IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0571

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JEFFREY ALLEN WESTFALL,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Eleventh Judicial District Court,
Flathead County, The Honorable Heidi J. Ulbricht, Presiding

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STATEMENT OF THE ISSUES

1. Whether Westfall waived his claim challenging the court's failure to order a fitness evaluation when he pled guilty and does not challenge the voluntariness of his plea.

2. Whether Westfall's convictions for aggravated assault and attempted sexual assault, enhanced based on the infliction of bodily injury, violate double jeopardy.

3. Whether the court erred in ordering Westfall to pay the costs of trial and a PSI fee.

STATEMENT OF THE CASE

Westfall was charged with attempted sexual intercourse without consent and aggravated assault. (Doc. 3.) On the first day of trial, Westfall repeatedly interrupted the court, and the court held several conversations with Westfall about whether he wanted to represent himself or proceed with appointed counsel. (Tr. at 15-121.) During these discussions, Westfall's counsel requested that the court make a determination about Westfall's fitness to proceed. (Tr. at 72.) The court denied the request, concluding that Westfall was fit based on his participation in the proceedings. (Tr. at 77.) The court concluded that Westfall's conduct was a "delay tactic." (Tr. at 80.)

On the second day of trial, after the victim testified, the parties reached a plea agreement. Pursuant to the agreement, Westfall pled guilty to attempted sexual assault and aggravated assault. (Tr. 359-80.) He did not reserve his right to appeal any issues.

STATEMENT OF THE FACTS

I. The offense

Before Westfall entered his guilty pleas, the victim, Francoise Chasse, testified to the following facts. Francoise and her husband operated a motel and RV resort. (Tr. at 328-29.) One evening, after midnight, a man, later identified as Westfall, rang the doorbell to the office. (Tr. at 337-38, 357.) After she opened the door, Westfall pushed her around and then punched her in the jaw. (Tr. at 338.) He then pushed her to the floor, repeatedly hit her, and pulled her pants off. (Tr. at 339.) Francoise screamed repeatedly, which eventually woke her husband. (*Id*.) Her husband kicked Westfall and led him to the door. (*Id*.) Westfall then disappeared. (Tr. at 343.) The assault was captured on surveillance videos, which were played at trial. (Tr. at 343-45.) Westfall's assault broke Francoise's jaw and left her bruised. (Tr. at 346-48.)

Facts alleged in the charging documents demonstrate that a woman staying at the motel reported the next day that she had been there with Westfall, and he had

left in their car. (Doc. 1 at 4.) After learning his name, law enforcement sent the surveillance video to officers in Butte, where Westfall was on probation, and his probation officer identified him as the person committing the assault. (*Id.*)

II. Procedural history

Before the trial began on April 19, 2021, the court conducted a pretrial conference. (Tr. at 8-52.) When the court raised an issue about the possibility of intoxication as a defense, Westfall asked questions and interrupted the conversation. (Tr. at 15-17.) Westfall's counsel, Greg Rapkoch, stated that he "would just like to make sure Mr. Westfall wants me to proceed as his attorney." (Tr. at 17.) Westfall replied, "Absolutely. Absolutely, I do." (*Id.*) Westfall then asked more questions on the record about the role of intoxication as a defense. (*Id.*) Specifically, he stated that he had had "more than just alcohol in my system at the time," and he asked how that affected the issue. (*Id.*) After a discussion between Rapkoch and the prosecutor about the admissibility of evidence of intoxication, Westfall requested to speak to Rapkoch and was given an opportunity to do so. (Tr. at 22-23.) At Westfall's request, the guards were present for the conversation. (Tr. at 23.)

After the break, the court attempted to continue the discussion about the admissibility of evidence of intoxication. (Tr. at 23-24.) When Rapkoch indicated that he did not object to the State's proposed order, Westfall stated that he did

object. (Tr. at 24.) Rapkoch then requested a *Faretta*[1] colloquy. (*Id*.) During the discussion, Westfall again stated that he "[a]bsolutely" wanted Rapkoch to represent him. (Tr. at 26.) Westfall responded to other questions, however, by repeatedly stating, "I don't know if I can answer that, Your Honor," or similar language. (Tr. at 26-29.) After Westfall repeatedly refused to answer questions, the court ruled that it would proceed with Rapkoch representing Westfall. (Tr. at 29-30.)

