

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 25-0201

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DENNIS STEFFENS,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Eighteenth Judicial District Court,
Gallatin County, The Honorable Andrew Breuner, Presiding

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STATEMENT OF THE ISSUES

1. Whether Appellant meets his plain error burden to show a manifest miscarriage of justice based on his new appellate argument that the phrase “in order to” in the “sexual contact” jury instruction as applied to the offense of sexual assault should be interpreted to mean the mental state of “purposely.”
2. Whether this Court should review Appellant’s ineffective assistance of counsel (IAC) claim on direct appeal based on his argument that no plausible justification explains counsel’s failure to object and to ask the district court to interpret the phrase as explained above.
3. Whether—in the light most favorable to the State—any rational juror could have found that Appellant committed sexual assault.

STATEMENT OF THE CASE

The State charged Appellant Dennis Steffens with sexual assault, alleging that—between 2009 and 2013 in Gallatin County—Steffens committed numerous instances of sexual assault against his niece who was less than 14 years old and unable to consent. (Doc. 4.) The case proceeded to jury trial.

Steffens did not move to dismiss the sexual assault charge for insufficient evidence at the close of the State’s case, or at any other time. (*See* 8/28/24 Tr. at 90, 248; 8/29/24 Tr. at 38.)

While the State proposed jury instructions for sexual assault, Steffens did not propose any alternative offense instructions. (*See* Docs. 84, 86, 98.) During the settling of instructions, Steffens did not object to the “sexual contact” jury instruction. (8/29/24 Tr. at 17-27.)

In 2024, the jury found Steffens guilty. (Doc. 111; 8/29/24 Tr. at 105.) The district court sentenced 71-year-old Steffens to the Department of Corrections for 15 years with 10 years suspended. (Doc. 134 at 1; Sentencing Tr. at 144-46.)

STATEMENT OF THE FACTS

I. The background and the offense

Frank and Mary E.¹ have two children, Alison and Annie. (8/27/24 Tr. at 161, 198.) Both children were adopted at one year old from China—Alison in 2001 and Annie in 2005. (*Id.* at 161-62, 205.) In 2007, the family moved to Gallatin County for Mary’s job at the U.S. Forest Service.

Steffens was married to Mary’s sister, Margie. (8/27/24 Tr. at 42, 86, 162-63, 200.) The pair lived in Wisconsin. (*Id.* at 162, 202.) Margie and Steffens do not have any children. (8/28/24 Tr. at 94.)

While Mary was close to all her siblings, she was close “in particular to Margie.” Margie was Mary’s “best friend” and they talked every week. (8/27/24

¹ Last name removed for confidentiality.

Tr. at 202.) They were close throughout their lives. (*Id.* at 200-01.) As adults, they tried to see each other twice a year, either in Montana or Wisconsin. (*Id.* at 202.) Thus, the E. family would visit Wisconsin, or Margie and Steffens would visit them in Montana, frequently. (*Id.* at 163, 202-04.)

Mary noted that, during the visits, Steffens “spent a lot of time playing with the kids[]” and was “very attentive” to them.” (8/27/24 Tr. at 207.) As for Margie, she typically did not play with Annie and Alison because she “doesn’t like kids” and was “not particularly great with young kids.” (*Id.*) Mary explained that “starting with [Alison] when she was very young,” Steffens would “often be playing” games with Alison while Mary and Margie “would be off catching up and talking about our lives and what we were doing.” (*Id.*) It became a “pattern where [Steffens] spent a lot of time alone with Ali[son] when she was younger and then with Annie when she was younger.” (*Id.*) Steffens was their “favorite uncle[.]” (*Id.*)

While “everything seemed great” on the family trips, Mary started to “notice things or worry about [Steffens’s] behavior around Annie in a way I hadn’t before[.]” (8/27/24 Tr. at 210.) She “had seen plenty of things” she was “worried about.” (*Id.* at 255.) For example, one time Mary saw Steffens “sneak off upstairs with Annie[.]” Mary “ran upstairs” and saw Annie “was in there with him.” (*Id.*)

While Steffens “wasn’t doing anything,” Mary “grabbed [Annie] and brought her out of there.” (*Id.*)

Annie explained that when Margie and Steffens would visit them, Steffens would show her more attention, and he would do arts and crafts or play in the yard with her. (8/28/24 Tr. at 13.) She affirmed Steffens would leave the adults to play with her. (*Id.* at 15.) Steffens was “always volunteering” to supervise Annie and her sister Alison. (*Id.* at 21.)

Annie explained that most games with Steffens were played in the presence of others—except the robot game. (8/28/24 Tr. at 14-15.) This game was made up by Steffens. (*Id.* at 19.) It occurred in the room where Steffens and Margie stayed during their visits. (*Id.* at 15.) The room was Frank’s office space, but an air mattress would be put in the room for Margie and Steffens. (*Id.*) Before the game, Steffens always closed the door behind them, and there were never any other adults in the room. (*Id.* at 16.) Annie believed she was around six or seven years old when Steffens started playing the game with her. (*Id.*)

The robot game would start with Annie lying down on the bed. (8/28/24 Tr. at 17.) Steffens would pull her pants and underwear down and lift her shirt up. (*Id.* at 17, 22.) Annie “was the robot” and “different body parts were different buttons on a robot[.]” (*Id.* at 17.) Every time, after Annie’s pants were pulled down, Steffens would pretend to put an imaginary “CD” into Annie’s vagina. (*Id.*)

He would “make this motion like a CD slot,” and would “push down,” on Annie’s “vagina” and would “press his thumb against” the “lower” part near the “clit area[.]”² (*Id.* at 17-18.) Then he would “touch different parts” of Annie’s body like her “stomach,” and “sometimes [her] face[.]” but Annie “distinctly remember[ed]” Steffens touching her “nipples” to pretend they “were dials, like the volume or something,” to turn the “dial” on “specific settings.” (*Id.* at 18.) Throughout the game, Steffens would narrate his actions, explaining, “I have to put the CD in” and “[W]e’re going to turn the volume up” and “[W]e’re taking the CD out.” (*Id.* at 19.)

Then, Annie would “get up,” and “pull [her] pants back up” and her “shirt down” and would “pretend to be a robot for a little bit[.]” (8/28/24 Tr. at 18.) The process would then repeat. Annie would “lay back down,” and Steffens would “touch all those parts, again, to turn the robot off.” (*Id.*)

During the game, Steffens was “smiling[.]” (8/28/24 Tr. at 37.) He would tell Annie “this is our special game,” and “just you and me get to play this.” (*Id.*)

Margie and Steffens visited once a year. (8/28/24 Tr. at 87.) Each time, they would stay for around a week. (*Id.* at 20.) Steffens played the robot game with Annie “approximately, like three times[.]” each visit. (*Id.*) This happened

² Annie was 19 years old at the time of trial. (8/28/24 Tr. at 10.)

from when Annie was six or seven years old until she was ten years old. (*Id.* at 21-22.)

