

THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0556

STATE OF MONTANA,

Plaintiff and Appellee,

v.

PITASKUMMAPI DAVID GREEN,

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

On Appeal from the Montana Fourth Judicial District Court
Missoula County, Honorable Jason Marks

APPEARANCES:

PENELOPE S. STRONG
2501 Montana Ave. – Ste. 4
Billings, MT 59101
Tel: (406) 839-9220
Fax: (406) 839-9221
ps18rabbits@gmail.com
Attorney for Petitioner/Appellant

KIRSTEN H. PABST
Missoula Co. Atty.
200 W. Broadway
Missoula, MT 59802
Representing: State of Montana

AUSTIN KNUDSEN
Montana Attorney General
215 N. Sanders
PO Box 201401
Helena, MT 59620
Representing: State of Montana

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i-vii
TABLE OF AUTHORITIES	iii-v
OTHER AUTHORITIES.....	vi
APPENDIX-TABLE OF CONTENTS.....	vii
 I. ISSUES PRESENTED.....	 1
A. Was Mr. Green denied the effective assistance of counsel, when defense trial counsel failed to submit the correct intent jury instruction for the SIVOC crime, and to object when the state submitted the incorrect intent jury instruction?.....	 1
B. Should this court exercise plain error review, and reverse this conviction, as Mr. Green’s right to Due Process was violated when the lower court gave an erroneous instruction on knowingly, which lowered the State’ burden of proof?.....	 1
II. COMBINED PROCEDURAL AND FACTUAL STATEMENT	1-8
a. Facts of Case.....	1-4
b. Procedural History.....	4-8
1. Pretrial Proceedings.....	4-5
2. Jury Trial and Sentencing.....	5-8
III. SUMMARY OF ARGUMENT.....	8-9
IV. ARGUMENT.....	9-19
A. Standards of Review.....	9
B. The Erroneous Jury Instruction on the Intent Element was So Egregious that a New Trial Must Be Granted to Mr. Green.....	10-13
C. Plain Error Should Be Invoked to Allow Review of the Jury Instruction Issue.....	13-15

D. Mr. Green’s Two Defense Counsel Failed Him, and No Plausible Strategic Explanation Exists.....	15-19
V. CONCLUSION.....	19
CERTIFICATE OF COMPLIANCE	20
CERTIFICATE OF SERVICE	21

TABLE OF AUTHORITIES

CASES

<i>Duren v. Missouri</i>	4
<i>Romo v. Shirley</i> 2022 MT 249, ¶ 62, 411 Mont. 111, 522 P.3d 401.....	9
<i>Santoro</i> ¶ 16.....	16
<i>State v. Brown</i> 1999 MT 31, ¶ 12, 293 Mont. 268, ¶ 12, 975 P.2d 321, ¶ 12....	15
<i>State v. Chafee</i> 2014 MT 226, ¶ 21, 376 Mont. 267, 272–73, 332 P.3d 240, 245	18
<i>State v. Dasen</i> 2007 MT 87, ¶ 38, 337 Mont. 74, ¶ 38, 155 P.3d 1282, ¶ 38.....	15
<i>State v. Deveraux</i> 2022 MT 130, ¶ 20, 409 Mont. 177, 512 P.3d 1198.....	13
<i>State v. Deveraux</i> 2022 MT 130, ¶¶ 31-32.....	10, 11
<i>State v. Dunfee</i> 2005 MT 147, ¶ 20, 327 Mont. 335, 114 P.3d 217.....	9
<i>State v. Gerstner</i> 2009 MT 303, ¶ 15, 353 Mont. 86, 219 P.3d 866.....	13
<i>State v. Gerstner</i> 2009 MT 303, ¶ 29, 353 Mont. 86, 91, 219 P.3d 866, 870.....	10, 11
<i>State v. Hamernick</i>	

