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STATE OF MONTANA
Case Number: DA 17-0611

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 17-0611

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JOSEPH JOHN MARTINEZ,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, The Honorable Gregory C. Pinski, Presiding

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ISSUES PRESENTED

Whether the district court correctly precluded Martinez from questioning the victim about Facebook messages she exchanged with another individual who did not testify at trial.

Whether Martinez voluntarily, knowingly, and intelligently waived his right against self-incrimination.

Whether Martinez received effective assistance of counsel.

STATEMENT OF THE CASE

On October 29, 2014, the State charged Appellant Joseph John Martinez by Information with sexual intercourse without consent, a felony, in violation of Mont. Code Ann. § 45-5-503. (D.C. Doc. 2.) A jury found Martinez guilty of the offense following a two-day trial. (D.C. Doc. 81.) The district court sentenced Martinez to 60 years to Montana State Prison (MSP), with 10 years suspended, and designated Martinez a Tier II sex offender. (D.C. Doc. 103, Appellant's App. B.)

During trial, Martinez attempted to impeach the victim using a Facebook conversation between her and another person who did not testify. The district court prevented Martinez from questioning her along those lines because the messages were hearsay, not relevant, and covered topics precluded by the Rape Shield.

Martinez also objected to his recorded statements being played for the jury and the district court overruled his objections. Martinez appeals. (Appellant's Br.)

STATEMENT OF THE FACTS

The Offense

On October 23, 2014, 15-year-old C.H. was invited to a party by her friend, James Garwood (Breznik). (3/14/17 Tr. at 53-54.) C.H. could not remember much about that night, but she remembered that Breznik picked her up at Van's IGA on 10th Avenue South in Great Falls, Montana, and took her to "a garage on the west side." (*Id*. at 55.) The garage belonged to Tristan Davidson's mother. (*Id*. at 25-26.) Davidson's mother was in Bozeman for the weekend, so he decided to throw a party. (*Id*. at 26.) When they got into the garage, C.H. and the other minors immediately started drinking. (*Id*., 3/13/17 Tr. at 149.) She remembered drinking "vodka and spiced rum" straight out of the bottle and chasing it with pink "strawberry soda." (*Id*. at 56.) She was also given a small blue pill and told it would make her stay awake. (D.C. Doc. 95, Psychosexual at 2.)

C.H. became intoxicated within an hour of arriving at the party. (3/14/17 Tr. at 58-59.) The seven other minors in attendance also quickly became "heavily intoxicated." (*Id*. at 25-27.) At some point, C.H. left the garage and went inside the adjacent house to use the restroom. (*Id*. at 58-59.) The last thing she remembered

about that night was coming out of the bathroom, sitting on the floor in the hallway, and passing out. (*Id*. at 58-59, 61-62.) After a while, Davidson followed C.H. into the house and she appeared "delirious and [was] kind of screaming around," and like she did not know where she was. (3/14/17 Tr. at 25-27, 32.) Davidson observed C.H. vomiting and then laying on the floor. (*Id*. at 30-31.) He moved her up onto a mattress in his bedroom and placed a small garbage can next to the bed for her to continue puking into. (*Id*.) When Davidson left her in this bedroom, she had all her clothes on and was "passed out." (*Id*. at 32.)

Great Falls Police Department (GFPD) Officer Jeff Parks arrived at Davidson's home in response to a noise complaint around 1 in the morning. (3/13/17 Tr. at 117.) Davidson answered the door when Parks knocked and allowed him inside the house. (3/13/17 Tr. at 119-121, 3/14/17 Tr. at 28.) Davidson told Parks that there were other people in the house and that "somebody was passed out" in a bedroom. (3/13/17 Tr. at 121-22, 3/14/17 Tr. at 28.) Davidson led Parks to the room to check on C.H. and opened the door. (3/13/17 Tr. at 122, 131, 3/14/17 Tr. at 28.)

Davidson saw C.H. "laying on the bed face down with her pants off, and [] Martinez trying to . . . hide behind her on the bed." (3/14/17 Tr. at 29, 32-33.) Davidson believed C.H. was unconscious. (*Id*.) Parks moved Davidson out of his way and noticed Breznik "just inside the right of the doorway sitting on the floor."

(3/13/17 Tr. at 131.) He then turned on the lights and saw C.H. lying face down on the bare mattress, completely naked from the waist down. (3/13/17 Tr. at 132, 143.)

Parks could smell vomit when he walked into the bedroom and he saw that C.H. had vomited on her clothes, on the mattress, in the garbage can near the bed, and on the floor. (*Id*. at 132, 135, 142.) Martinez was laying on the mattress with his pants down. (*Id*.) Parks told Martinez to stand up, and Martinez "was trying to hide an erection, and trying to get his pants bucked up right away." (*Id*. at 133.) Parks observed three stuffed animal keychains hanging off C.H.'s pants, which were on the floor next to the mattress, inside-out with her underwear still inside them, covered in vomit. (*Id*. at 138-39, 145-46, 3/14/17 Tr. at 61.)

C.H. "looked like she had been wet" and "there appeared to be vomit on her, and on the bed, and the floor." (3/13/17 Tr. at 132.) She was lying "limp" on the mattress and appeared to Parks "to be incoherent." (*Id*. at 147.) Parks was concerned for C.H.'s safety because he thought C.H. had alcohol poisoning and knew that, if she was left alone and untreated, she could aspirate on her vomit. (*Id*.) Parks called for "medical to respond" and requested that they "step it up" and get there as fast as they could. (*Id*. at 148.) At some point prior to medical arriving, C.H. woke up and took her sweatshirt off and began "swaying back and forth and stumbling" and "mumbling incoherently." (*Id*. at 168.) She continued to "dry

heave" in Parks' presence. (*Id*. at 169.) C.H. fell to her knees, and Parks rolled her onto her side so she would not choke on her vomit if she began throwing up again. (*Id*. at 148, 168.) Parks believed C.H. would have died had he not arrived and called medical when he did. (*Id*. at 149.)

