

DA 22-0465

IN THE SUPREME COURT OF THE STATE OF MONTANA

2024 MT 245

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

MICHAEL LEE MARFUTA, JR.,

Defendant and Appellant.

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APPEAL FROM: District Court of the Sixth Judicial District,  
In and For the County of Park, Cause No. DC-21-25  
Honorable Nickolas C. Murnion, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Tammy Hinderman, Appellate Defender, Alexander H. Pyle, Assistant  
Appellate Defender, Lewistown, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Brad Fjeldheim, Daniel  
Guzynski, Selene Koepke, Assistant Attorneys General, Helena, Montana

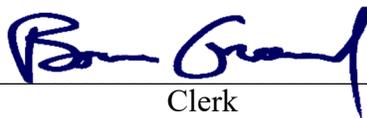
Kendra K. Lassiter, Park County Attorney, Livingston, Montana

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Submitted on Briefs: July 17, 2024

Decided: October 29, 2024

Filed:

  
Clerk

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Justice Jim Rice delivered the Opinion of the Court.

¶1 Michael Lee Marfuta, Jr. (Marfuta) appeals the denial of his motion to dismiss premised upon his contention the District Court improperly granted the State leave to pursue enhanced weapons charges under § 46-18-221, MCA (2019), without first seeking pre-filing approval. Marfuta also contends the District Court erred in instructing the jury on the requisite mental state for Attempted Deliberate Homicide, and claims his trial counsel was ineffective for failing to correct mischaracterizations of the requisite mental state at trial. He asks this Court to review jury instructions, prosecutor's statements, and the performance of his trial counsel for plain and cumulative error, and reverse his Attempted Deliberate Homicide convictions entered after jury trial in the Sixth Judicial District Court, Park County.

¶2 We restate the issues as follows:

1. *Did the District Court err by denying the motion to dismiss the weapon enhancement of the Attempted Deliberate Homicide charges?*
2. *Did the District Court's jury instructions regarding mental state for Attempted Deliberate Homicide constitute reversible error?*
3. *Did the Appellant's trial counsel render ineffective assistance?*

¶3 We affirm.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

¶4 Appellant Marfuta resided at a trailer park in Livingston, Montana, for over a decade. He worked for the park, providing maintenance services pursuant to an informal agreement with the park's owner. In early February 2020, the park was sold to a nonprofit corporation formed by the park's residents pursuant to a federal financing program. For

several months after the sale, Marfuta received no wages from the park or assurance about whether his position would continue under the new ownership. On June 19, 2020, the corporation's board, through its attorney, informed Marfuta that the federal program required a formal arrangement for his continued work at the park, including a contract, business license, insurance, and a Form W-9. Marfuta was already dealing with worsening health problems and selling his possessions to generate cash, and the complexity of the new employment requirements raised the specter that he would not be able to continue to work and would be evicted from the park for failing to pay rent.

¶5 Marfuta responded to the board's lawyer via email on June 23, 2020, beginning: "Dear scumbag uninformed lawyer . . ." and stating he would be "taking a stand" against any "outside interference on this situation" because he had "nothing to lose." Behind on his rent, Marfuta was served with a seven-day notice to pay or quit on July 24, 2020. Marfuta responded the same day with another email, calling the board's attorney a "lazy ass lawyer" and explaining at length that the notice to pay or quit did not matter because he was prepared to escalate the situation into a "death by cop or suicide by cop" event, adding, "[t]he only way I'm going anywhere is in a body bag. I choose this hill to die on."

¶6 On August 7, 2020, three Park County Sheriff's officers performed a welfare check at Marfuta's residence. Marfuta initially began "yelling and screaming," but the officers were able to calm him down. However, standing on his porch, Marfuta said, "we're not gonna have any troubles unless you come to evict me." Pointing at his gate, Marfuta said, "this is the line you can't come across... if you come across it'll be a fight." Marfuta did

not directly answer the officers' questions about whether he had firearms inside the trailer. The officers left without further incident.

¶7 The park's board subsequently initiated eviction proceedings against Marfuta for failure to pay rent. Marfuta did not respond to the judicial proceedings, and the board's attorney sent Marfuta the District Court's default judgment and order to vacate on October 28, 2020, via email and mail. On October 29, 2020, Marfuta sent an email to the board's attorney, stating in part:

I am not going anywhere and I cannot wait for you to try to enforce. I told you before, you will have to kill me to get me out. I will make sure it costs more than 10 times this bullshit judgement [sic] in equipment and man power alone to try and remove me. Bring force to my door and I will respond in kind. First person to show up with a gun, and tries to tell me what to do will start an amazing shit show. Try and collect from a pile of ashes, I will be damned if you ever see a dime . . . Wonder if any press want to come and watch the death and destruction you are bringing to pass. I accept your challenge and await your response—I am ready and do not expect to survive. Your move.

¶8 The board obtained writs of possession and assistance from the District Court, and law enforcement attempted to serve Marfuta with an eviction notice on February 2, 2021. Given Marfuta's previous threats and statements, sheriff's officers attempted to serve Marfuta while he was away from his trailer. A Park County deputy sheriff initiated a stop of Marfuta's vehicle just as Marfuta drove into the trailer park. However, Marfuta evaded the stop and drove to his trailer. A detective parked near Marfuta's trailer approached the driver's side of Marfuta's vehicle on foot but, as Marfuta exited his vehicle, he flashed a large knife at the detective and ran into his trailer. A standoff ensued.

¶9 Officers evacuated the neighborhood, displacing residents from approximately 40 homes. At about 3:00 p.m., the Bozeman-Gallatin County Joint Special Response Team (SRT) arrived with an armored vehicle called the BearCat. Officers parked the BearCat to the south of Marfuta's trailer. Near 5:00 p.m., officers obtained a felony arrest warrant for Marfuta. Police negotiators told Marfuta he could retrieve his dogs from his vehicle, which presented an opportunity for a safe apprehension of Marfuta by temporarily disabling him by use of a non-lethal foam bullet. Police shot Marfuta in the leg with the foam bullet, but an officer's attempt to take Marfuta into custody was unsuccessful. Marfuta retreated into his trailer and waived the barrel of a gun out his door.

