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STATE OF MONTANA
Case Number: DA 21-0372

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0372

STATE OF MONTANA,

Plaintiff and Appellee,

v.

BRYCE CALEB HAMERNICK,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, The Honorable John W. Larson, Presiding

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STATEMENT OF THE ISSUE

Whether the district court abused its discretion in instructing the jury and, if so, whether Hamernick's substantial rights were prejudiced as a result.

STATEMENT OF THE CASE

Bryce Caleb Hamernick was charged with sexual intercourse without consent (SIWOC) for forcing himself upon his employee, Jane Doe (age 18). (Docs. 1-4.) Doe immediately reported the rape to law enforcement and told the officer she had repeatedly told Hamernick to stop, but he did not. (*Id*.) Doe also showed the officers hundreds of text exchanges between the two in which Doe consistently rebuked Hamernick's advances and explicit sexual overtures. (*Id*.; 3/12/21 Tr. and 3/15/21 through 3/17/21 Tr. (hereinafter, "Tr.").) At trial, Hamernick testified that Doe had consented to having intercourse with him. (*Id*.)

The jury was given two different definitions for "knowingly" relative to the offense. (Doc. 48, JI. No. 42.) For the sexual intercourse element, the court gave the "conduct-based" definition and for the "without consent element," the court gave the "knowledge of fact" definition. (*Id*.) Hamernick was convicted and sentenced to prison for a term of 20 years with 15 years suspended. (Docs. 49, 62; 7/7/21 Tr.)

STATEMENT OF THE FACTS

I. The offense

In the spring of 2017, when Doe was 17 years old, she began working at Zimorino's where Hamernick was a delivery driver. (Tr. at 230-32, 586-88.) Hamernick was promoted to a management position that summer. (*Id.*) Doe stated she had a fine working relationship with Hamernick until later that year when he began sending her inappropriate text messages that made her uncomfortable. (*Id.* at 232-37; Exs. 1-1 through 1-145.) Hamernick also made inappropriate comments at work, touched Doe's back and thighs, and backed her up against a wall. (*Id.*) Doe showed the texts to her boyfriend, Christian, because they made her uncomfortable and she worried that if she rejected Hamernick her hours would be cut or she would not get earned raises. (*Id.*, 330-32.)

Doe repeatedly rebuked all of Hamernick's unseemly text messages telling him she was not interested in him that way and about her committed relationship with Christian. (Tr. at 240-75; Exs. 1-1 through 1-98.) Doe never saw Hamernick outside of work despite his attempts to get her to come live with him and consistently pointed out that Hamernick was her boss and she just wanted to be his friend. (*Id.*) Despite Doe's repeated rejections and admonition that his comments and actions made her uncomfortable, Hamernick did not relent in texting her and making unwanted physical advancements at work. (*Id.*)

One such inappropriate incident occurred in late spring or early summer of 2018, when Doe and Hamernick were talking in her car in Zimorino's parking lot. (Tr. at 238-39, 302.) Hamernick attempted to kiss Doe, and she turned her face and pulled away, making it clear she was uncomfortable with his advances. (*Id.*) Doe also continued to make her feelings known in person at work and through her reply texts to Hamernick's continued inappropriate comments. (*Id.*; Exs. 1-100 through 1-145.) For example, Hamernick's June 17, 2018 text to Doe confirms he knew Doe was not interested in having a relationship with him:

> I guess I really thought you wanted me. I will stop. I want you to be mine. I care about you so much. I have feelings for you much more than just lust. I love everything about you. No one makes me happy the way you do. I know you do not feel the same. I will stop forcing myself onto you, and I will stop with all the other stuff. You've made that very clear that's what you want. And I have been inconsiderate of that. I am so sorry.

(Tr. at 264-65.) But, Hamernick did not stop.

The next day, after Hamernick touched Doe's inner thigh and pressed up against her at work, the following text exchange took place:

> Hamernick: I thought you wanted me to touch you . . . but I guess you were just scared and I misread your reactions . . . I'm sorry I was so rough with you . . . you didn't like it though right[?]
>
> Doe: [N]o.
>
> . . .
>
> Hamernick: I liked touching you the way I did, but I suppose it's not fair for you to let me do that for my benefit.

Doe: [I]t’s not.

. . .

Hamernick: I’m just saying I’m sorry.

Doe: [O]kay.

Hamernick: I’m lucky you didn’t report me or anything...what if I went further? I could have ruined your life.

Doe: [Y]eah but you didn’t. I just kind of want to forget it all.

(Tr. at 268-70.) Despite Doe’s repeated comments that she was not interested in him and that he made her feel uncomfortable, Hamernick did not stop pursuing Doe through texts in the days leading up to when he forced himself upon her after work. (*Id*. at 274-75; Exs. 1-141 through 1-143.)

On July 7, 2018, after closing the restaurant at about 10 p.m., Hamernick and Doe went to a nearby building to enter supply orders online. (Tr. at 276-82, 311-13, 323.) Doe sat in a chair next to Hamernick and after he finished on the computer, Hamernick knelt in front of Doe while making flirtatious comments. (*Id*.) When Hamernick began rubbing Doe’s thigh and breasts, she tried to scoot away from him and turned her head when he tried to kiss her. (*Id*.) Doe became scared and tried to get up, but Hamernick kept pushing her down onto the chair despite her telling him “no” and that she “had to go home.” (*Id*.) Hamernick questioned whether Doe was sure about leaving and told her he thought she wanted it. (*Id*.) Doe was wearing loose-fitting capri overalls, so Hamernick was able to

reach up her pant leg and he touched her vaginal area while he continued kissing her neck. (*Id.*)

Hamernick then picked Doe up, walked to a different room, and tried to make her sit on his lap. (Tr. at 282-85, 323.) Doe got up and tried to move away, repeating that she had to go home, but Hamernick sat her back down on the chair and told Doe that she "wanted it" and, when she told him "no" and that she had to "go home," Hamernick insisted she was not serious. (*Id.*) Hamernick then took his pants down, exposed his penis, and put Doe's hand on his penis. (*Id.*) Doe froze and did not know what to do, but she continued to tell him she needed to leave. (*Id.*) Hamernick ignored Doe's plea. (*Id.*)

Hamernick then picked Doe up and stood her before a nearby table facing away from him and pulled her overalls down. (Tr. at 285-89, 323.) Hamernick bent Doe forward across the table and pushed his penis between her legs. (*Id.*) Doe tried to stand up and push him away with her hands, but Hamernick kept pushing himself into Doe until he penetrated her vagina with his penis. (*Id.*) Even as Doe shouted at him to stop, Hamernick questioned whether that was what she really wanted. (*Id.*)

Doe explained that during the assault, she repeatedly struggled to stand up and continually told Hamernick "no," and that she needed to leave. (Tr. at 286-89, 296-97, 307, 322-23, 325-26.) Doe stated that at no time, before or during the assault, did she give any signals that she was interested in having intimate contact

with Hamernick and she never reciprocated his advances. (*Id.*) Doe testified that she did not say anything during the assault to give Hamernick the impression she was joking when she told him "no," and to "stop." (*Id.*) Doe stated she never affirmatively consented to Hamernick touching her. (*Id.*)

At trial, after defense counsel confirmed with Doe that she did not bite Hamernick when he carried her to the table or yell out for help, he asked Doe if there was a "chance Mr. Hamernick was confused about what you wanted." (Tr. at 312-13.) Doe replied, "He could have been, but I don't think I was giving any reason for him to be confused." (*Id.*) Upon further inquiry, Doe agreed she had told the detective that Hamernick may have been confused and that she "could have been more assertive." (*Id.* at 315.) However, on re-direct, Doe reiterated that she had done nothing that night to indicate she was interested in Hamernick and had made several indications, both verbally and physically, that she was not. (*Id.* at 323.)

