DA 20-0580

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 291

IN THE MATTER OF:

J. W.,

A Youth.

APPEAL FROM: District Court of the Sixteenth Judicial District,
In and For the County of Fallon, Cause No. DJ-2020-1
Honorable Nickolas C. Murnion, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Shandor S. Badaruddin, Shandor S. Badaruddin, PC, Missoula, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Tammy K Plubell, Assistant Attorney General, Helena, Montana

Darcy L. Wassmann, Fallon County Attorney, Baker, Montana

Submitted on Briefs: September 22, 2021

Decided: November 9, 2021

Filed:

Clerk

Justice James Jeremiah Shea delivered the Opinion of the Court.

¶1 Appellant Youth J.W. appeals from the jury verdict and November 13, 2020 Dispositional Order by the Sixteenth Judicial District Youth Court, Fallon County, finding J.W. guilty of the offense of sexual intercourse without consent, a felony if committed by an adult; adjudicating J.W. a delinquent youth; and designating J.W. a serious juvenile offender. We review the following issues on appeal:

1. *Whether the Youth Court abused its discretion when it refused to instruct the jury to consider youth characteristics in determining J.W.'s guilt.*

2. *Whether the Youth Court abused its discretion when it refused to instruct the jury on the legal age of consent.*

3. *Whether the youth court jury had sufficient evidence to convict J.W. of the offense of sexual intercourse without consent.*

¶2 We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶3 During the early summer of 2019, the victim, M.H., and her friend, S.D., met up with two boys, K.W. and the defendant, J.W., to have a bonfire on J.W.'s family's ranch in Fallon County. J.W. was 14 years old and had just graduated from the eighth grade. The other teens were 16 and had just finished their sophomore year of high school. J.W., K.W., and S.D. were drinking beer and hard iced teas. M.H. was the only teen who did not have anything more than "a sip" to drink that night.

¶4 Sitting around the fire, the group played a few rounds of "Strip-Rock, Paper, Scissors" in pairs. One boy and one girl squared off at a time. Whenever a player lost a

round, that player had to remove a piece of clothing. The game ended when one of the two players were "completely naked."

¶5 After some time and a few more drinks, the teens started playing a game called "Nervous." Also played in pairs with one boy and one girl, the game involved one player touching the other with his or her hands until the second player said "nervous." When a player said "nervous," the game ended, and that player lost. M.H. was the only teen who had never played the nervous game before, and she testified that she felt pressured to play. M.H. acknowledged that she did not say "nervous" when J.W. touched her backside, put his hand inside her underwear, and inserted one, and then two fingers into her vagina.

¶6 M.H. testified as follows regarding what happened after that point: J.W. asked her to sit on the side of his flatbed truck and she complied. J.W. pushed her down by her shoulders so that she was laying on her back. J.W. removed her pants and underwear before climbing onto the truck bed and inserting two fingers into her vagina. M.H. felt a sharp pain in her vagina and saw that J.W. was suddenly on top of her. She could see both of his hands. M.H. told J.W., "I'm nervous, I'm nervous," and, "Okay you can get off now." When J.W. did not get off, M.H. told him, "No, no," and tried to push him away with her arms. J.W. then lifted one of her legs and she said, "No," louder. When J.W. still did not get off, M.H. twisted around to free her leg and then kicked him off by pushing her foot against his chest. At that point, J.W. stopped and they both got dressed.

¶7 J.W. testified that he did not insert his penis into M.H.'s vagina; M.H. consented to J.W. inserting his fingers in her vagina; and he stopped as soon as she said, "Ow," "No not here," and that she "didn't want to do it there."

¶8 The witnesses largely corroborated M.H.'s story. K.W. testified that:

> [M]e and [S.D.] were talking and then we heard [M.H.] say, "Nervous," and "Nervous," and then "Stop," and then [J.W.] we'd seen him like get off the pickup. I don't know if he got pushed off or what had happened but we were kinda (sic) like, oh what was that all about, we turned around and [J.W.] was puttin (sic) his pants on and [M.H.] was ta – putting [her] pants on.

