IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0369

STATE OF MONTANA,

Plaintiff and Appellee,

v.

MALCOLM JOSEPH NEWROBE, SR.,

Defendant and Appellant.

BRIEF OF APPELLANT

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

APPEARANCES:

CHAD WRIGHT
Appellate Defender
JAMES REAVIS
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147
jreavis@mt.gov
(406) 444-9505

ATTORNEYS FOR DEFENDANT
AND APPELLANT

TIMOTHY C. FOX
Montana Attorney General
C. MARK FOWLER
Bureau Chief
Appellate Services Bureau
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

JOSHUA A. RACKI
Cascade County Attorney
SUSAN WEBER
Deputy County Attorney
121 4th Street N., Suite 2A
Great Falls, MT 59401

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF THE ISSUES

1. The State charged Malcolm Newrobe with Incest despite lacking any proof of V.B. being Newrobe's descendant. The district court empaneled a jury and denied Newrobe's motion to dismiss. The district court declared a mistrial because the court reporter had a heart attack. Irrespective of the mistrial declaration's validity, was it error to deny Newrobe's motion to dismiss Incest, and should the State's second prosecution of SIWOC that erroneously followed be barred as well?

2. A district court cannot declare a mistrial over objection unless it is physically impossible to proceed and all possible alternatives have been exhausted. Newrobe objected to the district court's mistrial declaration and proposed the trial proceed with electronic recording or alternatively continue the trial until the hospitalized court reporter could be replaced. Did the district court err when it nonetheless declared a mistrial, requiring the Bail Jumping and SIWOC prosecutions to be barred?

3. (Alternative) In 2017, the Legislature amended the definition of consent for SIWOC from "compelled to submit by force" to a broader "words or overt actions indicating a freely given agreement to have sexual intercourse." But the State alleged Newrobe committed SIWOC in 2015. Did the district court err when it accepted the State's instruction on the new, less restrictive 2017 definition of consent?

STATEMENT OF THE CASE

The State filed an unlawful information charging Malcolm Newrobe with Incest of his 16-year-old niece, V.B., citing to Mont. Code

Ann. § 45-5-507 (2013).[1] (Docs. 1, 2; 12/10/18 Tr. 208-209.) The information was unlawful because sexual contact between an uncle and niece does not meet the statutory definition of "descendant" in the Incest statute. Mont. Code Ann. § 45-5-507(1); *see also* Criminal Law Commission Comments, § 45-5-507 ("The uncle-aunt-nephew-niece cases are excluded from the category of 'felonious incest,' in view of the severity of the penalty."). After Newrobe failed to appear for a court date, the State added a Bail Jumping charge under Mont. Code Ann. § 45-7-308. (Docs. 66, 68.)

The court reporter had a heart attack on the third day of trial during the State's case-in-chief and was taken to the hospital. (12/12/18 Tr. 3, complete transcript attached as App. A.) The district court said it would declare a mistrial. (App. A at 5.) Newrobe objected to the mistrial and moved to dismiss the Incest charge because the State did not prove the descendant element. (App. A at 5, 7.) In the alternative, Newrobe moved to continue the trial rather than declare a mistrial.

---

[1] While many documents in the record refer to the 2015 Montana Code Annotated, the correct law is actually the 2013 Montana Code Annotated because the alleged offense occurred on March 21, 2015 (12/10/18 Tr. 209), and the 2015 code did not take effect until October 1, 2015. *See* Mont. Code Ann. § 1-2-201(1)(a). Laws passed in 2017 differ significantly and will be cited (2017) as needed, otherwise cites refer to the 2013 Montana Code Annotated.

(App. A at 8.) The district court denied both motions. (App. A at 8, 10.) Seizing this opportunity, the State promptly amended the Incest charge to Sexual Intercourse Without Consent (SIWOC) under Mont. Code Ann. § 45-5-503. (Docs. 109, 112, 113.1, 113.2.)

Newrobe filed a motion to dismiss his charges on the grounds that holding a second trial would violate his right to be free from double jeopardy. (Doc. 113.) The district court denied the motion and the case proceeded to a second trial. (1/9/19 Tr. 6-7.) While Newrobe had been accused of violating the 2013 SIWOC law, the district court instructed the jury on the 2017 definition of consent, a broader and more encompassing definition that excludes a force element under the 2013 version of Mont. Code Ann. § 45-5-501(1)(a)(i). (Doc. 148, No. 17.) The jury convicted Newrobe of SIWOC and Bail Jumping. (Doc. 149.)

The district court sentenced Newrobe for SIWOC to 65 years at Montana State Prison, with 25 years suspended. (Doc. 179 at 9.) The court sentenced Newrobe for Bail Jumping to 10 years at Montana State Prison and ran the sentences consecutive, for a total of 75 years. (Doc. 179 at 9.) Newrobe timely appealed. (Docs. 179, 182.)

STATEMENT OF THE FACTS

The State characterized the act between Newrobe and 16-year-old V.B. as a rape (12/10/18 Tr. 127, 209), but the State sought to avoid proving the force element. V.B. alleged Newrobe removed her pants and had sex with her while her shirt was still on. (12/10/18 Tr. 212-213, 225.) However, her brother D.B. walked in on them and saw both his sister and uncle completely naked on the bed, engaging in sexual intercourse. (12/11/18 Tr. 271, 273.) Newrobe and V.B. "jumped up" when D.B. entered, and D.B. was mad and angry at V.B. (12/10/18 Tr. 215; 1/9/19 Tr. 170-171.) By charging Incest instead of SIWOC, the State would not have to prove a "without consent" element that V.B. was compelled to submit by force. *Compare* Mont. Code Ann. §§ 45-5-503, 45-5-507.

The State filed its proposed instructions a month ahead of the trial date. (Doc. 71.) State's #15 defined Incest as having sexual intercourse or sexual contact with a descendant, and State's #16 required the jury to find that V.B. was Newrobe's descendant. (Doc. 71.)

The State started having difficulties from the very start of trial because its primary witnesses—V.B. and D.B.—could not be located. (12/10/18 Tr. 118-119, 233-234.) As police officers searched for them, the State scrambled to call other filler witnesses out of its anticipated order. (*See* 12/10/18 Tr. 119-121.) V.B. was found but D.B. was not arrested until the next day. (12/10/18 Tr. 233-234 12/11/18 Tr. 246.)

V.B. testified about the sexual conduct. (12/10/18 Tr. 213-214.) The prosecutor, while using the word "rape" sixteen times during questioning, did not directly ask V.B. if Newrobe forced her to have sex without consent. (12/10/18 Tr. 214-216, 222-228, 230-231.) Critically, V.B. testified Newrobe was her mother's brother, that is, her uncle. (12/10/18 Tr. 208-209.)

Defense counsel reserved Newrobe's opening statement and asked very few questions on cross-examination, shortening the trial's length. Since the State was still not prepared to call its witnesses, the district court asked Newrobe to call his witnesses before the State finished its case. (12/10/18 Tr. 234-237; 12/11/18 Tr. 249.) The Defense obliged, calling witnesses who provided some short testimony that V.B. and D.B. did not have reputations for truthfulness or honesty. (12/11/18 Tr. 249-

251.)