The next thing C.H. remembered was waking up at Benefis Health System Hospital where she was being treated for alcohol poisoning. (3/14/17 Tr. at 63.) Although C.H. arrived at Benefis around 2 a.m., she was unable answer questions, "sleepy," and intoxicated, so Meghan Johnson, R.N. and sexual assault nurse examiner (SANE), waited to conduct a sexual assault examination of C.H. (3/14/17 Tr. at 77-79.) Johnson noted that by 8 a.m., C.H. was more awake and able to walk to and from the bathroom. (*Id*. at 79.) C.H. still had vomit in her hair, which was "messed up." (*Id*.) C.H. could not tell Johnson what happened to her. (*Id*. at 80-81.) After being discharged from the hospital, C.H. "laid in the bathtub" of her grandmother's home "all day puking." (3/14/17 Tr. at 63.) GFPD Special Victims Unit Detective Noah Scott conducted a forensic interview of C.H. following her discharge from Benefis. (3/14/17 Tr. at 127-28; Defense Ex. B, Video admitted at 3/14/17 Tr. at 131.)

C.H. remembered that she met Martinez for the first time that night at the party and that she never told him she was a senior in high school. (*Id*. at 57, 70.) But C.H. did not remember being so intoxicated that she vomited the pinkish red

vomit found all over the house and her clothing. (*Id*. at 62, 3/13/17 Tr. at 134-47.) She did not remember being helped onto the bed in Davidson's room. (*Id*.) C.H. did not remember Martinez coming into the room and performing CPR on her. (*Id*.) She did not remember anything that Martinez did to her. (*Id*.) She did not remember Officer Parks coming into the room, nor did she remember any medical intervention. (*Id*.) However, she never wavered in stating that she did not consent to any type of sexual contact with Martinez. (*Id*. at 58, 70.) She did not give him permission to put his fingers or penis inside her vagina. (*Id*. at 63.)

The Arrest and Interview

After Parks "got [15-year-old C.H.] taken care of, and put into the ambulance," 18-year-old Martinez identified himself and Parks confirmed his identity with dispatch. (3/13/17 Tr. at 150-51.) Martinez "appeared intoxicated, but he was coherent [and] talking to [Parks]." (*Id*. at 150.) During this time at Davidson's home, Martinez understood Parks and followed his instructions. (*Id*. at 151.) Parks took Martinez to GFPD to speak with him further. (*Id*.) At GFPD, Martinez provided a breath test, which was positive for alcohol. (*Id*. at 166.) Once in the interview room, Parks read Martinez his *Miranda* warning, and he agreed to answer questions. (*Id*. at 151-52, *Miranda* waiver admitted as State's Ex. 3 at 152; Video at 0:00-2:00, admitted as State's Ex. 5 at 160.)

Martinez objected to his recorded interview being played for the jury because he claimed he was not capable of understanding and waiving his rights. (3/13/17 Tr. at 152.) The district court overruled the objection and the video was admitted and played. (*Id.*) Parks testified that Martinez understood what he was saying to him and that he believed Martinez voluntarily waived his rights. (*Id*. at 152.) Despite his claimed intoxication, Martinez "tracked" and responded appropriately to Parks' questions. (*Id*. at 152, 163; *see also* video generally.) Martinez did not fall asleep during the interview or otherwise act incoherent or incompetent to waive his rights. (*Id*. at 152-53.)

In the video, Martinez told Parks that he and his "homies" got weed and alcohol and started partying. (Video at 2:00-31.) He told Parks he "got under the influence" and the next thing he knew he was "in a room with some chick and the cops come." (*Id*. at 2:31-45.) Martinez claimed to have been "blacked out" while in the bedroom with C.H. and said he "came to" when he saw Parks come into the room. (*Id*. at 2:45-3:47, 4:53-5:52, 6:58-7:37.) He told Parks he did not know whether he was having sex with C.H. but that he stopped doing "whatever [he] was doing" when he saw Parks. (*Id*. at 3:47-4:27.) Martinez told Parks he knew C.H. by name but that night was the first time he had hung out with her. (*Id*. at 4:27-53.) Martinez stated again that he was blacked out when Parks arrived at Davidson's

home, but that "the alcohol is starting to wear down, so I'm not blacked out anymore, but I was at the time." (*Id*. at 5:52-6:25.)

Unprompted, Martinez told Parks, "I started making out with her and I don't know how old she is . . . she looked like she was around my age, you know, so I started making out with her . . ." (Video at 6:35-58.) Parks asked Martinez if he wanted to have sex with C.H. and he responded, "I mean, I wanted to have sex regardless. I was drunk. But I wasn't, like, forceful like 'give it to me' . . . ." (*Id*. at 7:49-8:25.) He told Parks he remembered kissing C.H. before he blacked out and that, although he was "still very very under the influence" in the interview, he was not blacked out. (*Id*. at 9:25-10:20.) Martinez admitted that C.H. was "pretty hot" and reiterated that he thought she was his age. (*Id*. at 10:20-51.) Parks asked Martinez if he had sex with C.H. and he responded, "[n]ot that I know of, no. Not that I know of, no. Not that I remember of, no. We were getting pretty close, but then I blacked out . . . I don't remember penetrating her, though. But if you guys got evidence or DNA or some shit, let me know. Let me know." (*Id*. at 11:20-12:33.)

Martinez explained that he and his male friends were unsure if they wanted to "get some girls" for this party but ultimately decided to do so. (Video at 15:15-16:40.) Martinez told Parks he picked up a girl he knew was 16 years old, and "was still sketched out" because did not know if he could date her, although he

knew "she's consent for sex" (*Id*. at 16:40-17:06.) Martinez said all his friends looked at this girl when she showed up at Davidson's house and that is when "the lightbulbs went off," and his friends knew they could each bring a girl to the party and "that's when the horny-fest started." (*Id*. at 17:06-30.) He told Parks he hoped he "didn't mess up." (*Id*. 17:30-40.) Although he adamantly denied remembering any sexual contact between himself and C.H., Martinez admitted he may have put his hands down her pants to touch her legs in a "caressive" way. (*Id*. at 17:40-19:14.)

Parks let Martinez use the restroom, and then left him in the interview room for less than 10 minutes before returning to ask some follow up questions. (Video at 19:14-23:33.) Parks asked Martinez how much he had smoked and drank that night. Martinez responded that between all the partygoers, he estimated, "[a] fifth of Admiral" spiced rum, a "fifth of Nikolai" vodka, and an eighth of marijuana. (*Id*. 23:33-25:30.) Martinez told Parks that he remembered C.H. was acting "tipsy" but that he still did not remember who took C.H.'s clothes off because there were a lot of people in the room and when he "came to" she was "half naked." (*Id*. at 25:30-26:58.) Martinez denied giving C.H. any pills but stated that he was taking "uppers" and that he left "a [big] line" of Vyvanse on the table in front of C.H. when he went to smoke a cigarette and that C.H. may have snorted some of it. (*Id*. at 26:58-30:38.)

