IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0562

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JEDEDIAH KEITH LARSON,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Sixteenth Judicial District Court,
Carter County, The Honorable Nickolas C. Murnion, Presiding

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STATEMENT OF THE ISSUE

Did the district court fully and fairly instruct the jury on the law of aggravated assault, including, pursuant to statute and in the court's discretion after consultation with the parties, providing a supplemental instruction of "reasonable apprehension" in response to questions from the jury?

STATEMENT OF THE CASE

Appellant Jedediah Keith Larson (Larson) appeals from his judgment of conviction for felony aggravated assault and misdemeanor partner or family member assault (PFMA), committed against his girlfriend, Terra Brewer. (D.C. Docs. 78, 93, 97-99; Tr. at 657-59.) The jury found Larson not guilty of a third count, misdemeanor unlawful restraint. (D.C. Docs. 78, 93 at 2; Tr. at 659.) Larson asserts error only as to the judgment of conviction for felony aggravated assault, conceding his conviction for the misdemeanor PFMA for causing bodily injury to Terra. (Appellant's Br. at 3.)

For the felony aggravated assault, the district court sentenced Larson to a 10-year commitment to the Department of Corrections (DOC), with 5 years suspended, including a requirement for 6 months of prerelease supervision; credit for time served; a $500 fine; registration as a violent offender; a recommendation for mental health and chemical dependency screening by DOC; and enumerated

conditions of probation. (D.C. Doc. 93 at 3-10; 7/24/18 Tr. at 89-91.) The district court recited its reasons for the sentence on the record, based in part on the seriousness of the offenses and emphasizing Larson's use of force causing fear and apprehension in the victim:

> You, after drinking alcohol, hit the victim Terra Brewer in the head and face with your fist multiple times, you kicked her, put your hands around her neck to choke her, told her you were [going to] kill her, she suffered a left jaw face contusion, a left wrist sprain, left rib fracture, left shoulder pain, concussion, she had to be hospitalized. In general the Court has a hard time with men hitting women . . . and what you did to Ms. Brewer is [i]nexcusable. . . . Take into account the testimony of the victim. She's still afraid after all this time. She doesn't think you're [going to] change as long as you're out of custody she's [going to] be in fear. . . . [The c]ommunity of Carter County has a right to feel safe. They don't need to have someone roaming the streets causing disruptions and making them feel unsafe[.]

(7/24/18 Tr. at 91-92.)[1] As the victim testified at sentencing, she remained fearful of Larson after the attack. (*Id*. at 68-70.) The attack affected Terra's emotional state and daily life, forcing her to live in safe houses for a long period of time—"I ran in fear for my life constantly knowing that he was still in public and that [he] could travel to where I was in a very few hours." (*Id*. at 69.) Terra was very afraid of Larson being in public and did not feel that he was sorry or felt like he did anything wrong. (*Id*.) "I am constantly afraid. I'm constantly aware of this

[1] Verbal utterances such as "uh" and "um," where they are recorded in the transcripts, will be deleted from all quotations.

situation. It affects my mental state. . . . [M]y injuries . . . still bother me." (*Id*. at 69-70.) Terra feared for her life that Larson would be released, and Larson knew it. (*Id*. at 70.)

STATEMENT OF THE FACTS

In the middle of the night a 911 call came into Fallon County dispatch from Larson's house in Carter County; it was "a female calling for help, it was a domestic." (Tr. at 264, 266.) Dispatcher Lorri Hall testified that the caller "was very distressed sounding." (Tr. at 265.) On cross-examination, although she was not familiar with the caller's voice, Hall testified that you can always tell in their voices whether people are upset when they call 911. (Tr. at 269.) Carter County Undersheriff Jamie Walker "was contacted by dispatch and by Sheriff Kittleman that Terra Brewer had called 911 because of events that had happened at Jed Larson's residence." (Tr. at 368, 385.)

Terra testified about those events at trial: the beating that Larson unleashed on Terra and the thoughts, fears, and apprehension that she felt at his brutal use of physical force. At the time, Larson was Terra's boyfriend, they had been dating for a few years, and they lived together in Larson's house in Ekalaka. (Tr. at 273-77.)

