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 APPELLEE

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

APPEARANCES:

AUSTIN KNUDSEN
Montana Attorney General
KATIE F. SCHULZ
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
Fax: 406-444-3549
kschulz@mt.gov

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

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

ATTORNEY FOR DEFENDANT
AND APPELLANT

LEO GALLAGHER
Lewis and Clark County Attorney
KATIE JERSTAD
Deputy County Attorney
Courthouse – 228 Broadway
Helena, MT 59601

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STATEMENT OF THE ISSUES

Whether the district court erred when it allowed the State to amend the information as to form during the trial.

Whether plain error review is warranted to consider the appropriateness of the jury instructions, and, if so, whether the jury was fully and fairly instructed on the law.

STATEMENT OF THE CASE

Toston Gray LaFournaise forcibly raped 13-year-old S.S. in the fall of 2015. (Docs. 2, 30, 49; 4/18/19 Tr. and 4/19/19 Tr. (hereinafter, Tr.).) LaFournaise was charged with Count I, sexual intercourse without consent in violation of § 45-5-503(1) MCA, Count II, misdemeanor privacy in communications, and Count III, misdemeanor stalking. (Docs. 1-4.) The First Amended Information added felony tampering with witnesses, and the Second Amended Information changed Count I to aggravated sexual intercourse without consent in violation of § 45-5-508, MCA (2017). (Docs. 29-32, 36-39.)

At the beginning of the second day of trial, the court noted that aggravated sexual intercourse without consent did not become effective until October 2017. (Tr. at 315.) Following briefing and arguments, the State was granted leave to file a Third Amended Information as to form by amending Count I from aggravated

sexual intercourse without consent to the lesser-included offense of sexual intercourse without consent. (Docs. 48-49, 52-53; Tr. at 322-35, 404-05, 432-68.)

LaFournaise did not submit any proposed jury instructions and did not oppose the State's proposed instructions relative to the issue of "consent." (*See* Tr. at 406-09, 421, 426; Docs. 38, 54.) The jury found LaFournaise guilty of all four counts. (Tr. at 615-18; Docs. 55, 77.)

The district court sentenced LaFournaise as follows: for Count I, a 16-year commitment to Montana State Prison (MSP); for Count II, a 4-year consecutive commitment to MSP; for Count III, 6 months in jail, concurrent to Counts I and II; and for Count IV, 1 year in jail, concurrent to Counts I, II, and III. (05/29/19 Tr.; Doc. 77.) The court ordered that LaFournaise's sentence would run consecutive to the sentence he received for sexual intercourse without consent that he committed while at Pine Hills. (*Id*.) The court designated LaFournaise as a Tier III sex offender and ordered that he would be ineligible for parole until he completed Phases I and II of Sex Offender Treatment at MSP. (*Id*.)

STATEMENT OF THE FACTS

LaFournaise began sexually harassing S.S. when she started sixth grade at East Helena Valley Middle School (EHVMS) in 2013. (Tr. at 204-259, 300-14.) LaFournaise, who was a year ahead of S.S. in school, left her notes, pushed her

against the locker and kissed her, and grabbed her buttocks. (*Id*.) S.S. told him to stop and tried to just walk away, but his harassment persisted and made S.S. "sick to [her] stomach, scared, and very anxious." (*Id*.) S.S. made four formal complaints to the school and her parents met with school administrators. (*Id*.) Although her reports resulted in LaFournaise receiving two out-of-school suspensions and one in-school suspension, LaFournaise's behaviors did not change. (*Id*.) S.S. recalled LaFournaise leaving a note on her locker even after he went to Helena High as a freshman. (*Id*.) As a result of LaFournaise's unwelcome advances, S.S. developed depression and anxiety and engaged in self-harming behaviors. (*Id*.)

In the early fall of 2015, when 13-year-old S.S. was walking home from volleyball practice at EHVMS, LaFournaise suddenly rode up on his bicycle, quickly jumped off, and grabbed S.S. from behind. (Doc. 2; Tr. at 206-59.) LaFournaise pushed S.S. down and told her he was going to hurt her. (*Id*.) S.S. screamed for him to get off her, but LaFournaise repeatedly told her, "You need to be quiet." (*Id*.) LaFournaise pinned S.S.'s hands/arms above her head with his left hand and pulled her shorts down with his right hand. (*Id*.) LaFournaise took down his own shorts and positioned his knees between S.S.'s legs and inserted his penis in her vagina. (*Id*.) After he raped her, LaFournaise cut S.S.'s left thigh with a knife and warned her that, "If you tell anyone, I'll kill you." (*Id*.) S.S. eventually

managed to knee LaFournaise off her and she pulled up her shorts and ran home. (*Id*.) S.S. experienced a burning pain during the rape and suffered vaginal bleeding for at least a day after the assault. (*Id*.) S.S. did not report the rape because she believed LaFournaise would kill her if she did. (*Id*.)

Although S.S. never gave LaFournaise her phone number, during the summer of 2016, LaFournaise repeatedly called S.S. (Tr. at 234-59, 369-70; Tr. Exs. 7, 8.) His calls made S.S. sick to her stomach, and she blocked his number on her phone. (*Id*.) S.S. chose to attend Jefferson County High School (Jefferson) so she could avoid LaFournaise, but told her mother it was because she wanted to be at a smaller school. (Tr. at 368-69.)

