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STATE OF MONTANA
Case Number: DA 19-0453

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0453

STATE OF MONTANA,

Plaintiff and Appellee,

v.

TOSTON GRAY LAFOURNAISE,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, the Honorable Michael F. McMahon,
Presiding

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STATEMENT OF THE ISSUES

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II. Instructing the jury on the more expansive 2017 definition of consent removed the State's burden to prove the essential 2015 requirement that the defendant used force to compel sexual intercourse.

STATEMENT OF THE CASE

May 25, 2018	State filed the first Information charging Toston LaFournaise with: **Count I**: Sexual Intercourse Without Consent (SIWOC), a felony, in violation of Mont. Code Ann. § 45-5-503(1) . **Count II**: Privacy in Communications, a misdemeanor, in violation of Mont. Code Ann. § 45-8-213(1)(a), and **Count III**: Stalking, a misdemeanor, in violation of Mont. Code Ann. § 45-5-220. The SIWOC charge was alleged to have taken place in the Summer of 2015, while the other two charges were alleged to have taken place in March of 2017. District Court Document (D.C.Doc.) 4. The allegation was prompted by recent phone calls from Toston to S.S. Since Toston was seventeen-years-old, a juvenile transfer hearing was scheduled but then waived by defense counsel. (D.C. Doc 13.)
February 26, 2019	State filed second Information, amending Count I to include the enhancement penalty for bodily injury occurring during the commission of the offense under

	Mont. Code Ann. § 45-503(3)(a). (D.C. Doc. 32) The State also added an additional charge: **Count II:** Tampering with Witnesses and Informants, a felony in violation of Mont. Code Ann. § 45-7-206(1)(b).[1]
March 4, 2019	State filed the third Information, amending it to charge: **Count I:** Aggravated Sexual Intercourse Without Consent (Agg. SIWOC), a felony, in violation of Mont. Code Ann. § 45-5-208. (D.C. Doc. 39) This new statutory provision became effective on October 1, 2017. *See*, SB 29, Sec. 1 Ch. 279 Laws of Montana 2017.
March 18, 2019	Trial begins before the Honorable Michael F. McMahon. At the conclusion of the first day Judge McMahon identifies the problem with the Agg. SIWOC charge and orders the parties to address. (3-18-2019 to 3-20-2019 Trial Transcript (Tr.) at 316.)
March 19, 2019	State attempts to file a fourth Information, changing the Agg. SIWOC charge to SIWOC under Mont. Code § 45-5-503(1) and 3(a). D.C. Doc. 48. State admits change necessitated by "State's inattention to effective date of Mont. Code Ann. § 45-5-208." (D.C. Doc. 48 at 2.)
March 20, 2019	Toston's attorney moves to dismiss the Agg. SIWOC charge. District Court dismisses Agg. SIWOC but reinstates SIWOC charge in first filed Information. However, the jury was instructed on the new 2017 consent elements. Jury returned with verdict finding Toston guilty of all four counts. (Tr. at 615.)

[1] The Privacy in Communications charge became Count III and the Stalking charge became Count IV.

May 29, 2019 Toston is sentenced as follows:
Count I (SIWOC): Sixteen (16) years in the Montana State Prison with no parole until completion of Phase I and Phase II of sex offender treatment.
Count II (Tampering): Four (4) years in the Montana State Prison consecutive to Count I.
Count III (Privacy): six (6) months in the county jail concurrent to Count I and Count II.
Count IV (Stalking): one (1) year in the county jail concurrent to Counts I through III. (5/29/2019 Sentencing Tr. at 124-25). Written judgment entered on 6/10/2019. (D.C. Doc. 77, attached as Appendix A.)

