IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0470

STATE OF MONTANA,

Plaintiff and Appellee,

v.

TRACY ALAN REXFORD,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, The Honorable Jessica T. Fehr, Presiding

APPEARANCES:

AUSTIN KNUDSEN
Montana Attorney General
ROY BROWN
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
roy.brown2@mt.gov

SCOTT TWITO
Yellowstone County Attorney
BRETT D. LINNEWEBER
Deputy County Attorney
P.O. Box 35025
Billings, MT 59101

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

BENJAMIN M. DARROW
Darrow Law PLLC
P.O. Box 7235
415 N. Higgins, Suite 23
Missoula, MT 59807

ATTORNEY FOR DEFENDANT
AND APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF THE ISSUES

1. Should this Court exercise plain error review of Appellant's unpreserved claim that when he pleaded guilty via *Alford*, he actually intended to enter into an illegal no contest plea for a sexual offense?

2. Should this Court exercise plain error review of Appellant's unpreserved claim that the district court erred in allowing Appellant to enter into an *Alford* guilty plea for sexual assault, despite this Court's precedent allowing such pleas for sexual offenses?

3. Should this Court exercise plain error review of Appellant's unpreserved claim that the district court abused its discretion in finding Appellant ineligible for an exception to the mandatory minimum sentence in Mont. Code Ann. § 46-18-222(6)?

STATEMENT OF THE CASE

The State charged Appellant Tracy Alan Rexford with one count of Sexual Intercourse without Consent (SIWC) and an alternative count of Sexual Assault. (Doc. 78.) The State provided notice of its intent to seek a penalty enhancement for both offenses because of the ages of Rexford and the minor victim K.N., thus making the potential penalty for both offenses up to 100 years of incarceration at the

Montana State Prison (MSP). (Doc. 78; *see* Mont. Code Ann. §§ 45-5-503(3)(a), -502(3).

Pursuant to a plea agreement, the State agreed to move to dismiss the SIWC count and recommend for a 40-year MSP sentence with 20-years suspended with no parole restriction. (Doc. 75 at 4, *attached to Appellant's Br. as* Appellant's Ex. A.) In turn, Rexford agreed to plead guilty via *Alford* to felony sexual assault, while Rexford could argue for any legal sentence. (*Id*.) The agreement was not binding upon the district court. (*Id*. at 3; Mont. Code Ann. § 46-12-211(1)(c).)

At the change of plea hearing, after extensive inquiry, the district court found that there was a factual basis for Rexford's *Alford* guilty plea, that the plea was in Rexford's best interests, and that the relevant facts would be sufficient to prove beyond a reasonable doubt that Rexford was guilty of sexual assault. (12/2/19 Tr. at 17-19, *attached to Appellant's Br. as* Appellant's Ex. C.[1])

At sentencing, the State abided by its agreement, moving to dismiss the SIWC count and recommending a 40-year MSP sentence with 20 years suspended for the sexual assault count. (6/12/20 Tr. at 130, *attached to Appellant's Br. as* Appellant's Ex. D.) The district court accordingly dismissed the SIWC count.

---

[1] Rexford did not file this change of plea transcript as part of appellate record but has attached it as an Appendix to his Opening Brief. The State will reference this transcript by page numbers from the original document, not from Rexford's Bate stamp.

(*Id*.) For the remaining sexual assault count, Rexford argued that he was entitled to an exception to the mandatory minimum sentence of 4 years of incarceration under Mont. Code Ann. § 46-18-222(6), contending that community placement would be best for his rehabilitation. (6/12/20 Tr. at 135-36.) Rexford recommended a 15-year Department of Corrections sentence with all time suspended. (6/12/20 Tr. at 136.)

The district court analyzed the exception in Mont. Code Ann. § 46-18-222(6) and found by a preponderance of the evidence that "treatment while in the local community in this case will not provide for the ultimate protection of the victim and society." (6/12/20 Tr. at 139; *see also* Doc. 104 at 8-9, *attached to Appellant's Br. as* Appellant's Ex. B at 14-15.) Rexford did not object to the district court's determination.

