IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0160

STATE OF MONTANA,

Plaintiff and Appellee,

v.

BRANDON BAGNELL,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Twentieth Judicial District Court,
Lake County, The Honorable James A. Manley, Presiding

APPEARANCES:

JOSEPH P. HOWARD
Joseph P Howard, P.C.
PO Box 1928
Helena, MT 59624-1928

ATTORNEY FOR DEFENDANT
AND APPELLANT

TIMOTHY C. FOX
Montana Attorney General
215 North Sanders
PO Box 201401
Helena, MT 59620

STEVEN N. ESCHENBACHER
LAKE COUNTY ATTORNEY
106 4th Avenue East
Polson, MT 59860

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

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STATEMENT OF THE ISSUES

1. Whether the district court's failure to instruct the jury regarding the definitions of "purposely" and "knowingly" violated statutory and constitutional requirements, warranting a new trial pursuant to plain error review.

2. Whether trial counsel's failure to ensure the jury was instructed regarding the definitions of "purposely" and "knowingly" constituted ineffective assistance of counsel.

STATEMENT OF THE CASE

Brandon Bagnell (Bagnell) was charged by Amended Information with Count I, stalking, a felony, in violation of Mont. Code Ann. § 45-5-220; and, Counts II and III, violation of an order of protection, third or subsequent offense, felonies, in violation of Mont. Code Ann. § 45-5-626. (D.C. Doc. 41.) Count I and Counts II-III were severed for trial purposes, and Counts II and III were ultimately dismissed without prejudice upon motion of the State. (D.C. Docs. 49, 82-83.) Regarding Count I, the State alleged Bagnell, "purposely or knowingly caused serious emotional distress to L.L. by repeatedly sender [sic] her letters." (D.C. Doc. 41 at 2.)

Pursuant to Mont. Code Ann. § 45-5-220, a person commits the offense of stalking if the person, "purposely or knowingly causes another person substantial emotional distress or reasonable apprehension of bodily injury or death by

repeatedly," *inter alia*, "harassing, threatening, or intimidating the stalked person, in person or by mail, electronic communication, [] or any other action, device, or method."

The parties submitted jury instructions to the district court. (D.C. Docs. 92-93.) Neither party, however, submitted instructions defining "purposely" or "knowingly." (D.C. Docs. 92-93.) Bagnell proceeded to trial and the parties settled jury instructions. (Trial Tr. II at 3-4.) The jury would *not* be instructed regarding the *mens rea* elements of "purposely" or "knowingly." (Trial Tr. II at 26-29; Final Jury Instructions, attached hereto as Exhibit B.)

The jury ultimately found Bagnell guilty of stalking. (Trial Tr. II at 48; D.C. Doc. 95.) Bagnell was sentenced as a persistent felony offender, and received a sentence of 20 years to the Montana State Prison. (Sent. Tr. at 38; D.C. Doc. 122, attached hereto as Exhibit A.) Bagnell timely filed a notice of appeal. (D.C. Doc 125.)

STATEMENT OF FACTS

The Lake County Sheriff's Office received a phone call from L.L. wherein she reported receiving letters, and wanted to speak to a deputy about her "options." (Trial Tr. I at 146.) Deputy George Simpson (Deputy Simpson) retrieved approximately 29 letters that L.L. had delivered to Safe Harbor, a domestic violence shelter. (Trial Tr. I at 148-49.) A majority of the letters had been opened;

however, Deputy Simpson had no firsthand knowledge regarding who opened said letters. (Trial Tr. I at 153-54, 189.) The letters were addressed to L.L or her granddaughter and had been mailed from various detention facilities. (Trial Tr. I at 172, 175, 177, 179, 181.) Deputy Simpson had no knowledge as to whether L.L. had read the contents of any of the letters. (Trial Tr. I at 188, 190.)

Jolene Schmitz (Schmitz), a crime victim advocate employed by Safe Harbor, counseled L.L. regarding phone calls and letters she had been receiving. (Trial Tr. I at 201-02, 205.) Schmitz confirmed L.L. had previously sought a permanent order of protection against Bagnell, which expired in March of 2014. (Trial Tr. I at 206-07, 214.) Bagnell had been charged with felony stalking while said permanent order of protection was in place. (Trial Tr. I at 207.) L.L. obtained a second permanent order of protection on May 29, 2015. (Trial Tr. I at 208, 214.) Schmitz alleged that, in discussing Bagnell, L.L. would become "extremely agitated . . . upset . . . angry." (Trial Tr. I at 211.)

Regarding the letters L.L. delivered to Safe Harbor, Schmitz confirmed, "[s]ome of them were opened, yes." (Trial Tr. I at 210.) Although Schmitz could not recall the date L.L. delivered the letters, she believed it was three to four weeks after the second permanent order of protection went into effect. (Trial Tr. I at 215.) Schmitz reiterated a "few" of the letters had been opened, and she denied opening any of the letters. (Trial Tr. I at 215-16.)

