

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CHINA ROSE DAWN DAVIS,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, the Honorable Ashley Harada, Presiding

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STATEMENT OF THE ISSUES

1. China Davis hatched a vague, ill-conceived plan to steal Carl Archer's methamphetamine with the assistance of James Eder and Charlie Reimers. Everyone was very high on meth. In the course of the theft, Eder murdered Carl with a shotgun blast to the head. After killing Carl, Eder hurriedly escaped with Reimers, the getaway driver, stranding China in a motel room with Carl's body, Carl's girlfriend who was not involved in the planned heist, and the methamphetamine. There was no dispute how or where Carl died.

Did the District Court abuse its discretion in China's felony murder trial, where robbery by accountability was the predicate offense, when it admitted through a detective's testimony, over objection, nine graphic photographs of Carl Archer's fatal head wound and brain splatter around the room, which were not relied upon by the medical examiner and whose probative value was not explained to the jury?

2. Should the judgment be amended to change China's restitution obligation from one she solely bears to one shared jointly and severally with James Eder and Charlie Reimers, as the parties agreed

and as established in the documents supporting the State's restitution request?

STATEMENT OF THE CASE

The State charged China Davis with one count of deliberate homicide with a weapons enhancement under the felony murder rule, in violation of Mont. Code Ann. §§ 45-5-102(1)(b), 46-18-221. (D.C. Doc. 3.) The case proceeded to a five-day jury trial. (D.C. Docs. 58 – 60, 64, 68 (Minutes).¹)

Before trial, the Defense moved in limine to prohibit the State from showing the jury graphic photographs of Carl Archer's head injuries and brain splatter from the fatal gunshot wound inflicted by James Eder. (D.C. Docs. 29, 33.) The motion was argued during trial outside the presence of the jury; the District Court orally denied the motion. (09/14/2021 Tr. at 153 – 60.) Subsequently, the Defense again

¹ The court reporter prepared separate transcripts for each day of trial. The title page of each day of the trial lists "Trial – Day One," "Trial – Day Two," and so on. However, the court reporter mistakenly used "Trial – Day 3" twice – first on the third day of trial and then again on the fourth day of trial. The record is clear trial occurred between September 13 – 17, 2021, inclusive. To minimize confusion, the date is used herein when citing individual trial transcripts.

objected to each photograph during trial; the District Court overruled the objections again. (09/14/2021 Tr. at 175 – 76, 187.)

The jury convicted China of deliberate homicide under the felony murder rule and found the crime was committed with a weapon.

(09/17/2021 Tr. at 65 – 66; D.C. Doc. 72.)

At sentencing, the District Court imposed a prison sentence of 80 years for the homicide and a consecutive five-year sentence for the weapons enhancement. (02/03/2022 Tr. (“Sent. Tr.”) at 49, attached hereto as App. A; D.C. Doc. 94 at 1 (“Judgment”), attached hereto as App. B.) The District Court also ordered restitution of \$9,945.67. (App. A at 50; App. B at 3.) By comparison, James Eder, who shot and killed Carl Archer, received a cumulative 55-year prison sentence for deliberate homicide and the weapons enhancement. (App. A at 46.) Charlie Reimers, the getaway driver who provided the truck and shotgun Eder used in the murder and the only white person involved, received a 15-year prison sentence with 10 years suspended for robbery by accountability, not felony murder.² (App. A at 47.)

² The judge went so far as to state, “I don’t think that Mr. Reimer’s sentence should really be considered in that he was not as much involved in the entire encounter[.]” (App. A at 47.)

Eder and Reimers shared joint and several liability for the \$ 9,945.67 restitution obligation. (D.C. Doc. 85 at 2, citing the “Restitution Recap” attached to China’s presentence investigation report (“PSI”). (D.C. Doc. 88.³) The State requested China’s restitution to be imposed jointly and severally with Eder and Reimers; the Defense agreed. (Sent. Tr. at 11; D.C. Docs. 85 at 1 – 2, 9; 87 at 1.) However, the District Court imposed the entire restitution amount on China alone, irrespective of whether Eder or Reimers also paid full restitution. (App. A at 50; App. B at 3.)

China timely appealed.

STATEMENT OF THE FACTS

Background

China Davis has had a rough go of things in life. Removed with her twin sister from their biological parents before the age of one due to abuse and drug use by their parents, China and her sister bounced around the foster care system until they were eight years old when they were adopted by the Davis family. (09/16/2021 Tr. at 72; Sent. Tr. at

³ The PSI includes confidential information protected from public disclosure under Mont. Code Ann. § 46-18-113. The restitution amount is publicly disclosed elsewhere in the record.

13; D.C. Doc. 87 at 1 – 2.) Despite learning disabilities, several mental health diagnoses, and bullying, China did well in school in special education programs. (09/16/2021 Tr. at 74 – 75.⁴)

During her senior year of high school, China left the Davis household due to abuse. (09/16/2021 Tr. at 73; D.C. Doc. 88 at 8.) Afterward, she lived with her boyfriend at the time and graduated from high school in 2008. China later completed some college courses. (09/16/2021 Tr. at 72 – 73; D.C. Docs. 87 at 2; 88 at 8.)

The death of China's biological mother in 2011 sent China into a tailspin. (D.C. Doc. 87 at 2.) She became involved in two abusive relationships during which time she started using methamphetamine. Her use of methamphetamine and alcohol escalated over the years. (D.C. Docs. 87 at 2 – 4; 88 at 6, 8.) China has endured periods of homelessness as an adult. (09/16/2021 Tr. at 76; D.C. Doc. 87 at 4.)

China and Carl

In about June 2020, China met Carl Archer, a drug dealer in Billings. Her meth use increased substantially after she met Carl.

⁴ Additional psychological information is revealed within China's PSI. (D.C. Doc. 88 at 5.)

China helped Carl make meth sales in Wolf Point and Carl “paid” her with an ounce of meth each time they went to Wolf Point. China used all the meth Carl gave her, even though she testified an ounce of meth was worth \$5,000. (09/16/2021 Tr. at 75 – 81.)

