

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0495

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

TIMOTHY MCNEW,

Defendant and Appellant.

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**APPELLANT'S REPLY BRIEF**

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On Appeal from the Montana First Judicial District, Lewis and Clark  
County, the Honorable Michael G. Swingley, Presiding.

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## ARGUMENT

This Court should vacate McNew’s guilty verdicts and remand this matter because the State did not prove McNew’s justified use of force was not reasonable against Nicole McNew (“Nicole”) and there was not sufficient evidence supporting the conviction against Keely McNew (“Keely”) pursuant to Montana Code Annotated §45-5-206(1)(a) and (c). The *Brief of Appellee* does not prove otherwise. The *Brief of Appellee* grossly exaggerates facts from the record and yet there is still a lack of sufficient evidence for these two convictions. Appellant reasserts his arguments made in *Appellant’s Opening Brief* and clarifies some issues of fact below.

**I. The State Did Not Prove Beyond a Reasonable Doubt That McNew’s Justified Use of Force Against Nicole Was Not Reasonable.**

As the defendant who timely plead the affirmative defense of justifiable use of force (“JUOF”), McNew needed to prove: the defendant 1) was not the aggressor; 2) reasonably believed that he was in imminent danger of unlawful harm; and 3) used reasonable force necessary to defend himself and the State must prove beyond a reasonable that the defendant’s actions of force were not justified. *State v. DeMers* 234 Mont. 273, 280, 762 P.2d 860, 865 (1988); §46-16-131, MCA; §45-3-102, MCA. There was undisputed testimony at trial that McNew was not the aggressor since Nicole

hit him first. (Audio Recording of Justice Court Trial, December 31, 2018, hereinafter “Audio Rec. Trial 12/31/18” at 9:23:14-21; 9:34:24-36; 9:48:08-41).

Appellee seems to take issue with the last two elements of JUOF, thus those will be focused on here. Appellee argued McNew did not reasonably believe he was in imminent danger of unlawful harm. (*Brief of Appellee* at 14-15). McNew testified he was in imminent danger of unlawful harm because his wife was hitting him while they were in a moving car. (Audio Rec. Trial 12/31/18 at 9:23:14-21). Further, the State diminished Nicole’s act of hitting McNew when Kelly testified that Nicole was hitting McNew for about three minutes. (Audio Rec. Trial 12/31/18 at 9:25:50-59). Three minutes is a long time to be hitting someone, especially when the act of hitting someone takes a few seconds at most. McNew’s belief that he was in danger of unlawful harm was reasonable because a reasonable person that was being hit for about three minutes while in a moving car would believe they were in imminent danger of unlawful harm.

Appellee also argued the force McNew used, a slap, was not commensurate with the force used against him, hitting, because McNew had “plenty of options” in response to Nicole hitting him. (*Brief of Appellee* at 15). One of these “options” according to the State was verbally requesting

Nicole to stop hitting him, which the State alleged McNew did not do prior to slapping Nicole. This is incorrect as both McNew and Keely testified that McNew asked Nicole to stop hitting him before the slap occurred. (Audio Rec. Trial 12/31/18 at 9:23:21-24; 9:48:08-41). Thus, it was clear McNew attempted to resolve this unpleasant family situation with nonviolent measures. Only after the nonviolent measure did not work did the slap occur. This compounded with the fact that Nicole hit McNew first is additional evidence that McNew's belief that slapping his wife in order to get her to stop hitting him was reasonable.

Moreover, "the primary issue in the affirmative defense of justifiable use of force is the reasonableness of the defendant's belief that the use of force is necessary. Therefore, only facts known to the defendant at the time of the incident are relevant." *State v. Branham*, 2012 MT 1, ¶10, 363 Mont. 281, 269 P.3d 891 (citing *State v. Montgomery*, 2005 MT 120, ¶ 19, 327 Mont. 138, 112 P.3d 1014; *State v. Henson*, 2010 MT 136, ¶ 27, 356 Mont. 458, 235 P.3d 1274). It's easy for the State to conclude, after reviewing testimony at the trial which occurred way after the incident, that McNew had other options besides slapping Nicole to defend himself. However, McNew testified as to what he knew at the time of the slap which was: Nicole had been hitting him, Nicole refused to stop even after being verbally asked to

stop, and McNew was stuck in a moving vehicle with nowhere to “get away.” (Audio Rec. Trial 12/31/18 at 9:48:08-41). Based on the facts known to McNew at the time of the incident, it was reasonable for McNew to believe he was in imminent danger of unlawful harm when Nicole continued to slap him after being asked to stop; and for McNew to slap Nicole in self-defense after being hit by Nicole for about three minutes and trapped in a moving vehicle. The State did not prove beyond a reasonable doubt that McNew was not justified in using self-defense against his wife.

