IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0685

STATE OF MONTANA,

Plaintiff and Appellee,

v.

MARK WILLIAM COLLINS,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Third Judicial District Court,
Powell County, The Honorable Ray J. Dayton, Presiding

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Whether this Court should apply the doctrine of plain error review to consider the jury instructions.

Whether the district court abused its discretion when it instructed the jury and, if so, whether Collins' substantial rights were prejudiced as a result.

Whether Collins' ineffective assistance of counsel claims may be reviewed on direct appeal and, if so, whether Collins can establish he would not have been convicted if it were not for defense counsel's alleged deficient performance.

STATEMENT OF THE CASE

After driving his van the wrong way on the Interstate and frontage road, attempting to hit two civilian vehicles, and hitting a law enforcement patrol vehicle, Mark William Collins was charged with the following felonies: Count I, criminal endangerment (re: Kevin Morely); Count II, attempted assault with a weapon (re: Morely); Count III, assault with a weapon (re: Deputy John "Austin" Micu); Count IV, attempted assault with a weapon (re: Rick Hathaway); and Count V, attempted deliberate homicide (re: Deputy Micu). (Docs. 2, 36.)

Prior to trial, the State and defense submitted proposed jury instructions. (Docs. 15, 45, 48-49, 51, 54.) At trial, the court painstakingly reviewed each proposed instruction and collectively amended several instructions with input from

the parties and drafted additional instructions as needed. (07/16/20 through 07/19/20 Tr. (Tr.) at 616-42.) No instruction was given over an objection from either the State or defense counsel, Christopher Miller. (*Id*.; Doc. 59.)

The jury found Collins guilty of the following offenses: Count I, criminal endangerment; Count II, attempted assault with a weapon; Count III, assault with a weapon; Count IV, attempted assault with a weapon; and Count V, the lesser-included offense, attempted aggravated assault. (Tr. at 823.)

The district court sentenced Collins to the Montana State Prison for a net term of 90 years with 45 years suspended by imposing the following sentences to all run consecutive to one another: Count I (criminal endangerment), 10 years with 5 suspended; Count II (attempted assault with a weapon), 20 years with 10 suspended; Count III (assault with a weapon), 20 years with 10 suspended; Count IV (attempted assault with a weapon), 20 years with 10 years suspended; and Count V (attempted aggravated assault), 20 years with 10 years suspended. (10/5/18 Tr.; Doc. 78.)

STATEMENT OF THE FACTS

At about 4:30 in the morning on August 4, 2017, Kevin Morely was on his way to work at Rock Creek Cattle Company just west of Deer Lodge by way of Interstate 90. (Tr. at 118-46.) At that same time, Collins was driving his Dodge van

eastbound but on the westbound lanes of Interstate 90. (Tr.) Morely was just about to the North Exit when he saw headlights from Collins' van driving at a high rate of speed directly towards oncoming traffic. (*Id*.) Morely flashed his headlights and avoided the van by steering away. (*Id*.) Another car and semi-trailer had to make the same maneuvers to avoid Collins' van. (*Id*.) Thinking the van driver had made a simple error, Morely chose not to call in the wrong-way driver. (*Id*.) Morely stopped at the I-90 Auto Plaza for a snack and drink and then got back onto the Interstate and proceeded west, towards the Beck Hill Exit. (*Id*.)

As Morely traveled westbound, he noticed the same van again when Collins turned on his headlights. (Tr. at 118-46.) However, this time, Collins was driving parallel to Morely, but in the *eastbound* lanes of the Interstate. (*Id*.) Realizing Collins' driving decisions were not simple mistakes and he was creating a danger to others on the road, Morely reported the van to 911. (*Id*.) Powell County Sheriff's Deputy Micu responded to the dispatch and began looking for the van. (Tr. at 217-57, 334-81.)

Morely took the Beck Hill Exit, turned left onto the Interstate overpass, and proceeded to North Frontage Road that parallels the Interstate and runs north-to-south. (Tr. at 118-46.) Morely turned left onto North Frontage Road and headed south towards his turn off for the cattle ranch. (*Id*.) After driving about a mile or so, Morely saw a cloud of dust ahead of him and realized the van drove off

the eastbound Interstate lanes, into the ditch, and onto the frontage road. (*Id*.) After Collins drove across grass/dirt, through a State fence, and onto North Frontage, he aimed his van northbound and left skid marks from accelerating towards Morely. (Tr. at 387-400.)

Morely saw the van coming towards him at a high rate of speed and, about 50 yards past the Kohrs Ranch, Collins drove directly into Morely's path. (Tr. at 118-46.) Morely avoided colliding head-on by mere inches by quickly steering his vehicle off the road. (*Id*.) Morely believed that had he not evaded Collins' van, he would have been either killed or suffered serious injuries. (*Id*.) Morely drove back onto the frontage road away from Collins, called 911 a second time, and continued southbound to work. (*Id*.)

Dispatch relayed Morely's report of the near collision to Deputy Micu who then headed to that area. (Tr. at 223-57, 334-81.) After searching some backroads, Deputy Micu came across Collins' van stopped at the Beck Hill interchange on North Frontage Road without its headlights on. (*Id*.) When the patrol car approached, Collins turned on his headlights, immediately entered the roadway, and drove directly at the patrol car. (*Id*.) Deputy Micu drove off the road into the grass to avoid being struck by Collins. (*Id*.) The officer activated his emergency lights and siren and turned around to pursue the van southbound on North Frontage Road. (*Id*.)

As the patrol car got closer to him, Collins slowed to a stop, put his van in reverse, and accelerated backwards toward the patrol car. (Tr. at 225-257, 334-381.) Deputy Micu believed Collins was trying to hit him again, so he put his vehicle in reverse and backed up for approximately 300 yards. (*Id*.) While this was happening, Rick Hathaway was on his way to work at Rock Creek and came up to North Frontage Road from a side road. (Tr. at 146-82.) Hathaway looked left and saw the van and patrol car with its emergency lights and thought it was a typical traffic stop. (*Id*.) Hathaway turned right onto North Frontage Road and headed south. (*Id*.)

Before he rammed into the patrol vehicle, Collins saw Hathaway pull onto the road, stopped backing up, and accelerated southbound after Hathaway. (Tr. at 225-257, 334-381.) Deputy Micu reinitiated his pursuit with emergency lights flashing. (*Id*.) Hathaway did not believe he could safely pull over to the side of the road and chose to accelerate south as Collins pursued him. (Tr. at 146-82.) Hathaway made a right-hand turn onto Rock Creek Cattle Company Road, but Collins did not make the turn and sped through the intersection and stopped. (*Id*.)

