

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0149

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JOHN JAYCOB FISHBAUGH,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, The Honorable Rod Souza, Presiding

APPEARANCES:

AUSTIN KNUDSEN
Montana Attorney General
BRAD FJELDHEIM
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
brad.fjeldheim@mt.gov

SCOTT TWITO
Yellowstone County Attorney
BRAD LINNEWEBER
Deputy County Attorney
P.O. Box 35025
Billings, MT 59107

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

CHAD WRIGHT
Appellate Defender
MOSES OKEYO
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147

ATTORNEYS FOR DEFENDANT
AND APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUE 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 3

I. The offenses.....3

II. District court proceedings5

 A. The original charges..... 5

 B. The change of plea 6

 C. Status of counsel hearing and motion to withdraw guilty plea14

SUMMARY OF ARGUMENT17

ARGUMENT.....18

I. Standard of review18

II. The district court correctly denied Fishbaugh’s motion to withdraw his guilty plea because Fishbaugh failed to show good cause to support it19

 A. Fishbaugh cannot show his choice to plead guilty was involuntary19

 B. The district court correctly found Fishbaugh’s allegations of a breakdown in communication during the change of plea were not credible and insufficient to provide good cause for withdrawal23

CONCLUSION30

CERTIFICATE OF COMPLIANCE.....31

TABLE OF AUTHORITIES

Cases

<i>Brady v. United States</i> , 397 U.S. 742 (1970)	19
<i>Burns v. State</i> , 2012 MT 100, 365 Mont. 51, 277 P.3d 1238	19
<i>State v. Brinson</i> , 2009 MT 200, 351 Mont. 136, 210 P.3d 164	24
<i>State v. Dillingham</i> , 2020 MT 310, 402 Mont. 239, ___ P.3d. ___	25-26
<i>State v. Favi</i> 2005 MT 288, 329 Mont. 273, 124 P.3d 164	29
<i>State v. Gallagher</i> , 1998 MT 70, 288 Mont. 180, 955 P.2d 1371	23, 25
<i>State v. Humphrey</i> , 2008 MT 328, 346 Mont. 150, 194 P.3d 643	24
<i>State v. Johnson</i> , 2019 MT 34, 394 Mont. 245, 435 P.3d 64	23, 26
<i>State v. Lone Elk</i> , 2005 MT 56, 326 Mont. 214, 108 P.3d 500	19
<i>State v. McFarlane</i> , 2008 MT 18, 341 Mont. 166, 176 P.3d 1057	<i>passim</i>
<i>State v. Milinovich</i> , 269 Mont. 68, 887 P.2d 214 (1994)	20
<i>State v. Prindle</i> , 2013 MT 173, 370 Mont. 478, 304 P.3d 712	18

<i>State v. Thee</i> ,	
2001 MT 294, 307 Mont. 450, 37 P.3d 741	21
<i>State v. Turner</i> ,	
2000 MT 270, 302 Mont. 69, 12 P.3d 934	20
<i>State v. Valdez-Mendoza</i> ,	
2011 MT 214, 361 Mont. 503, 260 P.3d 151	21, 22, 25
<i>State v. Warclub</i> ,	
2005 MT 149, 327 Mont. 352, 114 P.3d 254	18
<i>State v. Whitlow</i> ,	
2008 MT 140, 343 Mont. 90, 183 P.3d 861	21

Other Authorities

Montana Code Annotated

§ 45-5-502(3)	1, 2
§ 45-5-503(2)	1
§ 45-5-503(4)	1
§ 45-5-504(1)(b)	2
§ 45-5-625(1)(i)	1
§ 45-5-625(4)	1
§ 46-1-401	1
§ 46-16-105(2)	1, 19

United States Constitution

Amend. VI	23
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STATEMENT OF THE ISSUE

1. Did the district court correctly deny the Appellant's motion to withdraw his plea for failure to show good cause, pursuant to Mont. Code Ann. § 46-16-105(2)?

STATEMENT OF THE CASE

On May 16, 2016, the Appellant, John Fishbaugh (Fishbaugh), was charged with three felonies: sexual intercourse without consent, in violation of Mont. Code Ann. § 45-5-503(2), sexual abuse of children, in violation of Mont. Code Ann. § 45-5-625(1)(i), and sexual assault, in violation of Mont. Code Ann. § 45-5-502(3). (D.C. Docs. (Doc.) 1-3.) The victim was a nine-year-old girl, so the State provided Fishbaugh notice of its intention to seek penalty enhancements on both counts one and two, pursuant to Mont. Code Ann. §§ 45-5-503(4), 45-5-625(4), and 46-1-401, which mandated a sentence of 100 years imprisonment and prohibited a suspended or deferred sentence for the first 25 years. (Docs. 1, 3; 1/8/16 recorded forensic interview with S.H.)¹

On October 16, 2017, the State filed an amended information, and Fishbaugh pleaded guilty to felony sexual assault, in violation of Mont. Code Ann.

¹ The facts of the offense are taken from the affidavit filed in support of the motion for leave to file the information and the forensic interview of S.H., which is cited in its entirety. (Doc. 1; 1/8/16 recorded forensic interview with S.H.)

§ 45-5-502(3), and felony indecent exposure, in violation of Mont. Code Ann. § 45-5-504(1)(b). (Docs. 82-85.) The plea agreement contemplated a joint sentencing recommendation of 25 years in the Montana State Prison (MSP) with 10 years suspended for each count and the sentences to run concurrently. (Docs. 83, 85.) On January 31, 2018, the district court held a status of counsel hearing due to a letter it received from Fishbaugh. (Doc. 89; Appellant's App. E (App. E).) After the hearing, the district court found there was a complete breakdown of the attorney client relationship, it allowed counsel to withdraw, and the Office of the Public Defender (OPD) appointed new counsel. (Docs. 89, 91-92.)

