In the Supreme Court of the State of Montana

Supreme Court No. DA 24-0473

STATE OF MONTANA,

Plaintiff and Appellee,

-vs-

JAY DEE DAVISSON,

Defendant and Appellant.

Appellant's Opening Brief

On Appeal from the Montana Second Judicial District Court,
Silver Bow County, Hon. Robert J. Whelan, Presiding.

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Statement of the Case

Jay Dee Davisson appeals from his conviction and sentencing in the Second Judicial District. A jury convicted Mr. Davisson on Count I, Sexual Intercourse Without Consent with a finding that Mr. Davission was four or more years older than the alleged victim, T.K. (Appendix A).

On June 5, 2024, the district court sentenced Mr. Davisson to 60 years in the Montana State Prison with 20 of those years suspended. The court also restricted Mr. Davisson's eligibility for parole for a period of 20 years. (Id.)

Mr. Davisson filed a timely Notice of Appeal on August 8, 2024. He is currently housed in the Montana State Prison.

Statement of the Issues & Summary of the Arguments

The district court committed plain error when instructing the jury on the applicable mental state on the offense of Sexual Intercourse Without Consent. Consistent with this Court's decision in *State v. Gerstner*, 2009 MT 303, ¶ 31, 353 Mont. 86, 219 P.3d 866, the court lessened the State's burden of proof by instructing the jury that, to

convict, Mr. Davisson only had to be aware of the high probability that his conduct would case a specific result.

If, for some reason, the Court concludes the elements of plain error are not satisfied, Mr. Davisson argues his counsel was ineffective for not only failing to seek a correct mental state instruction but actually stipulating to the incorrect mental state instruction, thus allowing the State to proceed with a lower burden of proof against Mr. Davisson.

Given the magnitude of counsel's error and the import of the mental state not only in the American judicial system but the facts and circumstances of this specific case, Mr. Davisson was prejudiced by counsel's error. There is more than a reasonable probability that, but for counsel's error, the result in Mr. Davisson's case would have been different.

Statement of Facts

On August 2, 2020, T.K. and her friends went to a house party in Butte. (Trial Tr. at 98). In attendance were "mainly older kinds and adults." (Trial Tr. at 115). T.K. and her friends "were drinking." (Id.)

Although T.G.'s Facebook profile proclaimed her birthday to be August 19, 1995, at the time of the events she was 17 days away from her sixteenth birthday. (Trial Tr. 132). Mr. Davisson did not know that.

What Mr. Davisson did know was that T.K. drank alcohol and represented herself to be 20 years old, a statement she had whispered in his ear during a physical encounter in his vehicle. (Trial Tr. 364). What Mr. Davisson also knew was that T.K. behaved in a sexual manner that would belie her actual age. (Id.) He also knew, because he witnessed it first hand, that T.K. engaged in an apparent consensual encounter with another woman in the front seat of his car the same night as the events in question. (Trial Tr. 290). That woman, B.L[1]., would later be granted immunity by the State from prosecution of her own sexual contact with T.K. in exchange for testifying against Mr. Davisson. (Trial Tr. 248).

By and large, the events of August 2, 2020, are undisputed. Mr. Davisson had been staying in the Red Lion Inn in Rocker, MT. for work.

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[1]Although B.L. was legally an adult during the events in question, given the nature of her testimony and grant of immunity, her initials are used to protect both her safety and privacy.

(Trial Tr. at 105). His daughter, Jay Cee Davisson, lived in Butte and was friends with B.L. B.L. was friends with H.R., who was also friends with B.L. Notwithstanding this seemingly tenuous connection, Mr. Davission's and T.K.'s paths eventually crossed for the first time on July 27, 2020. (Trial Tr. 110).

On the evening of July 27, 2020, T.K., H.R., and B.L. were again at a house party drinking alcohol and smoking marijuana.[2] (Id.). As all the girls were underage, they attempted to locate an adult "buyer" to procure them more alcohol. (Trial Tr. 111). According to T.K., their quest eventually lead them to the Red Lion Inn in Rocker. According to T.K., Mr. Davisson bought the girls a "24 party pack" of Twisted Teas. (Trial Tr. 112).

