FILED
06/16/2025
Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 25-0201

In the Supreme Court of the State of Montana

Supreme Court No. DA 25-0201

STATE OF MONTANA,

Plaintiff and Appellee,

-vs-

DENNIS STEFFENS,

Defendant and Appellant.

Appellant's Opening Brief

An Appeal from the Montana Eighteenth Judicial District Court
Gallatin County, Hon. Andrew Breuner, Presiding.

Appearances:

COLIN M. STEPHENS
JORDAN R. KILBY
Stephens Brooke, P.C.
315 W. Pine
Missoula, MT 59802
Phone: (406) 721-0300
colin@stephensbrooke.com

Attorney for Defendant & Appellant

AUSTIN KNUDSEN
Montana Attorney General
TAMMY K. PLUBELL
Appellate Bureau Chief
Joseph P. Mazurek Building
215 N. Sanders
Helena, MT 59620-1401

AUDREY CROMWELL
Gallatin County Attorney
502 S. 19th Ave.
Bozeman, MT 59718

Attorneys for Plaintiff & Appellee

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Statement of the Case

Dennis Steffens appeals from his conviction and sentencing in the Eighteenth Judicial District. A jury convicted Dennis on Count I, felony Sexual Assault, with a finding the victim was less than 16 years old and Dennis was 3 or more years older than the victim. (Appendix A).

On February 28, 2025, the district court sentenced Dennis to 15 years in the Montana State Prison with 10 of those years suspended.

Dennis filed a timely Notice of Appeal on March 17, 2025. He is currently housed in the Montana State Prison. (Id.)

Statement of the Issues & Summary of the Arguments

The district court committed plain error when it intentionally struck the word "purposely" from the jury instruction defining "sexual contact" and failed to provide the jury with the applicable legal definition for the term "purposely." By doing so, the district court altered the definition of sexual contact and lessened the State's burden resulting in a manifest miscarriage of justice.

In the alternative to plain error, Dennis' trial counsel was

ineffective in conceding to striking "purposely" from the definition of "sexual contact" and not proposing an instructional definition of "purposely." Trial counsel failed to ensure the jury was properly instructed on the applicable law and allowed a lower burden of proof for the State.

The State presented insufficient evidence for the jury to convict Dennis of Sexual Assault. In this case, a conviction for Sexual Assault required a proof-beyond-a-reasonable-doubt showing that Dennis subjected Anne E. to sexual contact without her consent. By law, sexual contact has two components. First, the touching of the sexual or intimate person of one person by another, directly or through clothing. Second, the touching must be done "in order to knowingly or purposely" (a) cause bodily injury to or humiliate, harass, or degrade another; or (b) arouse or gratify the sexual response or desire of either party. The State presented no evidence – let alone evidence to support proof beyond a reasonable doubt – as to either (a) or (b) above. In the absence of such evidence, Dennis' conviction cannot stand.

Statement of Facts

Dennis is the uncle to Anne E. and Alison E. Both Anne and Alison are adults now, but the allegations Anne leveled at Dennis occurred when she was a minor. Although the details of the allegation evolved, Anne claimed Dennis repeatedly sexually assaulted her when the two would play the "robot game" during times when Dennis and his wife would visit from Wisconsin. (Tr. Day 3 at 15).

On direct, Anne explained the "robot game" to the jury.

> So, basically, I was, like, I was the robot and he was controlling me . . . . So, basically, I would lay down and he would pull my pants down and lift my shirt up, and, like my body - - different body parts were different buttons on a robot and I remember every time he would start the game where he, after my pants were pulled down, he would - - there was an imaginary like CD that he would like pretend to put in me. So he would touch my, like, vagina and he would make this motion like a CD slot, and he would put the imaginary CD in - - he didn't put anything in me, but it was an imaginary CD that he would put and, like, kind of, push down, kind of, on my vagina and he would, like I don't remember exactly what function it was, but he would press his thumb against, like, a little bit lower than my vagina, kind of, like clit area and then he would like, touch different parts of my body like my stomach, sometimes my fact but I don't remember what functions those did, but, then, I distinctly remember him touching my - - touching my nipples and pretend they were, like, like they were dials, like the volume or something and he would pretend and he

> would make that - - he would touch my nipples and like turn the dial so there were specific - - so it was on specific settings.
>
> Then I would get up, I would, like pull my pants back up and my shirt down and would pretend to be a robot for a little bit, and then at the end I would lay back down, and he would touch all those parts, again, to turn off the robot off.

(Tr. Day 3 at 17-18).

Anne testified she would willingly go with Dennis into the room where the robot game was allegedly played, (Id. at 16). Anne affirmed Dennis was "wearing his clothes" throughout the duration of the game. (Id. at 19). The game went on from the time Anne was approximately six or seven until she was "like ten." (Id. at 21). According to Anne, she "just went along with it," and "was like giggling and stuff." (Id. at 23).

The game ended when Anne was "around ten-ish," and she was "like 'Dennis, I don't want to play this game, like I'd rather do other things' and he said, I don't know the exact words, but he was, like, 'oh, no, you don't? Are you sure?' And I was, like, 'I'd rather just play something else or, like, do something else,' and he's like, 'okay.' And then we never played that game again." (Id. at 24) (internal quotation

marks added for clarity).

