

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0461

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DONALD EDWARD FOSTER,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, The Honorable Michael G. Moses, Presiding

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STATEMENT OF THE ISSUES

1. Whether Appellant has met his burden to establish that he was prejudiced by alleged ineffective assistance of counsel (IAC) for not objecting to convictions of multiple counts of aggravated sexual intercourse without consent (SIWOC), which involved different forms of penetration that took place over several hours in different bedrooms.

2. Whether this Court should invoke the plain error doctrine to determine if Appellant was prejudiced by not being present for an in-chambers discussion about newly discovered evidence the State had received from his cellmate.

STATEMENT OF THE CASE

On May 4, 2021, the State charged Appellant Donald Foster (Foster) with multiple counts of aggravated SIWOC, attempted aggravated SIWOC, and aggravated kidnapping.¹ (Doc. 3.) The State alleged that in the early morning hours of May 3, 2021, Foster, who was 47, bound the hands of his mother (Judy) and her 18-year-old houseguest (M.W.), after threatening them with a knife. (Doc. 1 at 2.)

As Foster was raping or preparing to rape M.W., Judy escaped to a neighbor's house and called the Billings Police Department (BPD) at about 1:56 a.m. (*Id.*) A standoff with police ensued, and over the next several hours, Foster

¹ The State eventually filed a Third Amended Information, which will be referenced in detail, *infra*.

repeatedly raped M.W. (*Id.* at 3.) Foster eventually surrendered to police at about 9:35 that morning. (*Id.*)

On Friday, August 26, 2022, the parties began jury selection. (8/26/22 Tr. at 4.) Over the noon recess, the State received a letter “written by Mr. Foster’s cellmate” (Hopkins), which alleged that Foster had made “some admissions” about the incident.² (*Id.* at 115-16.)

On Monday, August 29, 2022, Foster filed a motion in limine to preclude Hopkins’ testimony “pursuant to Mont. R. Evid. 403 and 404(b), or in the alternative continue the jury trial in this matter pursuant to Mont. Code Ann. § 46-15-329.” (Doc. 54.) The State argued that “a short continuance is [the] appropriate mechanism to give the Defendant time to prepare.” (8/29/22 Tr. at 14.) Foster’s attorneys agreed that a continuance was “appropriate,” and explicitly reasoned that it was appropriate “to avoid any ineffective assistance of counsel issues.” (*Id.* at 22.)

After ruling that the State would be allowed to call Hopkins as a witness, the district court determined:

This case is going to be continued. Everybody is going to have an opportunity to take a look at the full disclosure and all evidence and all information. That evidence and full disclosure will now be fair to the State and fair to the Defendant.

² The letter itself was not made part of the record, nor was Hopkins mentioned again after the August 29, 2022 hearing.

Everybody will have a chance to fully address those issues and be fully prepared in a trial on the merits before a jury after you have had an opportunity to do due diligence on both sides. So [it] make[s] sense [for] the case be continued.

(*Id.* at 24-25.)

The district court discharged the jurors who had been selected (*id.* at 25) and scheduled another jury trial for January 17, 2023 (Doc. 59).

Prior to trial, the State filed a Third Amended Information. (Doc. 73.) Count I alleged that Foster had committed aggravated SIWOC under Mont. Code Ann. § 45-5-508(1), by forcing his penis into M.W.’s mouth. (*Id.*) Counts II and III charged aggravated SIWOC and alleged that on two separate occasions Foster anally penetrated M.W. with his penis. (*Id.* at 1-2.) Counts IV and V were for attempted aggravated SIWOC under Mont. Code Ann. §§ 45-4-103 and 45-5-503, and alleged that Foster attempted to force his penis into M.W.’s vagina on two separate occasions. (*Id.* at 2.) Counts VI and VII alleged aggravated kidnapping of Judy and M.W. under Mont. Code Ann. § 45-5-303(1)(b). (*Id.* at 3.)

On January 20, 2023, a jury convicted Foster on all seven counts. (Docs. 84-90.) The district court ordered a presentence investigation (PSI). (Doc. 82 at 3.)

At the June 15, 2023 sentencing, after hearing arguments from counsel, the district court observed:

The reason we can’t find factual circumstances like this one for purposes of comparing sentences is because of the crimes that were committed in this particular case. They are horrendous. I can’t think of

any other case. And I was involved in the legal community since 1978 in Yellowstone County.

(6/15/23 Tr. at 50.)

The district court sentenced Foster to life imprisonment on Counts I through V and ordered those sentences to run concurrently. (Doc. 107 at 1-2.) For the aggravated kidnapping convictions on Counts VI and VII, the district court sentenced Foster to 50 years on each count and ordered that those sentences run consecutively to all other counts. (*Id.* at 2.)