On China’s last trip to Wolf Point with Carl, Carl abandoned her at a gas station convenience store after he told her to go inside and buy him a sandwich and a soda. Carl had not paid China for this trip even though she had helped him make sales. China felt Carl owed her an ounce of meth. (09/16/2021 Tr. at 84; 09/17/2021 Tr. at 17 – 18.)

Eder Murders Carl

Now back in Wolf Point, China met James Eder, another drug dealer from Billings trying to make sales in Wolf Point. Eder brought China with him back to Billings the next day. They began living together right away and Eder started controlling China’s life. (09/16/2021 Tr. at 84 – 94.)

One evening China met up with a friend of hers, Morgan Long, in a room at the Days Inn in Billings. China noticed Carl’s jacket in the room and asked Morgan if she could hang out in the room with her and wait for Carl to return. Morgan agreed and eventually Carl returned

with meth. China still wanted the meth she felt Carl owed her.

(09/16/2021 Tr. at 95 – 97, 106; 09/17/2021 Tr. at 18 – 19.)

Meanwhile, Eder, who was jealous of China's relationship with Carl, had tracked her through her phone to the Days Inn. China told Eder she was with Morgan in Carl's hotel room and was planning to stay there. She and Eder had had a falling out earlier in the day.

(09/14/2021 Tr. at 34, 61 – 63; 09/16/2021 Tr. at 97 – 101.)

China got the idea to steal a three-ounce rock of meth Carl brought back with him to the motel room. She continued to believe Carl owed her for not paying her for their last trip together to Wolf Point and for stranding her there. China texted Eder to suggest stealing Carl's meth. (09/14/2021 Tr. at 36; 09/16/2021 Tr. at 106 – 07.)

Eder enlisted the help of his friend, Charlie Reimers, to assist with the heist. Reimers, yet another Billings drug dealer, had a vehicle and a shotgun. Indeed, Reimers was the only one of the three co-defendants who had a deadly weapon readily accessible and apparently happy to contribute it. (09/14/2021 Tr. at 36; 09/16/2021 Tr. at 109, 112.)

Back in the hotel room, Carl told China and Morgan they were going to move to a different hotel for the rest of the night. The three of them loaded into Carl's Lincoln Continental with their belongings. (09/16/2021 Tr. at 103 – 05.) Reimers and Eder followed Carl, China, and Morgan to a casino, Wal-Mart, and finally to Tiger Town Inn in Ballantine. (09/14/2021 Tr. at 40 – 46; 09/16/2021 Tr. at 108 – 13.) Although Carl was suspicious they were being followed while driving out to Ballantine, China falsely told him he was being paranoid and no one was following them. All the while, China was texting Eder about her whereabouts. (09/14/2021 Tr. at 44 – 49; 09/16/2021 Tr. at 113 – 14.) Everybody was very high on meth during the entire evening. (09/14/2021 Tr. at 40; 09/16/2021 Tr. at 102, 105, 116.)

When they got to Tiger Town Inn, Carl, China, and Morgan unloaded their belongings and Wal-Mart purchases from Carl's car and took them into Carl's motel room. (09/15/2021 Tr. at 11 – 12, 58; 09/16/2021 Tr. at 114; Exh. 13.) Meanwhile, Reimers and Eder drove past the motel to Worden and pulled into a random alleyway to wait. Following some messaging between Eder and China in which China

advised Eder where she was, Reimers and Eder drove to Tiger Town.

(09/14/2021 Tr. at 47 – 49; 09/15/2021 Tr. 114 – 15.)

Reimers stopped the van beside the gas pumps, while Eder got out and walked around back to the motel rooms. (09/14/2021 Tr. at 50 – 51; 09/15/2021 Tr. at 13 – 16, 58 – 60; Exh's. 14A – D.) As he approached the door to Carl's motel room, Eder held the shotgun up to his shoulder ready to fire, even though China had not mentioned shooting anyone. (09/14/2021 Tr. at 65; 09/15/2021 Tr. at 17; Exh. 14D; 09/16/2021 Tr. at 117.) She simply wanted Eder to help her steal meth she felt Carl owed her. Reimers waited a few seconds in the van and then began inching forward behind Eder toward Carl's motel room. (09/15/2021 Tr. at 14, 16 – 17, 19; Exh. 14A – D.)

China testified at trial that Eder knocked and walked in the room. After Eder and Carl yelled at each other for a few seconds, Eder shot Carl in the head. (09/16/2021 Tr. at 119 – 23.) Eder testified the gun accidentally went off as he and Carl tussled over the gun after Eder entered. (09/14/2021 Tr. at 51 – 52.) It is undisputed that Carl immediately collapsed from the shotgun blast into his eye, after which Eder said, "Oh, fuck," and ran out of the room without China or the

meth. (09/14/2021 Tr. at 52 – 53, 145; 09/16/2021 Tr. at 124 – 25.) Eder was in the room only about 30 seconds. By the time he exited, Reimers had pulled up to the room door in the van. Eder jumped in the passenger seat, still holding the gun. Reimers sped away from the motel toward Worden. (09/14/2021 Tr. at 53; 09/15/2021 Tr. at 17 – 19, 61; Exh's. 14C – D.)

A few seconds later, China and Morgan exited the room carrying bags of their things. (09/15/2021 Tr. at 16 – 17; Exh's. 14A – D.) China grabbed Carl's methamphetamine from the pocket of the pants he was wearing before he took them off to lie down in bed. (09/15/2021 Tr. at 17 – 18; 09/16/2021 Tr. at 125.) Both women walked down the road together in the opposite direction that Reimers drove. (09/15/2021 Tr. at 15 – 19, 62 – 63; Exh's. 14A – D, 204 - 207.) China texted Eder to return and pick her up, but Reimers refused to do so. (09/14/2021 Tr. at 54.)

