IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0088

STATE OF MONTANA,

Plaintiff and Appellee,

v.

LEWIS LEON BRYSON,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, The Honorable John W. Parker, Presiding

APPEARANCES:

AUSTIN KNUDSEN
Montana Attorney General
MARDELL PLOYHAR
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
mployhar@mt.gov

JOSHUA A. RACKI
Cascade County Attorney
JENNIFER QUICK
ASHLEE KUMMER
Deputy County Attorney
121 4th Street North, Suite 2A
Great Falls, MT 59401

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

CHAD WRIGHT
Appellate Defender
CAROLYN GIBADLO
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147

ATTORNEYS FOR DEFENDANT
AND APPELLANT

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1. Whether counsel was ineffective when he failed to request an instruction on the circumstance-based definition of knowingly to apply to the "incapable of consent" element when the conduct-based instruction applied to the remainder of sexual intercourse without consent.

2. Whether this Court should exercise plain error review to review Bryson's claim that the court erred when it failed to give a circumstance-based knowingly instruction to apply to the "incapable of consent" element when the conduct-based instruction applied to the remainder of sexual intercourse without consent.

3. Whether the court violated Bryson's right to present a defense when it excluded testimony that the victim stated when admitted to the hospital that she drinks a liter of vodka a day and stated during a prior hospital admission that she does not suffer alcohol withdrawal symptoms.

STATEMENT OF THE CASE

The State charged Bryson in an Amended Information with: Count I: sexual intercourse without consent (SIWOC), or in the alternative, aggravated sexual intercourse without consent (ASIWOC), a felony; Count II: tampering with or fabricating physical evidence (attempt), a felony; and Count III: obstructing a

peace officer, a misdemeanor. (Doc. 67.) SIWOC was charged under the theory that the victim, Valerie, was incapable of consenting due to incapacitation, whereas ASIWOC was charged under the theory that Bryson used force to have sexual intercourse with Valerie without her consent. (*Id*.) At trial, Bryson's counsel relied on the pattern jury instructions proposed by the State. (*See* 7/28/21 Tr. at 5-6; 8/19/21 Tr. at 5.) The jury was instructed that "A person acts knowingly when the person is aware of his conduct." (Doc. 78, Instr. No. 31.) A jury convicted Bryson of SIWOC and obstructing a peace officer. (Doc. 79.)

STATEMENT OF THE FACTS

I. The offense

Bryson's neighbor called law enforcement on May 2, 2020, to report that Bryson was spraying a woman with a hose, and the woman was screaming. (8/17/21 Tr. at 181.) The officer who responded located Bryson in his backyard "sitting relaxed with his legs crossed drinking a Steel Reserve . . . and smoking a cigarette." (*Id*. at 186.) The officer then saw a woman, later identified as Valerie, lying on the ground several feet from Bryson. (*Id*. at 186, 188.) She was "soaking wet" and was partially covered by a blanket. (*Id*. at 186-87.) She was unresponsive and had shallow breathing, prompting the officer to call for an ambulance. (*Id*. at 187, 219-23.)

Bryson refused to give the officer his name or Valerie's name. (*Id*. at 189.) When the officer asked who owned the property, Bryson said he had sold it to a friend, but he would not give the friend's name. (*Id*.) Bryson later said the property was still his. (*Id*.) The officer arrested Bryson for obstructing the investigation. (*Id*. at 191.)

After Valerie became responsive, she was very emotional. (*Id*. at 192.) She stated that Bryson had raped her, and her vagina hurt. (*Id*. 192-93.) She was scared and asked officers not to leave her alone. (*Id*.) She was squinting like she was in extreme pain and holding her side and vaginal area. (*Id*. at 193.) The officer noticed that Valerie's upper lip was red, swollen, and bleeding, and she had bruises on her head, neck, and rib area. (*Id*. at 194-201; State's Ex. 1-5.)

Valerie was transported to the hospital, where a SANE examination was conducted by Mychael Klajic. (8/18/21 Tr. at 35-74.) Valerie was hysterical when the examination began. (*Id*. at 41.) During the examination, she seemed very nervous and repeatedly checked to make sure Klajic was present. (*Id*. at 41-42.) Klajic observed that Valerie had scratches and bruises to her upper body and abrasions to her vaginal wall. (*Id*. at 44.) Valerie had dirt and grass on her body, including around her vagina. (*Id*. at 55-56, 109.) Sperm cells contained on a vaginal swab taken from Valerie during the SANE examination contained Bryson's DNA. (*Id*. at 173-74.)

Valerie reported to the SANE examiner that she had gone inside Bryson's house the day before to drink with him. (*Id*. at 38.) She said Bryson, "asked if we could make love, I said no. He started to hit me in the face and chest. He started to have his way with me." (*Id*.)

Valerie was intoxicated at the hospital. (8/18/21 Tr. at 39.) Her blood sample indicated that she had a blood alcohol content of 0.412 grams per one hundred milliliters of whole blood, and the alcohol content of her urine was greater than 0.500 grams per one hundred milliliters of whole blood, which is the maximum of the testing range. (*Id*. at 127-29.) Half of the population would die with an alcohol content that high. (*Id*. at 129, 136.) Valerie also had drugs in her system, which, like alcohol, were central nervous system depressants. (*Id*. at 129-31, 143-46, 151-53.) The combination of drugs and alcohol created more potential for sedation. (*Id*. at 131, 134, 153.)

Detective Scott Fisher interviewed Valerie about eight hours after Valerie was transported to the hospital. (8/19/21 Tr. at 133.) At that time, she was intoxicated, but could communicate. (*Id*. at 134.) She was cringing or squinting and appeared to be in a great deal of pain. (*Id*.) Another officer photographed Valerie on May 4, 2020, two days after she was transported to the hospital. (8/19/20 Tr. at 13-14.) That officer observed that Valerie had an injury to her upper lip on her right side and had several scratches and bruises on her body. (*Id*. at 17-23.)

Detective Fisher executed a search warrant at Bryson's house. (*Id*. at 135.) Valerie's damp clothes were hanging on the fence, and carpet laid on the ground was wet. (*Id*. at 137-38.) He also located two vodka bottles, which was consistent with one of Valerie's statements. (*Id*. at 139.) One was empty and the other, smaller bottle, was one-third full. (*Id*. at 140.)

Detective Keith Perkins contacted Bryson on May 4, 2020. (*Id*. at 41.) During their meeting, Bryson repeatedly referred to Valerie as "the woman," and stated that he was trying to help her because she was an alcoholic. (*Id*. at 42.) Bryson said she was his girlfriend, and they had consensual sexual intercourse multiple times. (*Id*. at 43, 58-59.) Bryson had several small injuries on his arms. (*Id*. at 44-45.)