Deputy Micu caught up with Collins and stopped about 50 feet behind the van. (Tr. at 217-57, 334-81.) Collins put the van in reverse and once again accelerated towards the patrol car. (*Id*.) When Deputy Micu put his car in reverse and hit the gas to again try to avoid the van, a safety feature on his car only

allowed him to back up at 5 miles an hour. (*Id*.) Collins hit the deputy's patrol car, spinning it sideways into the grass. (*Id*.; State's Ex. 6.) Deputy Micu estimated Collins was going about 35 miles an hour when he hit him and explained the impact caused him neck pain and jarred items off the seats in the vehicle. (*Id*.)

After hitting the patrol car, Collins turned down Rock Creek Cattle Company Road and continued pursuing Hathaway. (Tr. at 217-57, 334-81.) Deputy Micu reinitiated his pursuit reaching speeds of 85 to 90 miles per hour. (*Id*.) Hathaway feared for the safety of patrons and workers at Rock Creek, so he chose not to continue westbound on Rock Creek Cattle Company Road. (Tr. at 146-82.) Instead, Hathaway turned onto a back road to Garrison to lead Collins away from Rock Creek. (*Id*.) Hathaway drove to a gravel pit area where he could watch for the van and elude it if necessary. (*Id*.) Collins missed the turn Hathaway took and used the van's momentum to spin completely around in the intersection. (*Id*.; Tr. at 217-57, 334-81; State's Ex. 7.) By that time, Deputy Micu had caught up to him and stopped just to the other side of the intersection with his patrol vehicle facing Collins. (*Id*.) The patrol vehicle was on the right side of the road while the van was on the opposite side after it had spun around. (*Id*.; Ex. 7.)

Based on Collins' complete disregard for the safety of others, including driving the wrong way on the Interstate, chasing other vehicles at high rates of speed while attempting to drive into them, and actually striking his patrol vehicle,

Deputy Micu believed he had to intercede to stop Collins from killing someone. (Tr. at 234-35.) The officer exited his vehicle with his rifle and took a defensive position behind the door of his patrol car. (Tr. at 234-57, 334-81.) Collins accelerated directly towards Deputy Micu. (*Id*.; State's Ex. 7.) Deputy Micu heard the van's engine reach full throttle as it careened towards his patrol vehicle and he believed he would be killed when the van struck him and his car. (*Id*.) After making sure the van's trajectory was still right at him and that Collins showed no intent to steer away, Micu fired at the van's windshield several times, striking Collins three times. (*Id*.) The van decelerated, veered to the left, missing the patrol vehicle by inches, and came to rest in the barrow pit. (*Id*., Tr. at 526.) There was no evidence that Collins ever applied his brakes. (Tr. at 415-17.)

Deputy Micu, with the assistance of Montana Highway Patrol Officer Brian Locklin, secured Collins and rendered aid to his wounds until an ambulance arrived. (*Id*.) Collins had been hit in the shoulders and side of his face but was conscious and talking to the officers. (*Id*.) Lab testing of Collins' blood revealed he had methamphetamine and amphetamine in his system. (Tr. at 275-95; State's Ex. 4.)

Powell County Sherriff Scott Howard responded to the scene, secured Deputy Micu's rifle and body camera, and called the Department of Justice investigators with the Department of Criminal Investigation (DCI), to assist in

processing the scene. (Tr. at 424-62, 493-96.) When officers attempted to download Deputy Micu's body camera video, there was no data to collect, but they did recover video from Trooper Locklin's body camera. (Tr. at 462-82.) Ex. 12.) DCI Agent Mark Hilyard interviewed all the witnesses, including Collins. (Tr. at 489-608.) Collins did not remember the events of August 4, 2017, but did tell the officer he was angry with his roommate in Fairfield. (*Id*.)

STANDARD OF REVIEW

Whether an unpreserved error warrants plain error review is a question of law reviewed *de novo*. *State v. Trujillo*, 2020 MT 128, ¶ 6, 400 Mont. 124, 464 P.3d 72; *State v. Gray*, 2004 MT 347, ¶ 13, 324 Mont. 334, 102 P.2d 1255 (when plain error review is requested, Court's review is discretionary).

This Court reviews a district court's jury instructions for an abuse of discretion. *State v. Iverson*, 2018 MT 27, ¶ 10, 390 Mont. 260, 411 P.3d 1284; *State v. Birthmark*, 2013 MT 86, ¶ 10, 369 Mont. 413, 300 P.3d 1140; *State v. Cybulski*, 2009 MT 70, ¶ 34, 349 Mont. 429, 204 P.3d 7 (whether the district court acted arbitrarily or exceeded the bounds of reason resulting in substantial injustice in instructing the jury). Jury instructions are considered as a whole to determine "whether they fully and fairly instructed the jury on the law." *Iverson*, ¶ 10.

Claims of ineffective assistance of counsel (IAC) are mixed questions of fact and law that this Court reviews *de novo*. *Birthmark*, ¶ 10. Appellate courts "review IAC claims on direct appeal if the claims are based solely on the record." *State v. Ward*, 2020 MT 36, ¶ 15, 399 Mont. 16, 457 P.3d 955.

SUMMARY OF THE ARGUMENT

Collins did not oppose, and in fact proposed, the instructions he now claims were erroneously given to the jury. Since the only claims Collins raises on appeal were not preserved, this Court may only address them through plain error review or an IAC claim. Based on the record and overwhelming evidence against Collins, neither review mechanism is appropriate.

The plain error doctrine does not apply in this matter as there was no threat of a miscarriage of justice or compromise to the integrity of the judicial process since the instructions, taken as a whole, fully and fairly instructed the jury on the law and there was more than sufficient evidence to support the verdict. Collins' claim that Jury Instruction Nos. 36 and 46 relieved the State of the burden of establishing every element of the charged offenses fails to appreciate that when reviewing jury instructions, this Court will consider the instructions as a whole. Here, the jury received "elements" instructions that clearly set forth the State's

burden to establish each element beyond a reasonable doubt. The jury was also given three additional "attempt" instructions that specifically advised the jury that to be convicted of "attempt" Collins' actions must have been purposeful. The district court did not abuse its discretion when it instructed the jury on issues related to "attempt."

