IN 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.

BRIEF OF APPELLEE

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

APPEARANCES:

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

MATTHEW JENNINGS
Missoula County Attorney
RYAN MICKELSON
Deputy County Attorney
Courthouse – 200 West Broadway
Missoula MT 59802

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

PENELOPE S. STRONG
Attorney at Law
2501 Montana Ave., Ste. 4
Billings, MT 59101

ATTORNEY FOR DEFENDANT
AND APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF THE ISSUES

1. Whether Green has met his heavy burden of establishing his ineffective assistance of counsel (IAC) claim based on his attorney's failure to object to the mental state jury instruction when the State presented overwhelming evidence that the 75-year-old victim did not consent to sexual intercourse.

2. Whether Green has met his burden of establishing that plain error review is warranted based on the jury instruction defining the word "knowingly," when the facts presented at trial overwhelmingly established that the 75-year-old victim did not consent to sexual intercourse.

STATEMENT OF THE CASE

On December 16, 2020, the State filed a motion and affidavit for leave to file an Information charging Pitaskummapi Green (Green) with one count of sexual intercourse without consent (SIWOC), in violation of Mont. Code Ann. § 45-5-503(1) and (3). (Doc. 1.) The charge alleged that Green forcibly raped a 75-year-old woman (S.D.). (*Id.*). S.D. would later testify that she viewed Green as a "surrogate son." (11/2/21 through 7/26/22 Transcript [Tr.] at 198.)[1]

[1] All transcripts in this record, from November 2, 2021, through July 26, 2022, are combined in one consecutively numbered document.

On April 6, 2022, the district court began a jury trial in this matter. (Doc. 47.) After testimony, the district court read the agreed upon instructions to the jury, which included that, "A person acts knowingly with respect to a specific fact when the person is aware of a high probability of that fact's existence." (Tr. at 422.) The district court defined the charge and its elements as follows:

> A person who knowingly has sexual intercourse with another person without consent commits the offense of [SIWOC]. To convict the defendant of [SIWOC,] the State must prove the following elements[:] one, the defendant had sexual intercourse with [S.D.] and two, the act of sexual intercourse was without the consent of [S.D.], and three, the defendant acted knowingly.

(*Id.* at 423.)

On April 8, 2022, the jury found Green guilty of SIWOC, and found that during the course of the rape, Green inflicted body injury upon S.D. (Doc. 51.) The district court ordered a psychosexual evaluation and presentence investigation (PSI). (Docs. 52-53.)

The district court held a sentencing hearing on July 26, 2022. (Tr. at 453.) At the hearing, the district court addressed Green: "So Mr. Green, in reviewing the [PSI] Report and the psychosexual evaluation prior to today's hearing, I had strongly contemplated imposing a sentence that would have you serve the rest of your life in prison without possibility of parole." (*Id.* at 472.) However, the district court sentenced Green to the Montana State Prison for 80 years, and required that,

to be eligible for parole, Green had to complete phases 1 and 2 of sex offender treatment. (*Id.* at 473.)

STATEMENT OF THE FACTS

On April 6, 2022, the district court began the jury trial in this matter. (Tr. at 39.)

S.D. testified that she was 76 years old and had lived in Missoula for 42 years. (*Id.* at 194-95.) She told the jury that she was scared and humiliated about the case and identified Green as the man who raped her. (*Id.* at 195.)

S.D. had known Green since he was 16 years old.[2] (*Id.* at 196.) She described their relationship as: "We were friends." (*Id.* at 197.) S.D. elaborated that, over the course of their relationship, she had helped Green with "[s]chool clothes, helped with homework, he had no place to stay, you know, fed him." (*Id.*) S.D. was familiar with Green because he was the ex-boyfriend of her niece, Menahke Fish (Fish). (*Id.*)

Green and Fish had a child together. (*Id.* at 199.) S.D. described him as "the most wonderful child," and stated, "This is one reason why this whole thing is so upsetting to me." (*Id.*) S.D. described her relationship with Green's son and

[2] S.D. also testified that she "saw him once when he was about seven or eight." (Tr. at 197.)

summarized attempts she had made to foster Green's relationship with him. (*Id.* at 199-201.)

Prior to the rape, S.D. would have described Green as a "surrogate son." (*Id.* at 198.) S.D. was also friends with Green's mother. (*Id.*) When Green was approximately 19 years old, he had lived with S.D. at her apartment for a number of months. (*Id.* at 199.)

On the morning of December 9, 2020, S.D was "sound asleep" in her apartment. (*Id.* at 202.) She awoke to pounding on her door, and when she asked who it was, Green responded, "Aunt [S.D.], it's me, let me in." (*Id.* at 203.) S.D. thought it was unusual for Green to be there at this time and thought "something had happened and he was in trouble or something." (*Id.*) S.D. was wearing her nightgown and had wrapped herself in a blanket. (*Id.*)

Green appeared "all shaggy, dirty, [and] agitated." (*Id.* at 204.) Despite the fact that the temperature outside was "very cold," Green was wearing only a t-shirt and pants. (*Id.* at 205.) Green smelled like alcohol. (*Id.*) It had been "a little over a year" since S.D. had last seen Green. (*Id.*) However, she had no concerns about letting him into her apartment because she "totally trusted him." (*Id.* at 205-06.)

