IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0166

STATE OF MONTANA,

Plaintiff and Appellee,

v.

KYLE ALEXANDER HAMM,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, The Honorable Mike Menahan, Presiding

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3. Has Hamm sustained his difficult burden of proving his attorney provided constitutionally deficient presentation because he did not request a novel jury instruction regarding Hamm's new theory about the felony-murder statute?

4. Was the restitution award lawfully entered based on Cortright's affidavit.

STATEMENT OF THE CASE

Appellant Kyle Hamm (Hamm) appeals convictions for two deliberate homicide counts, felony tampering, and drug possession, entered by Lewis and Clark County District Court, the Honorable Mike Menahan, presiding. This case began on March 18, 2018, when Hamm went with Kaleb Taylor and Journey Wienke to the home of David and Charla Taylor in the Helena Valley, and Kaleb and Wienke bludgeoned the Taylors to death. (D.C. Doc. 5.) Kaleb admitted he attacked and killed his parents, and he is serving two life sentences in prison after he pleaded guilty to deliberate homicide. (*Id*. at 3.) A jury convicted Wienke on both counts of deliberate homicide. (D.C. Doc. 202 at 2.) In a separate trial, which

is the subject of the instant appeal, Hamm was also convicted of deliberate homicide and sentenced to 80 years in prison. (D.C. Doc. 208.)

STATEMENT OF THE FACTS

David and Charla Taylors' bodies were found in their North Helena Valley home on Cayuse Road on March 18, 2018. (Trial Tr. 254, 492.) David and Charla died horrible, brutal, bloody deaths. (*Id*. at 244, 285, 300, 545-60.) Three men, Kyle Hamm, Journey Wienke, and the Taylors' son Kaleb, had gone to the home that night in Kaleb's truck. (*Id*. at 499, 606, 611.) Much of the evidence points to Hamm waiting outside while Kaleb and Wienke went in. (*Id*. at 822.) David and Charla were home alone. Inside, Kaleb, with Wienke's direct participation and assistance, then attacked and killed his parents. (*Id.* at 720, 793; *see also* 926-27.) Kaleb and Wienke were in the residence for about fifteen minutes before returning to the pickup. (*Id*. at 922:19-20.)

Medical evidence presented at Wienke's trial showed David and Charla both died of a combination of blunt force injuries consistent with the use of a pipe- or crowbar-shaped instrument and sharp force injuries consistent with the use of a knife. (*Id*. at 545:9, 563:12; *see also* 549, 559, 567, 569, 854.) Charla was attacked while lying in the master bedroom bed, and she never left that position. (*Id*. at 681-82.) David's body was found face down in the living room, with several sharp

force injuries to the back of his neck. (*Id*. at 244.) Empty drawers from a jewelry cabinet were strewn on the bedroom floor. (*Id*. at 400:18.) Wienke helped Kaleb steal jewelry from the master bedroom before they left the residence in Kaleb's truck, which Hamm drove to the Rods-N-Dogs Car Wash. (*Id*. at 306:25, 848:19.)

At the carwash, the men got out of the truck. Hamm mostly stood around while Wienke and Kaleb washed the truck, their shoes, and items in the bed of the truck. (State's Ex. 121, Rods-N-Dogs surveillance video, beginning at 23:12:15.) Wienke apparently dropped a broken knife blade on the ground in wash bay #2; Hamm recognized the knife and used his foot to push the knife blade down the floor drain; and Kaleb then used the wash wand to hose the knife blade further under the truck or down the drain. (*See* State's Ex. 121, video at 23:12:33 to 23:14:55.) Investigators learned from the victims' family that David and Charla had determined that Kaleb burglarized their business, the Lincoln RV Park, about eight days before the homicides. (*Id*. at 574.) David and Charla knew Kaleb had committed that crime. (*See id*.)

Kaleb later confessed to attacking his parents on March 18, and he assisted law enforcement in recovering evidence related to the murders, including the metal rod used to beat his parents and a bag of jewelry taken from the home and discarded in a field. (*Id*. at 819-29.) Detectives obtained video surveillance recordings from the Rods-N-Dogs Car Wash near the Taylor home indicating that

at around 10:12 p.m. on March 18, 2018, Kaleb's pickup entered a car wash bay. The men washed the truck, Kaleb and Wienke their shoes, hands, and a metal bar from the bed of the truck consistent with the weapon used to bludgeon David and Charla. (State's Ex. 121, video at 23:12:33 to 23:17:54.)

The men afterward drove to a nearby Zip Trip to obtain refreshments. (Trial Tr. at 766, 775.) Then they drove around the Helena area disposing of items related to the homicides and robbery. (*Id*. at 750.) Security video from Drae's Casino from the night of the homicides corroborated that Kaleb, Hamm and Wienke were together. (*Id*. at 319, 870.)

The State will discuss additional record facts in the arguments that follow.

STANDARDS OF REVIEW

This Court reviews insufficiency of the evidence claims to determine whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Yuhas*, 2010 MT 223, ¶ 7, 358 Mont. 27, 243 P.3d 409. The inquiry will consider whether sufficient evidence existed to support the verdict, not whether the evidence could have supported a different result. *State v. Sheehan*, 2017 MT 185, ¶ 17, 388 Mont. 220, 399 P.3d 314. It is

within the province of the factfinder to weigh the evidence based on the credibility of witnesses and determine which version of events should prevail. *Id.*

This Court reviews preserved jury instruction challenges for an abuse of discretion coupled with a showing of prejudice to the defendant's substantial rights. *State v. Hanna*, 2014 MT 346, ¶¶ 12-15, 377 Mont. 418, 341 P.3d 629. If a defendant had the opportunity but failed to object to a jury instruction at trial, this Court will not examine the issue unless it qualifies for plain error review. *State v. Birthmark*, 2013 MT 86, ¶ 11, 369 Mont. 413, 300 P.3d 1140.

