

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA-23-0563

JORY RUSSELL STRIZICH

Petitioner and Appellant,

v.

STATE OF MONTANA

Respondent and Appellee.

APPELLANT'S OPENING BRIEF

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, The Honorable Michael F. McMahon,
Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	-3-
ISSUES PRESENTED	-6-
STATEMENT OF THE CASE	-6-
STATEMENT OF THE FACTS	-8-
STANDARDS OF REVIEW	-13-
SUMMARY OF THE ARGUMENT	-14-
ARGUMENT	-15-
I. The district court erred denying reply brief, conduct discovery, or a hearing	-15-
II. Appellate counsel provided ineffective assistance of counsel failing to appeal the sufficiency of the evidence	-17-
III. Trial counsel ineffective regarding Elkhorn evidence of flight	-33-
IV. Trial counsel ineffective failing to object to jury instructions	-38-
CONCLUSION	-41-
CERTIFICATE OF COMPLIANCE	-42-

TABLE OF AUTHORITIES

Cases:

<i>City of Hamilton v. Mavros</i> , 284 Mont. 46 (1997)	18-19, 21
<i>Heath v. State</i> , 2009 MT 7	13
<i>Hulse v. State</i> , 1998 MT 108	23
<i>Jackson v. Virginia</i> , 443 U.S. 307 (1979)	29
<i>In re Winship</i> , 397 U.S. 358 (1970)	29
<i>State v. Arlington</i> , 265 Mont. 127 (1994)	23
<i>State v. Daniels</i> , 2019 MT 214	26
<i>State v. Fish</i> , 2009 MT 47	17
<i>State v. Granby</i> , 283 Mont. 193 (1997)	28-29
<i>State v. Herman</i> , 2008 MT 187	23-24
<i>State v. Himes</i> , 2015 MT 91	28-29
<i>State v. Hocevar</i> , 2000 MT 157	23-24
<i>State v. Jackson</i> , 2009 MT 427	20,40
<i>State v. Kougl</i> , 2004 MT 243	14
<i>State v. Mason</i> , 2003 MT 371	23-24
<i>State v. Newman</i> , 2005 MT 348	28-29
<i>State v. Ray</i> , 2003 MT 171	30-31

<i>State v. Strizich</i> , 2021 MT 306	7,38
<i>State v. Wooster</i> , 1999 MT 22	22-23
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	13, 29-30
<i>Strizich v. Montana</i> , 142 S CT. 1699 (2022)	7
<i>Whitlow v. State</i> , 2008 MT 140	13
<i>Woepfel v. City of Billings</i> , 2006 MT 283	13

Statutes:

<i>Mont. Code Ann. § 45-2-101</i>	21,39-40
<i>Mont. Code Ann. §45-4-103</i>	20,40
<i>Mont. Code Ann. § 45-5-220</i>	25
<i>Mont. Code Ann. § 46-6-204</i>	31

Constitutions:

<i>Mont. Const., Art. II, Sec. 17</i>	28-29
<i>Mont. Const., Art. II, Sec. 24</i>	13
<i>U.S. Const., Amend. VI</i>	13,27
<i>U.S. Const., Amend. XIV</i>	7,13,15,28,30,37,40

Rules and Other Authority:

Admin. R. of Mont. 37.106.1902

22

ISSUES PRESENTED

The district court abused its discretion when it declined to hold an evidentiary hearing on Strizich's petition for postconviction relief.

STATEMENT OF THE CASE.

The State of Montana initially filed an Information charging Jory Strizich with Aggravated Burglary. (Trial Dkt 4). On June 20, 2017, the State moved for leave to file an Amended Information and Strizich was charged with Aggravated Burglary, Aggravated Burglary (Accountability), Burglary, and Tampering with or Fabricating Physical Evidence. (Trial Dkt 29). On June 6, 2017, a third Information added an additional count of Criminal Possession of Dangerous Drugs. (Trial Dkt 65).

After a five-day jury trial held from October 2, 2017, through October 6, 2017, Strizich was convicted of Aggravated Burglary, Criminal Possession of Dangerous Drugs, and Criminal Trespass to Property. 10/2/17-10/6/17 Transcript of Jury Trial, Volumes I-V [Tr.]¹

¹ Each volume of the trial transcript begins with page 1. Therefore, citations to the transcript will refer to the volume number and the page number.

The district court sentenced Strizich to forty years imprisonment for the Aggravated Burglary conviction, twenty years imprisonment with fifteen years suspended for Criminal Possession of Dangerous Drugs, and six months imprisonment all suspended for Criminal Trespass to Property. The first two sentences run consecutively to one another. The misdemeanor Criminal Trespass sentence runs concurrent to the Aggravated Burglary sentence.

Strizich timely appealed his convictions and sentences. A divided Montana Supreme Court affirmed Strizich's convictions. *State v. Strizich*, 2021 MT 306, 406 Mont. 391, 499 P.3d 575. Strizich timely filed a Petition for Writ of Certiorari with the United States Supreme Court on February 28, 2022. The Petition for Writ of Certiorari was denied on April 18, 2022. *Strizich v. Montana* 142 S CT. 1699 (2022). Strizich timely filed his Petition for Postconviction Relief on March 20, 2023.

