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.

REPLY 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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DISCUSSION

The State of Montana concedes it should have never charged Toston LaFournaise with Aggravated Sexual Intercourse Without Consent (Agg. SIWOC) in violation of Mont. Code Ann. § 45-5-508. (Appellee's Br. at 14-15.) This newly enhanced crime did not even exist when Toston was alleged to have sexually assaulted S.S. in 2015. Despite conceding this major error, the State continues to say the midtrial change in the Information was not substantive because Toston never claimed S.S. consented to sexual intercourse. (Appellee's Br. at 12.) The State's response overlooks its own responsibility to prove every essential element of the charged offense – no matter the defense.

More importantly, the State's response reveals a fundamental misunderstanding of the essential "consent" element in place in 2015 when Toston was supposed to have sexually assaulted S.S. See, Mont. Code Ann. § 45-5-501(1)(2015). The State's "no harm, no foul" approach on the consent element cannot be squared with the jury's struggle during deliberation. Several jurors disagreed Toston had committed SIWOC under the more expansive 2017 definition of freely given agreement to sexual intercourse defined in the newly amended Mont. Code Ann. § 45-5-501(1). *See*, D.C. Doc. 55 (Verdict) *and* D.C.Doc. 57

(Juror Note). The jury was improperly instructed with a more expansive consent definition, but it still held out in finding the case had proven the SIWOC charge with proof beyond a reasonable doubt. The court was forced to bring the jurors back into open court and give a "dynamite" instruction to obtain a verdict. See Tr. at 611-612. Understanding how the differences between the 2015 and 2017 definitions for consent affect both the State's charging error and instructional error show why Toston's conviction cannot stand.

I. The State's midtrial charging amendment changed the essential "consent" element.

The State and Toston agree a substantive change in the Information occurs when the amended Information alters "the essential elements of the crime." Appellee's Br. at 14 *quoting City of Red Lodge v. Kennedy*, 2002 MT 89, ¶ 14, 309 Mont. 330, 46 P.3d 602. The State then admits the "use of force" element was missing from the consent element in Toston's amended charge. But the State argues this element was not essential because Toston knew the State was charging a general lack of consent. (Appellee's Br. at 15.) The idea of a common definition of consent does not cut it. Montana has strictly defined consent and provided numerous ways the lack of consent can be proven

at trial. Just referencing "consent" in § 45-5-503(1) is insufficient without defining how consent was overcome.

In 2015, consent had to be overcome by applying the legal definition of force contained in Mont. Code Ann. § 45-5-501(2). Thus, the State had to prove beyond a reasonable doubt the infliction or threatened infliction of bodily injury, the commission of a forcible felony, or the threat of retaliatory action. Mont. Code Ann. § 45-5-501(1)(a) and (b). The level of force was further defined in Mont. Code Ann. § 45-5-511(5) to clarify the State does not have to prove resistance by the alleged victim. Claims that, but for the force element, a properly amended 2015 SIWOC offense would be identical to improperly charged Agg. SIWOC misses the point. (*See*, Appellee's Br. at 17). As the sponsor of Senate Bill 29 (which enacted the freely given agreement change) explained, the force element of consent was the "core factor" leading to the sex crimes overhaul in 2017. (*See,* January 6, 2017, Senate Judiciary hearing on SB 29 at 8:19:00).

Allowing the State to amend the Information and eliminate the force element after the State had closed its case was a substantive change. It meant the jury never considered the essential force element and could have convicted him without finding the use of force. The

change was substantive. *State v. Hardground*, 2019 MT 14, ¶ 17, 394 Mont. 104, 433 P.3d 711. The Court should not have allowed the State to amend the Information after dismissing the invalid Agg. SIWOC charge.

II. This Court must avoid the *Ex Post Facto* application of the 2017 legislative overhaul of sexual crimes.

The State suggests making an *ex post facto* argument is misleading. (Appellee's Br. at 11). What the State fails to explain is the reason the *ex post facto* analysis is no longer relevant to the dismissal question is that because the State now fully concedes Toston was improperly charged with Agg. SIWOC.