STATEMENT OF THE FACTS

I. August 26, 2022 trial setting

On the first day of jury selection, the State informed the district court that over the noon recess it had received a letter from Hopkins alleging that Foster had made some admissions to him regarding the offense. (8/26/22 Tr. at 115-16.) The State recommended that the district court not impanel the jury until the following Monday morning, “so that this gets sort of settled out.” (*Id.* at 116.)

The district court asked Foster’s attorneys for comment, prompting the following exchange:

MS. HAMMACK: For the record, Mr. Foster is not present for this conversation.

THE COURT: Why not?

MS. HAMMACK: He does not know yet this has happened. Because we want to see how this would go forward before I could advise him just to avoid any potential safety issues or retaliation issues for him when he returns back to the detention center after the conclusion of today's proceedings.

(*Id.*)

The district court determined that it would “not impanel this jury until Monday morning at nine o'clock.” (*Id.* at 118.) The district court added, “And then you can discuss those issues with your client. I’m a little uncomfortable he’s not here. *But I understand your position on that point.* And that will give you the opportunity to visit with him about where he is with respect to this case as well.”

(*Id.* (emphasis added).)

The parties selected the remaining jurors and two alternates, then recessed for the weekend. (*Id.* at 164.)

On Monday morning, the parties met in chambers with Foster present.

(Doc. 57.) The following discussion took place:

THE COURT: This—there was a motion for continuance by the Defendant in your—is that your motion to continue at the end of your brief last night at 6:19 when it came in. There was a position taken that if indeed, Mr. Hopkins’ testimony was going to come in that you would request a continuance in order to have a complete opportunity to visit with him.

MS. HAMMACK: That’s correct. So we made that argument in the alternative. Our first position was to object to his inclusion in trial and to exclude him as a witness entirely and proceed to trial this week. But in the alternative if the Court decides that he is allowed to be permitted into trial, *then we would need a continuance so that we*

could have the opportunity to interview him, do any follow-up investigation that we need to do to properly prepare for trial.

So yes, that was my alternative argument was the continuance if the Court allows him to be a witness.

(8/29/22 Tr. at 5-6 (emphasis added).)

After hearing from the State, the district court determined that Hopkins “was properly disclosed as quickly as the State knew about it. He’s a witness who has evidence that is relevant to this particular matter [and] would be relevant to a jury in this particular matter.” (*Id.* at 11.) The district court dismissed the jurors (*id.* at 25) and reset the jury trial for January 17, 2023 (Doc. 59).

II. Relevant trial testimony

A. Judy’s testimony

Judy was a retired teacher and widow with five children, including Foster. (1/18/23 Tr. at 40-41.) Prior to this offense, Foster had traveled to Texas to “meet another girl.” (*Id.* at 43.) Judy testified that Foster was “just living on the street” and had quit taking his medications. (*Id.*)

She offered to buy Foster a bus ticket home to “try to get [his] life back on track,” and he accepted that offer. (*Id.* at 44.) Judy told Foster he could stay with her for a short time, but that he would have to get a job. (*Id.* at 45.) Eventually,

Judy informed Foster he had to be out of her residence by Monday, May 3, 2021. (*Id.* at 48.)

On Sunday, May 2, 2021, at about 10:30 p.m., Foster knocked on Judy's bedroom door and informed her that M.W. was at her house. (*Id.* at 48.) M.W. told Judy that she had had an argument with her mother and did not have a place to stay. (*Id.* at 49.) Judy talked with M.W., then got her settled into an upstairs bedroom. (*Id.* at 50.) She closed the door to M.W.'s bedroom. (*Id.*)

Judy was later awakened by screaming, which she initially thought might be M.W. having a nightmare. (*Id.* at 53.) As Judy got out of bed and approached the hallway, she saw Foster and M.W. and observed that Foster was holding a large knife. (*Id.* at 54.)

Foster grabbed Judy by the throat and pushed her back against a chest of drawers. (*Id.*) After Foster made some irrelevant accusations, he allowed Judy to use the bathroom. (*Id.* at 54-55.) Judy found her cell phone in the bathroom and hid it in her underwear. (*Id.* at 55.)

Judy asked Foster what he was doing, and he responded, "when you are on meth, you never know what you will do." (*Id.* at 56.) Judy noticed that her hand was bleeding profusely. (*Id.*; *see also* State's Exs. 84-86.) She did not know how her hand was injured. (*Id.*)

Foster told Judy he had her 9mm handgun and ammunition and that she and M.W. “need to do what I say or one of you will get hurt.” (*Id.* at 58.) Foster tied Judy’s hands behind her back and told her and M.W. to go downstairs. (*Id.* at 58-59.) Once downstairs, Foster told Judy to go into the bathroom, which she did. (*Id.* at 60.) Foster told Judy that he and M.W. were going to the bedroom directly across the hall from the bathroom. (*Id.* at 60-61.)