Joseph Michaud, a counselor at Jefferson, explained that at the start of school, S.S. received very good grades, but over the next year, her academic performance declined significantly. (Tr. at 267-99; 370-71.) S.S. did very poorly socially, and Michaud described her as very withdrawn. (*Id*.) S.S. also saw the school therapist several times a day. (*Id*.)

On March 1, 2017, while she was having lunch at school, LaFournaise called S.S. and she answered because, unbeknownst to S.S., her new cell phone had not kept LaFournaise's number blocked. (Tr. at 223-75; Tr. Ex. 6.) LaFournaise told S.S. that he planned to rape her again and this time, he said he would impregnate her. (*Id*.) LaFournaise further warned S.S. that he now knew where to find her.

(*Id*.) S.S. was terrified by the call and ran to Michaud's office exclaiming, "He's found me. He knows where I am." (*Id*., 278-82.) Michaud explained the event stuck out in his memory because of how frantic and fearful S.S. was and her elevated tone of voice. (*Id*.) Michaud explained that after this incident, S.S. remained distraught, and he descried her as "wounded." (*Id*.)

S.S. told her parents about LaFournaise's call, but omitted the detail that he planned to rape her "again." (Tr. at 223-75; 375-87.) After school, S.S. and her parents met with Lewis and Clark County Sheriff Deputy Uriah Wood who gave them paperwork to apply for an order of protection. (*Id*.; 183-200.) Deputy Wood tried to contact LaFournaise by phone and in person to advise him to stop calling S.S., but he never reached him. (*Id*.) Later that evening, LaFournaise called S.S. again, but when she confronted him, he claimed he called the wrong number. (Tr. at 225-65; Tr. Exs. 4, 6.) S.S. remained upset all evening and her mother recalled having to sleep next to her to help calm her down. (Tr. at 378-79.)

The next day, S.S. told her school counselor about LaFournaise raping her a year and half ago. (Tr. at 265-300, 358-87.) S.S. also told her parents what had happened, including that LaFournaise had used a knife to cut her. (*Id*.) When she was forensically interviewed a few days later, S.S. was nervous and scared and she did not remember to tell the interviewer about the knife or threats LaFournaise

made because she wanted to get the interview over with and had tried to push the rape out of her memory. (Tr. at 222-23.)

Dr. Callie Riggin, S.S.'s pediatrician, performed a sexual assault exam on S.S. in April 2017. (Tr. at 336-58.) Dr. Riggin explained that S.S.'s exam was "normal" which is what she would expect given the amount of time since the rape and given the healing properties of the female genitalia. (*Id*.) The doctor did note a "well-healed scar" on S.S.'s left thigh which was consistent with S.S.'s report that LaFournaise had cut her with a knife when he threatened to kill her if she told anyone about the rape. (*Id*.) Dr. Riggin testified that S.S.'s report about vaginal bleeding after being raped was consistent with a traumatic sexual assault. (*Id*.)

On May 24, 2018, LaFournaise was charged with Count I, sexual intercourse without consent (pursuant to § 45-5-501(1), MCA), Count II, misdemeanor privacy in communications, and Count III, misdemeanor stalking. (Docs. 1-4.) Although LaFournaise was under 18 years old when he raped S.S., the information was filed directly into district court pursuant to § 41-5-206(3), MCA.

In February 2019, the State filed a First Amended Information charging LaFournaise with the following: Count I, sexual intercourse without consent (pursuant to §§ 45-5-503(1) and (3)(a) (enhanced penalty for inflicting bodily injury), MCA); Count II, felony witness tampering; Count III, privacy in

communications; and Count IV, misdemeanor stalking. (Docs. 29-32.) Before LaFournaise was arraigned on the First Amended Information, the State filed a Second Amended Information wherein it amended only Count I, changing it to aggravated sexual intercourse without consent in violation of § 45-5-508, MCA. (Docs. 36-39.)

During a hearing five days before the trial, LaFournaise's counsel, Randi Hood, confirmed she had not filed any proposed instructions and would rely upon the State's instructions. (03/13/19 Tr. at 74.) Hood also advised the court that in light of the Second Amended Information that charged aggravated sexual intercourse without consent, she planned to offer a lesser included instruction. (*Id*.)

At the close of testimony on the first day of trial, the district court addressed the parties, explaining it "anticipated a motion for directed verdict at the close of the State's case-in-chief," and then noted that the effective date of aggravated sexual intercourse without consent (§ 45-5-508 MCA) was October 1, 2107, and that S.S. testified she was raped in 2015. (Tr. at 315-16.) The court requested the parties address the issue when they reconvened. (*Id*.)

The next morning, the State filed a Motion for Order Allowing Third Amendment of Information <u>as to Form</u> as well as a Bench Brief. (Docs. 48-49, 52 (emphasis in original).) The State sought to amend Count I back to how it

appeared in the First Amended Information: sexual intercourse without consent in violation of §§ 45-5-503(1) and (3)(a) (enhanced penalty if bodily injury inflicted), MCA. (*Id*.) In its brief and oral argument to the court, the State pointed out that amending an information to charge a lesser-included offense was not a substantive change and did not prejudice LaFournaise since it was not a "different offense" or based on any new facts/evidence/witnesses. (*Id*.; Tr. at 322-35, 404-05, 432-34, 439-68.)

