APPENDIX A

DA 18-0046

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 93N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DANNY LEE WARNER, JR.,

Defendant and Appellant.

APPEAL FROM: District Court of the Eleventh Judicial District,
In and For the County of Flathead, Cause No. DC 16-542B
Honorable Robert B Allison, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Koan Mercer, Assistant Appellate Defender, Helena, Montana

For Appellee:

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

Travis R. Ahner, Flathead County Attorney, Kalispell, Montana

Submitted on Briefs: November 13, 2019

Decided: April 21, 2020

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 On October 12, 2017, Warner, representing himself with standby counsel, was found guilty by a jury of robbery and use of a weapon during the commission of the robbery. The District Court designated Warner a persistent felony offender, imposed a 50-year sentence, and made Warner ineligible for parole for 35 years. Warner appeals; we affirm.

¶3 On November 23, 2016, around 9 p.m., Jordan Miller (Miller), an employee at the 406 Bar and Grill (406) in downtown Kalispell, took a work-break and walked to the Eagles Bar to buy Camel Blue cigarettes. As he was walking back to the 406, he passed a stranger, later identified as Warner, in the parking lot. The two nodded and said hello. Miller walked to the back entrance of 406, where his co-worker, Dustin McGibony (McGibony), was sitting on a retaining wall. Warner proceeded towards Miller and came within a few feet, enabling Miller to see his face under the light. Warner pulled out a handgun, held it to Miller's chest, and told him he wanted Miller's car keys. Miller responded he did not have car keys, but offered what he had in his pockets, including tip money of $120, the Camel Blue cigarettes, and a lighter. Warner did not believe Miller about the keys and told him not to lie because he was desperate.

¶4 Warner next moved to McGibony, who, thinking Miller and Warner were friends, was not paying attention to the encounter. Warner held the gun to the back of McGibony's head. Miller told McGibony to turn around. McGibony could see the shadow of the gun on the wall. McGibony turned to look at Warner, who was standing directly in front of him. McGibony, who did not know Warner, told Warner he had car keys, but that his vehicle was not in the lot. Warner repeated that he was desperate. McGibony replied, "I can see that you're desperate, you're holding a gun to my face." Warner briefly took McGibony's keys but gave them back and left. Miller and McGibony rushed inside 406 and told their manager, Brian Scotti-Belli (Scotti-Belli), to call 911 because they had just been robbed at gunpoint.

¶5 Scotti-Belli called 911 and relayed everything Miller described to him about the robbery and Warner. Miller's description included the robber wearing a dark-colored, bigger coat; a hat of some kind; and glasses. While Scotti-Belli was on the 911 call, Miller, McGibony, and Scotti-Belli saw through the window a man walk along the front of the 406 building, which had exterior lighting, towards the VFW bar. Miller informed Scotti-Belli, the man walking by was the robber.

¶6 Law enforcement arrived at the 406 and interviewed Miller, McGibony and Scotti-Belli. Miller described Warner to police as being close to his height of six feet, two inches and wearing glasses, a dark beanie, and a coat that was almost army green. McGibony told police Warner was wearing a big, green coat; perhaps a beanie; and small glasses. McGibony had difficulty estimating Warner's height because they had been

standing at different levels. McGibony described the gun as a Glock-style smaller handgun that he thought was black.

¶7 While law enforcement was investigating the robbery, Chuck Barlow, the manager of a rooming house near the scene of the robbery, observed an intruder on his security camera. Barlow called the police. When police responded, they told Barlow about the nearby robbery and provided a general description of the suspect. Barlow thought this fit the description of the intruder and printed off a small photo of the intruder from the security system.

¶8 Meanwhile, Miller and Scotti-Belli walked to the VFW thinking they might find Warner inside. Scotti-Belli also wanted to let the VFW staff know about the robbery. Miller walked through the bar but did not see Warner. However, after Miller stepped outside to make a phone call, Warner came out of the VFW and walked right by him. The two made eye contact, and Miller immediately called 911. Warner was no longer wearing the beanie but Miller immediately recognized his face.

¶9 After making the 911 call, Miller went inside to tell Scotti-Belli he had just seen the robber. The two men waited outside for the police. An officer returned to the VFW to show Miller the photograph Barlow provided. He explained to Miller where he had gotten the photograph and asked if the person in the photograph was the person who had robbed him. Miller responded yes.

¶10 Police arrived at the VFW and detained Warner who was sitting at the bar. Police searched Warner and seized cash in excess of $120, Camel Blue cigarettes, a lighter, and

a .9mm Springfield handgun. Miller identified Warner, the gun, the cigarettes, and the lighter.

¶11 McGibony did not view a photo lineup or participate in any other pretrial identification procedure of Warner. However, at trial, McGibony identified Warner as the robber. McGibony also identified the gun as similar to the gun used in the robbery. Apparently, prior to trial, McGibony at some point searched for Warner on the internet to ascertain whether he remained incarcerated and saw a picture of him.

