# APPENDIX

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**APPENDIX A**

IN THE SUPREME COURT
OF THE STATE OF MONTANA

DA 19-0671, 2022 MT 130

STATE OF MONTANA,

Plaintiff and Appellee,

*v.*

GENE DEVERAUX,

Defendant and Appellant.

[Filed 07/05/2022]

[Bowen Greenwood, Clerk of the Supreme Court,
State of Montana]

APPEAL FROM: District Court of the Twenty-Second Judicial District, In and For the County of Carbon, Cause No. DC 2017-01, Honorable Matthew J. Wald, Presiding Judge

COUNSEL OF RECORD:

For Appellant: Chad Wright, Appellate Defender, Kristina L. Neal, Assistant Appellate Defender, Helena, Montana

For Appellee: Austin Knudsen, Montana Attorney General, Tammy K Plubell, Assistant Attorney General, Helena, Montana

Alex R. Nixon, Carbon County Attorney, Red Lodge, Montana

BEFORE: Hon. Jim Rice

CONCURRING: Hon. Mike McGrath
Hon. Laurie McKinnon
Hon. Ingrid Gustafson
Hon. Dirk M. Sandefur

Submitted on Briefs: April 27, 2022

Decided: July 5, 2022

Filed: /s/ Bowen Greenwood, Clerk

¶1 Gene Deveraux (Deveraux) was convicted by a jury in the Twenty-Second Judicial District Court, Carbon County, of five felony sexual offenses against his former stepdaughter and one count of Sexual Intercourse Without Consent (SIWOC) against his former wife, B.J. He appeals all six convictions based on the District Court's denial of his motion to remove a prospective juror for cause. He alternatively challenges his SIWOC conviction against B.J. on the grounds the District Court gave two erroneous jury instructions.

¶2 We affirm and restate the issues as follows:

1. *Was the District Court's denial of Deveraux's motion to remove a prospective juror for cause a structural error requiring reversal of Deveraux's convictions and a new trial?*

2. *Did the District Court err by giving a conduct-based jury instruction defining mental state for the SIWOC offense against B.J., rather than a results-based definition?*

3. *Should this Court exercise plain error review of an incorrect jury instruction on the definition of consent offered by Deveraux?*

## FACTUAL AND PROCEDURAL BACKGROUND

¶3 B.J. married Deveraux in March 2008. B.J. had four children when she married Deveraux, and three of them lived with the couple during the marriage, including D.S., who was seven years old when she became Deveraux's stepdaughter. The family enjoyed outdoor activities and maintained a residence in Billings and property in Bridger, Montana, where they spent weekends and worked on constructing a house. In May 2011, B.J. was driving herself, her son, and D.S. home from a concert when a drunk driver collided with their vehicle. B.J. suffered major injuries—a broken pelvis, a shattered femur, a spinal injury, and severe nerve damage. She underwent multiple surgeries and bone grafts, remaining in the hospital for a month. Upon release, she was completely dependent on others for her daily care. During this time, Deveraux began sexually abusing B.J., which continued until the couple separated in July 2014. In November 2016, D.S. disclosed to her brother and her friend that Deveraux had sexually abused her since before Deveraux married her mother, starting when she was around four years old, and continuing until D.S. was about 13 years old, when B.J. and Deveraux separated. D.S.'s father reported the abuse to the authorities. D.S. was 18 years old at the time of trial.

¶4 Deveraux was charged with: Counts I and II, Incest against D.S., in violation of § 45-5-507, MCA; Count III, Sexual Assault against D.S., in violation of § 45-5-502, MCA; Counts IV and V, SIWOC against D.S., in violation of § 45-5-503, MCA; and Count VI, SIWOC against B.J., in violation of § 45-5-503, MCA. Deveraux pled not guilty to all charges and the matter proceeded to trial.

**Jury Selection**

¶5 Deveraux's jury trial occurred over five days in June 2019. During voir dire, a prospective juror advised the court she had personal family issues she would like to discuss privately. Due to the emotional nature of the charges, the District Court asked Deveraux's counsel to identify similarly situated individuals on the jury panel. Deveraux's counsel addressed the panel: "Who has these sort of -- those deep-seated issues, these incredibly personal relationships with people about rape, about child sexual abuse, that we're talking about here today?" The District Court conducted individual voir dire with five prospective jurors who asked to speak privately about their experiences.

¶6 Prospective juror R.G. disclosed in chambers that his girlfriend had endured a marriage where "'no means no' did not apply in that relationship." He discussed how he believed it was hard to prosecute marital rape cases and how some people unfairly do not recognize it as a crime. R.G. stated, "I know the hardness of the person coming forward to testify on the stand, how incredibly horrible that would be. And I may have a problem in this area, out of sympathy." Deveraux's counsel asked, "If you were my client, would you want you on the jury?" R.G. responded, "I don't believe so . . . . I think to be fair to him, I should not be chosen." Deveraux's counsel moved to remove R.G. for cause.

¶7 The State questioned R.G.:

> Q: There is no down[]side to find these offenses to be terrible. The only question I

> have now is, can you put that aside and basically fulfill your duty as a juror to listen to the testimony of the witnesses?
>
> A: I can judge fairly. It's just an uncomfortable thing.
>
> Q: You realize it's probably uncomfortable for anybody selected?
>
> A: The question in the courtroom was: Does anybody know of? And I know of.
>
> Q: . . . My only question is, if you can be fair and impartial.
>
> A: I can be. I just -- well, I'm just like everybody else, I suppose. I just don't like it at all.

Based on R.G.'s responses, the State objected to defense counsel's challenge to remove him for cause.

¶8 The District Court then addressed R.G. directly:

> Q: I do not mean to imply that the answer is yes. Okay?. . . I'm just asking you, given the facts that you dealt with through your friend, whether that is of a magnitude that you do not believe that you can be fair and impartial and base a verdict solely on the evidence here, or whether you think you can put that aside and go ahead and judge this case based on the information and evidence just provided in the courtroom?
>
> A: I can judge this case by the evidence provided in the courtroom.

The District Court denied the motion and R.G. remained on the panel. Out of the five prospective jurors

individually questioned in chambers, the court dismissed three for cause, retained one upon agreement of the parties, and retained R.G. over defense counsel's objection. Deveraux's counsel exercised all six of his peremptory challenges, but did not use one to remove R.G., and R.G. ultimately sat on the jury.

**Trial Testimony**

¶9 B.J. testified in detail about her injuries resulting from the car accident and Deveraux's sexual abuse occurring during her recovery.[1] When B.J. returned home from the hospital, she needed continual care. She lay flat on her back on a twin mattress on the living room floor, was in severe pain, and could not move independently or sit up to eat. She testified she was so fragile that if she coughed, someone had to "put a pillow over my hips and we just tried to hold [me] together." B.J. initially had a full-time catheter that required changing and cleaning to prevent infection. Her friend Kathy primarily cared for B.J. at home, and the family received assistance from their church community. However, when Kathy was not available, Deveraux was commonly responsible for B.J.'s care.

¶10 B.J. testified that, after the accident, Deveraux became "completely different. He did not want to be married. He specifically said, 'I did not sign up for this.'" Deveraux wanted B.J. to file for divorce, but she refused out of fear she would lose the custody of her children to her ex-husband, with whom she was in a

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[1] Some of B.J.'s injuries were permanent. At the time of trial, B.J. still used crutches to walk and occasionally utilized a wheelchair. Her internal organs suffered irreversible damage.

difficult custody battle. She could not care for herself or her children, had lost her job, and exhausted her medical insurance. She was completely dependent upon Deveraux, explaining, "I needed him to have my children, I needed him for a roof over my head. I needed him to take care of me. I needed him for everything."

¶11 During this time, Deveraux's attitude regarding his sexual relationship with B.J. also dramatically changed. B.J. testified that, before the accident, the couple had a "traditional" sex life, informed by her religious beliefs not to do "anything out of the ordinary stuff." After the accident, "there was no caring. . . it was violent, it was unloving." B.J. testified that her first post-accident sexual experience with Deveraux occurred during her first shower after returning home from the hospital. She was still severely injured—she had to be carried into the shower and sat on a plastic chair with arm and leg supports, leaning on an inflatable innertube to keep pressure off her broken pelvis. "I would hold myself up because I was still broke," B.J. testified. "I still had staples. I was black and blue and a catheter [was] just hanging out of me." Deveraux got into the tub with B.J., and she expected him to help her shower. Instead, Deveraux shocked B.J. by demanding oral sex. B.J. testified Deveraux "grabbed the back of my neck" and forced her to participate. She did not understand "how he didn't care that it was hurting me. And I'm trying to pull away and he's pulling me towards him." Deveraux barely cleaned her afterward. B.J. testified that Deveraux forced her to have oral sex with him during every shower until she could bathe independently, "and if I didn't want to do that, I didn't get a shower." These showers occurred at

Deveraux and B.J.'s residence in Billings, but the forced oral sex continued once they moved permanently to the Bridger property in 2012.

¶12 B.J. next testified about the first time she had vaginal intercourse with Deveraux after the accident—she was still immobile, confined to the bed in the living room, and had just removed the catheter. Deveraux picked her up off the mattress and propped her up on the couch with pillows.

> I told him I didn't want to have sex. And I told him it was going to hurt and it was hurting. Keep in mind, [I'm] still all stapled up. And I told him, "My bones are moving. My bones are moving." He said, "You're pinned together, your bones aren't moving. You're fine.". . . He didn't care, still had to have sex. I'm crying, I'm telling him to stop.

Deveraux did not stop and the next day B.J. had to reinsert the catheter.

