

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0513

STATE OF MONTANA,

Plaintiff and Appellee,

v.

TERRANCE ANTHONY ROBERTS,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, The Honorable Leslie Halligan, Presiding

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STATEMENT OF THE ISSUES

1. Whether Appellant has met his burden of proving that this Court should reverse under the plain error or ineffective assistance of counsel doctrines because the district court provided the incorrect mental state instruction for obstructing a peace officer.

2. Whether the district court provided incorrect jury instructions on the definition of “force” and the mental states for attempted kidnapping and, where Appellant did not preserve allegations of instructional error for appeal, whether Appellant has met his burden of showing that reversal is appropriate under the plain error or ineffective assistance of counsel doctrines.

3. Whether the district court erred by admitting a video exhibit from Officer Henry Jensen’s body-camera and, if so, then whether the error was harmless.

4. Whether the district court erred by requiring Appellant to register as a sexual offender.

5. Whether the district court imposed an illegal sentence by ordering a \$50 presentence investigation fee.

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STATEMENT OF THE CASE

Missoula County charged Appellant Terrance Roberts (Roberts) with attempted kidnapping and obstructing peace officer or other public servant (Obstructing). (Doc. 27.) The State alleged that Roberts, who was 46 years old at the time, attempted to kidnap a 16-year-old girl, Z.S., near Brennan's Wave on the Clark Fork River in Missoula. (Docs. 23, 80.) Missoula Police Department (MPD) Officer Mark Puddy (Officer Puddy) arrested Roberts after a foot pursuit. (Doc. 23.) A Missoula County jury found Roberts guilty of both charges. (Doc. 74.)

At sentencing, the State requested a 15-year sentence to the Montana State Prison (MSP). (6/10/21 Hr'g Tr. (Sent. Tr.) at 691.) Roberts' conviction for attempted kidnapping was his tenth felony conviction. (*Id.* at 692) In requesting the sentence, the State cited the psychological trauma Z.S. had experienced, noting that she no longer felt safe walking around by herself in Missoula. (*Id.* at 693-94.) Understandably, when Z.S. and her father testified at the sentencing hearing, both requested a lengthier sentence and a parole restriction. (*Id.* at 698-705.)

Roberts cited his mental health and chemical dependency needs in arguing that the court should only sentence him to MSP for a term of seven years with two years suspended. (Sent. Tr. at 706.) However, Roberts was ambivalent about becoming sober, stating both that he wanted to get treatment to stop using drugs and alcohol, but also stating that he only hoped he could "cut down on it and be

responsible about it.” (*Id.* at 725-26.) The district court agreed with the State’s recommendation and sentenced Roberts to 15 years at MSP. (*Id.* at 735-36.)

Prior to the sentencing hearing, neither party considered whether Roberts should be required to register as a violent or sexual offender. (Sent. Tr. at 730-31.) However, at the hearing, the prosecutor opined that attempted kidnapping qualified as a sexual offense because Z.S. was a minor and Roberts was not her parent. (*Id.* at 733-34.) After reviewing the applicable statute, Roberts’ attorney agreed, and the court designated Roberts “as a sexual or violent offender.” (*Id.* at 735, 740.) The court ordered Roberts to pay several surcharges but did not require him to pay the presentence investigation (PSI) fee. (*Id.* at 739.)

The court’s written judgment also designated Roberts as a sexual offender. (Doc. 86 at 4.) The written judgment required Roberts “to submit to a sexual offender evaluation to establish a level designation for purposes of registration.” (*Id.*) The court advised that, after Roberts obtained his evaluation, it would “entertain a request from the State or Defense to establish the appropriate level designation for registration.” (*Id.*) Furthermore, the court ordered Roberts to pay a \$50 PSI fee. (*Id.* at 3.)

STATEMENT OF THE FACTS

In July 2020, Roberts traveled by bus from North Dakota to Missoula, en route to California. (Sent. Tr. at 727.) At the time, Roberts was on parole for a burglary conviction out of California and had active warrants for his arrest from California and North Dakota. (Docs. 16, 80; Sent. Tr. at 692.) After arriving in Missoula, Roberts went to Caras Park with another man to “score some drugs.” (Sent. Tr. at 707.)¹ Roberts drank “hard liquor” and got “pretty high” smoking marijuana. (*Id.* at 709-10.) Roberts got separated from the other man. (*Id.* at 707.) Roberts found “a youngster” who was selling “crystal” and he purchased \$10 worth and a needle. (*Id.* at 710.) After purchasing the drugs, Roberts sat down on a curb in the southeast corner of Caras Park, tied a band around his arm, and used the needle to inject himself with the narcotic. (Tr. at 288-89.)

Melissa Boys (Boys) had been paddleboarding on the river with her 18-year-old daughter and was getting ready to put the paddleboards on her vehicle when she saw Roberts injecting himself. (Tr. at 288-89.) Roberts realized Boys saw him and said to her: “I’m sorry you had to see that” as he removed the band from his arm. (*Id.* at 289.)

Roberts offered to help Boys load her paddleboards onto her car. (Tr. at 291.) Roberts was not very useful and Boys stated “it was not a comfortable

¹Roberts’ detailed version of the events comes from the sentencing hearing.

situation for my daughter” (*Id.* at 291, 294.) Boys was finally able to convince Roberts that they did not need his help and he left. (*Id.* at 292.) Boys observed Roberts stopping to talk with two girls who were approximately 18 years old. (*Id.*)

Amber Shaffer (Shaffer), who was also in the park that day, observed the interaction between Roberts, Boys, and Boys’ daughter. (Tr. at 308.) Shaffer observed that Roberts “got right behind them” and that he was “almost touching them” as they tried to put their paddleboards on top of their car. (*Id.*) Shaffer observed Roberts also approaching other girls who “seemed really young, maybe teenagers to college age” and that he would get “very close to them.” (*Id.* at 306.) Finally, Roberts walked away, headed in the direction of Brennan’s Wave. (*Id.* at 310.)

After getting her paddleboards loaded onto her car, Boys drove away with her daughter. (Tr. at 295.) Although Boys did not feel like she was in danger, her daughter was “upset,” and she felt like she “needed to call 911 just so that maybe the police could come and remove him from the situation.” (*Id.*) Boys called 9-1-1 after she had driven several blocks away from Caras Park. (*Id.*)

Z.S. spent the day of July 20, 2020, hanging out with two friends, B.M. and S.S. (Tr. at 320-21.) The three teenagers decided to try surfing at Brennan’s Wave, even though they had never surfed before. (*Id.* at 322.) After parking near Caras Park and leaving their cellphones in the car, the girls waded over to an island in the

middle of the river. (*Id.* at 324-25.) The island breaks Brennan's Wave in two, with the wave on the far side of the island being easier for beginners to surf. (*Id.* at 326.)

Z.S. struggled getting to the island. (Tr. at 327.) While crossing the river, she stubbed her pinky toe, tearing off the nail and causing it to bleed. (*Id.*) Once out on the island, B.M. and S.S. tried surfing first, but neither was successful. (*Id.* at 328.) S.S. ended up getting washed "pretty far down the river" and had to be helped to the riverbank by another friend who they had met up with and who was an experienced surfer. (*Id.*) Z.S. went last and was also washed downriver. (*Id.*) Z.S. struggled but was able to make it to the riverbank. (*Id.* at 328-29.)

