

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0386

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JAY STEVEN HUBBER,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Second Judicial District Court,
Silver Bow County, The Honorable Robert Whelan, Presiding

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STATEMENT OF THE ISSUES

1. Has Hubber has met his burden to demonstrate his challenge to the jury instructions on mental states should be reviewed under the plain error doctrine?
2. Was Hubber's counsel ineffective for failing to object to the mental state instructions?
3. Does sufficient evidence support Hubber's conviction for accountability to deliberate homicide?
4. Did the court abuse its discretion when it refused to instruct the jury that Montana has a bondsman privilege that allowed Hubber to enter another person's home to arrest a principal?

STATEMENT OF THE CASE

The State charged Appellant Jay Steven Hubber with deliberate homicide under Mont. Code Ann. § 45-5-102(1)(b), known as felony murder, and with aggravated burglary.¹ (Doc. 3.) The charges arose from an incident in which Hubber, who was a bail bondsman, and his codefendant, Nicholas Jaeger (Nick), went into a home to arrest a man for whom Hubber had posted bail. While they

¹ All statutory references refer to the 2021 version of Montana Code Annotated.

were in the home, Nick shot and killed the homeowner, William “Bill” Harris.

(*Id.*) The State later amended the Information to add an alternative charge of deliberate homicide by accountability. (Docs. 133, 136.)

Hubber moved to dismiss the aggravated burglary charge on the ground that, as a bondsman, he had the authority to make an arrest. (Docs. 16-17.) The court denied that motion, concluding that Montana law does not establish a bondsman privilege. (Doc. 42, available at Appellant’s App. D.) The court later ordered that Hubber could not present evidence that he had the right to enter a third party’s home to arrest his principal. (Doc. 146, available at Appellant’s App. E.) The court also refused Hubber’s proposed jury instructions on a bondsman privilege. (Docs. 143, 212; Trial Tr. at 1963-85, 2006-08.)²

Hubber’s and Nick’s cases were consolidated for trial, without objection. (Doc. 73.) At the close of the State’s case and at the end of the State’s rebuttal, Hubber moved to dismiss for insufficient evidence, which the court denied. (Trial Tr. at 1299-1311, 2017-18.) After a nine-day trial, the jury convicted Hubber of deliberate homicide by accountability and aggravated burglary. (Doc. 210; Doc. 227, available at Appellant’s App. A.) The jury found Hubber not

² The trial was held March 4-14, 2024. Because the transcript is consecutively paginated, the State cites it as “Trial Tr.”

guilty of the alternative charge of deliberate homicide under the felony murder rule.³ (*Id.*)

STATEMENT OF THE FACTS

I. Background

Before the offenses in this case took place, Hubber issued a bail bond for David Sandoval, enabling Sandoval to be released from jail. Sandoval later failed to appear for court, and several warrants were issued for his arrest. Hubber was going to lose \$15,000 if he could not bring Sandoval to jail. (Trial Tr. at 334, 525, 721, 1084, 1562-63; Hubber’s Ex. 16.)

The day before the homicide, on December 18, 2021, Hubber attempted to arrest Sandoval. (Trial Tr. at 1046-54.) Hubber located Sandoval at Harris’s home at 815 South Main Street in Butte. (*Id.* at 882-83, 1046, 1573-74.) Sandoval agreed to go with Hubber, and Hubber agreed to not place Sandoval in handcuffs. (*Id.* at 1048, 1151.) People in the house asked Hubber about his pistol, and he said if things got crazy he would “start capping motherfuckers.” (*Id.* at 1051.)

While they walked up the street, Sandoval convinced Hubber to let him go into another house to obtain money. (*Id.* at 1049, 1575.) After entering that house,

³ The State told the jury that it could not find Hubber guilty of both felony murder and deliberate homicide.

Sandoval ran out the window and onto the roof, losing Hubber. (*Id.* at 1049-54, 1576-77.)

Hubber called law enforcement, and officers responded to Hubber's location. (*Id.* at 327, 1577-78.) Hubber told law enforcement Sandoval was in a house on that street. (*Id.*) Captain Tim McMahon told Hubber law enforcement could not enter the house to remove Sandoval. (*Id.* at 330.) McMahon said Hubber was like probation and parole, so he probably had more authority to go into the house, but law enforcement could not. (*Id.*; State's Ex. 201 at 0:2:10-0:02:23.) An officer told Hubber he could call law enforcement if he saw Sandoval outside of the house. (Trial Tr. at 334; State's Ex. 201 at 0:03:20-0:03:35.)

McMahon later testified that he could not rely on Hubber's assertion that Sandoval was in the house to obtain a search warrant because law enforcement did not see Sandoval go into the house. (Trial Tr. at 344.) Based on prior contacts, McMahon did not believe Hubber was a reliable source and was hesitant to assist Hubber. (*Id.* at 344, 360.) McMahon described a prior incident in which it appeared Hubber and another bondsman, Jared Burns, had broken a door to get into a home and apprehend someone. (*Id.* at 355-59.) Afterward, McMahon had directed Hubber to call law enforcement before going into a home to arrest someone. (*Id.* at 359-60.) During that conversation, Hubber asserted that he could kick a door in any time. (*Id.* at 360.)

II. The day of the homicide

On December 19, 2021, Hubber sent Burns a text saying he had almost needed Burns's help. (State's Ex. 202; Trial Tr. at 373.) Hubber and Burns discussed Sandoval and agreed to work together to track down some missing clients. (State's Ex. 202; Trial Tr. at 374-75.) Hubber told Burns, "Let's do it. Let's shoot for Monday then I just wanna smoke a few of these mother fuckers that are trying to pull shit over on us." (*Id.*)

Later that day, a source told Hubber that Sandoval was back at Harris's home. (Trial Tr. at 1119-20, 1584.) After consuming several alcoholic drinks, Hubber convinced Jesse Jaeger (Jesse) and Jacqueline Schwartz to help him arrest Sandoval. (Trial Tr. at 524, 1583-86.) Hubber also got Jesse's brother, Nick, to agree to help by offering to forgive Nick's debt to Hubber, which Nick owed because Hubber had posted a bond for Nick. (*Id.* at 525-27, 1570-71, 1586, 1725.) Nick was an addict who had used fentanyl that morning, and his blood contained both fentanyl and methamphetamine. (Trial Tr. at 952-53, 1720; State's Ex. 255.)

The four met up, and Hubber drove them to 815 South Main Street. (Trial Tr. at 527-29, 1586.) Hubber dropped Jesse and Schwartz in the back of the house to watch for Sandoval. (*Id.* at 529, 559, 1587.)