The district court sentenced Rexford to MSP for 30 years with 15 years suspended. (6/12/20 Tr. at 140-41.) The court adopted the Tier 1 recommendation of the psychosexual evaluator and did not require or recommend Rexford to complete Phase 2 sexual offender treatment at MSP. (6/12/20 Tr. at 141.)

Rexford appeals, contending that: (1) he actually intended to enter into a no-contest plea, not an *Alford* guilty plea; (2) even if he entered into an *Alford* plea, his plea was illegal; and (3) the district court erred in finding Rexford ineligible for

an exception to the mandatory minimum sentence. Rexford recognizes that all of his claims are unpreserved and urges this Court to exercise plain error review.

STATEMENT OF THE FACTS

I. The offense

The victim K.N.'s stepfather is Robert Rexford, and her mother is Stephanie Rexford. (6/12/20 Tr. at 32.) Robert Rexford's biological father is Appellant Tracy Rexford. (*Id*.) K.N's younger stepsister is Madison Rexford, who is Robert's daughter and Stephanie's stepdaughter. (6/12/20 Tr. at 47, 9.) Madison is K.N's "best friend" and they talk about everything. (6/12/20 Tr. at 37, 45, 24.[2])

K.N. alleged that Rexford started sexually abusing her beginning in late 2016 when she was 11 years old. (Doc. 1 at 2-3; 6/12/20 Tr. at 45-46.) K.N. estimated the abuse occurred anywhere from one to three times per month. (Doc. 1 at 3.[3])

K.N. recalled multiple instances of sexual abuse by Rexford. For example, K.N. explained that, on Valentine's Day in 2017 at Chico Hot Springs, Rexford

[2] The facts of the K.N.'s family makeup were explained by K.N., Madison, Robert, and Stephanie, who all testified at sentencing.

[3] Since Rexford pleaded guilty, the following facts are from the Affidavit and Motion for Leave to File Information. (*See* Doc. 1 at 1-4.)

put his finger inside her vagina underneath her bathing suit near the swimming pool, while the rest of the family was either in the hot tub or hotel room.

In another incident in the fall of 2017, K.N. was sitting on Rexford's couch watching television when Rexford came in and sat beside her. K.N. was too nervous to walk away. Rexford started rubbing her leg, then pulled a blanket over her, and started "rubbing her crotch area inside her clothes and under her underwear." Madison was in the room with them, but K.N. did not think Madison saw anything.

The most recent incident K.N. remembered was on January 11, 2018. K.N. got out of school early because her final exams were complete. She texted Rexford, asking him to pick her up. After taking K.N. to eat at Panda Express, Rexford took K.N. to his house. K.N. was watching television when Rexford came in and sat beside her. Rexford pulled down her pants and put his fingers in her vagina. K.N. felt scared and nervous. Rexford asked, "Do you like this?" and K.N. responded, "I don't know."

K.N. recalled another incident that she thought Madison witnessed. K.N. explained that she was in Rexford's office on his lap playing a game on the computer when Rexford started touching her stomach and legs, then moved his hand down to her pants and underwear, putting his fingers in her vagina.

K.N. told Madison about Rexford's conduct early in 2017, specifically that Rexford "touched her crotch area with his hands." K.N. would keep Madison apprised of when "it" happened again.

Madison corroborated portions of K.N.'s story. Madison explained that they were watching a movie once at Rexford's house, when she saw Rexford cover himself and K.N. with a blanket. She observed that K.N. looked mad and uncomfortable "like someone was in her space." Madison also recalled the incident in Rexford's office, but she only saw K.N. sitting on Rexford's lap, and Madison started "yelling down the hall before going into the office because she did not want to see anything."

K.N. disclosed the abuse to her mom Stephanie after Stephanie dropped her and Madison off at Rexford's house for a sleepover. K.N. texted Stephanie and asked to come home. When Stephanie asked why, K.N. texted Stephanie that "[Rexford] touches me and I don't want to stay here."

K.N. detailed the allegations in a forensic interview in February of 2018. A detective took photographs of her text message to Rexford on the day of her final exams, as well as the text message K.N. had sent to Stephanie disclosing the abuse. K.N. and Madison completed forensic interviews.

II. Facts related to the district court's consideration of the application of the exception to the mandatory minimum sentence at sentencing.