China and Morgan had not walked far when Sergeant Ketch saw them at about 3:36 a.m., walking along the roadside with their garbage bags of stuff. (09/14/2021 Tr. at 159; 09/15/2021 Tr. at 16 – 17, 64 – 65.) China dropped the baggie of meth on the ground out of sight and told

the sergeant and an accompanying deputy that her friend Carl Archer had just been shot and killed by James Eder. (09/13/2021 Tr. at 160; 09/14/2021 Tr. at 101 – 04, 109 – 12; 09/15/2021 Tr. at 65 – 66.) China was taken in for questioning later that morning. (09/14/2021 Tr. at 85 – 89.) Law enforcement arrested Eder and Reimers that same day. (09/13/2021 Tr. at 180 – 83, 186 – 87; 09/14/2021 Tr. at 56.)

Additional facts pertinent to each argument are presented below.

STANDARDS OF REVIEW

“We review a district court's evidentiary rulings for an abuse of discretion. . . . A district court abuses its discretion when it acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice. . . . To the extent an evidentiary ruling is based on a conclusion of law, we review whether the court correctly interpreted the law.” *State v. Oliver*, 2022 MT 104, ¶ 18, 408 Mont. 519, 510 P.3d 1218 (citations, internal quotations omitted).

Criminal restitution orders are reviewed for compliance with §§ 46-18-241 through -249, MCA. *State v. Pierre*, 2020 MT 160, ¶ 10, 400 Mont. 283, 466 P.3d 494 (citations omitted).

SUMMARY OF THE ARGUMENT

The District Court abused its discretion by admitting nine photographs into evidence that depicted Carl's head injuries and his brain splatter around the motel room after Eder murdered him. The State did not tell the jury why the explicit and distasteful photos were probative of any element in the felony murder charge. The medical examiner did not rely on the photos during his testimony regarding the manner of Carl's death. And there was no dispute concerning who murdered Carl or where he died.

The State introduced over 200 other exhibits into evidence, the vast majority of which were photographs of the crime scene to which the Defense did not object. The objected-to photos lacked probative value, were unduly prejudicial to China, and served only to arouse the jury's sympathy for the deceased and against China. China's conviction should be reversed due to the erroneous, unduly prejudicial admission of the nine photographs.

The District Court illegally imposed the entire restitution amount of \$9,945.67 on China alone, even though Eder and Reimers already jointly and severally owed the same \$9,945.67 restitution due to their

convictions. Imposing the entire amount again, this time solely on China, would result in double payment to the victims and would constitute additional punishment for China. Neither outcome is authorized by law. If the Court does not vacate or reverse China's conviction, it should remand to the District Court with orders to change the restitution in China's judgment to be shared jointly and severally with James Eder and Charlie Reimers.

ARGUMENT

I. The District Court abused its discretion by admitting nine graphic photographs of Carl Archer's head injuries and brain splatter.

A. Background facts.

At China's trial, the State offered more than 200 exhibits. (D.C. Doc. 70 (listing exhibits).) Just one of the State's exhibits was refused. (D.C. Doc. 70, Exh. 93 (handwritten letter from Eder to China); 09/14/2021 Tr. at 189.) All but about a dozen of the exhibits are photographs or videos. Defense Counsel objected to nine photographic exhibits, i.e., Exhibits 60, 61, 65, 87, 88, 94, 95, 97, and 98. These nine photographs graphically displayed Carl's head wounds and his brain matter splattered around the motel room after Eder murdered him with

a shotgun blast through his eye. (D.C. Docs. 29, 33; 09/14/2021 Tr. at 153 – 60, 175 – 76, 187.)

Counsel argued those particular photos were “irrelevant, unnecessary, and [] cumulative” and their prejudice outweighed the probative value under Mont. R. Evid. 401, 402, and 403.⁵ Counsel contended “the autopsy photo and the evidence from the officers who investigate[d] the scene are more than enough evidence to establish where and how he [Carl] died[,]” remarking China was not charged with shooting Carl and there was no dispute as to how Carl died.

(09/14/2021 Tr. at 153 – 54.) The Defense contended the photos were being offered simply to arouse the sympathy of the jury and emphasized they only objected to the ones showing brain matter. (09/14/2021 Tr. at 154, 156.)

The Prosecutor retorted, “[T]he State should not be muzzled or have to sanitize its case[,]” noting it had to meet its burden to prove China guilty of deliberate homicide under the felony murder rule.

⁵ Counsel also cited generally to *State v. Azure*, 181 Mont. 47, 52, 591 P.2d 1125, 1129 (1979); *State v. Henry*, 241 Mont. 524, 531, 788 P.2d 316, 320 (1990); *State v. Close*, 267 Mont. 44, 47 – 48, 861 P.2d 1312, 1314 – 15 (1994). (09/14/2021 Tr. at 153, 156.)

(09/14/2021 Tr. at 155.) The State contended the challenged photos were relevant, probative, and not “unfairly or unduly prejudicial to the Defendant.” (09/14/2021 Tr. at 155 – 56.) The State denied it would introduce such photographs “to shock the jury into a conviction. None of that has to do with the State proving the elements. . . . [T]he Defense is attempting . . . to muzzle the State’s case in chief and to essentially underwhelm the jury and completely ignore the fact that this is a homicide case.” (09/14/2021 Tr. at 157.)

The District Court overruled the Defense objection to the photos. (09/14/2021 Tr. at 157 – 60, attached hereto as App. C.) The judge found the photos probative and not unduly or unfairly prejudicial, reasoning:

[T]he jury has the need to understand what occurred that evening and how things came to be. And I think that if they can see the room and they can see the crime scene, they can see the decedent, then they will have a better understanding.

. . .

. . . [O]bviously counsel is experienced enough to know that we don’t belabor the photos of the decedent.

We don't leave them on the screen and then move on to another topic. We show them, we take them down. We show them, we take them down. Because the jury doesn't need to sit and stare at that kind of thing.

(App. C at 157 – 59.) To support its ruling, the District Court cited *State v. Sigler*, 210 Mont. 248, 688 P.2d 749 (1984) (*en banc*), *overruled in part on other grounds State v. Rothacher*, 272 Mont. 303, 310, 901 P.2d 82, 87 (1995) (*en banc*), and *State v. Kills on Top*, 243 Mont. 56, 793 P.2d 1273 (1990) (*en banc*).⁶

The District Court admitted the nine graphic photographs,⁷ along with nearly 100 other photos, through the testimony of Detective Fritz

⁶ The Prosecutor cited *Sigler* and *Kills on Top* to support the State's argument for admitting the photographs. (09/14/2021 Tr. at 155, 157.)