STATEMENT OF THE FACTS

The judge could see the train jumping the track. (Tr. at 316.) Seventeen-year-old S.S. had just testified. She said, that in the Summer of 2015, when she was thirteen years old and Toston was fourteen years old, he rode his bicycle to East Helena and sexually assaulted her in broad daylight outside of East Helena Valley Middle School. (Tr. at 213-15.) No one witnessed what happened. S.S. reported this claim a year-and-a-half later because Toston called her at Jefferson High School. (Tr. at 219-20 and 223-24) Anticipating an upcoming defense motion to dismiss at the end of the State's case, the judge was reviewing through the charges and realized the State had charged

Toston with Aggravated Sexual Intercourse Without Consent in violation of Mont. Code Ann. § 45-5-208 - an offense that did not even exist in 2015. After hearing S.S. testify, the judge knew no alleged criminal act took place after the October 2017, effective date for Mont. Code Ann. § 45-5-508. (Tr. at 316.)

After S.S.'s testimony, the judge told the parties they better be able to explain this fatal flaw before court started in the morning. (Tr. at 316-17.) The State scrambled. Overnight, it e-mailed briefs to the judge's law clerk and defense counsel requesting to amend the Agg. SIWOC charge mid-trial. (Tr. at 321.) When the parties showed up to court in the morning, defense counsel told the judge it too had identified the fatal flaw with the Agg. SIWOC charge before trial and planned to move to dismiss the charge at the close of the State's case. Defense counsel objected to trying to make a substantive amendment to the charge mid-trial. (Tr. at 321-22.) The judge agreed with defense counsel, telling the parties it would not allow the State to use lesser included offense analysis to amend an "invalid charge." (Tr. at 327.) The State responded it was only asking the judge to make a change in form because of its "inattention to the effective date of Section 45-5-

508." D.C. Doc No. 48 at 2. The State even appealed in "equity" for the judge to correct the mistake it had made. (Tr. at 329.)

The judge informed the State it had put the court in a very difficult position but declared: "I have to make sure I can right the wrong." (Tr. at 331.) Defense counsel reminded the judge it had structured its defense to challenge the invalid charge which was clearly based on a new statutory offense enacted after the charged conduct. (Tr. at 333-34.) Toston would have to change his whole trial strategy, defense counsel explained because the State had violated his right to be told how and what he was charged with before trial. (Tr. at 334.)

Despite the uncertainty with the invalid Agg. SIWOC charge, the judge attempted to settle jury instructions before the end of the State's case. (Tr. at 400.) The judge informed the parties that the Agg. SIWOC charge listed in State's Proposed Instructions 17 through 19, 24, and 26 would have to be amended or eliminated because the judge was going to grant Toston's motion to dismiss the Agg. SIWOC charge at the end of the State's case. (Tr. at 404-05) After the lunch break, the judge told the State to remove any reference to the Agg. SIWOC charge and instead rely on the SIWOC elements contained in Mont. Code Ann. §

45-5-503(1). The judge knew the bodily injury element would remain problematic, so the judge precluded charging Toston under Mont. Code Ann. § 45-5-503(a) because of its requirement to find the "bodily injury" element. (Tr. at 443.) The State tried to argue "bodily injury was equivalent to force." The judge disagreed. The judge told the State to remove reference to bodily injury and said the court would also instruct the jury to disregard any proof the State put on about S.S. having a knife injury. (Tr. at 569.)

In the confusion about how to instruct a new charge separate from the invalid charge, the parties overlooked that the 2017 Legislature had also radically changed the 2015 SIWOC consent definition. Without objection from the defense, the court adopted the new 2017 affirmative assent consent definitions. In doing so, the court also dropped the essential force element contained in the 2015 consent definition.

After the State called its last witness and closed its case-in-chief, Toston's attorney moved to dismiss the invalid Agg. SIWOC charge. (Tr. at 502.) The judge granted the motion to dismiss, but to "right the wrong" he re-instituted the original SIWOC charge under Mont. Code Ann. §45-5-503(1) filed back on May 25, 2018. (Tr. at 506 and D.C. Doc.