¶9 S.D. testified: "I just saw him like shove her up against the truck and then him trying to go on and [M.H.] shoving him trying to su – get him off but . . . ." S.D. testified she then heard K.W. tell J.W. to "knock it off and that we needed to go."

¶10 The State filed a petition in the Youth Court on January 27, 2020, alleging that J.W. was a delinquent youth within the meaning of § 41-5-103(12)(a), MCA, because he committed an offense that, if committed by an adult, would constitute the criminal offense of sexual intercourse without consent. J.W. denied the allegations. The Youth Court held a jury trial in August 2020.

¶11 Prior to deliberation, the Youth Court refused to give four of J.W.'s proposed jury instructions. Three of the proposed instructions were based on language from the United States Supreme Court in *Miller v. Alabama*, 567 U.S. 460, 470-74, 132 S. Ct. 2455, 2464-66 (2012) (holding that mandatory life without parole for juvenile homicide offenders violates the Eighth Amendment's prohibition on cruel and unusual punishment), and *Roper v. Simmons*, 543 U.S. 551, 569-70, 125 S. Ct. 1183, 1195-96 (2005) (invalidating

the death penalty for all juvenile offenders under the age of 18). These instructions would have allowed the jury to consider J.W.'s youth characteristics when determining J.W.'s culpability.

¶12 J.W.'s first proposed jury instruction provided:

> This is a case where the accused is a child. The United States Supreme Court has determined, based on science and common sense, that children are different than adults in three significant ways: first, children lack maturity and a sense of responsibility; second, children are more susceptible to negative influences and outside pressures; and third, a child's character is not as full-formed as an adult.
>
> Anyone who remembers being a teenager, who has been the parent or caretaker of a teenager, or who has observed adolescent behavior, knows intuitively what scientific research shows – that adolescents do not think or behave like adults; their brains are not yet fully developed in the areas that control impulses, ability to foresee the consequences of their actions, and to temper their emotions. These differences are characteristics that you may consider as you listen to the evidence in this case.

¶13 Counsel for J.W. argued that the proposed instruction "goes squarely to intent" and "helps the jury understand that there are differences between adults and children." In denying this proposed instruction, the Youth Court distinguished *Miller*, which required sentencing courts to factor in youth characteristics when potentially sentencing children to life without parole. The Youth Court stated, "I don't see where this is relevant to liability or culpability." The Youth Court determined that Montana has not adopted "this kind of instruction," the proposed jury instruction language "was for sentencing purposes," and it "would be confusing to the jury."

¶14 J.W.'s second proposed jury instruction provided:

> In determining whether a child has acted reasonably you may consider that a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults. These attributes of youth often result in impetuous and ill-considered actions and decisions. Juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.

¶15 Counsel for J.W. argued that the instruction "goes directly to the knowingly requirement" of the alleged crime. The Youth Court denied the proposed instruction; agreeing with the State's argument that the instruction would confuse the jury because "we're not asking the jury . . . to determine whether anyone acted reasonably."

¶16 J.W.'s third proposed jury instruction provided:

> A person acts knowingly when the person is aware of the person's conduct.
>
> A knowing act is characterized by awareness of the consequences of that action. The youth here is an adolescent and one of the differences between adults and adolescents is that adolescents' brains are not fully developed in the areas that control impulses, foresee consequences, and temper emotions. Adolescents are susceptible to acting impetuously with little thought or consideration of consequences, a fact shown by brain development research as well as common sense. You may consider these attributes of adolescence when determining whether the youth acted knowingly.

¶17 Counsel for J.W. explained that "what this instruction tries to do is paint a better picture, a more complete picture that a youth's brain is perhaps less aware than an adult's brain." The Youth Court declined the instruction, stating, "Again, I believe that this goes more to a proper disposition." Likening the proposed instruction to Montana's rule that intoxication is not a defense, the Youth Court described the instruction as "almost [promoting] a new defense that adolescent brains are not fully developed in the areas that control impulses or see consequences and temper emotions."