Valerie later testified at trial that she met Bryson in the spring of 2020, when she was walking between her mother's house and a convenience store. (8/17/21 Tr. at 114-15.) He invited her to his house nearby, and she agreed to go with him. (*Id*. at 115.) Valerie drank beer and vodka at his house. (*Id*.) Valerie said she became tired and "real dizzy" and wanted to go home, but Bryson told her just to lie down at his house. (*Id*. at 115-16.) Valerie eventually lay down in Bryson's bed. (*Id*. at 116.) She testified that she fell asleep immediately, "and then I woke up and he was having sex with me." (*Id*. at 117.) She said she had gone to sleep wearing her clothes, but she woke up without any clothes on. (*Id*.) Valerie said

she told him, "Stop. That hurts. You're hurting me. Stop. Stop." (*Id*. at 118.) But Bryson did not stop right away. (*Id*.) Instead, Bryson tried to turn her over and engage in anal intercourse. (*Id*. at 118.) Valerie told him it hurt and asked him to stop, and eventually he did. (*Id*.)

Valerie testified that Bryson hit her in the mouth, which caused her to feel a pinch and taste blood. (8/17/21 Tr. at 119.) She said she had an injury to her lip that had not gone away. (*Id*.) She said she did not know where else he hit her, and that it was mainly her mouth. (*Id*.)

Valerie testified that after having intercourse with her, Bryson used a washcloth to wipe her vagina and anal area. (*Id*. at 121.) Valerie wanted to leave, but did not have her clothes. (*Id*.) Bryson gave her a small blanket that did not fully cover her. (*Id*.) He then used a hose outside to spray her down, which got the blanket all wet. (*Id*.) Bryson "was yelling and he would not stop spraying [her] down." (*Id*.) Valerie testified that Bryson's frustration and anger started when she told him to stop, and it continued until he was spraying her outside with a hose. (*Id*. at 122.)

She did not know how long she had been with Bryson. (*Id*. at 124.) She testified that it was "[a]ll that day, I know for sure." (*Id*.) But she also said it could have been longer, and she acknowledged she originally told officers she had been there two or three days. (*Id*.) Valerie also acknowledged that she later told

defense counsel during an interview that she was only there a "few hours at the very most." (*Id*. at 139.) When questioned about inconsistencies in her timeline, she explained that she did not remember some things and had chosen "to block all this stuff out." (*Id*. at 154.) She explained that she was traumatized, and the incident was hurtful and embarrassing. (*Id*. at 155.)

Valerie also did not remember how much she had to drink. (*Id*. at 143.) She testified that she drank one or two cans of malt liquor, and then began drinking vodka with Bryson. (*Id*. at 141.)

Valerie said that she had pain her in vaginal and anal areas and on one side of her face after the incident. (*Id*. at 123.) She also said her chest hurt for a week. (*Id*. at 160.) On cross-examination, Valerie acknowledged that she had chronic pancreatitis and that she reported in the hospital that her pancreas was hurting. (*Id*. at 166-67, 170-71.) Bryson's counsel also elicited her testimony that drinking alcohol could trigger her pancreatitis. (*Id*. at 167-68.)

Bryson testified that he met Valerie on Tuesday, April 28, 2020, when she was walking to a convenience store near his house to get beer, and he invited her to drink with him, which she agreed to. (8/19/21 Tr. at 235-36, 239.) Bryson said he purchased Steel Reserve, and they returned to his house to drink. (*Id*. at 240.) Bryson said Valerie stayed at his house from Tuesday until he was arrested on

Saturday. (*Id*. at 241.) Bryson testified that on Tuesday, Valerie "mentioned sex. I told her no, I was too intoxicated." (*Id*. at 241.)

Bryson testified that on Wednesday, Thursday, and Friday, Valerie drank vodka during the day and then passed out in the afternoon. (*Id*. at 242-48.) He said she woke up each evening after sleeping for several hours, and they had sex. (*Id*.) He testified that Friday was "horrifying" because Valerie emptied her bowels while they were having sex. (*Id*. at 248-49.) He claimed that he changed the sheets on the bed and then used a washcloth to wash her vagina and anus. (*Id*. at 250.) Bryson testified that they later fell asleep for the evening. (*Id*. at 251.)

Bryson said Valerie again purchased another bottle of vodka on Saturday morning, and she continued to drink. (*Id*.) He said she eventually took a nap, and he noticed that she had vomited on herself. (*Id*. at 252.) He claimed that he then took her clothes off and noticed that she had dried feces in her pants. (*Id*.) Bryson said he then washed her clothes and hung them on his fence to dry. (*Id*. at 253.)

Bryson said that after washing Valerie's clothes, he gave her a blanket and then washed her off with the hose. (8/20/21 Tr. at 11-12.) He said that she agreed to it, but she still screamed because the water was cold. (*Id*. at 12.) Bryson said after he was done, Valerie urinated on herself and fell over, so he sprayed her off again. (*Id*. at 13.) Bryson said he did not have sex with Valerie on Saturday, and she was never drunk when he had sex with her on the other days. (*Id*. at 14.) He

claimed that while she was at his house, she "was having an enjoyable three days." (*Id*. at 34.)

Bryson presented testimony from Dr. Thomas Bennett, who reviewed the photographs that had been taken of Valerie. He opined that the blue bump on her lip was caused by a plugged gland and was not evidence that she had been punched. (8/19/21 Tr. at 75-77.) Dr. Bennett also opined, based on the pictures, that some of Valerie's bruises were "several" or "many" days old, while others were "maybe a couple days old." (*Id*. at 79.) He testified that all of her bruises were on leading surfaces of her body and that chronic alcohol abusers, like Valerie, routinely have bruises from bumping into things. (*Id*. at 79-80.) He testified that her injuries were "otherwise explained by other than forcible inflicted injuries," and that he "found no trauma injuries sufficient to explain her assertions of pain." (*Id*. at 92.) Bennett also testified that Valerie's pain could be explained by her pancreatitis. (*Id*. at 93.)

Bryson also elicited testimony from a forensic serologist who opined that he would have expected more sperm cells to be located on the swab of Valerie's vaginal canal if she had sexual intercourse within five hours of the sample being taken. Instead, he opined that the sample was more consistent with having had sexual intercourse 18 hours earlier. (8/19/21 Tr. at 211-12.)