2023 MT 249, ¶ 13, 414 Mont. 307, 313, 545 P.3d 666, 670...	13
<i>State v. Hamernick</i>	
2023 MT 249, ¶ 26, 414 Mont. 307, 319, 545 P.3d 666, 673–74	10, 12
<i>State v. Hamernick</i>	
2023 MT 249, ¶ 27, 414 Mont. 307, 320, 545 P.3d 666, 674...	12, 19
<i>State v. Jefferson</i>	
2003 MT 90, ¶ 50, 315 Mont. 146, 69 P.3d 641.....	16
<i>State v. Johnston</i>	
2010 MT 152, ¶ 7, 357 Mont. 46, 237 P.3d 70.....	9
<i>State v. Kirn</i>	
2023 MT 98, ¶ 16, 412 Mont. 309, 530 P.3d 1.....	9
<i>State v. Kougl</i>	
2004 MT 243, ¶ 12, 323 Mont. 6, 97 P.3d 1095).....	9, 16
<i>State v. Miller</i>	
2008 MT 106, ¶ 11, 342 Mont. 355, 181 P.3d 625.....	13
<i>State v. Rodriguez</i>	
2021 MT 65, ¶ 31, 403 Mont. 360, 483 P.3d 1080.....	16
<i>State v. Rose</i>	
2017 MT 289, ¶ 19, 389 Mont. 374, 382, 406 P.3d 443, 449.....	16
<i>State v. Rowe</i>	
2024 MT 37, ¶ 33, 415 Mont. 280, 296, 543 P.3d 614, 625–26.	12, 19
<i>State v. Secrease</i>	
2021 MT 212, ¶ 15, 405 Mont. 229, 235, 493 P.3d 333.....	17
<i>State v. Secrease</i>	
2021 MT 212, ¶ 15, 405 Mont. 229, 493 P.3d 335.....	19

Strickland v. Washington

466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674

(1984).....

16

OTHER AUTHORITIES

Mont. Code Ann. § 46-20-701.....	14
Sec. 45- 1-101 (35), M.C.A.....	8

APPENDIX

- | | | |
|-----------|--|----------------|
| A. | Case Register Report DC-32-2020-708 | 2 pages |
| B. | Judgment | 3 pages |

I. ISSUES PRESENTED

- A. Was Mr. Green denied the effective assistance of counsel, when defense trial counsel failed to submit the correct intent jury instruction for the SIVOC crime, and to object when the state submitted the incorrect intent jury instruction?
- B. Should this court exercise plain error review, and reverse this conviction, as Mr. Green's right to Due Process was violated when the lower court gave an erroneous instruction on knowingly, which lowered the State's burden of proof?

II. COMBINED PROCEDURAL AND FACTUAL STATEMENT

a. Facts of Case.

On December 9, 2022, at about 7 am, S. D., a friend of Mr. Green's whom was 75 years old, heard a knock at her apartment door in Missoula, Montana. Jury Trial Transcript; p. 195. Mr. Green, whom was 30 years old, was allowed to enter as she knew him from past family contacts. Id. He was disheveled and asked to shower; Ms. D. made him coffee and waited in her living room as he did so. Id. Her niece and Mr. Green have a child together, so in the past she had

assisted him financially, even allowing him to live with her temporarily.
Id.

When Mr. Green exited the shower and came into the living room, he began to try to fondle Ms. D's breasts. Id. Mr. Green stated they discussed having sex, they did so , vaginal sex, on the couch, and he left. JT Tr, p. 353 She stated that he forcefully pushed her down on first the chair, and then moved her to the couch, where he forcefully had vaginal sex with her. JT Tr, pp 214-15. Ms. D testified that he pushed one of her legs up, hurting her, and eventually she was too weak to fight him off.
Id.

S. D. was traumatized after the assault, laid on her couch, and then called her daughter, whom lived right next door, and told her she had been raped by Mr. Green. Id, p. 219. Her daughter phoned her other daughter, and eventually Ms. D's niece reported the assault to the local police department. Id. p. 222. Ms. D. explained to her family she was not sure to report the incident, as she feared the consequences for Mr. Green's young son, C. G. Id.