A district court's compliance with sentencing statutes is generally a question of law that this Court reviews de novo. *State v. Cerasani*, 2014 MT 2, ¶ 11, 373 Mont. 192, 316 P.3d 819. This Court reviews a district court's findings of fact as to the amount of restitution owed for clear error. *City of Billings v. Edward*, 2012 MT 186, ¶ 18, 366 Mont. 107, 285 P.3d 523. A finding of fact is clearly erroneous if it is not supported by substantial evidence. *Id.* "Substantial evidence" is "evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* (quoting J*ohnston v. Palmer,* 2007 MT 99, ¶ 26, 337 Mont. 101, 158 P.3d 998). Although this standard requires more than a scintilla of evidence, it does not require proof by a preponderance of the evidence. *State v. Gallagher*, 2001 MT 39, ¶ 5, 304 Mont. 215, 19 P.3d 817.

SUMMARY OF THE ARGUMENT

The State adduced sufficient evidence of Hamm's accountability for the robbery that served as the underlying forcible felony for the deliberate homicides. Hamm's argument that the felony-murder statute must be read to preclude his homicide convictions is speculative legal theory unsupported in fact or law. Hamm uses the same novel theory to argue that the full and fair instructions given to his jury on accountability and the felony-murder rule were nevertheless deficient. Hamm's theory was not required to be given to the jury. Hamm in turn uses the same baseless theory in an attempt to assert ineffective assistance of counsel. But Hamm's counsel was not obliged to raise fanciful theories, particularly ones not dictated by precedent. Lastly, the restitution award was lawfully entered. Hamm's arguments of imprecision are not well taken. The fact that the sentencing judge provided a non-customary post-sentencing procedure as an option to Hamm for further redress does not render the sentencing decision on restitution defective or invalid. The optional remedy was a superfluity that Hamm did not use, and so he was not prejudiced thereby.

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ARGUMENT

I. Sufficient evidence supported Hamm's felony murder convictions by proving, among other things, that Hamm, Kaleb, and Wienke were legally accountable for the qualifying felony of robbery.

A. The totality of the evidence that the State adduced at trial demonstrates Hamm's accountability, along with Kaleb and Wienke, for the robbery, which served as the forcible felony predicate for Hamm's felony-murder conviction.

As pertinent here, Judge Michael Menahan instructed Hamm's jury with the following:

> A person commits the offense of deliberate homicide, if the person commits or is legally accountable for the commission of offense of robbery, and in the course of the robbery or flight thereafter, the person or any person legally accountable for the crime causes the death of another human being.
>
> * * *
>
> To convict the Defendant of deliberate homicide by being legally accountable for the conduct of another person, the State must prove the following elements:
>
> > 1. That the crime of Robbery, as defined in Instruction No. 25 has been committed; and
> >
> > 2. that the Defendant, Kyle Hamm, either before or during the commission of the offense of robbery, and with the purpose to promote or facilitate such commission, solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense.
>
> * * *
>
> A person is legally accountable for the conduct of another when either before or during the commission of an offense, and with the purpose to promote or facilitate such commission, the person solicits,

> aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense.

(D.C. Doc. 191, Instrs. 19, 22-23.)

Here, Hamm's own statements indicate that he rode along with his robbery accomplices knowing that Kaleb wanted to rob his parents and even kill them to do it. When the police interviewed Hamm, he admitted he knew what was happening when Kaleb and Wienke went into the Taylors' house and came back with blood on them. (State's Ex. 159A at 15: 665-66. Hamm: "I mean, ish. I mean, uh, I—I—I guess—I guess I kinda kn==kinda knew what was up but, uh, I mean, I—I—I didn't - I didn't think he did it;" *see also id*. at 53:2360-61. Hamm: "I kinda thought something may have happened.") Later in the same interview Hamm more affirmatively stated that he was in fact "pretty positive of what happened" in the house. (*Id*. at 41:1840; 42:1857.)

While Kaleb and Wienke were inside, Hamm was watching the events unfold. He admitted he observed the Taylor's second floor bedroom light turn on and knew it was on for about two minutes. (*Id*. at 39.) Other circumstantial evidence showed all three men knew that the Taylors' bedroom was where the Taylors stored their most valuable jewelry. (Trial Tr. at 932:1-2.) Also, while outside, Hamm moved from the passenger's seat to the driver's seat before Kaleb came out the house. (*Id*. at 974:7.) This further proves Hamm's prior knowledge and complicity in the robbery planning, a plan the jury could reasonably infer

involved all three accomplices robbing the Taylors, with Hamm aiding and abetting both the planning and commission of robbery by, among other things, knowing in advance he would serve as the getaway driver.

When Kaleb and Wienke came back out of the house to the truck, the accomplices emerged from the house with a bag of stolen items. Hamm would have known the bag was noticeably large. Hamm further aided the commission of robbery in the flight thereafter when he drove his accomplices with the stolen jewelry to the carwash. Hamm admitted putting money into a vending machine so Kaleb could operate the spray wand. (State's Ex. 159A at 17:728.) Hamm would have seen the bloody metal rod being washed by Kaleb, the rod that Hamm would have known served as both a valuable item stolen in the robbery and as an instrument facilitating the robbery; Hamm would have known the rod was not present with Kaleb earlier when Kaleb left the truck and entered the house.