Anne testified that it wasn't until she was around ten that she "pieced together why [she] was feeling uncomfortable." (Id. at 23). She recalled feeling "uncomfortable" and, without telling any details to her mother, she relayed that "there's this game we play," and she did not really want to play it anymore because "[i]t kind of makes [her] uncomfortable." (Id. at 23-24).

Dennis denied the entirety of Anne's allegations except for playing the robot game once. "It was in the stairwell. She held up her arms and said, 'I'm a robot.' And she kind of stumbled down the steps turned into the study and plopped on the air mattress and was acting like everything was stiff." (Id. at 130-131) (internal quotation marks added). "So I said, 'what do you need?' And she said 'oil'. . . . So I made like I had an oil can and oil her joints and I moved around back and forth and pressed her belly button and she jumped up and ran away and I think after that we played cards." (Id. at 131). During this time, there were "other people around." (Id. at 132).

Anne did not disclose Dennis' alleged sexual assault to law

enforcement and neither did Anne's parents, although the jury heard testimony both parents were aware of the allegations years before law enforcement knew. (Tr. Day 2 at 165-166; 214). Rather, it was Alison who disclosed on Anne's behalf. According to Alison, she learned of Anne's alleged abuse in 2018[1] when the girls and their family were in Wisconsin with Dennis and his wife, Margaret. (Tr. Day 2 at 164).

In 2021, without consulting her parents or her sister, Alison "reported what happened to [her] sister to law enforcement." (Id. at 169). According to Alison, she disclosed because Anne "was scared and upset," and "very uncomfortable around" Dennis. (Id. at 169-170). Alison, who was only "partially" living in her family's home, could "tell that [Anne] was scared." (Id. at 170-171). After relaying Anne's hearsay allegations about Dennis to law enforcement, Alison "immediately" moved out of her family home but not before first asking law enforcement not to act on her tip until the family could complete a trip to the Bahamas. (Id. at 171 & 177). Also immediately after disclosing Anne's tale to law enforcement, Alison blocked Anne from

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[1]Although Alison would "reiterate" "this was in 2019." (Tr. Day 2 at 165).

being able to contact Alison by either phone or social media. Anne was left without a way to contact Alison for years. (Id. at 184-185).

At trial, it was revealed that Alison expressly told law enforcement that she knew the robot game was sexual because she was in the room when it occurred. However, on direct, Alison backtracked from the basis of her factual knowledge, and told the jury that the only reason she knew the game was sexual was because Anne had told her. (Id. at 178). Then, on Alison's cross examination, Alison testified Anne told her before a family trip to Wisconsin, then she testified she had not learned about the game from Anne until they were in Wisconsin at Dennis' house. (Id. at 179). Again, on cross, she recanted her original statement to law enforcement that she was in the room when the game occurred.

After Alison's report, the case was assigned to Detective Nate Webb of the Gallatin County Sheriff's Office. Det. Webb sought the assistance of Wisconsin law enforcement to conduct a courtesy interview of Dennis. Det. Webb took no further action on the case until he received all of the information from Wisconsin. (Day 2 Tr. at 39-40).

At trial, the State did not call any law enforcement officers from Wisconsin. Dennis was fully cooperative with the officers from Wisconsin. (Tr. Day 3 at 133).

Once Det. Webb received the reports from his compatriots in Wisconsin, he contacted Dennis by phone. (Id. at 40). Again, Dennis was fully cooperative. (Id. at 74-75). However, Det. Webb became suspicious of a number of statements that were allegedly "inconsistent" regarding what Dennis had told the Wisconsin officers and what Dennis told Det. Webb. (Id. at 43). For example, Dennis apparently told officers in Wisconsin that "he would babysit Annie[2] to include bathing." (Id.) How often this occurred apparently went unasked by either Det. Webb or his colleagues in Wisconsin. Later, in his own interview with Dennis, Det. Webb found "inconsistent" Dennis' statement that "he was almost never alone with [Anne]." Again, what constituted "almost never," appears to have gone unexplored despite the fact that Det. Webb affirmed the "most important part of [his] job is to investigate." (Tr. Day 2 at 54).

[2]Anne and Annie are the same person and the names were used interchangeably at trial depending on the witness.

Det. Webb also found inconsistent who first raised the concept of the "robot" game. Det. Webb first testified that it was "Wisconsin law enforcement" who "first suggested" it in "their initial interview view with him." (Id. at 44). However, noting his own inconsistency, Det. Webb was compelled "to correct something [he] just said, it wasn't suggested by Wisconsin law enforcement. The game was identified by name, first, by Mr. Steffens." (Id.) To Det. Webb, this was inconsistent from the statement Dennis gave to Det. Webb. "I specifically asked Mr. Steffens about a game called the robot game because that had come up in prior interviews with Annie and so when I asked that of Mr. Steffens, he told me that it sounded familiar." (Id.)

Det. Webb concluded Dennis had

> contradictory explanations for the robot game. Initially, it was - - when I asked him, directly, about what the robot game was, he kind of stammered and talked about picking Annie up and throwing her around and turning her on and off. And then talking about throwing her on the bed indicated it was very, kind of, private game occurring in the bedroom. When I pressed again later in the interview about the robot game, he talked about chasing Annie around the house indicating that it was something that was occurring more in the public view.

