

DA 17-0400

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 220

STATE OF MONTANA,

Plaintiff and Appellee,

v.

HADLEY GENE RESH,

Defendant and Appellant.

APPEAL FROM: District Court of the Nineteenth Judicial District,
In and For the County of Lincoln, Cause No. DC-14-82
Honorable Matthew J. Cuffe, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Kristen L. Peterson, Assistant Appellate
Defender, Helena, Montana

For Appellee:


Timothy C. Fox, Montana Attorney General, Jeffrey M. Doud, Assistant
Attorney General, Helena, Montana

Marcia Boris, Lincoln County Attorney, Libby, Montana

Submitted on Briefs: July 24, 2019

Decided: September 17, 2019

Filed:


Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 A Lincoln County jury found Hadley Gene Resh guilty of felony sexual assault. The Nineteenth Judicial District Court instructed the jury, without differentiating between the charged offenses of sexual intercourse without consent and sexual assault, that a person under the age of sixteen is incapable of consent as a matter of law. Resh appeals, claiming that his counsel was ineffective when he failed to object to the instruction because the age of consent for sexual assault was fourteen years old. We reverse and remand for a new trial.

PROCEDURAL AND FACTUAL BACKGROUND

¶2 In March 2014, fourteen-year-old R.H. was living with her father in Kalispell. Resh was married to R.H.'s mother, and they had three children together. Even though Resh was not R.H.'s biological father, she considered him her father. She lived with Resh and his biological children until she was ten years old.

¶3 Near the end of March 2014, R.H. was staying at Resh's home to celebrate her half-sister's birthday. R.H. went into Resh's bedroom where he was on his bed watching television and drinking wine. R.H. had noticed that Resh had been sad all day and wanted to see how he was doing. At some point, Resh asked R.H. to get him another glass of wine. R.H. went to the kitchen to get ice, returned to Resh's bedroom, and filled his glass with wine from a box in the bedroom. R.H. recalled filling Resh's glass more than once.

¶4 After filling Resh's glass the first time, R.H. changed into a pair of Resh's boxers because her pajama bottoms were too warm. R.H. stood next to Resh, who put his arm around her and began "trailing" his fingers up and down her upper thigh. R.H. said that is

when she “thought something was fishy, so [she] moved” and got Resh his second drink. When R.H. came back, she sat on Resh’s bed next to him to watch a movie. Following a funny scene in the movie, Resh commented that R.H. looked pretty like her mother. R.H. testified that Resh told her, “Stop looking at me that way,” and R.H. responded that she did not understand what he meant. R.H. said that she was staring at Resh because it was nice to see him smile. Resh then leaned into R.H. and kissed her intimately on the lips and put his tongue inside her mouth. R.H. testified that this made her feel uncomfortable and that it was not the kind of kiss a father or stepfather should give his daughter. R.H. told investigators that she did start to kiss Resh back before asking herself, “Wait, what am I doing?” R.H. said that she was feeling confused when she started kissing him back. She stated, “I wanted to make him happy, but I didn’t know what that meant. So I just did what he did; I didn’t know what else to do. I didn’t know if I was supposed to get up and leave, if I was supposed to just sit there and pull away, or if I was supposed to—I didn’t know.”

¶5 R.H. said that they both fell back; she was laying down straight and he was propped up leaning into her. While kissing R.H., Resh began running his hand up and down R.H.’s thigh. He was running his hands across the top of the boxers R.H. was wearing. Eventually, Resh put his hands under the boxers and R.H.’s underwear and inserted two fingers into R.H.’s vagina. R.H. noticed that Resh got an erection. R.H. testified that the sexual contact made her feel very uncomfortable. She was “in shock” and did not know how she was supposed to act. When later questioned by an investigator, R.H. said, “My body was accepting it. Like it felt like my body wanted it. Then I was like, no.” When asked to clarify what she meant when she said her body wanted the contact, she

stated that it moved in rhythm with Resh. Ultimately, R.H. shifted position and moved Resh's hand away, and the sexual contact stopped. Resh began shaking his head and continually apologizing. R.H. told him that it was okay and left the room. R.H. testified that she said it was okay because she did not want Resh to "beat himself up about it," and she just wanted to get out of the room.

¶6 After R.H. left Resh's room, she went into the living room and told her half-sister, K.R., that Resh made out with her and "violated" her. K.R. testified that R.H. appeared "nervous, shaky, not herself," and that she cried. R.H. asked K.R. to go into Resh's bedroom to retrieve her sweater because R.H. did not want to go back into Resh's room. The following morning, Resh again apologized and asked R.H. if she was okay.

¶7 R.H. eventually told her father and stepmother what happened, and they reported it to police. Investigator Devin Kuntz interviewed R.H. within approximately a month of the incident. The State charged Resh in September 2014 with one count of sexual intercourse without consent and with an alternative count of sexual assault.