Annie “didn’t really like question it” until she “got older.” (8/28/24 Tr. at 23.) When she was ten years old, she started “feeling uncomfortable[.]” (*Id.*) Annie told Mary—without providing details—that “there’s this game we play. I really don’t want to play it anymore. It kind of makes me uncomfortable.” (*Id.* at 24.) Mary told Annie that she did not have to play a game she did not want to play. (*Id.*)

Annie later told Steffens, “I don’t want to play this game[.]” (8/28/24 Tr. at 24.) Steffens responded, “Oh, no, you don’t? Are you sure?” (*Id.*) Annie confirmed, and Steffens assented. (*Id.*) They never played the game again. (*Id.*)

II. Annie’s disclosure to her family and Alison’s disclosure to police

In 2018, when Annie was “around 12 or 13” years old and Alison was 18 years old, they were visiting Steffens and Margie in Wisconsin. Near the end of the trip, Annie decided to disclose Steffens’s sexual abuse to Alison. (8/27/24 Tr. at 164-65, 211; 8/28/24 Tr. at 25-26.) Annie was becoming “more aware” of her body and was “thinking about the robot game.” (8/28/24 Tr. at 25.) For privacy, Annie and Alison went to a “little cottage” that was on the property but was separate from Steffens’s house. (8/27/24 Tr. at 164-65; 8/28/24 Tr. at 26, 28.)

Annie told Alison that a “made up game[]” would “occur every single time we would see[]” Steffens, called the “the robot game.” (8/27/24 Tr. at 170.) Annie described to Allison where Steffens would touch her, including “[o]n her nipples and her belly button and her stomach and under her underwear.” (*Id.* at 170-71.)

But Alison already knew “the very first time” about Steffens’s abuse to Annie but she “couldn’t quite understand” she heard from Annie “what was going on.” (8/27/24 Tr. at 186, 191.) Alison remembered that when she “was 10 [years old]” and Annie was 4 or 5 years old, she was “in the room seeing it happen[,]” but she did not understand at the time what the robot game was. (*Id.* at 186; *see also id.* at 177-78, 190-91.) Alison felt “really uncomfortable” and knew “that wasn’t appropriate.” (*Id.*) She confirmed that this meant she had witnessed the abuse of her sister. (*Id.* at 186.)

After Annie disclosed to Alison, they resolved to talk to Mary about Steffens’s sexual abuse. (8/28/24 Tr. at 26.) Annie went to Mary in the main house and asked her to come out to the little cottage. (8/27/24 Tr. at 211-12.) When Mary arrived, she saw that both Annie and Alison were “very upset.” (*Id.* at 212.) Alison was “sitting on the floor” with “her body racked in sobbing” and Annie was “a little more stoic than Ali[son], just by nature,” and was “crying, but not loudly.” (*Id.*; *see also* 8/28/24 Tr. at 26-27.) Mary recalled that Alison and Annie then told her that “something had happened with [Steffens],” but she found

it “wasn’t extremely coherent.” (8/27/24 Tr. at 213.) According to Mary, Annie said that Steffens “scares” her, that she didn’t like the way he looked at her and looked at her shorts. (*Id.*) Mary “didn’t push them for a lot of detail at that point.” (*Id.* at 243.) Mary, “maybe naively,” asked the girls if they wanted to go back to the main building and have a conversation, to which both girls responded “no.” (*Id.* at 214.) Annie remembered Mary “crying” and “hugging us and trying to comfort us.” (8/28/24 Tr. at 28.)

The next day, they went back to Montana. (8/27/24 Tr. at 214.) Once home, they had a family conversation about the allegations, now including Frank. (*Id.* at 214-15, 245; 8/28/24 Tr. at 29.) Annie described “what had happened,” and how Steffens made her nervous and “that he played a game that she called the robot game,” but again—according to Mary—Annie “didn’t talk about it in a lot of detail.” (8/27/24 Tr. at 215.) Mary later conceded that Annie described the robot game, and “basically demonstrated a game that showed he touched her breasts an[d] he touched her, basically, her female parts.” (*Id.* at 246.) For her part, Annie remembered telling her family about the robot game and saying, “he touched me.” (8/28/24 Tr. at 29.) She also remembered she was “crying.” (*Id.* at 30.)

According to Alison, a decision was made to not do anything “outside of the family[.]” (8/27/24 Tr. at 165-66, 182.)

Mary would later testify that “communicating about really hard things is not our strong suit as a family.” (8/27/24 Tr. at 214-15.) Mary “absolutely believed that something had happened[.]” but she did not yet understand it was “something serious.” (*Id.* at 216.) Mary reiterated that they “didn’t talk about it in detail.” (*Id.*) There was no further discussion about the matter between Annie and Mary after Alison went off to college. (*Id.* at 217.) While Mary “believed” her daughter’s allegations “all along,” she “wasn’t accepting it[.]” and it “wasn’t sinking in.” (*Id.* at 254.)

Annie concurred that, at that time, her parents “weren’t sure what to do.” (8/28/24 Tr. at 30.) Annie was also “very unsure what to do” because she “felt really bad” for “Aunt Margie” and she knew “it would hurt a lot of people[.]” But Annie was “like 13” years old and she “didn’t really know what to do.” (*Id.* at 31.)

Alison was concerned about Annie’s safety because Margie and Steffens were planning to visit in the fall of 2018 while Alison would be at college. (8/27/24 Tr. at 166-67.) That trip was ultimately postponed until the fall of 2019. (*Id.* at 167.) But Alison remained concerned because Margie and Steffens ended up visiting in 2019 while she was at college in Massachusetts—and she was only informed about their visit after they had left. (*Id.* at 168.)

Mary confirmed that Steffens and Margie did indeed visit again in the fall of 2019. (8/27/24 Tr. at 217.) Prior to the visit, then 14-year-old Annie told her

mother, “I don’t want to be around [Steffens] when he’s here. Can I sleep with you?” (*Id.* at 217-18.) Mary responded, “[S]ure.” (*Id.* at 218; *see also* 8/28/24 Tr. at 32.) Annie would later explain she slept with her mom because she was “very uncomfortable with [Steffens]” and was “like scared he was going to come into my room at night or something,” which was “just like nerves for me.” (8/28/24 Tr. at 33.) Steffens and Margie visited for a week. (8/27/24 Tr. at 249.) In retrospect, Mary “regret[ed]” the decision to have them over. (*Id.*)

Annie recalled that “we” were not “sure how to tell Margie” and “we weren’t sure how we wanted it to come out[.]” When she heard Steffens was coming to visit, she remembered feeling “like I can do this, like, for my family . . . one more time,” but she also felt she really did not “want to see this man again.” (8/28/24 Tr. at 31.) During their visit, Annie avoided Steffens and only spent time with Margie and Mary or was otherwise at school or summer camp. (*Id.* at 32, 65.)