(Id. at 45).

Det. Webb described Dennis' demeanor as "nervous." (Id. at 48). Based on Det. Webb's training and experience, this nervousness manifested itself in Dennis stammering and "provid[ing] an incomplete sentence as an explanation as to what the game entailed." (Id. at 49). Det. Webb's interview with Dennis occurred in 2021. (Id. at 50).

In October 2020, some months before his interview with Det. Webb, Dennis had a stroke. (Tr. Day 3 at 135). The stroke "impacted [his] ability to speak," (Id. at 124), and made it difficult for him to swallow. He "walks with a limp, and [doesn't] feel stimulus properly on [his] left side." (Id.) It also affected his memory causing him to "miss things." (Id. at 135). At the time he interviewed Dennis, Det. Webb was unaware Dennis had had a stroke. (Tr. Day 2 at 90). In fact, Det. Webb appears to have first learned Dennis had a stroke when confronted on cross examination. (Id.) Det. Webb would later affirm that "stammering or stuttering" could be "a symptom of a stroke". (Id. at 92).

After two full days of testimony, the court and the parties met to settle jury instructions. It was the court that first raised the propriety

of a definition for the mental state of "purposely." (Tr. Day 4 at 17). The proposed instruction read: "A person acts purposely when it is the petitioner's[3] conscious object to engage in conduct of that nature." To his proposed instruction, the court informed the parties: "You know, my two cents on this would be we don't need this instruction, because I think the State has decided that it was a knowingly, that pursuing this was a knowingly, is there disagreement on that?" (Tr. Day 4 at 17-18). At this point, the settlement instructions devolved into a confused discussion of numbering, e-filing issues, and the definition of "consent." (Id. at 18-20). The court was able to return to the its original question and concluded: "We are not giving the purposefully instruction. Then what I've got here is the definition of sexual contact, which means the touching of the sexual parts of a person of another directly or through clothing, in order to knowingly or purposely arouse or gratify the sexual response or desire of either party. That's what I'm looking at, which the general instruction on that." (Id. at 20). Defense counsel did not

[3]It is unclear why, in a criminal trial, the term "petitioner" would be used. Presumably, the court said "person" and "petitioner" is reporter error.

object.

Relevant to this issue, the court then moved to a proposed instruction having "to do with inferring purpose and knowledge. We do have another instruction that talks about inferring state of mind and the State - - it actually is a general instruction. This one we could certainly use, also, but it think we would want to get rid of 'purpose.'" (Id. at 25). Both parties agreed

Another instruction supporting the plain error and ineffective assistance of counsel claims raised herein, is the court's given instruction 14 (Appendix B). Instruction 14 was the court's modified definition of "sexual contact." Unlike the statutory definition, which includes the mental state of "purposely," instruction 14 contains no reference to "purposely." The court's intentional omission of "purposely" from the instructions was based on fact that the offense of sexual assault was solely a "knowingly" offense. (Tr. Day 4 at 25-26). Consequently, instruction 14 is a truncated version of *Mont. Code Ann. § 45-2-101(65)(b)*, which reads: "'Sexual contact' means touching of the sexual or other intimate parts of the person of another, directly or

through clothing, in order to knowingly, [*sic*] arouse or gratify the sexual response or desire of either party." (Appendix B, inst. 14). A second result of "sexual contact," "to knowingly or purposely cause bodily injury to or humiliate, harass, or degrade another,[4]" was also not included by the court or the parties.

Finally, the court also instructed the jury it could use circumstantial evidence to determine the "particular mental state," and that the jury could infer that mental state "from what the Defendant does and says and from all the facts and circumstances involved." (Appendix B, inst. 19). The court also supplemented Instruction 19 with Instruction 20, which reads: "Knowledge ordinarily may not be proved directly because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's state of mind, including knowledge, from the defendant's acts and all other facts and circumstances in evidence which indicate his state of mind." (Appendix B, inst. 20).

The jury convicted Dennis on August 29, 2024. (Tr. Day 4 at 105).

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[4]Mont. Code Ann. § 45-2-101(65)(a).

On February 28, 2025, the court sentenced Dennis to the Montana Department of Corrections for a period of 15 years with 10 of those years suspended. (Sent. Tr. at 146). At the time of his sentencing, Dennis was 71 years old. (Id. at 141). He is currently housed in the Montana State Prison.[5]

Standards of Review

"This Court may discretionarily review claimed errors that implicate a criminal defendant's fundamental constitutional rights, even if no contemporaneous objection is made and notwithstanding the inapplicability of the *§ 46-20-701(2), MCA*, criteria, where failing to review the claimed error at issue may result in a manifest miscarriage of justice, may leave unsettled the question of law, or may compromise the integrity of the judicial process." *State v. Daniels*, 2003 MT 247, ¶ 20, 317 Mont. 331, 77 P.3d 224.

A district court's decisions regarding jury instructions are reviewed for an abuse of discretion. *State v. Lacey*, 2012 MT 52, ¶ 15,

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[5]https://offendersearch.mt.gov/conweb/Offender/3037800/638818006919994237/493dcc1033e41c2ab5aa09fde7c78adcbf301f92

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 is under 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.