¶10 Marfuta did not have a phone inside the trailer, making it difficult for officers to communicate with him. Around 6:00 p.m., the SRT removed a window on the trailer to facilitate placement of a crisis "throw-phone" inside the residence. Marfuta responded by shooting once at the BearCat. Around 8:00 p.m., officers placed a throw-phone into the trailer through the removed window. Marfuta answered the phone and made several threats to use lethal force. Around midnight, Marfuta told negotiators that he was going to sleep. Officers attempted to keep him engaged by turning on sirens and throwing rocks at his trailer. Marfuta then fired a shot that passed between two officers and struck a nearby building.

¶11 Around 1:00 a.m. on February 3, 2021, the Lewis and Clark County SRT replaced the Gallatin County team, and a team from Billings arrived with a second armored vehicle called the Bear, which they parked close to the northwest corner of Marfuta's trailer. The standoff continued throughout the day and, around 9:45 p.m., officers decided to move

Marfuta's truck using the BearCat to gain better visibility of the trailer. Negotiators assured Marfuta the truck would not be damaged. While speaking to a negotiator, Marfuta said, "I got to go shoot these guys . . . [They're] taking my truck."

¶12 The phone conversation ceased and Marfuta stepped partially outside of his trailer, carrying his rifle. Officers shot at Marfuta, striking him in the arm. Marfuta shot towards officers both to the south and northwest of his trailer, and retreated inside. Marfuta continued to discharge his weapon. Multiple officers returned fire at Marfuta. The SRT attempted to remove the curtain that was covering Marfuta's window by spraying it with water. At trial, Marfuta testified to shooting three high-caliber rounds at the water spray and an additional three rounds toward the Bear. When the shooting stopped, Marfuta informed officers he had been shot in the arm. Marfuta surrendered around 10:30 p.m. and was arrested and transported to a nearby hospital. A following investigation revealed that law enforcement fired approximately 100 rounds into Marfuta's trailer and that Marfuta shot at least 22 rounds towards officers.

¶13 The State filed an Information against Marfuta containing eight charges, including one count of Attempted Deliberate Homicide. The State based its charges, in part, on Marfuta "firing multiple shots" at officers, but the State did not cite the weapon enhancement provision of § 46-18-221, MCA, regarding use of a weapon. Later, the State moved for leave to file an Amended Information and supporting affidavit, which contained numerous references to Marfuta using dangerous weapons and described the standoff that occurred between Marfuta and law enforcement, although the motion itself did not reference the weapon enhancement statute. The motion for leave, affidavit, the District

Court's order granting leave to file the Amended Information, and the Amended Information itself were all filed at the same time, followed immediately by the District Court's order setting an arraignment on the Amended Information. The Amended Information charged Marfuta with two counts of felony Attempted Deliberate Homicide for "firing a gun" towards officers, and one count of felony Assault on a Peace Officer. For each of the Attempted Deliberate Homicide counts, the Amended Information contained the following language:

Pursuant to Mont. Code Ann. § 45-5-102(2), this offense is punishable by life imprisonment, or by imprisonment in the state prison for a term not less than 10 years or more than 100 years, except as provided in Mont. Code Ann. §§ 46-18-219 and -222 (2019).

Pursuant to Mont. Code Ann. § 46-18-221 (2019), the Defendant is also subject, in addition to the sentence for the offense, to a term of imprisonment in the state prison for not less than 2 years or more than 10 years for the use of a dangerous weapon. Said sentence shall run consecutive to the sentence provided in the offense.

¶14 Marfuta moved to dismiss the weapons enhancements, arguing the State "did not file or otherwise give notice to Marfuta regarding a weapons enhancement" on the ground that the motion for leave and affidavit did not refer to § 46-18-221, MCA, and thus "the State did not request or receive [the District Court]'s probable cause determination or leave to charge those enhancing facts and enhanced offenses." The District Court denied Marfuta's motion, explaining:

The Court clearly granted leave to the State to file the Amended Information and found probable cause to believe the Defendant committed the alleged offenses in the Order Granting State's Motion for Leave to File Amended Information. . . . The two counts of Attempted Deliberate Homicide specifically alleged that the offense was committed by the Defendant firing a gun towards the officers. The charges correctly cited § 46-18-221, MCA,

and stated that the Defendant faced an additional term of imprisonment of not less than two years or more than ten years for the use of a firearm. The sentence enhancement language was also in accordance with § 46-1-401, MCA in that it cited 46-18-221 and provided notice of the enhancing act which was the use of a dangerous weapon. The Court also notes several references in the Motion and Affidavit for Leave to File Amended Information to the Defendant using dangerous weapons including firearms and knives in the commission of the offenses for which he is charged.

¶15 Marfuta’s jury trial lasted seven days, beginning April 25, 2022. During defense counsel’s opening statement, the State objected to defense counsel’s characterization of Marfuta’s Attempted Deliberate Homicide charge as “taking actions to purposely kill law enforcement.” The State explained: “If we are gonna [sic] instruct the jury now what Attempted Deliberate Homicide [is,] it’s purposely and knowing. . . . It’s not just purposely.” The court sustained the State’s objection. During settlement of instructions, the parties stipulated to most of the instructions, including the definitions of knowingly and purposely. The District Court rejected the defense’s proposed jury instruction on Attempted Deliberate Homicide, which would have required the jury to find that “Marfuta attempted to cause the death of” officers to find him guilty. Instead, the court adopted the State’s proffered instruction, which stated that Attempted Deliberate Homicide was committed when a person, “with the purpose to commit the offense of deliberate homicide . . . commits any act towards the commission of the offense of deliberate homicide. . .,” thus omitting the “attempt to cause death” language proposed by Marfuta. The District

Court reasoned the State's instructions were the more correct statement of law. The relevant jury instructions read as follows:<sup>1</sup>