LaFournaise opposed the State's motion. (Tr. at 322-35, 404-05, 432-34, 439-68.) LaFournaise did not make any motions to dismiss Count I and offered only a general comment about how the ability to defend against Count I would be impacted if the charge was amended to the lesser-included offense. (*Id*. at 333-34 (*i.e*., "structured our defense" based on aggravated sexual intercourse without consent; if allowed to amend it would have "some impact on the way we would have proceeded")). Ultimately, LaFournaise's only argument in opposition was his claim that Hood had planned to move for a directed verdict on Count I and that it was a different statute number. (*Id*.) However, even though Hood stated the proposed amendment was a "totally different charge," when quizzed by the court, Hood agreed that the essential elements between the two offenses were the same except the use of force. (*Id*. at 456-59.)

Following argument from the parties, the trial court granted the motion allowing the State to amend Count I to sexual intercourse without consent, reasoning that the "essential elements of sexual intercourse without consent are the same without the use of force in aggravated sexual assault without consent." (Tr. at 446; Doc. 53.) The court explained that the "elements of the crime and the proof required remain the same," and that LaFournaise "has been informed of that charge all throughout this proceeding." (*Id*. at 464.)

However, the court would not allow the State to charge the aggravating factor of "bodily injury" pursuant to § 45-5-503(3)(a), MCA, "because the proof that was adduced in the testimony would establish bodily injury well above and beyond that anticipated by the defense" with the "use of force" element of aggravated sexual intercourse without consent. (Tr. at 446, 466-67.) The court believed that LaFournaise would be prejudiced if the facts he had to defend changed from "force to bodily injury." (*Id*. at 441.) Because the court determined the State could not charge aggravated sexual intercourse without consent, it ruled the State's related jury instructions, including the definition of force, could not be given so the State withdrew the proposed instruction. (Tr. at 426-28.)

Upon LaFournaise's request, and following open-court discussions, the court added Jury Instruction No. 48 (hereinafter, JI-48) as a "curative" instruction prohibiting consideration of evidence involving the knife and bodily injury during

the sexual intercourse without consent. (*Id*. at 538-44, 568; Doc. 54, JI-48.)[1] Neither the instruction, nor the court's ruling, precluded the State from referring to the knife and accompanying threat in relation to Count II. (*Id*.)

Prior to LaFournaise's testimony, the court read the amended Jury Instruction No. 4 advising the jury that LaFournaise was charged with: Count I, sexual intercourse without consent; Count II, tampering with witnesses; Count III, privacy in communications; and Count IV, stalking. (Tr. at 509-10.) LaFournaise admitted to the jury that he had harassed S.S. in school because he had a crush on her. (*Id*. at 513-45.) LaFournaise also admitted that despite the fact she told him not to call her, he repeatedly called S.S. in 2016 and March of 2017, but claimed his calls were all benign in content. (*Id*.) LaFournaise professed that he had never been back to EHVMS after graduating eighth grade and added that he lived 25 miles from East Helena and only had a bicycle. (*Id*.) Thus, LaFournaise asserted, he could not have raped S.S. because it would be too far for him to travel. (*Id*.) The defense theory that since LaFournaise did not have transportation he could not have raped S.S. was consistent from the opening statements to closing arguments. (*Id*. at 180, 590-91.)

[1] JI-48 instructed that: "During your deliberations on Count I – Sexual Intercourse Without Consent, you may not consider any evidence, arguments, or comments relating to injuries including physical injury or cuts or the use of a knife."

STANDARD OF REVIEW

This Court reviews a district court's decision to allow the State to amend an information for an abuse of discretion. *State v. Hardground*, 2019 MT 14, ¶ 7, 394 Mont. 104, 433 P.3d 711. "A district court abuses its discretion when it acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason resulting in substantial injustice." *Hardground*, ¶ 7.

A district court has broad discretion in formulating jury instructions, and this Court will not reverse on the basis of its instructions absent an abuse of discretion that prejudicially affects a defendant's substantial rights. *State v. Daniels*, 2019 MT 214, ¶ 26, 397 Mont. 204, 448 P.3d 511. This Court reviews claims of instructional error "in criminal cases to determine whether the jury instructions, as a whole, fully and fairly instruct the jury on the law applicable to the case." *Id.*

This Court generally "will not consider issues raised for the first time on appeal when the appellant had the opportunity to make an objection at trial." *Daniels*, ¶ 24; § 46-20-104, MCA (failure to make timely objection during trial constitutes waiver of issue for appeal).

SUMMARY OF THE ARGUMENT

Whether LaFournaise was subjected to an *ex post facto* law is not the issue presented. The issue is whether the district court abused its discretion when it

allowed the State to amend Count I to a lesser-included offense. Montana Code Annotated § 46-11-205 contemplates the State being able to amend a charge based on events that unfold during trial so long as the defendant is not prejudiced. Amending Count I to a lesser included-offense was a change in form, not substance as the amendment did not accuse LaFournaise of an "additional" or "different" offense and his substantial rights were not prejudiced.