¶12 On February 1, 2017, Warner moved the District Court to order a psychological examination pursuant to § 46-14-202, MCA. Warner filed another motion for a psychiatric examination on March 2, 2017. The District Court granted Warner's motion at a hearing held April 19, 2017. Noting § 46-14-202(4)(ii), MCA, requires the Defendant bear the cost of a psychiatric evaluation unless he is represented by the Office of the Public Defender (OPD), the District Court asked Warner whether he was able to bear the cost of appointing Dr. Phillip Rivers for an examination. Warner replied, "I don't have enough money, Your Honor." The District Court informed Warner, "[i]f you want that kind of evaluation we can send you to the State hospital, you would be there for several months and your trial would be bumped into October." Nick Aemisegger, a public defender, informed the District Court, "that's consistent with the policy of our office, that once a client waives representation we're no longer obligated nor do we have the authority to pay for any expenses at [Warner's] direction." Mr. Aemisegger indicated Dr. Rivers is an approved provider of mental health examinations for OPD. Regarding an independent examination by Dr. Rivers, the

District Court asked Mr. Aemisegger, "in a hypothetical case . . . what sort of time scale are we looking at?" Mr. Aemisegger replied: "usually a month to two months before he could conduct the evaluation, and then a couple weeks after that in order to get it." The District Court addressed Warner, stating "if your motion stands for a psychiatric examination I will grant it, but I will have you sent to the State Hospital at Warm Springs for that examination." Warner responded essentially characterizing the District Court's ruling as putting him in the position of either waiving an affirmative defense or agreeing to delay his case. Warner stated, "I'm willing to withdraw the motion, but with noted objection that I feel that I should be appointed an independent psychological examination." The District Court ultimately ordered Warner committed to Warm Springs for an evaluation.

¶13 A friend of Warner's, Caitlin Hamilton, testified at trial, that on November 23, 2016, Warner owned a vehicle. Hamilton testified that Warner had shown her the bill of sale, title, and registration for the vehicle. Hamilton testified that, following the arrest, she retrieved the vehicle from the parking lot of the VFW. Warner also called Dr. Bowen Smelko as an expert on eyewitness identification. Dr. Smelko testified extensively about memory processes and eyewitness identification.

¶14 On October 12, 2017, Warner, representing himself with standby counsel, was found guilty by a jury of robbery and using a handgun during the commission of the robbery. At the sentencing hearing, Warner stated he did not have any additions or corrections to the Presentence Investigation (PSI). Warner asked that his neuropsychological evaluation from an earlier federal charge in 2012 be attached to the

PSI. In response, the State asked that the more recent evaluation done by MSH also be attached to the PSI. Warner did not object to the State's request and the District Court agreed to attach both evaluations.

¶15 Warner first contends the District Court's "summary denial" of his speedy trial motions requires remand for further proceedings and an evidentiary hearing. On April 5, 2017, Warner filed a motion to dismiss for speedy trial violations, then renewed his speedy trial motion on September 29, 2017, just prior to his October 2017 trial. Warner's renewed motion intermingles arguments alleging ineffective assistance of counsel, discovery violations, oppressive incarceration, involuntary commitment, with alleged speedy trial violations–many of which were made in his first motion to dismiss.

¶16 We review a district court's speedy trial order to determine whether its findings of fact are clearly erroneous and we review a district court's conclusions of law de novo for correctness. *State v. Ariegwe*, 2007 MT 204, ¶ 119, 338 Mont. 442, 167 P.3d 815. The minimum delay necessary to trigger a speedy trial analysis is 200 days. *Ariegwe*, ¶ 41. The District Court found it "granted leave to file Information on November 25, 2017 and the trial was set for May 30, 2017, thus the gap in time between the trial date and the Information was 186 days." The record indicates, however, that Warner's trial date had been reset to October 10, 2017, which resulted in a delay of 321 days. The State concedes the length of delay as 321 days but maintains that under the facts of this case a hearing to consider speedy trial factors is unnecessary. We agree.

¶17 Although the District Court erroneously found the 200-day threshold had not been triggered, it made certain findings in its "Rationale" in support of its denial of Warner's motion to dismiss. Importantly, the District Court held:

> Upon the Defendant's inability to pay for a mental health evaluation in Flathead County, the Defendant was sent to the Montana State Hospital for evaluation following a pretrial hearing held April 19, 2017, and that was the reason his trial was delayed. Said evaluation was conducted at the request of Defendant and any delay that resulted should be attributable to him.

The record clearly demonstrates Warner, while representing himself, twice moved for a psychiatric examination and that the additional 135 days were directly attributable to Warner under *Ariegwe*. Undisputedly, the trial was delayed because Warner requested and received a mental health evaluation. While the District Court did not enter findings of fact and conclusions of law specifically addressing the *Ariegwe* factors, we are nonetheless able to assess Warner's speedy trial claim and conclude Warner's speedy trial right was not violated. Although the District Court erred in its calculation of days of delay and did not address all of the *Ariegwe* factors, "we will affirm the district court when it reaches the right result for the wrong reason." *State v. Betterman*, 2015 MT 39, ¶ 11, 378 Mont. 182, 342 P.3d 971. The District Court did not err in denying Warner's motion to dismiss for lack of speedy trial.

¶18 Warner's next claim is that the District Court erred in allowing McGibony's in-court identification. This Court treats a motion to exclude eyewitness identification as a motion to suppress and reviews the ruling to determine whether the district court's findings are clearly erroneous and the findings are correctly applied as a matter of law. *City of Billings v. Nolan*, 2016 MT 266, ¶ 15, 385 Mont. 190, 383 P.3d 219. We apply a

two-part test to determine whether evidence of an identification is admissible. *Nolan*, ¶ 19. We first determine whether the identification procedure was impermissibly suggestive. If it was, we then determine, based on the totality of the circumstances, whether the suggestive procedure created a substantial likelihood of irreparable misidentification. *State v. Lally*, 2008 MT 452, 348 Mont. 59, 199 P.3d 818.

