DA 22-0547

IN THE SUPREME COURT OF THE STATE OF MONTANA

2024 MT 37

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DANIEL CHRISTOPHER ROWE,

Defendant and Appellant.

APPEAL FROM: District Court of the First Judicial District,
In and For the County of Broadwater, Cause No. DDC-2020-32
Honorable Christopher D. Abbott, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Colin M. Stephens, Stephens Brooke, P.C., Missoula, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Katie F. Schulz, Assistant Attorney General, Helena, Montana

Cory Swanson, Broadwater County Attorney, Townsend, Montana

Submitted on Briefs: August 16, 2023

Decided: February 27, 2024

Filed:

Clerk

Justice Laurie McKinnon delivered the Opinion of the Court.

¶1 Daniel Christopher Rowe (Rowe) appeals his conviction for sexual assault, a felony, from the First Judicial District Court, Broadwater County. We reverse and remand for a new trial.

¶2 We restate the dispositive issues as[1]:

¶3 1. *Whether the District Court erred in admitting a subsequent uncharged act of sexual assault as proof of motive or plan to commit several earlier sexual assaults charged pursuant to a "common scheme."*

¶4 2. *Whether the jury instruction allowing the jury to select a conduct-based or result-based mental state definition violated Rowe's right to due process.*

FACTUAL AND PROCEDURAL BACKGROUND

¶5 On July 31, 2021, the State charged Rowe with one count of sexual assault of H.B., who was under sixteen years of age at the time of the offense. Rowe, who was married to H.B.'s older sister, Mari, was a father-figure to H.B. H.B. had not seen his father since he was 5 years old and would spend a lot of time with the Rowe family. Rowe and Mari had four children of their own–two sons and two daughters. Out of concern for his nephews' safety, H.B. disclosed Rowe's abuse several years later after learning that Rowe was requesting additional parenting time with his nephews, and not asking for similar time with his nieces. H.B. disclosed multiple instances of abuse, which occurred in different counties over a period of several years.

[1] As we conclude these two issues are dispositive, we do not address whether Rowe's right to be present during critical stages of trial was violated.

¶6 H.B. reported that the first assault he recalled occurred in Townsend in 2008 when H.B. was eleven years old. Rowe asked H.B. about his private parts and how H.B. felt about them. H.B. showed Rowe his private parts, but Rowe did not touch them at that time. Rowe would wrestle with H.B. in his underwear and when H.B. would lie on his stomach on the floor, Rowe laid on top of him, humping against H.B.'s back.

¶7 In the summer of 2012, H.B. went to the Helena Wingate with Rowe and his family. When H.B. was alone with Rowe on the bed, Rowe touched H.B.'s penis through his underwear. During another incident at the Wingate, H.B. came out of the shower while Rowe was sitting on the bed. Rowe put H.B.'s penis in his mouth and told H.B. not to tell anyone.

¶8 In the fall of 2012, Rowe took H.B. on a hunting trip to White Sulphur Springs where they stayed at the hotel at the hot springs. H.B. shared a bed with Rowe and when they were in bed Rowe began fondling H.B.'s penis. H.B. explained to Rowe it was wrong but Rowe assured him it was fine.

¶9 The final incident occurred in Lewistown in 2013 after H.B. had turned sixteen. Rowe and H.B. stayed in the guest house of some friends. When both were in bed, Rowe rubbed H.B.'s penis and then made H.B. rub Rowe's. H.B. explained it was wrong and "gay." Rowe assured H.B. that it was not gay.

¶10 In 2017, Rowe sought a divorce from Mari because he no longer wanted to hide the fact that he was gay. In January 2020, Rowe texted Mari asking for more time alone with their sons. When H.B. learned of this, he told Mari about Rowe's abuse. Mari obtained a

protective order and H.B. contacted Child and Family Services, who referred the matter to the Broadwater County Sheriff's Office. Rowe was interviewed by police and denied the accusations. The State charged a single count of sexual assault and alleged that all of the incidents, except that occurring in Lewistown, were done pursuant to a common scheme.

¶11 Rowe's trial began on December 13, 2021. The incident that occurred in Lewistown happened when H.B. was over sixteen and the State advised it would not include the Lewistown incident in the charges but nonetheless considered it admissible evidence. Rowe filed a motion in limine to exclude evidence of the Lewistown incident. The District Court denied the motion, finding the evidence was relevant for purpose and motive under Rule 404(b) and that its risk of prejudice was low considering it involved the same victim and type of conduct of the three incidents alleged pursuant to a common scheme.

¶12 H.B. testified about all the incidents, including the uncharged Lewistown incident. H.B. testified Rowe assaulted him on a hunting trip in Lewistown and gave many details about the house where they stayed and the surrounding area. On cross-examination, defense counsel questioned H.B.'s memory regarding details of the incident. The State presented three more witnesses regarding the Lewistown incident: Konnie Birdwell, the owner of the Lewistown house; James Matthews, a youth pastor who was on the hunting trip in Lewistown with H.B. and Rowe; and Officer Honeycutt, who interviewed H.B. about the Lewistown incident and investigated it. Birdwell testified about the details of the house, and Matthews testified about the trip and the house, though neither spoke to the incident itself. Rowe's counsel objected to the testimony based on M. R. Evid. 402, 403,

and 404. All objections were overruled by the court. Before Officer Honeycutt's testimony, defense counsel requested a sidebar conference and objected to the continuing evidence regarding the Lewistown incident. The Court allowed the testimony from Officer Honeycutt and provided a cautionary instruction to the jury that Rowe could not be convicted based on the Lewistown incident. Officer Honeycutt then gave testimony about H.B.'s demeanor during the interview and the details of the house where the alleged incident occurred. Defense counsel objected to Honeycutt saying H.B. appeared "truthful" and "calm" in his interview. The Court sustained these objections and instructed the jury that only they could determine the credibility of the witnesses.

¶13 During the settling of jury instructions, the State and Rowe disagreed about which definition of knowingly to give to the jury. The State proposed an instruction with both the conduct-based and result-based definition of knowingly, while Rowe wanted just the conduct-based instruction. The Court decided to use the State's instruction which read: "A person acts knowingly when the person is aware of his or her conduct, or when the person is aware there exists the high probability that the person's conduct will cause a specific result." Rowe objected to the use of this instruction.