Terra described Larson as 6'3", about 210 pounds, and in excellent physical shape due to his job as a concrete contractor, working out, and training in boxing

and Jiu Jitsu. (Tr. at 277-78.) Larson objected to the latter fact based on relevance, which the district court overruled based on the State's rationale: "Your Honor, one of the elements is this . . . witness's perception or reasonable apprehension of receiving bodily injury from this person so I believe it's relevant to her perception of his capabilities." (Tr. at 278-79.) Terra testified that Larson was an MMA (mixed martial arts) fighter and competed in boxing and cage fighting—"he won" and was quite proud of it. (Tr. at 279-80.)

In contrast, Terra was only 5'4" and weighed about 115 pounds. (Tr. at 280.) She described herself as in pretty good shape and had always done outdoors activities, hiking, and hunting. (Tr. at 281.) However, Terra had suffered a very serious brain injury in a four-wheeler accident in 2010; she had been life flighted to the hospital. (Tr. at 282.) She suffered a severe concussion and injury to the brain, stayed in the hospital for several weeks, and testified that she would never be fully recovered. (*Id*.) Terra had ongoing concerns due to that injury and had to be careful, wear a helmet, and not get hit in the head—she feared additional injury to her head would cause more concussion and easily bleed. (Tr. at 283.) Larson knew the whole story and was aware of the extent and seriousness of Terra's injury and condition. (Tr. at 283-84.)

On the night of the assault, Terra and Larson went out to dinner in town, like they usually do, and had a couple drinks. (Tr. at 285.) Terra had two Tanqueray

and tonics, but was not intoxicated. (Tr. at 286.) She did not remember how much Larson had to drink, but testified that he usually starts with beer and then goes to Crown and coke or whiskey and coke. (*Id*.) While they were having drinks and snacks and their night out progressed, Larson called Terra names and made derogatory comments towards her. (Tr. at 287.) Terra thought Larson was upset because she was probably playing on her phone and not paying attention to him. (*Id*.) Larson started getting upset, took off out the door after a man at the bar, and slapped his own head—Larson was very upset at the man, but Terra did not know the exact reason why. (Tr. at 287-88; *see* Tr. at 308-310, 365.) They left the bar with Larson still very angry and Larson revved the car and spun it around two or three times. (Tr. at 289.) Then they went home. (*Id*.)

Once back at the house, Larson was very angry at Terra and he "started yelling, getting aggressive, mad." (Tr. at 290.) Terra was just standing there listening to him and Larson "got more aggressive and hit me, punched me a few times in the head"—at first, she did not know what to think. (*Id*.) Larson hit Terra three times in the head. (*Id*.) Terra testified that she just got numb and knew other things were going to happen, so she "tried to detour it." (Tr. at 291.) Larson objected to that statement as speculative; the State responded that Terra was "stating her opinion as to what she thought at that time;" and the court overruled:

"She can answer what her understanding was at the time or her perception at the time." (*Id*.)

Larson was still aggressive, was coming at Terra, and then he started to choke her—"He grabbed ahold of me and started choking me with his one hand. . . . He put his . . . hand around my neck and picked me up from the ground and was choking me." (Tr. at 291-92.) Terra was thinking he was going to stop—and "then he didn't." (Tr. at 292.) The other thought Terra had while this was happening was: "That he was [going to] kill me." (*Id*.) When the choking stopped, Terra testified: "And then he grabbed ahold of me and threw me on the bed. Not wanting me to leave." (Tr. at 292-93.)

Terra recalled her perceptions and how she felt: scared, upset, hurt. (Tr. at 293-94.) Terra was hurt in the head and the shoulder and the back. (Tr. at 294.) "The injuries scared me enough that they were bad enough that I was [getting] it was my head." (Tr. at 295.) And Terra was not able to leave because Larson would not let her—he locked the house from the inside with a Master lock and Terra did not have the keys or know where they were. (Tr. at 296-97.)

Terra stayed in the bed, with Larson next to her, and "waited enough time that he was passed out to be able to call quietly." (Tr. at 298, 300-01.) Terra testified that she "kept feeling worse and I knew I was afraid that there was more damage." (Tr. at 300.) Then: "I called the dispatch but she was so loud I was

afraid that [Larson] was [going to] hear so I hung up and then I recalled and told her she needed to just be quiet and listen and I needed someone to come help me." (*Id*.)