¶19 Respecting the first prong, Warner asserts that in the absence of any pretrial identification process, McGibony's in-court identification of Warner amounted to an impermissibly suggestive "show-up" procedure under *Nolan*. A procedure is unnecessarily suggestive if a positive identification is likely to result from factors other than the witness's own recollection of the crime. *Nolan*, ¶ 20. Here, Warner was seated at counsel table and McGibony was asked, "can you identify in court the person who robbed you that night?" McGibony said yes and identified Warner. Warner is correct that, as in *Nolan*, the absence of a pretrial identification made McGibony's identification of Warner a "show-up" or "one-to-one" identification. However, other than being seated next to defense counsel, Warner cannot point to any other circumstance that would support his contention that the in-court identification was impermissibly suggestive. Here, there were sufficient factual circumstances to indicate the positive identification was likely the result of factors related to McGibony's recollection of the crime. McGibony had a face-to-face encounter with Warner when Warner pointed a gun at McGibony's head. Warner, while continuing to face McGibony, demanded McGibony's car keys. McGibony replied he had the keys, but his vehicle was not in the lot. Warner repeated that he was desperate and McGibony exclaimed: "I can see that you're

desperate, you're holding a gun to my face." Warner next took McGibony's keys. Given Warner's threats, his use of a gun, and his close proximity to McGibony, we conclude McGibony's in-court identification was a result of his recollection of the crime and not any unnecessarily suggestive procedure at trial.[1] Accordingly, as we find that McGibony's in-court identification was not impermissibly suggestive, we do not reach the second prong of the test—whether there was a substantial likelihood of irreparable misidentification. *Lally*, ¶ 15.

¶20 Warner next contends the District Court erred in refusing specific eyewitness identification instructions. Warner acknowledges this Court has held a trial court's refusal to give an eyewitness instruction similar to the one offered by Warner was not an abuse of discretion. *State v. Zlahn*, 2014 MT 224, ¶ 25, 376 Mont. 245, 332 P.3d 247. Warner urges us to overrule *Zlahn* stating, "the general witness instruction, focused on witness candor, does not adequately warn jurors of the risks of honest, but inaccurate identifications." This Court reviews a district court's decision that a requested jury instruction was not warranted for an abuse of discretion. *Peterson v. St. Paul Fire & Marine Ins. Co.*, 2010 MT 187, ¶ 45, 357 Mont. 293, 239 P.3d 904. A district court has broad discretion when it instructs a jury and reversible error occurs only where the instructions prejudicially affect the defendant's substantial rights. *Zlahn*, ¶ 14. There is no requirement that a jury be instructed specifically on eyewitness identifications in Montana. *Zlahn*, ¶ 23. Here, the jury instructions properly instructed the jury on

[1] McGibony's search of Warner on the internet prior to trial does not make his in-court identification of Warner impermissibly suggestive, particularly given that McGibony was examined by Warner during trial on this very issue.

witness credibility. As in *Zlahn*, the instructions given by the District Court "taken as a whole fully and fairly instructed the jury on the applicable law." *Zlahn*, ¶ 10. Further, Warner presented Dr. Smelko as an eyewitness identification expert. Dr. Smelko testified at length about inaccurate identifications and Warner emphasized Dr. Smelko's testimony during closing argument. We conclude the District Court did not abuse its discretion in denying Warner's proposed jury instruction.

¶21 Warner argues that the Montana State Hospital (MSH), psychiatric evaluation was a privileged communication and its disclosure by MSH, and use by the District Court at sentencing, was unauthorized. Warner contends a new sentencing is necessary before a different judge. We will not address whether dissemination of a defendant's mental health evaluation to the court and prosecution violated his constitutional rights where the defendant or his attorney did not object before or during trial. *See State v. Bartlett*, 282 Mont. 114, 127, 935 P.2d 1114, 1122 (1997). Here, Warner not only failed to contemporaneously object to the use of the evaluation conducted by MSH, but Warner raised the issue of his mental health as a mitigating factor at sentencing. Warner also requested a neuropsychological evaluation prepared in his 2012 federal criminal case be attached to the PSI and self-reported his mental health condition to the PSI author. We will not hold a district court in error for an action in which the appealing party acquiesced or participated. *State v. Gray*, 2004 MT 347, ¶ 20, 324 Mont. 334, 102 P.3d 1255. Warner failed to object and further acquiesced in the District Court's use of the MSH psychological evaluation. We therefore decline to address this issue.

¶22 Warner asserts he was entitled to an evidentiary hearing on his motion for new trial based upon his allegation that prosecutors listened to his privileged phone calls. This Court generally reviews a district court's decision to grant or deny a motion for new trial for an abuse of discretion. However, to the extent that a district court makes findings of fact while deciding a motion for new trial, those findings must be made by a preponderance of the evidence and will be reviewed for clear error. *State v. Morse*, 2015 MT 51, ¶ 18, 378 Mont. 249, 343 P.3d 1196. Specifically, Warner alleges he "obtained and presented documentation that before and during trial, prosecutors accessed and downloaded recordings of Mr. Warner's privileged strategy calls to his defense investigator." The State responds that, as an officer of the court, the prosecutor denied listening to the phone calls in question, reported that the nature of the recording system makes it impossible to listen to privileged phone calls, and offered a detailed explanation of how the recording system works.

¶23 In ruling on Warner's motion for new trial, the District Court held:

> [t]he State may have temporarily downloaded calls but could not have listened to them if they [were] made to an attorney or investigator. Searching Defendant's calls for non-confidential conversations does not constitute prosecutorial misconduct. The temporary download of calls to which the State could not listen did not deprive the Defendant of a fair and impartial trial.

¶24 We conclude the District Court's findings of fact are not clearly erroneous and were substantiated by the record established by both parties. The District Court did not abuse its discretion in denying Warner's motion for new trial.