Parks remarked how detailed Martinez's memory of the night was right up until he claimed to have "blacked out" when Parks arrived. (Video at 30:38-31:39.) Parks asked Martinez what they would find if they swabbed his fingers or his penis, and Martinez hung his head and said he did not know. (*Id*. at 31:39-32:08.) He "was looking for fun that night," saw her blonde hair and her face, and "that was it." He again claimed that he started kissing C.H., and then blacked out. When he came to, he was not "in her," but he was aroused, and they were both half naked. (*Id*. at 32:08-33:40.) He said his first thought when he came to was, "oh fuck, I hope she's not—I hope this won't get me in trouble, you know what I mean?" (*Id*. at 34:28-35:05.) Martinez clarified that even though he "heard she was in his grade," he was worried C.H. was underage. (*Id*. 35:05-30.)

Parks again left the room for a few minutes. (Video at 38:13-45:56.) When he came back in the room, he asked Martinez to be honest with him. Martinez responded, "[a]lright, that's it. Fine, here's the deal. You 'cock-blocked' me." (*Id*. at 45:56-46:28.) He clarified that "cock-blocking" means, "I was about to [have sex with C.H.], but you guys stopped me right before I did." (*Id*. at 46:28-43.) Martinez admitted he took C.H.'s pants down and that he was about to penetrate her with his penis when Parks walked in. (*Id*. at 46:43-50:14.) Parks asked if there was anything else Martinez needed to say and he responded, "I want to tell you, but I don't want to go to [] prison and get my ass killed." (Video at 50:14-33.)

Martinez ultimately told Parks he remembered "penetrating [C.H.] with [his] fingers." (*Id*. at 50:50-51:05.) He told Parks "I don't know what—how old she is. I just hope she's old enough to where I won't be called a pervert, you know. Because, I mean, I don't even know if she was my age, my—18. 18 can still be considered rape because of the alcohol and drugs and shit." (*Id*. 51:05-58.)

Parks left the room for a few more minutes. (Video at 52:17-58:30.) Immediately upon Parks entering the room, Martinez asked him if he "wanted to hear the full story." (*Id*. at 58:30-58:50.) Martinez told Parks that he, Breznik, and C.H. all walked into the house and C.H. "puked a bunch." She "puked and puked and puked and puked and then she stopped breathing. But luckily, I know how to do CPR. I had to do CPR on her a few different times to get her to start breathing again. Not even joking, like, I came up to her mouth, checked her pulse, I don't even know if her pulse was going but she was not breathing." (*Id*. at 1:00:40-1:01:55.) Martinez demonstrated for Parks how he breathed into C.H.'s mouth "really hard" to get her to start breathing again. He told Parks he "had to do that at least three different times to keep her alive." (*Id*.)

Martinez told Parks that Breznik disappeared and he and C.H. started talking and making out. He admitted penetrating her vagina with his fingers and then having a conversation with C.H. about the two of them having sex. Martinez said C.H. was [messed] up and imitated her talking by swaying his head back and forth.

Martinez admitted he took both their pants off and was about to have sex with C.H. but Breznik came in the bedroom and yelled at Martinez that C.H. was "[his] date." Contrary to his earlier assertions, he then told Parks that while he did black out at some point that night, he remembered everything he did with C.H. (Video at 1:01:55-04:18.)

Martinez had to wait "a few hours" in the GFPD interview room for processing on the search warrant for his sexual assault examination. (3/13/17 Tr. at 163.) Pursuant to the warrant, GFPD Officer Kevin Supalla transported Martinez to the emergency room at Benefis Hospital for the examination. (3/13/17 Tr. at 172-73.) Supalla arrived at the hospital with Martinez at approximately 7 a.m. and they "waited about an hour and 44 minutes" for Johnson to finish C.H.'s examination and come get Martinez for his examination. (*Id*. at 174, 3/14/17 Tr. at 82.) While they were waiting, the following took place:

> **Mr. Larsen:** And what was Mr. Martinez doing while you were waiting?
>
> **Officer Supalla**: The[y] had the TV going, and occasionally he would make statements to us.
>
> **Mr. Larsen:** What—how would you describe those statements? Were they—was he admitting what he had done or—
>
> **Officer Supalla:** Occasionally he would make statements about what had happened during the previous night, just spontaneously coming out with things.

> **Mr. Larsen:** Because of that, did you do something you don't normally do?
>
> **Officer Supalla:** Yeah, I went out to my patrol vehicle and got a digital recorder. I brought it back into the room, and recorded my time with him.
>
> **Mr. Larsen:** And that was based on the fact that he was making some statements that you thought might be relevant to the investigation?
>
> **Officer Supalla:** Correct.
>
> **Mr. Larsen:** You weren't really questioning him; right?
>
> **Officer Supalla:** He had a few questions for me, and I would answer the questions. Occasionally, I would ask for a clarification. I had a hard time understanding what he was telling me, so I'd ask him, What was that, or Say that again.

(3/13/17 Tr. at 174-75.)

Supalla was in uniform but was not wearing a mic that night. (3/13/17 Tr. at 177.) He had an external digital recorder that he "could get out of the car" if he needed it, which he did. (*Id*.) While he did not show it to Martinez, the recorder was visibly "hanging out of [his] pouch on [his] duty rig." (*Id*. at 178.) Supalla knew Martinez had just come from an interview where he had been *Mirandized*. (*Id*. at 177-79.) Supalla recalled that he, Martinez, and another officer were seated in an emergency department room with the door open and that a nurse came in and out several times. (*Id*. at 179-80.) With the door being open, Martinez could be heard by passersby in the hallway. (*Id*. at 180.)

Martinez objected to State's Exhibit 6 being played for the jury based on it being a surreptitious recording. (3/13/17 Tr. at 175-76, 180.) The district court overruled the objection and the recording was admitted and played. (*Id*. at 176.) Martinez asked Supalla what the search warrant "was based off of" and Supalla responded, "sexual intercourse without consent." (State's Ex. 6, recording at 0:04-41.) Martinez told Supalla, "she was really drunk. Can't you ask her when she's really sober?" (*Id*. at 0:41-47.) Supalla responded, "ask her what?" (*Id*. at 0:47-50.) Martinez stated, "I didn't know it's without consent, like, she (inaudible) carried it out (inaudible), she told me—she gave me consent. How do they know she said it wasn't consent?" (*Id*. at 0:50-1:02.)