Upon entering S.D.'s apartment, Green told her that he had been "at his cousin's at a party and they were going to drink all night and he couldn't be late for work." (*Id.* at 206.) S.D. told Green to go into the bathroom and clean himself up

and she would put on a pot of coffee. (*Id.* at 207.) When asked why she made coffee, S.D. responded, "Well, because it was morning. I was half asleep and he smelled like alcohol." (*Id.*)

S.D. heard the shower running, and heard Green suggest that she join him in the shower. (*Id.* at 208.) This struck S.D. as "very" unusual, as Green had never said anything similar to her before. (*Id.*) S.D. sat down in her recliner and heard Green walking down the hallway towards the living room. (*Id.* at 209.)

S.D. told Green the coffee was ready, turned around, and observed that Green was naked and did not appear to have showered. (*Id.* at 209-10.) S.D. noted that Green's hair was not wet, and "[h]e didn't look any cleaner than when he went in there." (*Id.* at 210.)

Green began trying to touch S.D.'s breast. (*Id.* at 212.) He told S.D. that he "had been planning this for a long time." (*Id.*) S.D. was in total shock. (*Id.*) She described Green's demeanor as, "It was just matter of fact, this is going to happen and you have no way of stopping it and stop fighting with me." (*Id.*)

S.D. testified that Green was "jerking on himself and masturbating and that," attempting to obtain an erection. (*Id.* at 213.) S.D. described what happened next:

> He's grabbing my legs and that and his hand was under my nightgown and that, and he eventually—he couldn't get an erection and then he grabbed me by my shoulders and pushed me, then over to the couch and I was still hugging my blanket and that and we fought and we fought and I kicked and told him to go home and that, and he stuck his finger in my vagina and made the comment nice and tight.

> And then he was on top of me and he was trying to put his penis in me and he was too high and he was really hurting me. And then he said, I have to feel wet, I have to feel wet. And then he finally with his finger he found wet and it was over in two seconds and that, and I was shaking and that, he got up and he looked at the clock or his watch or something and said Oh, I'm late. And he bent down, kissed me on top of the head and said, "See you later, Aunt [S.D.]," and walked out of the door.

(*Id.* at 214.)

S.D. described Green's initial attempts to penetrate her as causing "[e]xcruciating pain." (*Id.* at 215.) S.D. continued to resist, she stated, "I was able to fight that and keep that and that, but then he just got more forceful and more forceful." (*Id.* at 216.) During the rape, S.D. told Green, "Go home to your wife. Leave me alone. Why are you doing this? I helped you just like your mother did, things of that nature." (*Id.*)

S.D. testified that Green ejaculated in "less than a minute," and he did so on the inside and outside of her vagina. (*Id.* at 217.) Her hips were still "very hurtful" from the way Green had bent her legs. (*Id.* at 218.)

The State asked S.D. how she felt when Green kissed her forehead and left. (*Id*.) She responded:

> I felt defeated. I felt betrayed. I felt humiliated. I felt like dirt. I was in disbelief. I laid in that position on the couch gripping my blanket for I don't know how long, how long I laid there. But I know I did not get up and take a shower until sometime in the late afternoon.

(*Id.*)

When asked why she felt disbelief, S.D. testified:

> Because I trusted him. I totally trusted him. And that's not—I did not live my life in a bad way to be so humiliated. And there is just—I don't know that you just can't explain like, I'm just not the same person and I can't make myself become that person I was before. I can't stand anybody behind me. I have PTSD. I barely leave my apartment. I don't have trust in anybody. It's just—it's just I'm not me anymore. It changed my life.

(*Id.* at 219.)

S.D. did not remember whether she spoke with anyone else for the remainder of that day. (*Id.*) However, the next morning, she broke down crying and told one of her daughters what had happened. (*Id.*)

S.D. described some of her feelings about the rape, and explained:

> I should have fought harder. I fought as hard as I could. I fought and fought, didn't want this to happen. And I was just totally ashamed and not—it's not something—and I—it has taken quite a while that I could face a lot of people in the family.

(*Id.* at 220.)

News of the rape eventually reached S.D.'s niece, Fish, who called the police. (*Id.* at 222.)

S.D.'s daughter took her to "First Step" for an examination. (*Id.* at 223.) Prior to being raped by Green, S.D. had not had sex for "ten plus" years. (*Id.* at 225.) When asked if she was interested in a sexual relationship with Green, S.D. responded, "I'd say that's totally ridiculous." (*Id.* at 226.)

Finally, S.D. was asked what it was about the rape that she could not forget. (*Id.* at 227.) S.D. responded:

> That he was a trusted friend. Somebody that I would have helped him with anything that was, you know, wrong and that and I totally trusted him as a friend. And part of the family and I never treated him any different than I did my own kids. And it was totally—I just can't get over the fact that he did that.