¶14 Prior to the jury's deliberation, the court mentioned there was an event in Townsend the next day that some jurors wanted to attend, and they would likely break deliberations by five the next day and continue in the morning. After all the testimony had been given, the court stated to counsel "we'll have to come back and do deliberations tomorrow unless the one juror decides she'd rather power through tonight." After the jury had been given

instructions and sent to deliberate for several hours, the court reconvened the jury, the State, and defense counsel for a discussion about whether to break for the evening and continue deliberations tomorrow so that some jurors could attend a children's Christmas concert. The court stated it did not instruct defense counsel to summon Rowe given the nature of the inquiry. After the jurors gave their opinions, the court discussed the matter privately with counsel. The State proposed letting the jury go for the concert and then bringing them back for deliberation. Defense counsel objected to bringing the jurors back that evening. After reconvening, the jurors collectively decided to skip the break and continue deliberations that evening.

¶15 The jury found Rowe guilty of sexual assault on a minor.

STANDARD OF REVIEW

¶16 A trial court's decision on whether to admit evidence of other crimes, wrongs, or acts under M. R. Evid. 404(b), is directed to the relevance and admissibility of such evidence and thus reviewed for an abuse of discretion. *State v. Crider*, 2014 MT 139, ¶ 14, 375 Mont. 187, 328 P.3d 612. An abuse of discretion occurs when a district court acts arbitrarily without conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice. *State v. Madplume*, 2017 MT 40, ¶ 19, 386 Mont. 368, 390 P.3d 142. To the extent an evidentiary ruling is based on an interpretation of an evidentiary rule or statute, our review is de novo. *State v. Lacey*, 2010 MT 6, ¶ 12, 355 Mont. 31, 224 P.3d 1247.

¶17 We review a district court's jury instructions in a criminal case to assess whether the instructions, when considered as a whole, fully and fairly instructed the jury on the applicable law. *State v. Ragner*, 2022 MT 211, ¶ 13, 410 Mont. 361, 521 P.3d 29. We will only reverse if the district court abused its discretion in a way that prejudicially affected a defendant's substantial rights. *Ragner*, ¶ 13. "If the instructions are erroneous in some aspect, the mistake must prejudicially affect the defendant's substantial rights in order to constitute reversible error." *State v. Deveraux*, 2022 MT 130, ¶ 20, 409 Mont. 177, 512 P.3d 1198. Jury instructions that relieve the State of its burden to prove each element of an offense violate a defendant's right to due process. *State v. Hamernick*, 2023 MT 249, ¶ 13, __ P.3d __ (citing *State v. Miller*, 2008 MT 106, ¶ 11, 342 Mont. 355, 181 P.3d 625).

DISCUSSION

¶18 1. *Whether the District Court erred in admitting a subsequent uncharged act of sexual assault as proof of motive or plan to commit several earlier sexual assaults charged pursuant to a "common scheme."*

¶19 In 2021, the State charged Rowe with "Common Scheme Sexual Assault of a Minor," a felony, in violation of § 45-5-502(1) and (3), MCA. The single count charge was based on three separate alleged incidents of sexual assault involving the same victim at different locations in 2008, Summer 2012, and Fall 2012. In pertinent part, the Information charged Rowe with:

> **Count I: Sexual Assault, Common Scheme, a Felony, Mont. Code Ann. § 45-5-502(1), (3),** when on one or more occasions in Broadwater, Meagher, or Lewis & Clark County, the Defendant . . . knowingly subjected another person, H., to sexual contact without consent. At the time of the offense, H. was a minor under the age of 16 years old, and Rowe was 3 or more years older than H.

> This offense is charged in . . . Broadwater County pursuant to Mont. Code Ann. § 46-3-112(1), "if two or more acts are committed in furtherance of a common scheme, the charge may be filed in any county in which any of the acts or offense occurred."
>
> Common scheme is defined in Mont. Code Ann. § 45-2-101(8) as "a series of act or omissions . . . motivated by a purpose to accomplish a single criminal objective or by a common purpose or plan that results in the repeated commission of the same offense that affects the same person."

The State then used the charged common scheme to introduce testimony of two separate witnesses—the alleged victim and the investigating police officer—regarding the details of a fourth uncharged sexual assault of the same victim in 2013 in Lewistown, Montana, when the victim was age sixteen or older.[2] Over defense objection that it was highly prejudicial bad character evidence precluded from admission under M. R. Evid. 401, 403, and 404(b), the District Court admitted the uncharged bad acts evidence regarding the Lewistown incident based on the State's assertion that it was nonetheless admissible as evidence of the defendant's common motive to commit the charged common scheme sexual assaults that occurred earlier in 2008 and 2012. While not entirely clear as to whether the court admitted it under the M. R. Evid. Rule 404(b); § 26-1-103, MCA ("transaction rule"); or some combination thereof; admission of the other uncharged bad acts evidence was erroneous in every regard.

[2] The only witnesses testifying about the details of the 2013 Lewistown assault were H.B. and the investigating officer. Although the State produced three other witnesses who testified about inconsequential details concerning the house and surrounding circumstances, the bad acts evidence—which was the evidence that prejudiced Rowe—came in through the testimony of H.B. and the officer. Accordingly, our discussion concerns the admission of these two witnesses only, as the error in admitting their testimony on this incident was dispositive.

¶20 The fundamental error that led to the improper admission of the other bad acts evidence was that the State charged Rowe with a fictional offense that is not cognizable under Montana law; the State's charge being, "Common Scheme Sexual Assault of a Minor." The cognizable offense of felony Sexual Assault of a Minor "less than 16 years old" is defined by § 45-5-502(1) and (3), MCA, which expressly sets forth the essential elements of proof. Notably, the offense does not provide for sexual assaults committed pursuant to a "common scheme." However, the Legislature has designated certain offenses that may be committed pursuant to a "common scheme" which, if this essential element is proven, will qualify the offender for an enhanced penalty. *See* §§ 45-6-301(7)(b)(ii), -309(4)(c), -312(2), -316(3)(c), -317(2)(c), -325(4)(c), -341(2), and 45-7-210(2)(b), MCA (various species of common scheme theft/fraud).[3] "Common scheme" is defined in § 45-2-101(8), MCA, as "a series of acts or omissions resulting in a *pecuniary loss* to the victim . . . ." (Emphasis supplied). The legislature thus chose to provide enhanced penalties for certain enumerated property offenses by specifically setting forth a common scheme element and then defining common scheme in § 45-2-101(8), MCA. Accordingly, "common scheme" offenses are exclusively *property crimes* with felony-enhanced penalties reflecting the magnitude of the resulting "pecuniary loss to the victim." *See* § 45-2-101(8), MCA ("common scheme" definition); *compare*

[3] *See similarly* §§ 15-61-205(4), 23-5-156(3), 30-14-1414(2)(c), 87-6-206(1)-(2), (5), 33-1-1505(3)(c), -1504(2)(c), -1506(3)(c), -1507(3)(c), -1508(2)(c), MCA (medical savings account fraud, gambling device fraud, telemarketing fraud, unlawful game transactions, and insurance fraud).