On May 7, 2018, Fishbaugh filed a motion to withdraw his guilty plea. (Doc. 97.) After a hearing on October 15, 2018, the district court denied Fishbaugh's motion. (Docs. 101, 104 (attached as State's Appendix A (hereinafter State's App. A).) On December 12, 2018, Fishbaugh was sentenced to 25 years in the MSP with 10 years suspended for each count and the sentences to run concurrently, as jointly recommended by the parties. (Docs. 109, 115.) Fishbaugh appeals the district court's order denying his motion to withdraw his guilty plea. (Appellant's Brief (Br.) at 1-48.)

STATEMENT OF THE FACTS

I. The offenses

The victim of the charged offenses was a nine-year-old girl, S.H. (Doc. 1; 1/8/16 recorded forensic interview with S.H.) Fishbaugh, who was a truck driver, was the boyfriend of S.H.'s grandmother. (*Id.*) During the summer of 2015, Fishbaugh took S.H. with him in his truck for a work trip from Great Falls, Montana, through multiple states, including Washington and Oregon, and back through Montana, including both Missoula and Yellowstone counties. (*Id.*)

The State began investigating Fishbaugh after S.H. reported Fishbaugh physically and sexually abused her during the trip. (*Id.*) During a forensic interview with S.H., she disclosed a variety of sexual abuse by Fishbaugh, including:

The Defendant forced her to sleep naked with him in the truck cab against her wishes, forced her to touch his penis, and described this action by cupping her hand and making stroking gestures. The Defendant's penis was straight when she did this and he wouldn't let her stop. The Defendant used his fingers to vaginally penetrate her. S.H. was forced to shower with the Defendant in the truck stops that they went to, that she was forced to wash his penis and underneath his penis, and the Defendant also washed her privates. The Defendant's penis was soft and "weird" during the showers. S.H. provided many details and her statement remained consistent. S.H. reported that the sexual acts occurred in each of the places they went to.

(Doc. 1 at 2; *see also* 1/8/16 forensic interview of S.H.)

Law enforcement officers interviewed Fishbaugh. (Doc. 1 at 2-3.) Fishbaugh confirmed S.H. had accompanied him on the trip. (Doc. 1 at 2.) Fishbaugh said S.H. told him while they were in Washington that she was “itchy and sore down there.” (*Id.*) Fishbaugh said S.H. just dropped her pants and opened her legs, and he saw “a pretty good rash going on her vagina.” (*Id.*) Fishbaugh told her to take her clothes off and air out, and later she showed it to him, and he felt it. (*Id.*) Fishbaugh said he had S.H. sleep naked to help her air out, and she crawled down and slept by him. (*Id.*) Fishbaugh admitted he and S.H. were both naked while sleeping next to each other. (Doc. 1 at 3.) Fishbaugh said he did shower with S.H. because she had an accident and he needed to make sure S.H. cleaned all the poop off herself. (Doc. 1 at 2.) But Fishbaugh denied touching S.H. (*Id.*)

The State obtained surveillance video from a truck stop in Yellowstone County that showed Fishbaugh and S.H. enter a shower and exit an hour later on August 6, 2015. (Doc. 1 at 3.) Weigh station and client delivery records showed Fishbaugh was in Yellowstone County from August 6, 2015, through August 7, 2015. (*Id.*)

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II. District court proceedings

A. The original charges

On May 16, 2016, Fishbaugh was charged in Yellowstone County with three felonies: sexual intercourse without consent, sexual abuse of children, and sexual assault. (Docs. 1-3.) The State sought penalty enhancements for counts one and two because S.H. was nine years old, which mandated a sentence of 100 years imprisonment and prohibited a suspended or deferred sentence for the first 25 years (referred to by the district court as Jessica's law). (Doc. 3.) Fishbaugh entered a plea of not guilty. (Doc. 2.)

The State filed criminal charges against Fishbaugh in both Missoula and Yellowstone counties. (Doc. 15. at 1-2.) Counsel was appointed for Fishbaugh in both counties from the respective offices of OPD. (*Id.*) In Yellowstone County, two counsel were appointed, Ashley Harada (Harada) and Alexander Roth (Roth). (Docs. 4-5.) The State facilitated two forensic interviews of S.H. (Doc. 15 at 1-2.) An investigator from Missoula's OPD office interviewed S.H. (*Id.* at 2.) A copy of the recorded interview was provided to Yellowstone County and they provided it to Fishbaugh. (*Id.*) The State later decided to dismiss the Missoula charges and pursue only the Yellowstone charges. (*Id.*) After multiple continuances requested by Fishbaugh, trial was scheduled for October 16, 2017. (Docs. 8, 17, 19, 31-32, 38-39, 49, 51, 76.)

B. The change of plea

The trial was converted to a change of plea hearing because the parties came to a plea agreement. (Docs. 83-85.) On October 16, 2017, the district court granted the State's motion to amend the information, which reduced the counts to two, changed the charges to felony sexual assault and felony indecent exposure, and removed its request for the mandatory sentences under Jessica's law. (Docs. 1, 3, 82-85; 10/16/17 Hr'g Tr. at 10-11.) Rather than the 100 years mandatory term of imprisonment under Jessica's law, the parties agreed to jointly recommend a 25-year sentence to MSP with 10 years suspended for both counts and the sentences to run concurrently. (Doc. 85; 10/16/17 Hr'g Tr. at 8.)