Strizich raised three arguments in his petition: first, trial and appellate counsel were ineffective for failing to object to or argue certain flight evidence violated Strizich's right to a fair trial under the *Fourteenth Amendment*; second, trial counsel was ineffective by failing

to object to or provide comprehensible jury instructions as to the aggravating factors set forth in Aggravated Burglary; third, appellate counsel was ineffective by failing to file a sufficiency of evidence appeal to the Montana Supreme Court.

The district court ordered the State to respond to Strizich's petition. The State filed its response on August 31, 2023. Strizich's reply brief was due on October 3, 2023. On September 12, 2023, the district court denied Strizich's petition.

Strizich appeals the district court's denial of his petition for postconviction relief.

STATEMENT OF FACTS

On December 28, 2016, Strizich and Kaleb Daniels left Great Falls in Strizich's vehicle, a Dodge Durango. They drove to the Wolf Creek area outside of Great Falls. (Tr. vol. I, 46-52). After driving around for several miles, Strizich noticed his vehicle needed gas. He and Daniels stopped at a cabin located just off the road. The cabin was owned by Marshall and Sonja Buus. (Tr. vol. V, 54-55). The Buuses' were not home at the time Strizich and Daniels arrived.

After arriving, Daniels exited the Durango and walked up to the

Buus Cabin. After some time, Strizich exited his vehicle to go look for Daniels. Daniels was inside the cabin when Strizich approached. (Tr. vol. V, 122-24). Strizich implored Daniels to leave. (Tr. vol. V, 61).

Soon thereafter, Marshall and Sonya Buus drove up to their cabin. They saw Strizich and Daniels walking away from it. Daniels ran to Strizich's car, entered it, and pulled out a handgun he had been carrying with him. (Tr. vol. V, 63-64, 95). Strizich did not possess a weapon.

Marshall approached Daniels who was sitting in Strizich's vehicle. Marshall screamed at Daniels. Marshall then retrieved his own firearm and re-engaged Daniels near the vehicle. Marshall and Daniels continued yelling at each other and pointing their guns at one another at close range. (Tr. vol. V, 64-65). At one point, Daniels put his gun in Marshall's face and pulled the trigger. The gun failed to fire. (Tr. vol. II, 68).

Strizich's own interactions with Marshall were very different than what Daniels and Marshall engaged in. Strizich walked slowly towards Marshall with his hands raised. (Tr. vol. V, 66-67). Marshall told Strizich to stop walking. Marshall then discharged his weapon into the

ground in front of Strizich. Marshall discharged a second round that struck Strizich in the leg. (Tr. vol. V, 68-72).

Strizich left the area and crawled to a different unoccupied cabin, broke a window, and entered it to seek shelter and first aid. Law enforcement showed up a short time later and Strizich was taken into custody. (Tr. vol. V, 78-80). An ambulance transported Strizich to the hospital where he received treatment for his gunshot wound. (Tr. vol. V, 95).

1. Facts relevant to Strizich's ineffective assistance of counsel claims.

A. Sufficiency of Evidence.

When Marshall initially approached Strizich's vehicle, he began yelling at Daniels. Marshall's wife retrieved Marshall's pistol from their vehicle and handed it to Marshall. Daniels and Marshall continued to yell while they pointed their weapons at each other. (Tr. vol. II, 63-65). At trial, Marshall testified:

At that point, (Daniels) reached in his pocket. He pulled out a pistol and stuck it up in my face and all I saw was a chrome-plated pistol stuck in my face, and then he yelled something like, stay the hell back or get the hell back. At that point I'm starting to back up and I yell something like, get that Goddamn gun out of my face.

(Tr. vol. II, 67).

Marshall further testified at trial, “(Daniels) reaches over the top of the truck and aims at me and pulls the trigger and it just goes click.” (Tr. vol. II, 68). Daniels then ran away. (Tr. vol. V, 67).

Regarding Strizich’s actions, Marshall testified, “...I can see [Strizich] down there and he’s starting to walk towards the vehicle and I start yelling at him, stay the hell away, and I’m pointing the gun at him.” Marshall stated that he yelled at Strizich to stay the hell away with his gun pointed at Strizich, but Strizich kept walking up towards him. Marshall fired a shot into the ground and was still yelling for Strizich to stay away. Marshall then fired a second shot that he testified Strizich stepped into and consequently hit Strizich’s leg. (Tr. vol. II, 69). Daniels and Marshall then opened fire on each other.

Detective Pandis testified as to Marshall’s demeanor on the day of the burglary. Marshall was “very distraught and very upset.” (Tr. vol. IV, 182). Sonja testified on direct examination as follows:

Q. Now, after this happened, how was Marshall doing.

A. After the 28th?

Q. In the months after the incident.

A. Oh, well, he has good days and bad days. He doesn’t sleep real well and he gets really upset about it. I guess you could say he dreams about it at night. He thinks about it in

the shower. You can find him just sitting there off in La-La Land. He's not doing very well really. (Tr. vol. II, 227).

Sonja described herself as doing much better than Marshall. "I didn't have a gun in my face." (Tr. vol. II, 230).