Shortly after that, Westfall raised a new complaint about his counsel, alleging that his confidential statements to Rapkoch had been repeated to the court or prosecutor. (Tr. at 32.) The court removed the prosecutor from the courtroom to give Westfall and Rapkoch an opportunity to address Westfall's complaint on the record. (Tr. at 37-42.) Westfall then began asking questions about how long Rapkoch had been representing him. (Tr. at 38-39.) Rapkoch stated that he had been the lead attorney on the case for "probably six days," but he noted that, as the managing attorney, he had worked on the case with Westfall's other attorneys. (Tr. at 39.) Rapkoch then tried to determine whether Westfall wanted to waive his attorney-client privilege to have Rapkoch respond to Westfall's complaint about confidentiality, but Westfall refused to answer the question. (Tr. at 41-42.) Rapkoch then withdrew the complaint. (Tr. at 42.)

[1] *Faretta v. California*, 422 U.S. 806 (1975), held criminal defendants have a right to conduct their own defense.

As the hearing continued, Westfall continued to repeatedly interrupt and raise his own objections. (Tr. at 43-50.) The court paused the hearing to give Westfall another opportunity to communicate with Rapkoch in private. (Tr. at 51.) Afterward, Westfall complained that he did not have enough time to review information Rapkoch had given him, but Rapkoch stated that it did not need to be done at that time. (Tr. at 51-52.) The hearing ended, and the trial began with voir dire. (Tr. at 52-53.)

After conducting roll call, the court took another break. (Tr. at 63.) When the jury exited, the court indicated that Westfall had stated that he wanted to proceed pro se. (*Id*.) Westfall responded that "I'm not sure what I wish to do at this point." (*Id*.) He then complained that Rapkoch had told him that jurors do not like it "when you beat the shit out of an old lady," and Westfall complained that Rapkoch did not have sufficient time to prepare. (Tr. at 63-64.) The court then removed the prosecutors for another hearing on whether Rapkoch could continue to be counsel. (Tr. at 65.) Rapkoch explained that he had been trying to convey to Westfall the animosity that the jury may have based on the video evidence of him beating the victim. (Tr. at 66.) Westfall repeatedly questioned Rapkoch and raised complaints. (Tr. at 66-68.) Rapkoch questioned whether Westfall wanted to proceed with counsel after stating in front of the jury that he did not. (Tr. at 69.)

The court asked Westfall again whether he wanted to represent himself. (Tr. at 69.) He stated that he was "not sure yet." He followed up, stating, "I guess we'll have to see how the day goes." (Tr. at 70.) Rapkoch asked Westfall if he wanted to seek a continuance, and he insisted that he did not. (Tr. at 70-71.)

The court attempted to get Westfall to agree that he was "not in charge of the courtroom." (Tr. at 70-71.) Westfall replied, "Your Honor, I don't even know if I'm in charge of myself at this point. You know, Your Honor, I have mental difficulties and—." (Tr. at 71.) The court asked him what his diagnoses were, but he was not sure. (*Id*.) He then stated that he had been clinically diagnosed as manic depressive and with suicidal ideation, sexual sadism, and bipolar schizophrenia. (*Id*.) Westfall complained that he should be taking medications but was not. (Tr. at 72.)

Rapkoch then stated that, upon the State's return to the courtroom, "I would ask the Court to make a fitness to proceed determination on Mr. Westfall." (*Id*.) When the State returned, the Court mentioned that evaluations are often done at the Montana State Hospital. (Tr. at 72-73.) Rapkoch stated, "[o]ftentimes an evaluation is done," but he did not expressly request an evaluation. (Tr. at 73.)

When the court asked Rapkoch for clarification on what he wanted, Rapkoch stated that he had "reason to believe that my client is not feeling as though his mental health needs are being met, and that he has numerous symptoms that he

would like addressed. And that may be contributing to his indecision of what to do in the moment." (Tr. at 73.) Rapkoch noted that typically a determination is based on an evaluation done long before the trial date. (*Id*.) But he explained that if the defendant becomes unfit at any point, the proceedings must be ceased. (*Id*.) He then stated, "I just want to see if the Court would make some preliminary determination on that issue." (Tr. at 74.)