After getting out of the river, Z.S. walked along the path that paralleled the river back to Caras Park. (Tr. at 329.) She saw S.S. and their other friend going down to the river to go back out to the island. (*Id.*) Z.S. was alone and decided to go to the viewing platform so she could watch her friends. (*Id.* at 329-30.)

While on the platform, Z.S. was approached by Roberts, who she described as "really tall, Native American[.]" (Tr. at 332.) When Roberts approached, he stood approximately six inches behind her. (*Id.* at 334.) Z.S. believed Roberts was "drunk or on drugs" because he was "slurring his words heavily." (*Id.*) Z.S. was wearing a bikini. (*Id.*) Roberts made Z.S. "very uncomfortable," so she took her surfboard, which was still tethered to her ankle, and put it behind her, in between herself and Roberts. (*Id.*)

Despite Z.S.'s effort to put a barrier between them, Roberts kept talking to her, saying she should teach him how to surf and that she looked like a Californian. (Tr. at 335.) Z.S. walked off the platform onto the walking path to get away from Roberts. (*Id.*) She planned on going down the walking path to a dirt trail that went down to the river to see if she could get her friends' attention. (*Id.* at 335-36.) Roberts followed Z.S., only a step behind her, while trying to make small talk. (*Id.*)

Z.S. told Roberts he was making her "very uncomfortable." (Tr. at 337.) Roberts responded by telling Z.S.: "I shouldn't be making you feel uncomfortable." (*Id.*) Z.S. walked away a few more steps, but then turned around to face Roberts. (*Id.*) When Z.S. turned around, Roberts grabbed her by her "right upper arm" and commanded: "You're coming with me." (*Id.*) Z.S. estimated that Roberts held onto her for 10 to 15 seconds. (*Id.* at 338.) Z.S. tried to pull away, but Roberts tightened his grip. (*Id.*) Z.S. took her surfboard, which was in her left hand, and hit him with its tip. (*Id.*) Z.S. believed she was "going to be raped or . . . kidnapped." (*Id.* at 339.)

As Z.S. realized Roberts was loosening his grip, she "ripped [her] arm out of his hand and started running downstream." (Tr. at 339.) Z.S. ran until she saw a father and his daughter coming off the river and she asked them for help. (*Id.* at 341.) Neither the father nor the daughter had a cellphone. (*Id.*) The father offered

to go get his cellphone, but Z.S. did not want to be left alone and asked him to stay with her until her friends arrived from the river. (*Id.*)

B.M. and S.S. arrived shortly thereafter. (Tr. at 341.) Neither B.M. nor S.S. had seen Z.S.'s interaction with Roberts as the river was lined with bushes and trees, but both immediately recognized that something traumatic had happened because Z.S. was "very flustered," "[i]n shock," breathing heavily, and crying. (*Id.* at 386, 397-98, 543-44.) S.S. observed that Z.S.'s arm was red where Roberts had grabbed her, and Z.S. reported that it hurt. (*Id.* at 339-40, 400.) To avoid running into Roberts, the three girls took the "back way" to B.M.'s vehicle. (*Id.* at 341.) Once there, B.M. called 9-1-1. (*Id.* at 388.) Z.S. estimated that approximately ten minutes passed between the time Roberts had grabbed her to the time B.M. called 9-1-1. (*Id.* at 344.)

Officer Puddy was on bicycle patrol in Bess Reed Park, which is just upstream from Caras Park. (Tr. at 441.) Officer Puddy was wearing a standard issue police uniform for bicycle patrol. (*Id.* at 440.) Officer Puddy's badge and name plate were visible and his uniform had an MPD patch on the shoulder. (*Id.* at 441.)

Dispatch received Boys' 9-1-1 call first and advised Officer Puddy. (Tr. at 284-85.) Officer Puddy responded and located Roberts while he was talking to two females who were sitting in the grass. (*Id.* at 443.) The females appeared to be

uncomfortable with Roberts talking to them. (*Id.*) Officer Puddy asked Roberts to move along. (*Id.*) Officer Puddy later believed he had identified himself to Roberts as a police officer. (*Id.*) Roberts complied with Officer Puddy's request and left. (*Id.*)

Approximately three minutes after his contact with Roberts, Officer Puddy received the second dispatch regarding B.M.'s 9-1-1 call.² (Tr. at 444-45.) Officer Puddy recognized that B.M.'s description of the male was consistent with Roberts. (*Id.* at 446.) Officer Puddy located Roberts a short distance away on the east side of the Holiday Inn Hotel. (*Id.* at 447.) Officer Puddy approached Roberts and told him to "come here" to talk with him. (*Id.* at 451, Ex. 21 at 00:26-00:37.) Roberts did not comply and, instead, turned around and started walking away before increasing his speed to a "trot." (*Id.* at 448.)

Roberts cut through the parking lot of the Holiday Inn to South Pattee Street where he went off a curb embankment, which made it difficult for Officer Puddy to follow on his bicycle. (Tr. at 448.) Although Officer Puddy did not verbally identify himself as a police officer during the pursuit, he yelled at Roberts: "You're detained right now. You can't leave." (Ex. 21 at 1:08-1:13.) Roberts avoided

²Both Boys' and B.M.'s calls to dispatch were delayed from the events precipitating the calls. The dispatch logs and witness reports indicate that Roberts had contact with Z.S. after his contact with Boys and that Officer Puddy's first contact with Roberts was after the incident with Z.S. (*See* Tr. at 283, Ex. 1; Tr. at 284, Ex. 2.)

Officer Puddy by going back into the parking lot once Officer Puddy went down the embankment. (*Id.*) Officer Puddy repeatedly told Roberts to “stop!” (*See* Ex. 21 at 2:11-4:05.) Officer Puddy caught up to Roberts near the front entrance of the Holiday Inn. (Ex. 21 at 4:06.) Roberts attempted to enter the hotel, but they had locked the door. (Tr. at 451.) Officer Puddy was able to grab Roberts, force him to the ground, and place him in handcuffs. (*Id.* at 451-52.) During a post-arrest interview, Roberts stated he believed Officer Puddy was “some bicycle cop or some security guy.” (Tr. at 547, Ex. 30 at 3:35-3:43.)

At trial, Roberts largely did not contest Z.S.’s version of events, but rather argued that the public setting, the time of day when the event occurred, and his actions after contacting Z.S. all proved he did not intend to kidnap her. (*See* Tr. at 637-38.) Roberts further argued he did not have the means to “accomplish a kidnapping.” (*Id.* at 638.) Rather, Roberts chalked up the incident as a “misguided attempt to talk to and meet women” while “on drugs,” notwithstanding the 31-year age difference between himself and Z.S. (*See id.* at 645, 695.) Roberts argued that his actions only made him guilty of attempted unlawful restraint. (*Id.* at 646.)