§§ 45-6-301(7)(b) (ii), -309(4)(c), -312(2), -316(3)(c), -317(2)(c), -325(4)(c), -341(2), and 45-7-210(2)(b), MCA.[4] In contrast, nowhere in the statutory definition of the offense of felony Sexual Assault of a Minor is there any express or implied reference to a "common scheme" as a penalty enhancer or essential element of proof. *See* § 45-5-502(1) and (3), MCA. As defined by § 45-5-502(1) and (3), MCA, the offense of Sexual Assault of a Minor is thus neither cognizable, nor chargeable, as a "common scheme" offense. From the outset, Rowe was charged with committing a fictional offense, not cognizable under Montana law.

¶21 Moreover, the State's reference in the Information to § 46-3-112(1), MCA, did not ameliorate the substantive prejudicial effect of its initial charging error. In pertinent part, § 46-3-112(1), MCA, provides that "if two or more acts are committed in furtherance of a *common scheme*, the charge may be filed in any county in which any of the acts or offenses occurred." Section 46-3-112, MCA, which is contained in "Chapter 3—Venue," is no more than a *venue* provision regarding the correct geographic *situs* of the prosecution. Section 46-3-112(1), MCA, is thus merely a procedural provision having no bearing on either the substantive nature of the charged criminal conduct in a particular case, or the statutorily specified required elements of proof. *See* § 45-1-101, MCA (defining offenses cognizable under the Montana "Criminal Code"); *compare* § 46-1-103, MCA (Montana Code of Criminal Procedure).

[4] *See similarly* §§ 15-61-205(4), 23-5-156(3), 30-14-1414(2)(c), 87-6-206(1)-(2), (5), 33-1-1505(3)(c), -1504(2)(c), -1506(3)(c), -1507(3)(c), -1508(2)(c), MCA.

¶22 The second fundamental error that contributed to admission of the uncharged other acts evidence was the State's charging of the fictional "common scheme" sexual assault in a *single count* with three separate assaults for conviction. Even when set forth within the definition of a statutory offense, a "common scheme" offense still requires proof of the elements of each "repeated commission" of the base offense. *See* § 45-2-101(8), MCA ("common scheme" definition); *compare* §§ 45-6-301(7)(b)(ii),-309(4)(c), 312(2), -316(3)(c), -317(2)(c), -325(4)(c), -341(2), and 45-7-210(2)(b), MCA.[5] It thus follows that each of the "repeated commissions" of the offense charged as the predicates for the alleged "common scheme" must generally be distinctly pled in separate counts. *See* § 46-11-404(1) and (3), MCA ("two or more offenses . . . may be charged in the same charging document in a separate count . . . if the offenses . . . are based on the same transactions . . . constituting parts of a common scheme or plan . . . . Each offense of which the defendant is convicted must be stated in the verdict or [court] finding"); *State v. Richards*, 274 Mont. 180, 187, 906 P.2d 222, 226 (1995) ("[j]oinder is proper where the offenses are logically linked by motive and where overlapping proof must be offered"). Here, however, as stated in the Information and supporting probable cause affidavit, the State charged Rowe with a *single count* of felony Sexual Assault by "common scheme" based on proof of his "repeated commission" of the sexual assault offense against the same victim "*on one or more*" of three "occasions" in Broadwater, Meagher, *or* Lewis and Clark

[5] *See similarly* §§ 15-61-205(4), 23-5-156(3), 30-14-1414(2)(c), 87-6-206(1)-(2), (5), 33-1-1505(3)(c), -1504(2)(c), -1506(3)(c), -1507(3)(c), -1508(2)(c), MCA.

counties in 2008 and 2012. At the State's request, the District Court then, in pertinent part, instructed the jury consistent with the State's improper charge that:

> Defendant is charged with . . . Sexual Assault by Common Scheme . . . [and] may be found guilty if the proof shows . . . that [he] committed *any one or more of such acts*.

Jury Instruction 11 (emphasis added). The inclusion of a special unanimity instruction[6] did not cure the prejudice inuring from a fictitious charge of sexual assault committed pursuant to a "common scheme." The erroneous joinder into one count of the three separate alleged instances of sexual assault violated § 46-11-404(1) and (3), MCA, and set the table for the State's proffer of an uncharged, subsequent sexual assault occurring in Lewistown, under the pretense that it was evidence of Rowe's common motive in furtherance of the charged common scheme.

¶23 The fundamental charging and instructional errors clearly manifest at least one of the purposes for charging the fictional "common scheme" offense—to set up a cognizable *theory of admissibility* for the uncharged sexual assault under M. R. Evid. Rule 404(b) and/or the statutory transaction rule. Under M. R. Evid. 401 and 402, any evidence tending to make the existence of any fact of consequence more or less probable is generally admissible, except as otherwise provided by constitutional law or statutory or common law rules of evidence. As a "theory of admissibility," M. R. Evid. 404(b) generally bars

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[6] *See State v. Vernes*, 2006 MT 32, ¶ 21, 331 Mont. 129, 130 P.3d 169 quoting *State v. Weaver*, 1998 MT 167, ¶ 33, 290 Mont. 58, 964 P.2d 713) (fundamental due process right of criminally accused to require "substantial [jury] agreement as to the principal factual elements underlying a specific offense"); *Weaver*, ¶¶ 37-40 (specific unanimity instruction required when a single charged offense is susceptible to proof by more than one alleged predicate factual basis).

admission of other uncharged bad acts of the defendant as prejudicial bad character or propensity evidence. M. R. Evid. 404(b); *State v. Lake*, 2022 MT 28, ¶¶ 26-27, 407 Mont. 350, 503 P.3d 274 (The purpose of Rule 404(b) is to prevent, based on evidence of other uncharged bad acts or allegations, an improper inference by the jury that the accused "is a person of bad character, and thus likely guilty of the charged offense based on common experience or belief that persons of bad character are predisposed or have a tendency or propensity to subsequently act in conformance therewith."). Other bad acts evidence may yet be admissible, in the discretion of the court, for some other relevant purpose such as proof of the defendant's motive, intent, or common plan. *See* M. R. Evid. 401-02 and 404(b); *Lake*, ¶¶ 26-27. Here, whether under Rule 404(b) or § 26-1-103, MCA (transaction rule), the State's theory of admissibility was that the alleged and uncharged sexual assault of the same victim by Rowe in 2013 was relevant to prove his common motive to commit *one or more* of three sexual assaults in 2008 and 2012, as charged under a single-count "common scheme."

