mont. 212, 222, 718 P.2d 322, 329 (1986); *see also State v. Rodriguez*, 2021 MT 65, ¶ 36, 403 Mont. 360, 483 P.3d 1080 (defense counsel's failure to elicit false reporting statistics was not IAC because counsel was correct to recognize such testimony was prohibited); *State v. Grimshaw*, 2020 MT 201, ¶ 24, 401 Mont. 27, 469 P.3d 702 ("Presenting testimony that only between two and eight percent of sexual assault reports are false clearly commented on, and improperly bolstered, the credibility of [the victim's] testimony."). Expert testimony regarding witness credibility "improperly invades the jury's function by placing a stamp of scientific legitimacy on the victim's allegations." *State v. Harris*, 247 Mont. 405, 409, 808 P.2d 453, 455 (1991) (citing *Brodniak*, 212 Mont. at 222, 718 P.2d at 329). Defense counsel's failure in this case to object to statistical testimony regarding the frequency of false reporting in sexual assault and rape cases—which is clearly prohibited by *Brodniak* and its progeny—establishes deficient performance.

¶26 We next consider whether Dr. Vanino's improper statistical testimony prejudiced Quiroz's defense. Quiroz asserts that a timely objection to Dr. Vanino's credibility-boosting statistics might reasonably have resulted in a different verdict on Quiroz's sexual intercourse without consent, aggravated kidnapping, and assault with a knife convictions.[2] The State argues that Quiroz failed to demonstrate prejudice because it is not reasonably probable that the jury would have reached a different result on any of Quiroz's five convictions since S.C.'s allegations were sufficiently corroborated by other evidence.

¶27 In *Brodniak*, this Court found the trial court committed harmless error when it admitted improper testimony from a rape trauma syndrome (RTS) expert regarding the statistical percentage of false accusations in sexual assault or rape cases over defense counsel's objection. We reasoned that, even though the testimony was improper, the error was harmless because "the physical evidence against Brodniak and his own admissions that he resorted to violence were so overwhelming that admission of the RTS testimony did not affect his substantial rights." *Brodniak*, 221 Mont. at 223, 718 P.2d 329. Conversely, in *Grimshaw*, we determined the trial court's same error was not harmless because "the statistical evidence boosted [the victim's] credibility and ultimately tipped the scales to an unfair trial." *Grimshaw*, ¶ 32. We reasoned that Dr. Vanino's statistical testimony at Grimshaw's trial implied there was a 92 to 98 percent chance the victim was

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[2] Quiroz concedes counsel's deficient performance did not prejudice his defense as to the PFMA charge because the State presented sufficient evidence of S.C.'s physical injuries.

telling the truth about the sexual assault, and in a case that "turn[ed] on which party the jury believes, such numbers [were] impossible to ignore." *Grimshaw*, ¶ 32. While the State in that case presented evidence "tending to prove Grimshaw's guilt," such evidence "was not so strong there was 'no reasonable possibility' the false reporting statistics could have contributed to his conviction." *Grimshaw*, ¶ 32.

¶28 Although nearly factually identical, *Grimshaw* is procedurally distinguishable because Grimshaw's counsel objected to the statistical testimony; therefore, the issue was whether the error admitting the testimony was harmless, which required the State to prove beyond a reasonable doubt there was no reasonable possibility the inadmissible evidence contributed to the conviction. *Grimshaw*, ¶ 29. In this case, Quiroz bears the burden of demonstrating a reasonable probability that, but for his counsel's failure to object, the outcome in his case would have been different. *Stock*, ¶ 19.

¶29 Applying our precedent to the facts of this case, we conclude there is a reasonable probability that Dr. Vanino's testimony "ultimately tipped the scales to an unfair trial" and prejudiced Quiroz's defense as to the sexual intercourse without consent charge. Quiroz did not deny that he had sex with S.C. but claimed that it was consensual. S.C. did not deny that she and Quiroz were in an ongoing, albeit at times contentious, relationship. The State's ability to obtain a conviction for the sexual intercourse without consent charge required the jury to find that, despite this contentious, on-again-off-again relationship, S.C. did not consent to this particular sexual encounter with Quiroz. Quiroz presented evidence and testimony that S.C. had asked him to come over to have sex with her only a day earlier; numerous people saw the two together during the time that S.C. asserted she was being

held against her will and none of them perceived anything suspicious; and S.C.'s brother testified that S.C.'s reputation for honesty was not good in the community. The sexual intercourse without consent conviction entirely hinged on the jury finding the element of consent and required the State to establish S.C.'s credibility with the jury. The evidence against Quiroz was not so overwhelming that there was no reasonable probability the outcome would have been different without Dr. Vanino's credibility-boosting statistical testimony.

