DA 18-0434

# IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 108

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CITY OF MISSOULA,

Plaintiff and Appellee,

v.

JOHN ANTHONY ZERBST,

Defendant and Appellant.

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APPEAL FROM: District Court of the Fourth Judicial District,
In and For the County of Missoula, Cause No. DC-18-11
Honorable Karen S. Townsend, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Alexander H. Pyle, Assistant Appellate Defender, Helena, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Jon Bennion, Chief Deputy Attorney General, Helena, Montana

Jim Nugent, Missoula City Attorney, Carrie L. Garber, Deputy City Attorney, Missoula, Montana

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Submitted on Briefs: February 26, 2020

Decided: May 5, 2020

Filed:

Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 John Anthony Zerbst appeals his conviction for sexual assault. He asserts that the Missoula Municipal Court erred when it instructed the jury on a definition of consent from the 2017 sexual assault statute and not the applicable 2015 statute. We reverse and remand for a new trial.

## FACTUAL AND PROCEDURAL BACKGROUND

¶2 Zerbst was charged in Missoula Municipal Court with misdemeanor sexual assault for a disputed incident that occurred in July 2017. Zerbst and Katheryn, the complainant, had been in an on-and-off again relationship and were living together at the time, though they were separated. According to Zerbst, they were still intimate within a week of the reported incident.

¶3 Katheryn testified that on the day of the incident, Zerbst started touching her feet and then moved up her thighs and hips. Katheryn testified that she pushed him back, said "stop," and slapped John's chest. She testified that he got on top of her and started to touch her upper body, including her breasts. She testified that she had not given John permission at any point to touch her for any reason.

¶4 Zerbst told police that he previously had given Katheryn massages because she has a medical condition causing her body to swell in the heat. On the day of the incident, it was hot and Zerbst said he gave Katheryn a massage on her legs and shoulders to alleviate the discomfort. He admitted that his hands were in the vicinity of Katheryn's pelvic region and also may have brushed her breasts. He asserts that once Katheryn told him to stop, he stopped.

¶5 Zerbst contends that Katheryn interacted with a Missoula police officer the next day and did not say that anything inappropriate happened between her and Zerbst. He claims that two days after the incident occurred, Katheryn became upset with him, and police were called for a welfare check. Katheryn then told officers about the alleged assault. Zerbst maintains that he consistently told the officers he had massaged Katheryn to help with her swelling and discomfort and stopped touching Katheryn after she told him to stop.

¶6 The City of Missoula charged Zerbst with sexual assault in Municipal Court. At trial, the court instructed the jury, over Zerbst's objection, on the definition of "consent" contained in recent amendments to the sexual assault statute.

¶7 The jury found Zerbst guilty of sexual assault. Zerbst appealed to the Fourth Judicial District Court, Missoula County, alleging that the Municipal Court failed to apply the correct law when instructing the jury on the elements of the claimed offense. The District Court held that the instructions, taken as a whole, fully and fairly instructed the jury regarding the applicable law. Finding no instructional error that affected Zerbst's substantial rights, the court denied his appeal.

## STANDARDS OF REVIEW

¶8 In an appeal from a municipal court, a district court acts as an intermediate court of appeal; the appeal is confined to review of the record and questions of law. Sections 3-5-303 and 3-6-110, MCA. In a subsequent appeal, we review the case as if the appeal had been filed directly with this Court, without deferring to the district court's order on appeal. *State v. Holland*, 2019 MT 128, ¶ 7, 396 Mont. 94, 443 P.3d 519; *See City of Missoula v. Williams*, 2017 MT 282, ¶ 8, 389 Mont. 303, 406 P.3d 8.

¶9 Trial courts have broad discretion in formulating jury instructions, "ultimately restricted by the overriding principle that jury instructions must fully and fairly instruct the jury regarding the applicable law." *State v. Miller*, 2008 MT 106, ¶ 11, 342 Mont. 355, 181 P.3d 625 (citing *State v. Archambault*, 2007 MT 26, ¶ 25, 336 Mont. 6, 152 P.3d 698). *See State v. Shegrud*, 2014 MT 63, ¶ 7, 374 Mont. 192, 320 P.3d 455 (citing *State v. Matz*, 2006 MT 348, ¶ 13, 335 Mont. 201, 150 P.3d 367). If the jury instructions prejudicially affect the defendant's substantial rights, the error is not harmless. *Shegrud*, ¶ 7 (citing *Matz*, ¶ 13); *see State v. Kaarma*, 2017 MT 24, ¶ 7, 386 Mont. 243, 390 P.3d 609 ("To constitute reversible error, any mistake in instructing the jury must prejudicially affect the defendant's substantial rights."); *State v. Cybulski*, 2009 MT 70, ¶ 34, 349 Mont. 429, 204 P.3d 7.

