

DA 22-0088

IN THE SUPREME COURT OF THE STATE OF MONTANA

2024 MT 315

STATE OF MONTANA,

Plaintiff and Appellee,

v.

LEWIS LEON BRYSON,

Defendant and Appellant.

APPEAL FROM: District Court of the Eighth Judicial District,
In and For the County of Cascade, Cause No. DDC-20-312
Honorable John W. Parker, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Tammy Hinderman, Appellate Defender, Carolyn M. Gibadlo, Assistant
Appellate Defender, Missoula, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Mardell Ployhar, Assistant
Attorney General, Helena, Montana

Joshua A. Racki, Cascade County Attorney, Jennifer Quick, Ashlee
Kummer, Deputy County Attorneys, Great Falls, Montana

Submitted on Briefs: May 1, 2024

Decided: December 23, 2024

Filed:


Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 Lewis Leon Bryson (Bryson) appeals his conviction of sexual intercourse without consent (SIWOC), following a jury trial in the Eighth Judicial District Court, Cascade County. Bryson argues his trial counsel was ineffective for failing to propose correct jury instructions or, alternatively, this Court should review the jury instructions under the plain error doctrine. Bryson also contends the District Court erred by excluding testimonial evidence concerning the victim’s drinking habits and alcohol withdrawal symptoms.

¶2 We restate the questions presented as follows:

1. *Whether trial counsel rendered ineffective assistance by not proposing a jury instruction separately applying the “knowing” mental state for the charge of SIWOC to the victim’s incapacity to consent, or whether the issue should be reviewed for plain error.*
2. *Whether the District Court abused its discretion by excluding testimony concerning the victim’s drinking habits and symptoms of alcohol withdrawal.*

¶3 We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶4 On Saturday, May 2, 2020, Bryson’s neighbor observed him spraying Valerie Moreni (Moreni) with a hose in his backyard. She was without clothing and screaming, so the neighbor called police. When an officer arrived, Bryson was sitting outside and smoking a cigarette, while Moreni was laying on the ground a few feet away. She was wet and covered by a blanket. Because she was unresponsive and her breathing was shallow, the officer called an ambulance. When asked by the officer, Bryson refused to provide his

or Moreni's name. He also would not tell the officer who owned the property, but later claimed he owned it. The officer arrested Bryson for obstructing a peace officer.¹

¶5 When Moreni became responsive, she was emotional and claimed Bryson had raped her and that her vagina hurt. Emergency responders noted she appeared to be in pain, her upper lip was swollen and bleeding, and she had bruises on her head and neck. A blood sample taken at the hospital indicated she was very intoxicated, with an alcohol content reading of 0.412, and also had drugs in her system. A sexual assault nurse examiner reported that Moreni was frightened and nervous, had scratches and bruises on her upper body, and abrasions to her vaginal wall. The examiner conducted a vaginal swab and confirmed that sperm matching Bryson's DNA was present. Moreni reported that she went to Bryson's to drink, that he wanted to have sex, that she said no, and that he responded by hitting her in the face and chest. She claimed they had sex once.

¶6 Moreni met with Detective Scott Fisher about eight hours after her transport to the hospital. Moreni was still intoxicated but could communicate. Detective Fisher obtained and executed a search warrant at Bryson's house, where he found empty vodka bottles and Moreni's clothing hanging on a fence. Another detective, Keith Perkins, spoke with Bryson, who told him that Moreni was his girlfriend and that they had consensual sexual

¹ Bryson was convicted by the jury of this misdemeanor offense, and he received a six-month sentence to run concurrently with the sentence imposed for his SIWOC conviction. He does not provide an argument challenging the obstruction conviction on appeal, and we do not address it further.

intercourse on several occasions in the previous days. Bryson had minor injuries on his arms.

¶7 Bryson was charged with aggravated sexual intercourse without consent (ASIWOC), SIWOC, tampering with evidence, and obstructing a peace officer. A five-day trial of the charges was held in August 2021. Bryson and Moreni testified and offered very different recollections about the nature of their relationship and the timeline in which their interactions took place.

