IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 17-0611

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JOESEPH JOHN MARTINEZ,

Defendant and Appellant.

OPENING BRIEF OF APPELLANT

On Appeal from the Montana Eighth Judicial District Court, Cascade County, ADC 14-462, The Honorable Gregory G. Pinski, Presiding

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STATEMENT OF THE CASE

This is an appeal from a March 14, 2017, jury verdict, finding Appellant Joseph John Martinez (Martinez) guilty of one count of Sexual Intercourse Without Consent (SIWC), a violation of § 45-5-503, MCA. The Eighth Judicial District Court, Cascade County, did not enter an official final judgment adjudging Martinez guilty of the offense of SIWC, however, it entered an Order dated March 20, 2017, reciting the jury's guilty verdict and setting a date for a sentencing hearing (D.C. Doc. 89, Order attached hereto as Ex. A). A sentencing hearing ultimately took place August 2, 2017, where the district court, after receiving documentary evidence, and hearing witness testimony, sentenced Martinez to sixty (60) years at the Montana State Prison (MSP), with ten (10) years suspended. Evidence at sentencing indicated that Martinez has below average intelligence and suffers from

Attention Deficit Hyperactivity Syndrome (ADHD) and Fetal Alcohol Syndrome (FAS). (D.C. Doc. 98 (Sealed), Psychosexual Evaluation Report of Donna M. Zook, Ph.D).

A written judgment followed, in which the district court included the same sentencing rationale pronounced during the hearing. (D.C. Docs. 101, 103, Sentencing Order attached hereto as Ex. B). This appeal timely followed. (D.C. Doc. 106).

STATEMENT OF FACTS

On October 23, 2014, Martinez and a few friends decided to throw a party at Tristen Davidson's garage, since his mother was out of town. (Tr. at 24-26). Davidson and Martinez were 18 years old at the time, but they found someone to purchase alcohol for them, including two bottles of vodka and a case of Bud Light beer. (Tr. at 24, 35, 137). Approximately ten teens, all under 21 years of age, attended the party, including a few girls. (Tr. at 36, 149). Someone brought a bottle of rum. (Tr. at 35). One of the girls at the party was C.H., a 15 year old freshman at a local high school. (Tr. at 54-57). J.G., a friend of hers, invited her to the party. (Tr. at 55, 65). Davidson intended the party to remain in the garage, but by the end of the night, the people remaining at the party went inside the house. (Tr. at 27).

A neighbor called the police around 1:00 a.m. to report a loud party. (Tr. at

117). Great Falls Police Department (GFPD) Officer Jeff Parks responded to the call. He knocked on the front door without response and then went around to the garage which had an open door. He observed empty beer cans. (Tr. at 117-119). Officer Parks then knocked on the side door of the house. Davidson opened the door and gave permission for Officer Parks to enter. Davidson reported that someone was passed out and escorted Officer Parks to his bedroom. (Tr. at 119-122). A male was observed sitting on the floor, and another male and a female were observed on the bed. The female was naked from the waist down and there was vomit on the bed and floor. The male appeared to have his pants down. (Tr. at 130-133, Tr. at 25, 29). Martinez identified himself and the female on the bed was identified as C.H. She appeared drunk to Officer Parks and was mumbling and dry-heaving, however, he admitted that she was responsive enough to get up from her laying position and take off her sweatshirt. (Tr. at 147, 167-69). Martinez was also undisputedly intoxicated. (Tr. at 150). The other male in the room was identified, but never interviewed by law enforcement. (Tr. at 165).

Officer Parks transported Martinez to the GFPD station where Martinez provided a positive BAC breath test. (Tr. at 166). Martinez was advised of his *Miranda* rights, and purported to understand them, despite his obvious intoxication. (Tr. at 150-51). Martinez signed a waiver and gave an interview, where he ultimately admitted to engaging in sexual relations with C.H., including

penetration. (Tr. at 151, State's Trial Ex. 3). Martinez's trial counsel objected to playing the interview at trial on the basis that Martinez's intoxication rendered him incapable of understanding and voluntarily waiving his *Miranda* rights. The district court overruled the motion on the basis it was a jury question and went "to the weight of the evidence." (Tr. at 152). The record does not indicate that Martinez's counsel ever filed a pre-trial motion to suppress the interview.

A redacted video of the interview was played for the jury. (Tr. at 154-62, State's Trial Ex. 5). In the video, Martinez informs Officer Parks that "I'm still really under the influence right now, I hope you know that." Officer Parks responds affirmatively and further states "I can tell." (State's Trial Ex. 5). Officer Parks admitted during trial that he knew Martinez was intoxicated, but felt he was capable of understanding his rights. (Tr. at 152-53, 166-67). During the video, and during trial, Martinez was adamant that he reasonably believed C.H. was around his age, capable of consent, and that she told him that she was a senior. (Tr. at 150-51, 157). Indeed, Martinez's defense at trial was based on consent, that he reasonably believed C.H. was 16 years of age or older, pursuant to § 45-5-511(1), MCA.

The next day, Martinez was transported to the hospital by GFPD Officer Kevin Supalla for a sexual assault exam. In the waiting room, Martinez made several statements, including responses to questions by Officer Supalla, some of

which were surreptitiously recorded. Martinez was in custody, but not re-*Mirandized*, or reminded of his *Miranda* rights. (Tr. at 177-79). The audio was played to the jury during trial, over objection. (Tr. at 175-76). Martinez tells Officer Supalla that he hopes C.H. was at least 17 years old and admits to inserting his fingers into C.H.'s vagina. (State's Trial Ex. 6). Martinez's trial counsel renewed his objection after the video was played, which the district court again overruled. (Tr. at 180).