Roberts conceded that:

[Z.S.] ran down the trail terrified. The defense does not dispute that. It’s true she was terrified. Everyone agrees about it. Mr. Roberts feels horrible about it. Scaring her was never his intention.

(*Id.* at 638.)

In urging the jury to convict him of attempted unlawful restraint, Roberts argued:

. . . We admit it: the facts, they're bad. It doesn't look good at all. Mr. Roberts was scaring people. He was on drugs. There's no denial. He's had a hard go of it. He's down and out, and he needs help. He grabbed [Z.S.'s] arm; there's no denial. He scared [Z.S.]; there's no denial. He didn't stop when Officer Puddy told him to; there's no denial.

. . . .

Attempted unlawful restraint is what Mr. Roberts is guilty of. There's no denial there. He's guilty. His actions correspond directly with unlawful restraint. He grabbed [Z.S.] and tried to talk to her. It lasted maybe 15 seconds. He said, Come with me. He interfered with her liberty. No denial. That is what occurred. It was incredibly scary for her, and she ran. And he feels horrible about it, and that should be the end of it.

(*Id.* at 646-48.)

The jury disagreed and found the State had proved the elements of attempted kidnapping beyond a reasonable doubt. (Doc. 74.) Roberts now appeals.

SUMMARY OF THE ARGUMENT

Roberts was not prejudiced by the district court instructing the jury on the conduct-based definition of “knowingly” related to the Obstructing offense.

Although the instruction was not correct, the facts leading to the conviction were captured on video and largely uncontested. Roberts ran from Office Puddy, who was in uniform and had a badge, name plate, and MPD patch visible. Roberts later

conceded he knew Officer Puddy was a “bicycle cop” or “security guy.” Roberts has not shown prejudice from the instruction.

The district court’s instruction on “force” was correct. The word “force” is not defined in the kidnapping statute. Under any definition this Court could assign to the word, the district court’s instruction that force does not require physical violence or threat of personal injury was correct and the State met its burden of proving Roberts used “force.”

Furthermore, Roberts has not carried his burden of proving that this Court should reverse under the plain error or ineffective assistance of counsel doctrine related to the district court’s definition of “liberty” or for giving the conduct-based definition of “purposely” related to attempted kidnapping or attempted unlawful restraint. Although “attempt” is a results-based offense, the underlying crime of kidnapping is conduct-based. The district court did not err in providing both mental state instructions. Even if the court did err, Roberts has not shown prejudice.

The district court did not err in admitting MPD Officer Henry Jensen’s (Officer Jensen) body-camera video. Z.S.’s statements admitted through the video were not hearsay because they were prior consistent statements. The State properly played the entire video to show that Z.S.’s statements were consistent with her trial testimony and rebutted Roberts’ claim that she fabricated the statements because of Officer Jensen’s influence. Furthermore, the statements were admissible under the

excited utterance and then existing state of mind exceptions to the hearsay rule.

Finally, even if admitting the video was error, such error was harmless.

The district court did not impose an illegal sentence when it required Roberts to register as a sexual offender. Registration was required because Z.S. was a minor and not a family member, which triggers a sexual offender registration requirement pursuant to Mont. Code Ann. § 46-23-502(9)(a). Because the sentence was legal, it is not reviewable on appeal. Finally, the district court erred when it imposed a \$50 PSI fee for the first time in the written judgment.

ARGUMENT

I. Standard of review

“This Court reviews decisions regarding jury instructions for an abuse of discretion.” *State v. Wells*, 2021 MT 103, ¶ 13, 404 Mont. 105, 485 P.3d 1220. Where the claimed instructional error is unpreserved for appeal, this Court will only “choose to exercise discretionary plain error review where the alleged error may result in a manifest miscarriage of justice, leaves unsettled questions of fundamental fairness, or compromises the integrity of the judicial process.” *Id.* “Ineffective assistance of counsel claims are mixed questions of law and fact which [this Court] review[s] de novo.” *State v. Secrease*, 2021 MT 212, ¶ 9, 405 Mont. 229, 493 P.3d 335.

“This Court reviews evidentiary rulings for an abuse of discretion.” *State v. Pitkanen*, 2022 MT 231, ¶ 12, 410 Mont. 503, 520 P.3d 305.

“This Court reviews a district court’s sentence de novo for legality.” *Pitkanen*, ¶ 12.

II. Roberts was not prejudiced by the district court providing the jury with the incorrect “knowingly” instruction for Obstructing.

Roberts is not entitled to a reversal of his conviction for Obstructing because he was not prejudiced by the district court’s instruction. At trial, the court gave the conduct-based “knowingly” instruction without objection from Roberts. (Tr. at 610.) On appeal, Roberts argues this Court should reverse the Obstructing conviction under either a plain error or ineffective assistance of counsel theory. (Appellant’s Br. (Br.) at 18-23.)

“A person commits the offense of [Obstructing] if the person knowingly obstructs, impairs, or hinders the enforcement of the criminal law[.]” Mont. Code Ann. § 45-7-302(1). This Court has held that, “for the purposes of instructing the jury on the charge of obstructing a peace officer, the results-based ‘knowingly’ instruction should be given.” *Secrease*, ¶ 12; *see also City of Kalispell v. Cameron*, 2002 MT 78, ¶ 11, 309 Mont. 248, 46 P.3d 46.

This Court invokes plain error sparingly and only if the error “implicates a party’s fundamental constitutional rights and if ‘failing to review the claimed error

at issue may: (1) result in a manifest miscarriage of justice; (2) leave unsettled the question of the fundamental fairness of the trial or proceedings; or (3) compromise the integrity of the judicial process.” *State v. Daniels*, 2019 MT 214, ¶ 30, 397 Mont. 204, 448 P.3d 511 (citation omitted). This Court “will not reverse on the basis of [a district court’s] instructions” unless the error “prejudicially affects a defendant’s substantial rights.” *Daniels*, ¶ 26.

In evaluating ineffective assistance of counsel claims, this Court applies the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Secrease*, ¶ 13. The *Strickland* test requires the defendant to prove that (1) “‘counsel’s performance was deficient or fell below an objective standard of reasonableness’ and (2) ‘establish prejudice by demonstrating that there was a reasonable probability that, but for counsel’s errors, the result of the proceedings would have been different.’” *Id.* (quoting *State v. Koughl*, 2004 MT 243, ¶ 11, 323 Mont. 6, 97 P.3d 1095).

In *Secrease*, this Court found that Secrease’s attorneys’ performance was deficient because there was no plausible justification for their failure “to seek the correct ‘knowingly’ jury instruction on the obstructing a peace officer charge” *Secrease*, ¶ 15. This court further found that Secrease was prejudiced, stating:

By instructing the jury that Secrease only need[ed] to be aware of his conduct—that he was refusing the blood test—rather than properly instructing them that Secrease needed to be aware of the result of his conduct—that refusing the blood test after Trooper Burton had

obtained a search warrant was obstructing, hindering, or impairing the enforcement of the criminal law—the State’s burden in proving the crime was reduced.

Id.