"Ineffective assistance of counsel claims are mixed questions of law and fact which we review de novo." *State v. Secrease*, 2012 MT 212, ¶ 9, 405 Mont. 229, 493 P.3d 335.

"We review the sufficiency of the evidence to sustain a guilty verdict in a criminal case to determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt." *State v. Kalina*, 2025 MT 70, ¶ 25, 421 Mont. 305, ___ P.3d ___.

Argument

I. Because of both district court and counsel error, the State benefitted from a lowered standard of proof and Dennis' conviction is unconstitutional.

A. Plain Error

The district court erred when it did not provide a jury instruction defining purposely as it applies to the definition of sexual contact. Additionally, the State and Defense overlooked the plain language of the definition of sexual contact, which requires that an offender act with a specific purpose. To the extent it was defense counsel's duty to ensure the jury was instructed properly or, at minimum, propose a legally sufficient jury instruction, trial counsel was ineffective.

"[A]s a general matter, our criminal law seeks to punish the 'viscous will.'" *Xiulu Ruan v. United States*, 97 U.S. 450, 456, 142 S. Ct. 2370, 2376, 213 L. Ed. 706 (2022), citing *Morisette v. United States*, 342 U.S. 246, 251, 72 S. Ct. 240, 96 L. Ed. 288 (1952). This principle is supported by the Montana legislature's decision to define sexual contact as a touching done with a specific purpose. See *Mont. Code Ann. 45-2-101(67)* ("Sexual contact" means touching of the sexual or

other intimate parts of the person of another, directly or through clothing, in order to knowingly or purposely: (a) cause bodily injury to or humiliate, harass, or degrade another; or (b) arouse or gratify the sexual response or desire of either party). Sexual contact is established by two separate but equally important elements. First touching of the intimate parts of another must have occurred. Second, the touching must occur in order to accomplish an intent that makes the touching criminal.

Importantly, the touching alone does not establish the criminal act and instructing the jury on the definition of knowingly alone, ignores the plain language of the statute. The statute requires the State prove the touching was done "in order to" purposely or knowingly cause one of the described results. The phrase "in order to" is not defined in the Montana Code; therefore, the Court must look to its plain and ordinary meaning when examining the statute. See *State v. Knudson*, 2007 MT 324, ¶22, 340 Mont. 167, 174 P.3d 469.

In common parlance, the phrase "in order to" means "for the purpose of" or "as a means to." Dictionary.com (accessed May 28,

2025); see also www.dictionary.cambridge.org (designating "in order to" as a subordinating conjunction. "We use *in order to* with an infinitive form of a verb to express the purpose of something. It introduces a subordinate clause.")

The phrase is synonymous with phrases such as "with the intention of" or "with the purpose of." "In order to" is essentially the linguistic equivalent of the mental state of "purposely," i.e., a "conscious object to engage in" conduct or to cause a result. Both relate to the conscious object, aim, or purpose of the infinitive verb or action that follows them. As a matter of statutory construction, the court should have instructed on the definition of "purposely."

"In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." *Mont. Code Ann. § 1-2-101*. Although it may be convenient for a district court or the parties only to instruct on the mental state of "knowingly," this Court must not simply ignore the words adopted by the legislature, especially when those words play a critical role in a

criminal statute pertaining to the defendant's alleged "vicious will." *Xiulu Ruan,* 97 U.S. at 456.

While the jury may reasonably infer a "defendant's intent to gratify his sexual desire" from his conduct alone (See: *State v. Gerstner*, 2009 MT 303, ¶ 30, 353 Mont. 86, 219 P.3d 866), the jury must first be instructed it has to find that element proven beyond a reasonable doubt. By omitting the "purposely" instruction, the court lowered the State's burden of proof, excusing the State from proving the touching alleged occurred "in order to" accomplish a criminal result. Giving the "knowingly" instruction alone is insufficient where the plain language of the statute requires that an offender act "in order to" or in other words, with a purpose.

Furthermore, the requirement that the touching be done for a criminal purpose, here in order to sexually gratify a party or to cause bodily injury, humiliate, degrade or harass, is consistent with the centuries-old principal that acts be done with viscous will. "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and

persistent in mature systems of 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." *Morissette*, 342 U.S. at 250-251; see also: William Blackstone, vol. 4 "Commentaries on the Law of England," chapter 2 ("And, as a vicious will without a vicious act is no civil crime, so on the other hand, an unwarrantable act without a vicious will is no crime at all. So that to constitute a crime against human laws, there must be, first a vicious will; and, secondly, an unlawful act *consequent upon* such vicious will." (emphasis added).

In the absence of proof beyond a reasonable doubt of such vicious will, a mother changing her child's diaper would be guilty of sexual assault. Touching a baby's intimate parts to clean the baby is much different than touching intimate parts for the purpose that makes the statute criminal. Likewise, a doctor would be guilty of sexual assault when conducting a pelvic exam. Again, the distinction is centuries old. "Indeed to make a complete crime, cognizable by human laws, there must be both will and act." Blackstone's Commentaries, vol. 4, ch. 2.

The criminal purpose not just knowledge, must be proven beyond

a reasonable doubt in order for a crime have to occurred as a matter of law. It is a court's obligation to instruct the jury on the need for the State to prove this vicious will beyond a reasonable doubt.

