**45-5-207. Criminal endangerment -- penalty.** (1) A person who knowingly engages in conduct that creates a substantial risk of death or serious bodily injury to another commits the offense of criminal endangerment. This conduct includes but is not limited to knowingly placing in a tree, log, or any other wood any steel, iron, ceramic, or other substance for the purpose of damaging a saw or other wood harvesting, processing, or manufacturing equipment.

(2) A person convicted of the offense of criminal endangerment shall be fined an amount not to exceed $50,000 or imprisoned in the state prison for a term not to exceed 10 years, or both.

**History: En. Sec. 2, Ch. 196, L. 1987; amd. Sec. 1, Ch. 299, L. 1989.**

**Compiler's Comments:**

*1989 Amendment:* Inserted second sentence of (1) that read: "This conduct includes but is not limited to knowingly placing in a tree, log, or any other wood any steel, iron, ceramic, or other substance for the purpose of damaging a saw or other wood harvesting, processing, or manufacturing equipment."

**Case Notes:**

*Sufficient Evidence to Support Criminal Endangerment Conviction:* The defendant argued there was insufficient evidence to support the charge of criminal endangerment that resulted after she stopped a small bus on an interstate in the dark without deploying hazard lights or warning signs, ultimately causing the death of another driver. Despite the defendant's arguments that she warned approaching vehicles by turning on and off the lights inside the bus, a jury could have reasonably concluded that the defendant's conduct created a substantial risk of death or serious bodily injury. St. v. Bekemans, 2013 MT 11, 368 Mont. 235, 293 P.3d 843.

*Actual Knowledge of Facts Supporting Criminal Endangerment Charge -- Motion to Dismiss Properly Denied:* The state charged the defendant with criminal endangerment after the defendant allegedly swung her boyfriend's 6-month-old child headfirst against the child's crib, causing serious bodily injury to the child. At trial, the defendant moved to dismiss the charge, arguing the state did not provide adequate notice of the theories surrounding the charge. The District Court denied the motion. The Supreme Court affirmed, concluding that the defendant had actual notice of the state's theories regarding the charge: when the defendant appeared at a change of plea hearing 6 months before trial (the defendant later withdrew her guilty plea), the defendant articulated sufficient facts that supported either of the state's theories. St. v. Hocter, 2011 MT 251, 362 Mont. 215, 262 P.3d 1089.

*Criminal Endangerment and Failure to Act -- Parent-Child Duty Applicable to Children in Cohabiting Households:* A jury convicted the defendant of criminal endangerment for swinging her boyfriend's 6-month-old child headfirst against the child's crib, causing serious bodily injury to the child. On appeal, the defendant argued that the District Court erred in instructing the jury on criminal endangerment predicated on the defendant's failure or omission to act because the defendant had no legal duty to aid the child. Following the rationale of St. ex rel. Kuntz v. District Court, 2000 MT 22, 298 Mont. 146, 995 P.2d 951, which recognized a mutual reliance duty owed between two people who were not closely related but lived together, the Supreme Court held that the parent-child duty applies to children present in households of cohabiting adults. Because the defendant established a personal relationship similar to that of a parent with the victim, a common-law duty to protect the victim from harm existed, and the defendant's breach of that duty constituted an appropriate basis for her conviction of criminal endangerment. St. v. Hocter, 2011 MT 251, 362 Mont. 215, 262 P.3d 1089.

*Criminal Endangerment -- Bodily Injury -- Restitution for Lost Wages:* A defendant entered a guilty plea to felony criminal endangerment after he crashed into a car driven by a minor, who suffered multiple injuries. The District Court imposed on the defendant a 10-year commitment to the Department of Corrections with all but 180 days suspended and ordered him to pay the minor's wages for the summer, her father's lost wages, and her unpaid medical expenses. The defendant appealed, contending that the District Court had improperly awarded restitution for lost wages and had abused its discretion in imposing the maximum sentence. The Supreme Court affirmed, holding that the District Court was reasonable in including the minor's lost wages for summer employment as part of restitution and that the District Court properly considered the defendant's prior drunk-driving infractions in imposing the maximum sentence. St. v. Dodson, 2011 MT 302, 363 Mont. 63, 265 P.3d 1254.

*Proposed Instruction on Lesser Included Offense Properly Denied:* In a Youth Court proceeding in which the defendant was charged with felony criminal endangerment, the defendant's proposed jury instruction on a lesser included negligent endangerment instruction was properly denied when the

evidence established that the defendant knowingly took aim and fired a gun at moving vehicles and a pedestrian. In re T.J.B., 2010 MT 116, 356 Mont. 342, 233 P.3d 341.