¶25 Respecting the refusal by the District Court to allow a limited waiver of the attorney-client privilege, Warner unequivocally stated he would not waive his privilege and sought advice from the District Court about how to call his attorney as a witness without doing so. The record demonstrates Warner declared he had no intention of waiving his attorney-client privilege, stating "[n]o, your Honor, I'm not—I'm not willing to waive it." Further, Warner's attorney indicated: "I was told by this client, related to this subject, that under no circumstances was I to disclose information related to this." On this record, the District Court did not err in denying Warner's request for a limited waiver.

¶26 Warner argues that the District Court abused its discretion by refusing to send his audio exhibits to the jury room together with a method for playing them. In particular, Warner wanted the jury to hear the initial radio description of himself. However, the District Court properly refused Warner's request to send the audio descriptions of Warner to the jury room because to do so would risk emphasizing the audio information over other testimony. For the first time on appeal, Warner argues the prosecutor committed misconduct during his closing argument by commenting on his silence when he was arrested and by exceeding on rebuttal the scope of issues Warner addressed in his closing. Warner suggests that the Court can address this claim through plain error review, though he does not cite the standard for plain error or do any analysis of plain error. "[A] mere assertion that constitutional rights are implicated or that failure to review the claimed error may result in a manifest miscarriage of justice is insufficient to implicate the plain error doctrine." *State v. Gunderson*, 2010 MT 166, ¶ 100, 357 Mont. 142, 237 P.3d 74.

Here, due to lack of analysis, plain error review is inappropriate. Having found that there was no error committed during Warner's trial, we decline to address Warner's argument that there was cumulative error.

¶27 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.

¶28 Affirmed.

/S/ LAURIE McKINNON

We concur:

/S/ DIRK M. SANDEFUR
/S/ JAMES JEREMIAH SHEA
/S/ BETH BAKER
/S/ INGRID GUSTAFSON

APPENDIX B

RBA

CLERK OF DISTRICT COURT

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FILED

BY _____ DEPUTY

Robert B. Allison, District Judge
Department No. 2
Flathead County Justice Center
920 South Main Street, Suite 310
Kalispell, Montana 59901
Telephone: (406) 758-5906

MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY

STATE OF MONTANA, Plaintiff, vs. DANNY WARNER, JR., Defendant.	Cause No. DC-16-542B ORDER AND RATIONALE ON POST-TRIAL MOTIONS

This matter is before the Court on Defendant's objection to motion for dismissal of Count II and motion for new trial; Defendant's motion for court reporter costs; Defendant's motion for mistrial and dismissal; Defendant's motion for judgment as a matter of law or new trial; Defendant's motion for new trial; Defendant's motion for subpoena duces tecum and Defendant's objection to Court's abuse of discretion in violating sixth amendment.

ORDER

IT IS HEREBY ORDERED that the Defendant's motion for court reporter fees for a transcript for his motion for new trial is DENIED.

IT IS FURTHER ORDERED that the Court reserves ruling on the Defendant's motion for court reporter costs subject to Defendant's right to file an appeal.

IT IS FURTHER ORDERED that Defendant's objection to motion for dismissal of Count II and motion for new trial is DENIED.

IT IS FURTHER ORDERED that 1) Defendant's motion for mistrial and dismissal; 2) Defendant's motion for judgment as a matter of law or new trial; and 3) Defendant's motion for new trial are DENIED.

IT IS FURTHER ORDERED that Defendant's motion for subpoena duces tecum is DENIED.

IT IS FURTHER ORDERED that Defendant's objection to Court's abuse of discretion in violating sixth amendment is DENIED.

Defendant was convicted of robbery, a felony, on October 13, 2017. Defendant has filed several post-trial motions. After the conviction, the State moved to dismiss Count II, felony tampering with a witness. The Court granted the motion.

Defendant moves for court reporter fees for the trial transcript, attorney conference, side bars, voir dire and the verdict. Defendant wants the transcript for his motion for new trial. The Defendant waited until November 6, 2017 to request "expedited service" to produce the transcript. The request comes too late, there is insufficient time for all that Defendant seeks to be transcribed prior to sentencing. The Court is not going to delay sentencing to wait for a trial transcript to be produced. The Court will reserve ruling on court reporter fees for a transcript pending Defendant's right to file an appeal

Defendant, in a strange twist, objects to the dismissal of Count II, felony tampering with a witness. Defendant asserts that the motion to dismiss Count II is part of a pattern of prosecutorial misconduct. Defendant asserts that, if allowed to dismiss the claim for witness tampering, the State will be admitting that the Defendant was not guilty of the claim and did not make an admission regarding the robbery. Defendant argues that the Court erred when it allowed the State to question one of the victims about the phone call made to him by Defendant at trial. Defendant contends that the Court failed to conduct a hearing pursuant to Section 46-13-301, MCA on his motion to suppress evidence of the phone call to one of the victims. Defendant argues that if Count II is dropped he should be granted a new trial pursuant to Section 25-11-102, MCA and Rule 59, M.R.Civ.P.

The State's decision to move for dismissal of Count II, felony tampering of a witness, is not a concession on the part of the State that it could not prove the charge at trial or that Defendant did not make an admission. Defendant does not explain how the State moving for dismissal of Count II qualifies as prosecutorial misconduct. Prosecutors have broad discretion to determine what to charge and what charges to pursue. In Montana, a county attorney "not only directs under what conditions a criminal action [is] commenced, but from the time it begins until it ends his supervision and control is complete, limited only by such restrictions as the law imposes." *Halladay v. State Bank of Fairfield, 66 Mont. 111, 118, 212 P. 861, 863 (1923).* The Court properly granted the State's motion to dismiss Count II. "The district court may not interfere in the prosecutorial functions of the Attorney General and the county attorney -- the executive branch -- without violating the separation of powers embodied in Article III, Section 1 of the Constitution of the State of Montana. To hold otherwise would erode that fundamental constitutional mandate." *State ex rel. Fletcher v. District Court of the Nineteenth Judicial District* 260 Mont. 410, 414-415, 859 P.2d 992 (1993). As the Montana Supreme Court stated in dismissing Defendant's petition for supervisory control: "[t]urning to Warner's second request, we are unable to discern from his argument how a dismissal of an offense in the criminal proceeding violates his substantial rights."