The requirement that the State prove the offender acted in order to commit the statutorily defined criminal result cannot be discounted. This element is the sole difference between innocent and criminal conduct.

Where the plain language is clear, instructing on the knowing mental state does not save the conviction here. Dennis was not convicted of sexual assault as intended by the legislature because the court did not define "purposely" and therefore ignored the requirement that the touching be done "in order to" accomplish a criminal goal. Requiring the state to only prove that Dennis was aware of a high probability that a criminal goal will be accomplished (knowingly) is a lesser burden than requiring the State prove that the offender actually had the conscious object to cause that result. The jury was improperly instructed when the court omitted the purposely instruction. Such a failure was plain error, especially given the insufficiency of the

evidence presented at trial, addressed in Section II.

The court's error in failing to properly instruct the jury was, and is, plain. Therefore, this Court should invoke plain error review given the magnitude of the error.

"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 district 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 fully 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. Kougl*, 1004 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. 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, Section17*, 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 *Mont. Code Ann. § 45-2-103(1)* "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).

Second, failure to review the instructional error would leave unsettled the fundamental fairness of Dennis' trial and would also result in a miscarriage of justice.

As discussed further in Section II, the State presented scant – if any – evidence that Dennis acted with a purpose to engage in the wrongdoing defined in the Sexual Conduct statute or criminalized in the Sexual Assault statute. That the State was relieved of its burden to prove Dennis' vicious will beyond a reasonable doubt rendered the trial unfair and unconstitutional. Plain error review is appropriate and necessary.

B. Ineffective Assistance of Counsel

In the alternative, Dennis' counsel was ineffective in failing to seek a correct instruction or, at minimum, object to legally insufficient mental state instructions which lowered the State's burden of proof. Such a failing violated Dennis' rights to effective assistance of counsel guaranteed by the *Sixth Amendment* right to effective assistance of

counsel 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." *State v. Kougl*, 2004 MT 243, ¶ 11, 323 Mont. 6, 97 P.3d 1095 (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, Kougal*, ¶¶ 14-22.

In *State v. 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*, 2010 MT 152, ¶¶ 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.

Dennis' case presents a similar issue as the Court faced in *Johnston*. Both sexual contact and sexual assault do not proscribe touching, but a touching designed to achieve a specific result articulated in the definition of Sexual Contact. In failing to either seek a correct instruction or object to an incorrect one, defense counsel allowed the State's burden to be lowered. As in *Johnston*, Dennis' conviction should be reversed because the record on direct appeal demonstrates both error and a resulting prejudice for which there can be no reasonable explanation, especially since the district court settled instructions after the State had rested its case and trial counsel was

aware of the absence of evidence of a vicious will. Steffens suffered clear prejudice by the improper lowering of the State's burden of proof. That prejudice is highlighted by the failure of the State to introduce evidence for which the jury could find that he acted with the required purpose of the criminal act. Because of counsel's error, the jury was able to convict Dennis without needing to, or having the evidence to support, a finding he had purpose to commit the criminal act as charged.

II. There was insufficient evidence to convict Dennis.

Keeping in mind the argument raised in Section I, it is now appropriate to turn to view the evidence in Dennis' trial, specifically what the jury heard and, importantly, what it did not hear. Namely, the jury neither heard nor saw any evidence that would support a beyond-a-reasonable-doubt inference that Dennis' acted either knowingly or purposely to cause bodily injury, humiliation, harassment, or degradation to Anne, or that his conduct was such that it caused arousal or gratification of the sexual response in either Dennis or Anne.

The State charged Dennis with one count of felony Sexual Assault, in violation of *Mont. Code Ann. § 45-5-502.* (Dkt. 4). The allegation was that at some point between 2009 and 2013, Dennis subjected Anne to sexual contact without her consent. Specifically, the State alleged Dennis touched Anne's vagina with his hand on multiple occasions at a time when she was less than 14 years old, and unable to consent, and at a time when Dennis was three or more years older than Anne. (Id.) Consequently, the State was required to prove the following essential elements beyond a reasonable doubt: First, that Dennis subjected Anne to **sexual contact**; second, that he did so without her consent; and, finally, that he acted "knowingly." The commentary to the pattern Montana Criminal Jury Instruction on Sexual Assault, MCJI 5-125 (2022), instructs that "MCJI 2-107, defining sexual contact, should also be provided."

To establish the element of sexual contact, the State was required to prove not just that Dennis touched Anne, but that the touching constituted "sexual contact" as defined by law. *See Mont. Code Ann. § 45-2-101(67).* "'Sexual contact' means touching of the sexual or other

intimate parts of the person of another, directly or through clothing, *in order to* knowingly or purposely: (a) cause bodily injury[6] to or humiliate, harass, or degrade another; or (b) arouse or gratify the sexual response or desire of either party." *Id.* (emphasis added).

Even in a light most favorable to the State, nothing in the evidence presented to the jury established beyond a reasonable doubt that Dennis' touching of Anne caused any of the effects specifically criminalized by the Legislature let alone that he engaged in the touching with any of the purposes required by the statute. This is true even if the jury rationally inferred Dennis touched Anne's intimate parts, an act which he disputed.