The district court released the jury before 10:00 a.m. on the second day of trial because the State was not prepared to have the DNA expert and the serologist testify in person until the next day. (12/10/18 Tr. 234; 12/11/18 Tr. 248; Doc. 96.4 at 8; *see also* Doc. 113 at 2.)[2] With the remaining time after the jury left, the district court decided to settle jury instructions. (12/11/18 Tr. 274-275.) Near the end of reviewing the instructions, the district court asked, "What about a definition of descendant from the incest statute?" (12/11/18 Tr. 280.)

The State claimed they could not find a definition in the criminal code, so they looked at some generalized definitions and had a feeling the term included both direct and collateral descendants. (12/11/18 Tr. 280-281.) The district court said, "Well, I'll just leave that issue as it is. And if I come up with something, I will let you know." (12/11/18 Tr.

[2] Video depositions were taken in advance of trial because both Crime Lab employees had to testify in a homicide trial the same week, but it appears the State discovered they could be available on Wednesday, the third day of trial, and wanted them to testify in person. (12/10/18 Tr. 234; 12/11/18 Tr. 248; Docs. 64, 65.) In a responsive pleading after the trial, the State wrote the serologist and DNA expert were going to be testifying by Vision-Net. (*See* Doc. 125 at 3.) However, that statement is contradicted elsewhere in the record because the State—to resolve a pre-trial confrontation clause objection—said it would play the video depositions of the two witnesses, not present live video testimony. (*See* Docs. 75, 79, 84.)

281.) Trial then adjourned for the day at 10:07 a.m. (12/11/18 Tr. 282; Doc. 96.4 at 8.)

On the long break, the district court discovered the flaw in the State's charging decision. Uncle-to-niece is a familial relationship that does not qualify under the incest statute, so "under Montana Law, it is not incest." (*See* Doc. 125 at 2.) The State wanted to amend the information to Attempted Incest, arguing it would amend as to form, not substance, so it should be allowed. (*See* Doc. 125 at 2, 7-8.) The State, however, never filed a motion for a second amended information. It did file some quizzical proposed jury instructions discussing attempt, impossibility, and a marriage statute from Title 40. (*See* Doc. 101.)

The parties agreed to discuss the improper Incest charge at 8:00 a.m. the next day, prior to the jury reconvening. (Doc. 113 at 2, Doc. 125 at 2.) The parties waited in the courtroom to begin the third day of trial while the judge prepared in chambers. (Doc. 125 at 2.) The official court reporter, who had transcribed the first two days of trial, suffered a heart attack and collapsed in front of the judge. (App. A at 3.)

The judge called the hospital and paramedics took the court reporter away. (App. A at 3; Doc. 125 at 2.)

The district court summoned everyone to explain what had happened. (App. A at 3.) A different, official electronic court reporter turned on the For The Record (FTR) Gold Digital Recording System to record the proceedings. (App. A at 1, 11-12.) The proceeding was recorded without errors. (App. A at 1-12.)

The judge did not know the court reporter's condition at the hospital. (App. A at 3.)[3] The judge, after explaining he had lost his father under similar circumstances, said, "on a personal note, I am – this is a very difficult situation for me as a person and as a judge." (App. A at 4.) The judge said, "I'm just frankly not in a position right now given the events that have occurred this morning to be able to intelligently and professionally address the very important and complicated issues that the parties have pending." (App. A at 6.)

Although the proceeding was being recorded, the district court said the court's electronic audio recording was inherently unreliable for a trial. (App. A at 4.) The district court also said the "video witnesses" would not be picked up by the FTR recording equipment. (App. A at 5.)

[3] Thankfully, the court reporter recovered from the emergency and continues to work. She produced some of the transcripts for this appeal.

The court said the other stenographic reporter in Cascade County District Court was in another trial, and that an outside reporter could not be brought in "because the state requires that the contract court reporters carry insurance that apparently none of the local court reporters are willing to carry. So, we have no contracts with outside court reporters available." (App. A at 4.)

The district court concluded by saying, "And, both based on personal and professional circumstances, the Court finds that the manifest necessity standard is met to grant a mistrial. And, I have no choice but to do that for those reasons here today." (App. A at 5.) The court then asked if anybody wanted to put something on the record. (App. A at 5.)

Defense counsel responded, "Respectfully, Your Honor, and I'm sorry. And, I love [the official court reporter] as well. I have to object." (App. A at 5.) The district court said it would dismiss the jury and said the parties could file any motions they needed to file. (App. A at 6.) Once the court figured out the court reporter situation, it would prioritize getting the case back on the calendar, noting an open trial date in January, probably the soonest available date. (App. A at 6.)

Newrobe moved to dismiss the Incest charge "right now" with prejudice. (App. A at 7.) Newrobe explained that an uncle-niece relationship is excluded from Incest. (App. A at 7.) The jury was seated, and jeopardy had attached. (App. A at 7.) The charge could not stand and had to be dismissed with prejudice. (App. A at 7.)

The district court said:

> The motion is denied. At this point, there is also a pending motion to amend the information.[4] There are a number of legal issues. As the parties are aware, I sua sponte raised this issue about the annotation comment . . . until now, when I was looking at a definition of descendent yesterday, this issue didn't come up. I have -- there are legal issues on both sides of this. The motion to dismiss is denied. Now, I anticipate that you can file a written motion to that effect as the court rules require and the state can respond to it. And, that's what I'm saying I'd be happy to have a hearing on in relatively short order. But, as it stands today, the motion to dismiss is denied.

(App. A at 7-8.)

Newrobe then moved, in the alternative, for a motion to continue the trial rather than call a mistrial. (App. A at 8.) Newrobe noted that almost all the witnesses had testified except the DNA expert and the serologist. (App. A at 8; *see also* Doc. 113 at 2.) He had already called

[4] This finding is incorrect because the State had not filed a motion for a second amended information.

his witnesses and shown his hand. (App. A at 8.) Defense counsel explained he had intended to move to dismiss the Incest charge once the State rested based on the descendants issue but did not want to risk having the charge re-filed as a SIWOC until jeopardy attached. (App. A at 7-9.)

The district court responded:

> THE COURT: So, let me just -- I mean. I didn't want to get into the merits of it today. But, what you're saying -- so, let me just make sure I understand what you're saying. So, you have represented this client for three years. You kept him in jail for three years[5] with this argument in your back pocket that a niece doesn't constitute incest. Is that what you're saying? I want to know that for the record. Are you saying you kept your client jailed for three years with that argument in your back pocket?
>
> DEFENSE COUNSEL: That was one of my main arguments, Your Honor.
>
> THE COURT: Wow. Mr. Newrobe, your attorney kept you in jail for three years without raising that argument. I find –
>
> DEFENSE COUNSEL: I humbly object –
>
> THE COURT: -- that hard to believe.

