

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 17-0400

STATE OF MONTANA,

Plaintiff and Appellee,

v.

HADLEY GENE RESH,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Nineteenth Judicial District Court,
Lincoln County, Honorable Matthew J. Cuffe, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUES.....1

COMBINED STATEMENT OF THE CASE AND FACTS1

STANDARD OF REVIEW5

SUMMARY OF ARGUMENT6

ARGUMENT7

 I. RESH FAILED TO PRESERVE JURY INSTRUCTION ISSUE FOR
 APPEAL.....7

 II. THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY ON
 THE ELEMENTS OF SEXUAL ASSAULT.....9

 III. THE COURT SHOULD NOT ACCEPT RESH’S INVITATION TO
 CONDUCT PLAIN ERROR REVIEW.12

 IV. RESH’S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM
 CANNOT BE CONSIDERED ON DIRECT APPEAL.....15

 V. ANY CLAIMED ERROR BY THE DISTRICT COURT WAS
 HARMLESS.19

CONCLUSION.....23

CERTIFICATE OF COMPLIANCE.....24

TABLE OF AUTHORITIES

Cases

Adams v. State, 2007 MT 35, 336 Mont. 63, 153 P.3d 60118

Arizona v. Fulminante, 499 U.S. 279, (1991).....19

California v. Roy, 519 U. S. 2, (1996)20

Chapman v. California, 386 U. S. 18 (1967)..... 20, 21

Hagen v. State, 1999 MT 8, 293 Mont. 60, 973 P.2d 23318

In re M.J.W., 1998 MT 142, 289 Mont. 232, 961 P.2d 1055

Neder v. U.S., 527 U.S. 1, (1999) 19, 20

Peterson v. St. Paul Fire & Marine Ins. Co., 2010 MT 187, 357 Mont. 293,
239 P.3d 9045

Rock Mt. Bank v. Stuart (1996), 280 Mont. 74, 928 P.2d 243.....11

Rose v. Clark, 478 U. S. 570 (1986)20

Soraich v. State, 2002 MT 187, 311 Mont. 90, 53 P.3d 87816

State v. Bradley (1995), 269 Mont. 392, 889 P.2d 116710

State v. Brown, 1999 MT 31, 293 Mont. 268, 975 P.2d 32113

State v. Crider, 2014 MT 139, 375 Mont. 187, 328 P.3d 61213

State v. Daniels, 2011 MT 278, 362 Mont. 426, 265 P.3d 62313

State v. Davis, 2000 MT 199, 300 Mont. 458, 5 P.3d 5478

State v. Dethman, 2010 MT 268, 358 Mont. 384, 245 P.3d 308

State v. Detonancour, 2001 MT 213, 34 P.3d 487 10, 11

State v. Dyfort, 2000 MT 338, 303 Mont. 153, 15 P.3d 46416

State v. Earl, 2003 MT 158, 316 Mont. 263, 71 P.3d 120113

State v. Gardner, 2003 MT 338, 318 Mont. 436, 80 P.3d 1262.....9

State v. Gray, 2004 MT 347.....9

State v. Johnston, 2010 MT 152, 357 Mont. 46, 237 P.3d 7015

State v. Langford (1991), 248 Mont. 420, 813 P.2d 93616

<i>State v. Longstreth</i> , 1999 MT 204, 295 Mont. 457, 984 P.2d 157	10
<i>State v. McKenzie</i> , 608 P.2d 428, (Mont. 1980)	20
<i>State v. Micklon</i> , 2003 MT 45, 314 Mont. 291, 65 P.3d 559.....	9
<i>State v. Minez</i> , 2004 MT 115, 321 Mont. 148, 89 P.3d 966.....	8, 9
<i>State v. Myran</i> , 2012 MT 252, 366 Mont. 532, 289 P.3d 118	5
<i>State v. Novak</i> , 2005 MT 294, 329 Mont. 309, 124 P.3d 182	17
<i>State v. Robinson</i> , 2009 MT 170, 350 Mont. 493, 208 P.3d 851	15, 16
<i>State v. Sawyer</i> , 2019 MT 93	15, 16
<i>State v. Strauss</i> , 2003 MT 195, 317 Mont. 1, 74 P.3d 1052.....	10
<i>State v. Taylor</i> , 2010 MT 94, 356 Mont. 167, 231 P.3d 79	13
<i>State v. White</i> , 2001 MT 149, 30 P.3d 340	16, 17
<i>State v. Wilson</i> , 2007 MT 327, 340 Mont. 191, 172 P.3d 1264	8
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	15, 16, 17, 18