¶30 The State points to evidence it claims eliminates the reasonable probability that the result of the proceeding would be different on any of the charges for which Quiroz was convicted had defense counsel objected to Dr. Vanino's statistical testimony: (1) S.C.'s text messages to O'Malley and 911, as well as her dramatic exit from the house with her eldest child when Officer Benz arrived, which the State argues corroborate S.C.'s testimony that she was being held against her will and feared for her safety and the safety of the other people in her home; (2) S.C.'s numerous physical injuries including the marks on her leg consistent with the belt pattern she claimed Quiroz used to strike her and injuries to her face consistent with her claim that Quiroz hit her in the face at his mother's house; and (3) Quiroz's admissions that he had "tried to hurt" S.C. and that he and S.C. had sexual intercourse that night. But none of the State's evidence directly corroborates S.C.'s allegation as to the sexual intercourse without consent charge. The physical evidence of abuse and Quiroz's admission to wanting to hurt S.C. certainly provide evidentiary value as to the PFMA and assault counts. The text messages S.C. sent that night lend credence

to the kidnapping count, but they do not directly support her allegations of sexual intercourse without consent and, more to the point, are also dependent on S.C.'s credibility.

¶31 Contrary to Quiroz's unsurprising admission to having had sexual intercourse with S.C. that night, Dr. Vanino's statistical testimony was highly persuasive as it was "science-backed" and of qualitatively high value. *See Harris*, 247 Mont. at 409, 808 P.2d at 455; *State v. Gieser*, 2011 MT 2, ¶¶ 15-16, 359 Mont. 95, 248 P.3d 300 (finding that inadmissible standardized field sobriety and breathalyzer test results had a unique "appearance of precision and scientific reliability that is qualitatively different from the more subjective observations of an officer testifying in a DUI conviction"). Dr. Vanino's testimony implied there was a higher than 93 to 98 percent chance that S.C. was telling the truth that Quiroz forced her to have sex with him. In a case that primarily "turns on which party the jury believes, such numbers are impossible to ignore." *Grimshaw*, ¶ 32.

¶32 Quiroz argues that his counsel's failure to object to the inadmissible statistical probability regarding false reports of sexual assault, necessarily prejudiced his defense as to all three challenged convictions. Quiroz argues that, unlike the two acts for which he was acquitted, the sexual intercourse without consent charge was "inextricably linked" with the assault with a weapon (knife) and aggravated kidnapping charges. Quiroz argues the fact that he allegedly threatened to stab S.C. to death if she did not obey him was the basis for all three charges, and if defense counsel's deficient performance created a reasonable probability of a different verdict on the sexual intercourse without consent charge, then it created an equally reasonable probability of a different verdict on the

aggravated kidnapping and assault with a weapon (knife) charges. The State counters that the jury's verdict, which declared Quiroz innocent of two charges but guilty of five others, demonstrates that the jury considered the evidence particular to each charge, rather than jumping to the conclusion that S.C.'s story must be true because false rape allegations are statistically rare.

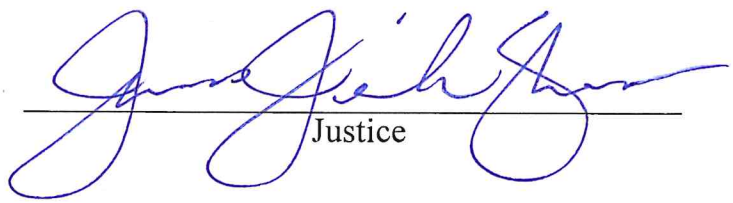
¶33 In a criminal trial, the jury must find the existence of every fact necessary to constitute the crime charged beyond a reasonable doubt. *State v. Stewart*, 175 Mont. 286, 299, 573 P.2d 1138, 1145 (1977) (citing *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073 (1970)). Witness credibility is solely within the province of the jury, and a jury is free to believe "all, a part of, or none of the testimony of any witness." *State v. Kelley*, 2005 MT 200, ¶ 22, 328 Mont. 187, 119 P.3d 67; *see also Brodniak*, 221 Mont. at 222, 718 P.2d at 329. When evidence conflicts, the jury decides which version of events will prevail. *Kelley*, ¶ 22 (citing *State v. Bailey*, 2003 MT 150, ¶ 13, 316 Mont. 211, 70 P.3d 1231).

¶34 Aside from the PFMA and possession charges that Quiroz concedes, the remaining charges largely relied upon S.C.'s testimony. The jury's verdict indicates that it considered the evidence as it pertained to the elements of each charge individually and on its own merits and concluded the State met its burden as to some charges, but not others. Contrary to Quiroz's argument, his aggravated kidnapping and assault with a knife convictions are no more "inextricably linked" to his sexual intercourse without consent conviction than they are to his acquittals for strangulation and assault with a hammer. The elements of each charged offense presented independent questions of fact for the jury.

¶35 Dr. Vanino's testimony was very specific as to the statistical veracity of sexual assault and rape allegations. Dr. Vanino did not testify as to the statistical veracity of kidnapping and assault allegations. While Dr. Vanino's testimony may have improperly bolstered S.C.'s testimony regarding the element of consent as to the sexual intercourse without consent charge, it had no bearing as to her testimony regarding the kidnapping and assault with a knife charges. Clearly, the jury did not find that Dr. Vanino's testimony bolstered S.C.'s credibility as to the strangulation and assault with a hammer charges, at least to the extent that it could find Quiroz guilty of those counts. Quiroz offers no basis by which we can conclude that Dr. Vanino's testimony swayed the jury enough to convict Quiroz for some, but not all, of the remaining offenses.