⁷ Exh's. 60, 61, and 65 were admitted at 09/14/2021 Tr. at 175 – 76. Exh's. 60 and 61 were published to the jury at 09/14/2021 Tr. at 176 – 77. Exh. 65 was published to the jury at 09/14/2021 Tr. at 178. Exh's. 87, 88, 94, 95, 97 and 98 were admitted at 09/14/2021 Tr. at 186 – 87. Exh's 87 and 88 were published to the jury at 09/14/2021 Tr. at 187 – 88. Exh's 94, 95, 97, and 98 were published to the jury at 09/14/2021 Tr. at 190 – 91.

In questioning Fritz about Exh. 95, the Prosecutor mistakenly referred to the exhibit as "96." The Prosecutor obviously misspoke because when asking Fritz to describe the photo, Fritz stated, "You can see the victim's head, the top of his head." (09/21/2021 Tr. at 190.) Carl's severely wounded head is visible in Exh. 95, not Exh. 96.

at the end of the second day of trial. (09/14/2021 Tr. at 162 – 206.) Fritz's other photographs that day included numerous views of the outside of the Tiger Town Inn and its gas station and convenience store. (09/14/2021 Tr. at 164 – 75; Exh's. 37 – 59.) The remainder of Fritz's photos that day were 40 pictures showing the disheveled state inside of the motel room as detectives discovered it immediately following Carl's murder. (09/14/2021 Tr. at 175 – 92; Exh's. 60 – 100.) The nine objected-to photographs were among this group of 40 exhibits.

Thus, there were 31 photos from inside the messy motel room admitted and published to the jury. These exhibits included pictures of blood in the room, pieces of Carl's shattered eyeglasses scattered about, and Carl's feet and lower legs lying between the two beds. (D.C. Doc. 70, Exh's 62, 64, 73 – 86, 89, 96, 99, 100.) All 31 exhibits were admitted and published to the jury without objection from the Defense. (09/14/2021 Tr. at 175 – 92.)

Fritz testified immediately *after* Dr. Kurtzman, who performed Carl's autopsy. (09/14/2021 Tr. at 134 – 152.) Through Dr. Kurtzman, the State introduced an x-ray of Carl's head showing pellets in his skull from the shotgun wound. Dr. Kurtzman discussed how pellets in

shotgun pellet scattered throughout Carl's head upon impact with his skull. (Exh. 31; 09/14/2021 Tr. at 141 – 44.) Dr. Kurtzman also introduced a photograph of the pellets he recovered from Carl's head during the autopsy, as well as the actual shot cup, wadding, and pellets. (Exh's. 32 – 35 ; 09/14/2021 Tr. at 147 – 48.) The Defense did not object to Kurtzman's testimony or the exhibits admitted during his testimony.

The State's next witness after Fritz was Detective Charbonneau, who displayed for the jury the shotgun Eder used to murder Carl. (09/15/2021 Tr. at 36 – 38; Exh. 156.) Further, at the beginning of the second day of trial, before the testimony of Kurtzman or Fritz, Eder himself testified about shooting Carl and watching “a piece of the top of his scalp come off” and then “haul ass out of there.” (09/14/2021 Tr. at 52 – 53.) Eder admitted he already had pled guilty to deliberate homicide for murdering Carl. (09/14/2021 Tr. at 56 – 57.) He hoped his judge would take his testimony against China into consideration at his sentencing hearing. (09/14/21 Tr. at 57.)

During a pretrial conference, without objection, the State agreed to prepare a separate exhibit notebook for each juror to use in the jury room for deliberations. (08/27/2021 Tr. at 15 – 16.) Before the District

Court excused the jury to begin deliberations, the judge advised them, “There are binders that will be provided so you each will have your own binder with the exhibits[.]” (09/17/2021 Tr. at 62 – 63.) There is no indication the State excluded any of the admitted exhibits, such as the nine gory photographs, from those notebooks.

B. Governing law.

“[W]here the purpose of a photographic exhibit is to assist the jury in understanding the case, it is admissible, even though its effect may be prejudicial or inflammatory, if its probative value outweighs its prejudicial effect.” *Sigler*, 210 Mont. at 256, 688 P.2d at 753.

Photographs “are admissible for the purpose of explaining and applying the evidence and assisting the court and jury in understanding the case.” *State v. Bischert*, 131 Mont. 152, 159, 308 P.2d 969, 973 (1957) (citation omitted). In contrast, “[p]hotographs that are calculated to arouse the sympathies of the jury are properly excluded, particularly if they are not substantially necessary or instructive to show material facts or conditions.” *Bischert*, 131 Mont. at 159, 308 P.2d at 973 (citation omitted).

When offering photographic exhibits as evidence, the State must “establish the substantial necessity or instructive value of the photographs as a foundation for their admissibility.” *State v. Newman*, 162 Mont. 450, 461, 513 P.2d 258, 264 (1973). In *Newman*, the defendant challenged his involuntary manslaughter conviction on several grounds, one of which alleged error in admitting into evidence and permitting the jury to view color photographs of the deceased victim’s injuries. This Court reversed Newman’s conviction and remanded for a new trial, ruling the probative value of four photographs taken by a policeman of the deceased’s embalmed body was never explained to the jury by the State’s medical witness who did not reference the photographs during his testimony after the policeman testified to lay the foundation for the admission of the photos. *Newman*, 162 Mont. at 461, 463, 513 P.2d at 264, 265. *Cf. State v. Buckley*, 171 Mont. 238, 245, 557 P.2d 283, 287 (1976) (finding no error in admitting pictures of the deceased in a deliberate homicide trial where “[t]he probative value of the photographs was constantly explained to the jury throughout the trial” through numerous witnesses, including a medical

witness who discussed the number of gunshot wounds and the damage done).