Here, even if Roberts’ counsel was deficient, to merit reversal under either the theory of plain error review or ineffective assistance of counsel, Roberts must prove prejudice. He has failed to do so.

To convict Roberts of obstructing a peace officer, the State needed to prove that Roberts was aware his conduct would hinder the execution of Officer Puddy’s duties. *See Cameron*, ¶ 11. Officer Puddy first contacted Roberts in the park as Roberts spoke with two females. Officer Puddy was in a police uniform with a badge, name plate, and MPD patch. At that time, Roberts recognized Officer Puddy’s authority to instruct him to move along. However, during the second contact, Roberts did not follow Officer Puddy’s directives to “stop” or “come here,” opting instead to run away. Officer Puddy told Roberts, “I need to talk to you. I need you to take a seat on the bench for me.” (Ex. 21 at 1:02-1:07.) Officer Puddy further advised Roberts of his authority by stating, “you’re detained right now. You can’t leave.” (Ex. 21 at 1:08-1:13).

This evidence was captured on Officer Puddy’s body-camera and was not contested at trial. Despite this show of authority and clear signal to Roberts that he was the subject of an investigation, Roberts ran away and played a game of

cat-and-mouse in the Holiday Inn parking lot. Although Roberts claimed ignorance that Officer Puddy had the authority to stop him, he also conceded that he knew Officer Puddy was a “bicycle cop” or “security guy.” (Tr. at 547, Ex. 30 at 3:35-3:43) Given the overwhelming evidence that Roberts recognized Officer Puddy as a police officer and knowingly evaded him to hinder an investigation, Roberts has not met his burden of showing prejudice by the incorrect instruction.

Therefore, this case is distinguishable from *Secrease*. Secrease refused to comply with a blood draw after the trooper had obtained a warrant. *Secrease*, ¶ 5. Importantly, prior to the blood draw, the trooper read Secrease the Montana Implied Consent advisory, which informed Secrease he could refuse the test, but also provided a consequence for doing so—the loss of his Montana driving privileges. *See id.* After explicitly being told that he could refuse, it would have been rational for Secrease to continue to refuse even after the trooper obtained a warrant.

The jury was also apparently confused by the contradiction, sending the district court a note, asking, “if the blood test & breath test are refused after a warrant is issued, is that obstructing, hindering or impairing the law[?]” *Secrease*, ¶ 7. Here, no such confusion existed. Roberts knew Officer Puddy was a police officer and he knew Officer Puddy wanted to detain him to speak to him about an investigation.

On appeal, Roberts concedes that he “was evading Puddy’s directions to stop and talk to him[,]” but not that he “knew he was hindering Officer Puddy’s investigation into Z.S.’s allegations.” (Br. at 22-23.) In sum, Roberts argues that to hinder an investigation, the defendant must know, not only that an investigation is taking place, but the precise nature of the allegations behind the investigation. Roberts is mistaken.

Officer Puddy had particularized suspicion to detain Roberts for his investigation. *See* Mont. Code Ann. § 46-5-401(1). Furthermore, an officer is only required to “as promptly as possible inform the person of the reason for the stop” if the stop is for a traffic violation. *Id.* Simply put, there is no requirement that an officer inform a fleeing suspect of the allegations against him. Obstructing requires a knowledge that the officer is conducting an investigation; it does not require the suspect to know any details of the investigation. Here, Roberts knew Officer Puddy was attempting to detain him to ask him questions about an investigation. Roberts obstructed the investigation by running away.

Roberts did not suffer prejudice by the court instructing the jury on the conduct-based definition of “knowingly.” Accordingly, his requests for plain error review and reversal for ineffective assistance of counsel both fail.

III. The district court did not abuse its discretion with its definitions of “force,” “liberty,” or the mental states for attempted kidnapping and attempted unlawful restraint.

“[D]istrict courts are accorded broad discretion in formulating jury instructions.” *State v. Archambault*, 2007 MT 26, ¶ 25, 336 Mont. 6, 152 P.3d 698. Although a court must fully and fairly instruct the jury regarding the applicable law, “the fact that one instruction, standing alone, was not as complete or accurate as it could have been is not reversible error[.]” *Id.* As noted above, to merit reversal, a mistake in the instructions “must prejudicially affect the defendant’s substantial rights.” *Daniels*, ¶ 26.

For the reasons set forth below, the district court did not abuse its discretion with its instructions related to “force,” the definition of “liberty,” or the mental states required for attempted kidnapping and attempted unlawful restraint. Furthermore, even if one of the instructions was incorrect, Roberts was not prejudiced and, therefore, his case should not be reversed.

A. The district court did not abuse its discretion with its instruction on “force.”

Attempted kidnapping requires the State to prove a defendant performed any act toward the commission of a kidnapping. Mont. Code Ann. § 45-4-103. In turn, “kidnapping” requires a defendant to “knowingly or purposely and without lawful authority restrain[] another person by . . . using or threatening to use physical

force.” Mont. Code Ann. § 45-5-302(1). The term “force” is not defined in the kidnapping statute. *See id.*

Roberts proposed instructing the jury that “force” required a “physical or violent act.” (Doc. 47, proposed Instr. 13.) The theory behind Roberts’ proposed instruction was rejected by this Court in *State v. Walker*, 139 Mont. 276, 362 P.2d 548 (1961).

Walker was a participant in a prison riot at MSP. *Walker*, 139 Mont. at 277, 362 P.2d at 549. Walker showed a knife to a guard, without explicitly threatening him with the knife, to convince him to go into an isolation cell, where the guard remained for several hours before being locked in a different cell during the riot. *Id.* Walker argued that the presence of the knife alone was insufficient to prove force. *Walker*, 139 Mont. at 278, 362 P.2d at 550. This Court disagreed, stating that “[t]here is no merit in [Walker’s] contention that there must be a showing of actual physical violence or threat of personal injury to prove the force necessary to establish the crime.” *Walker*, 139 Mont. at 280, 362 P.2d at 550.

Although the kidnapping statute has changed since *Walker*, the premise that “force” does not require a showing of actual physical violence or threat of personal injury has carried forward to the new statute. *See* Commission Comment to Mont. Code Ann. § 45-5-302 (stating: “It should be noted that subsection (1) conforms with current Montana law, that a showing of actual physical violence or threat of

personal injury are not required to prove the force necessary to establish the crime.”).

Furthermore, although “force” is not defined in the kidnapping statute, it is defined elsewhere in the criminal code. *See* Mont. Code Ann. § 45-5-501(2). As used in the aggravated sexual intercourse without consent statute, “force” means “the infliction, attempted infliction, or threatened infliction of bodily injury” *Id.* “Bodily injury” is defined as any “physical pain, illness, or an impairment of physical condition and includes mental illness or impairment.” Mont. Code Ann. § 45-2-101(5).

“Whenever the meaning of a word or phrase is defined in any part of [the] code, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears.” Mont. Code Ann. § 1-2-107. Here, the Legislature has not indicated a plain intention that the “force” definition found in Mont. Code Ann. § 45-5-501(2) should not be applied elsewhere. *See Dep’t of Revenue v. Gallatin Outpatient Clinic*, 234 Mont. 425, 430, 763 P.2d 1128, 1131 (1988).