¶10 "Jury instructions that relieve the State of its burden to prove every element of the charged offense beyond a reasonable doubt violate the defendant's due process rights." *State v. Iverson,* 2018 MT 27, ¶ 11, 390 Mont. 260, 411 P.3d 1284 (citing *Miller*, ¶ 11; *Carella v. California*, 491 U.S. 263, 265, 109 S. Ct. 2419, 2420 (1989)). Whether a defendant's due process rights were violated is a question of law that we review for correctness. *Miller*, ¶ 11 (citing *State v. McCaslin*, 2004 MT 212, ¶ 14, 322 Mont. 350, 96 P.3d 722).

## DISCUSSION

¶11 *1. Did the given instructions, as a whole, fully and fairly instruct the jury on the law applicable to the case?*

¶12 We first consider the instructions as a whole to determine whether the Municipal Court fully and fairly instructed the jury. *State v. Sanchez*, 2017 MT 192, ¶ 11, 388 Mont. 262, 399 P.3d 886 (citing *Kaarma*, ¶ 7). It is well-established that in criminal cases, the law in effect at the time of an alleged offense applies in any subsequent criminal prosecution. *State v. Daniels*, 2003 MT 30, ¶ 17, 314 Mont. 208, 64 P.3d 1045. For Zerbst's charged offense, which allegedly occurred in July 2017, that would be the 2015 version of the Montana Code Annotated.

¶13 Sexual assault is knowingly subjecting another to "sexual contact without consent." Section 45-5-502(1), MCA (2015).[1] Zerbst proposed instructing the jury that "without consent" has its ordinary meaning. The City proposed a jury instruction for the definition of "consent" mirroring Senate Bill 29, which passed in the 2017 legislative session and became effective October 2017, after the incident occurred. S. 29, 65th Leg., Reg. Sess. § 2 (Mont. 2017). The instruction stated:

> The term "consent" means words or overt actions indicating a freely given agreement to have sexual contact and is further defined but not limited by the following:
>
> (i) An expression of lack of consent through words or conduct means there is no consent or that consent has been withdrawn;
>
> (ii) A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent;

[1] The 2017 statute is identical.

(iii) Lack of consent may be inferred based on all of the surrounding circumstances and must be considered in determining whether a person gave consent.

A victim is incapable of consent if the victim is:

(i) mentally disordered or incapacitated;

(ii) physically helpless; or

(iii) overcome by deception, coercion, or surprise.

¶14 The trial court further instructed the jury that resistance is not necessary to show lack of consent. Zerbst objected to the proposed consent definition instruction, alleging it was an incorrect statement of law. He asserts that the Municipal Court erred when it gave the 2017 statutory definition of consent instead of the 2015 "ordinary meaning" definition. *State v. Stevens*, 2002 MT 181, ¶ 59, 311 Mont. 52, 53 P.3d 356 (citing *State v. Detonancour*, 2001 MT 213, ¶ 64, 306 Mont. 389, 34 P.3d 487) ("The ordinary meaning of 'without consent' applies to the offense of sexual assault.").

¶15 Zerbst asserts that by changing the law and giving consent a "legalistic" definition, the Legislature intended to give that element something other than its previous "ordinary" meaning. He argues that under the "ordinary meaning" definition applicable in this case, the question is not whether someone falls into a particular category—rendering him or her incapable of consent as a matter of law—but whether the person actually assents or approves. According to Zerbst, no such mandatory, categorical rule existed under the 2015 ordinary meaning of consent as applied to the offense of sexual assault. Zerbst asserts that the instruction was reversible error; because it allowed the jury to convict him based

on categorical definitions of who was, by law, incapable of consent, it lowered the City's burden to prove the consent element in the offense of sexual assault. The instructions did not require the jury to consider witness credibility or to resolve material factual disputes necessary to determine the element of consent.

¶16 The City, on the other hand, argues that the jury was instructed consistent with the ordinary meaning of consent. It asserts that the Municipal Court was resolving any ambiguity in the terms "without consent" and "consent" when it adopted the City's proposed jury instruction. The City insists that the definition of "without consent" for sexual intercourse without consent is narrower than the ordinary meaning, and thus the standards from the narrower definition apply within the "ordinary meaning" of consent for sexual assault.