Statutes

Mont. Code Ann. § 45-2-101	21
Mont. Code Ann. § 45-5-502	21
Mont. Code Ann. § 46-16-410.....	7, 8
Mont. Code Ann. § 46-20-104.....	8
Mont. Code Ann. § 46-20-701	8

STATEMENT OF THE ISSUES

1. Whether Resh preserved his argument for appeal.
2. Whether the district court properly instructed the jury as to the elements of sexual assault.

COMBINED STATEMENT OF THE CASE AND FACTS

Appellant, Hadley Gene Resh (Resh), was convicted of sexual assault after he penetrated his 14-year-old stepdaughter's vagina with two fingers after a night of drinking. Resh now claims that the district court erred because it did not offer an instruction as to the definition of "without consent" as that term is used in the sexual assault statute. Resh posits this argument even though Resh failed to object to, and actively participated in the formation of, the instructions that were given to the jury at his trial. Recognizing his failure to preserve this matter for appeal, Resh implores the Court to invoke its discretionary plain error review or to review this claim as an ineffective assistance of counsel. However, no matter how the Court looks at this case, it is clear that the jury was properly instructed as to the elements for felony sexual assault, and that overwhelming evidence exists in the record to affirm his conviction.

In March 2014, R.H. was 14 years old. Transcript of Jury Trial (Tr.) 121. Resh is R.H.'s stepfather. Tr. 123. Resh was married to R.H.'s biological mother and they had three children together, one whom is K.R. Tr. 123. Even though he was not her biological father, R.H. considered Resh her father. Tr. 123. They

shared a close relationship. Tr. 124. R.H. considered Resh her protector, best friend, and dad. Tr. 124.

In March 2014, R.H. was staying at Resh's house to celebrate her half-sister's birthday. Tr. 126; Tr. 182. During her visit, R.H. went into Resh's bedroom where he was on his bed, texting and watching television. Tr. 128. R.H. noticed that Resh had been sad that day and went to Resh's bedroom to see how he was doing. Tr. 128. Resh was drinking wine that he had in his room. Tr. 129. It was not unusual for Resh to have wine in his bedroom. Tr. 129.

At some point, Resh asked R.H. to get him another glass of wine. Tr. 129. R.H. went out into the kitchen, got ice, came back into Resh's room, and filled his glass with wine. Tr. 129-130. R.H. recalled filling Resh's glass more than once. Tr. 130-131.

R.H. was sitting on Resh's bed, watching televisions with him. Tr. 131. R.H., who had been wearing sweatpants, got warm and asked Resh if she could put on a pair of his boxer shorts. Tr. 132; State's Ex. 1 at 19. After changing, Resh and R.H. picked out a movie to watch together. Tr. 133. Following a funny part in the movie, Resh commented that R.H. looked pretty like her mother. Tr. 134. Then, unexpectedly, Resh kissed R.H. intimately, on the lips, and put his tongue in her mouth. Tr. 134-135; State Ex. 1 at 26. R.H. testified that this made her feel uncomfortable. Tr. 135. While R.H. testified that she started kissing back, she

stopped when she realized what she was doing. State's Ex. 1 at 27. While kissing R.H., Resh began running his hand up and down R.H.'s thigh. Tr. 135-136. At first, Resh was running his hands across the top of R.H.'s shorts. Tr. 136. Eventually, Resh put his hands under R.H.'s shorts and underwear, and inserted two fingers in his 14-year-old stepdaughter's vagina. Tr. 136-137. While Resh was assaulting R.H., she noticed that he got an erection. State's Ex. 1 at 48-49.

When questioned, R.H. said that her body accepted Resh's sexual contact and moved in rhythm; however, she also realized it was wrong and stated "[t]hen, I was like, no." State's Ex. 1 at 31. R.H. testified that Resh's sexual contact made her very uncomfortable. Tr. 137; State's Ex. 1 at 30. R.H. was "in shock" and did not know how she was supposed to act. Tr. 137-138. Eventually, R.H. moved Resh's hand to get Resh to stop. Tr. 138.