---

[5] This finding is also incorrect. Newrobe's case was two years old by the time of the first trial. (Doc. 2.) Newrobe remained at liberty for the first year. He was re-arrested in September 2017 after failing to appear for a trial date. (Doc. 33.) The district court revoked bond and the State added a bail-jumping charge. (Docs. 28, 29, 66.) Newrobe was in custody for a little under fifteen months prior to trial. Had defense counsel moved to dismiss before trial, Newrobe would have remained in jail on revoked bond with the still-pending bail jumping charge.

> DEFENSE COUNSEL: -- Your Honor.
>
> THE COURT: I find that hard to believe. I absolutely find that hard to believe under the circumstances. But, under what has happened today, I am in no position, as I have explained to the parties, to address these issues on the merits. The motion for a continuance is denied. I can't keep a jury impaneled for what could amount to over a month. So, in any event, I've stated my ruling on the record. We will reset this matter for trial as I indicated, and the parties can file their motions, and I'll have a hearing.

(App. A at 9-10.)

The mistrial gave the State a second chance, and it promptly moved to amend the information from Incest to SIWOC, which the district court granted. (Docs. 109, 112.) The district court scheduled a new trial within a month of the mistrial. (Doc. 110.)

Newrobe filed a written motion to dismiss the charges on the grounds that a continued prosecution would violate his protections against double jeopardy, arguing the manifest necessity exception to permit retrial had not been met. (Doc. 113 at 4-10.) Defense counsel cited the U.S. and Montana Constitutions but did not cite the statute Mont. Code Ann. § 46-11-503. (Doc. 113.) Newrobe also asked the district court to reconsider his earlier oral motion to dismiss the Incest charge. (Doc. 113 at 1-3, 9.)

The district court summarily disposed of Newrobe's legal arguments on the morning of the second trial. (1/9/19 Tr. 6-7, attached as App. B.) The district court said, "The Court has already ruled on this issue with regard to the mistrial that was granted. I'm not going to regurgitate those same rulings again previously ruled on at the end of the last trial." (1/9/19 Tr. 6-7.)

Unlike the first trial, the State elicited testimony from V.B. in the second trial that she did not consent to the sexual acts involving Newrobe. (1/9/19 Tr. 148-149, 164.) The State—still seeking not to prove force—proposed the broader 2017 instruction on consent rather than the narrower 2013 definition of consent in effect at the time of the alleged crime. (Doc. 129, No. 17.) Defense counsel did not object to the State's instruction and the district court adopted it. (1/9/19 Tr. 284; Doc. 148, No. 17.) No one discussed the differences between the two consent definitions during trial. The jury found Newrobe guilty of SIWOC and Bail Jumping. (Doc. 149.)

The district court held a sentencing hearing without a stenographic court reporter and the hearing was not electronically recorded. (Doc. 188.) No transcript was available, and the record had

to be reconstructed. (Doc. 188, attached as App. C.) The parties have stipulated they argued about whether Newrobe should be sentenced under the 2015 (actually 2013) SIWOC law, which carried a 100-year maximum or life, or the 2017 law, which maxed out at 20 years or life. (Doc. 188 at 1.)

Newrobe argued he should be sentenced under the sentencing range of the 2017 SIWOC law with its 20-year cap because of ameliorative sentencing principles. (Doc. 188 at 2-3.) Ignoring its use of the 2017 definition of consent to convict Newrobe, the State argued the 2017 law changed the definition of consent and it could only convict Newrobe under the old 2013 law. (Doc. 188 at 3.) The State said "consent" under the 2013 definition captured a narrower range of behavior than the 2017 version, so the older sentencing range should still apply. (Doc. 188 at 3.)

The district court ruled in favor of the State, holding that Newrobe should be sentenced under the 2013 law with the 100-year maximum. (Doc. 188 at 3-4; Doc. 179 at 2-7, attached as App. D.) In explaining this decision, the district court (inaccurately) stated Newrobe could not receive the ameliorative sentencing benefit of the

new law because the State prosecuted him under the old law with its narrower range of behavior as to consent. (Doc. 179 at 3-5.) Wrongly describing Newrobe as pleading guilty, the district court said Newrobe should not hide behind the shield of the 2013 law and use the sword of the 2017 law. (Doc. 179 at 5, Doc. 188 at 3-4.) As previously noted, the State tried Newrobe with the 2017 definition of consent, not the 2013 definition. (Doc. 148, No. 17.)

STANDARDS OF REVIEW

"This Court reviews de novo, for correctness, a district court's decision on a motion to dismiss a criminal case, and its decision on the interpretation and construction of a statute." *State v. Madsen*, 2013 MT 281, ¶ 6, 372 Mont. 102, 317 P.3d 806.

"A district court's denial of a motion to dismiss criminal charges on double jeopardy grounds presents a question of law which we review for correctness." *State v. Cates*, 2009 MT 94, ¶ 22, 350 Mont. 38, 204 P.3d 1224.

To prevail on an ineffective assistance of counsel claim, "the defendant must show (1) that counsel's performance was deficient, and (2) that counsel's deficient performance prejudiced the defendant."

State v. Ellison, 2018 MT 252, ¶ 24, 393 Mont. 90, 428 P.3d 826.

"To reverse a decision for plain error, the appellant must: (1) demonstrate that the claimed error implicates a fundamental right; and (2) firmly convince this Court that a 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. Akers*, 2017 MT 311, ¶ 10, 389 Mont. 531, 408 P.3d 142.

"Jury instructions that relieve the State of its burden to prove every element of the charged offense beyond a reasonable doubt violate the defendant's due process rights." *City of Missoula v. Zerbst*, 2020 MT 108, ¶ 10, 400 Mont. 46, 462 P.3d 1219. "Whether a defendant's due process rights were violated is a question of law that we review for correctness." *Zerbst*, ¶ 10.

SUMMARY OF THE ARGUMENT

Issue One

The alleged victim did not meet the definition of a descendant. Newrobe's Incest trial was on a charge the State could not prove. Whether framed as a motion for failure to state an offense or for

insufficient evidence, Newrobe timely and properly moved to dismiss the Incest charge. The State had not proved and could never prove Incest, so the district court should have granted Newrobe's motion to dismiss. The unexpected heart attack bestowed the State with a windfall, allowing it to amend an unprovable charge to salvage the prosecution.

Had the district court properly dismissed the Incest charge, Mont. Code Ann. § 46-11-503 would have barred the State from filing a new charge. A correct ruling dismissing Incest would have met the statute's criteria of (1) termination of a prosecution by a final order favoring the defendant; or (2) a determination of insufficient evidence to warrant a conviction. The resulting SIWOC prosecution and conviction that wrongly occurred here when the district court did not dismiss the Incest charge must be reversed and dismissed. This remains true regardless of the court reporter's heart attack.

Issue Two

The SIWOC and Bail Jumping convictions must be vacated and dismissed because the manifest necessity or physical impossibility standard for declaring a mistrial was not met when the court reporter

collapsed. Defendants have a valued constitutional right to retain a chosen jury. Once a jury has been empaneled and sworn, a mistrial cannot be declared on grounds of manifest necessity without first addressing remedial actions short of a mistrial, including the obvious alternative of a continuance.