¶17 As the City recognizes, prior to the 2017 amendments, the "without consent" standards in crimes of sexual assault and sexual intercourse were not the same. Section 45-5-501(1), MCA (2015), defined "without consent" for the crime of sexual intercourse without consent, but that definition did not apply to the crime of sexual assault. The "consent" element for the latter offense had its "ordinary meaning." *See Stevens*, ¶ 59 ("Unlike in the case of sexual intercourse without consent, the term 'without consent' is undefined for purposes of sexual assault and, instead, has its ordinary meaning."); *Detonancour*, ¶ 64 (citations omitted).

¶18 In 2017, the Legislature amended the sexual crimes statutes and statutorily defined "without consent" to apply to sexual assault. We presume that when the Legislature changes a statute, it means to change the law. *Crist v. Segna*, 191 Mont. 210, 212-13,

622 P.2d 1028, 1029 (1981) ("[W]e presume that the legislature, in repealing an old law and adopting a new statute, intended to make some change."). The Legislature expressly gave the terms "consent" and "without consent" uniform meanings for both sexual assault and sexual intercourse without consent. Section 45-5-501(1), MCA (2017). The statute was not retroactive; it became effective October 1, 2017. The new 2017 definition of consent as applied to sexual intercourse without consent and to sexual assault has the same material language the 2015 definition of consent had for sexual intercourse without consent only: that a victim is legally incapable of consent because the victim is "(A) mentally incapacitated; (B) physically helpless; (C) overcome by deception, coercion, or surprise[.]" Section 45-5-501(1)(a), MCA (2015).

¶19 This Court examined the 2017 statutory amendments to the sexual assault and sexual intercourse without consent definitions in *State v. Resh*, 2019 MT 220, 397 Mont. 254, 448 P.3d 1100. Resh was charged with sexual intercourse without consent and with sexual assault. The district court instructed the jury that the alleged victim was legally incapable of consent if she was under the age of sixteen. *Resh*, ¶ 9. The age of consent for sexual assault, however, was fourteen, and the instruction did not differentiate between the ages of consent for the two offenses. *Resh*, ¶¶ 8-9, 11. The State asserted during closing argument that the consent element of sexual intercourse without consent was satisfied because she was fourteen. *Resh*, ¶ 9. Drawing attention to the victim's age, the State emphasized that she "could not consent to sexual intercourse as a matter of law[.]" It then told the jury that "the elements of sexual assault are 'essentially the same.'"

*Resh*, ¶ 19. The jury found Resh not guilty of sexual intercourse without consent, but guilty of sexual assault.

¶20 We held that the instruction was in error because it "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." *Resh*, ¶ 12. The erroneous 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." *Resh*, ¶ 17.

¶21 Zerbst asserts that the City argued under the consent instruction that Katheryn was legally incapable of consenting due to developmental, mood, and physical impairments. He contends that during closing arguments, the City used the Municipal Court's consent instruction to argue the significance of Katheryn's developmental and physical incapacities and to discount the significance of the ongoing sexual relationship.

¶22 In its direct examination, the City asked Katheryn to testify about her developmental, mood, and physical diagnoses that qualified her for disability benefits. During closing arguments, the City argued, "We have direct evidence from Katheryn that she has been declared disabled since she was seventeen as a result of her developmental disability and mood disorder." The City did not explicitly ask the jury to rely on the language of the instruction to find that Katheryn's disability rendered her legally incapable of consent; the prosecutor urged the jury to "infer the lack of consent from all of the surrounding circumstances."

¶23 A jury must be allowed to consider collectively "all facts and circumstances" in determining guilt or innocence. *State v. Bullman*, 2009 MT 37, ¶ 21, 349 Mont. 228,

203 P.3d 768. The jury has the exclusive responsibility to determine credibility and weight given to conflicting evidence. *Sanchez*, ¶ 20. It "exclusively draws inferences from circumstantial evidence and should determine its conclusions on the elements of the crime if 'warranted by the evidence as a whole.'" *Sanchez*, ¶ 19 (citing *State v. Kelly*, 2005 MT 200, ¶ 21, 328 Mont. 187, 119 P.3d 67).

¶24 The instruction stated an incorrect definition of consent under the law applicable to this case. The instruction permitted the jury to find Katheryn incapable of consent if it found she met a categorical rule that certain persons are incapable of consent, and consent thus cannot be inferred from other facts. Under the ordinary meaning of consent—captured in the first part of the instruction given here—the jury would have had to resolve a factual dispute between John and Katheryn concerning her consent. But the language of the second part of the challenged instruction excused the jury from looking at the evidence as a whole; it could look just to those categorical exceptions. This erroneous instruction meant that the City did not have to meet the burden required by the 2015 "ordinary meaning" language.