The record here unequivocally establishes that LaFournaise knew he was bring tried for sexual intercourse without consent. LaFournaise's defense was that he could not have been physically present in East Helena when S.S. was raped or threatened with a knife. Therefore, his defense was not impacted whether he was charged with aggravated sexual intercourse without consent or the lesser-included offense of sexual intercourse without consent. LaFournaise did not have a constitutional right to lay in wait in hopes of an acquittal from a motion for a directed verdict. The trial court correctly brought the issue to the parties' attention to ensure that both sides received a fair trial.

Following a thoughtful and thorough process of evaluating whether the proposed amendment added or changed the essential elements or impacted LaFournaise's defense, the district court did not "act arbitrarily without the employment of conscientious judgment or exceed the bounds of reason resulting in substantial injustice" when it allowed the State to charge LaFournaise with

sexual intercourse without consent and precluded the State from asserting the aggravating factor of "bodily injury."

The district court did not commit plain error when it instructed the jury on the issue of "consent." The State was not relieved of its obligation to prove without consent. Nor was that duty reduced because of the jury instructions. LaFournaise is incorrect that the only way for the State to prove without consent was to establish use of force. The State's proposed jury instructions included two theories of without consent: S.S. was incapable of consent and that LaFournaise physically forced her to have sexual intercourse. Although the district court did not give the use of force instruction, it correctly gave the incapable of consent instruction.

It was not reversible error to give Jury Instruction No. 22 since that instruction essentially set forth the ordinary meaning of without consent. LaFournaise's defense had nothing to do with S.S.'s consent. LaFournaise cannot establish how his fundamental rights were implicated or that failure to consider this unpreserved argument will result in a manifest miscarriage of justice, leave unsettled the fundamental fairness of the trial, or compromise the integrity of the judicial process. Under the circumstances presented, the district court did not commit plain error or abuse its discretion when it instructed the jury.

ARGUMENT

I. The district court did not abuse its discretion when it permitted the State to amend Count I to a lesser-included offense.

"An information must reasonably apprise the accused of the charges against him, so that he may have the opportunity to prepare and present his defense." *City of Red Lodge v. Kennedy*, 2002 MT 89, ¶ 10, 309 Mont. 330, 46 P.3d 602; *Hardground*, ¶ 9. An information may be amended with leave of the district court under the parameters set forth at § 46-11-205, MCA. If the proposed amended charge is one of substance, it must be done more than five days before trial. § 46-11-205(1), MCA. However, an information or complaint may be "amended as to form at any time before a verdict . . . if no additional or different offense is charged and if the substantial rights of the defendant are not prejudiced." § 46-11-205(3), MCA.

"To differentiate amendments of form and substance, [this Court] examine[s] whether an amendment to an information or complaint alters the nature of the offense, the essential elements of the crime, the proofs or the defenses." *Kennedy*, ¶ 14. "An amendment is one of form when the same crime is charged, the elements of the crime and the proof required remain the same and the defendant is informed of the charges against him." *Kennedy*, ¶ 11.

The amended charge at issue here met all the *Kennedy* factors establishing it was a change in form, not substance. The nature of the offense remained sexual

intercourse without consent. The essential elements of the offense and required proof were identical, with the only change being deletion of the "use of force" element. LaFournaise was fully cognizant of the fact he was on trial for having sexual intercourse with S.S. without her consent from the very beginning of the case. LaFournaise's arguments on appeal are unavailing and he has not established that the district court abused its discretion when it permitted the State to file an amended information as to form.

First, LaFournaise's claim that the amendment was "not filed in a timely manner" is unavailing. (Opening Brief (Br.) at 13.) A district court may permit an amendment "*any time* before a verdict" if the defendant's substantial rights are not impacted. § 46-11-205(3), MCA (emphasis added).

Second, LaFournaise failed to establish how he was prejudiced by the amendment. On appeal, LaFournaise simply recites the district court's initial thoughts on the State's motion to amend, but fails to include the court's extensive process of evaluating the effect of the proposed amendment and its evolving analysis that led to its correct determination that the proposed amendment was not substantive. Ultimately, the district court properly considered whether the elements/nature of the offense was altered by the amendment, not whether a different statutory provision was cited.

Third, LaFournaise offers no useful explanation to this Court about how the amendment allegedly impacted his ability to present a defense. *See State v. Sheffer*, 2010 MT 73, ¶ 40, 355 Mont. 523, 230 P.3d 462 (appellant "proffer[ed] nothing concrete in support of [the] bald assertions" about how the amendment impacted his ability to present a defense). Instead, and just as he did at trial, LaFournaise alleges only general comments, claiming that the amendment "derailed [his] defense strategy" and "radically changed the available defenses" with no specific explanation or alleged facts related to his defense strategy. (Br. at 13, 16.)

Notably, from the opening arguments to closing remarks, the only element LaFournaise sought to counter was the identification of S.S.'s rapist and his defense was that he did not have the means to travel to East Helena the day S.S. was raped and therefore could not have been the assailant. *See* Tr. at 180 (arguing that he was accused of "coming over without any transportation from Helena High to East Helena and sneaking up on her and raping her"). LaFournaise did not assert that he encountered S.S. that day at the school and that she lied about him assaulting her. Nor did LaFournaise assert that S.S. had consented to some form of physical contact that she then later turned into unwanted sexual contact.