B. Elkhorn Flight

Following surgery to repair the gunshot wound in his leg, Strizich was transported to Elkhorn Physical Rehabilitation Center (Elkhorn) in Clancy, MT, to continue his recovery. Strizich recovered at Elkhorn for a few weeks. (Tr. vol V, 96). While there, he learned he had an arrest warrant out on him. Strizich left Elkhorn in a vehicle driven by William Lamere, a minor. (Tr. vol. III, 253). Although Strizich did not know it, the car was stolen. (Tr. vol. I, 170-71). Lamere ultimately led law enforcement on a high-speed chase that ended when the vehicle lost control and crashed. Strizich was taken into custody. (Tr. vol. V, 97-98). Lamere admitted to the offense of criminal endangerment by way of a Youth Court Dispositional Order. The district court took judicial notice of the Order; however, it excluded any evidence that the vehicle Lamere was driving was, in fact, stolen. (Tr. vol. I, 171).

STANDARDS OF REVIEW

“The standard of review of a trial court’s denial of a petition for postconviction relief is whether the court’s findings of fact are clearly erroneous and whether its conclusions of law are correct.” *Woepffel v. City of Billings*, 2006 MT 283, ¶7, 146 P.3d 789. A district court’s discretionary rulings in postconviction relief proceedings are reviewed for abuse of discretion. *Heath v. State*, 2009 MT 7, ¶13, 348 Mont. 361, 202 P.3d 118. Ineffective assistance of counsel claims are mixed questions of law and fact and are reviewed *de novo*. *Woepffel*, ¶7.

The *Sixth* and *Fourteenth Amendments* to the United States Constitution and *Article II, Section 24*, of the Montana Constitution, guarantee criminal defendants the right to effective assistance of counsel. Courts analyze ineffective assistance of counsel claims under the two-part test articulated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984.) *See also: Whitlow v. State*, 2008 MT 140, ¶10, 343 Mont. 90, 138 P.3d 861. First, Strizich must show (1) that “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 proceeding would have been different." *State v. Koughl*, 2004 MT 243, ¶ 11, 323 Mont. 6, 97 P.3d 1095 (adopting *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

SUMMARY OF THE ARGUMENT

The district court abused its discretion when it denied Strizich's petition for petition for postconviction relief without holding an evidentiary hearing. The district court should have followed its briefing schedule and allowed Strizich to file his reply brief. Additionally, in its order denying Strizich's petition, the district court pronounced that no party requested oral argument. Strizich asked for a hearing in both his petition and in his brief in support of the petition. The district court's mistaken belief that no hearing was requested demonstrates the district court abused its discretion.

Had the district court allowed Strizich to file his reply brief, conduct discovery, and hold an evidentiary hearing, the record could have been more fully developed, and Strizich could have called his trial and appellate attorneys to testify regarding the decisions they made at trial

and on appeal. Strizich's appellate attorney could have been questioned about the affidavit he provided for Strizich's postconviction petition.

While representing Strizich, trial and appellate counsel rendered deficient representation, falling below an objective standard of reasonableness. First, appellate counsel failed to raise a sufficiency of evidence argument on direct appeal because he didn't think the issue was properly before the Montana Supreme Court; second, trial counsel and appellate counsel failed to object or argue that flight evidence admitted at trial violated Strizich's right to a fair trial under the *Fourteenth Amendment*; finally, trial counsel failed to object to or provide comprehensible jury instructions.

ARGUMENT

I. The district court abused its discretion when it did not allow Strizich to file a reply brief and it failed to order a hearing on the petition.

In the opening paragraph of the district court's order denying Strizich's postconviction relief petition, the district court stated, "It is fully briefed. No party requested an oral argument." Both of these assertions by the district court are factually inaccurate.

On April 23, 2023, the district court issued an order extending the deadline for the State to file its response brief. On July 25, 2023, the district court issued a second order extending briefing deadlines in the case. In its order granting the State's request for a second extension, the district court stated:

IT IS HEREBY ORDERED:

The State's response brief is to be filed on or before August 31, 2023. Mr. Strizich's reply brief is to be filed on or before October 3, 2023.

(Dkt. 6).

On September 12, 2023, before Strizich's reply brief deadline, the district court issued an order summarily denying Strizich's petition. The order stated "It is fully briefed. No party requested an oral argument." (Dkt. 8). In Strizich's original petition for postconviction relief and in his separately filed brief in support of the petition, Strizich requested a hearing on his petition. The district court abused its discretion when it declined to hold a hearing because "no party requested oral argument."

Had a hearing been held, Strizich would have had the opportunity to fully develop the factual record regarding the decisions his attorneys made at trial and on appeal. Additionally, Strizich would have had the opportunity to question his appellate attorney regarding the affidavit he provided for Strizich's postconviction petition.

II. Appellate counsel was ineffective by failing to file a sufficiency of evidence appeal to the Montana Supreme Court.

Strizich was ultimately charged and convicted of aggravated burglary under § 45-6-204(2)(b)(ii), MCA, which states in part:

A person commits the offense of aggravated burglary if the person knowingly enters or remains unlawfully in an occupied structure and: the person has the purpose to commit an offense in the occupied structure,...and in effecting entry or in the course of committing the offense or in immediate flight after committing the offense:... the person purposely, knowingly, or negligently inflicts or attempts to inflict bodily injury upon anyone.