Ms. D. had a SANE exam at the First Step facility in Missoula, Montana. Id., p. 224. She had suffered vaginal bruising and bruising to

her cervix. *Id.* Biological samples were taken and turned over the investigating authorities. *Id.*, p. 343. DNA testing conducted by the Montana Crime Lab showed that Mr. Green's DNA was found on her external genital area, and also in her vagina. *Id.*, pp. 412-13.

Ms. D. stated the rape had dramatically altered her life, she was not very afraid to be alone, had "PTSD," her mobility was severely impaired, and she had problems trusting people. *Id.*, pp. 226.

Her two daughters also testified that she had radically changed, was very sad and withdrawn, and that no way would she ever have consented to sex with Mr. Green. *Id.*, pp. 236-260.

As Mr. Green was on parole at the time, he was picked up on a parole hold, and questioned by a detective and the patrol officer whom responded to Ms. D's report of being raped. *Id.*, pp. 288-90. At first, when read his Miranda rights he asked for a lawyer, but relented and agreed to speak with the officers. *Id.*, p. 287-88.

He told them he had drunk alcohol, and then took meth to bring himself down. *Id.*, p. 296. He recalled going to Ms. D's apartment but said he partially blacked out, and didn't recall much of the evening. *Id.*

At trial Mr. Green claimed the sex was spontaneous and consensual. and that they discussed having sex, after he showered, and then they had vaginal sex on the couch, and he left. Id, p. 353.

b. Procedural History

1. Pretrial Proceedings.

Mr. Green was charged with unlawful sexual intercourse without consent, by an information and affidavit filed on December 16, 2020. App. A- Docket Sheet; DC# 1 & 4. He was assigned counsel through the Montana State Public Defender, and an omnibus hearing was held on March 4, 2021. Id, DC# 14. No affirmative defenses were endorsed at that time, and no pretrial motions to dismiss, or to suppress evidence were filed Id. Jury trial was continued three times. Id, DC # #17,25,& 40.

Defense counsel filed a pretrial motion to obtain discovery for jury claims and selection issues based on *Duren v. Missouri*. Id, DC# 42. The Missoula County Clerk of Court testified at a pretrial hearing regarding that motion, Hearing Transcript, 3-29-22, pp. 22-36; and no order granting relief under that proceeding was issued. Id, p.38.

Defense counsel also filed a motion in limine to exclude other crimes and bad acts, and the lower court granted partial relief on that motion. App. A, DC ## 35 & 45. The Defense also filed a motion in limine to preclude confrontation clause violations, to exclude irrelevant testimony, and to exclude improper expert testimony on the alleged victim's credibility, and to preclude the State from referring to the alleged victim "victim," contending that she be called a "complainant." Id, DC# 34. The lower court granted all those requests, but for the victim reference. Id, DC# 45.

Neither party filed a trial brief. App. A, docket sheet.

2. Jury Trial and Sentencing.

Mr. Green's jury trial began on April 6, 2022, and ended with a guilty verdict on April 8, 2022. App. A, DC # # 46-7; # # 48-9. After a lengthy voir dire process, a jury was seated and the parties' counsel both gave their respective opening statements. JT Tr. pp. 1-193.

The state called Ms. Davis, her two daughters, a Missoula police officer, Mr. Green's employer, a Missoula Police department Detective , the SANE nurse, and a Montana Crime Lab DNA supervisor and

analyst. JT Tr. pp. 194-345; pp. 399-418. The State admitted five exhibits, including a video that showed Mr. Green coming to Ms. D's apartment, on the morning in question. App. A, DC# 49-minutes.

The defense called Mr. Green, whom testified in his own behalf. JT, Tr, p. 350-386.

Defense counsel submitted select proposed jury instructions. App A, DC# 25, but regarding the intent, or definition of knowingly element of SIVOC, defense counsel failed to submit any of the four available jury instructions. The State submitted proposed jury instruction no. 12, which read:

“ a person acts knowingly when with respect to a specific fact, when the person is aware of a high probability of the fact's existence.