Hubber went to the front of the house with Nick. (*Id.* at 1595.) Before entering the house, Hubber called 911 and informed the dispatcher he was going to

revoke a bond. (State's Ex. 268 at 0:00:07-0:00:12.) He asked if any officers were available. The dispatcher told him officers were occupied, but she would ask if they would help arrest Sandoval. (*Id.* at 0:00:18-0:00:36, 0:00:50-0:01:28.) She then spoke to Sergeant Berger, who said Hubber "tried this shit yesterday 'cause Sandoval won't come out of the house.'" (*Id.* at 0:02:12-0:02:21.) Berger said Hubber is "an idiot" and "We're not dealing with his bullshit." (*Id.* at 0:02:20-0:02:25.) Berger said law enforcement would serve the warrants if Hubber could get Sandoval to jail, "but that's up to him to catch him." (*Id.* at 0:02:30-0:02:38.) The dispatcher then told Hubber she had "a skeleton crew," and no one was available to help him. (*Id.* at 0:03:08-0:03:37.) Hubber told the dispatcher, "We have it handled" and "we don't need them." (*Id.* at 0:03:34-0:03:40.)

Berger later testified he did not agree to help Hubber because they were shorthanded and because he did not agree with some of Hubber's tactics or trust his work. (Trial Tr. at 404, 441, 444.) Berger explained that law enforcement did not have the authority to go into the home without a warrant, and he could not get a search warrant based on information from a source he did not trust. (*Id.* at 409-10, 446, 450.)

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III. Entry to the house

Hubber and Nick entered the house through the front door without knocking or announcing who they were. (Trial Tr. at 721, 1193, 1202-03, 1223, 1230.)

Several people were in the living room of the home. Hubber and Nick proceeded to a back bedroom where Sandoval and Harris were located. (*Id.* at 883.)

According to witnesses and Hubber's statement immediately after the homicide, Hubber immediately tased Sandoval upon entering the room. (State's Ex. 219 at 0:33:00-0:33:30, 0:49:20-0:49:59; Trial Tr. at 1055, 1120, 1193, 1597, 1732.)

Hubber tackled Sandoval and wrestled with him on the floor while trying to arrest him. (Trial Tr. at 884, 1056-57, 1122, 1204, 1206, 1220, 1598-99, 1732-33.)

Two men stood in the doorway to the bedroom after Hubber and Nick entered. (*Id.* at 1203, 1734.) One or both of them had a wooden object in their hands. (*Id.* at 532, 565-66, 589, 1205, 1220-21, 1734.) Sandoval yelled for help, and Harris directed Hubber and Nick to get out of his house, declaring they could not arrest Sandoval. (*Id.* at 533, 568, 1123, 1205, 1222, 1241, 1381.) Hubber yelled that Sandoval was going to jail. (*Id.* at 569.) Nick obtained Hubber's pistol. (State's Ex. 267 at 0:01:22-0:01:43; Trial Tr. at 740-41, 1604.)

Nick directed Harris to "Get the fuck back," and warned him that he would shoot. (Trial Tr. at 537, 569-70.) Harris took a step forward, attempting to get on the bed. (*Id.* at 1207.) Several witnesses later reported that he did not have a

weapon, although he may have had a beer bottle in his hand. (*Id.* at 1207-08, 1231-32, 1234; State's Ex. 267 at 0:01:43-0:01:49.) Nick fired two shots, killing Harris. (Trial Tr. at 538, 569-70, 1207-11.)

Hubber called 911. (*Id.* at 539.)

IV. Investigation

Officers located Harris, who had been fatally shot, in the back bedroom. (Trial Tr. at 415, 419.) A beer bottle was found next to him. (*Id.* at 620.) Officers located a spent casing from a bullet and a taser probe, and they found a pair of handcuffs under the bed. (*Id.* at 415, 626.) Officers located Sandoval and Schwartz in the yard of a home nearby. (*Id.* at 509.)

Law enforcement detained several people and placed those who had been involved in police cars. (*Id.* at 421-22.) Sandoval repeatedly said Hubber handed Nick the gun. (State's Ex. 267 at 0:00:10-0:00:11, 0:00:16-0:00:18.) Sandoval said he was in the back bedroom when Hubber and Nick came in. He said Hubber immediately tased him and they ended up wrestling around while Hubber repeatedly tased him. (*Id.* at 0:00:46-0:01:18.) Sandoval said Hubber pulled his gun out of his holster and he grabbed Hubber's wrist to stop him. (*Id.* at 0:01:22-0:01:31.) Sandoval said Nick asked for the pistol and then grabbed it. He said Harris stepped forward and then Nick shot him twice. (*Id.* at 0:01:31-0:01:43.)

Sandoval said Harris was not doing anything when he got shot, and he repeatedly said Harris was not armed with anything. (*Id.* at 0:01:43-0:01:49; Trial Tr. at 1066-67, 1155.)

Hubber smelled of alcohol, he had a 0.124 percent blood alcohol content, and cocaine was detected in his blood. (Trial Tr. at 697, 959, 1588-89; State's Ex. 256.) He was wearing a sweatshirt with ballistic panels, and he had two holsters, one for the taser and one for the pistol. (Trial Tr. at 698-99, 704-05.) The pistol holster was designed to retain a weapon until the release was manipulated, but it was defective, so it did not always retain the gun. (*Id.* at 707-08, 823-24.)

Hubber told law enforcement he entered the house without knocking because he wanted to get Sandoval "with the element of surprise." (State's Ex. 219 at 0:32:15-0:32:49.) He said he removed his taser as he entered the room and he fired it at Sandoval. Hubber said he wrestled with Sandoval and grabbed his throat. He asserted that somebody kicked him in the face while he was wrestling with Sandoval. Hubber said Nick pulled his pistol out of his holster and shot Harris, who was on the other side of the bed. Hubber called Nick a "fucking idiot," and said Harris did not deserve to get shot. Hubber said Nick should have protected him by punching Harris in the face, not by shooting him. Hubber also said he could not control what other people do. He was determined he had not

done anything wrong. (Trial Tr. at 715, 718-23, 1684-90; State's Ex. 219 at 0:32:00-0:34:25; 0:41:35-0:44:41, 0:48:54-0:49:14.)

During Nick's interview, he said they walked in the front door behind a person walking out, and they walked straight to the bedroom. (State's Ex. 266 at 0:09:36-0:09:55, 0:10:18-0:10:22.) They saw Sandoval sitting on the bed, and Hubber "mounted Sandoval" immediately. (*Id.* at 0:10:55-0:11:05.) Nick said he attempted to help Hubber handcuff Sandoval, but Sandoval kept fighting, so Hubber tased him. (*Id.* at 0:11:05-0:11:22.)