At the beginning of the hearing, Fishbaugh told the district court he had reviewed the acknowledgement of waiver of rights and plea agreement and intended to plead guilty to the charges. (10/16/17 Hr'g Tr. at 4-5.) The district court asked Fishbaugh if he had any questions about the document. (*Id.* at 5.) After an off-the-record discussion with his counsel, Fishbaugh had the following exchange with the district court:

[FISHBAUGH]: No sir.

THE COURT: Are you certain? You don't need any more time?

[FISHBAUGH]: (Pause.) Your honor, I just really can't—I'm just really having a hard time taking this. And I really don't—I just feel pressured into doing this.

THE COURT: Okay. I'm going to take a short recess to give counsel some time to visit with their client.

(*Id.*)

After about an hour, the district court reinitiated the hearing, explained Fishbaugh indicated "some reservations about pleading guilty," and asked the status. (*Id.* at 5-6.) Fishbaugh's counsel, Harada, told the district court they were prepared to continue with the change of plea. (*Id.* at 6.) The district court had the following exchange with Fishbaugh:

THE COURT: Approximately one hour ago you told me you felt like you were being pressured into this and you had reservations about pleading guilty. Have those issues been resolved?

[FISHBAUGH]: Yes, Your Honor.

THE COURT: Are you certain?

[FISHBAUGH]: (Pause.) Yes.

THE COURT: Yes?

[FISHBAUGH]: Yes, sir.

THE COURT: Because you need to understand, sir, that your decision today is final. This is something that cannot be taken back. So I want to make sure that you are making the best possible choice with the alternatives in front of you, and we'll get to all that, but when someone tells me that they feel like they're being pressured into something, that gives me some concern. And so I want to make sure this plea is voluntary.

So are you absolutely certain this is what you want to do?

[FISHBAUGH]: Yes, Your Honor.

(*Id.* at 6-7.)

The district court proceeded, but the judge directed Fishbaugh to stop him if he had any questions. (*Id.* at 7.) The district court explained the charges and maximum potential punishment, and Fishbaugh confirmed he understood. (*Id.* at 7-8.) The district court explained the joint sentencing recommendation and that it was not binding on the district court. (*Id.* at 8.) Fishbaugh confirmed he understood and stated he was still willing to go forward. (*Id.*) The district court explained the rights Fishbaugh would be waiving by pleading guilty. (*Id.* at 9-10.) Fishbaugh confirmed he understood and said he was willing to waive his rights. (*Id.* at 10.)

The district court continued:

THE COURT: Have you had sufficient opportunity to talk with your attorneys about the risks and benefits of going to trial versus proceeding with your guilty plea?

[FISHBAUGH]: Yes, Your Honor.

THE COURT: And you recognize that part of that negotiated settlement was the State coming off the Jessica's Law Amendment; is that true—or coming off the Jessica's Law charge, right?

[FISHBAUGH]: Yes, sir.

THE COURT: And so do you believe that you are making the best possible choice with the alternatives in front of you?

[FISHBAUGH]: Yes, Your Honor.

(*Id.* at 10-11.)

After the district court confirmed with Fishbaugh that he was not under the influence of medications, drugs or alcohol, the judge asked “[h]as anyone threatened you or coerced you into entering this agreement and pleading guilty?” (*Id.* at 11.) Fishbaugh paused, then said, “I feel like they coerced me into this, but other than that, I—I still have to . . . ,” which was followed by an off-the-record discussion between Fishbaugh and his counsel. (*Id.*) After the discussion the district court continued:

THE COURT: Well, I’ll ask you again, has anyone threatened you or coerced you into entering this agreement and pleading guilty?

[FISHBAUGH]: No.

THE COURT: No?

[FISHBAUGH]: No.

THE COURT: Okay. Okay, based on your previous answer, I’m going to go back to what we just talked about.

You have a right to a trial. We had a jury called today. I called that jury off last week. Now, I got another jury coming on Monday.

So your options are, you can go to trial on the original charges, the State would probably file a motion to amend back to the original charges.

You could have a jury consider all of the evidence, your attorneys—well, let me just take you a little bit through what a trial would look like. Okay?

[FISHBAUGH]: Yes, sir.

(*Id.* at 11-12.)

The district court took several minutes to explain Fishbaugh's right to a jury trial in detail, noting the measures taken to ensure the trial would be fair to Fishbaugh. (*Id.* at 12-16.) The following discourse ensued:

[THE COURT]: So you've been hesitant today, I've had some concerns, so I want to make absolutely sure this is exactly what you want to do.

(Pause.)

THE COURT: I recognize, Mr. Fishbaugh, these are important decisions.

[FISHBAUGH]: Yes.

THE COURT: And the reality here is, you need to analyze—well, your attorneys have talked to you about this, you can go to trial on the original Information, and we'd have the trial like we talked about. Okay? Or you can proceed with a guilty plea today on the Amended Information. But you need to be making a voluntary choice.

(Pause.)

THE COURT: Did you want to confer with your counsel?

[FISHBAUGH]: I, uh. The thing looks good here, so . . .

THE COURT: You want to proceed?

[FISHBAUGH]: I really don't have a choice, but to—

THE COURT: Well—

[FISHBAUGH]: —because I can't—

THE COURT: —but you do, you do have a choice, you have a choice to go to trial.