II. Other trial testimony and argument related to Valerie's alcohol consumption

During Bryson's cross-examination of Valerie, he asked her, "And you admitted to a nurse . . . at the hospital . . . that you'd be drinking a liter of alcohol a day?" (8/17/21 Tr. at 168.) Valerie responded that she did not remember saying that. (*Id*.)

Bryson later admitted testimony from a nurse, Melissa Matejovsky, who admitted Valerie to the behavioral health unit at the hospital on May 2, 2020. (8/19/21 Tr. at 164.) Matejovsky testified that Valerie reported auditory and visual hallucinations and reported having tremors throughout her body, which she said she has every time she stops drinking. (*Id*. at 165.) Matejovsky testified that Valerie told her, "I was told not to just stop." (*Id*. at 166.) Matejovsky explained that she admitted Valerie to the emergency department, rather than the behavioral health department, because Valerie exhibited potential signs of alcohol detoxification and had a history of alcohol withdrawal seizures, including a seizure that had occurred in the last month. (*Id*. at 168-71.)

Bryson also admitted testimony from Tanya McCullough, a nurse practitioner hospitalist who admitted Valerie to the hospital on May 3, 2020, after she was transferred by Matejovsky. (*Id*. at 173-75.) McCullough determined that Valerie was anxious and upset, but was not actively withdrawing from alcohol. (*Id*. at 176.)

Bryson attempted to present testimony from McCullough about Valerie's admission to the hospital a month earlier. (*Id*. at 176-78.) During a discussion outside the presence of the jury on the admissibility of the evidence, Bryson's counsel stated that the notes from Valerie's May admission stated that she was hospitalized in April 2020 while detoxing and did not have alcohol withdrawal problems, and she indicated in April that she does not have alcohol withdrawal problems. (*Id*. at 178-79.) He represented that McCullough's notes on Valerie's May admission said Valerie "was noted to have some intermittent type tremor movements, but they appeared fabricated and did not resemble tremors typically noted with alcohol withdrawal." (*Id*. at 178.)

Unprompted, McCullough twice questioned whether she had used the term "fabricated." (*Id*. at 178-79.) McCullough also noted that she suspected Valerie was having panic attacks. (*Id*. at 179.)

Bryson's counsel explained that Valerie's potential panic attacks were another reason he wanted to discuss the notes about the prior admission. (*Id*.) He argued that the notes would help explain how Valerie's brain was working during the May admission. (*Id*. at 179-80.) He argued evidence from the April admission was relevant because it related to the issue of whether Valerie had "fabricated" her tremors when admitted in May. (*Id*. at 180.)

The court then had McCullough explain what she meant by the term "fabricated" to determine whether the evidence Bryson sought to admit was extrinsic evidence of the victim's character pertaining to credibility. (*Id*. at 181.) McCullough explained that when she used the term "'fabricated,' I didn't necessarily mean made up." (*Id*.) She then distinguished between involuntary tremors associated with alcohol withdrawal, which cannot be stopped, and "voluntary" tremors that are caused by nervousness or a panic attack, which can be stopped. (*Id*. at 182.)

The court ruled that McCullough's testimony about Valerie's prior statements from her April admission were not relevant and were inadmissible under Mont. R. Evid. 401, 403 and 608(b). (*Id*. at 183-84.) But the court admitted evidence about Valerie's admission on May 3, 2020, including McCullough's notes about the tremors being fabricated. (*Id*. at 184.)

Bryson then elicited McCullough's testimony that she wrote in her notes that Valerie had "intermittent tremulous movements that appeared fabricated and did not seem consistent with alcohol withdraw[al] tremors. . . . Suspect patient may have had an anxiety attack at behavioral health." (*Id*. at 187.) She testified that by "fabricated," she meant "voluntary," like nervous or anxious tremors, not that the tremors were "made up." (*Id*. at 188.) McCullough testified that Valerie seemed anxious and upset. (*Id*. at 190.) She also testified that Valerie did not seem to be

suffering from pancreatitis at that time, even though she has chronic pancreatitis. (*Id*.)

Bryson attempted to elicit testimony from McCullough about how much Valerie reported that she drinks. (*Id*. at 191.) McCullough testified that Valerie is "an alcoholic." (*Id*.) But the court prohibited Bryson from eliciting testimony from McCullough that Valerie reported drinking a liter of vodka per day. (*Id*. at 192, 195.) The court indicated that it would allow McCullough to testify about how much Valerie had drunk in the days leading up to her admission to the hospital, but not about Valerie's chronic behaviors. (*Id*. at 195.) McCullough indicated that she did not have information about how much Valerie drank that was specific to the days before her admission, and the Court did not allow Bryson to question her about Valerie's statement about how much she had been drinking in general. (*Id*. at 196-97.)

Dr. Bennett also testified that Valerie "had many complications of the alcohol abuse—chronic alcohol abuse. Cirrhosis, varices, the blood vessels that dilate, and also chronic pancreatitis." (8/19/21 Tr. at 93; *see also id.* at 80 (indicating that Valerie's hospital records establish that she is a chronic alcohol abuser with cirrhosis).)

During the closing arguments, the State argued that Valerie was incapable of consenting to sex based on her level of intoxication, so Bryson should be convicted

of SIWOC, or in the alternative, he should be convicted of ASIWOC for using force to engage in sexual intercourse without Valerie's consent. (8/20/21 Tr. at 126, 131-32, 134.) During Bryson's closing argument, his counsel repeatedly emphasized Valerie's level of intoxication and habitual alcoholism. (*See id*. at 136-43.) Bryson's counsel listed her blood alcohol content six times and told the jury, "She is an alcoholic. She can't stop drinking the—the booze. And she likes the hard stuff. She wants Vodka. And she can't control herself." (*Id*. at 136-143.) He argued that she had fabricated her assertions that Bryson hit her or used force against her. (*Id*. at 137-61.)

III. Jury instructions and verdict

Before trial, defense counsel, Vince van der Hagen, indicated that he would "probably use the pattern instructions . . . unless something comes up" that creates a need for additional instructions. (7/28/21 Tr. at 5-6.) The State submitted proposed instructions before trial. (Doc. 56.) The State submitted an instruction on the elements of sexual intercourse without consent that was consistent with Model Criminal Jury Instruction (MCJI) 5-125(a). (*Compare* Doc. 56, Pl.'s Proposed Instr. No. 16, *with* MCJI 5-125(a) (2018 Supp.).) The State's proposed instructions contained one instruction defining knowingly, which stated, "A person acts knowingly when the person is aware of his or her conduct." (Doc. 56, Pl.'s

Proposed Instr. No. 30.) The only instruction Bryson's counsel proposed stated that the jury could convict on only one of the two charged offenses in Count I. (Doc. 64.)