Hamm also admitted pushing the bloody knife into the drain at the carwash (*id*. at 27:1214; 29:1282-85; 29:1301), further proving his knowledge that the robbery was a forcible one in that the accomplices had used clear deadly force; Hamm's conscious and deliberate disposal of the bloody knife sealed his participation in the entire scheme with Hamm and Wienke to rob the victims for drug money, forming part of a consistent pattern of robbery for drugs that Hamm and his best friend Kaleb had engaged in several times before. Hamm admitted

stealing for drugs with Kaleb and others, and that this had occurred over the course of weeks before the murders. In fact, Hamm admitted helping Kaleb take money from the Taylors' Lincoln RV park just days before the murders. (*Id*. at 35:1566)

Reasonable jurors could conclude Hamm knew his accomplices entered the Taylor's house to steal from them for drug money and possibly to kill them while committing the robbery. And a reasonable juror could conclude that Hamm purposely facilitated the commission of the robbery by participating in the flight after the commission of the offense.

B. Hamm posits unreasonable interpretations of the felony-murder statute at Mont. Code Ann. § 45-5-102(1)(b).

Hamm believes the felony-murder statute bars his deliberate homicide convictions. The State has attempted to construe Hamm's arguments reasonably and in good faith in an attempt to understand the reasoning supporting his proposed statutory construction. So construed, the State submits that, contrary to Hamm's arguments, the felony-murder statute does not prohibit his prosecution for the two deliberate homicides.

Citing essentially two Montana cases to support his argument, Hamm asserts that because Taylor and Wienke actually committed every element of the offense of robbery, Taylor and Wienke were "not 'legally accountable' for that offense as a matter of law." (Opening Br. at 31-32, citing *State v. Kline*, 2016 MT 177, 384 Mont. 157, 376 P.3d 132.) Hamm further reasons that the felony-murder

statute can only be reasonably construed to mean that "[i]f the decedent's death was caused by anyone other than the defendant himself or a person 'legally accountable' for the [qualifying] forcible felony, no criminal liability attaches under Montana's felony murder rule." (Opening Br. at 33.) To scaffold this reasoning, Hamm cites *State v. Burkhart*, 2004 MT 372, 325 Mont. 27, 103 P.3d 1037. (Opening Br. at 34-35.)

Kline and *Burkhart* do not support Hamm's propositions.

In *Kline*, the defendant appealed his incest conviction, arguing that the district court erred by concluding that his biological daughter was not legally accountable for Kline's incest and, therefore, incorrectly denied his motion for a directed verdict of acquittal and for a jury instruction on accountability instructing the jury to view S.K.'s testimony with distrust. *Kline*, ¶ 17.

The Court in *Kline* delt with a factually and legally unique circumstance. S.K. was 17 years old at the time of the crime and so was theoretically responsible for her own commission of incest, and was not simultaneously responsible under a theory of accountability for Kline's commission of incest. *Kline*, ¶ 24.

> Incest is **a qualitatively unique sexual offense** because the act itself is unlawful whether or not it is consensual or a minor is involved and especially because it requires two participants. **Accountability cannot be applied to the participants in incest because accountability is a theory of transferring culpability to a non-actor that is unnecessary where each participant is responsible for his or her own conduct and independently commits the offense.** Instead, our case law suggests that accountability for incest requires three actors:

> two related participants engaging in sexual contact or sexual intercourse and a third party who in some manner either knowingly causes incest or solicits, aids, abets, agrees, or attempts to aid another in the planning or commission of incest.

Kline, ¶ 21 (emphasis added). The matters at issue in *Kline* were *sui generis*.

Hamm's insistence on pounding the square peg of his case into the round hole of the holdings in *Kline* makes no sense in light of *Kline*'s distinctive circumstances. Neither S.K. nor Kline was a victim of incest. If both participants are over the age of 16, as in *Kline*, the statute criminalizes both as participants in incestuous conduct. The incest statute at Mont. Code Ann. § 45-5-507(1) does not contemplate, nor require, a determination of who is an incest victim unless one party is under the age of 16, in which case Mont. Code Ann. § 45-5-507(4) presumes the party under 16 is a victim because they are legally incapable of consenting to sex.

The various statements in *Kline* on accountability simply relate to the unique circumstances of that case, particularly to the law of incest, a far deferent crime than felony-murder where accountability determinations lawfully rest on differing contributions of **shared** criminal culpability.

Regarding *Burkhart*, Hamm cherry-picks a phrase to suggest in that case this Court specified a new definitional restriction on the felony-murder statute that runs counter to this Court's established felony-murder jurisprudence. Hamm insists *Burkhart* re-defines felony-murder to bar "'foist[ing] authorship of a homicide

upon a felon' who did not actually kill let alone do so with malice." (Opening Br. at 35, citing *Burkhart,* ¶ 42.) Hamm's quoted language was from this Court's quotation as background discussion by the Criminal Law Commission, whose Comment the Legislature relied on in enacting the 1947 version of the current felony-murder statute. This Court in *Burkhart* did not quote such language as amendatory reasoning for some new principle that redefines the felony-murder rule.

The sentence following Hamm's quote states: "Thus, in construing the felony-murder statute, it is the mental state which is imputed to the felon for an assault incidental to the homicide, not the act of killing." *Burkhart*, ¶ 42 (quoting the Criminal Law Commission Comment).