Doe testified that Hamernick finally stopped raping her when she kept shouting louder and louder for him to stop. (Tr. at 316.) Hamernick apologized to Doe and said he was sorry he raped her. (Tr. at 287-89, 305, 316-18, 325.) Doe did not say anything and just tried to leave, but Hamernick convinced her to stay and talk with him, which she did for about five or ten minutes. (*Id.*) Hamernick continued to apologize and told Doe he would not blame her if she came forward about what happened. (*Id.*)

Doe drove home and immediately took a shower because she wanted to "erase what had happened" and she "felt dirty [and] wanted to be clean." (Tr. at 289-93, 317-18.) Doe could not sleep, so she texted Christian and he called her. (*Id*., 333-40; Ex. 3.) Doe was eventually able to tell Christian what happened, and Christian encouraged her to contact the police. (*Id*.) Doe initially did not want to involve law enforcement because she was scared and not sure she could face what had happened. (*Id*.) After thinking more about it, Doe chose to contact the police because she realized she would not be able to just forget about it. (*Id*. at 292-94, 324-25; Ex. 2.) Doe told the dispatcher that Hamernick was her manager and was the person who raped her. (*Id*.) Doe then woke her mother and told her what had happened. (*Id*. at 347-60.)

Missoula Police Department (MPD) Officer Bryce Bare arrived at Doe's residence at about 12:30 a.m. and she relayed what Hamernick had done to her. (Tr. at 294-95, 351-59, 362-84.) Doe gave a statement at the police station and met with the crime victim advocate. (*Id*.) Doe was evaluated at First Step three times over the next three days to document new bruises as they became more visible. (*Id*.) Forensic nurses conducted the sexual assault examination of Doe and documented the bruising on Doe's legs and buttocks consistent with being pushed down onto a chair. (Tr. at 387-416; Exs. 8-10.) Both nurses explained that it was not uncommon for there to be no injuries to a woman's vagina following non-consensual sex. (*Id*.)

The next morning, MPD Corporal Matthew Stonesifer went to Hamernick's house to get Hamernick's version of the events. (Tr. at 213-25; Ex. 6.) Hamernick told the officers the two had been flirting for a while and things escalated the night before to kissing and touching, adding that Doe "had reciprocated it real well and I tried to go a little further, and I think I went too far and she seemed really upset about that [and] I feel really bad." (*Id*. at Ex. 6 00:45-1:00.) Hamernick stated he felt "terrible" and that Doe was "so upset and asked whether 'this is like a rape situation'" and added "I didn't go that far to where I . . . ." (*Id*. at Ex. 3:55-4:00, 4:10-4:20.) After acknowledging that he was her boss and a relationship with her would be inappropriate, Hamernick stated Doe and her boyfriend had broken up and he was trying to be there for her, but admitted he probably "should have backed off." (*Id*. at 5:45-6:05.) While inside his house, the officers noticed a letter on the counter that Hamernick had written to Doe. (*Id*.; Ex. 6.) The letter stated, in part, that

> There is no way I can correct things . . . I never felt a deeper regret than I do now. I thought I was a good person. Now, I don't know . . . I never wanted to hurt you ever. I never thought I would. . . . You trusted me, and I let you down. It's my greatest regret. . . .

(*Id*. at 222-23; Ex. 5.)

MPD Detective Connie Brueckner interviewed Hamernick. (Tr. at 543-54; Ex. 12.) Hamernick confirmed much of Doe's descriptions of their relationship, including that he was the one initiating flirtations, both physical and through texts.

(*Id*. at 3:40-6:40,13:00-14:50.) Hamernick also acknowledged that Doe had told him she did not want to be in a relationship with him, even after she and Christian broke up. (*Id*.) Hamernick repeatedly described how he "tested the waters" with Doe to see what her comfort level would be with physical touches. (*Id*. at 12:20-12:50, 21:20-21:30.) Hamernick also admitted that when he tried to kiss her, she told him to stop, and while he further clarified that Doe had not "lead me on," he still tried to justify his actions saying, "she didn't stop me when I made a move on her." (*Id*. at 15:25-16:15.)

Hamernick said that after work on July 7, Doe had not let him kiss her on the lips but did let him kiss her neck. (Tr. at 554-60; Ex. 12 at 20:00-21:20.) Hamernick described how he "tested the waters" by touching Doe's hips and breasts and that since Doe "did not stop me, she didn't try to grab me," he thought it was alright to continue, but also stated that at other times, Doe told him to stop, but he had interpreted it as a "playful no" and not a serious message to stop. (*Id*. at 21:20-22:00.) Hamernick stated he moved Doe to a different chair and then digitally penetrated her vagina, again justifying his actions by saying she had not stopped him. (*Id*. at 22:00-23:20.) Hamernick said he then took his pants down and put Doe's hand on his penis, explaining that he did not "wanna force her to do it, but I wanted to see, I was testing her again, to see how far she would go." (*Id*.)

According to Hamernick, Doe voluntarily gave him a “hand job” but then stopped and said she had to leave. (Tr. at 554-60; Ex. 12 at 23:20-23:45.) Hamernick then grabbed Doe’s breasts from behind and questioned whether she really needed to leave. (*Id.*) According to Hamernick, he then whispered in her ear that he wanted to put his penis inside her and it “seemed like that’s what she wanted” so he pulled down her overalls and touched his penis to her clitoris and then penetrated her vagina. (*Id*. at 23:45-25:00, 31:45-32:00.) Doe then told him to stop, but since she did not try to pull away, Hamernick continued to rub against her. (*Id*.)