The high degree of necessity required to declare a mistrial was not present here. The trial was being electronically recorded once the original court reporter left. The trial could have also been continued briefly to arrange for another stenographic reporter. As this did not occur, the State unlawfully prosecuted Newrobe for Bail Jumping twice. The State already prosecuted Newrobe for Incest, and the subsequent prosecution of SIWOC for the identical incident is unlawful because the statutory criteria for Mont. Code Ann. § 46-11-503 was met and it was not physically impossible to proceed to the first trial's conclusion.

Issue Three (Alternative)

In the alternative, Newrobe's case must be remanded for a new trial. Even in the absence of an objection, the right to be protected from convictions except upon proof beyond a reasonable doubt as to each

element of the charged offense is a fundamental right entitled to protection under plain error review.

Persons must be charged with the law in effect at the time the alleged offense occurred. Under 2013 law, lack of consent meant the victim was compelled to submit by force. Under 2017 law, consent means a freely given agreement to have sexual intercourse. This is a broader term than the previous definition, and the maximum sentencing penalty was lowered from 100 to 20 years.

The State submitted improper instructions using the new 2017 definition of consent. The jury was not instructed on and never considered the essential force element necessary to convict Newrobe. They deliberated on and convicted Newrobe of an entirely different offense.

At sentencing, the State applied the 2013 law to argue for a sentence with up to a 100-year maximum. The district court imposed 65 years, meaning the State used the consent definition of the new law to make it easier to convict, but took the sentencing range of the old law to allow for the harsher punishment. The State's second round of improper charging has unsettled the fundamental fairness of the

proceedings and—should this Court not grant an outright dismissal—a new trial with a properly instructed jury is required.

ARGUMENT

I. The State improperly charged Newrobe with a crime it could not prove, and its amended charge must also be dismissed.

A. The State did not prove the descendant element required to establish Incest, requiring dismissal.

The State dragged its case-in-chief out for days because it could not secure its witnesses and would not play the depositions it already possessed. The district court discovered the descendant element could not be proved and asked the State to explain themselves. The State scrambled, talking about so-called "collateral" descendants, filing quizzical jury instructions about marriage and impossibility, and contemplating (but not actually filing) a motion to amend "as to form" to Attempted Incest. (12/11/18 Tr. 280-281; Doc. 101; Doc. 125 at 1-2, 7.)

Before the problem could be addressed in open court, the court reporter collapsed. (App. A at 3.) Newrobe was under no obligation to point out the State's flawed reasoning, but the unexpected heart attack compelled him to move for dismissal before the court's mistrial took

effect. The district court erred when it denied dismissal, but the district court was put into a bind because of the State's unlawful charging decisions and its insistence on pressing forward with an unprovable prosecution.

1. The State's information failed to state the crime of Incest.

The failure of a charging document to state an offense is a nonwaivable defect that can be challenged at any time during the pendency of a proceeding. Mont. Code Ann. § 46-13-101(3). This statute also provides the procedural basis to raise such a challenge.

When a motion to dismiss is presented for failure to state an offense, analysis first begins with the charging statute, the definitions of terms within that statute, and the application of that statute to the State's allegations. *See Madsen*, ¶ 7. In *Madsen*, for example, the Court considered whether the term "prisoner" within the Mistreating Prisoners statute meant only persons serving sentences at prison or if the term also included persons detained by law enforcement. *See Madsen*, ¶¶ 7-14.

This Court has repeatedly accepted the legitimacy of defense motions to dismiss criminal charges when the State's allegations, even if accepted as true, still fail to establish a violation of the charged statute. This Court has considered whether the term "physical evidence" in the Tampering statute includes the blood within a person's body, *State v. Harrison*, 2017 MT 60, 387 Mont. 52, 390 P.3d 945, whether dust-remover is included within the term "drug" of the DUI statute, *State v. Pinder*, 2015 MT 157, 379 Mont. 357, 350 P.3d 377, and whether an expired adjudication under the Youth Court Act constitutes a "prior offense" for purposes of the Failure to Register statute. *State v. Hastings*, 2007 MT 294, 340 Mont. 1, 171 P.3d 726.

Newrobe's motion for dismissal, while presented orally under unexpected circumstances, was a motion to dismiss for failure to state an offense made in line with the statutory authority and cases cited above. The State charged Newrobe with sexual contact with his niece. (Doc. 2.) Newrobe correctly argued the term "descendant" within the Incest statute does not include an uncle-to-niece relation. (App. A at 7-8.) Uncles and nieces are not covered by the statute's text, and the commission comments explicitly exclude uncle and niece relationships.

The State was trying to avoid proving the force element required by the 2013 version of SIWOC. But it chose to charge Incest, which carries a familial relationship element that could never be proven. The State bore the risk of going to trial when its Information did not state an offense. Having recognized the State's charging error on its own, the district court should have granted Newrobe's motion to dismiss.

2. The State did not and can never present sufficient evidence that V.B. is a descendant of Newrobe.

Newrobe's motion may also be viewed as a motion to dismiss for insufficient evidence. *See, e.g.,* Mont. Code Ann. § 46-16-403. A motion to dismiss for insufficient evidence is appropriate if, viewing the evidence in the light most favorable to the prosecution, there is not sufficient evidence upon which a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Cybulski*, 2009 MT 70, ¶ 42, 349 Mont. 429, 204 P.3d 7. Due process makes it the State's duty in a criminal prosecution to prove beyond a reasonable doubt every element of the crime charged. *State v. Clark*, 1998 MT 221, ¶ 29, 290 Mont. 479, 964 P.2d 766.

It is true that a motion for insufficient evidence usually cannot be made until the State has had an opportunity to meet its burden of proof. *See State v. Nichols*, 1998 MT 271, ¶¶ 4, 10, 291 Mont. 367, 970 P.2d 79. The rationale behind this rule is that permitting a motion to be filed before the State rests would be premature, as the State is entitled to an opportunity to present its evidence to the trier of fact. *See State v. Tichenor*, 2002 MT 311, ¶¶ 20-23, 313 Mont. 95, 60 P.3d 454.

But here, the State could never have proven that V.B. is Newrobe's descendant. Granting dismissal would not have been premature because no number of additional witnesses could ever prove Newrobe's niece is his descendant. Newrobe's situation is akin to *State v. Gregori*, 2014 MT 169, 375 Mont. 367, 328 P.3d 1128. In *Gregori*, the State charged an uncle with Partner or Family Member Assault (PFMA) against his niece. *Gregori*, ¶¶ 3-4. A niece did not meet the definition of "family member" within the PFMA statute. *Gregori*, ¶ 15. The uncle could not have been convicted of PFMA and the charge was dismissed following reversal on appeal. *Gregori*, ¶¶ 17-18. Just as the State could have never proved the niece was a "family member" under

the PFMA statute in *Gregori*, the State can never prove V.B. is a descendant of Newrobe. The evidence for Incest is insufficient.