Mary did not discuss her child’s allegations of sexual assault with either Margie or Steffens. (8/27/24 Tr. at 218.) Mary was still “struggling with that attachment” and the way she viewed her family, as well as her “relationship with Margie and not wanting to blow all that up.” (*Id.* at 219.) Mary knew that dealing with the situation would end her relationship with Margie. (*Id.*) She felt “stuck” and “realiz[ed] this can’t go on” and she knew that “once it changes, it never goes back.” (*Id.*)

In 2021, Alison still felt unresolved fear for Annie’s safety and decided to go to law enforcement. (8/27/24 Tr. at 171.) She decided to report because Annie “was still a minor and there still could be a chance my aunt and uncle would come and visit.” (*Id.* at 169.) Alison knew Annie was “very scared and upset.” (*Id.*) Annie had told Alison that she “felt very uncomfortable around [Steffens],” and Alison could tell that “she was scared.” (*Id.* at 170.) Alison “felt like if my parents weren’t going to tell the police, then I should.” (*Id.* at 186.) Alison did not tell her parents about her decision, nor did she ask for Annie’s permission to report. (*Id.* at 171, 174-75.)

In June 2021, Alison reported that Annie had been sexually abused by Steffens to Detective Amy Ross at the Montana State University Police Department (MSU PD). (8/27/24 Tr. at 36-38, 109, 174-75.) During the disclosure, Alison mentioned that she did not want her parents to find out yet due to an upcoming family trip to the Bahamas. (*Id.* at 135.) She did not care about the trip, but she initially thought the trip might be “a really good way for all of us to talk[.]” (*Id.* at 188.) She was also afraid her parents would be upset at her for reporting and disappointed if she did not go on the trip. (*Id.* at 190.) But, ultimately, Alison decided not to go on the trip anyway because she felt she needed time alone and she was still upset about the situation. (*Id.* at 188-89.) According to Detective Ross, while Alison mentioned the Bahamas trip and that she “felt bad about saying no” to

that trip and that she “loves her mom and didn’t want to hurt her[,]” another reported concern was that Alison planned to move out of her parents’ house before they found out about her report. (*Id.* at 150-51.)

Indeed, while Alison was “[p]artially” living with her parents, she decided to move out after the disclosure because she was worried about how they would feel about her decision to report. (8/27/24 Tr. at 171-72.) She worried they would be upset with her. (*Id.*) This was because “for several years[,]” Alison explained, she “was told that I shouldn’t tell the authorities because of the relationship that my mom had with Margie, and that if something—if I were to tell law enforcement, that could ruin that relationship.” (*Id.* at 172.)

After the disclosure, Alison thought that Annie was upset with her too. (8/27/24 Tr. at 187.) Alison felt that Annie “didn’t quite know the severity of everything,” and when Alison would “try to talk to her about the reason” she left home, Annie would “just reiterate a lot of things” that the “parents were saying” and claim that Alison “split our family apart.” (*Id.* at 188.) But Annie testified that while she was “surprise[ed]” about the disclosure, she “wasn’t upset that [Alison] went to law enforcement[.]” (8/28/24 Tr. at 35-36.) Annie felt “good that it’s coming out[.]” (*Id.* at 36.)

Detective Ross visited the E. home and told Mary that Annie “may be in danger” and mentioned Steffens’s name. (8/27/24 Tr. at 221.) Mary figured, “[O]kay, now we’ll really figure out everything that’s been going on.” (*Id.* at 222.)

On June 17, 2021, Detective Ross watched the forensic interview of Annie at the Child Advocacy Center, conducted by Detective Dave Ferguson. (8/27/24 Tr. at 110-12, 136-39.) Detective Ross has done 96 forensic interviews and utilizes best practices for forensic interviews, including “not asking leading questions[.]” (*See id.* at 107, 115-18.) Detective Ferguson had undergone similar child forensic interview training. (*Id.* at 111.) Detective Ross noted that Detective Ferguson followed the forensic interview guidelines. (*Id.* at 118-19.)

Annie revealed that Steffens had molested her at least 50 times. (8/27/24 Tr. at 140.) Annie was 15 years old at the time of the interview. (*Id.* at 113.) Detective Ross observed she was “very articulate, [had] good verbal skills, [and was] definitely capable of answering questions.” (*Id.* at 119.) Annie “cried multiple times” throughout the interview, consistent with someone who had experienced “something tragic or traumatic[.]” (*Id.* at 119-20.)

Based on the interview, Detective Ross “definitely was going to move forward[.]” with the investigation. (8/27/24 Tr. at 120.) Because the events did not take place within Bozeman city limits, she referred the matter to the Gallatin County Sheriff’s Office. (*Id.*)

After briefly speaking with the detectives, Mary was “a little bit in shock[.]” (8/27/24 Tr. at 224.) In the car ride home, Mary said, “Annie, I’m so sorry.” (*Id.* at 225.) Annie said, “It’s okay.” (*Id.*) Annie described in “more detail about the robot game” and the “details of him touching her in her private parts[.]” (*Id.*) Mary noted that Annie was “crying that her uncle did these things to her and made it seem like a game.” (*Id.*) Annie was “not a kid who cried very much.” (*Id.*)

Mary also reached out to Alison. (8/27/24 Tr. at 226.) Mary told Alison, “I’m so sorry we didn’t handle this the way we should have.” (*Id.*) Mary recalled that Alison texted her back and kept her apprised of her life, although their relationship was not what it was before. (*Id.* 226-27.) Margie and Mary also spoke less after the allegations came out, merely wishing each other happy birthday. (*Id.* at 228-29.)

III. The investigation

Gallatin County Sheriff’s Office Detective Nathaniel Webb received a referral from the MSU PD, reviewed interview materials, and contacted authorities in Wisconsin. (8/27/24 Tr. at 36-38.) Wisconsin detectives interviewed Steffens and sent the interview materials to Detective Webb. (*Id.* at 40.)

Detective Webb next did a phone interview with Steffens. (8/27/24 Tr. at 40.) Steffens reported he had visited the E. family in Montana once a year from

2008 to 2019. (*Id.* at 42.) Steffens initially reported that he “would babysit Annie to include bathing[,]” but when “more specific” details were given about the allegations, Steffens explained he was “almost never alone with her.” (*Id.* at 43.)

When asked by Detective Webb about the “robot game[,]” Steffens responded that “it sounded familiar.” (8/27/24 Tr. at 44.) The title of the game had originally been “identified by name, first, by Mr. Steffens[.]” to Wisconsin law enforcement during the initial interview. (*Id.*) Specifically, when asked by Wisconsin authorities about the type of play he would engage in with Annie, “[Steffens] brought it up by name without [police] bringing it up.” (*Id.* at 48.)

Steffens gave “contradictory explanations” about the robot game—both within Detective Webb’s interview and in relation to what he told the Wisconsin detectives. (8/27/24 Tr. at 45, 97.) For example, when Detective Webb asked him what the robot game was, Steffens “kind of stammered and talk[ed] about picking Annie up and throwing her around and turning her on and off[.]³” (*Id.* at 45.) He talked “about throwing her on the bed,” which indicated it was a “private game occurring in the bedroom.” (*Id.*) When pressed for more details, however, Steffens “talked about chasing Annie around the house indicating that it was

³ When defense counsel challenged Detective Webb’s stammering comment by claiming that Steffens had previously had a stroke, Detective Webb responded, “that stammering was inconsistent with his demeanor and other parts of the interview.” (8/27/24 Tr. at 90-91.)

something that was occurring more in the public view.” (*Id.*) This also “directly contradict[ed] what was told to Wisconsin law enforcement in the very private nature of the game.” (*Id.* at 48.) He told Wisconsin detectives that he “wouldn’t often play the game because there was no place to hide, indicating that it was a very private game.” (*Id.* at 97.)