(*Id.*)

Elizabeth Wilks (Wilks) was one of S.D.'s daughters, and knew Green "[f]rom family functions, from him staying with my mom, living with my mom for a little bit." (*Id.* at 236.) Wilks testified that Green was connected to the family because he had a child with her cousin, Fish. (*Id.*)

Wilks lived next door to S.D. and was "[v]ery close" with her. (*Id.* at 237.) After the rape, Wilks was forced to quit her full-time job and work 15 hours a week because she began caring for S.D. (*Id.*)

Wilks had learned of the rape on December 10, 2020, when S.D. sent her a text and asked her to come to her apartment and lock the door behind her. (*Id.* at 242.) Wilks found S.D. wrapped in a blanket, crying and visibly upset. (*Id.*) After learning about the rape, Wilks informed her aunt and called her sisters. (*Id.* at 244.) When asked whether she had ever seen any indication that her mother was interested in a sexual relationship with Green, Wilks responded, "That is a crock of crap." (*Id.* at 247.)

Sara Williamson (Williamson) was another of S.D.'s daughters and had lived in Helena for about 20 years. (*Id.* at 248.) Williamson knew Green "from being part of the family." (*Id.* at 249.) Williamson described her mother's demeanor prior to the rape as: "Sweet, friendly, willing to help people, outgoing." (*Id.* at 250.) When asked if her demeanor had changed since the rape, Williamson responded, "She's not the same. She doesn't want to go anywhere. Totally different." (*Id.*)

Upon learning about the rape from Wilks, Williamson drove to Missoula and went straight to her mother's apartment. (*Id.* at 251.) Williamson took her mother to First Step for the examination. (*Id.* at 252.)

When asked if she had observed anything that might indicate S.D. was interested in a sexual relationship with Green, she responded, "No. That infuriates me. No. No way." (*Id.* at 254.)

Fish testified that she had dated Green in high school, and the two had an 11-year-old son together. (*Id.* at 255.) Fish indicated that Green's contact with their son was sporadic, and that there were typically "several years" between their visits. (*Id.* at 256.) Fish testified that S.D. had "acted as a mother" to Green. (*Id.*) She elaborated that S.D. gave Green rides, bought him food, and at one point let him live with her. (*Id.*)

On December 10, 2020, Fish's mother had called and informed her that Green had raped her aunt. (*Id.* at 257.) Fish testified that she knew S.D. wouldn't do anything to jeopardize Green's relationship with their son. (*Id.* at 258.) When asked why she felt that calling the police was her responsibility, Fish responded, "Because I brought [Green] to our family." (*Id.*)

Officer Shea Hollis (Officer Hollis) had been employed as a Missoula police officer for five and a half years. (*Id.* at 276.) On December 10, 2020, Officer Hollis went to S.D.'s residence in response to the 911 call from Fish. (*Id.* at 278.) Officer Hollis found S.D. "extremely upset, crying." (*Id.* at 279.) Officer Hollis took some photographs of the interior of S.D.'s apartment, which were admitted into evidence as State's Exhibits 1-A through 1-D. (*Id.* at 281-82.) Officer Hollis testified that Green was located and interviewed by herself and Detective Michael McCarthy (Detective McCarthy) that same day. (*Id.* at 282.)

Detective McCarthy had worked for the Missoula Police Department for over 18 years, and had been a detective for about 4 years. (*Id.* at 285.) His assignment as a detective was to sexual assault and SIWOC cases. (*Id.* at 286.) On December 10, 2020, Officer Hollis contacted him to assist with this investigation. (*Id.*) At about 3:30 or 4 p.m. that day, the officers interviewed Green. (*Id.* at 287.) Prior to any substantive discussions, Green agreed to give Detective McCarthy a buccal swab for DNA analysis. (*Id.* at 289.)

Green told officers that he knew S.D. and referred to her as his "auntie." (*Id.* at 290.) Green confirmed he had been at S.D.'s house on December 9, 2020. (*Id.* at 291.) Green also stated that prior to going to S.D.'s he had been at his cousin's house, drinking and using meth. (*Id.*)

Green told the officers he drove from his cousin's house to S.D.'s house, and that he "didn't really remember" what happened at S.D.'s because he was "basically blacked out." (*Id.* at 292.) In response to leading questions, Green did recall taking a shower and that S.D. had made him coffee. (*Id.*) Green admitted that he shouldn't have been driving and that he was "really too . . . fucked up." (*Id.* at 294.)

When the officers asked if he had had any sexual contact with S.D., Green told them that "he really didn't know what happened due to his intoxication and being blacked out." (*Id.* at 295-96.) When Detective McCarthy asked him how he felt about the allegations, Green responded, "How would you feel?" and "This was my family." (*Id.* at 296.) During the interview, Green never admitted or denied that there had been any sexual activity between himself and S.D., consensual or otherwise. (*Id.* at 297.)

Detective McCarthy obtained surveillance video from outside S.D.'s apartment. (*Id.* at 298.) The video was introduced into evidence as State's

Exhibit 4. (*Id.*) It showed Green arriving at S.D.'s apartment on December 9, 2020, at about 7:13 a.m. (*Id.* at 299.)

Jacqueline Towarnicki (Towarnicki) was a nurse practitioner at Partnership Health Center, who also worked night and weekend shifts for First Step. (*Id.* at 318-19.) She had a master's degree and two national board licenses in nursing. (*Id.* at 319.) Towarnicki was certified as a SANE, and had completed at least 200 of these examinations for First Step. (*Id.* at 322.)