The district court, however, gave the "conduct-oriented" knowingly instruction instead of the "result-oriented" knowingly instruction which this Court has determined is the appropriate mental state instruction for criminal endangerment. Nonetheless, given the overwhelming evidence that Collins created a risk of serious bodily injury or death to other motorists based on his deliberate driving acts, Collins cannot establish that declining to review this instruction will result in a miscarriage of justice or compromise the integrity of the judicial process.

Even if this Court invokes plain error review regarding the criminal endangerment "knowingly" instruction, such an error was harmless. Collins cannot establish how that instruction prejudicially affected his substantial rights when all the other instructions are considered and because the evidence of Collins' guilt was so overwhelming, no reasonable juror could have been influenced by the improper instruction.

Finally, Collins' IAC claims are insufficient to reverse his convictions. First, this Court may decline to consider the IAC claims because the reasons Miller offered some instructions and did not oppose others is not apparent in the record. It is entirely plausible that Miller's conscious decisions about the jury instructions were driven by the unrefuted, strong evidence that Collins deliberately operated his van in a manner that irrefutably created significant dangers to other drivers. The record supports that Miller's defense strategy hung almost entirely upon convincing the jury to acquit him of attempted deliberate homicide. Collins' IAC claims are, therefore, better suited for postconviction where Miller can explain his decisions.

Second, even if this Court chooses to consider the IAC claims on direct appeal, Collins cannot prevail. For all IAC claims, the appellant must establish that his counsel not only performed deficiently, but he must also establish how he suffered prejudice as a result. Here, Collins cannot establish how he was prejudiced by Miller's alleged errors because, given the unrefuted testimony of all three victims and their clear and consistent descriptions of how Collins' actions created a fear they would be seriously injured or killed, Collins cannot establish how the outcome would have been different had Miller performed differently.

ARGUMENT

I. Invocation of plain error doctrine to review the jury instructions is not warranted because Collins cannot establish that declining to consider the instructions on direct appeal will result in a manifest miscarriage of justice or call into question the fairness or integrity of his trial and, even if an error was made, Collins cannot establish his substantial rights were affected.

On appeal, Collins challenges two issues related to the jury instructions: the definition of knowingly for criminal endangerment (Count I) and instructions related to the "attempted" offenses (Counts II, IV and V). Collins concedes that he did not raise any objection to the jury instructions and, thus, failed to preserve the arguments he now attempts to raise on appeal. (Opening Brief (Br.) at 34.) *See* Mont. Code Ann. § 46-16-410(3) (party waives right to challenge "any portion of the instructions or omission from the instructions unless an objection was made" when the jury instructions were being settled).

Generally, this Court will not review jury instructions if the party asserting the error did not object to the instructions at the time they were proposed. *State v. Earl*, 2003 MT 158, ¶ 23, 316 Mont. 263, 71 P.3d 1201 (citing *State v. Finley*, 276 Mont. 126, 137, 915 P.2d 208, 215 (1996*), overruled on other grounds by State v. Gallagher*, 2001 MT 39, 304 Mont. 215, 19 P.3d 817 (hereinafter, *Gallagher 2001*); *Gray*, ¶ 19 (if timely objection not made, claim may not be heard on appeal unless it constitutes plain error).

Collins requests this Court reach his unpreserved arguments through the doctrine of plain error and an IAC claim (discussed below at Section II.B). (Br. at 34-41.) Neither of his arguments are compelling.

Pursuant to *Finley*, the plain error doctrine is applied only when "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." *Finley*, 276 Mont. at 137, 915 P.2d at 215. The plain error doctrine is employed sparingly, on a case-by-case basis, pursuant to the narrow circumstances articulated in *Finley*. *Earl*, ¶ 25.

"The particular facts and circumstances of each case drive the applicability of the plain error doctrines." *State v. Godfrey*, 2004 MT 197, ¶ 39, 322 Mont. 254, 95 P.3d 166 (*quoting Finley*, 276 Mont. at 134, 915 P.2d at 213). "[A] mere assertion that constitutional rights are implicated or that failure to review the claimed error may result in a manifest miscarriage of justice is insufficient to implicate the plain error doctrine." *State v. King*, 2013 MT 139, ¶ 39, 370 Mont. 277, 304 P.3d 1 (citation omitted). Moreover, "[p]lain error review should not act as 'a prophylactic for careless counsel.'" *Earl*, ¶ 25 (citation omitted).

Contrary to Collins' claim on appeal, declining to apply plain error review of the jury instructions would not leave one "firmly convinced" that some aspect of

the trial, if not addressed, would result in a manifest miscarriage of justice, call into question the fairness of the trial or proceeding, or compromise the integrity of the judicial process. *See State v. Taylor*, 2010 MT 94, ¶ 17, 356 Mont. 167, 231 P.3d 79; *Earl*, ¶ 25 (citing *Finley*, 276 Mont. at 137, 915 P.2d at 215).

A. "Attempt" instructions (re: Counts II, IV, and V)

Collins argues that the manner in which the court instructed the jury about the "attempt" offenses permitted the jury to convict him of those three offenses without requiring the State to prove that Collins had the "purpose to commit the underlying offense." (Br. at 28.) Collins specifically faults the court for giving Jury Instruction Nos. 21, 29, 30, 32, 36, 39, 46, 52, 53. (*See* Br. at 33, App. B.) Essentially, the "attempt" instructions Collins takes issue with are Jury Instruction Nos. 36 and 46 which stated: "A person who knowingly does any act toward the commission of Assault with a Weapon commits the offense of Attempted Assault with a Weapon."

Collins offered an equivalent instruction prior to trial. (*See* Doc. 48, Proposed JI No. 17.) And, as already established, he did not object to the instructions he now challenges. Nonetheless, Collins argues that these instructions "lowered" the State's burden to prove every element of the charged offenses. However, jury instructions are not considered in a vacuum.

This Court reviews jury instructions in criminal cases to determine whether the instructions, as a whole, fully and fairly instruct the jury on the applicable law. *State v. Patton*, 280 Mont. 278, 286, 930 P.2d 635, 639 (1996); *State v. Sanchez*, 2017 MT 192, ¶ 11, 388 Mont. 262, 399 P.3d 886 (When determining if the jury was fully and fairly instructed, this Court always considers instructions "as a whole.").

