

In the Supreme Court for the State of Montana

Supreme Court No. DA 24-0386

STATE OF MONTANA,

Plaintiff & Appellee,

-vs-

JAY STEVEN HUBBER,

Defendant & Appellant.

Appellant's Opening Brief

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

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Statement of the Case

Hubber appeals from his convictions for Deliberate Homicide (Accountability) and Aggravated Burglary. The district court sentenced Hubber to the Montana State Prison for a period of 60 years, 20 suspended for Deliberate Homicide and a concurrent term of 20 years for Aggravated Burglary. (Appendix A).

Hubber timely filed a notice of appeal and now requests this Court vacate his convictions and remand for a new trial.

Statement of the Issues & Summary of the Arguments

The district court committed plain error when instructing the jury on the applicable mental state instructions for the offenses of conviction. In the alternative, trial counsel was ineffective in failing to both object to incorrect instructions and propose legally correct mental state instructions.

Second, the district court erred denying Hubber's motions to dismiss for insufficient evidence, especially in light of the instructional errors.

Finally, the district court erred by refusing to recognize a

bondsman's privilege.

Statement of Facts

Leading to the death of Bill Harris, Hubber was a bail bondsman operating Alibi Bail Bonds, LLC. (Tr. 1531-1533). David Sandoval had absconded from pretrial release on numerous cases for a variety of charges including criminal possession of dangerous drugs and burglary. (Tr. 293). Sandoval's pretrial supervision was managed by Rachel Verlanic. (Id.)

Hubber posted \$15,000 and \$10,000 bonds for Sandoval in Butte City Court. (Tr. 1557-1560). In exchange, Sandoval signed a bail bond application and contract in which Sandoval agreed the "[Company] shall have control and jurisdiction over me during the term for which my bail bond(s) is executed *and shall have the right to apprehend and surrender me* to proper officials at any time for violation of my bail bond(s) obligations to the Court and [Company] as provided by law." (Tr. 1553) (emphases added). Sandoval also "consent[ed] *to the application of such reasonable force as may be necessary* to effect such return" to the jurisdiction. (Tr. 1552-1554) (emphasis added).

The contract listed three addresses for Sandoval. First was his mother's house at 1230 West Porphery [sic]. The second was 1330 Cortez, belonging to his grandmother. (Tr. 1089). The final address was 815 S. Main, a "trap house" owned by Harris. Sandoval did not fill out the address portions and was unsure if he gave this last address to Hubber. (Id). However, Ms. Verlanic testified that 815 S. Main was the address she associated with Sandoval's mailing address. (Tr. 1444).

Harold Mitchell lived with Harris at 815 S. Main Street for about two years. Mitchell testified Sandoval came over to the house two or three times a week to hang out, drink, and do drugs. (Tr. 1376-77). Mitchell testified Sandoval spent the night at the house two or three days before Harris' death. (Tr. 1377).

Seth Babcock testified Sandoval was at Harris' house at least once a day, and there were times when he was there for over 24 hours at a time. (Trial Tr. 1484).

On October 14, 2021, City Judge Jerome McCarthy issued two misdemeanor warrants for Sandoval and forfeited his bond in two cases. (Tr. 1561-1562). The district court issued its own warrant for

Sandoval on November 10, 2021, after Sandoval failed to appear at a final pretrial conference and did not maintain his GPS monitoring. (Tr. 295). The district court's warrant was directed to "any police officer or law enforcement personnel." It ordered Sandoval "shall be arrested in any jurisdiction within the State of Montana he may be found. Thereafter, [Sandoval] shall be brought before this Court for further proceedings in this matter." (Tr. 342-343).

The district court issued a second warrant for Sandoval in a second felony case on December 14, 2021, when Sandoval again failed to appear. This second warrant was similarly worded to the first. (Id.)

On the morning of December 18, 2021, Hubber went in search of Sandoval. Hubber successfully located Sandoval at the first place he looked: 815 S. Main. Hubber told Sandoval that Sandoval was going to jail. Sandoval was aware of the warrants and agreed he knew the "cops were looking for" him. (Tr. 1105). Sandoval, who did not want to go to jail replied, "Come on, man." Unpersuaded by Sandoval's compelling self-advocacy, Hubber reiterated "you got to go." (Tr. 1114). Sandoval argued with Hubber but eventually agreed to go with him yet refused

to wear handcuffs. (Tr. 1115). Hubber agreed after believing Sandoval's promise that he was "going to cooperate with" Hubber. (Id.)

Sandoval was able to escape Hubber. He fled into a residence at 735 South Main, up the stairs, dove out a window and jumped off the roof. (Tr. 1116-1117). Sandoval ran back into the house, locked the door, turned up the music and refused to come out again. (Tr. 1577). Hubber called law enforcement "requesting help to make the arrest, to see if there was anything we could do. If we could get him to maybe leave the house." (Tr. 1578).

Sgt. McMahon responded. He knew Sandoval and knew Sandoval had arrest warrants. (Tr. 341). Despite this, Sgt. McMahon did not believe he had a duty to try to arrest Sandoval because he did not see Sandoval. (Tr. 343). Sgt. McMahon did nothing except tell Hubber that Hubber "probably have more authority than" law enforcement to enter the house and go after Sandoval. (Tr. 333-334). Hubber did not enter the house that day, and Sandoval remained at large.

The next evening, while drinking beer¹ at the Acoma Bar, Hubber

¹Although Hubber also had residual trace amounts of cocaine in his system, he did not use on December 19, 2021. (Tr. 1589).

learned Sandoval had returned to the house at 815 S. Main. (Tr. 317; 1584). Knowing there would be other people in the residence, Hubber enlisted the assistance of Jesse Jaeger. Jesse, in turn, offered the assistance of his brother, Nick. (Tr. 1586). Nick would later become Hubber's co-defendant. A fourth person and friend of Jesse's, Jacqueline Schwartz, rounded out the group. They rendezvoused at the Triple S Building Center between 6:30 and 6:35. (Tr. 1586-87).

Hubber called law enforcement and spoke with a dispatcher, Jennifer Bailey. Again, Hubber sought the assistance of law enforcement in apprehending Sandoval on the outstanding warrants. (Tr. 1591). Sgt. Berger was shift commander and Ms. Bailey conveyed Hubber's request for assistance to Sgt. Berger. Sgt. Berger was aware of Sandoval's warrants and also was aware of his own duty to arrest Sandoval "in certain circumstances." (Tr. 435-440). However, in response to Ms. Bailey's inquiry, Sgt. Berger replied, "he [Hubber] is an idiot. We're not dealing with his bullshit." Sgt. Berger continued, "if he can get him, well, he can bring him to jail, and we'll serve the warrants when they get to the jail." (Tr. 1421-1422).

Ms. Bailey diplomatically told Hubber she had a skeleton crew and everyone was on call. She did not relay that Sgt. Berger and other available officers were at the station. (Tr. 432-433). Ms. Bailey, who believes bail bondsmen are an extension of law enforcement, (Tr. 1412), confirmed Sandoval had two felony and two misdemeanor warrants and told Hubber if he got into a struggle she would clear an officer to assist. (Tr. 1414-1417). Hubber responded “we have it handled, we got it.” (Tr. 1417). Nick did not hear what Ms. Bailey told Hubber. (Tr. 1615).

Hubber had been to the Harris house “probably over 30 times” in a work capacity, e.g. “collect cash,” “fill out paperwork;” he even had an advertising poster hanging on the wall. (Tr. 1565). He had met Harris “[a] handful of times,” but Hubber also believed Harold Mitchell owned the house at 815 S. Main because Mitchell had previously taken a “leadership” position in the house and had previously helped Hubber arrest individuals in the residence. (Tr. 1566). Mitchell had even called Hubber on prior occasions to let him know wanted individuals were in the house and Mitchell would let Hubber into the house to make the arrest. (Tr. 1566-67).