Five days later, T.K. and Mr. Davisson's paths would cross again. The girls, T.K., H.R., and the older B.L., were drinking at a house party. H.L. and "a friend" had gone upstairs and B.L. was "very distressed," because an ex-boyfriend was being rude to her. (Trial Tr.

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[2]Although she would later deny using methamphetamine at trial, T.K.'s toxicology report detected the presence of methamphetamine on August 2, 2020. (State's Ex. 6).

116, 265). "Fed up" with the situation, B.L. "simply walked away and ran to the door" to go for a walk or just "get out of there." (Trial Tr. 265). T.K. accompanied her.

As the two girls walked away from the house, both saw a car "flick[] their lights." (Trial Tr. 117). B.L. ran. T.K. walked up to the car and asked who it was. (Id.) T.K. recognized the driver as Mr. Davisson. B.L. returned and asked Mr. Davisson to take them to a gas station. The two girls got in the car with Mr. Davisson, and he drove them to the Flying J gas station in Rocker. (Trial Tr. 118).

At the Flying J, B.L. and T.K. went in to use the restroom and then returned to the car to wait for Mr. Davisson to return. T.K. was in the back seat. (Trial Tr. 118). According to T.K., the next thing she remembered was Mr. Davisson handing her a bottle of whiskey; she took a drink. (Id. 118-119). At this point, individual accounts of the evening start to conflict.

It is T.K.'s memory that Mr. Davisson and B.L. asked her to join them in the front seat to play music. T.K. complied and took another drink of the alcohol. The next thing she remembers is B.L. grabbing

her thigh and pulling T.K. on top of B.L.. T.K. felt intoxicated. In the front seat and on B.L.'s lap, T.K. closed her eyes and did not remember anything else until she awoke in the Red Lion later than morning. (Trial Tr. 119-120).

B.L. testified she was "pretty drunk" when she left the house party and that T.K. was only a little less so. (Trial Tr. 268). She also believed Mr. Davisson was "probably intoxicated." (Trial Tr. 270). After their trip to the Flying J, B.L. recalls returning to Butte. All occupants were in the front seat with Mr. Davisson driving, B.L. in the middle and T.K. on the outside. As they were driving around, the conversation "turned to sexual things." (Trial Tr. 272). B.L. remembers both Mr. Davisson and T.K. touching her. (Trial Tr. 273).

According to B.L., at some point she switched seats with T.K. and she began touching T.K., which ultimately lead to digital penetration. (Trial Tr. 274-275). B.L. estimates she digitally penetrated T.K. for "about five minutes." (Trial Tr. 275). At trial, B.L. affirmed the digital penetration was "consensual in the sense that [T.K.] wanted [B.L.] to do that," or "was allowing [B.L.] to do it." (Trial Tr. 297).

B.L. remembers Mr. Davisson also touching T.K., but she doesn't remember them "full on having, like, sex in the car" although she believes he tried to "put his penis in her." (Trial Tr. 274 & 276). She did not recall Mr. Davisson ejaculating. (Trial Tr. 277). Ultimately, all touching stopped "[l]ike, nothing happened." (Trial Tr. 275).

B.L.'s memory is a bit of a jumble. She remembers she had her shirt off but her pants on. (Trial Tr. 278). T.K. had "a cardigan or something" but "she didn't have her shirt on." B.L. also attested T.K. might have had her pants on, "but there was a point where they were off, too." (Trial Tr. 278). Mr. Davisson had "his clothes on." (Id.)

B.L. asked Mr. Davisson to take her home. He did. (Trial Tr. 277). B.L. tried to convince T.K. to say with her at her apartment. (Trial Tr. 278). She "didn't want her to go." (Id.) T.K. kind of cooperated with B.L., who was trying to put T.K.'s clothes on her. "I put her pants on and her shirt on, and I kind of helped her get dressed back up so we could go inside." (Trial Tr. 279). Although T.K. was sobering up, B.L. could not really understand her. (Trial Tr. 280).

Although B.L. was worried about T.K. because of what happened

in the car earlier in the evening, B.L.'s apartment was atop three flights of stairs and B.L., in her own intoxicated state, could not figure out how to get both herself and T.K. up the stairs. Despite her worry about T.K. going with Mr. Davisson, B.L. let the two depart while she went upstairs.

