

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-041

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JAMES MICHAEL PARKER,

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

On Appeal from the Montana Eighth Judicial District Court, Cascade
County, the Honorable Elizabeth Best, Presiding

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INTRODUCTION

Lloyd Geaudry was killed in a fight on March 23, 2018. His cause of death was “[s]harp force injury to the neck;” his manner of death, “homicide.” (Trial Tr. 1114.) Eleven men participated in the fight, five on Lloyd’s side, six on the other. After the fight, the men who fought opposite Lloyd threw away bloody clothing and weapons and concocted a story to tell police. But only one man was charged with any offense: James Parker. At trial, none of the ten surviving combatants testified to having seen James wield the fatal blow. One combatant, Matthew Swett, had previously told police that he had seen James kill Lloyd, but Swett recanted that statement at trial. The physical evidence against James merely corroborated what he had consistently acknowledged—that he brought a hatchet to the fight (which he gave to another combatant), and that he participated in the fight. James was ultimately convicted of deliberate homicide. Two rulings by the district court so prejudiced James’s right to a fair trial that a new trial is the only remedy.

ISSUES PRESENTED

I. Did the district court abuse its discretion in refusing to give the “witness legally accountable” jury instruction when nine legally accountable witnesses testified at trial, the instruction was requested by the defendant, and the instruction was consistent with the theory of the defense?

II. Did the district court abuse its discretion in refusing to grant a mistrial when the prosecutor vouched for the credibility of the State’s witnesses after the “witness legally accountable” instruction was refused, the jury had seen evidence of James’s incarceration, and the State’s incarcerated witness was presented in civilian clothing?

FACTUAL & PROCEDURAL BACKGROUND

Brian McGillis, Dakota Gopher, and Albert “Chris” Ledeau were drinking at Ranessa Ladeau’s house on March 16, 2018. (Trial Tr. 580). Brian picked a fight with Dakota. Chris stuck up for Dakota, and threw Brian out of the house. Chris did not see Brian for another week or so. (Trial Tr. 581.)

March 22 was Lloyd Geaudry’s birthday. That evening, Chris and Dakota were again drinking at Ranessa’s house. This time, Lloyd joined

them. Chris went to Town Pump to get something to drink at about 10:00p.m. (Trial Tr. 582.) There, he ran into Brian. Chris and Brian discussed the fight they had had a week prior, shook hands, and settled their “beef.” (Trial Tr. 585.) Chris returned to Ranessa’s house.

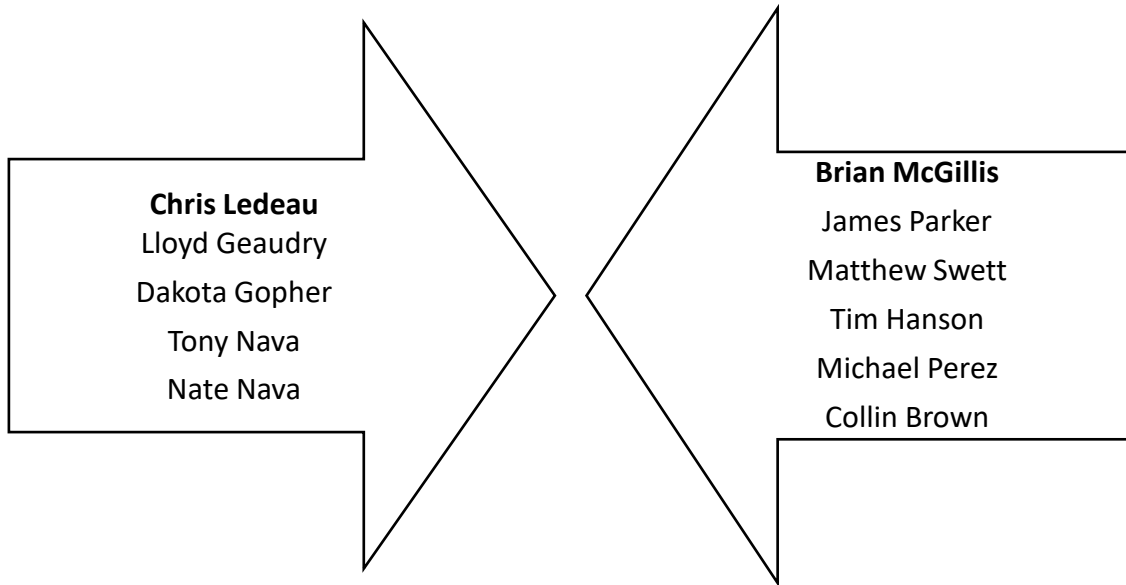
A short while later, Brian knocked on the door, accompanied by James Parker. Chris answered the door and started talking to James. Then someone hit Chris on the side of the head— “[i]t had to have been Brian.” (Trial Tr. 586.) After Brian hit Chris, the two men “rolled around on the ground, and then, [Chris] got on top of [Brian].” (Trial Tr. 586.) After the fight, Chris ran to his cousin Tony Nava’s house so that Tony “could have [Chris’s] back.” (Trial Tr. 586–7.) Chris and Tony got their other cousin, Nate Nava, and the three men started walking back to Ranessa’s house. (Trial Tr. 587.) On the walk back, Chris was texting James.¹ Chris texted him, “Wya,” meaning, “Where you at?” (Trial Tr. 590; State’s Ex. 58.) Over the next 45 minutes, Chris called James five times and sent him a series of messages:

¹ James Parker used the alias “Jimmy Podvin.” (Trial Tr. 591.)

| | | |
|--------------------|------------------------|---|
| LeDeau Christopher | 03/23/2018 01:41:26 AM | "phone duration 0" |
| LeDeau Christopher | 03/23/2018 01:42:05 AM | "phone duration 0" |
| LeDeau Christopher | 03/23/2018 01:42:55 AM | "phone duration 0" |
| LeDeau Christopher | 03/23/2018 01:43:44 AM | "phone duration 0" |
| LeDeau Christopher | 03/23/2018 01:51:07 AM | Wya |
| LeDeau Christopher | 03/23/2018 01:51:52 AM | Let's do this I got my brothers wanna start some shit hell no |
| LeDeau Christopher | 03/23/2018 01:54:11 AM | "phone duration 0" |
| LeDeau Christopher | 03/23/2018 01:54:37 AM | I'll show u some shit fuck both u |
| LeDeau Christopher | 03/23/2018 01:55:00 AM | Wanna act hard well I'm with sick people try some shit when I got |
| LeDeau Christopher | 03/23/2018 01:57:20 AM | my brothers |
| LeDeau Christopher | 03/23/2018 01:57:27 AM | Like some bitch shit |
| LeDeau Christopher | 03/23/2018 02:20:08 AM | Hahaha yeah you ain't fam |
| LeDeau Christopher | 03/23/2018 02:20:12 AM | Just wait |
| LeDeau Christopher | 03/23/2018 02:20:22 AM | You him you guys done |

(State's Ex. 58; Trial Tr. 590.) James responded at 2:44a.m. with, "Ok." Chris continued trying to get James to "meet up with him." (Trial Tr. 592.) At 2:56a.m., Chris texted James, "No cops no weapons us and you guys." (State's Ex. 58.) That was Chris's way of inviting a fist fight. (Trial Tr. 593.) James wrote back, "Where ya wanna meet? No weapons right?! Let's do it". (State's Ex. 58; Trial Tr. 594.)