Sheriff Kittleman arrived and took Terra to the hospital. (Tr. at 300-03, 389.) Physician assistant (PA) Dale Diede examined Terra's injuries, took x-rays, and sent her for a CAT scan; Terra remained in the hospital for a couple of days. (Tr. at 303, 389-90, 407-08, 414-15.) Later that day, Sheriff Kittleman took photographs of Terra at the hospital depicting "black and blue marks, the bumps that were on her arms." (Tr. at 394-95; State's Exs. 1, 2, 6.) Terra gave a recorded statement for law enforcement. (Tr. at 398-99.) About the time that Sheriff Kittleman was finished at the hospital, Terra started throwing up. (Tr. at 397-98.)

PA Diede testified to the complaints and injuries which Terra presented at the hospital, as well as her diagnoses and treatment. (Tr. at 413-38.) Terra told Diede that she was struck with a closed fist on the left side of her head and complained of left wrist pain, left shoulder pain, left side chest pain, a superficial bruise on her left lower lip, was unable to close her jaw, and that she had a headache. (Tr. at 413-14.) In addition to her injuries, Terra self-reported that she was fearful, "She did not want to return to her home." (Tr. at 431, 433.) The medical report of Terra's examination and treatment was admitted into evidence. (Tr. at 448; State's Ex. 10.)

Motion to dismiss aggravated assault for insufficient evidence

After the Stated rested its case, Larson moved to dismiss the aggravated assault based upon lack of evidence that Terra suffered serious bodily injury pursuant to the statutory definition. (Tr. at 478-87.) The district court granted the motion in part, as to the first element of aggravated assault, that Larson caused serious bodily injury to Terra and that he acted purposely or knowingly. (Tr. at 487.) However, as to the second aspect of that charge, the court denied the motion and allowed the jury to consider and determine whether Larson, with the use of physical force or contact, caused reasonable apprehension of serious bodily injury or death in Terra. (*Id*.) The court found that there was sufficient evidence to support that part of the charge, based on Terra's testimony that when Larson held her up by the throat and choked her she was in fear of her life, fear of death; and also the testimony of her preexisting injury, a serious concussion from a four-wheeler accident that she was supposed to wear a helmet and not have any more blows to her head or she could have serious consequences or serious injuries. (Tr. at 487-88.) Those consequences were in her mind, she communicated that, and Larson was aware of it. (Tr. at 488.) There was evidence that Larson used physical force or contact, and there was evidence of what appeared to be reasonable apprehension. (*Id*.)

The court reiterated that there was evidence of blows to the head, Terra previously had concussions, and that she had reasonable apprehension that those blows could cause her serious bodily injury. (Tr. at 490.) Therefore, the court ruled that there was sufficient evidence for that to proceed—the element that the use of physical force by Larson caused reasonable apprehension of serious bodily injury. in Terra. (Tr. at 490-91.)

Jury instructions and closing argument

Based on that ruling, the district court instructed the jury on the law of aggravated assault: "A person commits the offense of aggravated assault if the person purposely or knowingly, with the use of physical force or contact, causes reasonable apprehension of serious bodily injury or death in another." (D.C. Doc. 77 (Instrs. 20-21); Tr. at 600-01.) The court also instructed on the definition of "[s]erious bodily injury," as necessary to determine Terra's reasonable apprehension. (D.C. Doc. 77 (Instr. 22); Tr. at 601-02.)

Just as the State had previewed in opening (Tr. at 256-57), part of its closing argument focused on Terra's reasonable apprehension of serious bodily injury:

> He grabs her by the neck, lifts her off the ground and squeezes. He punches her with a closed fist three (3) times in the head and face. He then throws her on a hide-a-bed where he knows there's a metal bar across the middle. Is she afraid? Yes. She laid on the bed afraid to move. She was reasonably apprehensive about suffering serious bodily injuries. She's afraid of what would happen by her being hit in the head. She said to us, "I thought he was going to kill me."

> Is she injured? Yes. She said she was in pain. She told the doctor about that pain. She had multiple pains and injuries reported, she said it hurt.

(Tr. at 611.) The State argued further: "He caused her reasonable apprehension of serious bodily injury. . . . She was afraid because of her previous head injury. She's not supposed to get hit in the head. She's supposed to wear a helmet and [Larson] does it anyway. She's afraid she could suffer serious injuries from that." (Tr. at 634.)