When asked what was going through her mind, Judy responded, “[j]ust that I’m really scared. And [] I believed him when he said that something would happen if we didn’t do what he said. And when I found out that he had that nine-millimeter gun and ammunition, I thought this was really going to go downhill fast. And I was afraid that he would kill me or kill us.” (*Id.* at 61.)

Judy called 911 because she “was sure that unpleasant things were getting ready to happen to [M.W.] and myself.” (*Id.* at 62.) The 911 recording was introduced into evidence as State’s Exhibit 119. (*Id.* at 63.) It was published to the jury, who listened to Judy telling the 911 dispatcher that if Foster heard her talking on the phone he would kill her. (*Id.* at 64.)

At that point, Judy decided to escape. (*Id.*) She passed the basement bedroom and observed that Foster was sitting on the bed with M.W. on the other side of him. (*Id.* at 64-65.) While still on the phone with dispatch, Judy ran

barefoot to her neighbors' residence and began pounding on their door until the police arrived. (*Id.* at 65.)

B. M.W.'s testimony

M.W. grew up in Billings, and described Judy as "like a grandma." (1/19/23 Tr. at 42.) They were neighbors and Judy had taught M.W.'s vacation bible school. (*Id.* at 42-43.) M.W. had spent time with Judy's family, but Judy had never introduced M.W. to Foster. (*Id.* at 43-44.)

On May 2, 2021, M.W. had a dispute with her mother over not doing the dishes. (*Id.*) M.W. walked to Judy's residence, which was about a block away. (*Id.* at 44-45.) Foster answered the door and asked M.W. who she was and what she needed. (*Id.* at 46.) After she asked to speak with Judy, Foster let M.W. into the house and he went upstairs to wake Judy. (*Id.*)

Judy allowed M.W. to stay in the upstairs bedroom across the hall from her own. (*Id.* at 48.) Sometime later, M.W. was awakened by Foster, who said, "hey, your mom called. She wanted to say that she was sorry." (*Id.* at 50.) Foster wanted M.W. to call her mother, but she responded that she would call her the next morning. (*Id.* at 50-51.)

Foster then brandished a knife, and M.W. screamed out for Judy. (*Id.* at 51-52.) Foster pulled M.W. out of bed and escorted her to the hallway, where Judy was emerging from her bedroom. (*Id.* at 52.)

Foster began yelling at Judy. (*Id.*) At some point, Judy's hand was cut, and she went to the bathroom to grab a towel. (*Id.* at 53.) Foster then tied M.W.'s hands together with what she thought were "black boot strings." (*Id.* at 54.) Foster tied Judy's hands with a pair of shoelaces and a cord for some earbuds. (*Id.* at 55.) Foster directed Judy and M.W. to the basement. (*Id.* at 56.) As they walked down the stairs, Foster had his knife on M.W.'s back. (*Id.* at 57.) M.W. explained "[t]here was no way I could leave, otherwise I'm getting stabbed." (*Id.*)

Foster placed Judy in the downstairs bathroom and told M.W. to go into a nearby bedroom. (*Id.* at 58.) M.W. heard Foster tell Judy "not to do anything dumb or stupid otherwise [M.W.] was going to get hurt and then [Foster] closed the bathroom door." (*Id.* at 61.)

Foster entered the bedroom where M.W. was and partially closed the door. (*Id.*) When asked what happened next, M.W. testified:

He was telling me, like, don't do anything dumb. If Judy does anything dumb, like, you are going to get hurt, I'm going to cut you all up and then obviously, like, I'm terrified. I'm like crying and, like, asked him if he was going to rape [me] and he blatantly just said yeah.

(*Id.*)

1. Count I, aggravated SIWOC, forced oral penetration in the downstairs bedroom

After directing M.W. to take off her clothes, or else "he was going to do it for me," Foster removed his own clothing. (1/19/23 Tr. at 62.) At that point, M.W.

“was forced to give him oral sex.” (*Id.* at 63.) When asked why she used the word “forced,” M.W. responded, “I didn’t have a choice.” (*Id.*)

M.W. informed Foster that she was a virgin and had “never done any of these things.” (*Id.*) M.W. described being forced to perform oral sex on Foster: “I mean, obviously I gagged a ton, I guess. Like, it was not a good experience. Like, I mean, this being my first sexual experience is really shitty. Pardon my language. I apologize.” (*Id.* at 64.)