[FISHBAUGH]: I know I have a choice, but when you're standing in my shoes, I have no choice.

MR. ROTH: So, Mr. Fishbaugh, you do understand that you have a choice between going to trial and taking the plea?

[FISHBAUGH]: Yeah, when I look at the evidence and what I've been told—

MR. ROTH: So you believe it's your best choice?

[FISHBAUGH]: My best choice—

MR. ROTH: —based on—

[FISHBAUGH]: —you told me this.

MR. ROTH: Your best choice is to take this plea; is that correct?

[FISHBAUGH]: That's correct. That's about the only choice I really have. Because what they tell me and what's here, I have to take this.

MS. HARADA: You don't have to do anything, Mr. Fishbaugh. We could—

[FISHBAUGH]: If I don't want to spend the rest of my life in prison, I have to take this.

MR. ROTH: Mr. Fishbaugh, you always have the choice to go to trial. And it may not be a good choice, this may be a better choice—

[FISHBAUGH]: I go to trial and lose and then what happens?

MS. HARADA: We've gone over this, Mr. Fishbaugh.

MR. ROTH: We've explained that.

[FISHBAUGH]: Yeah, I spend the rest of my life in prison. I don't want to spend the rest of my life in prison, so I have to take this. Because from basing it on your information, and you're counsel, this is what I got to go with.

THE COURT: Okay. I want to make it clear, though, you don't have to do anything. You have the right to a trial. And I'm sure you have had extensive consultations with your attorneys, who are both well versed in criminal law, based on the evidence, and they can give you advice, but this has to be your choice and it has to be one that you do—you make knowingly and voluntarily.

(Pause.)

[FISHBAUGH]: I have to take the deal.

THE COURT: So you want to plead guilty?

[FISHBAUGH]: Don't want to, but I have to.

THE COURT: It is your decision to plead guilty?

(Discussion off the record between counsel and the Defendant.)

MR. ROTH: Mr. Fishbaugh, the hold up we're having here, because I know you feel that you only have the one option because the other option is bad, the Court needs to be certain you understand that there still is another option and you're choosing this of your own freewill. And that's not because—no one here has told you that you cannot go to trial. We've told you all along it's your choice to go to trial. We've represented strategies of trial, what would proceed at trial, we've advised you of these recommendations, but the decision is yours. And because you have a choice now, you don't have to take one choice over the other. But if you follow our advice, we recommend one of the choices over the other, you've had a chance to review both of the choices, and having reviewed that, are you choosing to take the Plea Agreement?

[FISHBAUGH]: Yes. I need to take the Plea Agreement.

THE COURT: Okay. And no one has threatened you or coerced you into entering this agreement and pleading guilty?

[FISHBAUGH]: No.

THE COURT: Looking at your options, you feel like this is the best choice for you to make?

[FISHBAUGH]: Yes.

THE COURT: Are you satisfied with the services of your attorneys?

[FISHBAUGH]: Yeah.

(Id. at 16-20.)

Fishbaugh then admitted he subjected S.H. to sexual contact without consent on August 6, 2015, and August 7, 2015, in Yellowstone County, including exposing his penis to S.H., contacting S.H. with his penis, and touching her vagina. *(Id. at 21-22.)* Fishbaugh admitted S.H. was nine at the time and he was more than four years older than her. *(Id.)* The district court accepted Fishbaugh's guilty pleas to both counts and noted they were voluntarily made. *(Id. at 22.)* The district court ordered the psychosexual evaluation be updated, discussed the release parameters for Fishbaugh, and concluded the hearing. *(Id. at 23-26.)* Sentencing was scheduled for January 31, 2018. (Doc. 87.)

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C. Status of counsel hearing and motion to withdraw guilty plea

On January 31, 2018, the district court held a status of counsel hearing due to a letter it received from Fishbaugh approximately two weeks prior. (Doc. 89; App. E; 1/31/18 Hr’g Tr. at 2.) In the letter Fishbaugh said his counsel did not put in sufficient effort in preparation for his defense, comparing it to his representation by different counsel in a case in Missoula that was dismissed. (App. E.) Fishbaugh named Harada in the letter but did not mention Roth. (*Id.*) Fishbaugh closed the letter by saying “[a]s I still claim innocence in this matter, but felt forced into a plea as there was no defense what so ever to go in front of a Jury [sic] with. I had to make the choice between the plea, and life in prison.” (*Id.*)

During the hearing, Fishbaugh informed the district court there was a breakdown in communication between him and his counsel and he felt coerced into the plea agreement. (1/31/18 Hr’g Tr. at 4-8.) Fishbaugh said he felt his counsel did not thoroughly investigate or discuss with him the evidence and his defense and accused him of committing the offense. (*Id.*)

Harada called Fishbaugh’s accusations “outrageous” and said, “[I]f he’s going to continue to represent things to the Court that aren’t true, I’m not comfortable moving forward as his counsel.” (*Id.* at 14.) Harada addressed Fishbaugh’s claim that he was coerced into pleading guilty.

He states that he felt forced into a plea and there was no defense. Your Honor took the change of plea, it was almost three hours long, I'm not sure, but I recall at least three times Mr. Fishbaugh was advised that he did not have to take this plea and he could proceed to trial. So I'm not sure why he felt forced.

(*Id.* at 12.) Roth said he strongly disagreed with “almost everything written in [Fishbaugh’s] letter,” but noted the factual disagreement supported a finding there was a breakdown in communication. (*Id.* at 14.) The district court ordered new counsel be appointed. (*Id.* at 15; Doc. 91.) New counsel was appointed by OPD on February 12, 2018. (Doc. 92.)