App. A, DC #32- State's proposed instruction no. 12, MCJI 2-014 (2009).

At the brief jury instruction conference, defense counsel didn't interpose any objection to the State's proposed intent instruction, or offer a late hour alternative. J T. Tr., pp. 390- 396. No one, the Lower Court, State's counsel nor the two defense counsel even broached the subject of which intent instruction to use. Id. The Lower Court used the

definition of knowingly, as submitted by the State. App. A, DC# 50, J.I. # 12; Jury Trial Tr, p.422, ll. 14-16.

During state's counsel's closing argument, counsel argued at length that Ms. D had not consented, the assault was violent, caused her serious physical and long lasting emotional injuries, and to reject Mr. Green's claim she had consented to having sex that morning. Id, pp. 424-432.

Defense counsel extensively argued in closing, that the main issue was whether or not the alleged victim had consented, and that due to embarrassment of having consensual sex with a much younger man, and one with whom she had a quasi parental relationship, she was fudging about it being consensual. Id, pp. 432-443. The Lower Court then had the jury retire for their deliberations. Id, p. 448. The jury concluded those, and found Mr. Green guilty. App. A, DC# 51- verdict; JT Tr p. 449.

A presentence investigation and psychosexual evaluation were prepared, and after a sentencing hearing, Mr. Green was sentenced to 80 years at the Montana State Prison, and designated a level III sex offender . App. B, DC# 57- Judgment.

Mr. Green's notice of appeal was timely filed on November 17, 2022. App. A, DC# 151.

III. SUMMARY OF ARGUMENT

In this criminal appeal, Mr. Green's two defense counsel wholly failed him, by failing to have knowledge of, research and ascertain the correct intent jury instruction to submit, and conversely, to object to the incorrect instruction that was actually given to the jury.

Prevailing case law is abundantly clear that of the four statutory definitions of knowingly, under Sec. 45- 1-101 (35), M.C.A., for a sexual intercourse without consent charge, the conduct based jury instruction must be given. When it is not, and a results based instruction used, a defendant's core due process rights are violated, as such erroneous jury instruction causes the State's burden of proof on the consent element, to be unfairly lightened. Here the results- based, "specific fact" instruction also was fatally flawed.

Defense counsels' ineffective assistance and dereliction of the current state of the law as to this key issue is clear from the trial court record. Thus, in no way can their conduct or lack thereof, be

denominated a strategic choice, requiring further explanation in a post conviction proceeding. Furthermore, this issue implicates Mr. Green's substantial rights, and is appropriate for plain error review by this Court.

IV. ARGUMENT

A. Standards of Review.

Ineffective assistance of counsel claims are mixed questions of law and fact which are reviewed de novo. *State v. Johnston*, 2010 MT 152, ¶ 7, 357 Mont. 46, 237 P.3d 70 (citing *State v. Koughl*, 2004 MT 243, ¶ 12, 323 Mont. 6, 97 P.3d 1095).

The standard of review for jury instructions is whether jury instructions, as a whole, fully and fairly instruct the jury on the law applicable to the case. *State v. Kirn*, 2023 MT 98, ¶ 16, 412 Mont. 309, 530 P.3d 1 (citing *State v. Dunfee*, 2005 MT 147, ¶ 20, 327 Mont. 335, 114 P.3d 217). A trial court's decision regarding jury instructions is reviewed for abuse of discretion." *Romo v. Shirley*, 2022 MT 249, ¶ 62, 411 Mont. 111, 522 P.3d 401.

B. The Erroneous Jury Instruction on the Intent

Element was So Egregious that a New Trial Must Be Granted to Mr. Green

This was a single count prosecution for sexual intercourse without consent. Such crime is a conduct-based offense, requiring an “awareness of conduct” mental state instruction. *State v. Deveraux*, 2022 MT 130, ¶¶ 31-32. As this Court stated in that case:

“ Under the language of the statute, the crime does not consist of sexual intercourse with a high probability the other person does not consent; rather, it is sexual intercourse with the awareness that it is *without* that person's consent, which may permissibly be inferred from all of the facts and circumstances of the case.” *Id* at ¶¶ 31-32.