The State then fails to consider the impact of maintaining the newly enacted consent element in its amended charge. A simple re-cap shows the Agg. SIWOC charge was improper – not because the elements of the new 2017 charge requiring free agreement to sexual intercourse were improper on their face. Instead, the new charge could not be prosecuted because the alleged conduct did not occur after 2017. When the State had to request a new charge based on conduct that allegedly happened in 2015, it compounded the initial charging error by relying on the 2017 definition for consent. Because the 2017 definition of SIWOC was less stringent, the State's charging miscues continued to

have *ex post* facto implications. This Court must consider the possibility Toston was convicted for conduct that occurred before the SIWOC consent definition was enacted. *See*, *State v. Price*, 2002 MT 284, ¶ 25, 312 Mont. 458, 59 P.3d 1122. Toston was charged and tried on sex a crime with a consent element unlike any seen before 2017, certainly *ex post facto* protections factor into both the mid-trial charging amendment and the improper jury instruction on consent.

III. The ordinary meaning of consent did not apply to the 2015 SIWOC definition.

The claims the consent instruction given in Toston's case "essentially set forth the ordinary meaning of without consent." (Appellee's Br. at 13.) The State goes on to argue consent was not important because Toston did not argue S.S. consented to sex. Neither proposition can stand.

Taking the State's second argument first, the Fourteenth Amendment to the United States Constitution and Article II, Section 17 of the Montana Constitution provide that 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; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). A defendant's fundamental right to a fair trial

may be implicated when, as here, the jury finds guilt without being fully and fairly instructed of the applicable law. *State v. Akers*, 2017 MT 311, ¶ 16, 389 Mont. 531, 408 P.3d 142. Jury instructions that relieve the State of its burden violate a defendant's due process rights. *Carella v. California*, 491 U.S. 263, 265, 109 S. Ct. 2419, 105 L. Ed. 2d 218 (1989); *See also*, *State v. Carnes*, 2015 MT 101, ¶ 13, 378 Mont. 482, 346 P.3d 1120 (Jury's express concerns about uninstructed element of the offense warranted plain error reversal). The chosen defense does not relieve the State of the duty to prove every essential element.

As to the first argument, the "ordinary" meaning of consent does not apply to the 2015 definition of SIWOC. In fact, the State's own authority confirms consent has to be defined by statute. In *City of Missoula v. Zerbst*, 2020 MT 108, 400 Mont. 46, 462 P.3d 1219,[1] this Court explained that only where no statutory definition exists should the ordinary meaning of consent be used. In doing so, this Court demarked a clear line between the essential consent element in SIWOC cases as opposed to sexual assault cases:

[1] Cited on pages 27 through 29 of the Appellee's Brief.

> The "consent" element for [sexual assault] had its "ordinary meaning." *See Stevens*, ¶ 59[2] ("Unlike in the case of sexual intercourse without consent, the term 'without consent' is undefined for purposes of sexual assault and, instead, has its ordinary meaning."); *Detonancour*, ¶ 64[3] (citations omitted).

City of Missoula v. Zerbst, 2020 MT 108, ¶ 17, 400 Mont. 46, 462 P.3d 1219. In 2015, without consent meant a victim who was compelled to submit by force to sexual intercourse. As in *Carnes*, the jury's concern about the 2017 version of SIWOC emphasizes how the trial was rendered unfair by the mid-trial amendment of the SIWOC charge and the eventual failure to instruct the jury about the more stringent 2015 SIWOC element.

IV. In 2015, the essential "without consent" took many different forms.

In 2015[4], the State still had numerous options about how it charged the "without consent" element. The most direct was proof that the defendant compelled the alleged victim to submit to sex by force. Mont. Code Ann. § 45-5-501(1). The same statute also allows the force to be applied to someone other than the victim. *Id.* Force then is

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[2] *State v. Stevens,* 2002 MT 181, 311 Mont. 52, 53 P.3d 356.