L.L. met Bagnell a "long time ago," but denied having a relationship with him, "for a good ten years at least." (Trial Tr. I at 219.) The relationship was a "one-sided thing," and L.L. alleged it was, "never a loving and normal relationship." (Trial Tr. I at 219-20.) L.L. also alleged it was a "[v]ery violent" relationship, and she was a "nervous wreck." (Trial Tr. I at 220.) She acknowledged obtaining a permanent order of protection against Bagnell in 2012, and "didn't even know it was expired." (Trial Tr. I at 221-22, 225.) Regarding Bagnell's previous stalking conviction, L.L noted, "he went with a plea bargain because I wanted him to get some kind of help." (Trial Tr. I at 224.) L.L. denied writing Bagnell, and allegedly did not otherwise solicit his phone calls following the expiration of the 2012 permanent order of protection. (Trial Tr. I at 225.) Rather, she allegedly informed Bagnell his communications were upsetting. (Trial Tr. I at 226.) The foregoing notwithstanding, L.L. and Bagnell were married in 2011; however, she sought and obtained a divorce in November 2015 (according to the Amended Information, Bagnell allegedly stalked L.L. on or about the time between April 24, 2014 and June 15, 2015). (Trial Tr. I at 227, 249; D.C. Doc. 41 at 2.)

Regarding the letters at issue, L.L. "might have read a couple of them," but she explained, "I can't open his mail because it's just like totally insane. It's just like I'm having a PTSD." (Trial Tr. I at 228.) L.L. confirmed most of the letters

had not been opened. (Trial Tr. I at 230, 255.) She alleged receiving hundreds of letters from Bagnell, but she, "didn't save them all . . . a lot of them I just threw away." (Trial Tr. I at 228.) L.L. alleged that receiving a letter from Bagnell would "totally derail" her, and should she open and read one of his letters, "I'm going to have a really bad couple of days to get over them." (Trial Tr. I at 246.) She collected Bagnell's correspondence for a year before contacting law enforcement. (Trial Tr. I at 253-54.) In that regard, L.L. admitted she kept Bagnell's letters, "just in case he wouldn't stop . . . kept them just in case[.]" (Trial Tr. I at 255.)

L.L. claimed she could not recall whether she spoke to Bagnell by phone seven times in January of 2015, and denied allowing her granddaughter to speak with Bagnell—"Hell, no." (Trial Tr. I at 260, 263-64.) Bagnell would, however, introduce recordings of the foregoing phone calls, including calls wherein L.L. allowed Bagnell to speak to her granddaughter. (Trial Tr. II at 14-18.) Although L.L. told Bagnell, "'Don't call me anymore,'" he placed, and she apparently accepted, subsequent calls. (Trial Tr. II at 20.)

The record demonstrates L.L. was present in the courtroom when the foregoing recordings were played for the jury pursuant to Bagnell's case-in-chief. (Trial Tr. II at 21.) And, although L.L. remained under subpoena, she apparently fled the courtroom. (Trial Tr. II at 21-22.) Bagnell asserted his right to recall L.L., and even the court remarked, "I would still like to ask her about what we just

listened to." (Trial Tr. II at 22.) Despite a recess, the State's efforts—"phone calls and texts"—to secure L.L.'s return were unsuccessful. (Trial Tr. at 22-24.)

SUMMARY OF THE ARGUMENT

Montana law requires the State to prove a culpable mental state as to all elements of the offense of stalking, including the conscious object to cause a result or an awareness of the high probability that the result will be caused by the person's conduct. At trial, Bagnell disputed whether he consciously caused L.L. "serious emotional distress" or was aware of the high probability that his conduct would cause such a result. In violation of Bagnell's right to due process, the failure to include jury instructions defining "purposely" and "knowingly" relieved the State of its burden to prove he consciously caused L.L. "serious emotional distress" or was aware of the high probability that his conduct would cause such a result. The error was not harmless because the parties relied upon the *mens rea* element in their case to the jury. Moreover the State, without objection or correction from the court, mischaracterized its burden relative to the *mens rea* element in opening and closing arguments. This Court should therefore exercise plain error review and remand for a new trial, because of the strong possibility that the jury did not find all elements of the offense.

In the alternative, the Court should find that Bagnell received ineffective assistance of counsel when trial counsel failed to propose the required and correct

instructions defining the "purposely" and "knowingly" elements of stalking, which ultimately reduced the State's burden as to the *mens rea* element. No plausible justification exists for trial counsel's failure to submit the correct instructions and failing to do so reduced the State's burden of proof.