However, in a case decided after the adoption of the new kidnapping statute, this Court again applied a definition of force that did not require the threat or infliction of bodily injury. *See State v. Herrera*, 197 Mont. 462, 465, 643 P.2d 588, 590 (1982). Herrera hid in the bushes while two young girls, one 12 and the other

14 years old, walked by. *Herrera*, 197 Mont. at 464, 643 P.2d at 589. Herrera called out to the two girls and, when they attempted to run, he grabbed them from behind and “dragged” them back to his father’s residence. *Id.*

Once inside his father’s house, the girls were “ordered to sit down” and to take off their clothes. *Herrera*, 197 Mont. at 464, 643 P.2d at 589-90. When the girls refused, Herrera went and retrieved a gun and put it on the couch, though he did not explicitly threaten either girl with the gun. *Herrera*, 197 Mont. at 465, 643 P.2d at 590. The girls were able to escape. *Id.* On appeal, Herrera argued the State had not proved the “force” element of kidnapping. *Id.* This Court held that “the use of force was well established by the evidence. The girls were physically dragged to [the father’s] residence, and once inside, were forced into their chairs.” *Id.*

Although this Court in *Herrera* did not specifically define “force,” it appears to have applied the common meaning of the word. Prior to the Legislature adopting a definition of “force” for aggravated sexual intercourse without consent, this Court applied “the ordinary and normal definition” of “force” as it related to that statute. *See State v. Thompson*, 243 Mont. 28, 32, 792 P.2d 1103, 1106 (1990) (*overruled on other grounds by State v. Spreadbury*, 2011 MT 176, ¶ 10, 361 Mont. 253, 257 P.3d 392, and abrogated by statute Mont. Code Ann. § 45-5-501(2)).

The Court in *Thompson*, noting that the Legislature had not yet defined “force,” applied the “ordinary and normal” definition, meaning: “physical compulsion, the use or immediate threat of bodily harm, injury.” *Id.* The “physical compulsion” definition of “force” from *Thompson* is consistent with this Court’s holding in *Herrera*, which found that the girls being “dragged” and “forced” to sit down, even without allegations of bodily injury or explicit threats of bodily injury, was sufficient to show the necessary “force” for kidnapping. *Herrera*, 197 Mont. at 465, 643 P.2d at 590.

In this case, the Court does not need to arrive at an appropriate definition of “force” because, under any definition, Instruction 19 was a correct statement of the law and because Roberts was not prejudiced by the instruction. First, while a showing of “physical violence or threat of personal injury” would be sufficient to establish force, neither is necessarily required under any definition. Here, Roberts did not threaten bodily injury and his act of grabbing Z.S. was not overtly violent. However, “force” was established by the evidence showing Z.S. suffered bodily injury from Roberts’ grip on her arm, which was like the force, or “physical compulsion,” used on the girls in *Herrera*.

The threshold to establish “bodily injury” is low, with any amount of physical pain or mental impairment being sufficient to meet the requirement. Roberts grabbed Z.S. by the arm while stating: “You’re coming with me.” Z.S.

described that Roberts' grip caused her pain, which was corroborated by faint bruising.

Furthermore, Z.S. testified about the mental anguish she suffered from the experience. The power dynamic between a large, 46-year-old man and a vulnerable 16-year-old girl in a bikini was substantial. Z.S. believed she would be kidnapped or raped.

Despite the physical pain and mental impairment Roberts caused Z.S., his actions were not "physically violent," nor did he overtly threaten her with physical injury. The district court correctly instructed the jury that neither physical violence nor threatened personal injury was required to show "force." Although the court's definition of "force" may not have been as complete "as it could have been," it was an accurate statement of the law and was not an abuse of discretion. *See Archambault*, ¶ 25.

Moreover, even if this Court adopts a definition of "force" that is more demanding than what *Herrera* requires, the State still met its burden of proof. In fact, in his closing argument, Roberts conceded that "[h]e grabbed [Z.S.'s] arm," which caused her to "[run] down the trail terrified." (Tr. at 638, 646.) The concession was enough to corroborate that Z.S. felt pain to her arm and suffered psychological trauma. Accordingly, Roberts was not prejudiced by the district court's instruction.

B. Roberts has not carried his burden of proving that this Court should exercise plain error review or reverse for ineffective assistance of counsel based on the district court providing the conduct-based definition of purposely in Instructions 21 and 27 or for its definition of “liberty.”

In his opening brief, Roberts reviewed Instructions 17-18, 20-22, and 26-30.

Roberts argues that those instructions, taken as a whole, were “a bewildering morass of conflicting statements on the mental state necessary to commit attempted kidnapping or attempted unlawful restraint.” (Br. at 36.) However, in the end, Roberts concedes that all but Instructions 21 and 27 were correct. (Br. at 37-38.) Roberts contends that, because “attempt” is a results-based crime, the same mental state applies to kidnapping and, therefore, the district court erred by providing a conduct-based definition of “purposely.” (Br. at 38.)

A district court does not err by providing a conduct-based mental state definition for one element of an offense and a results-based mental state for another element. *See State v. Strizich*, 2021 MT 306, ¶¶ 47-49, 406 Mont. 391, 499 P.3d 575. For example, the offense of theft requires a mental state that the person “purposely or knowingly” obtain unauthorized control over another’s property and, separately, that the person “has the purpose of depriving the owner of the property.” *Strizich*, ¶ 47 (quoting Mont. Code Ann. § 45-6-301(1)(a)).

The mental state related to obtaining unauthorized control over the property of another is conduct-based, i.e., that it is the defendant’s “conscious object to

engage in conduct of that nature.” *Id.* However, the mental state related to having the purpose of depriving the owner of the property is results-based, i.e., that it is the defendant’s conscious object to cause the deprivation. *Id.* Accordingly, it is correct to instruct the jury on both conduct- and results-based mental states for the elements of theft. *Id.* The Court in *Strizich* likewise found that the offense of aggravated burglary supported two mental state instructions. *Strizich*, ¶¶ 48-49.

Like the aggravated burglary offense at issue in *Strizich*, the offense of “attempt” requires that a defendant have “the purpose to commit a specific offense” and, accordingly, that element of the crime is results-based. *See State v. Colburn*, 2016 MT 246, ¶ 10, 385 Mont. 100, 386 P.3d 561; Mont. Code Ann. § 45-4-103(1). To prove an attempt offense, the State must show that the defendant had the mental state to achieve a specific result, i.e., the commission of the underlying crime—here, a kidnapping.

Moreover, to commit an attempt, the defendant must also complete “at least some appreciable fragment” of the underlying crime. *Colburn*, ¶ 11. Like in the aggravated burglary statute, to complete an attempt, the defendant must engage in some underlying conduct. Accordingly, multiple mental states may apply to the different elements of the crime. *See Strizich*, ¶¶ 46-49. The offense of kidnapping criminalizes the conduct of threatening or using force to restrain another person. The crime is “defined by the defendant’s actions, rather than the result of those

actions.” *Jones v. State*, 159 N.E.3d 55, 64 (Ind. Ct. App. 2020) (finding the mental state required to commit a kidnapping is conduct-based).