On December 10, 2020, Towarnicki examined S.D. (*Id.* at 323-34.) S.D. reported a lot of areas on her body that were in pain, and some of her injuries were visibly evident. (*Id.* at 325.) S.D. described pain in her shoulders, chest, hips, and vaginal area. (*Id.* at 326.) S.D. told Towarnicki that her legs had been forcibly separated, and Green had lifted her right leg up towards her head while her left leg was still down. (*Id.*) S.D. told Towarnicki that she had not had sexual intercourse in over ten years. (*Id.* at 329.)

Towarnicki documented bruises to S.D.'s torso. She noted separation of tissue just below S.D.'s urethral opening, elaborating that "very clearly there was a tear in the tissue" (*id.* at 335) and "quite a bit of erythema and swelling on the external [vaginal] tissue right around the opening" (*id.* at 337). Towarnicki observed hemorrhaging to S.D.'s vaginal walls and cervix (*id.* at 338) and documented discoloration in S.D.'s cervix, consistent with bruising (*id.* at 340).

Towarnicki testified that she would not expect to see these kinds of injuries during "normal sexual intercourse." (*Id.* at 341.) Towarnicki noted that S.D. had suffered "significant genital trauma" (*id.* at 344), she stated, "In this case to see external and internal findings was significant to me," and opined that the trauma was consistent with penile and digital penetration (*id.* at 345).

The State's final witness, Joseph Pasternak (Pasternak) was the DNA supervisor and technical leader overseeing biological operations and analyses for the State of Montana Forensic Science Division in Missoula.[3] (*Id.* at 399.) Pasternak performed DNA analysis for this case, and his report was submitted into evidence as State's Exhibit 5. (*Id.* at 403-04.)

Indications of male DNA tested positive on both the internal and external vaginal swabs. (*Id.* at 405.) Pasternak obtained a partial profile from a sperm cell fraction from the internal vaginal swab, which was consistent with being Green's DNA. (*Id.* at 410.) From the external vaginal swab, Pasternak obtained a major DNA profile that matched Green's DNA profile. (*Id.* at 412.)

Green testified and claimed that S.D. had explicitly consented to having sex. The alcohol and meth-induced memory loss he had described to the officers was apparently no longer an issue. Green testified that on December 8, 2020, he had

[3] As Pasternak had scheduling issues, the parties agreed that they would move on to the defense case. (Tr. at 349-50.) Pasternak testified out of order on the morning of April 8, 2022. (*Id.* at 399.)

been with his cousins, "partying" (*id.* at 351), and that he drove to S.D.'s because "It was a safe place to be" (*id.* at 352). Green agreed that S.D. had offered him a shower and started making him coffee. (*Id.* at 353.)

Green described what happened after he showered:

> I came out. I sat down in the recliner and then we started talking about having sex, and she agreed. She took off her underwear and then we moved over to the couch and I started using my fingers as foreplay and then the sex occurred and then it was over real quickly and then after that she was like angry at me. And then we got into an argument about the money that I owed her. And then after that happened I knew it was time to leave so I left.

(*Id.*)

Green alleged that he and S.D. had been talking "about different things," when he brought up sex, apparently rather spontaneously. (*Id.* at 354.) Green clarified that when he mentioned having sex, S.D. "just said, yeah, and then she took off her underwear." (*Id.*) Green recalled ejaculating, and testified that they only had intercourse in the missionary position. (*Id.* at 355.) Green claimed that S.D., who had just suffered what was medically documented as significant genital trauma, "started arguing about the money that I owed her back in 2012 when I wrecked one of her cars." (*Id.*)

Green further recalled that during the intercourse, he was wearing "pants, a shirt, a vest and then my ball cap." (*Id.* at 356.) He stated that, after the sex, he

basically buttoned up his pants and walked out the door, and S.D. was just sitting on the couch when he left her apartment. (*Id.*)

On December 10, 2020, Green's probation officer "showed up" at his work and arrested him, then dropped him off at the police department. (*Id.* at 358-59.) Green testified that he lied to the police when he told them he did not recall the morning in question because he wasn't comfortable talking to the police about it. (*Id.* at 362-63.) Green's attorney asked him to explain why he was upset about the allegations, and Green stated:

> I mean, she could have said no at any time, you know. So why bring up the allegations later on? Why was there delay in the reporting of me and you knew that you were going to say those things about somebody? Why delay the reporting on that? I don't understand it. So that's why I was in shock.

(*Id.* at 364.) Green admitted that S.D. "was like a mother figure to me." (*Id.*)

During cross-examination, Green admitted drinking alcohol the evening before the rape, but denied he had used meth. (*Id.* at 367.) When reminded that he told the police he had been using meth, and asked whether that was a lie, Green responded, "I'm guessing it is." (*Id.* at 368.) he admitted to telling the police that he was so "fucked up" he could not even recall how he got to S.D.'s house. (*Id.* at 369.)

Green admitted that when the police asked if it was possible that "something bad happened [at S.D.'s apartment]," his response was, "I don't know what

happened, to tell you the truth." (*Id.* at 378.) He clarified that this was the only time he had ever had sex with S.D. (*Id.* at 379.)