Twenty years after *Newman*, this Court reversed a conviction for accountability for aggravated kidnapping due, in part, to erroneous admission of photographs showing the victim's bodily injury. *State v. Bristow*, 267 Mont. 170, 176 – 77, 882 P.2d 1041, 1045 (1994). There, the Court observed that bodily injury was not in dispute. Two co-defendants testified at Bristow's trial about the bodily injury they inflicted on the victim and admitted they had been convicted of aggravated assault for the incident. The victim testified concerning the nature and extent of his injuries. *Bristow*, 267 Mont. at 176, 882 P.2d at 1045. What *was* in dispute was whether Bristow "promoted or facilitated the commission of the aggravated kidnapping by soliciting, aiding, or abetting" the two co-defendants:

Because bodily injury was not in dispute, the photographs were of little or no probative value in establishing accountability for aggravated kidnapping. In the absence of probative value, the photographs were irrelevant to the State's case, and therefore, could only serve to inflame the jury against the defendant. We conclude that the probative value of the photographs was far outweighed by their

prejudicial effect on the jury to the detriment of defendant.

We hold that the District Court erred in admitting into evidence, and permitting the jury to view, color photographs of the victim's injuries.

Bristow, 267 Mont. at 176, 882 P.2d at 1045.

Bischert is also instructive. There, the State charged defendant for manslaughter for allegedly starving his five-and-one-half-month-old infant to death. *Bischert*, 131 Mont. at 154, 308 P.2d at 970. A post-mortem examination tended to show death by starvation and also revealed “a widespread skin disease allegedly caused by urine.”

Bischert, 131 Mont. at 154, 308 P.2d at 970. At trial, the State used a projector and screen in a darkened courtroom to display one colored slide of the baby after the autopsy and three black-and-white photographs of the baby.

In reversing the conviction, the Court remarked:

The charge here was failure to provide food. It should be pointed out there was no charge of failure to provide medical care. That the photographs excite sympathy for the child and indignation and prejudice against the appellant is easily understandable. They show ghastly and gruesome looking sores or scars alleged to have been caused by dermatitis burns which in no way go to proof of starvation. When the purpose of an

exhibit is to inflame the minds of the jury or excite the feelings rather than to enlighten the jury as to any fact, it should be excluded.

Bischert, 131 Mont. at 159 – 60, 308 P.2d at 973. *Cf. State v. Rollins*, 149 Mont. 481, 484, 428 P.2d 462, 463 – 64 (1967) (upholding admission of a color photograph showing an assault victim’s bullet wound after it had been cleaned and dressed and calling the photographs in *Bischert* “particularly distasteful” and lacking “a significant contribution to the development of facts in that case”).

As the Prosecutor here asserted below, this Court does “not demand that a trial be sanitized to the point that important and probative evidence must be excluded.” *State v. Doll*, 214 Mont. 390, 400, 692 P.2d 473, 478 (1985). In *Doll*, the Court affirmed the trial court’s admission of fifteen photographic slides of the victim’s wounds taken at the scene of the crime and the autopsy. The Court remarked, the trial court “exercised its discretion carefully” and rejected an additional 40 slides. *Doll*, 214 Mont. at 399, 692 P.2d at 477 – 78. Of the 15 slides admitted, only six depicted the victim’s wounds. Further, the pathologist relied on the slides in his testimony. Under these circumstances, the slides were essential in establishing the cause of

death and would not “arouse prejudice to a point that probative evidence must be excluded.” *Doll*, 214 Mont. at 3400, 692 P.2d at 478.

Additionally, graphic photographs may be admissible where “the corroborative value of the photographs is indicative of their probative value” and the photographs are “accurate and reasonably necessary to depict the wounds of the victims” in a deliberate homicide trial under the felony murder rule. *State v. Cox*, 266 Mont. 110, 113, 121 – 22, 879 P.2d 662, 664, 669 – 70 (1994). In *Cox*, the State introduced 21 autopsy photographs taken by the medical examiner of five victims in the 1991 prison riot. *Cox*, 266 Mont. at 121, 879 P.2d at 669. The medical examiner testified he chose the 21 photographs as “the most instructive” out of more than 200 photographs taken. *Cox*, 266 Mont. at 122, 879 P.2d at 669. Each photo was posted individually 10 to 12 feet from the jury, turned away from the jury, and replaced by the next photo. At the end of the medical examiner’s testimony, the photographs were removed from display and sealed by the District Court. “Most importantly, the photographs were not allowed into the jury room.” *Cox*, 266 Mont. at 122, 879 P.2d at 669. Under these circumstances, the Court held the “safeguards taken by the State along with the probative

value of the photographs outweigh the prejudicial effect.” *Cox*, 266 Mont. at 122, 879 P.2d at 670. *Accord State v. Gollehon*, 262 Mont. 293, 301, 864 P.2d 1257, 1262 – 63 (1993) (*en banc*) (reaching the same result regarding the same set of photographs in another case from the 1991 prison riot); *State v. Mergenthaler*, 263 Mont. 198, 868 P.2d 560 (1994) (affirming use of autopsy slides of child-victim in a negligent homicide trial that were used as demonstrative exhibits during the testimony of the medical examiner, not entered into evidence, and not taken into the jury room during deliberations); *State v. Powers*, 198 Mont. 289, 293 – 94, 645 P.2d 1357, 1360 (1982) (*en banc*) (affirming admission of three autopsy photographs of a homicide child-victim where the medical examiner laid a foundation for the photos and testified they were accurate and necessary for him to fully describe his findings); *State v. Devlin*, 251 Mont. 278, 283, 825 P.2d 185, 187 – 88 (1991) (affirming the use of 8” x 10” color photographs of victim injuries and bloodstains at the scene of an attempted deliberate homicide and an assault where the district court discouraged the submission of ten of the photographs and actually refused two more, resulting in nearly one-third of the photographs not being received into evidence as the result

of the District Court's balancing of probative value against unfair prejudice).

In China's trial, the District Court did not rely on any of the above decisions when considering whether to admit the nine photographs to which the Defense objected. Instead, the District Court cited only *Sigler* and *Kills on Top* to overrule Defense Counsel's objection to all nine photographs.