*Failure to Prove Unconstitutional Statutory Vagueness:* G'Stohl challenged the constitutionality of 45-5-207 on grounds that the statute was unconstitutionally vague as applied to G'Stohl's conduct of driving while intoxicated and crashing his vehicle into an occupied vehicle because the section failed to give notice of prohibited conduct and failed to establish guidelines to prevent arbitrary enforcement. The Supreme Court disagreed. The statute gives a person of ordinary intelligence fair notice that the contemplated conduct was forbidden, and G'Stohl should have known that the conduct he engaged in was unlawful. G'Stohl also failed to point out any language in the statute that was ambiguous or to develop legal analysis supporting the position that any person arrested for DUI could also be charged with criminal endangerment. G'Stohl's vagueness arguments failed and the District Court was affirmed. St. v. G'Stohl, 2010 MT 7, 355 Mont. 43, 223 P.3d 926.

*Independently Obtained Blood Alcohol Test Result Admissible in Prosecution of Negligent Vehicular Assault, Negligent Homicide, and Criminal Endangerment:* Following a vehicle accident in which a person was killed, Schauf was charged with and convicted of negligent homicide, negligent vehicular assault, and criminal endangerment, but Schauf was not charged with DUI. At the hospital, a blood alcohol sample was taken at the direction of the investigating officer under the implied consent law and without advising Schauf of the right to an independent blood test. A second blood sample was drawn at the request of Schauf's treating physician in the emergency room. Schauf moved for suppression of the sample results, which showed that Schauf was intoxicated at the time of the accident. The District Court dismissed the results of the first test but admitted the results of the second test, and Schauf appealed, but the Supreme Court affirmed. The Supreme Court noted that the implied consent law applies when a person is charged with negligent vehicular assault, because that offense specifically relates to statutes governing DUI. However, proof of DUI is not an element of negligent homicide or criminal endangerment, so failure to advise Schauf of the right to an independent blood test provided no basis for dismissal of those charges. Additionally, to the extent that the negligent vehicular assault conviction rested upon the results of the second blood test, those results were obtained independently of state action and of the implied consent law. Thus, suppression of the law enforcement test was proper, but dismissal of all charges would have been an extreme measure given additional substantial evidence of Schauf's intoxication before and after the accident. St. v. Schauf, 2009 MT 281, 352 M 186, 216 P3d 740 (2009).

*Defendant's Fathering of Child Following Assault of Child -- Sentencing Condition That Defendant Not Engage in Contact With Children Under 15 Years of Age Affirmed:* Rowe was convicted of felony criminal endangerment and misdemeanor negligent endangerment after assaulting a 2-year-old child whom Rowe was babysitting. As a condition of sentence, the District Court prohibited Rowe from having contact with any child under 15 years of age unless supervised by an approved adult. Rowe appealed the sentencing condition on grounds that because he married and fathered a child following conviction, the sentencing condition effectively precluded him from contact with his own child and violated his fundamental right to parent. Nevertheless, the Supreme Court affirmed. Citing In re A.M., 2001 MT 60, 304 M 379, 22 P3d 185 (2001), the court noted that the child abuse and neglect statutes reflect the tension between the need to protect family unity whenever possible and the need to provide for the protection of children whose health and welfare are or may be adversely affected and further threatened by the conduct of those responsible for their care and protection, including a parent. Undisputedly, Rowe had an anger problem, and he participated in anger management for several years before the assault but voluntarily stopped taking his medications 2 to 3 weeks prior to the assault. Rowe also committed other incidents of violence in addition to the assault and posed a substantial risk of harm to his own child, so the District Court did not abuse its discretion by imposing a sentencing condition precluding Rowe's contact with his own child. St. v. Rowe, 2009 MT 225, 351 M 334, 217 P3d 471 (2009).

*Criminal Endangerment Not Requiring Registration as Violent Offender:* Upon conviction for felony criminal endangerment, Perkins was required to register as a violent offender. On appeal, the Supreme Court noted that criminal endangerment is not an offense that requires registration as a violent offender. The court ordered that the registration condition be stricken from Perkins' sentence. St. v. Perkins, 2009 MT 150, 350 M 387, 208 P3d 386 (2009).

*Restitution Proper for Felony Criminal Endangerment:* As part of Perkins' plea agreement on a charge of felony criminal endangerment, the state was allowed to seek restitution, and the sentencing

court assessed $5,947 in restitution. Perkins appealed. The state conceded that $78.44 was not supported by documentation, but the Supreme Court held that there was sufficient legal authority for the sentencing court to impose restitution as part of the sentence. Therefore, the restitution award was affirmed but was reduced by $78.44. St. v. Perkins, 2009 MT 150, 350 M 387, 208 P3d 386 (2009).