Chris and James agreed on a location for the fight: a park behind Great Falls High School. At approximately 3:30a.m., Chris, Lloyd, Dakota, Tony, and Nate all got into Dakota's car and drove to the agreed-upon location. (Trial Tr. 596.) What happened during this fight is the subject of wildly different testimony from the combatants. For ease of reference, the combatants are listed below and are grouped by whether they were on Chris Ledeau's "side" or Brian McGillis's.



A. Chris Ledeau

Chris testified that he got out of Dakota’s car, was immediately kicked to the ground by an unknown assailant, was “beat up,” then “got up and took off running to [his] grandma’s.” (Trial Tr. 597–8.) He could not identify anyone in the fight, and he did not recall seeing James at all. (Trial Tr. 597.)

B. Dakota Gopher

Dakota testified that on the floor of his car next to the driver’s seat he kept the wooden handle of a sledge hammer, which he called his “nightstick.” (Trial Tr. 389; State’s Ex. 55.) He also kept a machete under his seat. (Trial Tr. 487.) By Dakota’s estimation, he and his four friends were substantially outnumbered, with fifteen to eighteen

opponents. (Trial Tr. 391.) When he and his “crew” arrived at the park, “everyone jumped out of the car,” Dakota reached for his “nightstick,” and stepped out. (Trial Tr. 391, 404.) In those ten or fifteen seconds there was a body “already on the ground” “straight ahead of [his] car.” (Trial Tr. 391, 404.) Dakota saw “three or four guys – standing around that body, and then, they started walking back to the fight.” (Trial Tr. 392.) James Parker was not one of the men Dakota saw standing over the body. (Trial Tr. at 424.) Dakota looked around and estimated that there were “two to three or four [opponents] on each one of [his] friends.” (Trial Tr. 392.) In his peripheral vision he saw James walking from the body towards him. (Trial Tr. 394.) Dakota testified that James had in his hand a “really sharp” “hatchet or a tomahawk.” (Trial Tr. 395.) According to Dakota, James walked over to Dakota and swung the hatchet at him twice, striking him once in the head and once in the elbow. (Trial Tr. 397, 400.) The blows from this “really sharp” hatchet apparently caused Dakota “a little bit of pain” and left “a cut on [his] elbow and a big bump on [his] head.” (Trial Tr. 401.) Dakota said he then tripped and fell backwards, James yanked the club out of Dakota’s hand, and raised his hatchet as if he were going to strike Dakota with

it. Dakota said “Please don’t,” and James paused before walking back towards “the fight where everyone was at in the grass.” (Trial Tr. 397–8.) James was charged with Assault with a Weapon for this alleged attack on Dakota, but the jury acquitted him. (Doc. 403 at 1.)

Dakota then got back in his car, drove around the body lying on the ground, circled the park once, and was surrounded by people yelling and “hitting [his] car with something.” (Trial Tr. 403.) It sounded like metal hitting metal. (Trial Tr. at 451.) Dakota drove away and circled the block. When he neared the fight again, Tony jumped in the front seat, and Nate jumped in the back seat. (Trial Tr. 405.) The three men circled the block, and Nate said they had to go back and get Lloyd. The men pulled up to the body, and Nate got out of the car and hauled Lloyd’s body into the backseat. (Trial Tr. 406.) Then Dakota made a final loop around the park and headed into Parkdale. Tony exited the car in the middle of the street and headed home.² Dakota and Nate drove Lloyd’s body to the Emergency Room. (Trial Tr. 406.) Dakota

² Tony Nava was set to graduate from drug treatment court the following day, so he did not want to be caught in this situation. Dakota Gopher and Nate Nava initially lied to law enforcement officers about Tony’s involvement, but both admitted at trial that they had lied to protect Tony so Tony could graduate. (Trial Tr. 384, 1465.)

maintained that he agreed to engage in a fight, but he did not think any weapons would be used. (Trial Tr. 407.)

C. Nate Nava

Nate Nava testified that he was home asleep at approximately 3:30a.m. on March 23, 2018, when Chris called him three times in quick succession. (Trial Tr. 1463.) Nate picked up on the third call, and Chris said, “They jumped me.” A few minutes later, Dakota drove up to Nate’s house. Nate got in the vehicle and saw Dakota, Chris, and Lloyd already inside. The four men then drove to pick up Tony. (Trial Tr. 1463.) After they picked up Tony, the five men drove to the park behind Great Falls High School. The other “crew” was already there. (Trial Tr. 1467.) Nate estimated that there were eleven or twelve people total involved in the fight, and that the fight lasted no more than a minute and a half. (Trial Tr. 1467–8.) When Nate got out of the car, he saw Brian go after Chris, so Nate stepped in. Brian did not hit Chris at all; Brian ended up fighting with Nate instead. (Trial Tr. 1468.) During Nate’s fight with Brian, Nate saw James walk towards Tony and swing something at him. Nate saw Tony drop to the ground and assumed he had been struck by the object James was wielding, so he went over and

hit “whoever was on Tony at the time.” (Trial Tr. 1469.) Nate described the object as “an ax – a hatchet.” He explained that he “was trying to take the ax away” and “got cut with the other end of the blade” because it was “pretty sharp.” (Trial Tr. 1470.) When asked, “[w]hen you were trying to take the weapon away, who had the weapon?” Nate answered, “I want to say it was Parker.” (Trial Tr. 1470.) He described the man with the weapon as wearing a “short-sleeve, plaid, flannel t-shirt, and blue jeans.”³ (Trial Tr. 1470.) Nate acknowledged at trial that the man with whom he was tussling over the ax was wearing a short-sleeved button-up shirt and jeans, but was not wearing a white headband and did not have visible tattoos. (Trial Tr. 1489.) Then “everybody just scattered out.” Nate ran back towards Dakota’s car but realized Dakota had already left. When he saw the car drive by, he chased it down and got in. Nate, Tony, and Dakota circled the block and realized Lloyd was not with them. (Trial Tr. 1473.) They circled the block again and saw Lloyd lying in the street. Nate got out of the car and hoisted Lloyd’s body into the back seat. He checked for Lloyd’s pulse and felt none.

³ James Parker is on surveillance footage before the fight wearing a plaid shirt underneath a black coat with white sleeves, and a white headband. (Trial Tr. 1813.) He is visibly tattooed across most of his body, including his neck and face. (State’s Ex. 201–233.) Brian McGillis was wearing a plaid shirt that night. (Trial Tr. 626.)

(Trial Tr. 1474.) Dakota drove through Parkdale on the way to the Emergency Room, and told Tony to get out of the vehicle. (Trial Tr. 1474.) Dakota and Nate continued on to the Emergency Room.

D. Tony Nava

Tony Nava testified that at approximately 1:30a.m. on March 23, 2018, he was awoken by his cousin, Chris, pounding on his door. (Trial Tr. 1516.) Chris was upset and said he needed help, so Tony got dressed and got in a car with him. The occupants of the car drove to the park behind Great Falls High School. Tony got out of the car and met the other fight participants in the middle of the road. (Trial Tr. 1519.) Tony estimates he “got one or two punches in” before he was overwhelmed by the other side’s superior numbers. (Trial Tr. 1519.) He recalled being struck with an object at one point, and claimed it was James who wielded the object. (Trial Tr. 1520.) He described the object as “a stick handle – like a handle – like a stick – like a club.” (Trial Tr. 1521.) James was convicted of assaulting Tony. (Doc. 403 at 2.)