14. A person acts knowingly when the person is aware there exists the high probability that the person's conduct will cause a specific result.
  15. A person acts purposely when it is the person's conscious object to cause such a result.
  16. Purpose and knowledge ordinarily may not be proved directly because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the Defendant's state of mind, including his/her purpose and knowledge, from the Defendant's acts and all other facts and circumstances in evidence which indicate his/her state of mind.
  17. A person commits the offense of deliberate homicide if the person purposely or knowingly causes the death of another human being.
  18. A person commits the offense of attempted deliberate homicide when, with the purpose to commit the offense of deliberate homicide the person commits any act towards the commission of the offense of deliberate homicide. . . .
  19. To convict the Defendant of the offense of attempted deliberate homicide, as alleged in Count I, the State must prove the following elements:
    1. That on or about February 3, 2021, in Park County, Montana [Defendant] performed an act toward the commission of the offense of Deliberate Homicide by firing a gun toward [officers],
- AND
2. That the Defendant did so with the purpose to commit the offense of deliberate homicide.

¶16 During its closing argument, the State offered an explanation of the jury instructions, stating: “[Y]our question here is, did [Marfuta] perform an act toward the commission of the offense of deliberate homicide? . . . he had [to] fire the gun with the conscious object to commit the offense of deliberate homicide . . . [with] the high

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<sup>1</sup>Jury instruction 20 was substantively identical to 19, except that it asked the jury to consider Marfuta's actions with respect to Count II of Attempted Deliberate Homicide.

probability that firing a gun would cause the death of one of these officers.” In her closing statement, defense counsel applauded the State’s overview of instructions, saying the prosecutor did a “great job” explaining the law.

¶17 The jury found Marfuta guilty of two counts of Attempted Deliberate Homicide and one count of Assault on a Peace Officer. The jury also found Marfuta used a dangerous weapon in committing both Attempted Deliberate Homicide offenses for purposes of the weapon enhancement. The District Court sentenced Marfuta to 80 years in the Montana State Prison for each Attempted Deliberate Homicide conviction, and a 10-year sentence for Assault on a Peace Officer, all to run concurrently. The court also imposed two 2-year sentences under § 46-18-221, MCA, weapon enhancement, to run concurrently to each other and consecutively to the other sentences, for a total term length of 82 years.

¶18 Marfuta appeals.

### **STANDARD OF REVIEW**

¶19 This Court reviews de novo mixed questions of fact and law, including legal determinations and rulings on motions to dismiss. *State v. Dunsmore*, 2015 MT 108, ¶ 10, 378 Mont. 514, 347 P.3d 1220; *State v. Giffin*, 2021 MT 190, ¶ 11, 405 Mont. 78, 491 P.3d 1288. Claims of ineffective assistance of counsel are also subject to de novo review. *State v. Bristow*, 2023 MT 188, ¶ 11, 413 Mont. 403, 537 P.3d 103.

¶20 “The District Court has broad discretion to formulate jury instructions.” *Nolan v. Billings Clinic*, 2020 MT 167, ¶ 24, 400 Mont. 326, 467 P.3d 545. We review a district court’s jury instructions for an abuse of discretion. *State v. Gibbons*, 2024 MT 63, ¶ 18, 416 Mont. 1, 545 P.3d 686 (citing *State v. Christiansen*, 2010 MT 197, ¶ 7, 357 Mont. 379,

239 P.3d 949). To test for abuse of discretion, we ask whether the court acted arbitrarily, without employment of conscientious judgment, or exceeded the bounds of reason resulting in substantial injustice. *Cook v. Bodine*, 2024 MT 189, ¶ 10, 418 Mont. 49, 555 P.3d 236 (citing *Bessette v. Bessette*, 2019 MT 35, ¶ 13, 394 Mont. 262, 434 P.3d 894). Accordingly, a district court’s jury instructions must be reviewed “in their entirety in order to determine if they fully and fairly instruct the jury on the law applicable to the case.” *Peterson v. St. Paul Fire and Marine Ins. Co.*, 2010 MT 187, ¶ 22, 357 Mont. 293, 239 P.3d 904; *see also State v. Rowe*, 2024 MT 37, ¶ 17, 415 Mont. 280, 543 P.3d 614.

¶21 This Court may review unpreserved errors that implicate fundamental rights where failure to review them “may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process.” *State v. Deveraux*, 2022 MT 130, ¶ 21, 409 Mont. 177, 512 P.3d 1198. We apply the doctrine of plain error review “sparingly, on a case-by-case basis, considering the totality of circumstances of each case.” *State v. George*, 2020 MT 56, ¶ 5, 399 Mont. 173, 459 P.3d 854 (internal quotations omitted). The cumulative error doctrine applies only when an appellant establishes multiple errors that collectively prejudice his due process rights. *State v. Cunningham*, 2018 MT 56, ¶ 32, 390 Mont. 408, 414 P.3d 289.

## DISCUSSION

¶22 1. *Did the District Court err by denying the motion to dismiss the weapon enhancement of the Attempted Deliberate Homicide charges?*

¶23 Marfuta argues he should not have been subject to the weapon enhancement on the attempted homicide charges because the State did not properly receive leave from the District Court to file the enhanced weapons charges within the Amended Information. The process by which a prosecutor may request leave to file an information is provided by statute:

- 1) The prosecutor may apply directly to the district court for permission to file an information against a named defendant . . .
- 2) An application must be by affidavit supported by evidence that the judge or chief justice may require. If it appears that there is probable cause to believe that an offense has been committed by the defendant, the judge or chief justice shall grant leave to file the information, otherwise the application is denied.

Sections 46-11-201(1-2), MCA.