¶18 The final instruction informed the jury that a person under 16 years old is legally incapable of consent. Counsel for J.W. argued the instruction was applicable in the case because, "Defense has already explained to the jury in opening statements about . . . the Youth's age at the time of the offense, really it's the heart of the Defense's argument that at the time [J.W.] was less than sixteen, [M.H.] was over sixteen." He further argued that:

> I brought up that this was a delayed report, that [M.H.] had gone to four adults before reporting and that once it was reported the only difference between her being the perpetrator and being the victim was saying that she said no, that and what my intention of using this instruction and relying on this instruction is to argue reasonable doubt which the Defense has to be able to do and so if the Court does not allow this instruction it will be completely undercutting the Defense.

¶19 The State objected, arguing that the proposed instruction incorrectly instructs the jury as to whose consent it would be considering. The Youth Court asked J.W.'s Counsel to clarify J.W.'s position, inquiring: "Even if he initiates the sex he can't consent?" J.W.'s Counsel replied, "Yes, Your Honor." The Youth Court denied the instruction.

¶20 The jury found J.W. responsible for the offense of sexual intercourse without consent. The Youth Court held a dispositional hearing in which it adjudicated J.W. a delinquent youth and designated him a serious juvenile offender. Pursuant to the Extended Jurisdiction Prosecution Act, §§ 41-5-1601 to -1607, MCA, the Youth Court committed J.W. to the Montana Department of Corrections until the age of 25, with four years suspended, and ordered J.W.'s placement at Pine Hills Correctional Facility until age 18 or sooner released.

STANDARDS OF REVIEW

¶21 Recognizing that a district court has broad discretion when instructing a jury, we review jury instructions for an abuse of discretion. *State v. E.M.R.*, 2013 MT 3, ¶ 16, 368 Mont. 179, 292 P.3d 451. We determine whether the instructions, taken as a whole, fully and fairly presented the applicable law to the jury. *In re T.J.B.*, 2010 MT 116, ¶ 16, 356 Mont. 342, 233 P.3d 341 (citing *State v. Schmidt*, 2009 MT 450, ¶ 26, 354 Mont. 280, 224 P.3d 618). A court abuses its discretion when it acts arbitrarily or exceeds the bounds of reason, resulting in substantial injustice. *E.M.R.*, ¶ 16. We apply the same principles to proceedings held in youth court. *E.M.R.*, ¶ 16.

¶22 We review the sufficiency of the evidence to support a conviction by viewing the evidence in the light most favorable to the prosecution, and we determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *In re C.T.P.*, 2004 MT 63, ¶ 16, 320 Mont. 279, 87 P.3d 399. We review a jury's verdict to determine whether sufficient evidence exists to support the verdict, not whether the evidence could have supported a different result. *State v. Fleming*, 2019 MT 237, ¶ 12, 397 Mont. 345, 449 P.3d 1234. Determining the credibility of witnesses and the weight to be given to their testimony is exclusively the province of the trier of fact. *State v. Shields*, 2005 MT 249, ¶ 19, 328 Mont. 509, 122 P.3d 421. We will not substitute our judgment for that of the jury, and we will assume every fact that the jury could have deduced from the evidence. *T.J.B.*, ¶ 15.

DISCUSSION

1. Whether the Youth Court abused its discretion when it refused to instruct the jury to consider youth characteristics in determining J.W.'s guilt.

¶23 The Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article II, Section 17, of the Montana Constitution protect the substantive and procedural rights of persons faced with deprivation of life, liberty, or property by the government. *State v. Cameron*, 2021 MT 198, ¶ 18, 405 Mont. 160, 494 P.3d 314 (quoting *State v. Finley*, 2003 MT 239, ¶ 29, 317 Mont. 268, 77 P.3d 193). Montana youths are constitutionally guaranteed the same fundamental rights as adults. *C.T.P.*, ¶ 39 (citing Mont. Const. art. II, § 15).