*Criminal Endangerment -- Sufficient Proof of Mental State and Jurisdiction:* Cybulski contended that the state failed to prove criminal endangerment because there was insufficient proof that Cybulski acted knowingly or that the alleged offense occurred in Custer County. The Supreme Court disagreed with both arguments. Under 45-2-103, the existence of a mental state may be inferred from the acts of the accused and the facts and circumstances connected with the offense. Here, Cybulski drove at a high rate of speed for nearly 50 miles on the wrong side of the interstate while intoxicated. A rational trier of fact could conclude beyond a reasonable doubt that Cybulski either was aware of her conduct and the risk it was creating or was unaware solely because of her intoxicated condition, so the element of knowingly was proven. Under 46-3-112, if two or more acts are requisite to the commission of an offense, the charge may be filed in any county in which any of the acts occurred. Cybulski admitted that she drove on the wrong side of the interstate in Custer County and made no objection to charges being filed in Custer County, so venue in Custer County was proper. St. v. Cybulski, 2009 MT 70, 349 M 429, 204 P3d 7 (2009).

*Jury Instruction on Criminal Endangerment Not Prejudicial to Defendant -- Additional Language Not Relevant to Case Properly Excluded From Instruction:* At Cybulski's trial for DUI and criminal endangerment, the District Court gave the following jury instruction: "A person commits the offense of criminal endangerment if the person knowingly engages in conduct that creates a substantial risk of death or serious bodily injury to another. A person acts knowingly when the person is aware there exists the high probability that the person's conduct will cause a specific result." Cybulski requested additional language from 45-5-207 regarding endangerment caused by tree spiking, but the request was denied. Cybulski also requested additional language regarding the definition of "knowingly", but that request was denied as well. On appeal, Cybulski contended that the District Court erred by not including the requested language in the jury instruction. The Supreme Court disagreed. The language regarding tree spiking had no application to Cybulski's case and was properly refused. The District Court's definition language was shorter and clearer and properly stated the law. Cybulski was not prejudiced by the jury instruction because she was still able to argue her defense theory that she was not aware that her conduct would cause a substantial risk of death or serious bodily injury. The District Court was affirmed. St. v. Cybulski, 2009 MT 70, 349 M 429, 204 P3d 7 (2009).

*Exigent Circumstances Sufficient to Justify Warrantless Search to Avoid Possible Destruction of Drug Evidence:* Law enforcement officers were tipped off that defendant was transporting one-half pound of methamphetamine into the state and tracked defendant to another person's apartment in Corvallis. Officers began surveillance of the apartment and observed two individuals who appeared to be watching the officers. Within a minute, two persons left the apartment, and the officers concluded that their presence was known to persons in the apartment. Shortly thereafter, the officers received a call from an officer in Butte informing them that defendant had called an informant in Butte and told the informant that defendant knew he was being watched and asked the informant to come to Corvallis to help get rid of the drugs. The officers then discussed the possibility that defendant could destroy the drugs before a valid search warrant could be issued in 4 to 7 hours and decided to call for backup and enter the apartment. Upon entering, the officers found defendant and a woman present. Defendant had no drugs on his person, but had $1,500 in his wallet and appeared to be under the influence of methamphetamine. When the warrant eventually arrived, officers found 3 1/2 grams of methamphetamine packaged for sale. Defendant was charged with felony conspiracy to commit criminal distribution of dangerous drugs, felony criminal possession with intent to distribute, felony criminal endangerment, and misdemeanor criminal possession of drug paraphernalia. Defendant pleaded not guilty to all charges and moved to suppress the fruits of the warrantless search. The motion was denied, and defendant was convicted on one confessed count of intent to distribute. On appeal, defendant contended that the warrantless search was unlawful, but the Supreme Court affirmed. The facts that the officers had already witnessed one suspect flee the scene, knew that defendant was aware of the officers' presence, and knew that a third party had been contacted to help defendant get rid of the drugs, combined with the knowledge that procurement of a search warrant would take 4 to 7 hours, established the presence of exigent circumstances sufficient to

justify warrantless entry into the apartment to avoid destruction of the alleged one-half pound of methamphetamine. St. v. Ruggirello, 2008 MT 8, 341 M 88, 176 P3d 252 (2008), applying the exigent circumstances test set out in St. v. Stone, 2004 MT 151, 321 M 489, 92 P3d 1178 (2004).