¶24 However, the State's theory for admission of the uncharged bad act evidence is fatally flawed in multiple regards. First, as a threshold matter of relevance under M. R. Evid. 401 and 402, the uncharged sexual assault that allegedly occurred in Lewistown in 2013, occurred several months *after* Rowe's alleged commission of the Fall 2012 sexual assault, which was the latest of the three "common scheme" sexual assaults. Consequently, whether asserted for a non-propensity purpose under Rule 404(b) or the statutory transaction rule, an uncharged sexual assault that did not occur until several months *after*

the last of the charged "common scheme" sexual assaults cannot logically tend to prove or explain the alleged common motive or plan under which Rowe committed the "common scheme" sexual assaults *months and years earlier*.

¶25 Second, as a related matter of relevance under M. R. Evid. 404(b), mere reference to a permissible non-propensity theory of admissibility under Rule 404(b) or the statutory transaction rule is insufficient alone to avoid Rule 404(b)'s express bar of propensity evidence. *Lake*, ¶ 27. Other uncharged bad acts evidence "is admissible under the alternative clause of Rule 404(b) 'only if the proponent can clearly articulate how' it 'fits into a chain of logical inferences, no link of which may be an inference that the defendant . . . had the propensity' or was predisposed to commit" such an offense and thus committed the charged offense in conformity with that propensity or predisposition. *Lake*, ¶ 27 (quoting *State v. Madplume*, 2017 MT 40, ¶ 23, 386 Mont. 368, 390 P.3d 142). Here, the only probative value that an uncharged, subsequent sexual assault could logically have to prove the alleged common motive or scheme is a propensity-based inference that because he sexually assaulted the same victim in 2013, he must have done it before months and years earlier as charged. Neither at trial nor on appeal, has the State clearly articulated a relevant, alternative non-propensity theory of admission for this other bad acts evidence.

¶26 Third, evidence is admissible under the statutory transaction rule in the discretion of the court only if it is "inextricably linked" or intertwined with the alleged criminal conduct and is relevant to an essential element of the offense and provides a "comprehensive and complete picture" necessary for a full explanation or understanding

the entire criminal transaction at issue. *State v. Guill*, 2010 MT 69, ¶ 36, 355 Mont. 490, 228 P.3d 1152 (citing *State v. Bauer*, 2002 MT 7, ¶ 23, 308 Mont. 99, 39 P.3d 689). Nonetheless, the statutory transaction rule is still subject to the unqualified Rule 404(b) preclusion of propensity evidence. Here, it is difficult to logically fathom on what non-propensity basis a subsequently committed sexual assault can be "inextricably linked or intertwined with," much less necessary to provide or aid a "comprehensive and complete" explanation or understanding of the charged sexual assaults committed months or years earlier. Nor did the State clearly articulate a genuine non-propensity rationale prior to admission of the evidence.

¶27 Fourth, undisputedly, the admissibility of other bad acts evidence in the face of the Rule 404(b) propensity restriction depends, not on the "substance" of the evidence, but on the particular non-propensity purpose for which the proponent *demonstrates* its relevance. *Lake*, ¶ 27. However, even when offered for a legitimate non-propensity purpose, courts must still consider and balance the likely prejudicial effect of the substantive nature of other bad acts evidence against its relative probative value for the permissible non-propensity purpose offered. *See* M. R. Evid. 403 (discretionary exclusion of otherwise relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice"). Thus, particularly in the context of prior bad acts involving the sexual assault of children, we have explained:

> The *need and demand for careful consideration* and application of Rule 403 is *particularly critical* in the case of *other bad acts evidence* because, even when otherwise validly admissible for a non-propensity purpose, such evidence is inherently prejudicial insofar that it impugns or has the tendency

> to impugn the character of the accused based on matters not directly at issue, thus arousing or provoking hostility against him or her without regard to its probative value, thereby inviting or tempting the jury to find guilt on an improper basis. . . . *See State v. Pulst*, 2015 MT 184, ¶ 19, 379 Mont. 494, 351 P.3d 687 (internal citations omitted); *State v. Franks*, 2014 MT 273, ¶¶ 15-16, 376 Mont. 431, 335 P.3d 725 (internal citations omitted); *Salvagni*, ¶ 48 (prior bad acts evidence has "potential to be highly prejudicial"); *Derbyshire*, ¶ 51 (prior bad acts evidence carries danger "that the jury will penalize [the accused] simply for his past bad character ... or prejudge him and deny him a fair opportunity to defend against the particular crime charged"—internal citations omitted); *State v. Thompson*, 263 Mont. 17, 28-29, 865 P.2d 1125, 1132 (1993) (citing 1 J. Strong, *McCormick on Evidence* § 185 (4th ed. 1992)); *Old Chief v. United States*, 519 U.S. 172, 180-81, 117 S. Ct. 644, 650, 136 L.Ed.2d 574 (1997). This *inherent danger* is *even more acute when the other bad acts evidence pertains to child molestation*. *Franks*, ¶ 17 (noting highly inflammatory nature of child molestation evidence). *Accord Pulst*, ¶ 19 (citing *Franks*). *See also State v. Van Kirk*, 2001 MT 184, ¶ 46, 306 Mont. 215, 32 P.3d 735 (noting "the highly inflammatory nature of child molestation evidence"); *United States v. Ham*, 998 F.2d 1247, 1252 (4th Cir. 1993) ("no evidence could be more inflammatory or more prejudicial than allegations of child molestation"). We have thus repeatedly warned districts courts, and the State, to exercise great caution in the use of prior acts evidence regarding child sexual abuse. *See Pulst*, ¶ 19; *Franks*, ¶ 17. *See also State v. Sage*, 2010 MT 156, ¶¶ 36-37, 357 Mont. 99, 235 P.3d 1284 ("courts must . . . exercise great caution when" allowing use of "potentially inflammatory propensity or character evidence" of a sexual nature *even when admitted for some other limited legitimate purpose such as under the transaction rule*).

Lake, ¶ 32 (emphasis added). Here, the State erroneously charged Rowe with a fictitious "common scheme" offense in a single count based on "one or more" of three instances of alleged sexual assault, which was then mirrored in a key jury instruction. Compounding those already prejudicial errors, the State failed to clearly articulate a relevant non-propensity purpose of uncharged other bad acts evidence. The evidence was plainly of a type and nature that inherently posed a high risk of undue prejudice even when admitted for a legitimate purpose. Under these circumstances, the admission of the

testimonies of the alleged victim and investigating officer regarding the uncharged allegation of sexual assault in 2013 denied Rowe his right to a fair and impartial trial and was an abuse of discretion under Rule 401, 403, and 404(b), as well as the statutory transaction rule.