¶13 Deveraux forced B.J. to engage in sexual acts that were against her religious beliefs and that left her swollen, bruised, and bleeding. B.J. described how Deveraux would force her to use sex toys that would hurt her: "And I told him he was hurting me and I told him they were cutting me and he just -- he didn't care." She tried to block Deveraux with her hands and "raked him on the face with [her] fingernails once." At one point she complied because she was afraid he might kill her. Deveraux also used anal sex as punishment when B.J. angered him. He first subjected her to forced anal sex when she was still in early recovery and using the catheter. One of B.J.'s daughters came

to visit, and this angered Deveraux, leading to forced anal sex. Afterwards, Deveraux told B.J., "Every time you piss me off, this is what's going to happen." She bled for several days thereafter. Kathy discovered the bleeding while cleaning B.J. and took her to the emergency room. Kathy later testified, "[I]t was a sufficient amount of blood that I was scared." B.J. hesitantly told Kathy what Deveraux had done. B.J. testified, and Kathy corroborated, that B.J. did not report the abuse to the police at the time because of her dependence on Deveraux, and because she did not know there were laws against marital rape and that she could be legally protected.

¶14 Deveraux testified to a radically different version of his relationship with B.J. following the accident. He confirmed his wife needed constant care and was "basically bedridden." He denied any forced oral sex while helping B.J. shower during her recovery. Deveraux testified that he did not have sexual contact with B.J. until "she was quite a bit better" and was no longer using the catheter, approximately a month after she was discharged from the hospital. According to Deveraux, B.J. consented to the interaction, did not tell him it was painful, and he arranged pillows to help make her more comfortable. He testified B.J. consented as a willing participant to oral sex, anal sex, and the use of sex toys. The couple's sex life was "not what it was prior to [the accident], but it was okay.... Nothing out of the ordinary." Deveraux categorically denied any forced or violent sex with B.J., of ever using sex as a punishment, and any sexual abuse of D.S. He asserted that all allegations of sexual abuse by B.J. and D.S. were "made up," and that he was the victim of their lies.

**Jury Instructions**

¶15 The District Court instructed the jury that, in order to find Deveraux guilty of SIWOC against B.J., the State needed to prove the following elements:

> 1. That Mr. Deveraux had sexual intercourse with [B.J.]; AND
> 2. That the act of sexual intercourse was without [B.J.'s] consent; AND
> 3. That Mr. Deveraux acted knowingly.

The District Court further instructed the jury with the State's proposed "conduct-based" definition of the mental state "knowingly"—"A person acts knowingly: when the person is aware of his or her conduct." The court rejected Deveraux's proposed "results-based" instruction defining "knowingly" as "[a] person acts knowingly when the person is aware there exists the high probability that the person's conduct will cause a specific result."

¶16 For the definition of "consent," the District Court instructed the jury with Deveraux's proposed instruction:

> [T]he term "consent" means words or overt actions indicating a freely given agreement to have sexual intercourse or sexual contact. An expression of lack of consent through words or conduct means there is no consent or that consent has been withdrawn. A current or previous dating or social or sexual relationship by itself, or the manner of dress of the person involved with Mr. Deveraux in the conduct at issue,

> does not constitute consent. Lack of consent may be inferred based on all of the surrounding circumstances and must be considered in determining whether a person gave consent.

The District Court rejected the State's proposed instruction, which defined "without consent" as "the victim is compelled to submit by force against herself. . . . The term 'force' means: the infliction, attempted infliction, or threatened infliction of bodily injury."

¶17 The jury convicted Deveraux on all six counts, and he moved for a new trial, arguing the District Court should have removed R.G. for cause and gave an incorrect mental state instruction. The District Court denied his motion.[2]

¶18 On appeal, Deveraux asks this Court to reverse all six convictions and remand for a new trial based on the District Court's retention of R.G. on the jury, or, alternatively, for reversal of his conviction and a new trial for the SIWOC offense against B.J., based

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[2] For the incest and SIWOC offenses against D.S., Counts I, II, IV, and V, the District Court sentenced Deveraux to four concurrent sentences of 100 years in prison, no time suspended, with a 25-year parole restriction. For the sexual assault offense against D.S., Count III, Deveraux was sentenced to 50 years in prison, no time suspended, to run concurrently with his other offenses against D.S. For the SIWOC offense against B.J., Count VI, the District Court sentenced Deveraux to 20 years in prison, no time suspended, to run consecutively to his sentences for the offenses against D.S.

on his contention the jury instructions regarding mental state and consent were incorrect.

## STANDARDS OF REVIEW

¶19 We review a district court's denial of a challenge to remove a prospective juror for cause for abuse of discretion. *State v. Morales*, 2020 MT 188, ¶ 7, 400 Mont. 442, 468 P.3d 355 (citing *State v. Anderson*, 2019 MT 190, ¶ 11, 397 Mont. 1, 446 P.3d 1134). "A district court abuses its discretion if it denies a challenge for cause when a prospective juror's statements during voir dire raise serious doubts about the juror's ability to be fair and impartial or actual bias is discovered." *Anderson*, ¶ 11 (citation omitted). "If the defendant subsequently used a peremptory challenge to strike the prospective juror and ultimately exhausted all afforded peremptory challenges, the erroneous denial of a challenge of a prospective juror for cause is a structural error requiring automatic reversal." *State v. Johnson*, 2019 MT 68, ¶ 7, 395 Mont. 169, 437 P.3d 147 (citing *State v. Good*, 2002 MT 59, ¶¶ 62-65, 309 Mont. 113, 43 P.3d 948).

¶20 This Court reviews jury instructions given by a district court for abuse of discretion. We review jury instructions to determine whether, taken as a whole, the instructions fully and fairly instruct the jury as to the applicable law. *State v. Secrease*, 2021 MT 212, ¶ 9, 405 Mont. 229, 493 P.3d 335 (citing *State v. King*, 2016 MT 323, ¶ 7, 385 Mont. 483, 385 P.3d 561). "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. Gerstner*, 2009 MT 303, ¶ 15, 353 Mont. 86, 219 P.3d 866 (citation omitted).

¶21 We generally do not review issues raised for the first time on appeal, but when a defendant asserts an error implicating a fundamental right, "we may choose to invoke the common law plain error doctrine where failing to review the claimed error may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process." *State v. Favel*, 2015 MT 336, ¶ 13, 381 Mont. 472, 362 P.3d 1126 (citing *State v. Taylor*, 2010 MT 94, ¶ 12, 356 Mont. 167, 231 P.3d 79).

## DISCUSSION

¶22 *1. Was the District Court's denial of Deveraux's motion to remove a prospective juror for cause a structural error requiring reversal of Deveraux's convictions and a new trial?*

¶23 Deveraux argues the District Court abused its discretion in denying his challenge to juror R.G. because "the totality of [R.G.'s] responses raised serious questions about his ability to serve fairly and impartially," and he contends the State improperly attempted to rehabilitate R.G. *See Morales*, ¶ 12 (citing *Johnson*, ¶ 12) (it is improper "for counsel or the court to attempt to rehabilitate the juror by asking leading or loaded questions eliciting a one-syllable answer, such as whether the juror will follow the law, jury instructions, or an order of the court"). The State answers that the District Court acted within its discretion because R.G. "separated his disdain for the crime of rape from his duty to serve impartially as a juror, [and] he unequivocally stated that he would fulfill his oath as a juror to base his verdict on the facts presented at trial and the law the district court provided."

¶24 Criminal defendants have a fundamental right under both state and federal constitutions to be tried by an impartial jury. U.S. Const. amend. VI; Mont. Const. art. II, § 24; *Anderson*, ¶ 14. "A defendant may accordingly challenge a prospective juror for cause if the juror manifests 'a state of mind' regarding the case or either party 'that would prevent the juror from acting with entire impartiality' regarding the parties and material matters in the case." *Johnson*, ¶ 9 (quoting § 46-16-115(2)(j), MCA).

¶25 Deveraux frames the issue as structural error requiring automatic reversal. "A structural error is typically of constitutional dimensions, precedes the trial, and undermines the fairness of the entire trial proceeding . . . . structural error is automatically reversible and requires no additional analysis or review." *Good*, ¶ 59 (citing *State v. Van Kirk*, 2001 MT 184, ¶¶ 38-39, 306 Mont. 215, 32 P.3d 735). Errors involving jury selection are structural because they precede the trial and affect the fundamental, constitutional right to an impartial jury. *Good*, ¶ 60. We held in *Good* that, in the context of jury selection, "structural error occurs if: (1) a district court abuses its discretion by denying a challenge for cause to a prospective juror; (2) the defendant uses one of his or her peremptory challenges to remove the disputed juror; and (3) the defendant exhausts all of his or her peremptory challenges." *Good*, ¶ 62.

¶26 As noted, Deveraux did not use a peremptory challenge to remove R.G. from the jury pool, and thus he cannot satisfy part two of the analysis. Alternatively, Deveraux argues that, even if he cannot meet the requirements for structural error, our holding in

*Good* "does not foreclose a new trial when a biased juror, nevertheless, is seated on the jury," citing two cases for support. In *Anderson*, an already-selected juror told the bailiff he was "pretty sure the Defendant is guilty" based upon the questioning that had occurred during voir dire. *Anderson*, ¶ 5. We acknowledged the "unusual scenario" but nonetheless concluded it was appropriately considered structural error requiring reversal because, based upon the juror's statement to the bailiff and his following answers to the court, the district court abused its discretion by not removing the juror for cause at that juncture. *Anderson*, ¶¶ 19-21. The "unusual scenario" we faced in *Anderson* is not present here, as R.G.'s views were revealed in the ordinary course of voir dire, before peremptory challenges were exercised. Unlike in *Anderson*, Deveraux's counsel had the chance to question R.G. about his potential bias before he was selected for the jury, and to use a peremptory to strike R.G., but instead chose to exhaust them on other prospective jurors.