So, in order to determine whether Mr. Green was indeed guilty of SIWOC, the issue must be framed whether he was aware of his conduct—that is, whether he knowingly had sexual intercourse with the alleged victim. without her consent. *State v. Hamernick*, 2023 MT 249, ¶ 26, 414 Mont. 307, 319, 545 P.3d 666, 673–74.

Notably, the background authority for the proposition that SIVOC is a conduct based offense, is the 2009 case of *State v. Gerstner*, 2009 MT 303, ¶ 29, 353 Mont. 86, 91, 219 P.3d 866, 870, which involved a

charge of sexual assault, but nonetheless, was used in *Deveraux*, supra at ¶33 to support the holding that SIVOC is a conduct based offense, as opposed a result based offense.

Despite this case law authority, State's counsel submitted an incorrect "knowingly" jury instruction, consisting of a results- based, specific fact instruction; App. A, DC# 32, JI no. 12. The Lower Court, hearing no objection or even discussion of this important issue, rubber stamped it and gave this erroneous instruction:

" A person acts knowingly, when with regard to a specific fact, when the person is aware of a high probability of that fact's existence ". App. A, DC# 50, JI No. 12, JT TR p.422, ll. 14-16.

No rationale or discussion of what exactly the specific fact was, exists in this record. It conceivably could refer to the consent element, which was heavily litigated and argued by both parties at the jury trial. While this instruction is not equivalent to the result based instruction involved in *Gerstner*, supra and *Deveraux*, supra, it is so highly similar, that significant error must be found to have occurred in the giving of this instruction.

As this Court has emphasized, again and again, SIVOC is a conduct based crime, and the correct jury instruction is paramount in affording a criminal defendant their Due Process and just day in court, particularly, when in this type of sexual crime, a conviction on one count, means they will spend the rest of their adult life behind the walls of Montana State Prison. *See, State v. Hamernick*, 2023 MT 249, ¶ 27, 414 Mont. 307, 320, 545 P.3d 666, 674; *State v. Rowe*, 2024 MT 37, ¶ 33, 415 Mont. 280, 296, 543 P.3d 614, 625–26. Mr. Green, a 31 year old man was ultimately sentenced to 80 years prison. App. B-Sent order and judgment.

Moreover, in a yet more recent case, the Montana Supreme Court reversed a conviction for SIVOC, because a lower court improperly gave a high probability of fact instruction as to the consent element in the case. *State v. Hamernick*, *supra* at ¶ 27.

Importantly, the Court also concluded that such error, when considered in conjunction with Hamernick's trial testimony, “prejudicially affect[ed] the defendant's substantial rights,” because it undermined his defense by improperly lowering the State's burden of proof. *Id.* Significant to this case, is that Mr. Green also contended at

his trial that the victim consented, which was likewise Mr. Hamernick's argument. *Id.*

If jury instructions are erroneous in some aspect, the mistake must prejudicially affect the defendant's substantial rights in order to constitute reversible error." *State v. Deveraux*, 2022 MT 130, ¶ 20, 409 Mont. 177, 512 P.3d 1198 (citing *State v. Gerstner*, 2009 MT 303, ¶ 15, 353 Mont. 86, 219 P.3d 866). Jury instructions that relieve the State of its burden to prove each element of an offense violate a defendant's right to due process. *State v. Miller*, 2008 MT 106, ¶ 11, 342 Mont. 355, 181 P.3d 625; *State v. Hamernick*, 2023 MT 249, ¶ 13, 414 Mont. 307, 313, 545 P.3d 666, 670.

Here this grossly erroneous instruction prejudiced Mr. Green and denied him his Due Process rights, as it relieved the State of its constitutionally imposed burden to prove him guilty on each element, specifically whether or not the victim consented to engage in sexual intercourse with Mr. Green.