Rather than accounting for the instructions as a whole, Collins' argument lists only a few instructions and relies on only two in particular; Jury Instruction Nos. 36 and 46. But, under this Court's jurisprudence, all the instructions must be reviewed together, including the "definition" and "elements" instructions for Counts II, IV, and V. (*See* Doc. 59, JI Nos. 29/32 (attempted assault with a weapon against Morely), 29/47 (attempted assault with a weapon against Hathaway), 49/50 (attempted deliberate homicide against Micu) or 52/53 (attempted aggravated assault against Micu).)

The "elements instructions" all included the proper required mental states (knowingly or purposely) which were correctly set forth in Jury Instruction No. 30 (knowingly is when person is "aware there exists the high probability that the person's conduct will cause a specific result") and No. 31 (purposely is when it is

the person's conscious object to cause such a result").[1] (Doc. 59.) Jury Instruction Nos. 32, 47, 50, and 53 all instructed the jury that "all of these elements" must be established. (*Id.)*

Contrary to Collins' claim, the existence of Jury Instruction Nos. 36 and 46 did not negate the specific instructions to the jury that directed them to apply the appropriate mental state to each element of the offenses and ensure the State proved each element beyond a reasonable doubt. Taken as a whole, the jury was fully instructed on the law because those two instructions were not provided in isolation as Collins' argument suggests.

Moreover, Collins' claim that the court improperly instructed the jury on "attempt" fails to acknowledge three additional instructions that further undermine the alleged effect of JI Nos. 36 and 46. Those instructions stated:

> **JI No. 34**: A person commits the offense of attempt when, *with the purpose* to commit the offenses of Assault with a Weapon or Deliberate Homicide, the person commits any act toward the commission of the offense of Assault with a Weapon or Deliberate Homicide. The fact that the offense off Assault with a Weapon or Deliberate Homicide was or was not completed does not prevent conviction for the offense of attempt.

[1] Both attempted deliberate homicide and aggravated assault are result-oriented crimes that require a result-oriented mental state instruction. *See State v. Ilk*, 2018 MT 186, ¶ 19, 392 Mont. 201, 422 P.3d 1219.

> **JI No. 35**: To convict the Defendant of the offense of attempt, the State must prove the following elements:
>
> 1) That the Defendant performed an at toward the commission of the offense of Assault with a Weapon or Deliberate Homicide
>
> 2) That the Defendant did so *with the purpose* to commit the offense of Assault with a Weapon or Deliberate Homicide
>
> . . . .
>
> **JI No. 37**: A person commits the offense of attempt when, *with the purpose* to commit a specific offense, the person does any act towards the commission of the offense. A person is not liable under this section if, under circumstances manifesting a voluntary and complete renunciation of criminal purpose, the person avoided the commission of the offense attempted by abandoning the person's criminal intent. The fact that the offense of Assault with a Weapon or Deliberate Homicide was or was not completed does not prevent conviction for the offense of attempt.

(Doc. 59.) (Emphasis added.)

These instructions clearly advised the jury that they must determine whether Collins acted with purpose as part of the attempt charges. Purpose was defined for Counts II through V as a "conscious object to cause such a result." (*See* Doc. 59, JI No. 31.) When these instructions and the elements instructions are considered as a whole under the totality of the circumstances, the jury was fully and fairly instructed on the law as to Counts II through V.

Collins' argument about Jury Instruction No. 21 is also unavailing. (Br. at 32-33.) This instruction relates to issues of causation, and not attempt. *See* MCJI No. 2-111. Moreover, here Collins was not convicted of a distinct "harm" as

contemplated in that instruction. *See also, State v. Rothacher*, 272 Mont. 303, 312-13, 901 P.2d 82, 88 (1995) (held, when no facts were argued about what harm defendant intended, instruction about intended harm/causation was not prejudicial and at worst, superfluous".).

Collins was convicted for the effect or "result" of his conduct (causing either substantial risk of serious bodily injury or death (criminal endangerment) or reasonable apprehension of serious bodily injury (assault with a weapon; attempted aggravated assault). Determination of reasonable apprehension is from the victim's perspective. *See State v. Martin*, 2001 MT 83, ¶ 55, 305 Mont. 123, 23 P.3d 216. In fact, the evidence supports that Collins did not "attempt" to cause reasonable apprehension in Morely, Hathaway and Deputy Micu; he actually completed the offense by causing reasonable apprehension of serious bodily injury in all three victims.

Given the victims' description of Collins' actions and the indisputable fear Morely, Hathaway, and Deputy Micu felt and described to the jury, Collins has not established that plain error review is warranted to consider the "attempt" jury instructions. Taken as a whole, the instructions did not impede or confuse the jury, lessen the State's burden, or inhibit Collins' ability to put forth a defense. The record supports that the trial court did not "act arbitrarily without employment of conscientious judgment" or "exceed the bounds of reason" in instructing the jury

on issues of "attempt" and did not err in instructing the jury in issues related to "attempt." *Iverson*, ¶ 10.

Thus, since no error occurred, application of plain error need not be further considered. If application of the plain error doctrine is unwarranted, this Court "need not address the merits of the alleged error." *State v. Stutzman*, 2017 MT 169, ¶ 23, 388 Mont. 133, 398 P.3d 265; *State v. Gallagher*, 2005 MT 336, ¶ 13, 330 Mont. 65, 125 P.3d 1141 (when no objection made to jury instruction at issue, Court must first decide if exercising plain error review is appropriate); *Birthmark*, ¶ 21 ("threshold requirement for any plain error review of matters not objected to at trial is that there be error"). However, should this Court determine the "attempt" instructions require further consideration, the record does not support Collins' claim that plain error is appropriate.

The Court has declined to invoke plain error review with regard to jury instructions in numerous cases. *See, e.g*, *Earl*, ¶¶ 25-26; *State v. Rinkenbach*, 2003 MT 348, ¶ 11, 318 Mont. 499, 82 P.3d 8, *superseded on other grounds by State v. Kuykendall*, 2006 MT 110, 332 Mont. 180, 136 P.3d 983; *Gallagher*, ¶ 20; *State v. Dethman*, 2010 MT 268, 358 Mont. 384, 245 P.3d 30; *Gray*, *supra*.

In *Rinkenbach* the defendant was charged with assault on a peace officer and failed to object to a jury instruction regarding using force while resisting arrest. On appeal, the Court rejected his request to invoke the plain error doctrine because

Rinkenbach failed to establish the alleged error constituted "fundamental unfairness amounting to plain error." *Rinkenbach*, ¶ 14. Similarly, in *Dethman*, although the trial court did not provide the full *mens rea* requirement for the crime of assault on a peace officer in jury instructions, this Court declined to apply the plain error doctrine. *Dethman*, *supra*.