In reviewing the sufficiency of the evidence presented at trial, and especially presented by the State, this Court must have clear lenses through which to view the evidence *de novo* even in a light most favorable to the State. The first of those lenses is comprised of the statutes and their necessary elements.

[6]Pattern instruction MCJI 2-107 (2022) uses the phrase "bodily harm" rather than "bodily injury." This is an error in the pattern instructions.

"[N]o matter how troubling the facts, perhaps, especially when so, 'our job is to interpret the words consistent with their ordinary meaning . . . at the time Congress enacted the statute.'" *United States v. Jabateh*, 974 F.3d 281, 292 (3d Cir. 2020) (citing and quoting *Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 277 (2018) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)); *also citing New Prime v. Oliveira*, 586 U.S. 105, 113 (2019). "After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process[.]" *Bostock v. Clayton Cnty.,* 590 U.S. 644, 654-655 (2020). The same holds true for state laws adopted by the Montana Legislature and approved by the Governor. See also: *Mont. Code Ann. § 1-2-101* ("In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit was has been inserted.")

The second lens through which this Court must view Dennis' sufficiency challenge is from the facts and the evidence presented at trial. It is true that the State "need not negate every theory of innocence" and "may prove its case entirely by circumstantial evidence so long as guilt is established beyond a reasonable doubt." *United States v. Glenn*, 312 F.3d 58, 63-64 (2d Cir. 2002); *State v. Jackson*, 2009 MT 427, ¶ 28, 354 Mont. 63, 221 P.3d 1213 (citing cases). It is also true the State must present the rational trier of fact with enough evidence to infer, beyond a reasonable doubt, a defendant's guilt. However, there is a limit to how far a jury can infer. "Where the Government asks the jury to find an element of the crime through inference, the jury may not be permitted to conjecture or to conclude upon pure speculation or from passion, prejudice or sympathy." *United States v. Vernace*, 811 F.3d 609, 615 (2d Cir. 2016). Here, "sexual contact" is an element of the crime.

In *Matsushita Elec. Indus. Co. v. Zenith Ratio Corp*, 475 U.S. 574, 595-596 (1986), the United States Supreme Court highlighted limits on a jury's ability to infer in light of other facts. In *Matsushita*, the Court

noted where the defendants "had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy." Similarly, in *Mikes v. Borg*, 947 F.2d 353, 357 (9th Cir. 1991), the Court of Appeals for the Ninth Circuit held the record must contain sufficient probative facts from which the fact finder can reasonably infer guilt rather than being based on mere speculation. *See also United States v. Gardner*, 475 F.2d 1273, 1278 (9th Cir. 1973) (inference "too speculative" and "remote" to allow a conspiracy conviction beyond a reasonable doubt.)

Anne's testimony relevant to the conviction pertained to the robot game. The majority of Anne's testimony relating to robot game is recited in the Statement of Facts and can be found on pages 17-21 of transcripts from the third day of trial. In addition to her descriptions of the physical acts, Anne testified that Dennis, while clothed, "would narrate all of the parts he was touching." (Tr. Day 3 at 19). According to Anne, she and Dennis "played this robot game from around six or seven until [Anne] was about like ten." (Id. at 21). Anne described

Dennis pulling her underwear and pants down, touching her nipples "skin to skin." (Id. at 23).

The prosecutor asked Anne how she felt when Dennis was touching her vagina and nipples. Anne responded.

> It was, like, he just described it, like this is where I have to touch so this is where I'm touching, and like I don't know what it was, you shouldn't touch people. So I would just lay there and, like, I thought it was a game. So I was like giggling and stuff.

(Id.)

The prosecutor asked Anne if she "was confused." Anne responded. "I thought it was, like, just another kid's game so I didn't really like question it until I got older." (Id.)

The prosecutor asked Anne how the game stopped when Anne reached ten years of age. Anne responded

> By then, I was kind of, I don't really know - - when I was at that age, exactly, hadn't pieced together why I was feeling *uncomfortable*. I remember feeling *uncomfortable*, and so in like passing conversation with my mom, I said, with no details, I was like, oh, there's this game we play. I really don't want to play it anymore. It kind of makes me *uncomfortable*. And then, she was just like you don't have to play a game you don't want to play. So I was just, like, okay.

> I don't remember which trip and when, but it was around ten-ish where I was like, Dennis, I don't want to play this game, like I'd rather do other things and he said, I don't remember the exact words, but he was like, ok, no, you don't? Are you sure? And I was, like, I'd rather just play something else or, like, do something else, and he's like, okay. And then we never played that game again.

(Id. at 24) (emphasis added).

Anne also testified about her conversation with her sister, Alison, during a family trip to Dennis' house in Wisconsin. "[N]ear the end of the trip, I told my sister. I was like, yeah, I'm kind of feeling *uncomfortable*." (Id. at 25) (emphasis added). Also during that trip, Anne told her mother, but did not get into as much detail as she did with the jury. (Id. at 28).

On a later occasion, when Dennis and his wife came to Bozeman to visit Anne's family, Anne slept in her parents' bed because she "was very *uncomfortable* with Dennis." (Id. at 33) (emphasis added). "I just felt *uncomfortable* being alone with him in the house so I slept in my parent's bed." (Id) (emphasis added).

