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PREVIEW; State v. LaFournaise

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**Editor's Note: This preview discusses potentially triggering material involving sexual violence.

The Montana Supreme Court will hear oral argument in *State v. LaFournaise* on Wednesday, December 8, 2021 at 9:30 am via Zoom.[1] Chad Wright is expected to appear on behalf of defendant and appellant, Toston Gray LaFournaise. Austin Miles Knudsen, Katie F. Schulz, Leo Gallagher, and Katie Jerstad are expected to appear on behalf of plaintiff and appellee, the State of Montana.

I. INTRODUCTION

Toston Gray LaFournaise appeals from his conviction under Mont. Code Ann. § 45-5-503 (2015), sexual intercourse without consent, in the First Judicial District Court, Lewis and Clark County.[2] *State v. LaFournaise* is a cautionary tale on the importance of knowing which law applies in a criminal case based on the date of the offense. The Montana Supreme Court will review: (i) whether an amendment to the information during LaFournaise's trial was one of substance or form;[3] and (ii) whether harmless error occurred where the jury instructions failed to require a finding of force.[4] For the reasons discussed below, I anticipate an affirmation of LaFournaise's conviction by the Court.

II. FACTUAL AND PROCEDURAL BACKGROUND

LaFournaise began sexually harassing a child named S.S. when he was in seventh grade and she was in sixth.[5] He left her unwelcome notes, inappropriately touched her buttocks, and forced kisses upon her.[6] S.S. filed four formal complaints with the school. S.S.'s parents, aware of the situation, met with school administration, who suspended LaFournaise

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[1] The argument will be live-streamed and can be accessed through the Court's website at http://strearn.vision.net/MT-JUD/.
[2] Brief of Appellant at 6, *State v. LaFournaise*, No. DA 19-0453 (Mont. May 12, 2021) https://juddocumentservice.mt.gov/ getDocByCTrackId?DocId=353285.
[3] *Id.* at 1; *See generally* City of Red Lodge v. Kennedy, 46 P.3d 602 (Mont. 2002).
[4] Brief of Appellant, *supra* note 2, at 1; *See generally* City of Missoula v. Zerbst, 462 P.3d 1219 (Mont. 2020).
[5] Brief of Appellee at 2, *State v. LaFournaise*, No. DA 19-0453 (Mont. Aug. 11, 2021), https://juddocumentservice.mt.gov/getDocByCTrackId?DocId=36245.
[6] *Id.* at 3.

three times for his acts. Even after LaFournaise moved on to high school, S.S. found a new note from him on her locker.[7]

In the fall of 2015, as S.S. walked home from volleyball practice, LaFournaise rode up to her on his bicycle, jumped off, and pushed her to the ground.[8] He told her he was going to hurt her. She screamed for him to get off her. He pinned her arms above her head with one hand, and with the other pulled down S.S.'s and his own shorts. He inserted his penis into her vagina and raped her. He then cut a wound on her leg with a knife and told her that he would kill her if she told anyone. Because she believed him, she did not initially report the rape.[9]

LaFournaise continued to call S.S. in the summer of 2016 until she blocked his number.[10] Somehow, in 2017, the telephone unblocked LaFournaise's number, and he was able to call her again. He told her that he planned to rape her again and impregnate her, and that he "knew where to find her."[11] S.S.'s terror and anxiety resulting from this phone call led her to reveal the rape to her parents and school officials.[12]

On May 24, 2018, the State charged LaFournaise with sexual intercourse without consent (Count I), misdemeanor privacy in communications (Count II), and misdemeanor stalking (Count III).[13] Before trial, the State amended the information twice, first to add a penalty enhancement to Count I due to bodily injury, and then to amend the charge to aggravated sexual intercourse without consent.[14]

The problem noticed by the district court on the first day of trial was that the crime of aggravated sexual intercourse without consent did not exist until 2017.[15] The offense occurred in the fall of 2015, making the 2015 Montana Code the governing law.[16] Over the objection of the defense, the court allowed an amendment to the information reverting to the original charge of sexual intercourse without consent.[17]