In *Gallagher*, the Court declined to exercise plain error review when the trial court did not instruct the jury as to unanimity regarding each count of criminal endangerment and defense counsel had failed to object. The Court explained, "Although a specific unanimity instruction may well have been appropriate in this case, we cannot conclude from the circumstances that the omission compels the exercise of plain error review." *Gallagher*, ¶ 20.

Collins was not denied a fair trial based on allegedly improper "attempt" jury instructions. *See Gray*, *supra*. In *Gray*, this Court declined to apply the plain error doctrine when no unanimity jury instruction was given because the appellant failed to establish prejudice in light of "the record, which includes overwhelming evidence of guilt." *See Gray*, ¶¶ 22, 29. Just like in *Gray*, where uncontroverted evidence established that Gray rammed his truck into four patrol cars and all officers testified they were in shock or fear of safety and all drew weapons, here, the record reveals undisputed evidence that Collins' repeatedly drove his van, at highway speeds, towards other drivers and specifically aimed his vehicle at

Deputy Micu, Morely, and Hathaway, causing all three victims to fear for their lives and Deputy Micu to draw his weapon to stop Collins.

Just like in *Rinkenbach, Dethman, Gallagher*, and *Gray,* Collins fails to meet this high burden for invoking plain error because any error that may be assigned to the jury instructions in this matter did not rise to the level of "compromising the integrity of the judicial process" or a "manifest miscarriage of justice." *See Gray*, ¶¶ 13, 22 (plain error review shall be used "sparingly" and "considered in light of the totality of the circumstances" including the strength of the evidence); *Stutzman*, ¶ 13 (when asked to review an unpreserved issue through plain error, this Court's review is discretionary and should be applied "sparingly on a case-by-case basis"); *Gallagher*, ¶¶ 13-14; *King*, ¶ 39.

Collins' fails to meet the narrow criteria from *Finley* and this Court should decline to invoke the plain error doctrine to review instructions he offered and did not oppose. Collins received a fair trial and cannot establish how the "attempt" instructions prejudicially impacted his substantial rights. Thus, even if given in error, they did not constitute reversible error. *See* Mont. Code Ann. § 46-20-104; *State v. Kaarma*, 2017 MT 24, ¶ 7, 386 Mont. 243, 390 P.3d 609 ("To constitute reversible error, any mistake in instructing the jury must prejudicially affect the defendant's substantial rights."); *Ilk*, ¶ 19.

B. "Knowingly" instruction (re: Count I)

Collins was charged with criminal endangerment under Mont. Code Ann. § 45-5-207(1), which states, "A person who knowingly engages in conduct that creates a substantial risk of death or serious bodily injury to another commits the offense of criminal endangerment." A trial court must instruct a jury what the meaning of "knowingly" is in the context of the particular offense and facts presented. *State v. Azure*, 2005 MT 328, ¶ 20, 329 Mont. 536, 125 P.3d 1116.

In *State v. Lambert*, 280 Mont. 231, 929 P.2d 846 (1996), this Court observed that since the language in Mont. Code Ann. § 45-5-207, defining the offense of criminal endangerment, focuses on prohibiting the *result* of the offender's actions, the required mental state for that offense, "knowingly," refers to the result of the defendant's conduct (creating substantial risk of serious bodily injury or death to another) not the conduct itself (which includes several possible acts that in and of itself are not always criminal in nature). Thus the approved "knowingly" instruction for criminal endangerment (a result-oriented crime) is that the defendant "acted knowingly with the respect to the result of his conduct if he was aware that it is highly probable that the result will be caused by his conduct." *Lambert*, 280 Mont. at 237, 929 P.2d at 850.

Here, the district court gave the conduct-oriented instruction for the criminal endangerment mental state. *See* JI No. 23 ("A person acts knowingly with regard to

the offense of Criminal Endangerment when the person is aware of his conduct."). While this instruction was not "result-oriented," under the totality of the circumstances, the instruction did not result in miscarriage of justice or compromise the integrity of the judicial process to invoke plain error review. *See Gray*, ¶ 19.

Although the holding in *Lambert* set forth the preferred knowingly instruction for criminal endangerment, Collins' reliance upon that case as precedent to invoke plain error review to reverse his conviction for criminal endangerment is not compelling given the procedural and factual disparities between that case and this one.

First, Collins did not contemporaneously object to the jury instructions as was the case in *Lambert*. In *Lambert,* the defense specifically objected to instructing the jury on all three types of "knowingly" and that intoxication was not an available defense. *Lambert,* 280 Mont. at 234, 929 P.2d at 848. Collins did not make any objection to Jury Instruction No. 23 and, in fact, proposed a similar instruction himself. (*See* Doc. 48, Proposed JI No. 8.)

In *State v. Lancione*, 1998 MT 84, ¶¶ 40-43, 288 Mont. 228, 956 P.2d 1358, this Court has previously declined to review the court's failure to give the *Lambert* "knowingly" jury instruction in a criminal endangerment case when the defense failed to raise any objections to the instructions. This court has also declined to review an allegedly erroneous "result-oriented" purposely instruction that the

defendant did not object to at trial. *See State v. Johnson*, 2010 MT 288, ¶ 12, 359 Mont. 15, 245 P.3d 1113 (citing Mont. Code Ann. § 46-16-410(3) (if party asserting error failed to specifically and timely object to the alleged erroneous instruction, Court "will decline to review the instruction on appeal").

Collins' reliance on *Lambert* is significantly undermined by the fact that in that case, the objection to form of the knowingly instruction was properly preserved. Thus, unlike the circumstances presented here, the *Lambert* Court did not have to first determine if plain error should apply and instead went directly to evaluating the trial court's decision to deny Lambert's objection to the instructions to determine if the court correctly interpreted the law.

The second distinguishing factor is that in *Lambert,* this Court was dealing with other related instructions that are not at issue here. In *Lambert*, the court instructed the jurors that Lambert "did not need to intend the result that occurred in order to have acted with the requisite mental state," and "that a person in an intoxicated condition is criminally responsible for his conduct, and that an intoxicated condition could not be taken into account in determining the existence of a mental state which is an element of the offense." *Lambert*, 280 Mont. at 234, 929 P.2d at 848-49.