STANDARD OF REVIEW

This Court reviews for correctness legal determinations made in giving jury instructions, such as whether instructions as a whole, fully and fairly inform the jury on the applicable law and whether instructions correctly define the mental state element of the offense. *Peterson v. St. Paul Fire & Marine Ins. Co.*, 2010 MT 187, ¶ 45, 357 Mont. 293, 239 P.3d 904; *see State v. Lambert*, 280 Mont. 231, 234, 929 P.2d 846, 848 (1996). A district court has broad discretion in devising jury instructions, but instructions, "must contain an explanation or definition of the crime[.]" *State v. Campbell*, 160 Mont. 111, 114, 500 P.2d 801, 803 (1972); *State v. Anderson*, 2008 MT 116, ¶ 17, 342 Mont. 485, 182 P.3d 80. Whether a defendant's due process rights were violated by an erroneous jury instruction presents an issue of law, which this Court reviews for correctness. *Anderson*, ¶ 17.

Claims of ineffective assistance of counsel that are reviewed on direct appeal present mixed questions of law and fact, which this Court reviews *de novo*. *State v. Chafee*, 2014 MT 226, ¶ 11, 376 Mont. 267, 332 P.3d 240; *see also*, *State v.*

Johnston, 2010 MT 152, ¶ 7, 357 Mont. 46, 237 P.3d 70 (*citing State v. Kougl*, 2004 MT 243, ¶ 12, 323 Mont. 6, 97 P.3d 1095).

ARGUMENT

I. THE FAILURE TO INSTRUCT THE JURY REGARDING THE DEFINITIONS OF "PURPOSELY" AND "KNOWINGLY" VIOLATED CONSTITUTIONAL AND STATUTORY REQUIREMENTS, THUS A NEW TRIAL IS WARRANTED PURSUANT TO PLAIN ERROR.

The duty of a trial court to instruct the jury has been generally recognized as one that is necessary and inherent in the court. In the case *sub judice*, neither party correctly submitted instructions regarding the *mens rea* elements of "purposely" or "knowingly," and the district court ultimately committed plain error by failing to instruct the jury regarding the definitions of the foregoing elements.

A. The Failure to Define "Purposely" and "Knowingly" Relative to the Crime of Stalking Violated Statutory and Constitutional Requirements.

This Court has quoted with approval the following from California:

> In instructing the jurors, we must assume that they have no knowledge of the rules of law and that therefore, they must be instructed on all points of law which, under any reasonable theory, might be involved in their deliberations, to the end that their decision will be according to the law and the evidence and untinged by any private and possibly false opinion of the law that they entertain.

Billings Leasing Co. v. Payne, 176 Mont. 217, 224, 577 P.2d 386, 390-91 (1978). While the necessity to instruct and to properly instruct is no doubt greater in a criminal case because of the fundamental constitutional protections, this Court

observed, "the above statement serves to underline the importance of the trial judge's function to instruct the jury in all cases—civil as well as criminal. That duty cannot be delegated to counsel." *Billings Leasing Co.*, 176 Mont. at 224-25, 577 P.2d at 391.

Jury instructions are crucial to a jury's understanding of the case and, "unfortunately, counsel cannot always be relied upon to provide those instructions." *Billings Leasing Co.*, 176 Mont. at 225, 577 P.2d at 391. In that regard, this Court again quoted with approval the following, from California:

> It is the inescapable duty of the trial judge to instruct the jurors, fully and correctly, on the applicable law of the case, and to guide, direct, and assist them toward an intelligent understanding of the legal and factual issues involved in their search for truth. The court must instruct the jury properly on the controlling issues in the case even though there has been no request for an instruction or the instruction requested is defective.

Billings Leasing Co., 176 Mont. at 225, 577 P.2d at 391.

Under Montana law, the State is required to prove a defendant had a culpable mental state as to every element of the offense, *i.e.*, "[A] person is not guilty of an offense unless, with respect to each element described by the statute defining the offense, a person acts while having one of the mental states of knowingly, negligently, or purposely." Mont. Code Ann. § 45-2-103(1).

A person commits the offense of stalking when he, "purposely or knowingly causes another person substantial emotional distress or reasonable apprehension of

bodily injury or death by repeatedly," *inter alia*, "harassing, threatening, or intimidating the stalked person, in person or by mail, electronic communication, [] or any other action, device, or method." Mont. Code Ann. § 45-5-220. Here, the State alleged Bagnell, "purposely or knowingly caused serious emotional distress to L.L. by repeatedly sender [sic] her letters." (D.C. Doc. 41 at 2.)

Section 45-2-101(65), MCA, defines "purposely" in relevant part: "a person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is the person's conscious object to engage in that conduct or to cause that result." "Knowingly" is defined in relevant part:

> [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. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when the person is aware that it is highly probable that the result will be caused by the person's conduct.

Mont. Code Ann. § 45-2-101(35).

A district court must instruct the jury on what the terms "purposely" and/or "knowingly" mean in the context of the particular crime. *Johnston*, ¶ 9; *State v. Azure*, 2005 MT 328, ¶ 20, 329 Mont. 536, 125 P.3d 116. When an offense criminalizes particularized conduct, the court should define "purposely" in terms of a person's conscious object to engage in conduct of that nature. *See Lambert*, 280 Mont. at 236, 929 P.2d at 849; *State v. Gerstner*, 2009 MT 303, ¶ 29, 353 Mont.