The Court determined that Defendant's motion to suppress pursuant to Section 46-13-301, MCA, regarding the phone call Defendant made to Jordan Miller was properly addressed as a motion *in limine*. The issue was whether the evidence was admissible. Section 46-13-301, MCA provides that a Defendant may move to suppress as evidence any confession or admission given by the Defendant on the grounds that it was involuntary. Defendant is not arguing that his phone call to the victim to discuss the robbery was involuntary, he asserts he made no such call. The Court properly determined that the evidence was both relevant and admissible pursuant to *State v. Rodarte*, 2002 MT 317, P 21, 313 Mont. 131, 60 P.3d 983. Defendant has presented no basis for a new trial. The Court notes that neither Section 25-11-102, MCA, nor Rule 59, M.R.Civ.P., which govern civil actions, apply to criminal actions.

Defendant has filed three motions which include allegations of prosecutorial misconduct: 1) Defendant's motion for mistrial and dismissal; 2) Defendant's motion for judgment as a matter of law or new trial; and 3) Defendant's motion for new trial. Defendant moves for mistrial and dismissal on the grounds of newly discovered evidence of "flagrant and egregious prosecutorial misconduct during trial that renders his trial and the subsequent verdict void for violating the fifth and sixth amendment to the U.S. Constitution as well as Article II, Sections 17 and 24 of the Montana Constitutions." The Court notes that Defendant's motion for judgment as a matter of law is 37 pages long and exceeds the local rule limiting briefs to 25 pages. Despite this, the Court has reviewed and considered the motion. Many of the grounds for new trial offered in the several motions refer to pretrial matters that have previously been ruled on by the Court such as discovery, speedy trial, improperly suggestive identification and evidentiary issues covered by motions *in limine*. The Court will not revisit any such issues.

Defendant cites statutes and rules of civil procedure which, as the Court has indicated, do not apply to criminal actions. Mistrial is not a remedy at this stage in the proceedings, the trial has concluded. Motions for new trials in criminal cases are governed by Section 46-16-702, MCA, which provides for a new trial if required in the interests of justice.

Defendant, who is incarcerated and representing himself alleges that the State accessed, downloaded and listened to private privileged phone calls between him and his investigator, Joe Schussler and Bridgitt Erickson, Defendant's disability rights attorney. The State responds to these allegations by providing an explanation of the recorded jail call process. The State represents that it has not listened to any jail call between Defendant and his attorneys or investigators, that, in fact, this is not even possible. The recorded jail call program lists call recipients by phone number and not by name. A user, such as the prosecutors, in seeking non-confidential calls clicks on the recipient number and the recorded jail call program temporarily downloads the call to the user's computer. Every call contains an automated message prompting the inmate to enter account and call information and advising the inmate that the call is subject to recording and monitoring. A call connected to a non-confidential number will permit the user to listen, however, a call to a private number such as an attorney or investigator will cease when the call connects prior to the beginning of conversation. Counsel for the State has clicked on and temporarily downloaded a number of calls made by the Defendant. Since the recipient of the call is identified only by phone number and not name, the State does not know initially if the call is to someone with whom the inmate has a confidential relationship. The restraints of the

program, however, prevent the State from having access to conversations between the Defendant and his attorneys or investigators.

The Defendant has provided an addendum to his motion for new trial to present the affidavit of his disability attorney Bridgitt Erickson who testifies to an attorney client relationship with Defendant and opines that it is unethical conduct for an attorney and illegal conduct for a government agent to access privileged attorney-client communications. Defendant asserts that the State has listened to at least three private privileged conversations between Defendant and Erickson. As discussed above, the State may have temporarily downloaded calls but could not have listened to them if they made to an attorney or investigator. Searching Defendant's calls for non-confidential conversations does not constitute prosecutorial misconduct. The temporary download of calls to which the State could not listen did not deprive Defendant of a fair and impartial trial.

Defendant claims that because the State listened to a 10-minute phone call between Defendant and his investigator, the State was able to prepare for defense witness Kaitlyn Hamilton's testimony before Defendant even placed her on the witness list. Defendant also argues that the Court should not have allowed the State to enter the recording of the conversation between Defendant and Hamilton into evidence because the call was not disclosed or provided to Defendant. The State could not have listened to the 10-minute conversation between Defendant and his investigator. Defendant did name Kaitlyn Hamilton as a witness on October 5, 2017 and the State had a right to prepare to cross-examine her. The State was not obligated to disclose to Defendant the phone call Hamilton had with Defendant as it was used as rebuttal evidence and to impeach Hamilton during cross-examination. The Court properly exercised its discretion in permitting introduction of the phone call into evidence. *State v. Weitzel*, 2000 MT 86, P 24, 299 Mont. 192, 998 P.2d 1154.

Defendant also asserts that the State's reference to Defendant's conduct at booking was unduly prejudicial and created an unfair trial. Defendant did not file a motion *in limine* regarding his conduct at booking and there is no transcript for the Court to review to see if Defendant objected during trial to mention of his conduct at booking. Further, Defendant elicited testimony regarding the fact that he was calm when he was arrested and that that was evidence that he did not commit the offense. His violent behavior at booking then became probative and relevant. Defendant also references the State eliciting "the fact that Mr. Warner insisted on his fifth amendment right at booking." There is no transcript for the Court to review to determine if error occurred. Defendant could have promptly requested specific portions of the trial transcript supporting his arguments be produced but he did not. Defendant has the remedy of appeal.