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[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.* at 4.
[11] *Id.*
[12] *Id.* at 5.
[13] *Id.* at 6.
[14] *Id.* at 6–7.
[15] *Id.* at 7; *See* MONT. CODE ANN. § 45-5-508 (2017).
[16] Brief of Appellant, *supra* note 2, at 8; *See* City of Missoula v. Zerbst, 462 P.3d 1219, 1221 (Mont. 2020) (citations omitted) ("[T]he law in effect at the time of an alleged offense applies in criminal prosecution.").
[17] Brief of Appellant, *supra* note 2, at 4–6.

Further complicating the matter were jury instructions used for Count I (now sexual intercourse without consent) that listed the 2017 definition of consent.[18] The defense did not object to these jury instructions.[19] The 2017 definition of "consent" required affirmative consent indicating a "freely given agreement to have sexual intercourse . . . ."[20] The 2015 definition of "without consent" required the use of force.[21]

On appeal, LaFournaise argues the following: (i) the amendment to the information was one of substance, therefore untimely and the Court should reverse his conviction;[22] and (ii) the missing force element of "without consent" in the jury instructions prejudiced his substantial due process rights and therefore, under plain error doctrine, the Court should reverse his conviction.[23]

III. AMENDMENTS OF SUBSTANCE / AMENDMENTS OF FORM

Proper analysis of LaFournaise's first argument begins with an introduction to informations and their amendments. "An information is a written accusation of criminal conduct prepared by a prosecutor in the name of the State."[24] The purpose of the information is for criminal defendants to be aware of the conduct they are accused of violating so that they may prepare a defense.[25] An information can be amended in two ways—in substance and in form.[26]

a. What is an amendment of substance?

Amendments of substance change the nature or elements of an offense, thus requiring different proof or a different defense.[27] If a court gives leave to file the amendment, the defendant must be arraigned on the new charges and given time to prepare a new defense.[28] Because of the burden of such an amendment on the defense, Montana law prohibits an amendment of substance within five days of trial.[29] In *City of Red Lodge v. Kennedy*,[30] the prosecution initially brought a charge under one subpart of the stalking statute, which prohibited "harassing, threatening, or

[18] *Id.* at 6.
[19] *Id.*
[20] § 45-5-501 (2017) (amended 2019).
[21] § 45-5-501 (2015) (amended 2017, 2019).
[22] Brief of Appellant, *supra* note 2, at 12–18.
[23] *Id.* at 18–24.
[24] State v. Scheffer, 230 P.3d 462, 477 (Mont. 2010).
[25] *Id.*
[26] § 46-11-205 (2021).
[27] City of Red Lodge v. Kennedy, 46 P.3d 602, 605 (Mont. 2002).
[28] *Id.* at 604 (citing § 46-11-205 (2001)).
[29] *Id.*
[30] 46 P.3d 602 (Mont. 2002).

intimidating the stalked person . . . ."[31] On the day of trial, the district court gave leave for an amendment that updated the charge to the entire statute, now inclusive of the act of "following the stalked person."[32] The amendment further invoked another statute to prove that Kennedy's acts were a continuous course of conduct.[33] Because the information added elements that required a different defense, Kennedy argued the amendment was one of substance, and therefore untimely as it was filed within five days of trial.[34] The Court agreed, noting that under the new charges, the jury could find the defendant guilty without reliance on the subpart of the stalking statute originally charged. Because the amendment of substance was untimely, the Court reversed the conviction.[35]

b. What is an amendment of form?