¶24 “Obtaining leave to file an information is not a mere perfunctory matter, but rests in the sound discretion of the district judge.” *Giffin*, ¶ 8. Likewise, “the determination whether a motion to file an information is supported by probable cause is left to the sound discretion of the trial court.” *State v. Kern*, 2003 MT 77, ¶ 17, 315 Mont. 22, 67 P.3d 272 (quoting *State v. Arrington*, 260 Mont. 1, 6-7, 858 P.2d 343, 346 (1993)). The information must be complete and contain “such salient facts as will allow the district judge to make an independent determination that an offense has been committed.” *State v. Johnson*, 197 Mont. 122, 126, 641 P.2d 462, 465 (1982). While a criminal defendant “has a right to an independent judicial determination of probable cause, the defendant has no vested right to a particular procedure for the probable cause determination.” *State v. Strobel*, 268 Mont. 129, 132, 885 P.2d 503, 505 (1994) (citing *State v. Higley*, 190 Mont. 412, 418-19, 621

P.2d 1043, 1048 (1980)). The State also retains the ability to seek leave to amend a criminal information. *State v. Cardwell*, 187 Mont. 370, 375, 609 P.2d 1230, 1233 (1980). The process of requesting leave serves two purposes: “to ensure a defendant receives a neutral determination of probable cause for detention under the amended charges” and receives notice of the charges. *Cardwell*, 187 Mont. at 375, 609 P.2d at 1233.

¶25 Section 46-18-221, MCA, provides that a person who knowingly uses a firearm in the commission of an underlying offense may be sentenced to an additional term in the state prison of not less than 2 years or more than 10 years. Sentencing enhancements generally are governed by § 46-1-401, MCA, which provides that enhancements cannot be imposed unless “the enhancing act, omission, or fact *was charged in the information, complaint, or indictment, with a reference to the statute or statutes containing the enhancing act, omission, or fact and the penalty for the enhancing act, omission, or fact.*” Section 46-1-401(1)(a), MCA (emphasis added). A jury is required to make an independent finding that the enhancing act, omission, or fact occurred beyond a reasonable doubt. Section 46-1-401(1)(c), MCA.

¶26 Here, the original Information did not reference the weapon enhancement and the statute governing the same, but the State later sought leave to amend its Information. The State’s supporting affidavit for the motion for leave to file the Amended Information described in detail the firefight between Marfuta and law enforcement, making numerous references to Marfuta’s use of dangerous weapons, but did not mention § 46-18-221, MCA. As quoted above, the Amended Information itself provided the possible penalty for Attempted Deliberate Homicide and also cited § 46-18-221, MCA, providing notice that

Marfuta may also be subject to an additional term of imprisonment for use of a dangerous weapon should he be convicted of Attempted Deliberate Homicide. In its order granting leave for the State's Amended Information, the District Court explained that a review of the State's filings had provided "probable cause to believe the Defendant [] committed the alleged criminal offenses." Then, in its order denying Marfuta's motion to dismiss, the District Court further explained it had "clearly granted leave to the State to file the Amended Information and found probable cause to believe the Defendant committed the alleged offenses. . . ." The District Court noted that "[t]he sentencing enhancement language was in accordance with § 46-1-401, MCA in that it cited 46-18-221 and provided notice of the enhancing act which was the use of a dangerous weapon."

¶27 Marfuta's argument rests upon two technical points. First, Marfuta argues that the weapon sentence enhancement is "effectively an offense." He thus argues the enhancement is subject to all the statutes governing the filing of a standalone offense, including being separately cited as a charge within the motion for leave to file the Information ("§ 46-18-221 weapon charges require pre-filing, independent approval, just like other charges."). On that premise, he argues secondly that when the District Court denied his motion to dismiss by stating it had "clearly granted leave" and found probable cause for "the alleged offenses," it was only referring to the original charges, not the enhancements ("The District Court's order also apparently separated the alleged offenses (*i.e.*, attempted deliberate homicide and assault) from the enhancements (*i.e.*, § 46-18-221 weapon violations).") (Internal quotations omitted)).

¶28 We conclude that neither technical point is correct. While it is true that the State must comply with similar procedural requirements to pursue a weapon sentence enhancement, it is not itself a standalone offense. Rather, it is an enhancement that is added to the sentence for conviction of an underlying offense when that offense is committed with a dangerous weapon. *See* § 46-18-221(1), MCA (a person who has been found guilty of any offense, other than an offense in which the use of a weapon is an element of the offense, with a dangerous weapon, “shall, in addition to the punishment provided for the commission of the underlying offense,” be sentenced to a term of 2 to 10 years). Section 46-1-401, MCA, the enhancement procedural statute, requires an enhancement be “charged in the information, complaint, or indictment, with a reference to the statute or statutes containing the enhancing act.” Section 46-1-401(1)(a), MCA. Here, although the weapon enhancement statute was not cited in the motion for leave to file the Amended Information, the State nonetheless provided a supporting affidavit that asserted Marfuta had used dangerous weapons while committing the crime, demonstrating probable cause for this action, and also complied with all of the requirements of § 46-1-401(1)(a), MCA, by citing § 46-18-221(1), MCA, and setting forth the alleged enhancing acts within the Amended Information itself.

¶29 Secondly, the District Court did not reason, in denying the motion to dismiss, that it had granted leave to file only the underlying offenses, and not the enhancements. Rather, after stating it had “clearly granted leave” for “the alleged offenses,” it immediately explained, as quoted above, that the “alleged offenses” it was referencing were the offenses that included the enhanced weapon allegations. This is likewise supported by the record.

The State’s motion for leave to file the Amended Information and supporting affidavit, the court’s order granting leave to file, the Amended Information, and the court’s order setting an arraignment on the Amended Information, were all dated, signed by the District Court Judge, and filed on the same day, September 28, 2021. The record thus reflects that the District Court had all of these documents before it on the same day, and supports the court’s explanation of its actions.