¶8 The case proceeded to a jury trial. During the settling of jury instructions, the parties discussed the State's proposed instruction on the element of "without consent." It stated, "As used in these instructions, the term 'without consent' means the victim is incapable of consent by law because she is less than 16 years old." The proposed instruction was drawn from the applicable sexual intercourse without consent statute and the Model Criminal Jury Instructions. Resh's counsel did not propose a different instruction or request a separate instruction on "without consent" for the sexual assault charge.

¶9 The District Court read the following “without consent” jury instruction: “As used in these instructions the term ‘without consent’ means a person is incapable of consent by law if she is less than sixteen years old at the time of the alleged event.” During closing arguments, the State argued that the consent element of sexual intercourse without consent was satisfied because R.H. “was fourteen at the time that this happened . . . about to turn fifteen.” The State asserted, “[T]here’s no argument on any side that she was under the age of consent.” The State told the jury that if it was unable to find Resh guilty of sexual intercourse without consent then it should consider sexual assault. The State argued that the “second and third elements” of sexual assault were “essentially the same, the without consent and knowingly.” Defense counsel made no argument about the consent element for either offense. After deliberations, the jury found Resh not guilty of sexual intercourse without consent and guilty of felony sexual assault. Resh was sentenced to ten years at Montana State Prison, with five years suspended.

STANDARDS OF REVIEW

¶10 We review jury instructions for abuse of discretion to determine whether the jury instructions, as a whole, fully and fairly instructed the jury on the law applicable to the case. *State v. Johnston*, 2010 MT 152, ¶ 7, 357 Mont. 46, 237 P.3d 70. A defendant’s claim of ineffective assistance of counsel is a mixed question of law and fact that this Court reviews de novo. *State v. Root*, 2015 MT 310, ¶ 8, 381 Mont. 314, 359 P.3d 1088.

DISCUSSION

¶11 A person commits sexual assault by knowingly having “any sexual contact without consent” with another person. Section 45-5-502(1), MCA.¹ Sexual assault is a felony if the person is “less than 16 years old and the offender is 3 or more years older than the victim or if the offender inflicts bodily injury[.]” Section 45-5-502(3), MCA. A person commits sexual intercourse without consent by knowingly having “sexual intercourse without consent” with another person or “with another person who is incapable of consent.” Section 45-5-503(1), MCA. For both charged offenses, the State must prove that the sexual contact was without consent. *See* §§ 45-5-502, -503, MCA. This element differs, however, when the State can prove lack of consent solely by the victim’s age. *State v. Williams*, 2010 MT 58, ¶ 28, 355 Mont. 354, 228 P.3d 1127. As to sexual assault, there can be no consent as a matter of law if the victim is less than fourteen years old and the offender is three or more years older than the victim. Section 45-5-502(5)(a)(ii), MCA; *State v. Ghostbear*, 2014 MT 192A, ¶ 6, 376 Mont. 500, 338 P.3d 25. Meanwhile, a victim is incapable of consenting to sexual intercourse when she or he is less than sixteen years old. Section 45-5-501(1)(a)(ii)(D), MCA.²

¶12 R.H. undisputedly was fourteen years old, about to turn fifteen, at the time of the alleged offense. R.H. thus could not legally consent to sexual intercourse.

¹ As the offense was alleged to have occurred in 2014, all statutory citations are to the 2013 Montana Code Annotated unless otherwise noted.

² Section 45-5-501(1)(a), MCA, was amended in 2017 to apply the sixteen-year-old age of consent to sexual assault, sexual intercourse without consent, and aggravated sexual intercourse without consent. 2017 Mont. Laws ch. 279, § 2. The Legislature did not amend § 45-5-502(5)(a)(ii), MCA (2019), which still provides that under the sexual assault statute, consent is ineffective if the victim is less than fourteen years old and the offender is three or more years older than the victim.

Section 45-5-501(1)(a)(ii)(D), MCA. R.H. was not, however, “less than 14 years old” such that she could not legally consent to sexual contact. *See* § 45-5-502(5)(a)(ii), MCA. The State therefore could not prove the consent element of sexual assault by R.H.’s age alone. The District Court instructed the jury that a person could not consent if she was under the age of sixteen, but it did not differentiate the age of consent for the offense of sexual assault.

¶13 Resh’s counsel neither objected to the “without consent” jury instruction nor offered a separate jury instruction for the age of consent for sexual assault. The State argued in closing that neither party argued that R.H. could legally consent to sexual intercourse without consent, and it added that the element of “without consent” is “essentially the same” for sexual assault. Resh argues on appeal that his counsel’s failure to offer a jury instruction for the sexual assault consent element was not based on reasonable or sound professional judgment and prejudiced his right to a fair trial.