Green admitted the police had asked him, "[I]s it possible that you sexually assaulted [S.D.]?" (*Id.* at 382.) Green acknowledged that his response was, "I don't know, I don't know. I can't give you guys a solid answer. I don't know. I want to tell you something but I don't have nothing to tell you because I don't know." (*Id.* at 383.) Green's excuse for that response was that "they were—didn't give me a lawyer to talk with." (*Id.*) He then stated, "I didn't want to talk to the police because I don't trust the police." (*Id.*)

During his redirect examination, it became apparent that Green had managed to confuse himself. He had denied using meth prior to the rape and testified that he lied to the police when he told them that he had used meth. (*Id.* at 367.) However, in response to subsequent questions from his attorney, Green confirmed using meth prior to the rape and testified that he was telling the truth when he admitted to using meth to the police. (*Id.* at 386.) The defense presented no other evidence after Green's testimony. (*Id.* at 390.)

The jury was then excused for the day. (*Id.*) The defense withdrew its proposed instructions and did not object to any of the instructions the district court intended to give. (*Id.*) The instruction regarding the definition of "knowingly" was not mentioned during this process.

The next morning, on April 8, 2022, Green's counsel confirmed that they had received the amended jury instructions and that they had "no issues." (*Id.* at 397.) The State called Pasternak as its final witness (*id.* at 399), then rested (*id.* at 419).

The jury returned a verdict of guilty and found that Green inflicted bodily injury to S.D. during the rape. (*Id.* at 450; Doc. 51.)

The State will include additional relevant facts in the argument section of its brief.

SUMMARY OF THE ARGUMENT

Given the compelling evidence of Green's guilt, he has failed to meet his heavy burden of establishing that had his attorneys requested the conduct-based definition of "knowingly" in the jury instructions, there is a reasonable likelihood that the result of his trial would have been different. The trial came down to a credibility determination with respect to whether 75-year-old S.D. consented to intercourse, which caused her "excruciating pain" and "significant genital trauma," with then-29-year-old Green, whom she considered a "surrogate son." The jury weighed the evidence, and logically found S.D. credible. The issue of whether Green acted knowingly was not contested. Therefore, Green has failed to show prejudice, and his claim of IAC necessarily fails.

Further, this Court should not invoke plain error review as there was overwhelming evidence to support the verdict, and the issue of whether Green acted "knowingly" was never in dispute. The jury was presented with two very different versions of events, both of which depicted Green acting consistently with the conduct-based definition of knowingly. In either version, Green was aware of his own conduct and the circumstance of whether S.D. consented to having sex with him. The jury received the "elements" instructions that clearly set forth the State's burden to establish each element beyond a reasonable doubt.

The district court gave the "results-based" definition of knowingly, instead of the "conduct-based" definition, which this Court has determined is the appropriate instruction for SIWOC cases. Nevertheless, the evidence was overwhelming that Green physically forced intercourse upon S.D. without her consent. Based on S.D. kicking and fighting and telling him to leave her alone and go home to his wife, which the jury necessarily found had occurred, Green was aware of his own conduct and of the fact that S.D. had not consented to sex. Green cannot establish that declining to review this instruction would result in a miscarriage of justice, a fundamentally unfair trial, or a compromise of the integrity of the judicial process.

ARGUMENT

I. Standard of review

Ineffective assistance of counsel claims are mixed questions of law and fact, which this Court reviews de novo. *State v. Wright*, 2021 MT 239, ¶ 7, 405 Mont. 383, 495 P.3d 435 (citations omitted).

Whether an unpreserved error warrants plain error review is a question of law reviewed de novo. *State v. Trujillo*, 2020 MT 128, ¶ 6, 400 Mont. 124, 464 P.3d 72. This Court may use the plain error doctrine to review unpreserved claims in situations implicating a defendant's constitutional rights and where failing to review the alleged error may result in a manifest miscarriage of justice, leave unsettled the question of fundamental fairness of the proceedings, or compromise the integrity of the judicial process. *State v. Lawrence*, 2016 MT 346, ¶ 9, 386 Mont. 86, 385 P.3d 968 (citations omitted). This Court invokes plain error review sparingly, on a case-by-case basis. *Id.* ¶ 6 (citation omitted).

II. Green has failed to meet his burden to show that he was prejudiced by his alleged IAC.

A. Applicable law

This Court reviews IAC claims by applying the two-prong test set forth in *Strickland v. Washington,* 466 U.S. 668 (1984). *State v. Kougl*, 2004 MT 243, ¶ 11, 323 Mont. 6, 97 P.3d 1095. A defendant arguing IAC 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. *State v. Valenzuela*, 2021 MT 244, ¶ 29, 405 Mont. 409, 495 P.3d 1061 (citing *Baca v. State*, 2008 MT 371, ¶ 16, 346 Mont. 474, 197 P.3d 948). If an insufficient showing is made regarding one prong of the test, there is no need to address the other prong. *Strickland*, 466 U.S. at 697." If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Id.* Because Green cannot prove the prejudice prong of *Strickland*, his IAC claim fails.

To establish prejudice under the second prong of *Strickland*, 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." *Id.* The likelihood of a different result must be "substantial." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

B. Green has failed to meet the prejudice prong of *Strickland*.

There may have been an occasion when a 75-year-old woman was awakened in the early morning by a 29-year-old man, whom she considered a son and who smelled like alcohol, agreed to his spontaneous suggestion that they have sex, removed her own underwear, and then enjoyed the process while suffering bodily

injury in the form of "significant genital trauma." (Tr. at 344.) The evidence here proved beyond a reasonable doubt that this was not that occasion.