Defendant lists multiple rulings of the Court with which he disagrees and refers to "all the other acts of prosecutorial misconduct" without identifying specific acts. The Court is unsure of whether Defendant includes Court rulings in the category of prosecutorial misconduct. Court rulings are not prosecutorial. As the Court indicated above it will not revisit pretrial rulings.

Defendant argues that there was a lack of legally sufficient basis for the guilty verdict and requests that the Court enter a not guilty judgment. Defendant argues that the case was riddled with prior inconsistent statements, perjury and false testimony, irrelevant and prejudicial evidence and Court error and abuse of discretion. Motions to dismiss, or as Defendant has requested to enter a verdict of not guilty, should be granted by the District Court only when there is no evidence upon which a trier of fact could base a verdict. That is not the case here. The State presented, among other evidence, the eyewitness testimony of the two victims and corroborating physical evidence. Defendant asserts that their testimony was false and no juror could have concluded beyond a reasonable doubt that he was guilty. The Montana Supreme Court has addressed a similar scenario in the *State v. Weitzal* case:

> Weitzel, while acknowledging that witness credibility and weight of the evidence is the province of the jury, contends that there was insufficient evidence to convict him of felony assault because the testimony of all of the State's witnesses, with the exception of the police, was lacking in credibility. Weitzel points to "numerous inconsistencies" in the stories of the State's witnesses, such as the contradictory "time-line" put forward by those witnesses as to the events of March 12, and asserts that these conflicts in the testimony render the underlying felony assault conviction invalid. However, Weitzel's contentions are unavailing and need not be repeated in detail here. "'It is within the province of the finder of fact to weigh the evidence presented and determine the credibility of the witnesses; in the event of conflicting evidence on factual issues, the trier of fact determines which will prevail.' " *State v. Johnson*, 1998 MT 289, P41, 291 Mont. 501, P41, 969 P.2d 925, P41, 55 Mont. St. Rep. 1186 (quoting *State v. Sattler*, 1998 MT 57, P55, 288 Mont. 79, P55, 956 P.2d 54, P55, 55 Mont. St. Rep. 230).

State v. Weitzel, 2000 MT 86, P 20, 299 Mont. 192, 998 P.2d 1154.

Defendant has no proof that false or perjured evidence was presented to the jury. Defendant has no proof that the State suppressed evidence. Defendant cites 46-16-410 MCA but does not identify any improper jury instructions. Defendant asserts that the jury ignored certain instructions. The jury was properly instructed to consider the instructions given as a whole. Accumulated errors did not prejudice the Defendant's right to a fair trial. In applying the doctrine of cumulative error, the Montana Supreme Court has consistently refused to consider mere allegation of error, devoid of argument or authority supporting defendant's contentions. *State v. Enright* 2000 MT 372, P 34, 303 Mont. 457, 16 P.3d 366. Defendant points out 13 allegations of errors in his motion for judgment as a matter of law or new trial and argues that these errors taken as a whole constitute prejudicial error. Defendant's cumulative error argument presumes that these 13 items are error. There is no merit to Defendant's presumption. The Court, at one time or another, has dealt with all the allegations. Defendant was afforded all due process and received a fair and impartial trial.

Defendant moves the Court for a subpoena duces tecum for Jennifer Root seeking documents to offer in support of his motion for mistrial and new trial. The Court has already determined that the motions are without merit, and the motion for subpoena duce tecum is

denied. Defendant has filed a document entitled "Defendant's objection to Court's abuse of discretion in violating sixth amendment." Defendant objects to the Court rejecting his subpoena duces tecum. The subpoenas sought evidence of prosecutorial misconduct. Defendant contends he specifically reserved the right to present further evidence of prosecutorial misconduct in support of his motions for mistrial, new trial and judgment as a matter of law. The Court declined to issue the subpoenas to Jennifer Root on the basis that there were no pending charges against Defendant. Defendant supported his motion with Flathead County Jail Recording Access Log Reports regarding phone calls, so he has records. In addition, subpoenas duces tecum were issued to Jennifer Root on April 5, 2017 and August 31, 2017 for items including call logs, and "everything they have a record of." At this point Defendant is conducting a fishing expedition.

Defendant has filed a motion to challenge fees, costs and fines set forth in the pre-sentence investigation report. The motion is premature as Defendant has not yet been sentenced.

DATED this 16th day of November, 2017.

Robert B. Allison
District Judge

cc: Danny Warner
Travis R. Ahner
Sean Hinchey
11/16/17

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Robert B. Allison, District Judge
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Flathead County Justice Center
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IN THE DISTRICT COURT OF THE ELEVENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF FLATHEAD

* * * * * * * * * * *

STATE OF MONTANA,

Plaintiff,

vs.

DANNY LEE WARNER, JR.,

Defendant.