Tony “[g]ot pushed back to the car and was – tripped over the curb; was getting punched and kicked; and that’s when [he] said, ‘I’m done. I’ve had enough.’” (Trial Tr. 1519.) When Tony yelled for the other

combatants to stop, they did so. Tony looked around and realized Chris and Nate were already gone, and Dakota was driving away in the car. (Trial Tr. 1524.) But when the car stopped, Tony got in the front passenger seat, and then Dakota turned around the block to go back for Lloyd. (Trial Tr. 1525.) When they pulled up to Lloyd's body, Nate got out and hauled Lloyd's body into the back seat. Tony said he knew Lloyd was dead right away because "his head was damn near laid off his shoulders." (Trial Tr. 1525.) Tony told Dakota to drop him off at home.

E. Brian McGillis

Brian McGillis is James's cousin. (Trial Tr. 741.) Brian testified that he and James were in Rocky Boy, but traveled to Great Falls together on March 16, 2018. (Trial Tr. 743.) James brought with him an ax that "was black, about 12 [inches] long, about a four-inch blade, maybe, and a sharp pick at the end." (Trial Tr. 747.) They went to a friend's house and started drinking. In Brian's rendition of events, James got in a fight with someone and then left the house. In retaliation, "Tony and his nephews" then started beating Brian up. (Trial Tr. 745.) The next day, Brian went back to Rocky Boy. (Trial Tr.

749.) On March 22, 2018, Brian and James returned to Great Falls. They arrived at approximately 9:00p.m. (Trial Tr. 751.) Again, they went to a relative's house and started drinking. Brian had vodka and a "couple beers." At that point, James had "the hatchet" with him. (Trial Tr. 752.) Brian went to Town Pump to "get a liter," and he ran into "the two that jumped [him]," including Chris. (Trial Tr. 753.) Brian told Chris he "didn't want no problems," and headed back to the house where James was. (Trial Tr. 753.) Brian told James about seeing Chris at Town Pump, and James walked over to the house where Chris was drinking. Brian told James to "forget about it," but James wanted to "have some words." (Trial Tr. 756.) Brian accompanied James to the house where Chris was. Lloyd and Chris answered the door. (Trial Tr. 756.) James began talking to them about why they had jumped Brian. During the conversation, James "might have" given Lloyd a hug. (Trial Tr. 758.) Then Brian hit Chris and the two fought briefly. (Trial Tr. 757.) James and Brian then returned to their relative's house. (Trial Tr. 759.) Sometime later, Chris and a group of people knocked on the door of the house where Brian and James were. (Trial Tr. 760.) Chris and the group left after speaking to the woman who owned the house,

but Brian was afraid they might come back. James called his friends for a ride so he and Brian could leave. (Trial Tr. 760.)

James's friends picked James and Brian up and the group began driving around. (Trial Tr. 761.) James was talking on the phone during the drive. He said something like "Yeah, meet up," and Brian understood from the conversation James was having that they were going to go to a park and fight. (Trial Tr. 762.) When they got to the park and got out of the car, Brian began fighting Chris. Then he fought Lloyd. Brian saw James fighting someone else, but he was not sure who. Brian never saw James and Lloyd fighting. (Trial Tr. 763.) Brian tried to break up the larger fight, but the men were not stopping, so Brian "hit [another] guy a couple of times." (Trial Tr. 765.) Then he turned around and saw Lloyd lying on the ground. He did not see anyone with weapons during the fight, and he did not see anyone standing around Lloyd. (Trial Tr. 766.) Brian, James, and the other people on their side of the fight jumped back in the car, drove around the block a few times, and stopped in an alley before leaving the area. Brian claims not to have "see[n] anything" when they stopped in the alley. (Trial Tr. 767.) Brian and James were dropped off at a gas station

on the other side of town, where they began walking to James's girlfriend's house. (Trial Tr. 768.) Brian said that during this walk they discussed the fight and James said "he was getting a beat down, and he had to defend himself." James "didn't really make it clear. He just . . . he said he had to use whatever he had." And by that Brian guessed that James meant he had to use "[t]hat pick ax." (Trial Tr. 768–9.) But Brian acknowledged at trial that he did not see James with a hatchet that night. (Trial Tr. 774.) When Brian and James got to James's girlfriend's house, Brian asked for a ride elsewhere. He never saw James change his clothes or clean up at all. (Trial Tr. 771.) The next day, Brian got a ride back to Rocky Boy. (Trial Tr. 773.)

F. Matthew Swett

Matthew Swett was home with his roommate, Collin, in the early morning hours of March 23, 2018. Mike Perez and Tim Hanson were also there. (Trial Tr. 709.) Tim got a call, and based on that call, Matt, Collin, and Mike decided to "help [Tim] fight." (Trial Tr. 711.) Matt, Collin, Mike, and Tim drove to meet "James and his friend." Matt did not know James prior to this meet up. This group—Matt, Collin, Mike, Tim, James, and Brian—drove to the park and got out of the car, and

the two groups of men “started walking towards each other.” (Trial Tr. 712.) Matt did not know anyone in the other group, but he did recall seeing one of them with a claw hammer. (Trial Tr. 713, 728.) He did not recall seeing James during the fight. His only other recollection of the fight is that he fought with someone off to the side, choked that person out, and left him in the grass. (Trial Tr. 713.) The whole fight lasted “30 seconds from start to finish.” (Trial Tr. 717.)

After the fight, Matt, Collin, Tim, James, and Brian (everyone on this side of the fight except Mike) got in the truck and drove away. They stopped in an alley. They threw away clothes and a hatchet. (Trial Tr. 719–20.) Matt did not recall who among them threw away the hatchet. (Trial Tr. 720.) The group then dropped James and Brian off at an apartment complex, and Matt, Collin, and Tim returned to Collin and Tim’s residence. (Trial Tr. 719.) Tim had blood on his shirt and on the tops of his knuckles. (Trial Tr. 721, 723.) Matt also had blood on his shirt. (Trial Tr. 721.) Matt took his bloody clothing and Tim’s (and maybe also Collin’s as well; Matt could not remember) and ran ten blocks away to throw them in a dumpster. (Trial Tr. 732–3.) Meanwhile, Tim took a shower. (Trial Tr. 721, 732.) Matt, Collin, and Tim then

“agreed upon a false story together to tell the cops.” (Trial Tr. 734.)

When Matt was later interviewed by police, he “lied to them for hours.”

(Trial Tr. 714, 735.)

At trial, Matt said he could not presently recall seeing James at all during the fight, (Trial Tr. 713), but he agreed after reviewing his statement to police that he had previously told the police that “I [Matt] had looked over, and I seen James had [the hatchet] in his left hand, holding his shirt, and he had struck [Lloyd] right in the neck on his left side with the hatchet, and then, it was pretty much over at that point.”