At sentencing, K.N's mother Stephanie testified about the effects from Rexford's abuse on K.N., that she was depressed and had "night terrors" and had been put on prescription sleeping pills, which only exacerbated the night terrors because she couldn't wake up. (6/12/20 Tr. at 17, 22.) Stephanie explained that K.N. had been in counseling for over a year, her grades had suffered, and she did not care about being social or having friends. (6/12/20 Tr. at 23.)

Madison testified that K.N. had become "distant from everyone[,]" even from her. (6/12/20 Tr. at 39.) Madison explained that K.N. began cutting herself and she was worried about how much Rexford's abuse had hurt K.N. (6/12/20 Tr. at 39-40.)

K.N. testified that she had stopped eating, felt sick, had night terrors, and had been diagnosed with anxiety and depression, which she still currently had. (6/12/20 Tr. at 49-50.) She explained she had tried to kill herself four times. (6/12/20 Tr. at 51-52.) When she was home, she wouldn't come out of her room. (6/12/20 Tr. at 51.) She hated her body. (*Id*.) She still suffers from flashbacks of the abuse. (6/12/20 Tr. at 53.)

Stephanie testified that a probationary sentence for Rexford would not protect K.N. or society. (6/12/20 Tr. at 30.) Robert concurred that a probationary

sentence would "absolutely not" be appropriate for Rexford given his predatory actions on his granddaughter. (6/12/20 Tr. at 35-36.) For her part, K.N. felt that Rexford should be punished by going to prison because she would have to deal with his abuse for the rest of her life. (6/12/20 Tr. at 56-57.) K.N. explained that if Rexford got a probationary sentence she would "want to move out of the state, because with him out and about, it does not make me feel safe, leaving my house, I could run into him, anything." (6/12/20 Tr at 57.) She testified she would feel unsafe emotionally, and other potential victims in society should feel unsafe because Rexford would not admit to his conduct. (6/12/20 Tr. at 58.)

Michael Sullivan conducted Rexford's psychosexual evaluation. (6/12/20 Tr. at 61.) Sullivan diagnosed Rexford with a specified paraphilia called hebephilia (attraction to early teen, early pubescent children), which "would suggest deviance, or not normal." (6/12/20 Tr. at 65, 86.) Sullivan also assessed Rexford as a situationally regressed sexual offender. (6/12/20 Tr. at 78.) Part of the situationally regressed assessment was based on Rexford's self-report that he was unable to maintain an erection, which Sullivan made clear was "not at all" likely to stop such an offender from sexually assaulting another person. (*Id*.) Sullivan explained that such offenders opportunistically commit a sexual offense on early pubescent females, even though they generally present well in the community and "on the surface they look pretty good, but that's a veneer covering

up some inadequacy and poor problem solving." (6/12/20 Tr. at 79-80.) Sullivan detailed that specified paraphilia requires "long-term treatment" and "monitoring," and that the patient accept the diagnosis and make life adjustments. (6/12/20 Tr. at 87.)

Sullivan observed that Rexford denied sexually assaulting other women who came forward, and denied K.N.'s allegations, and that Rexford explained that it did not happen and K.N. wanted attention. (6/12/20 Tr. at 81-82.) Sullivan also noted that Rexford did not accept his diagnosis of hebephilia. (6/12/20 Tr. at 87.) Sullivan nonetheless detailed that denial of the offense played no part in assessing his overall risk. (6/12/20 Tr. at 69.)

While Sullivan ultimately concluded that Rexford presented as low risk, recommended a Tier 1 designation, and averred that Rexford could be successfully treated in the community, he offered no opinion on whether community placement would be appropriate for the ultimate protection of the victim and society. (6/12/20 Tr. at 66-67, 92.) Sullivan explained that his job was to recommend the "least restrictive alternative" for placement, and it was the court's job to fashion an appropriate sentence. (6/12/20 Tr. at 89.)