Hamernick said he told Doe afterwards that he “just thought you would stop me if you didn’t want it” and explained to the detective that “Like I said, I tested the waters and if she stopped and said no, I would definitely stop.” (Ex. 12 at 27:25-28:30.) Ultimately, Hamernick agreed that Doe had told him “no” at three distinct points during the event, but he kept “testing the waters” to see how far she would let him go, explaining that when Doe said “no,” he did not take it to mean “stop,” but was more like a “playful” no. (*Id*. at 30:00-31:00.) Hamernick further explained that Doe did not ever push him away and described Doe’s behavior as “when a girl says ‘no we shouldn’t do this’ and she kinda pulls and plays with ya a little bit.” (*Id*. at 31:00-31:30.) Hamernick admitted he told Doe that if she felt he had done something wrong, then she could report it to the police and charge him

and then he would give his version of events. (*Id*. at 40:20-40:40.) Hamernick was reluctant to let the officers see his phone and admitted he had deleted the text messages that he and Doe had exchanged for months. (Tr. at 428, 558.)

Hamernick spoke to a coworker, Tanner Smith, shortly after the assault about why Doe had quit working there so abruptly, telling him that something had been "going on" between him and Doe and that one night "they were on the cusp of potentially entering a sexual act, and he had done something to trigger her and make her super upset or uncomfortable or perhaps had taken things too far." (Tr. at 486-504.) Smith "had suspicions" about Hamernick's version of events because Smith "had a hard time believing [Doe] would leave so abruptly if it was as minor" as Hamernick had described. (*Id*.)

Hamernick told his boss, Harry Ward, that after closing he and Doe were making out and she told him he could not kiss her on the lips, but could kiss her neck. (Tr. at 518-32.) (*Id*.) Hamernick told Ward that he digitally penetrated Doe and touched her vagina with his penis, but claimed he did not penetrate her with his penis. (*Id*.)

Doe never returned to Zimorino's and for months after the rape was afraid to leave her home. (Tr. at 297-98, 351-59.) Doe began counseling with Kelly Donisthorpe. (*Id*. at 473-80.) Donisthorpe testified that Doe had experienced a trauma, noting Doe suffered from hyperarousal symptoms (i.e., feeling unsafe,

fearing Hamernick would come to her home, being highly anxious, having nightmares and flashbacks) and describing Doe's acute emotional issues involved "guilt, shame, blame" and questioning whether she could have done something to prevent the assault. (*Id.*)

After reviewing the hundreds of text messages between Doe and Hamernick that Doe had saved, Detective Brueckner reinterviewed Hamernick. (Tr. at 570-76; Ex. 13.) Hamernick admitted that the texts looked "bad" and that Doe was firm in her decision not to pursue a relationship with him in her texts, but Hamernick claimed Doe acted differently in person. (*Id.* at 1:50-3:50.) However, the only examples of Doe's flirtations Hamernick described was her snapping a towel and throwing pizza ingredients at him. (*Id.* at 3:50-4:50.) Hamernick stated he thought Doe was playing a "cat and mouse game" with him and sent him confusing/misleading messages. (*Id.*) While Hamernick described only one intimate physical contact with Doe before July 7 in his first interview, during his second interview, Hamernick claimed they had multiple occasions of mutual intimate contact at work. (*Id.* at 6:00-7:00; Tr. at 663-64.)

In his second interview Hamernick claimed that after the July 7 incident, Doe made it "very clear" he had done nothing wrong "so it was a big surprise" to him when the police came to his door that next morning; this was different than his first interview when Hamernick stated that he invited Doe to call the police if she

thought he assaulted her. (Ex. 13 at 17:30-17:50.) In his second interview, Hamernick told the detective he had asked for Doe's consent before he inserted his penis and she had said "yes" but she stopped him when he was about to penetrate her. (*Id*. at 18:40-19:15.) Detective Brueckner noted this response was also different than his first interview when Hamernick described interpreting Doe's behavior as giving him consent to have sex. (Tr. at 574.)

At trial, Hamernick alleged that, unlike her text responses that were "abrasive [and] cold," in person, Doe was "more engaging and flirtatious." (Tr. at 591-96.) However, during cross-examination, Hamernick agreed that Doe expressly asked him in a text whether she was sending mixed signals and he replied she was not. (*Id*. at 642-43.) Hamernick alleged that all their physical interactions began consensually, but then a switch would flip, and Doe would no longer engage with him. (*Id*. at 591-96, 665-98.) Hamernick testified that things were "heating up" between him and Doe for a month before July 7, but on cross-examination, he admitted that was not accurate because Doe's relationship with her boyfriend did not end until June 25. (*Id*., 629.)

At trial, Hamernick's version of the July 7 events mirrored his second interview where he asserted that Doe physically reciprocated his kisses by leaning into him and letting him kiss her neck. (Tr. at 603-09.) Hamernick claimed Doe opened her legs when he put his hand up her pant leg, but he did not describe Doe

consenting to him inserting his fingers in her vagina; rather he interpreted her physical response to his actions as indicating she was "into it." (*Id.*) Similarly, Hamernick stated Doe did not protest when he moved her hand to his penis, and offered no description of Doe verbally agreeing to his actions, but claimed she rubbed his penis. (*Id.*) Hamernick admitted that when Doe started to leave and said she should go home, he "slightly aggressively" grabbed her breasts from behind, pulled her to him, and questioned whether she was sure she had to go. (*Id.*, 678.) Hamernick testified that Doe did not try to pull away and when he asked if she would like it if he put his penis inside of her, Hamernick alleged that Doe verbally replied with "an affirmative 'yes.'" (*Id.*)

Hamernick testified that, "At that point, she had consented to sex," so he moved her to a nearby table and Doe allegedly explained how to take off her overalls. (Tr. at 609-11, 678-81.) According to Hamernick, when he rubbed his penis against her vagina, Doe did not stop him and appeared to him to be "into it," but when he penetrated her, Doe tensed up and said, "no, not that." (*Id.*) Hamernick testified that he repositioned his penis against her clitoris and when he said, "Like this?" Doe said "no" and he backed off. (*Id.* at 614.) Hamernick denied that afterwards he told Doe he felt like he had assaulted her. (*Id.*)

II. Jury Instructions

In addition to a "consent as a defense" instruction, which the court gave without objection, Hamernick also proposed the following "knowing" instruction:

> **Knowingly**
>
> A person acts knowingly with the respect to the element of sexual intercourse when the person is aware of his conduct.
>
> AND
>
> A person acts knowingly with respect to the element of without consent when the person is aware that there is no consent.

(Docs. 42, 48.)

The parties discussed jury instructions at the March 11, 2021 pretrial conference. (3/11/21 Tr.)[1] The court recognized that the parties differed on what "knowingly" instruction should be given relative to "without consent" and reserved ruling on that instruction until later. (*Id*. at 6-7.) Ultimately, the court chose to give "the instruction with the probability" that the State offered instead of the defendant's offered instruction. (Tr. at 689.)