On May 7, 2018, Fishbaugh filed a motion to withdraw his guilty plea. (Doc. 97.) A hearing on the motion was held on July 10, 2018. (Doc. 101.) Fishbaugh testified he was coerced by his prior counsel to take the plea agreement. (7/10/18 Hr’g Tr. at 9.) Fishbaugh said Harada told him that if he did not take the plea she would have “walked out on me.” (*Id.*) Fishbaugh acknowledged, however, that he did not raise this issue prior to his motion despite having the opportunity to do so at the change of plea hearing and the status of counsel hearing. (*Id.* at 19, 23-24.) Fishbaugh also acknowledged that no one forced him to sign the acknowledgment and waiver document. (*Id.* at 17.) The State asked Fishbaugh, “The reality is that you were unhappy that the only other option was a potential sentence if you were found guilty that was even worse, correct?” (*Id.* at 18.)

Fishbaugh answered, “Correct.” (*Id.*) The district court took the issue under advisement. (*Id.* at 25.)

On October 15, 2018, the district court denied Fishbaugh’s motion to withdraw his plea. (State’s App. A.) The district court found Fishbaugh’s claims that he did not understand the Acknowledgement and Plea Agreement were not credible due to the various breaks provided to Fishbaugh to privately discuss the documents with counsel and the district court’s detailed review of the documents in open court. (*Id.* at 3-5.) The district court found, “Fishbaugh’s claims that the change of plea was coercive have no support in the record.” (*Id.* at 5.) The district court found it had repeatedly explained to Fishbaugh that he had a right to a trial, explained how a trial would look in detail, and provided Fishbaugh numerous opportunities to stop the proceedings and go to trial. (*Id.* at 5-8.) To counter Fishbaugh’s assertion that he was coerced by Harada’s threat to abandon him, the district court pointed to Fishbaugh’s testimony during the change of plea where he described his feeling of coercion as: “If I don’t want to spend the rest of my life in prison, I have to take this.” (*Id.* at 9-10 (citing 10/16/17 Hr’g Tr. at 18).)

On December 12, 2018, the district court sentenced Fishbaugh to the jointly recommended sentence in the plea agreement, 25 years in MSP with 10 years suspended for each count and the sentences to run concurrently. (Docs. 109, 115.)

SUMMARY OF ARGUMENT

The district court correctly denied Fishbaugh's motion to withdraw his guilty plea because Fishbaugh failed to show good cause to support it. Throughout the proceedings below, Fishbaugh maintained that he felt coerced because he was forced to choose between the risk of life in prison after a trial and the substantially reduced sentence jointly recommended in the plea agreement. The test for good cause ultimately is one of voluntariness, and this Court has held a plea is not involuntary simply because it was entered to avoid a greater punishment. The district court and Fishbaugh's counsel took great measures during the change of plea hearing to ensure Fishbaugh understood it was his choice to accept the plea or proceed to trial. The district court correctly denied Fishbaugh's motion to withdraw his plea because the record showed Fishbaugh understood it was his choice and chose to take the plea.

Given the strength of the record in support of Fishbaugh's voluntary choice, he attempts to expand the facts of the change of plea hearing to accommodate his argument under the guise of ineffective assistance of counsel. Three months after the change of plea, the district court allowed Fishbaugh's counsel to withdraw due to a breakdown in communication. This breakdown, however, was due to the repudiation by Fishbaugh's counsel of his subjective assertions that were inconsistent with the record during the change of plea. The district court found his

version of the facts was not credible, and Fishbaugh's attempts to further expand his story on appeal further erode his credibility. The district court correctly rejected Fishbaugh's attempt to retroactively apply his disputed subjective assertions to the change of plea hearing.

The denial of Fishbaugh's motion to withdraw his plea should be affirmed.

ARGUMENT

I. Standard of review

The ultimate question of whether a plea is voluntarily made is a mixed question of law and fact. *State v. Prindle*, 2013 MT 173, ¶ 16, 370 Mont. 478, 304 P.3d 712. This Court reviews a court's ultimate grant or denial of a motion to withdraw a guilty plea de novo. *Id.* This Court reviews the district court's underlying factual findings regarding the voluntariness of the plea to determine if those findings are clearly erroneous. *Id.* "Findings of fact are clearly erroneous if they are unsupported by substantial evidence, the court misapprehended the effect of the evidence, or review of the record convinces us that a mistake has been made." *State v. McFarlane*, 2008 MT 18, ¶ 8, 341 Mont. 166, 176 P.3d 1057 (citing *State v. Warclub*, 2005 MT 149, ¶ 23, 327 Mont. 352, 114 P.3d 254).

II. The district court correctly denied Fishbaugh’s motion to withdraw his guilty plea because Fishbaugh failed to show good cause to support it.

A district court may permit a plea of guilty or nolo contendere to be withdrawn if a timely motion is filed and the defendant demonstrates “good cause.” Mont. Code Ann. § 46-16-105(2); *McFarlane*, ¶ 11. “Good cause” includes the voluntariness of the plea, but may also include other criteria, including ineffective assistance of counsel. *McFarlane*, ¶ 11.