Resh immediately realized that what he had done was wrong as he was shaking and continually apologized. Tr. 138. R.H. told him that it was okay and left the room. Tr. 139. R.H. told Resh that it was okay because she wanted to get out of his room. Tr. 139.

After she left Resh's room, R.H. went out into the living room and told her sister, K.R., that Resh had tried to rape her. Tr. 139, 162; State's Ex. 1 at 36. According to K.R., R.H. appeared "nervous, shaky, not herself," and she cried. Tr. 184; State's Exhibit 2 at 5, 10-11. R.H. asked K.R. to go into Resh's bedroom to

retrieve her sweater because R.H. did not want to go back into Resh's bedroom. Tr. 186. The next morning, Resh apologized, again, and asked R.H. if she was okay. Tr. 140-141.

On or about September 30, 2015, Resh was charged by information with one count of sexual intercourse without consent and one count of sexual assault. *Dkt. Doc. 4*. This matter proceeded to a jury trial. At the close of testimony, the parties settled the jury instructions. Tr. 224-227.

Chief among these were Jury Instructions Nos. 16, 19, 20, and 21. Instruction 16 instructed the jury as to the meaning of the phrase "without consent," which pulled the definition from the sexual intercourse without consent statute. *Dkt. Doc. 90* at 48; Tr. 224. Resh's only objection to this instruction was to request stylistic changes be made to the language of the instruction. Tr. 224-225. Once these non-substantive changes were made, Resh acquiesced to Instruction No. 16. Tr. 227, 239. Resh did not request a separate instruction on "without consent" as that term is used in the sexual assault statute.

Instruction Nos. 19, 20 and 21 instructed the jury on the elements of felony sexual assault and the State's burden of proof with respect to that charge. *Dkt. Doc. 90* at 51-52. Instruction No. 19 stated that "[a] person who knowingly subjects another person to any sexual contact without consent commits the offense of sexual assault." *Dkt. Doc. 90*. Instruction No. 20 set forth the specific elements

that the jury needed to find in order to convict Resh of sexual assault. *Dkt. Doc. 90*. Finally, Instruction No. 21 defined sexual contact. *Dkt. Doc. 90*. Resh lodged no objection to any of these instructions. Tr. 228.

After deliberations, the jury found Resh not guilty of sexual intercourse without consent, and guilty of felony sexual assault. *Dkt. Doc. 91*; Tr. 272. Resh was sentenced to ten years at Montana State Prison, with five years suspended. *Dkt. Doc. 98*.

STANDARD OF REVIEW

This Court reviews for correctness the legal determinations a lower court makes when giving jury instructions, including whether the instructions, as a whole, fully and fairly instruct the jury on the applicable law. *Peterson v. St. Paul Fire & Marine Ins. Co.*, 2010 MT 187, ¶ 45, 357 Mont. 293, 239 P.3d 904.

District courts are given broad discretion when instructing a jury, and reversible error occurs only if the instructions prejudicially affect a defendant's substantial rights. *State v. Myran*, 2012 MT 252, ¶ 16, 366 Mont. 532, 289 P.3d 118. A district court's decision on jury instructions is presumed correct, and the appellant has the burden of showing lower court error. *In re M.J.W.*, 1998 MT 142, ¶ 18, 289 Mont. 232, 961 P.2d 105.

SUMMARY OF ARGUMENT

The Court should not entertain Resh's appeal because he failed to object to the jury instruction that he now takes issue with. Resh's failure to object, and acquiescence to, the jury instructions is fatal to his ability to challenge those instructions. Even if the Court were to entertain Resh's argument, it is without merit because the jury was fully and fairly instructed on the elements of sexual assault, and sufficient evidence in the record exists to affirm his conviction.

This Court should not accept Resh's invitation for this Court to exercise plain error review. This case does not present one of the circumstances that would warrant review of an issue that was not raised at the district court level. Again, the record shows that sufficient evidence existed in the record to convict Resh of sexual assault.