¶28 2. *Whether the jury instruction allowing the jury to select a conduct-based or result-based mental state definition violated Rowe's right to due process.*

¶29 The offense of sexual assault occurs when "a person . . . knowingly subjects another person to any sexual contact without consent." Section 45-5-502, MCA. Consent is ineffective when the victim "is less than 14 years old and the offender is 3 or more years older than the victim." Section 45-5-502(5)(a)(ii). Montana law provides three different definitions of knowingly: one that is conduct-based, one that is result-based, and one regarding the existence of a particular fact that is an element of an offense. Section 45-2-101(35), MCA. Relevant here are the conduct-based and result-based definitions. The conduct-based definition of knowingly provides: "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." Section 45-2-101(35), MCA. The results-based definition provides: "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." Section 45-2-101(35), MCA. "Whether an offense is a conduct-based offense or a result-based offense, is determined by an analysis of its elements." *Deveraux*, ¶ 31.

¶30 The district court must instruct the jury on what "knowingly" means in the context of the particular crime. *State v. Azure*, 2005 MT 328, ¶ 20, 329 Mont. 536, 125 P.3d 1116. Courts may not present a smorgasbord approach such that the jury could employ any one of several definitions. Hence, a court may not present several "definitions to jurors and require the jurors to select the one definition it believes most applicable." *Azure*, ¶ 20.

¶31 Here, the jury instruction for knowingly allowed the jury to select which definition it believed applied. The jury instruction on the definition of knowingly given in this case provided: "A person acts knowingly when the person is aware of his or her conduct, or when the person is aware there exists a high probability that the person's conduct will cause a specific result." Thus, the court gave both the conduct-based and result-based definitions for the offense of sexual assault and instructed the jury to use one *or* the other definition in reaching its verdict. We have held that a conduct-based definition is appropriate for the offenses of sexual assault, while a result-based definition is not. In multiple cases, we have approved conduct-based knowingly instructions for sexual offenses. See *Hamernick*, ¶ 27, *Deveraux*, ¶ 32; *State v. Gerstner*, 2009 MT 303, ¶ 29, 353 Mont. 86, 219 P.3d 866; *State v. Harrington*, 2017 MT 273, ¶ 16, 389 Mont. 236, 405 P.3d 1248. In *Hamernick*, we explained that sexual intercourse without consent is a conduct-based offense, necessitating an "awareness of conduct" mental state instruction. *Hamernick*, ¶ 26. We held that because the court gave an existence-in-fact instruction for the element of consent, the State's burden of proof was reduced, and Hamernick's conviction was reversed because his substantial rights were prejudicially affected. *Hamernick*, ¶ 27. In *Deveraux*, we held

the prohibited conduct—without consent—for the offense of sexual intercourse without consent, required a conduct-based instruction and we affirmed Deveraux's conviction even though he had asked for a results-based instruction. *Deveraux*, ¶ 32. Similarly in *Gerstner*, we held the conduct-based instruction given for sexual assault was appropriate, and a results-based instruction would have lowered the State's burden of proof. *Gerstner*, ¶ 31. The conduct-based instruction is the most appropriate since "[i]t is the particularized conduct of making sexual contact that the statue makes criminal." *Gerstner*, ¶ 29. In Rowe's case, the result-based definition of knowingly lowered the State's burden of proof and should not have applied to the conduct-based crime of sexual assault.

¶32 While a court must specify which definition of knowingly applies to any particular statutory element, "[d]ifferent 'knowingly' definitions may be applied to the different elements of an offense." *State v. Hovey*, 2011 MT 3, ¶ 22, 359 Mont. 100, 248 P.3d 303. In *Hovey*, we approved of the District Court giving a conduct-based knowingly instruction for the sexual abuse of children and a knowledge-of-fact definition of knowingly for knowledge that the models were underage. *Hovey*, ¶ 20-21. However, we again affirmed a results-based instruction for a sexual offense would be inappropriate and approved the conduct-based instruction because Hovey argued he was unaware the models were underage. *Hovey*, ¶ 20-21. Based on the foregoing, and under the facts present here, only the conduct-based definition of knowingly should have been given to the jury.

¶33 A conviction will not be overturned due to improper jury instruction unless the error prejudiced the defendant's substantial rights. *Gerstner*, ¶ 15. If jury instructions lower the

State's burden to prove each element beyond a reasonable doubt, they violate the defendant's right to due process. *State v. Miller*, 2008 MT 106, ¶ 11, 342 Mont. 355, 181 P.3d 625. We will reverse a conviction if the State's burden of proof was lowered by an incorrect "knowingly" jury instruction, and the defendant suffered prejudice to their substantial rights as a result. *Hamernick*, ¶ 27; *State v. Secrease*, 2021 MT 212, ¶ 15, 405 Mont. 229, 493 P.3d 335 (jury instruction with conduct-based definition of knowingly rather than results-based definition for obstructing a peace officer lowered the State's burden of proof). The jury instruction here lowered the State's burden of proof. It did not correctly instruct the jury on the appliable law and thus affected Rowe's substantive rights.

CONCLUSION

¶34 The District Court erred in admitting a subsequent uncharged act of sexual assault as proof of motive or plan to commit several earlier sexual assaults charged pursuant to a "common scheme." The fundamental error that led to the improper admission of the other bad acts evidence was that the State charged Rowe with a fictional offense that is not cognizable under Montana law. The District Court also erred in offering both the conduct-based and result-based definition of knowingly for sexual assault without specifying to the jury which definition applied to which elements of the offense. Further, by giving a results-based definition, the court lowered the State's burden of proof resulting in a violation of Rowe's right to due process. We reverse Rowe's sexual assault conviction and remand for proceedings consistent with this opinion.

¶35 Reversed and remanded.

/S/ LAURIE McKINNON

We Concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ INGRID GUSTAFSON
/S/ DIRK M. SANDEFUR

Justice Jim Rice recused himself and did not participate in this matter.

Justice Beth Baker, dissenting.

¶36 I would affirm Rowe's conviction. First, addressing the argument Rowe makes on appeal, I would conclude that the District Court did not err when it determined that the probative value of evidence involving the Lewistown incident was not substantially outweighed by its prejudicial effect. Second, I agree that it was error for the District Court to instruct the jury on both the conduct-based and the result-based definitions of "knowingly" but would conclude, in light of the record as a whole, that the error was harmless. I also would conclude that Rowe has not made a case for plain-error review of his final claims or for ineffective assistance of counsel.