LaFournaise's defense was not based on the "use of force" element in aggravated sexual intercourse without consent. Thus, his defense was unaffected

by allowing the State to charge him with the lesser-included offense of sexual intercourse without consent. LaFournaise's substantial rights were not prejudiced. Moreover, LaFournaise's claim that the amendment "created serious problems with how the jury was instructed" and thus "altered the essential consent element" is unavailing (as described below at Section II).

LaFournaise claims that by permitting the State to amend, the court allowed a "new" theory of "without consent"—when a person is incapable of consent. (Br. at 17.) This argument is unsupported. The State submitted jury instructions on March 4, 2019, two weeks before the trial. (Doc. 38.) Included in those instructions was proposed jury instruction No. 16 ("A person who is incapable of consent means a person who is overcome by deception, coercion, or surprise.") LaFournaise was on notice that the State intended to prove the element of without consent for aggravated assault by either "use of force" or "person incapable of consent." Allowing the State to amend to the lesser-included offense did not introduce a "new" theory of without consent.

LaFournaise was afforded fundamentally fair procedures and his opportunity to prepare and present a defense was not impaired because, at all times, he was "reasonably apprise[d]" . . . of the charges against him." *Kennedy*, ¶ 10. *See also, Sheffer*, ¶ 39 (alleged facts underlying charge remained the same in amended information); *State v. Romero*, 279 Mont. 58, 77-78, 926 P.2d 717, 729-30 (1996)

(where the facts, circumstances, and acts for which the defendant is charged are set forth with sufficient certainty to constitute an offense, an erroneous statutory reference or offense name will not invalidate a charge; amendment to correct the citations is permissible).

This case is not like any of the cases cited by LaFournaise on appeal. (Br. at 14.) In those cases, new or different subsections to the original offense were amended/added which changed the essential elements of the original offense charged. Here, by removing only the "use of force" element, nothing was added to alter the nature, essential elements, or required proof of the offense charged.

In *Kennedy*, this Court determined that by citing the entire stalking statute in the amended information, and not a designated subsection as originally charged, the charging document improperly expanded the essential elements to create an additional or new offense. *Kennedy*, ¶¶ 15-16. *See also*, *State v. Brown*, 172 Mont. 41, 45, 560 P.2d 533, 535 (1976) (amending basis for an assault from causing bodily injury to creating reasonable apprehension of bodily injury changed the nature and substance of the charge); *State v. Hallam*, 175 Mont. 492, 500, 575 P.2d 55, 61 (1978) (substitution of one subsection of the arson statute for another by amendment constituted a change of substance because the essential element changed). Here, unlike *Kennedy*, *Hallam*, and *Brown*, the essential elements and nature of the charge—sexual intercourse without consent—remained constant.

The district court correctly determined it was the nature of the charge that was dispositive; not whether a different statutory provision was used.

Nor is this situation akin to *Hardground* where the amended information changed the alleged date of the offense from December 19, 2013, to August 5, 2014. *Hardground, supra*. Hardground was charged with failing to provide notice of change of residence in violation of the Sexual and Violent Offender Registry statutes. *Hardground*, ¶ 3. Since the time period that a person must file notice of a change in residence contains a three-day window, amending the date of the offense by eight months altered an element of the offense charged (*e.g*., evidence of conduct/lack of conduct on a specific date) and applicable defenses; therefore, the amendment was substantive. *Hardground*, ¶ 17.

Here, by allowing the State to charge LaFournaise with the lesser-included offense of sexual intercourse without consent, the court effectively eliminated the only element that was different between the two offenses ("use of force"). It did not, as happened in *Hardground*, alter the nature of the charge and available defenses.

LaFournaise asserts that the State should not have been allowed to amend the charge because he was hoping to move for a directed verdict. However, LaFournaise cites no authority that he had a constitutional right to present a

"gotcha defense." Moreover, while Hood claimed at trial she was aware of the "invalid" charge, at a hearing five days before trial Hood told the court she intended to ask for a lesser-included jury instruction, thus indicating she was preparing a defense for sexual intercourse without consent.

Finally, contrary to LaFournaise's argument, *State v. Newrobe*, 2021 MT 105, 404 Mont. 135, 485 P.3d 1240, is not applicable here. In *Newrobe*, this Court held that after a mistrial was declared in an incest case, the State was barred from prosecuting the defendant at a new trial using an amended information that charged sexual intercourse without consent. *Newrobe* does not apply here given the issue presented on appeal (mistrial vs. amended information) and because the original offense at issue in *Newrobe* was factually inapplicable as opposed to legally inapplicable under *ex post facto* principles as is the case here.

In *Newrobe*, the original charging instrument was defective because the victim, Newrobe's 16-year-old niece, was not a "descendent" as required to prove incest. *Newrobe*, ¶¶ 5, 7. Prior to the mistrial, the defense had argued that the State could not prove the incest charge because it was a factual impossibility to establish the required familial relationship between the victim and Newrobe to constitute incest. *Newrobe*, ¶ 15. After determining the district court should not have declared a mistrial, this Court observed in dicta that the court's error not only

gave the State a "tactical advantage over the accused," it also resulted in Newrobe being denied the opportunity for an acquittal since the State could not prove the elements of incest (*i.e.*, factual impossibility). *Newrobe*, ¶¶ 15-16.