B.L. would later tell law enforcement that T.K. told Mr. Davisson she "was 20" years old. (Trial Tr. 259). Later, under a grant of immunity, B.L. claimed her previous statement to law enforcement was a lie. B.L. also affirmed she told a neighbor, Jason Ford, about the incident, including that T.K. was told Mr. Davisson she was 20 years old. (Trial Tr. 287). B.L. also told Silver Bow Detective Stearns that T.K. was all over B.L., kissing her and making out with her, even going so far as to give B.L. a hickey on her neck. (Trial Tr. 290). B.L. also told Det. Stearns that "there was a joke about being 20" years old. (Trial Tr. 291). B.L. did not speculate as to how, if at all, Mr. Davisson would have known it was a "joke." B.L. did testify that she recalled telling Det. Stearns that she was "an idiot for not telling Jay Dee [T.K.'s] actual age."

B.L. would also later tell Det. Stearns that T.K., in B.L.'s mind, had blacked out or was acting blacked out. (Trial Tr. 382-383). Det. Stearns described "if you blacked out and you did something, there would be no way to know if that did happen." (Trial Tr. 382).

Mr. Davisson did not testify at trial. However, significant portions of his version of events were revealed through the testimony of Det. Stearns, who interviewed Mr. Davisson on August 10, 2020. (Trial Tr. 359). When Mr. Davisson recounted his first meeting on July 27, 2020 with the girls , he expressed his belief that they were 20 years old. (Trial Tr. 360). Twice Det. Stearns repeated Mr. Davisson's assertion that "in his mind he thought they were 20." (Trial Tr. 360 & 361).

According to Mr. Davisson as relayed by Det. Stearns, on the evening of August 2, Mr. Davisson was out at the bar and headed back to a friend's house. (Trial Tr. 361). He saw T.K. and B.L. and gave them a ride to the Flying J gas station in Rocker. Mr. Davisson candidly told Det. Stearns that he had been drinking and "probably had enough not to be driving." (Trial Tr. 362).

Mr. Davisson supported T.K.'s testimony that the two had only

met once before and "he thought she was 20." (Trial 363). Mr. Davisson knew T.K. "had an older Facebook [account] that said she was 24." (Trial Tr. 363). Mr. Davisson also told Det. Stearns that T.K. had told him she had a fake ID. (Id.)

As with his drinking, Mr. Davisson candidly admitted to having sexual intercourse with T.K. in his vehicle but stated T.K. initiated it. He told Det. Stearns that he "did ejaculate from it, but he said it wasn't sexual, a sexual experience for him." (Trial Tr. 365). Mr. Davisson found it odd that T.K. whispered in his ear that she was 20. As told by Det. Stearns, Mr. Davisson believed that T.K. was older based on the way she was "sexually acting." (Trial Tr. 364). Mr. Davisson believed T.K. was acting even more sexually mature than B.L. (Trial Tr. 383). That, coupled with the fact that "she was out late and she had alcohol in her hand, Twisted Tea, when he picked her up," also lead him to believe T.K. was older than her actual age, which was unknown to him. (Id.) Mr. Davisson said he was surprised when Det. Stearns informed him that T.K. was under the age of 16. (Trial Tr. 375-376).

After dropping B.L. off, Mr. Davisson and T.K. drove back to the

Red Lion Inn. Det. Stearns obtained surveillance from the Inn, which shows Mr. Davisson arriving at 5:37 a.m. Mr. Davisson exists the car, but T.K. does not. Surveillance video (State's Ex. 9) shows Mr. Davisson wandering around the Inn at various times and eventually moving his a car closer to a side door. At approximately 6:48 a.m., the video depicts Mr. Davisson carrying T.K. into the motel from his vehicle. (State's Ex. 9; Trial tr. 366). For approximately 30 minutes, Mr. Davisson is not seen on video. He is seen again at 7:18 a.m. (Trial Tr. 356).

According to Mr. Davisson, he took T.K. to his room where she lay on the bed "backward." Mr. Davisson described that T.K. then began acting "like she was roofied or something." (Trial Tr. 365-366). "He said she was laying on the bed backward and she was taking her clothes off and her shoes off and stuff like that." (Trial Tr. 366). Mr. Davisson eventually had to leave the Inn to meet with his boss. He left T.K. in his room with a note that included his name and number, a toothbrush, and money for a cab ride back to Butte. (Trial Tr. 370-371).