Amendments of form are ministerial tasks that do not change the elements of the crime charged, and therefore do not require different proof or a different defense.[36] Because an amendment in form does not prejudice the substantial rights of a defendant, it may occur any time before the verdict or finding is issued.[37] In *State v. Scheffer*,[38] a man suspected of inserting his fingers into a woman's vagina without consent slid his fingers in and out of his mouth and wiped them on his jeans in anticipation of a DNA test. The initial charge filed was tampering with or fabricating physical evidence.[39] When the results showed that in spite of the defendant's efforts, the test detected the woman's DNA, the prosecutor amended the charge to *attempted* tampering with or fabricating physical evidence.[40] Scheffer appealed on the grounds that the amendment was one of substance, and untimely.[41] The Court disagreed, and found that the amendment was of form because tampering with evidence and attempting to tamper with evidence both contained the same elements, but for the "attempting" language.[42]

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[31] *Id.* at 604 (citing § 45-5-220(1)(b) (2001) (amended 2003, 2019)).
[32] *Id.* (citing § 45-5-220 (2001) (amended 2003, 2019)).
[33] *Id.* at 605.
[34] *Id.* at 604.
[35] *Id.*
[36] State v. Scheffer, 230 P.3d 462, 477 (Mont. 2010) (citation omitted).
[37] *Id.* (citing MONT. CODE ANN. § 46-11-205(3) (2009)).
[38] 230 P.3d 462 (Mont. 2010).
[39] *Id.*
[40] *Id.* at 467.
[41] *Id.* at 477.
[42] *Id.*

c. LaFournaise's arguments

Here, LaFournaise claims that the amendment from the 2017 aggravated sexual intercourse without consent charge to the 2015 sexual intercourse without consent charge was an amendment of substance for two reasons: (i) "the amendment altered the defense strategy" to move for dismissal based on charging error;[43] and (ii) "the amendment altered the essential consent element."[44] Both arguments are flawed.

i. A windfall is not a right.

A defense strategy of hoping for dismissal due to a charging error is not a substantial right. In *Collins v. Youngblood*,[45] a defendant was unable to capitalize on a Texas common-law rule that would have overturned his conviction because he was both sentenced and charged a fine.[46] Aware of the loophole, the Texas legislature enacted law allowing the fine to be deleted, thereby curing the error.[47] Youngblood claimed a violation of his rights under the *ex post facto* doctrine because the statute was enacted after the commission of his offense.[48] The Supreme Court disagreed, finding the new law inoffensive to the specific protections offered by the doctrine.[49] To wit: the *ex post facto* doctrine did not shield the defendant from every disadvantage arising from post-offense legislation, only violations of substantial rights.[50] In his concurrence, Justice Stevens added "[t]he mere possibility of a capricious and unlikely windfall is not the sort of procedural protection that could reasonably be judged substantial . . . ."[51]

Here, the substantial right the law protects by limiting amendments is the right of the accused to build a defense based on the elements of their charges and produce the proof required by that defense.[52] Thus, in *Kennedy*, when additional elements of stalking and a continuous course of conduct changed the proof necessary to defend, the Court reversed the

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[43] Brief of Appellant, *supra* note 2, at 13–15.
[44] *Id.* at 17.
[45] 497 U.S. 37 (1990).
[46] *Id.* at 39–40.
[47] *Id.* at 40.
[48] *Id. See generally* U.S. CONST. art. I, § 10.
[49] *Youngblood*, 497 U.S. at 52 ("The Texas statute allowing reformation of improper verdicts does not punish as a crime an act previously committed, which was innocent when done; nor make more burdensome the punishment for a crime, after its commission; nor deprive one charged with crime of any defense available according to law at the time when the act was committed.").
[50] *Id.* at 52–61 (Stevens, J., concurring).
[51] *Id.* at 61 (Stevens, J., concurring). LaFournaise invokes the *ex post facto* doctrine several times in his brief. *See* Brief of Appellant, *supra* note 2, at 9, 19. The e*x post facto* doctrine is immaterial to the disposition of this case. The takeaway of the *Collins v. Youngblood* passages—that a lucky error is not a substantial right of the defendant—can apply to many constitutional contexts. Any mention of the *ex post facto* doctrine is coincidental and not a response to LaFournaise's *ex post facto* claims.
[52] City of Red Lodge v. Kennedy, 46 P.3d 602, 604 (Mont. 2002).

