

In the Supreme Court of the State of Montana

Supreme Court No. DA 24-0473

STATE OF MONTANA,

Plaintiff and Appellee,

-vs-

JAY DEE DAVISSON,

Defendant and Appellant.

Appellant's Reply Brief

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

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Arguments

I. Introduction

A clause in the State's Summary of the Argument demonstrates why plain error review is necessary in this case. "Because of the evidence and arguments presented at trial, the jury was required to resolve the requisite factual issues of whether Davisson was aware of T.K.'s true age and that she was physically helpless. The wrong definition of knowingly did not prevent the jury from doing that, and plain error review is not appropriate in this case." (State's Br. at 23) (emphasis added.) The conclusion the State seeks from this Court does not follow from its premise for a number of reasons, not the least of which is this Court's own precedent. It can just as easily be argued – as Mr. Davisson obviously would – that the jury's conclusion was *caused* by the incorrect definition of knowingly. Fortunately for this Court and for Mr. Davisson, the law resolves the dispute.

II. Plain Error and the Mental State

The State correctly points out the prosecution presented both a disjunctive and conjunctive theory of Mr. Davisson's guilt. The

Amended Information alleged that Mr. Davisson was guilty because he had sexual intercourse with T.K. and the intercourse was nonconsensual because T.K. was legally incapable of consenting for either or both of the following reasons: she was less than 16 years of age and/or she lacked the capacity to consent by being physically helpless. (Dkt. 78; State's Br. at 1).

It is worth remembering that the jury was instructed that Mr. Davisson acted knowingly if he was aware of a high probability that the conduct would cause a specific result, and not that he might have been aware of either of two particular circumstances that would negate consent, i.e., the circumstance of T.K.'s age or the circumstance of her incapacity. It is also worth remembering, the State was required to prove beyond a reasonable doubt, and the jury was required to find Mr. Davisson acted "knowingly" as to the specific circumstance of T.K.s age because of the statutory sentencing enhancement sought by the State.

Mr. Davisson will not reiterate the clearly established law on the legally correct definition of "knowingly" that has been established by this Court in *State v. Gerstner*, 2009 MT 303, 353 Mont. 86, 219 P.3d

74, *State v. Deveraux*, 2022 MT 130, 409 Mont. 177, 512 P.3d 1198, and *State v. Hamernick*, 2023 MT 249, 414 Mont. 307, 545 P.3d 666; all of this is set forth in the Appellant’s Opening Brief. The instruction that was given by the district court is simply legally incorrect.

Since the State argues on appeal the “evidence and arguments presented at trial” were sufficient for the jury to find guilt despite the instructional error, Mr. Davisson will focus his reply on the fact that the given “knowingly” instruction was not just legally incorrect, but it was also factually incorrect based on the State’s evidence and/or theories. Both the legal and factual errors combined to drastically reduce the State’s burden of proof.

Let us first turn to the State’s theory at trial that Mr. Davisson’s sexual intercourse with T.K. was nonconsensual because of T.K.’s age. This would also include the sentencing enhancement found by the jury.

This Court has correctly noted that age, when used as an element of a criminal offense, is an “attendant circumstance.” *State v.*

Weatherell, 2010 MT 37, ¶ 13, 355 Mont. 230, 255 P.3d 1256. Although the issue in *Weatherell* was whether convictions for PMFA and assault

on a minor stemming from the same victim violated double jeopardy, the legal principles and this Court's analysis help guide the discussion in Mr. Davisson's case.

[A] person commits assault on a minor if he commits an offense under 45-5-201, and at the time of the offense, the victim is under 14 years of age and the offender is 18 years of age or older. Incorporating the relevant cross-reference, the elements of assault on a minor are (1) purposely or knowingly, the *mens rea*; (2) causes bodily injury, the *actus reus*; and (3) to another who is 14 years of age and the offender is 18 years or older, the attendant circumstance.

Id. (internal quotations omitted). Both due process and *Mont. Code Ann. § 45-2-103* require that, with the exception of absolute liability offenses, the mental state applies to each element of the offense.

In Mr. Davisson's case and under the too-young-to-consent theory put forth by the State, the prosecution was required to prove beyond a reasonable doubt that Mr. Davisson had the mental state of "knowingly" with regard to the "attendant circumstance" of the element of age/consent. However, the "knowingly" definition given by the district court not only lowered the State's burden but did not even make sense in light of what the State was required to prove as to the consent element. A correct definition of "knowingly" as to this element would

have been: “a person acts knowingly with respect to a circumstance described by a statute defining an offense when the person is aware that the circumstance exists.”