Toward the end of the direct examination, the prosecutor asked Anne how Dennis looked while he was touching her vagina and nipples.

Anne's response was that Dennis was "kind of like smiling and laughing because it was a game and because it made me smile and laugh, too." (Id. at 37).

Neither "comfort" nor its opposites, discomfort or "uncomfortable," appear in the definition of "sexual contact." In fact, a word search conducted through the Montana Legislature's archive of the Montana Code Annotated reveals the word "uncomfortable" does not appear in the Code at all. This is presumably the result of good legislative drafting because, other than "fine," no word in the English language may be more vague and prone to subjective definition than the concepts of "comfort" and "uncomfortable." For example, in a recent *Eighth Amendment* challenge to conditions of confinement, a district court for the Western District of North Carolina, gave the prisoner "the benefit of every reasonable inference," and still concluded the prisoner's claims failed to state an *Eighth Amendment* claim." "The conditions alleged by Plaintiff while harsh and uncomfortable, are too vague and do not rise to the level of extreme deprivation necessary to state an *Eight Amendment* claim based on conditions of confinement." *Rosado v.*

Langdon, 2024 U.S. Dist. LEXIS 84011, ** 8-9 (W. Dist. N.C., May 8, 2024).

While there is a distinct difference between an *Eighth Amendment* claim and the issue here, *Rosado* serves to highlight the inherently vague nature of what it means to be "uncomfortable." It also highlights the difficulty in evaluating a vague term in a system that demands, if not certainty, at least definition to the point that citizens know what conduct to avoid and allow a jury to make reasonable, objective inferences about the elements of the offense to be adjudicated. *See People v. Olsonite Corp.*, 80 Mich. App. 763, 770 (1978) ("Must there be a provable and ascertainable injury or damage to property or is it sufficient to only prove that the 'comfort' of any person is endangered? When is comfort endangered? Health authorities tell us that cigarette smoking endangers health. Certainly it disturbs the comfort of many people. Is this an offense under the regulation? What disturbs the comfort of some people or what persons believe 'endangers' their comfort or health is not disturbing to others.")

The question before this Court within the context of the statutory

definition of "sexual contact" is whether the specific terms used in the statute include "uncomfortable." The specific omission of the word from the statute – and, indeed, all Montana statutes – suggests the question must be answered in the negative – reasonable inferences aside.

It is likely the State will argue the ordinary meaning cannon of statutory interpretation, coupled with an argument that the combination of reasonable inferences that may be drawn from the evidence when viewed in a light most favorable to the prosecution, allow for testimony of discomfort to fall within the definition of "sexual contact." Such an argument would be contrary to both plain meaning and basic statutory construction.

Certainly the words found in the definition of "sexual contact" are also broad terms, e.g., "humiliate," "harass," or "degrade." Regardless of their breadth, however, they are all transitive verbs. A transitive verb is "[a] verb that requires an object to express a complete thought; the verb indicating what action the subject exerts on the object." Garner's Modern English Usage, 4th ed., at 1035 ("Verbs: Transitive"). For example: "Dennis did not humiliate Anne"; "Dennis did not harass

Anne"; or "Dennis did not degrade Anne." The terms "arouse" and "gratify," found in *Mont. Code Ann. § 45-2-101(67)* are also transitive verbs.

"Uncomfortable" is an adjective, i.e., a word or phrase that describes qualities of a noun or pronoun. Garner at 986 ("Adjective"). For example, "Anne was uncomfortable."

In the context of transitive verbs, the law appropriately criminalizes the action the subject exerts on the object.

> In ordinary English, where a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object set forth in the sentence.

Flores-Figueroa v. United States, 556 U.S. 646, 650 (2009). However, it does not follow that simply because a specific result to an object occurs, that the result was caused solely by the subject. Such logic is a fallacy known as assuming the consequent. For example, "If my car is out of gas, it will not start. My car will not start, therefore it is out of gas." An example in Dennis' case would be: "If Dennis sexually assaulted Anne, she will be uncomfortable. Anne was uncomfortable, therefore

Dennis sexually assaulted Anne." Obviously, the fact that Anne was "uncomfortable" with the robot game does not mean the discomfort was the result of sexual contact or sexual assault. And, even the example given is untethered from the plain meaning of the definition of "sexual contact" because, again, "uncomfortable" is not a term included in the statute.

Finally, the jury was not instructed under *Mont. Code Ann. § 45-2-101(67)(a)*, meaning the State did not proceed under a charging theory that Dennis' actions resulted in Anne's harassment, humiliation or degradation. The State's offered instruction alleged the purpose of Dennis' conduct was "to knowingly or purposely arouse or gratify the sexual response of either party." (Dkt. 84 ("Sexual Contact"). Thus, any attempt to equate Anne being "uncomfortable" with "humiliate, harass, or degrade" would be inconsistent with both the charge pursued by the State and the law given to the jury in the instructions. (Appendix B, Inst. 14). Even in a light most favorable to the State, neither Anne's nor Dennis' testimony reference or suggest arousal or gratification of either party.