¶27 Deveraux also cites *State v. Chastain*, 285 Mont. 61, 947 P.2d 57 (1997). There, Chastain's counsel failed to make additional inquiries of two prospective jurors who expressed potential bias, failed to challenge either prospective juror for cause, and failed to remove them with a peremptory. *Chastain*, 285 Mont. at 63-64, 946 P.2d at 59. We held counsel had rendered ineffective assistance, and we reversed and remanded for a new trial. *Chastain*, 285 Mont. at 65-66, 946 P.2d at 60. Here, rather than an ineffectiveness claim, we are faced with the exercise of the District Court's discretion following defense counsel's addi-

tional inquiry of R.G. and his challenge for cause. Further, *Chastain* was decided five years before we articulated the three-part test for structural error in *Good*, and we have thereafter continued to rely on it. *See Morales*, ¶ 7; *Johnson*, ¶¶ 7, 16; *State v. Allen*, 2010 MT 214, ¶ 20, 357 Mont. 495, 241 P.3d 1045.[3]

¶28 Deveraux justifies not exercising a peremptory to remove R.G. by explaining he "was compelled to use peremptory challenges on other less desirable individuals." He provides reasoning for only four of the six individuals he removed, and, therefore, there is no demonstration that Deveraux could not have elected to remove R.G., as was defense counsel's predicament in *Anderson*. We conclude Deveraux has not satisfied the structural error standard required by *Good* that would entitle him to reversal. *Good*, ¶ 62.

¶29 *2. Did the District Court err by giving a conduct-based jury instruction defining mental state for the SIWOC offense against B.J., rather than a results-based definition?*

¶30 SIWOC is statutorily defined as: "A person who knowingly has sexual intercourse with another person without consent." Section 45-5-503(1), MCA. "When a criminal offense requires that a defendant act 'knowingly,' the [d]istrict [c]ourt must instruct the jury on what the term 'knowingly' means in the context of the particular crime." *State v. Azure*, 2005 MT 328, ¶ 20,

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[3] We later overruled "*Chastain's* holding that a claim of ineffective assistance of counsel for failure to challenge prospective jurors in voir dire can be determined from a record which is silent as to the lawyer's reasoning." *State v. Herrman*, 2003 MT 149, ¶ 33, 316 Mont. 198, 70 P.3d 738.

329 Mont. 536, 125 P.3d 1116. Section 45-2-101(35), MCA, provides several definitions of "knowingly." Two are at issue here—the conduct-based definition given to the jury, and the result-based definition proposed by Deveraux at trial, but rejected by the District Court. Deveraux argues the conduct-based instruction, which required the jury to find only that Deveraux was aware of his own conduct, "eliminated a necessary element of the offense of [SIWOC]: the specific intent to commit the underlying crime charged." He argues the District Court should have used a result-based instruction so the jury would have been required to find he acted with an awareness there existed a high probability that his conduct would cause the specific result of the offense. Section 45-2-101(35), MCA. Deveraux asserts this alleged error lowered the State's burden of proof, thereby violating his constitutional right to due process and his fundamental right to a fair trial. *See State v. Clark*, 1998 MT 221, ¶ 29, 290 Mont. 479, 964 P.2d 766 (citations omitted) ("The due process guarantee of the Montana Constitution, embodied in Article II, Section 17, makes it the State's duty in a criminal prosecution to prove beyond a reasonable doubt every element of the crime charged."); *see also Secrease*, ¶ 15.

¶31 Whether an offense is a conduct-based offense or a result-based offense is determined by an analysis of its elements. For example, regarding the offense of obstructing a peace officer, § 45-7-302, MCA, we have held that a result-based mental state instruction is required because "[f]or a person to knowingly obstruct an officer's lawful duty, the defendant must be aware that her conduct is highly probable to hinder the performance of that duty." *State v. Bennett*, 2022 MT 73,

¶ 10, 408 Mont. 209, 507 P.3d 1154 (citing *City of Kalispell v. Cameron*, 2002 MT 78, ¶ 11, 309 Mont. 248, 46 P.3d 46); *see also State v. Johnston*, 2010 MT 152, ¶ 14, 357 Mont. 46, 237 P.3d 70; *Secrease*, ¶ 15. In *Johnston*, we held that, for a conviction of obstruction for lying to officers, the State needed to prove, and the jury needed to find, both that the defendant was aware he gave dishonest answers to the officers (his "conduct"), and that he was aware it was highly probable his dishonest answers would hinder the officers' duties (the "result" of his conduct). *Johnston*, ¶¶ 12, 14. In other words, lying to officers alone is not the defined illegal conduct; the crime also includes the defendant's awareness of the high probability his lying would result in hindering the officers' duties. Similarly, we held that the offense of criminal endangerment, § 45-5-207, MCA, requires a result-based instruction because, there is "no particularized conduct which gives rise to criminal endangerment. . . . It is the appreciation of the probable risks to others posed by one's conduct that creates culpability for criminal endangerment." Therefore, requiring the defendant only be aware of his conduct is incorrect. Rather, a person may "engage in a wide variety of conduct and still commit the offense of criminal endangerment, provided the conduct creates a substantial risk of death or serious bodily harm. It is the avoidance of this singular result, the risk of death or serious harm, that the law attempts to maintain." *State v. Lambert*, 280 Mont. 231, 236, 929 P.2d 846, 849 (1996).

¶32 Deveraux argues, without citation to specific authority, that SIWOC is a result-based offense. Deveraux contends that, because the statute does not criminalize the act of sexual intercourse, the conduct-

based instruction incorrectly required the jury to find only that he was aware he was engaging in that legal act with his then-wife, B.J. We disagree. For SIWOC, the prohibited particularized conduct itself—engaging in sexual intercourse with another person *without that person's consent*—gives rise to the entire criminal offense, and requires only a conduct-based instruction. *See Gerstner*, ¶ 29. Legal sexual intercourse is distinct *conduct* from SIWOC. The statutory definition of SIWOC introduces both elements, "sexual intercourse" and "without consent," with the word "knowingly," and applies to both. "[C]ourts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element." *Flores-Figueroa v. United States*, 556 U.S. 646, 652, 129 S. Ct. 1886, 1891 (2009). In contrast to our cases cited above, there is no "wide variety of conduct" that may become SIWOC depending on the result of that conduct. The SIWOC statute clearly seeks to prohibit the conduct of rape, not any additional "singular result." *Lambert*, 280 Mont. at 236, 929 P.2d at 849. Here, "knowingly" was listed on the jury instruction as the final element in SIWOC, modifying the previous elements, including B.J.'s lack of consent. This mental state element clearly applied to Deveraux's knowledge of B.J.'s lack of consent. Based on the jury instructions, the jury could not have convicted Deveraux for legal sexual intercourse with B.J.

¶33 The State notes other cases in which this Court has approved conduct-based "knowingly" instructions for sexual offenses. *See Gerstner*, ¶ 29 (sexual assault); *State v. Harrington*, 2017 MT 273, ¶ 16, 389 Mont. 236,

405 P.3d 1248 (citation omitted) (sexual abuse of children). The District Court did not err by instructing the jury on this charge.[4]

¶34 *3. Should this Court exercise plain error review of an incorrect jury instruction on the definition of consent offered by Deveraux?*

¶35 Deveraux also asks the Court to exercise plain error review and reverse his conviction for the SIWOC offense against B.J., on the ground the District Court incorrectly instructed the jury with the inapplicable 2017 definition of consent, a definition that did not exist at the time of the alleged offense. The applicable definition of consent would have required the State to show Deveraux used force to compel B.J. to submit to sexual intercourse, and he asserts the erroneous instruction violated his due process rights by relieving the State's burden to prove the element of consent as it then existed in the law.

¶36 "It is well established that in criminal cases, the law in effect at the time of an alleged offense applies in any subsequent prosecution." *City of Missoula*

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[4] Deveraux argues the conduct-based instruction harmed his defense because at trial "[h]e admitted to having sex with [B.J.], but not during the times she described, and never without her consent." Deveraux testified he was not aware that, while having sex with B.J., she did not consent. This defense theory is consistent with, and unimpacted by, the given conduct-based instruction. The State offered evidence showing Deveraux was in fact aware that B.J. did not consent, primarily through B.J.'s testimony she told Deveraux to stop, told him she was in pain, and attempted to fight back. The jury then made a factual determination based on the conflicting evidence.

*v. Zerbst*, 2020 MT 108, ¶ 12, 400 Mont. 46, 462 P.3d 1219 (citing *State v. Daniels*, 2003 MT 30, ¶ 17, 314 Mont. 208, 64 P.3d 1045). "[A] change in the definition of an offense does not affect acts committed prior to the effective date." *Daniels*, ¶ 17. Deveraux is guaranteed due process of law under the Fourteenth Amendment of the United States Constitution and Article II, Section 17, of the Montana Constitution, which requires the State prove every element of the charged offense beyond a reasonable doubt. *Zerbst*, ¶ 30 (citing *State v. Carnes*, 2015 MT 101, ¶ 11, 378 Mont. 482, 346 P.3d 1120).

¶37 Here, the District Court indeed instructed the jury with an incorrect definition of consent, and should have given the State's proposed instruction, which was consistent with the statutory definition in effect when Deveraux was alleged to have committed the offense.[5] "Without consent" then meant "the victim is compelled to submit by force against the victim or another," § 45-5-501(1)(a)(i), MCA (2013), and "force" was defined as "the infliction, attempted infliction, or threatened infliction of bodily injury." Section 45-5-501(2)(a), MCA (2013). A proper instruction would have required the State to prove force, and this failure implicated Deveraux's fundamental rights to due process and to a fair trial. *See State v. Akers*, 2017 MT 311, ¶ 16, 389 Mont. 531, 408 P.3d 142; *Carnes*, ¶ 13.