As instructed, however, the jury was not required to find, and the State was not required to prove, that Mr. Davisson was actually aware of the circumstance. This is a critical and constitutional error because the jury heard testimony that T.K. misrepresented her age both by word and by action (e.g., drinking, etc.). The jury heard evidence that Mr. Davisson believed T.K. was 20 years old. (Trial Tr. 363, 365). The State was not required to rebut that belief and show beyond a reasonable doubt that Mr. Davission was aware T.K. was actually 16. But, the State’s burden was lowered even under the most generous reading of the mental state statute applied to the age/consent element.

As specifically addressed in *Hamernick*, the “high probability” definition of “knowingly” gives rise to a lower burden of proof for the State than requiring proof of actual awareness. *Hamernick*, ¶ 23. Juries are presumed to follow the instructions and the law given to them by the court. *State v. Labbe*, 2012 MT 76, ¶ 28, 364 Mont. 415,

276 P.3d 848. Therefore, it is presumed the jury read the court’s “knowingly” instruction and followed it by finding Mr. Davission guilty on the basis that there existed a mere high probability that his conduct would cause a specific result. Again, trying to shoehorn the given definition into the attendant circumstance element of age/consent is difficult, but it would result in something like the following: The jury found beyond a reasonable doubt that it was highly probable that Mr. Davission was aware of the circumstance that T.K. was under the age of 16. Such a definition is not only contradictory to the plain language of *Mont. Code Ann. § 45-2-101(35)* (“knowingly”), but to this Court’s established precedent. It also reduced the State’s burden and adversely undermined how the jury viewed Mr. Davission’s own defense.

Therefore, the State’s argument that “the erroneous definition of knowingly did not allow the jury to avoid resolving the requisite factual disputes – *beyond a reasonable doubt* –” is incorrect. The jury would have to ignore the instruction given and, on its own, elevate the proof required beyond “high probability” to an actual awareness. And, the jury would have had to arrive at the correct legal definition without any

guidance from the court that an actual awareness was required. And finally, the jury would have had to render that conclusion in the absence of evidence of actual awareness presented by the prosecution.

It is understandable the State speculates the jury made those extraordinary extralegal leaps, and the jury may have indeed done so given the confusing nature of the mental state instruction it was presented with, but neither lead to the conclusion that, therefore, Mr. Davission's conviction is constitutional.

These same arguments apply to the State's theory of Mr. Davission's guilt as to the consent element: physically helpless—compounding the confusion and thus compounding the error. Unlike age, this Court has not categorized physically helpless as a “circumstance,” but within the context of the larger criminal offense and other statutes, circumstance is the only logical definition of “knowingly” that would be appropriately applied especially since the state of being “physically helpless” was a temporary state rather than a permanent condition. The Court may conclude “physically helpless” is a fact, in which case the “high probability” definition of “knowingly” could be

appropriate but would still require a more legally sufficient definition to guide the jury in its evaluation of the State's evidence in light of the burden of proof. The definitions in *Mont. Code Ann. § 45-2-101(35)* distinguish between the need for the State to prove a high probability that a result will be caused by a person's conduct and a high probability that a person is aware of the existence of a particular fact.

Under either definition, the State's burden was lowered because it was not required to prove beyond a reasonable doubt that either Mr. Davisson was aware of the circumstance that T.K. was physically helpless, or that there was a high probability of the fact that she was physically helpless. This is especially true given the evidence at testimony the jury heard about T.K.'s behavior in the car and during the only instance in which Mr. Davisson admitted to having sexual intercourse with T.K.

The State hopes to focus this Court's attention on T.K.'s state in the morning when Mr. Davisson was carrying her, seemingly incapacitated, into the hotel. However, the jury heard no evidence that any sexual activity occurred in the hotel and Mr. Davisson denied any

occurred in the hotel. The State focused the jury's attention on this period of time in arguing T.K. was physically helpless. On appeal, the State uses, and even emphasizes the prosecutor's closing argument:

“He knew what he was doing. He knew exactly what he was doing.”

(State's Br. at 20) (quoting Trial Tr. 422-423) (emphasis in State's Br.)

Setting aside the fact that the prosecutor's closing argument isn't evidence, the context of the prosecutor's assertion of what Mr. Davisson knew he was doing, i.e., “knowingly,” is carrying T.K. into the hotel. This is not proof beyond a reasonable doubt that T.K. was physically helpless at the time of the sexual intercourse. Just because Mr. Davisson became aware of a fact or circumstance afterwards does not mean he was aware of the fact or circumstance during period of alleged criminal conduct. Proof of the former is not proof of the latter.