4.) The court claimed the dismissal of the Agg. SIWOC charge and resurrection of the first SIWOC charge acted as a procedural amendment to the Information, so it was not necessary to arraign Toston on the new charge. (Tr. at 460.) No longer able to rely on his strategy to dismiss the undisputedly invalid charge, Toston chose to testify under this new legal landscape. He denied sexually assaulting S.S. (Tr. at 513 and 518.)

While deliberating, the jury sent out a question indicating they were unable to reach a unanimous verdict. (Tr. at 607 and D.C. Doc. 57.) Then the jury was brought into open court because it indicated it had reached a verdict. But, upon examination by the judge, the jury forewoman revealed its verdict was not unanimous. (Tr. at 609-10.) The judge told the jury to hold on to the verdict form and then gave the jury a "dynamite" instruction. (Tr. 610-11.). After the judge's prompting and further deliberations, the jury came back with a verdict convicting Toston on all counts. (Tr. at 615-16.) The jury's verdict form showed the jury struggled with the revised SIWOC charge, crossing out the tallies on the not-guilty portion of the verdict form before indicating twelve jurors voted to convict on the resurrected SIWOC charge.

(D.C. Doc. 55.)

STANDARD OF REVIEW

This Court reviews a district court's decision to permit an amendment to a criminal complaint or information for an abuse of discretion. *State v. Hardground*, 2019 MT 14, ¶ 7, 394 Mont. 104, 433 P.3d 711.

This Court reviews for correctness legal determinations made in giving jury instructions, such as whether instructions as a whole fully and fairly inform the jury on the applicable law and correctly define the elements of the offense. *State v. Carnes*, 2015 MT 101, ¶ 6, 378 Mont. 482, 346 P.3d 1120; *see State v. Lambert*, 280 Mont. 231, 234, 929 P.2d 846, 848 (1996).

SUMMARY OF THE ARGUMENT

The State had no idea it had charged an offense that did not exist when it alleged the incident between S.S. and Toston LaFournaise took place in 2015. The charged offense, Aggravated Sexual Intercourse Without Consent, was not enacted and did not become effective until 2017. During trial the judge identified and tried to rectify this fatal flaw by dismissing the Agg. SIWOC charge and reinstating the Sexual

Intercourse Without Consent charge filed a year earlier. However, the judge could not fix the mid-trial error without making substantive changes to the Information. The amended SIWOC charge violated the filing requirements for Mont. Code Ann. § 46-11-205.

The attempt to revert back to the original SIWOC charge also compounded the charging problems. Rather than relying on the law in effect in 2015, the State submitted and the judge instructed on the more expansive definition of consent enacted in 2017. As a result, the jury, who at one point could not reach a unanimous verdict on the SIWOC charge, did not consider the essential 2015 consent element. Under either ground, Toston's SIWOC conviction must be reversed and remanded back to the district court.

ARGUMENT

I. After the judge dismissed the invalid Aggravated Sexual Intercourse Without Consent charge, the State substantively changed the nature of the alleged sex crime and fundamentally altered Toston LaFournaise's defense strategy.

A. The State charged an offense that did not exist in 2015.

The judge had no choice but to dismiss the Agg. SIWOC charge. The United States and Montana Constitutions prohibit *ex post facto* laws.

U.S. Const. art. I, § 10; Mont. Const. art. II, § 31. The prohibition means "[l]egislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts." *Collins v. Youngblood*, 497 U.S. 37, 43, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990). Thus, no Montana law "is retroactive unless expressly so declared." Mont. Code Ann. § 1-2-109. Moreover, "the law in effect at the time of an alleged offense applies in any subsequent criminal prosecution," *City of Missoula v. Zerbst*, 2020 MT 108, ¶ 14, 400 Mont. 46, 462 P.3d 1219. Since it was enacted in the 2017 Legislative Session without any retroactivity provisions, Mont. Code. Ann. § 45-5-208 became effective on October 1, 2017. It created a new sexual offense with new definitions and enhanced penalties:

> **45-5-508. Aggravated sexual intercourse without consent.**
> (1) A person who uses force while knowingly having sexual intercourse with another person without consent or with another person who is incapable of consent commits the offense of aggravated sexual intercourse without consent.
> (2) A person convicted of aggravated sexual intercourse without consent shall be punished by life imprisonment or by imprisonment in the state prison for a term of not less than 10 years or more than 100 years and may be fined not more than $50,000, except as provided in 46-18-219 and 46-18-222.