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[5] Deveraux was charged with SIWOC against B.J. for actions occurring between 2011 and 2014. The statutory definition of "consent" did not change during this time, and we reference the 2013 version of the statute that Deveraux cites to in his briefing.

¶38 "Failure to contemporaneously object to an asserted error generally constitutes a waiver of the right to seek appellate review." However, we may review an unpreserved assertion of error under the narrow exception of plain error review upon satisfaction of the applicable standards. *State v. Miller*, 2022 MT 92, ¶ 10, 408 Mont. 316, ___ P.3d ___. To qualify for plain error review, Deveraux must 1) demonstrate that the asserted error implicates a fundamental right; and 2) firmly convince this Court that a failure to review the asserted error would "result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial or proceedings, or compromise the integrity of the judicial process." *Akers*, ¶ 10 (citing *Favel*, ¶ 23).

¶39 Deveraux cites *State v. Resh*, 2019 MT 220, 397 Mont. 254, 448 P.3d 1100, and *Zerbst* to support his argument. In both cases, the trial court instructed the jury with an incorrect definition of consent that allowed the jury to rely exclusively on inapplicable statutory categories to find lack of consent. *Zerbst*, ¶¶ 6, 24 (erroneous instruction permitted the jury to find the alleged victim was incapable of consent because she was "mentally disordered or incapacitated," a statutory category that did not exist when the alleged offense occurred); *Resh*, ¶¶ 12, 20 (an instruction providing the incorrect age of consent permitted the jury to incorrectly find incapability of consent based solely on the alleged victim's age). Thus, the incorrect instructions in these cases removed the State's burden to properly prove lack of consent, excusing the jury from "looking at the evidence as a whole," evaluating the credibility of witnesses, and resolving factual disputes regarding consent. *Resh*, ¶ 20; *Zerbst*, ¶¶ 24, 37.

¶40 This case is distinct from *Resh* and *Zerbst* because the evidence and arguments presented at trial, despite the incorrect instruction, nonetheless required the jury to resolve the requisite factual issue of whether Deveraux had used force. The State's theory was that Deveraux used force to commit SIWOC against B.J., and its evidence supported this theory. According to B.J.'s testimony, Deveraux used "the infliction, attempted infliction, or threatened infliction of bodily injury" to compel her to submit to sexual intercourse. Section 45-5-501(2)(a), MCA (2013). She testified to numerous instances of forceful, violent intercourse against her will. These attacks caused bodily injury and pain, exacerbating her significant injuries from the accident. B.J.'s son testified that he heard his mother scream on multiple occasions and tell Deveraux to "stop," that "it hurts," and that she did not like what he was doing to her. Kathy corroborated that B.J. was bleeding days after the anal trauma. Deveraux responded by denying any forceful actions and instead offered a version of events where the couple engaged in consensual sexual activity while being careful to accommodate B.J.'s injuries. Counsel questioned Deveraux directly about using force, B.J. telling him she was in pain, and using sex as a punishment. He asserted B.J. was lying. Consequently, despite the incorrect instruction, the jury could not avoid considering the trial's substantial evidentiary conflict and evaluating witness credibility to resolve the central factual dispute of whether Deveraux had used force to submit B.J. to sexual intercourse without her consent. Therefore, the issue of Deveraux's use of force was central to his conviction, and the jury necessarily and correctly considered force as the basis for

finding B.J.'s lack of consent. Section 45-5-501(1)(a)(i), MCA (2013).

¶41 Plain error review is discretionary, and we apply it sparingly on a case-by-case basis "considering the totality of circumstances of each case." *Akers*, ¶ 13 (citation and quotation omitted); *Favel*, ¶ 13 (citation omitted). Here, the totality of circumstances does not meet the standard for us to exercise plain error review. While Deveraux's asserted error implicates fundamental rights, the jury still considered the right issue in spite of the wrong instruction, and we are not firmly convinced that our failure to review this error would "result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial or proceedings, or compromise the integrity of the judicial process." *Akers*, ¶ 10.

¶42 Likewise, we are not persuaded by Deveraux's argument that his attorney's error in proposing the incorrect consent instruction amounted to ineffective assistance of counsel. Based on the volume and centrality of the evidence regarding force presented at trial, Deveraux cannot demonstrate that "there was a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Resh*, ¶ 18 (quoting *State v. Kougl*, 2004 MT 243, ¶ 11, 323 Mont. 6, 97 P.3d 1095).

¶43 Affirmed.

## APPENDIX B

### Order Denying Defendant's Motion for New Trial

### MONTANA TWENTY-SECOND JUDICIAL DISTRICT COURT, CARBON COUNTY

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|---|---|
| STATE OF MONTANA,<br><br>Plaintiff,<br><br>vs.<br><br>GENE DEVEREUX<br><br>Defendant. | Cause No. DC 17-01<br><br>Judge: Matthew J. Wald<br><br>**ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL** |

[Filed Carbon County District Court

September 5, 2019

By /s/ Rochelle Loyning, Clerk

Rochelle Loyning, Clerk]

Before the Court is an *Opposed Motion for New Trial* filed by the Defendant, Gene Deveraux ("Deveraux"). Deveraux is represented by Colin M. Stephens and Nick K. Brooke. The State of Montana ("the State") opposes the motion. The State is represented by Alex Nixon and Shannon Foley. Having reviewed the parties' briefs, as well as the applicable law, the Court finds that Deveraux's *Motion* must be denied.

## BACKGROUND

This *Motion* arises out of Deveraux's June 28, 2019 conviction on the following charges:

- Count I – Incest (felony), in violation of § 45-5-507(1) and (5), MCA (2015)
- Count II – Incest (felony), in violation of § 45-5-507(1) and (4), MCA (2015)
- Count III – Sexual Assault (felony), in violation of § 45-5-502(1) and (3), MCA (2015)
- Count IV – Sexual Intercourse without Consent (felony), in violation of § 45-5-503(1) and (4), MCA (2015)
- Count V – Sexual Intercourse without Consent (felony), in violation of § 45-5-03(1) and (3), MCA (2015)
- Count VI – Sexual Intercourse without Consent (felony), in violation of § 45-5-503(1) and (3)(a), MCA (2015)

Deveraux was convicted of all counts on a unanimous jury verdict after a five-day trial that began on June 24, 2018. The case was sent to the jury for deliberations in the afternoon of Friday, June 28, 2019. The jury deliberated for approximately 90 minutes before returning a unanimous guilty verdict on all counts. Deveraux is currently awaiting sentencing.

On July 25, 2019, Deveraux filed the instant Opposed Motion for New Trial and Brief in Support. On August 14, 2019, the State filed its Response to Defendant's Opposed Motion for New Trial and Brief in Support. On August 29, 2019, Deveraux filed his Reply on Motion for New Trial. The Motion is now ripe for decision.

## DISCUSSION

Deveraux makes three main arguments about why he should be granted a new trial. First, he claims that the length of the jury's deliberations was too short for them to have competently deliberated regarding the charges against Deveraux. Second, he argues that one juror, R.E.G., should have been excused for cause. Lastly, he claims that the jury was given an improper *mens rea* instruction. These arguments are addressed in turn.

## I. Concerns regarding the length of jury deliberations are an impermissible attack on the verdict.

First, Deveraux argues that the approximately 80-minute-long jury deliberation "suggests that the jury disregarded both this Court's instructions and the presumption of innocence." *(Motion for New Trial,* p. 3). Deveraux believes that, due to the duration and complexity of this case, such a short deliberation shows that "the interests of justice are not served." *(Id.)* The State, however, argues that such an attack on the verdict is impermissible. The Court agrees with the State and will not speculate that the jury did anything except appropriately carry out its duty of deliberation of the issues before it. In addition, while extremely serious, the Court disagrees with the defendant that the case at bar was a complex case. The trial did not involve quantities of documentary evidence, scientific proof, or technical evidence that the jury had to sort through in order to determine whether the State had met its burden of proof. The proof of the trial was almost solely presented through witnesses and a conviction was necessarily based on the jury's determination of the relative credibility of the victims and defendant. Had the jury found either

victim's credibility wanting, a defense verdict could easily have been rendered in a similar time period, or less. The length of time the jury deliberated in this case has no reflection upon the deliberative process.

"Rule 606(b), M.R.Evid., prohibits inquiry into the validity of a verdict for any reason except (1) whether extraneous prejudicial information was improperly brought to the jury's attention; or (2) whether any outside influence was brought to bear upon any juror; or (3) whether any juror has been induced to assent to any general or special verdict, or finding on any question submitted to them by the court, by a resort to the determination of chance." *State v. Sittner,* 1999 MT 103, ¶ 27 (citing Rule 606(b), M.R.Evid.). In *Sittner,* the defendant argued "that the length of jury deliberations [...] indicate[d] that the jury failed to fully deliberate upon the evidence and that this jury had its collective minds made up prior to the close of trial." *Id,* The Court rejected this argument, noting that the defendant "d[id] not allege, and the record d[id] not support, the application of any of the exceptions set forth in Rule 606(b), M.R.Evid., as a basis for impeaching the jury's verdict." *Id.* Thus, the Court "decline[d] to reverse [the defendant's] conviction on the grounds that the jury should have deliberated longer before reaching a guilty verdict." *Id.*

Deveraux's argument is the same that was addressed in *Sittner,* and this Court reaches the same conclusion. Deveraux does not argue that extraneous prejudicial information was improperly brought to the jury's attention, that outside influence was brought to bear upon any juror, nor that any juror has been induced to assent to any verdict or finding by resorting to the determination of chance. Deveraux's argument

that *Sittner* misinterpreted Rule 606(b) is also unconvincing. Deveraux claims that, rather than barring inquiry into the validity of a verdict, Rule 606(b) merely limits the use of juror testimony or affidavits in such inquiries. However, the Court can understand why the *Sittner* court interpreted the rule as it did, as without juror testimony or affidavit any inquiry into why the jury deliberated for a certain amount of time would necessarily be limited to mere speculation. Further, Deveraux has not cited any support for his claim that "the Court should certainly take [the length of deliberation] into consideration when determining whether a jury acted and deliberated fairly."