2. Counts II and IV, aggravated SIWOC for anal penetration and attempted aggravated SIWOC for attempting to force vaginal penetration in the downstairs bedroom

After forcing M.W. to perform oral sex, Foster “pushed” M.W. over on the bed and began touching her vagina. (1/19/23 Tr. at 64-65.) M.W. repeatedly told Foster, “no, stop,” but Foster would not. (*Id.* at 65.) M.W. was trying to close her legs, and Foster was trying to force them open. (*Id.*) Foster “tried” to have vaginal intercourse with M.W., and she described, “I don’t know how else to explain it other than like he couldn’t get it in.” (*Id.* at 66.) M.W. recalled, “[h]e got like really frustrated. I think he kept calling me a bitch. And then he tried to give me anal sex. And it was extremely painful.” (*Id.*) M.W. clarified on cross examination that Foster was “successful” when he penetrated her anus with his penis in the downstairs bedroom. (*Id.* at 112.)

While they were still downstairs, Foster asked M.W. to give him oral sex again, “like, two more times.” (*Id.* at 66.) When asked to describe how that happened, M.W. testified:

We went from the bed to me sitting on, like, the rocking chair. And he was standing in front of me. And I was forced to give [oral sex] to him again. And then he got frustrated and then he apologized because he was too high, I guess. And then, so he ended up laying on the bed.

And then he told me to come here, and I did because what else am I going to do. I don’t have room to escape. I don’t have, you know—and so, I end up getting him oral sex again on the bed. And then he ended up coming. And I know he did because it tasted salty.

(*Id.* at 67.)

Foster then told M.W. to put her clothes on and they returned upstairs to Judy’s bedroom. (*Id.*) Foster kept repeating, “don’t do anything dumb.” (*Id.*) When they reached Judy’s room, the police called, which appeared to make Foster nervous and irritated. (*Id.* at 68.)

While she was seated on Judy’s bed, M.W. considered escape. (*Id.*) However, she would have had to get past Foster, who was still carrying the large knife in the front two beltloops of his pants. (*Id.* at 70.) Foster had also obtained a handgun, and “[h]e was kind of just haphazardly just like waiving it around.” (*Id.* at 71.)

M.W. spoke with officers over the phone, and Foster warned her, “don’t be dumb, like, be careful what you are saying, stuff like that.” (*Id.* at 72.) M.W.

described this as going on “for hours and hours and hours.” (*Id.*) M.W. was feeling numb and becoming nauseous. (*Id.* at 73.) When asked if anything happened between the phone calls with the officers, M.W. responded, “I was sexually assaulted twice.” (*Id.* at 75.)

3. Counts III and V, aggravated SIWOC for anal penetration, and attempted aggravated SIWOC for attempting to force vaginal penetration in Judy’s bedroom

M.W. described being anally raped in Judy’s bedroom:

I guess, like, how it started earlier was that like I ended up getting under the covers and just, like, I was done. And so, he ended up coming in and laying next to me. And so, he was—so like rubbing his hands all over and kept trying to grab my pants. And then told me either I was going to take them off or he was going to take them off for me. And he ended up taking them off for me. Like, I just froze like.

....

He then begins to sexually assault me again through anal sex.

(1/19/23 Tr. at 81.)

M.W. recalled that the anal rape was painful, she had been crying, and she had just wanted it to “be over.” (*Id.* at 82.) The State asked, “Did the Defendant try to have vaginal sex with you again at that point in time?” M.W. responded, “Yes, he did try and then again he just couldn’t penetrate so then he resulted back to anal sex.” (*Id.*)

After the second anal rape, M.W. testified that:

So after the second one I ended up I think putting my underwear on. And that's when I start to get like really sick, like, really nauseous. Like, I just want to be done. I just want to go home. Like, I was even telling him, like, yo, the weapons that you have out right now, like, you can wipe them. I won't even mention the weapons just let me leave.

(*Id.* at 86.)

M.W. described a third anal rape that began as she was speaking with an officer on the phone:

A. I'm, like, listen, dude, I just want to go home. I mean, he's, like, yeah, yeah, I understand. And then, like, silence and then the Defendant ended up pulling off the blanket and just grabbing me and then like turning me over and then he pulled off my underwear and proceeded to sexually assault me the third time anally.

And I—like, I kept telling him to stop. I started crying again. And he just kept telling me to shut up and quit being such a bitch and all that he wants just to be able to come.

Q. Did he?

A. Yeah.

Q. Where?

A. On my back.

(*Id.* at 87.)