86, 219 P.3d 866 (sexual assault criminalizes the particularized conduct of making sexual contact). Likewise, the court should define "knowingly" as awareness of one's conduct. *See Lambert*, 280 Mont. at 236, 929 P.2d at 849; *Gerstner*, ¶ 29. Where, however, an offense does not describe particularized conduct but instead the result of conduct, then "purposely" should be defined in terms of a person's conscious object to cause such a result, and "knowingly" should be defined as awareness of the high probability that the result will be caused by the person's conduct. *E.g., Lambert*, 280 Mont. at 236, 929 P.2d at 849 (criminal endangerment).

Section 45-5-220, MCA, does not particularize conduct which, if engaged in, results in commission of the offense of stalking; rather, one "may engage in a wide variety of conduct and still commit the offense," *e.g.*, "harassing, threatening, or intimidating the stalked person, in person or by mail, electronic communication, [] or any other action, device, or method." *See Lambert*, 280 Mont. at 236, 929 P.2d at 849. The statute seeks to avoid the singular result of "substantial emotional distress or reasonable apprehension of bodily injury or death," not any particular conduct. *See Lambert*, 280 Mont. at 236, 929 P.2d at 849. Indeed, in determining whether Mont. Code Ann. § 45-5-220 was void for vagueness as applied to a particular defendant, this Court concluded:

> The criminality of the offense arises when a defendant engages in such conduct repeatedly, purposely or knowingly causing another person *substantial emotional distress or reasonable apprehension of bodily injury. Without such mental state, a charge under the statute must fail*.

State v. Martel, 273 Mont. 143, 151, 902 P.2d 14, 19 (1995) (emphasis added).

Accordingly, the proper definition of "purposely" for this statue was a conscious object to cause such a result, and "knowingly" should have been defined as awareness of the high probability that the result will be caused by the person's conduct. And, to establish stalking in this case the State was required to prove beyond a reasonable doubt that Bagnell's conscious object was to cause L.L. "serious emotional distress," or he was aware of the high probability that his conduct would cause such a result. Stated differently, the crime of stalking is not completed if Bagnell did not purposely or knowingly cause serious emotional distress to L.L. by repeatedly sending her letters.

Here, the parties submitted jury instructions to the district court. (D.C. Docs. 92-93.) Neither party, however, submitted instructions defining "purposely" or "knowingly." (D.C. Docs. 92-93.) The first morning of Bagnell's trial, the State presented the court, "proposed 11 and 12, which deal with mental state . . . Somehow we missed the mental state on the ones we previously provided." (Trial Tr. I at 7.) The court observed: "So this is knowingly and purposely . . . we will deal with these at the end[.]" (Trial Tr. I at 8.) The parties settled jury

instructions; however, the record demonstrates State's "proposed 11 and 12," defining the *mens rea* elements of "purposely" or "knowingly," were not included in the discussion. (Trial Tr. II at 3-4; Ex B.) Accordingly, the court did *not* instruct the jury regarding the definitions of "purposely" or "knowingly." (Trial Tr. II at 26-29; Ex. B.)

Whether Bagnell purposely or knowingly caused serious emotional distress to L.L. by repeatedly sending her letters was a question for the jury to decide upon proper instruction. *See Morissette v. U.S.*, 342 U.S. 246, 274 (1952) ("It is alike the general rule of law, and the dictate of natural justice, that to constitute guilt there must be not only a wrongful act, but a criminal intention. Under our system . . . both must be found by the jury to justify a conviction for crime."); *see also*, *State v. Martinez*, 188 Mont. 271, 282, 613 P.2d 974, 980 (1980) (in a case of felony theft, the purpose to deprive the owner of the property was a question for the jury to decide upon proper instruction).

The jury here was instructed that the State needed to prove only that Bagnell "purposely" or "knowingly" caused L.L. substantial emotional distress or reasonable apprehension of bodily injury or death by repeatedly: harassing, threatening, or intimidating L.L., in person or by mail, electronic communication, or any other action, device or method. (Trial Tr. II at 26.) Bagnell failed to, however, receive the required instructions defining "purposely" and "knowingly"

altogether. The jury was provided instructions on other elements of stalking (issues in stalking, definitions of "substantial emotional distress," "harass" and "intimidate," and "circumstantial—inference of mental state"). However, again, the jury did not receive instructions defining the key elements of "purposely" or "knowingly," *i.e.*, Bagnell's conscious object was to cause L.L. "serious emotional distress," or he was aware of the high probability that his conduct would cause such a result.