In contrast, the main thrust of Larson's theory of the defense stated in opening and closing argument was acquittal by reason of his mental disease or defect, for which he had obtained an instruction and an alternative verdict option. (Tr. at 259-60, 614-19, 622-26, 628; *see* D.C. Docs. 77 (Instr. 19), 78 (verdict form).) In opening, Larson asked the jury to "keep an open mind about" his mental disease and defect and to ensure the State proved the necessary elements of the charges, specifically "bodily injury or serious bodily injury," without mention of reasonable apprehension. (Tr. at 259-60.) At closing, Larson mentioned in passing the elements of aggravated assault, including reasonable apprehension of serious bodily injury. (Tr. at 618.) But Larson did not dispute the evidence of Terra's reasonable apprehension, her fear for her life from Larson's attack and her injuries—and did not argue that Terra's "apprehension" of serious bodily injury under the circumstances was "unreasonable" under any standard. Instead, Larson

argued that the State had not proved that he caused serious bodily injury—an element no longer at issue due to his successful motion to dismiss that portion of the aggravated assault charge. (Tr. at 618-21, 626-27.)

Jury questions and supplemental instruction on definition of "reasonable apprehension"

Faced with these arguments and the court's instructions, the jury came back with a question about Instruction 21: "Please clarify 'reasonable apprehension of serious bodily injury'?" (LD-Questions from the Jury at 3-4 (included in the district court record and attached to Appellant's Br. as Appendix A); Tr. at 644-45.) After discussion on the record and there being no apparent definition of "reasonable apprehension" in the statutes, the district court sent back the following response, without objection: "You have been provided all instructions applicable to this case and you must consider those instructions." (LD-Questions from the Jury at 3; Tr. at 645-49.)

The jury went back to deliberations and then sent another question to the court: "Please provide us with a dictionary. We are confused by the term 'reasonable apprehension' in the context it is used in instructions." (LD-Questions from the Jury at 2; Tr. at 650.) Discussion ensued. (Tr. at 650-56.) The district court wanted to know if there was a way to furnish a definition since this was the jury's second request, but it was not going to give them a dictionary. (Tr. at 650.)

The district court and the State consulted Black's Law Dictionary, finding nothing for "reasonable apprehension," and considered defining the terms "reasonable" and "apprehension" separately—which the court thought would not "be terribly helpful." (Tr. at 650-52, 655.) The court came back to a general definition found on the Internet that it had previously considered: "Reasonable apprehension refers to fear that is justified under the circumstances as judged by the subjective standard of the reasonable man." (Tr. at 646-47, 650-51.) The court told counsel it was "willing to entertain alternate definitions if you can find one." (Tr. at 651.)

Larson noted that the pattern instructions contained no definition and stated that "at this point the jury does not believe that they can reach a conviction on that and to provide them with additional information would likely be spoon feeding a result and . . . that concerns me." (Tr. at 651.) The court acknowledged that the pattern instructions do not have instructions for everything, but reasoned that it could go to case law or to other sources as long as "it's a . . . good definition." (*Id*.) The court also agreed that it normally does not submit additional instructions, but noted this was the jury's second request. (*Id*.)

Larson suggested they take a break and "ruminate on it over lunch." (Tr. at 652.) Larson was not "inclined to give additional information. I think it's clear that the jury is having trouble agreeing and I think to spoon feed them additional

information would probably not be proper and I'd like [to] have time to further consider." (*Id*.)

After several long pauses noted on the record while the district court checked on some things, the court pointed out the statute providing:

> After the jury has retired for deliberation, if there is any disagreement among the jurors as to the testimony or if the jurors desire to be informed on any point of law arising in the cause, they shall notify the officer appointed to keep them together, who shall then notify the court. The information requested may be given, in the discretion of the court, after consultation with the parties.

Mont. Code Ann. § 46-16-503(2). (Tr. at 653.) The court summarized the situation:

> I believe that's where we're at. We've had the note regarding a question of law. [T]his is the second note we've gotten. I do not intend to give the jury a dictionary for a variety of reasons. . . . And I think it is a question of law as to what reasonable apprehension refers to. That appears to be, they've narrowed it now to just reasonable apprehension. They've left off the serious bodily injury.

(Tr. at 653-54.)

The district court again inquired of counsel whether the Internet definition would be sufficient or if counsel had a better definition. (Tr. a 654.) The State was amenable to either the proposed definition or separate definitions of the two terms. (Tr. at 654-55.) Larson still had concerns that deliberations had begun and thought it was problematic to give a material amendment to the instructions at this juncture.