Burkhart's dispositive reasoning, found in the penultimate paragraph disposing Kline's appellate issue, states: "The [felony-murder] statute provides notice to such an individual that, should he or she choose to participate in a serious felony, and should someone be killed, the felon will be subject to criminal liability for deliberate homicide." *Burkhart*, ¶ 45. Hamm's reliance on *Burkhart* plainly provides no justification for his construction.

Because Mont. Code Ann. § 45-5-102(1)(b) shows clear meanings that this Court can determine solely from the plain import of the language used, Hamm's reliance on principles he believes can be culled from his reading of *Kline* and

Burkhart constitutes an invalid extrinsic means of statutory interpretation, which is inappropriate. *See State v. Asmundson*, 283 Mont. 141, 146, 940 P.2d 104, 107 (1997) (stating when the language of a statute is plain, unambiguous, direct, and certain, the statute speaks for itself and there is no need to resort to extrinsic means of interpretation); *In re Estate of Garland*, 279 Mont. 269, 273-74, 928 P.2d 928, 230 (1996) ("Where the language is clear and unambiguous, the statute speaks for itself and we will not resort to legislative history or other extrinsic means of interpretation.").

For argument's sake, even if Hamm's construction were adopted, the purpose of the felony-murder statute would be largely nullified. Using a classic law school hypothetical and Hamm's pinched reading of the statute, getaway drivers at a bank robbery could never be held criminally liable for any murder committed by the robbery accomplices inside the bank during the course of the robbery. The preplanned getaway driver would be immune from criminal liability for the murders since, according to Hamm, two of his accomplices accomplished all the principal elements of the robbery in which people were murdered. This is despite the fact that the getaway driver is a part of the robbery scheme and is coextensively liable under the law for the robbery.

It appears Hamm attempts some semantic legerdemain with his use of the phrase "legally accountable." In the instant case, Hamm's jury was instructed with

the correct principles of accountability, *see supra*, that define how a getaway driver such as Hamm can be held liable for a robbery. Under case law addressing accountability, it is clear that the State must prove beyond a reasonable doubt that a defendant, in essence, facilitated commission of an offense by another with the intent that such offense be committed. *See in general State v. Owens*, 182 Mont. 338, 597 P.2d 72 (1979).

Hamm, as the State discusses more fully above, formed a role in the scheme, along with his two accomplices, to commit robbery. The State was not obliged to prove Hamm's mental intent (or show homicidal malice as Hamm intimates) when Kaleb and Wienke entered the Taylor residence with the purpose of actually killing the Taylors. Accountability for robbery does not require proving such elements. Montana Code Annotated § 45-2-302(3) provides, in part, that a person is legally accountable for the conduct of another when "either before or during the commission of an offense with the purpose to promote or facilitate such commission, he solicits, aids, abets, agrees, or attempts to aid such other person in the planning or commission of the offense."

While mere presence at the scene of a crime is not enough to establish accountability, the "**accused need not take an active part in any overt criminal acts to be adjudged criminally liable for the acts**." *State v. Spang*, 2002 MT 120, ¶ 43, 310 Mont. 52, 48 P.3d 727 (overruled on other grounds; citation omitted;

emphasis added). Additionally, mere presence and the failure to disapprove or oppose another's commission of an offense may be considered by a factfinder, along with other circumstances, as indication that the accused in some way aided or abetted the principal in the commission of the crime. *Id.*

Here, Kaleb/Wienke's act of killing David and Charla was their own criminal act. It is not an element of accountability for robbery that the person held accountable had foreknowledge of the accomplices' actual plan for how the robbery would be accomplished. The fact that Hamm might or might not have known Kaleb actually intended to kill his parents in the course of the theft is neither here nor there. Robbery can be considered completed before anyone is actually killed. *See, e.g.,* C*ommonwealth v. Thompson,* 648 A.2d 315 (Pa. 1994) (stating robbery is completed when an attempt is made to take the property of another by force or threat of force). There is no requirement that the robbery be successful.

The circumstantial evidence when viewed in the light most favorable to the State supports the inference that Hamm aided and abetted Kaleb and Wienke. He is responsible for the robbery and what occurred afterwards as if he had entered the house himself and was with the two killers as they stole from and murdered David and Charla. In fact, this record establishes fair inferences that the jury could conclude Hamm did in fact enter the house with Wienke and Kaleb. (*See* Trial Tr.

at 918-24.) A sustainable inference from such evidence shows Hamm directly participated in the core robbery events by accompanying his accomplices into the Taylors' home, and was present while the murders were taking place. (*Id*.) While the State is not asserting here that the evidence points beyond a reasonable doubt to Hamm participating in the actual homicides, which the State does not need to prove, the evidence does demonstrate he actively participated in all overt stages of the robbery, including as a direct participant in the murders.

Under the felony-murder statute, the getaway driver need not have any intention or malice toward the murdered victims. The established jurisprudence requires Hamm must be held liable for those murders, contrary to Hamm's fallacious construction of the felony-murder statute. This Court should reject Hamm's effort to avoid legal liability where, under this record, the law clearly establishes his guilt beyond a reasonable doubt.

II. The district court fully and fairly instructed the jury about the applicable law regarding accountability.

Hamm acknowledges the trial judge accurately instructed his jury on felony-murder and accountability. (Opening Br. at 38.) For the first time on appeal, however, Hamm asserts his jury was not instructed on what he calls a "key piece of the puzzle." (*Id*.)