B. The State's subsequent prosecution of Sexual Intercourse without Consent was barred under Mont. Code Ann. § 46-11-503 and the resulting conviction must be vacated.

The district court erred when it failed to grant Newrobe's motion to dismiss. Had Newrobe's motion been correctly granted, he could not have been subsequently prosecuted for SIWOC. Accordingly, the SIWOC prosecution must also be barred and the resulting conviction vacated.

Subsequent prosecutions are barred by Mont. Code Ann. § 46-11-503 (attached as App. E) when there has been a former prosecution described by the statute. An offense not filed during the first prosecution is potentially barred at the second prosecution if the offense in question was known to the prosecutor, supported by probable cause, consummated prior to the original charge, and jurisdiction and venue lie in the same court. Mont. Code Ann. § 46-11-503(1).

The SIWOC offense was known to the prosecutor prior to initiation of the first prosecution; indeed, the prosecutor used the words

"rape" and "raping" repeatedly throughout the first trial. (12/10/18 Tr. 127-129, 151, 195, 214-216, 222, 224-228, 230-231; 12/11/18 Tr. 257-258, 271.) The application for information presented probable cause to all the SIWOC elements, the SIWOC offense was allegedly consummated prior to the information's filing, and jurisdiction and venue for SIWOC lie in the Cascade County District Court. (*See* Docs. 1, 2.) The State, however, only charged Incest to avoid proving a "without consent" element and to take advantage of a charge based on either "sexual intercourse" or a broader "sexual contact." *Compare* Mont. Code Ann. §§ 45-5-503(1), 45-5-507(1).

A reversal from this Court on the motion to dismiss the Incest charge implicates Mont. Code Ann. § 46-11-503(1)(a) to bar a SIWOC prosecution because an Incest dismissal would act as an "acquittal," which the statute defines as either "a finding of not guilty by the trier of fact" or "a determination that there is insufficient evidence to warrant a conviction." A district court's mid-trial dismissal of a charge on insufficiency grounds is a substantive, non-appealable acquittal. *State v. Cool*, 174 Mont. 99, 101-102, 568 P.2d 567, 568-569 (1977); *State v. Barrows*, 2018 MT 204, ¶ 16, 392 Mont. 358, 424 P.3d 612. And

regardless of how Newrobe's motion to dismiss is categorized, the result is the same: there was insufficient evidence to warrant a conviction of Incest.[6] A reversal effectuates an "acquittal" under Mont. Code Ann. § 46-11-503(1)(a) and precludes a later SIWOC prosecution.

A reversal from this Court also implicates Mont. Code Ann. § 46-11-503(1)(c) to bar a SIWOC prosecution because the first prosecution for Incest would be "terminated by a final order" in Newrobe's favor. A final order is an order that, at least hypothetically, is appealable. *See Blevins v. Kramer*, 179 Mont. 193, 194, 587 P.2d 28, 29 (1978). A dismissal here would have acted as a final order the State could hypothetically appeal as a court order dismissing a case under Mont. Code Ann. § 46-20-103(2)(a). Such an appeal would not succeed (*see, e.g., Cool*, 174 Mont. at 101-102, 568 P.2d at 568-569) so the final order would not be "set aside, reversed, or vacated" either. *See* Mont. Code Ann. § 46-11-503(1)(c). A reversal effectuates a "final order" under Mont. Code Ann. § 46-11-503(1)(c) and precludes a later SIWOC prosecution.

[6] The acquittal definition in Mont. Code Ann. § 46-11-503(1)(a) of "warrant a conviction" is broader than the language in Mont. Code Ann. § 46-16-403, which describes insufficiency only in terms of "a finding or verdict of guilty."

Once this Court recognizes a violation on appeal, it must determine a sufficient and appropriate remedy. *State v. Minkoff*, 2002 MT 29, ¶¶ 17, 23, 308 Mont. 248, 42 P.3d 223. The State could have prosecuted Newrobe at the outset with SIWOC (arguing lack of consent by force) but made a conscious decision not to do so. Instead the State placed Newrobe into jeopardy with an Incest charge it did not prove and could never prove. Once Newrobe showed his hand, the State retreated from their misguided legal theory and rapidly amended the charge to save their case.

The sufficient and appropriate remedy is to put Newrobe in the same place he would have been in had the district court properly decided his motion and dismissed the Incest charge. Upon correction of the district court's erroneous denial, a SIWOC prosecution is barred by the result of the State's Incest prosecution.

As a final note, this issue does not rest on the court reporter's heart attack. The State's error existed from the very first documents it filed in this case. (Docs. 1, 2.) Newrobe was fully within his rights to move to dismiss the charge and did so after jeopardy attached. Whether or not the court reporter had a heart attack has no relationship to the

State's fundamental charging error here. The district court should have granted Newrobe's motion to dismiss. It did not and this was error. The State's unlawful SIWOC prosecution that followed must now be barred and dismissed.

II. The State violated Newrobe's double jeopardy protections when it prosecuted Newrobe for Sexual Intercourse without Consent and Bail Jumping after the district court declared a mistrial without manifest necessity.

A. The court reporter's heart attack did not meet the constitutional manifest necessity standard because the trial could have proceeded with electronic recording or continued until a stenographic court reporter had been secured.

Newrobe objected to the court's declaration of a mistrial after jeopardy attached in his trial. The district court's mistrial declaration did not meet the standards of manifest necessity (or, as later discussed, physical necessity), therefore, the second criminal trial is barred. *See City of Billings ex rel. Huertas v. Billings Municipal Court*, 2017 MT 261, ¶ 19, 389 Mont. 158, 404 P.3d 709.

"The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, and Article II, Section 25 of the Montana Constitution, protect citizens from being placed twice in jeopardy for the

same offense." *Cates*, ¶ 30. This constitutional prohibition is designed to prevent a person from being put at risk of conviction at a second trial. *Keating v. Sherlock*, 278 Mont. 218, 224, 924 P.2d 1297, 1300 (1996). Regardless of conviction or acquittal at the second trial, the person has already incurred the risk of jeopardy and cannot be forced to "run the gauntlet" a second time. *Keating*, 278 Mont. at 224, 924 P.2d at 1300-1301. The State, with all its resources and power, should not be allowed repeated attempts to convict a person for an alleged offense. *Cates*, ¶ 30.

Jeopardy attaches once a jury is empaneled and sworn. *Cates*, ¶ 30. The reason for attachment at this stage is the need to protect the accused's interest in retaining a chosen jury. *Crist v. Bretz*, 437 U.S. 28, 35 (1978). The accused has a "valued right to have [their] trial completed by a particular tribunal." *Cates*, ¶ 31; *Crist*, 437 U.S. at 36. Once banded together, a jury should not be discharged until it completes its solemn task of announcing a verdict. *Crist*, 437 U.S. at 36.