Lewistown Incident

¶37 Rowe's first claim of error is with the District Court's admission of evidence from three witnesses who were called to corroborate H.B.'s testimony about the trip to Lewistown. H.B. had described in his testimony details of the home in which the hunting party stayed and its location. Two of the three Lewistown witnesses—who included the

owner of the home and her son-in-law—gave testimony recalling Rowe's and H.B.'s visit there and describing the home's layout and interior. The son-in-law testified that H.B. "seemed very unhappy" as the party was leaving—which, at the time, he "probably would have just [described as] we're all pooped out." The third witness was Sergeant Honeycutt from the Lewistown Police Department, who investigated the incident. Over Rowe's objection, the court allowed Sgt. Honeycutt to also testify about the home where the party stayed and about H.B.'s demeanor when Honeycutt interviewed him. The court sustained Rowe's objection when Honeycutt offered that H.B. "appeared to be truthful" and instructed the jury that it was the sole judge "whether the witnesses are truthful[.]" The court explained further that it was "improper for a witness to comment on the credibility of a witness" and instructed the jury "to disregard that statement and give it no bearing."

¶38 Importantly, Rowe does not challenge the trial court's ruling that evidence of the Lewistown assault was admissible under M. R. Evid. 404(b) on a non-propensity theory. Rowe also acknowledges on appeal, "for the sake of argument," that the testimony was admissible under the transaction rule. He instead argues that "the sheer breadth of evidence the court allowed" prejudiced his right to a fair trial. Rowe thus limits his objection on appeal to Rule 403. Rowe did not challenge in the District Court the validity of the "common scheme" charge, and he makes no argument about that on appeal.

¶39 Notwithstanding the narrow scope of Rowe's appeal, the Court faults the State for its charging decision and uses that as a springboard to hold the trial court in error for admission of the Lewistown incident as improper propensity evidence. The Court provides

no specific Rule 403 analysis, simply concluding at the end that the evidence was "of a type and nature that inherently posed a high risk of undue prejudice even when admitted for a legitimate purpose." Opinion, ¶ 27.

¶40 "It is a settled rule in Montana that we will not review an issue raised for the first time on appeal." *In re N.G.H.*, 1998 MT 212, ¶ 19, 290 Mont. 426, 963 P.2d 1275 (citations omitted). With few exceptions, such as threshold issues of standing, we generally decline to consider a potential error in the proceedings "in the absence of a developed argument or briefing by the parties." *State v. Newbary*, 2020 MT 148, ¶ 27 n.7, 400 Mont. 210, 464 P.3d 999 (citing *State v. Allum*, 2005 MT 150, ¶ 20, 327 Mont. 363, 114 P.3d 233 (declining to address an issue not raised in the trial court or on appeal)); *In re D.A.H.*, 2005 MT 68, ¶ 7, 326 Mont. 296, 109 P.3d 247 (noting that standing is a threshold issue that the Court may raise *sua sponte*). Where such an exception does not apply, "[w]e must take the case as it comes to us." *State v. Williams*, 2010 MT 58, ¶ 20, 355 Mont. 354, 228 P.3d 1127. This basic principle of appellate review has constitutional undergirding. "[D]ue process requires a reasonable notice as to give everyone interested their opportunity to be heard." *Mont. Dep't of Natural Res. & Conservation v. ABBCO Invs., LLC*, 2012 MT 187, ¶ 29, 366 Mont. 120, 285 P.3d 532 (citations and internal quotation omitted). Absent an objection in the trial court or an argument from the Appellant, and without a corresponding opportunity for the State to be heard, it is error for this Court to reverse the trial court on the basis of an issue of its own making.

¶41 Turning to the merits of Rowe's singular Rule 403 claim, we accepted a similar argument recently in *State v. Peterson*, 2024 MT 5, ¶ 30, 415 Mont. 34, 541 P.3d 776, reversing the defendant's conviction for sexual assault because the probative value of other crimes testimony was substantially outweighed by the potential for unfair prejudice. After concluding that testimony from three other victims of the defendant's improper sexual conduct was admissible under M. R. Evid. 404(b) to show motive and intent, *Peterson*, ¶ 20, we examined the danger of unfair prejudice under Rule 403. The jury had learned that for the comparatively more egregious acts the defendant had committed against his other victims—which had come out in detail during the trial—he had been convicted of only one and served just 45 days in jail. *Peterson*, ¶ 25. The jury was given a copy of the judgment, and the State reminded jurors during closing argument of the 45-day jail term. *Peterson*, ¶ 25. After reviewing the record, we concluded on balance that "the State's use of the testimony from three women who accused Peterson of sexually abusing them when they were children carried significant danger that the jury would find Peterson guilty because he had committed similar offenses before and had not been adequately punished." *Peterson*, ¶ 26. In contrast, we rejected in *State v. Stryker* a challenge to evidence of a separate sexual assault on the child victim, despite considerable detail of the incident being presented at trial. 2023 MT 63, 412 Mont. 1, 527 P.3d 606. We found it "significant to the Rule 403 analysis that the 404(b) evidence at issue here was highly probative. It demonstrated that [the defendant] had an attraction to [the victim] that motivated him to

touch her with the purpose of gratifying his sexual desire, an element of the offense[.]" *Stryker*, ¶ 21.[1]

¶42 Here, none of the Lewistown witnesses provided any information about any sexual acts Rowe had committed—whether against H.B. or anyone else. Only H.B. provided evidence concerning the sexual assault that occurred in Lewistown. It is true that the District Court showed considerable latitude when it allowed the State to present testimony from all three witnesses, and some of the evidence arguably was cumulative. But evidence must be *unfairly* prejudicial to warrant reversing a conviction. *See State v. Madplume*, 2017 MT 40, ¶ 33, 386 Mont. 368, 390 P.3d 142. Rowe has not demonstrated how details about the "colors of the walls," the "hardwood floor[s]," or the paneling of the home in which Rowe and H.B. stayed unfairly prejudiced him. And Rowe ignores that he consistently challenged H.B.'s recollections during trial and grounded his defense in H.B.'s credibility. The State argued in closing that the jury could "decide whether [H.B.'s memory of that trip] helps you believe whether [H.B.] could clearly remember details."

¶43 The District Court managed the trial within its discretion, cautioning the State to limit the presentation of cumulative testimony, giving the jury limiting instructions, and responding appropriately to Rowe's objection when Sgt. Honeycutt went beyond the limits

[1] Illustrating the peril of deciding a case on a theory the parties have not raised or briefed, *Stryker* shows that it is not correct—as the Court dismissively concludes—that a sexual assault occurring *after* the charged conduct is not proper 404(b) evidence of common motive or plan. Opinion, ¶ 24. We rejected Stryker's 404(b) challenge to evidence of his sexual assault against the victim that occurred *after* the charged offenses and in another state, noting, "Stryker's sexual attraction to his 10-year-old step-daughter F.S. was unnatural and unexpected, but nonetheless clearly motivated his conduct, which began in Colstrip and continued thereafter in Wyoming, and which he acknowledged to Wyoming police."). *Stryker*, ¶ 16.

of admissibility. The Lewistown witnesses were a brief portion of the trial, and their testimony corroborated tangential details of H.B.'s descriptions, not testimony that went to the elements of the charged offense.