The law does permit a jury to make reasonable inferences but only so far as the inference is reasonable in light of the evidence presented. Both Montana law and this Court's decision allow a jury to reasonably infer a defendant's mental state from circumstantial evidence. *State v. Bay*, 2003 MT 224, ¶ 16, 317 Mont. 181, 75 P.3d 1265; *Mont. Code Ann. § 45-2-103(3).* This Court has also held that "[a] defendant's intent to gratify his sexual desire may be inferred from his conduct alone." *Gerstner*, ¶ 30 (citing cases). But, again, there must be limits to the ability to infer from available evidence to avoid conviction based solely on each individual juror's degree of prurient speculation.

In *Gerstner*, a reasonable inference could have been drawn because the jury was presented with evidence that Gerstner touched the victim's "testicle and that Gerstner put [another victim's] hand in [Gerstner's pants]." Gerstner admitted as much. *Gerstner*, ¶ 30. The jury also heard evidence that Gerstner watched pornography with one victim and, while doing so, put his arm around the victim and then told the victim that he, Gerstner, had an erection. This is a significant distinction to the paltry evidence the jury heard in Dennis' case. Here,

the jury heard no evidence of an erection or pornography that would support a reasonable inference the touching has a criminal purpose.

In *State v. Duncan*, 2008 MT 148, 343 Mont. 220, 183 P.3d 111, the jury heard evidence that Duncan sexually assaulted or had sexual intercourse with 3 different victims. One victim, C.S., who was Duncan's step-daughter, testified Duncan "penetrated her with his finger and his penis. C.S. claimed Duncan forced her to have sexual intercourse on at least one other occasion, and he repeatedly asked her if she wanted to have sex with him." *Id.*, ¶ 11. A jury acquitted Duncan of sexual intercourse without consent and sexual assault on C.S.

Two other victims, V.G., N.M., also testified Duncan had engaged in sexual contact with them. A witness, Duncan's youngest step-daughter, testified she witnessed Duncan engage in sexual contact with V.G. V.G. testified that she did not believe "Duncan had touched her by accident." *Id.,* ¶ 13. On appeal, Duncan challenged the sufficiency of the evidence. While this Court acknowledged the testimony of V.G. and N.M. alone was sufficient evidence to sustain the respective

convictions, the Court emphasized that "the State did present additional evidence to support the victims' testimony" *Id.*, ¶ 44. No such corroborating eye-witness evidence was presented in Dennis' trial.

Certainly, a jury's conclusions cannot be disturbed unless it is apparent there was a clear misunderstanding by the jury or that there was a misrepresentation made to the jury, *State v. Lucero*, 214 Mont. 334, 338, 693 P.3d 511, 513 (1984), the instructional error discussed above no doubt left the jury with a misunderstanding about the extent of evidence required to convict Dennis of sexual assault.

The State may argue that, in the past, this Court has consistently been very liberal in its in interpretation of "sexual contact" and has previously concluded that rubbing the belly, rubbing between the legs, and the chest of a prepubescent girl constitutes sexual contact. *See State v. Gilpin*, 232 Mont. 56, 68-69, 756 P.2d 445, 452 (1988); *State v. Howie*, 228 Mont. 497, 503, 744 P.2d 156, 159 (1987); *State v. Weese*, 189 Mont. 464, 467, 616 P.2d 371, 373 (1980). While that may be true, the plain language of the statute and basic due process principles dictate that regardless of how liberal this Court's interpretations may

be, neither proof nor inference of simply touching is sufficient to sustain a conviction. The act of touching must be designed to achieve a specific and criminalized end, which was not proven in Dennis' case.

Conclusion

Even with the most tenuous of inferences, Anne's testimony and the State's evidence was insufficient to sustain a conviction. That Anne was "uncomfortable" does not amount to the ends criminalized by "sexual contact" or "sexual assault." Most of us throughout the course of our days experience varying degrees of discomfort. That we experience such discomfort does not make its source criminal any more than it makes us victims. We simply either soldier on through our discomfort, or we seek to extricate ourselves, as Anne did when she told Dennis she did not want to play the game and he stopped. (Trial Day 3 at 24).

The insufficiency of the evidence is made even more plain in light of the instructional error by the Court, as well as inefficacy of counsel to ensure the State was put to the proof required by the statute, and that it do so to a point the jury is convinced of Dennis' guilt beyond a

reasonable doubt.

Given these errors and their prejudicial impact on the fairness of the proceedings, Dennis respectfully requests this Court vacate his conviction and remand his case for a new trial.

Respectfully submitted this 16th day of June, 2025.

/s/ Colin M. Stephens
Colin M. Stephens
STEPHENS BROOKE, P.C.
Attorney for Appellant

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 8,576.

Dated this 16th day of June 2025.

/s/ Colin M. Stephens
Colin M. Stephens
Stephens Brooke, P.C.
Attorney for Appellant

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 06-16-2025:

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Audrey S. Cromwell (Govt Attorney)
502 S 19th Ave
Ste 102
Bozeman MT 59715
Representing: State of Montana
Service Method: eService

Jordan Rhodes Kilby (Attorney)
315 West Pine Street
Missoula MT 59802
Representing: Dennis Steffens
Service Method: eService

Colin M. Stephens (Attorney)
315 W. Pine
Missoula MT 59802
Service Method: eService
E-mail Address: colin@smithstephens.com

Electronically signed by Daniel Kamienski on behalf of Colin M. Stephens
Dated: 06-16-2025