Next, unlike Collins, Lambert moved for a directed verdict claiming the State failed to prove Lambert had acted "knowingly;" before the instructions were

settled. *Lambert*, 280 Mont. at 234-35, 929 P.2d at 847-48. The district court denied this motion following oral arguments about the appropriate "knowingly" instruction. *Id*. Thus, this Court in *Lambert* was reviewing multiple, preserved, alleged trial court errors. ("We will review the court's interpretation of the law, and then determine whether it was proper for the court to rely on this interpretation of the law in denying Lambert's motion for acquittal and in instructing the jury.") *Lambert*, 280 Mont. at 234-35, 929 P.2d at 848. The procedural posture of Lambert's case on appeal varied vastly from what is presented here.

Finally, the defense theories in these cases were quite different. Unlike Collins, in *Lambert*, the defense specifically focused on the State's failure to prove whether he acted with the required mental state. Here, Collins' offered little or no defense to the criminal endangerment charge, including whether the State established that he acted knowingly. Nor did Collins put forth any argument that his actions did not cause a risk to Morely and others on the Interstate. In fact, in his efforts to discredit Deputy Micu's perception of danger when Collins' was backing up at him, he argued that 35 miles per hour would cause significant damage.

Although during his cross examination of Morely, Collins did highlight that Morely did not call 911 the first time he saw Collins driving the wrong way, during his closing remarks, Collins made no comment or challenge to Morely's perceptions of the events that morning. Collins made no comment or argument

about his actions or mental state when he twice drove the wrong way down the interstate, drove off the Interstate onto a frontage road and accelerated at Morely, or when he chased Hathaway at highway speeds down two different roadways. Collins' defense amounted to two main theories: poor investigation/law enforcement coverup/conspiracy; and Deputy Micu's perceptions of the events were inflated/incorrect.

Unlike *Lambert*, Collins' defense theory on the criminal endangerment was unaffected by the form of the knowingly instruction. Accordingly, Collins cannot demonstrate the narrow *Finley* criteria to warrant the sparingly invoked doctrine of plain error review. Collins fails to demonstrate that declining to review Jury Instruction No. 23 will leave one "firmly convinced" that some aspect of the trial, if not addressed, would result in a manifest miscarriage of justice, call into question the fairness of the trial or proceeding, or compromise the integrity of the judicial process. *See Gray*, ¶ 19; *Taylor*, ¶ 17; *Earl*, ¶ 25; *Finley*, 276 Mont. at 137, 915 P.2d at 215.

Contrary to Collins' argument, the instruction given did not eliminate an element or lessen the State's burden. The jury was instructed that to convict Collins of criminal endangerment, the State must prove Collins (1) engaged in conduct that created a substantial risk of death or serious bodily injury to Morely and other drivers on Interstate 90 near Deer Lodge and (2) acted knowingly

(*i.e.*, "was aware of his conduct"). (Doc. 59, JI Nos. 22-24.) The jury was also instructed that it may infer what Collins' mental state based on his actions. (*Id.*, JI Nos. 16, 18.) The State actually established that all of Collins' actions that morning were purposeful and deliberate; above-and-beyond the "knowingly" standard required for criminal endangerment.

When considering whether to invoke the plain error doctrine, this Court must consider the totality of the record in determining whether Collins suffered an injustice. This includes the overwhelming nature of the evidence against Collins. The unrefuted evidence established beyond a reasonable doubt that Collins was not only "aware of his conduct" but also "aware that it is highly probable that the result will be caused by his conduct." In fact, the evidence arguably met the higher result-oriented purposely mental state ("conscious object to cause result").

It is undisputed Collins deliberately chose to drive the wrong way directly into the path of other drivers on both the Interstate and two-lane roadways while he traveled at highway speeds. The evidence showed that Collins chose to drive without his headlights on at least two occasions. These acts created a substantial risk of serious bodily injury or death to others.

The evidence supports that Collins was aware of not only his conduct (deliberate acts), but also the risks he created because at least 3 vehicles had to make evasive maneuvers to avoid him on the Interstate 90 exit near Deer Lodge

and his subsequent actions along the frontage roads caused 3 drivers to make evasive maneuvers.

This case is not so "extraordinary" to result in manifest injustice if this Court does not undertake plain error review of Jury Instruction No. 23. Under the totality of the circumstances, including the unrefuted facts presented and the lack of defense theory concerning Collins' mental state, plain error review is unwarranted. Failing to review the claimed error will not result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial or proceedings or compromise the integrity of the judicial process. *See Gray*, ¶¶ 13, 19. In light of this Court's clear precedent that plain error review is discretionary and should be applied sparingly, Collins has failed to carry his heavy burden of establishing plain error review is appropriate to review the jury instructions. *See King*, ¶ 39.

Even if this Court chooses to invoke plain error and concludes the district court abused its discretion when it gave Jury Instruction No. 23, the conduct-oriented knowingly instruction constituted harmless error. *See* Mont. Code Ann. §§ 46-20-104, -701(1) ("A cause may not be reversed by reason of any error committed by the trial court against the convicted person unless the record shows that the error was prejudicial"), -701(2) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded"); *Patton*, 280 Mont. at

291, 930 P.2d at 643 (determining an instruction was given in err is only the "first part" of the analysis since "[p]ursuant to § 46-20-701, MCA, a district court's judgment will not be reversed for error unless the defendant's substantial rights are affected"); *Neder v. United States*, 527 U.S. 1, 8, 15 (1999) (failure to submit an element of a crime to a jury did not rise to the level of structural error which would require automatic reversal; rather it was trial error and subject to the harmless error test); *Ilk*, ¶¶ 21-21, 24.

This Court has concluded that prejudice is not presumed when error is shown, and it is for this Court to determine whether an error affects the substantial rights of the defendant. *State v. Allen*, 276 Mont. 298, 301, 916 P.2d 112, 114 (1996). This Court will not reverse a judgment for harmless error; determination of whether a particular error is harmful or harmless depends on the facts of the case under review. *Allen*, 276 Mont. at 301, 916 P.2d at 114 (citing Mont. Code Ann. 46-20-701(2)). When reviewing an instructional error to determine if that error was harmless this Court has held that the case must be reviewed as a whole, rather than by examining one component at a time. *State v. McKenzi*, 186 Mont. 481, 608 P.2d 428 (1980).

This Court has held that error in instructing the jury constitutes harmless error when "the offensive instruction could not reasonably have contributed to

the jury verdict." *State v. Hamilton*, 185 Mont. 522, 542, 605 P.2d 1121, 1132 (1980), *cert. denied* 447 U.S. 924 (jury instruction error is harmless when "the offensive instruction could not reasonably have contributed to the jury verdict"); *Rothacher*, 272 Mont. at 312-13, 901 P.2d at 88 (for error to be harmless, State must show beyond a reasonable doubt that the error did not contribute to the verdict obtained); *Neder*, 527 U.S. at 15 (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967 (test for determining whether such a constitutional error is harmless is "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'").