Unless and until the Montana Supreme Court determines that *Siltner* was incorrectly decided, it remains binding precedent. Rule 606(b), M.R.Evid. provides no relief for Deveraux based upon the length of jury deliberation. Thus, this Court is prohibited from inquiring into the validity of the jury's verdict based on the length of its deliberations, and as stated above will not do so. Deveraux's argument about the length of deliberations must thus be rejected and he is entitled to no relief from his convictions on that basis.

**II. The motion to excuse Juror R.E.G. for cause was appropriately denied.**

Deveraux also argues that juror R.E.G. should have been excused for cause. Deveraux claims that R.E.G.'s answers during individual voir dire show that he was unable to be fair and impartial. The State disagrees, noting that, *inter alia,* R.E.G. explicitly confirmed that he would be able to make a decision based on the evidence and that he could be fair and impartial. The Court agrees with the State.

"A district court abuses its discretion if it denies a challenge for cause when a prospective juror's statements during voir dire raise serious doubts about the juror's ability to be fair and impartial or actual bias is discovered." *State v. Cudd,* 2014 MT 140, ¶ 6, 375 Mont. 215, 218, 326 P.3d 417, 420. While "[j]urors who state that they are unable or unwilling to suspend their prejudicial beliefs and follow the law should be excused for cause[,] [...] a juror should not be removed merely because she voices a concern about being impartial." *Id.,* ¶ 9. "[F]ew people are entirely impartial regarding criminal matters" and thus "the critical inquiry is whether a prospective juror can convincingly affirm his or her ability to lay aside any misgivings and fairly weigh the evidence." *Id.* District Courts are not "required to grant or deny a challenge for cause strictly based on answers given after a juror's potential bias is revealed" but rather must "evaluate a prospective juror's responses as a whole." *Id.,* ¶ 15.

In *Cudd,* the defendant was charged with sexual intercourse without consent. *Id.*, ¶ 4. A juror "expressed some concerns about impartiality, but also affirmatively stated that she could judge the evidence fairly and give [the defendant] a fair trial." *Id.,* ¶ 13. The juror's statements included, *inter alia,* that she would be more likely to believe an alleged victim than a defense witness. *Id.,* ¶ 10. The defendant argued that the jurors "assurances that she could judge the evidence fairly and hold the State to its burden of proof" were merely "attempts to show respect for the judicial process and avoid confrontation with those officers of the court that were peppering her with ques-

tions," rather than evidence that she could be impartial. *Id.* The Court disagreed, noting that "M.R. expressly confirmed her ability to judge the evidence fairly and afford [the defendant] the fair trial to which he was entitled" and found that the District Court did not abuse its discretion in denying the challenge for cause. *Id.,* ¶ 15.

Deveraux's case is similar to the facts found in *Cudd.* First, contrary to Deveraux's claims, R.E.G.'s "bias" was not the reason that he requested *in camera* individual voir dire. R.E.G. simply answered in the affirmative when the panel was asked if any member of the panel wished to discuss issues regarding sexual assault in private rather than in open court. The discussion of this issue began not with R.E.G. spontaneously expressing concern about his "bias," but rather the Deveraux's counsel asking the prospective jurors about their personal experience with the subject matter involved in the trial. Deveraux's counsel noted the "visceral charges" against his client and asked the panel of prospective jurors:

> So who, when Mr. Nixon told you what the charges were, who said to themselves, oh, my goodness, that's just like my niece, or my daughter, or a story that my wife had told me? Who had those sort of - - those deep-seeded issues, these incredibly personal relationships with people about rape, about child sexual abuse, that we're talking about here today?

*(Trial Transcript).* Deveraux's counsel then composed a list of prospective jurors who answered in the affirmative to his question. After doing so he added:

> And without inquiring anymore, is it safer to say that you folks would rather have this discussion back in chambers than here in this open courtroom?

*(Trial Transcript).* The Court then expressly asked the entire jury pool whether any of the prospective jurors had experience with sexual assault or similar crimes that they preferred to share in private. The Court told the panel:

> […] if you feel like there's information that you really don't want to say in front of this panel that you feel is important for us to know, that's what I'm asking. So let's see a show of hands to that question.

R.E.G. then signaled to the Court that he "would be in that circumstance." *(Trial Transcript).* The Court confirmed that he "would rather talk [...] in a private setting". *(Trial Transcript).* R.E.G. said that:

> The issue that I had when everything was spoke [sic] about was the spousal part of it. I knew somebody who was treated that way for a long time.

*(Trial Transcript).* The Court then proceeded to allow individual voir dire in chambers with the prospective jurors who said they preferred to discuss the issue in private, including R.E.G. R.E.G. acknowledged the Court's request during his individual voir dire, saying:

The question in the courtroom was, does anybody know of? And I know of. *(State's Exhibit, page 6).* The Court reaffirmed the reason for the in camera individual voir dire by stating at the beginning of R.E.G.'s individual voir dire:

> "[R.E.G.] in open court indicated there was some information that he thought more appropriate to be presented to the parties in this setting, rather than in open court."

*(State's Exhibit, p. 1).* Thus, R.E.G. was subject to individual voir dire NOT because he expressed concerns of bias, but rather because the Court specifically asked if any of the prospective jurors had experience with sexual assault that they preferred to share in private, and he indicated that he did,

Deveraux is correct, however, that during R.E.G.'s individual voir dire, R.E.G. expressed some trepidation about being on the jury due to the experiences of his significant other, stating that he would sympathize to some degree with the alleged victim's testimony:

> R.E.G.: [...] I know the hardness of the person coming forward to testify on the stand, how incredibly horrible that would be. And I may have a problem in this area, out of sympathy.
>
> Deveraux's counsel: [...] If you were my client, would you want you on the jury?
>
> R.E.G.: I don't believe so.
>
> Deveraux's counsel: Just because of your own just sort of internal and with what's happened with your [significant other].
>
> R.E.G.: I think to be fair to [Deveraux], should not be chosen.

*(State's Exhibit, p. 4).* At that point, Deveraux's counsel moved to excuse R.E.G. from the jury panel for cause. The State then questioned R.E.G. During the

State's exchange with R.E.G., R.E.G. said the following:

> Mr. Nixon: The only question I have now is, can you put [R.E.G.'s personal feelings about sexual offenses being repugnant] aside and basically fulfill your duty as a juror to listen to the judge, to be impartial, and to listen to the testimony of the witnesses?
>
> R.E.G.: I can judge fairly. It's just an uncomfortable thing.

*(State's Exhibit, p. 6).* R.E.G. further confirmed his ability to be impartial despite his personal disgust towards sexual assault:

> Mr. Nixon: [...] My only question is, if you can be fair and impartial.
>
> R.E.G.: I can be. I just — well, I'm just like everybody else, I suppose. I just don't like it at all.

*(State's Exhibit, p. 6).*

Deveraux's attempts to distinguish *Cudd* from the facts in the instant case are not convincing. Deveraux claims that R.E.G. gave an "unprompted, spontaneous statement about his bias," while in *Cudd* the juror only admitted she could be biased in response to defense counsel's prodding. *Cudd,* ¶¶ 10-13. The Court believes that this is a mischaracterization of R.E.G.'s statements. Again, R.E.G. was not being subject to in camera individual voir dire because he expressed concerns of bias of his own accord, but rather because the Court asked if any of the prospective jurors would prefer to discuss any issues surrounding sexual crimes in private. R.E.G. saying that he would not want himself on the jury if he were Deveraux and that "to be fair to

[Deveraux], [R.E.G.] should not be chosen" are not clear expressions of bias nor were they "spontaneous" - they were in response to defense counsel's questioning, like in *Cudd*. Further, subsequent questioning revealed that these statements were more about R.E.G.'s distaste for sexually motivated offenses that a true inability to fairly weigh the evidence.

Deveraux's argument that the State attempted to rehabilitate R.E.G. with leading and obvious questions also lacks merit. On multiple occasions, the State explicitly asked R.E.G. if he was able to be fair and impartial. R.E.G. responded with more than a simple "yes" or "no". Rather, despite admitting that the subject matter made him uncomfortable, he affirmed that he could remain fair and impartial. Further, the Court explained the importance of fairly weighing the evidence and asked R.E.G. questions to determine whether he could actually remain impartial or whether he was just giving the State the answer it desired:

> The Court: So, [R.E.G.], the gist of it is [...] can you set aside the emotion, can you set aside the things that you know happened to your friend such that you would be able to render a fair and impartial verdict in this case based solely on the evidence presented here? And [...] I do not mean to imply that the answer is yes. Okay? I'm asking you that because both parties deserve that answer. [...] I'm just asking you, given the facts that you dealt with through your friend, whether that is of a magnitude that you do not believe that you can be fair and impartial and base a verdict solely on the evidence here, or whether you think you can put that aside and

> go ahead and judge this case based on the information and evidence just provided in that courtroom?
>
> R.E.G.: I can judge this case by the evidence provided in the courtroom.

*(State's Exhibit, pp. 7-8).* Based on this exchange, the Court finds that R.E.G. was aware of the reason for the questions he was being asked, the importance of answering truthfully, and that he was obligated to answer in the negative if he did not think he was capable of being fair and impartial. The Court took pains to make sure R.E.G. understood he was under no pressure to answer in any particular way. He clearly acknowledged that, despite his discomfort with the subject matter of sexual assault, he would be able to meet his obligations as a juror. Several jurors who could not clearly so state were discharged from the jury pool for cause.