¶8 Moreni testified she met Bryson while walking between her mother's house and a local convenience store, that he invited her to his house, that they drank together there, and that Bryson showed her his garden. Moreni testified she had become very dizzy and wanted to go home, but that Bryson told her to lie down there. She went to sleep and woke up to Bryson having sex with her. Moreni said she had gone to sleep with her clothes on, but woke up without clothing. Moreni testified she told Bryson to stop, but that he had continued. When she pleaded that he was hurting her, Moreni stated Bryson stopped but hit her in the mouth. Moreni stated that Bryson began to wipe her vaginal and anal areas with a rag. She wanted to leave, but did not have her clothes. She said Bryson took her outside and gave her a small blanket, but then began spraying her with a hose, yelling, and would not stop. Moreni said she eventually heard sirens, which turned out to be police arriving at Bryson's house. Moreni testified that she was not sure how long she had been with Bryson, but that it had been that entire day, and perhaps longer. She acknowledged

being inconsistent about the length of time she was at Bryson's house in previous statements she had given.

¶9 According to Bryson, the parties met near a convenience store and went to his place to look at his garden, get to know each other, and drink. However, Bryson testified that this occurred on Tuesday, April 28, 2020—four days before the police arrived at his house on May 2. Bryson stated that Moreni stayed over on Tuesday night, and that the parties had thereafter engaged in the same routine for several days, including getting drunk, passing out, having sex, and sleeping. He testified that he rejected sex on Tuesday because “[he] was too intoxicated.” On Wednesday, Moreni drank some of Bryson's vodka, fell asleep by early afternoon, and had sex with him later that night. Bryson believed Moreni had been sober enough to consent since she was asleep for the prior five or six hours. Moreni again stayed the night. On Thursday morning, Bryson said that Moreni purchased more vodka at a convenience store, and they again drank through the day at Bryson's house and watched television. Moreni fell asleep and urinated in her pants, and Bryson apparently responded by taking off her pants and laying them on the floor to dry. Bryson recounted that, when Moreni awoke, they had sex again, and she decided to stay a third night.

¶10 Bryson testified that Moreni again walked to the convenience store and bought vodka on Friday. Bryson apparently did not drink that day. Moreni fell asleep in Bryson's bed in the afternoon and, after she woke up, they engaged in sex. Afterwards, Bryson realized Moreni had defecated on the sheets and said he was horrified. He then attempted

to remove the bed sheets and clean Moreni with a washrag. Bryson stated he believed Moreni was aware of what was going on, and that she again stayed at Bryson's on Friday night. On Saturday, May 2, Bryson testified that they both drank. He said Moreni was drunk by midday and fell asleep again. He testified that she vomited on her shirt while he was out buying beer, so he removed her clothes and suggested he rinse her off with a hose in his backyard, claiming Moreni agreed to being washed off. It was at this point that his neighbor called the police. He said he did not have sex with Moreni on Saturday, and that she was never drunk when they had sex on the other days.

¶11 Bryson presented testimony to rebut Moreni's allegations and challenge her credibility. Dr. Thomas Bennett reviewed photographs taken of Moreni, and opined the bump on her lip was the result of a plugged gland. Dr. Bennett also explained that she had bruises a couple days old, but that some were many days old, and because they were on the leading surfaces of her body, they could have been caused from Moreni stumbling and bumping into things. He thus "found no trauma injuries sufficient to explain her assertions of pain," which could otherwise be explained by Moreni's pancreatitis. Bryson called a serologist who said he would have expected more sperm cells to be identified from the vaginal swab if Moreni and Bryson had had sex within a few hours of the sample being taken.

¶12 Bryson called nurses who had treated Moreni. Melissa Matejovsky admitted Moreni to the hospital and testified Moreni was experiencing hallucinations and reported having tremors throughout her body. Matejovsky admitted Moreni to the emergency

department rather than the behavioral health department because she had a history of alcohol withdrawal seizures and showed signs of detoxification. Tanya McCullough undertook Moreni's care from Matejovsky. She testified that she thought Moreni was anxious and upset, but not actively experiencing alcohol withdrawal. Bryson sought to admit testimony from McCullough regarding her treatment of Moreni during a prior hospitalization the month before, in April 2020, to which the State objected as irrelevant, and which the parties and the District Court discussed outside the presence of the jury.