When he was not raping M.W., Foster was “loading like a ton of guns.” (*Id.* at 89.) Foster was also “sniffing” a white substance, and M.W. heard him admit to the police that he was “really high.” (*Id.* at 90.)

M.W. described how she was able to eventually leave Judy's house:

I don't know if it is that he was done with this whole back and forth whatever or if I was just done. I did not care. But he still had the guns he still had [the] knife he set the knife down. And I put my—so if you hold the gun like this like finger wasn't on the trigger but holding it like this, I grabbed the top of the gun and I just, like, rest my hand there.

And I told him, like, if you want me to move my hand, tell me so or just give me the gun. So he ended up giving me the gun and I put it on Judy's dresser on this picture—I can't even remember what the picture was, but behind the picture frame. And then he asked if he could go to the bathroom.

And I'm, like, no, come on, we ain't doing this. We are going together and we are walking out, both of us alive. 'Cause I think if I had let him go to [the] bedroom, he would have killed himself and I'm not about that.

(*Id.* at 90-91.)

When they got outside, M.W. walked towards one of the SWAT members, while other officers arrested Foster. (*Id.* at 91.) An ambulance transported M.W. to the hospital, where she remained for several hours. (*Id.*) At the hospital, M.W. gave a statement to a detective and submitted to a SANE examination. (*Id.*)

C. Additional evidence

After Foster surrendered to police, Detective Steven Hallam (Detective Hallam) asked him, “[d]id you, in fact, rape this young lady?” (1/18/23 Tr. at 205.) Foster put his head down and looked away. (*Id.*) Detective Hallam repeated the question, saying, “look, it is time to be a man. I need to know what

kind of help we need to get her.” (*Id.*) Foster responded, “it was consensual,” and made no further comments about the incident. (*Id.*)

In Judy’s home, police found several rifles, a shotgun, a revolver, a “high-point” handgun, and a large, fixed-blade knife. (1/17/23 Tr. at 176; *see also* State’s Ex. 35.) Toxicology confirmed that Foster had been ingesting methamphetamine. (1/19/23 Tr. at 212-13; *see also* State’s Ex. 124.) Further, forensic analysis revealed that M.W.’s DNA was on the swabs collected during the SANE examination from Foster’s penis and scrotum. (1/19/23 Tr. at 225; *see also* State’s Ex. 125.)

The defense presented no evidence. (1/20/23 Tr. at 13.) For the SIWOC charges in Counts I through V, Foster’s attorneys moved for jury instructions on the lesser-included offense of sexual assault. (*Id.* at 18.) With respect to the two aggravated kidnapping charges, Foster asked for lesser-included instructions on the offense of unlawful restraint. (*Id.* at 18-19.)

The State objected. (*Id.* at 21.) After hearing arguments from both sides, the district court determined, “And here in each and every one of these seven cases, the requested lesser included offenses [sexual assault] are indeed lesser included offenses of the offense charged [SIWOC].” (*Id.* at 25.) The district court granted Foster’s motion to give the lesser-included offense instructions for all counts. (*Id.* at 28-29.)

The district court instructed the jury, “Each count[] charges a distinct offense. You must decide each count separately. The Defendant may be found guilty or not guilty of any or all of the offense charged. Your finding as to each count must be stated in a separate verdict.” (Doc. 81 at 28, Instr. No. 21.)

For the SIWOC instructions, the district court accurately identified the type of penetration alleged for each count. (*See* Doc. 81 at 33-55.) Further, for different counts that alleged the same type of penetration, the district court included the language “on an occasion different from [the previous count].” (*See, e.g.*, Doc. 81 at 36, Instr. No. 29.)

The jury convicted Foster on all seven counts. (1/20/22 Tr. at 118-20; Docs. 84-90.) This appeal follows.

SUMMARY OF THE ARGUMENT

Foster has not met his burden of showing either deficient performance or prejudice to establish IAC under *Strickland v. Washington*, 466 U.S. 668 (1984).

The convictions in this case were based on compelling, unrefuted evidence of separate and distinct acts, which took place over several hours in different bedrooms and involved different forms of penetration. The convictions were not precluded by Mont. Code Ann. § 46-11-410(2)(a), hence, there was no valid objection to be made under that statute.

This Court should decline to conduct plain error review of the in-chambers conversation that took place in Foster's absence on August 26, 2022. The conversation did not result in any conceivable prejudice. Foster's attorneys wanted to intelligently discuss evidence provided by his cell mate prior to passing on information that could result in additional violence at the jail. When the parties returned the following Monday to resume that conversation in Foster's presence, he remained in the same position to demand that the jury be sworn in and to proceed to trial. However, Foster acquiesced to what was in reality a joint motion for a continuance for the explicitly stated and legitimate purpose of determining the precise nature of Hopkins' potential testimony.