"When a court, in the absence of manifest necessity, declares a mistrial without the defendant's consent, the double jeopardy clause

forbids retrial." *Keating*, 278 Mont. at 227, 924 P.2d at 1302 (1996). Manifest necessity is a rule that "a trial can be discontinued when particular circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice." *State v. Carney*, 219 Mont. 412, 417, 714 P.2d 532, 535 (1986), *citing Wade v. Hunter*, 336 U.S. 684, 690 (1949). For almost two hundred years this power has been used with the "greatest caution, under urgent circumstances, and for very plain and obvious causes." *U.S. v. Perez*, 22 U.S. 579, 580 (1824); *see also, Carney*, 219 Mont. at 418, 714 P.2d at 535 ("Under [manifest necessity], a trial should be discontinued with great caution").

"[A] more stringent manifest necessity standard applies when a trial court considers declaring a mistrial without the defendant's request or consent." *Huertas*, ¶ 20. The key word of "necessity" within "manifest necessity," is not interpreted literally but this Court assumes there are degrees of necessity and that a "high degree" of necessity is required before concluding a mistrial is appropriate. *Huertas*, ¶ 20; *Carney*, 219 Mont. at 417, 714 P.2d at 535. When the defendant does not consent to a mistrial, trial judges are not to foreclose a defendant's options "until a scrupulous exercise of judicial discretion leads to the

conclusion that the ends of public justice would not be served by a continuation of the proceedings." *U.S. v. Dinitz*, 424 U.S. 600, 607 (1976). Any doubt as to a double jeopardy violation following discharge of the jury is to be resolved "in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion." *Downum v. U.S.*, 372 U.S. 734, 737-738 (1963).

Because a mistrial is an exceptional remedy, remedial actions short of a mistrial are preferred unless the ends of justice require otherwise. *Huertas*, ¶ 19; *Lamb v. District Court*, 2019 MT 274, ¶ 16, 397 Mont. 541, 452 P.3d 917. As an obvious alternative to declaring a mistrial, these remedial actions include continuing the trial. *Keating*, 278 Mont. at 227, 924 P.2d at 1302. In *Keating*, a juror got sick, did not return to jury duty, and no alternate jurors had been selected. *Keating*, 278 Mont. at 221, 924 P.2d at 1298. Before declaring a mistrial, the district court first explored multiple alternatives, including stipulations to fewer jurors, calling back the jury panel, or continuing the trial. *Keating*, 278 Mont. at 221, 228, 924 P.2d at 1299, 1303. Only after defense counsel rejected all these alternatives and affirmatively

requested a mistrial did the district court properly declare a mistrial. *Keating*, 278 Mont. at 228-230, 924 P.2d at 1303-1304.

Newrobe did not consent to a mistrial. (App. A at 5, 8.) He wanted to have the chosen jury retained and the trial brought to its conclusion. (App. A at 8.) Defense counsel explained that almost all of the witnesses had testified, he had already put on his witnesses out of order, and he had shown his hand as to Newrobe's defense, including a plan to have the Incest charge dismissed once the State rested. (App. A at 8-9.)

The district court had valid concerns about the state of the proceedings following the court reporter's heart attack, but some of the district court's statements were dubious. The jury was not sequestered, and a rescheduled trial date for January (or even the next week) would not have deprived the jurors of liberty, or even upset their holiday plans. The district court's statement of "I can't keep a jury impaneled for what could amount to over a month" is not an explanation for why the jury couldn't just come back later. (*See* App. A at 10.)

The district court also stated that the "video witnesses" could not be picked up by the FTR recording equipment, however, the serologist

and DNA expert were either testifying in person or by recorded deposition. (App. A at 5; 12/10/18 Tr. 234; 12/11/18 Tr. 248; Docs. 64, 65, 75, 79, 84.) If their depositions were being played, a CD of the deposition would simply be entered into the record and there would be no barrier to full appellate review.

The district court failed to adopt remedial actions, including Newrobe's proposal for a continuance, before declaring a mistrial on grounds of manifest necessity over Newrobe's objection. The new trial was certainly not ordered for Newrobe's benefit. *See State v. Hodgson*, 184 Mont. 394, 397-398, 603 P.2d 246, 247-248 (1979) ("Defendant did not object to this order granting a new trial . . . The order for a new trial was solely for defendant's benefit.").

On the third day of trial, an electronic court reporter recorded the proceeding without errors and the district court confirmed the recording was being made. (App. A at 4, 11.) While Newrobe appreciates the improved accuracy a stenographic court reporter brings to the courtroom (noting that his own sentencing hearing failed to be recorded), all that remained in this trial was for two video depositions to be played, a reading of the already-settled jury instructions by the

judge, and closing arguments by trained attorneys. The electronic court reporter could have recorded all these proceedings easily. There was no need to resort to the exceptional remedy of a mistrial. The status of the other stenographic court reporter could have also been inquired into, and the trial continued until that reporter, or any other stenographic reporter, became available.

Newrobe offered the obvious alternative of a continuance, allowing trial to resume once the judge collected himself and the court reporter situation became resolved. The district court, however, proceeded to make rulings and denied Newrobe's motion to continue. (*See* App. A at 9-10.)

In refusing to grant Newrobe's request for a continuance or to pursue any other remedial actions short of a mistrial, the district court's declaration of a mistrial over Newrobe's objection disbanded the jury without returning a verdict. The stringent manifest necessity standard was not met, meaning that jeopardy still attached to the first Bail Jumping prosecution. No second criminal trial should have occurred. *See Huertas*, ¶ 19.

B. The Sexual Intercourse without Consent prosecution, while not the same offense as Incest, is still barred in Montana because the offense was known to the prosecutor before the first prosecution and it was not physically impossible to proceed to the first trial's conclusion.

Under a federal constitutional analysis, the Bail Jumping prosecution is barred because the State prosecuted Newrobe for the same offense twice without meeting the manifest necessity standard. Under the U.S. Constitution, however, the SIWOC offense is not barred because SIWOC and Incest are not the same offense, as each crime has an element the other does not. *See U.S. v. Dixon*, 509 U.S. 688, 696-697 (1993); *Blockburger v. U.S.*, 284 U.S. 299, 304 (1932). The federal constitution considers only an offense's elements, even in the event of multiple prosecutions for identical conduct. *Dixon*, 509 U.S. at 697, 703-704.

Montana's statutes, however, "provide defendants with greater protections against double jeopardy than the United States Constitution." *City of Helena v. O'Connell*, 2019 MT 69, ¶ 12, 395 Mont. 179, 438 P.3d 318. Montana law mandates a broader conduct and transaction-based analysis than *Blockburger* provides. *State v. Tadewaldt*, 277 Mont. 261, 268, 922 P.2d 463, 467 (1996). And here,

under a manifest necessity or physical impossibility analysis, Mont. Code Ann. § 46-11-503 bars the SIWOC prosecution.