After researching the issue, the district court later entered on the record that his admissibility ruling—that re-administration of *Miranda* rights to Martinez was not required—was based on the case *Guam v. Dela Pena*, 72 F.3d 767 (9th Cir. 1995) and § 45-8-213(1)(c)(i), MCA, a statute which the district court reasoned permitted Officer Supalla to question Martinez as a public officer "performing his public duty in the official course of business." (Tr. at 198). During his sexual assault exam, Martinez also made a statement to GFPD Detective Noah Scott, admitting he inserted his fingers into C.H.'s vagina. (Tr. at 126). Martinez was not re-*Mirandized* prior to this statement.

C.H. testified at trial that she remembers drinking quite a bit that night, but does not recall vomiting in the bathroom, or anything that transpired in the bedroom. She only remembers waking up the next morning in the hospital, where she underwent a sexual assault exam by certified Sexual Assault Nurse Examiner

(SANE) Meghan Johnson, R.N . (Tr. at 58-63, 74-78). Johnson was also the examiner for Martinez's exam. Samples were taking during both exams, the results of which were admitted during trial. (Tr. at. 81-83, 85-110). Results indicated positive DNA profile results from C.H. on Martinez's penis. (Tr. at 104-06). C.H. did not recall ever telling Martinez that she was a senior, but also admitted she does not recall ever telling Martinez her age. (Tr. at 68-70). She testified the she never gave consent to sexual intercourse, however, she also testified that she does not remember anything that occurred in the bedroom. (Tr. at 62-63, 70).

During defense counsel's cross-examination of C.H. during trial, he inquires if she recalls exchanging messages with her friend J.G. over the social networking site, Facebook, the day after the party. (Tr. at 71). Counsel's intent was to impeach C.H. on the issue of consent. Indeed, she testified at trial that she did not recall exchanging messages with J.G. after the party. (Tr. at 71). The State objected and the district court sustained the inquiry based on his ruling earlier that day, outside the presence of the jury, that such statements by C.H. constituted inadmissible hearsay and violated the Rape Shield statute:

> **THE COURT**: Okay. So, let me see the Facebook post that you're going to use.
> . . .
> **MR. NORCROSS**: And just for the record, I -- this is a conversation, and if the Court will look at the date on that, it begins -- the conversation with [J.G.] seems to be ongoing. And so it starts out on

October 17th, and so this goes to the relationship between [J.G.] and [C.H.]. There's a lot of planning and preparation for partying, hanging out. There's a lot of information in here regarding drinking and smoking, getting weed, having bud, and having booze, and she's well aware of what she's getting into. There's also some -- regarding [J.G.'s] criminal history, she was aware that there was some instances where he was going out and providing -- getting both alcohol and marijuana. She's well aware of all of that. On page 713, she has a -- I guess, I don't -- on the bottom of that 1214, 1019, and 175239 she makes a statement regarding, Not much. You? And then she made the statement sucking dick, J.K. We're just waking up. So, I mean, she has some ideas of – she's not just this innocent person who knows nothing. And then continuing on, there's planning about going to -- to the parties.

THE COURT: But is there any testimony that he saw any of these Facebook posts?

MR. NORCROSS: The State provided all this information.

THE COURT: No. But what I'm saying is, is that you're using this to show that he has a reasonable belief that she was over 16 years old.

MR. NORCROSS: Correct.

THE COURT: [ ]You're using this to bolster your defense that he had a reasonable belief that she was over the age 16, but is there any indication that he saw this Facebook post?

MR. NORCROSS: There's -- I don't believe -- know if he has seen this or not.

THE DEFENDANT: I seen it.

THE COURT: No. I mean, this is a conversation between [C.H.] and [J.G.]. Is your client going to take the stand and testify about that he read these before the night of October 23rd?

MR. NORCROSS: No.

THE COURT: So, how can -- this is just after the -- after the fact, information that he didn't have available. It has to be a reasonable belief to him, and he has the burden of proving it.

MR. NORCROSS: Well, this goes to the state of mind of the witness and not to the state of mind of Mr. Martinez.

THE COURT: So, the State –

MR. NORCROSS: This goes to the credibility of the witness.

THE COURT: So, it goes to her state of mind in the sense that she went there that night wanting to have sex?

MR. NORCROSS: She went there that night, I believe, in looking at

her posting with [J.G.], she's well aware of what's going on and who is there and participating in the activities that everybody was engaging in.

THE COURT: So, how does that not implicate the Rape Shield Statute, which very clearly provides that "evidence concerning sexual conduct is inadmissible in prosecutions under this part, except evidence of the victim's past sexual conduct with the offender or evidence of specific instances of the victim's sexual activity regarding the origin of semen, pregnancy, or disease that is at issue"? The second part doesn't apply. I mean, how is this not sexual conduct -- it doesn't have anything do with Mr. Martinez.

MR. NORCROSS: On page 728, she questions whether -- she asked, Oh, did I sleep with anyone? And [J.G.] says: That's something we're going to have to, you know, talk about. Can you have visitors at the hospital? She's still at the hospital. I'm going to – I'm really confused. About what? She replies, Last night, all I remember is going pee. Her condition. So, will you tell me what happened? I wasn't a slut, was I? And then you were puking everywhere, and I tried to help you. And then Joey came into info and helped me -- I guess there's mostly -- into and helped me, and I went to [T] to smoke a cog. And when I came back, he was still helping you. And then I let Tanya finish it. When I came back to check -- check [sic] was on top of you with her panties -- your panties down, I guess. And I, like, grabbed him and threw him off, and we got into it. And then the cops showed up with him half naked, and you lying on the bed.

THE COURT: Okay. So, [J.G.] -- is [J.G.] going to testify?

MR. LARSEN: Your Honor, we issued subpoenas. [J.G.] is the same person as [J.B.]. Officer Parks testified he was in the room when he walked in. We were not able to locate [J.B.]. As with several other witnesses, we were not able to locate as well. We were only able to locate Mr. Davidson because he's in the prerelease on a felony. We had some information as to where [J.B.] might be. But we believe he's out of state, and we were unable to find him.