Similarly, the Court should decline to review Resh's ineffective assistance of counsel argument because it is impossible to determine from the record the reasons for Resh's counsel's decision to not object to or request a separate "without consent" instruction. Since it is not possible to ascertain the bases for counsel's reason from the record, this matter should not be reviewed on a direct appeal and taken up in a postconviction proceeding. Even if the Court takes up Resh's ineffective assistance argument, the district court should be affirmed because Resh cannot show that counsel's performance was deficient or that he suffered prejudice

by his counsel's action given the overwhelming amount of evidence in the record that supports his conviction for sexual assault.

Finally, to the extent that this Court were to find some issue with the jury instructions, the district court should still be affirmed because any error was harmless. The overwhelming evidence in the record shows that, beyond a reasonable doubt, the claimed error did not contribute to the verdict. Therefore, under any circumstance, the district court should be affirmed.

ARGUMENT

I. RESH FAILED TO PRESERVE JURY INSTRUCTION ISSUE FOR APPEAL.

The Court should not entertain Resh's argument because he failed to object to Instruction No. 16 and actively participated in the settling of the instruction. As such, Resh failed to preserve this issue and is now precluded from raising it for the first time in appeal.

This Court has repeatedly stated that it will not review issues raised for the first time on appeal. Mont. Code Ann. § 46-16-410(3) provides that “[a] party may not assign as error any portion of the instructions or omission from the instructions unless an objection was made specifically stating the matter objected to, and the grounds for the objection, at the settlement of instructions.” Mont. Code Ann. § 46-16-410(3). Generally, an appellant must establish that an objection was made at trial on the same basis as the error asserted on appeal. *State v. Davis*, 2000 MT

199, ¶ 38, 300 Mont. 458, ¶ 38, 5 P.3d 547, ¶ 38. The purpose behind this requirement is to give “the prosecution and trial court an opportunity to avoid or correct the purported error.” *Davis*, ¶ 38.

Consistent with the explicit mandate of Mont. Code Ann. § 46-16-410(3), case law holds that failure to make a timely objection to jury instructions constitutes a waiver of the objection, except as provided in Mont. Code Ann. § 46-20-701(2)¹, and the Court will not entertain an objection made to a jury instruction for the first time on appeal. Mont. Code Ann. § 46-20-104(2); *see also State v. Wilson*, 2007 MT 327, ¶ 36, 340 Mont. 191, 172 P.3d 1264, 1271 (refusing to hear argument on jury instruction because no objection was made at trial); *State v. Minez*, 2004 MT 115, ¶ 28, 321 Mont. 148, 89 P.3d 966; *State v. Dethman*, 2010 MT 268, ¶ 31, 358 Mont. 384, 245 P.3d 30, 36-37 (denying appeal regarding jury instructions when no objection was made at trial).

The record clearly demonstrates that Resh’s counsel did not object to Instruction No. 16, other than to request minor, stylistic changes to the language thereof. Once the district court made non-substantive changes to the language of Instruction No. 16, Resh’s counsel stated that he had no objection. Further, Resh did not request a separate “without consent” instruction or lodge any objection to

¹ Resh has not argued that his case falls within one of the exceptions listed in Mont. Code Ann. § 46-20-701(2), and none of these exceptions are applicable to Resh’s case.

the instructions on sexual assault. As such, this Court should refuse to entertain Resh's argument because he did not preserve his objection and is raising it for the first time on appeal.

Similarly, Resh's participation in, and acquiescence to, the formation of the jury instructions constitutes a waiver of his right to appeal. The Court has routinely held that it "will not put a district court in error for an action in which the appealing party acquiesced or actively participated." *State v. Gray*, 2004 MT 347, ¶ 20 (citing *State v. Micklon*, 2003 MT 45, ¶ 10, 314 Mont. 291, ¶ 10, 65 P.3d 559, ¶ 10; *Minez*, 2004 MT 115, ¶ 31). The Court has even gone so far as to hold that "acquiescence in error takes away the right of objecting to it." *Gray*, ¶ 20 (citing *State v. Gardner*, 2003 MT 338, ¶ 44, 318 Mont. 436, ¶ 44, 80 P.3d 1262, ¶ 44). Based upon these holdings, Resh is now foreclosed from arguing that the instructions are inadequate or violative of his rights because he actively participated in, and acquiesced to, the formation of these very same instructions. Thus, the district court should be affirmed.

II. THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY ON THE ELEMENTS OF SEXUAL ASSAULT.

Even if the Court were to entertain Resh's argument, his argument is without merit because the jury instructions, when read as a whole, fully and fairly presented the law to the jury with respect to felony sexual assault.

