IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 17-0033

STATE OF MONTANA,

Plaintiff and Appellee,

v.

SHANE CLARK JOHNSON,

Defendant and Appellant.

MEMORANDUM ACCOMPANYING MOTION TO WITHDRAW

On Appeal from the Montana Twelfth Judicial District Court,
Hill County, the Honorable Daniel A. Boucher Presiding

APPEARANCES:

CHAD WRIGHT
Appellate Defender
KOAN MERCER
Assistant Appellate Defender
Office of the Public Defender
Appellate Defender Division
555 Fuller Avenue
P.O. Box 200147
Helena, MT 59620-0147
kmercer@mt.gov
(406) 444-9505

ATTORNEYS FOR DEFENDANT
AND APPELLANT

TIMOTHY C. FOX
Montana Attorney General
C. MARK FOWLER
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

JESSICA COLE-HODGKINSON
Hill County Attorney
315 4th Street
Havre, MT 59501
CATHERINE TRUMAN
Special Deputy County Attorney
P.O. Box 201401
Helena, MT 59620-1401

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Montana Code Annotated

Montana Rules of Evidence

Montana Constitution

United States Constitution

Other Authorities

SUMMARY OF PROCEDURAL HISTORY

The State charged Appellant Shane Clark Johnson by Information in the Twelfth Judicial District Court, Hill County, with deliberate homicide for the death of his brother, Travis Johnson. (Docs. 1–3.) The State also charged a weapon enhancement under Mont. Code Ann. § 45-18-221. (Doc. 3.)

The Public Defender was appointed to represent Shane. (Doc. 4.) Shane gave notice of his intent to rely upon the affirmative defense of justifiable use of force. (Doc. 8.)

The State filed a motion in limine primarily seeking to bar evidence of Travis's violent character and drug use and Shane's hearsay statements to police regarding self-defense. (Doc. 27.) The defense filed a response. (Doc. 31.) The defense also filed its own motion in limine primarily seeking to bar evidence of prior criminal acts by Shane. (Doc. 32.) The State responded to the defense motion (Doc. 37) and filed a reply regarding its own motion (Doc. 38).

The district court held a hearing regarding these pretrial motions. The district court heard testimony from two of the officers who responded to the scene and spoke with Shane. (9/8/2014 Tr. at 16–33.)

The district court and parties agreed that Shane's prior acts would not come in unless the defense somehow opened the door to them. (9/8/2014 Tr. at 12–13.) The district court subsequently set a second hearing for the defense to make an offer of proof regarding evidence of past violence by Travis and justifiable use of force. (Doc. 85.) The defense objected to having to make such a proffer but did so. (9/18/2014 Tr. at 3–13.) The district court considered the proffer sufficient (9/18/2014 Tr. at 13), and on the morning of trial, it ruled that the defense could call witnesses in support of these prior acts of violence by Travis (9/23/2014 A.M. Tr. at 3–9).

Trial began on September 23, 2014, and ran through September 30. On the first day, the parties conducted voir dire and passed the panel for cause. (9/23/2014 A.M. Tr. at 35–100; 9/23/2014 P.M. Tr. at 2–71.) After the parties exercised their preemptory challenges, the district court sworn in a jury. (9/23/2014 P.M. Tr. at 72–79.)

On the second day, the district court gave the jury its preliminary instructions (9/24/2014 A.M. Tr. at 22–34) and the parties presented opening statements (9/24/2014 A.M. Tr. at 35–53). The State then began its case-in-chief, which continued through the fifth day of trial.

(9/24/2014 A.M Tr. at 55; 9/24/2014 P.M. Tr.; 9/25/2014 A.M. Tr.; 9/25/2014 P.M. Tr.; 9/26/2014 Tr.; 9/29/2014 Tr. at 78.)

After the State rested, Shane testified. (9/29/2014 Tr. at 83–126.) The defense did not call witnesses regarding Travis's prior acts of violence, and Shane testified that "[i]t is not like [Travis] to do something like this" and that Travis "has gotten mad and stuff but never grabbed anything [like a gun]." (9/29/2014 Tr. at 97.) The defense called Shane's mother to talk about her purported statement to police, Travis's familiarity with firearms, and her observation of Travis "drunk and belligerent" on the evening in question. (9/29/2014 Tr. at 140–49.) The State recalled its lead investigator for rebuttal. (9/29/2014 Tr. at 152–60.)

The district court and parties then settled jury instructions. (9/29/2014 Tr. at 163–75; 9/30/2014 Tr. at 2–35; *see also* Docs. 81, 87, 103.) The district court instructed the jury, including giving instructions as to a lesser included offense of negligent homicide over defense objection and instructions as to justified use of force over State objection. (9/30/2014 Tr. at 21, 28, 42; Doc. 105.) The parties then gave closing arguments. (9/30/2014 Tr. at 44–110.)

During deliberations, the jury sent a number notes. (9/30/2014 Tr. at 113–58; Doc. 106.) As a result of the jurors' questions, the parties and district court agreed to give jurors a new verdict form. (9/30/2014 Tr. at 157; Doc. 107.) The jury found Shane guilty of negligent homicide and found that he used a weapon during its commission but did not reach a verdict as to deliberate homicide. (Doc. 107.)

At a hearing on November 19, 2014, Shane received permission to represent himself. (11/19/2014 Tr. at 3–5; *see also* Doc. 117 (scheduling order with Shane's letters requesting to represent himself attached).) That same day, Shane filed a pro se motion for a new trial. (Doc. 123.) The State filed responses. (Docs. 138, 148–49.) Shane filed a number of other pro se documents. (Docs. 124–27, 131, 133–34, 136, 140–41, 143–45, 151, 153.) These ranged from requests for bond reduction, return of seized property, and removal of the prosecutor to supplemental arguments in support of the new trial motion. (*E.g.*, Docs. 125, 136, 141, 143.) The district court held a status hearing to address Shane's filings. (1/5/2015 Tr.; *see also* Doc. 159.) The district court ordered transcripts be prepared of the State's opening and closing arguments and the testimony of firearm analyst Travis Spinder. (Doc. 160.) Shane

continued to file pro se documents arguing for a new trial and indicating that he had not yet received all of the transcripts. (Docs. 162–69, 172–73, 178–79, 181–82, 187, 204.)

On May 18, 2015, the district court conducted a sentencing, at which Shane represented himself with standby counsel. (5/18/2015 Tr.) The district court imposed a persistent felony offender (PFO) sentence of 50 years in the Montana State Prison with ten years suspended plus an additional consecutive two-year weapon enhancement. (5/18/2015 Tr. at 61–62; Doc. 189 at 2.)

Shane filed a notice of appeal from his conviction. (Doc. 192; *see also State v. Johnson*, DA 15-0424.) However, he subsequently moved to dismiss that appeal without prejudice so that the district court could rule on the still pending motion for a new trial prior to this Court's appellate review. (Doc. 209.) Upon Shane's request, the district court appointed counsel to assist him with the new trial motion. (Docs. 207–08, 210.) Appointed counsel filed a brief in support of Shane's motion for a new trial, narrowing the issues presented. (Doc. 219.) The State filed responses. (Doc. 224, 234.) The matter was repeatedly delayed while awaiting the ordered transcripts. (*E.g.*, Docs. 230–31.) The

district court conducted a hearing at which no evidence was introduced and denied the motion. (11/28/2016 Tr.; Doc. 236.)