Bagnell's due process rights under the Fourteenth Amendment to the United States Constitution and Article II, Section 17 of the Montana Constitution require the State to prove every element of the offense beyond a reasonable doubt. *State v. Clark*, 1998 MT 221, ¶ 29, 290 Mont. 479, 964 P.2d 766; *In re Winship*, 397 U.S. 358, 364 (1970); U.S. Const. amend XIV; Mont. Const. art. II, § 17. Jury instructions that relieve the State of its burden to prove every element, including the mental state as to every element, beyond a reasonable doubt violate a defendant's due process rights. *Carella v. California*, 491 U.S. 263, 265 (1989); *Lambert*, 280 Mont. at 237, 929 P.2d at 850; *In re Winship*, 397 U.S. at 364 ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); *Sandstrom v. Montana*, 442 U.S. 510, 520-21 (1979) (jury instruction that relieves the State of its burden of proving the mental state

element violates due process); *State v. Andress*, 2013 MT 12A, ¶ 23, 368 Mont. 248, 299 P.3d 316 (courts are required "to instruct the jury on the proper mental state element based upon the charged offense").

The jury instructions in the present case failed to meet constitutional requirements because the instructions given by the district court failed to include definitions of "purposely" and "knowingly" that correlated to the culpable state of mind required by Bagnell to sustain a conviction for stalking. This resulted in the violation of Bagnell's due process rights because the instructions relieved the State of its burden to prove Bagnell's mental state in sending L.L. the letters at issue.

While the parties argued to the jury that the elements "purposely" or "knowing" had to be established to sustain a conviction for stalking, the record plainly demonstrates neither *mens rea* was defined. (Trial Tr. I at 134-35, 142; Trial Tr. II at 30-31, 34, 45.) Failure to include proper instructions defining the *mens rea* elements of "purposely" and "knowingly" violated Montana statutory law and Bagnell's due process rights. His conviction should be reversed and a new trial ordered.

B. The Failure to Instruct the Jury Regarding the Definitions of "Purposely" and "Knowingly" Was Not Harmless.

This Court should find the failure to instruct on the definitions of "purposely" and "knowingly" relieved the State of its burden of proof, prejudicially affected Bagnell's substantial rights, and was not harmless.

The harmless error standard for federal constitutional errors requires the State to prove that, "it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Neder v. U.S.*, 527 U.S. 1, 15 (1999) (*quoting Chapman v. California*, 386 U.S. 18, 24 (1967)); *see also*, *Chapman*, 386 U.S. at 24 (placing the burden of proof on the "beneficiary of a constitutional error")).

In *State v. Patton*, this Court found that the district court erred when it defined "purposely" in the context of deliberate homicide as having the conscious object to engage in conduct or cause such a result, allowing the jury to convict the defendant solely on the basis that he consciously engaged in conduct without regard to whether harm was intended. *Patton*, 280 Mont. 278, 291, 930 P.2d 635, 643 (1996). The Court found the error was harmless, however, because no facts were presented from which a credible argument could be made that the defendant did not intend to cause harm when he stabbed his victim eight times, given that his only asserted defense was that another person caused the crime. *Patton*, 280 Mont. at 291, 930 P.2d at 643.

Similarly, in *State v. Nuessle*, this Court refused to exercise plain error to review a district court's failure to instruct a jury regarding the definition of "knowingly" in the context obstructing justice. *Nuessle*, 2016 MT 335, 386 Mont. 18, 385 P.3d 952. The Court found the defense addressed the elements of obstructing justice in its opening statement, and both sides addressed the elements during their closing arguments. *Nuessle*, ¶ 14. Moreover, the jury was properly instructed on all of the elements of the offense, including the requirement that Neussle knew the person he harbored was an offender. *Nuessle*, ¶ 14. Even without an instruction defining "'knowing,'" the Court concluded the State was not relieved of its burden to prove the "'knowing'" element, "and the jury was well aware of the burden." *Nuessle*, ¶ 14. In that regard, the Court noted, "a jury 'need not be instructed on words or phrases of common understanding or meaning.'" *Nuessle*, ¶ 14 (*citing State v. Crisp*, 249 Mont. 199, 205, 814 P.2d 981, 984 (1991)). Accordingly, the Court declined to undertake consideration of the merits of the instruction issue pursuant to the plain error doctrine. *Nuessle*, ¶ 15.

In contrast here, the district court's failure to instruct the jury regarding the definitions of "purposely" and "knowingly" was not harmless. Whether Bagnell "purposely" or "knowingly" caused serious emotional distress to L.L. by repeatedly sending her letters was disputed at trial. In opening argument, the State posited, "there were a multitude of letters sent by Mr. Bagnell to his ex-wife—now

ex-wife [L.L.]—from jail between late 2014 and spring of 2015." (Trial Tr. I at 132.) In its next breath, the State acknowledged: "It doesn't sound like stalking on it's face, pretty normal for a spouse to be sending letters to another spouse who's in jail . . .." (Trial Tr. I at 132-33.) The State nevertheless insisted, "just the act of receiving the letters, [L.L.] from Mr. Bagnell, terrified her, distressed her, and made her life much, much more difficult." (Trial Tr. I at 133.)

Conversely, defense counsel argued,

> [Bagnell's] made mistakes in his life, obviously, but he didn't make one here. You'll hear that he and [L.L.]—they had quite the relationship . . . Fifteen years they fought, got back together, broke up, got back together, fought, broke up, got back together over and over and over again for 15 years.