The standard of review for sufficiency of the evidence is whether, upon viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Fish*, 2009 MT 47, ¶27 (citing *State v. Black*, 2003 MT 376, ¶29). As stated above, one essential element of the crime of aggravated burglary is inflicting or

attempting to inflict bodily injury upon another. § 45-6-204(2)(b)(ii), MCA. The record in this case is devoid of any evidence that Strizich inflicted or attempted to inflict bodily injury upon Marshall, or anyone else for that matter. The record is also devoid of sufficient evidence that Marshall suffered a bodily injury.

First, the record in this case is clear that Strizich did not physically contact, strike, or touch Marshall. Therefore, Strizich's conviction cannot be sustained because he "inflicted" no bodily injury. *City of Hamilton v. Mavros*, 284 Mont. 46 (1997), is illustrative of this point. *Mavros* may appear distinguishable from this case as Mavros was charged and convicted of assault, while Strizich was charged and convicted of aggravated burglary. This distinction is irrelevant, however.

Mavros and Strizich were both convicted of crimes in which an essential element is causing bodily injury upon another, and both Mavros and Strizich were convicted despite there being no evidence that they physically struck or touched anyone. Compare § 45-5-201(a)-(c), MCA, with § 45-6-204(2)(b)(ii), MCA. See Commission Comments on § 45-5-201, MCA ("It should be noted that 'battery,' i.e., actual bodily

injury or contact of some kind, is an essential element of assault [under subsections (a)-(c)]..."). It is Strizich's alleged battery on Marshall that ultimately elevates the burglary to an aggravated burglary in this case.

In *Mavros*, the evidence at trial showed that Mavros drove his car in a reckless manner into the wrong lane of traffic and slammed on his brakes to stop his car in front of his then-estranged common-law wife Janet Ohl's vehicle, which was stopped at an intersection. *Mavros*, 284 Mont. at 52. Two witnesses testified that after those acts, Mavros got out of his car, jumped over other cars to get at Ohl, and yelled profanities at her. *Id.* This Court reversed Mavros' assault conviction on appeal, in part, because "the trial testimony was clear that Mavros did not physically strike or touch Ohl." *Id.*

Here, there was no evidence presented whatsoever that Strizich physically struck or even touched anyone. Marshall's own testimony is clear that at most Strizich walked towards Marshall and, even then, Strizich's hands were raised. As detailed above, Marshall testified, "...I can see [Strizich] down there and he's starting to walk towards the vehicle and I start yelling at him, stay the hell away, and I'm pointing the gun at him." (Tr. vol. II, 69). Marshall stated that Strizich kept

walking up towards him. Marshall then fired a shot into the ground and continued yelling for Strizich to stay away. (Tr. vol. II, 69). Marshall then fired a second shot that hit Strizich. (Tr. vol. II, 69). Strizich then crawled away wounded while Marshall and Daniels traded gunfire. From the evidence presented, no rational trier of fact could have found beyond a reasonable doubt that Strizich "inflicted" bodily injury upon Marshall.

Second, the only way Strizich's conviction can be sustained is if there is sufficient evidence that Strizich "attempted" to inflict bodily injury to Marshall. "[A] person commits the offense of attempt when, with the purpose to commit a specific offense, a person does any act toward the commission of the offense." §45-4-103(1), MCA. Moreover, "the 'act' must constitute a material step toward the commission of the offense." *State v. Jackson*, 2009 MT 427, ¶24. Viewing the evidence in the light most favorable to the State, - the testimony of Marshall and Sonja Buus - Strizich walked toward Marshall, unarmed, with his hands up, yelling "stop." (Tr. vol. II, 69, 239). No evidence was ever presented that Strizich verbally threatened anyone, had an instrument

or weapon of any kind in his hands, clenched his fists, threw a punch or kick, ran at Marshall, or any other overt threatening act.

At trial, Marshall testified that when he noticed Strizich walking up the driveway, he began telling Strizich to "stay the hell away" and pointing his pistol at Strizich. (Tr. vol. II, 69). Strizich did not have a gun or anything else in his hands, nor was Strizich saying anything threatening. All Marshall perceived was Strizich's "form" coming towards him. (Tr. vol. II, 142-143). Sonja testified that she observed Strizich walking forward with his hands up yelling at Marshall to "stop." (Tr. vol. II, 239). Walking toward someone, unarmed, with hands up, yelling "stop" is too attenuated to constitute an attempted, let alone actual, infliction of bodily injury.

Third, there is insufficient evidence that Marshall suffered a bodily injury. "Bodily injury" is defined as physical pain, illness, or an impairment of physical condition and includes mental illness or impairment. § 45-2-101(5), MCA. That Strizich never made physical contact with Marshall is dispositive - no physical contact, no bodily injury. *See Mavros, supra.*

Physical contact or not, there was no evidence at trial that Marshall suffered any physical pain, illness, or an impairment of physical condition. This makes sense because there was no evidence that Strizich ever made or attempted to make physical contact with Marshall, as explained above. Further, there was no evidence presented at trial that Marshall suffered an injury that includes mental illness or impairment.

There is no statutory definition of "mental illness or impairment" in Montana. However, the Administrative Rules of Montana, in the title covering Mental Health Centers, defines "mental illness" as that condition of an individual in which there is either psychological, physiological, or biochemical imbalance which has caused impairment in functioning and/or behavior. ARM 37.106.1902.