Nick said that during the fight, Harris had a beer and scissors or something else he could not identify, possibly a knife, in his hand. He said two guys walked in the room behind him and grabbed sticks. Nick said Harris threatened to kick Hubber, and Hubber responded by threatening to shoot Harris between the eyes. Nick saw Hubber struggling to remove his gun from his holster while wrestling with Sandoval, so Nick grabbed the gun, which Hubber had started to remove from the holster. Nick said Harris threatened them, and Nick told Harris to get back. Nick claimed Harris instead jumped up "like he was going to stab [Hubber], so I shot him." (State's Ex. 266 at 0:07:15-0:07:55, 0:12:41-0:13:20, 0:13:40-0:13:50, 0:15:30-0:16:09, 0:21:00-0:21:53, 0:32:20-0:36:02; Trial Tr. at 737-41, 840-41.) Nick stated that he "panicked." (State's Ex. 266 at 0:13:20-0:13:23.)

V. Additional evidence admitted at trial

Sandoval later told a detective and testified at trial that there was a knife on the ground next to Harris and he took the knife when he fled. (Trial Tr. at 1069, 1080-82, 1155.) The State entered letters Sandoval wrote to Nick while they were in jail in which Sandoval said he told a detective about taking Harris's knife, asked if there was anything else he could do to help, and asked Nick for phone cards. (State's Exs. 263-64; Trial Tr. at 1071-79, 1811.) In the letters, Sandoval said he saw a skinny knife in Harris's hand. (Trial Tr. at 1079.) But Sandoval testified that he did not see that and he had made the prior statement based on information he read in the newspaper. (*Id.*)

Sandoval testified that Hubber removed his gun from his holster and Sandoval grabbed Hubber's wrist to push the gun away. (*Id.* at 1141, 1153.)

Hubber testified that Sandoval punched him when he entered the room before he tased Sandoval. (*Id.* at 1624, 1647-48, 1661.) He said Nick pulled his pistol out of his holster, but he also said he did not remember how it got out of his holster and it was possible he had handed Nick the pistol. (*Id.* at 1674, 1697.)

Nick testified that Harris threatened to kick Hubber in the face and that he thought Harris had scissors or a knife in one hand and a beer bottle in the other. (*Id.* at 1739-40, 1759.) Nick testified that Hubber pulled his pistol out of his holster and Nick grabbed the gun when he saw Sandoval struggling to get it from

Hubber. (*Id.* at 1740-42, 1760.) He said he told Harris to get back, which he did not. (*Id.* at 1744-45.) Instead, Harris started to step up on the bed, and Nick shot him. (*Id.* at 1746, 1758, 1785.) Nick asserted he feared for Hubber's life and his own. (*Id.* at 1746.) Nick acknowledged that Harris was on the far side of the bed and he could not have kicked Hubber from there. (*Id.* at 1781-84.) He also acknowledged they could have left when Harris ordered them to leave his house. (*Id.* at 1787.)

STANDARD OF REVIEW

This Court reviews jury instructions to determine whether the instructions, as a whole, fully and fairly instruct the jury on the law applicable to the case. *State v. Doyle*, 2007 MT 125, 337 Mont. 308, 160 P.3d 516. The district court maintains broad discretion in instructing the jury. *Id.* Jury instructions are reviewed for an abuse of discretion. *Id.* This Court will reverse for an incorrect instruction only if the jury instruction prejudicially affected the substantial rights of the defendant. *Id.*

This Court reviews a challenge to the sufficiency of the evidence 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 crime beyond a reasonable doubt. *State v. Michelotti*, 2018 MT 158, 392 Mont. 33, 420 P.3d 1020.

SUMMARY OF THE ARGUMENT

This Court should not review Hubber's challenge to the mental state instructions under the plain error doctrine. The court correctly instructed the jury on the result-based definition of knowingly. The result-based definition of purposely should have been given, rather than the conduct-based definition. But failing to review the claim would not result in a manifest miscarriage of justice. The jury was correctly instructed on the elements of the offenses. When the conduct-based definition was read in conjunction with the elements, which required a result, the instructions fully and fairly instructed jurors that to convict Hubber, jurors had to find Hubber had the conscious object to engage in conduct causing the result that was required by the elements. This Court has previously declined to invoke plain error review where the conduct-based definition of purposely was given for a result-based offense. This Court should again decline to apply plain error review in this case.

The court correctly denied Hubber's motion to dismiss the deliberate homicide by accountability count because there was evidence from which a rational tier of fact could find the elements of the offense beyond a reasonable doubt. Significantly, Hubber brought the pistol, taser, and Nick to the home, and he initiated the physical conflict. Sandoval initially stated that Hubber gave Nick the gun, and Nick initially stated that Hubber threatened to shoot Harris between the

eyes before Nick got the pistol from Hubber. This evidence is sufficient to support Hubber's conviction for deliberate homicide by accountability.

Finally, the court did not abuse its discretion when it refused to instruct the jury, and prohibited Hubber from arguing, that he was legally entitled to enter Harris's home to arrest Sandoval. Montana's statutes give a bondsman the authority to arrest their principal if a forfeiture is pending, but neither the statutes nor Montana common law give a bondsman the authority to violate other laws by entering the home of a third party to conduct an arrest. And Hubber's contract with Sandoval could not reduce Harris's right to privacy in his home. Because Hubber did not lawfully enter Harris's home, and Harris ordered Hubber to leave his home, Hubber could not legally arrest Sandoval in Harris's home. Under these facts, the court did not abuse its discretion when it refused to instruct on a bondsman privilege.

ARGUMENT

I. Hubber has not met his burden to demonstrate the mental state instructions should be reviewed under the plain error doctrine, and the instructions did not affect his substantial rights.

A. Facts related to the jury instructions

Hubber's proposed jury instructions did not include any mental state definitions. (Doc. 143.) The State's proposed instructions contained a result-based

definition of knowingly and a conduct-based definition of purposely. (Doc. 144, Plaintiff's Proposed Instrs. No. 8-9.) When the court settled instructions, Hubber did not object to the State's mental state instructions. (Trial Tr. at 1912-13.) Hubber's counsel specifically stated he did not object to the State's instruction defining purposely because it was a pattern instruction. (*Id.* at 1912.) Nick's counsel also stated that he had "[n]o objection to State's 9." (*Id.*)

As the parties agreed, the court instructed the jury that "[a] person acts knowingly when the person is aware there exists the high probability that the person's conduct will cause a specific result[,]" and "[a] person acts purposely when it is the person's conscious object to engage in conduct of that nature." (Doc. 212, Instrs. No. 17-18.)