(Trial Tr. I at 140.) Defense counsel implored the jury, "[a]s you look at all of the evidence, you'll find that it was not my client's intent to harass [L.L.], was not emotional distress caused in this case." (Trial Tr. I at 142.)

In closing, the State reminded the jurors of the *voir dire* discussion regarding the components of a "healthy relationship," *e.g.*, "two people communicating and coming together in a mutual way that was positive." (Trial Tr. II at 30.) It argued, however, "that did not exist here today." (Trial Tr. II at 30.) Again, defense counsel observed, "I told you in my opening that [L.L.] and Mr. Bagnell had quite a relationship. I think we can all agree that that is true." (Trial Tr. II at 35.)

The error and resulting prejudice was compounded by the State's emphasis of the *mens rea* elements of "purposely" and "knowingly," and its patently incorrect argument characterizing stalking as a conduct-based offense. Although stalking is plainly a result-based offense, the State argued it had proven the *mens rea* elements by simply proving Bagnell consciously mailed the letters or was aware of his conduct in mailing said letters. In opening, the State incorrectly argued, "'Four, that the defendant acted purposely or knowingly,' that *he chose to mail these letters and chose to write the content in those letters*." (Trial Tr. I at 135 (emphasis added).) In closing, the State again argued, incorrectly:

> And, finally, the defendant had to have acted purposely or knowingly. "*A person acts purposely when the person's conscious object is to engage in the conduct of that nature." He intended to send those letters. He put a stamp on them and he put them in the mail to [L.L.]*
>
> His action could also be knowingly. *Knowingly is when a person is aware of his or her conduct. He knew he was sending these. He addressed these. He wrote them to his wife. And he wrote a lot.*
>
> That he acted purposely, that his intent was purposeful or knowing, can be inferred from the content of the letters, that the content of the letters were not romantic gestures, eloquently expressive love.

(Trial Tr. II at 34 (emphasis added).) The State insisted: "His intent was clear." (Trial Tr. II at 45.)

Again, the district court did *not* instruct the jury regarding the definitions of "purposely" or "knowingly." And, without objection or correction from the court, the State erroneously argued the jury could find Bagnell committed the offense of

stalking by merely finding he consciously mailed the letters or was aware of his conduct—a fact that, by and large—was not in dispute. This relieved the State of its burden of proving the *mens rea* elements—that Bagnell's conscious object was to cause L.L. "serious emotional distress," or he was aware of the high probability that his conduct would cause such a result—beyond a reasonable doubt. Where, as here, a jury is not instructed regarding the correct definitions of "purposely" and "knowingly," and the State mischaracterizes the nature of the offense, the effect of not having the correct instructions given is unknown. Accordingly, the State cannot argue beyond a reasonable doubt that the failure to include the correct instructions did not aide in the guilty verdict.

C. The Error Warrants a New Trial Pursuant to Plain Error Review.

Neither the State nor defense counsel proffered instructions defining "purposely" or "knowingly," and no objection was made by defense counsel. Bagnell asks this Court to notice the error on plain error review. Pursuant to plain error review, this Court:

> [M]ay discretionarily review claimed errors that implicate a criminal defendant's fundamental constitutional rights, even if no contemporaneous objection is made notwithstanding the inapplicability of the § 46-20-701(a), MCA, criteria, where failing to review the claimed error at issue may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process.

State v. Finley, 276 Mont. 126, 137, 915 P.2d 208, 215 (1996).

The error in jury instructions here implicates Bagnell's fundamental constitutional rights. Due process, which appears in the Declaration of Rights, is a fundamental right. *Wadsworth v. State*, 275 Mont. 287, 299, 911 P.2d 1165, 1172 (1996) (a right is "fundamental" if it is "found in the Declaration of Rights or is a right 'without which other constitutionally guaranteed rights would have little meaning.'") (citation omitted). The United States Supreme Court has declared:

> The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense. Jury instructions relieving States of this burden violate a defendant's due process rights.

Carella, 491 U.S. at 265; *see also, Lambert*, 280 Mont. at 237, 929 P.2d at 850; Mont. Const. art II, § 17.

Jury instructions that violate a defendant's right to due process by relieving the State of its burden to prove the mental state element of the offense necessarily leave unsettled the question of the "fundamental fairness" of the trial. *See State v. Lundblade*, 191 Mont. 526, 531, 625 P.2d 545, 548 (1981) ("Without a correct statement of the elements of the crime being presented to the jury we cannot say that the defendant received a fair trial."). Fairness is called into question when the record does not even contain a discussion of the *mens rea* elements of "purposely" and "knowingly" at the time the jury instructions were settled, and the State

mischaracterized the nature of stalking in its opening and closing arguments. (Trial Tr. I at 135; Trial Tr. II at 3-4, 34.)