¶30 Reviewing the District Court’s determination, we conclude its probable cause determination, including for Marfuta’s use of a dangerous weapon during the commission of the underlying offenses, was proper. The District Court ensured Marfuta received notice of its neutral determination of probable cause, as well as notice of the State’s intention to pursue sentence enhancement under § 46-18-221, MCA. Marfuta’s argument that the enhanced charges violated Marfuta’s constitutional due process rights is unavailing. We conclude the District Court correctly denied Marfuta’s motion to dismiss.<sup>2</sup>

¶31 *2. Did the District Court’s jury instructions regarding mental state for Attempted Deliberate Homicide constitute reversible error?*

¶32 Marfuta argues the guilty verdict must be set aside due to errant instructions regarding the mental state required to prove Attempted Deliberate Homicide. Marfuta claims the jury was not informed about Attempted Deliberate Homicide’s “purpose-to-kill”

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<sup>2</sup> Although this Court generally reviews a District Court’s determination that a motion for leave to file an information is supported by probable cause for abuse of discretion (*see City of Bozeman v. Lehrer*, 2020 MT 55, ¶ 7, 399 Mont. 166, 459 P.3d 850), we held in *Giffin* that a District Court’s decision to deny a motion to dismiss for lack of probable cause is “a mixed question of law and fact.” *Giffin*, ¶¶ 10-11. Like in *Giffin*, Marfuta’s motion to dismiss was not entirely fact-based, but also included questions of law, namely, whether the State had properly sought leave to file its Amended Information. Thus, we apply a de novo standard of review here.

requirement. We first address the two issues preserved for appeal, those being the District Court's sustaining of the State's objection to the Defense's discussion of mens rea during opening statements, and the District Court's acceptance of the State's jury instructions. We will then address the unpreserved issues for which Marfuta seeks plain and cumulative error review.

### **A. Preserved Issues**

¶33 Marfuta first argues the District Court erred and misinformed the jury by sustaining the State's objection to defense counsel's discussion of mental states during her opening statement. The State objected when Marfuta's counsel said the jury would need to determine whether Marfuta acted "to purposely kill law enforcement." The District Court sustained the State's objection, explaining it was inappropriate to discuss the requisite mental state "because I haven't instructed the jury on those elements."

¶34 We have upheld restrictions upon discussion of pre-instruction mental states during opening statements. *See State v. Martinez*, 188 Mont. 271, 285, 613 P.2d 974, 982 (1980) ("The proper function of an opening statement is to outline the defense and the evidence that the defendant intends to produce. It is improper to expound or argue legal theories or to attempt to instruct the jury as to the law of the case"); *see also State ex rel. Fitzgerald v. District Court*, 217 Mont. 106, 120-21, 703 P.2d 148, 157-58 (1985). Given these permissible constraints, we conclude the District Court did not abuse its discretion by restricting the discussion about mental state until the jury had been instructed about the issue.

¶35 Next, Marfuta argues the District Court improperly rejected the Defense’s proposed jury instructions by providing instructions based largely on the State’s explanation of the requisite mens rea for Attempted Deliberate Homicide. Marfuta’s counsel objected to the State’s proffered jury instructions, which did not explicitly reference a “purpose to kill” mental state or an “attempt to cause death of” an officer. Instead, the court adopted the State’s proffered instruction, which stated that Attempted Deliberate Homicide was committed when a person, “with the purpose to commit the offense of deliberate homicide . . . commits any act towards the commission of the offense of deliberate homicide . . .,” thus omitting Marfuta’s proposed “attempt to cause death” of an officer language. The District Court stated its instructions were “a more correct statement of the law.”

¶36 We will reverse a lower court’s jury instructions only when the court acts arbitrarily or “without the employment of conscientious judgment” in a way that exceeds the bounds of reason and results in substantial injustice to one or more parties. *Nolan*, ¶ 3. Because it is “impossible to deliver the whole of the law in any one instruction,” *State v. Holmes*, 207 Mont. 176, 186, 674 P.2d 1071, 1076 (1983), “jury instructions must be read as a whole.” *State v. Kirn*, 2023 MT 98, ¶ 50, 412 Mont. 309, 530 P.3d 1; *State v. Williams*, 2015 MT 247, ¶ 21, 380 Mont. 445, 358 P.3d 127. It is the duty of the district court, not trial counsel, to provide “minimally sufficient” instructions to fully and fairly instruct the jury on relevant law. *State v. Mills*, 2018 MT 254, ¶ 36, 393 Mont. 121, 428 P.3d 834.

¶37 In criminal matters, juries must be “instructed on the mental state pertinent to the crime charged.” *State v. Ilk*, 2018 MT 186, ¶ 18, 392 Mont. 201, 422 P.3d 1219. Attempted Deliberate Homicide is an inchoate crime against the person, meaning the result of the

crime (i.e., causing death of another) was never completed. *State v. St. Marks*, 2020 MT 170, ¶ 22, 400 Mont. 334, 467 P.3d 550. Section 45-5-102(1)(a), MCA describes the elements of Deliberate Homicide: “[a] person commits the offense of deliberate homicide if . . . the person purposely or knowingly causes the death of another human being. . . .” Section 45-4-103(1), MCA defines “Attempt” as, “with the purpose to commit a specific offense, the person does any act toward the commission of the offense.” “‘Knowingly’ refers to a state of mind in which a person acts, while not toward a certain objective, at least with full knowledge of relevant facts and circumstances.” *State v. Miller*, 1998 MT 177, ¶ 22, 290 Mont. 97, 966 P.2d 721; § 45-2-101(35), MCA. “‘Purposely’ is the most culpable mental state and implies an objective or design to engage in certain conduct, although not particularly toward some ultimate result.” *Miller*, ¶ 22; § 45-2-101(65), MCA. Montana law allows “[t]he existence of a mental state [to] be inferred from the acts of the accused and the facts and circumstances connected with the offense.” Section 45-2-103(3), MCA.