ARGUMENT

I. Standard of review

IAC claims raise mixed questions of law and fact that this Court reviews de novo. *State v. Bryson*, 2024 MT 315, ¶ 23, 419 Mont. 490, 560 P.3d 1270 (citation omitted).

Preserved determinations regarding double jeopardy protections under Mont. Code Ann. § 46-11-410 present questions of law that this Court reviews for correctness. *State v. Geren*, 2012 MT 307, ¶ 24, 367 Mont. 437, 291 P.3d 1144

(citing *State v. Williams*, 2010 MT 58, ¶ 13, 355 Mont. 354, 228 P.3d 1127; *State v. Becker*, 2005 MT 75, ¶ 14, 262 Mont. 364, 110 P.3d 1).

This Court invokes the plain error doctrine only under extraordinary circumstances. *State v. Trujillo*, 2020 MT 128, ¶ 6, 400 Mont. 124, 464 P.3d 72 (citing *State v. Mitchell*, 2012 MT 227, ¶ 10, 366 Mont. 379, 19 P.3d 817). To invoke plain error review, the appellant bears the burden to firmly convince this Court that the claimed error implicates a fundamental right, 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. *State v. George*, 2020 MT 56, ¶ 5, 399 Mont. 173, 459 P.3d 854 (citations omitted).

II. Foster has failed to meet his burden of showing either deficient performance or prejudice as a result of alleged IAC.

A. Introduction

This Court reviews IAC claims by applying the two-pronged test set forth in *Strickland*. 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.*

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).

“This Court has held that counsel’s failure to make a *valid objection* based on the statutory prohibition on multiple charges constitutes deficient performance under *Strickland*.” *State v. Ellison*, 2018 MT 252, ¶ 25, 393 Mont. 90, 428 P.3d 826 (citation omitted) (emphasis added). The problem with Foster’s IAC claim is that, as his trial attorneys recognized, there was no valid objection to be made.

B. Foster’s convictions were not barred by Mont. Code Ann. § 46-11-410(1)-(2)(a).

(1) When the same transaction may establish the commission of more than one offense, a person charged with the conduct may be prosecuted for each offense.

(2) A defendant may not, however, be convicted of more than one offense if:

(a) one offense is included in the other[.]

Mont. Code Ann. § 46-11-410(2)(a).

(9) “Included offense” means an offense that:

(a) is established by proof of the same or less than all the facts required to establish the commission of the offense charged;

(b) consists of an attempt to commit the offense charged or to commit an offense otherwise included in the offense charged[.]

Mont. Code Ann. § 46-1-202(9)(a)-(b).

As this Court has observed, Mont. Code Ann. § 46-11-410 “makes it clear that a defendant may be convicted of multiple offenses arising from the same transaction.” *State v. Goodenough*, 2010 MT 247, ¶ 25, 358 Mont. 219, 245 P.3d 14; *see also State v. Strong*, 2015 MT 251, ¶ 17, 380 Mont. 471, 356 P.3d 1078 (concluding that while defendant’s conduct met the definition of “same transaction,” that conclusion “does not mean that Strong could not be convicted of multiple offenses arising from this single transaction”).

1. The attempts at forced vaginal penetration charged in Counts IV and V were not included offenses of forced oral and anal penetration.

The issue here is not whether Foster’s unsuccessful attempts at vaginal penetration were part of the same transaction when he “immediately repositioned and raped her anally,” as Foster asserts. (Appellant’s Br. at 23.) “Whether one offense includes the other depends on the facts necessary to prove the offenses.”

State v. McNamara, 2023 MT 2, ¶ 21, 411 Mont. 159, 522 P.3d 808 (citing Mont. Code Ann. § 46-1-202(9)(a)). Therefore, the issue here is whether attempting to vaginally rape M.W. would necessarily be proven by the same evidence as that of Foster forcing his penis into her mouth or anus.

Obviously, Foster's attempts to vaginally penetrate M.W., once in the basement and again later in Judy's bedroom, were *not* attempts to penetrate her anus or mouth. Moreover, the attempted vaginal penetration was not proven by "the same or less than all the facts required to establish the commission of the offense charged." Mont. Code Ann. § 46-1-202(9)(a). Proof of each count required establishing different facts and, therefore, the included offense provisions are not implicated here. *See McNamara*, ¶ 22.