A. Fishbaugh cannot show his choice to plead guilty was involuntary.

The ultimate test for withdrawal of a plea is voluntariness. *State v. Lone Elk*, 2005 MT 56, ¶ 14, 326 Mont. 214, 108 P.3d 500. When determining whether a plea was voluntarily entered, this Court examines “case specific considerations,” including “the adequacy of the district court’s interrogation, the benefits obtained from a plea bargain, the withdrawal’s timeliness, and other considerations that may affect the credibility of the claims presented.” *McFarlane*, ¶ 17. This Court has explained that it “will not overturn a district court’s denial of a motion to withdraw a guilty plea if the defendant was aware of the direct consequences of the plea, and if the plea was not induced by threats, misrepresentation, or an improper promise such as a bribe.” *Burns v. State*, 2012 MT 100, ¶ 6, 365 Mont. 51, 277 P.3d 1238 (citing *Brady v. United States*, 397 U.S. 742, 755 (1970)).

From the change of plea to the hearing on his motion to withdraw his plea, Fishbaugh consistently stated he felt coerced because he had to choose between the plea agreement and life in prison. During the change of plea hearing on October 16, 2017, he said, “If I don’t want to spend the rest of my life in prison, I have to take this.” (10/16/17 Hr’g Tr. at 18.) He then reiterated, “I don’t want to spend the rest of my life in prison, so I have to take this.” (*Id.* at 19.) In Fishbaugh’s January 2018 letter to the district court complaining about the performance of his counsel, he stated: “[I] felt forced into a plea as there was no defense what so ever to go in front of a Jury [sic] with. I had to make the choice between the plea, and life in prison.” (App. E.) During the hearing on his motion to withdraw on July 10, 2018, the State asked Fishbaugh, “The reality is that you were unhappy that the only other option was a potential sentence if you were found guilty that was even worse, correct?” (7/10/2018 Hr’g Tr. at 18.) Fishbaugh answered, “Correct.” (*Id.*)

“[A] plea is not involuntary simply because it was entered to avoid a greater punishment.” *State v. Turner*, 2000 MT 270, ¶ 52, 302 Mont. 69, 12 P.3d 934 (quoting *State v. Milinovich*, 269 Mont. 68, 71, 887 P.2d 214, 216 (1994)). This was the basis of Fishbaugh’s struggles during the change of plea and his subsequent attacks on his counsel, as illustrated by Roth’s exchange with Fishbaugh on the record during the change of plea.

MR. ROTH: Mr. Fishbaugh, the hold up we’re having here, because I know you feel that you only have the one option because the

other option is bad, the Court needs to be certain you understand that there still is another option and you're choosing this of your own freewill. And that's not because—no one here has told you that you cannot go to trial. We've told you all along it's your choice to go to trial. We've represented strategies of trial, what would proceed at trial, we've advised you of these recommendations, but the decision is yours. And because you have a choice now, you don't have to take one choice over the other. But if you follow our advice, we recommend one of the choices over the other, you've had a chance to review both of the choices, and having reviewed that, are you choosing to take the Plea Agreement?

[FISHBAUGH]: Yes. I need to take the Plea Agreement.

(10/16/17 Hr'g Tr. at 19-20.)

Despite Fishbaugh's efforts to paint his counsel as coercive or ineffective, informing a client that they cannot or are unlikely to prevail at trial "falls within defense counsel's duty to their client." *State v. Valdez-Mendoza*, 2011 MT 214, ¶ 16, 361 Mont. 503, 260 P.3d 151 (citing *State v. Thee*, 2001 MT 294, ¶ 13, 307 Mont. 450, 37 P.3d 741, *overruled on other grounds by Whitlow v. State*, 2008 MT 140, ¶ 18, 343 Mont. 90, 183 P.3d 861). In *Thee*, ¶ 13 (as described in *Valdez-Mendoza*, ¶ 16), this Court held "[c]ounsel's candid assessment of legal circumstances may have caused anxiety or pain, but did not 'induce' defendant to plead guilty, as counsel had a duty to 'inform client of the elements of the offense, the possible punishment, and advisability of a plea agreement.'"

Here, defense counsel was obligated to explain to Fishbaugh that the benefits of the plea agreement were drastically better than the potential sentence

after trial if Fishbaugh was convicted. *See Valdez-Mendoza*, ¶ 16. It eliminated the mandated 100-year sentence, with no suspension or deferment for 25 years on two counts, and promised a joint recommendation of 25 years with 10 suspended to run concurrently on both amended counts. The substantial benefit of the plea agreement also supports the district court’s conclusion that Fishbaugh voluntarily pleaded guilty. *See McFarlane*, ¶ 17. It was not coercive for Fishbaugh’s counsel to acknowledge the benefit of the plea agreement in contrast to the strength of the State’s case against Fishbaugh, including the testimony of the nine-year-old sexual assault victim who had done two forensic interviews. *See Valdez-Mendoza*, ¶ 16.

To determine the voluntariness of a plea, a court must make a credibility determination based on case-specific considerations. *McFarlane*, ¶ 17. Based on Fishbaugh’s statements during the change of plea hearing, the district court found Fishbaugh’s claims were not credible. Fishbaugh told the district court it was in his best interest to change his plea and take the plea agreement. Fishbaugh told the district court he was satisfied with his counsel’s performance. After several accommodations and explanations by the district court, Fishbaugh said it was his voluntary choice to change his plea and take the agreement.

Fishbaugh’s arguments on appeal support the district court’s finding that his claims were not credible. Fishbaugh argues he was “alone at the [change of plea hearing] against four seasoned lawyers—all working to resolve his case with a

guilty plea.” (Br. at 41.) As the district court found, this is not supported by the record, which shows the district court took great measures to accommodate Fishbaugh’s apprehension during the change of plea to ensure Fishbaugh understood it was his choice to proceed to trial or plead guilty. Fishbaugh’s counsel repeatedly explained to Fishbaugh it was only his decision to plead guilty or proceed to trial.