THE COURT: So, how are you going to get this in? It's hearsay.

MR. NORCROSS: Through -- because this is [C.H.'s] Facebook page. This is a conversation –

THE COURT: But she didn't author that. The author is [J.G.].

MR. NORCROSS: This is a conversation that she was having with [J.G.].

THE COURT: Yeah. But that statement –

MR. NORCROSS: This was on Facebook.
THE COURT: The statement that you just read on page 729, the author is [J.G.].
MR. NORCROSS: That's him telling her what happened.
THE COURT: Yeah; but ...
MR. NORCROSS: But this is a memorialized -- this is like a telephone –
THE COURT: But those aren't her words. Those aren't her words. I mean, so if somebody sends me something on Facebook, suddenly I've adopted it just simply because somebody sent it to me?
MR. NORCROSS: Well, I guess based upon unavailability of the witness, Judge.
THE COURT: Well, you've got to cite me a – you've got to cite me a hearsay exception to that because I don't know – I've got to find that there's indicia of reliability. And based on the fact that this person can't even spell puking, p-u-k-o-n-g, and it's a nonsensical -- it doesn't even make sense.
MR. NORCROSS: I think, Judge, if you understand teens and the way that they operate, everybody -- they understand what they're saying. She was clear about understanding it.
THE COURT: It -- okay. So, you're going to try to get in [J.G.'s] statements, who is not here. You're going to try to get in his out-of-court statements to show that she was drunk that night. I mean, am I understanding that correctly?
MR. NORCROSS: No, Judge. I'm getting in her -- about her conduct. About, Oh, my god, I'm such a slut. I'm sorry about last night. And then going on further, Judge, they get down to -- on page 732: Are you at the hospital? Yeah. That's good. No more drinking – [J.G.] says, No more drinking for a while, or are you ready for round two? Just jokes. And she replies on page 733: For real, smiley face; and ...
THE COURT: Yeah. Well, that is sexual conduct with [J.G.].
MR. NORCROSS: No, it's not -- it's not about sexual conduct. It's about going out and drinking again. She just gets out of the hospital from -- from drinking, and then goes right back on the same -- on the 24th.
THE COURT: Well, that's conduct that's after. That's not coming in. I mean, Ms. Quick, do you have a position on this?
MS. QUICK: Your Honor, I analyzed the 1600 pages last night under a number of theories. One is relevance, and I think he provided that

just to [J.G.]. There's multiple conversations. There's Rape Shield concerns, and then obviously the Court's already identified that we have this person who is unavailable for trial. So, looking at prior consistent statements, if he's attempting to get these in through Ms. Hunter, he would first have to have and give her the opportunity to say, Did you send this? Did you not? And then it would be inadmissible still under the relevance theory. I don't think they're relevant. She's consistent with, I do not remember what happened last night. Oh, my god. Did I sleep with someone? She apologizes for being a slut after she's informed by [M.H.] that her best friend is going to jail because of what happened and after she's informed, by [J.G.], that he had to pull Mr. Martinez off of her. And so her reaction that, Oh, my god; I'm such a slut is consistent with what a rape victims feels in these types of situations. And, quite frankly, [C.H.], for the last two years, has felt like this is her fault, and she's only getting to a point where she realizes this is criminal conduct, and she did nothing to ask for it. I think Mr. Norcross's representation that she was planning and participating, drinking, well aware of what she was getting into, turns this into a trial about the victim; that she was asking for it; that she went there; and because she had planned this night of drinking and planned to attend, that she somehow cannot be a victim of rape. And that is simply -- I don't think it's admissible for those purposes. So, I have, obviously, grave concerns on a number of grounds of objections that they're not going to be relevant.

THE COURT: Mr. Norcross?

MR. NORCROSS: Judge, the -- my whole purpose in all of this is about consent, conduct amounting to consent, how do you prove state of mind, and I think that's one of the jury instructions as well.

THE COURT: No. It's not the victim's state of mind. It's the Defendant's state of mind –

MR. NORCROSS: I understand.

. . .

THE COURT: Okay. So, you can offer these as -- if you want to mark these as an exhibit now for the record and offer them, we can do that.

MR. NORCROSS: Judge, I was not going to offer these as exhibits. I was going to have the witness discuss this with her while she's on the stand regarding her relationship with [J.G.] at the party that evening.

THE COURT: No. I'm not going to allow any of this Facebook discussion to come in. No. 1, it's hearsay. None of the declarant

> unavailable exceptions under Rule 804 apply. Nothing has been cited to me to indicate that any exception to the hearsay rule applies. This discussion is both not relevant, it goes to the conduct of the victim. The victim is not on trial here, and it is precluded -- the other portions are precluded by the Rape Shield Statute, which is codified at 45-5-511(2). So, with that in mind, I think we should mark these for clarity of the appellate record. So, let's offer these as Defense Exhibit 1, and then I will refuse the admission of this exhibit on those bases.
> **MR. NORCROSS**: That's fine.
> **THE COURT**: And I don't expect that you'll have any cross-examination on the subject matter that I've excluded here.

(Tr. at 10-20).

One of the Facebook messages sent to J.G. by C.H., in apparent reference to her sexual interaction with Martinez, stated "Omg I'm such a slut I'm sorry about last night." (Defendant's Trial Ex. A, pages 727-729 attached hereto as Ex. C). Another asked "did I sleep with anyone?" C.H. reiterates in her message that she does not recall the sexual interaction, but at no time does she state that she refused consent, or that she recalls telling Martinez she did not consent. The Facebook messages, denied admission by the district court, were authored by C.H. and J.G.