This Court has concluded that, although a jury may have been improperly instructed, based on the totality of the record, the error was harmless beyond a reasonable doubt in several cases. *See, e.g., Rothacher, supra*; *Hamilton, supra*; *Patton, supra*; *Ilk, supra*.

In *Hamilton*, this Court concluded that giving the instruction that was later deemed unconstitutional was harmless error because the evidence of Hamilton's guilt was so overwhelming that no reasonable juror could have been influenced by the improper instruction. *Hamilton*, 185 Mont. at 539-42, 605 P.2d at 1131-33. In *Rothacher*, this Court determined that the instruction stating that "the State merely needed to prove that Rothacher acted purposely, without regard to the result that he intended" constituted an improper statement of the law. *Rothacher*, 272 Mont. at

310, 901 P.2d at 86. However, noting that district court maintains broad discretion in instructing the jury and a court will be reversed only if the jury instruction prejudicially affected the substantial rights of the defendant, this Court concluded the instructional error was harmless. *Rothacher*, 272 Mont. at 313, 901 P.2d at 88.

This Court reached a similar conclusion in *Patton*, *supra*. In *Patton*, the court instructed that "a person acts purposely when it is his conscious object to engage in conduct of that nature or to cause such a result." *Patton*, 280 Mont. at 290-91, 930 P.2d at 642-43. On appeal, Patton argued that definition impermissibly broadened the *mens rea* element of the crime charged. *Id*. Like *Rothacher*, this Court found that the error was harmless after concluding no facts established the erroneous instruction may have contributed to his conviction (no credible argument that Patton did not intend to cause any harm; his only asserted defense was that the crime was committed by another person). *Id.*

Recently, this Court concluded that, like the situation here where a "conduct-oriented" instruction was erroneously given instead of a "result-oriented" instruction, the error was harmless based on the totality of the evidence provided. *Ilk*, ¶¶ 21-26. In *Ilk*, this Court observed that unlike *Lambert*, the appellant had not placed the mental state at issue, that is "he did not contend that he acted knowingly or purposely with regard to his conduct, but not with regard to the result of his conduct [which was] consistent with the overwhelming evidence

presented indicating that Ilk had acted to further the result [of the offense charged]." *Ilk*, ¶ 24.

This Court further explained that the erroneous instruction "had, at best, a tangential effect on the jury's consideration." *Ilk*, ¶ 25. Although Ilk had put forth an affirmative defense, this Court's ensuing comments hold true to the circumstances presented here: "The distinction between conduct and result-based instructions is simply too attenuated from the factual question . . . to have impacted Ilk's substantial rights." *Ilk*, ¶ 25.

The mere fact that the court did not give the *Lambert* "knowingly" instruction does not result in a presumption of prejudice to Collins. *See Allen*, 276 Mont. at 301, 916 P.2d at 114. The facts of this case, reviewed as a whole, support beyond a reasonable doubt that any instructional error did not contribute to Collins' verdict. *See Hamilton* and *Neder*, *supra*. Accordingly, any alleged error was harmless and does not require reversal of his conviction.

Based on the overwhelming evidence that during the morning hours of August 4, 2017, Collins' driving behavior constituted a complete and consistent disregard for the safety of others that was overtly apparent based on the evasive maneuvers other drivers had to take, the fact that a conduct-oriented knowingly instruction was given instead of a result-oriented instruction did not "reasonably

contribute to the guilty verdict" since more than sufficient evidence supported the jury's verdict that Collins was guilty of criminal endangerment.

II. Collins was not denied effective representation of counsel which prejudiced his right to a fair trial.

A. Collins' IAC claims are not record-based and, therefore, inappropriate for consideration on direct appeal.

When IAC is alleged on direct appeal, before reaching the merits of the argument, this Court must first determine if it is appropriate to consider the claim; that is, whether the claim is "record-based." *Ward*, ¶ 20. "[A] record which is silent about the reasons for the attorney's actions or omissions seldom provides sufficient evidence to rebut" the strong presumption counsel's conduct falls within the wide range of reasonable professional conduct. *State v. Larsen*, 2018 MT 211, ¶ 8, 392 Mont. 401, 425 P.3d 694. If an IAC claim is "based on matters outside the record, [this Court] will not review it on direct appeal, recognizing that the defendant may raise the issue in a postconviction proceeding" where a record may be developed. *Ward*, ¶¶ 20, 22 (when Court could only speculate as to reasons for counsel's action or inaction, IAC claim is not susceptible to review on direct appeal). The only exception is if there was "no plausible justification" for an attorney's allegedly deficient acts. *See Larsen*, ¶ 8.

The record is silent as to why Miller submitted several proposed jury instructions (including the three Collins takes issue with on appeal) and contains no explanation for Miller's failure to object to any offered instructions. Collins' IAC claims are better suited for postconviction proceedings. *Ward*, ¶¶ 20, 22; *Larsen*, ¶¶ 8. To overcome this procedural bar, Collins argues there was no plausible justification for Miller's performance in hopes that this Court will not conclude his IAC claims are inappropriate for review on direct appeal and decline to consider them. (Br. at 38-39.)

As established above, the district court did not abuse its discretion in instructing the jury on the issue of "attempt." Why Miller offered Defense Jury Instruction No. 17 is unknown. It is also unknown why Miller did not challenge the other "attempt" instructions. However, given the overwhelming evidence against Collins, it appears Miller made a strategic decision to get his client acquitted of the most serious offense, attempted deliberate homicide. This strategy is evident from Miller's cross-examinations and closing remarks.

Miller conceded the strength of the State's case during his closing when he stated:

> I am not going to insult your intelligence by telling you that the State doesn't have evidence that Mark Collins committed crimes that morning. It's, I mean it's obvious that they do. What I want to talk to you about is what that evidence supports as far as what you should or could convict Mr. Collins of. There's a lot of evidence, but there's

> not enough and the evidence there is not sound enough to justify a finding that Mark Collins intended to kill Austin Micu.

(Tr. at 799-80.) Miller then asked the jury to consider the lesser-included offenses "because the evidence may support a less serious charge." (*Id.)* But, other than the attempted homicide, Miller made no argument concerning the appropriateness of the other offered lesser-included offenses (negligent criminal endangerment and assault).