Foster's reliance on *Williams*, *supra*, is misplaced. (*See* Appellant's Br. at 22.) In *Williams*, the State alleged that the defendant penetrated Jane Doe's vagina with his finger. *Williams*, ¶ 7. Williams blocked the front door of the house after the first attack so Jane Doe could not leave. *Id.* Williams attempted to accost Jane Doe a second time, but she escaped from the house and fled to her mother's workplace. *Id.* The State charged Williams with SIWOC, sexual assault, assault on a minor, and intimidation. *Id.* ¶ 6.

On appeal, this Court concluded that Mont. Code Ann. §§ 46-1-202(9) and 46-11-410(2) precluded Williams' convictions for both sexual intercourse without

consent and sexual assault because, based upon the way the charges were presented, sexual assault was an included offense of the charged SIWOC, therefore multiple convictions were precluded by Mont. Code Ann. § 46-11-410(2)(a).

Williams, ¶ 30.

As this Court observed:

We find it worth noting, however, that *the State chose to charge Williams only for the first attack on Jane Doe*. The information filed against Williams also mentioned a second attempted attack on Jane Doe as she tried to leave the house. This second attempted attack could have formed the basis of additional charges that might have altered our discussion of the matter regarding two separate transactions.

Id. ¶ 20 (emphasis added).

In other words, based upon the way that case was charged, there was no way to prove the elements of the SIWOC that occurred without proving the elements of sexual assault. Under those facts, sexual assault was an included offense of SIWOC.

Here, the State charged and proved five separate and distinct acts Foster forced upon M.W. over the course of several hours in different bedrooms.³ None of the convictions constituted included offenses of the others. The district court demonstrated its understanding of the statutory definition of “included offense”

³ M.W. testified to multiple distinct episodes of Foster forcing oral sex upon her. (1/19/23 Tr. at 66-67.) Further, M.W. testified to three distinct instances of anal rape: one in the downstairs bedroom (1/19/23 Tr. at 66, 112), and twice in Judy’s bedroom. (*Id.* at 81-82, 87.)

when it granted Foster's motion to give the included offense instructions for *sexual assault*. As in *Williams*, based on the way this case was charged, sexual assault qualified as an included offense of the SIWOC charges under Mont. Code Ann. § 46-1-202(9).

2. The aggravated SIWOC charges in Counts I through III were not included offenses of each other.

Foster contends that this entire incident “should have been one charge, not three separate charges for the same course of conduct.” (Appellant's Br. at 26.) Foster's argument mirrors that of the defendant in *Geren, supra*. Geren was convicted of one count of incest and one count of attempted incest for acts committed against his daughter, T.G., during the same hunting trip. *Geren*, ¶¶ 8-9, 21. First, Geren had forced his tongue into T.G.'s mouth and touched her breast. *Geren*, ¶ 8. “Sometime later,” Geren tried to put his hand down T.G.'s pants. *Geren*, ¶ 9.

Geren, who had preserved the issue in district court, appealed his convictions for incest and attempted incest on the theory that “anything that happened from the time he and T.G. left the house to go hunting until the time they returned home constituted the same transaction.” *Geren*, ¶ 40. Like Foster, Geren maintained that the two convictions were, therefore, barred by Mont. Code Ann. § 46-11-410(2). *Id.*

Affirming the convictions, this Court stated, “The fallacy in Geren's argument is that his convictions for Incest and Attempted Incest involving T.G.

were not based on the same transaction.” *Geren*, ¶ 43. This Court pointed out that the State had “charged and proved” that the incest conviction involved a separate transaction from the conviction for attempted incest. *Geren*, ¶ 50. Citing *Williams*, *supra*, this Court reasoned, “We have already recognized that separate transactions can arise from criminal conduct occurring at the same place with the same victim.” *Geren*, ¶ 47.

Here, Foster held M.W. hostage for several hours. Aside from attempting vaginal rape, Foster completed the acts of orally and anally raping M.W. in the downstairs bedroom. Then, Foster told M.W. to get dressed and took her upstairs to Judy’s bedroom, where he eventually removed her pants and anally raped her again, twice. (*See, e.g.*, 1/19/23 Tr. at 75.) The rapes took place over what M.W. testified were “hours and hours and hours.” (*Id.* at 72.)

Foster’s proposed statutory interpretation to turn multiple rapes into one for sentencing purposes would lead to absurd results in the application of Mont. Code Ann. § 46-11-410(2). “Statutory construction should not lead to absurd results if a reasonable interpretation can avoid it.” *City of Missoula v. Fox*, 2019 MT 250, ¶ 18, 397 Mont. 388, 450 P.3d 898 (citations omitted).

For example, had Judy not escaped and called the police, this matter could have been even more prolonged. Foster’s convenient interpretation of Mont. Code Ann. § 46-11-410(2) would have allowed him to use that extra time, be it hours or

days, to continue raping M.W. with no additional legal consequences. Foster cites no authority for this interpretation of the relevant statute because there is none.