Fishbaugh has failed to show his plea was involuntary and the district court’s denial of his motion to withdraw his plea should be affirmed.

B. The district court correctly found Fishbaugh’s allegations of a breakdown in communication during the change of plea were not credible and insufficient to provide good cause for withdrawal.

Given the strength of the record supporting the voluntariness of Fishbaugh’s decision to plead guilty, Fishbaugh pursues ineffective assistance of counsel as a means to support good cause, pursuant to *State v. Gallagher*, 1998 MT 70, ¶ 10, 288 Mont. 180, 955 P.2d 1371. *See McFarlane*, ¶ 11 (a properly substantiated ineffective assistance of counsel claim may be good cause to withdraw a guilty plea). Fishbaugh argues there was a complete breakdown in communication with his counsel during the change of plea that violated his Sixth Amendment right to effective assistance of counsel. *See State v. Johnson*, 2019 MT 34, ¶ 20, 394 Mont. 245, 435 P.3d 64. The record, however, does not support this argument.

Three months after the change of plea, Fishbaugh made various allegations against his counsel in an ex parte letter to the district court. (App. E; 1/31/18 Hr'g Tr. at 2.) During a status of counsel hearing, both Harada and Roth called Fishbaugh's allegations untruthful. (1/31/18 Hr'g at 14.) Counsel acknowledged, however, that the disconnect between their and Fishbaugh's version of the facts supported withdrawal of counsel. (*Id.*) Harada noted, "if [Fishbaugh]'s going to continue to represent things to the Court that aren't true, I'm not comfortable moving forward as his counsel." (*Id.*) The district court found a complete breakdown in communication and appointed new counsel.

However, at no point did the district court or Fishbaugh's counsel endorse his argument that there was a breakdown in communication during the change of plea or at any point before the status of counsel hearing. Rather, the district court found none of Fishbaugh's allegations were credible and did not support good cause to withdraw his plea. As the district court noted, (State's App. A at 15), "while a defendant's subjective perceptions shed light on his state of mind, which in turn bears on the voluntariness of his plea, allegations of having had certain mental impressions at the time of the plea must be supported by objective proof in the record." *State v. Brinson*, 2009 MT 200, ¶ 12, 351 Mont. 136, 210 P.3d 164 (quoting *State v. Humphrey*, 2008 MT 328, ¶ 23, 346 Mont. 150, 194 P.3d 643).

The district court's finding that Fishbaugh's claims were not credible is based on the lack of objective proof during the change of plea hearing for Fishbaugh's version of the facts. *See id.* Fishbaugh cannot show this finding was made in clear error. *See McFarlane*, ¶ 8. Both of Fishbaugh's counsel said his claims were not true. The substantial evidence during the change of plea did not indicate any discord with counsel beyond that resulting from their duty to explain the substantial benefits of the plea agreement and considerable risk of going to trial. *See Valdez-Mendoza*, ¶ 16. The district court did not misapprehend the effect of the great measure taken during the change of plea hearing to ensure Fishbaugh was making a voluntary choice. *See McFarlane*, ¶ 8. It did not misapprehend the effect of Fishbaugh's attempt to retroactively apply his subjective and disputed assertions. *Id.* Fishbaugh cannot show the district court clearly erred, because he cannot point to anything in the record to show the district court made a mistake. *Id.*

Below, Fishbaugh relied on *Gallagher* to argue the district court should have presumed a breakdown in communication during the change of plea hearing and stopped the proceeding to conduct an inquiry into the sufficiency of the communication between Fishbaugh and his counsel. (Doc. 97 at 4-5.) Fishbaugh did not request this during the change of plea. Rather, he said he was satisfied with counsel's performance. The district court was not obligated to conduct an inquiry without a request from the defendant. *See State v. Dillingham*, 2020 MT 310, ¶ 17,

402 Mont. 239, ___ P.3d ___ (citing *Johnson*, ¶¶ 21-22) (“[w]hen a defendant requests substitute counsel, the trial court must undertake an ‘adequate initial inquiry’”). Accordingly, Fishbaugh has abandoned that argument on appeal and instead argues there was a breakdown in communication immediately upon the appointment of Harada in May 2016. The record does not support this.

Fishbaugh argues the breakdown in communication started in May 2016, based on Harada’s request for the appointment of Roth as co-counsel. Harada was appointed to represent Fishbaugh on May 13, 2016. Roth was appointed four days later. Fishbaugh was not charged until May 16, 2016. Nowhere in the record does Harada acknowledge there was disfunction in the attorney-client relationship during May 2016, as Fishbaugh argues, or that this disfunction caused her to seek the appointment of Roth. (Br. at 32.)

The only reference in the record that explains Harada’s request to have Roth appointed was her statement to the district court that she “would not meet or discuss the case without Mr. Roth being present.” (1/31/18 Hr’g Tr. at 8.) This does not support a breakdown in communication in May 2016. Rather, it supports Harada’s decision to appoint Roth to avoid the problem that Fishbaugh now seeks to create. Instead of having Harada’s word alone to dispute Fishbaugh’s attempt to change the facts of the change of plea hearing, there is the word of two attorneys who represented to the district court that Fishbaugh’s claims were untrue.