In *Sigler*, the District Court received multiple photographs into evidence in a deliberate homicide trial for the death of a 19-month-old child by blunt force trauma to the abdomen. *Sigler*, 210 Mont. at 250 – 51, 688 P.2d at 750. The baby also had numerous other physical injuries, including a hematoma to the head. *Sigler*, 210 Mont. at 251, 688 P.2d at 750. On appeal, *Sigler* challenged the admission of one photograph taken by the examining pathologist during the autopsy in which the pathologist had pulled back the child's scalp to display a subdural hematoma that was otherwise covered by his hair. This was the only photograph taken of that particular injury. Before allowing it into evidence, the District Court required the pathologist to block

portions of the slide pictures so that only the injury was shown to the jury. *Sigler*, 210 Mont. at 255, 688 P.2d at 753.

Sigler contended the photograph was “highly prejudicial and inflammatory,” claiming, in effect, that its prejudicial effect outweighed its probative value. *Sigler*, 210 Mont. at 255 – 56, 688 P.2d at 753.

This Court disagreed, holding “that where the purpose of a photographic exhibit is to assist the jury in understanding the case, it is admissible, even though its effect may be prejudicial or inflammatory, if its probative value outweighs its prejudicial effect.” *Sigler*, 210 Mont. at 256, 688 P.2d at 753. Accordingly, the Court ruled “the District Court did not abuse its discretion in admitting the photograph into evidence; that its probative value was more important than any prejudicial or inflammatory effect because the jury was entitled to know the nature and extent of the injuries suffered by the child and no other method would have shown it as graphically or as well.” *Sigler*, 210 Mont. at 256, 688 P.2d at 753 (citing consistent, similar holdings concerning photographs in other cases).

In *Kills on Top*, the defendant in a deliberate homicide trial challenged two photographs introduced by the State. One photo taken

in an abandoned community hall where the victim was found showed the victim's head and right shoulder. The other photo was taken at the autopsy and shows the left side of the victim's head, which was the side sustaining the fatal blows. The Court held the two photographs corroborated testimony about where the body was left after the victim had been severely beaten and the victim's fatal head injuries. In these circumstances, the Court concluded the photographs were relevant and not unduly inflammatory. *Kills on Top*, 243 Mont. at 86, 793 P.2d at 1293 – 94.

This Court has instructed:

In assessing the relative probative value of particular evidence against the danger of unfair prejudice under Rule 403, courts should consider:

“not only ... the item in question but [also] any actually available substitutes as well. If an alternative ... [is available with] substantially the same or greater probative value but a lower danger of unfair prejudice, sound judicial discretion would discount the value of the item first offered and exclude it if its discounted probative value were substantially outweighed by unfairly prejudicial risk.”

State v. Lake, 2022 MT 28, ¶ 41, 407 Mont. 350, 503 P.3d 274 (internal formatting modified), quoting *Old Chief v. United States*, 519 U.S. 172,

182-83, 117 S. Ct. 644, 651, 136 L.Ed.2d 574 (construing Fed. R. Evid. 403).

“[W]hat counts as the Rule 403 ‘probative value’ of an item of evidence, as distinct from its Rule 401 ‘relevance,’ may be calculated by comparing evidentiary alternatives.” *Old Chief*, 519 U.S. at 184-85, 117 S. Ct. at 652 (observing also that the Advisory Committee’s Notes to Federal Rule 403 state when a court considers “whether to exclude on grounds of unfair prejudice,” the “availability of other means of proof may . . . be an appropriate factor).

See 1 McCormick 782, and n. 41 (suggesting that Rule 403’s “probative value” signifies the “marginal probative value” of the evidence relative to the other evidence in the case); 22 C. Wright & K. Graham, *Federal Practice and Procedure* § 5250, pp. 546—547 (1978) (“The probative worth of any particular bit of evidence is obviously affected by the scarcity or abundance of other evidence on the same point).

Old Chief, 519 U.S. at 185, 117 S. Ct. at 652. *Accord State v.*

Pendergrass, 179 Mont. 106, 111 – 13, 586 P.2d 691, 694 – 95 (1978)

(holding the admission of a tape recording of the victim’s “emotional . . . outpourings in the immediate aftermath of a violent crime” was unduly prejudicial and destroyed a “fair trial climate,” where the State had

“clear proof” of a rape without the tape and the only issues at trial were identification and alibi).

C. The District Court’s error.

Sigler and *Kills on Top* involved an alleged assailant challenging photographs to try to prevent the State from sustaining its burden to prove they, the respective defendants, were the actual murderers. Neither decision is applicable to facts here. At trial, the State needed to prove beyond a reasonable doubt that China’s purpose in soliciting Eder’s help was to promote or facilitate the commission of a robbery, rather than merely a theft, and, thus, whether she was accountable for the predicate offense of robbery under the felony murder rule. There was no need to prove the manner of Carl’s death, as the parties agreed Eder murdered Carl with a shotgun blast to his head in the motel room at the Tiger Town Inn.

Also unlike the situation here, *Sigler* involved only one photograph introduced through the examining pathologist who believed the photo was necessary to show the child’s brain injury. Importantly, the trial court required the State to block out portions of the photo so the jury could only see the injury. In *Kills on Top*, one of the two photos

was introduced through the examining pathologist and the other corroborated testimony about the location of the victim and his injuries.

By contrast, at China's trial Dr. Kurtzman explained his medical findings regarding Carl's death without the use of, or reference to, the nine repulsive photographs to which the Defense objected. In fact, the State offered and published the objectionable photos *after* Dr. Kurtzman explained how Carl died, discussed a clear x-ray of Carl's injuries, and displayed the physical ammunition recovered from Carl's head. Thus, unlike *Sigler* or *Kills on Top*, the medical examiner had no need for, and did not use, the explicit photographs to explain Carl's death. Moreover, there was no need in this case for graphic photos to corroborate Carl's location or his injuries, unlike *Kills on Top*.

Fritz provided no testimony explaining how the nine contested, hideous photos were probative to the case against China. (09/14/2021 Tr. at 176 – 78, 187 – 88, 190 – 91.) He simply introduced the exhibits and described what each picture depicted, which the jurors could see with their own eyes. Eder already had testified how he killed Carl and pled guilty to deliberate homicide.