Hamm openly admits his issue was not raised below and therefore must rely upon the doctrine of plain error for this Court to reach the issue. (*Id*.) *State v. Gallagher*, 2005 MT 336, ¶ 13, 330 Mont. 65, 125 P.3d 1141 (when no objection made to jury instruction at issue, Court must first decide if exercising plain error review is appropriate). When a defendant requests this Court to review an unpreserved issue through plain error, the review is discretionary and should be applied "sparingly and on a case-by-case basis." *State v. Stutzman*, 2017 MT 169, ¶ 13, 388 Mont. 133, 398 P.3d 265; *Gallagher*, ¶¶ 13-14. If application of the plain error doctrine is unwarranted, this Court "need not address the merits of the alleged error." *Stutzman*, ¶ 23.

Hamm's appeal issue stalls at the starting gate. Deciding his issue under the governing dispositive standard simply focuses on whether the trial court fully and fairly instructed the jury on the applicable law. Thus, Hamm's concession that the instructed law on accountability and felony-murder was correct means he cannot establish the instructions as a whole failed to instruct the jury fully and fairly. He posits that a puzzle nevertheless exists among those given instructions, but Hamm's expressed "puzzle" is purely one of his own making. He predicates his assertion that "a person who personally commits all the elements of an offense cannot, as a matter of law, be legally accountable for that same offense" on the same misreliance on *Kline*, discussed *supra*, regarding his sufficiency of the

evidence claim. (Opening Br. At 18.) The State will not repeat its discussion regarding Hamm's erroneous reliance on *Kline* except to summarize that *Kline* is sui generis regarding the unique framing of accountability principles in that case. This Court should summarily reject Hamm's issue without analyzing it any further.

Notably, Hamm does not substantiate or express a clear claim of prejudice. He does not assert with citations to the trial record that his jury did not hold the State to its burden in this case. He does not point to his absent "puzzle piece" jury instruction as prejudicially affecting his substantial rights, as he is required to prove to predicate reversal. *See State v. Beavers*, 1999 MT 260, ¶ 18, 296 Mont. 340, 987 P.2d 371. Instead, Hamm implies a constitutional right exists based on his belief he cannot be convicted of a crime that is not expressly authorized. His non-extant crime is speculative theory. Hamm plainly errs to the extent he implies a constitutional construct exists to suggest his speculation alone evinces a mistake occurred in the jury instructions given in this case.

Hamm's belief his claim implicates his fundamental constitutional due process rights is largely dubious. (Opening Br. at 38.) Generally, under Montana law, since criminal accountability is not considered a substantive separate offense but merely a conduit by which to find a person criminally liable for the acts of another, due process is not automatically implicated. For example, if the State's case is based upon the accountability statutes, due process does not require that the

State set forth a theory of accountability in an information. *See, e.g.,* S*tate v. Tower,* 267 Mont. 63, 68, 881 P.2d 1317, 1320 (1994) (holding that the State is not required to set forth a theory of accountability in the information in order to give the defendant fair notice of the nature and cause of the accusation against him); *State v. Medrano, 285 Mont. 69, 74, 945 P.2d* 937, 940 (1997) (citing Tower and stating it is clear that accountability may be asserted by the State without having first asserted that basis for liability in an information); *State v. Abe*, 1998 MT 206, 290 Mont. 393, 965 P.2d 882 (citing *Tower* and stating criminal accountability is not considered a substantive separate offense but merely a conduit by which to find a person criminally liable for the acts of another).

For argument's sake, even if the court erred in declining to give Hamm's *Kline*-based instruction, that error was not "compelling" nor "exceptional," and therefore does not warrant plain error review. *See, e.g.,* S*tate v. Harris,* 1999 MT 115, 294 Mont. 397, 983 P.2d 881 (lack of unanimity instruction for incest count not an exceptional case warranting plain error review). Moreover, Hamm's unpreserved challenge to a jury instruction does not address how a novel, unexplored area of the law should or could have been known to the judge. *See, e.g., Black v. City & Cnty. of Honolulu*, 512 F. App'x 666, 670 (9th Cir. 2013) (no plain error where trial court declined to incorporate novel legal theory into instruction). The alleged error was certainly not egregious; and the multiple,

unseized opportunities to note an objection on the record may well reflect defense counsel's thoughtful decision to proceed no further with this issue, even if could be argued counsel should or could have known about it. As such, Hamm's alleged error does not fall within the limited and exceptional circumstances necessary for triggering plain error review.

III. Hamm has failed to establish a violation of his right to the effective assistance of counsel where he shows no clear precedent that supports his novel legal claim about the felony-murder statute he raises here for the first time on appeal.

Hamm has failed to prove a violation under *Strickland v. Washington*, 466 U.S. 668 (1984). An attorney cannot be faulted for failing to forecast changes or advances in the law, in Montana or elsewhere. *See Larrea v. Bennett*, 368 F.3d 179, 184 n.2 (2d Cir. 2004) (finding failure to anticipate change in state law not ineffective, and rejecting view that an attorney should be familiar with cases from other jurisdictions); *see, e.g.,* S*istrunk v. Vaughn,* 96 F.3d 666, 672 (3d Cir. 1996) (stating no IAC for failing to anticipate Batson).

Counsel simply cannot be required to utilize unsettled or debatable theories of law. *See Murtishaw v. Woodford*, 255 F.3d 926, 949-50 (9th Cir. 2001) (holding defense counsel insulated from ineffectiveness because of the obscurity of the legal basis for a defense of imperfect self-defense at the time of petitioner's capital trial); *United States v. Chambers*, 918 F.2d 1455, 1461 (9th Cir. 1990) (at time of trial,

instructional error case had not been decided); *see also Fields v. United States*, 201 F.3d 1025, 1028 (8th Cir. 2000) (noting no IAC exists for failure to object where the law is unsettled on a subject).