Detective Webb and other detectives interviewed family members and visited the E. family home. (8/27/24 Tr. at 52.) Frank reported to Detective Webb that Steffens’s “behavior around the children made him uncomfortable,” particularly the “physical nature of the play.” (*Id.* at 64.) He explained that he tried to keep an eye on Steffens. (*Id.* at 65.)

IV. Steffens’s defense

Steffens testified at trial that he remembered “playing [the robot game],” but only “once with Annie.” (8/28/24 Tr. at 131.) But Steffens nonetheless said that “the game started, *usually*, with her[,]” referring to Annie. (*Id.* at 138 (emphasis added).) Steffens admitted he immediately knew about the robot game when he was asked by detectives. (*Id.*)

Steffens claimed the alleged one-time game occurred “in the stairwell.” (8/28/24 Tr. at 131.) Annie purportedly said, “I’m a robot[.]” and stumbled down the steps and “plopped on the air mattress and was acting like everything was

stiff.” (*Id.*) Steffens then said, “[W]hat do you need?” (*Id.*) Annie responded, “Oil.” (*Id.*) So Steffens made an imaginary oil can to oil her joints and “pressed her belly button” to turn her back on, prompting Annie to jump up and run away. (*Id.*) He claimed there were other adults around the house at the time. (*Id.* at 132.)

Steffens admitted having told detectives he used to babysit the girls and give them baths. (8/28/24 Tr. at 138.) But he claimed he never babysat the girls alone. (*Id.* at 149.) Steffens admitted there was a time when Mary did not like the way he was playing with Annie, when he was upstairs alone with Annie. (*Id.* at 139.) But Steffens claimed that Annie had asked him to go upstairs to look at a picture she drew. (*Id.*) Contradicting Mary’s testimony that she took Annie away, Steffens claimed that Mary just came up, looked around the corner, saw them together, and then left. (*Id.* at 140.) Steffens reasoned without elaboration that Mary’s apparent purpose was to “ma[ke] it obvious that she was watching.” (*Id.*)

Cara Laney, Professor of Psychology at the College of Idaho, testified as a defense blind expert. She explained that false memories can come through “therapists” who believe something happened to a person as a child, who then asks leading questions, resulting in the person believing that something happened to them when it in fact has not happened. (8/28/24 Tr. at 174.) Professor Laney also gave the example of “[p]eople who hallucinate or daydream” as being more susceptible to false memories. (*Id.* at 181.) She noted that “[p]reschoolers

especially” and elementary students are more susceptible to false memories. (*Id.* at 184.) She explained that family members could adopt each other’s stories and motivations. (*Id.* at 192.) But Professor Laney did not think implanting false memories “would be done intentionally in forensic interview.” (*Id.* at 228.) She affirmed that with “best practices, [forensic interviews] are unlikely” to result in false memories. (*Id.*)

V. Closing argument

In closing, Steffens argued that Annie’s account was not credible because “nobody [went] to law enforcement[.]” in 2018, and Steffens and Margie were invited to come back to visit in 2019. (8/29/24 Tr. at 71-72.) Defense counsel also noted that there were no “confrontations” or “police” in 2019. (*Id.* at 73.) Counsel argued it “doesn’t make sense that a parent” would put a sibling relationship ahead of the safety of a child. (*Id.* at 73-74.)

Steffens argued that the sexual abuse had not actually occurred, because “it’s never been [Annie’s] story. It was her sister’s story, then it was law enforcement’s story. Never even got to her until other people had already made up their mind.” (8/29/24 Tr. at 81.) Defense counsel claimed that because “Alison was the first reporter,” she was the “first one to tell a story.” (*Id.* at 64.) Defense counsel

argued there was no “physical evidence” or “objective evidence” that the sexual abuse happened beyond Annie’s story. (*Id.* at 63.)

Defense counsel recalled Professor Laney’s testimony on false memories and argued that children were more susceptible “to influence.” (8/29/24 Tr. at 81-82.) Counsel argued Annie’s memory was implanted the same way children are informed that “Santa Clause exists[.]” (*Id.*)

In rebuttal closing, the State also recounted Professor Laney’s testimony and explained there was no evidence that “Annie heard another person tell her what happened to her[.]” or that “Annie [had] some kind of subsequent sexual assault or encounter that could have colored her memory of what happened between her and her uncle[.]” or that “information was provided” to Annie “by an authority figure” and repeated by Annie. (8/29/24 Tr. at 88-89.) Accordingly, the State argued, there was “no evidence here to suggest that any sort of false memory was presented or implanted to Annie before she told her mom and sister in the same setting what her uncle had done to her in playing the robot game.” (*Id.* at 89-90.)

VI. The settling of jury instructions

During the settling of the instructions, the district court addressed the State’s proposed instruction for “purposely,” in which a person acts purposely when it is the person’s “conscious object to engage in conduct of that nature.” (8/29/24 Tr. at

17.) The court noted that the instruction was probably unnecessary because the State was pursuing a “knowingly” offense. (*Id.* at 17-18.) The State responded, “I agree, we don’t need the purposely[.]” (*Id.* at 19.) Defense counsel did not object. (*See id.* at 17-19.) The court said, “We are not giving the purposefully instruction.” (*Id.* at 20.) Under the refused instructions, the “purposely” instruction was listed as “not given, agreed.” (Doc. 110 at 18.)

The court next addressed the “purpose and knowledge, ordinarily, may not be proved directly” instruction referring to a proper mental state inference, proposing to “get[] rid of ‘purpose.’” (8/29/24 Tr. at 25.) The State agreed, and Steffens did not object. (*Id.* at 25-26.) The instruction was given as modified. (*See* Doc. 110, augmentation to State’s proposed instruction #20; Doc. 109, Given Instr. #20.)

The district court next addressed “the definition of sexual contact” and the following discussion occurred:

COURT: . . . if we’re going to stick with the knowingly state of mind, I think we need to remove “or purposely” from there, in order to knowingly arouse. Does that make sense? So that we’re consistent with knowingly throughout.

STATE: Yes, I agree.

DEFENSE: It does make it more consistent, Judge. I agree with that. (8/29/24 Tr. at 26-27.) The instruction was given as modified. (*See* Doc. 110, augmentation to State’s proposed #20; Doc. 109, Given Instr. #14.)