Howard Lewis began providing sexual offender treatment to Rexford while his criminal case was pending. (6/12/20 Tr. at 95-96.) Lewis explained that when he treats individuals in such circumstance, he does not challenge their story about

the offense conduct and "the *Alford* plea would not be particularly relevant to the treatment we are doing." (6/12/20 Tr. at 97.) Lewis averred that Rexford was "in a great deal of denial" and treatment was currently difficult, but it could improve post-sentencing when the danger of the impending sentence had passed. (6/12/20 Tr. at 99-100.) Lewis explained that Rexford was "defensive and a little combative." (6/12/20 Tr. at 102.) Lewis observed that Rexford had "poor insight" and continued to blame others for his actions. (6/12/20 Tr. at 117-18.) Lewis concurred that Sullivan's diagnosis of hebephilia presented challenges to Rexford, who would have to be supervised through the rest of his life. (6/12/20 Tr. at 125.) While Lewis thought that Rexford could be treated in the community, he offered no opinion on the impact to the victim and the community. (6/12/20 Tr. at 105.)

Ultimately, the district court found Rexford ineligible for an exception to the mandatory minimum sentence, finding that community-based treatment for Rexford would not protect the victim or society. Additional facts relating to the district court's sentencing decision and Rexford's plea agreement claims are also discussed herein.

SUMMARY OF THE ARGUMENT

Rexford consistently affirmed that he intended to enter into an *Alford* guilty plea in both his initialed and signed plea agreement and at the change of plea

hearing. Rexford understood and discussed with his attorney what an *Alford* plea entailed, affirmed that such a plea was in his best interests, and conceded that the State could prove its case beyond a reasonable doubt. This Court should decline to consider the merits of Rexford's new claim that he actually intended to enter into a statutorily-prohibited no contest plea. The record does not expressly or even impliedly support Rexford's assertion.

Next, Rexford entered into a valid and legal *Alford* plea for his sexual offense, and the district court legally accepted his *Alford* plea. This Court has clearly stated that *Alford* pleas are guilty pleas, and *Alford* pleas are legally permissible for sexual offenses under Montana's statutory plea scheme. This Court should decline to exercise plain error review because Rexford fails to show he received a manifest miscarriage of justice when he voluntarily entered into a *Alford* guilty plea.

Finally, the district court fully and properly considered Rexford's request to apply an exception to the mandatory minimum sentence for felony sexual assault. Rexford is incorrect that the district court is punishing him solely for his entering into an *Alford* guilty plea but failing to admit guilt, as the district court never claimed that the reason for Rexford's sentence was his failure to admit guilt. Instead, the district court entered detailed findings in both its oral allocution and its judgment about why the exception was inapplicable to Rexford, which Rexford

does not substantively address or challenge on appeal. Rexford did not object to the district court's determination and, on appeal, he fails to establish plain error for his unpreserved claim.

STANDARD OF REVIEW

This Court may review an unpreserved claim alleging a violation of a fundamental constitutional right under the common law plain error doctrine where the defendant invokes the Court's inherent authority and "firmly convince[s]" this Court that failure to review the claimed error would 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. *State v. Taylor*, 2010 MT 94, ¶¶ 12-13, 17, 365 Mont. 167, 231 P.3d 79. "[G]iven the legislature's obvious intention to restrict the use of plain error review," this Court relies upon its "inherent power of common law plain error review sparingly, on a case-by-case basis, and we will invoke that doctrine only in the class of cases aforementioned." *State v. Finley*, 276 Mont. 126, 134-35, 137-38, 915 P.2d 208, 214, 216 (1996).

This Court reviews a sentence longer than one year to determine whether it is legal. *State v. Garrymore*, 2006 MT 245, ¶ 9, 334 Mont. 1, 145 P.3d 946. A sentence is legal if it falls within statutory parameters. *Id.*

ARGUMENT

I. Rexford intended to enter into an *Alford* plea.

Rexford argues that, based on the district court's inquiry and Rexford's responses at the change of plea hearing, that Rexford was actually not intending to plead guilty pursuant to *Alford* and was really "seeking to make a *nolo contendere* plea[.]" (Appellant's Br. at 10.) Rexford contends that this Court should exercise plain error review, conclude that Rexford's plea "resulted in an oppressive sentence[,]" and invalidate his plea agreement. (*Id.)*

Rexford's argument is not borne out from his express representations in the plea agreement and at the change of plea hearing. For example, the first sentence of the plea agreement is a statement that Rexford "agree[s] to enter an *Alford* plea (pursuant to *Lawrence v. Guyer*, 2019 MT 74) as hereinafter set forth." (Appellant's Ex. A at 1.) Rexford initialed next to every mention in the plea agreement that he was pleading guilty via *Alford*. (*Id*. at 2-4, p. 7, 17, 27.) Rexford affirmed that it was in his best interests to enter into an *Alford* guilty plea. (*Id*. at 4, p. 27.) Rexford agreed "to enter an *Alford* plea" to the offense of sexual assault. (*Id*. at 4.)