Counsel, thus, should not be found to have breached the competency requirement unless counsel failed to advance a theory or defense "dictated by precedent" controlling at the time the representation occurred. *See Teague v. Lane*, 489 U.S. 288, 301 (1989). "The result in a given case is not dictated by precedent if it is 'susceptible to debate among reasonable minds,' or, put differently, if 'reasonable jurists may disagree.'" *Graham v. Collins*, 506 U.S. 461, 475 (1993) (quoting *Stringer v. Black*, 503 U.S. 222, 238 (1992) (Souter, J., dissenting)).

Here, as Hamm notes, the jury was properly instructed regarding felony murder and accountability. (Opening Br. at 38) For the first time on appeal, however, he asserts his counsel should have sought to have the judge instruct his jury on what Hamm calls a "key piece of the puzzle," which the State has argued, *supra*, Hamm has newly concocted for the purpose of raising an IAC claim. Hamm cites no precedent that would dictate to a reasonably competent attorney that Hamm's jury would not be fairly and fully instructed on the applicable law.

The State has already demonstrated, *supra*, that Hamm misrelies on *Kline* and *Burkhart* to postulate a newly created instruction about the felony-murder statute. Reading *Kline* and *Burkhart* would not lead an attorney to conclude that

the view of felony-murder Hamm now proposes was then, or is now, susceptible to debate among reasonable minds or one upon which reasonable jurists may disagree. Failing to object when there is no error is not ineffective assistance. *See Hale v. Gibson*, 227 F.3d 1298, 1320-21 (10th Cir. 2000) (not ineffective to object to admissible other crimes evidence).

The State anticipates Hamm in his reply brief will shore up his novel legal theory to buttress his debate that his theory about felony-murder was available at or before his trial, and may discuss additional precedent in an attempt to clarify his own arguments. In doing so, Hamm would only buttress the State's assertion that his attorney could not have been ineffective based on his understanding of the law; if Hamm in his Opening Brief cannot conjure clear legal grounds demonstrating that the argument he raises was dictated by precedent and not "susceptible to debate among reasonable minds" when his jury was instructed, Hamm can hardly expect his trial attorney to have divined the same grounds. *See Smith v. Lewis*, 530 P.2d 589, 595 (Cal. 1975) ("If the law on a particular subject is doubtful or debatable, an attorney will not be held responsible for failing to anticipate the manner in which the uncertainty will be resolved."); overruled on other grounds, *In re Brown*, 544 P.2d 561, 562-63 (Cal. 1976).

Of course, there is no error, statutory or constitutional, warranting plain error in this case. *State v. West*, 2008 MT 338, ¶¶ 22-23, 346 Mont. 244, 194 P.3d 683

(Court will not address mere statutory claim under the doctrine of plain error review); *State v. Norman*, 2010 MT 253, ¶ 17, 358 Mont. 252, 244 P.3d 737 (plain error is discretionary review of claims that implicate fundamental constitutional rights). And there can be no serious, "firmly convinc[ing]" claim of error by the district court—or deficient performance by counsel—where the language of the contested instructions replicates and mirrors the language of the statute, and thus correctly sets forth the law applicable to the case and properly informs the jury of the law. *See State v. Doyle*, 2007 MT 125, ¶ 67, 337 Mont. 308, 160 P.3d 516.

Hamm in no way establishes prejudice since his belief that he could not as a matter of law be convicted of felony-murder rests on speculation. *See Bragg v. Galaza*, 242 F.3d 1082, 1087 (9th Cir. 2001), amended on denial of rehearing, 253 F.3d 1150 (9th Cir. 2001) (a defendant's mere speculation that a witness might have given helpful information is insufficient). This Court should reject Hamm's IAC allegations because they are conclusory and otherwise grounded on a silent record. *See Strickland*, 466 U.S. at 690; *see also State v. Black*, 270 Mont. 329, 338, 891 P.2d 1162, 1167 (1995) (finding that IAC allegation could not be addressed on direct appeal because the allegation could neither be established nor disproved on the record before the court); *State v. Webster*, 2005 MT 38, ¶ 15, 326 Mont. 112, 107 P.3d 500 ("The record before us does not reflect the reasons

behind counsel's failure to object to the questioning by the prosecution. As a result, we conclude this claim cannot be raised on direct appeal.") (citations omitted).

Lastly, Hamm errs in asserting that "no legitimate reason [exists] . . . for not offering an instruction that would have allowed the jury to acquit Kyle of murder . . . . Nor can there be a plausible justification." (Opening Br. at 43.) Such assertions are tantamount to the oft-expressed IAC assertion that "no conceivable rationale" existed for an attorney not to have taken certain actions. "No legitimate reason" and "no conceivable rationale" are throwaway phrases used to draw attention away from the fact it is Hamm's burden as an IAC claimant to show that the action undertaken by counsel was not warranted. *See Knowles v. Mirzayance*, 556 U.S. 111, 121-22 (2009) (pointedly rejecting the claim that counsel is ineffective simply because he or she did not take an action when "there was nothing to lose by pursuing it"); *Rice v. Hall*, 564 F.3d 523, 526 (1st Cir. 2009) (prejudice allegations were deficient when they rested almost entirely on "mays" and "could haves"); *Hunt v. Houston*, 563 F.3d 695, 705 (8th Cir. 2009) (unsupported speculation about the possible existence of some as-yet-undiscovered malfeasance does not establish prejudice). Hamm has not established deficient performance or prejudice.