The court noted that it had observed that Westfall "is engaged, he is familiar with the previous court rulings, he did answer—." (*Id*.) Westfall interrupted the court, saying "I cannot process any of this." (*Id*.) He complained that his anxiety was "through the roof." (*Id*.) The court then advised him that, based on his attorney's request, he could be committed to the Montana State Hospital for up to 90 days. (*Id*.) The record reflects that Westfall began breathing heavily in response. (*Id*.)

The State objected to further delay. (Tr. at 75.) The State noted that Westfall had been engaged in the motions and the plea agreement negotiations. (*Id*.) The State argued that disagreements with trial counsel were not a reason to go to the State hospital. (*Id*.) The State stated that this was "not a genuine issue" and "is all an act." (*Id*.) Westfall replied, "Sure, it's an act[,]" and then referenced his prior mental health issues (Tr. at 75-76.)

When the court consulted Rapkoch again, he deferred to Westfall's position and explained that it would be very difficult for him to continue as counsel under the circumstances. (Tr. at 76.)

The court denied the request for an evaluation to determine Westfall's fitness. (Tr. at 77.) The court observed that Westfall had been engaged, and he was familiar with the maximum penalty and the legal elements of the offenses. (*Id*.) Westfall repeatedly screamed during the court's ruling. (*Id*.)

The court asked Westfall a series of questions, to which he replied that he did not know or understand. (Tr. at 78-80.) The court informed Westfall that it had "already made a determination that this is a delay tactic being used by you." (Tr. at 80.) The court informed Westfall that it was going to proceed with Rapkoch representing him. (Tr. at 81.)

After a recess, the court resumed the proceedings with the jury present. (Tr. at 81-82.) Westfall continued to be disruptive, and the court instructed him not to talk. (Tr. at 82-83.) Westfall requested a continuance to seek a mental health evaluation, causing the court to take another recess to remove the jury. (Tr. at 84-85.) Westfall then requested a continuance and complained about the lack of time his counsel had to prepare. (Tr. at 85-86.) Westfall now claimed that his family would give him money to hire his own attorney, and he requested a continuance so that he could do so. (Tr. at 86.) Westfall made several additional

requests for a continuance, which the court repeatedly denied, noting that it had concluded his requests were a delay tactic. (Tr. at 86-89, 93.) The court noted that Westfall's claim that his family could hire an attorney was "a new scenario you've come up with now." (Tr. at 90.) The court complained that "[e]very time that we go proceed in front of the jury, you come up with something new." (*Id*.)

Westfall continued arguing with the court and being disruptive. (Tr. at 90-100.) When the court attempted to continue with voir dire, Westfall attempted to communicate directly to the jurors and continued to interrupt. (Tr. at 109-13.) Westfall also accused everyone of being "crooked." (Tr. at 116-17.)

Eventually, the court removed Westfall from the courtroom and placed him in another room where he could appear on video. (Tr. at 121.) Voir dire continued, and a jury was empaneled. (Tr. at 121-294.)

On the second day of trial, Westfall was allowed to be present in the courtroom. (Doc. 69.) The victim, Francoise, described the assault, and video of the assault was played. (Tr. at 327-55.)

After Francoise testified, the parties reached an agreement to resolve the case. (Tr. at 359-60.) The terms of the agreement required Westfall to plead guilty to aggravated assault and an amended charge of attempted sexual assault. (Tr. at 360.) In exchange, the State agreed to recommend a 50-year sentence to the Montana State prison with a 15-year parole restriction, and Westfall would be able

to argue for any legal sentence. (*Id*.) And the State would seek designation of Westfall as a persistent felony offender. (Tr. at 359.)

The maximum penalty for sexual assault was discussed. (Tr. at 360.) The prosecutor explained that under Mont. Code Ann. § 45-5-502(3), sexual assault is punishable by a term of not less than 4 years or more than 100 years if the offender inflicts bodily injury in the course of committing the offense. (Tr. at 360.) Rapkoch explained that the PFO sentence would replace the sentence for the offense and, as a PFO, he could be sentenced to 100 years. (Tr. at 362.)