At the change of plea hearing the district court meticulously confirmed that Rexford intended to enter into an *Alford* guilty plea:

> **COURT**: On page 3 of the agreement, paragraph 17, there's a written interlineation to clarify that the intention today is for you to enter an

Alford plea and not a guilty plea, I have asked counsel to all initial next to the change, and again I see TR, are those your initials?

REXFORD: Yes, they are.

COURT: And when you initialed there, did you understand that the change that was being made, that instead of a plea of guilty, you'll be entering an *Alford* plea?

REXFORD: That's correct.

COURT: And did you discuss the nature of an *Alford* plea with your counsel?

REXFORD: I did.

COURT: And you understand that an *Alford* plea requires you to admit that the State could prove what they say they could prove at trial?

REXFORD: Yes.

COURT: And also that you believe that entering this *Alford* plea is in fact in your best interests?

REXFORD: That's correct.

COURT: Have you discussed with your counsel that under Montana law an *Alford* plea is considered, for all intents and purposes, a guilty plea?

REXFORD: Correct.

(12/2/19 Tr. at 12-13.) The district court elicited from the State the specific facts of the offense intended to prove beyond a reasonable doubt that Rexford committed sexual assault, as well as the witnesses the State would call if the case proceeded to trial. (12/2/19 Tr. at 17.) Defense counsel confirmed that, based on

the defense's investigation, the State could prove the offense of sexual assault beyond a reasonable doubt. (*Id*.) The district court followed up with Rexford as to whether he believed that the jury would return a verdict of guilty for sexual assault. Rexford replied, "I believe they could prove beyond a reasonable doubt that there—that did happen." (12/2/19 Tr. at 18.) Rexford again affirmed that it was in his own best interests to ask the court to accept the *Alford* plea. (*Id*.)

The record is devoid of any representation by Rexford that he actually intended to seek a no contest plea. And Rexford's one-sentence contention that his plea resulted in an oppressive sentence has no bearing on the voluntariness of his plea, nor did Rexford ever move to withdraw his guilty *Alford* plea. Rexford fails to firmly convince this Court that failing to review this claim will 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. *Taylor*, ¶¶ 12-13.

II. Rexford legally entered into an *Alford* plea.

Rexford paradoxically argues that the district court committed reversible error in permitting him to enter into an *Alford* plea for a sexual offense, while

conceding that *Alford* pleas for sexual offenses are legal.[4] While not clear, Rexford cites Mont. Code Ann. § 46-12-212(2)—the statute that allows no contest pleas—to apparently support his contention that he intended to and did enter into a no contest plea. (Appellant's Br. at 10.) Rexford also makes a legislative history argument that when the Legislature amended the plea alternatives statute in 1999, it intended the prohibition of no contest pleas for sexual offenses in Mont. Code Ann. § 46-12-204(4) to apply to *Alford* pleas as well. (*Id*. at 11.) Rexford may also be arguing that because the district court did not determine a factual basis for the plea, his plea is not an *Alford* plea but is rather, in substance, a no contest plea. (*Id*. at 12.)

In *Lawrence*, the defendant pleaded "guilty by *Alford*" to one count of sexual assault and one count of solicitation of sexual assault, in exchange for the State's dismissal of other charges. *Lawrence v. Guyer*, 2019 MT 74, ¶ 4, 395 Mont. 222, 440 P.3d 1. Even though Lawrence pleaded guilty via *Alford*, Lawrence argued on habeas review that his plea was invalid because, pursuant to

[4] *Compare* Appellant's Br. at 4, issue statement and headnote "B" ("Did the District Court err in permitting Defendant to enter an *Alford* Plea, pursuant to *Lawrence v. Guyer*, 2019 MT 74 for a violation of MCA § 46-23-502?") *to Id*. at 12-13 ("*Lawrence* appears directly on point and the reliance upon it for precedence for Rexford's plea is clear."); ("Because an '*Alford* plea' is a guilty plea, courts are not statutorily prohibited from accepting *Alford* pleas in sexual offenses.")