B. Standard for review under the plain error doctrine

This Court has consistently held that it will not consider issues raised for the first time on appeal. *See, e.g., State v. Reim*, 2014 MT 108, ¶ 38, 374 Mont. 487, 323 P.3d 880; *State v. Taylor*, 2010 MT 94, ¶ 12, 356 Mont. 167, 231 P.3d 79. "A party may not assign as error any portion of the [jury] instructions . . . unless an objection was made specifically stating the matter objected to, and the grounds for the objection, at the settlement of instructions." *State v. Mathis*, 2022 MT 156, ¶ 42, 409 Mont. 348, 515 P.3d 758. But this Court may review an unpreserved claim alleging a violation of a fundamental constitutional right under the common

law plain error doctrine when the defendant invokes the Court’s inherent authority and establishes that failing to review the claimed error may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process. *Taylor*, ¶¶ 12-13. An error is plain only if it leaves one “firmly convinced” that some aspect of the trial, if not addressed, would result in one of the consequences listed above. *Taylor*, ¶ 17. This Court invokes plain error review “sparingly, on a case-by-case basis, according to narrow circumstances, and by considering the totality of the circumstances.” *State v. Williams*, 2015 MT 247, ¶ 16, 380 Mont. 445, 358 P.3d 127; *see also State v. Ament*, 2025 MT 97, ¶ 34, 421 Mont. 502, 568 P.3d 535 (“plain error review is invoked sparingly and only to prevent manifest injustice”).

C. Hubber’s conviction for deliberate homicide by accountability should not be reversed under the plain error doctrine.

1. The result-based instructions applied.

Montana’s statutes provide four definitions of knowingly, depending on whether the term applies to conduct, a circumstance, the result of conduct, or a

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fact. Mont. Code Ann. § 45-2-101(35). Montana Code Annotated § 45-2-101(35) states that

a person acts knowingly with respect to **conduct** or to a **circumstance** described by a statute defining an offense when the person is aware of the person's own conduct or that the circumstance exists. A person acts knowingly with respect to the **result** of conduct described by a statute defining an offense when the person is aware that it is highly probable that the result will be caused by the person's conduct. When knowledge of the **existence of a particular fact** is an element of an offense, knowledge is established if a person is aware of a high probability of its existence.

(Emphasis added.)

Similarly, the statutes set out a conduct-based and a result-based definition of purposely. Montana Code Annotated § 45-2-101(65) provides that “a person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is the person's conscious object to engage in that conduct or to cause that result.”

A court cannot provide the jury with all possible definitions of knowingly and purposely. Instead, this Court has required courts to provide only those definitions that are applicable. *State v. Azure*, 2005 MT 328, ¶ 20, 329 Mont. 536, 125 P.3d 1116. Further, this Court has explained that courts must determine whether the elements of an offense are conduct-based or result-based and instruct the jury accordingly. *Secrease*, ¶ 11; *see also Deveraux*, ¶ 31; *State v. Ilk*, 2018 MT 186, ¶ 18, 392 Mont. 201, 422 P.3d 1219; *Azure*, ¶ 20 (implying only one

definition of knowingly can ever be given); *State v. Lambert*, 280 Mont. 231, 240-41, 929 P.2d 846, 852 (1996) (Leaphart, J., concurring).

A person commits the offense of deliberate homicide if the person purposely or knowingly causes the death of another human being. Mont. Code Ann. § 45-5-102(1), (1)(a). Deliberate homicide is a result-based offense requiring result-based definitions of knowingly and purposely. *Ilk*, ¶ 35; *State v. Rosling*, 2008 MT 62, ¶ 37, 342 Mont. 1, 180 P.3d 1102.

To convict a defendant of deliberate homicide by accountability, the State must prove that the defendant “(1) had the purpose to promote or facilitate commission of deliberate homicide, and (2) aided or abetted [a codefendant] in the planning or commission of deliberate homicide.” *State v. Lantis*, 1998 MT 172, ¶ 33, 289 Mont. 480, 962 P.2d 1169; *accord* Mont. Code Ann. §§ 45-2-301, -302, 45-5-102. When deliberate homicide is charged by accountability, it continues to be a result-based offense. *See* Mont. Code Ann. § 45-2-302(3); *Lantis*, ¶¶ 35-36 (discussing the result needed to prove deliberate homicide by accountability); *State v. Kline*, 2016 MT 177, ¶ 13, 384 Mont. 157, 376 P.3d 132 (accountability is a theory by which a person is held accountable for the acts of another, not a separate offense); *Ilk*, ¶ 35 (attempted deliberate homicide is result-based).

Because deliberate homicide by accountability is a result-based offense, the court correctly provided the result-based definition of knowingly. The State

acknowledges, however, that the court should have provided the result-based definition of purposely, rather than the conduct-based definition. Thus, the jury should have been instructed that a person acts purposely when it is the person's conscious object to *cause such a result*, rather than when it is the person's conscious object to *engage in conduct of that nature*. See Mont. Code Ann. § 45-2-101(65); MCJI 2-106.

2. This Court should not apply plain error review.

Despite the use of the conduct-based definition of purposely, this Court should decline to review Hubber's claim under the plain error doctrine because he has not demonstrated failing to review the claim would result in a manifest miscarriage of justice. The jury was correctly instructed that "[a] person commits the offense of deliberate homicide if the person purposely or knowingly causes the death of another human being." (Appellant's App. B at 35 (Instr. No. 31).) The jury was also correctly instructed that Hubber was "legally accountable for the conduct of another when either before or during the commission of an offense, and with the purpose to promote or facilitate such commission, Mr. HUBBER solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense." (Appellant's App. B at 39 (Instr. No. 35).) In addition, the jury was correctly instructed that "[a] person acts knowingly when the

person is aware there exists the high probability that the person's conduct will cause a specific result." (Appellant's App. B at 21 (Instr. No. 17).)

Unlike the knowingly instruction, which was result-based, the jury was instructed that "[a] person acts purposely when it is the person's conscious object to *engage in conduct of that nature.*" (Appellant's App. B at 22 (Instr. No. 18) (emphasis added).) The jury should have instead been instructed that a person acts purposely when it is the person's conscious object to cause such a result. *See* MCJI 2-106; Mont. Code Ann. § 45-2-101(65).

But the use of the incorrect instruction does not establish a manifest miscarriage of justice because, when the instructions are read as a whole, the conduct the defendant had to engage in necessarily included the result. If purposely, rather than knowingly, was relied on to establish that Nick committed the deliberate homicide Hubber was accountable to, the conduct that had to be proven was "cause[d] the death of another human being." (Appellant's App. B at 35, 40 (Instrs. No. 31, 36).) Because the conduct included the result, there was no distinction between the two. When the conduct definition and the elements of deliberate homicide are read together, the jury was instructed that to convict, it had to find that Nick had the conscious object to engage in conduct of that nature, and the conduct Nick had to engage in was causing Harris's death. Thus, if the jury

relied on purposely rather than knowingly, the jury still found the necessary elements.

The same is true for accountability. To commit deliberate homicide by accountability, Hubber had to solicit, aid, abet, agree, or attempt to do one of those with Nick in the planning or commission of deliberate homicide with the purpose to promote or facilitate the commission of deliberate homicide. (Appellant's App. B at 39 (Instr. No. 35).) The conduct the jury had to find Hubber had the conscious object to engage in was promoting or facilitating the commission of a deliberate homicide, which necessarily included the result of causing a death. That is the same finding that would have needed to be made under the result-based definition.