¶13 According to McCullough's notes from the earlier visit, Moreni reported drinking a liter of alcohol daily and did not have withdrawal issues. Based on these statements and her current assessment, McCullough noted regarding the May visit that Moreni's reported tremors may have been "fabricated." The District Court ruled that "[t]he defense can ask about what she admitted to drinking within three or four days prior. But I don't want testimony about she is an alcoholic or she does drink chronically. . . . If you can just parse it out in terms of a day by day thing and not a permanent state or condition of her being alcoholic."

¶14 In the presence of the jury once again, McCullough testified that her note about Moreni's tremors being fabricated "didn't necessarily mean made up," but that McCullough was distinguishing between tremors associated with alcohol withdrawal, which are involuntary, and those from a nervous or panic attack, which can be stopped, and are thus "voluntary." In response to a defense question about Moreni's social history, and despite the District Court's ruling, McCullough stated that Moreni was an alcoholic.

When the State objected, defense counsel explained that when he had asked Moreni during cross-examination if she recalled telling a nurse that she drank a liter of alcohol a day, Moreni said she did not recall making that statement. The District Court allowed the defense to continue, but when McCullough stated, “[Moreni] told me that she drinks approximately one liter--”, the District Court said, “I’m going to curtail it there,” and stopped further questioning of McCullough.

¶15 During closing arguments, Bryson argued that Bryson believed she was consenting each time they had sex, that Moreni was not experiencing alcohol withdrawal, that her symptoms were fabricated, and that she was being untruthful in her testimony, including her claim that Bryson had hit her. The State explained to the jury that Bryson had been charged with alternative sexual crimes—aggravated sexual intercourse without consent, based upon Bryson’s alleged use of force, and sexual intercourse without consent, based upon Moreni’s inability to consent. The State asked for a conviction on the aggravated charge, but argued at length about the alternative theory that Moreni was incapable of giving consent based on her high level of intoxication, which the prosecutor argued had occurred at the hands of Bryson:

Now, Valerie’s BAC was .412, which is not surprising having drank Steel Reserves, drinking from two bottles of Vodka that the defendant had plied her with. Vodka is hard alcohol, right? You heard from three different forensic toxicologists from the Montana State Crime Lab who told you that this is five times the legal limit to operate a motor vehicle in Montana. Five times a .08. April Mitchell described to you the LD50. Meaning, in half of the population this would be a lethal dose of alcohol.

The point is, ladies and gentlemen, how can she be an alcoholic, likes to drink – “drunk as a skunk,” were Mr. Van der Hagen’s words – and be

able to consent to sex that the defendant told you they had three times during this window? How can you argue both things in the same breath? It doesn't make sense. Valerie couldn't consent. The condition that she was in, the defendant plied her with alcohol. She was a .412. That is something we all agree upon. She couldn't consent.

¶16 The State proposed jury instructions consistent with the Model Criminal Jury Instructions and defense counsel acquiesced, indicating that he likewise planned to use the pattern instructions “unless something [came] up,” ultimately offering one instruction explaining that the jury could convict on only one of the two charges in Count I, which listed both ASIWOC and SIWOC. The following given instructions are relevant to this appeal:

¶17 Instruction 14:

A person who knowingly has sexual intercourse with another person who is incapable of consent commits the offense of sexual intercourse without consent.

¶18 Instruction 15, in pertinent part:

To convict the Defendant of sexual intercourse without consent, the State must prove the following elements:

1. That the Defendant had sexual intercourse with Jane Doe;

AND

2. That Jane Doe was incapable of consent;

AND

3. That the Defendant acted knowingly.

¶19 Instruction 16:

A “person who is incapable of consent” means a person who is incapacitated.

¶20 Instruction 31:

A person acts knowingly when the person is aware of his conduct.