In criminal cases, jury instructions must be reviewed as a whole, and if they fully and fairly present the law to the jury, the jury has been properly instructed. *State v. Bradley* (1995), 269 Mont. 392, 395, 889 P.2d 1167, 1168. The test to be applied is whether, when an instruction is considered as a part of the whole body of instructions, the instruction is prejudicial to the appealing party. *State v. Longstreth*, 1999 MT 204, ¶ 15, 295 Mont. 457, ¶ 15, 984 P.2d 157, ¶ 15. District courts have broad discretion when instructing juries, and reversible error occurs only if the jury instructions prejudiced the defendant's substantial rights. *State v. Strauss*, 2003 MT 195, ¶ 47, 317 Mont. 1, ¶ 47, 74 P.3d 1052, ¶ 47.

Here, when viewing the jury instructions as a whole, it is clear that Resh was not prejudiced by the instructions that were given by the district court. The jury was instructed as to the specific elements of sexual assault, by way of Instruction Nos. 19, 20, & 21. *Dkt. Doc. 90*. The language of these instructions mimics the statutory elements necessary to prove sexual assault. As such, when viewing the whole body of instructions, it is clear that the jury was fully and fairly instructed on the law as it relates to felony sexual assault, and no error can be assigned to the district court.

The State's position is supported by *State v. Detonancour*, 2001 MT 213, ¶ 64, 34 P.3d 487, 495. In *Detonancour*, just as in this case, the appellant was found not guilty of sexual intercourse without consent and guilty of felony sexual

assault. *Detonancour*, ¶ 17. At the close of trial, the jury was instructed on the elements of sexual intercourse without consent, misdemeanor sexual assault, and felony sexual assault. *Detonancour*, ¶ 64. The district court gave an instruction on the definition of “without consent” as used in the sexual intercourse without consent statute, but did not instruct the jury as to the definition of “without consent” as it pertains to sexual assault. *Id.*

On appeal, this Court affirmed and held that the failure of the district court to give a limiting instruction was not prejudicial because “[t]he jury was instructed on the elements of the crime charged and the elements of the lesser included offenses.” *Detonancour*, ¶ 65. “The ordinary meaning of ‘without consent’ applies to the offense of sexual assault. *Id.* (citing *Rock Mt. Bank v. Stuart* (1996), 280 Mont. 74, 80, 928 P.2d 243, 247. As such, the Court found that the failure to give a separate instruction on the definition of “without consent” for purposes of felony sexual assault did not “prejudicially affect the appellant’s substantial rights.” *Detonancour*, ¶ 65.

Resh has posited essentially the same argument in this case. Resh argues that the district court should have given a separate instruction on the definition of “without consent” as it is used in sexual assault. He speculates that the jury used the definition of “without consent” within sexual intercourse without consent, and

focused solely on R.H.'s age to convict him of sexual assault. However, Resh's speculative statements do not comport with the jury's conduct in this case.

If age and consent had been the jury's primary considerations, as Resh contends, then the jury would have likely convicted him of sexual intercourse without consent. Rather, it is obvious, from the jury's verdict, that they were looking at the totality of Resh's conduct and were not squarely focused on R.H.'s age. The jury did not find that the nature of Resh's sexual contact rose to the level of sexual intercourse without consent. Since there is no evidence to substantiate Resh's speculative argument that the jury focused exclusively on R.H.'s age, and because the jury was fully and fairly instructed on the elements of sexual assault, Resh's substantial rights were not prejudiced by the instructions given, and his appeal should be denied.

III. THE COURT SHOULD NOT ACCEPT RESH'S INVITATION TO CONDUCT PLAIN ERROR REVIEW.

Recognizing that he made no substantive objection to the jury instructions at the district court level, Resh urges the Court to undertake plain error review of his case. However, plain error review is inappropriate because the claimed error would not result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial or proceedings, or compromise the integrity of the judicial process.