Although Hubber knew Sandoval was aware of his intent to arrest Sandoval, Hubber was unaware Sandoval had told Harris that Hubber was looking for him. Hubber was also unaware Sandoval and Harris had told everyone in the house to keep the doors locked. (Tr. 1184-1187).

Back in the Triple S parking lot, it was decided Jesse and Jackie would go into the back yard of the residence in case Sandoval ran out the back door. Hubber and Nick would enter through the front door. (Tr. 556).

Hubber and Nick approached the house. Through the window they could “see Sandoval and other individuals standing in the kitchen [then] turn[] around and walk[] to the back of the house.” Hubber did not know the other individuals. (Tr. 1595). As they approached the house, “[t]here was an individual coming out. . . .” (Id.) Hubber did not know the individual, but it looked like Michael Berg. The individual “opened the door.” (Tr. 1596). Nick told the individual they were bail bondsmen and were there to arrest Sandoval.

As the two entered the house, Nick was in the lead. He was

unarmed. Nick ran “into two more individuals in the front room” and “yelled” “loud enough for everybody to hear” that he and Hubber were bondsmen. (Tr. 1597). Hubber passed Nick on the left and went into the bedroom, where he found Sandoval sitting on the bed smoking methamphetamine and “weed.” (Tr. 1120)

Hubber informed Sandoval he was under arrest. Sandoval stood up and punched Hubber in the face. (Id.) Hubber pulled out his taser and “tased David Sandoval right there on the corner of the bed.” (Id.) Although Sandoval fell to the side of the bed, he was up again before Hubber could get handcuffs on him. “That’s where the wrestling start[ed].” (Tr. 1598).

Hubber’s recollection is he and Sandoval “rolled somehow off the bed onto the floor.” Hubber ended on top of Sandoval trying to control his hands and “place handcuffs on his wrists.” Sandoval was “fighting and resisting at the highest level,” punching Hubber. (Id.)

Harris, who was also in the bedroom began to kick Hubber in the right side. At the same time Nick was accidentally tasing Hubber. Hubber was unaware who was tasing him because he was “getting

kicked in the face” and in the side. (Tr. 1599). Hubber heard yelling and chaos but was not “focusing on what was happening on the right or left, front or behind,” he was only focused on Sandoval. (Tr. 1600).

Sandoval and Hubber continued to struggle until one or two gunshots rang out. Hubber did not know “who had the firearm and who was shooting at who.” When the shooting stopped and he heard all the footsteps leave the room, Hubber looked up, got off Sandoval and saw an “individual down.” (Tr. 1601). Hubber told Sandoval to stay in the room and not to leave. Sandoval fled out the back door but not before first bending down and grabbing something off the floor from the area around Harris’s body. (Id.)

Hubber, a former Marine and former driver of an ambulance service had training on assisting individuals with gunshot wounds, bent down and tried to assist Harris. (Tr. 1602). Hubber then turned, ran approximately 13 steps into the front room and called 911. (Tr. 1603). Hubber sustained blunt force trauma injuries to his face from being kicked by Harris’ steel-toed boots. (Tr. 1295-96). For the majority of the fight, he thought his life was in danger. (Tr. 830).

Hubber would later learn Nick had shot Harris with Hubber's gun while trying to protect Hubber.

Nick had never worked as a bail bondsman. He knew the residence was a trap house, well known for its open-door policy and frequently inhabited by drug users. (Tr. 1729). Nick believes Mark Hockaday let them into the residence. This was keeping with Nick's understanding that the residence was not a place he would have to "barge into." (Tr. 1729-30). While Nick did not recall yelling they were bail bondsmen, he does recall saying "we're here just to arrest [Sandoval]. We're bondsmen." (Tr. 1730). Nick had no protective gear and no weapons at the time he entered. (Tr. 1731-32).

Nick entered the bedroom after Hubber and saw Hubber use the taser on Sandoval. Nick saw Hubber tackle Sandoval and watched them fall to the floor. (Tr. 1732). At this point, Mark Hockaday and Sundance Heavy Runner came in from the living room. Both were armed with boards, sticks or clubs. (Tr. 1734). As Hubber struggled to detain Sandoval, Nick "just tried to keep everybody off of him." (Tr. 1733). "Things escalated really quick." (Tr. 1736).

Nick recalled grabbing the taser off the floor and trying to use it to help Hubber subdue Sandoval. He accidentally stunned Hubber and not Sandoval so he abandoned that effort. Someone Nick did not know was screaming and was “probably more mad than anybody.” “He was screaming, telling us to get out of his house.” (Tr. 1736). At that point, Nick did not know Harris and did not know the house belonged to Harris. (Tr. 1737).

Harris was standing on one side of the bed opposite to Nick and next to the back door. (Id.) Nick’s concern over Hubber’s safety increased and Harris continued to scream “get the fuck out of my house,” and that he, Harris, was going to kick Hubber in the face. (Tr. 1739). Nick, “surrounded by people with weapons,” was “really scared” but was “telling them to get back, telling them to get the fuck back.” (Tr. 1740). When Nick returned his focus to Harris, he thought he saw a “pair of scissors in one hand and a beer bottle in [Harris’] other hand.” (Id.) Nick told Harris to “calm down, get back.”

According to Nick, he looked down and saw Hubber with a gun in his hand and Sandoval holding Hubber’s wrist. “[T]he only thought

going through” Nick’s head was “I don’t want these guys to get that gun.” (Id.) Nick had not seen the gun come out of the holster and he did not take it out of Hubber’s holster himself. (Tr. 1741). According to Nick, he reached down and grabbed the gun from Hubber’s hand. To Nick, it looked like Hubber had just pulled it out of the holster or was trying to put it back in the holster. (Tr. 1743).

Feeling Harris was the biggest threat and with Hubber still wrestling with Sandoval on the floor, Nick pointed the gun at Harris and “told him to stay the fuck back” numerous times. (Tr. 1745). Harris jumped on the bed with the knife in his hand and, reacting out of fear for his life, Nick shot Harris. (Tr. 1746). The gun went off twice, Harris fell backwards and was dead. (Tr. 1747).

Hubber denied handing the gun to Nick and denied telling Nick to shoot Harris. Hubber did not expect Nick to shoot Harris. (Tr. 1604). Hubber’s gun was in a holster with a defective retention latch that would normally keep the pistol in the holster. (Tr. 1593).

Meanwhile, Sandoval – who had picked up the knife next to Harris and fled the house – threw the knife in a neighboring yard and

hid. He was later arrested. During his interview, he did not report Hubber getting kicked in the head and he omitted mention of the knife because he did not want it to seem like it was Harris' fault for getting shot. (Tr. 1063-1074). After being evaluated and released from the hospital, Sandoval was finally arrested on his outstanding warrants.

Standards of Review

A district court's decisions regarding jury instructions are reviewed for an abuse of discretion. *State v. Lacey*, 2012 MT 52, ¶ 15, 364 Mont. 291, 272 P.3d 1288. The standard of review of jury instructions in criminal cases is whether the instructions, as a whole, fully and fairly instruct the jury on the law applicable to the case. *State v. King*, 2016 MT 323, ¶ 7, 385 Mont. 483, 485, 385 P.3d 561, 563. The trial judge has a duty to instruct the jury on every issue or theory finding support in the evidence, and this duty is discharged by giving instructions which accurately and correctly state the law applicable in a case. *State v. Erickson*, 2014 MT 304, ¶ 35, 377 Mont. 84, 338 P.3d 598. It is reversible error for a trial court to give conflicting instructions on a material issue. *Bohrer v. Clark*, 180 Mont. 233, 246,

590 P.2d 117, 124 (1978).

Claims of ineffective assistance of counsel present mixed questions of fact and law, which are reviewed *de novo*. *State v. Hinshaw*, 2018 MT 49, ¶ 8, 390 Mont. 372, 414 P.3d 271.