Shane filed a second notice of appeal, initiating the present appeal. (Doc. 238.)

DISCUSSION OF APPELLANT'S CLAIMS THAT MIGHT ARGUABLY SUPPORT AN APPEAL

Pursuant to Mont. Code Ann. § 46-8-103(2) and *Anders v. California*, 386 U.S. 738, 744 (1967), undersigned counsel informs the Court that the record might arguably support the following claims on appeal.

I. *DOYLE* ERROR

Pertinent Law

Under the plain error doctrine, this Court may discretionarily review claimed errors that implicate a defendant's fundamental rights, even if no contemporaneous objection was made "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. Godfrey*, 2004 MT 197, ¶ 22, 322 Mont. 254, 95 P.3d 166.

Pursuant to *Doyle v. Ohio*, 426 U.S. 610 (1976), it violates due process to allow the prosecution to use a defendant's post-*Miranda* silence to impeach the defendant's trial testimony. *State v. Schaff*, 2011 MT 19, ¶ 15, 359 Mont. 185, 247 P.3d 727. For the purposes of *Doyle* error, such silence includes a defendant's words invoking his *Miranda* rights. *State v. Wagner*, 2009 MT 256, ¶ 19, 352 Mont. 1, 215 P.3d 20. "In the context of *Doyle* error, reversal under plain error review is appropriate when the Court is firmly convinced that the 'prosecutor's comments created an inference for the jury that by remaining silent after receiving his rights, the defendant must be guilty of the alleged crime.'" *Wagner*, ¶ 17 (quoting *Godfrey*, ¶ 38).

"*Doyle* does not preclude impeaching a testifying defendant using inconsistent pre-*Miranda* statements or omissions, or from arguing the significance of a defendant's inconsistent voluntary statements." *Schaff*, ¶ 15. This Court distinguishes between allowable comment on a defendant's story and prohibited comment upon his silence. *E.g.*, *State v. Morsette*, 2013 MT 270, ¶ 38, 372 Mont. 38, 309 P.3d 978. *Doyle* does not prohibit inquiries into inconsistent omissions between statements. *E.g.*, *State v. Clausell*, 2001 MT 62, ¶ 60, 305 Mont. 1, 22 P.3d 1111.

Pertinent Facts

Prior to opening statements, the State alerted the district court and defense that the State would be using Shane's statements while in custody but would not imply that Shane should have made any other statements at that time. (9/24/2014 AM Tr. at 3 (attached as App. A).) The district court discussed with defense counsel that the State was seeking to present evidence of Shane's demeanor and not to argue that he should have declared his innocence. (9/24/2014 AM Tr. at 4.) Defense counsel responded, "That's fine. We intend to cross examine on all of the statements he made." (9/24/2014 AM Tr. at 4.)

Without objection, the State introduced a video recording of Shane being advised of his *Miranda* rights and invoking his right to counsel. (9/24/2014 PM Tr. at 41; State's Ex. 179 at 1:27 to 2:50.) While invoking, Shane explained that he had acted in self-defense. (State's Ex. 179 at 1:37 to 1:47.) Defense counsel subsequently elicited testimony that Shane had invoked his right to counsel as was his right. (9/24/2014 Tr. at 55.) Defense counsel also elicited that Shane had told the officer that he acted in self-defense. (9/26/2014 Tr. at 111.) The State then asked whether Shane gave any details regarding his claim of

self-defense, to which the officer responded, "We did not question him because he was under Miranda and requested an attorney." (9/26/2014 Tr. at 112 (attached as App. B).)

II. STATE ALLOWED TO USE EXPERT AS CONDUIT FOR HEARSAY OPINION

Pertinent Law

"Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Mont. R. Evid. 801(c). Hearsay is generally inadmissible. Mont. R. Evid. 802. Montana Rule of Evidence 705 allows an expert to "testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data" and provides that "[t]he expert may in any event be required to disclose the underlying facts or data on cross-examination." This Court has found error where a party was allowed to use one testifying expert as a conduit for introducing the opinions and reports of others who did not testify. *Reese v. Stanton*, 2015 MT 293, ¶ 24, 381 Mont. 241, 358 P.3d 208. However, "a testifying expert may refer to otherwise inadmissible hearsay upon a foundational showing that the expert relied on the otherwise inadmissible evidence in forming the expert's

opinion and the information is of a type reasonably relied upon by experts in the field of expertise." *In re C.K.*, 2017 MT 69, ¶ 18, 387 Mont. 127, 391 P.3d 735.

Admission of inadmissible hearsay is trial error subject to harmless error analysis. *See State v. Van Kirk*, 2001 MT 184, ¶¶ 37–41, 306 Mont. 215, 32 P.3d 735. Once a defendant establishes such trial error and alleges prejudice, "the State must demonstrate that there is no reasonable possibility that the inadmissible evidence might have contributed to the conviction." *Van Kirk*, ¶¶ 42, 47. This burden includes "demonstrat[ing] that the *quality* of the tainted evidence was such that there was no reasonable possibility that it might have contributed to the defendant's conviction." *Van Kirk*, ¶ 44. This Court has emphasized that "the inquiry does not require [the Court] to definitively say whether or not the tainted evidence *actually* influenced the jury's decision to convict," but "[r]ather, the question is whether the State can show there is no reasonable possibility that the tainted evidence *might* have contributed to the conviction." *State v. Reichmand*, 2010 MT 228, ¶ 23, 358 Mont. 68, 243 P.3d 423. "[T]his is a very high bar." *Reichmand*, ¶ 23.

Pertinent Facts

The State presented William Schneck as an expert in "crime scene reconstruction." (9/26/2014 Tr. at 121.) Mr. Schneck testified as to possible explanations for why all four of the spent shell casings were found in Shane's room when one of the shots seems to have been fired in Travis's room. (9/26/2014 Tr. at 169–75.) Mr. Schneck appeared to suggest that while Shane and Travis struggled over the gun, Travis might have been holding onto the gun in a way that cut his fingers and caused the gun to jam. (*See* 9/26/2014 Tr. at 170–75.) In this context, the State inquired whether Mr. Schneck had talked "to any firearm's expert" about "the fired cartridge possibly lodging in the gun." (9/26/2014 Tr. at 175.) Mr. Schneck testified that he "talked to one of the firearm's examiners at the Washington State crime lab." (9/26/2014 Tr. at 175.) Over a defense hearsay objection that "he can tell us his opinion but cannot quote what somebody else told him," Mr. Schneck was allowed to recount: "Well, I am not a firearm's expert. But the firearm's examiner did say that generally speaking, .22 caliber semi-automatic handguns often jam." (9/26/2014 Tr. at 176 (attached as App. C).)