As previously presented in Issue One, Mont. Code Ann. § 46-11-503 is implicated when there has been a former prosecution and the offense in question in the current prosecution was known to the prosecutor, supported by probable cause, consummated prior to the original charge, and jurisdiction and venue lie in the same court. Mont. Code Ann. § 46-11-503(1). And as previously discussed, the SIWOC offense here was known to the prosecutor prior to initiation of the first prosecution, presented probable cause in the application for information, allegedly consummated prior to the information's filing, and jurisdiction and venue lie in the Cascade County District Court. (*See* Docs. 1, 2.) Indeed, the State sought to prosecute the identical conduct stemming from March 21, 2015 in both its initial Incest charge and its later SIWOC charge. (12/10/18 Tr. 209; 1/19/19 Tr. 143.)

Under Mont. Code Ann. § 46-11-503(1)(d)(i), a subsequent prosecution may be barred when, after the jury has been impaneled and sworn, the former prosecution was terminated for reasons not amounting to an acquittal. If the defendant did not consent to the

trial's termination, a subsequent prosecution is barred unless one of five listed reasons is met. Mont. Code Ann. § 46-11-503(2)(b). Reasons (ii) through (v) facially do not apply to the facts of this case. Only reason (i) requires further analysis. Reason (i) states: "[T]he trial court finds that the termination is necessary because it is physically impossible to proceed with the trial in conformity with law." This Court has yet to elaborate on the meaning of "physically impossible," but its constitutional rulings on manifest necessity provide a helpful guide. Given that Montana's statutes provide stronger protections than the U.S. Constitution, it follows that "physically impossible" is a higher standard than interpretations of manifest necessity from the U.S. Supreme Court.

The district court's mistrial declaration did not meet the standards of physical impossibility or manifest necessity. Even after the heart attack, an official electronic court reporter was still in the room, recording the proceedings. (App. A at 4.) The trial could have also been briefly continued to secure the services of another stenographic court reporter. Under Mont. Code Ann. § 46-11-503, the SIWOC prosecution is barred.

Defense counsel requested this relief in their written motion to dismiss and made this very argument, arguing Newrobe did not consent to the mistrial and the mistrial declaration was not supported by manifest necessity. (Doc. 113.) While defense counsel failed to cite to Mont. Code Ann. § 46-11-503 in their motion, this Court may still consider and apply Mont. Code Ann. § 46-11-503 based on ineffective assistance of counsel.

This Court has reversed for ineffective assistance when defense counsel only cites to constitutional double jeopardy provisions instead of Montana's stronger, statutory double jeopardy protections. *State v. Becker*, 2005 MT 75, ¶¶ 19-20, 326 Mont. 364, 110 P.3d 1.[7] Defense counsel's performance is deficient when a motion to dismiss fails to rely on the proper statutory grounds for dismissal. *Becker*, ¶ 20. Deficient performance is prejudicial when, but for the deficient performance, the proceeding's result would have been different. *Becker*, ¶ 21.

Newrobe argued for dismissal of his Bail Jumping and SIWOC charges on constitutional grounds that manifest necessity was not met.

[7] This Court has also reversed convictions for ineffective assistance when no objections to statutory double jeopardy protections were raised at all. *See Ellison*, ¶ 26; *State v. Brandt*, 2020 MT 79, ¶¶ 31-32, 399 Mont. 415, 460 P.3d 427.

(Doc. 113 at 1, 4-10.) While the argument is correct as to Bail Jumping, counsel failed to cite to the stronger statutory protections in Mont. Code Ann. § 46-11-503 as to the SIWOC charge. (Doc. 113.) But for counsel's deficient performance of not supplementing a statutory analysis to the constitutional argument, the SIWOC prosecution was permitted to proceed, resulting in a 65-year sentence that prejudiced Newrobe. This Court may still apply Mont. Code Ann. § 46-11-503 to bar the SIWOC prosecution through an ineffective assistance claim.

III. Alternatively, the jury never considered the essential and proper consent element when deliberating the Sexual Intercourse without Consent charge, unsettling the fundamental fairness of the proceedings when the State used the new law to make it easier to convict but turned to the old law to impose the harsher punishment.

A. The State prosecuted Newrobe with a statute that did not exist when the crime allegedly occurred.

Should this Court reject Newrobe's argument that the SIWOC conviction must be reversed and dismissed, then this case must be reversed for a new trial so Newrobe can receive the correctly instructed jury he is constitutionally entitled to have.

"The principle underlying plain error review is to correct error not objected to at trial but that affects the fairness, integrity, and public

reputation of judicial proceedings." *Akers*, ¶ 20. While employed sparingly, this Court will reverse under plain error when a party demonstrates that the claimed error implicates a fundamental right, and that failure to correct the error will result in a manifest miscarriage of justice, unsettle the fundamental fairness of the trial or proceedings, or compromise the integrity of the judicial process. *Akers*, ¶¶ 13, 17; *State v. Carnes*, 2015 MT 101, ¶ 13, 378 Mont. 482, 346 P.3d 1120.

All persons have a fundamental right to be protected from criminal convictions except upon proof beyond a reasonable doubt as to each element of a charged offense. *State v. L. Daniels*, 2011 MT 278 ¶ 33, 362 Mont. 426, 265 P.3d 623, *citing In re Winship*, 397 U.S. 358, 363-364 (1970). These standards of proof are "designed to exclude as nearly as possible the likelihood of an erroneous judgment." *State v. George*, 2020 MT 56, ¶ 11, 399 Mont. 173, 459 P.3d 854. Courts must carefully guard against dilution of the principle that guilt is only established by probative evidence and proven beyond a reasonable doubt. *State v. Favel*, 2015 MT 336, ¶ 25, 381 Mont. 472, 362 P.3d 1126. Therefore, Montana requires jurors be fully and fairly instructed on the applicable law and that guilt be established beyond a reasonable

doubt on every element of the charged offense. *Akers*, ¶ 15; *Carnes*, ¶¶ 11, 14.

It is axiomatic that criminal proceedings must use the criminal statutes in effect at the time of the alleged crime's commission. *Dexter v. Shields*, 2004 MT 159, ¶ 13, 322 Mont. 6, 97 P.3d 1208. "Persons alleged to have committed criminal offenses must be charged with violating the law in effect at the time the crime was committed." *State v. J. Daniels*, 2003 MT 30, ¶ 17, 314 Mont. 208, 64 P.3d 1045. Accordingly, jury instructions must fully and fairly instruct the jury on the applicable law, and the applicable law is the law in effect at the time of the alleged offense. *Carnes*, ¶ 14; *State v. Thomas*, 2019 MT 155, ¶ 11, 396 Mont. 284, 445 P.3d 777.

A district court violates due process when it instructs the jury on law not yet in existence that removes an essential element needed to convict the defendant. *Zerbst*, ¶¶ 15, 24-25. In *Zerbst*, the municipal court instructed the jury on the 2017 definition of consent, which became effective in October, but the crime occurred in July. *Zerbst*, ¶¶ 2, 6, 18. Under the old law for Sexual Assault, "without consent" was proved by its ordinary meaning. *Zerbst*, ¶ 17. This Court held that

using the 2017 consent definition was "an incorrect definition of consent under the law applicable to this case" and reversed. *Zerbst*, ¶¶ 24-25, 39.