¶38 This Court has explained that Attempted Deliberate Homicide requires “a result-based mental state instruction.” *Ilk*, ¶ 19; *see also* Comments to Montana Criminal Jury Instructions (MCJI) No. 4-103(a). The jury must be instructed regarding the State’s burden to prove the accused took “an act toward” purposely or knowingly causing the death of another. *State v. Lake*, 2022 MT 28, ¶ 29, 407 Mont. 350, 503 P.3d 274 (where the defendant was charged with Attempted Deliberate Homicide, “the State had the initial burden of proving that [the Defendant] purposely committed an act toward purposely or knowingly causing [the victim] to die”). Causing the death of another human being is a

result, whereas the taking of a material step is merely conduct. *See Ilk*, ¶¶ 18-20. “Attempted deliberate homicide requires proof that the defendant had the purpose to cause the death of another human being and acted toward purposely or knowingly causing the death of another human being.” *State v. Sellner*, 286 Mont. 397, 401, 951 P.2d 996, 998 (1997); *see also State v. Gone*, 179 Mont. 271, 279, 587 P.2d 1291, 1296 (1978).

¶39 Here, the District Court instructed the jury on the statutory definitions of “purposely” and “knowingly,” which both included result-based language, and to which the parties stipulated. The District Court’s instructions on Attempted Deliberate Homicide further stated that one must perform the act with “the purpose to commit the offense of deliberate homicide.” In referencing the specific counts with which Marfuta was charged, the District Court specified that the State had to prove Marfuta “performed an act toward the commission of the offense of Deliberate Homicide by firing a gun . . . with the purpose to commit the offense of Deliberate Homicide.” While the firing of a gun is conduct-based, the purpose to commit Deliberate Homicide addresses the result, which the District Court instructed was “caus[ing] the death of another human being.” Instruction 16 informed the jury of their ability to “infer the Defendant’s state of mind, including his/her purpose and knowledge, from the Defendant’s acts and all other facts and circumstances in evidence which indicate his/her state of mind.”

¶40 We conclude that, when considered as a whole, the instructions given by the District Court properly permitted a guilty verdict if the jury found the accused’s deliberate yet incomplete actions were directed towards either purposefully or knowingly causing the death of another. The jury was free to infer from the evidence presented at trial whether

Marfuta acted with the purpose of committing Deliberate Homicide. Admittedly, the District Court's instructions were a bit convoluted and could have been more concise. Instruction 18 would have benefitted from result-based language, so the jury did not need to cross-reference Instruction 17 to glean the result of causing death. However, the jurors were provided with jury instructions that correctly captured all of the elements of the Attempt and Deliberate Homicide statutes. Therefore, we conclude the instructions as a whole were minimally sufficient to fully and fairly instruct the jury on relevant law.

### **B. Unpreserved Issues**

¶41 Marfuta also argues that other, unpreserved trial errors resulted in a denial of due process, and should be reviewed under the plain error doctrine and as part of cumulative error. Chiefly, Marfuta asserts the District Court compromised the trial before it began by issuing a pretrial order framing the mental state issue as whether “the Defendant was aware that there exists a high probability that shooting his gun w[ould] cause . . . the killing of the officers.” Marfuta argues that “[t]hese words establish that the District Court considered a knowing mental state to be sufficient to convict, rather than the purposeful mental state that attempted deliberate homicide requires.” Marfuta also argues the operative jury instructions were incomplete to the point that the jury was able to convict without the State proving every fact necessary to the charged offense. He contends that the prosecutor's closing repeatedly and incorrectly advocated for the jury to find him guilty based merely upon a knowing mental state. Marfuta asks this Court to review these unpreserved issues for both plain error and cumulative error. The State responds that, as it argued above, the instructions as a whole correctly advised the jury, the law presumes the

jury followed the instructions, and, even if the prosecutor’s lengthy survey of the instructions was convoluted, closing arguments “do not substitute for proper jury instructions,” citing *State v. Seacreeze*, 2021 MT 212, ¶ 16, 405 Mont. 229, 493 P.3d 335.

¶42 For plain error review of an unpreserved issue, “the appealing party must (1) show that the claimed error implicates a fundamental right and (2) ‘firmly convince’ this Court that failure to review the claimed error would result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial or proceedings, or compromise the integrity of the judicial process.” *State v. Norman*, 2010 MT 253, ¶ 17, 358 Mont. 252, 244 P.3d 737 (citing *State v. Taylor*, 2010 MT 94, ¶¶ 14-17, 356 Mont. 167, 231 P.3d 79). The cumulative error doctrine requires that an appellant demonstrate a collection of errors prejudiced his due process rights. *State v. Cunningham*, 2018 MT 56, ¶ 32, 390 Mont. 408, 414 P.3d 289.

¶43 The pretrial order Marfuta references—an Order Regarding [the] State’s Motion in Limine to Exclude Defendant’s Mental Health Experts—did not infringe upon his right to a fair trial. The order was part of pretrial litigation to resolve an evidentiary dispute and ultimately had no bearing on the mental state instructions given to the jury, which were settled separately. Similarly, we are not convinced that the jury was left with a prejudicial misunderstanding of the law that could have resulted in a fundamental unfairness of the proceeding or a manifest miscarriage of justice. Considering the jury instructions were adequate as a whole, as discussed above, the jury’s verdict was premised upon a proper rendering of the law. Within the prosecutor’s survey of the instructions during closing argument, he stated that “a person acts purposely when it is the person’s conscious object

to cause such a result. So in this case by pointing a firearm towards these officers is it his conscious object to cause death?” The prosecutor then added that purpose into his explanation of the crime of attempted deliberate homicide:

So a person commits the offense of attempted deliberate homicide when with a purpose to commit that offense, that’s what it’s talking about the purpose to commit that offense of deliberate homicide, the person commits any act toward the commission of the offense of deliberate homicide.

¶44 These comments were thus consistent with our precedent, noted above, that “[a]ttempted deliberate homicide requires proof that the defendant had the purpose to cause the death of another human being and acted toward purposely or knowingly causing the death of another human being.” *Sellner*, 286 Mont. at 401, 951 P.2d at 998. Consequently, upon review of the record, we conclude that exercise of plain error review is not necessary to prevent a manifest miscarriage of justice, and, given our conclusions regarding the instructions, there was not cumulative error requiring reversal.