(Tr. at 655-56.) Larson reiterated that the jury was not agreeable and thought that further spoon feeding was going to be prejudicial. (Tr. at 656.) The court ruled:

> Well I'm going to give the definition, "Reasonable apprehension refers to fear that is justified under the circumstances as judged by the subjective standard of the reasonable man." I'm going to note that I have given Defense Counsel repeated opportunities to provide an alternate definition and they have refused so. I believe I have this discretion. I believe it's a question of law, I believe they've made repeated requests. . . . I do not see it any other way so I'm going to give this definition.

(Tr. at 656; *see* LD-Questions from Jury at 2.)

SUMMARY OF THE ARGUMENT

Larson did not object to the district court's supplemental "reasonable apprehension" instruction on the grounds that it included an erroneous "subjective standard." Larson objected generically that ANY instruction be given in response to the jury's questions, but made no suggestion, despite repeated requests, to modify the instruction or its language in any way. Pursuant to statute, the district court properly exercised its discretion to give the instruction based on the jury's desire to be informed on a point of law and the court's consultation with the parties. This Court should reject Larson's appeal based on his failure to properly preserve the issue and allow the district court, in the first place, to correct any error.

This Court should reject Larson's new theory stated for the first time on appeal because the supplemental instruction given—in the context of the law of aggravated assault and the instructions as a whole—essentially instructed the jury on the reasonable person standard for determining whether Terra's apprehension of serious bodily injury was reasonable. Although the instruction contains the extraneous word "subjective," that word alone does not abnegate the remainder of the instruction: that "reasonable apprehension" refers to "fear that is justified under the circumstances" as judged by a reasonable person.

The law of aggravated assault and its "reasonable apprehension" element require consideration of both objective and subjective evidence. As this Court has held, without evidence to show the victim's state of mind at the time of the alleged assault, it is impossible for the jury to determine whether defendant's conduct placed the victim in reasonable fear or apprehension of serious bodily injury. The supplemental instruction was not incorrect where it applied the reasonable person standard while also taking into account the inherent subjectiveness of the victim's "reasonable apprehension"—an element and determination that is impossible without evidence of the victim's subjective state of mind.

Moreover, any error in using the word "subjective" was harmless and did not affect Larson's substantial rights. Larson did not object to the instruction or try to correct the error at trial in the first place. In fact, in closing argument, Larson did

not dispute Terra's stated fears and apprehension or argue to the jury that her apprehension of serious bodily injury was "unreasonable" under any standard. Finally, overwhelming evidence was presented to prove Larson's use of physical force against Terra and Terra's resulting reasonable apprehension of serious bodily injury or death.

ARGUMENT

The district court in its discretion fully and fairly instructed the jury on the law of aggravated assault, including the discretionary supplemental instruction on "reasonable apprehension."

A. Standard of review and applicable law

This Court reviews issues arising from a district court's decisions on jury instructions for abuse of discretion. *State v. Birthmark*, 2013 MT 86, ¶ 10, 369 Mont. 413, 300 P.3d 1140. The inquiry, viewing the instructions as a whole, is whether the district court fully and fairly instructed the jury on the applicable law. *Id.*

Moreover, the Court reviews a district court's decision to provide the jury with requested information pursuant to Mont. Code Ann. § 46-16-503(2) (conduct of jury after retirement—advice from court) for abuse of discretion. *State v. Crawford*, 2002 MT 117, ¶ 15, 310 Mont. 18, 48 P.3d 706. That statute, as applied by the district court in this case, provides:

> After the jury has retired for deliberation, if there is any disagreement among the jurors as to the testimony or if the jurors desire to be informed on any point of law arising in the cause, they shall notify the officer appointed to keep them together, who shall then notify the court. The information requested may be given, in the discretion of the court, after consultation with the parties.

Mont. Code Ann. § 46-16-503(2).

B. The district court did not abuse its discretion when it instructed the jury on the statutory element "reasonable apprehension" in response to the jury's questions and upon consultation with the parties.