Mont. Code Ann. § 46-12-204(4), "the court may not accept a 'plea of nolo contendere in a case involving a sexual offense.'" *Id*. ¶ 5.

The *Lawrence* Court analyzed the legislative history from the 1991 commission comments and the 1999 legislative change allowing a defendant to plead "nolo contendere." *Id*. ¶ 7-9. This Court explained that the 1991 Legislature enacted Mont. Code Ann. § 46-12-212(2) to provide defendants the option to enter *Alford* pleas, and in 1999 added another plea alternative in Mont. Code Ann. § 46-12-204(1) for no contest pleas, excluding no contest pleas for sexual offenses. *Id*. ¶ 8. This court applied the statutory provisions, its own precedent, and *North Carolina v. Alford*, 400 U.S. 25 (1970), to conclude:

> In this case, Lawrence entered a plea of 'guilty by *Alford*' to the sexual offenses pursuant to § 46-12-212(2), MCA; he did not enter a plea of nolo contendere. Because an '*Alford* plea' is a guilty plea, courts are not statutorily prohibited from accepting *Alford* pleas in sexual offenses. Accordingly, we conclude Lawrence's *Alford* pleas were guilty pleas, not nolo contendere pleas, and that § 46-12-204(4), MCA, did not prohibit the District Court from accepting the Alford pleas to the sexual offenses.

Id. ¶ 10.

Here, as in *Lawrence*, Rexford pleaded guilty via *Alford* to sexual assault in exchange for dismissal of another charge, and claims that his plea—although denominated as an *Alford* plea—is actually a no contest plea. Rexford rehashes the argument that the legislative changes in the 1990s makes his plea actually a no contest plea.

But this Court has already considered and rejected all of Rexford's arguments—as Rexford even concedes: "*Lawrence* appears to be directly on point and the reliance upon it for precedence for Rexford's plea is clear." (Appellant's Br. at 13.) Rexford entered into a guilty plea by *Alford*, and the district court was statutorily permitted to accept his plea in a sexual offense. As in *Lawrence*, his guilty *Alford* plea to sexual assault is not a nolo contendere plea. To the extent that Rexford claims that the district court failed to establish a factual basis for his plea, the record shows that his assertion is mistaken. (12/2/19 Tr. at 17-19.) To the extent that Rexford claims that his guilty *Alford* plea required an admission of guilt, he is again mistaken, as the admission of guilt "is not a constitutional requisite to the imposition of criminal penalty." *Alford*, 400 U.S. at 37.

Rexford does not argue that *Lawrence* was manifestly wrong. Rexford fails to firmly convince this Court that failing to review this unpreserved claim will 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. *Taylor*, ¶¶ 12-13.

III. The district court properly exercised its discretion, based on the record, in determining that community-based treatment would not afford for the ultimate protection of the victim and society.

Rexford raises an unpreserved claim arguing that the district court improperly relied on his *Alford* plea and his refusal to admit guilt in finding him ineligible for the exception to the mandatory minimum sentence. (Appellant's Br. at 13.) Rexford contends the sole basis for the district court's decision was because he entered into an *Alford* plea and "that Rexford entered an *Alford* plea does not increase the risk to the victim or the community." (*Id*. at 16.) As to prejudice, Rexford contends that his sentence "creates the possibility" that he might have to complete Phase II of sex offender treatment at MSP, and he cannot pass Phase II unless he admits guilt. (*Id*.) Rexford urges this Court to exercise plain error review and remand for resentencing where the district court could again consider the exception to the mandatory minimum sentence. (*Id*. at 13, 16-17.)

A. Rexford has waived review of his challenge to the exception to the mandatory minimum sentence.

Rexford failed to object to the district court's determination that he was ineligible for the exception to the mandatory minimum sentence. This Court will "refuse to remand for resentencing when a defendant failed to bring the allegations of sentencing errors to the district court's attention in a timely fashion." *State v. Tucker*, 2000 MT 255, ¶ 15, 301 Mont. 466, 10 P.3d 832. This Court will only

review an unpreserved sentencing issue when the sentence imposed is illegal or exceeds statutory mandates. *Tucker*, ¶ 15.