Distinguishing deliberate homicide from deliberate homicide by accountability, this Court has explained that the result applicable to deliberate homicide by accountability is the act designed to promote or facilitate causing the death of another human being. *Lantis*, ¶ 36. Because the conduct necessary to commit the offense encompasses the result of causing death, the conduct and the result needed to prove deliberate homicide by accountability are the same. Both the conduct and the result are promoting and facilitating the commission of deliberate homicide.

“A failure to correctly instruct the jury on the appropriate mental state does not, by itself, warrant plain error review.” *State v. Kirn*, 2023 MT 98, ¶ 49, 412 Mont. 309, 530 P.3d 1. Because the jury was properly instructed on the elements of deliberate homicide by accountability and the conduct required by those instructions was to cause the result of facilitating deliberate homicide, Hubber has not demonstrated that failing to review his claim under the plain error doctrine will result in a manifest miscarriage of justice.

Here, the jury had evidence from which it could conclude that Hubber purposely promoted or facilitated the commission of deliberate homicide when he brought a taser and pistol into the home, immediately tased and tackled a guest in the home, brought Nick along to protect him, threatened to shoot Harris between the eyes, removed his pistol from his holster, and provided Nick with the pistol. Hubber has not met his burden to demonstrate he is entitled to plain error review of this claim.

Furthermore, an erroneous jury instruction does not require reversal unless the appellant demonstrates his substantial rights were affected. Because the instructions correctly instructed the jury on the elements of the offense and the elements required conduct that included a result, the jury could not have overlooked the need to find that Hubber facilitated Harris’s death. His substantial

rights were thus not affected by the incorrect definition of purposely, and his conviction for deliberate homicide by accountability should be affirmed.

D. Hubber’s aggravated burglary conviction should not be reversed under the plain error doctrine.

Hubber has not demonstrated that the court’s failure to instruct the jury on different mental states for each element of aggravated burglary or the court’s definition of purposely resulted in a manifest miscarriage of justice. This Court has never required courts to provide different mental state instructions for different elements of an offense. Rather, this Court has directed courts to determine whether an offense is conduct-based or result-based, and instruct accordingly. *Azure*, ¶ 20 (citing *Lambert*, 280 Mont. at 240-41, 929 P.2d at 852 (Leaphart, J., concurring)); *see also State v. Rowe*, 2024 MT 37, 415 Mont. 280, 543 P.3d 614; *Deveraux*, ¶ 31; *State v. Gerstner*, 2009 MT 303, 353 Mont. 86, 219 P.3d 866 (2009) (not requiring a separate mental state instruction for the sexual contact element of sexual assault). Although this Court allowed a court to provide a fact-based and conduct-based definition in *State v. Hovey*, 2011 MT 3, ¶¶ 20-22, 359 Mont. 100, 248 P.3d 303, this Court has never held it is error not to instruct on individual elements. Hubber has not demonstrated failing to review whether multiple mental state definitions should have been given would result in a manifest miscarriage of justice.

The State acknowledges that the jury should have been instructed on the result-based, rather than the conduct-based, definition of purposely. *See Kirn*, ¶ 49. But this Court held in *Kirn* that instructing on the conduct-based definition of purposely for aggravated burglary was not plain error. *Id.* This Court stated that “[a] failure to correctly instruct the jury on the appropriate mental state does not, by itself, warrant plain error review.” *Id.* This Court analyzed the evidence presented in *Kirn* and determined *Kirn* was not prejudiced by the incorrect mental state instruction. *Id.* This Court should reach the same conclusion here. *Id.*

To convict Hubber of aggravated burglary, the State had to prove:

1. That Mr. HUBBER knowingly entered or remained unlawfully in an occupied structure;

AND

2. That Mr. HUBBER knowingly or purposely committed the offense of assault in the occupied structure;

AND

3. That in the course of committing the offense, Mr. HUBBER purposely or knowingly attempted to inflict bodily injury on anyone.

(Appellant’s App. B at 27 (Instr. No. 23).)

As discussed above, the jury was instructed that “[a] person acts knowingly when the person is aware there exists the high probability that the person’s conduct will cause a specific result[,]” and “[a] person acts purposely when it is the person’s conscious object to engage in conduct of that nature.” (Appellant’s App.

B at 21-22 (Instrs. No. 17-18).) Because aggravated burglary required the jury to find Hubber purposely or knowingly attempted to inflict bodily injury, the offense was result-based. *Kirn*, ¶ 49. The jury was properly instructed on the result-based definition of knowingly. Each element of aggravated burglary includes the mental state of knowingly, and the jury could have properly relied on the definition of knowingly to find Hubber guilty of aggravated burglary without relying on the mental state of purposely.

Furthermore, even if the jury considered the mental state of purposely, failing to review this claim under the plain error doctrine would not result in a manifest miscarriage of justice. If the conduct-based definition of purposely was applied to the elements of aggravated burglary, the instructions necessarily required the jury to find that it was Hubber's object to cause the required result.

The mental state of purposely is only included in the second and third elements of aggravated burglary. The second element required that Hubber "knowingly or purposely committed the offense of assault in the occupied structure[.]" (Appellant's App. B at 27 (Instr. No. 23).) The jury was instructed that Hubber committed an act purposely if it was his conscious object to engage in conduct of that nature. But the conduct he had to engage in was an assault. When these instructions were read together, the jury was instructed that, to find Hubber guilty, it had to find he had the conscious object to engage in an assault. Because

engaging in an assault necessarily includes a result, there is no distinction between the finding a jury has to make with a conduct-based or a result-based instruction.

Additionally, the evidence overwhelmingly demonstrated that Hubber committed an assault by purposely and knowingly causing bodily injury when he tased Sandoval.⁴ Hubber points out the jury was instructed that assault includes negligently causing bodily injury, and the jury was not instructed on the definition of negligently. (Appellant's App. B at 32 (Instr. No. 28).) But Hubber acknowledged he intentionally tased Sandoval, and there was substantial evidence that he did it without prompting. (State's Ex. 219 at 0:32:50-0:33:50; Trial Tr. at 1647.) There is no question that Hubber purposely and knowingly inflicted bodily injury on Sandoval.

Similarly, if the jury applied the conduct-based definition of purposely to the third element, the jury had to find it was Hubber's conscious object to engage in the conduct of having "purposely or knowingly attempted to inflict bodily injury on anyone" during the course of the burglary. (See Appellant's App. B at 27 (Instr. 23).) Again, because the element included a result, the jury had to find it was Hubber's conscious object to cause the result of inflicting bodily injury. There is no distinction between the findings the jury might have made between a conduct-based or a result-based instruction when the conduct-based definition was

⁴ Bodily injury includes "physical pain." Mont. Code Ann. § 45-2-101(5).

applied to the elements that included a result. Because the jury was properly instructed on the elements of the offense, Hubber has not demonstrated a manifest miscarriage of justice.