STANDARD OF REVIEW

This court reviews a district court's evidentiary decisions for an abuse of discretion. *State v. Forsythe*, 2017 MT 61, ¶ 13, 387 Mont. 62, 390 P.3d 931 (citing *State v. Pingree*, 2015 MT 187, ¶ 9, 379 Mont. 521, 352 P.3d 1086). "Notwithstanding this deferential standard, however, judicial discretion must be guided by the rules and principles of law; thus, our standard of review is plenary to

the extent that a discretionary ruling is based on a conclusion of law. In such circumstance, we must determine whether the court correctly interpreted the law." *State v. Gittens*, 2008 MT 55, ¶ 10, 341 Mont. 450, 178 P.3d 91 (quoting *State v. McOmber*, 2007 MT 340, ¶ 10, 340 Mont. 262, 173 P.3d 690); *see also*, *State v. Awbery*, 2016 MT 48, ¶ 10, 382 Mont. 334, 367 P.3d 346.

"Moreover, where the court's conclusions of law involve the Constitution or the rules of evidence, our review is, likewise, de novo." *State v. Patterson*, 2012 MT 282, ¶ 10, 367 Mont. 186, 291 P.3d 556; *see also*, *State v. Colburn*, 2016 MT 41, ¶ 38, 382 Mont. 223, 366 P.3d 258 (J. McKinnon, concurring) (if a district court's interpretation and application of the law implicates a defendant's right to a fair trial, this Court will "review the court's ruling de novo"). De novo review also applies to claims of ineffective assistance of counsel (IAC), which involve mixed questions of law and fact. *St. Germain v. State*, 2012 MT 86, ¶ 7, 364 Mont. 494, 276 P.3d 886.

This Court may also discretionarily invoke plain error review when it is presented with a situation where the failure to review the claimed error at issue may result in a manifest miscarriage of justice or may compromise the integrity of the judicial process. *State v. Adgerson*, 2003 MT 284, ¶ 13, 318 Mont. 22, 78 P.3d 850. Indeed, an error which implicates or violates a party's fundamental

constitutional rights merits this Court's application of plain error review. *State v. Torres*, 2013 MT 101, ¶ 37, 369 Mont. 516, 299 P.3d 804.

SUMMARY OF ARGUMENT

Martinez was deprived of his constitutional right to a fair trial and his right of confrontation when the district court denied admission of the Facebook messages authored by C.H. to J.G. These messages, especially C.H.'s reference, twice, to being a "slut" that night and asking if she slept with anyone were both relevant and admissible on the issue of consent. The district court's rationale for denying their admission was erroneous. They did not constitute hearsay and were not precluded by Montana's Rape Shield statute. At the very least, Appellant was entitled to use the messages for impeachment purposes during cross-examination.

Additionally, Martinez was deprived of his constitutional rights to a fair trial and his right not to incriminate himself when his recorded statements made during the police interview and at the hospital were admitted during trial. He was intoxicated and did not waive his *Miranda* rights voluntarily, intelligently, or knowingly. Appellant was also entitled to be re-*Mirandized* at the hospital. To the extent his trial counsel should have moved, prior to trial, to suppress these statements, Appellant was denied effective assistance of counsel.

These prejudicial errors, independently or cumulatively, demand reversal and remand for a new trial.

ARGUMENT

I. MARTINEZ WAS ENTITLED TO QUESTION C.H. REGARDING THE FACEBOOK MESSAGES.

A. Criminal Defendants are Entitled to a Fair Trial and to Confront and Cross-Examine Witnesses Against Them.

The Sixth and Fourteenth Amendments of the United States Constitution and Article II, Section 24, of the Montana Constitution guarantee criminal defendants the right to a fair trial. Similarly, criminal defendants are afforded a meaningful opportunity to present a complete defense based on their right to due process under both state and federal law. U.S. Const. Amends. V and XIV; Mont. Const. Art. II, Sect. 17. A complete defense includes a defendant's ability to confront, question, and cross-examine his accuser. *State v. MacKinnon*, 1998 MT 78, ¶ 33, 288 Mont. 329, 957 P.2d 23 (a defendant charged with a crime has a right to confront his accusers, arising from the Sixth Amendment to the United States Constitution and Article II, Section 24 of the Montana Constitution). "The essential purpose of the right to confront witnesses is to secure the opportunity to test the witness's testimony through cross-examination." *State v. Baker*, 2013 MT 113, ¶ 18, 370 Mont. 43, 300 P.3d 696 (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986zzz0). A defendant has a similarly-based right to present evidence in his defense. *Colburn*, ¶ 25 (citing *State v. Johnson*, 1998 MT 107, ¶ 22, 288 Mont. 513, 958 P.2d 1182).

B. Montana's Rape Shield Law Balances a Defendant's Rights With Those of the Accuser.

Montana's Rape Shield Law, § 45-5-511(2), MCA, must be "balanced against the defendant's constitutional rights to confront his accusers and present evidence in his defense, because '[n]either the Rape Shield Law nor the defendant's right to confront and present evidence are absolute.'" *State v. Daffin*, 2017 MT 76, ¶ 29, 387 Mont. 154, 392 P.3d 150 (citing *Colburn*, ¶ 25). Montana's Rape Shield Law provides that "[e]vidence concerning the sexual conduct of the victim is inadmissible in prosecutions under this part except evidence of the victim's past sexual conduct with the offender or evidence of specific instances of the victim's sexual activity to show the origin of semen, pregnancy, or disease that is at issue in the prosecution." By its plain language, the statute precludes evidence of "sexual conduct" unrelated to the offense on trial, and certainly not evidence related to the issue of consent for the alleged offense. Section 45-5-501(1), MCA, defines consent, in relevant part, as "words or overt actions indicating a freely given agreement to have sexual intercourse or sexual contact."