Accordingly, and relevant to the issue on appeal, the jury was instructed as follows:

> **JI No. 4-2; KNOWINGLY**
>
> A person acts knowingly with the respect to the element of sexual intercourse when the person is aware of his conduct.

[1]Although not in the district court record, from the context of the pretrial conference discussions, it appears the State had submitted proposed jury instructions. (3/11/21 Tr.; Tr. at 689.)

AND

A person acts knowingly with respect to the element of without consent when the person is aware of a high probability that the sexual intercourse was without consent.

JI No. 5-6; ISSUES IN SEXUAL INTERCOURSE WITHOUT CONSENT

To convict the defendant of Sexual Intercourse Without Consent, the State must prove the following elements [beyond a reasonable doubt]:

(1) The Defendant has sexual intercourse with Jane Doe; and

(2) The act of sexual intercourse was without the consent of Jane Doe; and

(3) The Defendant acted knowingly with respect to both elements (1) and (2).

JI No. 5-2; DEFINITION OF "SEXUAL INTERCOURSE"

"Sexual intercourse" means penetration of the vulva, anus, or mouth of one person by the penis of another person, penetration of the vulva or anus of one person by a body member of another person, or penetration of the vulva or anus of one person by a foreign instrument or object manipulated by another person to knowingly:

(i) cause bodily injury or humiliate, harass, or degrade; or

(ii) arouse or gratify the sexual response or desire of either party.

Any penetration, however slight, is sufficient.

JI No. 5-3: "WITHOUT CONSENT" – SEXUAL INTERCOURSE WITHOUT CONSENT

The term "consent" means words or overt actions indicating a freely given agreement to have sexual intercourse and is further defined but not limited by the following:

(i) an expression of lack of consent through words or conduct means there is no consent or that consent has been withdrawn;

(ii) a current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent; and

(iii) lack of consent may be inferred based on all of the surrounding circumstances and must be considered in determining whether a person gave consent.

Additionally, resistance by the victim is not required to show lack of consent. Force, fear, or threat is sufficient alone to show lack of consent.

JI No. 5-4: CONSENT AS A DEFENSE

The consent of [Doe] is a defense to the offense of sexual intercourse without consent.

Such consent will not be a defense if [Doe] was induced to give consent by force.

(Doc. 48.)

STANDARD OF REVIEW

Since district courts have broad discretion in formulating jury instructions, this Court's standard of review is whether the court abused that discretion. *State v. Deveraux*, 2022 MT 130, ¶ 20, 406 Mont. 177, 512 P.3d 1198; *State v. Cybulski*, 2009 MT 70, ¶ 34, 349 Mont. 429, 204 P.3d 7 (Court determines whether trial court acted arbitrarily or exceeded the bounds of reason resulting in substantial injustice in instructing the jury). As part of this review, this Court "assesses whether the instructions, when considered as a whole, fully and fairly instructed the jury on the law applicable to the case." *State v. Ragner*, 2022 MT 211, ¶ 13, 410 Mont. 361, 521 P.3d 29.

"Even if an instruction error did occur, this Court will not reverse on such a claim unless it also finds that the district court abused its discretion in a way that

prejudicially affected a defendant's substantial rights." *Ragner*, ¶¶ 13-14. Whether a defendant's due process rights were violated is a question of law that this Court reviews for correctness. *City of Missoula v. Zerbst*, 2020 MT 108, ¶ 10, 400 Mont. 46, 462 P.3d 1219 (citing *Carella v. California*, 491 U.S. 263, 265 (1989) (a person's due process rights are violated if jury instructions relieve the State of its burden to prove every element of the charged offense beyond a reasonable doubt)).

SUMMARY OF THE ARGUMENT

Hamernick has failed to meet his burden of proving the district court abused its discretion and did not fully and fairly instruct the jury. Since a person must affirmatively agree prior to sexual penetration, knowledge of the absence of another's affirmative consent is a factual element of SIWOC. This Court approved giving different definitions of a mental state relative to elements of one offense and none of the cases cited by Hamernick prohibit the instructions that were given here. Hamernick cannot establish that the court acted arbitrarily or without reason when it provided both the correct "conduct-based" "knowingly" definition relative to Hamernick's act of penetrating Doe and the "knowledge of fact" "knowingly" instruction concerning whether Doe had first affirmatively consented to Hamernick's conduct.

Common sense reading of the instructions properly required the jury to convict Hamernick only if the jury found that Doe had not affirmatively consented. Thus, even if the jury should not have been given a separate "knowledge of fact" instruction, Hamernick had not established that his substantial rights were prejudicially impacted. It is beyond a reasonable doubt that the instruction at issue did not contribute to the jury's guilty verdict because the evidence established that Hamernick was "aware" that Doe had not affirmatively consented prior to the three times that Hamernick penetrated her. The strength of the State's evidence included Doe's consistent and compelling version of events as contrasted by Hamernick's evolving statements to investigators. Doe's emotional instability immediately after the assault as well as the hundreds of text messages further supported Doe's testimony that she had consistently rejected Hamernick's inappropriate advances.

Finally, even Hamernick's statements established that Doe had not freely given her consent. For instance, the language Hamernick used in his letter to Doe, where he wondered if he was a good person after he violated her trust, could certainly be interpreted by a reasonable juror as consciousness of guilt. In addition, Hamernick's own testimony at trial established that when he penetrated Doe for the third time, by repositing his penis against her clitoris, it was immediately after she said to stop and, therefore, done without obtaining Doe's freely given agreement. Hamernick has not established that the jury would have

had reasonable doubt regarding his guilt if the jury would have been instructed differently.

ARGUMENT

I. Hamernick failed to carry his burden of proving the district court did not fully and fairly instruct the jury.

A person commits the offense of SIWOC when the person "knowingly has sexual intercourse with another person without consent or with another person who is incapable of consent[ing]." Mont. Code Ann. § 45-5-503(1).[2] The definition of "knowingly," depends on whether the term applies to the defendant's conduct, a circumstance, the result of the defendant's conduct, or knowledge of a fact. Mont. Code Ann. § 45-2-101(35). That statute provides that,

> a person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when the person is *aware of the person's own conduct or that the circumstance exists*.
>
> A person acts knowingly with respect to the result of conduct described by a statute defining an offense when the person is *aware that it is highly probable that the result will be caused by the person's conduct*.
>
> When knowledge of the existence of a particular fact is an element of an offense, knowledge is established if a person is *aware of a high probability of its existence*.

[2]Since this offense occurred in July 2018, all references to Montana Code Annotated will use the 2017 version.

Id. (emphasis added). "'Conduct' means an act or series of acts and the accompanying mental state." Mont. Code Ann. § 45-2-101(15).