The evidence overwhelmingly demonstrated that Hubber entered Harris's home without permission, that Harris directed Hubber to leave, and that Hubber tased Sandoval while he was unlawfully in the home. These facts easily satisfied the elements of aggravated burglary. Hubber has not demonstrated that the conduct-based purposely instruction had any impact on the outcome of his case. As a result, he has not met his burden to demonstrate that failing to review this claim would result in a manifest miscarriage of justice.

In the alternative, even if this Court invokes plain error to review, this Court should deny this claim because Hubber has not demonstrated that his substantial rights were affected by the purposely instruction. The elements of the offense clearly required the jury to find that Hubber acted knowingly or with the conscious object to commit an assault within the structure and to inflict injury. Thus, the incorrect purposely instruction was harmless.

E. Hubber did not receive ineffective assistance of counsel because he was not prejudiced by his counsel's failure to object to the mental state instructions.

This Court reviews IAC claims by applying the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). A defendant must show that:

(1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. *Whitlow v. State*, 2008 MT 140, ¶ 10, 343 Mont. 90, 183 P.3d 861.

Trial counsel's performance is deficient if it falls "below an objective standard of reasonableness measured under prevailing professional norms and in light of the surrounding circumstances." *Whitlow*, ¶ 20. There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance' and the defendant 'must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.'" *Whitlow*, ¶ 21 (quoting *Strickland*, 466 U.S. at 689). This highly deferential review of counsel's performance is necessary to "eliminate the distorting effects of hindsight." *Worthan v. State*, 2010 MT 98, ¶ 10, 356 Mont. 206, 232 P.3d 380.

To establish that the defendant was prejudiced by counsel's deficient performance, a defendant must demonstrate a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Worthan*, ¶ 16. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The likelihood of a different result must be "substantial." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

To prevail, a defendant must satisfy both prongs of this test. It is unnecessary to address whether counsel was deficient here because Hubber has not demonstrated a reasonable probability that the outcome would have been different if his counsel had objected to the mental state instructions. As explained above, the court properly gave only one definition each for knowingly and purposely. The jury was correctly instructed on the result-based definition of knowingly.

Although the jury should have been instructed on the result-based definition of purposely, the incorrect instruction did not have any impact on the outcome of the case. The purposely instruction instructed the jury that a person acts purposely if he has the “conscious object to engage in conduct of that nature.” (Appellant’s App. B at 22 (Instr. No. 18).) When that instruction was applied to the elements of the offense, a common sense reading of the instruction required the jury to find that Hubber acted with the conscious object to produce the required result. There is not a reasonable probability that the result-based purposely instruction would have produced a different result.

II. A rational trier of fact could find that Hubber committed deliberate homicide by accountability.

To convict Hubber of deliberate homicide by accountability, the State had to prove beyond a reasonable doubt that Hubber: (1) had the purpose to promote or facilitate the commission of deliberate homicide; and (2) aided or abetted Nick in

the planning or commission of deliberate homicide. Mont. Code Ann. §§ 45-2-301, -302, 45-5-102; *Doyle*, ¶ 55; *Lantis*, ¶ 33. “The concept of accountability contemplates that the defendant played an active role in facilitating the commission of an offense.” *Doyle*, ¶ 55.

The State presented sufficient evidence from which a rational trier of fact could find that Hubber had the purpose to promote or facilitate the commission of deliberate homicide and that he aided or abetted Nick in the commission of deliberate homicide. Hubber brought Nick into the home to protect himself. (*Id.* at 0:43:50-0:44:32.) Hubber also brought a taser and a pistol. After entering the home, Hubber tased Sandoval, tackled him, and began wrestling with him. (State’s Ex. 219 at 0:33:00-0:33:30, 0:49:20-0:49:59; Trial Tr. at 1055-57.)

The jury could also conclude that Hubber gave Nick the pistol with the purpose of aiding a deliberate homicide. Sandoval repeatedly insisted shortly after the homicide that Hubber handed Nick the gun. (State’s Ex. 267 at 0:00:10-0:00:11, 0:00:16-0:00:18.)

Nick told law enforcement that after Harris threatened to kick Hubber, Hubber threatened to shoot Harris between the eyes. (State’s Ex. 266 at 0:33:40-0:34:05.) Nick said Hubber then tried to pull his pistol from his holster. (*Id.* at 0:34:05-0:35:56.) Nick asserted that Hubber struggled to get his pistol from his holster, so Nick took it from him. (*Id.*) Nick then pointed the gun at Harris and,

after ordering Harris to get back, fatally shot Harris. (Trial Tr. at 1207, 1211.)

Although Nick's account did not directly state that Hubber handed him the pistol, the jury could have concluded that Hubber did so based on Sandoval's report.

In addition, the jury heard evidence that Hubber had recently stated if things got crazy, he would "start capping motherfuckers" with his pistol, and he told another bondsman "I just wanna smoke a few of these mother fuckers that are trying to pull shit over on us." (Trial Tr. at 375, 1051; State's Ex. 202.)

This Court reviews a jury's verdict to determine whether sufficient evidence exists to support the verdict, not whether the evidence could have supported a different result. *State v. Spottedbear*, 2016 MT 243, ¶ 8, 385 Mont. 68, 380 P.3d 810. It is within the province of the jury to weigh the evidence based on the credibility of the witnesses and determine which version of events should prevail. *Id.*

Viewing the evidence in the light most favorable to the State, a rational trier of fact could find that Hubber had the purpose to promote or facilitate the commission of deliberate homicide when he threatened to shoot Harris, attempted to pull his pistol from his holster, and then provided Nick with the pistol. A rational trier of fact could further find that Hubber aided or abetted Nick in the commission of deliberate homicide. As a result, the court did not err when it denied Hubber's motion to dismiss for insufficient evidence.

III. The court did not abuse its discretion when it declined to instruct the jury on a bondsman privilege that has not been recognized in Montana.

A. Facts relating to the assertion of a bondsman privilege

Before trial, Hubber moved to dismiss the aggravated burglary charge, arguing that: (1) as a bondsman, he had the authority to enter Harris's home to arrest Sandoval; and (2) exigent circumstances authorized him to enter the home and arrest Sandoval. (Docs. 16-17; 11/17/22 Tr. at 5-9.) Hubber demonstrated he had posted a bond for Sandoval, they had entered a contract stating Hubber had jurisdiction over Sandoval and had the right to apprehend and surrender him, and the Butte City Court had forfeited two of Sandoval's bonds. (Doc. 18.)