Rexford does not allege he received an illegal sentence. Instead, Rexford urges this Court to exercise plain error review, alleging a "manifest injustice" for the district court's finding that he was "ineligible for an exception to the mandatory minimum sentence[.]" (Appellant's Br. at 16.) Rexford fails to explain how a discretionary sentencing decision, supported by the record, led to a manifest injustice. In any event, this Court should decline to exercise plain error review for the reasons stated below.

B. The exceptions to the mandatory minimum sentences are inapplicable to Rexford.

This Court has "consistently held that the exceptions set forth at § 46-18-222, MCA, do not apply in cases in which the district court sentences the offender to more than the minimum sentence." *State v. Rogers*, 2007 MT 227, ¶ 39, 339 Mont. 132, 168 P.3d 669 (*citing State v. Legg*, 2004 MT 26, ¶ 49, 319 Mont. 362, 84 P.3d 648 (collecting cases).) "In other words, the exceptions only apply if the district court is predisposed to sentencing the defendant to the mandatory minimum sentence." *Rogers*, ¶ 39 (citation omitted.)

For example, in *Rogers*, the defendant was sentenced to twenty years imprisonment with ten years suspended for sexual assault of a minor. *Id*. The mandatory minimum sentence was four years imprisonment. *Id*. Rogers argued

for the community treatment exception because he had no prior history of sexual assault, his offense was relatively minor, and Rogers was only classified as a Level I sex offender. *Rogers*, ¶ 38. This Court held that since the district court sentenced Rogers above the mandatory minimum sentence, the exception under Mont. Code Ann. § 46-18-222(6) was "inapplicable." *Rogers*, ¶ 39.

The same is true here. Rexford was sentenced to 30 years imprisonment, with 15 years suspended for sexual assault of a minor. The district court expressed no predilection to apply the mandatory minimum sentence of four years. *See* Mont. Code Ann. § 45-5-502(3). Rexford's arguments on appeal are inapplicable and unreviewable.

C. Even assuming for the sake of argument that Rexford's claim was preserved and reviewable, he fails to show he was entitled to the exception.

Montana Code Annotated § 45-5-502(3) provides a mandatory minimum sentence of 4 years for sexual assault of a minor "unless the judge makes a written finding that there is good cause to impose a term of less than 4 years and imposes a term of less than 4 years . . . ." Montana Code Annotated § 46-18-222 provides that a court may depart a mandatory minimum sentence if:

> (6) the offense was committed under 45-5-502(3) . . . and *the judge determines*, based on the findings contained in a psychosexual evaluation report prepared by a qualified sexual offender evaluator pursuant to the provisions of 46-23-509, that treatment of the offender while incarcerated, while in a residential treatment facility, or while in a local community affords *a better opportunity for rehabilitation of*

> *the offender and for the ultimate protection of the victim and society*, in which case the judge shall include in its judgment a statement of the reasons for its determination.

(Emphasis added.) Thus, allowing for an exception to the mandatory minimum sentence is a discretionary decision for the district court, and the district court must consider the conjunctive considerations of rehabilitation of the offender and the ultimate protection of the victim and society.

Here, the sentencing record shows that the district court seriously and substantively considered the mandatory minimum exception in Mont. Code Ann. § 46-18-222(6). The district court offered 12 written paragraphs of reasons for its sentence in its judgment, including a lengthy discussion of why treatment in the local community would not afford a better opportunity for Rexford's rehabilitation and for the ultimate protection of K.N. and society. (Doc. 104 at 8-9.)

The district court reasoned that Lewis explained Rexford was "resistant and combative[]" during treatment. (Doc. 104 at 8.) The court reasoned that Lewis had testified that Rexford was "completely disconnected from any evaluation of the victim or the impact he [sic] actions had on the victim." (*Id*.) While the district court did "not disagree" with Lewis and Sullivan that Rexford is amenable to treatment in the community, the court explained that their recommendations were only based on the least restrictive treatment and did not take into consideration the victim or community impact. (6/12/20 Tr. at 138.)