conviction.[53] And in *State v. Hardground*,[54] when the prosecution, on the date of trial, altered the date the accused allegedly changed residence (a critical element of the crime), the Court reversed the conviction because the necessary proof the defense required changed.[55] Here, the district court did not violate LaFournaise's substantial rights by depriving him of the ability to move for dismissal based on charging error. The court's decision did not interfere with constructing a defense founded on the elements of the crime. Nor did this decision alter the proof required to defend against the elements of the crime. It simply deprived him of the "capricious windfall" considered by Justice Stevens in *Youngblood*. Consequently, it offended no constitutional or statutory protection**.**[56]

ii. The amendment, by definition, was one of form.

The amendment to Count I of the information was one of form, because the elements of the crimes before and after were identical. In LaFournaise's second argument, he confuses the analysis between amendments of substance and form by subsuming his jury instruction complaint into the comparison.[57] He begins by discussing the confirmation between the State and the district court that the pre- and post-amendment crimes shared identical elements.[58] He then detours into discussing the 2017 definition of consent's appearance in the jury instructions.[59] Jury instructions are irrelevant in the determination of whether an amendment is of form or substance because the analysis compares statutory elements.[60] Implicit support for this proposition exists in the statute itself, as amendments of substance require an "arraignment on the amended information."[61] An arraignment on jury instructions, erroneous or not, is a non-sequitur. The analysis of the amendment must instead compare the previously charged statute, aggravated sexual intercourse without consent § 45-5-508 (2017) with sexual intercourse without consent § 45-5-503(1) (2015).[62]

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[53] *Id.* at 605.
[54] 433 P.3d 711 (Mont. 2019).
[55] *Id.* at 711–12, 714–15 ("Although an amendment to the date in an information might ordinarily constitute an amendment of form . . . here, the number of days a sexual or violent offender has to provide notice to the proper authorities of change of residence is an element of the offense charged . . . .").
[56] *Youngblood*, 497 U.S. at 61 (Stevens, J., concurring).
[57] Brief of Appellant, *supra* note 2, at 17.
[58] *Id.*
[59] *Id.* at 17–18.
[60] *See* State v. Yecovenko, 95 P.3d 145, 149 (Mont. 2004) (statutes are the same so amendment is of form). *Cf.* City of Red Lodge v. Kennedy, 46 P.3d 602, 605 (Mont. 2002) (comparing full stalking statute and continuous course of conduct statute to one subpart of stalking statute and finding amendment of substance).
[61] MONT. CODE ANN. § 46-11-205 (2021).
[62] Brief of Appellant, *supra* note 2, at 1–2.

§ 45-5-508 (2017)	§ 45-5-503(1) (2015)
A **person** who uses **force** while **knowingly** having **sexual intercourse with another person without consent** or with another person who is incapable of consent commits the offense of aggravated sexual intercourse without consent.	A **person** who **knowingly** has **sexual intercourse without consent with another person** commits the offense of sexual intercourse without consent.
	§ 45-5-501 (2015)
	(1) (a) As used in 45-5-503, the term "without consent" means: (i) the victim is compelled to submit by **force** against the victim or another . . . .

The elements of the pre- and post-amendment statutes are identical. The only difference is where the force element exists. Because the elements of both crimes are the same, the amendment was one of form.[63] Because the amendment was one of form, the amendment was timely as it was effectuated before the verdict issued.[64]

IV. JURY INSTRUCTIONS

Because they listed the 2017 definition of consent, the jury instructions provided in Lewis and Clark County contained a misstatement of the law.[65] LaFournaise correctly notes that the 2017 definition of consent does not include the force element required in 2015.[66]

a. Plain error review is appropriate.