*Evidence of Defendant's Conduct Prior to Accident Not Considered Irrelevant or Character Evidence -- Failure of Counsel to Object Not Ineffective Assistance:* Defendant contended that defense counsel erred by failing to object to evidence that defendant was driving erratically and aggressively for 10 miles prior to a fatal accident, asserting that the evidence was improper character evidence and irrelevant to and separate from the collision. The Supreme Court disagreed. The events preceding the accident were clearly relevant and closely related to the charged offenses of negligent homicide and criminal endangerment. An objection on grounds of improper character evidence and relevance would have been groundless, and defense counsel did not render ineffective assistance in failing to object. St. v. Tennell, 2007 MT 266, 339 M 381, 170 P3d 965 (2007).

*Deliberate Homicide by Accountability -- Instruction on Criminal Endangerment and Negligent Homicide Not Required:* At Doyle's trial for deliberate homicide by accountability, Doyle contended that the trial court should have offered instruction on the lesser included offenses of criminal endangerment and negligent homicide. The Supreme Court disagreed. Criminal endangerment is not a lesser included offense of deliberate homicide by accountability based on the defendant's failure to act under 45-5-201(2)(b). St. v. Doyle, 2007 MT 125, 337 M 308, 160 P3d 516 (2007).

*Sufficiency of Charging Documents -- Probability, Not Prima Facie Showing, That Defendant Committed Crime of Theft Sufficient:* Harlson allegedly stole a pickup and drove it 60 miles an hour through downtown Billings. Harlson was charged with theft, criminal endangerment, and DUI. Harlson moved to dismiss on grounds that the charging documents failed to show probable cause or allege a specific location, a substantial risk of death or serious bodily injury, a speed limit, or the presence of people in the area. The motion was denied, and on appeal, the Supreme Court affirmed. Citing St. v. Elliott, 2002 MT 26, 308 M 227, 43 P3d 279 (2002), the court noted that the sufficiency of the charging documents is established by reading the information together with the affidavit in support of the motion for leave to file the information. The affidavit need not make out a prima facie case that defendant committed an offense. A mere probability that the offense was committed is sufficient. In addition, the charging documents made clear that Harlson allegedly committed theft of a vehicle and drove the vehicle at high speed through downtown Billings, exceeding the speed limit and endangering any pedestrians in the area. Harlson was acquitted of the DUI charge, so the sufficiency of the charging document as to DUI was not at issue. The theft and endangerment charges were thus supported by the charging documents, and the motion to dismiss was properly denied. St. v. Harlson, 2006 MT 312, 335 M 25, 150 P3d 349 (2006).

*No Affirmative Defense of Renunciation to Charge of Solicitation:* Lynch was charged with solicitation to commit deliberate homicide. At trial, Lynch sought to introduce a defense of renunciation or withdrawal to the charge, but the trial court denied the defense, and Lynch appealed. The Supreme Court affirmed. Lynch conceded that the Legislature has not codified renunciation as an affirmative defense to a solicitation charge, but contended that because the defense is allowed with respect to some other crimes, he should have been able to assert that defense. The Supreme Court declined to extend the renunciation defense to solicitation, noting that the fact that a renunciation defense is statutorily available for other possible charges is irrelevant. The state has broad discretion in making charging decisions when facts support more than one possible charge, and the trial court did not err in disallowing Lynch's renunciation defense in this case. St. v. Lynch, 2005 MT 337, 330 M 74, 125 P3d 1148 (2005), distinguishing St. v. Bullock, 272 M 361, 901 P2d 61 (1995).

*Failure of Counsel to Request Unanimity Instructions on Two Counts of Criminal Endangerment Not Considered Ineffective Assistance:* Gallagher was convicted of two counts of criminal endangerment and asserted on appeal that failure of defense counsel to request specific unanimity instructions on the two charges constituted ineffective assistance and denied Gallagher the right to a fair trial. Based on the record, the Supreme Court disagreed. Both defense and prosecution counsel argued each count to the jury in closing arguments, linking appropriate facts and specific victims to each count, so juror confusion was extremely unlikely, nor could the court conclude that the trial outcome was prejudiced by the lack of a specific unanimity instruction on the endangerment charges that denied Gallagher a fair trial. Gallagher's convictions were affirmed. St. v. Gallagher, 2005 MT 336, 330 M 65, 125 P3d 1141 (2005).

*Sufficient Evidence of Criminal Endangerment to Child During Domestic Disturbance:* When officers responded to a domestic disturbance, they found Weigand holding his child in one arm and a knife in the other hand. Despite repeated demands to put down the knife and the child, Weigand refused and challenged the officers to shoot him. Eventually Weigand released the child and surrendered to a SWAT team. Weigand was convicted of criminal endangerment and appealed on grounds that the elements of the crime were not proved because: (1) Weigand never threatened his wife, the child, or the officers with the knife; and (2) there was no substantial risk of death or serious bodily injury to the child because the officers testified that they would not have shot Weigand while he was holding the child. The Supreme Court disagreed. Weigand's behavior throughout the altercation created a highly stressful, volatile, and dangerous encounter that in turn created a risk of death or serious bodily injury to the child. Weigand could not have known at the time of the incident that the officers would restrain themselves, given Weigand's extreme and unreasonable behavior, and one officer did in fact testify that he would have shot Weigand had the situation merited it. The criminal endangerment conviction was affirmed. St. v. Weigand, 2005 MT 201, 328 M 198, 119 P3d 74 (2005).