¶21 While the jury was deliberating, defense counsel realized and conferred with the prosecutor that the jury had been given the wrong mental state instruction defining “knowingly” for purposes of the misdemeanor obstructing a peace officer charge, based upon this Court’s decision in *State v. Secrease*, 2021 MT 212, ¶ 12, 405 Mont. 229, 493 P.3d 335, which had been issued three days earlier and reaffirmed that, “for the purposes of instructing the jury on a charge of obstructing a peace officer, the results-based ‘knowingly’ instruction should be given.” While the District Court and the parties were preparing to correct that error, the jury sent a question to the District Court asking for clarification of the “knowingly” mental state referenced in Instruction 15, part 3, specifically stating, “we would like clarification on Instruction #15 #3 that the Defendant acting [sic] knowingly. We need better understanding of the word knowingly.” The District Court discussed this with the parties, who stipulated to the District Court giving two instructions in response, the first providing the correct definition of “knowingly” for the obstruction charge, and a second in response to the jury question, which stated: “You are hereby instructed to rely on the trial evidence and the instructions previously given and to render your verdict accordingly.” The jury thereafter continued deliberating and returned a guilty verdict on the SIWOC and obstructing a peace officer charges less than two hours later.

¶22 Bryson appeals.

STANDARD OF REVIEW

¶23 “Ineffective assistance of counsel claims raise mixed questions of law and fact that we review de novo.” *State v. Bristow*, 2023 MT 188, ¶ 11, 413 Mont. 403, 537 P.3d 103.

¶24 Concerning plain error review, we employ the doctrine “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 citation omitted). Accordingly, “[t]he party requesting reversal because of plain error bears the burden of firmly convincing this Court that the claimed error implicates a fundamental right and that such review is necessary to prevent a manifest miscarriage of justice or that failure to review the claim may leave unsettled the question of fundamental fairness of the proceedings or may compromise the integrity of the judicial process.” *George*, ¶ 5.

¶25 This Court reviews a district court’s jury instructions for an abuse of discretion. *Camen v. Glacier Eye Clinic, P.C.*, 2023 MT 174, ¶ 16, 413 Mont. 277, 539 P.3d 1062. We therefore must determine “whether the instructions, when considered as a whole, fully and fairly instructed the jury on the applicable law.” *State v. Rowe*, 2024 MT 37, ¶ 17, 415 Mont. 280, 543 P.3d 614. If the jury instructions contain a mistake, we only find reversible error when the defendant’s substantial rights are prejudicially affected. *State v. Deveraux*, 2022 MT 130, ¶ 20, 409 Mont. 177, 512 P.3d 1198.

¶26 We likewise review evidentiary rulings by the district court for an abuse of discretion. *State v. Wienke*, 2022 MT 116, ¶ 15, 409 Mont. 52, 511 P.3d 990. “A district court abuses its discretion when it acts arbitrarily, without conscientious judgment, or

exceeds the bounds of reason.” *State v. Given*, 2015 MT 273, ¶ 23, 381 Mont. 115, 359 P.3d 90.

DISCUSSION

¶27 *1. Whether trial counsel rendered ineffective assistance by not proposing a jury instruction separately applying the “knowing” mental state for the charge of SIWOC to the victim’s incapacity to consent, or whether the issue should be reviewed for plain error.*

¶28 Bryson argues his trial counsel was ineffective “when he failed to research and propose the correct jury instructions.” Specifically, he contends his counsel overlooked that, “[b]y instructing the jury that consent was dependent upon Moreni’s circumstance but knowingly only applied to Bryson’s conduct, the district court erroneously instructed the jury to omit knowingly from the ‘incapable of consent’ element and reduced the State’s burden.” He likewise argues that “the district court never told the jury that knowledge applied to all of the elements of SIW[O]C, including the second element, ‘Jane Doe was incapable of consent.’” Because the definition of “knowingly” required that Bryson was aware only of his own conduct, he argues a separate instruction was necessary requiring the jury to find that he knew Moreni was incapable of consenting. However, we conclude that Bryson misreads the instructions, individually and as a whole, and that they correctly stated the law.