**II. There Is Not Sufficient Evidence in The Record to Support Keely’s Prior Inconsistent Statement That Keely Reasonably Apprehended Bodily Injury from McNew.**

Keely’s prior inconsistent statement cannot be the sole evidence supporting this conviction and there was no corroborating evidence supporting the elements of this crime. See *State v. Whitewater*, 194 Mont. 85, 89, 634 P. 2d 636, 639, (1981) and *State. V. Torres* 2013 MT 101, ¶24; ¶27, 369 Mont. 516, 299 P.3d 804. Appellee argued there was “vast” circumstantial evidence supporting Keely’s prior inconsistent statement. (*Brief of Appellee* at 19). However, Appellee inflated the facts from the record in regard to this circumstantial evidence. Appellee stated Keely witnessed McNew “strike her mother.” (*Brief of Appellee* at 21). The record does not support this statement. When asked to clarify whether Keely saw

McNew slap Nicole at trial, Keely stated she was unsure because it was blurry and she was trying to focus on the road. (Audio Rec. Trial 12/31/18 at 9:25:25-36).

Appellee also stated McNew was “forced out of the car.” (*Brief of Appellee* at 21). This is again not supported by the record. Nicole testified at trial that they had reached some train tracks on their drive home and she opened her car door, then opened McNew’s car door, and told McNew to walk home which he did without protest. (Audio Rec. Trial 12/31/18 at 9:35:04-22). McNew corroborated these events with his testimony at trial: they had arrived at the train tracks and there was a train going by and someone requested he get out of the car and he did because he wanted to get away from that situation. (Audio Rec. Trial 12/31/18 at 9:48:42 – 49:03; 9:51:31-41). Appellee next stated the women locked all the doors and windows to the home to prevent McNew from entering the house. (*Brief of Appellee* at 21). McNew testified that the doors were locked when he returned home but did not know if the windows were locked. (Audio Rec. Trial 12/31/18 at 9:51:43-50). When asked if Nicole locked the doors and windows at trial, Nicole stated she was sure they did because she was angry with McNew and wanted him to sleep outside in the camper. (Audio Rec.

Trial 12/31/18 at 9:32:32-37; 9:32:50-58). Being angry with someone and being afraid of someone are very different and cannot be conflated.

Appellee insinuates Keely was afraid of McNew based on Keely's demeanor including Keely calling 911, being upset when the officers responded to the scene, and not letting McNew into the house. (*Brief of Appellee* at 21). However, Appellee ignored the testimony which explained the rationale behind Keely's actions. Due to their anger at McNew, neither Keely nor Nicole let McNew into the home. (Audio Rec. Trial 12/31/18 at 9:33:04-07). Kelly testified that she called 911 not because she was afraid of McNew but because she was angry with McNew. (Audio Rec. Trial 12/31/18 at 9:19:30-37; 9:19:54 – 20:01). Keely also clarified with her testimony that she cries out of anger to explain her demeanor at the scene. (Audio Rec. Trial 12/31/18 at 9:20:32-45). Further when questioned regarding Keely's demeanor around the officers, Nicole stated she did not think Keely was crying. (Audio Rec. Trial 12/31/18 at 9:33:15-32).

There is not sufficient evidence in the record to support McNew's conviction of partner family member assault, reasonable apprehension of bodily harm on Keely pursuant to §45-5-206(1)(c), MCA. The only evidence supporting this conviction was Keely's prior inconsistent statement which cannot be the sole evidence supporting a conviction. See *State v.*

*Whitewater*, 194 Mont. 85, 89, 634 P. 2d 636, 639, (1981) and *Torres* ¶24;  
¶27.

### **CONCLUSION**

For the reasons stated above, and in *Appellant's Opening Brief*,  
McNew requests this Court reverse and remand this matter to the Helena  
Justice Court with instructions to dismiss McNew's convictions with  
prejudice.

Respectfully submitted this 25<sup>th</sup> day of August, 2020.

By: /s/ Taryn Gray

Taryn Gray  
MONTANA LEGAL JUSTICE, PLLC

## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Appellant's Reply Brief is printed with a proportionately spaced Times New Roman 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 not more than 5,000 words, excluding certificate of service and certificate of compliance.

/s/: Taryn Gray  
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## CERTIFICATE OF SERVICE

I, Taryn Leigh Gray, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 08-25-2020:

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