*Jury Rejection of Impossibility Defense -- Sufficient Evidence to Support Conviction of Assault and Criminal Endangerment:* York was charged with assault and criminal endangerment for ramming a vehicle from behind at 50 miles an hour. The deputy who responded saw York going the opposite direction on the same highway. York's defense was that it would have been impossible for him to commit the assault as reported and then arrive at the location where he was observed by the deputy because of the time and distance involved. The jury was instructed that it could reject any portion of a witness's testimony that it considered to be false. York presented his impossibility defense, and the jury rejected it. Although it could not be determined precisely why the jury convicted York, there were plausible theories as to how the jury could have reconciled the witness's testimony with York's theory. The conviction was supported by sufficient evidence and thus affirmed. St. v. York, 2003 MT 349, 318 M 511, 81 P3d 1277 (2003).

*Proper Venue for Prosecution of Common Scheme to Manufacture Methamphetamine in Several Counties -- Possession Charge Dismissed for Improper Venue:* Following arrest in Sanders County, Galpin was charged in Ravalli County with possession of methamphetamine in Sanders County, operating a methamphetamine lab in Ravalli County, possessing methamphetamine precursors in Ravalli and Missoula Counties, and criminal endangerment in Ravalli County. Citing venue grounds, Galpin questioned the evidence on the endangerment charge and moved to dismiss the possession charge and the Missoula County precursor charge because there was no evidence that the crimes were committed in Ravalli County where the charges were filed. The Supreme Court agreed that possession has but one requisite act, which is possession of the drug itself, and because neither the state's information nor trial testimony established that Galpin possessed methamphetamine anywhere but Sanders County, Ravalli County was not the proper venue for the possession charge, so it was dismissed. However, in pursuit of the common scheme to manufacture methamphetamine, Galpin kept precursors in storage facilities in both Ravalli and Missoula Counties and knowingly or purposely prepared, processed, or manufactured the drug as he traveled between Ravalli and Missoula Counties, so venue was proper in Ravalli County for the precursor charges. Ravalli County was also a proper venue for the criminal endangerment charges based on witness testimony that Galpin manufactured methamphetamine on at least three occasions at the witness's home in Ravalli County when children were present. St. v. Galpin, 2003 MT 324, 318 M 318, 80 P3d 1207 (2003).

*Criminal Endangerment, Negligent Endangerment, and Partner or Family Member Assault Not Considered Lesser Included Offenses of Aggravated Assault:* At trial for aggravated assault, the District Court refused Hoffman's request of lesser included offense instructions on the offenses of criminal endangerment, negligent endangerment, and partner or family member assault, and Hoffman appealed. The Supreme Court affirmed. Under 46-1-202(8)(a), a lesser included offense is one that is established by proof of the same or less than all the facts required to establish commission of the offense charged, while under 46-1-202(8)(c), a lesser included offense is one that differs from the offense charged only in the respect that a lesser kind of culpability suffices to establish its commission. Although Hoffman made prefatory reference to both subsections, the substance of Hoffman's argument focused entirely on subsection (8)(c), and the Supreme Court declined to address arguments related to subsection (8)(a) that were raised for the first time on appeal. It is incumbent on counsel to specify at trial which subsection is

being relied upon. Subsection (8)(c) does not support a conclusion that criminal endangerment, negligent endangerment, or partner or family member assault is a lesser included offense of aggravated assault. The District Court's properly concluded that the offenses were too dissimilar to warrant a lesser included offense instruction. St. v. Hoffman, 2003 MT 26, 314 M 155, 64 P3d 1013 (2003), following St. v. Fisch, 266 M 520, 881 P2d 626 (1994).

*Elements of Criminal Endangerment Satisfied:* Porter was convicted of criminal endangerment and appealed on grounds that the state failed to prove that Porter was aware of the high probability that his conduct would cause a substantial risk of death or serious bodily injury to others. The Supreme Court disagreed and affirmed the conviction. Porter shot his rifle five times at night, while angry and intoxicated, from a county road adjacent to an occupied public campground and then admittedly "beaded down" on the human occupants of the campground. One of the campers testified that Porter's admission of taking aim at the campground occupants was frightening. Even though it was never proved that the safety was off on the rifle or that Porter's finger was on the trigger, it was reasonable for a jury to assume that Porter was capable of discharging the rifle when aiming at the campers and that Porter was aware of the high probability that his conduct would cause a substantial risk of death or serious bodily injury. Thus, Porter's motion for a directed verdict on grounds of insufficient evidence was properly denied. Porter v. St., 2002 MT 319, 313 M 149, 60 P3d 951 (2002).