In response, the State argue there is not a bondsman privilege in Montana and, even if there was, it would not authorize Hubber to enter the home of a third party. (Doc. 27; 11/17/22 Tr. at 21-25.) The State also argued a bondsman contract is a contract of adhesion and Hubber did not have any authority to enter Harris's home to arrest Sandoval. (*Id.*)

The court found that Hubber did not have the authority to enter Harris's home, so all acts of force thereafter were unreasonable and unlawful. (Appellant's App. D at 5.) The court found that no Montana authority recognized "the common law bail bondsman's privilege and even if the Court did, it would not go so far as to authorize a bail bondsman's breach of Mr. Harris' privacy under the facts and

circumstances presented.” (*Id.*) Accordingly, the court denied Hubber’s motion to dismiss.

Before trial, the State moved to exclude any argument from Hubber that a bondsman privilege gave him the authority to enter Harris’s home. (Doc. 77.) In response, Hubber argued he had the right to enter the home because he had called law enforcement for assistance arresting Sandoval in the home, and law enforcement did not come to assist him or order him not to enter the home. (Doc. 84 at 12-15.) Hubber also argued he had the right to enter the home because Sandoval had listed Harris’s address as one of his addresses on paperwork. (*Id.* at 16-20.)

The court ordered that Hubber was prohibited from presenting evidence that he had a legal right as a bondsman to enter Harris’s home based on the theory of a bondsman privilege. (Appellant’s App. E at 3.) The court ruled that it was “not willing to recognize or extend [a bondsman] privilege to allow a bondsman this entry regardless of what address Mr. Sandoval may have provided in paperwork. This Court is not willing to allow individuals to subrogate the rights of other citizens merely by utilizing their address.” (*Id.* at 2.) The court again held that “there is no ‘bondsman privilege’ in Montana, and, as such, entry into the [home] was unlawful.” (*Id.*) The court explained that “[t]o allow this entry, would essentially elevate the authority of a bondsman over and above trained law

enforcement.” (*Id.*) The court stated it was “not persuaded that Hubber believed Sandoval lived there.” (*Id.*)

Despite the prohibition on testifying about a bondsman privilege, Hubber’s counsel elicited testimony from Burns that, as a bondsman, he has the authority to use force to arrest his clients and surrender them to jail. (Trial Tr. at 382-84.) He also elicited another bondsman’s testimony that he has used force to enter a building to arrest a client. (*Id.* at 1343.)

Hubber entered into evidence the bail bond contract he entered into with Sandoval. (Hubber’s Ex. 18.) In tiny print, the contract stated that the company “shall have the right to apprehend and surrender me[.]” (*Id.* at 1.) The contract also listed 815 South Main Street as a third address for Sandoval. Sandoval disputed that he gave Hubber that address. However, he provided it to pretrial services as his mailing address, but provided a different home address. (Trial Tr. at 1089-90, 1433, 1444, 1546; Hubber’s Exs. 18, 23.) Witnesses testified that, although Sandoval spent the night at Harris’s house occasionally, Sandoval did not live at Harris’s house and did not have permission to stay there long term. (Trial Tr. at 1089-90; *see id.* at 1376-78.)

Although Harris’s home was described as a trap house, witnesses testified that the house did not have an open-door policy, guests had to knock to obtain

entry, and Harris controlled who was allowed in the house and for how long. (*Id.* at 1184-85, 1191, 1376-77, 1381.)

Hubber proposed several jury instructions relating to the bail bond system and arrests, including instructions stating that a bondsman has the authority to break and enter into a principal's home to arrest the principal, and may use reasonable force in doing so. (Doc. 143, Proposed Instrs. No. 10-13, 17-28.) Hubber also proposed an instruction on the authority of a citizen to conduct an arrest. (Doc. 143, Proposed Instr. No. 21.)

The court instructed the jury on the authority of a citizen to arrest but refused instructions on bondsman privilege and resisting arrest. (Trial Tr. at 1963-85, 2006-08; Doc. 212, available at Appellant's App. B.)

B. The court correctly concluded that Montana law does not authorize a bondsman to enter a third party's home to arrest a subject.

Hubber had the authority to arrest Sandoval, pursuant to Mont. Code Ann. § 46-9-510 and his bail bond agreement with Sandoval if he could do so legally, but he did not have the authority to enter a third party's home uninvited or to immediately tase Sandoval. Because Hubber did not have the authority to be in Harris's home, he could not have carried out a lawful arrest in the home. Under the facts of this case, the court correctly refused to allow Hubber to argue about a bondsman privilege or to give jury instructions on the privilege.

Montana law authorizes a “surety company” to “arrest the defendant and surrender the defendant to the court, any peace officer, or any detention center facility of this state.” Mont. Code Ann. § 46-9-510(1)(b). Nothing in Montana’s statutes authorizes a bail bondsman to violate Montana’s laws, including the laws prohibiting trespass or burglary, except laws governing the restraint of a person. *See* Mont. Code Ann. § 46-9-503 (authorizing a bail bondsman to surrender a defendant); Mont. Code Ann. § 46-9-510.

Hubber’s reliance on common law is misplaced. In *Taylor v. Taintor*, 83 U.S. 366 (1872), the Supreme Court stated that when a defendant is released to a bondsman, he “is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him[,]” they may imprison him until they can deliver him, they may pursue him into another state, and they “may break and enter his house” to seize him. *Id.* at 371. But *Taylor* did not authorize a bondsman to enter a third party’s home.

And this Court should rely on Montana’s law, rather than common law from 1872, to determine the authority of bondsmen. Significantly, this Court has interpreted the statutory authority of bondsmen more narrowly than *Taylor*. In *Rupnow v. Montana State Auditor & Comm’r of Ins.*, 2024 MT 14, 415 Mont. 81, 542 P.3d 384, this Court held that the authority of a surety to arrest and surrender a

defendant cannot be exercised unless a court has issued a warrant for the defendant and forfeiture is pending or bail has been declared forfeited. *Rupnow*, ¶ 14. This Court explained that the statutes “do not . . . elevate a surety’s financial interest under a civil contract above a defendant’s rights to liberty and due process or provide a surety arrest authority far exceeding that of any law enforcement officer.” *Id.* *Rupnow* demonstrates that although bondsmen have the authority to arrest a principal under some circumstances, that authority does not exceed the authority of law enforcement.

The United States Supreme Court has explicitly held that an arrest warrant does not authorize law enforcement officers to enter the home of a third party to arrest a person inside. *Steagald v. United States*, 451 U.S. 204 (1981). Under *Rupnow*, ¶ 14, a bondsman does not have the authority that an officer does not have, so Hubber could not have had authority to enter the home.