After a break wherein the instructions were finalized, defense counsel brought up that the court’s instruction #20 (“purpose and knowledge ordinarily may not be proved directly . . .”), had not yet been modified as agreed. Specifically, defense counsel explained, “two references to purpose” had not yet been “excised[.]” (8/29/24 Tr. 39.) The State agreed. (*Id.*) The court acknowledged the situation and made the change. (*Id.*)

SUMMARY OF THE ARGUMENT

Steffens cannot meet his plain error burden of firmly convincing this Court that failing to review his claimed error is necessary to prevent a manifest miscarriage of justice or that failure to review the claim may leave unsettled the question of the fundamental fairness of the proceedings or may compromise the integrity of the judicial process. While, for the first time on appeal, Steffens argues the phrase “in order to” in the sexual contact jury instruction should be reinterpreted to mean the mental state of “purposely,” this challenge fails because the Legislature has long used and defined discrete terms denoting mental state to embody criminal intent. Steffens’s interpretation is otherwise unreasonable because the Legislature has already defined the criminal intent of “knowingly” directly adjacent to the phrase “in order to.” Steffens fails to show plain error here in any event because: (1) the jury was fully and fairly instructed on the elements of

sexual assault; (2) Steffens's defense did not directly implicate his intent for arousal; and (3) contrary to Steffens's argument, the State did not prosecute him without proving his criminal intent.

Next, this Court should reject Steffens's argument that "no plausible explanation" explains his counsel's failure to object and to ask the district court to add the mental state of "purposely" to a "knowingly" offense. Counsel was not obligated to object and proffer a theory that would have been an unsound exercise of professional judgment or would have undermined his client's defense. And, for similar reasons that plain error reversal is not appropriate here, Steffens's counsel's conduct did not raise a reasonable probability that the trial result would have been different but for counsel's performance.

Finally, in the light most favorable to the State, sufficient evidence supported the jury's conviction for sexual assault. As to sexual touching, Annie testified that Steffens touched her vagina, clitoral area, and her nipples directly under the pretext of a "robot game." The State presented sufficient evidence that Steffens did so "in order to knowingly arouse or gratify" his sexual response. Annie testified that Steffens removed her clothing and underwear, touched her private parts, was smiling during the events, and he told her that it was their "special game" only between them. An innocuous or non-sexual game would not have required Steffens to take off Annie's clothes and touch her private parts

repeatedly. Otherwise, well-established precedent forecloses Steffens's unsupported arguments that a jury may not infer mental state, that direct evidence of Steffens's sexual arousal was required to convict him of sexual assault, or that no corroborating evidence supported his conviction. This Court should affirm.

STANDARD OF REVIEW AND APPLICABLE LAW

Unpreserved instructional error claim: Generally, a party's failure to object to a perceived error at trial constitutes a waiver of the issue on appeal. *State v. Mathis*, 2022 MT 156, ¶ 42, 409 Mont. 348, 515 P.3d 758 (citing Mont. Code Ann. § 46-20-104(2)). As to jury instructions, Mont. Code Ann. § 46-16-410(3) provides that a defendant "may not assign as error any portion of the instructions or omission from the instructions unless an objection was made specifically stating the matter objected to, and the grounds for the objection, at the settlement of instructions."

Thus, "If a defendant had the opportunity to object to a jury instruction at trial but failed to do so," this Court will "not examine the issue unless it qualifies for plain error review." *Mathis*, ¶ 23 (citation omitted). This Court employs the plain error doctrine "sparingly, on a case-by-case basis, considering the 'totality of circumstances of each case.'" *State v. George*, 2020 MT 56, ¶ 5, 399 Mont. 173, 459 P.3d 854 (citation omitted). And "[t]he 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 process.” *George*, ¶ 5.

This Court will not undertake a full analysis of the alleged error each time a party requests plain error review. *State v. Griffin*, 2016 MT 231, ¶ 7, 385 Mont. 1, 386 P.3d 559. Conducting a full analysis to determine whether to find plain error would “defeat the underlying rule that a party must object to error at trial, because errors should be brought to the attention of the trial court where they can be initially addressed.” *State v. Ritesman*, 2018 MT 55, ¶ 12, 390 Mont. 399, 414 P.3d 261 (citing *Griffin*, ¶ 7).

IAC: IAC claims raise mixed questions of law and fact that this Court reviews de novo. *State v. Bryson*, 2024 MT 315, ¶ 23, 419 Mont. 490, 560 P.3d 1270 (citation omitted). Before addressing an IAC claim on direct appeal, this Court must first determine whether the record is sufficient to determine whether counsel was ineffective. *State v. Robinson*, 2009 MT 170, ¶ 29, 350 Mont. 493, 208 P.3d 851. This Court will address the IAC claim on direct appeal if the record “explains why counsel did not do something.” *State v. Sawyer*, 2019 MT 93, ¶ 13, 395 Mont. 309, 439 P.3d 931. If the claim instead is based on matters outside the

record, this Court will not review it on direct appeal, recognizing that the defendant may raise the issue in a postconviction proceeding. *Id.* However, this Court will consider a claim not based on the trial record if there is “no plausible justification” for counsel’s action or inaction. *State v. Wittal*, 2019 MT 210, ¶ 13, 397 Mont. 155, 447 P.3d 1039.

Sufficiency: This Court reviews the question of whether sufficient evidence supports a criminal conviction de novo. *State v. McCoy*, 2021 MT 303, ¶ 25, 406 Mont. 375, 498 P.3d 1266. This Court considers the evidence presented in the light most favorable to the prosecution, and it will uphold a conviction where “any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt.” *McCoy*, ¶ 25.

This Court’s “job as an appellate court [is] to probe the record for evidence to support the fact-finder’s determination.” *State v. Dineen*, 2020 MT 193, ¶ 14, 400 Mont. 461, 469 P.3d 122. The inquiry is whether sufficient evidence exists to support the verdict, not whether the evidence could have supported a different result. *State v. Sheehan*, 2017 MT 185, ¶ 17, 388 Mont. 220, 399 P.3d 314. Thus, “whether the evidence could have supported a different result proves immaterial to our review.” *State v. Burnett*, 2022 MT 10, ¶ 15, 407 Mont. 189, 502 P.3d 703.

When reviewing sufficiency of the evidence, this Court “will not substitute [its] judgment for that of the jury, which is able to view firsthand the evidence

presented, observe the demeanor of the witnesses, and weigh the credibility of each party.” *State v. Shields*, 2005 MT 249, ¶ 20, 328 Mont. 509, 122 P.3d 421. “It is only in those rare cases where the testimony of a witness is so inherently improbable or is so nullified by material self-contradiction that no fair-minded person could believe it, that we may say no firm foundation exists for the verdict based on it.” *Id.*

ARGUMENT

I. Steffens fails to show a manifest miscarriage of justice entitling him to plain error reversal based on his novel interpretation of the sexual contact statute.

The jury was instructed that “[s]exual contact” means “touching of the sexual or other intimate parts of the person of another, directly or through clothing, in order to knowingly[] arouse or gratify the sexual response or desire of either party.” (Doc. 109, Given Instr. #14; *see also* Mont. Code Ann. § 45-2-101(67).)