¶14 The State responds that when viewing the whole body of instructions, the jury was fully and fairly instructed on the law as it relates to felony sexual assault. The State cites *State v. Detonancour*, 2001 MT 213, ¶ 64, 306 Mont. 389, 34 P.3d 487, in support of its position. Also a case involving charges of both sexual intercourse without consent and sexual assault, the *Detonancour* jury was instructed on the elements of both offenses, but was instructed on the definition of “without consent” only as applied to sexual intercourse without consent. We held that the court’s failure to advise the jury that this definition did not apply to sexual assault did not prejudice the defendant. *Detonancour*, ¶¶ 64-65.

¶15 Article II, Section 24, of the Montana Constitution and the Sixth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment,

guarantee a person the right to effective assistance of counsel. This Court applies the two factors enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984), to evaluate claims of ineffective assistance of counsel. The defendant must demonstrate (1) that his counsel's performance fell below the range of competence required of attorneys in criminal cases and (2) that his counsel's deficient performance prejudiced his case. *Whitlow v. State*, 2008 MT 140, ¶ 10, 343 Mont. 90, 183 P.3d 861. The claim is reviewable on direct appeal when "no plausible justification" exists for counsel's error. *State v. Kougl*, 2004 MT 243, ¶ 15, 323 Mont. 6, 97 P.3d 1095.

¶16 In *Kougl*, we considered on direct appeal defense counsel's failure to seek instructions to view accomplice testimony with distrust and to require that such testimony be corroborated. *Kougl*, ¶¶ 20-21. We reasoned that defense counsel had "failed to use the law to strike at the heart of the State's case." *Kougl*, ¶ 20; *see also State v. Chafee*, 2014 MT 226, ¶ 18, 376 Mont. 267, 332 P.3d 240 (there was no plausible justification for defense counsel's failure to offer the "mere presence" jury instruction when defense counsel argued that mere presence at the scene was insufficient to support a conviction, and the instruction could have directly refuted the State's argument had the omitted instruction been offered).

¶17 Likewise here, the record provides no plausible justification for defense counsel's failure to object to an incorrect jury instruction that misstated an element of one of the charged offenses. Under the applicable version of §§ 45-5-501(1)(a)(ii) and 45-5-502(5)(a)(ii), MCA, victims less than fourteen years old could not consent as a matter of law to sexual contact. The court instructed the jury that the age of consent was sixteen

and did not limit the instruction to sexual intercourse without consent. The instruction therefore foreclosed the jury's consideration of a potentially favorable element for the defense and directed the jury to find that element against Resh. Had defense counsel offered a separate "without consent" instruction, the instruction would have been proper, and the argument that R.H. could not consent to sexual contact merely because of her age could have been directly refuted. Like counsel's failure in *Kougl*, there was no plausible justification for defense counsel's failure to offer a separate "without consent" instruction for sexual assault. The first prong of *Strickland* is therefore satisfied.

¶18 We turn to whether Resh has "demonstrate[d] that there was a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Kougl*, ¶ 11 (internal citation omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome, but it does not require that a defendant demonstrate that he would have been acquitted." *Kougl*, ¶ 25 (internal quotation and citation omitted). Contrary to the State's position, *Detonancour* does not answer the prejudice question. The victim in that case was an adult, and the two statutes' age-of-consent variation was not at issue. *See Detonancour*, ¶ 8.

¶19 When the State proposed the "without consent" jury instruction, Resh's counsel did not object to the legal error that the sixteen-year-old minimum age of legal consent was not applicable to the charged offense of sexual assault. In its closing arguments, the State emphasized that the parties agreed R.H. could not consent to sexual intercourse as a matter of law and that the elements of sexual assault are "essentially the same."

¶20 We conclude that defense counsel’s failure to seek a proper jury instruction undermines confidence in the verdict. The State argues that the evidence against Resh was overwhelming. But the instruction allowed the jury to convict Resh solely on evidence of R.H.’s age. Had trial counsel offered and argued a separate sexual assault “without consent” instruction, the jury would have been required to consider all the testimony, and the result may have been different. Because the jury could have convicted Resh without even considering the witnesses’ credibility, there is a probability sufficient to undermine confidence in the outcome of the trial. The second prong of *Strickland* is satisfied, and prejudice is apparent.

CONCLUSION

¶21 We conclude that defense counsel’s performance in this case fell short of the range reasonably demanded and that this failure was prejudicial to Resh. We therefore reverse Resh’s conviction for sexual assault and remand for a new trial.

/S/ BETH BAKER

We Concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ INGRID GUSTAFSON
/S/ JIM RICE