(Trial Tr. 716.) On cross examination, Matt and James’s attorney had the following exchange:

Q. [. . .] Just to start, was it your testimony today that you did not see Mr. Parker during the fight at all?

A. I did not say that. I said that I had seen him briefly.

Q. Okay. So did you see him fighting anyone?

A. Honestly, no, I don’t think I ever saw him throw a hit. I saw the one.

(Trial Tr. 725.) Matt’s story ends after he and Tim and Collin have disposed of their bloody clothing and agreed on a story to tell the cops.

They left the park that night without Mike, who had not been

answering his phone. At about 10:00a.m., Matt, Tim, and Collin drove around looking for Mike and eventually found him walking down the street. (Trial Tr. 722.)

G. Mike Perez

Mike Perez testified that on the evening of March 22, 2018, he was having a couple beers at Collin's house, and Tim and Matt were there as well. (Trial Tr. 517.) Tim got a phone call that "one of his buddies [sic] was getting bullied, or jumped by multiple people, and that we were going to go help him." (Trial Tr. 518.) The men got into Collin's girlfriend's truck, drove to pick up two people Mike had never met before (James and Brian), and then "went to go meet up with the other people that we were supposed be fighting with." (Trial Tr. 518.) On the drive to the park, James showed Mike what "looked to be like a hatchet." (Trial Tr. 521.) Their truck pulled up, the other car pulled up, everyone got out of the vehicles, and without "very many words exchanged [. . .] it just started." (Trial Tr. 522.) The fight was "complete chaos," and Mike never saw James with the hatchet once the fight started. (Trial Tr. 524.) Mike spent the entire fight engaged with someone in a red hoodie. (Trial Tr. 523–24.) He heard someone shout

that the cops were coming, and that's when he "just left." (Trial Tr. 524.) He did not witness anyone get severely injured or killed during the fight. (Trial Tr. 527–28.) He ran through alleys, jumped fences, and spent the rest of the night wandering around Great Falls. He confirms that Collin, Tim, and Matt found him walking along a street later that morning. (Trial Tr. 525.) When Mike was picked up, he learned from Matt that "the group had gone too far, as a whole, and somebody had ended up dying." (Trial Tr. 525.) The group went back to Collin's house and "[m]ade up a stupid story like [they] weren't even there." (Trial Tr. 526.) Mike told the made-up story to police when he was initially interviewed, and then he reverted to the truth when the police did not believe him.

H. Tim Hanson

Tim Hanson confirmed that he, Collin, Mike, and Matt were drinking at Collin's house when Tim got a call from James at 2:00 or 3:00a.m. (Trial Tr. 852.) James told Tim that a friend of James's had been jumped and they needed Tim's help. By that, Tim understood James to mean Tim was needed to even the odds in a fist fight. (Trial Tr. 852.) Tim, Collin, Mike, and Matt piled in a truck and drove to pick

up James and Brian. Tim did not bring any weapons, and he did not see Collin, Mike, or Matt bring weapons either. (Trial Tr. 853.) Tim maintains that James brought a hatchet for self-defense and showed it to Tim on the drive to the park. (Trial Tr. 855.) But Tim “ha[s] no idea” what James did with the hatchet after he showed it to Tim. (Trial Tr. 857.) Tim recalls arriving at the park, getting out of the vehicle, walking towards someone from the other group, starting to “swing[] on each other,” “fighting this guy for a minute, maybe two,” and then dispersing when someone said they were calling the cops. (Trial Tr. 860–61.) He recalls being struck in the back of the head with “a stick, or tree branch, or something like that.” (Trial Tr. 861.) His hands were bruised and cut and he had blood on his hands, his shirt, and his shoes, but he does not know where the blood came from. (Trial Tr. 862.) Tim has no recollection of seeing James during the fight, or of seeing him hitting anyone with a hatchet. (Trial Tr. 865.) When someone shouted about calling the cops, Tim ran back to the truck with the others in his group, and as they were driving away, they realized they were missing Mike. (Trial Tr. 864.) As they drove away, Tim saw “somebody laying in

the street, and it didn't look like Mikey, so [they] kept going." (Trial Tr. 868.)

They drove into an alley because "somebody had said something needed to be thrown away." (Trial Tr. 868.) Tim hopped out of the truck, "threw whatever it was that we were getting rid of in the dumpster, and [] came back." (Trial Tr. 869.) Then, James handed Tim the hatchet and told him to throw it away, so Tim did. The group drove away, dropped James and Brian off at an apartment building and then returned to Collin's house. (Trial Tr. 870.) Tim "headed straight for the bathroom and took a shower." (Trial Tr. 870.) While Tim was in the shower, he claims that "[s]omebody had thrown [his clothes] away," including his white shoes. (Trial Tr. 871, 877.) He did not recall instructing anyone to do so, and he did not recall who threw his clothes away.

When he got out of the shower, he put on a fresh set of clothes that someone had placed out for him. (Trial Tr. 872, 878.) Then the group got back in the truck and set out to look for Mike. While they were driving, Tim received notice from James that someone had died. The group eventually found Mike, and then the lot of them decided to

“come up with a plan.” (Trial Tr. 873.) If any of them was contacted by police, they agreed to tell the same story that they were not participants in a fight but rather were at Tim’s house in Vaughn watching movies. (Trial Tr. 873.) When Tim was contacted by police, he tried to lie at first but once he realized his friends had already told the police what they knew, Tim “had no option but to tell the truth.” (Trial Tr. 874.) At trial, Tim had the following exchange with defense counsel about Tim’s initial statement to the police:

Q. Okay. And do you recall telling them that you had punched the older bald male in the head and that he fell forward?

A. I don’t remember that. I mean, I could have said that. I don’t remember if I said that or not.

Q. Okay. And did you tell them that you assumed that the older bald male was the one that actually ended up dying?

A. Possibly.

Q. Okay. So then, do you recall telling them that, after you punched him, he fell forward, and that there was blood everywhere when he hit the ground?

A. It’s possible. I honestly don’t remember what my initial statement was.

Q. But that doesn’t seem entirely out of the realm of possibility to you?

A. I mean, anything's possible.

(Trial Tr. 880.) Tim then acknowledged that he had been in a fatal fight, thrown away evidence, washed blood from his body, and lied to police, but he had not been charged with any offense. (Trial Tr. 883.)

I. Collin Brown

Collin Brown testified that he and his friends Tim, Matt, and Mike, were at his house on March 23, 2018, when Tim got a call or a text from James. James said he was going to be “getting beat up by a group of different people, and he wanted somebody to come with him.” (Trial Tr. 1617.) The group decided to assist James. Collin was the driver. At the time, he had “no idea” who James and Brian were. (Trial Tr. 1619.) When the group arrived, Collin parked the truck, and the other group began coming towards them. Collin saw Tim fighting and chasing somebody, and one of them tackling the other. Collin also said he (Collin) had “definitely hit [Lloyd] a couple times.” (Trial Tr. 1645.) Then he saw “Lloyd on the ground, obviously, and everybody scattering to leave.” (Trial Tr. 1624.) Collin did not know Lloyd and did not see him go down. The only weapon he saw in use was someone from the other group using “a baseball bat, or a two by four — something

wooded.” (Trial Tr. 1625.) As he and his group got in the truck to leave, James and Brian asked to stop in an alley. James had given Tim a hatchet to throw away. (Trial Tr. 1625.) The group stopped in the alley where Tim threw things away, including a green hoodie that Tim had been wearing that had blood on it. Collin remembered the green hoodie being thrown away because he had lent that hoodie to Tim to wear earlier that evening. (Trial Tr. 1647.) Collin also told law enforcement that he rolled down the window and threw a knife in the garbage—a knife given to him by Brian. (Trial Tr. 1671–72.) Then the group dropped James and Brian off somewhere before returning to Collin’s house. Tim had blood on him. Tim showered. Tim asked for some new clothes, and Collin gave him some to borrow. (Trial Tr. 1628–29, 1672.) Then Collin, Tim, and Matt went to find Mike. When Collin first spoke to law enforcement, he told them “a complete different story.” (Trial Tr. 1626.) But when he started cooperating, he told detectives that during the fight he had seen James beating up someone who James had in a headlock. (Trial Tr. 1642.)