“We review a district court’s denial of a motion to dismiss a criminal charge for insufficient evidence *de novo*. A motion to dismiss for insufficient evidence is appropriate only if, viewing the evidence in the light most favorable to the prosecution, there is not sufficient evidence upon which a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt.” *State v. Hren*, 2021 MT 264, ¶ 16, 406 Mont. 15, 496 P.3d 949 (internal citations and quotations omitted).

“We review *de novo* a district court’s interpretation of a statute, and we review its application of a statute to a particular set of circumstances for correctness.” *State v. Felde*, 2021 MT 1, ¶ 8, 402 Mont. 391, 478 P.3d 825.

Arguments

I. (A) The District Court committed plain error when instructing the jury on the applicable definitions of

“knowingly” and “purposely.”

Despite the fact the State charged Hubber with Deliberate Homicide under two different theories of culpability and one count of Aggravated Burglary, the court only provided the jury with two applicable mental state instructions. Hubber’s counsel neither objected to the erroneous instructions nor did counsel propose his own correct instructions.

The court’s error qualifies for plain error review. “A 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 proceeding. *State v. George*, 2020 MT 56, ¶ 5, 399 Mont. 173, 459 P.3d 854. “Thus, ‘we first ask if the alleged error implicates a fundamental right; we next ask if failure to review the alleged error would result in one of those consequences.’” *Id.* (citing and quoting *State v. Hatfield*, 2018 MT 299,

¶ 15, 392 Mont. 509, 426 P.3d 569).

Despite any failure by counsel to either object or seek a correct instruction, a court has an independent legal duty to accurately and correctly instruct the jury on the law applicable in a case. *State v. Sheehan*, 2017 MT 185, ¶ 33, 388 Mont. 220, 399 P.3d 314 (citing and quoting *State v. Kaarma*, 2017 MT 24, ¶ 26, 386 Mont. 243, 390 P.3d 609); *see also*, *Billings Leasing Co. v. Payne*, 176 Mont. 217, 225, 577 P.2d 386, 391 (1978) (“trial court duty to full and correctly instruct jury on applicable law to guide, direct and assist in an intelligent understanding of the legal and factual issues involved in their search for truth”); *State v. Koughl*, 2004 MT 243, ¶ 26, 323 Mont. 6, 97 P.3d 1095 (“[i]t is the duty of the court to instruct the jury on the law. . . [which] cannot be delegated to counsel. . .”).

All of the plain error elements are present. First, the instructional error regarding the two mental states implicates a fundamental right. “The *Fourteenth Amendment* to the United States Constitution, the Montana Constitution *Article II, Section 17*, and § 26-1-403(2), MCA, independently require the state to prove every factual

element of a charged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 361-64 (1970); *State v. Mills*, 2018 MT 254, ¶ 24, 393 Mont. 121, 428 P.3d 834 (cleaned up). Both the Model Penal Code section 2.02(1) and § 45-2-103(1), MCA, “generally require[] the state to prove that the defendant acted with the requisite criminal mental state for *each element* of a charged offense.” *Mills*, ¶ 24 (emphasis added).

The fundamental nature of the right at issue here has been clearly established and articulated by both this Court and the Supreme Court of the United States for decades. “The fundamental right to require the government to prove all elements of an offense beyond a reasonable doubt necessarily includes the right to have the jury consider any admissible evidence that, if true, would factually negate the requisite mental state for an offense.” *Id.*, (citing *Cheek v. United States*, 498 U.S. 192, 203-204 (1991)). Inherent in this mandate is the need to have the requisite mental state for each offense correctly defined. Therefore, the fundamental right at issue and the error in the instructions pertaining to that right should have been obvious to the district court before and during the jury instructions.

Because the right is so fundamental, the second element of plain error review is also present, i.e, 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 proceeding. Failure to review the error here would result in all three.

Each of the offenses Hubber was charged with required the State to prove beyond a reasonable doubt that Hubber acted with a certain mental state. For the offense of Deliberate Homicide, the State was required to prove Hubber “purposely” or “knowingly” “caused the death of another human being.” § 45-5-102, *MCA*. As to the offense of Aggravated Burglary, the State was required to prove beyond a reasonable doubt that Hubber “knowingly” entered or remained unlawfully in an occupied structure **and** that he “knowingly” or “purposely” or “negligently²” inflicted or attempted to inflict bodily injury on anyone. § 45-6-204(2), *MCA*.

² The District Court did not provide any definition of “negligently” in its instructions to the jury. It does not appear the State offered such an instruction.

The State's charging theories as to the offense of Deliberate Homicide added additional instructional requirements for the court in relation to the mental state. As to the Deliberate Homicide charge, the State proceeded under two alternative theories: felony murder or accountability. Although Hubber was acquitted of felony murder, the instructional errors surrounding the allegation complicated the record, the instructions, and confused the jury. They also added to the unconstitutional burden-lessening that occurred because of the instructions.

The State's Amended Information alleged Hubber was legally accountable for the actions of Nick, because Hubber "either before or during the commission of the offense of Deliberate Homicide, with the *purpose* to promote or facilitate the commission, the person solicits, aids, abets, agrees, or attempts to aid the other person in the planning or commission of the offense." (Amended Info., at 2) (emphasis added); see also, Instruction 36. The plain language of this theory of culpability, found in § 45-2-302, MCA, requires the State to prove Hubber acted with a specific purpose.

Under the State’s felony murder theory, Hubber was guilty because he was legally accountable for the commission of aggravated burglary and, in the course of committing aggravated burglary Hubber or any person legally accountable for the crime, i.e., Nick, caused the death of a human being. (Instruction 34). “Under the felony murder rule, the prosecution does not need to prove the ‘purposely or knowingly’ element of the crime of deliberate homicide. Instead, the defendant’s intent to commit the underlying felony supplies the intent for all subsequent consequences, including homicide. A causal connection between the felonious act and the victim’s death must be present.” *State v. Main*, 2011 MT 123, ¶ 27, 360 Mont. 470, 255 P.3d 1240 (internal citations omitted). As this Court explained in *Main*, “the state [in Main’s case] had to prove 1) commission or attempted commission of, or accountability for, a forcible felony, 2) the occurrence of a death during the course of or flight after the felony, and 3) a causal connection between the felony and the death.” *Main*, ¶ 28 (citing *State v. Kills on Top*, 241 Mont. 378, 387, 787 P.2d 336, 342 (1990); § 45-5-102(1)(b), MCA. Any instruction on the need for the State to prove a

“causal connection between the felony and the death” beyond a reasonable doubt is absent from the instructions given in Hubber’s case.³

However, Hubber’s counsel did request an instruction (Defendant Hubber’s Proposed 29) that read: “Conduct is the cause of a result if without the conduct the result would not have occurred.” (Tr. 1985). The State objected. “So it looks like ‘purposely’ is . . . talks about the conscious object to engage in conduct. And then ‘knowingly’ is engaging when there’s a high probability that the conduct will cause a result.” (Tr. 1985-96) (internal quotations added). Hubber’s counsel persisted.

I don’t think that this – this instruction [Hubber’s Proposed 29] is included. I think it’s necessary because the issue – I mean, the jury has to decide whether there’s a causal connection between the aggravated burglary and the homicide. This is the same argument made – argument I made to the Court during my motion for acquittal and that there was no causal relationship between the aggravated burglary and the homicide.

....

In this instance, the purpose of entering into the residence was to arrest David Sandoval. And there’s no causal relationship between the arrest of David Sandoval and the

³ Both sides made much of the presence or absence of the causal connection in their respective arguments for and against a “judgment of acquittal.” See e.g., Tr. 1308 -1310.

death of Bill Harris.

And so I think this instruction is necessary because it establishes this causal connection between the conduct and the result.

(Tr. 1986).