Westfall expressed concern about a nonbinding plea agreement. (Tr. at 362-63.) He stated that his "behavior yesterday was deplorable, and I'm scared that that will affect the judge's decision." (Tr. at 363.) The prosecutor agreed to make the agreement binding on the court. (Tr. at 364.)

The court advised Westfall of the rights he was waiving, and he indicated that he did not have any questions. (Tr. at 369.) The court explained the terms of the agreement, including the maximum and minimum sentences. (Tr. at 370-71.) Westfall then pled guilty to the amended charge of attempted sexual assault and to aggravated assault. (Tr. at 372.) During the colloquy, Westfall indicated that he was satisfied with his attorney, he had sufficient time to consult with his attorney, he had not been threatened to plead guilty, and he had not consumed any intoxicating substances. (Tr. at 373.)

The court asked Westfall about his mental health diagnoses. (Tr. at 374.) Westfall stated that he had been diagnosed with manic depression with suicidal ideation and paranoia. (*Id*.) Westfall stated that he had attempted suicide before he was arrested and had been placed in psychiatric care. (Tr. at 375.) Westfall indicated that he was clear-headed to enter the plea. (*Id*.) When asked whether he was suffering from manic depression at that time, he replied, "A little bit, but not—not enough to affect my cognitive decision here today." (*Id*.) He also indicated that he was not suffering from paranoia at that time. (*Id*.) He clarified, "Last night I was, but not today." (Tr. at 375-76.) He stated that he was voluntarily entering his plea and was waiving the rights the court had listed. (Tr. at 376.)

Westfall acknowledged that he was the person on the video who had attacked Francoise. (Tr. at 377.) He agreed that he committed aggravated assault when he knowingly caused her severe bodily injury, which included breaking her jaw. (*Id*.) He also agreed that he committed attempted sexual assault when he had disrobed her to view her naked body for his sexual gratification. (Tr. at 378-79.) The court accepted his guilty pleas. (Tr. at 380.)

At the sentencing hearing, the State explained that the plea agreement capped the State's recommendation at a 50-year sentence, with a 15-year parole restriction. (Tr. at 395.) To comply with the agreement, the State argued that Westfall should be designated a persistent felony offender on only one count.

(Tr. at 396-97.) The State recommended that Westfall receive a 20-year sentence, with no time suspended and a 15-year parole restriction, for aggravated assault. (Tr. at 396.) The State recommended that Westfall be designated a persistent felony offender and be sentenced to 50 years, with a 15-year parole restriction. (Tr. at 396-97.) The State recommended that the sentences run concurrently. (*Id*.)

Rapkoch informed the court that "Mr. Westfall advised me he would like me to raise, as a legal challenge, that conditions should not be entered on both Counts I and II because he views that as an included-offense situation that violates double jeopardy." (Tr. at 404.) Westfall insisted on making additional objections to the court's sentence. (Tr. at 413-14.) He argued that if the court enhanced the attempted sexual assault due to the violence he was convicted of in aggravated assault, that would violate double jeopardy. (Tr. at 414.) He also objected to his attempted sexual assault being labeled a third offense, arguing that his prior two offenses were sexual intercourse without consent, not attempted sexual assault. (*Id*.)

The court followed the State's recommendation. It sentenced Westfall to 20 years in prison, with a 15-year parole restriction, for aggravated assault. The court sentenced Westfall to 50 years in prison, with a 15-year parole restriction, for attempted sexual assault, to run concurrent to the aggravated assault sentence, and designated him a PFO on attempted sexual assault. (Tr. at 415.) The court also designated him a level two sexual offender. (*Id*.) The court noted that this was "a

horrific crime," and there were "many aggravating factors in your criminal history." (Tr. at 412-13.)

STANDARD OF REVIEW

Whether Westfall waived his claim by pleading guilty is a legal determination that this court reviews for correctness. *Skyline Consulting Grp. v. Mortensen Woodwork, Inc.*, 2022 MT 192, ¶ 7, 410 Mont. 230, 518 P.3d 462.