T.K. believes she woke up around 2 p.m. She was halfway off the

bed with no pants or underwear on. The bed was made and there were folded clothes next to her. She had a shirt on, but it wasn't hears. (Trial Tr. 120). She was confused and scared so, after retrieving her pants and shoes, she called Mr. Davisson using the hotel phone. (Trial Tr. 123). She "told him to essentially F off." (Id.) She then took the money and "went downstairs to the lobby." (Id.)

T.K. caught a cab and returned to B.L.'s house in Butte. She eventually retrieved her car and went to her father's house. T.K. told her father she "had fallen asleep at a friend's house" and that she had lost her phone. (Trial Tr. 127). T.K.'s father then took her to H.R.'s house. By this time, T.K.'s body was sore especially her vagina and bottom. (Trial Tr. 129). After much convincing, H.R.'s mother, Terri Jo, took T.K. to the hospital for a SANE examination. (Id.)

Toxicology reports would later reveal that there was no alcohol present in T.K.'s blood at the time it was drawn. There were, however, positive results for both methamphetamine and THC. (Trial Tr. 144-146; 150-153). DNA testing revealed a DNA profile matching Mr. Davisson found in T.K.'s vagina and rectum. (Trial Tr. 223-224). DNA

was also taken from a stain, which contained a DNA mixture of three or more individuals. (Trial Tr. 239).

Mr. Davisson was charged and proceeded to trial under the theory that he did, in fact, have sexual intercourse with T.K. but had a reasonable belief that T.K. was 16 years of age or older and that she was not too intoxicated to consent to sexual intercourse.

At the conclusion of the trial, the district court – in contravention of clearly established law from this Court – instructed the jury on a single definition of the applicable mental state for sexual intercourse without consent. "A person acts knowingly when the person is aware there exists the high probability that the person's conduct will cause a specific result." (Instruction 14; Appendix B). The instruction was proposed by the State and stipulated to by defense counsel. The record reflects the district court made no comment on the mental state instruction and did not opine on whether the instruction was applicable to Mr. Davisson's case.

Mr. Davisson lost his trial and the district court sentenced him to prison. He now appeals.

Standards of Review

"We review jury instructions given by a district court for an abuse of discretion. We review jury instructions in criminal cases to determine whether the instructions, as a whole, fully and fairly instruct the jury on the law applicable to the case." *State v. Secrease*, 2021 MT 212, ¶ 9, 405 Mont. 229, 493 P.3d 335 (internal citations and quotations omitted).

"A district court abuses its discretion when it acts arbitrarily without employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice." *Langford v. State*, 2013 MT 265, ¶ 10, 372 Mont. 14, 309 P.3d 993.

"Ineffective assistance of counsel claims are mixed questions of law and fact which we review de novo." *Secrease*, ¶ 9.

When reviewing an issue on direct appeal not preserved below, appellate courts have inherent authority to exercise plain error review over the issue. "The plain error doctrine may be used in situations that implicate a defendant's fundamental constitutional rights, and where failing to review the alleged error may result in a manifest miscarriage

of justice, leave unsettled the question of the fundamental fairness of the proceedings, or compromise the integrity of the judicial process." *State v. Lawrence*, 2016 MT 346, ¶ 8, 386 Mont. 86, 385 P.3d 968 (internal citations and quotations omitted). It is the appellant's burden to make such a showing.

Arguments

I. The district court committed plain error by providing a mental state instruction that lessened the State's burden of proof.

All of the elements of plain error apply to the mental state instruction given in Mr. Davisson's trial. First, "[j]ury instructions that relieve the State of its burden to prove each element of an offense violate a defendant's right to due process." *State v. Hamernick*, 2023 MT 249, ¶ 14, 414 Mont. 307, 545 P.3d 666; see also *State v. Miller*, 2008 MT 106, ¶ 11, 342 Mont. 355, 181 P.3d 625; *Carella v. California*, 491 U.S. 263, 265 (1989) (per curiam). Due process is a fundamental right. *Dep't of State v. Munoz*, 602 U.S. 899, 909-910 (2004) ("Under our precedent, the [Due Process] Clause [of the *Fifth Amendment*] promises more than fair process: It also provides heightened protection against government interference with certain fundamental rights and

liberty interests.") Because the instruction at issue here implicates Mr. Davisson's fundamental constitutional right, the first element of plain error review is satisfied.