¶24 J.W. contends that the Youth Court's denial of three proposed jury instructions regarding the unique characteristics of youth deprived J.W. of his substantial rights because "children are constitutionally different than adults for purposes of determining delinquency." J.W. attempts to expand this Court's holding in *Steilman v. Michael* that "children are constitutionally different from adults for *purposes of sentencing* under the Eighth Amendment." *Steilman v. Michael*, 2017 MT 310, ¶ 14, 389 Mont. 512, 407 P.3d 313 (emphasis added) (citation and internal quotation marks omitted). The State maintains that the Youth Court was correct to deny J.W.'s proposed jury instructions because *Steilman* and *Roper* and its progeny are relevant only to sentencing juvenile offenders.

¶25 We decline to adopt J.W.'s extension of *Steilman* to a youth court jury's consideration of culpability. J.W.'s assertion finds no support in U.S. Supreme Court or

Montana law, nor does he make a compelling argument that this Court should extend its Eighth Amendment jurisprudence to a youth court jury's determination of guilt or innocence. In *Steilman*, we embraced *Miller*'s substantive rule, holding that Montana's sentencing judges must consider mitigating characteristics of youth when sentencing juvenile offenders to life without the possibility of parole. *Steilman*, ¶ 17. Our decision was based on the U.S. Supreme Court's clarification in *Montgomery v. Louisiana* that *Miller* "draws 'a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption' and allows for the possibility 'that life without parole could be a proportionate sentence only for the latter kind of juvenile offender.'" *Steilman*, ¶ 21 (citing *Tatum v. Arizona*, ___ U.S. ___, 137 S. Ct. 11, 12 (2016) (Sotomayor, J., concurring) (quoting *Montgomery v. Louisiana*, 577 U.S. 190, 136 S. Ct. 718, 734 (2016) (holding that *Miller*'s procedural requirements to consider youth characteristics when sentencing juvenile offenders provides a substantive rule that applies retroactively)).

¶26 These cases stem from the U.S. Supreme Court's recognition that, due to the "inherent differences that result from children's diminished culpability and greater prospects for reform," *Steilman*, ¶ 15 (citing *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 733 (internal citation and quotation marks omitted)), "[w]ith respect to life without parole for juvenile nonhomicide offenders, none of the goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation—provides an adequate justification." *Graham v. Florida*, 560 U.S. 48, 71,

130 S. Ct. 2011, 2028 (citation omitted). Thus, "[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense" and invalid under the Eighth Amendment's prohibition on cruel and unusual punishment. *Graham*, 560 U.S. at 71, 130 S. Ct. at 2028.

¶27 Nothing in *Montgomery*, *Miller*, or *Steilman* directs Montana youth courts to instruct juries on youth characteristics for purposes of determining culpability. This line of precedent, rooted in the U.S. Constitution's guarantee of proportionality in sentencing, evolved separate and apart from the law solidifying the jury's role as the factfinder in a youth court proceeding. "The jury's function is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged. The judge, by contrast, imposes sentence on the defendant after the jury has arrived at a guilty verdict." *E.M.R.*, ¶ 24 (quoting *Shannon v. United States*, 512 U.S. 573, 579, 114 S. Ct. 2419, 2424 (1994)).

¶28 Youth is a mitigating factor that can reduce the impact of a youth offender's sentence to "prevent and reduce youth delinquency through a system that does not seek retribution but that provides immediate, consistent, enforceable, and avoidable consequences of youths' actions"; as well as "a program of supervision, care, rehabilitation, detention, competency development, and community protection for youth before they become adult offenders." Montana Youth Court Act, § 41-5-102(2)(a)-(b), MCA. However, the scope and effect of such a mitigation determination is properly left to the sentencing judge—not the jury. *State v. Keefe*, 2021 MT 8, ¶ 35, 403 Mont. 1, 478 P.3d 830. This Court has stated that "in a non-capital case, the jury's verdict should

not be influenced *in any way* by sentencing considerations." *E.M.R.*, ¶ 24 (emphasis in original) (quoting *State v. Stewart*, 2000 MT 379, ¶ 44, 303 Mont. 507, 16 P.3d 391). In the same way that a trial court should not instruct jurors to consider the consequences of a verdict during their deliberations of guilt or innocence, the Youth Court is properly vested with the discretion to refuse instructions that will distract the jury from its fundamental duty—to determine whether the facts presented at trial establish the elements of the charge beyond a reasonable doubt. *E.M.R.*, ¶ 23 ("[T]he jury's sole function is to decide the defendant's guilt or innocence." (Citation and internal quotation marks omitted.)); *see Fink v. Williams*, 2012 MT 304, ¶ 18, 367 Mont. 431, 291 P.3d 1140 ("The District Court has broad discretion in determining issues related to trial administration.").