For the first time on appeal, Larson raises the claim that the supplemental reasonable apprehension instruction was based on a subjective standard and was, therefore, an incorrect statement of law. (Appellant's Br. at 1, 10.) Larson raised no such legal claim at trial. Larson objected to the district court giving the supplemental "reasonable apprehension" instruction in response to the jury's questions, but it was a general objection to ANY additional information or instruction because that would be "spoon feeding" the already-deliberating jury. (Tr. at 648 ("hesitant to provide something different"), 651 (concern was no pattern instruction and providing "additional information"), 652 ("not really inclined to give additional information"), 656 (concerned about "material amendment to the instructions" after deliberations had begun).)

Larson did not object to the language or content of the proposed supplemental instruction on any specific legal or factual ground—and certainly not

on the ground that it contained the wrong legal standard—and he provided no authority either for his objection to giving the instruction at all or for giving an instruction with language that would be preferable or acceptable to Larson. When the court inquired about an appropriate definition for "reasonable apprehension" in response to the jury's questions, Larson said "nothing comes to mind. . . . Not at the moment. . . . I'm thinking on it." (Tr. at 645-46.) Before giving the instruction, the district court gave the defense "repeated opportunities to provide an alternate definition and they have refused." (Tr. at 656.)

The rule is well established that this Court will not address an issue raised for the first time on appeal. *State v. Martinez*, 2003 MT 65, ¶ 17, 314 Mont. 434, 67 P.3d 207; *see* Mont. Code Ann. §§ 46-20-104(2), -701(1). Therefore, a party may not raise new arguments or change its legal theory on appeal. *State v. Gomez*, 2007 MT 111, ¶ 21, 337 Mont. 219, 158 P.3d 442. The reason for the rule is that it is fundamentally unfair to fault the trial court for failing to rule on an issue it was never given the opportunity to consider. *Martinez*, ¶ 17.

Larson objected to the district court giving the supplemental instruction in a general and unspecified manner and that is his only objection preserved for appeal. Any error on that issue should now be resolved by reference to the district court's undisputed discretion under Mont. Code Ann. § 46-16-503(2), after consultation with the parties, to give the jury additional information when they "desire to be

informed on any point of law arising in the cause." This Court should, therefore, limit its review "to the issue raised by the Appellant[] in the District Court and the record made thereon." *Martinez*, ¶ 18. The record here is limited to Larson's general objection to the district court's providing an additional instruction under Mont. Code Ann. § 46-16-503(2). It is in the discretion of the trial court whether or not to give additional instructions when such a request is made. *State v. Stewart*, 175 Mont. 286, 299, 573 P.2d 1138, 1145 (1977). There was no abuse of that discretion in the present case.

Thus, this Court should determine that the district court did not abuse its discretion based on any legal ground specified by Larson at trial. The district court repeatedly consulted with the parties, but Larson never provided the court with any opportunity to consider any alternative to the proposed supplemental instruction. Larson did not object that the supplemental instruction contained an incorrect "subjective standard" for determining whether Terra suffered the necessary "reasonable apprehension" from Larson's attack.

Larson faults the district court on appeal for looking to the Internet for a definition, rather than the case law. Yet Larson had that same opportunity to provide case law—or any authority—to the district court in the first place so that the court could resolve any potential issues that might affect Larson's rights. Chances are that the district court would have modified the instruction if Larson

had only suggested it—the State was agreeable with any of the options offered and the district court repeatedly turned to Larson for alternatives.

But Larson provided nothing—no alternative language, no argument about subjective versus objective standards, no position on the proposed instruction except for repeated references to "spoon feeding," and no opportunity to correct any specific problem that Larson might have had about the proposed instruction. Larson's lack of concern and objection about the wording of the supplemental instruction was consistent with his theory of the case, which did not dispute the evidence of Terra's apprehension of serious bodily injury or argue that it was unreasonable under any standard.

Turning to the specifics of Larson's new legal theory on appeal, the jury instructions regarding aggravated assault, considered as a whole, were neither an incorrect statement of law nor, if there was any error at all, did it affect the substantial rights of Larson, given the overwhelming and largely undisputed evidence of Larson's use of physical force against Terra and her resulting reasonable apprehension, judged by any standard.

In a nutshell, Larson now argues that he could not be convicted of aggravated assault based on Terra's "subjective fears" and that "reasonable apprehension" is an objective standard: "Apprehension of serious bodily injury is not from the victim's subjective perception. Rather, the standard is objective,

asking whether a reasonable person under similar circumstances would have reasonably apprehended death or serious bodily injury." (Appellant's Br. at 10.) The supplemental instruction contained three parts, only one of which Larson contests. It defines "reasonable apprehension" as: one, "fear that is justified under the circumstances" (no objection on appeal); two, "judged by the subjective standard" (objection on appeal); and three, "of the reasonable man" (no objection on appeal).