Once that first element is satisfied, this Court turns its analysis to the question of whether failing to review the alleged error may result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the proceedings, or compromise the integrity of the judicial process." *Lawrence*,¶ 8.

The keystone of criminal law is its purpose "to punish the 'vicious will.'" *Xiulu Ruan v. United States*, 597 U.S. 450, 457 (2022) (citing and quoting *Morisette v. United States*, 342 U.S. 246, 251 (1952). "Indeed, we have said that consciousness of wrongdoing is a principle 'as universal and persistent in mature systems of [criminal] law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Id.* (quoting *Morisette*, 342 U.S. at 250). Laws, whether they be passed by the United States Congress or the Montana Legislature "require a defendant to possess a culpable mental state." *Rehaif v. United States*,

588 U.S. 225, 229 (2019). It is the State's burden to prove each element of an offense beyond a reasonable doubt. *State v. Clark*, 1998 MT 221, ¶ 29, 290 Mont. 479, 964 P.2d 766. This includes the mental state. *Mont. Code Ann. § 45-2-103.*

Given the preeminence in a criminal prosecution that the mental state holds – and has held for centuries, it stands to reason that an instructional error that lessens the State's burden of proof on the mental state element must necessarily meet the remaining elements of plain error review, especially the fundamental fairness of the proceeding.

> A conviction will not be overturned due to improper jury instructions unless the error prejudiced the defendant's substantial rights. If jury instructions lower the State's burden to prove each element beyond a reasonable doubt, they violate the defendant's right to due process. We will reverse a conviction if the State's burden was lowered by an incorrect 'knowingly' jury instruction, and the defendant suffered prejudice to their substantial rights as a result.

State v. Rowe, 2024 MT 37, ¶ 33, 415 Mont. 280, 543 P.3d 614 (internal citations omitted).

In 2022, this Court conclusively decided that the offense of sexual intercourse without consent is a conduct-based offense for which the

mental state of "knowingly" is properly defined as when the person is aware of his conduct. *State v. Deveraux*, 2022 MT 130, ¶ 32, 409 Mont. 177, 512 P.3d 1198. *Deveraux* was decided April 27, 2022. Mr. Davisson's trial began months later in January 2023. Both the district court and the parties had ample opportunity to avail themselves of the correct definition as decreed by this Court.

Here, rather than correctly instruct the jury on the legally correct conduct-based definition of "knowingly," the district court instructed "a person acts knowingly when the person is aware there exists the high probability that the person's conduct will cause a specific result." (Instruction 14; Appendix B). As such, Mr. Davisson's case is comparable to the facts in *State v. Hamernick*, which was ultimately reversed because the lower court instructed the jury with the exact same instruction as was given in Mr. Davisson's case.

In *Hamernick*, this Court concluded: "Despite the language of the statute criminalizing the act of knowingly engaging in sexual intercourse 'without consent,' the State was relieved of proving that Hamernick knew his sexual conduct with [the alleged victim] was

without her consent, instead needing to prove only that he was aware of 'a high probability' of such." *Hamernick*, ¶ 23. Rebuffing the State's argument on appeal, this Court also warned

> the states argument [does not] address the troubling implications of permitting the use of two differing mental state defintions, as essentially interchangeable alternatives, in SIWOC prosecutions, a seemingly unfair double standard. More, if approved here, it would seem the State could prosecute other kinds of cases with the lower-burden 'high probability' definition of knowingly.

Id.

This is not to say the "high probability" definition should not have played some role in Mr. Davisson's case, perhaps as it related to the sentencing enhancement. It just should not have played the sole role in the case for the entirety of the instructions and the sentencing enhancement. Again, in *Hamernick*, this Court clarified the "high probability of fact' definition is to be used when 'knowledge of the existence of *a particular fact* is an element of the offense. By the plain language, this mental state definition is directed to a narrower factual issue than the conduct-based definition of 'awaren[ness] of the person's own conduct." *Hamernick*, ¶ 24.