Montana's Rape Shield Law "cannot be applied to exclude evidence arbitrarily or mechanistically and it is the trial court's responsibility to strike a balance in each case between the defendant's right to present a defense and a victim's rights under the statute." *Colburn*, ¶ 25. A district court balancing such

interests should ensure "that the proffered evidence is not merely speculative or unsupported." *Colburn*, ¶ 25. Evidence bearing on the alleged victim's consent, or state of mind, is critical to a defendant's defense. Similarly, a defendant's ability to question her during cross-examination secures and protects his rights under the Confrontation Clause. *Baker*, ¶ 21.

C. The District Court Deprived Martinez of His Rights When it Refused to Permit Him to Question C.H. Regarding the Messages.

The Facebook messages did not implicate C.H. in any prior or past sexual activity or any activity preclude by Montana's Rape Shield Statute. In the messages, she clearly indicates that she thought she might have slept with someone or acted like, or was, "a slut," which speaks to directly to the issue of consent. While she affirmed in the messages that she did not recall the sexual interaction, the messages were undisputedly relevant to the issue of consent. As they related to the offense on trial, they were not barred by the Rape Shield statute. This Court has noted that the law does not "provide[] an impenetrable wall of protection" for the victim or prevent "her credibility" from being "questioned or attacked," especially when the evidence is probative and critical to the defense of consent. *State v. Van Pelt*, 247 Mont. 99, 103, 805 P.2d 549, 552 (1991).

Martinez was entitled to introduce evidence that was relevant to whether his accuser consented to any sexual activity with him. C.H.'s twice reference to being

"a slut" and asking if she slept with anyone are undisputedly relevant to this issue. Martinez should have been permitted to introduce evidence of, or at least question C.H. during cross-exam, regarding such references. The district court's ruling to the contrary constitutes prejudicial error as such evidence prejudiced Martinez's substantial rights and a reasonably affected the outcome of the trial. *Golden v. State*, 2014 MT 141, ¶ 45, 375 Mont. 222, 326 P.3d 430 (citing *State v. Van Kirk*, 2001 MT 184, ¶ 29, 306 Mont. 215, 32 P.3d 735); *State v. Ingraham*, 1998 MT 156, ¶ 50, 290 Mont. 18, 966 P.2d 103.

Nor did the messages authored by C.H. constitute inadmissible hearsay as the statements were made by C.H. herself, who was testifying at trial. *See* Rule 801(c), M.R.Evid. (defining hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted") and Rule 801(d)(1)(A), M.R.Evid. (excluding from the definition of hearsay a prior statement by a witness—"[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is [] inconsistent with the declarant's testimony"). Moreover, the statements were not offered to prove the truth of the matter asserted—i.e., that C.H. was a slut; but rather her state of mind relevant to the issue of consent. The statements were not inadmissible on the basis of hearsay and should have been admitted. *State v. Mackie*, 191 Mont. 138, 143, 622 P.2d 673, 676 (1981).

Accordingly, the district court's inadmissibility ruling was in error. The Facebook messages were not implicated, nor prohibited, by the Rape Shield Law and spoke directly to the issue of consent. The jury was entitled to hear evidence related to the messages, especially the messages authored by C.H. where she references herself as "a slut." At the very least, Martinez was entitled to impeach her testimony that she did not recall exchanging messages with J.G. the day after the party. Martinez's rights to a fair trial and to confront his accuser were prejudiced by the district court's ruling. Had the jury heard such evidence, there is a reasonable probability the outcome might have been different. Reversal on this basis is required.

II. MARTINEZ'S RECORDED STATEMENTS SHOULD HAVE BEEN EXCLUDED AT TRIAL ON THE BASIS OF *MIRANDA*.

A. Criminal Defendants Have the Right Not to Incriminate Themselves, a Waiver of Which Must be Made Voluntarily, Knowingly, and Intelligently.

The Fifth Amendment to the United States Constitution and Article II, Section 25 of the Montana Constitution provide that people have the right not to incriminate themselves. The U.S. Supreme Court addressed the right against self-incrimination in *Miranda v. Arizona*, 384 U.S. 436 (1966), stating that "the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.'" *Miranda*, 384 U.S. at 460 (quoting *Malloy v. Hogan*, 378 U.S. 1, 8 (1964)). The *Miranda*

Court held that the prosecution may not use statements that stem from a custodial interrogation of a defendant unless the defendant is warned, prior to questioning, that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney. *Miranda*, 384 U.S. at 444

Section 46-6-107, MCA, the codification of *Miranda* in Montana, provides, in relevant part, that "[b]efore interrogating a person who is in custody, a peace officer shall inform the person that the person has the right to remain silent, that anything the person says can be used against the person in a court of law, that the person has the right to speak to an attorney and to have an attorney present during any questioning, and that if the person cannot afford an attorney, one will be provided for the person at no cost to the person." The *Miranda* warnings are required where the person is subject to a custodial interrogation. *Gittens*, ¶ 13 (citing *State v. McKee*, 2006 MT 5, ¶ 28, 330 Mont. 249, 127 P.3d 445; *State v. Munson*, 2007 MT 222, ¶ 20, 339 Mont. 68, 169 P.3d 364).

An individual may waive his or her Fifth Amendment rights only if the waiver is made voluntarily, knowingly, and intelligently. *Miranda*, 384 U.S. at 444; *Gittens*, ¶ 14. "The State has the burden to prove that the waiver of the constitutional right against self-incrimination was voluntarily, knowingly, and intelligently made." *Gittens*, ¶ 14. "This burden of proof is heavy and the

standards required for waiver are high. Courts indulge in every reasonable presumption against waiver of constitutional rights and will not indulge in any presumption of waiver." *State v. Lucero*, 151 Mont. 531, 538, 445 P.2d 731, 735 (1968), abrogated on other grounds, *State v. Reavley*, 2003 MT 298, 318 Mont. 150, 79 P.3d 270; *State v. Reim*, 2014 MT 108, ¶ 31, 374 Mont. 487, 323 P.3d 880.