*Admissibility of Expert Testimony on Munchausen Syndrome by Proxy:* In her trial for criminally endangering her child by leaving her medicine where the child could access it, the District Court found that the proper foundational requirement had been satisfied to allow expert testimony regarding Hocevar's possible affliction with Munchausen Syndrome by Proxy (MSBP), also known as factitious disorder by proxy, which is a pattern of behavior wherein a caretaker, usually a mother, fabricates or causes illness in another, usually a preverbal child, to gain attention. The expert characterized MSBP as a form of child abuse in the field of pediatrics, rather than a psychiatric disorder. Hocevar appealed the admissibility of the MSBP evidence. The Supreme Court found that expert testimony regarding MSBP was neither novel nor scientific and thus not subject to the standard in Daubert v. Merrell Dow Pharmaceuticals, 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786 (1993), which only applies to the admissibility of novel scientific evidence, so the court applied the conventional Rule 702, M.R.Ev. (Title 26, ch. 10), analysis of admissibility. Testimony about MSBP is beyond the range of ordinary training or intelligence and is therefore a subject matter requiring expert testimony. The state established sufficient foundation to show that the expert was qualified to testify on MSBP and had adequate knowledge upon which to base an opinion, and the District Court did not abuse its discretion in allowing the testimony into evidence. St. v. Hocevar, 2000 MT 157, 300 M 167, 7 P3d 329, 57 St. Rep. 625 (2000). See also Calif. v. Phillips, 175 Cal. Rep. 703 (1981).

*Allowing Child Access to Medication Considered Criminal Endangerment:* A mother left her child's headache medicine on the table with her own allergy medication, instructing the child to take his headache medicine and then leaving the room. The child took the allergy medicine instead and overdosed. The mother was subsequently convicted of criminal endangerment. On appeal, she contended that there was insufficient evidence to support the conviction because her conduct did not actually create a substantial risk of death or serious bodily injury and that the state had failed to prove that she knowingly made the medication available to her son, resulting in his injury. However, the state did not have to prove actual bodily injury, but rather that there was a high probability that the mother's conduct created a substantial risk of death or serious bodily injury. A rational jury could have found that substantial risk existed, and the state presented sufficient evidence that the mother knowingly made the medication available by leaving it in an open bottle on the table with the same medication that she instructed her son to take. The criminal endangerment conviction was affirmed. St. v. Hocevar, 2000 MT 157, 300 M 167, 7 P3d 329, 57 St. Rep. 625 (2000).

*Error in Refusing to Classify Defendant as First-Time, Nonviolent Offender Following Conviction for Criminal Endangerment:* Hocevar was convicted of criminal endangerment, which required a finding that her conduct created a substantial risk of death or serious bodily injury. The District Court refused Hocevar's request to be treated as a first-time, nonviolent felony offender because she committed a crime of violence. However, the definition of crime of violence in 46-18-104 means a crime in which an offender causes a serious bodily injury or death. Given the various options that were available to the jury, it could not be determined on appeal whether the jury found that Hocevar actually caused a substantial risk of

death or merely caused a risk of serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ. In light of the uncertainty, the District Court committed reversible error in concluding that Hocevar committed an act of violence and in refusing to classify Hocevar as a first-time, nonviolent felony offender. St. v. Hocevar, 2000 MT 157, 300 M 167, 7 P3d 329, 57 St. Rep. 625 (2000).

*Application of Weapon Enhancement Statute to Conviction for Criminal Endangerment Not Violative of Double Jeopardy Protection:* Keith was sentenced to 10 years in prison plus 10 years for use of a weapon, with 15 years suspended, for criminal endangerment. Keith argued that application of the weapon enhancement statute to the felony conviction for criminal endangerment violated the right to be free from multiple punishments for the same offense, pursuant to St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312 (1999). The Supreme Court distinguished Guillaume, noting that unlike the felony assault (now assault with a weapon) statute in that case, the definition of criminal endangerment does not require proof of the use of a weapon nor did Keith's use of a weapon raise the crime from a misdemeanor to a felony as in Guillaume. Because the offense of criminal endangerment, by its own terms, does not specifically increase a defendant's punishment for use of a weapon, application of the weapon enhancement statute to a criminal endangerment violation is not a double jeopardy violation. St. v. Keith, 2000 MT 23, 298 M 165, 995 P2d 966, 57 St. Rep. 120 (2000), followed in St. v. Dunnette, 2000 MT 33, 298 M 208, 996 P2d 379, 57 St. Rep. 141 (2000), and St. v. Charlo, 2000 MT 192, 300 M 435, 4 P3d 1201, 57 St. Rep. 761 (2000).