¶29 We decline to extend this Court's holding in *Steilman* to a youth court jury's determination of culpability. J.W.'s proposed instructions presented additional information entirely "unrelated to [the jury's] factfinding mission." *E.M.R.*, ¶ 20. The Youth Court did not abuse its discretion by denying J.W.'s proposed instructions.

2. Whether the Youth Court abused its discretion when it refused to instruct the jury on the legal age of consent.

¶30 Trial courts must instruct the jury on all materially relevant theories and issues supported by the evidence. *City of Helena v. Parsons*, 2019 MT 56, ¶ 19, 395 Mont. 84, 436 P.3d 710 (citing *State v. Erickson*, 2014 MT 304, ¶ 35, 377 Mont. 84, 338 P.3d 598). However, when instructing a jury, the trial court also must be "guided by the rules and principles of law, and jury instructions must fully and fairly instruct the jury on the applicable law." *State v. Davis*, 2016 MT 102, ¶ 29, 383 Mont. 281, 371 P.3d 979 (citing

State v. Ring, 2014 MT 49, ¶¶ 12-13, 374 Mont. 109, 321 P.3d 800 (internal quotations omitted)).

¶31 J.W. argues the Youth Court abused its discretion when it refused to instruct the jury on the legal age of consent, denying him his due process right to present one of his two theories of defense. J.W. claims his theory that "M.H. [altered] her testimony to avoid prosecution" was supported by the evidence, and without the denied instruction, the jury was "unaware of [M.H.'s] obvious motive, bias, or prejudice . . . to testify other than truthfully." The State argues J.W.'s proposed jury instruction was legally unavailable because the definition of "without consent" applies to the victim of sexual intercourse without consent, not to the offender. The State contends that J.W.'s theory implies a youth under the age of 16 could never be charged with any sexual offense. The State maintains that, beyond being legally incorrect, the Youth Court's refusal of the proposed instruction did not deny J.W. his right to present his defense because J.W. argued this theory to the jury in both his opening and closing statements.

¶32 The State petitioned J.W., who was 14 years old, to be a delinquent youth on the allegation that he committed the offense of sexual intercourse without consent against 16-year-old M.H., which would be a felony under § 45-5-503(1), MCA (2017), if J.W. had been an adult. At trial, J.W. requested an instruction stating, "A person who is under 16 years old is incapable of consent," based upon § 45-5-501(1)(b)(iv), MCA. On appeal, he argues he was entitled to the instruction to support his theory that M.H. reported J.W. to authorities to preempt a potential charge against herself. But at trial, his position was

broader, seeking to argue that even if he had been the instigator of the sexual activity, he could not legally consent to it.

¶33 J.W.'s reliance upon § 45-5-501(1)(b)(iv), MCA, is misplaced. Section 45-5-501(1)(b)(iv), MCA, does not state, as J.W. proposed, that "a person" who is under 16 years old is incapable of consent; it states that a "victim" who is less than 16 years old is incapable of consent. While "victim" is not separately defined in § 45-5-501, MCA—the sexual crimes definitional statute—that section does reference the "perpetrator," § 45-5-501(1)(b)(v)-(xii), MCA, as well as "offender," including "youth offender." Section 45-5-501(3), MCA. "Offender" is defined in the criminal code as "a person who has been or is liable to be arrested, charged, convicted, or punished for a public offense." Section 45-2-101(48), MCA. Thus, under the definitional statute, perpetrators/offenders are identified separately from victims, which simply makes common sense. It is clear too from these provisions that two legally distinct individuals—perpetrators and victims—are involved in a sexual crime, but only "victims" can be incapable of consenting. J.W.'s proposed instruction did not accurately reflect this distinction.