Finally, the highlighted language used by the prosecutor in closing serves to highlight the prejudice to Mr. Davisson. It is evident the prosecutor wanted the jury to focus on the argument that it was highly probable that the offense of sexual intercourse without consent resulted from Mr. Davisson's conduct and that Mr. Davisson was aware of that.

Rather than highlight Mr. Davisson's supposed guilt and secure a conviction, the language serves to highlight the lower burden under which the State secured its conviction.

Contrary to the State's argument, plain error review is appropriate and necessary in this case. The State's overall argument seems to be that, in the State's view, no plain error occurred because the jury found the State's witnesses credible and reached a verdict with which the State agrees. Obviously, those facts are present in every criminal defense appeal in which plain error is sought: a conviction was obtained but reversal is necessary because the conviction was obtained in plain violation of the appellant's constitutional rights, and the failure to review the claim on direct appeal will result in a miscarriage of justice or compromise the integrity of the judicial process. Under the totality of the circumstances, the error is both too great and too plain for this Court to affirm the conviction. The mental state instructions were incorrect and lowered the State's burden. Reversal is necessary to uphold the integrity of the judicial process and to prevent a miscarriage of justice.

Although the State agrees the “knowingly” instruction is incorrect, the State’s attempts to distinguish Mr. Davisson’s case with *Hamernick*. Its attempt is unpersuasive and does not even align with the dissenting opinion in *Hamernick*, which rightly notes: “Depending on the nature of the offense, multiple instructions for ‘knowingly’ may be appropriate.” *Hamernick*, ¶ 29 (Baker, J., dissenting). Perhaps, if the district court in Mr. Davisson’s case had also given a correct definition of “knowingly” as to the element of consent – be it relating to an actual awareness of age or physical helplessness or reasonable probability of the fact of physical helplessness and actual awareness of age – then Instruction 14 might not qualify for plain error. Unfortunately for the State, no second *mens rea* definitions were given.

Further, the dissent in *Hamernick* argued the incorrect verison of “knowingly” was saved by other instructions, specifically an instruction in accordance with *Mont. Code Ann. § 45-5-501(1)(a)*. *Id.* ¶ 32 (Baker, J., dissenting). No such instruction was given in Mr. Davisson’s case because of the very nature of the allegations. The alleged victim in *Hamernick* was an adult and legally capable of consenting.

Certainly, *Hamernick* is factually distinct from Mr. Davisson's case, but it does not change the legal principles upon which this Court relied specifically the decisions in both *Gerstner* and *Deveraux*. In *Hamernick*, the State seems to have made similar attempts to distinguish *Gerstner* and *Deveraux* on their facts in an attempt to salvage a conviction resulting from a faulty *mens rea* instruction. This Court was unpersuaded and should be so here. *Hamernick*, ¶¶ 22-26.

Without ambiguity or reference to case-unique facts, this Court held:

The crime of SIWOC is a conduct-based offense, necessitating an 'awareness of conduct mental state instruction. Under the language of the statute, the crime does not consist of sexual intercourse with a high probability the other person does not consent; rather it is sexual intercourse with the awareness that it is *without* that person's consent, which may permissibly be inferred from all facts and circumstances of the case.

Hamernick, ¶ 26 (emphasis in original).

Despite the State's valiant attempt to salvage the conviction in Mr. Davisson's case, plain error review is necessary. Mr. Davisson requests this Court reverse his conviction and remand his case for a new trial with legally correct jury instructions.

III. Ineffective Assistance and Prejudice

For the same reasons that plain error review is appropriate so, too, is reversal of Mr. Davisson's conviction for ineffective assistance of counsel.

Because it agrees the instruction was incorrect, the State seems to concede the first prong of *Strickland*' counsel's error. Instead, the State argues – as it did in its plain error argument – that Mr. Davisson was not prejudiced by the error. As demonstrated above, below, and in the Appellant's Opening Brief, the State's argument fails.

The State argues that “[e]vidence supporting the verdict was overwhelming. Davisson has not show a reasonable likelihood of a different outcome had his attorney requested and received the correct definition of knowingly and therefore has not show he was prejudiced by IAC.” (State's Br. at 32). Notwithstanding the State's understandable belief in its own evidence, “an erroneous jury charge may form the basis of a habeas petition, either independently or in conjunction with an ineffective assistance of counsel claim, where the instruction ‘so infected the entire trial that the resulting conviction violates due process’ by

rendering the trial fundamentally unfair.” *Luchenburg v. Smith*, 79 F.3d 388, 391 (4th Cir. 1996) (citing and quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). That Mr. Davisson is raising the claim on direct appeal rather than through a habeas claim makes his argument of IAC on direct appeal even stronger, since habeas (especially federal habeas) is a much higher bar to clear.