"Juries are to be instructed on the mental state pertinent to the crime charged." *State v. Ilk*, 2018 MT 186, ¶ 18, 392 Mont. 201, 422 P.3d 1219. "If the statute defining an offense prescribes a particular mental state with respect to the offense as a whole without distinguishing among the elements of the offense, the prescribed mental state applies to each element." Mont. Code Ann. § 45-2-103(4). However, this statute "does not require that the same definition of 'knowingly' apply to every element of the offense and that different 'knowingly' definitions may be applied to the different elements of an offense." *State v. Hovey*, 2011 MT 3, ¶ 22, 359 Mont. 100, 248 P.3d 303.

When instructing a jury on "knowingly," this Court has explained that a court cannot simply provide the jury with all possible definitions of knowingly leaving the determination of which definition applies to the jury. *State v. Azure*, 2005 MT 328, ¶ 20, 329 Mont. 536, 125 P.3d 1116 (citing *State v. Lambert*, 280 Mont. 231, 929 P.2d 846 (1996).) Instead, trial courts "must instruct the jury on what the term 'knowingly' means in the context of the particular crime." *Id.*

Here, the district court's "instructions, when considered as a whole, fully and fairly instructed the jury on the law applicable to the case" and Hamernick has

not established that the district court abused its discretion in instructing the jury. *Ragner*, ¶¶ 13-14.

The district court correctly instructed the jury on: the elements of SIWOC, including the appropriate mental state, "knowing," which applied to each element; the State's burden which was to prove each element beyond a reasonable doubt; the jurors' role as the sole judges of the witnesses' credibility. (JI. Nos. 2, 3, 5-6.)

Specific to the offense, the court correctly instructed that to establish the first element of SIWOC, the State had to prove Hamernick knowingly had sexual intercourse with Doe or, more specifically, the State had to prove Hamernick knowingly penetrated, however slightly, Doe's vulva with his finger and/or penis for sexual gratification. (JI No. 5-2.) Since penetrating someone's vulva is a physical action, *see* Mont. Code Ann. § 45-2-101(15), it constituted conduct which, under Mont. Code Ann. § 45-2-101(35), meant the State had to prove Hamernick was "aware of his conduct." (JI No. 4-2.)

The correctness of the instructions for the first element are not in dispute. Nor was the evidence establishing this element: Hamernick admitted that he penetrated Doe at least three times (once with his fingers and twice with his penis). *See State v. Lerman*, 2018 MT 5, 390 Mont. 117, 408 P.3d 1008 (clitoral rubbing constitutes penetration).

Relevant to the second element, the court indisputably provided the correct definition of "without consent." *See* JI-5-6. In 2017, Montana's Legislature chose to no longer define "without consent," but instead defined what "consent" means. *See* Mont. Code Ann. § 45-5-501(1) (*see* ch. 279, L. 2017). This amendment made it clear that a person could be raped even if "force" was not used and embodied society's belief that each participant must give affirmative consent prior to sexual intercourse. *See* Mont. Code Ann. § 45-5-501(1)(a) ("consent means words or overt actions indicating freely given agreement").

Given that "consent" now requires indication of "freely given agreement," whether a person gives consent is a threshold event that must occur prior to another having intercourse with that person. *See* JI-No. 5-6 ("[t]he act of sexual intercourse was without the consent of Jane Doe"). Thus, the court did not abuse its discretion in using the "knowledge of fact" knowingly instruction relevant to the separate element of "without consent." *See* JI-No. 4-2. Nor did this instruction constitute a "result-based" "knowingly.[3] And, whether a person gives affirmative consent does not constitute a "circumstance" ("aware of its existence") because

[3]While the "result-based" and "knowledge of fact" "knowingly" instructions include the "high probability" phrase, they apply to different elements: the "results-based" instruction is the mental state applied to defendant's actions in offenses designed to prohibit a certain result while the "knowledge of fact" instruction applies to an attendant fact the jury must determine relative to an offense, which here is the element of "without consent."

that would undermine the recent changes in legislation which make it clear that obtaining a person's consent before sexual intercourse is a threshold event that must occur; in other words, the existence of *the fact* that the person freely agreed to sex.

Questions of fact are determined by evaluating the totality of the circumstances. As the jury was instructed, a "lack of consent may be inferred based on all of the surrounding circumstances and must be considered in determining whether a person gave consent." (JI No. 5-3.) By instructing the jury that the State had to prove beyond a reasonable doubt that Hamernick had knowledge of the absence of Doe's affirmative consent before penetrating her, the district court did not act arbitrarily or exceed the bounds of reason. *Ragner*, ¶¶ 13-14; *Cybulski*, ¶ 34.

On appeal, Hamernick relies upon *State v. Gerstner*, 2009 MT 303, ¶ 29, 353 Mont. 86, 219 P.3d 866 and *Deveraux*, *supra*. However, neither of those cases concerned the propriety of giving, in addition to the "conduct-based" "knowingly" instruction, a separate "knowledge of fact" instruction relative to the element of without consent. Nor did those cases prohibit giving such an instruction.

Gerstner was charged with sexual assault for knowingly subjecting two children to sexual contact without consent and the court gave the "conduct-based" definition of "knowingly." *Gerstner*, ¶ 26. On appeal, Gerstner asserted that since

"sexual contact" requires a finding that the alleged touching (conduct) either caused bodily injury/humiliation or aroused a sexual response, the court should have given a "result-based" instruction. *Gerstner*, ¶ 28. This Court did not agree, explaining that the "particularized conduct of making sexual contact" is the act the statute makes criminal [so] the court correctly instructed the jury." *Gerstner*, ¶ 29.

Gerstner does not establish the district court abused its discretion in this case. The most notable difference is that the "without consent" element was not at issue in *Gerstner* and this Court did not even cite to that element in its analysis. *Gerstner*, ¶ 29. Rather, this Court focused only on the *conduct* or actions of the defendant (*i.e.*, subjects another to sexual contact) which includes in its definition the intent to cause humiliation or arouse sexual gratification. *Gerstner*, ¶¶ 29-32. Here, the conduct or act at issue was sexual intercourse (penetration to knowingly cause bodily injury/humiliate or arouse/gratify sexual response) for which, in accord with *Gerstner* and *Deveraux*, the court correctly provided a "conduct-based" knowingly instruction. The propriety of an additional "knowledge of fact" "knowingly" instruction for the "without consent" element was also not at issue in *Deveraux*.

In *Deveraux*, the district court rejected Deveraux's proposed "result-based" knowingly instruction for SIWOC. *Deveraux*, ¶ 15. Deveraux claimed that by choosing the "conduct-based" instruction over the "result-based" instruction,

which would have required the jury "to find he acted with an awareness there existed a high probability that his conduct would cause a specific result," the court somehow eliminated the State's obligation to prove "the specific intent to commit the underlying crime charged." *Deveraux*, ¶ 30. This Court disagreed.