Recognizing this fatal flaw, the district court noted that no alleged conduct took place after October 1, 2017.

Conduct occurring before an offense's effective date cannot constitute the offense because sufficient evidence to convict requires evidence of conduct occurring after the offense's effective date. *See, State v. Owen*, 40 Conn. App. 132, 669 A.2d 606, 612–13 (1996) (reversing a conviction where insufficient evidence supported that conduct occurred after the charged offense's effective date); *Com. v. Welch*, 444 Mass. 80, 825 N.E.2d 1005, 1014–15 (2005), *abrogated by O'Brien v. Borowski*, 461 Mass. 415, 961 N.E.2d 547 (2012) (considering only those acts committed after the offense's effective date to determine whether there was sufficient evidence to convict); *cf. Litton Indus. Prod., Inc. v. Gammage*, 668 S.W.2d 319, 324 (Tex. 1984) (reversing judgment where there was no evidence of offending conduct occurring after the law's effective date). Thus, at the close of the State's case, the judge dismissed Count I, Agg. SIWOC, a felony, in violation of Mont. Code Ann. § 45-5-208. Only the remaining valid charges should have gone to the jury. *See, State v. Newrobe*, 2021 MT 105, ¶¶ 15-16, __ Mont. __, __ P.3d __.

B. The State should have not been allowed to substantively amend the Information during trial.

After dismissing Count I, the judge sought to "correct the wrong" caused by the State's charging failure. However, this fatal flaw was not something that could be fixed without substantive changes to the Information. Amendments to the substance of an Information, however, must be filed not less than five days ***before*** trial. Mont. Code Ann. § 46-11-205(1):

> **46-11-205. Amending information as to substance or form.**
> (1) The court may allow an information to be amended in matters of substance at any time, but not less than 5 days before trial, provided that a motion is filed in a timely manner, states the nature of the proposed amendment, and is accompanied by an affidavit stating facts that show the existence of probable cause to support the charge as amended. A copy of the proposed amended information must be included with the motion to amend the information.
> (2) If the court grants leave to amend the information, the defendant must be arraigned on the amended information without unreasonable delay and must be given a reasonable period of time to prepare for trial on the amended information.
> (3) The court may permit an information to be amended as to form at any time before a verdict or finding is issued if no additional or different offense is charged and if the substantial rights of the defendant are not prejudiced.

The substantive amendment to the Information violated the five-day rule because it was filed after the State had completed its case-in-chief.

Moreover, the amendment charged a different offense forcing the defense to alter its trial strategy and impermissibly changing the essential consent element.

C. The amendment was not timely.

Of course, the State's proposed amendment in this case was not filed in a timely manner. In fact, the amendment would not have been filed at all, but for the judge pointing out the fatal flaw with the Agg. SIWOC charge. (*Compare,* Tr. at 615-16 to *Newrobe, ¶5.*) The State scrambled to file its request to amend the Information before its last witness testified. Even after the State had closed its case, the judge court had to hand delineate additional changes to remove the bodily injury elements under Mont. Code Ann. § 45-5-503(3)(a). (D.C. Doc. 53.) These changes came too late, derailed Toston's defense strategy and created serious problems in how the jury was instructed about the essential SIWOC elements.