However, as to the overall offense of sexual intercourse without consent, this Court made plain that "[u]nder the language of the statute, the crime does not consist of sexual intercourse with a high probability the other person does not consent; rather, it is sexual intercourse with the awareness that it is *without* that person's consent, which may permissibly be inferred from all of the facts and circumstances of the case." *Hamernick*, ¶ 26 (emphasis in original).

Ultimately, in *Hamernick*, the Court clearly held:

> We conclude that the District Court erred by giving the jury a high-probability-of-fact definition of "knowingly" for the element of "without consent," rather than the conduct-based definition, and thus failed to "fully and fairly instruct the jury as to the applicable law. We further conclude the error, when considered in conjunction with Hamernick's trial testimony, prejudicially affect[ed] the defendant's substantial rights, because it undermined his defense by improperly lowering the State's burden of proof.

Hamernick, ¶ 27 (internal citations omitted). Although Mr. Davisson did not testify, the same result must follow.

The prejudicial effect of the erroneous instruction was compounded by the fact that the State proceeded on a two-prong theory to establish Mr. Davisson's guilt and seek a sentencing enhancement

based on T.K.'s age. The State's closing argument and the verdict form emphasize the prejudice.

> So there's two possibilities here, her age and that she was physically helpless. The evidence before you tells you that [T.K.] was 15 years old. She, in fact, was 15 years old. The State proved that beyond a reasonable doubt. We also proved that the defendant was 45 years old. We proved that beyond a reasonable doubt. We proved that she was 15 and the defendant was four or more years older than [T.K.]. We checked that box.

(Trial Tr. 434) (See also Trial Tr. 452; Appendix C).

The defense theory, as set forth in the closing argument, was that "Mr. Davisson was consistent throughout his interview with Detective Stearns. He was - - he was surprised. he was upset when he found out her age. He was worried. But he said he would never have been - - had anything to do with her if he knew that she was under the age of 16." (Trial Tr. 445). And also,

> it is reasonable to believe that a person who is 17 days short of her 16th birthday was not 16 based upon her actions of staying out at night, 3:30 in the morning, riding around with Mr. Davisson and [B.L.] and engaging in adult sexual activities with [B.L.] and having sex with Mr. Davisson. He had sex with her, but he thought she was over the age of 16 because he had been told repeatedly.

(Trial Tr. 447).

The State's rebuttal closing conceded there had been conflicting testimony about whether or not [T.K.] said she was 20. (Trial Tr. 453). In addition to that conflicting testimony, the prejudice to Mr. Davisson was heightened because the State attacked the reasonableness of Mr. Davisson's belief. Although lawyers are apt to split the difference between "high probability" and "reasonable" to a micro-hair's width, a lay jury was likely confused. There is a complex legal distinction between the State having to prove beyond a reasonable doubt that Mr. Davisson was aware of his conduct, i.e., engaging in sexual intercourse without T.K.'s consent, and Mr. Davisson establishing by a preponderance of the evidence that he reasonably believed T.K. to be 16 or older.

A jury, properly instructed, could easily come to a number of different conclusions. For example, it could conclude the State had failed to meet its burden beyond a reasonable doubt though Mr. Davisson had not established this reasonable belief because he chose not to personally testify. In such a situation, an acquittal would result regardless of the reasonableness of Mr. Davisson's belief. A second

scenario could be that the jury concluded Mr. Davisson did have a reasonable belief that T.K. was 16 years or older, but the State had still proven beyond a reasonable doubt that he was aware of his conduct of having sexual intercourse without T.K.'s consent because she was incapacitated. In that situation, had the jury been properly instructed, a conviction would have been legally and factually proper.