IV. The district court did not err in ordering Hamm to pay $35,592 in restitution.

A. Applicable law

When a defendant is convicted of an offense, the sentencing court must impose full restitution if the offender's criminal conduct resulted in a pecuniary loss to a victim. Mont. Code Ann. § 46-18-201(5); *State v. Jent*, 2013 MT 93, ¶ 12, 369 Mont. 468, 299 P.3d 332. A "pecuniary loss includes special damages that a person could recover against the offender in a civil action 'arising out of' the offender's criminal activities." *Jent*, ¶ 13, citing Mont. Code Ann. § 46-18-243(1)(a). In addition, a pecuniary loss includes "the full replacement cost of property taken, destroyed, harmed, or otherwise devalued as a result of the offender's criminal conduct." Mont. Code Ann. § 46-18-243(1)(b); *Jent*, ¶ 13.

"The court shall specify the total amount of restitution that the offender shall pay." Mont. Code Ann. § 46-18-244(1). "This means that the amount of restitution must be stated as a specific amount of money." *State v. Heafner*, 2010 MT 87, ¶ 7, 356 Mont. 128, 231 P.3d 1087; *see also State v. Guill*, 2011 MT 32, ¶ 52, 359 Mont. 225, 248 P.3d 826. Indeed, "[t]he total amount that a court orders to be paid to a victim may be treated as a civil judgment against the offender and may be collected by the victim at any time, . . . including execution upon a judgment, for the collection of a civil judgment." Mont. Code Ann. § 46-18-249(1). In other

words, the amount of restitution in the criminal judgment operates as a current, immediately collectable civil judgment against the defendant in favor of the victim.

B. Hamm's arguments are meritless

Hamm's arguments, express or implicit, challenging the restitution are as follows:

- Hamm is not liable for restitution at all since his homicide convictions cannot stand.

- Cortright did not substantiate her restitution request by providing sufficient details showing she (or the RV Park, or the estate, or the Taylors' "heirs" who inherited the business) suffered any out-of-pocket expenses, lost income, or other economic damages as a result of the Taylors' deaths.

- The trial court unlawfully allowed restitution to be determined at a later date.

- The trial court unlawfully required Hamm to file a post-sentencing challenge re-raising his claim regarding the unsubstantiated amount, and forced Hamm to undergo a second evidentiary hearing.

- The trial court's requirement forcing Hamm to file a post-sentencing remedy means the restitution order was not specific or based on the evidence presented at sentencing.

The State will address each argument in turn, except the first argument regarding the homicide convictions, as the State has demonstrated, *supra*, the homicides were lawfully entered.

1. A victim's affidavit alone may suffice to establish restitution values.

As far as the documentation of the victim's pecuniary loss, Mont. Code Ann. § 46-18-242 provides:

> (1) Whenever the court believes that a victim may have sustained a pecuniary loss or whenever the prosecuting attorney requests, the court shall order the probation officer, restitution officer, or other designated person to include in the presentence investigation and report:
> (a) a list of the offender's assets; and
> (b) an affidavit that specifically describes the victim's pecuniary loss and the replacement value in dollars of the loss, submitted by the victim.
> (2) When a presentence report is not authorized or requested, the court shall accept evidence of the victim's loss at the time of sentencing.

Although "documentation supporting the claimed loss is not generally required," restitution is not supported by substantial evidence where the evidence is conflicting and no other testimony or evidence is available to be examined as to the discrepancy. *State v. Aragon*, 2014 MT 89, ¶ 20, 374 Mont. 391, 321 P.3d 841. It is important to recall that a victim's pecuniary loss may be substantiated either through an affidavit, **or** through testimony at the sentencing hearing. *See, e.g., State v. McMaster,* 2008 MT 268, ¶¶ 24-35, 345 Mont. 172, 190 P.3d 302; *see also Aragon*, ¶ 14 (explaining "[w]e have upheld awards of restitution where the only evidence in the record was the victim's affidavit or testimony regarding the amount of pecuniary loss" and "a victim's affidavit or her testimony may be sufficient, if credited by the court, to support an award of restitution").

Here, Hamm apparently argues that the district court erred in ordering $35,592 in restitution because Cortright's affidavit of loss, without more, could not establish all the exact values for compensable items. But Cortright provided an affidavit of pecuniary losses, even though she did not testify at the sentencing hearing. Cortright's affidavit was submitted to the court in advance, and Hamm must have known about the affidavit before the hearing and had the opportunity to contest the requested amounts, but he failed to convince the court not to award the full amount requested. Thus, contrary to what Hamm asserts, the State did present evidence supporting restitution for Cortright when it submitted Cortright's affidavit.

Hamm points to several concerns he raised at sentencing regarding Cortright's affidavit. His intent was to obtain "the context to understand better" the more precise accounting elements of net loss and net gains so that these matters were made "clear." (*See* Opening Br. at 44-46.) But these questions pose matters of refinement and exactitude and are not countervailing evidence—only Hamm's attorney's characterizations. An attorney's characterization is not evidence. *See Green v. Baker*, 66 Mont. 568, 573, 214 P. 88, 90 (1923) (an "opinion of counsel, however able and learned in the law, is not evidence"); *McKenzie v. Scheeler*, 285 Mont. 500, 508, 949 P.2d 1168, 1173 (1997) (finding unsupported attorney arguments are not evidence and do not establish the existence of the

matters that the attorney argues); *City of Helena v. Whittinghill*, 2009 MT 343, ¶ 23 n.2, 353 Mont. 131, 219 P.3d 1244 ("A party can not establish facts in a case by asserting them in a brief. Those are nothing more than an attorney's statements, which are not evidence. [Citation omitted.] Absent competent proof, such as by testimony, stipulation, or judicial notice, an attorney's statements do not constitute proof of facts.").