The State continued its argument that the given definitions of “knowingly” and “purposely” satisfactorily instructed on the legal need for a causal connection.

Your Honor, that⁴ was contrary to the felony murder rule when we were talking about the voluntary act. They add this and then they argue that the conduct of the aggravated burglary has to be completely intertwined with the conduct of the deliberate homicide. That is contrary to what the felony murder rule says. And it’s contrary to the instruction of the voluntary act when we only have to show that the conduct or that voluntary act was in the aggravated burglary.

So this blanket statement from the statute, if we put this in there and then it’s argued that the conduct from the aggravated burglary had to result in the death of Mr. Harris, that’s not what the felony murder rule requires. And so it’s not only confusing but contrary to the elements of the felony murder, deliberate homicide charge.

(Trial Tr. 1986-1987). The court denied Defendant’s Proposed

⁴It is unknown to what the State is referring with the use of this pronoun.

Instruction 29 based on the court's worry the instruction was too general and would cause confusion. (Trial Tr. 1988).

Although the court's denial of Defendant's Proposed 29 could serve as a stand-alone claim of error, the error is compounded when combined with the plain error of the mental state instructions.

Unlike *Main* and *Kills on Top*, which suggest the State need only prove the commission of any forcible felony, the State charged Hubber, and the Court instructed the State had to prove Hubber "committed or is legally accountable for the commission of aggravated burglary," a specific forcible felony. Therefore, the mental states for Aggravated Burglary serve as the mental states for Deliberate Homicide under the felony murder rule.

In Hubber's case, the court instructed the jury on the definition of "knowingly." "A person acts knowingly when the person is aware there exists the high probability that a person's conduct will cause a specific result." (Instruction 17). Colloquially, this is referred to as the "result based definition." See e.g., *State v. Ilk*, 2018 MT 186, ¶ 19, 392 Mont. 201, 422 P.3d 1219.

The court’s instruction on the definition of “purposely” reads: “A person acts purposely when it is the person’s conscious object to engage in conduct of that nature.” (Instruction 18). This instruction is referred to as the “conduct based definition.” *Ilk*, ¶ 10.

This conduct-based definition of “purposely” as applied to the Aggravated Burglary charge is plainly incorrect. As charged, the State was required to prove beyond a reasonable doubt it was Hubber’s “conscious object to cause” a specific result, i.e., the infliction or attempted infliction of bodily injury on another. (Instruction 22). In *State v. Kirn*, 2023 MT 98, ¶ 49, 412 Mont. 309, 530 P.3d 1, this Court opined the “conduct-based definition of ‘purposely’ ” should not have been given in an aggravated burglary case that alleged the infliction or attempted infliction of bodily injury on another. Although in *Kirn*, this Court found the error was insufficient to warrant plain error review, the errors in Hubber’s case are far more egregious and warrant it, given the totality of the circumstances.

In the case of Aggravated Burglary, the State was required to prove the following elements beyond a reasonable doubt, and the court

was required to instruct accordingly.

1. Hubber entered or remained unlawfully;
 - a. This element could be divided into two sub-elements:
 - i. the person entered or remained;
 - ii. the person did so unlawfully.
2. In an occupied structure;
3. AND
 - a. Hubber had the purpose to commit an offense in the occupied structure; or
 - b. Hubber knowingly or purposely committed any other offense within that structure;
4. AND
 - a. in effecting entry; or
 - b. in the course of committing the offense; or
 - c. in immediate flight after affecting entry or committing the offense
5. Hubber knowingly, purposely, or negligently inflicted or attempted to inflict bodily injury upon anyone; AND
6. Hubber acted knowingly.

From a *mens rea* standpoint, Aggravated Burglary is a complex statute requiring more than two contradictory definitions of “knowingly” and “purposely.” Take the first part of the first element: that Hubber entered or remained. The applicable definition would

likely be one of an awareness of conduct, i.e., Hubber was aware he was entering or remaining. However, if we then include the second part of the first element, “unlawfully,” the statute requires proof of an awareness (knowingly) of a circumstance, i.e., that Hubber was aware his entrance or act of remaining was unlawful.

This analysis on the first element is not simply pedantry; it had real application in Hubber’s case. The jury heard testimony the structure was a trap house with an open door policy. (Tr. 317-318; 333-334). The jury heard testimony Hubber believed, based on what he was told by Sgt. McMahon, that he (Hubber) probably had more authority to enter the building to arrest Sandoval than McMahon did. The jury also heard testimony that someone, possibly Berg or Hockaday, was exiting the structure and let Hubber and Nick into the residence. (Trial Tr. 1596; 1620; 1728-1729; 1771).

With respect to the first part of the first element, the jury was instructed in the first part of Instruction 22, “a person commits the offense of aggravated burglary if the person knowingly enters or remains unlawfully” Again, the given definition of “knowingly” at

Instruction 19, was “a person acts knowingly when the person is aware there exists the high probability that the persons conduct will cause a specific result.” Application of the result-oriented “knowingly” instruction to this element does not fit into the language of the statute.

In essence, the court instructed the jury to find that Hubber was aware of a high probability that his conduct of walking through the door or opening the door caused him to enter unlawfully. “When a criminal offense requires that a defendant act ‘knowingly,’ the [d]istrict [c]ourt must instruct the jury on what the term ‘knowingly’ means in the context of the particular crime.” *State v. Azure*, 2005 MT 328, ¶ 20, 329 Mont. 536, 125 P.3d 1116.

In *State v. Hamernick*, 2023 MT 249, 414 Mont. 307, 545 P.3d 666, an appeal from conviction on sexual intercourse without consent, this Court concluded “the District Court erred giving the jury a high-probability-of-a-fact definition of ‘knowingly’ for the element of ‘without consent,’ rather than a conduct-based definition, and thus failed to ‘fully and fairly instruct the jury as to the applicable law.” *Hamernick*, ¶ 27 (citing and quoting *State v. Kirn*, 2023 MT 98, ¶ 16, 412 Mont. 309,

530 P.3d 1). This Court further concluded that 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.” *Id.* (citing and quoting *State v. Deveraux*, 2022 MT 130, ¶ 20, 409 Mont. 177, 512 P.3d 1198).

Similar to *Hamernick*, the *mens rea* instructions in Hubber’s case lowered the State’s burden, especially given Hubber’s testimony surrounding his entrance into the structure. As instructed, the State was required to prove it was only highly probable that Hubber’s entry was unlawful versus knowing the entry was unlawful. This is a critical distinction and the absence of a correct instruction, in light of Hubber’s testimony and the testimony of other witnesses, prejudicially affected his substantial rights.

The issue extends beyond an awareness of entry, it also extends to arguments made by the State that, even if the initial entrance was lawful, Hubber remained unlawfully after Harris screamed “get the fuck out of my house.” In response to a defense motion to dismiss, the

State argued: “The unlawful entry. You heard testimony today that that house was definitely locked at times. You heard testimony today and yesterday that people were required to knock. You heard testimony from several people that Bill Harris said, ‘Get the fuck out of my house.’ If that isn’t an indication that you are not welcome there or invited to be there.” (Tr. at 1318). The State made a similar argument to the jury. “Harris gets to be the one to invite people in to his home. And if that did not happen, that was an unlawful entry. And, in addition to that, if Bill Harris says, ‘Get the fuck out of my house,’ I think it’s pretty safe to say they were not invited to remain.” (Tr. 2119). The State’s reference to “pretty safe to say” is akin to the highly probable standard rather than the higher burden that Hubber knew his entry was unlawful.

This Court has concluded, in certain cases, an instruction that a defendant was aware of the high probability his conduct will cause a specific result is a decreased burden of proof. *State v. Gerstner*, 2009 MT 303, ¶ 31, 353 Mont. 86, 219 P.3d 866 (In the context of sexual intercourse without consent, “knowingly” as to conduct is the correct

definition and concluding “knowingly” as to result would unconstitutionally decrease the State’s burden of proof). Hubber’s is such a case.