D. The amendment made substantive changes.

The judge had to do so because of the multiple ways including bodily injury substantively changed the offense: "So it's difficult for me to say that that is a form of change and not a substantive change with

respect to 503(3)(a), and that's – in the most recent case of *State v. Hardground*, 2019 MT 14, 394-104 - - excuse me – 394 Mont. 104, and that's at paragraph 11." (Tr. at 441.) Similarly, the Court rejected the argument that the change was one of incorporating a lesser included offense, because the Agg. SIWOC charge was invalid and there could be no lesser offense to an invalid charge. (Tr. at 450-51).

The State then had to thread the needle to convince the judge the trial amendment was only one of mere form. An amendment to the Information less than five-days before trial is only permissible when (1) the amendment applies to matters of form not substance, and (2) the amendment does not prejudice the substantial rights of the defendant. *Hardground*, ¶ 9, *citing State v. Hallam*, 175 Mont. 492, 500, 575 P.2d 55, 60–61 (1978) and *State v. Brown*, 172 Mont. 41, 45, 560 P.2d 533, 535 (1976). To differentiate amendments of form and substance, this Court examines whether the amendment alters the nature of the offense, the essential elements of the crime, the proofs or the defenses. *City of Red Lodge v. Kennedy*, 2002 MT 89, ¶ 14, 309 Mont. 330, 46 P.3d 602.

1. The amendment altered the defense strategy.

The judge asked how Toston would be prejudiced by changing the charge to Mont. Code Ann. § 45-5-503(1). Defense counsel's answer was simple: "Because he was charged with an invalid law and I knew it." (Tr. at457.) The defense had planned to dismiss the Agg. SIWOC charge at the end of the State's case. (Tr. at 457.) As this Court has recently recognized, allowing the State to amend charges when it would be unable to meet the legal requirements of the charge creates an obvious tactical advantage over the accused. *Newrobe*, ¶ 15 *citing State v. Carney*, 219 Mont. 412, 417, 714 P.2d 532, 535 (1986). In Newrobe, the defendant would have been acquitted of the original charge because State could not prove the familial descendant element of the Incest offense before the judge declared a mistrial and the State was allowed to amend the charge to sexual intercourse without consent. Here, the State would not have been able to prove the Agg. SIWOC charge because none of the alleged conduct occurred before the Mont. Code Ann. § 45-5-208 effective date. In both cases, counsel made a clear and concise objection about how, when the State's was nearly complete, the State would not be able to prove its case. *Newrobe*, ¶ 15. The State

tried to play off its fatal error in Toston's case as one of mere "inattention to detail." (Tr. at 453). But, there can be no dispute that amending the Information impacted Toston's legitimate defense strategy to seek a trial dismissal a fatally flawed charge.

The defense then had to pivot after the State had finished its case. Even if the jury had been properly instructed under the different elements contained in the 2015 version of Mont. Code Ann. § 45-5-503(1), the change to a different offense was substantial:

> **45-5-503. Sexual intercourse without consent.**
> (1) A person who knowingly has sexual intercourse with another person without consent or with another person who is incapable of consent commits the offense of sexual intercourse without consent.

While the basics of the amended charge seemed similar to what Toston was originally charged on May 25, 2018, the way the charge was instructed radically changed the available defenses. Defense counsel no doubt agreed to the incorrect definition in the ensuing confusion caused by the amendment. All of which is to say, the amendment had substantive effects on Toston's defense.

2. The amendment altered the essential consent element.

The State argued, and the judge agreed, that the essential elements of the charged crime would remain the same if the Agg. SIWOC charge was amended to SIWOC under Mont. Code Ann. § 45-5-503(1). (Tr. at 446-47.) They were wrong because the consent element was radically different after the amendment. As will be discussed more thoroughly in the next argument, the jury was instructed on the 2017 definition of consent found in Mont. Code Ann. § 45-5-501(1)(a)(i-iii)(2017) requiring affirmative consent to sex rather than the more stringent force requirement in the 2015 definition of consent found in Mont. Code Ann. § 45-5-501(1)(a)(i)(2015). (D.C. Doc 24 at Court's Instruction No. 22.) Even more bizarre, the State submitted and the judge instructed the jury that S.S. could be incapable of consent if she was overcome by deception, coercion, or surprise under Mont. Code Ann. § 46-11-205(2017). (D.C. Doc. 24 at Court's Instruction No. 23.) Sexual intercourse without consent has many different variations in the way it can be charged, especially when it comes to the essential consent element. Through five different versions of the SIWOC charge the State never before alleged S.S. was incapable of consent. It has to be