Unprompted, Martinez then stated,

> [h]ere's the thing guys, I know I'm dirty on this kit (inaudible), that me and her got really drunk, and none of this was intentional, I just hope that she realizes that. I don't know if I'll be dirty, but I'll be dirty with my fingers. You guys kind of walked in right before anything else happened. I'm glad you guys did, though. You might have stopped me from going to prison, I don't know. I just hope she's—I just hope she's. . .

(Recording at 2:40-3:29.)

Johnson conducted a sexual assault examination of Martinez pursuant to the search warrant. (3/14/17 Tr. at 82.) Detective Scott, who was assigned lead investigator of this case, was present during Martinez's sexual assault examination. (3/14/17 Tr. at 124-25.) Scott recalled that, "[d]uring the course of the exam, []

Martinez stated at one point that we only have to test his finger." (*Id*. at 126.) Martinez "held up his right pointer finger" to demonstrate. (*Id*.)

Regardless, various swabs were collected during Martinez's examination. Jennifer Revis-Siegfried from the Montana State Crime Lab testified that the crime lab "received a reference standard for Mr. Martinez and [C.H.], and I also received penis shaft swabs; left-hand fingernail scrapings; debris swab from Mr. Martinez's right-hand fingernail scrapings; debris swab from Mr. Martinez; unmarked swabs from fingernail scrapings from Mr. Martinez; right-hand swabs; penis head swabs; and scrotum swabs." (3/14/17 Tr. at 105.) She determined that the DNA profile obtained from the epithelial cell fraction of the head of Martinez's penis "matched" C.H., the major DNA profile obtained from the epithelial cell fraction of Martinez's scrotum matched C.H., the major DNA profile obtained from the epithelial cell fraction of Martinez's penis shaft matched C.H., and that C.H. could not be excluded as a contributor to the DNA profile obtained from Martinez's fingernail scrapings. (*Id*. at 106-08, 110-11, 114-16.)

Martinez testified that he believed that C.H. was a senior and close to his age. (3/14/17 Tr. 136-158.) After Scott reviewed all the evidence that was gathered in this case, the statements Martinez made, and other witnesses' statements, he charged Martinez with sexual intercourse without consent. (3/14/17 Tr. at 129.) The State will address additional facts related to this section when relevant.

Offer of Proof

Prior to the start of the second day of trial, outside the presence of the jury, Martinez's counsel, Brian Norcross, informed the court that he wished to cross-examine C.H. based on the contents of a Facebook conversation between C.H. and Breznik, who did not testify at trial. (3/14/17 Tr. at 8-20.) The ongoing conversation between C.H. and Breznik details the pair's plan to meet up and drink and smoke and, according to Norcross, illustrates "the mental state of the victim—regarding her preparation, planning, and participation in the party," and that "she's well aware of what she's getting into." (*Id*. at 9-10.) At one point in the Facebook conversation, Norcross points out that "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." (*Id*. at 10-11.)

The court asked, "So, it goes to her state of mind in the sense that she went there that night wanting to have sex?" Norcross responded, "She went there that night, I believe, in looking at her posting with [Breznik], she's well aware of what's going on and who is there and participating in the activities that everybody was engaging in." (3/14/17 Tr. at 12.) The ongoing conversation culminated in the following exchange on October 23, 2014, while C.H. was still in the hospital, typos and misspellings in original:

C.H.: What happened

Breznik: Uh .. shit went tonya whole another level do u remember any of lastnight

C.H.: No please tell me

Breznik: U honestly don't understand..where are you?

C.H.: The hospital who called the cops

Breznik: There was a noise complaint.

C.H.: Oh did I sleep with anyone

Breznik: That's something we are gonna have tonya talk about..can u have visitors AT the hospital?

C.H.: I'm going home soon I'm really confused

Breznik: Oh an about what?

C.H.: Last night all I remember is going pe

C.H.: Per

C.H.: Pee

Breznik: Yeah an when u came out u were fucked up..

C.H.: So will u tell me what happened I wasn't a slut was i

Breznik: U were pukong everywhere an I tried to help you an then joey [Martinez] came info an help meal an I went tonya smoke a cog an when I came back he was still helpong u an then I went tonya finish Its an when I cake back Check Check was on top of u with fur panta down ..an I like grabbed him am threw him off an we hot into Its then the cope showed up with him half naked an u laying on the bed…

C.H.: Omg I'm such a slut I'm sorry about last night

Breznik: Its good..

(Defendant's Ex. A, refused at 3/14/17 Tr. at 20, Appellant's App. C.)

The court determined it was not going to allow any of the Facebook discussion to come in at trial for several reasons. (3/14/17 Tr. at 19-20.) First, the court determined the messages authored by Breznik were hearsay and no hearsay exception applied. (*Id*. at 19.) Second, the conversation was not relevant to the issues at trial. (*Id*.) Third, any portion not barred by relevance and hearsay was precluded by the Rape Shield. (*Id*. at 20.) Despite the court's earlier ruling, Norcross still attempted to impeach C.H. with the messages during his cross-examination of her. (*Id*. at 71.) The district court reiterated its ruling and precluded any further questioning. (*Id*.)

STANDARD OF REVIEW

District courts have broad discretion in determining the relevance and admissibility of evidence. *State v. Walker*, 2018 MT 312, ¶ 11, 394 Mont. 1, 433 P.3d 202 (citing *State v. Daffin*, 2017 MT 76, ¶ 12, 387 Mont. 154, 392 P.3d 150). Thus, this Court reviews evidentiary rulings for an abuse of discretion. *Id*. (citation omitted). A court abuses its discretion if it acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice. *Id*. (citation omitted). In exercising its discretion, however,

a district court is bound by the Rules of Evidence and applicable statutes. *Id*. (citation omitted). Consequently, to the extent the court's ruling is based on its interpretation of an evidentiary rule or statute, this Court's review is de novo. *Id*. (citation omitted).

This Court will affirm the district court when it reaches the right result, even if it reaches the right result for the wrong reason. *Daffin*, ¶ 34 (citations omitted).

Claims of ineffective assistance of counsel raised on direct appeal present mixed questions of law and fact, which this Court reviews de novo. *State v. Howard*, 2017 MT 285, ¶ 18, 389 Mont. 356, 405 P.3d 1263 (citation omitted).