## CONCLUSION

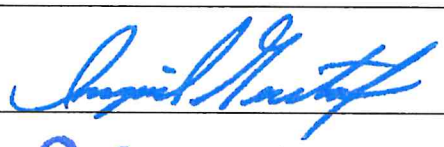
¶36 Because there is a reasonable probability that inadmissible statistical evidence swayed the jury to convict Quiroz of the offense of sexual intercourse without consent, defense counsel's deficient performance sufficiently undermines our confidence in the outcome of the proceedings as it pertains to Quiroz's conviction for sexual intercourse without consent. Accordingly, Quiroz's conviction for sexual intercourse without consent is reversed and remanded to the District Court for a new trial. We find no basis to overturn Quiroz's convictions for aggravated kidnapping and assault with a weapon (knife). Quiroz's convictions as to the remaining counts are affirmed.



Justice

We Concur:

Chief Justice



Justices

Justice Beth Baker, concurring in part, and dissenting in part.

¶37 I would affirm Quiroz's convictions on all counts because he has not met his burden to show prejudice from trial counsel's failure to object to Vanino's testimony about the statistical likelihood of false reports.

¶38 The Court acknowledges the heavier burden a defendant bears when alleging that IAC denied him a fair trial. Opinion, ¶ 28. "A defendant must do more than just show that the alleged errors of a trial counsel had some conceivable effect on the outcome of the proceeding." *State v. Dineen*, 2020 MT 193, ¶ 25, 400 Mont. 461, 469 P.3d 122 (quoting *State v. Peart*, 2012 MT 274, ¶ 23, 367 Mont. 153, 290 P.3d 706). He must prove a "reasonable probability" that, but for the failure to object, the result of the trial would have been different. Opinion, ¶ 23.

¶39 The Court does not dispute the overwhelming evidence of Quiroz's guilt on aggravated kidnapping and assault with a weapon (knife). Quiroz concedes the PFMA conviction because of the independent physical evidence of the injury he caused S.C. This undisputed evidence showed marks on her leg—including a red mark on S.C.'s left thigh, the red welt in a belt pattern on her leg, and small red dots on her left shin—and swelling, redness, and bruising on her face. The documented injuries corroborated S.C.'s testimony that Quiroz hit her with a belt, poked her in the leg with a knife, and hit her in the face at her mother's house. The State presented compelling additional corroborating evidence of S.C.'s account of events, including her desperate text messages to Dan O'Malley and 911, adamant that they not respond to the text for fear Quiroz would see it; S.C.'s immediate flight from the house upon Officer Benz's arrival and her obvious distraught, frightened

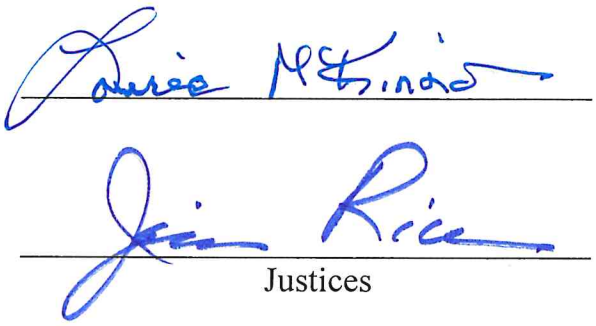
demeanor; the pocket knife found in Quiroz's pants pocket and woven belt found on the bathroom floor; Sammi's text message expressing concern when she had not heard from S.C.; and Quiroz's written admission to S.C. that he "got out of hand" and "was trying to hurt [her]" after being hurt by the text messages on her phone.

¶40 Other than Quiroz's heightened burden of proof, the case bears resemblance to *Brodniak*. Disputing the victim's version of events, Brodniak, like Quiroz, claimed that the parties had consensual sex, but he too acknowledged that he had become violent with her. After finding "clearly" improper the expert testimony on "malingering and the statistical percentage of false accusations," the Court concluded upon review of the record that the error was harmless. "[T]he physical evidence against Brodniak and his own admissions that he resorted to violence were so overwhelming that admission of the [improper] testimony did not affect his substantial rights." *Brodniak*, 221 Mont. at 223, 718 P.2d at 329.

¶41 The same is true here. To think a jury would have found that S.C., after enduring more than twelve hours of forced confinement at Quiroz's hands, during which time he held a knife to her throat, slapped her hard across the face, hit her with a belt, and threatened to kill her or her children, suddenly decided that she wanted to have sex with him is not only not "reasonably probable," it is incomprehensible. Quiroz cannot meet *Strickland*'s heavy burden to demonstrate prejudice from counsel's deficient performance, and his conviction for sexual intercourse without consent should stand.

Justice

Justice Jim Rice and Justice Laurie McKinnon join in the Concurrence and Dissent of Justice Baker.



Justices