Plain error doctrine review is appropriate because the defense's claims implicate his substantial rights of due process. LaFournaise did not object to the jury instructions at trial.[67] The Montana Supreme Court "generally will not consider issues raised for the first time on appeal when the appellant had the opportunity to make an objection at trial."[68] However, the Court will review claims of error on appeal when they may "(1) result in a manifest miscarriage of justice; (2) leave unsettled the question of the

[63] State v. Scheffer, 230 P.3d 462, 477 (Mont. 2010).
[64] § 46-11-205; Brief of Appellant, *supra* note 2, at 2–3.
[65] § 45-5-501 (2015) (amended 2017, 2019); Brief of Appellant, *supra* note 2, at 1.
[66] § 45-5-501 (2017) (amended 2019); § 45-5-501 (2015) (amended 2017, 2019); Brief of Appellant, *supra* note 2, at 6.
[67] Brief of Appellant, *supra* note 2, at 6.
[68] State v. Daniels, 448 P.3d 511, 518 (Mont. 2019).

fundamental fairness of the trial or proceedings; or (3) compromise the integrity of the judicial process."[69] Claims concerning whether the State properly instructed the jury on its burden of proof directly implicate the fundamental fairness of the trial and thus qualify for plain error review.[70] In *State v. Daniels*, the Court held that the defendant did not meet the burden of convincing them plain error review was necessary,[71] because the jury instructions the defendant complained of were unrelated to the counts the jury ultimately convicted him on.[72]

Here, plain error review is appropriate because LaFournaise's conviction rests on jury instructions whose language neglected to express the force element of "without consent."[73] A basic tenet of a criminal defendant's due process rights is that "every fact necessary to constitute the crime" must be proven beyond a reasonable doubt.[74] Without such a standard, we risk "leav[ing] people in doubt that innocent men are being condemned."[75]

b. Improper jury instructions can be reversible error.

LaFournaise cites several cases where the Court overturned convictions secured with incomplete jury instructions.[76] In all of these cases, the jury instructions provided an opportunity for the jury to convict without finding an element the State had a burden to prove.[77]

In *City of Missoula v. Zerbst*, another jury instruction mix-up occurred where a man defended himself against a sexual assault charge involving an "on-and-off again" romantic interest.[78] The alleged offense occurred in July 2017, when the 2015 Montana Code governed.[79] The instructions, however, provided the 2017 definition of consent which included a new bar to consent in situations where the victim suffered a mental disorder.[80] The alleged victim in *Zerbst* had a history of mental disease.[81] The State's burden under 2015 law was to prove "without consent" under the ordinary

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[69] *Id.* at 519 (citations omitted).
[70] *Id.* (citations omitted).
[71] *Id.* at 520.
[72] *Id.*
[73] MONT. CODE ANN. § 45-5-501 (2015) (amended 2017, 2019); Brief of Appellee, *supra* note 5, at 23–24.
[74] In re Winship, 397 U.S. 358, 364 (1970).
[75] *Id.*
[76] Brief of Appellant, *supra* note 2, at 20–23. *See generally* City of Missoula v. Zerbst, 462 P.3d 1219 (Mont. 2020); State v. Resh, 448 P.3d 1100 (Mont. 2019); State v. Carnes, 346 P.3d 1120 (Mont. 2015).
[77] *Zerbst*, 462 P.3d at 1226; *Resh*, 448 P.3d at 1105; *Carnes*, 346 P.3d at 1123.
[78] *Zerbst*, 462 P.3d at 1220–22.
[79] *Id.* at 1221–22.
[80] *Id.* at 1222 (quoting MONT. CODE ANN. § 45-5-501(1)(b)(i) (2017) (amended 2019)).
[81] *Id.* at 1223.

meaning of those words.[82] Because the jury could incorrectly presume a lack of consent due to mental disorder, the Court reversed the conviction.[83]