SUMMARY OF ARGUMENT

The district court did not abuse its broad discretion when it precluded Martinez from questioning C.H. regarding messages she authored in the hospital the morning after she was raped. The messages were irrelevant to the issue of consent, and Martinez's stated purpose for introducing them violated the Rape Shield. To the extent the district court erroneously concluded the messages authored by C.H. were hearsay and that no exception applied, it nevertheless reached the right result, and this Court should affirm. He was not deprived of his right to confrontation as his counsel cross-examined the victim at length.

The district court correctly allowed Martinez's recorded statements to be played for the jury as neither Martinez's supposed intoxication nor his self-reported diagnoses of ADHD and FAS *per se* invalidate his *Miranda* waiver. The totality of the circumstances demonstrate that Martinez's *Miranda* waiver was valid. Martinez was not subject to an interrogation when he made statements in the hospital, and law enforcement was not required to re-administer *Miranda* warnings or remind him of earlier warnings.

Finally, Martinez received effective assistance at trial when his counsel objected to the recordings of Martinez's statements being played for the jury, thus preserving them for appellate review. Even if this Court determines that counsel should have filed a pretrial motion to suppress, Martinez has failed to demonstrate prejudice as a result of his counsel's allegedly deficient performance because his recorded statements were not obtained in violation of *Miranda*.

ARGUMENT

I. The district court correctly precluded Martinez from questioning C.H. about Facebook messages she authored after the rape.

Martinez claims he was denied a fair trial and his right to confrontation when the district court denied admission of the Facebook messages authored by C.H. to Breznik. (Appellant's Br. at 13-18.) He claims that 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." (*Id*. at 13.) To the contrary, the district court correctly exercised its discretion when it concluded that the messages were not relevant to any fact at issue in the case and covered topics precluded by the Rape Shield. To the extent the district court erroneously concluded the messages authored by C.H. were hearsay and inadmissible on that basis, this Court should affirm the result as being right for the wrong reason.

A person commits the offense of sexual intercourse without consent when the person knowingly has sexual intercourse with another person without consent or with another person who is incapable of consent. Mont. Code Ann. § 45-5-503(1). Sexual intercourse means, among other things, penetration of the vulva of one person by the penis of another person, or penetration of the vulva of one person by a body member of another person, to knowingly or purposely arouse or gratify the sexual response or desire of either party. Mont. Code Ann. § 45-2-101. "Consent" means words or overt actions indicating a freely given agreement to have sexual intercourse or sexual contact and lack of consent may be inferred based on all of the surrounding circumstances and must be considered in determining whether a person gave consent. Mont. Code Ann. § 45-5-501. A victim is incapable of consent if the victim is mentally incapacitated, physically helpless, or less than 16 years old. Mont. Code Ann. §§ 45-5-501(i)-(ii), (iv).

Martinez claims he wanted to question C.H. about the Facebook messages she authored to Breznik "to impeach [her] on the issue of consent." (Appellant's Br. at 6.) It is unclear to the State how these messages are "undisputedly relevant to the issue of consent." (Appellant's Br. at 16.) Nothing in the messages authored by C.H. after the rape has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Mont. R. Evid. 401. In fact, it is undisputed that C.H., who was 15 years old at the time Martinez raped her, was mentally incapacitated due to alcohol. She was treated for alcohol poisoning and spent close to 24 hours throwing up. Martinez himself told Parks he had to administer CPR three separate times to keep her alive so he could have sexual intercourse with her. He told Parks that even if C.H. was his age, "18 can still be considered rape because of the alcohol and drugs and shit." Indeed, even Martinez knew C.H. was incapable of consenting to have sex with him as a matter of law. The fact that C.H., the day after the rape, apologized to another person for being "a slut" is completely irrelevant and not probative of the issue of consent in this case.

Further, Montana's Rape Shield Law generally precludes any "[e]vidence concerning the sexual conduct of the victim." Mont. Code Ann. § 45-5-511(2). The statute is designed to prevent the defendant's trial "from becoming a trial of the victim's prior sexual conduct" and to protect victims from "harassing or irrelevant

questions concerning their past sexual behavior." *State v. Colburn*, 2016 MT 41, ¶ 22, 382 Mont. 223, 366 P.3d 258 (citations omitted). As the State argued below, "'Oh my god; I'm such a slut,' is consistent with what a rape victim feels in these types of situations." (3/14/17 Tr. at 17.) Martinez's representations "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 planned this night of drinking and planned to attend, that she somehow cannot be a victim of rape." (*Id.*) The district court correctly concluded that the messages authored by C.H. were inadmissible for those stated purposes. (*Id.*)

II. The district court properly allowed Martinez's recorded statements at trial.

A. The totality of the circumstances show that Martinez's *Miranda* waiver was valid.

In the context of "custodial interrogation," certain procedural safeguards are necessary to protect a defendant's Fifth and Fourteenth Amendment privileges against compulsory self-incrimination. *Rhode Island v. Innis*, 446 U.S. 291, 297 (1980). In addition to the Fifth Amendment of the United States Constitution, article II, section 25 of the Montana Constitution provides the right against self-incrimination. *State v. Main*, 2011 MT 123, ¶ 15, 360 Mont. 470, 255 P.3d 1240. Thus, the State "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." *State v. Olson*, 2003 MT 61, ¶ 13, 314 Mont. 402, 66 P.3d 297 (citing *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)). There are two separate components to the "custodial interrogation" determination: (1) whether the individual was "in custody" and (2) whether the individual was subjected to an "interrogation." *State v. Munson*, 2007 MT 222, ¶ 21, 339 Mont. 68, 169 P.3d 364. The State does not dispute that Martinez was subject to a custodial interrogation when questioned by Parks at GFPD.

A suspect may waive his Fifth Amendment rights if such a waiver is made voluntarily, knowingly, and intelligently. *Main*, ¶ 21 (citations omitted). As this Court has cited, the United States Supreme Court has stated that this inquiry has "two distinct dimensions." *Id*. (citations omitted).

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived.

Main, ¶ 21 (citations omitted).

This Court has "likewise stated that '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.'" *Main*, ¶ 21 (citing *State v. Blakney*, 197 Mont. 131, 138, 641 P.2d 1045, 1049-50 (1982)). Thus, "[t]he 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.'" *Id*. (citations and internal quotations omitted). Other 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." *Id*. (citation and internal quotations omitted). In *Main*, this Court explicitly noted, "[w]e have considered a defendant's responses to questions while supposedly intoxicated as one 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)).