In his unpreserved claim, Steffens exclusively challenges the above jury instruction.⁴ Steffens argues that sexual contact “requires that an offender act with a specific purpose” and that purpose can be found by interpreting the phrase “in

⁴ While Steffens’s fact section discusses several jury instructions from which the district court struck “purposely”—in the argument itself—Steffens does not mention, much less claim, that such action was improper. (*Compare* Appellant’s Br. at 11-13, discussing Given Jury Instrs. #14, 19, 20, *to id.* at 16-24.)

order to” in the instruction. (Appellant’s Br. at 16-17.) Steffens argues that because “in order to” is undefined, it could mean “for the purpose of,” and is thus “essentially” the “linguistic equivalent of the mental state of ‘purposely[.]’” (*Id.* at 17-19.) Steffens argues the district court erred “when it did not *provide* a jury instruction defining purposely as it applies to the definition of sexual contact.” (*Id.* at 16 (emphasis added).) But Steffens does not argue it was error for the district court otherwise *to strike* the errant mention of “purposely” in the State’s proposed instruction from the “sexual contact” jury instruction—particularly considering that sexual assault is a “knowingly” offense. Instead, Steffens argues that the district court erred because it “did not define ‘purposely’ and therefore ignored the requirement that the touching be done ‘in order to’ accomplish a criminal goal.” (*Id.* at 21.) Unwinding the argument as the State understands it, interpreting the “in order to” phrase to mean “purposely” would have, in turn, required an additional definitional instruction for the mental state of “purposely.”

Here, Steffens cannot meet his “burden of firmly convincing this Court” that failing to review the claimed error “is necessary to prevent a manifest miscarriage of justice or that failure to review the claim may leave unsettled the question of fundamental fairness of the proceedings or may compromise the integrity of the judicial process.” *George*, ¶ 5. As further explained below, Steffens fails to show plain error because: (1) the jury was fully and fairly instructed on the elements of

sexual assault; (2) Steffens’s defense did not directly implicate his intent for arousal, while the State’s case was strong; (3) Steffens is incorrect that the State prosecuted him without proving his criminal intent or that sexual assault criminalizes benign conduct; and (4) Steffens’s statutory interpretation is incorrect, absurd, and unreasonable.

First, Steffens’s unpreserved claim fails because the jury was fully and fairly instructed on the elements of sexual assault. Sexual assault is not a “purposely” offense. Rather, “[t]he offense of sexual assault requires that the accused *knowingly* make sexual contact with another.” *State v. Gerstner*, 2009 MT 303, ¶ 29, 353 Mont. 86, 219 P.3d 866 (emphasis added) (*see also* Mont. Code Ann. § 45-5-502(1)). For the offense, the proper application of the knowingly statute should be applied, including the conduct-based definition. *See State v. Rowe*, 2024 MT 37, ¶¶ 28-31, 415 Mont. 280, 543 P.3d 614. And “courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word ‘knowingly’ as applying that word to each element.” *Bryson*, ¶ 31 (citing *State v. Hamernick*, 2023 MT 249, ¶ 16, 414 Mont. 307, 545 P.3d 666; *State v. Deveraux*, 2022 MT 130, ¶ 32, 409 Mont. 177, 512 P.3d 1198; *Fores-Figueroa v. United States*, 556 U.S. 646 (2009)); *see also* Mont. Code Ann. § 45-2-103(4) (application of particular mental state as applying to each element). Thus, the jury was fully and fairly instructed on the elements of sexual assault, including the correct mental state.

Second, even assuming *arguendo* that “in order to” could mean the mental state of “purposely,” there would be no manifest miscarriage of justice in failing to review Steffens’s plain error claim—particularly considering Steffens’s defense did not put his mental state directly at issue as pertaining to the “sexual contact” jury instruction. Steffens’s defense was not that he engaged in sexual touching but did so without the requisite criminal intent—i.e., Steffens did not claim inadvertence or accident. Instead, Steffens’s defense was that he did not engage in sexual contact through sexual touching at all. Particularly, Steffens claimed Annie had been implanted with a false memory. And, while Steffens acknowledged that the robot game had occurred once, he outright denied touching Annie’s sexual parts at all, only admitting to touching her belly button in the context of a game Annie created. If the jury would have otherwise believed Steffens’s story, such a defense would not have required the jury to ascertain Steffens’s intent to “arouse or gratify the sexual response” of either party.

Steffens’s defense fell flat in any event, making plain error review even less appropriate here. Steffens weakly argued that because Alison was the first reporter to police, it was her “story.” But this “false memory” theory had no legs because, as corroborated and otherwise undisputed, it was Annie who first told Alison about Steffens’s sexual abuse. Regarding the forensic interview, Professor Laney acknowledged that, with best practices, implanting a false memory in forensic

interviews is unlikely. After Detective Ross confirmed that best practices were used in Annie's forensic interview, Steffens did not even attempt to argue that the forensic interview was, in any way, tainted by leading questions or otherwise. Accordingly, Steffens made no inroads on the tenuous theory that Annie's memories of countless instances of sexual abuse at the hands of Steffens were implanted. And the jury rejected Steffens's defense that the robot game was a one-time non-sexual game done in the presence of others, considering: (1) Annie's compelling and detailed testimony; (2) Alison's recollection that she had witnessed Steffens sexually abusing Annie; (3) Steffens's otherwise telling admission that he believed other people were keeping an eye on him; and (4) Steffens's immediate acknowledgment to Wisconsin authorities that he remembered the game and his further confirmation of the game's private nature.

Third, Steffens is mistaken in his argument that the sexual assault statute criminalizes benign conduct and the State prosecuted him without proving "viscous will" or criminal intent. "Beginning in 1973, the Montana Legislature modified the mens rea culpability requirements, adopting 'purposely' and 'knowingly' to embody 'intent.'" *State v. Christensen*, 2020 MT 237, ¶ 107, 401 Mont. 247, 472 P.3d 622 (citations omitted). Here, the State proved that Steffens acted with intent in a "knowingly" offense. The jury was instructed that a person acts "knowingly" when "he is aware of his conduct." (Doc. 109, Given Instr. #18.) And

the jury was instructed that sexual contact means “touching of the sexual or other intimate parts of the person” to “knowingly[] arouse or gratify the sexual response or desire of either party.” (*Id.*, Given Instr. #14.) Thus, sexual assault already requires awareness of conduct of sexual touching and requires a specific intent to “arouse or gratify the sexual response” of either party. Applying the sexual contact instruction, “[i]t is the particularized conduct of making sexual contact that the statute makes criminal.” *Gerstner*, ¶ 29. Thus, contrary to Steffens’s claim, the Legislature has not criminalized innocuous touching such as changing a diaper because the mental state applies to the conduct done with knowledge to obtain sexual arousal, or knowledge to cause bodily injury or to humiliate, harass, or degrade the victim. *See* Mont. Code Ann. § 45-2-101(67). And, here, the State proved that Steffens had a culpable mental state, and thus conscious knowledge of his wrongdoing. *See Xiulu Ruan v. United States*, 597 U.S. 450, 457 (2022).⁵

Finally, Steffens’s argument that the district court should have *sua sponte* zeroed in on the phrase “in order to” and interpreted that phrase to mean the mental state of “purposely” fails to show that “failure to review the claim may leave unsettled the question of fundamental fairness of the proceedings or may compromise the integrity of the judicial process.” *George*, ¶ 5.

⁵ This is far from the circumstance where there is “no mens rea provision whatsoever[.]” *See Ruan*, 597 U.S. at 458-59.