*Evidence of Voluntary Mental Impairment Insufficient to Trigger Waiver of Mandatory Minimum Sentence -- Hearing Not Required:* Keith was sentenced to 10 years in prison plus 10 years for use of a weapon, with 15 years suspended, for criminal endangerment. At the sentencing hearing, the District Court noted that evidence of Keith's reduced mental capacity was based on Keith's voluntary ingestion of alcohol and prescription drugs and that under 46-18-222(2), the court could not waive the mandatory minimum sentence. Citing numerous cases, the Supreme Court held that the statute does permit the sentencing court to reject the mandatory minimum sentence if the court determines that defendant's mental capacity was significantly impaired during the commission of the offense but that the statute does not apply in cases when the maximum sentence or any sentence greater than the mandatory minimum is imposed. Here, there was no indication that the sentencing court ever intended to sentence Keith to either the 2-year mandatory minimum or to a period less than the 2-year mandatory minimum, so the exceptions did not apply. Further, because the exceptions were not an issue, Keith was not entitled to a hearing pursuant to 46-18-223. Nevertheless, in this case, the sentencing court did hold a hearing on its own motion but did not then abuse its discretion by denying Keith's request for a continuance of the sentencing hearing to allow evidence of Keith's mental capacity. St. v. Keith, 2000 MT 23, 298 M 165, 995 P2d 966, 57 St. Rep. 120 (2000).

*Reckless Driving Not Lesser Included Offense of Criminal Endangerment:* Reckless driving is a distinct offense and not an included offense of criminal endangerment. St. v. Beavers, 1999 MT 260, 296 M 340, 987 P2d 371, 56 St. Rep. 1035 (1999), following Blockburger v. U.S., 284 US 299, 76 L Ed 306, 52 S Ct 180 (1932).

*Sufficient Evidence of Criminal Endangerment -- Instruction on Negligent Endangerment Not Required:* Martinosky was charged with felony criminal endangerment. During settlement of jury instructions, Martinosky offered a proposed instruction on negligent endangerment as a lesser included offense of criminal endangerment, but the instruction was refused. On appeal, without reaching the question of whether negligent endangerment was a lesser included offense of criminal endangerment, the Supreme Court found that the evidence established that Martinosky was fully aware of his actions and the probable outcome of those actions and thus acted knowingly, so an instruction on negligent endangerment was not warranted. St. v. Martinosky, 1999 MT 122, 294 M 427, 982 P2d 440, 56 St. Rep. 495 (1999), following St. v. Martinez, 1998 MT 265, 291 M 306, 968 P2d 705, 55 St. Rep. 1093 (1998), and St. v. Ingraham, 1998 MT 156, 290 M 18, 966 P2d 103, 55 St. Rep. 611 (1998).

*Culpability for Criminal Endangerment Created by Appreciation of Probable Risks Posed by One's Conduct -- "Knowingly" Misapplied:* The mental state element of "knowingly" in criminal endangerment contemplates a defendant's awareness of the high probability that the conduct in which the defendant is engaging, whatever that conduct might be, will cause a substantial risk of death or serious bodily injury to another. Because there is no particularized conduct that gives rise to criminal endangerment, it is

incorrect to apply to that offense's mental element the definition of knowingly--that an accused need only be aware of the accused's conduct. It is the appreciation of the probable risks to others posed by one's conduct that creates culpability for criminal endangerment. Pursuant to 45-2-103, "knowingly" applies in this case to both conduct and the result of that conduct. Therefore, the District Court's application of the definition of knowingly--that an accused need only be aware of the accused's conduct--as the offense's mental element constituted reversible error. St. v. Lambert, 280 M 231, 929 P2d 846, 53 St. Rep. 1379 (1996). See also St. v. Crisp, 249 M 199, 814 P2d 981 (1991), St. v. Ingraham, 1998 MT 156, 290 M 18, 966 P2d 103, 55 St. Rep. 611 (1998), and St. v. Hocevar, 2000 MT 157, 300 M 167, 7 P3d 329, 57 St. Rep. 625 (2000).