Here, the district court did not err by providing a results-based mental state definition as it applied to “attempt,” while also providing a conduct-based mental state definition as it related to the underlying crime of kidnapping. The district court correctly instructed the jury that Roberts was required to have the purpose to commit a kidnapping (result-based) while also purposely engaging in some conduct toward the commission of that offense (conduct-based). The court fully and fairly instructed the jury on the elements of the crime. Because there was no error, the plain error and ineffective assistance of counsel doctrines do not apply.

Furthermore, the court did not err by defining “liberty” as “[f]reedom from arbitrary or undue external restraint,” which was derived from Black’s Law Dictionary. (*See* Doc. 70; *Black’s Law Dictionary* 743 (7th ed. 1999).) Roberts argues the definition of “liberty” was incorrect because it conflicts with the definition of “restrain,” which the court defined as a “substantial interference with the other person’s liberty” (Doc. 68.1, Instr. 26.) Read together, the definitions of “liberty” and “restrain” would require proof that a person substantially interfered with the other person’s right to be free from arbitrary or undue external restraint. The definitions did not conflict and the right to be free from arbitrary or undue

restrain did not negate that Roberts was required to “substantially interfere” with that right. The district court did not err by defining “liberty.”

However, even if the court erred in giving Instructions 21, 27 and the definition of “liberty,” this Court should decline to reverse under plain error review or ineffective assistance of counsel because Roberts has not proved prejudice. Roberts argues that there was no evidence that he had the purpose of kidnapping Z.S. because his attempted kidnapping occurred “in broad daylight in a park full of people with no means of restricting [Z.S.’s] liberty through false imprisonment.” (Br. at 39.) Roberts’ argument fails for several reasons.

First, the district court correctly instructed the jury that they were required to find that Roberts acted with the purpose of committing a kidnapping. Accordingly, the jury found, beyond a reasonable doubt, that when Roberts engaged in the conduct of grabbing Z.S.’s arm and issuing the command: “You’re coming with me,” he did so with the purpose of kidnapping her.

Second, Roberts’ argument that his low chance of a successful abduction defeated his mental state is also without merit. “It is not a defense to a charge of attempt that because of misapprehension of the circumstances, it would have been impossible for the accused to commit the offense attempted.” Mont. Code Ann. § 45-4-103(2). Z.S.’s ability to escape and thwart Roberts’ attempt does not undermine his purposeful actions.

Furthermore, Roberts' chance of success was not extinguished simply because the attempted kidnapping occurred in broad daylight in a public park. Z.S. could have frozen or she could have complied out of fear and gone quietly with Roberts to a more secluded location. The fact that Z.S. was brave, fought back, and escaped does not negate Roberts' culpability or his purpose to commit a kidnapping.

Finally, Roberts conceded in his closing argument that he grabbed Z.S. and that his actions terrified her. Roberts only contended that he did not commit those actions with the intent to kidnap Z.S. and, therefore, the jury should only convict him of unlawful restraint. Roberts did not elaborate on what his intentions were, i.e., why he would approach a 16-year-old, bikini-clad girl, grab her by the arm, and command her to go with him. Nevertheless, the district court instructed the jury that, to convict, it was required to find that it was Roberts' "conscious object to cause a Kidnapping" (Doc. 68.1, Instr. 20.) The instructions allowed Roberts to argue that kidnapping was not his purpose. The conduct-based definition of "purposely," related to the defendant's conduct of restraining Z.S. with force, did not undermine Roberts' theory of the case. Therefore, he has not shown prejudice.

Moreover, Roberts' concession that he should be found guilty of unlawful restraint was a concession that he purposely engaged in the conduct of restraining

Z.S. Therefore, even if the Court’s definition of “liberty” was in error, Roberts had conceded that element of the offense and cannot now claim prejudice.

In sum, the district court’s instructions fully and fairly instructed the jury on the mental states related to attempt and kidnapping. However, even if the court erred, this Court should not invoke plain error review or apply the doctrine of ineffective assistance of counsel because Roberts has not proved prejudice.

IV. The district court did not abuse its discretion by admitting Officer Jensen’s body-camera video.

Officer Jensen responded to the scene and spoke with Z.S. and her father, Tom Stack (Tom). During her interview, Z.S., who was still in obvious distress, explained to Officer Jensen what had happened, showed him where Roberts had grabbed her arm, and guided Officer Jensen to the platform and walking path while describing the incident. At trial, Roberts objected to admission of Officer Jensen’s video on hearsay grounds. The State responded that it was not offering the video for the truth of what Z.S. described but, rather, to show her demeanor in the immediate aftermath of the assault. The court, without explaining its rationale, admitted the video over Roberts’ objection.

On appeal, Roberts argues the video was inadmissible hearsay because there is not a “demeanor” exception to the hearsay prohibition. (Br. at 42.) Although there might not be a “demeanor” exception, the exhibit was still admissible and

this Court should affirm the district court’s ruling, “even if it reached the correct result for the wrong reason.” *State v. William Cameron*, 2005 MT 32, ¶ 31, 326 Mont. 51, 106 P.3d 1189.

Z.S.’s statements were admissible as prior consistent statements and were not hearsay. Furthermore, even if the statements were hearsay, they were admissible under the “excited utterance” and “then-existing state of mind” exceptions. Finally, even if the district erred in admitting the evidence, such error was harmless.

A. The body-camera video was admissible as a prior consistent statement.

Pursuant to Mont. R. Evid. 801(d)(1)(B), a statement is not hearsay if it is a prior consistent statement “and is offered to rebut an express or implied charge against the declarant of subsequent fabrication, improper influence, or motive” The proponent of the prior consistent statement must satisfy four requirements for the statement to be admissible under this rule. *State v. Teters*, 2004 MT 137, ¶ 25, 321 Mont. 379, 91 P.3d 559. The four requirements are:

(1) the declarant must testify at trial and (2) be subject to cross-examination concerning her statement, and (3) the statements to which the witness testifies must be consistent with the declarant’s testimony, and (4) the statement must rebut an express or implied charge of subsequent fabrication, improper influence or motive.

Id.

In *Teters*, Teters’ counsel claimed during his opening statement that the victim had been influenced by her mother and a “messy divorce” to fabricate allegations of sexual abuse. *Teters*, ¶ 23. During the victim’s cross-examination, Teters’ counsel further implied the victim had a motive to lie because she hated Teters. *Id.* In rebuttal, the State called a Child Protective Services (CPS) employee, who the victim had disclosed the sexual abuse to prior to her mother and Teters initiating the divorce proceedings. *Id.* Over Teters’ hearsay objection, the employee testified about what the victim had told him. *Teters*, ¶ 15.