[3] *State v. Detonancour*, 2001 MT 213, 306 Mont. 389, 34 P.3d 487

[4] All references in this section will be to the 2015 SIWOC elements and related definitions.

further broken down into three different elements: (1) the infliction, attempted infliction or threatened infliction of bodily injury (Mont. Code Ann. § 45-5-501(2)(a)); (2) the commission of a forcible felony (*Id.)* and (3) the threat of substantial retaliatory action combined with a reasonable belief of the defendant's ability to execute the threat (Mont. Code Ann. § 45-5-501(2)(b). These elements are all designed to overcome consent and do not include actions taken after the sexual act.

The State also recognized the seven broad categories where the Legislature said certain people are incapable to consent to sexual intercourse. Appellee's Br. At 27 *citing* Mont. Code Ann. § 45-5-501(1)(a)(ii)(A) through (G). In practice, these categories further limit the "ordinary" meaning of consent. For example, a female guard and male inmate can agree to engage in sexual intercourse without any sort of force involved. However, given their respective positions of power, the male inmate is incapable of consenting to the sexual acts. Mont. Code Ann. § 45-5-501(1)(a)(ii)(E).

In Toston's case, every Information filed by the State alleged that Toston compelled S.S. to submit to sexual intercourse by the direct use of force against S.S. (*See* Appellant's Br. at 1-2) Yet, under the State's theory, it could have instructed the jury to find Toston guilty based on

any form of SIWOC as long as it gave the ordinary definition of consent at the end of the case. "The information must reasonably apprise the accused of the charges against him, so that he may have the opportunity to prepare and present his defense." *State v. Scheffer*, 2010 MT 73, ¶ 38, 355 Mont. 523, 230 P.3d 462. It was this type of thinking that led to the State submitting instructions requiring affirmative consent to sexual contact rather than the more restrictive requirement to prove the use of force. Even more bizarre, the State continues to argue it was okay to allege, midtrial, for the first time, that S.S. was incapable of consent because she was overcome by deception, coercion, or surprise. (Appellee's Br. at 13). S.S. was not in a vulnerable position like the massage cases which are commonly associated with this incapable of consent category. *See*, *State v. Lerman*, 2018 MT 5, ¶¶ 15-17, 390 Mont. 117, 408 P.3d 1008. Nor was there any indication where consent was overcome by surprise. Adding the incapable of consent element created a totally separate charge never seen before the mid-trial amendment. Relying on the ordinary definition of consent allows the State's shotgun approach instead of being bound to elements charged in the Information and defined by statute.

When the district court allowed the State to charge a multitude of variations of consent that did not incorporate the force element Toston's attorney objected. She explained that removing the force element created a different charge – one that did not exist in 2015. (Tr. at 458.) The State tries to avoid the necessity to prove the essential force element by saying Toston's defense never contested consent or force. What the State overlooks, is Toston's attorney kept the opening statement vague because she knew the State's Aggravated SIWOC charge was invalid:

> There is a lot more to this story than you have been told, and all that we ask you is that you keep an open mind and you hear the evidence that comes out because we believe that there will be evidence that contradicts what this girl has said.

(Tr. at 180.) Toston's attorney was correct about the invalidity of the Aggravated SIWOC charge. What she could not anticipate is that the judge would allow the State to change the charge to something outside of what was alleged in the multiple Information filed by the State or even available to charge in 2015.

CONCLUSION

The district court knew the quandary the State had put it in with its charging error:

> Now, the Montana Supreme Court, Miss Jerstad, may -- they may say that this was a substantive change and I erred in granting it, but Miss Hood, if I -- if they say it is not a substantive change in the form change, we've only done it once, and I am going to do whatever I can to make sure [S.S.] doesn't never have to get up on that stand again to talk about this incident.

(Tr. at 465). Unfortunately, the court's emphasis not repeating S.S.'s testimony caused it to overlook the fundamental change made to the essential consent element both in the charging amendment and when instructing the jury. Toston's conviction under Count I of the Third Amended Information must be reversed.

Respectfully submitted this 24th day of September, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply 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 2298, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

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CERTIFICATE OF SERVICE

I, Chad M. Wright, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 09-24-2021:

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