¶34 Further, J.W.'s age was not an element of the crime as charged. The age of the "perpetrator" or "youth offender" is not an element of sexual intercourse without consent. Section 45-5-503(1), MCA. In cases alleging an age-based incapability of consent, only the age of the victim can be an element. Section 45-5-501(1)(b)(iv), MCA. Therefore, J.W.'s age was not an appropriate consideration for purposes of the "applicable law" of the sex crime. J.W.'s age would only have been relevant had M.H. been charged with sexual

intercourse without his consent. *See* § 45-5-503(1), MCA ("A person who knowingly has sexual intercourse . . . with another person who is *incapable of consent* commits the offense of sexual intercourse without consent." (Emphasis added.)). J.W.'s proposed instruction was not an accurate statement of applicable law, particularly as he argued the instruction to the Youth Court.

¶35 As the fact-finder, the youth court jury was tasked with determining whether M.H. had consented to sexual intercourse, not whether J.W. had consented. The Youth Court correctly reasoned that J.W.'s proposed jury instruction "turn[ed] the tables," misapplying the law in a way that is not just confusing but ultimately irrelevant to the jury's decision. J.W.'s instruction finds no *legal* basis within the context of this case because *legally* J.W. was not the alleged victim, as required by § 45-5-501(1)(b)(iv), MCA. Rather than "fully and fairly instruct[ing] the jury on the *applicable* law," *Davis*, ¶ 29 (emphasis added), J.W. sought to instruct the jury on law that was, by definition, inapplicable to this case.

¶36 J.W.'s claim that the denied age of consent instruction meant the jury was "unaware of [M.H.'s] obvious motive, bias, or prejudice . . . to testify other than truthfully" is unpersuasive. J.W.'s defense was that M.H. was not a credible witness; that she was lying about the course of events; and that she was motivated by self-preservation to see J.W. prosecuted before she could be charged with statutory rape. The Youth Court allowed J.W. to challenge M.H.'s testimony—including her motive, bias, or prejudice—by arguing to the jury that M.H. consented to sexual intercourse, and that she only reported the incident months later because she was afraid of being charged with statutory rape. Pertinent to this

defense, the Youth Court fully and fairly instructed the jury on the applicable law regarding its role in determining witness credibility. The Youth Court did not abuse its discretion in refusing J.W.'s proposed instruction.

3. Whether the youth court jury had sufficient evidence to convict J.W. of the offense of sexual intercourse without consent.

¶37 To support a conviction, the State must prove every element of the offense beyond a reasonable doubt. *C.T.P.*, ¶ 16. Section 45-5-503(1), MCA, provides that "[a] person who knowingly has sexual intercourse with another person without consent or with another person who is incapable of consent commits the offense of sexual intercourse without consent." The only element of the crime that J.W. disputes on appeal is whether, or to what extent, M.H. consented to the sexual contact. J.W. asserts that the evidence was not sufficient to support his conviction.

¶38 The elements of a charged offense are factual in nature and each must be determined by the jury. *State v. Gladue*, 1999 MT 1, ¶ 40, 293 Mont. 1, 972 P.2d 827. Determinations of witness credibility and the weight of testimony are within the exclusive province of the trier of fact; in the event of conflicting evidence on factual issues, the trier of fact decides which evidence prevails. *Shields*, ¶ 19; *Erickson*, ¶ 29. The direct testimony of one witness who is entitled to full credit is sufficient to prove any fact, and this Court "has consistently held that a conviction of sexual intercourse without consent is sustainable based entirely on the uncorroborated testimony of the victim." *Shields*, ¶¶ 18, 21 (citations omitted).

¶39 J.W. claims that he penetrated M.H. with her consent "but subsequently had insufficient time or opportunity to comply with her desire to stop what he was doing," and

once M.H. withdrew her consent, he stopped "as quickly as possible." M.H. directly contradicted J.W.'s version of events. M.H. testified that she withdrew her consent, then struggled to push J.W. away for several minutes, and that he did not stop until she kicked him. Two witnesses corroborated M.H.'s testimony that she called out, "nervous, nervous," and "stop," before she resorted to physical force.