Later a firearms expert from the Montana Crime Lab, Travis Spinder, testified to how the specific semiautomatic gun here might fail to eject a fire cartridge and jam if something was restricting the movement of its slide while firing. (9/29/2014 Tr. at 59–61.) He explained that if this gun failed to eject, a user would then have to manually pull the slide back before the gun could fire again. (9/29/2014 Tr. at 62.) He also testified to successfully test firing the gun without jamming at least five times. (9/29/2014 Tr. at 67–68.)

During closing argument, the State sought to connect the gun not ejecting when first fired to Travis having had his hand on the gun. (9/30/2014 Tr. at 55, 100–01.) The State told jurors that Mr. Schneck "gave his opinion that all of the evidence showed that the gun did not eject in Travis' bedroom." (9/30/2014 Tr. at 55.) The State criticized the defense for wanting jurors to believe that a casing was ejected in Travis's room and then perhaps kicked from that room to Shane's room. (9/30/2014 Tr. at 54–55.)

Defense counsel responded by telling jurors:

> Let's think about the shell casings. We got four shell casings that are found in Shane Johnson's room. So he must have had the gun and must have been shooting from his room, except one. They can't have him shooting from his

> room because the shot that is goes into his door because that was close contact shot. That is where they are saying, it must have jammed. No evidence of any jamming. Either it is by the use of the gun at the lab or any indication on the shell, the fired cartridge. Is there any evidence of that? You are suppose to pretend that happened because that's how they got the shell casing in the room.
>
> What is the proof? You heard and you know if any of you deal with guns. They are small and round. In that downstairs, before they ever find four shell casings over in Shane's room, we have three EMT's. Two police officers, Robert and Donna Biem. Some of those people went down in the hallway more than once. Because there were four people trying to get Travis' body out on that stretcher to haul him out. A lot you activity that could altered the placement of that shell casing. You just don't have any evidence.

(9/30/2014 Tr. at 76–77.)

Shane testified to struggling with Travis over the gun and to Tavis being shot during that struggle. (9/29/2014 Tr. at 97–99, 112–113.) The jury did not reach a verdict as to deliberate homicide, but found Shane guilty of negligent homicide. (Doc. 107.)

III. IMPROPER USE OF PRIOR INCONSISTENT STATEMENT

Pertinent Law

Montana Rule of Evidence 801(d)(1)(A) excludes from the definition of hearsay a prior statement of a testifying declarant/witness that is "inconsistent with the declarant's testimony." This Court has long held that "a claimed lapse of memory is an inconsistency within

the meaning of Rule 801(d)(1)(A)." *State v. Lawrence*, 285 Mont. 140, 159, 948 P.2d 186, 198 (1997). Montana Rule of Evidence 613(b) provides, "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require." This Court has recognized that "M.R. Evid. 613(b) only requires that the witness be available for cross-examination about the statement, its circumstances, and what she remembers about it." *State v. Baker*, 2013 MT 113, ¶ 31, 370 Mont. 43, 300 P.3d 696.

Pertinent Facts

Mrs. Biem (Shane and Travis's mother) testified that on the night of the shooting, Travis spilled groceries and had difficulty getting up the stairs to the house and that he was mad because Mrs. Biem would not let him come out to dinner with her and Mr. Biem. (9/24/2014 P.M. Tr. at 69–70.) The State attempted to ask Mrs. Biem about contrary statements she purportedly made to a police officer, but Mrs. Biem testified she did not remember the officer or the interview. (9/24/2014 P.M. Tr. at 70–72.) Because Mrs. Biem testified to not remembering

the interview, the district court prohibited the State from reciting and asking Mrs. Biem about specific statements that the State alleged she made during the interview. (9/24/2014 P.M. Tr. at 72–73.)

The State then sought to present testimony from the officer regarding Mrs. Biem's statements to him. (9/25/2014 A.M. Tr. at 7–9.) Defense counsel objected and appeared to argue that because Mrs. Biem did not remember talking to the officer, she could not be given an opportunity to explain the statement the officer would assert she made and, thus, the officer's testimony is inadmissible hearsay. (9/25/2014 A.M. Tr. at 10–13, 16, 31, 33.) The district court allowed the testimony. (9/25/2014 A.M. Tr. at 32–34 (attached as App. D).) The officer recounted that during initial interviews with him, Mrs. Biem had told him that there was nothing going on between Shane and Travis, that Travis had successfully walked and carried groceries that evening, that Travis had asked to accompany Mr. and Mrs. Biem to dinner but had not been serious, and that she did not think Travis would have caused a problem if he had come out to the dinner. (9/25/2014 A.M. Tr. at 36–44.) The defense was subsequently allowed to recall Mrs. Biem and ask

her about her purported statements to the officer. (9/29/2014 Tr. at 140–42.)

IV. RECITING VERBATIM FROM TRANSCRIPT UNDER GUISE OF REFRESHING WITNESS'S RECOLLECTION

Pertinent Law

> [T]he verbatim recitation of the transcript to the jury [is] not an appropriate method of refreshing the witnesses' testimony under M. R. Evid. 612. Although the adverse party is entitled to introduce relevant portions of the writing into evidence to impeach the witnesses' testimony, the rule does not allow the proponent of the evidence to have the refreshed witness read verbatim to the jury the contents of the writing.

State v. Bullock, 2017 MT 182, ¶ 32, 388 Mont. 194, 398 P.3d 881.

Transcripts are written words of a transcriptionist who listened to an audio recording of a conversation and then typed out what the transcriptionist thought they heard on the audio. They are a hearsay statement made by the transcriptionist, offered to prove the truth of what was said on the audio recording. *See* Mont. R. Evid. 801(c), 802. Such evidence is also prohibited by requirement to prove the content of a recording through introduction of the original recording. *See* Mont. R. Evid. 1002.

Admission of such inadmissible evidence is trial error subject to harmless error analysis. *See Van Kirk*, ¶¶ 37–41.

Pertinent Facts

While questioning an officer regarding statements that Mrs. Biem had purportedly made to the officer, the State sought to have the officer read from a transcript of a recording of the interview. (9/25/2014 A.M. Tr. at 36–37.) The defense objected, "Your Honor, before he uses the transcript, I think we ought to at least some showing that he does not recollect the statements and needs to use the transcript." (9/25/2014 A.M. Tr. at 37 (attached as App. E).) The State then elicited from the officer that the transcript would help him in his testimony and that the officer "could not be as accurate as the transcript." (9/25/2014 A.M. Tr. at 37.)

Without further defense objection, the State then directed the officer to a number of specific transcript sections and had the officer read verbatim to the jury from that transcript and another. (9/25/2014 A.M. Tr. at 37–44.) The transcript sections purported to recount statements by Mrs. Biem that nothing hostile was going on between Shane and Travis, that Travis had successfully walked and carried

groceries that evening, that Travis had asked to accompany Mr. and Mrs. Biem to dinner but had not been serious, and that she did not think Travis would have caused a problem if he had come out to the dinner. (9/25/2014 A.M. Tr. at 37–44.)

V. INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO PRESENT EVIDENCE

Pertinent Law

"This Court evaluates claims of ineffective assistance of counsel under the test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)." *State v. Llamas*, 2017 MT 155, ¶ 26, 388 Mont. 53, 402 P.3d 611. To prevail under *Strickland*, an appellant must show (1) that his attorney's performance was "deficient," meaning that "it fell below an objective standard of reasonableness" and (2) that the deficient performance "prejudiced" his defense, meaning that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Llamas*, ¶ 26 (internal quotations omitted).

This Court will review ineffective assistance of counsel claims on direct appeal only "when they are record-based; where the record on appeal fully explains counsel's performance." *Llamas*, ¶ 27. Where "the

record does not provide adequate information for this Court to evaluate the reasons for counsel's decisions," the claim must be presented through a petition for postconviction relief. *Llamas*, ¶ 27. This Court will, however, review ineffective assistance of counsel claims on direct appeal if there is "no plausible justification" for counsel's failure to act. *State v. Kougl*, 2004 MT 243, ¶¶ 15–22, 323 Mont. 6, 97 P.3d 1095.

Pertinent Facts

Within his pro se motions for a new trial, Shane alleged that defense counsel failed to introduce evidence of Travis's drug addiction, violent tendencies, and prior statement that he would kill Shane. (Doc. 123 at 3 (attached as App. F).) He also alleged that defense counsel "wouldn't put up all the witness's they were suppose to including experts that they failed to check their credentials" and "never asked the right question's of my witness's that would have brought out more truth about what shape Travis Johnson was in." (Doc. 123 at 3.)

Shane's two appointed defense attorneys were not called as witnesses at the hearing regarding the motion for a new trial, and the record contains no testimony regarding their reasons for handling the trial as they did. (*See* 11/28/2016 Tr. at 2–5.)

VI. INCOMPLETE AGGRESSOR INSTRUCTION

Pertinent Law

This Court reviews a district court's decisions pertaining to jury instructions for an abuse of discretion; however, the district court's discretion "is ultimately restricted by the overriding principle that jury instructions must fully and fairly instruct the jury regarding the applicable law." *State v. Hovey*, 2011 MT 3, ¶ 10, 359 Mont. 100, 248 P.3d 303.

This Court has held that the broad discretion of district courts in formulating jury instructions is reflected in the following rules:

> (1) while district courts must instruct the jury on each theory which is supported by the record, the defendant is not entitled to have the jury instructed on every nuance of his or her theory of the case; (2) the fact that one instruction, standing alone, was not as complete or accurate as it could have been is not reversible error; and (3) district courts may refuse to give a requested instruction if its contents are adequately covered by the given instructions—i.e., it is not necessary to give repetitive instructions.

State v. Archambault, 2007 MT 26, ¶ 25, 336 Mont. 6, 152 P.3d 698 (internal citations omitted). In reviewing requests for alternative jury instructions, this Court has explained:

> Our task on review is not to determine whether the District Court chose the better of two legally proper instructions.

> Nor is our task to determine whether the court formulated the instructions in the best possible way. Rather, as noted above, we must simply consider whether the given instructions fully and fairly instructed the jury regarding the applicable law.

Archambault, ¶ 27.

Montana Code Annotated § 45-3-105(2) provides that the defense of justified use of force is not available to a person who:

> (2) purposely or knowingly provokes the use of force against the person, unless:
>
> (a) the force is so great that the person reasonably believes that the person is in imminent danger of death or serious bodily harm and that the person has exhausted every reasonable means to escape the danger other than the use of force that is likely to cause death or serious bodily harm to the assailant; or
>
> (b) in good faith, the person withdraws from physical contact with the assailant and indicates clearly to the assailant that the person desires to withdraw and terminate the use of force, but the assailant continues or resumes the use of force.

Pertinent Facts

As requested by the State, the district court instructed jurors:

> The use of force in defense of a person is not available to a person who purposely or knowingly provokes the use of force against himself unless such force is so great that he reasonably believes that he is in imminent danger of death or serious bodily harm and that he has exhausted every reasonable means to escape such danger other than the use

of force which is likely to cause death or serious bodily harm to the assailant.

(Doc. 105, Instr. 22; 9/30/2014 Tr. at 42.) Defense counsel initially objected to the instruction, arguing that no one has a duty to retreat under Montana law. (9/30/2014 Tr. at 23–24.) Defense counsel later asserted that there was no evidence of Shane having provoked the use of force against him. (9/30/2014 Tr. at 25–26.) The district court agreed to give the instruction. (9/30/2014 Tr. at 26 (attached as App. G).)

The State presented evidence that Shane armed himself and then went into Travis's room where he and Travis began struggling over the gun. (*E.g.*, 9/26/2014 Tr. at 155–58.) In contrast, Shane testified that he went into Travis room because Travis had picked up the gun, but Shane agreed that once the two started struggling over the gun, the physical struggle did not cease until Travis was shot. (9/29/2014 Tr. at 97–99.)

VII. THE NEGLIGENCE INSTRUCTION DEVIATED FROM THE STATUTORY DEFINITION

Pertinent Law

Again, this Court reviews jury instructions for an abuse of discretion but instructions "must fully and fairly instruct the jury

regarding the applicable law." *Hovey*, ¶ 10. Within such review, the Court does not seek to determine whether the trial court "formulated the instructions in the best possible way." *Archambault*, ¶ 27.

Montana Code Annotated § 45-2-101(43) defines "negligently" as follows:

> a person acts negligently with respect to a result or to a circumstance described by a statute defining an offense when the person consciously disregards a risk that the result will occur or that the circumstance exists or when the person disregards a risk of which the person should be aware that the result will occur or that the circumstance exists. The risk must be of a nature and degree that to disregard it involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. "Gross deviation" means a deviation that is considerably greater than lack of ordinary care. Relevant terms, such as "negligent" and "with negligence", have the same meaning.

Pertinent Facts

As to the offense of negligent homicide, the district court instructed jurors:

> A person acts negligently when an act is done with a conscious disregard of the risk, or when the person should be aware of the risk by negligently handling the gun which then discharged causing the death of Travis Johnson.
>
> The risk must be of a nature and degree that to disregard it involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. "Gross deviation" means a deviation that is considerably greater than lack of ordinary care.

(Doc. 105, Instr. 17; 9/30/2014 Tr. at 42; *see also* Doc. 103, State's Proposed Instr. 29.) Defense counsel objected to the district court instructing as to negligent homicide but did not separately object to the specific manner in which the district court defined "negligently." (*See* 9/30/2014 Tr. at 29 (attached as App. H).)