Green cites *State v. Hamernick*, 2023 MT 249, ¶ 27, 414 Mont. 307, 545 P.3d 666, to support his contention that giving the results-based instruction of "knowingly" requires reversal of a SIWOC conviction, particularly when the defense is consent. (Appellant's Br. at 12-13.) Beyond the fact that the defendant in *Hamernick* preserved the issue in district court (*Hamernick*, ¶ 12), this case is readily distinguishable.

At trial, Hamernick testified to a plausible version of events about a sexual encounter he had with a teenage coworker with whom he had a history of sharing signs of affection. *Id*. ¶¶ 5, 8-10. The day after the alleged SIWOC, Hamernick gave a statement to police. *Id.* ¶ 11. Hamernick recalled the encounter, and "repeatedly" explained his version of what happened. *Id.* Hamernick told the police that when the victim rejected his attempt at vaginal sex, he thought that pertained only to vaginal sex, and he continued rubbing his penis on her clitoris. *Id.* Hamernick did not dispute that sexual intercourse with the victim took place, but specifically disputed *whether he was aware* that the victim had not consented. *Id.* ¶ 20. In other words, in *Hamernick*, the issue of whether the defendant acted "knowingly" was the contested issue. *Id.*

Importantly, the erroneous results-based definition of "knowingly" allowed the State to argue that "'based on all of his words and actions,' Hamernick should have been aware of the high probability of the fact that [the victim] had not consented to his sexual advances." *Id.* This Court observed, "The jury's legal basis for acquitting Hamernick, if he was believed factually, was seriously eroded by the prosecution's position, permitted by the instruction, that he was guilty under the law even by his own version of the incident." *Id.* ¶ 23.

Under the facts of this case, the State made no such argument, nor could it. Green testified that when he impetuously suggested they have sex, "[S.D.] just said, yeah, and then she took off her underwear." (Tr. at 354.) Green alleged that they moved to the couch, where he "started to use my fingers first before my penis entered her vagina." (*Id.*) Green testified that, after he ejaculated "real fast," the next words spoken between the two of them were about money he owed S.D. for wrecking her car in 2012. (*Id.* at 355.) Green further testified that S.D. did not seem upset, was not crying, and "was just sitting on the couch" when he left her apartment. (*Id.* at 356.)

In other words, Green testified that he was fully aware of his own conduct and whether S.D. had consented because he alleged that S.D. explicitly consented to having sex. Green's attorney argued that S.D. was just an "embarrassed" 75-year-old woman who falsely accused Green of rape in order to hide the fact that

she had consensual sex with him from her family. (*Id.* at 432-33.) If the jury believed Green, or if they disbelieved S.D., it would have acquitted him regardless of what definition of "knowingly" was utilized in the jury instructions.

However, the opposite is equally true because, unlike in *Hamernick*, the fact that Green acted knowingly was not in dispute. The jury believed S.D.'s testimony, necessarily determining that she expressed a very clear lack of consent and that Green physically forced her into having sex against her will. Green was undeniably aware of his own conduct and that S.D. was not consenting to sex as she fought and kicked and told him to leave her alone and go home to his wife (*id.* at 216), all while he inflicted "excruciating pain" (*id.* at 215) and "significant genital trauma" (*id.* at 344) upon her. To assert that the definition of knowingly prejudiced Green's defense or was a factor in jury deliberations under these circumstances is not a realistic argument.

Green cites *State v. Secrease*, 2021 MT 212, 405 Mont. 229, 493 P.3d 333, where this Court reversed a conviction for IAC due to counsel's failure to object to the conduct-based definition of knowingly in an obstruction case. (Appellant's Br. at 17.) The defendant in that case refused to consent to a blood test and was convicted of felony DUI and obstruction of a peace officer. *Secrease*, ¶ 8.

During deliberations, the jury asked, if the refusal took place after a warrant was issued, "is that obstructing, hindering, or impairing the law[?]" *Id.* ¶ 7. In reversing the conviction on grounds of IAC, this Court reasoned in part that:

> [T]he jury's question in this case showed confusion on the results-based nature of the obstruction charge and, in response to that confusion, they were referred back to the incorrect conduct-based instruction by the District Court. Counsel's deficient representation *in this case prejudiced Secrease's case such that there is a reasonable probability [the jury] would have arrived at a different outcome.* As such, Secrease's obstruction of a peace officer conviction must be reversed and remanded to the District Court for a new trial.

Id. ¶ 16 (internal citations and quotations omitted) (emphasis added).

Here, the jury had no questions during its deliberations. The evidence presented by both sides established only two possible versions of the truth with respect to the issue of consent. Under either version, Green was aware of his own conduct and aware of whether S.D. had consented to sexual intercourse.

Green testified that S.D. gave explicit oral consent to having sex and then removed her own underwear. (Tr. at 353-54.) S.D., on the other hand, testified that she expressed an unambiguous lack of consent, and that Green used physical force to violate her against her will while she attempted to fight him off. For example, "I was still hugging my blanket and that and *we fought and we fought and I kicked and told him to go home and that*, and he stuck his finger in my vagina and made the comment nice and tight." (Tr. at 214 (emphasis added).)