At the start of the fourth day of trial, the court held an off-the record jury instruction settlement conference. (8/19/21 Tr. at 5.) The court indicated on the record that the only instruction in dispute was the instruction concerning an admission or confession. (*Id*.) The parties then discussed that instruction. (*Id*. at 6-10.)

The mental state instructions were not discussed. (*See id*.)

The court instructed the jury that:

> To convict the Defendant of sexual intercourse without consent, the State must prove the following elements:
>
> 1. That the Defendant had sexual intercourse with Jane Doe;
>
> AND
>
> 2. That Jane Doe was incapable of consent;
>
> AND
>
> 3. That the Defendant acted knowingly.

(Doc. 78, Instr. No. 15.)

The court instructed the jury that "A 'person who is incapable of consent' means a person who is incapacitated." (Doc. 78, Instr. No. 16.)

The instructions that were originally given to the jury provided only the conduct-oriented definition of knowingly, which stated that "A person acts knowingly when the person is aware of his conduct." (Doc. 78, Instr. No. 31.)

While the jury was deliberating, van der Hagen realized that for the offense of obstructing a peace officer, the jury should have been instructed on the result-based definition of knowingly pursuant to *State v. Secrease*, 2021 MT 212, 405 Mont. 229, 493 P.3d 335. (8/20/21 Tr. at 178.) Van der Hagen communicated with the prosecutor, who agreed, and then van der Hagen informed the court. (*Id*.) The parties stipulated to giving the jury an additional instruction providing the result-based definition of knowingly for the offense of obstructing a peace officer. (8/20/21 Tr. at 179, 184-87; Doc. 82, Instr. No. 33.)

Around the same time, the jury sent a question indicating that "we would like clarification on instruction #15 # 3 that the defendant acting [sic] knowingly. We need better understanding of the word knowingly." (Doc. 81.) The court brought that to the parties attention, and they agreed to have the court give an instruction stating, "You are hereby instructed to rely on the trial evidence and the instructions previously given and to render your verdict accordingly." (8/20/21 Tr. at 187; Doc. 82, Instr. No. 34.)

After receiving the additional instructions, the jury returned its verdict finding Bryson guilty of SIWOC and obstructing a peace officer. (Doc. 79.) The

jury did not enter anything on the lines for the alternative charge of ASIWOC. (*Id*.)

At the sentencing hearing, van der Hagen stated that he had considered whether to file motions for a new trial "based on . . . the evidence presented and what the jury did here." (12/21/21 Tr. at 26.) He insisted that the jury did not find Valerie to be credible. (*Id*.) He stated that incapacitation "has a very clear definition under the law" and the complete statutory definition was not given at trial. (*Id*.) He then argued that the jury found Bryson guilty under a theory that Valerie was too drunk to consent, but he stated that Bryson was also too drunk to consent. (*Id*. at 27.) Van der Hagen questioned whether the jury had compromised when it found Bryson guilty of SIWOC. (*Id*. at 28.) But he also noted that he had not filed the motion for a new trial and was not asking the court to consider that. (*Id*.) Instead, he argued that the jury did not find Bryson guilty of a violent rape. (*Id*. at 28-29.) He argued that Bryson and Valerie were "two adults who were engaging in sex. It's just that they were too drunk to do it legally. And that is the law. But that is not a violent rape[.]" (*Id*. at 29.)

SUMMARY OF THE ARGUMENT

This Court has held that the proper mental state instruction for SIWOC is that a person acts knowingly when he is aware of his conduct. That was the

instruction given in this case. Because the instruction given was consistent with this Court's caselaw, Bryson's counsel was not ineffective for failing to request a separate mental state instruction for the incapable of consent element. A request for a mental state instruction on a single element would be inconsistent with this court's caselaw, which has required only the conduct-based definition of knowingly for SIWOC. Further, because the jury was instructed consistent with this Court's caselaw, this Court should not review Bryson's jury instruction challenge under the plain error doctrine.

The court also did not abuse its discretion when it excluded irrelevant testimony about Valerie's irrelevant statements. Neither her April statement that she did not suffer from alcohol withdrawal symptoms nor her statement about how much she drank made it more or less likely that she was incapable of consenting when Bryson had intercourse with her. The evidence established that she was an alcoholic, and the additional evidence from her prior admission was not probative. Even if this Court determines that there was some probative value to the excluded testimony, the court did not abuse its discretion in excluding it because the prejudicial value was substantially outweighed by any probative value.

ARGUMENT

I. Standard of review

Claims of ineffective assistance of counsel are questions of law and fact which this Court reviews de novo. *Whitlow v. State*, 2008 MT 140, ¶ 9, 343 Mont. 90, 183 P.3d 861.

This Court reviews jury instructions given by a district court for abuse of discretion. *State v. Deveraux*, 2022 MT 130, 409 Mont. 177, 512 P.3d 1198. This Court reviews instructions to determine whether, taken as a whole, the instructions fully and fairly instruct the jury as to the applicable law. *Id*. "If the instructions are erroneous in some aspect, the mistake must prejudicially affect the defendant's substantial rights in order to constitute reversible error." *State v. Gerstner*, 2009 MT 303, ¶ 15, 353 Mont. 86, 219 P.3d 866.

This Court reviews discretionary trial court rulings, including evidentiary rulings by the trial court, for an abuse of discretion. *State v. James*, 2022 MT 177, ¶ 9, 410 Mont. 55, 517 P.3d 170. To the extent the trial court's ruling is based on an interpretation of a rule of evidence, a statute, or a constitutional right, however, this Court's review is de novo. *Id*.

II. Bryson has failed to demonstrate that his counsel was ineffective for failing to request additional instructions when the instructions given were consistent with the pattern instructions and this Court's caselaw.

A. Standard applicable to ineffective assistance of counsel claims

This Court reviews ineffective assistance of counsel claims applying the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). A defendant arguing ineffective assistance of counsel under the *Strickland* test has a burden to demonstrate by a preponderance of the evidence that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. *Baca v. State*, 2008 MT 371, ¶ 16, 346 Mont. 474, 197 P.3d 948; *Ellenburg v. Chase*, 2004 MT 66, ¶ 12, 320 Mont. 315, 87 P.3d 473.