VIII. INSTRUCTING AS TO NEGLIGENT HOMICIDE OVER DEFENSE OBJECTION

Pertinent Law

Montana Code Annotated § 46-16-607 provides:

> (1) The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included in the offense charged.
>
> (2) A lesser included offense instruction must be given when there is a proper request by one of the parties and the jury, based on the evidence, could be warranted in finding the defendant guilty of a lesser included offense.
>
> (3) When a lesser included offense instruction is given, the court shall instruct the jury that it must reach a verdict on the crime charged before it may proceed to a lesser included offense. Upon request of the defendant at the settling of instructions, the court shall instruct the jury that it may consider the lesser included offense if it is unable after reasonable effort to reach a verdict on the greater offense.

The Commission Comments to Mont. Code Ann. § 46-16-607 note the statute was drafted to comport with *United States v. Jackson*, 726 F.2d

1466 (9th Cir. 1984). In *Jackson*, the Ninth Circuit Court of Appeals addressed the question of whether lesser-included offense instructions should require the jury to unanimously acquit on the greater charge before considering the lesser. The *Jackson*-court held that "although either formulation may be employed if the defendant expresses no choice, it is error to reject the form timely requested by defendant. *Jackson*, 726 F.2d at 1469.

Generally, to give a lesser included offense instruction the requested offense must legally be an included offense of the offense charged and must be supported by the trial evidence. *E.g.*, *State v. Daniels*, 2017 MT 163, ¶ 12, 388 Mont. 89, 397 P.3d 460; *State v. Hamilton*, 185 Mont. 522, 535, 605 P.2d 1121, 1128 (1980). This Court has upheld the State obtaining an included offense instruction as to negligent arson in a deliberate arson case over defense objection where the defendant was found intoxicated at a garage fire. *State v. Gray*, 202 Mont. 445, 447, 450–51, 659 P.2d 255, 256, 258 (1983). The Court has also held that adding a lesser included offense is not a substantive amendment under Mont. Code Ann. § 46-11-205. *State v. Crawford*, 2016 MT 96, ¶ 39, 383 Mont. 229, 371 P.3d 381.

Montana Code Annotated § 46-1-202(9) defines an "included offense" as an offense that either:

> (a) is established by proof of the same or less than all the facts required to establish the commission of the offense charged;
>
> (b) consists of an attempt to commit the offense charged or to commit an offense otherwise included in the offense charged; or
>
> (c) differs from the offense charged only in the respect that a less serious injury or risk to the same person, property, or public interest or a lesser kind of culpability suffices to establish its commission.

The State has previously argued that negligent homicide is not a lesser included offense of deliberate homicide. *State v. Robbins*, 1998 MT 297, ¶ 30, 292 Mont. 23, 971 P.2d 359 (overruled on other grounds by *State v. LaMere*, 2000 MT 45, ¶ 30, 298 Mont. 358, 2 P.3d 204). However, negligent homicide differs from deliberate homicide only in that negligent homicide requires a negligently mental state while deliberate homicide requires purposely or knowingly, *see* Mont. Code Ann. §§ 45-5-102(1)(a) ("A person commits the offense of deliberate homicide if: (a) the person purposely or knowingly causes the death of another human being . . . ."), -104(1) ("A person commits the offense of negligent homicide if the person negligently causes the death of another human being."), and Mont. Code Ann. § 45-2-102 establishes that "[w]hen the

law provides that negligence suffices to establish an element of an offense, such element also is established if a person acts purposely or knowingly." Montana Code Annotated § 45-5-104(2) provides that negligent homicide is not an included offense of felony murder deliberate homicide under Mont. Code Ann. § 45-5-102(1)(b) but says nothing regarding traditional deliberate homicide under Mont. Code Ann. § 45-5-102(1)(a).

Pertinent Facts

The State's Information charged Shane with one count of deliberate homicide for having "purposely or knowingly caused the death of another human being." (Doc. 3 at 1.) On the last day of trial, the State asked that the jury also be instructed regarding negligent homicide as a lesser included offense. (Doc. 103, State's Proposed Instrs. 26–29; 9/30/2014 Tr. at 2–3, 17–19.) The defense objected, arguing that the trial evidence did not support a negligent homicide charge. (9/30/2014 Tr. at 3, 19.) The district court assessed the trial evidence as supplying grounds to find that Shane, while highly intoxicated, struggled over a loaded handgun with another person who was also highly intoxicated and granted the State's request. (9/30/2014

Tr. at 19–21 (attached as App. I).) The district court instructed jurors as to negligent homicide as a lesser included offense of deliberate homicide. (Doc. 105, Intrs. 15–18; 9/30/2014 Tr. at 42.)

Shane testified that he went into Travis's room because Travis had picked up the gun and that Travis was shot while the two were struggling over the gun. (9/29/2014 Tr. at 99–99.) The State presented evidence that it was Shane who first picked up the gun. (*E.g.*, 9/26/2014 Tr. at 155–58.)

IX. PROSECUTORIAL MISCONDUCT

Pertinent Law

"The prosecutor is the representative of the State at trial and must be held to a standard commensurate with his or her position." *State v. Lawrence*, 2016 MT 346, ¶ 20, 386 Mont. 86, 385 P.3d 968. As this Court has held, "the United States Supreme Court has rightly observed that a prosecutor's improper suggestions and assertions to a jury 'are apt to carry much weight against the accused when they should properly carry none.'" *Lawrence*, ¶ 20 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). Defendants have a fundamental due process right to "a fair trial by a jury." *State v. Hayden*, 2008 MT 274,

¶ 27, 345 Mont. 252, 190 P.3d 1091. "A prosecutor's misconduct may be grounds for reversing a conviction and granting a new trial if the conduct deprives the defendant of a fair and impartial trial." *Hayden*, ¶ 27; *see also Lawrence*, ¶ 13. Even in the absence of objection by defense counsel, it is this Court's inherent duty to protect against such prosecutorial misconduct through plain error review. *Lawrence*, ¶ 22.

"While it is improper for the prosecution to comment on the failure of a defendant to testify, 'the prosecution is permitted to point out facts at issue which could have been controverted by persons other than the defendant, but were not.'" *State v. Makarchuk*, 2009 MT 82, ¶ 24, 349 Mont. 507, 204 P.3d 1213 (quoting *State v. Rodarte*, 2002 MT 317, ¶ 14, 313 Mont. 131, 60 P.3d 983 (citing *Lockett v. Ohio*, 438 U.S. 586 (1978))); *see also Demirdjian v. Gipson*, 832 F.3d 1060, 1067 (9th Cir. 2016) ("A prosecutor's remark thus can call attention to the defendant's failure to present exculpatory evidence so long as it is not of such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify." (internal quotations omitted)), *cert. denied*, 138 S. Ct. 71 (2017).

Pertinent Facts

The defense made no objections during the State's opening and closing arguments. (*See* 9/24/2014 A.M. Tr. at 35–48; 9/30/2014 Tr. at 44–69, 81–110.) However, in his pro se motion for a new trial, Shane alleged that prosecutors lied at trial about "the gun being taken apart to the spring on the safety" and about "the position of [his] DNA" and "who's was w[h]ere." (Doc. 123 at 1 (attached as App. F).) Shane asserted in the motion that his DNA, not Travis's, was on the barrel and that prosecutors said his DNA was on grip and trigger. (Doc. 123 at 1.) In a later filing, Shane reiterated his allegations that prosecutors falsely said that Travis's blood was on the barrel and that prosecutors lied by claiming that Shane's DNA was found on the trigger and grip. (Doc. 143 at 1 (attached as App. J).) Shane also reiterated that the firearms analyst from the Crime Lab "never took the gun apart" and that prosecutors falsely claimed the gun had been taken apart and put back together wrong. (Doc. 143 at 2.)