The validity of a defendant's *Miranda* waiver is a two-dimensional inquiry. First, the purported waiver "must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *State v. Nixon*, 2013 MT 81, ¶ 36, 369 Mont. 359, 298 P.3d 408. Second, a "valid waiver must include not merely a comprehension of the benefits being abandoned, but also an actual relinquishment of those benefits, as evidenced by the actions or statements of the accused." *State v. Main*, 2011 MT 123, ¶ 21, 360 Mont. 470, 255 P.3d 1240 (citing *State v. Blakney*, 197 Mont. 131, 138, 641 P.2d 1045, 1049-50 (1982)).

The "existence of a valid waiver 'must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'" *Main*, ¶ 21 (citing *Blakney*, 197 Mont. at 138, 641 P.2d at 1049). "Other valid considerations include 'the age, education, and intelligence of the accused, and his capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving

those rights.'" *Main*, ¶ 21 (citing *Blakney*, 197 Mont. at 138, 641 P.2d at 1049). Intoxication is also a factor to consider in the totality of the circumstances as to whether a waiver was made knowingly, intelligently, and voluntarily. *Main*, ¶ 21 (citing *State v. Cassell*, 280 Mont. 397, 403, 932 P.2d 478, 481-82 (1996); *see also*, *United States v. Welch*, 2014 U.S. Dist. LEXIS 162579, at *14 (D. Alaska Oct. 31, 2014) (while statements made to law enforcement by an intoxicated person are not invalid as a rule, "it is clearly a relevant consideration" as to whether a defendant can "validly waive his Miranda rights and/or provide voluntary statements").

In *State v. Gleed*, 220 Mont. 56, 59, 713 P.2d 543, 544-45 (1986), this Court affirmed a district court's denial of a motion to suppress as to waiver when the defendant was 21 years old, familiar with the criminal justice system due to prior felony convictions, had earned his GED, was of average intelligence, and stated he understood the *Miranda* advisory. Notably, however, the defendant "gave no indication of being under the influence of drugs or alcohol." *Gleed*, 220 Mont. at 59, 713 Mont. at 545. In *Cassell*, 280 Mont. at 403, 932 P.2d at 481-82, this Court affirmed a district court's denial of a motion to suppress and determined that the waiver was made knowingly, intelligently, and voluntarily despite the defendant's claim of intoxication because he was 43 years old, had a lengthy criminal record and was familiar with the criminal justice system and law enforcement

interrogation methods, and answered questions appropriately. *Cassell*, 280 Mont. at 403, 932 P.2d at 481-82.

In *Main*, the Court found a voluntary and knowing waiver of *Miranda* rights, based on the defendant's statement that six hours had passed since he last drank alcohol, that he showed engagement, intelligence, clear thought and speech; and that he was 46 years old, had graduate school experience, and had familiarity with the legal system and previous experience with police. *Main*, ¶ 23. This Court, in *Nixon*, rejected a intoxication challenge to a *Miranda* waiver based on the fact "he videotaped interrogation undermine[d] [his contention that he was too intoxicated and sleep-deprived to understand what was happening" because "he interrupted to seek clarification when he wanted it and answered [the officer's] questions in a clear, coherent manner." *Nixon*, ¶ 40.

While it does not appear that this Court has had occasion to invalidate a *Miranda* waiver based on alcohol intoxication, courts in other jurisdictions have. *See e.g. United States v. Bonner*, 2010 U.S. Dist. LEXIS 38586 (M.D. Pa. Apr. 20, 2010) (finding defendant's *Miranda* warning not voluntary and invalidating waiver due, in part, to his state of intoxication); *State v. Bramlett*, 609 P.2d 345, 350 (N.M. 1980) (overruled on other grounds) ("[w]e hold that none of the statements made by defendant, under the circumstances present in this case, were admissible" based on his intoxication).

As argued below, under the totality of the circumstances of the case, Martinez's undisputed intoxicated state at the time of the waiver, his age, diagnosis of AHD, FAS, education level, and intellectual capacity, invalidates his *Miranda* waiver, rendering his recorded statements inadmissible during trial.

B. The Totality of Circumstances, Including Martinez's Age, Intelligence, and Intoxication, Rendered his *Miranda* Waiver Invalid.

This case presents combined circumstances not present in the prior cases before this Court alleging invalidity of a *Miranda* waiver based on intoxication. Martinez suffers from ADHD and FAS. His intelligence and intellectual functioning are well below average, with particular deficits in verbal understanding and processing speed. (D.C. Doc. 98). At the time of the instant offense, Martinez was only 18 years old with no high school diploma or G.E.D. He reported attending high school though the 10th grade, including being placed in special education classes. (D.C. Doc. 98). A professional evaluator described him as "cognitively immature." (D.C. 98).

These circumstances, coupled with his undisputed intoxicated state due to excessive alcohol ingestion, render Martinez's *Miranda* waiver invalid. His waiver cannot be said to have been made with a full awareness of both the nature of the rights being abandoned and the consequences of such a decision so as to be voluntarily, knowingly, and intelligently given. Indeed, during his interview,

Martinez seems confused at times and tells the officer that he is still really drunk. The officer even acknowledges Martinez's inebriated state during his questioning, stating "I can tell," so Martinez was obviously showing signs of impairment. Under all of these circumstances, this Court should conclude that Martinez was not aware of his rights sufficient to knowingly and intelligently waive them. This is especially true given that a court should not indulge in any presumption of waiver of constitutional rights.

The district court erred in concluding otherwise, and certainly erred in determining that it was an issue for the jury when Martinez's trial counsel objected to the playing of the recorded interview. The determination of the validity of a *Miranda* waiver is a legal one. *Arizona v. Fulminante*, 499 U.S. 279, 286 (1991). To the extent the Court determines the issue should have been raised in a pretrial motion to suppress, Martinez asserts IAC on the basis his trial counsel failed to file such a motion. (*See* Section III below).