This Court “interpret[s] a statute first by looking to its plain language.” *City of Missoula v. Fox*, 2019 MT 250, ¶ 18, 397 Mont. 388, 450 P.3d 898. This Court then “construe[s] a statute by reading and interpreting the statute as a whole, ‘without isolating specific terms from the context in which they are used by the Legislature’ . . . Statutory construction should not lead to absurd results if a reasonable interpretation can avoid it.” *Fox*, ¶ 18. This Court’s job is to “read and construe each statute as a whole” to “give effect to the purpose of the statute.” *Id.*

Steffens’s argument that “in order to” means the mental state of “purposely” fails because, since 1973, the Legislature has chosen to use the discrete terms “purposely” and “knowingly” to denote criminal intent. *See Christensen*, ¶ 107. And the Legislature has, in turn, defined those terms denoting criminal intent. Mont. Code Ann. §§ 45-2-101(35), (65) (definitions of “knowingly” and “purposely”). In the application of phrases or words in a statute, “technical words and phrases and such others as have acquired a peculiar and appropriate meaning in law” are to be “construed according to such peculiar and appropriate meaning or definition.” Mont. Code Ann. § 1-2-106. And when the meaning of a word or phrase is defined” in code, “such definition is applicable to the same word or phrase” where it occurs. Mont. Code Ann. § 1-2-107. Here, because the Legislature had specified the applicable mental state directly adjacent to the phrase “in order to,” the Legislature has already foreclosed Steffens’s argument.

Here, while “in order to” is not otherwise defined, it cannot be reasonably interpreted to mean the mental state of “purposely.” Rather, “in order to” is a more formal way to say the word “to.” See, e.g., *State v. Townsend*, 941 N.W.2d 108, 111 (Minn. 2020) (citing Bryan A. Garner, *Garner’s Dictionary of Legal Usage* 460 (3d ed. 2011) (“The phrase in order to is often wordy for the simple infinitive[. . .]); Bryan A. Garner, *The Red Book: A Manual on Legal Style* 245 (4th ed. 2018) (recommending that authors replace “in order to” with “to”).

No further statutory interpretation of the phrase “in order to,” a phrase of common understanding, is needed here. This Court has explained that “the Legislature need not define every term that it employs when constructing a statute.” *State v. Ankeny*, 2010 MT 224, ¶ 22, 358 Mont. 32, 243 P.3d 391. Except where a statute is phrased in “technical words and phrases” that “have acquired a peculiar” or special legal meaning, statutory language must be construed in accordance with the plain meaning of the subject words and phrases in ordinary usage. See Mont. Code Ann. § 1-2-106. And if “a term is one of common usage and is readily understood, it is presumed that a reasonable person of average intelligence can comprehend it.” *Ankeny*, ¶ 22 (citing *State v. Trull*, 2006 MT 119, ¶ 33, 332 Mont. 233, 136 P.3d 551; *State v. Nye*, 283 Mont. 505, 513, 943 P.2d 96, 101 (1997).) To the extent possible, statutes must be construed to effect the manifest intent of the Legislature in accordance with the clear and unambiguous

language of its enactments, without resort to other means of construction.

Larson v. State, 2019 MT 28, ¶ 28, 394 Mont. 167, 434 P.3d 241.

“Statutory construction should not lead to absurd results if a reasonable interpretation can avoid it[.]” *Fox*, ¶ 18, and the “law favors rational and sensible construction.” *Yunker v. Murray*, 170 Mont. 427, 434, 554 P.2d 285 (1976) (citation omitted); *see also* Mont. Code Ann. § 1-3-233 (“Interpretation must be reasonable.”). Here, it would be absurd, irrational, and unreasonable to interpret “in order to” to mean the mental state of “purposely.” Applying Steffens’s proposed construction to this circumstance would mean a person commits sexual assault by knowingly engaging in sexual contact “purposely knowingly” to arouse the sexual response or gratification of either party. The Legislature did not intend to provide conflicting or superfluous mental states, particularly when the Legislature has already explicitly provided an applicable mental state right next to the phrase “in order to.” By ignoring this fact, Steffens is improperly “isolating specific terms from the context in which they are used by the Legislature[.]” *Fox*, ¶ 18.

“A fundamental aspect of ‘plain error’ is that the alleged error must indeed be ‘plain.’” *State v. Upshaw*, 2006 MT 341, ¶ 26, 335 Mont. 162, 153 P.3d 579. Steffens has failed to show any error generally, nor has he shown an error of the magnitude entitling him to plain error reversal.

II. Steffens’s direct appeal IAC claim is meritless.

Steffens’s IAC claim is inappropriate for further consideration on direct appeal because the record does not explain why defense counsel did not object and propose that the phrase “in order to” be interpreted as to the mental state of “purposely.” Instead, the record shows that defense counsel took care to ensure any reference to “purposely” in the jury instructions was excised. (*See* 8/29/24 Tr. at 39.) One plausible explanation for counsel to not object and read in “purposely” where it didn’t exist—particularly in a “knowingly” offense—was to prevent adding more possible avenues for the jury to convict Steffens. Defense counsel could have reasoned it would be wholly inappropriate and could constitute IAC to attempt to add “purposely” to a “knowingly” offense. Defense counsel may have wished to avoid causing great confusion to the jury by interpreting sexual contact as “purposely knowingly” and correspondingly adding an additional definitional instruction for “purposely.”

“Counsel is not ineffective for failing to pursue a meritless strategy or one with an unlikely chance of success based upon the exercise of reasonable judgment.” *State v. Payne*, 2021 MT 256, ¶ 32, 405 Mont. 511, 496 P.3d 546. And “[c]laims involving alleged omissions of trial counsel are often ill-suited for consideration on direct appeal.” *State v. Hinshaw*, 2018 MT 49, ¶ 21, 390 Mont. 372, 414 P.3d 271.

The totality of this record shows that counsel exercised reasonable professional judgment. Steffens cannot prove on direct appeal that his counsel was ineffective.

Alternatively, acknowledging IAC and plain error are different standards but for similar reasons discussed above in asserting that the exercise of this Court’s sparingly-used plain error review is not necessary to preserve the fundamental fairness of the trial proceeding, this Court should likewise conclude that defense counsel’s failure to object and attempt to expand the possible applicable mental states to convict Steffens did not raise a reasonable probability that the trial result would have been different but for counsel’s performance. *See, e.g., State v. St. Marks*, 2020 MT 170, ¶ 24, 400 Mont. 334, 467 P.3d 550 (finding lack of prejudice in IAC claim after rejecting plain error review of unpreserved instructional error claim).

III. Sufficient evidence supported Steffens’s conviction for sexual assault.

A person commits sexual assault when the person “knowingly subjects another person to any sexual contact without consent[.]”⁶ (Mont. Code Ann.

⁶ The State does not further discuss the “without consent” element here because the parties stipulated that Steffens, an elderly man, was 3 or more years older than Annie, and that Annie was less than 14 years old at the time of the offense. (See Given Instr. #15 (consent is ineffective if a person is less than 14 years old and the defendant is 3 or more years older than the person. . . .); Given Instr. #16 (stipulation).)