This Court has also previously adopted a New York state affirmative definition of mental illness. *State v. Wooster*, 1999 MT 22, ¶42. "'Mental illness' means an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking, or judgment to such an extent that the

person afflicted requires care, treatment and rehabilitation." *Id.* (citing New York Mental Hygiene Law § 1.03(20) (McKinney 1996)).

Applying the *Wooster* definition here, there was no evidence presented at trial that Marshall required care, treatment, or rehabilitation due to any mental illness or mental impairment. It is unclear what mental illness or impairment the State is even claiming Marshall suffered.

Moreover, mental illnesses and mental impairments are not within the knowledge of the average juror and therefore the State was required, but failed, to provide expert testimony establishing that Marshall suffered a mental illness or impairment as a result of Strizich's actions on the day of events. *Hulse v. State*, 1998 MT 108, ¶48 (holding "expert testimony is required in areas not within the range of ordinary training and intelligence."), *State v. Arlington*, 265 Mont. 127, 140 (1994) (holding only medical "experts" are qualified to testify about the injuries or the effect of adrenaline on the body.), see *State v. Hocevar*, 2000 MT 157, ¶ 59 (holding "the dynamics of child abuse and specifically MSBP are generally not within the knowledge of the average juror" and therefore a subject matter requiring expert

testimony), *State v. Mason*, 2003 MT 371, ¶¶ 35-36, overruled on other grounds, *State v. Herman*, 2008 MT 187 (evidence was presented that victim was diagnosed with Post Traumatic Stress Disorder, but no evidence that defendant "caused" victim's mental health condition.).

The only evidence presented at trial was lay witness testimony of Marshall's emotional distress. Detective William Pandis testified that on the day of the burglary Marshall's demeanor was "very distraught and very upset." (Tr. vol. IV, 182). Marshall said that he was "[p]retty shaken (sic) up" (Tr. vol. II, 81), and fleetingly mentioned, "all the trauma that I went through." (Tr. vol. II, 119). Sonja testified that in the months after the incident Marshall had "good days and bad days. He doesn't sleep real well and he gets really upset about it. I guess you could say he dreams about it at night. He thinks about it in the shower. You can find him just sitting there off in La-La Land. He's not doing very well really." (Tr. vol. II, 227). Significantly, Sonja described herself as doing much better than Marshall, "I didn't have a gun in my face." (Tr. vol. II, 230). This testimony comprised the total evidence of Marshall's distress.

The infliction of emotional distress is also not an element of aggravated burglary. If the Montana Legislature intended aggravated burglary to include the infliction of emotional distress it would have expressly done so, just as it has for other criminal offenses. For example, the offense of stalking under § 45-5-220, MCA, makes it a crime if a person "purposely or knowingly engages in a course of conduct directed at a specific person and knows or should know that the course of conduct would cause a reasonable person to: *fear* for the person's own safety or the safety of a third person, or suffer *other substantial emotional distress...*" § 45-5-220(1)(a)-(b), MCA (emphasis added). "Substantial emotional distress" means significant mental suffering or distress that may but does not necessarily require medical or other professional treatment or counseling. § 45-5-220(2)(b), MCA.

Aggravated burglary requires "bodily injury," and Marshall's emotional distress does not rise to the level of any injury listed under that definition. The State realized these evidentiary shortcomings. On the third day of trial the State attempted to substantively amend the aggravated burglary charge during the settling of jury instructions. The district court sustained Strizich's objection, however, and the State

was bound by the aggravated burglary as it was charged in the operative Second Amended Information. (Tr. vol. III, 144-146). Despite the charge remaining, Strizich was still convicted of aggravated burglary with no sufficient evidence of mental illness or impairment, particularly one requiring treatment.

If Marshall did suffer any bodily injury, this resulted from the actions of Daniels. It was Daniels, not Strizich, who stuck a pistol in Marshall's face. (Tr. vol. II, 67). It was Daniels, not Strizich, who pointed a pistol at Marshall and pulled the trigger. (Tr. vol. II, 68). It was Daniels, not Strizich, who then fired multiple shots at Marshall. (Tr. vol. II, 70, 78). It was Daniels who was convicted of attempted deliberate homicide on Marshall. *State v. Daniels*, 2019 MT 214. Any injury that Marshall may have suffered was caused by Daniels, not Strizich. (Tr. vol. II, 136). Marshall never saw Strizich reach for a gun. (Tr. vol. II, 142). The only threat Marshall perceived from Strizich was "his form coming at me." (Tr. vol. II, 143). Marshall shot Strizich. This evidence is insufficient to sustain Strizich's aggravated burglary conviction.

Appellate counsel raised several issues on Strizich's direct appeal:

(1) Whether the admission of the Elkhorn flight evidence violated Montana Rules of Evidence 402, 403, and 404(b) and therefore entitled Strizich to a new trial. *Strizich*, 2021 MT 306, ¶ 21. (2) Whether the district court violated the Confrontation Clause of the Sixth Amendment to the United States Constitution when it took judicial notice of and read to the jury William Lamere's youth court admissions. *Id.* at n.1. (3) Whether the district court's 'purposely' and 'knowingly' mental state instructions as to aggravated burglary were plain error. *Id.* at ¶¶ 44, 48-49. Each issue required invocation of plain error review because trial counsel failed to raise a specific objection in the district court.