Fishbaugh repeatedly asserts in his brief that Harada stormed out of meetings with him. (*See Br.* at 15, 30-31, 40.) Contrary to Fishbaugh’s assertion in his statement of facts, Harada never “admitted that she angrily stormed out of the room several times.” (*See Br.* at 15 (citing 1/31/18 Hr’g Tr. at 10-11).) During the status of counsel hearing, Fishbaugh made one reference to Harada leaving the room.

I’ve also had [Harada] walk out of the room on me a few times. She’d get mad and leave the room and throw up her hands and say, I’m finished with this. And [Roth] and I would have to sit there and talk.

(1/31/18 Hr’g Tr. at 6.) Harada said Fishbaugh’s claims were “outrageous” and untruthful, to which Roth agreed. (*Id.* at 14.) The only response Harada offered to explain Fishbaugh’s allegation was her decision to leave the psychosexual evaluation.

With regard to me leaving the room, in Mr. Fishbaugh’s psychosexual evaluation, which the Court has, there’s an indication that he is not comfortable with females in positions of power or control. And so if I left the room, it was only in an attempt to hopefully diffuse a situation and make him more comfortable. It was never my intention to neglect him or leave questions unanswered. And so I think the Court needs to understand that.

(*Id.* at 10-11.)

In his motion to withdraw his plea, Fishbaugh sought to expand this argument and said Harada told him that if he did not take the plea, she would have “walked out on me.” (7/10/18 Hr’g Tr. at 9.) However, he acknowledged that he

had not previously mentioned this despite the opportunities to do so during the change of plea and the status of counsel hearings. The district court discredited Fishbaugh's argument on various grounds. (State's App. A at 9-12). The most striking, however, is the contradiction between Fishbaugh's subjective assertions about what occurred during the off-the-record meetings and the repeated assertions of counsel on the record. Fishbaugh's version of the facts required the district court to find Harada was threatening him and demanding he take a plea behind closed doors and then saying, "You don't have to do anything," on the record. (10/16/17 Hr'g Tr. at 18.) The only things in the record to support this duplicity are Fishbaugh's evolving subjective assertions, which his counsel disputed as untrue.

Fishbaugh has continued to expand the breadth of his subjective assertions on appeal, which further erodes his credibility. Fishbaugh asserts, "According to Fishbaugh, at the three break-out sessions—each lasting 30 to 45 minutes—Harada was yelling, screaming, and hollering at him to cajole him to sign the plea." (Br. at 37.) This is not in the record. It is an attempt by Fishbaugh to expand the record to accommodate his argument. This supports the district court's findings that his claims are not credible.

Fishbaugh's credibility is further undermined by the nature of his complaint. Fishbaugh generally asserted a breakdown in communication, but upon prompting to provide specifics all of his complaints focused on Harada. No specific

complaints were forwarded about Roth. Both Harada and Roth explained to Fishbaugh on the record during the change of plea hearing that it was his choice to go to trial or take the plea. Both Harada and Roth were present during the off-the-record meetings. Even assuming Fishbaugh's assertions about Harada were true, which the State does not concede, nothing in the record undermines the effectiveness of Roth's assistance of Fishbaugh during the change of plea. This includes the district court's subsequent finding of a breakdown in communication because the sole basis of that finding was the factual disconnect between Fishbaugh and his counsel as to what happened during the change of plea.

Fishbaugh's attempt to distort the record of the change of plea is unpersuasive. As the district court noted, relying on *State v. Favi*, 2005 MT 288, ¶ 15, 329 Mont. 273, 124 P.3d 164, Fishbaugh provided "no evidence contemporary to the change of plea suggesting the defendant 'did not understand or appreciate those proceedings in full.'" (State's App. A at 16 (citing *Favi*, ¶ 15).) At no point during the change of plea did Fishbaugh call into question his counsels' performance. Rather, he affirmed to the district court that he was satisfied with his counsel. Fishbaugh made clear during the change of plea hearing that his apprehension was based solely on his struggle to accept the plea agreement or expose himself to a drastically higher sentence by going to trial. He subsequently reaffirmed this in his letter to the district court, in testimony during

the status of counsel hearing, and during the hearing on his motion to withdraw his plea.

Fishbaugh has failed to show the district court clearly erred in finding his subjective assertions were not credible. *See McFarlane*, ¶ 8. He has failed to support a breakdown of communications during the change of plea hearing to justify good cause to withdraw his plea. The district court's denial of Fishbaugh's motion to withdraw his plea should be affirmed.

CONCLUSION

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

Respectfully submitted this 6th day of January, 2021.

AUSTIN KNUDSEN
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: /s/ Brad Fjeldheim
BRAD FJELDHEIM
Assistant Attorney General

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 7,009 words, excluding cover page, table of contents, table of authorities, signatures, certificate of service, certificate of compliance, and appendices.

/s/ Brad Fjeldheim

BRAD FJELDHEIM

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0149

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JOHN JAYCOB FISHBAUGH,

Defendant and Appellant.

APPENDIX

Findings of Fact, Conclusions of Law, and Order Denying

Defendant's Motion to Withdraw Guilty Plea (D.C. Doc. 104) Appendix A

CERTIFICATE OF SERVICE

I, Brad Fjeldheim, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 01-06-2021:

Scott D. Twito (Prosecutor)
Yellowstone County Attorney's Office
PO Box 35025
Billings MT 59107
Representing: State of Montana
Service Method: eService

Moses Ouma Okeyo (Attorney)
610 Woody St
Missoula MT 59802
Representing: John Jaycob Fishbaugh
Service Method: eService

Electronically signed by Janet Sanderson on behalf of Brad Fjeldheim
Dated: 01-06-2021