Where the defendant raises the plain error doctrine to request review of issues that were not objected to at the district court level, the Court's review is discretionary. *State v. Earl*, 2003 MT 158, ¶ 25, 316 Mont. 263, ¶ 25, 71 P.3d 1201, ¶ 25. "For plain error review of an unpreserved issue, the appealing party must (1) show that the claimed error implicates a fundamental right and (2) 'firmly convince' this Court that failure to review the claimed error would result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial or proceedings, or compromise the integrity of the judicial process." *State v. Daniels*, 2011 MT 278, ¶ 32, 362 Mont. 426, 265 P.3d 623. Under this test, the Court asks two questions. First: does this alleged error implicate a fundamental right? Second: would failure to review the alleged error result in one of the above-listed consequences? *State v. Taylor*, 2010 MT 94, ¶ 14, 356 Mont. 167, 231 P.3d 79, 82.

However, the plain error doctrine is to be employed sparingly, on a case-by-case basis. *State v. Crider*, 2014 MT 139, ¶ 30, 375 Mont. 187, 328 P.3d 612, 621 (citing *Daniels*, ¶ 32). In order to determine the applicability of the plain error doctrine, the Court considers the totality of circumstances of each case. *State v. Brown*, 1999 MT 31, ¶ 12, 293 Mont. 268, ¶ 12, 975 P.2d 321, ¶ 12.

In this case, plain error review is not warranted because, upon reviewing the totality of the circumstances, the claimed error would not result in a manifest

miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial or proceedings, or compromise the integrity of the judicial process. The record establishes that the jury was properly instructed on the elements of felony sexual assault, and that overwhelming evidence existed to support the jury's verdict in this case.

As set forth above, R.H. testified that Resh's kissing and vaginal penetration made her feel uncomfortable. Tr. 135; 137; State's Ex. 1 at 30. R.H. was in shock and did not know what she was supposed to do. Tr. 137-138. R.H. physically removed Resh's hand to get him to stop. Tr. 138. Resh immediately began apologizing to R.H. Tr. 138. R.H. left the room, and told her sister what had happened. Tr. 139; 162; State's Ex. 2 at 5-6. R.H. was visibly shaken and crying after Resh assaulted her. Tr. 184; State's Ex. 2 at 5, 11. R.H. did not want to go back into Resh's room and asked her sister to retrieve her sweatshirt. Tr. 186. The following morning, when Resh would not have been intoxicated, Resh, again, apologized to R.H. Tr. 140-141.

These facts, coupled with the instructions given the jury, prove that the State presented sufficient evidence to establish each element of felony sexual assault regardless of R.H.'s age. Thus, the claimed error would not result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial or proceedings, or compromise the integrity of the judicial process.

IV. RESH’S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM CANNOT BE CONSIDERED ON DIRECT APPEAL.

Resh’s claim of ineffective assistance of counsel (IAC) cannot be heard on a direct appeal because Resh’s counsel’s decision cannot be ascertained through an examination of the record. As such, Resh’s argument must be raised in a postconviction proceeding. Even if this Court were to consider Resh’s IAC claim, he has not shown that counsel’s performance was deficient or that he suffered prejudice by his counsel’s action.

“Defendants have the right to effective assistance of counsel in criminal prosecutions under the Sixth and Fourteenth Amendments to United States Constitution and Article II, Section 24 of the Montana Constitution.” *State v. Sawyer*, 2019 MT 93, ¶ 13 (citing *State v. Johnston*, 2010 MT 152, ¶ 15, 357 Mont. 46, 237 P.3d 70). In considering whether IAC claims should be raised on direct appeal and in postconviction proceedings, Montana courts apply the two-pronged test set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *Id.*

However, before the Court can consider either of the *Strickland* factors, it must first determine “whether the claim is based on the trial record.” *Sawyer*, ¶ 13 (citing *State v. Robinson*, 2009 MT 170, ¶ 29, 350 Mont. 493, 208 P.3d 851). “The record ‘must adequately document a challenged act or omission of defense counsel for the defendant to raise an ineffective assistance claim on direct appeal.’”