Appellate counsel did not raise sufficiency of the evidence as to bodily injury to sustain Strizich's aggravated burglary conviction. Appellate counsel provided an affidavit as part of Strizich's postconviction relief petition. Therein appellate counsel states that Strizich repeatedly expressed a desire to challenge the sufficiency of the evidence on his aggravated burglary conviction. (See Appendix B, ¶¶ 9, 10, 12). However, appellate counsel states that he did not raise the

issue. He did not think the record supported a challenge to the sufficiency of the evidence because (1) of the burden generally placed on the appellant - i.e., demonstrating a lack of sufficient evidence when the evidence is viewed in a light most favorable to the State, and (2) he believed the issue was not properly preserved by trial counsel and would therefore require the invocation of plain error review, which is rarely invoked. (See Appendix B, ¶ 11). Appellate counsel was incorrect.

In *State v. Granby*, 283 Mont. 193 (1997), this Court determined that the Legislature intended that a reviewing court have the power to provide a comprehensive review of the district court proceedings for sufficiency of the evidence without the necessity of a motion challenging the sufficiency of the evidence in the district court. This Court recently reaffirmed that challenges to sufficiency of the evidence may be raised for the first time on direct appeal and receive *de novo* review. *State v. Himes*, 2015 MT 91. Appellate counsel acknowledges that he was unaware of these holdings and admits that "[e]lementary research would have discovered either Granby or Himes." (Appendix B, ¶ 11).

Further, it is well established that the Due Process Clause of the Fourteenth Amendment and Article II, § 17 of the Montana Constitution encompasses the right to have the State prove every element of a charged offense beyond a reasonable doubt, among other rights. *State v. Newman*, 2005 MT 348, ¶19 (citing *Estelle v. Williams*, 425 U.S. 501, 503 (1976)), *Jackson v. Virginia*, 443 U.S. 307, 326 (1979), *In re Winship*, 397 U.S. 358, 364 (1970).

In light of the complete lack of trial evidence that Strizich inflicted or attempted to inflict bodily injury on Marshall, and appellate counsel's failure to do the "elementary research" to discover the holdings in *Granby* and *Himes*, it was error not to raise the insufficient evidence issue. Appellate counsel's performance fell below an objective standard of reasonableness. Appellate counsel admits the same. (See Appendix B, ¶13). The first prong of *Strickland* is met.

The sufficiency of evidence issue here is clearly stronger than at least two of the issues raised by appellate counsel. Issue two, whether the district court violated Strizich's right to confront witnesses when it took judicial notice of Lamere's youth court admissions, was not objected to by trial counsel and therefore required appellate counsel to

argue plain error. As mentioned above "plain error review" is rarely invoked. *State v. Daniels*, 2019 MT 214, P 30. Notably, however, appellate counsel did not even ask this Court for plain error review of this issue. *Strizich*, 2021 MT ¶ 21 n.1.

Likewise, issue three, the district court's unobjected-to mental state instructions as to the aggravated burglary, required plain error review. Because those issues were not properly preserved by trial counsel, and because sufficiency of the evidence can be raised notwithstanding preservation in the district court and receives *de novo* review, it is reasonably probable that the sufficiency of the evidence issue would have had a greater chance of prevailing on appeal in this case, especially given the complete lack of evidence of infliction or attempted infliction of bodily injury by Strizich.

As a result of appellate counsel's unprofessional errors Strizich was deprived of appealing this issue to this Court and the State was allowed to escape its burden under the *Fourteenth Amendment* to the U.S. Constitution as well as Article II, § 17 of the Montana Constitution to prove every element of aggravated burglary beyond a reasonable doubt. Based on the facts in the record and the legal analysis above

regarding an *actus reas* by Strizich and bodily injury, had this issue been raised on direct appeal, Strizich would have had his conviction for aggravated burglary at least reduced to burglary and the case would have been remanded for resentencing. *State v. Ray*, 2003 MT 171, ¶58.

Section 46-6-204(3), MCA, sets forth the sentencing term for both burglary and aggravated burglary:

A person convicted of the offense of burglary shall be imprisoned in the state prison for any term not to exceed 20 years....A person convicted of the offense of aggravated burglary shall be imprisoned in the state prison for any term not to exceed 40 years....

Strizich was sentenced to 40 years imprisonment on the aggravated burglary conviction. At the very least, Strizich's sentence if convicted of burglary would have been reduced by 20 years. An additional 20 years for counsel's failings is objective proof of resulting prejudice. Therefore, the second prong of *Strickland* is met.

In its Order denying Strizich's petition, the district court did not address any of Strizich's arguments regarding lack of sufficient evidence of aggravated burglary. Rather, citing to this Court's opinion from the direct appeal in this case that the admission of the Elkhorn

flight evidence did not render Strizich's trial unfair, the district court stated, "the result of an appeal arguing the sufficiency of the evidence would not have been different:

The jury received overwhelming evidence of Strizich's involvement in the crimes, including the items in Strizich's Durango, the state of the Buuses' cabin, the state of the Mayernik's cabin, the photographs of Strizich and Daniels at the Buuses' cabin, and Lippert's stolen belt buckle. Strizich intentionally took off with Lamere and laid in the back seat, from which the jury could infer he sought to avoid arrest and prosecution for those offenses. And Strizich readily acknowledged that he fled from Elkhorn to avoid legal accountability for the Buus burglary.