In fact, it is because the State's theory of culpability was two-pronged that makes the prejudice in this case all the more egregious. Had the State proceeded simply on the guilt-because-of-age theory, on appeal it could possibly argue Mr. Davisson was not prejudiced by the erroneous instruction because the jury rejected his reasonable belief defense. Although still legally tenuous, it is a more plausible theory for the State because it could allow an inference that, by rejecting Mr. Davisson's reasonable belief that T.K. was 16 or older, the jury necessarily concluded the State has proven beyond a reasonable doubt she was not yet 16 and, therefore, legally incapable of consenting. However, an inability to consent due to incapacitation is a completely independent theory and unrelated to Mr. Davisson's reasonable belief

about T.K.'s age. It requires a conclusion by a properly instructed jury that the State proved beyond a reasonable doubt that Mr. Davisson *was aware* of his conduct of having sexual intercourse without T.K.'s consent, i.e., aware she was incapacitated an incapable of consenting not just that there was a high probability of that fact.

"In determining how to instruct the jury, the district court should take into consideration both the parties' theories and the evidence presented at trial." *Camen v. Glacier Eye Clinic, P.C.*, 2023 MT 174, ¶ 21, 413 Mont. 277, 539 P.3d 1062. With respect to the district court, there is no evidence in the record that it considered either the parties' theories or the evidence when settling the jury instruction. It seems to have simply relied on the parties stipulation. In the court's defense, there is no evidence either party properly considered the correct "knowingly" definitions given the evidence available to the case. The State ultimately received the benefit, however, because it was allowed to proceed under a lower and unconstitutional burden.

Given Mr. Davisson's theory of defense, the State's two-pronged theory of guilt, the conflicting evidence at trial, and the fundamental

right at issue, failing to review this question would result in a miscarriage of justice and call into question the fundamental fairness of Mr. Davisson's conviction and resulting 40 year custodial commitment[3] to the Montana State Prison with a 20-year restriction on his parole. He respectfully requests this Court reverse his conviction and remand his case for a new trial with instructions on the proper mental state.

II. In the alternative, Mr. Davisson's conviction is the result of ineffective assistance of counsel in violation of his rights.

Both the *Sixth Amendment* and *Art. II, § 24* of the Montana Constitution guarantee a criminal defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984); *Whitlow v. State*, 2008 MT 140, ¶ 19, 343 Mont. 90, 183 P.3d 861. This Court has adopted the two-pronged approach from *Strickland* to analyze claims of ineffective assistance of counsel.

> First the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the *Sixth Amendment*. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the

[3]60 years with 20 suspended.

defendant of a fair trial, a trial whose result is reliable. *Strickland*, 466 U.S. at 687; *Whitlow*, ¶ 10.

As to the first prong of *Strickland*, courts recognize it is "necessarily linked to the practice and expectations of the legal community." *Padilla v. Kentucky*, 599 U.S. 356, 366 (2010). "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Stickland*, 466 U.S. at 688. In *Whitlow*, this Court recognized the first *Strickland* prong is not directed to "whether counsel's challenged conduct may be characterized as 'strategic' or 'tactical'; rather it is whether that conduct – strategic, tactical or otherwise – was 'reasonable under the prevailing professional norms and in light of the surrounding circumstances." *Whitlow*, 2008 MT 140, ¶ 18 n.4.

To establish prejudice, the defendant must show that, but for counsel's errors, a reasonable probability exists that the result of the proceeding would have been different. *State v. Gunderson*, 2010 MT 166, ¶ 67, 357 Mont. 142, 237 P.3d 74. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the

proceeding." *State v. Miner*, 2012 MT 20, ¶ 12, 364 Mont. 1, 271 P.3d 56.

While claims of ineffective assistance of counsel are generally inappropriate for direct appeal, on a number of occasions, this Court has reversed convictions based on ineffective assistance of counsel when the record reveals a situation "when counsel is faced with an obligatory, and therefore non-tactical, action. *State v. Kougl*, 2004 MT 243, ¶ 15, 323 Mont. 6, 97 P.3d 1095. Another instance in which this Court has reversed are situations "where there is 'no plausible justification' for what defense counsel did." *Kougl*, ¶ 15 (quoting *State v. Jefferson*, 2003 MT 90, ¶ 50, 315 Mont. 146, 69 P.3d 641); *see also State v. Rose*, 1998 MT 342, 292 Mont. 350, 972 P.2d 321; *State v. Johnston*, 2010 MT 152, ¶ 16, 357 Mont. 46, 237 P.3d 70.