¶44 The trial court has broad discretion in ruling on the admissibility of evidence and is in the best position to determine whether it is unfairly prejudicial, as "Rule 403 is 'a fact-specific balancing test.'" *State v. Strizich*, 2021 MT 306, ¶ 34, 406 Mont. 391, 499 P.3d 575 (citations omitted). The court here did not act arbitrarily or without conscientious judgment when it permitted the Lewistown witnesses' testimony, and its admission was not in any event unfairly prejudicial.

Jury Instruction

¶45 Under Montana's criminal procedure code, this Court may not reverse a conviction "by reason of any error committed by the trial court against the convicted person unless the record shows that the error was prejudicial." Section 46-20-701(1), MCA. The statute instructs the Court to "disregard[]" "[a]ny error, defect, irregularity, or variance that does not affect substantial rights." Section 46-20-701(2), MCA. We will uphold a defendant's conviction in the face of a faulty mental-state instruction—even when that instruction lowers the State's burden of proof—when the defendant has not demonstrated prejudice to his substantial rights. *See e.g.*, *State v. Ilk*, 2018 MT 186, ¶¶ 24-26, 392 Mont. 201, 422 P.3d 1219; *State v. Patton*, 280 Mont. 278, 290-92, 930 P.2d 635, 642-43 (1996); *State v. Nick*, 2009 MT 174, ¶ 13, 350 Mont. 533, 208 P.3d 864. To the contrary, we reverse when

the record shows the error was not harmless. *See e.g.*, *State v. Lambert*, 280 Mont. 231, 929 P.2d 846 (1996); *State v. Johnston*, 2010 MT 152, 357 Mont. 46, 237 P.3d 70.

¶46 We set the framework for this analysis in *State v. Rothacher*, 272 Mont. 303, 901 P.2d 82 (1995). We determined there that the trial court erred as a matter of law "when it instructed the jury that the State merely needed to prove that Rothacher acted purposely, without regard to the result he intended." *Rothacher*, 272 Mont. at 310, 901 P.2d at 86. Evaluating whether the error affected Rothacher's substantial rights, we turned to decisions of the United States Supreme Court, which "has concluded that even instructions which violate the Federal Constitution may be harmless if, based on the entire record, the court concludes that the error was harmless beyond a reasonable doubt." *Rothacher*, 272 Mont. at 310, 901 P.2d at 87 (citing *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824 (1967); *Rose v. Clark*, 478 U.S. 570, 106 S. Ct. 3101 (1986)). We noted the *Rose* Court's observation that "[i]n many cases, the predicate facts conclusively establish intent, so that no rational jury could find that the defendant committed the relevant criminal act but did not intend to cause injury." *Rothacher*, 272 Mont. at 312, 901 P.2d at 88 (quoting *Rose*, 478 U.S. at 580-81, 106 S. Ct. at 3107 (citation omitted)). We emphasized that the case "must be reviewed as a whole," and the instructional error should not be examined "in isolation." *Rothacher*, 272 Mont. at 312, 901 P.2d at 88. Applying this standard, "after considering the record as a whole"—including the other jury instructions and the evidence presented at trial—we concluded that the instructional error was harmless beyond a

reasonable doubt because the erroneous instruction "did not apply to any facts which were offered as proof in th[e] case." *Rothacher,* 272 Mont. at 313, 901 P.2d at 88.

¶47 We since have affirmed other convictions where the record as a whole demonstrated that the erroneous mental state instruction could not have affected the verdict. In *Patton*, as in this case, the trial court erroneously instructed the jury on both the conduct-based and result-based definition of the applicable mental state. 280 Mont. at 290-91, 930 P.2d at 642-43 (considering instruction that "A person acts purposely when it is his conscious object to engage in conduct of that nature *or* to cause such a result") (emphasis added). Patton argued that the instruction impermissibly lessened the State's burden of proof because "he could only have acted 'purposely,' for purposes of a deliberate homicide conviction, if it was his conscious object to cause [the victim's death] and that the jury was improperly instructed that he could be convicted if the State proved that he had the purpose to 'engage in conduct,' . . . ." *Patton*, 280 Mont. at 290-91, 930 P.2d at 642. Agreeing that the instruction was erroneous, we concluded nonetheless that Patton's substantial rights were not affected. *Patton*, 280 Mont. at 291-92, 930 P.2d at 643. "Patton's only asserted defense was that the crime was committed by another person." *Patton*, 280 Mont. at 291, 930 P.2d at 643.

¶48 We held similarly in *Ilk* that the defendant's substantial rights were not affected by an improper mental state instruction when he relied at trial on a defense of justifiable use of force, which admits that the defendant acted purposely and knowingly. *Ilk*, ¶ 25. "Ilk did not argue, and under the evidence could not reasonably argue, that he intended to shoot

at [the victims] but was either unaware of his actions or unaware of the high probability that shooting at others could provoke the use of force against him." *Ilk*, ¶ 25. *See also State v. Tellegen*, 2013 MT 337, ¶ 21, 372 Mont. 454, 314 P.3d 902 (rejecting ineffective assistance claim based on counsel's failure to object to conduct-based instruction for result-based accountability for burglary offense because the record demonstrated "ample evidence for a jury to conclude that Tellegen knew her actions would assist an unlawful entry wherein a theft occurred"); *Nick*, ¶ 13 (finding a mental-state instructional error harmless where defendant claimed self-defense and thus conceded as a matter of law that he acted purposely or knowingly).

¶49 In contrast, when the evidence puts the mental-state element directly at issue, we have found the defendant's substantial rights affected and reversed. In *Johnston*, for example, the defendant's substantial rights were prejudiced by the trial court's instruction that "knowingly" meant the defendant was aware of his conduct when the offense with which he was charged—obstruction of a peace officer—required proof that "Johnston was aware that his conduct could hinder the officers' execution of their duties[.]" *Johnston*, ¶ 14. The error required reversal (on a claim of ineffective assistance of counsel) because the instruction "allowed the prosecutor to argue that Johnston had essentially confessed to the crime by his testimonial admission that he had been dishonest with the officers, thus reducing the State's burden in proving the crime." *Johnston*, ¶ 16.