C. Plain Error Should Be Invoked to Allow Review of the Jury Instruction Issue.

Here both defense counsel failed their client, first, by not submitting any intent instruction, and second, by not objecting to the result based instruction. This most certainly prejudiced Mr. Green. As previously argued, with ample authority, this error is no mere oversight, and most certainly implicates Mr. Green's fundamental trial rights.

Plain error must apply here, and that doctrine arises out of the following statute, but is constitutionally significant in our criminal jurisprudence:

Mont. Code Ann. § 46-20-701, provides, in part:

“(1) Whenever the record on appeal contains any order, ruling, or proceeding of the trial court against the convicted person affecting the convicted person's substantial rights on the appeal of the cause, together with any required objection of the convicted person, the supreme court on that appeal shall consider the orders, rulings..... A cause may not be reversed by reason of any error committed by the trial court against the convicted person unless the record shows that the error was prejudicial.

(2) Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded....”(emphasis supplied).

Pursuant to plain error doctrine, it is within this Court's discretion to review errors that, while not properly preserved for appeal, implicate Mr. Green's fundamental constitutional rights. *State v. Dasen*, 2007 MT 87, ¶ 38, 337 Mont. 74, ¶ 38, 155 P.3d 1282, ¶ 38.

When the Supreme Court determines the applicability of the common law plain error doctrine, it will consider the totality of the circumstances in each case. *State v. Brown*, 1999 MT 31, ¶ 12, 293 Mont. 268, ¶ 12, 975 P.2d 321, ¶ 12. Mr. Green contends the exceptional circumstances of his case qualify for plain error review.

**D. Mr. Green's Two Defense Counsel Failed him, and
No Plausible Strategic Explanation Exists.**

The felony charge of sexual intercourse without consent charge was very serious, and carried a substantial prison term, which was eventually imposed. B, DC# 57. Mr. Green was represented by not only one but two defense counsel.

When a defendant raises ineffective assistance of counsel claims on direct appeal, first, it must be determined whether the claims are more appropriately addressed in a postconviction relief

proceeding. *State v. Rodriguez*, 2021 MT 65, ¶ 31, 403 Mont. 360, 483 P.3d 1080 (citing *Santoro*, ¶ 16). Ineffective assistance of counsel claims are appropriate for review on direct appeal when “no plausible justification” exists for the actions or omissions of defense counsel. *Kougl*, ¶ 15 (citing *State v. Jefferson*, 2003 MT 90, ¶ 50, 315 Mont. 146, 69 P.3d 641).

The Montana Supreme Court has recently reaffirmed the standard for appellate review of an “IAC” claim, on direct appeal.

“[f]irst, the defendant must show that counsel's performance was deficient,” and “[s]second, the defendant must show that the deficient performance prejudiced the defense.” *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). *State v. Rose*, 2017 MT 289, ¶ 19, 389 Mont. 374, 382, 406 P.3d 443, 449.

In order to maintain an “IAC” claim on direct appeal, however, claims of ineffective assistance of counsel are only reviewed once a record has been developed. If there exists no record - based justification for the actions or omissions of trial counsel, the Montana Supreme Court may review such claims on direct appeal .

Notable in this case, is that defense counsel did not even submit any intent instruction or discuss this key issue before trial or at the jury

instruction conference. These omissions cannot be chalked up to a calculated, reasoned strategic approach to Mr. Green's defense. To the contrary, they are indicative of no viable trial strategy, and evince ignorance of the significance of the knowingly/intent instruction in a SIVOC prosecution.

In prior decisions in which trial counsel's performance was challenged on direct appeal, the Montana Supreme Court has ruled that trial counsel delivered ineffective assistance for failing to object, or to submit the correct jury instruction, and moreover, has held that the Court could decide such issues on direct appeal.