The jury weighed the conflicting evidence and determined that S.D.'s version of the events should prevail. *See State v. Weigand*, 2005 MT 201, ¶ 7, 328 Mont. 198, 119 P.3d 74. Such a determination is "exclusively within the province of the trier of fact." *State v. Spottedbear*, 2016 MT 243, ¶ 32, 385 Mont. 68, 380 P.3d 810 (citation omitted).

Based on finding S.D.'s testimony credible, the jury necessarily determined that Green had acted consistently with the conduct-based definition of knowingly when he ignored S.D.'s pleas to stop and overpowered her resistance to force her into intercourse against her will and caused her significant vaginal trauma.

Green has not met his burden to establish that giving the conduct-based definition of knowingly would have created a reasonable likelihood of a different outcome sufficient to undermine confidence in this verdict. The evidence that Green was aware of his own conduct and aware that S.D. did not consent was compelling and overwhelming, and proven beyond a reasonable doubt based on the jury's determination of credibility. The definition of knowingly was not relevant to that determination.

When the jury determined that Green had forced sex on S.D. against her will and caused her bodily injury, it necessarily found beyond a reasonable doubt that he acted knowingly, consistent with the conduct-based definition of that word. There was no possibility the jury convicted Green based on a "high probability"

S.D. was not consenting. S.D. testified to using unmistakable expressions of her lack of consent, including fighting and kicking, to which Green responded by becoming "more forceful and more forceful." (Tr. at 216.)

Based on its credibility determination, the jury concluded there was no reasonable doubt that Green was aware S.D. did not consent to sex when he physically overcame her resistance, forcibly raped her, and caused her bodily injury. Green has failed to prove he was prejudiced by the erroneous definition of knowingly and his claim of IAC likewise fails.

III. Green has failed to meet his burden to establish that plain error review is warranted.

A. Additional facts

In closing arguments, neither side addressed whether Green *knowingly* had sex with S.D. without her consent. The State recited the definition of consent: "Now, consent means, as Judge Marks told you, words or overt action indicating a freely-given agreement to have sexual intercourse." (Tr. at 427.) The State pointed out that the case came down to a credibility determination, and remarked:

> [S.D.'s] statement was unambiguous. Mr. Green raped her; forcibly raped her. Despite her attempts to fight him off, despite her attempts to play on his sympathies by reminding him she was like a mother to him, despite her telling him no and to stop multiple times, he overcame her express will and violated her body.

(*Id.* at 428.)

The State summarized the two versions of what occurred on December 9, 2020, as follows:

> On the one hand you have a woman who's lived in fear for a year and a half and who, by telling her family, the police, the nurse and you what happened, exposed the worst experience of her life to the entire world, over and over and over again. And she had to do so in front of the man that raped her, in front of strangers throughout the courtroom, in front of all of you, just so she could hope for some justice. On the other hand you have an admitted liar who desperately wants not to be held responsible for what he did.

(*Id.* at 432.)

Green's attorney argued that the intercourse was consensual, and asked the jury, "Is it embarrassing because she was raped by someone she knows or is it embarrassing because she wanted to instigate a sexual contact with someone significantly younger than herself?" (*Id.*)

Green's attorney later said, "I think [the State] put it correctly. There's really—this is a one-issue situation for you guys." (*Id.* at 437.) "The only issue that is really at question is whether this was with consent or not." (*Id.*) He continued, "With all the testimony and all the evidence that had come into place, *you have to make the determination of whether this was consensual or nonconsensual. That's it*." (*Id.* (emphasis added).) Green's attorney even acknowledged that "there's been plenty of evidence that bodily injury did occur." (*Id.* at 438.)

B. Applicable law

Green concedes that he did not object to the results-based definition of knowingly and thus failed to preserve the argument he now attempts to raise on appeal. (Appellant's Br. at 14.) *See* Mont. Code Ann. § 46-16-410(3) (party waives right to challenge "any portion of the instructions or omission from the instructions unless an objection was made" when the jury instructions were being settled). Green asks this Court to reach his unpreserved argument by invoking plain error review. (Appellant's Br. at 13.)

To establish he is entitled to plain error review, Green must "firmly convince" this Court that failure to consider his argument on appeal will "(1) result in a manifest miscarriage of justice; (2) leave unsettled the question of the fundamental fairness of the trial or proceedings; or (3) compromise the integrity of the judicial process." *State v. Daniels*, 2019 MT 214, ¶¶ 30-31, 397 Mont. 204, 448 P.3d 511 (internal quotations and citations omitted).

"The particular facts and circumstances of each case drive the applicability of the plain error doctrine." *State v. Godfrey*, 2004 MT 197, ¶ 39, 322 Mont. 254, 95 P.3d 166 (quoting *State v. Finley*, 276 Mont. 126, 134, 915 P.2d 208, 213 (1996)). "[A] mere assertion that constitutional rights are implicated or that failure to review the claimed error may result in a manifest miscarriage of justice is insufficient to implicate the plain error doctrine." *State v. King*, 2013 MT 139,

¶ 39, 370 Mont. 277, 304 P.3d 1 (citation omitted). Further, "[p]lain error review should not act as 'a prophylactic for careless counsel.'" *State v. Earl*, 2003 MT 158, ¶ 25, 316 Mont. 263, 71 P.3d 1201 (quoting *State v. Price*, 2002 MT 284, ¶ 23, 312 Mont. 458, 59 P.3d 1122).