considered a substantive change when after the amendment the State no longer had to prove the use of force and the jury could consider the little used deception, coercion and surprise consent factor. Since the amendment to the Information was substantive, the State violated Mont. Code Ann. § 46-11-205, and his resulting conviction must be reversed and remanded. *Kennedy*, ¶ 17.

II. Instructing the jury on the more expansive 2017 definition of consent removed the State's burden to prove the essential 2015 requirement that the defendant used force to compel sexual intercourse.

The judge identified the State's error in charging Toston with an offense that did not become effective until October of 2017. However, in the confusion of modifying the jury instructions at the last minute, all the parties missed the equally problematic decision to instruct the jury with the 2017 definition of consent. Doing so relieved the State of its duty to prove every essential element of the 2015 SIWOC charge. This Court may review unpreserved plain errors that implicate fundamental rights and call into question the fundamental fairness of the proceedings, the public reputation of the judicial process, or that suggest a miscarriage of justice. *State v. Price*, 2002 MT 284, ¶ 23, 312 Mont. 458, 59 P.3d 1122.

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). It is "the State's duty in a criminal prosecution to prove beyond a reasonable doubt every element of the crime charged." *State v. Clark*, 1998 MT 221, ¶ 29, 290 Mont. 479, 964 P.2d 766 (*citing* Mont. Const. art. II, § 17). In *Price*, this Court determined that a possible *ex post facto* violation meets the standards for reversal under plain error review. This Court found "no question that ex post facto application of the law . . . violates [a defendant's] fundamental constitutional rights." *Price*, ¶ 24. Also, that a defendant may be convicted for conduct occurring before a charged offense's enactment "brings into question the fundamental fairness of [the] trial." *Price*, ¶ 25. Because "Price's fundamental constitutional right to be free from ex post facto application of the law was violated," this Court reversed Price's conviction under plain error review. *Price*, ¶ 30. "The principle underlying plain error review is to correct error not objected to at trial but that affects the fairness, integrity, and public reputation of judicial proceedings." *Akers*, ¶ 20; *see also Carnes*, ¶ 13.

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

In *State v. Resh*, 2019 MT 220, 397 Mont. 254, 448 P.3d 1100, the defendant was charged with sexually assaulting his step-daughter and having sexual intercourse with her in March of 2014. *Resh*, ¶¶ 1-2. In 2014, the sexual assault statute defined fourteen-years-old as the age of consent. The statute was amended in 2017 to apply the sixteen-year-old age of consent to sexual assault, sexual intercourse without consent, and aggravated sexual intercourse without consent. *Resh*,¶ 11 *citing* 2017 Mont. Laws ch. 279, § 2. Just like *Zerbst*, the parties failed to recognize the 2017 Legislative changes. The district court instructed

the jury on the 2017 sixteen-year-old sexual assault consent definition. *Resh*, ¶ 12. This Court held the instruction misstated an element of the applicable sexual assault charge.

Resh, ¶ 17.

A district court violates due process when it instructs the jury on law not yet in existence that removes an essential element needed to convict the defendant. *Zerbst*, ¶¶ 15, 24-25. In *Zerbst*, the municipal court instructed the jury on the 2017 definition of consent, which became effective in October, but the crime occurred in July. *Zerbst*, ¶¶ 2, 6, 18. Under the old law for Sexual Assault, "without consent" was proved by its ordinary meaning. *Zerbst*, ¶ 17. This Court held that using the 2017 consent definition was "an incorrect definition of consent under the law applicable to this case" and reversed. *Zerbst*, ¶¶ 24-25, 39.