Under the 2013 code, "without consent," meant "the victim is compelled to submit by force against the victim or another." Mont. Code Ann. § 45-5-501(1)(a)(i) (2013). The Legislature replaced this language with a new definition of consent, which now means "words or overt actions indicating a freely given agreement to have sexual intercourse or sexual contact." Mont. Code Ann. § 45-5-501(1)(a) (2017).[8] This is a different definition than the older law that changes the meaning of consent and requires the weighing of different interests. *See Zerbst*, ¶¶ 18, 37. In broadening the definition of consent to capture a wider range of behavior, the Legislature also reduced the maximum penalty for SIWOC from life or 100 years to life or 20 years. *Compare* Mont. Code Ann. § 45-5-503(2) (2013) to Mont. Code Ann. § 45-5-503(2) (2017).

The State's filing of the new SIWOC charge after the mistrial still alleged the offense occurred on March 21, 2015. (Doc. 113.2.) Despite having an opportunity to carefully review its case following its improper

[8] Relevant 2013 and 2017 sections of the MCA are attached as App. E.

Incest charging decision, the State submitted the new 2017 consent definition. (Doc. 129, No. 17.) The district court adopted the State's instruction on the broader consent definition from 2017, which was not the law that existed at the time. (Doc. 148, No. 17.)

While the older definition requires proof of being compelled to submit by force, the newer definition requires only the absence of an agreement to have sexual intercourse or sexual contact. Mont. Code Ann. §§ 45-5-501(1)(a), 45-5-503(1) (2017). During V.B.'s direct examination, the prosecutor stuck to questions of consent and did not use the word "force". (*See* 1/9/19 Tr. 148-149, 164.) At closing, the prosecutor followed the improper instruction and argued, "She told you she, in no way, gave him consent to do these things to her." (1/10/19 Tr. 358.)

The State proposed and the district court instructed the jury on a definition of consent substantially different and broader than the definition of consent in effect at the time of the alleged crime. (Doc. 129, No. 17; Doc. 148, No. 17.) The given instruction omitted an essential element required to convict, did not fully and fairly instruct

the applicable law, and violated Newrobe's fundamental rights. *See Zerbst*, ¶ 25.

B. The State prejudiced Newrobe when it used the broader definition of consent in the non-applicable new law to make it easier to convict, and then relied on the old law to impose the harsher punishment.

The failure to fully and fairly instruct the jury on the applicable law implicates each of the plain error review criteria, but at a minimum leaves the fundamental fairness of the proceeding unsettled. *Akers*, ¶¶ 16-17; *Carnes*, ¶ 14. By having consent mean a freely given agreement instead of meaning a victim compelled to submit by force, the instruction "foreclosed the jury's consideration of a potentially favorable element for the defense." *See State v. Resh*, 2019 MT 220, ¶ 17, 397 Mont. 254, 448 P.3d 1100.[9]

The erroneous jury instruction prejudiced Newrobe because consent is an essential element to the crime of SIWOC and the State

[9] This Court reversed Resh's conviction under an ineffective assistance claim. *Resh*, ¶ 21. If this Court does not wish to undergo a plain error analysis, it could instead find counsel to be ineffective, as there was "no plausible justification" to fail to object to the State's proposed jury instruction. *See Resh*, ¶ 15. When evaluating prejudice in an effective assistance claim, courts must ultimately concentrate on "the fundamental fairness of the proceeding." *Weaver v. Massachusetts*, 137 S.Ct. 1899, 1911 (2017).

was not required to prove the correct definition of consent beyond a reasonable doubt. *See Zerbst*, ¶ 37. Without the "compelled to submit by force" element, the State prosecuted Newrobe for a different crime. That crime was not for SIWOC as the state of the law existed on March 21, 2015. The crime of SIWOC as it exists today is a different crime that prohibits a different kind of sexual behavior.

Newrobe's sentencing to a March 21, 2015 SIWOC offense where the 2017 consent instruction was applied at trial demonstrated fundamental unfairness. At the sentencing hearing, the State and the district court excoriated Newrobe for asking his exposure to SIWOC be limited to 20 years under ameliorative sentencing principles. (Doc. 179 at 2-7; Doc. 188 at 2-3.) The State, despite convicting Newrobe under the 2017 consent definition, said it could "only convict Newrobe under the [2013] version of the statute . . . which captured the narrower range of behavior than the 2017 version." (Doc. 148, No. 17; Doc. 188 at 3.)

The district court echoed that, saying, "Given the substantive differences between the two statutes and proof required for conviction, he is not entitled to be sentenced under the 2017 statute . . . The Defendant could not have been prosecuted under the 2017 version of

§ 45-5-503, MCA, which captured a broader range of conduct than the [2013] version and would have changed the State's theory." (Doc. 179 at 2, 5.)

The State and district court said all of this at sentencing despite the fact the jury convicted Newrobe on the 2017 definition of consent, just as the State's submitted instruction said. (Doc. 148, No. 17.) The State cannot use the newer law to make their case easier to prove while simultaneously using the older law to impose the harsher punishment. It is a fundamental miscarriage of justice that undermines the integrity of the justice system for our laws to be used this way.

The district court imposed a 65-year sentence. Using law that did not exist at the time of the offense to instruct on an element that was easier to prove but then claiming otherwise in order to impose the harsher punishment under the old law is a plain error that, if not corrected, leaves the fundamental fairness of these proceedings unsettled.

"When dealing with fundamental liberty interests, it is never too late to backup and correctly apply the law, as clearly and unambiguously set forth by the legislature." *State v. Running Wolf*,

2020 MT 24, ¶ 29, 398 Mont. 403, 457 P.3d 218. Should this Court not grant an outright dismissal to both of Newrobe's charges as argued in Issues One and Two, it can still require the district court to correctly instruct Newrobe's jury on the law in effect at the time of the alleged offense.

CONCLUSION

Newrobe respectfully requests this Court reverse the district court's denial of his motion to dismiss the charge of Incest, vacate Newrobe's convictions of Sexual Intercourse without Consent and Bail Jumping, and remand to the district court with instructions to dismiss the charges against him with prejudice.

In the alternative, Newrobe respectfully requests this Court reverse and remand for a new trial on the SIWOC.

Respectfully submitted this 28th day of July, 2020.

OFFICE OF STATE PUBLIC DEFENDER
APPELLATE DEFENDER DIVISION
P.O. Box 200147
Helena, MT 59620-0147

By: /s/ James Reavis
JAMES REAVIS
Assistant Appellate Defender

CERTIFICATE OF COMPLIANCE

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

/s/ James Reavis
JAMES REAVIS

APPENDIX

CERTIFICATE OF SERVICE

I, James Richard Reavis, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 07-28-2020:

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

Joshua A. Racki (Prosecutor)
121 4th Street North
Suite 2A
Great Falls MT 59401
Representing: State of Montana
Service Method: eService

Electronically signed by Kim Harrison on behalf of James Richard Reavis
Dated: 07-28-2020