Sawyer, ¶ 13 (citing *Soraich v. State*, 2002 MT 187, ¶ 21, 311 Mont. 90, 53 P.3d 878). “Thus, [the Court] will address an IAC claim on appeal ‘[i]f the record on appeal explains why counsel did not do something[.]’” *Sawyer*, ¶ 13 (citing *Robinson*, ¶ 29 (internal quotations omitted)). “On the other hand, [the Court] will not address the claim on appeal and instead allow a defendant to raise the issue in a postconviction proceeding ‘[i]f the claim is based on matters outside the record on appeal’ to develop a record ‘as to why counsel omitted some action[.]’ *Id.*

Though not easily distilled into a formula, the definitive question that distinguishes and decides which actions are record and which are non-record, is why? In other words, if counsel fails to object to the admission of evidence, or fails to offer an opening statement, does the record fully explain why counsel took the particular course of action? If not, then the matter is best-suited for postconviction proceedings which permit a further inquiry into whether the particular representation was ineffective. Only when the record will fully explain why counsel took, or failed to take, action in providing a defense for the accused may this Court review the matter on direct appeal.

State v. White, 2001 MT 149, ¶ 20, 30 P.3d 340, 343.

The underlying principle of the foregoing rule is that a silent record cannot rebut the strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance, under this Court’s *Strickland*-based analysis.

See State v. Langford (1991), 248 Mont. 420, 432-33, 813 P.2d 936, 946. Absent a complete record, the Court generally will not speculate on counsel’s alleged errors.

See e.g. State v. Dyfort, 2000 MT 338, ¶ 11, 303 Mont. 153, 15 P.3d 464, ¶ 11.

Generally speaking, this Court has found that claims regarding the failure of defense counsel to offer or object a particular jury instruction are not record-based and not suitable for a direct appeal. *See e.g. White*, ¶ 19 (stating that cases involving counsel’s failure to object to offer particular instruction was a non-record matter); *State v. Novak*, 2005 MT 294, ¶ 20, 329 Mont. 309, 124 P.3d 182, 187 (holding that defense counsel’s failure to object to an improper instruction was not suitable for direct appeal). Here, it would be impossible to ascertain why Resh’s counsel did not object to Instruction No. 16 or offer an instruction on the phrase “without consent” as it is used in the context of sexual assault, as Resh claims he should have done because the record does not provide the “why.” Rather, the record is silent as to counsel’s decision-making, meaning that Resh cannot rebut the strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance by pure speculation. As such, Resh can only bring his IAC claim in a postconviction proceeding.

Even if this Court were to entertain Resh’s IAC claim on direct appeal, the district court should be affirmed because Resh cannot show that counsel’s performance was deficient or that he suffered prejudice by his counsel’s action.

Under the test set forth in *Strickland*, the petitioner must show that: 1) counsel’s performance was deficient; and 2) that the deficient performance prejudiced the defense. *Hagen v. State*, 1999 MT 8, ¶ 10, 293 Mont. 60, ¶ 10, 973

P.2d 233, ¶ 10 (citations omitted). A defendant must satisfy both prongs of this test in order to prevail on an IAC claim. *Adams v. State*, 2007 MT 35, ¶ 22, 336 Mont. 63, ¶ 22, 153 P.3d 601, ¶ 22. Thus, if an insufficient showing is made regarding one prong of the test, there is no need to address the other prong. *Adams*, ¶ 22; *see also Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069 (“[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.”).

Here, Resh cannot satisfy either prong of the *Strickland* test. First, he cannot prove that his counsel’s performance was deficient. As shown above, the district court properly instructed the jury on the elements of both sexual assault and sexual intercourse without consent. Since no error can be assigned to the instructions, no error can be assigned to Resh’s counsel for not objecting to proper instructions.

Second, Resh cannot show that he was prejudiced by any alleged error committed by his counsel. Resh speculates that “there is reasonable probability that but for the attorney’s failure ‘the result of the proceeding would have been different.’” *Appt. Br. at 31*. Resh argues that his 14-year-old could have consented to his sexual contact, and cites statements made by R.H. to law enforcement. He argues that without an instruction on the meaning of “without

consent” in the sexual assault statute, the jury was deprived of the opportunity of considering whether R.H. consented to her stepfather’s touching.

However, as previously stated, the phrase “without consent” carries its ordinary meaning, and Resh’s argument neglects to acknowledge the statements that R.H. made showing that she did not consent to Resh’s sexual contact. For example, R.H. testified that: 1) Resh’s sexual contact made her feel uncomfortable; 2) she realized that what he was doing was wrong; and 3) she physically moved to make him stop. Additionally, R.H.’s sister, K.R. testified about her observation of R.H. immediately after she was assaulted. She described R.H. as visibly shaken and crying. These facts show that there was sufficient evidence in the record to convict Resh of sexual assault, which means that there can be little to no probability that he was prejudiced by his counsel’s alleged failure.