A trial counsel's performance is deficient if it falls "below an objective standard of reasonableness measured under prevailing professional norms and in light of the surrounding circumstances." *Whitlow*, ¶ 20 (following *Strickland*, 466 U.S. at 688). There is a "'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance' and the defendant 'must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.'" *Whitlow*, ¶ 21 (quoting *Strickland*, 466 U.S. at 689). This highly deferential review of counsel's

performance is necessary to "eliminate the distorting effects of hindsight." *Worthan v. State*, 2010 MT 98, ¶ 10, 356 Mont. 206, 232 P.3d 380.

To establish that the defendant was prejudiced by counsel's deficient performance, a defendant must demonstrate a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The likelihood of a different result must be "substantial." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

B. This Court should decline to review Bryson's ineffective assistance of counsel claim on direct appeal because it is not record based.

This Court reviews ineffective assistance of counsel claims on direct appeal if the claims are based solely on the record. *State v. Rovin*, 2009 MT 16, ¶ 24, 349 Mont. 57, 201 P.3d 780. Because there is a "strong presumption that counsel's actions are within the wide range of reasonable professional assistance, a record which is silent about the reasons for the attorney's actions or omissions seldom provides sufficient evidence to rebut this presumption." *State v. Sartain*, 2010 MT 213, ¶ 30, 357 Mont. 483, 241 P.3d 1032 (quotation marks and citation omitted). As a result, if the record does not demonstrate "why" counsel did or did not take an action, the ineffective assistance claim is more suitable for a petition for

postconviction relief. *Id.* A claim may be addressed on direct appeal, "[i]n rare instances," if there is no plausible justification for defense counsel's actions or omission. *State v. Fender*, 2007 MT 268, ¶ 10, 339 Mont. 395, 170 P.3d 971.

There is no information in the record about why van der Hagen did not argue for additional jury instructions, so the claim is not record based. And this is not a case in which there was no plausible justification for counsel's failure to request additional instructions.

Bryson inaccurately describes van der Hagen's statement when he claims that van der Hagen "acknowledg[ed] at the pretrial conference that instructions beyond the pattern instructions would be necessary[.]" (Appellant's Br. at 18.) To the contrary, van der Hagen stated that he would "probably use the pattern instructions at this point. That would be my position *unless* something comes up that I think that there's additional instructions that need to be—should be presented to the Court." (7/28/21 Tr. at 5-6 (emphasis added).) Bryson also asserts that van der Hagen "never researched . . . applicable pattern instructions." (Appellant's Br. at 18.) There is no evidence in the record about what research van der Hagen conducted, so there is no evidence to support his assertion that van der Hagen "never researched."

This claim can be more appropriately addressed in a postconviction proceeding where van der Hagen can provide information about his research and

his reason for not proposing additional instructions. As explained more fully below, the instructions given fully and fairly instructed the jury. Therefore, van der Hagen may have reasonably believed that it was unnecessary to propose additional instructions. Because there was a plausible reason for his actions, this claim should not be reviewed on direct appeal unless it is considered and denied at this stage to avoid unnecessary litigation in postconviction.

C. Bryson has failed to demonstrate that his counsel was ineffective for failing to request a circumstance-based definition of knowingly to apply to the incapable of consent element.

Van der Hagen was not deficient for failing to propose an additional mental state jury instruction for SIWOC. Indeed, this Court recently reaffirmed that only the conduct-based definition of knowingly should be applied to SIWOC. *State v. Hamernick*, 2023 MT 249, ¶¶ 21-27, __ Mont. __, __ P.3d __; *see also State v. Ragner*, 2022 MT 211, 410 Mont. 361, 521 P.3d 29; *Deveraux*, ¶¶ 30-33.

Montana's statutes set out four definitions for the mental state of knowingly, depending on whether the term applies to conduct, a circumstance, the result of conduct, or a fact. Mont. Code Ann. § 45-2-101(35). Montana Code Annotated § 45-2-101(35) states that

> a person acts knowingly with respect to **conduct** or to a **circumstance** described by a statute defining an offense when the person is aware of the person's own conduct or that the circumstance exists. A person

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

(Emphasis added.)

This Court has explained that a court cannot provide the jury with all possible definitions of knowingly. Instead, this Court has required courts to provide the jury with only those definitions that are applicable. *State v. Azure*, 2005 MT 328, ¶ 20, 329 Mont. 536, 125 P.3d 1116. Further, this Court has treated offenses as conduct-based or result-based and has explained that courts must determine whether the conduct-based or result-based definition applies and instruct the jury accordingly. *Secrease*, ¶ 11; *see also Deveraux*, ¶ 31; *State v. Ilk*, 2018 MT 186, ¶ 18, 392 Mont. 201, 422 P.3d 1219; *Azure*, ¶ 20; *State v. Lambert*, 280 Mont. 231, 240-41, 929 P.2d 846, 852 (1996) (Leaphart, J., concurring).

In *Deveraux*, this Court clarified that SIWOC is a conduct-based offense. This Court stated that for "SIWOC, the prohibited particularized conduct itself—engaging in sexual intercourse with another person *without that person's consent*—gives rise to the entire criminal offense, and requires only a conduct-based instruction." *Deveraux*, ¶ 32 (emphasis in original).

This Court reaffirmed that holding in *Ragner*, holding that the court correctly gave the conduct-based definition of knowingly for ASIWOC and correctly refused to give an additional instruction stating that the defendant acts knowingly "with respect to the 'without consent' element, [when] 'the person is aware that the circumstance exists.'" *Ragner*, ¶¶ 28, 34. This Court rejected Ragner's argument that refusing to give an instruction specific to the element of "without consent" "directed the jury's attention away from whether Ragner knew [the victim] did not consent to the intercourse and relieved the State of proving beyond a reasonable doubt that Ragner knew [the victim] did not consent." *Ragner*, ¶¶ 29, 34. This Court explained that a court is not required to specify a definition of knowingly for each element of the offense. *Ragner*, ¶¶ 31-33.

In *Hamernick*, this Court reaffirmed the holdings from *Deveraux* and *Ragner*. The district court in *Hamernick* gave the conduct-based definition of knowingly for the "has sexual intercourse" requirement of SIWOC. *Hamernick*, ¶ 18. But the court also provided the fact-based definition for the "without consent" requirement of the offense, instructing that Hamernick "must be found 'aware of a high probability that the sexual intercourse was without consent[.]'" *Id*. This Court held that the district court erred by giving the fact-based definition. *Hamernick*, ¶¶ 26-27. This Court explained again that only the conduct-based definition needs to be given because "to determine whether Hamernick is guilty of

SIWOC, the question must be whether Hamernick was aware of his conduct—that is, whether he knowingly had sexual intercourse with [the victim] without her consent." *Hamernick*, ¶ 26.