During opening argument, the State told jurors:

> Four shots fired and all cartridges found in the defendant's bedroom. There is a specialist at the Montana State crime lab tested and determined whether the pistol was working properly. He discovered that for reasons

> unimportant, the spring did not work engages the safety. He will get to why the safety would not engage. He found that the safety spring was turned the wrong way. Although this did not provide an answer as to why the safety did not work, somebody had been monkeying with that gun. He also determined the trigger pull. The trigger pull is the amount of force you need in order to pull the trigger. They determine that pressure in poundage. He found the trigger pull lower than normal meaning that it took much less force to pull that trigger on that pistol.

(9/24/2014 A.M. Tr. at 47.) The firearms expert, Travis Spinder, testified:

> The gun was working correctly, however, the external thumb safety was not working properly. I could not get that to engage correctly. I did field strip it, which means that, basically, I take the slide off and I am able to visualize any of the internal components that I can see. However, I determined that I could not figure what was wrong with the safety by doing a field strip. So I would therefore have to do a detailed strip which means I would had to pull it all apart, all material components. From that I spoke with [the prosecutor] and asked her if it was necessary to break it apart and find out what was causing a problem. It was determined it was not necessary.

(9/29/2014 Tr. at 46–47.)

Regarding DNA on the gun, during closing arguments, the State told jurors:

> On the gun, swabs from the blood stain on the gun had indication of mixture of the two individuals. The major DNA profile matched that of the defendant's. The magazine that was up inside the gun, and you saw that Travis loaded that

gun, that had the defendant's blood on it. The major profile was consistent with the defendant. None of these items showed any indication that Travis' blood was on it. There is no indication that Travis' DNA was on the gun case or any part of the gun.

. . .

No DNA from Travis on the gun or the magazine found in the gun.

. . .

There is DNA. There is blood on the magazine that was inside the pistol and that matched the defendant. He loads it. He gets it ready. There is a photograph of the gun that shows a blood blotch, a smear, a transfer stain on the actual gun right above the grip portion.

If you will recall, the defendant had blood on his hands in exactly that spot in the other photograph. You can compare these photographs yourselves and see that's what the evidence is showing you. Painting a picture that the defendant is the one who did this. Grabbed the gun. His blood is all over it. His DNA is all over it. The blood evidence is telling you this.

(9/30/2018 Tr. at 53, 62, 97–98.) The State also told jurors:

Defense attorney complained to every witness on the stand that there was no other evidence tested at the crime lab. The State has the burden of proof. Don't ever forget that. The defendant doesn't have to prove anything. But the crime lab will analyze evidence for the defendant if they request DNA analysis. The defense did not request an analysis. That does not remove the burden from the State but shows the defendant cannot come in here and complain that all of the evidence wasn't tested.

(9/30/2018 Tr. at 56.)

During its case-in-chief, the State elicited testimony that on the magazine from the gun, the Crime Lab found a "mixture of at least two individuals," the major profile of which "is consistent with that of Shane Johnson." (9/25/2014 P.M. Tr. at 34.) From the gun's barrel, the Lab found "a mixture from at least two individuals and the major DNA profile matches that of Shawn Johnson." (9/25/2014 P.M. Tr. at 35.) At both the gun's grip and trigger, the Lab found a mixture of "at least three individuals" but could make "no conclusion" as to the sources of the mixture. (9/25/2014 P.M. Tr. at 36–37.)

X. JURY ALLOWED TESTIMONIAL EXHIBITS DURING DELIBERATIONS

Pertinent Law

Montana Code Annotated § 46-16-504 provides: "Upon retiring for deliberation, the jurors may take with them the written jury instructions read by the court, notes of the proceedings taken by themselves, and all exhibits that have been received as evidence in the cause that in the opinion of the court will be necessary." However, Montana continues to follow the common law rule that prohibits sending "testimonial evidence" into the jury room during deliberations. *State v. Herman*, 2009 MT 101, ¶ 38, 350 Mont. 109, 204 P.3d 1254;

State v. Bales, 1999 MT 334, ¶¶ 23–24, 297 Mont. 402, 994 P.2d 17. The rule's rationale is the need to avoid placing "undue emphasis" on the testimony of any particular witness. *Herman*, ¶ 39; *Bales*, ¶¶ 19-20, 23; *State v. Harris*, 247 Mont. 405, 416–18, 808 P.2d 453, 459–60 (1991). "Testimonial evidence is a record of evidence elicited from a witness." *Herman*, ¶ 38 (citing *Bales*, ¶ 16 (quoting *Black's Law Dictionary*, 580 (7th ed. 1999))). This Court has held that a tape of a police interview with the defendant is testimonial evidence and that the trial court abused its discretion in allowing the jury to hear the tape during deliberations. *Bales*, ¶¶ 16, 24. However, the Court then declined to reverse the conviction because the statements on the tape were not inconsistent with those given by witnesses at trial and the tape was not critical to the State's case. *Bales*, ¶¶ 25–28.

Pertinent Facts

The State introduced an audio recording of Shane's statements to police while being escorted out of the house (State's Ex. 171 (offered and admitted 9/24/2014 P.M. Tr. at 7)) and a video recording of Shane's statements to police while in an interrogation room (State's Ex. 179 (offered and admitted 9/24/2018 P.M. Tr. at 40–41)).

During deliberations, the jury asked for a CD player. (9/30/2014 Tr. 125; Doc. 106.) Defense counsel objected:

> Yes, your Honor. I guess my first concern is memory serves that they were all short recordings. No—just general information of the jury that was presented to the jury. I would have no concern. However, I would object to them of replaying the CD's over and over again. They should recollect to their memory.
>
> . . .
>
> With this question. They don't say we want to listen to the 911 tape. Let's listen to some disks. It is not specific enough. We will object.

(9/30/2014 Tr. at 126.) Defense counsel later reiterated that the grounds of the defense objection was "That of question is not specific enough." (9/30/2014 Tr. at 127–28.) Defense counsel also expressed concern about the laptop that the State proposed to give jurors, but review of the laptop satisfied counsel that it would not allow jurors to access anything inappropriate. (9/30/2014 Tr. at 128–30.) The district court stated that it would give the laptop to jurors to access the exhibit disks. (9/30/2014 Tr. at 131 (attached as App. K); Doc. 106.)

XI. JURY DENIED REQUESTED DNA REPORT

Pertinent Law

Montana Code Annotated § 46-16-504 provides that during deliberation, jurors may have "all exhibits that have been received as

evidence in the cause that in the opinion of the court will be necessary."