This Court reviews for legality a criminal sentence imposing over one year of incarceration. *State v. Moore*, 2012 MT 95, ¶ 10, 365 Mont. 13, 277 P.3d 1212. This Court reviews whether the district court adhered to the applicable sentencing statutes de novo. *Id.*

SUMMARY OF THE ARGUMENT

By pleading guilty, Westfall waived all nonjurisdictional defects that may have occurred before the entry of his guilty pleas. He therefore waived his claim that the court erred in failing to order a fitness evaluation when his counsel raised concerns about his fitness. If Westfall had concerns about the voluntariness of his pleas, he could have raised that claim. He has not done so, and the claim that the court should have ordered a fitness evaluation is waived.

Westfall's convictions for aggravated assault and attempted sexual assault, enhanced based on the infliction of bodily injury, do not violate double jeopardy because each offense requires proof of an element the other does not. Aggravated assault requires the infliction of serious bodily injury, whereas the enhanced penalty for attempted sexual assault requires the infliction of bodily injury during a sexual assault. Because each offense requires an element the other does not, each offense can be punished separately.

Finally, the State concedes conditions 13(e) and 16, requiring him to pay costs and a PSI fee, should be struck based on his inability to pay.

ARGUMENT

I. Westfall waived his claim challenging the court's failure to order a fitness evaluation when he pled guilty to aggravated assault and attempted sexual assault.

"Montana's long standing jurisprudence holds that where a defendant voluntarily and knowingly pleads guilty to an offense, the plea constitutes a waiver of all non-jurisdictional defects and defenses, including claims of constitutional rights violations which occurred prior to the plea." *State v. Stone*, 2017 MT 189, ¶ 13, 388 Mont. 239, 400 P.3d 692 (quotation marks and citations omitted). After pleading guilty, a "defendant may only attack the voluntary and intelligent character of the guilty plea and may not raise independent claims related to prior

deprivations of constitutional rights." *Stone*, ¶ 13; *State v. Gordon*, 1999 MT 169, ¶ 23, 295 Mont. 183, 983 P.2d 377; *see also United States v. Broce*, 488 U.S. 563, 570-74 (1989) (stating collateral relief is barred if the guilty pleas were voluntary and intelligent).

This Court has adopted a definition of "jurisdictional claims" from the Ninth Circuit, explaining that in the context of waiver, jurisdictional claims are limited "to those cases in which the district court could determine, at the time of accepting the guilty plea and from the face of the indictment or from the record, that the government lacked the power to bring the indictment." *Gordon*, ¶ 25 (citing *United States v. Cortez*, 973 F.2d 764, 767 (9th Cir. 1992)). In *Gordon*, the defendant argued that the district court erred in failing to sentence him in accordance with an agreement he had reached with prosecutors in Idaho. *Gordon*, ¶ 21. This Court agreed with the State's argument that Gordon waived his right to challenge the court's denial of Gordon's motion to enforce the Idaho agreement when he pled guilty. *Gordon*, ¶¶ 22-29. In concluding that Gordon's claim was not jurisdictional, this Court noted that there was nothing in the record indicating that the State did not have the power to bring the charges in the Information. *Gordon*, ¶ 26.

This Court explained that Gordon could only attack the voluntary and intelligent character of his guilty plea and noted that he had not done so. *Gordon*, ¶¶ 23-24. This Court also noted that Gordon may have been able to negotiate to

reserve his right to appeal the issue he raised, but he had not reserved his right to appeal that issue. Having failed to do that, he waived his ability to appeal the issue. *Gordon*, ¶¶ 30-32.

Westfall, like Gordon, waived his ability to appeal his claim that he was entitled to a mental health evaluation when he voluntarily pled guilty to the offenses. His claim that the court violated Mont. Code Ann. § 46-14-202[2] and due process when it failed to order a fitness evaluation during his prosecution is not a jurisdictional defect that may be raised after pleading guilty. As *Gordon* demonstrates, jurisdictional defects are defects in the ability to bring the initial charges. Westfall has not alleged a jurisdictional defect. Thus, his challenge to the failure of the court to order a mental health evaluation is waived.