As is evident from the preceding arguments, both prongs of *Strickland* are satisfied in Mr. Davisson's case and, because his counsel had both a constitutional obligation to ensure the Court instruction did not lessen the burden of proof, and because there is no plausible reason for counsel's failure to seek the correct mental state instruction, the

claim is appropriately raised on direct appeal. There is a vast difference between failing to seek a legally correct jury instruction and stipulating to a legally incorrect one. Between the importance of the defendant's mental state in any criminal case, and the importance of Mr. Davisson's mental state in this particular case, counsel was not acting in a manner contemplated by either the *Sixth Amendment* or *Article II, § 24*. Reversal on the grounds of ineffective assistance of counsel is warranted.

As to the first prong of *Strickland*, counsel's performance in Mr. Davisson's case falls short of prevailing professional norms. Since at least 1973, Montana has had multiple definitions of "knowingly." The applicability of any particular definition is dependent on the offense charged. Some offenses require multiple definitions. Since, at least 2009, commentary to the pattern criminal jury instructions has cautioned parties of the need to match the correct definition to the specific elements of the offense. The authority relied on by the instructions dates back to the mid-1990s: *State v. Rothacher*, 272 Mont. 303, 901 P.2d 82 (1995); *State v. Lambert*, 280 Mont. 231, 929

P.2d 846 (1996); and *State v. Patton*, 280 Mont. 278, 930 P.2d 635.

Anecdotally, appellate counsel has attended and presented a number of CLEs geared to making criminal defense lawyers aware of the need to match the correct mental state definitions to the correct elements of the offenses charged. As noted above, almost a year before Mr. Davisson's trial, this Court's decision in *Hamernick* established the correct mental state definition to govern the instructions in Mr. Davisson's criminal trial on the offense of Sexual Intercourse Without Consent.

Even setting aside the obvious fact that the instruction given lowered the State's burden of proof, the prevailing professional norms since *at least* the mid-1990s dictate diligence as to application of the correct mental state definitions to the elements of the charged offenses. Failing to do that, indeed stipulating to a definition that lowered the State's burden of proof in a case so heavily dependent on the mental state, was a deviation from the professional norms and error under *Strickland* and *Whitlow*.

The second *Strickland* prong, prejudice, is evident by the very

nature of the error. It bears reiterating that "[j]ury instructions that relieve the State of its burden to prove each element of an offense violate a defendant's right to due process." *Hamernick*, ¶ 13. In Mr. Davisson's case, the instructions allowed the jury to convict if it concluded the State had proven it was highly probable that Mr. Davisson had sexual intercourse without consent, specifically that it was highly probable that he should have known she was younger than 16 or that she was incapacitated. That is not the State's correct legal burden under either theory of "without consent." The State has to prove he was aware of his conduct, i.e., that he was *actually* having sexual intercourse with someone unable – for whatever reason – to consent to that act.

Although a district court has an independent duty to correctly instruct the jury on the applicable law, a duty which cannot be delegated to the parties, defense counsel is the vanguard of his or her client's constitutional rights. It is counsel's duty to ensure that, even if he cannot obtain the most favorable instruction for his client, the court does not instruct on the least favorable or one that lessens the State's

burden of proof to an unconstitutional degree. Here, counsel not only failed to act as that vanguard but, by stipulating to the State's instructions, actually threw open the gates for the State to convict based on a lower standard of proof. Both prongs of *Strickland* are satisfied on the record before this Court. Mr. Davisson's conviction stands in violation of his right to effective assistance of counsel and reversal is warranted on that basis.

Conclusion

Given the arguments above and the legal authority, either plain error review or record-based ineffective assistance of counsel are apparent. Consequently, Mr. Davisson respectfully requests this Court reverse his conviction and remand his case for a new trial with legally correct instructions to put the State to the correct burden of proof.

Respectfully submitted this 7th day of April 2025.

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Certificate of Compliance

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that the Appellant's Opening Brief is printed with proportionately-spaced Century Schoolbook typeface of 14 points; is double-spaced except for lengthy quotations or footnotes; and does not exceed 10,000 words. The exact word count, as calculated by my WordPerfect software and excluding tables and certificates, is 6,143.

Dated this 7th day of April 2025.

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CERTIFICATE OF SERVICE

I, Colin M. Stephens, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 04-07-2025:

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