In *State v. Resh*,[84] the jury instructions, without objection, stated that a person was incapable of consent to sexual assault if under the age of sixteen.[85] The law, however, provided for consent in persons aged fourteen or older.[86] The alleged victim, at the time of the offense, was fourteen years old.[87] Again in *Resh*, jury instructions that erroneously stated the law offered an opportunity to convict without finding an element of the crime: lack of consent.[88] Consequently, the Court reversed on ineffective counsel grounds.[89]

In *State v. Carnes*,[90] a man charged with assault on a peace officer built his defense based on his lack of knowledge that the men he assaulted were officers.[91] The jury instructions stated the jury only needed to find the man's awareness as to his conduct, not to the fact that the deputies were peace officers.[92] When the jury asked specifically whether Carnes needed to be aware of the deputies' positions, the district court declined to answer and referred them back to the instructions.[93] The Montana Supreme Court held that this awareness was required, and because the jury had opportunity to convict Carnes without finding it, questions of the "fundamental fairness of the trial" remained.[94] Consequently, the Court reversed.[95]

c. Harmless Error

LaFournaise's case is distinguishable. The common, fatal thread in each of the preceding cases is the opportunity the jury had to convict without necessarily finding a required element of the crime. Here, despite the erroneous jury instructions, the jury could not have convicted LaFournaise without finding the required "without consent" element. This is because either (i) the jury found S.S. incapable of consent due to

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[82] *Id.* at 1226.
[83] *Id.*
[84] 448 P.3d 1100 (Mont. 2019).
[85] *Id.* at 1102.
[86] *Id.* at 1104 (citing MONT. CODE ANN. § 45-5-502(5)(a)(ii) (2013) (amended 2019)).
[87] *Id.*
[88] *Id.* at 1105.
[89] *Id.*
[90] 346 P.3d 1120 (Mont. 2015).
[91] *Id.* at 1123.
[92] *Id.* at 1122.
[93] *Id.*
[94] *Id.* at 1123.
[95] *Id.*

surprise; or (ii) it cannot be possible that the jury found the alleged conduct occurred without also finding force occurred.

If the jury found S.S. incapable of consent due to surprise, the State met their burden of proving "without consent."[96] In 2001, the Montana legislature added deception, coercion, and surprise as bars to consent in response to the reversal of a sexual intercourse without consent conviction in *State v. Haser*.[97] In *Haser*, the defendant, a professional photographer, used the pretext of adjusting models' poses as reason for placing his hands under their attire and incidentally penetrating their vaginas with his fingers.[98] The State argued that the surprise of these attacks should satisfy the force requirement of "without consent" because the victims had no opportunity to offer consent before penetration.[99] The Court found no language in the statute to support such an argument and they reversed the conviction.[100] Because the legislature added "surprise" in response to this holding,[101] the facts of *Haser* suggest the type of acts contemplated by the amendment—acts where penetration is the source of surprise.[102] The State, in its brief, considers it a likely outcome that the jury found S.S. was incapable of consent due to the surprise of LaFournaise's attack.[103] The period of time between LaFournaise's arrival on his bicycle and penetration expands the boundaries of immediacy drawn by *Haser*, but lacking a definition in either the statute or the jury instructions, the jury certainly could determine what "surprise" meant to them and whether they found it.[104] If they did find it, the State proved the "without consent" element of the crime.[105] Either way, as explained below, the jury found force.

The Constitution does not guarantee an error-free trial, and the Court will rightly ignore errors found to be harmless.[106] "[I]n the absence of error that renders a trial fundamentally unfair . . . a conviction should be affirmed where a reviewing court can find that the record developed at trial