In addition to the cases from this Court referenced on page 27 of Mr. Davisson’s Opening Brief, other courts have found prejudicial inefficacy where defense counsel failed to obtain correct instructions or object to legally incorrect ones despite (or because of) a conviction. In *Cox v. Donnelly*, 387 F.3d 193 (2d Cir. 2004), the Second Circuit found counsel’s performance was deficient and prejudicial where he failed to object to a jury instruction that relieved the prosecution of its burden of proof on the question of intent to kill. The Court specifically rejected an argument by the state that counsel’s failure to object was error but not prejudicial because it was part of an overall trial strategy to present a justification defense.

In *State v. Eyre*, 2008 UT 16, 179 P.3d 792 (2008), the Supreme

Court of Utah found counsel ineffective on direct appeal where trial counsel did not object to a jury instruction that omitted the existence of an essential element of the crime of tax evasion. The court concluded counsel's failure to object to the erroneous instruction did not alert the jury to every element of the crime. This error prejudiced the defendant because his defense at trial was that he failed to file, not because he was trying to evade tax but, rather, because he did not believe he had any tax due. The Utah Court opined that, had the jury been instructed properly, it would have had to make a determination regarding the state's proof of tax deficiency and the plausibility of the defense. *Id.*, ¶ 19. "Even where the State may have been able to prove that a tax was due and owing, that tax may have been small enough that the jury could have found that Eyre in good faith believed he did not have a tax deficiency and did not file as a result. The probability of this result is sufficient to undermine our confidence in the verdicts rendered by the jury." *Id.*

Mr. Davisson's case is similar to *Eyre*. In evaluating whether a defendant was prejudiced by counsel's failure regarding the jury

instructions, it is critical to look to the theory of defense. Mr. Davisson did not dispute he engaged in sexual intercourse with T.K. in the vehicle. The crux of his defense was his belief in her ability to consent either because she misrepresented her age or his good faith belief she was not physically helpless because of her actions in the car (moving from the back seat to the front, engaging in sexual intercourse with B.L., etc.) Had counsel not erred and had the jury been properly instructed, the jury could have concluded that Mr. Davisson was not actually aware T.K. was unable to consent under either of the State's dueling theories. As in *Eyre*, this probability should be sufficient to undermine this Court's confidence in the verdict.

Similarly, in *Lee v. Clarke*, 781 F.3d 114 (4th Cir. 2015), the Fourth Circuit found counsel to have committed prejudicial error by failing to request a heat-of-passion jury instruction. Under Virginia law, the defendant was entitled to the instruction. The jury was faced with a question of whether the homicide was committed before or after his "passion had cooled." *Id.* at 124 (internal citation and quotation omitted). Despite the verdict, Lee "produced some credible evidence

that he acted in the heat of passion, and was therefore entitled to an instruction on manslaughter.” *Id* at 123 (cleaned up). The Court also noted that disputed factual discrepancies “do not diminish the importance of the heat of passion.” *Id*.

The same must hold true for Mr. Davission’s case. Simply because the jury made a finding consistent with the State’s theories over Mr. Davission’s theory of defense does not mean it would have done so had it been properly instruction. The prejudice remains because of counsel’s failure to ensure the jury was correctly instructed, especially when the correct instruction would have been given and it was consistent with Mr. Davission’s theory of defense.

In addition to this persuasive authority, the real authority supporting reversal because of counsel’s inefficacy is found in this Court’s own jurisprudence. *See e.g., State v. Resch*, 2019 MT 220, 397 Mont. 448 P.3d 1100 (“the record provides no plausible justification for defense counsel’s failure to object to an incorrect jury instruction that misstated an element of one of the charged offenses.”) Here, counsel failed to object to an incorrect jury instruction. The incorrect

instruction misstated an element – mental state – of the offense charged. There is no plausible justification for counsel’s error especially in light of the defense and evidence mounted by Mr. Davission. The IAC is as plain as the error discussed in Section II of this Reply and the Appellant’s Opening Brief. Reversal is warranted.

Conclusion

In light of the arguments herein and in the Appellant’s Opening Brief, Mr. Davission respectfully requests his Court reverse his convictions and remand his case for a new trial with the correct mental state instructions.

Respectfully submitted this 15th day fo July, 2025.

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Certificate of Compliance

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that the Appellant's Reply 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 5,000 words. The exact word count, as calculated by my WordPerfect software and excluding tables and certificates, is 3,467.

Dated this 15th day of July, 2025.

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CERTIFICATE OF SERVICE

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