To continue the illustration of the plain error in the *mens rea* instructions, we return to the first element of Aggravated Burglary: that the defendant’s entrance or act of remaining was unlawful. This Court has never ruled a single definition of “knowingly” and a single definition of “purposely” applies to all offenses for which a defendant is charged. In fact, this Court has held the opposite. *State v. Hovey*, 2011 MT 3, ¶¶ 15, 22, 359 Mont. 100, 248 P.3d 303 (clarifying different definitions of “knowingly” may be applied to different elements of one offense).

Whether Hubber knew his entrance was unlawful or whether – assuming the initial entrance was lawful – his act of remaining became unlawful once Harris told him to “get the fuck out,” seems to require the State to prove Hubber was aware of the existence of a circumstance, i.e., the unlawfulness of his entrance or remaining. Even if this Court were to determine the element of “unlawfulness” is not one

of circumstance, the overarching mental state for the first element of Aggravated Burglary is not one of a high probability that the person's conduct will cause a specific result, as the jury was instructed. The error even as to this first element is plain, reversible and cannot be harmless. It was also a focal point of Hubber's overall defense.

Further parsing of the Aggravated Burglary statute further demonstrates the plain error. The third element requires the State to prove Hubber entered or remained unlawfully in an occupied structure *with the purpose to commit an offense or that he knowingly or purposely committed an offense in that structure*. In everyone's defense, Aggravated Burglary is a difficult statute, especially as to the third element. While the first two elements (enter or remain unlawfully, and occupied structure) reference only the single mental state of "knowingly," the third element brings in both "knowingly" or "purposely."

It is difficult to read the mental states in the third element as requiring anything other than the State prove Hubber either had a

“conscious object to cause”⁵ the commission of (or the purpose to commit) an offense in that structure. Alternatively, the State could also have proven Hubber was aware of a high probability that his conduct would cause that same result.⁶ What neither statute nor the element specifically seeks to criminalize is Hubber’s “conscious object to engage in conduct of that nature.” (Instruction 18). Rather, the offense seeks to prohibit a specific result: entrance with the purpose to commit an offense. As to this element, the instructions fail to correctly instruct the jury on the applicable law especially as that law relates to the applicable facts of the case and the evidence given at Hubber’s trial.

Notwithstanding the court’s ruling on Hubber’s pretrial bondsman arguments and authority, the trial evidence was replete with testimony regarding Hubber’s belief in his own authority. Even if that authority did not exist as a matter of law, the evidence was presented to the jury in droves. In the past, this Court has concluded a district court was “upholding its duty” “by instructing the jury based on the

⁵ “purposely”

⁶ “knowingly”

evidence.” *State v. Kaarma*, 2017 MT 24, ¶ 26, 386 Mont. 243, 390 P.3d 609. As in *Kaarma*, even if Hubber had not presented direct evidence regarding his mental state surrounding his understanding of his statutory and contractual authority as a bondsman, the court could still provide the correct *mens rea* instructions if such instructions “were supported by either direct evidence or some logical inference from the evidence presented at trial.” *Kaarma*, ¶ 27 (citing *State v. Erickson*, 2014 MT 304, ¶ 35, 377 Mont. 84, 338 P.3d 598; *State v. Hudson*, 2005 MT 142, ¶ 17, 327 Mont. 286, 114 P.3d 210).

On appeal, the State may argue the instructional error was harmless. In *Gerstner*, the State’s burden would be lessened if a statute requires proof of an awareness of conduct but the jury is instructed the State need only prove a defendant was aware of a high probability of a fact. *Gerstner*, ¶ 31 (“Had the jury been instructed that, to convict, Gerstner only had to be aware of the high probability that the contact was sexual in nature, the State’s burden of proof would have been lessened.”)

Because the court instructed the jury that “a person acts

knowingly when there exists a high probability that the person's conduct will cause a specific result," (Instruction 17), and because the third element of Aggravated Burglary requires the State to prove Hubber "knowingly or purposely" committed any other offense within the occupied structure, the State's burden was lessened to an unconstitutional degree, and this conviction must be vacated. This lowered burden permeated the entire aggravated burglary instruction because the overarching mental state for the entire statute is "knowingly."

Aggravated Burglary contains a fourth element requiring proof beyond a reasonable doubt that Hubber purposely, knowingly, or negligently inflicted or attempted to inflict bodily injury on anyone. (Instruction 22). The errors pertaining to this element of the offense are plain and prejudicial. In addition to the fact that the court appears not to have provided the jury on the legal definition of "negligently" or "negligence," its "knowingly" and "purposely" definitions left the State with multiple paths to victory and, no doubt, left the jury thoroughly confused.

In result-oriented offenses, such as homicide and assaults, the jury must be instructed that the “purposely” element requires having a conscious object to cause the prohibited result (e.g., bodily injury). It is error in a result-oriented offense to provide the jury with disjunctive definitions of the mental state elements that relate to both result and conduct. Similarly, as happened here, it is error to provide the jury with disjunctive or even opposing definitions of the mental state elements.

In *State v. Lambert*, 280 Mont. 231, 231 P.929 846 (1996), this Court reversed Lambert’s conviction for a result oriented offense noting “to prove that a defendant was aware of his conduct is one thing; to prove that he was aware of a high probability of the risks posed by his conduct is quite another.” *Lambert* at 237, 929 P.2d at 850. This Court issued similar holdings in *State v. Azure*, 2005 MT 328, ¶ 20, 329 Mont. 536, 125 P.3d 1116 (“the court must determine which of the four definitions is applicable to the case being heard, and instruct the jury accordingly”). The Supreme Court for the State of Iowa relied on *Lambert*, in *State v. James*, 693 N.W.2d 353, 356 (Iowa 2005) because

this Court's holding in *Lambert* was consistent with the Model Penal Code.

Although the court in Hubber's case did not give disjunctive definitions of the same mental state, it did give disjunctive or opposing definitions of the two different mental states. And, in the case of "negligently," the court gave no instruction at all. Thus, the State provided three paths to victory and the jury was left with three options:

1. To conclude the State has proven beyond a reasonable doubt that Hubber was aware of a high probability that his conduct would cause bodily injury;
2. To conclude the State had proven beyond a reasonable doubt that it was Hubber's conscious object to engage in conduct of that nature, i.e., bodily injury; or
3. To conclude the State had proven beyond a reasonable doubt that Hubber had negligently inflicted bodily injury on anyone based on each juror's subjective definition of "negligently."

This type of either-or-fashion *mens rea* instructions were found to

be error in *State v. Patton*, 280 Mont. 278, 930 P.2d 635 (1996). In *Patton*, a deliberate homicide case, the district court instructed the jury that “A person acts purposely when it is his conscious object to engage in conduct of that nature or to cause such a result.” *Id.*, 280 Mont. 290-91, 930 P.2d at 642-43. This Court explained that the “purposely” instruction in *Patton* was error because it “defined ‘purposely’ in an either-or-fashion, and allowed the jury to convict Patton solely on the bases he consciously engaged in conduct without regard to whether harm was intended.” *Id.*, at 291, 930 P.2d at 643; *see also*, *State v. Rothacar*, 272 Mont. 303, 307-308, 901 P.2d 82, 85-86; MCJI- 2-106, Comment.

Because the jury was incorrectly instructed as to the required mental state definitions for this element, and for the entire offense in general, neither the State nor this Court can determine from the jury’s verdict how this particular jury resolved the conflicting mental state evidence given at trial. Given this uncertainty and the gravity of the error, Hubber’s conviction must be reversed and his case remanded with instructions to the trial court on the correct definitions of each

element of Aggravated Burglary.