Nearly every comment Miller made during closing focused on Deputy Micu's perceived degree of harm. Miller offered no comments about either Morely's of Hathaway's testimony that Collins' driving behaviors put them at risk of serious bodily injury or death. Rather, it is evident from his closing remarks that Miller was focused on convincing the jury Collins did not intend to kill Deputy Micu.

It is reasonable to believe that given the strength of the evidence, Miller chose not to make arguments that would "insult the jurors' intelligence" and instead focused on the most serious offense. As Miller acknowledged, the strength of the evidence established that Collins' driving behaviors that morning were deliberate. Thus, focusing on whether he made an act in furtherance to assault two civilians and a deputy with his vehicle could take away from his main, and most crucial, defense strategy: convince the jury not to find his client guilty of trying to kill Deputy Micu.

Under the facts presented, this Court should not presume Miller had no reason to offer the instructions he did and not oppose the instructions given regarding "attempt." Collins' IAC claim on this issue should be raised by a petition for postconviction relief so the record may be more fully developed. *Larsen*, ¶¶ 12-13 (appellant bears high burden in bringing non-record-based IAC claim). The possibility that Miller deliberately offered the wrong knowingly instruction is not as evident. Particularly since he made no arguments about Count I during closing or attempt to convince the jury at most he committed negligent criminal endangerment.

Nonetheless, should this Court choose to consider one or both of the IAC allegations, Collins fails to establish sufficient factual basis or advance any applicable legal argument to support his IAC claims. A defendant claiming ineffective assistance of counsel must ground his or her proof on facts within the record and not on conclusory allegations. *State v. St. John*, 2001 MT 1, ¶¶ 38-37, 304 Mont. 47, 15 P.3d 970.

B. Collins cannot prevail on his IAC claims because he cannot establish how he was prejudiced by Miller's performance.

In reviewing IAC claims, this Court applies the two-prong test adopted by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), to determine whether counsel's performance was constitutionally deficient. *Whitlow v. State*, 2008 MT 140, ¶ 10, 343 Mont. 90, 183 P.3d 861. To prevail in

an ineffective assistance of counsel claim, the defendant must establish both *Strickland* prongs by showing that counsel's performance was deficient, and that the deficient performance prejudiced the defense. *Whitlow*, ¶ 10. If there is an insufficient showing on one *Strickland* prong, the two prongs may be addressed in any order. *Whitlow*, ¶ 11; *Strickland*, 466 U.S. at 697. Moreover, "if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Gallagher*, ¶ 25.

This Court may dispose of Collins' IAC claims because, even it is assumed that Miller's performance was deficient concerning the jury instructions, Collins cannot demonstrate how he suffered prejudice as a result.

To establish the *Strickland* prejudice prong, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S at 694. Prejudice is weighed against the totality of the evidence before the trier of fact. *Strickland*, 466 U.S at 695. Strong evidence reduces likelihood of establishing prejudice. *Pizzuto v. Arave*, 280 F.3d 949, 955 (9th Cir. 2002).

Collins cannot establish "there is a reasonable probability" that if the conduct-oriented instruction for knowingly had been given that there would have

been a different result and thus, he cannot establish the second *Strickland* prong. *See Strickland*, 466 U.S. at 694; *State v. Dubois*, 2006 MT 89, ¶ 49, 332 Mont. 44, 134 P.3d 82 (prejudice prong of Strickland test not met for same reason plain error review not appropriate; defendant was not denied a fair trial); *Gallagher*, ¶¶ 22-28 (based on the overwhelming evidence against defendant Court could not conclude trial was prejudiced by alleged missing instruction such that defendant denied fair trial and IAC failed); *Gray*, ¶ 29.

As established above, the evidence at trial strongly supported the jury's five guilty verdicts. Collins has failed to establish that his trial counsel's alleged errors "undermined confidence in the outcome." *See Strickland*, 466 U.S at 694. Miller's failure to offer a different instruction for "knowingly" or "attempt" related instructions did not prejudice Collins' case such that there is a reasonable probability the jury would have arrived at a different outcome.

As described above, this Court declined to invoke the plain error doctrine in *Gray* when defense counsel allowed a jury instruction that failed to ensure a unanimous verdict on the assault on a peace officer. *Gray*, ¶¶ 17, 22-26 (Court declined to apply plain error review based on counsel's participation in offering the instruction and the strength of the record). This Court also denied Gray's IAC claim because "[b]ased on the record, which includes overwhelming evidence of guilt, we cannot conclude that the outcome was prejudiced due to the lack of

specific unanimity instruction . . . and that Gray was thus denied a fair trial." *Gray*, ¶ 29 (uncontroverted evidence that Gray rammed his truck into 4 patrol cars, all officers testified they were in shock or fear of safety and all drew weapons).

The facts and procedures from *Gray* are akin to those presented here. Just as in *Gray*, the jury was presented with uncontroverted evidence that within 60 minutes during the early morning of August 4, 2017, Collins drove a Dodge van that nearly collided with at least five different cars. The witnesses' testimony, which was unrefuted, described deliberate and purposeful actions by Collins that were all aimed at crashing his van into other drivers. Collins sought out vehicles to collide with by driving on the wrong side of the road and chasing after other drivers. Drivers had to take evasive maneuvers to avoid suffering serious bodily injury or death. Morely, Hathaway, and Deputy Micu articulated that they experienced reasonable apprehension of serious bodily injury as a direct result of Collins' attempts to crash into their vehicles.

Given the overwhelming evidence against Collins, the outcome of the trial would not have been different had a result-oriented knowingly instruction been given for the criminal endangerment charge. *Strickland*, 466 U.S at 695 (prejudice is weighed against the totality of the evidence). Nor would the outcome have been different if different "attempt" instructions would have been provided. *Pizzuto*, 280 F.3d at 955 (strong evidence reduces likelihood of establishing prejudice).

Just as in *Gallagher*, *Gray*, and *Dubois*, the record sufficiently establishes that Collins' IAC claim cannot prevail because he cannot demonstrate that the alleged problematic jury instructions "undermine[d] confidence in the outcome." *Strickland*, 466 U.S at 694.

CONCLUSION

The jury's verdicts of guilty on Counts I through V should not be disturbed.

Respectfully submitted this 31st day of August, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,372 words, excluding certificate of service and certificate of compliance.

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CERTIFICATE OF SERVICE

I, Kathryn Fey Schulz, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 08-31-2020:

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