¶25 We are not persuaded that the Municipal Court fully and fairly defined consent as it applied to sexual assault in 2015 when it used a definition of consent from the 2017 amended statutes. The statutory language and our case law are clear that, in 2015, the definitions of consent for sexual assault and sexual intercourse without consent were different. *Stevens*, ¶ 59; *Detonancour*, ¶ 64; §§ 45-5-501 to -503, MCA (2015). We hold that the Municipal Court's instruction on consent did not fully and fairly instruct the jury on the applicable law.

¶26 *2. Did the erroneous jury instruction prejudicially affect Zerbst's substantial rights?*

¶27 To constitute reversible error, a mistake in rendering jury instructions "must prejudicially affect the defendant's substantial rights." *Cybulski*, ¶ 34; *see State v. Neiss*, 2019 MT 125, ¶ 15, 396 Mont. 1, 443 P.3d 435 (citing *Kaarma*, ¶ 7) ("We will not reverse unless a mistake in instructing the jury prejudicially affected the defendant's substantial rights."); *Archambault*, ¶ 14 (citing *State v. Courville*, 2002 MT 330, ¶ 15, 313 Mont. 218, 61 P.3d 749) ("If the district court has rendered instructions that are erroneous in some aspect, the mistake must prejudicially affect the defendant's substantial rights in order to constitute a reversible error."); *see also* § 46-20-701, MCA ("A cause may not be reversed by reason of any error committed by the trial court against the convicted person unless the record shows that the error was prejudicial.") This Court will reverse a conviction and order a new trial if an erroneous jury instruction prejudicially affects the defendant's due process rights. *See, e.g., Resh*, ¶ 20; *State v. Carnes*, 2015 MT 101, ¶¶ 15-16, 378 Mont. 482, 346 P.3d 1120; *State v. Bradley*, 269 Mont. 392, 396, 889 P.2d 1167, 1169 (1995).

¶28 Conversely, instructional errors are not prejudicial and do not adversely affect a defendant's substantial rights if the Court concludes that, on the whole, the district court properly instructed the jury on the applicable law. *See Sanchez*, ¶ 20; *State v. Williams*, 2015 MT 247, ¶ 17, 380 Mont. 445, 358 P.3d 127 (although one instruction listing the elements of the crime was clearly defective, the jury instructions as a whole fairly instructed the jury on the elements).

¶29 Erroneous jury instructions that do not fully and fairly instruct the jury on the applicable law will be considered harmless if the instructions do not affect the defendant's substantial rights. In *State v. Scarborough*, 2000 MT 301, ¶ 50, 302 Mont. 350, 14 P.3d 1202, we held that the jury instructions did not fully and fairly instruct the jury on the applicable law because they "effectively precluded consideration of Scarborough's affirmative defense." The erroneous jury instructions were not prejudicial, however, because they did not affect Scarborough's substantive rights; there was no evidence that he had met the burden of proof required for his affirmative defense, and the erroneous jury instruction "could have had no effect on the outcome of the trial." *Scarborough*, ¶ 51. Thus, the error was harmless.

¶30 The Fourteenth Amendment of the United States Constitution and Article II, Section 17, of the Montana Constitution guarantee due process of law. Due process requires that the government prove every element of the offense beyond a reasonable doubt. *Carnes*, ¶ 11 (citing *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073 (1970) ("the Due Process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.")).

¶31 In *Bradley*, the jury was not properly instructed on the elements of sexual intercourse without consent because the instruction did not contain both subsections of the statute applicable at the time of the offense. 269 Mont. at 396, 889 P.2d at 1169. We held that the instructions prejudiced Bradley by instructing the jury on an incomplete version of the appropriate law. The erroneous instruction removed from the jury's consideration a

question of fact required to establish all elements of the offense. Finding the error prejudicial, we reversed and remanded for a new trial. *Bradley*, 269 Mont. at 396, 889 P.2d at 1169.

¶32 In *State v. Spotted Eagle*, the district court abused its discretion when it erroneously instructed the jury on the law regarding the essential elements of the charge against the defendant. 2010 MT 222, ¶ 12, 358 Mont. 22, 243 P.3d 402. "Spotted Eagle was specifically charged with causing bodily injury to a partner. The jury should not have been instructed on the law regarding reasonable apprehension of bodily injury because that was never charged." *Spotted Eagle*, ¶ 15. Because the defendant's substantial rights were affected by an inaccurate statement of the elements of the offense as charged, we reversed and remanded for a new trial. *Spotted Eagle*, ¶ 17.