2. Contrary to what Hamm argues, neither during sentencing nor in the offer to Hamm of a post-sentencing remedy did the court declare or imply its restitution award at sentencing was deficient or otherwise unsubstantiated.

Hamm asserts that because the trial judge at one point during the sentencing hearing suggested the need for additional development of Cortright's affidavit, that proves the affidavit was deficient and that the court's reliance on it was therefore error. Such a characterization does not show that the court believed or ruled that the affidavit was insufficient, nor does it establish the court erred in relying on it when ultimately decided upon the sum certain as a reasonable calculation of loss. Although the final calculation relied upon and decided by the court might arguably have been based on "some guess work," such estimations did not render it unsubstantiated. *See McMaster*, ¶ 28 (quoting *State v. Benoit*, 2002 MT 166, ¶ 29, 310 Mont. 449, 51 P.3d 495); *Mayfield v. State*, 705 S.E.2d 717, 720 (Ga. Ct. App.

2011) ("[t]he owner of property is considered to be qualified to state his opinion as to value") (citation, punctuation, and emphasis omitted).

Further, the court's deliberations in arriving at the restitution sum do not somehow taint or invalidate the final award. Hamm only contested the Cortright's values as imprecise, he never contested any of the restitution awards with counter evidence. "Restitution is not surrounded by the panoply of protections afforded a defendant at trial. So long as the procedure leading to a restitution award is such that defendant is given the opportunity to contest the information on which the restitution award is based, to present relevant evidence, and to be heard, due process is satisfied." *State v. Fancher*, 818 P.2d 251, 253 (Ariz. Ct. App. 1991). This record shows the court arrived at the sum certain using reasonable methods based upon the affidavit.

Contrary to what Hamm argues, the court did not suggest, permit, or direct that restitution should be determined at a later date. The court gave Hamm the ability to pursue a post-sentencing challenge as a suggestion, not a requirement. Error by the district court is not presumed; it must be shown by the record. *State v. Blakney*, 185 Mont. 470, 479, 605 P.2d 1093, 1098 (1979). Motions for reconsideration do not exist under Montana civil law. *Horton v. Horton*, 2007 MT 181, ¶ 7, 338 Mont. 236, 165 P.3d 1076; *Jones v. Montana Univ. Sys.*, 2007 MT

82, ¶ 13, 337 Mont. 1, 155 P.3d 1247. This Court has said so repeatedly. *Nelson v. Driscoll*, 285 Mont. 355, 359-60, 948 P.2d 256, 258-59 (1997).

Here, the State acknowledges only that the district court offered Hamm an optional, additional post-sentencing remedy, which, while procedurally irregular, was not unlawful, erroneous, or prejudicial. Hamm did not exercise the option, and the State in this appeal does not assert Hamm should have. Since the court had already set restitution at sentencing, the offered option was superfluous and redundant. *See* Mont. Code Ann. § 1-3-228 (stating legal maxim that superfluity does not vitiate); *see, e.g., Major v. N. Valley Hosp*., 233 Mont. 25, 28, 759 P.2d 153, 155 (1988), overruled on other grounds; *Blackburn v. Blue Mtn. Woman's Clinic*, 286 Mont. 60, 951 P.2d 1 (1997) (stating that the inclusion of findings of fact in the district court's summary judgment order was unnecessary and redundant and was not error).

Moreover, the appellant bears the burden of showing lower court error. *State v. Carter*, 285 Mont. 449, 461, 948 P.2d 1173, 1180 (1997). Hamm cannot show error by pointing to, or presuming, error by the mere fact that the judge suggested some non-customary procedure for redressing Hamm's concerns. The offered remedy does not mean the court agreed that its restitution decision was incomplete, insufficient, or invalid; nor did the offered option render the original judgment

deficient or incomplete. To suggest otherwise commits the fallacy of *post hoc ergo propter hoc*.

Assertions advocating for better understandings, context, or precision for the calculations used in arriving at a restitutionary sum are arguments going to the weight of the evidence. The district court did not agree with Hamm's arguments about imprecision; that disagreement does not show that Hamm's arguments or evidence were not considered by the court. Mere disagreement with the factfinder who reasonably resolved factual issues is not enough. *See State v. Brogan*, 261 Mont. 79, 87, 862 P.2d 19, 24 (1993) (stating if events are capable of different interpretations, the trier of fact determines which is most reasonable). In disagreeing with the trial court's findings on restitution values, Hamm wrongly urges this Court to reevaluate the district court's determination on the weight of the affidavit evidence. *See State v. Billman*, 2008 MT 326, ¶ 45, 346 Mont. 118, 194 P.3d 58. The district court clearly provided Hamm with a meaningful review of the evidence. Hamm is simply unhappy with the district court's decision.

As an argument in the alternative, the State insists that, to the extent this Court concludes the district court's restitution award is unclear in any respect, this Court should remand to the district court for the limited purpose of entry of more detailed findings of fact to support the amount of restitution previously awarded. *See State v. Coluccio*, 2009 MT 273, ¶¶ 45-46, 352 Mont. 122, 214 P.3d 1282.

CONCLUSION

This Court should affirm Hamm's convictions and sentence.

Respectfully submitted this 3rd day of March, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal 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 7,998 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

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CERTIFICATE OF SERVICE

I, C. Mark Fowler, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 03-03-2022:

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