J. James Parker

James Parker did not testify at trial, but he did testify at a pretrial motions hearing, and that testimony was read to the jury. (Trial Tr. at 1567.) He explained at that hearing that he had a hatchet with him on the night of the fight, but he had given it to Tim Hanson. (8/30/19 Motions Hrng. 15.) He also explained that others in his group brought weapons to the fight: his cousin Brian had a knife, Matt had a knife, and Tim had brass knuckles. (Motions Hrng. 16–17.) James initially fought with Tony. He saw Dakota pull an ax handle out of a car, and that’s when he gave the hatchet to Tim because Tim “was nervous.”⁴ (Motions Hrng. 21–22.) James then ran towards Dakota to make sure “that dude didn’t use that ax handle on any of us.” (Motions Hrng. 22.) James did not see Lloyd at the fight. (Motions Hrng. 43.) After the fight, James saw blood on Brian’s pants, and on Tim’s and Matt’s shirt, pants, and shoes. (Motions Hrng. at 19–20.)

The purpose of the pretrial motions hearing at which James testified was for the Court to receive evidence about the existence of corroborating evidence sufficient under § 46-16-213, M.C.A. to support

⁴ Tim denies that James gave him the hatchet. (Trial Tr. 857.)

James's conviction for deliberate homicide. He had filed a motion to dismiss the deliberate homicide charge because no defendant may be convicted on the uncorroborated testimony of someone who is legally accountable for the same offense. (Doc. 38 at 2.) His theory was that the State had deliberately chosen not to charge any other participants in the fatal fight, in an attempt to circumvent the accountability statute and convict him on the testimony of the other participants. (Doc. 38 at 3.) The State responded that the testimony of other fight participants is sufficient to convict James because "no other person present knowingly, voluntarily and with common intent with the principal offender united in the commission of the crime of homicide." (Doc. 49 at 16.) In the alternative, the State argued that the question of whether a witness is legally accountable for a homicide is a question for the jury. (Doc. 49 at 17.) At the conclusion of the hearing, the Court held that this issue is a fact question for the jury and denied the motion to dismiss. (8/30/19 Motions Hrng. 68.)

K. First mistrial motion

The case proceeded to trial on September 10, 2021. Thrice during the trial James moved for a mistrial.⁵ The first mistrial motion was occasioned because prospective jurors saw James being escorted through the courthouse by armed guards wearing bulletproof vests emblazoned with the words “DETENTION OFFICER.” Prospective jurors could also see directly into the secure holding room where Parker was awaiting the start of trial. He argued that this irreparably compromised his presumption of innocence. (Trial Tr. 129; Doc. 373.) The Court denied this motion because “the possibility that members of the venire may have inadvertently and momentarily seen James entering and leaving the holding area did not deny him a fair trial or his presumption of innocence.” (Doc. 379 at 4.)

In contrast to James, who the venire saw being escorted by detention officers, the incarcerated witness testifying for the State was dressed up for the occasion. Dakota Gopher was in jail at the time of James’s trial, and the State facilitated his being given civilian clothing, changing into that clothing at the jail before being transported to the

⁵ The second mistrial motion, having to do with a potential Confrontation Clause violation, is not at issue in this appeal. (Trial Tr. 1002.)

courthouse to testify, and then having his shackles removed out of sight of the jury and being allowed to approach the witness stand without a “DETENTION OFFICER” escort. (Trial Tr. 462–63.) The Court agreed with James’s counsel that the effect of that presentation was misleading to the jury. (Trial Tr. 477.) The Court then ordered that the State’s two additional witnesses who were incarcerated but who had not yet testified, including Chris Ledeau, would be required to take the stand in standard-issue jail garb. (Trial Tr. 540–41.)

L. Third mistrial motion

The third mistrial motion was made after the State’s closing argument. (Trial Tr. 1901.) The State repeatedly characterized its witnesses’ testimony as being “the truth.” (Trial Tr. 1861.) In summarizing Dakota’s testimony, the State said, “What you heard is the truth. [Dakota]’s statement is truthful.” (Trial Tr. 1861.) Twice the Court sustained James’s objection to prosecutorial vouching for Dakota. (Trial Tr. 1861, 1862.) In summarizing Matt’s testimony, the State accused James’s counsel of taking Matt’s statements “out of context— isolat[ing] and twist[ing] to mean something that they weren’t.” (Trial Tr. 1878.) The Court sustained James’s objection to the “personal

attack” and the vouching. (Trial Tr. 1878.) When discussing Chris’s testimony, the State displayed a PowerPoint presentation to the jury that contained the statements, “What motive does Chris have to lie to you?” and “Nonetheless, got up here and told the truth.” The Court sustained another objection to improper vouching. (Trial Tr. 1882.) When the State concluded its closing argument, James moved for a mistrial based upon the cumulative prejudice of the numerous instances in which the State vouched for the credibility of a witness, or accused defense counsel of misleading or deceiving the jury. (Trial Tr. 1901–02.) The Court denied the motion for a mistrial, but issued an instruction designed to be curative. (Trial Tr. 1903, 1911; Doc. 401 at 45.)

James was acquitted of assaulting Dakota Gopher, but convicted of deliberate homicide, assaulting Tony Nava, and tampering with a witness. (Doc. 403.) The district court sentenced James to 55 years at the Montana State Prison for deliberate homicide, 10 years consecutive for assault with a weapon, and 10 years concurrent for tampering. (Doc. 419.) James timely appealed. (Doc. 424.)

STANDARDS OF REVIEW

“A district court has broad discretion when it instructs the jury,” but “the instructions, as a whole, [must] fully and fairly instruct the jury on the law applicable to the case.” *State v. Hall*, 2003 MT 253, ¶ 24, 317 Mont. 356, 77 P.3d 239. This Court will “find reversible error if a jury instruction prejudicially affected the substantial rights of the defendant.” *State v. Dubois*, 2006 MT 89, ¶ 30, 332 Mont. 44, 134 P.3d 82.

This Court reviews a district court’s decision on a motion for a mistrial for abuse of discretion, but the decision “must be based upon whether the party has been denied a fair and impartial trial.” *State v. Norquay*, 2010 MT 85, ¶ 13, 356 Mont. 113, 233 P.3d 768.