Similarly, failure to review the error here may result in a manifest miscarriage of justice, *i.e.*, it is possible Bagnell was convicted based on a jury finding only that he consciously mailed the letters or was aware of his conduct, but not that he possessed the requisite *mens rea* for the offense. All we can know for certain is that he was convicted of *some* elements of the crime. *See United States v. Alferahin*, 433 F.3d 1148, 1157 (9th Cir. 2006) (jury instructions omitted materiality element of offense of procuring naturalization contrary to law, "Simply put, Alferahin was not convicted of procuring naturalization contrary to law . . .; rather, he was convicted of committing only some of the elements of that crime."). To keep in place a conviction that rests on less than a finding of guilt as to all elements of the crime would result in a manifest miscarriage of justice. Moreover, it would compromise the integrity of the judicial process that requires proof beyond a reasonable doubt of all elements of an offense.

Finally, the error here was "plain." Again, "[i]t is the duty of the court to instruct the jury on the law." *Kougl*, ¶ 26. It was well-established at the time of trial that the district court was required to choose the appropriate definitions of "purposely" and "knowingly." *Azure*, ¶ 20; *see also, Alferahin*, 433 F.3d at 1157 ("We thus hold that a district court's error is plain when its jury instructions fail to

incorporate an element of the crime that has been clearly established by Ninth Circuit precedent.").

Bagnell respectfully requests this Court notice this issue on plain error review, vacate the conviction, and remand for a new trial.

II. ALTERNATIVELY, COUNSEL'S FAILURE TO SUBMIT JURY INSTRUCTIONS CORRECTLY DEFINING "PURPOSELY" AND "KNOWINGLY" CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

The Sixth Amendment to the United States Constitution, as incorporated through the Fourteenth Amendment, and Article II, Section 24 of the Montana Constitution guarantee a defendant's right to assistance of counsel. When analyzing an ineffective assistance of counsel claim, this Court applies the two-pronged test of *Strickland v. Washington*, 466 U.S. 668 (1984). *Kougl*, ¶ 11. Accordingly, a defendant, "must demonstrate that (1) counsel's performance was deficient or fell below an objective standard of reasonableness, and (2) establish prejudice by demonstrating that there was a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Kougl*, ¶ 11 (internal quotation marks omitted).

This Court will review an ineffective assistance of counsel claim on direct appeal where the record reveals why counsel acted as he or she did, or where there is no plausible tactical justification for the attorney's action or omission. *Kougl*, ¶¶ 14-15.

A. Direct Appeal Is the Proper Forum for Bagnell's Claim of Ineffective Assistance of Counsel.

This Court should rule on Bagnell's claim of ineffective assistance of counsel because there is no plausible justification for his counsel's failure to propose correct jury instructions defining "purposely" and "knowingly." *Kougl*, ¶ 15.

In *Johnston*, defendant argued, *inter alia*, he received ineffective assistance where his trial counsel failed to object to a jury instruction defining the *mens rea* element of the offense of obstructing a peace officer. *Johnston*, ¶ 15. The district court instructed the jury that, "'[a] person acts knowingly when the person is aware of his or her conduct;'" however, this Court concluded obstructing was a result-based offense and, therefore, the proper definition of "knowingly" was an awareness that it was highly probable that Johnston's conduct would obstruct, impair or hinder the officers' performance of their governmental function. *Johnston*, ¶¶ 10, 14. The Court reasoned trial counsel had nothing to lose in seeking a correct instruction, and the failure to do so allowed the prosecutor to argue Johnston had essentially confessed to the crime by his testimonial admission that he had been dishonest with the officers, thus reducing the State's burden in proving the crime. *Johnston*, ¶ 16. Accordingly, the Court concluded counsel's representation was deficient and prejudiced Johnston's case, "'such that there is a

reasonable probability [the jury] would have arrived at a different outcome.'" *Johnston*, ¶ 16 (alteration in original, *citing Kougl*, ¶ 26).

Here, as in *Kougl*, ¶ 20, *Johnston*, ¶ 16, and *State v. Rose*, 1998 MT 342, ¶ 18, 292 Mont. 350, 972 P.2d 321, there was no reason for Bagnell's trial counsel to fail to offer correct instructions on the *mens rea* elements. The jury must be instructed on the elements of the offense, including defining the *mens rea* elements of "purposely" and "knowingly." *State v. Lundblade*, 191 Mont. At 529, 625 P.2d at 548 ("At a minimum, the District Court must explain or define the crime for the jury."); *Azure*, ¶ 20 ("When a criminal offense requires that a defendant act 'knowingly,' the District Court must instruct the jury on what the term 'knowingly,' means in the context of the particular crime."). There should have been definitions of "purposely" and "knowingly" in the instructions; thus, this is not a case where counsel might strategically decline to request a particular instruction, for example an accomplice instruction inconsistent with a defense that the defendant was not at the crime scene. *State v. Johnson*, 257 Mont. 157, 163, 848 P.2d 496, 499 (1993). In fact, here Bagnell's trial counsel implored the jury, "look at all of the evidence, you'll find that it was not my client's intent to harass [L.L.] . . . ." (Trial Tr. I at 142.) Given that the jury should have been instructed on the definitions of "purposely" and "knowingly," it was incumbent on Bagnell's counsel to ensure that correct instructions were given that, at minimum, did not

deprive Bagnell of a fair trial by reducing the State's burden on the *mens rea* element.