The same conclusion must be rendered for Hubber's conviction for Deliberate Homicide by Accountability, which this Court has ruled is a result-based offense requiring the result-based mental state instruction. *State v. Ilk*, 2018 MT 186, ¶ 19, 392 Mont. 201, 422 P.3d 1219 (citing *State v. Rosling*, 2008 MT 62, ¶ 37, 342 Mont. 1, 180 P.3d 1102 (Deliberate Homicide is result-based); *State v. Martin*, 2001 MT 83, ¶ 16, 305 Mont. 123, 23 P.3d 216 (jury was instructed on Attempted Deliberate Homicide with result-based mental state)).

Hubber's jury was instructed "a person commits the offense of deliberate homicide if the person purposely or knowingly causes the death of another human being." (Instruction 31). As to the theory of accountability, the jury was also instructed the State had to prove beyond a reasonable doubt that a deliberate homicide had been committed and Hubber, either before or during the commission of an offense, and with the purpose to promote or facilitate the commission of that offense, he commissioned, solicited, aided, abetted, agreed, or attempted to aid another person in the planning or commission of the

offense. (Instruction 36).

Pursuant to § 45-2-101(65), *MCA*, “purpose” is an equivalent term with the same meaning as “purposely.” Section 2.06(4) of the Model Penal Code, “when causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.” The Commentary to Section 2.06(4) indicates the section makes an accomplice liable for the criminal result to the extent that his own culpability with respect to that result was sufficient for the commission of the offense.

As is plain from both § 45-2-302, *MCA*, and the commentary to the model upon which the offense was founded, culpability for accountability is predicated on a specific result. In this case, that result is deliberate homicide. Thus, if this Court incorporates the definition given in Instruction 18 (purposely) to also act as the definition of “purpose” within the accountability offense, the jury was incorrectly instructed it could find Hubber guilty if it was his conscious

object to engage in conduct.

While the statute does reference some conduct, i.e., solicitation, aiding, abetting, etc., the accountability for deliberate homicide theory seeks to avoid the singular result of solicitation, etc., of a deliberate homicide. A similar conclusion can be drawn by looking to this Court's decision in *State v. Johnston*, 2010 MT 152, 357 Mont. 46, 237 P.3d 70. There, Johnston was charged and convicted with obstructing a police officer, which requires proof a person "knowingly obstructs, impairs, or hinders . . . the performance of a governmental function." *Id.*, ¶ 9. In overruling the conviction on instructional error, this Court concluded conviction under the statute requires more than simply an awareness of conduct but an awareness that the conduct would cause a specific result. *Id.* ¶¶ 10-14 (*see also: City of Kalispell v. Cameron*, 2002 MT 78, 309 Mont. 248, 46 P.3d 46).

In the case of both Hubber and Nick, the jury heard conflicting testimony and evidence regarding the intent of both individuals, especially after the melee in the residence began. Hubber presented evidence Nick pulled Hubber's handgun from Hubber's holster, which

had a defective holster latch. (Tr. 841, 1057-1058; 1760). For his part, Nick testified Hubber pulled out his handgun and, upon being attacked, handed the gun to Jaeger. (Tr. 1742-43).

Under Hubber's theory of defense, he did nothing to solicit, aid, abet, etc., the ultimate result of a deliberate homicide. Under Nick's theory, the State had to prove more than Hubber being aware of his conduct, i.e., handing the firearm to Nick, but that it was Hubber's conscious object to cause the result of a deliberate homicide by handing Nick the firearm. Under the given definition of "purposely," all the State had to prove was that Hubber was aware of his conduct of handing Nick the gun and, therefore, he was guilty of accountability for the result Nick produced. This is a much lower burden than is legally required if the correct instructions are given.

As with Aggravated Burglary, Hubber's conviction is the result of plainly erroneous mental state instructions that prejudiced Hubber by lowering the State's burden of proof. The taint of the lowered burden affected the integrity of the trial. Plain error review is appropriate in this instance and reversal of Hubber's convictions is warranted.

I. (B) In the alternative, counsel was ineffective in failing to object to legally incorrect instructions or propose correct mental state instructions.

If the Court concludes the instructional error is insufficient to warrant plain error review, it should still reverse Hubber's convictions on the grounds that the instructional errors were the result of ineffective assistance of counsel in violation of the *Sixth Amendment* and *Article II*, § 24 of the Montana Constitution. This Court analyzes claims of ineffective assistance of counsel under the two-prong test in *Strickland v. Washington*, 466 U.S. 668 (1984). A defendant alleging ineffective assistance of counsel (IAC) must (1) demonstrate that "counsel's performance was deficient or fell below an objective standard of reasonableness" and (2) "establish prejudice by demonstrating that there was a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Kougl*, ¶11 (internal citations omitted). While this Court does not ordinarily consider IAC claims on direct appeal if the record is silent as to why counsel acted or failed to act, direct appeal review is warranted where there is "no plausible justification" for counsel's action or omission. *See*,

Kougl, ¶¶ 14-22.

In *Johnston*, this Court held trial counsel was ineffective for failing to object to an incorrect “knowingly” instruction as to the offense of obstruction of a peace officer. Because the statute prohibits knowingly causing the result of an officer being obstructed, rather than proscribing any particular conduct, obstructing a peace officer is a result-based offense and requires a result-based *mens rea* instruction. *Johnston*, ¶¶ 10-14. Counsel’s failure to seek a correct result-based *mens rea* instruction was ineffective as it impermissibly lowered the State’s burden of proof. *Id.*, ¶ 16. Such inefficacy is subject to direct appeal through the “no possible justification” exception because trial counsel has nothing to lose by seeking the correct, higher-burden instruction. *Id.*, ¶ 16.

While Hubber concedes jury instructions are difficult, they remain one of the most critical aspects of defense counsel’s duties. Jury instructions are the law of the case given to the jury by the court. They act as a guide for the elements of the offense and the evidence to be used to support or rebut the proof of those elements. All jurors have a

duty to follow the jury instructions, and they are presumed to understand them. Given their magnitude and the severity of the charges Hubber faced, the instructional errors were prejudicial beyond even the reasonable probability required by *Strickland*. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceedings.” *St. Germain v. State*, 2012 MT 86, ¶ 11, 364 Mont. 494, 276 P.3d 886.

Aside from a thwarted argument about what actions are legally permissible to bondsmen, Hubber’s entire defense hinged on his mental state. Someone opened the door for him to gain entry. (Tr. 1596; 1620). Sandoval attacked him first, (Tr. 1597), and he did not enter with the intent on committing an assault let alone a deliberate homicide. “There was much yelling and chaos going on, in [Hubber’s] mind at that very moment and he wasn’t focusing on what was happening on the left or right, front or behind” him. (Tr. 1600). He did not hear anyone revoke his ability to remain in the house. He did not hand his weapon to Nick. (Tr. 1604). He did not direct Nick to shoot. (Id.) He did not expect Nick to shoot. (Id.).

Even counsel's closing argument emphasized the need for the "causal connection" to be proven. "The reason it's important is because there has to be a causal connection between the entry and the arrest of David Sandoval and the death of Bill Harris." (Tr. 2076). Counsel's closing arguments were almost solely focused on the results of any particular conduct, not the conduct itself. This begs the question why counsel allowed the jury to be instructed on the conduct-only definition of "purposely" but the result-based definition of "knowingly." The answer to the question is: There is no justifiable, strategic, tactical, or reasonable reason not to ensure the mental state instructions compliment each other and are legally correct.

In this case, the jury was presented with different and conflicting mental states for different elements of complex offenses. The conflicting *mens rea* instructions lessened the burden of proof regarding both the individual elements of the offenses and the offenses as a whole. Failing to correct or seek the correct mental state instructions is both error under the prevailing professional norms and highly prejudicial to Hubber's case and constitutional rights. Both prongs of

Strickland have been met, and reversal is warranted.