SUMMARY OF THE ARGUMENT

Whether the nine other combatants were legally accountable for Lloyd’s death was a fact question for the jury, not a legal question for the State or the district court. James requested the “witness legally accountable” instruction so that the jury could determine this fact question and be instructed accordingly. The proposed instruction was consistent with James’s defense, and there was significant “accomplice

testimony” at his trial. Under the circumstances, the district court’s refusal to give the “witness legally accountable” instruction was an abuse of discretion. James was prejudiced by that refusal because the only eye-witness testimony supporting his conviction came from individuals who could have been charged with deliberate homicide under the felony murder rule, yet the jury was not instructed to view their testimony with distrust or to convict only if they found sufficient corroborating evidence.

The district court further abused its discretion in denying James’s motions for a mistrial when the prosecutor repeatedly vouched for the credibility of the State’s witnesses, after the “witness legally accountable” instruction had been refused, and after misleading the jury into believing that only James was incarcerated at the time of trial. The cumulative effect of these abuses of discretion was so prejudicial that a new trial is the only remedy.

ARGUMENT

- I. The district court abused its discretion in refusing to give the “witness legally accountable” jury instruction when nine legally accountable witnesses testified at trial, the instruction was requested by the defendant, and the instruction was consistent with the theory of the defense.**

Eleven men participated in a fight. One man died. Only one of the surviving men was charged with any criminal offense: James Parker. The remaining nine combatants were the only eye-witnesses. Early in the case, James moved to dismiss the deliberate homicide charge on the grounds that he may not be convicted on the uncorroborated testimony of witnesses legally accountable for the offense. (Doc. 38.) The State responded that the testimony of other fight participants is sufficient to convict James because “no other person present, knowingly, voluntarily and with common intent with the principal offender united in the commission of the crime of homicide.” (Doc. 49 at 16.) In the alternative, the State argued that the question of whether a witness is legally accountable for a homicide is a question for the jury. (Doc. 49 at 17.) Following a hearing on the matter, the Court denied the motion to dismiss, holding that whether all or any of the other fight participants “carried the same intent” and “who [w]ielded the ax that delivered the blows to the victim” are “fact questions for the jury.” (8/30/19 Motions Hrng. 68.)

In preparation for trial, James filed several proposed jury instructions, including a “witness legally accountable” pattern

instruction for each of the other fight participants on his side of the fight, Brian McGillis, Matthew Swett, Tim Hanson, and Michael Perez.⁶ (Doc. 350 at 13, 16, 19, 22.) At trial, the Court twice discussed these proposed instructions with counsel. The first time, on the fifth day of trial, the State cited *Charlo-Whitworth* for the proposition that if a defendant claims he did not commit the acts for which he is on trial, then he cannot ask the Court to instruct the jury that a testifying witness aided the defendant in the commission of those acts. (Trial Tr. 1169–70 (citing *State v. Charlo-Whitworth*, 2016 MT 157, 384 Mont. 50, 373 P.3d 845).) The State asked the Court to reserve ruling on the applicability of this instruction until the jury has “heard sufficient testimony to put this into play.” (Trial Tr. 1169.) The Court did so. (Trial Tr. 1171.) After the close of the State’s case, the Court revisited this instruction:

Defendant’s No. 6 through 9, I do want to discuss this. I have looked at the cases. I am not convinced that this—these

⁶ There was a fifth participant on James’s side of the fight, Collin Brown. He testified at trial. It is not clear from the record why a separate “witness legally accountable” instruction was not proposed specifically with respect to his testimony. However, James agreed with the Court at trial that the most appropriate course of action would be for the Court to issue a single instruction listing all the witnesses to whom it potentially applied. (Trial Tr. 1170.) It is the failure to give this instruction at all, rather than the failure to give it five or nine times (one for each fight participant who testified) that is the issue presented in this appeal.

instructions, with any modification, are appropriate. All of them talk in terms of another person being legally accountable for the conduct of the Defendant, and I don't think that's consistent with the Defendant's theory. I have asked [the law clerk] to circulate the most recent version, which refers specifically to only Counts 2 and 3, which is what our decision was last week—assault with a weapon. So I want to hear from you. That is the only version of this that I'm willing to discuss. I still think it's inconsistent, but I want to hear from all of you.

(Trial Tr. 1719–20.)

In light of the Court's restriction of this proposed instruction to the assault with a weapon counts, but not the deliberate homicide count, James's counsel withdrew the instruction. (Trial Tr. 1720.) In other words, James conceded that there was insufficient witness testimony that Brian, Matt, Tim, and Mike were legally accountable for assaulting Dakota and Tony with a weapon to support the "witness legally accountable" instructions with respect to those counts. But James did not concede the inapplicability of the proposed instruction to the deliberate homicide charge. The Court's refusal to give this instruction with respect to the deliberate homicide charge was an abuse of discretion warranting reversal.

A “district court has broad discretion when it instructs the jury,” but that discretion is not without limits. *Hall*, ¶ 24. The instructions must, “as a whole, fully and fairly instruct the jury on the law applicable to the case.” *Id.* The instructions must also comport with statutory directives on particular issues. For example, § 26-1-303(4), M.C.A., provides, “The jury is to be instructed by the court on all proper occasions that: [. . .] the testimony of a person legally accountable for the acts of the accused ought to be viewed with distrust[.]” This Court has held that “it is not proper to give an accountability instruction where it is not supported by the evidence and is inconsistent with the defendant’s claim of innocence.” *Hall*, ¶ 30. But the instruction should be given if the defendant requests the instruction and the record contains “significant accomplice testimony.” *State v. Johnson*, 257 Mont. 157, 163, 848 P.2d 496, 499 (1993). “[I]t is within the district court’s discretion to judge whether the case is a “proper occasion” on which to give an accomplice testimony instruction.” *Charlo-Whitworth*, ¶ 10 (citing *Johnson*, 257 Mont. at 163, 848 P.2d at 499).

The instruction required on “proper occasions” by § 26-1-303(4), M.C.A., necessitates another instruction defining under what

circumstances a person is “legally accountable” for the conduct of the defendant. Section 45-2-302(3), M.C.A., provides, in relevant 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 the commission, the person solicits, aids, abets, agrees, or attempts to aid the other person in the planning or commission of the offense.” It is normally a question of fact reserved for the jury whether a party is or is not legally accountable for the conduct of the defendant. *Hall*, ¶ 30 (citing *State v. Blackcrow*, 1999 MT 44, ¶ 21, 293 Mont. 374, 975 P.2d 1253). Section 46-16-213, M.C.A., then provides that “[a] person may not be found guilty of an offense on the testimony of one responsible or legally accountable for the same offense [. . .] unless the testimony is corroborated by other evidence that in itself and without the aid of the testimony of the one responsible or legally accountable for the same offense tends to connect the defendant with the commission of the offense.” This is the so-called “accomplice testimony corroboration rule.” *Blackcrow*, ¶ 21.

The Montana Criminal Jury Instructions Commission developed a single pattern instruction to incorporate these three principles, MCJI

1–112. This is the pattern instruction James proposed to the Court, once for each witness whom the jury may find legally accountable for Lloyd’s death. (Doc. 350 at 13, 16, 19, 22.) In this Court’s view,

[t]he purpose of the accomplice liability instruction is rooted in common sense. In our criminal justice system, we presume that witnesses will testify truthfully. Section 26–1–302, MCA. Nevertheless, Montana statutes also recognize the principle that if a person can avoid or lessen [his] punishment by testifying against another, that person will have strong motivations to not speak truthfully. Entitling a jury to view such testimony with disfavor is the specific purpose of the accomplice liability instruction in § 26–1–303(4), MCA.