*Proof That Specific Identified Person Was Placed at Risk:* The second sentence of this section, making it an offense to knowingly place any steel, iron, ceramic, or other substance in a tree, log, or any other wood for the purpose of damaging a saw or other wood-harvesting, processing, or manufacturing equipment is an example of criminal endangerment with no particular identifiable victim. In the present case, in which defendant drove down a narrow city street in the middle of the morning at up to 80 miles an hour past houses and buildings open to the public, ignoring traffic signs, the state was not required to prove that one or more particular identified persons were placed in substantial risk of death or serious bodily injury or that defendant intended to injure another. The legislative history of this section provides examples of acts that do not necessarily require identified possible victims. St. v. Bell, 277 M 482, 923 P2d 524, 53 St. Rep. 792 (1996).

*Plea to Lesser Included Offense -- Introduction at Sentencing of Evidence of Commission of Charged Offense -- Language of Plea Agreement:* Collier was arrested and charged with solicitation of deliberate homicide, which was reduced to criminal endangerment by a plea bargain. At the District Court level and on appeal, Collier challenged the state's introduction of evidence tending to prove her commission of the originally charged offense. The Supreme Court upheld the introduction of the evidence, noting not only that the rules of evidence do not apply in sentencing, but also that the plea agreement provided that "counsel for the State may make any recommendation and may introduce . . . evidence in support thereof at the time of sentencing". St. v. Collier, 277 M 46, 919 P2d 376, 53 St. Rep. 534 (1996).

*Criminal Endangerment Properly Charged in Arrest for Driving Under Influence -- Constitutionality:* Smaage had a history of seven DUI arrests when he was arrested again while driving with a blood alcohol level of 0.250. After review of his record of drinking and driving, Smaage was charged with criminal endangerment under this section, which Smaage contended was improper, rather than DUI under 61-8-401 or 61-8-722. Smaage also asserted that the criminal endangerment statute was unconstitutionally vague as applied to him because he was not given fair notice that driving after drinking was a felony crime. The Supreme Court found that the statutes were not conflicting, but rather were alternative charging statutes. The legislative history of the criminal endangerment statute indicated legislative intent in allowing use of that statute in prosecutions for DUI. Because the elements of criminal endangerment were present in this case due to Smaage's mental state of acting "knowingly", the conviction was affirmed. Further, with a history of DUI and negligent vehicular homicide, Smaage should have understood that his drunk driving created a substantial risk of bodily injury to others and was therefore proscribed. In light of Smaage's conduct, this section is not unconstitutionally vague as applied to this case. St. v. Smaage, 276 M 94, 915 P2d 192, 53 St. Rep. 294 (1996), following U.S. v. Mazurie, 419 US 544, 42 L Ed 2d 706, 95 S Ct 710 (1975).

*Statute Not Unconstitutionally Vague:* A defendant commits the crime of criminal endangerment when he is aware that there is a high probability that his conduct may cause a substantial risk of death or serious bodily injury to another. By incorporating the intent element of knowingly, a mental state that is adequately defined by statute, the Legislature has given fair warning of the mental state required in order to be convicted of felony criminal endangerment. The term "substantial risk of death" is not ambiguous and does not need to be defined. St. v. Crisp, 249 M 199, 814 P2d 981, 48 St. Rep. 640 (1991). See also St. v. Lancione, 1998 MT 84, 288 M 228, 956 P2d 1358, 55 St. Rep. 344 (1998).

*Substantial Risk of Death -- Definition Not Required:* The jury need not be instructed on words or phrases of common understanding or meaning. The District Court did not err in refusing jury instruction that indicated that the victim must sustain an injury that poses a substantial risk of death. St. v. Crisp, 249 M 199, 814 P2d 981, 48 St. Rep. 640 (1991).

*Instruction on Criminal Endangerment Unnecessary Absent Evidence:* Defendant convicted of

deliberate homicide contended that the District Court erred in refusing to give a proposed instruction on criminal endangerment as a lesser included offense. However, defendant presented no evidence at trial, neither testifying himself nor calling a single defense witness. Evidence must be presented at trial to warrant an instruction on criminal endangerment. A court's refusal to instruct on criminal endangerment is proper when a purposeful or knowing act causes death or when the failure to act results in accountability for deliberate homicide. St. v. Olivieri, 244 M 357, 797 P2d 937, 47 St. Rep. 1668 (1990).

*No Implied Repeal of Attempted Deliberate Homicide Law by Enactment of Criminal Endangerment Statute:* Criminal endangerment is clearly distinguishable from attempted deliberate homicide because the purpose of the behavior itself is different even if the result of the behavior is the same. Therefore, the Legislature did not impliedly repeal the offense of attempted deliberate homicide by enacting the offense of criminal endangerment. St. v. Clawson, 239 M 413, 781 P2d 267, 46 St. Rep. 1792 (1989).