This was not a case where a medical examiner relied on a limited number of carefully selected photographs during his testimony to describe the cause or means of Carl's death. Rather, this was a case where the Prosecutor and a detective wanted to display ghastly, horrific, indecent photographs to inflame the jury – which is exactly what this Court explained was impermissible in *Bischert*, where the State showed the jury photos of an infant with urine burns that were unrelated to the charge against the defendant. No one told the jury why these photos were relevant to the elements of robbery, robbery by accountability, or felony murder – the offenses with which China was charged and the State needed to prove beyond a reasonable doubt. The photographs simply were not relevant and were unduly prejudicial.

Here is a summary of what the nine, offensive photographs depicted:

Exhibit 60 shows Carl lying between the two beds, face-down in a pool of his own blood from the gunshot wound through the front of his skull.

Exhibit 61 shows a portion of Carl's prone torso, already dead, amid detritus scattered about the room.

Exhibit 65 is a photograph of the bathroom through the open bathroom door, next to which is a wall mirror reflecting the top of Carl's head with the front of his skull missing and his head lying face-down within his brain matter and blood on the carpet.

Exhibit 87 displays a nearly full-length view of Carl's prone body from his head to his knees with part of the top of his head wound showing and his pants or shorts below his buttocks and above his knees so that his bare bottom is exposed upward toward the ceiling and prominently displayed in the photograph.

Exhibit 88 shows the same view as Exhibit 87, but from a step or two away, such that Carl's entire, prone body from his knees to above his head is revealed, including his bare rear and his face lying in a large pool of his blood and brains, only some of which that has soaked down into the carpet and most of it pooled around Carl's head.

Exhibit 94 displays a large glob of blood and brain matter next to Carl's right shoulder that had seeped out of the wound in Carl's head.

Exhibit 95 is an unsettling close-up of the top of Carl's head at the foot of the bed showing how his blood, brain matter, and skull parts

had oozed several inches away and accumulated in a large pool surrounding Carl's prone face.

Exhibit 97 is a particularly graphic and disturbing image of Carl's prone body from his bare buttocks to above the top of his head revealing part of his face lying in the pool of his blood, brain matter, and bone fragments.

Exhibit 98 is the most repugnant of the photos, revealing a close-up picture of Carl's face and upper torso after he had been turned over onto his back and showing his misshapen, bloody, wounded head in great detail, missing his left eye and much of his left skull and including blood, brains, and bone fragments on his shirt.

These nine photographs are not only "particularly distasteful," *Rollins*, 149 Mont. at 484, 428 P.2d at 463 – 64, they are gratuitously shocking and beneath the dignity of a courtroom. These images should not have been displayed in court nor contained as part of a permanent, public, court record. They were an utterly unnecessary display of gore that destroyed a fair trial for China. *Pendergrass*, 179 Mont. at 111 – 13, 586 P.2d at 694 – 95.

The photographs were disproportionately prejudicial to the jury's understanding of the State's case against China. No one disputed the nature and extent of Carl's injuries or who shot Carl. What was disputed was whether China was guilty of deliberate homicide under the felony murder rule by participating, along with Eder and Reimers, in a robbery of Carl's methamphetamine, as opposed to a homicide by Eder followed by China's theft of Carl's methamphetamine after Carl received the fatal gunshot wound.

The nine gruesome photographs of Carl were not probative of a single disputed element in China's trial. They were irrelevant to the State's burden to prove felony murder and unduly prejudicial against China. Carl's injuries would arouse an emotional response in any reasonable juror, especially because the gory photos appear to have been included in each juror's exhibit notebook.

It is impossible for the State to demonstrate the erroneous admission of the photos was harmless. The explicit photos were part of an extremely aggressive prosecution of China by the State to make her appear a criminal mastermind who orchestrated Carl's murder. In reality, the evidence revealed a young, Native American woman

suffering from substance abuse, relationship abuse, and learning disabilities.

Take, for example, the Prosecutor's false tale to the jury during his opening statement that China said to Eder, "Let's off this fucker," referring to Carl as they planned to steal his methamphetamine. (09/13/2021 Tr. at 136.) In fact, the State's own affidavit in support of filing the information related China stated, "Let's *rob* this; let's *rob* him." (D.C Doc. 1 at 4 (emphasis added).) A deputy testified – consistent with the State's affidavit – that he heard China say during a videotaped interview she provided to law enforcement, "Let's rob this fucker." (09/15/2021 Tr. at 108 – 09.) Yet the Prosecutor invented a story he relayed to the jury during opening statement and then supported with a *subtitled* interview video shown to the jury with *incorrect* subtitles, which are inconsistent with the State's own affidavit in support of probable cause. The subtitles of the video falsely indicate China said, "Let's *off* this fucker." (09/15/2021 Tr. at 101 – 02; Exh's. 215 (admitted) and 215-A (admitted and published to jury) at 9:03 – 9:07.) In closing argument, the Prosecutor pretended as though he had

neither said nor published any of this incorrect information to the jury.
(09/17/2021 Tr. at 31 – 32.)

Consider also how the Prosecutor told the jury in closing argument referring to China taking Carl's methamphetamine after Eder murdered him, "Carl, the paranoid drug dealer – she [China] takes it [the meth] off of his dead body." (09/17/2021 Tr. at 39.) This assertion is patently false – the State's admissible, non-objectionable photos of Carl's "dead body" show he was not wearing pants when Eder shot him. (D.C. Doc. 70, at Exh's. 77, 79, 80, 82, 83.) The Prosecutor dehumanized China. He dehumanized Carl, referring to Carl's body at one point as, "And *that's* then in the body bag?," as though Carl were a thing, not a human being. (09/14/2021 Tr. at 191 (emphasis added).) With such an attitude, it is easy to see how the revolting photographs were offered and published to the jury as though they were ordinary pictures of a crime scene, without considering Carl Archer's humanity or the shock the photographs might arouse.