¶29 When considering ineffective assistance of counsel (IAC) claims, Montana courts apply the United States Supreme Court’s two-prong test as articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). *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. “[I]f an insufficient showing is made regarding one prong of the test, there is no need to address the other prong.” *Whitlow v. State*, 2008 MT 140, ¶ 11, 343 Mont. 90, 183 P.3d 861. Here, we conclude under the first prong that counsel’s performance was not “deficient.” *Golie*, ¶ 7.

¶30 “A person who knowingly has sexual intercourse with another person without consent or with another person who is incapable of consent commits the offense of sexual intercourse without consent.” Section 45-5-503(1), MCA. Instruction 14 repeated the statute exactly, removing only the alternative phrase, “with another person without consent,” to reflect how the charge was brought in this case, and thus stating: “A person who knowingly has sexual intercourse with another person who is incapable of consent commits the offense of sexual intercourse without consent.” Then, Instruction 15 followed by breaking down the statute into individual elements, requiring that the State prove: 1) that the Defendant had sexual intercourse with Jane Doe, and 2) that Jane Doe was incapable of consent, and 3) that the Defendant acted knowingly. Thus, the instructions correctly instructed the jury that Bryson was required to know that Moreni was incapable of consenting, which precisely reflected the statute.

¶31 Bryson draws from these instructions that the District Court “instructed the jury to omit knowingly from the ‘incapable of consent’ element” and “never told the jury that knowledge applied to . . . the second element, ‘Jane Doe was incapable of consent,’” but these arguments are inconsistent with both the plain language of the instructions and our case law. The District Court neither instructed the jury to “omit knowingly” from the incapable of consent element nor failed to tell the jury that knowledge also applied to that element. For the offense of SIWOC, as charged here, § 45-5-503(1), MCA, requires that a person knowingly have sexual intercourse with another person who is incapable of giving consent, and the instructions advised the jury that the State had to prove Bryson had knowingly done so. Further, beyond the plain language of the instructions, we have explained that “courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word ‘knowingly’ as applying that word to each element.” *State v. Hamernick*, 2023 MT 249, ¶ 16, 414 Mont. 307, 545 P.3d 666 (citing *Deveraux*, ¶ 32, (quoting *Flores-Figueroa v. United States*, 556 U.S. 646, 652, 129 S. Ct. 1886, 1891 (2009))).

¶32 We addressed a similar argument in *State v. Ragner*, 2022 MT 211, 410 Mont. 361, 521 P.3d 29. There, the defendant was charged with ASIWOC and argued that “the instructions directed the jury’s attention away from whether [he] knew [the victim] did not consent to the intercourse,” and therefore, with respect to the “without consent” element, “knowingly” should have been separately defined as “the person is aware that the circumstance exists.” *Ragner*, ¶¶ 28-29. The district court rejected that argument, and we

affirmed, citing § 45-2-103(4), MCA, which provides: “[i]f the statute defining an offense prescribes a particular mental state with respect to the offense as a whole without distinguishing among the elements of the offense, the prescribed mental state applies to each element.” *Ragner*, ¶ 33. Consequently, we have held that “‘the prohibited particularized conduct’ under the SIWOC statute [is] not merely awareness of sexual intercourse but ‘engaging in sexual intercourse with another person *without that person’s consent,*’” and that, “with the application of ‘knowingly’ to this conduct, this constituted ‘the entire criminal offense.’” *Hamernick*, ¶ 21 (citing *Deveraux*, ¶ 32) (emphasis in original).

¶33 Bryson argues that our prior decisions are inapposite because they involved cases where SIWOC was charged under a theory of “without consent,” rather than “incapable of consent,” as here. He contends the “awareness of conduct” definition of knowingly provided in Instruction 31 could not apply because the “incapable of consent” element describes Moreni, not Bryson’s conduct. However, there is no difference in this regard between a SIWOC charge with a “without consent” element and one with an “incapable of consent” element. Both involve the status or condition of the victim: either she did not consent or she was not capable of consenting, and the State must prove that the defendant acted with knowledge of the respective element it has charged. As the State notes, “[r]egardless of whether the victim did not consent or was incapable of consenting, the victim’s status is incorporated into the prohibited conduct that the defendant has to be aware of, and only the conduct-based definition needs to be given. . . . [Here], [t]he conduct

that Bryson had to knowingly engage in was having sexual intercourse with a person who was incapable of consent. That required the defendant to know that Valerie was incapable of consent.”