In rejecting the State's argument that it was proper to give the fact-based definition in addition to the conduct-based definition in this case, this Court noted that there were "troubling implications of permitting the use of two differing mental state definitions, as essentially interchangeable alternatives, in SIWOC prosecutions, a seemingly unfair double standard." *Hamernick*, ¶ 23. This Court acknowledged in *Hamernick* that in *State v. Hovey*, 2011 MT 3, 359 Mont. 100, 248 P.3d 303, this Court held it was appropriate to give the conduct-based instruction for the offense of sexual abuse of children and to also give the "high probability of fact" knowingly instruction for the element of the defendant's awareness that the models in the photographs were underage. *Hamernick*, ¶ 24. This Court explained in *Hamernick* that the ages of the unknown persons in the photographs in *Hovey* was a fact that would have been difficult for the State to prove, but it was possible to assess the probability of the defendant's awareness of the ages of the persons using the probability of a fact instruction. *Id*. This Court concluded that, in contrast, the conduct-based definition sufficiently addressed the elements of SIWOC. *Hamernick*, ¶¶ 25-27.

These cases demonstrate that van der Hagen was not deficient for failing to request an additional jury instruction because the conduct-based definition fully and fairly instructed the jury. A person commits SIWOC if the person "knowingly has sexual intercourse with another person without consent or with another person who is incapable of consent[.]" Mont. Code Ann. § 45-5-503(1). The jury was properly instructed, consistent with the pattern jury instruction, that to find Bryson guilty of SIWOC, the jury had to find that Bryson had sexual intercourse with Valerie, that Valerie was incapable of consent, and that Bryson acted knowingly. (Doc. 78, Instr. No. 15; MCJI 5-125(a).) By stating in the final element that the defendant had to have acted knowingly, as is done in the pattern instructions, the instruction informed the jury that the defendant had to perform each element knowingly. *See State v. Carnes*, 2015 MT 101, ¶ 11, 378 Mont. 482, 346 P.3d 1120 (noting that the pattern instruction "requires the State to prove the defendant acted purposely or knowingly with regard to all of the elements of the offense" of assault on a peace officer).

For SIWOC, the jury was properly instructed that a "person acts knowingly when the person is aware of his conduct." (Doc. 78, Instr. No. 31.) The conduct that Bryson had to knowingly engage in was having sexual intercourse with a person who was incapable of consent. That required the defendant to know that Valerie was incapable of consent. Thus, contrary to Bryson's argument, the jury

had to find that Bryson acted knowingly regarding each element and the instructions did not lower the State's burden of proof.

Also, Bryson's argument that a knowingly definition needs to be given specifically for the incapable of consent element to address Valerie's status is similar to the argument rejected in *Ragner*, ¶¶ 29-34. While SIWOC was charged in this case under the theory that Valerie was incapable of consent, rather than that the sexual conduct occurred without consent, as in *Ragner*, the same analysis applies. Regardless of whether the victim did not consent or was incapable of consenting, the victim's status is incorporated into the prohibited conduct that the defendant has to be aware of, and only the conduct-based definition needs to be given. Thus, the jury was properly instructed, and van der Hagen was not deficient for failing to request an additional instruction.

Further, Bryson has failed to establish that he was prejudiced by van der Hagen's failure to request a circumstance-based definition of knowingly to apply to the incapable of consent element. Because this Court's caselaw generally indicates that only a conduct or a result-based definition should be given, there is not a reasonable probability that the court would have given the additional instruction if van der Hagen had requested it. And because the instructions given fully and fairly instructed the jury, there is not a reasonable probability that an

additional instruction would have changed the jury's verdict. As a result, Bryson has failed to establish prejudice.

D. The lack of a definition for "mental incapacitation" does not render van der Hagen ineffective.

Bryson notes that "mentally incapacitated" was never defined by the jury, but it does not appear that Bryson is arguing that van der Hagen's failure to request an instruction defining "mentally incapacitated" renders him ineffective. (Appellant's Br. at 18.) Therefore, this Court does not need to consider whether van der Hagen was ineffective for failing to propose an instruction defining mental incapacitation.

If this Court interprets Bryson's brief to be raising the argument that van der Hagen was ineffective for failing to request an instruction defining mentally incapacitated, the claim should be denied. The pattern jury instructions provide, in pertinent part, that

> A "person who is incapable of consent" means a person who is:
>
> **[mentally disordered or incapacitated.]**

MCJI 5-123(a) (2018 Supp.) (emphasis in original).

Under Mont. Code Ann. § 45-2-101(41), mentally incapacitated means "that a person is rendered temporarily incapable of appreciating or controlling the person's own conduct as a result of the influence of an intoxicating substance."

Although "mentally incapacitated" is statutorily defined, that definition is not contained in the pattern jury instructions, even in the comments to MCJI 5-123(a), which reference other applicable definitions. (Comment to MCJI 5-123(a) (2018 Supp.).) The absence of the definition from the pattern jury instructions indicates that it is not routinely given, and failing to offer the instruction does not fall below an objective standard of reasonableness. Indeed, it would be reasonable for an attorney not to offer the instruction, even if they are aware of the statutory definition, because the definition is consistent with the common understanding of the term mentally incapacitated, and the term does not require additional clarification.

Further, because the definition is consistent with the common understanding of the term, Bryson cannot demonstrate a reasonable probability that the jury would have reached a different result if it had been given the definition. Bryson has thus failed to establish that he was prejudiced by his counsel's failure to request an instruction defining mentally incapacitated.

III. Bryson has not met his burden to demonstrate that the mental state instructions should be reviewed under the plain error doctrine.

Because Bryson did not request a circumstance-based knowingly instruction, this Court cannot review his claim that the court erred in failing to give the instruction unless this Court exercises its authority to do so under the plain

error doctrine. This Court should decline to do so because Bryson has failed to meet his burden to demonstrate that this is one of the rare cases in which this Court should exercise plain error review.