II. The District Court erred in denying Hubber's motions to dismiss for insufficient evidence.

At the close of the State's case and at the close of evidence, Hubber made motions to dismiss for insufficient evidence. (Appendix C). As to the issue regarding the offense of deliberate homicide by accountability, the motions were erroneously denied.

This Court recently reaffirmed that “the State must prove beyond a reasonable doubt all essential elements defining and required for conviction of a charged or otherwise asserted theory of legal accountability for the criminal conduct of another in accordance with §§ 45-2-302(3) and - 303, MCA.” *State v. Wood*, 2024 MT 318, ¶ 36, 419 Mont. 503, 561 P.3d 945. *See also State v. Doyle*, 2007 MT 125, ¶ 55, 337 Mont. 308, 160 P.3d 51 (for conviction on “deliberate homicide by accountability” State must prove “beyond a reasonable doubt” that the accused “aided or abetted” another “in the planning or commission of deliberate homicide” with “the purpose to promote or facilitate [the] commission of deliberate homicide.”)

Harkening back to the arguments made in Section I of this brief

and the prejudice to Hubber resulting from the instructional errors, this Court held in *Wood*:

Where, as here, the State charges an accused with personally committing an offense or, in the alternative, that she is at least legally accountable for it by aiding or abetting another in the commission of that offense, the trial court must distinctly, fully, and fairly instruct the jury regarding the essential elements of required proof, and the State's corresponding burden of proof, for each of those alternative theories of criminal liability and guilt.

Wood, ¶ 37. This Court also reiterated:

accountability to deliberate homicide by aiding or abetting another requires proof beyond a reasonable doubt that: (1) a deliberate homicide occurred, and (2) the accused and some other person or persons affirmatively acted with and in furtherance of a 'common purpose' before or during the homicide to aid or abet the commission of a deliberate homicide.

Wood, ¶ 40.

Even when viewed in a light most favorable to the State, the evidence does not support a conclusion that Hubber affirmatively acted with and in furtherance of a 'common purpose' before or during the homicide to aid or abet the commission of a deliberate homicide. Both defendants presented drastically conflicting accounts of the details surrounding Harris' death. Hubber, engaged in a struggle with

Sandoval, only heard shots and was unaware anyone had been killed until after he had disengaged with Sandoval. Hubber maintains he did not affirmatively hand Nick his gun and did not encourage, aid, abet, etc. Nick to shoot Harris. Hubber surmises Nick was able to retrieve the gun from Hubber's defective holster.

Nick maintained he grabbed the gun from Hubber's hand. (Tr. 1760). Hubber's hand was "by his holster." (Id.) Nick affirmed he was "the one that engaged in the efforts to get" the gun. (Id.) He saw the gun was out and retrieved it to prevent others from getting it. (Id.) Nick also affirmed the only reason he shot Harris is because Nick feared Harris was going to stab either Hubber or Nick. (Tr. 1761).

Nothing about the facts presented to the jury demonstrate any proof, let alone proof beyond a reasonable doubt, that Hubber had the specific purpose to facilitate the commission of Harris' death. Nor is there any evidence that Hubber solicited, aided, abetted, agreed, or attempted to aid Nick in the planning or commission of Harris's death. Given the absence of evidence, the court erred in denying Hubber's motions.

III. The court erred when it refused to recognize a bondsman's privilege under Montana law and denied Hubber's proposed jury instructions on the subject.

A bondsman's authority to arrest and surrender the principal derives from three overlapping sources: (1) common law principles; (2) statutory authority; and (3) the contract between the surety and the principal.

Under common law, the bail bondsman has the custody of the principal and may take him at any time and "in any place."

Commonwealth v. Brickett, 25 Mass. 138, 140 (1829). When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another State; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. *Taylor v. Taintor*, 83 U.S. 366, 371 (1872); see also, Jonathan Drimmer, *When Man Hunts Man: The Rights and Duties*

of Bounty Hunters in the American Criminal Justice System, 33 Hous. L. Rev. 731, 747 (1996) (citing numerous other cases).

Title 46, chapter 9, of the Montana Code provides the statutory scheme for bail. *Rupnow v. Mont. State Auditor & Comm’r of Ins.*, 2024 MT 14, ¶ 13, 415 Mont. 81, 542 P.3d 384. The commercial bail bond functions as a contract between the State, the defendant who promises to appear at a future court date, and the bond agent who acts as a surety of that promise. If the defendant does not appear, a court will forfeit the bond, giving the bond company the right to redeem its value against the defendant.

Hubber wrote two bail bonds totaling \$25,000 for Sandoval. (Tr. 1560). Hubber’s civil contract with Sandoval allowed Sandoval’s apprehension by Hubber if Sandoval violated his “obligations to the Court” or “commit[ted] any act which shall constitute reasonable evidence of [his] intention to cause a forfeiture of [his] bail bond,” such as failing to appear, fleeing, or resisting arrest. Sandoval “further consent[ed] to the application of such reasonable force as may be necessary to effect such return.” (Tr. 1552-1554).

Sandoval did not appear for court, abide by the conditions of release imposed by the judges sitting on his cases, three bench warrants signed by two different judges were issued for his arrest, and he did not abide by the conditions of his bail contract. These circumstances gave Hubber the authority under §§ 46-9-503(1) and 46-9-510(1)(b), MCA, to arrest Sandoval and surrender him to the Butte jail. *Rupnow*, ¶ 14.

a. The bondsman's privilege.

Relying upon § 46-9-510, MCA, a United States District Court in *Mitchell v. First Call Bail & Sur., Inc.*, 412 F. Supp. 3d 1208, 1213-1214 (D. Mont. 2019) noted that “Montana law allows commercial bond sureties to arrest and surrender those who have failed to appear in court” and concluded that § 46-9-510(1)(b) and *State v. Biesman*, 12 Mont. 11, 29 P. 534, 536 (1892) recognize the existence of a bondsman's privilege in Montana. *Mitchell*, at 1217-1218.

In *State v. Baker*, (Appendix F), a Fourth Judicial Dist. Court held a surety company's agents may enter a fugitive's home for the purpose of arresting him for failing to appear in court. It further found

Montana's legislature had yet to enact any legislation to regulate bounty hunters, and Montana's bail statutes have not abrogated the common law rights of bondsman and bounty hunters to apprehend fugitives.

Notwithstanding the plain and unambiguous language of § 46-9-510, MCA, the court instructed the jury that Hubber could only make a citizen's arrest of Sandoval. *Id.*, 2022. In order to make a citizen's arrest, there has to be probable cause and circumstances requiring immediate arrest; this put additional restrictions on Hubber's arrest authority not required by § 46-9-510, MCA. It further limited Hubber's ability to argue to the jury that as a bail bondsman, he not only had the right to arrest Sandoval without probable cause and exigent circumstances, but also to enter 815 S. Main for the purpose of arresting Sandoval. *Cf.*, Hubber's Proposed Instruction Nos. 27 and 28. This limitation unfairly enabled the State to argue that "[n]o one was in danger because David Sandoval failed to appear in court . . . and under those circumstances they want you to believe that entry into Bill's home that night was lawful. They want you to believe that under

those circumstances David Sandoval's immediate arrest was required.”
(Tr. 2006 - 2007; 2044; Jury Instruction No. 15.)

The court erred when it refused to find the existence of a bondsman's privilege and give Hubber's proposed Jury Instruction Nos. 10, 11, and 12. (Tr. 1963 - 1968).

b. Hubber lawfully entered 815 S. Main for the sole purpose of arresting David Sandoval.

The critical elements of the offense of Aggravated Burglary were the “knowing” and “unlawful” entry into an occupied structure. § 45-6-204(2), MCA. The State had to prove beyond a reasonable doubt Hubber knew that he was entering the dwelling at 815 S. Main illegally.