C. Re-Administration of *Miranda* Rights is Required When There are Intervening Events Between Law Enforcement's Questions.

Regardless of the lapse of time, if there are "intervening events," between the administration of *Miranda* warnings and subsequent questioning, *United States v. Savanh*, 727 F. Appx. 931, 934 (9th Cir. 2018), rather than a "continuing pattern of interactions between the defendant and police," *State v. Dispoto*, 913 A.2d 791 (N.J. 2007), a re-advisement of *Miranda* rights is required. *Savanh*, 727 F. Appx.

at 934 (a defendant must "show that 'intervening events' created an impression that his rights had "changed in a material way," thereby calling for re-warning) (citing *United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1129 (9th Cir.), amended by 416 F.3d 939 (9th Cir. 2005)). In determining whether there has been a "clear continuity of interrogation," courts will examine the "totality of the circumstances." *Commonwealth v. Gudino*, 2017 Pa. Dist. & Cnty. Dec. LEXIS 3272, at *17-18 (C.P. July 25, 2017).

In *State v. Lenon*, 174 Mont. 264, 274-75, 570 P.2d 901, 907-08 (1977), this Court determined that a time period of "less than nine hours" between law enforcement's administration of the *Miranda* warning and a defendant's confession "did not by itself, under the facts of this case, create a duty to verbally repeat those warnings." The Court held that "[u]nder the 'totality of the circumstances,' defendant understood his rights, confessed voluntarily, and there was no need to repeat the Miranda warning." *Lenon*, 174 Mont. at 274, 570 P.2d at 907 (citing Comment, *The Need to Repeat Miranda Warnings at Subsequent Interrogations*, 12 Washburn L.J. 222 (1973)).

While this Court has not addressed the issue recently, other courts consider the following factors, under the totality of the circumstances, in determining whether a re-advisement of *Miranda* is required: 1) the amount of time that has passed since the initial waiver; 2) any change in the identity of the interrogator or

the location of the interrogation; 3) an official reminder of the prior *Miranda* advisement; 4) the suspect's sophistication or past experience with law enforcement; 5) whether the statements obtained are materially different from other statements that may have been made at the time of the warnings; and 5) any further indicia that the defendant subjectively understands and waives his rights. *Gudino*, 2017 Pa. Dist. & Cnty. Dec. LEXIS 3272, at *17-18; *People v. Smith*, 150 P.3d 1224, 1240-41 (Cal. 2007).

Thus, under *Miranda*, the State must readvise a defendant of his constitutional rights and the privilege against self-incrimination if the totality of the circumstances indicates that intervening events interrupted questioning and created an impression that his rights may have changed. If not readvised, or at least reminded of the previous *Miranda* advisement, the prosecution should be precluded from using the statements during trial. Such is the case here.

D. Under the Totality of the Circumstances, Martinez's Recorded Statements Made at the Hospital Were Inadmissible Under *Miranda*.

An assessment of the totality of the circumstances, with consideration of the above factors, weighs in favor re-administration of *Miranda* rights to Martinez while he was at the hospital, or at least a reminder of the previous rights administration. First, it is undisputed that Martinez was still in law enforcement custody and subject to questioning. He was transported to the hospital the day

after being advised of his *Miranda* rights, he was questioned by a different law enforcement officer who did not remind him the prior *Miranda* advisement, and the record establishes that his level of sophistication and intelligence were well below average. Also a consideration is that his statements were recorded without his knowledge and that his previous warning was given to him while he was in an intoxicated state. Under the totality of the circumstances, Martinez was entitled to a re-administration of his *Miranda* rights, or at the very least, a reminder of the prior advisement. Because he was not, his statements made at the hospital should have been declared inadmissible a trial.

The district court committed prejudicial error when it allowed the jury to hear Martinez's statements. First, the district court's reliance on *Guam* was misplaced, or at least an incomplete analysis, as the lapse of time is not the only consideration in considering whether a defendant is entitled to a re-administration of his constitutional rights under *Miranda*. Moreover, contrary to the district court's rationale, § 45-8-213(1)(c)(i), MCA, does not somehow excuse the requirement for a re-advisement of *Miranda*, even if it authorized Officer Supalla's surreptitious recording here, which Martinez disputes.

While Martinez's defense was one of consent, he was still entitled to have his statements made at the hospital suppressed. Indeed, in order to give meaning to his right to a fair trial, he was entitled to make informed strategic decisions,

including whether to testify, based on knowledge of what evidence would be considered by the jury, especially what prior statements he made to law enforcement. To the extent Martinez's trial counsel should have filed a pretrial motion to suppress Martinez's recorded statements he made at the hospital on this basis, Martinez alleges IAC. (*See* Section III below).

Under the totality of the circumstances, it is clear that Martinez was not afforded all of the protections guaranteed by *Miranda*. His waiver was not "the product of a free and deliberate choice" and was not "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it" so as to be voluntarily, knowingly, and intelligently given. Independently, he was required to a re-administration of such rights while at the hospital. Because Martinez's substantial rights were prejudiced and there is a reasonable probability the jury's verdict might have been different if it had not heard Martinez's statements, the district court's prejudicial rulings must be reversed and this matter remanded for a new trial.

III. MARTINEZ RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

A. Record-Based Claims are Reviewable on Direct Appeal.

While IAC claims are rarely appropriate in a direct appeal, there are instances which merit review by this Court. *State v. Earl*, 2003 MT 158, ¶ 39, 316 Mont. 263, 71 P.3d 1201 (holding a defendant may raise only record-based IAC

claims on direct appeal). As the primary guardian of a defendant's constitutional rights, this Court should not hesitate to reverse a conviction where the fundamental right to counsel was denied. *State v. Enright*, 233 Mont. 225, 228, 758 P.2d 779, 781 (1988) (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)). Indeed, a defendant's right to effective assistance of counsel exists in order to give true meaning to the right to a fair trial. *City of Billings v. Smith*, 281 Mont. 133, 136, 932 P.2d 1058, 1060 (1997).