One of those cases is *State v. Secrease*, 2021 MT 212, ¶ 15, 405 Mont. 229, 235, 493 P.3d 333, in which defense counsel failed to request and obtain the correct "knowingly" jury instruction on the obstructing a peace officer charge. This Court ultimately concluded that the matter was suitable for review on direct appeal. *Id.*

In that regard, the lightening of the State's burden, due to a faulty jury instruction on the "knowingly" intent element, was key to granting relief for IAC, on direct appeal :

“By instructing the jury that Secrease only need to be aware of his conduct—that he was refusing the blood test—rather than properly instructing them that Secrease needed to be aware of the result of his conduct—that refusing the blood test after Trooper Burton had obtained a search warrant was obstructing, hindering, or impairing the enforcement of the criminal law—the State's burden in proving the crime was reduced. “ Id.

And as in *State v. Chafee*, 2014 MT 226, ¶ 21, 376 Mont. 267, 272–73, 332 P.3d 240, 245, the failure to offer the beneficial jury instruction prejudiced Mr. Green, and no tactical reason existed to excuse the decision, or lack thereof, to request the correct jury instruction, which had the effect of lightening the State's burden in this case.

In an IAC claim, the focus then turns to the second prong of the *Strickland* test which concerns whether given counsels' deficient performance, the defendant must show that, but for counsels' errors, a reasonable probability exists that the result of the proceeding would have been different, and a reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding. *Chafee*, supra.

As previously argued, Mr. Green was substantially prejudiced by the wrong jury instruction being given at his jury trial. And as this

Court very recently ruled, again reversing a conviction for SIVOC, in part due to an erroneous intent instruction relating to the definition of consent:

We will reverse a conviction if the State's burden of proof was lowered by an incorrect “knowingly” jury instruction, and the defendant suffered prejudice to their substantial rights as a result. *Hamernick*, ¶ 27; *State v. Secrease*, 2021 MT 212, ¶ 15, 405 Mont. 229, 493 P.3d 335 (jury instruction with conduct-based definition of knowingly rather than results-based definition for obstructing a peace officer lowered the State's burden of proof). *The jury instruction here lowered the State's burden of proof. It did not correctly instruct the jury on the applicable law and thus affected Rowe's substantive rights.*” (emphasis supplied).

State v. Rowe, supra at ¶33.

VI. CONCLUSION

Plain error should be invoked, and appropriate relief should be granted in this case. Mr. Green’s conviction must be reversed and remanded for a new trial.

DATED this 29th day of May, 2024.

/s/ Penelope S. Strong
PENELOPE S. STRONG
Attorney for Defendant/Appellant

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 Century Schoolbook 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 3,641 excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

DATED this 29th day of March, 2024.

/s/ Penelope S. Strong
PENELOPE S. STRONG
Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

I, hereby certify that I have filed a true and accurate copy of the foregoing with the Clerk of the Montana Supreme Court; and that I have served true and accurate copies of the foregoing upon each attorney of record, and each party not represented by attorney in the above-referenced District Court action as follows:

Austin Miles Knudsen
Montana Attorney General
215 N. Sanders
Helena, MT 59620
Service Method: eService

Tammy Plubell (Govt Attorney)
Appellate Bureau Chief
215 N. Sanders
Helena, MT 59620
406-444-9839
MPloyhar@mt.gov
Service Method: eService

Kirsten H. Pabst (Govt Attorney)
Missoula County Attorney
200 W. Broadway
Missoula, MT 59802
Service Method: eService

Dated this 29th day of May, 2024.

/s/ Julie K. Palmersheim
Julie K. Palmersheim

CERTIFICATE OF SERVICE

I, Penelope S. Strong, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 05-29-2024:

Chad M. Wright (Attorney)
P.O. Box 200147
Helena MT 59620-0147
Representing: Pitaskummapa David Green
Service Method: eService

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

Matthew C. Jennings (Govt Attorney)
200 W. Broadway
Missoula MT 59802
Representing: State of Montana
Service Method: eService

Electronically Signed By: Penelope S. Strong
Dated: 05-29-2024