Contrary to Larson's argument, the law does contemplate conviction for aggravated assault based on the victim's subjective fears and perceptions: "This Court does require the State to present evidence to show the victim's state of mind at the time of the alleged assault. Without such evidence, it is impossible for the jury to determine whether defendant's conduct placed the victim in reasonable fear or apprehension of serious bodily injury." *State v. LaMere*, 190 Mont. 332, 336, 621 P.2d 462, 464 (1980). That subjective inquiry into the victim's state of mind is inherent in the aggravated assault statute: the defendant's use of physical force or contact must cause "apprehension of serious bodily injury or death **in another**." Mont. Code Ann. § 45-5-202(1) (emphasis added). The uncontested aggravated assault instructions are an accurate statement of that law—identifying the element of apprehension in "another," generally, and the victim Terra, specifically. (D.C. Doc. 77 (Instrs. 20-21).)

Thus, a person does not commit aggravated assault, under that provision, as an entirely objective crime: he or she must cause apprehension of serious bodily injury or death in "another" person, as established by (objective) proof of the circumstances of the defendant's use of physical force and (subjective) proof of the victim's personal response to that force—that is, the "victim's state of mind at the time of the alleged assault." *LaMere*, 621 P.2d at 464. Contrast that with the other proscribed manner of committing aggravated assault—not at issue here—where a "person purposely or knowingly causes serious bodily injury to another," Mont. Code Ann. § 45-5-202(1), which is entirely objective: the defendant either caused serious bodily injury or did not, based on objective proof of the victim's injuries pursuant to the statutory definition. Mont. Code Ann. § 45-2-101(66)(a). (D.C. Doc. 77 (Instr. 22).)

Of course, the actual and subjective apprehension of the victim must be "reasonable" under the statute in order to support a conviction for aggravated assault. Thus, the Court has held, in sufficiency of the evidence cases mostly, that the standard for determining whether a person has "reasonably apprehended bodily injury is that of a reasonable person under similar circumstances." *State v. Vukasin*, 2003 MT 230, ¶ 19, 317 Mont. 204, 75 P.3d 1284 (quoting *State v. McCarthy*, 1999 MT 99, ¶ 27, 294 Mont. 270, 980 P.2d 629; citing *State v. Martel*, 273 Mont. 143, 150, 902 P.2d 14, 19 (1995) ("When faced with the conduct complained of,

would a reasonable person feel apprehension . . . ? A reasonable person standard is an objective one.").

The supplemental instruction took into account both the subjective and objective components of aggravated assault and it instructed the jury consistent with the reasonable person standard: the jury should consider whether Terra's "fear" was "justified under the circumstances"—that is, whether it was "reasonable." It instructed the jury to judge that fear arising under those circumstances by the "standard of a reasonable man." Aside from using an archaic form of the standard, the instruction told the jury to consider the "reasonable person standard," which is an objective one. *Martel*, 902 P.2d at 19.

Larson's complaint on appeal is entirely with the one word "subjective." While the addition of that word was inartful and extraneous, Larson has no complaint with any of the rest of the full and fair instructions. The instruction properly directed the jury to consider Terra's fear under the circumstances—that is, her subjective apprehension—and determine whether a reasonable person would judge that fear to be justified—that is, reasonable. Although the word "subjective" was unnecessary for the instruction to get that point across to the jury, it may be read in the context of the entire instruction—which Larson pretty much ignores on appeal—as the district court's attempt to reconcile the objective nature of the

reasonable person standard with the subjective nature of a victim's apprehension inherent in the elements of aggravated assault.

In essence, the objective reasonable person standard embodies—as does the supplemental instruction—the implicit subjectivity of the inquiry: the focus is on whether the victim herself has "reasonably apprehended bodily injury" as judged by "a reasonable person under similar circumstances"—basically a reasonable person standing in the shoes of the victim. Applying the "reasonable person under similar circumstances" standard requires the jury to consider what those circumstances are, including direct evidence of the victim's subjective apprehension as well as other circumstantial proof. *See, e.g.*, *Vukasin*, ¶¶ 20-22; *LaMere*, 621 P.2d at 464-65. Without evidence of the victim's subjective state of mind at the time of the alleged assault, "it is impossible for the jury to determine whether defendant's conduct placed the victim in reasonable fear or apprehension of serious bodily injury." *LaMere*, 621 P.2d at 644. Thus, the standard by which reasonable apprehension ought to be judged is not so clearly limited to an objective-only standard when considering its context within all the elements of aggravated assault, principally the actual and subjective apprehension of the victim.