The right to effective assistance of counsel is protected by the Sixth Amendment to the United States Constitution and Article II, Section 24 of the Montana Constitution. The right to counsel is fundamental and applies with equal force to all persons, regardless of their ability to compensate an attorney. *Enright*, 233 Mont. at 228, 758 P.2d at 781 (citing *Gideon*). A criminal defendant is denied effective assistance of counsel if: (1) his counsel's conduct falls short of the range reasonably demanded in light of the Sixth Amendment to the United States Constitution; and (2) counsel's failure is prejudicial. *State v. Rose*, 1998 MT 342, ¶ 12, 292 Mont. 350, 972 P.2d 321; *Strickland v. Washington*, 466 U.S. 668 (1984). In other words, to prevail on such a claim, a defendant must show his counsel's performance was deficient and the deficient performance prejudiced him. *Hardin v. State*, 2006 MT 272, ¶ 18, 334 Mont. 204, 146 P.3d. 746 (citing *Hans v. State*, 283 Mont. 379, 391-93, 942 P.2d 674, 681-82 (1997)).

To show prejudice, a defendant must show that, but for his counsel's unprofessional errors, there was reasonable probability that the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome of the trial. *Soraich v. State*, 2002 MT 187, ¶ 15, 311 Mont. 90, 53 P.3d 878. This burden represents a fairly low threshold. *Riggs v. Fairman*, 399 F.3d 1179, 1183 (9th Cir. 2005). "A 'reasonable probability' is less than a preponderance: '[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.'" *Pirtle v. Morgan*, 313 F.3d 1160, 1172 (9th Cir. 2002) (quoting *Strickland*, 466 U.S. at 694).

Ineffective assistance of counsel claims fall into two categories: record-based and non-record based. *Earl*, ¶ 39. As indicated above, a defendant may raise only record-based ineffective assistance claims on direct appeal. *Earl*, ¶ 39. This Court distinguishes record-based from non-record-based actions based on whether the record fully explains why counsel took, or failed to take, a particular course of action in providing a defense. *State v. White*, 2001 MT 149, ¶ 20, 306 Mont. 58, 30 P.3d 340. A claimant must raise a claim of ineffective assistance of counsel in a petition for postconviction relief if the allegation cannot be documented from the record. *Earl*, ¶ 39.

A direct appeal, however, is the proper forum for determining ineffective assistance of counsel when an appellant asserts claims on record-based actions, untaken obligatory actions, or implausible actions. *State v. Roedel*, 2007 MT 291, ¶¶ 38, 46, 339 Mont. 489, 171 P.3d 694 (reviewing trial counsel's failure to object to expert's testimony). While "omissions" are generally considered non-record based actions, *State v. Taylor*, 2010 MT 94, ¶¶ 21-22, 356 Mont. 167, 231 P.3d 79, claims of IAC based on counsel's conduct for which "no plausible justification" exists are considered record-based claims. *State v. Kougl*, 2004 MT 243, ¶ 19, 323 Mont. 6, 97 P.3d 1095 (trial counsel ineffective in failing to request an accomplice jury instruction); *Hagen v. State*, 1999 MT 8, ¶¶ 19-20, 293 Mont. 60, 973 P.2d 233 (claim that trial counsel was ineffective in failing to object to the State's introduction of medical reports, as well as other trial claims, should have been raised on direct appeal); *Petition of Hans*, 1998 MT 7, ¶¶ 28, 42, 288 Mont. 168, 958 P.2d 1175 (IAC claim predicated upon trial counsel's failure to object to matters during trial "can be decided on the basis of the record" and should have been raised on direct appeal).

Specifically, failure to file a meritorious motion may constitute IAC reviewable on direct appeal when no plausible justification exists for not doing so. *State v. Brown*, 2011 MT 94, ¶ 16, 360 Mont. 278, 253 P.3d 859. Such is the case here when Martinez's trial counsel did not seek to suppress Martinez's statements

prior to trial. Indeed, it is clear counsel was aware of the *Miranda* issue during trial. As such, there can be no plausible reason for not seeking to exclude his client's statements prior to trial.

B. Martinez's Trial Counsel was Ineffective.

As argued in the preceding section, Martinez's statements to law enforcement were inadmissible under *Miranda*. While his trial counsel objected to the State's playing of the recording of Martinez's statement to law enforcement during his interview on the basis of his intoxication and his statements at the hospital on the basis of *Miranda*, he did not file a motion to suppress these statements prior to trial. Section 46-13-301(1), MCA, authorizes a motion to suppress any confession or admission given by a defendant on the basis that the statement was involuntary. This Court has previously found deficient performance, and reversed a conviction based on IAC, when trial counsel fails to file a meritorious motion. *Brown*, ¶¶ 16-18. Had trial counsel excluded such statements prior to trial, the district court would have had the benefit of legal briefing from the parties on the issue. Moreover, the trial strategy of both sides may have been influenced by such a ruling.

Accordingly, to the extent the Court declines to rule on the above issues on the basis they were not sufficiently preserved for the record, Martinez asserts IAC. Counsel's errors were prejudicial for the same reasons as discussed above. The

jury heard incriminating statements from Martinez, recorded in violation of his constitutional rights afforded by *Miranda*.

CONCLUSION

Based on any or all of these reasons, Martinez was deprived of his constitutional rights. He is entitled to a new trial. He therefore respectfully requests this Court to vacate the jury's verdict and remand for a new trial with the Facebook messages declared admissible, and the statements taken in violation of *Miranda*, excluded.

Respectfully submitted this 26th day of September, 2018.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 10,000 words or less, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices

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APPENDIX

CERTIFICATE OF SERVICE

I, Robin Amber Meguire, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 09-26-2018:

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