¶50 In *Lambert*, we reversed a conviction for criminal endangerment on the basis of the trial court's instruction on all three disjunctive definitions of "knowingly," because it was

not enough to prove that Lambert was aware of his conduct. *Lambert*, 280 Mont. at 234, 237, 929 P.3d at 848, 850. Instead, the State was required to prove the "defendant's awareness of the high probability that the conduct in which he is engaging, whatever that conduct may be, will cause a substantial risk of death or serious bodily injury to another." *Lambert*, 280 Mont. at 237, 929 P.3d at 850. In *State v. Carnes*, 2015 MT 101, ¶¶ 8-9, 378 Mont. 482, 346 P.3d 1120, we reversed a conviction for assault on a peace officer because the instructions did not require the jury to find that the defendant knew the two deputies he was alleged to have assaulted—who had not identified themselves and approached him in the dark without emergency lights—were peace officers. "The given jury instruction required the jury to find the deputies were peace officers, but not that Carnes knew them to be peace officers." *Carnes*, ¶ 14. We concluded that the instructional error prejudiced Carnes because "[h]e made this very issue the central point of his defense." *Carnes*, ¶ 15. *See also Secrease*, ¶ 12 (quoting *City of Kalispell v. Cameron*, 2002 MT 78, ¶ 11, 309 Mont. 248, 46 P.3d 46) (finding prejudicial error where the court failed to instruct the jury in an obstruction charge that the defendant must be "aware that his conduct would hinder the execution of the Officers' duties").

¶51 We reached a like conclusion in *Hamernick*, but the Court's analogy to that case here is misplaced. Both parties to the encounter in *Hamernick* agreed there was sexual contact; whether the defendant had knowledge that the contact was non-consensual was the only disputed issue at trial. *Hamernick*, ¶ 32 (Baker, J., dissenting). We thus concluded that the erroneous mental-state instruction, "when considered in conjunction with

Hamernick's trial testimony," undermined his defense and prejudicially affected his substantial rights. *Hamernick*, ¶ 27 (citations omitted). Applying similar reasoning, we reversed a sexual assault conviction in *City of Missoula v. Zerbst* when the trial court instructed the jury on a statutory definition of "consent" that did not apply to Zerbst's offense. 2020 MT 108, ¶ 24, 400 Mont. 46, 462 P.3d 1219. The erroneous instruction allowed the jury to convict if it found that the victim was categorically incapable of consent because she was mentally disordered or incapacitated; this statement of the law did not apply to sexual assault at the time Zerbst committed the offense. *Zerbst*, ¶¶ 13, 24. Without the incorrect instruction, the "ordinary meaning of consent" would have applied, and "the jury would have had to resolve *a factual dispute* between [Zerbst] and [the victim] concerning her consent." *Zerbst*, ¶ 24 (emphasis added).

¶52 In *Zerbst*, we distinguished *State v. Scarborough*, where we affirmed a deliberate homicide conviction, despite an erroneous instruction that required the jury to first acquit the defendant of deliberate homicide before it could consider the lesser offense of mitigated deliberate homicide. 2000 MT 301, ¶¶ 49-51, 302 Mont. 350, 14 P.3d 1202. Even though the instruction impermissibly barred the jury from considering the lesser offense, we concluded that the error "could have had no prejudicial effect on the outcome of the trial" because a review of the record showed insufficient evidence on which a jury could find "that he committed deliberate homicide while *actually under the influence* of some extreme mental or emotional stress[.]" *Scarborough*, ¶ 56 (emphasis in original).

¶53 The Court's Opinion suggests, contrary to this authority, that the trial court's failure to "correctly instruct the jury on the applicable law" *ipso facto* "affected Rowe's substantive rights." Opinion, ¶ 33. But the precedent directs that our consideration of instructional error—even an error that affects the elements of the offense—include a full review of the record to determine whether the defendant's substantial rights were prejudiced.

¶54 In this case, the District Court instructed the jury correctly on the three elements of the offense of sexual assault:

> 1. The Defendant subjected H.B. to sexual contact;
> **AND**
> 2. The act of sexual contact was without the consent of H.B.;
> **AND**
> 3. The Defendant acted knowingly.

The court also instructed the jury correctly that:

> "Sexual Contact" means touching of the sexual or other intimate parts of the person of another, directly or through clothing, in order to knowingly or purposely arouse or gratify the sexual response or desire of either party.

¶55 Rowe's "only asserted defense" at trial, *Patton*, 280 Mont. at 291, 930 P.2d at 643, was that he did not engage in the conduct H.B. had described—the first element of the offense. Rowe steadfastly denied everything H.B. alleged, maintaining he had never touched him or even talked to him about "the birds and the bees." His theory was that H.B. fabricated the allegations to help Mari obtain a better custody arrangement for her and Rowe's children. H.B. testified in detail about Rowe's sexual contacts with him, which escalated to Rowe's fondling and rubbing of H.B.'s penis and instructing H.B. to

masturbate him in return. If the contact H.B. described occurred, Rowe does not dispute that it met the definition of "sexual contact." If the jury believed that Rowe engaged in that contact, there is no evidence in the record that could support a determination that he did not act knowingly. Rowe "did not argue, and under the evidence could not reasonably argue," *Ilk*, ¶ 25, that if he did rub H.B.'s penis or put his mouth on it, he did not act knowingly within the proper definition of that term.

¶56 H.B.'s testimony was corroborated by the testimony of Rowe's cousin Michael Eric Schell. Schell testified that he had walked in on Rowe and H.B. at Rowe's house when their pants were off; that Rowe had described for him what H.B.'s penis looked like; and that when he called Rowe after being contacted by investigators, Rowe asked that he be a "mole" and report back what the officers asked him. Schell also corroborated H.B.'s testimony that on the hunting trip to White Sulphur Springs, the other men had masturbated to pornography, which Rowe denied. Rowe accused Schell of lying so that Mari's family would help him buy property and a house. In rebuttal, the State again called Schell to the witness stand. He testified that he owned a small trailer and had not obtained any assistance from Mari's family.

¶57 On the whole of the trial record, and particularly in light of Rowe's defense, the instructional error did not prejudicially affect his substantial rights. Just as in *Patton*, there is no evidentiary support on which to conclude that the court's instruction to the jury—that a person acts knowingly "when the person is aware of his or her conduct, or when the person is aware there exists the high probability that the person's conduct will cause a

specific result"—could have affected the outcome of the trial. The instruction simply did not address a fact that was disputed by evidence at trial.

Other Issues

¶58 Rowe makes two final arguments, neither of which he preserved for appeal. He claims that his right to be personally present during a critical stage was violated when the court reconvened to discuss whether three jurors should be allowed to attend a Christmas concert in the middle of deliberations. And he argues that his counsel was ineffective when she did not object to the State's description of "reasonable doubt" during voir dire. Rowe's counsel instead addressed the point in closing argument, arguing that the State gave "very poor examples" of "important life decision[s]" and suggesting examples that represented the types of "decisions that we make that cannot be taken back." In brief, I would conclude that Rowe does not demonstrate plain error on either point or present a viable record-based claim of ineffective assistance.

¶59 Accordingly, I would affirm Rowe's conviction and judgment.

/S/ BETH BAKER