Further, even assuming for the sake of argument that the evaluator's testimony could be interpreted to mean that an alternative sentence would have provided Rexford with a better opportunity for rehabilitation, the district court also heard testimony from the victim in this case and rightfully concluded that an alternative sentence would not provide for a better opportunity for the ultimate protection of the victim and society. *See State v. Hamilton*, 2018 MT 253, ¶ 18, 393 Mont. 102, 428 P.3d 849 (concluding the same). Recognizing the need to protect the victim K.N., the district court explained:

> The Defendant's conduct resulted in self-harm, including four suicide attempts, by the victim. The victim testified in great detail at the sentencing as to the impact Defendant's conduct had on her life, the way she valued herself, and the fears she had if she told anyone of the abuse. The victim kept the abuse a secret, and allowed it to go on, as she feared that she would not be believed by her stepfather, Defendant's son, and that it would cause a divorce. The victim's mother, stepfather, and sister all testified about the changes seen in the victim during the course of abuse—corroborating the victim's testimony. Additionally, the victim's sister testified that she saw contact between the victim and the Defendant that she now understands was part of the abuse. *The victim's protection is not served by the Defendant remaining in the community for a probationary sentence with community-based treatment*.

(Doc. 104 at 8.) (emphasis added).

Recognizing the need to protect the public, the district court found that Rexford "has a long way [to go] before he may safely be in society." (Doc. 104 at 9.) The court explained the psychosexual evaluator's diagnosis of hebephilia, and that Rexford was a situationally regressed child sexual offender. (*Id.*) The court

explained that testimony at sentencing established that Rexford engaged in grooming and ongoing sexual abuse of the victim. (*Id.)*

Thus, the district court engaged with and rejected any possible reasons that Rexford could be safely treated in the community and exercised its discretion to not impose an exception to the mandatory minimum sentence. Rexford's arguments that the district court did not apply the exception merely because he entered into an *Alford* plea is meritless. The district court actually found that Rexford "did accept a finding of guilt instead of demanding a trial" as a *mitigating* circumstance in fashioning his sentence. (Doc. 104 at 9.) The district court never stated at sentencing that Rexford was ineligible for the exception because he refused to take responsibility for sexually abusing K.N. (*See* 6/12/20 Tr. at 137-42.) The district court was not punishing Rexford for entering into an *Alford* guilty plea, nor was its written or oral basis for its reasons of sentence based on Rexford entering into such a plea.

And Rexford's contention that his sentence resulted in a "manifest injustice" based on his asserted possibility that he might have to complete Phase II sexual offender treatment in prison—which he views as impossible because he pleaded via *Alford* and refuses to admit the conduct—is speculative and meritless. The State was "not even asking for [Phase 2][]" at sentencing. (6/12/20 Tr. at 132.) The district court adopted Sullivan's recommendation for a Tier 1 (or lowest)

sexual offender designation, and specifically declined to recommend or impose Phase II sexual offender treatment at MSP. (6/12/20 Tr. at 141.) Further, Rexford voluntarily entered into an *Alford* guilty plea and waived his right to not incriminate himself. While Rexford may maintain his factual innocence, his exercise of the right does not somehow qualify him for an exception to the mandatory minimum sentence.

The district court thoughtfully and carefully considered whether an exception to the mandatory minimum sentence applied. As the district court reasoned, there was evidence that went "well beyond [the requisite preponderance of the evidence] standard" that Rexford was ineligible for the exception. (6/12/20 Tr. at 138.) Consequently, Rexford fails to firmly convince this Court that failing to review his claim will 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. *Taylor*, ¶¶ 12-13.

/ / /

CONCLUSION

This Court should affirm Rexford's conviction and sentence.

Respectfully submitted this 31st day of August, 2021.

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

By: */s/ Roy Brown*
ROY BROWN
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 5,815 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature, and any appendices.

/s/ Roy Brown
ROY BROWN

CERTIFICATE OF SERVICE

I, Roy Lindsay Brown, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 08-31-2021:

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

Benjamin M. Darrow (Attorney)
PO Box 7235
Missoula MT 59807
Representing: Tracy Rexford
Service Method: eService

Electronically signed by Wendi Waterman on behalf of Roy Lindsay Brown
Dated: 08-31-2021