Martinez argues that he was too intoxicated to have validly waived his *Miranda* rights and that other jurisdictions have invalidated a defendant's *Miranda* waiver based on intoxication, citing in support *United States v. Bonner*, 2010 U.S. Dist. LEXIS 38586 (M.D. Pa. Apr. 20, 2010), a United States District Court trial court opinion from Pennsylvania, and *State v. Bramlett*, 94 N.M. 263, 609 P.2d 345

(N.M 1980) (*overruled in part by Armijo v. State ex rel. Transp. Dep't*, 105 N.M. 771, 737 P.2d 552 (N.M. 1987)), a Court of Appeals of New Mexico opinion from 1980. Neither case is binding on this Court and both are factually distinguishable, thus, not persuasive.

Importantly, the district court in *Bonner* simply analyzed the defendant's intoxication as this Court does: as one factor in the totality of the circumstances. The court, citing *Moran v. Burbine*, 475 U.S. 412, 421 (1986), noted, "[t]o determine the validity of a *Miranda* waiver, courts analyze the 'totality of the circumstances surrounding the interrogation' to determine whether they 'reveal both an uncoerced choice and the requisite level of comprehension.'" *Bonner*, at *16. The statements the court suppressed in this case were made following the detectives "convey[ing] a falsehood to Bonner when they explained that he was not a target of the investigation." *Id*. Bonner told officers he was suffering from the lingering effects of marijuana and PCP and that PCP use typically affects him for "a day or two." *Id*. at *18 n.11. Analyzing the totality of these circumstances, the court concluded "Bonner's *Miranda* waiver was not voluntary; his partial intoxication and the nature of the detectives' deceptive comment are sufficient to invalidate Bonner's rights waiver." *Id*. at *19.

In *Bramlett*, the defendant made a series of statements on scene after he had been involved in a one-vehicle accident and administered *Miranda* warnings, and

another statement at the police station after he signed a written waiver of his rights. *Bramlett*, ¶¶ 18-19. Officers described the defendant at the time of arrest as "staggering, slurred speech, difficulty in walking, strong alcoholic smell" and he registered a blood alcohol content of 0.23. These same officers decided the defendant was too intoxicated to be released and they continued his detention in jail "for his own protection." *Bramlett*, ¶ 20. The Court of Appeals noted it was "difficult to reconcile their conclusion of his extreme intoxication with their opinion of his judgmental awareness of his rights and an intelligent waiver of them." *Id*. The Court concluded that "[s]uch conflicting evidence from the same witnesses offends the standards of fundamental fairness under the due process clause and is unworthy of the degree of belief necessary to sustain a finding of voluntary waiver. *Id*., ¶ 21 (internal citations omitted). Here, Parks made no similar observations regarding Martinez's level of intoxication, nor was he detained for his own protection.

In *Main*, Main also claimed to have been intoxicated during his interrogation and that "other jurisdictions 'have held that alcohol intoxication may invalidate a *Miranda* waiver.'" *Main*, ¶ 24. However, this Court specifically recognized that "the cases he cites analyze intoxication as we do: as one factor in the totality of the circumstances." *Main*, ¶ 24 (citation omitted). This Court determined that Main's waiver was the product of a free and deliberate choice and that it was made with a

full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it to be voluntarily, knowingly, and intelligently given. *Main*, ¶ 24 (citations and quotations omitted). In making this determination, the Court noted that an officer "testified during the suppression hearing that, while Main smelled of alcohol and occasionally slurred his words, '[h]e wasn't stumbling. He answered questions in an articulate manner.'" *Main*, ¶ 23.

Similarly, in *Cassell*, this Court concluded, based on the totality of the circumstances, "that Cassell's statements were made voluntarily and that his waiver of his Fifth Amendment rights was made knowingly, intelligently and voluntarily," where Cassell was 43 years old at the time of the interrogations and he had a lengthy police record. *Cassell*, 280 Mont. at 403. "Thus," this Court concluded, "he was familiar with the criminal justice system and police interrogation methods. None of the three interrogations were overly long and no threats were made." *Id*. This Court emphasized that "the answers given by Cassell to the questions asked of him in the taped interviews were appropriate to the questions, thereby refuting Cassell's argument that he was too intoxicated to understand what was happening." *Id*.

Martinez argues that the totality of the circumstances, including his "undisputed intoxicated state at the time of the waiver, his age, diagnosis of A[D]HD, FAS, education level, and intellectual capacity, invalidates his Miranda waiver, rendering his recorded statements inadmissible during trial." (Appellant's Br. at 23.) However,

and unlike the cases Martinez cites, the totality of the circumstances present here demonstrate that Martinez's waiver was the product of a free and deliberate choice and that it was made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it to be voluntarily, knowingly, and intelligently given.

Parks testified that before Martinez waived his *Miranda* rights, he "appeared intoxicated," but he was coherent and able to understand and follow Parks' instructions. Despite his claimed intoxication, Parks testified that Martinez "tracked" and responded appropriately to his questions. At the time of the interview, at least two hours had elapsed since Martinez had consumed any alcohol and he did not fall asleep during the interview or otherwise act incoherent or incompetent. The recorded interview speaks for itself and undermines Martinez's contention that he was too intoxicated to waive his rights. *See State v. Nixon*, 2013 MT 81, ¶ 40, 369 Mont. 359, 298 P.3d 408; *Cassell*, 280 Mont. at 403. Martinez understood why he was being questioned, as well as the consequences of his actions, evidenced by his ever-changing story and fear of going to prison if he confessed. Martinez listened to Parks read his *Miranda* rights and signed a form waiving those rights. Parks testified that he was satisfied that Martinez was competent to waive his rights at that time.

In support of his arguments regarding "his age, diagnosis of A[D]HD, FAS, education level, and intellectual capacity," Martinez cites to information contained

in the Presentence Investigation Report (PSI). The PSI and related evaluations of Martinez detail that at the time of the offense, Martinez, who was 18 years old, had attended and completed school through 10th or 11th grade before dropping out due to criminal involvement. (D.C. Docs. 95 at 6, 98, Zook Psychosexual at 3.) He reported earning "b's and c's" while in school. (*Id.*) This demonstrates that Martinez is at least of average intelligence, despite his self-reported diagnoses of ADHD and FAS. Moreover, at the time of this offense, he was not being prescribed any medications for ADHD nor was he receiving medical treatment for any condition. (D.C. Doc. 95 at 6.)