¶34 The State tried the case consistent with the instructions, first asking for a conviction of ASIWOC based upon alleged violence, but alternatively seeking a conviction of SIWOC based upon Moreni’s incapacitation at Bryson’s hands. To prove that Bryson engaged in sexual intercourse with Moreni knowing she was incapable of consenting, it contended, among its other proof, that “Valerie couldn’t consent. The condition that she was in, the defendant plied her with alcohol. She was a .412.” The jury found the latter alternative, as correctly defined in the instructions, to be supported by the evidence.

¶35 Accordingly, we conclude Bryson’s counsel was not deficient for failing to propose different jury instructions, and the IAC claim thus fails the first prong of *Strickland*. Because there was no error, plain error review is not warranted.²

¶36 2. *Whether the District Court abused its discretion by excluding testimony concerning the victim’s drinking habits and symptoms of alcohol withdrawal.*

¶37 Bryson argues the District Court “paralyzed” his defense by excluding several of Moreni’s statements made to McCullough during her earlier visit to the hospital in April 2020. Bryson argues Moreni’s statement during the prior visit that she drank a liter of vodka per day was relevant and probative to corroborate his testimony that Moreni was

² During sentencing, defense counsel stated that he should have offered an instruction providing a definition of “incapacitated,” but he did not file a motion for new trial on the issue and, though referenced by Bryson on appeal, it is not a separate basis on which relief is sought.

ready and willing to drink, support his contention he had not tried to get Moreni intoxicated to take advantage of her, demonstrate that Moreni's pain was caused by her pancreatitis, not rough sex with Bryson, and undermine her credibility by demonstrating she had lied to the hospital staff, leading to McCullough's note that Moreni's reported tremors may have been "fabricated." The State objected based on relevance, and the District Court partially sustained that objection, noting that the statements also were more prejudicial than probative under M. R. Evid. 403.

¶38 The District Court balanced the prejudice concerns, attempting to exclude evidence about Moreni's past conduct but permitting evidence about Moreni's "drinking within three or four days prior" to this incident. Even within this framework, Bryson was able to elicit that Moreni was an alcoholic, experienced chronic alcohol abuse, suffered from pancreatitis, including complaints of pancreas pain at the hospital and reports of other alcohol-related complications. The purported report that she had admitted drinking a liter of vodka on a daily basis would have added little to the evidence that the jury received about her alcoholism and medical condition. Bryson takes issue with the District Court's exclusion of Moreni's earlier statement that she did not suffer from alcohol withdrawal, for purposes of further establishing a basis to attack her credibility, as McCullough had noted that Moreni's reported tremors appeared to be "fabricated." However, Bryson was fully able to explore this assessment with McCullough, and even though McCullough offered a clarification about her use of the term, he repeatedly referenced her "fabricated" observation and utilized it as a central point in his defense. Though requested by the

prosecutor, the jury did not find Bryson guilty of ASIWOC, perhaps accepting Bryson’s defense that Moreni’s pain arose from her conditions, not from an assault by him.

¶39 “Trial courts have broad discretion to determine the relevance and admissibility of evidence,” and we generally review such evidentiary decisions for abuse of discretion. *State v. Sneed*, 2023 MT 181, ¶ 8, 413 Mont. 392, 536 P.3d 435. We conclude the District Court did not abuse its discretion in the trial evidentiary rulings herein challenged.

¶40 Affirmed.

/S/ JIM RICE

We Concur:

/S/ MIKE McGRATH

/S/ LAURIE McKINNON

/S/ BETH BAKER

/S/ JAMES JEREMIAH SHEA