¶45 3. *Did the Appellant’s trial counsel provide ineffective assistance?*

¶46 Lastly, Marfuta contends his trial counsel provided ineffective assistance because she did not object to the State’s explanation of the instructions, particularly as to mental state, and instead “applaud[ed]” the State’s explanation during closing argument. He adds that trial counsel may have contributed to the District Court’s giving of improper instructions by making imprecise statements about mental state and by failing to offer instructions more specifically providing a “purpose to kill” requirement, for which there was no plausible justification. He contends that his counsel “could have used the law to strike at the heart of the State’s case,” but instead “didn’t speak up firmly for [his] rights,”

and thus, but for these errors, the jury would not have found him guilty of attempted deliberate homicide.

¶47 Under the Sixth Amendment to the United States Constitution, all criminal defendants have the fundamental right to a fair trial, which includes assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S. Ct. 2052, 2063 (1984). In *McMann v. Richardson*, 397 U.S. 759, 771, n.14, 90 S. Ct. 1441, 1449 (1970), the U.S. Supreme Court recognized that “the right to counsel is the right to the effective assistance of counsel.” The Montana Constitution also “guarantee[s] defendants the right to effective assistance of counsel in criminal cases.” *State v. Williams*, 2015 MT 247, ¶ 20, 380 Mont. 445, 358 P.3d 127; Mont. Const. art. II, § 24. We analyze ineffective assistance of counsel (IAC) claims using the Supreme Court’s two-prong test as articulated in *Strickland*. *Oliphant v. State*, 2023 MT 43, ¶ 37, 411 Mont. 250, 525 P.3d 1214. “Under the first prong of the *Strickland* test, the defendant must show ‘counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment.’” *Oliphant*, ¶ 37 (quoting *Golie v. State*, 2017 MT 191, ¶ 7, 388 Mont. 252, 399 P.3d 892). “Under the second prong of *Strickland*, the defendant must show that counsel’s performance prejudiced the defense.” *Oliphant*, ¶ 37. “Thus, if a defendant makes an insufficient showing regarding one prong of the test, there is no need to address the other prong.” *State v. Gunderson*, 2010 MT 166, ¶ 68, 357 Mont. 142, 237 P.3d 74.

¶48 Marfuta’s counsel initially objected to the State’s jury instructions on mental state but as discussed above, offered an alternative requiring the jury to find that he attempted to cause the death of law enforcement officers, which did not accurately capture the law of

attempt, including that the State’s burden was to prove “an act toward” purposely or knowingly causing the death of another. *Lake*, ¶ 29. As the State notes, inclusion of the “purpose to kill” language within the instructions, which Marfuta now requests, would have been redundant to the legally correct instructions given to the jury. Failing to object when, under the circumstances “would have been, arguably, without procedural or substantive merit, or which, otherwise, would likely not have changed the outcome of the proceeding,” will not support an IAC claim. *Ellison v. State*, 2013 MT 376, ¶ 18, 373 Mont. 159, 315 P.3d 950. As such, Marfuta has not overcome the “strong presumption” that his counsel’s performance fell within the wide range of reasonable professional assistance. *Whitlow v. State*, 2008 MT 140, ¶ 15, 343 Mont. 90, 183 P.3d 861.

¶49 As with our conclusion regarding Marfuta’s plain error argument, we likewise here conclude that Marfuta’s counsel did not fail to provide appropriate representation, and that his IAC claim fails the first prong of *Strickland*.

¶50 We affirm.

/S/ JIM RICE

We concur:

/S/ MIKE McGRATH  
/S/ BETH BAKER  
/S/ JAMES JEREMIAH SHEA  
/S/ DIRK M. SANDEFUR

Justice Ingrid Gustafson, dissenting.

¶51 I do not agree the jury was fully and fairly instructed on the law of attempt. This, coupled with the prosecutor’s blatantly inaccurate, erroneous explanation of the jury

instructions; the court's failure to correct the prosecutor's inaccurate explanation of the instructions; and defense counsel's concurrence with and praise for the prosecutor's inaccurate argument about the instructions deprived Marfuta of his right to a fair trial and resulted in a manifest miscarriage of justice.

¶52 To convict an individual of deliberate homicide, the State must prove beyond a reasonable doubt that the person purposefully or knowingly caused the death of another. Section 45-5-102(1)(a), MCA. To convict a person of deliberate homicide the State does not have to prove the defendant intended to kill the victim. It is sufficient to convict by merely showing the person knew or was aware there existed a high probability that his conduct would result in someone's death. Thus, a person with no intention of killing anyone can be convicted of deliberate homicide if he engages in conduct—such as discharging a firearm when others are nearby—which results in the death of another. Under the same circumstances but where no death occurs, the State cannot convict a person of attempted deliberate homicide without proving the person intended to kill the victim. Merely engaging in conduct that the person is aware has a high probability of causing death—such as discharging a firearm when others are nearby—is not enough. The jury instructions were erroneous, however, because the court instructed the jury in Instruction No. 14 that the element of “knowingly” could be satisfied if “the person is aware there exists the high probability that the person's conduct will cause a specific result.” A conviction for attempt, however, requires that the jury find the defendant had the purpose to commit *the specific* offense. Section 45-4-103(1), MCA (An individual “commits the offense of attempt when, with the purpose to commit a specific offense, the person does an

act toward the commission of the offense”); *State v. Rossbach*, 2024 MT 157, ¶ 48, 417 Mont. 287, 553 P.3d 402. The prosecution must carry the burden of proving the requisite mental state of the defendant for any offense—here, an *attempt* to commit deliberate homicide. “Purposely or knowingly” are statutory descriptions of various states of the human mind. They are specific elements included in the definition of the criminal offense at issue. No element of an offense can be presumed and, thus, the requisite mental state of mind must be established by the prosecution and believed by the jury beyond a reasonable doubt. *See Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319 (1977); *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068 (1970). By erroneously instructing the jury that Marfuta could be convicted for an attempt if he was aware of a high probability that his conduct would cause a specific result, the court—and the prosecutor reinforcing the error through his argument—did not fairly instruct the jury. As a result, the State’s burden of proof was reduced. Indeed, given the facts of this case it was easy for a jury to determine under the erroneous jury instruction (Instruction No. 14) that the element of knowingly had been satisfied. However, under the law of attempt the State was required to prove that Marfuta possessed the specific intent to kill law enforcement, not that he was aware of a high probability a death would occur.