Moreover, as in *Johnston*, ¶ 16, Bagnell's counsel had "nothing to lose" by offering correct instructions. *See also, Kougl*, ¶ 21 ("Trial counsel had nothing to lose in asking for both of these instructions. Her client, however, risked losing his liberty."). In this case, it was by and large undisputed Bagnell mailed L.L. letters; however, as his counsel argued, "it was not my client's intent to harass [L.L.] . . . ." (Trial Tr. I at 142.) The correct *mens rea* instructions—that "purposely" requires a conscious object to cause "substantial emotional distress," and "knowingly" requires an awareness of the high probability that the result will be caused by the person's conduct—would have "struck at the heart" of the State's case. *Kougl*, ¶ 20. The correct instructions would have only served to benefit Bagnell and provide him with a viable defense. *See Alferahin*, 433 F.3d at 1161 (finding deficient performance where, "the defense attorney failed to obtain an instruction on a critical element of the charged crime and thereby abandoned one of his client's most promising defenses"). The only party with anything to gain by the failure to correctly instruct the jury regarding the definitions of "purposely" and "knowingly"—reducing the *mens rea* elements—was the State.

The effect of counsel's failure to offer correct instructions, and failure to object to the State's mischaracterization of the *mens rea* elements, was to deprive

Bagnell of a viable defense and to lessen the State's burden on an element of the offense. Simply put, there is no plausible justification for this action. Accordingly, this Court should review this claim on direct appeal. *Kougl*, ¶ 22; *Johnston*, ¶ 16.

B. Bagnell Was Denied Effective Assistance of Counsel.

Because there is no plausible justification for counsel's failure, his performance was deficient and the first prong of *Strickland* is met. *Kougl*, ¶ 24; *Johnston*, ¶ 16.

Bagnell's claim also meets the second prong of *Strickland*, which requires him to establish, "only that there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different." *Rose*, ¶ 19 (*citing Strickland*, 466 U.S. at 694). And, as this Court has repeatedly acknowledged, "'A reasonable probability is a probability sufficient to undermine confidence in the outcome,' but it does not require that a defendant demonstrate that he would have been acquitted." *State v. Rogers*, 2001 MT 165, ¶ 14, 306 Mont. 130, 32 P.3d 724 (*quoting Strickland*, 466 U.S. at 694).

Here, the failure to define "purposely" and "knowingly," and the State's patently incorrect characterization of the *mens rea* elements, reduced the State's burden, *i.e.*, pursuant to the State's flawed argument it was required to show only that Bagnell consciously mailed the letters and was aware of his conduct, but not

that Bagnell's conscious object was to cause L.L. "serious emotional distress," or he was aware of the high probability that his conduct would cause such a result. The jury was not required to find the *mens rea* element of the offense, which undermines confidence in the outcome.

Correct instructions would have conveyed to the jurors that they were required to find that Bagnell's conscious object was to cause L.L. "serious emotional distress," or he was aware of the high probability that his conduct would cause such a result—an element of the offense that the defense vehemently disputed: "look at all of the evidence, you'll find that it was not my client's intent to harass [L.L.], was not emotional distress caused in this case." (Trial Tr. I at 142.) There is more than a reasonable probability the jury would have arrived at a different conclusion had they been properly instructed; accordingly Bagnell was prejudiced by his counsel's deficient performance. *Kougl*, ¶ 26; *Johnston*, ¶ 16.

Based on the foregoing, this Court should find that both prongs of the *Strickland* test are satisfied. Bagnell was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendment to the United States Constitution and Article II, Section 24 of the Montana Constitution, and his conviction should be reversed.

CONCLUSION

Bagnell respectfully requests this Court reverse his conviction on the grounds that the district court abused its discretion when it failed to instruct the jury regarding the definitions of "purposely" and "knowingly." In the alternative, Bagnell's conviction should be vacated because he received ineffective assistance of counsel.

Respectfully submitted this September 16, 2019.

By: /s/ Joseph P. Howard
Joseph P. Howard
Joseph P. Howard, P.C.
Attorney for Appellant

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 6946 words, excluding certificate of service and certificate of compliance.

/s/ Joseph P. Howard
Joseph P. Howard

APPENDIX

CERTIFICATE OF SERVICE

I, Joseph Palmer Howard, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 09-16-2019:

Timothy Charles Fox (Prosecutor)
Montana Attorney General
215 North Sanders
PO Box 201401
Helena MT 59620
Representing: State of Montana
Service Method: eService

Steven N. Eschenbacher (Attorney)
106 4th Avenue East
Polson MT 59860
Representing: State of Montana
Service Method: E-mail Delivery

Electronically Signed By: Joseph Palmer Howard
Dated: 09-16-2019