Noting that Deveraux's argument was circular and unsupported, this Court found that, unlike offenses such as criminal endangerment or obstructing a peace officer where the result of a person's actions are criminalized, in SIWOC "the prohibited particularized conduct itself—engaging in sexual intercourse with another person *without that person's consent*—gives rise to the entire criminal offense, and requires only a conduct-based instruction." *Deveraux*, ¶ 32 (emphasis in original) (citing *Gerstner*, ¶ 29). However, this Court's reliance on *Gerstner* for this premise was misplaced because the "without consent" element was not even at issue in *Gerstner* and that case did not hold that the conduct (subjecting another to sexual contact) is prohibited *only* because it is done without consent. As explained above, the issue presented in *Gerstner* addressed the prohibited act/conduct that this Court recognized is inextricably linked to the act of touching an intimate body part to cause bodily injury/humiliate or arouse sexual response. This Court did not find a similar inextricable link between the act of making sexual contact and without consent.

Like *Gerstner*, this Court's observation in *Devereux*, that the mental state, "knowingly," applies to "sexual intercourse" and "without consent," does not establish the district court acted arbitrarily or outside the bounds of reason in instructing the jury in this case. *Cybulski*, ¶ 34. At issue in *Deveraux* was what *singular* "knowingly" definition should be given for the offense of SIWOC, with the offered choices being either "conduct-based" or "result-based." This Court was not asked to consider the separate element of "without consent" as is the case here. Moreover, the offenses in *Gerstner* and *Devereux* occurred prior to 2017 when the definition of "without consent" was replaced with a definition of "consent," which, as explained above, requires an affirmative agreement prior to intercourse or sexual contact.

Here, the court did not give a "result-based" "knowingly" instruction, but rather gave the proper "conduct-based" knowingly instruction as approved in *Gerstner* and *Deveraux*. But, unlike those two cases, the district court gave an additional "knowledge of fact" instruction which did not alter the State's burden to prove all the elements beyond a reasonable doubt. Giving this separate instruction was not prohibited by *Gestner* or *Deveraux*. *Gerstner* and *Devereux* do not support Hamernick's claim that "the district court abused its discretion." *Ragner*, ¶¶ 13-14. Nor does this Court's holding in *Ragner* establish that the court abused its discretion in instructing the jury.

In Ragner's SIWOC trial, the court "instructed the jury that 'knowingly,' with respect to the totality of the elements of the crime of sexual intercourse without consent, [meant] 'the person is aware of his or her conduct'" and declined to give Ragner's proposed instruction relative to the "without consent" element that "knowingly" meant "the person is aware that the circumstance exists." *Ragner*, ¶ 28. This Court concluded that the trial court did not abuse its discretion by giving one "knowingly" instruction that applied to all the elements, which aligned with Mont. Code Ann. § 45-2-103(4). *Ragner*, ¶¶ 32-33.

Ragner does not control here. The issue in *Ragner* concerned whether the court erred by not giving two "knowingly" instructions which both used the "awareness" definition, not whether giving an additional instruction was an abuse of discretion. *Ragner, supra*. *Ragner* does not hold that giving a separate "knowingly" definition was prohibited and, if given, would amount to an abuse of discretion. *Id*. Finally, in *Ragner* this Court did not address the propriety of giving a "knowledge of fact" instruction in addition to the "conduct-based" knowingly instruction which this Court approved in *Hovey*, where the appropriate "knowingly" jury instructions for the offense of sexual abuse of children were at issue.

In *Hovey*, this Court held that it was not reversible error for the district court to give a "conduct-based" knowingly instruction relative to the act of possessing

the photographs and a "knowledge of fact" instruction relative to whether the photographs depicted children engaged in sexual conduct.[4] *Hovey*, ¶¶ 8, 20-21. This Court held that the "knowledge of fact" instruction was proper because it was designed to help "jury determine whether Hovey knew the pictures he downloaded" depicted children, not adults, in erotic settings which was Hovey's defense. *Id*. This Court observed that Mont. Code Ann. § 45-2-103(4) "does not require that the same definition of 'knowingly' apply to every element of the offense and that different 'knowingly' definitions may be applied to the different elements of an offense." *Hovey*, ¶ 22 (noting that "knowingly" was the mental state assigned to the offense, not a specific definition of "knowingly").

Therefore, while this Court has explained that normally one mental state definition is sufficient, *see Ragner*, and has not required courts to provide different mental state instructions for individual elements, *see Deveraux*, more than one "knowingly" instruction may nonetheless be appropriate. *See Hovey*, ¶¶ 21-22; *State v. Strizich*, 2021 MT 306, ¶ 47, 406 Mont. 391, 499 P.3d 575 (held, no plain error when court gave conduct-based instruction for act element of theft (obtaining unauthorized control) and result-based instruction for deprivation of the owner's property).

[4] A person commits sexual abuse of a child by knowingly possessing photographs that depict children in actual or simulated sexual conduct. Mont Code Ann. § 45-5-625(1)(e).

The situation in *Hovey* parallels the facts presented here. First, like the offense in *Hovey*, the offense at issue here is "conduct-based." Second, both defendants' defense was relative to knowledge of a pertinent fact (erotic models looked over 18; Doe had affirmatively consented) prior to their actions (took possession of photographs; penetrated Doe). *Hovey* support's the district court's instructions while none of the cases cited by Hamernick establish that the court abused its discretion when it gave the correct mental state (knowingly) instruction for all the elements using one definition for Hamernick's conduct (awareness of penetration for sexual gratification) and another relative to whether Hamernick first obtained Doe's affirmative consent (had knowledge of fact).

Finally, Hamernick's reliance upon *State v. Haltom*, 472 P.3d 246 (Ore. 2020) (see Br. at 21) is not compelling because Oregon's criminal statutes use immensely different language to define the offenses and that state's statutory scheme for assigning mental states to offenses differs vastly from Montana's.[5] In

[5]Relevant to mental states, unlike Montana, Oregon follows the Model Penal Code which requires the state to establish culpable mental state for any element 'concern[ing] the substance or quality of the crime—the harm or evil sought to be prevented." *State v. Wier*, 317 P.3d 330, 335 (Ore. Ct. App. 2013). Oregon's four mental states are: (1) intentionally meaning "conscious objective" (applies to result or conduct elements—not circumstances); (2) knowingly meaning "awareness" (applies to conduct or circumstance elements—not result); (3) reckless meaning "conscious disregard for a risk" (applies to result or circumstance elements); and (4) criminal negligence meaning "lack of awareness of risk" (applies to result or circumstance elements). *Haltom*, 475 P.3d at 250-51.