¶33 We also have found prejudice from erroneous jury instructions under our heightened plain-error standard. The defendant in *Carnes* was charged with assault on a peace officer. The statute required that a person must act purposely or knowingly with respect to all elements of the offense. On appeal, Carnes claimed that the given jury instruction did not require the jury to find the defendant knew that the deputies were in fact peace officers, an essential element of the offense. *Carnes*, ¶ 8. The claim was not properly preserved for appeal, so we invoked the doctrine of plain error to review the defendant's instructional claims. *Carnes*, ¶ 13. We held that the claim of error implicated the defendant's right to due process of law, a fundamental constitutional right, and concluded that the instruction given to the jury was a misstatement of the law. *Carnes*, ¶¶ 13-14. We held that the error was "clearly" prejudicial because the State did not meet its burden to prove all of the

elements of the offense. *Carnes*, ¶ 15. We reversed and remanded for a new trial. *Carnes*, ¶ 16.

¶34 *Resh* also involved plain-error review of an unpreserved objection to an erroneous jury instruction that misstated an element of one of the charged offenses. *Resh*, ¶ 17. We concluded that the instruction prejudiced Resh because it allowed the jury to convict him based solely on an inapplicable statutory category and without examining all of the testimony or the witnesses' credibility. *Resh*, ¶ 20. We reversed and remanded for a new trial. *Resh*, ¶ 21.

¶35 Zerbst asserts that the prejudice analysis here is similar to *Resh* because the consent instruction offered the City an alternative means of categorically establishing the "without consent" element outside what a jury may view as the term's "ordinary meaning." Because the instruction allowed the jury to find Katheryn legally incapable of consenting, contrary to the ordinary definition of consent, Zerbst argues that the City did not meet its burden to prove the elements of the offense of sexual assault beyond a reasonable doubt.

¶36 The City asserts that, to the extent any instructional error occurred, the error was harmless because it did not prejudicially affect Zerbst's substantive rights. The City asserts that Zerbst's defense never centered on whether there was consent; Zerbst instead denied that any of his touching was done for the purpose of sexually arousing himself or Katheryn and alleged a vindictive motive that undermined Katheryn's credibility. The City asserts that there is no evidence in the record Katheryn ever assented or approved to anything more

than a massage when her lower legs were swollen; Katheryn denied Zerbst had consent to touch her at all.[2]

¶37 The jury must find lack of consent to convict a defendant of sexual assault. This is an essential element of the crime that the City has the burden to prove beyond a reasonable doubt. Section 45-5-502(1), MCA (2015). Although the prosecutor did not emphasize its specific categorical language, the jury was told that a person is absolutely incapable of consent by law if he or she has a mental disability. Instead of considering the definition of "consent" under its "ordinary meaning," the instruction allowed the jury to substitute the absolute prohibition for its consideration and weighing of the witness testimony. Without that erroneous instruction, the jury could not rely on the categorical exclusions rendering a person incapable of consent as a matter of law. It would instead have had to resolve the factual disputes between Zerbst and Katheryn to determine whether she consented to his actions. The court gave no other instructions that ameliorated the categorical exclusions to the definition of consent.

¶38 Zerbst properly objected to the instruction. Under the applicable standard of review, Zerbst was entitled to jury instructions that fully and fairly instructed the jury on the applicable law regarding the element of consent; it was not so instructed. That undermined the prosecution's burden to prove each element beyond a reasonable doubt. Because there

[2] The State asserts that there was plenty of credible evidence for any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt, citing *State v. Haser*, 2001 MT 6, ¶ 18, 304 Mont. 63, 20 P.3d 100. Zerbst does not contest the sufficiency of the evidence but alleges an instructional error that "preclude[d] the jury from making a finding on the actual element of the offense." *Neder v. United States*, 527 U.S. 1, 10, 119 S. Ct. 1827, 1834 (1999).

was evidence from which the jury could have found Katheryn categorically incapable of consent under the 2017 definition, we are unable to say that the erroneous instruction "could have had no effect on the outcome of the trial." *Scarborough*, ¶ 51. We hold that Zerbst's substantial due process right was prejudiced when the trial court improperly instructed the jury on the consent element of the sexual assault charge.

**CONCLUSION**

¶39 The Municipal Court abused its discretion when it did not fully and fairly instruct the jury on the applicable law regarding the definition of consent as it applied to sexual assault in 2015. Zerbst's substantial rights were prejudicially affected. We therefore reverse and remand for a new trial.

/S/ BETH BAKER

We Concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ LAURIE McKINNON
/S/ JIM RICE