§ 45-5-502(1);, Doc. 109, Given Instr. #12.) A person acts “knowingly” when “he is aware of his conduct.” (Doc. 109, Given Instr. #18.) Knowledge may be inferred “from the defendant’s act and all other facts and circumstances in evidence which indicate his state of mind.” (*Id.*, Given Instr. #20.)

“[C]ircumstantial evidence” may be used to determine mental state, and the jury was permitted to “infer mental state” from “what the Defendant does and says and from all the facts and circumstances involved.” (*Id.*, Given Instr. #19.) “Sexual contact” means “touching of the sexual or other intimate parts of the person of another, directly or through clothing, in order to knowingly[] arouse or gratify the sexual response of either party.” (*Id.*, Given Instr. #14.)

Here, the State presented sufficient evidence that Steffens sexually assaulted Annie. As to sexual touching, Annie testified that Steffens touched her vagina, clitoral area, and her nipples directly. The State presented sufficient evidence that Steffens did so “in order to knowingly arouse or gratify the sexual response of either party.” Annie testified that Steffens removed her clothing and underwear, touched her private parts, was smiling during the events, and told her that it was their “special game” only between them. If Steffens were simply playing an innocuous game with Annie where she pretended to be a robot, the game could have been accomplished without Steffens removing her clothes, touching her private parts, and attempting to evade detection by telling her it was a secret.

Annie even vividly described how Steffens narrated the “robot game” as it occurred and the discrete process it would go through every time. Steffens was obviously aware of his conduct to “knowingly arouse or gratify” his own sexual response by utilizing a “game” to sexually abuse his niece.

While Steffens argues “the jury heard no evidence” that Steffens had an “erection” (Appellant’s Br. at 41), it is well-established that the State “need not prove direct evidence of arousal” to “meet its burden of proving the ‘sexual contact’ element of sexual assault.” *State v. Rogers*, 2007 MT 227, ¶ 30, 393 Mont. 132, 168 P.3d 669; *see also State v. Duncan*, 2008 MT 148, ¶ 46, 343 Mont. 220, 183 P.3d 111; *State v. Skinner*, 2007 MT 175, ¶ 24, 338 Mont. 197, 163 P.3d 399. For example, in *Skinner*, the defendant claimed the State failed to meet the intent prong of “sexual contact” despite proving that he had placed his hand down the back of his 11-year-old daughter’s underwear while she was asleep. *Skinner*, ¶ 23. This Court held that “while there is no direct evidence of arousal, such as an erection, there is sufficient circumstantial evidence for the jury to infer arousal” or that the intent “of Skinner’s act was arousal.” *Id.* ¶ 24. This Court explained that “Skinner was not casually touching [the victim] during an ordinary act.” *Id.* And in *Rogers*, the appellant argued there was insufficient evidence because there was no evidence that Rogers had an erection when the victim sat on his lap. *Rogers*, ¶ 29. This Court explained that “[w]hile the State may not have presented direct evidence

that Rogers was aroused, a jury could infer that Rogers' multiple acts of putting his hand inside [the victim's] underwear was for the purpose of arousal." *Id.* ¶ 31.

Indeed, for sexual assault offenses, "it is well-settled that the jury may infer intent of sexual arousal from the defendant's acts[]" and conduct alone. *Skinner*, ¶ 24; *see also Gerstner*, ¶ 30; *Duncan*, ¶ 46; *State v. McLain*, 249 Mont. 242, 246-47, 815 P.2d 147, 150 (1991); *State v. Gilpin*, 232 Mont. 56, 69, 756 P.2d 445, 452 (1988); *State v. Kestner*, 220 Mont. 41, 46, 713 P.2d 537, 540 (1986). The jury was so instructed. (Given Instrs. #19-20.) Steffens does not support his bare assertion that any mental state inference instruction was improper here, particularly considering that such instructions are fundamental in criminal trials. *See* Mont. Code Ann. § 45-2-103(3) ("the existence of a mental state may be inferred from the acts of the accused and the facts and circumstances connected with the offense").

While Steffens argues that the State never showed a "criminal purpose," nowhere in Steffens's brief does he explain a scenario where—viewing the evidence in the light most favorable to the State—a "noncriminal purpose" would explain Annie's account of Steffens's conduct. The jury had ample evidence from which to find that Steffens touched Annie with a "criminal" mental state when he took off her clothes and repeatedly touched her vagina and nipples under the pretext of a game. The jury's conclusion that "[Steffens's] actions constituted

sexual contact,” and its rejection of Steffens’s theory that no sexual conduct occurred, “necessarily means the State proved that he *knew* his conduct was sexual in nature.” *See Gerstner*, ¶ 30 (emphasis added).

Steffens next argues that no “corroborating eye-witness evidence was presented in [Steffens’s] trial.” (Appellant’s Br. at 42.) But “a child victim’s testimony does not need to be corroborated to support a conviction of sexual assault.” *State v. Olson*, 286 Mont. 364, 373, 951 P.2d 571, 577 (1997); *see also State v. Rennaker*, 2007 MT 10, ¶ 16, 335 Mont. 274, 150 P.3d 960. And there is no requirement for sufficiency purposes that the victim’s testimony must be “consistent with other proof legally presented at trial.” *Olson*, 286 Mont. at 373, 951 P.2d at 571 (citation omitted). It is the trier of fact’s prerogative to analyze the “child’s testimony” as “consistent or inconsistent with other evidence offered” as affecting the “weight and credibility of the testimony.” *See id.* Nonetheless, Alison bolstered Annie’s account that the robot game occurred, testifying that she herself had witnessed Steffens sexually abusing Annie when they were both young children.

Steffens devotes the bulk of his red-herring insufficiency argument highlighting Annie’s testimony that she felt “uncomfortable,” further explaining that “uncomfortable” is “not a term included in” the sexual contact statute. (*See Appellant’s Br.* at 33-39.) But Steffens fails to explain why Annie’s testimony on this point precluded his conviction for sexual assault. The State easily proved that

Steffens intended to arouse or gratify his sexual response, that he touched Annie sexually and directly, and that he did so knowingly. The “without consent” element was undisputed. And, as Steffens otherwise acknowledged in his first-raised claim, the focus is *the defendant’s* intent, which may be inferred from his actions and conduct alone. In any event, this Court has rejected an insufficient evidence claim under similar circumstances. *See State v. Earl*, 2003 MT 158, ¶¶ 34-36, 316 Mont. 263, 71 P.3d 1201 (affirming sexual assault conviction where the victim testified that the sexual touching made her “uncomfortable, very uncomfortable”). And the evidence here showed that Annie found Steffens’s sexual abuse unacceptable as a ten-year-old; she told Steffens to stop doing it, and she was later so afraid of Steffens that she wholly avoided him and slept with her mom. As Detective Ross testified, Annie’s repeated crying during her forensic interview showed that she had experienced trauma. Mary testified that Annie was not a child who cried a lot, and she cried to her mom after her disclosure too.

Accordingly—in the light most favorable to the State—the State presented sufficient evidence that Steffens sexually assaulted his niece Annie.

CONCLUSION

For the above reasons, the State respectfully requests that this Court reject Steffens's arguments and affirm the district court.

Respectfully submitted this 23rd day of October, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,988 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

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