Haltom, the Oregon Supreme Court concluded that under that for second degree sexual abuse (when a "person subjects another person to sexual intercourse . . . and the victim does not consent thereto"), the "does not consent thereto" element was a part of the essential character of the conduct proscribed by the statute so the appropriate mental states were either "intentionally" or "knowingly." *Haltom*, *supra*. *But see Wier*, 317 P.3d at 336 (for third degree sexual abuse (subjects another person to sexual contact and the victim does not consent to contact), "the fact that the victim does not consent to the sexual contact is a circumstance element of the crime" so three applicable "culpable mental states" could apply (*e.g.*, knowingly, reckless, criminal negligence)).

Unlike Oregon, where the courts must determine the category for each material element and assign the corresponding mental state instructions, Montana's Legislature has assigned mental states to each offense. Moreover, in *Haltom* a key to the court's decision was that the offense was defined, in part, as *subjecting* another to sex which "conveys that the sexual act is imposed on a person." *See Haltom*, 472 P.3d at 254. Montana's SIWOC statute does not include any such qualifying language to the act of penetration. Rather, in Montana, once the State proves the fact that a victim had not affirmatively consented (or was incapable of consenting), any penetration, however slight, constitutes sexual intercourse without consent.

Here, Hamernick conceded he penetrated Doe three times for sexual gratification. The remaining element was the existence of a fact–whether Doe affirmatively consented to sexual intercourse prior to Hamernick penetrating Doe. The "knowledge of fact" instruction did not interfere with the "conduct-based" instruction relative to the element of sexual intercourse. Nor did it improperly convert the charged offense into a "result-based" offense simply because the "knowledge of fact" instruction uses a similar phrase (high probability) or relieve the State of its burden to establish all the elements beyond a reasonable doubt.

Just as in *Hovey*, it was appropriate to give a "knowledge of fact" instruction in addition to a "conduct-based" instruction. Hamernick has not carried his burden to establish that, when considered as a whole, the instructions did not fully and fairly advise the jury on the applicable law in this case. *Ragner*, ¶ 13. The district court did not exceed its broad discretion in instructing the jury. *Deveraux*, ¶ 20.

II. The evidence presented at trial established beyond a reasonable doubt that giving the "knowledge of fact" instruction did not reasonably contribute to the jury verdict or prejudice Hamernick's substantial rights.

The Fourteenth Amendment of the United States Constitution and Article II, Section 17, of the Montana Constitution guarantee due process of law. Due process requires that the government prove every element of the offense beyond a reasonable doubt. *Zerbst*, ¶ 30; *In re Winship*, 397 U.S. 358, 364 (1970) ("the Due

Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”). However, “[a] cause may not be reversed by reason of any error committed by the trial court against the convicted person unless the record shows that the error was prejudicial.” Mont. Code Ann. §§ 46-20-104, -701(1), -701(2) (“Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded”).

Prejudice is not presumed when error is shown as it is for this Court to determine whether an error affects the substantial rights of the defendant. *State v. Allen*, 276 Mont. 298, 301, 916 P.2d 112, 114 (1996). This Court will not reverse a judgment for harmless error; determination of whether a particular error is harmful or harmless depends on the facts of the case under review. *Allen*, 276 Mont. at 301, 916 P.2d at 114 (citing Mont. Code Ann. § 46-20-701(2)). When reviewing an instructional error to determine if that error was harmless this Court has held that the case must be reviewed as a whole, rather than by examining one component at a time. *State v. McKenzie*, 186 Mont. 481, 608 P.2d 428 (1980).

“Even if an instruction error did occur, this Court will not reverse on such a claim unless it also finds that the district court abused its discretion in a way that prejudicially affected a defendant’s substantial rights.” *Ragner*, ¶¶ 13-14; *Zerbst*, ¶ 27; *Gerstner*, ¶ 15 (if instructions are erroneous in some aspect, the mistake must

prejudicially affect defendant's substantial rights in order to constitute reversible error); *Neder v. United States*, 527 U.S. 1, 8, 15 (1999) (harmless error test which is "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained'"). This harmless error rule "'promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.'" *Rose v. Clark*, 478 U.S. 570, 577 (1986) (citation omitted).

This Court has concluded that, although a jury may have been improperly instructed, based on the totality of the record, the error was harmless beyond a reasonable doubt in several cases. *See, e.g., State v. Hamilton*, 185 Mont. 522, 542, 605 P.2d 1121, 1132 (1980), *cert. denied* 447 U.S. 924; *State v. Rothacher*, 272 Mont. 303, 312-13, 901 P.2d 82, 88 (1995); *State v. Patton*, 280 Mont. 278, 291, 930 P.2d 635, 643 (1996) (determining if instruction given in error is only the "first part" of the analysis since "a district court's judgment will not be reversed for error unless the defendant's substantial rights are affected"); *Ilk, supra*.

In *Hamilton*, this Court concluded that giving the instruction that was later deemed unconstitutional was harmless error because the evidence of Hamilton's guilt was so overwhelming that no reasonable juror could have been influenced by the improper instruction. *Hamilton*, 185 Mont. at 539-42, 605 P.2d at 1131-33. In *Rothacher*, this Court determined that the instruction stating that "the State merely

needed to prove that Rothacher acted purposely, without regard to the result that he intended" constituted an improper statement of the law. *Rothacher*, 272 Mont. at 310, 901 P.2d at 86. However, noting that the district court maintains broad discretion in instructing the jury and a court will be reversed only if the jury instruction prejudicially affected the substantial rights of the defendant, this Court concluded the instructional error was harmless. *Id.*, 272 Mont. at 313, 901 P.2d at 88.

More recently, this Court concluded that, when a "conduct-based" instruction was erroneously given instead of a "result-based" instruction, the error was harmless based on the totality of the evidence provided. *Ilk*, ¶¶ 21-26. Ilk was charged with attempted deliberate homicide and aggravated assault, both of which require result-based mental state instructions, but the jury was given conduct-based instructions. *Ilk, supra*. The State agreed the wrong instructions were given, but asserted the error was harmless and this Court agreed, explaining that the erroneous instruction "had, at best, a tangential effect on the jury's consideration." *Ilk*, ¶ 25. This Court has also held that even when the evidence supports that the jury could have found the defendant guilty under either a "conduct-based" or "result-based" mental state instruction, the defendant did not establish he suffered any prejudice from an erroneous instruction. *See, e.g., State v. Tellegen,* 2013 MT 337, ¶¶ 19-21,

372 Mont. 454, 314 P.3d 902; *State v. Andress*, 2013 MT 12A, ¶¶ 25-29, 368 Mont. 248, 299 P.3d 316.

Like *Hamilton*, *Rothacher*, *Ilk, Tellegen,* and *Andress*, the evidence here demonstrates, beyond a reasonable doubt, that had the jury been given the "awareness" instruction instead of the "knowledge of fact" instruction that the jury would not have found Hamernick guilty. Therefore, even if this Court determines the district court abused its discretion when it gave the "knowledge of a fact" definition relative to "without consent," it constituted harmless error because the evidence at trial established beyond a reasonable doubt that Hamernick was "aware" Doe did not consent to any of the three times Hamernick penetrated her.