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[96] MONT. CODE ANN. § 45-5-501(1)(a)(ii)(C) (2015) (current version at § 45-5-501(1)(b)(iii) (2021)).
[97] 20 P.3d 100 (Mont. 2001); § 45-5-501(1)(b)(iii); John F. Decker & Peter G. Baroni, *"No" Still Means "Yes": The Failure of the "Non-Consent" Reform Movement in American Rape and Sexual Assault Law*, 101 J. CRIM. L. & CRIMINOLOGY 1081, 1141–42 (2011).
[98] *Haser*, 20 P.3d at 102–03.
[99] *Id.* at 107, 109.
[100] *Id.* at 110.
[101] Decker & Baroni, *supra* note 97, at 1141–42.
[102] *Haser*, 20 P.3d at 103, 107.
[103] Brief of Appellee, *supra* note 5, at 29.
[104] MONT. CODE ANN. § 45-5-501 (2015) (amended 2017, 2019); Brief of Appellee, *supra* note 5, at 3, 23–24.
[105] § 45-5-501 (2015) (amended 2017, 2019).
[106] United States v. Hasting, 461 U.S. 499, 508–09 (1983).

established guilt beyond a reasonable doubt."[107] In *Pope v. Illinois*,[108] members of the jury were instructed to find whether "allegedly obscene magazines" violated a community standard of value when the correct test required an objective reasonable person standard.[109] The Court held that the error in the instructions was harmless if no rational juror could have found the magazines of no value under one test without finding similarly under the other.[110] In *Rose v. Clark*,[111] a Tennessee court improperly instructed the jury that they could presume malice, a necessary element, by the mere existence of a homicide.[112] Such presumptions were (and are) unconstitutional because they remove the prosecutor's burden of proving an element of a crime beyond a reasonable doubt.[113] The *Clark* Court, however, found that such an error could be harmless if a reviewing court could find malice in the predicate facts.[114] It stated "[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."[115] It recognized that inference based on conduct is often the necessary path a jury takes to reach intent.[116] The Montana Supreme Court, in *State v. Scarborough*,[117] found harmless error where an erroneous jury instruction "could have had no effect on the outcome of the trial."[118]

These principles apply to LaFournaise because the "force" necessary for conviction was built-in to the conduct found by the jury. LaFournaise "jumped off his bicycle and grabbed S.S. from behind."[119] LaFournaise "pushed S.S. down and told her he was going to hurt her." He repeatedly told her "You need to be quiet" as she "screamed for him to get off her." He "pinned S.S.'s hands/arms above her head with his left hand and pulled her shorts down with his right hand." He "took down his own shorts and positioned his knees between S.S.'s legs and inserted his penis into her vagina."[120] Just as in *Pope*, no rational juror could have found these acts occurred and not found force. Just as in *Clark*, the predicate facts

[107] Pope v. Illinois, 481 U.S. 497, 502–03 (1987) (citation omitted) (internal quotation marks omitted).
[108] 481 U.S. 497 (1987).
[109] *Id.* at 503; Carella v. California, 491 U.S. 263, 270–71 (1989) (Scalia, J., concurring).
[110] *Pope*, 481 U.S. at 503.
[111] 478 U.S. 570 (1986).
[112] *Id.* at 574–75.
[113] *See* Sandstrom v. Montana, 442 U.S. 510 (1979).
[114] *Clark*, 478 U.S. at 580.
[115] *Id.* at 580–81.
[116] *Id.* at 581.
[117] 14 P.3d 1202 (Mont. 2001).
[118] *Id.* at 1214.
[119] Brief of Appellee, *supra* note 5, at 3.
[120] *Id.*

conclusively establish force. And just as in *Scarborough*, the error omitting force cannot possibly have influenced the outcome of the trial, because force is so manifestly implicit in everything LaFournaise did. Because the jury instruction error did not prejudice the outcome of LaFournaise's trial, the error was harmless.[121]

V. CONCLUSION

Because the amendment of form to Count I was timely, and because the error omitting a required finding of force from the jury instructions was harmless, I anticipate the Montana Supreme Court will affirm LaFournaise's conviction of sexual intercourse without consent.

[121] City of Missoula v. Zerbst, 462 P.3d 1219, 1224 (Mont. 2020) (citing State v. Scarborough, 14 P.3d 1202 (Mont. 2001)).