This Court has said the fact that a person died and the case is a homicide does not have to be "sanitized." *Doll*, 214 Mont. at 400, 692 P.2d at 478. Explicit photographs may be admissible where the medical

examiner relies on a limited number of images to explain the mechanism or cause of death, *Newman*, 162 Mont. at 461, 463, 513 P.2d at 264, 265, when they are not ghastly or horrific, *Bischert*, 131 Mont. at 159 – 60, 308 P.2d at 973, when they are probative of an element of the offense the State must prove, *Bristow*, 267 Mont. at 176, 882 P.2d at 1045, and when they do not go back to the jury room where they can inflame the jury's view of the evidence, *Cox*, 266 Mont. at 122, 879 P.2d at 670. None of those circumstances exists here.

The District Court did not exercise its discretion carefully. The judge admitted all nine of the challenged photographs and did not require the State to block or redact any parts of any of the pictures. Fritz did not tell the jury why the graphic photos were relevant to China's charges. And the record indicates the graphic photographs were included in the exhibit notebook given to each juror during deliberations. Given the nature of the photographs, the State cannot meet its burden to show there is no reasonable possibility they contributed to the verdict. The nine objectionable photos were unfairly prejudicial under the circumstances here. *Lake*, ¶ 44; *Pendergrass*, 179 Mont. at 111 – 13, 586 P.2d at 694 – 95.

The District Court clearly abused its discretion when it admitted Exhibits 60, 61, 65, 87, 88, 94, 95, 97, and 98. This Court should reverse China's conviction on account of the error.

II. The District Court illegally imposed the entire restitution amount on China instead of jointly and severally with James Eder and Charlie Reimers, as the State requested and China agreed.

A. Background facts.

In its sentencing memorandum, the State requested restitution of \$9,945.67, to be imposed jointly and severally with Eder and Reimers. (D.C. Doc. 85 at 2, 9.) To support the amount requested, the State relied on documents attached to China's PSI for Carl's funeral expenses and repairs for the hotel room where Eder murdered Carl. (D.C. Doc. 88 at "Restitution Recap" and supporting documents.) The supporting documents indicate they were prepared for Eder's and Reimer's sentencing hearings, which occurred before China's sentencing hearing. (D.C. Doc. 88 at Victim's Affidavit in Support of Financial Loss (filed in *State v. Eder*, Yellowstone County Cause No. DC 19-1421 (12/16/2019); Letter from Nautilus Insurance Group with supporting documents regarding the insurance claim for damages by Tiger Town Inn following Carl's murder (04/10/2020); Letter from and Supporting Affidavit of

Crime Victim Compensation Payment, referencing Defendants James Eder and Charlie Reimers (04/08/2020).) None of the supporting restitution documents were prepared specifically for China's hearing. The Defense did not contest the State's requested, joint and several restitution amount. (D.C. Doc. 87 at 1; Sent. Tr. at 3.)

Nevertheless, in the oral pronouncement and the written judgment the District Court imposed the entire restitution obligation of \$9,945.67 solely on China, notwithstanding that Eder and Reimers are jointly and severally responsible for the same restitution. (App. A at 50; App. B at 3.)

B. Governing law.

“Upon sentencing in a criminal case, courts must require defendants to pay restitution in an amount sufficient to fully compensate victims for all pecuniary loss substantiated by record evidence to have been caused by the defendant's criminal conduct.” *Pierre*, ¶ 12 (citations omitted). *See also* Mont. Code Ann. §§ 46-18-201(5) (requiring a sentencing judge to order a defendant to pay full restitution to a victim of the crime), 46-18-241(1) (same). “An offender's liability for a victim's pecuniary loss is joint and several, so that

restitution may be ordered even if another person may also be liable.”

State v. Perkins, 2009 MT 150, ¶ 11, 350 Mont. 387, 389, 208 P.3d 386 (citation omitted).

“Montana's criminal restitution statutes are remedial in nature. Their purpose is to make victims whole, not to further punish offenders. . . . Offenders have a duty to fully re-pay victims for what they have taken.” *State v. Johnson*, 2018 MT 277, ¶ 28, 393 Mont. 320, 430 P.3d 494 (citations omitted). “[T]he primary purpose of criminal restitution in Montana is remediation, not punishment.” *Johnson*, ¶ 37.

C. The District Court’s error.

The State requested, and the Defense agreed, China was responsible for restitution of \$9,945.67, jointly and severally with James Eder and Charlie Reimers. Before China’s sentencing occurred, Eder and Reimers had been sentenced and ordered to pay the restitution amount jointly and severally. Yet the District Court sentenced China to pay the entire amount of restitution by herself, even if or when Eder or Reimers pay the same restitution in-full.

The District Court’s imposition of the full amount of restitution on China alone was illegal under the present circumstances. *State v.*

Lenihan, 184 Mont. 338, 343, 602 P.2d 997, 1000 (1979). Full restitution is already being shouldered jointly and severally by Eder and Reimers. Requiring China to pay full restitution in addition to the full restitution imposed on Eder and Reimers would result in a windfall payment to the victims of Carl's homicide of double the amount of their documented, pecuniary losses. It also weaponizes restitution as a form of additional punishment on China, which this Court expressly prohibits. *Johnson*, ¶ 28.

If the Court declines to vacate or reverse China's conviction for felony murder, it should strike the restitution order in China's judgment and remand for an amended judgment that makes China jointly and severally liable for \$9,945.67 in restitution along with James Eder and Charlie Reimers.

CONCLUSION

For the foregoing reasons, China Davis requests the Court to reverse her conviction for felony murder and the weapons enhancement due to the District Court's erroneous admission of the nine, non-probative, unduly prejudicial photographs to which the Defense objected.

Alternatively, the Court should remand the judgment with instructions for the District Court to issue an amended judgment imposing the restitution obligation on China jointly and severally with James Eder and Charlie Reimers.

Respectfully submitted this 27th day of December, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 8,616, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Deborah S. Smith
DEBORAH S. SMITH

APPENDIX

Oral Pronouncement of Sentence.....	App. A
Judgment.....	App. B
Oral Ruling on Defense Objection to Photos	App. C

CERTIFICATE OF SERVICE

I, Deborah Susan Smith, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 12-27-2023:

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