Cause No. DC-16-542B

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ON MOTION TO SUPPRESS

This matter is before the Court on Defendant's motion *in limine* to exclude identification testimony from Jordan Miller, Dustin McGibony and Brian Scotti-Belli dated August 3, 2017 which the Court determined was properly addressed as a motion to suppress. An evidentiary hearing on the motion was held by the Court on September 15, 2017. Defendant was present representing himself. Also present was Defendant's stand-by attorney Sean Hinchey. Travis Ahner appeared on behalf of the State. On the basis of the briefs, the testimony and exhibits from the hearing, the Court makes the following:

FINDINGS OF FACT

1. Defendant is charged with burglary, a felony.
2. On November 23, 2016 two men were robbed at gun point outside the 406 Bar and Grille, a bar, restaurant and casino located on 1st Ave. West in Kalispell, Montana (hereinafter referred to as "the restaurant").
3. At approximately 9:00 p.m. two employees of the restaurant, Jordan Miller and Dustin McGibony, stepped outside the back exit of the restaurant after the end of their shifts to smoke.
4. Miller first walked over to the Eagles to buy cigarettes. As he walked back to the restaurant he passed a man in the parking lot a couple of feet away and said "hi".
5. Miller then went to the back door of the restaurant to smoke. The man who was in the parking lot came up to him, pulled a gun out and held it to Miller 's chest. Miller and the suspect were eye to eye. He asked Miller for car keys. Miller told him he had

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no keys because he walked to work. The suspect took Miller's cash, cigarettes and lighter.

6. The suspect then held the gun to the back of McGibony's head. McGibony gave his car keys to the suspect but when the suspect was informed by McGibony that he had walked to work and his truck was located elsewhere, the suspect returned McGibony's keys and left.
7. Miller had not consumed any alcohol or drugs and was wearing his contacts.
8. Miller and McGibony went back into the restaurant and informed their employer, Brian Scotti-Belli, what had occurred.
9. Scotti-Belli and Miller observed, through windows in the lounge, the suspect travel toward the VFW, located a couple blocks south on 1st Ave. West.
10. Scotti-Belli called 911 to report the incident. While on the phone, Scotti-Belli relayed a description of the suspect that Miller and McGibony were telling him.
11. The male was described as white male, around 6 feet tall, square lensed glasses, wearing a dark beanie and a long, dark green colored coat, between 40 and 50 years old.
12. A couple Kalispell Police Department Officers, including Officer Jason Parce responded to the restaurant. Officer Parce took the statements of Miller, McGibony and Scott-Belli. Officer Parce separated and spoke with them independently.
13. McGibony left after speaking with the officers.
14. Officers then canvassed the area looking for the suspect.
15. Earlier in the evening, Chuck Barlow, the manager of My Guest House and Inn (hereinafter "the Inn"), formerly known as the Rose Briar Inn, a hotel located a block north of the restaurant on 1st Ave. West, had called 911 to report a trespasser.
16. Barlow heard that a robbery had taken place in the neighborhood and learned of the suspect's description. Barlow thought that the description of the robbery suspect matched the man who had trespassed at the Inn.
17. Barlow called 911 again to inform the police that his trespasser matched the description of the robbery suspect. He also informed the police that he could pull a still picture of the man from his surveillance system.
18. Officer Dennis Peterson went to the Inn and obtained the paper photocopy of the picture from Barlow. Barlow did not "decide" Defendant was the robber, nor was he told that the man in the picture was the robber. Barlow thought that the description of the robbery suspect matched the man who had earlier in the evening trespassed at the Inn. Barlow made this determination prior to Officer Peterson telling him that the suspect had robbed a casino, meaning the 406 Bar and Grille.
19. After speaking with the police, Miller and Scotti-Belli went to the VFW to have a drink and because they had seen the suspect traveling toward the VFW.
20. In the parking lot of the VFW, the suspect walked right in front of Miller. There was sufficient light for Miller to recognize the suspect. Miller made eye contact with the suspect but did not say anything. Scotti-Belli also saw the suspect in the VFW parking lot and Miller again indicated that he was the man who robbed him.

21. Miller then called 911 and stated he was in the VFW parking lot and had seen the suspect there. Miller had no doubt at all when he called 911 that the man at the VFW was the man who robbed him. The suspect was wearing the same green colored coat but not the beanie.

22. Officer Parce arrived at the VFW parking lot. Miller and Scotti-Belli came up to his vehicle and Officer Parce showed them the picture obtained from Barlow. Officer Parce showed the photo only once and made no remarks other than to ask if the man in the picture was the suspect they were looking for. Both Miller and Scotti-Belli gave immediate, positive, confident responses. Miller identified the man in the picture as the man who robbed him. Scotti-Belli recognized him as the man pointed out to him outside the restaurant.

23. Scotti-Belli went inside the VFW, saw the suspect at the bar, approached him and offered to buy the male a drink to keep him there. Scott-Belli then alerted police and directed them to the male. Officers arrested and identified the male as Defendant Danny Warner.

24. The Officers pat searched the Defendant and found cash, cigarettes and a lighter.

25. The process of finding Defendant was a rapidly evolving situation involving a suspect armed with a deadly weapon.

26. The approximate length of time between the robbery and the arrest of Defendant was an hour and a half.

27. Defendant's booking description lists him as a white male, 6'2", 210 pounds, muscular build and aged 42. The booking photo reveals Defendant was wearing square lensed glasses at the time of his arrest.

28. Defendant filed a motion *in limine* in which he seeks to suppress evidence from witnesses Jordan Miller, Dustin McGibony and Brian Scotti-Belli, identifying Defendant as the suspect on the basis that the identifications were the result of impermissibly suggestive methods.

29. Any in-court identification of Defendant by Miller will most likely be based upon Miller's recollection of the crime and of the other two encounters with the Defendant prior to and after the crime but before Miller was shown the photo. The area of the crime was sufficiently lit, Defendant was close enough to Miller and the encounter lasted long enough for Miller get a very good look at Defendant.

30. Any comment by Miller that he only focused on the gun and could not describe the suspect was mere hyperbole to describe the intensity of the encounter. Miller did not recall making the comment.

31. McGibony never saw the surveillance photo. Defendant claims identification of him by McGibony is tainted by the fact that McGibony has searched Defendant's name on the internet since the robbery. There is no evidence to support this allegation.