Although this Court has stated in *State v. Bartlett*, 282 Mont. 114, 935 P.2d 1114 (1997), that a claim of incompetency cannot be waived by a defendant or his attorney, that does not apply in this situation where the defendant pled guilty. In *Bartlett*, this Court was addressing whether a defendant's failure to request an evaluation waived his right to challenge the competency evaluation. 282 Mont. at 119-20, 935 P.2d at 1117. That is different from the waiver that occurs when a

[2] Unless otherwise noted, all references to the Montana Code Annotated refer to the 2019 version.

defendant enters a guilty plea. A guilty plea waives all defects, including constitutional defects, that occurred prior to the entry of the plea. *Stone*, ¶ 13.

The State acknowledges that if Westfall was not fit to proceed, that would raise a question about the voluntariness and intelligence of his pleas. But, Westfall has not challenged the voluntariness and intelligence of his pleas.

Further, his plea colloquy demonstrates that he knowingly and voluntarily entered his pleas. Westfall discussed his mental health problems, but indicated that he was clear headed and that his mental health problems were not affecting his cognitive decisions. (Tr. at 375.) Westfall also participated in the plea negotiation and obtained more favorable terms when he persuaded the State to offer a binding plea agreement. (Tr. at 361-72.) Because Westfall has not challenged the voluntariness of his pleas or demonstrated that they were involuntary, he cannot now challenge his convictions. *Gordon*, ¶ 24.

II. Westfall's sentences for aggravated assault and attempted sexual assault causing bodily injury do not violate double jeopardy.

Westfall's sentences for aggravated assault and attempted sexual assault committed by a person who caused bodily injury in the course of committing the attempted sexual assault do not violate double jeopardy because each offense contains an element the other does not. The Fifth Amendment to the United States Constitution, as applied through the Fourteenth Amendment, and article II, section

25, of the Montana Constitution protect citizens from being placed twice in jeopardy for the same offense. U.S. Const. amend. V, XIV; Mont. Const. art. II, ¶ 25.

This Court applies the same test for determining whether there is a double jeopardy violation under the Montana Constitution that is applied under the United States Constitution. *State v. Valenzuela*, 2021 MT 244, ¶ 14, 405 Mont. 409, 495 P.3d 1061. To determine whether there is a double jeopardy violation under the United States or Montana Constitutions, this Court applies the "same elements" test set forth in *Blockburger v. United States*, 284 U.S. 299 (1932). *Valenzuela*, ¶ 14. The *Blockburger* test states:

> Each of the offenses created [must] require[] proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Blockburger, 284 U.S. at 304.

"The *Blockburger* test is a 'test of statutory construction . . . to determine whether [the legislature] intended the same conduct to be punishable under two criminal provisions.'" *Valenzuela*, ¶ 14 (quoting *Ball v. United States*, 470 U.S. 856, 861 (1985)). This Court has explained that '"[t]he dispositive question is whether the legislature intended to provide for multiple punishments. The *Blockburger* test is merely one rule of statutory construction to aid in the determination of legislative intent . . . . The ultimate question remains one of

legislative intent.'" *Valenzuela*, ¶ 14 (quoting *State v. Close*, 191 Mont. 229, 246, 623 P.2d 940, 949 (1981) (citing *Whalen v. United States*, 445 U.S. 684 (1980)).

The *Blockburger* test analyzes the statutory elements of the offense, rather than the actual evidence presented at trial. *Valenzuela*, ¶ 14 (quoting *Illinois v. Vitale*, 447 U.S. 410, 416 (1980)). In *Valenzuela*, this Court concluded that the defendant's convictions for sexual assault and incest did not violate double jeopardy because each offense required proof of an element that the other did not. *Valenzuela*, ¶¶ 20-27. While both offenses require proof of sexual contact and a knowing mental state, each offense contains a different, additional element. Incest requires a familial relationship with the victim, whereas sexual assault requires that the sexual contact be done without consent. *Valenzuela*, ¶¶ 20-22. Based on the additional element required for each offense, this Court concluded that the Montana Legislature intended to authorize cumulative punishments for sexual assault and incest. *Valenzuela*, ¶¶ 23-24. This Court noted that there were strong societal interests underlying the distinct offenses. *Valenzuela*, ¶ 24. Because neither offense was included in the other, this Court concluded that Valenzuela's convictions for both offenses did not violate double jeopardy. *Valenzuela*, ¶ 27.