This Court has consistently held that it will not consider issues raised for the first time on appeal. *See, e.g., State v. Reim*, 2014 MT 108, ¶ 38, 374 Mont. 487, 323 P.3d 880; *State v. Taylor*, 2010 MT 94, ¶ 12, 356 Mont. 167, 231 P.3d 79. But this Court may review an unpreserved claim alleging a violation of a fundamental constitutional right under the common law plain error doctrine where the defendant invokes the Court's inherent authority and establishes failing to review the claimed error may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process. *Taylor*, ¶¶ 12-13. An error is plain only if it leaves one "firmly convinced" that some aspect of the trial, if not addressed, would result in one of the consequences listed above. *Taylor*, ¶ 17. This Court invokes plain error review "sparingly, on a case-by-case basis, according to narrow circumstances, and considering the totality of the circumstances." *State v. Williams*, 2015 MT 247, ¶ 16, 380 Mont. 445, 358 P.3d 127.

As explained above, the court fully and fairly instructed the jury on the elements of SIWOC and the applicable definition of knowingly. Because the instructions given were consistent with this Court's caselaw, as set out in

Deveraux, *Ragner*, and *Hamernick*, Bryson has failed to meet his burden to establish that failing to review his claim under the plain error doctrine would result in a manifest miscarriage of justice. As a result, this Court should decline to review this claim under the plain error doctrine.

If this Court does review Bryson's claim that the circumstance-based jury instruction should have been given for the incapable of consent element, this Court should reject that claim because *Ragner* and *Hamernick* demonstrate that giving only the conduct-based definition was correct.

IV. The district court did not abuse its discretion when it excluded testimony that Valerie said during her May hospital admission that she drinks a liter of vodka a day and that she said during a prior hospital admission that she does not suffer from alcohol withdrawal problems.

The district court allowed Bryson to elicit testimony from McCullough about Valerie's May admission to the hospital, which included McCullough's assessment that Valerie "did not appear to be actively withdrawing from alcohol," and "was noted to have intermittent tremulous movements that appeared fabricated and did not seem consistent with alcohol withdraw[al] tremors." (8/19/21 Tr. at 187.) The court also allowed Bryson to elicit testimony that Valerie was an alcoholic; had chronic pancreatitis, which can be triggered by consuming alcohol; complained at the hospital that her pancreas was hurting; and "had many

complications" from her "chronic alcohol abuse." (8/17/21 Tr. at 166-68, 170-71; 8/19/21 Tr. at 93, 176, 190-91.) The court did not abuse its discretion when it excluded testimony about Valerie's statements about how much she drinks and her prior statement that she did not suffer alcohol withdrawal symptoms because those facts were not relevant to the offenses and were substantially more prejudicial than probative. (*See* 8/19/21 Tr. at 176-97.)

A. Valerie's prior statement about whether she experienced symptoms of withdrawal was not relevant to whether Bryson had sexual intercourse with her when she was incapable of consent.

Bryson sought to admit testimony from McCullough that when Valerie was admitted to the hospital in April 2020, McCullough wrote that she did not observe symptoms of withdrawal and Valerie "indicated she doesn't have any alcohol withdrawal problems." (8/19/21 Tr. at 179.) Bryson argued that this evidence was admissible to demonstrate whether Valerie "fabricated" her symptoms when she was admitted in May. (*Id*. at 180.) The court correctly excluded the evidence from the April admission under Mont. R. Evid. 401 as irrelevant and under Mont. R. Evid. 403 as substantially more prejudicial than probative. (*See id*. at 184.)

To be relevant, evidence must have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Mont. R. Evid. 401. Even if Valerie made inconsistent statements to a medical provider about whether she

suffers from symptoms of alcohol withdrawal, that evidence would not make it any more or less likely that she was incapable of consenting when Bryson had sexual intercourse with her.

Because the jury convicted Bryson of SIWOC under the theory that Valerie was incapable of consent, rather than the alternative charge of ASIWOC, and Bryson conceded that they had sexual intercourse, the only issue for the jury to determine was whether Valerie was capable of consenting when they had intercourse. Substantial evidence supported the jury's conclusion that Valerie was not capable of consent. Valerie had a blood alcohol content of 0.412 when she arrived at the hospital on Saturday, and she had additional drugs in her system. (8/18/21 Tr. at 39, 129-31, 143-46, 151-53.) Valerie's blood alcohol content was so high that half of the population would die at that level, and the level of alcohol in her urine was greater than the maximum testing range. (*Id*. at 127-29, 136.) Also, Valerie was lying on the ground unconscious and had shallow breathing when an officer first located her. (8/17/21 Tr. at 186, 219-23.) That evidence, not testimony about whether Valerie was suffering symptoms of alcohol withdrawal, was relevant to whether Valerie was too intoxicated to consent to sexual intercourse.

Further, Bryson's theory of admissibility at trial relied on a factual misunderstanding and was contradicted by McCullough's testimony. Bryson relied on McCullough's use of the term "fabricated" to argue that Valerie had

made up her symptoms when she was admitted in May. But McCullough explained that she did not mean that Valerie had "made up" her symptoms. (8/19/21 Tr. at 181-82.) Instead, she meant that Valerie's tremors were more consistent with anxiety than alcohol withdrawal. (*Id*.) As a result, the court correctly concluded that evidence of the April admission merely demonstrated Valerie's medical condition at that time, and did not establish that Valerie had fabricated her symptoms. (*Id*. at 183.)

The court also correctly prohibited Bryson from relying on Valerie's allegedly inconsistent statements to medical providers to establish that Valerie was a liar in general, and therefore lied about the sexual encounter. Although "[e]vidence of a pertinent trait of character of the victim of the crime" may be offered by an accused under Mont. R. Evid. 404(a)(2), proof of character may only be proven "by testimony as to reputation or by testimony in the form of an opinion." Mont. R. Evid. 405(a). Specific instances of conduct may only be inquired into on cross-examination. Mont. R. Evid. 405(a).

Similarly, Mont. R. Evid. 404(b) prohibits the admission of evidence "of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith." Although a defendant may introduce "reverse 404(b) evidence" of another witness's crimes or conduct to exculpate himself, to do so the evidence must be "clearly justified and carefully limited."

James, ¶¶ 12-13, 15 (quotation marks and citation omitted). "Other act evidence is admissible for a permissible Rule 404(b) purpose only if 'the proponent [can] clearly articulate how that evidence fits into a chain of logical inferences, no link of which may be the inference that the [witness] has the propensity to commit [an act.]" *James*, ¶ 13 (quotation marks and citation omitted); *see also State v. Henson*, 2010 MT 136, ¶¶ 23-24, 356 Mont. 458, 235 P.3d 1274 (excluding evidence of the victim's prior bad acts that were offered as a pertinent character trait of the victim, but were really improper propensity evidence). Significantly, a "defendant may not introduce reverse 404(b) evidence 'where it lacks connection with the crime, is speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant's trial." *James*, ¶ 13 (quotation marks and citation omitted).