This Court held that Teters’ counsel had opened the door to the testimony through his opening statement that the victim had fabricated her allegations due to the divorce. *Teters*, ¶ 28. The victim had made the statements to the CPS employee prior to the initiation of the divorce and, therefore, they “were made prior to [when] the alleged motivation to fabricate arose,” making the statements admissible pursuant to Mont. R. Evid. 801(d)(1)(B). *Id.*

Here, during his opening argument, Roberts’ counsel stated:

[Z.S.’s] first two statements, minutes after this all occurred were, He said, Come with me. And Officer Jensen talks to her a little bit longer, kind of recapitulates what happened and misquotes her and says, So he said, You’re coming with me. And from then on out, her statement has changed to Mr. Roberts said, You’re coming with me, or, Come with me, in a forceful way.

There's a big difference between, Come with me, and, You're coming with me. "You're coming with me" is a command. "Come with me" is a suggestion, an invitation[.]

(Tr. at 278.)

During his opening argument, Roberts' counsel argued that Z.S. fabricated the forcefulness of Roberts' command to go with him due to the improper influence of Officer Jensen misquoting her. However, the video rebuts Roberts' claim of fabrication. When Z.S. first recounted the event to Officer Jensen, she explained that she told Roberts she did not feel comfortable talking to him and Roberts responded by grabbing her and saying, "No, come with me." (Tr. at 353, Ex. 9 at 0:49-0:52.) To demonstrate what Roberts had done, Z.S. forcefully grabbed her friend by the arm and yanked on her. (*Id.*) Officer Jensen asked Z.S. to repeat what Roberts said when he grabbed her arm. (Ex. 9 at 1:48-1:51.) Z.S. again stated that Roberts said: "Come with me." (*Id.* at 1:51-1:54.)

Z.S. went on to explain how she hit Roberts with her surfboard, escaped his grip, and ran down the pathway to ultimately meet up with her friends. (Ex. 9 at 1:54-3:49.) Tom interjected during the interview to ask Z.S. clarifying questions and, at one point, exclaimed that Z.S. had been "hysterical" when he first spoke with her on the phone. (Ex. 9 at 3:45-3:49.)

Officer Jensen repeated Z.S.'s statement back to her, to make sure he understood her report. Officer Jensen summarized that Roberts had grabbed Z.S.

“forcefully” and stated: “You’re coming with me.” (*Id.* at 5:58-6:08.) Z.S. agreed with Officer Jensen’s rendition. (*Id.*)

At trial, in relation to Roberts’ command to go with him, Z.S. testified he “grabbed my right upper arm and said, You’re coming with me.” (Tr. at 337.) Z.S. was certain that Roberts’ statement was “[a] command” and not simply an invitation. (Tr. at 339.) On cross-examination, Z.S. agreed that the first time she used the specific words “You’re coming with me” was after Officer Jensen had repeated her statement back to her. (Tr. at 368.)

The court did not err in admitting Officer Jensen’s body-camera video. Officer Jensen’s statements were not hearsay because they were not offered for the truth of the matter asserted. Z.S.’s statements were admissible because they met the criteria set forth in *Teters* and Rule 801(d)(1)(B) for prior consistent statements.

First, Z.S. testified at trial. Second, she was subjected to cross-examination concerning her statements. Third, her prior statements were consistent with her trial testimony. Z.S. was clear from her initial statement that Roberts had commanded her to go with him. There was no difference between Roberts stating “Come with me” versus “You’re coming with me.” Both were commands meant to deprive Z.S. of her ability to refuse. Z.S.’s trial testimony was consistent with the statements she made prior to Officer Jensen’s summary, i.e., prior to the alleged improper influence.

Finally, the statements rebutted Roberts' allegation of subsequent fabrication or improper influence. Roberts first raised the argument that Z.S. had changed her story in his opening argument. Roberts also cross-examined Z.S. about the alleged fabrication. The State properly played Z.S.'s entire statement, which provided context for Z.S.'s statement and for what Roberts claimed was improper influence. The video rebutted Roberts' argument that Z.S. had, at first, suggested Roberts' command was a simple invitation, which only morphed into a command following Officer Jensen's summary. All the requirements of Rule 801(d)(1)(B) were met, and the district court did not err by admitting the video.

B. Even if Officer Jensen's body-camera video contained hearsay statements, they were admissible pursuant to Mont. R. Evid. 803(2)-(3).

An "excited utterance" is admissible hearsay if the "statement relat[ed] to a startling event or condition [and was] made while the declarant was under the stress of excitement caused by the event or condition." Mont. R. Evid. 803(2). The statement need not be made immediately following the event if the stress of the event persisted and guaranteed the statement's reliability. *See William Cameron*, ¶¶ 35-36 (finding the statement a young victim made to her sister within "an hour or two" of the incident was an excited utterance even though the victim had run/walked eight miles between the time of the incident and making the statement).

Hearsay statements are also admissible if they are “statement[s] of the declarant’s then-existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed.” Mont. R. Evid. 803(3). “[T]o prevent the exception from swallowing the rule, Rule 803(3) permits courts to admit out-of-court statements that directly reveal the declarant’s state of mind, but excludes the parts of those statements that explain the external circumstances that caused that state of mind.” *State v. Gomez*, 2020 MT 73, ¶ 52, 399 Mont. 376, 460 P.3d 926.

Here, Z.S.’s statements captured on Officer Jensen’s body-camera were admissible under either Rule 803(2), Rule 803(3), or both. Officer Jensen’s interview occurred immediately upon him arriving on-scene after Z.S. had just experienced an attempted kidnapping. Z.S. was still in obvious distress, as she is seen constantly fidgeting, quivering, and needing to be consoled by Tom. Z.S. made the statements while still under the stress or excitement caused by the event and they were, therefore, admissible pursuant to Rule 803(2).

Furthermore, several of Z.S.’s statements revealed her then-existing state of mind. For example, Z.S. indicated that her arm still hurt from where Roberts had grabbed her. (*See* Ex. 9 at 0:46-0:49.) Z.S. further stated that, in the moment, she believed she was going to be kidnapped and she did not have any control over what

was going to happen. (Ex. 9 at 3:05-3:33.) Z.S.’s statements to Officer Jensen were admissible as excited utterances and/or to show her then-existing state of mind.

C. Even if admitting the video was error, the error was harmless.

The admission of prohibited hearsay evidence “does not require automatic reversal.” *Gomez*, ¶ 56. This Court will not reverse a conviction “unless the record shows that the error was prejudicial.” *State v. Smith*, 2021 MT 148, ¶ 34, 404 Mont. 245, 488 P.3d 531 (quoting Mont. Code Ann. § 46-20-701(1)). The admission of a video interview containing inadmissible hearsay is trial error and subject to harmless error analysis. *Id.*

For a trial error to be harmless, “the State must demonstrate that there is no reasonable possibility that the inadmissible evidence might have contributed to the conviction.” *Gomez*, ¶ 56 (quoting *State v. Van Kirk*, 2001 MT 184, ¶ 47, 306 Mont. 215, 32 P.3d 735). “Inadmissible evidence is not prejudicial so long as the jury was presented with admissible evidence proving the same facts as the tainted evidence.” *Smith*, ¶ 34.