Similarly, Westfall's convictions for attempted sexual assault involving bodily injury and aggravated assault do not violate double jeopardy because neither offense is included in the other. Sexual assault is committed when a person

"knowingly subjects another person to any sexual contact without consent." Mont. Code Ann. § 45-5-502(1). An attempted sexual assault is committed if a person does any act toward the commission of a sexual assault with the purpose to commit the offense. Mont. Code Ann. §§ 45-4-103(1) and 45-5-502(1). Westfall was convicted of attempted sexual assault under Mont. Code Ann. § 45-5-502(3). (Doc. 86; Tr. at 372.) Subsection (3) enhances the penalty for sexual assault "if the offender inflicts bodily injury upon anyone in the course of committing sexual assault." Mont. Code Ann. § 45-5-502(3). Thus, Westfall's conviction for attempted sexual assault requires an act toward the commission of sexual assault, which has the following elements:

(1) knowingly

(2) subjects another person to any sexual contact

(3) without consent and

(4) inflicts bodily injury.

Mont. Code Ann. § 45-5-502(1), (3).

In contrast, aggravated assault requires the following elements:

(1) purposely or knowingly

(2) causes serious bodily injury to another.

Mont. Code Ann. § 45-5-202(1).

"Bodily injury" is defined as "physical pain, illness, or an impairment of physical condition and includes mental illness or impairment." Mont. Code Ann. § 45-2-101(5). In contrast, "serious bodily injury" is defined as bodily injury that: (i) creates a substantial risk of death; (ii) causes serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ; or (iii) at the time of injury, can reasonably be expected to result in serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ. Mont. Code Ann. § 45-2-101(66)(a). "Serious bodily injury" includes serious mental illness or impairment. Mont. Code Ann. § 45-2-101(66)(b).

Westfall's convictions for both offenses do not violate double jeopardy under the *Blockburger* test because neither offense is included in the other. In addition to bodily injury, the attempted sexual assault conviction required sexual contact that was made without consent. And aggravated assault required not just bodily injury, but serious bodily injury, which is significantly more severe. Viewing all of the elements of each offense demonstrates that neither is included in the other offense.

The elements of the offenses also demonstrate that the Montana Legislature intended to create two different offenses that would be punished separately. By adding the enhancement option under Mont. Code Ann. § 45-5-502(3), the

Legislature created an increased penalty for a sexual assault that also causes bodily injury. But aggravated assault creates a penalty for a specific type of bodily injury—serious bodily injury. By creating the offense of aggravated assault, the Legislature demonstrated an intent to create an enhanced penalty for an assault that causes serious bodily injury. That is not included in a sexual assault charged under subsection (3). Thus, the *Blockburger* test and public policy demonstrate that an offender can be punished for both a sexual assault under subsection (3) and aggravated assault.

Westfall's argument that he was improperly punished twice for breaking Francoise's jaw is factually and legally incorrect. While the broken jaw was the protracted injury that established serious bodily injury for purposes of aggravated assault, bodily injury could have been established by any of the times Westfall pushed and hit Francoise. More importantly, the double jeopardy analysis focuses on the elements of the offenses that the State has to prove, not the evidence presented at trial. *Valenzuela*, ¶ 14 (quoting *Vitale*, 447 U.S. at 416). Thus, a single act could be used twice to increase a sentence if neither of the two offenses committed is included in the other. That is demonstrated by the holding in *Valenzuela* that a single act may be punished as both incest and sexual assault.

Westfall's reliance on *State v. Guillaume*, 1999 MT 29, 293 Mont. 224, 975 P.2d 312, is also misplaced. In *Guillaume*, this Court held that if a person was

convicted of an assault that was enhanced from a misdemeanor to a felony based on the use of a weapon, the person could not also have their sentence enhanced under the weapon enhancement statute. *Guillaume*, ¶ 16. Under the statutes applicable to *Guillaume*, a "felony assault" was committed if "the person purposely or knowingly causes . . . reasonable apprehension of serious bodily injury in another by use of a weapon." *Guillaume*, ¶ 9 (quoting Mont. Code Ann. § 45-5-202(2)(b) (1995)).[3] Under the weapon enhancement statute, an additional sentence could be imposed on "a person who has been found guilty of any offense and who, while engaged in the commission of the offense, knowingly . . . used a . . . dangerous weapon." *Guillaume*, ¶ 9 (quoting Mont. Code Ann. § 46-18-221(1) (1995)).