In *Newrobe*, had the mistrial not been declared, the State would not have been able to prove incest because the familial relationship (uncle-niece) did not fit the requirement that the victim be a descendant of the offender. *Newrobe*, ¶ 17. Here, no such factual impossibility was present because the elements of sexual intercourse without consent were established by S.S.'s testimony.

In *Newrobe*, this Court reversed the conviction because the court improperly granted a mistrial, not because the court improperly allowed the State to amend the information prior to the verdict. *Newrobe* did not hold that a defendant has a constitutional right to an "opportunity for an acquittal" at the close of the State's case. Pursuant to § 46-11-205(3) MCA, the State is permitted, based on how events unfold during trial, to propose an amended information any time prior to the verdict as long as it does not prejudice the defendant.

Moreover, in *Newrobe* the defense asked the court to dismiss the incest charge in addition to declaring a mistrial. Here, LaFournaise opposed the motion to amend the information and did not move for a mistrial.

Additionally, unlike the situation here—where the State amended the charge to a lesser-included offense—in *Newrobe*, the charges at issue were not lesser-included offenses since each statute required poof of a distinct element that the other did not. *See State v. McQuiston*, 277 Mont. 397, 406-07, 922 P.2d 519, 525 (1996) (overruled in part on other grounds) (held, incest was not an "included offense" of sexual intercourse without consent because sexual intercourse without consent required a lack of consent and incest required only that the sexual relations be between the perpetrator and a related victim).

The record clearly shows the court's thoughtful process in determining that the proposed amendment was to form and not substance given that the essential elements did not change and LaFournaise's ability to present his defense was not substantially prejudiced. The district court did not "act arbitrarily without the employment of conscientious judgment or exceed the bounds of reason resulting in substantial injustice" when it allowed the State to charge LaFournaise with sexual intercourse without consent but precluded the State from asserting the aggravating factor of "bodily injury."

II. Plain error review is unwarranted as the jury instructions did not prejudicially affect LaFournaise's substantial rights.

A. Relevant additional facts

Prior to the close of the State's case and before it had ruled on the State's request to amend Count I, the court and parties settled jury instructions. (Tr. at 401-32.) During discussions, the court asked LaFournaise's position on several of the proposed instructions that may nonetheless apply if the State was allowed to charge the lesser-included offense, sexual intercourse without consent. (*Id*. at 406-07, 426.)[2] Hood agreed that those proposed instructions should be given if the State was allowed to amend Count I. (*Id*.) Before closing arguments, the court presented the parties with its revised jury instructions and LaFournaise offered no objections to any of the instructions. (*Id*. at 537-38.)

Relevant to the issue presented on appeal, for the offense of sexual intercourse without consent, the jury was given the following instructions:

> No. 22: As used in these instructions, the term "consent" means words or overt actions indicating a freely given agreement to have sexual intercourse or sexual contact.
>
> An expression of lack of consent through words or conduct means there is no consent or that consent has been withdrawn.
>
> A current or previous dating or social or sexual relationship by itself, or the manner of the dress of the person involved with the Defendant in the conduct at issue does not constitute consent.

[2] *See* Jury Instruction No. 20 (definition of sexual intercourse); No. 21 (defining female genital organs); No. 22 (consent defined); and No. 23 (person incapable of consent defined)).

> Lack of consent may be inferred based on all of the surrounding circumstances and must be considered in determining whether a person gave consent.
>
> No. 23: A "person who is incapable of consent" means a person who is overcome by deception, coercion, or surprise.

(Doc. 54, herein after JI-22 and JI-23, respectively.)

LaFournaise offered no objections to the jury instructions. Therefore, the only way this Court may consider LaFournaise's unpreserved claim that the district court abused its discretion by giving JI-22 is to invoke the plain error review doctrine.

B. Plain error review is unwarranted since JI-22 did not implicate LaFournaise's due process rights and failure to consider his argument will not result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial or proceedings, or compromise the integrity of the judicial process.

To reverse a decision for plain error, LaFournaise must "firmly convince" this Court that the claimed error implicated a fundamental right and that such a review is necessary. *Daniels*, ¶ 31; *State v. Akers*, 2017 MT 311, ¶ 10, 389 Mont. 531, 408 P.3d 142. Plain error review may be necessary if failing to review the claimed error at issue will: "(1) result in a manifest miscarriage of justice; (2) leave unsettled the question of the fundamental fairness of the trial or proceedings; or (3) compromise the integrity of the judicial process." *Daniels*, ¶ 30 (citation omitted). This doctrine of appellate review is implemented

"sparingly, on a case-by-case basis." *State v. Clemans*, 2018 MT 187, ¶ 20, 392 Mont. 214, 422 P.3d 1210.