Martinez claims that his "intelligence and intellectual functioning are well below average, with particular deficits in verbal understanding and processing speed." (Appellant's Br. at 23.) Martinez is correct that Donna Zook, who conducted a psychosexual evaluation of Martinez at his counsel's request, did opine that Martinez's "social judgment and executive functioning are well below what is expected for his chronological age and grade level." (D.C. Doc. 98, Zook Psychosexual at 6.) However, this same interviewer also utilized the Structured Inventory of Malingered Symptomatology (SIMS) and concluded that Martinez "responded in a manner that suggested feigning or malingering psychotic, affective, cognitive, memory, or neurological problems. His total raw score on each of the five categories grossly exceed[ed] the cutoff score for each one." (*Id.* at 7.)

At the time of this offense, Martinez had already acquired a lengthy criminal record and reported being arrested for approximately 31 misdemeanors as a juvenile. (D.C. Doc. 95 at 2-3, 10, Juvenile History.) Probation and Parole Officer Tim Hides, who prepared Martinez's PSI, explained that Martinez "has been on juvenile probation, [and] has been terminated from numerous placements, including juvenile treatment Court." (D.C. Doc. 95 at 10.) This lengthy criminal record demonstrates that Martinez was familiar with the criminal justice system and police interrogation methods at the time of the waiver in this case.

Further, Zook administered a Miranda Rights Comprehension Instrument (MRCI) as part of her psychosexual evaluation of Martinez. (D.C. Doc. 98, Zook Psychosexual at 7.) She concluded, based on this objective, standardized assessment that Martinez possessed the "linguistic comprehension and the ability to 'grasp' the concept of 'right' as a protection and entitlement and explaining these individual rights in his own words that reflect[ed] a genuine appreciation of them." (*Id.*) Martinez had "an appreciation of his right to an attorney and the adversarial nature between the police and himself and the police and his attorney. Most importantly, [] Martinez recognized that he was entitled to stop the interview at any time. He appreciated the entitlement of being 'silent' and recognized and appreciated that everything he says to the police can and will be used in court to hurt his case." (*Id.* at 8.)

The totality of the circumstances do not support Martinez's assertion that his *Miranda* waiver is invalid. Neither were Martinez's recorded statements to Parks extracted by any sort of threat or violence, by the exertion of any improper influence, or by any direct or implied promises. The videotaped interrogation undermines Martinez's contention that he was too intoxicated to understand what was happening; instead, he answered Parks' questions in a clear, coherent manner. *Nixon*, ¶ 40. The totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension. *Main*, ¶ 21 (citation omitted).

B. Law enforcement was not required to re-administer the previously-given *Miranda* warnings because officers did not interrogate Martinez while waiting for his sexual assault examination.

Martinez argues that the totality of the aforementioned circumstances "weigh[] in favor [of] re-administration of Miranda rights to Martinez while he was at the hospital, or at least a reminder of the previous rights administration." (Appellant's Br. at 26.) While Martinez is correct that he was in law enforcement custody at the hospital, his argument is based on the flawed premise that he was subject to a second custodial interrogation. However, the record demonstrates that Martinez was not "interrogated" within the meaning of *Miranda* while awaiting his sexual assault examination at Benefis Hospital.

As outlined above, there are two separate components to the "custodial interrogation" determination: (1) whether the individual was "in custody" and (2) whether the individual was subjected to an "interrogation." *Munson*, ¶ 21. The State does not dispute that Martinez was "in custody" while awaiting his sexual assault examination at the hospital. However, the State disputes that Martinez was subjected to an "interrogation." This term "refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Munson*, ¶ 25 (internal quotations and citations omitted). The primary focus in determining whether an incriminating response was reasonably likely to be elicited from the suspect is on the perceptions of the suspect, rather than on the intent of the police. *Id*. (citations omitted).

It is undisputed that the first prong of the definition of "interrogation" was not satisfied here because the conversation between Officer Supalla and Martinez included no express questioning. The second inquiry asks whether Supalla used any words or that he should have known were reasonably likely to elicit an incriminating response from Martinez. A spontaneous or unsolicited remark, not made in response to interrogation, is admissible even without a *Miranda* warning.

State v. Braulick, 2015 MT 147, ¶ 16, 379 Mont. 302, 349 P.3d 508 (citing *State v. Johnson*, 177 Mont. 182, 187, 580 P.2d 1387, 1390 (1978)).

As an initial matter, officers routinely wear body cameras during the performance of official duties. That Supalla had to go to his vehicle and retrieve the camera he was authorized to wear carries no weight in this analysis. Martinez cites no authority for the proposition that officers have a duty to inform arrestees they are recording their interactions. Further, the record demonstrates that while Supalla waited with Martinez for Johnson to finish C.H.'s sexual assault examination, Martinez made several unprompted statements about what had happened during the previous night. Supalla testified that Martinez was, "just spontaneously coming out with things." He confirmed that he was not questioning Martinez regarding those events, but simply letting him talk and occasionally asking for clarification if he had difficulty understanding him.

Moreover, Supalla recalled that he, Martinez, and another officer were seated in an emergency department room with the door open and that a nurse came in and out several times. With the door being open, Martinez could be heard by passersby in the hallway, which could have included members of the public or hospital staff. Supalla did not act or speak in any way that he should have known would have elicited an incriminating response from Martinez. As such, he was not

required to re-administer or remind Martinez of his previous *Miranda* waiver because Martinez was not subject to an interrogation.

Alternatively, if this Court concludes that Martinez was subject to a second interrogation, the district court correctly concluded that re-administration of *Miranda* between subsequent interrogations here was not required. Martinez was never released from custody and a span of less than nine hours elapsed between the first interrogation and the second. "A rewarning is not required simply because there is a break in questioning." *Guam v. Dela Pena*, 72 F.3d 767, 769 (9th Cir. 1995) (citing *United States v. Andaverde*, 64 F.3d 1305, 1312 (9th Cir. 1995)). There are no circumstances present that indicate the statements Martinez made in the hospital were not the product a free and deliberate choice or that the failure of Supalla to remind Martinez of his earlier *Miranda* waiver renders these statements inadmissible.