Deveraux claims that *State v. Allen,* 2010 MT 214, 357 Mont. 495, 241 P.3d 1045 is "particularly on point" and supports his claim that R.E.G. should have been excused for cause. The Court disagrees. In *Allen,* a prospective juror stated during voir dire that he had already made up his mind about the case because he was a "law-and-order sort of person" who was partial to police officers:

> When the prosecutor asked him if he had made up his mind about the case, Morgan responded that he had. Morgan explained that he had read newspaper accounts of the incident, that he was a "law-and-order sort of person," and that he would be partial to testimony by police officers

> involved in the case, whom he knew professionally and personally. Morgan's spontaneous explanation of why he had made up his mind in the case and of why he would be partial carries significant weight. Morgan also expressed an unwillingness to consider all the evidence before reaching a conclusion about the case and eventually agreed with Allen's counsel that he had serious doubts about his ability to be fair in the case.

*Id.,* ¶ 27. The State's attempt at rehabilitation in *Allen* "failed to convincingly demonstrate [the juror's] ability to be impartial":

> After Morgan voiced his initial misgivings about his ability to be impartial, the prosecutor asked, "So if I don't prove the case are you saying that you're still going to find him guilty?" And Morgan responded, "No. No, I wouldn't." This, the quintessential coaxed recantation, was inadequate to rehabilitate Morgan and show that he could lay aside his bias. In effect, the prosecutor asked Morgan if he would convict Allen without some showing of evidence by the State. Morgan could realistically be expected only to answer this leading question negatively, as he did.

*Id.,* ¶ 28. Thus, the District Court's failure to grant the defendant's challenge for cause was an abuse of discretion. *Id. ,* ¶ 30.

Unlike in *Allen,* R.E.G. did not say that he had made up his mind about the case, nor did he express an unwillingness to consider all the evidence before reaching a conclusion about the case. Although R.E.G.

expressed thoughts that he might sympathize with the alleged victim's testimony, he did not express serious doubts about his ability to be fair and impartial. On the contrary, when asked by both the State and the Court whether he could be fair and impartial, he affirmed that he could. He acknowledged his strong feelings about sexual assault, but "few people are entirely impartial regarding criminal matters, and a district court is not required to remove a prospective juror for cause if the juror convincingly affirms his ability to lay aside any misgivings and fairly weigh the evidence." *Id.,* ¶ 26. Unlike in *Allen,* R.E.G. convincingly affirmed his ability to fairly weigh the evidence despite his discomfort with the subject matter. Overruling the motion to remove R.E.G. for cause was appropriate and proper.

Deveraux also points to two recent Montana Supreme Court cases where the Court reversed two trial convictions on the grounds that a juror's spontaneous revelation of bias could not be overcome by rehabilitation and thus required disqualification. This Court is quite in agreement with Deveraux that decisions on removal of a juror for cause should be carefully weighed. However, those recent cases are distinguishable from the situation in this case. In *State v. Johnson,* 2019 MT 68, the defendant was charged with PFMA, an offense that requires the State prove the essential element of the victim being a legally defined "partner" of the defendant in order to convict. The prospective juror clearly had an issue with requiring the state to prove this essential element, and never gave a definitive statement that she would be able to put her bias aside and require the State prove all the elements of the charge beyond a reasonable doubt:

> a prospective juror twice spontaneously asserted emphatically that she would have a "hard time" and a personal "problem" with requiring the State to prove an essential element of the charged offense (i.e., that the alleged victim was a legally-defined "partner" of the Defendant). On a third occasion, she emphasized that she had "a real problem" with it. She twice stated emphatically that "it makes no difference to me"—if the defendant "beat her up," then "he should be punished" regardless of whether the victim was his partner or merely an acquaintance. In her final spontaneous statement, the prospective juror candidly stated that she "would try to not let" her desire for punishment of all assaults "affect" her, "but I just truthfully think it would."

*Id.,* ¶ 14. This is distinguishable from R.E.G.'s case, where his expression of "bias," or more properly expression of concern, was far less emphatic and unwavering. Unlike in *Johnson,* R.E.G. gave multiple assurances to both counsel and the Court that he could and would be fair and unbiased, and judge the case only on the evidence that was presented during the trial.

The other recent case that Deveraux points to, *State v. Anderson,* 2019 MT 190, ¶¶ 19-20, is also distinguishable. In *Anderson,* the jury had already been chosen when it came to the attention of the Court that the juror had expressed that he had already formed certain opinions about the guilt of the defendant. The district court did not remove the juror from the jury and replace him with an alternate based upon his expressed bias after he was chosen as a juror. The juror

had told a bailiff that he was "pretty sure the Defendant is guilty," *Id.* ¶ 19. When counsel for the state asked him whether he had formed an opinion about the defendant's guilt, the juror said that he "ha[d] a leaning". *Id* "When asked to clarify what he meant, M.J. reaffirmed his opinion and explained that it was based on what questions Defense counsel asked during voir dire" and "admitted being unsure whether he would `be able to push those sort of things all the way to the side.'" *Id.* The juror never fully committed to being able to be fair and unbiased. *Id.* The clear bias and judgment formed prior to the trial in *Anderson* is not present in the instant case, and perhaps more importantly, R.E.G. did what the juror in *Anderson* refused to: he committed fully to remaining fair, unbiased, and judging the case based on the totality of the evidence presented during the trial. Thus, *Anderson* is not instructive. The motion to remove R.E.G. for cause was appropriately denied.

To further address the issue, even if this Court's denial of Deveraux's challenge of R.E.G. was an abuse of discretion, that by itself is not enough to require a new trial. Analyzing the Court's decision about a juror's fitness to serve is a two-step process. *State v. Good,* 2002 MT 59, ¶ 41. First is the determination of whether the Court abused its discretion in denying a challenge for cause. *Id.* Second, if the Court abused its discretion, it must be determined whether the conviction should be set aside as a result of the error. *Id.* (internal citation omitted). The second part of the analysis involves determining the effect of the Court's alleged abuse of discretion. *Good,* 2002 MT 59, ¶ 57. Even were the Court's decision to deny Deveraux's challenge for cause of R.E.G, an abuse of discretion,

the second step of the analysis shows that a new trial would still be unwarranted.

In *Good,* the Court used its holding in *State v. Williams,* 262 Mont. 530, 866 P.2d 1099 (1993), to examine whether the defendant was prejudiced by the District Court's error. Specifically, *Good* upheld *Williams'* three-part test for determining whether a district court's denial of a challenge for cause to a prospective juror is structural error and thus automatically reversible. *Good,* ¶ 63. This test requires the Court to "presume prejudice if: (1) a district court abuses its discretion by denying a challenge for cause to a prospective juror, (2) the defendant uses one of his or her peremptory challenges to remove the disputed juror; and (3) the defendant exhausts all of his or her peremptory challenges." *Id.,* ¶ 58 (citing *Williams,* 262 Mont. at 538).

In *Good,* the Montana Supreme Court found that the three-part *Williams* test was satisfied. *Good,* ¶ 66. First, "[t]he District Court abused its discretion by denying challenges for cause to [two jurors]". *Id.* The defendant "used two of his six peremptory challenges to remove these jurors who should have been removed for cause, and he exhausted all of his peremptory challenges." *Id.* Thus, the Court held that the District Court's denial of the defendant's challenges for cause to these two jurors was structural error requiring automatic reversal and granted the defendant a new trial. *Id.*

Deveraux's case is distinguishable from *Good.* Prong (3) is satisfied as Deveraux exhausted his peremptory challenges. Although the Court maintains that prong (1) of the test is not satisfied because the

Court properly denied Deveraux's challenge for cause, even if it were Deveraux's argument would fail, as Prong (2) is not met, as Deveraux did not use a peremptory challenge to remove R.E.G. from the jury pool. In *Good,* the defendant used two of his peremptory challenges to remove the jurors that the trial court refused to remove for cause. That did not happen in Deveraux's case. Although Deveraux claims that his "counsel was compelled to use peremptory challenges on other less desirable individuals", there is nothing in *Good* suggesting that this is enough to excuse Prong (2) not being met. Further, other cases confirm that using a peremptory challenge to excuse a juror that the Court refuses to remove for cause is necessary for the defendant to be automatically entitled to a new trial. See, e.g., *Allen,* supra, at ¶ 30; *Johnson,* supra, at ¶ 16 (holding that that where a District Court abused its discretion in denying a defendant's motion to disqualify a prospective juror for cause, the "error was structural, requiring automatic reversal, because the defendant later used a peremptory challenge to strike [the juror] from the panel and ultimately exhausted all of his peremptory challenges").

Deveraux cites *Ross v. Oklahoma,* 287 US 81, 88, 108 S. Ct. 2273, 2278 (1988) to suggest that the core inquiry is not whether the juror should have been excused for cause or by using a peremptory, but whether a biased juror made it onto the jury. Essentially, Deveraux argues that the rule in *Williams* violates United States Supreme Court precedent regarding the Sixth Amendment right to an impartial jury. While Deveraux is correct that the central question concerns whether the jury is actually impartial, *Williams* reflects the method that the Montana Supreme

Court has developed for analyzing whether that aim has been achieved. This Court also notes that Deveraux has not argued in his *Motion* that any other jurors should have been excused, only R.E.G. It is not persuasive for Deveraux to argue that he was forced to use his peremptory challenges on "less desirable" prospective jurors than the one which he claims was so biased as to be unable to serve as a juror as a matter of law, having not challenged any those "less desirable" jurors for cause, and then argue that *Williams* was incorrectly decided. Regardless, unless and until the Montana Supreme Court has determined that *Williams* was decided incorrectly the Court is bound to follow its precedent. The Court also finds that under these circumstances, Deveraux did have the benefit of an impartial jury.