Ultimately, the supplemental instruction's inclusion of the word "subjective" along with "reasonable man" informed the jury of the nature of "reasonable

apprehension" as a concept containing both subjective and objective elements. The instruction considered in the context of the other instructions as a whole was not an abuse of discretion. This is especially so where the only issue on appeal is about one word in an instruction that otherwise effectively explained the proper parameters of the jury's decision—which issue was not previously raised by Larson despite ample opportunity.

Moreover, criminal appeals are not well taken where the issues preserved for appeal would not affect the substantial rights of the defendant: "Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Mont. Code Ann. §§ 46-20-104(1), -701(1)-(2). Given the overwhelming and essentially uncontested evidence of Terra's reasonable apprehension of serious bodily injury, Larson would have been found guilty of aggravated assault whether the jury applied a so-called objective test or a subjective test.

In one sense, the supplemental instruction may have increased the State's burden by defining reasonable apprehension as "fear justified by the circumstances." As the Court has said, "this Court has never held that a showing of immediate fear is the only way to prove 'reasonable apprehension'"—apprehension is not the same thing as fear. *LaMere*, 621 P.2d at 464 (citation omitted). This Court recognized that:

> [A] victim may be put in a position, such as the victim testified to here, of being so startled, or shocked, or afraid, that his reaction is a

> delayed one. The 'reasonable apprehension' may be a response that the victim is not instantly aware of, but his actions may clearly show that he apprehends the reality of the attack.

Id. *LaMere* again demonstrates the "subjective" nature of "reasonable apprehension," *see id*. ("The victim himself testified to the type of reaction that he had"), but also indicates that the supplemental instruction went beyond what is required to establish that element, rendering the State's burden greater than the law requires.

In the end, the jury was entitled to find beyond a reasonable doubt that Larson caused "reasonable apprehension" in Terra. Larson never argued to the jury that Terra's fear or apprehension of serious bodily injury or death was "unreasonable" or contested the evidence of her subjective fears and apprehension. The evidence of the circumstances in which Terra's apprehension arose was more than sufficient to establish that her apprehension was reasonable, under any standard.

Objectively, Larson was much bigger and stronger than Terra, he was a trained fighter, and he was aggressive, angry, and upset that night—with Terra and with a man at the bar. Larson knew Terra had previously suffered a serious brain injury that required her to be careful, try not to get hit in the head, and wear a helmet—of course not while out to dinner with her boyfriend, as glibly suggested

by Larson on appeal. (Appellant's Br. at 15.) But Larson hit her in the head multiple times anyway, threw her around, and choked her.

Subjectively, Terra testified to her mental state, her perceptions of what was happening to her, and what she was thinking. At first, she did not know what to think, then she just went numb, then she knew "other things were going to happen," and then she tried to "detour" Larson. When Larson started to choke Terra, she thought he was going to stop, but he did not stop, and then she thought he was going to kill her. Terra was afraid, upset, hurt, and lying in bed next to her attacker, locked in the house, waiting quietly in pain to dial 911 after he passed out. Hours later at the hospital, receiving care for her injuries, Terra was afraid to return home.

A reasonable person in those circumstances, in Terra's shoes and having suffered the attack that Terra suffered at Larson's hands, would reasonably feel apprehension of serious bodily injury or death—as the jury found after being fully and fairly instructed. Even if the word "subjective" in the supplemental instruction was in error, that one word did not impede the jury from determining that Terra's fears were reasonable and justified under the circumstances as judged by a reasonable person in similar circumstances. Any error was harmless and did not affect Larson's substantial rights.

CONCLUSION

This Court should affirm Larson's judgment of conviction for aggravated assault.

Respectfully submitted this 8th day of February, 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 6,687 words, excluding certificate of service and certificate of compliance.

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CERTIFICATE OF SERVICE

I, Jonathan Mark Krauss, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 02-08-2021:

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