All Z.S.’s statements to Officer Jensen were admitted through other admissible testimony at trial. Z.S.’s statements on the video were admitted through her own trial testimony. Furthermore, Z.S.’s statements to Officer Jensen were corroborated by other evidence. Testimony from B.M. and S.S. corroborated Z.S.’s testimony about going to Brennan’s Wave to surf, what occurred immediately

following the attempted kidnapping, and Z.S.'s state of mind and demeanor immediately after the event. Importantly, B.M.'s and S.S.'s testimony established Z.S.'s demeanor following the incident, making Tom's statement captured on Officer Jensen's video, that Z.S. was "hysterical," cumulative evidence of her demeanor.

James Herrick (Herrick), who was also in the park and witnessed parts of the interaction between Roberts and Z.S., corroborated much of what Z.S. said at trial and in the video. Herrick was, admittedly, not a very reliable witness due to his eyesight and mental health. However, he was unbiased and corroborated that Roberts was uncomfortably close to Z.S., that Roberts followed Z.S. down the path after their encounter on the viewing platform, that they stopped on the path, that Z.S. jumped away from Roberts, and that she then ran away down the path. (Tr. at 411-15.)

Roberts also confirmed his interaction with Z.S. during an interview with Detective Connie Brueckner. (*See* Tr. at 547, Ex. 30.) During the interview, Roberts admitted he had interacted with "some female that had a surfboard," who was "younger." (Ex. 30 at 5:00-6:30.)

Although Herrick did not see Roberts grab Z.S., and Roberts did not admit to it in his interview, Z.S.'s testimony in that regard was corroborated by faint bruising on her arm. (*See* Tr. at 538.) Therefore, Z.S.'s statements in Officer

Jensen's video were admitted through her own trial testimony and corroborated by the testimony of other witnesses. The statements that she and Tom made during the video were cumulative to other admissible evidence. Given the cumulative evidence, even if the statements were inadmissible hearsay, there is no reasonable possibility that they contributed to Roberts' conviction. Furthermore, Roberts conceded most of the facts during his closing argument, including that he grabbed Z.S.'s arm. (Tr. at 648, stating: "He grabbed [Z.S.'s] arm; there's no denial.") Any error in admitting the video was harmless.

V. Roberts' sentence was legal; therefore, his arguments concerning sexual offender registration were not preserved for appeal.

This Court will only review an unpreserved allegation that the court erred at sentencing "if it is alleged that such sentence is illegal or exceeds statutory mandates[.]" *State v. Pine*, 2023 MT 172, ¶ 28, 413 Mont. 254, __ P.3d __ (quoting *State v. Lenihan*, 184 Mont. 338, 343, 602 P.2d 997, 1000 (1979)). A sentence is legal "if it falls within statutory parameters." *Pine*, ¶ 29 (quoting *State v. Kotwicki*, 2007 MT 17, ¶ 8, 335 Mont. 344, 151 P.3d 892). "[A] sentencing court's failure to abide by a statutory requirement rises to an objectionable sentence, not necessarily an illegal one that would invoke the *Lenihan* exception." *Id.* (quoting *Kotwicki*, ¶ 13).

In *Pine*, this Court held that designating a defendant as a level three sexual offender was within the statutory parameters of Mont. Code Ann. § 46-23-509. *Pine*, ¶ 29. Therefore, Pine’s contention that the district court failed to follow the statutory requirements in arriving at the level designation did not make his sentence illegal. *Id.* This Court further held that Pine’s counsel was not deficient for failing to argue against the legal sentence. *Pine*, ¶ 36.

Montana Code Annotated § 46-23-502(9)(a) defines “sexual offense,” in part, as any conviction for attempted kidnapping where “the victim [was] less than 18 years of age and the offender [was] not a parent of the victim.” Because Roberts’ conviction qualified as a sexual offense, he is required to register. The requirement to register is a “legislative mandate” and not contingent on the court’s sentencing order. *See In re M.W.*, 2012 MT 44, ¶ 16, 364 Mont. 211, 272 P.3d 112 (quoting *State v. Myers*, 256 P.3d 13, 23-24 (N.M. 2011)).

Prior to sentencing, a sexual offender must undergo a psychosexual evaluation to obtain a recommended level designation. Mont. Code Ann. § 46-23-509(1). The court is required to consider, but is not obligated to follow, the psychosexual evaluation at sentencing. Mont. Code Ann. § 46-23-509(2)(a); *Pine*, ¶ 30.

If the court neglects to assign the offender a level designation, the county attorney may “petition the district court . . . to designate the offender as level 1, 2,

or 3.” Mont. Code Ann. § 46-23-509(8). The district court “may order a psychosexual evaluation” at that time and must hold a hearing prior to ordering a level designation. *Id.*

Roberts’ conviction for attempted kidnapping qualified as a sexual offense. As a result, Roberts is required to register as a sexual offender. Because the duty to register is a stand-alone legislative mandate, Roberts would be required to register even if the district court had not ordered him to do so. Although the district court should have ordered Roberts to complete a psychosexual evaluation, and then should have considered the evaluation at sentencing, the failure to follow the statutory requirements did not make Roberts’ sentence illegal. The district court’s order that Roberts register was within the statutory parameters of Mont. Code Ann. § 46-23-504 and was legal. Therefore, Roberts did not preserve the issue for appeal.

Roberts further argues that there is no statutory authority for the district court to order him to complete a sexual offender evaluation following his sentence. (Br. at 46.) However, that is not correct. As noted above, Mont. Code Ann. § 46-23-509(7) contemplates this precise fact pattern where a district court initially fails to order a level designation. Pursuant to Mont. Code Ann. § 46-23-509(7), the county attorney may petition the court for Roberts to complete an evaluation and

be assigned a level designation following a hearing. The court's order tracked the statutory language and was legal.

Moreover, pursuant to *Pine*, Roberts' counsel was not deficient for not arguing against registration. Registration is required by statute and, therefore, Roberts' counsel's failure to object to a legal sentence did not fall outside the "range of acceptable professional assistance[.]" *Pine*, ¶ 37 (citation omitted).

Furthermore, Roberts was not prejudiced. As noted above, Roberts would be required to register even if not ordered to do so by the court and even if the topic was not broached at sentencing. On appeal, Roberts has not advanced any argument supported by legal authority that his counsel should have made. Roberts only makes a vague claim that his counsel should have made an as-applied "constitutional argument" or that he should have requested a continuance to complete additional research. (Br. at 47.) Such vague claims without supporting legal authority are insufficient for Roberts to carry his burden of proving his counsel was ineffective.

VI. The district court imposed a \$50 PSI fee that was not ordered during its oral pronouncement of sentence.

The State agrees with Roberts that the district court's written judgment included a \$50 PSI fee that was not orally pronounced at sentencing. Accordingly,

this Court should remand for the purpose of striking lines 5-6 on page 3 of the judgment.

CONCLUSION

For the foregoing reasons, the Court should affirm Roberts' conviction and remand to the district court for the sole purpose of striking the \$50 PSI fee.

Respectfully submitted this 27th 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 9,997 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

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CERTIFICATE OF SERVICE

I, Bjorn E. Boyer, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 10-27-2023:

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