The Court properly denied Deveraux's challenge for cause of R.E.G., and this denial was not an abuse of discretion. Even if it were, Deveraux would not be automatically entitled to a new trial because he did not use any of his peremptory challenges to remove R.E.G. from the jury pool. Thus, Deveraux is not entitled to a new trial simply because R.E.G. remained part of the jury.

**III. The Jury Instructions Fully And Fairly Instructed The Jury On The Law Applicable To The Case.**

Deveraux's final argument for why he is entitled to a new trial concerns the jury instruction regarding the requisite mental state required for him to be guilty of the crimes alleged. Deveraux argues that he is entitled to a new trial because the jury was instructed as to the "conduct-based" definition of "knowingly" and therefore the jury could have convicted him solely for

engaging in sexual conduct, whether or not he knew the sexual conduct was without the consent of the victims. There are two aspects to this argument: First, concerning Deveraux's alleged conduct with B.J., his wife at the time of the offenses, and second, regarding his alleged conduct towards D.S., his stepdaughter at the time of some of the offenses.

Regarding the alleged conduct with B.J., towards whom he was charged with sexual intercourse without consent, Deveraux claims that limiting proof and a consideration of "knowingly" to a defendant's mere awareness of engaging in conduct, in this case sexual intercourse, falls short of fully and fairly instructing a jury regarding the applicable law. He claims that the jury was instructed only that Deveraux be aware of his conduct, i.e. sexual intercourse, while the State must prove that Deveraux also knew or should have known that he was engaging in the act without B.J.'s consent. Regarding the alleged conduct with D.S., against whom he was charged with crimes related to, *inter alia,* inappropriate touching, Deveraux claims that the same holds true. He argues that simply allowing the jury to conclude that Deveraux acted "knowingly" when he was aware of his conduct lowers the State's burden of proof, because the conduct charged is sexual in nature. Merely requiring the State to proof that Deveraux knew he was engaging in conduct, he argues, relieves the State of proving that Deveraux knew that the conduct either fit the definition of sexual conduct, or that there was a high probability that sexual contact would occur as a result of that contact. The Court disagrees that Deveraux was prejudiced in any way due to the manner in which the jury was instructed. In making this argument,

Deveraux fails to address the multiple times the jury was instructed that in order to convict, the State had the burden to prove beyond a reasonable doubt that any sexual activity must be *without the consent* of the victims.

Jury instructions in a criminal case are reviewed to determine whether the instructions, *"as a whole,* fully and fairly instructed the jury on the law applicable to the case," and a district court has broad discretion when it instructs a jury. *State v. Swann,* 2007 MT 126, P32, 337 Mont. 326, 160 P.3d 511 (emphasis added); See also *State v. Santiago,* 2018 MT 13. Therefore, when considering an argument that an individual was prejudiced by the giving of a particular instruction, all of the instructions given to the jury must be considered. When reviewing the instructions given in this case as a whole, Deveraux's arguments about confusion or mistake regarding Deveraux's knowledge regarding his victims' consent, or the sexual nature of certain of his actions, are unfounded. Instruction No. 15, titled "Sexual Contact," defined "sexual contact" as "touching of the sexual or other intimate parts of the person of another, directly or through clothing, *in order to knowingly arouse or grati.5) the sexual response or desire of either party."* (Emphasis added). Instruction No. 16, titled "Mental State Inference", allowed the jury to "infer Mr. Deveraux's state of mind, *including his knowledge,* from Mr. Deveraux's acts and all other facts and circumstances in evidence which indicate his state of mind." (Emphasis added). Instruction No. 17, titled "Definition of Consent in Sexual Crimes", defined "consent" as *"words or overt actions indicating a freely given agreement* to have sexual intercourse or sexual contact." (Emphasis added.) This instruction

added that "[a]n *expression of lack of consent through words or conduct* means that there is no consent or that consent has been withdrawn." (Emphasis added). Instruction No. 20, titled "Sexual Assault", stated that "[a] person who *knowingly subjects another to any sexual contact without consent* commits the offense of sexual assault." (Emphasis added). Instruction No. 21 informed the jury that, "[to] convict Mr. Deveraux of sexual assault, the State must prove [...] 1. That Mr. Deveraux subjected [D.S.] to *sexual contact;* AND 2. That the sexual contact was *without [D.S.'] consent;* and 3. That Mr. Deveraux *acted knowingly."* (Emphasis added). Instruction No. 23 stated that "[a] person who knowingly has sexual intercourse with another person who is incapable of consent commits the offense of sexual intercourse without consent." Instruction No. 25 stated that "[a] person who knowingly has sexual intercourse with another person without consent commits the offense of sexual intercourse without consent." Instruction No. 27 stated that "[t]o convict Mr. Deveraux of sexual intercourse without consent, the State must prove [...] 1. That Mr. Deveraux had sexual intercourse with [B.J.]; AND 2. That the act of sexual intercourse was without [B.J.'s] consent; and 3. That Mr. Deveraux *acted knowingly."* Given the totality of these instructions, the jury could not have convicted Deveraux unless it explicitly found beyond a reasonable doubt that the charged sexual activity against B.J. and D.S. was *without consent.*

Even looking specifically at the definition of knowingly provided the jury, Deveraux was not prejudiced in this case.

First, the term "knowingly" is statutorily defined:

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

Section 45-2-101, MCA. The language of the statues under which Deveraux was convicted is also relevant. Section 45-5-503(1), MCA, which criminalizes sexual intercourse without consent, states that "[a] person who *knowingly has sexual intercourse* with another person without consent or with another person who is incapable of consent commits the offense of sexual intercourse without consent." (Emphasis added). Section 45-5-507(1), MCA states that "[a] person commits the offense of incest if the person *knowingly marries, cohabits with, has sexual intercourse with, or has sexual contact,* as defined in 45-2-101, with an ancestor, a descendant, a brother or sister of the whole or half blood, or any stepson or stepdaughter." (Emphasis added). Section 45-5-502, MCA states that "[a] person who *knowingly subjects another person to any sexual contact without consent* commits the offense of sexual assault." (Emphasis added). Given the statutory definition as well as the statutes under which Deveraux was charged, the "conduct-based" *mens rea* instruction that was given to the jury did not prejudice

Deveraux and was an accurate statement of the law. Deveraux argues that he was wrongfully convicted because under the conduct based knowingly instruction the "conduct" at issue could be satisfied by proof that Deveraux "knowingly engaged in sexual activity." Under the context of the case and the specific elements of the charged offenses, it is clear that the conduct at issue was "knowingly engaging in sexual intercourse without consent."

In *Golie v. State,* a case involving charges for witness tampering, the District Court instructed the jury that a person "'acts knowingly when the person is aware of his conduct,' and 'acts purposely when it is the person's conscious object to engage in conduct of that nature.'" 2017 MT 191, ¶ 13, 388 Mont. 252, 399 P.3d 892. On appeal, the defendant argued that his attorney was ineffective by not objecting to these conduct-based instructions, claiming that "witness tampering is a result-based offense that criminalizes causing someone to 'testify or inform falsely' or 'withhold any testimony, information, document or thing,' which are results." *Id.* The defendant argued that "the statute does not particularize conduct, which could be a wide variety of actions, but rather particularizes results, and required result-based mental state instructions." *Id.* The Supreme Court disagreed, finding that "[t]he statute criminalizes, when one believes an official proceeding or investigation is pending, an attempt to 'induce or otherwise cause a witness or informant" to lie, withhold information, elude process, or not appear." *Id,* ¶ 15 (citing § 45-7- 206(1), MCA). The Court found that the text of the statute does not require that a witness or informant actually be induced to carry

through with the action and thus that a particular result is not criminalized. *Id.* The statute has "no requirement that any particular result actually be achieved." *Id.* Thus, the district court's conduct-based instructions defining "knowingly" and "purposely" were correct. *Id.,* ¶ 16. The conduct-based knowingly instruction in this case was correct as well, as the offenses for which Deveraux was charged all focus on the conduct itself, as in *Golie.* For example, §45-5-503(1), MCA, which criminalizes sexual intercourse without consent, states that "[a] person who *knowingly has sexual intercourse with another person* without consent or with another person who is incapable of consent commits the offense of sexual intercourse without consent." (Emphasis added).

In addition, regarding B.J., the jury heard extensive evidence regarding B.J.'s attempts to fight back, communicate to Deveraux her lack of consent, and her physical incapacity as well as B.J.'s actions and explicit statements that she did not consent. Regarding D.S., the acts for which Deveraux was convicted included digital penetration and other inappropriate touching that do not lend themselves to confusion or mistake on the issue of whether Deveraux was aware that his conduct towards his stepdaughter was of a sexual nature.

The jury was fully and fairly instructed on the law applicable to the case, and Deveraux could not have been convicted had the jury not determined that the sexual activity that was the subject of the charged offenses was done without the consent of the victims. Deveraux was not prejudiced and is not entitled to a new trial.

**Exhibit A to the State's Response must be sealed.**

In his *Reply,* Deveraux notes that Exhibit A to the State's *Response* brief contains the full name of R.E.G. and thus should be sealed. The Court agrees, as R.E.G. has the right to remain confidential and not have his full name be public. Thus, the Exhibit must be sealed.

For these reasons,

**IT IS ORDERED** that the Defendant's *Motion for a New Trial* is hereby **DENIED**.

**IT IS FURTHER ORDERED** that Exhibit A to the State's *Response* brief shall be **SEALED**.

DATED this 5th day of September, 2019.