The conduct-based definition of knowingly provides: "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." Mont. Code Ann. § 45-2-101(35). This Court has determined that this conduct-based definition of knowingly should be used in SIWOC cases. *State v. Rowe*, 2024 MT 37, ¶ 31, 415 Mont. 280, 543 P.3d 614 (citing *Hamernick*, ¶ 26).

C. Plain error review should not be invoked in this case.

In *State v. Deveraux*, 2022 MT 130, 409 Mont. 177, 512 P.3d 1198, this Court declined to invoke plain error review of a SIWOC conviction on the grounds that the district court gave an erroneous definition of "consent."[4] *Deveraux*, ¶ 35. The defendant claimed the victim had consented to sex and alleged the victim lied

[4] The district court gave the definition of consent as amended in 2017. *Deveraux*, ¶ 35. The defendant's conduct was alleged to have occurred in 2011 through 2014. *Id.* ¶ 37 n.5. The appropriate definition of "without consent," as it existed at the relevant times included a requirement that "the victim is compelled to submit by force against the victim or another." *Id.* ¶ 37.

when she testified to the multiple ways she had expressed that she did not give consent. *Id.* ¶ 40.

This Court declined to conduct plain error review "because the evidence and arguments presented at trial, despite the incorrect instruction, nonetheless required the jury to resolve the requisite factual issue of whether Devereaux had used force." *Id.* This Court concluded that:

> Consequently, despite the incorrect instruction, the jury could not avoid considering the trial's substantial evidentiary conflict and evaluating witness credibility to resolve the central factual dispute of whether Deveraux had used force to submit [the victim] to sexual intercourse without her consent. Therefore, the issue of Deveraux's use of force was central to his conviction, and the jury necessarily and correctly considered force as the basis for finding [the victim's] lack of consent.

Id.

Here, the definition of the word "knowingly" did not allow the jury to avoid weighing the respective credibilities and resolving the factual dispute regarding whether S.D. consented to sexual intercourse. By finding S.D.'s testimony credible, the jury necessarily determined that Green physically forced S.D. to submit to sexual intercourse against her will and without her consent. As S.D. testified, she was able to kick and fight, "but then [Green] just got more forceful and more forceful." (*Id.* at 216.)

It was not possible for Green to physically force sexual intercourse upon S.D. as she described, while inflicting "excruciating pain," without Green being

"aware of [his] own conduct or that the circumstance [S.D.'s lack of consent] exist[ed]." Mont. Code Ann. § 45-2-101(35). Therefore, by determining that S.D. was credible and Green was guilty of the charge, the jury determined that Green acted consistently with the conduct-based definition of "knowingly."

Green's attorney admitted that the only contested issue was whether S.D. consented to having sex with Green. As he emphasized in his closing argument, "With all the testimony and all the evidence that had come into place, *you have to make the determination of whether this was consensual or nonconsensual. That's it*." (Tr. at 438 (emphasis added).)

Neither side ever suggested or implied that Green was unaware of his own conduct or mistaken about whether S.D. consented. Again, if the jury believed Green's allegation that S.D. had explicitly consented to the sex, or did not believe S.D.'s testimony, which described a forcible rape, Green would have been acquitted, regardless of which definition of "knowingly" was given in the jury instructions.

However, S.D.'s description of the forcible rape was corroborated by significant medical findings, common sense, and biological science. Green's account of S.D.'s consent was preposterous, inconsistent with his prior statement, and did not align with the evidence. The jury logically found S.D.'s version of events credible.

Based on the jury's determination that S.D. was credible, there was no reasonable doubt that Green was aware of his own conduct and aware that S.D. did not consent to having sex. Regardless of the instruction, the jury necessarily found that Green acted consistently with the conduct-based definition of "knowingly." Therefore, Green was not prejudiced by the erroneous instruction.

Under the totality of the circumstances in this case, the results-based definition of knowingly did not result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial, or compromise the integrity of the judicial process. *Daniels*, *supra*, ¶¶ 30-31. The evidence supporting the verdict was overwhelming. Whether Green acted "knowingly" was not a contested issue, and therefore there is no reason to invoke plain error review.

CONCLUSION

Green has not met his burden of establishing that plain error review is warranted, and he has not met his burden to establish that he was prejudiced by his

/ / /

attorney's failure to object to the jury instructions. The jury's verdict in this case, which amounted to a determination of witness credibility, should be affirmed.

Respectfully submitted this 16th day of August, 2024.

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

By: */s/ Thad Tudor*
THAD TUDOR
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 7,811 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

/s/ Thad Tudor
THAD TUDOR

CERTIFICATE OF SERVICE

I, Thad Nathan Tudor, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 08-16-2024:

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

Penelope S. Strong (Attorney)
2517 Montana Ave.
Billings MT 59101
Representing: Pitaskummapi David Green
Service Method: eService

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

Electronically signed by Janet Sanderson on behalf of Thad Nathan Tudor
Dated: 08-16-2024