Charlo-Whitworth, ¶ 11. But this Court has also cautioned that,

the propriety of [the above] instruction presupposes the existence of an accomplice. Accordingly, if the defendant claims at trial that he did not commit the acts for which he is being tried, he cannot then ask the court to instruct the jury that a testifying witness aided the defendant in the commission of those acts. In other words, a person cannot be an accomplice to a person who did not commit the crime. Further, if there is no evidence to suggest that a testifying witness is legally accountable, then it is not proper to give the accomplice liability instruction.

Charlo-Whitworth, ¶ 12 (citing *Hall*, ¶ 30).

This case presents a unique factual scenario in which the defendant denied committing the crime of deliberate homicide under § 45-5-102(1)(a), M.C.A., but essentially admitted to conduct that would

support a charge of deliberate homicide under § 45-5-102(1) (b), M.C.A. All other combatants made similar admissions that would have supported individual charges of deliberate homicide under the felony murder rule. This case is unlike any other case in which this Court has had to grapple with the propriety of a “witness legally accountable” instruction.

In *Hall*, this Court approved the district court’s reasoning for rejecting the “witness legally accountable” instruction: “If the defendant claims ‘he did not do it, he was not there, and is not culpable or responsible, so be it. But then in such an event, [the testifying witness] is not an accomplice, nor is he legally accountable within the meaning of the instruction. He just did it.’” *Charlo-Whitworth*, ¶ 13 (citing *Hall*, ¶ 28). Similarly, in *Johnson*, the theory of the defense was that the defendant was not present at the scene of the crime, so his counsel’s failure to request the “witness legally accountable” instruction was likely tactical rather than ineffective. *State v. Green*, 2009 MT 114, ¶ 19, 350 Mont. 141, 205 P.3d 798 (citing *Johnson*, 257 Mont. at 163, 848 P.2d at 499). And in *Green*, counsel’s decision not to request a “witness legally accountable” instruction was considered tactical

because one of the witnesses to whom the instruction would have applied “actually provided favorable testimony for the defense.” *Green*, ¶ 20.

The district court in this case abused its discretion in concluding that this was not a “proper occasion” for the “witness legally accountable” instruction. James requested the instruction and the record contained significant accomplice testimony. *Hall*, ¶ 30; *Johnson*, 257 Mont. at 163, 848 P.2d at 499. The State may contend that Brian, Matt, Tim, Mike, and Collin are not “legally accountable” for the offense of deliberate homicide, so the district court’s refusal to give the instruction was appropriate. But that contention is neither supported in the record nor is it within the province of the State to decide.

All five of these men testified at James’s trial, as summarized below.

- Brian testified that he started the first altercation between the two groups by punching Chris, that he understood the purpose of the group’s trip to the park was to engage in a fight, and that once the group arrived at the park, he began fighting Chris but ended up fighting the decedent, Lloyd. (Trial Tr. 757, 762, 763.)
- Matt testified that he agreed to help Tim in a fight that night, that he did in fact engage in the fight, and that he threw away evidence after the fight, including his own bloody clothing. (Trial Tr. 711, 713, 719–21, 732.)

- Tim testified that he agreed to participate in the fight, that he did in fact participate in the fight, that he left the fight with blood on his hands, shirt, and shoes, and that when he left the fight, he threw away a hatchet and took a shower. (Trial Tr. 852, 860–62, 869–70.)
- Mike testified that he agreed to participate in the fight, and that he did in fact participate in the fight, and that he helped fabricate a story to tell police, in the event he was questioned about Lloyd’s death. (Trial Tr. 518, 523–24, 526.)
- Collin testified that he drove his group to the park for the fight, that he “definitely hit [Lloyd] a couple times” during the fight, and that after the fight, he threw away a knife that had been given to him by Brian. (Trial Tr. 1619, 1645.)

The contention that these five witnesses are not legally accountable within the meaning of § 45-2-302(3), M.C.A. strains credulity.

The State may argue that none of these individuals had the “purpose to promote or facilitate the commission” of deliberate homicide, and therefore they are not legally accountable for James’s conduct. But this kind of fact pattern is precisely why the felony murder rule exists. In fact, the felony murder rule is incorporated within Montana’s deliberate homicide statute, implying that it is not a separate crime but one of three ways of committing the offense of deliberate homicide. That statute provides, in relevant part,

(1) A person commits the offense of deliberate homicide if: (a) the person purposely or knowingly causes the death of another human being; [or] (b) *the person attempts to commit, commits, or is legally accountable for the attempt or commission of robbery, sexual intercourse without consent, arson, burglary, kidnapping, aggravated kidnapping, felonious escape, assault with a weapon, aggravated assault, or any other forcible felony and in the course of the forcible felony or flight thereafter, the person or any person legally accountable for the crime causes the death of another human being[.]*

Section 45-5-102, M.C.A. (emphasis added). The State had a factual basis on which to charge all ten surviving combatants with deliberate homicide under the felony murder rule. The State exercised its discretion in charging only James with an offense stemming from the fatal fight. The State did not charge any other combatant with even misdemeanor assault.⁷ But it was supposed to be a fact question for the jury, not a legal question posed to the State, to determine whether any testifying witness was legally accountable for James's conduct.

Blackcrow, ¶ 21. Because James requested the “witness legally accountable” instruction and because there was “significant accomplice testimony” at his trial, the district court abused its discretion by not

⁷ The practical effect of these charging decisions, of course, is that the uncharged witnesses were not entitled to counsel.

giving the instruction. *Charlo-Whitworth*, ¶ 10 (citing *Johnson*, 257 Mont. at 163, 848 P.2d at 499).

The prejudice to James as a result of the district court’s ruling cannot be overstated. James’s defense to the deliberate homicide charge was not that he did not attend and participate in the fight. He did not have an alibi, and he was not alleging mistaken identity. His defense was that he did not inflict the fatal blow to Lloyd. Nine other living people participated in that fight, by their own admissions. The State had no more circumstantial evidence about James’s mental state with respect to deliberate homicide than they had about any of the other combatants on his side. The physical evidence the State has to implicate James—serological evidence that his shoe was in close proximity to Lloyd’s blood, and surveillance video showing he purchased a “tactical tomahawk” a couple weeks before the fight (Trial Tr. 1770)—does not prove anything more than what James himself admitted to: he participated in the fight, and he brought a hatchet, which he gave to Tim. (8/30/19 Motions Hrng. at 15.) The only evidence that James killed Lloyd comes in the form of inferences drawn from the testimony of some of the other combatants, none of whom actually saw James inflict the

fatal blow, all of whom agreed in advance to participate in the fight, and all of whom benefitted by not being charged under the felony murder rule for the death that occurred during the fight.

The jury was instructed according to the pattern instruction on witness credibility, MCJI 1-103. (Doc. 401 at 14.) But the jury was not instructed that it is a question of fact for their determination whether the other combatants are legally accountable for deliberate homicide within the meaning of the felony murder rule; that if so, the testimony of the other combatants should be viewed with distrust; that James cannot be convicted on the testimony of those other combatants without corroborating evidence; and that corroborating evidence is insufficient if it merely shows the commission of the offense or the circumstances thereof. *See* MCJI 1-112; (Doc. 350 at 13, 16, 19, 22). As this Court observed in *State v. Rose*,

the distinction between what the jury was told and what it should have been told is significant. The jury was instructed only in general terms relative to the weight to be given the testimony of witnesses. It should have been specifically instructed that it should view the testimony of [the] accomplice, with distrust. An instruction concerning accomplice testimony would have gone to the heart of the defense that [the accomplice] was not telling the truth.