(Appendix A at 6 (citing Strizich, ¶38)). The district court then stated, "[i]t is axiomatic that evidence which is overwhelming is necessarily also sufficient." (Appendix A at 6).

The state of the Mayernik's cabin and Lippert's stolen belt buckle have nothing to do with the Buus cabin burglary. Strizich was found "not guilty" by the jury of both the Mayernik cabin burglary charge and the tampering with or fabricating physical evidence charge related to the stolen belt buckle. (Tr. vol. V, 237). That leaves the items in Strizich's Durango, the state of the Buuses' cabin, the photographs of Strizich and Daniels on the Buuses' property, and Strizich's flight from Elkhorn.

At best this remaining evidence supports a burglary of the Buus cabin. Neither this Court, the district court, nor the State have pointed to anywhere in the trial record of evidence that Strizich inflicted or attempted to inflict bodily injury upon Marshall, or that Marshall even suffered a bodily injury. That is because there is no, let alone sufficient, evidence of a forbidden act by Strizich, namely a bodily injury as to the aggravating element of aggravated burglary as charged by the State in this case. The district court erred when it denied this claim and rested its decision on the appellate record.

III. Trial counsel was ineffective by failing to object or argue the Elkhorn flight evidence violated Strizich's right to a fair trial under the *Fourteenth Amendment*.

At trial, the State asked the district court to allow into evidence that Strizich left Elkhorn three weeks after the Buus cabin burglary and was a passenger in a vehicle driven by Lamere. The State asked the district court to take judicial notice of Lamere's Youth Court Dispositional Order wherein Lamere admitted to the offense of criminal endangerment. According to the State this evidence "demonstrated [Strizich's] consciousness of guilt." (Tr. vol. I, 134-142). The district court admitted the evidence over defense counsel's objection. (Tr. vol. I,

at 168-169, 179-180). At the behest of the State, the district court then excluded any evidence that the vehicle Lamere was driving was stolen. (Tr. vol. I, 171).

The State called three witnesses who provided details of Strizich's departure from Elkhorn and Lamere's subsequent high-speed chase. Notably, it did not call Lamere and there is no evidence that he was unavailable to testify. Strizich never had the chance to confront Lamere at trial.

Elana Applin, a nurse at Elkhorn, testified that Strizich left the facility through a window. (Tr. vol. IV, 152). Deputy Greg Holmlund testified that he heard a report that Strizich fled Elkhorn in a silver Honda Accord and he decided to park and wait to see if he could spot the car. (Tr. vol. IV, 162-163). Eventually he saw the vehicle and began to follow it. He described the driver of another car (which was affiliated with Lamere) as "playing a cat and mouse game. When they came upon other vehicles, they would switch lanes real abruptly and real fast." Deputy Homlund also opined that "they did not want me behind that Honda." (Tr. vol. IV, 164). Deputy Holmlund eventually heard that the Honda had crashed and came upon the scene to find

officers with weapons drawn and Strizich being held at gunpoint. (Tr. vol. IV, 165).

The State continued with testimony from Deputy Joshua Schmidt. Schmidt testified he knew Strizich fled Elkhorn in a silver Honda. (Tr. vol. IV, 170). Deputy Schmidt observed the vehicle traveling between 90-100 miles an hour. He described the vehicle as “eluding law enforcement” and accelerating “to speeds at one point in excess of 135 miles per hour.” (Tr. vol. IV, 172). Deputy Schmidt testified that the vehicle crashed, and he and another deputy drew their pistols, handcuffed Strizich, and took him into custody. (Tr. vol. IV, 174).

The district court then took judicial notice of the Lamere Youth Court Dispositional Order and instructed the jury:

[t]he Court takes judicial notice that Mr. Lamere admitted to the offense of criminal endangerment in that on or about January 21, 2017, at approximately 6:46 p.m., he knowingly engaged in conduct that created a substantial risk of death or serious bodily injury to another when he was observed driving a silver Honda four-door passenger car with a male in the passenger seat in excess of 135 miles an hour northbound on Interstate 15 through the Sieben Flats area while being pursued by law enforcement vehicles who had their lights on. After he exited the interstate highway on Recreation Road driving 65 miles an hour, he lost control of the car and spun into a snowbank.

(Tr. vol. IV, 179-80).²

The impact of three witnesses, including two deputies from the Lewis and Clark County Sheriff's Office, providing details of Strizich's flight and Lamere's high-speed chase unfairly prejudiced the jury against Strizich. The district court's decision to take judicial notice of Lamere's Youth Court Disposition Order concerning an offense for which Strizich was not only not charged, but was the victim of, only further emphasizes the prejudicial effect of the evidence on the jury. The State sought to align the acts of Lamere with Strizich's underlying offense and cast Strizich in the same reckless disregard for the safety of others as Lamere.

Further, the State's misrepresentation that Strizich was a participant coupled with the district court's exclusion of evidence that Lamere's vehicle was stolen (a fact the State conceded), allowed the State to create the misleading impression to the jury that Lamere's high-speed chase was Strizich's attempt to avoid legal responsibility for his charged crime. Once defense counsel had been overruled on his

² Lamere admitted to creating a substantial risk of death or serious bodily injury to Strizich, the passenger in the Honda Accord.

argument that the Elkhorn evidence was irrelevant, he should have moved the district court for an instruction that told the jury Lamere was driving a stolen vehicle so the jury could have inferred from this evidence that Lamere led law enforcement on the high-speed chase to avoid legal responsibility for stealing the car.