Following *Resh* and *Zerbst*, Toston's case represents a continuing pattern of the State ignoring the major 2017 legislative changes to sexual crimes. Under the law in effect when S.S. alleged Toston sexually accosted her in 2015, "without consent," meant "the victim is compelled to submit by force against the victim or another." Mont. Code

Ann. § 45-5-501(1)(a) (2013). As part of extensive changes to the offenses involving sex crimes, the 2017 Legislature replaced this language with a new definition of consent, which now means "words or overt actions indicating a freely given agreement to have sexual intercourse or sexual contact." Mont. Code Ann. § 45-5-501(1)(a) (2017). This is a different definition than the older law that changes the meaning of consent and requires the weighing of different interests. *See Zerbst*, ¶¶ 18, 37. When the jury was told consent meant a freely given agreement for sex through words or actions instead of meaning a victim compelled to submit by force, the instruction "foreclosed the jury's consideration of a potentially favorable element for the defense." *Resh*, ¶ 17.

The erroneous jury instructions prejudiced Toston because consent is an essential element to the crime of SIWOC and the State was not required to prove the controlling definition of consent beyond a reasonable doubt. *See Zerbst*, ¶ 37. Without the "compelled to submit by force" element, the State prosecuted Toston for a different crime.

As opposed to 2015, the crime of SIWOC as it exists today is a different crime prohibiting a different kind of sexual behavior. With the

jury struggling to reach a unanimous verdict on the SIWOC charge, the 2017 definition left unsettled the fundamental fairness of Toston's proceeding. The 2017 consent instructions foreclosed the jury's consideration of more stringent force requirement and relieved the State of its burden to prove the 2015 definition of consent beyond a reasonable doubt. *See, Resh*, ¶ 17, *Zerbst*, ¶¶ 27-28, 37.

The prejudice incurred by a defendant subject to an improper consent instruction is not erased by counsel's failure to challenge the issue of consent at trial. *Resh*, ¶¶ 9, 18-20. Defense counsel did not discuss consent during its closing. *Resh*, ¶ 9. This Court focused on the incorrect jury instructions and how the State used the law not in effect to argue for Resh's conviction. This Court held prejudice was apparent. *Resh*, ¶¶ 19-20. When the jury is instructed on incomplete, inaccurate, and inapplicable law it relieves the State of its obligation to prove each correct element of the offense. *Zerbst*, ¶¶ 30-34. Same as here, in *Zerbst*, the trial court instructed the jury on the 2017 definition of consent for a crime where the 2015 definition applied. *Zerbst*, ¶¶ 6, 12. The Court reversed, finding prejudice from the improper instruction undermined the prosecutor's burden to prove each element beyond a

reasonable doubt. *Zerbst*, ¶ 38. Even without defense counsel's objection, the State should not have benefited again from instructing the jury about the more expansive 2017 definition of consent.

CONCLUSION

Prosecutors exercise exclusive domain and have immense discretion in making charging decisions. *State v. Passmore*, 2010 MT 34, ¶ 46, 355 Mont. 187, 225 P.3d 1229. With this great power comes the equally great responsibility to recognize significant legislative changes and apply the law in effect at the time of the alleged offense. As in *Resh* and *Zerbst*, the prosecutors in Toston's case joined the growing list of prosecutors who did not track the 2017 overhaul of Montana's sex crime statutes. In an attempt to salvage the prosecutors' mistakes, the judge improperly allowed the State to amend the Information during trial and then used the wrong consent definition to instruct the jury on the new SIWOC charge. Toston's conviction under Count I of the Third Amended Information must be reversed and remanded back to the district court.

Respectfully submitted this 12th day of May, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 5061, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Chad Wright
CHAD WRIGHT

APPENDIX

CERTIFICATE OF SERVICE

I, Chad M. Wright, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 05-12-2021:

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Dated: 05-12-2021