Montana Code Annotated § 46-16-503(2) provides:

> After the jury has retired for deliberation, if there is any disagreement among the jurors as to the testimony or if the jurors desire to be informed on any point of law arising in the cause, they shall notify the officer appointed to keep them together, who shall then notify the court. The information requested may be given, in the discretion of the court, after consultation with the parties.

Pertinent Facts

In his pro se motion for a new trial, Shane argued: "After rebuttal, juror during deliberation asked for DNA results on gun, they wanted this cause of all the lies both DA's said, the jurors were denied this, this gave me an unfair trial, cause DA's lied & my lawyers wouldn't object. They should have gotten the report." (Doc. 123 at 3 (attached as App. F).)

During deliberations, the district court received a note from a juror that read, "Report from Lacey Vangrinsven." (9/30/2014 Tr. at 113; Doc. 106.) Lacey Vangrinsven was the Crime Lab analyst who testified to having physically collected swabs from the various items of evidence submitted to the Lab and to having identified which items had blood on them. (9/25/2014 P.M. Tr. at 4–24.) She testified to having

written a report and was allowed to reference that report while testifying, but the report was not itself admitted as an exhibit. (9/25/2014 P.M. Tr. at 6–7; 9/30/2014 Tr. at 113 ("THE CLERK: It was identified but not admitted.").)

Both the State and defense counsel agreed that the report was not available for the jury to review. (9/30/2014 Tr. at 114–16.) Without objection, the district court informed jurors, "The Court is unable to provide you with a copy of the report prepared by Lacey Vangrinsven. You must rely on the testimony presented during trial." (9/30/2014 Tr. at 116 (attached as App. L); Doc. 106.)

XII. MOTION FOR NEW TRIAL DUE TO JUROR MISCONDUCT

Pertinent Law

The Sixth Amendment, applicable to the states through the Fourteenth Amendment, provides that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." Although "due process does not require a new trial every time a juror has been placed in a potentially compromising situation," it does require "a jury capable and willing to decide the case

solely on the evidence before it." *Smith v. Phillips*, 455 U.S. 209, 217 (1982).

> With regard to juror contact or misconduct, "the Constitution does not require a new trial each time a juror is placed in a potentially compromising situation" because it is "virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." *State v. Hage*, 258 Mont. 498, 503–04, 853 P.2d 1251, 1254 (1993) (citing *Rushen v. Spain*, 464 U.S. 114, 118–19, 104 S.Ct. 453, 455–56, 78 L.Ed.2d 267 (1983)) (internal quotations omitted). Accordingly, where there is juror misconduct, in order to receive a new trial, the defendant bears the initial burden of demonstrating that the misconduct actually injured or prejudiced the defendant. *State v. McNatt*, 257 Mont. 468, 472, 849 P.2d 1050, 1052–53 (1993).

State v. White, 2008 MT 129, ¶ 12, 343 Mont. 66, 184 P.3d 1008. *But see Godoy v. Spearman*, 861 F.3d 956, 966–68 (9th Cir. 2017) (recognizing a presumption of prejudice once a defendant has presented evidence of an external contact that has a tendency to be injurious to the defendant). The "ultimate inquiry" is "Did the intrusion affect the jury's deliberations and thereby its verdict?" *United States v. Olano*, 507 U.S. 725, 739 (1993).

Montana Code Annotated § 46-16-702 provides:

> (1) Following a verdict or finding of guilty, the court may grant the defendant a new trial if required in the interest of justice. A new trial may be ordered by the court

> without a motion or may be granted after motion and hearing.
>
> (2) The motion for a new trial must be in writing and must specify the grounds for a new trial. The motion must be filed by the defendant within 30 days following a verdict or finding of guilty and be served upon the prosecution.
>
> (3) On hearing the motion for a new trial, if justified by law and the weight of the evidence, the court may:
>
> (a) deny the motion;
>
> (b) grant a new trial; or
>
> (c) modify or change the verdict or finding by finding the defendant guilty of a lesser included offense or finding the defendant not guilty.

This Court has held that a trial court can consider a motion for a new trial under Mont. Code Ann. § 46-16-702(1) even if the 30-day deadline for defense motion under Mont. Code Ann. § 46-16-702(2) has expired. *State v. Morse*, 2015 MT 51, ¶¶ 22–29, 35, 378 Mont. 249, 343 P.3d 1196.

Pertinent Facts

After jury selection but prior to opening argument, the State reported to the district court regarding juror Topolosky:

> Mr. Topolosky, it came to our attention that he was in fact a witness to several different offenses as well as having been charged with at least one and possibly two.
>
> During my questioning in voir dire, I asked those questions and he did not respond. The State's concern is that he was not honest and that could have effected our—we base our peremptories on those sorts of things.
>
> . . .

> He was charged with one conviction. It was deferred and dismissed. I also have information that he was investigated or charged. That part I'm not clear on another offense. The information that I am unsure on was the one charge for sure.
>
> . . .
>
> We confirmed that one conviction that was deferred and dismissed.

(9/24/2014 A.M. Tr. at 16–17.) The State provided a copy of their file regarding Mr. Topolosky to the defense. (9/24/2014 A.M. Tr. at 18–19, 20.) It was determined that Mr. Topolosky had received a deferred prosecution agreement and had never been convicted. (9/24/2014 A.M. Tr. at 21.) Defense counsel attested that she was satisfied. (9/24/2014 A.M. Tr. at 21 (attached as App. M).)

During trial, a prosecutor separately reported to the district court:

> I feel the need to let you know and the defense know that myself and Agent Hilyard rode up the elevator with a juror. We were already in there. There was small talk between her and Agent Hilyard that is the extent of that. Then I was in the bathroom with another juror and she said hi to me.

(9/26/2014 Tr. at 2.) The district court asked defense counsel if they wanted to address the issue. (9/26/2014 Tr. at 2.) Defense counsel answered, "We don't have a problem." (9/26/2014 Tr. at 2 (attached as App. N).)

During deliberations, juror Miller sent a note that read: "The big Native American girl sitting between the two caucasian dirty blondes in the second row females, who are they? I happen to know Patty was socializing with her at Oxford Bar Friday night, what is their relationship to the Defendant & juror." (9/30/2014 Tr. at 116–17; Doc. 106.) The district court understood "Patty" to be one of the other jurors. (9/30/2014 Tr. at 117, 119 (attached as App. 0).)

The jury returned its verdict on September 30, 2014. (Doc. 107.) Shane filed a pro se motion for a new trial on November 19, 2014. (Doc. 123 (attached as App. F).)

In his motion for a new trial Shane argued: "Jurors at Oxford Bar disputing who they were talking to during deliberation neither juror should have been at the Oxford during a trial who knows who he talked to or asked for advise (Miller was one of the jurors). This was grounds for a mistrial." (Doc. 123 at 2.) He also argued:

> When I was leaving court one day I seen one of [the prosecutor's] Deputies getting into the elevator with a juror, thats wrong who knows what he said to him or what comments he made, and we can't believe the Deputy cause of all the lies [the prosecutors] said or I proven, so who's to say she didn't tell him to lie.