¶40 The youth court jury weighed the conflicting evidence, determined the credibility of the witnesses, and accepted M.H.'s testimony regarding the events in question. While M.H.'s testimony alone could be sufficient to sustain J.W.'s conviction, the State presented two corroborating witnesses who each bolstered M.H.'s claim that she had withdrawn her consent well before J.W. complied. Viewing the evidence in the light most favorable to the prosecution and giving proper deference to the jury's resolution of conflicting evidence, we conclude that any rational trier of fact could have found that J.W. did not have M.H.'s consent to sexual intercourse beyond a reasonable doubt, thus establishing the elements of sexual intercourse without consent.

CONCLUSION

¶41 The Youth Court did not abuse its discretion by refusing to give J.W.'s proposed jury instructions on youth characteristics when considering his culpability. The Youth Court did not abuse its discretion by refusing to give J.W.'s proposed jury instruction regarding the age of consent. Viewing the evidence in the light most favorable to the State, the youth court jury had sufficient evidence to find beyond a reasonable doubt that J.W. committed the offense of sexual intercourse without consent.

¶42 We affirm.

/S/ JAMES JEREMIAH SHEA

We Concur:

/S/ MIKE McGRATH
/S/ BETH BAKER
/S/ LAURIE McKINNON
/S/ JIM RICE

Justice Ingrid Gustafson, specially concurring.

¶43 I do not concur with the majority's reasoning with regard to issue two. I would conclude it was error for the District Court not to give J.W.'s instruction on the legal age of consent, but failing to do so was harmless error. I concur with the majority as to issues one and three.

¶44 The majority concentrates on language of § 45-5-501(1)(b)(iv), MCA, that states a "*victim* is incapable of consent because the *victim* is . . . less than 16 years old[.]" Section 45-5-501(1)(b)(iv), MCA (emphasis added); *see* Opinion, ¶ 33. The majority interprets "*victim*" to mean only the person alleged by the prosecution in its charge to be the victim. J.W.'s theory of defense, contrary to that of the State, was that he denied engaging in any sexual conduct with M.H. to which M.H. did not consent and that M.H., knowing that J.W. was of an age that he could not consent to sexual contact, feared being prosecuted for engaging in sexual conduct with J.W. so that she falsely asserted SIWOC against J.W. to avoid prosecution. The State's charge asserting M.H. to be the victim and J.W. to be the perpetrator, does not establish that such is the case. That determination is for the jury. J.W.

presented evidence that M.H. consented to sexual touch and was touched by J.W. M.H. was of an age she could consent to sexual contact and J.W. was not. M.H.'s allegations against J.W. could be explained by self-preservation—she was trying to avoid being charged with a sexual offense. A defendant is entitled to have instruction on any theory of the case supported by the record. *State v. Goulet*, 283 Mont. 38, 41, 938 P.2d 1330, 1332 (1997). Instructions need only be sufficient to allow a defendant to fairly present asserted defense theories supported by applicable law and the evidence. *State v. Mills*, 2018 MT 254, ¶ 34, 393 Mont. 121, 428 P.3d 834. Given J.W.'s theory of defense and the trial evidence, I would conclude it was error for the District Court not to give J.W.'s instruction on the legal age of consent. It was an accurate statement of the law and fit within J.W.'s presented theory of defense. Giving this instruction would not have "turn[ed] the tables" or misapplied the law. Additionally, giving the instruction does not imply a youth under the age of 16 could never be charged with any sexual offense as asserted by the State. I would find, however, this error was harmless in light of the totality of defense J.W. presented at trial. J.W. fully presented his defense. Counsel informed the jury on more than one occasion, without objection by the prosecution or correction from the District Court, that J.W. by law was unable to consent to engage in the sexual conduct thus providing a basis for M.H. to fabricate the charge—trying to avoid being charged with a sexual offense herself. Had the jury believed J.W.'s rendition of events, it could have rendered a verdict in his favor. It did not.

/S/ INGRID GUSTAFSON

Justice Dirk Sandefur joins in the specially concurring Opinion of Justice Gustafson.

/S/ DIRK M. SANDEFUR