V. ANY CLAIMED ERROR BY THE DISTRICT COURT WAS HARMLESS.

Finally, any error assigned to the district court, if any, should be considered harmless because the uncontroverted evidence establishes, beyond a reasonable doubt that Resh is guilty of sexual assault. Since any error assigned to the district court is harmless, the district court should be affirmed.

The U.S. Supreme Court “recognized that ‘most constitutional errors can be harmless.’” *Neder v. U.S.*, 527 U.S. 1, 8 (1999) (citing *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991)). “[I]f the defendant had counsel and was tried by an

impartial adjudicator, there is a strong presumption that any other constitutional errors that may have occurred are subject to harmless-error analysis.” *Neder*, 527 U.S. at 8 (citing *Rose v. Clark*, 478 U. S. 570, 579 (1986)). “Unlike such defects as the complete deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” *Id.* The courts has “often applied harmless-error analysis to cases involving improper instructions on a single element of the offense.” *Neder*, 527 U.S. at 8 (citations omitted); *see also California v. Roy*, 519 U. S. 2, 5 (1996) (per curiam) (“The specific error at issue here—an error in the instruction that defined the crime—is . . . as easily characterized as a misdescription of an element of the crime, as it is characterized as an error of omission).

The seminal test for determining whether a constitutional error is harmless was set forth in *Chapman v. California*, 386 U. S. 18 (1967). Under that test, the applicable consideration is whether it appears “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Chapman*, 386 U.S. at 24. The federal harmless error rule and Montana’s harmless error rule are essentially the same, and that in either case overwhelming evidence of a defendant’s guilt can render harmless a district court’s error. *State v. McKenzie*, 608 P.2d 428, 458 (Mont. 1980).

Here, when employing the *Chapman* harmless error test, any error that the district court committed with respect to the jury instructions was harmless given the overwhelming evidence of Resh's sexual assault of R.H.

Under Montana law, a person commits the offense of sexual assault when that person: 1) knowingly; 2) subjects another person to sexual contact; 3) without consent. Mont. Code Ann. § 45-5-502(1). "Sexual contact" is defined as any "touching of the sexual or other intimate parts of the person of another, directly or through clothing, in order to knowingly or purposely arouse or gratify the sexual response or desire of either party." Mont. Code Ann. § 45-2-101(67). "[A] person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when the person is aware of the person's own conduct or that the circumstance exists." Mont. Code Ann. § 45-2-101(35).

The record establishes that Resh penetrated his 14-year-old stepdaughter's vagina with his fingers. Tr. 136-137; State's Ex. 1 at 28-29. Resh became erect while touching his stepdaughter. State's Ex. 1 at 48-49. These facts establish that Resh touched R.H.'s sexual parts for the purpose of his own arousal or sexual gratification, thus satisfying the definition of "sexual contact."

Next, Resh's kissing and touching put R.H. in shock, made her feel uncomfortable, and she physically moved Resh's hand to make him stop. Tr. 138. R.H. was left visibly shaken and was crying after being assaulted by Resh. Tr.

184; State's Ex. 2 at 5, 10-11. While she stated that it felt good initially, she affirmatively stated that she realized it was wrong and "was like, no." State's Ex. 1 at 31. This testimony established that R.H. did not consent to Resh's touching.

Finally, Resh immediately realized that what he had done was wrong and continually apologized to R.H. Tr. 138. Resh even apologized the following morning. Tr. 140-141. These facts prove that Resh knowingly assaulted Resh and knew that what he had done was wrong.

The foregoing demonstrates that the State put forth overwhelming evidence in the record to satisfy all three elements of sexual assault beyond a reasonable doubt. As such, any claimed error in the jury instructions was harmless and did not contribute to Resh's conviction for felony sexual assault. Thus, the district court should be affirmed.

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CONCLUSION

Based on the foregoing, the district court's conviction of Resh for sexually assaulting his 14-year-old stepdaughter should be affirmed.

Respectfully submitted this 10th day of May, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I hereby certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is doubled-spaced except for quoted and indented material; and the word count calculated by Microsoft Word is 5431 excluding the Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

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