Hubber's proposed Jury Instruction Nos. 27 and 28 provided the legal basis for his entry into the house to arrest Sandoval. They were based upon *Steagald v. United States*, 451 U.S. 204, 214, n. 7, 101 S. Ct. 1642 (1981) citing *Payton v. New York*, 445 U.S. 573, 603, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980); *United States v. Jackson*, 576 F.3d 465 (7th Cir. 2009); *United States v. Underwood*, 717 F.2d 482 (9th Cir. 1983); Drimmer, *When Man Hunts Man*, 33 Hous. L. Rev. 731, 732

(1996); *Livingston v. Browder*, 51 Ala. App. 366, 369, 285 So. 2d 923, 926 (1973), citing 5 Am.Jur.2d Arrest §§ 82, 86; *Sterling v. Albany*, 24 Or. App. 397, 545 P.2d 1386 (1976); *People v. Denson*, 2022 IL App (2d) 200230-U.

In *Steagald*, the issue was “whether an arrest warrant — as opposed to a search warrant — is adequate to protect the fourth amendment interests of persons not named in the warrant, when their homes are searched without their consent and in the absence of exigent circumstances.” *Id.* at 212. The *Steagald* Court held a search warrant was necessary for law enforcement to enter a private dwelling to *search* for a suspect. However, citing *Payton v. New York*, the Court also stated an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within. *Steagald* at 214, fn. 7.

This Court noted in *Rupnow*, ¶ 13, fn. 2, the 2023 Legislature made changes to Title 46, chapter 9, MCA, including the requirement that the surety notify local police and sheriff’s offices of the intent to

apprehend, to provide information as to the name and license number of the individual to effectuate the arrest, and the name and location of the person to be taken into custody. These additional surety requirements did not apply at the time of Hubber's interaction with Sandoval, yet Hubber twice sought the assistance of the Butte Police Department to effectuate Sandoval's arrest. Assistance that request was refused entirely on December 19, 2021.

Hubber was not law enforcement; he was a bail bondsman performing a function that law enforcement expressly refused to perform and had delegated to Hubber. (Tr. 1421 - 1422). Hubber did not have the ability to apply for a search warrant, but he did not enter 815 S. Main for the purpose of *searching* for Sandoval. He entered for the purpose of *arresting* Sandoval pursuant to the arrest warrants, § 46-9-510, MCA, and the bail contract. Hubber reasonably believed that Sandoval resided at 815 S. Main from Sandoval's own representations to him when signing the bond contract.⁷ Hubber had

⁷ Sandoval even identified 815 S. Main as "the residence of where I was" in his *pro se* filings before this Supreme Court. See, *Sandoval v. Silver Bow County Jail*, OP 22-0398, *Petition for Writ of Habeas Corpus* (July 25, 2022), p. 2.

attempted to take custody of Sandoval at 815 S. Main on December 18, 2021. Given the totality of the facts, Hubber reasonably believed that he could enter without probable cause and exigent circumstances.

Hubber did not break the door down, make a forcible entry, or just barge into 815 S. Main. He and Nick were let into the house by someone who opened the door for them. (Tr. 1596; 1728-1729).

In *Livingston v. Browder*, 51 Ala. App. 366, 285 So.2d 923 (1973) a bondsman entered the residence of the principal's mother without her consent and arrested the principal. The appellate court reversed the bondsman's trespass conviction finding the right of a surety to capture his principal arises not only from common law and statutory law, but also from private rights established by the bail contract. *Livingston*, 51 Ala. App. at 369. The court concluded, "[A] bondsman does have the authority to arrest . . . when he sees his principal in the dwelling; when he properly identifies himself; and when he acts in a reasonable manner to enter the dwelling to effectuate his arrest." *Id.* at 370.

In *State v. Mathis*, 349 N.C. 503, 515, 509 S.E.2d 155 (1998), bondsmen searched a house owned by the principal's mother in which

the principal resided. The North Carolina Supreme Court rejected the holding in *Livingston* that a surety could enter the home of a third party where the principal does not reside, without the consent of the owner. *Mathis*, 349 N.C. at 513.

The *Mathis* court did hold, however, when the principal does reside in the house owned by another, the bond agreement allows sureties or their agents to enter his or her residence even though it may be shared by others. *Mathis*, 349 N.C. at 515. Under these circumstances, “Sureties or their agents may use such force as is reasonably necessary to overcome the resistance of a third party who attempts to impede their privileged capture of their principal. But they may use only such force as is reasonably necessary under the circumstances to accomplish the arrest.” *Id.* at 514.

In *Mease v. State*, 165 Ga. App. 746, 302 S.E.2d 429 (1983) the court concluded the evidence did not support a finding a bondsmen acted with an “unlawful purpose” when they entered the residence of a third party to arrest the defendant on a forfeited bond.

The court’s order hampered Hubber’s theory of defense and ability

to rebut the State's case when it limited, as a matter of law, Hubber's authority to arrest Sandoval to a simple citizen's arrest, requiring "existing circumstances requiring the person's immediate arrest." In fact, Hubber's legal authority was much more expansive.

c. The court unfairly limited Hubber's ability to argue that Harris was not trying to protect his residence, but instead was unlawfully trying to prevent the lawful arrest of Sandoval.

Harris knew Sandoval had outstanding warrants, was a wanted man, and that the cops and Hubber were looking for him. (Tr. 1106 - 1113). It was unlawful for Harris to harbor or conceal Sandoval. § 45-7-303(2)(a), *MCA*. It was also unlawful for him to prevent Sandoval's arrest by kicking Hubber in the face. §§ 45-3-108 and 45-7-303(2)(d), *MCA*. Harris wasn't protecting his residence, he was trying to prevent Sandoval's arrest. (Tr. 533 - 537:1).⁸ These circumstances establish that Harris had a diminished and lesser expectation of privacy in 815 S. Main.

815 S. Main was a trap house with an open door policy. It was a

⁸ The District Judge therefore erred when he refused Hubber's proposed instruction nos. 17 and 31.

“recreational drug use facility for the community and its participants,” like a community center or a homeless shelter. The door was open 90 percent of the time, most people frequently just walked in and out, uninvited or otherwise. (Tr. 1174; 1182 - 1184.) People were there when Hubber detained Sandoval on December 18, 2021, even though Harris was at work and not present. Nick related a similar situation when he went into 815 S. Main with Berg and Harris wasn’t present. Jesse thought that anyone could be there when Harris wasn’t present. (Tr. 528 - 529; 557 - 558). On December 19, 2021, there were eight other people in the residence besides Harris. (Tr. 1054 - 1055; 1175 - 1176; 1373 -1376.)

Under these circumstances, Harris’s expectation of privacy in 815 S. Main was not one that society would recognize as reasonable. It is well-established that non-probationers who live with probationers have a diminished expectation of privacy. See: *State v. Smith*, 2008 MT 7, 341 Mont. 82, 176 P.3d 258. Harboring a known fugitive in his house in an attempt to prevent his lawful arrest diminished any expectation of privacy Harris had. Harris allowed all manner of people to enter his

house to drink and use drugs, even when he wasn't there. Though Sandoval told Harris to lock the door, the door wasn't locked and, in fact, the front door had a broken knob (Tr. 2087) and an occupant of the structure opened the door for Hubber and Nick. It was not unreasonable or unlawful for Hubber to enter the residence under those circumstances.

Conclusion

Given the errors and resulting prejudice that occurred in Hubber's trial, he respectfully requests this Court reverse his convictions and remand his case for a new trial.

Dated this 11th day of April, 2025.

/s/ Colin M. Stephens
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CERTIFICATE OF COMPLIANCE

Pursuant to M.R.App.P., Rule 11(4)(e), I certify that this principal brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by WordPerfect is 11,669 words, excluding captions, tables, and certificates.

DATED this 11th day of April, 2025.

s/ Colin Stephens

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CERTIFICATE OF SERVICE

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