Guillaume is inapposite because in that case, the defendant's sentence was enhanced twice for the use of a weapon. His assault was enhanced to a felony because he used a weapon, and then it was enhanced a second time based on the weapon enhancement statute. *Guillaume*, ¶ 18. Thus, the same element was used twice to enhance his sentence. This Court concluded that the Legislature intended to punish an assault that was committed by the use of a weapon through the felony assault statute, which specifically addressed an assault committed with the use of a weapon. *Id*. This Court concluded that imposing the weapon enhancement after

[3] This offense would now be an assault with a weapon under Mont. Code Ann. § 45-5-213.

already enhancing Guillaume's sentence for the use of a weapon was a form of double punishment that double jeopardy was intended to prohibit. *Id*.

In this case, Westfall's sexual assault sentence was properly enhanced under Mont. Code Ann. § 45-5-502(3) because he caused bodily injury while committing the attempted sexual assault. Then, Westfall was separately punished for the severity of the injury through the aggravated assault conviction. Unlike *Guillaume*, where the enhancement conviction was based solely on the commission of the underlying offense and the use of a weapon, Westfall was convicted of two separate offenses, with unrelated elements, and one of those offenses was enhanced. That enhancement did not violate double jeopardy because the other offense—aggravated assault—was not included in the enhanced attempted sexual assault conviction. Accordingly, Westfall's sentences for aggravated assault and attempted sexual assault do not violate double jeopardy.

In the alternative, if this Court concludes that Westfall's sentence for attempted sexual assault violates double jeopardy, this Court should remand for resentencing that is consistent with the plea agreement. This Court has explained that "where the illegal portion of a sentence affects the entire sentence or we are unable to determine what sentence the trial court would have imposed under a correct application of the law," this Court generally remands for resentencing. *State v. Hicks*, 2006 MT 71, ¶ 44, 331 Mont. 471, 133 P.3d 206. And this Court

has stated that the remedy when a criminal defendant is improperly convicted of two offenses arising out of the same transaction is to remand for resentencing. *State v. Brandt*, 2020 MT 79, ¶ 31, 399 Mont. 415, 460 P.3d 427.

The plea agreement provided that the State would recommend a 50-year sentence and that Westfall would be designated a persistent felony offender. (Tr. at 371.) If Westfall's conviction for attempted sexual assault is reversed, Westfall could be designated a persistent felony offender for the aggravated assault conviction and could be sentenced to 50 years in prison for that conviction.

III. The State concedes that the financial obligations ordered in conditions 13(e) and 16 should be struck.

The Presentence Investigation Report (PSI) listed the statutorily required financial obligations. (Doc. 78 at 9-10.) Before the sentencing hearing, Westfall filed an objection arguing that he was unable to pay financial obligations, so they could not be imposed. (Doc. 82 at 4-6.) At the sentencing hearing, the court stated that it had "taken [Westfall's] financial ability to pay into consideration" and was modifying the conditions. (Tr. at 416.) The court suspended several of the financial obligations, but the court ordered Westfall to pay $5,228.61 for the costs of the jury and a witness and to pay $50 for the PSI fee. (*Id.*) The court did not address Westfall's ability to pay those obligations. (*Id.*) The court described the

order to pay those financial obligations as a recommended condition of parole. (*Id*.; Doc. 92, available at Appellant's App. A.)

The State concedes that, under the facts of this case, condition 13(e), ordering Westfall to pay $5,228.61 in costs, and condition 16, requiring Westfall to pay $50 for the PSI fee, should be struck.

CONCLUSION

Westfall's convictions for aggravated assault and attempted sexual assault should be affirmed. This case should be remanded to the district court with instructions to strike conditions 13(e) and 16.

Respectfully submitted this 3rd day of October, 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 5,969 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, Mardell Lynn Ployhar, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 10-03-2023:

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