¶53 Additionally, the prosecutor capitalized on this erroneous instruction when he explained to the jury that it could indeed find Marfuta guilty of attempted deliberate homicide even if Marfuta did not intend to kill anyone as Marfuta was aware there existed a high probability that his conduct of discharging a gun near others could cause someone’s death:

[T]his instruction really deals with the idea like, in this case, number fourteen deals with the idea I'm gonna [sic] fire a gun right into a crowd of people. I don't really care what happens to that gun I'm gonna [sic] fire it in there, I don't - I'm kind of indifferent to whether hit somebody or not. Um, if it hits somebody fine if it doesn't fine, but I don't have a conscious object to strike and hit anybody with a bullet. I'm just gonna [sic] fire it where there's people in this case you may find when Mr. Marfuta just fired it towards that Bear - that BearCat to the south with a Bear to the north you may find that he had the conscious object to do it . . . and the knowingly is stated, a person acts knowingly when the person is aware there exists a high probability that the person's conduct would cause a specific result. So let's say you don't know and I'm not saying you've come to this conclusion but let's just say you've come to the conclusion that you don't know if he purposely tried to sh - kill these cops, law enforcement officers. But you do know that he - he was aware that there was a high probability that those officers are in the direction of his muzzle he pulls the trigger. So that's where knowingly comes into play. The person acts knowing the person is aware there exists the high probability that the person's conduct would cause a result. For example, if you fire towards law enforcement officers in their direction there's a high probability that bullet will strike an officer.

¶54 Upon closing, the prosecutor misled the jury, explaining it could convict Marfuta by finding he was “aware there exist[ed] a high probability his conduct w[ould] cause a specific result which is the death of these officers.” The prosecution then reiterated Marfuta was guilty because “he knew there was a high probability that he was going to hit someone[.]” The District Court did not correct the prosecutor’s erroneous explanation of the law, and not only did defense counsel not object, but egregiously agreed with it.<sup>1</sup>

¶55 I would conclude that the “knowingly” instruction given by the court was erroneous and that, consequently, the jury was not fully and fairly instructed on all elements of the

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<sup>1</sup> Defense counsel told the jury: “I applaud the State, I do I think [the prosecutor] did a great job, going through these jury instructions and I appreciate you going through them with him. . . . Was he aware that there was a high probability that this was going to occur? He’s shooting at armored vehicles.”

offense. Given the facts here, and that Instruction No. 14 was essentially the State's theory of the case, the error cannot be deemed harmless as it permitted the jury to find Marfuta guilty even if the jury determined he had no intention whatsoever to kill anyone.

¶56 While it is the court's obligation to properly instruct the jury, we recognize courts rely on counsel to help inform the proper instructions—here, with both the prosecution and defense leading the court to give erroneous instruction to the jury. While the prosecution argued Marfuta had the requisite mental state to intend to kill law enforcement officers it likewise and in tandem argued to the jury that Marfuta could be found guilty for merely being aware there existed the high probability that firing a gun in the direction of the officers could cause the death of an officer. Defense counsel did nothing to correct this inaccurate and erroneous representation and, instead, agreed with it—praising the prosecution for its explanation of the jury instructions and arguing that since officers were inside an armored vehicle, there was not a high probability that firing a gun in the direction of the officers could cause the death of an officer. Given defense counsel's complete failure to understand Marfuta could not be convicted of an attempted deliberate homicide by merely being aware there existed the high probability that firing a gun in the direction of the officers could cause the death of an officer, Marfuta also asserts his trial counsel provided ineffective assistance.

¶57 Article II, Section 24, of the Montana Constitution and the Sixth Amendment to the United States Constitution, as incorporated through the Fourteenth Amendment, guarantee a defendant the right to effective assistance of counsel. *See State v. Kougl*, 2004 MT 243, ¶ 11, 323 Mont. 6, 97 P.3d 1095.

¶58 In assessing IAC claims, we apply the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). *Kougl*, ¶ 11. Under the *Strickland* test, the defendant must (1) demonstrate 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 proceedings would have been different.” *Kougl*, ¶ 11 (quoting *State v. Turnsplenty*, 2003 MT 159, ¶ 14, 316 Mont. 275, 70 P.3d 1234). Courts determine deficient performance based on whether a defendant’s counsel acted within the broad “range of competence demanded of attorneys in criminal cases.” *Schaff v. State*, 2003 MT 187, ¶ 18, 316 Mont. 453, 73 P.3d 803 (citation omitted). A strong presumption exists that counsel’s conduct falls within the wide range of reasonable professional conduct. *Kougl*, ¶ 11.

¶59 Marfuta argues his trial counsel was ineffective because there was no justifiable reason to not object to the prosecutor’s erroneous construct of the law and, more egregiously, to agree with it. Failing to object and agreeing with a construct of the jury instructions which lessens the State’s burden is undoubtedly deficient performance falling below an objective standard of reasonableness, satisfying the first prong of *Strickland*.

¶60 The second prong of *Strickland* requires that Marfuta show prejudice from counsel’s deficient performance. Here, counsel not only failed to object but agreed with an inaccurate legal construct that permitted the jury to find Marfuta guilty even if it accepted his defense—a mentally stressed, disabled person, facing homelessness and not intending to kill anyone unadvisedly fired warning shots in the direction of officers—as true. Under the circumstances here, I would also invoke plain error review of Marfuta’s ineffective

assistance of counsel claim. Clearly, Marfuta was prejudiced by his counsel's ineffectiveness. I would reverse and remand for a new trial.

/S/ INGRID GUSTAFSON

Justice Laurie McKinnon joins in the dissenting Opinion of Justice Gustafson.

/S/ LAURIE McKINNON