LaFournaise is incorrect that JI-22 "*relieved* the State of its duty to prove every essential element" of Count I, thus implicating his fundamental right to a fair trial. (Br. at 18 (emphasis added).) Jury Instruction Nos. 18 and 19 explicitly instructed the jury that to convict LaFournaise of sexual intercourse without consent, "the State must prove the following elements [beyond a reasonable doubt]: (1) That the Defendant had sexual intercourse with S.S.; AND (2) That the act of sexual intercourse was without S.S.'s consent; AND (3) The Defendant acted knowingly." (Doc. 54 (emphasis in the original).)

The jury was fully aware that the State had to prove that S.S. had not consented to LaFournaise having intercourse with her. As this Court has repeatedly explained, juries are presumed to have followed instructions provided by the court. *State v. Sinz*, 2021 MT 163, ¶ 31, ___ Mont. ___, ___ P.3d ___. The instructions did not relieve the State of its obligation to prove that S.S. did not consent to LaFournaise having sexual intercourse with her.

Even if LaFournaise believes JI-22 *reduced* the State's burden of proof, his claim is unavailing. The crux of LaFournaise's argument mistakenly asserts that to prove sexual intercourse without consent, the only way the State could prove "without consent" was to establish force was used. (Br. at 21-22.) LaFournaise's

argument ignores JI-23 and the fact that when prosecuting the offense of sexual intercourse without consent that occurred before (and after 2017), the "without consent" definition is not limited to just the use of force in 2015 (s*ee* § 45-5-501(1)(a), MCA (2015).

Prior to 2017, when prosecuting sexual intercourse without consent, "without consent" meant either:

> (i) the victim is compelled to submit by force against the victim or another; or
>
> (ii) . . . the victim is incapable of consent because the victim is:
> (A) mentally disordered or incapacitated;
> (B) physically helpless;
> (C) overcome by deception, coercion, or surprise;
> (D) less than 16 years old;
> . . . .

§ 45-5-501(1)(a), MCA (2015).[3]

Jury Instruction No. 23 properly set forth the correct definition of a person who was incapable of consent pursuant to subsection (a)(ii)(C) (2015). The facts supported that S.S. was surprised by LaFournaise's attack and LaFournaise has not alleged error as to that instruction. LaFournaise has not established how his fundamental right to due process was implicated.

[3] The 2017 Legislature maintained these seven categories of persons who are "incapable of consent" and expanded them to apply to sexual offenses other than just sexual intercourse without consent. *See* § 45-5-501(1)(b)(i) through (vii), MCA (2017).

Even if giving JI-22, in addition to JI-23, implicated a fundamental right, under the facts of this case and considering the jury instructions as a whole, LaFournaise cannot demonstrate how JI-22 created a "manifest miscarriage of justice," left "unsettled the question of the fundamental fairness of the trial," or "compromise[d] the integrity of the judicial process." *Daniels*, ¶ 30. LaFournaise relies upon *State v. Resh*, 2019 MT 220, 397 Mont. 254, 448 P.3d 1100, and *City of Missoula v. Zerbst*, 2020 MT 108, 400 Mont. 46, 462 P.3d 1219. (Br. at 20-24.) However, those cases are distinguishable and do not "firmly convince" that the district court committed plain error by giving JI-22.

The most significant difference between those two cases and the circumstances presented here is that, unlike *Resh* and *Zerbst*, the offense of sexual assault was never at issue in LaFournaise's prosecution. The reversible error in those two cases were grounded in the fact that prior to 2017, the definitions found at §§ 45-5-501(1)(a)(ii)(A) through (G), MCA (setting out seven categories of persons incapable of consent), applied only to sexual intercourse without consent (*i.e.*, § 45-5-503, MCA).[4] Unlike here, in both *Zerbst* and *Resh*, the issue was

[4] In 2017, the Legislature amended the definition of "without consent" and made it applicable to sexual assault (§ 45-5-502) and aggravated sexual intercourse without consent (§ 45-5-508). The "use of force" that was formerly included in the definition of "without consent" for sexual intercourse without consent (*see* § 45-5-501(1)(a)(ii), MCA (2015) was moved to apply only to the newly enacted aggravated sexual intercourse without consent at § 45-5-508, MCA (2017).

whether the victims were incapable of consent to sexual assault because they were in one of those categories.

Resh was charged with sexual intercourse without consent or, in the alternative, sexual assault, for kissing a 14-year-old and digitally penetrating her vagina. *Resh*, ¶¶ 2, 7. Under the applicable 2013 statutes, the State could establish the element of "without consent" based on the victim's age for both of the offenses; however, the age of consent was different. *Resh*, ¶ 11. For consent to be ineffective as to sexual assault, the victim must have been "less than 14 years old" and the offender must have been "3 or more years older than the victim." § 45-5-502(5)(a)(ii), MCA (2013). In a sexual intercourse without consent prosecution, a victim is "incapable of consent [if she is] less than 16 years old." § 45-5-501(1)(a)(ii)(D), MCA (2013).

At trial, and without objection from Resh, the jury was instructed only on the age of consent for sexual intercourse without consent (*i.e.*, under age 16) and during closing, the State focused on the victim's age, asserted it was undisputed "she was under the age of consent," and argued the elements of the two offenses were "essentially the same." *Resh*, ¶¶ 8-9. Resh was found not guilty of sexual intercourse without consent, but guilty of sexual assault. *Id*. This Court found that Resh's counsel was ineffective for not ensuring the jury had been instructed on the age of consent relative to sexual assault because, without it, the jury was allowed

to convict solely on the victim's age (as emphasized in the State's closing) and "without even considering the witnesses' credibility" which the jury would have had to do absent the categorial inability to consent instruction. *Resh*, ¶¶ 17, 19-20.