(Doc. 123 at 4.) The brief appointed counsel later filed in support of Shane's motion for a new trial reiterated these concerns and added an argument that juror Topolosky had not been truthful during voir dire regarding his criminal history. (Doc. 219 at 5–8 (attached as App. P).) At the hearing scheduled to address Shane's motion for a new trial, counsel reported that the defense had hoped to provide testimony from a juror but had unable to locate him. (11/28/2016 Tr. at 3–4.)

The district court denied the new trial motion as untimely and also ruled that it had not been established that a juror said or asked anything inappropriate. (11/28/2016 Tr. at 4–5 (attached as App. Q); Doc. 236 (attached as App. R).)

XIII. SENTENCE BASED UPON ACQUITTED AND DISMISSED CHARGES

Pertinent Law

> The due process clauses of the Fourteenth Amendment to the United States Constitution and Article II, Section 17 of the Montana Constitution protect a defendant from being sentenced based upon misinformation. *Bauer v. State*, 1999 MT 185, ¶ 20, 295 Mont. 306, ¶ 20, 983 P.2d 955, ¶ 20. Due process requires that an offender be given an opportunity to explain, argue, and rebut any information, including presentencing information, that may lead to a deprivation of life, liberty, or property. *State v. Allen*, 2001 MT 266, ¶ 18, 307 Mont. 253, ¶ 18, 37 P.3d 655, ¶ 18. However, due process does not protect against all misinformation—rather,

> the inquiry turns on whether the sentence was premised on materially false information. *Bauer*, ¶ 22. When a criminal defendant contests matters in a presentence report, the defendant has an affirmative duty to present evidence establishing inaccuracies. *State v. Winkle*, 2002 MT 312, ¶ 19, 313 Mont. 111, ¶ 19, 60 P.3d 465, ¶ 19; *Bauer*, ¶ 22.

State v. Mason, 2003 MT 371, ¶ 21, 319 Mont. 117, 82 P.3d 903 (overruled as to standard of review by *State v. Herman*, 2008 MT 187, ¶ 12 n. 1, 343 Mont. 494, 188 P.3d 978).

"A sentencing court may consider 'any matter relevant to the disposition' of an offender." *State v. Hill*, 2009 MT 134, ¶ 27, 350 Mont. 296, 207 P.3d 307 (quoting Mont. Code Ann. § 46-18-115(1)). "This includes other acts, even those which are dismissed pursuant to a plea bargain agreement." *Hill*, ¶ 31. "The rules of evidence do not apply to sentencing hearings." *Hill*, ¶ 20; *see also* Mont. R. Evid. 101(c)(3).

Pertinent Facts

At sentencing, Shane objected to the use against him of prior charges and allegations that had been dismissed. (5/18/2015 Tr. at 4–5.) The district court acknowledged that Shane had not been convicted of all the offenses alleged in his criminal history. (5/18/2015 Tr. at 6.) The State presented testimony through the presentence investigation author that Shane had previously victimized his son, had pled guilty to

sending unwanted sexual messages to a teenager, and had victimized an elderly woman. (5/18/2015 Tr. at 15–18, 20, 44.) Shane presented evidence that he had been falsely accused of abusing his son. (5/18/2015 Tr. at 46–47.)

When imposing sentence, the district court relied in part upon Shane having previously victimized the elderly woman and having sent sexual texts to the teenager. (5/18/2015 Tr. at 54–55, 63 (attached as App. S); Doc. 189 at 6 (attached as App. T).) The district court recommend but did not itself impose conditions requiring a psychosexual evaluation and treatment and barring contact with persons under 18. (5/18/2015 Tr.at 59–60; Doc. 189 at 6.)

XIV. PFO SENTENCE TO REPLACE WEAPON ENHANCEMENT

Pertinent Law

Montana Code Annotated § 46-18-502(1) provides that a first-time PFO "shall be imprisoned in the state prison for a term of not less than 5 years or more than 100 years or shall be fined an amount not to exceed $50,000, or both, if the offender was 21 years of age or older at the time of the commission of the present offense." Montana Code Annotated § 46-18-221(1) provides that a defendant found to have

knowingly used a firearm during an offense "shall, in addition to the punishment provided for the commission of the underlying offense, be sentenced to a term of imprisonment in the state prison of not less than 2 years or more than 10 years, except as provided in 46-18-222." "[S]entences imposed based on an offender's status as a persistent felony offender *replace* the sentence for the underlying felony." *State v. Gunderson*, 2010 MT 166, ¶ 54, 357 Mont. 142, 237 P.3d 74.

Undersigned counsel has been unable to identify a case where this Court has directly determined whether a PFO sentence replaces a weapon enhancement sentence. However, this Court has held that "when a persistent felony offender is convicted on multiple felony charges, the district court can sentence the offender to the maximum sentence allowable on *each* charge." *Gunderson*, ¶ 54. In so ruling, the Court sought to avoid "the unjust result of subjecting non-persistent felony offenders to greater sentences than persistent felony offenders." *Gunderson*, ¶ 39. Similarly, when considering the PFO statute and the Alternative Sentencing Authority statute, this Court rejected an interpretation that the PFO statute was more specific and, thus,

controlling because doing so would fail to give effect to both statutes. *State v. Brendal*, 2009 MT 236, ¶¶ 30–31, 351 Mont. 395, 213 P.3d 448.

Pertinent Facts

The district court designated Shane a PFO and imposed a sentence of 50 years in the Montana State Prison with 10 of those years suspended. (5/18/2015 Tr. at 56, 62 (attached as App. S); Doc. 189 at 2 (attached as App. T).) The district court then imposed a separate, consecutive sentence of two years for the weapon enhancement. (5/18/2015 Tr. at 61; Doc. 189 at 2.)

CONCLUSION

Undersigned counsel has not identified any non-frivolous issues to raise in this appeal, and, therefore, requests this Court to allow counsel to withdraw from this representation.

Respectfully submitted this 29th day of August, 2018.

OFFICE OF THE PUBLIC DEFENDER
APPELLATE DEFENDER DIVISION
555 Fuller Avenue
P.O. Box 200147
Helena, MT 59620-0147

By: /s/ Koan Mercer
KOAN MERCER
Assistant Appellate Defender

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Memorandum Accompanying Motion to Withdraw is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,983, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Koan Mercer
KOAN MERCER

APPENDIX

CERTIFICATE OF SERVICE

I, Gem Koan Mercer, hereby certify that I have served true and accurate copies of the foregoing Brief - Anders-Withdrawal of Counsel to the following on 08-29-2018:

Timothy Charles Fox (Prosecutor)
Montana Attorney General
215 North Sanders
PO Box 201401
Helena MT 59620
Representing: State of Montana
Service Method: eService

Jessica A. Cole-Hodgkinson (Attorney)
710 Summit Ave
Havre MT 59501
Representing: State of Montana
Service Method: E-mail Delivery

Electronically signed by Gerri Lamphier on behalf of Gem Koan Mercer
Dated: 08-29-2018