III. Martinez has failed to establish either prong of ***Strickland.***

A. Applicable law

The Sixth Amendment and article II, section 24 of the Montana Constitution guarantee criminal defendants the right to the effective assistance of counsel. This Court will address a claim of ineffective assistance of trial counsel on direct appeal only if the record is sufficient for review. When the record does not provide the basis

for the challenged acts or omissions of counsel, a defendant claiming ineffective assistance of counsel more appropriately makes his claims in a petition for postconviction relief. *State v. Herrman*, 2003 MT 149, ¶ 33, 316 Mont. 198, 70 P.3d 738 (internal citations and quotations omitted). That is, when the record is silent as to why counsel took a particular course of action, this Court will not address the claim on direct appeal. *State v. Briscoe*, 2012 MT 152, ¶ 10, 365 Mont. 383, 282 P.3d 657 (internal quotation marks and citations omitted); *Howard*, ¶ 29; *State v. Cheetham*, 2016 MT 151, ¶ 14, 384 Mont. 1, 373 P.3d 45; *State v. Heavygun*, 2011 MT 111, ¶ 8, 360 Mont. 413, 253 P.3d 897; *State v. Sartain*, 2010 MT 213, ¶ 30, 357 Mont. 483, 241 P.3d 1032; *State v. Gunderson*, 2010 MT 166, ¶ 71, 357 Mont. 142, 237 P.3d 74; *State v. Robinson*, 2009 MT 170, ¶ 29, 350 Mont. 493, 208 P.3d 851; *State v. Rovin*, 2009 MT 16, ¶ 34, 349 Mont. 57, 201 P.3d 780.

"An exception to the requirement for a record-based answer as to why counsel acted or failed to act arises where 'no plausible justification' exists to counter a claim of ineffective assistance on appeal." *State v. Upshaw*, 2006 MT 341, ¶ 34, 335 Mont. 162, 153 P.3d 579 (quoting *State v. Kougl*, 2004 MT 243, ¶ 15, 323 Mont. 6, 97 P.3d 1095). This exception is narrow, and the circumstances giving rise to it are rare. *Id*.

To prevail on an ineffective assistance of counsel claim raised for the first time on direct appeal, an appellant must establish: (1) that counsel's performance

was deficient; and (2) that the deficient performance prejudiced the defense. *Baca v. State*, 2008 MT 371, ¶ 16, 346 Mont. 474, 197 P.3d 948; *Strickland v. Washington*, 466 U.S. 668 (1984). Martinez must establish both prongs of the test. *Baca*, ¶ 16 (citing *Whitlow v. State*, 2008 MT 140, ¶ 9, 343 Mont. 90, 183 P.3d 861). If Martinez fails to establish one prong, therefore, this Court need not address the other. *Id*. Nor must this Court address the two prongs in any particular order. *Whitlow*, ¶ 11. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466 U.S. at 697; *accord State v. Morgan*, 2003 MT 193, ¶ 10, 316 Mont. 509, 74 P.3d 1047.

Counsel's performance is only deficient if it falls "below an objective standard of reasonableness measured under prevailing professional norms and in light of the surrounding circumstances." *Whitlow*, ¶ 20. To establish that counsel's performance was deficient, the defendant must overcome a strong presumption that counsel's actions were within the broad range of reasonable professional assistance. *Baca*, ¶ 17. When determining whether counsel's performance was deficient, this Court judges the reasonableness of counsel's performance "on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690.

With respect to the second prong of the test, a defendant must demonstrate the existence of a reasonable probability that, but for counsel's unprofessional conduct, the result of the proceedings would have been different. *State v. Mitchell*, 2012 MT 227, ¶ 22, 366 Mont. 379, 286 P.3d 1196. "This inquiry focuses on whether counsel's deficient performance renders the trial result unreliable or the proceeding fundamentally unfair." *Id.*

B. Discussion

Despite that "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*," Martinez argues that no plausible justification exists for his counsel to decline to file a pretrial motion to suppress. (Appellant's Br. at 31-32.) To the contrary, counsel is not obligated to file a pretrial motion simply because it is authorized by statute. (*Id.* at 32.) His counsel provided him with effective assistance in raising the issue at trial and preserving it for appellate review.

Even assuming, arguendo, that counsel's failure to file a pretrial motion was error, Martinez still bears the burden of demonstrating prejudice from this error. An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. *State v. Weber*, 2016 MT 138, ¶¶ 28-32, 383 Mont. 506, 373 P.3d 26

(citing *Strickland*, 466 U.S. at 691-92 (internal citation omitted)). The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. *Id*. It follows that any deficiencies in counsel's performance must be prejudicial to the defense to constitute ineffective assistance under the United States Constitution. *Id*.

Accordingly, to establish the second prong of *Strickland*, Martinez must show that the trial counsel's allegedly deficient performance prejudiced him. *State v. Peart*, 2012 MT 274, ¶ 23, 367 Mont. 153, 290 P.3d 706 (citing *Whitlow*, ¶ 10). He must do more than just show that the alleged errors of a trial counsel "had some conceivable effect on the outcome of the proceeding." *Peart*, ¶ 23 (citing *Strickland*, 466 U.S. at 693). Rather, Martinez must demonstrate a reasonable probability that, but for his trial counsel's allegedly deficient performance, the result of the proceeding would be different. *Peart*, ¶ 23 (citation omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding." *Peart*, ¶ 23 (citation omitted). The likelihood of a different result must be "substantial." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

Martinez claims that "had counsel *excluded* such statements prior to trial, the district court would have had the benefit of legal briefing from the parties on the issue," and "the trial strategy of both sides *may have* been influenced by such a

ruling." (Appellant's Br. at 32 (emphasis added).) As discussed previously, even if counsel had *moved* to suppress Martinez's statements, it would not have secured their exclusion as Martinez knowingly, voluntarily, and intelligently waived his *Miranda* rights and the district court correctly allowed the jury to hear them. Speculating that the parties' trial strategy may have been influenced is not a probability sufficient to undermine confidence in the outcome of the proceeding. Accordingly, Martinez has failed to demonstrate prejudice as a result of his counsel's allegedly deficient performance.

CONCLUSION

The State respectfully requests that this Court affirm Martinez's conviction and sentence.

Respectfully submitted this 27th day of March, 2019.

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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 9,637 words, excluding certificate of service and certificate of compliance.

/s/ Madison L. Mattioli
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CERTIFICATE OF SERVICE

I, Madison L. Mattioli, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 03-27-2019:

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