Bryson did not clearly demonstrate at trial that the evidence was relevant for a nonpropensity purpose. He failed to explain how evidence that Valerie had indicated in April that she did not suffer symptoms of alcohol withdrawal would have made it any more likely that Valerie was fabricating her sexual encounter with Bryson. There is no reason to believe that having symptoms of alcohol withdrawal would support a claim of being raped, so there is no reason to believe that a person would fabricate having alcohol withdrawal symptoms to falsify a rape claim. Thus, the evidence was not admissible as "reverse 404(b) evidence."

The evidence was also not admissible under Rule 608(a). "The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation," under Mont. R. Evid. 608(a), but "the evidence may refer only to character for truthfulness or untruthfulness." Mont. R. Evid. 608(a)(1). Specific instances of conduct may not be proved by extrinsic evidence. Mont. R. Evid. 608(b); *State v. Kowalski*, 252 Mont. 166, 171-72, 827 P.2d 1253, 1256 (1992). Rule 608(b) only allows the court, in its discretion, to allow inquiry into specific instances of conduct on cross-examination of the witness concerning the witness's character for truthfulness or untruthfulness if the inquiry is probative of truthfulness.

Based on these rules of evidence, the court correctly concluded that Valerie's "mental health response" was an inadmissible specific instance of conduct. (8/19/21 Tr. at 183.) As such, it was not admissible on direct examination.

And even if the court erred in determining that the evidence was not relevant, the court did not abuse its discretion when it excluded the evidence under Mont. R. Evid. 403 because any probative value of the evidence was substantially outweighed by the danger of unfair prejudice to the victim and confusion of the issues or by considerations of undue delay and waste of time. Although Valerie's statements made during her April admission and her May admission appeared to conflict, there are many potential explanations for that inconsistency. To

determine whether Valerie provided inconsistent information to medical providers would have required additional testimony into an issue that did not make it more or less likely that Bryson committed the charged offenses. That was likely to confuse the jury with testimony lacking probative value.

B. Valerie's statement quantifying how much she habitually drank was not relevant.

The court did not abuse its discretion when it excluded testimony that Valerie reported that she drinks approximately a liter of vodka daily. (*See* 8/19/21 Tr. at 196-97.) The court correctly concluded that Valerie's chronic alcohol use was irrelevant. As noted above, the only issue for the jury to determine to decide whether Bryson committed SIWOC was whether Valerie was incapable of consent when Bryson engaged in sexual intercourse with her. Valerie's chronic alcohol abuse was irrelevant to that fact. Whether she routinely drank or liked to drink alcohol was not relevant to the elements of the offense. Instead, Valerie's capability to consent had to be determined based on her level of intoxication at the time intercourse occurred. To reach that conclusion, the jury had to consider that Valerie had a blood alcohol content of 0.412 on Saturday and was unresponsive, not her past alcohol consumption. And even if her past alcohol consumption could be relevant, the court properly excluded the testimony because it was substantially more prejudicial than probative.

Further, the evidence was unnecessarily cumulative because substantial evidence was admitted demonstrating that Valerie was an alcoholic. It was unnecessary to quantify how much she drank to establish that she regularly drank alcohol. Also, while the State argued that Bryson "plied" Valerie with alcohol (8/20/21 Tr. at 124), there was no suggestion that Bryson forced Valerie to drink alcohol or that she did not willingly do so. The evidence thoroughly established that Valerie was an alcoholic, and Valerie's specific statement about how much she drank was not relevant.

C. Bryson's right to present a defense was not violated by the exclusion of evidence that was inadmissible under the rules of evidence.

The right to present a defense "is subject to reasonable restrictions." *United States v. Scheffer*, 523 U.S. 303, 308 (1998). "[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Scheffer*, 523 U.S. at 308. The Supreme Court has also explained that "[t]he accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor v. Illinois*, 484 U.S. 400, 410 (1988). Rules 401 and 403 are standard rules of evidence with counterparts in the federal rules of

evidence. Indeed, the Supreme Court has listed Fed. R. Evid. 403 and Mont. R. Evid. 403 as examples of "familiar and unquestionably constitutional evidentiary rules." *Montana v. Egelhoff*, 518 U.S. 37, 42 (1996). Because the evidence excluded was not relevant and was substantially more prejudicial than probative, the evidence's exclusion did not violate Bryson's right to present a defense.

Further, Bryson was able to admit evidence about Valerie's alcoholism and pancreatitis and McCullough's use of the term "fabricated" to describe Valerie's tremors, so his right to present a defense was not impaired by the exclusion of additional evidence about her alcohol consumption and withdrawal symptoms. His assertion that his defense was "paralyzed" by exclusion of evidence from Valerie's April hospital admission is belied by the record, which thoroughly established that she was an alcoholic, and that McCullough did not believe Valerie was suffering from alcohol withdrawal when she was admitted to the hospital.

D. Even if the court abused its discretion by excluding evidence of Valerie's statements from her April hospital admission, the alleged error is harmless because there is not a reasonable probability that the evidence would have impacted the outcome of the case.

If this Court concludes that the court abused its discretion by excluding Valerie's statements, that exclusion is harmless. The exclusion of evidence is harmless if there is no reasonable probability that the conviction resulted from the exclusion of the evidence. *State v. Garding*, 2013 MT 355, ¶ 33, 373 Mont. 16,

315 P.3d 912. Given Valerie's extremely high level of intoxication, evidenced by her blood alcohol content and unconscious state, there is not a reasonable probability that evidence about her previous lack of alcohol withdrawal symptoms or her chronic alcohol consumption would have changed the jury's conclusion that Valerie was not capable of consenting to sexual intercourse. Thus, the alleged error is harmless.

CONCLUSION

Bryson's convictions for SIWOC and obstruction of a peace officer should be affirmed.

Respectfully submitted this 11th day of January, 2024.

AUSTIN KNUDSEN
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: */s/ Mardell Ployhar*
MARDELL PLOYHAR
Assistant Attorney General

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 9,437 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Mardell Ployhar
MARDELL PLOYHAR

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 01-11-2024:

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Joshua A. Racki (Govt Attorney)
121 4th Street North
Suite 2A
Great Falls MT 59401
Representing: State of Montana
Service Method: eService

Carolyn Marlar Gibadlo (Attorney)
PO Box 200147
Helena MT 59620
Representing: Lewis Leon Byrson
Service Method: eService

Electronically signed by LaRay Jenks on behalf of Mardell Lynn Ployhar
Dated: 01-11-2024