/s/ Matthew J. Wald
MATTHEW J. WALD, District Judge

cc: Alex Nixon
Shannon Foley
Nick K. Brooke
Collin M. Stephens

[CERTIFICATE OF SERVICE

This is to certify that the foregoing was duly served by mail, fax, or email upon the parties or on the attorneys of record at their last known address of record.

Dated the 5th day of September, 2019

By: /s/ Katherine B. Stanley

Court Administrator to the Hon. Matthew J. Wald]

**APPENDIX C**

**Voir Dire Excerpts**

MONTANA TWENTY-SECOND JUDICIAL DISTRICT COURT CARBON COUNTY

| | |
|---|---|
| STATE OF MONTANA,<br><br>Plaintiff,<br><br>And<br><br>GENE DEVEREUX<br><br>Defendant. | **TRIAL**<br><br>June 24, 2019<br><br>CAUSE NO. DC 17-01<br><br>**JUDGE MATTHEW WALD** |

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* * *

**CARBON COUNTY COURTHOUSE**

**JUNE 24, 2019**

**DAY I OF TRIAL**

* * *

**pp. 123:4-123:25 of the transcript**

MR. STEPHENS: What do you think about what we're talking here today, the charges that my client's been --

MS. LULOFF: I have some personal family issues that I would like to discuss in private.

MR. STEPHENS: Okay. All right. And that's fine.

THE COURT: Mr. Stephens, let's try to identify those individuals.

MR. STEPHENS: Okay. Let's just do this, when Mr. Nixon read the charges, these are visceral charges, we react in our gut. There may be no more sort of volatile charge. So who -- when Mr. Nixon told you what the charges were, who said to themselves, oh, my goodness, that's just like my niece, or my daughter, or a story that my wife had told me?

Who has those sort of -- those deep-seated issues, these incredibly personal relationships with people about rape, about child sexual abuse, that we're talking about here today?

And if I could have a show of hands.

(Wherein, a show of hands.)

**pp. 125:3-125:20 of the transcript**

MR. STEPHENS: Gerald Paugh. Okay. And without inquiring any more, is it safer to say that you folks would rather have this discussion back in chambers than here in this open courtroom? Okay.

THE COURT: Well, let's identify those individuals, Mr. Stephens, that feel that way.

If in answer to Mr. Stephens' question, if there's information that you think is pertinent to what we're doing here today -- I think I have already identified Ms. Shepard and Ms. Luloff.

Having a bad taste in your mouth about the allegations, that's not cause now. Even if you know somebody, that is not cause. But if you feel like there's information that you really don't want to say in front of this panel that you feel is important for us to know, that's what I'm asking. So let's see a show of hands to that question.

(Wherein, a show of hands.)

**pp. 126:9-127:8 of the transcript**

THE COURT: Okay. Well, I think this would be a good time to deal with those issues. So we are going to talk to you individually as quickly as we can.

Yes, sir?

MR. GORSUCH: Are we going to speak of this in here?

THE COURT: No.

MR. GORSUCH: Okay. Well, I would be in that circumstance.

THE COURT: No. Where you would rather talk to us in a private setting?

MR. GORSUCH: Yes.

THE COURT: And your name again?

MR. GORSUCH: Richard Gorsuch. The issue I had when everything was spoke about was the spousal part of it. I knew somebody who was treated that way for a long time.

THE COURT: Well, Mr. Gorsuch, if you feel like that is more pertinent to talk to the parties in chambers instead of the whole group, we'll just do that. Okay?

So I have identified Ms. Luloff, Ms. Shepard, Mr. Wheaton, Mr. Slaven and Mr. Gorsuch. Counsel?

MR. NIXON: That's what I have,

MR. STEPHENS: Yeah, that's correct.

**pp. 141:13-147:21 of the transcript**

[The following excerpt took place in chambers.]

COURT: Sit right there, Mr. Gorsuch.

MR. GORSUCH: Thank you.

THE COURT: We're continuing voir dire.

Mr. Gorsuch in open court indicated there was some information that he thought more appropriate to be presented to the parties in this setting, rather than in open court.

So, Mr. Gorsuch, I'm going to ask Mr. Stephens to go ahead and ask you a few questions.

MR. STEPHENS: Mr. Gorsuch, would it be easier for you just to tell us or would it be easier for me to ask questions?

THE DEFENDANT: I'll just tell you. I have a friend that is -- was a spouse, she's divorced now, and the "no means no" didn't apply in that relationship.

I think that all forms of sexual crimes are horrible, but I believe this person to be true when she speaks of these things and I know that in society lots of times society will say, well, that's his wife or that's her husband and that can't be that way. But it is. It absolutely is.

And this is one of -- in my opinion, this is one of the crimes that's hard to prosecute because of that fact. Okay. A lot of society behooves it the woman or the man that's being preyed upon. And I think it's very unfair that a spouse should go through something like that. I mean, beyond unfair. Does that explain?

MR. STEPHENS: It does. And if -- I understand -- and the record won't reflect this -- but you seem emotional about this issue. Did -- I'm just going to refer to her as a friend -- did she stay in the marriage?

She didn't.

MR. GORSUCH: She's my girlfriend.

MR. STEPHENS: She's your girlfriend. But the second that this rape happened, did she leave the marriage or stay in an abusive marriage?

MR. GORSUCH: It was one of those things where she just figured it was her wifely duty.

MR. STEPHENS: So she did stay in the marriage. It happened more than one time?

MR. GORSUCH: For a long time.

MR. STEPHENS: Did she talk to you about this?

MR. GORSUCH: We did talk about it.

MR. STEPHENS: Okay. Again, I don't mean to pry, but obviously my client has been -- he's been accused of raping his wife. Is that an issue you think you can overcome and extend to my client the presumption of innocence or is this just kind of one of those emotional balls that time --

MR. GORSUCH: It's an emotional thing that I understand -- I understand the penalty for things like this are huge. Okay?

And I know the hardness of the person coming forward to testify on the stand, how incredibly horrible that would be. And I may have a problem in this area, out of sympathy.

MR. STEPHENS: Uh-huh. If you were my client, would you want you on the jury?

MR. GORSUCH: I don't believe so.

MR. STEPHENS: Just because of your own just sort of internal and with what's happened with your girlfriend.

MR. GORSUCH: I think to be fair to him, I should not be chosen.

MR. STEPHENS: Okay. Your Honor, with that, I would move to excuse Mr. Gorsuch for cause.

THE COURT: Mr. Nixon.

MR. NIXON: Mr. Gorsuch, you understand that it's hard to find somebody who hasn't had some sort of

experience with a loved one or friend that has had some sort of sexual abuse?

To be honest, I have friends that are very dear to me that have gone through terrible things. That being said, really what you've told us is you find rape repugnant.

MR. GORSUCH: I do.

MR. NIXON: And you understand that there's laws against rape.

MR. GORSUCH: I do.

MR. NIXON: It is my anticipation at the -if you were selected as a juror, that you would be instructed what the elements of sexual intercourse without consent are and it would not have any restriction of the offense against a wife. So essentially, you're in agreement with the law, correct?

MR. GORSUCH: Yes.

MR. NIXON: So the issue is whether you can be unemotional and listen to the facts. Does that seem fair?

MR. GORSUCH: Yeah.

MR. NIXON: I think it's pretty obvious to all of us that you think this is an important issue.

MR. GORSUCH: I do. I think it is huge.

MR. NIXON: And like I've told other jurors, too, there's no personal down side to find rape repugnant. There is no down side to find these offenses to be terrible.

The only question I have now is, can you put that aside and basically fulfill your duty as a juror to listen

to the judge, to be impartial, and to listen to the testimony of the witnesses?

MR. GORSUCH: I can judge fairly. It's just an uncomfortable thing.

MR. NIXON: You realize it's probably uncomfortable for anybody selected?

MR. GORSUCH: The question in the courtroom was: Does anybody know of? And I know of.

MR. NIXON: Please don't think I'm second-guessing you. All of us would rather hear this than not hear it. My only question is, if you can be fair and impartial.

MR. GORSUCH: I can be. I just -- well, I'm just like everybody else, I suppose. I just don't like it at all.

MR. NIXON: Sure. And do you understand the importance of your duty as a jury?

MR. GORSUCH: I do.

MR. NIXON: And do you believe that if you take an oath you're good for your word?

MR. GORSUCH: I do. Well, even if it gets me in trouble, I will not lie about anything.

MR. NIXON: And if Judge Wald swears you in as a juror, you believe that you will fulfill your oath?

MR. GORSUCH: I do.

MR. NIXON: The State objects.

THE COURT: So, Mr. Gorsuch, the gist of it is you probably feel like a ping-gong ball, I'm sure you do -- what I really need to know is can you set aside the emotion, can you set aside the things that you know

happened to your friend such that you would be able to render a fair and impartial verdict in this case based solely on the evidence presented here?

And I'm not -- I do not mean to imply that the answer is yes. Okay? I'm asking you that because both parties deserve that answer.

And I'm going to give you some rules that you have to follow. That's the way the system goes. I'm just asking you, given the facts that you dealt with through your friend, whether that is of a magnitude that you do not believe that you can be fair and impartial and base a verdict solely on the evidence here, or whether you think you can put that aside and go ahead and judge this case based on the information and evidence just provided in that courtroom?

MR. GORSUCH: I can judge this case by the evidence provided in the courtroom.

THE COURT: I'm going to deny your motion, Mr. Stephens.

And we do appreciate, Mr. Gorsuch, you coming in and make sure that we understood this and the thought that went into that before you answered that question.

MR. GORSUCH: Yes.

THE COURT: You can go ahead now. Remember where you were; you don't have to sit down quite yet.

MR. GORSUCH: Thank you, sir.

THE COURT: Thank you.