32. Descriptions of the suspect differ in some respects. Officers received several updated descriptions as the search for the suspect progressed. The differences are not significant. Miller describes the hat worn as a beanie and Officer Parce called it a stocking cap. Officer Parse testified that the coat worm by the suspect was a trench coat and others testified it was a "long" coat. Defendant argues that the coat he wore was not a trench coat. These are merely semantic differences. All the descriptions

given include a hat and coat. The coat is variously described as dark green by Miller and as brown on the booking report. The color of the cap is described as gray in the dispatch log, witnesses described it as dark and Defendant's exhibit A shows the hat as black. The color of the coat and hat may have appeared different in different lighting and in photographs. The hat in the color photo from the Inn which is attached to Defendant's brief does appear gray. There are multiple heights given for the Defendant. Defendant in his brief claims he is 5'11" but there was no evidence offered to support this height. Defendant's exhibit C state he is 71.25", which is roughly 5'9", not even Defendant asserts he is 5'9". Witnesses' height estimations vary from 6'4" to around 6' and the booking sheet, State's exhibit 4 states that the suspect is 6'2". A difference of a few inches one way or another does not render the identification suspect. Defendant claims the suspect was described as slender, but there was no testimony or evidence that he was described as having a slender or thin build. One updated description stated the suspect was 40-50 years of age with wrinkly skin. Defendant argues he does not have wrinkly skin and does not look 40 to 50 years old, however, Defendant is within this age range. The evidence and testimony confirm that the Defendant was wearing square framed glasses.

33. Miller's testimony and memory were very certain. Miller saw the Defendant on three separate occasions prior to being shown the photocopy of the picture from Barlow by Officer Parce. First in the parking lot, then behind the restaurant, then in the parking lot of the VFW. Nothing obscured Defendant's face and the lighting was bright enough to see. Miller had no doubt at all that the man at the VFW was the man who robbed him. Miller is more likely to retain in his memory the man he saw on three separate occasions rather than a photo shown to him after he had seen the suspect three times.
34. Miller identified the Defendant in the courtroom as the man who robbed him
35. Scott-Belli did not observe the robbery and cannot identify Defendant as the robber. However, he did see Defendant outside the restaurant walking on the sidewalk past windows on the front or west side of the restaurant, fifty feet away shortly after the robbery occurred. Miller stated to Scotti-Belli that that was the person who robbed him. Scotti-Belli also saw the suspect outside the VFW and Miller once more identified him as the man who robbed him. Scotti-Belli is also more likely to retain in his memory the man he saw twice before being shown the photo rather than the photo.
36. Scotti-Belli identified the Defendant in the courtroom as the man he saw walk past his restaurant and saw outside the VFW.
37. To the extent that any of the foregoing Findings of Fact are Conclusions of Law, they should be so construed.

Based upon the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. The Court has jurisdiction over this matter and the parties thereto.
2. Criminal suspects have a due process right to be free from identification procedures that are unnecessarily suggestive. Unconstitutional identifications must be excluded at trial. *State v. Lara*, 179 Mont. 201, 205, 587 P.2d 930 (1978).
3. *State v. Lara*, supra, sets forth a two-part test to determine if in-court identification would violate the accused's right to due process of law. The first prong is to determine if an identification procedure was impermissibly suggestive, the second prong is to determine if the procedure gave rise to a substantial likelihood of irreparable misidentification.
4. McGibony was not shown the photo from the Inn and there was no evidence presented at the suppression hearing supporting any basis for excluding identification of Defendant by McGibony.
5. An identification procedure is impermissibly suggestive "if a positive identification is likely to result from factors other than the witness's own recollection of the crime." *City of Billings v. Nolan*, 2016 MT 266, P 20, 385 Mont. 190, 383 P.3d 219.
6. A show-up, single photo, identification requiring a yes or no answer is far less desirable than positively picking out a person from an anonymous line-up. *Nolan*, P 20. However, The Montana Supreme Court has not held that a "show-up" identification is always impermissibly suggestive. *State v. Lally*, 2008 MT 452, P 16, 17, 348 Mont. 190, 199 P.3d 818.
7. Under the circumstance of this case, Officer Parce showing Miller and Scotti-Belli the photo from the Inn was not impermissibly suggestive.
8. There are five things to consider regarding the second prong in determining whether, based upon the totality of the circumstances, the procedure used would give rise to a substantial likelihood of irreparable misidentification. Those considerations are: 1) the opportunity of the witness to view the suspect at the time of the crime, 2) the witness' degree of attention, 3) the accuracy of the witness' prior description of the suspect, 4) the level of certainty demonstrated by the witness at the confrontation and 5) the length of time between the crime and the confrontation. *State v. Bingman*, 2002 MT 350, P 23, 313 Mont. 376, 61 P.3d 153.
9. Even if use of the single photo was impermissibly suggestive, based upon the totality of the circumstances, there is very little likelihood of misidentification of Defendant and, therefore, there is no basis for suppressing identification of Defendant, including an in-court identification by Miller, McGibony and Scotti-Belli.
10. To the extent that any of the foregoing Conclusions of Law are Findings of Fact, they should be so construed.

Any Based upon the foregoing Findings of Fact and Conclusions of Law, the Court enters the following:

ORDER

IT IS HEREBY ORDERED that Defendant's motion to suppress is DENIED.

DATED this 22nd day of September, 2017.

Robert B. Allison
District Judge

cc: Travis Ahner, Deputy Flathead County Attorney
Danny Warner
Sean Hinchey, Attorney at Law 9/22/17

Additional material from this filing is available in the Clerk's Office.