Before this Court issued its decision in *Rupnow*, United States District Court Judge Dana Christensen interpreted Montana’s statutes to recognize a bondsman privilege. *Mitchell v. First Call Bail & Surety, Inc.*, 412 F. Supp. 3d 1208, 1217-18 (D. Mont. 2019). But, like this Court, Judge Christensen concluded a bondsman’s power to arrest did not exceed the authority of the State. *Id.* at 1218. Judge Christensen noted that the authority of a citizen to arrest is even more

limited. Judge Christensen also noted that a contract can only be upheld where the consent is meaningful and freely given at the time the exchange was made. *Id.*

Rupnow and *Mitchell* both support the conclusion a bondsman does not have authority to enter the home of a third party to arrest a principal. That is further supported by Montana's heightened right to privacy in the Montana Constitution. *See* Mont. Const. art. II, §§ 10-11; *State v. Goetz*, 2008 MT 296, 191 P.3d 489, 345 Mont. 421. Contrary to Hubber's assertion, Harris had a right to privacy in his home, even if he allowed many people to enter, and his right to privacy could not be eliminated by Sandoval, even if Sandoval listed Harris's address as one of his multiple addresses on his bail bond contract.

Several other states have reached similar conclusions. In *State v. Lopez*, 734 P.2d 778, 783 (N.M. Ct. App. 1986), the New Mexico Supreme Court explained that "in view of this state's constitutional provision against unreasonable searches and seizures, neither the common law nor statutory authority of a bondsman to make a warrantless arrest of his principal absolves a defendant of criminal responsibility ensuing from the armed, unauthorized, and forcible entry into the residence of a third party." *Id.* Similarly, the Minnesota Supreme Court held that "[n]one of the sources from which a bail bondsman derives his authority—the common law, [a state statute], or the bail bondsman's contract—authorize the bondsman to forcibly enter the private dwelling of a third party to

arrest the principal.” *State v. Tapia*, 468 N.W.2d 342, 344 (Minn. Ct. App. 1991). The court noted that a contract with the principal “does not include the authority to infringe upon the rights of persons who are not parties to the contract.” *Id.*; see also *State v. Mathias*, 509 S.E.2d 155, 161 (N.C. 1998) (contractual authority to apprehend cannot be extended to home of a third party where principal does not reside).

Similarly, the Oregon Court of Appeals explained that the common law rule from *Taylor* “is inconsistent with contemporary requirements of civility.” *State v. Epps*, 585 P.2d 425, 428-29 (Or. Ct. App. 1978). The court quoted a commentator who noted that the *Taylor* rule gives bondsmen more power than law enforcement, without them being subject to the safeguards applicable to law enforcement. (*Id.*)

Additionally, this Court should not rely on *Applegate v. Lucky Bail Bonds, Inc.*, 387 P.3d 1128 (Wash. Ct. App. 2016), or *Livingston v. Browder*, 285 So. 2d 923 (Ala. Civ. App. 1973), because both cases involved distinguishable state statutes. In *Livingston*, the Alabama Court of Civil Appeals held that a bondsman has the authority to arrest when he sees his principal in a dwelling, properly identifies himself, and acts in a reasonable manner. 285 So. 2d at 370. But, unlike Montana statutes, Alabama statutes authorize a bondsman to arrest their principal “at any place in the state.” *Id.* at 368. The Washington statutes in *Applegate* are

similarly distinguishable because they direct courts to follow *Taylor*. Montana's statutes do not grant bondsmen such expansive authority.

Hubber's bail bond contract with Sandoval also did not give him authority to enter Harris's house. The district court correctly concluded that the contract could not reduce Harris's right to privacy because Harris was not a party to the contract. There was also no evidence that Harris allowed Sandoval to reside in the home. To the contrary, a tenant in the house testified that Sandoval came to Harris's house several days a week and would drink "until Bill told him he had to go." (Trial Tr. at 1377.) Further, the bail bond contract was a contract of adhesion, which could not have authorized Hubber to enter Harris's home and immediately take Sandoval because that is unduly oppressive, unconscionable, and contrary to public policy. *See Woodruff v. Bretz, Inc.*, 2009 MT 329, 353 Mont. 6, 218 P.3d 486.

The district court correctly concluded that Hubber was not entitled to rely on a bondsman privilege to create a defense when he went inside Harris's house to detain Sandoval.

C. The district court did not abuse its discretion when it refused to give the jury Hubber's Proposed Instructions No. 10-12, 17, and 27-28.⁵

⁵ In a footnote, Hubber argues that the court erred in not giving his Proposed Instructions No. 17 and 31. (Appellant's Br. at 59.) The State cannot locate any proposed instruction numbered 31. (Doc. 143.)

Because Hubber did not have the right to enter Harris's home, the district court did not abuse its discretion when it refused his instructions on a bondsman privilege. Hubber's Proposed Instructions No. 10 through 12 set out details about the bail bond process and instructed that a bondsman may arrest a defendant. (Doc. 143.) Given the court's ruling that Hubber could not arrest Sandoval in Harris's home, the instructions would have been confusing and misleading. The court properly exercised its discretion to refuse those instructions.

The court correctly refused Hubber's Proposed Instruction No. 27 because it incorrectly stated that a bondsman has "the right to enter land in the possession of another for the purpose of making the arrest." (*Id.* at 35.) The court also did not abuse its discretion by refusing Hubber's Proposed Instruction No. 28, which stated that "[a]n arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." (*Id.* at 36.) Montana's statutes authorize a bondsman to arrest, but they do not authorize a bondsman to enter the principal's home. Mont. Code Ann. § 46-9-510(1)(b). Further, the record does not support a conclusion that Hubber "lived" in Harris's home or that Harris ever gave him permission to represent that he lived in the home. As a result, the instruction would have been confusing and misleading.

The court also did not abuse its discretion when it refused Hubber's Proposed Instruction No. 17, which stated that "[a] person is not authorized to use force to resist an arrest that the person knows is being made either by a peace officer or by a private person summoned and directed by a peace officer to make then arrest[.]" (Doc. 143 at 23.) This language applies to law enforcement, not a bondsman who was not summoned or directed by a peace officer. It also would have been confusing because Sandoval's resistance was not a defense to any of the offenses charged.

D. Even if the court erred by not instructing the jury on Hubber's authority to arrest Sandoval, that error did not affect his substantial rights.

Even if the court erred in refusing to instruct the jury on the general authority of a bondsman to arrest his principal, this Court should affirm because the failure to provide that instruction did not affect Hubber's substantial rights. The overwhelming evidence, including Hubber's initial statements to law enforcement, demonstrates that Hubber entered Harris's home without knocking or announcing himself because he wanted the element of surprise, and then, when Sandoval did not submit to him, he tased Sandoval. The right of a bondsman to arrest a principal did not provide a defense to Hubber's conduct, and he would have been convicted even if an instruction on his authority to arrest had been read.

CONCLUSION

Hubber has not met his burden to demonstrate that the mental state instructions should be reviewed under the plain error doctrine. The court correctly denied Hubber's motion to dismiss the deliberate homicide by accountability count because it was supported by sufficient evidence. And the court did not abuse its discretion when it refused to instruct that Hubber's conduct was authorized by a bondsman privilege. Accordingly, Hubber's convictions for deliberate homicide by accountability and aggravated burglary should be affirmed.

Respectfully submitted this 24th 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 9,947 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

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CERTIFICATE OF SERVICE

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