Defense counsel ultimately failed to object to the Elkhorn flight evidence on the grounds that it violated Strizich's right to a fair trial under the *Fourteenth Amendment*. Nor did defense counsel object and propose that, if evidence of Lamere's high speed chase was to be admitted, then the fact that the vehicle Lamere was driving was stolen should also be admitted. On direct appeal to this Court, appellate counsel did not argue that evidence of Lamere's vehicle being stolen should have been admitted or that the Elkhorn flight evidence violated Strizich's right to a fair trial under the *Fourteenth Amendment*.

There is no strategic justification for counsels' decisions and because of this, their performance was deficient. This greatly prejudiced Strizich as it both denied the opportunity to have the district court and this Court to consider his right to a fair trial under the *Fourteenth Amendment* and allowed the State to create the misleading

impression that Strizich participated in Lamere's high speed chase to avoid legal responsibility for the aggravated burglary.

The evidence presented by the State that Strizich committed aggravated burglary was not overwhelming. There is a reasonable probability that, but for counsels' unprofessional errors, the results of the proceedings would have been different.

IV. Trial counsel was ineffective by failing to object to or provide comprehensible jury instructions as to the aggravating factors set forth in Aggravated Burglary.

At trial, the district court instructed the jury as to the elements of Aggravated Burglary. (*See* Dkt. 129, Instructions Nos. 18, 36-38). Trial counsel made no objection to the district court's final jury instructions. *State v. Strizich*, 2021 MT 306, ¶ 49. As to the third element of Aggravated Burglary specifically, absent in the jury instructions were result-based mental state definitions for "knowingly" and "purposely." The only definition the district court used for "knowingly" was a conduct-based definition. The definition used for "purposely" was result-based but only applied to the second element of Aggravated Burglary. The instruction given on "negligently" was also an incorrect definition. Further, there was no instruction given defining "attempt."

The State capitalized on the erroneous instruction during its closing arguments: “[W]hat sets this off from burglary, which is the lesser-included offense, is in the course of committing the offense or in the immediate flight after, [Strizich] purposely or knowingly or negligently inflicted or attempted to inflict bodily injury upon another. So [Strizich] did enter that cabin, and by doing that hurt Mr. Buus.” (Tr. vol. V, 189). Again, trial counsel made no objections.

In Strizich’s case a proper definition of each mental state required to make a burglary “aggravated” must be result-based. As to the third element of Aggravated Burglary, a proper definition of “knowingly” would have been “a person knowingly inflicts or attempts to inflict bodily injury upon another when it is the person’s conscious object to cause such a result.” *See* § 45-2-101(35), MCA. A proper definition of “purposely” would have been “a person purposely inflicts or attempts to inflict bodily injury upon another when it is the person’s conscious object to cause that result.” *See* § 45-2-101(65), MCA. A proper definition of “negligently” would have been “a person negligently inflicts bodily injury upon another when the person consciously disregards a risk that the result will occur or when the person disregards a risk of

which the person should be aware that the result will occur.” See § 45-2-101(43), MCA.

A proper definition of “attempt” would have been “a person commits the offense of attempt when, with the purpose to commit a specific offense, a person does any act toward the commission of the offense.” See § 45-4-103(1). Further, “the act must constitute a material step toward the commission of the offense.” *State v Jackson* 2009 MT 427 ¶24. Explaining “attempt” was important to avoid confusing the jury as to which mental states were required to prove the actual infliction versus attempted infliction of bodily injury. Trial counsel’s failure to object or offer the above jury instructions was deficient performance. This prejudiced Strizich as it relieved the State of its burden under the *Fourteenth Amendment* and *Art. II § 17* to prove every element of Aggravated Burglary beyond a reasonable doubt. The prejudice resulting from the erroneous instructions was compounded by the State’s argument during closing.

The evidence of guilt was not overwhelming. See Issue II above. The State’s argument that “[Strizich] did enter that cabin, and by doing that hurt Mr. Buus,” (Tr. vol. V, 189), is as clear an example of

insufficient evidence for bodily injury. The erroneous instructions as to the *mens rea* only compounded the State's failure and the jury's confusion. A reasonable probability exists that, but for trial counsel's unprofessional errors, a properly instructed jury would have acquitted Strizich of Aggravated Burglary or convicted him of a lesser included offense such as Burglary or Criminal Trespass to Property.

CONCLUSION

For the foregoing reasons, this Court should determine the IAC claims under *de novo* review. Alternatively, this Court should reverse and remand the denial of Strizich's petition for postconviction relief with instructions for the district court to conduct an evidentiary hearing.

Respectfully submitted this 12th day of March 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that the Appellant's Opening Brief is printed with proportionately-spaced Century Schoolbook typeface of 14 points; is double-spaced except for the lengthy quotations or footnotes; and does not exceed 10,000 words. The exact word count is 7,034 words as calculated by my Microsoft Word software excluding the Table of Contents, Table of Authorities, and Certificate of Compliance.

Dated this 12th day of March 2024.

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CERTIFICATE OF SERVICE

I, Paul Nathaniel Simon, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 03-12-2024:

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