Here, JI-23 was the correct statement of the law in 2015 as the only offense at issue was sexual intercourse without consent, not sexual assault. Unlike the *Resh* jury, the jury here was properly instructed that S.S. was incapable of consenting if the jury found deception, coercion, or surprise, which was supported by S.S.'s testimony that LaFournaise suddenly appeared and grabbed her from behind.

Another problem in *Resh* was that the jury was not instructed that for sexual assault offenses, "[t]he ordinary meaning of 'without consent' applies." *State v. Detonancour*, 2001 MT 213, ¶ 64, 306 Mont. 389, 34 P.3d 487. This same problem occurred in *Zerbst*, ¶ 24 ("erroneous instruction" relieved City of meeting burden of "ordinary meaning").

Zerbst was charged with misdemeanor sexual assault for touching an adult victim's thigh, hips, and breasts despite her telling him to stop. *Zerbst*, ¶ 3. Zerbst and the victim had been in an on-again-off-again relationship and Zerbst alleged that he was massaging the victim as he had in the past and that he stopped when she told him to stop. *Zerbst*, ¶ 4. Over Zerbst's objection, the jury was instructed

that a victim is incapable of consent if they are "mentally disordered or incapacitated" and the City relied upon that instruction at trial, arguing that the victim was incapable of consent due to developmental, mood, and physical impairments. *Zerbst*, ¶ 21. This Court reversed Zerbst's conviction for the same reasons it did in *Resh*. *Zerbst*, ¶¶ 24-25 (jury should not have been permitted to rely on one of the "categorical exceptions" because they did not apply to sexual assault and allowed jury to avoid resolving "factual dispute between" Zerbst and the victim; and City did not have to meet the burden required by the "ordinary meaning" language).

Notably, in *Zerbst*, this Court equated the language found at § 45-5-501(1)(a)(i), MCA (2017) to the "ordinary meaning of consent." *Zerbst*, ¶ 24. This was the language used in JI-22. LaFournaise cannot establish how he was substantially prejudiced by the jury being instructed on the common sense understanding on what it means to agree or assent to another person's actions. Nor was this instruction a "more expansive definition of consent" as alleged by LaFournaise. (*See* Br. at 9.)

Unlike the prosecutors in *Resh* and *Zerbst*, here the State did not focus on the definitions of without consent in its arguments to the jury. Nor did it need to focus on the definitions of consent since LaFournaise did not challenge that element and his defense had nothing to do with whether S.S. consented to

intercourse. LaFournaise did not challenge S.S.'s testimony that she was subjected to sexual intercourse against her will. LaFournaise challenged S.S.'s version of events by asserting he did not have the means to get to East Helena in the fall of 2015. According to LaFournaise's defense, he was not present in East Helena on the day in question to accept or reject S.S.'s consent or lack of consent.

This case did not present a scenario like *Resh* and *Zerbst* where allowing the jury to convict someone on a category of persons incapable of consent instead of having to resolve any conflict between the defendant's and victim's versions of events concerning consent substantially prejudiced the defendant. The jury instructions concerning consent had no impact on LaFournaise's ability to present his defense and did not lessen or forgive the State's burden to prove every element of the offense.

LaFournaise has not carried his burden to "firmly convince" this Court that failure to consider this argument on appeal will "(1) result in a manifest miscarriage of justice; (2) leave unsettled the question of the fundamental fairness of the trial or proceedings; or (3) compromise the integrity of the judicial process." *Daniels*, ¶ 30. Reviewing the instructions as a whole and in light of the facts presented at trial, the district court did not abuse its discretion when it instructed the jury on the common meaning of "consent" and the applicable category of a person who is incapable of giving consent. *Daniels*, ¶ 26 (Court will not reverse

on the basis of its instructions absent an abuse of discretion that prejudicially affects a defendant's substantial rights). LaFournaise has not established how his substantial rights were impacted or that the district court committed plain error.

CONCLUSION

This Court should affirm the jury's guilty verdicts on all four counts and the court's judgment and sentence.

Respectfully submitted this 11th day of August, 2021.

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

By: */s/ Katie F. Schulz*
KATIE F. SCHULZ
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 7,332 words, excluding certificate of service and certificate of compliance.

/s/ Katie F. Schulz
KATIE F. SCHULZ

CERTIFICATE OF SERVICE

I, Kathryn Fey Schulz, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 08-11-2021:

Chad M. Wright (Attorney)
P.O. Box 200147
Helena MT 59620-0147
Representing: Toston Gray Lafournaise
Service Method: eService

Leo John Gallagher (Govt Attorney)
Lewis & Clark County Attorney Office
Courthouse - 228 E. Broadway
Helena MT 59601
Representing: State of Montana
Service Method: eService

Electronically signed by Wendi Waterman on behalf of Kathryn Fey Schulz
Dated: 08-11-2021