State v. Rose, 1998 MT 342, ¶ 19, 292 Mont. 350, 972 P.2d 321. This Court reversed Rose’s conviction because his counsel’s failure to request an instruction on accomplice testimony amounted to ineffective assistance. *Rose*, ¶ 20. In this case, counsel’s request for that instruction was denied. But the result is the same: the jury was not told that it had the power to determine whether the other combatants are legally accountable for deliberate homicide, and that such a determination would affect the trustworthiness imputable to those witnesses, and the proof required to convict James. The district court’s refusal to give the “witness legally accountable” instruction on this “proper occasion” is an abuse of discretion warranting reversal of James’s deliberate homicide conviction. *Hall*, ¶ 30.

II. The district court abused its discretion in refusing to grant a mistrial when the prosecutor vouched for the credibility of the State’s witnesses after the “witness legally accountable” instruction was refused, the jury had seen evidence of James’s incarceration, and the State’s incarcerated witness was presented in civilian clothing.

In closing argument, the State took maximum advantage of the fact that the jury had not been instructed that the testimony of the other combatants should be viewed with distrust. Over and over again

the State vouched for the credibility of those witnesses. (Trial Tr. 1861, 1862, 1882.)

Both the United States and the Montana Constitutions guarantee a criminal defendant the right to a fair trial by jury. U.S. Const. amend. VI; Mont. Const. art. II, § 24. A fair trial by jury necessarily includes the right to have “the determination of the credibility of witnesses and the weight to be given their testimony [remain] solely within the province of the jury.” *State v. Byrne*, 2021 MT 238, ¶ 23, 405 Mont. 352, 495 P.3d 440 (quoting *State v. Brodniak*, 221 Mont. 212, 222, 718 P.2d 322, 329 (1986)). Accordingly, “it is improper for a prosecutor to offer personal opinions as to witness credibility.” *Byrne*, ¶ 23 (citing *State v. Aker*, 2013 MT 253, ¶ 26, 371 Mont. 491, 310 P.3d 506). This prohibition is so essential to a fair trial that this Court has declared it “reversible error for a prosecutor to comment directly on a witness’s credibility.” *Byrne*, ¶ 24 (citing *State v. Stringer*, 271 Mont. 367, 380–81, 897 P.2d 1063, 1071–72 (1995)). A new trial is the proper remedy, if the prosecutor made improper comments, and if those comments deprived the defendant of a fair trial. At *Byrne*, ¶ 18 (citing *State v. Sanchez*, 2008 MT 27, ¶ 51, 341 Mont. 240, 177 P.3d 444). Improper comments

are not presumptively prejudicial, but must be demonstrably prejudicial based on the record, when “viewed in the context of the case in its entirety.” at *Byrne*, ¶ 18 (citing *State v. Gladue*, 1999 MT 1, ¶ 27, 293 Mont. 1, 972 P.2d 827; and *State v. Wing*, 2008 MT 218, ¶ 33, 344 Mont. 243, 188 P.3d 999).

In this case, the prosecutor’s comments were improper because she repeatedly vouched for the credibility of the State’s witnesses in several of the ways this Court has condemned. The prosecutor argued that, “What you heard [from Dakota Gopher] is the truth. [Dakota Gopher]’s statement is truthful.” (Trial Tr. 1861.) This Court has often faulted prosecutors for characterizing a witness’s testimony as “the truth.” *See, e.g., Byrne*, ¶ 23; *State v. McDonald*, 2013 MT 97, ¶ 16, 369 Mont. 483, 299 P.3d 799; *State v. Racz*, 2007 MT 244, ¶ 36, 339 Mont. 218, 168 P.3d 685. The prosecutor also asked rhetorical questions such as, “What motive does Chris have to lie to you?” which she answered by displaying a PowerPoint slide that said, “Nonetheless, [Chris] got up here and told the truth.” (Trial Tr. 1882.) This Court has faulted prosecutors for telling juries that a State’s witness has no reason to lie. *See, e.g., State v. Thorp*, 2010 MT 92, ¶ 18, 356 Mont. 150, 231 P.3d

1096; *State v. Lindberg*, 2008 MT 389, ¶ 16, 347 Mont. 76, 196 P.3d

1252. These remarks were improper.

The prosecutor's personal opinions about the credibility of witnesses, while improper, are not viewed in isolation. *Byrne*, ¶ 18. In this case, the prosecutor's improper remarks in closing argument came after the jury had seen James being escorted into the holding room by armed guards wearing bulletproof vests announcing, "DETENTION OFFICER," (Trial Tr. 129), and after a witness for the State, Dakota Gopher, who was also incarcerated, had been dressed up in civilian clothing and allowed to enter the courtroom unshackled and unescorted, (Trial Tr. 462). The district court agreed that the effect of this charade was misleading to the jury, but declined to grant a mistrial on that basis. (Trial Tr. 477; Doc. 379 at 4.) As if the contrast between the defendant and the State's incarcerated witness were not enough, the State was also permitted to argue its case without the instruction that the testimony of the other combatants should be viewed with distrust, and that James cannot be convicted on the testimony of those other combatants without corroborating evidence.

Moreover, the State's conduct was not inadvertent. The State accommodated Dakota's change into civilian clothing and objected to the Court's order that its other incarcerated witnesses would be required to testify in jail garb so as not to continue misleading the jury. (Trial Tr. 540–41.) The State understood the effect of the appearance of incarceration on the credibility of its witnesses. The State also hid its vouching for Chris Ledeau in written text on a PowerPoint slide that the Court could not see until defense counsel read it out loud and objected. (Trial Tr. 1882.) The State's conduct in this trial is indicative of a party attempting, by any means, to persuade the jury to believe its witnesses.

The prosecutor's improper vouching in closing argument was not an isolated rhetorical flourish, but rather the culmination of a concerted effort to present nine of the eleven surviving fight participants as upstanding citizens, and one as a crazed ax-murderer. In the context of the entire trial, the prosecutor's improper comments during closing argument deprived James of a fair trial. The Court abused its discretion in not granting James's motions for a mistrial on this basis. *Norquay*, ¶ 13.

CONCLUSION

The district court abused its discretion in refusing the “witness legally accountable” instruction, and in denying James’s motions for a mistrial. The cumulative effect of these abuses of discretion was so prejudicial that a new trial is the only remedy. This Court should vacate the Judgment entered against James, and remand for a retrial on the counts of conviction.

Respectfully submitted this 19th day of April, 2023.

By: */s/ Caitlin Boland Aarab*
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Opening Brief is printed with a proportionally-spaced roman text, Century Schoolbook, and a typeface of 14 points, and is double-spaced except for footnotes and quoted, indented material. This brief contains 9,981 words, as calculated by Microsoft Word for Windows, excluding the Cover, Table of Contents, Table of Authorities, Certificate of Compliance, Certificate of Service, and Appendix.

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