C. Foster has not met his burden to show IAC or prejudice.

As discussed, any objection to the convictions under Mont. Code Ann. § 46-11-410(2) would have been futile. Failing to object when there is no error is not IAC. *See Hale v. Gibson*, 227 F.3d 1298, 1231 (10th Cir. 2000) (“As the evidence was properly admissible, we find that there was no deficiency in failing to raise an objection to it.”). Therefore, Foster’s attorneys’ failure to object to the convictions could not constitute IAC.

Furthermore, Foster has not identified any conceivable prejudice based on the multiple convictions. Foster concedes the validity of the consecutive sentences on the two counts of aggravated kidnapping. (Appellant’s Br. at 8.) Moreover, Foster concedes the “heinous” nature of the rapes, which he inaccurately references as his singular “act.” (Appellant’s Br. at 10.)

The district court pronounced the sentences for all of the SIWOC convictions to run concurrently. (Doc. 107 at 1-2.) The district court observed that Foster’s acts were “horrendous,” and stated, “there is no chance that this Court can punish commensurate with the harm caused in this particular case.” (6/15/23 Tr. at 50.)

Therefore, whether Foster received one life sentence, plus 100 years for the kidnapping charges, or multiple concurrent life sentences, plus 100 years, is a

distinction without a difference. Foster has failed to meet his heavy burden of showing IAC by demonstrating he was somehow prejudiced by his counsels' failure to object to the multiple convictions.

Alternatively, in the event that this Court disagrees, the remedy is to reverse the conviction for the lesser-included offense only and to remand for resentencing. *Ellison, supra*, ¶ 26 (citing *Becker*, ¶ 25).

III. This Court should decline to exercise plain error review of an in-chambers conversation that took place in Foster's absence.

The Confrontation Clause of the Sixth Amendment guarantees a criminal defendant the right to be present at all criminal proceedings against him. *State v. Price*, 2009 MT 129, ¶ 21, 350 Mont. 272, 207 P.3d 298 (citing *State v. Tapson*, 2001 MT 292, ¶ 14, 307 Mont. 428, 41 P.3d 305). The defendant also has a due process right to be present “whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.” *Price*, ¶ 21 (quoting *State v. Matt*, 2008 MT 444, ¶ 16, 347 Mont. 530, 199 P.3d 244). Article II, section 24, of the Montana Constitution also expressly guarantees a defendant the right to appear and defend a criminal prosecution in person. The defendant has the legal right to be present during the proceeding of the trial whenever “anything is done which in any manner affects his right.” *Price*, ¶ 22, (citing *Matt*, ¶ 17).

When this Court considers whether a district court has violated a defendant's right to be present, it generally first considers whether the court excluded the defendant from a "critical stage" of the proceeding. *State v. Godfrey*, 2009 MT 60, ¶ 25, 349 Mont. 335, 203 P.3d 834 (citing *State v. Mann*, 2006 MT 160, ¶ 15, 332 Mont. 476, 139 P.3d 159).

If this Court determines that the district court violated the defendant's right to be present, it considers "the effect the violation has on the defendant to determine whether the defendant suffered any conceivable prejudice." *Godfrey*, ¶ 25 (citing *Mann*, ¶ 15). If the record shows the defendant was not prejudiced, this Court has affirmed. *See Godfrey*, ¶ 25 (citing *State v. Kennedy*, 2004 MT 53, ¶¶ 27, 34, 320 Mont. 161, 85 P.3d 1279).

The in-chambers discussion on August 26, 2022, was not a critical stage of the proceedings since Foster's attorneys determined they needed to ascertain the district court's thoughts on recently discovered evidence prior to sharing that information with their client, which could have resulted in additional violence. They explained his absence, stating, "Because we want to see how this would go forward before I could advise him just to avoid any potential safety issues or retaliation issues for him when he returns back to the detention center after the conclusion of today's proceedings." (8/26/22 Tr. at 116.)

Importantly, Foster's lack of participation in the discussion did not cause him any conceivable prejudice. *See, e.g., Price*, ¶ 25. When the parties appeared before the district court the following Monday morning, Foster was in the identical legal position as he had been the previous Friday. He still had the right and the ability to demand that the jury be sworn in and to proceed to trial. Instead, Foster acquiesced to continuing the matter.

This is not a case justifying the invocation of plain error review.

CONCLUSION

Foster's convictions for aggravated SIWOC and attempted aggravated SIWOC should be affirmed.

Respectfully submitted this 21st day of February, 2025.

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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 6,878 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

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CERTIFICATE OF SERVICE

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