First, unlike Hamernick, Doe's version of the events was consistent and compelling. Doe testified how she pulled away from Hamernick, tried to scoot her chair back, and also tried to stand to leave. Doe described how Hamernick kept pushing her down into the chair, carried her to another room, and grabbed her breasts from behind, pinning her against the table. Doe was unwavering when she explained she did not see how Hamernick could have misinterpreted her physical and verbal cues that she did not agree to intimate contact.

In contrast, Hamernick's statements about that night changed over time. For instance, his initial statements to the responding officers was that he was "afraid this might happen," and had "gone too far" and asked "if this was like a rape

situation." Then in his first interview, he described how he "tested the waters" to see how far Doe would "let him go" and when she did not protest, he assumed she was agreeing to all his actions. It was not until his second interview and at trial that Hamernick claimed Doe gave him verbal affirmative consent before he penetrated her vagina with his penis. It would be reasonable for a juror to conclude that Hamernick would have no reason to change his story unless he realized he had not obtained Doe's consent and so he needed to "improve" his version of events. Under the facts presented, the jurors had more than sufficient basis to question Hamernick's more polished version of events.

Second, the jury was presented with months of text messages that established undisputed evidence of Hamernick's relentless pursuit of Doe despite her repeated rejections and explicit explanations that she was not interested in Hamernick in a romantic way. Hamernick's text messages showed a clear pattern of him making unwanted verbal and physical advances, Doe rebuking those advances, and Hamernick's insincere claims that he would stop pursuing Doe. Even at trial, Hamernick admitted he wanted to be in an intimate relationship with Doe. The jury could reasonably have concluded that, given Doe's consistent attempt to set boundaries in her text messages, Doe would not have suddenly changed her mind that night in the back room.

Third, the language Hamernick used in his letter to Doe did not describe someone who simply regretted having consensual sex with his 18-year-old employee. Hamernick wrote, "There's no way I can correct things . . . I never felt a deeper regret than I do now. I thought I was a good person. Now, I don't know . . . I never wanted to hurt you ever. I never thought I would. . . . You trusted me, and I let you down. It's my greatest regret. . . ." (Ex. 5.) As the State pointed out during its closing argument, the jury could reasonably interpret Hamernick's statements as reflecting upon his own character and consciousness of guilt. (Tr. at 713-14.)

Fourth, the jury was also presented with uncontroverted evidence corroborating Doe's report of being raped, including the fact she reported the assault within two hours of it occurring, submitted to repeated examinations, and also suffered abrupt emotional changes which Donisthorpe explained established that Doe had experienced a trauma.

Finally, the jury was presented with indisputable testimony that Hamernick penetrated Doe three different times (digitally penetrated her when she sat in the chair; penetrated her vagina with his penis; and penetrated her vulva after she told him to stop). And, even if the jury believed Doe gave verbal affirmative consent to Hamernick's statement that he wanted to put his penis inside her (e.g., second

penetration), the evidence at trial showed that Hamernick did not get Doe's consent prior to the other two times he penetrated her.

When he described digitally penetrating her, Hamernick testified that he could "tell she was into it" by the way she allegedly "opened up her legs" and pulled him toward her. However, given his consistent description about "testing the waters" and his own admission that immediately before that Doe had refused to even let him kiss her on the lips, the jury would be more than justified in accepting Doe's consistent and compelling version of events that she did not make any movements to encourage Hamernick digitally penetrating her.

Hamernick's own testimony established Doe had not consented to the third time he penetrated her. At trial, Hamernick testified that after he had penetrated Doe's vagina with his penis and Doe told him to stop, he nonetheless re-penetrated her vulva when he "redirected" his penis and rubbed against her clitoris, forcing Doe to tell him again to stop in an even louder voice.

Given the strength of the evidence against Hamernick, he cannot establish that giving an *additional* instruction relative to a fact prejudiced his substantial rights or how the instruction "reduced the State's burden." (*See* Br. at 16, 19.) Here, because a "result-based" instruction was not given in place of a "conduct-based" instruction, the State's burden was not altered. *See Lambert*, 280 Mont. at 237, 929 P.2d 850 (by giving all four knowingly instructions, court "altered"

State's burden of proof); *Hovey*, ¶ 22 ("different 'knowingly' definitions may be applied to the different elements of an offense"). The jury was fully and fairly advised that the State had to prove every element beyond a reasonable doubt, including the "knowingly" element which applied to the other two elements.

Even if giving the additional "knowledge of fact" instruction was an abuse of discretion, the totality of the record establishes beyond a reasonable doubt that the error did not contribute to Hamernick's guilty verdict and Hamernick's substantial rights were not prejudicially affected. *Ragner*, ¶¶ 13-14; *Zerbst*, ¶ 27; *Neder*, 527 U.S. at 8, 15. "The party assigning error must show prejudice to prevail, and [this Court] will not find prejudice if the jury instructions in their entirety state the applicable law of the case." *Deschner v. State*, 2017 MT 37, ¶ 10, 386 Mont. 342, 390 P.2d 152; *State v. Carnes*, 2015 MT 101, ¶ 6, 378 Mont. 482, 346 P.3d 1120 (trial court's "decision on jury instructions is presumed correct, and the appellant has the burden of showing lower court error").

Nor was the State's burden lessened like this Court warned could occur if a "result-based" instruction was given *instead* of a "conduct-based" instruction in a sexual assault prosecution. *See Gerstner*, ¶ 31 (if "result-based" instruction given instead of "conduct-based," it would have lessened the State's burden of proof as compared to having to establish Gerstner was aware his admitted contact was sexual). Moreover, Gerstner does not apply here because unlike those scenarios,

the district court did not improperly give a "result-based" "knowingly" instruction in place of the "conduct-based" instruction. Here, the court gave the correct mental state definition, "conduct-based-knowingly" in addition to the "knowledge of fact" instruction. The State's burden was not altered, let alone lessened.

The facts of this case, reviewed as a whole, support beyond a reasonable doubt that any instructional error did not contribute to Hamernick's verdict. *See Hamilton* and *Neder*. The fact that the court correctly instructed the jury that Hamernick had to be aware of his conduct and aware of a high probability that Doe had not affirmatively consented before he penetrated her did not create a presumption of prejudice. *See Allen*, 276 Mont. at 301, 916 P.2d at 114. Hamernick was afforded ample opportunity to present evidence and argue his position in this matter. The jury's rejection of Hamernick's defense does not equate to reversible error by the court. If the court abused its discretion in instructing the jury, that error was harmless and does not require reversal of his conviction.

/ / /

CONCLUSION

This Court should affirm Hamernick's judgment and sentence.

Respectfully submitted this 7th day of March, 2023.

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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 9,997 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

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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 03-07-2023:

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